

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Application) Application No. C-3228
of Time Warner Cable Information)
Services, LLC, d/b/a Time Warner)
Cable, Nebraska, Stamford,) GRANTED
Connecticut, for a Certificate)
of Authority to provide local)
and interexchange voice services)
within the state of Nebraska.) Entered: November 23, 2004

APPEARANCES:

For the Applicant:

Travis S. Tyler
Russell Westerhold
Fraser, Stryker, Meusey, Olson, Boyer & Bloch, PC
500 Energy Plaza
409 South 17th Street
Omaha, Nebraska 68102

For the Intervenors:

Southeast Telephone Company, Hemingford Cooperative Telephone
Company, Rural Independent Companies and
Alltel Nebraska Inc.
Paul M. Schudel
James A. Overcash
Woods & Aitken, LLP
301 South 13th Street
Suite 500
Lincoln, Nebraska 68508

For Nebraska Telecommunications Association:

Jack L. Shultz
800 Lincoln Square
121 South 13th Street
P.O. Box 82028
Lincoln, Nebraska 68501

For Qwest Communications Corporation:

Jill Vinjamuri Gettman
Kutak Rock LLP
The Omaha Building
1650 Farnam Street
Omaha, Nebraska 68102
and
Timothy Goodwin
1801 California
Suite 4900
Denver, Colorado 80202

Application No. C-3228

Page 2

For Rural Independent Intervenors:

Timothy F. Clare
Troy S. Kirk
Rembolt, Ludtke & Berger, LLP
1201 Lincoln Mall
Suite 102
Lincoln, Nebraska 68508

For AT&T:

Loel P. Brooks
Brooks, Pansing Brooks PC, LLO
984 Wells Fargo Center
1248 O Street
Lincoln, Nebraska 68508
and
Gary Witt
1875 Lawrence Street
Suite 1575
Denver, Colorado 80202

For the Commission:

Shana Knutson
300 The Atrium
1200 N Street
Lincoln, Nebraska 68508

BY THE COMMISSION:

By Application filed July 17, 2004, Time Warner Cable Information Services, Nebraska LLC, d/b/a Time Warner Cable (TWCIS or Applicant), Stamford, Connecticut, seeks authority to provide local and interexchange voice services within the state of Nebraska. Notice of the application was published in The Daily Record, Omaha, Nebraska, on July 21, 2004. Petitions of Formal Intervention were filed by the following: Southeast Telephone Company; Alltel Nebraska Inc.; Hemingford Cooperative Telephone Company; the Rural Independent Companies; the Nebraska Telecommunications Association, Qwest Communications Corporation; Benkelman Telephone Company; Arapahoe Telephone Company; Cozad Telephone Company; Curtis Telephone Company; Diller Telephone Company; Glenwood Telephone Membership Corporation; Keystone-Arthur Telephone Company; Wauneta Telephone Company; and Mainstay Communications. AT&T filed a Petition for Informal Intervention. A hearing on the application was held in the Commission Library on September 17, 2004, with appearances as shown above.

EVIDENCE

TWCIS is a limited liability company owned by Time Warner Cable Inc. and Time Warner Entertainments-Advance/Newhouse Partnership. The ultimate corporate parent of each of these entities is Time Warner Cable Inc. TWCIS seeks to provide facilities-based competitive local and long distance Internet Protocol voice services to customers in the State of Nebraska that have access to the cable facilities of Time Warner Cable in the Nebraska communities of Lincoln, Fremont, Columbus, York, Nebraska City, Seward, Crete, Fairbury, Falls City, Tecumseh, David City, Auburn, Pawnee City, Humboldt, Denton, and Table Rock. The application was made pursuant to Neb. Rev. Stat. §§ 86-128 and 86-129 (2002 Cum. Supp.) and Title 291, Article 5 §§ 002.49 and 003.12A of the Nebraska Public Service Commission Telecommunications Rules and Regulations.

Initially, Applicant's service will be offered only to customers who subscribe to its high-speed modem data service. The Applicant's service will be offered on a bundled, flat-rate basis and will allow local and long distance calling in addition to operator services, directory assistance, white page directory listings, E911 services, outbound 800 toll free calling, local number portability and access to telephone relay services. Applicant's customers will be able to call and be called by any other IP voice service subscriber of TWCIS. Customers will also have access to the public switched telephone network and thus will be able to call and be called by all other parties connected to the public switched telephone network. Applicant will bill for the digital phone monthly package in advance, although additional charges for international calling, directory assistance and operator services will be billed in arrears. Applicant does not plan to collect deposits.

