

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of McLeod Telemanage-)	Docket FC-1252
ment, Inc.; MCI Telecommunications,)	Docket FC-1253
Corp. and AT&T Communications of)	Docket FC-1254
the Midwest, Inc.)	
Complainants)	
vs.)	Sustained in Part
)	Denied in Part
US West Communications, Inc.)	
Respondent.)	Entered November 25, 1996

APPEARANCES:

For McLeod and MCI:
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BY THE COMMISSION:

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

On February 12, 1996, McLeod Telemanagement, Inc. (McLeod) and MCI Telecommunications Corporation (MCI) filed complaints (FC-1252 and FC-1253 respectively) and on March 21, 1996, AT&T Communications of the Midwest, Inc. (AT&T) filed a complaint (FC-1254) objecting to the February 5, 1996, filing by US West Communications (US West) discontinuing its offering of Centrex Plus service in the state of Nebraska and grandfathering existing Centrex Plus customers.

On February 13, 1996, the Commission rejected a motion to hold in abeyance the effective date of US West's Centrex Plus rate list until resolution of the formal complaints filed by MCI and McLeod. US West's rate list became effective February 16, 1996, pursuant to Neb. Rev. Stat Section 86-803(1) (1994).

On April 25, 1996, notice of hearing was sent to all parties. A hearing was held on May 30, 1996, at which time evidence and testimony were adduced. Appearances are as shown.

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T H E E V I D E N C E

Thomas M. Parvin, testifying on behalf of McLeod, said that US West's filing would make it impossible for McLeod to resell Centrex Plus in Nebraska in the future. He testified that McLeod is not currently certified to provide local service in Nebraska and that McLeod was awaiting action by the Commission in its investigation of local exchange service before making a filing to provide local service. Mr. Parvin testified that McLeod cannot provide facilities-based local service in Nebraska at this time and that there was no current service available from US West that was functionally equivalent to Centrex Plus. Mr. Parvin testified that he believed US West was discontinuing Centrex Plus service in order to prevent resellers from using Centrex Plus as a means to enter local markets. He testified that he believed resale is essential to the development of local service competition in Nebraska and that US West's action would limit job creation and economic development in Nebraska.

Anthony J. DiTirro, MCI, testified that US West's discontinuance of Centrex Plus would have a detrimental impact on MCI's entry into the local market and upon local competition in general. He testified that MCI is not currently certified to provide local service in Nebraska but that MCI is contemplating applying for such authority. Mr. DiTirro testified that he believed US West's actions were contrary to the provisions and policies of the Federal Telecommunications Act of 1996. He testified that he believed competitors' use of Centrex Plus service was technically and economically feasible and that there is no reasonable alternative to Centrex Plus service currently available from US West. Mr. DiTirro further testified that US West's actions were discriminatory and therefore in violation of the Federal Telecommunications Act.

John W. Blake, who appeared on behalf of AT&T, testified that AT&T had filed an application to provide local exchange service in Nebraska, but was unable to say how or when AT&T would actually provide local service in this state. Mr. Blake pointed out that in its application AT&T indicated that it intended to provide local exchange service through a combination of resale of other companies' services and the use of its own facilities. He testified that he believed that resale is extremely important to the development of competition. Mr. Blake also testified that he believed that US West's discontinuance of its Centrex Plus service is anti-competitive and in violation of the Federal Telecommunications Act of 1996.

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Karen A. Baird, testifying on behalf of US West, described Centrex Plus service as a central office-based switching service offered as an alternative to PBXs for large and medium sized business and government end-user customers. She testified that US WEST discontinued Centrex Plus service for several reasons. First, because Centrex Plus has been priced and structured to compete with PBX's, resellers are able to create an arbitrage situation with US West's business exchange service by purchasing Centrex Plus service and then reselling individual Centrex Plus lines to business customers at a rate below US West's flat rate for a business exchange line (1FB). Second, resellers have been using Centrex Plus to combine long distance traffic from unaffiliated end-users and offering them a 1+ alternative to US West's intraLATA long distance service which gives the resellers' customers the unfair advantage of 1+ dialing without having to contribute to the support of residential service to the extent that other business customers do. Lastly, Centrex Plus has failed to meet the needs of medium and large business and government customers as shown by the fact that in Nebraska, Centrex Plus has only a 9% share of the market as compared to the 91% market share of PBX systems. Ms. Baird testified that since the mid 1970's, US WEST has withdrawn and grandfathered a number of services in Nebraska without objection. She further testified that US West's actions in this case are not anti-competitive since the complainants have other options available to them for developing local exchange service including the new service US West is preparing to take the place of Centrex Plus. Ms. Baird also testified that there is nothing in Nebraska law or in the Telecommunications Act of 1996 which requires US West to continue offering Centrex Plus service to new customers.

