

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Appli- ) Application No. C-2648  
cation of Nebraska Technology )  
& Telecommunications, Inc., )  
for arbitration of the ) Interconnection Agreement  
interconnections rates, terms ) Approved as Modified  
and conditions with Aliant )  
Communications Co., d/b/a )  
ALLTEL. ) Entered: May 20, 2003

APPEARANCES:

For Nebraska Technology &  
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BY THE COMMISSION:

**Procedural History**

1. Petitioner, Nebraska Technology & Telecommunications, Inc. (NT&T), is a corporation which has been certificated by the Nebraska Public Service Commission (Commission or NPSC) to provide competitive local exchange carrier (CLEC or competitive LEC) and other telecommunications services in the State of Nebraska, including in the ALLTEL Nebraska, Inc. local exchange service areas.

2. ALLTEL Nebraska, Inc. (formerly known as Aliant Communications Co.) is a corporation, doing business as ALLTEL, (ALLTEL) and is an incumbent local exchange carrier (ILEC or incumbent LEC), which has been certificated by the Commission to provide LEC and other telecommunications services in certain local exchange service areas in the State of Nebraska.

3. For the past four years, ALLTEL has been providing telecommunications services to NT&T for resale pursuant to a February 25, 1999, interconnection agreement (the Existing

Interconnection Agreement)<sup>1</sup> which was voluntarily negotiated by NT&T and ALLTEL's predecessor in interest, Aliant Communications Co., and approved by the Commission on March 30, 1999, pursuant to § 252(a) and (e) of the Telecommunications Act of 1996 (the Act)<sup>2</sup>.

4. At NT&T's request, ALLTEL and NT&T have engaged in negotiations for new terms and conditions to be contained in a new interconnection agreement pursuant to § 252(a) of the Act to replace the Existing Interconnection Agreement. The parties have stipulated that August 1, 2001, should be deemed the date of ALLTEL's receipt of NT&T's bona fide request for the commencement of such negotiations for the purposes of § 252(a) and (b) of the Act.<sup>3</sup>

5. As of January 7, 2002, the Parties had voluntarily resolved many issues and agreed upon almost all of the text of a lengthy replacement interconnection agreement along with 21 incorporated attachments (the Proposed Interconnection Agreement),<sup>4</sup> essentially leaving six unresolved issues.<sup>5</sup> On January 7, 2002, NT&T filed a Petition for Arbitration with the Commission, pursuant to § 252(b)<sup>6</sup> of the Act, seeking arbitration as to the remaining open issues. On February 1, 2002, ALLTEL filed its Response to NT&T's Petition for Arbitration.<sup>7</sup> ALLTEL's Response includes, as Exhibit A<sup>8</sup> thereto, a list of the remaining issues raised by NT&T's petition, renumbered as Issues 1, 2, 3, 4, 5(a) - 5(n) and 6 along with a statement as to the positions of the parties regarding each.

6. Subject to § 252(b) and other applicable provisions of the Act, this Commission has jurisdiction over the Parties and jurisdiction over NT&T's Petition for Arbitration, to be exercised in accordance with the Commission's Mediation and Arbitration Policy, established in Application No. C-1128, Progression Order No. 3, dated April 8, 1997 (Arbitration Policy), and NEB. REV. STAT. § 86-122.

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<sup>1</sup> NT&T's Exhibit 4 introduced at the July 17, 2002, arbitration hearing. [Exhibits introduced by NT&T at the July 17 and 18, 2002, arbitration hearing commenced with "Exhibit 1" and exhibits introduced by ALLTEL commenced with "Exhibit 101."]

<sup>2</sup> 47 U.S.C. § 252(a) and (e).

<sup>3</sup> Exhibit 40, para. 1.

<sup>4</sup> Exhibit B to Exhibit 110.

<sup>5</sup> One of the six unresolved issues dealt generally with the appropriate pricing methodology (i.e., TELRIC) to be applied to available unbundled network elements (UNEs), combinations (UNE-P) and collocation and which had 12 sub-issues as to the particular price of each particular UNE, UNE-P, non-recurring cost or collocation element.

