

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Commission, ) Application No. NUSF-26  
on its own motion, seeking to )  
establish a long-term universal ) PROGRESSION ORDER NO. 1  
service funding mechanism. )

Entered: July 23, 2002

APPEARANCES:

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BY THE COMMISSION:

On August 21, 2001, on its own motion, the Nebraska Public Service Commission (Commission) opened the above-captioned docket seeking to establish a long-term universal service funding mechanism. Notice of the application was published in The Daily Record, Omaha, Nebraska, on August 24, 2001, pursuant to the rules of the Commission. In the Commission's August 21, 2001 order, the Commission proposed, inter alia, that carriers comply with NUSF service quality requirements in order to receive NUSF funding.<sup>1</sup> On January 28, 2002, the Hearing Officer entered a prehearing conference order separating the issue relating to service quality, broke that issue down into three questions, and set this matter for hearing on February 14, 2002. Specifically, the Commission sought comment on three questions as follows:

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<sup>1</sup> See Question No. 6.4, 15(E).

1. Does the Commission currently have statutory authority to impose service quality standards as promulgated in Title 291, Chapter 5 upon all carriers seeking support? Please explain why or why not.
2. Should service quality standards be a condition obtaining funding from the NUSF?
3. What should the standards be, if any?

The Hearing Officer further ordered that briefs be filed to answer question one above. The other two questions, supra, were reserved for the February hearing. Answer briefs on question one were filed March 11, 2002, and post-hearing comments on questions two and three were filed on April 8, 2002 by Western Wireless, the Rural Independent Companies, and ALLTEL.

This order addresses all three questions relating to service quality rules for carriers receiving state NUSF support.

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

Mr. Pursley, Director of the NUSF gave department recommendations to the Commission. He recommended that the Commission develop a set of service quality rules that are competitively and technologically neutral and apply the rules to all eligible telecommunications carriers. He further recommended a joint effort between the Communications Department and NUSF Department to develop this set of rules. Mr. Pursley further stated that the Commission should apply service quality rules to the extent that the ETC is seeking or receiving support for such a service pursuant to Neb. Rev. Stat. § 86-1405. Carriers should not be subject to penalty under two different sets of rules, Mr. Pursley stated. Rather, carriers should be held to one set of standards. The NUSF Department should incorporate the Commission's service quality rules into the Commission's telecommunication rules and regulations by reference. Mr. Pursley further recommended that the penalty for not meeting the Commission's service quality rules should be administrative fines first, rather than the withholding of support. Mr. Pursley also recommended that the Commission adopt on an interim basis, those existing service quality rules that are technologically neutral and applicable to NUSF and then should direct the Communications and NUSF Departments to work jointly through the existing communications docket in C-2483 to develop possible rules and regulations. Finally, Mr. Pursley recommended the specific rules to be applied on an interim basis. Those rules

were marked and received into the record as Exhibit 3 without objection.

Mr. Ken Pfister testified on behalf of the Rural Independent Companies. He is vice president of strategic policy for Great Plains Communications. The Rural Independent Companies believe that the Commission has ample authority to implement service quality standards as a part of a Universal Service program in Nebraska. They further believe that the Commission should implement such standards consistent with the NUSF Act and the Telecommunications Act of 1996 (the Act). The first principle stated in the NUSF Act declares that "quality telecommunications and information services should be available at just, reasonable and affordable rates." In addition, Section 253(b) of the Act provides that states may impose requirements that are necessary and proper to preserve and advance universal service and safeguard consumer rights.

The Rural Independent Companies then recommended four specific areas where rules should be developed. First, all customers using a supported service should be assured that their provider has E911 capability. Second, they recommended that each carrier be required to maintain network standards to ensure that customers have service at all times. Third, they recommended that a technologically neutral network standard for any carrier equivalent to Neb. Admin. R. & Regs., title 291, chapter 5, §§ 002.12(a) and 002.12(c) be imposed. The rural companies further recommended that informal complaints serve as a barometer of overall service quality. Through this recommendation, consistent complaint standards should be applied. Finally, the Rural Independent Companies recommended that the Commission adopt a standard to assure availability of carrier subscriber information through both a white page listing and directory assistance except for customers who request exclusion from such listings.

Mr. Pfister further testified that the Rural Independent Companies disagreed with ALLTEL's position that the Commission should not withhold carrier's support because of inadequate service quality performance. The rural companies believe that the Commission should use the amount of support it distributes to ensure that any ETC in the state is meeting minimal service standards.

