**BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION**

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| In the Matter of the Application of Virgil L. Spitz, Columbus, Nebraska, who seeks authority to receive telephone service from the Columbus exchange of the GTE Telephone Company. | **APPLICATION NO. C-892**<br><br>**DENIED**<br><br>**Entered: December 10, 1991** |

**APPEARANCES:**

For the Applicant:
Virgil Spitz, Pro Se
Box 194C, Route 2,
Columbus, NE
68601

For Protestant Lincoln Telephone & Telegraph Co.:
Paul Schudel, Esq.
1500 American Charter Center
Lincoln, NE 68508

**BY THE COMMISSION:**

**Preliminary Matters:**

Virgil Spitz (Applicant) filed a petition to receive telephone service from the Columbus exchange of the GTE Telephone Company (GTE) July 1, 1991. Notice of the application was published in the DAILY RECORD, Omaha, Nebraska July 3, 1991. Lincoln Telephone & Telegraph (LTT) filed a protest to the Spitz application August 2, 1991. LTT currently provides local service to the applicant in its Shelby exchange. Notice of the hearing was sent August 29, 1991 to the parties and to GTE North, Inc. of Columbus, Nebraska.

Hearing was held October 11, 1991 with appearances as shown at the Shelby Fire Hall, Shelby, Nebraska.

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

**I. Summary of the Evidence.**

Darlene Spitz testified. The Spitzes farm with their son in a partnership arrangement. The son resides in the Columbus area and is in the Columbus exchange. The Spitzes do business with, and have machinery repair done by, several implement companies within the Columbus exchange.

The Spitzes' doctor, hospital, and dentist are in Columbus. The veterinarian is in Osceola and that is a toll call. Church activities are within the Columbus exchange, too. Mrs. Spitz's elderly mother lives alone on a farm in the Columbus exchange and Mrs. Spitz provides transportation

and care for her. Columbus provides all the necessities Shelby cannot provide. Therefore, the Spitzes are faced with a huge bill every month due to their business interests.

The Spitzes make few calls with their own local exchange compared to the calls placed to the Columbus exchange. About the only local call is to the Shelby Farmers Co-op. The Spitzes reside in the Duncan Fire District which is within the Columbus exchange.

The Spitzes are aware that, assuming the application is granted, they must pay construction and other costs and reimburse LTT for its loss on investment. At this point in the testimony, LTT for the sake of clarity, stipulated LTT's loss of investment would be $206.00.

On cross-examination, Darlene Spitz testified her family has had LTT service for 34 years, including the last 12 years at their current address. General Telephone has never provided them with service. The technical quality of LTT's service has been fine. Service is not a problem. The reason for the application is that their community of interest lies outside the Shelby exchange and the large toll bills. The Spitzes total bill averages around $124 a month, which apparently (from the testimony) includes the base rate.

The Spitzes have extended area service (EAS) including service to Osceola for $1.50 per month. Initially the Spitzes did not apply for the service because of confusion over the LTT EAS plan. This plan presented the Spitzes (along with the rest of LTT subscribers) with several calling options. The Spitzes now have EAS but still consider it to be a toll plan. EAS does not fulfill their needs because the plan does not cover Columbus and Duncan. During cross-examination, Mrs. Spitz conceded they subscribe to the Optional Calling Plan. Protestant's counsel inferred that this plan from American Telephone & Telegraph (AT&T) includes Columbus as part of the service area. Mrs. Spitz expressed uncertainty as to whether this is the case.

Mrs. Spitz testified on cross-examination that she is aware there are two LTT subscribers on the same buried cable as the Spitzes who wish to remain with LTT. In response to the protestant counsel's statement that these customers' community of interest was in the Shelby exchange, or that they were at least apparently satisfied to remain in the Shelby exchange, Mrs. Spitz stated she understood one of those customers was going to use a cellular phone but the Spitzes cannot afford such a service.

Mrs. Spitz further testified she received a letter from GTE which contained GTE's estimate of construction costs.

These costs are estimated to be $4,835.06. At the direction of the hearing officer, GTE late-filed Exhibit 3 which separates the construction costs into their various components. Mrs. Spitz initially expressed uncertainty as to whether they would pay this amount. Later in her testimony, she stated she and her husband thought the switch to the new exchange would eventually pay for the costs in long-distance savings; she then agreed with protestant's counsel's interpretation that this meant the applicant will pay the construction costs estimated by GTE.

The legal description of the Spitz property is Range 1 West, Township 16, Section 27. The property is 213 feet from the GTE pedestal across the road from their property.

