

Miller Nash LLP
www.millernash.com
4400 Two Union Square
601 Union Street
Seattle, WA 98101-1367
(206) 622-8484
(206) 622-7485 fax

3400 U.S. Bancorp Tower
111 S.W. Fifth Avenue
Portland, OR 97204-3699
(503) 224-5858
(503) 224-0155 fax

500 E. Broadway, Suite 400
Post Office Box 694
Vancouver, WA 98666-0694
(360) 699-4771
(360) 694-6413 fax

Brooks E. Harlow
brooks.harlow@millernash.com
(206) 777-7406 direct line

June 4, 2004

Ms. Trudy Jaynes
Oregon Public Utility Commission
Administrative Hearings Division
550 Capitol Street N.E., Suite 215
Salem, Oregon 97301

Subject: UM 1083

Dear Ms. Jaynes:

Enclosed for filing are one original and five copies of RCC's Brief Responding to Further Recommendations and Analysis Based on FCC's *Highland Cellular* Decision.

Very truly yours,

Brooks E. Harlow

cc w/encs.: Service List

BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON
UM 1083

In the Matter of

RCC MINNESOTA, INC.

Application for Designation as an Eligible
Telecommunications Carrier, Pursuant to the
Telecommunications Act of 1996

RCC'S BRIEF RESPONDING TO
FURTHER RECOMMENDATIONS AND
ANALYSIS BASED ON FCC'S
HIGHLAND CELLULAR DECISION

INTRODUCTION

The record in this case closed in January. Final briefs were filed by all the parties in March, leaving nothing left to be accomplished in the docket other than oral argument and issuance of an order. In a somewhat unusual twist, however, Staff requested further proceedings to address the FCC's *Highland Cellular* decision.¹ The Commission Staff and Intervenor OTA filed briefs regarding reopening on April 28 and May 5, to which RCC responded on May 10.

At a status conference convened telephonically on May 17, 2004, RCC expressed its willingness and desire to submit its case based on the record as it stood when it closed in January of this year. The ALJ agreed that RCC was entitled to stand on the record and gave each of the parties an opportunity to file an additional brief analyzing *Highland Cellular* and RCC's new service commitments² based on the existing record.³ In its final brief, the Staff has provided a *Highland Cellular*-type analysis based on the record in the docket, concluding that the record

¹ Email from Charles Ferrari, April 16, 2004.

² Included in its May 10, 2004 brief.

³ See Status Conference Memorandum issued May 18, 2004.

supports RCC's assertions that designating it as an eligible telecommunications carrier ("ETC") is in the public interest and that its request for redefinition should be granted. In contrast, OTA provided no *Highland Cellular*-type analysis. OTA merely rehashes its earlier arguments based on the Joint Board Recommendation⁴ and FCC decisions that OTA already discussed at length in its opening and reply briefs in this docket. Such "new" precedent as OTA discusses consists of an order of the Louisiana Public Service Commission that the Louisiana Commission itself reversed on May 12, 2004, two weeks before OTA filed its most recent brief.⁵

DISCUSSION

I. RCC CONCURS IN STAFF'S RECOMMENDATION TO GRANT ETC DESIGNATION WITH ADDITIONAL REPORTING REQUIREMENTS, WITH ONE MINOR MODIFICATION

Consistent with the process established at the May 17, 2003 conference, Staff has undertaken a thorough analysis of the existing record in this case in light of the FCC's approach in *Highland Cellular*. RCC continues to disagree with the Staff that any weight needs to be given to the FCC's approach in *Highland Cellular*. Nevertheless, RCC applauds and appreciates Staff's willingness to undertake its review of the existing record within the short time frame required to facilitate a grant before June 30, 2004.⁶ Apart from questions of precedent, the Commission's decision whether to reject or follow the FCC's approach in *Highland Cellular* is effectively moot in this docket. Because Staff recommends a grant of RCC's application and because RCC is willing to agree with the substance of all of Staff's proposed annual reporting requirements (including three new ones), the order in this docket will be the same whether the Commission follows RCC's approach or the Staff's.

⁴ *Federal-State Joint Board on Universal Service (Recommended Decision)*, FCC 04J-1 (released February 27, 2004).

⁵ *In re Application of Centennial Lafayette Communications, et al.*, Order No. U-27174-A (Louisiana PSC decided May 12, 2004, issued May 26, 2004) (Attachment B hereto).

⁶ Because of the way the federal fund is administered, RCC would lose an entire quarter of support, and the state of Oregon would lose the investment, if the order is delayed even a day beyond the end of June.

Staff sums up its recommendations as follows:

Staff recommends RCC's application be granted for the wire centers set forth in Attachment A to its [May 10 brief re *Highland Cellular*], as well as the non-rural wire centers of Verizon and Qwest. Staff further recommends that RCC be ordered to prepare the documentation and maps necessary to effectuate the redefinition. Finally, Staff recommends that the grant be conditioned upon RCC's compliance with the following additional reporting requirements during the annual certification process.

Staff's Corrected Brief re Further Recommendations Based on Additional Analysis ("Staff Brief") at 7. The "following" reporting requirements are enumerated 1 through 8. Numbers 1 through 5 were set forth in Staff's Reply Brief, are acceptable to RCC, and need not be discussed here. Additionally, Staff sets forth three new recommended reporting requirements, enumerated 6 through 8, which are discussed below.

Recommended reporting requirement number 6--documentation of advertising of services throughout the entire designated area including areas potentially served by resale rather than RCC facilities--is acceptable to RCC. RCC is already tracking its advertising.

Recommended reporting requirement number 8--details of requests for service that are within RCC's designated ETC area but potentially outside of its CGSA--is also something that RCC is willing and able to comply with. Recommendation number 7, requests provision of copies of "current resale agreements" and documentation of the areas covered. Due to the nature of how RCC will provide resale coverage, this condition requires slight modification.

RCC has a number of resale and roaming agreements in place nationally. These agreements allow RCC's customers to use their phones almost anywhere in the country. The agreements are commercial agreements and are not covered by the filing requirements of Section 251 of the Communications Act. Moreover, the agreements are considered highly confidential by the parties. RCC would not be able to file the agreements with the Commission except with the permission of the other carriers and/or under a compulsory process such as a subpoena or Commission or Court order. In order to address this issue to the satisfaction of Staff, RCC has

discussed the confidentiality problem with Staff and the two parties have concurred on a modification to Staff's recommendation that is acceptable to RCC.

As RCC understands it, Staff is willing to accept, in lieu of filing resale agreements, an affidavit from an RCC company official as a part of the annual certification process that **either**: (1) RCC has resale agreements in place that cover the portions of wire centers that are within its ETC boundary but beyond the scope of its service; **or** (2) RCC has not received any requests for service in portions of wire centers that are within its ETC boundary but beyond the scope of its service that are not covered by resale agreements. If RCC has received requests for service in portions of wire centers that are within its ETC boundary but beyond the scope of its service, RCC will, as part of the annual certification process, provide: (1) a description of the steps taken by RCC to obtain a resale agreement with other telecommunications service providers in order to provide service to the requesting parties; (2) whether each party requesting service eventually received such service via RCC acting in the capacity of a reseller; and (3) RCC's estimated timeframe for negotiating a resale agreements in each wire center where it was unable to accommodate a request for service because RCC had no existing resale agreement in place.

If certification of a resale agreement is made and someone challenges the existence of an agreement, Staff would be willing to conduct an *in camera* review to confirm the accuracy of the certification. RCC commits to cooperate in seeking permission of the other carrier(s) with the understanding that such a review would be covered by a nondisclosure agreement or through the use of Commission subpoena and protective order to preserve the confidentiality of the resale agreement.

RCC understands that a modified reporting requirement number 7--as set forth above--would satisfy Staff's desire to ensure that RCC is making a *bona fide* effort to ensure full coverage of its ETC area consistent with its commitments made in this docket. Likewise, RCC

believes that it can accommodate Staff's modified reporting request without violating its contractual commitments to other CMRS carriers.

II. OTA OFFERS NO ANALYSIS OF *HIGHLAND CELLULAR* WHATSOEVER IN ITS LATEST FILING

As noted, the purpose of allowing OTA to file a supplemental brief on May 28 was to address the alleged impact of *Highland Cellular* on this docket. OTA was permitted to rebut RCC's May 10 brief in which RCC explained why the Commission need not and should not follow the *Highland Cellular* decision and in which RCC nevertheless undertook a detailed and thorough analysis of why the record conclusively established that there is no concern that granting RCC's application could have the "effect of cream skimming." OTA failed to address either of RCC's arguments, except obliquely.

First, OTA does not dispute RCC's analysis that *Highland Cellular* is not binding on this Commission.⁷ As to strength of that FCC decision, OTA merely asserts, without analysis or support, that the *Highland Cellular* order is not "a weak decision." OTA Brief at 3.

