

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Application) Application No. C-1889
of GCC License Corporation seeking)
designation as an eligible tele-) ORDER DENYING MOTION FOR
communications carrier (ETC) that) RECONSIDERATION
may receive universal service)
support.) Entered: February 21, 2001

BY THE COMMISSION:

On November 21, 2000, the Commission granted the application of GCC License Corporation, a wholly-owned subsidiary of Western Wireless, (hereinafter, Western Wireless or Respondent) to be designated as an eligible telecommunications carrier (ETC) pursuant to Section 214(e)(2) of the Federal Communications Act, as amended. On December 1, 2000, a motion for reconsideration and request for oral argument was filed by Arlington Telephone Company; Clarks Telecommunications Co.; Consolidated Telco, Inc.; Eastern Nebraska Telephone Company; Great Plains Communications, Inc.; Hamilton Telephone Company; Hartington Telecommunications, Inc.; Hershey Cooperative Telephone Company; Hooper Telephone Company; K & M Telephone Company; NebCom Inc.; Nebraska Central Telephone Company; Northeast Nebraska Telephone Company; Rock County Telephone Company; Southeast Nebraska Telephone Co.; Stanton Telecom Inc.; and Blair Telephone Company (collectively, the Independents). On December 14, 2000, the executive director of the Commission sent by first class, a letter to all partes interested, a notice of the oral arguments. On December 15, 2000, Western Wireless filed a response to the motion for reconsideration. The oral argument was held on December 19, 2000 in the Commission Hearing Room, 1200 N Street, Lincoln, Nebraska. Appearing for the Independents at the hearing was Kelly R. Dahl. The Respondents were represented by their attorney, Mark J. Ayotte. Michael T. Loeffler appeared for the Commission.

In their arguments, the Independents argue:

- The Commission, in an earlier order, in another docket,
- Docket No. C-1604, made a policy decision that any ETC
- applications would be granted only if the applicant
- proved that the designation was in the public interest
- "by clear and convincing evidence."
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- The Commission failed to adopt public interest conditions
- prior to designating Western Wireless as an ETC.
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- The public interest test adopted by the Commission
 - eliminates the public interest requirement.
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 - The Commission's order constituted inappropriate rulemaking.
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 - The Commission failed to consider the effect of multiple
 - ETCs in rural areas and continued to assert that the
 - Independents presented credible evidence that such designation is contrary to the public interest.
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- The designation of Western Wireless as an ETC was
 - contrary to the public interest because the Commission
 - has asserted inadequate jurisdiction over the ETC-designate, Western Wireless.

The Independents propose that, as a result, the Commission vacate its earlier order.

Based on our review of the record, and a review of the briefs in support and in opposition to the motion for reconsideration, the Commission finds that the Independents' motion for reconsideration and vacation of our prior order should be, and is hereby, denied.

We start our analysis by noting that there exists an extensive record in this proceeding. Parties engaged in a series of prefiled testimony, briefs and arguments. The Commission held lengthy public hearings. Finally, the parties filed extensive and thorough post-hearing briefs.

The first argument advanced by the Independents in support of their motion is that the Commission failed to apply a "clear and convincing" evidentiary standard to the entirety of the application submitted by Western Wireless. In support of that contention, the Independents cite the order we entered in Docket No. C-1604. Our order in that docket included eight separate paragraphs that detailed policy statements for the designation of ETCs. Only in paragraph 8, did we include any language regarding the evidentiary standard. We said,

"...[¶] 8. We do not **designate** at this time service areas for other carriers, such as competitive local exchange carrier (CLECs) or wireless providers. When a petition is presented to the Commission by such a

provider to obtain ETC status, the appropriate service areas of non-incumbent local exchange carriers (ILECs) will be defined. It must be demonstrated by clear and convincing evidence that **designation** is in the public interest."⁽¹⁾ [Emphasis added.]

As we pointed out in our November 21, 2000, order, the evidentiary standard clearly goes to the designation of service areas. In our November 21, 2000, order, we discussed this link to the legislative history on the federal Telecommunications Act of 1996⁽²⁾. This evidentiary standard is critical as applied to the designation of a service area because as we pointed out,

We find and affirm here, that the evidentiary standard of a "clear and convincing" finding relates only to that part of the application dealing with the designation of a service area and a finding that the designated service area serves the public interest in that the service area is significantly large to promote access to the proposed ETC's services by all residents and that the service area is not so defined as to allow the incoming ETC to siphon off the incumbent carrier's most profitable or least costly customers. Such a finding is consistent with the intent of Congress, the meaning of the findings in Docket C-1604, and our findings in the instant case.⁽³⁾

We once more affirm, and find, that the evidentiary standard, which the Independents assert should apply to the entire application, applies only to the designation of the service area.

