

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Application of) Application No. C-4657
Cox Nebraska Telcom, LLC, Omaha,)
seeking a determination from the)
Nebraska Public Service Commission)
that local competition exists in) GRANTED
the Omaha, Bellevue, Bennington,)
Elkhorn, Gretna, LaVista,)
Papillion, Valley and Waterloo)
Exchanges, pursuant to Neb. Rev.)
Stat. §86-143.) Entered: May 20, 2014

BY THE COMMISSION:

APPEARANCES:

For the Applicant:

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B A C K G R O U N D

On January 10, 2014, Cox Nebraska Telcom, LLC ("Cox"), filed an application seeking a determination from the Nebraska Public Service Commission ("Commission") that local competition exists in the Omaha, Bellevue, Bennington, Elkhorn, Gretna, LaVista, Papillion, Valley and Waterloo Exchanges, pursuant to Neb. Rev. Stat. §86-143. Notice of the docket was published in The Daily Record, Omaha, Nebraska, on January 15, 2014.

On February 5, 2014, Qwest Corporation d/b/a CenturyLink QC, ("CenturyLink") filed a Petition for Formal Intervention in the above-captioned docket.

On February 18, 2014, Nebraska Technology and Telecommunications, Inc., ("NT&T") filed a Petition for Informal Intervention in the above-captioned docket.

An order entered by the Hearing Officer on February 26, 2014 granted the petitions for intervention and set a hearing in the above-captioned docket. Notice of the hearing was sent via certified mail, return receipt requested, to Cox. Notice of the hearing was published in the Omaha World Herald on March 3 and March 10, 2014.

A hearing in the above-captioned docket was held on April 16, 2014 in the Commission Hearing Room, 300 The Atrium, 1200 N Street, Lincoln, Nebraska.

E V I D E N C E

Mr. Robert Logsdon, Director of Regulatory Affairs for Cox testified at the hearing on behalf of Cox. Mr. Logsdon testified that Cox filed the application for the sole purpose of being relieved of the 90 day notice requirement, public meetings, and 120 day protest period for rate increases under Nebraska law.¹ If the application is granted, Cox could increase its rates with a 10 day notice as with other tariff changes.² Mr. Logsdon further testified that Cox competes with 22 landline carriers, a minimum of 9 wireless carriers, and some Voice Over Internet Protocol (VoIP) providers in the Omaha metro area.³ Mr. Logsdon described the competition between Cox and wireless carriers in the area "fierce," stating that customers are increasingly choosing wireless service exclusively.⁴

Mr. Logsdon further testified that Cox's rates are comparable to or below many competitors in the market.⁵ He also stated his belief that not granting the current application will harm the public and approval of the application will make Cox more competitive in the marketplace.⁶

Ms. Ann C. Prockish, Director of State Regulatory Operations for CenturyLink, testified at the hearing on behalf of CenturyLink. Ms. Prockish testified in support of the Cox application for competitive designation of certain exchanges in the Omaha metropolitan area. She testified that CenturyLink's access lines have declined 74% since 2001

¹ See Neb. Rev. Stat. § 86-101 et seq.

² See Application C-4657 Transcript 12:13-20, (Hereinafter, "TR Page number:Line number").

³ TR 12:21 - 13:11.

⁴ Transcript, Exhibit 6, p. 5.

⁵ Id.

⁶ Id. at p. 6.

and regulated access lines comprise less than 35% of the voice market in the Omaha metro area.⁷

Ms. Prockish offered testimony based on data provided by *Centris*, a consulting firm retained by CenturyLink to provide estimates of the voice market share of CenturyLink and its competitors in the consumer markets across the Omaha Exchanges. According to Ms. Prockish, *Centris* data demonstrates that CenturyLink, as of third quarter 2013, serves 12.9% of the occupied households in the Omaha market. Cox market share for the same period has remained relatively stable and the wireless providers have the largest share of the voice market.⁸ She further testified that wireless connections have increased 111% in Nebraska in the past 11 years.⁹

Ms. Prockish also stated that the Omaha markets are, "very competitive" with a number of carriers offering reasonably comparable voice service to CenturyLink and Cox at reasonably comparable rates, terms, and conditions.¹⁰

