

Telecommunications Orders - Issued 1997

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

IN THE MATTER OF THE SALE OF CERTAIN TELEPHONE EXCHANGES BY U S WEST COMMUNICATIONS, INC. TO CERTAIN TELECOMMUNICATIONS COMPANIES IN SOUTH DAKOTA)))))	AMENDED DECISION AND ORDER REGARDING SALE OF THE MCINTOSH EXCHANGE; NOTICE OF ENTRY OF ORDER TC94-122
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PRELIMINARY STATEMENT

On December 20, 1994, a Joint Application was filed by U S WEST Communications, Inc. (U S WEST), and twenty telecommunications companies (Buyers) requesting that the South Dakota Public Utilities Commission (Commission) approve the sale by U S WEST of 67 local telecommunications exchanges to the Buyers or their affiliates. Specifically, the filing sought:

1. A declaration that the sale and transfer of the exchanges do not require Commission approval or in the alternative that the Commission knows of no reason why the sale and transfer should not occur; and
2. An order from the Commission that U S WEST's gain from the sale be booked to Account 7350 of the Uniform System of Accounts (USOA) as nonoperating income not available for ratemaking purposes.

The Commission assumed jurisdiction over this docket pursuant to its authority under SDCL Chapter 49-31, specifically 49-31-3, 49-31-3.1, 49-31-4, 49-31-7, 49-31-7.1, 49-31-11, 49-31-18, 49-31-19, and 49-31-20. The Commission set an intervention deadline of January 25, 1995. Subsequently, the following parties applied for and were granted intervention: AT&T Communications of the Midwest, Inc. (AT&T); South Dakota Radio Common Carriers [composed of Pierre Radio Paging and Telephone, Inc.; Vantek Communications, Inc.; B&L Communications; Mitchell Two Way Radio; Nelson Electronics, Inc.; Booker Communications; Dakota Electronics; Rees Communications; A & M Radio, Inc.; Frey's Electronics; and Milbank Communications]; Roger D. McKellips; City of Mobridge; Walworth County; Doug Scott; Alcester Telephone System User's Group [composed of Phyllis Bergdale; Bernard Bergdale; Jay Clark; Cleo Clark; Wendell Solbert; Kathy Solbert; Dennis Jones; Robin Jones; Ronald Treiber; Becky Treiber; Gary McKellips; Deb McKellips; David Broadwell; Kathy Broadwell; Donovan Larson; Marlys Larson; Glenice Pilla; and Larry Pilla]; Midco Communications;

LDDS; TeleTech; TCIC; FirsTel; TelServ; MCI; Corson County Commission; Thomas Brunner; Gary Brunner; Deanna J. Mickelson; Marjorie Reder; Duane Odle; Baltic Telecom Cooperative; Barbara Mortenson as an individual and a group of telephone users known as the Henry Users Citizens Group. LDDS later filed a petition to withdraw as an intervenor which was granted by the Commission. On March 30, 1995, Senate Bill 240, later codified as SDCL 49-31-59, became effective. The Commission added this statute to the other statutes under which it had asserted its jurisdiction.

On March 29, 1995, the Commission issued an Order for and Notice of Hearing for six regional evidentiary hearings to be held at various locations throughout the state of South Dakota. Notice of said hearings was given to the public by newspaper publications and radio announcements; personal notice was given to all parties to the docket. Pursuant to said Order of the Commission, and subsequent amended Orders, the following regional evidentiary hearings were held:

