

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE PROVISION OF OPERATOR SERVICES) CASE NO.
BY AMERICALL SYSTEMS OF LOUISVILLE) 89-132

O R D E R

On January 8, 1990, the Commission issued an Order in this proceeding. On January 12, 1990, AmeriCall Systems of Louisville ("AmeriCall") filed a motion for stay of the enforcement of the Commission's January 8, 1990 Order. On January 18, 1990, the Commission granted AmeriCall's motion for stay of enforcement in part and denied its motion in part. On January 29, 1990, AmeriCall filed an application for a rehearing of the Commission's January 8, 1990 Order.

In its application for rehearing, AmeriCall asserted that the Commission's determination that it must cease providing intraLATA operator services is unlawful and unreasonable and that the Commission's determination that it must modify its tariff to provide interLATA utility services as a facility based carrier is unlawful and unreasonable. AmeriCall also asserts that the Commission should authorize AmeriCall not to file its "aggregator" contracts.

I. Whether the Commission's Regulatory Plan Authorizes it to Review and Require Modification of Effective Tariffs.

AmeriCall asserts that the Commission's statutory regulatory plan does not contemplate that the Commission may review effective

tariffs and then disapprove them. AmeriCall asserts that the Commission's "inadvertent approval" of its tariff concerning intraLATA operator services is irrelevant as to whether the Commission may require AmeriCall to delete the tariff provision. Whether such assertion adequately considers KRS 278.260 and KRS 278.280 both of which provide for the Commission to initiate investigations, on its own motion, when it finds that the rates or services of a utility are unreasonable, is a question which will be resolved upon rehearing.

AmeriCall further contends that the Commission did not find that its tariff was unreasonable and, thus, was not properly proceeding under KRS 278.260 or KRS 278.280. AmeriCall recognizes that for this argument to prevail it must square with the Commission's Orders in Administrative Case No. 261¹ and Administrative Case No. 273.² Such assertion brings into question the propriety of this Commission's finding that AmeriCall was "providing operator services on an intraLATA basis contrary to Commission policy." In considering this question, it should be noted that the Commission has already found that the facilities owned by AmeriCall make it unreasonable and unjust for AmeriCall

¹ Administrative Case No. 261, An Inquiry Into the Resale of Wide Area Telecommunications Service, Order dated September 2, 1983.

² Administrative Case No. 273, An Inquiry Into Inter- and Intra-LATA Intrastate Competition in Toll and Related Services Markets in Kentucky, Order dated May 25, 1984.

to continue to provide intraLATA telecommunications services through the resale of WATS, including intraLATA operator services. While AmeriCall argues that its tariff reflects the Commission's "fully reasoned policies expressed in Administrative Case Nos. 273 and 261," the Commission's present "read" of the Orders in those administrative cases is otherwise.

In order for AmeriCall to have a further opportunity to argue this matter, a rehearing will be granted. However, AmeriCall is apprised that such further arguments about expenditure of monies by AmeriCall to provide intraLATA operator services carries little weight. The Commission does not perceive the presence or absence of such expenditure as a basis of any Commission decision.

II. Whether AmeriCall Should be Required to Modify its Tariff to Provide InterLATA Service.

AmeriCall next argues that the Commission's order that it modify its tariff to provide interLATA utility service as a facilities-based carrier is unreasonable and unlawful. In support of its statement, AmeriCall asserts that it had no notice that its facilities were an issue in this investigation. However, at the August 8, 1989 hearing in this proceeding, AmeriCall had an opportunity to respond to questions concerning the facilities owned by AmeriCall and its witness was unable to respond.³ Thus, AmeriCall was requested to supply answers to these questions

³ Transcript of August 8, 1989 Hearing, generally at pages 222-230.

following the hearing. Contrary to AmeriCall's claim in its petition for rehearing, it did have a hearing on this issue and was given ample opportunity to present its arguments.

AmeriCall's argument of lack of notice on this issue is unsupported because the Orders in Administrative Case No. 261 and Administrative Case No. 273 clearly set forth that AmeriCall, as a WATS reseller authorized to resell WATS, shall not own any transmission facilities. The fact that the Commission had to probe at an investigatory hearing to determine what type of facilities AmeriCall owned is unfortunate. AmeriCall should have disclosed to the Commission its ownership of facilities long before the hearing in this matter because of the Commission's clear prohibition regarding reseller ownership of transmission facilities. AmeriCall may not rely on its failure to disclose critical facts regarding its operations to the Commission as grounds to claim lack of notice.

