

BEFORE THE
PUBLIC SERVICE COMMISSION OF WISCONSIN

Application of the City of Antigo for Approval of a Preliminary
Agreement for the Lease and Sale of Certain Telecommunications
Facilities

180-TB-100

FINAL DECISION

This is the Final Decision in the application of the City of Antigo, Langlade County, Wisconsin (Applicant), for approval under Wis. Stat. § 66.0817 of a preliminary agreement under which Applicant proposes to lease and sell its complete telecommunications public utility plant. Applicant is a certified alternative telecommunications utility (ATU) in the other category, Wis. Stat. §§ 196.01(1d)(f) and 196.203, operating as a competitive local exchange carrier (CLEC) in Antigo. Applicant proposes to transfer its facility to Wittenberg Wireless, LLC (Wittenberg), an investor-owned telecommunications provider that is affiliated with Wittenberg Telephone Company and certified as a CLEC in docket 6752-NC-100.¹

A list of interested parties is attached as Appendix A.

Introduction

On December 31, 2009, Applicant filed an application with the Commission for approval of a certain "Lease Purchase Agreement" (Agreement) by which the Applicant, specifically through its the Antigo Broadband Utility (ABU), seeks to transfer its entire fiber optic and related transmission facilities to Wittenberg Wireless, LLC, a designated party to this

¹ Final Decision for Certification as a CLEC, *Application of Wittenberg Wireless LLC for Certification as a Competitive Local Exchange Carrier and an Alternative Telecommunications Utility*, No. 6752-NC-100 (Wis. PSC, February 6, 2010).

proceeding. Wittenberg Wireless supports the application for approval of the transaction consistent with the terms of the Agreement. Applicant is requesting an expedited decision on this application on or before February 19, 2010, in order to permit timely printing of ballots for the required referendum, which Applicant would like to schedule with its April 2010 spring elections for reasons of economy and efficiency.

The Commission issued a Notice of Proceeding dated January 28, 2010. No other persons have sought to intervene. The Notice delegated to the Administrator of the Telecommunications Division certain responsibilities, including the issuance of a Final Decision on the merits.

The applicable statute granting Commission jurisdiction, Wis. Stat. § 66.0817, requires the Commission to “determine whether the interests of the municipality and its residents will be best served by the sale or lease, and if it so determines . . . fix the price and other terms.” The applicable statute also requires that the municipality have a referendum approving the terms of the transaction as approved by the Commission.

Applicant has supplied material regarding the transaction in conjunction with the application and in response to Commission staff data requests issued under Wis. Stat. § 196.25. The record basis for this Final Decision consists of the application, the accompanying affidavits of Antigo Mayor Bill Brandt and Wittenberg’s chief officer Al Mahnke, and the data requests with Applicant’s responses, and staff’s separate affidavits regarding the transaction’s particulars including valuation of the transaction for purposes of setting a price. The parties have reviewed the staff affidavits and a draft of this Final Decision and have formally filed waivers of their rights to a formal hearing in order to permit the docket to proceed immediately to decision.

Findings of Fact

1. Applicant is a municipality, organized under the laws of Wisconsin, that operates public utility telecommunications plant in the City of Antigo under Commission certification granted in docket 180-NC-100.

2. Certified about five years ago, Applicant, through the Antigo Broadband Utility (ABU), constructed its fiber optic telecommunications facility and secured certain customers, including Antigo City Hall departments and other city-owned sites, the Unified School District of Antigo, and a number of private businesses.

3. In each year of operation, the ABU made minimal investments in plant additions. Although the Unified School District of Antigo, private business, and various city departments purchase high speed circuits from the ABU, the business only achieved approximately one-third of the revenues forecast in its original business plan. Antigo was not generating sufficient cash flow to make the debt service payments on the existing bond or payments on an internal loan.

