

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**

In the Matter of the Application of )  
Northwest Missouri Cellular Limited )  
Partnership for Designation as a )  
Telecommunications Company Carrier )  
Eligible for Federal Universal Service )  
Support Pursuant to Section 254 of the )  
Telecommunications Act of 1996. )

Case No. TO-2005-0466

**HOLWAY TELEPHONE COMPANY'S  
PREHEARING BRIEF**

**1. INTRODUCTION AND SUMMARY**

Northwest Missouri Cellular Limited Partnership ("NWMC") has failed to provide competent and substantial evidence showing that granting it eligible telecommunications carrier ("ETC") status is in the public interest. Specifically, NWMC has failed to provide a plan for how it intends to spend roughly \$1.469 million per year in estimated federal Universal Service Fund ("USF") support. NWMC's application only offers information as to how it would spend a fraction of this amount. NWMC has provided what it calls a five-year plan showing the intended use of the high-cost support, but this plan provides no detailed descriptions of any of its construction plans nor does it indicate the start or end dates of the construction plans. NWMC has failed to give the Missouri Public Service Commission ("Commission") sufficient information regarding its use of the estimated USF support, and its plan does not comport with either the Federal Communications Commission ("FCC") guidelines found in its ETC Report

and Order<sup>1</sup> nor does it comport with the Commission's newly-promulgated ETC rule, 4 CSR 240-3.570. Additionally, the plan fails to demonstrate that the support will only be used for the intended purposes. The Commission will need more information before it can grant ETC status to NWMC or prepare appropriate findings of fact and conclusions of law to support that decision.

## II. DISCUSSION

**Issue 1.** Telecommunications companies seeking eligible telecommunications carrier ("ETC") status must meet the requirements of Section 214(e)(1) throughout the service area for which designation is received. Section 214(e)(1) requires a carrier to offer the services that are supported by Federal universal service support mechanisms either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and to advertise the availability of such services and the charges therefore using media of general distribution. Does NWMC meet the requirements of Section 214(e)(1) throughout the service area for which it seeks designation?

No. It is NWMC's burden to demonstrate that it will provide the supported services throughout the service territory of each separate incumbent LEC ("ILEC") study area. Yet NWMC does not seem to plan to offer ubiquitous coverage as Ms. Zentgraf readily admits that "the prevalence of 'dead spots' is presumed."<sup>2</sup> One of the major purposes of universal service set out in the federal and Missouri ETC regulations is that consumers in all regions, including those in rural, insular and high-cost areas, will have access to telecommunications and information services at rates that are reasonably comparable to rates charged for similar services in urban

---

<sup>1</sup>*In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, FCC-05-46 (Rel. March 17, 2005) ("*the ETC Order*").

<sup>2</sup>Direct Testimony of Kathryn Zentgraf, p. 21.

areas.<sup>3</sup> In NWMC's application, and in response to a data request from the Commission Staff, it is clear that NWMC does not plan to make investments in the exchange area served by Holway Telephone Company ("Holway"). Based on this information, NWMC evidently does not plan to invest in Holway's service area even with USF support.<sup>4</sup> Thus, NWMC has clearly failed to meet its burden of proof in this regard.

NWMC's application does not demonstrate how universal service high-cost support will be used to improve coverage, service quality or capacity on a wire center-by-wire center basis throughout the ETC service area with any degree of specificity. The Application does not contain detailed maps indicating the coverage area before and after improvements nor the existing tower locations. The coverage maps that are provided do not show how consumers in rural and high-cost areas of the ETC service area will receive service and signal quality comparable to that available in urban areas.<sup>5</sup> The information on service coverage and service quality discussed in the testimonies of Mr. Warinner and Mr. Brown show that NWMC does not provide coverage at sufficient signal strength throughout the requested ETC service area. Because NWMC does not provide sufficiently adequate service throughout the requested area, the Commission should deny ETC status.

---

<sup>3</sup>Rebuttal Testimony of William J. Warinner, p. 24; MoPSC ETC rule, 4 CSR 240-3.570(2)(A)2.A.(III).

<sup>4</sup>Warinner Rebuttal, p. 24, HC Exh. WJW-6.

