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VIA ELECTRONIC MAIL AND U.S. MAIL

Filing Center
Oregon Public Utility Commission
550 Capitol Street NE, Ste 215
Salem, OR 97301-2551

Re: UM 1217 – Opening Brief of the Oregon Telecommunications Association

Dear Sir/Madam:

Enclosed are the original and five copies of the Opening Brief of the Oregon Telecommunications Association and Certificate of Service.

Sincerely,

RICHARD A. FINNIGAN

RAF/km
Enclosures

cc: Service List (w/encl., via e-mail)
ALJ Christina Smith (w/encl., via e-mail and U.S. mail)
Brant Wolf (w/encl., via e-mail)

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

In the Matter of Oregon Public Utility Commission Staff Investigation to Establish Requirements for Initial Designation and Recertification of Telecommunications Carriers Eligible to Receive Federal Universal Service Support	DOCKET NO. UM 1217

OPENING BRIEF OF THE OREGON TELECOMMUNICATIONS ASSOCIATION

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INTRODUCTION

Pursuant to the case schedule adopted in this docket, the Oregon Telecommunications Association (OTA) hereby submits its Opening Brief in this matter. The format for this Opening Brief will be to follow the Issues List that has been developed for this docket as issued on October 28, 2005.

POLICY OBJECTIVES

ISSUE I.A: What policy objectives should the Commission attempt to achieve through this docket?

The testimony offered by Mr. Wolf succinctly sets out the suggested policy objectives for this docket:

> (1) Applications: In the initial designation of eligible telecommunications carriers or ETCs, the policy objective of the Commission should be to ensure that its process for review of applications becomes thorough, rigorous and supports the accomplishment of the policy objectives contained in Section 254 of the Telecommunications Act of 1996.[1]
>
> (2) Certification: As to the annual certification process, the Commission's policy objectives should be to develop a process that is cost efficient, yet provides for accountability in the use of federal high-cost funds taking into account differences in the way different carriers are funded and the existing accountability mechanisms that are in place for incumbent ETCs.[2]

[1] OTA/1, Wolf/3, l. 21 – 4, l. 4.
[2] Ibid.

THE APPLICATION PROCESS

This section of OTA's Opening Brief addresses the issues related to the application process for entities seeking initial designation as eligible telecommunications carriers (ETCs).

ISSUE II.A.1: Should the Commission adopt any, or all, of the requirements proposed by the FCC in Order 05-46?

OTA's position, which is in general agreement with Commission Staff, is that the requirements proposed by the FCC in Order 05-46 should be adopted.[3]

ISSUE II.A.2: Should the Commission adopt other basic eligibility requirements?

Commission Staff has proposed additional eligibility requirements which are consistent with past Commission ETC orders. These requirements are found at Exhibit Staff/1, Marinos/47-48. OTA supports adoption of those additional requirements.

Further, OTA supports adoption of a quality of service standard for wireless ETCs. Wireline ETCs are subject to quality of service standards. There is no reason not to have wireless ETCs subject to equivalent standards.

As stated by Mr. Wolf: "A consumer should not receive a lower quality of service simply because they are served by a competitive ETC compared to an incumbent ETC. If the purpose, at least in part, of the federal universal service fund is to ensure that 'quality services are available at just, reasonable and affordable rates' then it would seem logical that a quality of service standard should apply."[4]

[3] Although there is agreement on the outcome, this should not be taken to mean that OTA agrees with the rationale offered by Commission Staff on all points for adoption of the basic criteria for initial designations of ETCs.
[4] OTA/5, Wolf/1, l. 19-22 (emphasis added).

Mr. Wolf goes on to point out that the Commission has determined that "...just because an entity is a competitor does not mean it should not provide quality service. To this end, the Commission has adopted quality of service standards for competitive companies."[5] These are the quality of service standards that should apply to a competitive ETC.

Mr. Wolf specifically identified certain standards that ought to apply. These include the following:

1. Held order and provisioning requirements. See, OAR 860-034-0390(4) and OAR 860-032-0012(4).[6]

2. Trouble reports. See, OAR 860-032-0012(5). This standard, as some of the others, may need to be modified somewhat to reflect differences in technology. For example, rather than using total working access lines within a reporting wire center, it may be that the standard should be the number of troubles per number of handsets issued with a particular NPA/NXX for the area in which the applicant seeks designation as an ETC.[7]

3. Repair clearing time. See, OAR 860-032-0012(6).[8]

4. An equivalent standard for blocked calls as set forth in OAR 860-032-0012(7). The equivalent standard could be based upon cell sites rather than exchanges.[9]

5. Access to business office and repair centers. See, OAR 860-032-0012(8).[10]

6. Standards for switching equipment. See, OAR 860-032-0012(11).[11]

These standards are not overly burdensome. These are a set of basic standards that Oregon consumers should know that the service that they are receiving meets when it is

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[5] OTA/5, Wolf/2, l. 3-5.
[6] OTA/1, Wolf/15, l. 3-8.
[7] OTA/5, Wolf/2, l. 20-23.
[8] OTA/5, Wolf/3, l. 1-2.
[9] OTA/5, Wolf/3.
[10] OTA/5, Wolf/3, l. 8-9.
[11] OTA/5, Wolf/3, l. 9-10.

undertaken by one that purports to provide the quality services that are supported by federal universal service funds. These requirements help ensure that the goals of Section 254, the National Universal Service Policy, are met.

It is not unusual for states to apply quality of service standards for a wireless ETC. As Mr. Wolf points out, Arizona has proposed similar requirements. The Arizona requirements are set out in OTA/6. The Arizona case referred to by Mr. Wolf is In the Matter of the Application of WWC License LLC (Western Wireless Corporation) for Designation as an Eligible Telecommunications Carrier and Redefinition of Rural Telephone Company Service Area, Arizona Corporation Commission, Docket No. T-04248A-04-0239, Recommended Order (2005).[12]

The Minnesota Public Utilities Commission has indicated its interest in ensuring that wireless ETCs provide a certain level of quality. In its rejection of Nextel's application for ETC designation, the Minnesota Commission described what should be included in an application to allow the Minnesota Commission to consider whether the application was in the public interest. This includes "a customer service agreement that defines a service quality plan consistent with the [applicant's] claim to provide high quality service, including dispute resolution policies, network maintenance policies, procedure for resolving service interruptions, any customer services offered, and [the applicant's] billing, payment, and deposit policies."[13] The Minnesota Commission also stated its interest in reviewing the process that the wireless ETC applicant would have for tracking held orders and customer complaints.[14]

[12] Copy attached as Appendix A.
[13] In the Matter of NPCR, Inc. dba Nextel Partners for Designation as an Eligible Telecommunications Carrier Under 47 U.S.C. §214(e)(2), Order Denying Without Prejudice Nextel's Application for ETC Designation, Docket No. PT-6200/M-03-647 (December 1, 2003) at p. 9 (copy attached as Appendix B).
[14] Ibid.

The Oklahoma Corporation Commission has adopted rules for wireless ETCs that includes such service standards as:

1. Emergency service reporting requirements. OAC 165: 55-23-5.[15]
2. The handling of billing disputes. OAC 165: 55-23-9.
3. Transmission objectives. OAC 165: 55-23-50.
4. Trouble reports. OAC 165: 55-23-52.
5. Notice of service interruptions. OAC 165: 55-23-54.
6. Restoration of service plan. OAC 165: 55-23-56.

Commission Staff opposes adoption of these types of rules.[16] Commission Staff advances three arguments for its position. The first argument is an assertion that the Commission lacks jurisdiction to impose such requirements, citing to ORS 759.450(8).[17] OTA agrees with the analysis that the Commission could not impose quality of service on <u>all</u> wireless carriers, whether or not they seek ETC status.

However, as the Commission Staff recognizes, the Commission does have authority to impose additional standards for ETC application consistent with what is expected of that status: the status of an eligible telecommunications carrier fulfilling the obligations and principles under 47 U.S.C. §254.[18] This authority has been recognized by the appellate courts. In the leading case on universal service issues, the Fifth Circuit determined that states had the authority to impose additional requirements on ETCs; additional in the sense of going beyond those imposed by the FCC.[19]

[15] A copy of each of the cited Oklahoma Commission rules is found in Appendix C.
[16] Staff/4, Marinos/12-14.
[17] Staff/4, Marinos/14, l. 5-7.
[18] Staff/1, Marinos/23, l. 14-22.
[19] <u>Texas Office of Public Utility Counsel v. FCC</u>, 183 F.3d 393, 418 (5th Cir. 1999).

OTA recognizes that this same analysis could apply to cooperative associations. That is, while the Commission does not have the blanket authority to impose quality of service standards in the abstract, it could do so as part of an ETC process. However, as pointed out in Mr. Wolf's testimony, there is good reason not to take such action. In fact, there are two very solid reasons. First, the Commission has a long experience with the incumbent ETCs and the level of service that they provide to their customers. That long history shows that there is no need to provide regulatory oversight on quality of service issues. As OTA points out, once the Commission has the same level of understanding with wireless ETC services, the oversight could be dropped.[20] For example, a wireless ETC could be given the option after a period of five years, of asking that the Commission remove the quality of service standards requirement.

The second good reason for not imposing quality of service standards on cooperatives is that cooperatives are managed by their own members. If a cooperative is not performing to the level of satisfaction of the members, the members themselves have a direct voice in changing management and changing the level of service delivered.[21]

Commission Staff's second argument against adopting quality of service standards for wireless ETCs is, in fact, an argument by analogy to cooperatives.[22] Staff argues that there is an equivalent choice or voice for wireless ETC customers that exists for cooperative members. Instead of the power to vote, Staff asserts that those wireless ETC customers can simply vote with their feet and change carriers. However, that view ignores the fact that, as pointed out in cross examination, there are many wireless customers that are subject to long-term contracts.[23]

[20] OTA/1, Wolf/15, l. 14-21.
[21] OTA/1, Wolf/15, l. 9-13.
[22] Staff/4, Marinos/13, l. 13-18.
[23] TR 28, l. 6 – 29, l. 5; TR 142, l. 20-24.

In fact, in many cases wireless service customers do not have the ability to vote with their feet and, instead, are subject to whatever level of service they may be receiving for the duration of the contract.

Commission Staff argues that the third reason for not imposing quality of service standards is that the wireless ETCs would be required to change the way they measure their service. This is an argument also vociferously advanced by the wireless carriers. However, the fact that wireless ETCs may need to make some changes does not appear to be a logical reason for opposing quality of service standards. After all, as RCC's witness pointed out on cross examination, they have an interest in providing service quality and do, in fact, have many measurements for tracking that level of quality.[24]

RCC's witness, Mr. Otto, agreed that RCC monitors blocking problems, both at its cell sites[25] and in their transport links.[26] Mr. Otto even admitted that RCC uses a busy hour standard.[27] The standard for trunk blockage may be lower than wireline, as admitted by Mr. Otto, but it still exists.[28]

RCC has timelines internal to their operations for measuring how they meet service requests. As stated by Mr. Otto, there would be no objection to using some sort of service request standard and reporting that to the Commission from an operational standpoint.[29]

RCC has trouble reports with a standard of resolving those reports within twenty-four

[24] It is also interesting to note that RCC was the only wireless ETC providing an operational witness. As a result, we have absolutely no knowledge of whether United States Cellular Corporation, Cingular or Edge Wireless do anything to measure service quality. What reason can there be for entities receiving federal universal service funds not providing quality service?
[25] TR 9, l. 9 - 10, l. 25.
[26] TR 19, l. 6 – 20, l. 5.
[27] TR 10, l. 2.
[28] TR 19, l. 16 – 20, l. 5; TR 21, l. 1-10.
[29] TR 12, l. 4 – 14, l. 3.

hours and generating management reports related to how well they perform.[30]

RCC has standards for how rapidly they respond to calls to their customer service centers.[31] They are concerned with customer calls be answered at their customer service and business offices on a timely basis.[32] From a policy perspective, Mr. Wood testified on behalf of RCC and USCC that there really is no distinction between the wireline and wireless world in how customer calls are answered at a customer service center.[33]

What this shows is that RCC, and presumably other wireless carriers, have standards for measuring quality of service. They just do not care to have quality of service standards imposed on them by the Commission. That is understandable. No one likes to have standards imposed. It is also understandable that companies do not want to change the way they record or track things today. However, as pointed out on cross examination all carriers need to change their behaviors and systems when the Commission takes action that affects the way they do business. That is part of operating in the public interest.[34] Until such time as the Commission gains a sufficient level of comfort with wireless operations, wireless ETCs should be required to meet certain quality of service standards and report to the Commission concerning those standards.

What this boils down to is the question of why should the Commission designate a wireless carrier as an ETC with the expectation that the customer receiving service from that wireless ETC may well receive a lower quality of service than provided by the incumbent ETC? If that expectation is to be part of the ETC designation process, why have quality of service rules for any level of carrier, ETC or non-ETC? For incumbent ETCs, the cost of complying with

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[30] TR 16, l. 14 – 18, l. 25.
[31] TR 26, l. 7-16; TR 49, l. 7-19.
[32] TR 23, l. 14 – 24, l. 2.
[33] TR 69, l. 18 – 70, l. 13.
[34] TR 120, l. 4-12.

Commission quality of service standards and delivering high quality service to customers is built into the cost per line of the incumbents. This is the same basis upon which the competitive ETCs receive their federal universal service support. If the funds to provide high quality service and comply with Commission quality of service rules are inherent in the funds received by the competitive ETCs, why should they not comply with those rules? Either all ETCs should have a quality of service obligation, or no one should have that obligation.

ISSUE II.A.3: Should the same requirements apply to applications for designations in rural and non-rural ILEC service areas?

There is general agreement that the same requirements should apply.

ISSUE II.A.4: Should the same requirements apply regardless of the type of support (traditional high-cost, interstate access/common line, low-income) that the ETC will receive?

Again, there is general support that the same requirements should apply. OTA does point out that it might make sense to have a shorter application process for those applicants that seek to provide only low-income support, and not receive other types of support. For example, if an ETC applicant wanted to concentrate service on the downtown Portland area and receive low income support for those customers, it may not make sense for that applicant to be required to show how they will provide the service throughout the entire exchange. It may be in the public interest to make Lifeline, Linkup and OTAP support available on a basis that is different than the requirements that must be demonstrated to receive high cost universal service funds.

PUBLIC INTEREST TEST

In this section of the Opening Brief, OTA will address the issues that exist under Issue II.B. These issues relate to the criteria that should be used to determine whether designation of a competitive ETC is in the public interest.

ISSUE II.B.1: Should the Commission adopt the criteria proposed by the FCC in Order 05-46?

OTA recommends that the Commission adopt the criteria proposed by the FCC in Order 05-46, otherwise known as the ETC Designation Order.

There is a distinction in the way that Commission Staff and OTA approach the public interest test. Commission Staff believes that a density analysis to review creamskimming potential is not required.[35] However, in the ETC Designation Order, the FCC pointed out why such analysis is necessary. The FCC analyzed the potential for creamskimming as follows:

> The potential for creamskimming, however, arises when an ETC seeks designation in a disproportionate share of the higher-density wire centers in an incumbent LEC's service area. By serving a disproportionate share of the high-density portion of a service area, an ETC may receive more support than is reflective of the rural incumbent LEC's costs of serving that wire center because support for each line is based on the rural telephone company's average costs for serving the entire service area unless the incumbent LEC has disaggregated its support. Because line density is a significant cost driver, it is reasonable to assume that the highest-density wire centers are the least costly to serve, on a per-subscriber basis. The effects of creamskimming also would unfairly affect the incumbent LEC's ability to provide service throughout the area since it would be obligated to serve the remaining high-cost wire centers in the rural service area while ETCs could target the rural incumbent LEC's customers in the lowest cost areas and also receive support for serving the customers in these areas. <u>In order to avoid disproportionately burdening the universal service fund and ensure that incumbent LECs are not harmed by the effects of creamskimming, the Commission strongly encourages states to examine the potential for creamskimming in wire centers served by rural incumbent LECs</u>. (Emphasis added.)[36]

[35] Staff/1, Marinos/58, l. 20 – 61, l. 14.
[36] Order 05-46 at ¶49.

This Commission has itself used density analysis in past ETC applications.[37] There is no reason why that process should not continue. It has not been overly expensive or burdensome to perform the analysis. The downside of not performing the analysis is that designation of a competitive ETC to serve only the more profitable areas of a rural incumbent may make it difficult for that rural incumbent to continue to provide service to the rest of its customers.[38]

OTA firmly believes that continuation of a public interest test measured, in part, by a creamskimming analysis is appropriate. The Nebraska Commission conducted a creamskimming analysis in denying an application submitted by Nextel. See, In the Matter of the Application of Amended NPCR, Inc., dba Nextel Partners, Eden Prairie, Minnesota Seeking Designation as an Eligible Telecommunications Carrier that may Receive Universal Service Support, Application No. C-2932, Order, at p. 9 (February 10, 2004).[39]

A similar density analysis was conducted by the Nevada Commission and was a basis for denying an application by CellularOne. See, Application of WWW License L.L.C., dba CellularOne, for Redefinition of its Service Area as a Designated Eligible Telecommunications Carrier, Docket No. 04-3030, Compliance Order (August 4, 2004) at ¶46.[40] The Nevada Commission went on to find that such designation would have undermined the rural incumbent's ability to serve its entire study area. Compliance Order at ¶47.

Density was also considered by the Idaho Commission when it considered applications

[37] In the Matter of RCC Minnesota, Inc. Application for Designation as an Eligible Telecommunications Carrier, Pursuant to the Telecommunications Act of 1996, Docket No. UM 1083, Order No. 04-355 (June 24, 2004) and In the Matter of United States Cellular Corporation Application for Designation as an Eligible Telecommunications Carrier, Pursuant to the Telecommunications Act of 1996, Docket No. UM 1084, Order No. 04-356 (June 24, 2004).
[38] Anyone who is of the belief that the current system of USF support where if an incumbent loses a line, it receives the same amount of support is dreaming (the assertion is not factually correct in any event given limitations on corporate operations expense and freezes in some parts of the fund). A public policy decision should not be predicated upon hopes.
[39] Copy attached as Appendix D.
[40] Copy attached as Appendix E.

from Clear Talk and Nextel Partners. The density analysis of the potential for creamskimming was one of the reasons for denying the applications. See, In the Matter of the Petition of IAT Communications, Inc. dba NTCH-Idaho, Inc. or Clear Talk for Designation as an Eligible Telecommunications Carrier/In the Matter of the Application of NPCR, Inc. dba Nextel Partners Seeking Designation as an Eligible Telecommunications Carrier, Case Nos. GNR-T-03-8/GNR-T-03-16, Order No. 29541 (July 23, 2004) at p. 17.[41] The Idaho Commission was also concerned that the extent to which creamskimming may affect the incumbent's ability to serve. See, Order No. 29541 at p. 18.

Commission Staff argues that disaggregation, coupled with the requirement to serve an entire wire center, is a sufficient answer to creamskimming.[42] The FCC has found this position not to be correct. Acting on a much more complete record than is before this Commission, the FCC concluded:

> Nevertheless, although disaggregation may alleviate some concerns regarding creamskimming by ETCs, because an incumbent's service area may include wire centers with widely disparate population densities, and therefore highly disparate cost characteristics, disaggregation may be a less viable alternative for reducing creamskimming opportunities. This problem may be compounded where the cost characteristics of the rural incumbent LEC and competitive ETC applicant differ substantially. Thus, creamskimming may remain a concern where a competitive ETC seeks designation in a service area where the incumbent rural LEC has disaggregated high-cost support to the higher-cost portions of its service area.[43]

This Commission has, in the past, included density analysis in its consideration of whether an application for designation as an ETC is in the public interest. There is good reason to continue that process. Density analysis is an important factor in determining the potential for

[41] Copy attached as Appendix F.
[42] The disaggregation issues will be addressed in more detail below.
[43] Order 05-46 at ¶51.

creamskimming.

ISSUE II.B.2: Should the criteria differ between designations in rural and non-rural ILEC service areas?

OTA believes that the criteria are the same in each area. However, as OTA points out, the examination of public interest should be more rigorous in rural areas.[44] This is the position advanced by the FCC in the ETC Designation Order.[45] What this means is the criteria are the same, but the review is more rigorous in the case of rural service areas.

ISSUE II.B.3: Should the Commission require an ETC to include entire ILEC wire centers in its service area, regardless of the boundaries of its licensed area?

OTA supports the inclusion of the entire ILEC wire center. This is consistent with the FCC position that the smallest geographic area served by a rural incumbent that should be considered for designation for a competitive ETC is the wire center.[46]

ISSUE II.B.4: Whether and to what extent the Commission should require incumbent local exchange carriers to disaggregate and target support in a different manner, as permitted by 47 C.F.R. Section 54.315(c)(5)?

It is OTA's firm position that the Commission does not have any basis from the record in this proceeding to make a decision whether incumbent local exchange carriers should be required to disaggregate. A cost-benefit analysis has not been presented to the Commission.[47] A rigorous

[44] OTA/1, Wolf/22, l. 6-9.
[45] Order 05-46 at ¶42 and 43 and, especially, 59.
[46] Order 05-46 at ¶77.
[47] OTA/7, Mason/4, l. 1-7.

review of the potential costs have not been presented to the Commission. The only benefits that have been described are perhaps a general benefit of being able to address creamskimming.[48]

However, based upon a much more extensive record in the ETC Designation Order proceeding, the FCC found that disaggregation was not the answer to creamskimming.[49] Disaggregation can impose very significant costs. Before any decision is made whether to require disaggregation, there should be a rigorous analysis of the costs that may be incurred.

As pointed out by Mr. Mason, the costs involved can vary a great deal depending upon the nature of the existing records of the rural incumbent local exchange carrier. Under existing rules, and for a very long time, rural incumbent local exchange carriers have been told to track their costs based upon their service area, not based upon each exchange. Thus, many rural local exchange carriers do not have the records available to them to support a disaggregation effort.[50] Those that do, have probably disaggregated.[51] If the cost is relatively low, then a marginal benefit might support disaggregation. However, where the cost is high, a greater demonstration of benefit is needed. It can be assumed that for many rural local exchange companies, the cost would be quite high. An example provided for the record is a small, rural telephone company in a western state that spent nearly $100,000.00 on a disaggregation study.[52]

It might be suggested that a proxy cost model could be used as a basis for disaggregation. However, there is nothing in this record to show that any proxy cost model is a relatively accurate means to allocate costs. Proxy cost models have been rejected for use in determining federal universal service support for rural carriers because of the inability of those models to

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[48] See, generally, Staff/1, Marinos/67.
[49] Order 05-46 at ¶48-53.
[50] OTA/7, Mason/7, l. 20 – 8, l. 5.
[51] For example, Pioneer Telephone Cooperative disaggregated based upon a "robust" level of recordkeeping at the exchange level. USCC/17; OTA/7, Mason/8, l. 21-23.
[52] OTA/7, Mason/9, l. 3-5.

accurately predict the cost of a rural telephone company to provide service. This is, in part, because of the widely disparate nature of the service areas served by rural telephone companies. See, generally, In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Rural Task Force Recommendation to the Federal-State Joint Board on Universal Service, (Released September 29, 2000) (RTF Recommendation) which conducted an extensive examination of the applicability of proxy cost models and concluded: "The aggregate results of this study suggest that, when viewed on an individual rural wire center or individual Rural Carrier basis, the costs generated by the Synthesis Model are likely to vary widely from reasonable estimates of forward-looking costs. As a result, it is the opinion of the Task Force that the current model is not an appropriate tool for determining the forward-looking cost of Rural Carriers."[53]

Why would such a questionable model perform any better for determining the relative costs for disaggregation for a company? As an example, look at the Cascade Utilities service areas. Cascade has exchanges that it serves in the high plains of north central Oregon. It has exchanges in the hills of west central Oregon. Cascade has an exchange in the rural suburbs of Portland. It has an exchange in the vicinity of Mt. Hood. On what basis would a proxy cost model be able to assign relative costs for such widely disparate geographic areas within the same company? The answer is: there is no basis. Proxy cost models do not work for rural companies.

Further, as Mr. Mason's testimony points out, disaggregation might well simply produce a windfall for existing wireless ETCs. In the example cited by Mr. Mason, the following was posited as a possible outcome:

> The following hypothetical example explains the potential for windfall: ETC Alpha is an ILEC with 1,000 access lines, with 800 access lines in Wire Center A and 200 of its lines in Wire Center B. Alpha is currently receiving $10 of high-cost loop support on a per-line

[53] RTF Recommendation at p. 18.

basis. This results in Alpha receiving $10,000 of annual support. CETC Beta is currently reporting that it is serving 500 access lines in Alpha's study area, which includes both wire centers, to USAC, and thus receives $5,000 in support (500 lines x $10 per line).

If ETC Alpha is required to disaggregate support to a wire center basis, the following scenario could occur. Wire Center A would include the 800 access lines, and Wire Center B would include 200 access lines. The results of the disaggregation study might determine that Wire Center A support per line is $5 per line, and Wire Center B support per line is $30 per line. For ETC Alpha, total support remains at $10,000 [(Wire Center A lines of 800 x $5 per line = $4,000) plus (Wire Center B lines of 200 x $30 per line = $6,000)].

However, if CETC Beta reports 200 lines in the Wire Center A and 300 lines in the Wire Center B, the support for CETC Beta doubles, with the same number of lines reported [(200 x $5 per line = $1,000) plus (300 x $30 per line = $9,000) for a revised total of $10,000 of CETC support]. This illustration demonstrates the potential for a windfall from disaggregation. Why should CETC support double after the fact of designation as an ETC just because of disaggregation?[54]

Before embarking on a disaggregation path, the Commission should have before it evidence as to whether this type of windfall will or will not occur.

In addition, the Commission must consider the complexity of doing any sort of relatively accurate disaggregation study. As described by Mr. Mason, the steps are generally as follows:

The starting point for a disaggregation study for a rural Oregon ILEC is the High Cost Loop support mechanism algorithm. The theory behind this algorithm is to develop the cost for each loop within the study area. The difference between the calculated cost per loop and the National Average Cost per Loop determines support to be received two years after the expense is incurred by the ILEC.

The cost per loop calculated by the High Cost Loop algorithm is calculated at the study area level. The premise behind disaggregation is to calculate cost per loop at the wire center/zone level; the FCC's rules allow up to two zones per wire center. One way of developing cost per loop at the wire center/zone level requires determining the plant necessary to provide the loop. Operating expenses are then allocated to the wire center/zone level based on that loop plant.

Under the approach I am describing, the ILEC's Continuing Property Records are the basis for determining Central Office and Outside Plant (Cable and Wire Facilities) loop plant. An ILEC with a robust CPR program may maintain CPRs at the wire center level, even though current rules require CPRs only at the study area level. In should be noted that maintaining CPRs at the wire center level is not the same thing as doing a cost study

[54] OTA/7, Mason/11, l. 7 – 12, l. 6.

> at the wire center level. If an ILEC does not have CPRs maintained at the wire center/zone level, then the ILEC has to go through the process of developing such records, which is quite expensive, or costs must be allocated to the wire center/zone level based on some methodology. One question is what methodology should be used as this is a very important cost driver.
>
> Under the method I am describing, General Support Assets are also assigned to each wire center/zone. Some General Support Assets can be directly assigned to a specific wire center/zone. For example, Land and Buildings within a wire center's boundaries and used exclusively to provide service to customers in that wire center could be direct assigned to that wire center. Other General Support Assets must be allocated based on some methodology. Again, choice of methodology will drive the cost of the process.
>
> Once Central Office plant, Outside (Cable and Wire facilities) plant, and General Support Assets have been assigned to the wire center/zone level, the expenses associated with plant follow that assignment and a methodology for allocating Corporate expenses and taxes to the wire center/zone level must be developed. These expense categories, when summed, become the total expense level to serve customers in each wire center/zone and, when divided by loops served, become the cost per loop for that wire center/zone.
> For other support mechanisms, a similar analysis must also be undertaken.
>
> As I have stated throughout, the choice of allocation mechanism is a very big driver in the cost to develop disaggregation numbers. The more precise the desired outcome, the more detailed, and, as a result, costly, the disaggregation methodology. If the benefit sought is to provide correct economic signals, then precision (i.e., accuracy) would seem to be the goal. However, the quandary is that this may be expensive.[55]

Before deciding whether disaggregation is in the public interest, the Commission should have an understanding of the costs to the rural companies of proceeding down that path. There is no evidence in this record which can provide that understanding.

For all of these reasons, the Commission does not have a basis to require incumbent local exchange carriers to disaggregate in the evidence presented in this docket.

<u>ISSUE II.B.5:</u> Should the Commission adopt an upper limit on the number of ETCs that can be designated in any given area?

OTA suggests that the Commission give serious consideration to whether their

[55] OTA/7, Mason/9, l. 12 – 11, l. 5.

limitations are appropriate. The exponential growth in the size of the federal universal service fund is an important consideration. The Commission faces its own concerns in the growth of the OUSF. What happens when multiple competitive ETCs are designated for the same service area for OUSF purposes, as well as federal universal service fund purposes?

ANNUAL CERTIFICATION OF ETCS

This section of the Brief will address the issues under Section III. The general issue (Issue III.A) states as follows: What specific requirements should the Commission adopt for the annual recertification of ETCs? The issues here are focused on what requirements should be contained in the annual certification of ETCs, whether the ETC be wireline or wireless. The primary issue is whether the requirements should differ between wireless ETCs and wireline ETCs.

ISSUE III.A.1: Should the Commission adopt any, or all, of the FCC reporting requirements proposed in Order 05-46?

OTA's position is that the requirements proposed in Order 05-46 should be adopted for wireless ETCs.

ISSUE III.A.2: Should the Commission adopt other reporting requirements?

Commission Staff recommends that certain reporting requirements as contained in the Commission's prior orders for RCC Minnesota, Inc. (Order No. 04-355) and United States

Cellular Corporation (Order No. 04-356) be applied to ETC reporting, particularly for wireless ETCs.[56] OTA supports the adoption of those requirements for wireless ETCs.

<u>ISSUE III.A.3:</u> Should the same reporting requirements apply to all types of ETCs – ILEC ETCs and competitive ETCs?

Commission Staff and OTA agree that the same reporting requirements should not apply to competitive ETCs and ILEC ETCs.

