

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

| | |
|--------------------------------------|----------------------------|
| In the Matter of the Application) | Application No. C-873 |
| of Henry & Vern Jantzen, Plymouth,) | |
| Nebraska, seeking authority to) | Motion for Reconsideration |
| receive telephone service from the) | And/or Rehearing |
| Plymouth exchange of the Lincoln) | GRANTED |
| Telephone Company.) | |
|) | Order of November 26, 1991 |
|) | REVOKED |
|) | |
|) | Order of May 14, 1991 |
|) | REVOKED |
|) | |
|) | Application GRANTED |
|) | |
|) | Entered: December 19, 1991 |

APPEARANCES:

For the Applicants:
 Henry & Vern Jantzen, Pro Se
 Route 1 Box 88
 Plymouth, Nebraska 68434

For the Protestant, Diller
 Telephone Company:
 Jack L. Shultz, Esq.
 P.O. Box 82028
 Lincoln, NE 68508

Index

| | page |
|--|------|
| Preliminary Matters. | 2 |
| Opinion and Findings | 2 |
| I. The First Hearing - | 3 |
| Testimony of: Henry Jantzen. | 3 |
| Vern Jantzen | 3 |
| Bill Sandman | 4 |
| II. The Second Hearing - | 5 |
| Testimony of: Henry Jantzen. | 5 |
| Vern Jantzen | 5 |
| Bill Sandman | 8 |
| Arnold White | 8 |
| Norm Osland | 10 |
| Bill Ashburn | 11 |
| Bill Sandman (recalled). | 11 |
| III. Discussion - | 11 |
| A. Loss of Investment. | 13 |
| B. Community of Interest | 13 |
| C. Duplication of Service, Economic Soundness, Impairment of Service. | 14 |
| D. Adequacy of Service | 16 |
| IV. Conclusion - | 19 |
| Order. | 19 |

BY THE COMMISSION:

Preliminary Matters:

Henry and Vern Jantzen (applicants) filed their petition to receive telephone service from the Plymouth exchange of the Lincoln Telephone and Telegraph Company (LTT) on December 18, 1990. Notice of the application was published in the DAILY RECORD, Omaha, Nebraska on December 20, 1990. Commission Rule of Procedure 014.02 (Title 291, Chapter 1) requires protests to be filed within thirty days of the date of publication of notice. Here, thirtieth day fell on a Saturday. The following weekday, which is not a holiday, then became the thirtieth day. Monday, January 21, 1991 was a state holiday (Martin Luther King Day); therefore January 22, 1991 was the final day for filing a protest.

Diller Telephone Company (protestant) filed its protest to the application on January 23, 1991. Technically, Diller filed its protest too late to participate in this proceeding. However, since the applicants did not file or make a timely motion at or before the hearings objecting to the appearance of the protestant, we will not preclude either the protestant's participation nor its evidence. The Commission will not assume the role of a party's legal counsel. Notice of the hearing was sent to the parties and to Lincoln Telephone & Telegraph on February 19, 1991.

The first hearing was held March 28, 1991 with appearances as shown. The Commission unanimously granted the application May 14, 1991 and found (a) the evidence established a loss of investment by Diller of \$97.21 (consisting of \$60.90 for the buried drop and \$36.31 for the drop protector) and (b) that the remaining investment shown in Ex. #4 will not be displaced by approving the application. The protestant filed a motion for rehearing/reconsideration three days later and oral argument was held May 28, 1991. The Commission granted a rehearing on a 3-2 vote and the second hearing was held September 13, 1991, with appearances as shown, in the City Council Chambers at Plymouth, Nebraska. The exhibits and transcript from the first hearing were admitted into evidence at the second hearing. Subsequent to the second hearing, the Commission entered an order November 26, 1991 denying the application on a 3-2 vote. The applicants timely filed a motion for rehearing/reconsideration and oral argument was held December 16, 1991.

O P I N I O N A N D F I N D I N G S

Upon reconsideration of (a) the application, (b) the evidence adduced at both hearings, (c) the oral arguments by the respective parties and (d) being fully advised in the premises, the Commission is of the opinion and finds that the motion for reconsideration should be granted, the order

Application C-873

-3-

entered November 26, 1991 should be revoked, and the application should be granted.

A review of the evidence reveals the following facts:

I. The First Hearing -

Applicants live in Plymouth, Nebraska and are served by the Plymouth exchange of LTT and the Harbine exchange of protestant Diller Telephone Company. This is a dual application by Mr. Henry Jantzen, and his son, Mr. Vern Jantzen. Henry Jantzen lives two miles east and two miles south of Plymouth. He has farmed there since 1953. In 1974, he purchased the land where Vern Jantzen lives. This farmstead is one mile south and one mile east of the Henry Jantzen farm. Henry Jantzen is in the Plymouth exchange served by LT&T while Vern Jantzen resides in the Harbine exchange served by Diller.

