



Public Service Commission

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-M-E-M-O-R-A-N-D-U-M-

DATE: August 24, 1998

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF COMMUNICATIONS (WILLIAMS) *RW*
DIVISION OF LEGAL SERVICES (BROWN, PENA) *MB EMP*

RE: DOCKET NO. 970109-TI - APPLICATION FOR CERTIFICATE TO PROVIDE INTEREXCHANGE TELECOMMUNICATIONS SERVICE BY KTNT COMMUNICATIONS, INC. D/B/A IDC TELECOMMUNICATIONS.

AGENDA: 09/01/98 - REGULAR AGENDA - POST HEARING DECISION - PARTICIPATION IS LIMITED TO COMMISSIONERS AND STAFF

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\CMU\WP\970109.RCM

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CASE BACKGROUND

At its April 14, 1997, Agenda Conference, the Commission addressed a request by KTNT Communications, Inc. d/b/a It Doesn't Matter and d/b/a I Don't Care (KTNT) for a certificate to provide interexchange telecommunications service in Florida. The Commission deferred a decision on the company's request until additional information could be obtained on how the company intended to use its proposed fictitious names in order to determine if the names were in the public interest. Thereafter, on June 19, 1997, the company informed the Commission by letter that it did not intend to use the fictitious names "It Doesn't Matter" and "I Don't Care" at that time. It asked that its certificate application be

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modified to request a certificate under the name KTNT Communications, Inc. d/b/a IDC Telecommunications.

On September 9, 1997, in Proposed Agency Action Order No. PSC-97-1060-FOF-TI, the Commission approved the modified application and granted an interexchange telecommunications certificate to KTNT Communications, Inc. d/b/a IDC Telecommunications (KTNT) with the specific condition that KTNT must seek formal Commission approval to use any other fictitious name in the future. On September 15, 1997, the Office of Public Counsel (OPC), filed a timely protest of the Order, raising specific issues with respect to the managerial capabilities and business practices of KTNT because of its use or proposed use of the fictitious names. On November 7, 1997, the Office of the Attorney General, filed a petition to intervene in the proceeding. By Order PSC-97-1576-PCO-TI, issued on December 15, 1997, the Commission granted the Attorney General's intervention.

On May 28, 1998, the Commission held an administrative hearing on the issues identified by the parties. In its prefiled testimony and at the hearing, KTNT explained that because of the protest it was withdrawing its request to receive a certificate under the name KTNT Communications, Inc. d/b/a IDC Telecommunications, and was requesting that the certificate be issued in the original application name, KTNT Communications, Inc. d/b/a It Doesn't Matter and d/b/a I Don't Care. Thus the question of whether KTNT should be permitted to use its unusual fictitious names to provide telecommunications service in Florida was squarely addressed in this proceeding. Staff's recommendations on the specific issues raised by the parties are set forth below.

STAFF RECOMMENDATION

ISSUE 1: Has KTNT COMMUNICATIONS, INC. d/b/a IT DOESN'T MATTER and d/b/a I DON'T CARE (KTNT) made the requisite showing pursuant to Section 364.337(3), Florida Statutes, that it has sufficient technical, financial, and managerial capability to provide interexchange telecommunications services within the state?

RECOMMENDATION: Yes, KTNT has made the requisite showing that it has sufficient technical, financial, and managerial capability to provide interexchange telecommunications services pursuant to Section 364.337(3), Florida Statutes. (WILLIAMS, BROWN)

POSITION OF PARTIES:

OPC/AG: No. KTNT has made it clear that its management wishes to use fictitious names such as "I don't care" and "It doesn't matter" to trick the public into using their service. Since such operations are a management decision, the company has shown that it has inadequate management capabilities to support a certificate from this Commission.

KTNT: Yes. There is no dispute that KTNT has sufficient technical, financial, and managerial capability to provide interexchange telecommunications service within the state. KTNT is therefore entitled to certification under Section 364.337(3).