Virgil Spitz testified about the LTT cable buried in the east ditch next to the road west of his residence. Mr. Spitz testified he understands the county (or State) roads department plans to grade this road. He contends this means new telephone cables will have to put in place. On cross-examination, Spitz testified he does not know the timetable for the grading but saw the road crews surveying the road this past summer.

This concluded the applicant's presentation.

William Ashburn testified on behalf of LTT. Ashburn is LTT's Industry Relations Manager, which includes liaison with the Commission. After reading the application, he consulted LTT's service maps to locate the Spitz residence in the LTT Shelby exchange. Exhibit 4 is a map of Holt County and highlights the Shelby school district, the Shelby telephone exchange, the Duncan Rural Fire District (RFD), and the Spitz residence.

Exhibit 5 is a Section/Township/Range map and places the Spitz residence in context to its location to the LTT cable facilities and the location of LTT subscribers in the Shelby exchange. Exhibit 6 is a township map that reflects the boundary lines between the Shelby and Columbus exchanges. This map also shows the locations of the subscribers in the exchanges.

The Spitz residence is served by the Stromsberg-Carlson digital office. This is a state of the art central office serving the entire exchange. The cables themselves are all buried. LTT intends to install new fiber facilities between David City and Shelby, probably within the next year. Mrs. Spitz did not challenge the quality of the service provided by LTT and Ashburn answered in the affirmative when asked by counsel whether he expected this would be the case with such a modern facility.

Ashburn has reviewed LTT's long distance toll records showing the Spitzes toll charges for the last two years (September 1989 - September 1991). These records were marked and offered as Ex. 7 which shows all the toll charges for LTT as well as for AT&T. The hearing officer refused to enter into the record copies of the actual bills reflecting the general information in Ex. 7 in order to protect the Spitzes privacy. The Spitzes subscribe to LTT's optional calling plan (OCP). The OCP is a 25 mile calling radius which crosses GTE's exchange and includes Columbus. The Spitzes pay a flat rate for one hour's worth of OCP calling per month. Over one hour, a fee of 65 cents for each six minutes of calling is assessed. Ashburn estimated the OCP plan's rate is about 50 percent less than regular toll rates. The Spitzes also have an extended area service (EAS) plan which covers Osceola.

On August 16, 1991 LTT implemented a new Enhanced Local Calling Area which is basically a 25 mile radius within the exchange. This plan contained various options for subscribers. Because of the plan, the Spitzes base local rate dropped from $11.45 per month to $11. Ex. 7 shows the Spitzes subscribed to the EAS service to Osceola.

Ashburn identified Ex. 8 which is a copy of the letter from LTT's president, Frank Hilsabeck, to Mr. Spitz explaining the Enhanced Local Calling Area plan and the various options available to Shelby exchange subscribers. The letter explained that the Spitzes had the option to choose the Enhanced Local Calling Area plan and purchase a one hour block of time to exchanges within the LTT area and within 25 miles of the Shelby exchange. Ashburn testified the Spitzes did not choose this option. LTT developed this plan for a 25 mile calling radius to give its subscribers a larger calling area at a reduced rate. The plan does not include Columbus, however, because the regulations pertaining to the LATA (Local Access Transport Area) boundary, which is not controlled by LTT, prevent the enhanced plan from extending into a different LATA. LATA's were created as part of the AT&T divestiture and the particular LATA boundary in this case runs along the Platte River and therefore separates the Spitzes from Columbus.

Foreign exchange (FX) service is another option available to the Spitzes. For a fee, a subscriber gets an FX line which allows the subscriber to make calls into other exchanges without paying toll charges. (We note parenthetically that FX service usually costs between $100 and $200 per month.) Based on Ex. 7, Ashburn testified the Spitzes subscribe to the OCP purchased from AT&T and perhaps as much as 99 percent of the calls made using OCP were from the Spitz residence to Columbus.

If the Spitzes need to reach the Duncan RFD (which is in the Columbus exchange), they would call 911. This is not a toll call. 911 calls to the Polk County Sheriff in Osceola for medical emergencies are dispatched from either Shelby or Osceola by the Sheriff's office. Law enforcement-related calls are handled the same way. The Spitz residence lies within the Shelby school district.

Ex. 5 shows the location of the facilities serving the Spitzes. The main cable feed runs south to north in the ditch on the east side of the road next to the Spitz property. The Spitzes and two other residences are served by this cable. The cable extends north of the Spitz residence where it crosses the road and proceeds west to serve the two other residences. Ashburn believes, if the application is approved, GTE cannot serve the Spitz residence without creating a duplication of service because a GTE cable will have to cross the LTT cable serving the remaining two residences.

