

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

**Western Wireless Corporation vs.
Consolidated Telephone Cooperative, Inc.
Complaint**

Case No. PU-1564-99-17

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

August 31, 1999

Appearances

Commissioners Bruce Hagen, Susan E. Wefald and Leo M. Reinbold.

Gene DeJordy, Executive Director-Regulatory Affairs, Western Wireless Corporation, 3650 111th Avenue SE, #400, Bellevue, Washington 98006 on behalf of Western Wireless Corporation.

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Charles E. Johnson, Commerce Counsel, Public Service Commission, State Capitol, 600 East Boulevard Avenue, Bismarck, North Dakota 58505 on behalf of the Public Service Commission.

William W. Binek, Commerce Counsel, Public Service Commission, State Capitol, 600 East Boulevard Avenue, Bismarck, North Dakota 58505 as Hearing Officer.

Preliminary Statement

On January 15, 1999, Western Wireless Corporation (Western) filed a complaint with the Public Service Commission against Consolidated Telephone Cooperative, Inc.

(Consolidated). Western alleges that Consolidated discontinued service to Western with the intent of preventing Western from providing telecommunications service in competition with Consolidated in violation of N.D.C.C. §§ 49-21-07, 49-21-09, and 49-21-10; N.D. Admin. Code § 69-09-05-02; 47 U.S.C. §§ 251(a)(1) and 251(b)(3); and 47 C.F.R. § 51.217(c)(1).

Included with the complaint was an Expedited Motion for Preliminary Injunction, requesting the Commission issue an expedited order requiring Consolidated to immediately restore service to Western.

On January 20, 1999, the Commission found that the complaint stated a *prima facie* case and moved to serve the complaint on Consolidated. Also on January 20, 1999, the Commission issued a Notice of Hearing, which was revised on January 21, 1999, scheduling a public hearing for March 10, 1999 for the purpose of considering the allegations in the complaint.

On January 25, 1999, Consolidated filed an offer to restore service for Western's cellular customers who are not Wireless Residential Service (WRS) customers.

On February 9, 1999, Consolidated filed its Answer and Counterclaim, admitting it discontinued service to Western on January 11 and stating that the service was reconnected on February 1, 1999. Consolidated denied that its actions were unlawful. In its counterclaim, Consolidated alleges that Western engaged in competitive local exchange carrier activities without proper authority required under N.D.C.C. chapter 49-03.1 and § 49-21-08. Consolidated requests the Commission issue an order requiring Western to cease and desist from providing fixed wireless service in Regent until Western has complied with the law.

On February 15, 1999, Consolidated filed its Response to Motion for Preliminary Injunctive Relief, requesting the Commission deny the motion because service has been restored and the motion is therefore moot.

On March 3, 1999, Western filed its Answer and Motion to Dismiss Counterclaim. Western denied that it engaged in any activities without proper authority and requested the Commission dismiss the counterclaim.

On March 10, 1999, a formal hearing was held as scheduled. On April 23, 1999, the parties filed simultaneous briefs according to a briefing schedule set by the Hearing Officer.

On May 4, 1999, Consolidated filed a copy of a letter to Western requesting agreement to file reply briefs by May 7th and on May 7, 1999, Consolidated filed a reply brief. On May 12, 1999, Western filed a motion to strike Consolidated's reply brief because it was not agreed to at the hearing and not included in the briefing schedule set by the Hearing Officer.

On May 11, 1999, the Commission conducted a working session during which it discussed this case and determined it needed additional information from the parties. On May 14, 1999, the Commission sent a letter to the parties requesting the information and the parties filed responses on June 14, 1999.

On July 8, 1999, the Commission conducted a second working session. On July 9, 1999, Consolidated sent a letter to the Commissioners that further discussed issues in the case.

On August 13, 1999, the Commission sent a letter to the parties stating that in order to fairly allow parties to provide any relevant or updated analysis not previously submitted the Commission would accept reply briefs or comments until August 18, 1999. No such reply briefs or comments were received.

On August 19, 1999, The Commission conducted a third working session.

