

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of GCC License) Application No. C-1889
Corporation seeking designation)
as an eligible telecommunications) ORDER APPROVING
carrier (ETC) that may receive) ADVERTISING PLAN
universal service support.)
) Entered: October 4, 2001

BY THE COMMISSION:

On November 21, 2000, the Commission granted eligible telecommunications carrier (ETC) status to GCC License Corporation (Western Wireless). In that order, as a separate requirement, the Commission instructed Western Wireless to submit an advertising plan to the Commission for approval.¹ Western Wireless complied with Commission order and submitted its advertising plan to the Commission for approval on December 29, 2000. Western Wireless supplemented its filing on February 8, 2001. Notice of appeal was filed with the Commission on March 19, 2001. The appellants' motion for a stay, filed April 12, 2001, was overruled by the Nebraska Supreme Court. Therefore, the Commission believes that it is appropriate at this time to address the advertising plan submitted by Western Wireless in accordance with the Commission's November 21, 2001, order.

On March 6, 2001, the Commission entered an order requesting comments on Western Wireless' advertising plan. The Commission requested that the comments be specifically limited in scope and speak only to the advertising plan. Comments were filed by Arlington Telephone Company; Clarks Telecommunications Co.; Consolidated Telco, Inc.; Consolidated Telephone Company; Eastern Nebraska Telephone Company; Great Plains Communications, Inc.; Harrington Telecommunications, Inc.; Hershey Cooperative Telephone Company; Hooper Telephone Company; K & M Telephone Company; NebCom; Inc.; Nebraska Central Telephone Company; Northeast Nebraska Telephone Company; Pierce Telephone Company; Rock County Telephone

¹ In its November 21, 2001 order, the Commission specifically ordered that:

GCC License Corporation shall submit an advertising plan which shall include; a) a description of those services and their rates; b) the geographic area where those services are available; c) the medium of publication of the advertising, including the names of the media where such advertising will be published; and d) the size and type of advertising. . . In the Matter of the application of GCC License Corporation seeking designation as an eligible telecommunications carrier (ETC) that may receive universal service support, Application No. C-1889, Order Granting ETC Status And Issuing Findings, Entered November 21, 2000, at 15.

Company; Southeast Nebraska Telephone Co.; Stanton Telecom, Inc. and the Blair Telephone Company (hereinafter referred to collectively as the Independents). Arapahoe Telephone Company, Benkelman Telephone Company, Cozad Telephone Company, Curtis Telephone Company, Diller Telephone Company, Hemingford Cooperative Telephone Company, Henderson Cooperative Telephone Company, Wauneta Telephone Company (hereinafter referred to collectively as the Rural Independents) and Aliant Communications Inc., d/b/a ALLTEL also filed written comments. Western Wireless filed reply comments pursuant to Commission order on March 23, 2001.

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

Through its comments, the Independents urged the Commission not to approve the advertising plan as submitted by Western Wireless. The Rural Independents also requested that the Commission not approve the Western Wireless advertising plan at this time. ALLTEL remained neutral but expressed some limited concerns. Western Wireless filed reply comments requesting the Commission to approve its advertising plan and arguing that the plan meets the Commission's explicit criteria. The Commission addresses these comments in the following paragraphs.

The Independents contend that the advertising plan submitted by Western Wireless does not clearly state that the basic universal service offering by Western Wireless is the Fixed Wireless Service that Western Wireless previously stated that it would offer. Upon review of these allegations, the Commission finds that the advertising plan is not sufficiently clear. The Commission granted Western Wireless ETC status based upon its application as such for a fixed wireless service. Although the plan does outline the available service offerings, the Commission finds that it should identify for consumers what type of service it is offering for the particular rate listed. The Commission believes this to be in conformance with the Commission's November 21, 2001, order. The Commission will therefore require Western Wireless to modify its service offering description in its advertising campaign in conformance with these findings prior to offering services.

The commenters also requested that the Commission clarify that Western Wireless' only service offering eligible to receive universal service funding is the fixed wireless service to assure that funding is directed to areas where support is warranted. The Commission finds that this support related issue can and will be appropriately addressed in the Commission's Nebraska Universal Service Fund (NUSF) proceedings.

