

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Application) Application No. NUSF-68
of the Distance Education)
Council of Nebraska, seeking)
support from the Nebraska)
Universal Service Fund of the) ORDER
Nebraska Public Service)
Commission for use in distance)
education.) Entered: April 22, 2008

BY THE COMMISSION:

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

By Application filed May 22, 2007 the Distance Education Council of Nebraska (DEC) seeks Nebraska Universal Service Fund (NUSF) support for use in distance education. Notice of the Application was published in The Daily Record, Omaha, Nebraska on May 24, 2007. No protests or interventions were filed. A hearing on the application was held in the Commission Hearing Room, Lincoln, Nebraska on December 19, 2007. Appearances were entered by Mark Fahleson, attorney for the DEC, and Shana Knutson, staff attorney for the Commission.

Along with the application, the DEC filed a plan for NUSF support. This plan was updated on December 7, 2007 and again on January 10, 2008 (Late-Filed Exhibit No. 10) to reflect revised bids received in response to a state Request for Proposal (RFP). At the time of the hearing, the DEC's proposal sought \$2.4 million from the NUSF over a period of four years. The second revised proposal filed on January 10, 2008 sought approximately \$1.2 million over the same four year period.

On December 14, 2007, the NUSF Advisory Board met and voted on a recommendation with respect to this application. By a vote of five to three, the Advisory Board recommended to support the DEC proposal to the extent the Commission believed funds were available. The Chair of the Advisory Board, Anne Byers, sent a letter to the Commission advising the Commission of the Advisory Board's recommendation. That letter was received into evidence as Exhibit No 2. The minutes from the December 14, 2007 Advisory Board meeting were entered into the record as Late-Filed Exhibit No. 9.

The applicant provided witness testimony in support of the application. Mr. Gordon Roethemeyer, the Executive Director of

the DEC was the primary witness for the applicant. He filed pre-filed testimony and supplemental testimony which was entered into the record. Mr. Roethemeyer testified that a number of schools were experiencing a doubling and tripling in telecommunications rates. Even with the Federal E-rate assistance costs were going to be on average two and one-half times what the costs had been in the past. The DEC is requesting NUSF support for a period of four years. Mr. Roethemeyer testified that the DEC is seeking assistance from the NUSF for costs above \$600.00 per month after the E-Rate assistance. Mr. Roethemeyer further testified that state aid is usually 24 to 36 months in arrears.

The DEC is seeking support for three to four phases which were developed by the NITC as a result of recent legislation. Exhibit No. 4 detailed a sample breakdown of proposed NUSF support to be distributed over four years and the estimated costs associated with each phase.

Mr. Ron Cone also testified in support of the application. Mr. Cone was employed as the Network and Informational Services Director for Educational Service Unit 10. Mr. Cone testified regarding the bids that were received on Phase 2. The bids, according to Mr. Cone, were much higher than the school districts were able to afford. The schools have very few options. They could stay with their existing contract however the equipment is old and is failing in some cases. The schools can also use a master contract that the state has procured in the past. If the costs come in higher than what the school can afford they may choose not to continue distance education services.

Ms. Shirley Schall, Distance Learning Director for Educational Service Unit No. 16, also testified in support of the application. Ms. Schall represented the southwest and west central portions of Nebraska. She testified the sparsely populated districts she represents are in need of educational resources for their students. Ms. Schall testified regarding the difficulty in obtaining grants for distance learning. Ms. Schall testified that Educational Service Units 15 and 16 covered land twice the size of the state of Massachusetts and contained 33 school districts. Ms. Schall did not know whether or how many of the 33 school districts were at their lid limits on tax levies.

Mr. Dan Hoelsing, Superintendent of Schools for Laurel and Concord Public Schools, Newcastle Public Schools and Wynot Public Schools testified in support of the application. He testified that within the four school districts he represents, 57 distance education classes are conducted per day. His schools rely on the network to be able to provide adequate access to education. Mr. Hoelsing testified that some of his schools do not qualify for state aid. There are some shortcomings in LB 1208 that should be addressed. The request for support in this application is to fill the gap that is promised in LB 1208 from the time that they actually spend the money to the time they actually start receiving LB 1208 funds. Mr. Hoelsing testified that discontinuing distance education is not an option if the school wants to stay in existence.

