

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

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Chair
Commissioner
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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: June 8, 2004

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

ORDER REAFFIRMING PRIOR ORDER

PROCEDURAL HISTORY

On May 7, 2002, Midwest Wireless Communications, LLC (Midwest), a cellular telephone 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) throughout its licensed service area. In particular, where the boundary of Midwest’s service area partially overlaps a wire center, Midwest sought ETC designation for only the portion of the wire center that lay within its service area.

On March 19, 2003, the Commission issued its ORDER GRANTING CONDITIONAL APPROVAL AND REQUIRING FURTHER FILINGS, conditionally approving Midwest’s petition because it would serve the public interest. Because Midwest needs the permission of the Federal Communications Commission (FCC) to be designated an ETC in parts of its proposed service area, the Commission stated that it would petition the FCC for approval.

On August 7, 2003, the Commission filed its petition with the FCC.²

On November 7, 2003, the FCC initiated a proceeding to consider the petition.³ The petition remains under consideration today.

On April 23, 2003, the FCC issued a notice and solicitation of comments on two recent FCC orders regarding ETC petitions.⁴ The notice invited initial comments by May 14, 2004, from parties with ETC-related petitions pending before the FCC, and cited the Midwest petition among others.

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

² See *Petition of the Minnesota Public Utilities Commission for Agreement to Redefine the Service Areas of Twelve Minnesota Rural Telephone Companies*, CC Docket No. 96-45, DA 03-2641 (August 7, 2003).

³ Public Notice re: *Petition to Redefine Rural Service Areas in Minnesota*, DA 03-3594 (November 7, 2003).

⁴ CC Docket No. 96-45; DA 04-999, 69 FR 22029-31.

On May 10, 2004, Midwest filed a letter supporting the Commission's prior Order and opposing any reconsideration of it.

On May 11, 2004, the Commission convened a hearing to hear comment about how the Commission should respond to the FCC's notice. The Commission received comments from Midwest, the Minnesota Department of Commerce (the Department), jointly from Citizens Telecommunications Company of Minnesota, Inc., and Frontier Communications of Minnesota, Inc. (Citizens/Frontier); and collectively from a coalition of incumbent rural telephone companies known as the Minnesota Independent Coalition (MIC).

FINDINGS AND CONCLUSIONS

I. The Telecommunications Act of 1996

The Act 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"⁵ by subsidizing those rates. The Act authorizes states to determine which carriers qualify for universal service funding;⁶ the Act's term for these carriers is "eligible telecommunications carriers."

An application for ETC status is governed by federal and state law.⁷ State commissions grant ETC status to any qualified applicant to the extent that it seeks to serve areas not served by rural telephone companies.⁸ But when an applicant seeks designation to compete with a rural telephone company, a state must consider additional factors. For example, a state commission must determine whether designating the applicant to compete with a rural telephone company would be in the public interest.⁹

Additionally, when an applicant's proposed service area overlaps any part of a rural telephone company's service area, then the applicant will be expected to accept ETC designation throughout the rural company's "study area"¹⁰ – typically the company's entire service area within a state.¹¹

⁵ 47 U.S.C. § 254(b)(3).

⁶ 47 U.S.C. § 214(e).

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

⁸ "Rural telephone company" is defined at 47 U.S.C. § 153(37).

⁹ 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.

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

¹¹ *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45 Report and Order, 12 FCC Rcd 8776, ¶ 172, fn. 434.

This situation arises, for example, when a wireless telephone company seeks ETC designation throughout its licenced service area, and that area overlaps part but not all of a rural telephone company's service area.

If the applicant is unwilling or unable to serve the rural company's entire study area, the applicant may ask the state commission and the FCC to disaggregate ("redefine") the rural company's service area into multiple service areas that better correspond to the applicant's desired service area. The applicant could then agree to serve the desired service areas and not the others.

Substantively, state commissions and the FCC analyze these requests by considering 1) the risk that the new entrant will serve only the most lucrative customers, leaving the less-lucrative customers to be served by the incumbent ("cream skimming"), 2) the regulatory status accorded rural telephone companies under the Act and 3) any additional administrative burdens that might result from the redefinition.¹² Procedurally, the FCC gives automatic consent to redefinition petitions unless the FCC takes some action to suspend the approval before the end of a 90-day review period.¹³

II. Recent FCC Actions

A. Other Carrier's ETC Petitions

Where a petitioning carrier is not subject to the jurisdiction of a state commission, the Act authorizes the FCC to make ETC designations.¹⁴ In the context of considering ETC petitions for wireless carriers in Virginia, the FCC rendered two decisions articulating the factors that it finds relevant to the public interest, and to determining whether to redefine a rural telephone company's study area.