Mr. James Blundell testified on behalf of Western Wireless. Mr. Blundell testified that he was not sure what problem the Commission was anxious to resolve since there are no competitive ETCs receiving support. Western Wireless' suggestion would be that the Commission take a wait and see approach, as, in his opinion,

over-regulation could thwart competition. Moreover, Western Wireless believes that service quality rules are preempted in their application to wireless carriers pursuant to federal law.

Mr. Bill Ashburn testified on behalf of ALLTEL. ALLTEL believes that the Commission has the jurisdiction to incorporate some of its service quality standards for ETCs. Mr. Ashburn testified that the Commission should address the issues pertaining to service quality rules in C-2483 which is its retail service quality investigation docket. ALLTEL is concerned about double penalties and double standards. ALLTEL further does not support the withholding of funds as a penalty for failure to meet the Commission's service quality standards. Mr. Ashburn further stated that if the Commission did decide to withhold funds as a penalty, then the Commission should consider a probation period for ETCs which would establish a period of time within which ETCs could remedy missed standards before having their NUSF distributions withheld.

Mr. Robert Lanphier testified next on behalf of Qwest. Mr. Lanphier testified that Qwest believes that all telecommunications carriers should be held accountable to a common set of key service quality standards and that all ETCs should accept the same responsibilities of universal service including service quality standards. Qwest also believed that the Commission should not withhold support for failing to meet service quality standards. Qwest expressed concern regarding double or triple penalties for the same violation. Mr. Lanphier testified that the Commission could potential fine a carrier, withhold support, and in Qwest's case, subject it to penalties under the terms of the QPAP. Mr. Lanphier testified that the Commission should not permit the imposition of more than one penalty for the same violation. Mr. Lanphier agreed that the Commission can and should apply some interim rules by order until it adopts rules by way of a rulemaking procedure.

Mr. Pursley then reiterated the position of the department in light of the testimony.

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

### **ISSUE ONE:**

The Commission presented a legal question to the parties regarding its statutory authority to impose service quality rules similar to those promulgated in Neb. Admin. R. & Regs. Title 291, Chapter 5 upon all eligible telecommunications carriers (ETCs). The Commission received briefs from three parties: ALLTEL, the

Rural Independent Companies and Western Wireless. The Commission also received comments on this issue from Qwest in its testimony. All parties with the exception of Western Wireless responded that the Commission possesses the statutory authority to subject all ETCs including wireless ETCs to its service quality rules and regulations. ALLTEL argued that the Commission's statutory jurisdiction over ETCs is more appropriately exercised independent from the NUSF.

With respect to Question One, the Commission finds that it does possess statutory authority to impose service quality performance standards on those services for which any ETC receives money from the state fund. This question was further answered by the Legislature in the 2001-2002 session through the adoption of LB 1211.

The Commission as a constitutional agency derives its authority first from the Nebraska Constitution. Neb. Const., Art. IV, Sec. 20 provides that the "powers and duties of such commission shall include the regulation of rates, service and general control of common carriers as the Legislature may provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision." The Nebraska Constitution grants authority to the Commission for general control of common carriers, subject, however, to the Legislature's power to enact laws that specify the extent of authority the Commission may exercise.

Despite rate deregulation in 1986, Neb. Rev. Stat. § 86-803(7) provides that 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." Prior to 1986, the Commission regulated the entry of cellular providers into the marketplace. This changed in 1986 when the Legislature provided in § 86-808 that cellular providers were exempt from regulation. This exemption was changed in part in 1997 with the establishment of the NUSF. Legislative Bill 660 amended § 75-109 and added subsection (2) to § 86-808 providing that the Commission may require every provider of telecommunications services to contribute to any universal service mechanism established by the Commission. Moreover, in the NUSF Act, the Legislature listed policies and goals for the Commission to obtain. First among them was the requirement that the Commission ensure that "quality telecommunications and information services should be available at just, reasonable and affordable rates."

