Policy Div.

DOCKET FILE COPY ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED
AUG 30 1999
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
UNION TELEPHONE COMPANY	)	
	)	CC Docket No. 96-61
Petition for Waiver of Sections 64.1903(a)(2) and 64.1903(b) of the Commission's Rules	)	~~File No.~~
	)	

To: Chief, Common Carrier Bureau

PETITION FOR WAIVER OF UNION TELEPHONE COMPANY

Union Telephone Company ("Union"), by its attorneys and pursuant to Section 1.3 of the Commission's Rules, hereby seeks a waiver of certain provisions of the Commission's Rules to allow the continued provision of competitive long distance services to its rural customers without burdensome, unnecessary and uneconomic structural changes. Union, which owns certain transmission facilities, seeks waiver of the requirement that all incumbent local exchange companies ("LECs") except "pure" resellers must establish a separate subsidiary for the purpose of providing in-region interexchange telecommunications services.[1] Absent grant of the requested relief, the public interest policy goals which underlie the rule will not be served.[2] Accordingly,

---

[1] Section 64.1903(b) of the Commission's Rules, enacted pursuant to *Second Order on Reconsideration and Memorandum Opinion and Order*, In the Matter of Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area (CC Docket No. 96-149) and Policy and Rules Concerning the Interstate, Interexchange Marketplace (CC Docket No. 96-61), FCC 99-103 (rel. June 30, 1999)("*Second Order*") requires that an incumbent LEC providing in-region, interstate, domestic interexchange services must establish a legally-separate entity for the provision of those services . Section 64.1903(c) specifies that subject LECs shall come into compliance with this requirement no later than August 30, 1999. Union notes, however, that Paragraph 52 of the *Second Order* specifies that its requirements "shall be effective 30 days after publication of a summary thereof in the Federal Register." The summary was published on August 16, 1999 (64 Fed. Reg. 44,423 (1999)), yielding an effective date for the cited provisions of September 15, 1999.

[2] By this filing, Union seeks waiver of provisions of Subpart T - Separate Affiliate Requirements for Incumbent Independent Local Exchange Carriers That Provide In-Region,

good cause exists for grant of the requested relief.

I. BACKGROUND

Union is a small local exchange telephone company, serving approximately 6,200 landline local subscriber access lines in 16 exchanges in Colorado, Utah and Wyoming. The communities served by Union are rural and sparsely populated.

Union has provided long distance services to its subscribers for decades, and in 1994 initiated equal access long distance service to afford efficient access to a wider choice among interexchange carriers, and to ensure that the specific long distance service requirements of area residents would be served. Union provides long distance services directly, through a combination of the resold services of other interexchange carriers and the utilization of its own facilities.[3] Union maintains its records in conformance with Part 32 of the Commission's Rules, including ledger detail sufficient to allow tracking of the revenues and expenses associated with its long distance operations. Union adheres to the Commission's cost allocation rules. Facilities utilized by Union in the provision of interexchange services directly to its customers are available to competitor interexchange companies under nondiscriminatory terms and conditions.

All Union exchanges have been converted to equal access capability and local exchange customers currently enjoy a robustly competitive marketplace, having a choice among numerous

---

Interstate Domestic interexchange Services or In-Region International interexchange Services. Accordingly, Union interprets Section 1.1105 of the Commission's Rules, assessing a filing fee with respect to petitions for waiver of the requirements of Part 64, Allocation of of Costs Rules (subpart I), as inapplicable.

[3] Over the years, Union constructed transmission facilities and between its exchanges for exchange access services. It also utilizes these transmission facilities and associated switching facilities in its provision of long distance services; these facilities are available to other interexchange carriers pursuant to tariff.

long distance carriers, including AT&T, Sprint and MCI.[4] Union does not enjoy a commanding position in the long distance market. In addition, Union also provides long distance service outside of its local exchange telephone service area. Currently, approximately 17 % of its long distance customers, receive incumbent LEC services from a LEC other than Union.