STAFF ANALYSIS: KTNT Communications, Inc. is a Texas corporation admitted to do business in Florida. Florida's Secretary of States' office has approved and registered KTNT's fictitious names, "I Don't Care" and "It Doesn't Matter". (Dees, Tr. 20) KTNT is a switchless reseller of telecommunications service, whose primary business has been as an operator service provider. (Dees, Tr. 19) KTNT witness Dees states that KTNT plans to expand its business into other areas of telecommunications, such as one plus and 800-888, as time permits. (Dees, Tr. 19) For the present, however, KTNT's business involves handling operator assisted calls when a customer dials only "0", with no other digits. (Dees, Tr. 50; Poucher, Tr. 83)

Witness Dees asserts that KTNT has the financial, technical and managerial capability to conduct this business. He states that KTNT started business in Texas in February of 1995, expanded into Michigan and Ohio in April of 1997, and has the financial resources to expand into Florida and other states. (Dees, Tr. 20) KTNT received over a million dollars in revenue last year. (Dees, Tr. 57-58) Since KTNT operates as a reseller of telecommunications service, it has contracts with underlying carriers to conduct the technical side of the business. The switch, T1's and operator centers are all leased facilities. Mr. Dees claims that; "[e]ven though KTNT has a firm understanding of the technical side, it obviously does not need to manage in detail this side of the business." (Dees, Tr. 20-21) KTNT also has a contract with another

company, ZPDI of San Antonio, Texas, to handle all of its billing.
(Dees, Tr.21)

Witness Dees claims that KTNT has proven its managerial competence to run its business in Florida by its demonstrated success in other states and the fact that it continues to expand throughout the country. (Dees, Tr.20) Witness Dees asserts that out of 300,000 calls completed in Texas, KTNT has never had a complaint filed against it about the use of its fictitious names. (Dees, Tr.25, 47) In response to questioning by OPC, Mr. Dees acknowledged that one customer had complained about the names, but Mr. Dees contended that the customer originally complained about KTNT's rates, and only made the complaint about the fictitious names after he had read articles about them in the newspaper. (Dees, Tr.47) Mr. Dees also asserts that the company will comply with Commission rules, orders, and policies pertaining to the reselling of intrastate telecommunications services in Florida. (Dees, Tr.22) KTNT argues in its brief that by these facts KTNT has shown that it has fulfilled the requirements of Section 364.337, Florida Statutes, and is therefore entitled to a certificate to provide interexchange telecommunications service in Florida. (KTNT Br. 2-4)

The Office of Public Counsel (OPC) and the Attorney General (AG) do not dispute KTNT's assertion that it has the requisite financial and technical capability to provide telecommunications service in Florida. They do dispute the assertion that KTNT has the managerial capability to operate in Florida. They state that:

KTNT has made it clear that its management wishes to use fictitious names such as "I Don't Care" and "I Doesn't Matter" to trick the public into using their service. Since such operations are a management decision, the company has shown that it has inadequate management capabilities to support a certificate from this Commission." (OPC and the AG Br. 1)

OPC's and the AG's witness Poucher explains that KTNT's primary product is operator transfer service. The company offers operator services to customers who dial "0" and request that an operator complete a toll call for them. (Poucher, Tr.81) Mr. Poucher states that KTNT registers its fictitious names with the local exchange carrier, such as BellSouth, so that the company may share in default operator services traffic generated through "0" dialing. (Poucher, Tr. 83) When a customer who has dialed "0" indicates to the local exchange operator that he or she wants to make a collect, person-to-person, third party, or calling card

call, the local operator offers to connect the customer to the operator services company of the customer's choice to complete the call. (Poucher, Tr. 83) Witness Poucher claims that if the customer responds, "I don't care" or "It doesn't matter", the call will go to KTNT, even though the customer may never have heard of the company or its fictitious names. (Poucher, Tr 84)

Witness Poucher claims that this practice is deceptive and unfair to customers, and anticompetitive and unfair to the approximately fifteen other companies who are registered with BellSouth to provide operator transfer services in Florida. Mr. Poucher explains that normally when a customer does not have a choice of a company to provide operator services, the call would be distributed to the registered providers on an alternating basis. By using its fictitious names, KTNT forecloses the other companies from their fair share of the default business. (Poucher, Tr.84)

