

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Ameritech)	
Petition for Limited Modification of LATA)	
Boundary to Provide Expanded Local)	File No. NSD-L-00-78
Calling Service (ELCS))	

MEMORANDUM OPINION AND ORDER

Adopted: December 19, 2001

Released: December 19, 2001

By the Acting Chief, Network Services Division, Common Carrier Bureau:

I. INTRODUCTION

1. On July 21, 2000, Ameritech, on behalf of The Ohio Bell Telephone Company (Ameritech), pursuant to Section 3(25) of the Communications Act of 1934, as amended,¹ filed a petition to provide two-way, measured-rated, non-optional expanded local calling service (ELCS) between the Ripley exchange and the exchanges in Clermont and Cincinnati, Ohio.² Ameritech’s petition requests limited modifications of a local access and transport area (LATA) boundary.³ The petition was placed on public notice,⁴ and no parties filed comments. For the reasons stated below, we deny Ameritech’s request.

II. BACKGROUND

2. Requests for new ELCS routes are generally initiated by local subscribers. IntraLATA ELCS routes can be ordered by the state commission.⁵ For interLATA routes, prior to the

¹ See 47 U.S.C. § 153(25).

² Ripley is an Ameritech exchange. The Clermont and Cincinnati exchanges are Cincinnati Bell Telephone Company exchanges. Ripley has 1,721 access lines; Clermont has 404,045 access lines; and Cincinnati has 552,202 access lines.

³ Section 3(25) of the Act defines LATAs as those areas established prior to enactment of the 1996 Act by a Bell Operating Company (BOC) such that no exchange area includes points within more than “one metropolitan statistical area, consolidated metropolitan statistical area, or State, except as expressly permitted under the AT&T Consent Decree”; or established or modified by a BOC after such date of enactment and approved by the Commission.

⁴ See Public Notice, “Comment Sought on Ameritech Request for Limited Modification of LATA Boundaries to Provide Expanded Local Calling Service Between Certain Exchanges in Ohio,” in Ohio,” rel. April 27, 2001.

Telecommunications Act of 1996 (1996 Act),⁶ the Bell Operating Companies (BOCs) were required to secure state approval and then obtain a waiver from the United States District Court for the District of Columbia (District Court).⁷ In the years between the Consent Decree⁸ and the 1996 Act, the District Court received more than one hundred requests for Consent Decree waivers to permit new interLATA ELCS routes.⁹ Because of the large number of requests involved and because most of the requests were non-controversial, the District Court developed a streamlined process for handling such requests.¹⁰

3. Under the streamlined process developed by the District Court, the BOC submitted its waiver request to the Department of Justice (Department). The Department reviewed the request and then submitted the request, along with the Department's recommendation, to the District Court. In evaluating ELCS requests, the Department and the District Court balanced the public's interest in being able to make a local call within one's community against the anticompetitive effect that would arise from taking certain calls out of a competitive market and delivering them to a monopoly provider. The District Court would first determine whether a sufficiently strong community of interest between the exchanges justified granting a waiver of the Consent Decree.¹¹ A community of interest could be demonstrated by such evidence as: (1) poll results showing that customers in the affected exchange were willing to pay higher rates to be included in an expanded local calling area;¹² (2) usage data demonstrating a high level of calling between the exchanges; (3) narrative statements describing how the two exchanges were part of one community and how the lack of local calling between the exchanges caused problems for community residents;¹³ and (4) whether the calling volume was

⁵ See, e.g. *United States v. Western Electric Company, Inc.*, 569 F. Supp. 990, 995 (D.D.C. 1983) ("The distance at which a local call becomes a long distance toll call has been, and will continue to be, determined exclusively by the various state regulatory bodies.").

⁶ Pub. L. No. 104-104, 110 Stat. 56 (1996).

⁷ *United States v. Western Electric*, 569 F. Supp. at 995.

⁸ The Consent Decree required AT&T to divest its ownership of the BOCs. *United States v. American Telephone and Telegraph Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

⁹ Petitions for Limited Modification of LATA Boundaries to Provide Expanded Local Calling Service (ELCS) at Various Locations, *Memorandum Opinion and Order*, 12 FCC Rcd 10646, 10648 (*July 1997 Order*).

¹⁰ See *United States v. Western Electric Company, Inc.*, No. 82-0192 (D.D.C. Feb. 6, 1984); *United States v. Western Electric Company, Inc.*, No. 82-0192 (D.D.C. Mar. 15, 1984).

