

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

IN THE MATTER OF THE	)	
APPLICATION OF J. EARL NELSON	)	APPLICATION NO. C-1003
FOR DECLARATORY RELIEF	)	
REGARDING CONTROL OF HAMILTON	)	APPLICATION DISMISSED
TELEPHONE COMPANY AND NEDELCO,	)	
INC.	)	

APPEARANCE FOR THE APPLICANT

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OPINION AND FINDINGS

I

Preliminary Matters

The Applicant, J. E. Nelson, ("Applicant" or "J. E. Nelson"), filed this original action for declaratory relief October 15, 1993. Notice of the Application was published in the Omaha Daily Record October 20, 1993. Respondent, Hamilton Telephone Company, Aurora, Nebraska, ("Hamilton"), filed its response to the Petition on November 19, 1993. Applicant then filed several motions for continuance which were granted, and this matter subsequently came before the Commission for hearing on June 3, 1994 in the Commission Hearing Room, Lincoln, Nebraska. Commissioner Landis chaired the proceeding. Also in attendance were Commissioners Johnson and Munnelly. Notice of hearing was sent to the parties on May 5, 1994 by the Commission's Executive Director, and a copy of this Notice was made a late-filed exhibit.

In this Petition, J. E. Nelson raises two threshold issues:  
(1) Should the Nebraska Public Service Commission, (the "Commission"), assert and accept jurisdiction in this matter

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involving the control of Nedelco, Inc. ("Nedelco"), a holding company which controls Hamilton, a regulated telecommunications common carrier? (2) Assuming the Commission takes jurisdiction, what person(s) under the determinable facts and applicable law, control(s) Hamilton and Nedelco? The relief sought by the Petitioner may be summarized as follows: J. E. Nelson asserts that he is in control of these Companies and seeks an Order from this Commission so declaring.

For its part, Hamilton has responded to the Petition by asserting the Commission lacks jurisdiction over Nedelco as a holding company and denies that the Commission has statutory or constitutional authority to determine the directors or officers of a common carrier such as Hamilton. Hamilton seeks dismissal of the Application.

## II Discussion

This Application consists of numerous pleadings, copies of correspondence, written testimony, copies of documents and exhibits introduced at the June 3, 1994 hearing. Reduced to its essence, the Application asks this Commission to determine whether J. E. Nelson is still master of the domain he built over many years. Briefly, Hamilton is a telephone common carrier operating in intrastate commerce and is subject to regulation by this Commission, as provided by Chapter 75, Articles 1 and 6 and Chapter 86, Article 8. As regards transfer of ownership of exchange carriers or their properties, specifically, Rule 002.26A of the Telecommunications Rules of the Nebraska Public Service Commission, Title 291, Nebraska Administrative Code, Chapter 5, states that: "No valid sale, assignment or transfer of one or more exchanges can be affected by transfer of the physical properties, or the assignment of stock resulting in a change in controlling interest until a joint application requesting such change is approved by the Commission and a certificate of public convenience and necessity has been issued to the new owner." Therefore, valid transfers of controlling interest in a telecommunications common carrier are subject to Commission approval. Transfers outside the scope of this rule are beyond the scope of this Commission's jurisdiction. It appears from the record that although the controlling interest of Nedelco has changed, that of Hamilton has not. Accordingly, it appears this Commission, in fact and law, lacks jurisdiction to act favorably upon this Application. Nevertheless, for clarification purposes,

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a discussion of the factual issues presented at the June 3, 1994 hearing is in order.

In 1964, the Commission, in Order No. 24586, permitted Nedelco to obtain control of Hamilton; and Hamilton has been subject to Nedelco's control since then. Examination of the various documents contained in this Application indicate that Nedelco now owns 3,132 shares of Hamilton stock (i.e. 96.7% of the total shares). In 1964, in the stock exchange described above, J. E. Nelson exchanged 1,495 shares of Hamilton stock for Nedelco stock of equal value.

The relationship between Nedelco and Hamilton is a threshold issue for this Commission to consider. J. E. Nelson asserts he still has control of Nedelco and hence, also Hamilton. In our view, the issue of control of Nedelco can be established by examining a particular transaction which occurred in 1989.