Henry Jantzen testified. He filed applications with this Commission in 1974, 1975, and 1976 to extend the boundary of LTT's Plymouth exchange to include the purchased farmstead in the Harbine exchange where Vern Jantzen now resides. The applications were denied. The purchased farmstead has a Plymouth address, is in the Plymouth Fire District, and is located closer to Plymouth than to Diller. Recent events have again brought up the numerous problems and expenses associated with operating a single farm operation serviced by two separate telephone companies.

In 1988, Vern Jantzen married and moved to the farmstead in the Harbine exchange. It soon became apparent that telephone communication between the two farmsteads for business and pleasure was expensive and, therefore, has been done only on a minimal basis. As Vern Jantzen assumes more management responsibility, the applicants will need to communicate more. Henry Jantzen owns the property in both exchanges. The property where Vern Jantzen lives consists of 395 acres divided by the two telephone companies' exchange boundaries. On cross examination, Henry Jantzen testified that he has lived all his life on his farm in the Plymouth exchange and has never lived on the property in the Harbine/Plymouth exchange where his son now resides. In prior applications, neither he nor his son lived there.

Vern Jantzen testified. He farms with his father and lives on the farm southeast of Plymouth as identified on Ex. #3. Vern Jantzen testified that he is not receiving, and will not within a reasonable time receive, reasonably adequate exchange telephone service. He testified that, by the facts, this definition can extend beyond merely providing the physical service of the telephone alone; Jantzen contends the

Application C-873

-4-

definition also includes the community of interest. He uses the telephone for business and pleasure and his primary community of interest is within the Plymouth exchange. He testified that the issue of duplicated facilities does not exist because an LTT cable is buried 108 feet north from the telephone service entrance to his house, while the Diller Telephone Company has a cable 324 feet east of the service entrance to the house. He is willing to pay a reasonable cost associated with any loss to Diller and any reasonable cost to hook up to LTT.

Vern Jantzen compared this application to In re Application of George Farm Co. v. Northeast Nebraska Telephone Company, 233 Neb. 23, 443 N.W.2d 285 (1989) in which the Supreme Court held: *"From a consideration of the entire record, we find that it makes no sense for half of the applicant's property to be within one exchange and the other half to be within another exchange. We hold that the decision of the Commission denying the applicant's request to have all of its property placed within the service area of Northwestern Bell's South Sioux City exchange was unreasonable and arbitrary and should be reversed."* Id. at 27-28. The case was remanded to the Commission with directions to grant the application.

On cross examination, Vern Jantzen testified his household uses the optional calling plan offered by Diller Telephone Company. Under the plan, he consumes 25 minutes of the first hour just to call the "home place" (the Henry Jantzen farmstead). He uses an additional 112 minutes per month, beyond that first hour, to call Plymouth, the church, and Beatrice businesses. At this first hearing, he was not sure whether the LTT cable is suitable to serve his residence and has asked the engineering department of the company to investigate. He is willing to pay reasonable construction costs.

Mr. Bill Sandman testified on behalf of the Diller Telephone Company. He has been manager and assistant manager for approximately 26 years. The service the applicant is receiving is a digital, buried, one-party service. 1-plus direct dialing, touch-tone and full custom calling features are available. Since the last application in 1976, the company has installed digital switching, buried cable, and upgraded to a one-party system. Two customers live north of Vern Jantzen's residence and are served in the Harbine exchange. Approximately 120 customers are served in this exchange. The LTT cable which crosses Mr. Jantzen's property is a toll cable serving the LTT exchanges and was not to result in any duplication of facilities. Mr. Sandman submitted and explained Ex. #4 which is titled "Diller Telephone's Company Investment In Telephone Plant Serving A

Application C-873

-5-

Subscriber Who Has Requested Boundary Change." This exhibit allocated \$1,261.21 per subscriber as Diller Telephone Company's investment.

II. The Second Hearing -

Henry Jantzen opened for the applicants by making a short statement thanking the Commission for holding the second hearing in Plymouth. He expressed his hope that the Commission will sustain its original order.

At the second hearing, Vern Jantzen testified. While he can switch his bank or machinery dealer if he becomes dissatisfied with their service, he cannot do so with his telephone service. He understands the reasons for this, but he is dissatisfied with the current service from the protestant and wants the current boundary changed so his farmstead is in the Plymouth exchange of LTT.

In regard to adequacy of service, Vern Jantzen wants to call people in the Plymouth exchange without a toll charge and to make unlimited calls to the Beatrice exchange for a small monthly fee. He could do this if he is switched to the Plymouth exchange. If he uses the protestant's optional calling plan, he cannot call his family or business contacts between 8:00 a.m. and noon, Monday through Friday, if he is to realize any savings from the plan. Ex. #9 is a list of telephone numbers showing the calls he makes from the Harbine exchange to the Plymouth and Beatrice exchanges. Calls to both are toll calls. The list also shows the calls he makes to Harbine and Diller businesses.

Ex. #8 is a map showing the various points of community interest to Vern Jantzen. The map identifies Vern Jantzen's farm in relationship to the farm on which Henry resides. Vern lives on 395 acres through which the boundary between the Plymouth and Harbine exchange runs. Henry's farm is the location where Vern and his brother operate the dairy. This brother lives a mile east of Vern and is within the LTT Beatrice exchange. Plymouth, Nebraska is six miles northwest and Beatrice is eight miles east of Vern's farm. Harbine, Nebraska is seven miles and Diller is 10.5 miles south of there. Tri-County school is one mile east and five miles north. Another brother still attends high school there and the majority of the people he knows sends their children to Tri-County.