Secondly, after asserting that *Highland Cellular* supports OTA's concerns about cream skimming where partial wire centers and partial study areas are served, OTA undertakes no analysis of whether the record in this docket supports a concern about the "effects of cream skimming." Indeed, OTA does not raise a single substantive argument to respond to RCC's May 10 analysis of the wire center densities in the Century Tel or Sprint study areas. Nor does OTA contest that of the affected rural ILECs, only the Century Tel and Sprint study areas must be redefined and, therefore, there can be no possibility of cream skimming in the other rural ILECs' study areas.

The import of OTA's lack of direct response is clear. As RCC argued in its May 10 brief, the record in this docket conclusively establishes that there is no cream skimming, nor is there any possible "effect of cream skimming" in granting RCC's application.

⁷ Staff likewise does not dispute that *Highland Cellular* is not binding here.

Accordingly, the FCC's analysis in *Highland Cellular* can have no impact on the outcome of this docket regardless of whether the Commission chooses to follow it.

Rather than taking on the "effect of cream skimming analysis" of RCC, OTA recycles its prior, unsupportable, argument that RCC should have made a specific public interest showing for each individual rural ILEC.⁸ OTA made this same argument in both its opening brief filed in February,⁹ and its reply brief filed in March of this year.¹⁰ OTA offers no citation in support of this recycled assertion for two reasons. First, it is unsupportable. The FCC has never held that an ETC applicant needs to make an ILEC-specific public interest showing. Nor is RCC aware of any state commission that has imposed such a requirement.¹¹

The second likely reason OTA provided no citation for its claim is that when OTA made the assertion before, it purported to rely on the *Virginia Cellular* decision.¹² Two problems immediately flow from such a citation. First, it would be even more obvious that OTA was using the opportunity of the May 28 filing simply as a further and improper reply brief, rather than a legitimate response to a new FCC decision in *Highland Cellular*. Second, it would reemphasize the fact that *Virginia Cellular* offers no support for OTA's assertion that the public interest must be analyzed for each ILEC study area. The only study area-by-study area analysis in *Virginia Cellular* was to examine the "effect of the cream skimming" issue by comparing densities of the included versus excluded wire centers. This is precisely the analysis that both RCC and the Staff engaged in, but that OTA ignored.

⁸ OTA Brief at 1, 6.

⁹ OTA Opening Brief at 3, 11, 13, and 20.

¹⁰ OTA Reply Brief at 14.

¹¹ No purpose would be served by such an analysis because harm to ILECs is not a proper public interest criteria. Rather, the proper criteria is whether the public would be well served by a grant of RCC's petition. That determination is made throughout the entirety of RCC's proposed ETC service area.

¹² OTA Opening Brief at 11, citing *Virginia Cellular*, ¶ 28.

Next, OTA attempts to obscure the lack of a true *Highland Cellular*-type of analysis by attacking RCC's new map, feigning an inability to see the map. Because it is clear that OTA had the new map in hand two days before the due date for its filing, any inability of OTA to review the map before its filing appears to have been by choice.¹³ Moreover, OTA's somewhat confusing argument about the map overlooks two important things. First, it was not OTA that sought a better map to begin with, it was Staff. OTA is merely seizing upon the map as a way to delay of RCC's grant of ETC status. Second, the Staff's original purpose in seeking the map was to see "the intersection of [RCC's] CGSA and underlying rural ILEC wire centers."¹⁴ This, in turn, was driven by the desire to ensure that RCC's application would not have the "effect of cream skimming" by encompassing only the most densely populated portions of the wire center, while excluding the less dense areas.¹⁵ Because RCC no longer seeks to serve any partial wire centers, the maps no longer can have any bearing on the public interest determination in this docket. The Commission now knows exactly where RCC will be obligated to serve and where it will not without need for a map because RCC has defined its scope of coverage by the existing (and known) rural ILEC wire center boundaries.¹⁶

OTA asserts that RCC has not demonstrated an acceptable commitment to serve complete wire centers because it did not provide copies of resale agreements. Once again, OTA is making up new requirements out of whole cloth. Neither the FCC, nor any other state of which RCC is aware, has ever imposed a requirement to provide or have resale agreements in place as a condition to a grant of ETC status. Requiring RCC to approach every other possible

¹³ The import of OTA's statements about the map are difficult to follow. OTA states that it received the map electronically late in the day on May 26, two days before the due date of its filing, which is correct. Then, however, OTA states that the map "was not opened until the date of this filing."

¹⁴ Exhibit Staff/3 at 29.

¹⁵ Staff's Brief re Impact of Recent FCC Action at 5 (April 28, 2004).

¹⁶ OTA's challenge to the "word" of RCC and vague allusions to "hidden frailties" are speculative and unsupported.

telecommunications carrier and put in place resale agreements, committing to make such a huge investment of time and resources before even knowing whether there will be a request that must be served by resale, let alone where the hypothetical customers are located or which carrier has facilities the area where a request may come from, can serve no purpose other than to erect a barrier to entry.¹⁷

The rhetorical questions that OTA poses as to the public interest benefit from reselling an ILEC's service are both misguided and wrongly answered. Eight years ago, Congress mandated that any ETC may provide service through a combination of facilities and resale.¹⁸ Irrespective of what OTA thinks, RCC is permitted to serve some customers through resale, unbundled network elements (or any other means for that matter) that provide the supported services to consumers. In writing this provision into the statute, surely Congress thought there was some public interest reason in permitting ETCs to serve customers through a combination of facilities of resale.

Even assuming, for the sake of argument, that RCC would be forced to resell an ILEC's service, there is still a substantial public interest benefit because RCC will be able to receive support for the overwhelming majority of the customers it will be serving using its facilities. Moreover, if RCC does obtain an number of resale customers in a given area, that provides a strong motivation for RCC to build facilities because, as soon as it does, it can migrate customers to its facilities and begin to receive high cost support for them. This incentive to migrate is yet another clear public interest benefit.

¹⁷ Moreover, resale is but one of many tools a competitive ETC can use to get service to customers. RCC has a huge incentive to try to get every customer on its facilities, because it only receives high cost support if it serves customers using facilities. *Federal-State Joint Board On Universal Service (Order)*, 12 FCC Rcd 8776, 8933-34 (1997) ("In addition, we clarify the Joint Board's recommendation on eligibility and find that carriers that provide service to some customer lines through their own facilities and to others through resale are eligible for support only for those lines they serve through their own facilities.").

¹⁸ 47 U.S.C. Section 214(e)(1)(A).

OTA's argument attempts to take the public interest analysis down to the level of a single customer or handful of resale customers, which is ludicrous. Moreover, RCC likely would not resell an ILEC's service but would instead resell the service of another wireless carrier, since wireless service is what was requested of RCC.¹⁹ Everyone can agree that customers are better served by getting new facilities built out in rural Oregon, and the USF system is set up to provide competitors with the maximum incentive to do so and migrate their customers away from resale arrangements.

Likewise, the rhetorical question that OTA poses regarding whether it is in the public interest to designate a second ETC in the Helix study area--which receives over \$1300 per line a year in federal support²⁰--completely misunderstands the whole point of the federal scheme. A more appropriate question would be whether it is in the public interest for Helix to install two new legacy-POTS circuit switches, at a cost of \$500,000, to serve fewer than 350 customers?²¹ From RCC's perspective, this kind of investment is a waste of high cost support. For the same money, RCC could invest in two new cell towers and provide excellent voice coverage, along with all the additional public interest benefits that wireless brings. But the whole point of the federal universal scheme is that regulators should not make these decisions. Under the federal rules, competing carriers and technologies are to be provided the same support and ultimately consumers will decide which has the most efficient or desirable service.

¹⁹ A customer that contacts RCC for service likely wants wireless service, not land line service. That is the type of service RCC markets and advertises.

²⁰ OTA Brief at 2-3.

²¹ See *In the Matter of Helix Telephone Company*, Order No. 04-052 (OPUC Dkt. UM 1125, Jan. 27, 2004).

III. RCC SUBMITS AS SUPPLEMENTAL AUTHORITY THE ORDER ON RECONSIDERATION OF THE LOUISIANA PUBLIC SERVICE COMMISSION IN THE CENTENNIAL CASE.

OTA argued repeatedly that this Commission should follow the lead of the Louisiana Public Service Commission (“PSC”) in *Centennial Cellular*, Cause No. 41052-ETC 45 Order Denying Petitioner’s Application For Designation As An Additional ETC (March 14, 2004) (“*Centennial*”).²² OTA continued to rely on the Louisiana order in its May 28 filing, even though the PSC had reversed its earlier decision on reconsideration. The order on reconsideration was voted on May 12 and issued on May 26, 2004. A copy is attached hereto as Attachment B.

While OTA continues to argue that *Virginia Cellular* and the Joint Board Recommendations are grounds to deny ETC status, the Louisiana PSC plainly believes just the opposite. Indeed, the PSC cited both the *Virginia Cellular* order and the Joint Board Recommendations as their reason for reconsidering and changing their denial of ETC status into a **grant**. *Centennial* at 6-7.

