

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

**IN THE MATTER OF THE APPLICATION
OF E•SPIRE COMMUNICATIONS, INC.,
GST TELECOM, INC., AT&T
COMMUNICATIONS OF THE MOUNTAIN
STATES, INC., AND MCI WORLDCOM,
INC., FOR A RULEMAKING TO ADOPT
AN INTER-CARRIER COMPLAINT RULE.**

Utility Case No. 3227

FINAL ORDER ADOPTING 17.11.20 NMAC

THIS MATTER comes before the New Mexico Public Regulation Commission (“Commission”) upon the Notice of Proposed Rulemaking (“NOPR”) issued on May 19, 2000, and on the record developed in this case.

STATEMENT OF THE CASE

On December 21, 1999, e•spire Communications, Inc., and ACSI Local Switched Services, Inc., d/b/a e•spire Communications, Inc. (“e•spire”), GST Telecom, Inc. (“GST”), AT&T Communications of the Mountain States, Inc. (“AT&T”), and MCI WORLDCOM, Inc. (“MCI”), filed an Application for a Rulemaking to Adopt an Inter-Carrier Complaint Procedure Rule (“Application”). A proposed form of rule was attached as an appendix to the Application. As described by the applicants, the proposed rule “would provide a complaint procedure for disputes between telephone companies.”

The Commission issued a Procedural Order on February 2, 2000. That Order required interested persons and the Commission Staff (“Staff”) to file responses to the Application by no later than February 15, 2000.

On February 15, 2000, Staff and U S West Communications, Inc. (“U S West”) filed Responses to the Application. On February 29, 2000, e•spire and the other joint Applicants filed a Reply to the Staff and U S West Responses.

The Commission issued its NOPR on May 19, 2000. The NOPR proposed a rule that would establish an expedited complaint procedure for disputes between telecommunications providers, as required by House Bill 400 (“HB 400”). HB 400 (being 2000 N.M. Laws, Ch. 102) had been signed into law on March 7, 2000. Among other things, HB 400 requires that complaints between telecommunications providers be resolved within sixty days unless extended for good cause by the Commission or hearing examiner. See NMSA 1978, § 8-8-12.1.¹ The rule proposed in this case was issued pursuant to this authority. The NOPR also set the dates for the filing of written comments and scheduled a hearing for oral comments on August 1, 2000.

Affidavits of timely publication were filed with the Commission by the Albuquerque Journal on May 26, 2000, and the Las Cruces Sun News on June 13, 2000.

Comments on the proposed rule were filed in accordance with the NOPR on June 13, 2000 by U S West and, jointly, by e•spire, AT&T, GST, MCI and Sprint Communications Company (“Joint Commentors”). The Joint Commentors filed a Reply to U S West’s Comments on June 27, 2000. On that same date, the Attorney General of New Mexico (“AG”) filed her Comments on Proposed Rules.

On July 31, 2000, the Commission issued an Order designated Elizabeth C. Hurst as Hearing Examiner for the purpose of presiding over the comment hearing on August 1, 2000.

The public comment hearing was held as scheduled on August 1, 2000. At that hearing, oral comments were received from e•spire, AT&T, U S West and Staff.

¹ The provision of HB 400 relating to the expediting of complaints between telecommunications providers was codified at NMSA 1978, § 8-8-12.1.

On August 8, 2000, the Commission issued a NOPR in Utility Case No. 3237 as a part of HB 400's mandate that the Commission adopt a rule that will "establish an expedited regulatory process for considering matters related to telecommunications services that are pending before the commission." Among other things, the NOPR in Case No. 3237 identified the rule proposed in this Case No. 3227 as one of the "other ongoing rulemaking proceedings aimed at streamlining existing procedures for handling telecommunications matters." As such, the Commission must adopt the rulemaking proposed in this case by the HB 400 deadline of January 1, 2001.

DISCUSSION

The Commission commends Staff and the participants in this case for their comments and participation in this case. Before proceeding to a discussion of the comments and the proposed rule, we note that the attached rule in its final form has been reconfigured and renumbered so that it conforms to the format for agency rules currently required by the New Mexico Commission of Public Records—State Records Center and Archives. References to particular sections of the rule are to those sections as presently numbered.

