

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the application of)	
NPI-OMNIPOINT WIRELESS, LLC,)	
for designation as an eligible telecommunications)	Case No. U-13714
carrier pursuant to Section 214(e)(6) of the)	
Communications Act of 1934.)	
_____)	

At the August 26, 2003 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. J. Peter Lark, Chair
Hon. Robert B. Nelson, Commissioner
Hon. Laura Chappelle, Commissioner

OPINION AND ORDER

I.

HISTORY OF PROCEEDINGS

On March 3, 2003, NPI-Omnipoint Wireless, LLC, (NPI) filed an application seeking designation as an eligible telecommunications carrier (ETC) under Section 214(e)(6) of the federal Communications Act of 1934, as amended, 47 USC 214(e)(6) (federal Act) and Sections 201 and 203 of the Michigan Telecommunications Act, MCL 484.2101 et seq. (MTA). If granted, designation as an ETC would permit NPI to receive universal service support in Michigan.

Several parties petitioned to participate in the proceeding. On May 6, 2003, the Commission Staff (Staff) filed a notice of appearance. On May 21, 2003, CenturyTel of Michigan, Inc., CenturyTel Midwest-Michigan, Inc., CenturyTel of Northern Michigan, Inc., and CenturyTel of

Upper Michigan, Inc., (CenturyTel) jointly filed a petition to intervene. Also on May 21, 2003, Hiawatha Telephone Company, Chippewa County Telephone Company, Midway Telephone Company, and Ontonagon County Telephone Company (Hiawatha) jointly petitioned to intervene. The Michigan Exchange Carriers Association, Inc., (MECA), a voluntary association of 33 small incumbent local exchange carriers (ILECs) in Michigan, also filed a petition. On May 28, 2003, AT&T Communications of Michigan, Inc., and TCG Detroit (AT&T) filed a notice of intent to participate.

On May 28, 2003, a pre-hearing conference was conducted by Administrative Law Judge Mark E. Cummins (ALJ). NPI, CenturyTel, Hiawatha, MECA, AT&T, and the Staff attended. The ALJ ordered the parties to file their direct testimony by June 10, 2003 and rebuttal testimony by June 23, 2003. Cross-examination of witnesses was to take place on July 7, 2003,¹ with a briefing schedule to be determined thereafter. In order to meet the 180-day Federal Communications Commission (FCC) guideline for state commissions to act on ETC applications, the Commission agreed to read the record in this proceeding.

Several parties filed testimony. NPI filed the direct and rebuttal testimony of Frank Noverr, the Managing Director of NPI. CenturyTel filed the direct and rebuttal testimony of Ted M. Hankins, its Director of State Government Relations. Hiawatha filed the direct and rebuttal testimony of Robert W. Orent, President and CEO of Hiawatha Communications, Inc. The Staff filed the direct testimony of Daniel J. Kearney, Supervisor of the Operations Section of the Commission's Telecommunications Division.

On July 8, 2003, the ALJ conducted an evidentiary hearing. All testimony was bound into the record by stipulation of the parties and cross-examination of witnesses was waived. NPI,

¹ This date was later moved to July 8, 2003.

CenturyTel, MECA, and the Staff filed briefs and reply briefs on July 23 and August 1, 2003, respectively.

II.

POSITIONS OF THE PARTIES

There are two issues in this proceeding. First is whether NPI should be designated as an ETC for purposes of receiving universal service support. Second, if NPI is granted ETC status by the Commission, for what service area(s) should NPI's status be granted.

NPI

NPI provides wireless telecommunications service to over 35,000 Michigan customers through the use of "GSM" technology. Its service area encompasses the Alpena, Grand Rapids, Mt. Pleasant, Muskegon, Petoskey, Saginaw, Sault Ste. Marie, and Traverse City areas.

NPI maintains that it is committed to making the necessary investments to provide high quality service in its service area. NPI further avers that it possesses the necessary financial, managerial, and technical qualifications to provide wireless service and that it provides all the services supported by universal service mechanisms. NPI says that it advertises the availability of those services and charges in media of general distribution as required by federal law.

