BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Commission, on its own motion, to investigate the effects of local service freezes in Nebraska.	))))))	Application No. C-2662/PI-55 FINDINGS AND CONCLUSIONS Entered: May 7, 2002

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BY THE COMMISSION:

B A C K G R O U N D

The Nebraska Public Service Commission (Commission) opened the above-captioned docket on January 29, 2002, to investigate the effects of local service freeze offerings in Nebraska. Concomitantly in that order, the Commission demanded that Qwest Corporation (Qwest) cease and desist offering its proposed local service freeze program in Nebraska pending further review. Notice of this investigation appeared in The Daily Record, Omaha, Nebraska, on January 31, 2002.

Upon being informed about Qwest's proposal to offer a local service freeze to Nebraska consumers, the Commission issued a letter to Qwest requesting it to delay implementation of such service until the Commission had the opportunity to review the affects of this service on competition. Qwest responded that it was too late to delay implementation. However, Qwest informed the Commission that it would agree to delay the marketing of its product.

In addition, before formally opening this docket, the Commission received three informal complaints regarding Qwest's proposed local service freeze offering. ALLTEL Corporation (ALLTEL), Cox Nebraska Telcom, L.L.C. (Cox) and AT&T Communications of the Midwest (AT&T) sent letters to the Commission expressing concerns with Qwest's local service freeze offering and asking the Commission to investigate the proposed program. The Commission also received a petition from Cox requesting the Commission to issue a show cause action against Qwest and to order Qwest to cease and desist implementation of the local service freeze. Oral arguments were heard by the Commission on January 29, 2002. The Commission subsequently found that the issue was moot by the Commission's independent finding that the implementation of Qwest's local service freeze may be in violation of state law or federal law and ordering Qwest to cease and desist offering of the local service freeze pending further investigation.

A public hearing was held on February 20, 2002, in the Commission Hearing Room, Lincoln, Nebraska, upon notice to the parties by order entered January 29, 2002. Appearances at the public hearing were as shown above.

T E S T I M O N Y

Mr. Robert Logsdon, director of regulatory affairs for Nebraska and Iowa, testified first on behalf of Cox. Mr. Logsdon testified Cox believes that Qwest's actions in implementing the local service freeze are anti-competitive. Cox is the primary residential competitor in Omaha and Cox believes that there is no evidence of slamming by local carriers. To his knowledge, slamming has not been a problem in the local exchange markets as it has been in the long distance markets. Without a local service freeze, the customer only needed to make one phone call to switch local providers. With Qwest's local service freeze in place, customers will be required to lift the freeze with Qwest prior to leaving the company. Cox believes this to be an onerous requirement and one that would deter a number of customers from switching local providers.

Cox was also concerned that the information on the implementation of Qwest's local service freeze program was not adequate. Qwest sent a product notification to Cox on December 18, 2001, notifying competitive local exchange carriers (CLECs) of its decision to offer local carrier freezes for customer accounts in Nebraska. As of the date of the hearing, Qwest had not informed Cox on the proper procedures for lifting freezes on customer accounts. Cox was not given the phone numbers to call, information on how Qwest was going to be staffed to participate in three-way calls, nor was Cox informed about the hours Qwest would be available for three-way calls.

Mr. Logsdon further testified that it was difficult, if not impossible, for a customer to not know he or she was being switched to Cox service from Qwest. Therefore, a true act of slamming would be rare. A local service change from one facilities-based provider to another requires that a company technician set up an appointment to meet the subscriber and then requires physical modification of the system and wiring at the subscriber’s home by the CLECs technician. Mr. Logsdon challenged Qwest to find proven cases of local slamming in Nebraska.