4. The proposed transaction is a lease-to-purchase agreement. The principal terms of the Agreement provide for payment by Wittenberg Wireless of \$390,000 in two hundred and forty installments at an interest rate of three and one quarter percent (3.25%) and payment by Wittenberg Wireless of \$1,210,000 amortized over twenty years at an interest rate of five and three quarters percent (5.75%),² plus retention by ABU of payments by the Unified School District of Antigo as further described below. The ABU has entered into an agreement with the Unified School District of Antigo under which the ABU will retain monthly circuit lease fees of

² This second compensation component is tied to Antigo's facility construction bonds that will expire in 32 months, subject to extension upon a mutually-agreed new rate of interest between Antigo and the lender. Under the Agreement, Wittenberg may elect to accept the new rate, which may be higher, or secure its own financing and cash out its obligation to Applicant under this compensation provision.

\$2,435 per month, which will total, as calculated from the date of the application's filing, the sum of \$197,966 by the Agreement's expiration. Under the Agreement's lease payment terms Wittenberg will assume the contract for the Unified School District of Antigo and provide all broadband services. However, payments from the Unified School District will continue to flow through to the ABU. In total, the cash payments over time have a present value of \$1,797,966. The terms of the Agreement allow Wittenberg Wireless to purchase the assets at any time for the aggregate principal balance due at the time of the purchase or for \$1.00 at the end of the lease term.

5. In exchange for the foregoing compensation, the ABU, under the terms of the Agreement, will transfer to Wittenberg all of its telecommunications plant assets, including all buried and aerial fiber facilities, all broadband equipment to provide connection and termination for fiber facilities, network connections and gateway equipment to provide Internet access.

6. If the transaction is approved and consummated, Wittenberg intends to expand broadband facilities in the City of Antigo, using a substantial portion of the \$750,000 invested by Wittenberg Telephone Company in Wittenberg Wireless, LLC.

7. Wittenberg proposes to make voice and high-speed Internet access service available to all residents of the City of Antigo within two years of the closing of the transaction.

8. If Wittenberg fails to make lease payments as required by the Agreement, Applicant may declare Wittenberg in default and re-take ownership of the facilities transferred (except as specified for Parcel B), including any improvements and extensions made by Wittenberg.

9. It is reasonable to determine that under the “original cost less depreciation” methodology the original cost of the plant subject to transfer was \$1,558,975 through December 31, 2009, less accumulated depreciation \$172,000, which equals a net book value of \$1,386,975. It is also reasonable to determine that under the “reproduction cost new less depreciation” methodology the value of the transferred plant is \$1,386,975, the same value as the original cost of construction less depreciation. This estimate of reproduction cost less depreciation is based on current cost information for the fiber cable and equipment units and labor costs, associated with the City of Antigo’s fiber network. The cost of the fiber cable has been steadily decreasing, so that fiber cable costs today are normally less than the cost of the fiber cable installed approximately five years ago. The equipment associated with the fiber facilities has increased somewhat in cost, as new products were introduced and provided enhanced capabilities to the fiber network. Labor cost for construction has remained constant over this time period and significant increases in the cost of labor to install facilities or equipment appears unlikely. Overall, the decrease in fiber costs would offset the slight increase in equipment costs and with no significant change in labor costs, the overall reproduction cost less depreciation would be, in effect, the same amount today as the amount incurred by the Applicant at the initial time of construction.

10. Under a discounted cash flow (DCF) analysis, the business operation has a negative net present value of approximately \$1,183,000 as ABU is not generating sufficient cash to meet its bonding obligation and would need to use municipal funds to meet that obligation.

11. The appropriate price to be fixed by the Commission for purposes of the Agreement is that set forth in the Agreement, subject to two compliance conditions.

12. The price set forth in the Agreement, using a lengthy series of installment payments, is sufficiently above “original cost less depreciation” or “reproduction costs new less depreciation” for the physical plant and leased parcels to cover any intangible value attributable to economic development, leaseholds, and rights-of-way access.

