

P-421/EI-89-860 DETERMINING DISCOVERY MOTIONS

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Darrel L. Peterson	Chair
Cynthia A. Kitlinski	Commissioner
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In the Matter of Northwestern Bell Telephone
Company's, d/b/a U S West Communications,
Proposed Incentive Regulation Plan

ISSUE DATE: March 15, 1990

DOCKET NO. P-421/EI-89-860

ORDER DETERMINING DISCOVERY
MOTIONS

PROCEDURAL HISTORY

On October 31, 1989 the Commission issued its NOTICE OF FILING AND ORDER ESTABLISHING PROCEDURES in the above-entitled matter. That Order notified potentially interested parties that Northwestern Bell Telephone Company, d/b/a U S West Communications (Northwestern Bell or the Company), had filed an incentive regulation plan under Minn. Stat. § 237.625 (Supp. 1989). Minn. Stat. § 237.625, subd. 2 (Supp. 1989) requires the Commission to conduct an expedited proceeding under Minn. Stat.

§ 237.61 (1988) to decide whether to approve the plan. The Order set forth the procedural framework the Commission would use to evaluate the proposed incentive plan.

The Order also required the Company and interested persons to respond to information requests within ten days of receipt, subject to the terms of a Protective Order limiting disclosure of proprietary information, to be issued later. The Protective Order was duly issued on December 21, 1989.

On March 7, 1990 the Commission met to consider the following motions regarding the scope of discovery in this proceeding:

1. McCaw Cellular's motion to compel the Company to provide cost information on rates for three services: cellular interconnection, Direct Inward Dial Service, and Extended Area Service;
2. McCaw Cellular's motion to compel the Company to provide information on a switch modernization program implemented in Oregon and Washington;
3. The Company's motion to limit McCaw Cellular's participation in the incentive plan proceeding;

4. The Company's motion to amend the Protective Order to limit disclosure of certain information to regulatory agencies only;
5. The Department of Public Service's motion to compel the Company to provide specified information and copies of documents regarding the operations of U S West, Inc. as they relate to the Minnesota jurisdiction, particularly the Company's budget forecasts, assumptions, and strategic and financial plans.
6. The Company's and McCaw Cellular's motions to assess against the other party the costs and attorneys' fees they incurred in bringing and defending these motions against one another.

FINDINGS AND CONCLUSIONS

The Applicable Legal Standard

The Commission's rules of practice and procedure, Minn. Rules, parts 7830.0100 through 7830.4400, do not address the scope of discovery in Commission proceedings. By statute, however, the Commission has broad authority to require regulated utilities to produce books and documents, to require copies thereof, and to compel the sworn testimony of utilities' officers, agents, and employees regarding their business and affairs. Minn. Stat. § 216A.05, subd. 3 (1988).

The statute provides for the Commission to exercise its subpoena/document production powers in the same manner as the district court exercises its subpoena powers. The Commission therefore concludes it would be reasonable to use the discovery provisions of the Minnesota Rules of Civil Procedure as a guide in determining the appropriate scope of discovery in this proceeding. Those rules provide as follows:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if that information appears reasonably calculated to lead to the discovery of admissible evidence.

Minn. R. Civ. P. 26.02 (a).

The rules also allow the court to limit discovery under the following circumstances:

- (1) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is either more convenient, less burdensome, or less expensive;
- (2) the party seeking discovery has had ample opportunity by discovery in the action to

obtain the information sought; or

- (3) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.

Minn. R. Civ. P. 26.02 (a) (1)-(3).

Finally, the rules authorize the court to fashion a protective order upon a showing of good cause to protect a person from whom discovery is sought against annoyance, embarrassment, oppression, or undue burden or expense. The court has broad discretion over the terms of such an Order. Minn. R. Civ. P. 26.03.

The Commission will apply the standards of the Rules of Civil Procedure to determine the discovery motions at issue. Each motion will be addressed in turn.

