BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Nebraska Public Service Commission, on its own Motion, to Conduct an Investigation to Determine Whether NPPD is Operating as a Common Carrier Offering Intrastate Telecommunications Services and is Thereby Subject to Commission Jurisdiction.	Application No. C-1481/PI-18 Order to Cease and Desist Entered: December 2, 1997

APPEARANCES

For the Commission:
Deonne L. Bruning
Staff Attorney
300 The Atrium, 1200 N Street
P.O. Box 94927
Lincoln, Nebraska 68509

For the Nebraska Public Power District:
Kile W. Johnson
1227 Lincoln Mall
P.O. Box 81686
Lincoln, Nebraska 68501-1686

For the Nebraska Telephone Association and Nebraska Independent Telephone Association:
Jack L. Shultz
P.O. Box 82028
Lincoln, Nebraska 68501

For Benkelman Telephone Co., Wauneta Telephone Co., Cozad Telephone Co. and Henderson Cooperative Telephone Co.:
Timothy Clare
1201 Lincoln Mall, Suite 102
Lincoln, Nebraska 68508

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, to investigate and determine whether Nebraska Public Power District (NPPD) was offering intrastate telecommunications services on a for-hire basis and was, 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.

Printed with soy ink on recycled paper

Formal interventions were filed by the Nebraska Telephone Association, the Nebraska Independent Telephone Association, Benkelman Telephone Co., Wauneta Telephone Co., Cozad Telephone Co., Henderson Cooperative Telephone Co., Aliant Communications, US West Communications (US West), AT&T of the Midwest and UtiliCorp United.

The Commission initiated this docket after the issuance of Attorney General Opinion No. 96076, released November 25, 1996. In responding to the Commission's request for an Opinion, the Attorney General concluded that the Commission did not provide sufficient factual information to determine whether NPPD was, in fact, providing telecommunications services for hire. The Attorney General further concluded that insufficient factual information was provided to determine whether NPPD was offering telecommunications service necessitating the issuance of a certificate of public convenience and necessity.

The Commission held a hearing on the matter on March 25, 1997, with appearances as shown above. On May 28, 1997, the Commission entered an Order determining the services which NPPD offered for distance learning between Norfolk and South Sioux City, Nebraska, as well as the services NPPD offered the City of Norfolk for intranet and internet access were telecommunications services. Further, the Commission determined that the telecommunications services provided by NPPD to Northeast Community College and the City of Norfolk are for-hire.

On June 11, 1997, the Commission requested from the Attorney General an opinion concerning the authority of NPPD to provide telecommunications services on a for-hire basis as a contract carrier. The Attorney General issued its Opinion No. 97045 on September 9, 1997. The Opinion stated that despite LB 660's removal of the statutory prohibition against public power districts providing telecommunications service for-hire, NPPD still lacks authority under current Nebraska statutes to provide telecommunications services for-hire. The Opinion confirmed that this absence of authority precludes the Commission from issuing a certificate of public convenience and necessity to NPPD.

On October 20, 1997, the Commission held a hearing to determine what certificated carriers, if any, would be able to

Printed with soy ink on recycled paper

offer telecommunications services in place of those currently being provided by NPPD to the Norfolk, South Sioux City, and Wayne areas. Further, the Commission sought to ascertain when a carrier could provide similar services in the area and at what price.

Alan L. Bergman, Director of State Market Strategies for US West Communications, testified as follows: US West is capable of providing T-1 service in the area, currently served by NPPD. This service is routinely provided by US West throughout Nebraska for the provision of interactive video services. US West would partner with Northeast Nebraska Telephone Company to provide the T-1 service between Norfolk and South Sioux City. US West serves the exchanges of Norfolk and South Sioux City, but the middle portion of the route is served by Northeast Nebraska Telephone Company. US West could provide a T-1 facility between Norfolk and South Sioux City on about three weeks' notice. Pricing of the jointly provided T-1 facility would be based on the percentage of the facility provided by US West, as well as the percentage provided by Northeast Nebraska Telephone Company. The prices for each respective company are on file at the Commission in their company tariffs. The prices are the same for all customers. The price of the T-1 circuit provided by US West and Northeast Nebraska Telephone Company would vary depending on the length of the contract. A five-year contract would be $1,456.66 per month or $17,503.92 annually. If provided on a month-to-month basis, the same circuit would be $2,025.06 per month or $24,300,72 annually. In both cases, non-recurring installation charges would be assessed in the amount of $1,200. Beginning in January, 1998, discounts will be available for schools ranging from 20 to 90 percent to support telecommunications services. This funding will be of great assistance in making telecommunications services affordable for Nebraska schools. Prices would vary significantly for the City of Norfolk due to the fact that rates are distance-sensitive. Accordingly, services provided within the City of Norfolk would be less expensive than a connection between the cities of Norfolk and South Sioux City.

