

OPINIONS OF THE SUPREME COURT OF OHIO

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Wadsworth, Sharon Center, and Montrose Committee for Toll-Free Telephone Service et al., Appellants, v. GTE North Incorporated; Public Utilities Commission of Ohio, Appellee. [Cite as Committee for Toll-Free Tel. Serv. v. GTE North Inc. (1993), Ohio St.3d .]

Public Utilities Commission -- Telephone companies --

Commission's determination denying flat-rate extended area service not unreasonable or unlawful, when.

(No. 93-153 -- Submitted October 19, 1993 -- Decided December 15, 1993.)

Appeal from the Public Utilities Commission of Ohio, No. 92-311-TP-PEX.

Appellants, numerous subscribers of the Wadsworth, Sharon Center, and Montrose telephone exchanges of GTE North Incorporated ("GTE"), filed a petition with appellee, Public Utilities Commission of Ohio, alleging that their existing local telephone service was inadequate to meet their daily calling needs. As to the relief sought, appellants requested that two-way, flat-rate extended area service ("flat-rate EAS") be implemented between the Sharon Center, Montrose, and Wadsworth exchanges. Implementation of flat-rate EAS would replace existing message toll service (traditional long distance service) with toll-free local calling. Because toll-free calling already existed between the Sharon Center and Wadsworth exchanges, the commission processed this case as a request for EAS between the Sharon Center and Montrose exchanges and between the Montrose and Wadsworth exchanges.

The commission held a hearing on the petition pursuant to R.C. 4905.26 and under the guidelines established by Ohio Adm. Code 4901:1-7-03.1 At the hearing, several subscribers of the involved exchanges offered testimony as to their need to telephone the requested exchanges, as well as to the availability of services, products and activities within their existing local calling areas to meet their daily calling requirements. See Ohio Adm. Code 4901:1-7-03(B)(3). This testimony established that the subscribers' need to place calls to the requested exchanges generally arose from sharing a school district and places of employment. Although the

testimony indicated that the petitioning subscribers placed calls to the requested exchanges for other products, services, and activities (e.g., to health care providers and to various shops), it also reflected that comparable products, services, and activities were available within the existing local calling areas on a toll-free basis. (The Sharon Center local calling area currently contains 227,301 access lines and includes the Akron, Medina, and Wadsworth exchanges; the Wadsworth local calling area contains 213,520 access lines and includes the Akron, Rittman, and Sharon Center exchanges; and the Montrose local calling area contains 209,328 access lines and includes the Akron exchange.)

In addition, GTE provided information as to the relevant calling statistics between the exchanges. See Ohio Adm. Code 4901:1-7-03(B)(1). The calling rate and distribution of calling, respectively, were 3.72 and 52.04 percent from Sharon Center to Montrose; 1.46 and 33.17 percent from Montrose to Wadsworth; and 1.54 and 33.18 percent from Wadsworth to Montrose.

GTE also presented testimony as to the costs to implement EAS and the revenues it would lose if flat-rate EAS, or the alternative usage-sensitive ("measured-rate") EAS, were implemented. See Ohio Adm. Code 4901:1-7-03(C). Under measured-rate EAS, subscribers who place calls to the involved exchanges are charged based upon the duration, distance and time of day of their calls. The charges equate to an approximate seventy percent savings over existing toll rates. GTE's net annual revenue loss would be \$104,566 if flat-rate EAS were implemented between the Sharon Center and Montrose exchanges, compared to \$32,139 if measured-rate EAS were implemented. Its net annual revenue loss would be \$252,408 if flat-rate EAS were implemented between the Montrose and Wadsworth exchanges, and \$59,588 if measured-rate EAS were implemented.

Upon consideration of the guidelines set forth in Ohio Adm. Code 4901:1-7-03, the commission determined that the community-of-interest testimony, the low calling statistics, and the costs involved did not warrant any form of relief between the Montrose and Wadsworth exchanges. However, it granted two-way, measured-rate EAS between the Sharon Center and Montrose exchanges, primarily due to the relatively higher calling statistics and also due to the slightly more significant community of interest exhibited between the exchanges. Appellants subsequently filed an application for rehearing, alleging that the commission erred by not ordering flat-rate EAS between all exchanges. The application was denied and the cause is now before this court upon an appeal as a matter of right.