As stated by Commission Staff, the rationale for this distinction is as follows:

> The FCC developed its reporting requirements specifically for wireless ETCs, since that is the only type of carrier that the FCC designates as an ETC. While the competitive neutrality principle should be considered when selecting annual reporting requirements, it does not mean that all ETCs must have the exact same annual reporting requirements for universal service recertification. All ETCs should demonstrate compliance with all ETC requirements, but not necessarily in exactly the same ways. For instance, when the Commission already requires certain ILECs to file reports covering an area of compliance, it should not require them to resubmit those reports for annual certification purposes.[57]

As pointed out by OTA's witness Mr. Wolf, an additional rationale for the difference is as follows:

> Incumbent ETCs have already expended the funds for investment for which they are being reimbursed under the federal USF mechanism. Incumbents support their investment through the submission of detailed cost studies. Competitive ETCs receive support based upon the incumbent's level of cost on a per-line level, not the competitive ETC's own prior investment. CETCs do not submit cost studies for review. Therefore, it is appropriate for competitive ETCs to demonstrate how they will use USF funds to make investments. The incumbent ETC has already made this demonstration through the investment it has made and the supporting cost studies it has filed.[58]

As Mr. Wolf also points out, the Commission has reports available to it that show the incumbent's investment levels. He specifically references Forms O and I, and the Commission's

[56] Staff/1, Marinos/85-86.
[57] Staff/1, Marinos/89, l. 4-13.
[58] OTA/4, Wolf/4, l. 4-11.

annual access review.[59] Commission Staff agrees that these reports and reviews should be a basis for distinguishing what incumbent ETCs and CETCs file for the annual re-certification process.[60]

There is a difference between OTA and Commission Staff on the way in which reporting requirements would apply to ILEC ETCs. Commission Staff suggests that for those ILEC ETCs that do not submit outage reports, trouble reports and held orders on a regular basis should submit an annual report as part of the re-certification process.[61] OTA disagrees for the necessity for this level of reporting. It should be sufficient for ILEC ETCs to certify their compliance with quality of service standards. The reason for certification rather than detailed reporting is that the Commission has a long history with ILEC ETCs. The Commission is fully aware of the excellent quality of service provided by ILEC ETCs. Reporting from these entities is not necessary. OTA believes that even competitive ETCs could be relieved of this level of reporting once the Commission gains a sufficient level of confidence in the quality of service provided by competitive ETCs. That level of confidence would be gained over a period of time in which the Commission can view the reports submitted by the competitive ETCs.

Commission Staff suggests that there should be a certain level of ETC advertising; that is, four times a year.[62] It is not clear exactly what is meant by this suggestion. For example, on cross-examination Staff suggested it would be sufficient if an ETC placed the same ad in four different newspapers.[63] Why would an ETC that covers large portions of the state, such as RCC Minnesota, be able to advertise in four areas and not even cover its entire service area, when an

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[59] OTA/1, Wolf/30, l. 3-5.
[60] TR 180, l. 1-24.
[61] See, generally, Staff/4, Marinos/27-38.
[62] Staff/4, Marinos/38, l. 5-11.
[63] TR 145, l. 4-15.

ETC covering a small area, such as Helix, would have to advertise four times in the same area? And, incur that unneeded expense? It does not make sense.

Before any advertising requirements are imposed, the Commission should give consideration as to the efficacy of such advertising. It may be that communication with social service agencies in the local service area is a far more effective way to disseminate information than simply purchasing a newspaper advertisement. The Commission should gather more information about what companies are doing before imposing any particular level of advertising. The key should be communication, not the form of communication.

ISSUE III.A.4: Should the same reporting requirements apply regardless of the types of support (traditional high-cost, interstate access/common line, low-income) received by the ETC?

In its testimony, OTA points out that the ICLS and IAS certification mechanism is on a different track than the high-cost certification mechanism under FCC rules.[64] ICLS and IAS are access revenue replacement mechanisms. It is also clear that under federal rules, these funds are portable to CETCs. Commission Staff, in its reply testimony, seems to leap to the conclusion that because OTA points out that there is a different legal requirement related to the two certification processes, OTA is not concerned about how these funds are spent.[65] On cross examination, Commission Staff seems to back away from that position.[66]

Obviously, OTA believes that all funds should be expended properly. The question is what is the proper certification process for each type of funding source. It is important to compare 47 C.F.R. §54.809 (IAS) and 54.904 (ICLS) with 47 C.F.R. §314 (high cost support).

[64] OTA/1, Wolf/31, l. 11-15.
[65] Staff/4, Marinos/44, l. 5-8.
[66] TR 145, l. 16 – 147, l. 4.

The FCC's rules place the annual certification for IAS and ICLS with the "Administrator and the Federal Communications Commission" not the states. On the other hand, certification regarding high cost support is with the states.

It should also be kept in mind that for rural ILECs that draw from the Oregon USF, they have already demonstrated a level of cost that anticipates support predicated on the amount drawn from ICLS or IAS. In other words, the OUSF formula takes as a dollar for dollar deduction the amount that a rural ILEC receives in ICLS or IAS from the amount the rural ILEC would be entitled to draw from the state fund. What this means is that for those carriers, there is already a demonstration under Oregon procedures as to the appropriateness of the level of receipt of ICLS or IAS funds since they go to support the level of expense the Oregon Commission has found appropriate for OUSF support.

On the other hand, CETCs simply draw based upon the same per line amount that the incumbent draws, with no showing of need or cost support.

For the reasons stated above, the Commission should not require the same level of reporting for ICLS and IAS as it does for high cost funds.

OTA also thinks that the level of annual recertification reporting should be greatly diminished if all a carrier is receiving is Lifeline/Linkup support. Commission Staff recognizes that there should not be any network plan reporting for such a limited ETC. OTA agrees. Further, OTA suggests that care should be taken that the reporting requirements are not so burdensome for a limited purpose ETC (the limited purpose being receipt of Lifeline/Linkup funds) that the process discourages what otherwise would be accomplishment of a public policy goal – ensuring that service is provided to low income persons.

CONCLUSION

OTA appreciates the opportunity to submit its comments in this docket. OTA believes that the positions it has advanced will lead to an ETC certification process that is rigorous and fulfills the public policy goals of Section 254 and Section 214(e) of the Telecommunications Act of 1996. Further, OTA's recommended positions on the annual re-certification process provides the Commission with detailed basis upon which to make the annual certification decision. It is a process which recognizes the differences in funding and operations between incumbent ETCs and competitive ETCs, particularly wireless ETCs.

The Commission's consideration of these positions is appreciated.

Dated this 17th day of April, 2006.

Richard A. Finnigan, OSB No. 96535
Attorney for the Oregon Telecommunications Association

APPENDIX A

BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

JEFF HATCH-MILLER, Chairman
WILLIAM A. MUNDELL
MARC SPITZER
MIKE GLEASON
KRISTIN K. MAYES

IN THE MATTER OF THE APPLICATION OF WWC LICENSE LLC (WESTERN WIRELESS CORPORATION) FOR DESIGNATION AS AN ELIGIBLE TELECOMMUNICATIONS CARRIER AND REDEFINITION OF RURAL TELEPHONE COMPANY SERVICE AREA.	DOCKET NO. T-04248A-04-0239 DECISION NO. __________ **ORDER**

Open Meeting
September 7 and 8,2005
Phoenix, Arizona

BY THE COMMISSION:

WWC License LLC dba CellularOne ("Western Wireless" "Applicant" or "Company") is a commercial mobile radio services ("CMRS") provider operating under the "CellularOne" national brand name. Western Wireless currently serves customers in LaPaz, Mohave and Yuma Counties in Arizona. Pursuant to the Federal Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("1996 Act" or "Act") and the rules and regulations of the Federal Communications Commission ("FCC"), Western Wireless filed with the Arizona Corporation Commission ("Commission") on March 26, 2004, an application for designation as an eligible telecommunications carrier ("ETC") in the wire centers listed on Exhibits A and B, attached hereto and incorporated herein by reference. Designation as an ETC will enable Western Wireless to apply for and receive Federal universal service support from the Federal Universal Service Fund. Western Wireless is currently licensed and provides signal coverage throughout the rural study areas and non-rural wire centers identified on Exhibit A, and unconditionally requests ETC designation in those study areas and non-rural wire centers. In addition, Western Wireless requests that the Commission conditionally designate Western Wireless as an ETC in the service area of the wire centers described in Exhibit B, subject to approval of the redefinition by the FCC under 47 C.F.R. § 54.207(c) to effectuate Western Wireless' designation.

Public notice of the application was given as outlined herein. The notice set a deadline for requesting intervention, and set a separate deadline for requesting a hearing. Intervention was requested by and granted to the Arizona Local Exchange Carriers Association ("ALECA").[1] No other parties requested intervention. Three procedural conferences were held at which Western Wireless, ALECA, and the Commission's Utilities Division Staff ("Staff") appeared. Also appearing at the initial procedural conference was Verizon California, Inc. ("Verizon"). Opportunity for requesting a hearing was provided at each procedural conference. No parties requested a hearing.

Staff filed an initial Staff Report on the application, and subsequently filed a Supplemental Staff Report on the application following the FCC's release, on March 17, 2005, of a Report and Order addressing the minimum requirements for a telecommunications carrier to be designated an ETC.[2] A notable addition to prior FCC requirements for ETC designation is the requirement that ETC applicants file a five-year network improvement plan outlining the use of universal service funds as a condition of ETC designation, and a requirement that ETCs already designated by the FCC file such a plan no later than October 1, 2006.[3] The *ETC Minimum Requirements Report and Order* also imposes annual reporting requirements and urges State Commissions to adopt requirements similar to those adopted by the FCC.

Staff recommended that Western Wireless be required to file a five-year network improvement plan prior to a hearing or Decision in this matter, and that Staff be allowed to provide a supplemental filing in response to the plan within 60 days following the filing of the plan. Staff also recommended that following ETC designation, Western Wireless be required to comply with annual reporting requirements related to the five-year plan.

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[1] ALECA is a non-profit trade association whose members include the following rural Commission-regulated incumbent local exchange carriers ("ILECs"): Arizona Telephone Company, CenturyTel, Copper Valley Telephone, Frontier Communications, Midvale Telephone Exchange, Navajo Communications, South Central Communications, Southwestern Telephone Company, Table Top Telephone Company, and Valley Telephone Cooperative. ALECA also includes the following tribally-owned ILECs: Fort Mojave Telephone Company, Gila River Telecommunications, San Carlos Apache Telecom Utility and Tohono O'Odham Utility Authority.

[2] *Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, FCC 05-46* (rel. March 17, 2005) *("ETC Minimum Requirements Report and Order" or "Report and Order").*

[3] This requirement does not apply to ETCs designated by State Commissions. Section 214(e)(2) of the 1996 Act provides state public utility commissions with the primary responsibility for designating ETCs. However, section 214(e)(6) of the Act directs the FCC to designate carriers when those carriers are not subject to the jurisdiction of a state public utility commission. Western Wireless is subject to the jurisdiction of this Commission.

Western Wireless states that it will accept Staffs recommendations in this matter with the exception of Staffs recommendation that it be required to file a five-year network improvement plan prior to designation. Western Wireless made two alternative proposals, one to make a post-designation compliance filing instead of filing a five-year plan, and the second, to file a five-year plan by October **1,2006.**

As set forth in the following Findings of Fact, we find that because Western Wireless will be entitled to receive universal service funds upon designation as an ETC, it is in the public interest to require Western Wireless to file, prior to receiving an ETC designation, a five-year network improvement plan for Commission approval that demonstrates how those universal service funds will be spent to improve coverage, signal strength or capacity that would not otherwise occur absent the receipt of high-cost support, for the purpose of expanding or preserving wide access to phone services in Arizona. We find that any burden that the requirement to file such a plan as a condition of becoming eligible for a Federal subsidy may impose is outweighed by the need to ensure that Western Wireless is willing and able to provide the supported services throughout the requested designation area, and to ensure that ratepayer-funded universal service support funds are used in the manner intended, which is to aid in the provision of access to affordable telecommunications and information services to rural and high-cost telecommunications services consumers. The annual progress report requirement recommended by Staff and adopted herein can serve as a vehicle for an annual "true-up" of the Company's network improvement plans as the Company deems necessary to comport with technological advances and possible changes in the business and regulatory environment. We will require that Western Wireless' annual progress report include a notification of such changes to its current-year plans and will also require that the annual progress report include updates to the Company's future-year plans to reflect its actual planning.

* * * * * * * * * *

Having considered the entire record herein and being fully advised in the premises, the Arizona Corporation Commission finds, concludes, and orders that:

[illegible] FACT

1. Western Wireless is a CMRS provider operating under the "CellularOne" national brand name. Western Wireless currently serves customers in LaPaz, Mohave and Yuma Counties in Arizona.

2. Western Wireless is licensed by the FCC to provide non-wireline service in the northern portion of Arizona Rural Service Area ("RSA") 1 and Arizona RSA 4.

3. Section 214(e) of the 1996 Act, and the rules and regulations of the FCC establish criteria for designation as a Federal ETC in Arizona.

4. On March 26, 2004, pursuant to the 1996 Act and the rules and regulations of the FCC, Western Wireless filed with the Commission an application for designation as an ETC in the wire centers listed on Exhibits A and B, attached hereto and incorporated herein by reference. Designation as an ETC will enable Western Wireless to apply for and receive Federal universal service support from the Federal Universal Service Fund.

5. Western Wireless is currently licensed and provides signal coverage throughout the rural study areas and non-rural wire centers identified on Exhibit A, and unconditionally requests ETC designation in those study areas and non-rural wire centers.

6. Western Wireless requests that the Commission conditionally designate Western Wireless as an ETC in the service area of the wire centers described in Exhibit B, subject to approval of the redefinition by the FCC under 47 C.F.R. § 54.207(c) to effectuate Western Wireless' designation.

7. On August 17, 2004, Western Wireless filed a Request for a Procedural Conference to address the timing and conduct of the proceeding in this docket.

8. A Procedural Conference was held as scheduled on September 2, 2004. Western Wireless, ALECA, Verizon, and Staff entered appearances through counsel and discussed public notice requirements, time required for discovery, and proposed dates for the filing of a Staff Report as well as for filing comments on the Staff Report.

9. A Procedural Order issued September 3, 2004 established public notice requirements which included deadlines for intervention, for requesting a hearing on the application, for the filing of the Staff Report and for the filing of responses thereto. The Procedural Order also established a

deadline of October 29,2004 for filing any requests for a hearing on the application.

10. On September 22,2004, pursuant to the September 3,2004 Procedural Order, Western Wireless filed a Notice of Filing Affidavit of Mailing and Notice of Filing Affidavit of Publication, and on October 8,2004, filed a Notice of Filing Supplemental Affidavit of Mailing.

11. On October 14, 2004, ALECA filed a Motion to Intervene, which was granted by Procedural Order of October 27,2004.

12. No other requests to intervene were filed, and no requests for hearing were received.

13. On December 28,2004, ALECA filed a Notice of Filing Decision No. 67403 Granting ETC Status to Alltel Communications, Inc.

14. On December 30, 2004, Staff filed a Staff Report on the application, recommending approval of Western Wireless' application subject to conditions.

15. On February 18, 2005, ALECA and Western Wireless each filed a response to the December 30, 2004 Staff Report. Both parties requested that the Commission modify the conditions Staff recommended.

16. On March 1, 2005, a Procedural Order was issued setting a Procedural Conference for March 10, 2005 to discuss the need for a hearing in this matter. The Procedural Conference was convened as scheduled on March 10, 2005. Western Wireless, ALECA and Staff appeared through counsel. The parties stated that the FCC had recently issued a press release stating that it would soon issue a Report and Order adopting additional requirements to apply to carriers seeking designation as an ETC from the FCC. Staff proposed to review the new FCC ETC Order, ascertain how it applies to this case, and file a supplemental Staff Report within 30 days of the public release of the new FCC ETC Order. Western Wireless and ALECA both agreed with the concept proposed by Staff. Western Wireless, ALECA and Staff all stated a belief that a hearing was not required, although ALECA maintained its right to request a hearing, if after release of the new FCC ETC Order, it found a hearing to be necessary.

17. A Procedural Order issued April 8, 2005, directed Staff to file its Supplemental Staff Report on the application within 30 days of the date the FCC Report and Order in FCC Docket No. FCC 05-46 was made publicly available.

18. On March 17, 2005, the FCC's Wireline Competition Bureau released the *Minimum ETC Requirements Report and Order* addressing the minimum requirements for a telecommunications carrier to be designated an ETC.

19. On April 15, 2005, Staff filed a Supplemental Staff Report on the application, recommending approval subject to revised conditions and reporting requirements. Staff recommended that Western Wireless be required to file a five-year network improvement plan prior to a hearing or Decision in this matter, and that Staff be allowed to provide a supplemental filing in response to the plan within 60 days of its filing.

20. On April 22, 2005, a telephonic procedural conference was held for the purpose of allowing the parties to discuss remaining procedural issues associated with this proceeding. Western Wireless, ALECA and Staff appeared through counsel. Western Wireless stated that it wished to have an opportunity to formally respond to legal and practical issues raised in the Supplemental Staff Report. ALECA indicated that it wished to have the opportunity to reply to Western Wireless' response. All parties indicated their continuing belief that a hearing on the application was unnecessary.

21. On April 22,2005, a Procedural Order was issued setting a procedural schedule for the filing of responsive comments to the Supplemental Staff Report, and for the filing of reply comments thereto. The Procedural Order directed that the responsive and reply comments include supporting legal arguments.

22. On May 12,2005, Western Wireless filed a Response to Supplemental Staff Report.

23. On May 13,3005, ALECA filed a Response to Staffs Supplemental Report.

24. On May 27,2005, Staff filed a Reply to Responses to Supplemental Staff Report.

25. Also on May 27, 2005, ALECA filed a Reply to Western Wireless' Response to Supplemental Staff Report, and Western Wireless filed a Reply to ALECA's Response to Supplemental Staff Report.

<u>Statutory and FCC Requirements for ETC Designation</u>

26. Western Wireless' Application seeks ETC designation pursuant to Section 214(e)(2)

of the 1996 Act for purposes of receiving Federal universal service support in Arizona.

27. Section 214(e)(2) of the 1996 Act,[4] as set forth below, provides state commissions with the primary responsibility for performing ETC designations:

> (2) Designation of eligible telecommunications carrier
> 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 telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.

28. Section 214(e)(1) of the 1996 Act[5] provides as follows:

> (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.

29. Pursuant to section 254(a)(1) of the 1996 Act[6] the FCC promulgated regulations designating the nine services that an ETC must offer in order to receive Federal universal service support as follows:

1) Voice grade access to the public switched network;
2) Local usage;

[4] 47 U.S.C. § 214(e)(2).
[5] 47 U.S.C. § 214(e)(1).
[5] 47 U.S.C.§ 254.

3) Dual tone multi-frequency ("DTMF") signaling or its functional equivalent;
4) Single-party service or its functional equivalent;
5) Access to emergency services, including 911 and enhanced 911;
6) Access to operator services;
7) Access to interexchange services;
8) Access to directory assistance; and
9) Toll limitation for qualifying low-income consumers.[7]

30. FCC regulations further require that in order to be designated as an ETC, a carrier must also offer Lifeline and Link Up services to all qualifying low-income consumers within its service area.[8] Lifeline service provides basic telephone service with discounts on monthly telecommunications charges. Link Up service provides financial assistance to help cover the installation charges for telecommunications service. FCC regulations require an ETC to publicize the availability of Lifeline and Link Up support in a manner reasonably designed to reach those likely to qualify for the services.[9]

31. With its *ETC Minimum Requirements Report and Order*, the FCC adopted, consistent with the recommendations of the Federal-State Joint Board on Universal Service, additional mandatory requirements for ETC designation proceedings in which the FCC acts pursuant to section 214(e)(6) of the Act.[10] The *Report and Order* adopted the recommendation of the Joint Board, to encourage states such as Arizona that exercise jurisdiction over ETC designations pursuant to section 214(e)(2) of the Act to adopt the requirements of the *Report and Order* when deciding whether a common carrier such as Western Wireless should be designated as an ETC.[11] The *Report and Order* includes the FCC's public interest analysis,[12] and encourages State Commissions to require ETC applicants to meet the same conditions and to conduct the same public interest analysis the FCC

[7] 47 C.F.R. § 54.101.
[8] 47 C.F.R. §§ 54.401, 54.405 and 54.411(a).
[9] 47 C.F.R. §§ 54.405(b) and 54.411(3)(d).
[10] Section 214(e)(2) of the Act provides state public utility commissions with the primary responsibility for designating ETCs. However, section 214(e)(6) of the Act directs the FCC to designate carriers when those carriers are not subject to the jurisdiction of a state public utility commission. Western Wireless is subject to the jurisdiction of this Commission.
[11] *ETC Minimum Requirements Report and Order, para 19.*
[12] *Id., para 40-57.*

requires.[13] The *Report and Order* states that the FCC's permissive guidelines for state ETC designation proceedings are designed to ensure designation of carriers that are financially viable, likely to remain in the market, willing and able to provide the supported services throughout the designated service area, and able to provide consumers an evolving level of universal service.[14] The FCC further states in the *Report and Order* that a set of guidelines allows for a more predictable process among the states, and that its guidelines will improve the long-term sustainability of the universal service fund, because under its guidelines, only fully qualified carriers that are capable of and committed to providing universal service will be able to receive support.[15]

32. In addition to implementing additional requirements for new applicants for ETC designation, the *ETC Minimum Requirements Report and Order* makes new reporting requirements applicable on a prospective basis to all ETCs previously designated by the FCC, and requires those ETCs to submit evidence demonstrating how they comply with the new ETC designation framework by October 1, 2006, at the same time they submit their annual certification filing.[16] The *Report and Order* further states that the FCC does not believe that different ETCs should be subject to different obligations associated with receiving universal service support because of when they happened to first obtain ETC designation.[17] On that basis the FCC encourages State Commissions to apply the new reporting requirements to all ETC applicants over which they exercise jurisdiction, regardless of the date of initial ETC designation.[18]

33. The additional requirements for FCC designation of ETCs that the FCC adopted in the *Minimum Requirements Report and Order* include the following:

§ 54.202 Additional Requirements for [Federal Communications] Commission designation of eligible telecommunications carriers.

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[13] *Id., para 19, 58-62.*
[14] *Id., para 60.*
[15] *Id., para 58.*
[16] *Id., para 68-72.*
[17] *Id., para 20.*
[18] *Id., para 71-72.*

(a) On or after the effective date of [the rules adopted by the FCC], in order to be designated an eligible telecommunications carrier under section 214(e)(6), any common carrier in its application [to the FCC] must:

(1) (A) commit to provide service throughout its proposed designated service area to all customers making a reasonable request for service. Each applicant shall certify that it will (1) provide service on a timely basis to requesting customers within the applicant's service area where the applicant's network already passes the potential customer's premises; and (2) provide service within a reasonable period of time, if the potential customer is within the applicant's licensed service area but outside its existing network coverage, if service can be provided at reasonable cost by (a) modifying or replacing the requesting customer's equipment; (b) deploying a roof-mounted antenna or other equipment; (c) adjusting the nearest cell tower; (d) adjusting network or customer facilities; (e) reselling services from another carrier's facilities to provide service; or (f) employing, leasing or constructing an additional cell site, cell extender, repeater, or other similar equipment; and

(B) submit a five-year plan that describes with specificity proposed improvements or upgrades to the applicant's network on a wire center-by-wire center basis throughout its proposed designated service area. Each applicant shall demonstrate how signal quality, coverage or capacity will improve due to the receipt of high-cost support; the projected start date and completion date for each improvement and the estimated amount of investment for each project that is funded by high-cost support; the specific geographic areas where the improvements will be made; and the estimated population that will be served as a result of the improvements. If an applicant believes that service improvements in a particular wire center are not needed, it must explain its basis for this determination and demonstrate how funding will otherwise be used to further the provision of supported services in that area.

(2) demonstrate its ability to remain functional in emergency situations, including a demonstration that it has a reasonable amount of back-up power to ensure functionality without an external power source, is able to reroute traffic around damaged facilities, and is capable of managing traffic spikes resulting from emergency situations.

(3) demonstrate that it will satisfy applicable consumer protection and service quality standards. A commitment by wireless applicants to comply with the Cellular Telecommunications and Internet Association's Consumer Code for Wireless Service will satisfy this requirement. Other commitments will be considered on a case-by-case basis.

(4) demonstrate that it offers a local usage plan comparable to the one offered by the incumbent LEC in the service area for which it seeks designation.

(5) certify that the carrier acknowledges that the [Federal Communications] Commission may require it to provide equal access to long distance carriers in the event that no other eligible telecommunications carrier is providing equal access within the service

area.

(b) Any common carrier that has been designated under Section 214(e)(6) as an eligible telecommunications carrier or that has submitted its application for designation under section 214(e)(6) before the effective date of [these new rules adopted by the FCC] must submit the information required by paragraph (a) of this section no later than October 1, 2006, as part of its annual reporting requirements under section 54.209.

(c) *Public Interest Standard.* Prior to designating an eligible telecommunications carrier pursuant to section 214(e)(6), the [Federal Communications] Commission shall determine that such designation is in the public interest. In doing so, the [Federal Communications] Commission shall consider the benefits of increased consumer choice, and the unique advantages and disadvantages of the applicant's service offering. In instances where an eligible telecommunications carrier applicant seeks designation below the study area level of a rural telephone company, the [Federal Communications] Commission shall also conduct a creamskimming analysis that compares the population density of each wire center in which the eligible telecommunications carrier applicant seeks designation against that of the wire centers in the study area in which the eligible telecommunications carrier applicant does not seek designation. In its creamskimming analysis, the [Federal Communications] Commission shall consider other factors, such as disaggregation of support pursuant to § 54.315 by the incumbent local exchange carrier.

(d) A common carrier seeking designation as an eligible telecommunications carrier under section 214(e)(6) for any part of tribal lands shall provide a copy of its petition to the affected tribal government and tribal regulatory authority, as applicable, at the time it files its petition with the Federal Communications Commission. In addition, the [Federal Communications] Commission shall send the relevant public notice seeking comment on any petition for designation as an eligible telecommunications carrier on tribal lands, at the time it is released, to the affected tribal government and tribal regulatory authority, as applicable, by overnight express mail.[19]

34. The *ETC Minimum Requirements Report and Order* also adopted annual reporting requirements for FCC-designated ETCs that include the following:

§ 54.209 Annual reporting requirements for designated eligible telecommunications carriers.

(a) A common carrier designated under section 214(e)(6) as an eligible telecommunications carrier shall provide:

(1) a progress report on its five-year service quality improvement plan, including maps detailing its progress towards meeting its plan targets, an explanation of how much universal service support was received and how it was used to improve signal quality, coverage, or capacity, and an explanation regarding any network improvement targets that have not been fulfilled. The information shall be submitted at the wire center level;

[19] *See ETC Minimum Requirements Report and Order, Appendix A, amending Part 54 of Title 47 of the Code of Federal Regulations.*

(2) detailed information on any outage, as that term is defined in 47 C.F.R § 4.5, of at least 30 minutes in duration for each service area in which an eligible telecommunications carrier is designated for any facilities it owns, operates, leases, or otherwise utilizes that potentially affect (a) at least ten percent of the end users served in a designated service area; or (b) a 911 special facility, as defined in 47 C.F.R. § 4.5(e). Specifically, the eligible telecommunications carrier's annual report must include information detailing: (a) the date and time of onset of outage; (b) a brief description of the outage and its resolution; (c) the particular services affected; (d) the geographic areas affected by the outage; (e) steps taken to prevent a similar situation in the future; and (f) the number of customers affected;

(3) the number of requests for service from potential customers within the eligible telecommunications carrier's service areas that were unfulfilled during the past year. The carrier shall also detail how it attempted to provide service to those potential customers, as set forth in § 54.202(a)(1)(A);

(4) the number of complaints per 1,000 handsets or lines;

(5) certification that it is complying with applicable service quality standards and consumer protection rules;

(6) certification that the carrier is able to function in emergency situations as set forth in §54.201(a)(2);

(7) certification that the carrier is offering a local usage plan comparable to that offered by the incumbent LEC in the relevant service areas; and

(8) certification that the carrier acknowledges that the [Federal Communications] Commission may require it to provide equal access to long distance carriers in the event that no other eligible telecommunications carrier is providing equal access within the service area.[20]

Staff's Recommendations

35. In its initial Staff Report, which was issued prior to the *ETC Minimum Requirements Report and Order,* Staff recommended approval of Western Wireless' application subject to the following ten conditions:

1) Western Wireless shall docket an informational tariff with the Commission, setting forth the rates, terms and conditions for its general services (including, but not limited to, its Life Line and Link Up service) and other services for which it receives Federal Universal Service Fund support in its ETC service area approved herein within 30 days of an Order

[20] See *id.*

in this matter. On an ongoing basis Western Wireless shall comply with A.R.S. § 40-367 in amending its tariffs.

2) Western Wireless shall make available Lifeline and Link Up services to qualifying low-income applications in its ETC service area no later than 90 days after a Commission Decision. Western Wireless shall docket a letter providing notification of the commencement date for the service within 100 days of a Commission decision.

3) Western Wireless shall docket its advertising plan for Lifeline and Link Up services, for Staffs review, within 60 days of a decision in this matter or prior to commencing service, whichever occurs first. The Company must also demonstrate its intention to advertise throughout its entire service area.

4) Western Wireless shall publicly file, with its informational tariff, accurate coverage-area maps of the portions of its service areas for which this Decision designates it an ETC within 30 days of this Decision. Western Wireless shall docket, by April 1 of each year, commencing with 2005, the most accurate coverage-area maps available. Western Wireless shall also provide updated coverage-maps upon request by the Commission. On an ongoing basis, prior to entering into any service contract with a potential customer, Western Wireless shall provide that potential customer with copies of the most accurate coverage-area maps available, in order to enable the potential customer to ascertain where, within the ETC designation areas, Western Wireless can actually provide service to that customer.

5) Western Wireless shall be required to provide service quality data following a request by Commission Staff. Western Wireless shall provide such data within the timeframe given in Staffs request to the Company.

6) Western Wireless shall submit any consumer complaints that may arise from its ETC service offerings to the Commission's Customer Service Division, provide a regulatory contact, and comply with the provisions of the Commission's customer service rules, including establishment of service, minimum customer information requirements, service connection and establishment, provision of service, billing and collection, and termination

of service. Western Wireless shall include the Commission's Consumer Service Division's telephone number on all bills issued to customers in its ETC service area.

7) Western Wireless shall be required to utilize all federal high-cost support for its rural ETC service area within the State of Arizona. Western Wireless shall docket an affidavit confirming that all federal high-cost support for its Arizona exchanges will only be used for the provision, maintenance, and upgrading of facilities and services for which the support is intended, consistent with Section 254(e) of the 1996 Act. This Affidavit shall reflect the calendar year and be due by April 1 of each year following ETC approval, beginning with April 1,2006.

8) Western Wireless shall maintain and retain auditable records of all expenditures of universal service funds received as a result of the ETC designation granted herein, and shall be required to submit to an audit of its expenditures of its universal service funds upon a request by Commission Staff.

9) Western Wireless shall docket a plan that details proposed projects to be supported by the Federal Universal Fund within ninety (90) days after an Order in this matter.

10) Western Wireless shall be required to docket an annual filing detailing how it is utilizing its federal high-cost support for its Arizona exchanges, service quality performance data, and consumer complaint data. This annual filing should reflect the calendar year and should be due by April 1 of the first four years following ETC approval, beginning with April 1,2006, and ending on April 1,2009.

36. In its Supplemental Staff Report on Western Wireless' application, Staff states that after considering the *ETC Minimum Requirements Report and Order,* Staff recommends that Western Wireless be required to meet certain eligibility conditions and associated reporting requirements. Staff recommends that in order to be designated as an ETC, Western Wireless must:

1) Demonstrate a commitment and ability to provide supported services throughout the ETC service area and provide a five-year network improvement plan.

a. File with the Compliance Section of the Utilities Division an Initial formal five-year network improvement plan that shows for each wire center within the designated ETC service area:

i. Planned improvements in signal quality, coverage, or capacity;

ii. Projected start date and completion date and investment amount for each planned improvement;

iii. Specific geographic areas where each planned improvement will occur;

iv. Estimated population served by each planned improvement; and

v. Coverage area maps detailing how high cost monies will be used to improve its network, and where signal strength coverage or capacity will be improved where funding is received.

b. File with the Compliance Section of the Utilities Division an Annual Progress Report on five-year service quality improvement plan providing the following information at the wire center level:

i. Maps detailing progress towards meeting its plan targets including how high cost monies were used to improve its network, and where signal strength coverage or capacity have been improved where funding was received;

ii. An explanation of how much universal service support was received and how the support was used to improve signal quality, coverage, or capacity;

iii. An explanation of any unfulfilled improvement goals; and

iv. A description of why any targets in the five-year plan have not been met.

