

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

|                                  |   |                             |
|----------------------------------|---|-----------------------------|
| In the Matter of WWC License     | ) | Application No. C-3031      |
| LLC, a Subsidiary of Western     | ) |                             |
| Wireless Corporation, d/b/a      | ) |                             |
| CellularOne, seeking approval of | ) | ORDER STAYING CONSIDERATION |
| its advertising plan for         | ) | OF ADVERTISING PLAN         |
| Measured Usage Universal Service | ) |                             |
| Offerings in the State of        | ) |                             |
| Nebraska.                        | ) | Entered: December 16, 2003  |

APPEARANCES:

For the Applicant:

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For the Commission:

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BY THE COMMISSION:

B A C K G R O U N D

On April 14, 2003, WWC License, LLC, a subsidiary of Western Wireless Corporation, d/b/a CellularOne (Western Wireless or Applicant), filed a request seeking approval of its advertising plan for "Measured Usage Universal Service Offerings in the State of Nebraska" (hereinafter Measured Usage Plan.) Subsequently, on October 7, 2003, this docket was opened for the purpose of examining the Measured Usage Plan. Notice of this filing appeared in The Daily Record, Omaha, on October 9, 2003. A formal protest was filed by a group of rural independent incumbent carriers providing telecommunications services in Nebraska, comprised of Arlington Telephone Company; Blair Telephone Company; Clarks Telecommunications Co.; Consolidated Telephone Company; Consolidated Telco, Inc.; Eastern Nebraska Telephone Company; Great Plains Communications, Inc.; Hartington Telecommunications Co., Inc.; Hershey Cooperative Telephone Company; K&M Telephone Company, Inc.; NebCom, Inc.; Nebraska Central Telephone Company; Northeast Nebraska Telephone Company; Pierce Telephone Co.; Rock County Telephone Company; Stanton Telephone Co., Inc.; and Three River Telco (collectively, the Protestants.) A petition of formal intervention was filed on November 7, 2003, by Arapahoe Telephone Company; Benkelman Telephone Company; Cozad Telephone Company; Curtis Telephone Company; Dalton Telephone Company; Diller Telephone Company; Elsie Communications; Glenwood Telephone Membership Corporation; Hartman Telephone Company; Hemingford Cooperative Telephone Company; Keystone-Arthur Telephone Company; Mainstay Communications; Southeast Nebraska Telephone Company; and Wauneta Telephone Company (collectively, the Intervenors.) By Order released November 25, 2003, the Commission accepted the Protest and Formal Intervention and named the above-listed companies interested parties and set forth a procedural schedule.

After several oral arguments on the initial advertising plans submitted by Western Wireless in Docket No. C-1889, the Commission approved a plan for Western Wireless on August 13, 2002. That plan contained a description of the service and rates for an unlimited local usage offering, and pursuant to Commission Order, Western Wireless was required to inform their potential customers of the service area and mobility limitations of the universal service offering presented to the Commission for approval in Docket No. C-1889 and approved by the Commission

on November 21, 2000. Western Wireless was also required to file with the Commission, on an annual basis, a copy of the customer preference page being disseminated by Western Wireless to its customers containing a disclaimer with respect to its service area and mobility limitations.<sup>1</sup>

Through the April 14, 2003, filing, Western Wireless is requesting the Commission's approval of its Measured Usage Plan, which includes 18 separate measured usage service offerings described in attachments to the application. Each service offering is provided through conventional hand-held cellular telephones. Each such plan includes nationwide mobility and either nationwide toll-free or Nebraska-wide toll-free calling. In seeking approval of the Measured Usage Plan, it is Western Wireless' desire to obtain certification from this Commission to receive federal universal service support for its customers with Nebraska billing addresses who have activated service in connection with any of the 18 measured usage service offerings.

On December 10, 2003, the Commission held Oral Argument relating to one threshold issue, whether the Measured Usage Plan was consistent with the decision to designate Western Wireless as an eligible telecommunications carrier in Docket No. C-1889 and the Commission's subsequent proceedings on the initial advertising plan. At the conclusion of the Oral Argument, the Commission decided that proposed orders, rather than legal briefs, should be filed with the Commission.