1. April 17, 1995, at the City Auditorium, 212 Main Street, Mobridge, South Dakota, for public testimony on the sale of the Selby, Gettysburg, Roscoe, Onida, Bowdle, Morrystown, Timber Lake, Lemmon, Eureka, Ipswich, McIntosh, and Mobridge exchanges.
2. April 18, 1995, at the Community Center, 1401 LaZelle, Sturgis, South Dakota, for public testimony on the sale of the Nisland, Newell, and Hermosa exchanges.
3. May 1, 1995, at the St. Mary's Hall, 305 West Third, Winner, South Dakota, for public testimony on the sale of the Winner, Burke, Bonesteel, Reliance, Murdo, Lake Andes, Wagner, Gregory, Witten, Clearfield, Presho, and Platte exchanges.
4. May 3, 1995, at the Lake Area Technical Institute, Student Lounge, 230 11th Street NE, Watertown, South Dakota, for public testimony on the sale of the Webster, Clark, Florence, Hayti, Bradley, Willow Lake, Waubay, Castlewood, Summit, Peever, Veblen, Wilmot, Howard, Oldham, Revillo, and South Shore exchanges.
5. May 4, 1995, at the Johnson's Fine Arts Center, Room 134, Northern State University Campus, Aberdeen, South Dakota, for public testimony on the sale of the Britton, Pierpont, Roslyn, Wessington Springs, Mellette, Bristol, Frederick, Hecla, Doland, Wolsey, and Cresbard exchanges.
6. May 5, 1995, at the Alcester High School Gymnasium, Fifth and Iowa, Alcester, South Dakota, for public testimony on the sale of the Marion, Tyndall, Centerville, Viborg, Lesterville, Tabor, Hudson, Tripp, Parkston, Salem, Alcester, Bridgewater, and Canistota exchanges.

On May 1, 1995, U S WEST and the Buyers filed an amended Joint Application. In its amended Joint Application, U S WEST and the Buyers stated that since the filing of the Joint Application in December, "the sale of several exchanges to certain buyers has been reevaluated by the Buyers." They requested the following changes:

1. In the Agreement with Golden West Telephone Properties, Inc., delete in Exhibit A the Newell exchange, and change the purchase price reflected in Paragraph 1.3 of the Agreement accordingly;
2. In the Agreement with West River Cooperative Telephone Company, Inc. (Bison), delete in

Exhibit A the McIntosh exchange and add the Newell and Nisland exchanges, and change the purchase price reflected in Paragraph 1.3 of the Agreement accordingly; and

3. In the Agreement with Cheyenne River Sioux Tribe Telephone Authority, delete in Exhibit A the Nisland exchange and add the McIntosh exchange, and change the purchase price reflected in Paragraph 1.3 of the Agreement accordingly.

Due to the amended application, the Commission set a new intervention deadline of May 12, 1995. Subsequently, the city of McIntosh and Corson County applied for and were granted intervention. Because the application had been amended, the Commission held another public hearing on May 25, 1995, at the McIntosh School Gymnasium, McIntosh, South Dakota, for public testimony.

At each regional evidentiary hearing, representatives from U S WEST and each purchasing company were present to testify and were available for cross-examination.

On April 5, 1995, the Commission issued a Notice of Hearing setting the final hearing for June 1-2, 1995. All prefiled testimony was required to be filed by May 25, 1995. A prehearing conference was held on May 22, 1995.

The final hearing was held on June 1-4, 1995. At said final hearing, 42 witnesses testified and were available for cross-examination, 126 exhibits were offered and received into the record at the hearing, and an additional 19 exhibits were filed by June 19, 1995, which was the deadline set by the Commission for late-filed exhibits.

On June 7, 1995, the Commission issued a Post-hearing Order requesting briefs on certain issues and allowing the submission of proposed Findings of Fact and Conclusions of Law. On June 19, 1995, the parties submitted late-filed exhibits. On June 23 and July 3, 1995, the parties filed their post-hearing briefs and proposed Findings of Fact and Conclusions of Law.

On July 13, 1995, at a duly noticed meeting, the Commission unanimously voted to not approve the sale of the McIntosh exchange to Cheyenne River Sioux Tribe Telephone Authority (CRSTTA) which proposed to purchase the McIntosh exchange through its subsidiary, Owl River Telephone, Inc. (Owl River). The Commission issued a written Order on July 31, 1995.

U S WEST and CRSTTA appealed the Commission's decision. By Order dated February 21, 1997, the Honorable Steven L. Zinter, Circuit Court Judge, issued his Memorandum Decision. The Circuit Court ordered the Commission to enter Findings of Fact on each of the statutory factors listed in SDCL 49-31-59. The Circuit Court also reversed and remanded the Commission's decision because the Commission improperly conditioned its approval upon CRSTTA's refusal to waive its sovereign immunity. The Circuit Court also found that the Commission erred in concluding that SDCL 49-1-17 prohibited approval of the proposed sales. The Notice of Entry of Order of Remand was filed on March 6, 1997.