Dr. Jim Underwood, President of Northeast Community College at Norfolk, Nebraska, testified as follows: A major mission of Northeast Community College is to provide outreach programs throughout northeast Nebraska through interactive video technology. As a result of the video technology program, enrollment at the

Printed with soy ink on recycled paper

College has increased 32 percent; however, information relative to the number of students benefitting from the NPPD project is not available. Video technology offers people an education at times that are convenient and at an affordable cost. US West and Northeast Community College have a good relationship. Interactive video educational programming is provided to many school districts though separate pods in northeast Nebraska using the services provided by US West. US West is working with Northeast Community College's Life-Long Learning Center which is under construction and nearing completion in Norfolk. This facility will expand the College's interactive video programs.

Through NPPD, video programming from Norfolk to South Sioux City is provided at the rough cost of $6,500 a year. This annual cost is presently divided equally between the College and South Sioux City. Thus, the College's cost is approximately $250 to $300 per month. If the Wayne State system becomes operational, the cost will decrease as the contractual price will be divided by thirds. The present budget for the College is fixed until June 30, 1998, and is roughly $13 million dollars. The amount budgeted for the interactive video programing between the College and South Sioux City is the contracted NPPD price. The College budget for FY July 1, 1997, to June 30, 1998, was developed internally in the fall of 1996. In the spring of 1997, the budget was set by the Board of Governors. It became the working budget until a public hearing was held this fall. While the College could reduce the budget after receiving public input, it is unlikely that the budget would be increased. The budget was adopted after the formal budget hearing about one month ago and the tax rates were certified approximately two weeks ago. During this process, no consideration was made to increase the amount budgeted for the video programing classes being provided by NPPD despite the Commission's investigative docket. If the College had flexibility within its budget, Mr. Underwood stated it would have been wise to set up a contingency fund. However, with enrollment growths, it was practically impossible to do so without closing the front door. If the NPPD contract was nullified, Mr. Underwood would advise the Board of Governors, from a budgetary standpoint, that the College could not continue its program with South Sioux City at US West's quoted prices.

The College uses its video programming at all times, not just on a semester basis. However, this level of utilization will not

Printed with soy ink on recycled paper

be realized with South Sioux City until additional arrangements can be finalized. The College recognizes there is a clause in the contract which makes the contract null and void if legal or regulatory problems arise. However, while the clause exists in the contract, the College hopes it is not exercised. The College does not want to intentionally or unintentionally be involved in an illegal contract.

Karl Harig, President of Harig Communications, testified as follows: Harig Communications started an internet service known as Nebraska Internet, or NIN Net. The company came on-line in April, 1997. NIN Net approached the City of Norfolk Public Library about providing it Internet services; however, the Library selected to obtain its service from NPPD. While NIN Net cannot currently provide the same service as NPPD, the company could have the service available within 90 days. A competitive bid was not requested by the Library for Internet services. If a competitive bid had been requested, NIN Net would have bid on the project.

Lance Hedquist, representing the City of South Sioux City, testified as follows: The South Sioux City schools' budget operates on a July 1st fiscal year. The superintendent of the schools has stated that if the price of the service increases, they would terminate the program.

Jim McKenzie, Information Systems Manager for the City of Norfolk, testified as follows: The City of Norfolk did not pursue negotiations with Karl Harig or NIN Net due to his lack of experience in the business. The City did not put out a formal request for proposal. The City is using Pioneer Internet as their content provider and NPPD for facilities and fiber.

Kile Johnson, attorney for NPPD, stated for the record: The NPPD Board does not believe (1) that it is providing telecommunications services, (2) that such services are for-hire, or (3) that it is prohibited from offering these services to the public. The Board does not accept the Attorney General's Opinion which has been issued in this matter. This is not a profit-making venture for NPPD, as the services that are being provided are based on cost. NPPD believes if its services are offered at cost, are not proprietary, are not sold for profit and are not for-hire then it's not providing a telecommunications service subject to the juris-

Printed with soy ink on recycled paper

diction of the Public Service Commission. NPPD asks that the Commission let it honor its contract with the College and the City of Norfolk. In the interim, the authority of NPPD may be resolved by the legislature. NPPD is providing a cost effective way to provide service in northeast Nebraska and it is not depriving any profit-making entity from revenues. NPPD requests the status quo be maintained and that the service continue through the duration of the contract. Mr. Johnson would recommend the Board terminate the service at the end of the contract year for both the City of Norfolk and the College.