The comments submitted by the Independents also alleged that the advertising plan submitted by Western Wireless did not meet the

criteria found in the Commission's findings and conclusions entered in Application No. C-1628 on January 1999. First, the Independents stated that the prices in the advertising plan do not comply with the \$17.50 and \$27.50 price targets established in Application No. C-1628. Second, the commenters request that the Commission require Western Wireless submit a two-tiered rate plan to distinguish business lines from residential lines. Third, the Independents state that the Commission cannot approve an advertising plan for service until it has resolved how it will determine the appropriate pricing of this service with respect to receiving interim NUSF support. These issues, the Commission finds, would be more appropriately raised and addressed in Commission NUSF proceedings. The Commission has not received a request for support from Western Wireless. Moreover, the Commission has opened a docket to examine issues relevant to support levels for all ETCs.

The Independents point out that Western Wireless cannot claim that it offers all consumers voice-grade access to the public switched telephone network without the legally required interconnection contracts being established with the local exchange carriers. The Commission agrees that Western Wireless must either negotiate interconnection agreements pursuant to Section 252 of the Act or negotiate amendments to existing interconnection agreements where necessary prior to offering access to the public switched telephone network. The Commission will therefore require these interconnection agreements or amendments be filed and duly approved by the Commission.

The Independents next request that the Commission ensure parity and competitive neutrality among ETCs eligible for NUSF support. The Independents point out that the plan as submitted does not provide consumers with equal access to interexchange carriers (IXCs). We agree with the Independents that equal access is in the public interest of consumers and promotes our competitive goals. The Commission has made it a requirement that all local exchange carriers provide intraLATA dialing parity in the state of Nebraska.² In that order, the Commission declared that customer choice is imperative. Therefore, the Commission requires Western Wireless to provide equal access to its fixed wireless customers. Western Wireless should include this offering in its advertising plan.

Further, this Commission reiterates that it has the power to enforce its jurisdiction over any carrier receiving support from the Nebraska Universal Service Fund. We agree that ensuring that ETCs meet Commission requirements on service quality standards and

² *In the Matter of the Nebraska Public Service Commission on its own motion to conduct an investigation into the effects of local competition on the telecommunications industry in Nebraska, Dialing Parity Established, Docket C-1128, Progression Order 4, September 15, 1997.*

minimal technical requirements are included in the Commission responsibilities. Therefore, these issues will be properly addressed by the Commission once it receives a request for funding by Western Wireless and once the Nebraska Universal Service Fund rules and regulations are in effect. The Commission declines to adopt such criteria in this present order which examines Western Wireless' advertising plan.

The Rural Independents emphasized concern that the advertising plan will place their companies at a competitive disadvantage and is inherently unfair. The Rural Independents focus on the fact that Western Wireless proposes to advertise its universal service offering at a rate of \$14.99 per month, excluding taxes and governmental assessments. The Rural Independents further stated that wireless carriers such as Western Wireless are not required to charge the federal subscriber line charge (SLC). Therefore, they concluded overall, Western Wireless would have a price advantage of \$8.00 per month. The overriding concern of the Rural Independents is that if Nebraska Universal Service Fund support is portable from the incumbent local exchange carrier (ILEC), the \$8.00 price difference could arguably be coming from the NUSF. Upon consideration of this argument, the Commission finds that this is also an issue that is not ripe for decision. This concern can and should be raised in the Commission's NUSF proceedings.

The rural companies suggest that it is premature for the Commission to determine the propriety of the Western Wireless advertising plan. Upon consideration of these concerns, the Commission finds that it is not premature to approve the advertising plan. Rather, the Commission, in its November 21, 2000, order stated that it would expeditiously address the advertising plan on file with the Commission. The Commission finds that the concerns raised by the rural independents are premature. The Commission will set forth the requirements under which Western Wireless would be entitled to receive NUSF funds in a NUSF proceeding.