<sup>6</sup> 47 U.S.C. § 252(b)

<sup>7</sup> Exhibit 110.

<sup>8</sup> This also is Exhibit A to hearing Exhibit 110.

7. The Commission appointed staff attorney, Laura K. Davenport, to act as Arbitrator. A hearing was conducted on July 17 and 18, 2002, by the Arbitrator, pursuant to the Commission's Arbitration Policy at which testimony and exhibits were introduced on the record.<sup>9</sup> Following the hearing, the Arbitrator, with the agreement of the parties, set a post hearing schedule for "final offers" and "briefs in support thereof" and, pursuant to the Commission Arbitration Policy, requested that the form be based upon "issue-by-issue final offers."<sup>10</sup>

8. The Arbitrator issued the Arbitrator's Initial Decision in this matter on November 27, 2002, and established December 9, 2002, as the due date for the parties to file any comments in connection therewith. After receipt of the Parties' comments, the Arbitrator issued the Arbitrator's Final Decision on February 26, 2003. The Arbitrator's Final Decision determined each of the six open issues in ALLTEL's favor and required the Parties to submit an interconnection agreement to the Commission conformed to reflect said Arbitrator's Final Decision. On March 26, 2003, ALLTEL submitted a proposed conforming interconnection agreement. On March 27, 2003, NT&T submitted two draft interconnection agreements, one purporting to be a conforming interconnection agreement and one purporting to be the same agreement but with approximately 16 other changes, which were not raised in the arbitration but which NT&T stated it believed the Parties had agreed to prior to the arbitration petition being filed.

9. On April 15, 2003, the Commission conducted a post-arbitration hearing, with appearances as shown above. The purpose of such hearing was to review the final arbitrated interconnection agreement and any public comments which had been filed with respect thereto. As of the April 15, 2003, Commission hearing, no public comments had been received. As noted in footnote 9, above, the two-volume transcript of the July 17 and 18, 2002, arbitration hearing and a third volume consisting of the exhibits which were received into evidence by the Arbitrator were admitted into the Commission's April 15, 2003, post arbitration hearing record as "Exhibit No. 1 Vols. 1-3." The Commission also admitted into its hearing record as Exhibit No. 2, the pleadings which were considered by the

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<sup>9</sup> The transcripts and exhibits constituting the July 17 and 18, 2002, arbitration hearing record were received into the Commission's own April, 15, 2003 post-arbitration hearing record as "Exhibit No. 1 - Volumes 1-3." Citations to the arbitration hearing transcript in this order will be in the form "Tr. p. \_\_, ln. \_\_." where "p." is the page number and "ln." is the line number. References to arbitration hearing exhibits will be to the exhibit numbers used in the arbitration hearing transcript.

<sup>10</sup> Tr. p. 331.

Arbitrator in this matter, except the Commission granted ALLTEL's objection and determined that a certain "survey" which was offered as part of Exhibit No. 2 purportedly prepared in connection with a West Virginia PSC proceeding, would not be considered part of the evidentiary record because it was not submitted during the arbitration hearing.<sup>11</sup>

## II. Arbitrated Issues

10. The six unresolved issues expressly identified and raised by the parties in the Petition for Arbitration and the Response thereto are set forth below in the order and in the language of the Arbitrator's Final Decision.

Issue 1: Determine the appropriate wholesale discount rate at which ALLTEL must provide local retail telecommunications services to NT&T for resale.

Issue 2: Determine whether ALLTEL must provide NT&T operator services and directory assistance (OS/DA), and if so, determine the appropriate method.

Issue 3: Determine whether ALLTEL can assess NT&T Directory Charges, and if so, determine the appropriate rate.

Issue 4: Determine whether ALLTEL must be required to provide competitors such as NT&T with at least 30 days notice prior to implementing tariff and pricing changes.

Issue 5: Determine the appropriate rates at which ALLTEL must provide unbundled network elements (UNEs), including UNE-P.

Issue 6: Determine whether ALLTEL must provide NT&T with Digital Subscriber Line (DSL) service, and if so, determine the appropriate rates.