DISCUSSION

State Law:

Although complainants have alleged that US West's actions in this case are contrary to Nebraska law, the only statute that they have been able to present to this Commission is Neb. Rev. Stat. Section 86-801 (1994) which is a statement of legislative policy. Because Section 86-801 is a statement of general policy, it neither prohibits nor permits any particular action by a telecommunications company. A statement of general policy may be used to help interpret other parts of a legislative act, but it cannot control or enlarge the power of any governmental body. Therefore, Section 86-801 is insufficient by itself to sustain a finding of any violation of state law.

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The complainants have charged that the grandfathering of Centrex Plus service for existing customers is illegal because it is discriminatory. However, in the area of utility service it is not every discrimination by a telephone company or other utility that is objectionable but only such discriminations that are unjust or arbitrary. It has long been recognized that there may be differences between different categories of customers such as between residential and commercial users of utility service. Rutherford v. City of Omaha, 183 Neb. 398, 160 N.W.2d 223 (1968). Moreover, the Nebraska Supreme Court has held that resellers are in a different category from consumers and that different treatment of a reseller by a public utility does not result in unjust discrimination. Cornhusker Electric Co. v. City of Fairbury, 134 Neb. 248, 278 N.W.2d 379 (1938).

Grandfathering is a common and well-accepted practice in the telephone industry. The Wisconsin Public Service defines it as a procedure whereby a service becomes unavailable to new customers but continues to be available for existing customers. Re: Wisconsin Bell, Inc., 120 P.U.R.4th 617, 619 (1990). A number of examples of services that have been grandfathered in Nebraska without objection were cited in the testimony in this case.

The reason for grandfathering is one of fairness. When a service is discontinued, existing customers often do not want the service taken away from them. In order to treat existing customers fairly, they are given a period of time during which they can continue to use the service before they are actually forced to change to a different service. Having been in the position of relying on the service that is now being discontinued, they are considered to be in a different category from those customers who have never signed up or had the service installed for them. For this reason, grandfathering has been considered an equitable way of handling existing customers and has not been viewed as unjust discrimination. This reasoning would appear to be particularly true with regard to Centrex Plus service where the existing customers are large businesses and governmental bodies which use the service to cover multiple locations. It could be extremely disruptive to them if US West were to withdraw Centrex Plus service from them immediately. Accordingly, this Commission does not believe that US West's actions in this case are contrary to Nebraska law.

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Filing Requirements:

The complainants have challenged US West's filing procedure in this case and have asserted that US West's withdrawal of Centrex Plus service is subject to Commission Rule 002.21 which requires Commission approval of a tariff filed by an exchange carrier. However, the distinctions between a tariff and a rate list came into existence with the adoption of Neb. Rev. Stat. Section 86-801 to 86-811 in 1986, and US West has been providing Centrex Plus service according to the terms and conditions of a rate list filed under Neb. Rev. Stat. Section 86-803(1). It is the opinion of this Commission that Commission Rule 002.21 does not apply in this case and that US West's filing was appropriate under Nebraska law.

Telecommunications Act of 1996:

In adopting the Telecommunications Act of 1996, Congress delegated general enforcement powers to the Federal Communications Commission (FCC). On August 8, 1996, the FCC issued its First Report and Order, FCC 96-325 (Report), concerning the implementation of that Act. In its Report, the FCC declined to adopt a rule on the subject of the ability of an incumbent local exchange carrier (LEC) to withdraw services where resellers are purchasing such services for resale in competition with the incumbent LEC including that "this is a matter best left to state commissions." Although the FCC did not find that a withdrawal of service is an unreasonable restriction on resale, it did state the following at paragraph 968 of its report:

We find it important, however, to ensure that grandfathered customers -- subscribers to the service being withdrawn who are allowed by an incumbent LEC to continue purchasing services -- not be denied the benefits of competition. We conclude that, when an incumbent LEC grandfathers its own customers of a withdrawn service, such grandfathering should also extend to reseller end users. For the duration of any grandfathering period, all grandfathered customers should have the right to purchase such grandfathered services either directly from the incumbent LEC or indirectly through a reseller. The incumbent LEC shall offer wholesale rates for such grandfathered services to resellers for the purpose of serving grandfathered customers. {Footnote omitted.}

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This Commission agrees with the statement of the FCC quoted above. Although it may not be unreasonable for an incumbent LEC to withdraw a local exchange service as a public offering and to grandfather existing customers, nevertheless we believe that under the Telecommunications Act of 1996, certificated resellers of local service should be allowed to purchase the grandfathered service from the incumbent LEC at wholesale rates and to offer that service for resale to the grandfathered customers of the incumbent LEC. Therefore, this Commission will direct US West to make Centrex Plus service available to certificated resellers of local service in this state for the duration of the grandfathering period so that such resellers may offer the service on a resale basis to US West's grandfathered Centrex Plus customers.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the complaints of McLeod Telemanagement, Inc., MCI Telecommunications Corporation, and AT&T Communications of the Midwest, Inc. regarding any violation of Nebraska law be, and they are hereby denied.