CONCLUSION

RCC has attached a corrected list of the rural wire centers for ETC designation as Attachment A.²³ As requested, RCC has prepared a form of petition for redefinition of the study areas of CenturyTel and Sprint that the Commission can file with the FCC upon entry of its order granting RCC’s application.²⁴

²² OTA May 5, 2004 Brief at 3, OTA May 28, 2004 Brief at 4. *See also*, OTA March 4, 2004 Reply Brief at 2 (citing oral decision prior to release of order).

²³ In preparing the new map, RCC discovered that it had inadvertently left the Oregon Slope wire center of Malheur Telephone Company off of revised Exhibit A to the petition and Attachment A to RCC’s May 10, 2003 brief. Oregon Slope has been added, consistent with RCC’s commitment to serve the entire study area of Malheur. Oregon Slope was listed in the original application and has never been withdrawn. Just to be clear, it remains RCC's intention to serve all of Malheur. "Stices Gulch" (shown in RCC’s last filing as a Pine Telephone wire center) can be omitted. The consensus among the parties is that it is part of the Granite exchange and Granite wire center. RCC commits to serve the area, regardless of how it is designated.

²⁴ Attached hereto as Attachment C.

The Commission should reject OTA's recycled and unsupportable arguments. Instead, the Commission should either adopt RCC's recommendation to disregard *Highland Cellular* or should adopt the RCC and Staff *Highland Cellular*-type analyses and grant RCC's application, finding that *Highland Cellular* factors are satisfied. In either event, Staff's conditions, with the minor modification noted above, are acceptable to RCC. The Commission should grant RCC's application subject only to the eight reporting conditions proposed by Staff and modified above.

Respectfully submitted this 4th day of June, 2004.

MILLER NASH, LLP

Brooks E. Harlow
OSB #03042

Attorneys for RCC Minnesota, Inc.

Of Counsel:

LUKAS NACE GUTIERREZ
AND SACHS, Chartered
David LaFuria
Steven M. Chernoff
1111 19th Street, N.W., Suite 1200
Washington, D.C. 20036
Tel. (202) 857-3500

TABLE 1--FULLY SERVED RURAL WIRE CENTERS, REVISED 6-4-04

Wire Center	ILEC	Revision	Comments
Floratroj	Asotin	None	RCC will serve entire study area
Harney	CenturyTel	None	RCC will serve entire wire center
Lakeview	CenturyTel	None	RCC will serve entire wire center
Echo	CenturyTel	None	RCC will serve entire wire center
Monument	CenturyTel	None	RCC will serve entire wire center
Long Creek	CenturyTel	None	RCC will serve entire wire center
Ukiah	CenturyTel	None	RCC will serve entire wire center
Pilot Rock/Starkey	CenturyTel	None	RCC will serve entire wire center
North Powder	CenturyTel	None	RCC will serve entire wire center
Durkee	CenturyTel	None	RCC will serve entire wire center
Huntington	CenturyTel	None	RCC will serve entire wire center
Burns	CenturyTel	None	RCC will serve entire wire center
Seneca	CenturyTel	None	RCC will serve entire wire center
John Day	CenturyTel	None	RCC will serve entire wire center
Paulina	CenturyTel	None	RCC will serve entire wire center
Silver Lake	CenturyTel	None	RCC will serve entire wire center
Gilchrist	CenturyTel	None	RCC will serve entire wire center
Chemult	CenturyTel	None	RCC will serve entire wire center
Chiloquin	CenturyTel	None	RCC will serve entire wire center
Paisley	CenturyTel	None	RCC will serve entire wire center
Bly	CenturyTel	None	RCC will serve entire wire center
Sprague River	CenturyTel	None	RCC will serve entire wire center
Bonanza	CenturyTel	None	RCC will serve entire wire center
Malin	CenturyTel	None	RCC will serve entire wire center
Merrill	CenturyTel	None	RCC will serve entire wire center
Rocky Point	CenturyTel	None	RCC will serve entire wire center
Fort Klamath	CenturyTel	None	RCC will serve entire wire center
Richland	Eagle	None	RCC serves entire study area
Helix	Helix	None	RCC serves entire study area
Meacham	Helix	None	RCC serves entire study area
Vale	Malheur	None	RCC serves entire study area
Ontario	Malheur	None	RCC serves entire study area
Nyssa	Malheur	None	RCC serves entire study area
Oregon Slope	Malheur	Omission corrected	RCC serves entire study area *
Harper	Midvale	None	RCC serves entire study area
Juntura	Midvale	None	RCC serves entire study area
Hereford-Unity	Oregon Tel.	None	RCC serves entire study area
Prairie City	Oregon Tel.	None	RCC serves entire study area
Bates	Oregon Tel.	None	RCC serves entire study area
Dayville	Oregon Tel.	None	RCC serves entire study area
Mount Vernon	Oregon Tel.	None	RCC serves entire study area
Oxbow	Pine Tel.	None	RCC serves entire study area
Halfway	Pine Tel.	None	RCC serves entire study area
Stices Gulch	Pine Tel.	Delete	Does not exist as separate wire center *
Granite	Pine Tel.	None	RCC serves entire study area
Crater Lake	Sprint/United	None	RCC will serve entire wire center

* Correction from 5-10-04 filing

LOUISIANA PUBLIC SERVICE COMMISSION

ORDER NO. U-27174-A

**CENTENNIAL LAFAYETTE COMMUNICATIONS, LLC,
CENTENNIAL BEAUREGARD CELLULAR, LLC,
CENTENNIAL HAMMOND CELLULAR, LLC,
CENTENNIAL CALDWELL CELLULAR CORP. AND
CENTENNIAL MOREHOUSE CELLULAR, LLC,
EX PARTE.**

Docket No. U-27174. In re: Application for designation as an eligible telecommunications carrier pursuant to Section 214(e)(6) of the Communications Act of 1934 for the purposes of receiving federal universal service support in Louisiana. **(On Reconsideration)**

(Amends and Supersedes Order U-27174)

(Decided at the May 12, 2004 Business and Executive Session.)

Nature of the Case

Centennial Lafayette Communications, LLC, Centennial Beauregard Cellular, LLC, Centennial Hammond Cellular, LLC, Centennial Caldwell Cellular Corp. and Centennial Morehouse Cellular, LLC (“Centennial”) seek to be designated eligible telecommunications carriers (“ETCs”) pursuant to 47 U.S.C. § 214(e)(2) throughout Centennial’s service area for purposes of receiving federal universal service support and high cost certification in Louisiana.¹ 47 U.S.C. § 214(e)(2) provides that the Louisiana Public Service Commission (“Commission”), may, upon request and consistent with the public interest, convenience, and necessity, designate more than one common carrier as an ETC for a service area designated by the state commission, so long as the carrier meets the requirements of 47 U.S.C. § 214(e)(1). Centennial requests that the Commission exercise its authority and designate each Centennial subsidiary as an ETC so that those subsidiaries are eligible to receive federal high cost and low-income universal service support.

Jurisdiction and Applicable Law

The Commission exercises jurisdiction over public utilities in Louisiana pursuant to the Louisiana Constitution Article IV, Section 21(B), which states:

The commission shall regulate all common carriers and public utilities and have such other regulatory authority as provided by law. It shall adopt and enforce reasonable rules, regulations and procedures necessary for the discharge of its duties, and shall have other powers and perform other duties as provide by law.

Pursuant to the above authority, the Commission adopted the Regulations for Competition in the Local Telecommunications Market, as most recently amended in Appendix B to the General Order dated July 24, 2002. As defined therein in Section 101,

(6) Commercial Mobile Radio Service (CMRS) – a mobile service that is: (a)(1) provided for profit, i.e., with the intent of receiving compensation or monetary gain; (2) an interconnected service; and (3) available to the public, or to such classes of eligible users as to be effectively available to a substantial portion of the public; or (b) the functional equivalent of such a mobile service described in paragraph (a) of this definition. 47 CFR § 20.3, as amended. CMRS includes “Radio Common Carriers: as that term is defined and used in La. R.S. § 45:1500 *et seq.*”

¹ The application was erroneously filed under § 214(e)(6), which governs applications filed with the Federal Communications Commission seeking ETC status.

(7) Commercial Mobile Radio Service Provider – any person or entity engaged in the provision of a service that is a commercial mobile radio service. CMRS provider includes “Radio Common Carriers: as that term is defined and used in La. R.S. § 45:1500 *et seq.*

Pursuant to constitutional and statutory provisions, the Commission is given broad power to regulate telephone utilities and may adopt all reasonable and just rules, regulations, and orders affecting or connected with the service or operation of such business.² As stated previously, 47 U.S.C. § 214(e)(2) grants the power to the state commissions to designate a common carrier that meets the requirements of 47 U.S.C. § 214(e)(1) as an ETC for a service area specified by the commission.

Additionally, the Commission sets forth the filing requirements for CMRS providers in Section 401.B, which states,

Providers of CMRS and providers of PMRS shall file tariffs, which identify and describe the rates, terms and conditions of services offered and provided in Louisiana. Such tariff filings shall be reviewed by the Commission consistent with the mandates of the Omnibus Budget Reconciliation Act of 1993 as codified at 47 U.S.C.A. §332, as amended. However, to ensure the universal availability of telecommunications services to Louisiana consumers at affordable rates, providers of CMRS or PMRS, where such services have become or are a substitute for land line telephone exchange service for a substantial portion of the communications within the State, shall be required to abide by and comply with these tariff filing requirements.