Ex. #8 shows Vern's residence is within the Plymouth Rural Fire District (RFD). This is problematic because the Harbine exchange's 911 service (as shown by Ex. #s 10 and 11) is administered through Gage County while Vern resides within Jefferson County. Even though Vern lives in the

Application C-873

-6-

Plymouth RFD and is in close proximity to the Plymouth fire and ambulance services, a 911 call would put him in contact with the authorities in Gage County (through the Harbine exchange). Vern testified to his concerns about what delays might result in an emergency due to these circumstances.

As for duplication of service, economic soundness, and impairment of service to remaining subscribers, Vern Jantzen testified to what he termed a unique situation because of an abandoned toll cable belonging to LTT buried 108 feet from his house and which could be made operational to serve him. LTT's engineer reportedly said the cable may be usable. Since the cable and Diller Telephone's line are already in place, he believes there will be no duplication of facilities. Vern Jantzen also testified there would be an economic benefit to him if the switch was made, considering the existence of the LTT cable, because he does not have to pay to build a new line.

Vern Jantzen then testified about community interest. He referred to the Plymouth businesses he calls (see Ex. #9) and the fact his address is Plymouth. His other interests are in the Beatrice exchange of LTT. He again referred to the RFD and his 911 concerns. With the new open enrollment school law, his children may end up going to Tri-County school. All of the people in the Tri-County booster club (of which he is a member), save one, are on LTT's service.

125 of 128 members of Vern's church are in LTT's service area, as are the doctor, dentist, and hospital his family uses. There are no banks, machinery dealers, county government officials or veterinary services in the Harbine or Diller exchanges. Of the 21 neighbors surrounding his farm, 11 are in the protestant's exchanges. People often have problems locating his phone number because it doesn't appear in the Plymouth exchange's list of phone numbers despite his Plymouth address and the amount of business he does in Plymouth. They cannot even find him in the listings for the Diller exchange because he is listed in the Harbine exchange. And, of course, when they do track down his number, they do not call because it is a toll call to reach him.

The last items Vern Jantzen testified about are construction costs and investment loss. He is willing to bear a cost of around \$1400 to have service switched to the LTT cable buried near his house. Jantzen challenged protestant's Ex. #4, introduced at the first hearing, which showed an investment loss of \$1261.21. Jantzen agreed with the Commission's previous loss of investment analysis and he has submitted payment based on those findings to reimburse Diller Telephone. Also, there is a brand new residence one mile north of his home and any loss of revenue due to

Application C-873

-7-

Jantzen's removal from the Harbine exchange will be made up by the addition of the new residence (which is occupied).

In conclusion, Vern Jantzen stated the difficulty of a farming operation being divided by two telephone exchanges. He reiterated the points about his community of interest in the Plymouth exchange, the available LTT buried cable, the substitution of his neighbor for himself as an economic impact on the protestant, and that the property in question has the boundary line running right through it. He finished his testimony by referring to the applicability of the George Farm Company decision.

On cross-examination, Vern Jantzen conceded that in the George Farm Company case, the property in question was one piece of property through which the boundary line ran while in the present application, his father's farmstead (where the dairy is located) and his farmstead are not contiguous, but are separated by intervening landowners. Actually, Vern's farmstead is the one through which the boundary line runs.

Vern Jantzen stated the optional calling plan is too restrictive to be of much use, the toll charges are a problem, and that he needs to communicate better with people in the manner he previously described. He and his family are consciously limiting the use of their phone because of the high costs associated with being in different exchanges. Diller Telephone does not match LTT's service in terms of extended area service (EAS), 911 (as described earlier), and caller ID. A possible option is to obtain foreign exchange (FX) service from LTT; however, according to the Beatrice exchange's manager, the cost would be about \$200 per month. There would be a cost to him if he wanted to be listed in the Plymouth and Beatrice exchanges while remaining in the Harbine exchange. Jantzen has been told verbally by Diller Telephone that changes are forthcoming regarding the optional calling service. Removal of the blocked out period would make that service more valuable but would not eliminate the toll charge callers will absorb if they call him from outside the Harbine exchange. Jantzen has not attempted to pay LTT anything to reactivate its cable because of Diller Telephone's motion for reconsideration and the consequent lack of finality to this application.

If Diller Telephone's \$1261.21 figure prevails as to loss of investment, instead of the Commission's estimate, Jantzen is not willing to pay that amount coupled with the amount LTT apparently wants for its cable's reactivation. Jantzen does not want to pay more than the \$97.21 the Commission has estimated plus the \$1460 LTT has estimated.

Application C-873

-8-

Even if LTT's local basic exchange fee is more than Diller's, Jantzen stated the overall cost will still be less if he switches exchanges.