Nonetheless, the Commission will grant a rehearing on the issue concerning facilities ownership by AmeriCall strictly to allow consideration of an alternate plan and will maintain a stay of enforcement of the January 8, 1990 Order which required AmeriCall to cease providing intraLATA services not including the provision of intraLATA operator services. AmeriCall will be given 30 days in which to file a plan regarding its facilities that is consistent with Commission policy. Accordingly, such plan should include either divesting its ownership in these transmission facilities or disabling these facilities. AmeriCall may provide

intraLATA WATS resale pending the Commission decision concerning this matter.

III. Whether AmeriCall Should File its "Aggregator" Contracts with the Commission.

The final issue addressed by AmeriCall in its application for rehearing requests that the Commission authorize it not to file its "aggregator contracts." AmeriCall contends that such contracts are between a broker and an aggregator of customers and are not, therefore, a contract between a utility and an end-user requiring Commission approval. However, the law makes no such distinction.

KRS 278.160 mandates that every utility "file with the Commission, within such time and in such form as the Commission designates, schedules showing all rates and conditions for service established by it and collected or enforced." (emphasis added) Pursuant to Commission regulation, 807 KAR 5:011, Section 13, all rates not included in a utility's general tariff shall be filed with the Commission as a special tariff. That regulation states:

Every utility shall file true copies of all special contracts entered into governing utility service which set out rates, charges or conditions of service not included in its general tariff. The provisions of this regulation applicable to tariffs containing rates, rules and regulations, and general agreements, shall also apply to the rates and schedules set out in said special contracts, so far as practicable.

The Order in Administrative Case 273 dated May 25, 1984 orders that "all carriers certified as being nondominant . . . are hereby subject to the regulatory requirements of 807 KAR Chapter 5, as abbreviated and modified by this Order." The Order does not lift

the statutory and regulatory requirement to file all rates, whether by general tariff or by special contract. The Order specifically states at p.35 "the nondominant carriers will be required to provide 20 days' notice to the public of proposed tariff changes and to file a copy of their tariffs with this Commission." Nonetheless, since the requirement to file all rates is statutory whether by general tariff or special contract, it cannot be waived by Commission Order.

Lastly, AmeriCall's claim that this contract is an aggregator contract is meaningless. AmeriCall's contract with the University of Kentucky filed in this proceeding clearly states that AmeriCall will provide "telecommunication services" to the public. Therefore, the language of the contract is contrary to AmeriCall's claim that it is an aggregator contract. Regardless of what "type" of contract it is, the contract without a doubt states that AmeriCall will provide telecommunications services to the public at a rate not included in AmeriCall's general tariff and in accordance with the law must be filed with the Commission. Therefore, the Commission finds that AmeriCall's request for rehearing concerning the filing of its contracts should be denied.

IT IS THEREFORE ORDERED that:

1. AmeriCall's request for rehearing on the Commission's Order to cease providing intraLATA operator services within 30 days and that it notify its customers within 10 days is hereby granted for the purpose of allowing all parties to submit a brief on this issue. All parties may file their respective briefs no later than 30 days from the date of this Order.

2. AmeriCall's request for rehearing on the Commission's Order to file all special contracts in compliance with 807 KAR 5:011, Section 13, is hereby denied.

3. AmeriCall's request for rehearing concerning the ownership of facilities is hereby granted strictly to allow AmeriCall to file a plan which includes either divesting its ownership of its facilities or disabling its facilities within 30 days of the date of this Order. AmeriCall may provide intraLATA WATS resale pending the Commission's decision concerning this case.

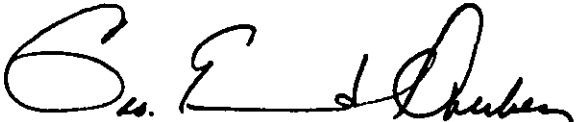
4. The stay of enforcement of the Commission's January 8, 1990 Order that AmeriCall cease providing intraLATA operator services within 30 days and that it notify its customers within 10 days is hereby continued until further Order.

5. The stay of enforcement of the Order that AmeriCall immediately cease providing transmission services for its affiliate AmeriCall Dial-O Services, Inc. is hereby continued until further Order.

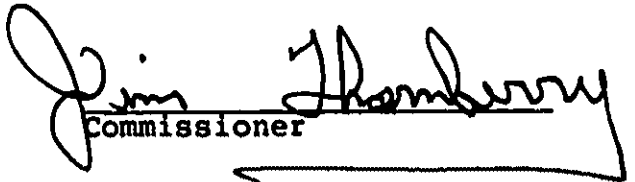
6. The Commission's Order in this matter dated January 8, 1990 shall continue in force except as specifically amended herein.

Done at Frankfort, Kentucky, this 20th day of February, 1990.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman


Commissioner

ATTEST:


Executive Director