

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE ARBITRATION OF:

SPRINT COMMUNICATIONS COMPANY L.P.,

Petitioning Party,

vs.

ACE COMMUNICATIONS GROUP, CLEAR LAKE INDEPENDENT TELEPHONE COMPANY, FARMERS MUTUAL COOPERATIVE TELEPHONE CO. OF SHELBY, FARMERS TELEPHONE COMPANY, FARMERS MUTUAL TELEPHONE COMPANY, GRAND RIVER MUTUAL TELEPHONE CORPORATION, HEART OF IOWA COMMUNICATIONS COOPERATIVE, HEARTLAND TELECOMMUNICATIONS COMPANY OF IOWA d/b/a HICKORYTECH, HUXLEY COMMUNICATIONS, IOWA TELECOMMUNICATIONS SERVICES, INC., d/b/a IOWA TELECOM f/k/a GTE MIDWEST, KALONA COOPERATIVE TELEPHONE, LA PORTE CITY TELEPHONE COMPANY, LEHIGH VALLEY COOPERATIVE TELEPHONE ASSOCIATION, LOST NATION-ELWOOD TELEPHONE COMPANY, MINBURN TELECOMMUNICATIONS, INC., ROCKWELL COOPERATIVE TELEPHONE ASSOCIATION, SHARON TELEPHONE, SHELL ROCK TELEPHONE COMPANY d/b/a BEVCOMM c/o BLUE EARTH VALLEY TELEPHONE COMPANY, SOUTH CENTRAL COMMUNICATIONS, INC., SOUTH SLOPE COOPERATIVE TELEPHONE COMPANY, SWISHER TELEPHONE COMPANY, VAN BUREN TELEPHONE COMPANY, INC., VENTURA TELEPHONE COMPANY, INC., VILLISCA FARMERS TELEPHONE COMPANY, WEBSTER CALHOUN COOPERATIVE TELEPHONE ASSOCIATION, WELLMAN COOPERATIVE TELEPHONE ASSOCIATION, and WEST LIBERTY TELEPHONE COMPANY d/b/a LIBERTY COMMUNICATIONS,

Responding Parties.

DOCKET NO. ARB-05-2

ORDER DENYING MOTION TO DISMISS AND RE-CLOSE DOCKET

(Issued October 10, 2005)

On March 31, 2005, Sprint Communications Company L.P. (Sprint) filed a petition with the Utilities Board (Board) requesting arbitration of certain terms and conditions of a proposed interconnection agreement between Sprint and several rural incumbent local exchange carriers,¹ hereinafter referred to as the RLECs. The petition was filed pursuant to § 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, Pub. L. No. 101-104, 110 Stat. 56 (1996) (hereinafter referred to as the "Act").

On April 15, 2005, the RLEC Group² filed a motion to dismiss and a response to the petition. Also on April 15, 2005, Iowa Telecommunications Services, Inc., d/b/a Iowa Telecom (Iowa Telecom), filed a substantially similar motion to dismiss and response to the petition for arbitration.

On May 26, 2005, the Board issued an order granting the motions to dismiss filed by the RLEC Group and Iowa Telecom (collectively, the RLECs), finding that Sprint does not intend to offer its proposed service in the RLEC exchanges to any party other than its private business partners, pursuant to individually-negotiated

¹ Ace Communications Group, Clear Lake Independent Telephone Company, Farmers Mutual Cooperative Telephone Co. of Shelby, Farmers Telephone Company, Farmers Mutual Telephone Company, Grand River Mutual Telephone Corporation, Heart of Iowa Communications Cooperative, Heartland Telecommunications Company of Iowa d/b/a HickoryTech, Huxley Communications, Iowa Telecommunications Services, Inc. d/b/a Iowa Telecom f/k/a GTE Midwest, Kalona Cooperative Telephone, La Porte City Telephone Company, Lehigh Valley Cooperative Telephone Association, Lost Nation-Elwood Telephone Company, Minburn Telecommunications, Inc., Rockwell Cooperative Telephone Association, Sharon Telephone, Shell Rock Telephone Company d/b/a BEVCOMM c/o Blue Earth Valley Telephone Company, South Central Communications, Inc., South Slope Cooperative Communications Company, Swisher Telephone Company, Van Buren Telephone Company, Inc., Ventura Telephone Company, Inc., Villisca Farmers Telephone Company, Webster Calhoun Cooperative Telephone Association, Wellman Cooperative Telephone Association, and West Liberty Telephone Company d/b/a Liberty Communications.

² Being all of the RLECs except Iowa Telecommunications Services, Inc., d/b/a Iowa Telecom.

contracts. As a result, the Board found that Sprint would not make its proposed services available on a common carrier basis and therefore would not be a common carrier for purposes of this docket. As a result, the Board found that Sprint was not a "telecommunications carrier" entitled to invoke the negotiation and arbitration process under the Act.

On June 23, 2005, Sprint filed a "Complaint for Declaratory and Injunctive Relief" in the United States District Court for the Southern District of Iowa, naming the Board and the Board members as defendants and seeking to overturn the Board's May 26, 2005, order.³ During the course of those judicial proceedings, the parties to that proceeding (i.e., Sprint and the Board) concluded that Sprint may have evidence and argument that was not previously presented to the Board that could be relevant to the Board's May 26, 2005, decision. Accordingly, on August 12, 2005, Sprint and the Board, acting through counsel, filed an agreement stipulating to the entry by the Court of an order staying the judicial proceedings for 60 days and remanding the matter to the Board for the duration of the stay to give the Board an opportunity to hear evidence and argument and reconsider its May 26, 2005, order.