The protestant called the manager of the Diller Telephone Company, Bill Sandman. Ex. #s 13, 14, and 15 were entered into evidence, these being the orders by the Commission denying the Jantzens' previous applications in the mid-1970's. Sandman described the improvements the protestant has made in the service area similar to what he described in the first hearing. It is his opinion that the applicant is receiving reasonably adequate service. Changes to the optional calling plan are forthcoming and notices will be sent to subscribers at the beginning of October. Sandman testified the new optional calling plan will lower Vern Jantzen's bill because the four hour block will be replaced with a new 24 hour schedule with a toll discount. Sandman claimed that if the application is granted there would possibly be a greater revenue impact on the remaining subscribers. Sandman testified that Diller Telephone did not object to LTT installing the toll cable in question through the Harbine exchange because Diller understood the cable to be a toll cable.

Diller Telephone's loss of investment analysis was performed by Arnold White of the accounting firm of Fry, White, & Guszak. Sandman said Diller is concerned about losing any subscriber because others may follow. Granting this application might set a precedent for others to leave the Diller service area.

Upon questioning by the Commission's counsel, Sandman admitted that the loss or gain of an individual subscriber does not alter the rate charged to the remaining subscribers in the exchange. Sandman stated on re-direct that he believes more subscribers would be interested in leaving the exchange if that meant avoiding toll calls.

Arnold White then appeared on behalf of the protestant. He is a certified public accountant. He has performed accounting services for the protestant for more than 20 years. He did the loss of investment analysis on the Jantzen applications in the mid-1970's. In doing those studies, his methodology was to examine Diller Telephone's continuing property records. He totaled the original plant investments in the central office equipment, the central office building, and the buried cable accounts in the Harbine exchange. The appropriate depreciation was applied to those costs to arrive at a net depreciated value. In the 1970's applications, he divided the net depreciated value by number of subscribers served in the Harbine exchange to get a depreciated investment cost per individual subscriber. To that figure was

Application C-873

-9-

added a cost for the retirement of the plant. In 1974, the loss of investment was calculated to be \$840 for the Jantzen application that year. The same figure was arrived at in the 1975 and 1976 applications.

For the current application, White used basically the same methodology except he took the total plant investment in the central office building, central office equipment, the span lines between the host and remote office, and the buried cable route that serves the subscribers. His calculations are found in Ex. #16 and the result is basically the same result found in Ex. #4 (which was admitted into evidence in the first hearing). The central office costs were based on the 119 subscribers in the Harbine exchange on December 31, 1990. The buried cable costs were divided by the number of possible subscribers the cable might serve. To that figure was applied depreciation which left a net value of plant investment per subscriber. To this a retirement cost was added (\$250). The result is a total cost allocated to the subscriber (Jantzen) of \$1261.21.

The difference between the figure just cited and the \$840 figure arrived at in the 1970's is due to equipment upgrading since that time. The additional investment has driven up the loss on investment the protestant would experience if the application is granted.

White does not agree with the Commission's original loss of investment calculation of \$97.21. He does not agree the Commission calculated the figure correctly and, more importantly, believes the Commission should not have calculated the cost on just the buried drop and the protector. The entire line should be considered. While the phone company perhaps should not be entitled to recovery on 75, 50, or 25 pair line cables because they might be used again when new subscribers are added, the smaller 6, 3, and 2 pair lines are probably a complete loss and will never be used again because of declining local rural population.

White testified that approval of the application is not economically sound to the protestant. The loss of revenue from Jantzen's switch to the Plymouth exchange would be replaced by increased rates to the remaining subscribers. While rates do not go up every time a subscriber enters or leaves an exchange, the rate of return is analyzed annually and a determination of whether to seek a rate adjustment is made. If enough subscribers are lost, then rates will go up. The loss of an individual subscriber will not necessarily result in an increase in rates, but collectively, a series of such applications could lead to such an occurrence.

On cross-examination, White testified the loss of investment occurs when the investment no longer produces revenue. White stated that once the telephone company incurs a cost to serve a specific subscriber and that subscriber leaves the exchange, that subscriber's location will never be served again. Therefore, the wire and connections installed from the central office to the former subscriber's location are unused and become a lost investment. White conceded this would not quite be the case if a house was built, for example, across the road from Vern Jantzen's house. White did not agree with Vern Jantzen's assertion that the cable is not abandoned all the way back to the central office. White also was not willing to concede Jantzen would own the abandoned cable if he paid the protestant for the loss of its investment, if the application is granted.

On examination by Commission counsel, White explained his reason for objecting to the Commission's original determination that the protestant's loss of investment is \$97.21. Besides the difference over arithmetic, White contended that finding the loss of investment to be solely the cost for the buried drop and the protector is a bad precedent. White did concede the possibility that the larger cables (75-24, 50-24, and 25-24) are more likely to continue to produce revenue than the 6-24, 3-24 and 2-24 cables and that the central office equipment servicing those remaining cables still remains in service when an individual application is granted. The \$250 retirement cost in Ex. #16 (not found in Ex. #4) is what White estimates Diller Telephone will spend for its employees to do the actual labor and book work to disconnect the line.