2) Demonstrate a commitment and ability to advertise supported services and lifeline and linkup throughout the ETC service area.

a. File with the Compliance Section of the Utilities Division an Initial Advertising Plan for supported services throughout the ETC service area.

b. File with the Compliance Section of the Utilities Division an Annual Certification that Western Wireless is advertising the supported services including lifeline and linkup throughout the ETC service area.

3) Offer Lifeline and Linkup.

a. File with the Compliance Section of the Utilities Division an Initial Letter indicating provision of lifeline and linkup.

b. File with the Compliance Section of the Utilities Division an Annual Certification that Western Wireless is offering lifeline and linkup.

4) Demonstrate the ability to remain functional in Emergency Situations.

a. File with the Compliance Section of the Utilities Division an Annual Certification that Western Wireless is able to function in emergency situations.

5) Demonstrate a commitment to meeting Service Quality Standards.

a. File with the Compliance Section of the Utilities Division an Annual report of unfulfilled requests for service from potential customers within the ETC service area, how Western Wireless attempted to provide service, and why it was unsuccessful.

b. File with the Compliance Section of the Utilities Division Information on any outage lasting at least 30 minutes in any part of the ETC service area including:

i. The date and time of onset of the outage;

ii. A brief description of the outage and its resolution;

iii. The particular services affected;

iv. The geographic areas affected;

v. Steps taken to prevent a similar situation in the future; and

vi. The number of customers affected.

6) Demonstrate a commitment to meeting consumer protection standards and compliance with Arizona Corporation Commission Customer Service Rules including R14-0-503 – Establishment of Service; R14-2-504 – Minimum Customer Information Requirements; R14-2-505.A – Service Connection and Establishment; R14-2-507.A, C and D – Provision of Service; R14-2-508 – Billing and Collection; R14-2-509 excluding A(2) – Termination of Service; R14-2-510 – Customer Complaints.

a. File with the Compliance Section of the Utilities Division an Annual Certification that Western Wireless is in compliance with CTIA Consumer Code for Wireless Service.

b. File with the Compliance Section of the Utilities Division an Annual Certification that Western Wireless is providing accurate coverage area maps to potential customers consistent with CTIA Consumer Code.

c. File with the Compliance Section of the Utilities Division an Annual Report documenting the number of consumer complaints per 1,000 handsets/lines.

d. Include Arizona Corporation Commission contact information on customers' bills.

7) Offer a Local Usage plan comparable to the one offered by the underlying local exchange carrier.

a. File with the Compliance Section of the Utilities Division an Annual Certification that Western Wireless is offering an acceptable Local Usage Plan.

8) Acknowledge willingness to provide Equal Access in the designated ETC service area in the event that no other ETC is providing equal access within the service area.

a. File with the Compliance Section of the Utilities Division an Annual Certification that Western Wireless is willing to provide Equal Access in the event that no other ETC is providing equal access within the service area.

9) Acknowledge willingness to file an annual informational tariff.

a. File with the Utilities Division and Consumer Services an Annual (or as updated by the ETC) Informational Tariff setting forth the rates, terms and conditions for all service offerings within ETC service area.

10) Acknowledge willingness to file a service coverage map consistent with CTIA Consumer Code that requires the company to provide potential customers with a map depicting approximate voice service coverage generated using generally accepted methodologies and standards to depict the carrier's outdoor coverage.

a. File with Utilities Division and Consumer Services an Initial Service Coverage Map consistent with CTIA Consumer Code.

b. File with the Utilities Division and Consumer Services an Annual (or as updated by the ETC) Service Coverage Map consistent with CTIA Consumer Code.

11) Maintain and retain auditable records as required by the FCC, USAC, and as kept in the normal course of business of all expenditures of universal service funds received and submit to an audit of its expenditures of its universal service funds upon request by

Commission Staff.

37. The Supplemental Staff Report further recommends that Western Wireless be required to file the five-year network improvement plan described in its Condition No. 1.a above prior to a hearing or Decision in this matter, and states that within *60* days following the filing of the plan, Staff will provide a supplemental filing in response to the plan.

38. The Supplemental Staff Report states that subject to filing its five-year network improvement plan, Western Wireless has met the eligibility requirements set forth in Findings of Fact No. 36 above. Staff recommended that upon Staffs review and supplemental filing in response to the Company's five-year network improvement plan, this Commission grant Western Wireless' application for ETC designation for its requested non-rural and rural service areas consisting of the study areas of Rio Virgin Telephone Co. Inc. and Southwestern Telephone Co., five of the six wire centers served by Verizon California, Inc., and those wire centers within Arizona RSA No. 4 served by Qwest Corporation.

39. The Supplemental Staff Report recommends that this Commission require Western Wireless to file a consolidated annual filing with the Compliance Section of the Utilities Division in fulfillment of Staffs recommended reporting requirements described above.

40. The Supplemental Staff Report further recommends that this Commission grant Western Wireless' request to redefine the service territory of Verizon California, Inc. from the study area to the wire center level.

ALECA's Response to Staffs Recommendations and Reply to Western Wireless' Response

41. ALECA states that it supports the recommendations contained in the Supplemental Staff Report. ALECA believes that the recommendations are necessary to ensure that Western Wireless meets all of its duties as an ETC, and that Staffs recommendations are consistent with the FCC's recent pronouncements in the *ETC Minimum Requirements Report and Order.* ALECA also urges that several recommendations appearing in the original Staff Report should be adopted in addition to the recommendations in the Supplemental Staff Report, as discussed below.

42. ALECA supports Staffs recommendation in the Supplemental Staff Report that Western Wireless be required to file a five-year network improvement plan as a precondition to

designation as an ETC, and recommends that Western Wireless' request for elimination of this requirement be denied. ALECA argues that adoption of the requirement that an applicant submit a five-year network improvement plan as a precondition to designation as an ETC will ensure that telecommunications infrastructure is constructed and expanded in rural Arizona. ALECA also points out that if designated an ETC, Western Wireless will become eligible to receive millions of dollars in Federal high cost support, and that with this benefit comes the obligation to deploy Federal support in a way that furthers the policy of universal telecommunications service. ALECA posits that submittal of the five-year network improvement plan prior to ETC designation is necessary to ensure that Western Wireless actually complies with the five-year plan requirement. In support of Staffs recommendation that the five-year plan be filed prior to Western Wireless' designation, ALECA states that while pending Federal ETC applicants may not be required to submit a five-year plan until 2006, there is nothing that prohibits this Commission from adopting the five-year plan requirement effective immediately in this docket.

43. ALECA notes that Staffs recommendation does not require the five-year plan to be docketed, and requests that Western Wireless' initial five-year plan be made available to it at the same time it is provided to Staff, so that ALECA may file comments on the plan prior to a hearing or Decision in this docket.

44. ALECA believes that this Decision should include specific language restricting Western Wireless' use of Federal high-cost support from its rural ETC service area in Anzona to the deployment of telecommunications infrastructure in rural Arizona, and that such a restriction should continue as long as Western Wireless is receiving high-cost support.

45. ALECA believes that the filing of additional network improvement plans beyond the five-year plan proposed by Staff would be valuable to the Commission in assessing Western Wireless' compliance with ALECA's proposed requirement that Federal high-cost support from the Company's rural ETC service area be used in rural Arizona, and recommends that if Western Wireless is required to file successive five-year plans following the initial plan, Staffs proposed annual reporting requirement should continue as long as the successive five-year plans are in place.

46. ALECA expresses concern that the Cellular Telecom and Internet Association's

Consumer Code for Wireless Service ("CTIA Code") lacks a mechanism to address and resolve consumer complaints. ALECA recommends that in addition to requiring Western Wireless to comply with the CTIA Code, any Order approving Western Wireless' request for ETC designation should adopt Staffs Recommendation No. 6 in the original Staff Report, which reads as follows:

> 6. Western Wireless shall submit any consumer complaints that may arise from its ETC service offerings to the Commission's Customer Services Division, provide a regulatory contact, and comply with the provisions of the Commission's customer service rules, including establishment of service, minimum customer information requirements, service connection and establishment, provision of service, billing and collection, and termination of service. Western Wireless shall include the Commission's Consumer Service Division's telephone number on all bills issued to customers in its ETC service area.

47. ALECA states that while the Supplemental Staff Report recommends that Western Wireless be required to file annual outage reports and annual reports of unfulfilled requests for service, that the Staff recommendation stops short of the requirement set forth in paragraph 22 of the *ETC Minimum Requirements Report and Order.* ALECA urges that this Decision adopt the requirements referenced at paragraph 22 of the *ETC Minimum Requirements Report and Order.*

<u>Western Wireless' Response to Staff's Recommendations and Reply to ALECA's Response</u>

48. In its Response to the Supplemental Staff Report, Western Wireless states that with one exception, it will accept Staffs recommended conditions. Western Wireless objects to Staffs recommendation requiring Western Wireless to file a five-year plan modeled after the five-year plan required in the *ETC Minimum Requirements Report and Order* prior to a Decision or hearing on its application. Western Wireless proposes instead that the Commission adopt one of two alternative compliance conditions the Company recommends. Western Wireless advances the following legal arguments in support of its objection. First, the Company asserts that adoption of Staffs condition as is would violate the universal service principle of competitive and technological neutrality set forth in the FCC's 1997 Universal Service Order[21] because Western Wireless would be the only ETC in Arizona required to submit a five-year network improvement plan and subsequent annual progress

[21] *In the Matter of Federal-State Joint Board on Universal Service,* CC Docket 96-45, Report and Order, FCC 97-157, para 47 (rel. May 8, 1997).

reports, causing it a competitive disadvantage. Second, Western Wireless argues that this Commission's ability to impose requirements on ETCs is limited to the adoption of formal regulations. Third, Western Wireless asserts that denial of Western Wireless' application due to its failure to file a five-year plan prior to a Decision or hearing would prevent Western Wireless fiom providing telecommunications services as an ETC, in violation of 47 U.S.C. § 253(a).[22] Western Wireless also argues that in the event the FCC's five-year plan requirement adopted by its *ETC Minimum Requirements Report and Order* is modified as a result of requests for reconsideration, modification, or clarification that Western Wireless expects to be filed, this Commission will have processed the instant application based on standards never enforced at the Federal level.

49. The Company states that it supports the goal that the proposed five-year plan requirement is intended to achieve, which it describes as giving this Commission the opportunity to ensure that Federal universal service support received in Arizona is used for the provision, maintenance and upgrading of facilities and services for which the support is intended, as required by 47 U.S.C. § 254(e). Western Wireless claims, however, that Staffs recommendation is an onerous requirement with which Western Wireless is unable to comply, and that the requirement is unlikely to be an effective means of ensuring compliance with the requirements of 47 U.S.C. § 254(e) because any five-year plan in a dynamic, competitive market will by necessity be very general and will be modified substantially each year to account for changes in technology, business conditions, and universal service funding. Western Wireless posits that the proposed plan's predictive value to Staff and the Commission for years beyond 2006 may be minimal; that it is not clear what Staff would do with projected plans for 2007-2010; and that in the event Staff questioned a proposed expenditure under a plan, it would not be efficient to litigate over speculative proposed investments projected 2-5 years in the future.

[22] 47 U.S.C. § 253 provides as follows:

> (a) No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.
>
> (b) Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

50. Western Wireless states that it cannot comply with Staffs five-year plan recommendation because it does not today plan investment, buildout, and network projects five years into the future, and that it cannot do so with any degree of confidence, because wireless technology is changing rapidly and it is nearly impossible to predict the next technology that will best deliver that which consumers will demand; and that because the business and investment climate is uncertain, no company knows how much and what source of capital will be available for investment three, four, or five years in the future. Western Wireless states that uncertainty also exists over how Federal universal service funding will be calculated and distributed over the long run, and how much any particular carrier will receive.

51. Western Wireless states, as an additional reason that it cannot comply with Staffs five-year plan recommendation, that carriers designated at the Federal level have until October 2006 to conduct their analysis and develop their five-year plan, such that there is not yet any industry standard or FCC-endorsed plan in existence upon which the Company can model a five-year plan for Arizona.

52. Western Wireless states that it "could develop a methodology and process for projecting possible network improvements five years out, but that doing so would be a significant company undertaking that will require a great deal of thought, analysis and input from various parts of the Company." Western Wireless further states that "such a projection would be a guess as to what might take place that far in the future and will not drive the actual planning that the company will have to do for years three, four and five of the plan."

53. Western Wireless states that it cannot comply with Staffs proposed requirement to submit plans on a wire center basis because it does not track capital investment, coverage or demand on a wire center basis and therefore cannot provide project and budget information on a wire center level. Western Wireless states that organizing and tracking capital investment, coverage, network planning and customer demographics by wire center would require a reconfiguration of Western Wireless' business and accounting practices. Western Wireless concedes that it may be required to develop such a reconfiguration for 2006 Federal reporting, but states that it is not positioned to do that today for Arizona.

54. Western Wireless proposes in place of Staffs five-year plan recommendation two alternative compliance conditions, and states that the alternatives are intended to provide information showing how Western Wireless will spend universal service funds in the future and its progress in extending its network in the requested ETC designation area.

55. Western Wireless' first alternative proposal is for this Commission to adopt the following post-designation requirements:

a. Within 90 days of designation, Western Wireless would file its list of 2005 proposed projects supported by universal service funds;

b. Each year by April 1, Western Wireless would make a filing showing how support had been used; and

c. Western Wireless would maintain records and be subject to audit by Commission Staff regarding its use of funds.

56. Western Wireless states that the above proposed post-designation requirements are based on Staffs recommendations in the Staff Report it issued prior to the FCC's *ETC Minimum Requirements Report and Order*. Western Wireless states that the above proposal could be made stronger by requiring that the Company's annual April 1 filing showing how Federal universal service support had been used in the prior year also include a projection for use of the Federal funding for that calendar year.

57. The Company's second alternative proposal is that in lieu of requiring submission of Staffs proposed five-year plan prior to a Decision or hearing, Western Wireless be allowed to file a five-year plan by October 1, 2006.

58. Western Wireless requests a clarification of the Condition No. 6 Staff recommends in the Supplemental Staff Report. The Company believes that the word "including" as it appears in this condition creates unnecessary uncertainty about whether other Customer Service Rules exist with which it must comply, and requests that the word be deleted from Condition No. 6.

59. Western Wireless also responds to ALECA's suggested changes to the conditions Staff recommends in the Supplemental Staff Report. Regarding ALECA's recommendation to add language to Staffs five-year plan proposal that restricts Western Wireless' use of Federal high-cost

support from its rural ETC service area in Arizona to the deployment of telecommunications infrastructure in rural Arizona for as long as it receives such support, Western Wireless argues that such language could cause confusion because 1) Western Wireless seeks ETC designation in both non-rural and rural study areas and wire centers; and 2) because the term "deployment" is imprecise, and section 254(e) allows universal service support to be used not just for deployment of telecommunications infrastructure, but for the "provision, maintenance and upgrading of facilities and services." Western Wireless also responds that its use of Federal high-cost support will remain limited to the provision, maintenance and upgrading of facilities and services by section 254(e) indefinitely into the future, such that any further time restriction is unnecessary. Western Wireless additionally responds that if ALECA's intent with the term "deployment of telecommunications infrastructure" is to limit its use of high-cost support to the buildout of new facilities, that this would violate the universal service principle of competitive and technological neutrality, because it would restrict Western Wireless' use of support as compared to other carriers, especially wireline carriers.

60. In response to ALECA's statement that the filing of additional annual network improvement plans beyond the five-year plan period proposed by Staff would be valuable to this Commission, Western Wireless asserts that it would be premature to determine compliance requirements at this time that will not be relevant until 2010.

61. Regarding ALECA's proposal that Western Wireless be required to submit consumer complaints to this Commission, Western Wireless responds that it does not specifically oppose this recommendation, but that its adoption is unnecessary for the following reasons: the competitive nature of the wireless industry provides a strong incentive for the Company to provide prompt and complete responses to customer complaints; Staffs proposed Condition No. 6 already requires the Company to comply with A.A.C.R14-2-510, which sets forth detailed provisions governing investigations and responses to consumer complaints and billing disputes; the FCC has stated that for a wireless ETC, a commitment to comply with the CTIA Consumer Code for Wireless Service constitutes a sufficient commitment to consumer protection and service quality;[23] and Western

[23] Western Wireless cites to paragraph 28 of the *ETC Minimum Requirements Report and Order.*

Wireless will be required to submit to this Commission an annual certification of its compliance to the CTIA Code.

62. Western Wireless states that ALECA's recommendation that the service extension requirements set forth in paragraph 22 of the *ETC Minimum Requirements Report and Order* is unnecessary because it has already specifically committed to nearly identical service extension requirements, but that it does not object to the incorporation of those service extension standards into a Commission Order.

Staffs Reply to ALECA and Western Wireless' Responses

63. In its Reply, Staff continues to recommend that ETC status not be granted to Western Wireless until Staff has had the opportunity to review Western Wireless' five-year network improvement plan. Staff argues that if ETC designation is granted to Western Wireless, the Company would expect to qualify for and receive Federal universal service funds for years to come, and that because the Company would be required by 47 U.S.C. § 254(e) to utilize support it will receive in the future for the provision, maintenance, and upgrading of facilities and services for which support is intended, it is reasonable to assume that Western Wireless has some idea of how it will comply. Staff asserts that it is appropriate for this Commission to require Western Wireless to file the five-year plan in order to demonstrate how universal service funds will be used to improve coverage, signal strength or capacity that would not otherwise occur absent the receipt of high-cost support prior to granting the Company an ETC designation in Arizona.

64. In response to the Company's objections that it cannot comply with Staffs recommended five-year plan requirement, Staff expresses that it understands that Western Wireless may not currently have detailed plans in place for network expansion and improvement in Arizona that extend five years into the future; that the level of certainty and detail in the proposed five-year plan will decline with each successive year; that projected expenditures for years three, four and five will not be as specific as those for earlier years and are subject to change; and that plans for year five are likely to be based on projections. Staff points out, however, that the annual progress reports Staff is also recommending will allow Western Wireless to notify the Commission of deviations from its current-year plans and to update its future-year plans.

65. In response to Western Wireless' concern that the five-year network improvement plan must be based on a wire center level, Staff stated that given the relatively small number of cell sites present in the requested ETC service area, Western Wireless should be able to correlate the coverage area of a cell site to the ILEC wire center(s), and points out that Western Wireless was fully capable of providing information on a wire center level in its request for redefinition of Verizon's service territory.

66. In response to Western Wireless' contention that the FCC's five-year plan requirement adopted by its ***ETC Minimum Requirements Report and Order*** may be modified as a result of requests for reconsideration, modification, or clarification that Western Wireless expects to be made, Staff responds that the Commission's Decision in this docket is independent of the FCC's rulemaking, and continues to recommend that the Company be required to comply with Staffs proposed five-year plan requirement regardless of any further action by the FCC.

67. Staff argues that requiring the five-year plan to be filed prior to a hearing or Decision will not put Western Wireless at a competitive disadvantage, because ETC status in itself will give Western Wireless an advantage in the form of a substantial government subsidy over its competitors who are not designated as ETCs. Staff further argues that wireless ETCs are not subject to the sort of in-depth regulatory review to which wireline ILECs designated as ETCs are subject, such as rate cases. Staff believes that wireless ETCs ought to be subject to some sort of monitoring given the substantial public funds they will receive, and that Staffs recommended five-year plan condition serves this purpose by requiring Western Wireless to explain how it intends to spend public money.

68. Staff disagrees with Western Wireless' claim that Staffs recommended five-year plan requirement can be imposed only with adoption of a rule applicable to all ETCs. Staff asserts that this Commission has broad discretion under fundamental administrative law principles to choose between rulemaking and case-by-case adjudication.[24] Staff believes the difficult public interest issues

[24] Staff cites *Arizona Corp. Comm'n v. Palm Springs Util.* Co., 24 Ariz. App. 124, 129, 536 P.2d 245, 250 (1975)(the Commission can proceed on a case by case approach, so long as there exists a rational statutory or constitutional basis for the action); *General Motors Corp. v. Arizona Dept. of Revenue*, 189 *Ariz.* 86, 98, 938 P.2d 481, 493 (App. 1997)(applying Palm Springs); and *Cagle Bros. Trucking Serv. v. Arizona Corp. Comm'n*, 96 Ariz. 270, 272-73, 394 P.2d 203, 205 (1964)(the Commission may adopt new requirements without a rule if it affords the affected company a hearing). Staff correctly notes that Western Wireless voluntarily waived its right to a hearing in this case.

raised by ETC cases suggest that an individually tailored, case-by-case approach is appropriate.

69. Staff states that Western Wireless' argument that Staffs five-year plan recommendation would bar it from entering the market is without merit because Western Wireless has long served the markets in question without Federal universal service funding. Staff argues that its proposed five-year plan requirement does not constitute a barrier to entry, because imposition of this condition would not require Western Wireless to actually build expensive facilities prior to applying for support, but would require only that the Company submit a plan explaining how it intends to spend the substantial subsidy it will receive. Staff further argues that even if its proposed five-year plan condition did pose a barrier to entry, it would be acceptable under 47 U.S.C. § 253(b)[25] because the condition is necessary in order to ensure that the public's funds are spent by the ETC to expand or preserve wide access to phone services, rather than simply providing a windfall to the recipient ETC.

70. In response to Western Wireless' request for clarification regarding the scope of Staffs recommended Condition No. 6, Staff recommends that the word "including" be deleted from its recommended Condition No. 6 in order to clarify that Staff means the list of Customer Service Rules presented in Condition *6* to be an exhaustive list of applicable Customer Service Rules with which Western Wireless must comply.

71. In response to ALECA's recommendation that Staffs recommended Condition No. 6 be replaced by language from Staffs recommendations in the original Staff Report, Staff states that it believes the revised Condition No. 6 appearing in the Supplemental Staff Report provides ample opportunity for consumers and the Commission to address any deficiencies in service and billing that may arise in Western Wireless' designated ETC area.

72. In response to ALECA's proposal that this Decision adopt language fiom paragraph 22 of the *ETC Minimum Requirements Report and Order* (regarding the provision of service within a reasonable time at a reasonable cost within the ETC designation area), Staff states that it agrees with the intent of the proposed language but believes it is not necessary in light of Staffs recommended

[25] See footnote 22 above.

Condition 1.b (filing of annual progress reports on network improvements) and 47 U.S.C. § 254(e) (requires a carrier receiving universal service support to use that support "only for the provision, maintenance, and upgrading of facilities and services for which the support is intended"). Staff states that the annual reporting of all unfulfilled requests for service, which is included in Staffs proposed Condition No. 5.a, is the most effective tool to address any potential concerns with respect to the Company's obligation to serve its designated ETC area.

73. Staff also responds to ALECA's request that the five-year plan be made available to ALECA for comment and to ALECA's requests for clarification regarding whether Staffs proposal contemplates the filing of additional five-year plans beyond the initial five-year plan Staff recommends and how long the annual network improvement plan progress reports must be filed pursuant to Staffs recommended Condition 1.b. Staff states that much of the detailed and sensitive information about the Company's network, facilities, customers and investment decisions that will be included in the five-year plan should be provided pursuant to the protective agreement between the parties to this docket. Staff states that it intends by its recommendations that Western Wireless be required to file one five-year network improvement plan with five annual progress reports that describe Western Wireless' progress towards meeting its five-year improvement goals, and clarifies that the word "initial" was used to indicate the timing of the filing, which Staff recommends should occur prior to Western Wireless' ETC designation.

ANALYSIS

74. Upon designation as an ETC, Western Wireless will be entitled to receive universal service funds. For this reason, we find that it is in the public interest to require Western Wireless to file, prior to receiving an ETC designation, a five-year network improvement plan for Commission approval that demonstrates how those universal service funds will be spent to improve coverage, signal strength or capacity that would not otherwise occur absent the receipt of high-cost support, for the purpose of expanding or preserving wide access to phone services in Arizona. We find that any burden that the requirement to file such a plan as a condition of becoming eligible for a Federal subsidy may impose is outweighed by the need to ensure that Western Wireless is willing and able to provide the supported services throughout the requested designation area, and to ensure that

ratepayer-funded universal service support funds are used in the manner intended, which is to aid in the provision of access to affordable telecommunications and information services to rural and high-cost telecommunications services consumers.

75. While we have considered Western Wireless' alternative proposal to instead make a post-designation compliance filing, and its alternative proposal to file a five-year plan by October 1, 2006, also post-designation, we find that the filing of a five-year network improvement plan prior to designation is the best and most reasonable means of ensuring that universal service funds will be directed where most needed to serve universal service goals. We acknowledge the Company's arguments that wireless technology is changing rapidly and that Western Wireless faces difficulty in predicting the next technology that will be able to best deliver that which its customers will demand; that uncertainty exists over how Federal universal service funding will be calculated and distributed in the future, and that consequently there may be some uncertainty regarding how much universal service subsidy Western Wireless will receive. The existence of uncertainty, however, does not justify a lack of strategic planning, especially when public funding is involved. We firmly believe that the Company must have an appropriate forward-looking network improvement plan in place, organized by wire center,[26] in order to qualify for the public funding it plans to receive. We acknowledge the Company's statement that its initial five-year plan may not drive the actual planning that the Company will have to do for years three, four and five of the plan. However, the annual progress report requirement recommended by Staff and adopted herein can serve as a vehicle for an annual "true-up" of the Company's network improvement plans as the Company deems necessary to comport with technological advances and possible changes in the business and regulatory environment. As set forth in Findings of Fact No. 111 below, we will require that Western Wireless' annual progress report include a notification of such changes to its current-year plans and will also require that the annual progress report include updates to the Company's future-year plans to reflect its actual planning.

76. ALECA is concerned that the CTIA Code lacks a mechanism to address and resolve

[26] Western Wireless concedes that it may be required to reconfigure its business and accounting practices to organize and track capital investment, coverage, network planning and customer demographics by wire center for Federal reporting purposes for 2006.

consumer complaints, and recommends that Western Wireless be required to submit any consumer complaints that may arise fiom its ETC service offerings to our Customer Services Division. We note that Condition 6 as recommended by Staff in the Supplemental Staff Report requires the Company to commit to comply with Rule A.A.C. R14-2-510, which governs customer service complaints for telephone utilities. We find that Western Wireless' commitment to comply with Rule A.A.C. R14-2-510, in conjunction with our adoption of Staffs recommended Condition 5.a, which requires Western Wireless to file an annual report of unfulfilled requests for service from potential customers within the ETC service area, provides the most effective combined tool to address ALECA's concerns with respect to the Company's obligation to serve its designated ETC area. As set forth in Findings of Fact No. 111 below, we will also require the Company to include in its annual compliance filing a certification that the Company continues to comply with the customer service rules included in requirement number 6, which includes a requirement that the Commission's contact information appear on customers' bills.

77. ALECA proposes that this Commission adopt as a requirement for Western Wireless the requirements referenced in paragraph 22 of the *ETC Minimum Requirements Report and Order.* We note that while paragraph 22 of the ***Report and Order*** references reporting to the FCC of unfulfilled requests for service within 30 days, the language of the rule adopted by the FCC requires reporting on unfulfilled requests for service annually. Staffs recommended Condition 5.a also requires an annual report of unfulfilled requests for service from potential customers within the ETC service area. We find that annual reporting of unfulfilled requests for service is a reasonable requirement when viewed in conjunction with the filing of an appropriate five-year plan and annual progress reports. We will also direct Staff to pay particular attention to the number of unfulfilled requests for service in Western Wireless' consolidated annual compliance filing, and to file a Staff Report that includes an analysis of the filing and any necessary recommendations to the Commission.

78. In regard to ALECA's recommendation to add language to the five-year network improvement plan restricting the Company's use of Federal high-cost support fiom its rural ETC service area in Arizona to the deployment of telecommunications structure in rural Arizona, we agree with Western Wireless that section 254(e) allows universal service support to be used not just for

deployment of telecommunications infrastructure, but for the "provision, maintenance and upgrading of facilities and services." We find that the factors Staff recommends be included in the five-year plan are adequate to allow Staff to review the planned improvements and determine whether the plan is adequate to meet universal service goals, and that the particular language proposed by ALECA is not necessary at this time. In the memorandum that we direct Staff to file after its review of the five-year plan, we expect Staff to inform the Commission of its analysis of whether planned improvements will serve the universal service goal of aiding in the provision of access to affordable telecommunications and information services to rural and high-cost telecommunications services consumers.

79. ALECA suggests that the filing of additional network improvement plans beyond the five-year plan proposed by Staff would be valuable to the Commission. Staff states that it contemplates the filing of only one five-year plan and five annual consolidated compliance filings. It is unknown at this time whether five years of compliance filings will be adequate or not. We will therefore direct Staff to include in its Staff Report following the Company's fifth annual consolidated filing in fulfillment of the reporting requirements set forth in Findings of Fact No. 111 below, a recommendation regarding whether a need exists for continuing compliance filings.

80. We agree with the FCC that different ETCs should not be subject to different obligations, going forward, associated with receiving universal service support because of when they happened to first obtain ETC designation.[27] We will therefore direct Staff to initiate proceedings as necessary to ensure that existing eligible telecommunications carriers in Arizona are not subject to different obligations, going forward, associated with receiving universal service support than WWC License LLC dba CellularOne because of when they happened to first obtain eligible telecommunications carrier designation from this Commission.

<u>Western Wireless' Provision of Nine Supported Services</u>

81. <u>Voice-made access to the public switched network</u> – Voice-grade access means the ability to make and receive phone calls within a voice frequency range of between 300 and 3500

[27] *See ETC Minimum Requirements Report and Order*, para 20.

Hertz, a bandwidth of approximately 2700 Hertz." Western Wireless states in its application that through its interconnection arrangements with local telephone companies, including Qwest, all Arizona customers of Western Wireless are able to make and receive calls on the public switched network within the prescribed frequency range (Application at 4).

82. Local usage – Western Wireless states in its application that it provides its customers with an amount of local usage, free of charge, as required by FCC rules.[29] Western Wireless attested that once it is designated as an ETC, it will comply with all minimum local usage requirements adopted by the FCC (Application at 5).[30] In the Supplemental Staff Report, Staff states that Western Wireless currently offers 12 calling plans in its western Arizona service territory and 11 calling plans in its northwestern Arizona service territory.

83. Dual tone multi-frequency signaling or its functional equivalent – Dual tone, multi-frequency ("DTMF") signaling is a method of signaling that facilitates the transportation of call set-up and call detail information. The FCC permits carriers to provide this supported service by providing signaling that is the functional equivalent to DTMF.[31] Western Wireless currently uses out-of-band digital signaling and in-band multi-frequency signaling that is functionally equivalent to DTMF, and therefore, meets this requirement (Application at 5).

