

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Commission,) Application No. NUSF-1
on its own motion, seeking)
to establish guidelines for) Progression Order No. 6
administration of the Nebraska)
Universal Service Fund.) Entered: March 21, 2000

BY THE COMMISSION:

1. On March 16, 1999, the Nebraska Public Service Commission (hereinafter, the "Commission") entered an Order Initiating Docket and Seeking Comment in Application No. NUSF-1 in which the Commission defined the services that would be subject to the Nebraska Universal Service Fund (hereinafter, the "NUSF") surcharge.

2. At that time, the Commission adopted the Federal Communications Commission's (hereinafter, the "FCC") definitions for certain retail end-user intrastate telecommunications revenue that would be subject to assessment of the NUSF surcharge. In so doing, the Commission found that the NUSF surcharge should be assessed on "mobile services, including wireless telephony, paging and messaging, and other mobile services" as well as other intrastate telecommunications services. Any entity offering these services to the public is required to bill and collect the NUSF surcharge on such services.

3. On October 26, 1999, ATS Mobile Telephone, Inc. (hereinafter, "ATS") filed a Petition for Declaratory Ruling, pursuant to Title 291, Chapter 1, Section 019 of the Commission's Rules of Procedures (hereinafter the "ATS Petition"). In that Petition, ATS requested a hearing and an order declaring that ATS is not subject to bill and collect the NUSF surcharge.

4. As noted In the ATS Petition, the Commission rules regarding petitions for declaratory rulings are found in Title 291, Chapter 1, Section 019 of the Rules of Commission Procedure (hereinafter, the "Commission's rules"). Section 019.05 of the Commission's rules states:

"If a petition for declaratory ruling presents a question of statewide commercial importance or such is noted during or after hearing on the petition, the Commission shall not issue a declaratory ruling but will resolve such question in an investigative proceeding."

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5. Given that any findings in this matter would potentially modify the findings contained in the Commission's March 16, 1999, NUSF-1 Order, the Commission determined that the ATS Petition presents a question of statewide commercial importance and concluded that the issues described therein would be best addressed in an investigative docket. Accordingly, on November 16, 1999, the Commission entered Progression Order No. 3 in Docket No. NUSF-1, setting a hearing on this matter. The purpose of said hearing was to ensure that the Commission was fully informed as to the issues surrounding the ATS Petition and its potential ramifications. On November 18, 1999, notice of said hearing was sent by first class mail from the Director of the Commission to all interested parties. This included all telecommunications companies that the Commission had identified as subject to billing and collecting the NUSF surcharge, including all companies known to be providing paging services.

6. A public hearing was held on December 14, 1999, in the Commission Hearing Room, 300 The Atrium, 1200 N Street, Lincoln, Nebraska. Testimony was presented by ATS, Telebeep Wireless (hereinafter, "Telebeep"), and Cable USA, Inc. (hereinafter "Cable USA"), (collectively, the "Petitioners"), all seeking an exemption for paging companies, from billing and collecting the NUSF surcharge.

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

7. The Commission derives its authority with respect to the NUSF from Nebraska Revised Statutes §§ 86-1401 through 86-1410, collectively known as the "Nebraska Telecommunications Universal Service Fund Act" (hereinafter the "NTUSFA"). These statutes were enacted through LB 686 [1997] and subsequently amended by LB 514 [1999] and LB 150 [1999]. Neb. Rev. Stat. § 86-1402 states:

"The purpose of the Nebraska Telecommunications Universal Service Fund Act is to authorize the commission to establish a funding mechanism which supplements federal universal service support mechanisms and ensures that all Nebraskans, without regard to their location, have comparable accessibility to telecommunications services at affordable prices."

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The Legislature has declared in Neb. Rev. Stat. § 86-1404(4) that:

"All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service."

The Legislature delegated to the Commission the powers to "determine the standards and procedures reasonably necessary, [to] adopt and promulgate rules and regulation as reasonably required, . . . as may be reasonably necessary to efficiently develop, implement, and operate the fund." Neb. Rev. Stat. § 86-1406. Further, Neb. Rev. Stat. § 86-1405 gives the Commission the "authority and power to issue orders carrying out its responsibilities".

8. Moreover, the NTUSFA was enacted in response to Telecommunications Act of 1996 (hereinafter, the "Federal Act") passed by Congress. In the Federal Act, Congress granted explicit authority to states to create state universal service funds. As codified in 47 U.S.C. § 254(f):

"A State may adopt regulations not inconsistent with the Commission's [FCC] rules to preserve and advance universal service. Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State. A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms."

