

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Commission, ) Application No. C-2044/  
its own motion, to conduct an ) PI-27  
investigation for determination )  
of the requirements for the ) ORDER  
implementation of the contract )  
carrier provisions contained in )  
Legislative Bill 150 (1999). ) Entered: January 11, 2000

BY THE COMMISSION:

The Commission, on its own motion, opened this docket on May 3, 1999, to conduct an investigation for determination of the requirements for the implementation of the contract carrier provisions contained in Legislative Bill 150 (1999). Notice of the application was published in the Daily Record, Omaha, Nebraska, on May 6, 1999, pursuant to the Rules of Commission Procedure. On May 12, 1999, the Commission requested comments to a series of questions and on July 1, 1999, held a "roundtable" discussion with commentators to further define and discuss the issues.

On October 26, 1999, the Commission opened Rule and Regulation Proceeding No. 146 to consider the draft rules that were prepared as a result of the prior proceedings. In the course of this docket, the Nebraska Public Power District (NPPD) raised an issue which was not specifically addressed in the rules proceeding. In order to address the issue raised by NPPD, the Commission conducted a public hearing in legislative format on November 29, 1999, the purpose of which was to determine whether the leasing of dark fiber makes an entity a telecommunications carrier subject to the jurisdiction of the Commission. Notice of the hearing was sent to all interested parties on October 21, 1999.

E V I D E N C E

Written comments were received from Nebraska Public Power District (NPPD), US West, the Nebraska Telephone Association (NTA) and GTE Midwest. Said comments are considered a part of the record in this proceeding. Furthermore, five witnesses appeared and provided testimony before the Commission.

William Malone, appearing on behalf of NPPD, testified that it is the position of NPPD that the provisioning of dark fiber is not within the Commission's jurisdiction, because dark fiber is, of itself, inert and not capable for use as a transmission median. NPPD believes that dark fiber cannot be characterized as a telecommunications service, and the fact that it is an unbundled network element according to the FCC does not make it a telecommunications service. NPPD believes the recent FCC decision in CC Docket No. 96-98 held if dark fiber is physically connected

to the facilities of an incumbent LEC, it can be used to provide service, but NPPD is not an incumbent LEC. NPPD has made no unconditional offering to the public of its facilities, and it is in no different position with respect to dark fiber than it would be with respect to space on its towers for leasing to someone to put up an antenna. For these reasons, NPPD concludes the Commission would not have jurisdiction over the provision of dark fiber.

Todd Lundy, appearing on behalf of US West, testified that there should be parity of regulation. If multiple entities are providing similar services, that meet similar types of customer demands, there should be parody of regulation. Parody of regulation would promote competition as advocated by the Telecommunications Act. To the extent the Commission can bring within its purview, entities that are providing the same type of services, it should do so. The Commission has previously found that dark fiber is a telecommunications service. The FCC has recently ruled that dark fiber should be considered part of the loop and must be available to any requesting telecom carrier if requested under either Sections 251 or 252 of the Telecommunications Act of 1996. Therefore, it stands to reason that any entity providing dark fiber should be considered a telecommunications company. Because the FCC only has jurisdiction over carriers, it stands to reason that a carrier, or an entity that is providing an unbundled network element (UNE), be it a switch, a loop, or dark fiber, has to be considered a carrier. Dark fiber is not a unique, individualized or particularized service that is being provided to a consumer because it is widely available from ILECs and other carriers. To determine that dark fiber does not constitute "transmission" would suggest that if the FCC and this Commission have no jurisdiction over dark fiber, then they have no jurisdiction over a loop, a switch, a transport or any other unbundled network element. All entities, not just NPPD, who provide dark fiber should be within the jurisdiction of the FCC and the Nebraska Commission. Some US West states have taken a position they do not regulate dark fiber, but the Colorado Commission does exercise jurisdiction over dark fiber.

Barry Counts, testifying on behalf of Sprint Corporation, stated that his company does not view dark fiber as a telecommunications service.

The Public

Service Commission should retain jurisdiction over the pricing and availability of dark fiber as a UNE, consistent with the FCC's ruling in CC Docket 96-98. The FCC order speaks to provisioning of dark fiber by incumbent local exchange carriers (ILECs) only. Incumbent local exchange carriers have tremendous marketplace advantages over competitive local exchange carriers (CLECs). For that reason, different regulatory standards are often warranted. Sprint does not believe its CLEC

has the same unbundled network obligations as its ILEC.

Eric Carstenson, President of the Nebraska Telephone Association, testified that the current leasing of dark fiber by incumbent local exchange carriers is a tariffed service. The Commission has ruled that dark fiber in Nebraska is an unbundled network element in Application No. C-1400, AT&T Communications of the Midwest (April of 1997). The Commission's ruling occurred after the passage of the Telecommunications Act. The FCC has determined that dark fiber is an unbundled network element, which ILECs must offer telecommunications carriers. Dark fiber has been determined by the FCC to fall within the definition of the loop. NPPD presents a unique challenge because it is a political subdivision of state government, and the Commission's decision will have implications for every other political subdivision of the state. If other subdivisions take the same approach that NPPD has, it will result in new, unanticipated tax subsidized, unregulated players in the telecommunications industry. It is the Legislature, not the Commission, that should determine this policy issue. The Legislature's Transportation Committee had language before it in 1997 which would have specifically addressed the provisioning of dark fiber. The Transportation Committee took no action on that language. Unlike Texas, the Nebraska Legislature did not carve out a statutory exemption for the provision of dark fiber by political subdivisions. NPPD has previously testified before the Legislature that it cannot engage in activities which are not specifically authorized by the Legislature. No language in the Nebraska statutes authorizes NPPD to provide telecommunications service, be it retail or wholesale, to third parties. It is for these reasons that the issue should be before the Legislature and not the Nebraska Public Service Commission.

