

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for certificate to provide interexchange telecommunications service by KTNT Communications, Inc. d/b/a IDC Telecommunications.) DOCKET NO.: 970109-TI FILED: 5/26/98

POSTHEARING BRIEF

KTNT Communications, Inc. d/b/a IDC Telecommunications (KTNT), files its posthearing brief in this proceeding.

INTRODUCTION

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), Florida Statutes.

The Office of Public Counsel (OPC) and Attorney General oppose the grant, alleging that KTNT would trick customers and unfairly compete with other carriers. But they do not bring any evidence of trickery or unfair competition or cite any rule that KTNT's business plan would violate; they simply do not like KTNT's strategy for the "zero minus" market. KTNT has completed over

ACK 300,000 calls in Texas without complaints from customers, AFA 1 regulators or competitors about the use of its service marks. APP CAF Moreover, no other carrier had intervened in this proceeding or CMU otherwise objected to KTNT's certification. In sum, KTNT's use of CTR its service marks has not been a problem, and the opposition of the EAG 2 OPC/Attorney General to KTNT's application is without basis in LEG 3 fact. LIN 3

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KTNT applied for a certificate over a year ago. Staff has recommended twice that it be granted a certificate. KTNT has shown by its conduct in this proceeding that it attempts to honor regulatory policy. KTNT has the technical, managerial, and financial capability to provide interexchange service within the State in compliance with Commission rules, and the Commission should grant the certificate to KTNT Communications, Inc. d/b/a I Don't Care and d/b/a It Doesn't Matter without further delay.

SPECIFIC ISSUES, RESTATED POSITIONS AND ARGUMENT

ISSUE 1: Has 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 service within the state?

KTNT's Position: **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).**

Analysis and Argument

Section 364.0337(3), Florida Statutes, establishes the statutory criteria for granting a certificate for the provision of intrastate interexchange service. That section provides as follows:

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.

Unlike other provisions controlling the grant of certificates, this section is mandatory: if the applicant establishes that it has ". . . sufficient technical, financial, and managerial capability

to provide such service in the geographic area proposed to be served(.)," the Commission shall grant the certificate. There can be no reasonable denial that KTNT has made the requisite showing of capability. The affirmative evidence of this is contained in KTNT's initial application and the direct testimony of Mr. Dennis Dees.

Indeed, the OPC/Attorney General do not dispute the sufficiency of KTNT's financial and technical capability, or KTNT's managerial capability to implement its business plan. [Tr. 90-91] Rather, the OPC/Attorney General dispute KTNT's managerial capability based on allegations of "managerial unfitness" because of KTNT's zero transfer marketing strategy. The OPC/Attorney General do not explain why KTNT's zero transfer strategy is either probative of managerial incapability or predictive of rule non-compliance, nor could they. The witness for the OPC/Attorney General admitted during cross-examination that the only basis he has for suggesting that KTNT would not follow applicable Commission rules is his "personal opinion" and that he "... would never trust a company based on that kind of concept." [Tr. 97] The sincerity of the witness notwithstanding, personal opinion does not provide a competent record foundation upon which to deny an IXC certificate to an applicant that has satisfied the criteria of Section 364.337(3), Florida Statutes.

To reiterate, KTNT has the technical, financial and managerial capability to provide the proposed service. Thus, if the Commission is to follow the statute, no further discussion is

needed: it will simply grant KTNT's certificate as soon as possible.

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

KTNT's Position: **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.**

Analysis and Argument

Preface

Any consideration of KTNT's business plan must begin with the three fundamental propositions amply demonstrated throughout the record:

- (1) KTNT has committed to comply with all applicable Commission regulations, i.e., all applicable statutes, rules and orders;
- (2) There is no basis in the record to question KTNT's commitment to comply with all applicable Commission regulations; and
- (2) KTNT's current business plan - including the zero minus strategy - does comply with all applicable Commission regulations.

If the OPC/Attorney General believe that KTNT's zero transfer strategy or other aspects of its business plan violate the public interest as contemplated under Chapter 364, Florida Statutes, then the OPC/Attorney General should propose rules that would prohibit the strategy. Of course, to adopt the proposed rule the Commission would have to determine, inter alia, that the new policy had adequate statutory foundation, represented the least costly regulatory alternative, and addressed an actual problem. (See generally Sections 120.535 through 120.541, Florida Statutes). In

short, the proposed rule could not be based simply on the "personal opinion" of the OPC/Attorney General's witness or the generalized hypersensitive reaction of their offices to the realities of robust competition.