## III. Findings and Conclusions

11. Section 252(e)(1) of the Act requires that any interconnection agreement adopted by arbitration be submitted to the state commission for approval. The Commission's review of the arbitrated agreement is limited by section 252(b)(4) of the

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<sup>11</sup> Commission April 15, 2003, hearing transcript, p. 3, ln. 10 - p. 4, ln. 25.

Act, which provides, "Action by State Commission. (A) The State commission shall limit its consideration of any petition [for arbitration] under paragraph (1) [of section 252(b) of the Act] (and any response thereto) to the issues set forth in the petition and the response, if any, filed under paragraph (3)." Thus, in reviewing this matter, the Commission is statutorily constrained to only consider the issues raised by the parties in the petition and response within the meaning of section 252(b)(4). If necessary, however, Section 252(b)(4)(B) of the Act, provides that "the Commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision ..."

12. With that said, section 252(e)(2)(B) of the Act provides that the Commission may reject "an agreement (or any portion thereof) adopted by arbitration under subsection (b) if it finds that the agreement does not meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251, or the standards set forth in subsection (d) of this section."

13. Also, in review of such arbitrated interconnection agreements, state commissions are allowed, pursuant to section 252(e)(3) of the Act, to utilize and enforce state law in its review of agreements. Accordingly, the Commission may also consider what the Nebraska Legislature has declared, in that "it is the policy of the state to: . . . [p]romote fair competition in all Nebraska telecommunications markets in a manner consistent with the federal act." NEB. REV. STAT. § 86-801. In an effort to ensure such fair competition, the Nebraska Legislature has provided that "Interconnection agreements approved by the commission pursuant to section 252 of the act may contain such enforcement mechanisms and procedures that the commission determines to be consistent with the establishment of fair competition in Nebraska telecommunications markets." NEB. REV. STAT. § 86-122(1).

14. Finally, while an arbitrated agreement must normally be approved or rejected within 30 days after submission by the parties of an agreement by arbitration under section 252(e)(4), the parties agreed to allow the Commission until May 20, 2003, to render a decision on this agreement.<sup>12</sup>

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<sup>12</sup> The arbitrated interconnection agreement was submitted to the Commission on March 26, 2003, and the Commission's final determination date was extended from 30 days thereafter until May 20, 2003, by agreement of the parties and the Commission to give the parties adequate time to file proposed orders and for the Commission to enter its order approving/rejecting said agreement.

15. In fulfilling its obligations under the Act and Nebraska statutes, the Commission reviewed the Arbitrator's decision, the proposed interconnection agreements submitted by the parties, and the parties' comments. Except as indicated below, we conclude the Arbitrator's decision comports with the requirements of the Act, applicable Federal Communications Commission (FCC) rules and relevant state laws and regulations.

16. For organizational purposes, we will address each issue set forth in the Arbitrator's decision, and provide clarification or modification of the Arbitrator's decision where appropriate.

### Issue 1

**Determine the appropriate wholesale discount rate at which ALLTEL must provide local retail telecommunications services to NT&T for resale.**

17. ALLTEL's final offer regarding Issue 1 was that ALLTEL should provide local regulated retail telecommunications services to NT&T for resale at a wholesale discount rate of 16 percent. According to ALLTEL, its offer was based upon an avoided cost study performed by its witness David Blessing.

18. NT&T's proposal provided for a wholesale discount rate of 24 percent. NT&T, however, acknowledged that its proposal was not based upon a cost study, as it could not afford the expense of producing its own cost study.

19. The Commission notes that ALLTEL's offer is in fact higher than the 12.88 percent discount originally developed by ALLTEL's cost study and proposed by ALLTEL at hearing or the 11.64 percent discount rate as developed by ALLTEL near the end of negotiations as the result of an avoided cost study based upon then-available company financial data.

20. The Arbitrator found in ALLTEL's favor based upon ALLTEL's avoided cost study and NT&T's inability to discredit ALLTEL's cost study or to provide a cost study yielding a different rate.<sup>13</sup> During the Commission's post-arbitration hearing on April 15, 2003, NT&T acceded to ALLTEL's position and agreed that the discount rate should be 16 percent.<sup>14</sup>

21. The Commission therefore finds that the evidence in the record supports the arbitrated provisions of the intercon-

<sup>13</sup> Arbitrator's Final Decision, pp. 3-7.

