BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of Nebraska Public Power District, Columbus, seeking authority to lease dark fiber to Frontier Telecommunications Company of Nebraska, Burnsville, Minnesota.	Application No. C-2683 ORDER Entered: May 7, 2002

APPEARANCES:

For Nebraska Public Power District:
Mr. Kile W. Johnson
1227 Lincoln Mall
Lincoln, NE 68508

For Nebraska Telecommunications Association:
Mr. Jack L. Shultz
P.O. Box 82028
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For the Nebraska Public Service Commission:
Ms. Laura Davenport
1200 N Street, Suite 300
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BY THE COMMISSION:

By application filed February 22, 2002, Nebraska Public Power District, Columbus, Nebraska (hereinafter NPPD), seeks authority to lease dark fiber to Frontier Telecommunications Company of Nebraska, Burnsville, Minnesota (hereinafter Frontier).

Notice of the application was published in The Daily Record, Omaha, Nebraska, on February 25, 2002, pursuant to the rules of the Commission. On March 1, 2002, Nebraska Telecommunications Association (hereinafter NTA) timely filed a petition for intervention in this matter.

A pre-hearing conference was held in this matter on April 1, 2002, at 1:30 p.m. in the Commission Library. A hearing was held on April 29, 2002, at 1:30 p.m. in the Commission Hearing Room, 300 The Atrium, Lincoln, Nebraska.

This is a matter of first impression before the Commission. This proceeding is governed by Neb. Rev. Stat. §§ 86-2301 to 86-2305 (2001 Supp.) and the Commission's Order Entering a

Certificate of Adoption for Remaining Proposed Rules, in Rule and Regulation No. 152, entered March 19, 2002.

Dark fiber is any unused fiber optic cable through which no light is transmitted or any installed fiber optic cable not carrying a signal. Neb. Rev. Stat. § 86-2301 (2001 Supp.). Any agency or political subdivision of the state may lease dark fiber pursuant to Neb. Rev. Stat. § 86-2304 (2001 Supp.). See Neb. Rev. Stat. § 86-2304 (2001 Supp.).

E V I D E N C E

On behalf of NPPD, Bruce Gorton, Eugene Trouba, and Greg Bordelon testified.

Bruce Gorton testified that he is telecommunications manager for NPPD, and has been involved with this application. Frontier approached NPPD in July of 2001 to discuss a potential dark fiber lease from Columbus to Kearney, as well as the possibility of supporting distance learning by use of leased fiber. NPPD and Frontier continued negotiations until December 2001. Mr. Gorton testified that the agreement ultimately focused on a lease of fiber from Columbus to Rising City for the Crossroads Distance Learning Consortium and ESU Number 7.

Mr. Gorton testified that Frontier and NPPD agreed to a lease price of $510. The parties reached what they felt to be a fair rate based upon the fact that it met the needs of both parties and based upon comparison to dark fiber lease rate negotiations between Frontier and another owner of dark fiber in Nebraska.

Mr. Gorton testified that the terms of the lease are contained within the lease document that is part of Exhibit 2. By the lease NPPD will own the fiber and will operate and maintain the fiber that is the subject of this proposed lease. The proposed lease is for a term of one year, renewable for additional one-year terms. Mr. Gorton testified that the one-year term is due to the method that NPPD finances its debt. Furthermore, renewal of the lease is not subject to approval by NPPD’s Board of Directors; rather, the lease would be automatically renewed. Mr. Gorton also testified that the lease may be terminated by either party by 90 days’ written notice.

Mr. Gorton testified that the Board of Directors (Board) of Nebraska Public Power District has not authorized execution of this lease, however, the Board will consider final approval of the agreement after the Public Service Commission has ruled on the application.

Mr. Gorton explained the structure and operation of NPPD’s fiber optic network. NPPD has installed 1,002 miles of fiber optic cable from South Sioux City through Norfolk, Columbus, Seward, Lincoln, Beatrice, to McCook, and back to Norfolk. Mr. Gorton testified that NPPD’s fiber map, Exhibit 9, indicates that ring protection is provided. NPPD has installed 24 fibers, and currently has an internal operational need for 12. Mr. Gorton testified on redirect that NPPD’s communications network reliability was 99.9832 percent in 2001.

