

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Commission on) Application No. NUSF-32
its own motion, seeking to conduct)
an inquiry into the failure of)
various companies to comply with) PARTIAL FINDINGS AND
Commission Orders and, at its own) CONCLUSIONS AND ORDER IMPOSING
discretion, impose administrative) ADMINISTRATIVE FINES
fines against the named defendants.)
Entered: April 1, 2003

APPEARANCES:

For TCG Omaha, AT&T Communications
of the Midwest, AT&T Wireless, Charter
Communications d/b/a USA Paging, and
Global Crossing Communications/Frontier: Loel Brooks
Brooks, Pansing, Brooks
984 Wells Fargo Center
Lincoln, Nebraska 68508

For LCI International Telcom, Inc.: Jill Vinjamuri
Kutak Rock LLP
1650 Farnam Street
Omaha, Nebraska 68102

For ATS Mobile Telephone, Inc.: Charles Humble
Erickson & Sederstrom
301 S. 13th Street Ste 400
Lincoln, Nebraska 68508

For Touch America: Joseph Michaud, pro se
130 North Main Street
Butte, Montana 59701

For the Commission Staff: Shana Knutson
300 The Atrium
1200 N Street
Lincoln, Nebraska 68508

BY THE COMMISSION:

B A C K G R O U N D

By Order entered on November 19, 2002, the Commission sought to conduct an inquiry into the failure of various companies to comply with certain Commission orders and to impose administrative fines against the named defendants. Notice of the application was published in The Daily Record, Omaha, Nebraska, on November 21, 2002. Certified copies of the Commission's order was sent certified mail return receipt requested on November 19, 2002. A hearing on this inquiry was held in the Commission Hearing Room on December 17, 2002 with

appearances entered above. On March 4, 2003, in Progression Order No. 1, this Commission dismissed this action against USA Paging.

The remaining defendants in this action are as follows: ATS Mobile Telephone, Inc.; ATT Wireless PCS, LLC; Global Crossing/Frontier Communications/ ALLNET; LCI International Telcom, Inc.; Lightyear; McLeod USA Telecommunications Services; Omaha Cellular Telephone Company; TCG Omaha; Touch America; and Verizon Wireless Messaging Services.

Summary of Testimony

Mr. Pursley, Director of the Nebraska Universal Service Fund for the Nebraska Public Service Commission testified on behalf of the NUSF Department. Mr. Pursley outlined the remittance audit requirements for the Commission. He then testified about the status of the audits with respect to each of the named defendants. The NUSF Department entered into the record correspondence from Lightyear Communications asking for leniency because of its bankruptcy status and because it could not timely acquire permission to send counsel to the hearing on its behalf.

Mr. Pursley further testified that the NUSF Department had engaged in settlement negotiations with McLeod, Omaha Cellular and Verizon. The staff had recommended an administrative penalty of \$100.00 per day for all companies filing audits past the due date.

Upon cross-examination, Mr. Pursley stated that the audits were originally due on June 30, 2002. The Commission had granted two extensions, one until August 30, 2002 and then another until October 30, 2002.

Mr. Joseph Michaud testified on behalf of Touch America, Inc. Mr. Michaud is a senior tax accountant with said company. Mr. Michaud testified that in June of 2002, Touch America purchased long distance services from Qwest Communications. From Qwest Communications, it inherited tax filings in all 50 states. Touch America was also in the process of negotiating settlement of revenues on a monthly basis. It had difficulties separating the overall revenues from 50 states into Nebraska specific information. Touch America has an ongoing arbitration with Qwest Communications to provide more adequate revenue data. A fine of up to \$10,000 would present hardship to Touch America.

Upon questioning by the Commission, Mr. Michaud stated that Touch America was hoping to have the audit done within 30 days.

Mr. Charles Humble made a statement on behalf of ATS Mobile Telephone, Inc. He stated that ATS has had difficulty finding an auditor to satisfy the Commission's requirements. Mr. Humble stated that ATS estimates that it will be able to comply with the Commission's audit requirements on or about January 17, 2003. Mr. Humble further believed that the Commission's civil penalty statute at

Neb. Rev. Stat. § 75-156 would not permit a fine going back to the date in which audits were due, rather he averred that the Commission could not begin a fine until after the hearing.

Mr. Loel Brooks also made a statement on behalf of his clients which included TCG Omaha, AT&T Communications of the Midwest, AT&T Wireless, Charter Communications d/b/a USA Paging and Global Crossing Communications/Frontier. With respect to TCG and AT&T Communications of the Midwest, Mr. Brooks stated there has been significant confusion concerning the audit requirement in this particular case. He stated that the Commission's order in NUSF-1, Progression Order 7 did not contain any standards as to the nature of the audit that would be acceptable. Mr. Brooks stated that the first they were aware of the particular audit standards was June 3, 2002, after the Commission sent out a letter reminding parties of their audit requirements. The letter contained proposed language that would satisfy the Commission's requirements. Shortly after that time, AT&T attorneys began a dialogue with Mr. Pursley. AT&T hired Price Waterhouse to perform the audit functions. It became apparent to Price Waterhouse and AT&T that the audit would take more time to be completed and filed. AT&T requested the extension until October 2002 which was granted. AT&T Communications did file an audit in time, however, it was clarified immediately preceding the hearing that the TCG Omaha numbers were not included. Mr. Brooks stated that AT&T and TCG have exercised good faith in attempting to fulfill the Commission's audit requirements.

