

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

The Commission, on its own) Application No. C-2044/PI-27
motion, to conduct an investi-)
gation for determination of)
requirements for implementation) Comment Cycle Established
of the contract carriers)
provisions contained in)
Legislative Bill 150 (1999).) Entered: May 12, 1999

BY THE COMMISSION:

In January of 1997, upon its own motion, the Commission opened Docket No. C-1481 to determine whether the Nebraska Public Power District (NPPD) was offering intrastate telecommunications services for hire, and, therefore, subject to the Commission's jurisdiction. NPPD was providing distance-learning services between Norfolk and South Sioux City, as well as internet and intranet access for the City of Norfolk. Prior to opening the docket, the Commission requested an opinion from the Attorney General (AG) as to whether such services constituted telecommunications. The AG concluded (in Opinion No. 96076) that it had insufficient factual information upon which to make its determination. After notice and hearing, the Commission determined that NPPD was providing telecommunications on a for-hire basis as a contract carrier.

After reaching its conclusion, the Commission requested a second AG opinion as to whether NPPD was required to receive a certificate of public convenience and necessity before it could provide the services described. The AG concluded (in Opinion No. 97045) that despite LB 660's (1997) removal of the statutory prohibition on public power districts providing telecommunications services for hire, NPPD still lacks the statutory authority to provide telecommunications. The AG continued that this absence of authority precludes the Commission from issuing a certificate to NPPD. In light of the AG's opinion, the Commission issued an order that NPPD cease and desist from providing telecommunications services. NPPD appealed to the Court of Appeals. The Supreme Court removed the case and took jurisdiction.

In NPSC vs. NPPD, the Court ruled that the Commission did not have statutory jurisdiction over contract carriers. Therefore, the Commission's orders concerning NPPD were found to be null and void.

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On April 29, 1999, the Nebraska Legislature passed LB 150 which, among other things, distinguished between common and contract carriers and gave the Commission express authority over each. The Legislature did so "to preserve the integrity of a ubiquitous network, to preserve and advance universal service, and to ensure the delivery of essential and emergency telecommunications services."

The Nebraska Supreme Court cited three US Supreme Court rulings [Michigan Commission v. Duke, 266 U.S. 570, 45 S. Ct. 191, (1925); Frost Trucking Co. v. R.R. Com., 271 U.S. 583, 46 S. Ct. 605 (1926); and Smith v. Cahoon, 283 U.S. 553, 51 S. Ct. 582 (1931)] for the proposition that a "contract carrier cannot be constitutionally required to meet the same standards as a common carrier." At issue in each of these cases were requirements that either a contract or private motor carrier obtain a certificate prior to operating in the individual state. In each instance, the High Court struck down the certification requirement because the obligations imposed upon the contract or private carrier did not relate to public safety or the state's other police powers. In Smith v. Cahoon, the Court stated " . . . we entertain no doubt of the power of the state to insist upon suitable protection for the public against injuries through the operations on its highways of carriers for hire, whether they are common carriers or private carriers." 283 U.S. 567. In adopting LB 150, the Nebraska Legislature was mindful of a state's ability to oversee contract carriers when there is a public safety concern or other interest within the state's police powers. The Legislature gave the Commission authority over contract carriers "to preserve the integrity of a ubiquitous network, to preserve and advance universal service, and to ensure the delivery of essential and emergency telecommunications services."

The Commission hereby opens this investigation, upon its own motion, to determine how common and contract carriers should be treated under the Commission's Rules and Regulations and what obligations, rights, and responsibilities should be placed upon or afforded to such carriers. After examining the issues raised in this docket, the Commission will close this docket and open a formal rulemaking proceeding under the Administrative Procedures Act. The Commission will initiate a separate rulemaking proceeding

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to implement the anti-slamming provisions that were also contained in LB 150.

The Commission invites interested parties to submit written comments on the following questions and issues by June 17, 1999.

1. In what ways are the rights and obligations of contract carriers different from those of common carriers?
2. In light of LB 150, and the cases cited above, to what extent **must** the Commission treat common and contract carriers differently? In what respects **may** the Commission treat such carriers the same, or similarly?
3. In what ways **should** the Commission treat common and contract carriers differently? In what ways **should** the Commission treat them the same, or similarly? Why?

