EVEREST CONNECTIONS℠

DOCKET FILE COPY ORIGINAL

4740 Grand Avenue, Suite 200, Kansas City, Missouri 64112 • 816-714-2900 • www.everestgt.com

RECEIVED
AUG - 3 2001
FCC MAIL ROOM

August 2, 2001

01-129

Ms. Magalie Roman Salas, Esq.
Secretary, Federal Communications Commission
Office of the Secretary
Room TW-204B
445-12th Street, SW
Washington, DC 20554

VIA FEDERAL EXPRESS

RE: COMMENTS OF UTILICORP COMMUNICATIONS SERVICES, EVEREST CONNECTIONS CORPORATION AND EXOP OF MISSOURI, INC.

Dear Ms. Salas:

Utilicorp Communications Services, Everest Connections Corporation and Ex-Op of Missouri, Inc. hereby file an original and nine copies of Comments in Response to the Commission's Notice of Inquiry soliciting data and information on the status of competition in the market for the delivery of video programming for its eighth annual report.

In addition to the original and nine copies, Everest has included a copy of this pleading marked "FILE STAMP COPY" for stamp and return to Everest as proof of filing. If you have any questions or require additional information, please contact me at 816-714-2972.

Sincerely,

Rachel Lipman Reiber

Rachel Lipman Reiber
Vice President Regulatory and Government Affairs

Enclosures

No. of Copies rec'd 0+9
List ABCDE

Before the

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED
AUG - 3 2001
FCC MAIL ROOM

In the Matter of	)	
	)	CS Docket No. 01-129
Annual Assessment of the Status of	)	
Competition in the Market	)	
for the Delivery of Video Programming	)	

COMMENTS OF UTILICORP COMMUNICATIONS SERVICES,
EVEREST CONNECTIONS CORPORATION. AND EXOP of MISSOURI, INC.

In response to the Notice of Inquiry submitted by the Commission on June 20, 2001, Utilicorp Communications Services, Everest Connections Corporation and ExOp of Missouri, Inc. submit the following comments.

Introduction

Utilicorp Communications Services is a wholly owned subsidiary of Utilicorp United, Inc., a public utility company providing natural gas and electricity distribution services in seven Midwestern states. UtiliCorp United, Inc. also has an ownership interest in Aquila, which trades in natural gas, electricity and broadband futures. In 2000, Utilicorp made two investments in telecommunications properties, acquiring Everest Connections Corporation ("Everest") and ExOp of Missouri, Inc. ("ExOp"). Both companies are broadband service providers, who have overbuilt incumbent telephone and cable companies and who are providing voice, video and data services to customers.

Everest Connections Corporation[1] was founded by Utilicorp Communications Services and several of the former principles of Brooks Fiber Properties in April 2000. The original business plan developed by Everest contemplated market entry as a facilities-based competitive provider of voice, video and data through hybrid fiber coaxial infrastructure in Grand Rapids, MI, Kansas City, Minneapolis and Tulsa. Although franchises had been acquired to serve a number of the municipalities in these four metropolitan areas, when the capital markets began to shut down in late 2000, Utilicorp began providing more of the funding for Everest's business plan. People who invest in Utilicorp stock select it because Utilicorp is a traditional gas and electric utility. Although many, if not most, utilities have a number of unregulated investments, earnings must be in line with Wall Street estimates and must be comparable with other gas and electric utility companies. While Utilicorp has stated its continuing commitment to Utilicorp Communications Services, it is looking to secure venture capital funding to facilitate its business plans to roll out broadband services. With the dearth of venture capital currently available to start-up telecommunications ventures, Utilicorp remains bullish about the long-term prospects of Everest, but has decided, in the near term, to scale back the original business plan of Everest until the capital markets become more forthcoming with funding. Based on the feedback received from the financial community, during 2001, Everest has focused on executing its business plan in Lenexa, Kansas, a suburb of Kansas City.[2]

---

[1] Everest Midwest Licensee, LLC is the entity that holds certificates from the public utilities commissions and franchises in Kansas and Missouri.

[2] According to the 2000 census, Lenexa has a population of 40,238.

Everest has estimated the Lenexa market to consist of approximately 9,800 single dwelling units, 7,000 multiple dwelling units and 1,800 commercial customers or a total of 18,600 addresses passed. Everest began turning up service to customers on January 25, 2001. As of June 30, 2001, Everest had turned up service to 4,107 addresses, thereby completing 22 percent of its build out of the City of Lenexa. The response to Everest's service has been excellent. In several nodes, penetration has exceeded 30 percent; in one node, penetration tops 50 percent. Most nodes have initial penetration rates in excess of 20 percent. Everest has not yet turned up service to any customers residing in multiple dwelling units because of some of the obstacles discussed in more detail, *infra*.