84. Single-party service or its functional equivalent – "Single-party service" means that only one party will be served by each subscriber loop or access line, in contrast to a multi-party line. The FCC has concluded that a wireless provider offers the equivalent of single-party service when it offers a dedicated message path for the length of a user's particular transmission.[32] Western Wireless provides a dedicated message path throughout the duration of all customer calls in satisfaction of this element (Application at 5).

[28] *See Universal Service Fourth Order on Reconsideration,* FCC 97-420 (rel. Dec. 30, 1997).
[29] *See* 47 C.F.R. § 54.101(a)(2).
[30] We note that while toll limitation for qualifying low-income customers (see Findings of Fact No. 89 below) serves the purpose of limiting the size of those customers' bills in order to help ensure continuation of their access to local usage, toll limitation may not fulfill this purpose for wireless customers, whose bills are based on total minutes of usage as opposed to a flat charge for all local usage. Western Wireless may wish to pursue some type of a "minutes-limitation" option or a pre-paid option for its qualifying low-income customers in order to limit the potential size of those customers' bills, to help ensure the continuation of their access to local usage.
[31] 47 C.F.R. § 54.101(a)(3).
[32] *Universal Service First Report and Order* at 8810.

85. Access to emergency services – Western Wireless states that it currently provides all of its customers with access to the appropriate public safety answering point ("PSAP") by dialing 911, and stands ready to provide Enhanced 911 ("E911") service to its customers once a PSAP submits a compliant request for E911 service (Application at 5-6). E911 service includes the capability of providing both automatic numbering information (("ANI") and automatic location information ("ALI").

86. Access to operator services - Access to operator services is defined as any automatic or live assistance provided to a consumer to arrange for the billing or completion, or both, of a telephone call.[33] Western Wireless states that it meets this requirement by providing all of its customers with access to operator services provided by either the Company or other entities (Application at 6).

87. Access to interexchange service – An ETC must offer consumers access to interexchange service for the purposes of making and receiving toll or interexchange calls.[34] Western Wireless states that equal access to interexchange service, i.e., the ability of a customer to access a Pre-subscribed long distance carrier by dialing 1+number, is not required.[35] Western Wireless states that it presently provides all of its customers with the ability to make and receive interexchange or toll calls through direct interconnection arrangements it has with several interexchange carriers ("IXCs"), and that additionally, customers are able to reach their IXC of choice by dialing the appropriate access code (Application at 6-7).

88. Access to directory assistance – Access to operator services means the ability to place a call directly to directory assistance.[36] Western Wireless states that it provides all of its customers with access to directory assistance by dialing "411" or "555-1212" in satisfaction of this requirement (Application at 7).

89. Toll limitation for qualifying low-income consumers – ETCs must offer either toll

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[33] 47 C.F.R. § 54.101(a)(6).
[34] 47 C.F.R. § 54.101(a)(7).
[35] *In the Matter of Federal-State Joint Board on Universal Service, CC* Docket No. 96-45 *Report and Order* (rel. May 8, 1997); *In the Matter of Federal-State Joint Board on Universal Service, CC Docket 96-45, Order and Order on Reconsideration, FCC 03-170* (rel. July 14, 2003); *47 U.S.C. § 332(c)(8).*
[36] 47 C.F.R. § 54.101(a)(8).

control or toll blocking services to qualifying Lifeline customers at no charge.[37] Western Wireless points out that FCC Rules define "toll limitation" as either "toll blocking" or "toll control" if a carrier is incapable of providing both, but as both "toll blocking" and "toll control" if a carrier can provide both.[38] Toll blocking allows consumers to elect not to allow the completion of outgoing toll calls. Toll control allows consumers to specify a certain amount of toll usage that may be incurred per month or per billing cycle.[39] Western Wireless states that it is not currently capable of providing toll control (Application at 7). Only carriers designated as ETCs can participate in Lifeline.[40] Western Wireless states that it offers toll-blocking services for Lifeline customers in states in which it has been designated as an ETC, and that it will provide toll blocking to Arizona Lifeline customers at no charge in the requested ETC designation areas (Application at 7).

90. In its Staff Report, Staff states that Western Wireless currently provides mobile telephony, data/facsimile, 911, and other wireless services in its proposed ETC service area to subscribers taking service under its plans, and will offer the required nine supported services required by FCC rules[41] and Lifeline and Link Up services, using Western Wireless' own facilities (Staff Report at 5).

Advertising, Lifeline, and Link Up Requirements

91. Advertising - Western Wireless states that it currently advertises the Federally supported services throughout its requested designated service areas through various media forms, including newspaper, television, radio and billboard advertising; that it maintains retail store locations throughout its licensed coverage areas, which provide additional advertising; and that it will continue to advertise the availability of the supported services and the corresponding charges using media of general distribution upon designation (Application at 7). In its Supplemental Staff Report, Staff recommends that Western Wireless be required to file with the Compliance Section of the Utilities Division its initial advertising plan and an annual certification that it is advertising the

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[37] *Universal Service First Report and Order* at 8810; *Universal Service Fourth Order on Reconsideration,* FCC Docket No. 96-45; and *Report and Order* in CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, 13 FCC Rcd 5318 (1997).
[38] 47 C.F.R. § 54.400(d).
[39] 47 C.F.R. § 54.500(b)-(c).
[40] *See* 47 C.F.R. § 54.400-415.
[41] 47 C.F.R. § 54.101.

supported services, including Lifeline and Link Up, throughout the service area (Supplemental Staff Report at 9). This is a reasonable recommendation and we will adopt it.

92. Lifeline and Link Up – As a condition of ETC designation, Staff recommends in its Supplemental Staff Report that Western Wireless should make these services available to qualifying low-income applicants in its ETC service area no later than 90 days after a Commission Decision and should docket a letter providing notification of the commencement date for the service within 100 days of a Commission Decision (Supplemental Staff Report at 9). Staff further recommends that Western Wireless be required to file an annual certification that it is offering Lifeline and Link Up throughout its ETC service area. We find this to be a reasonable recommendation and will adopt it.

Additional ETC Minimum Requirements

93. Five Year Plan - In its *ETC Minimum Requirements Report and Order,* the FCC encourages State Commissions to require, an applicant to provide a five-year plan demonstrating how high-cost universal service support will be used to improve its coverage, service quality or capacity in every wire center for which it seeks designation and expects to receive universal service support. For the reasons discussed above, we find Staffs recommendation to require that Western Wireless file an appropriate five-year plan prior to its designation as an ETC to be reasonable and necessary in order to ensure that the Company can demonstrate that it will use universal service funds in a manner that justifies an ETC designation, and will adopt it.

94. Ability to Remain Functional in Emergency Situations - In its *ETC Minimum Requirements Report and Order,* the FCC states that in considering whether a common carrier has satisfied its burden of proof necessary to obtain ETC designation, the FCC requires, and encourages State Commissions to require, an applicant to demonstrate its ability to remain functional in emergency situations. We find Staffs recommendation for an annual certification in this regard to be reasonable and will adopt it.

95. Satisfaction of Consumer Protection and Service Quality Standards - In its *ETC Minimum Requirements Report and Order,* the FCC states that in considering whether a common carrier has satisfied its burden of proof necessary to obtain ETC designation, the FCC requires, and encourages State Commissions to require, an applicant to demonstrate that it will satisfy consumer

protection and service quality standards. We find Staffs recommendation in the Supplemental Staff Report that the Company demonstrate a commitment to meet consumer protection standards and to comply with Arizona Corporation Commission Customer Service Rules, to include the Commission's contact information on its bills and to annually certify compliance with the CTIA Code to be reasonable and will adopt it. We will also require that the Company's annual certification filing include certification that the Company is complying with Arizona Corporation Commission Customer Service Rules as recommended by Staff.

96. Comparable Local Usage Plans - In its *ETC Minimum Requirements Report and Order*, the FCC states that in considering whether a common carrier has satisfied its burden of proof necessary to obtain ETC designation, the FCC requires, and encourages State Commissions to require, an applicant to offer local usage plans comparable to those offered by the incumbent local exchange carrier ("LEC") in the areas for which it seeks designation. We find Staff's recommendation for an annual certification in this regard to be reasonable and will adopt it.

97. Equal Access Requirement - In its *ETCMinimum Requirements Report and Order*, the FCC states that in considering whether a common carrier has satisfied its burden of proof necessary to obtain ETC designation, the FCC requires, and encourages State Commissions to require, an applicant to acknowledge that it may be required to provide equal access if all other ETCs in the designated service area relinquish their designations pursuant to section 214(e)(4) of the Act. We find Staffs recommendation for an annual certification in this regard to be reasonable and will adopt it.

98. Annual Reporting Requirements - In its *ETC Minimum Requirements Report and Order*, the FCC sets forth annual reporting requirements for all ETCs designated by the FCC, and encourages states to require such annual progress reports to be filed by all ETCs over which they have jurisdiction. We find Staffs recommendations in this regard to be reasonable and will adopt them.

99. Public Interest Determination – Before designating Western Wireless as an additional ETC for an area served by a rural telephone company, in addition to determining whether Western Wireless meets the requirements for ETC designation, this Commission must find that the

designation is in the public interest.[42] In its *ETC Minimum Requirements Report and Order*, the FCC adopts the public interest framework from the *Virginia Cellular ETC Designation Order*[43] and clarifies that an applicant should be designated as an ETC only where such designation serves the public interest, regardless of whether the area where designation is sought is served by a rural or non-rural carrier, and encourages states to apply the FCC's analysis in determining whether or not the public interest would be served by designating a carrier as an ETC. The *Report and Order* encourages states to apply the FCC's analysis in determining whether or not the public interest would be served by designating a carrier as an ETC.[44] In its original Staff Report, Staff performed a public interest analysis consistent with *Virginia Cellular*. Staff states that the presence of a wireless competitor benefits customers by offering a choice in telecommunications providers and unique services that are not offered by ILECs; that Western Wireless may even be able to reach customers in the region that do not have access to wireline service; that the Company's service offerings provide customers with the advantages of expanded local calling areas, the convenience of mobile phone service, the safety and security advantages of mobile telephone service, advanced data services, and innovative bundled services. In addition, Staff points out that ETC designation will allow Western Wireless to offer Lifeline and Link Up services to eligible customers.

100. In its *ETC Minimum Requirements Report and Order*, the FCC did not adopt a specific test to consider the cost impact on the Universal Service Fund, stating that it is unlikely that any individual ETC designation would have a substantial impact on the overall size of the fund.[45] In its original Staff Report, Staff analyzed the possible impact on the Universal Service Fund of granting Western Wireless' request, and noted that the additional support received by Western Wireless, which in Staffs estimate could be between approximately $82,341 and $175,210 per quarter, would not dramatically burden the fund.

101. We agree with Staff that Western Wireless's voice and data services offerings could

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[42] 47 U.S.C. § 214(e)(2).
[43] *Federal-State Joint Board on Universal Service; Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier for the Commonwealth of Virginia*, Memorandum Opinion and Order, CC Docket No. 96-45, 19 FCC Rcd at 1563, 1570-1571, para 15-16 (rel. January 22, 2004)(*"Virginia Cellular"*).
[44] *ETC Minimum Requirements Report and Order*, *para* 3, 43.
[45] *Id.*, *para* 54.

offer increased competitive choice and other service benefits in the requested service area, and find that in conjunction with the filing of an appropriate five-year network improvement plan, that it will be in the public interest to designate Western Wireless as an ETC in the requested service area.

Study Area Redefinition

102. Western Wireless is currently licensed to serve only 5 of the 6 wire centers located in the rural study area served by Verizon. Those 5 wire centers are listed in Exhibit B. Unless the service area standard is redefined for purposes of Western Wireless' ETC designation from study area to wire center, Western Wireless would be precluded from being designated as an ETC in any of the 6 wire centers in Verizon's service area.[46] Western Wireless has therefore requested that the Commission and the FCC redefine, for purposes of Western Wireless' ETC designation, Verizon's service area from the study area level to the wire center level, pursuant to 47 C.F.R. § 54.207, and has made its request for ETC designation for the 5 wire centers listed in Exhibit B contingent upon the requested redefinition.

103. Pursuant to the 1996 Act and FCC regulations,[47] an ETC designation involves the designation of a geographic area for the purpose of determining universal service obligations and support mechanisms for each designated ETC, and this Commission may designate a requested ETC service area that differs from the rural ILEC study area.

104. The *ETC Minimum Requirements Report and Order* states that in cases where the applicant seeks to redefine the rural service area of the underlying ILEC, as Western Wireless does in the case for the portion of its service territory served by Verizon, a creamskimming analysis should be employed to determine whether a potential for creamskimming exists.[48] The *Report and Order* states that application of its permissive guidelines for state ETC designation proceedings will facilitate the FCC's review of petitions seeking redefinition of incumbent LEC service areas filed pursuant to section 214(e)(5) of the 1996 Act.[49] Staff conducted a creamskimming analysis in this case.

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[46] 47 U.S.C. § 214(e)(5); 47 C.F.R. § 54.207(b).
[47] 47 U.S.C. § 214(e)(5) and 47 C.F.R. § 54.201(b).
[48] *ETC Minimum Requirements Report and Order*, para 49.
[49] *Id., para 60.*

105. Pursuant to a Federal-State Joint Board on Universal Service Recommended Decision,[50] there are three factors to be considered in determining whether to define the service area of a provider seeking ETC designation differently from the ILEC study area: 1) whether the provider is attempting to "cream skim" by only proposing to serve the lowest cost exchanges; 2) the regulatory and competitive status of rural ILECs as a result of the 1996 Act; and 3) the administrative burden imposed on rural ILECs as a result of calculating costs on a level other than the study area.

106. Staff stated that Western Wireless' request for redefinition of Verizon's service territory is essentially a request to exclude the Parker Dam wire center from its ETC service area. Staff evaluated this request to determine whether it constitutes an attempt at creamskimming. Staff determined that the Parker Dam wire center has a greater density than the majority of rural wire centers included in the requested ETC service area, and that Western Wireless has not limited its requested service area to only high-density (i.e. lower cost) wire centers. Staff therefore has no concerns that the Company is trying to "cream-skim," or serve only the low-cost, high revenue customers in a rural telephone company's service area.

107. Staff affirmed in its original Staff Report that redefinition of Verizon's study area will not alter its status as a "rural" telephone company, and will not affect the amount of universal service support Verizon will receive.

108. Staff states that currently, Verizon's universal support payments are based on the study area level costs, and that Verizon has the option to disaggregate its per-line high-cost universal service support to the wire center level. Disaggregation involves the ILEC conducting cost studies that segregate its cost areas at the wire center level rather than throughout its entire service area, and ensures that lower-cost areas receive lower levels of universal service support. Staff states that it recognizes that should Verizon choose to disaggregate its funding, it would face some administrative costs, but notes that disaggregation is not mandatory, and that redefinition of the study area does not change the existing rules applicable to Verizon for calculation of its embedded costs.

109. Based on its creamskimming analysis, Staff recommended approval of Applicant's

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[50] *Federal-State Joint Board on Universal Service, Recommended Decision,* Docket 96-45, 12 FCC Rcd at 179-180, para 172-174 (1996).

equest for redefinition of the Verizon study area for purposes of Western Wireless' ETC designation n the wire centers within its service area as shown on Exhibit B.

110. Consideration of the three factors outlined above demonstrates that when Western Nireless has demonstrated compliance with the requirements set forth in Findings of Fact No. 111, /erizon's study area should be redefined for purposes of Western Wireless' ETC designation in the vire centers within its service area as shown on Exhibit B.

CONCLUSION

111. Based on the analysis herein, we find that it is reasonable to require Western Wireless o meet the following requirements in order to be designated as an ETC.[51]

1) Demonstrate a commitment and ability to provide supported services throughout the ETC service area and provide a five-year network improvement plan.

   a. File with the Compliance Section of the Utilities Division an initial formal five-year network improvement plan that shows for each wire center within the designated ETC service area:

      i. Planned improvements in signal quality, coverage, or capacity;

      ii. Projected start date and completion date and investment amount for each planned improvement;

      iii. Specific geographic areas where each planned improvement will occur;

      iv. Estimated population served by each planned improvement; and

      v. Coverage area maps detailing how high cost monies will be used to improve its network, and where signal strength coverage or capacity will be improved when funding is received.

   b. File with the Compliance Section of the Utilities Division an Annual Progress Report on its five-year service quality improvement plan providing the following information at the wire center level:

      i. Maps detailing progress towards meeting its plan targets including how high

[51] These requirements are largely the requirements recommended by Staff as they appear in Findings of Fact No. 36 above, but include some clarifications consistent with the discussion herein.

cost monies were used to improve its network, and where signal strength coverage or capacity have been improved where funding was received;

ii. An explanation of how much universal service support was received and how the support was used to improve signal quality, coverage, or capacity;

iii. An explanation of any unfulfilled improvement goals;

iv. A description of why any targets in the five-year plan have not been met;

v. A notification of changes to its current-year plans that the Company deems necessary to comport with technological advances and possible changes in the business and regulatory environment; and

vi. Updates to its future-year plans to reflect the Company's actual planning.

2) Demonstrate a commitment and ability to advertise supported services and Lifeline and Link Up throughout the ETC service area.

a. File with the Compliance Section of the Utilities Division an Initial Advertising Plan for supported services throughout the ETC service area.

b. File with the Compliance Section of the Utilities Division an Annual Certification that Western Wireless is advertising the supported services including Lifeline and Link Up throughout the ETC service area.

3) Offer Lifeline and Link Up.

a. File with the Compliance Section of the Utilities Division an Initial Letter indicating that it has commenced provision of lifeline and linkup services within 90 days of ETC designation, with the letter to be filed within 100 days of a Commission Decision granting ETC designation.

b. File with the Compliance Section of the Utilities Division an Annual Certification that Western Wireless is offering Lifeline and Link Up.

4) Demonstrate the ability to remain functional in emergency situations.

a. File with the Compliance Section of the Utilities Division an Initial Plan and an Annual Certification that Western Wireless is able to function in emergency situations,

5) Demonstrate a commitment to meeting Service Quality Standards.

a. File with the Compliance Section of the Utilities Division an Annual Report of unfulfilled requests for service from potential customers within the ETC service area, how Western Wireless attempted to provide service, and why it was unsuccessful.

b. File with the Compliance Section of the Utilities Division information on any outage lasting at least 30 minutes in any part of the ETC service area including:

i. The date and time of onset of the outage;

ii. A brief description of the outage and its resolution;

iii. The particular services affected;

iv. The geographic areas affected;

v. Steps taken to prevent a similar situation in the future; and

vi. The number of customers affected.

6) Demonstrate a commitment to meeting consumer protection standards.

a. File with the Compliance Section of the Utilities Division an Annual Certification that Western Wireless is in compliance with CTIA Consumer Code for Wireless Service.

b. File with Utilities Division and Consumer Services an Initial Service Coverage Map consistent with CTIA Consumer Code.

c. File with the Utilities Division and Consumer Services an Annual (or any time maps are updated by the ETC) Service Coverage Map consistent with CTIA Consumer Code.

d. File with the Compliance Section of the Utilities Division an Annual Certification that Western Wireless is providing accurate coverage area maps to potential customers consistent with CTIA Consumer Code.

e. File with the Compliance Section of the Utilities Division an Annual Report documenting the number of consumer complaints per 1,000 handsets/lines.

f. Include Arizona Corporation Commission contact information on customers' bills.

g. File with the Compliance Section of the Utilities Division an Annual Certification that Western Wireless is complying with Anzona Corporation Commission Customer Service Rules A.A.C. R14-0-503 – Establishment of Service; A.A.C. R14-2-504 – Minimum Customer Information Requirements; A.A.C. R14-2-505.A – Service

Connection and Establishment; A.A.C. R14-2-507.A, C and D – Provision of Service; A.A.C. R14-2-508 – Billing and Collection; R14-2-509 excluding A(2) – Termination of Service; and A.A.C. R14-2-510 – Customer Complaints; and that it continues to include Arizona Corporation Commission contact information on customers' bills.

7) Offer a Local Usage plan comparable to the one offered by the underlying local exchange carrier.

a. File with the Compliance Section of the Utilities Division an Initial Certification and an Annual Certification that Western Wireless is offering an acceptable Local Usage Plan.

8) Acknowledge willingness to provide Equal Access in the designated ETC service area in the event that no other ETC is providing equal access within the service area.

a. File with the Compliance Section of the Utilities Division an Initial Certification and an Annual Certification that Western Wireless is willing to provide Equal Access in the event that no other ETC is providing equal access within the service area.

9) File with the Utilities Division and Consumer Services an Annual (or as updated by the ETC) Informational Tariff setting forth the rates, terms and conditions for all service offerings within ETC service area.

10) File an Initial Certification that it will maintain and retain auditable records as required by the FCC, USAC, and as kept in the normal course of business of all expenditures of universal service funds received and submit to an audit of its expenditures of its universal service funds upon request by Commission Staff.

112. With the exception of demonstrating compliance with the requirements outlined in the preceding Findings of Fact, Western Wireless otherwise meets the criteria necessary for ETC designation.

113. We will also require Staff to file a Staff Report on or before May 15 of each year for the duration of Western Wireless' initial five-year plan, which addresses the Company's annual April 1 filing, and will require that the Staff Report include, but not be limited to, the number of unfulfilled requests for service in the designation area. The Staff Report shall also include any recommendations Staff may have based on the Company's consolidated annual filing. The Staff Report filed following

Western Wireless' fifth annual consolidated filing shall include Staffs recommendation regarding whether a need exists for continuing compliance filings.

CONCLUSIONS OF LAW

1. Western Wireless is a public service corporation within the meaning of Article XV of the Arizona Constitution and A.R.S. § 40-202; a CMRS provider as defined in 47 U.S.C § 153(27) and A.A.C. R14-2-1201; a telecommunications carrier as defined in 47 U.S.C. § 153(44); and a common carrier as defined in 47 U.S.C. § 153(1).

2. The Commission has jurisdiction over the subject matter of the application.

3. Section 214(e)(2) of the 1996 Act demonstrates Congress' intent that State Commissions evaluate local factual situations in ETC cases and exercise discretion in reaching conclusions regarding the public interest, convenience, and necessity, and nothing in section 214(e) of the 1996 Act prohibits this Commission from imposing ETC eligibility requirements in addition to those described therein.

4. It is in the public interest to require, prior to Western Wireless' ETC designation, that Western Wireless demonstrate compliance with the requirements set forth in Findings of Fact No. 111, in order to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

5. With the exception of demonstrating compliance with the requirements outlined in Findings of Fact No. 111, Western Wireless otherwise meets the criteria necessary for ETC designation in all the requested service areas, including those that are served by rural ILECs.

6. Because Western Wireless will be entitled to receive universal service funds upon designation, it is in the public interest to require Western Wireless to file a five-year network improvement plan for Commission approval that demonstrates how those universal service funds will be spent to improve coverage, signal strength or capacity that would not otherwise occur absent the receipt of high-cost support, for the purpose of expanding or preserving wide access to phone services in Arizona.

7. When Western Wireless has demonstrated compliance with the requirements set forth in Findings of Fact No. 111, it will be in the public interest to grant its application for ETC

iesignation.

8. When Western Wireless has demonstrated compliance with the requirements set forth in Findings of Fact No. 111, it will be in the public interest to grant Western Wireless' request for redefinition of the Verizon study areas listed in Exhibit B, for purposes of Western Wireless' ETC designation, subject to approval of the redefinition by the Federal Communications Commission under 47 C.F.R. § 54.207(c).

9. Once Western Wireless is designated an ETC, it is in the public interest to require Western Wireless to file a consolidated annual compliance filing including the compliance items set forth in Findings of Fact No. 111 for the purpose of examining whether Western Wireless continues to comply with the requirements of section 214(e) of the 1996 Act, and should therefore remain eligible to receive Federal universal service finding.

ORDER

IT IS THEREFORE ORDERED that the request of WWC License LLC dba CellularOne for a designation as an eligible telecommunications carrier in the service areas of the rural telephone company wire centers listed on Exhibit A and Exhibit B, attached hereto and incorporated by reference, will be approved when this Commission makes a determination that WWC License LLC dba CellularOne has filed a five-year plan that 1) demonstrates a commitment to provide universal service supported services throughout the requested designation areas as shown on Exhibit A and Exhibit B; 2) meets the requirements listed in Findings of Fact No. 111 above; and 3) includes all the Initial Certifications and Plans listed in Findings of Fact No. 111 above.

IT IS FURTHER ORDERED that the request of WWC License LLC dba CellularOne to redefine the service territory of Verizon California, Inc. set forth in Exhibit B attached hereto from the study area to the wire center level will be approved when this Commission makes a determination that WWC License LLC dba CellularOne has filed a five-year plan and initial plans that 1) demonstrate a commitment to provide universal service supported services throughout the requested designation areas as shown on Exhibit A and Exhibit B and 2) meet the requirements listed in Findings of Fact No. 111 above. Approval for redefinition of the service area set forth in Exhibit B attached hereto is also subject to approval of the requested redefinition by the Federal Communications Commission under 47 C.F.R. § 54.207(c).

IT IS FURTHER ORDERED that within 60 days of the date WWC License LLC dba CellularOne files the five-year plan and the initial plans referenced in the above Ordering Paragraph, the Commission's Utilities Division Staff shall file in this docket a Memorandum indicating whether the five-year plan and Initial Certifications and Plans as filed 1) demonstrate a commitment to provide universal service supported services throughout the requested designation areas as shown on Exhibit A and Exhibit B and 2) meet the requirements listed in Findings of Fact No. 111 above. The Memorandum shall be accompanied by a Recommended Order that either approves or denies WWC License LLC dba CellularOne's application.

IT IS FURTHER ORDERED that after being designated an eligible telecommunications carrier, WWC License LLC dba CellularOne shall make a consolidated annual compliance filing with the Commission's Utilities Division's Compliance Section on or before April 1 of each year in fulfillment of the annual progress reporting requirements and certification filing requirements set forth in Findings of Fact No. 111 above for the duration of its initial five-year plan.

IT IS FURTHER ORDERED that the Commission's Utilities Division Staff shall, on or before May 15 of each year for the duration of WWC License LLC dba CellularOne's initial five-year plan, file a Staff Report on WWC License LLC dba CellularOne's consolidated annual compliance filing. The Staff Reports shall address, but shall not be limited to, the number of unfulfilled requests for service in the designation area, and shall also include any recommendations Staff may have based on WWC License LLC dba CellularOne's consolidated annual filing. The Staff Report filed following WWC License LLC dba CellularOne's fifth annual consolidated filing shall include Staffs recommendation regarding whether a need exists for continuing compliance filings.

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IT IS FURTHER ORDERED that the Commission's Utilities Division Staff shall, no later than November 30, 2005, initiate proceedings as necessary to ensure that existing eligible telecommunications carriers in Arizona are subject to obligations associated with receiving universal service support similar to those adopted herein.

IT IS FURTHER ORDERED that this Decision shall become effective immediately.

BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

CHAIRMAN COMMISSIONER

COMMISSIONER COMMISSIONER COMMISSIONER

IN WITNESS WHEREOF, I, BRIAN C. McNEIL, Executive Director of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of the Commission to be affixed at the Capitol, in the City of Phoenix, this _____ day of _________, 2005.

BRIAN C. McNEIL
EXECUTIVE DIRECTOR

DISSENT ____________________

DISSENT ____________________

TW:mj

SERVICE LIST FOR: WWC LICENSE LLC

DOCKET NO.: T-04248A-04-0239

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Company Name	Study Area Code
RIO VIRGIN TELEPHONE CO., INC.	552356
SOUTHWESTERN TELEPHONE CO.	452174

Company Name	Wire Center Locality	Wire Center Code
QWEST CORPORATION	Somerton	SMTNAZMA
QWEST CORPORATION	Wellton	WLTNAZMA
QWEST CORPORATION	Yuma	YUMAAZFT
QWEST CORPORATION	Yuma	YUMAAZMA
QWEST CORPORATION	Yuma	YUMAAZSE

Rural Telephone Company Wire Centers for Which Western Wireless Seeks Conditional ETC Designation Subject to Redefinition of the Service Area

Company Name	Wire Center Locality	Wire Center Code
VERIZON CALIFORNIA INC.	Bouse	BOUSAZXC
VERIZON CALIFORNIA INC.	Cibola	CIBLAZXC
VERIZON CALIFORNIA INC.	Ehrenberg	EHRNAZXF
VERIZON CALIFORNIA INC.	Parker	PRKRAZXC
VERIZON CALIFORNIA INC.	Poston	PSTNAZXC

APPENDIX B

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayer	Chair
Marshall Johnson	Commissioner
Ken Nickolai	Commissioner
Phyllis A. Reha	Commissioner
Gregory Scott	Commissioner

In the Matter of NPCR, Inc. d/b/a Nextel Partners for Designation as an Eligible Telecommunications Carrier Under 47 U.S.C. §214(e)(2)

ISSUE DATE: December 1, 2003

DOCKET NO. PT-6200/M-03-647

ORDER DENYING WITHOUT PREJUDICE NEXTEL'S APPLICATION FOR ETC DESIGNATION

PROCEDURAL HISTORY

On April 25, 2003, NPCR, Inc. d/b/a Nextel Partners (Nextel) submitted its original filing asking the Commission to designate it as an eligible telecommunications carrier (ETC) for the purpose of receiving support from the federal universal service fund.

On May 5, 2003, Citizens Telecommunications Company of Minnesota, Inc. (Citizens) and the Minnesota Independent Coalition (MIC) filed challenges to the completeness of Nextel's petition. Nextel responded to the challenges on May 12, 2003.

By May 15, 2003, the Commission had received comments from Citizens and the Minnesota Department of Commerce (the Department). The parties argued that Nextel's filing is inadequate.

On July 17, 2003, the Commission met to act on Nextel's petition. Following discussions with the other parties, Nextel agreed at the Commission meeting to file supplemental information concerning its service offerings, facilities and advertising plan. Nextel also agreed that the 180-day timeline would begin upon its making a supplemental filing. The Commission agreed to defer consideration of Nextel's ETC petition until the record was more fully developed.

On July 28, 2003, Nextel submitted a supplemental filing to the pending petition.

On August 18, 2003, the Department and Citizens filed comments.

On August 20, 2003, the Commission issued its ORDER REQUIRING ADDITIONAL FILINGS AND VARYING TIME PERIOD.

On August 28, 2003, MIC and Nextel filed reply comments.

The Commission met on October 23, 2003 to consider this matter.

FINDINGS AND CONCLUSIONS

I. NEXTEL'S PETITION

Nextel asked the Commission to designate it an eligible telecommunications carrier (ETC) so that it can receive financial support from the federal universal service fund. Nextel stated that the requirements for ETC designation are set forth in 47 U.S.C. § 214(e)(1)-(2), 47 C.F.R. § 54.101, and Minn. Rules, Part 7811.0100, subp. 15. The Company argued that it met all the requirements for designation. Specifically, Nextel asserted that (1) it is a common carrier as required by 47 U.S.C. § 214(e)(1), (2) it provides each of the supported services identified by the Federal Communications Commission (FCC), and (3) it will meet all service and advertising obligations of an ETC.

On May 12, 2003, Nextel replied to Citizens' and MIC's objections that Nextel's petition was incomplete for failure to provide certain information. Nextel maintained that its petition was complete because it provided the items listed in the relevant rule, Minn. Rules, Part 7811.1400, subp. 4. While Nextel acknowledged that in two previous ETC cases the Commission had requested the additional items cited by MIC and Citizens it argued that this did not mean that these items were now filing requirements. Nextel stated that although it was not required to do so, it would voluntarily provide some of the information mentioned by MIC and Citizens: information regarding its service offerings, facilities, and advertising plan.