NPI argues that its application is in the public interest. In support of its position, NPI notes that the FCC has determined that wireless providers may be designated as ETCs.² NPI further notes that the Commission has already determined that ETC designation of wireless carriers can be

² See, NPI application, p. 5, citing, *Federal-State Joint Board on Universal Service*, Report and Order, CC Docket No. 96-45, 12 FCCR 8776, 8858-59, ¶¶ 145-47 (1997).

in the public interest.³ NPI asserts that both the FCC and the Commission recognize that designating competitive ETCs promotes competition and benefits consumers in rural and high-cost areas by increasing customer choice, promoting innovation and new technologies, and encouraging affordable service.⁴ NPI claims that it is dedicated to serving rural areas in Michigan where there are few choices for local telecommunications services. NPI claims that its customers will benefit from having an expanded local calling area, making intrastate toll calls more affordable.

NPI also requests that the Commission establish “service areas” for purposes of determining universal service support. NPI asserts that the federal Communications Act of 1934, as amended, allows the Commission to designate service areas for purposes of determining universal service support obligations and support mechanisms.⁵ NPI requests that its service area be NPI’s service area for purposes of determining universal support obligations and support mechanisms. NPI specifically requests ETC status in each of the counties covered by its service area and the exchanges of the landline telephone companies located therein.

CenturyTel

CenturyTel argues that NPI’s application must be denied. CenturyTel believes that NPI’s application does not meet the requirements for the granting of ETC status under 47 USC 214(e), because granting ETC status to NPI would not be in the public interest. CenturyTel asserts that

³ See, NPI application, p. 5, citing the November 20, 2001 order in Case No. U-13145.

⁴ See, NPI application, p. 6, citing, *Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carriers in the State of Wyoming; Federal-State Joint Board on Universal Service*, Memorandum Opinion and Order, CC Docket No. 96-45, 12 FCCR 48, ¶ 17 (2000); *In re Application of RFB Cellular, Inc. for Designation as an Eligible Telecommunications Carrier*, Case No. U-13145, p. 4 (November 20, 2001).

⁵ See, NPI’s application, p. 5, citing, 47 USC 214(e)(2) and (5).

NPI has been successful at providing service without the need for universal service support. It argues that giving NPI universal service funds would give NPI an unearned windfall, would increase charges for Michigan customers, and would ultimately jeopardize the universal service support mechanism altogether.

CenturyTel claims that NPI should not be granted ETC status because, as a wireless carrier, NPI's costs are unrelated to landline costs from which universal service support is derived. CenturyTel also asserts that it is held to higher service standards and regulatory obligations than wireless carriers, which result in higher operating costs for CenturyTel. CenturyTel specifically objects to the fact that NPI has lower costs than CenturyTel, but would receive the same universal service support. CenturyTel argues that granting NPI ETC status would create an uneven playing field, biased against higher cost providers, and could actually reduce competition.

CenturyTel also expresses concern over the fact that wireless carriers are not subject to the same regulatory oversight as incumbent carriers. CenturyTel contends that while wireless carriers are seeking support from a regulatory cost recovery mechanism, the Commission has no regulatory oversight over these carriers to ensure that the monies are used to advance universal service. CenturyTel contends that this uneven playing field, and the fact that the benefits of granting wireless carriers ETC status do not exceed the costs, means that granting NPI's application would not be in the public interest.

CenturyTel also believes that it would be premature for the Commission to grant any ETC applications while the FCC is in the process of considering new rules for the granting of ETC

status to competitive carriers.⁶ CenturyTel suggests waiting until the FCC makes its pronouncements regarding any changes.

Furthermore, if the Commission decides to grant NPI's application, then CenturyTel requests that NPI's ETC status be conditioned on NPI's compliance with regulatory safeguards to ensure a level competitive playing field with rural providers. CenturyTel also argues that allowing NPI to have ETC status in only a portion of a rural ILEC's service area is contrary to the public interest, and that the Commission should not redefine CenturyTel's rural ILEC service area.

Hiawatha

For the reasons stated in CenturyTel's petition to intervene, Hiawatha believes that NPI's application should be denied. Hiawatha asserts that it provides rural telecommunications services and would be economically harmed if NPI's application were granted.

