

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application of)	
GTE COMMUNICATIONS CORPORATION)	
for the issuance of a license to provide and)	Case No. U-11440
resell basic local exchange service in Ameritech)	
Michigan s and GTE North Incorporated s)	
exchanges in the State of Michigan and related)	
approvals.)	
_____)	

At the December 12, 1997 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. John G. Strand, Chairman
Hon. John C. Shea, Commissioner
Hon. David A. Svanda, Commissioner

OPINION AND ORDER

On June 16, 1997, GTE Communications Corporation filed an application, pursuant to the Michigan Telecommunications Act, MCL 484.2101 et seq.; MSA 22.1469(101) et seq., for a license to provide basic local exchange service in the exchanges served by GTE North Incorporated and Ameritech Michigan.¹ On September 22, 1997, Administrative Law Judge Daniel E. Nickerson, Jr., (ALJ) presided over a hearing at which the testimony of witnesses for GTE Communications and the Commission Staff (Staff) was bound into the record without cross-examination. The record consists of 131 pages and 10 exhibits.

¹GTE Card Services Incorporated, d/b/a GTE Long Distance, filed the application and subsequently changed its name to GTE Communications Corporation. GTE Communications later clarified that it was not seeking a license for exchanges served by GTE Systems of the South. Tr. 91-92.

The parties filed briefs and reply briefs and, on November 17, 1997, the ALJ issued a Proposal of Decision (PFD) recommending that the Commission grant the application with a single modification to the conditions proposed by the Staff. On November 24, 1997, GTE Communications and the Staff filed exceptions. On December 3, 1997, both parties filed replies to exceptions.

The Michigan Telecommunications Act requires the Commission to grant a license to provide basic local exchange service if it finds that:

(a) The applicant possesses sufficient technical, financial, and managerial resources and abilities to provide basic local exchange service to every person within the geographic area of the license.

(b) The granting of a license to the applicant would not be contrary to the public interest.

MCL 484.2302(1); MSA 22.1469(302)(1).

There is no dispute among the parties that GTE Communications possesses sufficient technical, financial, and managerial resources and abilities to provide basic local exchange service to every person within the geographic area of the license. There is also no dispute that permitting GTE Communications to provide basic local exchange service in all Ameritech Michigan exchanges is not contrary to the public interest. The only dispute is whether it is contrary to the public interest at this time to permit GTE Communications to provide basic local exchange service in GTE North's exchanges.

The Staff recommends that GTE Communications not be permitted to provide basic local exchange service in GTE North's exchanges until those exchanges are irreversibly open to competition, as shown by (1) GTE North's filing of acceptable tariffs in compliance with a final, nonappealable order establishing wholesale discounts and prices for unbundled network elements, (2) GTE North's implementation of interconnection agreements with at least AT&T Communications of Michigan, Inc. (AT&T) and Sprint Communications Company, L.P., (Sprint) not subject to appeal, and (3) competitors actually purchasing services pursuant to those agreements. Tr. 113-114.

The ALJ recommended that the Commission adopt the Staff's proposed conditions, except the requirement that GTE North not appeal the Commission orders. In his view, there was no lawful basis for limiting a party's right to appeal a Commission order.

In its exceptions, the Staff says that it did not propose to interfere with GTE North's right to appeal any Commission order. Rather, the Staff says, its proposal would require GTE North to make a business decision about whether to appeal the Commission's orders or to satisfy a condition that would permit its affiliate to provide basic local exchange service.

In its exceptions, GTE Communications says that it supports the objective of achieving competition in the marketplace and agrees that the conditions imposed should be competitively neutral; i.e., the conditions must permit GTE Communications to enter the market at the same time as a competitor is able to enter the market. It asserts that the Staff's proposed conditions, even as modified by the ALJ, are more restrictive than necessary and contrary to law. It proposes that it be permitted to provide basic local exchange service in GTE North's exchanges when GTE North's markets become irreversibly open to competition as shown by either (1) the Commission's issuance of a final order establishing wholesale discounts and prices for unbundled network elements and GTE North's filing of acceptable tariffs or (2) the Commission's approval of an interconnection agreement between GTE North and a nonaffiliated, major competitor pursuant to which the competitor has the ability to purchase services.