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

Upon consideration of the arguments tendered, the record in Docket No. C-1889, and being fully informed in the premises, the Commission is of the opinion and finds the Measured Usage Plan contains universal service offerings that go beyond those approved by the Commission and which are contrary to the limitations voluntarily agreed to by the Applicant during the course of the proceeding in Docket No. C-1889. The designation of Western Wireless as an eligible telecommunications carrier (ETC) was based upon the evidence presented in the hearings leading up to the November 21, 2000, decision and the representations made to the Commission during the course of that proceeding.

As stated by the Protestants in oral argument, the witness for Western Wireless made very specific representations when questioned in the hearing on Western Wireless' ETC designation.

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<sup>1</sup> The Commission notes that Western Wireless has failed to follow-up with the Commission as required by the June 18, 2002, Order.

Gene DeJordy, Applicant's Vice President of Regulatory Affairs, testified that Applicant's universal service offering would be through wireless local loop technology and that the use of a wireless access unit at the customer's premises was a key component in such offering. See, e.g. Docket No. C-1889, Bill of Exceptions 40:15-17 and 81:13-19. The basic universal service (BUS) offering was described by Mr. DeJordy as intended for use in a defined community served by a cell site and possessing limited mobility. *Id.* 99:7-16. Mr. DeJordy specifically testified that the company would not be seeking universal service support for "traditional cellular" service. *Id.* 102:19-24.

Further, the Commission finds that it would be considerably inappropriate to permit the applicant to independently broaden the universal service offering without an evidentiary hearing to determine whether such offering meets the eligibility criteria set forth in 47 U.S.C. § 254(e), including but not limited to the public interest requirement of Section 214(e)(2). Based on the record before the Commission in Docket No. C-1889, Western Wireless has not established, in regard to the services described in the Measured Usage Plan, that such services are offered in compliance with 47 C.F.R. § 54.101 throughout the service areas identified in Appendix A to the Commission's Order entered in Docket No. C-1889 on November 21, 2000. While Applicant's counsel stated during oral argument that Applicant provides each of the nine requirements of Section 54.101 in connection with the service offerings described in the Measured Usage Plan, such statements do not constitute evidence that the Commission can consider. Western Wireless chose to establish a record in Docket No. C-1889 limited to the BUS offering and that record does not sustain a finding that the services described in the Plan satisfy the requirements of 47 U.S.C. § 214(e)(1) or 47 C.F.R. § 54.101, so as to support a finding that the Measured Usage Plan should be approved.

Overall, because Western Wireless limited the scope of its Docket No. C-1889 application through representations to the Commission under oath, the Commission will require Western Wireless to abide by these limitations until its ETC designation can be expanded through a new application. Accordingly, the Commission finds that consideration of the Measured Usage Plan should be stayed until such time as the Commission has designated Western Wireless as an ETC in connection with the services described in that plan.<sup>2</sup> In order to pursue this matter

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<sup>2</sup> The Commission notes that it is not making a finding that Western Wireless' conventional "handheld" mobile wireless services do not meet universal service standards for eligibility. The Commission finds only that Western

further and obtain approval of the Measured Usage Plan as filed with the Commission Western Wireless should file an application seeking ETC designation for its conventional "handheld" mobile wireless service offering along with a listing of the proposed service areas for determination by the Commission.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that consideration of the Measured Usage Plan filed by Western Wireless shall be stayed until the Commission has had the opportunity to hear evidence on an application to expand Western Wireless' ETC designation to include conventional "handheld" mobile wireless services in its basic universal service offering.

IT IS FURTHER ORDERED that Western Wireless may ask the Commission to approve its proposed Measured Usage Plan in connection with an application to expand its ETC designation.

MADE AND ENTERED at Lincoln, Nebraska, this 16th day of December, 2003.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chair

ATTEST:

Executive Director

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Wireless must make an evidentiary showing that its conventional mobile service offering meets the requirements enumerated in 47 U.S.C. § 214(e) and applicable FCC rules codified at 47 C.F.R. § 54.101.