

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Commission,) Application No. C-1878/PI-23
on its own motion, seeking to de-)
termine appropriate policy regard-) MOTION FOR REHEARING DENIED
ing access to residents of multiple) AND STATEWIDE POLICY FOR
dwelling units in Nebraska by) MDU ACCESS CLARIFIED IN PART
competitive local exchange tele-)
communications providers.) Entered: April 20, 1999

BY THE COMMISSION:

On August 5, 1998, the Commission, on its own motion, opened this docket to determine appropriate policy regarding access to residents of multiple dwelling units (MDUs) in Nebraska by competitive local exchange telecommunications providers (CLECs). A public hearing in this matter was held on September 14, 1998, in the Commission Hearing Room, Lincoln, Nebraska. After hearing testimony and reviewing briefs and other comments filed in this docket, the Commission entered an order creating a statewide policy regarding CLEC access to residential MDUs on March 2, 1999.

On March 9, 1999, Cox Nebraska Telcom II, L.L.C. (Cox) filed a Motion to Clarify the March 2, 1999, Commission order. On March 15, 1999, US West filed a Motion for Rehearing and for Clarification. Aliant Midwest, Inc. (Aliant) and Cox filed responses to the motions. Subsequently, Cox filed a Motion to Strike Aliant's Response. An oral argument was held on the motions in the Commission Hearing Room, Lincoln, Nebraska, on March 30, 1999.

F I N D I N G S A N D C O N C L U S I O N S

The primary purpose of the March 2, 1999, order was to create a framework which parties throughout the state, incumbents and competitors alike, would utilize to serve residents of MDUs. The policy was intended to foster competition while simultaneously providing residents of MDUs a realistic opportunity to select their preferred telecommunications provider.

The Telecommunications Act of 1996 (Act) was designed to open up the telecommunications market for competition. The Act authorized both the Federal Communications Commission (FCC) and the indi-

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vidual states to implement the procedures necessary to effect this monumental change.¹

As such, both the FCC and the Nebraska Legislature have adopted rules and statutes effectuating the Act. The Nebraska Legislature in Neb. Rev. Stat. sec. 75-109(2) authorized this Commission to "do all things reasonably necessary and appropriate to implement the federal Telecommunications Act of 1996" Section 75-109(2) also provides, in part, that "the authority granted to the Commission pursuant to this section shall be broadly construed in a manner consistent with the [Act]."

US West argues that the order establishing a statewide policy for MDU access results in an unconstitutional taking of incumbent local exchange carrier (ILEC) property. However, an unconstitutional taking occurs only when a state agency acts in the absence of statutory authority to appropriate private property.

According to Sutter Butte Canal Co., 279 U.S. 125, the alteration of a public utility's facilities and equipment to effectuate a reasoned and legitimate change in public policy does not constitute a compensable taking of property under state or federal constitutions. In fact, both this Commission and the FCC have, in the past, taken similar action regarding inside wire.²

In FCC Docket No. 79-105 and Commission Rule and Regulation No. 65, both the federal and state commissions ordered telephone companies to give up ownership and control of inside wire and to remove the associated investment from their regulated rate base. In so doing, this Commission provided two options for recovery of that investment including amortizing it over an eight-year period or flash cutting such amount from the current year's operations. A fair and comparable recovery mechanism is being proposed in this order.

¹ Telecommunications Act of 1996, Public Law 104-104, 47 U.S.C. 251(d).

² Federal Communications Commission, CC Docket No. 79-105. Nebraska Public Service Commission; Docket No. R & R 65.

In the March 2, 1999, order, the Commission ordered ILECs to provide CLECs unlimited access to the portion of the loop between the demarcation point and the newly moved Minimum Point of Entry (MPOE) as well as any existing campus wire in exchange for a one-time payment of 25 percent of current construction charges and a portion of continued maintenance expenses. While it is true that the Commission is requiring the ILEC to "share" a portion of its existing facilities, the ILEC retains complete ownership and in our opinion is adequately compensated.

The Commission's authorizing the property to be used for competitive telephone service in accordance with its deregulatory policies, when the property was already dedicated to the public use of providing telephone service, does not constitute an unconstitutional taking or physical invasion of private property.

Nonetheless, the Commission would like to clarify that the one-time payment of 25 percent of current construction charges is subject to modification if justified. The Commission, as always, will take into consideration changes in the industry as well as changing economic times. As ILECs and CLECs varied greatly in the amount that each indicated should be paid to the other, the Commission developed a reasonable and legitimate compromise between the two. At the current time, it appears that 25 percent remains appropriate and is not arbitrary as it is supported by the record and late-filings made in this docket.³

The Commission would further like to clarify its original order by incorporating the attached Exhibit A as a Charges and Remission Schedule. This scheme of charges and remissions shall end and CLECs, starting service at the MDU property under consideration, shall not be obligated to make further remission with respect to the MPOE "move" (relocation costs) nor the "Cable Use Cost" after three years from the date when the first CLEC starts serving the MDU property. Such Charges and Remission Schedule shall be administered by the ILEC.

