

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

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Marshall Johnson  
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Gregory Scott

Chair  
Commissioner  
Commissioner  
Commissioner

In the Matter of the Petition of Minnesota  
Southern Wireless Company d/b/a  
HickoryTech for Designation as an Eligible  
Telecommunications Carrier Under 47 U.S.C.  
§214(e)(2)

ISSUE DATE: August 14, 2003

DOCKET NO. PT-6213/M-03-591

ORDER GRANTING CONDITIONAL  
APPROVAL AND REQUIRING  
ADDITIONAL FILINGS

**PROCEDURAL HISTORY**

On April 17, 2003, Minnesota Southern Wireless Company d/b/a HickoryTech (HickoryTech or the Company) filed a petition for designation as an Eligible Telecommunications Carrier (ETC). HickoryTech requested that the Commission designate it as eligible to receive all available support from the federal Universal Service Fund (USF), including support for all consumers subscribing to its services in rural, insular and high cost areas and for qualifying low income customers.

On May 7, 2003, the Department of Commerce (DOC) filed comments recommending that the Commission grant preliminary approval to HickoryTech's petition subject to compliance filings.

On May 19, 2003, Citizens Telecommunications Company of Minnesota (Citizens) and Frontier Communications of Minnesota, Inc. (Frontier) filed reply comments and a petition for intervention.

On May 28, 2003, HickoryTech filed its opposition to the petition to intervene by Citizens and Frontier. HickoryTech also filed a motion to strike the comments filed by Citizens and Frontier or, in the alternative, leave to reply to the late-filed comments of Citizens and Frontier.

On June 18, 2003, Midwest Wireless Communications L.L.C. (Midwest Wireless) filed a petition to intervene.

On June 19, 2003, RCC Minnesota, Inc. (RCC) filed a petition to intervene.

On July 17, 2003, the matter came before the Commission.

## FINDINGS AND CONCLUSIONS

### **I. Historical Background**

The federal Telecommunications Act of 1996 (the Act)<sup>1</sup> 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"<sup>2</sup> by subsidizing those rates. Only carriers that have been designated ETCs are eligible to receive these subsidies.<sup>3</sup>

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.<sup>4</sup>

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 Up<sup>5</sup>) and ongoing residential telephone bills (Lifeline<sup>6</sup>).

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

<sup>2</sup> 47 U.S.C. § 254(b)(3).

<sup>3</sup> 47 C.F.R. § 54.201(a)(1).

<sup>4</sup> *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, 16 FCC Rcd 11244, 11251, ¶ 13 (2001).

<sup>5</sup> 47 C.F.R. § 54.411.

<sup>6</sup> 47 C.F.R. § 54.401.

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.<sup>7</sup> 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. The Act's term for these carriers was "eligible telecommunications carriers" (ETCs).<sup>8</sup>

## II. The Legal Standard

Applications for ETC status are governed by federal and state law.<sup>9</sup> The Act's § 214 requires an ETC to offer certain designated services throughout 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.<sup>10</sup> While the list of designated services may change over time,<sup>11</sup> 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

This Commission has the responsibility for designating ETCs in Minnesota except where it lacks jurisdiction over an applicant.<sup>12</sup> The Commission evaluates an application based on the criteria of

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<sup>7</sup> 47 U.S.C. § 254.

<sup>8</sup> 47 U.S.C. § 214(e).

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

<sup>10</sup> 47 U.S.C. § 214(e) (1).

<sup>11</sup> 47 U.S.C. § 254(c)(1).

<sup>12</sup> 47 U.S.C. § 214(e)(6).

the Act, the FCC, and the state itself.<sup>13</sup> State-imposed criteria must be “competitively neutral” so as not to favor incumbents, competitors, or any particular technology.<sup>14</sup>

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.<sup>15</sup> This requirement reflects Congressional concern that some thinly-populated areas might not be able to support more than one carrier.

Since HickoryTech seeks ETC designation for areas served by rural telephone companies, the Commission must determine whether granting the Company’s petition would be in the public interest.

