

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

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In the Matter of a Commission Investigation to Consider Adopting the Federal Communications Commission's Standards for Designating Eligible Telecommunications Carriers

ISSUE DATE: October 31, 2005

DOCKET NO. P-999/M-05-1169

ORDER ADOPTING FCC REQUIREMENTS FOR DESIGNATING ELIGIBLE TELECOMMUNICATIONS CARRIERS, AS MODIFIED

PROCEDURAL HISTORY

I. New Federal Communications Commission Requirements for Federal ETC Designation and Annual Reporting Requirements

On March 17, 2005, the Federal Communications Commission (FCC) issued an Order¹ adopting five new requirements for carriers seeking federal ETC designation² and encouraging states to adopt these requirements for their ETC designation proceedings as well:

- (1) a five-year plan demonstrating how high-cost universal service support will be used to improve service coverage, service quality, or capacity in every wire center in which designation is sought.
- (2) demonstrated ability to remain functional in emergency situations.
- (3) demonstrated ability to satisfy consumer protection and service quality standards.

¹ FCC Order in CC Docket 96-45, FCC 05-46 (March 17, 2005); 47 CFR (hereafter FCC Rule) § 54.202(a) (1-5), hereafter FCC Rule § 54.202

² Under the Federal Telecommunications Act of 1996, telecommunications carriers must be designated "eligible telecommunications carriers," or ETCs, to qualify for subsidies from the federal Universal Service Fund. State regulatory commissions have primary responsibility for granting ETC designations, but the FCC acts on designation requests from carriers who are not subject to state commission jurisdiction, such as in tribal lands. See 47 U.S.C. §214(e)(2) and (6) of the Federal Telecommunications Act of 1996.

- (4) local usage plans comparable to those offered by the incumbent local exchange carrier in the areas for which ETC designation is sought.
- (5) an acknowledgment that the applicant may be required to provide equal access to long distance carriers in areas in which all other ETCs relinquish their ETC designations.

The FCC also set the analytical framework for determining whether the public interest is served by an ETC designation.³

In addition, the FCC's Order also adopted eight annual reporting requirements for federally designated ETCs,⁴ and encouraged state commissions to consider adopting these annual reporting requirements for the ETCs that the state commissions had designated.

II. The Commission's July 21, 2005 Order on Annual Reporting Requirements

In an Order issued July 21, 2005 in Docket No. P-999/M-05-741 (the 741 Docket), the Commission addressed the FCC's recommendation regarding the reporting requirements. In its Order, the Commission directed ETCs in Minnesota to comply with the annual filing requirements suggested by the FCC, as modified in two respects.

In addition, the Commission opened the current docket (P-999/M-05-1169) to consider the FCC's first recommendation, i.e., that the Commission adopt the FCC's suggested processes, procedures, and standards for initially designating a telephone company as an ETC.

III. Filings in the Current Docket

On July 22, 2005, the Commission solicited comments on whether the Commission should adopt the Federal Communications Commission's (FCC's) standards for designating eligible telecommunications carriers (ETCs).

On August 4, 2005, comments were filed by 1) Sprint Corporation (on behalf of both its incumbent local exchange carrier (LEC) and its wireless division, collectively called herein as Sprint), 2) Citizens Telecommunications Company of Minnesota, LLC and Frontier Communications of Minnesota, Inc. (Citizens/Frontier), 3) American Cellular Corporation and WWC Holding Co., Inc. (ACC/WWC) and 4) the Minnesota Department of Commerce (the Department).

On September 12, 2005, the Residential and Small Business Utilities Division of the Office of the Attorney General (RUD-OAG) filed Reply Comments.

³ 47 CFR § 54.202(c).

⁴ 47 CFR § 54.209(a)(1-8).

On September 14, 2005, the Minnesota Independent Coalition (MIC), American Cellular Corporation and Alltel, Inc. (ACC/Alltel)⁵, and Citizens/Frontier filed Reply Comments.

