ALJ/ ec/vdl

Decision 82 06 065 JUN 2 1982

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of GTE Satellite Corporation to provide customized digital transmission services between Marina del Rey, California and Sacramento, California via communications satellite capacity.	Application 61108 (Filed December 4, 1981)

O P I N I O N

GTE Satellite Corporation (GSAT) seeks authorization to provide to GTE Data Services, Inc. (GTEDS), a customized digital transmission service between Marina del Rey and Sacramento. GSAT also requests a "Certificate of Convenience and Necessity"[1/] permitting provision of this intrastate service to GTEDS and to possible future public customers since the channel capacity is greater than the service proposed to be provided to GTEDS.

On March 10, 1982, GSAT filed a request to withdraw its application without prejudice on the grounds that the digital transmission services proposed to be offered are outside the jurisdiction of the Commission.

GSAT and GTEDS are wholly owned subsidiaries of General Telephone and Electronics (GTE). GSAT is a Delaware corporation and has a Certificate of Qualification granted by the California Secretary of State authorizing it to transact intrastate business in California.

1/ We assume GSAT means Certificate of Public Convenience and Necessity. See Public Utilities (PU) Code Section 1001 et seq.

GSAT is a communications common carrier under jurisdiction of the Federal Communications Commission (FCC) and in conjunction with American Telephone and Telegraph Company has been providing interstate communication services since 1976 via Comstar communications satellites.

The proposed service will be a duplex 1.544 megabits per second digital data channel between premises of GTEDS at Marina del Rey and Sacramento. The facilities to provide the service will be an earth station erected by GSAT at each of the above terminals connected by space links through a leased portion of the transponder capacity of a synchronous satellite owned by Telesat Canada. GSAT estimates the Marina del Rey and Sacramento earth stations will cost $618,000 and $530,000, respectively.

It is stated that the use of this satellite is temporary because of the lack of domestic satellite capacity. The FCC order authorizing GSAT's lease of the Canadian satellite was granted pending availability of a domestic transponder satellite but not to extend beyond the end of 1984 when domestic transponder satellite capacity is expected to be available. The lease of the Telesat Canada satellite channel will cost GSAT $22,150 Canadian monthly. (FCC order adopted October 29, 1981, File W-P-C-4008).

The proposed service is to be provided to GTEDS under a service agreement (Exhibit II of the application). The agreement provides for a monthly charge to GTEDS of $29,700 for the service. The agreement further provides that it shall be for a term of 24 months, with provisions for extension or curtailment of the basic term.

GSAT served the following utilities with a copy of its application since these utilities offer California intrastate private line services to the public: The Pacific Telephone and Telegraph Company (PT&T), General Telephone Company of California,

Western Union Telegraph Company, and Southern Pacific Communications Company. No protests to the application have been received; however, by letters dated January 8 and February 10, 1982 PT&T offered a number of comments on GSAT's request.

Discussion

The first and principal question to be considered is whether the proposed service is one that falls under the Commission's jurisdiction. PU Code Section 216(a) and (b) defines public utility and prescribes the circumstances where a public utility is subject to the Commission's jurisdiction. PU Code Sections 233 through 236 define telephone line, telephone corporation, telegraph line, and telegraph corporation.[2/]

2/ "216.(a) 'Public utility' includes every common carrier, toll bridge corporation, pipeline corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, sewer system corporation, wharfinger, and heat corporation, where the service is performed for or the commodity delivered to the public or any portion thereof. (Former Sec. 2(dd).)

"(b) Whenever any common carrier, toll bridge corporation, pipeline corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, sewer system corporation, wharfinger, or heat corporation performs a service or delivers a commodity to the public or any portion thereof for which any compensation or payment whatsoever is received, such common carrier, toll bridge corporation, pipeline corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, sewer system corporation, wharfinger, or heat corporation, is a public utility subject to the jurisdiction, control, and regulation of the commission and the provisions of this part. (Part former Sec. 2(ee).)

"233. 'Telephone line' includes all conduits, ducts, poles, wires, cables, instruments, and appliances, and all other real estate, fixtures, and personal property owned, controlled, operated, or

(Continued)

In the above PU Code citations reference is made to telephone or telegraph messages and "communication by telephone" or by telegraph. No further definition of "telephone" or "telegraph" exists in the Code. Television Transmission, Inc. v Public Utilities Commission (1956) 47 Cal 2d 82 is of some assistance in clarifying these meanings. At page 86 the court stated:

> "To be a telephone corporation petitioner must operate a telephone line. (PU Code Section 234.)"