Motion to Strike

At the close of hearing, the Hearing Officer established a schedule for submitting simultaneous post-hearing briefs but was silent regarding the filing of reply briefs. After receiving additional briefs in this and a related case, the Commission provided both parties an opportunity to file reply briefs or comments by August 18, 1999. As a result, both parties have now had ample opportunity to file reply briefs. Therefore, Western's motion to strike the reply brief filed by Consolidated on May 7, 1999 is moot.

Findings of Fact

1. The Complainant, Western Wireless Corporation dba Cellular One (Western), is a provider of wireless telecommunications services to customers in North Dakota under license by the Federal Communications Commission (FCC).
2. The Respondent, Consolidated Telephone Cooperative (Consolidated) is an incumbent local exchange carrier (ILEC) that provides local exchange telephone service to customers in and around the community of Regent, North Dakota.

Western's Complaint

3. Western witness Kim Schmidt, Special Projects Manager, testified that Western contacted Consolidated in August, 1998, about obtaining direct interconnection and Direct Inward Dialing (DID) numbers and these services were provided by Consolidated soon thereafter.

4. On January 7, 1999, Western began offering Wireless Residential Service (WRS) in Regent, North Dakota in competition with the local exchange service provided by Consolidated.

5. On January 11, 1999, Consolidated disconnected six DID trunks and 2,000 telephone numbers that were being used for interconnecting Western's cellular and WRS customers with Consolidated's local exchange service network. The effect of the disconnection was that Western's cellular and WRS customers were unable to receive local calls.

6. Consolidated did not provide any notice to Western or Western's customers prior to discontinuing service.

7. On February 1, 1999, Consolidated restored the service and DID numbers to Western.

Violations

8. Western alleges Consolidated violated N.D. Admin. Code § 69-09-05-02(1) when it discontinued services for which Western has paid in full. Western further alleges that it was disconnected without the disconnect notice required by N.D. Admin. Code § 69-09-05-02(5).

9. The relevant disconnect rule provides:

69-09-05-02. Discontinuance of telecommunications services.

A utility may not discontinue telecommunications services, except as provided in this section.

1. A utility may discontinue the essential services it provides:

- a. If the customer is delinquent in payment for essential services, then essential services may be discontinued even though discontinuing the services results in the discontinuance of all telecommunication services.
- b. If the customer is delinquent in payment for long-distance services rendered by a local exchange company or another company and billed by the local exchange company, then the local exchange company may deny the customer all forms of access to the network of the telecommunications company to which the customer is delinquent in payment. However, if, due to technical limitations, a local exchange company must also deny the customer all forms of access to the long-distance networks of all telecommunications companies, including its own, in order to deny the

customer access to the network of the company to which the customer is delinquent, the local exchange company may do so.

5. A utility may not discontinue service to a customer for failure to pay for service until the utility first gives the customer notice of its intention to discontinue such service on account of delinquency. The notice must:
 - a. Be sent by first-class mail addressed to the billing name and address of the affected account.
 - b. Show the amount of the delinquency.
 - c. Include the telephone number of the public service commission.
 - d. Advise the customer of the customer's rights and remedies, including the customer's right to work out a satisfactory deferred installment agreement for delinquent accounts.
 - e. Inform the customer that service will be discontinued if the delinquent account is not paid within ten calendar days from the date of mailing or personal delivery of the notice, or if a satisfactory installment agreement is not made with the utility for payment of the delinquent bill. The utility may discontinue service without further notice if the customer fails to pay the delinquent account by the due date.

N.D. Admin. Code § 69-09-05-02, subsections (1) and (5).

10. Consolidated contends that this rule does not apply and that any duty to continue service is premised upon Western first complying with applicable federal and state laws and regulations.

11. Under the rule, Consolidated may not discontinue service if payment for the service is not delinquent. In addition, if Consolidated believed it had reason to discontinue service to Western, the rule requires Consolidated to first give notice of its intent to disconnect. Consolidated's obligations under N.D. Admin. Code § 69-09-05-02 do not depend on Western's compliance with any other law or rule.

12. The Commission finds that Consolidated violated N.D. Admin. Code § 69-09-05-02 when it discontinued service to Western on six trunks and 2,000 associated DID numbers available or being used for service to Western's cellular and WRS customers.

