

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

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

BY THE COMMISSION:

GCC License Corporation (Western Wireless, GCC or Applicant), a wholly-owned subsidiary of Western Wireless Corporation, doing business in Nebraska as Cellular One, made application with this Commission for designation as an Eligible Telecommunications Carrier (ETC) pursuant to Section 214(e)(2) of the Federal Communications Act of 1934, as amended (Act or the federal Act)<sup>1</sup> on August 31, 1998. Notice of the application was published in The Daily Record on September 4, 1998.

Petitions of Formal Intervention were timely filed by: Arlington Telephone Company; Blair Telephone Company; Cambridge Telephone Company; Clarks Telecommunications Co.; Consolidated Telco Inc.; Consolidated Telephone Co.; Eastern Nebraska Telephone Company; Great Plains Communications; Hamilton Communications; Hartington Telecommunications Co.; Hershey Cooperative Telephone Company, Inc.; Hooper Telephone Company; K & M Telephone Company, Inc.; NebCom Inc.; Nebraska Central Telephone Company; Northeast Nebraska Telephone Company; Pierce Telephone Company; Rock County Telephone Company; Southeast Nebraska Telephone Company and Stanton Telecom, Inc., through their attorney, Kelly R. Dahl; Arapahoe Telephone Company, Benkelman Telephone Company, Cozad Telephone Company, Diller Telephone Company, Hemingford Cooperative Telephone Company, Henderson Cooperative Telephone Company and Wauneta Telephone Company, through their attorney, Timothy F. Clare; Curtis Telephone Company, through its attorney, Steve Cole; The Glenwood Telephone Membership Cooperative, through its attorney, Charles W. Hastings; US West Communications (now known as Qwest and hereinafter referred to in this order as Qwest), initially through attorney Richard L. Johnson and subsequently by their attorneys, first Charles W. Steese, and then Todd Lundy (collectively, Intervenors).

Procedural orders were entered by this Commission on March 9, 1999; October 5, 1999, and November 16, 1999. All parties were properly notified and the orders entered were subsequently mailed to the parties.

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<sup>1</sup> Codified at 47 U.S.C. §214(e)(2).

Complete records on these progression orders can be found in the file in this docket and can be inspected at Commission offices. A hearing on the pending application was held October 20-21, 1999, in the Commission Hearing Room, 1200 N Street, 300 The Atrium, Lincoln, Nebraska. Testifying for the applicant was Gene DeJordy, for the intervenors, testimony was received by Cindy Bitteringer, Don Macke, Dr. Barbara M. Wilcox and Steve Watkins.

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

### Ripeness

1. Intervenors argue that Section 214(e)(2) of the federal Telecommunications Act (the Act) requires Western Wireless to already be offering and advertising the services supported<sup>2</sup> by the federal universal service fund before the Commission can grant ETC status. Application opponents contend that the offering of the services and the advertising of those offerings are *aprerequisite* to designation as an ETC. In other words, they argue that the application must fail because Western Wireless fails to offer a current universal service package.

2. Such reasoning seems contrary to the objectives of the Act which is to increase competition. The FCC noted in a Recommended Decision adopted November 7, 1996:

We agree with the majority of commenters who argue that any carrier that meets these criteria is eligible to receive federal universal service support, regardless of the criteria used by that carrier. We conclude that this approach best embodies the *pro-competitive, de-regulatory spirit of the 1996 Act and ensures the preservation and enhancement of universal service.*<sup>3</sup> (Emphasis added.)

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<sup>2</sup> In relevant part the language of §214(e)(2) states, "the State Commission may...designate more than one common carrier as an eligible telecommunications carrier...so long as [the carrier] meets the requirements of paragraph (1)." Section 214(e)(1) states, "A common carrier designated as an eligible telecommunications carrier [shall] (A) offer the services that are supported by Federal universal service fund mechanisms...[and] (B) advertise the availability of such services and the charges therefor using media of general distribution."

