BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Commission, on its own motion, to make adjustments to the Universal Service Fund mechanism established in NUSF-26. Waiver request received from Elsie Communications and Dalton Telephone Company.	)	Application No. NUSF-50 DENIED Entered: May 12, 2009

BY THE COMMISSION:

By application filed February 5, 2009, Dalton Telephone Company (Dalton) and Elsie Communications (Elsie) jointly filed an application seeking a waiver of the state universal service fund mechanism (NUSF) established in NUSF-26 and amended in part by the Commission's orders in the above-captioned docket. Notice of the waiver request was published in the Daily Record, Omaha, Nebraska on February 9, 2009. No protests or interventions were filed.

On March 24, 2009, the Hearing Officer entered a procedural order requiring pre-filed testimony. The pre-filed testimony and exhibits were made part of the record at the hearing. The Commission held a hearing on the waiver request on April 14, 2009 in Lincoln, Nebraska. Mr. Paul Schudel appeared on behalf of Elsie and Dalton. Ms. Shana Knutson appeared on behalf of the Commission staff.

In support of the application, Elsie and Dalton called two witnesses, Mr. David Shipley, Western Regional Manager and Director of Cable TV and Video Operations for Signal Telecom Partners and Vice President and General Manager of Elsie and Dalton, and Mr. Jeffrey Pursley, a consultant advising Elsie and Dalton.

Mr. Shipley testified that Elsie and Dalton are both in the process of increasing local residential and business rates. In his opinion, Elsie and Dalton meet the criteria which make them eligible to request a waiver. Mr. Shipley was not with Signal Telecom Partners when Elsie and Dalton requested and received the FUSF imputation waiver in 2007.

Mr. Pursley is a consultant with the firm of Parrish, Blessing and Associates. Mr. Pursley was formerly the Director of the Commission's Universal Service Fund Department from 1999 to 2008. Mr. Pursley testified that the facts that were the basis underlying the initial waiver request have not changed.

He testified the two companies experienced a reduction in support due to the FUSF imputation and the companies were uniquely impacted by the timing of their acquisition as compared with the Commission approval of the FUSF imputation. Mr. Pursley suggested that the Commission refrain from creating a blanket policy with respect to waivers that generally disfavor such requests, and instead consider each waiver request on its own merits. Mr. Pursley testified in opposition to updating the criteria because new companies may then become eligible to make a waiver request. Mr. Pursley did not think it was likely that Elsie and Dalton would earn more than a 12 percent (12%) rate of return during the five (5) year period for which this waiver request would apply.

Mr. Pursley further testified that Elsie and Dalton are seeking this request for five (5) years to allow the acquisition of the debt to pass. Mr. Pursley agreed that the amount of debt taken on by the companies was at the companies' own discretion. The debt assumed is not reflected on the regulated books which make up the information contained within the NUSF-EARN Forms filed with the Commission both on a historic and forecasted basis. The amount of the debt acquired by the companies totaled approximately $13.5 million. The pay-down on the debt has been slightly over $3 million since the debt was originally incurred.

On questioning, Mr. Pursley stated that he did not know why the companies did not try to increase revenue from local rates prior to this year since he was hired mid-January of 2009. However, Mr. Pursley testified that he counseled the companies to do so.

He testified that he spoke with other affected companies regarding the application to let them know they would be impacted if the waiver request were granted by the Commission. Mr. Pursley testified that each of the 14 companies impacted would still see an increase averaging 8 percent (8%) from 2008 to 2009.

Mr. Tyler Frost and Ms. Sue Vanicek testified for the Commission staff. Ms. Vanicek is the current Director of the Nebraska Telecommunications Infrastructure and Public Safety Department. Mr. Frost is a staff economist.

Mr. Frost testified that in 2007 he offered support for a fact-specific test that determined whether or not a company was eligible to request, not to obtain, a waiver of FUSF imputation. The fact-specific test included three conditions. The three conditions required companies to show the company experienced a change in support due to the FUSF imputation in NUSF-50. The

Year 3 NUSF support must have decreased relative to Year 2 NUSF support, and where the probability that any company will experience a relative decrease greater than the company in question, is less than 5 percent (5%). In addition to the three conditions, the company was required to demonstrate unique circumstances. Mr. Frost testified that the test was never intended to be used beyond the first round of waiver requests, nor was it intended to be a “once eligible, always eligible” criteria.

Mr. Frost further testified that if the Commission were to use the criteria again in this waiver request, the information underlying it should be updated. Once the data set is updated, the companies fail to meet the criteria and would be ineligible for the waiver request. Furthermore, the losses in NUSF support due to the FUSF imputation would have been $8,300 and $9,700 for the 2009 support year for Dalton and Elsie, respectively. Therefore, the amounts of support lost due to the FUSF imputation are significantly less than the amounts that are currently being requested in the waiver. Once the second and third steps are updated as well, the companies would no longer meet the criteria and would be ineligible for the waiver request. In addition, the calculation method should be updated with the more recent NUSF EARN-Form data. Once the calculation method is updated, the waiver payment amounts would be zero.

Ms. Vanicek recommended denial of the waiver request. Elsie and Dalton are no longer eligible to make a wavier request because they do not meet the criteria. In addition, the staff believes that Dalton and Elsie are no longer uniquely impacted by the FUSF imputation. The fact that Dalton and Elsie do not receive NUSF high-cost support for the 2009 funding year is driven by earnings rather than by the FUSF imputation. Both companies had significant over-earnings as reported on their 2007 NUSF EARN-Forms. The NUSF distribution model computes support amounts so that the companies cannot earn greater than a 12 percent (12%) rate-of-return and receive NUSF high-cost support, without an offsetting reduction in support. If the Commission were to grant the waiver request, it would allow Dalton and Elsie to earn a greater than 12 percent (12%) return while continuing to receive NUSF support which would not be competitively neutral.

