

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendraye
Ellen Gavin
Marshall Johnson
Phyllis A. Reha
Gregory Scott

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of the Petition of Midwest Wireless Communications, LLC, for Designation as an Eligible Telecommunications Carrier (ETC) Under 47 U.S.C. § 214(e)(2)

ISSUE DATE: March 19, 2003

DOCKET NO. PT-6153/AM-02-686

ORDER GRANTING CONDITIONAL APPROVAL AND REQUIRING FURTHER FILINGS

PROCEDURAL HISTORY

On May 7, 2002, Midwest Wireless Communications, LLC (the Company) filed a petition under the federal Telecommunications Act of 1996 (the Act)¹ asking this Commission to designate it an “eligible telecommunications carrier” (ETC) in areas in central and southern Minnesota where it is currently licensed to provide cellular phone service. The Company needs the designation to qualify for subsidies from the federal universal service fund.

On July 5, 2002, the Commission issued its ORDER REQUIRING ADDITIONAL FILINGS, VARYING TIME PERIOD AND NOTICE AND ORDER FOR HEARING. In its order, the Commission granted the request of Citizens Telecommunications Company (Citizens), Frontier Communications of Minnesota, Inc. (Frontier), the Minnesota Department of Commerce (the Department) and the Minnesota Independent Coalition (MIC) to require the Company to provide additional information. The Commission also referred the matter to an administrative law judge (ALJ) for a contested case proceeding.

The Company made supplemental filings on July 15, July 22, and November 4, 2002.

Following hearings, the ALJ filed her Findings of Fact, Conclusions of Law and Recommendation (ALJ’s Report) on January 2, 2003, recommending granting the Company’s request. The Commission received exceptions to the ALJ’s Report on January 10 from the Department, MIC, and jointly from Citizens and Frontier. The Company filed replies to these exceptions on January 21.

The case came before the Commission for decision on February 13, 2003.

¹ Pub. L. No. 104-104, 110 Stat. 56, codified throughout title 47, United States Code.

FINDINGS AND CONCLUSIONS

I. Historical Background

The federal Telecommunications Act of 1996 is designed to open the nation's telecommunications markets to competition. Its universal service provisions are designed to keep competition from driving rates to unaffordable levels for "low-income consumers and those in rural, insular, and high cost areas"² by subsidizing those rates. Only carriers that have been designated ETCs are eligible to receive these subsidies.³

Traditionally rural rates, which otherwise would have reflected the higher costs of serving sparsely-populated areas, were subsidized explicitly by payments from federal universal service funds and implicitly by requiring carriers to average rural and urban costs when setting rates.⁴

Competition calls into question the continued viability of subsidizing rural rates through averaged pricing. While no one was sure how competition would develop, many credible scenarios suggested that it would first appear in urban areas, for two reasons: First, urban areas cost less to serve. Second, urban rates are often inflated to finance rural subsidies, a cost that new entrants without rural customers would not incur. Together, these factors made urban markets the logical starting point for new entrants seeking to underprice the incumbents. This urban-first scenario could threaten the affordability of telecommunications services in rural, insular and high-cost areas.

In addition, to promote access to telecommunications by people with low income, Congress provided programs to subsidize both the cost of initiating residential telephone service (Link Up⁵) and ongoing residential telephone bills (Lifeline⁶).

Congress directed the Federal Communications Commission (FCC) to work with the states through a Federal-State Joint Board to overhaul existing universal service support systems.⁷ The Act required the FCC to determine which services qualified for subsidies. It authorized the states to determine which carriers qualified for universal service funding.⁸ The Act's term for these carriers was "eligible telecommunications carriers."

² 47 U.S.C. § 254(b)(3).

³ 47 C.F.R. § 54.201(a)(1). However, carriers may receive subsidies for providing toll-free access to Internet service providers, or for providing designated services to eligible schools and libraries, without obtaining ETC status. 47 C.F.R. § 54.621(a).

⁴ *In the Matter of Federal-State Joint board on Universal Service, Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket Nos. 96-45, 00-256 Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking (May 10, 2001) ¶ 13, quoting Ninth Report and Order, 14 FCC Rcd at 20441, ¶ 15.

⁵ 47 C.F.R. § 54.411.

⁶ 47 C.F.R. § 54.401.

⁷ 47 U.S.C. § 254.

⁸ 47 U.S.C. § 214(e).