Oberholtzer, Filous & Young, John C. Oberholtzer and Theodore J. Lesiak, for appellants.

Lee I. Fisher, Attorney General, James B. Gainer and Paul A. Colbert, Assistant Attorneys General, for appellee.

Per Curiam. We have recognized that EAS cases are essentially adequacy-of-service proceedings subject to R.C. 4905.22, 4905.26, and 4905.381. *Arcadia Tel. Co. v. Pub. Util.*

Comm. (1979), 58 Ohio St.2d 180, 12 O.O.3d 182, 389 N.E.2d 498. Although appellants raise several arguments in their brief, the basic premise of their appeal is that Ohio Adm. Code 4901:1-7-03, and particularly the commission's consideration of the calling statistics thereunder, is inconsistent with the adequacy-of-service determination which the commission must make under R.C. 4905.26. They argue that the petitioning subscribers' testimony alone establishes that existing service in the petitioning exchanges is inadequate and thus that the commission was compelled to order flat-rate EAS implemented between the involved exchanges pursuant to R.C. 4905.381. For the reasons which follow, we reject appellants' arguments and affirm the commission's order.

We have recognized the commission's authority under R.C. 4901.13 to adopt Ohio Adm. Code 4901:1-7-01 et seq. to aid its inquiry in EAS cases. *Norwalk v. Pub. Util. Comm.* (1982), 1 Ohio St.3d 107, 1 OBR 140, 438 N.E.2d 425. We find that the calling statistics provided for therein, which measure the frequency and distribution of calling to other exchanges, are probative not only of the adequacy of service for a given exchange, but also as to whether a community of interest exists between that exchange and other exchanges. Clearly, it is reasonable for the commission to consider the calling patterns between the petitioning and requested exchanges, and thus the degree of reliance on the exchange to which toll-free service is requested, in determining whether EAS should be ordered and, if so, its form. Moreover, we reject appellants' assumption that the subscribers' testimony, if considered alone, would demonstrate that existing service is inadequate. The record clearly reflects that the local calling areas are sufficient to meet much of the petitioning subscribers' day-to-day calling needs. Indeed, it would appear that, absent consideration of the calling statistics of which appellants complain, denial of all relief between the exchanges would have been well within the commission's discretion.

Appellants further claim that it was inconsistent for the commission to deny relief as between the Montrose and Wadsworth exchanges, while granting measured-rate service between the Sharon Center and Montrose exchanges. We find that the commission's determination is supported by the relatively higher calling statistics between the latter two exchanges as well as by the slightly greater community of interest exhibited between the exchanges from the community-of-interest testimony.

Appellants next argue that service between Sharon Center and Montrose was found inadequate because a toll charge was incurred for calls placed between the exchanges. They contend that the existing service cannot be rendered adequate merely by reducing that charge through the seventy-percent discount provided by the measured-rate service ordered. Appellants would prefer that flat-rate EAS be instituted and that its costs be spread over GTE's subscriber base. We have acknowledged that R.C. 4905.381 provides the commission with wide discretion in fashioning remedies in EAS proceedings. *Morrow Chamber of Commerce v. Pub. Util. Comm.* (1993), 67 Ohio St.3d 147, 616 N.E.2d 880. Here, noting the limited reliance between the two exchanges, we cannot find it unreasonable that

the commission, by ordering measured-rate EAS, required the cost of the service to be borne by those subscribers actually using it - - at significant savings over their previous message toll service.

Finally, appellants argue that toll charges subsidize local service and should be abolished as being discriminatory. The record does not support appellants' broad proposition as it relates to this particular proceeding, or as to its farreaching implications for telecommunication services in this state.