13. The terms of the Agreement produces a net present value for the transaction with Wittenberg Wireless, LLC, if fully performed, of \$31,753, which means under the transaction ABU will receive funds in excess of its outstanding bonding obligations.

14. For any person to submit a price better than that submitted by Wittenberg, the offer must be (a) a one-time cash purchase price for the same assets of not less than \$1,797,966, or (b) an offer to consummate the same deal proposed by Wittenberg Wireless, LLC transaction on exactly the same terms and conditions, but offering either higher compensation relative to the categories of compensation, or the same total amount of cash as offered by Wittenberg, but payable to Antigo over a shorter period of time.

15. For the reasons set forth in the Opinion, it is reasonable for Applicant to conclude that due to technology changes in the telecommunications industry and the likelihood of additional plant costs in the near term, continued operation of the telecommunications business of the ABU is not in the best interests of the Applicant or its residents.

16. For the reasons set forth in the Opinion, the Commission finds that the proposed Agreement, or terms equal to or better than those of the Agreement, for the lease or sale of the plant involved, would serve the best interests of the municipality and its residents.

17. No evidence has come to the Commission’s attention that would warrant the imposition of additional conditions, except as to compliance with Wis. Stat. § 66.0817.

Conclusions of Law

The Commission has jurisdiction under Wis. Stat. §§ 66.0817, 196.02(1) and (7), 196.05, 196.28, 196.37, 196.395, 196.40, and other pertinent provisions of Wis. Stat. chs. 196 and 227, to determine whether the proposed Agreement is in the best interests of the Applicant and its residents, to determine the price and other relevant or necessary sale or lease conditions, to impose conditions on the transaction as part of any order herein, and to issue this Final Decision.

Opinion

The Commission has rarely been called upon under Wis. Stat. § 66.0817 or its predecessor statutes to evaluate whether a price for the sale or lease of facilities owned by a municipality is in the best interests of a municipality and its residents. However, decisions in the electric and water utility areas furnish guidance on the critical issue of how to set a price. Two Commission cases involve the sale of municipally-owned electric facilities to Wisconsin Power & Light Co.: Findings of Fact, Certificate and Order, *Preliminary Agreement of the Village of Footville, Rock County, as an Electric Public Utility, to Sell its Electric Public Utility Plant to Wisconsin Power and Light Company*, Nos. 6680-EB-103/2040-EA-100, (Wis. PSC April 1, 1987), and Findings of Fact and Determination, *Application of the Village of Hustisford, Dodge County, as an Electric Public Utility to Sell and Wisconsin Power and Light Company to Buy the Electric Utility Plant Now Owned and Operated by the Former*, No. 2-U-7132, 56 PSCW Reports 172 (1971). In both cases, the municipal transferor was seeking to avoid the costs of installation of required plant upgrades and to integrate with a privately-owned electric utility having considerably larger financial and managerial resources. A third case involves a town condemning a private water utility for purposes of incorporating it into the municipal water

utility system. *See* Findings of Fact and Order, *Petition of Town of Pleasant Prairie, Kenosha County for Determination of the Compensation to be Paid for the Taking of Property of the Pleasant Park Utility Company*, No. 4730-WB-1, 63 Wis. PSC 373 (Wis. PSC Oct. 31, 1978).

The issues in this case are two-fold: (1) Is the proposed transaction in the best interests of the Applicant and its residents; and (2), If the answer to (1) is “yes,” what price and appropriate conditions, if any, should the Commission establish.

The Commission concludes that the transaction is in the best interests of Antigo and its residents. In his affidavit, Antigo Mayor Bill Brandt indicated that the expense of keeping the technology current and expanding the system to meet customer demands presented issues that the City of Antigo “would not likely be able to undertake on its own.” Antigo sought potential partners or purchasers and apparently produced interest from Wittenberg Telephone Company that led to the present preliminary agreement. Antigo’s response to data requests stated Antigo’s belief that Wittenberg Wireless could deliver greater reliability and customer responsiveness in telecommunications, thus enhancing economic development potential for the community. In addition, staff’s review of the available employees for the ABU’s operations indicates that the City of Antigo’s sharing of employees with other municipal units probably curtailed the City’s ability to fully market the service to residents, a more labor-intensive activity than contracting with large local customers and institutions, such as the school district. Also supporting this conclusion is the evidence that the revenues fell substantially below original projections. In sum, the proposed transaction serves the best interests of the municipality and its residents by prudently transferring the assets to a capable third-party when the assets are still an attractive property.

