

Before the Nebraska Public Service Commission

In the Matter of the Nebraska Public)	Application No. C-4807/PI-202
Service Commission, on its Own)	
Motion, to investigate ways to)	COMMENTS BY UNITE PRIVATE
accelerate the deployment of)	NETWORKS, LLC
broadband consistent with Section)	
706 of the Telecommunications)	
Act of 1996.)	

COMMENTS OF UNITE PRIVATE NETWORKS, LLC

Unite Private Networks, LLC (“UPN”) hereby files its Comments with regard to the Nebraska Public Service Commission’s (the “Commission”) Motion to investigate ways to accelerate the deployment of broadband.

COMPANY HISTORY

UPN provides high-bandwidth, fiber-based communications networks and related services to schools, governments, carriers, data centers, hospitals, and enterprise business customers throughout the United States. Service offerings include dark and lit fiber, private line, optical Ethernet, Internet access, data center services, and other customized solutions.

UPN currently serves over 300 communities across 20 states, with over 6,000 metro fiber route miles, and 3,500 on-net buildings. As of December 2015, total customer contract commitments amounted to over \$600 million.

UPN has a proven history of successful completion of large and complex fiber-optic construction projects, on time and on budget. Customer relationships typically include long-term agreements (10-20 years) for fiber-optic connectivity between multiple facility locations. UPN manages all phases of the customer relationship, including RFP response, construction management, network reliability, technical assistance, and customer service, to facilitate a long-term partnership with the customer. UPN also has significant experience working with federal E-Rate program guidelines for K-12 school districts.

UPN is regulated by Public Service Commissions of each state in which UPN operates (including the Nebraska Public Service Commission) and also by the Federal Communication Commission, with periodic reporting requirements and service standards. UPN is a certified E-Rate service provider.

Headquartered in the Kansas City, MO metro area, UPN has been providing customer-focused communications solutions since 1998.

COMMENTS REGARDING ISSUES RAISED BY THE COMMISSION

UPN congratulates the Commission on its foresight in opening this Docket and welcomes the opportunity to share some of the issues it has encountered while deploying fiber optic broadband solutions throughout the state of Nebraska. Our specific comments have been broken down into the categories raised in the Commission's Motion below.

1. The challenges that carriers face when deploying new broadband infrastructure.

a. Difficulties in properly identifying the correct entity and/or department that would have jurisdiction over a section of right of way delays application processes.

Just as each state has different regulations that govern their public service commission, each city, county, or municipal jurisdiction (such as Sanitary and Improvement Districts within the Omaha, NE area) ("Municipalities") all have different regulations that govern access to the right of way. Identifying boundaries for each of these jurisdictions can be challenging as records are not readily available to the public.

In addition, correctly identifying the proper department within the municipality to work with can be equally challenging as each municipality might delegate this responsibility to different practice areas. Generally, it is a collaboration between the City Engineer, City Manager, and City Attorney.

Some Municipalities have clearly identified procedures on their public websites. This speeds up the application process as it is easy to identify the proper procedure and costs. Other Municipalities have no procedure in place, which makes the process of gaining access to the right of way much longer.

b. Challenges faced with record keeping issues within Municipalities regarding location of other utilities can cause delays in approval processes.

Older communities often face challenges when it comes to specifically locating existing gas, water, and/or electrical lines that may have been placed decades ago. When UPN submits its engineered drawings for review by a Municipality's engineering department, it identifies all other utilities in the right of way where UPN is proposing to install its fiber, to the extent possible. However, much of this information is not readily available - even to Municipality personnel. This requires carriers to agree to either perform open trenching and/or hand dig many sections of its build within these areas to avoid damaging other utilities facilities. These methods of deploying fiber are more costly to carriers and can be cost-prohibitive to expanding a carrier's footprint.

In addition to added costs and significant delays, inaccurate records of other utilities can pose a significant safety concern for our contractors and the public at large.

2. *The approval processes and the extent to which the processes vary from one jurisdiction to another.*

a. *Difficulties in navigating the differences in terminology from one municipality to another delays application process.*

Each Municipality has different expectations and a different vehicle for granting access to the right of way, i.e., a Franchise Agreement, License Agreement, Permit for Use of Right of Way, or Right of Way Access Agreement. Essentially, these different types of agreements are interchangeable with the exception of a Franchise Agreement. However, navigating through the differences in terminology to determine what the Municipality requires adds to the length of time it takes to begin the application process. A streamlined version of terminology that could be used throughout the State of Nebraska would help level the playing field so that carriers would not have to spend valuable time researching Municipality requirements that can vary greatly from one Municipality to another.

In addition, while the names for the Agreements can be used interchangeably, the meaning and what they entail can differ significantly. For instance, a Franchise Agreement will ordinarily require a popular vote by the constituents within that Municipality, which delays access to the right of way for months. Whereas, a License Agreement can be approved by the City Council and entered into in a much shorter time period.

