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SERVICE DATE

DEC 11 1996

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Claim of)	
)	
GTE NORTHWEST INCORPORATED)	DOCKET NO. UT-960324
)	
for Rural Telephone Exemption)	SECOND SUPPLEMENTAL ORDER
Pursuant to 47 U.S.C. Section 251)	
.....)	

SUMMARY

Issue: Does GTE Northwest Incorporated ("GTE") qualify for the Rural Telephone Company Exemption from the interconnection provisions of the 1996 Telecommunications Act (1996 Act)?

Conclusion: The Commission concludes that GTE is a rural telephone company to the extent it provides service in the Contel study area, but its failure to assert the claim in a timely fashion constitutes a waiver of the claim. To the extent GTE did not waive the claim, it is estopped from asserting the claim, based on the the harm to other parties from its failure to notify them.

INTRODUCTION

GTE contends that its study area for the former Contel service area qualifies for the exemption under §3(a)(47)(C). GTE's contention affects all potential interconnectors, so the Commission severed the rural exemption issue from existing interconnection dispute arbitrations for resolution in this proceeding. See, First Supplemental Order.

Notice: The Commission served notice of this proceeding on its entire telecommunications industry mailing list to give all present and prospective interconnectors an opportunity to argue the issue.

Prehearing Conference: Administrative Law Judge Karl Craine held a prehearing conference on October 8, 1996.

Parties: The parties are: AT&T Communications of the Pacific Northwest, Inc.; GTE Northwest Incorporated; MCIMETRO; and TCG Seattle.

Stipulation: The parties stipulated to the following facts:

Contel of the Northwest, Inc. ("Contel"), a local exchange carrier, was merged into GTE Northwest Incorporated ("GTE Northwest") in February 1993. Upon consummation of the merger, Contel ceased to exist as a separate corporate entity.

Prior to the merger, there existed a Washington study area for Contel ("Contel Study Area") and a Washington study area for GTE Northwest ("GTE Study Area").

According to the LATA's and Exchange Territories map dated March 1, 1987, the Contel Study Area included the following exchanges:

- Acme, Alger, Big Lake, Blaine, Burlington, Concrete,
- Conway, Custer, Deming, Edison, Everson,
- Ferndale, Grayland, Hamilton-Lyman, LaConner,
- Laurel, Lynden, Maple Falls, Marblemount, Mount
- Vernon, Sedro Wooley, Sumas, Westport, Curlew,
- Loomis, Molson, Naches, Nile, Republic, Tonasket.

The GTE Study Area included approximately 40 exchanges.

For jurisdictional separation purposes, the Federal Communications Commission ("FCC") froze study area boundaries as they existed on November 15, 1984. 47 C.F.R. Part 36, Appendix. GTE has not applied for a waiver of the study area boundary freeze in Washington.

GTE Northwest, a local exchange carrier, operates and provides telephone exchange services to the exchanges listed in paragraph 3, above.

Fewer than 100,000 access lines receive telephone exchange service from GTE Northwest in the Contel Study Area exchanges listed in paragraph 3, above.

GTE Northwest serves a total of approximately 700,000 access lines in Washington, including the access lines in the Contel Study Area exchanges listed in paragraph [3].

Briefs: The parties filed opening briefs on October 24, and reply briefs on October 31, 1996.

Commission Meeting: The Commission considered the issue at its November 26, 1996, Open Meeting.

MEMORANDUM

I. The Rural Exemption

Section 251(f)(1) of the 1996 Act exempts "rural telephone companies" from the interconnection requirements in §251(c) of the Act. (The exemption does not apply to rural telephone companies which started providing video programming after the effective date of the 1996 Act if the new entrant is a cable operator already providing video programming and desiring to start providing telecommunications services.)

Section 251(f)(2) provides a second mechanism for exempting rural telephone companies with less than two percent of the nation's subscriber lines. The exemption applies to both §251(b) and §251(c).

Section 3(a)(47)(C) of the Act defines a "rural telephone company" to include "a local exchange carrier operating entity to the extent that such entity . . . provides telephone service to any local exchange carrier study area with fewer than 100,000 access lines."

The 1996 Act does not define the term "study area."

