BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the matter of the Commission, on its own motion, to conduct an investigation to determine whether the Nebraska Public Power District is operating as a common carrier offering intrastate telecommunications services and is thereby subject to Commission jurisdiction.	Application No. C-1481/PI-18 INTERIM ORDER DETERMINING NPPD IS PROVIDING TELECOMMUNICATION SERVICES Entered: May 28, 1997

APPEARANCES

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BY THE COMMISSION:

E V I D E N C E

The Nebraska Public Service Commission (Commission), on its own motion opened docket C-1481 on January 30, 1997. The purpose of the docket is to investigate and determine whether the Nebraska Public Power District (NPPD) is offering intrastate telecommunications services on a for-hire basis, and is therefore subject to Commission jurisdiction. Notice of the investigation was published in the ***Daily Record***, Omaha, Nebraska, on February 6, 1997, pursuant to the Rules and Regulations of the Commission pertaining to notice. Formal interventions in the proceeding were filed by the Nebraska Telephone Association, the Nebraska Independent Telephone Association, Benkelman Telephone Co., Inc., Wauneta Telephone Co., Cozad Telephone Co. and Henderson Cooperative Telephone Co. The matter came before the Commission for oral hearing on March 25, 1997.

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NPPD called five witnesses to testify in this proceeding. The witnesses testified as follows:

Dr. James Underwood testified: He is President of Northeast Community College (NCC or the College) in Norfolk, Nebraska, and has served in that capacity since July 1, 1995. The College is a comprehensive community college with technical as well as academic offerings at the certificate, diploma and associate degree levels. Some of the area educational sites affiliated with the College include Ainsworth, O'Neill, Bloomfield, Neligh, West Point, South Sioux City and Hartington. The College offered classes at some 79 sites throughout northeast Nebraska within its 20 county service region. It is the community college's role and mission to make educational offerings available at times and places that are convenient to its constituents. The College is serving its off-campus students through tele-courses offered over NETV, on-site instruction, on-site credit, as well as non-credit instruction and by interactive video distance learning technology. The College has a contract with US West to provide connectivity to three public school consortiums for the delivery of educational programs from the college via interactive video. The consortiums include the Niobrara Valley Partnership, consisting of 13 school districts, Northeast Nebraska Telepartnership, consisting of 8 school districts, and the Elkhorn Valley Partnership, consisting of 8 school districts. The College has an agreement with NPPD to use a portion of its access capacity for delivering programs to South Sioux City from Norfolk via interactive video. The College, through the use of technology, is reaching small groups of people throughout rural Nebraska with affordable, accessible and convenient programs.

In 1994, a consulting firm was hired by secondary and post-secondary institutions in northeast Nebraska to do a feasibility study of the region's telecommunications needs. One of the impediments identified was that of providing on-site programming to South Sioux City, which was in a different LATA. The cost of providing programing across the LATA boundary was prohibitive, so other alternatives were explored. The cost of providing distance learning across the LATA was $47,148 a year. The College's current agreement with US West, wherein it is serving some 29 distance learning sites within the LATA, cost $18,420 a year. The consultant discovered that NPPD was replacing and upgrading a service line from its Norfolk substation to the IBP plant in Dakota City. The College's former president, Dr. Bob Cox, inquired of NPPD's administrative office if there might be enough reserve capacity available in its fiber optic system so that educational

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partners could lease a portion of that communication system to reach the South Sioux City area. It was determined that such access capacity existed, and a meeting with NPPD as well as the educational partners was scheduled. It was determined that it would be possible to transmit educational programs between Wayne State College (WSC) and Norfolk, as well as South Sioux City. It was determined that each of the partners (NCC, WSC and South Sioux City) located in the area would be connected to NPPD's splice points at each partner's individual expense. In 1996, the educational partners decided to make the investment without any cost to NPPD. The affiliation agreement, which was entered into in 1996, is a cooperative arrangement to provide interactive distance learning educational opportunities which originate in Norfolk at NCC and will be transmitted to South Sioux City, with some origination occurring at Wayne. The NPPD excess capacity fiber between South Sioux City and Norfolk are being made available by NPPD for a monthly maintenance cost. During the fall, 1996 term, courses in business communications, sanitation and safety, as well as ICD coding were offered. In addition to an expanded number of courses, the system will also be used for conferences, staff meetings and non-credit offerings with business and industry. During the fall of 1997 an expanded number of credit offerings will be offered from NCC designed primarily for the adult education population, but the school will also offer credit and escrow courses for high school students. College level courses for high school students will also be offered in the disciplines of math, science, communications, history, humanities and business. During the fall of 1997, WSC will offer several upper level division courses, as well as graduate courses from its campus to South Sioux City. WSC is currently installing equipment and training faculty for the project.

