

**THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS**

Before Commissioners: Dwight D. Keen, Chair
 Shari Feist Albrecht
 Susan K. Duffy

In the Matter of the Application of Nex-Tech,)
LLC for an Order Confirming Relinquishment)
of its Eligible Telecommunications Carrier)
Designation and Notice Pursuant to K.S.A.) Docket No. 19-NTHT-244-ETC
2015 Supp. 66-2006(d) of Intent to Cease)
Participation in the Kansas Lifeline Services)
Program.)

ORDER ON NEX-TECH, LLC'S PETITION FOR RECONSIDERATION

This matter comes before the State Corporation Commission of the State of Kansas (Commission). Having examined its files and records, and being fully advised in the premises, the Commission finds the following:

BACKGROUND:

1. On October 27, 2016, in Docket No. 17-SWBT-158-MIS (17-158 Docket), Southwestern Bell Telephone Company d/b/a AT&T Kansas (AT&T) applied for relinquishment of its Eligible Telecommunications Carrier (ETC) designation in all currently designated areas except for the census blocks identified in Exhibit B to its Application.¹ AT&T's relinquishment request included certain census blocks within the Abilene exchange.²

2. On May 3, 2017, in the 17-158 Docket, Commission Telecommunications Staff (Staff) recommended the Commission grant AT&T's request for ETC relinquishment in AT&T's non-Connect America Fund (CAF) II census blocks within the Abilene exchange.³

¹ 17-158 Docket, Application of Southwestern Bell Telephone Company for an Order Confirming Relinquishment of Its Eligible Telecommunications Carrier Designation in Specific Areas, and Notice of Intent to Cease Participation in the Kansas Lifeline Services Program, pp. 1-3 (Oct. 27, 2016) (AT&T Relinquishment Application).

² See 17-158 Docket, *Order on Nex-Tech, LLC's Petition to Intervene and on Petitions for Reconsideration from Nex-Tech and AT&T*, ¶¶ 9, 12 (Apr. 23, 2019).

³ 17-158 Docket, Report and Recommendation, Utilities Division, pp. 2, 11 (May 3, 2017), attached to Notice of Filing of Staff's Second Report and Recommendation (May 4, 2017).

3. On December 19, 2018, Nex-Tech, LLC (Nex-Tech) filed an Application requesting a Commission order “confirming (i) relinquishment of its Eligible Telecommunications Carrier (“ETC”) designation for all of its local exchange service areas in Kansas specified [in the Application], effective May 31, 2019,”⁴ which included the Abilene exchange.⁵ Nex-Tech noted that it was granted ETC status in AT&T’s exchanges in Commission Docket Nos. 05-NTHT-140-ETC (05-140 Docket) and 06-NTHT-1022-ETC (06-1022 Docket).⁶

4. On March 14, 2019, Staff filed a Notice of Filing of Staff Report and Recommendation (R&R). Staff’s R&R provided a history of ETCs, an explanation of specific ETC types, and changes in the federal high-cost programs.⁷ Regarding ETC relinquishment, Staff summarized the various dockets in which Nex-Tech obtained ETC status, including the 06-1022 Docket in which Nex-Tech was granted ETC authority in the Abilene exchange in particular.⁸ Staff noted Nex-Tech’s obligation to provide universal service throughout its designated service area in response to all reasonable requests for service.⁹

5. Staff determined that AT&T is the only other “high-cost ETC” providing service in the Abilene exchange.¹⁰ Ultimately, Staff recommended the Commission grant Nex-Tech’s ETC relinquishment request in the Atwood, Bird City, Great Bend, Hays, Hoxie, McDonald, McPherson, Norton, Oberlin, Phillipsburg-Kirwin, Plainville, Salina, Smith Center, St. Francis, and Stockton exchanges.¹¹ However, Staff recommended the Commission deny Nex-Tech’s ETC relinquishment

⁴ Application of Nex-Tech, LLC for an Order Confirming Relinquishment of Its Eligible Telecommunications Carrier Designation and Notice of Intent to Cease Participation in the Kansas Lifeline Services Program, p. 1 (Dec. 19, 2018) (Application for Nex-Tech, LLC).

