

STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a Session of the Public Service
Commission held at its office
in Jefferson City on the 2nd
day of October, 1992.

In the matter of the application of North)
American Communications Corporation for a)
temporary and permanent certificate of) CASE NO. TA-93-107
service to provide interexchange operator)
services.)

ORDER GRANTING TEMPORARY CERTIFICATE

On September 18, 1992, North American Communications Corporation
(North American) filed an application for an interexchange telecommunications
service authority certificate to provide operator services in Missouri. North
American also requested that the Commission issue it a temporary certificate
pursuant to Section 392.410.6, RSMo Supp. 1991, which states:

The commission may issue a temporary certificate which
shall remain in force not to exceed one year to assure
maintenance of adequate service or to serve particular
customers, without notice and hearing, pending the
determination of an application for a certificate.

On September 23, 1992, North American filed an explanation of its
request for a temporary certificate. North American has been authorized by this
Commission to provide private pay telephone service in Missouri since April 24,
1990. Earlier during the current year, North American submitted a bid with
Lincoln University to provide telecommunications services at the school. A
review by the University revealed that North American was not certified to
provide operator services and that Staff believes that interexchange
certification is necessary in order to provide the services sought by the
University. The University is to award the contract on October 2, 1992, and if
North American is not adequately certified by that time, its bid will not be
considered. North American has chosen not to contest Staff's conclusion as to

its service authority and instead states that to grant it a temporary certificate would be in the public interest.

On September 29, 1992, the Staff of the Commission (Staff) filed a response to North American's request for a temporary certificate. Staff argued that the temporary certificate statute is intended to assure that telecommunications service may be provided where, but for the issuance of a temporary certificate, a customer would be without telecommunications service altogether. Staff stated that Lincoln University has telecommunications service, so a temporary certificate is not needed to assure that adequate service is provided. Staff also stated that North American is seeking a temporary certificate for its own convenience, not for the public interest.

The Commission is of the opinion that Section 392.410.6, RSMo Supp. 1991, empowers the Commission with discretion to issue a temporary certificate in special circumstances and that such discretion and circumstances are not limited solely to situations in which no service would be provided but for the temporary certificate. While the Commission concurs in Staff's belief that temporary certificates should be granted sparingly (and expects to maintain its practice in that regard), the breadth of the statute's plain language prevents the Commission from adopting Staff's extremely narrow interpretation of legislative intent as a means of avoiding responsibility for its exercise of discretion.

The Commission also agrees with Staff that the convenience of an applicant is not the appropriate standard by which to grant a certificate. An applicant's reasons for seeking a certificate are not determinative of whether it is in the public interest to grant it, however.

The Commission finds that the facts underlying North American's request constitute a unique situation which warrants temporary certificate. Lincoln University is currently without the application of the service sought in

its bid process. North American has been previously certified to provide another type of service and its failure to seek certification to provide operator services was due to an error made in "good faith" regarding the service that may be provided under the authority of its pre-existing certification. Also, upon learning of Staff's belief that North American was not adequately certified, the Company applied for interexchange certification. Further, North American would be precluded from participating further in the bid process in which it already has invested significant resources, if a temporary certificate were not issued. The Commission also finds that issuing a temporary certificate to North American is in the public interest in that it affords Lincoln University the opportunity to choose the best bid from a wider variety of bids.

Thus, the Commission determines that North American should be granted a temporary certificate in order to allow North American to continue to participate in Lincoln University's bid process. The temporary certificate should grant North American authority to provide operator services to Lincoln University only. The Commission also determines that North American should not provide service under the temporary certificate until such time as tariffs for such service have been approved by the Commission.

IT IS THEREFORE ORDERED:

1. That North American Communications Corporation is hereby granted a temporary interexchange telecommunications service authority certificate to provide operator services to Lincoln University in Jefferson City, Missouri.

2. That the temporary certificate of service authority granted in Ordered Paragraph 1 shall remain in effect for no longer than six (6) months from the effective date of this Order.

