

SERVICE DATE

APR - 2 1996

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

GTE NORTHWEST)	
INCORPORATED,)	DOCKET NO. UT-950277
)	
Complainant,)	FIFTH SUPPLEMENTAL ORDER
)	
v.)	COMMISSION DECISION AND ORDER
)	GRANTING MOTION TO DISMISS
WHIDBEY TELEPHONE COMPANY,)	
)	
Respondent.)	
.....)	

SUMMARY

PROCEEDINGS: On March 2, 1995, GTE Northwest Incorporated ("GTE") filed with the Commission a complaint against Whidbey Telephone Company ("WTC") alleging that the rates charged by WTC in a portion of its South Whidbey Exchange, designated the Supplemental Service Area ("SSA"), do not recover the costs of providing service in the area. In its answer WTC denied the allegation, raised certain affirmative defenses, and as a conditional counterclaim, alleged that the rates charged by GTE in the SSA do not recover the costs of providing service in the area. WTC moved to dismiss the complaint at the conclusion of GTE's case in chief, arguing that GTE had not carried its burden of proof. The Third Supplemental Order in this proceeding, Interlocutory Order Denying Motion to Dismiss, denied the motion. WTC petitioned for review of that order.

HEARINGS: A prehearing conference was held on August 1, 1995, and a hearing for cross-examination of GTE's direct case was held on October 12, 1995. The hearings were held in Olympia before Administrative Law Judge ("ALJ") John H. Prusia.

APPEARANCES: GTE is represented by Richard E. Potter, A. Timothy L. Williamson, and Timothy J. O'Connell, attorneys, Everett. WTC is represented by Robert S. Snyder, attorney, Seattle. The Staff of the Washington Utilities and Transportation Commission ("Commission Staff") is represented by Jeffrey D. Goltz and Shannon E. Smith, Assistant Attorneys General, Olympia. Donald T. Trotter, Assistant Attorney General, appears as Public Counsel.

COMMISSION: The Commission will reverse the Third Supplemental Order, and dismiss the complaint without prejudice, because GTE did not carry its burden of proof.

MEMORANDUM

I. BACKGROUND

This is a complaint proceeding by GTE Northwest Incorporated against Whidbey Telephone Company. GTE alleges that the rates charged by WTC in the Supplemental Service Area are unjust, unreasonable, in violation of law, and/or insufficient to yield reasonable compensation for the services rendered, in violation of RCW 80.36.140, and are unreasonable, unremunerative, illegal, unfair and/or intending or tending to oppress GTE, stifle competition, and/or create or encourage the creation of a monopoly, in violation of RCW 80.04.110(1).

The SSA is a portion of WTC's South Whidbey exchange which overlaps a portion of GTE's Coupeville Exchange. The Commission authorized WTC to provide service in the SSA, and to extend the tariffs currently in effect in the South Whidbey exchange to the SSA in Docket No. UT-950030.

GTE objected to the grant to WTC to provide service in the SSA. GTE's complaint seeks a Commission order requiring WTC to charge rates in the SSA which cover costs, and such other relief as may be just and reasonable.

WTC answers denying that GTE and WTC are in competition in the SSA; denying that the rates charged in the SSA do not recover the costs of providing service in the SSA; denying that the rates charged in the SSA are unjust, unreasonable, in violation of law, and/or insufficient to yield reasonable compensation for the services rendered; and, denying that those rates are unreasonable, unremunerative, illegal, unfair and/or tending to oppress GTE, stifle competition and/or create or encourage the creation of a monopoly in the SSA. WTC counterclaims conditioned upon 1) the Commission finding that GTE and WTC are in competition with one another in the SSA, and 2) the Commission ordering WTC to increase the rates it is authorized to charge in the SSA. The counterclaim's allegations mirror those of GTE's complaint. WTC requests the Commission determine and fix the rates to be observed by both companies in the SSA, and/or establish rates that GTE shall observe in the SSA, and grant WTC such other relief as may be just and reasonable.

On July 11, 1995, the Commission issued a notice of prehearing conference for August 1, 1995, and provided:

All interested persons, including the Commission Staff, if any, will be expected to have available at that time for distribution copies of the direct testimony and exhibits that they propose to present. Those documents will be marked as exhibits. P. 2.

