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BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

CP 880

In the Matter of the Application of AMERICAN)
FIBER SYSTEMS, INC., for a Certificate of)
Authority to Provide Telecommunications Service in) ORDER
Oregon and Classification as a Competitive Provider.)
)

DISPOSITION: APPLICATION GRANTED

Note: By issuing this certificate, the Commission makes no endorsement or certification regarding the certificate holder's rates or service.

The Application

On October 11, 2000, American Fiber Systems, Inc. (Applicant) filed with the Commission an application for certification to provide telecommunications service in Oregon as a competitive provider. Applicant seeks to provide intraexchange (local exchange) telecommunications service in areas coextensive with the local exchanges of the telecommunications utilities listed in Appendix A to this order. Applicant also seeks authority to provide interexchange telecommunications service statewide in Oregon.

Applicant will provide non-switched private line service (dedicated transmission service) only within the exchanges of the telecommunications utilities listed in Appendix A. Applicant did not request to provide intraexchange (local exchange) switched service (i.e., local dial tone). Applicant will not operate as a reseller, but will operate as a facilities-based provider of local exchange service. Applicant may purchase unbundled network elements (building blocks) only from other certified carriers. Applicant may construct its own lines or transport facilities for local exchange services.

Applicant will provide interexchange non-switched private line service (dedicated transmission service) statewide in Oregon. Applicant did not request authority to provide

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interexchange switched (long distance toll) service. Applicant will not operate as a reseller, but will operate as a facilities-based provider of interexchange service. Applicant may purchase unbundled network elements (building blocks) only from other certified carriers. Applicant may construct its own lines or transport facilities for interexchange services.

Operator services are not part of non-switched telecommunications service. Applicant will not directly provide operator services as defined in OAR 860-032-0001. Applicant will not be an 'operator service provider' as defined in ORS 759.690(1)(d). Commission rule OAR 860-032-0007 and Oregon statute ORS 759.690, which established conditions regarding provision of operator services.

In an attachment to the application, Applicant stated that it intended to provide service on a resale basis, as well as on a facilities-based basis. That attachment contradicts the application at page 2, where Applicant checked "No" to both Item 6.d (intraexchange), and 6.c (interexchange), which asked if applicant would resell the services of other carriers. The Commission will determine that application was not made to operate as a reseller, and will grant authority to Applicant to operate as a facilities-based provider only. The Commission considers the use of unbundled network elements (building blocks) from other carriers to be facilities-base service.

The Commission served notice of the application on the Commission's telecommunications mailing list on November 13, 2000. The Commission did not receive any protests or requests to be made parties to this proceeding. On December 12, 2000, an Administrative Law Judge (ALJ) with the Commission issued a ruling that adopted procedures for processing this docket. The ALJ set a procedural schedule. On December 21, 2000, the Commission Staff (Staff) distributed a proposed order for review by the parties. No exceptions to the proposed order were filed.

The Commission has reviewed the proposed order and the record in this matter. Based on a preponderance of the evidence, the Commission makes the following:

FINDINGS AND CONCLUSIONS

Applicable Law

Applications to provide telecommunications service and for classification as a competitive telecommunications service provider are filed pursuant to ORS 759.020. ORS 759.020 provides that:

- (1) No person [or] corporation * * * shall provide intrastate telecommunications service on a for-hire basis without a certificate of authority issued by the Public Utility Commission under this section.

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* * * * *

(5) The commission may classify a successful applicant for a certificate as a telecommunications utility or as a competitive telecommunications services provider. If the commission finds that a successful applicant for a certificate has demonstrated that services it offers are subject to competition or that its customers or those proposed to become customers have reasonably available alternatives, the commission shall classify the applicant as a competitive telecommunications services provider. * * * For purposes of this section, in determining whether telecommunications services are subject to competition or whether there are reasonably available alternatives, the commission shall consider:

- (a) The extent to which services are available from alternative providers in the relevant market.
- (b) The extent to which services of alternative providers are functionally equivalent or substitutable at comparable rates, terms and conditions.
- (c) Existing economic or regulatory barriers to entry.
- (d) Any other factors deemed relevant by the commission.

Applications to provide local exchange (intraexchange) telecommunications service are reviewed pursuant to ORS 759.050, the “competitive zone law.” Under ORS 759.050(2)(a), the Commission may:

Certify one or more persons, including another telecommunications utility, to provide local exchange telecommunications service within the local exchange telecommunications service area of a certified telecommunications utility, if the commission determines that such authorization would be in the public interest. For the purpose of determining whether such authorization would be in the public interest, the commission shall consider:

- (A) The effect on rates for local exchange telecommunications service customers both within and outside the competitive zone.
- (B) The effect on competition in the local exchange telecommunications service area.
- (C) The effect on access by customers to high quality innovative telecommunications service in the local exchange telecommunications service area.
- (D) Any other facts the commission considers relevant.

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Under ORS 759.050(2)(b), the Commission shall:

Upon certification of a telecommunications provider under paragraph (a) of this subsection, establish a competitive zone defined by the services to be provided by the telecommunications provider and the geographic area to be served by the telecommunications provider.

