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APR 08 2005

SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

Re: Docket TC03-193

Dear Pam:

Enclosed herein are the original and ten copies of the **SUPPLEMENTAL BRIEF OF INTERVENORS** in the above-referenced docket.

By copy of this letter, I am also serving those persons named on the Certificate of Service with a copy of the Brief.

Sincerely yours,



Darla Pollman Rogers
Attorney at Law

DPR/ph

Enclosures

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RECEIVED

APR 18 2005

SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE PETITION
OF RCC MINNESOTA, INC., AND
WIRELESS ALLIANCE, L.L.C., FOR
DESIGNATION AS AN ELIGIBLE
TELECOMMUNICATIONS CARRIER
UNDER 47 U.S.C. § 214(e)(2)

Docket No. TC03-193

SUPPLEMENTAL BRIEF
OF INTERVENORS

I. PRELIMINARY STATEMENT

This Supplemental Brief is filed in accordance with this Commission's Order Granting Motion by Intervenors to Submit a Supplemental Brief issued April 5, 2005. The Brief is submitted on behalf of all intervening parties in this proceeding, including the South Dakota Telecommunications Association ("SDTA") and the following South Dakota rural local exchange carriers ("RLECs") whose rural service areas are subject to the Petition for Eligible Telecommunications ("ETC") Designation filed by RCC Minnesota, Inc. and Wireless Alliance, L.L.C. (collectively, "RCC"): Alliance Communications Cooperative, Inc.; Interstate Telecommunications Cooperative; James Valley Telecommunications, PrairieWave Community Telephone; Roberts County Telephone Cooperative; RC Communications; Sioux Valley Telephone Company; Union Telephone Company; Stockholm-Strandburg Telephone Company; and Venture Communications Cooperative.

Any references in this Brief to the testimony provided at the hearing in this matter held on October 13-14, 2004, will be designated "TR V.1" or "TR V. 2" with additional reference to the appropriate page number(s) of the hearing transcript. Any references to

prefiled testimony or other exhibits admitted into evidence at the hearing will be designated either “RCC EXH” or “Intervenors EXH” with additional reference to the appropriate page number(s).

II. ARGUMENT

A. This Commission should apply the new FCC requirements and standards.

On February 25, 2005, the Federal Communications Commission (“FCC”) took action pursuant to certain recommendations of the Federal-State Joint Board on Universal Service (“Joint Board”) to further refine and make more rigorous the federal requirements that apply to ETC designation applications.¹ The written FCC decision finalizing this action, which includes an implementation of specific FCC rule changes, was released on March 17, 2005 (hereinafter referenced as the FCC’s “*Report and Order*”).²

The FCC through its recent *Report and Order* took action adopting certain additional minimum requirements for ETC designation, changing even further the ETC designation framework that it had established through its *Virginia Cellular ETC Designation*

¹ The FCC process leading to this action commenced with the FCC release of its *ETC Referral Order* on June 28, 2002, requesting that the Joint Board review certain of the Commission’s rules relating to the high-cost universal service support mechanisms to ensure that the dual goals of preserving universal service and fostering competition continue to be fulfilled. *See Federal-State Joint Board on Universal Service, Order, CC Docket No. 96-45, 17 FCC rdc 22642, para. 1 (2002)*. Pursuant to this direction, the Joint Board sought comment and held a public forum to address concerns regarding the designation and funding of ETCs in high-cost areas. On February 27, 2004, based on its review and consideration of the record developed in response to the *ETC Referral Order*, the Joint Board released a Recommended Decision making several recommendations to the FCC regarding the ETC designation process and the Commission’s rules regarding high-cost support. *See Federal-State Joint Board on Universal Service, Recommended Decision, CC Docket No. 96-45, 19 FCC Rcd, 4257 (2004) (Recommended Decision)*. On June 8, 2004, the FCC released a Notice of Proposed Rulemaking seeking comment on the proposals outlined in the Joint Board’s Recommended Decision concerning the ETC designation process and the FCC’s rules regarding high-cost support. In addition, the FCC sought comment on whether to modify its rules governing the filing of annual certifications and data submissions by ETCs. *See Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Notice of Proposed Rulemaking, 19 FCC Rcd 10800 (2004) (ETC Designation NPRM)*. The FCC’s action on February 25, 2005, was taken pursuant to this rulemaking notice.

² *Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, FCC 05-46 (adopted February 25, 2005, released March 17, 2005)*.