<sup>3</sup> *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Adopted November 7, 1996, para. 155.

3. The Act itself is straightforward. Section 214(e)(1) states that a common carrier designated as an ETC shall "throughout the service area for which the designation is received. . . (B) advertise the availability of such services *and the charges therefor* using media of general distribution (emphasis added)." <sup>4</sup> It is illogical to assume that a carrier could advertise the prices of its universal service offerings without the knowledge of whether or not it was eligible to receive federal and/or state universal service funding. To get to the prices advertised, such a carrier would have to know its underlying costs and any offsetting subsidies received."

4. GCC argues that it has met all of the requirements detailed in the Act. GCC (a) is a common carrier; (b) provides the supported services<sup>5</sup>; (c) will advertise the availability of the supported services; and (d) will make the supported services available throughout the designated service areas. The intervenors argue that proposed intentions to do what is required of the Act is insufficient.

We agree with the statement that GCC makes in its brief; to wit:

"The actual obligation to "offer" and "advertise" the services under Section 214(e)(1) are not preconditions to ETC status, but instead obligations of a carrier upon receipt of its ETC designation . . . no carrier could as a practical matter be expected to fully compete or actually provision universal services to a customer without the ability to receive the intended subsidy. And, the subsidy is not available to a carrier unless it has already been designated as an ETC."<sup>6</sup>

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<sup>4</sup> 47 U.S.C. 214(e)(1)(B).

<sup>5</sup> These services are defined under FCC Rule 54.101(a) as: 1. Voice grade access; 2. Local usage; 3. Dual tone multi-frequency signaling or its functional equivalent; 4. Single party service; 5. Access to emergency services; 6. Access to operator services; 7. Access to interexchange services; 8. Access to directory assistance; and, 9. Toll limitation for qualifying low-income consumers.

<sup>6</sup> Brief of GCC License Corporation (hereinafter, GCC Brief), December 17, 1999, at 23.

5. GCC also argues that FCC procedures specifically allow for either retroactive or prospective designation.<sup>7</sup> The argument that a fair and reasonable reading of the statute is persuasive that an ETC candidate does not have to offer and advertise for the supported services prior to designation.

6. The Minnesota Utilities Commission gives guidance in its order granting ETC status to Minnesota Cellular as follows:

"The main meaning of this language [i.e., 47 U.S.C. §214(e)(1)] is that once a carrier has been designated an ETC it shall offer and shall advertise the supported services. The designation comes first; the obligation to offer and advertise follows . . . Not only does viewing ETC designation as a linear process square with the plain meaning of the statute, it squares with the underlying policy of opening the nation's telecommunications markets to competition. Requiring ETC applicants to actually offer and advertise universal service packages throughout their service area before designating them ETCs would be inherently anti-competitive."<sup>8</sup>

7. Finally, the Commission finds that it could designate ETC status prior to decisions regarding the method and level of funding for such a designate.

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<sup>7</sup> GCC Brief at 21 (fn. 7).

<sup>8</sup> *In the Matter of Minnesota Cellular Corporation's Petition for Designation as an Eligible Telecommunications Carrier*, Docket No. P-5695/M-98-1285, October 27, 1999, at 7.

Burden of Proof

8. Several intervenors argue that burden of proof for GCC in the application is "extraordinarily high" in that the applicant must demonstrate its case by "clear and convincing evidence."<sup>9</sup> The intervenors are at least partially correct. However, this evidentiary standard need not be applied to the application as a whole.

9. The Commission on October 15, 1997, issued an order in Docket C-1604 that stated:

" . . . [¶] 8. We do not designate at this time service areas for other carriers, such as competitive LECs or wireless providers. When a petition is presented to the Commission by such a provider to obtain ETC status, the appropriate service areas of non-ILECs will be defined. It must be demonstrated by clear and convincing evidence that designation is in the public interest."<sup>10</sup>

10. The interpretation offered by the opponents to the application is that the "clear and convincing" standard should be applied to the entire application. This interpretation is incorrect.