Under ORS 759.050(2)(c), the Commission may:

Impose reasonable conditions upon the authority of [the applicant] to provide competitive zone service within the competitive zone * * * at the time of certification of a telecommunications provider, or thereafter.

Subsection (5)(a) of ORS 759.050 provides that:

Unless the commission determines that it is not in the public interest at the time a competitive zone is created, upon designation of a competitive zone, price changes, service variations, and modifications of competitive zone services offered by a telecommunications utility in the zone shall not be subject to ORS 759.180 to ORS 759.190 [notice, hearing and tariff suspension procedures], and at the telecommunications utility's discretion, such changes may be made effective upon filing with the commission.

OAR 860-032-0015(1) authorizes the Commission to suspend or cancel the certificate if the Commission finds that (a) the holder made misrepresentations when it filed the application, or (b) the certificate holder fails to comply with the terms and conditions of the certificate.

Designation as a Competitive Provider

Applicant has met the requirements for classification as a competitive telecommunications service provider. Applicant's customers or those proposed to become customers have reasonably available alternatives. The incumbent telecommunications utilities listed in Appendix A provides the same or similar local exchange services in the local service area requested by Applicant. AT&T, WorldCom, Sprint Communications, Qwest, and others provide interexchange telecommunications service in the service area requested by Applicant. Subscribers to Applicant's services can buy comparable services at comparable rates from other vendors. Economic and regulatory barriers to entry are relatively low.

Conditions of the Certificate

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There are several conditions listed in the application. Oregon Administrative Rules relating to certificates of authority are generally included in OAR chapter 860, division 032. Conditions applicable to certificate holders include, but are not limited to the following: OAR 860-032-0007, 860-032-0008, 860-032-0011, 860-032-0012, 860-032-0013, 860-032-0015, 860-032-0045, 860-032-0060, 860-032-0090, and 860-032-0095. The conditions listed in the application and those contained in Oregon Administrative Rules are adopted and made conditions of this certificate of authority. A condition of this certificate of authority is that Applicant shall comply with applicable laws, Commission rules, and Commission orders related to provision of telecommunications service in Oregon.

The Commission first applied the competitive zone law, ORS 759.050, in dockets CP 1, CP 14, and CP 15. After full evidentiary hearings and consideration of the public interest criteria set forth in ORS 759.050(2)(a), the Commission designated three competitive providers of switched local exchange services as alternate exchange carriers or competitive local exchange carriers (CLECs) in the Portland metropolitan area. *See* Order No. 96-021. The Commission subsequently applied those findings and conclusions to dockets CP 132, CP 139, and CP 149, and certified two CLECs to provide switched local exchange services in areas located throughout the state.

The Commission takes official notice of the record in dockets CP 1, CP 14, and CP 15.¹ In Order No. 96-021, the Commission established conditions applicable to CLEC certificates. Since Applicant proposes to offer local exchange service, it seeks certification as a CLEC. Pursuant to ORS 759.050(2)(c) and Order No. 96-021, Applicant as a CLEC shall comply with the following conditions:

1. Applicant shall comply with the Oregon Exchange Carrier Association's (OECA) informational and operational needs as specified by the OCAP or any successor plan approved by the Commission.
2. Applicant shall not take any action that impairs the ability of other certified telecommunications utilities, competitive providers, or cooperative corporations to meet service standards specified by the Commission.
3. At the request of the Commission, Applicant shall conduct and submit to the Commission traffic studies regarding traffic exchanged with telecommunications service providers and other entities designated by the Commission.
4. Applicant shall comply with universal service requirements as determined by the Commission.

¹ Under OAR 860-014-0050(2), a party may object to facts noticed within 15 days of notification that official notice has been taken. The objecting party may explain or rebut the noticed facts.

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5. Any obligation regarding interconnection between Applicant and the telecommunications utilities listed in the Appendix to this order shall be governed by provisions of the Telecommunications Act of 1996 (the Act), including but not limited to sections 251 and 252 of the Act (47 USC 251 and 252), as well as the applicable rules and regulations of the Federal Communications Commission and this Commission implementing the Act. Order No. 96-021 will govern the interconnection obligations between such parties for the provision of switched local services, unless otherwise addressed by an interconnection agreement or the Commission modifies the principles established in Order No. 96-021.
6. Applicant shall pay an annual fee to the Commission pursuant to ORS 756.310, 756.320, and 756.350 and OAR 860-032-0008, 860-032-0080, 860-032-0090, and 860-032-0095. By November 1, of each year, the Commission will set the fee level that is to be based on gross retail intrastate revenues for the following calendar year. The minimum annual fee is \$100. Applicant is required to pay the fee for the preceding calendar year by April 1.
7. Pursuant to Oregon Laws 1987, chapter 290, sections 2-8, and to OAR chapter 860, division 033, Applicant shall be responsible to ensure that the Residential Service Protection Fund surcharge is remitted to the Commission. This surcharge is assessed against each paying retail subscriber at a rate that is set annually by the Commission.
8. Applicant and its affiliate, Eagle Telephone System, Inc., shall keep separate accounts for regulated utility services and competitive provider services. Both shall comply with OAR 860-034-0394, regarding allocation of costs and revenues.

