



LEXSEE 2 FCC RCD 5986

In the Matter of Northwestern Bell Telephone Company Petition for Declaratory Ruling

RELEASE-NUMBER: FCC 87-290

FEDERAL COMMUNICATIONS COMMISSION

2 FCC Rcd 5986; 1987 FCC LEXIS 2973; 63 Rad. Reg. 2d (P & F) 1701

October 5, 1987 Released; Adopted September 9, 1987

ACTION:

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MEMORANDUM OPINION AND ORDER

JUDGES: By the Commission

OPINION:

[*5986] I. INTRODUCTION

1. On December 9, 1986, Northwestern Bell filed a petition for a declaratory ruling that Teleconnect is required to pay access charges for interstate calls placed to a Teleconnect service called Talking Yellow Pages. Teleconnect filed an opposition to the Northwestern Bell petition on December 23, 1986, in which it asserts that its Talking Yellow Pages is an enhanced service and is therefore entitled to an exemption from interstate access charges under our rules. On January 21, 1987, we released a public notice requesting comments on the petition. n1 In this order we clarify that under our current rules, enhanced service providers are treated as end users for access charge purposes. Since end users would not pay interstate access charges when using local exchange facilities in the manner Teleconnect is using them to provide Talking Yellow Pages, we conclude Teleconnect is similarly not subject to such charges. Accordingly, the petition of Northwestern Bell is denied.

n1 FCC Public Notice, DA 87-23 (Commission See ks Comments on Petition for Declaratory Ruling Filed by Northwestern Bell Regarding Exemption from Interstate Access Charges), released January 21, 1987. The following parties filed comments: Ameritech, Dial Info, MCI, and NYNEX. The following parties filed reply comments: ADAPSO, MCI, Northwestern Bell, NYNEX, and Teleconnect.

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II. PETITION AND PLEADINGS

2. Northwestern Bell requests a ruling that Teleconnect is required to pay access charges for interstate calls placed to Teleconnect's Talking Yellow Pages service. This service enables customers in Omaha, Nebraska to dial a local number and hear recorded advertisements. The call is routed over Direct Inward Dialing (DID) trunks provided by Northwestern Bell to Teleconnect's point of presence (POP) in Omaha. The call then goes over transmission facilities obtained from an unaffiliated interexchange carrier to Teleconnect's POP in Cedar Rapids, Iowa, where the playback machine is located. In addition to providing the Talking Yellow Pages service and other enhanced services, Teleconnect operates as a nondominant interexchange carrier. n2 Talking Yellow Pages is also available to customers in the Cedar Rapids, Iowa area. The recorded information is centrally stored in Teleconnect's Cedar Rapids switch, and callers never speak with a live Teleconnect operator. n3

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n2 Teleconnect also manufactures and sells key-systems and publishes telephone directories, but Northwestern Bell focuses on Teleconnect's position as an interexchange carrier.

n3 Opposition of Teleconnect Company to Petition for Declaratory Ruling at 4.

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3. In its petition, Northwestern Bell says that it has discussed the matter of Teleconnect's obligation to pay access charges with the Commission staff. Northwestern Bell asserts that it was advised that Teleconnect's Talking Yellow Pages service is an enhanced service, and therefore exempt from access charges. n4 It states that it is not currently assessing access charges on Teleconnect's enhanced service operations.

n4 Northwestern Bell Petition at 2. Northwestern Bell asked the Common Carrier Bureau staff whether the fact that Teleconnect was an interexchange carrier made its enhanced service offering ineligible for the exemption from access charges that is applicable to enhanced services generally.

4. Northwestern Bell bases its request that Teleconnect be required to pay access charges on two theories. Northwestern Bell argues first that the resale structure of *Computer II* requires unbundling enhanced service from basic transmission; and second, that an exemption from access charges would result in federal preemption of intrastate basic transmission services. n5

n5 Northwestern Bell cites *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, *Memorandum Opinion and Order*, 84 FCC 2d 50, 75 n.19 (1980).

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5. Northwestern Bell contends that the access charge exemption sought by Teleconnect would subvert the *Computer II* resale structure. Northwestern Bell states that *Computer II* requires the unbundling of basic and enhanced services. It argues: "In this particular instance, Teleconnect as a carrier has effectively bundled basic and enhanced services -- and, as the access charge exemption which it seeks is available *only* if the customer subscribes to Teleconnect's enhanced service (because a customer supplying its own recording device must pay access charges), has turned the *Computer II* resale structure on its head." n6

n6 Northwestern Bell Petition at 3.