We combine the arguments on the application of the public interest test since their analysis closely overlaps (arguments 2, 3 and 5). The Independents argue that the Commission failed to adopt public interest standards prior to the designation of Western Wireless as an ETC. More accurately, their complaint is that the Commission did not adopt the standards offered by the Independents. In fact, the Commission thoroughly examined every aspect of the public interest test. We researched the origin of the public interest requirement in the federal Act and found that the major concern of Congress was that the service area served by the ETC-designate was large enough so that the benefits of competition flowed to a large area to prevent the practice of "cherry-picking."⁽⁴⁾ We reiterate that the public interest test was not designed to protect rural carriers but to ensure that the persons in the rural areas had the greatest chance of securing the benefits of competition.

Further, we acknowledged that the mere provision of additional competition was insufficient to meet the public interest test.⁽⁵⁾ We further found that the public interest requirement "centered" on the issue on the size of the service area of the ETC applicant. However, we did not end our analysis there. Instead, we examined the evidence offered by the Independents that there was a public interest question. The evidence offered by the Independents on the public interest test came largely in the contents and findings of a report from the executive director of the Nebraska Rural Development Commission

(hereinafter the Macke Report). The Macke Report bases some of its conclusions on the unproven presumption that competition in some counties of certain populations would harm the existing rural carriers. We in the previous paragraph of this order addressed the concerns of the testimony. The federal Act envisions the encouragement of competition and its benefits, not the protection of the interests of existing rural carriers. If the latter were to be the case, there could never be any competition in the rural areas - a direct contradiction to the objectives of the federal Act.

We examined the Macke Report in great detail. After careful consideration, we found little merit in its conclusions because of flawed assumptions that were not based in state or federal law, the acknowledgment of the report's author on his lack of expertise to evaluate the capabilities of wireless technology and the questionable probative value of the report. The report makes numerous assumptions without substantive justification. Further, the report would have us consider the question of public interest using standards that are not found in the federal Act.⁽⁶⁾ The Independents did not give any additional evidence or reason to add any evidentiary weight to the Macke Report either in their supporting brief nor in their oral argument.

But our analysis of the public interest component did not end there. We found credible evidence, unrefuted by the Independents, that the offerings of Western Wireless provided important and unique benefits to rural customers, including mobility, an expanded calling area and increased choice.

The determination of a public interest must necessarily be a balancing act of all factors presented by opposing parties in an adversarial procedure. All parties to this application gave ample evidence to support their positions. But there is no question that the great weight of the evidence considered demonstrated that the public interest component was met by the respondent/applicant.

The Independents assert that the Commission eliminates the public interest requirement from the Act. This assertion is unfounded. To support their analysis, the Independents start with an inaccurate presupposition, namely that, "The Commission's test relates solely to the size of the service area an applicant seeks to serve in the rural ILEC territories."⁽⁷⁾ We have already explained that while the Commission did include an analysis on the size of the service area in its order, the Commission also considered extensively the benefits of the offerings by Western Wireless, the effects of a second ETC, the evidence offered by the Independents and the ability of the Commission to provide meaningful oversight (as discussed below). Further, we considered and dismissed the attempts of other intervenors to introduce requirements for an ETC not supported by the Act. We recognized and met our duty under federal law to designate ETC status to telecommunications carriers on a technology-neutral basis.

Next, the Independents allege that the Commission's designation of Western Wireless constituted inappropriate rulemaking. The Independents' analysis is based, in part, on the application of *Neb. Rev. Stat.* §75-110 which states:

The Public Service Commission shall adopt and promulgate rules and regulations for the government of its proceedings, including rules of procedure for notice and hearing. The Commission shall adopt and promulgate rules and regulations which the commission deems necessary to regulate persons within the Commission's jurisdiction. The Commission shall not take any action affecting persons subject to the commission's jurisdiction unless such action is taken pursuant to a rule, regulation, or statute. *Neb. Rev. Stat. §75-110 (Reissue 1996)*.

In oral arguments, the Independents also cited *Neb. Rev. Stat.*

§86-1406 which provides,

86-1406. Fund; commission; powers and duties. The commission shall determine the standards and procedures reasonably necessary, adopt rules and regulations as reasonably required, and enter into such contracts with other agencies or private organizations or entities as may be reasonably necessary to efficiently develop, implement, and operate the fund. *Neb. Rev. Stat. §86-1406* (Reissue 1999).

Section 86-1406 was enacted in 1997 when the Legislature authorized the creation of the Nebraska Universal Service Fund (NUSF). The requirement to adopt rules and regulations (as reasonably required) pertains only to the establishment of the NUSF and not to the designation of ETCs.