Norm Osland testified on behalf of the protestant. He is president of the Nebraska Telephone Association (NTA). He has discussed the concept of telephone boundary exchange integrity with officials of the Rural Electric Association (REA). These discussions took place in January and February of 1991 in response to a bill (LB 780) introduced in the Nebraska Legislature to eliminate exchange boundaries. The Association's (apparently the REA --- the transcript is vague as to which Association was referred to) position was in opposition to this bill.

As a result of these discussions, REA sent a letter (Ex. #17) in support of maintaining boundary integrity. (This letter was apparently in reference to LB 780 and not to this application.) REA supports maintaining telephone exchange boundaries because their REA loans are based partly on those boundaries. REA lends to Diller Telephone Company and to other NTA members.

Application C-873

-11-

The protestant then called Bill Ashburn as a witness. He is industry relations manager for LTT. Ashburn testified that Vern Jantzen proposed to receive service from LTT by use of a toll cable that runs near his residence. He stated he did not know when the cable was installed and that LTT estimated the cost of connecting Jantzen to the cable to be about \$1460.00. After speaking with Jantzen by phone three or four weeks prior to this second hearing, LTT still believes the \$1460.00 cost is accurate and the method already proposed to connect Jantzen for that sum is the best option.

On cross-examination, Ashburn testified that with some work the LTT toll cable could be used to connect Jantzen to the Plymouth exchange.

Vern Jantzen then asked to recall Bill Sandman. Sandman testified, in reference to the \$1261.21 loss of investment figure cited in previous testimony, Jantzen's new neighbor, Robert Hays, did not pay such a charge when he was connected to the Diller cable in the Harbine exchange. He also conceded that if Jantzen asked for a disconnection from the Harbine exchange, he would not have to pay such an amount for the disconnection. Sandman also conceded that the elderly age of Jantzen's neighbors and the unlikelihood that they will be replaced by new customers (because of the declining farm/rural population) means that the subscriber base will probably decline through attrition.

As for the new optional calling plan Diller Telephone is preparing to initiate, the new 24 hour service will have a \$4.45 (sic) rate for the first hour and 45¢ per each six minute interval thereafter. This represents an increase in rates and is in accordance with the applicable tariff. In Jantzen's case, his charges for calls after 12:00 noon and before 8:00 a.m. will increase under the new plan while calls made between 8:00 a.m. and 12:00 noon will decrease substantially.

Jantzen pointed out that he has already decreased those calls as much as possible. The potential exists for his rates to go up under this plan.

Sandman was then examined by protestant's counsel and stated that because of the declining population and the elderly status of many of its customers, as alluded to in prior testimony, retaining subscribers within the exchange is particularly important.

This concluded the evidence offered by the parties.

III. Discussion -

Neb. Rev. Stats. §§75-612 to 75-615 (Reissue 1990) govern a petition to switch telephone exchanges. These statutes became law in 1969 and allow a subscriber to petition for telephone service from an exchange different from the one in which the subscriber resides or operates. Prior to passage of L.B. 906, only telephone companies had the right to file such petitions with the Commission.

Since L.B. 906 became law, four telephone boundary exchange cases have been decided by the Nebraska Supreme Court: Schoen v. American Communication Co., Inc., 189 Neb. 78, 199 N.W.2d 716 (1972), Hartman v. Glenwood Tel. Membership Corp., 197 Neb. 359, 249 N.W.2d 468 (1977), Reis v. Glenwood Tel. Membership Corp., 207 Neb. 575, 299 N.W.2d 771 (1980), and In Re Application of George Farm Co., 443 N.W.2d 285 (1989).

§75-613 provides that after the hearing on this application, the Commission may grant the application, in whole or in part, if the evidence establishes all of the following:

"(1) That such applicant or applicants are not receiving, and will not within a reasonable time receive, reasonably adequate exchange telephone service from the company furnishing such service in the exchange service area in which the applicant or applicants reside or operate. The fact that an applicant is required to pay toll charges for long-distance telephone calls to an exchange service area adjacent to the territory in which the applicant resides or operates shall not be deemed to constitute inadequate exchange telephone service from the company furnishing such service;

(2) The revision of the exchange service area or areas required to grant the application will not create a duplication of facilities, is economically sound and will not impair the capability of the telephone company or companies affected to serve the remaining subscribers in any affected exchanges;

(3) The community of interest in the general territory is such that the public offering of each telephone company in its own exchange service area involved should include all the territory in its service area as revised by the Commission's order; and

(4) The applicant or applicants are willing and will be required to pay such construction and other costs and rates as are fair and equitable and will reimburse the affected company for any necessary loss of investment in existing property as determined by the Nebraska Public Service Commission."

Application C-873

-13-

A. Loss of Investment

We first address sub(4) of §75-613. After the original hearing, the Commission determined that the protestant's loss of investment totaled \$97.21. This consisted of \$60.90 for the buried drop and \$36.31 for the drop protector. Upon reconsideration, we find protestant's loss of investment to be \$338.91.

We do not agree with Diller Telephone's argument that its loss of investment is \$1261.21. The "retirement cost" of \$250 has no basis for support in the statute. Sub(4) solely addresses the "loss of investment in existing property;" a retirement cost for physically disconnecting the subscriber's line and any record-keeping envisioned by Diller Telephone is not addressed by the statute and does not constitute an "investment in existing property."