<sup>14</sup> April 15, 2003, Hearing Tr. p. 55, lns. 4-55.

nection agreement as determined by the Arbitrator and the agreement of the parties. The Commission, however, agrees with the Arbitrator in that "ALLTEL's cost study would have been more persuasive had ALLTEL presented a witness to verify the accuracy of the cost inputs." Arbitrator's Final Decision, at 5. Nonetheless, with the record before us, and in consideration of the agreement between the parties, the Commission approves 16 percent as the appropriate wholesale discount rate for resale, which should appear in the final interconnection agreement

### Issue 2

**Determine whether ALLTEL must provide NT&T operator services and directory assistance (OS/DA), and if so, determine the appropriate method.**

22. NT&T's final offer was that it should be entitled to use ALLTEL's OS/DA services, arrange for its own OS/DA, or purchase OS/DA unbundled network elements.

23. ALLTEL's final offer was that the parties should be required to include language proposed by ALLTEL in Attachment 6, Section 5.2.1, 5.2.2, 5.2.4, 7.2.2 and 8.2.2 to the Proposed Interconnection Agreement. ALLTEL contends that it has agreed to provide "customized routing" in Attachment 6, Section 9.1 of the Proposed Interconnection Agreement, as follows:

9.1 Customized Routing permits NT&T to designate a particular outgoing trunk that will carry certain classes of traffic originating from NT&T's end users. *Customized routing* enables NT&T to direct particular classes of calls to particular outgoing trunks which will permit NT&T to self-provide or select among other providers of interoffice facilities, operator services and directory assistance. [Emphasis supplied].

The language in Attachment 6, Section 9.1, permits NT&T to arrange for its own OS/DA, which is a portion of the relief sought by NT&T in its Final Offer. The FCC provided in its Third Report and Order in Docket 96-98, codified as 47 C.F.R. § 51.319(f):

*Operator Services and Directory Assistance.* An incumbent LEC shall provide nondiscriminatory access in accordance with §51.311 and section 251(c)(3) of the Act to operator services and directory assistance on

an unbundled basis to any requesting telecommunications carrier for the provision of a telecommunications service *only where the incumbent LEC does not provide the requesting carrier with customized routing or a compatible signaling protocol.* [Emphasis supplied.]

The FCC explained this rule in its Executive Summary of the Third Report and Order, at pages 25 and 26:

Network Elements that Need Not be Unbundled. The following network elements need not be unbundled:

Operator Services and Directory Assistance (OS/DA). Incumbent LECs are not required to unbundle their OS/DA services pursuant to section 251(c)(3), except in the limited circumstance where an incumbent LEC does not provide customized routing to a requesting carrier to allow it to route traffic to alternative OS/DA providers.

ALLTEL has agreed to provide NT&T with customized routing, and under the authority cited above is not required to also provide OS/DA as a UNE or allow NT&T to use ALLTEL's OS/DA, as requested by NT&T. Therefore, the Arbitrator selected ALLTEL's final offer, and determined that the parties be required to include language proposed by ALLTEL in Attachment 6, Section 5.2.1, 5.2.2, 5.2.4, 7.2.2 and 8.2.2 to the Proposed Interconnection Agreement.<sup>15</sup> The Commission finds that the evidence in the record and applicable law support the arbitrated provisions of the interconnection agreement as determined by the Arbitrator and approves ALLTEL's final offer regarding Issue 2.