Order and its *Highland Cellular ETC Designation Order*.³ Further, the FCC by its *Report and Order* has now amended its administrative rules pertaining to the ETC designation process to make specific reference to these new additional requirements and to more specifically define the “public interest standard” as it applies to the process of reviewing ETC designation requests.

Pursuant to its *Report and Order*, the FCC has amended Part 54, Subpart C of its administrative rules to include the following additional language:

- (a) On or after the effective date of these rules, in order to be designated an eligible telecommunications carrier under section 214(e)(6), any common carrier in its application must:
 - (1) (A) commit to provide service throughout its proposed designated service area to all customers making a reasonable request for service. Each applicant shall certify that it will (1) provide service on a timely basis to requesting customers within the applicant’s service area where the applicant’s network already passes the potential customer’s premises; and (2) provide service within a reasonable period of time, if the potential customer is within the applicant’s licensed service area but outside its existing network coverage, if service can be provided at reasonable cost by (a) modifying or replacing the requesting customer’s equipment; (b) deploying a roof-mounted antenna or other equipment; (c) adjusting the nearest cell tower; (d) adjusting network or customer facilities; (e) reselling services from another carrier’s facilities to provide service; or (f) employing, leasing or constructing an additional cell site, cell extender, repeater, or other similar equipment; and
 - (B) submit a five-year plan that describes with specificity proposed improvements or upgrades to the applicant’s network on a wire center-by-wire center basis throughout its proposed designated service area. Each applicant shall demonstrate how signal quality, coverage or capacity will improve due to the receipt of high-cost support; the projected start date and completion date for each improvement and the estimated amount of investment for each project that is funded by high-cost support; the spe-

³ See *Federal-State Joint Board on Universal Service; Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier for the Commonwealth of Virginia*, Memorandum Opinion and Order, CC Docket No. 96-45, 19 FCC Rcd 1563 (released January 2, 2004) and *Federal-State Joint Board on Universal Service; Highland Cellular, Inc. Petition for Designation as an Eligible Telecommunications Carrier for the Commonwealth of Virginia*, Memorandum Opinion and Order, CC Docket No. 96-45, 19 FCC Rcd 6438 (released April 12, 2004).

cific geographic areas where the improvements will be made; and the estimated population that will be served as a result of the improvements. If an applicant believes that service improvements in a particular wire center are not needed, it must explain its basis for this determination and demonstrate how funding will otherwise be used to further the provision of supported services in that area.

- (2) demonstrate its ability to remain functional in emergency situations, including a demonstration that it has a reasonable amount of back-up power to ensure functionality without an external power source, is able to reroute traffic around damaged facilities, and is capable of managing traffic spikes resulting from emergency situations.
- (3) demonstrate that it will satisfy applicable consumer protection and service quality standards. A commitment by wireless applicants to comply with the Cellular Telecommunications and Internet Association's Consumer Code for Wireless Service will satisfy this requirement. Other commitments will be considered on a case-by-case basis.
- (4) demonstrate that it offers a local usage plan comparable to the one offered by the incumbent LEC in the service areas for which it seeks designation.
- (5) certify that the carrier acknowledges that the Commission may require it to provide equal access to long distance carriers in the event that no other eligible telecommunications carrier is providing equal access within the service area.

(b) Any common carrier that has been designated under section 214(e)(6) as an eligible telecommunications carrier or that has submitted its application for designation under section 214(e)(6) before the effective date of these rules must submit the information required by paragraph (a) of this section no later than October 1, 2006, as part of its annual reporting requirements under section 54.209.

(c) *Public Interest Standard.* Prior to designating an eligible telecommunications carrier pursuant to section 214(e)(6), the Commission determine that such designation is in the public interest. In doing so, the Commission shall consider the benefits of increased consumer choice, and the unique advantages and disadvantages of the applicant's service offering. In instances where an eligible telecommunications carrier applicant seeks designation below the study area level of a rural telephone company, the Commission shall also conduct a creamskimming analysis that compares the population density of each wire center in which the eligible telecommunications carrier applicant seeks designation against that of the wire centers in the study area in which the eligible telecommunications carrier applicant does not seek designation. In its creamskimming analysis, the

Commission shall consider other factors, such as disaggregation of support pursuant to § 54.315 by the incumbent local exchange carrier. . . .⁴

