

GUNDERSON, PALMER, GOODSSELL & NELSON, LLP

ATTORNEYS AT LAW

J. CRISMAN PALMER
G. VERNE GOODSSELL
JAMES S. NELSON
DANIEL E. ASHMORE
TERENCE R. QUINN
DONALD P. KNUDSEN
PATRICK G. GOETZINGER
TALBOT J. WIECZOREK
MARK J. CONNOT
JENNIFER K. TRUCANO
MARTY J. JACKLEY

ASSURANT BUILDING
440 MT. RUSHMORE ROAD
POST OFFICE BOX 8045
RAPID CITY, SOUTH DAKOTA 57709-8045
TELEPHONE (605) 342-1078 • FAX (605) 342-0480
www.gundersonpalmer.com

DAVID E. LUST
THOMAS E. SIMMONS
TERRI LEE WILLIAMS
PAMELA SNYDER-VARNS
SARA FRANKENSTEIN
AMY K. KOENIG
JASON M. SMILEY
SHANE C. PENFIELD
JONATHAN M. OOSTRA
WYNN A. GUNDERSON
Of Counsel

ATTORNEYS LICENSED TO PRACTICE IN
SOUTH DAKOTA, NORTH DAKOTA, IOWA, NEBRASKA
COLORADO, MONTANA, WYOMING & MINNESOTA

VIA FAX 605-773-3809

Patricia Van Gerpen
Executive Director
South Dakota Public Utilities Commission
500 E. Capitol Avenue
Pierre SD 57501

FROM: Talbot J. Wieczorek

RE: RM06-001 – In the Matter of the Adoption of Rules Regarding Eligibility, Certification and Reporting Requirements for Eligible Telecommunications Carriers Rural Cellular Corporation GPGN File No. 7401.040099

NUMBER OF COPIES TRANSMITTED INCLUDING THIS SHEET: 24

COMMENTS:

ORIGINALS: Mailed via Next Day Delivery and Emailed

THE INFORMATION CONTAINED IN THIS FACSIMILE MESSAGE IS ATTORNEY PRIVILEGED AND CONFIDENTIAL INFORMATION INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY NAMED ABOVE. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE IMMEDIATELY NOTIFY US BY TELEPHONE, AND RETURN THE ORIGINAL MESSAGE TO US AT THE ABOVE ADDRESS VIA THE U.S. POSTAL SERVICE. THANK YOU.

NOTE: If you do not receive all pages or have any problems with receiving, please call (605) 342-1078 and ask for Karen L. Webb. Thank you.

GUNDERSON, PALMER, GOODSSELL & NELSON, LLP

ATTORNEYS AT LAW

J. CRISMAN PALMER
G. VERNE GOODSSELL
JAMES S. NELSON
DANIEL E. ASHMORE
TERENCE R. QUINN
DONALD P. KNUDSEN
PATRICK G. GOETZINGER
TALBOT J. WIECZOREK
MARK J. CONNOT
JENNIFER K. TRUCANO
MARTY J. JACKLEY

ASSURANT BUILDING
440 MT. RUSHMORE ROAD
POST OFFICE BOX 8045
RAPID CITY, SOUTH DAKOTA 57709-8045
TELEPHONE (605) 342-1078 • FAX (605) 342-0480
www.gundersonpalmer.com

ATTORNEYS LICENSED TO PRACTICE IN
SOUTH DAKOTA, NORTH DAKOTA, IOWA, NEBRASKA
COLORADO, MONTANA, WYOMING & MINNESOTA

DAVID E. LUST
THOMAS E. SIMMONS
TERRI LEE WILLIAMS
PAMELA SNYDER-VARNS
SARA FRANKENSTEIN
AMY K. KOENIG
JASON M. SMILEY
SHANE C. PENFIELD
JONATHAN M. OOSTRA
WYNN A. GUNDERSON
Of Counsel

May 22, 2006

VIA FAX 605-773-3801

Email at: Patty.VanGerpen@state.sd.us

NEXT DAY DELIVERY

Patricia Van Gerpen
South Dakota Public Utilities Commission
Capitol Building, 1st Floor
500 East Capitol Avenue
Pierre, SD 57501-5070

RE: RM06-001 – In the Matter of the Adoption of Rules Regarding Eligibility, Certification and Reporting Requirements for Eligible Telecommunications Carriers
Rural Cellular Corporation
GPGN File No. 7401.040099

Dear Ms. Van Gerpen:

Enclosed for filing please find a copy of Rural Cellular Corporation's Comments in the above-entitled matter. The hard copy of this letter, along with the original and three copies of the Comments, will be sent via Next Day Delivery on Monday, May 22, 2006.

I have provided a copy to those on the service list

If you have any questions, please contact me.