II. ARGUMENT

A. WAIVER IS NECESSARY TO SERVE THE UNDERLYING PURPOSE OF THE COMMISSION'S RULES

Union seeks waiver of Sections 64.1903(a)(2) and 64.1903(b) of the Commission's Rules to allow the uninterrupted provision of competitive long distance services in an economic fashion. Union proposes that it continue to own and utilize certain transmission facilities for both exchange and interexchange purposes, as well as continue to operate its long distance business as a division within its single corporate format. Given the factual circumstances outlined above and the Commission's policy goals for establishing the rules in question, good cause exists for grant of the requested waivers.

Pursuant to Section 1.3 of the Commission's Rules, waiver of specific rule provisions is warranted where good cause is shown. Good cause exists where special circumstances justify deviation from the general rule and such deviation serves the public interest.[5] To meet this standard, a petitioner must establish that application of the general rule does not serve the public interest when applied under a specific set of facts and that grant of the requested waiver will not

---

[4] Union LEC customers which are presubscribed to Union's long distance services number approximately 2,000; AT&T has more presubscribed customers than Union and the remaining LEC customers are presubscribed to a variety of other carriers, predominantly MCI.

[5] *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C.Cir. 1969).

frustrate the public policy goals of the rule.[6] The requisite conditions are present in this case.

The Commission established the current rules in the context of distinguishing the regulatory treatment of "pure" resellers from the obligations to be imposed on those LECs which engage in the provision of interexchange services through the combination of resale activities and the ownership of transmission or switching facilities. Both standards are based upon the public policy goal of promoting competition in the provision of interexchange services and prohibiting a LEC from achieving an unfair advantage over competitors.[7] The Commission's concern is based upon the position of an incumbent LEC as a "bottleneck" access service provider. In distinguishing between resellers and facilities-based LEC providers of competitive long distance services, the Commission found that "pure" resellers are less likely to engage in anticompetitive activity because "pure" resellers are ultimately dependent upon the underlying carriers and will suffer (or fail to benefit) from anti-competitive activity.[8]

Grant of Union's waiver request will not undermine the Commission's enunciated policy goal of advancing competition, but instead will actually promote the continued provision of competitive interexchange services both within and outside of Union's incumbent LEC service area. The characteristics and effects of Union's current operations represent specific facts which

---

[6] *Id.*

[7] *See, e.g., Second Order* at para. 10.

[8] The Commission has found that resellers have a reduced incentive and ability to engage in anticompetitive activities. For example, the Commission noted that delayed or poor quality interconnection to underlying carriers would also impede a reseller's ability to provide service. The Commission also found that discrimination against individual competitors is curtailed because the choice among carriers renders any benefit to the LEC's long distance operations uncertain. The Commission also noted that resellers are less likely to engage in cost misallocation because wholesale rates of resold services are more easily analyzed by auditors than the "underlying transmission costs of facilities-based carriers." *Second Report* at para. 22.

should eliminate the Commission's generalized concerns regarding the likelihood of anticompetitive conduct by a facilities-based carrier. These concerns are demonstrably inapplicable in this instance. Inasmuch as specific facts must outweigh a mere supposition that certain conditions may generate an expected result, imposition of more onerous regulatory burdens in not warranted. In fact, imposition of the rules under these circumstances would frustrate their underlying purpose; accordingly, grant of the waiver is decidedly in the public interest.

As demonstrated above, Union has established equal access arrangements in each of its exchanges; interexchange carriers compete with Union's long distance services on a level playing field.[9] Union does not dominate the interexchange market, either within or outside of its incumbent LEC service area. Furthermore, 97% of Union's minutes terminate outside of its incumbent LEC service area; certainly with respect to this rather substantial portion of its operations, Union is situated no differently than any other interexchange company.

The historic and current facts of operation belie any suggestion that either customers or carriers are disadvantaged by Union's current long distance operations. Competition is robust and competitors are not impeded or disadvantaged in their operations. Under these circumstances, the imposition of additional regulatory burdens will not improve the competitive situation, and,

---

[9] Union notes that the Commission's concern regarding a "price squeeze" in the form of access charge manipulation is obviated by the fact that Union is a member of the National Exchange Carriers Association, Inc. ("NECA") and is an issuing carrier under NECA Tariff FCC No.5, which establishes access charges based upon the compiled and averaged data of all NECA members. Accordingly, Union cannot raise unilaterally its access rates to "squeeze" its competitors. Moreover, as noted above, Union assesses to itself the cost of tariffed services at tariffed rates.

accordingly, would serve no purpose other than to diminish Union's own competitive position.[10] This result is directly contrary to the underlying policy of the rules and antithetical to the spirit of the Telecommunications Act of 1996.