II. Parties' Positions

A. GTE

GTE qualifies under a plain reading of the act because §251(f)(1) allows *any* company to qualify as a "rural telephone company" *to the extent* it qualifies under any of five criteria. The "study area" criterion refers to a concept which the FCC has used for a variety of purposes, including the task of identifying high cost areas and providing universal service support payments for those areas. The FCC froze study areas in 1984 and, until recently, required companies to obtain a waiver before consolidating study areas. After GTE acquired Contel, it acquired a waiver for Oregon. It has not done so for Washington, so the separate Contel study area still exists. GTE has not exercised a recently available option to unilaterally consolidate study areas.

MCI Responds: The "to the extent" language refers to situations in which the carrier has more than 100,000 lines in one state and less than 100,000 lines in another.

B. Other Parties

The other parties advanced several arguments to support their position that GTE does not qualify for the exemption.

1. General Intent of the Act

MCImetro: An exemption for GTE would not be consistent with the general pro-competitive intent of the 1996 Act.

TCG Seattle: The Act does not support the notion that an incumbent can be a "rural telephone company" for only part of its service territory in a state.

GTE Responds: The "to the extent" language in §3(a)(47)(C) contemplates multiple study areas in a single state.

2. Legislative History

AT&T and MCImetro: Congress intended to protect small rural carriers from large entities with significantly greater financial and technological resources. It did not intend to protect carriers with the resources available to the GTE family of entities, so the term "local exchange carrier operating entity" does not apply to a firm GTE's size.

GTE Responds: The Commission should assume that Congress chose its words with care:

"The test of resolving the dispute over the meaning of [the statutory provision] begins where all such inquiries must begin: with the language of the statute itself[.] In this case it is also where the inquiry should end, for where, as here, the statutory language is plain, 'the sole function of the courts is to enforce it according to its terms.'

U.S. v. Ron Pair Enterprises, Inc., 489 U.S. 231, 241, 109 S. Ct. 1026, 1030, 103 L.Ed.2d 290 (1989)(internal citation omitted) quoting *Caminetti v. U.S.*, 242 U.S. 470 (1917). The approach suggested by opposing parties, of elevating their perceived purpose of the statute over its clear words, 'is necessarily wrong.' *Orca Bay Seafoods v. Northwest Truck Sales, Inc.*, 32 F.3d 433, 436 (9th Cir. 1994)."

3. Section 251(f)(2)

AT&T, MCImetro, and TCG Seattle: The 1996 Act only allows carriers with fewer than two percent of the nation's subscriber lines to petition a state commission for suspension or modification of requirements in §251(b) or §251(c). The subscriber line limitation applies at the holding company level because Congress intended to exempt only small carriers from the Act. *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, FCC 96-325, CC Docket No. 96-98, (August 8, 1996).

GTE Responds: Subsections (f)(1) and (f)(2) are different provisions; Congress chose to tie the availability of the (f)(2) procedure to the size of the company -- it did not for (f)(1). This distinction alone makes clear that opposing parties' arguments based on their inference of Congressional intent are simply wrong.

4. Study Area Freeze

AT&T and MCImetro: The FCC froze study areas to prevent ILEC's from putting high-cost exchanges into separate study areas to increase their share of support payments from the Universal Service Fund. ILEC's typically have one study area for each state they serve. Nothing suggests that Congress intended to permit large ILEC's to purchase rural exchanges and automatically continue to qualify for exemption from the 1996 Act.

GTE Responds: The "to the extent" language in §3(a)(47)(C) contemplates multiple study areas in a single state.

5. Waiver

AT&T and MCImetro: AT&T requested interconnection with GTE on March 11 and again on March 18. MCImetro requested interconnection on April 3. GTE began negotiations without asserting a claim to the exemption. GTE did not communicate a claim to the exemption until June 19 when it notified the Commission, but not the other parties to pending negotiations, of the claim. GTE continued to negotiate with the other parties without mentioning its claim to the exemption. By remaining silent about the claim, GTE waived it. *In the Matter of the Welfare of S. V. B.*, 75 Wn. App. 762, 770, 880 P.2d 80 (1994).