Sincerely,



Talbot J. Wieczorek

TJW:klw

Enclosure

c: RaeAnn Kelsch - Alltel Communications via email
Rolayne Wiest – via email
Clients

**STATE OF SOUTH DAKOTA
PUBLIC UTILITIES COMMISSION**

IN THE MATTER OF THE PROMULGATION
OF ADMINISTRATIVE RULES

DOCKET NO. RM-06-001

**COMMENTS OF RCC MINNESOTA, INC.
AND WIRELESS ALLIANCE, LLC D/B/A UNICEL**

MAY 22, 2006

GUNDERSON, PALMER, GOODSSELL
& NELSON LLP
Talbot J. Wiczorek
P.O. Box 8045
Rapid City, South Dakota 57709
Telephone: (605) 342-1078

BRIGGS AND MORGAN, P.A.
Mark J. Ayotte
Matthew A. Slaven
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
Telephone: (612) 977-8400

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	DISCUSSION.....	2
	A. Any ETC Application, Certification and Reporting Requirements Adopted By The Commission Must Be Competitively And Technologically Neutral	2
	B. Unicel Supports The Commission's Adoption Of A Two-Year Service Improvement Plan, But Proposed Rules 20:10:32:43.02 And 20:10:32:54(1) Should Be Revised To Allow The Submission Of Service Improvement Data At The Service Area Level	3
	C. Proposed Rule 20:10:32:43.01 Should Be Revised To Ensure That The Service Extension Requirement Is Competitively And Technologically Neutral.....	7
	D. Proposed Rule 20:10:32:43.04 Should Be Revised To Provide That A Wireless Carrier's Commitment To Adhere To The CTIA Consumer Code Will Satisfy The Requirement To Comply With Applicable Consumer Protection And Service Quality Standards	9
	E. Proposed Rules 20:10:32:43.06 and 20:10:32:54(8) Should Be Revised To Clarify That Only The FCC Has Authority To Require A Wireless Carrier To Provide Equal Access	10
	F. Proposed Rule 20:10:32:54(2) Should Be Revised To Conform With The FCC's Part 4 Outage Reporting Requirements	12
	G. Proposed Rule 20:10:32:55 Should Be Revised To Clarify That Lifeline And Link-Up Advertising Requirements Only Apply Within An ETC's Designated Service Area And To Further Harmonize The Reporting Deadline With The June 1 Deadline Set Forth In Proposed Rule 20:10:32:52	14
	H. The Commission Should Retain Rule 20:10:32:44 To Clarify That Existing ETC Designations Will Remain In Effect Notwithstanding The Adoption Of New Rules.....	15
	I. The Commission Should Extend The Proposed Rules' Initial Filing Deadline Until June 1, 2007 To Allow ETCs Sufficient Time To Implement Procedures To Properly Collect And Maintain The Required Information	16
	J. The Proposed Rules Should Be Revised To Include A Specific Provision That Ensures The Confidentiality Of Proprietary Carrier Information	18
III.	CONCLUSION.....	20

I. INTRODUCTION

RCC Minnesota, Inc. and Wireless Alliance, LLC d/b/a Unicel (collectively "Unicel"), by and through their undersigned counsel, respectfully submit these comments in response to the South Dakota Public Utilities Commission's ("Commission") Notice of Public Hearing to Adopt Rules setting forth proposed application, certification and annual reporting requirements for eligible telecommunications carriers ("ETCs") in the State of South Dakota.

Unicel is licensed by the Federal Communications Commission ("FCC") to provide commercial mobile radio services ("CMRS") in portions of South Dakota. Unicel has also been designated by the Commission as a competitive ETC for certain service areas within the State.¹ As a CMRS provider and competitive ETC in South Dakota, and as a participant in the federal universal service program, Unicel has a significant interest in the subject matter of this proceeding and appreciates the opportunity to provide these comments.

Unicel generally supports the Commission's efforts to conform its ETC rules to the guidelines established by the FCC in its March 17, 2005 Order.² Adoption of these requirements will help ensure that South Dakota's efforts to promote universal service are done in a competitively and technologically neutral manner for all telecommunications companies. In certain limited instances, however, Unicel objects to portions of the Commission's proposed rules. In some cases, the proposed rules deviate from the standards established by the FCC, resulting in alternative and inconsistent standards. Other proposed rules are unnecessary for the promotion of universal service or fail to accommodate important administrative, legal and

¹ *In the Matter of the Filing by RCC Minnesota, Inc. and Wireless Alliance, LLC d/b/a Unicel for Designation as an Eligible Telecommunications Carrier*, Docket No. TC03-193, *Order Designating RCC Minnesota, Inc. and Wireless Alliance, LLC d/b/a Unicel as Eligible Telecommunications Carriers; Findings of Fact and Conclusions of Law; and Notice of Entry of Order* (June 6, 2005).

² *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Report and Order*, FCC 05-46 (rel. March 17, 2005) ("*March 2005 Order*").

technical differences among carriers and technologies. Accordingly, Unicel respectfully encourages the Commission to revise its proposed rules to ensure competitive and technological neutrality and to avoid the imposition of requirements that are not necessary for the promotion of universal service in South Dakota. To assist the Commission with its review, Unicel's specific recommended revisions to the proposed rules are set forth in detail below.

II. DISCUSSION

A. Any ETC Application, Certification and Reporting Requirements Adopted By The Commission Must Be Competitively And Technologically Neutral

As set forth in the proposed rules, the Commission proposes to implement new application, certification and annual reporting requirements applicable to all ETCs operating in South Dakota. Any such rules adopted by the Commission must be competitively and technologically neutral.³

In its *March 2005 Order*, the FCC adopted new regulations governing the application, certification and annual reporting requirements for ETCs designated pursuant to its authority under Section 214(e)(6) of the Telecommunications Act of 1996 (the "Act"), 47 U.S.C. § 214(e)(6). The FCC generally encouraged State regulatory commissions to consider these regulations when adopting requirements for State-designated carriers, but did not mandate the adoption of any such requirements.⁴ Rather, the FCC emphasized that State regulators should consider the extent to which a particular regulation is necessary to protect consumers and the

³ In 1997, the FCC adopted the principle of competitive neutrality as a core principle for its universal service rules. This principle means that universal service rules must not favor one competitor or technology over another. *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Report and Order*, FCC 97-157, ¶ 47 (rel. May 8, 1997) ("*Universal Service Order*").