Witness Poucher contends that a company that engages in this type of practice has not demonstrated that it has the appropriate management capability to do business in Florida, and; [i]f the Commission grants approval for the use of the two names proposed by KTNT, there will be no basis in the future to preclude the use of other deceptive names." (Poucher, Tr. 84-85, 88, 93) OPC and the AG also point out that KTNT withdrew its applications in Georgia, Nevada, and Maryland (Dees, Tr. 56) in the face of opposition from PSC staff in those states. According to OPC and the AG, the management of the company was less than forthright in its characterization of opposition that it confronted in other states. (OPC/AG Brief 4) Witness Poucher argues that while he believes KTNT is competent to provide a service he would describe as deceptive and misleading, under those circumstances the Commission should not reward the management of such a company with a certificate to abuse Florida customers in the name of competition. (Poucher, Tr. 90,87)

KTNT's witness Dees disagrees with Mr. Poucher's description of how selection of an operator service provider would work when a customer responds; "I don't care" or "It doesn't matter," to the BellSouth operator's request that the customer choose a company. Witness Dees states that the BellSouth operator should respond to the customer that there is a carrier with that name and then ask the customer if that carrier is the customer's choice. (Dees, Tr.31) According to witness Dees, the customer then has another opportunity to make an affirmative choice of a carrier, and may or may not choose "I Don't Care" or "It Doesn't Matter". (Dees, Tr.32) Witness Dees asserts that KTNT has arranged with local companies to follow that practice in Texas, although he did admit

under cross examination that KTNT has no written contract with any local exchange company to follow that practice. (Dees, Tr.52) Witness Dees also asserts that KTNT will ask BellSouth to follow that practice also, although he again admits that KTNT cannot control how a BellSouth operator would handle such a call, and he has no proof beyond his assertion that local exchange company operators do so now or will do so in the future. (Dees, Tr.62-63, 66) Witness Dees contends that even though KTNT cannot guarantee that a BellSouth operator will ask the follow-up question that KTNT believes should be asked, the customer will still not be deceived, because KTNT brands all calls "I Don't Care" or "It Doesn't Matter" when the call is transferred, before any billing incident has occurred. Witness Dees argues that KTNT's fictitious names are unusual and controversial, but they are not designed to, and do not in practice, trick people into using KTNT's operator services. (Dees, Tr.44)

The OPC suggests that we're tricking customers and unfairly competing with other carriers large and small, but only the OPC and the Attorney General seems [sic] to be saying that. Customers are not complaining, competitors are not complaining, and regulators are not complaining. (Dees, Tr.45)

Therefore, witness Dees argues, the Commission should grant KTNT's application.

Section 364.337(3), Florida Statutes, establishes the statutory criteria to grant certification for the provision of interexchange telecommunication service in Florida. That section states:

The commission shall grant a certificate of authority to provide intrastate interexchange telecommunications service upon a showing that the applicant has sufficient technical, financial, and managerial capability to provide such service in the geographic area proposed to be served.

Section 364.335, Florida Statutes, gives the Commission some flexibility to respond to any unusual circumstances that may surround a particular certification application, by providing that the Commission may grant a certificate with conditions or modifications in the public interest. The basic criteria for review of a certificate application, however, are found in section 364.337(3).

OPC and the AG do not dispute KTNT's financial and technical capability to provide service, and staff recommend that the record shows that KTNT has the requisite ability in those areas. OPC and the AG claim that KTNT's proposed use of the two fictitious names tricks people into inadvertently using KTNT, and therefore KTNT does not have the managerial capability to provide service in Florida. OPC's and the AG's contention, however, is speculative. There is no solid evidence in the record to show that customers have been misled or harmed in Texas or other states where KTNT has been using these names to provide operator services for some time. Nor is there any evidence in the record to demonstrate that KTNT's competitors have complained of KTNT's business practices. Witness Poucher contends only that KTNT will have the opportunity to deceive customers and harm competitors if it is permitted to use these names, and the use of the names by itself is sufficient to prove managerial inadequacy.

