



**DAKOTA COOPERATIVE TELECOMMUNICATIONS, INC.**

P.O. Box 66 • IRENE, SOUTH DAKOTA 57037

TELEPHONE (605) 263-3301

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TC97-014

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FEB 10 1997

SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION

February 10, 1997

William Bullard, Jr.  
Executive Director  
Public Utilities Commission  
500 East Capitol  
Pierre, SD 57501

Rolayne Ailts Wiest  
Commission Counsel  
Public Utilities Commission  
500 East Capitol  
Pierre, SD 57501

Dear Mr. Bullard and Ms. Wiest:

By this letter, Dakota Cooperative Telecommunications, Inc. and its subsidiary companies, Dakota Telecom, Inc. and Dakota Telecommunications Systems, Inc. ("Dakota") are requesting the South Dakota Public Utilities Commission to determine whether it objects to waiver by the FCC of the definition of "Study Area" contained in the Part 36 Appendix-Glossary of the Federal Communications Commission's rules to allow Dakota to expand its South Dakota study area boundaries to include the new local exchange facilities it is constructing in Viborg and Centerville, South Dakota.

If the South Dakota Public Utilities Commission does not object to such a waiver by the FCC, Dakota requests that you provide us with a letter to that effect. The requested letter will be part of Dakota's application to the FCC for the study area waiver.

The South Dakota Public Utilities Commission has already granted Dakota Telecom, Inc. and Dakota Telecommunications Systems, Inc. statewide authority to provide telecommunications services, including local exchange services. Dakota will provide service to consumers in the Centerville and Viborg exchanges through its subsidiaries, and has begun providing such services.

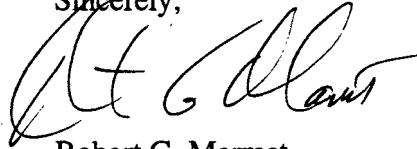
Dakota's current study area completely surrounds the Viborg and Centerville exchanges. Dakota is building a new, state of the art switching facility in Viborg, which is centrally located with respect to Dakota's service area. This new network facility will permit Dakota to provide consumers in Viborg and Centerville with greatly enhanced telecommunications services, including all CLASS features, caller ID, enhanced business features, ISDN, state of the art data services and Internet access, as well as interactive video for distance learning and telemedicine.

*William Bullard, Jr.  
Rolayne Ailts Wiest  
February 10, 1997*

*page 2*

Your prompt attention to this matter is greatly appreciated.

Sincerely,

A handwritten signature in black ink, appearing to read "R. G. Marmet". The signature is fluid and cursive, with the first name "R" being particularly large and stylized.

Robert G. Marmet  
Attorney for Dakota

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA**

IN THE MATTER OF THE REQUEST BY )  
DAKOTA COOP. TELECOMMUNICATIONS, )  
INC. AND ITS SUBSIDIARY COMPANIES, )  
DAKOTA TELECOM, INC. AND DAKOTA )  
TELECOMMUNICATIONS SYSTEMS, INC. )  
FOR WAIVER OF STUDY AREA )  
DEFINITIONS )

2/28/97  
*see*

DOCKET TC97-014

**Petition to Intervene**

The South Dakota Independent Telephone Coalition ("SDITC") hereby petitions the Commission for intervention in the above captioned proceeding pursuant to SDCL 1-26-17.1 and ARSD Sections 20:10:01:15.02, 20:10:01:15.03 and 20:10:01:15.05. In support hereof, SDITC states as follows:

1. SDITC is an incorporated organization representing the interests of numerous cooperative, independent and municipal telephone companies operating throughout the State of South Dakota.

2. As expressly noted in the Bylaws of SDITC, duly adopted by the Coalition, "one of the primary purposes for the formation and existence of the South Dakota Independent Telephone Coalition is representation by the Coalition before the South Dakota Public Utilities Commission." The member companies of SDITC have delegated to the SDITC Board of Directors and its President the authority to intervene on their behalf in PUC proceedings which will or might potentially impact their common interests.

3. Dakota Cooperative Telecommunications, Inc. and its subsidiary companies (collectively referred to as "DCT") have by letter to the Commission dated February 10, 1997,

requested that the Commission make a determination that it does not object to DCT seeking a "study area" waiver with the Federal Communications Commission ("FCC") which would allow it to expand its South Dakota study area boundaries to include new local exchange facilities it is constructing in the communities of Viborg and Centerville. The Viborg and Centerville exchange areas are currently being served by US WEST Communications, Inc. ("US WEST"), but are being purchased by the Fort Randall Telephone Company ("Fort Randall"). The Commission gave its approval to Fort Randall's purchase of the exchanges by its Order dated October 24, 1996 in Docket TC96-125. In the Order, the Commission indicated that it had no objection to the FCC granting Fort Randall and US WEST study area waivers which would reflect the Viborg and Centerville exchange sales. Fort Randall and US WEST have at this time pending with the FCC a request for the necessary study area waivers.

4. The filing by DCT raises issues concerning the Commission's obligation under 47 U.S.C. § 214 to designate "eligible telecommunications carriers".

5. Pursuant to Section 214(e)(2) of the Telecommunications Act, it is the Commission's responsibility to designate which LEC or LECs are "eligible telecommunications carriers" ("ETCs") or, in other words, which carriers will be eligible to receive federal universal service funding. Further, in the case of areas served by "rural telephone companies" such as Fort Randall, before the Commission can designate more than one ETC in rural service areas, Section 214(e)(2) requires a finding by the Commission that designating more than one ETC would be in the public interest.

6. Study areas have been established at the federal level, specifically, for purposes of determining universal service distributions to LECs. If the Commission grants DCT's request in this matter indicating that it has no objection to the FCC redefining DCT's study area to include Viborg and Centerville, it in effect would be indicating that DCT should be viewed as an ETC in serving such areas.

7. SDITC would object to the Commission making any such determination. Clearly, DCT would not qualify under the Telecommunications Act as an ETC in its provisioning of local exchange services in Viborg and Centerville. DCT asks this Commission to concur in its study area waiver request, but under the Federal Act it cannot properly be designated an ETC without first establishing that its provisioning of service meets the ubiquitous service requirements imposed by § 214(e)(1)(A) and (B). Also, this Commission has already in its Order in Docket TC96-125 indicated that it has no objection to the FCC granting study area waivers necessary to incorporate the Viborg and Centerville exchanges into Fort Randall's study area. In doing so, this Commission gave recognition to the fact that Fort Randall would be assuming US WEST's carrier of last resort obligations and would at some point be applying for ETC status. Under Section 214(e)(2), the Commission cannot proceed to designate an additional carrier to serve as an ETC in the Viborg and Centerville exchanges without conducting a review and determining that such designation would be in the public interest.

8. The filing by DCT is a blatant attempt on its part to avoid the requirements applicable to ETC designations set forth in Section 214 of the Telecommunications Act. Obviously, at the present time DCT is in no position to claim that it meets the ETC requirements. It is not presently capable of providing telephone services to either all customers in the Viborg and Centerville exchanges or all customers throughout the applicable service area. Moreover, until the FCC has completed its universal service rulemaking and the federal universal service support mechanism is better defined, it is not possible for the Commission to make a decision on the issue of whether designating more than one ETC relative to the Viborg and Centerville exchanges would be in the public interest.

9. In view of the requirements of 47 U.S.C. Section 214, the Commission should reject DCT's filing. Furthermore, if DCT in fact proceeds to file a study area waiver request with the FCC, this Commission should object to the FCC filing. The FCC should be informed that DCT as

a company which plans to compete in the Viborg and Centerville exchanges has not been granted ETC status and that, accordingly, it is not entitled to the study area waiver.

10. Fort Randall Telephone Company is an SDITC member company. Based on the direct interest of Fort Randall in this matter and also because this matter raises issues concerning implementation of the Telecommunications Act that are important to and may affect other SDITC member companies, SDITC is an interested party to this Docket and seeks intervening party status.

11. SDITC respectfully requests permission to intervene on behalf of its member companies and an opportunity to be heard in this matter.

Dated this 28th day of February, 1997.

Respectfully submitted:



Richard D. Coit, Executive Director & General Counsel  
South Dakota Independent Telephone Coalition  
207 East Capitol, Suite 206  
P.O. Box 57  
Pierre, SD 57501  
Telephone: (605) 224-7629

CERTIFICATE OF SERVICE

I hereby certify that an original and ten copies of SDITC's Petition to Intervene were hand delivered on the 28<sup>th</sup> day of February, 1997, to the following person:

William Bullard Jr.  
Executive Director  
South Dakota Public Utilities Commission  
State of South Dakota  
500 East Capitol Avenue  
Pierre, SD 57501

and a true and correct copy was delivered via facsimile and also via the US Postal Service addressed to the following person:

Robert G. Marmet  
Attorney for Dakota Cooperative  
Telecommunications, Inc.  
PO Box 269  
Centerville, SD 57014



Bette Dozier  
Administrative Assistant  
SDITC  
207 East Capitol, Suite 206  
Pierre, SD 57501

FAX Received FEB 28 1997

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BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION

IN THE MATTER OF THE REQUEST BY DAKOTA )  
COOPERATIVE TELECOMMUNICATIONS, INC. )  
AND ITS SUBSIDIARY COMPANIES, DAKOTA )  
TELECOM, INC. AND DAKOTA )  
TELECOMMUNICATIONS SYSTEMS, INC. FOR )  
WAIVER OF STUDY AREA DEFINITION )

TC97-014

PETITION FOR INTERVENTION  
AND COMMENTS BY  
FORT RANDALL TELEPHONE  
COMPANY

Dakota Cooperative Telecommunications Inc. and its subsidiary companies, Dakota Telecom, Inc. and Dakota Telecommunications Systems Inc. ("Dakota"), have requested that the South Dakota Public Utilities Commission ("Commission") advise the Federal Communications Commission ("FCC") that it does not object to a waiver by the FCC of the definition of "Study Area" contained in Part 36 of the Code of Federal Regulations to allow Dakota to expand its South Dakota Study Area boundaries to include Dakota's new local exchange facilities it is constructing in Viborg and Centerville. Fort Randall Telephone Company ("Fort Randall") seeks permission to intervene in this proceeding for the purpose of objecting to Dakota's request. As is explained below, expansion of Dakota's Study Areas to include the Centerville and Viborg exchanges would be inappropriate because: 1) Dakota is not providing the level of services required to qualify for universal service support in those exchanges; and 2) Dakota will not provide qualifying service throughout Fort Randall's service area, as required by the Act.



**I. Fort Randall's Legal And Financial Interests May Be Adversely Affected As A Result Of This Proceeding.**

Fort Randall should be permitted to intervene in this proceeding because its legal and financial interests may be adversely affected as a result of this proceeding. Fort Randall has agreed to purchase the Viborg and Centerville exchanges from US WEST Communications, Inc. ("USWC"). The Commission approved the purchase of those exchanges by Fort Randall in its Order dated October 24, 1996, in Docket TC96-125. Fort Randall has an interest in this proceeding because a decision extending Dakota's Study Area into those exchanges may negatively affect the level of universal service funding available to Fort Randall for serving these exchanges in the future. Further, as discussed below, Dakota would not qualify for universal service funding under the Telecommunications Act of 1996 ("Act"), and the provision of universal service funding to Dakota, a future competitor of Fort Randall's, cannot be demonstrated to be in the public interest.

**II. Dakota Should Not Receive Universal Service Funding For Its Facilities In The Viborg and Centerville Exchanges.**

**A. Dakota Does Not Satisfy The Service Requirements Of An Eligible Telecommunications Carrier in the Centerville And Viborg Exchanges.**

Dakota wishes to extend its study area in order to obtain universal service funding for the facilities it is constructing for the purpose of providing competing local exchange service in the Centerville and Viborg exchanges. Dakota's authority to provide competing local exchange service is based on the Act. Any extension of Dakota's rights to obtain universal service funding should similarly be determined under the provisions of the Act. It is clear that Dakota does not qualify for universal service funding under the Act.

Section 214(e) requires that universal service funding be provided only to an eligible telecommunications carrier ("ETC") and establishes several specific requirements for becoming an ETC. Dakota fails to satisfy those requirements in either the Centerville or Viborg exchanges and, therefore, should not be permitted to extend its Study Area to include those exchanges.

More specifically, Section 214(e) provides in relevant part:

A common carrier designated as an eligible telecommunications carrier under paragraph (2) or (3) shall be eligible to receive universal service support in accordance with section 254 and shall, throughout the service area for which the designation is received--

(A) offer the services that are supported by Federal universal service support mechanisms under section 254(c), either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and

(B) advertise the availability of such services and the charges therefor using media of general distribution.

(Emphasis added.) At this time, there is no indication that Dakota will provide all of the services eligible for universal service support to all customers throughout the appropriate study area, or that it has published the availability of its services to all customers.

The Act requires satisfaction of these service requirements in order to prevent a competitor from receiving universal service funding while selectively serving only the most desirable customers -- presumably those with a lower than average cost of service. If a competitor could selectively serve some customers while receiving universal service funding, it would obtain an unfair economic advantage over the incumbent local exchange carrier ("LEC") which would serve the remaining higher cost customers.

In addition, a carrier cannot qualify as an ETC through pure resale. It must provide the required services using at least some of its own facilities. This is an important limitation on the ability to receive universal service support because universal service funding should be provided to cover the cost of the facilities used to provide the service. While Dakota has expressed the intent to develop its own facilities, it cannot use those facilities to provide local service in the Viborg and Centerville exchanges without first obtaining an interconnection agreement permitting the interexchange of traffic between the itself and the incumbent LEC. Dakota does not have an interconnection agreement.

While Dakota may claim an intent to satisfy the requirements of an ETC, it is clear that it does not currently satisfy those requirements, and any determination on eligibility should not be made until there is proof of actual compliance. Therefore, Dakota's request is, at best, premature and should not be granted at this time.

**B. Universal Service Funding To Dakota Has Not Been Shown To Be In The Public Interest.**

Dakota is seeking universal service funding for future facilities. However, in the future, the Centerville and Viborg exchanges will be owned by a Rural Telephone Company, and Section 214(e) of the Act does not permit a competing LEC, like Dakota, to receive universal service funding absent an express finding by the Commission that funding two ETCs is in the public interest. Until the federal universal service funding mechanism is better defined, it is not possible to make a finding that funding two ETCs in the Centerville and Viborg exchanges would be in the public interest.

Section 214(e) provides in relevant part:

(2) DESIGNATION OF ELIGIBLE TELECOMMUNICATIONS  
CARRIERS-

....

Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company . . . designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.

At this time, in the absence of an established federal universal service funding mechanism, it is not possible for the Commission to find that authorizing a second ETC “is in the public interest.”

**C. Dakota Fails To Satisfy The Service Area Obligations To Be A Competing ETC In A Rural Service Area.**

Pursuant to Section 214(e)(1) and (5), in order for a competing LEC, like Dakota, to qualify for universal service funding in an area served by a Rural Telephone Company, such as Fort Randall, the competing LEC must satisfy the ETC obligations throughout the Rural Telephone Company’s service area. Dakota does not satisfy that requirement.