MECA

MECA also opposes NPI's application for designation as an ETC. MECA asserts that it and its members, many of whom provide service to rural areas of the state, will suffer from a loss of universal service support. MECA's asserts that a loss of universal service funds will affect small rural telecommunications providers' ability to maintain and invest in the infrastructure needed to serve high-cost areas.

MECA argues that NPI's application cannot be granted unless granting the application is in the public interest. MECA asserts that merely providing all universal service supported services does not mean that an applicant's application is in the public interest. MECA alleges that the

⁶ See, Public Notice, *Federal-State Joint Board on Universal Service Seeks Comment on Certain of the Commission's Rules Relating to High-Cost Universal Service Support and the ETC Designation Process*, FCC 03J-1, CC Docket No. 96-45 (February 7, 2003).

further public interest finding should be based upon universal service purposes and principles. MECA asserts that Congress, in placing this added requirement, did not believe that the public interest would always be furthered by encouraging competition in rural areas.

MECA claims that Congress did not intend universal service support to be a subsidy program. Rather, MECA argues, Congress intended universal service support to provide for cost recovery in order to promote infrastructure investment in high-cost rural areas where providing the same quality service at affordable rates comparable to urban areas is not suitable for carriers. MECA argues that without this support, high-cost investment would not have occurred in the past and will not occur in the future. MECA sees infrastructure investment as the primary goal of the universal service program.

MECA argues that the only providers of high quality, facilities-based services throughout their respective service areas are the rural ILECs. MECA claims that once a rural ILEC loses the ability or incentive to continue investing in its network, then rural areas may be deprived of affordable, high quality telecommunications services. MECA asserts that lack of sufficient funding will also affect the deployment of advanced services to consumers, such as schools, libraries, and health care facilities.

Consequently, the granting of ETC status to competitive carriers in areas served by rural carriers, MECA contends, must be properly managed to foster the goals of the federal Act. MECA claims that if the overall demand for funding grows to an unsustainable level, then support payments will be frozen or curtailed, resulting in serious operating issues for many rural telephone companies. MECA claims that this would result in reductions in service quality, higher rates, and perhaps even financial failure of rural companies that serve as the “lifeline” for many remote

customers. MECA argues that the proliferation of “uneconomic competition” in rural areas could jeopardize rural telecommunications services altogether.

MECA also asserts that state commissions have placed far too great an emphasis on the benefits of competition when deciding ETC applications for rural service areas. MECA claims that subsidized competition does not serve the public interest. MECA believes that this over-emphasis has been to the detriment of ensuring that all consumers will retain and gain access to high quality, affordable telecommunications services, including advanced services, on a comparable basis to those available in urban areas. Because of this, MECA believes that the Commission must establish a set of principles to guide its decisions on ETC applications affecting rural areas.

To assist the Commission in establishing this set of principles, MECA offers its own. First, rural consumers should receive access to affordable, high quality telecommunications and information services, including advanced services that are reasonably comparable to those in urban areas and at reasonably comparable prices. Second, high-cost support should not be used as an incentive for uneconomic competition in areas served by rural carriers. Third, universal service funds are a scarce national resource that telephone companies must carefully manage to serve the public interest. Fourth, rural universal service support reflects the difference between the cost of serving high-cost rural areas and the rate levels mandated by policymakers. Fifth, the public interest is served only when the benefits from supporting multiple carriers exceed the costs of supporting multiple networks. Sixth, in areas where costs of supporting multiple networks exceed the public benefits from supporting multiple carriers, the public interest dictates providing support to a single carrier that provides critical telecommunications infrastructure. Seventh, the cost of market failure in high-cost rural Michigan could be severe.

In addition to the guiding set of public interest principles, MECA believes the Commission should create a standard set of minimum qualifications, requirements, and policies to be applied when considering ETC applications for rural service areas. MECA believes that using such a template would help the Commission determine whether the public interest would be served by granting an application. MECA also asserts that such a guideline would also improve the long-term viability of the universal service fund because it believes only the most qualified carriers that are capable of, and committed to, being “true providers” of universal service should receive the ETC designation.