Since 1965, Nedelco has continuously been the controlling stockholder of Hamilton. Filings with this Commission reflect such ownership, as well as stock records, consolidated Federal Income Tax Returns, financial statements, and corporate minutes of both corporations. In December, 1970, and in various transactions thereafter, different kinds of common and preferred stock of Nedelco were issued, exchanged, gifted and otherwise rearranged within the family of J. Earl Nelson and Elsie Nelson. During this period, no significant changes were made in the ownership of Hamilton. Nedelco remained, and still remains, the controlling stockholder of Hamilton.

Records in this Application show that on August 16, 1977, at the annual meeting of shareholders of Nedelco, the following Board of Directors was elected: J. E. Nelson, Elsie Nelson, Philip C. Nelson, James E. Nelson, and Nancy K. Nelson. At subsequent annual meetings of Nedelco held in August of the years following, the aforementioned five Directors were all re-elected to the Board of Directors of Nedelco.

On December 15, 1989, Applicant J. E. Nelson and his wife, Elsie Nelson, as Trustees of the Julius E. Nelson Revocable Trust and the Elsie K. Nelson Revocable Trust, executed and delivered to the Board of Directors of Nedelco a written offer wherein the Trustees requested Nedelco to redeem all of the preferred stock owned by their Trusts for a total cash price of \$835,000.00. Within that offer, Mr. and Mrs. Nelson acknowledged that the

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Nedelco Board of Directors would meet shortly to consider the offer and that Mr. and Mrs. Nelson, as Directors of Nedelco, would or would not participate in the Board's deliberations about the offer as determined by the other three Board members. On December 20, 1989, a special meeting of the Board of Directors was held via conference call. Present at the meeting were, among others, the following individuals, being all of the Directors of Nedelco: J. E. Nelson, Elsie Nelson, Philip C. Nelson, James E. Nelson, and Nancy K. Nelson. At such meeting, the December 15, 1989 offer of the Julius E. Nelson Revocable Trust and Elsie K. Nelson Revocable Trust to redeem all preferred stock in Nedelco was discussed and evaluated. Afterward, a resolution was introduced and adopted by a three to zero vote, with J. E. Nelson and Elsie Nelson abstaining. The resolution accepted the redemption offer proposed by the senior Nelsons as Trustees of their respective revocable trusts. On January 23, 1990, at a special meeting of the Board of Directors of Nedelco, the Board accepted the resignations of J. E. Nelson and Elsie Nelson from the Board of Directors and elected new officers of the Company. The officers elected were: President, Philip C. Nelson; Vice-President, James E. Nelson; Vice-President of Corporate Development, Jerald D. Warren; and Secretary/Treasurer, Nancy K. Nelson.

The Applicant, in his Petition, raises several points which should be addressed by this Commission. Applicant contends that there can be no voting among Nedelco shareholders because the Applicant retained voting control by virtue of a common stock transfer to Nedelco on December 15, 1970. Therefore, no Nedelco shareholder supposedly held any voting stock; and therefore, no new directors could have been elected. This, however, is contradicted by a document under the signature of the Applicant's own hand from the annual meeting of shareholders held August 16, 1977 which states that the following shareholders holding preferred stock were present and in person, those being: J. E. Nelson and Elsie Nelson; and then in addition, another shareholder holding common stock was present and in person, that being Philip C. Nelson. Further, the following individuals were duly elected to the Board of Directors of Nedelco. Those individuals were: J. E. Nelson, Elsie Nelson, Philip Nelson, James Nelson and Nancy Nelson. This document was signed by both Elsie Nelson and by J. E. Nelson, as President.

It is apparent from the face of the Company's own documentation as signed by Mr. Nelson himself, that the Board of

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Directors, as of August 16, 1977, was made up of five individuals, including himself and his wife, Elsie, with the remaining Board of Directors consisting of his children, Philip, James, and Nancy Nelson. The record reflects that on December 15, 1989, J. E. and Elsie Nelson, as Trustees of their respective Trusts, presented an offer to the Board of Directors of Nedelco wherein they requested that the Company redeem all of the preferred stock owned by their Trust for a total cash price of \$835,000.00.