On April 2, 1997, Commission Staff filed a Motion on Remand asking that the Commission consider the remand on the record and set a procedural schedule for the submission of proposed Findings of Fact and Conclusions of Law by the parties. On April 14, 1997, the Commission received CRSTTA's Response to Motion on Remand. In its Response, CRSTTA opposed the Motion on Remand and asked that the Commission reopen the record for

consideration of new evidence. CRSTTA requested that the record be reopened due to changed circumstances, including the enactment of the Telecommunications Act of 1996, the election of a new Commissioner to the Commission, a provisional certificate of convenience and necessity issued by the Standing Rock Sioux Tribe, and the Telephone Authority's efforts to comply with regulatory requirements. On April 14, 1997, the Commission received U S WEST's Joinder in Response to CRSTTA's Response to the Motion on Remand. By Order dated May 9, 1997, the Commission found that, consistent with the Circuit Court's opinion, it would not reopen the record since the Circuit Court specifically stated that the case was remanded to the Commission on the record. In that Order, it was also noted that Commissioner Nelson had decided to abstain from voting on matters related to this case since she was not a Commissioner when the hearings on the docket were held.

The Commission received proposed Findings of Fact and Conclusions of Law from intervenor Doug Scott, Commission Staff, Corson County Commission and the City of McIntosh, U S WEST, and CRSTTA. On June 2, 1997, the Commission received a Motion to Take Judicial Notice from CRSTTA and U S WEST. CRSTTA and U S WEST requested that the Commission take judicial notice of a dispute resolution mechanism adopted by the Telephone Authority and a provisional certificate of convenience and necessity issued by the Standing Rock Sioux Tribe. On June 4, 1997, the Commission received Staff's Resistance to Motion to Take Judicial Notice. On June 16, 1997, the Commission received CRSTTA's and U S WEST's Reply to the Resistance to Take Judicial Notice and a Joint Brief in Response to the Proposed Findings of Fact and Conclusions of Law of Intervenor Doug Scott.

On July 15, 1997, a regularly scheduled meeting, the Commission voted to deny the Motion to Take Judicial Notice. The Commission found that since the Circuit Court specifically remanded the case back to the Commission "on the record" that taking judicial notice of these resolutions would supplement the record in contravention of the Circuit Court's Order. In addition, the Commission found that the dispute resolution and provisional certificate are not the type of facts which should be judicially noticed after the record has been closed. Parties should have the opportunity to cross-examine witnesses concerning these types of documents.

At the July 15, 1997, meeting, the Commission also voted to deny the sale of the McIntosh exchange as contrary to the public interest.

Based on the evidence presented on the record and the decision of the Circuit Court the Commission makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. U S WEST is a Colorado corporation providing local exchange telecommunications services, interexchange carrier access, intraLATA interexchange telecommunications services, and other telecommunications services throughout South Dakota.
2. On or about December 7, 1994, U S WEST entered into purchase agreements for the sale of 67 local exchanges with 20 local exchange telecommunications companies. On December 20, 1994, U S WEST and the Buyers filed a Joint Application for a Commission Declaration on the Sale and for Proper Accounting Treatment of any Gain. Exhibit 29. U S WEST and the Buyers filed all 20 purchase agreements along with the Joint Application. Exhibits 31-50. One of the purchase agreements entered into was between U S WEST and CRSTTA. Exhibit 32.

3. CRSTTA is a telecommunications company and a division of the Cheyenne River Sioux Tribe. CRSTTA currently provides telecommunications services in South Dakota. Exhibit 22 at page 119.

4. Owl River is a wholly-owned subsidiary of CRSTTA incorporated under the laws of the Cheyenne River Sioux Tribe. Exhibit 22 at page 119. Owl River has no license to do business in the state of South Dakota. Exhibit 22 at pages 145-146.