Assuming the application is granted, LTT, according to Ashburn, does not believe a new boundary line can be created which does not result in a duplication of facilities. Ashburn thinks the fact the other two resident subscribers are not seeking an exchange switch means there is a division of community interest in the general area of the Spitz property.

Ashburn testified the Commission has sought to eliminate dual service areas as a matter of public policy. In his opinion, granting the application will contribute to the creation of a dual service area contrary to that policy.

If the application is granted, LTT fears a snowball effect will result and other LTT subscribers will seek to switch exchanges. The instability this creates making planning and investment by LTT difficult.

Ashburn also stated for the record the loss of investment if the application is granted will be $206. This concluded the protestant's evidence.

Virgil Spitz then stated that the list of telephone bills prepared by LTT does not reflect all the other calls to the Spitzes from their son who lives a half mile away and from Mrs. Spitz's mother, both of whom live in different exchanges and therefore have to pay toll charges. Many other people also do not call the Spitzes because of the interexchange toll calls.

Mrs. Spitz asserted one of the nearby residents on the same cable (Mr. Stanek) now has a Columbus phone contrary to

Ashburn's testimony and that Stanek moved to Columbus. Apparently, he has a Shelby telephone line for his feedlot in the Shelby exchange along with the Columbus phone line. Mrs. Spitz also asserted the other neighbor (Mr. Scow) planned to file an application along with the Spitzes, but did not because of a job change. In subsequent testimony, Ashburn stated he understands the Scows still have a dial tone and that the Stanek residence is now occupied by the son of the Scows. LTT is definitely serving the two residences north of the Spitzes and they are served by the same cable serving the Spitzes.

In answer to a question from Commission counsel, Ashburn stated the "snowball" effect he described previously, and which LTT fears, starts with the approval of one application which then becomes two, three, four, and more. In answer to another question from counsel, Ashburn stated that approval of the Spitz application will have no material effect on LTT's ability to service its debt or on the company's economic soundness. Granting this application will not create the need for a rate increase to make up the lost revenue.

Ashburn is not familiar with the future road upgrade described by Virgil Spitz. LTT takes the position that two telephone companies' cables buried in the same right of way constitute a duplication of facilities. If the companies' cables are on opposite sides of a road, each in a separate right of way, there is no duplication.

This concluded the evidence presented and the hearing was closed.

**II. Discussion.**

This application is governed by Neb. Rev. Stats. §§75-612 to 75-615 (Reissue 1990). These statutes became law in 1969 and allow a subscriber to petition for telephone service from another exchange different from the one in which the subscriber resides or operates. Prior to passage of L.B. 906 in 1969, only telephone companies had the right to file such petitions with the Commission. Accordingly, subscribers themselves may now make such a petition.

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."

For an applicant to prevail, the evidence must satisfy the standards and requirements established in all four subsections of §75-613. Failure to satisfy even one of the subsections requires us to deny the application. In 1982, the Nebraska Legislature passed LB 229, which amended subsection (1) by adding the last sentence of that section. The amendment states that an applicant cannot demonstrate inadequate exchange telephone service because he or she pays toll charges for interexchange calls between neighboring exchanges.

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 applicant's community of interest is in the Columbus exchange of LTT. Friends, relatives, and business contacts are in the Columbus exchange. See Hartman v. Glenwood Tel. Membership Corp., 197 Neb. at 366 and In Re Application of George Farm Co., 223 Neb. at 24 for comparison.

While we agree the Spitzes community of interest is within the Columbus exchange (their relatives, church, community activities, and business interests are in GTE's Columbus exchange), community of interest by itself is not sufficient grounds for approving the application.

The Spitzes candidly admitted that the service provided by LTT is adequate and while we are sympathetic to the issue of toll charges for interexchange calls such as those the Spitzes make (for example calls to their son and Mrs. Spitz's mother), the Legislature has precluded the Commission from considering these calls as evidence in an application. Since Virgil Spitz is receiving reasonably adequate service as shown by the evidence described earlier in this order, the fact his community of interest lies in the Columbus exchange is insufficient grounds for granting the application. We are required by law not to consider the toll charges to which the Spitzes are subjected. Because the applicant has failed to show the service is not reasonably adequate as required by subsection (1), we do not need to address the other subsections of the statute.

III. Conclusion -

The applicant has not met the burden of proof required by the statute. The applicant has failed to establish that reasonably adequate telephone exchange service is not being received now or within a reasonable time in the exchange in which he resides. The application should be denied.

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-892 be, and it is hereby, denied.