13. Western alleges that Consolidated's discontinuance of service to Western and Western's customers while continuing to provide service to Consolidated and its customers constitutes a violation of N.D.C.C. § 49-21-07, the prohibition against discrimination.

14. The discrimination prohibition provides:

49-21-07. Discrimination unlawful. It shall be unlawful for any telecommunications company to make any unjust or unreasonable discrimination in prices, practices, or service for or in connection with like telecommunications service, or give any undue or unreasonable preference or advantage to any person or telecommunications company or to subject any person or *telecommunications company to any undue or unreasonable prejudice or disadvantage in the service rendered by it to the public or to a telecommunications company*, or to charge or receive for any such service rendered, more or less than the prices provided for in the schedules then on file with the commission. A telecommunications company, including a telecommunications company exempt from one or more provisions of title 49 under section 49-21-02.1 providing intrastate interexchange message toll services shall charge uniform prices on all routes where it offers such services. A telecommunications company providing local exchange service and message toll and private line services shall cover in its price for message toll and private line services, the price of providing access service in its own exchanges. Nothing in this chapter shall be construed to prevent any telecommunications company from offering or providing volume or other discounts based on reasonable business practices; from passing through any state, municipal or local taxes to the specific geographic areas from which the taxes originate; or from furnishing free telecommunications service or service at reduced prices to its officers, agents, servants, or employees. N.D.C.C. § 49-21-07 (emphasis supplied).

15. Consolidated denies that its actions were unlawful or that it made any unjust or unreasonable discrimination and asserts that its actions were justified because of Western's failure to comply with applicable federal and state laws and regulations. Consolidated further contends that N.D.C.C. § 49-21-07 does not apply to Western.

16. Western was a customer of Consolidated at the time of the disconnect. Western, in turn, had customers using the service Western purchased from Consolidated. Consolidated's disconnect subjected Western to undue or unreasonable prejudice or disadvantage in the service rendered by Western to its customers. The Commission finds that Consolidated violated N.D.C.C. § 49-21-07 when it discontinued service to Western.

17. Western alleges that discontinuance of services by Consolidated constitutes a violation of N.D.C.C. § 49-21-10.

18. Section 49-21-10 provides:

49-21-10. Transmitting telecommunications from other telecommunications companies. Every telecommunications company operating in this state shall *receive, transmit, and deliver, without discrimination or delay, the telecommunications of every other telecommunications company* with which a connection has been made. N.D.C.C. § 49-21-10 (emphasis supplied).

19. Consolidated intentionally ceased transmitting Western's telecommunications. The Commission finds that Consolidated violated N.D.C.C. § 49-21-10 when it discontinued service to Western, thereby failing to receive, transmit, and deliver, without discrimination or delay, the telecommunications of Western.

20. Western alleges that Consolidated's disconnection violates N.D.C.C. § 49-21-09, which obligates Consolidated to interconnect with Western.

21. The interconnection statute provides:

49-21-09. Telecommunications - Connections. Whenever a connection can be made reasonably between the facilities of two or more telecommunications companies for the transfer of telecommunications and public convenience and necessity will be subserved thereby, the commission may require that such connection be made and may order that telecommunications be transmitted and transferred by the companies, as provided in this section. When, after notice and hearing in accordance with chapter 28-32, the commission finds that public convenience and necessity require the use by one telecommunications company of facilities or services of another telecommunications company, and that such use will not result in irreparable injury to the owner or other users of such facilities or services, nor any substantial detriment to the facilities or services, and that such telecommunications companies have failed to agree upon such use or the terms and conditions or compensation for the same, the commission, by order, may direct that such use be permitted, and may prescribe reasonable compensation, terms, and conditions. If such use is directed, the telecommunications company to which the use is permitted is liable to the owner or other users of such facilities or services for such damage as may result therefrom to the property of such owner or other users thereof. N.D.C.C. § 49-21-09.

22. The record does not support a finding that Consolidated violated N.D.C.C. § 49-21-09.

23. Western alleges violation of 47 U.S.C. § 251 subsections (a)(1) and (b)(3), and 47 C.F.R. § 51.217(c)(1). Allegations concerning federal rules and statutes should be addressed in the federal jurisdiction.

