

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

REGULATORY REFORM REVIEW COMMISSION

Monday, October 14, 2002
Meadow Room, Country Inn and Suites
Fargo, North Dakota

Representative Rick Berg, Chairman, called the meeting to order at 9:00 a.m.

Members present: Representatives Rick Berg, Eliot Glassheim; Senator Rich Wardner; Public Service Commissioner Tony Clark

Member absent: Senator Steven W. Tomac

Others present: See attached appendix

It was moved by Representative Glassheim, seconded by Senator Wardner, and carried on a voice vote that the minutes of the previous meeting be approved as distributed.

PERFORMANCE ASSURANCE PLAN BILL DRAFT

At the request of Chairman Berg, commission counsel presented a bill draft [30189.0100] to provide for the expenditure of funds collected under the performance assurance plan.

Commissioner Clark presented written testimony on the bill draft. He said the Public Service Commission supports the bill draft; however, the spending authority should be raised from \$50,000 to \$100,000. A copy of his testimony is on file in the Legislative Council office.

In response to a question from Representative Glassheim, Commissioner Clark said \$100,000 is a closer approximation to the amount the Public Service Commission would have to pay for monitoring the plan. He said Nebraska created a fund and the Public Service Commission had unlimited spending authority; however, if the fund reaches \$100,000, the extra money goes into a technology fund.

In response to a question from Representative Glassheim, Commissioner Clark said under the bill draft the money collected from Qwest would have to be spent on monitoring the performance assurance plan. He said after June 30, 2005, the expiration date of the bill draft, the money would automatically go into the general fund.

In response to a question from Representative Berg, Commissioner Clark said Qwest has asked for reapproval of the Section 271 filing. He said the Federal Communications Commission has to act on the filing by the end of December. He said if the Section 271 filing is approved, then the performance assurance plan would begin and fines could come to the Public Service Commission as soon as January.

In response to a question from Representative Berg, Commissioner Clark said the performance assurance plan arose from the previous Section 271 filings by other regional Bell operating companies. Because the other companies included the plan in their filings and their filings were approved, other companies have done the same. He said the performance assurance plan is a mechanism for ongoing oversight over the wholesale market place. He said it is a voluntary contract between the regional Bell operating company and the competitive local exchange carriers. He said it provides for fines for failure to compete which go to competitors and the state. He said the fines that go to the state are to discourage anticompetitive behavior and to repair the harm caused to the competitive marketplace.

In response to a question from Representative Berg, Commissioner Clark said the fines that the Public Service Commission can impose are limited to \$5,000 per occurrence. He said these fines go to the general fund.

Commissioner Susan Wefald, Public Service Commission, presented testimony on the bill draft. She suggested the bill draft include Qwest's name.

Representative Berg said the bill draft is a reasonable way to address a situation in which the Public Service Commission does not know how much money will be collected under the plan. He said this allows the Public Service Commission the ability to spend fines under the plan but requires a review by the Legislative Assembly at the end of the two years. He said he does not want a long-term continuing appropriation. He said after two years the Public Service Commission will have more information to place the performance assurance plan operating money in its budget. He said the bill draft is meant as a window to provide information for the Legislative Assembly to base budgeting decisions.

In response to a question from Representative Berg, commission counsel said the money in the special fund would go to the general fund at the termination of the special fund. He said additional language saying the special fund money would go to the general fund would be explicit; however, the language is not needed.

Senator Wardner said he approves of the language as it appears in the bill draft.

It was moved by Representative Glassheim, seconded by Commissioner Clark, and carried on a roll call vote that the bill draft [30189.0100] to provide for expenditures of funds collected under the performance assurance plan be amended to increase the threshold for Budget Section approval from \$50,000 to \$100,000. Representative Glassheim, Senator Wardner, and Commissioner Clark voted "aye." Representative Berg voted "nay."

Commissioner Clark said if the limit were not raised, the Public Service Commission may have to go to the Budget Section many times and this would not be a good use of the Budget Section's time. He said it would cost a lot for experts to review Qwest's actions and \$50,000 would be spent quickly.

It was moved by Representative Glassheim, seconded by Senator Wardner, and carried on a roll call vote that the bill draft to provide for expenditures of funds collected under the performance assurance plan, as amended, be approved and recommended to the Legislative Council. Representatives Berg and Glassheim, Senator Wardner, and Commissioner Clark voted "aye." No negative votes were cast.

STATE UNIVERSAL SERVICE FUND

Other States

Commissioner Clark provided a chart showing summaries of state universal service funds. He said most states have a high-cost component. He said the Lifeline program is a monthly support for low-income individuals to offset the monthly cost of telephone service. He said the LinkUp program offsets the initial cost of hooking up telephone services. He said telecommunications relay service is covered by some states under their state universal service fund. He said some state universal service funds offset implicit access charges in telephone rates through a state universal service fund. He said some states supplement the federal schools and libraries and rural hospital programs through a state universal service fund. He said some states fund E911 through a state universal service fund. A copy of the handout is on file in the Legislative Council office.