After receipt of the notice, GTE failed to move to invoke the Commission's discovery rule, which would permit it could conduct discovery prior to preparing and prefilng its testimony and exhibits.

GTE distributed prefiled testimony of Lida C. Tong with attached exhibits 2, 3, and 4 at the prehearing conference. The Commission's discovery rule, WAC 48-09-480, was invoked upon the motion of GTE. The parties engaged in an off-record discussion of scheduling, and then jointly proposed a schedule which was adopted by the ALJ. GTE did not request an opportunity to conduct discovery in order to supplement its prefiled materials in any manner. It did not raise any objection to the requirement imposed upon it to prefile materials at the prehearing conference, nor did it object to the lack of a prefiling requirement on other parties.

On October 12, 1995, a hearing was held for cross-examination of GTE's direct testimony. At the end of the hearing, Commission Staff voiced an oral motion to dismiss GTE's complaint on two grounds: (1) that GTE failed to sustain its burden of proof, and on the alternative ground, (2) that even if it did meet its burden, the Commission, as a matter of law and policy, should exercise its discretionary authority not to implement the relief requested by GTE. GTE did not design its own proposed remedy, but sought to have the Commission Staff perform a Staff led investigation into the cost of serving the SSA. Staff argued the appropriate forum to address the policy issue of competitive pricing is a generic proceeding. Staff subsequently withdrew its motion to dismiss; it later filed a memorandum in support of WTC's motion to dismiss.

WTC moved to dismiss the complaint, with prejudice, pursuant to WAC 480-09-420(8), and in accordance with Civil Rule 41(b)(3). WTC's motion contends that GTE has not provided proof either that competition exists between GTE and WTC in the SSA, or that WTC's tariffed rates for local exchange service in the SSA are below cost.

Commission Staff's memorandum supporting WTC's motion disagrees with WTC's position that GTE and WTC are not in competition in the SSA. Staff agrees with WTC that GTE has not demonstrated that WTC's prices are below cost, and argues that the instant complaint should be dismissed because the relief GTE requests is not appropriate. Staff argues, first, it would be bad policy to require a Staff investigation, or long-run incremental cost ("LRIC") studies by the entrant, every time a competitor proposed to enter into another company's historic service area, because the requirement would be a limitation on the state policy to promote diversity of supply of telecommunication services. Second, the area in question is so small, and the customer base so finite, that Staff should not be burdened with performing such a study when much larger issues are at hand. Third, the purpose of RCW 80.04.110 is to protect competition, and GTE's requested relief would use the statute to restrict competition by creating barriers to competition, such as requiring complicated rate studies of new entrants into even the tiniest markets prior to commencing service. In conclusion, Staff argues the "important policy decisions" required if GTE's complaint is not dismissed are more appropriately undertaken in a generic proceeding or an adjudication with numerous parties and much more at stake.

Public Counsel also submitted a memorandum in support of WTC's motion to dismiss. He too disagrees with WTC's position that GTE and WTC are not in competition in the SSA, but agrees with WTC that GTE has not proven that WTC's rates are below cost,

and argues the relief sought by GTE is not supported by the record. He argues the record is insufficient to award relief under RCW 80.04.110(1), because adequate and fair relief under the statute would require evidence of both companies' costs of service, and GTE presented no evidence of its own costs.

GTE opposed the motion to dismiss. GTE claims the Commission led it to believe that a formal complaint was the appropriate vehicle to protest WTC's rates in the SSA. It cites to extensive extra-record evidence, including events in Docket No. UT-950030, the open meeting docket in which the Commission authorized WTC, over GTE's protest, to expand its South Whidbey Exchange into the southern portion of GTE's Coupeville exchange, and made WTC's existing tariffed service offering and rates available to customers in the SSA.

In its answer, GTE contends that its testimony and WTC's filed tariffs establish that the two companies are in competition in the SSA. GTE also contends: (1) the Commission has not established the cost standard to be applied to situations such as this where one traditional local exchange company is extending its tariffed basic service and other offerings into the filed exchanges of another traditional local exchange company; (2) that it has provided prima facie evidence that WTC's rates are below cost; and, (3) that the Commission should establish the appropriate cost standard, and then either order WTC to demonstrate that its rates in the SSA are above cost, or to allow GTE an opportunity to demonstrate, through discovery, that WTC's rates are not above cost. GTE argues under the instant circumstance the Commission should not dismiss this proceeding pursuant to Rule 41(b)(3).