On August 18, 2005, the Court approved the stipulation, stayed its proceedings, and remanded the matter to the Board for a period of 60 days to allow the Board to hear the additional evidence and reconsider its decision.

³ Sprint Communications Company L.P. vs. Iowa Utilities Board, et al., Case No. 4:05-CV-354.

Pursuant to the stipulation, on August 19, 2005, the Board entered a procedural order establishing a schedule for reconsideration of its May 26, 2005, dismissal order in this docket.

On August 26, 2005, the RLECs filed a "Motion to Dismiss and Re-Close Docket," asking the Board to close this docket rather than reconsider its earlier order. The RLECs argue that, pursuant to Iowa law, the Board's May 26, 2005, order was a final determination; that there was no timely application for rehearing or petition for judicial review; and that the Board therefore has no further jurisdiction of this matter. In their supporting brief filed with the motion, the RLECs cite various cases interpreting state law and coming to the same conclusion.

On September 8, 2005, Sprint filed its "Opposition to Motion to Dismiss." Sprint argues that this proceeding arises under federal law, specifically § 252 of the Act, and therefore the state law cited by the RLECs does not apply.

Further, Sprint notes that it appealed the Board's May 26, 2005, order pursuant to federal law (47 USC § 252(e)). That statute gives the federal court exclusive jurisdiction to review the Board's actions under the Act. Thus, the federal court has jurisdiction of Sprint's review petition and the federal court remanded this matter to the Board for further proceedings. Sprint concludes that the Board therefore has jurisdiction of this matter, at least for the time period of the remand.

In support of its position, Sprint cites federal cases recognizing the power of a federal court, when reviewing administrative agency action, to remand the matter to

the agency for further findings while maintaining the appeal on the court's docket. In fact, Sprint points out that this agency has exercised remand jurisdiction in a similar case in the past, citing U S West Communications, Inc., v. Thoms, et al., 1999 WL 33456553 (S.D. Ia. 1999).

On September 16, 2005, the RLECs filed a response to Sprint's opposition, arguing that 47 USC § 252 establishes a "relatively novel federal-state jurisdictional framework." (Reply at p. 2.) The RLECs argue that in the pending docket, the Board decided that Sprint did not have standing to request negotiations and arbitration pursuant to the Act. Thus, they conclude, there is no Board determination pursuant to § 252 and therefore no exclusive jurisdiction in the federal district court.

The RLECs argue that U S West is distinguishable from the instant case because in that proceeding the Board arbitrated an interconnection agreement, which was properly challenged in the federal district court. Further, U S West involved a remand to the agency to consider a change in law that occurred after the Board's initial arbitration decision. No such change in law exists in this case; instead, they argue, Sprint merely seeks an opportunity to present evidence to the Board that it could have presented the first time around, but chose not to.

Finally, the RLECs argue that the federal court did not confer jurisdiction on the Board as a part of its stay and remand because the stipulation filed with the Court by Sprint and the Board provided that the Board would reconsider its May 26, 2005, order on its own motion.

On September 23, 2005, Sprint filed a reply to the response.⁴ Sprint argues that the RLECs' initial motion was based entirely on state law, but the RLECs are now arguing that a question of federal law (whether Sprint's proposed activities make it a "telecommunications carrier" as defined in the Act) is committed to the exclusive jurisdiction of the state court. Sprint asserts the RLEC argument is both without merit and late.

The Board will deny the RLECs' motion to dismiss and to re-close this docket. The Board's jurisdiction in this matter is based on federal law. Sprint's original petition was based on the federal Act, and the Board's May 26, 2005, order was a determination, pursuant to § 252 of the Act, that (based on the record then before the agency) Sprint was not a telecommunications carrier for purposes of § 252(e)(1). Section 252(e)(6) gives the federal court exclusive jurisdiction to review "*any case in which a State commission makes a determination under this section... .*" (Emphasis added.) Thus, the federal court's jurisdiction is not limited to situations in which the Board reviews or arbitrates an interconnection agreement, but includes other situations in which the Board makes a determination under § 252. The federal court had (and continues to have) jurisdiction of this matter and it has remanded the matter to the Board to hear Sprint's additional evidence and rule upon it. The remand order gives the Board jurisdiction.

⁴ The Board's procedural rules do not specifically contemplate replies to responses and it is arguable that the RLEC Group and Iowa Telecom should have the first and last word on their motion. The Board will summarize Sprint's filing, but the Board's decision on the motion would be the same even if Sprint had not filed this reply.

The RLECs' arguments based on state law do not apply to this case. The Board notes, however, that if its jurisdiction in this docket were based on state law, then Sprint presumably would have sought judicial review of the Board's order pursuant to Iowa Code § 17A.19. That statute includes a provision for temporary remand from the reviewing court to the agency to hear and consider further evidence, see § 17A.19(7). While that provision is not directly relevant to this proceeding, it shows that the procedures being followed here are also available under state law in cases where state law applies. This is not an unusual or unheard-of procedure, even under state law.

IT IS THEREFORE ORDERED:

The "Motion to Dismiss and Re-Close Docket" filed on August 26, 2005, by Iowa Telecom and the RLEC Group is denied.

UTILITIES BOARD

/s/ John R. Norris

/s/ Diane Munns

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Curtis W. Stamp

Dated at Des Moines, Iowa, this 10th day of October, 2005.