The Commission would like to emphasize that all companies must comply with the requirements set forth in the March 2, 1999, order

³ Memorandum to Nebraska Commission, Martin Corcoran, Cox Communications, Inc., December 9, 1998, p. 3.

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in good faith and in the most expeditious and cost-effective manner possible. To that end, ILECs should respond to Requests for Re-engineering (requests) by the requestor with a formal price quote and construction schedule within 15 business days of the request's receipt by the ILEC. If the price quote and/or construction schedule is unacceptable to the requestor, the requestor shall have the right to immediately employ a third party contractor from the approved list to complete the request.

To aid in the development of a pre-approved list of contractors, the Commission believes that ILECs and CLECs shall meet within 30 days of a request to determine a mutually-agreeable third party or parties to perform any necessary maintenance or repair. Maintenance shall be performed within 24 hours and repair shall be initiated within four hours of a request for service by either party. In the event the ILEC cannot perform the necessary maintenance or repair within the above time frame, any CLEC shall have the authority to have said maintenance or repair performed by an agreed-upon third party as soon as practicable.

Finally, in an effort to develop a fair and acceptable average-cost per-foot calculation in a timely fashion, the Commission requests that samples of recently-completed MDU construction jobs or work orders from both ILECs and CLECs be compiled by the ILEC. At that time, an average distance calculation can be made by the ILEC for residential MDU properties as well as an average cost per foot calculation. Once each of these numbers has been derived, the average cost per foot shall be multiplied by the average distance calculation to determine an overall average cost for residential MDU properties. The resulting figure shall be subject to Commission approval and unless objected to shall be utilized as the "current construction charges" for MDU properties. Said current construction charges shall remain in effect until otherwise agreed to by all affected parties or negotiated pursuant to future interconnection agreements.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that US West's Motion for Rehearing and for Clarification is denied.

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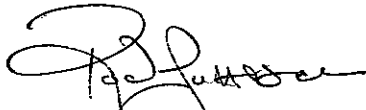
IT IS FURTHER ORDERED that the order establishing a statewide policy for residential multiple dwelling unit access in the state of Nebraska is clarified as set forth above.

IT IS FINALLY ORDERED that should any court of competent jurisdiction determine any part of this order to be legally invalid, the remaining portions of this order shall remain in effect to the full extent allowed by law.

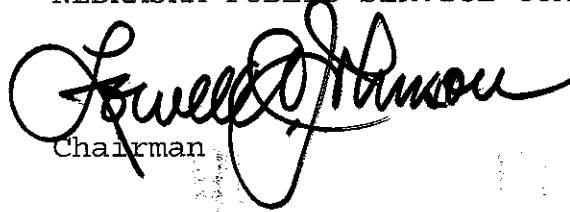
MADE AND ENTERED at Lincoln, Nebraska, this 20th day of April 1999.

NEBRASKA PUBLIC SERVICE COMMISSION

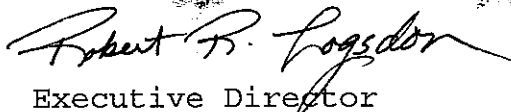
COMMISSIONERS CONCURRING:



//s//Lowell C. Johnson
//s//Frank E. Landis
//s//Daniel G. Urwiller


Chairman

ATTEST:


Executive Director

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Exhibit A

CHARGES AND REMISSIONS

The charges and remissions discussed in the body of this Decision will be made using the proration chart set forth below. This scheme of charges and remissions shall end and CLECs, starting service at the MDU property under consideration, shall not be obligated to make further remission with respect to the MPOE "MOVE" (relocation costs) nor the "Cable Use Cost" after three years from the date when the first CLEC starts serving the MDU property. In the following table, the terms "Requester" and "Party" refer to the CLEC(s) serving the MDU property.

MDU Proration Table

Requester	MPOE Move Cost or Cable Cost (25%)	Remission Percent	To Party
1st	100.00%	NA	NA
2nd	50.00%	50.00%	1st
3rd	33.33%	16.67%	1st & 2nd
4th	25.00%	8.33%	1st to 3rd
5th	20.00%	5.00%	1st to 4th
6th	16.67%	3.33%	1st to 5th
7th	14.29%	2.38%	1st to 6th
8th	12.50%	1.79%	1st to 7th
9th	11.11%	1.39%	1st to 8th
10th	10.00%	1.11%	1st to 9th

After the 10th
No Further Remissions

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