Section 214(e)(5) defines the service area to which the ETC service obligations apply as a Rural Telephone Company’s study area, unless the FCC and the Commission determine a different service area taking into account the recommendation of the Federal-State Joint Board. The Federal-State Joint Board has recommended defining the service area for customers served by a Rural Telephone Company as the Rural Telephone Company’s study area.

The purpose of this requirement is to prevent a competitor from selectively competing against an incumbent LEC in limited exchanges. This is an important economic protection for the incumbent LEC because it assures that a competitor will not receive universal service funding unless it incurs a cost of service similar to that of the incumbent LEC. Absent such protection, the competing LEC would obtain an unfair competitive advantage.

Once Fort Randall acquires the Viborg and Centerville exchanges, Dakota cannot qualify for universal service funding unless it satisfies the ETC service obligations throughout Fort Randall's Study Area.<sup>1</sup> Based on Dakota's request to extend its study area to the Viborg and Centerville exchanges, it is clear that Dakota does not intend to serve all of Fort Randall's Study Area.<sup>2</sup>

### **III. Conclusion.**

Dakota's request that the Commission indicate that it does not object to a waiver allowing Dakota to extend its Study Area to include the Centerville and Viborg exchanges should be denied. Further the Commission should indicate to the FCC that it objects to such an extension of Dakota's Study Area: 1) Dakota is not satisfying the obligations of an ETC -- it is not offering local exchange service to all end users in the Viborg and Centerville

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<sup>1</sup> The purpose of this obligation is to prevent competitors from selectively competing in more desirable exchanges while leaving the Rural Telephone Company with the obligation of serving the less desirable exchanges.

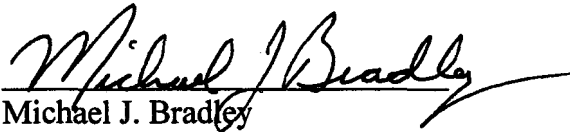
<sup>2</sup> Fort Randall's study area includes the Wagner, Lake Andes and Tyndall exchanges in southeastern South Dakota and the Hermosa and Keystone exchanges (operated by its affiliate Mount Rushmore Telephone Company) in western South Dakota. After the close of the sale by USWC, the Study Area will be expanded to include Tabor, Centerville and Viborg.

exchanges and, in fact, is unable to provide such service at this time; 2) it cannot be determined at this time that allowing Dakota to receive universal service funding in exchanges served by a Rural Telephone Company is in the public interest; and 3) Dakota does not intend to satisfy the ETC obligations throughout Fort Randall's entire service area.

Dated: February 27, 1997

Respectfully submitted,

MOSS & BARNETT  
A Professional Association

A handwritten signature in black ink that reads "Michael J. Bradley". The signature is written in a cursive style and is positioned above the typed name.

Michael J. Bradley  
4800 Norwest Center  
90 S Seventh Street  
Minneapolis, Minnesota 55402  
Telephone: 612-347-0337

Attorneys on behalf of Fort Randall  
Telephone Company

P.O. Box 66  
Irene, South Dakota 57037-0066  
Phone: 605-263-3301  
Fax: 605-263-3995

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SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION

# Fax

**To:** William Bullard

**From:** Kristie Lyngstad *Kristie*

**Fax:**

**Pages:** 9

**Phone:**

**Date:** March 3, 1997

**Re:** TC97-014

**Office Phone:** 605-263-3301

**Urgent**     **For Review**     **Please Comment**     **Please Reply**     **Please Recycle**

*Exhibits for the above mentioned docket*

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If you have any problems receiving this fax, please contact Kristie Lyngstad at 605-263-3301.

**EXHIBIT A**



Kansas Corporation Commission

Bill Graves, Governor Susan M. Seltam, Chair F.S. Jack Alexander, Commissioner Timothy E. McKee, Commissioner  
Judith McConnell, Executive Director David J. Heinemann, General Counsel

Utilities Division

February 12, 1996

Common Carrier Bureau  
Federal Communications Commission  
Washington, DC 20002

RE: Rural Telephone Service Company, Inc. - Study Area  
Waiver

Dear Madam/Sir:

This letter is written upon request of Rural Telephone Service Company, Inc., who informs us that they plan on filing a request for a study area waiver with the Federal Communications Commission.

This is written to confirm that the Kansas Corporation Commission (Commission) does not object to the interstate study area waiver as it relates to the interstate nature of the matter. The Commission issued Rural Telephone Service Company, Inc. a Certificate of Convenience and Authority in Docket No. 190,843-U, 94-RRLT-569-COC, on December 8, 1995, to provide service in the Hill City, Kansas exchange area.

If you should have any further questions regarding this matter, please call me at (913) 271-3228.

Sincerely,

Handwritten signature of Karen J. Flaming in cursive script.

Karen J. Flaming  
Chief of Telecommunications



**EXHIBIT B**

**Federal Communications Commission**

**DA 97-77**

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Petition for Waiver filed by	)	
	)	
Rural Telephone Service Company	)	AAD 96-38
	)	
Concerning the Definition of "Study Area"	)	
Contained in Part 36 Appendix-Glossary	)	
of the Commission's Rules	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: January 13, 1997**

**Released: January 13, 1997**

By the Chief, Common Carrier Bureau:

**I. INTRODUCTION**

1. On March 25, 1996, Rural Telephone Service Company (Rural) filed a petition for waiver of the definition of "Study Area" contained in the Part 36 Appendix-Glossary of the Commission's rules. That definition constitutes a rule freezing all study area boundaries, effective November 15, 1984. The requested waiver would allow Rural to expand its Kansas study area boundaries to include the new local exchange facilities it is constructing in Bogue and Hill City, Kansas. In this Order, we find that the public interest would be served by allowing Rural to expand its study area boundary to include the Bogue and Hill City areas. We therefore grant the petition.

**II. BACKGROUND**

2. A study area is a geographic segment of a carrier's telephone operations. Generally, a study area corresponds to a carrier's entire service territory within a state. Thus, carriers operating in more than one state typically have one study area for each state, and carriers operating in a single state typically have a single study area. Study area boundaries are important primarily because carriers perform jurisdictional separations at the study area level.<sup>1</sup> For jurisdictional separations purposes, the Commission froze all study area boundaries effective

<sup>1</sup> The phrase "jurisdictional separations," or "separations," refers to the process of dividing costs and revenues between a carrier's state and interstate operations. See generally 47 C.F.R. §§ 36.1-36.741.

## Federal Communications Commission

DA 97-77

November 15, 1984.<sup>2</sup> The Commission took that action primarily to ensure that carriers do not establish high cost exchanges within their existing service territories as separate study areas to maximize interstate cost allocations.<sup>3</sup> A carrier must apply to the Commission for a waiver of the frozen study area rule if it wishes to sell or purchase an exchange.<sup>4</sup>

3. Waiver of Commission rules is appropriate only if special circumstances warrant deviation from the general rule and such a deviation will serve the public interest.<sup>5</sup> In evaluating petitions seeking a waiver of the rule freezing study area boundaries, the Commission employs a three-prong standard: first, the change in study area boundaries must not adversely affect the universal service fund (USF) support program;<sup>6</sup> second, the state commission(s) having regulatory authority over the exchange(s) to be transferred does not object to the change; and third, the public interest supports such a change.<sup>7</sup>

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<sup>2</sup> 47 C.F.R. § 36 App. (defining "study area"). See MTS and WATS Market Structure, Amendment of Part 67 of the Commission's rules and Establishment of a Joint Board, Recommended Decision and Order, 49 Fed. Reg. 48325 (Dec. 12, 1984) (1984 Joint Board Recommended Decision); *id.*, Decision and Order, 50 Fed. Reg. 939 (Jan. 8, 1985) (1985 Order Adopting Recommendation); see also Amendment of Part 36 of the Commission's rules and Establishment of a Joint Board, Notice of Proposed Rulemaking, 5 FCC Rcd 5974 (Oct. 10, 1990) (Study Area Notice).

<sup>3</sup> See 1984 Joint Board Recommended Decision, *supra* note 2, ¶ 66; 1985 Order Adopting Recommendation, *supra* note 2, ¶¶ 1, 5.

<sup>4</sup> 47 C.F.R. §§ 1.3, 36 App.

<sup>5</sup> Northeast Cellular Tel. Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990); see also WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969); 47 C.F.R. § 1.3.

<sup>6</sup> See 1984 Joint Board Recommended Decision, *supra* note 2, ¶ 66. The Commission created the USF to preserve and promote universal service. See Amendment of Part 67 of the Commission's rules and Establishment of a Joint Board, Decision and Order, 96 FCC 2d 781 (1984). The USF allows carriers with high local loop plant costs to allocate a portion of those costs to the interstate jurisdiction, thus enabling the states to establish lower local exchange rates in study areas receiving such assistance. To determine which carriers' study areas are eligible for USF support, the USF rules prescribe an eligibility threshold set at 115 percent of the national average unseparated loop cost per working loop. When loop cost in a particular study area exceeds that threshold, the study area is eligible for support equal to a certain percentage of the loop cost in excess of that threshold. The study area becomes eligible for higher levels of support as its loop cost rises above additional thresholds set farther above the national average unseparated loop cost. Because USF assistance is targeted primarily at small study areas, the level of support provided at each threshold generally is greater if the study area has 200,000 or fewer working loops. See 47 C.F.R. § 36.631. We note that the USF support mechanism is currently being re-evaluated. Federal-State Joint Board on Universal Service, Notice of Proposed Rulemaking Order Establishing a Joint Board, CC Docket No. 96-45, FCC 96-93 (rel. March 8, 1996) (Universal Service NPRM), Federal-State Joint Board on Universal Service, Recommended Decision, CC Docket 96-45, FCC 96J-3 (rel. Nov. 8, 1996) (Universal Service Recommended Decision).

<sup>7</sup> See U S WEST Communications, Inc., and Eagle Telecommunications, Inc., Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's rules, Memorandum Opinion and Order, 10 FCC Rcd 1771, ¶ 5 (1995) (U S WEST-Eagle Study Area Order).

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**Federal Communications Commission**DA 97-77

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**A. Petition**

4. Rural is a local exchange carrier that provides service to nearly 6,400 access lines in 26 Kansas exchanges. It plans to expand its operation by installing plant and providing local exchange service in the Bogue/Hill City exchange in competition with the United Telephone Company of Kansas (United). United already serves approximately 1,500 access lines in this exchange. United, however, is in the process of selling this exchange to Classic Telephone, Inc. (Classic).<sup>8</sup> Rural seeks a waiver of the rule freezing study area boundaries to enable it to expand its existing study area to include the Bogue/Hill City exchange.

5. Rural plans to install modern telecommunications plant in the Bogue/Hill City exchange so that it can provide customer services such as voice mail, local Internet access, calling number delivery, selective call forwarding and distinctive ringing, call waiting, automatic recall and redial, customer originated trace, and other enhanced custom calling features.<sup>9</sup> It plans to make single-party service available to all Bogue and Hill City residents by the end of 1996. In addition, Rural plans to connect this exchange to its fiber optic ring which links its 26 existing exchanges to each other and to the public switched telephone network. It argues that the new facilities will substantially improve the reliability and quality of the intrastate and interstate toll services to Bogue and Hill City subscribers.<sup>10</sup>

6. Rural estimates that the total cost of its construction program in the Bogue/Hill City exchange will be approximately \$7 million,<sup>11</sup> and that, as a result, its annual USF draw would increase by \$354,694.<sup>12</sup> Rural states that the increase in USF support would be used for the purpose for which the USF was established, *i.e.*, to promote or preserve universal service by supporting improved and affordable modern telecommunications services in high cost rural areas.<sup>13</sup>

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<sup>8</sup> See In the Matter of Petition for Waiver Filed by Classic Telephone, Inc., Concerning the Definition of "Study Area" Contained in the Part 36 Appendix-Glossary of the Commission's Rules, Memorandum Opinion and Order, DA 96-885, AAD 95-171 (June 3, 1996) (Classic MO&O). See also Classic Telephone, Inc. Petition for Preemption, Declaratory Ruling and Injunctive Relief, Memorandum Opinion and Order, FCC 96-397 (rel. Oct. 1, 1996). In the Order, the Commission applied Section 253 of the Act to preempt decisions by Hill City and Bogue to deny Classic's requests for franchises to provide local telephone service to Hill City and Bogue.

<sup>9</sup> Rural Petition at 7.

<sup>10</sup> Id. at 8.

<sup>11</sup> Id. at 11.

<sup>12</sup> Id. at 9 and Exhibit E.

<sup>13</sup> Id. at 10.

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**Federal Communications Commission****DA 97-77**

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**B. Comments**

7. On April 16, 1996, the Common Carrier Bureau (Bureau) released a Public Notice soliciting comments on the petition.<sup>14</sup> On May 13, 1996, the National Exchange Carrier Association, Inc. (NECA) and the National Telephone Cooperative Association (NTCA) submitted comments supporting the petition and Classic and Sprint Corporation (Sprint) filed comments opposing the petition. On May 28, 1996, the Bureau received reply comments from NTCA and Rural.

8. In opposing the petitions, Classic states that Rural's petition is deficient and that the waiver would contravene the policies of the Commission and the public interest.<sup>15</sup> Classic also asserts that the petition is misleading in its characterization of the factual circumstances giving rise to Rural's request and that Rural's petition should be denied outright or held in abeyance until the Commission resolves the recently initiated proceeding to develop new universal service rules, the outcome of which is directly relevant to Rural's petition.<sup>16</sup>

9. Sprint raises a number of arguments against granting Rural's petition: (1) Rural has failed to establish that the requested study area boundary change will not adversely affect the USF; (2) Rural has failed to apprise the Commission of litigation it has filed against the Kansas Corporation Commission (KCC) after the KCC granted to Classic the obligation of provider of last resort for Bogue and Hill City; and (3) the waiver request, addressing a competitive over-build, cannot be found to be in the public interest under current Commission rules.<sup>17</sup>

10. In response, Rural states that its proposal satisfies all three of the criteria employed by the Bureau to evaluate study area waivers. Rural contends that it has shown the following: (1) that the KCC and the local Bogue and Hill City franchising authorities support its waiver request and have thereby granted Rural all necessary authorizations; (2) that Rural will provide Bogue and Hill City residents state-of-the-art telecommunications facilities and modern services that they have lacked for decades; and (3) that the impact of its proposed waiver on the USF will be within the parameters approved in prior Bureau rulings.<sup>18</sup> Rural states that Classic's and Sprint's oppositions are attempts to delay Bureau action on Rural's petition while they complete the exchange sale proposed in AAD 95-171.<sup>19</sup> Rural states that any delay would be to the

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<sup>14</sup> Public Notice, 11 FCC Rcd 4645 (Com. Car. Bur. 1996).

<sup>15</sup> Classic opposition at 1.

<sup>16</sup> Classic opposition at 1.

<sup>17</sup> Sprint opposition at 5-7.

<sup>18</sup> Rural reply comments at i.

<sup>19</sup> See Classic MO&O, supra n. 8.