The Commission has generally excluded CMRS from any additional regulatory or reporting requirements.

47 USC § 214(e) Provision of Universal Service

(1) Eligible telecommunications carriers - A common carrier designated as an eligible telecommunications carrier under paragraph (2), (3), or (6) shall be eligible to receive universal service support in accordance with section 254 of this title and shall, throughout the service area for which the designation is received—

(A) offer the services that are supported by federal universal service support mechanisms under section 254(c) of this title, 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); and

(B) advertise the availability of such services and the charges therefor using media of general distribution.

(2) Designation of eligible telecommunications carriers - 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). Before designating an additional eligible

² South Central Bell Tel. Co. v. Louisiana Public Service Commission, 352 So.2d 999, Supp. 1977.

telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.

47 C.F.R. § 54.101 Supported Services for Rural, Insular and High-Cost Areas

- (a) Services designated for support. The following services or functionalities shall be supported by federal universal service support mechanisms:
- (1) Voice grade access to the public switched network. "Voice grade access" is defined as a functionality that enables a user of telecommunications services to transmit voice communications, including signaling the network that the caller wishes to place a call, and to receive voice communications, including receiving a signal indicating there is an incoming call. For the purposes of this part, bandwidth for voice grade access should be, at a minimum, 300 to 3,000 Hertz;
 - (2) Local usage. "Local usage" means an amount of minutes of use of exchange service, prescribed by the Commission, provided free of charge to end users;
 - (3) Dual tone multi-frequency signaling or its functional equivalent. "Dual tone multi-frequency" (DTMF) is a method of signaling that facilitates the transportation of signaling through the network, shortening call set-up time;
 - (4) Single-party service or its functional equivalent. "Single-party service" is telecommunications service that permits users to have exclusive use of a wireline subscriber loop or access line for each call placed, or, in the case of wireless telecommunications carriers, which use spectrum shared among users to provide service, a dedicated message path for the length of a user's particular transmission;
 - (5) Access to emergency services. "Access to emergency services" includes access to services, such as 911 and enhanced 911, provided by local governments or other public safety organizations. 911 is defined as a service that permits a telecommunications user, by dialing the three-digit code "911," to call emergency services through a Public Service Access Point (PSAP) operated by the local government. "Enhanced 911" is defined as 911 service that includes the ability to provide automatic numbering information (ANI), which enables the PSAP to call back if the call is disconnected, and automatic location information (ALI), which permits emergency service providers to identify the geographic location of the calling party. "Access to emergency services" includes access to 911 and enhanced 911 services to the extent the local government in an eligible carrier's service area has implemented 911 or enhanced 911 systems;
 - (6) Access to operator services. "Access to operator services" is defined as access to any automatic or live assistance to a consumer to arrange for billing or completion, or both, of a telephone call;

- (7) Access to interexchange service. “Access to interexchange service” is defined as the use of the loop, as well as that portion of the switch that is paid for by the end user, or the functional equivalent of these network elements in the case of a wireless carrier, necessary to access an interexchange carrier's network;
 - (8) Access to directory assistance. “Access to directory assistance” is defined as access to a service that includes, but is not limited to, making available to customers, upon request, information contained in directory listings; and
 - (9) Toll limitation for qualifying low-income consumers. Toll limitation for qualifying low-income consumers is described in subpart E of this part.
- (b) Requirement to offer all designated services. An eligible telecommunications carrier must offer each of the services set forth in paragraph (a) of this section in order to receive federal universal service support.
- (c) Additional time to complete network upgrades. A state commission may grant the petition of a telecommunications carrier that is otherwise eligible to receive universal service support under Sec. 54.201 requesting additional time to complete the network upgrades needed to provide single-party service, access to enhanced 911 service, or toll limitation. If such petition is granted, the otherwise eligible telecommunications carrier will be permitted to receive universal service support for the duration of the period designated by the state commission. State commissions should grant such a request only upon a finding that exceptional circumstances prevent an otherwise eligible telecommunications carrier from providing single-party service, access to enhanced 911 service, or toll limitation. The period should extend only as long as the relevant state commission finds that exceptional circumstances exist and should not extend beyond the time that the state commission deems necessary for that eligible telecommunications carrier to complete network upgrades. An otherwise eligible telecommunications carrier that is incapable of offering one or more of these three specific universal services must demonstrate to the state commission that exceptional circumstances exist with respect to each service for which the carrier desires a grant of additional time to complete network upgrades.

Background and Procedural History

Centennial filed an application with the Commission on February 19, 2003 seeking designation as an ETC pursuant to § 214(e)(2) of the Communications Act of 1934 for the purposes of receiving federal universal service support in Louisiana.³ Notice of the application was published in the Commission's Official Bulletin dated February 28, 2003.

Timely interventions were filed by the following: The Small Company Committee (“SCC”); AllTel Communications Wireless, Inc.; Radiofone, Inc.; Lafourche Telephone Company, LLC; EATEL; Elizabeth Telephone Company; Cameron Telephone Company; CenturyTel of Northwest Louisiana, Inc.; CenturyTel of Central Louisiana, LLC; CenturyTel of Ringgold, LLC; CenturyTel of Southeast Louisiana, Inc.; CenturyTel of North Louisiana, LLC; CenturyTel of East Louisiana, LLC and CenturyTel of Southwest Louisiana, LLC.

³ The Communications Act of 1934 was revised in 1996 and is now referred to as the Telecommunications Act of 1996.

CenturyTel of Evangeline, LLC and CenturyTel of Chatham, LLC each filed a Motion for Intervention Out of Time and Inclusion on Service List on March 19, 2003. On March 27, 2003, Centennial filed an Opposition to Late Intervention of CenturyTel of Evangeline, LLC and CenturyTel of Chatham, LLC.

On April 16, 2003 a status conference was held during which the parties agreed that the issues could be presented for decision to the tribunal through briefing and that a hearing was not necessary. Secondly, a procedural schedule was established that required position statements to be filed by July 18, 2003 and replies to position statements to be filed by August 1, 2003. Finally, the Motion[s] for Intervention Out of Time and Inclusion on Service List filed by CenturyTel of Evangeline, LLC and CenturyTel of Chatham, LLC were denied.

On May 16, 2003 the Applicant filed a Motion to Correct Application in which it amended its application to reflect that it is also seeking designation as an ETC in the Lake Charles Metropolitan Statistical Area (“MSA”) and the Lake Charles Rural Service Area (“RSA”) 7, noting that it inadvertently omitted these areas from the original application. Notice of the corrected application was published in the Commission's Official Bulletin dated May 23, 2003. Elizabeth Telephone Company, LLC and Cameron Telephone Company, LLC filed timely interventions.

In accordance with the deadlines established at the April 16, 2003 status conference, position statements and/or comments were submitted by Cameron Telephone Company; Elizabeth Telephone Company; Commission Staff; CenturyTel of East Louisiana, LLC; CenturyTel of North Louisiana, LLC; CenturyTel of Southeast Louisiana, Inc.; CenturyTel of Southwest Louisiana, Inc.; CenturyTel of Ringgold, LLC; CenturyTel of Central Louisiana; CenturyTel of Northwest Louisiana, Inc.; Small Company Committee and Centennial. Small Company Committee, Cameron Telephone Company, Elizabeth Telephone Company, and Centennial filed reply comments.

ALJ's Recommendation

The ALJ concluded that Centennial has demonstrated that it will offer the services supported by the federal universal service mechanism upon designation as an ETC. By so doing, and thus, complied with the requirement of 47 USC § 214(e)(1)(A) to “offer the services that are supported by the Federal universal service support mechanisms under 47 USC § 254(c).” The ALJ also concluded that Centennial has demonstrated that it satisfies the requirement of § 214(e)(1)(B) to advertise the availability of the supported services and the charges for those services using media of general distribution. The ALJ additionally determined that designating Centennial as an ETC in rural areas would be in the public interest. Accordingly, the ALJ recommended Centennial’s application be granted, with certain conditions placed on such a grant.