On cross-examination by NTA’s attorney, Mr. Gorton testified that as long as the lease continued to be renewed, the lease would never need to come before the Commission again. NPPD is using up to 12 fibers as part of the protective rings indicated on NPPD’s map, Exhibit 12. Mr. Gorton testified that he could not estimate if or when NPPD would require all 24 fibers. He also testified that NPPD would be able to provide sufficient notice to cancel the lease if it ultimately needed to use all 24 fibers.

Upon questioning by Commissioner Landis, Mr. Gorton testified that after the Commission has ruled on NPPD’s application, he expects that NPPD’s Board would then decide whether to give final approval to the Commission-approved document.

Counsel for NPPD and NTA stated that if there are ultimately changes to the lease, beyond either the market price or the profit distribution, and if the Commission requires NPPD to file the lease once it has been adopted by the Board, then any changes to the final filed agreement should be specifically identified.

Eugene Trouba testified next on behalf of NPPD. Mr. Trouba is Transmission Services Financial and Performance Manager for NPPD. Mr. Trouba analyzed the actual costs of the fiber optic system, including installation and debt service associated with the fiber. Mr. Trouba also analyzed costs of transmission structures used to support the fiber optic cable, and direct burial costs for fiber that is underground. NPPD reviewed costs of easements, steel poles and wood pole structures.

Regarding transmission structures, Mr. Trouba testified that capital costs are reported on the books at original costs less accumulated depreciation in accordance with Generally Accepted Accounting Principles. The allocation of transmission structure costs to dark fiber optic cable is based upon the engineering term “wind pound per foot,” which is a calculation of the pole strength and hardware required to support the attached fiber optic cable. Upon cross-examination by NTA’s attorney, Mr. Trouba testified that the allocation is based upon the additional strength required due to the fiber being placed upon the structures.

Mr. Trouba testified that NPPD made some corrections to calculations in documents filed with the Commission, which are reflected in Exhibit 2.

Mr. Trouba testified that the structures need to support an additional 2.68 percent wind pound per foot loading when fiber is added to the electric transmission line. He testified that NPPD took a conservative approach and rounded the number down to 2 percent. Upon questioning by Commisison staff, Mr. Trouba testified that he would not object or dispute if the Commission were to ultimately apply a factor of 2.68 percent to the transmission structure allocation.

Regarding cost of debt, Mr. Trouba testified that NPPD used a level debt calculator to determine what is essentially a mortgage payback of the cost of the fiber, and he determined that NPPD's actual debt cost was 4.77 percent over a 20-year payback period.

Regarding buried fiber, Mr. Trouba testified that there were no allocations for wind factors and no structure costs associated with buried fiber. The cost of buried fiber was the actual cable itself plus installation. Mr. Trouba testified that the payments to the Nebraska Internet Enhancement Fund would be made in equal monthly payments. The proposed lease, which is part of Exhibit 2, is silent on when payments to the Nebraska Internet Enhancement Fund will be made, however, the lessee will make an annual payment to the lessor for access to the fiber.

Gregory Bordelon was NPPD's final witness. Mr. Bordelon is the State Manager of Outside Plant Engineering and Construction for Citizens Communications, doing business as Frontier Communications of Nebraska.

Mr. Bordelon testified that he negotiated the proposed lease rate with NPPD, and that the lease price was based upon a previously-negotiated rate with an owner of dark fiber in Nebraska. Frontier was developing a similar arrangement for a fiber lease with CableUSA between Kearney and Alma. He testified that the proposed fiber lease agreement with CableUSA has not been executed due to changes in the DSL market in Alma. In negotiations with NPPD, he suggested the rate of $510 per fiber, per mile, per month, which was the same rate negotiated with CableUSA for the Kearney-Alma route. He testified that he believed the rate was fair and reasonable.

Mr. Bordelon testified that Frontier has a need for NPPD's fiber to provide service to Crossroads Consortium's distance learning project, which connects about 13 locations, seven of which are south of the Platte River, in ALLTEL's territory. He testified that in order to connect with ALLTEL, Frontier would have to construct about 25 miles of fiber strictly for the purpose of serving the distance learning project. He testified that the cost of doing so would have been cost-prohibitive.

Mr. Bordelon further testified that the term of the lease is workable for Frontier, although Frontier would prefer a longer lease term due to the fact that its agreement with the schools will be for an initial term of four years, renewable for a term of four years, then renewable for a term of two years.