Joe Schuele, appearing on behalf of Alltel, testified that the provisioning of dark fiber is a fundamental policy question that belongs at the Legislature. Alltel does not believe dark fiber is a service, nor that it should be regulated, but the question of whether public power districts should get into the business is a policy question to be determined by the Legislature. Alltel does not support the entry of political subdivisions into the fiber business, because of the presence of many private providers. The fact that dark fiber is an unbundled network element does not require the Commission to regulate its provision in all circumstances. The obligations of Alltel's ILEC and those of its non-regulated affiliates and CLEC are different. It is ALLTEL's position that dark fiber should not be regulated other than in an ILEC/interconnection situation.

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

The Commission previously found that the lease of dark fiber by NPPD was a telecommunications service for hire. Interim Order (finding NPPD was providing telecommunications service), Neb. P.S.C. Application No. C-1481 (May 28, 1997). NPPD appealed that decision to the Nebraska Court of Appeals. The case was eventually heard by the Nebraska Supreme Court. The Nebraska Supreme Court did not rule on the issue of whether NPPD was providing for-hire telecommunications services, but instead determined that this Commission had no jurisdiction over "contract carriers." The Commission had characterized NPPD's service in its order as contract carriage. Following the Court's decision, the Nebraska Legislature adopted LB 150 (1999), which empowered this Commission to regulate contract carriers. In the course of drafting and adopting our contract carrier regulations, the issue of whether the leasing of dark fiber should be regulated as either a common or contract service has arisen.

Currently, the leasing of dark fiber is a tariff item for ILECs operating in Nebraska. Both the FCC and this Commission have determined that dark fiber is an unbundled network element. However, our analysis of the issue is complicated by the fact that NPPD is a political subdivision of the state. The authority conferred upon NPPD must come from the Legislature which created it.

The Nebraska statutory definitions of "telecommunications service" in Neb. Rev. Stat. § 86-802(18) and "telecommunications" in Neb. Rev. Stat. § 86-802(14) both parallel the definitions adopted by Congress in the Telecommunications Act of 1996. However, subsequent decisions by the United States Supreme Court in AT&T v. Iowa Utilities Board, 525 U.S. 366 (1999) (regarding access to network elements) and by the FCC in CC Docket 96-98 (regarding unbundled network elements) have complicated the issue at hand.

The Supreme Court has determined that the FCC has jurisdiction over unbundled network elements offered by incumbent local exchange carriers. Furthermore, the FCC recently reached essentially the same conclusion in determining what constitutes unbundled network elements. Dark fiber is one of the unbundled network elements identified by the FCC.

In its written comments, NPPD cites a District of Columbia Circuit Court decision as well as several prior decisions of the FCC supporting the concept that dark fiber should not be a regulated service. However, we find these decisions of limited value because the decisions were rendered before the passage of the Telecommunications Act of 1996. The FCC determination that dark fiber is an unbundled network element which ILECs are required to

provide on a regulated basis greatly complicates the issue. For entities other than ILECs, however, there is no FCC directive to regulate the leasing of dark fiber. Furthermore, the concern over political subdivisions leasing dark fiber is a policy matter for determination by the Legislature.

Therefore, the Commission finds that at the present time, it does not have jurisdiction over the leasing of dark fiber by entities other than ILECs. To the extent that this Commission has previously ruled that the leasing of dark fiber was a telecommunications service,<sup>(1)</sup> the Commission hereby modifies said ruling. The Commission is of the opinion and finds that the leasing of dark fiber alone, without more, is not a telecommunications service as defined by statute. As such, the Commission will only regulate the leasing of dark fiber to the extent required by the FCC when it is considered an unbundled network element of an incumbent local exchange carrier.

Nonetheless, the question of whether the leasing of dark fiber is a service subject to regulation by this Commission does not address the issue of whether it is legal or appropriate for dark fiber to be offered for lease by a political subdivision of the state. That remains a fundamental policy question to be addressed by the Legislature or the courts. Since this is clearly an unsettled legal question, we urge political subdivisions that seek to lease dark fiber to pursue explicit authority to do so. As such, this order shall in no way be interpreted as permission for, or an endorsement of, the offering of dark fiber for lease by political subdivisions.

#### O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the leasing of dark fiber shall only be regulated to the extent required by the FCC. This FCC directive extends only to the regulation of dark fiber offered by ILECs as an unbundled network element.

IT IS FURTHER ORDERED that this order shall in no way be interpreted as permission for, or an endorsement of, the offering of dark fiber for lease by political subdivisions.

MADE AND ENTERED at Lincoln, Nebraska this 11th day of January 11, 2000.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chairman

ATTEST:

Executive Director

1. **See,** Commission orders in  
Application Nos. C-1481/PI-18 and C-1400.

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