Applicant further testified that it will contribute to the federal and state universal service funds in accordance with applicable law. Applicant's voice services will also fully comply with all requirements applicable to telecommunications services including all applicable E911 obligations, CALEA, universal service and telephone relay service requirements. Applicant will provide customers with access to directory assistance, operator assistance and directory listings.

The service provided by Applicant will be carried over its proprietary IP network and will not travel over the public Internet. This provides Applicant with sufficient control to ensure that its services meet or exceed the applicable technical standards for service quality. All appropriate intercarrier

compensation will be paid on calls originating from Applicant's network and all jurisdictional determinations and payments will be made in accordance with existing compensation regimes. Applicant will rely on its underlying carrier, identified as Sprint, for further technical and managerial support.

Mr. Steven E. Watkins testified for the Formal Intervenor Southeast Nebraska Telephone Company. His testimony was also represented as the viewpoints and concerns of the other rural independent companies. Mr. Watkins observed that this application is unique because the result of Applicant's proposal would be that it would not enter into interconnection agreements with ILECs. Mr. Watkins further testified that while Applicant intends to serve the end-user with local exchange service, it does not intend to have arrangements directly with the other carriers in Nebraska that terminate a call from a Time Warner end user or that originate a call to that end user.

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

As the Hearing Officer previously stated in the prehearing conference, the Commission's review of this Application is based upon the Commission's Rules in the Neb. Admin. Code Title 291, Ch. 5, Rule 002.49. Accordingly, the Commission considers this application for authority in light of the following criteria and standards established in the Commission's telecommunications rules:

- (a) Whether the Applicant has provided the information required by the Commission;
- (b) Whether the Applicant has provided a performance bond, if required;
- (c) Whether the Applicant possesses adequate financial resources to provide the proposed service;
- (d) Whether the Applicant possesses adequate technical competence and resources to provide the proposed service;
- (e) Whether the Applicant possesses adequate managerial competence to provide the proposed service; and
- (f) Whether granting the Applicant a certificate preserves and advances universal service, protects the public safety and welfare, ensures the continued quality of telecommunications services and safeguards the rights of consumers, pursuant to Section 253(b) of the Act.

Applicant has demonstrated that it meets the standards of financial, technical and managerial competence. No party in this proceeding refuted the Applicant's competence.

The Applicant's ability to meet the Commission's public interest criteria was a disputed issue. Southeast Nebraska Telephone Company (Southeast) in particular raised concerns with Applicant's ability to provide access to emergency services or to provide service in the event of a power loss. Applicant committed to filing its disclaimers to customers in this regard and to working with the Commission in the event that it has concerns with these issues. The Commission finds that these commitments sufficiently address the concerns raised in this regard.

The Commission has lingering concerns, however, with the impact of Applicant's request for authority in Southeast's territory where the rural exemption has not been lifted, and with respect to Mr. Watkin's testimony that this Applicant unlike other carriers, does not plan to enter into an interconnection agreement with the incumbent local exchange carrier (ILEC). Rather, Applicant testified that it has entered into an agreement with Sprint, a competitive local exchange carrier, for the exchange of traffic. The Commission agrees with Mr. Watkins that this presents a unique circumstance and that new issues with respect to rural carriers are likely to arise. The Commission finds that the concerns proffered by Mr. Watkins although uncontroverted, did not rise to the level to defeat Applicant's evidence that a grant would serve the public interest. While we find that Applicant met its burden of proof, the Commission recognizes there are some legitimate concerns regarding when and how the rural exemption is addressed. The substance of Mr. Watkin's concerns will be more appropriately addressed at the point at which there has been a request to lift the rural exemption and when interconnection agreement approval is requested. The Commission believes that Applicant as the retail provider who seeks to compete in a rural incumbent's area and who benefits from this competition should be likewise accountable to the Commission during this process. Accordingly, prior to the offering of service in competition with Southeast Nebraska Telephone Company or any other rural telephone company under this certificate the Applicant must:

1. File written notice with the Commission when a bona fide request has been sent either by it or its underlying carrier to a rural ILEC.

2. The rural ILEC then will have 30 days in which to notify the Commission that it intends to raise the rural exemption as a reason not to negotiate or arbitrate an agreement.

3. The Commission will rule on the rural exemption in accordance with the Telecommunications Act of 1996 (Act).

4. The parties will either negotiate or arbitrate an agreement. The parties will file the agreement for approval. The Commission will then approve or reject the agreement in accordance with the Act.

