

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Nebraska) Application No. C-1746/PI-19
Public Service Commission, on its)
own motion, to conduct an inves-)
tigation to determine when the) CLARIFICATION ORDER
Commission has jurisdiction to)
authorize acquisitions, mergers,)
or other transfers of control.) Entered: March 10, 1998

BY THE COMMISSION:

On February 3, 1998, the Commission opened this investigative docket to determine under what circumstances the Commission has jurisdiction to approve, condition or deny proposed acquisitions, mergers, or other transfers of ownership or control of regulated common carriers.

Parties were allowed to submit briefs on this issue on or before February 20, 1998. Briefs were filed by GTE Midwest, Inc., US West Communications, Inc., jointly by AT&T Communications of the Midwest, Inc. and TCG Omaha, and jointly by WorldCom, Inc. and MCI Communications Corporation.

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

Questions have arisen regarding the Commission's authority to approve, condition or deny proposed mergers, acquisitions and transfers of control. For the purpose of developing and establishing a consistent policy concerning the Commission's authority to review, and approve, condition or deny these transactions, the Commission makes the following findings:

Neb. Rev. Stat. §§ 75-146 through 75-151 (the Statutes) govern certain financial and structural aspects of "common carriers" operating in the state of Nebraska (the State). The term "common carrier" is defined in Neb. Rev. Stat. § 75-109(1) as follows:

...all carriers, including contract carriers, engaged in the transportation of freight or passengers for hire or furnishing communication services for hire in Nebraska intrastate commerce.

Application No. C-1746/PI-19

PAGE 2

The Commission has been granted the right of prior approval over certain capital transactions involving Nebraska common carriers. The Commission's statutory authority to approve transfers of control of common carriers, including telecommunications companies, stems from Neb Rev. Stat. § 75-146. This statute states, in part:

...No common carrier other than a railroad shall consolidate its stock, property, franchise or earnings, in whole or in part, with any other competing common carrier **without permission of the Commission...**[Emphasis added.]

In addition, the Commission has adopted certain regulations which also address the ability of common carriers to effectuate certain capital transactions including mergers, consolidations and transfers of control. Title 291 Neb. Admin. R. & Regs. Chapter 5, Sections 001 through 003 (the Regulations) govern activities of common carriers which provide interexchange and local exchange services in Nebraska. Section 003 of the Regulations governs telecommunications services provided by "interexchange carriers." Section 001.01U of the Regulations defines an "interexchange carrier" as "...a telecommunications company which provides interexchange telephone service." Section 003.01(d) of the Regulations applies certain subsections of Section 002 of the Regulations, which governs the provision of local exchange service by exchange carriers, to interexchange carriers. While not specifically set forth in Section 003.01(d), the Commission has adopted a policy which includes subsection 002.26 among those subsections of Section 002 which apply to interexchange carriers. Neb. Admin. R. & Regs. Section 002.26 provides in pertinent part:

002.26A. No valid sale, assignment or transfer of one or more exchanges can be affected by transfer of the physical properties, or the assignment of stock resulting in a change in controlling interest until a joint application requesting such change is **approved by the Commission...** [Emphasis added.]

002.26B. No two or more exchange carriers operating as a common carrier shall consolidate their properties, or any part thereof involving an exchange, into a single carrier, nor shall one or more exchange carriers acquire the whole or any part of the properties of another exchange carrier by the purchase of stock, securities, or by lease or in any like manner without first filing an application with and receiving from the Commission a certificate of convenience and necessity..." [Emphasis added.]

Pursuant to Neb. Rev. Stat. § 75-109, a "common carrier" is an entity furnishing communications services for hire in Nebraska intrastate commerce. Neb. Rev. Stat. § 75-604 provides that no entity may offer telecommunications services in the state of Nebraska without first receiving from the Commission a Certificate of Convenience and Necessity to provide such services. Therefore, the Commission's explicit prior approval for authority under § 75-146 concerning mergers, consolidations or transfers of control of common carriers applies only to those common carriers which are actually certificated to furnish telecommunications services in the state of Nebraska.

Similarly, Section 002.26 of the Regulations applies to "exchange carriers", which are defined under Section 001.010 of the Regulations as follows:

Exchange carrier shall mean a local exchange telephone company operating under authority of a certificate of public convenience and necessity engaged in providing access line service and related telecommunications service, regulated and unregulated, to the public. An exchange carrier may provide interexchange service as authorized by this Commission.

Again, it is the certificated carrier actively providing service in the state of Nebraska which is the entity whose consolidation or transfer of control requires prior approval by the Commission.

Accordingly, in determining the scope of the Commission's jurisdiction in transfer of control, consolidation and merger transactions, the Commission must focus on the entity which is certificated in the State and which is actually providing service in the State.

