

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION OF NEXUS COMMUNICATIONS,)
INC. FOR DESIGNATION AS A)
COMPETITIVE ELIGIBLE)
TELECOMMUNICATIONS CARRIER) CASE NO. 2005-00474
PURSUANT TO SECTION 214(E) OF THE)
TELECOMMUNICATIONS ACT OF 1996)

O R D E R

On November 22, 2005, Nexus Communications, Inc. ("Nexus"), a Competitive Local Exchange Carrier, filed with the Commission a petition under 47 U.S.C. § 214(e)(2) seeking designation as an Eligible Telecommunications Carrier ("ETC") to receive federal universal service support for service offered throughout its service area in the state of Kentucky.¹ More specifically, Nexus requested ETC designation in the study areas of Kentucky ALLTEL, Inc. ("ALLTEL," now Windstream), Cincinnati Bell Telephone Company ("Cincinnati Bell"), and BellSouth Telecommunications, Inc. ("BellSouth").

The petition states that: (1) Nexus meets all the requirements for designation as an ETC to serve the designated areas in the state of Kentucky;² (2) Nexus requests

¹ Nexus requests ETC designation throughout its service area in Kentucky. See Petition at page 1 and Exhibit D.

² Id. at 4 - 6.

designation throughout each of the designated areas within its service coverage;³ (3) in accordance with 47 U.S.C. § 214(e)(2), Nexus is entitled to be designated as an ETC in non-rural wirecenters;⁴ and (4) designation of Nexus as an ETC for the designated areas served in Kentucky will serve the public interest.⁵

On December 16, 2006, the Commission set forth a procedural schedule that included opportunity for public comment, discovery, and opportunity to request a hearing. On January 23, 2006, the Commission issued discovery requests to Nexus. Nexus replied to those requests on February 14, 2006 with supplemental answers on February 21, 2006, June 7, 2006 and June 12, 2006. Having completed the procedural schedule and not receiving a request for a public hearing this matter is ripe for the Commission's decision.

DISCUSSION

47 U.S.C. § 254(e) provides that "only an eligible telecommunications carrier designated under section 214(e) shall be eligible to receive specific Federal universal service support." Pursuant to 47 U.S.C. § 214(e)(1), a common carrier designated as an ETC must offer and advertise the services supported by the federal universal service mechanisms throughout the designated service area.

47 U.S.C. § 214(e)(2) provides state commissions with the primary responsibility for performing ETC designations. Pursuant to 47 U.S.C. § 214(e)(2), the Commission may, with respect to an area served by a rural telephone company, and shall, in all

³ Id. at 12 and Exhibit D.

⁴ Id. at 13.

⁵ Id.

other cases, designate more than one common carrier as an ETC for a designated service area, consistent with the public interest, convenience, and necessity, so long as the requesting carrier meets the requirements of 47 U.S.C. § 214(e)(1). Also, before designating an additional ETC for an area served by a rural telephone company, the Commission must determine that the designation is in the public interest.

An ETC petition must contain the following: (1) a certification that the petitioner offers or intends to offer all services designated for support by the Commission pursuant to 47 U.S.C. § 254(c); (2) a certification that the petitioner offers or intends to offer the supported services "either using its own facilities or a combination of its own facilities and resale of another carrier's services"; (3) a description of how the petitioner "advertise[s] the availability of [supported] services and the charges therefore using media of general distribution"; and (4) if the petitioner meets the definition of a "rural telephone company" pursuant to 47 U.S.C. § 3(37), the petitioner must identify its study area, or, if the petitioner is not a rural telephone company, it must include a detailed description of the geographic service area for which it requests an ETC designation from the Commission.

OFFERING THE SERVICES DESIGNATED FOR SUPPORT

Nexus has demonstrated through the required certifications and related filings that it now offers, or will offer upon designation as an ETC, the services supported by the federal universal service mechanism. Nexus certifies that it now provides or will provide throughout its designated service area the services and functionalities enumerated in 47 C.F.R. § 54.101(a). Nexus has also certified that, in compliance with

47 C.F.R § 54.405, it will make available and advertise Lifeline service to qualifying low-income consumers.

ADVERTISING SUPPORTED SERVICES

Nexus has demonstrated that it satisfies the requirement of 47 U.S.C. § 214(e)(1)(B) to advertise the availability of the supported services and the charges therefore using media of general distribution. In its petition, Nexus states that it currently advertises the availability of its services, and will do so for each of the supported services on a regular basis in newspapers, magazines, television, and radio, in accordance with 47 C.F.R. § 54.201(d)(2).

NON-RURAL STUDY AREAS

The FCC previously has found designation of additional ETCs in areas served by non-rural telephone companies to be *per se* in the public interest based upon a demonstration that the requesting carrier complies with the statutory eligibility obligations of 47 U.S.C. § 214(e)(1).⁶

OFFERING THE SUPPORTED SERVICES USING A CARRIER'S OWN FACILITIES

In response to Commission Staff's First Data Request, Item 2, Nexus states that it currently does not have an interconnection agreement with ALLTEL. In response to Commission Staff's Data Request, Item 4, Nexus states that it does not have any facilities in place anywhere in Kentucky except for purchased UNEs. Based on these responses the Commission finds that Nexus should not be designated an ETC in the study area of ALLTEL for failure to meet the requirements of 47 C.F.R. § 54.201(d)(1).

⁶ See, e.g., Cellco Partnership d/b/a Bell Atlantic Mobile Petition for Designation as an Eligible Telecommunications Carrier, Memorandum Opinion and Order, CC Docket No. 96-45, 16 FCC Rcd 39 (2000).