The second question is what price is fair for a sale or lease transaction. See Wis. Stat. § 66.0817(3). Commission staff analyzed the transaction under three methodologies employed in the three Commission cases noted above: fair market value; capitalized income (discounted cash flow); and “cost,” consisting of “original cost less depreciation” and “reproduction cost new, less depreciation.”

In evaluating market value, Antigo sought potential partners or purchasers through a Request for Private Partnership Proposals that Antigo sent to fourteen similar businesses serving the area. The Agreement with Wittenberg Wireless was a result this proposal process.

Commission staff obtained historical data on the business operations from Antigo’s filed annual reports. Through data requests, staff obtained forecasts of income and expenses for the upcoming five years. Staff developed a forecast of net cash flow based on this data. Staff discounted the future net cash flow to determine a net present value of the business operation. The business operations have a negative net present value to Antigo of about \$1,183,000 as the cash flow from operations is not expected to be sufficient to meet the outstanding bonding obligation. Staff compared the cash flow under current operating conditions to the cash flow that would be expected under the Agreement. The terms of the Agreement are expected to result in a positive net present value of about \$31,753 as Antigo will receive funds in an amount greater than is needed to meet its bonding obligation.

Commission staff obtained data from the utility’s general ledger to determine the original cost of the facilities. Staff used information from Antigo’s filed annual reports to determine the accumulated depreciation. In this manner, staff computed the current net book value of the facilities to be \$1,386,975. The purchase price is greater than the original cost less depreciation.

Reproduction cost new is not likely to be greater than the original costs. The Commission finds that the cost of the fiber cable has been steadily decreasing, so that fiber cable costs today are normally less than the cost of the fiber cable installed approximately five years ago. The equipment associated with the fiber facilities has increased somewhat in cost, as new products have been introduced and provide enhanced capabilities to the fiber network. Construction labor cost has remained constant over this five-year period and significant increases in the cost of labor to install facilities or equipment appear unlikely. Based on the foregoing facts the Commission concludes that reproduction costs today would be, in effect, the same as Applicant's original construction costs.

In light of the foregoing analysis under the three methodologies, the Commission determines that the price for the transaction is that set in the Agreement, or \$1,797,966, and is reasonable. This judgment is based primarily on the cost methodology due to the recent original construction of the facilities, and the Applicant and staff evidence supporting a finding that "reproduction cost new" would not likely produce a significantly different cost in today's market. The fair market value approach is not usable due to a lack of comparable sales. The capitalized income methodology shows that Applicant is losing money and has done so for four years. The price covers the debt obligation that Applicant originally incurred to finance the broadband facilities at issue, and provides an additional consideration of a sufficient magnitude to cover whatever unquantifiable values are reasonably attributable to the lease of four parcels, right-of-way use, and other associated intangibles. Thus, the Commission finds that the price of \$1,797,966 is reasonable for the lease of facilities, considering the quality of the facility, the debt

risks sought to be avoided by Antigo, and Wittenberg Wireless' assumption of risks and its willingness to expand the network.

Wis. Stat. § 66.0817(2) requires the Commission to fix a price and “other terms” on the deal. Two additional “terms” are needed.

