COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, MAY 29, 2009

PETITION OF

SPRINT NEXTEL

CASE NO. PUC-2007-00108

For reductions in the intrastate carrier
access rates of Central Telephone Company
of Virginia and United Telephone-Southeast, Inc.

ORDER ON INTRASTATE ACCESS CHARGES

On November 7, 2007, Sprint Communications Company of Virginia, Inc.; Sprint Spectrum L.P.; Sprintcom, Inc.; Nextel Communications of the Mid-Atlantic, Inc.; and NPCR, Inc. d/b/a Nextel Partners (collectively, "Sprint Nextel") filed a petition with the State Corporation Commission ("Commission") seeking a reduction in the intrastate carrier switched access[1] rates charged by Central Telephone Company of Virginia ("Centel") and United Telephone-Southeast, Inc. ("United") (collectively, "Embarq"). On November 16, 2007, AT&T Communications of Virginia, LLC ("AT&T") filed comments in support of the petition. Embarq filed responsive pleadings on November 28 and December 6, 2007. Sprint Nextel filed a response on December 12, 2007, and Embarq filed a reply on January 2, 2008. On February 15, 2008, the Commission issued an Order Establishing Investigation that, among other things, assigned this matter to a Hearing Examiner for further proceedings.

On April 15, 2008, the Hearing Examiner held a procedural conference, with representatives from Sprint Nextel, Embarq, AT&T, the Office of the Attorney General's

[1] As previously explained by the Commission, "switched access ... provides interconnections of short duration between [an interexchange carrier's] customer and that [interexchange carrier's] interexchange network." *Commonwealth of Virginia, ex rel. State Corporation Commission, Ex Parte, In Re: Investigation of the appropriate methodology to determine intrastate access service costs*, Case No. PUC-1987-00012, 1988 S.C.C. Ann. Rep. 232, 232 (May 18, 1988).

Division of Consumer Counsel ("Consumer Counsel"), and the Commission's Staff ("Staff") in attendance. On April 17, 2008, the Hearing Examiner issued a ruling that, among other things, established a procedural schedule for this case.

On September 29 and 30, 2008, the Hearing Examiner held public evidentiary hearings. On or before November 4, 2008, the following filed post-hearing briefs: Embarq; Sprint Nextel; AT&T; Consumer Counsel; and the Staff. In addition, the Commission received a number of written and electronic comments in this matter.

On January 28, 2009, the Hearing Examiner issued a Report in this matter ("Report"), wherein, among other things, he found that Embarq's intrastate access charges constitute a subsidy having a detrimental impact on competition in the Commonwealth.[2] The Hearing Examiner also recommended that Embarq's intrastate access charges be adjusted to eliminate the Carrier Common Line Charge ("CCLC") over three years and further adjusted to current interstate access rates in the fourth year.[3] On or before February 18, 2009, the following filed comments on the Hearing Examiner's Report: Embarq; Sprint Nextel; AT&T; and Consumer Counsel.[4]

On March 17, 2009, in response to a motion from Embarq, the Commission heard oral argument on the findings and recommendations in the Hearing Examiner's Report. The following participated in oral argument: Embarq; Sprint Nextel; AT&T; Consumer Counsel; and the Staff.

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[2] Report at 40-41.

[3] *Id.*

[4] Embarq filed a corrected version of its Comments (non-confidential) on February 24, 2009.

NOW THE COMMISSION, having considered this matter, is of the opinion and finds as follows.

Switched Access Charges

Centel and United (Embarq) are two incumbent local exchange carriers ("ILECs") in the Commonwealth. Embarq serves "approximately 370,000 access lines in 90 communities in the Commonwealth and provides a full portfolio of communications services to their customers, including local, long-distance, wireless, high-speed data and video."[5] The 90 communities served by Embarq "range in size from small communities like Rich Valley to more urban areas like Charlottesville."[6] In addition, Embarq's "gross book investment of its property, plant and equipment in Virginia [is] approximately $1.1 billion."[7]

"Intrastate" switched access charges are paid by long-distance carriers to local exchange carriers ("LECs") for originating and terminating long-distance calls over the LEC's network within the same state. For example, if a Sprint Nextel long-distance customer is provided local exchange service by Verizon and that customer makes an in-state long-distance call to someone provided local exchange service by Embarq, Sprint Nextel pays originating intrastate access charges to Verizon and terminating intrastate access charges to Embarq.[8] Furthermore, LECs may also offer long-distance services to their customers (i.e., through a package of services usually including local, long-distance and miscellaneous services and referred to as a "bundle"); thus, Embarq (or its affiliated long-distance carrier) may provide Embarq customers with

[5] Exh. 2 at 3.

[6] Exh. 2 at 6.

[7] Exh. 2 at 3.

[8] In this example, if the long-distance call was made from a customer with Embarq local exchange service to another Embarq local exchange customer, the long-distance provider pays both originating and terminating intrastate access charges to Embarq.

long-distance service and *pay* intrastate access charges to other LECs (and effectively to itself) for long-distance calls originating and terminating to other LECs' customers.