**MADE AND ENTERED** at Lincoln, Nebraska this 10th day of December, 1991.

**NEBRASKA PUBLIC SERVICE COMMISSION**

Daniel G. Urwiller

Vice **Chairman**

**COMMISSIONERS CONCURRING:**

Duane D. Gay

//s//James F. Munnelly
//s//Daniel G. Urwiller

COMMISSIONERS DISSENTING:
//s//Eric Rasmussen

**ATTEST:**

**Executive Director**

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Commissioner Rasmussen, dissenting.

I dissent from the order denying the Spitzes' application. The majority's reasoning means absent consent of the affected local telephone exchanges, an applicant's chances of successfully obtaining a boundary change are virtually nil.

A petition to switch telephone exchanges is governed by **Neb. Rev. Stats.** §§75-612 to 75-615 (Reissue 1990). Before L.B. 906 became law in 1969, only telephone companies had the right to file such petitions with the Commission. Accordingly, subscribers themselves may now petition this Commission.

In my judgement, this order is a continuation of the pattern established in Application No. C-873 (Application of Vern and Henry Jantzen, Plymouth Nebraska), decided November 26, 1991. There is practically no means for applicants to prevail on a petition as a result of these orders.

I believe the evidence establishes the Spitzes met the requirements of §75-613 as follows:

The Spitzes satisfied subsection (4) of §75-613 by testifying they are willing to pay LT&T for its loss of investment and by also, admittedly reluctantly, testifying they are willing to pay GTE for installation of service from the GTE Columbus exchange.

Subsection (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 Columbus exchange of GTE. Friends, relatives, and business contacts are in the Plymouth exchange. See Hartman v. Glenwood Tel. Membership Corp., 197 Neb. at 366 and In Re Application of George Farm Co., 223 Neb. at 24 for comparison.

Subsection (2) requires the Commission 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. There will be no duplication of service should this application be granted. The Supreme Court's dicta in Hartman v. Glenwood Tel. Membership Corp. 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 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 this application, LT&T stated for the record (see TRANSCRIPT, page 51) its position that if its cable and the GTE cable are each in separate ditches across from each other on a roadside, no duplication of facilities exists. With the upcoming road grading in the area, the result will be no duplication. LT&T also testified in response to a question from the Commission legal counsel that if the application is granted, the loss of the Spitzes to the GTE exchange will not have a material effect on the company and that it would not be grounds for a rate increase to make up the lost revenue.

Also in response to a question from Commission counsel, LT&T testified it feared a "snowball effect" if the Spitz application is granted. The observations of the supreme court in Hartman v. Glenwood Tel. Membership Corp. are worth noting in considering such a fear. The telephone company in both Hartman and Schoen argued affirming approval of those applications would open the floodgates to subsequent applications with a negative impact on the protestant telephone companies. 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 the application before us, there has been no flood of approved applications.

Finally, subsection (1) of §75-613 requires the Commission to consider whether the evidence establishes the applicants are not and will not within a reasonable time receive reasonably adequate service in the LT&T exchange. 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. L.B. 229 added the following sentence to §75-613(1): "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.

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 of §§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.

I reiterate my position as expressed in the C-873 Jantzen dissent I joined in with Commissioner Landis regarding adequacy of service. There are grounds for deciding the Spitzes current and future service from LT&T is inadequate:

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. Mr. Spitz testified to the negative impact of toll call charges accumulated by his son and mother-in-law due to interexchange calling as well as to the fact other people do not call because of the toll. 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.

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. The Spitzes are in the LT&T exchange while the community of interest is within the GTE Columbus exchange. The court's observation in George Farm Co. is applicable to the Spitzes' circumstances: "In short, the applicant's only contact with Jackson is some property located there." 233 Neb. at 24. I also note for the record that I do not take such a crabbed

view of the George Farm Co. case that the different factual circumstances between it and the Spitz application render George Farm Co. inapplicable. I contend George Farm Co. requires this Commission to look beyond the restriction placed on petitioners by §75-613(1) and recognize that the issue of toll charges is not the determining factor protesting telephone companies wish to believe it is.

I also contend 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.

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 [.]" Obtaining FX service before as a condition to receiving approval of an application is a useless and expensive exercise for an applicant, including the Spitzes. 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 left to the Spitzes by the majority's order. 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).

The Spitzes have sustained their burden of proof as required by the statute. The application is fair and reasonable, is in the public interest, and should be granted. If the majority continues to maintain its current position, it

should simply ask the Legislature to repeal §75-613 because no applicant can prevail against the majority's reasoning.

Eric Rasmussen

Commissioner Eric Rasmussen
4th District