When making the public interest determination the Federal Communications Commission (FCC) 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 carrier exercised its option to relinquish its ETC designation.<sup>16</sup> But states may add their own criteria, so long as they do not regulate the entry or rates of a Commercial Mobile Radio Service (CMRS) provider.<sup>17</sup>

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<sup>13</sup> See *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 417-18 (5th Cir. 1999) (state may impose own criteria, in addition to federal criteria, when evaluating requests for ETC status).

<sup>14</sup> 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 (1997). (USF First Report and Order).

<sup>15</sup> 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).

<sup>16</sup> *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, 17 FCC Rcd 23532, 23540-42 ¶¶ 22-25 (2002) (RCC/Alabama Order).

<sup>17</sup> See *Texas Office of Public Utility Counsel*, supra.

### **III. HickoryTech's Application**

HickoryTech is a CMRS carrier, providing mobile services<sup>18</sup> and interstate telecommunications services.<sup>19</sup> HickoryTech is authorized to provide mobile service to south/central Minnesota and personal communications services (PCS) to Mankato and Rochester.

HickoryTech stated that it is a full-service wireless carrier which offers all of the services supported by the federal universal service fund (USF) throughout the area for which ETC designation is being sought. It indicated that it utilizes a combination of its own facilities, including its own wireless antennas, towers, and mobile switching offices, and the resale services of an affiliate, which enables it to serve the entire Mankato exchange.

HickoryTech currently offers a qualifying basic plan, the Wireless Phone Link (WPL), to its subscribers. The WPL service offers wireless calling including unlimited toll-free calling within the 507 area code for \$29.95 per month. This plan restricts roaming and bills as toll calls all calls outside the 507 area code. If Hickory tech is granted ETC status, the Company will reduce the price of its WPL service to \$14.99 in all areas where ETC status is granted.

HickoryTech stated it would use the universal support for the provision and maintenance of the supported services by expanding and improving its wireless network.

HickoryTech requested ETC designation for all areas within the Company's cellular licensed area and a portion of its PCS licensed area. HickoryTech requested immediate ETC designation for identified exchanges of Qwest, a non-rural local exchange carrier (LEC) and for rural LEC study areas HickoryTech serves in their entirety.<sup>20</sup> Further, it requested ETC designation in the rural service areas where its license covers only portions of a rural incumbent LEC service area.<sup>21</sup> Specifically, HickoryTech requested redefinition of rural LEC's service areas or disaggregation by wire centers for the LEC service areas listed in Exhibit B of its application and requested disaggregation below the wire center level for the service areas of LECs listed in Exhibit C to its application.

### **IV. Positions of the Parties**

#### **A. Department of Commerce**

It was the position of the DOC that HickoryTech made a credible preliminary showing of its intent and capability of providing the nine supported services throughout its requested service area. It

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<sup>18</sup> As defined in 47 U.S.C. §153(27).

<sup>19</sup> As defined in 47 U.S.C. §254(d) and 47 C.F.R. § 54.703(a).

<sup>20</sup> Identified in Exhibit A to HickoryTech's application.

<sup>21</sup> Identified in Exhibits B and C to HickoryTech's Application.

recommended that the Commission grant preliminary approval to HickoryTech's request and require a compliance filing in which the Company would:

1. provide information that describes the location of its cell sites, interconnection agreements, and switching facilities used to provide service in the requested areas;
2. provide a statement regarding its plans for the rollout Phase 2-E911 services;
3. provide information that describes how customers access interexchange carriers;
4. list its toll limitation services and their prices in a disclosure or informational tariff;
5. provide an advertising plan that specifically publicizes the availability of Lifeline and Link Up services as well as the WPL;
6. list specific upgrades it will make to current facilities and provide a list of new facilities that it will construct with the use of the universal service funds;
7. provide a list of all the rates associated with its WPL service, including the cost of all equipment and installation charges and all other recurring and non-recurring charges, in an informational tariff;
8. list all terms and conditions of service associated with its WPL service in an informational tariff.

The DOC argued that given the extensive information provided by HickoryTech in its initial filing and the Commission's decisions in previous ETC applications,<sup>22</sup> the DOC does not believe that this case should be sent to an Administrative Law Judge for contested case proceedings.

Further, the DOC indicated that HickoryTech has established that its designation as an ETC is in the public interest, subject to a satisfactory compliance filing as discussed above.