Public Interest

In Order No. 93-1850, docket UM 381, the Commission considered the public interest aspects of local exchange competition for dedicated transmission service. In dockets CP 1, CP 14, and CP 15, Order No. 96-021, the Commission made several public interest findings regarding local exchange competition in general.

With regard to the general factual conclusions relevant to this proceeding, the Commission adopts the Commission's Findings of Fact and Opinion in docket UM 381, Order No. 93-1850, at pages 4-6, and the Commission's Findings and Decisions in dockets CP 1, CP 14, and CP 15, Order No. 96-021 at pages 6 - 21, entered pursuant to ORS

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759.050(2)(a)(A) - (C). The Commission takes official notice of the record in dockets UM 381, CP 1, CP 14, and CP 15.²

Based on a review of those findings, as well as information contained in the application, the Commission concludes that it is in the public interest to grant the application of American Fiber Systems, Inc., to provide local exchange telecommunications service as a competitive telecommunications provider in the exchanges of the telecommunications utilities listed in Appendix A, as described in the application. Further, it is in the public interest to grant the application to provide intrastate, interexchange telecommunications service statewide in Oregon, as described in the application.

This finding will have no bearing on any determination the Commission may be called upon to make under sections 251 or 252 of the Act (47 USC § 251, 252) with regard to the telecommunications utilities in this docket.

Competitive Zones

All the exchanges of the telecommunications utilities listed in the Appendix to this order are designated competitive zones, for dedicated transmission service, pursuant to ORS 759.050(2)(b).

Pricing Flexibility

Cooperative telephone companies are generally not regulated by the Commission for local exchange services, and therefore already have pricing flexibility for local exchange service. Telecommunications utilities which are exempt under ORS 759.040 from the provisions of ORS 759.180 to 759.190 already have pricing flexibility for local exchange service. This order has no effect on any ORS 759.040 exemption. However, if one of those telecommunications utilities loses its ORS 759.040 exemption from provisions of ORS 759.180 to 759.190, for any reason, it will automatically become eligible for an exemption under ORS 759.050(5)(a) to (d), as described below.

In Order No. 93-1850, docket UM 381, the Commission granted pricing flexibility for dedicated transmission service at the same time the Commission granted the certificate of authority. Applicant seeks authority to provide intraexchange dedicated transmission service. Therefore, the telecommunications utilities listed in Appendix A are granted pricing flexibility for dedicated transmission service in their respective exchanges by this order.

² Under OAR 860-014-0050(2), a party may object to facts noticed within 15 days of notification that official notice has been taken. The objecting party may explain or rebut the noticed facts.

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IT IS ORDERED that:

1. The application of American Fiber Systems, Inc., to provide intraexchange non-switched, private line service (dedicated transmission service) and to provide interexchange non-switched telecommunications service (dedicated transmission service), as described in the application, is in the public interest and is granted with conditions described in this order.
2. Applicant is designated as a competitive telecommunications provider for intraexchange service in the exchanges of the telecommunications utilities listed in Appendix A, and for intrastate, interexchange service statewide in Oregon.
3. The local exchanges of the telecommunications utilities listed in Appendix A are designated as competitive zones for dedicated transmission service.
4. Any obligation regarding interconnection between Applicant and the telecommunications utilities listed in Appendix A shall be governed by the provisions of the Telecommunications Act of 1996 (the Act), including but not limited to sections 251 and 252 of the Act (47 USC §§ 251 and 252), as well as the applicable rules and regulations of the Federal Communications Commission and this Commission implementing the Act. Order No. 96-021 will govern the interconnection obligations between such parties for the provision of switched local services, unless otherwise addressed by an interconnection agreement or the Commission modifies the principles established in Order No. 96-021.
5. No finding contained in this order shall have any bearing on any determination the Commission may be called upon to make under section 251 or 252 of the Act (47 USC § 251 or 252) with regard to the telecommunications utilities listed in the appendix to this order.
6. The telecommunications utilities listed in Appendix A shall receive pricing flexibility on an exchange-by-exchange basis as set forth in this order.

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7. Pursuant to ORS 759.050(2)(c), Applicant shall comply with Commission imposed universal service requirements as a condition of authority to provide local exchange service.

Made, entered, and effective _____.

William G. Warren
Director
Utility Program

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order to a court pursuant to applicable law.

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APPENDIX A

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EXCHANGES ENCOMPASSED BY THE APPLICATION:

ALL EXCHANGES OF THE TELECOMMUNICATIONS
UTILITIES LISTED BELOW

Telecommunications Utilities Not Exempt Pursuant to ORS 759.040

CenturyTel of Eastern Oregon, Inc.

CenturyTel of Oregon, Inc.

Qwest Corporation, formerly U S WEST Communications, Inc.

United Telephone Company of the Northwest dba Sprint

Verizon Northwest Inc., formerly GTE Northwest Incorporated

Telecommunications Utilities Exempt Pursuant to ORS 759.040

None

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