Embarq states that "intrastate switched access rates have been established at levels that not only recover the costs of access service, but also help recover the costs of basic local service."[9] Embarq further asserts that its rates for local exchange service do not cover the cost of providing such service.[10] However, Embarq's local exchange rates – at Embarq's request – are not established based on cost of service. Furthermore, the instant proceeding will *not* determine the rates that Embarq can charge to its retail customers; those rates are currently governed by Embarq's Modified Plan.

Embarq's Modified Plan, however, does not provide a specified method for determining the level of intrastate access charges. Rather, such plan states that "[p]ricing for access services, except as permitted in Section G above [regarding revenue-neutral rate changes], will be considered *separately* by the Commission."[11] Accordingly, in the instant proceeding, the prices for intrastate access charges are being considered separately by the Commission in accordance with Embarq's Modified Plan.

Carrier Common Line Charge

Embarq's current intrastate switched access rates equate to $0.0517 per minute for United and $0.0426 per minute for Centel.[12] These intrastate access rates are more than five times higher than Embarq's comparable interstate switched access rates and are more than three times

[9] *See* Exh. 2 at 4.

[10] *See id.*

[11] *See* Embarq's Modified Plan at ¶ L (emphasis added).

[12] *See* Report at 21.

higher than Verizon's intrastate access rates.[13] The Hearing Examiner found that Embarq's intrastate access charges collect a subsidy for local exchange service from all carriers terminating calls to Embarq's Virginia customers.[14] Embarq does not contest this finding. Rather, Embarq claims that its intrastate access rates "act as a subsidy for local exchange telephone service" and that it "need[s]" such subsidies in order to serve its customers.[15]

A major component of Embarq's intrastate access charges is a monthly fixed CCLC amount which, according to the Report, is designed as a pure subsidy rate element.[16] The CCLC currently produces approximately $22.8 million of annual revenue.[17] As explained by the Staff, in 2001 the Commission issued an Order approving a settlement, agreed to by Embarq, designed to reduce the per-minute subsidy collected through intrastate access charges – without any increase in rates for basic local exchange telecommunications services.[18] The *Embarq Access Settlement* adopted a fixed CCLC recovery mechanism assuming that access minutes (and lines) would continue to grow.[19] Rather, access minutes have declined in recent years; as a result, Embarq's average intrastate access revenue per minute has not decreased to the level projected

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[13] *See, e.g.,* Report at 10, 21.

[14] Report at 40. Although we conclude that access charges present a subsidy for Embarq to the extent that those charges are above the cost of providing intrastate access service, we have not determined – in this proceeding – what services, if any, are being subsidized via access charge revenues.

[15] *See* Embarq's February 24, 2009 Comments at 10, 17. *See also id.* at 28 (According to Embarq, its "current level of intrastate switched access rates not only recovers the cost of switched access service but also helps recover the cost of basic local service in the company's high-cost, rural areas.").

[16] *See, e.g.,* Report at 4, 27-34.

[17] Embarq's February 24, 2009 Comments at 34. *See also* Report at 34; Exh. 1C, Attach. V.

[18] *Commonwealth of Virginia, ex rel. State Corporation Commission, Ex Parte, In Re: Investigation of the appropriate level of intrastate access service prices*, Case No. PUC-2000-00003, 2001 S.C.C. Ann. Rep. 254 ("*Embarq Access Settlement*"). *See, e.g.,* Report at 10-11.

[19] *See, e.g.,* Report at 10-11.

under the settlement. In other words, the fixed CCLC revenue amount is being recovered from a decreasing base of switched access minutes and, therefore, increasing the average per minute intrastate access rate paid by long distance carriers contrary to the intent of the settlement.[20]

Reductions to Intrastate Access Rates

The subsidies contained in intrastate access charges distort the true cost of providing service, the true value of such service, and the development of the market for telephone services.[21] As noted above, Embarq's intrastate access rates are more than five times higher than its comparable interstate access rates, and the agreed upon prior attempt (in the *Embarq Access Settlement*) to begin reducing Embarq's intrastate access rates was unsuccessful. We also have considered, among other things, Embarq's status as the second largest ILEC in the Commonwealth[22] and the existence of Embarq's Modified Plan. In addition, we find that our decision herein is consistent with the General Assembly's local exchange telephone service competition policy as set forth in § 56-235.5:1 of the Code:

> The Commission, in resolving issues and cases [under this title,] ... shall, consistent with federal and state laws, consider it in the public interest to, as appropriate, ... promote competitive product offerings, investments, and innovations from all providers of local exchange telephone services in all areas of the Commonwealth.[23]

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[20] *See, e.g.*, Report at 9-11.

[21] *See, e.g.*, Report at 24-25.

[22] Based upon information filed with the Commission, Verizon (that is, Verizon Virginia Inc. and Verizon South Inc.) has the greatest number of access lines in Virginia and Embarq (that is, United and Centel) has the second largest number of access lines in the Commonwealth.