First, an additional term is required because the Agreement does not have a provision for insertion of a price as fixed by the Commission, in the event the Commission were to fix a price that was higher than that provided in the preliminary agreement. This provision is required by Wis. Stat. § 66.0817(2). The Commission concludes that the absence of such a provision goes to the legal authority of Applicant to attempt to consummate the Agreement, assuming voter approval. Wis. Stat. § 66.0817(2)—the only provision specifically addressing a required agreement provision—is intended to ensure that the municipality consummates a deal at the proper valuation of the plant, regardless of whether the deal is with a contracting party or a third-party. Applicant must follow the predicate requirements of the statute in order for the Commission to usefully and properly proceed with a binding determination of the “best interests of the municipality and its residents” with respect to the sale or lease of utility plant. *See Wisconsin Gas & Elec. Co. v. Ft. Atkinson*, 193 Wis. 232, 248, (1927) (“[T]here can be no doubt that, where reasonable regulations are prescribed, the municipality must comply with such regulations in order to pass good title”).

Because no other person has intervened in the proceeding, and sufficient time exists between the date of this Final Decision and the proposed referendum, it is reasonable to accommodate remediation of the deficiency, if done sufficiently in advance of the referendum to permit public awareness of the transaction terms. The Commission concludes that this Final

Decision be conditioned upon the parties fulfilling Wis. Stat. § 66.0817(2) by an appropriate addendum to the Agreement, signed by the parties and filed with the Commission not later than March 19, 2010. If such an addendum is not filed by the designated date, then this Final Decision is void and the transaction may not proceed. The addendum may only include an additional provision permitting either party to decline to close in the event of a Commission-set price higher than that in the Agreement. Because the Commission will not have an adequate opportunity to review any other substantive terms prior to the referendum, the parties may not alter, add to, or delete, any of the other substantive term of the Agreement except as provided in this Final Decision.

Second, a condition appears necessary to protect Antigo if a third-party were to step forward to take the place of Wittenberg as the other party. The statute clearly intends that, if in the event a buyer, such as Wittenberg, is unable or unwilling to complete the transaction, the transaction terms remain available to any third-party stepping forward with a higher, better offer on the terms approved. Because this is a lease-to-purchase transaction stretching over twenty years and three different forms of compensation to Applicant are identified, additional contract clarity is needed as to what constitutes a “better” price. In the event an unknown third-party seeks to assume the deal on better terms, the third-party buyer must, at a minimum, (a) make a one-time cash purchase price for the same assets of not less than \$1,797,966; (b) offer to consummate the same deal proposed by Wittenberg Wireless, LLC, on exactly the same terms and conditions, while offering a higher total cash payment as to the three categories of specified compensation (Agreement, Sec. 6); or (c) offer the same total amount of cash as offered by Wittenberg, but paying it to Antigo over a shorter period of time. In addition, as permitted by

Wis. Stat. § 66.0817(4) any third-party proposal is still subject to the municipality declining to consummate the approved agreement with a third-party it had not dealt with before. A reasonable concern for Antigo is whether a third party is capable of performing and a good fit for the community. The Commission further provides that a qualified third-party offer under (b) or (c) as set forth above, is subject to the Applicant determining that the third-party is at least as creditworthy and as well capitalized as Wittenberg (at or above \$750,000), and is likely to be at least equally responsive to the local service concerns of Applicant and its residents. The foregoing protections for Antigo regarding what constitutes a better offer and the qualifications of a third party buyer shall be incorporated in the Agreement as an “other term” via the addendum required to correct omission of the contract provision required by Wis. Stat. § 66.0817(2).

Order

1. This Final Decision is effective on the day after the date of mailing.
2. The Commission approves of the terms and conditions set forth in the Agreement with Wittenberg Wireless, LLC, as “lease-to-purchase” terms respecting a transfer of the telecommunications facilities (including associated real estate) of Applicant, described in the Agreement and this Final Decision, subject to the provisions of this Final Decision.
3. Applicant shall notify the Commission in writing of the results of the referendum to be held pursuant to Wis. Stat. § 66.0817(4) within ten (10) days after the final vote count.
4. Applicant shall notify the Commission in writing of the date that a transfer in accordance with the terms of the Agreement, as amended by this Final Decision, is consummated

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with Wittenberg Wireless, LLC, or another qualified buyer offering to agree to the same terms on equivalent or better compensation terms, as described in the Opinion.

