

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Application ) Application No. C-2349  
of CityNet Telecom, Inc., Silver )  
Spring, Maryland, seeking authority )  
to obtain a Certificate of Public ) GRANTED  
Convenience and Necessity to provide )  
competitive local exchange and inter- )  
exchange telecommunications services )  
within the state of Nebraska. ) Entered: January 9, 2001

APPEARANCES:

For the Applicant:  
Jon C. Bruning  
Bruning Law Office  
1079 N. 204th Ave.  
Elkhorn, NE 68022

For the Commission:  
Chris A. Post  
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1200 N Street  
Lincoln, Nebraska 68508

BY THE COMMISSION:

By its application filed July 17, 2000, CityNet Telecom, Inc. (Applicant) seeks authority to provide competitive local exchange and interexchange telecommunications services in the state of Nebraska. Notice of the application appeared in The Daily Record on July 21, 2000. The following parties filed petitions of formal intervention: Arapahoe Telephone Company; Benkelman Telephone Company, Inc.; Cozad Telephone Company; Henderson Cooperative Telephone Company and Wauneta Telephone Company. A hearing on the application was held September 26, 2000, in the Commission Hearing Room, Lincoln, Nebraska, with appearances as shown above.

E V I D E N C E

In support of its application, the applicant produced one witness, Randy Reed, vice president of regulatory affairs for the applicant, who testified as follows:

Mr. Reed testified that the applicant is a privately-held company organized under the laws of the state of Delaware that has its headquarters in Silver Spring, Maryland. Applicant has obtained authority to transact business in the state of Nebraska.

The applicant is currently seeking authority to offer competitive local exchange service in the area currently served by Qwest Corporation. Furthermore, it is seeking statewide intrastate

interexchange authority.

Mr. Reed testified that applicant will mostly serve other carriers and large businesses through its fiber system, but that it may in the future provide local service using its own facilities and through resale of incumbent carrier facilities. The applicant will engage in direct marketing to notify Nebraska businesses and residents that its services are available. A direct sales force will be utilized.

Mr. Reed testified that the applicant has sufficient managerial and technical resources and abilities to provide local exchange telecommunications services in the proposed service territory. The applicant's management team is composed of individuals that have many years of combined technical, directorial and business experience. Mr. Reed also presented testimony showing that the applicant has sufficient financial resources to implement and provision its local and interexchange telecommunications services in Nebraska. Mr. Reed testified that the application included up-to-date financials that demonstrate that applicant has the financial resources required to provide the proposed telecommunications services.

Mr. Reed further testified that granting the application will promote the public interest by providing consumers a choice in providers. Consumers will not have to purchase the applicant's services since it is not the carrier of last resort. The applicant's provisioning of service will enhance the goals of universal service, promote the policies set forth in the Telecommunications Act of 1996 (the Act), and advance the objective of the Commission which is set forth in Application No. C-1128, Progression Order, dated December 19, 1995, relating to the implementation of local exchange competition.

Mr. Reed testified that when the applicant offers services to end users in Nebraska, said customers will be able to inquire about bills through a toll-free number during regular business hours. At that time, customers will have access to the operator services as well as 911 services through the existing incumbent local exchange carriers (ILECs). Furthermore, applicant will contract with ILECs to provide customers with directory listings and for the distribution of directories.

Mr. Reed confirmed that this application is not a bona fide request for interconnection with any rural telephone provider as defined by the Act. He also testified that he understood any request for interconnection with a rural telephone provider may trigger a hearing by this Commission as to whether or not the rural exemption discussed in the Act applies to that particular rural telephone company.

Mr. Reed also testified that it had entered into a contract

with the City of Omaha whereby it would locate its fiber in the city's sanitary sewer system. Mr. Reed testified that the contract gave applicant exclusive access to certain portions of the city of Omaha's public right-of-way and that the contract required applicant to give two strands of fiber to the city for its use in exchange for access to the city's rights-of-way.

The Commission and Commission staff inquired as to the impact of the contract with the City of Omaha. Several concerns were raised by the Commission regarding the exclusive access and "in-kind" services.

No other parties introduced testimony or evidence at the hearing.

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

The Commission considers this application for authority in light of the following criteria and standards established in the Commission's telecommunications rules:

(a) Whether the applicant has provided the information required by the Commission;

(b) Whether the applicant has provided a performance bond, if required;

(c) Whether the applicant possesses adequate financial resources to provide the proposed service;

(d) Whether the applicant possesses adequate technical competence and resources to provide the proposed service;

(e) Whether the applicant possesses adequate managerial competence to provide the proposed service; and

(f) Whether granting the applicant a certificate preserves and advances universal service, protects the public safety and welfare, ensures the continued quality of telecommunications services and safeguards the rights of consumers, pursuant to Section 253(b) of the Act.

Applicant has demonstrated that it meets the standards of financial, technical and managerial competence and all other criteria necessary to provide interexchange and local exchange service in the state of Nebraska. No party in this proceeding refuted the applicant's competence.

After hearing, the applicant, recognizing the Commission's concerns with the provisions of its contract with the City of Omaha relating to exclusive access and "in-kind" services, filed a letter

signed by Bob Hamer, deputy city attorney for the City of Omaha; Don Elliott, public works director for the City of Omaha and Mark Perkell, general counsel for CityNet Telecommunications, Inc. that reflected their intent to modify the aforementioned contract to delete the exclusive access and the "in-kind" services provisions.