[23] Embarq asserts that § 56-235.5:1 of the Code "simply does not mandate the elimination of subsidies from [intrastate access] rates." Embarq's February 24, 2009 Comments at 3. As stated above, we find that our decision herein is consistent with this statute; we need not, however, and have not concluded that such decision is mandated by statute.

Accordingly, we again find – as the Commission did in the *Embarq Access Settlement* – that it is reasonable to decrease Embarq's intrastate access rates in order to reduce the level of subsidies included in such charges. First, we find that it is reasonable to modify the CCLC recovery mechanism so that it no longer guarantees the same annual fixed level of CCLC revenue. This modification should help ensure, in contrast to the implementation of the *Embarq Access Settlement*, that the access charge reductions contemplated herein are realized. Specifically, Embarq shall change the CCLC recovery mechanism to a per minute rate (that is further revised in accordance with the schedule set forth below) based on year-end 2007 local switching minutes and current fixed CCLC revenue amounts.[24] We find that changing the CCLC recovery mechanism so that it no longer guarantees the same annual fixed level of revenue will help effectuate, and will result in a reasonable implementation of, the intrastate access charge reductions required herein.

Next, Embarq shall reduce its intrastate access rates by reducing the CCLC per minute rate by 50% pursuant to the following schedule:

1) On or before January 1, 2010, Centel and United, individually, shall restructure their CCLC component to a per minute rate based on year-end 2007 local switching minutes;

2) On or before July 1, 2010, Centel and United, individually, shall reduce their January 1, 2010 per minute CCLC by 25%; and

3) On or before July 1, 2011, Centel and United, individually, shall further reduce the CCLC to 50% of January 1, 2010 per minute CCLC.

Based on the considerations set forth above and the record in this proceeding, we conclude that the intrastate access charge reductions set forth herein are reasonable. We recognize, however, that the above transition does not completely eliminate the CCLC as

[24] We also note that, prior to the *Embarq Access Settlement*, Centel's CCLC was assessed on a per line basis. *See, e.g.*, Exh. 44 at 9-10.

recommended by the Hearing Examiner, the Staff, and the parties. While, as discussed in the following section, Embarq's assertions regarding concomitant retail rate impacts appear questionable, taking a gradual approach to access charge reductions as reflected herein, among other things, will ameliorate alleged upward pressure on retail rates and will assist in monitoring the implementation and impacts of such reductions. Indeed, based on the transition schedule set forth above, and as further explained below, Embarq has no reasonable basis to claim that the access charge reductions required herein force it to immediately raise retail local exchange rates.

Finally, in this regard, we will keep the instant docket open and require Embarq to file reports at least semi-annually with, and as may be further defined by, the Commission's Division of Communications on the implementation and impacts of the access rate reductions required herein. Accordingly, the Commission will conduct additional proceedings in this docket to determine what amount – if any – of access charge subsidies remains appropriate in the competitive market.

Local Telephone Rate Increases

At various points throughout this proceeding, Embarq has claimed that if the Commission reduces intrastate access rates, then Embarq would in turn be required to raise its retail rates to Virginia consumers in response thereto.[25] Embarq has also suggested that such action would be required because these "[s]ubsidies ... keep local rates affordable,"[26] and, thus, without such subsidies Embarq will somehow be forced to make retail rates unaffordable by implementing

[25] *See, e.g.*, Embarq's February 24, 2009 Comments at 9, 19, 26, 34.

[26] *Id.* at 17. *See also id.* at 18 ("Subsidies, therefore, keep retail rates affordable.").

"significantly higher local telephone rates."[27] Such a claim has been contradicted by Embarq's subsequent statements in this proceeding.

First, when the rate of return on common equity for Centel and United is reviewed, it is clear that Embarq is earning returns well above traditional cost of service levels, apparently based largely upon newer service offerings other than basic local telephone service. Specifically, at the conclusion of this proceeding and at the request of the Commission, Embarq filed annual rate of return statements for Centel and United.[28] Those statements showed that, for 2007 and 2008, Centel's and United's total Virginia per books annualized rates of return earned on common equity ranged from 21.08% to 24.58%.[29]

Second, Embarq's claims that any intrastate access charge reductions would force it to increase prices under its Modified Plan for basic local exchange telephone service were further undermined by subsequent developments in this proceeding. Specifically, Embarq eventually admitted – at the conclusion of this proceeding during oral argument – that it expects to raise retail rates under its Modified Plan *regardless* of the outcome of this case.[30] Stated differently,

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[27] *See id.* at 26 ("[I]f access rates are reduced, ... such a reduction will result in significantly higher local telephone rates.").

[28] Tr. 75-76 (March 20, 2009)..

[29] Exh. 52.

