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April 8, 2005

Ms. Pam Bonrud
Executive Director
Public Utilities Commission
500 East Capitol
Pierre, SD 57501

Re: In the Matter of the Filing by RCC Minnesota, Inc.
and Wireless Alliance, L.L.C. d/b/a Unicel for
Designation as an Eligible Telecommunications Carrier
Docket TC03-193

Dear Ms. Bonrud:

Enclosed for filing you will find Supplemental Staff Brief with reference to the above captioned matter. By copy of this letter I am serving a copy of the enclosure on those noted below, which is intended as service upon them by mail.

Very truly yours,

John Smith
Commission Counsel

JS:dk
Enc.

cc: Mr. Talbot J. Wiczorek
Mr. David A. LaFuria
Mr. Darla Pollman Rogers
Mr. Richard Coit
Mr. James Cremer
Ms. Meredith Moore

Enc.

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

IN THE MATTER OF THE FILING BY RCC)	
MINNESOTA, INC. AND WIRELESS)	SUPPLEMENTAL STAFF
ALLIANCE, L.L.C. D/B/A UNICEL FOR)	BRIEF
DESIGNATION AS AN ELIGIBLE)	
TELECOMMUNICATIONS CARRIER)	TC03-193

I. SUPPLEMENTAL PROCEDURAL HISTORY

The same abbreviations of parties and other entities will be used in this Supplemental Brief as in Staff's Brief. On March 17, 2005, the FCC released its Report and Order in *Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, FCC 05-46 (Rel. Mar. 17, 2005) (*USF Order*). On March 24, 2005, Intervenors in this docket filed a Motion by Intervenors to Submit a Supplemental Brief to address the effect of the *USF Order* on this case. At an Ad Hoc meeting duly noticed for March 29, 2005, the Commission considered Intervenors' Motion. Petitioners, Intervenors and Staff appeared through counsel. The Commission granted Intervenors' Motion and ordered that Intervenors and Staff's supplemental briefs be submitted electronically on or before 12:00 Noon, on March 8, 2005. The Commission further ordered that Petitioners submit their reply brief by March 11, 2005. The Commission further ordered that the parties be permitted to address the application of the last sentence of ARSD 20:10:32:42 to this case.

II. JURISDICTIONAL STATEMENT

The Commission has jurisdiction over this matter pursuant to SDCL Chapters 1-26 and 49-31, including 1-26-18, 1-26-19, 49-31-3, 49-31-7, 49-31-7.1, 49-31-11, 49-31-78, 49-31-81; ARSD 20:10:32:42 through 20:10:32:46, inclusive; and 47 U.S.C. § 214(e)(1) through (5).

III. DISCUSSION

A. Applicability of *USF Order* to this Case

Staff's first concern is with whether the *USF Order* ought to be applied to this case at all and if so, how it should be applied. The evidentiary record was concluded in this case with Petitioners' filing of revised RCC Ex 18 on November 9, 2004 - almost five months ago. It is at least arguable whether Petitioners' evidence should now be measured against a decision, and the standards set forth therein, of which Petitioners could not have been aware and for which they could not have prepared prior to hearing. The FCC itself seemed to recognize as much in its own resolution of the pending applications for service area redefinition in which it exercised liberality in applying the order's revised standards to pending applications. *USF Order*, para. 76 et seq.

On the other side of the coin, however, is the unambiguous insistence in the *USF Order* that the standards set forth in the decision apply not only to ETCs designated after the effective date of the order but to all ETC's, with active regulatory monitoring of compliance commencing at the latest on October 1, 2006, via the annual certification filings due on such date. It must therefore be asked whether it makes sense to make a designation decision at this time without due consideration of the *USF Order's* substantive guidance.

The Commission may wish to at least consider the *USF Order* as offering helpful guidance, and in some areas even decisive resolution, of several issues concerning which there remained uncertainty as of the time of the original briefing in this case. In this regard, the decision can be seen in some instances as not to impose new standards but merely to clarify uncertainty with respect to standards that have been generally known at least since the *Virginia Cellular* and *Highland Cellular* decisions.

Staff feels strongly, however, that the *USF Order* could be argued to alter the ETC designation standards sufficiently to where it would constitute a deprivation of due process to render a decision on the basis of a record made at the time when the final standards were not known. Furthermore, the Commission may wish to consider whether the *USF Order's* clarified and new standards ought to be adopted ad hoc in this company-specific proceeding or whether, since the FCC intends for them to apply to all existing ETCs as well as new applications, the new recommended standards might be more advisedly addressed generically in a rule-making proceeding, where the Commission could consider them in the context of their general applicability and with the benefit of industry-wide policy input. Staff accordingly recommends that the Commission follow one of the following courses: (i) permit Petitioners to reopen the record and make such further showings as they and the Commission may deem necessary to demonstrate compliance with the *USF Order* and conduct such further hearings as may be necessary to afford all parties their due process rights; or (ii) issue any order granting Petitioners' designation subject to a condition that Petitioners shall be required at some point in the future to demonstrate compliance with such standards and procedures as are adopted by the Commission in an industry-wide rule-making proceeding.

