

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Commission,) Application No. C-2738/PI-58
on its own motion, seeking to)
investigate telecommunications) TARIFFS DENIED IN PART
companies' terms, conditions and)
rates for the provision of)
wireless termination service.) Entered: January 22, 2003

BY THE COMMISSION:

On April 24, 2002, Great Plains Communications, Inc. filed an application, designated as Application No. C-2726, to set reasonable rates, terms and conditions for Intra major trading area (MTA) wireless termination service and to approve its wireless termination service tariff. On April 29, 2002, both Hamilton Telephone Company (Hamilton) and the Nebraska Independent Telephone Association (NITA) on behalf of 18 NITA member companies, filed applications, designated as Application Nos. C-2727 and C-2728 respectively, to set reasonable rates, terms and conditions for IntraMTA wireless termination service and to approve their respective wireless termination service tariffs. Hamilton subsequently withdrew Application No. C-2727 on May 22, 2002.

On June 5, 2002, the Commission opened this docket to investigate the terms, conditions and rates in wireless termination tariffs filed by Great Plains Communications, Inc. and the Nebraska Independent Telephone Association (NITA) on behalf of 18 NITA member companies in Application Nos. C-2726, and C-2728, respectively. The proposed tariffs filed by these companies (Applicants) provide for terms, conditions and rates for termination in applicants' exchanges of traffic originating from Commercial Mobile Radio Service (CMRS) providers' end-users and transiting through a third party tandem provider. The proposed tariffs would apply if there were no interconnection agreement between the CMRS provider and the applicant.

Pursuant to the June 5, 2002 order, the Commission sought prefiled testimony and hearing on the following issues.

1. Can the applicants lawfully apply tariffs to CMRS providers for traffic that originates from CMRS providers' end-users and terminates to the applicants' exchanges through a third party tandem provider in the absence of an approved interconnection agreement?

2. If the answer to Question No. 1 is yes, are the terms, conditions and rates in the applicants' filings fair, just and reasonable?

3. Should wireless carriers be allowed to file tariffs with the Commission to recover the costs associated with terminating access similar to those requested by wireless carriers in WT Docket No. 01-316 before the Federal Communications Commission (FCC)?

4. If the answer to Question 3 is yes, what rate may be reasonably charged for such service?

Testimony was prefiled by Dan Davis on behalf of the Applicant incumbent local exchange carriers (ILECs); Gene DeJordy on behalf of Western Wireless Corporation, AT&T Wireless Services, Inc. and T-Mobile USA, Inc.; Bill Pruitt on behalf of Sprint Spectrum, L.P., d/b/a Sprint PCS; and William Easton on behalf of Qwest Corporation and Qwest Wireless, LLC.

The hearing was held on August 14, 2002, at which prefiled testimony was received and all witnesses were subject to cross-examination. Post-hearing briefs and proposed orders were filed on October 15, 2002.

Based on the testimony and evidence presented at the hearing, the provisions of the Telecommunications Act of 1996 (the Act), Nebraska law and the post-hearing briefs submitted in this matter, the Commission issues the following Findings and Conclusions:

F I N D I N G S A N D C O N C L U S I O N S

In deciding whether to approve or reject the tariffs proposed by Applicants, there are potentially many issues that might be addressed, including: Whether the proposed tariffs addressing compensation for termination of wireless traffic are permissible under the Act or are inconsistent with the Act's reliance on interconnection agreements or other bilateral agreements to establish reciprocal compensation arrangements; whether the tariffs are necessary or appropriate to ensure that Applicants are compensated for termination of the wireless traffic; whether the proposed termination rates are inconsistent with the reciprocal compensation pricing standards in the Act and FCC rules; whether interMTA traffic should be distinguished from intraMTA traffic; whether other terms and conditions in the proposed tariffs are reasonable and whether the tariffs should be approved on an interim basis only, subject to true-up with regard to the rates.

The parties have strongly argued their respective sides of the basic legal issues and whether the tariffs are consistent

with and subject to the Act's provisions regarding reciprocal compensation for exchange of traffic. The Applicants basically argue that the tariffs are not attempting to take the place of reciprocal compensation arrangements since the tariffs are only effective if there is no agreement between the Applicants and a CMRS provider. Also, because the tariffs do not purport to address reciprocal compensation for all traffic exchanged by the Applicants and wireless providers but only the traffic terminated by them, they are not subject to the reciprocal compensation pricing standards of the Act.