9. The Petitioners, in essence, raise three issues related to the assessment of the NUSF surcharge on paging services. They are:

- A. Paging services are interstate telecommunications services because such services are licensed by the FCC. Therefore, paging services should not be assessed the NUSF surcharge consistent with the Commissions C-1628 order, entered February 2, 1999, that determined the NUSF would be funded solely from revenues from intrastate telecommunications services.

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B. The Federal Act in 47 U.S.C § 254(b) and § 254(d) and Neb. Rev. Stat. § 86-1404(4) requires the universal service contributions be made in an equitable and nondiscriminatory manner. Assessing the NUSF surcharge on paging services violate this requirement for the following reasons:

- 1) Paging services are not eligible for support from the NUSF.
- 2) Assessing the NUSF surcharge on paging services will force paging carriers to subsidize competing carriers that bundle services eligible for universal service funding together with paging services.
- 3) Paging customers derive no benefit from the NUSF.
- 4) Paging companies and customers already pay the NUSF surcharge on their basic service lines, in-state long distance calls, and interconnection bills. To require paging carriers and customers to pay the NUSF surcharge on paging services represents "double dipping".

C. Federal law only allows states to assess universal service surcharges on commercial mobile radio services (hereinafter "CMRS") providers, such as paging companies, if paging services are a substitute for landline telephone exchange services. At present no paging provider can be considered as a substitute for landline telephone service for any portion of Nebraska. Accordingly, the state may not assess the NUSF surcharge on paging services.

The Commission will address these concerns individually.

A. Assertions that paging is an interstate telecommunications service.

10. ATS argues that they offer only interstate paging services. ATS states that it has implemented a telecommunications infra-structure by constructing and utilizing towers located in the states of Iowa, Nebraska, Missouri, and Kansas. ATS testified that a paging message is broadcast simultaneously over the entire multi-state ATS system, irrespective of the paging customers actual

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location, via a technique known as "simulcasting". Therefore, ATS asserts that the entirety of its paging services are interstate services. To further support the claim that their paging services are interstate, ATS cites findings in ATS Mobile Telephone Inc. vs. General Communications Co.¹ (hereinafter "ATS v. GCC"). Therefore, ATS avers that its paging services should not be assessed the NUSF surcharge, consistent with the Commission's February 2, 1999, order in Docket No. C-1628 that determined that the NUSF should be funded via a surcharge on retail end-user revenue from solely intrastate telecommunications services.

11. The Commission finds that the evidence introduced by ATS and the other petitioners in this docket concerning the interstate versus intrastate characteristics of their services is insufficient to support the assertion that the services offered are exclusively interstate. The conclusory statements presented concerning the interstate characteristics of ATS's service are in conflict with the findings of the FCC and at least one United States Circuit Court regarding this issue. The FCC, in its Fourth Reconsideration Order at para. 303 notes that data submitted to the FCC by CMRS carriers for year 1995 reveal that interstate revenues amount to only 24 percent of total revenues for paging and other mobile service carriers². A analysis of the most recent data released by the FCC for year 1998, shows that interstate revenues amount to only 13.5 percent of total revenues for paging services provider based upon data submitted by the paging companies³. In its consideration of a similar claim by a paging company the CMRS providers are "jurisdictionally interstate", the Fifth Circuit Court of Appeals characterized such claim as a "weak challenge", and agreed with the FCC that

"... a significant portion of the CMRS providers' services arise providing intrastate telecommunications services. [footnote omitted] This undeniably significant involvement of CMRS providers in the provision of intrastate service is more than sufficient to place them within the ambit of section 254(f)."

¹ ATS Mobile Telephone, Inc. vs. General Communications Co., 204 Neb. 141, 282 N.W.2d 16 (1979)

² See *Telecommunications Industry Revenue: TRS Fund Worksheet Data*, Industry Analysis Division, Common Carrier Bureau, December 1996.

³ See *Telecommunications Industry Revenue: 1998*, Industry Analysis Division, Common Carrier Bureau, September 1999.

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Texas Pub. Util. Comm'n v. Federal Communications Comm'n, 183 F. 3d 393, 433 (5th Cir. 1999) (hereinafter "TPUC v. FCC").

12. Section 254(f) of the Federal Act preserves to the states the authority to "adopt regulations not inconsistent with the Commission's [FCC] rules to preserve and advance universal service." This section continues by stating:

"Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State."

Of course, as set forth in those portions of the NTUSFA quoted above, such Act was adopted by the Nebraska Legislature, and is being implemented by the Commission for the express purposes set forth in § 254(f) of the Federal Act.