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**Federal Communications Commission****DA 97-77**

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detriment of the citizens of Bogue and Hill City.<sup>20</sup> Therefore, in its reply comments, Rural requests that the Commission strike Classic's and Sprint's comments from the record. Classic and Sprint oppose Rural's request to strike their comments.<sup>21</sup> Subsequently, on July 10, 1996, Rural filed a Motion for Acceptance of Response to Unauthorized Pleadings and a Response to Unauthorized Pleadings; and on July 22, 1996, Classic and Sprint filed Responses to Rural's June 7, 1996 filings.

### III. DISCUSSION

11. Procedural Issues. We turn first to the procedural issues raised by Rural's request that we strike Classic's and Sprint's comments from the record. Contrary to Rural's allegations, we do not find that Classic's and Sprint's comments are devoid of substantive merit or filed with the sole purpose of delaying Rural's entry into the Bogue/Hill City exchange. We therefore decline to strike Classic's and Sprint's comments from the record. Moreover, we conclude that Rural's request to strike Classic's and Sprint's comments was in the nature of a motion and thus, under Section 1.727 of our rules,<sup>22</sup> Classic and Sprint were entitled to submit oppositions within ten days after submission of Rural's motion. Classic's and Sprint's oppositions were, therefore, timely filed. Rule 1.727 provides, in addition, that no reply may be filed in response to an opposition to a motion. We therefore shall deny Rural's "Motion for Acceptance of Response to Unauthorized Pleadings," (Motion) which seeks permission to submit a reply to Classic's and Sprint's oppositions. For that reason, Rural's Motion of July 10, 1996, pleading replying to Classic's and Sprint's oppositions, as well as Sprint's and Classic's July 22, 1996, filings responding to Rural's July 10, 1996, pleading, are excluded from the record.

12. State Commission views and public interest considerations. The KCC does not object to the requested waiver.<sup>23</sup> The KCC states that Rural has demonstrated it has the financial, managerial and technical capabilities to provide this exchange with efficient and sufficient telecommunications service, and it has granted Rural a Certificate of Convenience and Necessity. Further, the KCC states that its decision to grant two certificates to serve the Bogue and Hill City areas will bring greater benefits for the telecommunications consumers in these areas.<sup>24</sup> The KCC

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<sup>20</sup> Rural reply comments at ii.

<sup>21</sup> Sprint filed Opposition to Rural Reply Comments (June 7, 1996) and Classic filed Opposition to Motion for Sanctions (June 7, 1996).

<sup>22</sup> 47 C.F.R. §1.727 (1995).

<sup>23</sup> See Letter from Karen Flaming, Chief of Telecommunications, KCC, to FCC (Feb. 12, 1996).

<sup>24</sup> On Dec. 8, 1995 the KCC granted both Classic and Rural a Certificate of Convenience and Necessity. See KCC Order and Certificate, Docket No. 190, 843-U, 94-RRLT-569-COC (Dec. 8, 1995)(KCC Order). See also Order and Certificate of the Corporation Commission of the State of Kansas, Docket No. 192,521-U, 95-CLST-508-COC (Dec. 8, 1995).

**Federal Communications Commission****DA 97-77**

notes that subscribers in these communities will have the ability to choose their telecommunications carrier.<sup>25</sup>

13. Rural states that it will install advanced telecommunications facilities in the Bogue/Hill City exchange and will be able to provide improved service in the exchange. We agree that Rural's installation of advanced telecommunications facilities will improve service to the telephone subscribers in the Bogue/Hill City exchange. Thus, we conclude the public interest will be served by Rural's provision of service in this area.

14. We find that granting Rural's petition to expand its study area to include the Bogue/Hill City exchange is consistent with Section 214(e) of the Communications Act of 1934, as amended (the Act), which permits more than one carrier to qualify for receipt of universal service assistance. The Federal-State Joint Board has recently completed its review of existing universal service programs and recommended changes required to make these programs consistent with the Act.<sup>26</sup> The Joint Board delivered its recommended decision to the Commission on November 8, 1996, and based on those recommendations, the Commission will formulate rules for universal service by May 8, 1997.<sup>27</sup>

15. We conclude that the three-prong standard for granting a study area waiver has been met, and that the study area waiver request should be granted. We have carefully reviewed the objections of Classic and Sprint, and determined that their objections have been adequately addressed by the KCC.

**IV. ORDERING CLAUSES**

16. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 201 and 202 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 201 and 202, and Sections 0.91, 0.291 and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291 and 1.3, that the petition of Rural Telephone Service Company, for waiver of Part 36, Appendix-Glossary, of the Commission's rules, 47 C.F.R. Part 36 Appendix-Glossary, IS GRANTED.

17. IT FURTHER ORDERED, pursuant to Sections 0.91, 0.291 and 1.727 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291 and 1.727 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291 and 1.727 that the "Motion for Acceptance of Response to Unauthorized Pleadings," filed by Rural Telephone Service Company on July 10, 1996, is DENIED, and the "Response to Unauthorized Pleadings" filed by Rural Telephone Company on July 10, 1996, the "Response" filed by Sprint Corporation on July 22, 1996, and the "Reply" filed by Classic Telephone, Inc., should be and hereby are stricken from the record of this proceeding.

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<sup>25</sup> See KCC Order.

<sup>26</sup> See Universal Recommended Decision.

<sup>27</sup> 47 U.S.C. § 254(a).

**Federal Communications Commission**

**DA 97-77**

18. IT IS FURTHER ORDERED, pursuant to Sections 1, 4(i), 5(c), 201 and 202 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 201 and 202, and Sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91 and 0.291, that this Order IS EFFECTIVE IMMEDIATELY UPON RELEASE.

FEDERAL COMMUNICATIONS COMMISSION



Regina Keeney  
Chief, Common Carrier Bureau



**DAKOTA COOPERATIVE TELECOMMUNICATIONS, INC.**

P.O. Box 66 • IRENE, SOUTH DAKOTA 57037

TELEPHONE (605) 263-3301

FAX (605) 263-3995

March 3, 1997

**BY FAX & FIRST CLASS MAIL**

William Bullard, Executive Director  
South Dakota Public Utilities Commission  
500 East Capitol  
Pierre, South Dakota 57501

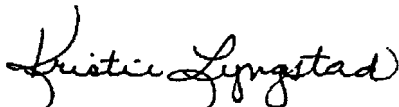
RE: TC97-014 ANSWER TO PETITIONS TO INTERVENE

Dear Mr. Bullard:

On behalf of Dakota Cooperative Telecommunications, Inc., Dakota Telecom, Inc., and Dakota Telecommunications Systems, Inc., ("Dakota"), I have enclosed the original and four copies of the ANSWER TO PETITIONS TO INTERVENE the above referenced docket. This ANSWER is being served to all parties on the service list by mail this same date.

Please file stamp and date the extra copy and return to Robert G. Marmet, attorney for Dakota in the enclosed self-addressed stamped envelope. Thank you.

Sincerely,



Kristie Lyngstad  
Administrative Assistant

cc: service list



**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA**

**IN THE MATTER OF THE REQUEST )  
BY DAKOTA COOPERATIVE TELE- )  
COMMUNICATIONS AND ITS )  
SUBSIDIARIES FOR A LETTER )  
FROM THE SOUTH DAKOTA PUBLIC )  
UTILITIES COMMISSION TO THE )  
FEDERAL COMMUNICATIONS )  
COMMISSION )**

**DOCKET TC97-014**

**ANSWER TO PETITIONS  
TO INTERVENE**

COME NOW DAKOTA COOPERATIVE TELECOMMUNICATIONS, INC.,  
DAKOTA TELECOM, INC., AND DAKOTA TELECOMMUNICATIONS SYSTEMS,  
INC., ("Dakota") and pursuant to ARSD 20:10:01:15.04 file the following Answer to  
Petitions to Intervene.

1. In this proceeding, Dakota has requested a letter from the South Dakota Public  
Utilities Commission ("the South Dakota Commission") to the Federal Communications  
Commission ("the FCC"). The South Dakota Independent Telephone Coalition,  
("SDITC") and Fort Randall Telephone Company ("Ft. Randall") mis-caption their  
pleading and misconstrue the filing by Dakota. Dakota is not requesting that the South  
Dakota Commission grant it a waiver of the study area definition. That Waiver can only  
be granted by the Common Carrier Bureau of the FCC. Dakota is asking the South  
Dakota Commission to prepare and send a letter similar to the letter sent by the Kansas  
Corporation Commission, (attached hereto as "Exhibit A") informing the FCC that the  
South Dakota Commission has no objection to the grant of a waiver. This Commission

cannot grant Dakota a waiver of the definition of a study area contained in the Code of Federal Regulations. Because SDITC and Ft. Randall either misunderstand Dakota's request or deliberately seek to obfuscate the issue, their Petitions to Intervene leave the impression that this Commission has the authority to determine the waiver which Dakota seeks. Their arguments and comments are better addressed to the FCC where this issue of waiver will be determined. The arguments which they make will be familiar to the FCC. Those same arguments were made *In the Matter of Petition for Waiver Filed by Rural Telephone Service Company Concerning the Definition of "Study Area" contained in Part 36 Appendix-Glossary of the Commission's Rules, AAD 96-38*; Memorandum Opinion and Order, Adopted January 13, 1997, Released January 13, 1997, DA 97-77, (attached hereto as "Exhibit B" and hereafter "the Rural case").

2. SDITC and Ft. Randall lack standing to intervene. A statutory basis is required for intervention:

A petition to intervene shall be granted by the commission if the petitioner shows that he is specifically deemed by statute to be interested in the matter involved, that he is specifically declared by statute to be an interested party to the proceeding, or that by the outcome of the proceeding he will be bound and affected either favorably or adversely with respect to an interest peculiar to him as distinguished from an interest common to the public or to the taxpayers in general. ARSD 20:10:01:15.05

Neither SDITC nor Ft. Randall have cited a statute declaring them to be interested in the matter, nor anything which shows that they will be bound by the outcome of this proceeding. This proceeding seeks a letter. The interest claimed by both putative Intervenor is an interest in preventing competition in the Centerville and Viborg exchanges

3. The Centerville and Viborg exchanges are currently operated by U S WEST Communications, Inc. ("U S WEST"), not Ft. Randall. Dakota is the only rural company serving customers in these exchanges. The interest in this matter claimed by SDITC is, at best, derivative of its member Ft. Randall. Ft. Randall's interest is speculative. Any interest they have in this matter will not ripen until they have become the successor to U S WEST. The Petitions to Intervene should be dismissed on this ground.

4. The issue which Dakota asks this Commission to determine is simple: Does the South Dakota Public Utilities Commission object to the Federal Communications Commission granting Dakota a waiver of the definition of study area to allow it to add Centerville and Viborg to its current study area? If this Commission has no objection, Dakota requests a letter to that effect. If this Commission does object, Dakota requests a letter stating the objection and the reason for the objection. The FCC is the forum for determining the issue of public interest and impact on Universal Service Funds which will result from the waiver of the definition of a study area. Both SDITC and Ft. Randall will be able to file comments at the FCC without showing that they have an interest in the matter.

5. Ft. Randall has a Petition before the FCC at this time requesting a waiver of its own study area to add Centerville and Viborg. Its argument that satisfaction of Eligible Telecommunications Carrier ("ETC") requirements are a prerequisite to the grant of a study area waiver would preclude the grant of its petition. Following Ft. Randall's logic, only incumbents or competitors who have actually constructed and are operating competitive facilities would qualify for a study area waiver. The FCC considered this issue in the Rural case. Ft. Randall should press its argument there.

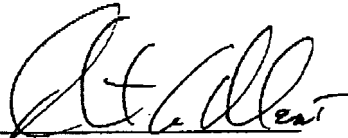
6. The arguments presented in the Petitions to Intervene are familiar ones. These same arguments were presented at the time Dakota Telecom, Inc. (TC96-050) and Dakota Telecommunications Systems, Inc. (TC95-087) applied for authority to provide telecommunications services in South Dakota. SDITC and Ft. Randall's arguments seek to preserve the advantage of the incumbents and prevent competition. Dakota seeks the opportunity to provide services to consumers in Centerville and Viborg. By adding those communities to its study area, Dakota could, where appropriate, have those services which it provides included in Universal Service Fund calculations. Dakota projects no increase in the amount it will receive from the current USF as a result of the proposed change in study area boundaries.

The determination of whether a study area waiver should be granted is with the FCC. Ft. Randall has represented to the FCC that the South Dakota Commission has no objection to Ft. Randall adding Centerville and Viborg to its study area. Since the passage of the Telecommunications Act of 1996, the South Dakota Commission has steadfastly pursued a policy of competitive neutrality. Dakota requests that this policy continue. As a facilities based competitor, Dakota should be treated the same as the purchaser of existing facilities.

7. The questions raised about ETC status and the scope of a rural telephone company's service area are best reserved for another proceeding. Dakota respectfully requests that the South Dakota Commission limit itself to ruling on the matter which Dakota has brought before it, not the peripheral issues sought to be raised by the Petitions to Intervene. The time for determining those issues is close at hand. It is not before the South Dakota Commission in this docket.

WHEREFORE, Dakota requests that the South Dakota Commission deny the Petitions to Intervene and forthwith determine whether it objects or does not object to the FCC granting Dakota a waiver of its study area to include Centerville and Viborg. Regardless of which way this Commission rules, Dakota requests that a letter be prepared to be included in the filing which Dakota will be presenting to the Federal Communications Commission.

Dated this 3<sup>rd</sup> day of March, 1997.



Dakota Cooperative Telecommunications, Inc.  
By: Robert G. Marmet  
PO Box 66  
Irene, SD 57037  
Phone (605) 263-3301  
Fax (605) 263-3995

**CERTIFICATE OF SERVICE**

I, Kristie Lyngstad, hereby certify that on the 3<sup>rd</sup> of day of March, 1997, I mailed by United States mail, first class postage prepaid, a true and correct copy of the foregoing Answer to Petitions to Intervene, to the following:

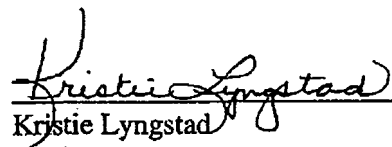
Cameron Hoseck, Staff Attorney  
South Dakota Public Utilities Commission  
500 East Capitol  
Pierre, South Dakota 57501

William Bullard, Executive Director  
South Dakota Public Utilities Commission  
500 East Capitol  
Pierre, South Dakota 57501

Michael Bradley  
Moss & Barnett  
4800 Norwest Center  
90 South 7<sup>th</sup> Street  
Minneapolis, Minnesota 55402-4129

Richard D. Coit  
SDITC  
200 West Pleasant Drive  
P.O. Box 57  
Pierre, South Dakota 57501

Dated this 3<sup>rd</sup> day of March, 1997.