Jack Shultz, representing the Nebraska Telephone Association, stated for the record: This issue has been fully analyzed by the Commission, as well as the Attorney General. The College has indicated that the alternatives offered by US West are not fiscally possible. However, the difference between what the College currently pays and what the new rate would be if the service is provided by a certificated carrier is roughly four-ten thousandths of one percent of the College's current budget. If this is a high priority program, then this additional cost can be absorbed. The Commission has sought guidance from the Attorney General. Clearly, the Opinion provides that it is contrary to Nebraska's statutes for NPPD to offer this service. Commissioners take an oath when entering office to uphold that laws of the State of Nebraska. The Commissioners' only alternative is to make NPPD cease and desist from offering telecommunications services. To not act because NPPD had good public policy intentions in serving the schools and libraries is poor precedent.

Tim Clare, representing various certificated local exchange carriers, made the following statement: It is irrelevant to take into consideration that the contract is with a public entity. The College budget was approved after the Attorney General had issued its Opinion clearly stating this was a telecommunications service and that it could not be offered by NPPD. The Opinion goes on to provide that legislative changes must take place in order for NPPD to be authorized to provide telecommunications services. Yet, the College did not take this Opinion into consideration when finalizing its budget in September.

Printed with soy ink on recycled paper

OPINION AND FINDINGS

The Commission initiated this investigation nearly one year ago. We previously determined that the services provided by NPPD to the College, South Sioux City and the City of Norfolk constituted telecommunications services. We also concluded that such services were offered on a for-hire basis. After making such conclusions, an Attorney General's Opinion was sought to receive guidance as to whether NPPD, if granted a certificate of public convenience and necessity, could continue to provide telecommunications services under existing state law.

It is the opinion of the Attorney General that this Commission could not, under existing state statutes, certificate NPPD to offer telecommunications services. The Attorney General further stated that absent legislative changes, NPPD cannot provide telecommunications services on a for-hire basis. Accordingly, NPPD's actions of providing telecommunications services to the South Sioux City school, the Northeast Community College and the City of Norfolk exceed their chartered authority and contravenes state law.

Pursuant to the Nebraska Constitution and state statutes, this Commission is charged with regulating intrastate telecommunications services. In accordance therewith, this Commission issues certificates of public convenience and necessity to carriers deemed fit to provide intrastate services. Pursuant to state statute, this Commission is permitted to fine carriers that offer intrastate telecommunications services without such a certificate of authority.

NPPD has not been issued a certificate of public convenience and necessity. Further, NPPD has indicated it has no intention of applying for certification. The Attorney General has indicated we cannot certificate NPPD and that NPPD is without statutory authority to provide telecommunications services. We have no alternative but to order NPPD to cease and desist from offering telecommunications services as soon as practicable.

We find that NPPD should cease from offering telecommunications services to the South Sioux City school, Northeast Community College, and the City of Norfolk Public Library no later than

Printed with soy ink on recycled paper

December 31, 1997. This period allows the South Sioux City school, Northeast Community College, and the Library to secure like services from US West, if they desire. Further, this provides time to give notice of program cancellation if that is ultimately necessary. While Dr. Underwood stated there was no preferable time to disconnect the service, we believe December 31 will pose the least inconvenience to students who have enrolled in video classes for the Fall 1997 semester.

We believe the South Sioux City school, the College and the Library had good intentions regarding the commencement of the pilot project with NPPD; however, it is now abundantly clear that legal and regulatory problems exist. The NPPD contract contains a clause which provides:

> The Parties agree that the District, under this Agreement, is not a contract or common telecommunications carrier and is not providing contract or common carrier telecommunications services or furnishing telecommunications equipment or facilities for the purpose of state and federal law. In the event that a final order of a regulatory agency or court determines to the contrary, this Agreement shall be null and void ab initio and of no further legal effect whatsoever.

We do not make the decision without giving due concern to the citizens presently benefitting from NPPD's venture. However, it is clear that other legal alternatives exist for the College, the South Sioux City school and the City of Norfolk to receive similar telecommunications services with a minimal disruption of service. US West is able, by partnering with Northeast Telephone Company, to offer similar telecommunications services in lieu of those being provided by NPPD. US West testified it would take roughly three weeks to install the requested service. Also, the video programing services would be disabled for only one hour during the conversion. US West also offers service within Norfolk so it is able to provide telecommunication services to the City of Norfolk Public Library. Accordingly, the telecommunications services offered in NPPD's pilot project can be provided by other entities certificated to do so under state law.