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<sup>22</sup> See: *In the Matter of the Petition of RCC Minnesota, Inc. and Wireless Alliance, LLC for Designation as an Eligible Telecommunications Carrier (ETC) Under 47 U.S.C. § 214(e)(2)*, Docket No. PT-6182m6181/M-02-1503, ORDER GRANTING CONDITIONAL APPROVAL AND REQUIRING ADDITIONAL FILINGS (July 31, 2003); *In the Matter of the Petition of Midwest Wireless Communications, LLC, for Designation as Eligible Telecommunications Carrier (ETC) under 47 U.S.C. § 214(e)(2)*, Docket No. PT-6153/AM-02-686, ORDER GRANTING CONDITIONAL APPROVAL AND REQUIRING FURTHER FILINGS (March 19, 2003); *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).

The DOC also recommended that the Commission approve the service area redefinition requested by HickoryTech. It argued that HickoryTech's request that the affected rural ILEC's service areas be disaggregated at the wire center level to conform to HickoryTech's own licensed service area and its request that disaggregation be below the exchange level in exchanges where it will serve only part of the exchange was consistent with the Commission's prior decisions.

At hearing, the DOC, with the Company's agreement, requested that the Commission add the following to the compliance filing requirements:<sup>23</sup>

The Company should establish a process for tracking, and for making available to the Commission upon request; 1) instances in which the Company is unable to provide its basic universal service offering within 30 days of the time that the customer requests service be initiated; and 2) customer complaints or disputes related to the service quality of its basic universal service offering, including reports of interrupted service.

The Commission should include in its order that upon a complaint, a petition from the Department, or on the Commission's own motion, the Commission may investigate any change in the Company's tariff, customer service agreement (if submitted), or lease agreement (if applicable), for the purpose of rescinding the change or revoking the Company's federal ETC status. After investigation the Commission may find that the change is not consistent with the Commission's decision to approve the Company's federal ETC status, and rescind the change or revoke the Company's federal ETC status.

## **B. Citizens and Frontier**

Citizens and Frontier argued that the issues associated with designating a CMRS provider as an ETC should be resolved in a contested case proceeding. They argued that this has been the procedure the Commission has followed in the past and should be followed in this case as well.

Further, Citizens and Frontier argued that the Commission should address several factual and policy issues raised by HickoryTech's petition before designating HickoryTech an ETC: the public interest benefit, the disaggregation of rural carriers' service areas, the service area where HickoryTech will be providing universal service, the ability of HickoryTech to provide service throughout its proposed ETC service area, and applicable service quality standards.

Citizens and Frontier disagree with the DOC that the disaggregation proposal by HickoryTech be conditionally approved. They argued that, from the information provided by HickoryTech, it is not clear that HickoryTech intends to provide ETC service throughout the entire service area where it is licensed to provide CMRS or PCS service. They argued that HickoryTech should not be allowed to select only certain ETC areas within its licensed territory. They requested that HickoryTech be required to provide additional information to confirm that it intends to serve all ILEC exchanges within its licensed areas.

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<sup>23</sup> Compliance filing requirements are listed in the staff Briefing Papers at II.A.2 (a-i).

Finally, Citizens and Frontier recommended that the Commission initiate a formal rulemaking to address the procedures, practices and requirements that will apply to all requests from CMRS providers for ETC designation and the service obligations of carriers designated as ETCs.

### **C. HickoryTech**

HickoryTech, in response to Citizens and Frontier's position that a contested case proceeding is necessary, argued that the Commission has repeatedly found that designating a CMRS provider as an ETC serves the public interest.<sup>24</sup> In this case, it argued, its application provides sufficient basis for the Commission to make the necessary public interest finding.

Further, HickoryTech argued that it has provided in its application information confirming that it will serve all ILEC exchanges within its cellular license area and a portion of its personal communications service (PCS) license area. To be required to show more is unnecessary.

Finally, HickoryTech argued that Citizens and Frontiers request for a rulemaking was not properly raised by Citizens/Frontier in reply comments. Rather, the request should be filed under the requirements of the Administrative Procedure Act,<sup>25</sup> which would give the public the opportunity to comment on a rulemaking petition.