On July 28, 2003, Nextel supplemented its petition. The Company 1) clarified that Nextel Partners. and Nextel Communications jointly market the "Nextel" brand name throughout their national service area; 2) argued that while it does not offer a service comparable to other ETCs' universal service offering, all of its conventional service plans qualify for universal service funding because they contain the nine supported services and are priced to rural customers at the same competitive price charged by Nextel Communications in the metro areas; 3) described its Minnesota facilities and service area; 4) submitted its advertising plan and discussed its commitment to advertise its service offerings throughout its Minnesota service area; 5) provided its standard custom service agreement; and 6) reaffirmed its arguments why designating it an ETC will benefit the public.

II. THE LEGAL STANDARD

Applications for ETC status are governed by federal and state law.[1] Section 214 of the Telecommunications Act of 1996 requires an ETC to offer certain designated services throughout

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[1] 47 U.S.C. §§ 254, 214; 47 C.F.R. § 54.101; Minn. Rules parts 7811.1400 and 7812.1400. The fact that this Order analyzes and denies the petition based on provisions of the federal law does not negate the fact that there are also state standards and conditions to bring to bear on a petition for ETC status. For instance, while 47 U.S.C. § 214(e)(2) requires a public interest finding only when an applicant seeks ETC designation in an area served by a rural telephone company, Minn. Rules, Part 7812.1400, subp. 2 requires a public interest determination when a CLEC seeks ETC status in areas served by non-rural as well as rural telephone companies. See *In the Matter of the Petition of WETEC LLC dba Unitel Communications, Inc. for Designation as an Eligible Telecommunications Carrier*. Docket No. P-5614/M-03-1051, ORDER (November 26, 2003).

its ETC-designated service area, use its own facilities or a combination of its own facilities and resale of another carrier's service in providing these services, and advertise the availability and price of these services.[2] While the list of designated services may change over time,[3] FCC rule § 54.101(a) currently designates the following services:

1. voice grade access to the public switched network
2. local usage
3. touch-tone service or its functional equivalent
4. single-party service
5. access to emergency services, including 911 and enhanced 911
6. access to operator services
7. access to interexchange services
8. access to directory assistance
9. toll limitation for qualifying low-income customers

This Commission has the responsibility for designating ETCs in Minnesota except where it lacks jurisdiction over an applicant.[4]

An applicant for ETC status must make several showings before it is deemed eligible for ETC status under the Act. These requirements are found in 47 U.S.C. § 214(e). First, the applicant must be a common carrier. Second, the applicant must offer the services that are supported by federal universal service support mechanisms under 47 U.S.C. § 254(e). Third, the applicant must do so either using its own facilities or a combination of its own facilities and resale of another carrier's services. Fourth, the applicant must offer the identified services throughout the service area for which the designation is received. Fifth, the applicant must advertise the supported services and charges therefor throughout the service area for which the designation is received using media of general distribution.[5]

Once a state commission determines that an applicant meets these five requirements, the applicant is entitled to receive ETC status unless the applicant is seeking to serve exchanges in which the incumbent local exchange carrier is a rural telephone company. If the applicant is seeking ETC status in an area served by a rural telephone company, the state commission must make an additional finding that the designation is in the public interest.

III. COMMISSION's ANALYSIS AND ACTION

The Commission is required to confer ETC status on Nextel if it finds that the Company meets the requirements of 47 U.S.C. 214(e)(1)(A) and (B) and, since Nextel seeks designation in areas served by rural telephone companies, the public interest standard of 47 U.S.C. 214(e)(2).

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[2] 47 U.S.C. § 214(e)(1).

[3] 47 U.S.C. § 254(c)(1).

[4] 47 U.S.C. § 214(e)(6).

[5] These five requirements are established in 47 U.S.C. § 214(e)(1).

Having reviewed the record developed in this matter and heard the parties' oral arguments, the Commission finds that Nextel has failed to meet the service and advertising requirements of 47 U.S.C. § 214(e)(1), as explained more fully below.

A. Requirement to "Offer Services" Throughout the Service Area

An ETC must offer the services that are supported by federal universal support mechanisms under section 254(e)(1) throughout the service area for which the designation is received.[6] The FCC has advised in a Declaratory Ruling that a carrier requesting ETC status is not required to provide ubiquitous service at the time of its application.[7] In the same Ruling, however, the FCC clarified that applicants must support their assertions of ability and willingness to provide service throughout the service area with credible evidence:

> We caution that a demonstration of the capability and commitment to provide service must encompass something more than a vague assertion of intent on the part of a carrier to provide service. The carrier must reasonably demonstrate to the state commission its ability and willingness to provide service upon designation.[8]

In this case, Nextel has not adequately supported the assertion in its verified petition that it will meet all service obligations of an ETC. Nextel has acknowledged that there were large areas of its service area that it cannot serve at present. The Company presented no plan for expanding its service capabilities and simply stated that receipt of the universal service funding would change (in unspecified ways) the economic model that might (no guarantee or analysis to show reasonable likelihood) make expansion (of unspecified extent) into some (unspecified) areas possible. The extent to which the economic model would change was not specified. No guarantee of expansion or analysis was provided to demonstrate the likelihood of expansion. No areas were identified for expansion. At the same time, the Company stated that the cost of installing one additional signal tower was approximately $250,000 to $300,000 and that the annual revenue initially anticipated from the universal service fund is approximately $100,000.

In these circumstances and based on this record, therefore, the Commission finds that Nextel has failed to demonstrate that it is willing and able to serve "throughout the service area for which the designation is received . . ." as required of an ETC by 47 U.S.C. § 214(e)(1).[9]

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[6] 47 U.S.C § 241(e)(1).

[7] *In the Matter of Federal-State Joint Board on Universal Service Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, Declaratory Ruling, CC Docket 96-45, FCC 00-248, 15 FCC Rcd at 15175, Paragraph 17 (August 10, 2000) (Declaratory Ruling).

[8] Declaratory Ruling, Paragraph 24.

[9] In its July 31, 1998 Order in Docket No. P-5508/M-98-561, the Commission denied a petition for ETC status by Crystal Communications, a Minnesota competing local exchange company (CLEC), on the basis that the record in the case was insufficient to conclude that the applicant would offer the required services throughout the service area for which the designation

B. Requirement to Advertise the Supported Services Throughout the Service Area

An applicant must also be willing and able to **advertise** the availability of and the charges for the services that are supported by the federal universal service support mechanisms 1) throughout the service area for which ETC designation is sought and 2) using media of general distribution.[10]

In its petition filed April 24, 2003, Nextel stated that it would advertise the availability of the supported services and charges therefor using media of general distribution. Nextel stated that after being designated an ETC, it would continue to advertise its services in designated areas and work with the Department to develop an advertising plan consistent with what other ETCs implemented.

The Department objected that Nextel did not include an advertising plan nor had it provided detail regarding its plans specifically to advertise its universal service offering(s) and the availability of Lifeline and Link-Up for qualifying customers, either to advertise the availability of a basic universal service offering or to advertise the availability of the nine supported services throughout its proposed service area.

In its May 12, 2003 reply to MIC's and Citizens' challenge to the completeness of its petition, Nextel stated that it would file supplemental information, including an advertising plan. On July 28, 2003, it filed supplemental information, including a document entitled Advertising Plan of NPCR, Inc.

On August 18, 2003, the Department argued that the advertising information provided by Nextel was inadequate. The Department stated that Nextel had failed to provide a plan to advertise a basic universal service offering or to advertise the availability of the nine supported services throughout its proposed service area.

The Commission finds that Nextel fails to meet the advertising requirement of 47 U.S.C. § 214(e)(1)(B) because it has not submitted an advertising plan adequate to demonstrate its intent and ability to advertise the availability of the nine supported services throughout its proposed service area. In light of the Company's inability to serve throughout its requested area, as found above, Nextel's assertion that it will advertise throughout the area as required by law is not an adequate substitute for submitting an actual advertising plan whose scope and detail demonstrates the Company's intent and capability to advertise the availability of the nine supported services throughout its proposed service area.

Because the Nextel application fails the "advertise" requirement of 47 U.S.C. § 214(e)(1)(B) for reasons explained in the preceding paragraph, it is unnecessary to reach the further issue whether it

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was requested. *In the Matter of Crystal Communications' Petition to Become an Eligible Telecommunications Carrier*, Docket No. P-5508/M-98-561, ORDER GRANTING IN PART, DENYING IN PART, STATUS AS ELIGIBLE TELECOMMUNICATIONS CARRIER (July 31, 1998), at page 5.

[10] 47 U.S.C. § 214(e)(1).

also fails that requirement because it did not include an advertising plan for a basic affordable universal service offering.[11]

C. Affordability: a Public Interest Consideration

To date, Nextel has refused to offer, let alone advertise, a particular universal service offering as distinguished from any of its other service offerings. Nextel has asserted that requiring an applicant to offer a lower cost "affordable" rate would be impermissible rate regulation. Nextel argued that although offering and advertising such a service (a separate and distinct lower cost universal service offering) was the way that past applicants[12] have chosen to meet the "offer and advertise" requirements of 47 U.S.C. § 214(e), the law does not require that an applicant make such an offering in order to qualify for ETC status. In addition, Nextel asserted that there are no standards on what can be considered affordable and nothing in the record to indicate that Nextel's offerings were not affordable.

Nextel stated that, even though it offered no particularized lower cost universal service offering, each of its regular, nationally offered and advertised offerings provide all the required functionalities, i. e., the nine supported services listed by the FCC in 47 C.F.R. § 54.101(a). As a consequence, Nextel argued, offering its nationally offered set of services meets the "offer" requirement of 241(e)(1)(A) and advertising those services meets the "advertise" requirement of 241(e)(1)(B).

The Department countered that in the context of ETC designation for receipt of public funds requiring an applicant to offer at least one "affordable" (in the sense of "lower cost") service that contains some level of local service does not constitute prohibited rate regulation. The Department cited 47 U.S.C. 254(i):

> The [Federal Communications] Commission and the States should ensure that universal service is available at rates that are just, reasonable, and affordable.

The Department noted that the FCC rules permit a state commission to designate additional qualifying ETCs for areas served by a rural telephone company only if the state commission finds that the designation of more than one carrier is in the public interest. The Department noted that the FCC has not defined the public interest factors that the state Commission may or should consider when designating an additional ETC in a rural service area. According to the Department,

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[11] Not reaching the affordability issue at this time in the context of the advertising requirement is also appropriate because, as explained next in section C, affordability is a public interest consideration which is reached only if Nextel's next application for ETC status meets the threshold ETC requirements of 47 U.S.C. 214(e)(1)(A) and (B).

[12] Western Wireless Corporation (fka Minnesota Cellular Corporation) in Docket No. P-5695/M-98-1285; Tekstar Communications, Inc. in Docket No. P-5542/M-01-1865; Midwest Wireless Communications, L.L.C. in Docket No. P-573/AM-02-686; and RCC Minnesota, Inc. and Wireless Alliance, LLC (filing jointly as affiliates of Rural Cellular Corporation) in Docket No. PT-6182, 6181/M-02-1503.

however, there can be no doubt that affordability is a public interest factor. The Department noted that state Commissions have been given the primary role in evaluating the affordability factor. The Department cited the following FCC statement:

> We agree with the [Federal-State] Joint Board [on Universal Service] that states should exercise initial responsibility, consistent with the standards set forth above, for determining the affordability of rates. . . . As the Joint Board determined, the unique characteristics of each jurisdiction render the states better suited than the Commission to make determinations regarding rate affordability.[13] [Bracketed material added.]

Based on the parties' arguments and a review of the statutory and regulatory framework, the Commission finds that affordability is an appropriate public interest factor to consider during any public interest evaluation of an application from Nextel.

The public interest evaluation of an application such as Nextel's, however, is properly conducted **after** the applicant is found to have met the threshold statutory requirements of 47 U.S.C. § 214(e)(1).[14]

As noted previously in this Order, Nextel has not met all those requirements. Therefore, the public interest factors applicable to Nextel's application (which include affordability and service quality) are not ripe for consideration at this time. Accordingly, the Commission will make no findings at this time whether, for example, the public interest requires Nextel to provide, as the Department has argued, at least one affordable lower cost alternative service offering that includes some level of local calling.

IV. LOOKING AHEAD

The denial of Nextel's application will be without prejudice. In the event that Nextel refiles with new information that persuades the Commission that it meets the threshold requirements of

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[13] *In the Matter of Federal-State Joint Board on Universal Service,* CC Docket No. 96-45, FCC 97-157, "Report and Order," 12 F.C.C. Rcd 8776 (rel. May 8, 1997) ¶ 108 aff'd in part and reversed in part, *Texas Office of Pub Utility Counsel v. FCC* 183 F.3d 393 (5th Cir. 199) ¶ 118.

[14] Analysis under 47 U.S.C. § 214(e) of applications for ETC status in an area served by a rural telephone is a two step process. The first step is to determine whether the applicant meets the threshold statutory requirements of 47 U.S.C. § 214(e)(1)(A) and (B). If so, the second step is to determine whether the applicant satisfies the public interest standard of 47 U.S.C. § 214(e)(2). The two-step analysis followed by the Commission in this Order is consistent with the approach used by the Administrative Law Judge (ALJ) and by the Commission in the two most recent ETC applications: Midwest Wireless Communications, Docket No. PT-6182, 6181/M-02-1503 and RCC Minnesota. Inc./Wireless Alliance, Docket No.PT6153/AM-02-686.

47 U.S.C. § 214(e)(1)[15], the Commission will undertake the public interest evaluation of that application.

An applicant for ETC designation bears the burden of proof on all the federal and state requirements and considerations applicable to its application. Information adequate to meet the filing requirements on Minn. Rules, Part 7811.1400, subp. 4 is not necessarily adequate to meet the applicant's burdens of proof and persuasion on all issues relevant to the application. An applicant, therefore, is advised to build a complete record containing much information beyond the Commission's filing requirements.

In previous proceedings involving applications for ETC designation in areas served by rural telephone companies, the Commission has directed applicants to provide several specific items beyond what was required to meet the initial filing requirements.[16] With no attempt to be comprehensive, the Commission has listed in footnote 14 two informational items relevant to meeting the Phase 1 threshold requirements.[17] The Commission believes that the following information would be relevant to the public interest evaluation:

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1. a detailed description of a basic universal service offering or affordable alternative or an explanation of why it would be in the public interest to give an applicant access to universal service funding if that applicant does not offer an affordable lower cost service that specifically preserves and advances universal service;

2. a tariff or price list showing the list, prices and terms of offered services including local usage levels and calling areas for which the applicant seeks universal service support, including the terms and rates for the basic universal service package, along with references to Lifeline and Link-Up and other services which may be added to the basic universal service package;

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[15] Information relevant to those determinations would include 1) an advertising plan specific to a basic universal service offering, the nine-supported services, and the availability of Lifeline and Link-Up for qualifying customers and 2) a list of facilities used to provide services in the area in which Nextel seeks certification.

[16] In addition, in its Order designating each of Minnesota's incumbent local exchange companies (ILECs) as ETCs, the Commission required each ETC to submit an advertising plan, including a description of available services and their rates; the geographic area where those services are available; the medium of publication of the advertising, including the names of, and geographic areas served by, the newspapers in the plan, and the size and the type of the advertising. *In the Matter of the Request by Members of MIC for Designation as an Eligible Telecommunications Carrier and Temporary Suspension of Certain Toll Restrictions* and *In the Matter of the Requests by Other Incumbent LECs for ETC Designations*, Docket No. P-999/M-97-1270, ORDER DESIGNATING PETITIONERS AS ELIGIBLE TELECOMMUNICATIONS CARRIERS (December 23, 1997).

[17] The Phase 1 threshold requirements appear in 47 U.S.C. § 214(e)(1)(A) and (B).

3. a customer service agreement that defines a service quality plan consistent with the Company's claim to provide high quality services, including dispute resolution policies, network maintenance policies, procedure for resolving service interruptions, any customer remedies offered, and Nextel's billing, payment, and deposit policies;

4. a list of and Nextel's commitment to its federal obligations regarding its service area;

5. information typically gathered from ETCs in the annual certifications;

6. description of the process the Company will use to track and make available to the Commission and the Department, upon request, the following: (a) held orders for customer premises equipment and for either the basic universal service plan or any services the Company relies on to meet the "offer" requirement of 47 U.S.C. § 214(e)(1)(A) for more than 30 days and (b) customer complaints or disputes related to service quality, including reports of interrupted service for the basic universal service plan and for any service the Company relies on to meet the "offer" requirement of 47 U.S.C. § 214(e)(1)(A).

This Order will not contain a directive for Nextel to include any particular information with its next application because to do so would be premature. Moreover, the Department, any intervening party, and Commission Staff can submit Information Requests to the Company for any information they deem relevant. As in previous proceedings, however, it is unlikely that the Commission will begin the 180 day processing period prescribed in Minn. Rules, Part 7811.1400, subp. 12 until the information referenced has been filed.[18]

ORDER

1. Nextel's application for designation as an eligible telecommunications carrier (ETC) for the purposes of receiving universal service funding is denied without prejudice.

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[18] The Commission took this view in the two most recent ETC proceedings. See *In the Matter of the Petition by RCC Minnesota, Inc. and Wireless Alliance, L.L.C. for Designation as an Eligible Telecommunications Carrier Under 47 U.S.C. § 214(e)(2)*, Docket No. PT-6182/M-02-1503, ORDER REQUIRING ADDITIONAL FILING, VARYING TIME PERIOD AND NOTICE AND ORDER FOR HEARING (November 4, 2002) at pages 4 and 9; and *In the Matter of the Petition by Midwest Wireless Communications, L.L.C. for Designation as an Eligible Telecommunications Carrier Under 47 U.S.C. § 214(e)(2)*, Docket No. P-573/AM-02-686, ORDER REQUIRING ADDITIONAL FILINGS, VARYING TIME PERIOD AND NOTICE AND ORDER FOR HEARING (July 5, 2002) at pages 3-5 and 8.

2. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

This document can be made available in alternative formats (i.e., large print or audio tape) by calling (651) 297-4596 (voice) or 1-800-627-3529 (TTY relay service).

APPENDIX C

SUBCHAPTER 23. WIRELESS ELIGIBLE TELECOMMUNICATIONS CARRIER

PART 1. GENERAL PROVISIONS

PART 1. GENERAL PROVISIONS

165:55-23-1. Requirements

(2) A Trade Name Report filed with the Secretary of State as provided in 18 O.S. § 1140;
(3) A Withdrawal of Trade Name Report filed with the Secretary of State as provided in 18 O.S. § 1140.1;
(4) A Transfer of Trade Name Report filed with the Secretary of State as provided in 18 O.S. § 1140.2; and,
(5) An attestation that no revisions are being made, except for the name change or change, addition or deletion of a trade name of the Wireless ETC.

[**Source:** Added at 21 Ok Reg 2115; eff 7-1-04; Amended at 22 Ok Reg 728, eff 7-1-05]

165:55-23-4. [RESERVED]

165:55-23-5. Emergency service reporting requirements

In areas equipped with E911 emergency service, when the end-user's number is changed due to a change of location or service to the end-user or there is a change in service provider with or without a change to the end-user's number, the wireless ETC shall report such changes to the appropriate E911 emergency number database within two (2) business days, or as required by agreement with the appropriate E911 agencies within the state, after completion of service orders. In the event of an error report, the wireless ETC shall correct the error within two (2) business days, unless the agreement with the appropriate E911 agency allows otherwise.

[**Source:** Added at 21 Ok Reg 2117, eff 7-1-04]

165:55-23-6. [RESERVED]

165:55-23-7. Content of bills

Wireless ETCs shall develop a bill design that can be easily interpreted by their customers and complies with federal billing requirements for each Supported Service.

[**Source:** Added at 21 Ok Reg 2117, eff 7-1-04; Amended at 22 Ok Reg 729, eff 7-1-05]

165:55-23-8. [RESERVED]

165:55-23-9. Billing disputes
(a) In the event of a dispute between an end-user and a wireless ETC, the wireless ETC shall make such investigation as is required by the particular case, and report the results thereof to the end-user.
(b) In the event the dispute is not resolved, the wireless ETC shall inform the end-user that the end-user may utilize the complaint procedures of the Commission's Consumer Services Division. The information to be provided to consumers shall be:

(1) The street address of the Consumer Services Division, which is Oklahoma Corporation Commission, Consumer Services Division, 2101 N. Lincoln Blvd. Suite 460, Oklahoma City, OK 73105.
(2) The mailing address of the Consumer Services Division, which is P. O. Box 52000, Oklahoma City, OK 73152-2000.
(3) The telephone numbers of the Consumer Services Division, which are (405) 521-2331 and (800) 522-8154.
(4) The hours of operation of the Consumer Services Division, which are 8:00 a.m. to 4:30 p.m. Monday through Friday.

(c) When a complaint has been made with the Commission's Consumer Services Division, the wireless ETC shall be required to forego disconnect procedures on account of nonpayment of any portion of accumulated disputed charges pending investigation by the Commission's Consumer Services Division. The end-user shall be required to pay the undisputed part of the bill and, if not paid, the wireless ETC may discontinue service.

[**Source:** Added at 21 Ok Reg 2117, eff 7-1-04]

165:55-23-10. [RESERVED]

165:55-23-11. Minimum service standards
(a) The purpose of this Section is to create a uniform standard governing the minimum components of the Supported Services for all end-users of wireless ETCs. Supported Services shall be offered by each wireless ETC pursuant to OAC 165:55-23-15 and 165:55-23-17.

(1) Each wireless ETC shall make available to each end-user subscribing to its Supported Services within its ETC designated service area the following service features:

(A) Local usage for Supported Services at uniform rates for end-users of a given class within its designated service area;
(B) Dual tone multi-frequency signaling or its functional equivalent;
(C) Single-party service or its functional equivalent:

165:55-23-23. Response to customer complaint inquiries

A wireless ETC shall respond to the Commission upon written or electronic inquiry from the Commission within the following time periods:

(1) Inquiries regarding disconnection, suspension or termination of Supported Services - within one (1) business day of receipt of inquiry from the Commission.

(2) Inquiries other than for disconnection, suspension or termination of Supported Services - within three (3) business days of receipt of inquiry from the Commission.

[**Source:** Added at 21 Ok Reg 2119, eff 7-1-04]

PART 3. TRANSMISSION OBJECTIVES

165:55-23-50. Service standards; sufficient operating and maintenance force

A wireless ETC shall maintain an operating and maintenance force sufficient to meet service objectives and minimum standards for restoration of service after interruption as follows:

(1) Provisions will be made to receive customer trouble reports at all times, twenty-four (24) hours per day.

(2) Provision will be made to correct interruptions of service to persons and agencies required to respond to emergencies involving human life and safety at all times, consistent with the bona fide needs of the end-user and the availability and safety of wireless ETC personnel.

[**Source:** Added at 21 Ok Reg 2119, eff 7-1-04]

165:55-23-51. [RESERVED]

165:55-23-52. Records of trouble reports

(a) The wireless ETC shall maintain its network so as to minimize customer trouble reports for Supported Services in an economical manner, but shall not exceed eight reports per one hundred (100) customers per month per service area averaged over a three-month period. An occurrence of a violation of this procedure shall be considered as each day in the month for which the three-month average of trouble reports for that month and the preceding two months exceed this criteria for the service area in question.

(b) The response of a wireless ETC to customer trouble reports shall be eight-five percent (85%) of all trouble reports cleared within twenty-four (24) hours.

[**Source:** Added at 21 Ok Reg 2120, eff 7-1-04]

165:55-23-53. [RESERVED]

165:55-23-54. Notice of service interruptions

(a) The Commission shall be notified, through the Director of the Consumer Services Division, of interruptions in Supported Services causing customer to not have access to one or more cell sites within the designated service area; a mobile switching office or any interruption which, in the judgment of the wireless ETC, may cause a high degree of public interest or concern.

(b) The Commission notification process required in subsection (a) of this Section, may be accomplished by facsimile, twenty-four (24) hours a day, seven (7) days a week; or by phone, during the business hours of 8:00 a.m. through 4:30 p.m., Monday through Friday, and should consist of the following:

(1) An initial contact to advise of the outage; the cause of such outage; the area affected; and, the estimated time for repair;

(2) Intermediate contact to provide status reports, as deemed necessary by the telecommunications service provider, or as may be requested by the Commission Staff; and,

(3) A conclusory contact detailing the results and completion of the restoration of service.

[**Source:** Added at 21 Ok Reg 2120, eff 7-1-04]

165:55-23-55. [RESERVED]

165:55-23-56. Restoration of service plan

Each wireless ETC shall have a written restoration of service plan (Plan) to be followed during interruptions in Supported Services of which the Commission is to be notified under OAC 165:55-13-52. Each wireless ETC shall submit its Plan by September 30 of each year to the Commission through the Director of the Consumer Services Division. In lieu of submitting a Plan, a wireless ETC may submit a letter confirming that a previously submitted Plan has not changed or detailing changes to the Plan. The Plan shall contain the name and telephone numbers of company-designated liaison(s) to be contacted during emergency periods by Commission staff during business and non-business hours. The Plan should indicate that the wireless ETC is prepared to take the following types of action where necessary:

(1) To make an initial assessment of the extent of the Supported Service interruption in order to comply with the reporting requirements of OAC 165:55-13-52(b)(1).

(2) To make a determination if the Supported Service interruption can be restored by

the use of in-house personnel only, or if contractors (personnel obtained from outside resources) will be required.
(3) To provide priority consideration to restoration of Supported Service, where feasible, to emergency services (hospitals, law enforcement and fire fighting entities).
(4) To make intermediate assessments of the restoration of Supported Service in order to comply with the requirements of OAC 165:55-13-52(b)(2).
(5) To make a conclusory assessment of the restoration of Supported Service in order to comply with the requirements of OAC 165:55-13-52(b)(3).

[**Source:** Added at 21 Ok Reg 2120, eff 7-1-04]

165:55-23-57. [RESERVED]

165:55-23-58. Customer choice
(a) Where choices are available, every customer shall have the right to choose his or her telecommunications service provider, whether wireless or wireline.
(b) A wireless ETC shall not enter into a contract with the owner or manager of multi-tenant dwellings to exclusively provide Supported Services to the exclusion of other telecommunications service providers.

[**Source:** Added at 21 Ok Reg 2120, eff 7-1-04]

APPENDIX D

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Application of Amended NPCR, Inc., d/b/a Nextel Partners, Eden Prairie, Minnesota seeking designation as an eligible telecommunications carrier that may receive universal service support.	) Application No. C-2932))) DENIED)))) Entered: February 10, 2004

APPEARANCES:

For the Applicant:

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BY THE COMMISSION:

B A C K G R O U N D

By application filed April 24, 2003, NPCR, d/b/a Nextel Partners (NPCR or Applicant) of Eden Prairie, Minnesota, seeks a designation as an eligible telecommunications carrier (hereinafter, ETC) so that it may receive federal universal service fund support. The application was amended by NPCR on April 28, 2003. Notice of the application was published in The Daily Record, Omaha, Nebraska, on April 30, 2003. No protests or interventions were filed. A hearing on the application was held on July 17, 2003, in the Commission Hearing Room, with appearances as shown above.

The application provides that NPCR seeks designation in several of Qwest's wire centers and in the rural study areas of

Arlington Telephone Company, Blair Telephone Company, Clarks Telephone Company, Diller Telephone Company, Eastern Nebraska Telephone Company, Hamilton Telephone Company, Hartington Telephone Company, Henderson Cooperative, Hooper Telephone, Sodtown Telephone Company, Southeast Nebraska Telephone Company and Stanton Telecom, Inc. (*See* Attachment 1 to Exhibit 3, hereinafter "Attachment 1".)

In support of the application, NPCR presented one witness, Mr. Scott Peabody, director of engineering for NPCR. In addition to the application and amended application, which were offered and received into evidence as Exhibits 3 and 3(a), NPCR offered the pre-filed testimony of Mr. Peabody into the record. In summary of his written testimony, Mr. Peabody stated that NPCR meets all of the requisite criteria for a grant of ETC status.

NPCR is a Delaware corporation with a principal place of business located in Eden Prairie, Minnesota. NPCR was formed in 1998 to build out and operate a digital mobile network in mid-size, small and rural markets using the Nextel Communications brand name. NPCR launched service in Nebraska in 2000. NPCR has obtained licenses from the Federal Communications Commission (FCC) to operate in territories where 53 million people live and work. NPCR built a self-site network covering over 36 million people in 31 states. Nextel Communications and NPCR are separate companies, though they are working together through strategic agreements. The partnership arrangement has allowed NPCR to offer the same services to rural consumers as those offered to urban consumers by Nextel Communications at the same or similar rates.

The application and pre-filed testimony state generally that NPCR is a common carrier and provides the supported services including voice-grade access to the public switched network, local usage, dual tone, a functional equivalent to dual-tone, multi-frequency signaling, single-party service, access to emergency services, access to operator services, access to interexchange service, access to directory service, and will, upon designation, provide toll limitation for low-income consumers. NPCR's application also states that NPCR will offer and advertise the availability of supported services within the designated areas.

Mr. Peabody further testified that with an ETC designation, NPCR will be eligible to compete on a level playing field with its competitors. According to Mr. Peabody, in rural areas, public interest is served by bringing consumer choice, innovative services and new technologies to the designated areas. Specifically, the application avers that the public interest test is or will be met because: 1) NPCR's request covers enough territory to prevent cherry-picking, 2) that NPCR will be able to provide universal service on a more competitively neutral basis, 3) that NPCR will provide supported services to Nebraska consumers with service offerings that will be different from landline offerings, 4) that deployment and wireless network expansion will continue with universal service support, 5) that incumbent local exchange carriers (LECs) will be given the incentive to improve their existing networks in order to remain competitive, 6) that NPCR will provide all of the supported services required by the Commission and will allow NPCR to compete on a level playing field, and 7) to promote the extensive role NPCR plays in the provision of communications services to Nebraska public schools, libraries and local, state and federal government agencies.

O P I N I O N A N D F I N D I N G S

In reviewing an application for eligible telecommunications carrier designation, the Commission looks to Sections 254(b) and 214(e) of the Telecommunications Act of 1996 (the Act), in conjunction with applicable FCC rules and regulations.

Section 254(b) of the Act defines universal service by outlining six principles:

1. Quality services should be available at just, reasonable and affordable rates.
2. Access to advanced services should be provided in all regions of the nation.
3. Consumers in all regions of the nation should have access to services (including advanced services) at rates that are reasonably comparable to those in urban areas.
4. All telecommunications providers should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.
5. There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.
6. Schools and libraries should have access to advanced services.

In 1997, the FCC released its Universal Service Report and Order in CC Docket 96-45, FCC 97-157 (Universal Service Order), which implemented several sections of the Act. The FCC's Universal Service Order provides that only eligible telecommunications carriers designated by a state commission shall receive federal universal service support. Section 214(e) of the Act delegates to the states the ability to designate a common carrier as an ETC for a service area designated by the state commission. A service area is the geographic area established for the purpose of determining the universal service obligation and support eligibility of the carrier. The FCC also provided that "competitive neutrality" should be an added universal service principle.