[30] The following excerpts are from oral argument on March 20, 2009:

> [EMBARQ'S COUNSEL]: I don't think I can commit to the, to the Commission that we would not increase our rates if our access charges were kept constant. (Tr. 54, March 20, 2009.)
> ***
> [COMMISSIONER]: What I'm trying to figure out is, would Embarq be increasing its rates anyway under its [Modified] Plan?
> [EMBARQ'S COUNSEL]: Probably. (Tr. 55, March 20, 2009.)
> ***
> [EMBARQ'S COUNSEL]: I'm saying that there is probably going to be a rate increase anyway. (Tr. 63, March 20, 2009.)
> ***

Embarq's claim that a reduction in access charges would result in a rate increase for basic local telephone service is belied by the admission that Embarq is planning to increase rates whether or not access charges are reduced.

Next, Embarq mischaracterized the nature and implementation of its Modified Plan. In approving the Modified Plan, the Commission found – as required by statute – that based on the facts and circumstances established in that proceeding, such plan would protect the affordability of basic local exchange telephone services.[31] Under the Modified Plan, prices for basic local exchange telephone services cannot increase more than 10% on an annualized basis.[32] For example, the median residential basic local exchange rate for Centel is $10.65 per month;[33] thus, a 10% increase thereto would increase the monthly rate by $1.07, to $11.72 per month.[34]

At the conclusion of this case during oral argument, Embarq eventually admitted as follows: "So, the affordability aspect ... is really not in play here. We all know that ... the Commission will make sure that Embarq's rates are affordable."[35] In that regard, the Commission directs its Staff to monitor any changes in basic local exchange rates during the transition period ordered herein, and the Commission will take appropriate action if necessary.[36]

> [COMMISSIONER]: [Y]ou're going to raise your rates anyway, right?
> [EMBARQ'S COUNSEL]: Well, yes, probably. ... We wouldn't have asked for authority to do so [in the Modified Plan] if we, if we weren't going to. (Tr. 133, March 20, 2009.)

[31] *See Modified Plan Order.* at 8-9.

[32] *See* Embarq's Modified Plan at ¶ F.

[33] *See* Central Telephone Company of Virginia, General Subscriber Services Tariff, Tariff SCC No. 1.

[34] The Modified Plan also limits increases by imposing price ceilings for BLETS that reflect past GDPPI growth and permitting these price ceilings to increase annually based on future growth in the GDPPI.

[35] Tr. 38 (March 20, 2009) (Embarq's counsel).

[36] We also note that Va. Code § 56-235.5 D authorizes the Commission to "alter, amend or revoke" an alternative regulatory plan when the Commission finds that "any class of telephone company customers ... are being unreasonably prejudiced or disadvantaged by" such a plan.

Accordingly, we herein direct Embarq to provide any information or reports as may be further defined by the Commission's Division of Communications to assist the Staff in its normal and ongoing monitoring of Embarq's retail rates. We further conclude, as noted above, that Embarq has no reasonable basis to claim that access charge reductions as set forth herein force the company to immediately raise retail local exchange rates.

Cost of Service

Embarq also suggests that a reduction in intrastate access rates "potentially creates a requirement to price Embarq's retail products and services at levels that may not permit Embarq to recover its costs of those products and services."[37] We do not find, based on the record in this proceeding, that Embarq will be prevented from achieving revenues that cover its reasonable cost of service.[38]

In addition, and as explained above, Embarq has chosen to be regulated under an alternative form of regulation,[39] as opposed to traditional cost of service regulation.[40] Thus, Embarq's Virginia jurisdictional rates – as permitted under its Modified Plan – are not based on cost plus a fair return on investment; rather, such rates, among other things, protect the affordability of such service. For example, under its Modified Plan, Embarq can charge within a limited range of rates for basic local exchange telephone service. Furthermore, as noted above, for 2007 and 2008 Centel's and United's total Virginia per books annualized rates of return earned on common equity ranged from 21.08% to 24.58%.[41] In addition, while the Modified

[37] Embarq's February 24, 2009 Comments at 40 (emphasis omitted).

[38] *See, e.g.*, Report at 31-37, 40.

[39] Va. Code § 56-235.5.

[40] Va. Code § 56-235.2.

[41] Exh. 52.

Plan also allows Embarq to charge whatever price the market will bear for certain competitive and bundled services, if these competitive offerings are too expensive customers can either move to the price-constrained basic local exchange service or go to a competitor (if available).

Likewise, the intrastate access rate changes that we require at this time do not result in access charges exclusively tied to costs and will not eliminate all of the subsidies currently built into Embarq's access charges.[42] We find, however, that such reductions represent a reasonable decrease, at this time, based on the record in this proceeding. If Embarq believes – contrary to our findings herein – that its existing rates and existing revenue sources are insufficient to cover the cost of providing service, then Embarq may file an application in accordance with applicable Commission rules and Virginia statutes seeking specific rates to recover its cost of service.[43] Virginia statutes also permit the Commission to amend or revoke the Modified Plan if, among other things, such plan "threaten[s]" the affordability of basic local exchange telephone service or "is no longer in the public interest."[44]

The Hearing Examiner's Report also provides some insight into the potential revenue impacts resulting from decreased intrastate access rates and Embarq's Modified Plan.[45] In addition, as noted above, Embarq states that the CCLC currently provides approximately

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[42] *See, e.g.,* Report at 31.

