

SECRETARY'S RECORD, PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Nebraska) Application No. C-5461/PI-244
Public Service Commission, on)
its own motion, to adopt safe) ORDER ADOPTING SAFE
harbor market rates for the) HARBOR MARKET RATES FOR
leasing of dark fiber by) DARK FIBER LEASES
agencies or political)
subdivisions of the state.) Entered: November 7, 2023

BY THE COMMISSION:

On December 6, 2022, the Nebraska Public Service Commission ("Commission") initiated this proceeding on its own motion to adopt guidelines for the leasing of dark fiber by agencies or political subdivisions of the state ("Entity" or "Entities") pursuant to Neb. Rev. Stat. §§ 86-574 - 86-578. Pursuant to Neb. Rev. Stat. § 86-577(4), the Commission is required to establish a safe harbor range of market rates for all dark fiber leases using a competitive price determination comparison.¹ Comments from interested parties were due by January 6, 2023, and reply comments were due by January 27, 2023. This docket was then held in abeyance due to pending legislative action. Following the close of the legislative session, the Commission entered an order in this matter seeking additional comments due August 25, 2023 and scheduling a hearing in this matter.

E V I D E N C E

In its December 6, 2022 order opening this docket ("December 6 Order"), the Commission sought input from interested parties on a range of topics. Comments and reply comments were received from the Nebraska Rural Independent Companies ("RIC");² the Nebraska Public Power District ("NPPD");³ Ubiquity Nebraska, LLC

¹ The term "dark fiber" is defined in § 86-574 as "any unused fiber optic cable through which no light is transmitted or any installed fiber optic cable not carrying a signal."

² Exhibit 7.

³ Exhibit 8.

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("Ubiquity");⁴ the Nebraska Rural Broadband Alliance ("NRBA");⁵ and the city of South Sioux City, Nebraska ("South Sioux City").⁶

In comments, some parties noted that information on dark fiber leasing rates is difficult to obtain.⁷ However, RIC provided some pricing information based on leases held by their member companies, with rates ranging between \$35.10 monthly per strand per mile to \$29.17 monthly per strand per mile.⁸ Additionally, NPPD noted that one lease they hold is set at \$425 per mile per year.⁹ NPPD also stated that rates for a one-year agreement are substantially higher than rates for a ten-year agreement, with a one year price of approximately \$1,380.¹⁰ Commenters agreed that rates should be reassessed periodically.¹¹

Comments varied with regard to the question of whether the Commission should set regional versus statewide rates. RIC noted that leases are likely to differ based upon whether fiber serves urban or rural locations.¹² Ubiquity suggested that rates should distinguish between urban and suburban rates, and whether the fiber would be considered last mile or middle mile.¹³ Conversely, NPPD suggested that the safe harbor rates should be set on a statewide basis for purposes of manageability and simplicity in calculating rates.¹⁴

In comments, RIC also noted that applicants for dark fiber leases should submit a map of the area to be served so that the

⁴ Exhibit 9.

⁵ Exhibit 10.

⁶ Exhibit 11.

⁷ Ex. 7 at 1-2.

⁸ *Id.* at 3.

⁹ Ex. 8 at 1. \$425 per mile per year is equivalent to approximately \$35.42 monthly.

¹⁰ *Id.*

¹¹ Ex. 9 at 1-2 (Ubiquity recommending annual adjustments); Ex. 8 at 2 (NPPD recommending adjustments every 5 years); Ex. 7 at 3 (RIC recommending triennial adjustments).

¹² Ex. 7 at 2.

¹³ Ex. 9 at 2.

¹⁴ Ex. 8 at 2.

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Commission can determine whether the 50% allocation of profit to the NUSF is necessary.¹⁵ However, NPPD suggested that shapefiles should not be required due to security concerns.¹⁶

Hearing

A hearing in this matter was held on September 19, 2023, in the Commission Hearing Room, Lincoln, Nebraska. Sallie Dietrich appeared on behalf of the Telecommunications and NUSF Department of the Commission ("Department"). Paul Schudel appeared on behalf of RIC. Exhibits numbered 1 through 11 were offered and accepted.