5. The purchase agreement entered into between CRSTTA and U S WEST states as follows:

Seller and Buyer agree to promptly file any required application and to take such reasonable action as may be necessary or helpful (including, but not limited to, making available witnesses, information, documents, and data requested by the PUC) to apply for and receive approval by the PUC for the transfer of Assets and Authorities to Buyer.

Exhibit 32, Section 6.3, subparagraph D.

6. In the Joint Application filed with the Commission on December 20, 1994, U S WEST and CRSTTA had entered into a purchase agreement where U S WEST proposed to sell the Nisland, Timber Lake, and Morrystown exchanges to CRSTTA.

7. A duly noticed public hearing was held at Mobridge, South Dakota, on April 17, 1995, at the City Auditorium, beginning at 8:00 p.m., concerning, along with other sales, the sale of the Timber Lake, Morrystown, and McIntosh exchanges. At the time of the hearing, West River Cooperative Telephone, Inc. (West River) was the proposed buyer of the McIntosh exchange.

8. A duly noticed public hearing was held at Sturgis, South Dakota, on April 18, 1995, beginning at 7:00 p.m. M.D.T. concerning, along with other sales, the sale of the Nisland exchange. At the hearing, the Buyers announced that CRSTTA would no longer be purchasing the Nisland exchange. Instead, West River proposed to purchase the Nisland and Newell exchanges and CRSTTA proposed to purchase the McIntosh exchange which West River had originally intended to purchase. Exhibit 23 at pages 5-6.

9. The amended Joint Application setting forth the changes in the buyers of the Nisland, Newell, and McIntosh exchanges was filed with the Commission on May 1, 1995. Exhibit 30. Due to the amendment of the Joint Application, the Commission set a new intervention deadline of May 12, 1995. The city of McIntosh and Corson County applied for and were granted intervention. The Commission held another public hearing on May 25, 1995, at the McIntosh School Gymnasium, in McIntosh. Testimony was given by members of the public in opposition to the sale of the McIntosh exchange to CRSTTA. Exhibit 28 at pages 118-160. The two main concerns of the public were lack of Commission oversight and loss of tax dollars.

10. On June 1-4, 1995, in Pierre, South Dakota, a final hearing was held concerning all of the proposed exchange sales. Members of the public testified in opposition to and in support of the sale of the McIntosh exchange to CRSTTA. Transcript of Pierre Hearing at pages 707-736, 770-779.

11. The McIntosh exchange is located within the boundaries of the Standing Rock Sioux Reservation. Exhibit 93.

12. CRSTTA maintains that if the sale of the McIntosh exchange to CRSTTA were allowed, the Commission would lose all regulatory control over the McIntosh exchange. Exhibit 28 at page 36.

13. CRSTTA does not pay gross receipts taxes on the telephone exchanges it currently operates. Exhibit 22 at page 123. J. D. Williams, manager of CRSTTA, stated that the state "may impose its gross receipts tax on the income generated from sales to non-Indians and non-members of the area. However, it has no mechanism whereby to force the tribe to collect the tax. The tribe has a sales tax agreement with the state and a similar arrangement may be possible with respect to collecting a gross receipts tax." Exhibit 22 at page 132.

14. CRSTTA proposed a Memorandum of Understanding which provided that CRSTTA would follow the same regulatory procedures found under South Dakota law. Exhibit 145. However, pursuant to that Memorandum of Understanding, the Commission was given no regulatory oversight.

15. The Commission lacks the authority to enter into a tax agreement with a tribal entity. No tax agreement was reached with the state of South Dakota by the close of the record on June 19, 1995.

16. Local exchange service provided by a telecommunications company is classified as a noncompetitive service. SDCL 49-31-1.1.

17. The South Dakota State Legislature has charged the Commission with important duties in overseeing telecommunications services within the state of South Dakota and has further vested in the Commission significant powers to protect telecommunications subscribers. SDCL Chapters 49-1, 49-13, and 49-31.

18. If the sale of the McIntosh exchange to CRSTTA were approved, CRSTTA would not recognize the Commission as having regulatory authority over CRSTTA and the McIntosh exchange. Exhibit 28 at page 36.