The Commission met to consider this matter on October 13, 2005.

FINDINGS AND CONCLUSIONS

I. Summary of Order

This Order considers whether the Commission should adopt the FCC's suggested standards for initially designating a telephone company as an ETC. The Commission concludes that it has the discretion to use the FCC criteria without first conducting a rulemaking and further decides that it will do so, with certain modifications addressed more specifically below.

II. Adoption of Policy by Rulemaking or Order

In comments filed August 4, 2005, ACC and Western Wireless argued that if the Commission wished to adopt new ETC designation criteria it must do so by rule rather than by Commission Order. ACC and WWC stated that if the Commission adopted the FCC's proposed ETC designation standards, those standards would be generally applicable to all carriers seeking ETC designation in the future and allegedly a rule under Minn. Stat. § 14.02, subd. 4.

The other parties commenting on this issue⁶, including the RUD-OAG, disagreed, stating that the Commission has authority to apply the FCC proposed requirements in any proceeding without rulemaking since the Commission has the discretion under Minnesota law to implement policy either by rulemaking or in individual cases.

The Commission finds that it has the discretion to decide in this Order whether the FCC's suggested requirements will apply to petitions seeking ETC status⁷ and that it is appropriate to do so. The Commission's industry-wide proceeding in this docket has been open, fair, and exhaustive. At the outset, the Commission served notice on potentially interested parties that the

⁵ In its September 14, 2005 Reply Comments, ACC, which had filed its initial comments on August 4, 2005 in conjunction with WWC, reported that WWC had subsequently become a subsidiary of Alltel Corporation (Alltel). ACC's Reply Comments, therefore, were filed in conjunction with Alltel and ACC/Alltel maintained the positions expressed by ACC/WCC in their August 4, 2005 comments.

⁶ Citizens and Frontier, MIC, and the RUD-OAG.

⁷ *In re Intra-LATA Equal Access and Presubscription*, 532 N.W.2d 583, 588 (Minn.Ct.App.1995), *review denied* (Minn. Aug. 30, 1995); *In the Matter of the Proposal by Lakedale Telephone Company to Offer Three Additional Class Services*, 561 N.W.2d 550 (Minn.Ct.App. 1997); and *Bunge Corp. v. Commissioner of Revenue*, 305 N.W.2d 779 (Minn.1981).

Commission was considering adopting the FCC's requirements and invited written comments and reply comments. The Commission gave notice of its public hearing on the matter and distributed Commission staff briefing papers to interested parties in advance of the hearing. At the hearing, the Commission heard the parties' oral presentations and rebuttal arguments. Finally, based on all these inputs from the parties and as discussed in the following section, the Commission duly considered all the parties' comments and, in response, has decided to modify the FCC's proposed requirements.⁸

III. Consideration of the FCC's Suggested Requirements

A. Sprint's Comments

Sprint stated that the requirements adopted by the Commission in the 741 Docket⁹ concerning annual certification requirements for existing ETCs should apply equally to entities seeking initial ETC designation in Minnesota.

Specifically, Sprint noted that the Commission should require only a two-year plan at the study area level, rather than a five-year plan at the wire center level, as suggested by the FCC and require that ETCs offer local usage plans comparable, but not identical, to those offered by the incumbent LECs.

B. Frontier and Citizens' Comments

Citizens and Frontier filed joint comments urging the Commission to adopt the FCC's standards for ETC designations, with the same minor modifications the Commission adopted in the 741 Docket.

The Companies argued that employing the FCC criteria as modified would provide for a more predictable ETC designation process and improve the long-term sustainability of the universal service fund. Moreover it would allow for a competitively neutral treatment for all carriers. Citizens and Frontier also noted that, since American Cellular Corporation currently has an ETC application pending before the Commission, the Commission should take this opportunity to clearly articulate its standards for ETC designation.