Increased regulatory burdens will seriously jeopardize Union's ability to offer competitive long distance services. While the competitive market can no doubt absorb Union's customer base in the event that Union ceases to provide competitive services, the value of localism cannot be underestimated. As a local company, Union is knowledgeable of and responsive to the requirements of its customers. Union is able and willing to design plans and services which are specifically tuned to its relatively small market. This responsiveness to consumer demand and satisfaction of that demand is the ultimate goal of competition, which unfortunately has become misunderstood to be the goal, rather than a means by which public interest policy objectives are achieved.

Given the existence of circumstances which demonstrate that the Commission's policy is served without imposition of onerous regulatory burdens which themselves may undermine the same specific policy objectives, grant of the requested relief will serve the public interest. Accordingly, grant of the requested waiver is warranted.

B. LIMITED TRAFFIC WARRANTS WAIVER

The Commission's *Second Order* modified an earlier order to allow independent LECs providing "in-region, long distance services solely on a resale basis" to do so through a separate

---

10 The Commission has recognized the substantial and disparate cost impact on rural telephone companies generated by implementation of a separate legal entity requirement. *See, e.g., Second Order* at para. 18. In Union's case, the legal and administrative costs of creating and maintaining such a separate structure are also significant.

corporate division rather than a separate legal entity. Distinguishing the position of "pure resellers," the Commission found that maintenance of the separate subsidiary requirement is necessary because a facilities-based independent LEC would otherwise have the ability and incentive to engage in such prohibited practices as cost misallocation, unlawful discrimination, and price squeezing. [11] The Commission was concerned that an independent facilities-based LEC through the use of cost misallocation would benefit an affiliate to the detriment of competitors in the market.

Notwithstanding the requirements of the *Second Order*, the Commission left in place the existing process for an independent company to seek a waiver of the organizational requirements by satisfying the existing regulations and by demonstrating that the company would not be able to engage in anticompetitive activity. In the instant case, Union, as a small rural telecommunications company, has such a small amount of targeted traffic, that it works an unreasonable burden to require it to adhere strictly to the requirements of the *Second Order*.

The Commission in its *Second Order* weighed its concern with anticompetitive behavior and action with the inability of certain rural independent incumbent LECs to engage in such activity. With this in mind, the Commission exempted independent LEC resellers from the rigors of the *Second Order* while noting that most rural LECs and midsized LECs would qualify for the exemption.[12]

The Commission defined independent LEC resellers as those independent LECs that provide "in-region, long distance services using no interexchange switching or transmission

---

11 *Second Order* at para. 27.
12 *Second Order* at para. 10.

facilities or capability of the LEC's own." While excluding from the definition those independent LECs which utilized their own switching or transmission facilities, it was the Commission's intent to carve out an exception to its general rule in order to alleviate unnecessary regulation.[13]

As further evidence of the Commission's intent to address its concern for anticompetitive action while at the same time not unnecessarily restricting or burdening the activity of small rural LECs, the Commission restricted the definition of "interexchange" and "in-region" services. The restricted definition of these terms exempts a number of companies from the reach of the *Second Order* when they might otherwise have been included.

The term interexchange is defined in the Order as: "services between a point located in an independent LECs exchange area and a point located outside such area."[14] The term does not refer to services between local telephone exchanges within an independent LEC's exchange area; therefore the separate affiliate requirement only applies to the provision of in-region, interstate, interexchange services which are those services between an independent LEC's exchange area and a point located outside of such area. In-region service is defined as:

> service originating in an independent local exchange carrier's local service areas or 800 service, private line service or their equivalents that: (1) terminate in the independent LEC's local exchange area; and (2) allow the called party to determine the interexchange carrier, even if the service originates outside the independent LEC's local exchange areas.[15]

Given these definitions and the intent of the *Second Order* to protect competition while at the same time not unnecessarily burdening rural incumbent LECs, the applicable services provided

---

13 *See Second Order* at paras. 18 and 24.