11. We find, and affirm here, that the evidentiary standard of a "clear and convincing" finding relates only to that part of the application dealing with the designation of a service area. A finding that the designated service area serves the public interest, in that the service area is significantly large to promote access to the proposed ETC's services by all residents, and that the service area is not so defined as to allow the incoming ETC to siphon off the incumbent carrier's most profitable or least costly customers. Such a finding is consistent with the intent of Congress, the meaning of the findings in Docket No. C-1604, and our findings in the instant case.

Public Interest Test

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<sup>9</sup> See, e.g., *Post-Hearing Brief of Formal Intervenors Arapahoe, Benkelman, et al.*, filed December 17, 1999, at 8.

<sup>10</sup> *In the Matter of the Application of the Nebraska Public Service Commission on its own motion to Designate Telecommunications Carriers Eligible to Receive Federal Universal Service Support*, Docket C-1604, October 15, 1997, (hereinafter Docket C-1604) at 3.

12. The Act provides that an applicant for ETC status in a rural area must satisfy a public interest test. Specifically, the Act provides:

Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.<sup>11</sup>

13. We find that the public interest test of the Act as applied to rural areas is centered on the issue of whether a proposed application has defined its service area reasonably enough to prevent "cherry-picking" by incoming designated ETCs. An application must meet a "clear and convincing" standard that such an area prevents such an abuse.

14. But that should not be, and is not, this Commission's only "public interest" concern. First, we acknowledge that the mere provision of additional competition by the entry of another ETC into a rural area is not sufficient in and of itself as a demonstration of the public interest.<sup>12</sup> We accept the argument made by the Intervenor that, "Competition is not tantamount to public interest." If that were the case, no public interest test review would be necessary since any and all new competitors would represent additional benefit to the public.

15. Our first consideration in determining whether Western Wireless has met the rural public interest test is an examination of the proposed service area to determine if it has been fashioned to be large and diverse enough to meet the concerns of Congress when they made the public interest finding a requirement for carriers desiring to serve as an ETC in rural areas:

Those of us who come from rural areas want to say if you are going to certify a new essential (company) in an area that

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<sup>11</sup> 47 U.S.C. §214(e)(2).

<sup>12</sup> *Post-Hearing Brief of Formal Intervenor Arapahoe, Benkelman, et al.*, filed December 17, 1999, at 13.

would be eligible for universal service funds, we want that certification to be based on a couple of themes that they think are important, one of which is this ought to result in the build-out of the infrastructure in rural areas. We know that build-out will occur in urban areas because that is where the money is, and we are just saying we want that same opportunity to exist in rural areas.<sup>13</sup>

The sponsor of the amendment requiring the finding of a public interest in the designation of an ETC in rural areas apparently did not introduce this requirement to protect rural telecommunications companies from competition, but instead to ensure that rural areas were not insulated from infrastructure development. We find that the public interest requirement for designation of an ETC in rural areas is not meant as a protective barrier for rural telephone companies but rather as a method for ensuring that rural areas receive the same benefits from competition as their urban neighbors. The FCC spoke to these goals when it discussed its decision that ETC status should be granted in a competitively neutral manner (including technological neutrality):

A principal purpose of section 254 is to create mechanisms that will sustain universal service as competition emerges. We expect that applying the policy of competitive neutrality will promote emerging technologies that, over time, may provide competitive alternatives in rural, insular and high cost areas and thereby benefit rural consumers. For this reason, we reject assertions that competitive neutrality has no application in rural areas or is otherwise inconsistent with section 354.<sup>14</sup>

16. The Commission must then ask and answer the threshold question on whether the service area proposed by Western Wireless is large enough to meet the objectives of Congress in that its size avoids and prevents cherry-picking of the least costly subscribers. We find that the service area as defined in the Western Wireless application meets this threshold concern. (See Exhibits 5 and 6 of the pre-filed testimony.) The service area designated by the applicant covers 326 wire centers throughout the

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<sup>13</sup> Comments of Senator Dorgan (ND) on the Telecommunications Act, Floor of U.S. Senate, 141 Cong. Rec. S. 7950 (June 8, 1995).