⁸ See *In re Intra-LATA Equal Access and Presubscription* (supra footnote 8) in which the Court cited similar procedural openness and fundamental fairness of process as a basis for finding that the Commission had discretion to adopt policy by rule or by Order, i.e., on a case-by-case basis. Supra at 590. The Commission notes that interested parties also had notice regarding the FCC's proposed requirements and had an opportunity to participate in the FCC's formulation of them.

⁹ *In the Matter of Possible Changes to the Commission's Annual Certification Requirements Related to Eligible Telecommunications Carriers' Use of the Federal Universal Service Support*, Docket No. P-999/M-05-741, ORDER SETTING FILING REQUIREMENTS AND OPENING PROCEEDING TO CONSIDER ADOPTING FCC STANDARDS FOR DESIGNATING ELIGIBLE TELECOMMUNICATIONS CARRIERS (July 21, 2005).

C. The Department's Comments

The Department recommended the Commission should add the FCC standards to its current process for reviewing ETC designation applications, with the modifications adopted by the Commission in the 741 Docket.

The Department also argued that the FCC standards provides for nationwide consistency and are competitively and technologically neutral, ensuring that all ETCs are held to the same level of accountability regarding the use of the Universal Service Fund, the provision of service, and meeting their obligations.

D. ACC/WWC's Proposed Modifications

ACC and WWC argued that if the Commission adopted the FCC's designation standards, it should modify them in several respects:

1. Instead of a five-year service improvement plan as suggested by the FCC or a two-year plan as recommended by the other parties, ACC/WWC recommended that the Commission eliminate the requirement entirely or reduce its scope to one-year, the current year only. ACC/WWC asserted that there was no reason why this requirement should apply at the initial application since this information would be required as part of the annual recertification process.
2. ACC/WWC urged that the Commission not require ETC applicants to demonstrate ability to remain functional in emergency situations. ACC and argued that since the Commission has required that all ETCs file information starting in 2006 that they meet this standard, this requirement will ultimately apply to all ETCs. The Companies also stated that there is no objective standard by which compliance can be determined at this time.
3. ACC/WWC recommended that the Commission not adopt FCC Rule 54.202(a)(4) requiring an ETC applicant to show that it has one local usage plan that is comparable to that offered by the incumbent LEC. ACC/WWC stated that the Commission should instead maintain its present requirement that a wireless ETC maintain a Basic Universal Service (BUS) offering with rates and usage levels deemed comparable to the incumbent because this standard is understandable and the new standard does not make the process any clearer. ACC/WWC stated that if the Commission wishes to adopt a new comparability requirement, the Commission should conduct a comparability test that also looks at mobility, larger local calling areas, and other added values provided by a wireless ETC and not just the number of available minutes and prices.
4. ACC/WWC recommended that the Commission not adopt FCC Rule 54.202(a)(5) that requires ETC applicants to acknowledge that the FCC may require them to provide equal access. The Companies stated that, under 47 U.S.C. § 332(c)(8), the FCC that has the authority to require a commercial mobile radio service (CMRS) provider to provide equal access and that, therefore, an acknowledgment to the Commission adds nothing to the ETC designation process.
5. ACC/WWC recommended that the Commission not adopt the new public interest standard being applied by the FCC because the FCC standard does not differ from the rigorous public interest test currently applied by the Commission.

IV. Commission Analysis and Action

A. Current Review Template

Currently, the Commission designates ETCs upon determining that they satisfy the threshold requirements (common carrier providing the nine supported services; offering and advertising the availability and charges for, the supported services throughout the designated service area) and public interest considerations for the ETC designation. In addition, the Commission also requires ETC applicants to demonstrate that they have the intent and capability to provide the supported services, by requiring the filing of the following:

- a list and description of the facilities used to provide services throughout the service area for which designation is sought;
- a description of how the applicant will fulfill its obligation to provide service upon a customer's reasonable request;
- a detailed description of at least one "basic" affordable universal service offering with all the supported services;
- a formal plan for advertising the offering and availability of Lifeline, LinkUp and the basic universal service offering throughout the proposed service area;
- a service quality plan, including commitments and/or disclosures regarding customer service, dispute resolution policies, network maintenance policies, procedures for resolving service interruptions, and any associated customer remedies, and billing, payment, deposit and disconnection policies and procedures;
- an informational tariff, or customer service agreement that shows the rates, service plans, cost of related equipment and installation charges, and all terms and conditions related to the universal service offering.