Cox took the position that the Federal Communications Commission (FCC) has given the states clear authority to issue moratoria on local service freezes. The FCC intended to leave the decision up to individual states. Mr. Logsdon testified this Commission has the ability to adopt such a moratorium upon local service freezes. Also, in the FCC’s *Second Report and Order*, the FCC warned of the dangers for abuse among carriers. Mr. Logsdon further testified that the Colorado commission had specifically admonished Qwest for poor handling of three-way calls. Mr. Logsdon admitted that the Colorado decision pertained to Qwest’s handling of primary interexchange carrier (PIC) freezes and not local freezes. Cox offered a copy of the Colorado Commission’s order, which was received into evidence as Late-Filed Exhibit No. 13. In short, Mr. Logsdon stated that Cox believes the Commission has both the authority and the justification to ban preferred local carrier freezes in Nebraska. Cox advocated a complete moratorium on local service freezes.

Upon questioning, Mr. Logsdon provided that he saw no benefit in the local service freeze for consumers. First, he stated that the Commission was empowered to assist a consumer and punish a carrier if it determined that a local slam took place. Second, Qwest’s local service freeze program was detrimental to competition because it added another step in the process for competitors to overcome. Mr. Logsdon testified that Nebraska has only a handful of competitors who have survived in the marketplace and there was no indication that local slamming could even become a big problem. Upon questioning by Ms. Vinjamuri, Mr. Logsdon testified that the Commission’s three local slamming complaints, although unverified, should be considered seriously.

Mr. Brad Hedrick, testified next on behalf of ALLTEL. Mr. Hedrick offered ALLTEL's position statement into the record. It was received as Exhibit No. 7. Mr. Hedrick testified that he did not believe that the local service freeze was warranted or needed. ALLTEL did not utilize local service freezes in any of its incumbent local exchange carrier (ILEC) or CLEC operations. ALLTEL generally supported Cox's statements. He was not aware of any local slamming complaints filed by or against ALLTEL. ALLTEL believed that the local service freeze initiative by Qwest was anti-competitive. Mr. Hedrick testified that the Commission should balance the interests of ensuring that competition does develop with the needs of Nebraska consumers. It was ALLTEL's position that at this point in time, the implementation of local service freezes would be detrimental in the development of competition, while local slamming was not a prevalent problem.

More opposition came from Mr. Musfeldt, pro se, on behalf of Nebraska Technology & Telecommunications, Inc. (NT&T). He testified that the local service freeze as proposed by Qwest, would stall competition. NT&T was concerned that the local service freeze process would cause customer confusion and create inefficiencies for customers and CLECs alike. Importantly, the local service freeze as proposed by Qwest would add another step into the implementation process. Finally, Mr. Musfeldt testified that the interconnection agreement in place with the ILEC, which provides how the companies process their orders, is sufficient to deter them and like CLECs from slamming. Mr. Musfeldt testified that if NT&T changes a customer's service without prior authorization from the customer, Qwest could claim its interconnection agreement was in breach and could stop providing service to them.

Mr. Scott A. McIntyre, director of product and market issues, testified on behalf of Qwest. Mr. McIntyre provided in his direct testimony that Qwest's "local service freeze (LSF) program allows customers the choice of placing a 'hold' or 'freeze' on their local service account so that a change in local service providers cannot be made without their authorization."[1] This service is optional for consumers and is offered at no additional charge. Mr. McIntyre testified that local service freezes allow consumers to protect their account against slamming. He then testified that unauthorized changes in ser-

[1] McIntyre, Direct at 3.

vice providers were a concern of this Commission as demonstrated by its rules prohibiting the practice of slamming. Mr. McIntyre testified that the FCC has recognized that carrier freezes serve as a means of protecting consumers against slamming. The FCC also established methods for lifting a freeze. Qwest would follow the FCC standards.

Mr. McIntyre further testified that the value of preferred carrier freezes is underscored by the fact that three states require Qwest to offer them through rules and regulations. Washington, Colorado and Utah have adopted rules requiring all local exchange carriers to offer preferred carrier freezes.