<sup>14</sup> *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, FCC 97-157 (Released May 7, 1997), ¶50 (hereinafter, *Universal Service Report and Order*).

state. Moreover, this service area includes large areas of rural Nebraska. Designation of Western Wireless can help bring about the telecommunication infrastructure envisioned by Congress in adopting the rural public interest requirement.

17. Western Wireless also offers in its application additional benefits to the public interest, including increased choices, an expanded calling area and the benefits of mobility.<sup>15</sup> These benefits are every bit as valuable, if not more so, to the rural customers as to the urban customer.

The Report from the Nebraska Rural Development Commission

18. The intervenors offered into evidence a report from Don Macke, executive director of the Nebraska Rural Development Commission specifically addressed to the issues raised by this docket (hereinafter, the Macke Report). The Macke Report examined "the capacity for rural markets to effectively support the type of competition being proposed by Western Wireless."<sup>16</sup> The Macke Report starts out by making a flawed presumption, namely, that:

The PSC should consider as part of its public interest determination, the ability of any ETC applicant to provide what is now commonplace in Omaha or Lincoln - high quality and capacity voice, data, and video services.<sup>17</sup>

Such a requirement for an ETC applicant has no basis in either federal or state law, our rules, or our regulations. The statement seems to argue that a carrier engaged in telecommunications services should provide data and video ability. Setting aside for the moment that the term "data ability" is extremely wide in scope and that the Report offers no clarifying definition, it is clear that few telecommunications carriers in the state offer video services to their residential subscribers. Further, there is no legal requirement in the federal Act or in our regulations that an ETC be required to provision such services.

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<sup>15</sup> Brief of GCC License Corporation, filed December 17, 1999, at 21, 33.

<sup>16</sup> *Likely Impacts of Western Wireless's Proposal in PSC Application C-1889, May 1999 (Hereinafter, the Macke Report)*, at 1.

<sup>17</sup> *Id.*, at 3.



19. The Macke Report offers this Commission another criteria to add that is not supported by law. The Report states:

The Commission should specifically address the (1) wireless technologies capacity and (2) Western Wireless as a provider's capacity to deliver (a) secure, (b) reliable, and (c) necessary services. *The standards for assessment should be in comparison to existing telecommunications services as being provided by Nebraska's rural telecommunications providers.* (Emphasis added.)

Again, we note that nothing in the federal law or in our state law, Commission rule or regulation, requires this Commission to examine the current state of telecommunications services prior to contemplating the designation of an ETC and we specifically decline to adopt such a standard. To do otherwise might be to unwisely stifle the very competition that could bring advanced services into the rural areas.

20. The Report recognizes its own limitations. The author notes, "The Nebraska Rural Development Commission does not have the expertise to evaluate the capabilities of wireless technology"<sup>18</sup> and that the "RDC's analysis is limited in that it was conducted on a county group basis. In reality, these services are currently delivered by specific ETCs on an exchange by exchange basis."<sup>19</sup>

21. In short, given the fact that the Report asks this Commission to accept standards and to make comparisons that have no basis in law, and by its own admission, lacks expertise, the Commission finds that the Report is of questionable probative value.

#### Additional Requirements Offered by Qwest

22. Qwest asks this Commission to adopt additional criteria for the public interest component in the determination and designation of an ETC: affordability, unbundling, quality and landline substitutability.<sup>20</sup> We will discuss each of these four concepts in turn.

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<sup>18</sup> *Id.*, at 3.

<sup>19</sup> *Id.*, at 10.

<sup>20</sup> *Qwest Communications, Inc., Post-Hearing Brief*, filed December 17, 1999, at 8.