¹¹ See, e.g., *United States v. Western Electric Company, Inc.*, No. 82-0192 slip op. at 2, 3 n.3 (D.D.C. Jan. 31, 1985) (*Jan. 1985 Order*); *United States v. Western Electric Company, Inc.*, No. 82-0192 (D.D.C. Dec. 3, 1993); *United States v. Western Electric Company, Inc.*, No. 82-0192 (D.D.C. Dec. 17, 1993).

¹² See *United States v. Western Electric Company, Inc.*, No. 82-0192, slip. op. at 3 n.5 (D.D.C. July 19, 1984) (*July 1984 Order*).

¹³ See *Jan. 1985 Order* at 2-3 & n.3.

sufficiently high to justify non-optional, flat-rated service.¹⁴ In

addition, the District Court also considered the competitive effects of granting a proposed ELCS waiver¹⁵ and the number of customers or access lines involved.¹⁶

4. Matters previously subject to the Consent Decree are now governed by the 1996 Act.¹⁷ Under section 3(25)(B) of the Act, BOCs may modify LATA boundaries, if such modifications are approved by the Commission.¹⁸ On July 15, 1997, the Commission released a decision granting 23 requests for limited boundary modification to permit ELCS.¹⁹ Although calls between the ELCS exchanges would now be treated as intraLATA, each ELCS exchange would remain assigned to the same LATA for purposes of classifying all other calls.²⁰ The Commission stated that it would grant requests for such limited modifications only where a petitioning BOC showed that the ELCS exhibited, among other things, a community of interest among the affected exchanges sufficient to justify non-optional, flat-rated calling. The Commission also examined the proposed ELCS to see if granting the requested waiver would have any anticompetitive effects.²¹ The Commission concluded that a carrier would be deemed to have made a prima facie case supporting grant of the proposed modification if the ELCS petition: (1) has been approved by the state commission; (2) proposed only flat-rated, non-optional ELCS, *i.e.*, traditional local service; (3) indicated that the

¹⁴ *Id.*

¹⁵ See *July 1984 Order* at 3; *Jan. 1985 Order* at 2-3; *United States v. Western Electric Company, Inc.*, No. 82-0192, slip op. at 2 (D.D.C. May 18, 1993) (*May 1993 Order*). The District Court granted waivers for more than one hundred flat-rated, non-optional ELCS plans that allow the provision of traditional local telephone service between nearby exchanges. See, e.g., *Western Electric*, 569 F. Supp. at 1002 n.54; *July 1984 Order* at 3; *January 1985 Order* at 4. Under such plans, subscribers pay no extra charge for calls beyond their established monthly service charge (the plan involves a flat-rated charge), and all subscribers in the exchange are included in the plan (the plan is non-optional).

¹⁶ *July 1984 Order* at 3 n.8.

¹⁷ Section 601(a)(1) of the 1996 Act states that “[a]ny conduct or activity that was, before the date of enactment of this Act, subject to any restriction or obligation imposed by the AT&T Consent Decree shall, on and after such date, be subject to the restrictions and obligations imposed by the Communications Act of 1934 as amended by this Act and shall not be subject to the restrictions and obligations imposed by such Consent Decree.” On April 11, 1996, the D.C. District Court issued an order terminating the AT&T Consent Decree and dismissing all pending motions under the Consent Decree as moot, effective February 8, 1996. See *United States v. Western Electric Company, Inc.*, No. 82-0192, 1996 WL 255904 (D.D.C. Apr. 11, 1996).

¹⁸ See 47 U.S.C. § 153(25)(B).

¹⁹ *July 1997 Order*, 12 FCC Rcd at 10646.

²⁰ If an exchange were assigned to another LATA for all purposes, any existing local calling routes between that exchange and the original LATA would be lost because such traffic would now be interLATA and could no longer be carried by the BOC. Instead, the traffic would generally be carried by an interexchange carrier charging long distance toll rates.

²¹ *July 1997 Order*, 12 FCC Rcd at 10649-50.

state commission found a sufficient community of interest sufficient to justify such service; (4) documented this community of interest through such evidence as poll results, usage data, and descriptions of the communities involved; and (5) involved a limited number of customers or access lines.²²