II. The Legal Standard

Applications for ETC status are governed by federal and state law.⁹ The Act's § 214 requires an ETC to offer certain designated services throughout its ETC-designated service area, use at least some of its own facilities in providing these services, and advertise the availability and price of these services.¹⁰ While the list of designated services may change over time,¹¹ FCC rule § 54.101(a) currently designates the following services:

- voice grade access to the public switched network
- local usage
- touch-tone service or its functional equivalent
- single-party service
- access to emergency services, including 911 and enhanced 911
- access to operator services
- access to interexchange services
- access to directory assistance
- toll limitation for qualifying low-income customers

Procedurally, this Commission has the responsibility for designating ETCs in Minnesota except where it lacks jurisdiction over an applicant.¹² The Commission evaluates an application based on the criteria of the Act, the FCC, and the state itself.¹³ State-imposed criteria should be “competitively neutral” so as not to favor incumbents, competitors, or any particular technology.¹⁴

The Commission must grant ETC status to any qualified applicant, provided that the applicant is not seeking to serve exchanges in which the incumbent telephone company is a rural telephone company. For these areas the state commission must first make a finding that designating more than one carrier is in the public interest.¹⁵ This requirement reflects Congressional concern that some thinly-populated areas might not be able to support more than one carrier.

⁹ 47 U.S.C. §§ 254, 214; 47 C.F.R. § 54.101; Minn. Rules parts 7811.1400 and 7812.1400.

¹⁰ 47 U.S.C. § 214(e).

¹¹ 47 U.S.C. § 254(c)(1).

¹² 47 U.S.C. § 214(e)(6).

¹³ See *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) (state may impose own criteria, in addition to federal criteria, when evaluating requests for ETC status).

¹⁴ 47 U.S.C. § 254(b)(7); *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45 Report and Order, 12 FCC Rcd 8776, 8801-03 ¶¶ 46-51 (USF First Report and Order).

¹⁵ 47 U.S.C. § 214(e)(2). Each grant of ETC status must be consistent with the public interest, convenience and necessity. Minn. Rules part 7811.1400, subp. 2; 7812.1400, subp. 2. “Rural telephone company” is defined at 47 U.S.C. § 153(47).

III. The Company's Application

The FCC has granted the Company a license to provide commercial mobile radio service (CMRS, or cellular phone service) throughout a swath of southern Minnesota. The Company requested ETC designation – including the duties to serve and the opportunities to receive subsidies – for this entire area. The Company's proposed service area includes territories served by fifty telephone companies, including rural telephone companies.

The Company proposes to provide service through both its conventional cellular offerings and through a new Basic Universal Service (BUS) offering. BUS is designed to compete with wireline service, providing the customary basic functionalities of wireline service including those required for ETC designation. But BUS would permit a customer to place toll-free calls over a larger area than would most of the competing wireline services.

The Company seeks subsidies calculated on the basis of the number of subscribers it acquires for all of its service offerings, regardless of the subscribers' rate plan. This request has proven controversial because, according to the Department, some of these rate plans fail to provide all of the services required for ETC designation.

IV. Evaluation

Having reviewed the record and provided all parties with an opportunity to be heard, the Commission finds the analysis of the ALJ persuasive. Consequently, the Commission will accept, adopt and incorporate the ALJ's Findings of Fact, Conclusions of Law and Recommendation, including the recommendation to grant the Company's petition for ETC designation. Consistent with the Commission's practice, however, this grant is made provisionally, pending review and approval of a compliance filing designed to address concerns identified by the ALJ and the parties.

The contents of the compliance filing, and the Commission's analysis in general, are set forth below.

A. Offering Necessary Services

The ALJ's Report concludes that the Company's proposal demonstrates an ability and commitment to provide all the services required for ETC designation throughout the requested service area. See ALJ's Report at ¶¶ 15, 19-25. But parties take exception to this conclusion, arguing that some of the Company's rate plans fail to incorporate all the required services, and that the Company has failed to demonstrate ability and commitment to serve all parts of its proposed service area.

1. Rate Plans

Among the services required for ETC designation is "local usage," defined as "an amount of minutes of use of exchange service, prescribed by the [FCC], provided free of charge to end users."¹⁶ To date, the FCC has not prescribed the minimum number of calling minutes necessary to fulfill this requirement.

¹⁶ 47 C.F.R. § 54.101(2).