14 *See Second Order* at paras. 30-31.

15 47 C.F.R. § 64.1902.

by Union are so small in relation to the total message telecommunications services provided by the company that it would work an undue hardship to require adherence to the provisions of the *Second Order*. Union provides telecommunications services to sixteen local exchanges located in the tri-state area of Wyoming, Colorado, and Utah. Although Union provides service in these three states to approximately 6,200 access lines, only a few of these customers reside in the states of Colorado and Utah. Indeed, there are 16 Colorado customers located in an area just south of the Wyoming border and 500 customers located in four small communities lying on the Wyoming border. It should be noted that of the approximately 6,200 access lines in Union's exchanges, only 2,000 of these customers utilize Union's long distance services, compared to approximately 4,000 utilizing the services or other interexchange carriers.

An analysis of Union's long distance traffic for interstate calls demonstrates the burden the *Second Order* would impose by requiring company segregation for such a *de minimis* amount of traffic as contemplated by the *Second Order*. In 1996, for instance, in-region traffic would have comprised approximately three percent of the total and six-tenths of a percent of total originating minutes. On a minute-of-use basis, approximately fifty percent (50%) of the minutes were for 1-800 service of carriers other than Union. Union, with only 33% of the customers and providing only six-tenths of a percent of the total carriage, has little if any ability to misallocate funds, or otherwise engage in anticompetitive behavior.

As the traffic carried by Union is *de minimis*, and as the goals of the *Second Order* are otherwise accomplished, it is appropriate that its requirements, specifically, that a separate affiliate be legally created and ownership of facilities separated, be waived and that Union be treated in whole as a reseller.

C. AT MINIMUM, AN EXTENSION OF TIME IS REQUIRED TO AVOID UNDUE EXPENSE AND DISRUPTION

Notwithstanding the validity of the foregoing, Union requests that, at a minimum, the Commission grant an extension of the compliance deadline until at least January 1, 2000, within which to separate ownership of facilities and establish a separate operating entity. Major changes occurring mid-year result in significant hardship and inflate unjustifiably accounting and operational costs. Moreover, the authorization of three state commissions is believed to be required to effect this change. Given the significant burden that will be encountered by Union in the event that its waiver request is denied, alleviation of a portion of that burden by allowing conversion at a natural point in its business cycle would be a fair and reasonable approach.

III. CONCLUSION

Union has demonstrated that good cause exists for the requested waiver. The underlying purpose of the Commission's Rules would be enhanced by the promotion of continued vigorous competition in the provision of long distance services in the rural areas in question. In addition, application of the rules in this instance would be unduly burdensome given both the expense involved in the establishment and maintenance of a separate subsidiary, and the minimal traffic involved. Accordingly, grant of the requested waiver is warranted and in the public interest.

Respectfully submitted,
UNION TELEPHONE COMPANY

By: Bruce S. Asay (SC)

Bruce S. Asay
Associated Legal Group, LLC
1807 Capitol Avenue, Suite 205
Cheyenne, Wyoming 82001
(307) 632-2888

Sylvia Lesse
Kraskin, Lesse & Cosson, LLP
2120 L Street, NW, Suite 520
Washington, D.C. 20037
(202) 296-8890

August 30, 1999

DECLARATION OF HOWARD D. WOODY

I, Howard D. Woody, President of Union Telephone Company, do hereby state that I have read the foregoing Petition for Waiver of Union Telephone Company. I certify under penalty of perjury that the facts presented therein are true and correct.

Howard D. Woody

8/28/99
Date

Post-It® Fax Note 7671	Date 8/28/99 # of pages ▶ 1
To Sylvia	From Tomie Woody
Co./Dept.	Co.
Phone # 202-296-8890	Phone # 307 782 4129
Fax # 202-296-8893	Fax # 307 782 3079