

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Application) Application No. C-2932
of Amended NPCR, Inc., d/b/a)
Nextel Partners, Eden Prairie,)
Minnesota seeking designation as) DENIED
an eligible telecommunications)
carrier that may receive)
universal service support.)
) Entered: February 10, 2004

APPEARANCES:

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BY THE COMMISSION:

B A C K G R O U N D

By application filed April 24, 2003, NPCR, d/b/a Nextel Partners (NPCR or Applicant) of Eden Prairie, Minnesota, seeks a designation as an eligible telecommunications carrier (hereinafter, ETC) so that it may receive federal universal service fund support. The application was amended by NPCR on April 28, 2003. Notice of the application was published in The Daily Record, Omaha, Nebraska, on April 30, 2003. No protests or interventions were filed. A hearing on the application was held on July 17, 2003, in the Commission Hearing Room, with appearances as shown above.

The application provides that NPCR seeks designation in several of Qwest's wire centers and in the rural study areas of

Arlington Telephone Company, Blair Telephone Company, Clarks Telephone Company, Diller Telephone Company, Eastern Nebraska Telephone Company, Hamilton Telephone Company, Hartington Telephone Company, Henderson Cooperative, Hooper Telephone, Sometown Telephone Company, Southeast Nebraska Telephone Company and Stanton Telecom, Inc. (See Attachment 1 to Exhibit 3, hereinafter "Attachment 1".)

In support of the application, NPCR presented one witness, Mr. Scott Peabody, director of engineering for NPCR. In addition to the application and amended application, which were offered and received into evidence as Exhibits 3 and 3(a), NPCR offered the pre-filed testimony of Mr. Peabody into the record. In summary of his written testimony, Mr. Peabody stated that NPCR meets all of the requisite criteria for a grant of ETC status.

NPCR is a Delaware corporation with a principal place of business located in Eden Prairie, Minnesota. NPCR was formed in 1998 to build out and operate a digital mobile network in mid-size, small and rural markets using the Nextel Communications brand name. NPCR launched service in Nebraska in 2000. NPCR has obtained licenses from the Federal Communications Commission (FCC) to operate in territories where 53 million people live and work. NPCR built a self-site network covering over 36 million people in 31 states. Nextel Communications and NPCR are separate companies, though they are working together through strategic agreements. The partnership arrangement has allowed NPCR to offer the same services to rural consumers as those offered to urban consumers by Nextel Communications at the same or similar rates.

The application and pre-filed testimony state generally that NPCR is a common carrier and provides the supported services including voice-grade access to the public switched network, local usage, dual tone, a functional equivalent to dual-tone, multi-frequency signaling, single-party service, access to emergency services, access to operator services, access to interexchange service, access to directory service, and will, upon designation, provide toll limitation for low-income consumers. NPCR's application also states that NPCR will offer and advertise the availability of supported services within the designated areas.

Mr. Peabody further testified that with an ETC designation, NPCR will be eligible to compete on a level playing field with its competitors. According to Mr. Peabody, in rural areas, public interest is served by bringing consumer choice, innovative services and new technologies to the designated

areas. Specifically, the application avers that the public interest test is or will be met because: 1) NPCR's request covers enough territory to prevent cherry-picking, 2) that NPCR will be able to provide universal service on a more competitively neutral basis, 3) that NPCR will provide supported services to Nebraska consumers with service offerings that will be different from landline offerings, 4) that deployment and wireless network expansion will continue with universal service support, 5) that incumbent local exchange carriers (LECs) will be given the incentive to improve their existing networks in order to remain competitive, 6) that NPCR will provide all of the supported services required by the Commission and will allow NPCR to compete on a level playing field, and 7) to promote the extensive role NPCR plays in the provision of communications services to Nebraska public schools, libraries and local, state and federal government agencies.

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

In reviewing an application for eligible telecommunications carrier designation, the Commission looks to Sections 254(b) and 214(e) of the Telecommunications Act of 1996 (the Act), in conjunction with applicable FCC rules and regulations.

Section 254(b) of the Act defines universal service by outlining six principles:

1. Quality services should be available at just, reasonable and affordable rates.
2. Access to advanced services should be provided in all regions of the nation.
3. Consumers in all regions of the nation should have access to services (including advanced services) at rates that are reasonably comparable to those in urban areas.
4. All telecommunications providers should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.
5. There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.
6. Schools and libraries should have access to advanced services.