On January 22, 2004, while ruling on the application of Virginia Cellular, LLC, for designation as an ETC in Virginia (the *Virginia Cellular* order),¹⁵ the FCC articulated a number of factors to consider in evaluating whether a designation would be in the public interest:

In determining whether designation of a competitive ETC in a rural telephone company's service area is in the public interest, we weigh 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, and the competitive ETC's ability to satisfy its obligation to serve the designated service areas within a reasonable time frame.¹⁶

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

¹³ 47 U.S.C. § 54.207(c)(3)(ii).

¹⁴ 47 U.S.C. § 214(e)(6).

¹⁵ *In the Matter of Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, CC Docket No. 96-45, DA 04-999 Memorandum Opinion and Order, 69 FR 8958 (released January 22, 2004).

¹⁶ *Virginia Cellular*.

Applying these factors, the FCC approved Virginia Cellular's request for ETC designation in most requested areas. But the FCC observed that Virginia Cellular's proposed service area would encompass only the densely-populated portions of one rural telephone company's service area. Assuming that the average cost of service decreases as population density increases, the FCC concluded that it would not be in the public interest to permit Virginia Cellular to be designated in only the high-density, low-average-cost areas, leaving the low-density, high-average-cost areas for the incumbent to serve. The FCC also declared that it would apply this analysis "to all ETC designations for rural areas pending further action by [the FCC]."¹⁷

Subsequently the FCC issued its *Highland Cellular* order.¹⁸ That order echoed many of the same concerns as *Virginia Cellular* but went further. According to the FCC, rural customers are vulnerable to harm from a withdrawing ETC because rural customers tend to have few competitive alternatives. The FCC reasoned that an ETC that serves an entire community would be less likely to withdraw its services than an ETC that merely serves part of the community. And the FCC reasoned that a rural wire center boundary is likely to encompass a relevant "community" because rural wire center boundaries often coincide with county or city boundaries. For these reasons, the FCC concluded that it would no longer designate an ETC to serve any part of a rural telephone company's wire center unless the ETC agreed to extend service throughout the wire center.¹⁹

B. The *Midwest* Docket

As noted above, on August 7, 2003, the Commission filed its petition with the FCC to redefine the service areas where Midwest seeks to serve.²⁰ While FCC rules provide for these petitions to receive automatic approval after a 90-day period, on November 7, 2003, the FCC initiated a proceeding to consider the petition, effectively suspending the docket.

Now the FCC has invited comments from a number of petitioners, including this Commission as petitioner in the *Midwest* docket, to supplement their petitions based on the *Virginia Cellular* and *Highland Cellular* orders.

III. Positions of the Parties

A. The Department

The Department asks the Commission not to modify its March 19, 2003 Order or its petition to the FCC. Among other things, the Department argues that the Commission would have difficulty justifying any change in factual conclusions in the absence of new factual information.

¹⁷ *Id.* at ¶ 4.

¹⁸ *In the Matter of 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 (released April 12, 2004).

¹⁹ *Id.* at ¶ 33.

²⁰ See *Petition of the Minnesota Public Utilities Commission for Agreement to Redefine the Service Areas of Twelve Minnesota Rural Telephone Companies*, CC Docket No. 96-45, DA 03-2641 (August 7, 2003).

While the Commission's Order already refutes the concern that granting Midwest's petition would result in cream skimming, the Department offers a study to bolster this conclusion. The study purports to show the population densities of various wire centers, demonstrating that the wire centers that Midwest seeks to serve are not significantly more densely populated than the wire centers that fall beyond Midwest's proposed service area.

B. Midwest

Similar to the Department, Midwest also asks the Commission not to amend its prior Order or its FCC petition.

First, Midwest argues that the *Virginia Cellular* and *Highland Cellular* orders are not binding on this Commission. When the FCC rules on ETC petitions under authority of 47 U.S.C. § 214(e)(6), it does so as a substitute for a state commission, and its decisions are no more binding on the Minnesota Commission than would be the decision of any other state commission. Consequently, while the Commission may consider the persuasiveness of the arguments presented in these orders, Midwest argues that federal preemption is not at issue.

Second, Midwest distinguishes the Commission's March 19, 2003 Order from the *Virginia Cellular* and *Highland Cellular* orders. The FCC rendered its decisions without the benefit of much record development. In contrast, the Minnesota Commission reached its decision about Midwest's ETC petition after a contested case proceeding in which an administrative law judge made specific recommendations, and the Commission made specific conclusions, about the public interest, population density and cream skimming, and the effects the petition would have on the federal universal service fund.

For example, the *Highland Cellular* order reflects a concern that permitting an ETC to serve only part of a community would lead to an ETC withdrawing service later, and that wire center boundaries identify a relevant "community" because they often coincide with county and city lines. But where Midwest seeks to serve only a portion of a wire center, it proposed to divide the wire center along county lines, thereby preserving the community of interest that was the subject of the FCC's *Highland Cellular* order. Moreover, the Commission expressly considered and rejected the idea that granting Midwest's petition would have any bearing on a subsequent withdrawal of ETC service. In all the years that competitive ETCs have been serving in Minnesota, there is no evidence that any ETC has subsequently abandoned a service area. In sum, Midwest argues that the *Virginia Cellular* and *Highland Cellular* orders reflect the FCC applying its standards to the facts of those cases. The Minnesota Commission's Order reflects the application of very similar standards to very different facts, resulting in a different – but well-reasoned and well-supported – conclusion.