The Commission finds Applicant will be required to notify the Commission of the above-listed events and triggers and may be considered by the Commission as a necessary party in future Commission proceeding where the issue involves when and how Applicant's retail service is to be offered in competition with a rural carrier.

Moreover, in all certificated areas, before the Applicant is allowed to provide local service to its users, it must either:

1. Through negotiation or arbitration, reach an interconnection/resale agreement with the pertinent local exchange carrier and receive Commission approval of the interconnection/resale agreement; or

2. In the event a certified local carrier provides a wholesale tariff, purchase rates from that tariff, and file its own tariff.

The opinions and findings in this Order carry no precedential value other than establishing minimum standards and criteria to apply when considering applications to provide interexchange and local exchange service in the above-mentioned territories. All telecommunications carriers seeking such a certificate must demonstrate that they meet, at a minimum, the standards and criteria set forth herein.

This order does not terminate, waive or in any manner diminish the exemptions and protections created by the Act for rural carriers, as defined by the Act. This order does not address the issue of the rural local exchange carrier exemption

under the Act. Rural exemptions may be terminated, suspended or modified only as provided in Section 251(f) of the Act. Prior to providing local exchange service in any area in the state of Nebraska, Applicant must file tariffs in accordance with the provisions of section 002.21 of Neb. Admin. Code title 291, chapter 5.

As a provider of local telecommunications service in the state of Nebraska, Applicant is subject to the same laws, rules and regulations, both federal and state (including any laws, rules or regulations regarding universal service, restrictions on joint marketing and quality of service), applicable to any other local exchange company except those obligations imposed on ILECs pursuant to Section 251(c) of the Act.

Finally, the Commission turns to the objections of AT&T. During the course of the hearing, AT&T objected to the admittance of the testimony filed by Southeast Telephone Company on the grounds that it did not receive notice of the extension of time for intervenors to file testimony and it was not served with Southeast's prefiled testimony.¹ AT&T objected further to the fact that it was not given copies of the testimony prior to the hearing. Accordingly, AT&T asserted at the hearing and in its post-hearing brief, due process was not fulfilled. The Hearing Officer gave AT&T the opportunity to assert its objection, but overruled this objection.

Upon review of the Commission's rules, the Commission finds that due process was not subverted by the Hearing Officer's

¹ AT&T further argues in its post-hearing brief that the Commission has continually failed to serve it with its orders in this proceeding. AT&T insinuates the Commission had a malicious intent to overlook AT&T in this proceeding. As an example, AT&T states that it has not yet been served a copy of the Commission's Hearing Officer Order of August 6, 2004. However, we note for the record that AT&T filed its Petition for Informal Intervention on August 8, 2004. Accordingly, the Commission would not have served a copy of its August 6, 2004, Order on AT&T because it was prior to their interest being on record. However, the Commission further notes that it erroneously did not serve a copy of the Hearing Officer's Order denying oral argument and denying the requested continuance which also moved the deadline for prefiled testimony. This was due to an administrative error. There was no malice in this oversight and the Commission believes that such error was harmless as AT&T could not have changed its position and AT&T was given the opportunity at the hearing to object and to request portions be stricken from the record.

Moreover, upon review of this case, it became apparent that neither the Applicant nor Southeast served a copy of its prefiled testimony on AT&T, the Commission believes this to be an oversight on the part of both parties and cannot deduce from the record that there was an intention to exclude AT&T by either party.

decision to extend the comment deadline. After discovery responses had been filed, the Commission received a Motion to Compel from Southeast regarding Request No. 6. Simultaneous with that Motion to Compel, the Commission was also informed that the Applicant and Southeast continued to communicate to resolve the discovery dispute and Applicant had agreed to provide Southeast with further information responsive to Request No. 6. The Commission did not schedule an oral argument on the Motion to Compel on that basis.

On September 9, 2004, the Commission received a Motion to set Oral Argument on the Motion to Compel and also received a Motion to Continue the Hearing from Southeast. In support of the Motion to Continue the Hearing, Southeast stated in writing that because it had just received information from the Applicant responsive to Request No. 6, it needed additional time to prepare for the hearing. The Hearing Officer overruled those motions and instead, because information was just exchanged between the parties, decided to extend the time frame for intervenor testimony from the original due date of September 10, 2004 (which was the deadline respective to all intervenors, including informal intervenors) to September 16, 2004 at 2:30.² The extension of time was granted for all intervenors.

