

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Requests by) Application No. C-3423
34 Nebraska Rural Local Exchange)
Carriers to Revise the) ORDER
Commission's July 20, 2004 Order)
Granting Suspension of the)
Federal Communications)
Commission's Requirement to)
Implement Wireline-Wireless)
Number Portability Pursuant)
to 47 U.S.C. §251(f)(2).) Entered: July 12, 2005

BY THE COMMISSION:

By Application filed May 11, 2005, thirty-four Nebraska Rural Local Exchange Carriers (the "RLECs")¹ request that the Commission enter an order extending the date by which the RLECs are required to file a petition for further relief as set forth in the Commission's July 20, 2004 Order Granting Suspension in Applications No. C-3096, et al. and the August 3, 2004 Order Granting Limited Extension in Application No. C-3207 (collectively referred to herein as the "Suspension Order"). Notice of the application was published in The Daily Record, Omaha, Nebraska on May 17, 2005.

On July 5, 2005, the Hearing Officer assigned to this case held a prehearing conference, and as a consequence of such conference entered a Prehearing Conference Order on the same date. During such prehearing conference, all parties to this matter, through their respective legal counsel, agreed that there are no facts in dispute in this matter and that the Commission could render its decision herein based upon the legal arguments presented in the pleadings and supporting briefs. Further at the prehearing conference, legal counsel for

¹ Arapahoe Telephone Company d/b/a ATC Communications; Benkelman Telephone Company, Inc.; Cambridge Telephone Company; Clarks Telecommunications Co.; Consolidated Telephone Company; Consolidated Telco, Inc.; Consolidated Telecom, Inc.; Cozad Telephone Company; Curtis Telephone Company; Dalton Telephone Company, Inc.; Diller Telephone Company; Eastern Nebraska Telephone Company; Elsie Communications, Inc.; Glenwood Telephone Membership Corporation; Great Plains Communications, Inc.; Hamilton Telephone Company; Hartington Telecommunications Co., Inc.; Hartman Telephone Exchanges, Inc.; Hemingford Cooperative Telephone Company; Hershey Cooperative Telephone Company, Inc.; Hooper Telephone Company d/b/a Westel Systems; K&M Telephone Company, Inc.; Keystone-Arthur Telephone Company; Mainstay Communications; Plainview Telephone Company; Nebraska Central Telephone Company; Northeast Nebraska Telephone Company; Pierce Telephone Co.; Rock County Telephone Company; Sodtown Telephone; Southeast Nebraska Telephone Company; Stanton Telecom, Inc.; Three River Telco and Wauneta Telephone Company.

intervenor, WWC License, LLC ("WWC"), asserted that the Commission lacked subject matter jurisdiction to grant the relief sought in this application.

In response to the intervenor's position concerning the Commission's jurisdiction over this matter, the Hearing Officer established a schedule for the intervenor to file a motion to dismiss the application, together with a supporting brief and proposed order, and further provided for dates for submission of reply briefs and proposed orders on behalf of the applicants and a rebuttal brief on behalf of the intervenor. The Commission has received and reviewed such briefs and proposed orders submitted by the parties. Based on the legal arguments presented and facts recited below, the Commission concludes that it has subject matter jurisdiction over this application and that the RLECs should receive the relief as set forth in this Order.

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

In the Suspension Order, the Commission found that each of the RLECs should receive a suspension of the obligation to implement intermodal local number portability ("LNP") pursuant to 47 U.S.C. § 251(b)(2) as such obligation was interpreted and ordered to be implemented by the Federal Communications Commission ("FCC") in the *Intermodal Order*. The Commission suspended the RLECs' obligation to implement LNP in accordance with 47 U.S.C. § 251(f)(2). Further, the Commission directed that in the event that the RLECs sought further relief from the obligations of the *Intermodal Order*, a petition or petitions for such relief should be filed with the Commission not later than July 20, 2005.

On August 5, 2004, WWC initiated an original action in the United States District Court for the District of Nebraska, captioned *WWC License L.L.C. v. Gerald L. Vap, et al.*, Civil Action No. 4:04CV3261 in which WWC filed a Complaint for Declaratory and Injunctive Relief (the "Federal Complaint"). In the Federal Complaint, WWC stated that jurisdiction before the Federal Court was based upon 28 U.S.C. §§ 2201 and 2202 and 1331 (the declaratory judgment and federal question provisions of the United States Code, respectively). In the Federal Complaint, WWC requests the Federal Court to find that in the Suspension Order the Commission improperly suspended the RLECs' obligations created by the *Intermodal Order* and requested that enforcement of the Order be enjoined.²

² WWC did not address the Order Granting Limited Suspension entered in Application No. C-3207 on August 3, 2004 pertaining to Cambridge Telephone Company in the Federal Complaint.

