

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the US West) Application No. C-1830
Communications, Inc.'s filing of)
its notice of intention to file)
Section 271(c) application with) Progression Order No. 9
the FCC and request for Commission)
to verify US West compliance)
with Section 271(c).) Entered: December 4, 1998

B A C K G R O U N D

On August 14, 1998, US West Communications, Inc. (US West) filed its first set of data requests propounded to AT&T Communications of the Midwest, Inc. (AT&T); to Teleport Communications Group, Inc. (TCG); to Sprint Communications Company (Sprint); to McLeod USA Telecommunications Services, Inc. (McLeod); to MCI Telecommunications Corp. (MCI); to Nebraska Independent Telephone Association (NITA); to Nebraska Telephone Association (NTA); to Nebraska Technology and Telecommunications Inc. (NT&T); and to Cox Nebraska Telecom II, L.L.C. (Cox). On August 19, 1998, US West submitted its first set of data requests to Aliant Midwest, Inc. (Aliant).

On August 20, 1998, AT&T filed its objections to US West's first set of data requests. On August 20, 1998, TCG filed its objections to US West's first set of data requests. On August 20, 1998, McLeod filed its objections to US West's first set of data requests. On August 20, 1998, MCI filed its objection to US West's first set of data requests. On August 21, 1998, Cox filed its objection to US West's first set of data requests. On August 26, 1998, Sprint filed its response to US West's first set of data requests. On September 3, 1998, McLeod filed a supplemental response and objections to US West's first set of data requests.

The Nebraska Independent Telephone Association, the Nebraska Telephone Association, and Nebraska Technology and Telecommunications, Inc. have not filed any responses to US West's first set of data requests.

On August 24, 1998, US West filed a motion to compel responses by AT&T, Teleport, Sprint and McLeod to US West's first set of data requests. On August 26, 1998, AT&T and TCG filed their responses to US West's motion to compel. On August 26, 1998, Sprint filed its response to US West's motion to compel.

On August 27, 1998, at 9:30 a.m., a hearing was held on all of the above requests for information, objections, motions to compel, and responses thereto. The parties were either present in person, by counsel, or by telephone. Staff Attorney John Doyle was present. Counsel for US West and Aliant announced that they had reached an agreement on their dispute. MCI's objection, based upon the applicability of Public Service Commission General Docket No. C-1540 stating that only those parties who submitted pre-filed testimony and witnesses would be required to respond to discovery, was argued and taken under submission.

Thereafter, arguments were made on behalf of AT&T, TCG, Sprint and McLeod, and a response was made by US West. The proceedings were continued until Monday, August 31, 1998, at which time a further teleconference hearing was held with the same parties participating. At that time, the Special Master announced his rulings. Specifically, he stated that even though the order in Docket No. C-1540 expressly states that discovery can be requested only of those parties who have filed sworn affidavits, exhibits and work papers, to so limit the discovery is a fundamental unfairness and a deprivation of due process to US West. This ruling was subsequently reconsidered by the entire Commission and reversed, and MCI's objections on that basis have been sustained.

The Special Master then stated that all other objections would be overruled, with specific exceptions mentioned below. It was stated that the proprietary objections are protected and covered by the protection order, which could be amplified if necessary to make certain that it was in place. The Special Master further stated that he would err on the side of discovery consistent with the general civil litigation rule, and let the Commission make a final determination as to relevance at the time of hearing. He further stated that he did not know what would be discovered, or how much of what was discovered would be relevant. The Special Master then made specific rulings on burdensome objections, sustaining in part and overruling in part the objections. Additional rulings were made overruling the attorney-client privilege objection.

A further teleconference hearing was held on September 2, 1998, with the same parties either present or represented by counsel. In addition, Commissioner Lowell Johnson, Commission Executive Director Robert Logsdon, and Staff Attorney John Doyle were also present. AT&T, TCG, Sprint, and McLeod stated that they wished to seek a reconsideration of the Special Master's previous overruling of their objections to the discovery requests. The Special Master advised that he had no objection to the parties presenting the motion for reconsideration to the entire Commission, and further stated that he was of the opinion that he would not alter his prior rulings on a motion for reconsideration.