KTNT's Business Plan

KTNT is a switchless reseller whose primary business activity has been as an operator service provider. KTNT will be expanding into other areas of telecommunications such as one plus and 800-888 numbers as time permits. [Tr. 18] As a switchless reseller KTNT will not own any network switches or transmission facilities. Rather it resells the switching and transmission services of its underlying providers.

With respect to billing, KTNT has contracted with ZPDI of San Antonio, Texas, to handle all of its billing for the State of Florida. ZPDI already handles all of KTNT's billing in the states it does business in now. Billing inquiries and/or customer complaints will be handled on behalf of KTNT by ZPDI. Customers will be directed to make their inquiries by dialing an 800 number which will be included in the billing. If ZPDI for some reason is unable to satisfy the customer then the customer will be given KTNT's 800 number and KTNT will handle the complaint. [Tr. 20-21]

KTNT's Service Marks

KTNT uses the fictitious names "I Don't Care" and "It Doesn't Matter" as service marks. Under its business plan, there are four basic situations in which these names will be used in the market: (1) to provide one-plus presubscribed long distance; (2) to provide

10-XXX dial-around long distance; (3) to provide 800/888 services; and (4) to provide zero-transfer services. The first three offerings are standard and need no further description here. The controversial zero transfer service is further described below.

Zero Transfer

When a customer places an operator assisted interLATA call through a BellSouth operator, the operator must prompt the customer to choose an IXC to carry the call. Typically this occurs at pay telephones. [Tr. 31] If the customer states no preference, the BellSouth operator will assign the customer through a default system designed by BellSouth that is assumed to be random. The Commission has never established rules governing this default assignment system, leaving it to BellSouth use a fair and cost-effective method. [Tr. 119] These types of calls are referred to as "zero-minus calls" and "zero transfer" calls.

When the customer's call is transferred to the IXC's operator, the call is branded twice under the IXC's service mark, which may or may not be the same as the IXC's corporate name on its certificate. Because the zero transfer call is casual, it will typically be billed through the customer's local exchange company. The charges will be listed under the certificated name of the company. [Tr. 112]

Under KTNT's zero transfer strategy, when a customer responds to the operator prompt for an IXC selection with either the words "I Don't Care" or "It Doesn't Matter," the BellSouth operator should respond to the consumer that there is a carrier with that

name and then ask the consumers if that is his or her choice. This strategy attempts to generate business by calling KTNT's distinctive names to the consumers' attention.¹ [Tr. 22] Upon transfer to "I Don't Care" or "It Doesn't Matter" the call is branded twice. Thus the customer has three confirmations that he has selected "I Don't Care" or "It Doesn't Matter" to handle the zero transfer call.

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

KTNT's Position: **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.**

Analysis and Argument

As noted under Issue 2, KTNT's current business plan - including the zero minus strategy - will comply with all applicable Commission regulations, increases competition in the reselling of intrastate telecommunications services and increase consumer choice. Thus, there is no basis - factual, legal or equitable - to claim that KTNT's business plan is counter to the public interest.

Unsubstantiated Allegations of OPC/Attorney General

The lack of a legal foundation notwithstanding, both the

¹ At hearing, staff counsel asked during cross examination of Mr. Dees whether it would be possible for the BellSouth operator to skip the confirmation process and directly assign the call to either "I Don't Care" or "It Doesn't Matter." Mr. Dees stated that this was possible, although an event beyond KTNT's control. By the same token, it is also possible that the BellSouth operator might fail to identify "I Don't Care" and "It Doesn't Matter" as IXCs and assign the call through default.

Attorney General and OPC have opposed certification on the basis that the business plan is allegedly contrary to the public interest. For example, Mr. Gross for the Attorney General said, in part, at hearing:

. . . briefly, the Attorney General objects to the certificate on several grounds. The name is inherently misleading and deceptive. It exhibits an unequivocal intent to obtain customers through deception. There's no honorable motive for the company choosing such a name. It will adversely affect fair competition and will harm other telecommunications carriers by diverting business away from them through a subterfuge. It will harm consumers by denying them true freedom of choice...
[Tr. 10]

The OPC was equally emphatic. Here are the words of Mr. Beck:

. . . Their business is focused on the zero minus traffic where typically a customer goes to a pay phone and dials zero and wishes to complete a call. They are trying to deceive customers into having their company be named when, in fact, the intent of the customer is to simply say they have no preference. This deceives customers.

