

BEFORE THE TENNESSEE REGULATORY AUTHORITY AT

NASHVILLE, TENNESSEE

January 24, 2001

(REVISED)

IN RE:

**Application of American Fiber Systems, Inc. for
Certificate of Convenience and Necessity to Provide
Facilities-Based and Resold Local Exchange and
Interexchange Telecommunications Services
throughout the State of Tennessee**

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DOCKET NO. 00-00988

**INITIAL ORDER GRANTING CERTIFICATE OF
PUBLIC CONVENIENCE AND NECESSITY**

This matter came before the Tennessee Regulatory Authority ("Authority"), upon the Application of American Fiber Systems, Inc. ("Applicant") for a Certificate of Public Convenience and Necessity as a Competing Telecommunications Service Provider to offer telecommunications services within the State of Tennessee (the "Application") filed on November 1, 2000. The Application was made pursuant to Tenn. Code Ann. § 65-4-201 *et seq.* A Hearing on the Application was held before K. David Waddell, acting as Hearing Officer, on January 10, 2001.

LEGAL STANDARD FOR GRANTING CCN

The Application was considered in light of the criteria for granting a certificate of public convenience and necessity ("CCN") as set forth in applicable statutes. Tenn. Code Ann. § 65-4-201 provides, in part:

(a) No public utility shall establish or begin the construction of, or operate any line, plant, or system, or route in or into a municipality or other territory already receiving a like service from another public utility, or establish service therein, without first having obtained from the authority, after written application and hearing, a certificate that the present or future public convenience and

necessity require or will require such construction, establishment, and operation, and no person or corporation not at the time a public utility shall commence the construction of any plant, line, system or route to be operated as a public utility, or the operation of which would constitute the same, or the owner or operator thereof, a public utility as defined by law, without having first obtained, in like manner, a similar certificate . . .

* * *

(c) After notice to the incumbent local exchange telephone company and other interested parties and following a hearing, the authority shall grant a certificate of convenience and necessity to a competing telecommunications service provider if after examining the evidence presented, the authority finds:

(1) The applicant has demonstrated that it will adhere to all applicable commission policies, rules and orders; and

(2) The applicant possesses sufficient managerial, financial, and technical abilities to provide the applied for services.

An authority order, including appropriate findings of fact and conclusions of law, denying or approving, with or without modification, an application for certification of a competing telecommunications service provider shall be entered no more than sixty (60) days from the filing of the application.

(d) Subsection (c) is not applicable to areas served by an incumbent local exchange telephone company with fewer than 100,000 total access lines in this state unless such company voluntarily enters into an interconnection agreement with a competing telecommunications service provider or unless such incumbent local exchange telephone company applies for a certificate to provide telecommunications services in an area outside its service area existing on June 6, 1995.

In addition, pursuant to Tenn. Code Ann. § 65-5-212, competing telecommunications providers are required to file with the Authority (1) a plan containing the provider's plan for purchasing goods and services from small and minority-owned telecommunications businesses; and (2) information on programs that might provide technical assistance to such businesses.

INTERVENORS

Public notice of the hearing in this matter was made by the Authority's Executive Secretary, pursuant to Tenn. Code Ann. § 65-4-204. No interested persons sought intervention prior to or during the hearing.

APPLICANT'S HEARING

The Application was uncontested. At the hearing held on January 10, 2001, Mr. Ronald W. Del Sesto, Jr. of Swidler Berlin Shereff Friedman, LLP, 3000 K STREET, N.W., Suite 300, Washington, D.C. 20007-5116 represented the Applicant. In addition, Ms. Gita Ramachandran, Chief Financial Officer, American Fiber Systems, Inc., 100 Meridian Centre, Suite 250, Rochester, New York 14618, represented the Applicant. Ms. Ramachandran presented testimony and was subject to examination by the Hearing Officer. Upon Applicant's conclusion of the proof in its case, the Hearing Officer recommended approval of the Application based upon the following findings of fact and conclusions of law:

I. APPLICANT'S QUALIFICATIONS

1. The Applicant is a corporation organized under the laws of the State of Delaware.
2. The complete street address of the Applicant's principal place of business is 100 Meridian Centre, Suite 250, Rochester, New York 14618. The phone number is (716) 340-5400. Applicant's outside counsel is Mr. Ronald W. Del Sesto, Jr. of Swidler Berlin Shereff Friedman, LLP, 3000 K STREET, N.W., Suite 300, Washington, D.C. 20007-5116.
3. The Application and supporting documentary information existing in the record indicate that the Applicant has the requisite technical and managerial ability necessary to provide telecommunications services within the State of Tennessee. Specifically, the Applicant's management and technical teams have extensive expertise in the telecommunications industry. The Applicant has authority to provide telecommunications services in Kansas, Missouri, Nevada, New York and provisional authority in Pennsylvania.
4. The Applicant has the necessary capital and financial capability to provide the services it proposes to offer.

5. The Applicant has represented that it will adhere to all applicable policies, rules and orders of the Authority.

II. PROPOSED SERVICES

1. The Applicant intends to provide interexchange access telecommunications services within Tennessee.

2. Except as may be authorized by law, the Applicant does not intend to serve any areas currently being served by an incumbent local telephone company with fewer than 100,000 total access lines where local exchange competition is prohibited pursuant to Tenn. Code Ann. § 65-4-201(d).

III. PERMITTING COMPETITION TO SERVE THE PUBLIC CONVENIENCE AND NECESSITY

Upon a review of the Application and the record in this matter, the Hearing Officer finds that approval of the Application would inure to the benefit of the present and future public convenience by permitting competition in the telecommunications services markets in the State and by fostering the development of an efficient technologically advanced statewide system of telecommunications services.

IV. SMALL AND MINORITY-OWNED TELECOMMUNICATIONS BUSINESS PARTICIPATION PLAN & BUSINESS ASSISTANCE PROGRAM

1. The Applicant has filed a satisfactory small and minority-owned telecommunications business participation plan, pursuant to Tenn. Code Ann. § 65-5-212 and the Authority's Rules.

2. The Applicant has acknowledged its obligation to contribute to the funding of the small and minority-owned telecommunications business assistance program, as set forth in Tenn. Code Ann. § 65-5-213.

IT IS THEREFORE ORDERED THAT:

1. American Fiber Systems, Inc.'s application is approved;
2. The Applicant shall file a report with the Authority two years after the date of this order, if the Applicant has not yet offered service in Tennessee. Such report shall detail the reasons for the lack of service and any future plans for providing telecommunications services in Tennessee.
3. Any party aggrieved by this initial decision may file a Petition for Reconsideration with the Tennessee Regulatory Authority within fifteen (15) days from and after the date of this Order. Such Petition shall be considered by the Hearing Officer presiding herein;
4. Any party aggrieved by the decision of the Hearing Officer in this matter may also file a Petition for appeal pursuant to Tenn. Code Ann. § 4-5-315 with the Tennessee Regulatory Authority within fifteen (15) days from and after the date of the Order. If the Tennessee Regulatory Authority or any of the parties herein do not seek review of this Initial Order within the time prescribed by Tenn. Code Ann. § 4-5-315, this Order shall become the Final Order.

ENTERED THIS 11th DAY OF January, 2001.

A handwritten signature in black ink, appearing to read "K. David Waddell", is written over a horizontal line.

K. DAVID WADDELL,
AS HEARING OFFICER