GTE Communications argues that a requirement that it satisfy both conditions is not competitively neutral because competitors could be providing service under a wholesale tariff or an approved interconnection agreement, while GTE Communications could not provide service because both conditions had not been satisfied. It also argues that a condition requiring two named competitors to be purchasing services under an approved interconnection agreement is not competitively neutral because competition in GTE North's market does not depend on the identity of the nonaffiliated competitor and because AT&T or Sprint could choose to delay or not enter the market at all.

The Commission concludes that GTE Communications' entry into GTE North's service territory without conditions designed to create competition is contrary to the public interest and that portion of the application should be denied unless those conditions are in place. The Commission further concludes it is not likely that GTE Communications' proposed conditions will result in competitive neutrality.

GTE North's conduct to date does not give the Commission reason to believe that the company will

permit competition, at least by nonaffiliated providers. Tr. 109-113.² Of greatest importance, both AT&T and Sprint went through the negotiation and arbitration process to develop interconnection agreements with GTE North. The Commission issued final orders requiring action by GTE North on December 12, 1996 in Case No. U-11165 for AT&T and January 15, 1997 in Case No. U-11206 for Sprint. As of today, GTE North has refused to comply with those orders, and neither AT&T nor Sprint is able to provide basic local exchange service in GTE North's exchanges. Furthermore, GTE North does not have an approved wholesale tariff.

The Commission agrees with the Staff that GTE North must have filed acceptable tariffs in compliance with a Commission order approving a wholesale tariff and prices for unbundled network elements. The Commission also agrees that GTE North must have an approved interconnection agreement, although the Commission does not agree that it is necessary to specify that the agreement be with AT&T or Sprint. The development of competition does not require that either of those providers complete an interconnection agreement. It is enough that some nonaffiliated competitor do so. With tariffs and an interconnection agreement in place, the Commission concludes that competitors will be in a position to compete with GTE North. Whether they choose to do so at that time will be their business decisions and not a product of GTE North's refusal to permit competition in its exchanges. The Commission is therefore not persuaded that it is necessary to add the condition that competing providers actually be providing service under those tariffs or agreements.

On the other hand, a condition regarding appeals is necessary to prevent GTE North from defeating the competition that is a necessary condition to GTE Communications' entry into the basic local exchange market. It is not necessary to prevent GTE North from appealing. It is only necessary to prevent GTE North and GTE Communications from circumventing the requirement that competition become irreversible before GTE Communications may provide basic local exchange service in GTE North's exchanges. GTE North is free to appeal any order approving a tariff or interconnection agreement. If it

²The Staff even questions whether GTE North will permit an affiliate to provide competing basic local exchange service. If that is the case, GTE Communications' challenges to the Staff's conditions, and the application itself, are irrelevant.

appeals those orders, GTE Communications can enter GTE North's markets when the appeals have run their course, if there is still a Commission-approved tariff and interconnection agreement.

The development of competition will be chilled if GTE Communications can enter the basic local exchange market in GTE North's exchanges while its affiliate challenges the tariffs or interconnection agreements under which others seek to enter the market. Consequently, the Commission finds that it is contrary to the public interest to permit GTE Communications to enter GTE North's service territory while GTE North is seeking to overturn the Commission orders under which competitors, other than GTE Communications, are authorized to provide competitive service. Delaying GTE Communications' entry into GTE North's exchanges until others are free to enter those markets without the cloud of pending appeals will maximize the likelihood that competition in GTE North's service territory exists and is irreversible.