Commission's Original Consideration

The ALJ’s Final Recommendation regarding Centennial’s application was considered by the Commission at its January 14, 2004 Business and Executive Session. Following oral argument by the parties, Commissioner Field made a motion to deny Centennial’s application, stating the following reasons:

“that first of all, the state commissions, according to the Telecom Act of 1996, has a primary jurisdiction for granting ETC designations, and under Section 214(e) upon requests in consistent with the public interest, convenience, and necessity, the Commission may, with respect to an area served by a rural telephone company, and shall in all other cases designate more than one common carrier as an ETC for a designated service area. Secondly, the ALJ’s recommendation correctly notes that the Commission seeks to ensure that all Louisiana residents have access to affordable phone service. One method of achieving this goal is to encourage providers to service rural and low-income areas by offering subsidies in the form of universal service support. Thirdly, the current regulatory compact the Commission enforces with the Louisiana rural LECs acknowledges the Commission’s authority to regulate the

rural LECs retail rates for essential telecom services. Therefore, any draw the rural LECs make from the Universal Service Fund must be used to further the deployment of telecom services to rural and high cost customers. Moreover, the rates charged for these telecom services are subject to Commission's jurisdiction. Furthermore, the integrity of the universal service fund is safeguarded as a result of the requirement that the rural LECs draw is based on the rural LECs cost per wire line customer. Fourthly, no regulatory compact exists with cellular providers. The Commission has no authority over the rates charged by cellular providers. If granted ETC status, Centennial would have the ability to draw from the fund without the legal obligation to reinvest in the service territory and with the freedom to price their services at whatever the market will bear. The ALJ in her final recommendation did place in a condition that restricted the manner in which funds can be expended. However, there is doubt as to whether such a condition would be enforceable. Furthermore, Centennial would base their Universal Service draw on the rural LECs cost per wire line customer, not on their own cost. Not only could this practice threaten the integrity of the Universal Service Fund, but it is against good government policy to award subsidies to entities without regard to their own cost. Fifth, in addition to these facts, Centennial has failed to demonstrate that the company needs USF support in order to continue providing services in rural Louisiana. This is a threshold issue. If the current market prices in the cellular market place provide a sufficient return for the services rendered, there's no need for USF support at this time. For these reasons I find at this particular time, given this set of facts, it is not in the public interest to approve Centennial's application for ETC designation, and I move to deny the application for these reasons."

Commissioner Field's motion was seconded by Commissioner Sittig, and unanimously adopted by the Commission. The Commission's vote resulted in the issuance of Order U-27174 on March 5, 2004, which denied Centennial's request for ETC designation as not being in the public interest. Centennial filed a timely motion with the Commission, asking that it reconsider its prior decision.

Subsequent to the Commission's consideration, two important pronouncements were released that more clearly outlined a state's authority regarding public interest determinations. First, the FCC issued its decision *In the Matter of Federal-State Joint Board on Universal Service, Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, CC Docket No. 96-45, *Memorandum Opinion and Order*, FCC 03-338 ("Virginia Cellular"), and later, the Joint Board on Universal Service issued its Proposed Recommendation, *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45 (released 2/27/04.) In order to establish specific rules to implement public interest criteria, Staff was directed to open a rulemaking docket, the result of which was the issuance of a General Order in Docket R-27841, adopted by the Commission at its May 12, 2004 Business and Executive Session.

As set forth in the General Order, a number of factors are to be considered and applied, on a case specific basis, to determine whether an application for ETC designation in a rural area is in the public interest.

Commission's Reconsideration of Order U-27174

Following its vote in Docket R-27841, the Commission, on Motion of Commissioner Field, seconded by Commissioner Blossman, and unanimously adopted, voted to reconsider Centennial's request to be designated as an ETC. Following this vote, Commissioner Field then moved to designate Centennial as an ETC for the areas it requested, subjected to the public interest factors adopted in docket R-27841, and the additional factors:

1. As a condition of receiving and maintaining ETC status, Centennial shall have the limited right to intervene in the LOS/State USF docket for the purpose of ensuring the equality of USF assessments to all TSPs.

2. All USF funds received by Centennial shall not be used for any other purpose than to provide, maintain and/or upgrade its facilities and services in the rural high-cost areas within the state of Louisiana within its FCC-designated service territory.
3. All unspent USF funds received by Centennial in the prior calendar year shall be placed into a segregated, interest bearing account.
4. Centennial's ETC designation shall be effective as of January 14, 2004, the date of the original order denying Centennial's ETC certification.
5. The LPSC shall take all action reasonably requested by Centennial to ensure that Centennial's ETC certification, and Centennial's receipt of federal high cost USF funds, is retroactive to January 1, 2004, including, without limitation, promptly filing with the FCC and USAC appropriate materials supporting Centennial in its requests for such retroactive support.
6. Centennial shall use portions of the funds it receives as a result of this designation to provide service to the originally unserved areas of Shaw and Blackhawk.

Commissioner Blossman seconded Commissioner Field's motion. Discussion was held concerning whether Centennial satisfied the public interest criteria established in Docket R-27841, whereby Staff agreed Centennial had satisfied the requirement. Following the discussion, role was taken, with Commissioners Field, Blossman, Dixon and Campbell voting yes and Commissioner Sittig voting no.

IT IS THEREFORE ORDERED THAT

1. Centennial Communication is designated as an Eligible Telecommunications Carrier for the purpose of receiving Universal Service Funds in areas served by rural telephone carriers, as set forth in its application in this docket, subject to the conditions established in Docket R-27841 and the additional conditions discussed herein.
2. This designation shall be deemed as effective as of January 14, 2004

BY ORDER OF THE COMMISSION
BATON ROUGE, LOUISIANA
May 26, 2004

/S/ IRMA MUSE DIXON
DISTRICT III
CHAIRMAN IRMA MUSE DIXON

/S/ C. DALE SITTIG (DISSENTS)
DISTRICT IV
VICE CHAIRMAN C. DALE SITTIG

/S/ JAMES M. FIELD
DISTRICT II
COMMISSIONER JAMES M. FIELD

/S/ JACK "JAY" A. BLOSSMAN
DISTRICT I
COMMISSIONER JACK "JAY" A. BLOSSMAN

LAWRENCE C. ST. BLANC
SECRETARY

/S/ FOSTER L. CAMPBELL
DISTRICT V
COMMISSIONER FOSTER L. CAMPBELL

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Federal-State Joint Board on Universal)	
Service)	CC Docket No. 96-45
)	
Petition for FCC Agreement in Redefining the)	
Service Areas of Rural Telephone Companies)	
in the State of Oregon Pursuant to 47 C.F.R.)	
Section 54.207(c))	

**PETITION FOR FCC AGREEMENT IN REDEFINING
RURAL TELEPHONE COMPANY SERVICE AREAS**

[date]

TABLE OF CONTENTS

	Page
I. BACKGROUND.....	1
II. DISCUSSION.....	4
A. Redefinition Is Consistent With Federal Universal Service Policy.....	4
B. The Requested Redefinition Satisfies the Three Joint Board Factors Under Section 54.207(c)(1) of the Commission’s Rules.....	7
C. The FCC’s Recent Highland Cellular Order Does Not Prohibit Redefinition, Either Because Highland Cellular Does Not Apply or Because the Proposed Redefinition Meets Highland Cellular’s Requirements Anyway	10
III. CONCLUSION	14

Summary

The Public Utilities Commission of the State of Oregon (“OPUC”) files this Petition pursuant to the provisions of 47 C.F.R. § 54.207(c). Under that rule, a state commission may petition the FCC for its concurrence to redefine the service area of a rural Incumbent Local Exchange Carrier (“ILEC”) as something other than the ILEC’s entire study area. Redefinition is necessary in connection with the OPUC’s recent designation of RCC Minnesota, Inc. (“RCC”) as an eligible telecommunications carrier (“ETC”) for purposes of receiving high-cost support from the federal universal service program. Because RCC’s licensed service territory does not correlate with rural ILEC service areas, the Act provides that rural ILEC service areas must be redefined before designation in those areas can take effect. Consistent with OPUC’s designation order and with previous actions taken by the FCC and several other states, redefinition is requested such that each wire center of the affected ILECs constitutes a separate service area.

The proposed redefinition is warranted under the Commission’s competitively neutral universal service policies, and it constitutes precisely the same relief granted to similarly situated carriers by the Commission and several states. Unless the relevant ILEC service areas are redefined, RCC will be unable to use high-cost support to improve and expand its service to consumers in many areas of its licensed service territory, and consumers will be denied the benefits. As the Commission and several states have consistently held, competitive and technological neutrality demand the removal of these artificial barriers to competitive entry. Moreover, the requested redefinition satisfies the analysis provided by the Federal-State Joint Board on Universal Service (“Joint Board”) in that it reduces opportunities for payment of uneconomic support to RCC, duly recognizes the special status of rural carriers under the 1996 Act, and does not impose undue administrative burdens on ILECs. Finally, the Commission’s *Highland Cellular* order does not prohibit the redefinition, either because *Highland Cellular*

does not apply in this case or because the proposed redefinition meets *Highland Cellular's* requirements.

The redefinition proposed herein is well-supported by the record at the state level, and all affected parties were provided ample opportunity to ensure that the Joint Board's recommendations were taken into account. Accordingly, OPUC requests that the FCC grant its concurrence expeditiously and allow the proposed redefinition to become effective without further action.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
)	
Petition for FCC Agreement in Redefining the Service Areas of Rural Telephone Companies in the State of Oregon Pursuant to 47 C.F.R. Section 54.207(c))	

PETITION FOR FCC AGREEMENT IN REDEFINING RURAL TELEPHONE COMPANY SERVICE AREAS

The Public Utilities Commission of the State of Oregon (“OPUC”) submits this Petition seeking the FCC’s agreement with the redefinition of the service areas of CenturyTel of Eastern Oregon (“CenturyTel”) and United Telephone – Northwest (“United”), two rural incumbent local exchange carriers (“ILECs”), whereby each individual wire center of the affected ILECs will be redefined as a separate service area. The redefinition will foster federal and state goals of encouraging competition in the telecommunications marketplace and extending universal service to rural Oregon’s consumers.