6. Teleconnect responds that the resale structure applies to carriers that use their own facilities and file tariffs. Teleconnect does not use its own transmission facilities for the Talking Yellow Pages service, but obtains facilities from an unaffiliated interexchange carrier. In addition, Teleconnect says that because it is nondominant, it does not have any tariffs on file with the Commission. Finally, Teleconnect contends even if its arrangement violated the resale structure, this would not turn an enhanced [**5] service into a basic service that is subject to access charges. n7

n7 Teleconnect Opposition at 5-6.

7. In its reply, Northwestern Bell argues that the converse of Teleconnect's final point is true: when a nondominant carrier adds an enhanced service to a basic service, it does not turn the basic transmission into an enhanced service. n8 Northwestern Bell characterizes Talking Yellow Pages as an interstate FX line with a recording device attached to the closed end. n9

n8 Northwestern Bell Reply at 3.

n9 Northwestern Bell Petition at 1. Although the arrangement Teleconnect uses is functionally similar to an FX, technically Teleconnect is not using FX service for the provision of its Talking Yellow Pages service because it has a POP in the exchange where the calls originate (that is, in Omaha) and interconnects with the local exchange facilities at question at that POP. An FX service is configured differently: the FX customer does not have a POP in the exchange where the local exchange service is provided. In this case, an FX customer would not have a POP in Omaha, the exchange where the calls originate.

8. Northwestern Bell also contends that an exemption for Teleconnect [**6] would result in preemption of state regulation of intrastate basic transmission services, since if "a carrier-provided recording device on a carrier's premises results in classification of the transmission facility as enhanced, state regulation over the transmission facility itself is preempted." n10 Teleconnect responds that, since the Commission has already decided to preempt state regulation of enhanced services, the granting of an exemption to Teleconnect will not result in any increased preemption of enhanced services regulation. n11

n10 Northwestern Bell Petition at 3-4.

n11 Teleconnect Opposition at 10.

9. Teleconnect believes that neither of Northwestern Bell's arguments is relevant to the question of whether it should pay access charges. Teleconnect argues that this Commission's definition of enhanced service includes services that "involve subscriber interaction with stored information," and that Talking Yellow Pages is clearly such a service. n12 The Teleconnect reply observes that none of the commenters argue that Talking Yellow Pages is not an enhanced service. n13 Since this Commission has exempted enhanced services from the payment of access charges the answer [**7] to Northwestern Bell's Petition is clear, according to Teleconnect: Talking Yellow Pages is an enhanced service and need not pay access charges. MCI and ADAPSO agree that this Commission should limit our consideration to the question of whether Talking Yellow Pages is an enhanced service. n14

n12 *Id.* at 7, quoting 47 C.F.R. section 64.702(a).

n13 Teleconnect Reply at ii.

n14 MCI Comments at 7; ADAPSO Reply at 5.

[*5987] 10. In its comments, Dial Info interprets Northwestern Bell's petition as taking the position that the status of a telecommunications service changes from basic to enhanced depending upon the location of the service provider's information storage facility. Dial Info opposes Northwestern Bell's petition, saying that the Talking Yellow Pages service is enhanced and therefore exempt whether the information storage facility is in Nebraska or Iowa. Dial Info argues that the line between enhanced and basic service should be drawn on the basis of user interaction with stored information, rather than on the basis of the location of the storage facility.

11. NYNEX argues that this Commission did not exempt enhanced services, but enhanced service *providers*. [**8] Because Teleconnect is an interexchange carrier, NYNEX says that the rate shock rationale that underlies the access charge exemption for enhanced service providers should not apply -- Teleconnect already pays access charges. Teleconnect and MCI respond that this Commission intended to exempt anyone who offers enhanced services, including interexchange carriers. Teleconnect says first that in using "enhanced service providers" in CC Docket No. 78-72, the Commission meant both carriers and non-carriers that provide enhanced services. Moreover, according to Teleconnect, in *Computer II*, this Commission clearly decided enhanced services are unregulated whether they are provided by an interexchange carrier or another entity. Teleconnect concludes that the scope of exemption from regulation and the scope of exemption from access charges are the same. n15 Finally, MCI and Teleconnect argue that denial of the exemption to interexchange carriers providing enhanced services would result in discrimination, since some providers of enhanced services would be subject to access charges and others would not. n16

n15 Teleconnect Reply at 8.

n16 MCI Reply at 5 n.6; Teleconnect Reply at 7.

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12. Other commenters focus not on Teleconnect's Talking Yellow Pages, but on the enhanced service provider exemption in general. Ameritech says that it is illogical to determine whether one is entitled to the access charge exemption based on whether the wire from Teleconnect's Cedar Rapids POP terminates at a recorded playback machine or an announcer's headset. n17 NYNEX argues that all carriers using ordinary subscriber lines and end office facilities should pay the same access charges, and that because this Commission's policy has been to eliminate exceptions, an exception for Teleconnect would be a step backward. n18

n17 Ameritech Comments at 2.

n18 NYNEX Comments at 4-5.