  
\_\_\_\_\_  
Kristie Lyngstad

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA**

IN THE MATTER OF THE APPLICATION FILED )  
BY DAKOTA COOPERATIVE )  
TELECOMMUNICATIONS, INC., DAKOTA )  
TELECOM, INC., AND DAKOTA )  
TELECOMMUNICATIONS SYSTEMS, INC. )  
REQUESTING THE COMMISSION TO )  
DETERMINE WHETHER IT OBJECTS TO A )  
WAIVER BY THE FCC OF THE DEFINITION OF )  
A STUDY AREA. )

ORDER GRANTING  
INTERVENTION

TC97-014

On February 10, 1997, the South Dakota Public Utilities Commission (Commission) received an application by Dakota Cooperative Telecommunications, Inc., and its subsidiary companies, Dakota Telecom, Inc., and Dakota Telecommunications Systems, Inc. (Dakota), requesting that the Commission determine whether it objects to a waiver by the FCC of the definition of "Study Area" contained in Part 36 Appendix-Glossary of the FCC's rules to allow Dakota to expand its South Dakota study area boundaries to include the new local exchange facilities it is constructing in Viborg and Centerville. Dakota represents that it will provide service to consumers in the Centerville and Viborg exchanges through its subsidiaries, and has begun providing such services. Dakota's current study area completely surrounds the Viborg and Centerville exchanges. Dakota represents that it is building a new, state-of-the-art switching facility in Viborg, which is centrally located with respect to Dakota's service area. If the Commission does not object to such a waiver by the FCC, Dakota requests that the Commission provide Dakota with a letter to that effect.

The Commission has jurisdiction in this matter pursuant to SDCL Chapters 1-26, 49-13 and 49-31.

Petitions to intervene have been received from parties on February 28, 1997, as follows: South Dakota Independent Telephone Coalition, Inc. (SDITC); Fort Randall Telephone Company.

At its regularly scheduled March 4, 1997, meeting, the Commission found that the Petitions to Intervene were timely filed and demonstrated good cause to grant intervention. It is therefore

ORDERED that the Petitions to Intervene of SDITC and Fort Randall Telephone Company, are granted.

Dated at Pierre, South Dakota, this 11<sup>th</sup> day of March, 1997.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.

By: *Alaine Kelbo*

Date: 3/12/97

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

*James A. Burg*  
JAMES A. BURG, Chairman

*Pam Nelson*  
PAM NELSON, Commissioner

*Laska Schoenfelder*  
LASKA SCHOENFELDER, Commissioner

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA**

IN THE MATTER OF THE APPLICATION FILED )	
BY DAKOTA COOPERATIVE )	
TELECOMMUNICATIONS, INC., DAKOTA )	ORDER ESTABLISHING A
TELECOM, INC., AND DAKOTA )	BRIEFING SCHEDULE
TELECOMMUNICATIONS SYSTEMS, INC. )	
REQUESTING THE COMMISSION TO )	TC97-014
DETERMINE WHETHER IT OBJECTS TO A )	
WAIVER BY THE FCC OF THE DEFINITION OF )	
STUDY AREA )	

On February 10, 1997, the Public Utilities Commission (Commission) received an application from Dakota Cooperative Telecommunications, Inc., and its subsidiary companies, Dakota Telecom, Inc., and Dakota Telecommunications Systems, Inc., (collectively referred to as Dakota), requesting that the Commission determine whether it objects to a waiver by the Federal Communications Commission (FCC) of the definition of "Study Area" contained in Part 36 Appendix-Glossary of the FCC's rules to allow Dakota to expand its South Dakota study area boundaries to include the new local exchange facilities it is constructing in Viborg and Centerville. Dakota will provide service to consumers in the Centerville and Viborg exchanges through its subsidiaries, and has begun providing such services. Dakota's current study area completely surrounds the Viborg and Centerville exchanges. Dakota is building a new, state-of-the-art switching facility in Viborg, which is centrally located with respect to Dakota's service area. If the Commission does not object to such a waiver by the FCC, Dakota requests that the Commission provide Dakota with a letter to that effect. The Commission has granted interventions to the South Dakota Independent Telephone Coalition, Inc. and Fort Randall Telephone Company.

The Commission has jurisdiction over this matter pursuant to SDCL Chapters 1-26 and 49-31.

On April 1, 1997, at its regularly scheduled meeting, the Commission reviewed Dakota's filing and voted to establish a briefing schedule in this matter. The Commission has directed the Executive Director of the Commission to establish a briefing schedule in this matter.

The procedural schedule for briefing in this matter shall be as follows:

<b>DATE</b>	<b>BRIEFING SCHEDULE</b>
April 14, 1997	Simultaneous Initial Briefs Due
April 21, 1997	Simultaneous Reply Briefs Due



As the Commission's final decision in this matter, it is therefore

ORDERED, that all parties shall follow this briefing schedule.

Dated at Pierre, South Dakota, this 7<sup>th</sup> day of April, 1997.

<b>CERTIFICATE OF SERVICE</b>	
The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.	
By:	<u><i>Delaine Kelbo</i></u>
Date:	<u>4/7/97</u>
(OFFICIAL SEAL)	

BY ORDER OF THE COMMISSION:  
Commissioners Burg, Nelson and  
Schoenfelder

*William Bullard, Jr.*  
WILLIAM BULLARD, JR.  
Executive Director

FAX Received APR 14 1997

RECEIVED

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

APR 15 1997

SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION )  
BY DAKOTA COOPERATIVE )  
TELECOMMUNICATIONS, INC., DAKOTA )  
TELECOM, INC., AND DAKOTA )  
TELECOMMUNICATIONS SYSTEMS, INC. )  
REQUESTING THE COMMISSION TO )  
DETERMINE WHETHER IT OBJECTS TO A )  
WAIVER BY THE FCC OF THE )  
DEFINITION OF STUDY AREA )

BRIEF OF DAKOTA

TC97-014

STATEMENT OF THE CASE

This matter is before the South Dakota Public Utilities Commission ("the Commission") pursuant to a request by Dakota Cooperative Telecommunications, Inc. and its subsidiaries Dakota Telecom, Inc. and Dakota Telecommunications Systems (collectively "Dakota") for a letter from the Commission to the Federal Communications Commission ("the FCC") indicating that the Commission has no objection to the grant of a waiver of the freeze in study areas which the FCC has imposed to permit Dakota to add the Centerville and Viborg exchanges to its existing study area.

ABSTRACT OF THE EVIDENCE

By letter dated February 10, 1997, Dakota requested that the Commission send a letter to the FCC indicating that the Commission had no objection to a waiver of the FCC definition of Dakota's study area to add the Centerville and Viborg exchanges.

"A study area is a geographic segment of a carrier's telephone operations. Generally, a study area corresponds to a carrier's entire service territory within a state. [C]arriers operating in a single state typically have a single study area. Study area boundaries are important primarily because carriers perform jurisdictional separations at the study area level<sup>1</sup>." *Memorandum Opinion and Order; In the Matter of Petition for Waiver filed by Rural Telephone Service Company Concerning the Definition of "Study Area" Contained in Part 36 Appendix-Glossary of the Commission's Rules, AAD 96-38, 97-77, Adopted January 13, 1997.*

<sup>1</sup> The phrase "jurisdictional separations," or "separations," refers to the process of dividing costs and revenues between a carrier's state and interstate operations. See generally 47 C.F.R. §§ 36.1-36.741.

Part 36 of 47 CFR is entitled "Jurisdictional Separations Procedures". The Appendix-Glossary of this section of the Code of Federal Regulations contains the definitions. The definition of study area is as follows:

Study area: Study area boundaries shall be frozen as they are on November 15, 1984.

Since November 15, 1984, all study area boundaries have been frozen by the FCC. This freeze was put into place out of a concern that carriers would put all of their high cost exchanges into separate study areas to increase high cost support payments. Since the freeze went into effect, sellers and buyers of exchanges have had to seek permission from the FCC to alter the boundaries of their study areas.

Carriers use Part 36 to account for their Telecommunications Property (Subpart B), Operating Revenue and Certain Income Accounts (Subpart C), Operating Expenses and Taxes (Subpart D), Reserves and Deferrals (Subpart E), Universal Service Fund (Subpart F) and Lifeline Connection Assistance Expense Allocation (Subpart G). The separations process is intended to divide income and expenses between interstate and intrastate jurisdictions. *47 C.F.R. §§36.1-36.741.*

On July 31, 1995 this Commission approved the sale of the Centerville and Viborg exchanges by U S WEST Communications, Inc. (US WEST) to Dakota. That decision made no reference to the position of this Commission regarding study area waivers. Paragraph 30 of that Decision and Order found that the amounts received by individual buyers from the Universal Service Fund was dependent upon a decision by the FCC. *South Dakota Public Utilities Commission Docket TC94-122, Viborg Exchange; South Dakota Public Utilities Commission Docket TC94-122, Centerville Exchange.* A letter was sent to the FCC by Rolayne Wiest, Commission Counsel, on March 14, 1996, indicating that this Commission had no objection to the requested study area waiver. *DA 96-570, AAD 95-124, at page 9, Footnote 40.*

On April 11, 1996, the Chief of the Accounting and Audits Division of the FCC approved the waiver of Dakota's Study Area boundary to include the Centerville and Viborg exchanges and the waiver of the U S WEST study area boundary to exclude those exchanges. Dakota made that application along with the other buyers of U S WEST exchanges in South Dakota<sup>2</sup>. *DA 96-*

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<sup>2</sup> DA 96-570 AAD 95-124. Dakota was one of the Petitioners who, together with US WEST, sought a waiver as part of the sale of several South Dakota US WEST exchanges to nineteen buyers. Subsequent to the decision in that docket Dakota terminated its agreement to purchase.

570 AAD 95-124, Memorandum Opinion and Order, Adopted April 11, 1996, Released April 11, 1996.

On October 24, 1996, this Commission approved the sale of the Centerville and Viborg exchanges by U S WEST to Hanson Communications through its subsidiary Fort Randall Telephone Company ("Ft. Randall"). Paragraph XXIV of that Decision and Order found that the Commission had no objection to the study area waivers which the Buyers would be requesting. *South Dakota Public Utilities Commission Docket TC96-125, Viborg Exchange; South Dakota Public Utilities Commission Docket TC94-125, Centerville Exchange.*

On January 23, 1997, Fort Randall Telephone Company petitioned the Accounting and Audits Division of the FCC for a waiver of the definition of Study Area. AAD 97-24.

By letter dated February 10, 1997, Dakota requested that the Commission send a letter to the FCC indicating that the Commission had no objection to a waiver in the definition of Dakota's study area.

## ARGUMENT

### **1. DAKOTA IS COMMITED TO PROVIDING CUSTOMERS IN CENTERVILLE AND VIBORG WITH UPGRADED TELECOMMUNICATIONS SERVICE**

#### **A. There is already a demand for Dakota service**

Dakota began serving customers in Centerville and Viborg the summer of 1996 in response to customer demand. In the fall of 1996 Dakota began construction of a network operations center in Viborg. Upon completion this year, the center will provide a central headend site for many of the towns receiving cable television service from Dakota. This center will also be the location of Dakota's new Class 5 telecommunications switch which will provide advanced digital switching technologies to all of Dakota's local exchange customers in South Dakota. Dakota is currently rebuilding its cable systems in Centerville and Viborg using advanced digital fiber optic/coaxial cabling techniques which will bring advanced telecommunications services, including high speed Internet access, to Dakota's customers in those exchanges.

Dakota intends to provide telecommunications services to all consumers in the Centerville and Viborg exchanges. Until such time as Dakota can over-build facilities in these exchanges, it may have to serve some customers through resale agreements with the incumbent. In the event that Ft. Randall takes possession of the U S WEST facilities it has agreed to

purchase before all of Dakota's new facilities are in place, Dakota will make a bona fide request for interconnection with Ft. Randall at that time.

**B. Dakota is a part of the Centerville and Viborg communities.**

Dakota's principal office is in Irene, South Dakota approximately nine miles from both Centerville and Viborg. Dakota's traditional service territory surrounds the Viborg and Centerville exchanges. Dakota and its subsidiaries employ approximately 80 people in a wide range of operational, technical, managerial and customer service capacities. Many Dakota employees live in the rural areas and towns in the Centerville and Viborg exchanges. Dakota is owned and operated by rural South Dakotans who are committed to bringing advanced telecommunications to themselves and their neighbors.

Dakota has long standing involvement in Centerville and Viborg. From Pee-Wee baseball team uniforms and contributions to "after-prom" parties to support of local economic development initiatives, Dakota been an active corporate citizen of all the communities it serves.

Dakota believes that access to advanced telecommunications technologies is crucial to providing economic opportunity, while preserving the rural culture of southeastern South Dakota. In 1996 Dakota provided a Project Coordinator who assisted small town schools, including those in Centerville and Viborg, in submitting a grant proposal to connect for distance learning. The Southeast South Dakota Distance Learning Challenge Project was awarded \$336,000 by the Rural Utilities Service to be used to purchase classroom equipment for interactive video.

Dakota has fiber optic cable in place at both Centerville and Viborg schools, and is committed to providing affordable full motion interactive video connections between the fourteen project sites for distance learning, as well as connecting them to the world through telecommunications technology. Dakota's Project Coordinator provides ongoing assistance to Centerville, Viborg and surrounding communities in seeking other funding for community telecommunications projects.

**C. Intervenors arguments are intended as barriers to competition.**

The South Dakota Independent Telephone Coalition ("SDITC") and Ft. Randall's arguments are predicated on the premature assumption that these exchanges are operated by a rural telephone company and that this Commission will impose 253(f) requirements on Dakota for this service area. As of this date, the Centerville and Viborg exchanges continue to be operated by U S WEST. To date this Commission has not addressed whether it will impose eligible telecommunications carrier requirements on competitors in any rural exchange. Once the

Commission has acted, Dakota may seek designation as an eligible telecommunications carrier for those exchanges. That matter is not before the Commission at this time. Contrary to the assertions of SDITC and Ft. Randall, this request is not an application for eligible telecommunications carrier status.

In October of 1996 this Commission granted Dakota's subsidiaries Dakota Telecom, Inc. and Dakota Telecommunications Systems, Inc., authority to provide telecommunications services within the state of South Dakota. SDITC and Ft. Randall each actively participated in those dockets, seeking limitations on Dakota's authority to prevent it from providing service to Centerville, Viborg and other areas where Dakota intends to provide competitive service. This Commission found that those exchanges "are not currently owned and operated by a rural telephone company as defined in 47 U.S.C. §153. Therefore, the provisions in the Federal Telecommunications Act relating to rural telephone companies are not currently applicable to these exchanges." *Conclusion of Law IV, Final Order and Decision Granting a Certificate of Authority, TC 95-087;*, *Final Order and Decision Granting a Certificate of Authority, TC 96-050.*

D. This is not a Petition for Eligible Telecommunications Carrier Status.

SDITC and Ft. Randall have intervened in this docket and raised the issue of whether Dakota's request for a letter from this Commission amounts to a request that Dakota be designated as an "eligible telecommunications carrier" for the Centerville and Viborg telephone exchanges. Neither in the February 10 letter nor at this time, does Dakota request that it be designated as an "eligible telecommunications carrier" for the Centerville and Viborg exchanges.

The term "study area" is used in the Telecommunications Act of 1996 to define the service area in which an rural carrier serves. But the purpose of a study area goes beyond the question of rural telephone company service areas. The study area concept is used throughout Part 36 to delineate the geographic areas where costs should be allocated. U S WEST had to receive permission to alter its study area boundaries as part of the sale of its rural South Dakota exchanges.