Staff agrees that the names in question and KTNT's use of them are controversial, but the record does not indicate that they are necessarily deceptive in practice. If local exchange operators follow the practice that KTNT asserts it will ask them to follow, and if KTNT brands the calls it receives as it has asserted it will, customers will be informed twice that they are using a company called "I don't care" or "It Doesn't Matter", and they will have two opportunities to reject KTNT as their operator service provider. The record shows that in practice KTNT will have no more opportunity to deceive customers than several other companies the Commission has certificated to provide service in Florida. As witness Poucher confirmed at the hearing, if customers or competitors are in fact harmed, the Commission has continuing authority to review the company's practices and correct the problems when they occur. (Poucher, Tr.122-124) Also, staff believes that it is not entirely logical to contend that KTNT's fictitious names rob customers of their right to choose an operator services provider when customers would only use the words "I don't care" or "It doesn't matter" to indicate that they had relinquished their right to choose. For these reasons, staff recommends that KTNT has adequately shown that it has the financial, technical, and managerial capability to provide intrastate interexchange telecommunications service, as section 366.337(3), Florida Statutes, requires.

ISSUE 2: What are KTNT's business plans for the state of Florida?

RECOMMENDATION: KTNT intends to operate in the State of Florida as a switchless reseller primarily providing operator services. (WILLIAMS)

POSITION OF PARTIES:

OPC/AG: KTNT plans to use the names "I don't care" and "It doesn't matter" for operator transfer services. The company has a token marketing effort, relying instead on tricking the public into using its services.

KTNT: KTNT is a switchless reseller that will initially provide primarily operator services using the service marks "I Don't Care" and "It Doesn't Matter." Later, KTNT will provide other services such as one plus and 800-888. KTNT does not plan to use telemarketing and will at all times comply with Commission rules.

STAFF ANALYSIS: As described more fully in Issue 1, KTNT's primary business activity is providing operator transfer services. The company receives most of its revenues from this service, where customers dial zero and are then asked to choose an interexchange carrier to complete a long distance call. (Poucher, Tr.82) OPC and the AG contend that KTNT has been so successful in its reliance upon deception or accidental choice to attract customers that it has spent less than \$500 on marketing advertisement while generating a million dollars in revenue (Dees, Tr. 58.) KTNT asserts that it does not intend to, and will not, deceive customers by use of its zero transfer strategy or by any other means. As explained in Issue 1, staff believes that KTNT's business plans are consistent with the determination that KTNT has the managerial capability to provide telecommunications service in the State.

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ISSUE 3: Are KTNT's business plans for the state of Florida in the public interest?

RECOMMENDATION: Yes, KTNT's business plans for the State of Florida are in the public interest. (WILLIAMS)

POSITION OF PARTIES:

OPC/AG: No

KTNT: Yes. KTNT's business plans comply with all applicable Commission regulations. The public interest is served by creating greater competition in the reselling of intrastate telecommunications services. KTNT anticipates that its proposed services will increase consumer choice.

STAFF ANALYSIS: OPC and the AG indicate that KTNT's marketing plan is based almost solely on the accidental and unintended choice of language by customers who are attempting to place long distance calls by dialing zero. Allowing KTNT to operate in Florida under this business plan will result in customer confusion and deception and is not in the public interest. (Poucher, Tr. 88)

KTNT responds that there is no basis - factual, legal or equitable - to claim that KTNT's business plan is counter to the public interest (KTNT Br.7). KTNT asserts that it will comply with all applicable Commission regulations, increase competition in the reselling of intrastate telecommunications services and increase consumer choice. (KTNT Br.7)

Upon review of KTNT's application, and the record in this proceeding, and for the reasons explained in Issue 1, staff believes that KTNT's business plan to operate as a switchless reseller/operator service provider in the State of Florida is consistent with the public interest. KTNT asserted at hearing that it would make serious efforts to insure that when customers said "I don't care" or "it doesn't matter" in response to the operator's request to choose a provider, the operator would specifically inform the customer that there was an company by that name. Staff encourages KTNT to make those efforts.

ISSUE 4: Is it in the public interest to allow KTNT to obtain a certificate from the Commission?

RECOMMENDATION: Yes, it is in the public interest to allow KTNT to obtain a certificate from the Commission. KTNT should be granted Florida Public Service Commission Certificate No. 4870 to operate as a switchless reseller and operator service provider within the State of Florida. (WILLIAMS)

POSITION OF PARTIES:

OPC/AG: No. It is not in the public interest to allow KTNT to obtain a certificate from the Commission.