To assist the Commission, MECA offers the following qualifications and requirements that it believes the Commission should adopt when considering ETC applications: 1) A carrier must demonstrate its ability and willingness to provide all supported services throughout the service area. 2) To fulfill the advertising requirement, an ETC must emphasize its universal service obligation to offer service to all consumers in the service area. 3) A carrier must have formal arrangements in place to provide service where facilities have yet to be built. 4) A carrier must have a plan for building out its network once it receives ETC status and must make demonstrative progress toward achieving its plan to retain its status. 5) A carrier must demonstrate that it is financially stable.

In addition to public interest principles and minimum qualifications and requirements, MECA urges adoption of the following policies that it believes the Commission should adhere to when reviewing ETC applications involving rural areas: 1) ETC designations in rural areas should be made at the study area level (an ILEC’s entire service territory within one state). 2) The Commission should ensure that competitive ETCs will be capable of providing high-quality service to all customers in the service area should the rural ILEC find it necessary to relinquish its

own ETC designation. 3) Any service quality standards, reporting requirements, and customer billing requirements established by the Commission should apply equally to all ETCs in the state. 4) The Commission should retain the authority to decertify any ETC that is not meeting any of the Commission's qualifications and requirements.

In short, MECA does not believe that granting NPI's application would be in the public interest. MECA also supports deferring the decision on NPI's application until the Federal-State Joint Board clarifies the process for designating ETCs.

Staff

The Staff's testimony references background material that it believes will assist the Commission in determining whether granting NPI's application would be in the public interest. In so doing, the Staff directs attention to portions of the MTA and the federal Act that support the development of competition and use of competition to make available quality telecommunications services at prices that are just, reasonable, and affordable in rural, high-cost areas. The Staff also presents a number of questions for the Commission's reflection. The Staff would like more guidance as to the definition of "public interest." The Staff suggests that healthy competition is the most significant factor in a public interest analysis, followed closely by choice and reasonable rates. In the end, the Staff sees no reason to further delay or deny NPI's ETC designation.

III.

DISCUSSION

ETC Designation

Pursuant to 47 USC 214(e)(2), the Commission may designate more than one carrier in a rural area as an ETC if the Commission finds doing so consistent with the public interest, convenience, and necessity. The parties to this proceeding opposing NPI's application argue that granting NPI's application is not in the public interest. The Commission disagrees. On numerous occasions, the Commission has found that competition can be advantageous to the citizens of this state. In this case, designating NPI as an ETC is in the public interest because it is likely to promote competition and provide benefits to customers in rural, high-cost areas by increasing customer choice, while promoting innovative services and new technologies, and encouraging affordable telecommunications services. Further, NPI provides service where there are few, if any, competitive local exchange carriers.

The Commission disagrees with the significance of the numerous arguments advanced by the opposing parties. To the extent that the opposing parties claim that wireless service is inferior to landline service, the Commission responds that customers should not be denied an opportunity to determine which of these services best meets their needs. In response to the argument that wireless service providers are not subject to the same regulations designed to protect customers, the Commission finds sufficient protection for customers in their right to choose not to use wireless service and to choose from whom to take service. To the extent that the opposing parties are concerned about the effects on themselves of competition from wireless carriers, the Commission does not agree that the public interest requires that they be protected from competition. Moreover, concerns over the effect of competition on the universal service

mechanism are better addressed by the FCC, which is responsible for disbursing the federal universal service funds.

There is ample precedent in support of a wireless carrier's designation of ETC status. On at least two prior occasions, this Commission has granted ETC status to wireless carriers.⁷ In addition, numerous ETC proceedings involving competitive carriers, including wireless carriers, have taken place at the FCC and before other state commissions with the competitive carrier ultimately being granted ETC status.⁸ The Commission provided parties an opportunity to voice their concerns about the granting of ETC status to a wireless carrier by conducting an evidentiary hearing. Virtually every argument raised by the parties in opposition to NPI's application, however, has been addressed previously. No new information was brought to the Commission's attention that would persuade the Commission that designating a competitive carrier ETC status in an area served by a rural ILEC would be contrary to the public interest.