In 1997, the FCC released its Universal Service Report and Order in CC Docket 96-45, FCC 97-157 (Universal Service Order), which implemented several sections of the Act. The FCC's Universal Service Order provides that only eligible

telecommunications carriers designated by a state commission shall receive federal universal service support. Section 214(e) of the Act delegates to the states the ability to designate a common carrier as an ETC for a service area designated by the state commission. A service area is the geographic area established for the purpose of determining the universal service obligation and support eligibility of the carrier. The FCC also provided that "competitive neutrality" should be an added universal service principle.

Section 214(e)(1) provides that an ETC Applicant shall:

Throughout the service area for which such designation is received--

- (A) offer the services that are supported by federal universal service support mechanisms under section 254 . . .; and
- (B) advertise the availability of such services and the charges therefore using media of general distribution.

The FCC's supported services are found in 47 C.F.R. § 54.101(a) and are as follows:

- a. voice grade access to the public switched network;
- b. local usage;
- c. dual tone multi-frequency signaling or its functional equivalent;
- d. single-party service or its functional equivalent;
- e. access to emergency services;
- f. access to operator services;
- g. access to interexchange services;
- h. access to directory assistance; and
- i. toll limitation for qualifying low-income consumers.

Upon review of the application and testimony presented, the Commission finds that Applicant offered only generalized statements that it has the ability to provide the supported services listed in a-i, above.

Federal law further provides that:

In the area served by a rural telephone company "service area" means such company's "study area" unless and until the Commission and the States after taking into account recommendations of a

Federal-State Joint Board instituted under section 410(c), establish a different definition of service area for such company.

Section 214(e)(2) generally provides,

A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the State commission. ***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). (Emphasis Added).

In an area served by rural carriers Section 214(e)(2) further requires ETC Applicants to demonstrate to the state Commission that the designation of ***an additional*** ETC is in the public interest. (Emphasis Added).

The Commission previously found in its Western Wireless Order that it was not necessary for an ETC to be offering the supported services and advertising the availability and charges of the services *prior to* ETC designation. However, in that ruling the Commission also found that Western Wireless had presented sufficient and credible evidence that it was willing and capable of meeting the requirements of Section 214(e)(2) and had every intention of carrying out its plan to provide the supported telecommunications services *throughout the designated area*. Western Wireless provided detailed evidence as to how its basic universal service offering (BUS) was to be provided over a wireless access unit and antenna combination that was capable of reaching even the most insular rural areas of the state.

Unlike the case in Western Wireless, the evidence presented in this case, does not convince the Commission that the Applicant is likewise capable of meeting the requirements of Section 214(e)(2). Nor does the evidence indicate to the Commission that the Applicant is willing to meet the basic requirements of Section 214 (e)(2).

The Commission further finds that the Applicant has not presented a clear plan and timetable for providing the supported services throughout the designated territory. Upon questioning, the Applicant stated that it would be difficult to follow any parameters set by the Commission in relation to the provisioning of service. (Transcript at 53:8-20). Applicant claims the Commission does not have the ability to set any reasonable parameters to ensure that the requirements of Section 214(e)(2) are fulfilled. This testimony creates concerns in relation to NPCR's willingness to serve the entirety of the study areas for which NPCR has requested designation.

In sum, the Commission finds that NPCR has not provided sufficient evidence that it is willing and capable of meeting the core eligibility requirements of section 214(e). NPCR failed to provide sufficient evidence that it can provide the supported services listed in 47 C.F.R. § 54.101 et seq. and failed to demonstrate to the Commission that it is willing to serve the entire designated area.

We also interpret the language in Section 214(e)(2) to mean that the Commission is only obligated to designate more than one ETC in a given territory served by non-rural carriers. Specifically, Section 214 (e)(2) reads that upon a finding that it is consistent with public interest and necessity, the Commission **shall** designate **more than one** ETC in an area served by a non-rural company. The plain construction of the phrase "**more than one**" in the Commission's opinion means the designation of a second ETC is required upon a finding that said ETC Applicant has satisfied the requirements of the Act and FCC regulations. However, the Commission finds that the literal reading of Section 214(e)(2) stops there. The Commission believes that the designation of a third or fourth ETC in a given territory served by a non-rural carrier is purely discretionary. In light of this interpretation, the Commission finds that it has already satisfied the requirement in Section 214(e)(2) by designating more than one ETC in all of the proposed non-rural territory described by NPCR in Attachment 1 to its application.