GTE rebuts Commission Staff's argument that the Commission should not grant GTE's proposed remedy because requiring LRIC studies every time one company wishes to enter into another company's historic service area would be a limitation on the state policy to promote diversity of supply of telecommunications services. It urges that Commission rules and a number of statutes generally require prices to be above cost, and GTE would have the very same burden, under RCW 80.04.130(1), if it were to ask to reduce its rates to match WTC's. GTE contends Staff's argument that this case is small and not worth Staff's time does not justify a denial of due process or the fair application of law, and that the amount of revenue GTE could lose is sizeable. As to Staff's argument that requiring WTC to demonstrate its rates in the SSA are above cost would restrict competition by creating barriers, GTE responds that allowing below cost pricing would countenance unfair and anticompetitive conduct.

WTC filed a reply to GTE's answer. WTC argues that GTE's answer containing a request the Commission clearly state what cost standard should be addressed by the parties is in violation of WAC 480-09-420(8), which requires that motions be filed separately. WTC also asserts that: (1) GTE is in effect seeking a declaratory ruling as to Commission policy, which is beyond the scope of the relief requested in its complaint and not supported by requisite expert policy testimony; (2) GTE had ample opportunity for

discovery and its failure to engage in discovery should not be excused; (3) GTE has not stated grounds for disregarding Civil Rule 41(b)(3); (4) GTE wholly failed to carry its burden of proof with respect to the competition component of its claim; (5) GTE's argument it has established that WTC's rates are below fully distributed costs is incorrect; and, (6) GTE has failed to demonstrate how receipt of any subsidy by WTC is unfair.

II. THE THIRD SUPPLEMENTAL ORDER

A. The Order's Rulings

The Third Supplemental Order made the following four rulings: (1) the motion by WTC for an order dismissing the complaint with prejudice is denied; (2) the request by GTE for a declaratory ruling regarding cost standards is denied; (3) GTE is authorized to conduct additional discovery; and, (4) GTE will be allowed to present additional evidence of the costs of service of both WTC and GTE in the SSA, and any other evidence bearing upon whether WTC's rates are competitively fair.

B. The Petition for Interlocutory Review

WTC petitions for interlocutory review of rulings (1), (3), and (4). WTC argues that the initial order's determination that GTE has not established a prima facie case should have been determinative. WTC also objected to the initial order's reference to extra-record information regarding the pertinent Commission open meeting. It argues again that its motion to dismiss was not predicated on a contention that GTE has selected the wrong cost standard, but that GTE failed to sustain its burden of proof as judged by the cost standard it selected. WTC argues that to the extent there is uncertainty as to the relevant cost standard, GTE was free to choose to present its direct case on more than one standard.

In response to the Third Supplemental Order's position that continuing the case, with further discovery, would be more efficient than dismissal (presuming a GTE refiling), WTC notes again that it seeks a dismissal with prejudice. WTC also argues that consideration of GTE's requests to conduct discovery and present additional evidence was in direct violation of Commission procedural rule 480-09-420(8). WTC asserts the circumstance here does not constitute cause for further extending the ten month deadline for a final order. Finally, WTC expresses concern that the Third Supplemental Order could be read to rule upon ultimate facts, rather than merely discussing what GTE's evidence shows.

Commission Staff supports the petition for review for the reasons set forth in its answer to the motion to dismiss discussed above. It argues that the following statement in the initial order should be dispositive:

If the Commission were to accept GTE's position, and were to decide the complaint on the basis GTE has selected, it would have to conclude that GTE has failed to make a prima facie showing that WTC's local service is priced below cost. P. 10.

Staff again notes its concern that the remedy sought by GTE appears to be to have the Commission initiate a rate case involving WTC's service in the SSA, and to require either the Commission Staff or WTC to perform the requisite cost studies.