13. ATS' position on this issue is not supported by ATS v. GCC. In such case, the jurisdiction of this Commission to require a radio common carrier licensed by the FCC to obtain Commission certification prior to commencing business was at issue. Obviously, the Federal Act had not then been adopted and the specific reservation of authority to the states under section 254(f) did not exist. While 47 U.S.C. sec 332(c)(3)(A) preempts states from regulating rates or entry by CMRS providers, we conclude, as did the Fifth Circuit in TPUC v. FCC, that state imposition of universal service fund requirements on a CMRS provider does not violate sections 332(c)(3)(A) of the Federal Act. 83 F.3d at 431.

14. Based upon the evidence in the record, and the available legal precedents on this issue, the Commission finds that the paging services offered by ATS and other petitioners participating in this docket are not exclusively interstate, that substantial revenues derived from such services are intrastate in nature and the Commission possesses the authority under the Federal Act and NTUSFA to require CMRS providers to contribute to the NUSF.

B. Assertions that assessing paging service violates the equitable and nondiscriminatory provision of federal and state law.

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15. ATS asserts that establishing and making the NUSF surcharge collectable in full by ATS is neither equitable nor nondiscriminatory because ATS is unable to withdraw funds while at the same time it is billing and collecting the surcharge. ATS, by virtue of ownership and the operation of its paging services, is not a carrier which can utilize the Universal Service Funds as set forth in the Commission's C-1628 and NUSF-4 orders. For these reasons, ATS maintains that requiring it, as a paging carrier, to collect and remit the NUSF surcharge violates the equitable and nondiscriminatory requirements set forth in Section 254(d) of the Federal Act.

16. Along similar lines, Telebeep argues that both the Federal Act and Nebraska law require that telecommunications providers' contributions to the NUSF be equitable and nondiscriminatory. Telebeep further states that paging carriers are technically incapable of providing all of the services that constitute universal service, as defined by the FCC, and are currently ineligible to draw from the NUSF. Therefore a requirement that customers of paging carriers, which cannot receive support under the NUSF, still have to contribute to the NUSF would violate the provisions of the Federal Act and Nebraska law.

17. Both ATS and Telebeep claim that by requiring companies that offer solely paging services to bill and collect the NUSF surcharge will result in these companies subsidizing competing carriers that bundle services receiving universal service funding together with paging services. Telebeep asserts that this "unbalanced situation" imposes burdens on the paging industry that no other telecommunications provider must face and places Nebraska paging providers in an untenable competitive disadvantage with respect to other telecommunications providers.

18. ATS and Telebeep assert that paging carriers and customers subscribe to basic local service. As a result they pay the NUSF surcharge on their basic lines of services and in-state long distance calls. Telebeep also states that it pays the NUSF surcharge on its interconnection bills. ATS points out that most paging customers return pages by using other telecommunications services that are subject to the NUSF surcharge. Both companies assert that assessing the NUSF surcharge results in "double dipping" that is fundamentally unfair and discriminatory and violates the Federal Act and Nebraska statutes.

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19. In bringing the Commission's attention to § 254(d) of the Federal Act concerning "equitable and nondiscriminatory" contributions to support universal service, ATS and the other petitioners participating in this docket fail to recognize that this is but one of seven principles identified by Congress in § 254(b) to guide the FCC's determination of universal service. Similarly, the Nebraska Legislature in section 86-1404 of the NTUSFA established eight principles so serve the policy of Nebraska "to preserve and advance universal service." Requiring that all telecommunications service providers make an "equitable and nondiscriminatory contribution" is but one of such factors. Both the Federal Act and the NTUSFA also instructs that "all" providers of telecommunications services should contribute to universal service. This language gives the Commission discretion to fashion a policy that is guided by both of these principles. Moreover, § 254(f) of the Federal Act, setting forth state authority with respect to universal service, requires that "[e]very telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State [emphasis added]."

20. Neither the Federal Act nor the NTUSFA require that only those who draw from the NUSF should be required to contribute thereto. Contrary to Telebeep's contention, the Commission does not conclude that imposition of the NUSF surcharge on CMRS providers will subject such providers to a competitive disadvantage as compared to other carriers. The evidence in the record on this point is conclusory and no independent studies or other data is offered to support such conclusions.