⁴ *March 2005 Order*, ¶ 61 ("We decline to mandate that state commissions adopt our requirements for ETC designations.")

extent to which the regulation may harm an ETC because it is not the incumbent LEC.⁵ Most importantly, the FCC advised that “states should not require regulatory parity for parity’s sake.”⁶

Additionally, the FCC emphasized that if State regulators adopted the requirements set forth in the *March 2005 Order*, such requirements must be consistently implemented to ensure the uniform and predictable administration of the federal universal service program.⁷ The FCC stated, “we encourage States to conform these guidelines [the FCC’s requirements] with any similar conditions imposed on previously designated ETCs *in order to avoid duplicative or inapplicable eligibility criteria and reporting requirements*” and reiterated its desire that States develop “a single, consistent body of eligibility standards to be applied in all cases.”⁸ These principles must be at the forefront of the Commission’s evaluation process as it considers adoption of the proposed rules.

B. Unicec Supports The Commission’s Adoption Of A Two-Year Service Improvement Plan, But Proposed Rules 20:10:32:43.02 And 20:10:32:54(1) Should Be Revised To Allow The Submission Of Service Improvement Data At The Service Area Level

1. Requiring A Two-Year Service Improvement Plan Is More Reasonable And Technically Feasible Than The FCC’s Five-Year Requirement

Proposed rule 20:10:32:43.02 would require an ETC applicant to submit a two-year plan describing the company’s projected use of federal high-cost universal service support to complete network improvements or upgrades on a wire center-by-wire center basis throughout its designated service area. Similarly, proposed rule 20:10:32:54(1) would require a designated ETC to annually submit a progress report concerning its two-year service improvement plan. Consistent with FCC Rule 54.202(a)(1)(ii), proposed rule 20:10:32:43.02 would require the plan

⁵ *March 2005 Order*, ¶ 30.

⁶ *March 2005 Order*, ¶ 30 (“We agree with the Joint Board’s assertion that ‘states should not require regulatory parity for parity’s sake.’”)

⁷ *Id.*, ¶¶ 1, 2, 58.

⁸ *Id.*, ¶¶ 58-59 (emphasis added).

to demonstrate: (1) how signal quality, coverage, or capacity will improve in the designated area due to the receipt of high-cost support; (2) the projected start and completion date for each improvement, including the estimated amount of investment per project funded by high-cost support; (3) the specific geographic areas where improvements will be made; and (4) the estimated population that will be served as a result of the improvements.

Unlike the FCC, however, the Commission appropriately determined that a two-year plan would be more feasible, and would result in the submission of more accurate information, than the five-year plan required by the FCC. The Commission's inclusion of a two-year plan, in lieu of the FCC's five-year plan, is consistent with determinations of other regulatory agencies – including the Minnesota and Iowa commissions – and should be adopted.⁹ Simply stated, five-years is an unrealistic planning horizon for any telecommunications carrier, including a wireless carrier like UniceL. Wireless carriers and other competitive providers face too many variables to accurately or predictably project or plan network improvements five years into the future. Moreover, the variables are often outside the control of the carrier since technological innovations, changing demand and shifting customer needs will invariably require plan modifications.

⁹ See *In the Matter of Possible Changes to the Commission's Annual Certification Requirements Related to Eligible Carriers' Use of the Federal Universal Service Support*, Docket No. P-999/M-05-741, and *In the Matter of a Commission Investigation to Consider Adopting the FCC's Standards for Designating Eligible Telecommunications Carriers*, Docket No. P-999/CI-05-1169, *Order Setting Filing Requirements and Opening Proceeding to Consider Adopting FCC Standards for Designating Eligible Telecommunications Carriers* (rel. July 21, 2005), and *In the Matter of a Commission Investigation to Consider Adopting the FCC's Standards for Designating Eligible Telecommunications Carriers*, Docket No. P-999/CI-05-1169, *Order Adopting FCC Requirements for Designating Eligible Telecommunications Carriers, as Modified* (rel. Oct. 31, 2005) (collectively, "Minnesota ETC Orders") (generally adopting requirements from the FCC's March 2005 Order, but requiring a two-year service improvement plan); see also *In re Eligibility, Certification, and Reporting Requirements for Eligible Telecommunications Carriers [199 IAC 39]*, Docket No. RMU-06-1, *Order Commencing Rulemaking* (Feb. 24, 2006) (setting forth proposed rules which include a two-year service improvement plan requirement in lieu of the FCC's five-year plan requirement).

Unicel therefore concurs with the Commission's recognition of the inherent limitations of a five-year planning horizon and supports the adoption of a two-year plan requirement as set forth in proposed rules 20:10:32:43.02 and 20:10:32:54(1).