[43] The Hearing Examiner found, based on the record in this proceeding, that even if Embarq's intrastate access fees are reduced to its interstate rate, such rate will still exceed Embarq's incremental cost of service under the Commission's long-standing methodology. *See* Report at 31, 40. We herein require a more limited intrastate access rate reduction than what was recommended by the Hearing Examiner. Accordingly, Embarq will still be receiving a subsidy in its access fees.

[44] Va. Code § 56-235.5 D.

[45] *See* Report at 33-37. We note that Embarq objects to some of the estimates in the Hearing Examiner's Report. *See, e.g.,* Embarq's February 24, 2009 Comments at 33-40. Although not necessarily required for our findings herein, we find that data in the Hearing Examiner's Report serves as a reasonable illustration for purposes of this discussion. The Hearing Examiner also uses data provided by Embarq to compare (1) access revenue reductions, to (2) estimated Modified Plan revenue increases. These estimated revenue increases, however, have been treated as confidential in this proceeding at Embarq's request. *See* Report at 33-37.

$22.8 million of annual revenue. The true amount of current CCLC revenue – on a total Embarq company basis – is significantly less than $22.8 million, as a portion of that amount is returned by Embarq's retail long-distance company as payment to its wholesale long-distance provider. That is, Embarq provides bundled long-distance service through an independent wholesale provider. The expense to Embarq's retail long-distance company for this service includes the intrastate access charges paid by the wholesale provider. Thus, while Embarq receives intrastate access charges from many long-distance providers, any such charges received from its wholesale long-distance provider must be returned as an expense.[46] As a result, there is a significant amount of CCLC revenue that Embarq's local exchange companies take in from such transactions, but that Embarq's retail long-distance company must pay back out, and, thus, on a company-wide basis CCLC revenues are significantly less than $22.8 million.[47]

Va. Code §§ 56-235.5:1 and 56-235.5

We disagree with Embarq's assertion that reducing subsidies currently contained in intrastate access rates "put[s Va. Code § 56-235.5:1] in conflict with [Va.] Code § 56-235.5."[48] To the contrary, our decision herein is consistent with both statutes. For example, under § 56-235.5:1 of the Code as noted above, we have "consider[ed] it in the public interest to, as appropriate, ... promote competitive product offerings, investments, and innovations from all providers of local exchange telephone services in all areas of the Commonwealth."[49] Furthermore, under § 56-235.5 B of the Code, Embarq's Modified Plan – at the time it was

[46] *See, e.g.*, Report at 36-37.

[47] The estimated percentage of Embarq's CCLC revenue that is actually paid back by Embarq's retail long-distance company has been treated as confidential in this proceeding at Embarq's request. *See, e.g.*, Report at 36.

[48] Embarq's February 24, 2009 Comments at 39.

[49] *See, e.g.*, Report at 24-25.

previously approved by the Commission and voluntarily adopted by Embarq – "protects the affordability of basic local exchange telephone service [and] is in the public interest." Neither these two statutes, nor the Commission's implementation thereof, are in conflict.

Discovery

Embarq asserts that the "Hearing Examiner denied Embarq's ability to gather facts to determine whether the public would benefit by Embarq reducing access charges."[50] According to Embarq, "the Hearing Examiner denied Embarq access to information regarding Sprint's 'flow through' of purported savings to its Virginia customers resulting from lowering of intrastate access charges in Virginia."[51] Embarq concludes that the Hearing Examiner "prejudiced Embarq's defense of its intrastate switched access charges in this proceeding and significantly limited Embarq's ability to defend the assault on its access charges brought by the Staff and other parties."[52] We find, however, that the information sought by Embarq from Sprint – and the conclusions that may or may not have been drawn from such – would not alter our analysis of Embarq's intrastate access rates. Our findings herein are not dependent upon the "flow through" to Virginia consumers of any amount of potential savings from reduced access rates. Accordingly, we conclude that Embarq was not prejudiced by the Hearing Examiner's rulings in this regard.

Universal Service Fund

Embarq asserts that, "[a]t a minimum, before any access reductions are implemented for Embarq, the Commission should convene an evidentiary investigation to determine whether the

[50] Embarq's February 24, 2009 Comments at 15 (typeface modified).

[51] *Id.* at 16.

[52] *Id.* at 17.

'policy' relied upon in the Report is more appropriately applied to rural Virginia through creation and implementation of a state [Universal Service Fund ('USF')] – *i.e.*, a mechanism for removing subsidies from intrastate access rates and maintaining the affordability of local exchange rates of customers in rural Virginia."[53] We find that it is not necessary to investigate the reasonableness of establishing a USF prior to implementing the intrastate access rate reductions in the manner and under the time frames established herein.