KTNT: Yes. KTNT has established (1) that it has sufficient technical, financial, and managerial capability to provide interexchange telecommunications service within the state, and (2) that it will follow the Commission's rules adopted to ensure that the competitive provision of such service is in the public interest.

STAFF ANALYSIS: OPC and the AG argue that KTNT's primary means to gain market share is not through customers exercising competitive choices, but by accident and deception and that the company is actually pursuing an anti-competitive strategy that would serve to limit customer choice (OPC/AG Br.6; Poucher, Tr. 83-84.). Further, according to OPC and the AG, the company's basic marketing plan hinges upon exploiting customers and the management motives of KTNT are directed at deceiving the public. Witness Poucher argues that a company that intentionally engages in deceptive trade practices ought not be allowed to operate in the State of Florida. (Poucher, Tr. 81)

KTNT maintains that the public interest standard that the Commission uses in the application process must be consistent with the statutory criteria in section 364.337(3), Florida Statutes. If the applicant is able to demonstrate that it has technical, financial and managerial capability to provide the service under Chapter 364, then the public interest standard is satisfied. KTNT maintains that OPC and the AG would have the Commission subject an applicant's application to scrutiny not based on standards found in the statute, but on what the opposing parties feel is fair. (KTNT Br.14)

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Upon review of KTNT's application, and the record in this proceeding, and for the reasons explained in Issue 1, staff recommends that it is in the public interest to grant KTNT a certificate pursuant to Section 364.337(3), Florida Statutes. KTNT should be granted Florida Public Service Commission Certificate No. 4870 to operate as an switchless reseller and operator service provider within the State of Florida.

ISSUE 5: If it is in the public interest to allow KTNT to obtain a certificate from the Commission, should the certificate be modified to prohibit the company from using fictitious names in Florida?

RECOMMENDATION: No, KTNT should be allowed to obtain a certificate of public convenience and necessity to conduct telecommunication business within the State of Florida under the name KTNT Communications, Inc. d/b/a It Doesn't Matter and I Don't Care. The Commission should require KTNT to seek formal Commission approval if it proposes to change its fictitious names or add any additional fictitious names. (WILLIAMS, PEÑA)

POSITION OF PARTIES:

OPC/AG: Yes, if the Commission decides to grant a certificate to KTNT, the certificate should be modified to prohibit the company from using misleading fictitious names in Florida.

KTNT: No. KTNT's business plan complies with Commission rules. KTNT's use of its controversial service marks has not been a problem for consumers, competitors or regulators. KTNT will follow the Commission's rules. There is no legal basis to infringe on KTNT's right to use its service marks.

STAFF ANALYSIS: OPC and the AG urge the Commission to prohibit KTNT from using the fictitious names "I Don't Care and "It Doesn't Matter." They allege that KTNT would trick customers and unfairly compete with other carriers. They state that Section 364.335(3), Florida Statutes, empowers the Commission to make modifications to certificates in the public interest. If the Commission should decide to grant a certificate to KTNT, it should modify the certificate to prohibit the use of the fictitious names. (OPC/AG Br.10)

KTNT maintains that OPC/AG does not provide any concrete evidence of trickery or unfair competition; they simply do not like KTNT's strategy for the "zero minus" market. KTNT has completed over 300,000 calls in Texas without complaints from customers, regulators or competitors. KTNT's use of its controversial fictitious names has not been a problem, and the opposition of the

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OPC and the AG to KTNT's application is not based on real-world experience. (KTNT Br.10)

Staff notes that the Commission has granted certificates to other IXCs where the name could be confusing. (Poucher, Tr.122-123) In those instances, as in this case, the Commission has the continuing authority to correct problems and resolve complaints that may arise. Staff does recommend that KTNT be required to seek formal Commission approval if it proposes to change its fictitious names or add any additional fictitious names.

ISSUE 6: Should this docket be closed?

RECOMMENDATION: Yes. (BROWN, PEÑA)

STAFF ANALYSIS: If no party files a Motion for Reconsideration or Notice of Appeal of the Commission's final order, no further action will be required. Therefore, this docket should be closed.