IT IS FURTHER ORDERED that the complaints of McLeod Telemanagement, Inc., MCI Telecommunications Corporation, and AT&T Communications of the Midwest, Inc. regarding a violation of the Telecommunications Act of 1996 be, and they are hereby sustained, to the extent that for the duration of the grandfathering period US West will be required to allow certificated resellers of local service to purchase Centrex Plus at wholesale rates and to offer Centrex Plus for resale to the grandfathered customers of US West.

MADE AND ENTERED at Lincoln, Nebraska this 25th day of November, 1996.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

//s//Rod Johnson
//s//Frank E. Landis
//s//James F. Munnelly
//s//Daniel G. Urwiller

Chairman

ATTEST:

COMMISSIONER DISSENTING:

[Signature]

[Signature]
Executive Director

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DISSENT OF COMMISSIONER LOWELL C. JOHNSON

I respectfully disagree with the Opinions and Findings expressed by the majority of the Commission in this matter, and the Order approved by a majority vote, on November 25, 1996.

State Law.

I reject the finding that this is a routine case of "grandfathering." US West has testified that it will permit existing customers of Centrex Plus to expand their use of such service, even though other interested customers are being denied the same service. I find such a practice to be contrary to the traditional and customary form of grandfathering, and thus unjust, arbitrary and discriminatory treatment of potential customers. I further find such practice constitutes a violation of Neb. Rev. Stat. § 75-126(1)(b) (1995 Supp.), which states that no common carrier shall make or give any undue or unreasonable preference or advantage to any particular person.

Filing Requirements.

I find that US West's filing procedure is contrary to Commission Rule 002.21 because such filing encompasses terms and conditions of the Centrex Plus service (not just rates). Amendments and changes which affect terms and conditions of a service must be provided for in a tariff, subject to Commission approval under Rule 002.21. Rule 002.21 did not become inoperable when the Legislature permitted rates to be modified by filing a rate list pursuant to Section 86-803(1).

Telecommunications Act of 1996.

The majority's adoption of the procedure required by the FCC at paragraph 968 of its First Report and Order, allowing resale only to the "grandfathered customers of US West," orders US West to do nothing more than comply with an existing legal obligation. The majority relies upon this provision to avoid examining the substantive requirements of the Telecommunications Act of 1996 ("Act") itself.

The Act creates a pro-competitive framework designed to bring competition to local exchange markets. The Act specifically (i) prohibits unreasonable or discriminatory restrictions on resale [47 U.S.C. § 251(b)(1)], (ii) requires wholesale rates for all services offered at retail [47 U.S.C. § 251(c)(4)(A)], and (iii) forbids the erections of barriers to entry into exchange markets [47 U.S.C. § 253]. The evidence before the Commission showed that US West's filing will have the effect of imposing a barrier to the entry of competitors into

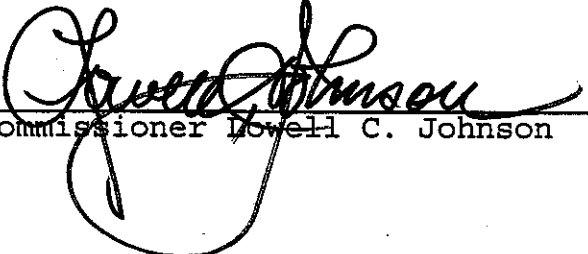
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local exchange markets, in clear violation of 47 U.S.C. §§ 251(b)(1) and 253. Furthermore, the withdrawal of Centrex Plus service as proposed by US West will effectively circumvent the "resale" requirement of the Act, because US West has not offered either a more feature rich competitive product or a functionally equivalent replacement. US West's withdrawal of Centrex Plus, under such circumstances, thus violates 47 U.S.C. § 251(c)(4)(a) as well. Finally, allowing some customers to expand Centrex Plus service, while denying the same Centrex Plus service to other interested customers, is testimony to the fact that Centrex Plus is not truly withdrawn, and serves to emphasize that US West's proposal to "withdraw" or "grandfather" Centrex Plus is unreasonable and discriminatory, a clear violation of 47 U.S.C. § 251(b)(1).

The majority made no findings regarding whether US West's proposed "grandfathering" of Centrex Plus would constitute a violation of the Federal Act's provisions which prohibit discrimination, require wholesale rates for all services offered at retail, and forbid the erection of barriers to entry. While the Act does not require that US West's product line be forever frozen in time, it does require that this Commission examine the withdrawal of a service such as Centrex Plus, and consider whether that withdrawal is anti-competitive, discriminatory, imposes barrier to entry, or is otherwise contrary to law or the public interest. No such determination was made in the opinions and findings entered by the majority of this Commission, contrary to the requirements of the Act.

I find that the Complainants in this matter presented evidence that the US West proposal to withdraw Centrex Plus service is unreasonable, arbitrary, anti-competitive and discriminatory. The formal Complaints of MCI Telecommunications Corporation, AT&T Communications of the Midwest, Inc., and McLeod Telemanagement, Inc. should be sustained.


Commissioner Lowell C. Johnson