

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Petition of) Application No. NUSF-77
the Nebraska Telecommunications)
Association for Investigation and) PROGRESSION ORDER NO. 1
Review of Processes and)
Procedures Regarding the NUSF.) Entered: November 3, 2010

BY THE COMMISSION:

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

On January 14, 2010, a Petition was filed by the Nebraska Telecommunications Association (NTA) for an investigation and review of the processes and procedures regarding the Nebraska Universal Service Fund (NUSF). Notice of this investigation was published in the Daily Record, Omaha, on January 19, 2010 and again on March 12, 2010. On March 8, 2010, the Commission held a planning conference in Lincoln, Nebraska. The participants generally discussed a timeline for the development of issues to be included in this investigation and the process to be used to move this investigation forward. An initial list of issues or comments were filed on April 19, 2010 and replies on May 24, 2010.

A workshop was held on June 24, 2010 in Lincoln and by teleconference so that threshold issues could be identified. The parties present agreed that there should be a short period to brief some legal issues pertaining to the Commission's jurisdiction and statutory authority. The Commission then sought comment on the following questions:

1. Does the Commission possess legal authority to provide specific support for deployment and/or operational costs of broadband services through the Nebraska Universal Service Fund (NUSF)?
2. If so, from where does that authority derive? If not, what kind of statutory change would be required?
3. If the Commission does possess the authority to support broadband services by virtue of the NUSF Act, are there any limitations on the Commission's authority with respect to the first question? Please explain.
4. Should the Commission establish a separate NUSF program for supporting the expansion of broadband availability in Nebraska?

Initial briefs were filed on or before July 3, 2010. Citizens Telecommunications Company of Nebraska d/b/a Frontier Communications of Nebraska (Frontier), the Nebraska Telecommunications Association (NTA), Qwest Corporation (Qwest), the Rural Telecommunications Coalition of Nebraska (RTCN), the Rural Independent Companies (RIC), and Sprint Nextel submitted written comments. Frontier reserved comment on all questions except question four. Reply briefs were filed on or before August 3, 2010. Frontier, Qwest and RIC filed reply briefs.

Legal Authority to Provide Broadband Support

The NTA, Qwest, RTCN and RIC believe that the Commission possesses the legal authority to provide support for broadband deployment and/or operational costs in Nebraska through the Nebraska Universal Service Fund (NUSF).

Sprint Nextel believes that the Commission lacks authority under Nebraska and federal law to provide support for broadband deployment through the NUSF. Sprint Nextel contends that broadband is an "information service" and that § 86-324 only authorizes the NUSF to be used for "telecommunications services." Sprint Nextel argues that if the legislature had intended the NUSF to be used for information services, it would have expressly included the term "information services" under § 86-324 as it had in § 86-323. Additionally, Sprint Nextel states that because the FCC has exclusive jurisdiction over broadband Internet access as an interstate information service, the Commission lacks authority to impose an assessment on intrastate telecommunications services revenues to be used to fund interstate information services.

Sources of Legal Authority

As stated above, the NTA, Qwest, RTCN and RIC believe that the Commission draws its authority to use the NUSF to support broadband deployment from Nebraska law. The NTA commented that no statutory changes would be necessary as the Legislature contemplated that the NUSF would be used for broadband deployment when it used the term "information services" in the policy declaration of § 86-323. Qwest states that the Legislature intended for telecommunications services and information services to be provided across the state, and granted authority to the Commission under the Nebraska Telecommunications Universal Service Fund Act (NTUSFA) to provide support for those services. The RTCN states that the Legislature gave the Commission explicit authority to create a fund that supplements the federal USF. If the FCC delegates a portion of the Federal USF to support broadband deployment, then

the RTCN argues that the Commission has explicit authority to extend the NUSF in order to supplement any federal USF support for broadband. In addition to the legislative intent of the NTUSFA, the RICs state that federal cases such as *Qwest Corp. v. FCC*, 258 F.3d 1191 (10th Cir.2001) and the federal statutory provisions of 47 U.S.C. § 254 support the conclusion that states have the authority to assess state USF to support universal service principles in partnership with the federal government, including information services.

Sprint Nextel believes that since the Commission lacks the authority to provide support through the NUSF for broadband deployment, any funding mechanism to support broadband deployment in Nebraska must be authorized by the Legislature. Additionally, Sprint Nextel states that broadband deployment should not be funded through assessments on voice telecommunications services as doing so would be anti-competitive and discriminatory to voice service providers and customers.

Based on the comments submitted, the Commission finds that it possesses the requisite legal authority to provide support for broadband deployment and/or operational costs of broadband services through the NUSF. The Legislature's NUSF policy declaration in § 86-323 states that the purpose of the NUSF is to provide universal access to "advanced telecommunications and information services" across the state. To that end, the Legislature delegated authority to the Commission under § 86-325 to determine the standards and procedures necessary to operate the NUSF. Legislation should be read in a way which best achieves the stated legislative purpose. If the Legislature intended that both telecommunications and information services be made available at just and reasonable rates, it would follow that the Legislature would have intended the Commission to have the requisite authority to carry out the legislative policy in regards to an information service such as broadband. In addition, the Legislature has specified that the NUSF should supplement the Federal USF. Because the FCC has stated that it intends to support broadband with the Federal USF, the Commission should support state deployment of broadband with the NUSF.