The first year of the project succeeded in getting the equipment installed and operational, the training courses written, the trainers' trained, the faculty trained, the courses adapted for the distance learning technology, with some courses having been implemented. Given the investment of time and energy and the reasonable line costs which the College has experienced with NPPD, the project should be allowed to continue. He is unable to state whether additional projects in Burt and Cuming Counties contemplate use of NPPD's excess capacity. He played no role in the initial discussions regarding the cost of traversing a LATA to provide the proposed service. If a technical problem developed on the distance learning network and it was attributable to a line problem, presumably the College's technicians would be in touch with representatives of NPPD.

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US West plays a role in the partnership of providing distance learning by connecting the schools to the west and north of NCC. Currently, the College offers its interactive video technology through US West to the west and north, and through NPPD to the east. He does not know if any contacts were made regarding any certification requirements before the project began, and he did not know if the technology was in place to have obtained the service from a source other than NPPD. Reliability would absolutely be a key element of the distance learning project. The agreement between the parties specifies the amount of the payment NCC makes to NPPD.

Lance Hedquist testified: He is the City Administrator for the City of South Sioux City, Nebraska. He has held his position for the last 17 years. The city worked with several schools to develop an educational system based upon pods of schools working together to utilize fiber optics for two-way interactive educational efforts. A 1993 report from the consultant indicated that many thousands of dollars of additional expense would be required to add South Sioux City to the regional network because it was located across a LATA boundary. By chance, the city learned that NPPD was planning to place a fiber optic line between two critical points in the consortium's network which would cross the LATA boundary. Meetings were conducted to establish a distance learning pilot project utilizing NPPD's fiber optic line. South Sioux City has a technology center located on the high school property which is linked by fiber optic to NCC so as to provide two-way interactive classes. The city and the school installed about one and a half miles of fiber optic line in order to connect to the NPPD line, which in turn connects to NCC. This arrangement has made educational needs of the residents available in a cost effective manner. The consultant, Telesystems, Inc., at no time indicated there were any improprieties of proceeding with the connection of the distance learning network. The witness was not aware of any inquiries made with regard to any regulatory restrictions that might exist. The city did not think it could hook up to the system for the distance school learning system at the price quoted by US West. The discussion centered on strictly the financial side, and that became the impediment.

Mike Nolan, City Manager of Norfolk, testified: In November of 1996, municipal government was seeking an alternative mechanism for high speed connectivity to internet services. The purpose was to provide the Norfolk Public Library with access to the internet. The city provides library services to citizens from

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12 to 13 counties in a trade area that numbers 90,000-100,000 people. The city is also seeking to improve its own internal communications system. The city has sought to connect all of its various satellite offices, but the cost of installing its own fiber optic network is cost prohibitive. In the short term, the city obtained access through a local internet server, but access to the system is frequently not available. The city asked NPPD to consider the project. Exhibit 6 is a schematic of the collaborative relationships required to provide the connectivity to the internet service. The entire plan is not connected, but live connection exists between NPPD's maintenance facility and the city's fire division. The access and use agreement the city has with NPPD specifies an annual charge of approximately $6,500 for access to NPPD's fiber. The city considers this a pilot project, because it is for a duration of 12 months. At the end of the pilot project, if neither party decided to go forward, the city could find an alternative provider. The cost of the relationship to use someone else's fiber plus the equipment that was needed to set up the city's intranet is about $50,000 as compared to $500,000 to construct its own fiber network. Through Supplynet, a subsidiary of Long Lines Phone Company, the city gets a reliable, high speed access to the internet. The city embarked upon its present pilot project so that it would be in a position to do everything that it needs to do as a learning organization so that its library, its staff and elected officials could access a good, quality service. Nolan and the Norfolk city attorney discussed with NPPD's attorney the pilot project. As a result of that conversation, all parties were of the opinion there was no reason why the city couldn't engage in the pilot project. All customer service provided by either NPPD or Cablecom are specified in the agreement. The City of Norfolk did make a request for proposals from existing telephone companies for the internet access service. The companies responded that they were capable of providing the service. A request for proposal was advanced to US West. In October or November of 1996, the parties discussed the legal ramifications of a pilot project, and city representatives did not understand that there was going to be any problem. In the event there is a breakdown that occurs someplace on the system, the city would deal with the entity that owned that portion of the network where the breakdown occurred. The city's plans for the next year include connecting to additional utilities by utilizing US West's copper wire. The terms of the agreement with NPPD provide that in the event the final order of a regulatory agency or court determine that NPPD is a common or contract carrier, the agreement shall be null and void.