Nexus has in place an interconnection agreement with BellSouth that predates the Federal Communications Commission's ("FCC") orders commonly referred to as the TRO and TRRO.⁷ But, BellSouth has made it known that it will no longer provide, pursuant to Section 251 and 252, those elements that the TRO and TRRO relieved incumbent carriers from providing notably switching and transport elements that make it possible to provide local service and which Nexus relies on to provide service. Nexus states that it is currently negotiating with BellSouth to obtain switched port/loop combinations that will enable it to continue to provide service to customers in the BellSouth study area.

The Commission finds that Nexus does not meet the criterion that it must be providing services using its own facilities wholly or in part for the study area of BellSouth. A commercial agreement with BellSouth to offer switch/port loop combinations amounts to nothing more than a wholesale/resale agreement. BellSouth is not obligated to provide this switch/port loop combination in any manner that is enforceable pursuant to Part 51. A wholesale service platform, as provided to Nexus by BellSouth, cannot be considered a sustainable platform for ETC status. To meet the federal criteria set forth below, a carrier must have some facilities of its own. The universal service support to be provided by the federal government to Nexus upon the state commission's finding that Nexus meets the ETC criteria may lawfully be used only to upgrade and maintain facilities and services to promote the availability of universal service. Nexus has no facilities and services in the ALLTEL and BellSouth study areas

⁷ Triennial Review Remand Order, Unbundled Access to Network Elements, Order on Remand, WC Docket No. 04-313; CC Docket No. 01-338, 20 FCC Rcd 2533 (2005).

in Kentucky for which it would legitimately be able to expend these monies. The leasing of network elements, no longer available as an entire platform, provided a degree of control and ownership that does not exist under a commercial agreement or wholesale arrangement. To be eligible for ETC designation, a carrier must own or control some facilities of its own, perhaps at least a switch, and have an interconnection agreement in place to access customer premises and to carry traffic.

The relevant parts of 47 C.F.R. § 54.201 are sections (d), (e) and (f). Under section (d), the carrier must provide the supported services by "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)." In section (e) the term "facilities" is defined: "facilities means any physical components of the telecommunications network that are used in the transmission or routing of the services that are designated for support pursuant to subpart B of this part." Certainly, the facilities that Nexus would use pursuant to its commercial agreement would meet the definition of facilities. But section (f) defines the term "own facilities" as "includes, but is not limited to, facilities obtained as unbundled network elements pursuant to part 51 of this chapter, provided that such facilities meet the definition of the term 'facilities' under this subpart." This is where a commercial agreement fails the test. Even if the new service arrangement with BellSouth involves the same facilities that Nexus would have obtained pursuant to a Section 252 agreement just a few months ago, those facilities are no longer provided "pursuant to Part 51."

The Commission has carefully reviewed this issue and finds that Nexus cannot meet the federal criteria for ETC designation in the absence of owning or controlling

some facilities of its own in BellSouth's study area. The commercial agreement is a voluntary arrangement rather than one required by 47 U.S.C. § 252(1) and (2). It has not been submitted to this Commission for review or approval pursuant to Section 252 of the Act.

In response to Item 3 of Staff's First Data Request, Nexus states that it does have an interconnection agreement in place with Cincinnati Bell which predates the TRO and TRRO. However, it states that Cincinnati Bell has not indicated that it plans to cease providing those UNEs. The Commission finds that for the study area of Cincinnati Bell Nexus has demonstrated that it satisfies the requirement of 47 U.S.C. § 214(e)(1)(A) to offer the supported services using either its own facilities or a combination of its own facilities and resale of another carrier's services. Should the interconnection arrangement between Nexus and Cincinnati Bell change in such a way as to affect Nexus's ability to own or control facilities pursuant to part 51, then the ETC certification granted herein may be reconsidered and withdrawn if found to comply no longer with the FCC's requirements.

DESIGNATED SERVICE AREAS

The Commission finds that Nexus should be certified as an ETC in the study area of Cincinnati Bell, a non-rural telephone company.

IT IS THEREFORE ORDERED that:

1. Nexus shall be designated an ETC in the study area of Cincinnati Bell.
2. Nexus shall offer universal support services to consumers in this part of its service area.

3. Nexus shall offer these services using its own facilities or a combination of its own facilities and resale of another carrier's services, including services offered by another.

4. Nexus shall advertise the availability of and charges for these services using media of general distribution.

5. Nexus is hereby certified as complying with the FCC's criteria, in accordance with 47 U.S.C. § 254(e), and therefore eligible to receive Universal Service Fund support for the current certification period.

6. Nexus shall immediately notify the Commission of any changes in its interconnection arrangement with Cincinnati Bell that may affect Nexus's ability to own or control facilities "pursuant to Part 51." Upon such notice, the Commission may reconsider and withdraw the ETC certification granted herein if it finds Nexus no longer complies with the FCC requirements.

7. By September 1, 2006, and by each September 1 thereafter, Nexus shall make its annual certification filing in Administrative Case No. 381⁸ and shall submit additional records as described herein.

8. A copy of this Order shall be served upon the FCC and the Universal Service Administration Company.

9. Nexus's petition to be designated an ETC in the study areas of ALLTEL (now Windstream) and BellSouth is denied.

⁸ Administrative Case No. 381, A Certification of the Carriers Receiving Federal Universal Service High-Cost Support.

Done at Frankfort, Kentucky, this 29th day of August, 2006.

By the Commission

ATTEST:



Executive Director