Further, HickoryTech argued that the Commission's prior proceedings on this issue established the procedures for the consideration of an ETC application by a CMRS provider and such procedures provide clear guidance to applicants. Therefore, a rulemaking procedure was not necessary. However, if the Commission should decide to commence a rulemaking proceeding, action on HickoryTech's application should not be delayed pending the outcome of such a rulemaking procedure.

### **D. Commission Action**

The Commission agrees with the DOC that HickoryTech has made a credible preliminary filing showing its intent and capability of providing the required services within its requested service area. However, the Commission will require the Company to make a compliance filing including the information set forth in Section IV. A, herein. The Commission will also require, in the compliance filing, information on additional rate plans and proposed tariffs, including customer service policies and procedures for resolving service interruptions, and additional information on the Company's proposed service area. These requirements will enable the Commission to make a final determination on whether HickoryTech's application meets the standards for ETC designation.

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<sup>24</sup> Id.

<sup>25</sup> Minn. Stat. § 14.09.

The Commission also finds that the procedures set forth by the DOC, and agreed to by the Company (in Section IV. A, herein), which set forth procedures for tracking and making available to the Commission information on service quality complaints and procedures for reviewing, rescinding, or revoking ETC status are reasonable. The Commission will direct HickoryTech to act accordingly.

Further, the Commission finds that HickoryTech's filing, subject to a satisfactory compliance filing, meets the public interest standard. Consumers would receive the benefits of competition. They would have a choice of providers, features, local calling areas, usage amounts and prices. Increasing investment in the rural infrastructure would provide improved access to emergency services and potential access to new services. There is no evidence that there would be any harm to consumers nor is there any evidence that the local service market is insufficient to support competition.

The Commission finds that there are no outstanding issues of material fact that would require contested case proceedings; nor are there policy issues of first impression requiring further development. The record in this case does not demonstrate a need for further evidentiary development in a contested case hearing. For these reasons, the Commission will not refer this matter for contested case proceedings.

Finally, the Commission will not initiate a rulemaking procedure to address the designation of CMRS providers as ETCs or the service obligations of CMRS providers designated as ETCs, as requested by Citizens/Frontier in their comments. Earlier proceedings on ETC applications by CMRS providers have clarified and resolved the fundamental issues posed by CMRS certification.<sup>26</sup> A rulemaking therefore will not be initiated.

## **V. Requests to Intervene**

### **A. Citizens and Frontier**

Citizens and Frontier argued that they be permitted to intervene because: since they provide local exchange service in the area for which HickoryTech has requested ETC designation, the Commission's decision in this proceeding may have a direct effect on Citizens and Frontier's ability to continue to provide service to their customers; no other parties to this proceeding would adequately represent their interests; and their intervention will help establish a complete record.

### **B. Midwest Wireless and RCC**

Midwest Wireless and RCC have each been granted conditional approval in their respective petitions for designation as a wireless ETC.<sup>27</sup>

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<sup>26</sup> See footnote 22, above.

<sup>27</sup> See footnote 22, above, relating to these companies.

Midwest Wireless and RCC argued that they be permitted to intervene in this proceeding for the following reasons: HickoryTech's petition involves issues that may impact the rights and obligations of competitive ETC's in Minnesota, and neither Midwest Wireless' or RCC's interests are adequately represented by HickoryTech or by other parties to this proceeding,

Further, they argued that the late filing of their respective Petitions to Intervene was due to new issues that arose in comments of Citizens and Frontier (May 19, 2003) and the response of HickoryTech (May 27, 2003) in the present case, which gave rise to Midwest Wireless' and RCC's interest in this proceeding.

### **C. Hickory Tech**

HickoryTech opposed the Petitions to Intervene by Citizens and Frontier, Midwest Wireless, and RCC arguing that they have not provided any factual basis to support any lawful grounds for intervening.

### **D. Commission Action**

The Commission finds that Citizens and Frontier, RCC and Midwest Wireless have shown that they have interests in this proceeding that are not represented by other parties to this matter and that the outcome of this proceeding will directly affect their ability to provide service to their customers. Their request to intervene will be granted.

However, a variance is necessary to Minnesota Rules 7811, Subp.9, which sets forth requirements for intervention. Among other things, this rule addresses petitions to intervene by a person who files initial comments and requires that a such a petition to intervene be filed prior to the expiration of the reply period. Since Midwest and RCC's petitions to intervene were filed after the deadline for filing reply comments, and since Citizens and Frontier did not file initial comments, a variance is required.

