

**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

STAFF’S PRETRIAL BRIEF

Introduction

Northwest Missouri Cellular Limited Partnership (NWMC) filed an application requesting the Missouri Public Service Commission to designate NWMC as a telecommunications carrier eligible to receive Federal universal support under 47 U.S.C. Section 214.

The parties agreed upon a list of three issues to be determined by the Commission. The Staff’s brief provides the Staff’s positions on those issues and provides citations to prefiled testimony in support of those positions.

Argument

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?

Staff Response: Yes. The supported services are listed in Federal Communications Commission (FCC) Rule 47 CFR Section 54.101 and are repeated in the Direct Testimony of NWMC witness Zentgraf at pages 6-9. The Direct Testimony of NWMC witness Bundridge states, at pages 3-5 that NWMC does, or will if granted ETC designation, provide the supported services. Mr. Bundridge also testifies, at pages 5-6, that NWMC will, upon the grant of its application, advertise such services and the charges for those services.

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's") *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?

Staff Response: No. The Staff's public interest analysis is addressed under Issue 3.

Issue 3. In addition to the standards set out in the FCC's *ETC Designation Order*, the Commission has promulgated 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 Commission's ETC rules?

Staff Response: NWMC does not meet all the requirements of the Commission's ETC rule

The Rebuttal Testimony of Staff witness McKinnie agrees at pages 5-7, that NWMC's application, as supported by its prefiled testimony and data request responses, meets the following requirements:

- (2)(A)1. – Intended use of high-cost support;
- (2)(A)3. subparagraphs A-F – 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;
- (2)(A)4. – Ability to remain functional in an emergency;
- (2)(A)6. – Commitment to advertise;
- (2)(A)7. – Commitment to provide Lifeline and Link Up;
- (2)(A)9. – Acknowledgement of equal access requirements; and
- (2)(B) - A commitment to follow and a copy of the Cellular Telecommunications and Internet Association (CTIA) code.
- (2)(C) – A plan outlining the method for handling unusual construction or installation charges

Mr. McKinnie's testimony explains that NWMC's application does not meet other requirements of the Commission's ETC rule. Paragraph (2) (A) 8 requires a statement that the carrier will satisfy consumer privacy protection standards; NWMC does not make this commitment (McKinnie Rebuttal, p. 8). Paragraph (2) (A) 10 requires the carrier's commitment to offer a local usage plan comparable to those offered by the incumbent local exchange carrier; NWMC offers a comparable plan but has not committed to continue offering a comparable plan (McKinnie Rebuttal pages 8-9). Paragraph (2)(A) 2 requires a two-year plan demonstrating, with specificity, that high-cost universal support shall only be used for the facilities and services

for which the support is intended; Staff cannot state for certain that all funds NWMC expects to receive in year 2 will be spent on appropriate items or that such support will be used in addition to any expenses that the ETC would normally incur as required by Paragraph (2) (A) 3 (G). (McKinnie Rebuttal, pages 10-11). HC Appendix P to the Surrebuttal Testimony of NWMC witness Bundridge shows that NWMC does not plan to spend all year 2 support for supported services and facilities.

Paragraph (2) (A) 5 requires a demonstration that the Commission's grant of the applicant's request for ETC designation would be consistent with the public interest, convenience and necessity.

On March 17, 2005, the FCC released a decision¹ regarding how the FCC would evaluate applications before the FCC when applying for ETC status, and recommending that the states use similar guidelines. The MO ETC Rule largely, but not entirely, follows the *Report and Order*.

Paragraph 41 of the *Report and Order* states:

41. In instances where the Commission has jurisdiction over an ETC applicant, the Commission in this Report and Order adopts the fact-specific public interest analysis it has developed in prior orders. First, the Commission will consider a variety of factors in the overall ETC determination, including the benefits of increased consumer choice, and the unique advantages and disadvantages of the competitor's service offering. Second, in areas where an ETC applicant seeks designation below the study area level of a rural telephone company, the Commission also will conduct a creamskimming analysis that compares the population density of each wire center in which the ETC applicant seeks designation against that of the wire centers in the study area in which the ETC applicant does not seek designation. Based on this analysis, the Commission will deny designation if it concludes that the potential for creamskimming is contrary to the public interest. The Commission plans to use this analysis to review future ETC applications and strongly encourages state commissions to consider the same factors in their public interest reviews. (footnotes omitted)

¹ Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, FCC-05-46. Rel. March 17, 2005. ("*Report & Order*")

The footnote to the “prior orders” the FCC references in the above paragraph refers to both the *Virginia Cellular ETC Designation Order* (FCC 03-338, CC Docket 96-45, Released January 22, 2004) and the *Highland Cellular ETC Designation Order* (FCC 04-37, CC Docket 96-45, Released April 12, 2004).