3. That North American Communications Corporation shall not provide operator services under the temporary certificate granted in Ordered Paragraph 1 until such time as tariffs for such service are approved by the Commission.

4. That this Order shall become effective on October 2, 1992.

BY THE COMMISSION

Brent Stewart

Brent Stewart
Executive Secretary

(S E A L)

Mueller, Rauch and
Kincheloe, CC., Concur.
McClure, Chm., and Perkins, C.,
dissent in separate opinion.

In the matter of the application of North American
Communications Corporation for a temporary and permanent
certificate of service to provide interexchange operator
services.) Case No. TA-93-107
)

Section 392.410 was enacted in 1987 as a part of House Bill 360 and constitutes the legislature's mandate that all telecommunications companies doing business in the state of Missouri pursuant to this section possess either a certificate of public convenience and necessity or a certificate of service authority from the Commission before being allowed to do business in this state. The legislature at the time of the writing of House Bill 360 was attempting to deal with the entry of competing telecommunications companies in Missouri.

Subsection 6 was included as a part of Section 392.410 to deal with the possible, although not likely, situation of a specific area or group of customers being left with no telephone service in the event that telecommunications companies did not timely meet the other requirements of Section 392.410. This subsection must be read *in pari materia* with the remainder of the statute from which it is taken.

Section 392.410 in its entirety states as follows:

392.410.1. A telecommunications company not possessing a certificate of public convenience and necessity from the commission at the time this section goes into effect shall have not more than ninety days in which to apply for a certificate of service authority from the commission pursuant to this chapter unless a company holds a state charter issued in or prior to the year 1913 which charter authorizes a company to engage in the telephone business. No telecommunications company not exempt from this subsection shall transact any business in this state until it shall have obtained a certificate of service authority from the commission pursuant to the provisions of this chapter, except that any telecommunications company which is providing telecommunications service on September 28, 1987, and which has not been granted or denied a certificate of public convenience and necessity prior to September 28, 1987, may continue to provide that service exempt from all other requirements of this chapter until a certificate of service authority is granted or denied by the commission so long as the telecommunications company applies for a certificate of service authority within ninety days from September 28, 1987.

2. No telecommunications company offering or providing, or seeking to offer or provide, any interexchange telecommunications service shall do so until it has applied for and received a certificate of interexchange service authority pursuant to the provisions of subsection 1 of this section. No telecommunications company offering or providing, or seeking to offer or provide, any local exchange telecommunications service shall do so until it has applied for and received a certificate of local exchange service authority pursuant to the provisions of section 392.420.

3. No certificate of service authority issued by the commission, except a grant of authority to provide basic local telecommunications service, shall be construed as granting a monopoly or exclusive privilege, immunity or franchise. The issuance of a certificate of service authority to any telecommunications company shall not preclude the commission from issuing additional certificates of service authority to another telecommunications company

providing the same or equivalent service or serving the same geographical area or customers as any previously certified company, except to the extent otherwise provided by section 392.450.

4. Any certificate of public convenience and necessity granted by the commission to a telecommunications company prior to September 28, 1987, shall remain in full force and effect unless modified by the commission, and such companies need not apply for a certificate of service authority in order to continue offering or providing service to the extent authorized in such certificate of public convenience and necessity. Any such carrier, however, prior to substantially altering the nature or scope of services provided under a certificate of public convenience and necessity, or adding or expanding services beyond the authority contained in such certificate, must apply for a certificate of service authority for such alterations or additions pursuant to the provisions of this section.

5. The commission may review and modify the terms of any certificate of public convenience and necessity issued to a telecommunications company prior to September 28, 1987, in order to ensure its conformity with the requirements and policies of this chapter. Any certificate of service authority may be altered or modified by the commission after notice and hearing, upon its own motion or upon application of the person or company affected. Unless exercised within a period of one year from the issuance thereof, authority conferred by a certificate of service authority or a certificate of public convenience and necessity shall be null and void.