Dr. David I. Rosenbaum, Professor of Economics at the University of Nebraska-Lincoln, testified at the hearing on behalf of Commission staff. Dr. Rosenbaum did not testify in support or opposition to Cox's application, but offered general comments regarding competition in markets and discussed different factors for Commission consideration in making a determination regarding the extent of local competition in a market. He also offered analysis of competition in the five exchanges in question.¹¹

Dr. Rosenbaum first considered the providers operating in the five exchanges, specifically noting whether a provider in the market is serving residential or business customers, or both. Dr. Rosenbaum testified based on Commission records that of the 21 carriers operating in the five exchanges, 18 serve business customers and 13 serve residential customers.¹²

He next discussed the importance of considering facilities-based versus non-facilities-based carriers, noting that non-facilities-based carriers are totally dependent on the underlying carrier's plant to provide service. The facilities versus non-facilities-based determination applies according to Dr. Rosenbaum to wireline, wireless, and VoIP providers.¹³

⁷ TR 31:4-9.

⁸ Transcript, Exhibit 7, pp. 11-14.

⁹ *Id.* at p. 14.

¹⁰ TR 30:23 - 31:3.

¹¹ The Cox Application, Transcript, Exhibit 1, p. 3, identified nine exchanges in the Omaha metro area. The parties agreed prior to the hearing that there are now only five: Omaha (which includes Bellevue, La Vista, and Papillion), Bennington, Elkhorn/Waterloo, Gretna, and Valley.

¹² TR 47:1-6.

¹³ TR 47:7-16.

Of the facilities-based wireline carriers operating in the five exchanges, Dr. Rosenbaum stated that only two serve sufficient access lines to make them important to the competition determination, CenturyLink and Cox.¹⁴ Dr. Rosenbaum stated CenturyLink as the incumbent serves all of the housing units in each of the five exchanges.¹⁵ Dr. Rosenbaum then used Cox's coverage area map and census block data to determine the percentage of housing units in each exchange with potential access to Cox service.¹⁶

Regarding wireless carriers, Dr. Rosenbaum testified that wireless non-facilities-based carriers utilize roaming agreements to provide service making them less viable competitors.¹⁷ Of the facilities-based wireless carriers, Dr. Rosenbaum estimated, based on data available, that upwards of 90% of housing units in the five exchanges have access to two or more facilities-based wireless carriers.¹⁸

Next, Dr. Rosenbaum discussed the concept of market share to determine competitiveness in a certain market. According to Dr. Rosenbaum, while having the potential to serve in a market may be relevant in certain situations, the number of customers actually being served is more important in determining the degree of competition in a market. Market share utilizes the number of customers any competitor is actually serving in a given market relative to the size of the entire market. Dr. Rosenbaum then utilized a Herfindahl Index ("HHI") calculation to determine the relative concentration in in each of the five exchanges based on the estimated market shares.¹⁹ Dr. Rosenbaum stated he made reasonable approximations of market shares and HHIs using data filed by carriers with the Commission.²⁰ He further stated he was conservative in his estimates.²¹

In analyzing the HHI values, Dr. Rosenbaum recommended as a guideline the classifications of HHIs into categories used by the Federal Trade Commission ("FTC") and the U.S. Department of Justice ("DOJ") in considering the effect potential mergers may have on creating market power and on competition.²² The HHI values calculated by Dr. Rosenbaum showed moderate levels of market concentration based on the FTC and DOJ guidelines. Dr. Rosenbaum testified that moderate HHI values, while indicating some concern about competition, require careful consideration of other relevant factors.²³ The other factors recommended by Dr. Rosenbaum include percentage of housing units in an

¹⁴ TR 47:17-21.

¹⁵ Transcript, Exhibit 8, p. 4.

¹⁶ TR 47:24 - 48:7.

¹⁷ Transcript, Exhibit 8, p. 6.

¹⁸ TR 48:12-17.

¹⁹ 49:3-21.

²⁰ Transcript, Exhibit 8, p. 9.

²¹ TR 52:5-7.

²² TR 50:6-20.