Section 214(e)(1) provides that an ETC Applicant shall:

> ***Throughout the service area*** for which such designation is received—
>
> (A) offer the services that are supported by federal universal service support mechanisms under section 254 . . .; and
>
> (B) advertise the availability of such services and the charges therefore using media of general distribution.

The FCC's supported services are found in 47 C.F.R. § 54.101(a) and are as follows:

a. voice grade access to the public switched network;
b. local usage;
c. dual tone multi-frequency signaling or its functional equivalent;
d. single-party service or its functional equivalent;
e. access to emergency services;
f. access to operator services;
g. access to interexchange services;
h. access to directory assistance; and
i. toll limitation for qualifying low-income consumers.

Upon review of the application and testimony presented, the Commission finds that Applicant offered only generalized statements that it has the ability to provide the supported services listed in a-i, above.

Federal law further provides that:

> In the area served by a rural telephone company "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.

Section 214(e)(2) generally provides,

> 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). (Emphasis Added).

In an area served by rural carriers Section 214(e)(2) further requires ETC Applicants to demonstrate to the state Commission that the designation of ***an additional*** ETC is in the public interest. (Emphasis Added).

The Commission previously found in its Western Wireless Order that it was not necessary for an ETC to be offering the supported services and advertising the availability and charges of the services *prior to* ETC designation. However, in that ruling the Commission also found that Western Wireless had presented sufficient and credible evidence that it was willing and capable of meeting the requirements of Section 214(e)(2) and had every intention of carrying out its plan to provide the supported telecommunications services *throughout the designated area*. Western Wireless provided detailed evidence as to how its basic universal service offering (BUS) was to be provided over a wireless access unit and antenna combination that was capable of reaching even the most insular rural areas of the state.

Unlike the case in Western Wireless, the evidence presented in this case, does not convince the Commission that the Applicant is likewise capable of meeting the requirements of Section 214(e)(2). Nor does the evidence indicate to the Commission that the Applicant is willing to meet the basic requirements of Section 214 (e)(2).

The Commission further finds that the Applicant has not presented a clear plan and timetable for providing the supported services throughout the designated territory. Upon questioning, the Applicant stated that it would be difficult to follow any parameters set by the Commission in relation to the provisioning of service. (Transcript at 53:8-20). Applicant claims the Commission does not have the ability to set any reasonable parameters to ensure that the requirements of Section 214(e)(2) are fulfilled. This testimony creates concerns in relation to NPCR's willingness to serve the entirety of the study areas for which NPCR has requested designation.

In sum, the Commission finds that NPCR has not provided sufficient evidence that it is willing and capable of meeting the core eligibility requirements of section 214(e). NPCR failed to provide sufficient evidence that it can provide the supported services listed in 47 C.F.R. § 54.101 et seq. and failed to demonstrate to the Commission that it is willing to serve the entire designated area.

We also interpret the language in Section 214(e)(2) to mean that the Commission is only obligated to designate more than one ETC in a given territory served by non-rural carriers. Specifically, Section 214 (e)(2) reads that upon a finding that it is consistent with public interest and necessity, the Commission ***shall*** designate ***more than one*** ETC in an area served by a non-rural company. The plain construction of the phrase "***more than one***" in the Commission's opinion means the designation of a second ETC is required upon a finding that said ETC Applicant has satisfied the requirements of the Act and FCC regulations. However, the Commission finds that the literal reading of Section 214(e)(2) stops there. The Commission believes that the designation of a third or fourth ETC in a given territory served by a non-rural carrier is purely discretionary. In light of this interpretation, the Commission finds that it has already satisfied the requirement in Section 214(e)(2) by designating more than one ETC in all of the proposed non-rural territory described by NPCR in Attachment 1 to its application.

In addition, with respect to the request to be designated as an additional ETC in the rural areas outlined in Attachment 1, the Commission finds that the Applicant has not sufficiently proven that designation is in the public interest.

To demonstrate public interest, the Applicant's witness testified that the addition of it as a competitor and the introduction of new technologies in the rural market satisfy the public interest test. To further support its argument that a designation is in the public interest, the Applicant states that the Commission should review its application against this Commission's Western Wireless Order. If we would do so, NPCR's application would fall short of the standards set by the Commission. First, as stated above, we do not believe Applicant has shown that it is willing to provide the supported services throughout the designated territory. We do not believe that Applicant's proposed service territory is large enough to properly address our concerns relating to "cherry picking." Moreover, there is no indication that a designation in the present case would lead to "increased" competition. Finally, while the Commission did provide an analysis of public interest in the Western Wireless case, the Commission believes that a public interest analysis requires a case-specific finding. A review of public interest requires the Commission to carefully balance the public benefits and public harms of approving an ETC application. This requires the Commission to look at the environment at the time designation is sought. In the present case, Applicant is already providing the wireless service throughout its licensed territory in Nebraska. Applicant offered no evidence that it will, in fact, extend its service or provide better service than presently being offered. Instead, Applicant has made generalized statements with respect to public interest, which even if true, would not distinguish itself from any other wireline or wireless provider.

Nonetheless, we will address NPCR's claims individually. First, NPCR claims that its proposed territory is large enough to prevent cherry-picking. We do not believe that it is. NPCR does not give any other information to back this claim with the exception of a map, which outlines its licensed territory and signal strength. (*See* Exhibit 8). Exhibit 8 demonstrates that large regions of territory served by Eastern Nebraska Telephone and Stanton will go unserved while the higher populated areas will continue to receive NPCR's service. In response to Commission questions, Applicant could not give the Commission a time frame in which to expect all proposed designated areas to be served. Further, unlike Western Wireless, NPCR's application covers only a part of the eastern portion of the state, leaving the western half of the state unserved. We do not think the proposed territory is large enough to prevent cherry-picking.

Next, NPCR states that with federal support, it will be able to provide universal service on a more competitively neutral basis. Competitive neutrality was added by the FCC to the Section 254 list of universal service principles. Contrary to the position of NPCR, we find that the goal of competitive neutrality is not automatically met with the designation of an additional ETC in the areas served by rural companies. As NPCR is already successfully providing a wireless service in that area, there is no reason to believe that NPCR needs a subsidy to level the competitive playing field. Federal subsidies flowing to NPCR may result in just the opposite, a windfall to Applicant, particularly when this Applicant is unwilling to submit to some basic state-imposed requirements such as equal access, the filing of tariffs and service quality benchmarks.

Third, NPCR states that it will provide supported services to Nebraska consumers with service offerings that will be different from landline offerings. NPCR is providing service in the proposed territory now. There was no evidence produced which would indicate that this ETC designation would produce better or more valuable services than those currently available to rural consumers. Although NPCR claims that it will expand deployment of its wireless network as it receives universal service support, it brought forth no specific evidence of where and when it plans to do so. In fact, the NPCR witness stated in the hearing that NPCR could not give any timetable for any such expansion.

Further, NPCR claims that incumbent local exchange carriers (ILECs) will be given the incentive to improve their existing networks in order to remain competitive. We do not believe this to be true. Because NPCR does not directly compete with the service of the rural incumbent carrier, there would be no incentive for the incumbent LECs to make any improvements. Moreover, we note that current state universal service mechanisms already give incumbent LECs incentives to improve their existing networks.

Finally, NPCR states that public interest is met because designation will promote the extensive role NPCR plays in the provision of communications services to Nebraska public schools, libraries and local, state and federal government agencies. NPCR offered no specific evidence of how this would come about or where universal service support would be invested.

In today's marketplace, we find that the question to be answered is whether subsidizing NPCR's service offering in the proposed Nebraska rural territories is good public policy. Looking back to its 2000 Western Wireless decision, the Commission finds that perhaps its public interest analysis wasn't rigorous enough and tailored enough to the goals of universal service. To be sure, the Commission was more concerned at that time with bringing competition to the rural areas of Nebraska. Since then, the environment and the Commission's focus has changed. The Commission believes that universal service is not a vehicle by which competition should be artificially created. The purpose of universal service is not to promote competition. Rather, the purpose of universal service is found in section 254 of the Act. To this end, the Commission's role is to ensure that the universal service principles continue to be served in a competitive environment.

As we noted in our Western Wireless Order,

> The mere provision of additional competition by the entry of another ETC into a rural area is not sufficient in and of itself as a demonstration of the public interest. We accept the argument made by the Intervenors that, "Competition is not tantamount to public interest." If that were the case, no public interest test review would be necessary since any and all new competitors would represent additional benefit to the public.

In light of the current environment, we find that the real issue to consider is whether Applicant's competitive efforts in the proposed territory should be subsidized by payments from the federal USF. We find they should not. As the Applicant's case demonstrates, no federal subsidy is necessary to bring Applicant's service to the rural areas. Applicant is already serving the rural areas and bringing new technologies to these areas without the assistance of a federal subsidy. We further believe an ETC designation would not place Applicant on a level playing field with the incumbent carriers. Rather, a grant of the application would grant to the Applicant distinct advantages over the incumbent carriers, jeopardizing their ability to serve all of their subscribers adequately and jeopardizing the principles set forth in section 254. In addition, Applicant is virtually unregulated in terms of service quality, and Applicant has no equal access obligations that the incumbent carriers have. Unlike Western Wireless, Applicant was unwilling to submit its service to some service quality benchmarks, file tariffs, or consent to the Commission's general jurisdiction over consumer complaints. Consumers in the proposed territory are already receiving telecommunications services from the Applicant without additional costs. If this application is granted, consumers would be required to bear the additional costs necessary to subsidize the service provided by the Applicant. Accordingly, we find that the public costs in granting an ETC designation in the territory served by the rural carriers outweighs any supposed benefits offered by Applicant.

In sum, we find NPCR's application for ETC designation in the proposed territories described in Attachment 1 to the application served by non-rural carriers and by rural carriers should be denied.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the application of NPCR d/b/a Nextel Partners should be and it is denied.

MADE AND ENTERED at Lincoln, Nebraska, this 10th day of February, 2004.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chairman

ATTEST:

Executive Director

Commissioners Anne Boyle and Lowell Johnson dissenting:

We respectfully dissent. NPCR, d/b/a Nextel Partners (NPCR) filed this application seeking eligible telecommunications carrier (ETC) designation in areas served by Qwest and a number of rural independent companies. The Commission duly published notice of the application and placed all carriers on notice of NPCR's intentions. Even though there has been great controversy at the state and national level regarding designation of ETC status, no party opposed or intervened. It is well established that the "failure to timely file a protest shall be construed as a waiver of opposition and participation in the proceeding." See Neb. Admin. Code Title 291, Chapter 1, Section 014.01.

Nevertheless, in order to ensure that NPCR's offering satisfied all criteria outlined in the federal Telecommunications Act of 1996 (the Act), the Nebraska Public Service Commission (NPSC) chose to hold a hearing. NPCR, through its witness, offered into the record evidence on each element of proof necessary. The Commission accepted the evidence and did not dispute NPCR's claim that they had met all criteria required by the Act.

We are very concerned about the Federal Universal Service Fund (USF) from which ETCs draw funding. As the FCC has recognized, designation of additional ETCs draws more from the USF, which is suffering from ever-increasing demands and diminishing sources of revenue. Some rural associations have criticized states for cursorily granting ETC designation. However, we do not believe that the states should be to blame as the term "public interest" has been an ill-defined and ever changing test. At the time of the hearing on this application, the FCC hadn't offered clear guidelines to states to determine public interest. It was only recently, that the FCC, by Memorandum Opinion and Order involving Virginia Cellular, Inc., gave states a specific framework for making their public interest judgments.[1] However, the FCC explained that its public interest analysis may again be altered due to the Joint Board's deliberations and any other public interest framework that the FCC may adopt.

In reviewing this application, we question whether designation of ETC status in rural areas where competition may harm existing carriers of last resort. At the same time we consider whether customers are well served without the benefit of choice. A competitive ETC does not draw until it begins to provide service. Therefore, the only tests states can consider are the objective criteria set by the Act and the public interest.

We are hopeful that the FCC will give states more authority to look to a number of relevant factors prior to designation. If states are to consider the size of the fund, the FCC should compute a formula to determine the amount each state should receive. A federal/state partnership would allow each state to administer their portion of the fund. Currently carriers simply certify they are properly using provided funds. State administration would allow closer scrutiny to ensure proper use of funds. Currently, states have no control over the size or disbursements from the federal USF.

Based on the record in this case, it is our opinion that the NPSC is legally unable to make a decision to deny an ETC application simply because of the aforementioned concerns. With no protests, no dispute that necessary criteria had not been met and no provision in the Act for state discretion to deny an application other than those previously mentioned, the application should be granted.

Anne C. Boyle

Lowell C. Johnson

APPENDIX E

BEFORE THE PUBLIC UTILITIES COMMISSION OF NEVADA

Application of WWC License L.L.C., d/b/a CellularOne, for redefinition of its service area as a designated Eligible Telecommunications Carrier.	)))))	Docket No. 04-3030

At a general session of the Public Utilities Commission of Nevada, held at its offices on August 4, 2004.

PRESENT: Chairman Donald L. Soderberg
Commissioner Carl B. Linvill
Commission Secretary Crystal Jackson

COMPLIANCE ORDER

The Public Utilities Commission of Nevada ("Commission") makes the following findings of fact and conclusions of law:

1. On March 30, 2004, WWC License L.L.C., d/b/a CellularOne ("Western Wireless" or the "Company"), filed an Application with the Commission requesting: to be designated as an eligible telecommunications carrier ("ETC") for the purpose of qualifying to obtain federal universal service support in the service areas of certain rural and non-rural telephone company service areas (the "Application"). The Commission designated this matter as Docket No. 04-3030.

2. The Application was filed pursuant to the Telecommunications Act of 1996, 47 United States Code ("U.S.C.") § 214(e), 47 Code of Federal Regulations ("C.F.R.") §§ 54.101 and 54.207, Chapters 703 and 704 of the Nevada Revised Statutes, and Chapters 703 and 704 of the Nevada Administrative Code ("NAC"), including, but not limited to, NAC 704.680461.

3. The Commission issued a public notice of the foregoing Application in accordance with state law and the Commission's Rules of Practice and Procedure on April 8, 2004.

4. On April 21, 2004, the Attorney General's Bureau of Consumer Protection ("BCP") filed a Notice of Intent to Intervene in the above-mentioned Docket. The BCP and the

Regulatory Operations Staff of the Commission ("Staff") participate as a matter of right. The BCP withdrew its intervention on May 18, 2004.

5. Petitions for Leave to Intervene were filed by Nevada Bell Telephone Company, d/b/a SBC Nevada ("SBC Nevada"), Lincoln County Telephone System, Inc. ("Lincoln County"), and Humboldt Telephone Company ("Humboldt").

6. The Nevada Telecommunications Association and Central Telephone Company of Nevada, d/b/a Sprint of Nevada, Sprint Communications Company L.P., and Sprint Spectrum L.P., filed Notices of Intent to Participate as Commenters.

7. On April 30, 2004, the Presiding Officer conducted a prehearing conference on this matter.

8. On May 4, 2004, the Presiding Officer issued Orders granting the Petitions for Leave to Intervene of SBC Nevada, Lincoln County and Humboldt.

9. On May 4, 2004, the Presiding Officer issued a Procedural Order.

10. On May 27, 2004, the Presiding Officer conducted a hearing on this matter. During the hearing, the Parties agreed to waive the deadline for a decision regarding Western Wireless' redesignation as an ETC.

II. Positions of the Parties

A. Western Wireless

11. Western Wireless currently provides commercial mobile radio service ("CMRS") under the CellularOne national brand. (Application at 3.) Western Wireless seeks immediate designation as an ETC in certain wire centers of a non-rural telephone company and conditional designation as an ETC in certain wire centers of three rural telephone companies.[1] (Application at 1; Exhibit 11.) The conditional designation results from the need to redefine the service areas of the three rural telephone companies, which requires the additional approval of the Federal Communications Commission ("FCC"). Western Wireless seeks ETC designation in order to

[1] Western Wireless originally requested designation as an ETC for the entire study area of Humboldt Telephone, but subsequently modified its request in its Direct Testimony, Exhibits 2 and 11.

become eligible to receive federal universal service funding. (Application at 5-6.) Specifically, Western Wireless seeks designation as an ETC for the following wire centers:

Company Name	Wire Center Locality	Wire Center
SBC Nevada	Duckwater	DKWRNV11
	McGill	MCGLNV11
	Schurz	SCRZNV11
	Winnemucca	WNMCNV01
Verizon California, Inc., d/b/a Verizon Nevada ("Verizon")	Mina	MINANVAB
Lincoln County Telephone System	Alamo	ALAMNVXF
	Caliente	CLNTNVXF
	Lake Valley	LKVYNVXF
	Panaca	PANCNVXF
	Pioche	PICHNVXA
Humboldt Telephone Company	McDermitt	MCDRNVII
	Orovada	ORVDNVXA
	Paradise Valley	PRVYNVII

(Exhibit 11 at Exhibit A.) Western Wireless' request for designation is contingent on the Commission's agreement to redefine the service area for the rural telephone companies to individual wire centers, rather than their study areas. (Exhibit 11 at 5-6.)

12. Western Wireless claims that it meets the requirements under 47 U.S.C. § 214(e)(1)-(2) and 47 C.F.R. § 54.101 for designation as an ETC and will fulfill all service and advertising obligations. (Application at 5-6; Exhibit 11 at 6-7.) Western Wireless affirms that it provides the core services to be offered by an ETC, including: (1) voice-grade access to the public switched network; (2) local usage; (3) dual tone multi-frequency signaling or its functional equivalent; (4) single-party service or its functional equivalent; (5) access to emergency services; (6) access to operator services; (7) access to interexchange services; (8) access to directory assistance; and (9) toll limitation for qualifying low-income consumers. (Id.)

13. In order to meet the requirements for eligibility under NAC 704.680461, Western Wireless requests that the Commission waive NAC 704.680461(1)(a) because CMRS carriers are

not subject to state regulation and consequently do not hold a certificate of public convenience and necessity. (Application at 4-5.)

14. Western Wireless asserts that its designation as an ETC is also in the public interest because it will promote competition, advances universal service, promotes the deployment of new telecommunications technologies and will not result in significant adverse impacts to the rural carriers. (Id. at 11-17.) In addition, Western Wireless claims that the redefinition of the SBC Nevada, Verizon, Humboldt and Lincoln County service areas is warranted to promote competition and bring new telecommunications services to rural Nevada. (Id. at 24.)

Don J. Wood

15. Don J. Wood, principal in the financial consulting firm of Wood & Wood, testified for Western Wireless as to the public interest aspect of the Application and the request for redefinition of the service area requirement for areas served by certain rural telephone companies. (Exhibit 2 at 4.) Mr. Wood stated that the designation of Western Wireless as an ETC in the requested areas would have both short-term and long-term benefits. (Id. at 6.) Specifically, Mr. Wood suggested that consumers would benefit from a choice of suppliers and a broader array of service in the short-term, and more efficient and responsive customer service in the long-term due to competitive market forces. (Id.)

16. Mr. Wood testified that the Commission should consider the Joint Board's Recommendation to the FCC for ETCs and the orders in 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 (Jan 22, 2004)("Virginia Cellular") and Highland Cellular, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia, CC Docket No. 96-45, Memorandum Opinion and Order, FCC 04-37 (April 12, 2004)("Highland Cellular"), but must be mindful of purpose of the federal universal service mechanism. (Id. at 10; Tr. at 12.) At the hearing, Mr. Wood argued that the Commission should follow the existing requirements addressed in Virginia Cellular and Highland Cellular. Mr. Wood opined that Virginia Cellular

and Highland Cellular are instructive because those decisions indicate FCC actual interpretation of the details of the requirements for ETC designation in rural areas. (Tr. at 18.)

17. Mr. Wood testified that redefinition of Humboldt and Lincoln County's service areas is necessary because Western Wireless's licensed cellular boundary is not contiguous with those rural carriers' study area boundaries. The redefinition, according to Mr. Wood, will result in competitive benefits and that competition serves the universal service policy. (Exhibit 2 at 13.)

18. At the hearing, Mr. Wood also addressed Western Wireless' ability to serve. Mr. Wood stated that Western Wireless was not required to show it was currently providing service throughout the requested service areas, but merely needs to demonstrate its capability and commitment to respond to reasonable requests for service. (Tr. at 28-29.) Mr. Wood further indicated in rebuttal testimony that while Western Wireless has made substantial investments in rural Nevada, it now seeks to offer wireless service at a level of quality that can compete directly with current wireline local service offerings. (Exhibit 3 at 30.)

19. Finally, Mr. Wood testified that there is no set standard for the size of customer base required to support two ETCs in a particular service area without degradation of service. (Tr. at 157.) Mr. Wood stated that the analysis depends on the size of the wire center and on the cost to serve throughout the area. (Id.)

James H. Blundell

20. James H. Blundell, Executive Director of External Affairs for Western Wireless, testified as to how Western Wireless already provides the supported services in Nevada, the Company's plans, how the Application is in the public interest and why the Commission should redefine the rural carriers' service areas. (Exhibit 11 at 5.) Mr. Blundell argued that no state law prerequisites applied to Western Wireless' Application, due to federal preemption of state regulation over CMRS providers. (Id. at 6.)

21. Mr. Blundell testified that Western Wireless has sought ETC designation in those wire centers where the Company's network will reach at least 85 percent of the population in the wire center. (Id. at 15.) In addition, Mr. Blundell stated that Western Wireless expects that its

network would expand over time to meet reasonable requests for service within those areas. (Id. at 11.) On cross-examination, however, Mr. Blundell testified that Western Wireless is not obligated to use universal service funding solely for expansion of service, but could use the monies for operations and maintenance of its existing network. (Tr. at 270-271.)

22. Mr. Blundell also stated that the Commission could waive NAC 704.680463(2), which requires an ETC to serve the entire area of the rural telephone company. Mr. Blundell deferred the issue to the Parties' legal briefs, but believed that the Commission's regulation conflicts with federal law. (Tr. at 192.)

23. Mr. Blundell testified that the public interest determination should consider whether the benefits of an additional ETC outweigh any potential harm. (Exhibit 11 at 19.) The Commission, according to Mr. Blundell, should emphasize competition and consumer benefits, not incumbent protection. (Id.) Mr. Blundell stated that consumers should be able to choose services based on their own needs, not just the service of the Incumbent Local Exchange Carrier ("ILEC"). (Id. at 20.) Mr. Blundell also claimed that with the ETC designation Western Wireless would also offer additional services, such as an expanded calling area and advanced services that meet or exceed landline networks, and would eventually increase deployment of its cellular network. (Id. at 22.) On rebuttal Mr. Blundell enumerated all the potential benefits that, in his opinion, could come from granting ETC status. (Exhibit 12 at 22-23.)

B. Humboldt and Lincoln County

24. Humboldt opposes Western Wireless' Application with regards to the redefinition of Humboldt's service area to individual wire centers and the designation of the Company as an ETC in the requested wire centers. (Humboldt Brief at 1.) Humboldt believes that the Commission should determine that any potential ETCs must commit to serve all customers within a rural telephone company's study area. (Id. at 24.) Humboldt argues that Western Wireless produced no evidence of ubiquitous signal coverage in Humboldt's service area, and made no commitment to any specific service improvements. Humboldt also claims that Western Wireless suppressed relevant evidence. (Id.)

25. Likewise, Lincoln County opposes Western Wireless' Application with regards to the redefinition of Lincoln County's service area to individual wire centers and the designation of the Company as an ETC in the requested wire centers. (Lincoln County Brief at 22-23.) Lincoln County believes that Western Wireless has not met its burden of proof. (Id.) Specifically, Lincoln County argues that the Company's Application conflicts with NAC 704.680463 and FCC policies against "creamskimming." (Id.)

Glenn H. Brown - Witness for Humboldt and Lincoln County

26. Glenn H. Brown, President of the telecommunications consulting firm McLean & Brown, testified on behalf of both Humboldt and Lincoln County. Mr. Brown suggested that the Commission deny Western Wireless' Application with regards to the redefinition and ETC designation in the service areas of Humboldt and Lincoln County. (Exhibit 20 at 4.) Mr. Brown believed that Western Wireless has failed to meet its burden of proof that its Application is in the public interest. (Id.)

27. According to Mr. Brown, Western Wireless' request regarding the Humboldt and Lincoln County service areas will create significant new public costs and deliver few, if any, incremental public benefits. (Id.) Mr. Brown claims that serving 85 percent of the population is not sufficient to meet the standard for designation as an ETC because that last 15 percent is the most costly to serve, and that last 15 percent is the stated goal of universal service. (Tr. at 393.) Mr. Brown also emphasized that customers in the low cost and high density areas of the study areas already have Western Wireless service as a competitive option, so it is misleading for Western Wireless to assert that these customers would not have a competitive option if ETC service is not granted. (Exhibit 20 at 19.)

28. Mr. Brown stated that Western Wireless provided none of the fact-specific data required by Virginia Cellular to support its request. (Exhibit 20 at 4.) Mr. Brown claims that in return for the requested ETC designations, Western Wireless commits to nothing more than serving the areas within Nevada that it currently serves, providing no evidence of a commitment to expansion to additional high cost areas outside its current range. (Id at 52.) According to Mr.

Brown, the generic claims of benefits from increased competition do not outweigh the potential costs. (Id.)

29. Second, Mr. Brown opined that it is not in the public interest to encourage competition and consumer benefits through designating multiple ETCs in some areas served by rural telephone companies. (Tr. at 408.) Mr. Brown pointed out that as the population density decreases, the costs increase geometrically. (Exhibit 20 at 27-31.) Mr. Brown testified that both wireline and wireless networks are driven by customer density, so it does not make sense to subsidize two entities to serve areas where it is prohibitively expensive for one. (Tr. at 410.)

30. Mr. Brown explained that Humboldt and Lincoln both have towns where the wire center or the switch are generally located, and the customers that are very close to that switch have short loops; therefore, the distribution plant, because they're closely packed, is much cheaper. (Tr. at 441.) Mr. Brown noted that there are low cost customers in every wire center and that it is out at the extremes that one gets the very high cost; therefore, the average cost is high as well. (Tr. at 442.) Mr. Brown explained that a lot of times the presence or absence of a major highway can be a determinant in something being low cost for the wireless carrier that could be high cost for the wireline, particularly in very sparse areas and particularly when the technologies are different, and that disaggregation does not solve the underlying problem. (Tr. at 466.)

<u>Jeffery F. Beck - Witness for Humboldt</u>

31. Jeffrey F. Beck, Vice President for Regulatory and External Affairs for Humboldt, testified regarding the public interest considerations in the proceeding and to support Mr. Brown's testimony. Mr. Beck opined as to the importance of federal and Nevada universal service support to Humboldt's operations. (Exhibit 23 at 5.) Mr. Beck stated that Humboldt is an extremely high-cost rural local exchange carrier. (Id.) According to Mr. Beck, neither the construction nor continued operation of Humboldt's service facilities would be possible without universal service support revenues. (Id.)

32. Mr. Beck testified that while Western Wireless claims to serve 85 percent of the population in Humboldt's wire centers for which ETC designation is requested, Humboldt has incurred disproportionate costs to serve the remaining 15 percent. (Id. at 17.) Mr. Beck also presented testimony on his experience receiving Western Wireless signals while in Humboldt's service area. (Id. at 18-21.)

Ken Snow - Witness for Lincoln County

33. Ken Snow, Senior Consultant with GVNW Consulting, Inc., testified for Lincoln County regarding the operation of the federal universal service funds and the impact that additional carriers drawing on those funds may have on Lincoln County. (Exhibit 25 at 4.) Mr. Snow testified that if Lincoln County lost 20 percent of its access lines, the estimated cost per loop would rise approximately 23 percent. (Id. at 6.) Consequently, Lincoln County's per loop High Cost Loop support would increase approximately 292 percent. (Id.) Furthermore, as a Provider of Last Resort, the incumbent has to be ready, willing, and able to serve in their certificated area, and have the financial means and wherewithal to do that. (Tr. at 590.)

C. SBC Nevada

34. SBC Nevada did not sponsor any witness or file testimony in this proceeding. SBC Nevada, however, opposes Western Wireless' request for designation as an ETC in four of SBC Nevada's wire centers. (SBC Brief at 1.) SBC Nevada claimed that Western Wireless is required to show that its request for designation as an ETC in four of SBC Nevada's wire centers is in the public interest, and that the Company has not met that standard. (Id.)

D. PUCN Regulatory Operations Staff

35. Staff recommends that the Commission grant Western Wireless' Application in part, designating Western Wireless as an ETC in the requested wire centers of SBC Nevada, Verizon, and Lincoln County. (Staff Brief at 2.) Staff suggests that the Commission condition these designations on: (1) the Company filing written assurances regarding commitments made by its witnesses in the case; and (2) Western Wireless' commitment to expand its service to include Lincoln County's entire study area. (Id. at 2 and 14.)

Jeffrey W. Galloway

36. Jeffrey W. Galloway, Financial Analyst for Staff, testified regarding Western Wireless' requests with respect to each ILEC. Mr. Galloway recommended that the Commission approve Western Wireless' request for ETC designation in the SBC Nevada wire centers, except for the Winnemucca exchange not in SBC Nevada's service area. (Exhibit 26 at 6.) Mr. Galloway justifies the recommendation on the fact that SBC Nevada does not have the proper financial incentives to invest in its rural exchanges. (Id. at 7.) SBC Nevada is regulated pursuant to a plan of alternative regulation, capping its basic network service rates. (Id.) Therefore, it is not in SBC Nevada's interest to invest in rural exchanges because it would not earn a return on its investment in the traditional manner. (Id.) In addition, SBC Nevada does not have access to many federal universal service fund programs. (Id.) Consequently, additional consumer choice and mobility, and the potential for advanced services would benefit local residents. (Id. at 7-9.)

37. Mr. Galloway's recommendation regarding SBC Nevada's Winnemucca exchange was meant to clarify a confusion in the record. Mr. Galloway testified that Western Wireless should be allowed ETC designation for the Winnemucca exchange as currently recorded in SBC Nevada's tariff and the area certificated to SBC Nevada in Humboldt County, but not yet served. (Id. at 9.) Mr. Galloway stated that Western Wireless had erroneously identified approximately the entire southern half of Humboldt County as an area within SBC Nevada's Winnemucca exchange. (Id.) According to Mr. Galloway, the area west of Winnemucca is certificated to Humboldt, not SBC Nevada, and is not included in his recommendations regarding SBC Nevada's wire centers. (Id.)

38. With regard to Verizon's wire centers, Mr. Galloway recommended granting the conditional approval for redefinition and ETC designation. (Id. at 10.) Mr. Galloway testified that Verizon, like SBC Nevada, is unlikely to invest in its rural exchanges. (Id.) Mr. Galloway indicated that there is little chance of harm to universal service funds because Verizon serves about 11 lines in Montgomery Pass, the area served by the Mina wire center. (Id. at 11.)

39. Regarding Lincoln County, Mr. Galloway recommended that Western Wireless request for ETC designation be approved contingent on the Company's commitment to serve Lincoln County's entire service area including the Rachael and Sand Springs exchanges. (Id. at 12.) Mr. Galloway based his recommendation on his belief that the benefits from Western Wireless' designation as an ETC outweighs the costs, but the Company is required to serve a rural telephone company's entire study area under NAC 704.680463 to qualify as an ETC. (Id. at 13-15.) Mr. Galloway concluded that the added requirement for Commission approval of Western Wireless' request is equitable and preferable to denying the designation for Lincoln County because it balances the interests of competitors. (Id. at 15.)

