07/07/87 City of Brookings v. Federal Communications

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Before: EDWARDS and STARR, Circuit Judges, and SWYGERT,* Senior Circuit Judge.

2. See also 47 U.S.C. § 410(c) (1982) (providing for a Federal-State Joint Board to address certain issues of allocating local plant costs between interstate and intrastate jurisdictions); Smith, 282 U.S. at 148-51 (percentage of local plan costs used for interstate service is within federal jurisdiction).

3. For a full discussion of this distinction, see NARUC, 737 F.2d at 1104; see also MCI, 750 F.2d at 137; MTS & WATS Market Structure, 93 F.C.C.2d 241, 268-69, reconsid., 97 F.C.C.2d 682 (1983), further reconsid., 97 F.C.C.2d 834 (1984), aff'd in part, NARUC, 237 U.S. App. D.C. 390, 737 F.2d 1095 [hereinafter Access Charges Order]. An example of a non-traffic sensitive cost is that of installing a line, or "loop," 47 C.F.R. § 67.701 (1986), between a subscriber's premises and a local telephone office; the cost is the same regardless of how many calls the subscriber places. The cost of the switching equipment at a local office that routes calls from one line to another, in contrast, tends to be traffic sensitive. Larger, more expensive switches become necessary as usage increases. NARUC, 737 F.2d at 1104; see also FCC Brief at 4. But cf. Access Charges Order, 93 F.C.C.2d at 269 (indicating that a portion of local dial switch is classified as non-traffic sensitive for separations purposes in order to segregate cost of terminating a line in the switch from costs of switching).

4. See United States v. American Tel. & Tel. Co., 552 F. Supp. 131.

5. Correlatively, subscribers who neither placed nor received interstate calls provided no revenues for cost recovery, even through exchange companies incurred interstate NTS costs in providing those subscribers with access to an exchange system that carried interstate as well as intrastate calls. Id. at 1108.

6. An "access line" essentially comprises the transmission facilities between a subscriber's premises and the central office of an exchange company. See 47 C.F.R. § 67.701 (1986). Thus, the number of access lines that a company serves is approximately equal to the number of subscribers it serves. Petitioner's Brief at 16 n.51.

7. In addition to a flat charge per access line imposed on end users, the FCC has provided for recovery of the interstate NTS costs of local telephone plant through two additional charges: (1) interexchange (i.e., long-distance) carriers pay a "carrier's carrier" charge; and (2) users of private lines pay a surcharge. NARUC, 737 F.2d at 1110.

8. 47 C.F.R. § 69.606(b) provided in relevant part: The association shall submit a proposed revision of the formula [governing average schedule compensation] for each annual period subsequent to May 31, 1985 or certify that a majority of the directors of the association believe that no revisions are warranted for such period on or before November 30 of the preceding year.

9. In addition to its duty to propose average schedule revisions, NECA also has broad responsibilities for preparation of access charge tariffs and collection and distribution of access charge revenues. See 47 C.F.R. § 69.603. The Access Charges Order required all exchange carriers to recover the "carrier common line charge" levied on interexchange carriers through NECA distributions. See Access Charges order, 93 F.C.C.2d at 327-30; see also 47 C.F.R. § 69.3; NECA Brief at 5 n.8. An exchange company's common line revenue requirements are also recovered through common line charges levied upon end users, known as "the end user common line charge." See Access Charges Order, 93 F.C.C.2d at 328. Exchange companies are not required to recover these charges through NECA. Id.

10. See NECA Modification of Average Schedules at 9-10 (Sept. 16, 1985), J.A. at 29-30. To be specific, the usage-sensitive ARPM method in effect prior to the NECA modifications was used to compute settlements under the schedule designated A-1. See id. at 7, 10, J.A. at 27, 30. The A-1 schedule compensated average schedule exchange companies primarily for interstate common line costs, which are interstate costs of exchange facilities that carry both interstate and intrastate messages. See id. at 7, J.A. at 27; see also Average Schedule Order, 103 F.C.C.2d at 1019, J.A. at 2. In addition to the A-1 schedule, numerous other schedules covered various categories of interstate costs. Nonetheless, average schedule settlements as a whole may be considered usage-sensitive and ARPM-based because A-1 settlements represented 90% of the average schedule settlements. Comments of the ICORE Local Exchange Companies on the Proposed Revisions to the Average Schedule Formulas, exh. 6, at 2-3 (letter from Mr. Henry Coo to Mr. Jan Reimers), J.A. at 152-53; see also NECA Modification at 509, J.A. at 25-29; Average Schedule Order, 103 F.C.C.2d at 1019, J.A. at 3.

