

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Petition of ) Application No. C-3233/  
Chase 3000 Inc., Imperial; ) PI-84  
Skybeam, Scottsbluff; McCookNet )  
Internet Service, McCook; ) ORDER CLOSING INVESTIGATION  
AxtellTech, Axtell; and Facspro )  
Infotech Consulting, LLC Brady )  
for Commission rulemaking. ) Entered: September 21, 2004  
)

BY THE COMMISSION:

By Petition filed May 21, 2004, the above-listed parties (Petitioners) requested the Nebraska Public Service Commission (the Commission) "either initiate a rulemaking proceeding to identify rules which would be applicable to the relationship between ILECs and their affiliated companies or, alternatively, initiate a Commission investigative proceeding to allow public comment on the fair and equitable use of resources held by a monopoly that may be protected from competition and to provide relief from the unfair use of these resources." On July 7, 2004, the Commission entered an Order seeking comments on the Petition. The Commission's Order sought public comment on 11 different inquiries raised by Petitioners. The Commission Order states that comments submitted on the questions posed in its Order are for purposes of rulemaking. Interested parties were invited to submit comments on or before August 9, 2004, and reply comments on or before August 30, 2004. The Nebraska Telecommunications Association (NTA) also filed a Motion to Stay in Application No. C-3233/PI-84 on July 26, 2004. The purpose of the Motion to Stay was to either extend the comment period, or stay all proceedings in Application No. C-3233/PI-84 until such a time as the Commission could rule on the pending NTA Petition for Declaratory Ruling. The NTA Motion to Stay was denied on August 5, 2004.

Comments were filed by Chase 3000; Inventive Wireless, LLC; Sprint; NTA; Qwest Corporation; AT&T; and Western Wireless. Reply comments were filed by AT&T and Qwest.

Upon consideration of the Petition filed by the above-captioned providers and all comments filed in the above-captioned proceeding, the Commission is of the opinion and finds that it lacks jurisdiction to enact rules which generally govern a non-regulated affiliate of a local exchange carrier as the Petitioners' request.

The Commission agrees with the comments filed by the NTA that its jurisdiction is limited, extending to common carriers engaged in furnishing telecommunications services for hire in

Nebraska. The Petition appears to be seeking a set of rules which would either directly or indirectly decide how non-regulated affiliate companies should be structured, and how they should operate.

The Commission has previously spoken on this issue in the area of mergers and acquisitions. For example, the Commission has previously found that it must "focus on the entity which is certificated in the State and which is actually providing service in the State."<sup>1</sup> The Commission further found that the "explicit wording of the applicable statutes and regulations focuses on the state-certificated carrier rather than on the capital structure of the upstream entity."<sup>2</sup>

The Commission's jurisdiction does not extend to non-regulated services or rates provided by affiliates of common carriers who are not required to be certificated in the state, except as it relates to universal service and E911 as otherwise provided for in statute. The Commission's ability to set rates and prices for service provided by regulated entities generally is also limited by statute.<sup>3</sup>

That is not to say that such affiliates are not subject to any oversight. The Federal Communications Commission (FCC) has rules which govern how the ILECs must account for transactions with their affiliates.<sup>4</sup> The FCC's rules impose auditing and reporting requirements and extend to services offered in state tariffs.<sup>5</sup>

Moreover, as it pertains to the regulated entity itself, there are provisions in both state and federal law which prohibit discriminatory pricing. If there is a case for discriminatory pricing or anti-competitive behavior by an ILEC, it should be brought before the FCC or the Commission for determination under its jurisdiction to resolve complaints related to activities of the regulated common carriers.

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<sup>1</sup> Application No. C-1746/PI-19 *In the Matter of the Nebraska Public Service Commission on its own motion to conduct an investigation to determine when the Commission has jurisdiction to authorize acquisitions, mergers or other transfers of control*, Clarification Order (March 10, 1998).

<sup>2</sup> *Id.*

<sup>3</sup> See *Neb. Rev. Stat. § 86-139* (2002 Cum. Supp.) which provides, "Except as provided in the Nebraska Telecommunications Regulation Act, telecommunications companies shall not be subject to rate regulation by the commission . . ."

<sup>4</sup> See *e.g.*, 47 C.F.R. § 32.27

<sup>5</sup> *Id.*

However, at this point, the Commission is without evidence that there is a problem of statewide magnitude. It appears unnecessary to create additional rules applicable to all entities to resolve complaints relating to one or a few, particularly, if they involve reporting duplicative information already provided to the FCC.

Many of the issues raised by AT&T and Western Wireless relating to the activities by Bell Operating Companies (BOCs) may be plausible concerns, but we find them to be outside the scope of this investigation. Most of the concerns they raised occurred outside this state by another BOC or dealt with retail pricing and win-back activities not specific to Nebraska. Should these commenters have a specific complaint about a carrier's actions in Nebraska, a complaint should be filed setting forth specific allegations and the grounds for relief.

O R D E R

IT IS THEREFORE ORDERD by the Nebraska Public Service Commission that above-captioned investigation be and it is hereby closed.

MADE AND ENTERED at Lincoln, Nebraska this 21<sup>st</sup> day of September 2004.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chairman

ATTEST:

Executive Director