In addition, Dalton and Elsie provided forecasted information which would project over-earnings in the interstate jurisdiction for 2009 and 2010. The FUSF imputation should be applied to all carriers including Dalton and Elsie to recognize that NUSF support is designed to supplement federal Universal Service Fund support.

In addition, Ms. Vanicek testified that the waiver mechanism should be temporary in nature designed to allow carriers a transitional period in the event that a change in the methodology occurs which results in an unforeseeable reduction in NUSF support. The permanent support mechanism developed in NUSF-26 allowed for transitional mechanisms for carriers that experienced a decrease in NUSF support. The transitional mechanism phased down support for a period of five (5) years. By contrast, if the Elsie and Dalton application was granted, the Commission would have given Elsie and Dalton seven (7) years of static support.

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

In consideration of the application, testimony and all evidence adduced at the hearing, the Commission is of the opinion and finds the application should be denied. A waiver of the calculation of the high-cost universal service mechanism is discretionary. The distribution model does not operate to guarantee a certain minimum rate-of-return but rather is supplemental support designed to give carriers the opportunity to earn a 12 percent (12%) rate of return. As such, in an order in Docket NUSF-50 adopted on December 19, 2006, the Commission adopted a policy whereby it would consider the amount of support a carrier receives from the federal universal service mechanism when determining the state high-cost universal service support. That process is the FUSF imputation. Elsie and Dalton applied for and received a two-year deferment of the FUSF imputation in 2007. The approval of this deferment was based on the support of the NTIPS Department and the unique circumstances faced by the companies, which made it reasonable at that time for the Commission to approve.

However, we do not find it reasonable to grant a second waiver that has been the issue of this particular proceeding. We base this finding on a number of reasons. First, the unique circumstances faced by the companies were a result of a discretionary decision made by the company. Second, we agree that the criteria used to determine eligibility of the waiver request was limited in time and should not be used as the basis for this request. Third, we find that a waiver may create a situation where we are not treating carriers in a competitively neutral manner. Finally, we believe that Elsie and Dalton were given a sufficient period of time to react to the changes made by the Commission in December of 2006.

In the hearing,[1] it was explained that the unique circumstances that serve as the basis for the waiver request were that the companies took on debt obligations prior to the Commission's decision to apply the FUSF imputation. While the companies may not have anticipated the FUSF imputation decision of the Commission in 2007, the Commission does not find this to be a particularly compelling reason for another waiver. Rather, taking into account extant circumstances we are not persuaded that the FUSF imputation continues to play much of a role in determining why Elsie and Dalton are ineligible for NUSF high-cost support. According to the companies, they managed to pay down approximately $3 million of this debt over the last three years. The waiver request in this application extends to 2013 to permit the companies to pay its debt obligations. Admittedly, the debt the companies took on was by choice of the companies in financing a transfer of control. The companies have had over two years to adjust to the Commission's FUSF imputation. The Commission does not believe it reasonable to expect the NUSF to absorb the effects of the companies' debt. In addition, the companies, knowing that additional revenue was needed, did not take steps to increase that revenue through a local rate increase until immediately prior to making this application.

The criteria used by the Commission staff in 2007 was not formally adopted by the Commission. We are not bound by it in order to determine whether to grant or deny the current application of Dalton and Elsie. Notwithstanding, we would agree with the testimony indicating it was limited in nature. This was made clear by Mr. Frost's testimony which defined the second step in the calculation as a comparison between funding Years 3 and 2.

Likewise, we have concerns that a grant of the waiver request would unfairly advantage Elsie and Dalton over other companies.[2] As Ms. Vanicek testified, the NUSF-EARN Forms for 2007 reflect over-earnings by the companies whereby the companies could earn more than the 12 percent (12%) cap without an offsetting reduction in support. A waiver gives Elsie and

---

[1] The explanation that the acquisition of debt created unique circumstances was first raised at the hearing. We can find no information in the pre-filed testimony regarding the amount of debt or the timing of its assumption. Of course, we have been aware of the collateralized guarantee of the companies' assets as the Commission approved the application filed by the companies at the time Elsie and Dalton transferred control of the companies to American Broadband.

[2] Although no other company intervened, we are not confident that they realize their support would be reduced by a grant of this application. The prior waiver granted by the Commission did not impact the support of any other company. However, the present waiver request would.

Dalton a continued opportunity to over-earn while other companies face the 12 percent (12%) earnings cap.

Finally, to grant Elsie and Dalton seven-year period in which to adjust to the FUSF imputation is out of line with prior Commission transitional mechanisms. For example, some companies experienced a large decrease in support when the Commission adopted the permanent funding mechanism; however, the Commission gave only a five-year transitional mechanism where companies support was phased down over time. Elsie and Dalton have requested a static amount of support and this request is based on speculative company projections five years in the future. An approval of this nature would be unlike any other prior transitions and would create a precedent for other waiver requests. This is a precedent we do not want to create.

Accordingly, the waiver request should be denied.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the waiver request filed by Elsie Communications and Dalton Telephone Company be and it is hereby denied.

MADE AND ENTERED at Lincoln, Nebraska this 12th day of May, 2009.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRRING:

Chairman

ATTEST:

Executive Director