LEXSEE 66 FCC2D 227

In Re Applications of

The Bell Telephone Company of Pennsylvania

For Authority and Certificate for Discontinuance, Reduction and Impairment of Service pursuant to Section 214 of the Communications Act of 1934

File No. W-P-D-81

File No. W-P-D-105

FEDERAL COMMUNICATIONS COMMISSION

66 F.C.C.2d 227; 1977 FCC LEXIS 721

RELEASE-NUMBER: F.C.C. 77-652

September 28, 1977 Released; Adopted: September 21, 1977

ACTION: **[**1]**

Memorandum Opinion and Order

JUDGES:

By the Commission:

OPINION:

[*227] 1. The Commission has before it the above-referenced applications of the Bell Telephone Company of Pennsylvania (Bell), filed on August 24, 1976 and June 3, 1977, respectively, for authority to discontinue interchange of traffic with Philadelphia Mobile Telephone Company (PMTC) and Pennsylvania Radio Telephone Company (PRTC), Radio Common Carriers (RCCs), pursuant to Section 214 of the Communications Act of 1934 (the Act), and Section 63.501 of the Commission's Rules and Regulations. n1 PMTC filed an Opposition to Application (which, though late filed, we treat as a timely filed petition to deny due to the importance of the matters contained therein) on October 7, 1976. n2 Bell filed a supplement to its application on August 27, 1976 and an Opposition on October 28, 1976. PRTC filed no pleadings.

n1 Section 63.501 lists the required contents of applications to sever physical connection or to terminate or suspend interchange of traffic with another carrier.

n2 PMTC submitted a letter on April 6, 1977 refuting certain assertions made by Bell in its pleadings. Bell responded with a letter on April 25, 1977. We consider both submissions as untimely and dismiss them.

[2]**

2. Bell provides wireline telephone service in the Philadelphia, Pennsylvania area to PMTC and in the Reading, Pennsylvania area to PRTC; both PMTC and PRTC are Commission licensees in the domestic public land mobile radio service (DPLMRS). n3 By its application, **[*228]** Bell seeks to terminate telephone service to PMTC for non-payment of $27,720.93 in bills owed Bell for radio-telephone interconnect service rendered between November 1975 and July 1976. n4 PMTC, on the other hand, is holding back payment to force Bell into a revenue sharing agreement by which PMTC would be credited with a percentage of revenue derived from toll calls made by its mobile subscribers through Bell. Bell also seeks to terminate service to PRTC for similar non-payment in the amount of $3,755.77 (as of May 7, 1977). Bell feels that its experience with the common principals of PMTC justifies termination of service to PRTC without prior settlement negotiations.

n3 PMTC: Radio Station KGI-775; PRTC: Radio Station KGA-808.

n4 See Appendix A for non-payment schedule of PMTC and Appendix B for PRTC.

3. Bell filed a supplement to application (WPD-81) on August 27, 1976 which advised the Commission that a complaint **[**3]** had been filed in the United States District Court for the Eastern District of Pennsylvania n5 on August 23, 1976 by Robert L. Starer n6 and PMTC. This complaint resulted in a temporary restraining order preventing Bell from discontinuing, reducing, or impairing service to PMTC without Commission authorization pursuant to Section 214 of the Act. On September 2, 1976 a Stipulation for Entry of Preliminary Injunction was adopted by the Court and a copy submitted on October 7, 1976 to the Commission by PMTC along with its Opposition to Application. Bell agreed that it would not sever the physical connection or discontinue or interrupt the communications service between PMTC and the landline telephone system ". . . until and unless . . . Bell| . . . shall first have obtained a final determination from the FCC either (a) granting a certificate or other authorization to discontinue such service to PMTC pursuant to Section 214 . . . or (b) that no such certificate or other authorization is required." It also requires PMTC to pay new bills due Bell from and after August 16, 1976.

n5 Civil Action No. 76-2680.

n6 President, PMTC, Mobile Telephone Company of New Jersey and PRTC.

[4]**

4. PMTC argues that Bell is merely applying "pressure upon PMTC to compromise its legal right to revenue sharing and to encourage PMTC to pay over to Bell an amount which has been retained by PMTC in the way of a setoff against amounts due to PMTC from Bell." Moreover, PMTC points out that in handling toll calls from subscribers it incurs certain processing costs, yet does not share in resulting profits, as does Bell in its competing two-way mobile telephone service in the Philadelphia area. PMTC concludes that it is deprived of these "benefits of revenue sharing enjoyed

by Bell to . . . PMTC's| . . . competitive and economic disadvantage." Finally, PMTC asserts a grant of Bell's application would adversely affect its subscribers since they "would not be able to obtain comparable services from any other carrier within the service area of PMTC."