⁵ Application for Nex-Tech, LLC, Exhibit A.

⁶ Application for Nex-Tech, LLC, ¶ 1.

⁷ See R&R, pp. 2-5.

⁸ R&R, p. 6.

⁹ R&R, p. 7.

¹⁰ R&R, p. 8.

¹¹ R&R, p. 9.

request in the Abilene exchange if the Commission granted AT&T's relinquishment request in that same exchange in the 17-158 Docket.¹²

6. On March 14, 2019, in the 17-158 Docket, the Commission issued its *Order on AT&T's Request to Relinquish its Eligible Telecommunications Carrier (ETC) Designation* (Relinquishment Order). Consistent with Staff's recommendation, the Relinquishment Order allowed AT&T to relinquish its ETC designation in all of the census blocks it requested (including the non-CAF II census blocks in the Abilene exchange) except for the 1,248 census blocks identified in Staff's January 4, 2019 filing of Updated Exhibits 1 and 2.¹³

7. On March 25, 2019, Nex-Tech responded to Staff's R&R in the instant docket.¹⁴ Nex-Tech disagreed with Staff's recommended denial of relinquishment in the Abilene exchange, arguing that Nex-Tech's relinquishment in the Abilene exchange is in the public interest.¹⁵ Nex-Tech asked the Commission to "grant its Application for ETC relinquishment in full, including the Abilene exchange."¹⁶

8. On March 29, 2019, Staff replied to Nex-Tech's Response, stating that "[a]mong the exchanges where relinquishment was granted [to AT&T in the 17-158 Docket] was the Abilene exchange, giving rise to the Staff recommendation not to grant Nex-Tech relinquishment because after granting AT&T ETC relinquishment, Nex-Tech would be the only remaining high-cost ETC in the Abilene exchange to continue to provide service."¹⁷

9. On April 23, 2019, the Commission issued its *Order on Nex-Tech, LLC's ETC Relinquishment and KLSP Non-Participation Application* (April 23, 2019 Order), denying Nex-

¹² R&R, p. 9.

¹³ 17-158 Docket, *Order on AT&T's Request to Relinquish its Eligible Telecommunications Carrier (ETC) Designation*, Ordering Clause A (Mar. 14, 2019); 17-158 Docket, Updated Staff Exhibits 1 and 2, Staff Updated Exhibit 2 (Jan. 4, 2019).

¹⁴ Nex-Tech, LLC's Response to Staff's Report and Recommendation (Mar. 25, 2019) (Nex-Tech Response to R&R).

¹⁵ Nex-Tech Response to R&R, ¶ 6.

¹⁶ Nex-Tech Response to R&R, ¶ 9.

¹⁷ Staff Reply to Nex-Tech, LLC's Response to Staff's Report and Recommendation, ¶ 3 (Mar. 29, 2019) (Staff Reply).

Tech's request for ETC relinquishment in the Abilene exchange but approving the relinquishment request in the other listed exchanges.¹⁸

10. On May 8, 2019, Nex-Tech filed a Petition for Reconsideration (PFR), asking the Commission to reconsider its April 23, 2019 Order and grant Nex-Tech ETC relinquishment in the Abilene exchange.¹⁹

LEGAL STANDARDS:

11. A Petition for Reconsideration must state the specific grounds upon which relief is requested.²⁰ The purpose of requiring matters to be raised in a Petition for Reconsideration is to inform other parties and the Commission "where mistakes of law and fact were made in the order."²¹ An order is lawful if it is within the statutory authority of the Commission and if the statutory rules are followed.²² All actions of an administrative agency have a rebuttable presumption of validity.²³ As the party challenging the legality of the Commission's Order, the Petitioner bears the burden of proving the Commission's action was invalid.²⁴

FINDINGS AND CONCLUSIONS:

12. Nex-Tech incorporated arguments it made in the 17-158 Docket into its PFR here, and asked the Commission to take administrative notice of its files and records in the 17-158 Docket.²⁵ The Commission takes administrative notice of its files and records in the 17-158 Docket. However, the Commission does not address any of Nex-Tech's arguments from its pleadings in the 17-158 Docket because Nex-Tech's arguments in those pleadings have been adequately addressed

¹⁸ April 23, 2019 Order, Ordering Clauses B & C.