Mr. Jeff Pursley, Director of the Nebraska Telecommunications Infrastructure and Public Safety Department (NTIPS) which administers the NUSF offered testimony. Mr. Pursley stated that he had several concerns with the DEC application. First and most significantly, Mr. Pursley testified that he does not believe that the NUSF could afford supporting distance education. The level in the NUSF is at an all time low with less than two month's reserve. If the Commission wanted to fund this request, other cuts to existing funding commitments would need to be made. In Docket No. NUSF-71, the Commission learned that NUSF receipts were down. A large part of the decrease in funding is due to the implementation by the wireless companies of the latest wireless safe harbor which means that more revenue is reported as interstate.

In addition, Mr. Pursley testified that support for schools is largely the role of the State Legislature, which determines the amount of state tax revenue that should be allocated to schools. Mr. Pursley also stated his concerns that the NUSF surcharge would be going to a public purpose, funding state education, which gave him concerns that the rate would appear more like a tax. Mr. Pursley testified that the Commission recently requested the authority to review rates charged in supported programs like telehealth and E911 through a legislative proposal.

Mr. Pursley testified that he did not think the policy goals listed in *Neb. Rev. Stat. § 86-323* were mandatory requirements of the Commission, but rather authorized the Commission to create a fund which would fulfill those goals.

He added that NUSF support indirectly supports schools by improving service in high cost areas. He did not think that the capacity the schools were proposing to use would exist in the rural communities without the NUSF support.

Mr. Gary Oxley came forward with public comment. He was employed as a superintendent and represented the Raymond Central Public Schools. He testified that the schools need distance education very badly. He emphasized Mr. Hoelsing's testimony regarding the importance of distance education to smaller school districts.

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

There has been no question about the value and importance of distance education in Nebraska. In 2002, the Commission opened a docket to investigate issues impeding the availability of distance education in certain areas of the state. The state legislature through LB 1208 [2006] significantly altered the structure of distance education by creating incentives for schools to connect to one statewide network, Network Nebraska. According to the testimony offered at the hearing, there was a lag in LB 1208's funding mechanism which brought the DEC to the Commission for a request in support from the universal service fund. The amount of support requested changed over the course of the application two times. The final request for support, as shown in late-filed Exhibit 10, totaled One Million One Hundred Seventy-Nine Thousand Eighty-Eight Dollars and Twenty-Two Cents (\$1,179,088.22).

Based on the testimony of Mr. Pursley, the fund balance, and current fund obligations, the Commission finds the NUSF does not have adequate funding available to grant the application. To ensure the solvency of the NUSF, the Commission has made it a goal to maintain a two-month reserve in the fund balance. Currently, the NUSF is operating on a less than two-month reserve. If the Commission were to grant the application before it, in whole or in part, the Commission would need to cut existing programs which would include the high-cost, low-income, wireless and telehealth programs.

The NUSF Advisory Board's recommendation to approve the application to the extent the Commission is financially able to fund distance education was also noteworthy. However, the

Commission finds that the application and proposed plan on file was overreaching.¹ Even if the Commission was financially able to fund some of the requested amounts, the application presented a broad attempt to create equal obligations to all schools regardless of their size and ability to pay for distance education. The Commission would not have been able to carve out the schools with the greatest need for distance education funding without being arbitrary.

However, even if funds were available, the Commission would have other concerns in granting the application. The NUSF Advisory Board and counsel for DEC correctly point out that the Legislature in Neb. Rev. Stat. § 86-323(6), provided "Elementary and secondary schools, libraries, and providers of health care to rural areas should have access to advanced telecommunications services as described in the Telecommunications Act of 1996." Mr. Pursley testified that he views the declaration of policy as guidance and not a mandate on the Commission for funding. We agree. The policy goals provide the Commission with guidance as to the goals of universal service and they in large part mirror the goals of the federal universal service fund.

The Legislature has taken clear control over distance education programs in Nebraska through its statewide initiatives. The Commission feels that the Legislature is the appropriate body to dictate how much funding should be directed to the program, how the program should be managed and who controls the technical requirements of the program. Given that there has been no specific directive from the Legislature to the Commission on distance education, and that oversight of distance education has been vested in other public bodies of the state, the Commission does not find it appropriate to step in and modify or supplement the existing structure.

Based upon the foregoing, the Commission is of the opinion and finds that the application filed herein should be denied.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the above-captioned application be and it is hereby denied.

¹ This was the case even with the optional monthly threshold of Eight Hundred Fifty Dollars (\$850.00) shown in late-filed Exhibit 10.

MADE AND ENTERED at Lincoln, Nebraska, this 22nd day of April 2008.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chair

ATTEST:

Executive Director