2. Wire Center Level Reporting Is Not Competitively Neutral

The Commission should revise proposed rules 20:10:32:43.02 and 20:10:32:54(1) to allow carriers the option of submitting service improvement plan data on a service area level, rather than mandating a wire center-by-wire center basis for all carriers. Wire centers are a construct of the wireline telecommunications industry and provide no meaningful basis for reporting data by wireless and other competitive telecommunications carriers. Wireless and other competitive carriers do not construct their networks based on the incumbents' wire centers, nor do they track capital investments or expenses at the wire center level. As noted by the Minnesota Public Utilities Commission, wireless carrier service areas do not correspond to "the service territory boundaries or exchange area boundaries of incumbent landline carriers."¹⁰ Imposing a reporting requirement on wireless carriers based on a physical boundary "that is simply structured to fit the contours of an incumbent's facilities [makes] it difficult [for a wireless carrier] to conform its signal or service area to the precise contours of the incumbent's area, giving the incumbent an advantage [. . .]."¹¹ Consequently, proposed rules 20:10:32:43.02 and 20:10:32:54(1) should be modified to allow applicants or designated ETCs to submit service improvement plan data on either a service area basis or a wire center basis.

¹⁰ 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-6182, 6181/M-02-1503, *Order Granting Conditional Approval and Requiring Additional Filings*, p. 9 (rel. Jul. 31, 2003) ("RCC MN ETC Order"); *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)*, Docket No. PT-6182, 6181/M-02-1503, *Order Granting Conditional Approval and Requiring Additional Filings*, p. 11 (rel. Mar. 19, 2003) ("Midwest Wireless MN ETC Order").

¹¹ *RCC MN ETC Order* at 10; *accord Midwest Wireless MN ETC Order* at 12.

It is more reasonable for the Commission to allow all ETCs to track and report service improvements and projected expenditures for either their entire designated ETC service area or at the wire center level depending upon the nature of the carrier's operations. Such a result is consistent with the Commission's previous determination that a competitive ETC may report capital expenditures at the service area level, rather than requiring the carrier to attempt to allocate costs to individual wire centers.¹² In addition, there is no policy rationale which supports requiring wireless and other competitive carriers to track and report service improvements and expenditures at the wire center level.

Accordingly, the Commission should revise proposed rules 20:10:32:43.02 and 20:10:32:54(1) to allow carriers to submit data on either a service area basis or a wire center basis as follows:

20:10:32:43.02. Submission of two-year plan. An applicant requesting designation as an eligible telecommunications carrier shall submit a 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 the following on a wire center-by-wire center basis or on a service-area basis:

- (1) How ~~signal~~ service quality, coverage, or capacity will improve due to the receipt of high-cost support;
- (2) 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;
- (3) The specific geographic areas where the improvements will be made; and
- (4) The estimated population that will be served as a result of the improvements.

¹² See *In the Matter of the Filing by WWC License, LLC D/B/A CellularOne for Designation as an Eligible Telecommunications Carrier in Other Rural Areas*, Docket No. TC03-191, *Order Granting in Part and Denying in Part Western Wireless' Petition for Reconsideration and Clarification; Findings of Fact and Conclusions of Law; and Notice of Entry of Order* (Jan. 3, 2005).

If an applicant believes that service improvements in a particular wire-center or portion of a service-area 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.¹³

20:10:32:54. Certification requirements. In its annual certification filing, each eligible telecommunications carrier shall provide the following to the commission:

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

C. Proposed Rule 20:10:32:43.01 Should Be Revised To Ensure That The Service Extension Requirement Is Competitively And Technologically Neutral

Consistent with FCC Rule 54.202(a)(1)(i), proposed rule 20:10:32:43.01 would require an ETC applicant to commit to provide service throughout its requested service area to all customers making a reasonable request for service, and to further certify its adoption of the six-step graduated process for the provision of service to potential customers outside its existing network coverage. Unicel supports the Commission's adoption of the FCC's service extension requirement, but recommends that the Commission revise proposed rule 20:10:32:43.01 to clarify its application to all carriers, regardless of the technology employed to provide service.

The FCC has long recognized that an ETC applicant is not required to provide ubiquitous service throughout the carrier's requested service area prior to designation. Rather, a new competitive entrant is entitled to the same opportunity as the incumbent LEC to develop and extend its facilities to provide service upon reasonable request:

We find the requirement that a carrier provide service to every potential customer throughout the service area before receiving ETC designation has the effect of prohibiting the provision of service in high-cost areas. As an ETC, the incumbent

¹³ Unicel's proposed revisions are indicated by stricken and underlined text.

LEC is required to make service available to all consumers upon request, but the incumbent LEC may not have facilities to every possible consumer. We believe the ETC requirements should be no different for carriers that are not incumbent LECs. A new entrant, once designated as an ETC, is required, as the incumbent is required, to extend its network to serve new customers upon reasonable request. We find, therefore, that new entrants must be allowed the same reasonable opportunity to provide service to requesting customers as the incumbent LEC, once designated as an ETC. Thus, we find that a telecommunications carrier's inability to demonstrate that it can provide ubiquitous service at the time of its request for designation as an ETC should not preclude its designation as an ETC.¹⁴

This standard is reflected in the requirements of FCC Rule 54.202(a)(1)(i), which provides a graduated process under which requests for service may be properly evaluated on a case-by-case basis. As drafted, however, the Commission's proposed rule is not competitively or technologically neutral in that it predominantly references only wireless carriers and wireless facilities. The wireless-centric nature of the proposed rule raises questions concerning its applicability to other types of carriers or technologies and will make it difficult to administer as other technologies develop over time.