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Gary Westphal, Vice President of Wholesale Operations of NPPD, testified: He is a civil engineer and joined NPPD in 1971. He is responsible for wholesale customer service, including the internal communications network. In order to operate its electrical system, NPPD requires a communications network to support high speed electrical protective relaying systems stability, telemetry, system control and data acquisition. NPPD transports large volumes of data and voice statewide between its various offices and to support corporate operations. NPPD was authorized, pursuant to an FCC license, to use two gigahertz band frequencies for microwave communications. The FCC subsequently required relocation of two gigahertz users to other frequencies on the spectrum. In response, NPPD began converting its microwave system to a combination of new frequency digital microwave and fiber optics to preserve its internal communication capability.

Early in 1994, NPPD was approached by Robert Cox, President of NCC, and Lance Hedquist, City Administrator of South Sioux City, who requested NPPD's help to facilitate a distance learning project between NCC and South Sioux City. For the most part, the fiber used in the communication network would be contained in the shield wire which protects NPPD's high voltage system from lightening. NPPD anticipated replacing the shield wire on the line from Norfolk to Sioux City over the next several years. Discussions between NCC, South Sioux City, South Sioux City Community Schools, WSC and NPPD concluded that a two year distance learning pilot project should be implemented. Participants would be allowed to access NPPD's digital network to provide distance learning. Services were priced to recover NPPD's costs. NCC and the Dakota School District in Sioux City each provided the connection from campus locations to NPPD's network. In late 1996, the City of Norfolk requested that NPPD allow it to be a part of the pilot project by allowing it to access a channel on NPPD's digital network between Norfolk and South Sioux City. The City of Norfolk would arrange for and pay for the connection with NPPD's network in Norfolk and South Sioux City. NPPD would provide the channel on the same cost recovery basis as the distance learning project. NPPD is providing a transmission channel, but it does not generate or change the content of the transmission which is determined by the educational entities involved. NPPD built the network to move data to communicate on its own system, so it views its network as a private network. The three entities who connected to the network initiate all signals that move on their network and on NPPD's network. NPPD does not initiate any of those signals, nor does it change them. When the shield wire's cable was replaced with fiber optic, NPPD thought it needed between 10 and 12 fibers for its own use, and contemplated what its future requirements would be. When it built

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its microwave system in the late 1970's, it underestimated the number of channels that would be required for moving data. It cost NPPD about 10% more to place 24 fibers on the Norfolk to Sioux City segment of its network, thinking that down the road it may need those additional fibers. Even though the federal act states that transmission between points of the user's choosing without changing the form or the content of the information received constitutes telecommunications service, he does not believe that NPPD is providing telecommunications service. He believes the system is a private system, and that basically NPPD just allows others to travel on it. The fact that other people are using it, such as the City of Norfolk and NCC, does not change its private system status. NPPD has no other pilot projects presently under consideration. Because NPPD is not offering telecommunications service, it is not a common carrier, and therefore not subject to the Commission's regulation. NPPD's communication staff deals with making sure the fiber is operational for its use, although it did help the college and the City of South Sioux City make the system operational. NPPD has no plans to expand services on the project other than allowing WSC to be connected. NPPD believes the pilot project does not require any regulatory control. NPPD does not believe the distance learning project is competing with local telephone companies. He does not know why a pilot project would be treated differently than any other regulated service. If NPPD does not initiate the signal over its system, then the signal must be initiated by whoever else is making use of the system. Only 6 of the 24 fibers on its system would be required for its private use. As a result of technological advances, more data can be moved on a single fiber now, and therefore NPPD's excess capacity is greater than when it was originally installed. If the system operated at capacity, 75% of the traffic on the system would be traffic other than NPPD internal communications. When NPPD executed its contracts with the City of Norfolk and South Sioux City, there was concern that a regulatory issue might be encountered in the future, but no one from NPPD contacted the Commission. He is not aware of any statutory or regulatory authority that would authorize NPPD to offer the service. No application has ever been directed to the Commission for authorization to provide the subject service. NPPD believes the communications system that it operates is very reliable. NPPD is taking information provided to it by NCC, not changing the content of that information, and delivering it where the college directs. NPPD asked NCC to pay for the incremental investment and expenses. The fee charged by NPPD to NCC and the City of Norfolk resulted in a not-for-profit pricing system.