5. In its Opposition to PMTC's filing, Bell alleges that PMTC seeks to delay final determination of the Section 214 issue by requesting that each adjudicatory forum maintain the status quo pending resolution in the alternate forum. Bell feels that PMTC is attempting to use the seven-year docketing-to-trial backlog in the Philadelphia Court **[**5]** of Common Pleas (State Court) calendar n7 to delay Commission action, **[*229]** and the Section 214 filing before the Commission to delay Federal Court action.

n7 Bell filed an action in assumpsit in Philadelphia Court of Common Pleas on September 23, 1976. PMTC answered and counterclaimed on antitrust grounds.

Discussion

6. PMTC is attempting to establish a setoff against uncontroverted charges due and owing Bell for service rendered between November 1975 and June 1976. PMTC, however, cannot justify nonpayment of charges properly billed by a claim of "competitive and economic disadvantage." Such self-help remedies are contrary to Section 203 of the Communications Act of 1934, as amended, n8 and existing case law. It is well established that rates published in tariffs are rates imposed by law and operate to control the rights and liabilities between parties. n9 Other remedies are available to PMTC, such as Sections 201(a), 201(b) and 208 of the Act n10 and Subpart E of Part 1 of the Commission's Rules, n11 for resolution of its claims.

n8 See MCI Telecommunications Corporation, Memorandum Opinion and Order, FCC 76-685, released July 30, 1976. Section 203(c) provides in part that:

[6]**

". . . no| carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation, for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect. . . ."

n9 See United States v. Associated Air Transport, Inc., 275 F.2d 827, 833 (5th Cir. 1960); American Telephone and Telegraph Company v. Florida Texas Freight, Inc., 357 F Supp. 977, affirmed 485 F.2d 1390 (1973); and cases cited therein.

n10 *47 U.S.C. 201*(a):

It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request; therefore, and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes. (emphasis added)

47 U.S.C. 201(b): **[**7]**

All charges, practices, classifications, and regulations for and in connection with such communication services shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful. . . .

47 U.S.C. 208:

Any person, any body politic or municipal organization, or State commission, complaining of anything done or omitted to be done any common carrier subject to this Act, in contravention of the provisions thereof, may apply to said Commission by petition. . . . Section 207 *(47 U.S.C. 207)* of the Act provides for recovery of damages as an alternate to Section 208 and its implementing rules.

n11 Subpart E_Complaints, Applications, Tariffs, and Reports Involving Common Carriers; Sections 1.701 through 1.735.

7. Moreover, PMTC's argument that Bell must obtain authority under Section 214 of the Act, *47 U.S.C. 214,* prior to taking its proposed action is simply in error. Section 214 authority is required when a carrier intends to "discontinue, reduce, or impair service." Bell intends to take no such action. Bell is not attempting to rescind a tariff offering. Rather, it is simply doing what is mandated **[**8]** by Section 203 of the Act, *47 U.S.C. 203,* and accepting no "greater or less or different compensation" than specified in its tariff. No one is being denied service by the carrier; even petitioners may receive service if and when they determine to pay the tariff rate. There is no requirement under Section 214 for a carrier to obtain prior approval from this Commission before it takes an action mandated by the Communications Act. Accordingly, Bell does not require Section 214 authority to terminate service to PMTC or PRTC for non-payment of charges made pursuant to tariff.

[*230] 8. PMTC is concerned that grant of Bell's application would adversely affect the present and future public convenience and necessity because its subscribers would not be able to obtain comparable mobile telephone services elsewhere. However, in the same pleading n12 PMTC states that it offers substantially identical service in the substantially identical market as Bell. It appears that PMTC serves approximately 125 two-way mobile radiotelephone and 475 one-way signalling subscribers in the Philadelphia area. In addition to PMTC, there are seven licensees authorized to offer two-way mobile radiotelephone service and **[**9]** five licensees authorized to furnish one-way signalling service in all or a part of PMTC's exchanges service area. n13 Staff inquiries reveal that alternate capacity in the Philadelphia area exists for PMTC subscribers, both mobile radio and signalling, though certain problems, such as availability of service on a leased basis to subscribers who may already own their equipment and UHF/VHF equipment compatibility, may delay cutover. Moreover, we believe that there are numerous potential licensees in the Philadelphia area that would eagerly, and with minimal delay, render service to all of PMTC's current subscribers on the channels that PMTC would vacate. n14 We conclude, therefore, that PMTC's service is not technically unique and that even if authority under Section 214 of the Act were required to discontinue service, the public interest would not be derogated by grant of Bell's application.

n12 Opposition to Application at page 2.

n13 DPLMRS licensees:

Two-way mobile radiotelephone

Telephone Message Bureau Inc. Radio Broadcasting Company Radio Dispatch Company Scott Communications, Inc. The Diamond State Telephone Company The Bell Telephone Company of Pennsylvania Mobile **[**10]** Telephone Company (commonly held with PMTC)

One-way Signalling

Air Signal International of Philadelphia Radio Dispatch Company Radio Broadcasting Company Scott Communications, Inc. Mobile Telephone Company (commonly held with PMTC)

n14 Our experience shows that whenever a DPLMRS channel becomes available, particularly in a large metropolitan area, there is a multiplicity of applicants.