I. BACKGROUND

Pursuant to Section 214(e) of the Communications Act of 1934, as amended (the “Act”), state commissions generally have authority to designate carriers that satisfy the requirements of the federal universal service rules as ETCs and to define their service areas.¹ The service area of a rural ILEC is defined as its study area. However, the Act explicitly sets forth a process whereby a competitive ETC may be designated for a service area that differs from that of the

¹ 47 U.S.C. § 214(e).

ILEC, provided the rural ILEC's service area is redefined. Specifically, Section 214(e) of the Act provides:

“Service area” means such company’s “study area” unless and until the Commission and the States, after taking into account recommendations of a Federal-State Joint Board instituted under Section 410(c), establish a different definition of service area for such company.²

The FCC and the Federal-State Joint Board on Universal Service (“Joint Board”) have recognized that a strict rule requiring a competitive ETC to serve an area exactly matching a rural LEC’s study area would preclude competitive carriers that fully satisfy ETC requirements from bringing the benefits of competition to consumers throughout their service territory.³ The FCC has established a streamlined procedure for the FCC and states to act together to redefine rural ILEC service areas.⁴ Using this procedure, the FCC and state commissions have applied the Joint Board’s recommendations and concluded that it is necessary and appropriate to redefine the LEC service areas to permit the designation of competitive ETCs in those areas.⁵

RCC applied for federal ETC status in May 2003⁶ and requested that its ETC service area be defined to be coterminous with its FCC-licensed service territory.⁷ Because, as a

² *Id.*

³ See *Petition for Agreement with Designation of Rural Company Eligible Telecommunications Carrier Service Areas and for Approval of the Use of Disaggregation of Study Areas for the Purpose of Distributing Portable Federal Universal Service Support, Memorandum Opinion and Order*, 15 FCC Rcd 9924, 9927 n. 40 (1999) (“*Washington Redefinition Order*”), citing *Federal-State Joint Board on Universal Service, Recommended Decision*, 12 FCC Rcd 87, 181 (1996) (“*Joint Board Recommended Decision*”).

⁴ See 47 C.F.R. § 54.207(c). See also *Federal-State Joint Board on Universal Service, Report and Order*, 12 FCC Rcd 8776, 8881 (1997) (“*First Report and Order*”).

⁵ See, e.g., *Public Notice, Smith Bagley, Inc. Petitions for Agreement to Redefine the Service Areas of Navajo Communications Company, Citizens Communications Company of the White Mountains, and CenturyTel of the Southwest, Inc. On Tribal Lands Within the State of Arizona*, DA 01-409 (rel. Feb. 15, 2002) (effective date May 16, 2002); *Washington Redefinition Order, supra*, 15 FCC Rcd at 9927-28.

⁶ Application of RCC Minnesota, Inc. for Designation as an Eligible Telecommunications Carrier (filed May 9, 2003) (“*Application*”).

⁷ See Application at pp. 3-4. Although licensed by Rural Service Area (“RSA”) and Metropolitan Statistical Area (“MSA”), cellular carriers are generally authorized to provide service only within their (FOOTNOTE CONT'D)

wireless carrier, RCC is licensed to serve areas that do not match the service areas of the affected ILECs, RCC requested the redefinition of certain rural ILEC service areas, pursuant to the process established under Section 54.207(c) of the Act, to permit its designation in rural areas not completely covered by its authorized service areas.⁸ 47 C.F.R. § 54.207(c).

RCC was designated as an ETC on June __, 2004.⁹ In the *RCC Order*, OPUC concluded that a grant of ETC status would serve the public interest, and that RCC should be designated in those rural ILEC wire centers that RCC committed to serve completely. RCC was not designated in portions of rural ILEC wire centers. The OPUC also found that RCC's request to redefine affected rural ILEC service areas satisfied the Joint Board's three concerns. Specifically, RCC's designation was to become effective immediately in non-rural areas and in rural areas where RCC's proposed ETC service area covered the rural ILEC service area completely. OPUC further concluded that a petition should be filed to obtain the FCC's concurrence with the proposed redefinition.¹⁰

OPUC submits this Petition for concurrence, in accordance with the RCC designation order, the Act and the FCC's rules. Specifically, the OPUC seeks concurrence for redefinition that would involve redefining each wire center of CenturyTel and United as a separate service area.

Cellular Geographic Service Area ("CGSA"), the area within which a company is deemed to provide reliable service according to a mathematical formula established by FCC rule. *See* 47 C.F.R. § 22.911(a). Providers of other kinds of wireless service, such as PCS, are authorized to provide service anywhere within the Basic Trading Area ("BTA"), Major Trading Area ("MTA"), Economic Area ("EA"), or other market in which they are licensed.

⁸ *See* Application at pp. 3-4.

⁹ [cite order] ("*RCC Order*").

¹⁰ *RCC Order* at p. __.

II. DISCUSSION

The FCC should grant this Petition because (1) redefinition is consistent with federal Universal Service policy, (2) redefinition satisfies the three Joint Board factors under Section 54.207(c)(1) of the Commission's Rules, and (3) the FCC's recent *Highland Cellular* order¹¹ does not prohibit redefinition, either because *Highland Cellular* does not apply or because the proposed redefinition meets *Highland Cellular's* requirements. Ultimately, redefinition along wire center boundaries will advance universal service, promote competition and the ability of rural consumers to have similar choices among telecommunications services and at rates that are comparable to those available in urban areas.¹² The proceedings at the state level provided all affected parties with an opportunity to comment on the proposed redefinition, and OPUC fully considered and addressed the parties' arguments on this subject. The OPUC record well supports the proposed redefinition, and the order designating RCC provides the FCC with ample justification to concur.

A. **Redefinition Is Consistent With Federal Universal Service Policy.**

Congress, in passing the 1996 amendments to the Act, declared its intent to "promote competition and reduce regulation" and to "encourage the rapid deployment of new telecommunications technologies."¹³ As part of its effort to further these goals, Congress enacted new universal service provisions that, for the first time, envision multiple ETCs in the same market.¹⁴ In furtherance of this statutory mandate, the FCC has adopted the principle that

¹¹ *In the Matter of Highland Cellular, Inc., Petition for Designation of an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, cc Docket No. 96-45, FCC 04-37 (April 12, 2004) ("*Highland Cellular*").

¹² See 47 U.S.C. § 254(b)(3).

¹³ Pub. L. No. 104-104, 110 Stat. 56 (1996) (preamble).

¹⁴ See 47 U.S.C. § 214(e)(2).

universal service mechanisms be administered in a competitively neutral manner, meaning that no particular type of carrier or technology should be unfairly advantaged or disadvantaged.¹⁵

Consistent with this policy, the FCC and many state commissions have affirmed that ETC service areas should be defined in a manner that removes obstacles to competitive entry.¹⁶ Last year, for example, the FCC granted a petition of the Colorado Public Utilities Commission (“CPUC”) for a service area redefinition identical in all material respects to the redefinition proposed in this Petition.¹⁷ In support of redefining CenturyTel’s service area along wire-center boundaries, the CPUC emphasized that “in CenturyTel’s service area, no company could receive a designation as a competitive ETC unless it is able to provide service in 53 separate, non-contiguous wire centers located across the entirety of Colorado . . . [T]his constitutes a significant barrier to entry.”¹⁸ The FCC agreed and, by declining to open a proceeding, allowed the requested redefinition to take effect.¹⁹ The FCC similarly approved a petition by the Washington Utilities and Transportation Commission (“WUTC”) and about 20 rural ILECs for the redefinition of the ILECs’ service areas along wire center boundaries, finding that:

[O]ur concurrence with rural LEC petitioners’ request for designation of their individual exchanges as service areas is warranted in order to promote

¹⁵ See First Report and Order, *supra*, 12 FCC Rcd at 8801. Competitive neutrality is a “fundamental principle” of the FCC’s universal service policies. Guam Cellular and Paging, Inc., Petition for Waiver of Section 54.314 of the Commission’s Rules and Regulations, CC Docket No. 96-45, DA 03-1169 at ¶ 7 (Tel. Acc. Pol. Div. rel. April 17, 2003). Moreover, competitive neutrality is not among the issues referred by the FCC to the Joint Board. See Federal-State Joint Board on Universal Service, FCC 02-307 (rel. Nov. 7, 2002) (“Referral Order”).

¹⁶ See, e.g., *First Report and Order, supra*, 12 FCC Rcd at 8880-81; Petition by the Public Utilities Commission of the State of Colorado to Redefine the Service Area of CenturyTel of Eagle, Inc., Pursuant to 47 C.F.R. § 54.207(c) at p. 4 (filed with the FCC Aug. 1, 2002) (“CPUC Petition”).