19. None of the subscribers of the McIntosh exchange would be able to vote for Tribal Council members or elect Board of Directors to Owl River. Exhibit 28, at pages 55-56.

20. CRSTTA currently provides adequate service to its present customers. Exhibit 28 at pages 37-38. However, unlike other sales approved by the Commission, the Commission is unable to require, as a condition of the sale, that CRSTTA offer, at a minimum, all existing services currently offered by U S WEST in the McIntosh exchange. In addition, the Commission is unable to require, as a condition of the sale, that CRSTTA honor all existing U S WEST contracts, commitments, leases, licenses, and other agreements which relate to, arise from, or are used for the operation of the purchased exchange. This lack of regulatory control by the Commission combined with the lack of the ability of a subscriber to vote or have a political voice in CRSTTA could negatively affect adequacy of service.

21. With respect to the factor of reasonableness of rates for local service, CRSTTA states that it would charge the same rates that U S WEST currently charges. Exhibit 28 at page 41. However, unlike other sales approved by the Commission, the Commission is unable to require as a condition of the sale that CRSTTA not increase current local rates for 18 months.

22. On the factor of the provisioning of 911, enhanced 911, and other public safety services, CRSTTA offers free firebar service to volunteer fire departments in communities it currently services. Exhibit 22 at page 124. It currently does not offer 911 or E-911 service because the counties have not yet authorized the collection of taxes for 911. Id. at page 125.

23. Since CRSTTA maintains that there is no enforcement mechanism that would require CRSTTA to pay gross receipts taxes, approval of the sale would also result in the loss of significant tax revenue for cities, counties, and school districts located within the McIntosh exchange. Exhibits 94, 95, 96, 97A, 97B; Exhibit 28 at pages 126-129, 133-137; Transcript of Pierre Hearing at pages 707-731. The position of CRSTTA creates conflict and, at a minimum, uncertainty as to the taxability of CRSTTA.

24. With respect to the factor concerning the ability of the local exchange company to provide modern, state-of-the-art telecommunications services that will help promote economic development, telemedicine, and distance learning in rural South Dakota, CRSTTA has the ability to provide these services. Exhibit 28 at pages 97-98. In addition, CRSTTA has no plans to change existing extended area service. Exhibit 28 at pages 35-36. However, unlike other sales, the Commission is unable to require as a condition of sale that CRSTTA not change any current extended area service arrangements without prior approval by the Commission. In addition, unlike the other sales of exchanges that were approved, the Commission would be unable to require CRSTTA to make any improvements necessary for the public safety, convenience, and accommodation as allowed by SDCL 49-31-7.

25. On the issue of whether the sale is in the public interest, the Commission finds the sale is not in the public interest for the following reasons:

1. Since CRSTTA maintains there is no enforcement mechanism that would require CRSTTA to pay gross receipts taxes, approval of the sale would result in the loss of significant tax revenue for cities, counties, and school districts located within the McIntosh exchange;
2. The lack of regulatory control by the Commission would mean that the Commission would be unable to set conditions of sale that must be followed by CRSTTA.
3. The Commission is unable to require as a condition of the sale that CRSTTA offer all existing services currently offered by U S WEST;
4. The Commission is unable to require as a condition of the sale that CRSTTA honor all existing U S WEST contracts and agreements;
5. The lack of regulatory control and the lack of the ability of subscribers to vote or have a political voice in CRSTTA could negatively affect adequacy of service;
6. The Commission is unable to require as a condition of sale that CRSTTA not increase the current local rates for 18 months;
7. The Commission is unable to require as a condition of the sale that CRSTTA not change any current extended area service arrangements without prior approval by the Commission; and
8. The Commission is unable to require CRSTTA to make any improvements necessary for the

public's safety, convenience, and accommodation as allowed by SDCL 49-31-7.