Possible Limitations to Commission Authority

The NTA does not believe that there are any limitations to the Commission's authority to support broadband services, other than to what extent the Commission decides that broadband would be supported by NUSF funds.

Although the RIC states that the Commission has authority to support broadband deployment through the NUSF, the RIC contends that the Commission does not have authority to regulate broadband Internet service. The RIC states that the question of any limitation on the Commission's authority may be best answered after the FCC issues its ruling in the Third Way Notice of Inquiry, which is currently pending.

Based on the briefs and comments submitted, the Commission finds that the issue concerning the limitations on the Commission's authority should be reserved until after the FCC issues a ruling either in the Third Way Notice of Inquiry or other National Broadband Plan proceedings.

Separate NUSF Broadband Program

The NTA, Frontier, RTCN and RIC support the creation of a separate NUSF program for broadband. The RTCN states that should the Commission choose to establish a separate broadband fund, the new fund should be separate and supplemental to the existing NUSF fund. Frontier recommends that any separate NUSF program created to support broadband be limited to funding broadband deployment in geographic areas where no broadband service currently exists. Additionally, the RICs recommend that the Commission issue a progression order requesting comment and/or to conduct a public hearing on several sub-issues, including the definition of "broadband," policy goals, funding sources, eligibility for grants, and possible terms and procedures for the application and grant process.

Qwest does not believe that a separate broadband program is required for initial deployment, but that some NUSF funds could be redistributed to support a broadband deployment pilot program. Qwest recommends that a separate funding program be created after the results of the pilot program are analyzed.

Sprint Nextel recommends that before considering any new broadband funding program, the Commission should require all local exchange carriers to reduce their intrastate switched access rates to interstate levels as recommended by the FCC in its National Broadband Plan.

The Commission finds a broadband program developed in the NUSF may be an appropriate and forward looking tool to assist the FCC in meeting its broadband plan goals. A separate broadband program would increase accessibility to advanced services consistent with § 86-323 and would be in the public interest.

Issues for Public Comment

Creating a broadband program and transitioning support for broadband purposes is a significant undertaking which should be carefully crafted. Accordingly, we believe initially, the Commission should consider implementing a broadband pilot program. We ask interested parties to comment on whether the Commission should implement a broadband pilot program within the NUSF, and if so, how the broadband pilot program should be administered.¹

In addition, we seek comment on the timing of the creation of a pilot or long-term broadband support mechanism. We ask the interested parties to comment on whether the Commission should wait for an FCC determination on broadband support at the federal level. The FCC has several dockets pending to reform universal service and the intercarrier compensation mechanisms. The FCC is currently considering whether to add broadband services to the list of services supported by the Federal USF. In addition, the Commission is considering the treatment of Internet services in a Third Way Notice of Inquiry. In light of the unanswered questions at the federal level, how can the Commission best coordinate its NUSF policies with federal actions to promote broadband availability in Nebraska?

If the Commission moves forward with a broadband pilot program, we seek comment on how the program should be structured overall. What policy goals should the Commission establish? How should this pilot program be funded? What should the size of the pilot program be? Who should be eligible to apply for and receive funds or grants from the broadband pilot program?

In addition, there are several definitional questions to consider. The Commission seeks comment on the definition of "broadband" for the purpose of this program. How should "broadband" be defined? What should the minimum download and upload speeds be? What is the rationale for selecting the certain speed tiers?

In addition, how should data determining unserved and underserved areas be collected? Should the Commission utilize

¹ We decline at this time to consider Sprint Nextel's request to require access reform. The Commission has recently addressed access rate proceedings in Docket No. C-4145/NUSF-45, which is currently on appeal. The Commission finds it appropriate to wait until that appeal is resolved or wait until further guidance from the FCC on intercarrier compensation reform prior to making any findings relative to reductions to carriers' intrastate access rates.

the broadband mapping project to determine unserved/underserved areas? Why or why not? How should broadband investment be reported? What other factors should be used in the selection of a supported area or provider?

Comments responsive to these questions may be filed on or before **December 17, 2010**. Reply comments may be filed on or before **January 18, 2011**. Interested parties should file one (1) paper copy and one (1) electronic copy of their comments. Electronic copies of comments should be sent to Brandy.Zierott@nebraska.gov and Shana.Knutson@nebraska.gov. Comments will be posted on the Commission's website. Courtesy copies of the comments and reply comments should be sent through the electronic service list to all parties which previously filed comments in this proceeding.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the opinion and findings relative to the Commission's authority to establish a broadband program as set forth herein be, and they are hereby, adopted.

IT IS FURTHER ORDERED that comments responsive to the questions and issues outlined herein may be filed on or before **December 17, 2010**. Reply comments may be filed on or before **January 18, 2011**. Comments shall be filed in the manner prescribed above.

MADE AND ENTERED at Lincoln, Nebraska, this 3rd day of November, 2010.

NEBRASKA PUBLIC SERVICE COMMISSION

Chairman:

ATTEST:

Executive Director