

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of: )  
 ) **WT Docket No. 00-239**  
Petition of the State Independent Alliance and )  
the Independent Telecommunications Group )  
for a Declaratory Ruling that the Basic Universal )  
Service Offering Provided by Western Wireless in )  
Kansas is subject to Regulation as Local )  
Exchange Service. )

**Comments of the  
Nebraska Public Service Commission**

October 16, 2002

Anne C. Boyle, Chair  
Gerald L. Vap, Vice-Chair  
Frank E. Landis, Commissioner  
Lowell C. Johnson, Commissioner  
Rod Johnson, Commissioner

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## **COMMENTS OF THE NEBRASKA PUBLIC SERVICE COMMISSION**

### **I. Introduction**

The Nebraska Public Service Commission (the “NPSC”) respectfully submits its comments in the above-captioned proceeding seeking comment on a Petition for Reconsideration and Clarification (the “Petition”) submitted by the State Independent Alliance and the Independent Telecommunications Group (the “Independents”), as requested by the Federal Communications Commission (the “Commission”) in its Public Notice. The NPSC appreciates the opportunity to comment on this petition. States have an important role to play in determining requirements for universal service that are responsive to the needs of each individual state, especially as it relates to universal service support funds established and operated by the states. Furthermore, some states, such as Nebraska, have clearly defined statutory authority and responsibilities with regard to their state universal service funds. For example, the Nebraska Telecommunications Universal Service Fund Act (“NUSF Act”) created the NUSF, granted the NPSC powers to administer the fund, and codified a set of principles to be followed in administering the fund.

The NPSC is commenting on the Petition because it believes that the Commission’s statement that “. . . Kansas may not regulate BUS entry or rates and may not require equal access for telephone toll services. . . .” as well as the Independents’ Petition for clarification of this statement, implies that the classification of a service as Commercial Mobile Radio Service (“CMRS”) has a bearing on whether or not a state has the authority to establish requirements for a state universal service fund. Classification of a service has no bearing on whether a state has the authority to establish requirements for a state universal service fund. Furthermore, the NPSC wishes to clarify that while it had not adopted requirements for its universal service fund that applied to all eligible telecommunications carriers (“ETCs”) at the time comments were received in this proceeding, the NPSC has since examined the issue in greater detail. The NPSC has now adopted a condition to provide equal access to interexchange service that is applicable to all Nebraska ETCs seeking NUSF support. In so doing, the NPSC recognized the significant consumer benefits of conditioning receipt of NUSF support upon the provision of equal access.

### **II. States Have the Authority to Establish Conditions for Receipt of State Universal Service Funds.**

The NPSC has adopted an equal access attribute for access to interexchange service, a supported service of the NUSF. The NPSC carefully considered its authority to do so, as it recognizes that providing equal access to interexchange service is not a condition to receive federal universal service support.

The NPSC has found that it has the authority under the NUSF Act to administer the NUSF in a manner determined by the NPSC to be consistent with the authority delegated to it by the Nebraska Legislature. The Commission has affirmed that a state is not prohibited from establishing criteria for designation of ETCs in connection with the operations of that state’s

universal service mechanism, consistent with Section 254(f).<sup>1</sup> Section 254(f) states: “A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms.” The NPSC has found that conditioning the receipt of NUSF support on the provision of equal access to interexchange services advances universal service within Nebraska, and does not rely on or burden federal universal service support mechanisms.<sup>2</sup>

Equal access to interexchange services is not currently included in the list of federally supported universal services.<sup>3</sup> However, the NPSC believes that this is not a limiting factor for development of supported services that the NPSC may establish for access to the NUSF. In fact, case law supports the authority of states to develop eligibility requirements for their universal service funds that differ from federal requirements. The United States Court of Appeals for the Fifth Circuit has held that states may adopt their own universal service eligibility requirements. In *Texas Office of Public Utility Counsel V. FCC*, 183 F.3d 393, 418 (5th Cir. 1999), the Fifth Circuit found that states may impose additional eligibility requirements for ETC designation beyond the requirements contained in FCC rules. (See Rule & Regulation No. 150 Order, entered Apr. 9, 2002, p. 8 for additional case law citations.)

In addition, Section 253(b) gives Nebraska and other states the regulatory authority to impose on “a competitively neutral basis and consistent with Section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.” The NPSC believes that conditioning NUSF support upon providing equal access is within its statutory responsibility to safeguard the rights of consumers within Nebraska. Nebraska has afforded the telecommunications consumers of this state with intraLATA dialing parity since 1997.

Moreover, the NPSC believes that a requirement to provide equal access in order to receive NUSF support fulfills the purposes of the NUSF Act. Section 86-1402 states, in part, that “all Nebraskans, without regard to their location, have comparable accessibility to

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<sup>1</sup> The NPSC has established two separate ETC designations, one for federal universal service support purposes, and one for NUSF support.

<sup>2</sup> See *The Commission, on its own Motion, Seeking to Establish Title 291, Chapter 10, Nebraska Universal Service Fund Rules and Regulations, in Accordance with the Provisions of Neb. Rev. Stat. Section 86-1404 et. seq.*, Rule and Regulation No. 150, Order Issuing a Certificate of Adoption for the Proposed Amendments, Entered Apr. 9, 2002, at 7, para. 13.