The Department and MIC agree that the Company's BUS rate plan provides all the required services, but argue that some of the Company's other rate plans do not provide adequate local service. While the BUS plan offers unlimited local calling toll-free, the Company's other plans offer only a limited number of minutes of toll-free calling each month, or none at all. In response to these concerns, the Company pledges to comply with all minimum local usage requirements that the FCC might establish in the future. Nevertheless, the Department and MIC recommend denying the Company's ETC designation. Alternatively, they recommend granting the designation only with respect to the Company's BUS offering, as was done in another state.¹⁷

The Commission is not persuaded to grant either form of relief. Nothing in the Act or FCC rules prohibits an ETC from offering a variety of rate plans, provided that at least one rate plan offers all the required services. In the present case, no party disputes that the BUS plan provides all the required services, including adequate local usage. That is sufficient. As the ALJ remarked, if the Company wants to offer a rate plan with "premium features or an expanded calling area as well, 'that is between the company and the customer.'"¹⁸

Furthermore, the practice of restricting the Company's ETC designation to a specific service plan would be discriminatory, contravening the FCC's admonition to remain competitively neutral. The Commission has not imposed similar restrictions on other ETCs. For example, some ETCs offer measured local service -- that is, they offer an optional service plan that involves an incremental charge for each minute of use. By the Department's and MIC's reasoning, such measured service plans do not provide "local usage,"¹⁹ yet the Commission has not limited the subsidies paid to ETCs offering such plans. The Commission is disinclined to single out the Company for such limitations.

2. Ability and Commitment to Serve

MIC, Citizens and Frontier also object to the ALJ's conclusion that the Company has demonstrated an ability and commitment to provide the required services throughout its entire service area. They note that the Company does not yet have facilities to serve some parts of the area. The Company declined to provide an estimate of when it would build such facilities, but has acknowledged that building new cellular towers typically takes from 12 to 15 months. MIC, Citizens and Frontier argue that if the Company is going to receive ETC designation, the Commission should impose a timetable on the Company's plans for building out its infrastructure just as the Commission imposed on incumbent telephone companies in the *Ely*²⁰ and *Tofte*²¹ cases.

¹⁷ *In the Matter of the Application of WWC Texas RSA Ltd. Partnership for Designation as an Eligible Telecommunications Carrier Pursuant to 47 U.S.C. § 214(e) and PUC Subst. R. 26.418*, Docket No. 22278, SOAH Docket No. 473, 00-1167, ORDER (October 30, 2000).

¹⁸ ALJ Report at ¶ 47, quoting *In the Matter of Minnesota Cellular Corporation's Petition for Designation as an Eligible Telecommunications Carrier*, Docket No. P-5695/M-98-1285 ORDER GRANTING PRELIMINARY APPROVAL AND REQUIRING FURTHER FILINGS (October 27, 1999).

¹⁹ 47 C.F.R. § 54.101(a)(2).

²⁰ *In the Matter of Petition for Assignment of an Eligible Telecommunications Carrier to Provide Service in Unassigned Territory in Northern Minnesota*, Docket No. P-407/EM-98-1193 (July 28, 1999).

²¹ *In the Matter of the Request for Service in Qwest's Tofte Exchange*, Docket No. P-421/CP-00-686 (June 21, 2002).

The Company opposes this proposal as discriminatory, noting that the Commission did not impose similar requirements on incumbent telephone companies as a condition of receiving ETC status. The Commission agrees.

A company need not have all its facilities in place before it receives ETC designation.²² And, while *Ely* and *Tofte* illustrate that the Commission occasionally imposes deadlines on a telephone carrier's construction plans, these cases are easily distinguishable from the present case: Neither case arose as a result of the carrier's request for ETC designation; rather, they arose as a result of unfulfilled customer requests for service.

Indeed, *Tofte* supports the Company's position. Qwest's predecessor was designated an ETC in the Tofte exchange in 1997,²³ and had "carrier of last resort" obligations predating that time. Yet the Commission did not begin imposing construction deadlines when it granted ETC designation; the need to impose a construction schedule only arose years later when customer complaints made the Commission aware that a problem existed.

Here the Company is able to offer its services through approximately 200 cell sites in and around the state, and has pledged to build an additional 15 cell sites upon designation as an ETC. The Company has pledged to meet customer orders for new service through a variety of measures including additional cell sites, cell extenders, rooftop antennae, high-powered phones, and the resale of existing service. In addition, the Company has stated that it is willing to address a customer's request for service by developing a schedule for extending service. The ALJ regards these assurances as adequate for the purpose of granting ETC designation. The Commission agrees.

If and when evidence arises that the Company has failed to fulfill its ETC obligations, the Commission may pursue remedial actions including the revocation of the Company's ETC designation.²⁴ But that matter is beyond the scope of the current docket.