### Issue 3

**Determine whether ALLTEL can assess NT&T Directory Charges, and if so, determine the appropriate rate.**

24. NT&T's final offer was that no directory charge may be assessed by ALLTEL. In the alternative, NT&T would be willing to pay a nominal cost-based charge provided that NT&T shares in the revenues generated from the directories. NT&T asserts, without supporting evidence, that there is no cost to ALLTEL in publishing the directories, stating that ALLTEL generates

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<sup>15</sup> Arbitrator's Final Decision, pp. 7-9.

revenue from the sale of "yellow page" advertisements and white page listings.<sup>16</sup>

25. ALLTEL's final offer was that it may assess NT&T costs incurred in connection with the publication and distribution of its directories to NT&T, and that the incremental cost of providing such directories is \$2.86. ALLTEL asserts that publishing and delivery of directories results in real costs, and further asserts that it does not recover these costs from NT&T through its UNE pricing.<sup>17</sup>

26. Section 251(b)(3) of the Act requires that ALLTEL provide NT&T with "nondiscriminatory access to . . . directory listings." Applicable case law provides that directory services are network elements that must be provided to competitors at cost-based prices. See *AT&T Comm. of Virginia, Inc., v. Bell Atlantic-Virginia, Inc.*, 197 F.3d 663 (4th Cir. 1999). By law, ALLTEL may assess NT&T cost-based directory charges.

27. The unresolved issue is ALLTEL's cost for providing directories to NT&T's customers. ALLTEL indicated throughout negotiations and in prefiled testimony that directories are published by ALLTEL Publishing, and that its cost is \$3.00 each. At the hearing before the Arbitrator, ALLTEL's witness Mr. Alfred Busbee corrected his prefiled statement, testifying that Nebraska directories are actually published by L.M. Berry Company and ALLTEL's cost for the directories is \$2.86. Without such information disclosed timely, NT&T was placed at a disadvantage in presenting an effective case to the Arbitrator.

28. Hampered by this late information exchange, NT&T could not provide evidence to dispute that \$2.86 is not the true cost, nor even that \$3.00 would not be the true cost. Thus, the Arbitrator concluded that \$2.86 was the cost of the directories and selected ALLTEL's final offer on this issue. Further, the Arbitrator determined that the parties should be required to include the language proposed by ALLTEL found in Attachment 9, page 5, of the Proposed Interconnection Agreement, but the "Price Per Initial Book" should be changed to \$2.86 on the "Directories Price List" contained therein.<sup>18</sup>

29. In consideration of the Arbitrator's decision on this issue and the evidence in the record, the Commission approves, on an interim basis, the Arbitrator's decision regarding Issue 3. In order to "promote fair competition," however, as set

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<sup>16</sup> NT&T's Post-Hearing Brief, p. 25.

<sup>17</sup> Exhibit 108(a) and (b), p. 6 lns. 13-17 and Exhibit 106 (a) and (b), p. 19, lns. 13-18.

<sup>18</sup> Arbitrator's Final Decision, pp. 9-10.

forth in NEB. REV. STAT. § 86-102(5), the Commission will undertake a critical analysis of ALLTEL's true costs of providing directories to NT&T. NT&T was unable to effectively counter the information provided late by ALLTEL. The Commission's own investigation will determine and/or verify the true cost of providing directories. If, after its critical analysis, the Commission finds a cost that differs from what has been set forth herein for ALLTEL's directories, then those findings shall be incorporated into the interconnection agreement on a going-forward basis. Such action is necessary to promote fair competition in Nebraska and, as recognized by the Arbitrator, to make sure that the costs reflect the financial benefits ALLTEL derives from its arrangement with L.M. Berry.

#### Issue 4

**Determine whether ALLTEL must be required to provide competitors such as NT&T with at least 30 days notice prior to implementing tariff and pricing changes.**

30. NT&T's final offer was that prior to implementing any change in rates or fees, ALLTEL should be required to provide NT&T with notice at least thirty (30) days in advance of any pricing changes in whatever form is most convenient to the parties. Currently, ALLTEL offers to and does comply with all Commission rules and regulations regarding such changes, including notice, but does not provide NT&T with any special advance notice, which is not required by such rules and regulations.

31. ALLTEL's final offer is that the parties should not be required to add language to the Proposed Interconnection Agreement requiring advance notice of tariff changes that is not required by current Commission rules. ALLTEL maintains that it complies with Commission rules regarding notice of tariff changes and that it is not obligated to provide NT&T with advance notice.