LB 150 defines a "telecommunications common carrier" to be "a provider of telecommunications services for hire which offers its services to the general public at large in Nebraska intrastate commerce." The bill defines a "telecommunications contract carrier" to be "a provider of telecommunications services for hire, other than as a common carrier, in Nebraska intrastate commerce." In light of these definitions:

4. What types of scenarios does the definition of contract carrier include (e.g., nursing homes providing telephone service to its clients, companies "cherry picking" high-volume customers, a "carrier's carrier" etc.)? What types of scenarios are not included in the definition of contract carrier?
5. Should the Commission distinguish between different types of contract carriers based upon the nature of the services provided and/or the individual contract at issue (e.g., the issuance of permits for "public interest contracts" to entities such as nursing homes vs. a permit for a "private contract" to companies who target high volume users.)? Should the regulatory treatment of residential contracts be different from for business contracts? Are there other circumstances where contract carriers should be treated differently from one another?

6. When does a contract carrier become a common carrier?
7. Can a carrier be both a common carrier and a contract carrier within the same service area? Can a subsidiary or affiliate of a common carrier be a contract carrier in the common carrier's service area?
8. Can a carrier (or its subsidiary or affiliate) be both a common carrier and a contract carrier for the same customer?
9. Are the provisions of a contract for telecommunications services subject to the "pick and choose" rule (Consider both contracts between the carrier and the end user or other carrier, and contracts between the carrier and its affiliate)?
10. Does a contract carrier have to make the services provided by contract available to competitors at wholesale rates under the Federal Telecommunications Act (Consider both contracts between the carrier and the end user or other carrier, and contracts between the carrier and its affiliate)?
11. Are there any circumstances under which a contract carrier should be eligible to receive universal service support?
12. Are there any ways in which a contract carrier's obligations to universal service should be different from those of a common carrier (e.g., the contract carrier contributes directly to universal service vs. billing and collection by the underlying carrier of a resale contract carrier)?
13. What should be the procedure for applying for a permit? What should a contract carrier have to demonstrate to the Commission to receive a permit? Should a carrier have to acquire a permit for each contract?
14. What effect would the existence of a contract carrier have on a common carrier's assertion of the "rural exemption" found in the Federal Telecommunications Act?
15. What reporting requirements should be required of contract carriers?

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16. Should contract carriers be required to file contracts for telecommunications services with the Commission? If so, how should proprietary material be treated?
17. What authority does the Commission have to approve, disapprove, condition, or modify contracts for telecommunications services?
18. Should the Commission require contracts for telecommunications services to be compensatory to prevent predatory pricing?
19. What authority does the Commission have to hear and resolve disputes resulting from such contracts for telecommunications services?
20. What consumer issues should the Commission consider as it develops rules respecting contract carriers?
21. Interested parties are encouraged to raise other issues that are not addressed herein.

After receiving comments on the issues identified above, the Commission will hold a "roundtable discussion" on July 1, 1999, at 1:30 p.m. CDT in the Commission Library between staff and interested parties to discuss the various issues raised. Staff will then propose comprehensive rules for the Commission to consider in a formal rulemaking process.

O R D E R

IT IS THEREFORE ORDERED that interested parties may file written comments to the questions and issues raised above by June 17, 1999.

IT IS FURTHER ORDERED that the Commission shall hold an informal "roundtable" discussion between staff and interested parties to discuss the issues raised herein on July 1, 1999, at 1:30 p.m. CDT in the Commission Library.

IT IS FURTHER ORDERED that parties filing comments shall specifically identify the question or issue to which they are

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responding. Under Item Number 21 above, parties are encouraged to raise and comment upon issues not specifically identified in this order.

IT IS FURTHER ORDERED that parties filing comments shall submit three written copies of such comments, along with one electronic copy in WordPerfect format 5.0 (or newer). Comments will be on the Commission's webpage (<http://www.nol.org/home/NPSC>) so that parties may prepare for the July 1 roundtable discussion.

IT IS FURTHER ORDERED that the Commission shall forward a copy of this order to the Universal Service Advisory Board to allow it the opportunity to file comments in this docket.

MADE AND ENTERED at Lincoln, Nebraska, this 12th day of May, 1999.

NEBRASKA PUBLIC SERVICE COMMISSION


COMMISSIONERS CONCURRING:



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


Chairman

ATTEST:


Executive Director