The Qwest witness pointed to customer concern for a reason to support Qwest's local service freeze. Mr. McIntyre reminded the Commission that long distance slamming has been a problem in Nebraska in recent years. In support of this information, Qwest invited the Commission to refer to its most recent annual report to the Legislature and to the Commission's website. Mr. McIntyre asserted that based upon the degree of slamming that has occurred in the long distance arena, it is realistic to think that Nebraska consumers are concerned about the potential for local slamming as well.

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

In order to open the local market to competition pursuant to the Telecommunications Act of 1996 (the Act), state commissions are required to remove any barriers to competition. Neb. Rev. Stat. § 75-109(2) gives the Commission broad authority to "do all things reasonably necessary and appropriate to implement the federal Telecommunications Act of 1996." The Act makes it clear that state and local barriers are to be removed and that regulators must help foster a competitive local market. In certain cases, a barrier can be built to impede competition through the practical effect of the policies and programs of the telecommunications carriers. A barrier exists when customers face problems purposefully changing carriers or when customers are otherwise deterred from choosing amongst carriers. To that end, the Commission must ensure that the customer experiences a seamless transition when changing from one carrier to another. The Commission is also charged with promoting and moreover, facilitating a simplified mechanism for the switching of local carriers in order to foster the development of competition.[2] This is not only a significant component for consumer

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[2] *See* Consumer Bill of Rights in Application No. C-1128.

protection, it also vital for carriers trying to enter and compete in local markets.

The Commission is likewise charged by state and federal authorities to protect consumers from certain abuses inherent in a competitive market, specifically here, slamming. Slamming is the term commonly used to refer to unauthorized changes of a subscriber’s preferred carrier. Slamming became a widespread problem in the long distance market in the late 1990s and is now illegal under federal law and many state laws including Nebraska’s.

In this particular instance, the Commission is faced with a balancing test. The Commission must balance the interest of promoting competition pursuant to the directives of state and federal law against the possibility that slamming in the local market could become a prevalent problem in Nebraska.

Generally, a freeze placed on a customer’s preferred carrier selection for local exchange service (hereinafter local service freeze) requires direct authorization by the customer to the local exchange carrier to lift the freeze before a change in carriers can be made. A freeze placed on a subscriber’s account is usually aimed at preventing one telecommunications carrier from slamming a subscriber’s account.

In this instance, the local freeze service proposed by Qwest would likewise require any subscriber with a freeze on his or her account to make direct contact with Qwest in order to lift the freeze. Lifting a freeze with Qwest representatives is a precondition to the subscriber’s ability to effect a change in local carriers. The testimony provided by Qwest demonstrated, competitive carriers would not be informed that a local freeze was preventing that customer’s order from being processed.[3]

The parties opposed to the adoption of a local service freeze by Qwest made several arguments. First, they argued that the local service freeze proposal offered by Qwest is anti-competitive. They argued further that it does not respond to any particular problem because there is no prevalence of local slamming. Third, they contended Qwest’s proposed offering was a method used by Qwest in order to keep its market share.

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[3] Qwest provided supplemental testimony in the place of a letter requested by the Commission as a late-filed exhibit. This testimony was objected to by Cox. The Commission sustains Cox’s objection and infers only that no letter could be produced by Qwest.

Finally, they averred that local preferred carrier selection programs are easily susceptible to abuse.

All parties opposed to the local service freezes questioned the timeliness of this proposed offering in light of Qwest’s 271 application. The parties argued the local service freeze to be anti-competitive. Qwest’s actions, which limit competitor’s access and ability to switch customers, would not conform with Qwest’s arguments that they have sufficiently opened the market for local competition.

The parties are correct in that there is little evidence of local slamming in Nebraska. Omaha is the largest market and Cox, another facilities-based carrier, is Qwest’s largest competitor. Qwest admitted they had knowledge of no other slamming complaints filed with the Commission other than those unverified complaints listed in Exhibit 9. The Commission has no validated cases of slamming between Cox and Qwest.