Also, "...it does not operate a telephone line and is therefore not a telephone corporation unless such control, operation or management are in connection with or to facilitate communication 'by telephone.' (Ibid.) The crucial word 'telephone' is not defined in the code. Neither is the word 'telegraph' as used in section 235."

2/ (Continued)

managed in connection with or to facilitate communication by telephone, whether such communication is had with or without the use of transmission wires. (Former Sec. 2(s).)

"234. 'Telephone corporation' includes every corporation or person owning, controlling, operating, or managing any telephone line for compensation within this State. (Former Sec. 2(t).)

"235. 'Telegraph line' includes all conduits, ducts, poles, wires, cables, instruments, and appliances, and all other real estate fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate communication by telegraph, whether such communication is had with or without the use of transmission wires. (Former Sec. 2(u).)

"236. 'Telegraph corporation' includes every corporation or person owning, controlling, operating, or managing any telegraph line for compensation within this State. (Former Sec. 2(v).)

Also, at page 88:

> "Not only are the methods of transmission different in each art [television and telephony], however, but in telephony one may carry on a two-way communication by speaking as well as listening...."

In addition Section 233 in defining telephone line concludes with these words:

> "..., whether such communication is had with or without the use of transmission wires."

This language thus includes radio satellite links as part of "telephone lines."

When the above code sections were enacted many years ago telephone service was a relatively simple matter. A telephone instrument modulated an electric current in relation to voice (sound) input to a transmitter. The current was transmitted over wires to another telephone instrument where the receiver reconstituted the electric signals to voice output. Telegraph service is similar though simpler. A key interrupts an electric current in a prescribed on-off code. The coded on-off electric current is transmitted over wires to an instrument which repeats the on-off current as transmitted either audibly or printed on a tape. In each of the above arrangements wires connect two instruments or apparatuses. The wires provide a conduit for the transmission of information between the terminal devices. The only additional equipment employed was amplifiers or repeaters to boost an electric signal which weakened with distance, thus increasing the possible distance between terminals. Transmission service such as this is sometimes called "transparent," that is, the conduit accepts certain information at one end and delivers the same information, with little or no delay, at the other end.

Over the past years computer technologies were applied through telecommunications for a number of purposes. Analog

signals such as voice were converted to data bits (binary digits) permitting increased transmission capacity; processing applications were developed to change the form, content, or code of the subscriber input to the transmission service, i.e. to the path or conduit; voice or data storage and retrieval systems were developed. This technological trend made it more and more difficult to distinguish between communications and data processing.

The FCC in its Second Computer Inquiry, Docket 20828, Final Decision adopted April 7, 1980, classified network services (transmission services) as "basic" or "enhanced." Basic transmission service is transmission capacity between two or more points suitable for a user's communications needs. Memory or storage may be used only incidentally. Basic transmission service provides a virtually transparent capability as described earlier. Enhanced transmission service will include computer processing which may be used to act on the form, content, code, or protocol of the information the subscriber provides. Additional, different, or restructured information can be provided the subscriber. Voice or data storage and retrieval can also be provided. The FCC concluded that basic services would continue to be regulated and enhanced services were found to be not subject to regulation under the Federal Communications Act of 1934.

This Commission, in Television Transmission, Inc. v PUC (supra) was faced with the same difficulty as the FCC, and in the matter before us the same kind of problem is presented. Advances in communications technology have left the simple definitions and concepts of telephony and telegraphy of the early 1900s far behind. However, some basic facts of the proposed service lead inescapably to certain conclusions.

The transmission service proposed by GSAT is very sophisticated and of high transmission capacity but it is only a

"transparent" conduit for the data GTEDS will insert at one end and extract at the other. The channel will transmit information in either direction (duplex). GSAT also states:

> "...the capacity of the satellite channel and earth stations can be expanded to... accommodate additional data [non-voice] or digitized voice."

In other words the channel can and may transmit voice and transmit it in both directions. The transmission is made without delay and without change in content of the information provided by the customer. We conclude that the facilities to be used to provide the proposed service constitute a telephone line as defined in PU Code Section 233. It then follows that GSAT is a telephone corporation as defined in PU Code Section 234.