Third, Midwest urges the Commission not to act on the basis of what it anticipates the FCC will do. The fact that the FCC suspended the Midwest petition does not mean that the FCC has decided to deny the petition, Midwest argues. The suspension was not focused at the Midwest docket specifically, but was part of the FCC's nation-wide reconsideration of ETC matters. Moreover, Midwest argues, if the Commission were to act on a mistaken impression of what the FCC would do, Midwest would be prejudiced. If the Commission reaffirms its past decision and the FCC later rejects it, then the parties will have the opportunity to remedy that issue in the future. On the other hand, if the Commission were to preemptively change its decision to conform to how it anticipates the FCC will rule, then Midwest will never have the opportunity to learn how the FCC would have ruled based on the unique factual record of the current case. Midwest argues that its rights can be preserved only if the Commission renders a decision based on its own understanding of the law and the facts, not based on a forecast of what the FCC will do.

Finally, while Midwest appreciates the Department's efforts to resolve any remaining concerns about cream-skimming, Midwest asks the Commission not to accept the Department's study into the record of this case. Midwest states that it has not had adequate opportunity to review the study and comment on it.

C. Citizens/Frontier

Citizens/Frontier argue that the *Virginia Cellular* and *Highland Cellular* orders have changed the law to such an extent that the Commission should change its own Order in this docket and revise its petition to the FCC. The FCC is clear about its opposition to redefining service area boundaries in a manner that cuts through wire centers, Citizens/Frontier argue. Citizens/Frontier claim that other wireless carriers have taken the opportunity offered by the FCC to abandon their pursuit of ETC certification in partial wire centers, by either reducing or expanding their requested service areas. According to Citizens/Frontier, the procedure for resolving a redefinition impasse with the FCC is uncharted.

D. MIC

MIC shares Citizens/Frontier's conclusion that the FCC's recent decisions have changed the law. According to MIC, the Commission's past decisions were influenced by a general understanding of the FCC's liberal standard for ETC qualifications; because this understanding is now in doubt, MIC argues that the Commission would be justified in reconsidering its past decisions based on that understanding.

Similar to Citizens/Frontier, MIC is unsure about what would occur if the FCC and the Commission could not agree on the boundaries for a redefined service area.

IV. Commission Action

A. Department Cream-Skimming Study

The Commission appreciates the Department's efforts to bring perspective to the issues in this docket, including the Department's study purporting to refute concerns that Midwest's petition might result in cream skimming. However, the Department's cream-skimming analysis is detailed, and the other parties have not had a reasonable opportunity to review it. In the interest of fairness, therefore, the Commission will decline to consider the study for purposes of the current decision.

B. Reconsideration of March 19, 2003 Order and FCC Petition

The Commission initiated this reconsideration in response to the FCC's invitation to supplement the record of various ETC petitions before it. Having considered the arguments of the parties, the Commission will decline to change its prior Order or its petition to the FCC.

Citizens/Frontier and MIC correctly observe that in the *Virginia Cellular* and *Highland Cellular* orders the FCC pursued a more rigorous public interest analysis than in the past, and declined to redefine a service area boundary to cross a wire center. But as the Department and Midwest note, those cases are easily distinguished from the current docket.

Even before the FCC issued its *Virginia Cellular* and *Highland Cellular* orders, this Commission had conducted rigorous public interest analyses for ETC designations pursuant to its authority to apply additional criteria.²¹ This Commission based its decision in this docket on a well-developed factual record, including consideration of population densities and the prospects for cream skimming. The Commission found no evidence that any ETC would relinquish its designation over any area as a result of Midwest's designation, and the Commission approved redefining service areas along wire center boundaries and county lines, thereby preserving communities of interest. Consequently, the Commission's decision vindicates rather than frustrates the policies that underlay the *Virginia Cellular* and *Highland Cellular* orders.

In sum, the parties arguments do not point to new and relevant evidence, do not expose errors or ambiguities in the original Order, and do not otherwise persuade the Commission that it should change its original decision. The Commission concludes that the original decision is the one most consistent with the facts, the law, and the public interest; consequently, the original decision will be reaffirmed along with the resulting FCC petition.

The Commission will so order.

ORDER

1. The Commission reaffirms its ORDER GRANTING CONDITIONAL APPROVAL AND REQUIRING FURTHER FILINGS (March 19, 2003) and its petition with the Federal Communications Commission in CC Docket No. 96-45, DA 03-2641 *In the Matter of: Federal-State Joint Board on Universal Service Petition of the Minnesota Public Utilities Commission for Agreement with Changes in Definition of Service Areas for Exchanges Served by CenturyTel, et al.* (August 7, 2003).
2. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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²¹ See *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999).