11. The dispute before us primarily concerns NECA's decision to base common line settlements on access lines. The Association also proposed modification to settlements for traffic sensitive costs and billing and collection costs, the other two categories of access elements. See NECA Modification at 10-13, J.A. at 30-33; see also Average Schedule Order, 103 F.C.C.2d at 1022, J.A. at 6; ALLTEL Comments at 4, J.A. at 294 (summarizing NECA's overall approach).

12. In addition, NECA stated that it would continue to study those companies that stood to lose more than $5 per line after enduring the four-year cuts. Id., app. A, at 12, J.A. at 55.

13. In addition to the notice provided by the Commission in October 1985, NECA sent "impact statements" to each average schedule company in July 1985 to apprise them of the effect the revisions would have on each. See NECA Modification at 1, J.A. at 21.

14. Motion of Jefferson Telephone Co. and Northwest Iowa Telephone Co. for Leave to File Request for Production of Data and Studies Supporting the Revised Average Schedule Formulas (filed Oct. 28, 1985), J.A. at 69.

15. NECA's Reply to Request for Production (Nov. 7, 1985), J.A. at 77.

16. Renewed Motion of ICORE Companies for Production of Data and an Extension of Time to File Comments (Nov. 27, 1985), J.A. at 83. ICORE is a consulting firm that represents independent local telephone companies. Its members include the twelve petitioners. See Petitioners' Brief at 3 & n.2.

17. Comments of the ICORE Local Exchange Companies on the Proposed Revisions to the Average Schedule Formulas at

22-23 (Dec. 6, 1985), J.A. at 113, 140-41.

18. See Letter from G. R. Evans, Director of Tariff & Regulatory Matters, NECA, to Wm. Tricarico, Sec'y, FCC (Dec. 12, 1985), J.A. at 195.

19. NECA Reply Comments at i (Jan. 6, 1986), J.A. at 257, 259.

20. Average Schedule Order, 103 F.C.C.2d 1017, J.A. at 1. The Commission also ruled on two aspects of its access charge rules that were remanded to it for further consideration in NARUC, 737 F.2d at 1147. These rulings are not before us for review.

21. This fourth reason cited by the Commission was briefly mentioned as an improvement in comments submitted by ALLTEL Corp. See Reply Comments of ALLTEL Corp. at 8 (Jan. 6, 1986), J.A. at 298.

22. See MTS & WATS Market Structure: Average Schedule Companies CC no. 78-72, Phase I (Commission Memorandum Opinion & Order dated Sept. 30, 1986) [hereinafter Reconsideration Order], J.A. at 375.

23. Id. at 14-22 (discussing waiver applications of Northwest Iowa Telephone Co. and Jefferson Telephone Co.), J.A. at 388-96; Petition of Brindlee Mountain Telephone Co. for Waiver of the Average Schedule Revisions (filed Sept. 25, 1986).

24. In its Reconsideration Order, the FCC denied Northwest Iowa's wavier petition, which was based on asserted "extreme hardship." The Commission concluded that the company had received adequate notice of the revisions to protect itself against the hardship of which it complained. Id. at 16-17, J.A. at 390-91. The Commission did not, in contrast, finally dispose of Jefferson's waiver request. Jefferson sought relief from the "flash cut" called for in NECA's transition plan. The company claimed that the "flash cut" should not be applied to it because, contrary to NECA's estimates, Jefferson was not recovering more than 85% of its unseparated NTS costs; in fact, Jefferson maintained, it was recovering only 60%. Id. at 18-19, J.A. at 392-93. The Commission found data and analysis submitted by Jefferson too speculative to support a waiver, but sufficiently detailed to justify further study. Id. at 20-22, J.A. at 394-96. The third petition, filed by Brindlee Mountain, was based on the assertion that Brindlee had initially received an impact statement from NECA indicating that it would benefit from the revisions, but was informed in a later impact statement, received after the comment period ended, that it would actually suffer reduced settlement payments. Petitioners' Brief at 13 n.39, 24. The Commission denied this petition in an order dated March 30, 1987. Petitioners' Later Advising of Additional Authority (filed Apr. 14, 1987) (citing Memorandum Opinion & Order, FCC No. 87-72 (Mar. 30, 1987)).