Given the above conclusion GSAT is a public utility subject to the jurisdiction of the Commission if it performs the service for the public or any portion thereof for compensation or payment. (PU Code Sections 216(a), (b)). PU Code Section 207 defines "public or portion thereof" to mean "the public generally, or any limited portion of the public, including a person, private corporation, ..." GSAT proposes to provide the service to a corporation, GTEDS, for compensation, $29,700 per month. However, the serving and customer corporations are both wholly owned by GTE. The service and terms for its provision as spelled out in the service agreement attached to the application are not the result of arm's-length negotiation. For example, the charge to GTED is $29,700 per month, $356,400 annually. The cost to GSAT is $22,150 Canadian ($18,140 U.S. at recent exchange rates) per month or annually about $218,000 U.S. plus annual charges on the two earth stations whose total capital cost is approximately $1,150,000, and administrative and other miscellaneous ongoing costs. A conservative estimate of the annual charges on high technology capital investment, such as the two earth stations,

is at a rate of 30% of capital cost. In this case that produces an annual cost for the two stations of $345,000. Thus GSAT's annual costs are some $563,000 plus additional unknown costs as compared to revenues from GTEDS of $356,400; not a likely result of arm's-length dealing.

In Decision (D.) 93472[3/] (August 18, 1981) in Order Instituting Rulemaking 3, the Commission considered the question of the regulation of the transportation of property by a corporation for another corporation when both are members of the same corporate family. Corporate family was defined as the parent and wholly owned subsidiaries. The Commission's conclusion was that such service is exempt from regulation under the PU Code. Among other things we found such service to be proprietary, and that corporate family revenues and expenses are unaffected by the level of intercorporate charges.

The transportation of goods bears considerable similarity to the transportation of information, better known as telecommunications. Similarities are more than sufficient to warrant the same basic conclusion - telephone service provided from one corporation to another of the same corporate family is not "service for the public or any portion thereof."

The service proposed to be offered by GSAT to GTEDS, for which Commission authorization is sought, is not public utility service and such undertaking by GSAT is not subject to this Commission's jurisdiction.

As noted previously, the GSAT application suggests an interest in receiving authority to provide its service to possible future public customers. However, GSAT offered no evidence as to the potential market or demand for such service nor as to the rates,

---

3/ The decision is in effect; however, an application for rehearing has been granted.

charges, or other conditions of service to govern its provision to any customer other than GTEDS. If GSAT's plans to offer the proposed service to members of the public become more definite, it may resubmit its application for authority to offer such service.

GSAT, by petition filed March 10, 1982, requests withdrawal of its application, without prejudice. Its request is based on the conclusion that the service proposed to be offered is outside the statutory jurisdiction of the Commission. Briefly stated, GSAT argues that the service is not "telephone" service. We agree with GSAT's conclusion on our lack of jurisdiction, but for totally different reasons. We will dismiss the application without prejudice to its resubmission in the event GSAT develops specific plans to offer service to the public.

Findings of Fact

1. The service proposed to be offered by GSAT has the following characteristics:

   a. It provides a path for the transmission of information.

   b. The path can operate in both directions.

   c. The path can and may transmit digitized voice as well as other information.

   d. The transmission service provided will not delay transmission nor change the content of the information provided by the customer.

2. GSAT and GTEDS are wholly owned subsidiaries of GTE and thus members of the same corporate family, which is defined as the parent and its wholly owned subsidiaries.

3. GSAT offered no evidence as to public demand for its proposed service nor as to the specific rates or conditions of service it would offer to the public.

Conclusions of Law

1. The service proposed is to be provided over a path that is a telephone line as defined in PU Code Section 233.

2. GSAT, under its proposal, is a telephone corporation as defined in PU Code Section 234.

3. GSAT, under its proposal, would not be performing a service or delivering a commodity to the public or any portion thereof, since the offering would be between members of the same corporate family and thus proprietary and not public utility in nature.

4. GSAT's application should be dismissed without prejudice.

O R D E R

IT IS ORDERED that the application of GTE Satellite Corporation is dismissed without prejudice.

This order becomes effective 30 days from today.

Dated JUN 2 1982, at San Francisco, California.

JOHN E. BRYSON
President
RICHARD D. GRAVELLE
LEONARD M. GRIMES, JR.
VICTOR CALVO
PRISCILLA C. GREW
Commissioners

I CERTIFY THAT THIS DECISION WAS APPROVED BY THE ABOVE COMMISSIONERS TODAY.

Joseph E. Bodovitz, Executive Director