Accordingly, the Commission should revise proposed rule 20:10:32:43.01 as follows to clarify its application to all ETCs, regardless of the technology employed by the carrier:

20:10:32:43.01. Demonstration of commitment to provide service. An applicant requesting designation as an eligible telecommunications carrier shall commit to providing 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 proposed designated service area where the applicant's network already passes the potential customer's premises; and

¹⁴ *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, CC Docket 96-45, Declaratory Ruling, FCC 00-248 (rel. Aug. 10, 2000) (emphasis added).*

(2) Provide service within a reasonable period of time, if the potential customer is within the applicant's ~~licensed~~ proposed designated 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) Extending facilities, such as constructing or extending an access line, ~~Deploying a roof-mounted antenna or installing~~ other equipment,
- (c) Adjusting the nearest cell tower, if applicable;
- (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~~ additional network facilities, such as an extended access line or consolidator, a cell site, cell extender, repeater, or other similar equipment.

D. Proposed Rule 20:10:32:43.04 Should Be Revised To Provide That A Wireless Carrier's Commitment To Adhere To The CTIA Consumer Code Will Satisfy The Requirement To Comply With Applicable Consumer Protection And Service Quality Standards

Similar to FCC Rule 54.202(a)(3), proposed rule 20:10:32:43.04 would require an ETC applicant to demonstrate that it will comply with applicable consumer protection and service quality standards. As set forth in FCC Rule 54.202(a)(3), the FCC expressly determined that a wireless ETC applicant's commitment to comply with the CTIA Consumer Code fully satisfies this requirement. The CTIA Consumer Code sets forth certain principles, disclosures and practices for the provision of wireless service for the benefit of consumers. A wireless carrier's commitment to these principles and practices ensures that consumers will receive high-quality service. More importantly, the FCC has determined that a wireless carrier's commitment to comply with the CTIA Consumer Code constitutes a specific commitment to objective service quality and consumer protection measures.¹⁵

¹⁵ *March 2005 Order*, ¶ 28; *Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier In the Commonwealth of Virginia*, CC Docket No. 96-45, *Memorandum Opinion and Order*, FCC 03-338, ¶ 30 & n. 94 (rel. Jan. 22, 2004).

Significantly deviating from FCC Rule 54.202(a)(3), proposed rule 20:10:32:43.04 provides that a wireless ETC applicant's commitment to comply with the CTIA Consumer Code "may" satisfy this requirement; whereas, FCC Rule 54.202(a)(3), provides that such commitment by a wireless ETC applicant "shall" satisfy this requirement. The word "may" creates uncertainty where there should be none. The FCC has already determined that a wireless ETC applicant's commitment to comply with the CTIA Consumer Code is a sufficient demonstration.

The Commission should, therefore, revise proposed rule 20:10:32:43.04 as follows to eliminate this ambiguity and conform the rule to the FCC's standard:

20:10:32:43.04. Demonstration of ability to satisfy consumer protection and service quality standards. An applicant requesting designation as an eligible telecommunications carrier shall 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 ~~may~~ will satisfy this requirement. Other commitments will be considered on a case-by-case basis.

E. Proposed Rules 20:10:32:43.06 and 20:10:32:54(8) Should Be Revised To Clarify That Only The FCC Has Authority To Require A Wireless Carrier To Provide Equal Access

Proposed rules 20:10:32:43.06 and 20:10:32:54(8) would require an ETC applicant or a designated ETC to acknowledge that it may be required to provide equal access to long distance carriers if no other eligible ETC is providing equal access within the company's designated service area. The proposed rules mirror FCC Rules 54.202(a)(5) and 54.209(a)(8). As a result, proposed rules 20:10:32:43.06 and 20:10:32:54(8) mistakenly refer to the authority of the "commission" to require the provision of equal access, rather than correctly referring to the authority of the "FCC" to require the provision of equal access.

The proposed rules must, therefore, be revised to clarify that the FCC, not this Commission, has the sole authority to require a wireless carrier to provide equal access. Pursuant to federal law, the Commission is preempted from requiring wireless carriers to provide

equal access. Section 332(c)(8) of the Act grants the authority to require CMRS providers to provide equal access to the FCC alone:

A person engaged in the provision of commercial mobile services, insofar as such person is so engaged, shall not be required to provide equal access to common carriers for the provision of telephone toll services. If [the FCC] determines that subscribers to such services are denied access to the provider of telephone toll services of the subscribers' choice, and that such denial is contrary to the public interest, convenience, and necessity, then the [FCC] shall prescribe regulations to afford subscribers unblocked access to the provider of telephone toll services of the subscribers' choice through the use of a carrier identification code assigned to such provider or other mechanism. . . .

47 U.S.C. § 332(c)(8) (emphasis and brackets added). This fact was reiterated by the FCC in its *March 2005 Order*. The FCC cited Section 332(c)(8) and noted that "if such circumstances arise, the [FCC] should consider whether to impose an equal access or similar requirement under the Act."¹⁶ Thus, if an incumbent ETC attempts to relinquish its ETC designation, it will be the FCC, not this Commission, that will determine whether a competitive wireless ETC will be required to provide equal access.

