

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE ESTABLISHMENT OF INTRASTATE)
SWITCHED VOICE SERVICE (METROFONE)) CASE NO. 8919
BY WESTERN UNION TELEGRAPH COMPANY)

O R D E R

On September 22, 1983, Western Union Telegraph Company ("Western Union") filed proposed tariffs for provision of switched voice service called Metrofone. The filing was suspended for further investigation on October 19, 1983. On December 16, 1983, AT&T Communications of the Southeast ("ATTCOM") filed its motion for intervention. The ATTCOM motion was granted by Commission Order dated December 27, 1983. On February 1, 1984, the Attorney General's Consumer Protection Division filed its motion to intervene. [No action taken yet.]

Before proceeding to the merits of the Metrofone tariff, a preliminary question must be resolved: whether Western Union is required to obtain a certificate of public convenience and necessity before it can offer Metrofone service.

By letter of January 20, 1984, counsel for Western Union stated that it had not yet been finally determined whether to file an application for a certificate of public convenience and necessity or file a further statement in support of Western

Union's claim that it is currently authorized to provide Metrofone under its "grandfather" rights. On February 3, 1984, Western Union submitted a memorandum in support of its position that it was not required to seek a certificate in order to offer Metrofone.

In its memorandum, Western Union first argues that certification is only required when facilities are to be constructed, as in KRS 278.020. However, this ignores the Commission's policy of requiring applicants desiring to begin offering a utility service to first demonstrate they are "ready, willing and able" to undertake that obligation. The Commission is required to make such a finding under Public Service Commission v. Cities of Southgate, Ky., 268 S.W.2d 19 (1954). As a result of Administrative Case No. 261, An Inquiry Into The Resale Of Intrastate Wide Area Telecommunications Services, WATS resellers have been required to obtain certificates before beginning their operations. According to Professor A.J.G. Priest:

By what is the substantially uniform rule, no public utility may...begin operations or abandon them...until it has obtained from the commission having jurisdiction a certificate to the effect that the present or future public convenience and necessity require or will require the action contemplated.¹

This requirement is not met by Western Union regardless of whether it must construct additional facilities to offer Metrofone.

¹A.J.G. Priest, Principles of Public Utility Regulation, Vol. 1 at p. 347.

Next, Western Union asserts that if a certificate requirement were deemed applicable for the offering of a new service Western Union would be immune from that requirement under its grandfather rights, since Western Union, in some form, was in existence prior to the adoption of Kentucky's Public Service Commission Law in 1934. Although not explicitly demonstrated, Western Union may hold some grandfather rights, but those rights are limited to the type and extent of its utility operations prior to the act's passage. Western Union has not provided any evidence that it was providing telephone service involving two-way voice communication prior to 1934 in Kentucky. Therefore, in order to offer Metrofone service, which is a telephone service involving two-way switched voice communication, Western Union would still need to obtain a certificate.

Western Union has referred to its previous offering under Tariff P.S.C. No. 1, a private line voice and alternate voice facsimile transmission service begun in 1962 without first obtaining a certificate. Had this issue been raised before the Commission today, it is not clear that the same result would have been reached. Even so, there are important distinctions to be drawn between Western Union offering a private line service to enable its telegraph or record customers to communicate orally between specified locations and the type of toll telephone service which enables customers to call all other telephone customers in the world. There is no indication that the 1962 tariff provided "switching" capability by means of Western Union's facilities to the extent as in the proposed Metrofone service.

The clear thrust of the 1962 tariff is to provide an ancillary service to its data transmission customers. There is absolutely no indication that Western Union was previously holding itself out as providing switched voice-grade service to the population at large in Kentucky, or more importantly was capable of doing so independently. The scale of these prior operations casts considerable doubt upon the conclusion drawn by Western Union that a certificate is not required. Furthermore, there is no record of this Commission ever having affirmatively granted Western Union a statewide toll service certificate. Giving Western Union the benefit of every doubt, any de facto certificate would only include the ability to service the private line routes between its customers' locations. The scope of Western Union's service territory for the provision of two-way switched voice service, if any, is limited to its "profession, holding out or dedication of service."²

Finally, Western Union argues that even if it had never offered any voice service, as a result of continuously providing telegraph services, it is authorized to provide telephone services. Western Union cites an Illinois case in support of this position.³ That case involved a specific construction of Illinois' Public Utilities Act as not distinguishing between telephone and telegraph services and therefore, a utility with a

²City of Bardstown v. Louisville Gas & Electric Co., 383 S.W.2d 918, 921 (1964).

³State Public Utility Commission v. Postal Telegraph Cable Co., 285 Ill. 411, 120 N.E. 795 (1918).

certificate to provide telegraph service was not required to obtain a certificate before commencing the provision of telephone service.

There is no case law in Kentucky directly on this point. The decision in Cumberland Telephone & Tel. Co. v. Atherton, 122 Ky. 154, 91 S.W. 257 (1906), cited by Western Union, only stands for the proposition that penalties or damages for failure to deliver and/or complete messages would be computed in the same way by that court for a telephone company as had previously been required in a telegraph case. In addition to the obvious differences in the telecommunications industry as it now exists compared to its development in 1918 when the Postal Telegraph case was decided, the Commission is persuaded that the strong dissent in that case reflects the better judgment on the subject of whether telephone and telegraph services are distinct. Justice Carter noted that the telegraph firm had itself admitted this difference by seeking an amendment to its charter from the legislature so it could construct telephone poles.⁴ Justice Carter also found illuminating an article which described telegraph and telephone as "clearly distinguishable," based upon the mode of transmission used, the important differences in which the companies transact business with customers and the facilities required for each.⁵ In a more recent Illinois case, the Illinois Supreme Court favorably cited Judge Carter's dissent concerning

⁴Ibid. at 798.

⁵Ibid.

the very real distinctions between telephone and telegraph.⁶

Having determined that Western Union is not currently authorized to provide its Metrofone service, another factor which is important to the Commission's consideration herein is the status quo whereby competition in the provision of toll service on an intrastate basis is not permitted, but is being investigated through Administrative Case No. 273, An Inquiry Into Inter- and IntraLATA Intrastate Competition In Toll And Related Service Markets In Kentucky. A decision in that case is imminent and should provide guidance to Western Union regarding how it should further proceed.

The Commission is, therefore, of the opinion and FINDS that:

1. Western Union does not possess the requisite authority to begin offering its proposed Metrofone service.

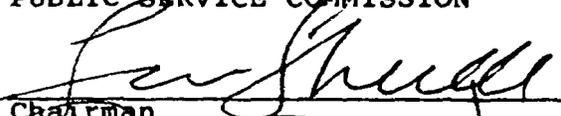
2. This case should accordingly be dismissed without prejudice to Western Union refiling this tariff should Western Union choose to apply for a certificate of public convenience and necessity.

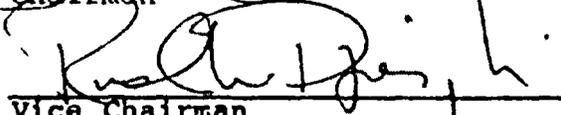
IT IS THEREFORE ORDERED that this case be and it hereby is dismissed without prejudice.

⁶Illinois-Indiana Cable Television Assn. v. Illinois Commerce Commission, 55 Ill.2d 205, 302 N.E.2d 334 (1973).

Done at Frankfort, Kentucky, this 14th day of May, 1984.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman


Commissioner

ATTEST:

Secretary