

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Application
of The Furst Group, Inc. Vincen-
town, New Jersey which seeks
authority to operate as a resale
common carrier of telecommuni-
cations in Nebraska.

) Application No. C-1004

) GRANTED

) Entered: September 7, 1993

APPEARANCES

For the Applicant
James Kaylor, Vice President/
Chairman of the Board
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Vincentown, NJ 08088
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For the NPSC Staff
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PRELIMINARY MATTERS

By application filed June 23, 1993, The Furst Group, Inc. ("Furst"), Vincentown, New Jersey seeks authority to operate as a reseller of intrastate interLATA interexchange telecommunications services in Nebraska. Furst's principal office and the location where its books and records are kept is noted above and its registered agent is the CT Corporation, 206 South 13th Street, Lincoln, Nebraska, 68508.

Notice of the application was published in the Omaha DAILY RECORD June 24, 1993 in accordance with the Commission's rules of procedure. No one protested the application. Hearing on the application was held August 5, 1993 in the Commission Hearing Room, Lincoln, Nebraska with appearances as shown. Commissioner Gay chaired the proceeding.

BY THE COMMISSION

O P I N I O N A N D F I N D I N G S

Upon consideration of the application, the governing statutes and rules¹, the evidence adduced at the hearing,

¹ Interexchange reseller applications are governed by Neb. Rev. Stats. §§75-604 and 86-805 (1990 and 1987 Reissues, respectively) and Title 291 Neb. Admin. Regs. Ch. 5, Rule 003.12.

and being fully informed, the Commission is of the opinion and finds:

Nebraska was divided into three Local Access Transport Areas (LATAs) as a result of the terms of the Modified Final Judgment issued in the AT&T divestiture case. *United States v. American Telephone & Telegraph Co.*, 552 F.Supp. 131 (D.D.C. 1982), aff'd sub nom., *California v. United States*, 460 U.S. 1001 (1983) and *United States v. American Telephone & Telegraph Co.*, 569 F. Supp. 990 (D.D.C. 1983) aff'd sub nom., *California v. United States*, 460 U.S. 1001 (1983). While Neb. Rev. Stat. §75-604, refers to local exchange service, the Nebraska Supreme Court in *Northwestern Bell Telephone v. Consolidated Telephone Co.*, 180 Neb. 268, 142 N.W.2d 324 (1966) ruled that long distance service is also governed by that statute. This was recognized by the Nebraska Legislature when it approved LB 835 (LAWS 1986) because interexchange services (which include resellers) governed in part by Neb. Rev. Stat. §86-805 (Reissue 1987) are referenced to in Neb. Rev. Stat. §75-604 (Reissue 1987). Consequently, the Commission distinguishes between intraLATA and interLATA resale while considering reseller applications.

Mr. James Kaylor appeared before the Commission on behalf of the applicant. Kaylor is the company's Vice President and Chairman of the Board. Kaylor testified that Furst began in 1989 and was created by himself and co-founder John Streep. The company began by reselling AT&T's Software Defined Network ("SDN") product. Originally, the company considered itself to be operating under the authority of AT&T. Now Furst is obtaining its own intrastate operating authority from the various states, including Nebraska.

Furst incorporated in New Jersey in 1989. It is a privately held stand-alone corporation, the corporate officers of which are Streep (President and Chairman), Kaylor (Chairman and Vice President), Suzanne Brinn (Secretary and Director) and Wayne Phipps (Treasurer and Director). Streep and Kaylor own 95 percent of the company's stock.

The applicant has several business offices across the country, including an office at North Platte, Nebraska. At the hearing, the applicant's financial statements, its certificate to do business as a foreign corporation in Nebraska, and a copy of its articles of incorporation were provided and made part of the record.

Kaylor testified that the company seeks interLATA authority. The company does not seek intraLATA authority and therefore intraLATA authority will not be considered in our deliberations. The filed application, upon which the DAILY RECORD notice is based, does not seek a certificate to provide

alternate operator service ("AOS"). We note this Commission has consistently held that an application for a reseller certificate does not include AOS unless specifically petitioned for in the application.²

The applicant proposes to operate as a non-facilities based reseller of AT&T long-distance service in Nebraska. No future facilities in Nebraska are contemplated but there are, according to Kaylor, approximately 40 employees at the North Platte business office. The applicant resells AT&T's SDN Message Toll Service ("MTS") with distance sensitive per minute rates. The method of access will be Feature Group D (via AT&T points of presence and AT&T access). Furst also will provide toll free 800 service and WATS type services with the method of access via switched facilities. Calling card service will also be available. There are no facilities and Furst is solely dependent upon AT&T facilities. AT&T also prepares customer bills for Furst through its billing subsidiary, ACUS.