23. The suggestion by Qwest for the Commission to adopt an affordability standard is not relevant to the granting of ETC status, but may directly affect the qualifying funding by the Nebraska Universal Service Fund (NUSF). To apply the affordability standard to the actual designation is misplaced because, as we have noted, pricing by the ETC candidate is necessarily dependent on its ability to draw from the universal service fund. Second, as the applicant correctly notes in its post-hearing brief, no affordability standard was applied to incumbent local exchange carriers (ILECs) when they were uniformly granted ETC status in our October 15, 1997, order. We have already described in detail the prohibition of treating other applicants differently based on the technology that will be employed to provide service. Finally, the Commission will be able to continue to explore, develop and establish pricing standards through the NUSF Docket authorized in this Order as contained herein. As such, the affordability argument is not ripe for discussion here.

24. Qwest also argues that unbundling of elements should be made a prerequisite for ETC designation.<sup>21</sup> After careful consideration of the arguments advanced by Qwest, we find that it has not made a persuasive argument. Such a view is unsupported by the clear reading of the federal Act and subsequent rulings from the FCC.

25. Qwest also asserts that quality of delivered services is an integral element to be considered in the granting of ETC status. Much like its argument regarding affordability, this argument does not go to the granting of ETC status. The requirement to offer unbundled elements cannot be found in the federal law.

26. Finally, Qwest argues that landline substitutability should be made a requirement for ETC designation. We also decline to add this requirement. Qwest premises its argument on the Act's "absolute right to relinquish" provision.<sup>22</sup> Such a stand is contrary to the objectives of the Act. Indeed, the requirement for landline substitutability is not found in the plain language of the Act. The arguments of the applicant are more persuasive. These include the transition period allowed to the states in the event a current ETC decides to relinquish its status and the safety

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<sup>21</sup> *Id.*, at 10.

<sup>22</sup> *Id.*, at 13.

net provided by the requirements of state law that would ensure the continued provision of telecommunication services.<sup>23</sup>

#### Commission Jurisdiction

27. In response to questioning by the Commission, the applicant indicated that it would voluntarily submit to the Commission's jurisdiction for service quality and tariff filing of rates and services. We believe that jurisdiction over these issues, as well as information regarding the level of access rates charged by the carrier, is proper and necessary to meet the objectives of the Universal Service Fund Act. This jurisdiction, we note falls short of, and does not include "entry and rate" regulation.

28. The Commission finds that it has the necessary powers to enforce its jurisdiction over any carrier receiving universal service fund support. As state law indicates:

The commission shall have authority and power to issue orders carrying out its [Nebraska Universal Service Fund] responsibilities and . . . [t]he commission shall have the authority to review the compliance of any eligible telecommunications company receiving support for continued compliance with any such order and may withhold all or a portion of funds to be distributed from any telecommunications company failing to continue compliance with its order.<sup>24</sup>

These responsibilities include service quality standards, ensuring that the offerings of an ETC meet Commission requirements including, but not limited to, advertising and service offerings, minimal technical requirements, local usage requirements, etc., established either by federal or state law, or established by order of the Commission either generally, or by the Universal Service Department within the Commission.

29. We further specifically find that the Commission may, through orders entered into via a NUSF Docket, establish reasonable price ranges for local service offerings which qualify for NUSF funding, appropriately defining "local usage" and issue any future orders on any matters relevant to the enforcement of this order and consistent with the objectives of the federal Act and state law.

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<sup>23</sup> See Neb. Rev. Stat. § 86-806 (Reissue 1999).

<sup>24</sup> Neb. Rev. Stat. § 86-1045 (Reissue 1999).

30. We further find that a NUSF docket should be opened to determine an appropriate level of support, resolve issues raised by this order relevant to the designation of GCC License Corporation as an ETC, and to clarify any other relevant issues as may be determined by the NUSF Department.

### Conclusions

31. Section 214 of the federal Act provides that the Commission is required to designate a common carrier that meets the requirements of Section 214(e)(1) as an ETC for the service area designated by the Commission. Such a designation must conform to the public interest.