¹⁹ PFR, p. 9.

²⁰ K.S.A. 77-529(a).

²¹ *Citizens' Util. Ratepayer Bd. v. State Corp. Comm'n*, 24 Kan. App. 2d 222, 228 (1997) (citing *Peoples Nat. Gas Div. of N. Nat. Gas Co. v. State Corp. Comm'n*, 7 Kan. App. 2d 519, 525 (1982)).

²² *Kan. Gas & Elec. Co v. State Corp. Comm'n*, 239 Kan. 483, 496 (1986).

²³ *Trees Oil Co. v. State Corp. Comm'n*, 279 Kan. 209, 226, 105 P.3d 1269 (2005).

²⁴ K.S.A. 77-621(a)(1). See *Trees Oil Co.*, 279 Kan. at 226.

²⁵ PFR, ¶ 7.

in the Commission's April 23, 2019 *Order on Nex-Tech, LLC's Petition to Intervene and on Petitions for Reconsideration from Nex-Tech and AT&T* in the 17-158 Docket, the June 4, 2019 *Order on Nex-Tech, LLC's Petition for Reconsideration of the Commission's Order of April 23, 2019* in the 17-158 Docket, and the April 23, 2019 Order in the instant docket.

13. As stated in paragraph 11 above, the purpose of a PFR is to apprise the Commission where it allegedly make mistakes of fact or law in its Orders. However, Nex-Tech largely failed to allege any mistakes of fact or law in the Commission's April 23, 2019 Order. Rather, Nex-Tech asserted that the Commission "had a choice" on granting ETC relinquishment;²⁶ that the Commission need not adopt a Staff recommendation on relinquishment;²⁷ that while 47 U.S.C. § 214(e)(4) "does not require the Commission to perform a balancing test," it does not prohibit such analysis;²⁸ and the Commission could properly grant relinquishment to Nex-Tech.²⁹ None of these assertions alters the fact that the Commission properly granted AT&T relinquishment in the Abilene exchange in accordance with 47 U.S.C. § 214(e)(4). Further, none of the above assertions alters the fact that Nex-Tech stated in its ETC Application in the 06-1022 Docket that it was able to provide customers throughout the Abilene exchange "the services and functionalities that are to be supported by the Federal universal service support mechanisms, as identified in 47 C.F.R. § 54.101(a)."³⁰ Thus, Nex-Tech has provided the Commission no basis for reconsideration.

14. Nex-Tech claimed that "[r]etaining Nex-Tech as the ETC is contrary to the public policy of the State of Kansas to ensure that every Kansan will have access to a first-class

²⁶ PFR, ¶ 14.

²⁷ PFR, ¶ 14.

²⁸ PFR, ¶ 15.

²⁹ PFR, ¶ 21.

³⁰ April 23, 2019 Order, ¶ 20. 06-1022 Docket, Application of Nex-Tech, Inc. for Designation as an Eligible Telecommunications Carrier in the Abilene, Atwood, Bird City, Great Bend, Hays, Hoxie, McDonald, McPherson, Oakley, Oberlin, Phillipsburg, Plainville, Salina, Smith Center, St. Francis, Stockton, Kansas Exchange Areas, pp. 3, 6, 12 (Mar. 17, 2006) (06-1022 ETC Application) (stating that "Nex-Tech does, and will continue to, advertise the availability of services supported by the Federal universal service mechanisms *throughout the Abilene ... Exchange*[]" (emphasis added)).