Section 75-110 contains three requirements. First, the law requires the Commission to promulgate and adopt rules of procedure. These rules have been adopted and are codified in Chapter 291⁽⁸⁾. Second, the Commission is required to adopt and promulgate rules and regulations which the Commission deems necessary to regulate persons within the Commission's jurisdiction. These rules, too, have been promulgated and adopted within Chapter 291⁽⁹⁾. Third, the Commission is prohibited from taking any action affecting persons subject to the Commission's jurisdiction unless such action is taken pursuant to a rule, regulation or statute. Since the Commission has long since complied with the first two requirements, we presume that it is this last sentence that is the basis of the Independents' argument.

We note that the Commission designated Western Wireless as an ETC pursuant to Commission rules and federal law. The federal Act, in its relevant language, states:

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).⁽¹⁰⁾

Our designation of Western Wireless is clearly action taken pursuant to a federal statute and is therefore lawful under § 75-110. Additionally, the Commission has established in Docket No. C-1604, those policies that it would follow in the designation of an ETC. In the October 15, 1997 order in that docket, we stated:

¶4. As recommended by numerous commenters, we do not limit ETC designation to just incumbent LECs. All carriers, including wireless providers that satisfy the criteria set forth in the Telecommunications Act of 1996 and in FCC rules, may be designated an ETC.

¶5. We believe that to be designated as an ETC, no criteria other than that set forth by the FCC and the Act should be required.⁽¹¹⁾

Inasmuch as our decision to designate Western Wireless as an ETC was made pursuant to federal law, is consistent with the FCC directives to designate an ETC with technological-neutrality, and conforms to the rules of this Commission, we find that the argument of the Independents should be dismissed.

The Independents further argue that the designation of Western Wireless as an ETC was contrary to the public interest because the Commission has asserted inadequate jurisdiction over the ETC-designate, Western Wireless. This argument is without merit. We

need only cite the conclusions and orders in our November 21, 2000, order:

27. In response to questioning by the Commission, the applicant indicated that it would voluntarily submit to the Commission's jurisdiction for service quality, and tariff filing of rates and services. We believe that jurisdiction over these issues, as well as information regarding the level of access rates charged by the carrier, is proper and necessary to meet the objectives of the Universal Service Fund Act. This jurisdiction, we note falls short of, and does not include "entry and rate" regulation.

28. The Commission finds that it has the necessary powers to enforce its jurisdiction over any carrier receiving universal service fund support. As state law indicates:

The commission shall have authority and power to issue orders carrying out its [Nebraska Universal Service Fund] responsibilities and ...[t]he commission shall have the authority to review the compliance of any eligible telecommunications company receiving support for continued compliance with any such order and may withhold all or a portion of funds to be distributed from any telecommunications company failing to continue compliance with its order.⁽¹²⁾

These responsibilities include service quality standards, ensuring that the offerings of an ETC meet Commission requirements including, but not limited to, advertising and service offerings, minimal technical requirements, local usage requirements, etc., established either by federal or state law, or established by order of the Commission either generally, or by the Universal Service Department within the Commission.⁽¹³⁾

Based on the applicant's testimony, state law, and our policies governing disbursements from the NUSF, we affirm that the Commission has the necessary and proper authority and jurisdiction over eligible telecommunications carriers sufficient to protect the public interest.

After consideration of all the arguments, the Commission finds that the motion for reconsideration should be denied.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the motion for reconsideration should be, and is hereby, denied.

MADE AND ENTERED in Lincoln, Nebraska on this 21st day of February, 2001.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chairman

ATTEST:

Executive Director

1.

In the Matter of the Application of the Nebraska Public Service Commission on its own motion to Designate Telecommunications Carriers Eligible to Receive Federal Universal Service Support, Docket C-1604, October 15, 1997, (hereinafter Docket C-1604) at 3.

2. See comments of Senator

Dorgan (N.D.) on the Telecommunications Act, Floor of U.S. Senate, *141 Cong. Rec.*, S.7950, (June 8, 1995).

3. *Order Granting ETC Status and Issuing Findings*, Docket C-1889, November 21, 2000, (hereinafter, November 21 Order) at ¶11.

4. See *November 21 Order*, at ¶15.

5. *Id.*, at ¶14.

6. See discussion in the *November 21 Order*, at ¶18-21.

7. Independents Brief on Motion for Reconsideration, at 4-5.

8. See Neb. Admin. R. & Regs., Title 291, Ch. 1, Nebraska Public Service

Commission, Rules of Commission Procedure.

9. See Neb. Admin. R. & Regs., Title 291, Ch. 5, Nebraska Public Service

Commission, Telecommunications Rules and Regulations.

10. 47 U.S.C. 214(e)(1).

11. Docket C-1604, October 15, 1997, at 2.

12. *Neb. Rev. Stat. § 86-1045 (Reissue 1999)*.

13. *November 21*

Order, at 12.

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