B. Additional Requirements Proposed by the FCC

1. Generally

The Commission concurs with the FCC, as well as with the Department and the RUD-OAG who commented specifically in this case, that it is appropriate to move to a more rigorous process for certifying applicants' eligibility for federal Universal Service Fund support.

First, entitlements under the Fund appear to be growing, justifying increased scrutiny. In calendar year 2003, Minnesota ETCs drew some \$59,000,000 from the Fund. In calendar year 2005, Minnesota ETCs are projected to draw \$31,000,000 during the third quarter alone. These are significant sums, collected as mandatory surcharges from telecommunications subscribers, and their disbursement merits careful regulatory oversight.

Further, federal and state regulators now have substantial experience with the new subsidy system established by the Telecommunications Act of 1996 and can establish effective administrative structures beyond the bare-bones requirements initially adopted to avoid being overly prescriptive.

Finally, this Commission has historically given the most careful consideration to initiatives commended to state commissions by the FCC, both to honor principles of comity and to share in the advantages of that agency's broad-based, nation-wide regulatory perspective. Here, the FCC's recommended move toward more focused and detailed review of Universal Service Fund certification appears entirely appropriate.

For all these reasons, the Commission will adopt the new FCC requirements applicable to applicant's initial requests for designation as an ETC, as modified below. The Commission finds that the FCC's proposed additional requirements call for information that is relevant to the Commission's consideration of ETC applications and which, therefore, would likely be brought into the record pursuant to Information Requests from the Department, Commission staff, or some other interested party. Requiring the applicant to make this information part of the record from the outset will expedite a thorough review of applications for ETC certification.

The few modifications that the Commission will make in the details of FCC's proposed requirements are addressed in the following sections.

2. Modifications to be Consistent With the Commission's July 21, 2005 Order in the 714 Docket Regarding the Annual Reporting and Recertification Process

In its July 21, 2005 Order in the 714 Docket, the Commission considered the requirements suggested by the FCC for the ETC annual recertification process and modified those requirements in two respects. The Commission adapted the FCC filing requirements in two ways to more accurately reflect the needs of Minnesota carriers: (1) carriers may choose to file their annual progress reports on two-year service quality improvement plans, instead of five-year plans; and (2) carriers may choose to file information on a service-area basis, instead of on a wire-center basis.¹⁰

In this docket, the Commission will adapt the FCC's proposed requirements for the initial ETC designation process similarly: 1) as part of its application to be designated an ETC, an applicant may choose to file a two-year plan described in § 54.202(a)(1)(B) rather than a five-year plan; and 2) carriers may choose to file information on a service-area basis, instead of on a wire-center basis.

Regarding ACC/WW's objection that it is unnecessary and burdensome to require applicants to provide a service quality improvement plans as part of their initial filings, the Commission finds that this information is relevant to the Commission's determination whether an applicant has the intent and capability to provide requisite service in the areas for which it seeks ETC designation. To expedite proper review of the application, this information should be provided as part of the applicant's initial filing.

3. Modification Proposed by the RUD-OAG

One of the FCC's proposed additional requirements is that the applicant demonstrate in its application that it will satisfy applicable consumer protection and service quality standards. The FCC's rule also states that a wireless applicants would be deemed to have complied with that requirement if it committed to comply with the Cellular Telecommunications and Internet

¹⁰ See the July 21, 2005 Order in the 714 Docket at pages 9 and 10.

Association's (CTIA's) Consumer Code for Wireless Service.