Contrary to what RCC may suggest, even a cursory review of the new rule provisions set forth above indicates that the FCC has again made significant changes to its requirements and standards applicable to ETC designations. While mandating that its new ETC designation provisions must be applied to proceedings for ETC designation initiated with the FCC pursuant to 47 U.S.C. § 214(e)(6), the FCC stopped short of mandating the application of these provisions to state ETC designation proceedings (in recognition of 47 U.S.C. § 214(e)(2), which gives states the primary responsibility to designate ETCs).⁵ The FCC did, however, in its *Report and Order*, stress that states exercising jurisdiction over ETC designation proceedings must act in a manner consistent with both federal and state law and strongly encouraged states to utilize the new requirements and standards:

We encourage state commissions to require all ETC applicants over which they have jurisdiction to meet the same conditions and to conduct the same

⁴ In addition to these provisions, new rules were also adopted addressing annual reporting requirements for ETCs, the timeframe for commencing distribution of universal service support to competitive ETCs, and the carrier certification requirements that are established to ensure that carriers used universal service funding as it is intended to be used. See §§ 54.307, 54.313, 54.314, and 54.809.

⁵ 47 U.S.C. §214(e)(6) provides as follows:

In the case of a common carrier providing telephone exchange service and exchange access that is not subject to the jurisdiction of a State commission, the Commission shall upon request designate such a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the Commission consistent with applicable Federal and State law. Upon request and consistent with the public interest, convenience and necessity, the Commission may, with respect to an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated under this paragraph, 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 Commission shall find that the designation is in the public interest.

public interest analysis outlined in this Report and Order. . . . We agree with the Joint Board's recommendation that a rigorous ETC designation process ensures that only fully qualified applicants receive designation as ETCs and that all ETC designees are prepared to serve all customers within the designated service area. Additionally, a set of guidelines allows for a more predictable application process among the states. We believe that these guidelines will assist states in determining whether the public interest would be served by a carrier's designation as an ETC. We also believe that these guidelines will improve the long-term sustainability of the fund, because, if the guidelines are followed, only fully qualified carriers that are capable of and committed to providing universal service will be able to receive support. *Report and Order, Par. 58.*

A single set of guidelines will encourage states to develop a single, consistent body of eligibility standards to be applied in all cases, regardless of the characteristics of the incumbent carrier. *Id. at Par. 59.*

We also find that states that exercise jurisdiction over ETC proceedings should apply these requirements in a manner that will best promote the universal service goals found in section 254(b).⁶ While Congress delegated to individual states the right to make ETC decisions, collectively these decisions have national implications that affect the dynamics of competition, the national strategies of new entrants, and the overall size of the federal universal service fund. In addition, these guidelines are designed to ensure designation of carriers that are financially viable, likely to remain in the market, willing and able to provide the supported services throughout the designated service area, and able to provide consumers an evolving level of universal service. Moreover, state commissions that apply these guidelines will facilitate the Commission's review of petitions seeking redefinition of incumbent LEC service areas filed pursuant to section 214(e)(5) of the Act. *Id. at Par. 60.*

As indicated clearly by the language cited above, there are good reasons for this Commission to apply the newly established federal requirements and standards to its ETC designation proceedings, including the pending application of RCC. The new requirements are the end result of a lengthy federal proceeding initiated for the specific purpose of studying and taking action to improve the ETC designation process provided for under the Federal Communications Act. The new requirements adopted by the FCC are in large part based on the specific recommendations of the Joint Board, an entity that is charged

⁶47 U.S.C. § 254(b).

with making recommendations on issues important to both the federal and state jurisdiction, whose membership includes FCC Commissioners and State utility commission representatives. Through the course of this federal proceeding, input was received by the FCC and Joint Board from numerous parties representing different segments of the telecommunications industry. The FCC's final conclusions in the matter, now reflected in the new rule provisions, were based on a consideration of these varied interests and obviously intended to put in place ETC designation provisions that more closely comport with the universal service goals set forth in the Federal Act.

As evidenced by statements in the *Report and Order*, the intended affect of the new requirements is to establish a more rigorous ETC designation process, one which ensures that "only fully qualified carriers that are capable of and committed to providing universal service will be able to receive support" and which improves "the long-term sustainability of the [universal service] fund."⁷ In addition, the FCC in adopting the new requirements emphasized the need to establish a "more predictable ETC designation process."⁸ Intervenors urge this Commission to recognize and take action consistent with these stated goals and to follow the FCC's new ETC designation requirements. In states like South Dakota, where rural telephone companies serving as carriers of last resort have a greater reliance on universal service support than carriers in many other states, protecting the long term sustainability of the federal universal service fund should be an important concern. Accordingly, this Commission should not shy away from applying the more rigorous ETC designation requirements that the FCC has adopted, which, in part, have been adopted as a means of addressing concerns over sustainability of the fund.