The hearing was continued to September 3, 1998, at 3:00 p.m. At that time, the parties were present in person, represented by counsel, or by telephone. Commissioners Lowell Johnson and Frank Landis were present, along with Commission Executive Director Robert Logsdon and Staff Attorneys John Doyle and Chris Post. The Special Master announced that the Commission had agreed to have a special hearing on Tuesday, September 8, 1998, at 1:30 p.m., at which time all filed motions for reconsideration would be considered and ruled upon. Commissioner Landis announced that the hearing would be based upon the filings, without any oral argument. It was agreed that those parties who had not filed a motion for reconsideration would do so on or before 12:00 noon on September 8, 1998.

Hearing was held on September 8, 1998, and on that date the Commission sustained MCI's motion for reconsideration and overruled the Special Master's ruling regarding the applicability of the order in Docket No. C-1540. The Commission overruled all other motions for

reconsideration and sustained the Special Master's previous ruling overruling the objections of all parties to the requests for information. Subsequent thereto, AT&T, Sprint, TCG and McLeod withdrew their interventions and asked leave to change their filing status so that they would not be required to respond to discovery requests. This request was granted by the Commission on September 21, 1998. Because of the change in status, the Special Master did not reduce to writing his previous discovery rulings.

On November 13, 1998, the Special Master received a written request from Frank Landis, Commission Vice Chairman, asking that a written order be prepared summarizing prior rulings on the various discovery issues. This order is prepared and filed accordingly.

D I S C U S S I O N

Intervenors are concerned that the data requested is confidential, proprietary, and trade secrets. The Commission has issued a Protective Order consistent with Rule 26(c) of the Nebraska Supreme Court Rules. That order provides that the material requested can only be disclosed to counsel, witnesses and experts; can only be used in this proceeding; cannot be given to anyone with marketing, pricing, product development, market analysis, market entry, or strategic planning responsibilities; and cannot be used for purposes of business or competition. All parties have a good faith obligation to abide by and trust the implementation of the Protective Order.

Rule 016.11 of the Nebraska Public Service Commission Rules of Procedure, Title 291 of the Nebraska Administrative Code, states that the use of discovery in proceedings before the Commission is governed by the rules and regulations of the Nebraska Supreme Court. The above rule was in full force and effect at all times mentioned herein. Rule 26(B)(1) of the Nebraska Supreme Court discovery rules provides that, "It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." The Nebraska Rules of Civil Procedure are based upon the Federal Rules of Civil Procedures, and in both jurisdictions, the rules have been liberally construed to allow broad discovery. That is not to say that all information discovered is admissible, but discovery should be allowed when the request appears reasonably calculated to lead to the discovery of admissible evidence. (*Henneck v. Lexington State Bank and Trust Company*, 1994 Nebraska Appellate Court 228 at 232; *Christensen v. Educational Service Unit No. 16*, 243 Nebraska 553 at 563 (1993)).

The subject of this Section 271(c) proceeding is the status of competition in the state of Nebraska, and not in any other state. US West cannot prove Section 271(c) compliance in the state of Nebraska unless it has information from the intervenors respecting OSS system needs and the status or potential status of competition. Although US West has a primary obligation to open its markets and put systems in place that will allow competition if it wishes to enter the long-distance market, what intervenors AT&T, TCG, Sprint and McLeod plan to do is relevant. That is particularly true if these intervenors have no interest in entering the Nebraska market at any

time soon. For this reason, Nebraska may be different from Montana, Michigan, South Carolina and other states. Consequently, it is necessary for the FCC to look at the status of competition in each state to determine what the competitors are really planning to do and whether the OSS obligations will be satisfied. The OSS system needs of AT&T may be different from those of Aliant, McLeod, Sprint and the others. For the above reasons, the Special Master believes that all of the requests for information are reasonably calculated to lead to the discovery of relevant and admissible evidence.

O R D E R

Thus, on August 31, 1998, except as to certain intervenors' objections based on burdensomeness, all of intervenors' objections to US West's first set of data requests were and are again hereby, overruled by the Special Master.

Dated this 4th day of December, 1998.

Samuel Van Pelt
Special Master

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