6. The commission may issue a temporary certificate which shall remain in force not to exceed one year to assure maintenance of adequate service or to serve particular customers, without notice and hearing, pending the determination of an application for a certificate.

Prior to September 28, 1987, telecommunications companies in Missouri possessed certificates of public convenience and necessity. Such certificates remained in full force and effect subsequent to September 28, 1987, unless modified by the Commission. Section 392.410.4. All other telecommunications companies not possessing a certificate of public convenience and necessity were required to apply for a certificate of service authority from the Commission within 90 days of the effective date of the statute unless the company held a state charter issued in or prior to 1913 authorizing the company to engage in the

telephone business. Section 392.410.1. Subsection 6 contemplates the Commission issuing temporary certificates to assure maintaining adequate service or to serve particular customers when a telecommunications company does not apply for the required certificate so that a particular group of customers is not without service. Such an event did not occur.

Even if the majority's interpretation is correct, the plain language of subsection 6 is discretionary, not mandatory. It allows the Commission to issue a temporary certificate to assure maintenance of adequate service or to serve particular customers. The statute does not mandate the issuance of a temporary certificate whenever the Commission is faced with either of these situations. The Commission has never, in its discretion, issued a temporary certificate since the enactment of Section 392.410 in 1987. Other applicants have inquired about temporary certification and the interpretation urged by Staff has been consistently applied. That consistent interpretation is entitled to serious consideration and should be given great weight.

North American seeks a temporary certificate in order to bid on a contract for telecommunications services at Lincoln University. North American must hold the appropriate certificates to provide the desired services in Missouri to be an eligible bidder. In Case No. TA-90-209, North American was granted a certificate of service authority to provide private pay telephone service in Missouri via customer-owned coin operated telephone equipment. Such certificate of service authority was granted subject to the conditions of certification set forth in that order. One of those conditions is that any intrastate operator services provider employed by North American shall hold a certificate of service authority from, and have on file with, this Commission for the provision of operator services to traffic aggregators. TA-90-209, Report And Order, c. at page 2. North American knew or should have known that it did not

possess the required certificate to provide operator services in the manner the bid contemplates and which the exercise of due diligence would have discovered. Attempting to determine "good faith" as the majority opinion suggests will be a very difficult subjective determination to make in every case and should not be the standard.

In addition, North American is not the only bidder. All the other bidders have been issued the appropriate certification by the Commission and are eligible to provide service. Lincoln University is not currently without telecommunications services. It is not necessary for the North American to receive a temporary certificate in order to maintain adequate service to Lincoln University or to serve particular customers who have been left without telecommunications services by failing to meet the other requirements of Section 392.410. Nor will Lincoln University be left without service in the future since a pool of eligible providers remains.

The Commission is charged above all else with ensuring safe and adequate services at just and reasonable rates. Certificates of service authority are to be granted if they are in the public interest. The certificate sought by North American is primarily for the convenience of the applicant and is not in the public interest. Even the Public Counsel, whose duty it is to represent the public, asserted to the Commission that the temporary certificate is not in the public interest, but is merely for the convenience of the applicant. Public Counsel has consistently interpreted the statute in the same manner as Staff and sees no reason to alter that interpretation based upon the facts presented by North American.

We believe that the majority's decision to issue a temporary certificate to North American is quite possibly a dangerous precedent setting move. We fear that the Commission is disregarding the reasons contemplated in Sec-

tion 392.410 for issuing a temporary certificate and will have great difficulty in the future in acting in any way other than to grant any request for a temporary certificate to any telecommunications company that submits such a request. For the foregoing reasons, we respectfully dissent.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Kenneth McClure".

Kenneth McClure
Chairman

A handwritten signature in cursive script, appearing to read "Patricia D. Perkins".

Patricia D. Perkins
Commissioner

Dated at Jefferson City, Missouri,
on this 2nd day of October, 1992.