

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the ) Application No. C-3379  
Precedential Nature of Orders on )  
Reconsideration Issued in ) ORDER  
Consolidated Docket Nos. FC-1296 )  
and FC-1297. ) Entered: November 1, 2005

BY THE COMMISSION:

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

By application filed February 28, 2005, Qwest Corporation (Qwest) seeks a determination of the precedential nature of the orders issued by the Commission in consolidated docket FC-1296/FC-1297. Notice of this application appeared in the Daily Record, Omaha, Nebraska on March 7, 2005. No petitions of formal intervention or protest were filed on this application. Qwest requested argument on its application which was held on October 12, 2005. Ms. Jill Gettman and Mr. Chuck Steese entered appearances on behalf of Qwest.

On December 17, 2002 the Commission issued the Order Granting Relief and on January 28, 2003 issued an Order on Reconsideration (collectively referred to as the orders). By this petition, Qwest is not asking the Commission to change or revisit its previous orders determining the issues in FC-1296/FC-1297. Qwest seeks clarification of the precedential effect of the determinative orders issued in FC-1296/FC-1297. Specifically, Qwest requests a Commission holding that its orders are not binding on any other party that was not a party to the FC-1296/FC-1297 complaint proceeding and cautioning their use as precedent or cited authority by parties to any other proceedings. Qwest states that even though new evidence has been presented in other states' proceedings, a wireless carrier has sought to bind Qwest to the Commission's decision. See Qwest Petition at 5.

Of primary concern to Qwest is the application of offensive collateral estoppel which may or may not foreclose its ability to demonstrate factual distinctions between the evidence presented to the Commission and other proceedings where they have uncovered new evidence not presented to this Commission. Under the doctrine of collateral estoppel otherwise referred to as issue preclusion, "when an issue of ultimate fact has been determined by a final judgment, that issue cannot again be litigated between the same parties in a future lawsuit." *Eicher v. Mid America Financial Investment Corporation*, 270 Neb. 370, 387, 702 N.W.2d 792, 809 (2005). See also *Woodward v. Andersen*, 261 Neb. 980, 627 N.W.2d 742 (2001).

There are other instances where Nebraska courts have refrained from applying the doctrine of collateral estoppel to administrative decisions where the issues cannot be considered identical or when the facts in each case must necessarily be separately considered. See *In re Applications of Nebraska Public Power District v. Nebraska Safe Energy Alternatives, Inc.*, 215 Neb. 8, 337 N.W.2d 107 (1983) (Holding the collateral estoppel doctrine does not apply when an agency considers public convenience and necessity issues and determines public interest for the state.)

The Commission's decision in this docket is unlikely to control when and how the Nebraska courts apply collateral estoppel to a particular case. In addition, the Commission believes similar principles of collateral estoppel would likely be applied in other states' adjudicative proceedings irrespective of how the Commission rules here.

However, the Commission does not want to encourage parties to adopt a "wait and see" attitude as Qwest would describe it; rather, the Commission agrees it serves the public interest for all interested and affected persons to participate in the original action. See *Parklane Hosiery Co. Inc. v. Shore*, 439 U.S. 322, 331 (1979). Accordingly, the Commission clarifies that the orders issued in FC-1296/FC-1297 were based upon the particular facts presented by the parties in that consolidated case relating to the services provided in Nebraska. The Commission further clarifies that it considers its decision in FC-1296/FC-1297 binding only on the parties to that consolidated case.

## O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that Qwest's application for clarification on the precedential nature of the orders issued in FC-1296 and FC-1297 be and it is hereby granted to affirm that the Commission's findings and conclusions were based solely on the record presented by the parties in that case.

IT IS FURTHER ORDERED that as the Commission clarifies herein, the orders issued in FC-1296/FC-1297 are not considered binding on anyone who was not a party to that case.

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MADE AND ENTERED at Lincoln, Nebraska this 1st day of  
November, 2005.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

*Lowell Johnson*

Chairman

*Gerald L. Vap*

*Anne C. Boyle*

ATTEST:

*Joel Johnson*

*Ad S Pollak*

Executive Director

//s// Frank E. Landis

//s// Gerald L. Vap