McCaw Cellular's Motion to Compel Production of Cost Studies Regarding Three Services

McCaw Cellular (McCaw) asked the Commission to order the Company to produce cost studies relating to three services: cellular interconnection, Direct Inward Dial Service, and Extended Area Service. McCaw maintained this information was necessary to determine whether these three services were properly priced. McCaw also alleged the cost studies might tend to prove that the Company's costs were generally declining, reducing the Company's risks and reducing the potential benefit to ratepayers of the proposed incentive plan.

The Commission finds that the cost studies sought are not relevant to the issues in this proceeding and are not reasonably likely to lead to the discovery of relevant evidence. The issues in this proceeding -- the appropriateness of the Company's existing rates and the appropriateness of the proposed incentive plan -- must be examined from a much broader perspective than the one reflected in this information request.

The Commission's examination of existing rates in this proceeding must focus on rates in the aggregate, not on rates and costs for individual services. The expedited statutory time frame simply does not allow the sort of detailed examination of individual rates typically conducted in the rate design phase of a general rate case, for example. The issue here is whether the Company's rates are generally appropriate in relation to its overall revenue requirement, not whether all individual rates are properly set.

Although adopting the plan would preclude the Commission from ordering the Company to initiate a general rate case for the life of the plan, it would not preclude an investigation into individual rates under Minn. Stat. § 237.081, subd. 1a (Supp. 1989). The Commission therefore concludes that detailed information on the costs of providing the three individual services would not be helpful in evaluating the appropriateness of the Company's rates for purposes of this proceeding.

Similarly, the Commission does not believe cost studies on these three services would be helpful in determining whether the Company's overall costs are declining. The services at issue are discrete, do not constitute a significant portion of the Company's revenues, and are not representative of the Company's services as a whole. The Commission will therefore deny McCaw's motion to compel

disclose of these cost studies on relevance grounds.

McCaw Cellular's Motion to Compel Disclosure of Information on Project Avalanche

McCaw also sought disclosure of detailed information regarding Project Avalanche, a switch modernization program conducted by U S West in Washington and Oregon from 1985 through 1989. McCaw was especially interested in cost information, in the degree of similarity between Project Avalanche and the rural modernization program included in the Company's proposed incentive plan, and in the authorized rate of return for the Washington and Oregon companies during Project Avalanche.

The Commission finds that detailed information about Project Avalanche, and informed comparisons between that project and the Company's proposed modernization program for Minnesota, would be relevant in this proceeding. One of the key benefits the Company claims for its incentive plan is that it would accelerate the Company's switch modernization program. Without the incentive plan, the Company does not plan to modernize all Minnesota switching facilities until after the year 2000. With the incentive plan, the Company will modernize all Minnesota switching facilities by the end of calendar year 1994. Switch modernization will benefit ratepayers by providing custom calling, greater clarity in voice transmission, greater accuracy in data transmission, faster call completion, faster Touch Tone signal processing, and access to multiple long distance carriers.

McCaw properly points out that the Company's switch modernization schedule is not wholly within its discretion, that the reasonableness of its timetable for upgrading its Minnesota system is within the purview of the Commission. The reasonableness of the Company's non-incentive plan modernization timetable, and the costs modernization will entail, are key issues in this proceeding. If, for example, the facts should show that the costs of modernization do not justify delaying modernization past the year 2000 in any case, this would clearly affect the Commission's evaluation of the appropriateness of the proposed plan. The Commission will therefore grant McCaw's motion to compel discovery of information regarding Project Avalanche.

Northwestern Bell's Motion to Limit McCaw's Participation in this Proceeding

Northwestern Bell has moved to limit McCaw's participation in this proceeding to issues directly affecting the interests it claimed in its intervention petition -- protecting its tariffed contractual relations with Northwestern Bell. The Company claims this is appropriate under the Commission's rules of practice and procedure, Minn. Rules, part 7830.2400. The Company also asserts it is necessary to preserve the integrity of this proceeding, claiming McCaw's extensive discovery activities are a result and a reflection of an alleged corporate goal to harass Northwestern Bell. The Company pointed to statements attributed by Forbes magazine to McCaw's founder as evidence of this corporate policy of harassment. The Commission will deny the motion.