GTE Responds: Waiver requires the party to have "intentionally relinquished a known right." *Saunders v. Lloyd's of London*, 113 Wash. 2d at 339, 779 P.2d at 254. Conduct giving rise to a claim of waiver "cannot be consistent with any other interpretation than intent to waive." *Id.*, at 340, 779 P.2d at 254. Against these standards, opposing parties' claims wholly fail: GTE's conduct in continuing to negotiate in good faith with these parties -- when approximately 90% of its Washington operations are not covered by the rural exemption -- evidences no intent

whatsoever regarding the Contel study area. At best, opposing parties may point to some conduct to suggest a waiver, but the intent to waive "will not be inferred from 'doubtful or ambiguous factors.'" *In re the Welfare of S.V.B.*, 75 Wash. App. 762, 770, 880 P.2d 80, 84 (1994) quoting *Wagner v. Wagner*, 95 Wash. 2d 94, 102, 621 P.2d 1279 (1980).

6. Estoppel

AT&T and MCImetro: GTE had a duty to promptly assert the claim because its silence prevented other parties to the negotiations from filing notice of their bona fide request under §251(f)(1). This prevented the Commission from addressing the exemption issue within a time frame consistent with the 1996 Act's requirements for resolving interconnection agreement disputes. Given the duty, and the harm to other parties, GTE is estopped from now asserting its claim. *Syrov v. Alpine Resources* 80 Wn. App. 50 (December 7, 1995); *Honey v. Davis*, 78 Wn. App. 279, 896 P.2d 1303, 1306 (June 27, 1995); *Suburban Janitorial Services v. Clarke American*, 72 Wn. App. 302, 310-11, 863 P.2d 1377 (1993).

GTE Responds: "Are AT&T and MCI truly claiming that they would not have negotiated for interconnection agreements in Washington if they had known earlier that GTE Northwest claimed the rural company exemption for the Contel Study Area?" In addition, study area line counts are public knowledge (as a result of the Universal Service Fund proceedings) and could be readily ascertained by parties as experienced in telecommunications as AT&T or MCI. This negates an estoppel, which is available "only when the party claiming estoppel did not know the true facts and had no means to discover them." *Marashi v. Lannen*, 55 Wash. App. 820, 824, 780 P.2d 1341, 1344 (1989). Thus, "where both parties can determine the law and have knowledge of the underlying facts, there can be no estoppel." *Saunders v. Lloyd's of London*, 113 Wash. 2d 330, 341, 779 P.2d 249, 255 (1989).

7. Other State Commissions

Each side submitted commission decisions for other states to support its position:

STATE	ACCEPT CLAIM	REJECT CLAIM	DOCKET & DATE
Illinois		x	96 AB 005; 09/12/96
Kentucky	x		96-313; 08/14/96
Michigan		x	U-11137; 08/28/96
Ohio		x	96-612-TP-UNC; 06/27/96
Virginia	x		PUC960109; 10/22/96

III. Commission Discussion and Decision

A. Qualification

Under the plain terms of the 1996 Act, GTE is a rural telephone company with respect to its Contel Study Area:

- (1) "the term 'rural telephone company' means a local exchange carrier operating entity" -- The parties stipulated that GTE is a local exchange carrier and identified GTE as the operating entity for the Contel study area. *Fact Stipulation ¶5*. Nothing in the Act limits the term "local exchange carrier operating entity" to small entities;
- (2) "to the extent that such entity" -- GTE Northwest only asserts its status as a rural telephone company with respect to the Contel Study Area. Partial qualification as a rural telephone company is consistent with the "to the extent" language in §3(a)47(C);
- (3) "provides telephone exchange service" -- The parties stipulated that GTE Northwest provides telephone exchange services in the Contel study area. *Fact Stipulation ¶ 5*;
- (4) "to any local exchange study area" -- Even if carriers typically have just one study area per state, the Contel study area exists as a second Washington study area. *Fact Stipulation ¶ 3 and ¶ 4*; and,
- (5) "with fewer that 100,000 access lines" -- The parties stipulated to fewer than 100,000 access lines. *Fact Stipulation ¶ 6*.