Mr. Bordelon testified that he understood that the lease required a full year's payment in advance.

Mr. Bordelon testified that he has conducted some research regarding the market rate for fiber leases in Nebraska. He testified that in Qwest's Nebraska Statement of Generally Available Terms, Qwest has proposed a fiber transport per mile rate of $56.27, or $675.24 per fiber, per mile, per year. Upon cross-examination, Mr. Bordelon testified that his market analysis would not necessarily reveal that the proposed lease rate would be the appropriate lease price for another fiber route, such as Lincoln to Omaha.

Upon conclusion of Mr. Bordelon's testimony, NPPD rested.

The intervenor did not call any witnesses.

Steven Stovall and Tyler Frost testified on behalf of the Commission.

Mr. Stovall testified that he is a staff accountant for the Public Service Commission. Mr. Stovall testified that Commission staff disagrees with NPPD's rounding of the transmission structure allocation to a figure of 2 percent, and that the actual figure of 2.68 percent should be used. The effect of applying the 2.68 percent factor instead of 2 percent is that NPPD's costs are calculated to be $86.89, rather than $84.92, per fiber, per mile, per year, as proposed in calculations revised by NPPD in Exhibit 2.

Mr. Stovall also testified that recalculating NPPD's costs based upon the 2.68 percent figure would affect the resulting contribution to the Nebraska Internet Enhancement Fund. Staff's recalculation of profit distribution to the Nebraska Internet Enhancement Fund and to NPPD is $60,834.76, while the applicant proposed a profit distribution of $61,118 per year in Exhibit 2.

On cross-examination by NTA's attorney, Mr. Stovall testified that in traditional telecommunications rate-making, the Commission endeavors to determine an appropriate rate of return on rate base that has been invested by the applicant, which also includes net book value of the plant in service. Mr. Stovall testified that NPPD recovers costs from current ratepayers as well as holders of debt instruments, and that depreciation is not taken into consideration. Mr. Stovall testified that he is comfortable that depreciation is not taken into consideration under these circumstances.

Next, Tyler Frost testified on behalf of the Commission. Mr. Frost is a cost analyst with the Public Service Commission. Mr. Frost testified that on April 10, 2002, Commission staff requested information in an effort to gather additional data to use in determining the dark fiber market rate. The Commission requested information from nine parties: ALLTEL, AT&T, Charter-Fiberlink Nebraska, Dark Fiber Solutions, Great Plains Communications, MCI WorldCom, Qwest, Sprint and Frontier, and received responses from all parties but Charter-Fiberlink. ALLTEL filed its response confidentially, and the Commission accepted ALLTEL's response as Exhibit 14, only to be reviewed by the Commission and its staff. NPPD and NTA did not object to admission of Exhibit 14, but noted that their lack of objection to this procedure was only for the purpose of this proceeding.

Mr. Frost testified that Commission staff also reviewed access tariff filings and interconnections contracts. Staff's research indicated that there were no rates for dark fiber leasing in access tariffs. Mr. Frost testified that the only interconnection contract that included dark fiber rates was between Qwest and Integra Telecom, and that Qwest also identified this same contract in their response to Commission information requests.

Mr. Frost testified that a market involves the interplay of potential and actual buyers and sellers of a particular commodity or service. Mr. Frost testified that given the limited number of dark fiber leases that have actually occurred in Nebraska, it may not be possible to conclude that there is actually a competitive market in the state, but that it is possible to begin to infer that a market price exists.

Mr. Frost testified that staff performed an analysis on dark fiber lease arrangements, including information submitted in response to Commission information requests, information found in interconnection agreements and other rate schedules. All information used was for services and arrangements in Nebraska.

Mr. Frost testified that staff determined a dark fiber lease rate range from approximately $37 to approximately $123 per fiber, per mile, per month. The rate proposed by NPPD is $42.50 per fiber, per mile, per month, which Mr. Frost testified falls within the range identified by staff. Mr. Frost also testified that NPPD's proposed rate falls within a statistically meaningful range of the available data.