⁷ See *Report and Order*, para. 2, 58.

⁸ *Id.* at para. 58, 59.

This Commission has followed the FCC rules in making past ETC designations and it should continue to do so in this case. In its first decision granting Western Wireless Corporation ETC designation in rural service areas, this Commission applied a two-part analysis in making an affirmative public interest finding.⁹ The first part of the analysis was “whether consumers will realize the benefits from increased competition.”¹⁰ The second part of the public interest analysis applied by the Commission was “whether the introduction of competition in these rural areas will ultimately prove detrimental to universal service.”¹¹ These findings of the Commission are consistent with standards applied by the FCC during the same time frame, in ruling on ETC designation requests.¹²

More recently, this Commission again followed FCC standards pertaining to the ETC designation process in Docket TC03-191, involving the second petition by Western Wireless Corporation for ETC designation.¹³ In that case, this Commission gave recognition to the FCC’s “more stringent public interest analysis” applied in the *Virginia Cellular* and *Highland Cellular* Orders. Further, the Commission specifically concluded that it would use its prior definition of public interest and would also “adopt the FCC’s public interest analysis.”¹⁴

⁹ *In the Matter of the Filing by GCC License Corporation for Designation as an Eligible Telecommunications Carrier*, Findings of Fact and Conclusions of Law; Notice of Entry of Order, Docket TC98-146, Findings of Fact para. 9.

¹⁰ *Id.*

¹¹ *Id.* at para. 13.

¹² See *Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier in the State of Wyoming*, CC Docket No. 96-45, DA 00-2896, para. 1, 16-22, released December 26, 2000; and *Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota*, CC Docket No. 96-45, FCC 01-283, para. 1, 11-16, released October 5, 2001.

¹³ *In the Matter of the Filing by WWC License, LLC d/b/a Cellular One for Designation as an Eligible Telecommunications Carrier in other Rural Areas*, Docket TC03-191, Amended Order Designating Western Wireless as an Eligible Telecommunications Carrier, Findings of Fact and Conclusions of Law; and Notice of Entry of Order, dated January 3, 2005.

¹⁴ *Id.* at para. 18 and 19.

Moreover, this deference to the FCC standards is consistent with the South Dakota Supreme Court's decision in In re GCC Licenses Corp, 2001 SD 32 (May 14, 2001), where South Dakota's highest court addressed on appeal certain issues affecting the first petition of Western Wireless Corporation for ETC designation. Specifically, the South Dakota Supreme Court in that case, when faced with an issue involving interpretation of the statutory ETC designation provisions (found in 47 U.S.C. § 214), concluded that it should be "highly deferential" in reviewing the federal agency's interpretation of a statute it administers. This Commission, to date, has given similar deference to the FCC requirements and standards that have been adopted for addressing ETC designation requests and it should not depart from that same approach in addressing the pending RCC application.

As earlier noted, the FCC is encouraging states to utilize the new requirements and standards that have been adopted, in part, because it will allow for "a more predictable ETC designation process."¹⁵ The importance of maintaining a predictable process should not be ignored. Following a consistent set of requirements and/or standards in reviewing ETC designation requests is essential if the ETC designation provisions set forth in federal and state law are to be implemented in a manner consistent with achieving long term universal service goals. The FCC has noted that reviewing ETC designation applications in a consistent manner, following the federal guidelines, "assists states in determining whether the public interest standard would be served by a carrier's designation as an ETC" and ensures that "only fully qualified carriers that are capable of and committed to providing universal service will be able to receive support."¹⁶

¹⁵ *Report and Order*, FCC 05-46 at para. 1, and 58.

¹⁶ *Report and Order* at para. 58.

It also should not be forgotten when deciding whether the new FCC requirements and standards will be applied that, at the present time, there are pending before this Commission two other petitions for ETC designation.¹⁷ Both of these petitions, similar to RCC's ETC petition, involve requests for ETC designation extending to rural service areas and, thus, both will also require a "public interest" review. The request for designation in one of the pending dockets (Docket TC05-016), like RCC's request, is for wireless service and includes a specific request to redefine certain rural service areas below the wire center level. If the Commission in the instant case involving RCC determines that it should disregard the new requirements, that could set a precedent in the other pending dockets. The Commission should not preclude consideration of the additional requirements adopted by the FCC, which will assist the Commission in determining whether designating additional carriers as ETCs will enhance the public interest in all of the pending dockets before the Commission.