Accordingly, proposed rules 20:10:32:43.06 and 20:10:32:54(8) should be revised as follows:

20:10:32:43.06. Provisioning of equal access. An applicant requesting designation as an eligible telecommunications carrier shall certify that the applicant acknowledges that the Federal Communications Commission ~~commission~~ may require it to provide equal access to long distance carriers if no other eligible telecommunications carrier is providing equal access within the service area.

20:10:32:54. Certification requirements. In its annual certification filing, each eligible telecommunications carrier shall provide the following to the commission:

(8) Certification that the carrier acknowledges that the Federal Communications Commission ~~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.

¹⁶ *March 2005 Order*, ¶ 35.

F. Proposed Rule 20:10:32:54(2) Should Be Revised To Conform With The FCC's Part 4 Outage Reporting Requirements

Proposed rule 20:10:32:54(2) would require a designated ETC to report detailed information regarding service outages on an annual basis. Such a reporting requirement at the State level is unnecessary as every telecommunications carrier providing voice communication services, including all designated ETCs, must already comply with the FCC's outage reporting requirements set forth at 47 C.F.R. Part 4 ("Part 4 outage reporting requirements").¹⁷ The Commission's proposed ETC outage reporting standards will also be burdensome to designated carriers to the extent they require information different than the FCC's Part 4 outage reporting requirements.

In the *Outage Order*, the FCC promulgated detailed reporting requirements specifically tailored to the technology used by each type of voice service provider.¹⁸ For example, wireless carriers have the following obligation:

Wireless. All wireless service providers shall submit electronically a Notification to the [FCC] within 120 minutes of discovering that they have experienced on any facilities that they own, operate, lease, or otherwise utilize, an outage of at least 30 minutes duration: (1) of a Mobile Switching Center (MSC); (2) that potentially affects at least 900,000 user minutes of either telephony and associated data (2nd generation or lower) service or paging service; (3) that affects at least 1,350 DS3 minutes; (4) that potentially affects any special offices and facilities (in accordance with paragraphs (a) - (d) of section 4.5) other than airports; or (5) that potentially affects a 911 special facility (as defined in (e) of section 4.5), in which case they also shall notify, as soon as possible by telephone or other electronic means, any official who has been designated by the management of the affected 911 facility as the provider's contact person for communications outages at that facility, and they shall convey to that person all available information that may be useful to the management of the affected facility in mitigating the effects of the outage on callers to that facility. (DS3 minutes and user minutes are defined in paragraphs (d) and (e) of section 4.7.) In determining the number of users potentially affected by a failure of a switch, a concentration ratio of 8 shall

¹⁷ *In the Matter of New Part 4 of the Commission's Rules Concerning Disruptions to Communications*, ET Docket No. 04-35, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 04-188, 19 FCC Rcd. 16830 (rel. Aug. 19, 2004) ("*Outage Order*").

¹⁸ See 47 C.F.R. § 4.1 *et seq.*

be applied. For providers of paging service solely, however, the following outage criteria shall apply instead of those in subparagraphs (1) – (3), above: Notification must be submitted if the failure of a switch for at least 30 minutes duration potentially affects at least 900,000 user-minutes. Not later than 72 hours after discovering the outage, the provider shall submit electronically an Initial Communications Outage Report to the [FCC]. Not later than thirty days after discovering the outage, the provider shall submit electronically a Final Communications Outage Report to the Commission. The Notification and the Initial and Final reports shall comply with all of the requirements of section 4.11.

47 C.F.R. § 4.9(b).

In light of these mandatory federal reporting requirements, any ETC outage reporting requirements adopted at the State level would be duplicative and unnecessary regulation. Moreover, the differences in the Commission's proposed outage reporting requirements, as compared to the FCC's Part 4 outage reporting requirements, would result in unnecessary burdens and costs to carriers. A comparison of the FCC's Part 4 outage reporting requirements and proposed rule 20:10:32:54(2) reflects significant differences in the obligations to track and report outages. For example, the FCC's Part 4 outage reporting thresholds for wireless and wireline carriers are based on the affected minutes of use; whereas, proposed rule 20:10:32:54(2) would rely on a percentage of end users served in a designated service area. Similarly, the Commission's proposed rule would require carriers to describe the resolution of the outage and to report steps taken to prevent similar outages in the future, which are not requirements under the FCC's Part 4 outage reporting rules. In the end, the adoption of proposed rule 20:10:32:54(2) can be expected to require designated ETCs to establish burdensome and unnecessary internal outage reporting processes to conform to the new requirements.

Alternatively, if the Commission deems it necessary to obtain outage information, an ETC should be allowed to satisfy the reporting requirement by annually filing with the Commission a copy of the carrier's FCC Part 4 outage reports. The filing of the FCC reports would provide the Commission with meaningful information regarding the reliability of services

provided by ETCs, and it would avoid the unnecessary burden to carriers associated with developing alternative processes to capture and report different information under proposed rule 20:10:32:54(2).

However, any outage reports filed with the Commission must be subject to appropriate safeguards to ensure confidentiality of the data contained in the reports. These safeguards must be in place because the FCC has determined that such data presents a national security risk and should be protected from public dissemination under the Freedom of Information Act:

The overwhelming majority of the commenting parties, including the Department of Homeland Security ("DHS"), have demonstrated that the outage reports will contain sensitive data, which requires confidential treatment under the Freedom of Information Act ("FOIA"). This data, though useful for the analysis of past and current outages in order to increase the reliability and security of telecommunications networks in the future, could be used by hostile parties to attack those networks, which are part of our Nation's critical information infrastructure. The disclosure of outage reporting information to the public could present an unacceptable risk of more effective terrorist activity. We therefore will treat the information that will be provided as confidential. This information will be withheld from disclosure to the public in accordance with the Freedom of Information Act.¹⁹

Accordingly, any outage data required by the Commission must be afforded strict confidential treatment under South Dakota law.