Cullen Robbins, Director of the Telecommunications and NUSF Department, offered testimony. Mr. Robbins stated that dark fiber leasing by an agency or political subdivision of the state was first allowed by statute in 2002.¹⁷ The Commission was required to make sure the lease price was not less than the current market rate, and fifty percent of the profit was required to be remitted to the now defunct Nebraska Internet Enhancement Fund.¹⁸ Mr. Robbins noted that in the intervening twenty years, very few leases have been pursued through this process.¹⁹

Mr. Robbins stated that due to recent legislative changes, the Commission must establish a safe harbor range of market rates for all dark fiber leases using a competitive price determination comparison.²⁰ Mr. Robbins recommended that applicants should define the area served by a potential lease so that the Commission can determine whether 25/3 Mbps service exists in that area.²¹ Mr. Robbins opined that determining a range of market rates is more challenging.²² However, Mr. Robbins noted that based upon comments

¹⁵ Ex. 7 at 4-5.

¹⁶ Ex. 8 at 2.

¹⁷ Transcript at 9.

¹⁸ *Id.* at 9-10.

¹⁹ *Id.* at 10.

²⁰ *Id.* at 11.

²¹ *Id.*

²² *Id.* While other Nebraska statutes relating to broadband use a 100/100 Mbps standard, the statute governing dark fiber leases relies on a 25/3 Mbps standard. Neb. Rev. Stat. § 86-577(1)(b). Mr. Robbins also noted in testimony

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filed in this docket, the per-mile lease rates vary between \$20 monthly per strand per mile to \$500 annually per strand per mile.²³ Rates vary based on the term of the agreement and whether it serves rural or urban locations.²⁴ Mr. Robbins spoke in favor of applying the safe harbor range of rates statewide.²⁵ Mr. Robbins suggesting that revisiting the safe harbor range of rates every three years would be reasonable.²⁶

Paul Schudel then offered testimony on behalf of RIC. Mr. Schudel stated that leases of dark fiber are typically confidential and it is therefore difficult to determine rate information.²⁷ Mr. Schudel stated that leasing rates differ between urban and rural areas, and recommended that the Commission set different rates for urban and rural leases.²⁸ Mr. Schudel described the lease rates offered in comments and advised that the current market rate for a ten-year dark fiber lease in rural Nebraska is approximately \$32.50 per month.²⁹ Mr. Schudel stated that based on the record, the low end of the range of rates would be \$24.58 per month, and the high end would be \$41.25 per month.³⁰

Mr. Schudel advised that rates for rural leases are likely to be higher priced than urban leases, and shorter leases would have higher rates than longer leases.³¹ However, Mr. Schudel opposed setting a range based on regions of the state.³²

Mr. Schudel noted that leases are generally for at least a three-year term and up to a ten-year term.³³ Mr. Schudel stated

that a dark fiber lease would be expected to provide speeds much higher than 25/3 Mbps. Transcript at 13-14.

²³ Transcript at 11-12. See Ex. 8 at 1; Ex. 7 at 3.

²⁴ Transcript at 12.

²⁵ *Id.*

²⁶ *Id.* at 15-16.

²⁷ *Id.* at 20-21.

²⁸ *Id.* at 21.

²⁹ *Id.* at 22.

³⁰ *Id.* at 35.

³¹ *Id.* at 29.

³² *Id.* at 33.

³³ *Id.* at 30-31.

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that it would be appropriate to set different ranges for different lease terms.³⁴

Mr. Schudel agreed with filed comments that the 25/3 Mbps standard in Neb. Rev. Stat. § 86-577 is outdated and stated that he would support legislation establishing a 100/100 Mbps standard for this statute.³⁵ Mr. Schudel opposed comments filed by NPPD advocating for a standard that the existence of two or more fiber providers in a given location would be required for an area to be considered served.³⁶

Following Mr. Schudel's testimony, no further evidence was offered, and the hearing was adjourned.