The study area establishes the territory within which a carrier may use its expenses and income for purposes of dividing its operations between interstate and intrastate jurisdictions. *In the Matter of Petition for Waiver filed by Rural Telephone Service Company Concerning the Definition of "Study Area" Contained in Part 36 Appendix-Glossary of the Commission's Rules, AAD 96-38, 97-77, Adopted January 13, 1997.* The purpose of Dakota's filing is to expand its

study area in order to account for the costs and revenues from its Viborg and Centerville operations as part of the Part 36 accounting.

The request before the Commission relates to FCC mandated accounting rules. Those rules provide the basis for USF funds, but also relate to other, more mundane book keeping matters. Whether the territories into which Dakota expands are operated by a regional Bell operating company or a rural telephone company should not determine whether this Commission has an objection to the waiver in the study area freeze.

**E. Dakota's request is not premature.**

Intervenors seek to prevent competition with "Catch 22" logic which would require a competitor to have all of its facilities in place before applying for a study area waiver. The absence of a fully constructed network or an interconnection agreement should not be used as a basis to withhold consent to a waiver of the study area freeze. At the time Rural Telephone Service Company made its application to the FCC it had not completed its local loop facilities. *In the Matter of Rural Telephone Service Company, Inc. Petition for Waiver of the Definition of "Study Area" contained in Part 36, Appendix-Glossary of the Commission's Rules, AAD 96-38, Petition at page 7.* In granting the waiver to a competitive provider, the FCC relied on Rural's "plans to install" and "estimates...[of]...total cost of its construction program". *Memorandum Opinion and Order, DA 97-77, at p. 3.*

It is no more premature for Dakota to request a Study Area freeze waiver prior to completing its planned construction than it is for Ft. Randall to request the waiver before it has begun to operate the facilities it intends to purchase from U S WEST.

**2. THE STUDY AREA WAIVER HAS BEEN BEFORE THE COMMISSION PREVIOUSLY**

**A. The Commission did not object to addition of Centerville and Viborg exchanges to Dakota's study area as part of the sale of exchanges.**

This is not the first time that the question of adding Centerville and Viborg to Dakota's Study Area has been considered. The Accounting and Audits Division of the FCC previously granted Dakota a waiver of the definition of "Study Area" for certain exchanges, including Centerville and Viborg. As a part of those proceedings, Counsel for the Commission sent a letter to the FCC indicating that there was no objection to the requested study area waivers. *DA 96-570, AAD 95-124, at page 9, Footnote 40.*

**B. Consumers in Centerville and Viborg will benefit from Dakota's competitive services**

In Docket TC 94-122, Dakota had entered into an agreement to purchase the existing facilities of US WEST in the Centerville and Viborg exchanges. Today, rather than purchasing existing facilities and making upgrades, Dakota is building new, competitive facilities. The distinction between the previous proceeding and this one is that Dakota is requesting the waiver of the freeze for competitive rather than monopolistic facilities. In 1995 this Commission had no objection to Dakota adding these exchanges to its Study Area. The only thing that has changed is that this Commission has approved the sale of these exchanges to Ft. Randall, and Dakota is now serving them as a competitive provider.

The Memorandum Opinion and Order approving the previous request by Dakota found that the public interest was served by the waiver. Dakota contends that providing customers in these two exchanges with competitive services is even more beneficial to the public interest than would result from the grant of a waiver as a result of purchase of facilities in these exchanges.

**C. The FCC will decide whether the waiver is appropriate**

Petitions for Approval of Sales of Exchanges routinely include requests for this Commission to indicate that it has no objection to the waiver of the study area freeze. Ft. Randall and the other purchases of the U S WEST exchanges all applied jointly with U S WEST to have the FCC grant them study areas waivers. (See *In the Matter of East Plains Telecom, Inc., Fort Randall Telephone Company, U S WEST Communications Inc. and Vivian Telephone Company Expedited Joint Petition for Waiver of the Definition of Study Area Contained in Part 36, Appendix-Glossary of the Commission Rules; and Petition for Waiver of Sections 69.3(e)(11) and 69.3(I)(4) of the Commissions Rules, AAD 97-24, filed January 23, 1997.*)

Petitions for Waivers are filed with the Accounting and Audits Division of the Common Carrier Bureau of the FCC. The FCC employs a three-prong standard to evaluate the request. The first test is whether the requested change will adversely effect the USF support program; the second prong determines whether the state commission having jurisdiction has any objection; the third question is whether the public interest is served. *U S West Communications, Inc., and Eagle Telecommunications, Inc., Memorandum Opinion and Order, 10 FCC Rcd 1771, ¶5 (1995).*

As part of its application to the FCC, Dakota is prepared to state that the change in the study area boundary will not increase Dakota's draw from the USF pool. The purpose of this proceeding is to determine whether the state commission has any objection. Since the study area



waiver will have no impact on any state subsidy program and since consumers in the Centerville and Viborg exchanges will benefit from increased competition, this Commission should find that the public interest supports such a change in the study area boundary.

This Commission does not have the last word on the question. It is the Accounting and Audits Division of the FCC which will ultimately determine if the boundary should be changed. Intervenors and any other interested parties will have the opportunity to file comments with the FCC. Intervenors comments will be considered by the FCC in making the final determination as to whether the public interest is served by the requested waiver. The only issue raised in this proceeding at the state level is whether this Commission has any objection to the waiver requested by Dakota.

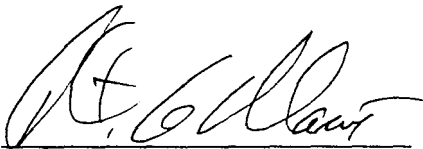
### **Conclusion**

Dakota respectfully requests that this Commission determine that it has no objection to the waiver of its study area boundaries to include the exchanges of Centerville and Viborg, and issue a letter to the FCC stating that position.

Dated this 14<sup>th</sup> day of April, 1997.

Dakota Cooperative Telecommunications, Inc.  
Dakota Telecom, Inc.  
Dakota Telecommunications Systems, Inc.

By:



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**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA**

**RECEIVED**

**APR 15 1997**

**SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION**  
TC97-014

IN THE MATTER OF THE REQUEST BY DAKOTA )  
COOPERATIVE TELECOMMUNICATIONS, INC. )  
AND ITS SUBSIDIARY COMPANIES, DAKOTA )  
TELECOM, INC. AND DAKOTA )  
TELECOMMUNICATIONS SYSTEMS, INC. FOR )  
WAIVER OF STUDY AREA DEFINITION )

**INITIAL BRIEF OF  
FORT RANDALL TELEPHONE  
COMPANY**

Dakota Cooperative Telecommunications, Inc. ("DCT") and its subsidiary companies, Dakota Telecom, Inc. ("DTI") and Dakota Telecommunications Systems, Inc. ("DTS") (collectively "Dakota" or "Petitioners"), have requested that the South Dakota Public Utilities Commission ("Commission") not object to the Federal Communications Commission ("FCC") waiving the definition of "Study Area" contained in Part 36 of the Code of Federal Regulations to allow Dakota to expand DCT's existing Study Area boundaries to include the Viborg and Centerville exchanges. Dakota's stated reason for this request is to qualify facilities that have been installed in those exchanges for Universal Service Fund support. Fort Randall Telephone Company ("Fort Randall"), which anticipates owning those exchanges within the next two months, recommends that the Commission not support a study area waiver for the following reasons:

1. DCT is not authorized to offer local service outside of its existing Study Area; and DTI and DTS will require separate authorization to serve those exchanges after they are acquired by Fort Randall. Dakota should not be allowed to amend DCT's Study Area to add exchanges in advance of obtaining authority to offer service in the exchanges.

2. Dakota is requesting a waiver of the current study area in order to obtain universal service funding for facilities Dakota installed in the Centerville and Viborg exchanges.

However, Dakota is not providing those exchanges with the level of services required by the Telecommunications Act of 1996 (“Act”), Section 214(e), in order to receive Universal Service Fund support.

3. Dakota does not intend to satisfy the service obligations throughout Fort Randall’s entire Study Area.

4. In the absence of an established federal universal service funding mechanism, it is not possible for the Commission to find that authorizing a second qualifying carrier to receive universal service funding in a Rural Telephone Company exchange would be in the public interest.

5. If the waiver was granted, it would jeopardize DCT’s ability to receive Universal Service Fund support for the services it is providing in its current study area.

**I. Dakota Does Not Qualify For Universal Service Funding In The Centerville and Viborg Exchanges.**

Dakota has acknowledged that the purpose of requesting the study area waiver is to qualify for universal service fund support for facilities located in the Centerville and Viborg exchanges, stating in part:

By adding those communities to its study area, Dakota could, where appropriate, have those services which it provides included in Universal Service Fund calculations. Dakota projects no increase in the amount it will receive from the current USF as a result of the proposed change in study area boundaries.

be subject to the following provision of the Final Order and Decision Granting A Certificate of Authority, Dockets TC96-050 and TC95-087, October 22, 1996, stating in part:

FURTHER ORDERED, that the Commission grants [DTI/DTS] statewide authority, subject to the Commission's restriction with respect to rural telephone companies . . . .

The restriction on providing competitive local service in a Rural Telephone Company service area is contained on page 2 of the Order, which provides as follows:

On June 24, 1996, at an ad hoc meeting, the Commission considered how to proceed in these dockets. The Commission ruled that the Commission may grant a company statewide certification to provide local exchange services. However, with respect to rural telephone companies, a competing provider of local exchange services will have to come before the Commission in another proceeding before being able to provide service in that rural service area pursuant to 47 U.S.C. § 253(f) which allows the Commission to require a company that seeks to provide service in a rural service area to meet the requirements in 47 U.S.C. § 214(e)(1) for designation as an eligible telecommunications carrier. In addition, the granting of statewide certification will not affect the exemptions, suspensions, and modifications for rural telephone companies found in 47 U.S.C. § 251(f). Finally, the Commission may also need to consider SDCL 49-31-21.

Therefore, because the Centerville and Viborg exchanges will be owned by a Rural Telephone Company prior to the time DTI/DTS become eligible for universal service fund support under the Act, they should be required to comply with the Commission's procedures for obtaining authority to serve those exchanges as a precondition for a study area waiver.

Fourth, if Dakota is acting within the limits of the existing certificates of authority, there is no need for a study area waiver. DCT qualifies for universal service within its authorized study area. As separate entities, DTI/DTS will need to separately apply for universal service support based on their "service areas." Because DTI/DTS are not Rural

Telephone Companies, their service areas can be other than Dakota's study area. See Section 214(e).

Dakota has failed to show that the granting of a study area waiver is in the public interest. Clearly, a study area waiver should not occur in advance of the companies obtaining all necessary approvals to offer local service to the two exchanges.

**B. The Petitioning Companies Are Not Satisfying The Act's Universal Service Obligations.**

**1. Dakota Is Not Providing Basic Services To All Customers Within The Centerville/Viborg Exchanges.**

While it is asserted that Dakota is currently offering local service in these exchanges, the scope of the service must be extremely minimal and does not include local switched access between Dakota's customer(s) and the other local customers in those exchanges. This limited service does not qualify for universal service funding.

In Rural at p. 3, the FCC noted that the applicant for the waiver would provide universal service deserving of universal service funding, stating in part:

Rural plans to install modern telecommunications plant in the Bogue/Hill City exchange so that it can provide customer services such as voice mail, local Internet access, calling number delivery, selective call forwarding and distinctive ringing, call waiting, automatic recall and redial, customer originated trace, and other enhanced custom calling features. It plans to make single-party service available to all Bogue and Hill City residents by the end of 1996. In addition, Rural plans to connect this exchange to its fiber optic ring which links its 26 existing exchanges to each other and to the public switched telephone network. It argues that the new facilities will substantially improve the reliability and quality of the intrastate and interstate toll services to Bogue and Hill City subscribers.

(Footnotes omitted.) Therefore, by the time the study area waiver was granted in January 1997, Rural was providing universal service to the area to be added to Rural's study area,

such that the FCC expressly found that universal service fund support was consistent with the Act, stating in part at p. 6:

We find that granting Rural's petition to expand its study area to include the Bogue/Hill City exchange is consistent with Section 214(e) of the Communications Act of 1934, as amended (the Act) . . . .

In sharp contrast, Dakota is not providing universal service within the Centerville/Viborg exchanges. While it is alleged that customers located within those exchanges are receiving local service from one or more of the companies, none of the companies has an interconnection agreement with USWC. Consequently, calls originating in those exchanges cannot even be terminated within those exchanges unless both callers are Dakota customers.

Such limited service is inadequate for universal service fund support. Section 214(e) of the Act requires that universal service funding be provided only to an eligible telecommunications carrier ("ETC") and establishes several specific requirements for becoming an ETC. Dakota fails to satisfy those requirements in either the Centerville or Viborg exchanges and, therefore, should not be permitted to extend its Study Area to include those exchanges.

More specifically, Section 214(e) provides in relevant part:

A common carrier designated as an eligible telecommunications carrier under paragraph (2) or (3) shall be eligible to receive universal service support in accordance with section 254 and shall, throughout the service area for which the designation is received--

(A) offer the services that are supported by Federal universal service support mechanisms under section 254(c), either using its own facilities or a combination of its own facilities and resale of another carrier's services

(including the services offered by another eligible telecommunications carrier); and

(B) advertise the availability of such services and the charges therefor using media of general distribution.

(Emphasis added.) At this time, the record would not support a finding that Dakota will provide all of the services eligible for universal service support to all customers throughout the two exchanges, or that it has published the availability of its services to all customers.

Further, Dakota has implicitly admitted that it does not qualify for ETC status within the Centerville/Viborg exchanges. In its Request For Eligible Telecommunications Company Status, Docket TC97-030, Dakota lists those exchanges where it believes it is offering service in a manner that qualifies it as an ETC. Missing from that list are the Centerville and Viborg exchanges.

The Act requires satisfaction of these service requirements in order to prevent a competitor from receiving universal service funding while selectively serving only the most desirable customers -- presumably those with a lower than average cost of service. If a competitor could selectively serve some customers while receiving universal service funding, it would obtain an unfair economic advantage over the incumbent local exchange carrier ("LEC") which would serve the remaining higher cost customers.

In addition, a carrier cannot qualify as an ETC through pure resale. It must provide the required services using at least some of its own facilities. This is an important limitation on the ability to receive universal service support because universal service funding should be provided to cover the cost of the facilities used to provide the service. While Dakota has expressed the intent to develop its own facilities, it cannot use those facilities to provide local

service in the Viborg and Centerville exchanges without first obtaining an interconnection agreement permitting the interexchange of traffic between Dakota and the incumbent LEC. Dakota does not have an interconnection agreement.

While Dakota may claim a future intent to satisfy the requirements of an ETC, it is clear that it does not currently satisfy those requirements, and any determination on eligibility should not be made until there is proof of actual compliance. Therefore, Dakota's request is, at best, premature and should not be granted at this time.

**2. Dakota Fails To Satisfy The Study Area Service Obligations To Be A Competing ETC In A Rural Service Area.**

Pursuant to Section 214(e)(1) and (5), in order for a competing LEC, like DTI/DTS, to qualify for universal service funding in an area served by a Rural Telephone Company, such as Fort Randall, the competing LEC must satisfy the ETC obligations throughout the Rural Telephone Company's service area. Dakota does not satisfy this requirement.