25. Reconsideration Order at 23-24, J.A. at 397-98.

26. See also United States v. L.A. Tucker Truck Lines, 344 U.S. 33, 37, 97 L. Ed. 54, 73 S. Ct. 67 (1952): Simple fairness . . . requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.

27. This was only the second time average schedule revisions have been submitted under Commission rule 69.606; the

first set of revisions, submitted by AT & T, were essentially unopposed and thus did not present the opportunity to rule on the procedural issues now raised. See FCC Brief at 12-13 (quoting MTS & WATS Market Structure, FCC Mimeo No. 83-509, at para. 8 (Nov. 14, 1983)).

28. We acknowledged in WATCH that other exceptions to the general rule of exhaustion may exist, 712 F.2d at 682-83 & n.11, but none of the examples cited in that case applies here.

29. The Commission and NECA point out that petitioners do not, as part of their substantive challenge, allege that under NECA's revisions they will be unable to recover their costs of providing interstate service. On this basis, NECA and the FCC mount two related legal arguments against judicial review. Neither of them has merit. Their primary contention is that Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 88 L. Ed. 333, 64 S. Ct. 281 (1944), precludes judicial review. Hope articulated an "end result" test under which courts may not review the method by which rates are set; they may only determine whether the results are unreasonable. Id. at 602. Since petitioners have not impugned the end result of NECA's revisions, the argument runs, they may not take issue with the methods employed. See FCC Brief at 25-27; NECA Brief at 21-27. This argument fails for several reasons. First, the Commission itself classifies average schedule companies as such because it has determined that they have insufficient resources to conduct cost studies; they would therefore hardly seem to be in a position to determine whether NECA's revisions permit recovery of full costs. Second, the Hope doctrine applies to ratemaking; NECA's revisions affect the division of revenues among carriers, not rates. Third, assuming arguendo NECA and the FCC negotiated these logical hurdles, they would run up against City of Charlottesville v. FERC, 213 U.S. App. D.C. 33, 661 F.2d 945 (D.C. Cir. 1981). In that case we held that the "end result" standard of review applicable to ratemaking had "evolved" since Hope was decided. "Experience has taught that a determination of whether the result reached is just and reasonable requires an examination of the method employed in reaching that result." Id. at 950. In addition to advancing the "end result" rationale, NECA cites a line of precedent concerning review of ICC approval of industry-wide railroad rate increases. NECA Brief at 17-20. These cases, upon examination, are wholly inapposite. For one thing, like the "end result" line of precedent, these ICC cases concern ratemaking, not division of revenues. Furthermore, these decisions involve rate changes initiated by carriers; in contrast, the revisions before us for review were proposed by NECA, an entity created and shaped by Commission regulation. See, e.g., Arizona Elec. Power Co-op, Inc. v. ICC, 218 U.S. App. D.C. 284, 675 F.2d 303, 305-06 (D.C. Cir. 1982). Thus, while it is true that the courts have determined that the ICC's decision whether to suspend or investigate carrier-initiated rate increases is "committed to ICC discretion and therefore . . . not judicially reviewable," id. at 306, that precedent simply cannot be stretched to fit the different factual and legal setting of this case.

30. Petitioners do not seriously dispute that the FCC's goal of adopting average schedules that reflect the shift in reimbursement of cost companies was lawful and reasonable. See Oral Argument Tr. at 15-16 (Mar. 27, 1987). Indeed, the rule calling for such a shift, section 60.606, was part of the Commission's Access Charges Order and was not judicially challenged. See 93 F.C.C.2d 241, app. A, at 362.

31. The demand unit on which revised schedules for traffic sensitive costs were based was the access minute. See NECA Modification at 12, J.A. at 32. The unit of demand on which revised billing and collection schedules were based was the message. Id. at 13, J.A. at 33. See also id., app. A, 6, 15-18, J.A. at 49, 58-61; supra note 11.

32. See ICORE Comments at 20-21, J.A. at 138-39.

33. See Oral Argument Tr. at 7. Compared NECA Reply Comments at 13, J.A. at 274 with NECA Data Submission, J.A. at 719.

34. See ICORE Comments at 23-24, J.A. at 141-42; ICORE Reply Comments at 17-18, J.A. at 224-25.

35. See ICORE Comments at 24, J.A. at 142.

36. To buttress this contention, petitioners submitted the calculations of Mr. Henry Coo, an analyst who had overseen the development of average schedules for AT & T before the responsibility for average schedule revision was shifted to NECA. See Petitioner's Brief at 21; see also infra text at 33. Mr. Coo purported to demonstrate that when one attempted to work "backwards" from the allocation factors to the figures of the individual cost companies on which the factors were based, one obtained results that were woefully inadequate in replicating the actual costs reported by the cost companies. See ICORE Reply Comments, app. B., J.A. at 234-38.