Also, clear cases of abuse by carriers have, in fact, been documented in other states.[4] Not only does the carrier have a second chance to convince the customer not to switch to a competing carrier, it also has the customer’s account records at its disposal. Without proper mechanisms in place to guard against abuse, competing carriers are helpless to gain a level competitive foothold. Absent express abuse, there is evidence that a customer will be less likely to switch carriers if that customer faces obstacles to change.[5] The Commission is not satisfied that the potential for abuse has been eliminated.

Qwest on the other hand made four basic arguments in support of preferred carrier freezes. First, Qwest contended that its decision to implement a preferred carrier freeze program was based in customer concerns of slamming. Qwest also argued that local slamming is occurring in Nebraska. Third, Qwest provided that preferred carrier freezes were not only suggested by the FCC but also by state law. Finally, Qwest argued that some other states have required Qwest to make a preferred carrier freeze available to its customers and because it provides it in other states, it needs to provide it in Nebraska. We analyze these arguments accordingly.

First, Qwest argued that its decision to implement a preferred carrier freeze program in Nebraska was based upon customer concerns regarding local slamming. To support this

[4] *See* Exhibits 4 and 13.
[5] *Id.*

argument, Qwest used information from the State of Washington regarding the number of people that have signed up for a local service freeze. Although the Qwest witness offered this as reasoning on direct, Qwest was unwilling to release the exact numbers to the other interested parties when asked. The Commission ordered Qwest to provide this information, albeit under confidential seal.

The Commission finds that the numbers of subscribers in Washington with a local service freeze is irrelevant in demonstrating even a generalized customer fear of slamming. Just because subscribers have opted to have a freeze placed on their account, after prompting by the Qwest customer service representative, does not indicate that the subscriber had any particular fear that his or her account would be switched without authorization. Many times customers will agree to opt into programs provided by a telephone carrier particularly when touted as “free” and “protection.” Moreover, the Commission does not find the Washington numbers pertinent to showing customer sentiment in Nebraska. The Washington Commission may have had more complaints of local slamming or more reason to believe a preferred carrier selection was appropriate. Qwest did not provide any evidence that customers in Nebraska were concerned or fearful about local slamming.

Compounded with the aforementioned customer concerns, Qwest argued that slamming in the local exchange market, was occurring. In support of this argument, Qwest requested that the Commission take administrative notice of three alleged local slamming complaints received as recently as this year. Commission staff counsel requested that the Commission supplement the record with the results of its investigation of the local slamming complaints. All three complaints involved McLeodUSA, a competitive local exchange carrier which recently filed for bankruptcy. Of the three alleged slamming complaints, the Commission investigator found that one customer had, in fact, requested a change in carriers but had forgotten. Two complainants admitted they told the telemarketer “yes” to receiving additional information but stated they did not consent to a change in carriers. These two complaints were resolved informally, the customers were switched back to the carrier of their choice and refunded by McLeodUSA.

The Commission finds the evidence of local slamming to be nebulous at best. There was little proof on the record that local slamming was occurring in Nebraska or could proliferate in the local market. The Commission finds that two incidents not sufficient to warrant a need for Qwest’s local service freeze.

Qwest’s argument was, therefore, unsupported by fact or evidence in the record.

It is true that the FCC, in its *Second Report and Order* in CC Docket No. 94-129, FCC 98-334 (Second Report and Order), cited the general benefits of preferred carrier freezes.[6] The FCC outlined a number of rules a carrier must follow when implementing preferred carrier freezes.[7] At the same time, the FCC warned that preferred carrier freezes can have a particularly adverse impact on the development of competition in markets that are newly open to competition.[8] Moreover, the FCC made clear that states may adopt moratoria on the imposition or solicitation of intrastate preferred carrier freezes if they deem appropriate to prevent anticompetitive conduct.[9] AT&T, Cox and ALLTEL argue that paragraph 137 of the FCC’s order describes situation in this case. Finally, as provided in the hearing, the FCC’s *Second Report and Order* mainly addresses the problems associated with long distance slamming, a problem that was prevalent at the time of the writing of that order.