B. Waiver and Estoppel

The Commission must resolve waiver and estoppel issues in the context of the 1996 Act. The Act establishes the following time schedule for reaching interconnection agreements:

Request for Negotiation. The process starts when the new entrant asks the incumbent to negotiate. §252(b)(1).

Petition for Arbitration. "During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues." §252(b)(1).

Decision Deadline. "The State commission shall ... conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section." §252(b)(4)(C).

When the local exchange carrier claims the rural telephone company exemption, §251(f)(1)(B) of the 1996 Act establishes the following schedule for the state commission to follow in determining whether to terminate the exemption:

Notice to Commission. "The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission."

Commission Inquiry. "The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A)."

Decision Deadline. "Within 120 days after the State commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 (other than subsections (b)(7) and (c)(1)(D) thereof)."

It is not clear from §251(f)(1)(B) whether Congress intended for the exemption inquiry to run concurrently with negotiations or to delay negotiations until the end of the inquiry. The answer to that question lies in §251(f)(1)(A) which states:

(A) Exemption: Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 (other than subsections (b)(7) and (c)(1)(D) thereof).

Section 252(f)(1)(A) creates a two-step process by eliminating a rural telephone company's duty to negotiate with new entrants. If the rural telephone company responds to a new entrant's request for negotiation by claiming the exemption, the new entrant can immediately ask the state commission to start an inquiry to determine whether to terminate the exemption. The state commission inquiry delays an agreement by a maximum of 120 days.

If this Commission allows incumbents to claim the exemption after commencing negotiations, it would sanction an anti-competitive strategy which incumbents could use to prevent new entrants from obtaining agreements within the 1996 Act's explicit time frames. The Commission shares the Ohio commission's concern about the implications of GTE's behavior:

The company has had to have known for some time that it would be asserting this exemption, yet the company chose to withhold this vital information from potential competitors and from this Commission until late in the negotiation process with Time Warner and AT&T. Such posturing certainly causes us to step back and ponder the company's intentions, including whether the company is positioning itself to act in an anti-competitive fashion going into the emerging local competitive era. *Ohio Order ¶6.*

This Commission will not sanction behavior which is inconsistent with the incumbent's statutory duty to negotiate in good faith. *See* §251(c)(1). An ILEC receiving a request under §252(b)(1) negotiates in bad faith unless it explicitly alerts the new entrant to any potential incumbent action which would threaten the new entrant's ability to obtain an agreement within the 9 month statutory time frame. The potential incumbent action in this case was GTE's potential claim to the rural telephone company exemption for the Contel Study Area.

GTE correctly notes that study area line count information is publicly available, but that misses the point. The missing information was GTE's intentions regarding the exemption. Only GTE knew whether it would claim the exemption or pursue a single agreement for all of its operations, so the Commission is not precluded from applying estoppel principles.

The Commission *should* apply estoppel principles because GTE's behavior was harmful to the new entrants. GTE's failure to disclose its intentions prevented the new entrants from promptly pursuing their rights under §251(f)(1)(B).

GTE's silence about the exemption would be inconsistent with its duty to negotiate in good faith unless GTE intended to waive the exemption. GTE asserts that it was negotiating in good faith, so the Commission should not now characterize its silence as doubtful or ambiguous conduct. The Commission concludes that GTE intended to waive its claim to the exemption.

The Commission notes that the Act prohibits GTE from discriminating among competitive carriers. Since GTE waived the exemption for the competitive carriers with pending petitions, it would discriminate against subsequent competitive carriers if it asserted the claim with respect to their requests for negotiations.

FINDINGS OF FACT

- 1. GTE is a rural telephone company to the extent it provides service in the Contel Study Area.
- 2. GTE is estopped from asserting its claim to the exemption.
- 3. If GTE was negotiating in good faith, it waived its right to claim the exemption.

ORDER

THE COMMISSION ORDERS That arbitrators in currently pending GTE arbitrations ignore GTE's claims to the rural telephone company exemption.

DATED at Olympia, Washington and effective this 11th day of December 1996.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION



SHARON L. NELSON, Chairman



RICHARD HEMSTAD, Commissioner



WILLIAM R. GILLIS, Commissioner