We have considered all of the written comments and oral comments of the parties. Staff, the Joint Commentors and the AG support, or do not object to, the rule as proposed. U S West suggests a number of changes to the proposed rule. For the reasons set out below, we adopt the rule in the form attached to this Order.

Section 17.11.20.7—Definition

U S West argues that the references to the federal Telecommunications Act of 1996, and related federal law, should be deleted because it would unduly extend the

applicability of this rule to areas where the Commission lacks jurisdiction. However, the Commission has broad authority, under both state and federal law, to resolve disputes between telecommunications carriers and to impose penalties, including fines. Moreover, while any given complaint filed with the Commission might be outside its jurisdiction, no rule can entirely prevent the filing of non-jurisdictional or other complaints without merit. As with other types of complaints, the Commission's review of complaints between telecommunications providers must of necessity include a consideration of the Commission's jurisdiction over the parties and subject matter of the complaint. And, as with other types of complaints, jurisdictional questions may be raised by any party or the Commission.

We will retain the definition as originally proposed.

Section 17.11.20.9—Right to File Expedited Complaint

U S West claims that this right is too broadly stated and should be restricted. This right, however, is conferred by HB 400, not by this or any other rule. Nor does the right to file an expedited complaint necessarily encompass a right to extraordinary or any other type of relief. The burden is on any complainant to establish that they are entitled to the relief they are seeking. At any rate, and as the Joint Commentors point out, the availability of expedited review of disputes between telecommunications providers is important to this transitional stage toward more effectively competitive markets. If normal business relations between the disputant carriers deteriorate, and if, as a complaint must demonstrate (see section 17.11.20.11), good faith negotiations have failed to resolve the disagreement, then the expedited procedures required by HB 400 and implemented by this rule may be necessary.

U S West’s recommendations will not be adopted.

Section 17.11.20.11—Contents of Expedited Complaint

Even though U S West supports the requirement that a complainant demonstrate that they have engaged in good faith negotiations with a respondent to resolve their disagreement, and that the parties failed to resolve the issue, it argues that this requirement needs clarification. The Commission concludes that no such clarification is necessary. “Good faith negotiations” includes any genuine striving to resolve differences in accordance with applicable rules. If, for example, an interconnection agreement contained dispute resolution procedures that had to be exhausted before other recourse could be sought, “good faith negotiations” in that context would necessarily include the exhaustion of such procedures.

In the event, after the Commission and affected carriers gain some experience under this rule, additional clarification is needed for the subject provision, U S West (now Qwest Corporation) and other interested persons may apply to the Commission for any revisions the applicant wishes to propose.

Section 17.11.20.12—Service of Notice of Intent and Complaint

U S West urges the Commission to add a requirement that it make preliminary jurisdictional and probable cause determinations for each complaint. In support of this suggestion, U S West cites the formal complaint procedures in the rule on Utility Division Procedures (17 NMAC 1.2.18.3). That rule, however, is derived from the complaint process established in the Public Utility Act (see NMSA 1978, § 62-10-1), which requires a probable cause determination. No such requirement exists in HB 400. While all complaints brought before the Commission are subject to review on

jurisdictional grounds, such review can be conducted in the ordinary course of considering a complaint. As noted earlier, jurisdictional questions can be raised by any party, and can be asserted in an answer, a motion, at the pre-hearing conference, or any other appropriate time.

Because HB 400 does not call for the preliminary determinations U S West advocates, they will not be added to the rule.

Section 17.11.20.13—Answer

Under this rule, respondents must satisfy, answer or respond to complaints within seven calendar days of delivery. U S West asks that this time be increased to ten calendar days. Seven days, claims U S West, is insufficient time for a response, especially in light of the unlimited time a complainant has to prepare its complaint. Although seven calendar days is a limited period, it must be viewed in the context of a statutorily-created expedited complaint process of only sixty days (unless extended for good cause). Additionally, because of the good-faith negotiation requirement described above, the prospect of an expedited complaint should not come as a complete surprise to a respondent. In any case, if seven days proves to be inadequate, a respondent retains the right to move for an appropriate extension of time.