²² *In the Matter of the Federal-State Joint Board on Universal Service, Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, CC Docket No. 96-45, FCC 00-248, Declaratory Ruling ¶¶ 12-13 (July 11, 2000).

²³ *In the Matter of the Request by Members of MIC for Designation as Eligible Telecommunications Carrier and Temporary Restriction of Certain Toll Restriction Services; In the Matter of the Request by Certain Other Incumbent LECs for ETC Designation*, Docket No. P-999/M-97-1270 ORDER DESIGNATING PETITIONERS AS ELIGIBLE TELECOMMUNICATIONS CARRIERS, ALLOWING ADDITIONAL TIME TO PROVIDE CERTAIN SERVICES, APPROVING RATE REDUCTIONS FOR QUALIFIED LOW-INCOME CUSTOMERS, AND REQUIRING FILINGS (December 23, 1997).

²⁴ 47 U.S.C. § 254(e); *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 No. 96-45, 15 FCC Rcd 15168, 15174 ¶ 15 (2000).

B. Advertising Necessary Services

The Act requires an ETC to advertise the availability and price of the required services throughout the designated service area using media of general distribution.²⁵ An ETC must also publicize the availability of Link-Up and Lifeline services in a manner reasonably designed to reach those likely to qualify for those services.²⁶

After the Department asked the Company to elaborate on its advertising plans, the Company agreed to work with the Commission's staff and the Department to reach agreement on an acceptable advertising plan within 30 days of ETC designation. On this basis, the ALJ found that the Company demonstrated an ability and commitment to fulfill this advertising obligations.

Having reviewed the record and provided all parties with an opportunity to comment, the Commission will adopt the recommendation of the ALJ. The Company has demonstrated its willingness and ability to advertise the required services.

C. Using Own Facilities

The Act requires an ETC to use at least some of its own facilities to provide the designated services in its service area. As noted above, the Company currently is able to offer its services through approximately 200 cell sites in and around the state, and has pledged to build an additional 15 cell sites upon designation as an ETC. The Company has pledged to meet customer orders for new service through a variety of measures including additional cell sites, cell extenders, rooftop antennae, and high-powered phones, among other things. In addition, the Company has stated that it is willing to address a customer's request for service by developing a schedule for extending service.

The Commission concludes that the Company has demonstrated a willingness and commitment to employ at least some of its own facilities in providing the designated services to its customers.

D. Public Interest

1. The Legal Standard

While the Act generally requires a state commission to designate all qualifying applicants as ETCs, that is not true for areas served by rural telephone companies. For those areas, a state commission must first make a finding that designating more than one ETC would be in the public interest.²⁷ As noted above, the Company seeks ETC designation for areas served by rural telephone companies, and therefore this Commission must determine whether granting the Company's petition would be in the public interest.

When the FCC has had to make this determination, it has considered 1) whether customers are likely to benefit from increased competition, 2) whether designation of an ETC would provide benefits not available from incumbent carriers, and 3) whether customers would be harmed if the incumbent

²⁵ 47 U.S.C. § 214(e)(1)(B).

²⁶ 47 C.F.R. §§ 54.504(b), 54.411(d).

²⁷ 47 U.S.C. § 214(e)(2).

carrier exercised its option to relinquish its ETC designation.²⁸ But states may add their own criteria, so long as they do not regulate the entry or rates of a CMRS provider.²⁹

The Department and MIC argue that the public interest standard requires consideration of additional factors, such as the affordability of the Company's services and the effect of the Company's ETC status on the federal universal service fund.

2. FCC Standard

Applying the FCC's standard, the ALJ concludes that granting the Company's request would promote the public interest. It would increase customer choice and provide new services and functionalities made possible by wireless technology that are not provided by the incumbents. Customers would not merely have the option of a cheaper version of the incumbent's service; they would have the option of mobility, broader calling scopes, numeric paging and text messaging, and the like. Also, the ALJ states that granting the Company's petition would enhance competition, encouraging all providers to make infrastructure investments and promote quality service. The ALJ could not identify any harm to consumers as a result of granting the Company's petition. Finally, the ALJ notes that the harm to incumbent ETCs from increased competition is mitigated by the fact that, due to the FCC's subsidy formulas, incumbents do not lose much high-cost subsidy even if they lose a customer to a competitor.³⁰

The Commission finds the ALJ's reasoning persuasive. Additionally, the Commission has previously found that the risk that an incumbent carrier would surrender its ETC designation does not warrant withholding ETC designation from a competitor.³¹

While the Commission finds the ALJ's Report persuasive, MIC does not. The fact that the Company provides competition and services today demonstrates to MIC that the Company does not need high-cost subsidies. Consequently, MIC argues, there is no basis for concluding that the subsidies will cause any of these alleged benefits.