²³ Transcript, Exhibit 8, pp. 9-10.

exchange with access to different competitors, market power, barriers to competition, and plant in service.²⁴

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

The Nebraska Telecommunications Regulation Act²⁵ ("Act") gives authority to the Commission to determine if local competition exists in a certain exchange or exchanges upon application of a telecommunications company pursuant to Neb. Rev. Stat. § 86-143. The pertinent provisions of § 86-143 reads:

(2) Local competition shall be deemed to exist in an exchange if a telecommunications company files an application with the commission requesting a determination as to whether local competition exists in one or more exchanges specified in the application and the commission enters an order after public notice and a hearing which determines that local competition exists in such exchange or exchanges. Notwithstanding any other provision of the Nebraska Telecommunications Regulation Act, the commission may consider any wireless telecommunications service provided in the exchange or exchanges when determining whether local competition exists.²⁶

The Statute gives the Commission the authority to deem local competition to exist in an exchange and the permissive authority to consider wireless telecommunications offerings in its determination. The statute provides no guidance on making a determination of local competition by the Commission.

Scope of Designation

As a preliminary matter, the Commission states that a finding that competition exists in an exchange only impacts the notice and meeting requirements contained in Act.²⁷ A competitive designation does not change, impact, or alter any other regulatory obligations, responsibilities, or requirements of any carrier in the exchange. The Commission's regulatory oversight over carriers in a competitive exchange regarding service quality, interconnection agreements and other requirements, rules, and orders would be unchanged.

Exchanges

The statute specifically requires the Commission to consider local competition within an, "exchange or exchanges".²⁸ Local exchange area is defined in the Act as "a territorial unit established by a telecommunications company for the administration of telecommunications service within a specific area generally

²⁴ Transcript, Exhibit 8, p. 10.

²⁵ See Neb. Rev. Stat. § 86-101 et seq.

²⁶ Neb. Rev. Stat. § 86-143(2)(2012 Cum. Supp.).

²⁷ See Neb. Rev. Stat. §§ 86-141 to 86-148 (2012 Cum. Supp.).

²⁸ *Id.*

encompassing a city or village and its environs as described in maps filed with and approved by the commission."²⁹

In Cox's application they sought competitive designation in what Cox termed, "the Omaha metropolitan area," but identified the exchanges of Omaha, Bellevue, Bennington, Elkhorn, Gretna, LaVista, Papillion, Valley and Waterloo.³⁰ However, in consultation with CenturyLink and Commission staff it was determined that due to consolidation there are now only five exchanges encompassing the area in which Cox seeks a competitive designation.³¹

The Omaha Exchange now encompasses the Omaha, Bellevue, La Vista, and Papillion Exchanges, and Elkhorn and Waterloo constitute one exchange identified as the Elkhorn-Waterloo Exchange. Therefore, while the geographic area for which Cox seeks competitive designation has not changed, it is now composed of five exchanges: Omaha, Bennington, Elkhorn-Waterloo, Gretna, and Valley. A map of the five exchanges in question was submitted as an exhibit at the hearing and represents the five local exchange areas the Commission will consider in this proceeding.³²

Business vs. Residential Service

Cox in its application included information from the Commission's 2013 Annual Report on Telecommunications to the Legislature ("Annual Report") that shows that 21 wireline carriers reported they were offering service in the five exchanges at issue.³³ The determination of competition in an exchange must go beyond just carriers reporting they operate in an exchange. As Dr. Rosenbaum points out, some carriers only serve business customers, some only residential, some serve both residential and business customers.

Dr. Rosenbaum's analysis of Commission data reveals that of the 21 wireline carriers operating, only 13 serve residential customers, while 18 carriers serve business customers.³⁴ As fewer carriers compete in the residential market, the Commission is confident a finding that local competition exists in the residential market, would also indicate local competition in the business market. Therefore, our analysis will focus on the residential market in the five exchanges.

Access to Facilities-based Carriers

The Commission's Annual Report includes all wireline carriers reporting they offer service in the five exchanges. The Annual Report does not however distinguish between those that are facilities-based, or using their own facilities to provide service, and those that are

²⁹ Neb. Rev. Stat. § 86-115 (Reissue of 2008).

³⁰ See Application C-4657 Transcript, Exhibit No. 1, p. 3.