<sup>5</sup>Rebuttal Testimony of Glenn H. Brown, p. 5.

**Issue 2.** ETC designations by a state commission must be consistent with the public interest, convenience and necessity pursuant to Section 214(e)(2). The Federal Communication Commission's ("FCC") *ETC Designation Order* determined that this public interest standard applies regardless of whether the area is served by a rural or non-rural carrier. Is granting ETC status to NWMC consistent with the public interest, convenience and necessity throughout the service area for which NWMC seeks ETC designation?

No. The Act states, "Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission **shall** find that the designation is in the public interest." 47 U.S.C. § 214(e)(2) (emphasis added). NWMC has failed to meet its burden of proof by failing to provide the Commission with competent and substantial evidence to support a finding that granting ETC status to NWMC is in the public interest.

The Federal Communications Commission ("FCC") has established a rigorous set of minimum public interest requirements to apply in ETC cases.<sup>6</sup> The FCC stated that it believes that "because these requirements create a more rigorous ETC designation process, their application by the [FCC] and state commissions will improve the long-term sustainability of the universal service fund."<sup>7</sup> NWMC has failed to meet the FCC's minimum public interest requirements in order to be designated as an ETC so its application should be denied.

**A. FCC Public Interest Factors.**

When analyzing whether the grant of ETC status is in the public interest, the FCC considers

---

<sup>6</sup>*In the Matter of the Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Report and Order*, released March 17, 2005 ("the *ETC Order*").

<sup>7</sup>*Id.* at ¶2. The Missouri Commission promulgated its own ETC rule based on these FCC guidelines that will be addressed under Issue No. 3.

factors such as whether consumers are likely to benefit from increased competition, whether the additional designation will provide benefits not available from incumbent carriers, whether consumers may be harmed should the incumbent withdraw from the service area, and whether there would be harm to a rural incumbent LEC.<sup>8</sup> The Federal-State Joint Board on Universal Service provided the following additional recommendation: “The characteristics of many rural carrier service areas also support a more rigorous standard of eligibility. Rural carrier service areas often have low customer densities and high per-customer costs. These circumstances support our belief that state commissions should apply a particularly rigorous standard to the minimum qualifications of applicants seeking ETC designation in rural carrier service areas.”<sup>9</sup>

The FCC commissioners in various statements have indicated that they have doubts about funding more than one ETC in rural areas. In its *Virginia Cellular Order*, the FCC stated:

We conclude that the value of increased competition, by itself, is not sufficient to satisfy the public interest test in rural areas. Instead, we weigh numerous factors, including the benefits of increased competitive choice, the impact of multiple designations on the universal service fund, the unique advantages and disadvantages of the competitor’s service offering, any commitments made regarding quality of telephone service, and the competitive ETC’s ability to provide the supported services throughout the designated area in a reasonable time frame.<sup>10</sup>

In addition, the separate statements of Commissioners Kathleen Q. Abernathy and Michael J. Copps as well as the remarks of Jonathan S. Adelstein filed in January of 2004 offer

---

<sup>8</sup>Warinner Rebuttal, p. 39; *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket 96-45, FCC 04J-1, (Rel. February 27, 2004), p. 17, ¶ 40 (“*Recommended Decision*”).

<sup>9</sup>Warinner Rebuttal, p. 40; *Recommended Decision*, pp. 7-8.

<sup>10</sup>Warinner Rebuttal, p. 40-41; *Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, CC Docket No. 96-45, FCC 03-338 (Rel. January 22, 2004), ¶4 (“*Virginia Cellular Order*”).

further insight on this issue. Commissioner Abernathy stated:

While promoting competition is undoubtedly a core goal under the Telecommunications Act of 1996, the use of universal funding to engender competition where market forces alone cannot support it presents a more complex question. Particularly in rural study areas where the cost of providing service typically far exceeds retail rates, regulators must carefully consider whether subsidizing the operations of an additional ETC promotes the public interest.<sup>11</sup>

Commissioner Cops stated that, "We must give serious consideration to the consequences that flow from using the fund (universal service fund) to support multiple competitors in truly rural areas."<sup>12</sup> Commissioner Adelstein stated that:

This ETC process has raised a lot of questions from those who are concerned that many States and the FCC began using universal service to "create" competition in areas that could barely support just one provider, let alone multiple providers. They question if this is what Congress intended. It may come down to a choice Congress never envisioned between financing competition or financing network deployment that will give Rural America access to advanced services like broadband.<sup>13</sup>

Finally, FCC Chairman Martin has expressed concerns with using federal USF support to create "competition" in rural high-cost areas:

I am hesitant to subsidize multiple competitors to serve areas in which costs are prohibitively expensive for even one carrier. This policy may make it difficult for any one carrier to achieve the economies of scale necessary to serve all customers in a rural area, leading to inefficient and/or stranded investment and a ballooning universal service fund.<sup>14</sup>

Holway agrees with the statements of the FCC commissioners regarding the value of

---

<sup>11</sup>Warinner Rebuttal, p. 41; *Virginia Cellular Order*.

<sup>12</sup>Warinner Rebuttal, p. 41; *Virginia Cellular Order*.

<sup>13</sup>Warinner Rebuttal, p. 41; *Virginia Cellular Order*.

<sup>14</sup>2<sup>nd</sup> Report and Order and FNPRM in CC Docket No. 00-256, 15<sup>th</sup> Report and Order in CC Docket No. 96-45, and Report and Order in CC Docket Nos 98-77 and 98-166, rel. Nov. 8, 2001, *Separate Statement of Commissioner Kevin J. Martin*.

competition and the possible harm to rural areas from multiple ETC designations. In his rebuttal testimony, CenturyTel witness Brown provides a cost/benefit analysis to assist the Commission in its decision whether to approve additional ETCs in the rural areas where NWMC is seeking ETC designation. Mr. Brown explains that, "When multiple wireless providers seek ETC designation in the same wire centers, as is the case in the instant proceeding, the Commission must be especially vigilant to assure that the increased public costs created by each additional wireless ETC designation produce commensurately increasing public benefits."<sup>15</sup> Although he identifies some benefits that would be created with the investments in new towers and facilities, he ultimately concludes that in very sparsely populated areas there could be increased public costs due to the loss in network efficiency caused by multiple providers serving in a less efficient manner than a single provider could serve.<sup>16</sup> His conclusions reinforce the stated concerns of the FCC commissioners cited above.

**Issue 3.** In addition to the standards set out in the FCC's *ETC Designation Order*, the Missouri Public Service Commission ("MoPSC") has promulgated ETC rules to be used in evaluating ETC applications. A final Order of Rulemaking for these rules, designated as 4 CSR 240-3.570, was published in the Missouri Register on May 15, 2006. Does NWMC meet the requirements of the MoPSC's ETC rules?

No, NWMC does not meet all of the requirements of the Commission's ETC rule as explained below.

**A. NWMC's network improvement plan does not comply with the requirements of Commission rule 4 CSR 240-3.570.**

The FCC requires that an applicant for ETC status "provide a five-year plan

---

<sup>15</sup>Brown Rebuttal, p. 12.

<sup>16</sup>Brown Rebuttal, p. 13.

demonstrating how high-cost universal service support will be used to improve its coverage, service quality or capacity in every wire center for which it seeks designation and expects to receive universal service support.”<sup>17</sup> The Missouri ETC rule reduces the requirement to a two-year plan.<sup>18</sup> The ETC rule states:

(2) Applications for Designation as an ETC.

(A) Each request for ETC designation shall include:

1. Intended use of the high-cost support, including detailed descriptions of any construction plans with start and end dates, populations affected by construction plans, existing tower site locations for CMRS cell towers, and estimated budget amounts;

2. A two (2)-year plan demonstrating, with specificity, that high-cost universal service support shall only be used for the provision, maintenance and upgrading of facilities and services for which the support is intended in the Missouri service area in which ETC designation was granted.

\* \* \*

3. The two (2)-year plan shall include a demonstration that universal service support shall be used to improve coverage, service quality or capacity on a wire center-by-wire center basis throughout the Missouri service area for which the requesting carrier seeks ETC designation including:

A. A detailed map of coverage area before and after improvements and in the case of CMRS providers, a map identifying existing tower site locations for

---

<sup>17</sup>*Id.*

<sup>18</sup>4 CSR 240-3.570 (2)(A)1.