With respect to AT&T Wireless, Mr. Brooks stated that the Commission's letters regarding the audit requirements were not being forwarded to the proper department. Mr. Brooks stated the correct department did not learn of its audit responsibilities until the Commission's order mailed on November 19, 2002. Since that time, AT&T Wireless has hired Price Waterhouse to prepare both the 1999/2000 audit report as well as the 2000/2001 audit report. The correct contact personnel have been added to the Commission's list for any further audit compliance issues.

Mr. Brooks reminded the Commission that this was the first remittance audit cycle for telecommunications carriers and a case of first impression for the Commission. Mr. Brooks argued that the Commission should not impose a civil penalty in this case. Rather, he requested that the Commission set a date certain for enforcement in the future and warn carriers that if audits were not filed that civil penalties would then begin to accrue.

Mr. Michael Shortley testified on behalf of Global Crossing. He is general counsel for the company. He gave the Commission an update on the status of Global Crossing's Chapter 11 proceeding. He testified that Global Crossing hopes to emerge from Chapter 11 sometime in the first quarter of 2003. Global Crossing's former auditor was Arthur Anderson, which no longer exists. In order to have new outside auditors, it requires court approval. The new outside auditors for the bankruptcy were appointed by the court on November 28, 2002. The first task for the auditors is to find the prior work

papers of Arthur Anderson. Then, there are two years, which will need to be restated. Mr. Shortley testified that the earliest Global Crossing could file the audit with the Commission would be the end of June.

O P I N I O N A N D F I N D I N G S

Upon consideration of the testimony adduced at the hearing, the Commission finds that civil penalties should be assessed at this time against ATS Mobile Telephone, Inc.; ATT Wireless PCS, LLC; LCI; McLeod USA Telecommunications Services; Omaha Cellular Telephone Company; TCG Omaha; and Verizon Wireless Messaging Services. The Commission finds that these companies have violated NUSF-1, Progression Order No. 7, setting forth the requirement that remittance audits be filed with the Commission by the Commission-prescribed due date. Since Touch America has not yet filed the required audit, the Commission will address Touch America in a subsequent order or proceeding.

The Commission finds with respect to Global Crossing, which is in the process of emerging from Chapter 11, that it should grant Global Crossing 14 days from the date of completion of the audit of its restated financial earnings to file the required remittance audits with the Commission. Global Crossing should notify the Commission on the date that it has completed its audit of the re-stated financial information such date will then trigger the 14-day time frame.

Lightyear was also undergoing Chapter 11 reorganization. Lightyear did however file its 1999/2000 audit and 2000/2001 audit 105 days after the due date. Notwithstanding, to be consistent with the treatment given to other carriers undergoing bankruptcy proceedings we find that Lightyear should not be assessed an administrative penalty as the audits were delayed in large part by its bankruptcy status.

With respect to ATS Mobile Telephone, which filed its audit 105 days after the due date, the Commission finds that an administrative penalty in the amount of \$3,300.00 should be assessed. We further find that an administrative penalty of \$3,300.00 should be assessed against AT&T Wireless, which filed its audit 71 days late, and \$3,300.00 should be assessed against LCI which filed its 1999/2000 audit 98 days late. We note that Neb. Rev. Stat. § 75-156 (Cum. Supp. 2002) contemplates that the accrual date for penalties assessed under the statute be connected to the date of the violation. For this purpose, the Commission finds that the date of violation begins the date after the audit became due, in this case, October 31, 2002. Each date the violation continues can be considered a separate violation and for this purpose, we consider each day to be a separate violation of the Commission's order. We have considered the severity of the penalty against the good faith efforts of ATS Mobile, AT&T Wireless and LCI in the calculation of this penalty.

With respect to TCG Omaha, which filed its 1999/2000 audit and its 2000/2001 audit 47 days after the due date, we find that a \$4,000.00 fine is appropriate. In determining this amount, the Commission took into account that two audit periods were due and not timely filed.

McLeod also violated the Commission's order by not timely filing its 2000/2001 audit with the Commission until 44 days after the date it was due. The Commission finds that an administrative penalty of \$1,700.00 is appropriate considering its good faith efforts in filing its audit with the Commission.

Verizon Wireless filed its 1999/2000 audit 48 days after the due date. Upon consideration of its good faith efforts in filing the audit and negotiating with the Commission staff on a settlement, the Commission finds that it should be assessed a penalty in the amount of \$2,100.00.

Finally, Omaha Cellular filed its 1999/2000 and 2000/2001 audit 9 days late. Upon consideration of its good faith efforts in complying after notice of the violation, the Commission finds that a penalty should be assessed against Omaha Cellular in the amount of \$180.00.

The fines assessed against each company in this proceeding should not be construed in any manner to serve as precedent as the fines assessed have been tailored to the particular circumstances in this proceeding. We further note that with all of the penalties determined above, we gave heavy consideration to and granted leniency on account of the arguments presented by Mr. Brooks inasmuch as this proceeding represents the Commission's first penalty action against companies for violation of the remittance audit requirements.

Payments of all civil penalty amounts assessed should be made payable to the Nebraska Public Service Commission and remitted no later than 30 days following the date ascribed to this Order.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the companies assessed civil penalties herein shall remit such amounts to the Nebraska Public Service Commission within 30 days from the date of this Order.

IT IS FURTHER ORDERED that Global Crossing be required to file its audit no later than 14 days following the completion of the audit of its re-stated financial information or be subject to administrative penalties. Global Crossing shall notify the Commission in writing on the date its auditors completes the audit of its re-stated financial earnings.

MADE AND ENTERED at Lincoln, Nebraska, this 1st day of April
2003.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chair

ATTEST:

Executive Director