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Ronald Asche testified: He is chief financial officer for NPPD, and has been employed by NPPD for approximately 21 years. He was appointed chief financial officer in March of 1995, and vice president of business support services in April of 1996. The NPPD rate department, under his supervision, developed the annual charge which was designed to recover NPPD's cost for allowing the City of Norfolk, NCC and South Sioux City access to its fiber optic system. The cost included debt service, the cost associated with capital investment for fiber optic channel, a debt service coverage charge, operation and maintenance costs, and administrative and general costs. The total estimated capital costs for the project was $600,000. The project provides 84 communication channels, of which NCC required one channel, and the City of Norfolk required one channel, making the installed capital costs $7,143 per channel. The debt service cost included a principal and interest component assuming a borrowing rate of 5.1% and a two year recovery period, which equals an annual cost factor of 52.7%. The district maintains a debt service coverage ratio of at least 1.5 to one to comply with its revenue bond requirements, which amount is that available after payment of operating expenses to pay principal and interest costs. Applying the debt service coverage factor of 1.5 to the annual debt service factor of 52.7% resulted in a total capital cost factor of 79.05%. In addition, an operation and maintenance factor of 9.5% and an administrative and general expense factor of 3.5% were added resulting in the total estimated annual charge of 92.05. The installed capital cost of $7,143 per channel multiplied by a 92.05 cost factor resulted in an annual fee of $6,576. The fee charged to NCC and the City of Norfolk is fair and reasonable, and does not exceed the cost of the project to NPPD and did not result in any profit or margin to the district. It is NPPD's position that it could not charge prices to end users which generate a profit. The NPPD cost study demonstrated its break-even analysis for its telecommunications services sold to the City of Norfolk and NCC (Exhibit 12). The price of the service connection between NCC and South Sioux City could have been priced at a level to generate a profit or below cost. The methodology used for creating late filed Exhibit 12 was essentially the same as that used for determining cost recovery for the transmission of electricity. He cannot estimate the expected life of the fiber placed between Norfolk and Sioux City. NPPD did not factor in any cost for underlying transmission structures on which the cables are attached. If NPPD's electrical rates demonstrate in a given year it generated more revenue than it costs to provide the service, it would provide an adjustment in the following year's rates. No such provision for a "true up" of the cost versus revenue has been done with regard to the telecommunications services.

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Formal Intervenor, the Nebraska Telephone Association, called one witness, Cary Sharkey, Sales Manager for US West Communications, who testified: She is responsible for selling US West products and services to education and government accounts in Nebraska. US West was approached by the South Sioux City schools requesting a proposal on long distance learning in June of 1996. The request was for a T-1 point-to-point circuit from South Sioux City High School to NCC for purposes of distance learning. Exhibit 13 is a description of the manner in which service was to be provided under the US West proposal to the South Sioux City school system. The proposal provided a point-to-point T-1 circuit in cooperation with Northeast Nebraska Telephone. Exhibit 14 shows the proposed charges and how they were calculated. According to the tariffs on file, the proposal reflects a total monthly charge for transport services at $1,770.93 and a non-recurring one-time charge of $2,345.36. Following the submission of the proposal by US West, there was no subsequent request for service relating to this project; however, US West presently provides frame relay internet access to the South Sioux City school system. In October of 1996, US West responded to an RFP issued by the City of Norfolk relating to Internet access. US West was informed in December that the city was not acting upon its bid and was not taking any action at that time. US West is prohibited from offering any discounts under its current tariff. The annual cost to South Sioux City, if the service was provided by US West, equates to approximately $23,000 annually compared to $6,576 under the NPPD contract. The proposal by US West was to provide the same service NPPD provides as T-1 finished service for the purpose of delivering a video signal as a tariffed telecommunications service.

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

The Commission initiated this investigation to determine the answers to two questions. First, does the service provided by NPPD to NCC and the City of Norfolk constitute telecommunications services? Second, is the service offered on a for-hire basis? We had previously requested an Attorney General's Opinion on these issues. After receiving a response from the Attorney General in Opinion No. 96076 on November 25, 1996, it became apparent that further investigation of the factual circumstances was necessary. The hearing in this matter was convened for that purpose.