Admittedly, proving causation is difficult because no one can know what the Company would do in the future in the absence of federal subsidies. The Commission can only observe that the Company claims that the federal subsidies will make it financially viable to build 15 additional towers, and that the Company pledges to use the subsidies only for their intended purposes. This is not much different than the level of evidence that the Commission requires to certify that the state's ETCs will use the federal high-cost subsidies only for the provision, maintenance and upgrading of facilities and

²⁸ *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) (RCC/Alabama Order).

²⁹ See *Texas Office of Public Utility Counsel*, *supra*.

³⁰ ALJ Report at ¶¶ 33-38. An overview of the current subsidy programs can be found in *In the Matter of Federal State Joint Board on Universal Service*, CC Docket No. 96-45, Public Notice, FCC 03J-1 (February 7, 2003).

³¹ See *In the Matter of Minnesota Cellular Corporation's Petition for Designation as an Eligible Telecommunications Carrier*, Docket No. P-5695/M-98-1285 (October 27, 1999) at 18.

services for which the support is intended.³² For such certifications, however, the Commission also required ETCs to file affidavits, additional documentation pertaining to the amount of federal high-cost support received for the prior year, and the ETC's operational and capital expenditures.³³

The ALJ recommends that the Company be required to make a compliance filing containing, among other things, "all information the state typically gathers from ETCs to make its annual certification that ETCs in Minnesota are using high-cost funds...." ALJ's Report at ¶ 62. The Commission will adopt this recommendation as a reasonable effort to document the Company's intentions.

3. Affordability

While acknowledging the importance of "affordability" to promoting the public interest, the ALJ concludes that in this case market forces can address this issue adequately. Competitive carriers do not have monopoly power to exploit; consequently, they can only win customers (and federal subsidies) by offering a service with an attractive combination of quality and price. The ALJ observes that the Company had demonstrated its capacity to do so, attracting 88,000 customers already.

If the Commission desires a more objective basis upon which to judge the affordability of the Company's services, the ALJ notes that the Company's BUS rate plan is priced at \$14.99 per month for unlimited local usage. The ALJ concludes that this combination of rates and quality is affordable by any standard.

The Department takes issue with the ALJ's analysis of affordability, arguing that the facts cited by the ALJ are taken out of context. The Department notes that the Company's 88,000 subscribers represent a small percentage of the roughly 1 million people that live within the Company's Minnesota service territory. And the Company's offer to provide its BUS rate plan for \$14.99 per month fails to reflect the cost of buying, installing and activating various equipment at the customer's premises. It does not reflect the cost of paying a deposit. It does not reflect any liabilities arising out of long-term contracts and leases. It does not reflect the costs imposed by possibly onerous service agreements. And it does not reflect the burden of unresponsive network maintenance policies, or billing and payment policies.

Moreover, there was some dispute about whether all the necessary equipment for BUS was still being manufactured and would remain available to customers.³⁴

The Department asks that the Commission not grant final approval to the Company's petition until it has resolved all these issues. The Department notes that the ALJ shared some of these concerns, recommending that the Company make a filing containing –

³² 47 C.F.R. § 54.313(a) (pertaining to non-rural telephone companies); 47 C.F.R. § 54.314(a) (pertaining to rural telephone companies). See, for example, *In the Matter of Annual Certifications Related to Eligible Telecommunications Carriers' (ETCs) Use of Federal Universal Service Support*, Docket No. P-999/M-02-1403 ORDER CERTIFYING ETC's USE OF FEDERAL HIGH-COST SUBSIDY (December 23, 2002).

³³ *Id.*, NOTICE OF FILING DEADLINE (August 22, 2002).

³⁴ ALJ's Report at n.23.

information specifying all rates, terms, and conditions applicable to its BUS plan, including the option for customer premise equipment and the charges it plans to assess for it ... and its proposed customer service agreement.³⁵

The Commission finds merit in the Department's concerns. The fact that the Company has acquired 88,000 customers speaks well of its ability to offer affordable service generally, but it says nothing about the affordability of the BUS rate plan specifically. If affordability has any meaning, it cannot be restricted only to a consideration of recurring costs; affordability must take account of one-time costs, customer contract terms, and simple availability, among other things. To the extent those matters remain unresolved, the issue of the BUS's affordability remains unresolved.