* * *

There's nothing innovative or clever in the use of deception as a basis for their business plan. There have always been companies ready to make a dollar by deception and trickery, and this company wants you to give them a certificate to engage in those practices. [Tr. 13]

And finally, here is an excerpt from Mr. Poucher's oral summary of testimony at hearing:

Our position is very simple. We believe that the motives of management of this company are directed towards deceiving the public, that the company intentionally engages in deceptive practices, and to that extent we believe that the management of the company does not meet the standards that you should require in the state of the Florida. . . . The marketing plan of KTNT is intended to trick customers into an unintended choice of providers when that customer responds by saying "It doesn't matter" or "I don't care." [Tr. 88]

With this aggressive rhetoric, one would expect these agencies

to come to the hearing armed with evidence to support their attacks on the business plan and character of KTNT's management. But they did not, and for a simple reason: there is no basis in fact for their position.

The heart of the OPC/Attorney General's position is framed by Mr. Beck as follows:

. . . They are trying to deceive customers into having their company be named when, in fact, the intent of the customer is to simply say they have no preference. This deceives customers. [Tr. 13]

Thus, according to the OPC, when the customer expresses no preference for an IXC through by saying, for example, "I Don't Care," and the BellSouth operator asks the consumer whether he or she meant to identify the carrier named "I Don't Care" or to express no preference, the consumer has been deceived.

The OPC/Attorney General are so offended by this alleged deception is so egregious that nothing else seems to matter. For example, it does not matter if the customer chooses to use "I Don't Care," or if the rates are lower, or if the customer chooses another carrier, or if the customer asks to be assigned to another carrier by default, or if the customer does not feel deceived; none of this matters, because the OPC and Attorney General, surveying the field from their elevated positions have simply declared that the use of the service mark "I Don't Care" in the context of the zero transfer service is deceptive. The advantage of a fiat is that no evidentiary basis for the pronouncement is required. This approach may work in the press, but in an adjudicatory proceeding a fiat is not evidence.

The Evidentiary Basis For Concluding the Zero Transfer Strategy Is Not Deceptive.

The reason the OPC/Attorney General have been unable to support their case with evidence is that no one in the real world seems to agree with their view of deception. KTNT has completed over 300,000 calls in Texas without complaints from customers, competitors or regulators about the use of the service marks.² KTNT's use of its controversial service marks has not been a problem. In addition, several other states have granted KTNT a certificate to operate as an IXC.³ Given this universal acceptance of KTNT's strategy where it is in business, one must question the OPC/Attorney General's use of such terms as "deception," and "trickery." The general population simply does not seem to work from the same dictionary.

The OPC/Attorney General do not have a satisfactory explanation for why they believe the zero transfer strategy is deceptive but does not trigger complaints. For example, when Mr. Poucher was asked about the absence of customer complaints, he suggested that some customer were apathetic and that other customers were unaware that they had been deceived. [Tr. 104-105] In other words, the some 300,000 consumers were either too dim to recognize that they had been violated or too apathetic to complain. This is a condescending attitude toward the public. KTNT suggests

² As the OPC/Attorney General pointed out at hearing, KTNT uses several different fictitious names in Texas. Thus not all of the 300,000 plus calls were handled under the name "I Don't Care" or "It Doesn't Matter."

³ Illinois, Michigan, Ohio, and Texas. [Tr. 17]

that a more respectful conclusion is that the consumers typically did understand KTNT's zero transfer strategy and had no problem with it. After all, they initiated the operator assisted call without any preference; it didn't matter to them and they did not care.

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

KTNT's Position: **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. **

Analysis and Argument

Under Chapter 364, the public interest standard for IXC certificates is in effect a simple two-prong test. First, has the applicant met the statutory criteria of Section 364.0337(3)? Second, has the applicant shown that it will comply with all applicable rules established by the Commission to ensure that competition is in the public interest?

