

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of R. Brent Cherry,) FORMAL COMPLAINT NO. 1240
Seward, Nebraska,)
)
Complainant,)
vs.)
) DISMISSED
The Lincoln Telephone and Telegraph)
Company, Lincoln, Nebraska,)
)
Respondent.) ENTERED: OCTOBER 11, 1994

APPEARANCES

For the Complainant:

R. Brent Cherry, pro se
1426 North H Street
Seward, NE 68434

For the Respondent:

Paul M. Schudel, Esq.
206 South 13th Street
Suite 1500
Lincoln, NE 68508

BY THE COMMISSION:

OPINION AND FINDINGS

The order entered in this matter on June 7, 1994, in which the Commission dismissed the complaint did not set forth in sufficient detail the background and evidence adduced.

By complaint filed January 31, 1994, R. Brent Cherry, aka Brent Cherry, alleged that Lincoln Telephone and Telegraph Company (LT&T) was unwilling to install in the Seward central office a software feature called forward on busy/no answer service. Complainant alleged that the service is essential to him. Complainant alleged that: The service he requests simply transfers a telephone call to another number when the number called is not answered in a given number of rings. The feature is available throughout the United States. The service is available in territory served by U.S. West as well as other territories served by respondent.

The Commission recognized a letter filed February 22, 1994, from William J. Ashburn, Industry Relations Manager of respondent, as the answer to the complaint. Respondent's answer alleged: Line busy call diversion permits a call to automatically be transferred to a predetermined alternate number whenever the primary number is busy. The alternate number can be any dialable number. If the alternate location is not a free call, the customer will be billed for each call diverted. Call transfer no answer permits a customer to specify a number to which incoming calls will be transferred after a prescribed

number of unanswered rings. If the call location is not a free call, the customer will be billed for each call forwarded. To provide these features in the DMS-10 switch at Seward, a software feature would need to be activated at a cost of \$3,800. The cost includes a right-to-use fee and an activation fee. Currently, no DMS-10 within LT&T's territory has this feature activated. Respondent has marketed the features in Lincoln, Beatrice, Hastings, and Nebraska City for approximately eight years. It has 141 customers in Lincoln and 12 customers outside of Lincoln for line busy call diversion and 792 in Lincoln and 14 customers outside of Lincoln for call transfer no answer. The Lincoln market penetration is 0.81 percent and 0.06 percent outside of Lincoln. Respondent has been unable to develop a business case for offering the services in additional markets. If respondent determines there is sufficient demand for the features in Seward, it will notify complainant of their availability.

Apparently respondent's labeling of its services line busy call diversion and call transfer no answer are the services complainant terms forward on busy/no answer.

Hearing on the complaint was held March 30, 1994, in the Commission Hearing Room with appearances as shown.

Complainant produced one witness, himself, and testified: He believes LT&T is providing poor quality of service in Seward, specifically, regarding his inability to transfer phone calls when he is on the phone or not in his office. His colleagues around the country utilize the sort of service he requests. The cost to LT&T of providing the service to him is minimal, \$3,800. Other people in Seward have requested the service. At one point, he was led to believe that LT&T would provide the service. In his business, a busy signal and no answer on the telephone are not acceptable. He does not get busy signals when he calls other businesses through the normal course of events. Low level telecommunication service affects everyone who considers locating in Nebraska. If he had it to do over again, before relocating in Nebraska, as he did last summer, he would have investigated the level of communication service more thoroughly than he did. LT&T has a monopoly. He has no other source of the service he requires. He requests that the calls to his number be diverted to his corporate voice mail in Dallas, Texas, when a calling party calls him when he is on the phone or out of the office. The diverted call would be a toll call at his expense. He thinks 10 or 15 other people in Seward would use this service. He would expect to pay approximately the same price for the feature that he paid when he was served by U.S. West in Colorado. If he were to obtain the equipment to render the service that he wants, it would cost him approximately \$10,000. Call waiting would not be a solution to his service requirements. Additional lines would not solve the problem.

Respondent produced one witness, Bill Ashburn, who testified: He is industry relations manager for LT&T. The \$3,800 respondent quotes as the cost to furnish the service is a one-time cost charged by the switch manufacturer for the right to use and activate the equipment. He does not know of any other customers in Seward who would be interested in the service. The switch in Seward is a Northern Telecom

DMS-10 switch, which is capable of providing the service requested. The service Mr. Cherry requests has been offered in Lincoln, Beatrice, Hastings, and Nebraska City for eight years or longer. The services are provided at a \$1.75 per month. The tariff contains four requirements for offering service. Service will be provided where technically and economically feasible where the company determines sufficient demand exists to warrant provision of services. The company has not found any demand for the service in Seward. The service could be provided through a contract with Mr. Cherry if he is interested in agreeing to subscribe to the service for a period of time at some sort of rate. The company would help Mr. Cherry find alternate equipment that would provide the service he wants. Telecommunications Rules and Regulation 022.02 says, "Each exchange carrier shall provide adequate access line service. Access lines shall mean the facility used by the exchange carrier to provide dial tone to the subscriber from the central office through and including a network interface on the subscribers premise." Adequacy of service means dial tone.