WWC argued in its Motion to Dismiss that the Federal Complaint is an "appeal" of the Suspension Order. However, the Commission agrees with the applicants that this is an incorrect assertion by WWC. The Federal Complaint is an action seeking declaratory and injunctive relief and is an original action (rather than an appeal) grounded on (i) 28 U.S.C. § 1331 which reads: "The district courts shall have *original jurisdiction* of all civil actions arising under the Constitution, laws, or treaties of the United States." (emphasis added); and (ii) 28 U.S.C. §§ 2201 and 2202 which create a remedy for declaratory judgment to accord relief in a "case of actual controversy within [any court of the United States] jurisdiction."

We find that the legal authorities cited in the Brief and Reply Brief of WWC to be distinguishable from the issue presented in this case. Clearly, as discussed herein, the circumstances have changed since the Commission entered the Suspension Order and we no longer regard the July 20, 2005 deadline to be enforceable. The Commission believes it retains the authority to grant the relief requested in the application and extend the deadline by which the RLECs are required to file a petition or petitions for further relief. Accordingly, we overrule WWC's Motion to Dismiss and proceed with consideration of the merits of the application and the judicial developments subsequent to the date of entry of the Suspension Order.

Following the FCC's entry of the *Intermodal Order*³, a petition for review was filed with the District of Columbia Circuit Court of Appeals which challenged the legality of the *Intermodal Order*, and in particular, asserted that the FCC failed to perform a regulatory flexibility analysis required under the Regulatory Flexibility Act ("RFA"), 5 U.S.C. § 604, in connection with the FCC's issuance of the *Intermodal Order*.

On March 11, 2005, the decision in *USTA v. FCC*, 400 F.3d 29 (D.C.Cir. 2005) was announced. The Circuit Court remanded the *Intermodal Order* to the FCC to prepare a regulatory flexibility analysis as required by the RFA. Further, the Circuit Court held: "Until that analysis is complete, we stay the effect of the order solely as it applies to those carriers that qualify as small entities under the RFA." 400 F.3d at 30. Each of the RLECs is a "small entity" for the purposes of the RFA. The effect of

³ *In the Matter of Telephone Number Portability*, CC Docket 95-116, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, FCC 03-284 (rel. Nov. 10, 2003) (the "Intermodal Order").

the decision in *USTA v. FCC*, as it relates to the matter currently before the Commission, is that the RLECs are currently under no legal obligation to implement LNP.

Because of the stay entered by the Circuit Court, the RLECs filed a Motion for Stay of further consideration in the Federal Complaint proceeding pending the completion and publication by the FCC of the final regulatory flexibility analysis as required by *USTA v. FCC*. WWC agreed that the request for stay was appropriate in light of the decision in *USTA v. FCC*. On April 8, 2005, the U.S. Magistrate ordered that the Federal Complaint proceeding be stayed until October 11, 2005, when a joint status report regarding the relevant proceedings before the FCC is required to be submitted to the Federal Court.

In response to *USTA v. FCC*, on April 22, 2005 the FCC issued a Public Notice in CC Docket No. 95-116 (the "Public Notice") seeking comment on the Initial Regulatory Flexibility Analysis ("IRFA") in the FCC's LNP proceeding. The comment cycle in the Public Notice established a comment date 30 days following publication of the Public Notice in the Federal Register, and a reply comment date 45 days thereafter. As of the date of this Order, publication in the Federal Register has not occurred and thus, neither the comment nor the reply comment dates have been established.

Due to the judicial decision in *USTA v. FCC* and the timing of the FCC's completion of the IRFA pursuant to the Public Notice (during which time the *Intermodal Order* is of no force or effect as to the RLECs), as compared to the July 20, 2005 date established in the Suspension Order by which the RLECs are required to file a petition or petitions for further relief from the obligations of the *Intermodal Order*, it is necessary and desirable for the Commission to extend the July 20, 2005 date established in the Suspension Order for the filing of petitions for further relief by the RLECs.

As a consequence of the above-described developments, the Commission concludes that the date by which the RLECs should be required to file a petition or petitions for further relief from the obligations of the *Intermodal Order* shall be extended from July 20, 2005 to a date thirty (30) days following the date that the FCC order is issued as a consequence of the FCC's completion of the IRFA. (the "Extension Petition Date").

The Commission believes that should one or more of the RLECs file a petition for further relief that the Commission can process the petition on an expedited basis. Accordingly, in the event that one or more of the RLECs file a petition for further

relief, the termination date for the Suspension Order shall be extended to the date that is one hundred twenty (120) days following the Extension Petition Date giving the Commission 120 days to act thereon.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that WWC's Motion to Dismiss is overruled.

IT IS FURTHER ORDERED by the Commission that the date by which the RLECs are required to file a petition or petitions for further relief from the obligations of the *Intermodal Order* shall be extended from July 20, 2005 to the Extension Petition Date as defined above.

IT IS FURTHER ORDERED by the Commission that the termination date for the Suspension Order shall be extended to the date that is one hundred twenty (120) days following the Extension Petition Date in order that the Commission shall have 120 days to act thereon.

MADE AND ENTERED at Lincoln, Nebraska, this 12th day of July, 2005.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Lowell Johnson

Chairman

Gerald L. Vag

Ann C. Boyle

ATTEST:

Paul Johnson

Executive Director

And S. Pollock

//s// Frank E. Landis

//s// Gerald L. Vag