To its credit, the Company has sought to clarify these matters. In its replies to exceptions, the Company denies that there is any basis to doubt that the relevant equipment will continue to be available to consumers. Furthermore, at hearing the Company agreed to make a compliance filing setting forth all relevant customer charges and the terms of customer contracts and leases. The Company committed to leasing the relevant equipment needed inside the customer's home for the BUS offering for \$5.00 per month. The Company agreed to provide all other equipment needed to get the BUS offering to the customer at no charge. Finally, the Company committed to limit installation charges to no more than \$35; where installation merely requires placing a small antenna on a customer's roof, the Company would provide the installation free of charge.

The Commission finds these commitments encouraging. Having heard from all parties, the Commission sees the wisdom in the ALJ's recommendation to require a compliance filing. The Commission will elaborate on the ALJ's recommendation, directing the Company to file a tariff with terms and rates for the BUS, with Lifeline and Link-Up and other services which may be added to a universal service offering. In addition, the Company shall file its customer service agreement with customer service and dispute resolution policies; network maintenance policies with procedures for resolving service interruptions and any customer remedies; billing and payment policies; and deposit policies. Finally, the Company shall include a statement of its understanding of its federal obligations regarding its service area. With this information, the Commission will be better able to resolve any doubts about whether granting the Company's petition is in the public interest.

4. Effect on Federal Universal Service Fund

The Company anticipates recovering between \$6 million to \$8 million annually if it is designated an ETC throughout its licensed service territory in Minnesota.

MIC questions whether this is a prudent use of public funds. MIC cautions that permitting the Company to receive federal Universal Service subsidies will cause all telecommunications carriers to make larger contributions to the federal Universal Service Fund. MIC argues for denying the Company's ETC petition, or at least restricting the ETC designation to the Company's BUS service.

The Commission will decline both proposals. It may well be true that adding more ETCs will cause the size of the federal Universal Service Fund to grow, requiring larger contributions. But this fact alone does not persuade the Commission to withhold the Company's designation.

³⁵ ALJ's Report at ¶ 62.

Various reasons support the Commission's conclusion. First, the FCC has concluded that the financial impact on the federal fund of designating a carrier as an ETC is irrelevant to whether a carrier should be so designated.³⁶

Second, if this Commission were inclined to consider the impact on the federal fund, it would discover that the Company's projected subsidy would increase the fund's size by roughly 0.25%. The Commission is not persuaded that this level of impact warrants singling out the Company for special consideration.

MIC argues that the Commission should consider not merely the cost of the Company's subsidies, but the cost of the subsidies that might be paid to all CMRS providers licensed to provide service in the Company's service territory, or in the entire state, assuming all CMRS providers in the state became ETCs. The Commission disagrees. The issue before the Commission is the Company's petition, and no one else's. In this docket the Commission will decline to consider the effect of other CMRS companies' subsidies, just as the Commission has not considered the effect of the incumbent ETCs' subsidies. To do otherwise would violate the principle of competitive neutrality.

Third, Minnesota telecommunications carriers -- and indirectly, Minnesota ratepayers -- are already paying into the fund; it would be inequitable for qualified Minnesota providers and Minnesota ratepayers not to derive the benefit of the fund, too.

Finally, the FCC has initiated a proceeding to re-consider how universal service support is distributed.³⁷ To the extent that these issues warrant further review, they will be addressed and remedied holistically in the federal docket. Thus, these issues need not be addressed on a piecemeal basis in company-specific dockets such as this.

5. Conclusion

The Commission tentatively finds that granting the Company's petition would be in the public interest. Customers would be likely to benefit from increased competition, including the provision of services and functionalities that the incumbent providers do not offer. No customer harms are foreseeable. The Commission has cause to find that the BUS service is affordable, although it will await the Company's compliance filing on this question. And the Commission is not persuaded that concerns about the size of the federal Universal Service Fund require the Company's ETC designation to be withheld or limited in scope.

E. Service Area Disaggregation

1. Legal Standard

A carrier must offer and advertise the required basic services throughout any "service area" for which the carrier is designated an ETC. While state commissions establish service area boundaries, those boundaries typically coincide with the service territory boundaries or exchange area boundaries of incumbent landline carriers. The Act defines "service area" as –

³⁶ RCC/Alabama Order at ¶ 3.

