

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of
E.N.M.R. Telephone Cooperative
For the Unserved Area Cellular Licenses to Serve
Portions of New Mexico RSAs 1 & 2 on
Frequency Block A
File Nos. 0002299667 and 0002299670

Order

Adopted: March 6, 2007

Released: March 6, 2007

By the Deputy Chief, Mobility Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. This Order addresses the petition to deny (Petition) filed on October 6, 2005 by Chama Wireless, LLC (Chama) against the above-captioned applications filed by E.N.M.R. Telephone Cooperative (ENMR). For the reasons discussed below, we deny Chama’s Petition, and will process the mutually exclusive applications of Chama and ENMR for unserved area cellular licenses to serve portions of New Mexico’s Rural Service Areas (RSAs) 1 and 2 on cellular frequency block A in accordance with Commission rules.

II. BACKGROUND

2. Chama is currently the license of call sign WPRS845, operating in Cellular Market Area (CMA) 553, New Mexico RSA 1-San Juan on frequency block B. ENMR is currently the licensee of call sign KNKN320, operating in CMA554, New Mexico RSA 2-Colfax on frequency block B. On July 25, 2005, Chama filed an application seeking authority for unserved area on frequency block A for both CMA553, New Mexico RSA 1 - San Juan and CMA554, New Mexico RSA 2 – Colfax. On September 1, 2005, ENMR filed two applications seeking to serve the same general area as Chama proposes to serve (the “Angel Fire” area in New Mexico), resulting in overlapping cellular geographic service areas

1 Petition to Deny, filed by Chama Wireless, LLC (Oct. 6, 2005).

2 See 47 C.F.R. §§ 1.2102(a), 22.131.

3 Chama’s application (File No. 0002252327) was placed on Public Notice on August 3, 2005. See Wireless Bureau Site-by-Site Applications Accepted for Filing, Public Notice, Report No. 2217. We note that Chama’s proposed contour also overlaps Alltel’s existing license under call sign KNKN720. Chama has submitted extension agreements with Alltel and is claiming only the unserved area outside Alltel’s CGSA.

4 ENMR’s applications (File Nos. 0002299667 and 0002299670) were placed on Public Notice on September 7, 2005. See Wireless Bureau Site-by-Site Applications Accepted for Filing, Public Notice, Report No. 2247. ENMR’s proposed contours of its Angel Fire site (File No. 0002299670) and its Chacon site (File No. 000229667) do not overlap each other, whereas both ENMR contours overlap Chama’s contour.

(CGSA).⁵

3. Chama filed its petition to deny against ENMR's applications arguing that the filings propose a monopoly and are "strike" filings submitted only to block further processing of the Chama application.⁶ In its opposition, ENMR argues that its applications are consistent with the Commission's rules and will serve the public interest. ENMR claims that the addition of 25 MHz of spectrum at two rural sites will not allow ENMR to build a monopoly on the market and that significant spectrum is licensed to competitors and potential competitors in the RSA.⁷ Both competitors state their willingness to participate in an auction for the spectrum in question.⁸

III. DISCUSSION

4. As discussed below, we disagree with Chama that grant of ENMR's applications will have an anticompetitive effect by increasing ENMR monopoly status in the relevant RSAs contrary to Commission policy and therefore deny Chama's Petition.

A. Timing of Competitive Review

5. *Background.* Former section 22.942 of the Commission's rules substantially limited the ability of parties to have interests in cellular carriers on different channel blocks in the same rural geographic area.⁹ To the extent licensees on different channel blocks had any degree of overlap between their respective CGSAs in an RSA,¹⁰ former section 22.942 prohibited any entity from having a direct or indirect ownership interest of more than five percent in one such licensee when it had an attributable interest in the other licensee.¹¹ In its 2004 *Rural Report and Order*,¹² the Commission recognized the safeguard that the cellular cross-interest rule had provided against the possibility of significant additional consolidation of control over cellular spectrum in rural areas and the attendant serious anticompetitive

⁵ See 47 C.F.R. § 22.911. We note that, pursuant to section 22.951, 47 C.F.R. § 22.951, "[a]pplications for authority to operate a new cellular system in an unserved area, other than those filed by the licensee of an existing system that abuts the unserved area, must propose a contiguous cellular geographic service area ("CGSA") of at least 130 square kilometers (50 square miles)." Each of ENMR two applications, as well as Chama's application, request an area greater than 50 square miles.

⁶ Chama Petition at 3-4.

⁷ Opposition to Petition to Deny, filed by E.N.M.R. Telephone Cooperative (Oct. 17, 2005) (ENMR Opposition). Chama also filed a reply to ENMR Opposition essentially reiterating its previous argument made in the Chama Petition. Reply to Opposition to Petition to Deny, filed by Chama Wireless, LLC (Oct.24, 2005) (Chama Reply).

