

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the application) Application No. C-2092
of JD Services, Inc., d/b/a)
American Freedom Network, Salt) APPLICATION DENIED;
Lake City, Utah, seeking to obtain) CEASE AND DESIST ORDER
a certificate of Public) ENTERED
Convenience and Necessity to)
operate as a reseller of inter-)
exchange telecommunications) Entered: November 23, 1999
services within the state of)
Nebraska.)

BY THE COMMISSION:

On August 5, 1999, JD Services, Inc., d/b/a American Freedom Network (Applicant), filed with the Commission an application to obtain a Certificate of Public Convenience and Necessity to operate as a reseller of interexchange telecommunications services in the state. Notice of the application was published in The Daily Record, Omaha, Nebraska, on August 9, 1999.

Because the applicant had a prior certificate under application C-1237 that had been revoked, the Commission set this application for hearing. Notice of the hearing was sent to all interested parties by first class mail on October 18, 1999. On November 4, 1999, a hearing was held in the Commission Hearing Room. Mark Pieper appeared for the applicant. Michael Loeffler appeared for the Commission.

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

Applicant was previously issued a Certificate of Public Convenience and Necessity in application C-1237. As part of its regulatory authority and pursuant to Neb. Rev. Stat. §86-807, the Commission requires all certificated carriers to file an annual report on or before April 30th of each calendar year. JD Services filed its 1997 annual report with the Commission on May 12, 1998, which was twelve days following the deadline for such filing. Pursuant to the legislative authority granted to the Commission in Neb. Rev. Stat. §75-128, such late-filing carriers may be assessed an administrative fine and, after notice and public hearing, may have their certificates of public convenience and necessity revoked. It should be noted that JD Services was notified of the requirement to file its annual report by first class mail on both January 12, 1998 and April 1, 1998.

On May 13, 1998, the Commission opened Docket C-1810/DC-25 for the purpose of revoking the certificates and issuing a cease and desist order for those carriers not in compliance with the filing requirement. Notice of the docket was placed in The Daily Record,

Omaha, Nebraska, on May 22, 1998. On May 14, 1998, the applicant was notified by certified mail that its annual report was received after the filing deadline and that the company was being assessed an administrative fine of \$500.00 and was sent a stipulation in which JD Services would acknowledge that it had failed to file the required annual report. In that letter, the applicant was also notified that, "Any company that has not agreed to a stipulation with the Communications Department by July 1, 1998, will remain named on the complaint and will be subject to a hearing to revoke their operating authority in Nebraska."

On August 4, 1998, a hearing was held in the Commission Hearing Room to determine whether named defendants, including JD Services, should have their authority to operate in the state revoked. The applicant made no appearance at the hearing. On August 11, 1998, the Commission entered an order revoking the certificate of public convenience and necessity of JD Services for failure to pay the administrative penalty and for failure to sign the stipulation as required. On August 19, 1998, the Executive Director of the Commission sent a letter by first class mail to JD Services informing them of their revocation.

Nothing further was heard from the applicant until the applicant filed a tariff revision for the authority granted and later revoked in C-1237 in June 1999. On July 28, 1999, the applicant was informed once again that the authority had been revoked and this application ensued in order to regain authority to operate in the state.

Applicant does not dispute that notice was sent regarding the prior failures to file, the assessment of the late fee, the hearing to revoke, or the later notice of revocation. In fact, in its application, the applicant notes, "Applicant was notified of such revocation, and due to staff turnovers, this revocation was not brought to attention of applicant's management." *Application at 5.* Applicant paid the delinquent \$500.00 administrative fee with the filing of the application in this docket. It should further be noted that the same Salt Lake City, Utah address listed for the officers in this application is the same address to which the prior notices under Dockets C-1237 and C-1810/DC-25 were also sent.

The consequence of these events is that the applicant has been operating in the state without a certificate of authority from the Commission for over one year.

The applicant's technical expertise and financial foundation are not in question. The issues that lie before the Commission are the third rung of the triad test, the question of managerial competence and the additional issue of whether the granting (or denial) of this application is consistent with the public interest.

In past applications, we have often granted certificates of authority upon a showing that the management of the applicant company had some degree of experience, background or similar educational training. In the present case, the Commission has direct knowledge of poor management practices and lack of attention to legal detail. The applicant has failed five times: first, in its failure to make timely required reports; second, in its failure to acknowledge and timely pay the assessed fine; third, in its failure to respond to notice of possible revocation; fourth, in its failure to respond back to the Commission after the notice of revocation had been sent; and, most importantly, in its continued operation in the state without authority or certification from this Commission.

We find that the applicant, under the authority granted in C-1237, showed clear disregard to the rules and regulations of this Commission and to the laws of the state of Nebraska. In the grant of authority from this Commission, the applicant is directly charged with, and has a constructive duty to know, understand and comply with such rules.

Unfortunately, this Commission lacks a full range of enforcement tools to deal with such non-compliance. While we do have statutory authority to impose specific penalties for failure to file mandated reports, we lack specific legislative grant of enforcement mechanisms such as the imposition of fines for non-compliance with other Commission rules, including the continued operation in the state absent direct authority from this Commission. With limited choices, we feel compelled to deny the present application. To allow a carrier who has shown continued defiance of compliance back into operation under the guise of an alternate certificate, especially where such company has continued to reap the financial benefits of operating without the authority of this Commission as required by state law, would be to make a mockery of those carriers who have diligently and lawfully complied with Commission rules and state statutes.

Accordingly, we find that the certificate should be denied and that no further application from the applicant will be entertained until such time as one year has passed from the entering of this order. Such a time restriction would impose a penalty for the time that the applicant operated in this state without authority to do so.

In considering the public interest, we note that the applicant primarily engages in the sale of prepaid telephone cards and neither owns nor operates any switching, transmission, or other physical facilities in the state. While the availability of an alternate method of payment for individuals, such as a prepaid card, certainly offers benefit to the public at large, there is no

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shortage of vendors currently operating in the state who are selling prepaid phone cards and who are operating within the letter of the law. We cannot conclude that there would be a detriment to the public interest in the denial of this application.

We further find that this Commission should issue an order to the applicant to cease and desist further operations in this state following the notice of this order. In addition, JD Services, Inc., d/b/a American Freedom Network, should notify its vendors to immediately stop selling the applicant's products in the state of Nebraska. Copies of said notifications shall be filed with this Commission.

Any violations to this order will be presented to the attorney general of this state for prosecution.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the application in C-2092 should be, and is hereby, denied.

IT IS FURTHER ORDERED that JD Services, d/b/a American Freedom Network, refrain from making further application with this Commission for authority until after November 23, 2000.

IT IS FURTHER ORDERED that JD Services, d/b/a American Freedom Network, cease and desist all operations in the state of Nebraska immediately.

IT IS FINALLY ORDERED that JD Services, Inc., d/b/a American Freedom Network, should notify its vendors to immediately stop selling the Applicant's products in the state of Nebraska. Copies of said notifications shall be filed with this Commission within 30 days from the date of this order.

MADE AND ENTERED in Lincoln, Nebraska, on this 23rd day of November, 1999.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Lowell C. Johnson

Ann C. Boyle
//s//Lowell C. Johnson
//s//Frank E. Landis

Lowell C. Johnson
Chairman

ATTEST:

Robert H. Logsdon
Executive Director