The RUD-OAG argued that the Commission should not agree to accept a wireless applicant's agreement to comply with the CTIA Code as adequate because the CTIA Code is a voluntary, unenforceable guideline promulgated by the wireless industry. The RUD-OAG argued that giving wireless carriers this preferential treatment would contradict the principle of competitive neutrality and was especially unwarranted in light of the number of customer complaints regarding cell phone providers' performance. The RUD-OAG stated that the FCC clearly acknowledged that state commissions maintain the flexibility necessary to impose additional ETC eligibility requirements.

ACC/WWC argued that the FCC's decision regarding the CTIA Code supersedes the Minnesota Commission's previous requirement that wireless ETCs maintain one basic universal service (BUS) offering that is provided pursuant to a service agreement that reflects standards in the Commission's service quality rules. ACC/WWC cited Section 254(f) of the Act in support of its position that the Commission should defer to the FCC and provide that a wireless ETC can choose to adopt the CTIA Code in lieu of providing its BUS offering.

The Commission notes that the FCC has specifically acknowledged that it lacks authority to mandate state commissions to adopt or follow the FCC's changes and has clarified that state commissions maintain the flexibility to impose additional eligibility requirements on ETC applicants.¹¹

The Commission finds that a wireless applicant's commitment to comply with the CTIA Code is inadequate to demonstrate that it will satisfy applicable consumer protection and service quality standards. The CTIA Code is a voluntary, unenforceable guideline that provides no specific and measurable service quality requirements, such as measurable time frames for provisioning or restoring service. By contrast, landline providers (ILECs and CLECs) that are ETCs are required to comply with specific service quality requirements contained in Commission rules. The Commission finds no justification to lower the consumer protection and service quality standards for wireless ETC applicants.

4. Other Modifications Proposed by ACC/WW

a. Functionality in Emergency Situations – FCC Rule 54.202(a)(2)

ACC/WWC urged that the Commission not adopt FCC Rule 54.202(a)(2), thereby not requiring ETC applicants to demonstrate ability to remain functional in emergency situations. ACC/WWC argued that the FCC rule was too vague to be useful and recommended that the Commission investigate the various network engineering issues presented by carriers using different technologies and establish meaningful objective standards.

The Commission appreciates the problem identified by ACC/WWC but finds it more administratively efficient to determine reasonable compliance with the generally stated requirement on a case-by-case basis when new applicants apply for ETC designation, rather than

¹¹ FCC's March 17, 2005 Report and Order in CC Docket No. 96-45 at Paragraph 62. See also *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).

undertaking to determine in advance what it will specifically require.

b. Comparable Usage Plan – FCC Rule 54.202(a)(4)

ACC/WWC recommended that the Commission not adopt FCC Rule 54.202(a)(4) requiring an ETC applicant to show that it has one local usage plan that is comparable to that offered by the incumbent LEC. ACC/WWC suggested that the Commission engage in a broad comparability test taking into account the various values that different services provide.

The Commission finds that the specificity of the FCC's proposed requirement is appropriate since the funding given ETCs is intended to support the provision of basic, universal service, which has been defined as local calling service.

c. Acknowledgment of Potential Obligation to Provide Equal Access – FCC Rule 54.202(a)(5)

In its comments, ACC/WWC acknowledged what the FCC recommended an applicant be required to acknowledge in its application for ETC designation, i.e. that the FCC may, in certain defined circumstances, require a wireless provider to provide equal access to common carriers for the provision of telephone toll services. ACC/WWC opposed making that acknowledgment a requirement of the application process, however, and stated that such a requirement added nothing to the Commission's ETC designation process.

The Commission finds that the proposed required acknowledgment is not burdensome on applicants and may in fact benefit them by bringing the possibility of their equal access obligation to their attention in this formal manner. The FCC has considered this question and decided to impose the requirement on applicants to it for ETC designation. The Commission will accept the FCC's recommendation, finding no reason not to do so.

d. New Public Interest Analysis -- FCC Rule 54.202(c)

ACC/WWC objected to the FCC's proposed formulation of the public interest standard and stated that the Commission should maintain its current framework for analyzing the public interest. ACC/WWC stated that there is no need to adopt a new public interest standard because the Commission's decisions on this subject provide appropriate guidance to potential applicants.