40. Regarding Humboldt, Mr. Galloway recommended denial of the requested redefinition and ETC designation. (Id. at 16.) Mr. Galloway stated that based on the evidence presented by Western Wireless, the potential costs of ETC designation outweigh the perceived benefits. (Id.) In particular, Mr. Galloway was concerned that universal service may be impaired in Humboldt's service area because of the high cost of service. (Id. at 17.)

III. Commission Discussion

41. 47 U.S.C. § 214(e)(2) states:

> A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of [47 U.S.C. § 214(e)(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 [47 U.S.C. § 214(e)(1)]. Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.

Under 47 U.S.C. § 214(e)(1), a common carrier designated as an ETC must: (1) offer the services supported by federal universal service support mechanisms using either its own facilities or a combination of its own facilities and resale of another carrier's services; and (2) advertise the availability of such services and their charges.

42. None of the Parties contradicted Western Wireless' assertions that they currently provide the services supported by the federal universal service support mechanisms and will advertise the availability of those services in the areas for which the Company seeks designation as an ETC. Therefore, the primary question before the Commission is whether Western Wireless's designation as an ETC is in the public interest, regarding the rural telephone companies, and consistent with the public interest, convenience and necessity, regarding the non-rural telephone companies. Because the Commission's decision regarding the rural telephone companies rests on the public interest test, there is no need to address the other arguments presented by the Parties.

Lincoln County Wire Centers

43. The Commission finds that Western Wireless has not met its burden for showing that its request for designation as an ETC in portions of Lincoln County's service area is in the public interest. The Commission must evaluate the facts presented in each application for designation as an ETC, weighing the costs and benefits of granting ETC status in the requested area. The FCC has indicated that the public interest analysis for designation as an ETC should be rigorous and stringent. (Virginia Cellular at ¶4; Highland Cellular at ¶21.) Western Wireless' evidence did not persuade the Commission that designating the Company as an ETC would be in the public interest.

44. Western Wireless placed significant emphasis on the benefits of competition justifying designation as a competitive ETC. The FCC, however, has stated that competition is not sufficient to satisfy the public interest test in rural areas. (Virginia Cellular at ¶4.) Although the potential benefits of competition are one factor to be considered, other considerations include the impact of multiple ETC designations on the universal service fund, the unique advantages and disadvantages of the competitor's service offering, commitments regarding service quality,

and the competitive ETC's ability to provide supported services throughout the designated service area within a reasonable period. (Id.)

45. Mr. Blundell asserted that benefits attributable to competition as well as other benefits could flow from granting ETC status. However, he also testified that Western Wireless could choose to use universal support funds to support maintenance and operations expenses rather than to extend service. Furthermore, Western Wireless chose not to provide the Commission with a plan for expanding service in its Application either within its current service areas or to the study area as a whole.

46. Of particular concern to the Commission is the exclusion of the Sand Springs wire center from Western Wireless' Application and the redefinition of Lincoln County's service area to include only those individual wire centers already served by Western Wireless. The Sand Springs wire center has a population density of 1.56 households per square mile. By comparison, the FCC in Virginia Cellular was concerned with areas having a population density of 33 persons per square mile. Inclusion of some high cost wire centers in a proposed redefinition does not negate the fact that Lincoln County could potentially be at a significant disadvantage if Western Wireless were able to compete in other portions of Lincoln County's study area. (Highland Cellular at ¶31.)

47. Therefore, the Commission finds that designating Western Wireless as an ETC in the requested wire centers potentially could undermine Lincoln County's ability to serve its entire study area. This concern is significant because Lincoln County is a Provider of Last Resort, and placing it in a competitively disadvantageous position could impede the fulfillment of its obligations. This, in turn, could affect consumers and the goal of universal service throughout Nevada. Consequently, the request to redefine Lincoln County's service area is denied, and as a result, the request for ETC designation in this service area is also denied.

Humboldt Wire Centers

48. The Commission also finds that Western Wireless has not met its burden for showing that its request for designation as an ETC in portions of Humboldt's service area is in the public

interest. Humboldt serves a very high cost area of Nevada and is dependant on both federal and Nevada universal service funding. The redefinition of Humboldt's service area to exclude the Denio exchange for Western Wireless would potentially exacerbate Humboldt's reliance on Nevada universal service funding. Therefore, for the same reasons discussed above with respect to Lincoln County, the Commission must deny the redefinition of Humboldt's service area and Western Wireless' request for designation as an ETC in that service area.

49. Therefore, the Commission finds that designating Western Wireless as an ETC in the requested wire centers potentially could undermine Humboldt's ability to serve its entire study area. Again, this is a significant concern because Humboldt is a Provider of Last Resort, and placing it in a competitively disadvantageous position could impede the fulfillment of its obligations and, consequently, affect consumers and universal service in Nevada. Consequently, the request to redefine Humboldt's service area is denied, and as a result, the request for ETC designation in this service area is also denied.

<u>SBC Nevada's Wire Centers</u>

50. In areas served by non-rural carriers, the Commission must designate more than one common carrier as an ETC when "consistent with the public interest, convenience, and necessity." (47 U.S.C. § 214(e)(2).) In <u>Highland Cellular</u>, the FCC noted that the Common Carrier Bureau had previously found that the designation of additional ETCs in areas served by non-rural telephone companies was per se in the public interest. (<u>Highland Cellular</u> at ¶21.) The FCC, however, disagreed with that interpretation, stating that it "[did] not believe that designation of an additional ETC in a non-rural telephone company's study area based merely upon a showing that the requesting carrier complies with [47 U.S.C. § 214(e)(1)] will necessarily be consistent with the public interest in every instance." (Id.)

51. Similarly, this Commission recently denied another ETC application because the applicant had not provided a sufficient basis for a finding that the proposal was in the public interest. (SBC Brief at 5.) That decision, however, involved a telephone company seeking to expand its Certificate of Public Convenience and Necessity to be the second Provider of Last

Resort in a service area. In the instant case, Western Wireless is not requesting anything as unique as that application. Western Wireless already serves the requested areas and has an economic incentive to provide service to rural areas, unlike SBC Nevada, which is not eligible for universal service funding to support additional investments in rural exchanges at this time. (Staff Brief at 10.) Therefore, the Commission finds that Western Wireless has made an adequate showing that its designation as an ETC in SBC Nevada's Duckwater, McGill, Schurz and Winnemucca Wire Centers, in accordance with the clarification raised by Mr. Galloway, is consistent with the public interest and ETC designation is granted for those wire centers.

Verizon's Wire Center

52. Verizon did not participate in this proceeding, and no Party opposed Western Wireless' request for designation as an ETC in Verizon's Mina wire center and the related redefinition of the ILEC's service area. Staff supported Western Wireless' request for redefinition of Verizon's service area to individual wire centers and ETC designation for Mina wire center and designation as an ETC. (Staff Brief at 13.) Staff stated that Verizon is unlikely to invest in, expand, or provide new services in the Mina exchange. (Id.; Exhibit 26 at 10.) Verizon's Mina exchange serves the area of Montgomery Pass on the California-Nevada state line in southern Mineral County, several miles from Verizon's other exchanges. (Exhibit 26 at 10.) Due to the remote character of this location, Staff anticipates that Verizon would request payment for any line extensions. (Id.) Wireless service in this area would negate this added cost to consumers. (Id.) Furthermore, the benefits of increased consumer choice and mobility are greater than the anticipated impact on universal service funds. Therefore, the benefits from an additional ETC providing wireless service outweigh any costs to universal service funding or other disadvantages and Western Wireless' request for redefinition of Verizon's service area and ETC designation for the Mina wire center are granted.

THEREFORE, based upon the foregoing findings of fact and conclusions of law, it is hereby ORDERED that:

1. The Application of WWC License L.L.C., d/b/a CellularOne, designated as Docket No. 04-3030, is APPROVED IN PART and DENIED IN PART in accordance with the findings and conclusions contained in this Order.

2. WWC License L.L.C., d/b/a CellularOne, will FILE with the Commission a copy of its Petition seeking the Federal Communications Commission's approval of the redefinition of the service area of Verizon California, Inc., d/b/a Verizon Nevada.

3. All arguments of the parties raised in these proceedings, including but not limited to arguments raised in the hearing, not expressly considered herein have been considered and either rejected or found to be non-essential further support for this Order.

4. The Commission retains jurisdiction for the purpose of correcting any errors that may have occurred in the drafting or issuance of this Order.

By the Commission,

DONALD L. SODERBERG, Chairman

CARL B. LINVILL, Commissioner and Presiding Officer

Attest: Crystal Jackson
CRYSTAL JACKSON, Commission Secretary

Date: Carson City, Nevada

8-12-04

(SEAL)

APPENDIX F

Office of the Secretary
Service Date
July 23, 2004

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE PETITION OF IAT COMMUNICATIONS, INC. DBA NTCH-IDAHO, INC. OR CLEAR TALK FOR DESIGNATION AS AN ELIGIBLE TELECOMMUNICATIONS CARRIER.	CASE NO. GNR-T-03-8
IN THE MATTER OF THE APPLICATION OF NPCR, INC. DBA NEXTEL PARTNERS SEEKING DESIGNATION AS AN ELIGIBLE TELECOMMUNICATIONS CARRIER.	CASE NO. GNR-T-03-16 ORDER NO. 29541

On February 3, 2003, IAT Communications, Inc. dba NTCH-Idaho, Inc. or Clear Talk ("Clear Talk") filed an Application requesting that the Commission designate it as an eligible telecommunications carrier ("ETC") in specific rural areas of Idaho. A similar petition was filed on April 28, 2003 by NPCR, Inc. dba Nextel Partners ("Nextel Partners"). ETC designation would allow the Applicants to receive federal universal service support for providing universal telecommunications services to consumers in specified rural, high cost areas in Idaho. 47 U.S.C. § 214(e). Each of these rural areas is now served by an incumbent telephone company that was previously designated as an ETC. The incumbent companies oppose designating the Applicants as ETCs.

These Applications raise issues of first impression. The primary issue is whether it is in the public interest to designate Clear Talk and Nextel Partners as ETCs in the specified rural telephone company study areas. A "study area" is a geographic area used for the purpose of determining universal service obligations and support. 47 U.S.C. § 214(e)(5). In order to be designated as an ETC in a study area served by a rural telephone company, the applicant must demonstrate and the Commission must find that it would be in the public interest. 47 U.S.C. § 214(e)(2). A secondary issue is whether the Applicants are committed to bringing competition and providing universal services throughout these rural areas.

After reviewing the record in this proceeding, the Commission finds that the Applicants have failed to carry their burdens of proof to demonstrate that they should be designated as an ETC in the rural telephone company study areas identified in their respective Applications.

BACKGROUND

1. Procedural History

On May 27, 2003, the Commission ordered that these Applications be consolidated in a joint proceeding and processed under Modified Procedure, IDAPA 31.01.01.201-204.[1] At the same time, the Commission granted intervention to the Idaho Telephone Association, a state telephone association with members that include both commercial companies and cooperatives. Some of these telephone companies provide basic and advanced telecommunications services in the rural areas where the Applicants seek to be designated as an ETC.[2] Project Mutual Telephone Cooperative, and Citizens Telecommunications Company of Idaho also intervened. They provide local exchange services in some of the rural areas specified in the Applications. As stated previously, ITA and Citizens opposed Clear Talk's and Nextel Partners' Applications. The other parties in this case are Qwest Corporation and the Commission Staff. These latter parties did not participate actively or state positions on the Applications.

On June 10, 2003, ITA filed comments opposing the use of Modified Procedure and requested the Commission hold an evidentiary hearing. The Commission granted ITA's request and a hearing was held on December 9 and 10, 2003.[3] The parties filed post-hearing briefs on their positions advanced at hearing and on new issues raised by a recent decision involving ETC designation issued by the Federal Communications Commission ("FCC").[4] Finally, the Commission granted motions to take official notice of several ETC decisions from other jurisdictions pursuant to Commission Rule 263, IDAPA 31.01.01.263.[5]

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[1] Order No. 29240.

[2] ITA has numerous members but those directly affected by this case are Albion Telephone Company, Farmers Mutual Telephone Company, Filer Mutual Telephone Company, Mud Lake Telephone Cooperative Association, Project Mutual Telephone Cooperative Association, Rural Telephone Company, and Fremont Telecom.

[3] Order Nos. 29292 and 29312.

[4] *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, 19 F.C.C.R. 1563 (2004) (hereinafter "*Virginia Cellular*").

[5] The Commission took official notice of the following decisions: 1) *In the Matter of the Application of Nextel Partners for ETC Designation as an ETC*, Docket No. 03-141-U (Ark. 2003); 2) *In the Matter of the Application of Nextel Partners for Designation as an ETC*, Application No. C-2932, (Ne. 2004); 3) *Virginia Cellular, LLC*, 19 F.C.C.R. 1563 (2004); 4) *In the Matter of the Federal-State Joint Board on Universal Service, Recommended Decision*, Docket No. 96-45, FCC 04J-1, 19 F.C.C.R. 4257 (Feb. 27, 2004); 5) *In the Matter of Federal State Joint Board on Universal Service – Highland Cellular, Inc. Petition for Designation as an ETC in the Commonwealth of Virginia*, CC Docket No. 96-45, FCC 04-37, 2004 WL 770088 (2004) (hereinafter *"Highland Cellular")*.

2. The Telecommunications Act of 1996's Twin Goals

The Applicants request that the Commission designate them as ETCs in certain rural telephone company study areas so they can seek support from the federal Universal Service Fund to provide telecommunications services that promote competition and universal service in rural high cost areas in Idaho.[6] Because the Commission's review of these Applications involves the Telecommunications Act of 1996 (the "1996 Act") a brief overview of it and the Communications Act of 1934 (the "1934 Act"), is necessary to understanding the principles of competition and universal service in this case.

The 1996 Act has twin congressional mandates of providing universal telecommunications service in the United States and implementing competition into the market for local telephone service. 47 U.S.C. § 151 *et. seq. See also Alenco Communications v. F.C.C.*, 201 F.3d 608, 614-15 (5th Cir. 2000). Universal service has been a fundamental goal of federal telecommunications regulation since the passage of the 1934 Act. *Id.* Section 1 of the 1934 Act defined federal universal service policy as "to make available, so far as possible, to all the people of the United States ... a rapid, efficient, Nation-wide, and world-wide wire and communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151 (as amended). *See also Texas Office of Public Utility Counsel v. FCC ("TOPUC"),* 183 F.3d 393, 405-06 and n. 2 (5th Cir. 1999). The 1934 Act also created the FCC and charged it with the responsibility to carry out this policy as well as to regulate the telecommunications industry in general.

The 1996 Act expanded the definition of universal service and articulated guiding principles to govern universal service. These principles of universal service are:

1) Quality services should be available at just, reasonable, and affordable rates;

2) Access to advanced telecommunications and information services should be provided in all regions of the Nation;

3) Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas should have access to telecommunications services that are reasonably comparable to the services provided in urban areas and at rates that are reasonably comparable to rates charged for similar services in urban areas;

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[6] Both Applicants made clear that at this time they were not seeking ETC designation for purposes of receiving support from the Idaho Universal Service Fund.

4) All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service;

5) There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service;

6) Schools, health care providers and libraries should have access to advanced services; and

7) Such other principles as the Joint Board and FCC may later determine are necessary and appropriate for the protection of the public interest, convenience and necessity.

47 U.S.C. § 254(b)(1-7). Section 254(e) of the 1996 Act requires that any financial support received in furtherance of the goal of universal service must be used only for the provision, maintenance and upgrading of facilities and services for which the support is intended.

Paired with the universal service mandate is the directive that local telephone markets be opened to competition. *See* 47 U.S.C. §§ 251-253; *see also Alenco*, 201 F.3d at 615. The 1996 Act provides that both universal service and competition must be realized and one cannot be sacrificed for the other. *Alenco*, 201 F.3d at 615.

3. Requirements for ETC Designation

To encourage competition and universal service, the 1996 Act allows qualifying telecommunications carriers to receive universal service support for providing service in high cost areas of the Nation by meeting certain ETC requirements.[7] These requirements are contained in 47 U.S.C. § 214(e) and, if met, allow the carrier to be eligible to receive universal service support throughout the service area where such designation is sought. The 1996 Act defines "service area" as a geographic area established by a state commission for the purpose of determining universal service obligations and support mechanisms. 47 U.S.C. § 214(e)(5). For an area served by a rural telephone company, Section 214(e)(5) provides that the term "service area" means the rural telephone company's "study area" unless and until the FCC and a state

[7] The FCC has adopted the principle that ETC status and federal support mechanisms should be competitively neutral, neither unfairly advantaging nor disadvantaging particular service providers or technologies. *See Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 F.C.C.R. 8776, 8801, ¶¶ 46-48 (1997). *See also* First Report and Order, 12 F.C.C.R. at 8932-8934, ¶¶ 286-290, 8944-8945, ¶¶ 311-313.

commission establish different service areas under the procedures set forth in 47 C.F.R. § 54.207(c)-(d).

The 1996 Act gives state commissions authority to determine whether a carrier meets the requirements to be designated as an ETC. 47 U.S.C. §§ 214(e)(2) and 254; 47 C.F.R. § 54.201. To be designated as an ETC the carrier shall be: 1) a "common carrier" as defined by 47 U.S.C. § 153(10); and 2) offer throughout its proposed service area the services set forth in 47 C.F.R. § 54.101(a) either by using its own facilities or a combination of its own and the resale of another carriers.[8] Section 214(e)(1)(B) also requires that the carrier seeking ETC designation advertise the availability of its universal service offering and the charges therefore using media of general distribution. *See also* 47 C.F.R. § 54.201(d).

A carrier requesting ETC status is not required to provide "ubiquitous" service throughout its service area prior to being designated as an ETC.[9] However, an applicant must demonstrate that the capability and commitment to provide service is something more than a "vague assertion" of intent on the part of a carrier to provide service. *Western Wireless,* 15 F.C.C.R. at 15178 at ¶ 24 (2000). Thus, an applicant carrier must reasonably demonstrate to the state commission its ability and willingness to provide service upon designation. *Id.*

A new entrant can make a reasonable demonstration of its capability and commitment to provide universal service without the actual provision of the proposed service by providing, but not limited to: (1) a description of the proposed service technology, as supported by appropriate submissions; (2) a demonstration of the extent to which the carrier may otherwise be providing telecommunications services within the state; (3) a description of the extent to which the carrier has entered into interconnection and resale agreements; or, (4) a sworn affidavit signed by a representative of the carrier to ensure compliance with the obligation to offer and advertise the supported services. *Id.*

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[8] The services/functionalities are: 1) Voice grade access to the public switched network; 2) local calling; 3) dual tone multi-frequency signaling or its functional equivalent; 4) single-party service or its functional equivalent; 5) access to emergency services where available; 6) access to operator services; 7) access to long-distance service; 8) access to directory assistance; and 9) toll limitation. 47 C.F.R. § 54.101(a). In addition, ETCs are also required by FCC Rules §§ 54.405 and 54.411 to offer qualifying low-income customers both "Lifeline and Link Up" programs as a condition precedent to receiving federal universal service support.

[9] *Report and Order, In the Matter of Federal-State Joint Board on Universal Service, Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission,* 15 F.C.C.R. 15168, 15169 at ¶ 2 (2000).

Section 214(e)(2) provides that a state commission "may" designate more than one ETC in areas served by a rural telephone company if it is in the public interest and the Applicants have met the requirements of § 214(e)(1). In all other areas the state commission "shall" designate more than one ETC if a carrier meets the requirements of § 214(e)(1). The study areas in this case are all served by rural telephone companies (incumbent ETCs). Accordingly, the Applicants have the burden of proof to demonstrate that the public interest is served by designating them as ETCs in these rural areas. *Virginia Cellular, LLC Petition for Designation as an ETC*, 19 F.C.C.R. 1563, 1574 (2004). Congress has not defined or limited states' public interest tests under Section 214(e)(2), leaving it to the states to set their own parameters for public interest analyses for rural service areas, consistent with the underlying purposes of the Act. *TOPUC*, 183 F.3d 393, 417-18 (1999); *WWC Holding Co. v. Public Service Commission*, 44 P.3d 714, 719 (Utah S.Ct. 2002). Furthermore, the Act gives state commissions discretion in how many carriers to designate in a given area. 47 U.S.C. § 214(e). *See also TOPUC*, 188 F.3d at 417-18.

In evaluating the "public interest," this Commission weighs whether the potential benefits of ETC designation outweigh the potential harms. *Virginia Cellular*, 19 F.C.C.R. at 1574. Until recently, the FCC evaluated the public interest by considering whether: 1) customers are likely to benefit from increased competition; 2) designation of an additional ETC would provide benefits not available from incumbent carriers; and 3) customers would be harmed if the incumbent carrier exercised its option to relinquish its ETC designation.[10] More recently, the FCC found there was a need for a more stringent public interest analysis for ETC designations in rural telephone company service areas. In *Virginia Cellular* the FCC opined:

> We conclude that the value of increased competition, by itself, is not sufficient to satisfy the public interest test in rural areas. Instead, in determining whether designation of a competitive ETC in a rural telephone company's service area is in the public interest, we weigh numerous factors, including the benefits of increased competitive choice, the impact of multiple designations on the universal service fund, the unique advantages and disadvantages of the competitor's service offering, any commitments made regarding quality of telephone service provided by competing providers, and the competitive ETC's ability to provide the supported services throughout the designated service area within a reasonable time frame.

[10] *In the Matter of Federal State Joint Board on Universal Service, RCC Holdings, Inc. Petition for Designation as an ETC Throughout its Licensed Service Area in the State of Alabama*, CC Docket No. 96-45, DA 02-3181, 17 F.C.C.R. 23532, 23540-42 (November 26, 2002).

19 F.C.C.R. at 1565. With this background, we turn to the evidence provided by the parties.

THE HEARING EVIDENCE

1. Clear Talk

Clear Talk originally requested that the Commission designate it as an ETC in the rural telephone company study areas of Albion Telephone Company, Citizens Telecommunications Company of Idaho, Filer Mutual Telephone Company, Fremont Telecom, Inc. and Project Mutual Cooperative Association, Inc.[11] Application at 3. However, at the evidentiary hearing the Company stated it was only seeking ETC designation in the rural exchanges and partial wire centers of Fremont Telecom, Project Mutual Telephone and Citizens in Idaho. Tr. at pp. 370, 379-80. *See also* Exhibit 1.

a. 214(e)(1) Requirements

In support of its Application Clear Talk offered two witnesses, Glen W. Ishihara and Larry Curry. Their direct testimony is virtually identical; thus, for purposes of brevity the Commission provides citations only to Mr. Ishihara's testimony.[12] The Company also called Mr. Curry on rebuttal. Mr. Ishihara is president of IAT Communications, Inc., a Delaware corporation, and chief financial officer of NTCH-Idaho, Inc, an Idaho corporation doing business in Idaho as Clear Talk. He stated that the Company is a "telecommunications carrier" and "common carrier" as defined in 47 U.S.C. § 153(10) & (49) and is authorized by the FCC to provide commercial mobile radio services under the brand name "Clear Talk" in certain FCC defined service areas in Idaho. Tr. at pp. 336, 346. Mr. Ishihara testified that Clear Talk has been serving Idaho consumers in these areas since 2001 and currently offers and provides the required nine services and functionalities identified by 47 C.F.R. § 54.101 that are necessary for ETC designation. Tr. at pp. 336, 346-56. He testified Clear Talk provides these services using its existing network and licensed CMRS spectrum. Tr. at p. 356. Clear Talk also planned to provide services with fixed wireless local loop equipment installed at a customer's location. Tr. at pp. 356-57. Mr. Ishihara claims this equipment is more powerful than a handset. Tr. at pp. 358-59.

[11] Clear Talk also requested that it be designated as an ETC in non-rural areas that are served by Qwest Corporation. On June 11, 2003, the Commission granted the Company's request. Order No. 29261.

[12] Mr. Curry's direct testimony is contained at pages 396-424 of the transcript.

Mr. Ishihara alleged if Clear Talk received a request for service outside its existing coverage area, it can attempt to provide service in several ways. Tr. at p. 360. A technician can install a high-gain antenna at the location, or the power at an existing cell site can be turned up or redirected, or antennae can be adjusted (e.g., azimuth and downtilt), or microwave equipment can be installed, or new cell sites could be built, or Clear Talk can contract for the use of another carrier's facilities. *Id.*

Mr. Ishihara asserted Clear Talk would advertise the availability of its support services and charges in a manner that fully informs the general public. Tr. at pp. 364-67. He also stated the Company would comply with all form and content requirements, if any, adopted by the FCC and this Commission. *Id.*

b. Public Interest

Mr. Ishihara alleged that designating Clear Talk as an ETC in Idaho will bring competition to rural, high-cost areas, and that competition is in the public interest. Tr. at p. 374. He also asserted that competition could induce the incumbents to introduce new innovative or advanced service offerings. Tr. at p. 375. He stated that failure to designate Clear Talk as an ETC would deprive consumers of competition, including increased choices, higher quality service, lower rates, expanded calling areas and mobility. Tr. at pp. 374, 376, 392. In regard to quality of service, Mr. Curry testified that the Company will make commitments to ensure high service quality including stipulating to comply with the Commission's Customer Relations Rules for the universal services it offers in Idaho.[13] Tr. at p. 445.

On rebuttal, Mr. Curry testified that the Commission should also consider that Clear Talk has local switching for its services that provides for greater network security and reliability. Tr. at pp. 429-30. He stated Clear Talk provides jobs in Idaho to maintain these switches and to staff its customer care operations.[14] Curry also asserted that designating Clear Talk as an ETC will allow more federal USF dollars to flow into Idaho. Tr. at p. 447. Finally, he alleged the

[13] In post-hearing briefs, Clear Talk made additional commitments based on the FCC's decision in *Virginia Cellular,* 19 F.C.C.R. 1563 (2004).

[14] Exhibit 3 attached to Mr. Curry's rebuttal testimony is entitled "Clear Talk Idaho Fact Summary." In it Clear Talk represents that the Company has 31 Idaho employees, 6 retail centers, 30 reseller locations, 3 Lucent switches, 70 antenna facilities built with four more under construction, 47 active sites and 38 collocators. The exhibit also states that Clear Talk projects it needs a total of 97 facilities to cover its licensed area.

wireless technology Clear Talk uses to provide service is less environmentally intrusive than its landline counterpart. Tr. at p. 449.

Based on the foregoing, Clear Talk asserted it meets the requirements necessary for the Commission to designate it as an ETC in rural telephone company service areas.

2. Nextel Partners

Nextel Partners is a separate corporation from Nextel Communications, although the latter through a subsidiary, is the largest shareholder of Nextel Partners. Tr. at pp. 10-11. Nextel Partners was formed in 1998 to provide service under the "Nextel" brand name in small and rural markets and launched service in Idaho in 2000. Tr. at p. 11. Nextel Partners presented the testimony and exhibits of two witnesses, Scott Peabody and Don J. Wood. On November 17, 2003, the Company filed the rebuttal testimony of the same two witnesses.

Mr. Peabody, a Director in Nextel Partners' Engineering Department, testified the Company is authorized by the FCC to provide commercial mobile radio service in areas served by rural telephone companies Albion Telephone Company, Filer Mutual Telephone Company, Farmers Mutual Telephone Company, Mud Lake Telephone Cooperative, Project Mutual Telephone, Rural Telephone Company and Citizens Telecommunications of Idaho. Tr. at p. 9-10. Although Nextel Partners already provides service in rural Idaho, it now seeks ETC status. Mr. Peabody testified that with the exception of Citizens' areas, Nextel Partners' authorized service area covers all of the study areas of the rural telephone companies listed above.[15] Tr. at p. 34.

a. 214(e)(1) Requirements

Mr. Peabody said Nextel Partners is a "common carrier" and said the Company could provide each of the FCC-listed services and/or functionalities required by 47 U.S.C. § 214(e)(1). Tr. at pp. 19, 20, 22-26. In fact, he stated Nextel Partners already provides all of these services in Idaho except for toll limitation service to qualifying low-income consumers. Tr. at p. 21. He maintained Nextel Partners will make its universal service offerings using the same phones, antennae, cell sites, towers, trunk lines, mobile switching center and interconnection facilities used today. Tr. at p. 29. Mr. Peabody asserted the Company regularly deploys additional cell

[15] For Citizens' service area, Nextel Partners seeks ETC designation conditioned on the Commission and the FCC redefining Citizens' service area to an exchange by exchange basis pursuant to 47 C.F.R. § 54.207(b). This is the process authorized by federal law to authorize service and ETC designation in only a portion of a rural LEC's study area.

sites and channels, as necessary to maximize signal coverage and service availability. Tr. at p. 30. He insisted Nextel Partners is well-equipped to respond to reasonable requests for service throughout its proposed ETC service areas. *Id.*

Mr. Peabody said Nextel Partners will advertise the availability of the supported services and the corresponding charges in a manner that fully informs the general public within the designated service areas. Tr. at p. 32. *See also* Exhibit 105.

b. Public Interest

In regard to the public interest, Mr. Peabody urged the Commission to presume that "competition benefits consumers, and citizens throughout the state are entitled to the benefits of competitive universal service." Tr. at p. 50-51. He suggested that the Commission should determine "whether consumer benefits will be outweighed by demonstrated adverse impacts on consumers resulting from the designation." *Id.* Mr. Peabody asserted competitive service providers are "hard to find" in rural areas and the incumbents have been successful in expanding their services provided and deploying advanced network infrastructure such as local service, long distance, cable, wireless, internet, and/or DSL services without any competition from other landline providers. Tr. at pp. 51-52. He argued wireless providers are the only chance to bring competition to these areas, which can only happen if Nextel Partners is able to compete on a "level playing field" by being designated as an ETC so that it to can receive federal USF.[16] *Id.* Moreover, he suggested that Nextel Partners' service is more "universal" because it is mobile and provides consumers with a larger calling area than its landline counterparts. Tr. at pp. 54, 85.[17] Tr. at p. 85.

Mr. Peabody also stated ETC designation will facilitate the continued role of Nextel Partners in providing communications services to public schools, libraries, and local and state government agencies. Tr. at p. 56. Mr. Peabody also argued the Company's service is consistent with Congress' basic universal service principle that rural consumers must be afforded access to telecommunications services reasonably comparable to those services provided in urban areas at comparable rates. Tr. at p. 56. Finally, he asserted that Nextel Partners provides high quality services and customer service. This is especially the case regarding service quality because of

[16] Peabody also asserted Nextel Partners has been designated as a ETC in other states. Tr. at p.17.

[17] The Company alleged it offers Direct Connect service, mobile wireless data service including access to the Internet, email and text messaging and in some locations mobile 911 and GPS location for subscribers. Tr. at p. 85.

the competition existing in the wireless market. He contended that if the Company did not meet its customers' expectations for wireless service, it would lose them to other wireless competitors. Tr. at pp. 54-55.