CMRS cell towers;

B. The specific geographic areas where improvements will be made;

C. The projected start date and completion date for each improvement;

D. The estimated amount of investment for each project that is funded by high-cost support;

E. The estimated population that will be served as a result of improvements;

F. If an applicant believes that service improvements in a particular wire center are not needed, it must explain its basis for this determination and demonstrate how funding will otherwise be used to further the provision of supported services in that area; and

G. A statement as to how the proposed plans would not otherwise occur absent the receipt of high-cost support and that such support will be used in addition to any expenses the ETC would normally incur[.]

NWMC has submitted what it calls a five-year plan in Highly Confidential Appendix M to Mr. Bundridge's supplemental direct testimony and Highly Confidential Appendix P to his surrebuttal testimony. These plans are deficient under both the requirements of the FCC Order and the Missouri ETC rule. NWMC's plans fail to show that the funds will be used for the intended purposes and do not demonstrate how the high-cost universal service support will be used to improve coverage, service quality, or capacity in each wire center for which NWMC seeks designation. The plans only generally state "an annual average to support the new site construction and operation as well as advanced wireless services and capacity increases

throughout the requested ETC area.”<sup>19</sup> As stated by Mr. Brown, the plan in the appendices is “poorly described, difficult to understand, [and] poorly labeled,”<sup>20</sup> and the plan does not demonstrate with any specificity how the high-cost support will be used for the provision, maintenance, and upgrading of facilities and services within the service area in which ETC designation is granted. NWMC has also failed to provide coverage maps in sufficient detail to permit the Commission to determine the nature of NWMC’s signal enhancements and the number of rural consumers that will experience improvement to service levels reasonably comparable to those in the more urban areas.<sup>21</sup> Neither does the plan contain specific start and end dates for improvements. Appendix M does not indicate the level of investment and expense that NWMC would incur if it were not granted ETC status, so the Commission cannot determine how the proposed plans would not occur absent the receipt of high-cost support as required by 4 CSR 240-3.570(2)(A)3.G.

From NWMC’s application and responses to data requests, it appears that NWMC does not intend to make any investments within the exchange area served by Holway. In fact, Holway’s wire centers were not listed as benefitting from CDMA coverage with enhancements in NWMC’s five-year plan. Based on this information, it appears that NWMC does not intend to invest in Holway’s service area even with USF support.<sup>22</sup> Neither has NWMC provided any explanation as to why service improvements are not needed in that wire center nor any

---

<sup>19</sup>Surrebuttal Testimony of Roger Bundridge, p. 5; HC Appendix P.

<sup>20</sup>Brown Rebuttal, p. 29.

<sup>21</sup>Brown Rebuttal, p. 30.

<sup>22</sup>Warinner Rebuttal, p. 24.

demonstration of how funding will otherwise be used to further provision of supported services in that area. Until NWMC either demonstrates a plan for the Holway exchanges or explains why it is not necessary and how the funds will otherwise be used to support service in that area, it has not complied with the rule.

**B. NWMC has not satisfactorily demonstrated that it will satisfy consumer protection and service quality standards.**

4 CSR 240-3.570(2)(A)(8) states that an Application shall include, “A statement that the carrier will satisfy consumer privacy protection standards as provided in 47 CFR 64 Subpart U and service quality standards as applicable.” NWMC does not comply with this provision of the rule as it does not commit to follow the consumer privacy protection standards referenced in the federal rule. Holway Telephone, as an ILEC, is subject to strict standards regarding the use of Customer Proprietary Network Information (“CPNI”). As the Commission’s ETC rule indicates, wireless carriers who are designated as ETCs should be subject to the same CPNI standards as the ILECs.<sup>23</sup> NWMC has not demonstrated to the Commission that it intends to comply with the rule.