Section 214(e)(5) defines the "service area" to which the ETC service obligations apply as a Rural Telephone Company's "study area", unless the FCC and the Commission determine a different service area taking into account the recommendation of the Federal-State Joint Board. The Federal-State Joint Board has recommended defining the service area for customers served by a Rural Telephone Company as the Rural Telephone Company's study area. Recommended Decision By The Federal-State Joint-Board ("Recommended Decision"), ¶ ¶ 160,165.

The purpose of this requirement is to prevent a competitor from selectively competing against an incumbent LEC in limited exchanges. This is an important economic protection



for the incumbent LEC because it assures that a competitor will not receive universal service funding unless it incurs a cost of service similar to that of the incumbent LEC. Absent such protection, the competing LEC would obtain an unfair competitive advantage.

Once Fort Randall acquires the Viborg and Centerville exchanges, Dakota cannot qualify for universal service funding unless it satisfies the ETC service obligations throughout Fort Randall's Study Area. Based on Dakota's request to extend its study area only to the Viborg and Centerville exchanges, it is clear that Dakota does not intend to serve all of Fort Randall's Study Area.<sup>1</sup>

**C. Universal Service Funding To Dakota Has Not Been Shown To Be In The Public Interest.**

Dakota is seeking universal service funding for future facilities. However, in the future, the Centerville and Viborg exchanges will be owned by a Rural Telephone Company, and Section 214(e) of the Act does not permit a competing LEC, like Dakota, to receive universal service funding absent an express finding by the Commission that funding two ETCs is in the public interest. Until the federal universal service funding mechanism is better defined, it is not possible to make a finding that funding two ETCs in the Centerville and Viborg exchanges would be in the public interest. Therefore, at this time, it cannot be determined whether the standard in Rural, that the waiver "must not adversely affect the universal service fund (USF) support program," would be met.

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<sup>1</sup>Fort Randall's study area includes the Wagner, Lake Andes and Tyndall exchanges in southeastern South Dakota and the Hermosa and Keystone exchanges (operated by its affiliate Mount Rushmore Telephone Company) in western South Dakota. After the close of the sale by USWC, the Study Area will be expanded to include the Tabor, Centerville and Viborg exchanges.

Section 214(e) provides in relevant part:

**(2) DESIGNATION OF ELIGIBLE TELECOMMUNICATIONS  
CARRIERS-**

....

Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company . . . designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.

In the absence of an established federal universal service funding mechanism, it is not be possible for the Commission to find that authorizing a second ETC “would not adversely affect” universal service support.

**II. Including Viborg and Centerville In DCT’s Study Area Could Jeopardize Universal Service Support For DCT’s Other Exchanges.**

The FCC is expected to issue its rules on Universal Service Fund support on May 8, 1997. Therefore, the following comments are based on the assumption that the FCC follows the Recommended Decision of the Joint-Board. Based on those recommendations, a company will receive entitlement to aid based on the entire service area of the company. For Rural Telephone Companies, such as DCT, the service area will be their study areas. Consequently, by including two exchanges where DCT is not satisfying the service obligations of an ETC, the Commission would be required to deny DCT ETC status in its other exchanges. Therefore, at a minimum, Dakota’s request should be denied until the full consequences of its request can be determined.

The Recommended Decision, ¶ 160, explains that:

Section 214(e)(1) requires that, in order to be eligible for universal service support, a common carrier must offer universal service throughout the state-designated service area . . .

Paragraph 165 defines a “service area” as follows:

Section 214(e) defines the term “service area” as “a geographic area established by a State commission for the purpose of determining universal service obligations and support mechanisms.” For areas served by a rural telephone company, section 214(e)(5) provides that the term “service area” means the rural telephone company’s study area “unless and until the Commission and the States, after taking into account the recommendations of a Federal-State Joint Board instituted under section 410(c), establish a different definition of service area for such company.”

The Recommended Decision, ¶ 172, proposes retaining the current study areas of Rural

Telephone Companies as the service areas, stating in part:

We recommend that the [FCC] retain the current study areas of rural telephone companies as the service areas for such companies. . . . We find no persuasive rationale in the record for adopting, at this time, a service area that differs from a rural telephone company’s present study area.

Therefore, if DCT’s study area is expanded to include the Viborg and Centerville exchanges, DCT would cease to qualify as an ETC, and the Commission would be required to deny DCT ETC status in its existing exchanges. This would be in conflict with the requirement in Rural that waivers not jeopardize universal service support.

### **III. Denying Dakota’s Request Is Not Inconsistent With Prior Commission Decisions.**

The Commission has not opposed other requests for a study area waiver, including a request for a waiver related to the purchase of the Viborg and Centerville exchanges by Fort Randall. Opposing Dakota’s request would not be inconsistent with those prior Commission actions.

In the other matters in which the Commission did not object to a waiver request, the purpose of the waiver was to allow a local telephone company that was acquiring a USWC exchange to qualify for universal service support. In each case, the acquiring company had agreed to maintain all existing services and all existing rates previously offered by USWC. Clearly, Fort Randall, for example, will qualify as an ETC upon closing the sale of the Centerville and Viborg exchanges. It will have in place all of the facilities needed to provide service, will provide service to all potential customers within the exchange, and will act as the carrier of last resort (serving all customers not otherwise served by another authorized carrier).

Therefore, the prior waiver requests were fully consistent with the universal service goals and are easily distinguishable from Dakota's current request.

#### **IV. Conclusion.**

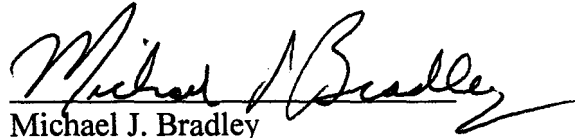
Dakota's request that the Commission indicate that it does not object to a waiver allowing Dakota to extend DCT's Study Area to include the Centerville and Viborg exchanges should be denied because: 1) it is premature to grant a waiver until the company seeking to obtain universal service support funds has authority to serve the Centerville and Viborg exchanges; 2) neither DCT, the only company with a study area, nor DTI/DTS are satisfying the obligations of an ETC -- they are not offering local exchange service to all end users in the Viborg and Centerville exchanges and, in fact, in the absence of an interconnection agreement are unable to provide such service at this time; 3) it cannot be determined at this time that allowing Dakota to receive universal service funding in exchanges served by a Rural Telephone Company is in the public interest and consistent with

the purposes of universal service support; 4) Dakota does not intend to satisfy the ETC obligations throughout Fort Randall's entire study area; and 5) if the waiver was granted, it would jeopardize DCT's ability to receive Universal Service Fund support for the services it is providing in its current Study Area.

Dated: April 14, 1997

Respectfully submitted,

MOSS & BARNETT  
A Professional Association

A handwritten signature in cursive script, reading "Michael J. Bradley". The signature is written in black ink and is positioned above the printed name.

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BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

RECEIVED

APR 14 1997

SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION )  
FILED BY DAKOTA COOPERATIVE )  
TELECOMMUNICATIONS, INC., DAKOTA )  
TELECOMMUNICATIONS SYSTEMS, INC., )  
REQUESTING THE COMMISSION TO )  
DETERMINE WHETHER IT OBJECTS TO A )  
WAIVER BY THE FCC OF THE DEFINITION )  
OF STUDY AREA )

SDITC INITIAL BRIEF

DOCKET TC97-014

**I. PRELIMINARY STATEMENT**

The South Dakota Independent Telephone Coalition ("SDITC") submits this Initial Brief in response to the Commission's Order Establishing Briefing Schedule issued in the above captioned matter on April 7, 1997. Dakota Cooperative Telecommunications, Inc. and its subsidiary companies, Dakota Telecom, Inc. and Dakota Telecommunications Systems, Inc. will be referenced in this brief collectively as "Dakota". The Fort Randall Telephone Company will be referenced herein as "Fort Randall". US WEST Communications, Inc. will be referred to as "US WEST".

**II. ISSUE**

Whether the Commission should issue a letter to the Federal Communications Commission ("FCC") stating that it does not object to a request by Dakota for a waiver of its current study area definition to allow expansion of its study area boundaries to include facilities it is constructing in the exchange areas of Viborg and Centerville?

## II. ARGUMENT

### A. Background.

Dakota has by letter to the Commission dated February 10, 1997, requested that the Commission make a determination that it does not object to DCT seeking a "study area" waiver with the FCC which would allow it to expand its present South Dakota study area boundaries to include new local exchange facilities it is constructing in the communities of Viborg and Centerville. The Viborg and Centerville local exchange areas, although currently being served by US WEST, are being purchased by Fort Randall. The Commission gave its approval to Fort Randall's purchase of the exchanges by its Order dated October 24, 1996, in Docket TC96-125. In the same Order, the Commission indicated that it had no objection to the FCC granting Fort Randall and US WEST study area waivers which would reflect the Viborg and Centerville exchange sales. Fort Randall and US WEST have at this time pending with the FCC a request for the necessary study area waivers.

Dakota indicates in its letter to the Commission that it has already begun providing telecommunications services to consumers in the Centerville and Viborg exchanges. Dakota at present, however, has no interconnection agreement with either US WEST or Fort Randall that would give it the ability to route local exchange traffic between the customers it claims it is already serving and other customers in the Viborg and Centerville exchanges who currently receive their telephone service from the incumbent LEC. Dakota has admitted specifically in comments filed with the Commission supporting its request that its purpose in adding the Viborg and Centerville communities to its study areas is to have such areas "included in [its] Universal Service Fund calculations" (comments Dated March 3, 1997, page 4). Even though, Dakota seeks a change to its study area definition so that it may qualify for universal service support for

Viborg and Centerville, Dakota has offered no evidence indicating that it would qualify for such support pursuant to Section 214(e) of the Telecommunications Act (hereinafter referred to as “the Act”) which establishes the requirements to be followed by State Commissions in designating “eligible telecommunications carriers”.

SDITC and Fort Randall are objecting to the request filed by Dakota and urge the Commission to deny the request because: (1) it cannot be pursued without regard to the requirements imposed under Section 214(e) of the Act; and (2) if such requirements are followed, Dakota at this time cannot properly be designated an “eligible telecommunications carrier” (“ETC”) in the Viborg and Centerville exchange areas.

B. In reviewing Dakota’s request, the Commission must consider the requirements of Section 214(e) of the Act.

Dakota stated in its March 3<sup>rd</sup> comments filed with the Commission in opposition to interventions filed by SDITC and Fort Randall that we either misunderstand the request that has been filed or that we are deliberately trying to “obfuscate the issue”. SDITC takes objection to this statement and other statements made by Dakota suggesting that our purpose in participating in this docket is to merely interject confusion as a means of preventing competition in the affected exchange areas. We have intervened because we are concerned that Dakota is attempting to, in effect, obtain designation as an ETC for Viborg and Centerville outside the process established for ETC designations under the Federal Act. We are only trying to ensure that Dakota’s request is properly reviewed with an understanding of Dakota’s clear purpose in seeking the study area waiver, which is to make it eligible to receive universal service support based on service it intends to provide in the Viborg and Centerville exchanges.



The Telecommunications Act imposes certain requirements which must be met before a LEC can legally be designated as eligible to receive federal universal service support. Pursuant to Section 214(e) of the Telecommunications Act it is the Commission's responsibility to designate which LEC or LECs are "eligible telecommunications carriers" or, in other words, which carriers will be eligible to receive federal universal service funding. In order to qualify for ETC designation under Section 214(e)(1), specifically, the Commission must first determine that the LEC (A) offers throughout the service area for which designation is sought, either by using its own facilities or a combination of its own facilities and resale, all telecommunications services supported by federal universal service support mechanisms; and (B) advertises throughout the service area the availability of all such services using media of general distribution. In addition, Section 214(e)(2) mandates that in the case of an area served by a rural telephone company before the Commission can designate more than one ETC in such area it must make a finding that such designation is in the public interest. Under Section 214(e)(5) the Commission is also authorized to establish the service area used for the purpose of determining universal service obligations and support mechanisms. The subsection further provides that for rural telephone companies, its "service area" means its "study area" unless and until the FCC and the States establish a different definition of service area for such companies.

A ruling of the Commission as to whether or not it objects to Dakota's request with the FCC for a study area waiver is directly tied to the issue of universal service funding and cannot be made without considering whether or not Dakota would meet the ETC requirements of Section 214(e) of the Act. Study areas have been established at the federal level, specifically, in order to quantify the average per loop costs incurred by LECs and based on such costs, determine universal service fund distributions. As noted, Dakota itself has admitted that it is seeking a

change in its present study area definition so that it may include costs associated with providing service in the Viborg and Centerville exchanges in its universal service fund calculations.

Contrary to what Dakota would have the Commission believe, the issues which SDITC and Fort Randall raise regarding compliance with Section 214(e) are clearly not "peripheral" issues. It is difficult to understand how Dakota could view the study area issue as being disconnected from ETC issues. A determination by the Commission that it does not object to Dakota being granted a study area waiver presupposes a finding on its part that Dakota should be deemed eligible for universal service funding - - a finding which cannot be made without establishing first that Dakota meets the requirements of Section 214(e). If the Commission states that it has no objection to the FCC granting Dakota a new study area to include the exchanges of Viborg and Centerville, the inescapable conclusion is that Dakota should be viewed as an ETC in serving such areas. The FCC would logically assume that this Commission has conducted the necessary review under Section 214(e) of the Act and concluded that Dakota is deserving of ETC status.

Dakota has submitted to the Commission, as Exhibit A to its filing, a recent FCC decision granting a study area waiver to a LEC operating in the state of Kansas. In the Matter of Petition for Waiver filed by Rural Telephone Service Company, DA 97-77, AAD 96-38 (January 13, 1997). Dakota contends that the decision supports its position that the Commission should, without conducting any review under Section 214(e), issue a letter to the FCC stating that it does not object to the proposed study area waiver. With reference to that decision, it should be noted that the Kansas Corporation Commission in providing input to the FCC had obviously conducted a thorough review of the issues and facts and made a determination that Rural Telephone Service Company ("Rural") should be authorized to essentially serve as a carrier-of-last-resort or ETC in

those new areas that were part of its waiver request. The Kansas Commission determined that such authorization would be in the best interest of consumers. DA 97-77, pp. 5 and 6. Also, the FCC in addressing the study area waiver request concluded, specifically, that granting the request would be consistent with Section 214(e) of the Act. In addition, Rural had proven that it was offering basic telephone services to all customers residing in its proposed new areas. Id. at p. 3.

The FCC decision cited supports our position in this case. The study area waiver issue presented cannot be disconnected from the review contemplated under Section 214(e) for ETC designations and clearly Dakota does not satisfy the prescribed ETC criteria.

SDITC believes that the filing by Dakota is a deliberate attempt on its part to avoid the requirements established for ETC designations under the Federal Act. Dakota is attempting to cloud or confuse the issue(s) before the Commission by absurdly suggesting that the study area issue and ETC issues can be addressed separately and also by downplaying the significance of this Commission's role in the FCC's study area waiver process.

