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BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI

Application for Approval *Nunc Pro Tunc* of a Transfer of Assets from NeTel, Inc. d/b/a Tel 3 to OneStar Long Distance, Inc.	)))	**Case No. TM-2000-418**

ORDER APPROVING TRANSFER OF ASSETS

On January 12, 2000, OneStar Long Distance, Inc. (OneStar) filed with the Missouri Public Service Commission (Commission) an application for approval *nunc pro tunc* of a transfer of assets from NeTel, Inc. d/b/a Tel 3 (Tel 3) to OneStar. The application was also accompanied by the direct testimony of Laura Collier, regulatory supervisor for OneStar. The application states that it is being filed pursuant to Section 392.300, RSMo 1994[1].

OneStar states that it is doing business as OneStar Long Distance. However, OneStar did not produce a fictitious name certificate which demonstrated that. To the contrary, the certificate of good standing from the secretary of state filed by OneStar with its application shows that it is doing business as "OneStar Long Distance, Inc." OneStar is an Indiana corporation, authorized to do business in Missouri.

[1] All references herein to Sections of the Revised Statutes of Missouri (RSMo), unless otherwise specified, are to the revision of 1994.

OneStar also stated that it is a nationwide provider of telecommunications services and is authorized to provide resold long distance services in Missouri under certification granted under case number TA-98-50. OneStar states that it also provides interstate and international telecommunications as a non-dominant common carrier pursuant to the authority of the Federal Communications Commission.

OneStar states that Tel 3 is a Delaware corporation headquartered in Florida. OneStar states that Tel 3 filed a bankruptcy petition in Florida on December 14, 1998. Eventually, OneStar states, Tel 3 sold its Dial 1+ Customer Base to OneStar, and this agreement was approved by the bankruptcy court on July 19, 1999. OneStar states that the deal was finally closed on August 2, 1999. OneStar states that, to its information and belief, Tel 3 does not do business in Missouri.

OneStar states that it did not have an opportunity to seek the Commission's prior approval of the transfer of assets. OneStar states that it regrets that it was unable to seek prior Commission approval and respectfully requests that the Commission permit it to cure this deficiency *nunc pro tunc*. OneStar states that the approval *nunc pro tunc* of the transfer of assets from Tel 3 to OneStar is in the public interest. OneStar states that its acquisition of Tel 3's customer base avoided any unnecessary interruption in the telecommunications service provided to Tel 3's former customers in Missouri. OneStar argues, that, from the perspective of affected customers, the transfer will be largely transparent, leaving the quality of service that the customers expect unaltered. In addition, OneStar states, the transfer will allow it to realize significant economies of scale, thereby making it possible for OneStar to introduce new products and services.

On February 28, 2000, the Staff of the Commission (Staff) filed its memorandum. Staff recommended that the Commission issue an order to approve prospectively the transfer of Tel 3's Dial 1+ customer base to OneStar.

The statute under which the application was filed, i.e., Section 392.300, RSMo, states, in part: "No telecommunications company shall...sell...[or] transfer...the whole or any part of its franchise, facilities or system...without having first secured from the [public service] commission an order authorizing it.... Every such sale...[or] transfer...made other than in accordance with the order of the commission authorizing the same *shall be void.*" (Emphasis added.)

Citing this statute in a prior case, the Commission has held that the law

> ...requires telecommunications companies to obtain Commission approval before entering into arrangements for sale of assets or mergers. Transactions embarked upon without Commission approval are deemed void.... [Violators] should be placed on notice that future applications involving purchases should be filed on a timely basis if [a violator] wishes to avoid incurring penalties. In the matter of the joint application of Tel-Central of Jefferson City, Inc. and LDDS of Missouri, Inc., d/b/a LDDS Communications to sell assets, Case No. TM-94-156.

Commission Rule 4 CSR 240-2.060(1)(D) states, in part: "All applications shall...include the following information:...[r]eference to the statutory provision or other authority under which relief is requested...." OneStar cites no cases, statutes or other authority giving the Commission authority to issue a *nunc pro tunc* order as required by Commission Rule 4 CSR 240-2.060(1)(D), because there are none to cite.

In fact, the Commission has earlier ruled adversely on an application to approve an order *nunc pro tunc*:

> The Commission is an administrative body created by statute and has only such powers as are expressly conferred by statute and reasonably incidental thereto. State ex rel. Harline v. Public Service Commission, 343 S.W.2d 177, 181(5) (Mo. App. 1960). Pursuant to Section 392.300, RSMo 1994, the Commission's approval can only be effective on and after the effective date of this order; the Commission does not have statutory authority to grant retroactive approval of the acquisition. In the Matter of the Application of Premiere Communications, Inc. for Approval of the Acquisition of Assets of National Collegiate, Inc., Case No. TM-99-83.

The Commission declines to legitimize the void sale and unlawful transfer here, but will grant prospective approval.

The Commission notes that OneStar stated in its application that it will amend its tariff as necessary to incorporate the services, rates, terms and conditions previously offered by Tel 3. The Commission has reviewed the application and the Staff's memorandum and finds that approval of the remaining phase of the transfer, i.e., the amending of OneStar's tariffs, is not detrimental to the public interest and the authority requested should be granted. The Commission emphasizes that this approval is prospective only.

IT IS THEREFORE ORDERED:

1. That the request for *nunc pro tunc* approval of the transfer of assets from NeTel, Inc. d/b/a Tel 3 to OneStar Long Distance, Inc. is denied.

2. That the application for approval of transfer filed on January 12, 2000, by OneStar Long Distance, Inc. is prospectively approved and that it is authorized to take any and all actions necessary to effect the transfer authorized by this order, including but not limited to the amending of its tariffs.

3. That OneStar Long Distance, Inc. shall report to the Commission within ten (10) business days of the completion of the approved transfer that such has been accomplished.

4. That this order shall become effective on March 20, 2000.

BY THE COMMISSION

Dale Hardy Roberts

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

(S E A L)

Bill Hopkins, Senior Regulatory Law Judge,
by delegation of authority pursuant to
4 CSR 240-2.120(1) (November 30, 1995)
and Section 386.240, RSMo 1994.

Dated at Jefferson City, Missouri,
on this 10th day of March, 2000.