Rule 017 of Commission Procedure provides the Hearing Officer with the power to rule on issues, including substantive issues, as long as the ruling is not dispositive of the case. The Hearing Officer in this case ruled on procedural motions, i.e., the Motions for Continuance and for Oral Argument which arose during a discovery dispute, and said rulings were not dispositive to this case. In the interest of time, oral argument was not scheduled on either the discovery motion or the motion for continuance; rather, the Commission dealt with the issues on the pleadings. This was permissible procedurally and fully within the discretion of the hearing officer.

Finally, at the hearing, it was argued that an informal intervenor could not offer objections into the record because of their limited status. While it is true that an informal intervenor cannot elicit testimony from others during the hearing, cannot participate in discovery, and is limited to a prefiled statement of one witness at the hearing, there is no rule which explicitly provides that an informal intervenor may

² The Commission notes that its request for prefiled testimony is purely discretionary. Prefiled testimony is generally not required except by Commission or Hearing Officer order. The purpose of requesting prefiled testimony is to assist the Commission and to expedite the hearing.

not make oral or written objections on the record. The Commission believes it is in the discretion of the Hearing Officer to entertain objections from informal intervenors. Generally speaking, where it is discretionary, the Commission believes it good public policy to err in favor of including information, rather than excluding it. In this case, the Hearing Officer heard the objections of the informal intervenor and made his ruling. The Hearing Officer included the testimony of Mr. Watkins and overruled the motion to strike or exclude the testimony. Upon further review the Commission finds this to be a proper ruling. Time Warner's application and testimony contained a reservation of rights regarding jurisdiction. We view testimony of Mr. Watkins as responsive to this reservation of rights and not outside the scope of the proceeding. The testimony of Mr. Watkins contained the intervenors' concerns with the enforceability and operation of the reservation of rights clause and was not a broad discourse on the issue of regulating VoIP generally. The Commission has considered the testimony presented by all interested persons and gives the testimony the weight that it merits in this proceeding.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that Application No. C-3228 filed by Time Warner Cable Information Services be and it is hereby granted to the extent provided herein.

IT IS FURTHER ORDERED that the Applicant comply with Section 251(f)(1)(B) of the Telecommunications Act of 1996 and that the Applicant submit any bona fide request(s) for interconnection, services or network elements from a rural telephone company to the Commission for its approval prior to the provision of any service under the certification in a rural telephone company area.

IT IS FURTHER ORDERED that Applicant is obligated to abide by the same laws, rules and regulations, both federal and state (including any laws, rules or regulations regarding universal service, restrictions on joint marketing and quality of service), applicable to any other interexchange and local exchange carriers, except obligations imposed on incumbent local exchange carriers pursuant to Section 251(c) of the Act.

IT IS FURTHER ORDERED that, to the extent Applicant provides access line service as referenced in the Telecommunications Relay System Act, Neb. Rev. Stat. §§ 86-301 through 315 (Relay Act) and defined in Neb. Admin. R. & Reg.

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

Application No. C-3228

Page 10

Title 291, ch. 5 § 001.01B, the Applicant shall collect from its subscribers a surcharge (Relay Surcharge) pursuant to the relay act and the Commission's annual orders establishing the amount of the surcharge, and shall remit to the Commission the proceeds from the relay surcharge as provided by the relay act.

IT IS FURTHER ORDERED that the Applicant comply with all necessary statutes and Commission Rules and Regulations as they pertain to the Nebraska Universal Service Fund.

IT IS FURTHER ORDERED that Applicant, like all other certificated carriers, shall file, in accordance with the applicable statutes, on or before April 30 of each year, an annual report with the Commission consisting of: (a) a copy of any report filed with the Federal Communications Commission; (b) a copy of any annual report to stockholders; and (c) a copy of the latest Form 10-K filed with the Securities and Exchange Commission. If such reports are unavailable, Applicant shall file a balance sheet and income statement for the previous year of operation, and for the state of Nebraska on a combined interstate-intrastate basis, the investment in the telephone plant and equipment located within the state, accumulated depreciation thereon, operating revenues, operating expenses and taxes.

IT IS FURTHER ORDERED that within 30 days from the entry of this order that the Applicant file a tariff with the Commission as required by state statutes and the Commission's regulations.

IT IS FINALLY ORDERED that this order be, and hereby is, made the Commission's official Certificate of Public Convenience and Necessity to the Applicant to provide local and interexchange voice services within the state of Nebraska.

MADE AND ENTERED at Lincoln, Nebraska, this 23rd day of November, 2004.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Ronald Johnson Chairman

Gerald L. Vap

Frank E. Landis

ATTEST:

And S. Pollock

//s// Frank E. Landis

//s// Gerald L. Vap

Executive Director