On the other hand, the opposing parties contend that the Act envisions bilateral agreements for transport and termination of local traffic and that tariffs are not an acceptable substitute. Similarly, they argue that the Act and FCC rules on pricing apply to any transport and termination of local traffic and not just reciprocal compensation agreements.

The Commission notes that the legal issues concerning the viability of tariffs such as those proposed by Applicants are now before the FCC. Several wireless carriers filed a Petition for Declaratory Ruling on September 6, 2002, asking the FCC to find that such tariffs "are not a proper mechanism for establishing reciprocal compensation arrangements" and to order withdrawal of such tariffs or, alternatively, find them unlawful and void. The Petition asks the FCC to affirm prior decisions that found ILECs engaged in bad faith by unilaterally filing tariffs prior to negotiating agreements.

The Commission concludes that it does not need to make a definitive decision regarding the legality and appropriateness of the proposed tariffs under the Act. We leave that for the FCC. However, we do conclude that the Act, at the very least, clearly indicates a preference that compensation for termination of IntraMTA traffic be addressed through bilateral agreements.

Therefore, the Nebraska Commission believes that, where possible, compensation arrangements should be negotiated between the parties. As such, we do not believe that tariffs for IntraMTA traffic are necessary or appropriate in lieu of the process contemplated by the Act.

The Applicants have not made an adequate showing in this case that a "true" effort was made to negotiate with the wireless carriers. The lack of meaningful attempts to resolve the issue through negotiation certainly suggests that the Applicants were not compelled, as a last resort, to file tariffs with

the Commission to establish an IntraMTA compensation arrangement.

The Applicants have not shown how much traffic they are terminating from CMRS providers or the jurisdictional nature (InterMTA versus IntraMTA) of the intrastate traffic, much less that it is a significant amount of traffic. Nonetheless, if such traffic can be appropriately accounted for, then compensation for intrastate InterMTA traffic through tariffs may be appropriate.

While at this time there is no evidence that the traffic terminated by Applicants is greater than what the CMRS providers terminate for the Applicants, this is not to say the Applicants are not in fact entitled to additional compensation.

As such, the Commission believes that the parties should immediately commence a study to determine the level of IntraMTA traffic being exchanged, and if necessary, negotiate compensation arrangements pursuant to the process contemplated by the Act.

While the Commission is of the opinion that either the wireless carrier or the local exchange carrier may initiate negotiations, the Commission notes the wireless carriers in this case have agreed to commence formal negotiations under the Act if requested to do so by the Applicants. Indeed, both the Applicants and CMRS providers have stated they are agreeable to a process involving joint negotiations by all the parties. This appears to be a more efficient and comprehensive method of addressing the potentially complex issues involved in the exchange of traffic between the Applicants and wireless carriers than filing a tariff. Furthermore, it appears to address the Applicants' concerns about being able to obtain a resolution of disputed issues by the Commission.

In regards to intrastate InterMTA traffic, it would appear to this Commission that such traffic is subject to access charges. In our view, Section 251(g) of the Act specifically preserved the access charge regime. This is further supported by the FCC, in paragraphs 1034 and 1043, of its First Report and Order on Local Competition.

We therefore find that the proposed tariffs are not fair, just and reasonable when applied to intrastate IntraMTA traffic. However, we expect the Applicants and the CMRS providers to commence formal joint negotiations within 60 days from the date of this order to address the appropriate compensation arrange-

ments. The Act's process for negotiations, mediation or arbitration will permit the parties to address and resolve such issues in an orderly and established manner.

In regards to intrastate InterMTA traffic, the Commission finds that such traffic is subject to access charges. Therefore, the Commission will permit tariffs to be filed with the Commission outlining the appropriate charges for terminating intrastate InterMTA traffic.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the applications for approval of the proposed wireless termination tariffs are denied in part.

IT IS FURTHER ORDERED that the Applicants and the CMRS providers shall commence formal joint negotiations to resolve intrastate IntraMTA compensation issues within 60 days from the date of this Order.

IT IS FINALLY ORDERED that carriers that terminate intrastate InterMTA wireless traffic may file the appropriate tariffs with the Commission.

MADE AND ENTERED at Lincoln, Nebraska, this 22nd day of January, 2003.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chair

ATTEST:

Executive Director