13. Teleconnect responds that arguments about the general wisdom of the access charge exemption for enhanced services are irrelevant for the purposes of the Northwestern Bell petition, which seeks a declaratory ruling on the meaning of the present rules, rather than a change in those rules. n19 ADAPSO says that all users of interexchange access services do pay access charges, although there are different kinds of charges, and that a separate Rule Making would be required if all users of interexchange [*10] access services were to be required to pay the same charges. n20

n19 Teleconnect Reply at 10-11.

n20 ADAPSO Reply at 3.

14. Dial Info requests that this Commission clarify the exemption of enhanced services, and argues that it too qualifies for the exemption from interstate access charges. Dial Info provides interactive information and entertainment programs via Touch-tone phone, under Audiotex or 976 tariffs. Dial Info says that each of the seven BOCs with which it deals has refused to consider it exempt from access charges. NYNEX responds that Dial Info does not pay interexchange access charges for its 800 service, but instead is charged for 800 service by AT&T. The LECs bill access charges to AT&T. In addition, NYNEX says that it is appropriate for the LECs to bill interstate access charges for 976 services to the interexchange carrier of record. n21

n21 NYNEX Reply at 5.

III. DISCUSSION

15. We conclude that under this Commission's current rules, Teleconnect is not required to pay access charges for interstate calls placed to its Talking Yellow Pages service. The pleadings raise three arguments in support of Northwestern Bell's petition, and we address each [*11] of these in turn, and then discuss the application of our rules to this particular case.

16. In its petition, Northwestern Bell argues that an access charge exemption for Talking Yellow Pages violates the resale structure established in the *Computer II* proceeding. Based on the record before us, Teleconnect exclusively uses the common carrier services of third parties in providing Talking Yellow Pages to its Omaha customers. n22 Thus, arguments based on the "resale" structure of *Computer II* are inapposite. To the extent that Northwestern Bell's argument goes to the logic of an exemption for enhanced service providers generally, that question is outside the scope of this declaratory ruling proceeding. However, we recently initiated a Rule Making proceeding to consider whether to eliminate the access charge exemption for enhanced service providers, n23 and that question will be addressed there.

n22 Teleconnect Opposition at 6; Northwestern Bell Reply at 3-4.

n23 See Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, Notice of Proposed Rule Making, CC Docket No. 87-215 (released July 17, 1987) (hereinafter *Notice*).

17. [*12] Northwestern Bell also contends that an exemption for Teleconnect would result in federal preemption of intrastate basic transmission service. While Talking Yellow Pages service is also offered on an intrastate basis, the interstate access charge issues of this proceeding affect only the interstate provision of this service. Thus, since there does not appear to be any preemptive federal regulation of intrastate basic services at issue in this particular case. Northwestern Bell's argument is inapt. n24

n24 While an access charge exemption for Talking Yellow Pages does not result in any preemption of intrastate basic services, we emphasize that in proceedings such as *Computer II* and *Computer III*, we have not attempted to require states to exempt enhanced service providers from intrastate access charges, or any other intrastate charges, when such enhanced service providers are using jurisdictionally intrastate basic services in their enhanced service offerings.

18. In its comments, NYNEX argues that this Commission exempted enhanced service providers, rather than enhanced services, from interstate access charges and that Teleconnect, as an interexchange carrier, should [*13] not

receive an access charge exemption even when it is offering enhanced services. This argument misconstrues our rules. Under those rules entities that offer both interexchange services and enhanced services are treated as carriers with respect to the former offerings, but not with respect to the latter. Thus, interexchange carriers, like Teleconnect, are eligible for an interstate access charge exemption for their enhanced service offerings. Although the access charge orders refer to "enhanced service providers," we have never limited that category to entities that provide only enhanced services. Rather, any entity that actually provides enhanced services should be treated as an "enhanced service provider," regardless of any other services that entity might provide. Furthermore, we agree with MCI and Teleconnect that to exempt non-carrier providers of enhanced services, but not providers of enhanced services that are also carriers, would raise questions of discrimination and could bestow an unfair advantage on non-carrier competitors. n25

n25 See, e.g., *MTS and WATS Market Structure, Memorandum Opinion and Order*, 97 FCC 2d 682, para. 3 (1983).