Mr. Frost further testified that if the Commission were to determine a market rate by only looking at dark fiber rates derived from interconnection environments, the Commission could examine rates filed by Qwest in the Commission's cost docket (Application No. C-2516) and rates in the voluntarily-negotiated interconnection in the contract between Qwest and Integra Telecom. Staff concludes that the NPPD proposed dark fiber rate falls within one standard deviation of these dark fiber rates.

Mr. Frost concluded that the proposed rates are reasonable in the present application.

Upon cross-examination by NTA's counsel, Mr. Frost testified that the presence of one willing buyer and one willing seller does not in and of itself mean that an agreed-upon price is the market rate.

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

Under Neb. Rev. Stat. § 86-2304 (2001 Supp.), any agency or political subdivision of the state may lease its dark fiber if certain conditions are met. Each condition set forth in the statute and the Commission's findings with regard to each condition are delineated below.

1. Certificated Carrier.

Section 86-2304(1) requires that the lessee be a certificated telecommunications common carrier or a permitted telecommunications carrier pursuant to Neb. Rev. Stat. § 75-604 or an Internet service provider. Frontier is a telecommunications carrier certificated by the Nebraska Public Service Commission pursuant to §75-604.

2. Lease Price.

Neb. Rev. Stat. §86-2304(2)(a) provides:

> The commission shall not approve any lease price which is less than the market rate for leasing such fiber as determined by the commission. The market rate is the price associated with similar unbundled network elements that may be available from the incumbent local exchange carrier or the price of any other private entity leasing dark fiber optic facilities serving the same or similar territory where the leased equipment is located.

The statute further provides that before entering into a lease, each agency or political subdivision shall file a request with the Commission for a competitive price comparison to determine the market rate. Neb. Rev. Stat. § 86-2304(2)(a) (2001 Supp.).

Also,

> When conducting a competitive price comparison, the commission in its discretion shall use rate schedules, interconnection agreements, or other documents within its regulatory oversight and shall gather other market rate information as deemed necessary. Id.

Mr. Frost testified that Commission staff used rate schedules, interconnection agreements and gathered information regarding dark fiber lease rates from a number of telecommunications carriers. Mr. Frost also testified that it may not be possible to conclude that a competitive market for dark fiber exists in the state.

The Commission finds that the market rate for dark fiber is within a range between $37 and $123, per fiber, per mile, per month. The Commission further finds that NPPD’s proposed lease price of $510 per fiber, per mile, per year, which calculates to a monthly rate of $42.50, is within this range and is not less than the market rate.

3. Fiber Maintenance.

Section 86-2304(2)(b) provides that the Commission shall not approve any lease price unless the lease requires that the agency or political subdivision be solely responsible for the maintenance of its dark fiber and that the lessee be responsible, on a pro rata basis, for any such maintenance costs.

The lease, filed as part of Exhibit 2, requires NPPD "[t]o maintain the two leased optical fibers in the same manner as it maintains its own internal operational fiber optic cable." (Exhibit 2, Lease Agreement, par. 1.g). The Commission finds no provision, however, that explicitly requires Frontier to be responsible, on a pro rata basis, for any such maintenance costs. The Commission finds that the lease should be revised to reflect this requirement, and that final approval of the lease price should not be granted until the applicant has demonstrated that the change has been made.

4. Costs and Profit Distribution.

Section 86-2304(2)(c) provides:

> The commission shall not approve any lease unless fifty percent of the profit earned by the agency or political subdivision under the lease is remitted to the Nebraska Internet Enhancement Fund. Profit earned by the agency or political subdivision is the lease price less the cost of infrastructure overbuilding. Before entering into a lease, each agency or political subdivision shall file a request with the commission to determine the cost of overbuilding its fiber optic infrastructure. For purposes of this subdivision, cost of infrastructure overbuilding means the cost of each leased optic fiber, including the cost, on a pro rata basis, associated with the agency's or political subdivision's installation of such fiber....

In its application, NPPD proposed that its cost of infrastructure was $1,965,788, or $81.74 per mile, which NPPD revised to $2,042,247, or $84.92 per mile, in its calculations in Exhibit 2. In pre-filed testimony, Mr. Stovall indicated that by his calculations, NPPD's cost of infrastructure overbuilding is $2,089,396, or $86.89 per mile, and that NPPD's total cost for this lease is $24,986.09 per Schedule 2 in Exhibit 10. Mr. Stovall testified that the discrepancy between staff's calculation and NPPD's revised calculation is due to the allocation of the transmission structures, namely, NPPD's rounding of 2.68 percent to 2 percent.