9. Having found that PMTC has not paid its due and owing charges to Bell in the aggregate amount of $27,720.93 during the period indicated in Appendix A to this Order, that alternate service is available or could be made available in the relevant market within metropolitan Philadelphia, that Bell's claim of $3,755.77 (as of May 7, 1977) against PRTC is uncontroverted, and that Section 214 authorization and certification is not required in this case, we need rule only on the matters of waiver of our rules, deletion of PMTC and PRTC from AT&T tariffs, and the public interest and equitable consideration to be afforded the customers of PMTC and PRTC when Bell implements termination.

10. We recognize that the amount due Bell is a significant sum for PMTC and PRTC to present on relatively short notice. **[**11]** Accordingly, we urge Bell and PMTC and PRTC to agree to a reasonable repayment **[*231]** plan. n15 Such plan must, however, provide for payment of all outstanding bills within a reasonable time.

n15 Bell has agreed to such repayment plans before (see File No. P-D-344). If after 30 days from the release date of this Order, Bell and PMTC and PRTC have not agreed to such a plan, PMTC and PRTC are directed to notify all their subscribers by writing that Bell is authorized to terminate service to PMTC and PRTC 90 days from the release date of this Order. This schedule will allow PMTC and PRTC subscribers about 60 days to arrange alternate service if Bell and PMTC and PRTC fail to agree to a reasonable repayment plan within 30 days of release of this Order.

11. Bell also seeks to delete reference to PMTC and PRTC from American Telephone and Telegraph Company's Tariff F.C.C. 263 (paragraph 3.4.2(B)(1)), Mobile Radiotelephone Service through Miscellaneous Common Carriers. Concomitantly, Bell requests that the Commission waive the notice requirements of Sections 61.58 and 63.90 of the Rules submitting that ". . . these requirements would serve no useful purpose, and could result in prejudicial **[**12]** delay. The only party in a position to give effective notice to customers of PMTC is PMTC itself." Section 63.90 contains methods for publication and posting notices upon application ". . . for authority to close or otherwise discontinue the operation, or reduce the hours of service at, a telephone exchange, a telegraph office . . . or a public coast station. . . ." Since termination of service to a carrier is at issue here, we do not consider the posting requirements of Section 63.90 applicable. Section 61.58 provides the notice requirements to the public and the Commission for tariff publications and filings. For filings involving discontinuance, reduction or other impairment of service "the filing carrier

shall take such steps as are appropriate under the circumstances to inform the affected customers of the content of the tariff publication." Further, as we discuss below, PMTC's and PRTC's decision to pay (or not pay) Bell will determine whether and when the tariff revision and authority to terminate service will take effect. In addition, PMTC and PRTC maintain business records that contain up-to-date customer name and address information. On balance, PMTC and PRTC are in the **[**13]** best position to provide the notice of discontinuance required by Section 61.58. Accordingly, Bell's request for a waiver of Section 61.58 is granted to the extent that: (a) Bell's revision of AT&T Tariff F.C.C. 263 (paragraph 3.4.2(B)(1)) deleting reference to PMTC will be effective on not less than one day's notice to the Commission and to PMTC and PRTC after 90 days after release of this Order, and (b) Bell will not be required to notify PMTC's subscribers of the impending discontinuance.

Order and Certificate

12. In view of the foregoing, IT IS ORDERED, That, pursuant to Section 203 of the Communications Act of 1934, as amended, and Section 0.291 of the Commission's Rules, Bell Telephone Company of Pennsylvania MAY TERMINATE service to Philadelphia Mobile Telephone Company and Pennsylvania Radio Telephone Company 90 days from the release date of this Order upon condition that Philadelphia Mobile Telephone Company has not paid $27,720.93 to Bell by that date and that Pennsylvania Radio Telephone Company has not paid all bills due and owing from June 1, 1976 to Bell by that date, or that both Philadelphia Mobile Telephone Company and Pennsylvania Radio Telephone **[*232]** Company have not **[**14]** reached by that date a reasonable agreement to pay Bell those amounts.

13. IT IS FURTHER ORDERED, That if after 30 days from the release date of this Order, Bell, PMTC and PRTC have not agreed to a reasonable repayment plan, PMTC and PRTC are directed to notify all their subscribers, in writing, that Bell is authorized to terminate service to PMTC and PRTC 90 days from the release date of this Order.

43-45 Appendix A, B