telecommunications infrastructure that provides excellent services at an affordable price (K.S.A. 66-2001(a)).”³¹ The Commission rejects this assertion because Nex-Tech’s ETC status was granted based on its presumed commitment to “ensure first-class telecommunications infrastructure that provides excellent services at an affordable price” to the consumers in the Abilene exchange. Thus, the Commission affirms its finding that Nex-Tech’s designation as an ETC in the 06-1022 Docket means that Nex-Tech still has an obligation to provide universal service throughout the Abilene exchange, regardless of what any other ETC in that exchange might do, and regardless of whether such service may require Nex-Tech to build-out in the Abilene exchange.³²

15. Nex-Tech argues “the facts clearly do not support the Commission’s Order in the instant Docket.”³³ Although Nex-Tech does not explain “the facts” to which it refers, the Commission assumes Nex-Tech is referring to the facts that ostensibly justify its claim that it cannot “ensure” continued universal service in the Abilene exchange.³⁴ However, none of Nex-Tech’s assertions of current inability to serve support the notion that it may be excused from its ongoing ETC obligations. Nex-Tech’s ETC obligations are not contingent on AT&T’s presence or absence from the Abilene exchange as an ETC.³⁵ The Commission finds all of Nex-Tech’s arguments boil down to the legally inexcusable claim that it cannot provide ETC service in the entire Abilene exchange going forward, even though the 06-1022 Docket - where Nex-Tech willingly asked to take on the obligations of an ETC in the Abilene exchange - requires it to provide such service.

16. Nex-Tech has essentially argued the Commission should reconsider its denial of Nex-Tech’s ETC relinquishment request in the Abilene exchange because Nex-Tech is allegedly a

³¹ PFR, ¶ 19.

³² April 23, 2019 Order, ¶¶ 20-21.

³³ PFR, ¶ 21.

³⁴ See PFR, ¶¶ 18-19.

³⁵ See 06-1022 Docket, Application of Nex-Tech, Inc. for Designation as an Eligible Telecommunications Carrier in the Abilene, Atwood, Bird City, Great Bend, Hays, Hoxie, McDonald, McPherson, Oakley, Oberlin, Phillipsburg, Plainville, Salina, Smith Center, St. Francis, Stockton, Kansas Exchange Areas (Mar. 17, 2006); 06-1022 Docket, *Order* (June 16, 2006).

better candidate for relinquishment in that exchange than AT&T. In other words, in Nex-Tech's view, the Commission chose wrongly in deciding to grant AT&T's relinquishment request in Abilene and to deny Nex-Tech's request. Nex-Tech has no valid factual or legal basis for its view. AT&T requested ETC relinquishment in the Abilene exchange, and Staff recommended approval of AT&T's request, long before Nex-Tech sought its own ETC relinquishment in Abilene. The Commission found that AT&T met the test for ETC relinquishment in the Abilene exchange, a finding Nex-Tech does not contest. Thus, the Commission acted lawfully and reasonably in granting relinquishment to AT&T, rather than to Nex-Tech. Nex-Tech has not demonstrated the Commission committed any factual or legal error in denying Nex-Tech's relinquishment request, and thus, the Commission denies Nex-Tech's Petition for Reconsideration in its entirety.

THEREFORE, THE COMMISSION ORDERS:

- A. Nex-Tech's Petition for Reconsideration is denied.
- B. This Order constitutes final agency action.³⁶ Any request for review of this action shall be in accordance with K.S.A. 77-613. Lynn M. Retz, Secretary to the Commission, is the proper party to receive service of a petition for judicial review on behalf of the Commission.³⁷
- C. The Commission retains jurisdiction over the subject matter and parties for the purpose of entering such further orders as it deems necessary.

BY THE COMMISSION IT IS SO ORDERED.

Keen, Chair; Albrecht, Commissioner; Duffy, Commissioner

Dated: 06/04/2019



Lynn M. Retz
Secretary to the Commission

MJD

³⁶ K.S.A. 77-607(b)(1).

³⁷ K.S.A. 77-613(e).

CERTIFICATE OF SERVICE

19-NTHT-244-ETC

I, the undersigned, certify that a true copy of the attached Order has been served to the following by means of electronic service on 06/04/2019.

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