By following the new FCC requirements, the Commission also would facilitate any redefinition proceeding that may result from an ETC designation. If the Commission grants ETC designation to RCC and determines that certain rural service areas should be redefined as requested by RCC, any such service area determination also must be approved by the FCC pursuant to 47 U.S.C. § 214(e)(5). In its *Report and Order*, the FCC indicated that applying the guidelines would "facilitate the [FCC's] review of petitions

¹⁷ *In the Matter of the Filing by Brookings Municipal Utilities d/b/a Swiftel Communications for Designation as an Eligible Telecommunications Carrier*, Docket TC04-213; and *In the Matter of the Filing by PrairieWave Telecommunications, Inc. for Designation as an Eligible Telecommunications Carrier*, Docket TC05-016.

seeking redefinition of incumbent LEC service areas filed pursuant to section 214(e)(5) of the Act.”¹⁸

B. The RCC Petition for ETC Designation does not satisfy the new requirements and standards.

Based on all of the foregoing, Intervenors believe this Commission should apply the new FCC requirements and standards to RCC’s pending Petition. And, upon application of these new requirements and standards, it is clear that RCC’s Petition for ETC Designation is deficient and should on the current record be denied.

Counsel for RCC, during the Commission meeting held on March 29, 2005, indicated that RCC is pleased with the current record and suggested that the evidence already submitted is sufficient to satisfy even the more rigorous requirements and standards adopted in the FCC’s Report and Order. Intervenors strongly disagree. A fair review of the current record measured against the new requirements and/or standards only reasonably can lead to the conclusion that RCC has failed to meet its burden of proof as the ETC applicant. The FCC’s new rule provisions establish a number of additional minimum criteria for ETC designation. Provided below is a list of the additional new criteria that are not sufficiently addressed by the record evidence in this matter and a brief explanation as to why this is so.

1. 47 C.F.R. § 54.202(a)(1)(B) -- submission of a five-year improvement plan.

In part, the FCC established with its new rule provisions a requirement for the ETC applicant to provide “a five-year plan that describes with specificity proposed improvements or upgrades to the applicant’s network on a wire-center by wire-center basis throughout its proposed designated service area.” This plan must include: (a) a demon-

¹⁸ *Report and Order* at para. 60.

stration of how signal quality, coverage or capacity will improve due to the receipt of high-cost support; (b) the projected start date and completion date for each improvement and the estimated amount of investment for each project that is funded by high-cost support; (c) the specific geographic areas where the improvements will be made; and (d) the estimated population that will be served as a result of the improvements.

Very clearly, RCC failed to present any such improvement plan or any evidence that could be deemed sufficient to meet the above outlined requirements. As pointed out in Intervenors' earlier filed Reply Brief, RCC has not provided any build-out plan to support its application for ETC status. RCC has requested ETC status in ten separate rural study areas and in none of these ten requested areas has it presented an actual build-out plan showing how it would expand to serve throughout the requested service areas within a reasonable time frame. The only evidence presented by RCC concerning build-out related to the construction of four additional cell sites covering only two of the ten rural service areas subject to RCC's application, and this construction covered a period of only 18 months. TR V. 2, pp. 80, 128. Beyond this, RCC has offered no build-out information. Furthermore, both RCC witnesses Mr. Gruis and Ms. Kohler were questioned at the hearing concerning an expected time frame for completing a build-out throughout the identified service areas where RCC is seeking designation, and both refused to make any timeframe commitment. Ms. Kohler merely referenced in her pre-filed direct testimony a "build-out that could take many years." She was also asked specifically by Staff Counsel John Smith whether each of the service areas would be substantially covered within a five-year timeframe. In response, she stated that she was "really hesitant to use date-certain parameters like five years. . . ." TR V. 1, p. 95. In referring to a map of RCC's

current signal coverage, she further stated, “I don’t know that I envision five years from now a scenario where that will be completely orange, I just don’t think that is the demographics of South Dakota.” TR V. 1, pp. 95-96. RCC witness, Mr. Gruis, also was not helpful in answering questions concerning RCC’s build-out objectives. He was specifically questioned by Staff Counsel as to whether it was the company’s objective to “substantially” cover or build-out the identified service areas within a reasonable period of time and he was unwilling to provide any specific information. TR V. 2, pp. 53-55. The current record, in sum, falls far, far short of meeting the specific requirements related to a build-out plan under the FCC’s new rules.

2. 47 C.F.R. § 54.202(a)(2) -- ability to remain functional in emergency situations.