Everest is currently offering four "bundled" packages of services in addition to its a la carte offerings. Basic cable, the digital tier and one local exchange telephone line is priced at $49.95. Basic cable, the digital tier, one premium channel, one local exchange line and 256K Internet downstream is priced at $ 76.95. Basic cable service, the digital tier, two premium channels, one local exchange line, 10 custom calling features, basic voice mail and 1.5 Mbps Internet downstream is priced at $99.95. For $129.95, a customer can have basic cable service, the digital tier, all premium channels, (HBO, Cinemax, Showtime, Starz, and Encore), 10 custom calling features, high speed Internet at 3 Mbps downstream and voice mail with increased greeting, message and storage capabilities, plus home/guest mailbox feature. Everest's average revenue per customer is $86 per month excluding long distance and pay-per-view services.

In 1997, ExOp entered Kearney, Missouri, as a competitive local exchange carrier. Kearney is a community of 4,500, located approximately 10 miles north of Kansas City's northernmost suburb. In 2000 Utilicorp Communications Services acquired ExOp and added digital cable television services over its telephone network using VDSL technology. ExOp estimates that there are1650 homes and 125 businesses in Kearney. As of June 30, 2001, ExOp served 800 or 48 percent of residential customers and 118, or 94 percent of the business customers. Of the 800 customers who subscribe to telephone service, 405 subscribe to cable, and 163 subscribe to DSL high speed Internet service. Of the 118 business customers who subscribe to telephone service, 25 also subscribe to DSL high speed Internet service.

Barriers to Entry

In the Seventh Annual Report[3] issued in response to last year's Notice of Inquiry, RCN, another broadband service provider, indicated that it had experienced multiple barriers to competitive entry.[4] Among these are anticompetitive tactics of incumbent cable companies, delays in gaining access to local rights-of-way, delays and excessive rates for pole attachments, adverse or delayed commission decisions, and the inability to gain access to MDU inside wiring. RCN also cited problems gaining access to some programming, particularly local sports programming. Everest has experienced some similar, and some different barriers to entry. ExOp has met with some resistance from the incumbent cable company on the multi-dwelling front, but generally was welcomed by Kearney because ExOp's infrastructure was so advanced compared to the incumbent telecommunications and cable companies.

a. Barrier's to entry into the right of way

[3] In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 00-132, Seventh Annual Report adopted 01/02/2001;

[4] Id. at ¶ 130.

Negotiating franchises with some municipalities has been a challenge. Some cities are hostile to competitive providers because they do not want their streets and rights of way disturbed. They require new providers to go underground, when incumbents have a grand fathered right to go overhead. Underground construction greatly increases the cost of providing service. Some communities have sought to require Everest, as the first facilities-based competitor to enter their city, to install excess conduit in the event that yet a third competitor would emerge. Some of the cities requiring excess conduit have proposed that Everest bear all up-front costs for the excess conduit with proposed paybacks through credits to franchise fees over 60 months. This is simply unacceptable, because the cost of excess conduit is too great (it increases costs by 50 percent) and a 60-month payback is too slow. In one community, where franchise negotiations have been ongoing for more than a year, the city has finally agreed to pay for and to assume ownership of any excess conduit that will be required. It is interesting to note that when that city was pressing to have Everest own the conduit, the city was seeking almost 200 miles of excess conduit. Now that the city has agreed to own any excess conduit it requires, it is anticipated that the amount of excess conduit will be approximately $1/10^{th}$ of what was originally going to be required of Everest.

Incumbents also have sought to place barriers to competition in the franchising process. In several instances, the incumbent, in the course of renewal negotiations, has agreed to terms will be burdensome to new entrants. The incumbent has been successful in convincing the city to then require, under the guise of "competitive neutrality," that these provisions be mandatory in all cable franchises. Examples of these provisions are strenuous build-out schedules, low build-out density requirements, requirements of customer service centers in each city where service is provided and extensive institutional network infrastructure requirements or large monetary contributions for existing institutional networks. The incumbent makes it known that they will sue the city if any franchise is granted that is more favorable or less burdensome than their own agreement with the city.

b. Pole attachment agreements

Everest has had mixed success in negotiating pole attachment agreements. In the Kansas City metropolitan area, there are three investor owned utilities and one municipal utility that provide electric service. One of the investor-owned utilities is a subsidiary of Utilicorp United, Everest's parent company. Everest has been successful at reaching agreement with the two investor owned utilities other than the Utilicorp subsidiary and does not anticipate problems reaching agreement with the Utilicorp subsidiary. The municipal utility has been another story and Everest has yet to reach agreement with the one city-owned utility.