B. Issues Raised by the *USF Order*

The *USF Order* raises several issues bearing on Petitioners' application including: (i) whether the per-line support levels of the incumbent rural LECs within Petitioners' proposed service area are sufficiently high to be of concern, and if so, what influence that should have on the Commission's decision in this case; (ii) whether Petitioners' evidence concerning their build-out commitment meets the *USF Order's* more stringent and more objective standards on commitment and ability to serve throughout the designated area; (iii) whether Petitioners adequately demonstrated that they meet the order's emergency back-up power supply and procedures standard; (iv) whether

the evidence in the record is adequate to support a finding that Petitioners' local service offering will meet the order's standard; (v) whether the order's statements regarding multiple same-mode ETC designations in an area should be considered by the Commission in its public interest analysis; and (vi) whether rural incumbent LEC's service areas should be redefined below the study area and if so, whether they should be redefined below the wire center level. Staff believes the *USF Order* does not change the creamskimming analysis sufficiently to warrant addressing this issue again.

1. Effect of Incumbents' Per-Line Support Amounts

The *USF Order* clarifies that the per-line support levels within an applicant's proposed service area may properly be considered in an ETC designation proceeding. The FCC said at paragraph 55:

We find that per-line support received by the incumbent LEC should be one of many considerations in our ETC designation analysis. We believe that states making public interest determinations may properly consider the level of federal high-cost per-line support to be received by ETCs. High-cost support is an explicit subsidy that flows to areas with demonstrated levels of costs above various national averages. Thus, one relevant factor in considering whether or not it is in the public interest to have additional ETCs designated in any area may be the level of per-line support provided to the area. If the per-line support level is high enough, the state may be justified in limiting the number of ETCs in that study area, because funding multiple ETCs in such areas could impose strains on the universal service fund.

Staff believes the evidence in this case justifies a finding that the per-line support amount in Petitioners' proposed service area is high as compared to the national average. Intervenors' original brief contains a detailed analysis of this evidence in section II., E. at p. 29. Given these high per-line support amounts, the order states that the Commission may consider whether it is justified in limiting the number of ETCs in the service area. The problem Staff sees with this issue is the same problem as was presented by the FCC's analysis in *Virginia Cellular* and *Highland Cellular*. The FCC states as the justification for this consideration of per-line support the effect multiple designations could have on the universal service fund, not on the provision of service within the particular area. The

problem is that effects on the universal service fund simply cannot be analyzed in any meaningful way in the context of a particular ETC designation proceeding. Plain and simple, this is a national policy issue that must ultimately be addressed by the FCC or Congress on the basis of what kind of subsidy program for high-cost areas will best achieve the objectives of universal service and whether it is sound policy to subsidize "competition." The order goes on to conclude that ETC designations should not be limited to one wireline and one wireless carrier per service area and that there should be no presumption that such a limitation is in the public interest. Staff accordingly concludes that the per-line support level provides no useful guidance in deciding whether to grant or deny Petitioners' application.

2. Commitment and Ability to Provide the Supported Services

In Staff's view the most significant issue presented by *the USF Order* for this case is the network improvement commitment and plan standard. The order states at paragraph 21:

We adopt the requirement that an ETC applicant must demonstrate its commitment and ability to provide supported services throughout the designated service area: (1) by providing services to all requesting customers within its designated service area; and (2) by submitting a formal network improvement plan that demonstrates how universal service funds will be used to improve coverage, signal strength, or capacity that would not otherwise occur absent the receipt of high-cost support. (Emphasis supplied).

The order further states in paragraph 23:

Specifically, we require that an ETC applicant submit a five-year plan describing with specificity its proposed improvements or upgrades to the applicant's network on a wire center-by-wire center basis throughout its designated service area. The five-year plan must demonstrate in detail how high-cost support will be used for service improvements that would not occur absent receipt of such support. This showing must include: (1) how signal quality, coverage, or capacity will improve due to the receipt of high-cost support throughout the area for which the ETC seeks designation; (2) the projected start date and completion date for each improvement and the estimated amount of investment for each project that is funded by high-cost support; (3) the specific geographic areas where the improvements will be made; and (4) the estimated population that will be served as a result of the improvements. To demonstrate that supported improvements in service will be made throughout the

service area, applicants should provide this information for each wire center in each service area for which they expect to receive universal service support, or an explanation of why service improvements in a particular wire center are not needed and how funding will otherwise be used to further the provision of supported services in that area.