³¹ Transcript, Exhibit No. 6, p.3.

³² Transcript, Exhibit No. 10.

³³ Transcript, Exhibit 1, pp. 4-5.

³⁴ Transcript, Exhibit 8, p. 4.

non-facilities-based, or reselling the facilities of another carrier to provide service.

AT&T urges us to make no distinction between facilities-based carriers and non-facilities-based carriers in our analysis. AT&T states that competition from Competitive Local Exchange Carriers ("CLECs"), or those reselling the facilities of other carriers, are important and fundamental to the telecommunications marketplace.³⁵

The Commission agrees that CLECs are important competitors in a market, and we do not discount the competition such carriers provide. However, we agree with Dr. Rosenbaum that carriers with no facilities are dependent upon an underlying carrier to provide service and would be unable on their own to offer any substitute service in the event the underlying carrier ceased to do business in the area.³⁶

We find it necessary in an analysis of local competition to focus our consideration on facilities-based carriers in the market. The presence of facilities-based carriers in a market indicates providers able to offer functionally equivalent or substitute service, ensures continued availability of competitive offerings even if the incumbent or other carriers exit the market, and demonstrates the carriers' investment and commitment to offering service in the long-term.

According to Dr. Rosenbaum, based on access lines reported by the wireline carriers to the Commission, only two wireline facilities-based carriers, Cox and CenturyLink, possess substantial enough numbers of access lines in the exchanges to be of consequence in a competition analysis.³⁷ All of the other wireline carriers in the five exchanges collectively account for only one to two percent of the access lines, making them de minimis in a competition analysis.³⁸

Dr. Rosenbaum also considered wireless service. Cox and Centurylink pointed out that there are numerous wireless carriers operating in the Omaha metropolitan area.³⁹ Dr. Rosenbaum acknowledged the presence of multiple wireless carriers, but as with wireline carriers, he advocates considering those wireless carriers with significant enough coverage area in the exchanges to be of consequence to the competition analysis. Dr. Rosenbaum conservatively estimated that at least three wireless facilities-based carriers have significant coverage footprints in the five exchanges.⁴⁰

We agree with Dr. Rosenbaum that we should focus our analysis on facilities-based competitors in the market with sufficient access lines to be of consequence, namely Cox, CenturyLink and the wireless carriers with significant coverage footprints.⁴¹ Based on Dr.

³⁵ Transcript, Exhibit 7, pp. 8-9.

³⁶ Transcript, Exhibit 8, pp. 5-6.

³⁷ TR 47:17-21.

³⁸ TR 51:9-18.

³⁹ TR 13:4-7; Transcript, Exhibit 7, pp. 7-8.

⁴⁰ TR 48:12-22.

⁴¹ TR 51:16-18.

Rosenbaum's analysis, we find a conservative estimate of at least four facilities-based providers, either wireless or wireline, in the five exchanges significant enough to be consequential to our analysis of competition.

We further find, the mere presence of facilities-based carriers in a certain exchange is insufficient for a determination that competition exists. Rather, we next must focus on the coverage of facilities-based carriers in the market.

Coverage by Facilities-Based Carriers

After determining the presence of multiple facilities-based carriers, we next consider the percentage of customers that each facilities-based carrier is able to serve in each exchange. To accomplish this analysis we agree with Dr. Rosenbaum's usage of census block data to determine the percentage of housing units included in a carrier's service territory. Based on his analysis, all but one of the exchanges has 80% or more of housing units with access to both CenturyLink and Cox service. The Omaha and Elkhorn-Waterloo Exchanges demonstrate coverage of 98% or higher, while the Valley Exchange exhibited 63% coverage by two wireline carriers, CenturyLink and Cox.⁴²

Concerning facilities-based wireless carrier coverage, Dr. Rosenbaum compared coverage maps available from Verizon, Sprint, AT&T, and U.S. Cellular with confidential wireless coverage maps in Commission records and reported he was comfortable concluding upwards of 90% of the housing units in the five exchanges were able to receive wireless service from more than one wireless carrier.⁴³

We find the ability of 75% or more of housing units in an exchange to receive service from 4 or more facilities-based carriers in an exchange is a strong indicator of local competition. While it is essential to determine the facilities-based carriers with substantial coverage area in the exchanges, the next consideration in our analysis is the relative size of the carriers. Carriers may have a large coverage area where their service is available, but not have any customers. So we next consider market share and market power.