Once the Commission identifies the certificated entity, it must determine whether the transaction directly involves a merger or change of control of the certificated carrier. It is common for significant capital transactions, including mergers and acquisitions, to occur in an entity which is one or more levels "upstream" from the certificated entity. Often the certificated carrier is a subsidiary or affiliate of one or more larger entities which either provide services in other states or act as holding companies for one or more certificated carriers. Transactions at the holding company level or above do not typically involve a change in the actual ownership or control of the certificated carrier.

The explicit wording of the applicable Statutes and Regulations focuses on the state-certificated carrier rather than on the capital structure of an upstream entity. Therefore, so long as the transaction does not directly involve the securities of the state-certificated carrier, then a transaction at the holding company level or above would not fall within the scope of the Statutes or Regulations.

The following example illustrates one of several scenarios which would not fall within the scope of the Statutes or Regulations. Assume the existence of a common carrier certificated in Nebraska known as "Local Corp." All of the stock of Local Corp. is owned by Holding Corp., which is not a certificated carrier providing services in the State. Holding Corp. is a wholly-owned subsidiary of TeleCorp, a national telecommunications provider which is not certificated in the State and does not otherwise provide services in the State. If TeleCorp were to merge with another company, in this case Competition Corp., and the merger would involve the ownership of Holding Corp., but would maintain the survival and operation of Local Corp., there would be no direct change of the capital structure or ownership of Local Corp.'s stock, which would remain wholly-owned by Holding Corp. In this case, the explicit language of the Statutes and Regulations would not reach the upstream transaction involving TeleCorp, Competition Corp., and Holding Corp. because none of these entities were "com-

Application No. C-1746/PI-19

PAGE 5

mon carriers" or "exchange carriers" subject to the jurisdiction of the Commission pursuant to the Statutes or the Regulations; and the transaction did not directly involve the securities of the local certificated carrier, Local Corp.

The scope of the Commission's authority to exercise prior approval over certain capital transactions is also limited under an applicable ruling of the Supreme Court of the State of Nebraska entered in United Airlines, Inc. v. Nebraska State Railway Commission, 172 Neb. 784 (1961). In United Airlines, the Court found that where the business of a certificated common carrier is only "incidentally" involved in the State of Nebraska, and where such carrier's other business is national in character, the Commission does not have the power to extend its jurisdiction to financial transactions involving business activities of such carrier largely beyond the limits of the State of Nebraska. Pursuant to Nebraska statutes substantially similar to Neb. Rev. Stat. §§ 75-148 and 75-150, the Commission had sought to exercise its prior approval jurisdiction over United Airline's proposed capital transactions.

The Court concluded that while the language of the prior approval statute could be rationally applied to corporations whose business was "exclusively or largely restricted to Nebraska," to apply such language to a corporation like United, whose interests were only "incidentally involved" in the State, would be an unconstitutional burden on interstate commerce. The Court concluded that United's proposed transactions were not subject to the control of the State and that orders by the Commission requiring prior approval of such transactions were invalid as being "beyond the power" of the Commission.

It should be noted that United was not conducting its business in Nebraska through a separate subsidiary but, rather, was operating directly through its Delaware corporate entity, which was qualified to do business in Nebraska and was certificated to provide transportation services by the Commission. Therefore, the Court in United Airlines prohibited the Commission from exercising its jurisdiction over capital transactions involving a Nebraska certificated carrier which, on their face, would have appeared to be within the scope of the Commission's jurisdiction pursuant to the Statutes and the Regulations.

Application No. C-1746/PI-19

PAGE 6

Based upon the foregoing, the Commission is of the opinion and hereby finds that acquisitions, mergers or other transfers of control transactions by or directly involving certificated common carriers in the State of Nebraska are subject to the jurisdiction of the Commission. Acquisition, merger, or other change of control transactions involving holding companies or other parent entities one or more levels upstream from the Nebraska certificated common carriers, which holding companies and/or other upstream parent entities significantly engaged in interstate commerce beyond the borders of the State, and which transactions only indirectly affect the Nebraska certificated carrier, shall not be subject to Commission jurisdiction.

All future merger, acquisition and transfer of control transactions will be processed in accordance with the findings herein. Transactions directly involving a Nebraska certificated entity should be filed as an Application for Authorization. All other transactions should be reported to the Commission for informational purposes only.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that Docket C-1746/PI-19 be, and it is hereby, closed.

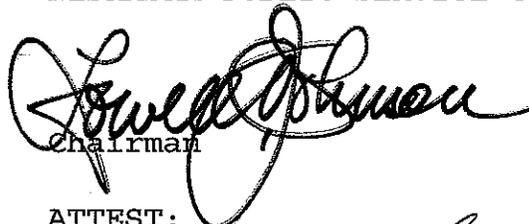
IT IS FURTHER ORDERED that all future applications filed pursuant to Neb. Rev. Stat. § 75-146 be accepted only when the transaction directly affects and involves the common carrier certificated to operate in Nebraska.

MADE AND ENTERED in Lincoln, Nebraska, on this 10th day of March, 1998.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

//s//Lowell C. Johnson
//s//Frank E. Landis
//s//Daniel G. Urwiller


Chairman

ATTEST:


Executive Director