⁸ See Chama Petition at 7 and ENMR Opposition at 1.

⁹ 47 C.F.R. § 22.942. The original cellular cross-interest rule was adopted in 1991. See Amendment of Part 22 of the Commission's Rules to Provide for Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules, CC Docket No. 90-6, *First Report and Order and Memorandum Opinion and Order on Reconsideration*, 6 FCC Rcd 6185, 6228-29 ¶¶ 103-06 (1991) (*Cellular First Report and Order*).

¹⁰ Application of the cellular cross-interest rule required comparison of the CGSAs of cellular licensees operating on A Block frequencies in an RSA with those of cellular licensees operating on B Block frequencies in the same RSA. Because cellular licensees are authorized on frequencies in either one or the other of these channel blocks, any geographic area within an RSA would fall within the CGSAs of no more than two cellular licensees (one on each channel block).

¹¹ 47 C.F.R. § 22.942(a).

¹² Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services, *Report and Order and Further Notice of Proposed Rule Making*, 19 FCC Rcd 19078, 19113 (2004) (*Rural Report and Order*).

effects,¹³ but found that the public interest was better served by eliminating the per se cross ownership restriction. Rather, the Commission applied a case-by-case review with its greater degree of flexibility to reach the appropriate decision in each case, the reduced likelihood of prohibiting beneficial transactions or levels of investment both in urban and rural areas, and the ability to account for the particular attributes of a transaction or market. The Commission found that the greater regulatory flexibility offered by a change in its methods for review outweighed any “guarantees” to the competitive nature of cellular competition in rural areas ensured by the “then” cross-interest rule,¹⁴ as that rule may have inadvertently discouraged transactions and cross interests that could be found to be in the public interest. Further, the Commission concluded that no cross interest or transaction should be presumptively prohibited in RSAs and that the Commission should consider such proposals under an approach that is consistent with the same case-by-case analysis that is employed in all other CMRS contexts.¹⁵ Although the Commission provided for case-by-case competitive analysis in the *Rural Report and Order*, it did not, however, specify the timing for such review.

6. *Discussion.* We recognize that the required competitive analysis may be typically performed when an auction winner has submitted its long form application for Commission review, rather than determining at an earlier stage the potential competitive impact of each bidder. However, in this case involving only two incumbent licensees with mutually exclusive applications for cellular unserved area, where one party alleges anticompetitive effect,¹⁶ we find it administratively more efficient and in the public interest to first address Chama’s allegation and thereby determine whether mutually exclusivity can be eliminated.

B. Competitive Analysis – New Mexico Unserved Cellular Area (RSA 1 & 2)

7. As the Commission has discussed, transactions such as mergers can diminish competition and firms can exercise market power in a number of ways.¹⁷ A transaction may create market power in a single firm and allow that firm to act on its own in raising prices, lowering quality, reducing innovation, or restricting deployment of new technologies or services. A transaction also may diminish competition if it makes the firms selling in the market more likely to engage in a coordinated manner that harms consumers, such as tacit or express collusion. The effects of such coordinated behavior may include increased prices, reduced number of minutes in a given price plan, degraded output quality, or some combination of these effects. It may also include adverse effects such as reduced innovation and restricted deployment of new technologies and services.¹⁸

8. In evaluating this case, we apply the same screening criteria that the Commission has

¹³ Although economic theory dictates that there is not a static threshold by which a reduction in competitors results in anticompetitive harm, a consolidation in a local cellular market from duopoly to monopoly status provides consumers with less choice and potentially less benefits from competition. The likelihood of the Commission approving a cellular consolidation between two providers in such conditions remains small.

¹⁴ See 200 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services, WT Docket No. 01-14, *Report and Order*, 16 FCC Rcd 22668, 22679 ¶ 26 (2001) (*Spectrum Cap Sunset Order*) (“In adopting the cellular cross-interest rule, the Commission acted ‘[i]n order to *guarantee* the competitive nature of the cellular industry and to foster the development of competing systems.’”) (emphasis added) (quoting *Cellular First Report and Order*, 6 FCC Rcd at 6628 ¶ 104).

¹⁵ *Rural Report and Order*, 19 FCC Rcd at 19115 ¶ 68.

¹⁶ We note that ENMR did not file a petition to deny against Chama’s applications.

¹⁷ See, e.g., Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation For Consent to Transfer Control of Licenses and Authorizations, *Memorandum Opinion and Order*, 19 FCC Rcd 21522, 21557 ¶ 70 (2004) (“*Cingular-AT&T Wireless Order*”).