26. The Commission rejects the proposed Findings of Fact and Conclusions of Law submitted by the parties.

From the foregoing Findings of Fact, the Commission now makes its:

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over U S WEST and CRSTTA and the sale of the McIntosh exchange to CRSTTA pursuant to SDCL Chapter 49-31, specifically 49-31-3, 49-31-3.1, 49-31-4, 49-31-7, 49-31-7.1, 49-31-11, 49-31-18, 49-31-19, 49-31-20, and 49-31-59. At the final hearing CRSTTA contested the jurisdiction of the Commission pursuant to SDCL 49-31-59 by claiming that it was an ex post facto law. This argument is without merit since ex post facto applies only to criminal laws and laws that assess penalties. Delano v. Pettys, 520 N.W.2d 606, 608 (S.D. 1994). Moreover, the Joint Application was amended on May 1, 1995, which was after the passage of SDCL 49-31-59. In addition, the purchase agreement entered into between U S WEST and CRSTTA specifically provides that U S WEST and CRSTTA would cooperate in obtaining Commission approval for the transfer of assets and authority to CRSTTA. Finally, CRSTTA did not contest, at any of the hearings, the jurisdiction of the Commission pursuant to the other statutes under which the Commission asserts its jurisdiction.

2. The hearings held by the Commission relative to this matter were contested case hearings pursuant to SDCL Chapter 1-26.

3. The Commission lacks the authority to enter into a tax agreement with a tribal entity.

4. The Commission finds that CRSTTA currently provides adequate service to its present customers. However, unlike other sales approved by the Commission, the Commission is unable to require, as a condition of the sale, that CRSTTA offer, at a minimum, all existing services currently offered by U S WEST in the McIntosh exchange. In addition, the Commission is unable to require, as a condition of the sale, that CRSTTA honor all existing U S WEST contracts, commitments, leases, licenses, and other agreements which relate to, arise from, or are used for the operation of the purchased exchange. Further, the lack of regulatory control by the Commission and the lack of the ability of subscribers to vote or have a political voice in CRSTTA could negatively affect adequacy of service.

5. The Commission finds CRSTTA plans to charge the same rates that U S WEST currently charges. However, unlike other sales approved by the Commission, the Commission is unable to require as a condition of the sale that CRSTTA not increase current local rates for 18 months.

6. The Commission finds CRSTTA offers free firebar service to volunteer fire departments in communities it currently services. Exhibit 22 at page 124. It currently does not offer 911 or E-911 service because the counties have not yet authorized the collection of taxes for 911. Id. at page 125.

7. The Commission finds that approval of the sale of the McIntosh exchange would have significant, adverse tax consequences to the taxpayers located in the cities, counties, and school districts within the McIntosh exchange due to CRSTTA's position that the state lacks

the authority to enforce the collection of taxes on the Reservation.

8. The Commission finds that CRSTTA has the ability to provide modern, state-of-the-art telecommunications services. In addition, CRSTTA has no plans to change existing extended area service. However, unlike other sales, the Commission is unable to require as a condition of sale that CRSTTA not change any current extended area service arrangements without prior approval by the Commission. In addition, unlike the other sales of exchanges that were approved, the Commission would be unable to require CRSTTA to make any improvements necessary for the public safety, convenience, and accommodation as allowed by SDCL 49-31-7.

9. The Commission finds the sale is not in the public interest for the reasons listed in Finding of Fact 25.

10. The Commission rejects the proposed Findings of Fact and Conclusions of Law submitted by the parties.

Pursuant to SDCL Chapter 1-26, the Commission hereby enters its final decision in this docket. It is therefore

ORDERED that the sale of the McIntosh exchange to the Cheyenne River Sioux Tribe Telephone Authority, through its subsidiary Owl River Telephone, Inc. is not approved; and it is

FURTHER ORDERED that the proposed Findings of Fact and Conclusions of Law submitted by the parties are rejected.

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that this Order was duly entered on the 22nd day of August, 1997. Pursuant to SDCL 1-26-32, this Order will take effect 10 days after the date of receipt or failure to accept delivery of the decision by the parties.

Dated at Pierre, South Dakota, this 22nd day of August, 1997.

CERTIFICATE OF SERVICE	BY ORDER OF THE COMMISSION:
The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.	_____
By: _____	JAMES A. BURG, Chairman
Date: _____	PAM NELSON, Commissioner, abstained
(OFFICIAL SEAL)	_____
	LASKA SCHOENFELDER, Commissioner

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