First, we address the issue of whether allowing the City of Norfolk, NCC, and for that matter, the South Sioux City schools, to connect to the NPPD fiber optic system results in the provision of telecommunications services. From the evidence before us, we find

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such an arrangement constitutes provision of telecommunications services. Initially, it should be pointed out that no Nebraska statute, case, rule or regulation defines telecommunications service. However, the Commission has previously determined that dark fiber, such as that offered by NPPD in the instant case, is a network element open to unbundling for purposes of interconnection agreements. ***See***, AT&T, GTE Interconnection Agreement C-1400. We see no difference between a regulated entity subject to the jurisdiction of this Commission offering dark fiber for a fee and NPPD offering dark fiber for a fee. Under our previous analysis, the leasing of dark fiber constitutes a telecommunications service.

The Federal Telecommunications Act defines a telecommunications service as the offering of telecommunications for a fee directly to the public or to such classes of users as to be effectively available directly to the public, regardless of the facilities used. 47 U.S.C. § 153(44). Further, the act defines telecommunications as the "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent or received." 47 U.S.C. § 153(43).

The dark fiber owned by NPPD has been made available to two entities under contract for an agreed upon fee. NCC and South Sioux City have installed their own fiber to connect with the NPPD fiber at the physically closest location. Each entity owns the fiber from its facilities to the point where its fiber connects with that of NPPD. NCC and the South Sioux City schools transmit interactive video back and forth between the points they so specify. The information transmitted is determined by the two users. There is no change in the form or content of the information as sent or received. The same service was offered by US West Communications subject to the published tariff as a service subject to the jurisdiction of this Commission. The circumstances involving the use of the NPPD fiber for the City of Norfolk has substantially similar characteristics, and must also be characterized as telecommunications services.

The second issue the Commission must address is whether the telecommunications services being offered by NPPD are for-hire services. For-hire services in Nebraska may be provided by either common carriers or contract carriers. NEB. REV. STAT. § 75-109. At this point in time the access to NPPD's fiber is available only to a limited number of parties pursuant to contract arrangements. Such an arrangement constitutes contract carriage. NPPD contends that if its services, which we have determined to be

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telecommunications services, are priced at cost, such services are not for-hire. We do not believe that pricing of telecommunications services must result in a profit to qualify as for-hire services. If NPPD were offering the subject services at no charge to the users, the services would not be for-hire. The fact that the service is priced at cost is of no significance, since profit is merely driven by either cost allocation or pricing.

The Access and Use Agreement (Exhibit 11) between NPPD and NCC provides that "the parties desire to enter into an agreement to provide for access to, use of and payment for such a fiber optic link." Under the agreement, NPPD remains the owner of the subject channel, but NCC is obligated to pay NPPD $6,576 annually for two years in equal monthly installments. The contract outlines the terms under which access will be provided, and clearly constitutes for-hire service. NPPD and NCC further provided for a termination of the contract in the event this Commission or some other regulatory agency or court found the service to be common or contract telecommunication services. Such forethought should not result in a hardship on either party, since the parties not only provided for such a contingency, but agreed that the contract would be null and void in such a circumstance.

The Commission therefore finds:

1. The services which NPPD offers by interconnection to its dark fiber for distance learning between Norfolk, Nebraska and South Sioux City, Nebraska are telecommunication services.

2. The services which NPPD offers the City of Norfolk for intranet and internet access are also telecommunication services.

3. The telecommunications services offered to Northeast Community College and the City of Norfolk are both offered by NPPD on a for-hire basis as a contract carrier.

4. Service offerings such as those offered by NPPD fall within the Commission's jurisdiction under NEB. REV. STAT. § 75-109.

5. The services offered by NPPD are being offered in the absence of any certificate of public convenience and necessity.

6. The Commission should seek further guidance from the Nebraska Attorney General as to whether NPPD, if granted a certificate of public convenience and necessity, could continue to provide the above described services under existing state law.

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7. This file should remain open until the Attorney General further advises the Commission under the premises found in this order.

O R D E R

IT IS THEREFORE ORDERED that this Commission shall seek the guidance of the Nebraska Attorney General pursuant to the foregoing findings.

MADE AND ENTERED at Lincoln, Nebraska, this 28th day of May, 1997.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chairman

//s//Rod Johnson
//s//Frank E. Landis
//s//Daniel G. Urwiller

ATTEST:

Executive Director

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