37. ICORE Comments at 24, J.A. at 142.

38. Id. at 25 & n.54, J.A. at 143 & n.54.

39. Id. at 26, J.A. at 144; ICORE Reply Comments at 19, J.A. at 226.

40. ICORE Comments at 26, J.A. at 144.

41. The tables to which petitioners drew NECA's attention early in the proceedings contained common line allocation factors multiplied by average schedule financial data that had been broken down into 21 major investment and expense accounts. For several account items to which NECA assigned allocation of factors of zero, it multiplied the zero factor by the account item to produce non-zero factors by non-zero account items yielded products of zero. See ICORE's Renewed Motion for Production of Data at 6 & exhs. 304, J.A. at 88, 106-108. Having received no response to this discovery, petitioners renewed their objections to these math errors in comments filed December 6, 1985. ICORE Comments at 22-23, J.A. at 140-41. On December 12, 1985, NECA submitted new tables "which correct[ed] prior submissions for Allocation Factor Development" and announced that "no further data [would] be forthcoming." Letter from G.R. Evans, J.A. at 195.

42. Petitioners did attempt to respond to these explanations of NECA. See Motion of ICORE for Leave to File Response to Reply Comments (Feb. 7, 1986), J.A. at 324. The Commission denied the motion in its Reconsideration Order. See Reconsideration Order at 24, J.A. at 398.

43. Besides NECA, three parties to the proceedings below filed comments in support of the revisions. One of the supporters, Rural Telephone Coalition, did not directly address the specifics of petitioners' complaints; rather, it more generally supported the "concept" of underlying the revisions. See Comments of RTC at 3-4 (Dec. 6, 1985), J.A. at 188,

190-91; see also Reply Comments of RTC (Jan. 6, 1986), J.A. at 304. The ALLTEL Corporation made similarly generalized comments on NECA's methodology . . . is in keeping with past practice. . . .The data used was reasonably representative and reasonably reliable." Reply Comments of ALLTEL Corp. at 5 (Jan. 6, 1986), J.A. at 291, 295. It is worth nothing, however, that ALLTEL implicitly recognized some cogency in petitioners' criticism when it opined that this criticism "should be used as a guide to developing future average schedules [but] not as a reason to delay the implementation of those porposed [sic] by NECA now." Id. at 6, J.A. at 296. Southwestern Bell Telephone was the third NECA supporter; it expressed its approval in two and a half pages. See Reply Comments of Southwestern Bell Telephone Co. (Jan. 6, 1986), J.A. at 300

44. ICORE Reply Comments, exh. B. at 4-6, J.A. at 237-39.

45. Id., exh. C, at 3-5, J.A. at 251-53.

46. We note that the duty to consider alternatives in this case does not depend on whether the Commission was engaged in promulgating a substantive rule, as petitioners maintain, or merely implementing a pre-existing rule, section 69.606, as the Commission contends. We do not resolve this dispute over the characterization of the FCC's actions for reasons discussed at length, supra in section II-A. Nor is resolution of this procedural issue necessary to addressing the Commission's duty to consider significant alternatives. that duty inheres in the agency's broader responsibility for exercising its expertise in a reasoned manner. See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 48-49, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983). Indeed, the Commission does not dispute its obligation to entertain significant alternatives. Instead, it argues that petitioners' proposals were not significant.

47. See Joint Report by USITA Settlements & Separation Committee & Bell System Representatives (Apr. 5, 1971), J.A. at 63, 65; see also FCC Brief at 44 n.56; Petitioners' Brief at 8 n.15.

48. Indeed, petitioners have implicitly conceded this point in their reply brief. See Reply Brief as 23.

49. See NECA Modifications, app. A, at 13, J.A. at 56.

50. See NECA Data Submission, J.A. at 845-47.

51. See NECA Reply Comments at 20, J.A. at 281.

52. Although the exact numbers are in dispute, it appears that a majority of the 732 average schedule companies receives increased settlements under NECA's revisions. See NECA Modification at 20, app. A, at 10, J.A. at 40, 53; cf. Reply Brief at 25 n.55.