G. Proposed Rule 20:10:32:55 Should Be Revised To Clarify That Lifeline And Link-Up Advertising Requirements Only Apply Within An ETC's Designated Service Area And To Further Harmonize The Reporting Deadline With The June 1 Deadline Set Forth In Proposed Rule 20:10:32:52

Proposed rule 20:10:32:55 would establish new advertising and outreach requirements for the promotion of the Lifeline and Link Up assistance programs. Unicef supports these standards as consistent with the existing obligations of ETCs and in furtherance of the universal service goal of increasing consumer access to essential telecommunications services. In addition to these requirements, proposed rule 20:10:32:55 would also require ETCs to submit to the

¹⁹ *Outage Order*, ¶ 3.

Commission a report regarding the carrier's Lifeline and Link Up outreach efforts by March 1 of each year.

Unicel recommends that proposed rule 20:10:32:55 be revised to clarify that the Lifeline and Link Up advertising and outreach requirements only apply within the ETC's designated service area. Unicel further recommends that the proposed rule be revised to require that the annual advertising and outreach report be filed by June 1 of each year consistent with the filing deadline set forth in proposed rule 20:10:32:52, as follows:

20:10:32:55. Lifeline and link-up advertising requirements - Annual report on outreach efforts. An eligible telecommunications carrier shall advertise the availability of the federal lifeline and link-up assistance programs to each of its existing customers residing in its designated service area at least annually by written notification provided directly to the existing customers. A new customer residing in its designated service area shall receive written notification of lifeline and link-up assistance programs within 30 days after receiving telecommunications services. An eligible telecommunications carrier shall annually advertise the availability of lifeline and link-up services in media of general distribution throughout its designated service areas. An eligible telecommunications carrier shall submit a detailed report on its outreach efforts designed to increase participation in the lifeline and link-up assistance programs to the commission. The report shall be filed by June 1 ~~March 1~~ of each year and shall report on the carrier's outreach activities for the previous year.

H. The Commission Should Retain Rule 20:10:32:44 To Clarify That Existing ETC Designations Will Remain In Effect Notwithstanding The Adoption Of New Rules

The Commission proposes to repeal rule 20:10:32:44, which provides that ETC designations granted by the Commission prior to the effective date of newly adopted rules shall remain in effect unless later changed by the Commission after notice and opportunity for a hearing. Rule 20:10:32:44 was first adopted in 1998 to ensure that existing ETCs would not be required to reapply for ETC designation when the Commission established new ETC requirements in A.R.S.D. 20:10:32:42 through 49. The proposed repeal of rule 20:10:32:44 may place the status of existing ETC designations in doubt and unnecessarily suggests that all existing

ETCs must reapply for designation to conform to the new standards. This is inconsistent with the original intent of rule 20:10:32:44 and the structure and application of the FCC's Rules.

The Commission should make clear that existing ETCs need not reapply for designation despite the adoption of new rules. Such a result is consistent with proposed rule 20:10:32:53, which merely requires existing ETCs to submit informational filings. Proposed rule 20:10:32:53 would require existing ETCs, and ETC applicants who submitted applications prior to the effective date of the new rules, to submit the information required by the proposed rules to the Commission by August 1, 2006. This is also consistent with FCC Rule 54.202(b), which requires existing ETCs to comply with newly adopted annual reporting requirements. Notably, neither proposed rule 20:10:32:53 nor FCC Rule 54.202(b) state that existing ETC designations would be called into doubt or subject to reevaluation.

Rather, the intent of proposed rule 20:10:32:53 and FCC Rule 54.202(b) is to ensure that an existing ETC will be allowed to maintain its ETC status and not be required to reapply for designation. Accordingly, Unicel recommends that the Commission retain rule 20:10:32:44 for purposes of clarifying and preserving the status quo for existing ETCs.

I. The Commission Should Extend The Proposed Rules' Initial Filing Deadline Until June 1, 2007 To Allow ETCs Sufficient Time To Implement Procedures To Properly Collect And Maintain The Required Information

Proposed rules 20:10:32:52 and 20:10:32:54 would require all ETCs to file their annual certifications and reports with the Commission by August 1, 2006, and by June 1 of each year thereafter. With the adoption of the new ETC application and reporting requirements, Unicel recommends that the Commission extend the initial filing deadline under the proposed rules from August 1, 2006 to June 1, 2007 to allow all ETCs sufficient time to implement procedures and collect the historical data necessary to provide the Commission with meaningful information.

Proposed rule 20:10:32:54 would require ETCs to collect, compile, analyze and develop a substantial amount of information prior to the proposed August 1, 2006 filing deadline. This information includes significant amounts of historical information relating to outages, unfulfilled requests for service, service complaints and emergency functionality not previously required. Moreover, the development of a new two-year service improvement plan will take considerable time and planning by all carriers. Because ETCs in South Dakota have not previously been required to file the information contemplated by the proposed rules, it is unlikely that these carriers currently have procedures in place to collect and analyze this data. Simply stated, the proposed August 1, 2006 filing deadline will not provide ETCs sufficient time to comply with these new reporting requirements.