¹⁸ *Id.*

used in prior wireless industry merger orders to identify whether particular markets in any proposed transaction potentially are adversely affected.¹⁹ This initial analysis is designed to eliminate from further review those markets in which there is no competitive harm relative to today's generally competitive mobile telephony market.²⁰

9. First, because spectrum is a necessary resource for carriers to compete effectively, we have examined the impact of the proposed licensing of the A block unserved cellular licenses in CMA553 New Mexico 1-San Juan and CMA554 New Mexico 2-Colfax by ENMR on the concentration of spectrum holdings, or spectrum aggregation that would occur. Consistent with the approach the Commission has taken when examining previous transactions involving aggregation of cellular and other spectrum used in the provision of mobile telephony services, we give further review to geographic markets where, post-transaction, the merged entity would have a 10 percent or greater interest in 70 MHz or more of cellular, PCS, and SMR spectrum.²¹ In our analysis of ENMR's spectrum holdings, we did not find any geographic area where ENMR would have a 10 percent or greater interest in 70 MHz or more of spectrum. Therefore, additional competitive analysis due to spectrum aggregation does not appear to be warranted.

10. Second, we estimate subscriber-based market concentration measures in order to examine potential market concentration concerns that might arise in this case. A horizontal transaction is unlikely to create or enhance market power or facilitate its exercise unless the transaction significantly increases concentration and results in a concentrated market.²² Specifically we calculate the Herfindahl-Hirschman Index ("HHI")²³ and the change in the HHI for various geographic markets.²⁴ Our market concentration analysis of ENMR's potential licensing of unserved areas in CMA553 New Mexico 1-San Juan and CMA554 New Mexico 2-Colfax applies the same thresholds as the Commission used in previous merger orders: an HHI of 2800 with a change of 100 or greater or a change in the HHI of 250 regardless of the level of the HHI.²⁵ These thresholds are based on our current evaluation of the mobile telephony market.²⁶ Since the currently unlicensed A block cellular spectrum is not being used to provide facilities-

¹⁹ See Applications for the Assignment of License from Denali PCS, L.L.C. to Alaska DigiTel, L.L.C. and the Transfer of Control of Interests in Alaska DigiTel, L.L.C. to General Communication, Inc., *Memorandum Opinion and Order*, 21 FCC Rcd 14863, 14881 ¶ 36 (2006) ("*GCI-Alaska DigiTel Order*"); *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21568-69 ¶¶ 106-109.

²⁰ *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21568 ¶ 108.

²¹ See *GCI-Alaska DigiTel Order*, 21 FCC Rcd at 14882 ¶ 37; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21568-69 ¶¶ 106, 109. 70 megahertz represents a little more than one third of the total bandwidth available for mobile telephony today, leaving approximately 130 megahertz of capacity available for a competitive response by other carriers in a local market. Applications of Western Wireless Corporation and ALLTEL Corporation, *Memorandum Opinion and Order*, 20 FCC Rcd 13053, 13074 ¶ 49 (2005) ("*ALLTEL-Western Wireless Order*").

²² *GCI-Alaska DigiTel Order*, FCC Rcd at 14882-83 ¶ 38; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13067 ¶ 23; see also Horizontal Merger Guidelines, issued by the U.S. Department of Justice and the Federal Trade Commission, § 0.1, n.6, April 2, 1992, revised April 8, 1997 ("*DOJ/FTC Merger Guidelines*").

²³ Market concentration is generally measured by the HHI, and changes in concentration are measured by the change in the HHI. See, e.g., *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13067 ¶ 23; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21556 ¶ 69.

²⁴ *GCI-Alaska DigiTel Order*, FCC Rcd at 14882-83 ¶ 38; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13074 ¶ 50; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21568 ¶ 106.

²⁵ See *GCI-Alaska DigiTel Order*, FCC Rcd at 14882-83 ¶ 38; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13074 ¶ 46; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21568 ¶ 106.

²⁶ The Commission previously concluded that a market in which a transaction causes a change of less than 100 in the HHI need not be examined further because, even if the post-transaction HHI for such a market would be greater than 2800, the loss of a competitor with such a small market share is not likely to cause significant transaction-

(continued...)

based mobile telephony service, the change in the HHI is zero. Accordingly, we find no need for a further, in-depth analysis based on concentration measures and find Chama's argument regarding anti-competitive impact to be without merit.

11. Accordingly, IT IS ORDERED that, pursuant to sections 4(i), 303(r), and 309(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 309(d), and Sections 0.331 and 1.939 of the Commission's rules, 47 C.F.R. §§ 0.331, 1.939, the Petition to Deny filed by Chama Wireless, LLC on October 6, 2005, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

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specific harm. *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13073 ¶ 47; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21568 ¶ 107.