KTNT easily satisfies this test. As shown under Issue 1, KTNT has met the criteria of Section 364.0337(3) by showing that it has the technical, financial and managerial capability to provide the proposed service. And as demonstrated under Issues 2 and 3, KTNT's current business plan - including the zero minus strategy - will comply with all applicable Commission regulations. The public interest standard under Chapter 364 has therefore been conclusively established in the record.

Statutory Basis For Public Interest Determination

Unfortunately, the OPC/Attorney General have confused this application proceeding by arguing, inter alia, that the public interest standard pervading Chapter 364, Florida Statutes, empowers the Commission to micro-manage competition through the certificate application process. For example, under the OPC/Attorney General's view of Chapter 364, the Commission must review KTNT's application to ensure that KTNT's business plan and service marks are in the public interest; moreover under the OPC/Attorney General's approval the public interest will be defined not by existing Commission rules but by argument over what is fair in the marketplace and what is not. A neutral reading of Chapter 364 does not support this approach.

Certainly, both Chapter 364 and caselaw make it clear that a certificate is to be granted only if it is in the public interest to do so. For example, Section 364.335(2) provides in part that

The commission may, on its own motion, institute a proceeding under s. 120.57 to determine whether the grant of such certificate is in the public interest.

In addition Section 364.335(3) provides in part that

The commission may grant a certificate, in whole or in part or with modifications in the public interest, but in no event granting authority greater than that requested in the application or amendments thereto and noticed under subsection (1); or it may deny a certificate.

Moreover, in interpreting the statutory precursor to Section 364.337, the Supreme Court of Florida observed that the legislative intent to promote competition did not require the Commission to grant certificates upon demand contrary to the public interest.

Microtel, Inc. v. Florida Public Service Commission, 483 So.2d 415 (Fla. 1986).

The preceding authority, however, does not support the OPC/Attorney General's implicit argument that the standards for the public interest determination are to be made on a case by case basis. On the contrary, under Chapter 364 the Commission is to establish through rule the conditions and restraints under which interexchange carriers must compete upon the grant of a certificate. If the applicant IXC is able to demonstrate that it has technical, financial and managerial capability to provide the proposed service under these rules, then the public interest standard is per se satisfied. And if competition appears to evolve contrary to the public interest, then it is incumbent upon the Commission to adopt the appropriate prophylactic rules.

The above understanding of the statute is required not only by the specific language of Section 364.337(3), but also by the Section 364.337(4), which provides in part as follows:

Rules adopted by the commission governing the provision of intrastate interexchange telecommunications service shall be consistent with s. 364.01.

As the Commission is aware, Section 364.01 contains the fundamental statement of legislative intent that must inform the application of Chapter 364. In general that declares that the Commission should encourage competition by regulating with a light but deft hand. Key provisions of Section 364.01 applicable to IXCs include the following:

(4) The commission shall exercise its exclusive jurisdiction in order to:

(b) Encourage competition through flexible regulatory treatment among providers of telecommunications services in order to ensure the availability of the widest possible range of consumer choice in the provision of all telecommunications services.

(e) Encourage all providers of telecommunications services to introduce new or experimental telecommunications services free of unnecessary regulatory restraints.

(g) Ensure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior and eliminating unnecessary regulatory restraint.

Thus, in developing its rules to govern the conduct of IXCs the commission is to, inter alia, encourage competition, achieve regulatory flexibility, eliminate unnecessary regulatory restraint. Any application of the "public interest" standard that the commission would use in the application process must be consistent with the rules established under these criteria. And the most straightforward way to achieve this consistency is to simply require all applicants to make an adequate showing that they will comply with the Commission's rules.

The OPC/Attorney General would invite the Commission to abandon this competitively neutral approach to promoting the public interest. These parties instead would have the Commission subject applicant's to scrutiny not based on standards found in statute, rule or order, but on what opposing parties feel is fair. This approach does not protect the public interest, but merely raises

the entry costs of applicants who would challenge the sensibilities of the Office of the Public Counsel and the Attorney General.

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?

KTNT's Position: **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.**

Analysis and Argument

As established under Issue 1, KTNT is entitled under statute to certification. As established under Issues 2 and 3, KTNT's business plan is in the public interest, and established under Issue 4, granting KTNT's certificate is in the public interest. There is no basis to modify KTNT's certificate to restrict the use of its fictitious names as service marks. Thus, any such restriction would constitute arbitrary and capricious agency action.