GTE Communications argues that the Commission's approval of a license for Ameritech Communications, Inc. (ACI), an Ameritech Michigan affiliate, to provide basic local exchange service in Ameritech Michigan's and GTE North's exchanges supports the issuance of a license in this case. It points out that both Ameritech Michigan and GTE North are prohibited from bundling local exchange service with long distance service except through a separate affiliate. GTE Communications argues that, like ACI, it will be severely disadvantaged in the marketplace if it cannot offer one-stop shopping in GTE North's exchanges when other providers can do so. GTE Communications acknowledges that ACI's license will become effective in Ameritech Michigan's exchanges when the Federal Communications Commission (FCC) authorizes it to provide in-region interLATA service under Section 271 of the federal Telecommunications Act of 1996 (the FTA). 47 USC 271. It points out that Section 271 does not apply to it, and argues that the Commission cannot lawfully impose restrictions that are patterned after a statutory provision that does not apply to it. Further, it argues that it is unlawful and unreasonable to tie its license to the conduct of an affiliate that it cannot control.

The Commission's action with regard to ACI supports the decision in this order because the conditions imposed in both cases are designed to permit the affiliate of the incumbent to offer bundled

services when the incumbent's exchanges are open to competition. For both companies, the Michigan Telecommunications Act requires the Commission to consider how the grant of a license will affect the public interest. Contrary to GTE Communications' argument, there is no legal requirement that the Commission ignore how the applicant is likely to interact with an affiliate or how that interaction will affect the public interest. In particular, the Commission need not pretend that GTE North and GTE Communications will act without regard to how their separate actions affect the interests of the corporate entity with which they are both affiliated.

If GTE North is serious about permitting competition, as the Michigan Telecommunications Act and the FTA require, the conditions imposed by this order are not impediments to GTE Communications' efforts to provide one-stop shopping. GTE Communications (and other potential competitors) cannot provide basic local exchange service in GTE North's exchanges without interconnection agreements or approved tariffs for wholesale or unbundled network elements. If GTE North does what it must to permit its affiliate to provide service, it will also have done much to satisfy the conditions set forth in this order. It is not unreasonable to require it to do the balance, which will permit competition to exist, as envisioned by both the Michigan Telecommunications Act and the FTA.

GTE Communications argues that Section 253 of the FTA prohibits the Commission from imposing these conditions. Section 253(a) provides: No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service. 47 USC 253(a). The Commission does not dispute that it should not impose conditions that would impede the development of competition in the basic local exchange market. In this case, in light of GTE North's past conduct, it is likely that immediately permitting GTE Communications to provide basic local exchange service in GTE North's exchanges will ensure that competition does not develop in those exchanges. Consequently, under state law, the Commission must impose conditions designed to promote competition and, under federal law and policy as embodied in the FTA and the FCC's actions, may do so. GTE Communications seems to be propounding the absurd position that a state may not impose any requirements on a potential provider,

including the requirement that it obtain a license. It is entirely consistent with the interaction of state and federal law for the Commission to impose the conditions in this order. Even the FTA recognizes the need for states to retain authority to impose, on a competitively neutral basis . . . requirements necessary to . . . protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers. 47 USC 253(b).

The ALJ also adopted the Staff recommendation that GTE Communications be required to file legible maps showing the exchanges within which it would offer service.

In its exceptions, GTE Communications argues that there is no currently effective rule that dictates the condition or quality of the maps showing its service territory. It says that it will be using the pre-existing exchange boundaries of Ameritech Michigan and GTE North, which already have maps on file that are accessible to the public, and the Commission should not require it to file duplicate maps. It suggests that it, and other competitive local exchange providers, be permitted to incorporate by reference the maps of the incumbent local exchange providers. It also suggests that the cost of preparing maps is a significant barrier to those seeking to enter the basic local exchange market.

The Commission rejects GTE Communications' position. As competition develops, it is likely that all providers will not use the same exchange boundaries and that incumbent providers may seek to alter boundaries or withdraw from certain exchanges. It is therefore reasonable to require a provider to file its own maps showing clearly the areas that it proposes to serve.³

The Commission FINDS that:

a. Jurisdiction is pursuant to 1991 PA 179, as amended by 1995 PA 216, MCL 484.2101 et seq.; MSA 22.1469(101) et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; MSA 3.560(101) et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACS, R 460.17101 et seq.

b. GTE Communications possesses sufficient technical, financial, and managerial resources and

It is absurd for a provider with GTE Communications' resources to assert that the cost of filing legible maps is a significant barrier.

abilities to provide basic local exchange service to every person within the geographic area of the license.

c. Granting GTE Communications a license to provide basic local exchange service in the requested areas, subject to the conditions set forth above, will not be contrary to the public interest.