The FCC rules also require that the ETC applicant “demonstrate its ability to remain functional in emergency situations” and this is to include: (a) a demonstration that it has a reasonable amount of back-up power to ensure functionality without an external power source; (b) a showing that the applicant is able to reroute traffic around damaged facilities; and (3) that it is capable of managing traffic spikes resulting from emergency situations.

Again, with respect to these additional requirements, the evidence presented by RCC is deficient. Although some evidence was presented through Mr. Gruis concerning battery back-up power at primary cell sites and as to the general reliability of RCC’s network in South Dakota, the evidence does not sufficiently address the specific rule requirements. With respect to the battery back-up power information provided, Mr. Gruis indicated that the information only extended to “primary” cell sites within RCC’s network and the switches used in routing its wireless traffic. TR V.2, pp. 25, 2, Intervenor

EXH 10. The information provided does not include information concerning any “repeater type sites” utilized within RCC’s network in South Dakota. Moreover, while general information was presented concerning microwave facilities used to connect the RCC cell sites in South Dakota to RCC’s switching facilities, there is no evidence on the record that allows for any finding by this Commission as to how the company reroutes traffic around facilities that are damaged, which is also a specific requirement under the new FCC rules. There also is no information in the current record that addresses RCC’s capability to manage traffic spikes brought on by emergency situations, as required by the FCC’s new rules.

3. 47 C.F.R. § 54.202(a)(4) -- offering a local usage plan comparable to the one offered by the incumbent LEC.

The FCC adopted a requirement that ETC applicants demonstrate that they offer “a local usage plan that is comparable to the one offered by the incumbent LEC in the service areas for which the applicant seeks designation.” Further, the FCC recognized in its *Report and Order*, given the varied factors that would have to be considered in making a decision on comparability of plans, that a case-by-case analysis is required.

The record in this case contains listings of many different wireless rate plans, in excess of 100, but the evidence presented does not allow for any fair determinations by this Commission as to specifically (a) which of the plans listed are provided by Rural Cellular Corporation and which are provided by Wireless Alliance; (b) what local calling scope is provided under each of the wireless rate plans; (c) whether all of the plans are available in all of the service areas where designation is sought; and (d) whether any of the plans are promotional and thus no longer available.

Ms. Kohler described the Wireless Alliance rate plans listed on Petitioners EXH 9, and stated that:

These were examples, and by no means an exhaustive set, of the promotional offers that we provide. And, again, these are very time sensitive so we have promotions that change weekly including rate plans change frequently. We will keep rate plans in the system, but new promotions will roll out. So at the time of preparing – I believe this was in response to the discovery. I don't remember which question, but it was a sampling of current promotions. *Emphasis added.*

TR. V.1 p. 50. Further, she indicated the rate plans listed were as of May 7th, and that there “could be other active plans that customers are currently on, but we are not actively promoting.” Given these statements suggesting that some of the listed rate plans may no longer be available and that the rate plan listing provided may not be complete, it is impossible to even know which wireless rate plans should be considered for purposes of comparison of RCC's local service offerings with those of each of the RLECs. There is also no evidence on the record that would reliably confirm which of the wireless plans listed are actually available throughout all of the identified rural service areas. The evidence is inadequate to make any determinations as to where, geographically, each of the wireless rate plans is offered.

In addition, the information presented on the record does not allow for any factual determinations concerning local calling scope for each of the rate plans. Although references are made in Petitioners EXH 10 to “Regional Calling,” Ms. Kohler, when asked to describe what this regional calling means, provided an unclear response. She stated that “we typically offer – and, again, this is time sensitive. It has changed over time. But right now, we typically look at our regional offering in this regional as a three-state region.” TR V.1 p. 53. Her response in regard to “regional calling” was even less helpful

with respect to the rate plan offerings of Wireless Alliance. As to the Wireless Alliance rate plans, she stated:

I believe the regional. I believe that is marketed a little bit different in that you have an option to take a footprint bigger than this. I would have to check with our store to see what we call it. I don't think it's a three-state plan. I think we call it expanded roaming capability. . . . It's a little bit different because its different technology so that drives some of the differences.

TR V.1, p. 53. This testimony suggests that the local calling scopes offered may be different between Rural Cellular Corporation and Wireless Alliance. This interjects even greater uncertainty into the process of reviewing the current record for purposes of making determinations on the comparability of RCC's local usage plans with the RLEC local service offerings.