Commission Staff also notes that if the Third Supplemental Order is affirmed, the Commission should allow adequate time for the parties to try the matter. Staff urges that if the ten month deadline is a concern, one solution would be for GTE to seek permission to dismiss its complaint without prejudice and then refile and restart the ten month clock. Staff seeks an order clarifying GTE has the burden of proof in this proceeding, a burden which it cannot shift to Staff or WTC.

Public Counsel also supports the relief sought in WTC's petition. He incorporates the arguments made in his earlier response to the WTC motion to dismiss discussed above. He argues the basis for dismissal should have been the ALJ's conclusion that GTE had failed to make a prima facie case.

Public Counsel also argues GTE is the party that selected the complaint process, and it bears the burdens and benefits of that process. He notes that in a case such as this where no established standard exists for the type of cost analysis which is appropriate, there are several options open to a party. Among its choices are adjudication, rulemaking, or an interpretive or policy statement. GTE elected adjudication and therefore GTE must assert the standard it deems appropriate, and support that standard with proof.

GTE did not answer the petition.

III. COMMISSION DISCUSSION AND DECISION

A. Burden of Proof

Based upon our review of the record in this proceeding, the Commission concurs with the following statement in the initial order:

If the Commission were to accept GTE's position, and were to decide the complaint on the basis GTE has selected, it would have to conclude that GTE has failed to make a prima facie showing that WTC's local service is priced below cost. P. 10.

The Commission believes this determination to be dispositive.

GTE chose to bring a complaint case under RCW 80.04.110. In making this choice, GTE assumed the burdens of the moving party in a complaint proceeding. It was the responsibility of GTE to analyze and determine what it believed to be the elements of a prima facie case. It was the responsibility of GTE to determine what proof would establish each of those elements, and to proffer the requisite evidence in its direct case. If data were

required, it was GTE's responsibility to obtain those data. If studies were required, it was GTE's responsibility to perform those studies. We would expect GTE, and any other company filing a complaint against another company in a proceeding before the Commission, to evaluate its responsibilities and have a strategy for fulfilling them before a complaint is ever filed.

The option of bringing a complaint case was available to GTE, and GTE availed itself of that option. The Commission made a forum available to it, and GTE had the responsibility of satisfying the burdens imposed by the option chosen. This matter will be dismissed because GTE did not carry the burden of proof it undertook in choosing to bring the complaint.

B. Dismissal of GTE's Complaint

WTC's motion to dismiss is made in accordance with Rule 41 (b)(3) of the Civil Rules for Superior Court. Under that rule, unless the court in its order for dismissal otherwise specifies, the dismissal operates as an adjudication on the merits. If an adjudication on the merits is made, the court is required by the rule to make findings. Based upon this provision, WTC has asked the Commission to dismiss GTE's motion with prejudice. Nowhere in its motion, petition, or memoranda, has WTC outlined a persuasive argument why the dismissal should be with prejudice. The Commission specifies that the dismissal ordered herein shall be without prejudice.

The reason for dismissal is GTE's failure to present a prima facie case.¹ WTC argues that the issue of whether there is competition between GTE and WTC in the SSA is not ripe for determination. The Commission will not allow GTE's failure to adequately carry its burden of proof to bar future consideration of the proper level rates for WTC and GTE in the SSA.

There is a dispute between the parties that should be resolved in some future forum, whether it is a refiled complaint, a more generic adjudication, a rulemaking, or an interpretive or policy statement. As outlined above, GTE may file another complaint proceeding, if it develops proof of an appropriate standard, proof that WTC's rates do not meet that standard, and if it is able to fashion a remedy which the Commission is willing to approve. It is not the duty of Commission Staff to perform any of these tasks for GTE. If GTE wishes to obtain the assistance of Commission Staff, Public Counsel, WTC and other parties in resolving these issues, it should consider working with them to determine an appropriate manner of proceeding. Given the enactment of the federal Telecommunications

¹ WTC has argued that the appropriate evaluation is whether GTE has established its case by a preponderance of the evidence, not whether it has made a prima facie case. The distinction makes no difference in this determination, although it might matter in a different setting.

Act of 1996, it may be wise for these parties and the broader local telecommunications provider community to discuss appropriate means to govern traditional LEC-on-LEC competition and the role of universal service funds in "facilitating" such competition.