³⁷ See *In the Matter of Federal-State Joint Board on Universal Service*, Order, FCC 02-307 (rel. Nov. 8, 2002).

a geographic area established by a State commission ... for the purpose of determining universal service obligations and support mechanisms. In the case of an 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) of this title, establish a different definition of service area for such company.³⁸

A telephone company's "study area" generally comprises the company's entire service territory within the state.³⁹ This default definition assigns all of a rural telephone company's exchanges to one large service area.

Large service areas pose an obstacle to carriers seeking ETC status. The FCC concluded that –

service areas should be sufficiently small to ensure accurate targeting of high cost support and to encourage entry by competitors.... [L]arge service areas increase start-up costs for new entrants, which might discourage competitors from providing service throughout an area because start-up costs increase with the size of a service area and potential competitors may be discouraged from entering an area with high start-up costs. As such, an unreasonably large service area effectively could prevent a potential competitor from offering the supported services, and thus would not be competitively neutral, would be inconsistent with section 254, and would not be necessary to preserve and advance universal service....

[I]f a state adopts a service area that is simply structured to fit the contours of an incumbent's facilities, a new entrant, especially a CMRS provider, might find it difficult to conform its signal or service area to the precise contours of the incumbent's area, giving the incumbent an advantage....⁴⁰

To address these problems, the Act authorized the states to re-define an incumbent's service area, dividing the territory into multiple areas for universal service purposes. But small service areas may pose problems, too. In considering whether to disaggregate a rural telephone company's service territory, the state and the FCC must consider three factors identified by the Joint Board:⁴¹ 1) the risk of "cream skimming," 2) the regulatory status accorded rural telephone companies under the 1996 Act, and 3) any additional administrative burdens that might result from the disaggregation.⁴²

A state may disaggregate a non-rural telephone company's service area at its own discretion. But a rural telephone company's service area may not be disaggregated without the mutual consent of the state and the FCC.⁴³

³⁸ 47 U.S.C. § 214(e)(5); 47 C.F.R. § 54.207.

³⁹ USF First Report and Order at ¶ 172, fn. 434.

⁴⁰ *Id.* at ¶¶ 184-85, footnotes omitted [discussing non-rural service areas].

⁴¹ 47 C.F.R. § 54.207(c)(1)(ii).

⁴² See *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Recommended Decision, 12 FCC Rcd 87, 179-80, ¶¶ 172-74 (1996) (Joint Board Recommendation).

⁴³ 47 C.F.R. § 54.207(c).

2. The Company's Proposal

As noted above, the FCC has authorized the Company to provide commercial mobile radio service (CMRS) throughout a swath of southern Minnesota. The Company seeks ETC designation for its entire service territory. But the boundaries of the Company's licensed service territory do not coincide with the boundaries of the incumbents' underlying service areas.

For most service areas within the Company's service territory, these boundary issues pose no problem. The Company asks the Commission to designate it an ETC in any exchange in its service territory that is served by a non-rural telephone company, since the Commission has the discretion to redefine the service areas of non-rural telephone companies unilaterally.

Additionally, where a rural telephone company's entire service area is within the Company's service territory, the Company is willing to be designated an ETC for the entire service area.

But where the Company's authority to provide wireless service extends only part way through a rural telephone company's service area, the Company would be precluded from obtaining ETC designation unless the service area were disaggregated. The Company asks for this relief. That is, the Company seeks to disaggregate the incumbent companies' service areas to the extent necessary to permit the Company to obtain ETC designation throughout its licensed service territory – even if this requires disaggregating below the exchange level.

3. Comment

The ALJ recommends granting the Company's request and petitioning the FCC to disaggregate the service areas. ALJ Report at ¶¶ 55-59.

No party opposes the Company's request, except where the Company seeks ETC designation with respect to fractional parts of an exchange. Citizens and Frontier argue that this aspect of the Company's proposal would provoke customer confusion, frustrate the federal scheme matching subsidies to cost, and increase administrative burdens.

4. Commission Action

In considering whether to disaggregate a rural telephone company's service territory, the FCC directs the Commission to consider three factors identified by the Joint Board: 1) the risk of "cream skimming," 2) the regulatory status accorded rural telephone companies under the 1996 Act, and 3) any additional administrative burdens might result from the disaggregation.⁴⁴

"Cream skimming" may arise if a competitive ETC were to target low-cost exchanges, or low-cost portions of an exchange. Generally, a competitive ETC receives a subsidy for each access line it serves equal to the average subsidy per line that would otherwise be paid to the incumbent carrier in the study area. If a competitive ETC were to target unusually low-cost areas within a study area, the ETC might receive the same subsidies per line as the incumbent while incurring a fraction of the cost per line. The incumbent, in contrast, would be left serving the relatively costly customers.

