

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Lincoln Telephone)	Application No. C-634
and Telegraph Company, Louisville)	
Nebraska exchange, Petition for)	GRANTED IN PART
Declaratory Ruling.)	
)	Entered: October 7, 1986

APPEARANCES:

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BY THE COMMISSION:

By its application filed January 13, 1986, The Lincoln Telephone and Telegraph Company (LT&T) seeks a Declaratory Ruling that the activities of certain of its Louisville, Nebraska exchange subscribers are in violation of the Nebraska Statutes and the Rules and Regulations of this Commission.

Notice of the filing of LT&T's application was published on January 17, 1986, pursuant to the provisions of the Commission's Rules and Regulations.

A Petition for Formal Intervention in Application No. C-634 was filed on behalf of Ash Grove Cement Company, Copple Chevrolet-GMC, Inc., Errol Meisinger d/b/a/ Louisville Ready Mix, Herman Brothers, Inc., and L. G. Roloff Construction Company ("Louisville Subscribers") on February 19, 1986 and was granted by the Commission.

Pursuant to notice required by law, public hearing was held on June 9, 1986, in Louisville, Nebraska with appearances as shown.

Prior to the filing of this application and as a result of informal complaints by the Louisville Subscribers and others, Herbert J. Sherdon, Director of the Communications Department, had filed a Formal Complaint with this Commission, FC-1201, concerning rates and billing practices for foreign exchange (FX) service. The complaint alleges the rates established for FX service are excessive and will cause bypass.

OPINION AND FINDINGS

Upon consideration of the application, the evidence adduced at the hearing and being fully advised, the Commission is of the opinion and finds that:

1. Applicant, LT&T, is a Delaware corporation domesticated under the laws of the State of Nebraska and is certified by this Commission to provide telecommunications services in 22 counties of southeastern Nebraska at 137 telephone exchanges, including the Louisville, Nebraska telephone exchange.

2. For several years and continuing to the present time, the Louisville Subscribers have utilized foreign exchange ("FX") service to the Omaha toll free calling area. Due to the fact that the northern boundary of the Louisville Exchange coincides with the Local Access and Transport Area ("LATA") boundary created in conjunction with the Modified Final Judgment in the AT&T Divestiture Case, three carriers are involved in providing such FX service. AT&T Communications of the Midwest, Inc. ("AT&T-MW") provides the interLATA facilities and the tariff for the service. Northwestern Bell Telephone Company ("NWB") provides the terminating exchange access service and bills for the service. LT&T provides the originating exchange access service.

3. On November 1, 1985, Ash Grove Cement Company through its Superintendent, William E. Walker, submitted a complaint to this Commission relating to increased charges for foreign exchange (FX) telephone services and billing problems encountered with Northwestern Bell Telephone Company.

4. Subsequent to the filing of the Complaint, representatives of the Louisville Subscribers conferred with members of the Commission's Staff and with representatives of Northwestern Bell Telephone Company, AT&T Communications of the Midwest, Inc. and The Lincoln Telephone and Telegraph Company concerning the Formal Complaint. By letter dated November 27, 1985 Mr. Sherdon corresponded with the Subscribers conveying his understanding that these informal conferences had taken place in an attempt to resolve the billing problems which had been experienced. He requested that he be advised if the Formal Complaint had not been resolved to the satisfaction of the Subscribers.

5. By letter dated December 5, 1985 Robert Copple, president of Copple Chevrolet-GMC, Inc. replied to Mr. Sherdon on behalf of the subscribers advising that the billing problems had not been resolved and requesting that this docket be held open pending such resolution.

6. In early November 1985, Ash Grove requested ten leased circuits from LT&T to run from its PBX located on its premises within the Louisville Exchange to a pump house on Ash Grove's property at the south bank (Cass County) of the Platte River. The intended use of the requested facilities was to connect with a cable attached to State Highway 50 bridge crossing the Platte River, in turn to connect to facilities into the L. G. Roloff Construction Co. property at the north bank (Sarpy County) of the Platte River, and finally to be connected with 10 B-1 lines provided from NWB's Springfield Exchange. LT&T declined to provide these circuits without compliance by the Louisville Subscribers with applicable statutes and Commission Rules.

7. Subsequent to November 18, 1985, Ash Grove proceeded to install facilities from its office in which its PBX is located, to and across the Platte River, to a connection point with the NWB facilities on the Roloff property. Mr. Breitzkreutz, Ash Grove's representative, testified that the installation of what was believed to be a legal bypass system was the result of an increase in rates and due to the unresolved billing dispute with AT&T-MW and NWB (Tr. 62:10-19) which is the subject of FC-1201.

8. During December 1985, Copple Chevrolet-GMC, Inc. ("Copple") attempted on at least two occasions to arrange for the lease of facilities from its place of business in downtown Louisville to Ash Grove's office building for the purpose of connection with the facilities interconnected with NWB. LT&T responded to these requests in the same manner as it had to Ash Grove. Likewise, Meisinger made a request for a leased circuit from his place of business in Louisville to Ash Grove's office. LT&T declined to provide the service. Herman Bros. terminal is located on Ash Grove's premises and there was a pre-existing extension from Ash Grove's PBX to Herman Bros. which would have provided interconnection with the facilities of NWB.

9. Ash Grove's AT&T Horizon PBX, which it owns, is located on Ash Grove's property within LT&T's Louisville Exchange in the "South 402 LATA." The facilities extended from it for the purpose of interconnecting with NWB terminate on property owned by L. G. Roloff Construction Co. and pass over the Platte River. The Roloff property is located within NWB's Springfield Exchange in the "North 402 LATA."