As such, in Municipalities that do not have clear and definitive procedures for telecommunications carriers to access their right of way, it can sometimes be a lengthy negotiation process just to identify the type of Agreement the Municipality would be willing to enter into with a carrier.

b. *Municipalities who own their own fiber tend to have very lengthy processes for new entrants to gain access to the right of way.*

UPN has been met with the most resistance in Municipalities that own their own fiber networks in some fashion. In those instances, the Municipality will either require a lengthy and involved review/approval process, require a Franchise Agreement that requires a popular vote, or require the payment of exorbitant fees that are not consistent with the market. All of these actions seem to deter new entrants and competition from entering the market.

c. *Difficulties in maintaining access for additions to existing network infrastructure.*

Oftentimes, Municipalities will require the right of way access agreement to be so narrowly written that carriers must re-apply for Amendments or entirely new Agreements for any additions to the existing network infrastructure. When this occurs, it delays (and can be prohibitive to) the implementation of needed infrastructure upgrades or expansion to provide service to new customers.

d. *Initial requirements can be cost prohibitive to entering new markets.*

Most Nebraska Municipalities require carriers to provide fully-engineered route maps that have been certified by an Engineer before any application can be submitted or agreement can be negotiated. This requires the carrier to develop their route and pay for an engineer

without the input of the Municipality. Then, after this work is completed, the Municipality will review and require changes based on the availability of the right of way. The carrier then has to employ an Engineer to make these changes, which can drastically increase the cost of engineering to develop the route. When developing the re-route, information relating to the placement of other utilities is not always given to the carrier. As such, it can often take several phases of engineering to gain approval for a project, especially for a larger project in an older development, which again adds to the cost for the fiber build.

Instead, UPN would prefer to collaborate with Municipalities in route development to identify where other existing utilities are located and the best route available to UPN for its fiber - rather than re-routing and incurring this additional cost. Unfortunately, many Municipalities are not open to this type of collaboration.

e. Varied levels of approval needed in each Municipality can be a delaying factor.

Just as each Municipality has a different Agreement they require a carrier to enter into, each Municipality has a different method for approving that Agreement. Initially, most require its Engineering Department to approve of the location of the proposed fiber route.

After this level of approval is received, there are two differing levels of final approval that can be available to carriers: 1) a City Manager can be allowed to grant access and sign the agreement; or 2) action of the governing body (i.e. a City Council or Board) is required to grant access and sign the agreement. The level of approval needed is generally dictated by the Municipality's Code of Ordinances.

For the second option, this can be a very lengthy process as it can often require two or three meetings of the governing body to review, vote on, and then approve Agreements. Since these meetings are only held twice a month, this can significantly delay the necessary approval. In these instances, carriers are at the Municipality's mercy to move their applications/agreements through their processes. There is no recourse for a carrier when a Municipality causes significant delays.

3. The fees for obtaining access and how they compare to other market-based rates.

a. Fees range greatly from one Municipality to another.

Fees that can be assessed range greatly from one Municipality to another. Smaller communities may not require a specific Agreement. Instead, they rely on their permitting processes to ensure that engineering is appropriate and recoup their costs through permitting fees. Other Municipalities seem to see their right of way as a revenue generator and require larger up-front application fees (in the \$2,000 range), as well as ongoing annual payments that generally translate to a certain amount per linear foot of right of way occupancy. Generally, these fees are not easily identifiable and carriers have no way of knowing if it is being assessed on a competitively neutral manner, as required by Nebraska State Statutes.

As discussed in more detail below, other states that have taken initiatives to further deployment of broadband facilities have taken steps to make the cost of accessing the right

of way readily available to the public and more streamlined to encourage investment in broadband infrastructure.

b. Fees are supposed to be tied to the cost associated with maintaining the right of way.

Per Nebraska State Statute § 86-704, only an occupation tax and permit fee are allowed for use of the public right of way. Both the tax and permit fees are to be tied to the cost of maintaining the right of way. However, carriers have no way of knowing if this is actually the case. In addition, there seems to be no check and balance system to ensure that Municipalities are not receiving a windfall from the collection of these fees.

4. The challenges negotiating rights of way access with entities such as railroads, utilities, and other private entities.

a. Carriers are often forced to employ outside experts to assist in navigating agreements with railroads.

UPN has had a great deal of interaction with all of the railroads in Nebraska and surrounding states. While Nebraska has a state statute that dictates how railroad crossings should be handled, this is not always what we experience in the field. We have experienced complete shut downs of work by the railroad after we have followed the statutory requirements. When this happens, it is usually a dispute over fees that the railroad believes they can charge to cross its tracks. In order to speed up this process, UPN (and many other carriers) have engaged the services of outside experts to assist in negotiating and requiring railroads to follow the Nebraska statutes, which can increase the cost of obtaining permits to cross railroads.