Everest has found that negotiation of the agreements is only one part of the equation. Ongoing administration of the agreements can pose many challenges. When Everest has sought to reconfigure the lines of existing pole tenants to accommodate Everest's new overhead lines, the incumbent cable operator has raised objections to relocation. Everest has been barred from rearranging the pole attachments. The power company, which is responsible for administering the poles, has taken excessive amounts of time to relocate existing pole attachments.

c. Multiple dwelling units

There are many challenges related to entering multiple dwelling units. Some owners refuse to sign private easement agreements to allow Everest to reach their buildings. Kansas law[5] permits telephone companies that hold certificates from the state public utilities commission to exercise rights of eminent domain to gain rights of easement through private property. However, this same right does not extend to cable companies. It is unclear how the law would be applied to broadband service providers.

Although Kansas law[6] does provide that a tenant may request and receive telecommunications and cable service from any entity that holds a franchise from the local franchising authority, the reality is that the landlord still has the power to thwart market entry.

Many landlords were approached by the incumbent cable company in 1998 or 1999 and were asked to sign "easement agreements" that purport to circumvent the Cable Home Wiring Rules (Exhibit A). Now these landlords fear litigation if they allow a competitor onto their property. While the cable inside wiring rules were conceived with good intentions, most landlords are fearful of invoking them. In one instance, Everest is in the process of installing its own home run wiring because the MDU owner was fearful of invoking the cable home run wiring rules against the incumbent cable company. In addition, the incumbent telephone company claimed the point of demarcation was at the pedestal and was going to require Everest to sign a "UNE Remand Supplemental Interconnection Agreement" in order to purchase a "UNE subloop." As a facilities-based carrier Everest believed it was unnecessary to sign this agreement, particularly when the

---

5 Kan. Stat. Ann. §17-618 (2000).

6 Kan. Stat. Ann. §58-2553(a)(5) (2000)...the landlord shall not interfere with or refuse to allow access or service to a tenant by a communication or cable television service duly franchised by a municipality.

nonrecurring charge for the "UNE subloop" was 50 percent more than what self-installation will cost.

If landlords do not fear litigation, they often are unwilling to allow Everest into their MDU because of fear of jeopardizing their existing lucrative "exclusive marketing agreement," with the incumbent. To gain the right to market and serve an MDU, Everest has found that the "price of admission" is steep. Landlords have requested up-front access payments, commissions for each tenant that subscribes to service, a share of the revenues generated by their tenants, free web pages and free service for their employees.

d. Access to equipment and programming

There also have been challenges obtaining the digital set-top box of choice, since several vendors indicated they had signed exclusive agreements with the large incumbent MSOs. Everest has been unable to obtain digital set-top boxes from either Scientific Atlanta or Pioneer. Programming, particularly access to Video-on-Demand services, has also been an issue. When Everest's video-on-demand provider went bankrupt, several providers, when contacted, including iNDEMAND, Diva and Concurrent, indicated they could not do business with Everest because they had exclusive agreements with their owners, who are large MSOs. Our preliminary research indicated that these video-on-demand providers had neither requested, nor received from the Commission, a determination that such exclusive arrangements were in the public interest. Everest strongly urges the commission to extend the sunset date for the rules prohibiting programming exclusivity.[7] Even though it appears that incumbent cable companies have been ignoring these regulations, Everest believes it is important to have a process to bring these anticompetitive relationships to the commission's attention.

---

[7] 47 U.S.C. § 548 (c)(5).

CONCLUSION

Everest believes that the future of competition, for both incumbent cable and telephone companies, lies with facilities-based broadband service providers. It is very costly to install last-mile infrastructure that is capable of serving each residential customer. This type of capital expenditure cannot be justified if a provider is offering stand-alone telephone service or stand-alone cable service. However, Everest and ExOp's business models, coupled with early performance results, indicate that competitive broadband service providers are a viable long-term alternative to incumbent providers. Everest and ExOp's experience with our customers indicates that people are eager for choice, competitive prices, responsive customer service and the convenience of a single bill.

Respectfully submitted,

Rachel Lipman Reiber

Rachel Lipman Reiber
Vice President of Regulatory and Government Affairs

Utilicorp Communication Services
Everest Connections Corporation
ExOp of Missouri, Inc.