Dakota states generally in its March 3<sup>rd</sup> comments that "the determination of whether a study area waiver should be granted is with the FCC", implying that the Commission's role in the process is very limited and that therefore its request to the Commission for a letter deserves perfunctory treatment. Although the FCC makes the actual ruling on study area waiver requests, the FCC in its review has effectively made state utility commissions partners in its decision-making process. A statement from the state utility commission that it does not object to the new study area is viewed by the FCC as a requirement without which it will not grant a requested study area waiver. SDITC is not aware of any case where the FCC has granted a study area waiver without obtaining such a statement. The process followed by the FCC rightly gives state commissions significant control with respect to study area waivers which is consistent with

Section 214(e)(5) of the Act. The provisions of Section 214(e)(5) give state commissions, not the FCC, the authority to establish service areas “for the purpose of determining universal service obligations and support mechanisms.”

This Commission’s input into the FCC study area waiver process is necessary because it gives the Commission the ability to ensure that any study area waivers granted by the FCC are consistent with Section 214(e) requirements. Under the Telecommunications Act, it is the state commission that is given the authority to designate ETCs and to establish “service areas” for universal service purposes. This Commission should not, in effect, delegate away such authority by making a premature statement to the FCC that it does not object to Dakota obtaining a new study area.

C. Dakota does not meet the requirements of an ETC as set forth in Section 214(e) of the Act.

The matter before the Commission cannot be determined without regard to the requirements of Section 214(e) of the Act, and clearly Dakota at this time would not qualify as an ETC under the Act making it eligible receive universal service support. Section 214(e) requires that universal service funding be provided only to ETC’s and establishes several specific requirements for becoming an ETC.

In relevant part, Section 214(e) requires the carrier seeking ETC designation to throughout the service area for which designation is being sought: (1) offer all services that are supported by federal universal service support by either using its own facilities or a combination of its own facilities and resale of another carrier’s services; and (2) advertise the availability of the services and the charges therefore using media of general distribution.

Dakota has offered no proof to the Commission indicating that it would meet the above requirements in providing service in the Viborg and Centerville exchanges. At present, it is obvious that Dakota does not even have the capability to meet the ETC service requirements. As earlier noted, Dakota would need to obtain an interconnection agreement with the incumbent LEC in order to interexchange traffic between its customers and those still served by the incumbent LEC. Dakota, to our knowledge, does not have any such agreement. Dakota is obviously not at the present time providing competitive local exchange services at a level that would entitle it to seek ETC status in the Viborg and/or Centerville exchanges. This is demonstrated directly by Dakota's recent filing to the Commission in Docket TC97-030 by which it is specifically seeking an ETC designation under Section 214(e) of the Federal Act. The petition is appropriately limited to Dakota Cooperative Telecommunication's present exchange areas. Neither the Viborg or Centerville exchanges are identified in the ETC petition filed as being exchanges where Dakota is either providing or intends to provide service in compliance with the Section 214(e) requirements.

Also, the fact that the Viborg and Centerville exchanges will soon be owned and operated by Fort Randall cannot be overlooked and will require that Dakota offer services throughout Fort Randall's defined service area if it intends to qualify as an ETC in Viborg and Centerville. As pointed out by Fort Randall in its comments filed with the Commission dated February 27, 1997:

Pursuant to Section 214(e)(1) and (5), in order for a competing LEC, like Dakota, to qualify for universal service funding in an area served by a Rural Telephone Company, such as Fort Randall, the competing LEC must satisfy the ETC obligations throughout the Rural Telephone Company's service area. Dakota does not satisfy the requirement.

Section 214(e)(5) defines the service area to which the ETC service obligations apply as a Rural Telephone Company's study area, unless the FCC and

the Commission determine a different service area taking into account the recommendation of the Federal-State Joint Board. The Federal-State Joint Board has recommended defining the service area for customers served by a Rural Telephone Company as the Rural Telephone Company's study area.

The purpose of this requirement is to prevent a competitor from selectively competing against an incumbent LEC in limited exchanges. This is an important economic protection for the incumbent LEC because it assures that the competitor will not receive universal service funding unless it incurs a cost of service similar to the incumbent LEC. Absent such protection, the competing LEC would obtain an unfair competitive advantage.

Once Fort Randall acquires the Viborg and Centerville exchanges, Dakota cannot qualify for universal service funding unless it satisfies the ETC service obligations throughout Fort Randall's study area. . . ."

Dakota tries to compare its pending filing with the Commission with the previous request made by Fort Randall seeking support for an FCC study area waiver. It is suggested by Dakota that the policy of competitive neutrality demands that it be treated the same as Fort Randall and receive the same relief. Obviously, the circumstances surrounding Fort Randall's study area request were vastly different than those presented by Dakota's pending request. Fort Randall made its request to the Commission as a company acquiring the exchange properties of US WEST, the existing incumbent LEC serving the Viborg and Centerville exchanges. Through its acquisition of all of US WEST local exchange facilities in the Viborg and Centerville exchanges, Fort Randall will be replacing US WEST as the incumbent provider of local telephone services. In the case of Fort Randall, it was entirely reasonable for the Commission to conclude that Fort Randall would be serving as the incumbent carrier and, consequently, would be offering local telephone services on a ubiquitous basis to all customers in the acquired exchange areas. Based on these conclusions, the Commission appropriately provided to the FCC a statement that it would not object to a change in Fort Randall's study area definition to include the Viborg and Centerville exchanges. It is ridiculous for Dakota to suggest that its situation is comparable to

that of Fort Randall and that the Commission should reach the same conclusions on issues relating to eligibility for universal service support. Dakota is entering the Viborg and Centerville exchanges as a new competing local service provider, not as a purchaser of existing exchange facilities, and the Commission cannot simply assume that Dakota in providing service will meet the requisite ETC obligations. Evidence showing actual compliance with the ETC requirements set forth in Section 214(e) of the Act must be provided. Absent such evidence, the Commission cannot fairly indicate to the FCC that Dakota should receive a study area waiver allowing the Viborg and Centerville exchanges to be included for universal service funding purposes.

In addition to the fact that Dakota cannot establish that it meets the ETC requirements, SDITC would question the validity of Dakota seeking a study area waiver to include the Viborg and Centerville exchanges because Dakota Cooperative Telecommunications, Inc. as an entity is not currently authorized to provide local exchange service in such exchanges. Dakota Telecom, Inc. and Dakota Telecommunications Systems, Inc. are the companies which received a statewide certificate from the Commission to provide local exchange telecommunications services. Dakota Telecommunications Cooperative was not an applicant in the prior certification proceedings and, to our knowledge, is not presently certified or authorized to provide local exchange services outside the existing exchange areas it serves as an incumbent LEC. If Dakota proceeds to file a request for a study area waiver to include Viborg and Centerville, it will be requesting the expansion of its current study area to include areas where it does not have legal authority to provide local exchange services.

request. The FCC should be informed that Dakota as a company which plans to compete in the Viborg and Centerville exchanges is not entitled to a study area waiver because the Commission has not determined that Dakota should be granted ETC status and also because Dakota Cooperative Telecommunications Cooperative is not properly certified at the state level to provide local exchange services in the new exchange areas.

Dated this 14th day of April, 1997.

Respectfully submitted:

A handwritten signature in black ink, appearing to read 'Richard D. Coit', is written over a horizontal line.

SDPFC

Richard D. Coit

Executive Director and General Counsel



**CERTIFICATE OF SERVICE**

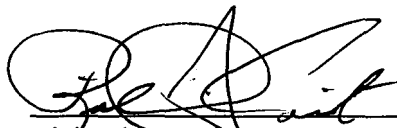
I hereby certify that an original and ten copies of SDITC's Initial Brief were hand delivered on the 14~~th~~ day of April, 1997, to the following person:

William Bullard Jr.  
Executive Director  
South Dakota Public Utilities Commission  
State of South Dakota  
500 East Capitol  
Pierre, SD 57501

and true and correct copies were delivered via facsimile and also via the US Postal Service addressed to the following persons:

Robert G. Marmet  
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Mike Bradley  
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Richard D. Coit  
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Pierre, SD 57501

RECEIVED

APR 22 1997

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE APPLICATION )
BY DAKOTA COOPERATIVE )
TELECOMMUNICATIONS, INC., DAKOTA )
TELECOM, INC., AND DAKOTA )
TELECOMMUNICATIONS SYSTEMS, INC. )
REQUESTING THE COMMISSION TO )
DETERMINE WHETHER IT OBJECTS TO A )
WAIVER BY THE FCC OF THE )
DEFINITION OF STUDY AREA )

REPLY BRIEF OF DAKOTA

TC97-014

FAX Received APR 21 1997

ARGUMENT

1. DAKOTA SEEKS A LETTER FROM THIS COMMISSION STATING THAT IT HAS NO OBJECTION TO THE FCC GRANTING A STUDY AREA BOUNDARY WAIVER

Dakota Cooperative Telecommunications, Inc. and its subsidiaries Dakota Telecom, Inc. and Dakota Telecommunications Systems, Inc. (collectively "Dakota") come before this Commission seeking a letter. This letter directed to the Federal Communications Commission ("FCC") will not grant or even request Eligible Telecommunications Carrier status to or for Dakota. This Commission is knowledgeable enough to understand that a Study Area waiver is not a determination of Eligible Telecommunications Carrier status. Dakota seeks to add Centerville and Viborg to its Study Area so that the costs of serving the customers in those communities can be allocated under Dakota's own separations procedures, and so that when the Universal Service Fund ("USF") rules are finalized, Dakota may, where appropriate, include expenditures in USF calculations.

This Commission had no objection to this addition to Dakota's Study Area when Dakota was purchasing assets in these exchanges from U S WEST Communications, Inc. ("U S WEST"). Dakota is not interested in serving only a few of the customers in these exchanges.

Dakota is committed to an orderly build-out capable of serving all consumers in these exchanges. Neither Centerville nor Viborg have any high volume, high traffic customers which might be considered “cream” for Dakota to skim. These are communities located at the heart of Dakota’s traditional service area.

Dakota seeks to serve these customers because it is the right thing to do and because if rural residents are to reap the benefits of the telecommunications revolution they must have access to all the benefits of modern technology. By passing the Telecommunications Act of 1996, Congress decreed that competition was the quickest way to encourage the spread of technology. As the FCC stated in the context of interconnection: “We believe that Congress did not intend to insulate smaller or rural LECs from competition, and thereby prevent subscribers in those communities from obtaining the benefits of competitive local exchange service...” ¶1262, In the Matter of Implementation of Local Competition Provisions of the Telecommunications Act of 1996, CC docket 96-98, FCC 96-325.

**2. THIS COMMISSION HAS NOT YET RULED THAT DAKOTA OR ANY COMPANY SEEKING TO COMPETE WITH A RURAL PHONE COMPANY HAS TO MEET ELIGIBLE TELECOMMUNICATIONS CARRIER REQUIREMENTS**

Both of the Intervenors briefs are built upon a series of misconceptions. Rather than detailing each here, the more egregious of those misstatements have been set forth in Appendix A, attached hereto.

The Telecommunications Act of 1996 establishes the principle that a pro-competitive, deregulatory national policy framework is necessary for the rapid deployment of advanced telecommunications and information technologies to all Americans. In thirty-four words, Congress swept away a century of central planning:

No State or local statute or regulation, or other State or local requirement, may prohibit, or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications services. §253(a)

A limited exception to this general rule is carved out in subsection (f). This Commission has the responsibility of deciding whether or not to impose the permitted requirements of subsection (f). This threshold question has not yet been answered by the Commission. Intervenors repeatedly assume that the Commission has taken positions which are hostile to competition in the Centerville and Viborg exchanges. When the time comes for determining these issues, this Commission will have the opportunity to weigh the interests of consumers, who may benefit from competition, as well as the interests of Rural Telephone Companies.

### **3. THE COMMISSION HAS THE OPPORTUNITY TO HELP BRING RURAL CONSUMERS THE BENEFITS OF COMPETITION**

The rural residents of Southeast South Dakota should not have to be last in line for advanced services. Dakota is building the facilities and planning its network to provide the consumers in Centerville and Viborg with state-of-the-art services. As the Federal-State Joint Board on Universal Service has recognized, the goal of providing rural areas with services comparable to those which will be available in lower cost areas, and at comparable prices, is an important mandate of the 1996 Act. While the provisions of the 1996 Act cited by Intervenors could be used by this Commission as tools to stifle competition in rural South Dakota, Intervenors are premature in their presumption that the Commission will choose the interests of Rural Telephone Companies over the interests of rural consumers.

### Conclusion

Dakota respectfully requests that this Commission determine that it has no objection to the waiver by the FCC of the definition of study area to permit Dakota to include the exchanges of Centerville and Viborg, and that the Commission issue a letter to the FCC stating that position.

Dated this 21<sup>st</sup> day of April, 1997.

Dakota Cooperative Telecommunications, Inc.  
Dakota Telecom, Inc.  
Dakota Telecommunications Systems, Inc.

By: 

Robert G. Marmet  
Kathleen Armstrong Marmet  
PO Box 66  
Irene, SD 57037  
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**APPENDIX "A"**

<b>ASSERTION</b>	<b>CONCLUSION</b>	<b>REALITY</b>
Ft. Randall...anticipates owning Centerville & Viborg exchanges within the next 2 months	Centerville & Viborg must be treated as rural exchanges now	US West serves Centerville and Viborg exchanges now. U S West is not a Rural Telephone Company
When Ft. Randall owns Centerville & Viborg exchanges, Commission will require DCT to meet to meet 47 USC §214(e)(1) requirements	Commission has already imposed requirements permitted, but not required by 47 USC §253(f)	Commission has not determined requirements for competitive service in rural markets
DTI & DTS are not Rural Telephone Companies	DTI & DTS service areas can be other than DCT's	DTI & DTS, to the extent that they provide local exchange services, meet requirements of 47 USC §153(r) (47)
DCT is not authorized to provide local service outside its existing study area	Viborg & Centerville are "unauthorized" service area	DCT certificate of authority to provide local exchange service contains no limitation as to area of service
	DCT must wait to amend study area until it has authority	Ft. Randall did not have specific authority to serve Centerville & Viborg when it requested letter regarding study area waiver from Commission
DCT applied for ETC status in traditional service areas.	DCT cannot qualify as ETC in Centerville & Viborg	DCT application for determination of ETC status does not preclude future applications for ETC status in additional exchanges
Application for study area waiver cannot be made prior to building facilities to serve all customers (Citing Rural case from Kansas)	DCT cannot be permitted to request study area waiver	Rural made application and obtained letter from Kansas commission prior to completing construction of facilities
In the absence of an interconnection agreement Dakota customers' calls can only be terminated with other Dakota customers	An interconnection agreement is necessary to call between exchanges	Dakota customers can terminate calls all over the world

## CERTIFICATE OF SERVICE

I, Kristie Lyngstad, hereby certify that on the 21<sup>st</sup> of day of April, 1997, I faxed and mailed, a true and correct copy of the foregoing REPLY BRIEF of "Dakota" in Docket TC97-014, to the following:

William Bullard, Executive Director  
South Dakota Public Utilities Commission  
500 East Capitol  
Pierre, South Dakota 57501

Michael Bradley  
Moss & Barnett  
4800 Norwest Center  
90 South 7<sup>th</sup> Street  
Minneapolis, Minnesota 55402-4129

Richard D. Coit  
SDITC  
200 West Pleasant Drive  
P.O. Box 57  
Pierre, South Dakota 57501

Dated this 21<sup>st</sup> day of April, 1997.