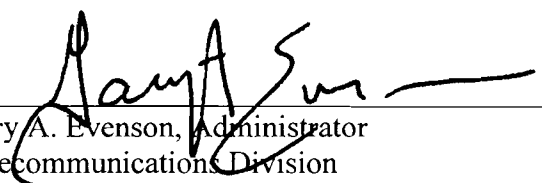
5. The parties shall comply with the two conditions described in the Opinion by executing an addendum to the Agreement, signed by the parties and filed with the Commission not later than March 19, 2010. If a compliant addendum is not timely filed, then this Final Decision is void and the transaction may not proceed. The parties' addendum may not modify, add to, or delete any other substantive terms of the Agreement except to the extent authorized by this Final Decision.

6. This approval for the Agreement is conditioned on the consummation of the transaction described in the Agreement within one year of the date of mailing of this Final Decision.

7. Jurisdiction is retained.

Dated at Madison, Wisconsin, 19 February 2010

For the Commission:



Gary A. Evenson, Administrator
Telecommunications Division

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See attached Notice of Rights

PUBLIC SERVICE COMMISSION OF WISCONSIN
610 North Whitney Way
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Madison, Wisconsin 53707-7854

NOTICE OF RIGHTS FOR REHEARING OR JUDICIAL REVIEW, THE
TIMES ALLOWED FOR EACH, AND THE IDENTIFICATION OF THE
PARTY TO BE NAMED AS RESPONDENT

The following notice is served on you as part of the Commission's written decision. This general notice is for the purpose of ensuring compliance with Wis. Stat. § 227.48(2), and does not constitute a conclusion or admission that any particular party or person is necessarily aggrieved or that any particular decision or order is final or judicially reviewable.

PETITION FOR REHEARING

If this decision is an order following a contested case proceeding as defined in Wis. Stat. § 227.01(3), a person aggrieved by the decision has a right to petition the Commission for rehearing within 20 days of mailing of this decision, as provided in Wis. Stat. § 227.49. The mailing date is shown on the first page. If there is no date on the first page, the date of mailing is shown immediately above the signature line. The petition for rehearing must be filed with the Public Service Commission of Wisconsin and served on the parties. An appeal of this decision may also be taken directly to circuit court through the filing of a petition for judicial review. It is not necessary to first petition for rehearing.

PETITION FOR JUDICIAL REVIEW

A person aggrieved by this decision has a right to petition for judicial review as provided in Wis. Stat. § 227.53. In a contested case, the petition must be filed in circuit court and served upon the Public Service Commission of Wisconsin within 30 days of mailing of this decision if there has been no petition for rehearing. If a timely petition for rehearing has been filed, the petition for judicial review must be filed within 30 days of mailing of the order finally disposing of the petition for rehearing, or within 30 days after the final disposition of the petition for rehearing by operation of law pursuant to Wis. Stat. § 227.49(5), whichever is sooner. If an *untimely* petition for rehearing is filed, the 30-day period to petition for judicial review commences the date the Commission mailed its original decision.³ The Public Service Commission of Wisconsin must be named as respondent in the petition for judicial review.

If this decision is an order denying rehearing, a person aggrieved who wishes to appeal must seek judicial review rather than rehearing. A second petition for rehearing is not permitted.

Revised: December 17, 2008

³ See *State v. Currier*, 2006 WI App 12, 288 Wis. 2d 693, 709 N.W.2d 520.

APPENDIX A

This proceeding is a contested case under Wis. Stat. ch. 227. Therefore, in order to comply with Wis. Stat. § 227.47, the following persons who appeared before the agency are considered parties as defined by both Wis. Stat. § 227.01(8) and Wis. Admin. Code § PSC 2.02(6), (10), and (12), for purposes of any review under Wis. Stat. § 227.53.

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(Not a party but must be served)
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