Establishing June 1, 2007 as the initial filing deadline is more reasonable. The establishment of a later filing date is also consistent with the timeframes established by other State commissions and the FCC in their respective ETC rulemaking proceedings. For example, in its July 21, 2005 Order adopting new ETC requirements, the Minnesota Public Utilities Commission established an initial filing deadline of June 1, 2006 — thus providing Minnesota ETCs with over 10 months in which to prepare for and implement the necessary mechanisms to collect and report the required information.²⁰ Likewise, the FCC provided ETCs with over 18 months to develop and implement the necessary processes and procedures to collect and report the required data.²¹ Extending the initial filing deadline to June 1, 2007 will benefit the

²⁰ See *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; *In the Matter of a Commission Investigation to Consider Adopting the FCC's Standards for Designating Eligible Telecommunications Carriers*, Docket No. P-999/CI-05-1169, *Order Setting Filing Requirements and Opening Proceeding to Consider Adopting FCC Standards for Designating Eligible Telecommunications Carriers* (July 21, 2005).

²¹ See *March 2005 Order*, ¶¶ 68-72.

Commission as well, as it will enable ETCs to provide the Commission with more accurate and useful information.

Accordingly, Unicel recommends that the Commission extend the proposed rules' initial filing deadline from August 1, 2006 to June 1, 2007 with the annual filing being due on or before June 1 each year thereafter.

J. The Proposed Rules Should Be Revised To Include A Specific Provision That Ensures The Confidentiality Of Proprietary Carrier Information

As set forth in the proposed rules, an applicant for ETC designation, or a carrier previously designated as an ETC, would be required to file with the Commission certain non-public information, including the location of network facilities, financial data, emergency preparedness or disaster recovery plans, service outage reports and proprietary service evaluations. The disclosure of such information would materially prejudice an ETC applicant or designated ETC's financial or competitive position, reveal trade secrets and impair the public interest. Indeed, with respect to specific information concerning the operation of telecommunications networks or the location of network facilities, the FCC has specifically determined that national security concerns outweigh any interest in public access to such information.²²

Pursuant to Sections 1-27-3 and 1-27-30 of the South Dakota Codified Laws, proprietary or trade secret information of the type required to be filed under the proposed rules is deemed confidential and may be withheld from public disclosure. Section 49-1-11 specifically authorizes the Commission to promulgate rules concerning the procedures and requirements for handling confidential information, as well as determining whether particular information should be protected as confidential. While the Commission has promulgated general confidentiality

²² See Section F above.

rules under A.R.S.D. 20:10:01:40 through 43, given the highly confidential nature of the filings called for by the proposed rules, a specific confidentiality rule should be included in Chapter 20:10:32.

Accordingly, the Commission may appropriately act pursuant to SDCL § 49-1-11 in this proceeding to adopt a provision specifically preserving the confidentiality of proprietary material required to be filed by ETC applicants or designated ETCs. To further this purpose, Unicel encourages the Commission to presumptively deem all non-public materials required to be filed by applicants and designated ETCs as confidential consistent with the following proposed rule:

20:10:32:60. Confidential treatment of eligible telecommunications carrier applications and reports. Requests for confidential treatment of material that contains network development information, service quality improvement plans and annual progress reports, information concerning signal coverage, emergency preparedness or disaster recovery plans, service outage reports, proprietary marketing information, service evaluations or financial information filed by an applicant for designation, or a carrier previously designated, as an eligible telecommunications carrier shall be deemed granted pursuant to A.R.S.D. 20:10:01:41 and SDCL 1-27-3, 1-27-30. Such material or information shall be presumptively deemed proprietary or trade secret, which, if disclosed, would result in material damage to the applicant or designated eligible telecommunications carrier's financial or competitive position, reveal a trade secret or impair the public interest. The information shall be held confidential by the Commission upon filing and will be subject to the provisions of A.R.S.D. 20:10:01:39 through 44.

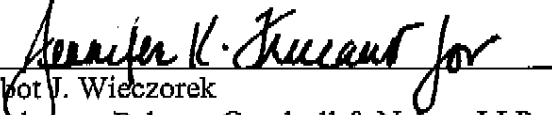
The Commission's adoption of proposed rule 20:10:32:60 will assure carriers that proprietary information filed with the Commission will be afforded appropriate protection and will further promote administrative efficiency by avoiding case-by-case determinations concerning the confidentiality of such information. The Commission should, therefore, adopt proposed rule 20:10:32:60 in this rulemaking proceeding.

III. CONCLUSION

Unicel appreciates the opportunity to participate in this proceeding and supports the Commission's efforts to adopt consistent, predictable, and competitively-neutral ETC application, certification and annual reporting requirements.

Dated: May 22, 2006

Respectfully submitted,

By 
Talbot J. Wieczorek
Gunderson, Palmer, Goodsell & Nelson LLP
P.O. Box 8045
Rapid City, South Dakota 57709
Telephone: (605) 342-1078

Mark J. Ayotte
Matthew A. Slaven
Briggs and Morgan, P.A.
2200 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402
Telephone: (612) 977-8400

Counsel for RCC Minnesota, Inc. and Wireless Alliance, LLC d/b/a Unicel