Market Power

Market power is generally defined as the power to set prices or exclude competitors from a marketplace. The more market power held by a single company in a marketplace the less likely competition exists in that market.⁴⁴ Dr. Rosenbaum recommended utilizing a calculation called the Herfindahl Index ("HHI"), which is used by the FTC and DOJ when conducting analyses of concentration of market power created in a market by a merger. We agree with the use of HHI calculations and

⁴² Transcript, Exhibit 8, p. 3.

⁴³ Transcript, Exhibit 8, p. 4.

⁴⁴ Id. at p. 5.

find taking guidance from DOJ and FTC on HHI values reasonable for our purposes.

Dr. Rosenbaum estimated HHIs for each of the five exchanges. The HHI values show a moderate level of concentration of market power based on the guidelines used by the FTC and DOJ.⁴⁵ AT&T disagreed with Dr. Rosenbaum's use of three wireless carriers in his analysis. AT&T recalculated the HHI values utilizing four wireless carriers producing lower HHI numbers but with concentration still in the moderate range.⁴⁶

We realize that Dr. Rosenbaum made a relatively conservative assumption by utilizing three instead of four or more wireless carriers in his calculations. However, if a relatively conservative estimate gives us market power numbers in a moderate range, we can be confident the competitive picture may very well be better than our numbers show, and is unlikely to be worse.

Based on the HHI numbers, the exchanges continue to exhibit indicators of competition. The Valley Exchange showed a lower percentage of housing units with the ability to receive both Cox and CenturyLink service, around 63%.⁴⁷ However, the HHI for Valley showed the least market concentration of all five exchanges, meaning less concentrated market power or a more competitive market than the other exchanges. We find that the lower HHI number in combination with high wireless facilities-based coverage indicates competition in the Valley Exchange offsetting the lower percentage coverage by wireline facilities.

Dr. Rosenbaum testified that the HHI is not a bright line determiner of competition, but is merely one aspect that must be considered with other relevant factors.⁴⁸ We agree HHI calculations are useful but must be considered collectively with other factors to get a more complete picture of competition in an exchange. Some of these factors we have considered above; these include different competitors in the market, plant in service or facilities-based carriers, and the percentage of housing units with access to different competitors. To these we add our market power analysis using HHI. Finally, we will also consider whether other potential barriers to competition exist that would make a designation of competitiveness inappropriate at this stage.

Other Barrier to Competition

One potential barrier to competition is costs to customers to move from one carrier to another. These costs can include fees to be released from long term contracts and fees for starting or stopping service. Another potential barrier is lack of number portability; if

⁴⁵ Id. at pp. 7-10.

⁴⁶ Transcript, Exhibit 7, pp. 7-8.

⁴⁷ Transcript, Exhibit 8, p. 3.

⁴⁸ Id. at pp. 9-10.

a customer must obtain a new number to move, the potential cost and inconvenience could be a barrier to changing carriers.⁴⁹

On a wholesale basis, interconnection could be a potential barrier to entry by another carrier if interconnection is not available under terms and conditions that enable the carrier to compete in the market.⁵⁰

Cox testified that based on the Commission's Annual Report, wireline providers in the area are charging comparable prices for service.⁵¹ Number portability and interconnection are mandated and a competitive designation by the Commission would not affect those obligations for any carrier, they would remain as they are currently.⁵²

We find no evidence that significant barriers to competition due to cost of changing carriers, number portability, or interconnection exist in the five exchanges in question.

Internet Services

We are aware that internet based voice services are also competing in the Omaha metro area. These services can be provided in two ways, from a supplier providing their own connection to the internet, such as cable modems and Digital Subscriber Lines (DSL) from a wireline carrier, or from an over-the-top provider that utilizes the broadband network of another carrier, such as Skype.⁵³ While we acknowledge internet based voice services are competing in the five exchanges, we have insufficient and incomplete data available to allow us to conduct a proper analysis of their competitive impact. We do however, acknowledge their presence in the market and find the availability of broadband is another potential indicator of competition in an exchange.