¹⁷ See CPUC Petition at p. 5 (“Petitioner requests agreement to redefine CenturyTel’s service area to the wire center level”).

¹⁸ CPUC Petition at p. 4.

¹⁹ CenturyTel has petitioned the FCC to reconsider its decision. However, as of this date CenturyTel’s service area redefinition is effective.

competition. The Washington Commission is particularly concerned that rural areas . . . are not left behind in the move to greater competition. Petitioners also state that designating eligible telecommunications carriers at the exchange level, rather than at the study area level, will promote competitive entry by permitting new entrants to provide service in relatively small areas . . . We conclude that this effort to facilitate local competition justifies our concurrence with the proposed service area redefinition.²⁰

Other state commissions have similarly concluded that redefining rural ILEC service areas along wire center boundaries is fully justified by the pro-competitive goals of the 1996 Act. For example, in a decision that was later adopted by the Minnesota Public Utilities Commission, an administrative law judge (“ALJ”) recommended approval of Midwest Wireless Communications L.L.C.’s proposal to redefine certain rural ILEC service areas to the wire center level.²¹ Specifically, the ALJ concluded that “[t]he service area redefinition proposed by Midwest will benefit Minnesota consumers by promoting competitive entry and should be adopted.”²² Similar conclusions were reached in decisions granting ETC status to wireless carriers in Arizona, New Mexico, Maine, and West Virginia.²³

As in those cases, OPUC believes that the redefinition requested in the instant proceeding will enable RCC to make the network investments necessary to bring competitive service to people throughout its licensed service area. Redefinition will bring about a variety in pricing packages and service options on par with those available in urban and suburban areas.²⁴

²⁰ *Washington Redefinition Order, supra*, 15 FCC Rcd at 9927-28 (footnotes omitted).

²¹ Midwest Wireless Communications, L.L.C., OAH Docket No. 3-2500-14980-2, PUC Docket No. PT6153/AM-02-686, Findings of Fact, Conclusions of Law, and Recommendation at ¶¶ 53-59 (Minn. ALJ Dec. 31, 2002), *aff’d* by Minn. PUC March 19, 2003 (petition for concurrence pending before FCC).

²² *Id.* at ¶ 59.

²³ *See* Smith Bagley, Inc., Docket No. T-02556A-99-0207 (Ariz. Corp. Comm’n Dec. 15, 2000) (FCC concurrence granted May 16 and July 1, 2001); Smith Bagley, Inc., Utility Case No. 3026, Recommended Decision of the Hearing Examiner and Certification of Stipulation (N.M. Pub. Reg. Comm’n Aug. 14, 2001, adopted by Final Order (Feb. 19, 2002) (FCC concurrence granted June 11, 2002); RCC Minnesota, Inc. et al., Docket No. 2002-344 (Maine PUC May 13, 2003); Highland Cellular, Inc., Case No. 02-1453-T-PC, Recommended Decision (W.V. PSC Sept. 15, 2003).

²⁴ *See* 47 U.S.C. § 254(b)(3).

The use of high-cost support for infrastructure investment will bring improved wireless service and important health and safety benefits associated with increased levels of radio frequency coverage.²⁵ Redefinition will also remove a critical obstacle to competition, consistent with federal telecommunications policy.²⁶

B. The Requested Redefinition Satisfies the Three Joint Board Factors Under Section 54.207(c)(1) of the Commission’s Rules.

A petition to redefine an ILEC’s service area must contain “an analysis that takes into account the recommendations of any Federal-State Joint Board convened to provide recommendations with respect to the definition of a service area served by a rural telephone company.”²⁷ In the *Recommended Decision* that laid the foundation for the FCC’s *First Report and Order*, the Joint Board enumerated three factors to be considered when reviewing a request to redefine a LEC’s service area.²⁸ These factors are addressed below.

1. RCC is not cream skimming.

First, the Joint Board expressed concern as to whether the competitive carrier is attempting to “cream skim” by only proposing to serve the lowest cost exchanges.²⁹ RCC is not attempting to cream skim. As a wireless carrier, RCC is restricted to providing service in those areas where it is licensed by the FCC. RCC is not picking and choosing the lowest-cost exchanges; on the contrary, RCC proposed an ETC service area that is coterminous with its licensed service territory, and the has committed to offer service to customers throughout its

²⁵ See *RCC Order* at ____.

²⁶ See Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. At 113 (stating that the 1996 Act was designed to create “a pro-competitive, de-regulatory national policy framework” aimed at fostering rapid deployment of telecommunications services to all Americans “by opening all telecommunications markets to competition. . .”).

²⁷ 47 C.F.R. § 54.207(c)(1).

²⁸ *Joint Board Recommended Decision, supra.*

²⁹ See *Joint Board Recommended Decision*, 12 FCC Rcd at 180.

designated ETC service area upon reasonable request.³⁰ RCC has not attempted to select areas to enter based on support levels. In its designation order, OPUC required RCC to serve entire wire centers and as a result, RCC deleted from its petition those wire centers that it did not, or could not, commit to serve in their entirety. In sum, RCC has not attempted to serve only low-cost areas.

Opportunities for receiving uneconomic levels of support are further diminished by the FCC's decision to allow rural ILECs to disaggregate support below the study-area level.³¹ By moving support away from low-cost areas and into high-cost areas, ILECs have had the ability to minimize or eliminate cream skimming and the payment of uneconomic support to competitors.³² Furthermore, any ILECs that failed to disaggregate support effectively may modify their disaggregation filings subject to state approval.³³

A review of the disaggregation filing submitted by CenturyTel reveals that cream skimming is not a concern in this case. CenturyTel elected to disaggregate support under Path 3 by self-certifying a disaggregation plan that went into effect immediately upon being filed.³⁴ This plan has effectively moved higher levels of support away from lower-cost, higher-density areas and to areas where costs are higher and service is needed most – thus reducing or eliminating the possibility of RCC, or any competitive ETCs that may yet be designated, from

³⁰ See *RCC Order* at _____.

³¹ See *RCC Order* at _____. See also *Federal-State Joint Board on Universal Service, Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, Fourteenth Report and Order, twenty-second Order on Reconsideration, and Further Notice of Proposed Rulemaking*, 16 FCC Rcd 11244 (2001) (“*Fourteenth Report and Order*”).

³² See *Federal-State Joint Board on Universal Service, Western Wireless Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota, Memorandum Opinion and Order*, 16 FCC Rcd 18133, 18141(2001).

³³ See 47 C.F.R. §§ 54.315(b)(4); 54.315(c)(5), 54.315(d)(5).

³⁴ Path 3 filings were made by CenturyTel of Eastern Oregon, Malheur Home Telephone Company, and Pioneer Telephone Cooperative. A checklist of disaggregation filings made by Oregon ILECs is available on USAC's web site at <http://www.universalservice.org/hc/disaggregation/checklist/oregon.xls>.

receiving uneconomic support.³⁵ United elected not to disaggregate support, presumably because it believed that the apportionment of support corresponded with costs and there were no significant cost disparities that needed to be addressed. If United has concerns about cream skimming or uneconomic support as a result of RCC's entry, it may petition OPUC for approval of a new disaggregation plan that removes such opportunities.³⁶

2. The OPUC considered the rural ILECs' special status.

Second, the Joint Board recommended that the FCC and the States consider the rural carrier's special status under the 1996 Act.³⁷ The OPUC did so when granting RCC's application for ETC designation. The OPUC weighed numerous factors in ultimately determining that such designation was in the public interest. Congress mandated this public-interest analysis in order to protect the special status of rural carriers in the same way it established special considerations for rural carriers with regard to interconnection, unbundling, and resale requirements.³⁸ No action in this proceeding will affect or prejudice any future action the OPUC or the FCC may take with respect to any ILEC's status as a rural telephone company, and nothing about service area redefinition will diminish a rural ILEC's status as such.

3. The ILECs will face no undue administrative burden.

Third, the Joint Board recommended that the FCC and the States consider whether rural ILECs would face an undue administrative burden as a result of the proposed redefinition.³⁹ There is no undue burden in this case. The proposal to redefine rural ILEC service areas along wire center boundaries is made solely for ETC designation purposes.

³⁵ *See RCC Order at* ____.

³⁶ *See* 47 C.F.R. § 54.315(b)(4).

³⁷ *See Joint Board Recommended Decision*, 12 FCC Rcd at 180.

³⁸ *See id.*

³⁹ *See id.*

Defining service areas in this manner will in no way impact the way the affected rural ILECs calculate their costs but is solely to enable a newly designated competitive ETC to begin receiving high-cost support in those areas in the same manner as the ILECs. Rural ILECs may continue to calculate costs and submit data for purposes of collecting high-cost support in the same manner as they do now.

