

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

IN THE MATTER OF THE)	Application No. C-1485
APPLICATION OF GALAXY)	
TELECOM, L.P., FOR AUTHORITY)	
TO OPERATE TELECOMMUNICATION)	GRANTED
SERVICES AND CONSTRUCT)	
FACILITIES WITHIN THE STATE)	
OF NEBRASKA.)	Entered: July 1, 1997

APPEARANCES

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BEFORE THE COMMISSION:

This matter comes before the Commission pursuant to an Application by Galaxy Telecom, L.P. [Galaxy] filed on February 28, 1997, seeking a Certificate of Public Convenience and Necessity to offer telecommunications services and construct telecommunications facilities throughout the State of Nebraska.

Petitions of Formal Intervention were timely filed by Aliant Communications Co. [Aliant], Nebraska Telephone Association [NTA], Pierce Telephone Company, Inc. [Pierce], Plainview Telephone Company [Plainview], Nebraska Independent Telephone Association [NITA], Benkelman Telephone Co. [Benkelman], Cozad Telephone Co. [Cozad], Henderson Cooperative Telephone Co. [Henderson], and Wauneta Telephone Co. [Wauneta]. Notice of this docket was published in the Daily Record, Omaha, Nebraska, on February 7, 1997, pursuant to the rules and regulations of the Commission pertaining to notice.

On April 24, 1997, Galaxy filed an amended application and request for authority [the amendment] to authorize Galaxy to provide intrastate interexchange telecommunications services in the State of Nebraska in the territory currently served by Galaxy's existing cable network, pursuant to Neb.Rev.Stat. §86-805 and Title 291, Article 5, Section 003.12A of the Nebraska Public Service Commission's Telecommunications Rules and Regulations.

A public hearing on the docket was held pursuant to written notice on May 22, 1997, at 2:00 p.m. in the Commission Hearing Room.

In addition to the exhibits filed by the parties which are part of the record, Galaxy provided testimony by the following witnesses:

J. Keith Davidson, executive vice president and chief financial officer of Galaxy, described the general business operations and structure of Galaxy and described Galaxy's financial and managerial qualifications to provide the proposed services in the State of Nebraska. Mr. Davidson testified that Galaxy owns, operates and developed classic cable television systems primarily in the Midwest and Southeast United States, serving approximately 200,000 subscribers in 16 states. Galaxy currently serves approximately 20,000 subscribers in the State of Nebraska and has installed a significant fiber optic network in the State to provide its proposed services. Galaxy currently employs approximately 40 employees in the State of Nebraska and

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maintains its principal Nebraska management office in York, Nebraska.

Mr. Davidson testified that Galaxy possesses the managerial competency to provide the proposed interexchange services in its service territory. Galaxy will be supported by its corporate office in Sikeston, Missouri, where the six senior managers have over 100 years of combined experience in all facets of cable television. Galaxy will also utilize the expertise of Broadband Network, Inc. [BNI], based in State College, Pennsylvania, for installation, maintenance, operational support, and employee training concerning the proposed services. Galaxy's Nebraska operations will be supported by the accounting and corporate functions of the corporate headquarters in Sikeston, Missouri, and the customer service functions of Galaxy's Regional Service Center in Wickcliff, Kentucky.

Mr. Davidson further testified that Galaxy has ample financial resources to provide the proposed services in Nebraska. Galaxy's operating cash flow, its access to a significant line of credit, and its access to additional capital in the public and private debt markets gives it the financial resources necessary to provide its proposed services in Nebraska.

Mr. Terry M. Cordova, vice president of engineering, testified that Galaxy is seeking intrastate interexchange authority to enable it to provide educational distance learning and wide area networking to schools and other customers in Galaxy's service area. Galaxy's proposed service is an interactive video conferencing system which will allow users to receive and terminate multiple full motion video conferences at any user location. The proposed system also has the capability to support other features, such as wide area connection to local area networks (LAN), high speed Internet access, fax services and distribution of multi-media library service from one site to the entire network. The two-way interactive dimension of Galaxy's proposed services is the subject of Galaxy's proposed application for interexchange authority from the Commission.