ALLTEL also expressed its concern about the advertised rate of \$14.99 in comparison to the Commission-established benchmark of \$17.50 for residential and \$27.50 for business service. ALLTEL states that the benchmarks were also established with a clear understanding that a SLC charge would be assessed to the customer as well. ALLTEL therefore requests the Commission to presume that the benchmark rates and an amount equivalent to the appropriate SLC are being charged to the customers prior to Western Wireless receiving NUSF support. The Commission recognizes ALLTEL's concern, but finds that this concern can and should be raised in the NUSF proceeding triggered by Western Wireless' request for support and by collateral NUSF proceedings.

Western Wireless reply comments provided that the advertising plan should be approved because it had provided the Commission with

the information required pursuant to the Commission's November 21, 2001, order. Western Wireless further alleged that many of the other comments received were beyond the scope of the advertising plan at issue.

Upon review of the advertising plan on file with the Commission and in consideration of the comments and reply comments filed, the Commission finds that the advertising plan should be approved as modified by the opinion and findings above. We are not making any specific findings as to any requirements which may be imposed upon Western Wireless for NUSF support purposes.

The approval of the Western Wireless advertising plan carries no precedential value or weight with respect to NUSF issues. The approval of the applicant's advertising plan in this order does not trigger automatic support from the NUSF. Nor does it preclude the Commission from deciding on what services and on what basis ETCs should receive support. We agree with the commenters that we have the statutory authority over other "terms and conditions" of service for all carriers who wish to receive funding from the NUSF. As indicated however the Commission will, through orders entered in an NUSF docket, establish reasonable price ranges for local service offerings which qualify for NUSF funding.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the advertising plan filed by Western Wireless be, and it is hereby, approved subject to the satisfaction of the conditions described herein and presented to the Commission for final approval.

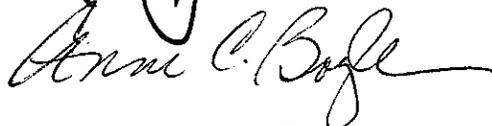
IT IS FURTHER ORDERED that Western Wireless file its interconnection agreements or amendments thereto for Commission approval prior to offering service.

IT IS FURTHER ORDERED that Western Wireless be and it is hereby required to provide equal access to interexchange carriers pursuant to the findings and conclusions contained herein.

MADE AND ENTERED at Lincoln, Nebraska this 4th day of October, 2001.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:



//s//Frank E. Landis


Chairman

ATTEST:



Executive Director

Commissioners Rod Johnson and Gerald L. Vap dissenting:

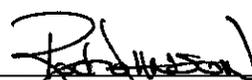
We write separately to dissent because we believe that the Commission is divested of the subject matter jurisdiction and cannot take these post-appeal steps to effectuate its November 21, 2000, order after the perfection of the appeal. We believe that the Commission's approval of Western Wireless' advertising plan, also violates the automatic stay rule provided in *Neb. Rev. Stat. §75-134(3) (Cum. Supp. 2000)*.

According to Nebraska law, once an appeal is perfected, the administrative body is divested of subject matter jurisdiction until the appellate court issues its mandate. *Norwest Bank Nebraska, N.S. v. Bellevue Bridge Comm'n*, 7 Neb. App. 750, 585 N.W.2d 505 (1998). In *Norwest*, a trial court issued a nunc pro tunc order after an appeal was perfected. The Court of Appeals held that the action of the trial court was void. Similarly in this case, the Appellants have perfected their appeal and the Commission is divested of the subject matter jurisdiction over Western Wireless' ETC designation. We believe this Commission lacks jurisdiction to enter any additional orders in Application No. C-1889 until the Nebraska Supreme Court issues its mandate and any formal action on the part of this Commission without subject matter jurisdiction is void.

Moreover, *Neb. Rev. Stat. §75-134(3) (Cum. Supp. 2000)* provides that except in certain limited circumstances, which are inapplicable here, an order appealed to the Court of Appeals shall be held in abeyance until a mandate is issued by the court or by

Nebraska Supreme Court. In taking yet another post-appeal step, the Commission is ignoring the automatic stay rule.

The Commission's action today to approve the Western Wireless advertising plan is an additional step which facilitates its operations as an eligible telecommunications carrier (ETC). We believe that the Commission's action today is premature and that it should wait until the appeal process has been completed before taking any further action.



Commissioner Rod Johnson



Commissioner Gerald L. Vap

ATTEST:

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