To be profitable as a reseller, Furst has entered into a contract with AT&T.³ The contract requires Furst to commit to a specific volume of usage in order to qualify for a substantial discount which allows American to resell for a profit. The applicant then charges its customers rates below the underlying carrier's tariff rates for intrastate Nebraska calling. The difference between the rate paid by the customers and the discount received from AT&T provides the margin of profit. Kaylor projected subscriber savings of about 18 percent below the AT&T rate when comparing the SDN rate to the PRO WATS rate.

No state commission has rejected a Furst application for reseller authority. There is a proceeding pending in Kentucky regarding Furst's operations in that state prior to obtaining intrastate authority. As of the hearing date, the applicant was operating as a reseller in the following states: Montana, Virginia, Colorado, Michigan, New Jersey, Tennessee, Oklahoma, Idaho, New York, Washington, South Carolina, and Florida. The authority sought here in Nebraska is the same as obtained in

² We observe that a late-filed amendment to add AOS to the application is an inadequate solution; the previously published notice of the application would not then accurately reflect the authority sought in the application.

³ The Federal Communications Commission still regulates AT&T as a dominant common carrier. Therefore, a tariff still controls AT&T's rate structure. Tariff No. 1 permits AT&T and a reseller such as the applicant to enter into the type of agreement described here.

those states. The applicant does not propose to provide service of a different type in this state.

Kaylor testified the applicant has approximately 40,000 subscribers to its service across the country in states where it currently operates. These subscribers are generating about \$3.2 million per month in toll.

The financial information provided by the applicant was marked as Exhibit 3 and was compiled in-house and subsequently audited by Coopers & Lybrand, a Philadelphia, Pennsylvania CPA firm. Kaylor, relying on Exhibit 3's contents, testified that in 1990 the company had assets and equities and liabilities of \$285,000. The company was not profitable in 1990 and lost \$303,000. In 1991, the assets and equities and liabilities increased to \$2.405 million and the company lost \$209,000. For the first eight months of 1992 (unaudited), Furst's assets and liabilities and equities totaled \$3.7 million and the company became profitable. At the end of eight months, its income was \$435,000. Late-filed Exhibit 5 (unaudited) shows the company's assets and liabilities and equities grew to \$6.66 million. Its net income for the period grew to \$1.7 million.

The applicant's proposed tariff, which is part of its application, is in accordance with the Commission's rules and regulations. The tariff appears reasonable in light of the proposed service.

The facilities of the applicant now in place are providing interstate service. Applicant does not propose to construct facilities for use in intrastate service; therefore, no existing facilities will be duplicated if this application is granted for reseller service.⁴

This is a relatively new company; it has turned the corner and is now operating in the black. Coupled with the demonstration that the company is competently operated and has the requisite expertise, we believe the evidence is strong enough to warrant approval of the application. We note that the applicant candidly admitted it began operations in Nebraska prior to authorization from this Commission, in part because of its mistaken understanding of its relationship with AT&T. Exhibit 6 shows that the company generated less than \$8,000 in intrastate usage in Nebraska in 1992 and about \$25,000 for the first seven months of 1993. Staff's investigation of this matter shows no intent to deceive or act in bad faith. In fact, the

⁴ See §75-604.

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company responded promptly and cooperatively to all requests from this Commission for information and made prompt application to obtain the requisite authority. We are completely satisfied as to Furst's fitness to operate in Nebraska.

Based on the testimony, the exhibits, and the proposed tariff, the application is fair and reasonable, is in the public interest, and should be granted.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that Application No. C-1004 be, and it is hereby, granted and "The Furst Group, Inc." of Vincentown, New Jersey be, and it is hereby, authorized to *operate as a resale carrier of intrastate interexchange interLATA telecommunications services in Nebraska.*

IT IS FURTHER ORDERED that applicant shall file, in accordance with the applicable statutes, an annual report with this Commission consisting of (a) a copy of any report filed with the Federal Communications Commission, (b) the annual report to stockholders, and (c) for the state of Nebraska on a combined interstate-intrastate basis, the investment in telephone plant and equipment located within the state, accumulated depreciation thereon, operating revenues, operating expenses, and taxes.

IT IS FURTHER ORDERED that applicant file an updated and corrected tariff prior to offering service pursuant to the certificate granted in this order.

IT IS FURTHER ORDERED that this order be, and it is hereby, made the Commission's official Certificate of Public Convenience and Necessity to furnish the service authorized herein.

MADE AND ENTERED at Lincoln, Nebraska this 7th day of September, 1993.

NEBRASKA PUBLIC SERVICE COMMISSION

Commissioners Concurring:

Daniel G. Unwillen
Duane D. Gay

//s//Rod Johnson
//s//Frank E. Landis, Jr.
//s//James F. Munnelly

James Landis
Chairman

ATTEST:

Pjt R. King
Executive Director