On June 7, 1994, the Commission entered its order in this matter in which it dismissed the complaint. The complainant filed a motion for rehearing and/or reconsideration which was heard on September 13, 1994. The motion for rehearing was sustained. On September 27, 1994, the record was reopened and additional evidence was adduced with appearances as shown.

Brent Cherry testified: His business is hurt due to the lack of adequate phone service in the community of Seward because the local exchange is unable to transfer his calls to his corporate voice mail system when he is on the phone or when he is not able to answer the phone. The technology to correct the situation is a simple software upgrade and an extension of the existing call-forwarding feature. It is called call forward on busy or no answer. The cost to upgrade the service would be \$3,800. The digital switch in the Seward office is capable of supporting the upgrade. His competitors utilize such technology. In business the standard is to provide a caller an opportunity to leave a message, either with a live receptionist or voice mail or some mechanism to leave a message, regarding the nature of the caller's business and a number from which the caller can be reached. Without the technology he requests, his callers get busy signals and no answers, which are unacceptable in the business world today. U.S. West provides the service he requests in virtually all of its exchanges in Nebraska.

Complainant also read into the record a list of 64 cities and villages where the service he wants is offered by U.S. West.

Respondent called Bill Ashburn who testified: He was present and testified at the original hearing. The offer of busy signal/no answer and call forward is not part of the standard service offerings in Nebraska. LT&T does not see a demand in Seward at this time to support the offering of the service. No one other than the complainant has asked for the service in Seward.

FORMAL COMPLAINT NO. 1240

PAGE FOUR

The Commission reserved ruling on the offer of Exhibits 1 and 3. Exhibit 1 is a list of U.S. West exchanges tendered to show where U.S. West offers the service the complainant contends should be offered in Seward. No foundation was laid for the admission of the exhibit so it cannot be admitted in evidence. Exhibit 3 purports to be a clipping from the Eustis News of August 18, 1994, which would indicate that Curtis Telephone Company offers the service to its customers. Again, no foundation was laid for the admission of the exhibit and it cannot be admitted in evidence.

The evidence complainant offered at the second hearing of his complaint added little to what was offered at the original hearing. No evidence was offered to show that the Seward exchange subscribers, except for Mr. Cherry, would utilize the forward on busy/no answer service if it were available. No evidence was offered to show that LT&T would realize any return on its investment were the Commission to require it to provide the \$3,800 switch for the Seward exchange.

From the evidence adduced and being fully informed in the premises, the Commission is of the opinion and finds that this complaint should be dismissed.

O R D E R

IT IS, THEREFORE, ORDERED that the complaint of R. Brent Cherry of inadequate telephone service in Seward, Nebraska, provided by Lincoln Telephone and Telegraph Company be, and it is hereby, DISMISSED.

MADE AND ENTERED at Lincoln, Nebraska, this 11th day October, 1994.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

//s//Duane D. Gay
 //s//James F. Munnelly
 //s//Daniel G. Urwiller

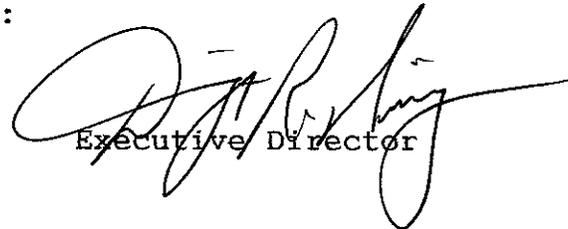


Chairman

ATTEST:

COMMISSIONERS DISSENTING:

//s//Rod Johnson
 //s//Frank E. Landis



Executive Director

DISSENT OF COMMISSIONER LANDIS:

Although a perusal of the Commission's files would have supplied complainant abundant evidence that the service Mr. Cherry wants is offered by many companies in Nebraska, he did not properly introduce such evidence into the record, so under the holding in In re Application of Northwestern Bell Tel. Co., 223 Neb. 415, 390 N.W.2d 495 (1986), the Commission is precluded from considering its files and records. Complainant did, however, without objection, supply the Commission a list of cities and villages where U.S. West offers the