4740 Grand
Kansas City, Missouri 64112
(816) 714-2972 voice
(816) 714-2995 FAX

APPENDIX A

3196351

STANDARD ACCESS AGREEMENT

THIS STANDARD ACCESS AGREEMENT (the "Agreement" is made by Pinnacle Pointe, L. P. ("Owner"), the owner of the land and building or complex of buildings known as Pinnacle Pointe whose address is 10460 Pflumm Lenexa, KS 66219 (the "Premises"), in favor of Kansas City Cable Partners, a Colorado general partnership, and which also does business as Time Warner Cable ("Time Warner Cable").

1. For valuable consideration, Owner grants to Time Warner Cable an unrestricted easement in gross over, under and through the Premises for the installation of facilities to furnish cable communications services to the Premises, including, but not limited to, wires, cables, conduits, pedestals, and related fixtures and equipment (the "Equipment"), and further grants Time Warner Cable an easement for access to the Premises for all purposes related to the provision of communications services to the Premises, including, but not limited to: (a) installation, relocation, alteration, replacement, inspection, maintenance and removal of the Equipment, and (b) marketing of services to tenants of the Premises. Time Warner Cable and Owner agree that the provisions of this agreement are intended to comply with the rules and regulations of the Federal Communications Commission ("FCC") which require all service contracts entered into between Cable Operators and Owners of multiple dwelling unit ("MDU") buildings to include provisions setting forth the parties Agreement regarding the disposition of only home run wiring in such MDU upon the termination of such contract and that this Agreement will supersede any default disposition procedures adopted by the FCC which might otherwise apply.

   A. All equipment and other property placed on the Premises by Time Warner Cable ("Services Deliver System") shall be and remain the sole personal property of Time Warner Cable and shall not be affixed to or become a part of the Premises.

   B. Time Warner Cable shall have the sole right to possession of and dominion and control over the Services Delivery System and any equipment, facilities, antennas, pipes, conduits, poles, pedestals, vaults, active or passive devices, converters, cables and wires on the Premises on the date of this Agreement which are to be used by Time Warner Cable to deliver services under this Agreement. Neither Owner nor any other party may tamper with, attach to or use any portion of the Services Delivery System without prior written authorization of Time Warner Cable.

   C. Time Warner Cable may remove any and all of the equipment and wiring and any other properties placed on the Premises by Time Warner Cable at any time following the expiration of the term of this Agreement. If Time Warner Cable damages the Premises when it removes the Services Delivery System or any of its other properties from the Premises, Time Warner Cable will repair and restore such damage.

2. Time Warner Cable will use reasonable care not to damage the Premises, and will undertake to cause its employees and contractors to do the same. Owner will use reasonable care not to damage the Equipment or interfere with its use, and will undertake to cause its employees, contractors and tenants to do the same. Owner will take reasonable precautions to notify its employees, contractors and tenants of the location of the Equipment. During the term of this Agreement, Owner shall not enter into any agreement or take action which would impair or interfere with Time Warner Cable's ability to provide or market Time Warner Cable's services to any of the residents of the Premises.

3. The easements granted hereunder shall continue so long as Time Warner Cable possesses the right to provide communications services in the city where the Premises are located under a municipal franchise (including under any extensions, renewals or issuances of new or replacement franchises from time to time for any franchise currently in effect) or under applicable law.

4. The legal description of the Premises is attached hereto as Schedule A. If the legal description of the Premises is not attached to this Agreement at the time it is signed on behalf of Owner, then Owner authorizes Time Warner Cable subsequently to obtain and attach such legal description as Schedule A. At the option of Time Warner Cable, this Agreement may be recorded in the real property records of the county in which the Premises are located, at its expense.

5. This Agreement shall be binding on and inure to the benefit of the successors, assigns, transferees, heirs and legal representatives of Owner and Time Warner Cable.

6. This Agreement constitutes the full and entire understanding and agreement between Owner and Time Warner Cable with respect to the subject matter hereof. This Agreement may not be amended except by an Agreement in writing signed by both Owner and Time Warner Cable.

STATE OF KANSAS
COUNTY OF JOHNSON } SS
FILED FOR RECORD
2001 JAN 11 P 3:43
SARA F. ULLMANN
REGISTER OF DEEDS

$10

OWNER: Pinnacle Pointe, L. P.

By: Robert E. Newton

Name: Robert E. Newton

Title: Managing Partner

Subscribed and sworn before me this 17th day of March, 1999.

Linda L. Perrin

Linda L. Perrin My Commission expires 6-10-2001

Notary Public

Notary Public-State of Kansas
LINDA L. PERRIN 6-10
My Appointment Expires 2001

BOOK 6821 PAGE 664