Mr. Cordova testified that Galaxy has the technical expertise and resources to provide the proposed interexchange services in Nebraska. Galaxy currently operates over ninety (90) cable television systems in the State of Nebraska, serving approximately 20,000 customers. Galaxy employs a fully skilled technical staff in Nebraska who service their local customers

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through Galaxy's highly efficient and unique "QUALCOMM" satellite system. Mr. Cordova testified that Galaxy will be hiring additional technical employees with expertise necessary to maintain the advanced video and data networks planned for development in Nebraska. Galaxy will also utilize the expertise of BNI to provide in-depth training to both system users and Galaxy's own technical staff.

Mr. Cordova further testified that Galaxy will be providing its services largely over its own fiber optic network to schools, hospitals, governmental entities and other businesses requiring video conferencing or high speed data networking. Due to the cost of the proposed services and the networking capacity necessary to utilize the system, Galaxy does not view its proposed services as suitable for individual residential users. Mr. Cordova stated that Galaxy has no business plan to provide local exchange services in the State of Nebraska and that its proposed distance learning interactive video service does not constitute basic local exchange service under Nebraska law.

Mr. Cordova also testified that the public interest would be served by granting Galaxy's request for authority because Galaxy's proposed interactive distance learning systems will enhance the ability of Nebraska educational institutions to service the needs of their students. In addition, Galaxy's proposed system will permit other businesses and governmental entities to have access to a lower cost and high quality educational system which will enhance the educational opportunities of their respective clients, customers, employees and constituents. Galaxy will comply with all statutory requirements, administrative rules and Commission orders once certified by the Commission.

Mr. Cordova stated that Galaxy was still evaluating the FCC's recent Report and Order of the Federal-State Joint Board on Universal Service, Docket No. 96-45, to determine whether Galaxy's proposed services would constitute Universal Service offerings.

Mr. Thomas Donahue, vice president sales & systems integration, and previously vice president of engineering for BNI, offered testimony to describe the technical design provided by BNI for Galaxy's proposed system and to demonstrate that Galaxy has the technical expertise to provide the services sought to be offered by Galaxy in its application for authority. Mr.

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Donahue stated that Galaxy's proposed system was neither technically nor functionally similar to a typical telephone system. Galaxy's proposed system uses cable television, cable modem and high speed campus networking technology to provide a higher grade of video and high speed data dominated performance. Galaxy's proposed system architecture does not utilize telephone switches or switch architecture and does not use the DS3 based design used by LECs to deliver their own equivalent video conferencing services. Rather, the proposed Galaxy system uses signal processing to reproduce the tuning effect of a television control. This signal processing most clearly resembles the operation of a common VCR which places all signal contact into Channel 2 or 3 to connect to a television.

Mr. Donahue also stated that Galaxy's system will not provide a "dial tone" as used in accessing the public telephone network and that Galaxy's system will not connect to or integrate with the public telephone system. Any connection to a public telephone system would be only to gateways servicing other private, dedicated distance learning or interactive session locations. Galaxy's system is not intended to be used by typical residential customers, but rather by users of high-end interactive technology such as educational institutions and hospitals.

Mr. Donahue then presented a physical demonstration of the proposed Galaxy system to the Commission.

Mr. Donahue further stated that Galaxy possesses the technical and engineering talent and knowledge to provide the proposed services in Nebraska and that the technology utilized in the proposed Galaxy system is completely consistent with the technology and system design technique commonly used by Galaxy's cable systems. In addition, BNI will be providing technical support and ongoing service to Galaxy for the installation and maintenance of the system. Mr. Donahue concluded by stating that, in his opinion, the proposed services did not constitute "plain old telephone" service as that term is commonly used in the industry.

Cross-examination of Galaxy's witnesses by Aliant, NTA and NITA focused on Galaxy's financial condition, on whether Galaxy would be actually providing local exchange service in the form of two-way switched voice communications which would be competitive to incumbent local exchange carriers, and whether Galaxy would be providing a tariff describing its proposed services and rates.

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

This application presents issues of first impression for the Commission to consider. Galaxy is in the business of providing cable television services to customers in various parts of the State of Nebraska. Pursuant to Neb.Rev.Stat. §86-808(1), the Commission has been prohibited from regulating "one-way broadcast or cable television transmission of television or radio signals." Galaxy's historic service in this state, ie. the provision of one-way cable television services, has therefore not been the subject of Commission regulation.