In 1998, when slamming was becoming a problem in the long distance markets, it was assumed that it likewise would proliferate in a vulnerable local exchange market. The same holds true for the Nebraska Consumer Slamming Prevention Act in Neb. Rev. Stat. § 86-1901 et seq., and the Commission’s rules and regulations. This law and the corresponding rules were developed with long distance slamming experiences in mind.

Although state law and Commission rules are applicable to local exchange carriers as Qwest points out, slamming was and remains more of a problem in the long distance arena where switching a carrier involves only a change in carrier codes. Unlike the case in the long distance market, the Commission finds that state and federal laws prohibiting slamming in the local service markets provide a sufficient deterrent from and adequate compensation for incidents of slamming. While our state law provides that slamming by a local exchange carrier is unlawful, it does not require Qwest to offer a local preferred carrier selection mechanism.

Accordingly, neither state nor federal law bars this Commission from adopting a moratorium on local service freezes. The Commission finds that the reasons which require long

[6] *See* Qwest Corporation’s Post Hearing Brief at 3.
[7] *Id.* at 11.
[8] *See* Brief of Cox Nebraska Telcom, LLC at 9.
[9] *Id. See also* Second Report and Order ¶ 137.

distance carriers to offer a PIC freeze are not present in the case of local exchange carriers. Adding another step into the process of changing local exchange carriers constructs an additional barrier to competition. The local service freeze program Qwest wishes to implement is highly suspect at this time.

Upon consideration of the testimony and evidence adduced at the hearing, the Commission finds that the negative impact of such freezes on the development of competition in the local market outweighs the potential benefit of such service to consumers. The provisioning of local service freezes at this time would be harmful to the development of competition and that harm outweighs the benefit of preventing the possibility that a local slam should occur and other mechanisms in state and federal law cannot adequately compensate a victim of such an act.

Finally, the Commission rejects Qwest's argument that the Commission should give deference to a program Qwest was required to implement in other states and finds Qwest faces no undue burden from unequal enforcement of local service freezes throughout its region. Upon review of many of the programs in other states, the Commission became aware that the rules and regulations of those states apply across the board to all local exchange carriers. There are no such rules in place applicable to all carriers in Nebraska. The Commission declines to permit carriers on a piecemeal basis to implement local carrier freezes. If local carrier freezes are permitted at all, the Commission finds that such freezes should be made applicable to all carriers with appropriate safeguards founded in rules and regulations. At such time however, no carrier has demonstrated a palpable reason which convinces the Commission that local service freezes are needed or appropriate in the local market.

The Commission finds Qwest's argument that a moratorium in Nebraska would pose an undue burden upon the company, is likewise without merit. Qwest has programs, rates and terms that vary widely from state to state. Moreover, to date, Qwest is unable to offer its local service freeze program in a number of other states in its region. The Commission finds that it is not an undue burden on Qwest to instruct its account representatives of the prohibition on local service freezes in Nebraska.

The Commission, therefore, finds that local service freezes should be prohibited in Nebraska until further order by this Commission. Qwest is ordered not to offer its local service freeze program in Nebraska. The Commission further finds that this investigation and the petition filed in Application No. C-2664 should be dismissed.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that a moratorium on local service freezes be, and it is, hereby, adopted in Nebraska.

IT IS FURTHER ORDERED that Qwest be, and it is hereby, prohibited from offering local service freezes in Nebraska until further notice of the Commission.

IT IS FURTHER ORDERED that the petition filed in Application No. C-2664 should be, and it is hereby, dismissed.

MADE AND ENTERED at Lincoln, Nebraska, this 7th day of May, 2002.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chair

ATTEST:

Executive Director