Penalties

24. Penalties for violations of utility law, rules and orders are provided in N.D.C.C. § 49-07-01.1. It provides:

49-07-01.1. Violation of statute, commission order, or commission regulation - Assessment of civil penalty. Any person who violates any statute, commission order, or commission regulation which applies to matters within the authority of the commission under chapters 8-08, 8-09, 8-10, 24-09, and 32-25, titles 60 and 64, and title 49 except for chapter 49-22, shall, in addition to any other penalty provided, be subject to a civil penalty of not to exceed five thousand dollars. The civil penalty may be compromised by the commission. The amount of the penalty when finally determined or agreed upon in compromise, if not paid, may be recovered in a civil action in the courts of this state. N.D.C.C. § 49-07-01.1.

25. The Commission finds that the intentional discontinuance of service to Western, resulting in discontinuance of service to Western's cellular and WRS customers, is a serious matter. Consolidated's actions constituted violation of two North Dakota laws and one Commission rule. Consolidated's actions affected another company, as well as the end-use customers of that company. The Commission finds Consolidated should be assessed a civil penalty of \$15,000.

26. The Commission recognizes that these are the first such violations by Consolidated and that Consolidated did voluntarily restore service. Therefore, the Commission finds that \$13,500 (90%) of the \$15,000 penalty should be suspended on the condition that Consolidated has no further violations during the period ending two years from the date of this Order.

Consolidated's Counterclaim

27. Consolidated alleges in its counterclaim that Western engaged in competitive local exchange carrier activities without proper authority under N.D.C.C. chapter 49-03.1 and § 49-21-08. Consolidated requests the Commission issue an order requiring Western to cease and desist from providing fixed wireless service in Regent until Western has complied with the law.

28. Western moved to dismiss Consolidated's counterclaim on grounds that Western is authorized to provide WRS over its cellular licenses and WRS is a Commercial

Mobile Radio Service (CMRS) exempt from state entry regulation under 47 U.S.C. § 332(c)(3)(A).

29. 47 U.S.C. § 332(c)(3)(A) provides that states are prohibited from entry and rate regulation of mobile services. The statute provides:

(3) State preemption. (A) Notwithstanding sections 2(b) and 221(b) [47 USCS §§ 152(b) and 221(b)], no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates. Notwithstanding the first sentence of this subparagraph, a State may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if such State demonstrates that-

(i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or

(ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.

The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition. If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such periods of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory. 47 U.S.C. § 332(c)(3)(A).

30. 47 U.S.C. § 153(27) defines mobile services:

(27) Mobile service. The term “mobile service” means a radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves, and includes (A) both one-way and two-way radio

communication services, (B) a mobile service which provides a regularly interacting group of base, mobile, portable, and associated control and relay stations (whether licensed on an individual, cooperative, or multiple basis) for private one-way or two-way land mobile radio communications by eligible users over designated areas of operation, and (C) any service for which a license is required in a personal communications service established pursuant to the proceeding entitled "Amendment to the Commission's Rules to Establish New Personal Communications Services" (GEN Docket No. 90-314; ET Docket No. 92-100), or any successor proceeding. 47 U.S.C. § 153(27).

31. 47 U.S.C. § 153(28) defines mobile station:

(28) Mobile station. The term "mobile station" means a radio-communication station capable of being moved and which ordinarily does move. 47 U.S.C. § 153(28).

32. 47 C.F.R. § 22.99 contains several definitions, including a further definition of mobile station:

Mobile station. One or more transmitters that are capable of operation while in motion. 47 C.F.R. § 22.99

33. Western contends WRS is CMRS because it is provisioned as a hybrid fixed/mobile service. Western witness Schmidt testified that WRS functions like conventional cellular service in that it is associated with a customer rather than a specific location. Instead of using a hand-held phone or bag phone, WRS uses a device that it terms a "Tellular". Schmidt explained that the Tellular device is about the size of a small laptop computer and consists of a standard cellular antenna to transmit and receive signals in the same manner as a hand-held cellular phone. The Tellular is connected to the customer's existing telephone set and operates on either AC or battery power. Battery power provides mobility that allows customers to operate wire-line telephones in a cellular fashion from a vehicle, other building, or outdoors.