C. Issues Posited by the Complaint

In dismissing GTE's complaint, the Commission does not intend our action as a comment upon the merits. As stated at the open meeting when approving WTC's tariff, we believe significant policy matters are presented by the extension of service offerings by incumbent local exchange companies ("LEC") into one another's tariffed service areas. We are not persuaded that these policy matters are not now ripe for determination, regardless of revenue impact or customer count affected by competition in the SSA. Whether or not competition currently exists in the SSA, in the practical sense of both companies competing for the same customers, with the same or similar services offerings, on the basis of price, service quality, and other measures, the circumstance reflects the essence of these policy matters and the need for their resolution.

In addition to the obvious issue at what price should service be offered, and upon what basis should price be determined, the Commission believes other concerns are posited by the circumstance of LEC-on-LEC competition. Not the least of these concerns are universal service issues, principally the potential misuse by incumbent LECs of universal service funds. Such funds should not be used to protect a company's revenue stream while it underprices an entire class of service in order to establish or enhance a competitive position. Likewise, such funds should not be used to subsidize prices for targeted services or customers in order gain a competitive advantage.

The Commission believes these policy matters must be addressed sooner rather than later. Given the parties' experience with the instant proceeding and the broader reach of the issues posed, a complaint proceeding in retrospect probably is not the best forum for this purpose. The Commission encourages the LECs to pursue discussions among themselves and together with Commission Staff, Public Counsel, and others explore this question -- nevertheless, these policy matters must be addressed and resolved.

For the reasons stated above, WTC's petition for interlocutory review will be granted, and GTE's complaint dismissed.

Having discussed above in detail both the oral and documentary evidence concerning all material matters in this proceeding, and having stated findings and conclusions, the Commission now makes the following summary of those facts and conclusions. Those portions of the preceding detailed findings pertaining to the ultimate findings and conclusions are incorporated by this reference.

FINDINGS OF FACT

1. The Washington Utilities and Transportation Commission is an agency of the state of Washington vested by statute with authority to regulate rates, rules, regulations, practices, accounts, securities, and transfers of public service companies, including telecommunication companies.

2. GTE Northwest Incorporated and Whidbey Telephone Company are telecommunications companies doing business in the state of Washington, and are subject to the jurisdiction of the Washington Utilities and Transportation Commission.

3. On March 2, 1995, GTE filed with the Commission a complaint against WTC alleging that the rates charged by WTC in a portion of its South Whidbey exchange designated a Supplemental Service Area ("SSA") do not recover the costs of providing service in the area. In its answer WTC denied the allegation, raised certain affirmative defenses, and as a conditional counterclaim, alleged that the rates charged by GTE in the SSA do not recover the costs of providing service in the area.

4. A prehearing conference was held on August 1, 1995, and a hearing for cross-examination of GTE's direct case was held on October 12, 1995. At the conclusion of GTE's direct case, WTC moved to dismiss the complaint.

5. GTE's only witness, Lida Tong, testified that the appropriate test for the Commission to apply under RCW 80.04.110(1) is whether WTC's rates in the SSA cover WTC's long-run incremental costs of service. GTE did not present any evidence of WTC's long-run incremental costs of service in the SSA. GTE failed to make a prima facie showing that WTC's local exchange service in the SSA is priced below cost.

CONCLUSIONS OF LAW

1. The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of this proceeding and the parties.

2. The complaint by GTE against WTC should be dismissed without prejudice.

On the basis of the foregoing findings of fact and conclusions of law, the Commission makes and enters the following order.

ORDER

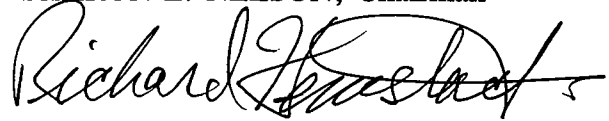
THE COMMISSION ORDERS That the complaint of GTE Northwest Incorporated against Whidbey Telephone Company is dismissed without prejudice.

DATED at Olympia, Washington, and effective this 2nd day of April 1996.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION



SHARON L. NELSON, Chairman



RICHARD HEMSTAD, Commissioner



WILLIAM R. GILLIS, Commissioner

NOTICE TO PARTIES:

This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-09-810, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-09-820(1).