We also find that with the exception of the BJF 6-24 cable, BWF 3-24 cable, BW 2-24 buried drop and the drop protector, the remaining plant investment specified in Ex. #16 remains in use and does not constitute a loss to protestant of its investment in existing property. Therefore, upon a grant of the Jantzens' application, the loss of investment to the protestant consists of the following:

| | cost per subscriber | after depreciation |
|-------------------------------------|------------------------|-----------------------|
| 8,287 feet of BJF 6-24 cable | \$340.66 | \$221.43 |
| 2,626 feet of BWF 3-24 cable | 113.22 | 73.59 |
| 300 feet for BW 2-24 buried drop | 60.90 | 39.58 |
| 1 drop protector | 36.31 | 23.60 |
| (depreciation rate from Ex. #16) | x 0.035 | 358.20 |
| | = 19.29 | -----> (19.29) |
| | | <u>\$338.91</u> |

After depreciation, the loss of investment amounts to \$358.20. We note that the depreciation figure relied upon by the protestant is for the period 1981 to December 31, 1990. We therefore depreciate the cost per subscriber figures cited an additional 3.5% for 1991 (for a further depreciation of \$19.29) and deduct this amount for a total of \$338.91. The applicants should be required to reimburse Diller Telephone in this amount for its loss of investment in existing property. We observe that applicants, specifically Vern Jantzen, stated his willingness to pay construction and other costs for receiving exchange service from LTT.

B. Community of Interest

Sub(3) of §75-613 requires the Commission to determine if the evidence establishes the community of interest in the general territory is such that the application should be granted. The evidence clearly demonstrates the applicants' community of interest is in the Plymouth exchange of LTT. Friends, relatives, and business contacts are in the Plymouth exchange. See, e.g., Hartman v. Glenwood Tel. Membership Corp., 197 Neb. at 366 and In Re Application of George Farm Co., 223 Neb. at 24 for comparison.

In the case of Vern Jantzen, Ex. #8 and Vern's testimony amply establish where the applicants' community of interest lies. The farmstead where Henry Jantzen resides and where Vern and his brother operate the dairy is within the LTT Plymouth exchange. Vern Jantzen's address is Plymouth and he resides in the Plymouth Rural Fire District. Plymouth and Beatrice are both closer to Vern's residence than Harbine or Diller. Tri-County school is nearby in the Plymouth exchange. The vast majority of the school's boosters (of whose club he is a member) and members of his church are in the Plymouth exchange. The same is true of his family's doctor, dentist, and hospital. There are no banks, machinery dealers, county government officials or vet services he uses which are in the Diller or Harbine exchanges. Clearly, the Jantzens' community of interest is not within the Harbine or Diller exchanges. The evidence establishes the Jantzens' community of interest lies in the Plymouth exchange for the purposes of this application.

C. Duplication of Service, Economic Soundness, Impairment of Service

The next subsection of the statute we consider, sub(2), requires the Commission to examine the issues of duplication of service, economic soundness, and whether approval of the application will impair the affected telephone companies ability to render service to the other subscribers. We do not find there to be a duplication of service. We are mindful of the Supreme Court's dicta in Hartman v. Glenwood Tel. Membership Corp. in which the court rejected Glenwood's arguments regarding duplication of facilities. The court reasoned, "[u]nder Glenwood's theory, any time a telephone company has facilities to serve a resident in its area, that resident's application for other service under section 75-613, must be denied because granting the application would result in a duplication of facilities. Glenwood's interpretation of section 75-613 would permit granting an application only if the telephone company serving the applicant's territory did not have any facilities capable of serving that particular applicant. Such an interpretation would severely limit the applicability of section 75-613 and would give rise to difficult questions in future cases as to

Application C-873

-15-

whether the telephone company serving the area of an applicant has facilities capable of serving that applicant when its wires run near, but not directly to, the applicant's residence." Id. at 197 Neb. 368.

In the Jantzen application, Vern Jantzen's farmhouse is located only 108 feet from an LTT service cable which is currently not in use. At the present time, no duplication of facilities exists since the LTT cable is in the Plymouth exchange and does not serve the Vern Jantzen farm. Upon approval of this application, the boundary will be re-drawn and the LTT cable as it serves Jantzen will be within the LTT Plymouth exchange while the cable formerly serving Jantzen will be within the Harbine exchange serving the remaining or future subscribers on that cable. After approval of this application, there will therefore be no duplication of facilities.

§75-613(2) requires the evidence establish that approval of the application will not impair the affected telephone companies' capability to serve the remaining subscribers in the exchanges. We find no impairment exists. The cable to which Vern Jantzen has been linked in the Harbine exchange remains intact to serve the remaining subscribers on that cable or future subscribers who would be linked to the Harbine exchange. Approval of this application does not impair the telephone companies from capably serving the remaining subscribers.