First of all, the limitation on intervenor participation set forth in the rules of practice and procedure is not directly applicable here. The incentive plan statute requires the use of a less formal proceeding, an "expedited proceeding" as described in Minn. Stat. § 237.61 (1988), rather than the contested case proceeding envisioned in the rules. The Commission's NOTICE OF FILING AND ORDER ESTABLISHING PROCEDURES carried out that statutory mandate by allowing persons

to participate in the proceeding either by filing intervention petitions, as McCaw did, or by filing declaration of interest forms, which were attached to the notice and order. Persons filing declaration of interest forms were not required to state the nature and extent of their interest in the proceeding. It would be anomalous to limit McCaw's participation in this proceeding because it chose a more formal method of electing to participate than other participants.

The allegation that McCaw is abusing Commission proceedings by using them to harass Northwestern Bell is a more serious concern, but one which the Commission finds has no factual basis. McCaw is clearly playing an active role in this proceeding. It has served Northwestern Bell with numerous information requests. None of these requests has been shown to be frivolous, however. In fact, as McCaw has pointed out, much of the information it has received from the Company has been cited in other parties' preliminary comments on the proposed incentive plan. The Company has not shown that McCaw's conduct in this proceeding has been abusive or oppressive. The Commission will therefore deny the motion to limit McCaw's participation in this proceeding.

"Interested Person" Status Conferred by Filing Either Declaration of Interest or Petition to Intervene

Minn. Stat. § 237.61 (1988), dealing with expedited proceedings, refers to persons participating in such proceedings as "interested persons" rather than parties, intervenors, or similar terms. For purposes of this proceeding, the Commission hereby clarifies that persons who have filed declarations of interest indicating their intention to become "interested persons" and persons who have filed petitions to intervene are "interested persons" and have identical rights, privileges, and duties in this proceeding.

Northwestern Bell's Motion to Amend the Protective Order

Northwestern Bell has asked the Commission to amend the Protective Order to limit disclosure of strategic financial and business planning information to regulatory agencies only. The Company maintains that broader disclosure might impede the Company's ability to compete and might expose the Company to liability under the federal securities laws. The Commission sees no need to amend the Protective Order at present and will deny the motion without prejudice.

The Commission will entertain a similar motion at a later date, should the Company receive a specific information request posing the risks described above. The Commission expects that any such motion would articulate clear standards for defining the type of information the Company seeks to protect and would include proposed procedures for limiting disclosure previously used in this or other jurisdictions.

The Commission is unconvinced that disclosure of strategic planning information under the terms of the existing Protective Order would expose the Company to securities laws violations. The Company relies on a January 13, 1984 Securities Exchange Commission statement, Release No. 33-6504, which provides in pertinent part as follows:

The antifraud provisions of the federal securities laws apply to all company

statements that can reasonably be expected to reach investors and the trading markets, whoever the intended primary audience. Thus, as with any communications to investors, such statements should not be materially misleading, as the result of either misstatement or omission. To the extent that the standard of accuracy and completeness embodied in the antifraud provisions is not met, the company and any person responsible for the statements may be held liable under the federal securities laws Public companies and their spokesmen need to be mindful of these obligations under the federal securities laws when making statements that can reasonably be expected to be made known to the market. Examples of such statements are statements made in or concerning rate filings or other publicly available filings with government agencies

Clearly, information provided under the Protective Order would not constitute a "publicly available filing" and could not reasonably be expected to reach investors and the trading market. Such material should be free of misstatements and materially misleading information in any case. The Commission therefore sees no reasonable likelihood that the Company would incur liability under the federal securities laws for disclosing requested information under the Protective Order.