⁴⁴ See *Joint Board Recommendation*, 12 FCC Rcd at 179-80, ¶¶ 172-74.

But the record does not support the suggestion that the Company is targeting areas based on their cost characteristics. Rather, the Company is targeting all areas within its licensed service territory. Any correlation between the Company's disaggregation proposal and the cost characteristics of the areas the Company seeks to serve appears to be coincidental.

Additionally, the FCC now permits incumbents to disaggregate their own service areas, thereby letting them target their subsidies to their high-cost areas.⁴⁵ Disaggregation reduces the opportunity for cream-skimming; a competitive ETC that targeted only low-cost areas would also receive only low levels of subsidies. Most Minnesota telephone companies, including Citizens⁴⁶ and Frontier,⁴⁷ have elected to disaggregate their own service areas down to the exchange level for universal service purposes, and even to subdivide their exchanges into cost zones. Consequently, the Commission finds little prospect of cream-skimming resulting from disaggregating the exchanges at issue into sub-exchange service areas.

Similarly, disaggregating these service areas is consistent with the regulatory status accorded rural telephone companies under the Act. For example, the Commission has expressly determined that Frontier is a rural telephone company under the Act. This determination entitles Frontier to special status under the Act⁴⁸ and the statutory exemptions granted under this provision, exemptions from interconnection, unbundling and resale requirements, remain unchanged as a result of the disaggregation of Frontier's service area. Further, the disaggregation of Frontier's service area does not reduce the careful consideration, including a determination of public interest, that the Commission must give to any application by a CLEC for ETC status in Frontier's service area.

The Commission is not persuaded that this disaggregation will result in significant additional administrative burdens. Given Citizens' and Frontier's own election to disaggregate their service areas to the exchange and sub-exchange levels, it is difficult to conclude that the resulting administrative challenges can be attributed to this docket.

Finally, the Commission is not persuaded that disaggregating exchanges would prompt much additional customer confusion. While exchange boundaries have long held significance to people in the local telephone business, it is less clear that these boundaries have been so significant to customers. Moreover, customers are generally aware that a cellular phone may have a different calling scope than a landline phone.

For all of these reasons, the Commission finds the Company's request reasonable, and will grant it. The Commission will petition the FCC to disaggregate, for ETC purposes, the incumbents' service areas as requested by the Company.

⁴⁵ 47 C.F.R. § 54.315.

⁴⁶ *In the Matter of Citizens Telecommunications Company, Inc. Election of a Federal High-Cost Universal Service Support Disaggregation Plan*, Docket No. P-407/DP-02-426, ORDER (May 31, 2002).

⁴⁷ *In the Matter of Frontier Communications, Inc. Election of a Federal High-Cost Universal Service Support Disaggregation Plan*, Docket No. P-405/DP-02-425, ORDER (May 31, 2002).

⁴⁸ 47 U.S.C. § 251(f).

V. Conclusion

The Commission will grant preliminary approval to the Company's application, finding that the Company has made a credible showing of its ability and intention to provide a high quality, affordable universal service offering throughout its proposed service area. Final approval will be granted upon Commission review and approval of a filing complying with the requirements discussed in the body of this Order.

ORDER

1. The Commission accept, adopt and incorporate the ALJ's Findings of Fact, Conclusions of Law and Recommendation, and grants preliminary approval to the Company's application for designation as an eligible telecommunications carrier. Final approval is contingent upon Commission review and approval of the compliance filing set forth in paragraph 2.
2. The Company shall make a compliance filing including the following items:
 - (a) information typically gathered from ETCs in the annual certifications,
 - (b) information on rates, terms and conditions applicable to the BUS, including customer premise equipment options and charges,
 - (c) an advertising plan,
 - (d) a tariff with terms and rates for the BUS, with Lifeline and Link-Up and other services which may be added to a universal service offering,
 - (e) a customer service agreement with customer service and dispute resolution policies, network maintenance with procedures for resolving service interruptions and any customer remedies, billing and payment and deposit policies, and
 - (f) a list of the Company's federal obligations regarding its service area.
3. The Commission will petition the FCC to disaggregate, for ETC purposes, the service areas of the relevant incumbent telephone companies to the extent necessary to permit the Company to obtain ETC designation throughout its CMRS licensed service territory.

4. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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