The last portion of sub(2) to consider is whether approving the application is economically sound. The applicants have stipulated they will reimburse Diller Telephone for its lost investment in existing property. The Nebraska Supreme Court has rejected this as the sole determination of economic soundness. In Reis v. Glenwood Tel. Membership Corp., 207 Neb. at 577, the court stated: "*In determining economic soundness the commission must consider the financial condition of the protestant telephone company, the effect of the revision on its income and ability to service its debt, the likelihood that the revision will require future rate increases by the affected company, the fact that subscribers other than the applicants may have equally meritorious claims and the general effect of gradual erosion. . .*"

Mr. Sandman stated that approval of this application would not in and of itself cause a rate increase, although the protestant feared that approving this application could set a precedent for more applications. However, Sandman testified to a lack of complaints from other subscribers about the adequacy of protestant's service. The loss of subscribers the protestant fears is largely speculative. The potential for equally meritorious claims (applications)

exists, of course, but cannot be determined absent such applications. At this time, neither the potential for gradual erosion nor for consideration of other meritorious applications has risen in the exchanges served by Diller Telephone. The observations of the Supreme Court are notable in this regard. The court observed in Hartman v. Glenwood Tel. Membership Corp. that the telephone company in both Hartman and Schoen argued affirming those applications would open the floodgates to subsequent applications with a negative impact on the protestant telephone company. The court rejected this speculation by observing that by the time of Hartman (1977), those cases were the only two to reach the Supreme Court concerning §75-613. Said the court: "*It does not appear that the Schoen case created an incentive for widespread granting of applications.*" 197 Neb. at 370-371. Subsequent to this, there has been no flood of approved applications.

Sandman testified that Diller Telephone has 870 subscribers, 120 of whom are within the Harbine exchange. The loss of Vern Jantzen to Diller Telephone amounts to 0.11494 percent of its subscriber base. The loss of revenue from Jantzen will not significantly affect the income of Diller Telephone or its ability to service its debt.

D. Adequacy of Service

Finally, does the evidence establish the applicants are not and will not within a reasonable time receive reasonably adequate service in the Harbine exchange? From these hearings, we determine that the Jantzen's service is not now reasonably adequate nor will it be within a reasonable time.

Prior to 1982, toll charges for calls outside of the applicant's current exchange could be considered in deciding the adequacy of the protestant telephone company's service. In 1982, the Legislature's Telecommunications Committee introduced L.B. 229 at the request of the Nebraska Telephone Association. L.B. 229 amended §75-613(1) by inserting the following sentence: "*The fact that an applicant is required to pay toll charges for long-distance telephone calls to an exchange service area adjacent to the territory in which the applicant resides or operates shall not be deemed to constitute inadequate exchange telephone service from the company furnishing such service [.]*" The Commission, therefore, is precluded from considering the issue of toll calling by the applicant in making a determination of adequate or inadequate service. Testimony on behalf of the NTA indicates the bill was introduced in response to the Schoen decision and its descendants.

Application C-873

-17-

While it is true that Schoen, Hartman, and Reis involved applicants who sought relief from toll charges for inter-exchange telephone calls, the Supreme Court in those decisions did not limit itself nor the Commission to *only* considering the effect of toll charges to determine reasonably adequate service. Instead, the court in Schoen found the statute introduces a new concept whereby "*an applicant may prevail without proving inadequacy of service or unfairness of rates in the tradition of public utility law. . . Such phrases as 'reasonably adequate service,' 'duplication of facilities,' 'public interest,' and 'community of interest in the general territory' acquire a new meaning limited to the context §§75-613 and 75-614, R.R.S. 1943. Definition must evolve, case by case.*" Id. at 189 Neb. 82. The court reiterated this view in the Hartman decision at 197 Neb. 369.

We find there are several grounds for deciding the Jantzen's current and future service from Diller Telephone Company is inadequate:

(1) While it is true the toll charges paid by an applicant for calls to the local adjacent exchange are not a basis for finding inadequate service because of §75-613(1), the fact that local callers within an applicant's community of interest must pay toll charges to call the applicant is an indication of inadequate service. Vern Jantzen testified to the lack of calls received from his community of interest because of the toll charges. We observe that the statute specifies the *applicant's* toll charges cannot be considered; the statute does not preclude consideration of toll charges deterring others in the applicant's community of interest (but in a different exchange) from calling the applicant. If they do not call because of the toll charges, then the service received by the applicant is not adequate.

(2) The 911 situation faced by Vern Jantzen also demonstrates inadequate service exists. Jantzen lives in Jefferson County and the 911 service he receives originates in Gage County. At the same time, the fire and ambulance service is in the nearby Plymouth exchange and not in Gage County. In an emergency, a 911 call would route to the rescue services in Gage County which do not serve him and his family. Essentially, 911 as a service is of no use to the Jantzens. If the Jantzens are in the Plymouth exchange, a 911 call would route to those nearby services from the Plymouth Rural Fire District.

We recognize that the issue of 911 is not controlled by the local telephone company. From the telephone company's point of view, it is rendering as reasonably adequate service as it

can in the context of 911 service. However, the statute specifies that the question to decide is whether the *applicant* is receiving reasonably adequate exchange telephone service. The fact Vern Jantzen's family resides in the Harbine exchange reduces the quality of 911 service. Therefore, the exchange service Vern Jantzen is receiving is inadequate.