The evolution of the NUSF Act continued with the passage of LB 1285, section 23, which amended § 86-1405(1) so that the Commission possessed authority to issue orders governing the operation of the NUSF, including collections and disbursements from the fund and the conditions with which all ETCs are to comply in order to qualify for NUSF support. In 2001, LB 389 added "Notwithstanding the provisions of section 86-808" to the provisions of § 86-1405 to make clear that the Commission's jurisdiction over ETCs superceded its more general limitations in § 86-808 on the regulation of wireless providers. Neb. Rev. Stat. § 86-1403(4) of the NUSF Act, was also revised so that it was clear that a telecommunications company meant any corporation offering telecommunications services for hire in Nebraska intrastate commerce without regard to whether such company held a certificate or permit from the commission. These changes were specifically designed to incorporate wireless entities and other telecommunications carriers not holding a certificate or permit from this Commission into the universal service scheme. Finally, in 2002, the Legislature further amended § 86-1405, which now reads as follows:

Notwithstanding the provisions of section 86-808, in addition to other provisions of the act, and to the extent not prohibited by federal law, the commission: (a) shall have the power to subject eligible telecommunications companies to service quality, customer service and billing regulations. Such regulations shall apply only to the extent of any telecommunications services or offerings made by the eligible telecommunications company which are eligible for support by the fund. The commission shall be reimbursed from the fund for all costs related to drafting, implementing and enforcing the regulations and any other services provided on behalf of customers pursuant to this subdivision (LB 1211).

While our primary concern is with state law, we will briefly address Western Wireless' preemption argument. Section 253(b) in the Telecommunications Act of 1996, gives the state regulatory authority to impose on "a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." We do not believe that Congress intended to preempt the states ability to safeguard the rights of consumers through section 332.

Moreover, we do not find *Bastien v. AT&T* to be controlling law in this situation. It is well-established that a state regulatory authority can define ETC eligibility criteria in addition to the federal criteria, for the purposes of state funds, so long as it does not burden the federal universal service mechanism. See, e.g., *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 418 (5th Cir. 1999). State service quality rules do not have any effect upon the federal universal service mechanism. Rather, such rules would only impact the possible withholding of state funds in the event that minimal service quality performance is not achieved. We find that it is in the public interest to ensure that monies paid into the NUSF by the telecommunications carriers, and in particular by consumers, are spent to ensure quality telecommunication services are being provided to consumers throughout the state.

Neb. Rev. Stat. § 75-110 provides that the Commission shall adopt regulations as it deems necessary to regulate persons within its jurisdiction. We find that the promulgation and application of service quality rules and application of those rules upon all ETCs for the purpose of receiving support from the state NUSF fund, is consistent with the spirit and principles set forth in the federal Telecommunications Act and the state NUSF Act.

Based on the foregoing, we find that the Commission does possess the statutory authority to impose service quality standards on all ETCs including wireless carriers as a condition precedent to the receipt of state NUSF support.

## ISSUE TWO

We next turn to the propriety of requiring the achievement of certain service quality levels as a condition to obtaining and receiving support from the NUSF. This issue was listed as issue or question number two provided *supra*.

As was made clear throughout the proceeding, the Commission's current service quality rules codified in Neb. Admin. R. & Regs., title 291, ch. 5 apply to all "basic local exchange carriers." Although all ETCs must offer some level of basic local service as it is defined in Section 214 of the Act, companies like Western Wireless do not describe themselves as "basic local exchange carriers." Specifically, "Exchange Carrier" as defined in the Commission's Telecommunications Rules and Regulations is "[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 or unregulated, to the public. An exchange carrier may provide interexchange service as authorized by this Commission." Neb. Admin. R. & Regs., title 291, chapter 5, section 001.010. Wireless carriers are not required by this Commission to apply for or receive a Certificate of Public Convenience and Necessity, therefore, wireless carriers are not "local exchange" carriers as defined under section 001.010 and other portions of chapter 5.

All commenters, with some limited exception by Western Wireless, were in favor of the Commission applying service quality rules upon all eligible telecommunications carriers. Western Wireless agreed that all ETCs should be subject to the same NUSF rules whether or not the rules were of ETC eligibility or service quality for NUSF purposes. However, Western Wireless continued to argue that it would be unlawful to require the imposition of the same set of regulatory requirements on competitive ETCs as currently imposed on incumbents. Western Wireless further questioned the Commission's timing and argued that the Commission was drafting a solution in search of a problem. Western Wireless testified that to its knowledge there were no CETC's receiving state support in the marketplace. Western Wireless further recommended that the Commission take a wait and see approach.

ALLTEL took the position that the Commission should not enforce its service quality rules through an NUSF mechanism. ALLTEL sought separate enforcement through fines only.