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19. The foregoing analysis is consistent with this Commission's decisions that have held that, for purposes of the Communications Act, a service provider is not a common carrier with respect to each communication service it offers, simply because it offers some services on a common [*5988] carrier basis. n26 Thus, in *Computer III*, we explicitly held that firms that are treated as common carriers for certain of their offerings are *not* common carriers in their roles as enhanced service providers. n27

n26 See *NARUC v. FCC*, 525 F.2d 630, 644 (1976) (A particular system is a common carrier by virtue of its functions, rather than because it is declared to be so.); *NARUC v. FCC*, 533 F.2d 601, 608 (1976) (. . . one can be a common carrier with regard to some activities but not others.).

n27 Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), Memorandum Opinion and Order on Reconsideration, CC Docket No. 85-229, para. 179 (released May 22, 1987).

20. Having decided that Teleconnect is not disabled from qualifying for an access charge exemption for its enhanced services [*15] offerings under the current access charge rules simply because it is also an interexchange carrier, we turn to the specific issue raised in the proceeding -- that is, whether Teleconnect should pay interstate access charges to Northwestern Bell for its Talking Yellow Pages service. This requires us to address two questions: first, whether Talking Yellow Pages is an enhanced service; and second, if it is, whether the access charge exemption applies to the particular configuration Teleconnect uses to offer the service. We answer both questions in the affirmative. First, a subscriber to Talking Yellow Pages makes a phone call and hears a recorded advertisement. Thus, Talking Yellow Pages involves "subscriber interaction with stored information," and falls squarely within the definition of "enhanced service" in Section 64.702(a) of this Commission's rules, 47 C.F.R. § 64.702(a). Second, under this Commission's rules, enhanced service providers are classified as "end users." n28 An end user that interconnected local exchange lines with interstate transmission facilities through a PBX or similar device on its premises would not be required to pay interstate access charges for the interstate [*16] traffic that traversed these local exchange lines. Rather, this would be treated as part of the "leaky PBX" phenomenon, and the end user would pay subscriber line charges for its local exchange lines and special access surcharges on its private line connection. We find that the configuration Teleconnect uses in Omaha to provide its Talking Yellow Pages service is similar to this type of leaky PBX configuration. Accordingly, we conclude that Teleconnect is not required to pay interstate access charges to Northwestern Bell for interstate calls made to its Talking Yellow Pages service. n29

n28 Section 69.2(m) of this Commission's rules defines end user as "any customer of an interstate or foreign telecommunications service that is not a carrier . . ." 47 C.F.R. § 69.2(m). Section 69.5 sets out the general categories of charges to be assessed. Section 69.5(a) specifies that "end user charges shall be computed and assessed upon end users." Subsection (b) provides for the assessment of carrier's carrier charges upon interexchange carriers," and subsection (c) says that "special access surcharges shall be assessed upon users of exchange facilities that interconnect these facilities with means of interstate or foreign telecommunications to the extent that carrier's carrier charges are not assessed upon such interconnected usage. . . ." 47 C.F.R. § 69.5.

n29 See 47 C.F.R. § 69.5. It is true that the exemption for Teleconnect's Talking Yellow Pages services results in a somewhat anomalous situation; if Teleconnect used FX service, which would be functionally very sim-

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ilar to the arrangement it does use, interstate access charges would apply since end users who subscribe to FX service are assessed access charges. *MTS and WATS Market Structure*, 97 FCC 2d 834, paras. 100-01 (1984). Nevertheless, anomalies that arise because of the exemption for enhanced service providers are best discussed in the context of the Notice of Proposed Rule Making we recently adopted in which we proposed to eliminate the exemption for enhanced service providers. See Notice, *supra* note 22.

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21. While not directly at issue in the petition, we wish to address a situation raised in the record by Dial Info to clarify the circumstances in which an exemption from access charges does not apply. Dial Info argues that it should be exempt from access charges for the interstate services, such as 800 service, it uses in offering its enhanced services. As NYNEX observes in its comments, Dial Info does not pay interstate access charges directly; the LECs bill the interexchange carriers that provide 800 service to Dial Info. Thus, Dial Info seems to be suggesting that these interexchange carriers should receive an exemption from access charges for the interstate services they provide Dial Info and presumably should be required to pass through the cost savings to Dial Info. The same analysis we have applied to the Teleconnect situation demonstrates that Dial Info is not entitled the exemption it seeks. As discussed above, enhanced service providers are treated as end users for purposes of our access charge rules. End users that purchase interstate services from interexchange carriers do not thereby create an access charge exemption for those carriers. Thus, to the extent that [**18] Dial Info is suggesting that some kind of access charge credit for 800 or 976 service should be available, Dial Info has misinterpreted our rules; it cannot be credited for an exemption from access charges on that traffic.

IV. ORDERING CLAUSE

22. Accordingly, IT IS ORDERED, That pursuant to the provisions of sections 4(i), 4(j), 201-205, 218, 220, 403, and 404 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201-205, 218, 220, 403, and 404, the Petition for Declaratory Ruling filed by Northwestern Bell Telephone Company IS HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico

Secretary