The seven-calendar-day answer period should be adopted.

Section 17.11.20.14—Pre-Hearing Conference

The pre-hearing conference, says U S West, should be held no later than fifteen calendar days after the filing of the expedited complaint, instead of the ten calendar days proposed in the rule. U S West goes on to recommend that the hearing be permitted as late as forty days after the filing of the complaint, rather than thirty days. Allowing the

pre-hearing conference to be held within fifteen days would afford more time for parties, or the Commission or presiding officer, to address procedural and other issues that are typically handled in a pre-hearing conference. At the same time, the Commission or presiding officer could schedule a pre-hearing conference earlier than fifteen days if they deemed it necessary. U S West's revision should therefore be adopted.

However, pushing the mandatory time for a hearing to forty days would run the risk of cutting too short the time for parties to file post-hearing briefs and exceptions, and for the presiding officer and/or the Commission to reach a decision. Thirty calendar days is sufficient for this purpose.

U S West's concern about a "discretionary" hearing is unnecessary. Just as courts may render judgments on the pleadings and summary judgments without trials or hearings, so may the Commission enter orders without hearings if warranted by the law and the record. If, on the other hand, there are issues of fact to be resolved, due process—and this rule—will necessitate a hearing.

The rule will be revised in part as indicated.

Section 17.11.20.15—Recommended Decision

U S West's proposal that the recommended decision be issued within fifty days after the filing of the expedited complaint instead of forty-five, should be rejected for the reasons given above regarding its proposal for the holding of a hearing.

Section 17.11.20.17—Extension for Good Cause

Under § 8-8-12.1(C), "[e]ach complaint shall be resolved by the commission within sixty days unless extended for good cause by an order of the commission or hearing examiner that states with specificity the reasons and length of the extension."

The rule as initially proposed does not provide for an extension as allowed by this statutory provision. To give the rule the type of flexibility permitted by statute, we will insert a new section 17.11.20.17. That section will read as follows.

EXTENSION OF TIME FOR GOOD CAUSE: For good cause shown, the Commission or hearing examiner may extend the time for resolution of a complaint filed pursuant to this rule beyond sixty (60) days. An order for extension of time shall state with specificity the reasons for and length of the extension. Any such extension may, if appropriate, also include extensions of any other procedural deadlines established by this rule.

THE COMMISSION FINDS AND CONCLUDES:

1. The foregoing statements and discussion are hereby adopted as Findings and Conclusions of the Commission.
2. The Commission has jurisdiction over the parties and subject matter of this case.
3. It is in the public interest for 17.11.20 NMAC (Expedited Complaint Procedures) to be adopted as provided by this Order and as set out in Exhibit 1 to this Order.
4. The Commission has the jurisdiction and authority to adopt and issue this rule pursuant to NMSA 1978, Sections 8-8-4, 8-8-15 and 63-9A-8.2.
5. Due and proper notice has been given.

IT IS THEREFORE ORDERED:

- A. 17.11.20 NMAC is hereby adopted and approved as provided by this Order. As so adopted and approved, 17.11.20 is attached to this Order as Exhibit 1.
- B. 17.11.20 NMAC shall be published on or before December 29, 2000 in the New Mexico Register and shall be effective January 1, 2001.
- C. This Order is effective immediately.

D. Copies of this Order shall be served on all persons on the attached Certificate of Service.

E. This Docket is closed.

ISSUED under the Seal of the Commission at Santa Fe, New Mexico, this 12th day of December, 2000.

NEW MEXICO PUBLIC REGULATION COMMISSION

BILL POPE, CHAIRMAN

HERB H. HUGHES, VICE CHAIRMAN

JEROME D. BLOCK, COMMISSIONER

LYNDA M. LOVEJOY, COMMISSIONER

TONY SCHAEFER, COMMISSIONER