Based upon the above-proposed amendments to the applicant's contract with the City of Omaha, this Commission is willing to grant this application. This Commission was extremely troubled by provisions of the contract that gave applicant exclusive access to parts of that system and required applicant to give the city of Omaha two strands of fiber in exchange for access. If those provisions remained in the contract, the Commission could not have found that granting this application was in the public interest and would have denied the application. Indeed, the ordering clauses in this order mandate that applicant not enter into any agreement containing provisions that violate that part of Neb. Rev. Stat. § 86-301 et. seq. proscribing the trading of services for access to public rights-of-way or any agreement that gives applicant exclusive access to the public right-of-way.

These opinions and findings carry no precedential value other than establishing minimum standards and criteria to apply when considering applications to provide interexchange and local exchange service in the above-mentioned territories. All telecommunications carriers seeking such a certificate must demonstrate that they meet, at a minimum, the standards and criteria set forth herein.

Before the applicant is allowed to provide local exchange service to its users, it must either:

(a) Through negotiation or arbitration, reach an interconnection/resale agreement with the pertinent incumbent local exchange carrier and receive Commission approval of the interconnection/resale agreement; or

(b) In the event a certified local exchange carrier provides a wholesale tariff, purchase rates from that tariff, file its own tariff and receive Commission approval of its tariff.

This order does not terminate, waive or in any manner diminish the exemptions and protections created by the Act for rural carriers, as defined by the Act. This order does not address the issue of the rural local exchange carrier' exemption under the Act. Rural exemptions may be terminated, suspended or modified only as provided in Section 251(f) of the Act.

Prior to providing interexchange or local exchange service in any area in the state of Nebraska, applicant must file and the Commission must approve, tariffs in accordance with the provisions of Section 002.21 of the Neb. Admin. R. & Regs. Title 291, ch. 5.

As a provider of interexchange and local exchange service in the state of Nebraska, applicant would be subject to the same laws, rules and regulations, both federal and state (including any laws, rules or regulations regarding universal service, restrictions on joint marketing and quality of service), applicable to any other local exchange company except those obligations imposed on ILECs pursuant to Section 251(c) of the Act.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that Application No. C-2349 be, and it is hereby, granted.

IT IS FURTHER ORDERED that the applicant comply with Section 251(f)(1)(B) of the Telecommunications Act of 1996 and that the applicant submit any bona fide request(s) for interconnection, services or network elements from a rural telephone company to the Commission for its approval.

IT IS FURTHER ORDERED that applicant is obligated to abide by the same laws, rules and regulations, both federal and state (including any laws, rules or regulations regarding universal service, restrictions on joint marketing and quality of service), applicable to any other interexchange and local exchange carriers, except obligations imposed on incumbent local exchange carriers pursuant to Section 251(c) of the Act.

IT IS FURTHER ORDERED that applicant shall abide by the provisions of Neb. Rev. Stat. § 86-301 et. seq. regarding use of public rights-of-way. Applicant shall not agree to any contract with any public entity that violates said statute and requires the trading of services for access to rights-of-way.

IT IS FURTHER ORDERED that applicant shall abide by the competitive neutrality provisions of both the Act and Nebraska Law and shall not agree to any contract with any public entity that provides for exclusive access to the public rights-of-way.

IT IS FURTHER ORDERED that, to the extent applicant provides access line service as referenced in the Telecommunications Relay System Act, Neb. Rev. Stat. §§ 86-1302 to 86-1306 (Relay Act) and defined in Neb. Admin. R. & Reg. Title 291, ch. 5 § 001.01B, the applicant shall collect from its subscribers a surcharge (Relay Surcharge) pursuant to the Relay Act and the Commission's annual orders establishing the amount of the surcharge, and shall remit to the Commission the proceeds from the relay surcharge as provided by the Relay Act.

IT IS FURTHER ORDERED that the applicant comply with all necessary statutes and Commission Rules and Regulations as they

pertain to the Nebraska Universal Service Fund.

IT IS FURTHER ORDERED that applicant shall file, in accordance with the applicable statutes, on or before April 30 of each year, an annual report with the Commission consisting of: (a) a copy of any report filed with the Federal Communications Commission; (b) a copy of any annual report to stockholders; and (c) a copy of the latest Form 10-K filed with the Securities and Exchange Commission. If such reports are unavailable, applicant shall file a balance sheet and income statement for the previous year of operation, and for the state of Nebraska on a combined interstate-intrastate basis, the investment in the telephone plant and equipment located within the state, accumulated depreciation thereon, operating revenues, operating expenses and taxes.

IT IS FURTHER ORDERED that within 30 days from the entry of this order that the applicant file a tariff with the Commission as required by state statutes and the Commission's regulations.

IT IS FURTHER ORDERED that CityNet Telecommunications, Inc. shall file a copy of the revised contract approved by the City Council prior to CityNet Telecommunications, Inc. providing any telecommunications services in the state of Nebraska pursuant to this certificate.

IT IS FINALLY ORDERED that this order be, and hereby is, made the Commission's official Certificate of Public Convenience and Necessity to the applicant to provide interexchange services statewide and competitive local exchange service in the area served by Qwest Corporation in the state of Nebraska.

MADE AND ENTERED at Lincoln, Nebraska, this 9th day of January, 2001.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

ATTEST:

Executive Director

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