Furthermore, the Legislature has decided that the Commission should not regulate wireless service. For that reason, the Commission must also decline to adopt the numerous conditions proposed, such as requiring NPI to assume carrier of last resort responsibilities, which would require that the Commission regulate wireless service. Consistent with prior designations,

⁷ See, the November 20, 2001 order in Case No. U-13145 and the December 6, 2002 order in Case No. U-13618.

⁸ See, e.g., *RCC Minnesota, Inc. et. al. Request for Designation as Eligible Telecommunications Carrier*, Order, Maine Public Utilities Commission Docket No. 2002-344 (May 13, 2003); *In the Matter of Federal State Joint Board on Universal Service Cellular South License Inc. Petition for Designation as an Eligible Telecommunications Carrier Throughout its Licensed Service Area in the State of Alabama*, Memorandum Opinion and Order, CC Docket No. 96-45, DA 02-3317 (rel. Dec. 4, 2002); *In the Matter of Federal State Joint Board on Universal Service RCC Holdings, Inc. Petition for Designation as an Eligible Telecommunication Carrier Throughout its Licensed Service Area in the State of Alabama*, Memorandum Opinion and Order, CC Docket No. 96-45, DA 02-3181 (rel. Nov. 2, 2002).

however, the Commission reserves the right to conduct audits as needed to determine that the funds are used for permitted purposes.

The Commission declines CenturyTel's and MECA's recommendation to defer its determination on NPI's application until after the Federal-State Joint Board provides further clarity on ETC designations. At this point, there is no time frame in which the Joint Board will act. The Commission, however, has been urged by the FCC to act upon ETC applications within 180 days and the end of that period with respect to this application is fast approaching. The Commission believes the better course of action is to act upon NPI's application within the desired timeframe and take recommendations of the Federal-State Joint Board into account when deciding future cases.

Service Area

NPI also requests that the Commission establish a "service area" for purposes of determining universal service support. The federal Act defines the term "service area" to be a "geographic area established by a State commission for the purpose of determining universal service obligations and support mechanisms." 47 USC 214(e)(5). As stated above, NPI requests that its licensed service area be the designated service area for universal service support. NPI specifically requests ETC status in each of the counties covered by its service area and the exchanges of the ILEC located therein.

Additionally, NPI requests that the Commission petition the FCC to redefine the service areas of the incumbent carriers within its licensed territory, including SBC Ameritech Michigan, CenturyTel, Hiawatha, Upper Peninsula Telephone Company, and Verizon North Inc. NPI's witness testified that NPI is not able to serve the entire study area of each of these companies because of limitations on its FCC license to provide wireless service.

CenturyTel and MECA oppose NPI's service area proposal. CenturyTel and MECA argue that NPI must serve the same service area as the rural ILEC. CenturyTel contends that redefining a rural carrier's service area acts as a disincentive for an additional ETC to serve the most rural parts of a relevant study area. CenturyTel contends that the goal of universal service would be better served by requiring "ETCs to expand their horizons." CenturyTel Brief, p. 18. CenturyTel is also concerned that if additional ETCs are not required to serve a rural ILEC's entire study area, then there is a greater risk of "cream-skimming," where the additional ETC can choose to provide service to lower cost customers without being subject to providing service to attendant higher cost customers while receiving the same level of universal service support as the rural ILEC. MECA also raises concerns about what it described as significant administrative burdens for an ILEC as a result of study area changes. MECA describes how an ILEC's accounting and auditing procedures are built around their existing study areas.

The Commission appreciates the concerns raised by CenturyTel and MECA, but declines to accept the proposal that the ETC's service area should encompass the ILEC's entire study area. In granting ETC status to RFB Cellular and Thumb Cellular, the Commission did not require the wireless carrier to provide service to the entire study area of the rural ILEC.

The Commission, however, also has concerns with NPI's proposals. The Commission declines to redefine the ILEC's study area or to grant NPI's ETC designation based upon political boundaries, such as underlying counties. The study areas of rural ILECs have existed for many years and many accounting and other administrative tasks are based upon those study areas. The Commission is persuaded that designating a service area for purposes of universal service support based upon political boundaries is unwise. The Commission finds that there are administrative efficiencies to be achieved by ensuring that designated service areas do not cross the geographic

boundaries of other relevant telecommunications areas. Political boundaries, for instance, are not congruent with LATAs, exchanges, study areas, or wire centers that are relevant geographic areas for telecommunications purposes.