NWMC is not currently subject to the same service quality standards as ILECs such as Holway. In its application and testimony in this case, NWMC has stated that it agrees to comply with the Cellular Telecommunications and Internet Association (“CTIA”) Consumer Code for wireless service. The requirements of the CTIA Code are not service quality standards, however, and NWMC will not be subject to the same rigorous regulations as Holway or other Missouri ILECs. This is not “competitively neutral,” and unfairly discriminates against the wireline ILEC

---

<sup>23</sup>Warinner Rebuttal, p. 39.

when the wireless ETC is not required to follow the same standards as the ILEC.

NWMC witness Bundridge states in his Direct Testimony that traditional telephone quality of service standards were required to protect the consumer in an environment where the service provider is a monopoly provider.<sup>24</sup> Thus, he believes that it is only the lack of competition that creates an environment where quality of service is appropriately regulated. Holway, however, believes that in order to advance the FCC's concept of competitive neutrality, it is important for both wireline and wireless providers that receive federal USF support to be subject to the same quality of service requirements. The Joint Board stated in its *ETC Order* that "preemption from state regulation afforded under section 332 of the Act should not be equated with conditions that apply only to carriers that choose to seek ETC designation and universal service support."<sup>25</sup> In other words, an applicant requesting ETC status in order to receive federal USF support is not afforded exemption from conditions that are imposed on other ETC carriers merely because it is a wireless carrier. Further, while Section 332(c)(3) of the Act generally preempts states from regulating the rates and entry of CMRS providers, it specifically allows states to regulate the other terms and conditions of commercial mobile service. Additionally, the FCC has stated, "Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal

---

<sup>24</sup>Direct Testimony of Roger Bundridge, p. 19.

<sup>25</sup>Warinner Rebuttal, p. 37; *ETC Order*, ¶31.

availability of telecommunications services at affordable rates.”<sup>26</sup> In the *ETC Order*, the FCC stated that state commissions “may extend generally applicable, competitively neutral requirements that do not regulate rates or entry and that are consistent with sections 214 and 254 of the Act to all ETCs in order to preserve and advance universal service.”<sup>27</sup> Holway believes that the Commission has the authority to impose the same quality of service standards on wireless ETC applicants as are imposed on other ETCs and that the same quality of service standards should apply.<sup>28</sup>

**C. NWMC has not demonstrated that it will offer a local usage plan that is reasonably comparable to the ILEC plans.**

4 CSR 240-3.570(2)(A)(10) requires the ETC applicant to offer a local usage plan that is comparable to the ILEC plan in the area for which it seeks ETC designation. This requirement is consistent with the universal service principles in order to ensure that quality services are available at just, reasonable, and affordable rates.<sup>29</sup> NWMC has submitted plans to offer two Lifeline plans if ETC status is granted and USF monies are received and one local usage plan for \$17.95 per month.<sup>30</sup> The ILEC-equivalent plan would be available to all NWMC subscribers, and would include only the “traditional ILEC calling area for the subscriber’s address.”

---

<sup>26</sup>Warinner Rebuttal, p. 36-37; *Recommended Decision*, p. 15, footnote 84.

<sup>27</sup>*ETC Order*, ¶31.

<sup>28</sup>Warinner Rebuttal, p. 37. Holway also believes that the Commission should impose the same consumer protection and CPNI standards on wireless ETC applicants in order to advance the principle of competitive neutrality. Warinner Rebuttal, pp. 38-39.

<sup>29</sup>Warinner Rebuttal, p. 26.

<sup>30</sup>Bundrige Rebuttal, p. 9.

NWMC's plans are minute-of-use based and region specific. Since the details provided in testimony and responses to data requests did not provide adequate information on the per-minute rate when the customer is away from the home site, Holway assumes that the roaming rate of \$0.65 per minute would apply which would equate to \$39.00 per hour.<sup>31</sup> NWMC has not provided any indication that it will reduce rates after ETC designation other than to provide the discounted Lifeline plans. NWMC does not provide any enhanced or better quality of service for the specific essential telecommunications service that is used to determine eligibility for ETC status. To the contrary, it could be argued that throughout Holway's service area NWMC's quality of service would be far inferior to the service Holway's customers currently experience.<sup>32</sup> The only advantage offered by NWMC is mobility, but mobility is not a supported service. NWMC has not shown that it will provide a reasonably comparable local usage plan in the Holway exchanges.