<sup>3</sup> The Federal-State Joint Board on Universal Service (“Joint Board”) recently reexamined the list of federally supported universal services. The Board did not make a recommendation on whether equal access should be added to the list of supported services, as the Board was split on the issue. However, the possibility still exists that equal access could be added to the list of services receiving federal universal service support. Two of the three Federal Communications Commission members of the Joint Board voted to include equal access to interexchange services in the list of federally supported services.

telecommunications services at affordable rates.” If equal access were not provided by all Nebraska ETCs in all areas of the state, comparable accessibility would be denied to some consumers in the state. Further, in making scarce state support available, the Commission believes it has the right and the responsibility to ensure that ETCs that receive support provide comparable services that benefit consumers. To allow unequal conditions in the provision of access to interexchange services would be detrimental to consumers. Section 86-1405(3) declares that consumers in all regions of the state, including those in rural and high cost areas, should have access to telecommunications services, including interexchange services, that are reasonably comparable to those in urban areas. Again, if equal access is not provided by all ETCs in all areas of the state, access to interexchange service cannot be considered to be reasonably comparable in all regions of the state.

The NPSC’s conditioning of NUSF support upon the provision of equal access does not rely on or burden federal universal service mechanisms. This is due to the fact that the cost recovery mechanisms associated with this requirement are limited to the state jurisdiction.

In summary, the NPSC believes that states have the authority to establish conditions for receipt of state universal service funds. Given this authority, states may find it appropriate, and in fact even necessary to adopt conditions for receipt of state universal service funds in addition to the federal requirements in order to comply with state statute, as the NPSC found in adding equal access to the list of services supported by the NUSF.

### **III. The Regulatory Classification of a Service is not Relevant to Whether a State May Impose Conditions on the Receipt of State Universal Service Support Funds.**

While the Kansas Corporation Commission (“KCC”) declined to impose certain requirements on Western Wireless’ Basic Universal Service (“BUS”) offering in Kansas because it believed the BUS offering to be CMRS, this does not preclude other state regulatory commissions from imposing conditions on receipt of state universal service support funds. The KCC supported receiving clarification from the Commission on whether Western Wireless’ BUS offering is CMRS in order to administer its state universal service fund. However, while the KCC declined to impose conditions on Western Wireless’ BUS offering in order to receive state universal service support pending a Commission ruling, this does not set or constitute a precedent that other states must follow. Rather, any ruling issued regarding this petition is specific only to the situation in Kansas. The NPSC believes that states may impose conditions on receipt of state universal service funds, consistent with a recent court decision in *WWC Holding Co. Inc. v. Public Service Commission of Utah*, 44 P. 3d 714 (Utah 2002), regardless of the regulatory classification of the carrier seeking state universal service support.

In *WWC Holding Co. Inc. v. Public Service Commission of Utah* (“Utah PSC”), Western Wireless argued that the Utah PSC should not have required Western Wireless to price its universal service offering at or below the affordable base rates in order to receive state universal service funds. Western Wireless argued that requirement is preempted by federal statute. 47 U.S.C. Sec. 332(c)(3)(A) states, in relevant part, that “no State or local government shall have any authority to regulate the entry of or rates charged by any commercial mobile service. . . .” However, the court found that the requirement was not regulation of entry or rates as contemplated by 47 U.S.C. Sec. 332(c)(3)(A). The court noted that the requirement “. . . is

narrowly applicable only to telecommunications carriers who voluntarily seek ETC status and who voluntarily receive state funding. The rule is not a factor in determining ETC status or in eligibility for federal universal service support.” The court found that Western Wireless is free to set its rates without state interference, even after its voluntary decision to seek ETC status. Only in Western Wireless’ voluntary decision to receive state universal service support, must it set the price of its universal service offering at or below a specified level. And even while receiving state universal service support, Western Wireless is free to set the rates for other services without state intervention. Because the requirement is not rate regulation, the court held that Section 332(c)(3)(A) does not preempt the requirement.

The NPSC believes that its conditioning of receipt of NUSF support upon the provision of equal access is similar to the benchmark rate requirement in Utah. Western Wireless voluntarily chose to seek ETC status in Nebraska. It received a designation of such status without a requirement to provide equal access, and the conditioning of NUSF support upon the provision of equal access does not affect Western Wireless’ eligibility to receive federal universal service support. Furthermore, Western Wireless does not need to provide equal access for all of its service offerings—only for those offerings for which it seeks NUSF support. As such, the NPSC inclusion of the provision of equal access as a condition to receive state support is just that—a condition imposed on the receipt of state funds—and not a requirement imposed on CMRS carriers generally.

#### **IV. Conclusion**

The NPSC believes that any ruling the Commission may issue on the Petition is constrained to the particular case of the KCC and the Kansas universal service fund, as that is the context in which issues in the Petition were raised. As the NPSC has demonstrated, the Telecommunications Act of 1996 grants states the authority to administer state universal service funds as they deem appropriate, as long as state rules are not inconsistent with federal rules, and do not rely on or burden federal support mechanisms. The United States Court of Appeals for the Fifth Circuit has held that states may adopt their own universal service eligibility requirements. The NPSC has conditioned the receipt of NUSF support on the provision of equal access, based on the preceding authority, as well as on state statute. The NPSC has found providing equal access to interexchange service to benefit consumers.

Conditioning the receipt of state universal service support upon the provision of equal access, or other provisions, is not prohibited regulation of CMRS carriers as demonstrated by *WWC Holding Co. Inc. v. Public Service Commission of Utah*. This case demonstrates that states can impose conditions on receipt of state universal service funds.