However, the proposed services for which Galaxy is seeking certification contain fully "interactive" capabilities, in other words, two-way video and audio transmissions. As stated in Galaxy's Application For Authority and its proposed tariff, Galaxy's fiber optic cable will transmit one-way and two-way video with audio subcarriers for two-way audio transmission.

In Attorney General Opinion No. 97031 dated May 28, 1997, the Nebraska Attorney General examined the statutory scope and definition of "cable television" service in connection with the authority of public power districts in Nebraska to provide cable television service. The Attorney General noted that there is a distinction between "cable" television service and "telecommunications service" as defined under the Telecommunications Act of 1996 (the Act). The Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used". (See Act, Section 3(51)). The term "telecommunications" is defined under the Act to mean "the transmission between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received...". (See Act, Section 3(48)).

By contrast, Federal statutes governing "cable communications" contained in Chapter 5 of Title 47, "subchapter V-A", provides that the term "cable services" means:

- A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and

B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service... [Emphasis Added]

The general definitional section of the Act incorporates the definition of "cable services" as set forth above.

LB660, an Act adopted by the Nebraska Legislature which became effective on May 22, 1997, incorporated substantially similar definitions of "telecommunications" and "telecommunications services" as those set forth in the Act.

The Attorney Generals's Opinion indicates that "two-way" cable services, including two-way audio signals, constitute "telecommunications services" under the Act, and by virtue thereof, "telecommunications services" under LB660, which services are subject to the regulatory jurisdiction of the Commission. Therefore, Galaxy's proposed "interactive" two-way video conferencing services, both the video and audio components, constitute telecommunications services under Nebraska law which are properly the subject of regulation by the Commission.

Given that Galaxy's proposed services constitute telecommunications services under the Act and applicable Nebraska law, a determination of the appropriate classification of those services under Nebraska law and Commission regulations is necessary. The intervenors have argued that Galaxy's system will provide "two-way switched voice communications within a local exchange area" and thus should be classified as "basic local exchange service" pursuant to Neb.Rev.Stat. §86-802. Galaxy argues that its services are appropriately classified as interexchange services and are not "basic local exchange services" due to the substantially different technical, operational and functional characteristics of the proposed services.

Upon consideration of the application, the governing statutes and rules, the evidence provided at the public hearing, and giving due consideration to the letters, petitions and pleadings received by the Commission concerning this application, and being fully informed, the Commission is of the opinion and finds as follows:

1. The interactive two-way video and audio services to be offered by Galaxy constitute "telecommunications services" under the Act and applicable Nebraska law.

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2. The telecommunications services to be offered by Galaxy are not basic local exchange services as defined under Neb.Rev.Stat. Section 86-802(2) and are, rather, interexchange services subject to regulation under Neb.Rev.Stat. Section 86-805 and Title 291, Neb.Admin.Reg. Chapter 5, §003.12A.

3. Galaxy possesses adequate financial resources to provide the proposed services.

4. Galaxy possesses adequate managerial and technical competency to provide the proposed services.

5. The provision of Galaxy's proposed services will promote the public policy goals of the State of Nebraska set forth in Neb.Rev.Stat. Section 86-801 and will promote the interests of the public requesting such services from Galaxy.

6. Galaxy has offered to restrict its operating authority under this application to that territory currently served by Galaxy's existing cable network, it being understood that Galaxy may file subsequent applications for authority to expand its service territory as may be necessary and appropriate.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that, pursuant to Neb.Rev.Stat. Section 86-805 and Title 21 Neb.Admin.Reg., Chapter 5, Section 003.12A, Application No. C-1485, as amended, be, and it is hereby, granted.

IT IS FURTHER ORDERED that Galaxy file a tariff prior to offering service pursuant to the certificate granted in this order.

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

Made and entered at Lincoln, Nebraska, this 1st day of July, 1997.

COMMISSIONERS CONCURRING:

Ann C. Boyle
//s//Lowell C. Johnson
//s//Frank E. Landis
//s//Daniel G. Urwiller

NEBRASKA PUBLIC SERVICE COMMISSION

Lowell C. Johnson
Vice Chairman

ATTEST:

Robert R. Logsdon
Executive Director