

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Commission, on) Application No. C-1128
its own motion, to conduct an in-) Progression Order No. 4
vestigation into the effects of) PETITION FOR DECLARATORY
local competition on the telecommu-) RULING DENIED
nications industry in Nebraska.) Entered: May 4, 1999

BY THE COMMISSION:

On January 22, 1999, US West Communications (US West) filed a petition with the Commission seeking a declaratory ruling by the Commission which would effect the adoption and enforcing of the Federal Communications Commission's (FCC) proposed anti-slamming rules on an interim basis in the state. The petition also moved for an expedited proceeding. Specifically, the petition asked the Commission to address 1) whether the Commission should adopt and enforce anti-slamming rules promulgated by the Federal Communications Commission (FCC), and 2) what authority the Commission has to do so. GTE Midwest, Inc., MCI WorldCom, and AT&T; each filed comments on the petition.

A hearing was held on February 9, 1999, in the Commission Hearing Room, Lincoln, Nebraska. Notice of the hearing was sent to all local exchange and interexchange carriers certificated in Nebraska on January 29, 1999. A revised notice correcting a typographical error in the original notice was mailed to the same carriers on February 3, 1999. The hearing was conducted using the legislative format. Appearing for US West was Todd Lundy representing the Petitioner. Representing the Respondents were: Rebecca DeCook for AT&T; Jeff DeWolf for Sprint, and Steve Seglin for MCI.

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

On December 17, 1998, the FCC issued its Second Report and Order and Further Notice of Proposed Rulemaking to combat the practice of slamming. *CC Docket No. 94-129* (FCC Order). The FCC Order was subsequently published on February 16, 1999, with most parts of the order becoming effective 70 days after publication, that is April 27, 1999, with the remaining becoming effective 90 days after publication, that is May 18, 1999.

The FCC order included provisions which modified the methods by which a carrier could verify customers' authorizations to change their local telephone service providers. US West points out that the FCC order, being applicable to all local telephone service, applies equally to unauthorized changes of providers of intraLATA toll and services by the local provider. US West contends that immediate adoption of the rules contained in the FCC order is necessary to protect consumers from having their choice for intraLATA carrier changed without their knowledge or understanding. Petitioner's brief at 2.

Respondents argue that the Commission lacks the authority to issue emergency orders, or that, alternately, it should find that no emergency exists.

The issuance and effectiveness of rules is governed generally by the Nebraska Administrative Procedure Act (APA) which prescribes time limits, notice requirements, comment periods, publication requirements, and procedures for submission of proposed and final rules to respective state authorities. Neb. Rev. Stat. § 84-901 et seq. (Reissue 1994).

At the hearing, US West relied on three separate statutes to argue that the Commission could exercise "emergency" rulemaking authority. US West argues that Neb. Rev. Stat. § 84-907 empowers the Commission to engage in the type of immediate adoption of the rules contained in the FCC order that it seeks. A closer examination of the statute reveals that it outlines only the procedure by which an administrative agency may waive the public hearing required by that section. However, a finding of "good cause" as defined in § 84-907 does not alleviate the responsibilities of the Commission to publish proposed rules, to submit the rules to the Governor and the Attorney General for review, for the filing of the proposed and final rules with the Secretary of State, or to circumvent the five-day period after such filing before the rules become effective.

US West also relies on Section 74-121 to further define "emergency" situations which should prompt the Commission to engage in an expedited rulemaking process. However, Section 74-121 is expressly limited to circumstances involving predatory **rate** competition. It has no applicability in this case.

Finally, Petitioner relies on the broad mandate found in Neb. Rev. Stat. § 86-801(5) which empowers the Commission to "(p)romote fair competition in all Nebraska telecommunications markets in a manner consistent with the federal act." This mandate cannot be read so as to allow the Commission to circumvent the specific requirements of the state's APA and we decline to do so here.

While we specifically decline to determine in this order the Commission's ability to effectuate "emergency" rulemaking, we cannot find in the legal authority submitted by the Petitioner the mechanism for circumventing the procedures set out in the APA.

Second, we note that even if the Commission were to find the statutory authority to do what is proposed by the Petitioner, we would not do so because the matter is largely moot. Most of the FCC rules are, as of the date of this order, in effect. The rest will be in effect within 20 days. Given the statutory and practical time constraints to adopt the federal rules within our rulemaking procedures, any relief that could be afforded here, even where such need to be demonstrated, would occur following the full enactment of the federal law.

The Commission also notes that the Nebraska Legislature has passed to the governor for his signature LB 150 which sets in state law certain anti-slamming measures which parallel the provisions in the FCC order. The rulemaking that is mandated in Section 10 of the bill provides the opportunity for the process to be completed in a manner that is more orderly and complete than any action that could be taken here.

Because we cannot find authority to adopt the provisions of the FCC order outside the parameters of the state's APA, and because the relief granted by the enactment of the federal FCC rules and the Nebraska Legislature's LB 150 makes any relief granted pursuant to this petition moot, we deny the Petitioner's motion for a declaratory ruling.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the petition for a declaratory ruling to adopt and enforce the FCC's anti-slamming rules on an interim basis be, and it is hereby, denied.

MADE AND ENTERED at Lincoln, Nebraska, this 4th day of May, 1999.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chairman

ATTEST:

Executive Director

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