The Commission's regulations require carriers to pay \$1,250 per crossing. UPN believes this is for a crossing that is not included in the public right of way for a street or highway. However, we have experienced railroads who require payments two or three times larger than the statutory limit, regardless of the location of the crossing. In addition to these fees, railroads often require "Railroad Protective Liability Insurance", which is not easily obtained through a standard insurance carrier. BNSF will allow carriers to purchase insurance through them for approximately \$400 per crossing. Other railroads require the Railroad Protective Liability Insurance to be purchased through them or a separate carrier at the cost of approximately \$1,800 per crossing. This changes the cost to cross a railroad outside of the public right of way from a flat \$1,250 to \$1,650 to \$3,050 per crossing. Unfortunately, the statutes don't have any sanctions or regulatory consequences for railroads who refuse access without payment.

Railroad also require carriers to pay the cost of having flagging personnel onsite while work is being performed. While UPN agrees that flagging personnel should be available to ensure safety measures are properly taken, we believe that this is inconsistent with the Commission's intention when setting the fee at \$1,250. We believe that this fee should be all inclusive of personnel needed to be onsite.

b. The Commission's regulations are unclear as to whether the \$1,250 per crossing applies when in the public right of way for a street or highway.

UPN believes that when a public right of way already crosses the railroad that right of way should be accessible to public utility companies without any additional charge. Railroad companies all disagree and require payment of this fee and the Railroad Protective Insurance regardless of whether the placement of our fiber facilities are within the public right of way or not.

- c. *Other utilities who may own assets, such as poles, in the public right of way are subject to the FCC's regulations with regard to timelines for allowing access to the poles. Many don't follow them and there is no recourse for carriers.*

While we concede that there are FCC guidelines in place that should govern the timelines for pole owners to grant access to the poles for fiber lines to be installed, they are not always followed. In several instances in recent years, we have paid all make ready fees and then been delayed by over four or five months in gaining access to poles to hang our fiber. In those instances, we have not been able to meet our end-customer's expectation for service delivery dates and have been subject to liquidated damages to offset our end-customer's issues with the delay in service delivery. In these instances, there is no formal complaint process that UPN can follow that would bring this issue to the attention of the Commission and cause the pole owner to be more forthcoming.

5. *The extent to which the Commission or public stakeholders can play a role to encourage the rapid deployment of broadband in areas where federal CAF support is being provided.*

- a. *The State of Kansas has enacted legislation that specifically details fees that may be charged by a Municipality and provides an exemption for data-only (broadband) facilities.*

The State of Kansas legislature enacted Kan. Stat. Ann. § 17-1902 which governs how Municipalities and carriers work together to allow access to the right of way. The fees are specifically outlined in the statute, making it much easier for carriers to identify costs associated with the use of the right of way. Additionally, in order to provide an incentive for the deployment of broadband facilities, Kansas has allowed an exemption from certain Municipal right of way fees for "data-only" (or broadband) facilities.

- b. *The State of Texas has enacted regulations that are promulgated by the Public Utility Commission (the "PUC") to streamline access to the right of way.*

The State of Texas legislature enacted Texas Local Government Code § 283.052, 283.056 and 283.057 to govern how Municipalities could allow utilities to access their rights of way and the cost associated with this access. Texas then tasked its PUC with ensuring that these regulations are followed. The PUC provides a list of the per access line fee that a Municipality can assess in each community. It is then incumbent upon the carrier to pay these fees on a quarterly basis depending on the size and scope of their footprint in a given Municipality.

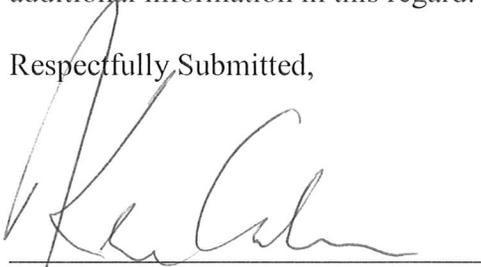
Because this streamlined process is in place, most Municipalities require simple permitting procedures for carriers to access the right of way, which are generally not expensive and do not take weeks or months to complete.

CLOSING REMARKS

Again, UPN congratulates the Commission on its efforts and looks forward to working with the Commission Staff to bring these issues to light and present possible resolutions. We have included examples of what we have encountered in other states simply to show how other communities have tackled these issues. We believe that a strong presence from the Commission, and possibly the state legislature, will aid greatly in overcoming obstacles that currently prevent carriers from entering new communities and bringing broadband resources to every Nebraskan.

Please do not hesitate to contact us at (816) 903-9400 should you have any questions or need any additional information in this regard.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Kevin Anderson', written over a horizontal line.

Kevin Anderson
Chief Executive Officer
Unite Private Networks, LLC