Curtailling KTNT's use of its service marks would be discriminatory as well. As pointed out in the testimony of Mr. Dees, the Commission has granted certificates to other IXC's where the names could easily be confusing to the public:

With respect to either corporate or fictitious names, it seems to me that other companies are currently providing service under other names that could be more confusing than "I Don't Care" and "It Doesn't Matter" in some contexts. For example, there are:

- The Other Phone Company, Inc.
- The Phone Company
- Dial & Save
- Florida Public Telecommunications

- Association, Inc.
- Budget Call Long Distance, Inc.
 - Business Discount Plan, Inc.
 - Hometown Telephone, Inc.
 - Long Distance Savers, Inc.
 - A Quality Communication Services

I suppose we could all create hypothetical situations where a consumer might be confused by these names.
[Tr. 39]

In addition to these names, there are many other company names that are confusingly similar to each other. [Exhibit 1]

Marketing with Multiple Names

At hearing the OPC/Attorney General criticized KTNT for its lack of traditional marketing and its use of multiple names on the zero transfer default list. For example, Mr. Beck argued during his opening statement as follows:

Their lack of any marketing of any significance, I think, should be a telling sign to you as you hear the evidence. This company did a million dollars of business last year, yet they did less than a thousand dollars in marketing. I will tell you that their business practice is based upon deception and not upon a fundamental and real business plan. [Tr. 13-14]

And during questioning by Commissioner Clark, Mr. Poucher suggested that it was not fair for KTNT to use register two separate names with BellSouth's default list because it would give the company an unfair advantage. [Tr. 107]

These comments are significant because they demonstrate OPR/Attorney General's unfamiliarity with the realities of the competitive market. For example, the OPR/Attorney General ignore the free publicity provided KTNT, which promotes market recognition of its service marks. In addition, the OPR/Attorney General overlook the fact that other companies do use multiple names in

marketing. Indeed, KTNT's use of its two distinctive service marks rather than traditional advertising is addressed by Mr. Dees in his rebuttal testimony:

Q: Why don't you advertise or use some other less controversial method of competing in the zero minus market?

A: The nature of the zero-minus market requires unorthodox marketing if you are going to compete for the call, as opposed to just participate in a default process.

Q: Why?

A: The zero minus market is small and would not support traditional marketing techniques. In Florida, only the three biggest companies with national one-plus exposure provide zero minus services: AT&T, Sprint, and MCI. The market is so small compared to the cost of entry, that other companies with name recognition simply skip participation in this line of business. The only way to make any money in this market is to use a marketing technique of some kind that does not include high advertising costs. For example, another company in the market, Connect America, operates under five other names to increase its percentage of calls it is assigned through default. Connect America is not a company with name recognition and it doesn't advertise. It simply gets business by being on the rotation five times. [Tr. 32-33]

KTNT's Service Marks Not Inherently Deceptive

As already noted, Mr. Gross for the Attorney General attacked KTNT's service marks in his opening statement, arguing in part as follows:

The name is inherently misleading and deceptive. It exhibits an unequivocal intent to obtain customers through deception. There's no honorable motive for the company choosing such a name. [Tr. 10]

Because the OPC/Attorney General provided no evidence tending

to show any deception of customers, it is difficult to know exactly what these parties mean by "inherently . . . deceptive." There is a suggestion in the rhetoric that the service marks are absolutely deceptive, given that "(t)here's no honorable motive" for the service marks. This tact notwithstanding, the witness for OPC/Attorney General readily agreed that whether a service mark is confusing or not depends on the context in which it is used:

Q: . . . So would you not agree with me that whether or not a service mark is confusing depends on the context in which it's used?

A: Very definitely. [Tr. 95]

Obviously, if whether a service mark is confusing depends on the context in which it is used, then it cannot be "inherently deceptive" outside a particular context. As noted, there are four contexts in which the service marks may be used: (1) to provide one-plus presubscribed long distance; (2) to provide 10-XXX dial-around long distance; (3) to provide 800/888 services; and (4) to provide zero-transfer services.