Finally, the question whether an ILEC may have to file a plan of disaggregation is not the type of undue administrative burden that is properly considered in this proceeding. In its RTF Order, the FCC placed upon rural ILECs the burden of disaggregating support if they believe disaggregation is in their best interest.⁴⁰ It is noteworthy that rural ILECs fully supported disaggregation as an appropriate means of targeting high-cost support so as to prevent competitors from receiving uneconomic support.⁴¹ Accordingly, the burden of disaggregating support is not present as a result of service area redefinition.

C. The FCC’s Recent *Highland Cellular* Order Does Not Prohibit Redefinition, Either Because *Highland Cellular* Does Not Apply or Because the Proposed Redefinition Meets *Highland Cellular*’s Requirements Anyway.

1. *Highland Cellular* does not apply.

Highland Cellular does not apply to this Petition because the FCC issued *Highland Cellular* on April 12, 2004, which was after the record closed in RCC’s ETC docket in

⁴⁰ *Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking in CC Docket No. 96-45, and Report and Order in CC Docket No. 00-256, IN THE MATTER OF FEDERAL-STATE JOINT BOARD ON UNIVERSAL SERVICE, Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, 16 FCC Rcd 11,244 (2001).

⁴¹ *See, Disaggregation and Targeting of Universal Service Support, Rural Task Force White Paper 6, September, 2000 at www.wutc.wa.gov/rtf* (“Both competitive and incumbent carriers agree with the need to disaggregate and target universal support below the study area level. Incumbent carriers favor disaggregation in order to properly target support to high-cost areas and to avoid cream skimming of their most lucrative customers. Competitive carriers seek disaggregation in order to develop rational entry strategies and to facilitate portability of support. Disaggregation will also reduce the possibility for arbitrage of universal service support resulting in shortfalls or windfalls to either competitors or incumbent Rural Carriers.”).

January 2004. *Highland Cellular* does not require the OPUC to reopen the record once it is closed, and the OPUC properly chose not to do so.

Second, *Highland Cellular* does not apply to ETCs other than Highland Cellular. That is because *Highland Cellular's* standards were not established pursuant to notice and comment requirements of the Administrative Procedure Act ("APA"). Designation of ETCs is governed by 47 U.S.C. § 214(e). The FCC's construction and implementation of § 214(e) was codified in § 54.201 of the Rules. See 47 C.F.R. § 54.201(a)-(d). Because it is a binding rule that affects a carrier's right to obtain universal service support, the § 54.201 ETC eligibility rule is legislative (or substantive) under the Federal Administrative Procedure Act ("APA").⁴² See, e.g., *Chrysler Corp. v. Brown*, 441 U.S. 281, 301-03 (1979). Thus, if the FCC were to make substantive changes to the designation process that it intended to be binding in all subsequent FCC and state cases under Section 214(e), it would trigger the notice-and-comment requirements of the Act and the APA. Because the FCC did not conduct a notice-and-comment rulemaking required by § 254(a) of the Act and § 553 of the APA, in *Highland Cellular*, the FCC could not have changed its rules and regulations in that case. In *Highland Cellular* the FCC could do no more than apply existing law to the unique facts and circumstances it faced based on the record in that case.

Consistent with this reasoning, at least two state commissions have recognized that they are not bound by the FCC's *Highland Cellular* decisions, since states have ultimate authority under the Act to make determinations as to the public interest.⁴³ In each case, as in this proceeding, the state commission emphasized that it had developed an extensive record resulting

⁴² 5 U.S.C. § 553(b)-(c).

⁴³ Federal-State Joint Board on Universal Service, Petition of the Minnesota Public Utilities Commission for Agreement with Changes in Definition of Service Areas for Exchanges Served by CenturyTel et al., Supplemental Comments of the Minnesota Public Utilities Commission (filed May 14, 2004); Petition by the Colorado Public Utilities Commission, Pursuant to 47 C.F.R. Section 54.207(c), for Commission Agreement in Redefining the Service Area of CenturyTel of Eagle, Inc., a Rural Telephone Company, Supplement to Petition by the Colorado Public Utilities Commission (filed May 14, 2004).

in a finding that designation throughout the petitioner's requested ETC service area would serve the public interest.

The FCC itself very recently explained that its orders must be interpreted in light of the rulemaking requirements of the APA in the AT&T access charge order.⁴⁴ AT&T argued that the FCC had exempted internet traffic from access charges in a report to Congress. Rejecting that argument, the FCC explained, “If the Commission had wanted to establish an exemption from section 69.5(b) for certain telecommunications services, it would have been obligated to conduct a rulemaking in conformity with the [APA]. Statements of policy in a Report to Congress or a Notice of Proposed Rulemaking – even if clear – cannot change our rules.” *AT&T Order*, ¶ 16 (footnotes omitted). Thus, the FCC could not have made rules of general applicability in *Highland Cellular*.

2. RCC meets *Highland Cellular*'s standards.

Even though the *Highland Cellular* decision did not exist at the time the record before the OPUC was developed in the RCC docket, the record nevertheless shows that RCC meets the standards of *Highland Cellular*. *Highland Cellular* contained a more detailed analysis of cream skimming than that required by the Joint Board factors listed above that involved review of population densities and projected costs of service. In that case, the FCC granted Highland Cellular's ETC designation for most of the requested study areas but denied ETC designation for the study area of certain rural carriers where Highland Cellular's licensed service area did not fully cover the study areas. *Highland Cellular* at ¶ 1. The FCC did so because it found that Highland Cellular would be cream skimming by largely serving the lowest-cost customers in the study areas. In the study area of Verizon South, the FCC concluded that four of the wire centers served by Highland Cellular were the four highest-density “and thus presumably

⁴⁴ *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361 (April 21, 2004) (“*AT&T Order*”).

lowest-cost wire centers in Verizon South’s study area.” *Highland Cellular* at ¶ 31. The FCC determined that “94 percent of Highland Cellular’s potential customers in Verizon South’s study area would be located in [four of the six wire centers served by Highland Cellular].” *Id.* The FCC then denied the application as to all six wire centers in the Verizon South study area. *Id.* at ¶ 32. The FCC engaged in a similar analysis regarding the Saltville wire center of United Telephone Company and reached the same conclusions. *Id.* at ¶ 1.

Unlike *Highland Cellular*, RCC’s customers tend to be in the lowest density ILEC wire centers. The wire centers in the Century Tel study area which RCC proposes to serve are more than six times less dense (and, therefore, presumably, more costly) than the remaining wire centers in the Century Tel study area. This is shown by the fact that the 26 wire centers in the Century Tel study area that RCC proposes to serve contain an average 1.22 access lines per square mile while the remaining 30 wire centers in the Century Tel study area have an average 7.93 access lines per square mile.⁴⁵ RCC intends to serve only four of the seventeen highest density wire centers in the Century Tel study area.⁴⁶ Of the 22,381 access lines in the 17 highest density wire centers in the Century Tel study area, RCC will serve only 7,385 access lines, or 33% of the total. Moreover, the eight most dense wire centers in Century Tel’s study area are outside of RCC’s proposed service area.⁴⁷ The average cost per Century Tel access line in the wire centers RCC proposes to serve is \$72.88 compared to an average cost for the remaining Century Tel access lines of \$46.70.⁴⁸ This means the wire centers RCC proposes to serve are 56% more costly than the rest of the wire centers in the Century Tel study area.

The same situation exists with RCC’s proposal to serve the Crater Lake wire center in the United study area. The United study area is a fairly large area that includes White

⁴⁵ *RCC Order* at _____.

⁴⁶ *RCC Order* at _____.

⁴⁷ *RCC Order* at _____.

⁴⁸ *RCC Order* at _____.

City (pop. 5,466)⁴⁹, The Dalles (pop. 12,230)⁵⁰, Hood River (pop. 4,500)⁵¹, Tillamook (pop. 4,270)⁵² and the City of Lincoln City (pop. 7,437)⁵³. In contrast, the Crater Lake area that RCC proposes to serve an area is lightly populated and has a low population density. United, although a party to RCC's ETC docket before the OPUC, filed no objections to RCC's application. Given the relatively dense populations of these cities and the lack of any objections to RCC designation, redefinition of the Crater Lake wire center is in the public interest.

III. CONCLUSION

OPUC has found that RCC's use of high-cost support to increase the availability of competitive services and to invest in rural infrastructure development will serve the public interest.⁵⁴ Yet, without the FCC's concurrence with the rural ILEC service area redefinition proposed herein, consumers will not be able to experience those benefits in many areas in which RCC is authorized by the FCC to provide service. The redefinition requested in this Petition will enable RCC's ETC designation to take effect throughout its designated ETC service area in Oregon. Accordingly, OPUC requests that the Commission grant its concurrence with the proposal to redefine the service areas of Century Tel and United.

Respectfully submitted,

[OPUC]

[date]

⁴⁹ See www.city-data.com/city/White-City-Oregon.html. The population for White City and the other cities was obtained from the U.S. Census data or State of Oregon records.

⁵⁰ See www.thedalleschamber.com.

⁵¹ See www.gonorthwest.com/Oregon/columbia/hood_river.

⁵² See www.tillamookchamber.org.

⁵³ See www.lcchamber.com.

⁵⁴ See *RCC Order* at ____.