10th Circuit Remand

Commissioner Clark said the 10th Circuit remand in which a federal judge ordered the Federal Communications Commission to develop "a carrot or a stick" for states to make a state universal service fund will most likely not affect this state. He said he recently spoke with the staff and the commissioners on the Federal Communications Commission. He said they expected an order by the end of the year. He said the order will most likely require a review of rates in rural areas to see if they are comparable with urban areas. He said if the rates are comparable, the state will not be required to create a state universal service fund.

He said it appears the rates in this state are comparable.

Bill Drafts

At the request of Chairman Berg, commission counsel presented two bill drafts relating to a state universal service fund. He said one bill draft [30184.0100] provides for a high-cost fund to supplement any reduction in federal universal service funds and one bill draft [30185.0100] provides for the removal of implicit subsidies and replaces those implicit subsidies with explicit subsidies.

Representative Berg said the reason the two bill drafts were requested was so the commission could have a starting point for its review of state universal service funds. He said it is not necessary for the commission to recommend a state universal service fund.

Commissioner Clark said the definitions of telecommunications carrier and telecommunications service in the bill draft are broad enough to include aggregators like the University of North Dakota. He said the definition may include Internet providers. He said those that contribute to the fund should be able to receive from the fund.

Commissioner Wefald testified that in the last legislative session direct line services were eliminated from the definition of telecommunications services. She said the definitions in the bill draft should be reviewed to see if they do the same.

In response to a question from Commissioner Clark, commission counsel said the definitions of the telecommunications carrier and telecommunications service appear to be quite broad and are not limited by the subdivisions.

In response to a question from Representative Glassheim, commission counsel said the definitions are based on the definitions used for the gross receipts tax.

Representative Glassheim said it was unclear whether the definitions include hotels, motels, or aggregators. He said the commission should agree on a concept of who pays.

Representative Berg said who contributes to the fund is an important issue. He said the commission had identified an important issue and if the commission reviews the bill draft during a future meeting, the commission should request testimony from interested parties who do not want to be contributors.

Representative Glassheim said the first step should be to make a list of those included and those not included in the definitions.

In response to a question from Representative Glassheim, Commissioner Clark said under the federal program if a rural cooperative customer receives services from the incumbent local exchange carrier and that customer uses a cell phone, both companies receive a federal universal service fund payment. He said the rural cooperative would receive

embedded costs and the wireless company would receive the same amount. He said in the high-cost fund bill draft the new carrier would receive an amount based on its own cost. He said this would be a lower cost and would lower the amount of funding needed for a state universal service fund.

Commissioner Wefald provided testimony on both bill drafts. She said the testimony was hers and not that of the Public Service Commission. She said the state universal service fund could result in an increase in the cost of basic service rates in this state. She said the commission should look at whether companies need the money provided in the bill drafts. She said a state universal service fund could provide for overrecovery. She said the implicit subsidy removal bill draft states that the cost of support is the difference between a forward-looking cost and the benchmark cost; however, there is no investigation of costs. She said the high-cost bill draft provides for recovery based on embedded costs and not need.

Commissioner Wefald said both bill drafts provide that all information is trade secret. She said only parties can look at trade secret information and it is not available to the general public.

Commissioner Wefald said there are many complaints about the federal \$6 access fee for local service. She said the state universal service fund would produce another fee on customers' bills that may upset customers. She said if the implicit subsidy removal bill draft was adopted, a person who makes many intrastate long-distance calls would pay more than presently. She said a tax would raise the cost to consumers and would create a need for a program for low-income people to cover the cost of the tax.

In response to a question from Representative Glasheim, Commissioner Wefald said language could be drafted so that the Public Service Commission could look at need instead of basing the fund on what telephone companies say they need.

Mr. David Crothers, North Dakota Association of Telephone Cooperatives, provided testimony on the bill drafts. He said neither bill draft represents the position of the cooperatives. He said he was against the implicit subsidy removal bill draft and the high-cost bill draft needs to be revised. He said the high-cost bill draft came from the last interim. He said the association does not think it is time for a state universal service fund. He said the Federal Communications Commission will act on state universal service funds next spring. He said it is too soon to draft legislation. He said the Federal Communications Commission will have a detailed order in the future and that order will be the template for any bill draft. He said the order will deal with portability and the cost to competitors.

In response to a question from Representative Berg, Mr. Crothers said there are some good things in the high-cost bill draft. He said this bill draft could be modified to accommodate the needs of North Dakota. He said the positive aspects of the bill draft are that

no industry has an advantage over another; the Public Service Commission can create a fund to keep services affordable; the Public Service Commission can determine a benchmark that consumers can afford and then the company receives funds for the difference between the benchmark and the cost; the state universal service fund is created only if the federal universal service fund is inadequate; whatever the Federal Communications Commission uses to determine cost is what the state uses; and no eligible telecommunications carrier is unjustly enriched.

In response to a question from Representative Berg, Mr. Crothers said the high-cost fund bill draft provides that a competitor receives funding based on the competitor's cost.