Mr. Wood also testified on behalf of Nextel Partners regarding the "public interest" aspect of the Company's petition. Tr. at p. 157. Relying on his background as a consultant on economic and regulatory matters and his telephone company and IXC industry experience, he opined that designating Nextel Partners as an additional ETC in the affected rural telephone company service areas would have both short-term and long-term benefits. Tr. at pp. 161-64. With respect to the short term, he said consumers would have a choice of technology and suppliers, along with a "broader array" of services and pricing. Tr. at p. 169. In the long-term, Mr. Wood testified that the economic benefits of competition represent an equally important source of potential gain for consumers of telecommunications services in rural areas and for rural economic development. Tr. at pp. 170-71. The "availability of affordable and high-quality wireless service is extremely important in rural areas for health and safety reasons." Tr. at pp. 171-74. Lastly, he alleged the entry of competitive ETCs into a rural area could provide incentives to the incumbent to implement new operating efficiencies, lower prices, and offer better service to its customers. Tr. at p. 169. In sum, Mr. Wood concluded that designating Nextel Partners as an ETC would be in the public interest.

3. Idaho Telephone Association Testimony

ITA presented the testimony and exhibits of Daniel L. Trampush, who is employed as the director of telecommunications consulting for the firm of Moss Adams LLP. Mr. Trampush testified for both ITA and Citizens. Tr. at p. 480. Mr. Trampush asserted the ITA member telephone companies in this case and Citizens are "rural telephone companies" as defined in 47 U.S.C. § 153(37), and combined serve approximately 61,000 access lines in rural areas of Idaho. Tr. at p. 485. He maintained that low population density in the rural areas where the Applicants seek ETC designation translates into high average service costs. Trampush also testified that the incumbent ETCs are already serving these high cost areas and require support from federal and state universal funds to defray costs, keep rates affordable, and promote universal service. Tr. at pp. 493, 495-97. In these high cost areas there are still pockets of customers that comprise the incumbents' lowest cost and most profitable customers. Tr. at pp. 493-94. Thus, he argued it would be unfair to allow unregulated competitors to target only their most profitable customers, while leaving the incumbents as the carrier of last resort for the very highest cost customers.[18] *Id.* He asserted allowing this "cherry picking" or "cream skimming" would jeopardize the incumbents' financial viability, provide an unjustified windfall to the Applicants, and prove detrimental to universal service goals by increased demands on federal and state USFs. Tr. at pp. 494-95.

Mr. Trampush contended that a recent survey conducted by ITA analyzing its member companies' service densities and costs demonstrates the very rural and insular nature of the areas they serve. Tr. at p. 495. On average ITA members have only two access lines per square mile of service territory. Tr. at p. 495. He contrasted this with the findings of the Rural Task Force, which determined that, on average, rural carriers service 19 lines per square mile. *Id. See The Rural Difference, Rural Task White Paper 2,* January 2000, www.wutc.wa.gov/rtf. Mr. Trampush asserted that the lack of access line density and the requirement that ITA members provide ubiquitous coverage in these rural areas translates into high costs. He alleged that Citizens is similarly situated having 3.96 customers per square mile. Tr. at p. 497. He stated if the Citizens data is blended with ITA's the average density would equal 2.4 access lines per square mile.

Mr. Trampush asserted neither Applicant can make the necessary demonstration to show it has the capability and commitment to meet the obligations as an ETC throughout its proposed service area, but for different reasons. Tr. at pp. 503-505. He contended Clear Talk's requested service area for ETC designation is not coterminous with the entire study areas of Fremont Telecom and Project Mutual as it omits the Island Park exchange of Fremont and the Oakley exchange of Project Mutual. Tr. at pp. 505-507. Furthermore, Clear Talk only requested ETC status in one of 18 Citizens' exchanges in the Company's Idaho study area. Tr. at pp. 506-07. Mr. Trampush also asserted Clear Talk is seeking designation in certain partial wirecenters that the Company does not identify. *Id.* Consequently, Trampush argued that granting Clear Talk's Application based on this evidence is improper under the law. *Id.* Finally, Mr. Trampush questioned Clear Talk's financial ability to perform the ETC obligations pointing out that Leap Wireless, which owns 30% of Clear Talk, is now in bankruptcy. Tr. at p. 509.

[18] Mr. Trampush states ITA members and Citizens are subject to state public utility regulation that carries with it an obligation to serve as a carrier of last resort. Tr. at p. 493.

Turning to Nextel Partners' Application, Mr. Trampush conceded it "probably" has the financial capability to provide ubiquitous service if it chooses to. Tr. at p. 510. However, he argued there is strong evidence showing the Company isn't willing to meet its obligations under the Act. Tr. at p. 510. First, he alleged Nextel Partners seeks ETC designation in two-thirds of Citizens' Idaho exchanges that are generally the most heavily populated and lowest cost exchanges. Tr. at pp. 511-12. He observed that in certain study areas the Company would have to build out to meet its ubiquitous service requirement but has offered no specific plans to accomplish this. Tr. at pp. 513-14. He alleged that Nextel Partners when asked could not describe the analysis it would employ when a consumer requests service in an area not currently served by the Company, but within the requested ETC designation area. Tr. at p. 515. He maintained that Nextel Partners is not serious about building out its network to meet new requests for service. Tr. at p. 515.

Mr. Trampush also argued that Nextel Partners is not committed based on his perception of Nextel's business objectives. Tr. at pp. 515, 518, fn. 10. He insisted that Nextel's business strategy is to target the very highest margin customers while largely ignoring the rest. Tr. at pp. 515-17. Mr. Trampush states a survey of Idaho rural telephone company and Nextel Partners' access line data corroborates this business strategy that he says is incompatible with ETC obligations as it would amount to cream skimming in rural areas of Idaho. Tr. at pp. 519-521.

Mr. Trampush asserted the Applicants' witnesses uniformly argue that the presumed benefits of competition with the incumbents are sufficient to satisfy the public interest test. Tr. at p. 523. If this were the case, Mr. Trampush argued, the public interest test would be meaningless. Tr. at p. 525. He alleged an equally important public interest goal is to preserve and enhance universal service as evidenced by the six major universal service principles contained in 47 U.S.C. § 254(b). Tr. at pp. 489-91. Thus, the Applicants must show some public interest benefit beyond the presumptive benefits of competition and he believes they have not done so. Tr. at p. 527. In considering the public interest, Mr. Trampush urged the Commission to determine what goals it is trying to accomplish with USF payments, the likelihood the goals will be met and if the results justify the costs. Tr. at p. 529. Supporting his position, Mr. Trampush cited comments of FCC Commissioner Adelstein who stated:

> Whether granting ETC status to a competitor will bring benefits to a community that it does not already have and what effect it will have on the overall size of the fund, and thus on consumers bills, [are two important issues.] So, a threshold question is, does the benefit to consumers outweigh the ultimate burden on consumers.

Tr. at pp. 529-30. *Remarks of Commissioner Johnathan S. Adelstein* before the National Association of Regulatory Utility Commissioners on February 25, 2003.

Mr. Trampush next argued that the evidence in the record does not support the Applicants' belief that failure to subsidize their operations will deprive consumers of the benefits of competition. He cited the FCC's most recent CMRS Competition report that he claims found 94 % of the total U.S. population lives in counties with three or more mobile telephone service operators. Tr. at p. 531. He asserted this finding is corroborated by ITA's survey of its areas that found an average of 5 wireless carriers operating in them. *Id.* He further alleged that in many of these areas CMRS providers have been offering mobile service for 5 to 10 years without high-cost support. Tr. at p. 532.

Mr. Trampush insisted that wireless carriers are not direct competitors with the incumbent LECs for basic local exchange service as line counts for ITA members and Citizens have been essentially flat during the last three years. Tr. at p. 533. Thus, he believes wireless service is complementary to wireline service with respect to basic local service. Tr. at p. 535.

In conclusion, Mr. Trampush urged the Commission to deny these Applications contending that in this case it does not make sense to devote scarce federal USF money to promote wireless competition in rural areas. Tr. at p. 537.

4. <u>Citizens' Testimony</u>

Citizens also objected to designating either Clear Talk or Nextel Partners as ETCs in its study areas. Citizens offered the testimony and exhibits of its witness Lance A. Tade. Mr. Tade is employed by Citizens Communications as Manager of Regulatory Affairs. Tr. at p. 572. Mr. Tade urged the Commission to carefully consider whether to modify Citizens' study areas to accommodate Clear Talk and Nextel Partners because neither company is requesting ETC designation throughout the Company's entire study area. Citizens is concerned that granting secondary ETC status only over a portion of its study area fosters asymmetric regulation, or in other words, imposing restraints on the incumbent firm not also borne by its competitors. Tr. at p. 584. Granting the ETC requests could lead to each Applicant picking and choosing the geographic extent of its obligations while at the same time requiring the rural incumbent to maintain its obligations over a wider geographic area. Tr. at pp. 584-85. Mr. Tade contended effective competition can only emerge when all carriers enjoy the same freedoms, bear the same responsibilities and endure the same restraints. *Id.* Thus, Mr. Tade argues both Applicants should be required to meet the obligations of an ETC throughout the rural telephone company study areas where it seeks ETC designation and to submit a plan for building out its network to this end. Tr. at p. 588. Mr. Tade also argued the Commission should require the Applicants to provide unlimited free local usage like it does Citizens and other rural LECs.[19] Tr. at p. 592.

Mr. Tade urged the Commission to engage in a cost benefit analysis when looking at the public interest. Tr. at pp. 594-95. He argued the costs of having multiple ETCs include the growth in the size of the federal USF and the consequent increase in the interstate contribution factor required to finance that growth. *Id.* He maintained that as the contribution factor increases, political pressure will mount to cap the fund, and may cause USF draws to decline, thereby endangering the existence of affordable basic local exchange service in rural areas. Tr. at p. 597.

Mr. Tade also argued that many wireless carriers including Clear Talk and Nextel do not properly compensate rural ILECs for wireless calls terminated on ILECs local networks. Tr. at p. 599. If the Applicants are designated as ETCs, they will receive federal USF while still using the networks of the ILECs for free. Tr. at p. 600. Allowing the Applicants to use the incumbents' networks for free provides a disincentive for them to use USF to build out their own networks. *Id.*

COMMISSION FINDINGS AND DECISION

The Commission has jurisdiction to determine whether the Clear Talk and Nextel Partners Applications for ETC designation should be granted. 47 U.S.C. § 214; *Idaho Code* §§ 62-615(1) and 62-610D. We must determine whether the Applicants have met their burden to demonstrate that it is in the public interest to grant the Applications of Clear Talk and Nextel Partners. The Commission also examines whether Clear Talk and Nextel Partners have the capability and commitment to meet the obligations of an ETC throughout their requested service area under the Act.

[19] Tade states for $35.99 a month Nextel Partners customers receive 300 anytime minutes whereas for $10.70 a month Citizens customers receive unlimited local usage. Tr. at p. 593.

1. Clear Talk

Clear Talk alleged that designating it as an ETC would be in the public interest because it would: 1) bring competition to rural, high-cost areas; 2) increase consumer choices for types of service and rates; 3) provide incentives for the incumbent to introduce new, innovative or advanced service offerings; 4) offer customers an expanded calling area for rural customers and mobility; 5) further the deployment of the Company's facilities-based network in Idaho; 6) provide jobs in Idaho to support its network and customer care functions; and 7) improve the quality of service. Despite these representations, the Commission finds that granting Clear Talk's Application would not be in the public interest for several reasons.

First, Clear Talk has requested ETC designation for less than the entire study areas of the affected rural telephone companies in this case. Tr. at pp. 367-68, 380, 418-19. In Fremont's study area, Clear Talk omits the Island Park exchange. Tr. at p. 344, Exhibit 1; *see also* Tr. at p. 507. In Project Mutual's area Clear Talk omits the Oakley, Norland and Minidoka exchanges. In Citizens' study area, the Company requests designation in the Aberdeen exchange only (1 of 18 Citizens' exchanges) and it is unclear because of Clear Talk's partial wirecenter request whether it intends to serve this entire exchange. *Id.* Clear Talk also seeks ETC designation in certain partial wirecenters where its FCC licensed boundaries do not extend over an entire wirecenter. Tr. at pp. 370, 420. The Company failed to identify how many partial wirecenter designations it requests or where they are located. *Id.*

A request for ETC designation for an area less than the entire study area of a rural telephone company generally raises concerns that an Applicant intends to "cream skim" in the rural study area.[20] Rural cream skimming occurs when competitors seek to serve only the low-cost, high revenue customers in a rural telephone company's study area. This is a concern because universal service support is calculated based on a study area-wide <u>average</u> of a rural telephone company that serves customers in <u>both</u> high cost and low cost areas throughout its study area. As the FCC's Federal-State Joint Board on Universal Service noted in 1996:

> Potential "cream skimming" is minimized because competitors, as a condition of eligibility, must provide services <u>throughout the rural telephone</u>

[20] *Recommended Decision, In the Matter of Federal-State Joint Board on Universal Service* CC Docket No. 96-45, 12 F.C.C.R. 87, 180 at ¶ 172 (1996) (stating that potential cream skimming is minimized when competitors, as a condition of eligibility for universal service support, must provide services throughout a rural telephone company's study area). *See also Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia,* CC Docket No. 96-45, 19 F.C.C.R. 1563, 1578 (2004).

company's study area. Competitors would thus not be eligible for universal service support if they sought to serve only the lowest cost portions of a rural telephone company's study area.

12 F.C.C.R. 87, 108 at ¶ 172 (emphasis added).

The Commission finds that the exchanges and partial wirecenters that Clear Talk omits from its request are in areas that are among the least populated in Idaho. Mr. Trampush testified about low access line density in the study areas of the affected rural telephone companies that translates into high costs to provide service for ITA members and Citizens. Accordingly, we conclude that the areas/exchanges and partial wirecenters omitted from Clear Talk's request are high cost areas to serve.

We also find that the population of these omitted exchanges and partial wirecenters compared to those that Clear Talk wishes to serve is widely disparate. For example, the Rupert exchange of Project Mutual has a greater population than the Company's Oakley, Minidoka or Norland exchanges combined. In addition, the St. Anthony exchange of Fremont Telecom is more than twice the size of the Company's Island Park exchange. Accordingly, Clear Talk's Application appears to request that it be designated as an ETC only in the potentially lowest-cost portions of the study areas of the affected rural telephone companies. The FCC in *Virginia Cellular* found that under similar circumstances, granting a carrier ETC designation for only its licensed portion of the rural study area may have the same effect on the ILEC as rural cream skimming.[21] The FCC found:

> [I]t would not be in the public interest to designate Virginia Cellular as an ETC in the study area of NTELOS. Virginia Cellular's licensed CMRS area covers only the Waynesboro wire center in NTELOS' study area. Based on our examination of the population densities of the wire centers in NTELOS' study area, we find that Waynesboro is the lowest-cost, highest-density wire center in the study area of NTELOS, and that there is a great disparity in density between the Waynesboro wire center and the NTELOS wire centers outside Virginia Cellular's service area. . . . Universal service support is calculated on a study-area-wide basis. Although NTELOS did not take advantage of the Commission's disaggregation options to protect against possible uneconomic entry in its lower-cost area, we find on the facts here that designating Virginia Cellular as an ETC only for the Waynesboro wire center could potentially significantly undermine NTELOS' ability to serve its entire study area. The widely disparate population densities in NTELOS' study area and the status of Waynesboro as NTELOS' sole low-cost, high-

[21] *See also Highland Cellular*, CC Docket No. 96-45, FCC 04-37, 2004 WL 770088 (2004).

density wire center could result in such an ETC designation placing NTELOS at a sizeable unfair competitive disadvantage.

Virginia Cellular, 19 F.C.C.R. at 1579-80 (citations omitted and emphasis added).

We find that similar to the *Virginia Cellular* case, even though Clear Talk will only be serving the lower cost areas of the study areas pertinent to its Application, it would still receive USF support based on the incumbent's total cost, including the high cost areas. Thus, Clear Talk will be able to keep its costs down by serving only the highest margin areas. We conclude that this is rural cream skimming and results in an unfair competitive advantage for Clear Talk over the incumbents. This could also undermine the incumbent's ability to serve the entire study area.[22] We find that Clear Talk has not met its burden to demonstrate that it is in the public interest to grant its Application. Consequently, the Commission concludes Clear Talk's Application should be denied.

Second, Clear Talk requested partial wirecenter designation in unidentified study areas of the incumbent rural telephone companies. Without an identification of these areas, it is not possible for the-Commission to determine whether Clear Talk will meet its obligations as an ETC. Furthermore, the request raises the same rural cream skimming concerns discussed above. Recently, the FCC has found that making designations for a portion of a rural telephone company's wirecenter would be inconsistent with the public interest. *Highland Cellular*, CC Docket No. 96-45, FCC 04-37, 2004 WL 770088 (2004). In the *Highland Cellular* decision the FCC reasoned that prior to designating an additional ETC in a rural telephone company's service area, the competitor must commit to provide the supported services to customers throughout a minimum geographic area. This minimum area was found to be a rural telephone company's wire center because rural carrier wire centers typically correspond with county and/or town lines. Requiring the competitive carrier to commit to a minimum geographic area would make it less likely that the competitor will relinquish its ETC designation at a later date. The FCC further

[22] We note that the future of USF support is uncertain. Recently, the Federal-State Joint Board on Universal Service made the recommendation that the FCC limit the scope of high-cost support to a single connection that provides access to the public telephone network. The Joint Board reasoned that supporting a single connection is more consistent with the goals of section 254 of the Act than the present system, and is necessary to preserve the sustainability of the universal service fund. *In the Matter of the Federal-State Joint Board on Universal Service, Recommended Decision*, Docket No. 96-45, FCC 04J-1, 19 F.C.C.R. 4257, 4258-59 (Feb. 27, 2004). Although just a recommendation, the Commission finds that it certainly calls into question whether state commissions should continue to designate multiple ETCs in rural telephone company study areas until the FCC has ruled on this matter.

noted that consumers in rural areas tend to have fewer competitive alternatives than those in urban areas and such consumers are more vulnerable to carriers relinquishing ETC designation. The Commission finds that this reasoning is sound. Accordingly, we find that Clear Talk's lack of commitment to serve at least full wirecenters is problematic and thus its request is inappropriate in this case. We conclude for these reasons that granting Clear Talk's Application is again not in the public interest.

Third, in evaluating Clear Talk's ETC Application, the Commission examined the impact on USF. In *Virginia Cellular,* the FCC found it appropriate to consider the impact of multiple designations on USF when evaluating the public interest.[23] The FCC noted its increasing concern about the impact on USF due to the rapid growth in high cost support distributed to competitive ETCs that increases the size of USF and could increase consumers' costs to support USF. Although individually the amount any one carrier may cause to be added to the fund is small, it still cannot be ignored. We also find persuasive the dissenting comments of FCC Commissioner Martin in the *Highland Cellular* decision. He stated:

> The main goals of the universal service program are to ensure that all consumers, including those in high cost areas, have access at affordable rates.
>
> During the past two years, I have continued to express my concerns with the Commission's policy of using universal service support as a means of creating "competition" in high cost areas. As I have stated previously, I am hesitant to subsidize multiple competitors to serve areas in which costs are prohibitively expensive for even one carrier. The Commission's policy may make it difficult for any one carrier to achieve the economies of scale necessary to serve all of the customers in rural areas.

Highland Cellular, FCC 04-37, 2004 WL 770088 (2004) (C. Martin, dissenting).

Designating Clear Talk as an ETC would have a negative impact on the USF. Moreover, it will not meet the goals of universal service because of the rural cream skimming and partial wirecenter issues discussed above. Finally, Clear Talk has been providing service in the rural areas it requests ETC designation since 2000 and has been doing so without USF subsidies. We believe that designating the Company as an ETC is unjustified.

[23] *Virginia Cellular,* 19 F.C.C.R. at 1578.

Based on the foregoing, the Commission finds that the costs of granting Clear Talk's Application clearly outweigh the benefits. Therefore, we find that it is not in the public interest to grant the Company's Application.

2. Nextel Partners

The Commission's analysis of Nextel Partners' Application centers on the Company's commitment to provide service throughout its proposed ETC designated area and whether it is in the public interest to grant its Application.

a. Capability and Commitment

In demonstrating its capability and commitment, a carrier requesting ETC status is not required to provide "ubiquitous" service throughout a study area prior to being designated as an ETC.[24] However, an applicant's demonstration must encompass something more than a vague assertion of intent on the part of a carrier to provide service. The carrier must reasonably demonstrate to the state commission its ability and willingness to provide service upon designation.[25]

Nextel Partners argued that it must be given a reasonable opportunity, subject to real world business limitations to enter the area. Tr. at p. 70 citing *Western Wireless*, 15 FCCR at 15173, ¶¶ 12-13; Tr. at pp. 71. In post-hearing briefing the Company also stated it would make service provisioning commitments consistent with those announced in the FCC's *Virginia Cellular* decision and make post designation reports to the Commission regarding its build out progress. However, at the hearing Nextel Partners admitted its coverage does not extend to several regions within the rural telephone company study areas where it requests ETC designation. Tr. at p. 100. In response to ITA discovery requests, Nextel Partners stated that it had no specific plans for building out its network in these areas in order to meet its ETC obligation. Tr. at pp. 514-15. Nextel Partners also did not know how long it would take to build out its network to provide service throughout its proposed designation area but speculated that it would take years rather than months. Tr. at p. 140. Furthermore, the Company did not have a plan to determine how it could provide service to requesting customers within its designated areas. Tr. at pp. 140, 514-15.

[24] *Western Wireless Corporation Petition for Preemption,* 15 F.C.C.R. 15168, 15169 at ¶ 2 (2000).

[25] *Id.* at 15178, ¶ 24.

Based on this evidence the Commission finds that the Company has failed to demonstrate a solid commitment to provide service throughout its designated areas. To demonstrate a commitment to serve an entire area for which it seeks designation, the Commission expects an applicant to provide some evidence that it has a generalized plan to meet the needs of consumers in rural areas and the goals of universal service. *Western Wireless* does not prevent the Commission from requiring an applicant to prepare and submit to it a tentative, general business plan to this end. In *Virginia Cellular*, the carrier committed to use USF support to construct cellular sites outside its existing service area within 18 months of being designated an ETC. *Virginia Cellular,* 19 F.C.C.R. 1571 at ¶16. Based on its business experience in these areas since 2000, Nextel Partners should have been able to do this. Instead, it appears that the Company has not done so and will create a business plan <u>only after</u> it receives designation and receives USF subsidies for access lines it already serves—access lines the Company was able to obtain without the aid of USF support. Instead of a commitment, Nextel Partners offered a condition. The Company's case is simply not enough to convince the Commission that Nextel Partners is committed to serving the needs of consumers in rural areas of Idaho throughout the areas it requests ETC designation.

b. <u>Public Interest</u>

To determine whether it would be in the public interest to grant Nextel Partners' Application, the Commission used the factors the FCC has employed in making similar determinations. First, although increased competition is an important factor in this analysis, by itself it is not enough to satisfy the public interest test in rural areas. *Virginia Cellular,* 19 F.C.C.R. at 1565. With this in mind the FCC has evaluated the public interest considering: 1) whether customers are likely to benefit from increased competition; 2) whether designation of an additional ETC would provide benefits not available from incumbent carriers; 3) whether customers would be harmed if the incumbent carrier exercised its option to relinquish its ETC designation; 4) the impact of multiple designations on the universal service fund; 5) the unique advantages and disadvantages of the competitor's service offering; 6) any commitments made regarding quality of telephone service provided by competing providers; 7) and the competitive ETC's ability to provide the supported services throughout the designated service area within a reasonable time frame. *Virginia Cellular,* 19 F.C.C.R. at 1565; *In the Matter of Federal State Joint Board on Universal Service, RCC Holdings, Inc. Petition for Designation as an Eligible*

Telecommunications Carrier Throughout its Licensed Service Area in the State of Alabama, CC Docket No. 96-45, DA 02-3181, Memorandum Opinion and Order ¶¶ 22-25 (November 26, 2002). With this background, we examine the evidence provided by the parties.

In general, Nextel Partners asserted that it is in the public interest to designate it as an ETC because of the increased competition, innovative services and enhanced consumer choices that the Company can bring to the areas in which it seeks designation. Nextel Partners also agued that without USF support it will not be able to extend its network into the most rural areas of Idaho and this will deprive consumers from receiving the benefits they will receive from competition and universal service.

The Commission finds that it is not in the public interest to grant Nextel Partners ETC status. First, Mr. Peabody admitted that he did not know what evidence supported his contention that Nextel Partners needed to receive support in order to extend service to many of the rural areas in Idaho. Tr. at p. 97. In addition and most importantly, the record shows that Nextel Partners is not committed to providing universal service throughout the study areas and exchanges where it seeks designation. Thus, the Commission is concerned that any universal service support the Company would receive would not be used to provide service to those customers in the most rural areas of Idaho. Instead, Nextel Partners' commitment up to this point has been that it will provide service once it receives the funds. That is insufficient. Granting Nextel Partners ETC designation when it is not committed to these same principles is not in the public interest. To do so would not only be contrary to the principles of universal service but would also negatively impact USF. This would be a poor precedent to set at a time when high-cost support distributed to competitive ETCs is growing at a dramatic pace. *See Virginia Cellular,* 19 F.C.C.R. at 1577.

Second, the Commission finds that ETC designation will not directly provide consumers with increased choices in rural areas. The evidence in the record demonstrates that some consumers in these areas already have increased choices for telecommunications services. Since 2000, Nextel Partners has been providing service in rural areas in Idaho. *Id.* In fact, Nextel Partners can provide the required universal services in Idaho. Tr. at p. 21. The Company has accomplished this without ETC designation or the federal universal support that would follow. The record demonstrates that several other wireless carriers have also accomplished the same feat under similar circumstances in these rural areas in Idaho. Tr. at pp. 531-32. Thus, the

Commission concludes that consumers in these rural areas are already benefiting from increased choices for telecommunications service. Designation would allow Nextel to receive USF support for the access lines that it already successfully serves without USF support. The Commission further finds that designating Nextel Partners would not necessarily provide further benefits for the costs that such designation would impose on USF especially when the Commission believes the Company is not committed to serving its entire proposed designation area. As we previously mentioned, we find that designating additional ETCs in rural areas puts additional stress on the USF and the public interest is not served in this case by subsidizing multiple carriers in rural high cost areas.

Finally, the Commission has concerns about the commitments the Company has made regarding the terms and quality of service. Nextel Partners repeatedly represents that its not regulated by the Commission and does not desire to have the Commission's Customer Relations Rules apply to them. Nextel Partners alleged that it believes as a matter of basic business practice it meets or exceeds the standards contained in these rules. Tr. at p. 77. The Company has also made certain commitments consistent with those made in the FCC's *Virginia Cellular* case and stated it would voluntarily comply with the Cellular Telecommunications and Internet Association ("CTIA") Consumer Code.[26] CTIA is the international organization of the wireless industry for carriers, manufacturers, and Internet product and service providers and is "dedicated to expanding the wireless frontier." www.ctia.org. By complying with this Consumer Code Nextel Partners is entitled to display CTIA's "Seal of Wireless Quality Consumer Information." http://files.ctia.org/pdf/Media_Kit_Q&A.pdf. It appears that the only consequence for Nextel Partners if it does not comply with this Code is that it will not be entitled to use CTIA's seal.

Despite the Company's representations, the Commission is still concerned that the Company wants to make quality of service commitments only on its terms. If the Commission

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[26] The Association's webpage states:

> CTIA vigorously represents its members with policymakers in the Executive Branch, the Federal Communications Commission, Congress and the States. CTIA works with its members to shape the issues they care about-from minimizing regulatory mandates to influencing spectrum management, from enhancing security to reining in taxation, and from expanding the wireless Web to defending network performance.

www.ctia.org.

were to accept this, it would have very little and most likely no authority to address consumer issues that may arise in the future concerning the terms and quality of service that Nextel Partners would provide. Furthermore, the Commission finds that the CTIA Consumer Code is merely meant to provide guidelines for the provision of wireless service and in reality gives consumers very little recourse if a carrier fails to follow its terms. The Commission finds that this lack of accountability is troubling and not in the public interest, particularly when the Company could receive a substantial sum of money from USF after ETC designation.

Based on the foregoing, the Commission finds that the costs in granting Nextel Partners request for ETC designation outweigh any benefits that it says will be provided. In addition, we find that the Company is not committed to meeting the obligations of an ETC throughout the service area it seeks ETC designation. Accordingly, we deny the Company's Application.

ORDER

IT IS HEREBY ORDERED that Clear Talk's Application for eligible telecommunications carrier designation is denied.

IT IS FURTHER ORDERED that Nextel Partner's Application for eligible telecommunications carrier designation is denied.

THIS IS A FINAL ORDER. Any person interested in this Order (or in issues finally decided by this Order) or in interlocutory Orders previously issued in these Case Nos. GNR-T-03-8 and GNR-T-03-16 may petition for reconsideration within twenty-one (21) days of the service date of this Order with regard to any matter decided in this Order or in interlocutory Orders previously issued in these cases. Within seven (7) days after any person has petitioned for reconsideration, any other person may cross-petition for reconsideration. *See Idaho Code* §§ 61-626 and 62-619.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 23rd day of July 2004.

PAUL KJELLANDER, PRESIDENT

See Separate Statement Concurring in Part and Dissenting in Part
MARSHA H. SMITH, COMMISSIONER

DENNIS S. HANSEN, COMMISSIONER

ATTEST:

Jean D. Jewell
Commission Secretary

O:GNRT038_GNRT0316_jh10

CONCURRING AND DISSENTING OPINION
OF
COMMISSIONER MARSHA H. SMITH
CASE NOS. GNR-T-03-8 AND GNR-T-03-16
ORDER NO. 29541

I write separately to explain why I concur in part and dissent in part to today's Order. I concur in that portion of the Order denying Clear Talk's Application because it requested ETC designation for less than the entire rural study areas and because it requested partial designation in unidentified rural study areas. These points alone are sufficient to deny Clear Talk's Application. Although I share the majority's concern that granting these Applications may adversely impact the federal USF, this concern is an insufficient basis to deny the Application. While this Commission may not approve of a support system that awards USF to multiple ETCs, this is the system that is in place today. The FCC has asked the Joint Board to examine the issue of high cost USF support in competitive areas and the FCC may adopt a "different framework for the public interest analysis of ETC applications." However, we must consider the public interest of ETC designation with the standards currently in place.

I must respectfully dissent to that portion of the Order denying Nextel Partners' Application. Unlike the majority, I believe Nextel Partners' representations made in its Application and post-hearing brief are sufficient to grant ETC status. Nextel Partners indicated that it would make the same commitments to provide service outside its existing service areas as the wireless carriers made in the FCC's *Virginia Cellular* and *Highland Cellular* cases. Such commitments were sufficient to meet the public interest standard in those two cases and should be sufficient here. Nextel Partners' dilemma is that it needs ETC status to obtain federal USF support to expand in high cost rural areas, but cannot get ETC status without expanding into such areas. Because the majority has denied Nextel Partners' Application, we do not reach the issue of redefining Citizens' study area.

Marsha H. Smith

MARSHA H. SMITH, COMMISSIONER

CERTIFICATE OF SERVICE
UM 1217

I certify that I have this day served the foregoing Opening Brief of the Oregon Telecommunications Association by electronic mail and U.S. mail to the following:

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I further certify that I have this day served the foregoing Opening Brief of the Oregon Telecommunications Association upon all parties of record in this proceeding by electronic mail pursuant to OAR 860-013-0070, to the following parties or attorneys of parties:

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Dated at Olympia, Washington, this 17th day of April, 2006.

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