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

The process for dark fiber leasing by agencies or political subdivisions of the state is set forth in Neb. Rev. Stat. § 86-577. An entity may lease dark fiber it owns to a lessee that is a certificated telecommunications common carrier, a permitted telecommunications contract carrier, or an internet service provider. The lease terms must be fair, reasonable, and nondiscriminatory. Under Neb. Rev. Stat. § 86-577(4)(a), the Commission must establish a safe harbor range of market rates for all dark fiber leases using a competitive price determination comparison.

Before a lease becomes effective, it must be filed with the Commission.³⁷ The Commission will then publish notice of the lease, including the lease rates. The lease will become effective fourteen days after the publication of the notice unless a protest is filed with the Commission. If a protest is filed, the Commission will consider the lease a contested matter.³⁸ Among the matters that may be contested is the allocation of served and unserved locations in the lease. Served and unserved locations are determined at the time a lease is filed with the Commission. Served locations must

³⁴ *Id.* at 31.

³⁵ *Id.* at 22-23.

³⁶ *Id.* at 23; Ex. 8 at 2.

³⁷ Neb. Rev. Stat. § 86-577(3)(a).

³⁸ Contested proceedings are governed by the Commission's Rules of Procedure, found at 291 Neb. Admin. Code, Chapter 1.

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be able to receive minimum speeds of 25/3 Mbps; unserved locations are those not receiving and not able to receive at least 25/3 Mbps at the time a lease is filed with the Commission.³⁹

If a lease utilizes rates within the safe harbor range established by the Commission, those rates may not be contested. Once a lease is finalized, fifty percent of the profit earned by the Entity for the lease of dark fiber to a served location must be remitted to the Nebraska Telecommunications Universal Service Fund ("NUSF").⁴⁰

Based upon the evidence entered in this proceeding, the Commission finds that the safe harbor range of market rates for dark fiber leases in Nebraska should be set as broadly as is reasonable until additional data can be collected. The Commission therefore sets the range of rates from \$20 per month to \$200 per month. This range will apply on a statewide basis without distinction between urban and rural areas, and without distinction for the number of fiber strands in the lease. The Commission reserves the right to revise the safe harbor range in the future, including revisions to geographic restrictions, urban or rural areas, number of strands in the lease, or other factors.

In order to make determinations of whether a lease encompasses "served" or "unserved" locations, the Commission finds that applicants for a dark fiber lease must submit shapefile maps showing the geographic area to be served by the lease in question. The submission of shapefile data will allow the Commission to expeditiously make a determination in the event a protestant objects to the allocation of served and unserved locations in the lease by reviewing available data, including but not limited to Nebraska's broadband maps and information gathered through the Federal Communication Commission's Broadband Data Collection. Applicants for a dark fiber lease may request confidential treatment of data submitted for purposes of reviewing the lease.

³⁹ Neb. Rev. Stat. § 86-577(1).

⁴⁰ "Profit" is defined in Neb. Rev. Stat. § 86-577(4)(b) as "the lease price less the cost of infrastructure deployment."

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O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that dark fiber leasing in Nebraska by agencies or political subdivisions of the state must comply with the process set forth in Neb. Rev. Stat. § 86-577 and with the requirements set forth above.

IT IS FURTHER ORDERED that the safe harbor market range of rates shall be between \$20 per month and \$200 per month, and shall continue until modified by further order of the Commission.

IT IS FURTHER ORDERED that applicants for dark fiber leases must submit with the lease shapefile data showing the geographic area to be served by the lease, as described above.

ENTERED AND MADE EFFECTIVE at Lincoln, Nebraska this 7th day of November, 2023.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Eric M. Hamler

[Signature]

Kevin Stocker

[Signature]

Chair

ATTEST:

Thomas W. Golden
Executive Director