Contrary to Embarq's characterization, our findings in this matter do not set a "policy" for rural Virginia or the myriad of small local exchange telephone companies and cooperatives serving rural Virginia. Rather, our findings herein are applicable to a single company – Embarq – which is the second largest ILEC in the Commonwealth.[54] In addition, and as discussed above, Embarq is differentiated from other carriers by the fact that it has chosen to be regulated under an alternative form of regulation, which statutorily protects the affordability of basic local exchange telephone service.[55] As this Order applies only to Embarq, we do not find that a state USF investigation is required prior to implementing Embarq's intrastate access rate reductions.[56]

Accordingly, IT IS HEREBY ORDERED THAT:

(1) Embarq shall reduce its intrastate switched access rates as required in this Order.

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[53] *Id.* at 44.

[54] Virginia's two largest ILECs in terms of access-line market share are Embarq and Verizon. Rural local exchange carriers ("RLECs") are so small in terms of statewide access-line market share that intrastate access charges paid to them reasonably have a *de minimis* impact on competition statewide.

[55] Verizon is the only other incumbent local exchange carrier that has chosen to operate under an alternative form of regulation pursuant to § 56-235.5 of the Code. *See Application of Verizon Virginia Inc. and Verizon South Inc. For Approval of a Plan for Alternative Regulation*, Case No. PUC-2004-00092, Final Order (January 5, 2005).

[56] Nor do we find – contrary to Embarq's request – that the Commission should delay acting in this matter in anticipation of some possible, undefined action by the FCC. *See, e.g.*, Report at 38.

(2) On or before December 1, 2009, Embarq shall file revised tariffs with the Division of Communications for its intrastate switched access services to be effective on and after January 1, 2010, which reflect the CCLC component on a per-minute rate as required by this Order.

(3) At least thirty (30) days prior to any intrastate switched access rate reduction required by this Order, Embarq shall file revised tariffs with the Division of Communications for its switched access services to be effective as of the date of such required reduction.

(4) This matter is continued.

AN ATTESTED COPY hereof shall be sent by the Clerk of the Commission to all persons on the official Service List in this matter. The Service List is available from the Clerk of the State Corporation Commission, c/o Document Control Center, 1300 East Main Street, First Floor, Tyler Building, Richmond, Virginia 23219. A copy shall also be delivered to the Commission's Office of General Counsel and Division of Communications.

LEXSEE 52 PA. PUC 372

Re Cable Television Pole Attachments

Docket No. M-78080077

PENNSYLVANIA PUBLIC UTILITY COMMISSION

1978 Pa. PUC LEXIS 97; 52 Pa. PUC 372

August 2, 1978

PANEL: [*1]

Before Louis J. Carter, chairman, and Robert K. Bloom, Helen B. O'Bannon, Michael Johnson, and W. Wilson Goode, commissioners.

OPINION: By the COMMISSION:

This commission has become increasingly aware that the use of electric and telephone utility pole space by cable television systems sometimes called Cable TV is significant. It is our conclusion that an exercise of this commission's jurisdiction over the rates, terms, and conditions of CATV pole attachment rates are equitable and nondiscriminatory, and to avoid potential disruption of utility service regulation by this commission is necessary.

Initially, we note that our jurisdiction is found both under § 202(e) of the public utility law, act of May 28, 1937, PL 1053, 66 PS § 1122(e) * as amended, as well as under our general regulatory powers over utilities; e.g., §§ 901 and 902 of the public utility law, 66 PS §§ 1341 and 1342, ** as amended. In this regard, we also note that utility poles clearly are an essential part of public utility plant, the cost of which must ultimately be recovered from the utility's ratepayer.

* *Section 1102 (3)* of the public utility code effective August 31, 1978.

** Sections *501 and 502* of the public utility code.

[*2]

Utility revenues received from the use of pole space by CATV operators is taken into account in fixing utility rates, and thereby reduce customer charges. In view of the exclusive position that utilities have in offering pole space, it is appropriate to exercise our jurisdiction over the terms and conditions of agreements for CATV pole attachments, in order to ensure that both CATV and utility customers bear a reasonable share of the costs incurred in the construction and maintenance of utility poles. Further, common use of the same poles that deliver essential utility services requires regulation to ensure that such use does not interfere with the primary purpose of the utility poles.

Therefore, in view of the fact that this commission has the power to regulate the rates, terms, and conditions for CATV pole attachment agreements, and in so regulating, can and should consider the interests of CATV users; therefore,

It is ordered:

1. That each electric and telephone utility doing business within this commonwealth shall, within thirty days of entry of this order, file (a) a copy of all CATV pole attachment agreements now in use and (b) any proposed pole attachment agreements [*3] which the utility intends to offer to CATV systems doing business within its service territory. Thereafter on or before the tenth of each calendar month any agreement entered into during the prior calendar month shall be filed with the secretary of the commission.

2. With regard to guidelines to be followed in determining the reasonableness of the rates, terms, and conditions of pole attachment agreements, written comments may be submitted by all interested persons within sixty days of publication of this order in the *Pennsylvania Bulletin* to the Pennsylvania Public Utility Commission, Attention: Secretary, P.O. Box 3265, Harrisburg, Pennsylvania 17120.

3. That the secretary shall serve a copy of this order upon all parties of record in the proceeding known as I.D. 73 - - Investigation upon Commission Motion to Inquire into the Commission's Jurisdiction and Power toRegulate Television Cable Service.