The commission's order, made in accordance with the applicable statutes and rules, is supported by the record in this proceeding, is neither unreasonable nor unlawful and, accordingly, must be affirmed. MCI Telecommunications Corp. v. Pub. Util. Comm. (1988), 38 Ohio St.3d 266, 268, 527 N.E.2d 777, 780.

Order affirmed.

Moyer, C.J., A.W. Sweeney, Douglas, Wright, F.E. Sweeney and Pfeifer, JJ., concur.

Resnick, J., not participating.

#### FOOTNOTE

1 Ohio Adm. Code 4901:1-7-03 provides in part as follows:

"(A) EAS is not a substitute for message toll service, but rather a service designed to meet the day-to-day calling requirements of subscribers which cannot properly be met with local calling confined to the local calling area of a particular exchange. Requests for EAS are not evaluated by a formula, but rather by the facts and circumstances of each case. While the factors which determine whether EAS should be provided in a given situation are sometimes difficult to evaluate and quantify, the commission shall consider the factors set forth below. However, the commission is not precluded from considering other relevant circumstances not set forth in these rules.

"(B) Community of interest factors:

"(1) The involved local exchange company(s) must submit the following calling data for at least one representative month, unless compelling circumstances exist to warrant the submission of data for other than the representative month and the commission directs the company(s) otherwise:

"(a) The calling rate between the involved exchanges ["Calling rate" means the average number of message toll calls placed per access line per month from one exchange to another exchange, ' 4901:1-7-01(D)];

"(b) The distribution of calling (to determine whether the traffic is originated by the subscribers generally or by only a relatively few subscribers) ["Distribution of calling" means the ratio, expressed as a percentage, of access lines placing at least one message toll call per month from one exchange to another exchange compared to the total number of access lines in the exchange, ' 4901:1-7-01(E)];

"(c) With reference to paragraphs (B) (1) (a) and (B) (1) (b) of this rule, the commission will consider the calling rate and distribution of the calling in both the exchange requesting EAS and the exchange being requested, unless the access lines of the requesting exchange number less than forty percent of the total of the access lines in both exchanges. In that instance,

the commission shall consider the calling data from the requesting exchange to the requested exchanges(s) only;

"(d) Under normal circumstances and in the absence of other compelling considerations:

"(i) A calling rate of less than three from the requesting exchange to the requested exchange is insufficient to support the approval of EAS;

"(ii) In situations where the calling rate is at least three, but less than five from the requesting exchange to the requested exchange, no presumption for or against the establishment of EAS shall exist. However, in any such case, only usage sensitive service shall be considered, unless the company does not provide a usage sensitive service and can demonstrate that it is not technically or economically feasible for it to do so;

"(iii) In situations where the calling rate is at least five, but less than eight from the requesting to the requested exchange, no presumption for or against the establishment of EAS shall exist. However, in any such case, if EAS is appropriate, usage sensitive service shall be the preferred option, unless the company does not provide a usage sensitive service and can demonstrate that it is not technically or economically feasible for it to do so, or unless those seeking EAS can demonstrate a need for flat-rate service; and

"(iv) In situations where the calling rate is at least eight from the requesting exchange to the requested exchange, a rebuttable presumption shall exist that some form of EAS, either flat-rate service or usage sensitive service, is warranted.

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"(3) The location of various services, products, and activities, including, but not limited to, the following shall be considered:

"(a) Population movement and other demographic considerations;

"(b) Commercial development;

"(c) School activities;

"(d) Police and fire services;

"(e) Other governmental services, including the county seat;

"(f) Medical, dental, and veterinarian services;

"(g) Religious institutions;

"(h) Agricultural organizations and services;

"(i) Shopping and service centers;

"(j) Employment centers; and

"(k) Social, cultural, and recreational activities.

"(C) Investment, cost, and revenue considerations:

"(1) It would not be in the public interest for a local exchange company to enter into exceptionally heavy investments in facilities and incur exceptionally high costs in situations where the EAS requirement is not substantial. Therefore, each of the factors must be evaluated in relation to all other factors. Timing is an important cost consideration and substantial weight must be given to plans for instituting the service in the most economical manner and at the most economical time."