We acknowledge that the US West tariffed rate will exceed the rate presently charged by NPPD. However, we do not find that the

Printed with soy ink on recycled paper

increased cost will create an economic hardship for the College. US West will charge $24,300.72 annually to provide similar telecommunications service to the College and South Sioux City if no contract is signed and service is simply delivered on a month-to-month basis. This price can be reduced to $17,503.92 annually if the parties enter into a five-year contract with US West.

The present contract with NPPD expires on June 30, 1998. The annual price assessed by NPPD is $6,500 or $542 monthly. Using the higher month-to-month price, service can lawfully be provided by US West for $2,025.06 per month. As testified by Dr. Underwood, the prices are presently divided evenly between the College and South Sioux City. Further, Dr. Underwood testified that if Wayne State becomes operational, the NPPD contracted rate will be divided by thirds.

US West's price of $2,025.06 per month would thereby amount to $675.02 per month once the contract is divided by thirds. If Wayne State does not become operational, the monthly amount would be $1,012.53. Dr. Underwood testified the College has a $13 million annual budget. The six-month cost to the College ($4,070.10) is approximately four-thousandths of one percent of the College's $13 million budget. We believe if this is a priority project, as indicated by Dr. Underwood, the College will be able to continue the video program to South Sioux City at these rates.

We also find that ample consideration could have been made in the budget process to increase the estimated cost of the telecommunications service to South Sioux City. In November 1996, an Attorney General's Opinion was requested regarding the legality of NPPD's pilot project. Subsequently, this investigative docket was opened in January 1997. The evidence showed that the College's budget for 1997-98 was established in the spring of 1997.

Like the College, the South Sioux City school system will be impacted by the increased price. However, federal Universal Service Funds will be made available effective January 1, 1998, to schools in order to make telecommunications service more affordable. As indicated by Mr. Bergman in his testimony, discounts ranging from 20 percent to 90 percent will be made available to schools for telecommunications service.

Printed with soy ink on recycled paper

Statistics from the Department of Education indicate that the South Sioux City school system will be eligible to receive approximately a 70 percent discount off its telecommunications service. Therefore, while the contractual amount will increase for the remaining six months from $180.55 to $675.02 per month, the availability of Universal Service support will enable the South Sioux City school to obtain telecommunications services at prices similar to those presently offered by NPPD.

The City of Norfolk Public Library will also incur higher prices if services are not provided through NPPD. However, Mr. Bergman testified it will cost less for US West to serve the Library than the College, as the charges are mileage sensitive. Minimal mileage charges will be assessed to the Library, unlike the College/South Sioux City/Wayne State project. Further, beginning January 1, 1998, the City of Norfolk Public Library will be eligible to receive Universal Service support for its telecommunications service. The Norfolk school system, and also the Library, is eligible for roughly a 50 percent discount. Thus, the prices quoted by US West will be more similar to those presently charged by NPPD.

After thoroughly reviewing the evidence, testimony, and exhibits filed herein, we find we have no alternative but to order NPPD to cease and desist from offering telecommunications services in Nebraska until the proper statutory authority has been obtained. NPPD urged the Commission to permit the pilot project to continue until the expiration of the contract on June 1, 1998. However, we cannot ignore the fact that NPPD's actions are violative of the law. To allow the contract to continue any longer beyond December 31, 1997 would make a mockery of the legal advice given by the state's Attorney General.

After conducting multiple hearings, receiving briefs and requesting two Attorney General Opinions, we have received clear guidance. NPPD is presently offering telecommunications services for-hire. NPPD cannot, under current state law, provide telecommunications services in Nebraska. Accordingly, NPPD's pilot project in northeast Nebraska must stop.

Printed with soy ink on recycled paper

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission the Nebraska Public Power District cease and desist from offering telecommunications services in Nebraska until statutory authority allows public power districts to engage in providing telecommunications services.

IT IS FURTHER ORDERED that the telecommunications services presently provided by the Nebraska Public Power District to the Northeast Community College, the South Sioux City school system and the City of Norfolk Public Library be disconnected no later than December 31, 1997.

MADE AND ENTERED in Lincoln, Nebraska on this 2nd day of December, 1997.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chairman

ATTEST:

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

Executive Director

Printed with soy ink on recycled paper

Printed with soy ink on recycled paper