In addition, with respect to the request to be designated as an additional ETC in the rural areas outlined in Attachment 1, the Commission finds that the Applicant has not sufficiently proven that designation is in the public interest.

To demonstrate public interest, the Applicant's witness testified that the addition of it as a competitor and the introduction of new technologies in the rural market satisfy the public interest test. To further support its argument that a

designation is in the public interest, the Applicant states that the Commission should review its application against this Commission's Western Wireless Order. If we would do so, NPCR's application would fall short of the standards set by the Commission. First, as stated above, we do not believe Applicant has shown that it is willing to provide the supported services throughout the designated territory. We do not believe that Applicant's proposed service territory is large enough to properly address our concerns relating to "cherry picking." Moreover, there is no indication that a designation in the present case would lead to "increased" competition. Finally, while the Commission did provide an analysis of public interest in the Western Wireless case, the Commission believes that a public interest analysis requires a case-specific finding. A review of public interest requires the Commission to carefully balance the public benefits and public harms of approving an ETC application. This requires the Commission to look at the environment at the time designation is sought. In the present case, Applicant is already providing the wireless service throughout its licensed territory in Nebraska. Applicant offered no evidence that it will, in fact, extend its service or provide better service than presently being offered. Instead, Applicant has made generalized statements with respect to public interest, which even if true, would not distinguish itself from any other wireline or wireless provider.

Nonetheless, we will address NPCR's claims individually. First, NPCR claims that its proposed territory is large enough to prevent cherry-picking. We do not believe that it is. NPCR does not give any other information to back this claim with the exception of a map, which outlines its licensed territory and signal strength. (See Exhibit 8). Exhibit 8 demonstrates that large regions of territory served by Eastern Nebraska Telephone and Stanton will go unserved while the higher populated areas will continue to receive NPCR's service. In response to Commission questions, Applicant could not give the Commission a time frame in which to expect all proposed designated areas to be served. Further, unlike Western Wireless, NPCR's application covers only a part of the eastern portion of the state, leaving the western half of the state unserved. We do not think the proposed territory is large enough to prevent cherry-picking.

Next, NPCR states that with federal support, it will be able to provide universal service on a more competitively neutral basis. Competitive neutrality was added by the FCC to the Section 254 list of universal service principles. Contrary to the position of NPCR, we find that the goal of competitive neutrality is not automatically met with the designation of an additional ETC in the areas served by rural companies. As NPCR

is already successfully providing a wireless service in that area, there is no reason to believe that NPCR needs a subsidy to level the competitive playing field. Federal subsidies flowing to NPCR may result in just the opposite, a windfall to Applicant, particularly when this Applicant is unwilling to submit to some basic state-imposed requirements such as equal access, the filing of tariffs and service quality benchmarks.

Third, NPCR states that it will provide supported services to Nebraska consumers with service offerings that will be different from landline offerings. NPCR is providing service in the proposed territory now. There was no evidence produced which would indicate that this ETC designation would produce better or more valuable services than those currently available to rural consumers. Although NPCR claims that it will expand deployment of its wireless network as it receives universal service support, it brought forth no specific evidence of where and when it plans to do so. In fact, the NPCR witness stated in the hearing that NPCR could not give any timetable for any such expansion.

Further, NPCR claims that incumbent local exchange carriers (ILECs) will be given the incentive to improve their existing networks in order to remain competitive. We do not believe this to be true. Because NPCR does not directly compete with the service of the rural incumbent carrier, there would be no incentive for the incumbent LECs to make any improvements. Moreover, we note that current state universal service mechanisms already give incumbent LECs incentives to improve their existing networks.

Finally, NPCR states that public interest is met because designation will promote the extensive role NPCR plays in the provision of communications services to Nebraska public schools, libraries and local, state and federal government agencies. NPCR offered no specific evidence of how this would come about or where universal service support would be invested.

In today's marketplace, we find that the question to be answered is whether subsidizing NPCR's service offering in the proposed Nebraska rural territories is good public policy. Looking back to its 2000 Western Wireless decision, the Commission finds that perhaps its public interest analysis wasn't rigorous enough and tailored enough to the goals of universal service. To be sure, the Commission was more concerned at that time with bringing competition to the rural areas of Nebraska. Since then, the environment and the Commission's focus has changed. The Commission believes that universal service is not a vehicle by which competition should

be artificially created. The purpose of universal service is not to promote competition. Rather, the purpose of universal service is found in section 254 of the Act. To this end, the Commission's role is to ensure that the universal service principles continue to be served in a competitive environment.