The Commission is sensitive to the concern that administrative difficulties could abound if every ETC applicant desires its own service area designation. The Commission also appreciates the “cream-skimming” issues that could exist if every ETC applicant is able to carefully craft its own desired service area. Consequently, the Commission has decided to delineate service areas for purposes of universal service support by exchanges. In so doing, the Commission finds that the “cream-skimming” concerns are alleviated because NPI has not specifically picked the areas in which it will serve, but instead the areas were defined in the FCC’s wireless licensing process. Additionally, exchanges tend to encompass many types of customers, including rural and high-cost customers. The Commission is persuaded that NPI is not targeting any specific area or that serving any of the partial study areas would result in a windfall due to service to a highly-populated area. Much of the area covered by NPI’s wireless carrier license is in very rural parts of Michigan. The Commission is also convinced that designating service areas utilizing entire exchanges will minimize the administrative burden on rural telephone companies to calculate costs at something other than a study area level. This approach requires affected ILECs to disaggregate into service areas that are coterminous with existing telecommunications boundaries for which costs are already calculated.

Finally, the Commission rejects NPI’s request that the Commission petition the FCC for the necessary changes to implement this order. Rather, the Commission finds that the burden should be on NPI to obtain whatever relief is necessary, such as changing the geographic scope of its

wireless carrier license and petitioning the FCC for concurrence with the Commission's determinations herein.

The Commission FINDS that:

- a. Jurisdiction is pursuant to 1991 PA 179, as amended, MCL 484.2101 et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1999 AC, R 460.17101 et seq.
- b. NPI should be designated as an ETC for the purpose of receiving federal universal service funds.
- c. NPI's designation as an ETC is in the public interest.
- d. NPI's service area for purposes of determining universal service obligations and support mechanisms should be coterminous with established exchanges.
- e. NPI should be directed to file in this docket (and serve upon the other parties) a listing of the exchanges where it currently provides service or intends to provide service under its license and for which it wishes to receive universal service support and is able to meet universal service obligations.
- f. The granting of NPI's ETC status should be conditioned upon the Commission's reservation of its right to audit all expenditures of these universal service funds.
- g. NPI's ETC designation should be subject to the annual Commission re-certification process.

THEREFORE, IT IS ORDERED that:

A. NPI-Omnipoint Wireless, LLC, is designated as an eligible telecommunications carrier for the purpose of receiving federal universal service funds.

B. NPI-Omnipoint Wireless, LLC's service area for purposes of determining universal service obligations and support mechanisms is to be coterminous with established exchanges.

C. NPI-Omnipoint Wireless, LLC, is directed to file in this docket (and serve upon the other parties) a listing of the exchanges where it currently provides service or intends to provide service under its license and for which it wishes to receive universal service support and is able to meet universal service obligations.

D. NPI-Omnipoint Wireless, LLC's eligible telecommunications carrier designation is conditioned upon the Commission's reservation of its right to audit all expenditures of these universal service funds.

E. NPI-Omnipoint Wireless, LLC's eligible telecommunications carrier designation is subject to the annual Commission re-certification process.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ J. Peter Lark
Chair

(S E A L)

/s/ Robert B. Nelson
Commissioner

/s/ Laura Chappelle
Commissioner

By its action of August 26, 2003.

/s/ Robert W. Kehres
Its Acting Executive Secretary

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

Chair

Commissioner

Commissioner

By its action of August 26, 2003.

Its Acting Executive Secretary

In the matter of the application of)
NPI-OMNIPOINT WIRELESS, LLC,)
for designation as an eligible telecommunications)
carrier pursuant to Section 214(e)(6) of the)
Communications Act of 1934.)
_____)

Case No. U-13714

Suggested Minute:

“Adopt and issue order dated August 26, 2003 approving the application of NPI-Omnipoint Wireless, LLC, for designation as an eligible telecommunications carrier for purposes of receiving universal service support, as set forth in the order.”