10. The billing difficulties which these Louisville subscribers have experienced relating to their foreign exchange service have not been satisfactorily resolved even though assurances of such resolution had been given by representatives of AT&T Communications of the Midwest, Inc. and Northwestern Bell Telephone Company to the Commission and to the Louisville subscribers.

11. Neither Northwestern Bell nor AT&T of the Midwest have placed equipment in service to meter the usage by these subscribers of foreign exchange service for which they have subscribed. Thus, there is no way to measure the actual use of the service by these subscribers and therefore no accurate billing statements can be rendered to the subscribers. This Commission concludes that the absence of such metering equipment has been the primary reason for these billing disputes and probable overbilling to these subscribers.

12. The lack of resolution of these billing problems has led to frustration and dissatisfaction on the part of these subscribers. In response to this situation these subscribers, without prior Commission approval, proceeded to install privately-owned facilities with business one-party lines from Northwestern Bell's Springfield exchange.

13. This Commission finds that the costs expended by these subscribers in making the private facility installation should be compensated by a corresponding credit for foreign exchange service charges. Based upon the testimony, Mr. Breitzkreutz, the representative of Ash Grove Cement Company, stated that the costs expended in the facility installation were \$22,090.00.

14. Taken together, §75-109 and §75-604 effectively ban the extension of service from one telephone company's service area to that of another for the private use of one or a group of individuals.

15. Neb.Rev.Stat. §§75-612--615 provide the requirements which must be satisfied prior to establishment of service to a subscriber from an adjacent exchange service area. The facts clearly establish that the privately-owned facilities would carry NWB's Springfield Exchange dial tone to each of the Louisville Subscribers in the event the facilities become operational. No application has been filed by the Louisville Subscribers for revision of exchange boundaries.

16. Rule 002.25B, Chapter 5, Commission Rules, when read in conjunction with Neb.Rev.Stat. §75-605 and 606 sets forth this State's policy that an exchange service area boundary of a telephone company is to be observed and that service offered in the area affected shall be valid only after Commission approval. The evidence adduced at the hearing establishes that NWB was advised of the intended use of the circuits which the Louisville Subscribers requested to terminate at Highway 31 and 50 in the Springfield Exchange. This intended use was the extension of Springfield dial tone to the business premises of these Subscribers located within LT&T's Louisville Exchange. Under these circumstances, provision of the requested facilities should have been declined unless and until Commission approval of the interconnection arrangement was granted.

17. Operation of these privately-owned facilities by the Louisville Subscribers does not constitute legal bypass. This case is distinguishable on its facts from Fort Mill Telephone Co. v. FCC, 719 F.2d 89 (4th Cir. 1983) and Atlantic Richfield Co., F.C.C.2d (Nov. 27, 1985). The shared-use, privately-owned facilities, are solely intended by the Louisville Subscribers to supplant foreign exchange service which, while technically capable of transmitting interstate messages, is practically speaking only for intrastate use. As outlined herein, there are several legitimate and compelling state policies requiring vindication, and thus, granting the declaratory relief requested by LT&T is required. We believe our decision herein is consistent with Louisiana Public Service Commission v. FCC, 106 Sup. Ct. 1890 (1986).

ORDER

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that Application No. C-634 is hereby granted in part and the Commission declares:

- A. The installation and attempted operation by the Louisville Subscribers of the privately-owned facilities constructed from Ash Grove's Office located within LT&T's Louisville Exchange Area to terminate within NWB's Springfield Exchange Area is effectively barred by §75-109 and §75-604;
- B. The provision of the circuits requested by the Louisville Subscribers for the stated purpose of carrying dial tone from NWB's Springfield Exchange to the Louisville Subscribers' business premises within LT&T's Louisville Exchange constitutes a change in service to the affected area subject to §75-605 and 606 and Rule 002.25B which is impermissible without prior approval of the Commission; and

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- C. The privately-owned facilities installed by the Louisville Subscribers constitute illegal bypass of existing local exchange facilities.

IT IS FURTHER ORDERED THAT NWB shall insure these privately-owned facilities are not used to extend Springfield service into LT&T's Louisville Exchange.

IT IS FURTHER ORDERED that as a result of the failure to satisfactorily resolve Formal Complaint, FC-1201, and due to the fact that billings were rendered to the Louisville subscribers based upon minutes of use of foreign exchange service without provision of equipment to actually measure such usage, Ash Grove Cement Company, Copple Chevrolet-GMC, Inc., Herman Bros., Inc., and Errol Meisinger, d/b/a/ Louisville Ready Mix, shall be allowed a credit of \$22,090.00 for foreign exchange service charges which amount is equal to the cost of installation of the privately-owned facilities which these subscribers intended to interconnect with Northwestern Bell Telephone Company. Although this Commission understands from the evidence submitted that all of these costs have been expended by Ash Grove Cement Company, the Commission will leave it to these subscribers to agree upon the proper apportionment of this credit, and after such agreement is reached, these subscribers shall advise Northwestern Bell Telephone Company of the allocation of this credit among themselves.

IT IS FURTHER ORDERED that Northwestern Bell Telephone Company shall install metering equipment in order that future provision of foreign exchange service to these and similarly-situated customers can be measured based upon minutes of use. Where metering equipment is not technically and economically feasible, NWB will provide an alternative solution or solutions, that are acceptable to the subscribers and the Commission.

MADE AND ENTERED in Lincoln, Nebraska this 7th day of October, 1986.

NEBRASKA PUBLIC SERVICE COMMISSION


Chairman

COMMISSIONERS CONCURRING:

//s//Bob Brayton
//s//James F. Munnelly
//s//Harold D. Simpson

ATTEST:


Executive Secretary

COMMISSIONER DISSENTING:

//s//Duane D. Gay

COMMISSIONER PASSED:

//s//Eric Rasmussen