Subsequently, on December 20, 1989, at a special meeting of the Board of Directors of Nedelco, the offer of redemption was accepted. Also, on December 20, 1989, J. E. Nelson and Elsie Nelson executed, as Trustees of their respective Trusts, stock assignments transferring to Nedelco a total of 87,456 shares of preferred stock in Nedelco. The redemption of the Nelson's preferred stock interest was completed and the cash purchase price paid to them in December, 1989. Mr. Nelson has contended in his Petition that this meeting was void, claiming that the children, Philip, Nancy, and James were not Directors; and that, therefore, there could not have been a Board of Director's meeting to which this matter could have been brought for consideration. However, a letter dated December 15, 1989 from Julius E. Nelson and Elsie Nelson is addressed to the Board of Directors of Nedelco. It strikes us as unlikely that if J. E. and Elsie Nelson were the only members of the Board of Nedelco that they would write a letter to themselves. Further, this letter offering the transaction earlier described makes clear that it was addressed to the other Board members, they being: Philip, James and Nancy. This is evidenced by the final sentence of that letter which states: "The undersigned individuals, as Directors of Nedelco, will participate or not (sic) in the Board's deliberations on the subject, as determined by the other three Board members." This letter was signed by both J. E. Nelson and Elsie Nelson. This establishes conclusively that at this time in 1989, the Board of Directors consisted of the five individuals described previously.

The minutes of the special meeting of the Board of Directors held December 20, 1989, were signed by the Vice-President of Nedelco, stating that the members of the Board then discussed at length the proposed redemption offer in light of the appraisal of the preferred stock, the legal analysis from corporate counsel as to the preferred stock, certain other items; and that then upon motion duly made by Nancy Nelson and seconded by James Nelson,

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the Board unanimously adopted the resolution to accept the offer. This vote was abstained from by J. E. Nelson and Elsie Nelson. Further, documentation establishes signatures by J. E. Nelson and by Elsie Nelson regarding their Revocable Trusts which assign their stock to Nedelco for value received.

All of these things establish that J. E. Nelson and his wife, Elsie, gave up their interest and control in Nedelco in 1989 as part of an estate plan. Because of this act by the Nelsons, J. E. Nelson does not have control of Nedelco and thereby does not have control of Hamilton. He is not the President or Chief Executive Officer of either of those two Corporations and has not been so since 1989.

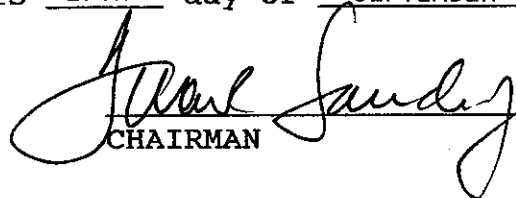
It is unfortunate that the transfer of interests in the 1989 transaction has led to disappointments and disagreements as is apparent from the contentions in the application. However, in spite of the stresses which have occurred, regrettable as they are, we can look only to the facts available to us and render judgment based on those facts.

The facts and law demonstrate that the remedy sought by the Applicant cannot be provided by this Commission, and the Application should be dismissed.

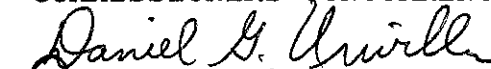

ORDER

IT IS, THEREFORE, ORDERED by the Nebraska Public Service Commission that Application No. C-1003 be, and it is hereby, dismissed.

MADE AND ENTERED this 27TH day of SEPTEMBER, 1994  
at Lincoln, Nebraska.

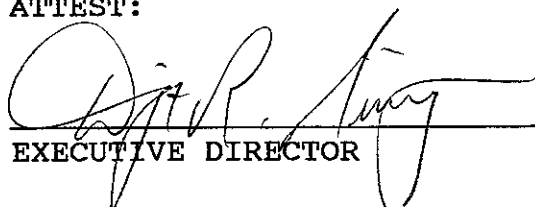
  
CHAIRMAN

COMMISSIONERS CONCURRING:

//s//Rod Johnson  
//s//Frank E. Landis  
//s//James Munnelly

ATTEST:

  
EXECUTIVE DIRECTOR