On cross-examination, Mr. Poucher admitted that if KTNT followed the Commission's slamming rules in the marketing of its one-plus service, then there would be no issue around the service marks being misleading in that context.⁴ Next, Mr. Poucher agreed

⁴ Mr. Poucher did opine, however, that where customers new to the ILEC's territory sign up for local and long distance, there would be a situation parallel to the zero transfer process, i.e., a new customer might say "I Don't Care" when asked who he or she wanted to be his or her presubscribed carrier. According to Mr. Poucher, it is unlikely that the ILEC employee will ask the customer to confirm the selection, and thus the customer will be "tricked." [Tr. 10] KTNT believes its arguments with respect to the zero transfer strategy apply to this conjectural objection with

that the controversial service marks raised no concerns where the customer was reaching KTNT via dial around or perhaps 800/888 number using digits that corresponded to a portion of the service mark. Thus, the only context in which the service marks could be viewed as "inherently deceptive" would be in the provision of zero-transfer services. And given the lack of complaints from consumers, competitors and regulators where KTNT provides zero transfer service, one must conclude that these service marks are not confusing.

It may be worth noting here that, as a very broad proposition, a service mark is confusing or deceptive if it misleads the average consumer as to the source, nature or quality of the services he or she is obtaining from the business. The notion of "inherently" deceptive or misleading arises when the trademark or service mark of the entity offering the goods or services suggests to the average consumer that the nature of service is different than it actually is. A recent example might be useful. Walmart's "buyer's club" discount store was formerly called "Sam's Wholesale Club." On information and belief, Walmart was required to change the name to simply "Sam's Club," because in fact the merchandise was not being sold to club members at wholesale, but at discounted retail. The name "Sam's Wholesale Club" was thus "inherently misleading" to the public because it suggested that members were buying wholesale when they were not.

This notion of "inherently deceptive" is simply inapplicable

equal force.

to KTNT's service marks. In KTNT's situation, the consumer may say KTNT's service mark meaning "no preference" and then be prompted to confirm how he or she wishes to have the call handled. Because this customer had no preference and because his or her choice is being solicited and then honored through prompting by the operator and by double branding, there is no deception, inherent or otherwise.

Prohibiting Use of Service Marks Would Infringe KTNT's Constitutional Right to Commercial Free Speech

Although no case has been found directly on point, it would appear that prohibiting KTNT from using its service marks "I Don't Care" and "It Doesn't Matter" would be unconstitutional infringement of its right to commercial free speech. Defining the precise parameters of protected commercial free speech is admittedly difficult. Nevertheless, two seminal cases are instructive, and at the very least their central lesson is that the Commission must tread lightly in abridging self-expression in the market.

In the seminal case of Virginia State Board of Pharmacy v Virginia Citizens Consumer Council, Inc., (1976) 425 US 748, the United States Supreme Court held that "commercial speech" is within the protection of the First Amendment "free speech" clause of the Constitution. Under this case, Court held that ordinary advertising of commercial products is as deserving of Constitutional protection as political speech or writing. The Court wrote that:

Advertising, however tasteless and excessive it sometimes

may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominately free enterprise economy, the allocation of resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well formed. To this end, the free flow of commercial information is indispensable.

425 US at 765.

Next, in Central Hudson Gas & Elec. v. Public Serv. Comm'n, 447 U.S. 557 (1980), the Court held that the a regulation of the New York Public Service Commission that completely bans an electric utility from advertising to promote the use of electricity violates the First and Fourteenth Amendment. The lengthy decision applied a four step test to determine whether the extent of suppression of the protected speech was supported by a sufficient state interest. This four step evaluation was necessary because of a fundamental constitutional principle:

If the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation must be designed carefully to achieve the State's goal. . . .

447 U.S. at 560.

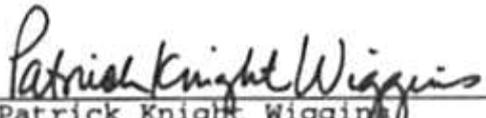
Applying the basic holdings of these two cases to the instant issue, it would appear that the proposed ban on the use of the service marks would be unconstitutional. Advertising is protected speech and it is difficult to think of expression more personal and more important to the purposes of advertising than the selection of a service mark. A service mark is thus an essential component of

protected commercial speech. Thus the State cannot infringe on the right to use that mark without adequate justification. Moreover, the Commission's status as the regulator of monopolies and competitive carriers does not exempt it from this requirement of justification.