The Independent companies took the position that enforcement of service quality rules through the withholding of NUSF support was proper and the most appropriate method of enforcement.

The Commission finds that the applicability of its service quality regulations should be expanded, where appropriate, so that there is no question that service quality rules apply to all eligible telecommunications carriers operating within the state.

With respect to the position of Western Wireless, the Commission finds that it is most appropriate to take a proactive approach when it comes to the quality of service provided by telecommunications carriers. Contrary to what Western Wireless believes, the Commission's service quality investigation is not aimed solely at Western Wireless. Rather, it is significant to note that the Commission's ETC order entered November 21, 2000, already found that supported carrier's responsibilities included following service quality standards established by federal or state law, or established by order of the Commission either generally or



by the Universal Service Department within the Commission.<sup>2</sup> To this end, the Commission simply desires to ensure that all ETCs, whether wireless or wireline, are aware of any service quality conditions in connection with receipt of NUSF funds. The Commission's service quality rules should be codified in a competitively neutral set of rules and regulations. For the present time, the Commission finds that service quality rules are relevant to the services being offered for which state NUSF support is sought. The applicability of service quality rules and enforcement from noncompliance of the Commission's service quality rules should be limited to those lines for which the wireless company requests NUSF support.

With respect to the position of ALLTEL which suggested that the Commission establish a probationary period in which carriers can reach compliance with the Commission's rules prior to penalty. The Commission declines to adopt such a probation period rule for the present time. The Commission expects all carriers to ensure that some minimal level of quality is being obtained at all times. This expectation would not be furthered by the addition of a probationary period whereby carriers can dip below the acceptable level of service with the knowledge that it would be without penalty.

Upon consideration of the testimony and comments submitted by ALLTEL, Qwest and the Rural Independent Companies, the Commission finds that it would not be inappropriate to withhold NUSF support to a carrier which is providing insufficient service in violation of service quality rules and standards. The Commission understands the concerns raised by ALLTEL and Qwest with respect to double penalties, but finds that the withholding of support is a tool envisioned by Neb. Rev. Stat. § 86-1405 in addition to other administrative penalties, particularly in cases where the fine amount would not deter future noncompliance. The Commission agrees with the comments filed by Western Wireless that the imposition of double penalties would not necessarily equate with double jeopardy. The default penalty for inadequate service quality performance, however, pursuant to Mr. Pursley's recommendation should be an administrative fine pursuant to Neb. Rev. Stat. § 75-156.

### **ISSUE THREE**

Finally, the Commission turns to the question of which service quality standards should apply to all ETCs in the interim and on a

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<sup>2</sup> In the Matter of the Application of GCC License Company (Western Wireless), Issaquah, Washington, seeking designation as an eligible telecommunications carrier that may receive Universal Service Support, ORDER GRANTING ETC STATUS (November 21, 2000) at 11.

permanent basis. The Commission agrees with the commenters that the rules should be applied in a competitively neutral manner.

Mr. Jeff Pursley provided a list of rules from Neb. Admin. R. & Regs., title 291, chapter 5 that he recommended the Commission incorporate by reference and impose upon all ETCs pending the adoption of new rules and regulations. This list was offered and accepted into the record as Exhibit 3. The list included the following:

- a. 002.02 Adequacy of Service
  - i. Section 002.02F should not apply because the standard is not technologically neutral.
- b. 002.03 Interruption of Service
- c. 002.04 Trouble Reporting
- d. 002.05 Emergency Operations and Power.
  - i. 002.05C should be modified to apply to connections between customer and central office.
- e. 002.07 Intercept
- f. 002.08 Maintenance Program
- g. 002.10 Tests
- h. 002.11 Answer Time Objectives
- i. 002.12 Dial Service Objectives
  - i. 002.12A Should not apply. This standard is not technologically neutral as written.
  - ii. 002.12D Should not apply. EAS is not a supported service.
- j. 002.13 Loop Transmission Objectives.
  - i. 002.13A-002.13F Should not apply. These standards are not technologically neutral.
- k. 002.15 Application for Service.
- l. 002.16 Refusal of Service and Disconnection.
  - i. 002.16B3 and 002.16B4 Should not apply. This standard is not relevant for NUSF purposes.
- m. 002.17 Customer Billing
- n. 002.18 Information
- o. 002.19 Rules Governing Credits and Deposits
- p. 002.21 Tariff to be Filed with the Commission
  - i. 002.21C Should not apply. EAS is not a Supported Service.
- q. 002.23 Records
- r. 002.25 Service Area
- s. 002.32 Notice of Rate Changes
- t. 002.48 Blocking of 900, 960, 976