The Commission finds that the actual figure of 2.68 percent should be applied, rather than the rounded figure, and finds that NPPD's cost of infrastructure overbuilding is $2,089,396, or $86.69 per mile.

Furthermore, the Commission finds that the total profit under the lease is $121,669.51. Fifty percent of this figure is $60,834.76, and must be remitted to the Nebraska Internet Enhancement Fund. Pursuant to Rule 007.09B3, profits must be remitted within 60 days of receipt of payment pursuant to a lease. See Rule and Regulation No. 152, Order Entering Certificate of Adoption for Remaining Proposed Rules, Rule 007.09B3 (March 19, 2002).

5. Interconnection Agreement.

Section 86-2304(3) requires that "[a]ny interconnection agreement subject to subsection (2) of Section 75-109 is approved by the Commission." No interconnection agreement is required by the arrangement between NPPD and Frontier, therefore, no such interconnection agreement needs to be approved by the Commission.

6. Fiber Activation.

Finally, Section 86-2304(4) requires the lessee to make every reasonable effort to activate the maximum amount of the leased fiber as is possible, within one year after entering into the lease, unless good cause is shown. Furthermore, Section 007.11A of the Commission's proposed rules and regulations regarding dark fiber leasing provides that "[t]he lessee shall report to the Commission its efforts to activate dark fiber within one year of the Commission's approval of a lease price and profit distribution." See Rule and Regulation No. 152, Order Entering Certificate of Adoption for Remaining Proposed Rules, Rule 007.11A (March 19, 2002).

The Commission finds that the lessee, Frontier, should report to the Commission on or before November 7, 2002, detailing its efforts to activate both strands of dark fiber proposed to be leased under the arrangement that is the subject of this application. If Frontier reports that all such fiber is not activated, Frontier should report to the Commission again on May 7, 2003.

C O N C L U S I O N

In conclusion, the Commission finds that NPPD's proposed lease rate of $510 per fiber, per mile, per year, should be approved for the lease of dark fiber from Columbus to Kearney and Columbus to Rising City. The Commission finds that NPPD's cost of infrastructure overbuilding is $86.69 per fiber, and that the profit distribution to the Nebraska Internet Enhancement Fund should be $60,834.76 per year. Finally, the Commission finds that the lease does not explicitly require the lessee to pay a pro rata share of any maintenance, therefore, the applicant must demonstrate to the Commission that the lease has been revised to this effect.

Rules and regulations adopted by the Commission provide that if an application included a proposed lease price and profit distribution, and if the Commission does not approve the lease price and profit distribution, the applicant shall file a revised lease price and profit distribution that comports with the Commission's order establishing market rate and cost of infrastructure overbuilding. See Rule and Regulation No. 152, Order Entering Certificate of Adoption for Remaining Proposed Rules, Rule 007.07A (March 19, 2002). Because the Commission does not approve NPPD's proposed profit distribution in the application, nor in revised calculations submitted in Exhibit 2, the Commission finds that NPPD should file a revised profit distribution that comports with this order. The Commission further finds, pursuant to subsection 007.07A2 of the Commission's adopted rules, that the profit distribution must be approved by entering an order. Id. Upon receipt of a revised profit distribution by NPPD that comports with this order and upon demonstration by NPPD that the lease has been revised as discussed in the immediately preceding paragraph, the Commission will enter an order approving the profit distribution, which will conclude final approval of this application.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the dark fiber lease rate proposed by NPPD is hereby approved.

IT IS FURTHER ORDERED that the Commission shall enter an order approving profit distribution upon receipt of a revised profit distribution calculation and revised lease that comport with this order.

IT IS FURTHER ORDERED that the lessee shall report to the Commission, on or before November 7, 2002, detailing its efforts to activate dark fiber leased pursuant to the agreement that is the subject of this application.

IT IS FURTHER ORDERED that if the lessee reports that all fiber has not been activated by November 7, 2002, lessee shall report to the Commission again on May 7, 2003, detailing its efforts to activate dark fiber leased pursuant to the agreement that is the subject of this application.

MADE AND ENTERED at Lincoln, Nebraska, this 7th day of May, 2002.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chair

ATTEST:

Executive Director