4. That the secretary serve a copy of this order on the secretary of the Federal Communications Commission and by separate letter certify that this commission has asserted jurisdiction over CATV pole attachments.

Legal Topics:

For related research and practice materials, see the following legal topics:
Communications LawCable SystemsU.S. Federal Communications Commission JurisdictionCommunications LawU.S. Federal Communications CommissionProceduresEnergy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsGeneral Overview

Donnelley Directory, a Division of the Reuben H. Donnelley Corporation, Complainant v. The Bell Telephone Company of Pennsylvania, Respondent

C-871245

PENNSYLVANIA PUBLIC UTILITY COMMISSION

1988 Pa. PUC LEXIS 144; 66 Pa. PUC 376

February 19, 1988

PANEL: [*1]

Commissioners Present: Bill Shane, Chairman; William H. Smith, Vice-Chairman; Linda C. Taliaferro; Frank Fischl

OPINION: OPINION AND ORDER DENYING PETITION FOR INTERLOCUTORY REVIEW AND REQUEST FOR STAY OF PROCEEDINGS

BY THE COMMISSION:

On January 9, 1988, The Bell Telephone Cmpany of Pennsylvania ("Bell" or "Respondent" or "Petitioner") filed a Petition for Interlocutory Review of Administrative Law Judge ("ALJ") Herbert S. Cohen's Order of December 28, 1987, wherein he denied Bell's Motion for Summary Judgment in this proceeding. Bell further requested a stay of the proceeding.

Bell filed a Brief in Support of the Petition on January 15, 1988. Donnelley Directory ("Donnelley" or "Complainant") filed a Brief in opposition. By Secretarial Letter dated February 1, 1988, we waived the 30 day time limitation contained in our regulations at *52 Pa. Code § 5.303*, in order to properly consider the issues raised.

Background

Donnelley publishes a classified advertising directory called the Donnelley Directory, which competes with Bell's Yellow Pages. Prior to divestiture, Donnelley had been Bell's agent for the Yellow Pages. After divestiture, [*2] Bell opted to publish the Yellow Pages itself and terminated its relationship with Donnelley. Donnelley decided to publish its own classified advertising directory in competition with Bell. In this Complaint, Donnelley has requested access to certain of Bell's utility resources that would be useful in publishing a classified advertising directory. Save for the licensing of certain lists, Bell has denied the requested access and declared that access to the requested resources was not available at any price. Donnelley has requested Commission review of Bell's policy in this proceeding.

Brief History

Complainant filed an Amended Complaint in this proceeding on October 4, 1987. On November 2, 1987, Bell filed an Answer to the Amended Complaint and on November 6, 1987, filed a Motion for Summary Judgment. After further pleadings were filed fully discussing the issues raised, the ALJ entered his order denying the Respondent's Motion.

Discussion

The standard for granting a Petition for Interlocutory Review is a high one. The Commission will not permit interlocutory review of ALJ rulings except upon a petition alleging extraordinary circumstances. *52 Pa. Code § 5.301* [*3] (emphasis added). Bell, in its Petition for Interlocutory Review, states that interlocutory review is appropriate here because:

This Commission should act now to prevent the long and burdensome ordeal of a hearing in a case where no relief is available under the Public Utility Code. The Commission's review is particularly compelling in this case, where a competitor seeks to explore, in exhaustive detail and at unjustifiable cost, every facet of Bell's competitively sensitive business operations and proposes to engage in extensive economic theorizing requiring costly consultants.

Donnelley argues in its Brief at p. 6 that interlocutory review is unjustified because:

Bell of PA is not prejudiced by this Commission conducting an investigation, pursuant to complaint, into alleged violations by Bell of PA of the Public Utility Code through the provision of unduly discriminatory access to public utility information, services, facilities and assets. Whether such an investigation becomes complex, detailed, and costly is irrelevant to the Commission's consideration of the substantive issues as presented in Donnelley's complaint.

Our analysis starts with the observation that interlocutory [*4] review should not be used as a vehicle to second-guess the rulings of an Administrtive Law Judge where there has not been a final order resolving any of the issues involved in the proceeding. It is a more compelling observation here due to the fact that discovery and hearings have not been concluded.

Bell argues in its brief that the ALJ erred in not granting summary judgment because the Commission is without authority to require the relief requested by Donnelley. This argument assumes that the ALJ, if he ruled in Donnelley's favor on any of the ultimate issues, would grant the identical relief requested by the Complainant. This is a premature issue unripe for disposition at this stage of this proceeding because the ALJ has not ruled against Bell on any of the ultimate issues or ordered any relief.

Any "sensitive information" or "burdensome" discovery problems can be adequately resolved without prejudice to Bell by way of an appropriately crafted protective order. We therefore find this ground for interlocutory review to be insubstantial.