  
Kristie Lyngstad

FAX Received APR 21 1997

RECEIVED

APR 22 1997

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE REQUEST BY DAKOTA )
COOPERATIVE TELECOMMUNICATIONS, INC. )
AND ITS SUBSIDIARY COMPANIES, DAKOTA )
TELECOM, INC. AND DAKOTA )
TELECOMMUNICATIONS SYSTEMS, INC. FOR )
WAIVER OF STUDY AREA DEFINITION )

TC97-014

REPLY BRIEF OF FORT RANDALL TELEPHONE COMPANY

This Reply Brief is submitted on behalf of Fort Randall Telephone Company ("Fort Randall") in response to the Brief of Dakota. Fort Randall anticipated many of Dakota's arguments in its Initial Brief and will not repeat those comments except as necessary to clarify this Reply.

I. "Dakota" Does Not Require A Study Area Waiver.

The South Dakota Public Utilities Commission ("Commission") is being requested to not oppose a study area waiver for Dakota. However, there is no "Dakota" that is relevant to the issue of whether a study area waiver is appropriate. Dakota's Brief recognizes that study areas are relevant for the purpose of determining universal service support and for the purpose of making interstate/intrastate cost separations. Dakota Cooperative Telecommunications, Inc. ("DCT") and its subsidiary companies, Dakota Telecom, Inc. ("DTI") and Dakota Telecommunications Systems, Inc. ("DTS"), are separate entities with separate legal rights and responsibilities with respect to universal service funding and cost separations. None of the three entities has a legitimate need for a study area waiver.

One or more of the companies plan to locate a Class 5 switch in Viborg. That switch will apparently support the services of all three companies. DCT does not, however, need a



study area waiver to recognize the cost of that switch or other facilities used by DCT to provide service to DCT customers. There is nothing in the Federal Communications Commission (“FCC”) Rules, 47 C.F.R. Part 32 or anywhere else, that excludes expenses and investments located physically outside of a study area from being included in determining the cost of service within a study area. Indeed, it is common for local exchange carriers (“LECs”), including DCT, to include investments and expenses related to switches and other facilities located physically outside a study area in determining the cost of providing service within a study area.

Nor can DCT request a waiver of its Study Area for the purpose of including the cost and investments related to providing service to customers in Viborg and Centerville, because DCT is not authorized to provide local service to those communities. Only DTI and DTS have such authority.

Nor do DTI and DTS have a basis for requesting a study area waiver. DTI and DTS are competitive local exchange carriers (“CLECs”) and have no legal need or use for a “study area.” Universal service fund support for DTI and DTS will be provided based on the “service areas” for which they have been designated as eligible telecommunications carriers. While service areas and study areas are expected to be identical for Rural Telephone Companies, CLECs will not have study areas.

Dakota, pp. 5-6, asserts that a study area waiver is required for accounting and separations purposes. However, DTI/DTS are not subject to those accounting provisions and do not set their interstate switched access rates based on separated costs.

As Dakota notes, p. 2, study areas were frozen in 1984 by the FCC. They were frozen for the only entities that had study areas -- LECs. For that reason, US WEST Communications, Inc. ("USWC") has received a waiver of its Study Area to reflect the sale of Centerville and Viborg to Fort Randall. As a result, the two exchanges will be transferred into Fort Randall's Study Area. Thus, waivers are limited to changing LEC study areas. New study areas are not being created for CLECs as is demonstrated by the fact that AT&T, McLeod and other authorized CLECs have not petitioned for study areas.

Therefore, the request for a study area waiver should not be supported. "Dakota" has failed to identify any legitimate reason for such a waiver.

## **II. A Request For A Waiver Must Take Into Consideration Eligible Telecommunications Carrier Issues.**

Dakota requests that the Commission consider the request for a study area waiver without taking into consideration whether "Dakota" is satisfying the requirements of an eligible telecommunications carrier ("ETC"), stating at page 5 that Dakota does not request that it be "designated as an 'eligible telecommunications carrier' for the Centerville and Viborg exchanges." A study area waiver request must, however, take ETC issues into consideration.

The FCC, in Rural Telephone Service Company, AAD 96-38, January 13, 1977 ("Rural"), established the following standards for reviewing a waiver request:

[F]irst, the change in study area boundaries must not adversely affect the universal service fund (USF) support program; second, the state commission(s) having regulatory authority over the exchange(s) to be transferred does not object to the change; and third, the public interest supports such a change.

Therefore, the request for a waiver is directly tied to the impact such a waiver would have on universal service funding received by DCT (the only entity which has its universal service funding determined based on a study area).

DCT could not qualify for universal service fund support for services provided to customers located in the Centerville and Viborg exchanges. As was explained in Fort Randall's Initial Brief, pp. 3-6, DCT lacks authority to offer any local services in those exchanges and, therefore, cannot receive universal service support for services to those exchanges.

Further, while Dakota alleges that customers located within those exchanges are receiving local service from one or more of the companies, none of the companies has an interconnection agreement with USWC. Consequently, calls between Dakota's customers and all other customers within the exchange should be handled as toll calls and subject to switched access charges.

Such limited service is inadequate for universal service fund support. Section 214(e) of the Federal Telecommunications Act of 1996 ("Act") requires that universal service funding be provided only to an ETC and establishes several specific requirements for becoming an ETC. DCT (and its affiliates) fail to satisfy those requirements in either the Centerville or Viborg exchanges and, therefore, should not be permitted to include those exchanges in DCT's Study Area.

More specifically, Section 214(e) provides in relevant part:

A common carrier designated as an eligible telecommunications carrier under paragraph (2) or (3) shall be eligible to receive universal service support in accordance with section 254 and shall.

throughout the service area for which the designation is received--

(A) offer the services that are supported by Federal universal service support mechanisms under section 254(c), either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and

(B) advertise the availability of such services and the charges therefor using media of general distribution.

(Emphasis added.) While "Dakota" has expressed a general intent to offer a broad range of services sometime in the future, at this time, the record would not support a finding that DCT will provide all of the services eligible for universal service support to all customers throughout the two exchanges, or that it has published the availability of its services to all customers. Moreover, Dakota, p. 5, expressly states that it is not requesting that it be designated an ETC for these exchanges. Therefore, Dakota's request is, at best, premature and should not be granted at this time.

Finally, as was explained in Fort Randall's Initial Brief, pp. 11-12, it is expected that a company will receive entitlement to universal service funding based on the entire service area of the company.<sup>1</sup> For a Rural Telephone Company, such as DCT, the Federal-State Joint Board has recommended that the service area be the same as the company's study areas. Recommended Decision By The Federal-State Board, ¶¶ 160, 165. Consequently, by including two exchanges where DCT is not satisfying the service obligations of an ETC, the Commission would be required to deny DCT ETC status in its other exchanges. Therefore,

---

<sup>1</sup> The FCC is expected to issue rules defining the requirements for receiving universal service fund support on May 8, 1997.

at a minimum, Dakota's request should be denied until the full consequences of granting the request can be determined.

For the above-stated reasons, a study area waiver should not be granted to DCT because it fails to satisfy the ETC obligations of the Act in the Centerville and Viborg exchanges.

**III. The Prior Study Area Waiver Granted To DCT Does Not Support The Current Request.**

At one time, Dakota sought and received authority to purchase the Centerville and Viborg exchanges from USWC. In the course of obtaining Commission and FCC approval of the sale, USWC was granted a waiver of its existing Study Area to remove the Centerville and Viborg exchanges from its Study Area, which had the effect of transferring those exchanges into DCT's Study Area. Dakota, pp. 2, 6-7, claims that the earlier waiver supports its current request. To the contrary, while the earlier waiver is consistent with the current waiver granted to USWC as a result of the sale of those exchanges to Fort Randall, it does not support the request for a waiver by any of the Dakotas.

In the earlier proceeding, Dakota had been authorized by the Commission to replace USWC as the LEC -- providing service to all customers and acting as the carrier of last resort. Clearly, Dakota would have qualified for universal service support for the services it provided to customers located in Centerville and Viborg. That authority ceased when DCT terminated its purchase of those exchanges and Fort Randall purchased them. Consequently, DCT is no longer authorized to provide local service in the Centerville and Viborg exchanges. While DTS/DTI have authority to offer local service in those exchanges, those

companies are not regulated based on, or otherwise affected by, the size of DCT's Study Area.

Further, as described in the preceding Section of this Reply, none of the three "Dakotas" would qualify for universal service support based on the current services offered to those exchanges.

Therefore, based on the current facts and circumstances, the Commission should not support "Dakota's" request for a waiver of the study area.

#### **IV. Conclusion.**

For all of the above-stated reasons and the reasons stated in Fort Randall's Initial Brief, the Commission should not support Dakota's request for a study area waiver: 1) DCT has not demonstrated that a waiver is needed to address its legitimate accounting and separations concerns, and neither DTI nor DTS are affected by study areas; 2) it is premature to grant a DCT a waiver prior to obtaining authority to serve the Centerville and Viborg exchanges; 3) neither DCT, the only company with a study area, nor DTI/DTS are satisfying the obligations of an ETC -- they are not offering local exchange service to all end users in the Viborg and Centerville exchanges and, in fact, in the absence of an interconnection agreement, are unable to provide such service, at this time; 4) it cannot be determined, at this time, that allowing any of the three companies to receive universal service funding in exchanges served by a Rural Telephone Company would be in the public interest and consistent with the purposes of universal service support; 5) Dakota has not demonstrated that it intends to satisfy the ETC obligations throughout Fort Randall's entire study area; and

6) if the waiver was granted, it would jeopardize DCT's ability to receive universal service fund support for the services it is providing in its current Study Area.

Dated: April 21, 1997

Respectfully submitted,

MOSS & BARNETT  
A Professional Association



Michael J. Bradley  
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Attorneys on behalf of Fort Randall  
Telephone Company

# SDITC

South Dakota Independent  
Telephone Coalition, Inc.

Richard D. Coit  
Executive Director

April 21, 1997

Bette Dozier  
Administrative Assistant

Mr. Bill Bullard, Executive Director  
South Dakota Public Utilities Commission  
State Capitol Building  
Pierre, SD 57501

RE: Docket TC97-014 (concerning DCT study area waiver)

Dear Bill:

For its reply to Dakota's brief dated April 14<sup>th</sup>, 1997, SDITC concurs in all respects with the reply brief being submitted by the Fort Randall Telephone Company.

For all of the reasons stated in our initial brief and the briefs filed by Fort Randall in this matter, SDITC urges the Commission to reject Dakota's request for a letter of no objection concerning its proposed study area waiver request with the FCC.

Dakota is clearly not at this time entitled to such a waiver and if, in fact, Dakota proceeds before the FCC, this Commission should issue a letter to the FCC noting its objection to the requested study area change. As explained in Fort Randall's reply brief, the study area waiver is not as Dakota alleges necessary to address any legitimate accounting and/or separations concerns. Dakota's request to this Commission is nothing more than an attempt to obtain a premature determination on issues relating to its eligibility for universal service support without having to show compliance with the specific ETC requirements set forth in Section 214(e) of the Telecommunications Act.

Sincerely,



Richard D. Coit  
Executive Director and General Counsel

cc: Mike Bradley  
Robert G. Marmet

RECEIVED

APR 22 1997

SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION

*SDITC hand delivered  
a copy of this letter  
on 4/21/97.*





**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA**

<b>IN THE MATTER OF THE APPLICATION FILED )</b>	
<b>BY DAKOTA COOPERATIVE )</b>	
<b>TELECOMMUNICATIONS, INC., DAKOTA )</b>	<b>ORDER DENYING REQUEST</b>
<b>TELECOM, INC., AND DAKOTA )</b>	<b>FOR LETTER TO THE FCC</b>
<b>TELECOMMUNICATIONS SYSTEMS, INC. )</b>	
<b>REQUESTING THE COMMISSION TO )</b>	<b>TC97-014</b>
<b>DETERMINE WHETHER IT OBJECTS TO A )</b>	
<b>WAIVER BY THE FCC OF THE DEFINITION OF )</b>	
<b>STUDY AREA )</b>	

On February 10, 1997, the Public Utilities Commission (Commission) received an application from Dakota Cooperative Telecommunications, Inc., and its subsidiary companies, Dakota Telecom, Inc., and Dakota Telecommunications Systems, Inc., (collectively referred to as Dakota), requesting that the Commission determine whether it objects to a waiver by the Federal Communications Commission (FCC) of the definition of "Study Area" contained in Part 36 Appendix-Glossary of the FCC's rules to allow Dakota to expand its South Dakota study area boundaries to include the new local exchange facilities it is constructing in Viborg and Centerville. Dakota stated that it will provide service to consumers in the Centerville and Viborg exchanges through its subsidiaries, and has begun providing such services. Dakota's current study area completely surrounds the Viborg and Centerville exchanges. Dakota stated that it is building a new, state-of-the-art switching facility in Viborg, which is centrally located with respect to Dakota's service area. If the Commission does not object to such a waiver by the FCC, Dakota requested that the Commission provide Dakota with a letter to that effect. The Commission granted interventions to the South Dakota Independent Telephone Coalition, Inc. (SDITC) and Fort Randall Telephone Company (Fort Randall).

By Order dated April 7, 1997, the Commission established a briefing schedule in this docket. On April 14, 1997, initial briefs were received from SDITC, Fort Randall, and Dakota. On April 21, 1997, reply briefs were received from Fort Randall and Dakota.

At its May 2, 1997, meeting, the Commission unanimously voted to deny Dakota's request for a letter to the FCC stating it does not object to Dakota's study area waiver request. The Commission found that although Dakota was not asking for designation as an eligible telecommunications carrier for the exchanges in question at this time, a rural company's study area is currently considered to mean the same as its service area pursuant to 47 U.S.C. § 214(e)(5). A determination by the Commission that it does not object to Dakota being granted a study area waiver could presuppose a finding on the Commission's part that Dakota should be deemed an eligible telecommunications carrier for those exchanges. This finding cannot be made without first establishing that Dakota meets the requirements of 47 U.S.C. § 214(e). The Commission determined that Dakota's request is premature and cannot be granted. It is therefore

ORDERED that Dakota's request that the Commission write a letter stating that the Commission does not object to Dakota's study area waiver request to allow Dakota to include the new exchanges of Viborg and Centerville is denied.

Dated at Pierre, South Dakota, this 12<sup>th</sup> day of May, 1997.

<b>CERTIFICATE OF SERVICE</b>	
The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.	
By:	<u><i>Delanie Koels</i></u>
Date:	<u>5/13/97</u>
(OFFICIAL SEAL)	

BY ORDER OF THE COMMISSION:

*James A. Burg*  
JAMES A. BURG, Chairman

*Pam Nelson*  
PAM NELSON, Commissioner

*Laska Schoenfelder*  
LASKA SCHOENFELDER, Commissioner