32. The Arbitrator determined that there was no justification for abrogating the Commission's rules regarding notice of tariff changes. The Arbitrator therefore determined that the parties should not be required to add language regarding advance notice of tariff changes.<sup>19</sup> While the Commission finds that the evidence in the record and applicable law support the arbitrated provisions of the interconnection

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<sup>19</sup> *Id.* pp. 10-11.

agreement as determined by the Arbitrator and approves ALLTEL's final offer regarding Issue 4, the Commission notes its frustration with ALLTEL's position to not voluntarily exceed the minimum notice requirements. Because the Commission feels that NT&T's request for thirty (30) days advance notice of ALLTEL pricing changes is reasonable in the competitive arena, we will institute a proceeding to pursue a change in the notice rules as they apply to wholesale customers. Without sufficient advance notice of pricing changes, a competitor is placed at a competitive disadvantage.

33. While the Arbitrator concluded that she could "find no apparent justification for abrogating the Commission's rules regarding notice of tariff changes" and accepted ALLTEL's final offer, the Arbitrator opined that "[i]t would seem reasonable and fair that ALLTEL could simply fax or e-mail any new tariff filing to NT&T on the date of filing with the Commission to save NT&T the time and resources of monitoring ALLTEL's tariff filings on its own." The Commission could not agree more. Therefore, while the Commission at this time upholds the Arbitrator on this matter, the Commission requests that ALLTEL voluntarily provide such courtesy notice pending the outcome of a Commission proceeding to formally modify its notice requirements.

#### Issue 5

**Determine the appropriate rates at which ALLTEL must provide unbundled network elements (UNEs), including UNE-P.**

34. NT&T's final offer on each of the rates was listed in its Final Offer. NT&T asserts that the rates it proposes are "just, reasonable and nondiscriminatory" pursuant to 47 U.S.C. § 251 (d)(3). NT&T argues that ALLTEL's study was discredited because ALLTEL's best offer of 1.5 times Qwest UNE rates exceeds ALLTEL's benchmark rates and the national average, making the rates anticompetitive and not "just and reasonable."

35. ALLTEL's final offer on each of the rates is listed in its pricing for Issues 5(a)-5(n).<sup>20</sup> ALLTEL asserts that these rates are based upon its "total element long run incremental costs," or "TELRIC" determined costs.

36. Section 251(c)(3) of the Act requires that ALLTEL negotiate with NT&T for the provisioning of unbundled network elements (UNEs). For establishing UNE rates through a

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<sup>20</sup> See Exhibit 110B (Attachment 6, Exhibit A).

compulsory arbitration pursuant to section 252(b), the Act requires:

Determinations by a State commission of . . . the just and reasonable rate for network elements for . . . purposes of subsection [251](c)(3) . . .

(A) shall be (i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and (ii) nondiscriminatory, and

(B) may include a reasonable profit.

Section 252(d)(1). The FCC's rules provide further guidance for state commissions implementing section 252(d)(1) and require that costs be treated as TELRIC determined costs.<sup>21</sup>

37. ALLTEL's study and pertinent documents were introduced into evidence at the arbitration hearing as Exhibits 102, 103(a) and (b), and 104(a) and (b). ALLTEL's witness, David Blessing, provided testimony as to the development of the study, the use of ALLTEL's financial data, the results of the study and the study's compliance with current law, including the FCC's TELRIC rules and the recent U.S. Supreme Court decision.<sup>22</sup> Based upon its study, ALLTEL proposed rates for each available UNE and UNE-P, including the twelve UNE rate element issues raised by the parties in this matter.

38. NT&T acknowledged that it was unable to provide its own TELRIC-based study. NT&T, however, did provide testimony from Bradley Moline, co-founder of Birch Telecom, who testified that ALLTEL's proposed UNE-P rates in this proceeding greatly exceed UNE-P rates charged in similarly situated markets in other states.

39. Given that the TELRIC rules apply, the Arbitrator could not rely upon NT&T's assertions that the rates it proposed are just, reasonable and nondiscriminatory. However, NT&T's testimony does call into question the validity of ALLTEL's cost study and certain factors used therein, namely, the average loop length, and the appropriate number of loops.

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<sup>21</sup> 47 C.F.R. § 51.505.