The Company's concern about potential disclosure of sensitive information to competitors causes the Commission greater concern. The Protective Order was drafted with this concern in mind, however, and essentially limits the disclosure of sensitive information to competitors' attorneys and their technical experts. It explicitly prohibits disclosure of such information to persons who could use it for any purpose unrelated to this proceeding. To date, the Company has provided no evidence that the safeguards incorporated into the Protective Order have failed or are likely to do so. The Commission will therefore deny this motion, with the understanding that the Company is free to renew it if experience shows that the Protective Order provides inadequate protection or if the Company believes itself to be in imminent danger of specific highly confidential information falling into the wrong hands.

The Department of Public Service's Motion to Compel Discovery and the Production of Documents

The Department of Public Service (the Department) has brought a motion to compel discovery and the production of documents regarding U S West's financial and business plans and forecasts for its Minnesota operations. The Company responds that it has provided the information in derivative form in other formats, and that the Department has not demonstrated a need for access to and copies of documents relating to the Company's corporate operations as a whole. The Company maintains that the documents sought by the Department contain highly confidential information, little of which relates to its Minnesota operations.

The Commission agrees with the Department that discovery should be allowed. Without access to corporate level documents, the Department cannot verify Company explanations of affiliated transactions, expense allocations between the 14 states, long and short term earnings projections, long and short term commitment to investment in the Minnesota network, and similar matters. Apart from the verification issue, the Department needs these documents to provide a cohesive presentation on these issues, all of which are highly relevant to the Company's request that the Commission insulate its overall earnings from general rate review for the next four years. Without

the documents it seeks, the Department would be reduced to piecing together information from various sources in an attempt to answer its questions. This would be undesirable in any case, but is particularly unworkable in the context of an expedited proceeding.

The Commission will therefore grant the Department's motion. The Commission will also approve the Department's proposed procedure for disclosure, which gives the Company an opportunity to object to disclosure of the information to other parties before such disclosure takes place. Finally, the Commission will grant the Department's motion that it be allowed to modify positions taken in its preliminary incentive plan comments, should the information gained as a result of this Order so dictate, in its secondary or reply comments. The Commission will establish a due date for such comments by all parties by Order following review of all parties' preliminary comments.

Northwestern Bell's and McCaw's Motions for Costs and Attorneys' Fees

Both Northwestern Bell and McCaw have brought motions asking the Commission to assess against the other party the costs and attorneys' fees they incurred in bringing and defending their motions against one another. The Commission does not have statutory authority to assess costs and attorneys' fees in such cases and will deny the motions.

ORDER

1. McCaw Cellular's motion to compel the Company to provide cost information on rates for cellular interconnection services, Direct Inward Dial Service, and Extended Area Service is denied.
2. McCaw Cellular's motion to compel the Company to provide information on Project Avalanche is granted.
3. Northwestern Bell's motion to limit McCaw Cellular's participation in this proceeding is denied.
4. Northwestern Bell's motion to amend the Protective Order to limit disclosure of certain information to regulatory agencies only is denied without prejudice.
5. The Department of Public Service's motion to compel the Company to provide specified information and copies of documents regarding the operations of U S West, Inc. as they relate to the Minnesota jurisdiction is granted. The Company shall supply the information and documents under the terms proposed by the Department.
6. The Department may modify positions taken in its preliminary incentive plan comments, should the information gained as a result of this Order so dictate, in its secondary or reply comments.
7. Northwestern Bell's and McCaw Cellular's motions for costs and attorneys' fees are denied.

8. Persons who have filed declarations of interest indicating their intent to become "interested persons" and persons who have filed successful petitions to intervene are "interested persons" for purposes of this proceeding and have identical rights, privileges, and duties.
9. The official service list for this proceeding is attached to this Order.
10. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Lee Larson
Acting Executive Secretary

(S E A L)