III. DISCUSSION

5. The criteria that the Commission uses to determine whether a prima facie case supporting grant of an ELCS petition has been made is based substantially upon the criteria established by the District Court. As the District Court and Commission cases have stated, flat-rated, non-optional service is one of the major indicia that a sufficient community of interest exists between exchanges. The Ameritech plan does not propose to offer flat-rated, non-optional service; not offering such service, we believe, indicates that a sufficient community of interest does not exist between the respective exchanges to justify an ELCS modification. As we noted in the initial ELCS order, subscribers to flat-rated ELCS plans pay no extra charge for calls within the ELCS area beyond their established monthly service charge. A non-optional, flat-rated plan will be imposed where a sufficient calling volume exists between the exchanges to justify treating all calls within the proposed calling area equally, even though the monthly flat-rate may be higher for all callers than it had been prior to the grant of ELCS. The imposition of a measured-rated plan, on the other hand, indicates that call volume between the relevant exchanges is insufficient to justify an increased charge to all callers because measured-rate calling only increases the rates of those who actually complete calls between the relevant exchanges. Measured-rated plan subscribers pay rates based upon factors such as duration, distance, and time of day.²³ Under the Consent Decree, the District Court found that measured-rated local service was virtually identical to discounted toll service normally carried by interexchange carriers (IXCs). The District Court also concluded that it would be anticompetitive to grant a waiver that would allow a BOC the exclusive right to provide a service that is not non-optional and flat-rated in an area where such service had previously been offered competitively by the IXCs.²⁴ Although we are not bound by conclusions reached by the District Court, we are substantially guided by its analysis in evaluating ELCS requests.

²² *Id.* at 10659. The Commission also delegated authority to act on petitions to modify LATA boundaries to the Common Carrier Bureau. *Id.* at para 10657-58. On August 6, 1997, the Commission released a decision granting requests to modify LATA boundaries to permit three independent telephone company (ITC) exchanges in Texas to change LATA association for purposes of improving service to subscribers. The Commission stated that a carrier will be deemed to have made a prima facie case supporting grant of a proposed association change if the petition: (1) states that the association change is necessary because of planned upgrades to the ITC's network or service that will require routing traffic through a different BOC LATA; (2) involves a limited number of access lines; and (3) includes a statement from the affected BOC(s) requesting a LATA modification, pursuant to section 3(25) of the Act, to permit the change in association. Petitions for LATA Association Changes by Independent Telephone Companies, *Memorandum Opinion and Order*, 12 FCC Rcd 11769 (1977) (*August 1997 Order*).

²³ *July 1997 Order*, 12 FCC Rcd at 10649-50.

²⁴ *See, e.g., Western Electric*, 569 F. Supp. at 1002 n.54; *July 1984 Order*; *Jan. 1985 Order*.

6. In the present case, the Public Utilities Commission of Ohio (PUCO) has ordered that non-optional, measured-rated ELCS be provided even though flat-rated service is available

in Ohio.²⁵ Ameritech argues in support of the PUCO order by stating that flat-rated and measured-rated service are two components of “traditional” local telephone service provided in Ohio; and that the non-optional, measured-rate service ordered by the PUCO is not a substitute for toll service, but rather is an appropriate remedy under Ohio law which addresses the adequacy of local service issues.²⁶

7. In ruling on petitions to modify LATA boundaries for ELCS, the Commission and the Bureau have sought to exercise the exclusive authority to modify LATA boundaries in a manner consistent with their other obligations under the Act. Thus, the “local” nature of requests to modify LATA boundaries does not relieve the Commission of its obligation to ensure that competitive markets remain competitive and that BOC incentives to seek authority under section 271 to provide interLATA service are not impaired.

8. The preservation of existing competition in the toll market is at the heart of the reason that we generally require that ELCS areas be flat-rated and non-optional. The elimination of a competitive toll market, without proper safeguards, could be considered improper forbearance from the requirement in section 10(d) of the Act to fully implement section 271.²⁷ Only in one instance have we granted an ELCS request for service that was not non-optional and flat-rated²⁸ In that instance, Ameritech had requested authority to establish message-rated ELCS in Wisconsin. That request, however, was unique in two important respects: first, in Wisconsin, Ameritech only offered message-rated service; and, second, only 10 access lines were involved. Under those circumstances, we believed that granting a request that deviated from our usual requirements was appropriate.

9. Further, we find Ameritech’s arguments in favor of granting the ELCS request to be unpersuasive in light of previous decisions. In response to a factually similar request, the Commission denied a petition to provide optional, measured-rated ELCS where the Oregon Commission, in finding a community of interest, required carriers to offer both flat and measured-rated options for all ELCS routes in the state.²⁹ In another factually similar case decided by the

²⁵ Ameritech Petition at 4-5.