Under Minn. Rules 7829.3200, Subp.1 the Commission may vary any of its rules upon making the following findings:

- enforcement of the rule would impose an excessive burden upon the applicant or others affected by the rule;
- granting the variance would not adversely affect the public interest; and
- granting the variance would not conflict with standards imposed by law.

The Commission finds that the requirements for a variance are met in this case. Enforcing the rule will not impose a burden on HickoryTech or others. The public interest will not be adversely impacted. In fact, allowing additional input from these companies will serve the public interest by providing a more developed record for the Commission to consider. Finally, granting the variance will not conflict with standards imposed by law.

Finally, the Commission will accept Citizens' and Frontier's comments, deny HickoryTech's motion to strike Citizen's and Frontier's comments, and accept HickoryTech's late-filed response to these comments.

### **ORDER**

1. The petitions for intervention by Citizens/Frontier, RCC and Midwest are accepted and Minn. Rule 7811.1400, subp.9 is varied to allow this intervention.
2. Citizens/Frontier's comments are accepted.
3. HickoryTech's motion to strike Citizens/Frontier's comments is denied. HickoryTech's alternative motion for leave to file late-filed response to Citizens/Frontier's comments is granted.
4. HickoryTech's request for ETC designation is conditionally approved. HickoryTech shall submit a compliance filing with the following:
  - a. additional documentation suggested by the DOC and set forth in Section IV. A, herein;
  - b. a description of rate plans other than the Wireless Phone Link (WPL) which could be considered universal service offerings that could serve communities in its proposed service area other than those identified in Exhibit G (attached to HickoryTech's April 16, 2003 petition for ETC designation).
  - c. a description of other rate plans for which universal service subsidies are expected, including pricing, terms and conditions, local calling area, and local usage component;
  - d. proposed Tariffs for the WPL and other universal service offerings, including information about prices, terms and conditions, local calling area, local usage, related CPE, auxiliary services, miscellaneous charges, requirements on deposits, a description of its toll limitation service, customer service and dispute resolution policies; network maintenance policies, procedures for resolving service interruptions and any applicable customer remedies, and billing and payment policies;
  - e. a full description of the Company's proposed service area, including a comparison with its FCC-licensed, both cellular and PCS, areas and an explanation of any differences;

- f. a comparison of its proposed service area with the communities listed in Exhibit G where WPL service is optimal, and an explanation of why not or how other communities can receive similar optimal service;
- g. a comparison of the Company's proposed service area with the local area coverage of the proposed WPL service;
- h. an explanation of why the Commission should approve the proposed disaggregation of many ILECs' study area, both at the exchange and sub-exchange level, in light of the additional information regarding the service area;
- i. a statement as to why the Company is eligible to become an ETC despite not being a LEC in Minnesota, or to submit a request for a waiver of Minn. Rule 7811.1400, subps. 1 and 2;
- j. the Company's investment commitments and network improvement plans;
- k. service quality plans consistent with the Company's claims to provide high quality of service. As required in similar cases, the Company should be required to put in writing its commitment with respect to Held Orders, Customer Complaints, and other relevant service quality measurements.
- l. the Company shall commit to provide a written notice to the Commission and the DOC immediately upon any change in prices (including CPE-related rates) or terms and conditions of the universal service offerings, and prior to the withdrawal of any such offering;
- m. the Company shall establish a process for tracking, and for making available to the Commission on request: 1) instances in which the Company is unable to provide its basic universal service offering within 30 days of the time that the customer requests service be initiated; and 2) Customer complaints or disputes related to the service quality of its basic universal service offering, including reports of interrupted service;
- n. upon a complaint, a petition from the Department, or on the Commission's own motion, the Commission may investigate any change in the Company's tariff, customer service agreement (if submitted), or lease agreement (if applicable), for the purpose of rescinding the change or revoking the Company's federal ETC status. After investigation, the Commission may find that the change is not consistent with the Commission's decision to approve the Company's federal ETC status, and rescind the change or revoke the Company's federal ETC status.

5. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar  
Executive Secretary

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