THEREFORE, IT IS ORDERED that:

A. GTE Communications Corporation is granted a license to provide basic local exchange service in Ameritech Michigan's exchanges.

B. GTE Communications Corporation is granted a license to provide basic local exchange service in GTE North Incorporated's exchanges when it has satisfied the conditions set forth in this order.

C. GTE Communications Corporation shall provide basic local exchange service in accordance with the regulatory requirements specified in the Michigan Telecommunications Act, MCL 484.2101 et seq.; MSA 22.1469(101) et seq.

D. Before commencing basic local exchange service, GTE Communications Corporation shall submit its tariff reflecting the services that it will offer and legible maps identifying the exchanges in which it will offer service.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26; MSA 22.45.

MICHIGAN PUBLIC SERVICE COMMISSION

(S E A L)

/s/ John G. Strand
Chairman

By its action of December 12, 1997

/s/ John C. Shea
Commissioner, concurring in part and
dissenting in part in a separate opinion.

/s/ Dorothy Wideman
Executive Secretary

/s/ David A. Svanda Its
Commissioner

C. GTE Communications Corporation shall provide basic local exchange service in accordance with the regulatory requirements specified in the Michigan Telecommunications Act, MCL 484.2101 et seq.; MSA 22.1469(101) et seq.

D. Before commencing basic local exchange service, GTE Communications Corporation shall submit its tariff reflecting the services that it will offer and legible maps identifying the exchanges in which it will offer service.

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MICHIGAN PUBLIC SERVICE COMMISSION

Chairman

action of December 12, 1997.

By its
Commissioner, concurring in part and
dissenting in part in a separate opinion.

Executive Secretary

Its
Commissioner

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approvals.)
_____)

Case No. U-11440

Suggested Minute:

Adopt and issue order dated December 12, 1997 granting GTE
Communications Corporation a license to provide basic local exchange service,
as set forth in the order.

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OPINION OF COMMISSIONER JOHN C. SHEA
CONCURRING IN PART AND DISSENTING IN PART

(Submitted on December 12, 1997 concerning order issued on same date.)

The grant or denial of a license for basic local exchange service is governed by Article 3 of the Michigan Telecommunications Act, 1991 PA 179, as amended by 1995 PA 216, MCL 484.2101 et seq; MSA 22.1469(101) et seq. (the Act), and specifically, Section 302(1) of the Act. That section requires the Commission to approve an application for a license if the Commission finds the following:

- (a) The applicant possesses sufficient technical, financial, and managerial resources and abilities to provide basic local exchange service to every person within the geographical area of the license.
- (b) The granting of a license to the applicant would not be contrary to the public interest.

MCL 484.2302(1); MSA 22.1469(302)(1).

In the accompanying order, the majority concludes that the applicant in the proceeding, GTE Communications Corporation, satisfies the requirements of subsection (a), *supra*. Based on the record in this matter, I join the majority in concluding that the applicant has satisfied the requirements of subsection (a), *supra*.

I am troubled, however, by the majority s fluid understanding of public interest. In Case No. U-11053, the Commission (including the undersigned) rightly determined that the provisions of Section

101(2) of the Act contained the benchmark for determining the effect on the public interest of the grant or denial of a license. See, August 28, 1996 order in Case No. U-11053 at 20-21. No mention is made of Section 101(2) in the accompanying order. Instead the accompanying order reaches for authority in some unnamed state law and federal law. Put simply, there is no law that would justify the imposition of conditions on the license that is subject to this proceeding.*

Based on the foregoing, I would grant a license without conditions.

John C. Shea, Commissioner

*I view the requirement for legible maps differently: the location of the geographic area of the license cannot be known without legible maps. Therefore legible maps are required. It is absurd to claim otherwise.