In response to a question from Representative Berg, Mr. Crothers said if payment from the fund is based on the incumbent's costs, there would be a substantial cost to the fund. He said identical support is inappropriate. He said the commission should determine who pays into the fund. He said hotels and motels do not pay the gross receipts tax but did at one time.

In response to a question from Commissioner Clark, Mr. Crothers said he does not know whether a competitor's cost would be based on the embedded cost or the forward-looking cost under the high-cost bill draft.

Representative Glasheim said he represents an urban area and wants rural areas to be served by telephone companies. He said he is not in favor of a fund so urban consumers can pay more for telephone services to subsidize rural areas that pay less for telephone services than in urban areas.

In response to a question from Representative Glasheim, Mr. Crothers said if a Qwest customer pays \$21 for telephone service and the benchmark is \$25, the Qwest customer will not pay more than the rural customer for telephone service.

In response to a question from Senator Wardner, Mr. Crothers said there are a few legislatures that meet biennially. He said the Federal Communications Commission will be advised of this fact in its rule-making and will most likely accommodate these legislatures in its rulemaking process.

At the request of Chairman Berg, Ms. Natalie Baker, AT&T, Network Service Division, provided testimony on the bill drafts. Ms. Baker said AT&T supports a universal service fund that has an appropriate subsidy design so it works in the competitive marketplace. She said historical universal services were supported through implicit subsidies that included higher rates for business services, higher rates in urban areas, and high access rates. She said these implicit subsidies supported local residential service. She said these implicit subsidies have historically kept local service at low rates. She said since the federal Telecommunications Act of 1996,

the removal of implicit subsidies has required changes in universal service funding.

Ms. Baker said there are four universal service funds--Erate, Lifeline, LinkUp, and high-cost. She said the high-cost fund can be divided into nonrural high-cost support and rural high-cost support. She said there are four things the Federal Communications Commission needs to determine for a state universal service fund--what is reasonably comparable, what is sufficient, what is the rationale for a benchmark, and what should be the state involvement.

Ms. Baker said there are five principles that a state universal service fund must contain to be compatible with a competitive marketplace. She said the principles are the creation of explicit subsidies through the removal of implicit subsidies, broad funding, narrowly targeted support, administration by a neutral third party, and portability. She said portability requires the full measure of support to go to a competitor. In some states, she said, the public utilities commission administers the state universal service fund. She said in other states the commission has oversight over a fiscal agent. She said the administration of a state universal service fund requires a major time expenditure, the developing and maintaining of a data base, and complex accounting. She said the range of bids to operate a state universal service fund may range from \$40,000 to \$300,000. She said the Public Service Commission is important in hiring the appropriate fiscal agent.

Ms. Baker said contributions should be based on total end user intrastate retail revenue. She said collection from interstate, intrastate, and international revenue was overturned in Oregon and is being challenged in Texas and North Carolina. She said if every state implemented an interstate, intrastate, and international tax to support that state's universal service fund, then each call would be taxed in two states and by the federal government.

Commissioner Clark said the Federal Communications Commission oversees the federal fund, but the fund is operated by the Universal Service Administrative Corporation which was set up by the National Exchange Carriers Association for the purposes of administering the fund.

Ms. Baker said the term "reseller" has a specific definition as a person that buys a finished service at discounts and markets under that person's name. She said universal service funds go to facilities-based carriers that can have resold services of part of the carrier's offering.

Ms. RaeAnn G. Kelsch, Western Wireless, presented testimony on the bill drafts. She said Western Wireless wants a level playing field. She

said a level playing field would be produced by providing the competitor with the exact same subsidies the incumbent receives or by removing all subsidies. She said a forward-looking cost model produces a more true determination of costs than the embedded cost model. She said Western Wireless supports the concept contained in the implicit subsidy reduction bill draft.

CONTINUATION OF THE REGULATORY REFORM REVIEW COMMISSION

Mr. Crothers said the life of the Regulatory Reform Review Commission should be extended because of future Federal Communications Commission rulings that may affect universal service in the state. He said it was important for the Legislative Assembly to have members with expertise in telecommunications issues.

Senator Wardner said because of this testimony there may be a reason to keep the commission.

Representative Glassheim said the commission has been extended in the past because of possible Federal Communications Commission rulings and the commission has later found out that no action is required because of the rulings. He said if a need did arise, the Public Service Commission could have a bill drafted with legislative sponsors or the Legislative Council could assign a study to a committee, for instance, the Information Technology Committee.

It was moved by Representative Glassheim, seconded by Senator Wardner, and carried on a roll call vote that a bill draft to extend the life of the Regulatory Reform Review Commission to 2005 be approved and recommended to the Legislative Council. Representatives Berg and Glassheim, Senator Wardner, and Commissioner Clark voted "aye." No negative votes were cast.

It was moved by Commissioner Clark, seconded by Senator Wardner, and carried on a voice vote that the chairman and the staff of the Legislative Council be requested to prepare a report and the bill drafts recommended by the commission and to present the report and recommended bill drafts to the Legislative Council.

Chairman Berg adjourned the meeting at 11:55 a.m.

Timothy J. Dawson
Commission Counsel

ATTACH:1