Perhaps the most salient issue raised by Bell is its assertion that the Commission is without jurisdiction to continue this complaint [*5] proceeding because, while the Yellow Page operation is fully integrated with the regulated operation of Respondent, it is not a utility service subject to regulation. In order to adequately resolve this issue, some background is necessary.

In Pennsylvania, the Commission is limited in its jurisdiction to regulation of public service, as distinguished from private service. The classified directory, i.e., Yellow Pages, has been determined to be not subject to direct regulation by the Commission because it is an advertising project competing with other advertising media. *Felix v. Pa. P.U.C., 187 Pa. Super. 578, 149 A.2d 347 (1959).* However, because the Yellow Pages business uses the assets and facilities supported by ratepayers, its expenses and revenues have always been considered "above-the-line" for ratemaking purposes. This is consistent with the regulatory philosophy that the Yellow Pages operation is incidental to the provision of regulated services and will induce increased usage of such services, accruing to the benefit of all ratepayers. This stimulation of additional revenue is a legitimate mode of extending the company's business, [*6] in direct furtherance of its charter object. *Erie Lighting Company, et. al. v. Pa. P.U.C., 131 Pa. Super. 109, 198* A.901 (1938). See also Pittsburgh Telecommunication Inc. v. Bell of Pennsylvania, Slip Opinion, Docket No. R-42772C001 (November 17, 1987).

It is appropriate to note at this point that when a service such as the Yellow Pages operation requires utilization of public utility facilities and is an adjunct to the provision of telephone service, then its operations fall within the context of Commission jurisdiction. Three examples of this sort of ancillary jurisdiction, in the field of telecommunications, are: (1) conduit occupancy, see Pittsburgh Telecommunications, supra; (2) pole attachments, as noted in Re CATV Pole Attachments; *52 Pa. PUC 372 (1978)* and the cases cited therein; and (3) the billing and collection services provided by Bell to interexchange carriers discussed in Re *Intrastate Access Charges, 69 PUR 4th 69, 127-128 (Pa. P.U.C. 1985).* These are important cases because, while the Commission may detariff a telecommunications service ancillary [*7] to regulated services, it does not render this Commission without jurisdiction to examine expenses and revenues associated with that service when it utilizes ratepayer supported property.

Bell argues that the Commission cannot require access to Company resources because: (1) it would violate Constitutional guarantees, citing *Pacific Gas and Electric v. California PUC, ("PG&E") 475 U.S. 1 (1986);* and (2) the Commission is without authority under the Public Utility Code.

The second argument fails because, as noted above, Yellow Page operations have always been considered "above the line" for ratemaking purposes. The decisions of utility managers are generally respected because the Commission or

a Court is not the business or financial manager of the utility. However, those decisions may be ignored if they are found to be contrary to the public interest. *Erie Lighting, supra.*

Assuming, arguendo, that this Commission may not be able to require Bell to provide Donnelley with access to resources not traditionally considered to be associated with public utility services subject to regulation, we could impute revenues [*8] for ratemaking purposes to regulated operations if we concluded that Bell unreasonably failed to pursue revenues that would accrue to the benefit of all ratepayers, such failure being contrary to the public interest.

On this point, we agree with the ALJ's review of the record in this proceeding when he states that this situation warrants the application of the summary judgment standard enunciated in *Schacter v. Albert, 212 Pa. Super. 58, 239 A.2d 841,* which provided, in pertinent part, that "the court must consider both the record actually presented and the record potentially possible at the time of trial."

The constitutional objection raised by Bell fails as well. The United States Supreme Court decided in *PG&E, supra,* that First Amendment guarantees regarding a corporation's unwillingness to be associated with speech with which it disagreed superseded the California PUC's authority over regulated activities. We find this decision irrelevant to any issue present in this proceeding.

Conclusion

The Respondent has failed to demonstrate the 'extraordinary circumstances' required for interlocutory [*9] review of an ALJ ruling on an interim matter that does not terminate any issues involved in the proceeding. Any prejudice that potentially may be suffered by Bell due to disclosure of sensitive business information or unduly burdensome discovery proceedings can be adequately prevented by way of a protective order. This Commission has the authority to examine Yellow Page operations, upon complaint, because it is an above the line operation inextricably entwined with the provision of regulated services. While some of the relief requested by Donnelley may arguably be outside the Commission's authority under the Public Utility Code, this issue is unripe for decision for the reasons discussed infra. The Constitutional issues raised by Bell are irrelevant to this proceeding.

Consequently, we shall deny the Respondent's Petition for Interlocutory Review and Stay of Proceedings; THEREFORE,

IT IS ORDERED:

1. That the Respondent's Petition for Interlocutory Review and Stay of Proceedings be, and hereby is, denied.

2. That the record be, and hereby is, remanded to Administrative Law Judge Herbert S. Cohen for further proceedings not inconsistent with this Opinion and Order.

Legal Topics:

For related research and practice materials, see the following legal topics:
Communications LawU.S. Federal Communications CommissionJurisdictionEnergy & Utilities LawAdministrative ProceedingsJudicial ReviewGeneral OverviewEnergy & Utilities LawUtility CompaniesGeneral Overview