It also is significant that the current record evidence includes absolutely no information as to the current local service offerings of each of the RLECs. Without any such information available as part of the record in this matter, this Commission cannot proceed to make the comparison described within the FCC rule. The FCC rule requires a case-by-case analysis, and as part of this analysis, it would seem absolutely necessary to have at least basic information as to the current local service rates being offered by each RLEC within its service area and/or exchange areas and also the landline local calling scopes that are being made available. Accordingly, RCC's exhibits along with the testimony provided concerning these exhibits do not allow any meaningful comparison of the Rural Cellular Corporation and Wireless Alliance rate plans with the local usage plans currently offered by each of the RLECs. Petitioners EXH 9 and EXH 10, TR V. 1 pp 47-54.

4. 47 C.F.R. § 54.202(c) -- the creamskimming analysis.

With its new rules, the FCC has provided more specific direction concerning the factors that should be considered in making a determination as to whether granting multiple ETC designations is in the public interest. The provisions of 47 C.F.R. § 54.202(c), while not referring to all of the public interest criteria that the FCC has established by its decisions, references the need to consider the “benefits of increased consumer choice” and also “the unique advantages and disadvantages of the applicant’s service offering.” In addition, the rule provides a guideline applying to those cases where the ETC applicant seeks designation below the study area level of the rural telephone company. With regard to such cases the rule states:

In instances where an eligible telecommunications carrier applicant seeks designation below the study area level of a rural telephone company, the Commission shall also conduct a creamskimming analysis that compares the population density of each wire center in which the eligible telecommunications carrier applicant seeks designation against that of the wire centers in the study area in which the eligible telecommunications carrier does not seek designation. In its creamskimming analysis, the Commission shall consider other factors, such as disaggregation of support pursuant to § 54.315 by the incumbent local exchange carrier.

Intervenors believe the current record demonstrates that creamskimming would occur if RCC’s Petition is granted. Evidence was presented in this proceeding by Intervenors’ witness, Mr. Glenn Brown, concerning the population densities existing within each of the RLEC service areas. Certain “clustering” information was also provided allowing for some comparison of densities between particular areas within the identified rural service areas. This information demonstrated that creamskimming would occur if RCC’s Petition is granted. However, it does not allow this Commission to fully address

creamskimming concerns raised by RCC's request for ETC designation where designation is sought below the wire center level.

The creamskiimming analysis, as described in the FCC rule, also requires a consideration of issues surrounding the disaggregation of universal service support. As demonstrated in Intervenor's Brief, and contrary to the general suggestions made by RCC in this case, the simple fact that some of the RLECs have chosen to disaggregate and the fact that the other affected RLECs may still have disaggregation available as an option does not eliminate concerns over creamskiimming by competitive ETCs in high-cost rural areas. As the FCC rightly recognized in its *Report and Order*,

Although disaggregation may alleviate some concerns regarding creamskiimming by ETCs, because an incumbent's service area may include wire centers with widely disparate population densities, and therefore highly disparate cost characteristics, disaggregation may be a less viable alternative for reducing creamskiimming opportunities. This problem may be compounded where the cost characteristics of the rural incumbent LEC and competitive ETC applicant differs substantially. Thus, creamskiimming may remain a concern where a competitive ETC seeks designation in a service area where the incumbent rural LEC has disaggregated high-cost support to the higher-cost portions of its service area.¹⁹

Moreover, the rule also indicates that additional information, beyond just the disaggregation plan or method used, may be considered. In order to make any reasonable determination concerning the effectiveness of any specific disaggregation plan or method, at minimum, it would appear necessary to have information which allows for some reasonable measure of the costs that are actually experienced by RLECs in providing basic services within the higher and lower cost areas of their service areas, and also to have information giving some indication as to how wireline and wireline network costs

¹⁹ *Id.* at para. 51

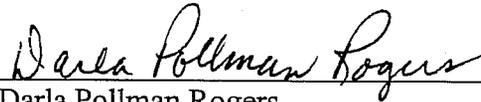
may differ in serving the same areas. No such evidence has been presented in this proceeding.

B. Conclusion.

In conclusion, it is the position of Intervenors that this Commission should, consistent with its previous ETC designation decisions, apply the FCC standards that have been adopted for reviewing ETC designation requests. Following these standards is not only consistent with the Commission's past practice in dealing with ETC designations, it also is consistent with the fundamental goals of preserving and advancing universal service. As the FCC stated in its Report and Order, "[w]hile Congress delegated to individual states the right to make ETC decisions, collectively these decisions have national implications that affect the dynamics of competition, the national strategies of new entrants, and the overall size of the federal universal service fund." Intervenors urge the Commission to keep these national implications in mind and to act in a manner that is consistent with protecting the long-term sustainability of the federal universal service fund. The reliance of South Dakota on the federal USF to preserve affordably priced basic telephone services is more pronounced than in many other states, and this reliance is more likely to increase in the future, as inter-carrier compensation reforms are implemented by the FCC. The FCC in adopting its additional "minimum requirements" and establishing a "more rigorous" ETC designation process did so, primarily, because of concern over the long-term sustainability of the federal fund.²⁰ Intervenors urge this Commission to give the highest priority to that same goal and, accordingly, to follow the newly prescribed FCC requirements and standards.