**D. NWMC has not demonstrated that the grant of ETC designation to an additional carrier in a rural, high-cost area is in the public interest.**

NWMC has not sufficiently demonstrated that the grant of the application is consistent with the public interest, convenience and necessity as required by 4 CSR 240-3.570(2)(A)(5). As was explained above, NWMC has not demonstrated that the benefits that will result to rural consumers in the form of improvements to coverage, service quality or capacity will exceed the costs that will be created by its designation as an ETC.

One of the principles of universal service is to provide just, reasonable and affordable

---

<sup>31</sup>Warinner Rebuttal, p. 29.

<sup>32</sup>Warinner Rebuttal, p. 31.

rates for basic local telephone service comparable to the services and rates offered in urban areas. Holway's services and rates conform to that USF principle. USF support has allowed Holway to improve the services offered to its customers while maintaining basic local rates at affordable levels. If future USF support is impacted by the designation of additional ETCs, Holway's earnings will be negatively impacted and may require Holway to request increases in basic local rates that would cause their basic local rates to exceed those of urban areas.

There are no landline competitors in the exchanges of Holway because the customer base cannot sustain duplicative investments in landline facilities. Even with USF support, the existence of competing landline carriers would be jeopardized because the revenues would not cover the cost of providing service and neither carrier would be able to provide services at rates comparable with urban areas. In the case of CMRS providers, however, there is already robust competition in the exchange areas served by Holway, and the rates and services offered by the CMRS providers are already comparable with the rates and services offered by CMRS providers in urban areas.<sup>33</sup>

The public interest will not be served by granting ETC status to NWMC because wireless competition already exists without the necessity of providing USF support. Holway's customers will not be offered any universal service benefits that are not currently available. In addition, there is a potentially devastating impact on USF because with each approval of ETC designation, such as that of NWMC, every other wireless carrier will be encouraged to submit an ETC application and become eligible for USF support thus causing the fund to escalate to an unsustainable level.

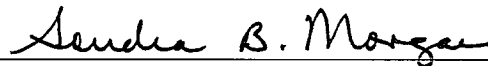
---

<sup>33</sup>Warinner Rebuttal, p. 45.

**Conclusion**

Holway does not believe that NWMC has demonstrated that it meets all of the federal and Missouri standards in order to qualify for ETC designation. NWMC has not met all of the criteria established by the Commission's ETC rule, nor has it demonstrated that the grant of ETC designation for multiple providers in high-cost areas is in the public interest. Because NWMC will not be required to comply with the same regulations and quality of service standards as Holway, the grant of ETC status to NWMC will be discriminatory. For all of these reasons, the Commission should deny NWMC's application ETC status.

Respectfully submitted,



---

W.R. England, III                      Mo. Bar 23975  
Sondra B. Morgan                      Mo. Bar 35482  
Brian T. McCartney                      Mo. Bar 47788  
Brydon, Swearingen & England P.C.  
312 East Capitol Avenue  
P.O. Box 456  
Jefferson City, MO 65102-0456  
(573) 635-7166  
(573) 634-7431 (fax)  
trip@brydonlaw.com (e-mail)  
smorgan@brydonlaw.com (e-mail)  
bmmcartney@brydonlaw.com (e-mail)

Attorneys for Holway Telephone Company



Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was sent by electronic submission or hand-delivered this 24th day of May, 2006 to:

Mr. Mike Dandino  
Office of the Public Counsel  
P.O. Box 2230  
Jefferson City, Missouri 65102

Mr. William Haas  
Missouri Public Service Commission  
P.O. Box 360  
Jefferson City, Missouri 65102

Paul DeFord  
Lathrop & Gage  
2345 Grand Blvd.  
Kansas City, MO 64106

Brent Stewart  
Stewart & Keevil  
4603 John Garry Drive, Suite 11  
Columbia, MO 65203

Robert Gryzmala  
AT&T Missouri  
One AT&T Center, Room 3518  
St. Louis, MO 63101

  
\_\_\_\_\_  
Sondra B. Morgan