<sup>22</sup> Exhibit 101, 106(a) and (b), 107(a) and (b), Tr. p. 142, ln. 14 - p. 246, ln. 23 and p. 311, ln. 14 - p. 325, ln. 21.

40. While the Commission, at this time, accepts the Arbitrator's decision, such acceptance is on an interim basis. In order to "promote fair competition," as set forth in NEB. REV. STAT. § 86-102(5), the Commission will institute a critical cost analysis to determine and/or verify the true TELRIC costs for providing UNE and UNE-P.

41. While the Arbitrator did in fact follow the Commission's own guidelines for final offer arbitration, the end result proposed in the arbitrated agreement, in this Commission's opinion, does not fully comply with the law. Therefore, the Commission will accept such findings on an interim basis until such time that the Commission completes its own critical analysis of ALLTEL's costs.

42. The Commission is not convinced that ALLTEL's cost study complies with TELRIC. At the arbitration hearing, ALLTEL's witness David Blessing testified that ALLTEL's cost model was entirely "dependent upon the assumptions and inputs included within it" and that an even a slight modification in some inputs can have "a very large impact" on the TELRIC results (206:5-15). According to Mr. Blessing, "it's a rather simple task for a savvy user to manipulate the results of a TELRIC model based solely upon the input values selected." (207:11-15).

43. Furthermore, despite the model's need for complete and accurate data, Blessing admitted that he did not prepare the TELRIC inputs in this proceeding and could not identify who did, only that he was "pretty sure" and "believ[ed]" that it was prepared by the cost group at ALLTEL." (146:11-20; 150:2-8). Indeed, upon cross examination by NT&T's counsel, Blessing testified that he did not know who actually prepared the data that serves as the basis for ALLTEL's entire model (150:15-151:5). Most importantly, Blessing admitted that he did not know whether the data was accurate (152:1-7; 212:16-18).

44. ALLTEL's only other witness, Alfred Busbee, testified that he had "no personal knowledge as to the accuracy" of the model inputs and outputs (262:3-5), that he "didn't prepare these studies and . . . can't attest to any of the material [in the studies]." (260:3-7). Simply put, according to ALLTEL's witness, Mr. Blessing, "the model is only as accurate as its data" (161:3-9), and ALLTEL failed to produce any evidence as to the accuracy of its data.

45. Finally, the accuracy of ALLTEL's model is called into question when the results are compared to rates found in similarly situated competitive markets.

46. Valid statutory authority and Commission precedent exists for the Commission to institute its own critical cost analysis. In Application No. C-1473, *In the Matter of Cox Nebraska Telecom, Inc.'s Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with US West Communications, Inc.*, we addressed a record virtually identical to that at issue here, i.e., Cox failed to produce a cost study of its own and there were serious doubts as to the accuracy of US West's cost study. In our July 15, 1997, order in that docket, we concluded:

Cost Based Prices for Unbundled Elements, Interconnection, Resale and Collocation. The Arbitrator ruled in favor of Cox [sic] stating Cox presented no costs studies. We agree and approve the Arbitrator's recommendation. The Commission has opened Docket C-1415 to establish an appropriate cost model for USW. If the determinations of Docket C-1415 support differ[ent] pricing conclusions than those addressed herein, those changes should be incorporated into the interconnection agreement. . . . The Arbitrator's decision is approved on an interim basis.

47. In a November 25, 1997, reconsideration order in Docket C-1473, we noted that "[i]t is the role of the Commission to approve agreements that foster fair competition in the telecommunications field . . . ," and determined that the appropriate wholesale discount rate for residential service should be greater than that demonstrated by US West's questionable cost study. Consequently, we unilaterally increased the proposed residential wholesale discount rate.

48. In the end, we conclude that we are left without a reliable and verifiable TELRIC cost study in the record on which to determine whether ALLTEL's proposed rates are "just, reasonable and nondiscriminatory." 47 U.S.C. § 251(d)(3). The Commission hereby accepts the Arbitrator's ruling on UNE rates until such time that the Commission completes its own critical analysis of the cost of ALLTEL's UNES. If the analysis finds costs that differ from what has originally been set forth by ALLTEL, then those findings shall be incorporated into the interconnection agreement on a going-forward basis. Such action

is necessary to promote fair competition in Nebraska and to comply with the 1996 Act.