²⁶ *Id.* The PUCO further states that it does not limit its consideration to only flat-rate ELCS; that the rates of the measured-rate service are “virtually identical to those that any Ameritech subscriber in Ohio would pay for local service if he/she chose the measured rate option”; that the service is “subject to the local competition guidelines and minimum telephone service standards established” by the PUCO for local exchange companies; that the ELCS traffic is not carried over facilities dedicated to toll traffic but, rather, over local facilities.

²⁷ 47 U.S.C. § 160(d).

²⁸ *See* Ameritech Petition for Limited Modification of LATA Boundaries to Provide Expanded Local Calling Service in Wisconsin, 13 FCC Rcd 3042 (1998).

²⁹ *See July 1997 Order*, 12 FCC Rcd at 10656.

District Court, GTE sought authority to provide interLATA, non-optional,

measured-rated extended area service between various exchanges in Ohio.³⁰ The PUCO had ordered measured-rated service because it concluded that subscribers could enjoy a substantial savings over the existing toll rates. Yet, in examining calling patterns and other information, the PUCO did not find the justification for two-way, flat-rated ELCS.³¹ In rejecting GTE's request, the District Court noted that if the calling patterns were not sufficient for the PUCO to order flat-rated ELCS,³² then an adequate community of interest had *not* been demonstrated to justify extended local calling.³³ The District Court also noted that the means by which these measured-rated savings would occur would largely result from the elimination of the BOCs' requirement to pay access charges,³⁴ and concluded that a plan which would reward BOCs for not having to pay access charges is "antithetical ... to the principle of fair competition."³⁵ Additionally, the Division recently released an even more similar order denying a non-optional, measured-rated ELCS that would have authorized two-way ELCS between the Middletown exchange and the exchanges in Hamilton and Cincinnati, Ohio.³⁶

10. The Commission and the Bureau have resolved hundreds of ELCS petitions, and approved over 160 requests. Of these, only one petition to provide measured-rated ELCS has been granted because the impact was minimal and there was no flat-rated alternative.³⁷ We believe that allowing measured-rated ELCS requests in all but the most limited circumstances risks a "piecemeal dismantling"³⁸ of the BOCs' section 271 obligations. We, therefore, deny the Ameritech petition

³⁰ United States v. Western Electric Company, Inc., No. 82-0192 (D.D.C. Dec. 3, 1993) (*Dec. 3, 1993 Order*).

³¹ *Id.* at 9.

³² *Id.* at 6.

³³ BellSouth and the Alabama Public Service Commission (APSC) sought a waiver to provide ELCS calling capability based on factors such as time and distance. *United States v. Western Electric Company, Inc.*, No. 82-0192 (D.D.C. Dec. 17, 1993) (*Dec. 17, 1993 Order*). The PSC considered but rejected non-optional, flat-rated ELCS because it considered that to be unfair to subscribers who do not make toll calls. *Id.* at 3. The Court stated that it was hesitant to grant such a waiver without a "documented finding by the appropriate state regulatory agency" that a sufficient community of interest exists. *Id.* at 3-4. In rejecting the APSC's waiver, the Court noted that APSC decided against flat-rated, non-optional service because it was inequitable to subscribers who did not make toll calls. *Id.* at 4. The Court interpreted such reasoning as proof that a "substantial number of subscribers likely would not be using this service." *Id.*

³⁴ *Dec. 3, 1993 Order* at 7.

³⁵ *Id.* at 8.

³⁶ Ameritech Petition for Limited Modification of LATA Boundary to Provide Expanded Local Calling Service (ELCS), *Memorandum Opinion and Order*, NSD-L-99-72, DA 01-2169 (rel. Sep. 17, 2001).

³⁷ *See* note 29, *infra*.

³⁸ *See* May 18, 1993 *Order* at 4.

because its inclusion of measured-rate service is inconsistent with a finding that a sufficient community of interest exists to grant an ELCS LATA boundary modification.

VI. CONCLUSION AND ORDERING CLAUSES

11. Accordingly, IT IS ORDERED, pursuant to sections 3(25) and 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 153(25), 154(i), and authority delegated by Sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, that the petition of Ameritech, on behalf of The Ohio Bell Telephone Company, for a LATA modification for the limited purpose of providing measured-rated, two-way, non-optional ELCS at specific locations, identified in File No. NSD-L-00-78, IS DENIED.

12. IT IS FURTHER ORDERED that pursuant to section 416(a) of the Act, 47 U.S.C. § 416(a), the Secretary SHALL SERVE a copy of this order upon the petitioner, Ameritech.

FEDERAL COMMUNICATIONS COMMISSION

Diane Griffin Harmon
Acting Chief, Network Services Division
Common Carrier Bureau