NUSF

The Commission notes that Nebraska Universal Service Fund (NUSF) high cost support is allocated to the exchanges at issue in this proceeding. While an exchange may be largely competitive, pockets of high cost areas may still exist in that same exchange.⁵⁴ The Commission has worked to carefully focus NUSF support to the highest cost areas.⁵⁵ Of the \$40 million in high cost support distributed from

⁴⁹ Id. at p. 10.

⁵⁰ Id. at p. 6.

⁵¹ Transcript, Exhibit 6, p. 5.

⁵² Id. at p. 7 & p. 9.

⁵³ Transcript, Exhibit 8, p. 6.

⁵⁴ TR 53:4-11.

⁵⁵ See Application No. C-3554/NUSF-50, *In the Matter of the Nebraska Public Service Commission, on its own motion, seeking to investigate whether the zones established in Docket C-2516 are appropriate in light of NUSF-26 findings and conclusions; In the Matter of the Nebraska Public Service Commission, on its own motion to make adjustments to the universal service fund mechanism established in NUSF-26.*

NUSF on an annual basis statewide, less than \$200,000 is received by the exchanges in question.⁵⁶

The Commission finds that a determination that a certain exchange is competitive does not necessarily preclude NUSF support being received in that exchange. However, the Commission will carefully scrutinize any NUSF support allocated to those exchanges to ensure the high cost areas continue to exist justifying future high cost support.

Carrier of Last Resort

Carrier of Last Resort (COLR) obligations have been discussed in this proceeding. However, we find that any determination made by the Commission on this application will have no effect on any COLR or COLR-type obligations of any carrier in the five exchanges. CenturyLink agreed with this analysis, Ms. Prockish stated, "it seems to me that since CenturyLink's carrier of last resort obligations are not relieved by approval of this application, it's -- it wouldn't be an issue."⁵⁷ As we stated above, the only changes to carrier requirements that will result is to the notice and meeting requirements for rate increases found in the Act.⁵⁸ COLR obligations remain unchanged as a result of this proceeding.

Future Proceedings

Concerns have been raised regarding potential future applications for competitive designation of other exchanges in Nebraska. The determinations in this proceeding are based on the facts and evidence presented regarding the five exchanges in the Omaha metro area. Omaha is the lone city of the Metropolitan Class in Nebraska,⁵⁹ making Omaha and its immediately surrounding area unique in Nebraska. We caution any parties attempting to apply the analysis discussed in this order to other exchanges in Nebraska. In future proceedings, the specific numbers of providers, percentage of coverage, and other calculations used in this order are not binding and have no precedential value on future proceedings. Competitive analysis of other exchanges will raise different facts and issues for consideration by the Commission, particularly in more rural exchanges.

Conclusion

Therefore, based on the facts and evidence set forth on the record of this proceeding and the analysis and calculations conducted above, the Commission finds that local competition exists in the Omaha, Bennington, Elkhorn/Waterloo, Gretna, and Valley Exchanges.

⁵⁶ TR 53:12-16. Dr. Rosenbaum testified originally that the NUSF High Cost Fund distributed approximately \$30 million annually. As per the Commission's Telecommunication Infrastructure and Public Safety Department that oversees the NUSF High Cost Fund, the actual number is \$40 million annual distribution.

⁵⁷ TR 34:19-22.

⁵⁸ See Neb. Rev. Stat. §§ 86-141 to 86-148 (2012 Cum. Supp.).

⁵⁹ See Neb. Rev. Stat. § 14-101 (Reissue of 2012).

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that local competition exists in the Omaha, Bennington, Elkhorn/Waterloo, Gretna, and Valley Exchanges.

MADE AND ENTERED at Lincoln, Nebraska, this 20th day of May, 2014.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chair

ATTEST:

Executive Director

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that local competition exists in the Omaha, Bennington, Elkhorn/Waterloo, Gretna, and Valley Exchanges.

MADE AND ENTERED at Lincoln, Nebraska, this 20th day of May, 2014.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Tim Schram

Dee Janusa

Gerald L. Uy

Chair
Chair

ATTEST:

Steve Meradith
Executive Director

//s//Frank E. Landis