

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the application) Application No. C-1839/PI-
22
of the Nebraska Public Service)
Commission, on its own motion,)
seeking to conduct an)
investigation into the effects) GRANTED
of incumbent local exchange)
carriers using affiliates to)
compete within their own)
territory.) Entered: December 15, 1998

BY THE COMMISSION:

On July 14, 1998, the Commission, on its own motion, opened this docket for the purpose of investigating whether an incumbent local exchange carrier (ILEC) should be able to establish an affiliated Competitive Local Exchange Carrier (CLEC) to provide local exchange services within the ILEC's service territory. All interested parties were invited to comment on all issues related to whether an ILEC should be permitted to establish an affiliated CLEC for the purpose of competing in-region.

Comments were submitted by Aliant Communications Co. (Aliant), GTE Midwest Incorporated and GTE Communications Corporation (GTE), MCI Telecommunications Corporation (MCI), Nebraska Technology & Telecommunications, Inc. (NT&T), Sprint Communications Company L.P. and United Telephone Company of the West (Sprint). Such comments have been received and have been given careful study by the Commission. Based upon the comments and reply comments submitted to the Commission in this docket, the Commission issues the following opinions and findings.

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

Generally, the Telecommunications Act of 1996 (the Act) promotes a fully competitive local exchange market. The Act does not limit either the number of competitors that may participate in the local exchange market or the type of competitors based upon their corporate affiliations or the structure of the ILEC or the CLEC. Given the unique distribution of the population in the

State of Nebraska, the Commission finds that prohibiting a CLEC access to local exchange market served by an affiliated ILEC would place such a CLEC (referred to in this order as an affiliated in-region CLEC) at a distinct competitive disadvantage particularly in relation to multi-location customers, while simultaneously enhancing the competitive position of non-affiliated CLECs serving such market.

The Commission finds that it is neither proper nor necessary to place an affiliated in-region CLEC at a competitive disadvantage to other CLECs. Artificial barriers to competition are inconsistent with the Act. Further, the creation of such barriers is inconsistent with the Commission's vision of a fully competitive local exchange market.

The concept of affiliated in-region CLEC competition is not unique to Nebraska. This issue has been considered by at least two other states and is it presently pending before the Federal Communications Commission (FCC). While the findings from the state commissions in Texas and Kentucky are not binding upon this Commission, such findings provide insights into this issue.

The Texas Public Utilities Commission (TPUC) denied the application of GTE Communications Corporation to compete in-region with its affiliated ILEC, GTE Southwest. Texas PUC, Docket No. 17898, Order (November 21, 1997); Texas PUC, Docket No. 16495, Order (November 20, 1997). However, the TPUC based its decision entirely upon a state statute that prohibits the TPUC from issuing more than one type of certificate to any single company. It is not clear whether the TPUC would have granted GTE's affiliated in-region CLEC application in the absence of such a limiting statute. Thus, the TPUC's GTE decision provides minimal guidance on this issue.

The Kentucky Public Service Commission (KPSC) reached the merits of this issue when it denied the application by Bellsouth BSE, Inc. to compete in-region with its affiliated ILEC, Bellsouth Telecommunications, Inc. In reaching its decision, the KPSC determined that granting the requested authority could be detrimental to competition because of the potentially anti-competitive conduct that might exist when an affiliated in-region

CLEC provides local service within its affiliated ILEC=s service territory. Kentucky PSC, Case No. 97-417, Order (June 8, 1998).

However, the KPSC has granted rehearing in the Bellsouth case for the purpose of examining whether procedures may be developed to enable oversight of the activities of the ILEC so that opportunities and incentives to engage in anti-competitive conduct may be minimized. Kentucky PSC, Case No. 98-410, Order on Rehearing (July 21, 1998).

We agree that proper guidelines and oversight of the activities of the affiliated in-region CLEC can be used to minimize the opportunities and incentives to engage in anti-competitive conduct. This Commission is the proper regulatory body to determine the extent to which an affiliated in-region CLEC should be permitted to compete in the markets served by its affiliated ILEC. See, Neb.Rev.Stat. Section 86-803(16) (1997 Sup.) and section 86-807(1) (Reissue 1994). The Commission finds that when properly conditioned, affiliated in-region CLEC competition will foster a fully competitive market, and thus promote the implementation of enhanced telecommunications services and the reduction of service costs for customers. Accordingly, we find that the following approach to in-region CLEC competition should be permitted:

A. Subject to the terms of paragraph B below, certification granted to an affiliated in-region CLEC shall be limited within the service territory served by its affiliated ILEC to provision of basic local exchange service only to multi-location customers with locations inside and outside of the affiliated ILEC=s service territory. In providing such service, the affiliated CLEC must adhere to the following conditions:

1. The affiliated in-region CLEC shall be a legal entity separate from the affiliated ILEC operated consistent with the requirements of the Report and Order in CC Docket No. 96-150, released December 24, 1996, in which the FCC addressed accounting safeguards necessary to satisfy the requirements of the Telecommunications Act of 1996;

2. There shall exist an interconnection agreement between the affiliated ILEC and a non-affiliated third-party CLEC that has been approved by the Commission

which the affiliated in-region CLEC can adopt pursuant to Section 252(i) of the Act;¹

3. The affiliated in-region CLEC shall provide its own facilities except as otherwise provided by the interconnection agreement adopted pursuant to Section 252(i);

4. The affiliated ILEC and the affiliated in-region CLEC shall provide the Commission, on request, with access to documents, data and records pertaining to inter-company transactions relating to in-region transactions;

5. The affiliated ILEC shall not discriminate in favor of the affiliated in-region CLEC in the provision of any telecommunications services;

6. The affiliated in-region CLEC must inform an end user prior to entering into a service agreement that:

a. the affiliated ILEC will no longer be the end user=s service provider; and

b. the end user may purchase local service from either the affiliate or any other local service provider; and

¹ The affiliated in-region CLEC is required to adopt a third-party interconnection agreement for use in the affiliated ILEC=s service territory. Under these circumstances, such CLEC is prohibited from competing in-region until at least one other competitor has executed an interconnection agreement with the ILEC. Additionally, this will also prohibit the ILEC from providing its affiliated in-region CLEC with preferential service terms or conditions.

7. The affiliated in-region CLEC shall not use any customer proprietary network information associated with or attributable to the affiliated ILEC=s provision of local exchange or access services, except as otherwise provided in the Second Report and Order and Further Notice of Proposed Rulemaking, CC Docket Nos. 96-115 and 96-149 (1998).

B. The Commission is mindful of its obligations under the Act and of the Legislative policy favoring the promotion of fair competition in all Nebraska telecommunications markets. Neb. Rev. Stat. Section 86-801(5) (1997 Sup.). Accordingly, an affiliated in-region CLEC may, pursuant to Neb. Rev. Stat. Section 86-803(16) (1997 Sup.), seek Commission approval for a termination of the limitation of service within the affiliated ILEC=s service territory provided in paragraph A above, by filing an application with the Commission establishing that competition exists in the affiliated ILEC=s service territory. Following the hearing on such an application, the Commission will determine whether local competition exists in the affiliated ILEC=s service territory, and if such competition exists, the Commission will expand the affiliated in-region CLEC=s operating authority to a basis comparable with unaffiliated CLECs operating in such service territory.

1. For purposes of determining the effective level of competition in the ILEC=s service territory, the affiliated ILEC and CLEC shall be treated as one company; and

2. Consistent with the requirements of Section 86-803(16), the Commission may consider the presence of any wireless telecommunications services (excluding affiliated wireless service providers) being provided in the affiliated ILEC=s service territory when determining whether local competition exists in such service territory.

C. By requesting and receiving authority to compete within the affiliated ILEC=s service territory, both the affiliated ILEC and CLEC agree that the Commission shall have the power, upon proper notice and hearing, to (1) revoke the affiliated in-region CLEC=s authority to compete within the affiliated ILEC=s service

territory in the event that either of such ILEC or CLEC fail to abide by any of the conditions set forth herein or demonstration that either such ILEC or CLEC has engaged in anti-competitive conduct, and (2) take whatever additional remedial actions the Commission deems necessary.

The Commission finds that the existing financial accounting rules for affiliates should adequately prevent any potential for gaming of the system between ILECs and affiliated CLECs.

Finally, the Commission finds that the existing regulatory structure and complaint procedures provide the Commission with sufficient authority and jurisdiction to address any potential anti-competitive conduct complaints that may arise. The Commission finds that the foregoing conditions and safeguards minimize the potential for anti-competitive conduct between ILECs and an affiliated in-region CLEC, and create an environment that promotes full and open competition in the local exchange service market.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that affiliated in-region CLEC competition should be permitted under the conditions set forth above.

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that a copy of this order be served upon each of the parties to this docket.

MADE AND ENTERED at Lincoln, Nebraska this 15th day of December, 1998.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chairman

ATTEST:

Executive Director