34. Consolidated contends that the Tellular unit through which WRS is provisioned is not a mobile station under the statutory definition because it ordinarily does not move. The Tellular unit is heavy and awkward compared to hand-held wireless phones and must be connected to a traditional telephone set. There are no handles or other conveniences that would indicate the unit was designed or intended for mobile use. Consolidated contends that WRS is provisioned as a basic exchange service such that its purpose is to provide basic local exchange service to residences using a radio loop instead of a conventional wire loop.

35. In 1994, the FCC determined that services having both fixed and mobile capabilities fall within the statutory definition of mobile services:

38. We also agree with Rockwell that satellite services provided to or from a transportable platform that cannot move when the communications service is offered should not be included within the definition of mobile service. These fixed services are used to provide disaster relief, temporary communications for news reporters and expeditions, and temporary communications in remote areas and cannot be used in a mobile mode. *Services provided through dual-use equipment, however, such as Inmarsat-M terminals which are capable of transmitting while the platform is moving, are included in the mobile services definition.* We also agree with New York that the substitution of a radio loop for a wire loop in the provision of BETRS does not constitute mobile service for purposes of our definition. As the Commission noted in the BETRS proceeding, n53 this service was intended to be an extension of intrastate basic exchange telephone service. Thus, the radio loop merely takes the place of wire or cable, which in rural and geophysically rugged areas is often prohibitively expensive to install and maintain. Second Report and Order, FCC 94-31, GN Docket No. 93-252, (emphasis supplied).

36. The FCC reaffirmed its 1994 determination in its 1996 CMRS Flexibility Order:

7. The current rules also place some limits on the ability of licensees on CMRS spectrum to offer fixed services, however. *In reviewing the definition of "mobile service" under the Communications Act, "we have concluded that services having both fixed and mobile capabilities, e.g., services provided through dual-use equipment, fall within the statutory definition."* In contrast, we have concluded that services that are solely fixed in nature, e.g., fixed point to point services such as Basic Exchange Telephone Radio Service (BETRS), do not constitute "mobile service" within the meaning of the statute. The current rules do not allow fixed services to be offered on spectrum allocated for PCS or other CMRS unless they are ancillary to or in support of mobile service offerings, or unless the carrier obtains a waiver allowing it to offer primarily fixed service. The rationale for prohibiting non-ancillary fixed uses of the spectrum has been that the amount of spectrum available for the development of new mobile services such as PCS is limited and that alternative spectrum is available for fixed services. First Report and Order and Further Notice of Proposed Rule Making, FCC 96-283, WT Docket No. 96-6, (footnotes omitted, emphasis supplied).

37. Consolidated has not met its burden of proof. The record does not support a finding that WRS is a solely fixed service.

38. The Commission finds WRS has mobile capabilities and is therefore a mobile service.

39. As a mobile service, WRS is exempt from state entry regulation.

Conclusions of Law

1. The Commission has jurisdiction of the parties and of this matter.
2. Consolidated violated N.D.C.C. §§ 49-21-07, 49-21-10 and N.D. Admin. Code § 69-09-05-02 when it discontinued telephone service to Western and its customers on January 11, 1999.
3. North Dakota is federally preempted from rate and entry regulation of Western's Wireless Residential Service, as provided in 47 U.S.C. § 332(c)(3)(A).
4. Any requirement for a certificate of public convenience and necessity under N.D.C.C. chapter 49-03.1 is federally preempted.
5. The counterclaim filed by Consolidated should be dismissed.

Order

The Commission Orders:

1. Consolidated is assessed a penalty of \$15,000, of which \$13,500 is suspended on condition that Consolidated not have any further violations for a period of two years from the date of this Order.
2. Remittance of the \$1,500 penalty that is currently payable shall be made within thirty days of receipt of this Order, payable to the Public Service Commission.
3. Western's motion to dismiss the counterclaim filed by Consolidated on February 9, 1999, is granted and Consolidated's counterclaim is dismissed.
4. Western's motion to strike Consolidated's late filed brief is moot.
5. Western's Motion for Preliminary Injunctive Relief is moot because service has been restored.

PUBLIC SERVICE COMMISSION

Susan E. Wefald
Commissioner

Bruce Hagen
President

Leo M. Reinbold
Commissioner