(3) In the George Farm Co. decision, the supreme court found it made no sense for "*half of the applicant's property to be within one exchange and the other half to be within another exchange.*" 233 Neb. at 27. We are faced with the same scenario. The Vern Jantzen farmstead is within both the Plymouth and Harbine exchanges. In George Farm Co., where the applicant's residential portion of the property was within Northeast Nebraska Telephone's Jackson exchange, the applicant's community of interest was in the adjacent exchange. Here the Vern Jantzen family is in the Harbine exchange, but their community of interest lies in the Plymouth exchange. The court's observation in George Farm Co. is applicable to the Jantzens' circumstances: "*In short, the applicant's only contact with Jackson is some property located there.*" 233 Neb. at 24.

We, too, find it to make no sense that the Vern Jantzen farmstead be within two exchanges. The better sense is for the property and the residents on that property to be within the exchange which most closely encompasses their community of interest.

We also observe that part of the court's rationale for reversing the Commission in George Farm Co. was because "*forcing the applicant to bear the burden of paying for two phone services for the same property so that such property and its occupants may have full service to the general area comprising their community of interest is arbitrary and unreasonable.*" 233 Neb. at 27. The applicant had put an "FX" (foreign exchange) line through the Jackson exchange in order to place calls to the community of interest without a toll charge. The cost for the FX line was approximately \$130 per month. The court ruled that an FX charge is not a toll charge (thus avoiding the effect of §75-613(1)), but instead is a flat fee for monthly service. On this basis, the court found that to deny the application for a change of boundaries and force the applicant to pay for two phone services in order to receive full service is arbitrary and unreasonable. "*Therefore, the fact that the applicant is required to pay a monthly fee so that all of its property can be within the same telephone exchange strikes us as a justifiable reason for granting the relief requested.*" 233 Neb. at 27.

Application C-873

-19-

In the Jantzen application, FX service was a possibility for making interexchange calls without long-distance fees. The cost per month cited in the transcript for such a service is \$200 per month. There is no sense in requiring an applicant in a telephone boundary application to first obtain, prior to the application, FX service and, in the words of the supreme court: *"forc[e] the applicant to bear the burden of paying for two phone services for the same property so that such property and its occupants may have full service to the general area comprising their community of interest [.]"* To require an applicant to first obtain FX service before granting an application is a useless and expensive exercise for the applicant. What is important to consider is that an applicant can only obtain full service to the general area of its community of interest by having both the local exchange service and FX service from the exchange in which the applicant's community of interest is found. This is the situation faced by the Jantzens. That they face this situation to obtain full service demonstrates the exchange service they receive is not adequate within the meaning of §75-613(1).

IV. Conclusion -

Applicants have met the burden of proof required by the statute. The application is fair and reasonable, is in the public interest, and should be granted. The applicants' should have their property (the Vern Jantzen farmstead) placed within the Plymouth Exchange of the Lincoln Telephone & Telegraph Company. The boundary between the Plymouth exchange and the Harbine exchange of Diller Telephone Company should be re-drawn to reflect this change. The applicants should reimburse Diller Telephone for its lost investment in property. The applicants should pay such construction and other costs to LTT as are required to establish exchange service from LTT to the applicants.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that, in accordance with *Neb. Rev. Stat.* 75-613 (Reissue 1990), Application No. C-873 be, and it is hereby, granted. The orders entered in this matter May 14th and November 26th, 1991 are hereby revoked.

IT IS FURTHER ORDERED that the loss of investment to Diller Telephone Company be, and it is hereby, determined to be the sum of \$338.91 and that the applicants file with the Commission a receipt showing payment of the same. Applicants are required to pay LT&T the construction charge to connect

Application C-873

-20-

the facilities using the most advantageous route to applicant Vern Jantzen's premises.

IT IS FURTHER ORDERED that, subsequent to applicants' payment to the Diller Telephone Company for the lost investment, both the Plymouth exchange boundary map and the Harbine exchange boundary map be revised to incorporate the entire farm property in question in the Plymouth exchange.

IT IS FURTHER ORDERED that subsequent to the grant of this application, LTT shall be issued a certificate of convenience and necessity to serve that portion of the territory added to its exchange pursuant to this order. In addition, the Commission shall set a date when the service granted shall take effect.

MADE AND ENTERED at Lincoln, Nebraska this 19th day of December, 1991.

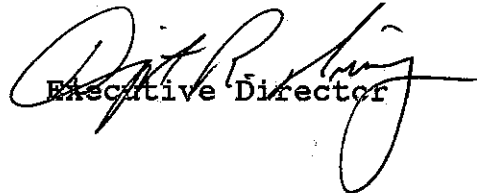
NEBRASKA PUBLIC SERVICE COMMISSION


Chairman

COMMISSIONERS CONCURRING:

//s//Frank E. Landis
//s//James F. Munnelly
//s//Eric Rasmussen

ATTEST:


Executive Director

COMMISSIONERS DISSENTING:

//s//Duane D. Gay
//s//Daniel G. Urwiller