service he wants. The list and the population of these points, according to the last official census, includes: Ainsworth, 1,870, Alliance, 9,765, Ashton, 251, Atlanta, 114, Axtell, 707, Belgrade, 157, Bennington, 866, Big Springs, 495, Bridgeport, 1,581, Broken Bow, 3,778, Brule, 411, Butte, 452, Cairo, 733, Cedar Rapids, 438, Central City, 2,868, Chadron, 5,588, Clarkson, 699, Cody, 177, Crawford, 1,115, Crookston, 99, Culbertson, 795, Dannebrog, 324, Decatur, 641, Elba, 221, Elkhorn, 1,398, Elm Creek, 116, Elwood, 679, Emerson, 791, Farwell, 152, Fremont, 23,680, Fullerton, 1,452, Gordon, 1,803, Gothenburg, 3,347, Grand Island, 39,487, Gretna, 2,249, Harrison, 291, Holdrege, 5,671, Homer, 553, Howells, 615, Humphrey, 741, Lexington, 8,544, Long Pine, 396, Loup City, 1,104, Lyons, 1,144, McCook, 8,112, Minden, 2,749, Norfolk, 21,476, North Platte, 22,605, Oakland, 1,279, Ogallala, 5,095, Overton, 665, Oxford, 949, Pender, 1,208, Primrose, 69, Randolph, 983, Ravenna, 1,317, Rockville, 122, Rushville, 1,127, Schuyler, 4,052, Seward, 5,641, Sidney, 5,959, Wood River, 1,156, West Point, 3,250, Whitney, 38, as well as Omaha.

Neb. Rev. Stat. Section 75-109 (Reissue 1990) says:

Except as provided in sections 19-4603, 86-803, and 86-808, the commission shall have the power to regulate ... services of and to exercise a general control over all common carriers ... furnishing communications services for hire in Nebraska intrastate commerce.

Neb. Rev. Stat. 86-803(6) (Reissue 1987) states:

The commission shall retain quality of service regulation over the services provided by all telecommunications companies and shall investigate and resolve subscriber complaints concerning quality of telecommunications service, subscriber deposits, and disconnection of service. If such complaint cannot be resolved informally, then, upon petition by the subscriber, the commission shall set the matter for hearing in accordance with the commission's rules and regulations for notice and hearing and may by order render its decision granting or denying in whole or in part the subscriber's petition or provide such other relief as is reasonable based on the evidence presented to the commission at the hearing. Any such order of the commission may be enforced against any telecommunications company as provided in sections 75-140 to 75-145 and may be appealed.

From these statutes it is clear that the Legislature has delegated to the Commission the authority to regulate the service provided by a telephone company. The authority of the Commission to set standards of telephone service was confirmed by the Supreme Court in Myers v. Blair Tel. Co., 194 Neb. 55, 230 N.W.2d 190 at page 61 of the Nebraska Report the Court stated:

"A public utility is obligated to serve all its ratepayers fairly and without undue discrimination. In seeing that the utility meets this obligation, the commission is not directing how funds of the utility are to be used. Rather, it is requiring the utility to render the service for which

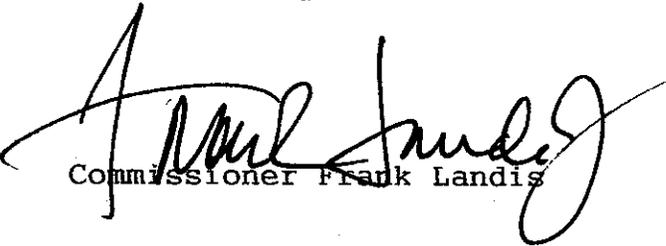
the rate was set, or, as was done here, to refund a portion of the rate charged for the inferior service. As we said in *Furstenberg v. Omaha & C.B. St. Ry. Co.* (1937), 132 Neb. 562, 272 N.W. 756: 'The primary object of the regulation of public utilities by the railway commission is not to establish a monopoly or to guarantee the security of investment in public service corporations, but, first and at all times, to serve the interest of the public.'

Respondent would have this Commission hold, and apparently the majority concurs, that LT&T's responsibility to its customers ends with the delivery of dial tone. I cannot conceive that in this day and age of burgeoning telephonic technology, a carrier's responsibility extends merely to providing dial tone. Respondent has already admitted that it provides the service requested by the complainant in at least four other cities in its territory. Given respondent's capitalization and profitability, I can see no reason why respondent should not make the nominal investment requested by complainant. Respondent has admitted that it has not made any serious effort to market the service requested by complainant in the Seward area. In pricing the service complainant requests, the respondent should take into consideration the additional toll charges that it stands to accrue from respondent's use of a Dallas terminus for the incoming calls that would be diverted if the service complainant requests were in place.

Adequacy of service is a constantly fluctuating standard. Telephony is and always has been an adaptation of available technology to the market place. The time is long gone when adequate service was simply the offer of dial tone. The market place will dictate adequacy of service, and it is this Commission's responsibility to watch the market and assert its authority when regulated monopolies refuse to respond to the public. Surely the Commission could not be faulted for requiring respondent to provide the more than 5,600 residents of Seward and the surrounding area it serves the same level of service now enjoyed by the 69 residents of Primrose or the 38 residents of Whitney.

For the majority of the Commission, in this case, the mandate of our Supreme Court "to serve the interest of the public" has fallen on deaf ears.

The complaint should have been sustained.


Commissioner Frank Landis