32. The Act further states that a carrier that is granted ETC status is eligible to receive federal universal service support, and shall offer, throughout the designated service area, those services which are supported by federal universal service support mechanisms.<sup>25</sup> The carrier must also advertise the availability of these services and the rates for the services using media of general distribution. This latter requirement is aimed at ensuring that a carrier designated as an ETC truly offers a service that reaches out to all in the service area and is also aimed at avoiding cherry-picking by the ETC designated carrier.

33. The FCC has designated certain services as being supported by federal universal service support mechanisms, namely: (1) voice grade access to the public switched network; (2) local usage; (3) dual tone multi-frequency signaling or its functional equivalent; (4) single party service or its functional equivalent; (5) access to emergency services; (6) access to operator services; (7) access to interexchange service; (8) access to directory assistance; and (9) toll limitation for qualifying low-income customers.<sup>26</sup> In addition, this Commission has determined that a subscriber's desire to have his or her number published in a standard "white page" (or alpha directory) listing is a basic service.<sup>27</sup>

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<sup>25</sup> 47 U.S.C. 214.

<sup>26</sup> 47 C.F.R. § 54.101(a) (1999).

<sup>27</sup> *In the Matter of the Application of the Nebraska Public Service Commission, on its own motion, seeking to conduct an investigation into intrastate access charge reform, Docket C-1628, Order entered January 13, 1999, at 3.*

34. The applicant has given sufficient and credible evidence that it is willing, and capable, of meeting these requirements. We have concluded that federal law does not require the applicant to already be providing these services prior to ETC designation, but have adopted the conclusion, reached in other jurisdictions as well, that the applicant must be willing to offer these services. The offering consists of its intentions to do so coupled with the financial, technical and managerial capabilities to fulfill those intentions. The applicant demonstrated that it already provides each of the supported services within its existing network. No credible evidence was presented by Intervenorors that Western Wireless failed to meet these basic requirements.

35. The applicant has demonstrated that it meets the public interest test of the federal law. Not only will the granting of the applicant's application result in benefits of increased competition, the applicant also provides the benefits of an expanded calling area, the deployment of alternative technology and the practical benefit of mobility.

36. The Commission explicitly rejects the additional requirements suggested by Qwest as necessary components for ETC designation. Where the issues of affordability and quality are relevant to the applicant's offering, the Commission will evaluate, monitor, and rectify those concerns within the scope of an NUSF docket.

37. The Commission finds that the applicant has, by "clear and convincing" evidence, established that its defined service area satisfies the requirements and objectives of the Act.

38. The Commission hereby finds that the applicant, GCC License Corporation should be, and is, designated as an eligible telecommunications carrier for the purpose of receiving federal and state universal service support in the study areas included in its application and as designated in the ordering clauses of this order.

#### O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the applicant, GCC License Corporation should be, and is hereby, designated an eligible telecommunications carrier for the purpose of receiving federal universal service support and potentially receiving Nebraska Universal Service Fund support in the study areas for the telephone companies and exchanges listed on Appendix A of this order, which we hereby incorporate by reference.

IT IS FURTHER ORDERED that this order shall constitute a certificate of designation as an eligible telecommunications carrier in the areas incorporated by reference in Appendix A.

IT IS FURTHER ORDERED that the NUSF Department of the Commission, in conjunction with this order, shall open a docket to examine the issues relevant to the designation granted in this order, to issue findings and to enter orders to address the concerns and issues delineated herein. The order or the orders issued by the Commission in that docket must precede any distribution of NUSF funding.

IT IS FURTHER ORDERED that GCC License Corporation shall submit an advertising plan which shall include: a) a description of available 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. Within thirty days after receiving the advertising plan, the Commission shall enter an order approving or rejecting the filed plan. The Commission reserves the right to alter the geographic scope of the authority granted in this order pending the evaluation of an approved advertising plan.

MADE AND ENTERED in Lincoln, Nebraska on this 21st day of November, 2000.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chairman

ATTEST:

Executive Director