### Issue 6

**Determine whether ALLTEL must provide NT&T with Digital Subscriber Line service, and if so, determine the appropriate rates.**

49. NT&T's final offer was that ALLTEL must provide it with Digital Subscriber Line (DSL) service, and that ALLTEL must do so at a resale discount of 24% and a UNE rate as set forth in NT&T's Final Offer.

50. ALLTEL's final offer was that it agrees to provide NT&T with DSL service, and that NT&T can either purchase DSL capable UNE loops under Attachment 6 of the Proposed Interconnection Agreement or can purchase ALLTEL's DSL service on a non-discounted basis for resale from ALLTEL's interstate tariff. ALLTEL also points out that NT&T may utilize the bona fide request process in the Proposed Interconnection Agreement at Attachment 19, to obtain DSL services and negotiate prices, terms and conditions.

51. Subsequent to hearing, NT&T, in its proposed order filed with the Commission, acknowledged that ALLTEL agreed to provide NT&T with such DSL service, the terms and conditions for which have not yet been subject to negotiation between the parties. Consequently, we accept the Arbitrator's decision to adopt ALLTEL's final offer as to DSL service.

### Nonrecurring Charges

52. In its Petition and post-hearing filings, NT&T contested the validity of ALLTEL's rates for nonrecurring charges. It appears, however, that the Arbitrator did not directly address this issue in her Final Decision, unless it is assumed that her opinion as to the appropriate rates for UNEs encompassed nonrecurring charges as well. Regardless, both at the arbitration hearing as well as the hearing before the Commission, NT&T has cast serious doubt as to the validity of ALLTEL's proposed nonrecurring charges.

53. Given the fact that nonrecurring rates were not specifically addressed by the Arbitrator, we are not prepared to simply allow ALLTEL to incorporate its proposed rates on a

permanent basis. Further, because the recurring rates for UNEs was not acceptable, as discussed above, and because nonrecurring rates cannot be reasonably bifurcated from nonrecurring rates, the Commission considers it prudent to examine ALLTEL's nonrecurring rates when it conducts the critical cost analysis on UNE rates discussed above.

54. Accordingly, the Commission will allow ALLTEL's nonrecurring rates to be effective on an interim basis. The Commission will then consider what nonrecurring rates are appropriate when it conducts the critical cost analysis on UNE rates discussed above. If the findings of such analysis support pricing conclusions that are different than the interim rates approved herein, those changes shall be incorporated into the parties' interconnection agreement.

### Conclusion

55. In regards to the Commission's election to commence a critical cost analysis for further determination and/or review of proposed rates as set forth herein, it is the Commission's opinion that such action is necessary to promote fair competition in all Nebraska telecommunications markets. The Nebraska Legislature has specifically stated that "Interconnection agreements approved by the commission pursuant to section 252 of the act may contain such enforcement mechanisms and procedures that the commission determines to be consistent with the establishment of fair competition in Nebraska telecommunications markets." NEB. REV. STAT. § 86-122(1). Accordingly, we find that ordering interim rates pending the completion of the cost analysis commenced herein is necessary and consistent with the establishment of competition in Nebraska.

56. Having reviewed the remaining provisions of the parties' interconnection agreement, we find them to be in compliance with the Act and federal law. Many provisions were agreed to by both parties. Such negotiated terms and conditions were reviewed and determined to be nondiscriminatory and consistent with the public interest, convenience and necessity.

### O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the Arbitrator's Final Decision is approved as modified herein.

IT IS FURTHER ORDERED that the Commission shall commence a critical cost analysis, as set forth herein, to finally determine ALLTEL's costs in accordance with both federal and state law.

IT IS FINALLY ORDERED that an interconnection agreement containing the terms and conditions set forth herein be filed with the Commission on or before June 3, 2003.

MADE AND ENTERED at Lincoln, Nebraska this 20th day of May, 2003.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chair

ATTEST:

Executive Director