The Commission finds that the FCC's proposed language is consistent with what the Commission has required in past cases and will adopt it. While the adoption of the FCC's language does not substantively change the Commission's public interest analysis, ACC/WWC's comments provide no basis to reject the FCC's public interest formulation and rejecting that formulation may suggest that the Commission's public interest analysis is different from the FCC's.

ORDER

1. The Commission will apply the provisions of FCC Rule § 54.202, as adapted and changed pursuant to the decisions discussed above in the text of this Order, to petitions filed with the Commission after the date of this Order seeking designation as an eligible telecommunications carrier under 47 U.S.C. § 214(e)(2). The specific requirements are set

forth in Order Paragraph 2.

2. In addition to its current review template set forth above on page 8 of this Order, therefore, the Commission hereby adopts the following additional requirements for Commission designation of eligible telecommunications carriers:¹²

After the date of this Order, petitioners to the Commission to be designated an eligible telecommunications carrier under 47 U.S.C. § 214(e)(2) must

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

(B) submit a ~~five-year~~ two-year plan that describes with specificity proposed improvements or upgrades to the applicant's network on a wire center-by-wire center basis or on a service-area basis throughout its proposed designated service area. Each applicant shall demonstrate how signal quality, coverage or capacity will improve due to the receipt of high-cost support; the projected start date and completion date for each improvement and the estimated amount of investment for each project that is funded by high-cost support; the specific geographic areas where the improvements will be made; and the estimated population that will be served as a result of the improvements. If an applicant believes that service improvements in a particular wire center are not needed, it must explain its basis for this determination and demonstrate how funding will otherwise be used to further the provision of supported services in that area.
- (2) demonstrate their ability to remain functional in emergency situations, including a demonstration that it has a reasonable amount of back-up power to ensure functionality without an external power source, is able to reroute traffic around damaged facilities, and is capable of managing traffic spikes resulting from emergency situations.
- (3) demonstrate that it will satisfy applicable consumer protection and service quality standards. ~~A commitment by wireless applicants to comply with the Cellular Telecommunications and Internet Association's Consumer Code for Wireless Service will satisfy this requirement. Other~~ Applicants' commitments will be

¹² FCC Rule 54.202 provides the basic text. The Commission's additions to that language are shown by underline and its deletions are shown by ~~strikeout~~.

considered on a case-by-case basis.

- (4) demonstrate that it offers a local usage plan comparable to the one offered by the incumbent EEC in the service areas for which it seeks designation.
 - (5) certify that the carrier acknowledges that the Commission may require it to provide equal access to long distance carriers in the event that no other eligible telecommunications carrier is providing equal access within the service area.
3. In addition, the public interest standard that the Commission will apply in considering applications for designation as an ETC is as set forth in FCC Rule § 54.202(c) with the clarification that whereas the term “the Commission” in the FCC rule refers to the FCC, the term “the Commission” in the following refers to the Minnesota Public Utilities Commission:

Public Interest Standard. Prior to designating an eligible telecommunications carrier pursuant to section 214(e)(~~6~~) (2), the Commission [will] determine that such designation is in the public interest. In doing so, the Commission shall consider the benefits of increased consumer choice, and the unique advantages and disadvantages of the applicant’s service offering. In instances where an eligible telecommunications carrier applicant seeks designation below the study area level of a rural telephone company, the Commission shall also conduct a creamskimming analysis that compares the population density of each wire center in which the eligible telecommunications carrier applicant seeks designation against that of the wire centers in the study area in which the eligible telecommunications carrier applicant does not seek designation. In its creamskimming analysis, the Commission shall consider other factors, such as disaggregation of support pursuant to § 54.315 by the incumbent local exchange carrier.

4. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

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