As demonstrated throughout this brief, KTNT's service marks are neither misleading nor unlawful. Indeed, the position of the OPC/Attorney General notwithstanding, the service marks as used in the zero transfer strategy do not mislead the consumer about the source of the IXC service; on the contrary, as contemplated in Virginia State Board of Pharmacy, KTNT's clever strategy prompts greater ". . . dissemination of information as to who is producing and selling . . ." the telecommunication service being requested by the consumer. In this context, it is clear that KTNT's service marks fall squarely within the kind of commercial speech protected by First and Fourteenth Amendment. And based on the record established in this proceeding, there is no legitimate State interest in abridging this protected speech by forbidding KTNT to use its legitimate service marks.

CONCLUSION

For the reasons provided, applicant requests that without further delay the Commission grant to it an IXC certificate under the names KTNT Communications, Inc. d/b/a I Don't Care and d/b/a It Doesn't Matter.


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EXHIBIT 1

Telecommunications Companies: Reseller

A Quality Communication Services

ACC Long Distance
Access Long Distance of Florida, Inc.
Access Network Services, Inc.
ACSI Local Switched Services, Inc.

American Long Lines, Inc.
American MetroComm Long Distance Corporation
AmericaTel Corporation
Amerivision Communications, Inc.

ATC Long Distance
ATI Telecom, Inc.
Atlantic Telecommunication Systems, Inc.
AT&T Communications of the Southern States, Inc.

Budget Call Long Distance, Inc.
Business Discount Plan, Inc.

Coast International, Inc.
Communication Network Solutions, L.L.C.
COMNEX

Datacomm International Company LTD.
DebitCom, Inc.
Deltacom Long Distance Services, Inc.

Dial & Save

Digital Network Operator Services, Inc.
Digital Services Corporation
Direct Net Telecommunications

Frontier Communications International, Inc.
Frontier Communications Services

Global Access Communications, Inc.
Global Paycom, Inc.
Global Tel*Link Corporation
Globalplex Telecom & Technologies, Inc.
Glob* National Telecommunications, Inc.

GT Com Long Distance
GTS

Gulf Communication Services, Inc.
Gulf Long Distance, Inc.

Hometown Telephone, Inc.
International Digital Telecommunications Systems, Inc.
International Marketing & Advertising, Inc.
International Telemedia Associates, Inc.
Interstate FiberNet, Inc.

ISN Communications
IXNET, LTD. CO.

K & S International Communications, Inc.
KMC Telecom Inc.

LCI International Telecom Corp.
Legacy Long Distance International, Inc.
Long Distance Savers, Inc.

National Data & Communications, Inc.
NationalTel

MCI
NTI
OCI

Quest Telecommunications, Inc.
Qwest Communications the Power of Connections, Inc.

Satcom Systems, Inc.
Satel (Satellite Communications Systems, Inc. d/b/a)

SecurFone America, Inc.
Security Telecom Corporation

Star National Enterprises, Inc.
STAR Telecommunications, Inc.
Starlink Communications, LLC

TEL-LINK of Florida, L.L.C.
Tel3
Telcom.Net, Inc.
Telcorp Ltd. Company
TeleCard Communications International, Inc.
Telecom*USA or Teleconnect (SouthernNet, Inc., d/b/a)
Teleglobe USA Inc.
TeleHub Network Services Corporation
Telenational Communications Limited
Teligent, Inc.
Telstar Long Distance, Inc.

TransGlobal Communication Enterprises, Inc.
Transtel Communications of Northern Florida, Inc.

UCN, Inc. (Universal Communications Network, Inc. d/b/a)

United Services Telephone, LLC

US LEC of Florida, Inc.

US Xchange of Florida, L.L.C.

USA Tele Corp.

ValNet Communications, L.L.C.

VarTec Telecom and Clear Choice Communications

World Access Communications Corp.

World Long Distance, Inc.

World Pass Communication Corp.

World-Link, Inc.

WorldTouch Telecom, Inc.

XIEX Telecommunications, Inc.

Zenex Long Distance, Inc.

CERTIFICATE OF SERVICE

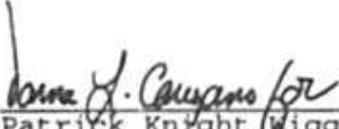
Docket No. 970109-TI

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery* or U.S. Mail this 26th day of June 1998, to the following:

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