²⁰ *Id.* at para. 1, 2, 58.

Respectfully submitted this eighth day of April, 2005.



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the **SUPPLEMENTAL BRIEF OF INTERVENORS** was served via the method(s) indicated below, on the eighth day of April, 2005, addressed to:

Pamela Bonrud, Executive Director (original and 10)	()	First Class Mail
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Pierre, South Dakota 57501	()	Overnight Delivery
	()	E-Mail
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with respect to the rate plan offerings of Wireless Alliance. As to the Wireless Alliance rate plans, she stated:

I believe the regional. I believe that is marketed a little bit different in that you have an option to take a footprint bigger than this. I would have to check with our store to see what we call it. I don't think it's a three-state plan. I think we call it expanded roaming capability. . . . It's a little bit different because its different technology so that drives some of the differences.

TR V.1, p. 53. This testimony suggests that the local calling scopes offered may be different between Rural Cellular Corporation and Wireless Alliance. This interjects even greater uncertainty into the process of reviewing the current record for purposes of making determinations on the comparability of RCC's local usage plans with the RLEC local service offerings.

It also is significant that the current record evidence includes absolutely no information as to the current local service offerings of each of the RLECs. Without any such information available as part of the record in this matter, this Commission cannot proceed to make the comparison described within the FCC rule. The FCC rule requires a case-by-case analysis, and as part of this analysis, it would seem absolutely necessary to have at least basic information as to the current local service rates being offered by each RLEC within its service area and/or exchange areas and also the landline local calling scopes that are being made available. Accordingly, RCC's exhibits along with the testimony provided concerning these exhibits do not allow any meaningful comparison of the Rural Cellular Corporation and Wireless Alliance rate plans with the local usage plans currently offered by each of the RLECs. Petitioners EXH 9 and EXH 10, TR V. 1 pp 47-54.

4. 47 C.F.R. § 54.202(c) -- the creamskimming analysis.

With its new rules, the FCC has provided more specific direction concerning the factors that should be considered in making a determination as to whether granting multiple ETC designations is in the public interest. The provisions of 47 C.F.R. § 54.202(c), while not referring to all of the public interest criteria that the FCC has established by its decisions, references the need to consider the “benefits of increased consumer choice” and also “the unique advantages and disadvantages of the applicant’s service offering.” In addition, the rule provides a guideline applying to those cases where the ETC applicant seeks designation below the study area level of the rural telephone company. With regard to such cases the rule states:

In instances where an eligible telecommunications carrier applicant seeks designation below the study area level of a rural telephone company, the Commission shall also conduct a creamskimming analysis that compares the population density of each wire center in which the eligible telecommunications carrier applicant seeks designation against that of the wire centers in the study area in which the eligible telecommunications carrier does not seek designation. In its creamskimming analysis, the Commission shall consider other factors, such as disaggregation of support pursuant to § 54.315 by the incumbent local exchange carrier.

Intervenors believe the current record demonstrates that creamskimming would occur if RCC’s Petition is granted. Evidence was presented in this proceeding by Intervenors’ witness, Mr. Glenn Brown, concerning the population densities existing within each of the RLEC service areas. Certain “clustering” information was also provided allowing for some comparison of densities between particular areas within the identified rural service areas. This information demonstrated that creamskimming would occur if RCC’s Petition is granted. However, it does not allow this Commission to fully address

creamskimming concerns raised by RCC's request for ETC designation where designation is sought below the wire center level.

The creamskimming analysis, as described in the FCC rule, also requires a consideration of issues surrounding the disaggregation of universal service support. As demonstrated in Intervenor's Brief, and contrary to the general suggestions made by RCC in this case, the simple fact that some of the RLECs have chosen to disaggregate and the fact that the other affected RLECs may still have disaggregation available as an option does not eliminate concerns over creamskimming by competitive ETCs in high-cost rural areas. As the FCC rightly recognized in its *Report and Order*,

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may differ in serving the same areas. No such evidence has been presented in this proceeding.

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Respectfully submitted this eighth day of April, 2005.

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