In considering whether designation of Virginia Cellular as an ETC will serve the public interest, we have considered whether the benefits of an additional ETC in the wire centers for which Virginia Cellular seeks designation outweigh any potential harms. We note that this balancing of benefits and costs is a fact-specific exercise. *In determining whether designation of a competitive ETC in a rural telephone company’s service area is in the public interest, we weigh the benefits of increased competitive choice, the impact of the designation 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 satisfy its obligation to serve the designated service areas within a reasonable time frame.* (italics added)

The same italicized phrase is contained in paragraph 22 of the *Highland Cellular Order*.

The items in the italicized phrase above were used in Staff’s determination of whether or not NWMC’s application is in the public interest. (McKinnie Rebuttal, pages 11-13)

1. “the benefits of increased competitive choice”

Consumers will benefit from having an additional choice of telecommunications providers in locations where NWMC does not currently offer service but would offer service after the implementation of their 5 year plan. Areas where NWMC currently does not offer service are identified as white spaces in Highly Confidential Appendix O attached to NWMC witness Reeves’ Direct Testimony. Those areas that will receive service after implementation of the 5 year plan are changed to green spaces in Highly Confidential Appendix H attached to Mr. Reeves Direct Testimony. Consumers who currently receive NWMC’s service will receive no additional benefit.

While NWMC provides information on this aspect of the public interest standard, the FCC noted that increased competition in of itself is not sufficient to meet the public interest standard. Paragraph 4 of the Virginia Cellular Order states:

We conclude that the value of increased competition, by itself, is not sufficient to satisfy the public interest test in rural areas.

2. “the impact of the designation on the universal service fund”

According to NWMC witness Zentgraf’s Direct Testimony, on page 15, lines 22-23, NWMC expects to receive \$1,468,614 annual in total USF support. NWMC witness Zentgraf states that NWMC’s expected portion of the fund is .0358% of the total high cost USF support.

As Ms. Zentgraf cites in her Direct Testimony, the FCC discussed the impact of each ETC designation in paragraph 54 of the *Report and Order*:

Indeed, given the size of the total high-cost fund — approximately \$3.8 billion a year — it is unlikely that any individual ETC designation would have a substantial impact on the overall size of the fund. (footnote omitted)

3. “the unique advantages and disadvantages of the competitor’s service offering”

NWMC cites the ability to make E-911 calls resulting from enhanced CDMA coverage as a public interest benefit of its application. Staff agrees that the ability to call 911 from a wireless telephone is a very important public interest and public safety consideration, and that the benefits from having an enhanced 911 (or “E-911”) system are significant. However, if a wireless carrier other than NWMC provides wireless coverage in areas where NWMC does not currently serve, residents already reap the benefits of calling 911. If the area already has a wireless carrier providing E-911 service, the benefits of granting ETC designation to NWMC are further reduced.

Unfortunately, it is difficult to determine the benefit of an additional wireless network. As wireless networks are prone to “dead spots” and coverage gaps, it is possible that a redundant network would improve E-911 or 911 coverage to areas within NWMC’s proposed ETC designation areas. There are certainly public interest benefits in improving 911 and E-911 coverage in this manner. However, NWMC has provided no evidence about the current status of 911 or E-911 wireless coverage in its requested ETC designation areas. Without this information, it is difficult to fully evaluate the increased benefits from NWMC’s proposed network expansion.

4. “any commitments made regarding quality of telephone service”

The MO ETC Rule itself has several areas regarding quality of service. For example, subsection (2)(B) requires prospective CMRS ETC applicants to commit to the consumer code of the Cellular Telecommunications and Internet Association (CTIA code). NWMC has committed to abiding by the CTIA code.

5. “the competitive ETC’s ability to satisfy its obligation to serve the designated service areas within a reasonable time frame”

NWMC is already serving much of its designated service area so this analysis is somewhat moot. However, NWMC has submitted a five year plan to indicate where network improvements will be made throughout their service area. While it does not appear there are large coverage gaps in the proposed ETC area, NWMC certainly works towards filling those gaps “within a reasonable time frame”.

There are still important considerations regarding commitments not made so far in the MO ETC Rule and information needing to be filed regarding the amount of money expected to

be spent in year 2 of the plan. Until those problems are addressed, Staff cannot say that NWMC has demonstrated their application is in the public interest. (McKinnie Rebuttal, pages 18-20)

Conclusion

The Staff recommends that the Commission reject NWMC's application for ETC designation. NWMC has not made all of the commitments necessary to satisfy the requirements of the Commission's ETC rule, nor has NWMC demonstrated that granting it ETC designation would be consistent with the public interest, convenience and necessity.

Respectfully submitted,

/s/ William K. Haas

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 24th day of May 2006.

/s/ William K. Haas

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