Upon consideration of the evidence and comments provided, the Commission finds in the interim, it should designate by this order,

the following rules from Neb. Admin. R. & Regs., Title 291, chapter 5, which should be applied to all ETCs regardless of technology:

**002.02 Adequacy of Service:** The Commission finds that section 002.02 should apply generally. However, section 002.02F should not be made applicable for NUSF purposes to ETCs because it is not technologically neutral as written.

**002.03 Interruption of Service** The Commission believes that this section can and should be applied to all ETCs regardless of technology.

**002.04 Trouble Reporting:** The Commission believes that this section can and should be applied to all ETCs regardless of technology.

**02.05 Emergency Operations and Power:** The Commission finds that this section should apply generally. However, Section 002.05C should be modified to apply to connections between customer and central office.

**02.07 Intercept:** The Commission agrees with Western Wireless that this section should not be applied for NUSF purposes to ETCs for the present time.

**02.08 Maintenance Program:** The Commission finds that this section should be applied to all ETCs regardless of technology.

**02.10 Tests:** The Commission finds that this section should be applied to all ETCs regardless of technology.

**02.11 Answer Time Objectives:** The Commission agrees with Western Wireless that this section should not be applied for NUSF purposes to ETCs at the present time.

**002.12 Dial Service Objectives:** The Commission finds that this section should apply to all ETCs including wireless ETCs however, the Commission agrees with Western Wireless that 002.12A should not apply because this standard is not technologically neutral as written. The Commission further finds that 002.12D should not apply.

**002.13 Loop Transmission Objectives:** The Commission finds as a general matter that this rule should be applied. However, sections 002.13A-002.13F should not apply for NUSF purposes to ETCs.

**002.15 Application for Service:** The Commission finds that this rule should apply to all ETCs regardless of technology.

**002.16 Refusal of Service and Disconnection:** The Commission finds that this rule should apply generally. However, sections 002.16B3 and 002.16B4 should not apply because this standard is not relevant for NUSF purposes.

**002.17 Customer Billing:** The Commission finds that this section should apply to all ETCs regardless of technology.

**002.18 Information:** The Commission finds that this section should apply to all ETCs regardless of technology.

**002.19 Rules Governing Credits and Deposits:** The Commission finds that this section should apply to all ETCs regardless of technology.

**002.21 Tariff to be Filed with the Commission:** The Commission finds that this section should apply to all ETCs regardless of technology. The Commission finds, however, that section 002.21C should not apply because EAS is not a Supported Service.

**002.23 Records:** The Commission finds that this section should apply to all ETCs regardless of technology.

**002.25 Service Area:** The Commission finds that this section should apply to all ETCs regardless of technology.

**002.32 Notice of Rate Changes:** The Commission finds that this section should apply to all ETCs regardless of technology. The Commission will not hear challenges to rate changes unless provided for by law.

**002.48 Blocking of 900, 960, 976:** The Commission finds that this section should apply to all ETCs regardless of technology.

The Commission further finds that an "exchange carrier" in the context of the aforementioned rules means an ETC for the purposes of receiving NUSF support. An "exchange area" should have the same meaning as "service area" which the Commission defined in Rule and Regulation No. 150. Finally, for the purpose of the rules listed above, "access line" means the facility that provides a link to or from a customer's location to the serving switch.

With respect to the Commission's long term plan for a rulemaking, the Commission directs the NUSF Director and the Communications Director to collaborate on and propose service quality standards consistent with the above findings that upon adoption will be applied to all ETCs equally. The Commission further directs the NUSF Department and the Communications Department to work together in a rulemaking proceeding and propose a set of standards in conjunction with the service quality standards proposed in Commission Application No. C-2483.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the interim rules referenced above and to the extent described herein be applied to all ETCs regardless of technology and subject to enforcement by NUSF Department and the Communications Department Telecommunications Rules and Regulations.

IT IS FURTHER ORDERED that the NUSF Department and Communications Department collaborate on proposed service quality rules for a future Commission rulemaking.

MADE AND ENTERED at Lincoln, Nebraska, this 23rd day of July, 2002.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chair

ATTEST:

Executive Director