21. We conclude that CMRS providers do, in fact, benefit from the imposition and collection of the NUSF surcharge. A substantial component of the value of paging service to the user is the ability of calling parties to transmit a page to the paging user, and for the paging user to return a telephone call to the person paging him or her. As the FCC noted, paging carriers benefit from a larger and more universal public network system, because it increases the number of potential locations for paging use. The Fifth Circuit found this a "reasonable view". The ubiquity of telephone service is of obvious value to the CMRS providers. As "providers of telecommunications services", as opposed to a pizza restaurant, hotel or other business, CMRS providers benefit from universal telephone service in a unique manner and it is the finding of this Commission that the policy of this State, consistent with the

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requirements of the Federal Act and the NTUSFA, requires that paging companies should collect from their customers and remit applicable NUSF surcharges.

C. Assertions that Federal law prohibits states from placing universal service requirements on CMRS providers.

22. Telebeep argues that the Federal Act prohibits the Commission from assessing the NUSF on paging carriers. Telebeep points to 47 U.S.C. § 332(c)(3)(A). This section of the Communications Act of 1934, as amended states:

" . . . no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates."

Telebeep asserts that the second sentence of this section permits states to assess universal service surcharges on Commercial Mobile Radio Service or CMRS carriers, such as paging companies, but only to the extent that the services offered by CMRS carriers are a substitute for traditional landline telecommunications service for a substantial portion of the communications within a state. Telebeep argues that since, presently, no CMRS providers can be considered to serve as a substitute for landline telephone service for any portion of Nebraska, the Commission may not assess the NUSF surcharge on paging carriers.

23. The argument presented by Telebeep was also presented by CMRS providers in TPUC v. FCC. 183 F.3d at 430-433. The Fifth Circuit carefully considered the argument in section 5(c)(iv) of its decision. Id. The reasoning of the FCC concerning the proper construction of section 332(c)(3)(A) that was accepted by the Fifth Circuit, fully supports a consistent conclusion by the Commission that § 332(c)(3)(A) does not preclude the requirement that paging providers contribute to the NUSF, nor does such section negate the

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reservation of authority to the state by Congress under section 254(f). Specifically, section 332(c)(3)(A) was enacted prior to the Federal Act. The Federal Act included § 254(f) that requires that "Every . . . carrier that provides intrastate telecommunications services" contribute to the universal service programs as determined by the states. The provisions of § 332(c)(3)(A) should not be read to trump the express commands of § 254(f).

24. Telebeep points to the second sentence in § 332(c)(3)(A) to support its claim the Commission can only assess the NUSF surcharge on CMRS providers whose services are a substitute for landline telephone exchange service for substantial part of Nebraska. The Commission disagrees with Telebeep's interpretation of this sentence. The second sentence of § 332(c)(3)(A) clarifies the ability of a state to regulate rates and entry in the name of universal service, while the "other terms and condition clause", contained in the first sentence, enable state to impose universal service requirements, such as those expressly authorized by § 254(f) of the Federal Act. The Fifth Circuit agrees that requiring universal service contributions does not constitute the regulation of rates and entry. Texas Pub. Util. Comm'n, 183 F.3d 393,432 (5th Cir. 1999). The Fifth Circuit further held that states may generally regulate CMRS providers as they please, but they may regulate the rates and entry of CMRS providers only when they make a finding of substitutability. Id. Telebeep's reading of § 332(c)(3)(A) presents a direct conflict with § 254(f), which requires that "every telecommunications carrier" contribute to the universal service fund and thereby, as the Fifth Circuit determined, does not represent the unambiguous intent of Congress. Accordingly, the Commission finds no merit in Telebeep's argument on this issue.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that for the reasons set forth above, ATS' Petition for Declaratory Ruling is denied.

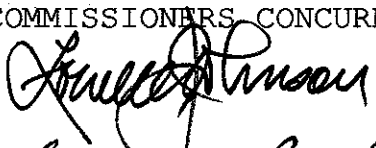
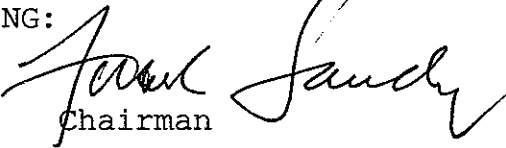
IT IS FURTHER ORDERED that CMRS providers, including paging companies, operating in the State of Nebraska shall bill and collect the surcharge for the Nebraska Universal Service Fund as ordered by this Commission, beginning May 1, 2000.


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MADE AND ENTERED at Lincoln, Nebraska, this 21st day of March,
2000.


NEBRASKA PUBLIC SERVICE COMMISSION:
COMMISSIONERS CONCURRING:

 
Chairman





ATTEST:


Executive Director

//s//Frank E. Landis

//s//Daniel G. Urwiller

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