As we noted in our Western Wireless Order,

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. 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.

In light of the current environment, we find that the real issue to consider is whether Applicant's competitive efforts in the proposed territory should be subsidized by payments from the federal USF. We find they should not. As the Applicant's case demonstrates, no federal subsidy is necessary to bring Applicant's service to the rural areas. Applicant is already serving the rural areas and bringing new technologies to these areas without the assistance of a federal subsidy. We further believe an ETC designation would not place Applicant on a level playing field with the incumbent carriers. Rather, a grant of the application would grant to the Applicant distinct advantages over the incumbent carriers, jeopardizing their ability to serve all of their subscribers adequately and jeopardizing the principles set forth in section 254. In addition, Applicant is virtually unregulated in terms of service quality, and Applicant has no equal access obligations that the incumbent carriers have. Unlike Western Wireless, Applicant was unwilling to submit its service to some service quality benchmarks, file tariffs, or consent to the Commission's general jurisdiction over consumer complaints. Consumers in the proposed territory are already receiving telecommunications services from the Applicant without additional costs. If this application is granted, consumers would be required to bear the additional costs necessary to subsidize the service provided by the Applicant. Accordingly, we find that the public costs in granting an ETC designation in the territory served by the rural carriers outweighs any supposed benefits offered by Applicant.

In sum, we find NPCR's application for ETC designation in the proposed territories described in Attachment 1 to the

application served by non-rural carriers and by rural carriers should be denied.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the application of NPCR d/b/a Nextel Partners should be and it is denied.

MADE AND ENTERED at Lincoln, Nebraska, this 10th day of February, 2004.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chairman

ATTEST:

Executive Director

Commissioners Anne Boyle and Lowell Johnson dissenting:

We respectfully dissent. NPCR, d/b/a Nextel Partners (NPCR) filed this application seeking eligible telecommunications carrier (ETC) designation in areas served by Qwest and a number of rural independent companies. The Commission duly published notice of the application and placed all carriers on notice of NPCR's intentions. Even though there has been great controversy at the state and national level regarding designation of ETC status, no party opposed or intervened. It is well established that the "failure to timely file a protest shall be construed as a waiver of opposition and participation in the proceeding." See Neb. Admin. Code Title 291, Chapter 1, Section 014.01.

Nevertheless, in order to ensure that NPCR's offering satisfied all criteria outlined in the federal Telecommunications Act of 1996 (the Act), the Nebraska Public Service Commission (NPSC) chose to hold a hearing. NPCR, through its witness, offered into the record evidence on each element of proof necessary. The Commission accepted the evidence and did not dispute NPCR's claim that they had met all criteria required by the Act.

We are very concerned about the Federal Universal Service Fund (USF) from which ETCs draw funding. As the FCC has recognized, designation of additional ETCs draws more from the USF, which is suffering from ever-increasing demands and diminishing sources of revenue. Some rural associations have criticized states for cursorily granting ETC designation. However, we do not believe that the states should be to blame as the term "public interest" has been an ill-defined and ever changing test. At the time of the hearing on this application, the FCC hadn't offered clear guidelines to states to determine public interest. It was only recently, that the FCC, by Memorandum Opinion and Order involving Virginia Cellular, Inc., gave states a specific framework for making their public interest judgments.¹ However, the FCC explained that its public interest analysis may again be altered due to the Joint Board's deliberations and any other public interest framework that the FCC may adopt.

In reviewing this application, we question whether designation of ETC status in rural areas where competition may harm existing carriers of last resort. At the same time we consider whether customers are well served without the benefit of choice. A competitive ETC does not draw until it begins to provide service. Therefore, the only tests states can consider

are the objective criteria set by the Act and the public interest.

We are hopeful that the FCC will give states more authority to look to a number of relevant factors prior to designation. If states are to consider the size of the fund, the FCC should compute a formula to determine the amount each state should receive. A federal/state partnership would allow each state to administer their portion of the fund. Currently carriers simply certify they are properly using provided funds. State administration would allow closer scrutiny to ensure proper use of funds. Currently, states have no control over the size or disbursements from the federal USF.

Based on the record in this case, it is our opinion that the NPSC is legally unable to make a decision to deny an ETC application simply because of the aforementioned concerns. With no protests, no dispute that necessary criteria had not been met and no provision in the Act for state discretion to deny an application other than those previously mentioned, the application should be granted.

Anne C. Boyle

Lowell C. Johnson