

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF MIDCOM COMMUNICATIONS,)
INC. AND GE CAPITAL COMMUNICATIONS)
SERVICES CORPORATION, D/B/A GE EXCHANGE) CASE NO. 96-078
AND D/B/A GE CAPITAL EXCHANGE FOR)
APPROVAL OF A TRANSFER OF ASSETS)

O R D E R

On February 29, 1996, MIDCOM Communications, Inc. ("MIDCOM") and GE Capital Communications Services Corporation, d/b/a GE Exchange and GE Capital Exchange ("GE") (hereinafter referred to as "Joint Applicants") filed an application ("Joint Application") pursuant to KRS 278.020(4) and KRS 278.020(5) requesting Commission approval of the transfer of "a portion of" GE's customer accounts to MIDCOM [Joint Application at 1]. The Joint Application and related documents stated that GE had agreed to switch the primary interexchange carrier designation ("PIC") of some of its customers to MIDCOM and MIDCOM had agreed to pay GE for same. GE was to "execute a master Letter of Authorization . . . in favor of MIDCOM" [Customer Base Purchase and Sale Agreement, Exhibit to Joint Application]. The permission of those customers whose PICs were to be changed was not sought. Instead, the customers were simply to be sent notice that GE and MIDCOM were completing an agreement "that will allow MIDCOM to provide your long distance service." The Commission found this statement to be misleading because MIDCOM is already "allowed" to provide long-

distance service in Kentucky to customers who request its service. The Commission granted this authority to MIDCOM by Order dated October 8, 1992, in Case No. 92-138.¹

On May 7, 1996, the Commission issued its Order denying authority to consummate the transaction as proposed on the ground that changing a customer's PIC without his consent is an "unreasonable act" pursuant to KRS 278.260.² The Commission explained in its Order that Wats International Corporation v. Group Long Distance (USA), Inc., National Independent Carrier Exchange, James J. McKeeff and Sprint Communications Company, L.P. (F.C.C. File No. ENF-94-05, Order dated November 9, 1995) does not support the Joint Application. WATS International states that there is no violation of Federal Communications Commission PIC change rules absent customer authorization when the entity serving the customers after the transaction is the "successor in interest" to the seller. The buyer in WATS International had bought the stock of the predecessor utility. In contrast, GE plans not only to remain in business, but to continue to provide precisely the same services in Kentucky it currently provides.

¹ Case No. 92-138, Application of Mid-Com Communications, Inc. for a Certificate of Public Convenience and Necessity to Operate as a Reseller of Telecommunications Services Within the State of Kentucky.

² In addition, House Concurrent Resolution 2, unanimously adopted by the Kentucky House of Representatives and Senate and signed by the Governor on March 8, 1996, directs the Commission to promulgate administrative regulations to "ensure that customers are not switched from one carrier to another without consciously consenting to the change."

On May 29, 1996, Joint Applicants filed a Petition for Rehearing ("Petition") pursuant to KRS 278.400. While Joint Applicants admit that "[o]n a superficial level, the transaction proposed by Applicants may resemble slamming in certain limited respects," they contend that "the concerns which arise from slamming are not present" [Petition at 3]. Joint Applicants state that "slamming" is proscribed to protect "not only the customer . . . but also the serving carrier and the competition of the marketplace" [Petition at 4]. The gist of Joint Applicants' argument is that, if the customer's current carrier consents to the PIC change, there is no problem [Petition at 4]. They also argue that the transaction is a legitimate one because the customers "could avoid the transfer by simply choosing another carrier" [Petition at 7, n. 2].³ Joint Applicants also cite Wats International in an attempt to justify this transaction on the basis that, by virtue of this transaction, MIDCOM is a "successor in interest" to GE and ordinary PIC change rules do not apply. The Commission is unpersuaded by these arguments.

Joint Applicants' "successor in interest" argument is circular: they state they may transfer customers because MIDCOM is a successor in interest to GE, and that MIDCOM is a successor in interest to GE because they are transferring customers. WATS International did not involve a stand alone sale of customer accounts by a carrier which planned to continue to provide service to all its customers except those whose

³ Joint Applicants state that MIDCOM meant only to purchase the "opportunity to serve" certain GE customers" [Petition at 6]. However, as the Commission has previously explained, MIDCOM already possesses the "opportunity to serve" Kentucky customers, including those whose current carrier is GE, if those customers wish to subscribe to MIDCOM service.

accounts it sold. The end result of the transaction proposed by Joint Applicants is simply that customers' PICs will have been switched without their consent from one viable long-distance carrier to another.

Joint Applicants are correct in contending that, in the usual case of "slamming," both the legitimately chosen carrier and the customer who chose that carrier are injured. Joint Applicants are also correct in contending that GE's receipt of payment for executing a "master Letter of Authorization" for these PIC changes protects GE's interests. However, Joint Applicants' arguments that the goal of furthering competition is served by such transactions and that governmental policies and customer interests are adequately protected by intercarrier agreement and mere customer notice -- especially when that notice misleadingly implies that an authorized carrier has some right to serve that it previously has lacked -- are unpersuasive.

Kentucky's policy, like that of the federal government, demands that customers affirmatively authorize PIC changes. Federal Communication Commission PIC change verification rules, see, e.g., 47 CFR Section 64.1100 (verification of PIC change orders generated by telemarketing), require verification that the customer, not the customer's current carrier, desires the PIC change. Similarly, the preamble to Kentucky House Concurrent Resolution 2 specifically finds that a problem exists when a customer's PIC is changed "although the customer did not ask for the change" (emphasis added). It is undisputed that the customers whose PICs GE and MIDCOM propose to change have not "asked for" for the change. As the Federal Communications Commission has so succinctly put it, "[f]or any competitive market to work efficiently, consumers must have

information about their possible market choices and the opportunity to make their own choices about the products and services they buy." Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, FCC 95-225, CC Docket No. 94-129 (June 14, 1995), at III. 8. Elimination of customer choice as contemplated in this transaction flies in the face of these free market principles.⁴

Joint Applicants correctly describe the state of affairs in the competitive toll market in Kentucky in stating that the customers at issue retain the right to "contact any other carrier, and arrange for new service" [Petition at 6]. However, they beg the question as to the legitimacy of the transaction at issue. Any "slammed" customer may, of course, contact any other carrier and arrange for new service. The issue here is whether this transaction may legitimately take place, not whether a customer who dislikes the transaction may take steps to remedy the situation. Moreover, although Joint Applicants plan to send customer notice prior to the closing of the transaction, the notice does not inform the customers of their right to avoid the switch. Even if it did, it would be at best a "negative option" letter which requires customers to take action to avoid a PIC change. The Federal Communications Commission has specifically prohibited such "negative option" letters. See Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, FCC 95-225, CC Docket No. 94-129 (June 14, 1995), at III.11 (requiring a consumer to "take some action to avoid a PIC change"

⁴ Because the toll market in Kentucky is competitive, Joint Applicants' citation to Kentucky law concerning electric utilities -- which are monopolies -- is inapposite [Petition at 7, n. 2]. Customer choice is not an issue in this area.

imposes "an unreasonable burden on consumers who do not wish to change their PICs").

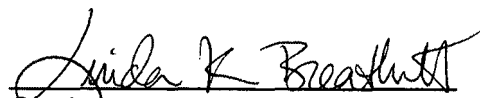
Joint Applicants assert that the underlying carriers providing service to the customers will not change as a result of the proposed transaction [Petition at 6]. However, the identity of the underlying carrier is irrelevant: the PIC is not the underlying carrier, but the carrier that sets the rates for the end-user. WATS International.

MIDCOM may market its services directly to these customers or to any others in Kentucky in an effort to persuade them to request its services. Joint Applicants may contact these customers and seek their authorization to change their PICs in accordance with regulatory procedures already in place. However, Joint Applicants' petition offers no legitimate basis for eliminating customer authorization from the PIC change process altogether.

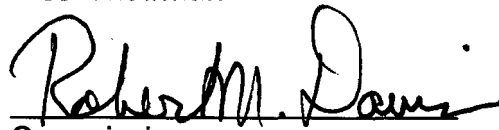
IT IS THEREFORE ORDERED that the Petition for Rehearing is denied.

Done at Frankfort, Kentucky, this 17th day of June, 1996.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman


Commissioner

ATTEST:


Executive Director