Staff does not believe Petitioners' evidence concerning its network improvement plans satisfies this more detailed service commitment standard. Petitioners witness, Elizabeth Kohler, described Petitioners' planning horizon as essentially a year-ahead horizon. TR Vol. I at 65-66. In fact, as of the October 13, 2004 date of Ms. Kohler's testimony, Petitioners had not yet finalized their capital budget for 2005. TR Vol. I at 65. Ms. Kohler further testified as follows with respect to the companies' build out plans:

Q [I]s it the intentions [sic] of your company speaking as its representative, that each of those areas that are marked out in black, be substantially covered in orange within, let's say, a five-year time frame?

A I just really hesitate to use date-certain perimeters [sic] like five years. . . . So 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. But in five years I hope a lot more people that live in this area have access to a competitive choice, and I hope they choose wireless.

Even in its original brief, Staff expressed concern with the Petitioners' build-out commitment based upon Petitioners' stated intention to base its coverage extension investments on facility-specific incremental return-on-investment analysis. TR Vol. II at 52. Given the *USF Order's* clarification of the showing required to demonstrate commitment to serve throughout the designated area, Staff believes that at a minimum, Petitioners should be required to make a concrete commitment on the record that they have a present intention and a plan to build out to provide coverage substantially throughout the service area and that the Petition should be denied if such a showing is not made.

3. Emergency Back-Up Power Supply and Procedures

The *USF Order* establishes a requirement that an ETC applicant demonstrate its ability to remain functional in emergency situations. Specifically, the order states in paragraph 25:

Specifically, in order to be designated as an ETC, an applicant must demonstrate 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.

Petitioners' witness, Kyle Gruis, presented testimony that in Staff's view demonstrated that Petitioners have in fact installed adequate back-up power supplies. Petitioners also presented evidence of their system reliability and ability to respond to system failure. Petitioners Ex 5; TR 24 et seq. Petitioners did not present evidence that explicitly addressed rerouting of traffic around damaged facilities or the management of traffic spikes resulting from emergency situations. The Commission may wish to consider whether Petitioners should be required to make such a showing prior to designation, explain why such a showing is not appropriate in this case or impose a condition that Petitions install and maintain such functionality.

4. Parity with Incumbent's Local Calling Plans

The *USF Order* states in paragraph 32:

Specifically, we require an ETC applicant to demonstrate that it offers a local usage plan comparable to the one offered by the incumbent LEC in the service areas for which the applicant seeks designation.

There is evidence in the record of all of Petitioners' existing rate plans. Intervenors Ex 9; Petitioners Ex 10; TR 47-54. As far as Staff has been able to determine, Petitioners did not introduce evidence that expressly addressed the comparability of its local usage rate plans to the local usage rate plans of the incumbent RLECs within its proposed service area. Although Staff has some concerns with a rigid interpretation of this requirement given the differences between national service and rate plan norms and customer expectations in the wireless sector, the Commission may wish to consider

whether Petitioners should be required to make such a showing prior to designation, explain why such a showing is not necessary in this case or impose a condition that Petitions offer local usage rate plans that are comparable to the local rate plans of the incumbent LECs within the proposed service area.

5. Multiple Same-Mode ETCs

In its original brief, Staff raised the question of whether from a public policy perspective, it makes sense to designate multiple same-mode ETCs in areas where it is difficult and expensive for even one carrier to provide universal service to all persons within the service area. Staff noted that what seems to be left in designating additional same-mode carriers is simply "competition by itself" and that by splitting lower cost revenues among multiple carriers, multiple designations may make it more difficult, and actually less likely, for any carrier to be able to deploy service ubiquitously throughout the service area. Staff also noted and concluded, however, that it did not feel an adequate policy or regulatory framework on this issue had been set forth in law, regulation or FCC decisions to serve as the basis for an outcome in this case. The *USF Order* now provides definitive guidance on this issue in paragraph 57:

For similar reasons, we also decline to adopt a proposal that would allow only one wireline ETC and one wireless ETC in each service area. Such a proposal that limits the number of ETCs in each service area creates a practical problem of determining which wireless and wireline provider would be selected. We also reject the application of a rebuttable presumption that it is not in the public interest to have more than one ETC in each rural high-cost area. (Emphasis supplied).

Staff concludes that the Commission should not base its decision in this case on the fact that designating Petitioners will result in two same-mode ETCs in Petitioners' proposed service area.

6. Service Area Redefinition

In its original brief, Staff questioned the justification for defining Petitioners' service area on a basis other than its FCC licensed service area. In the *USF Order*, the FCC reiterated its conclusion

in *Highland Cellular* that redefinition should not go below the incumbent RLEC's wire center level in paragraph 77:

We concluded that a rural telephone company's wire center is the appropriate minimum geographic area for ETC designation because rural carrier wire centers typically correspond with county or town boundary lines. (Emphasis supplied).

Although the facts in this case simply do not support the FCC's basis for this conclusion since the RLEC's wire center boundaries do not coincide with county and town boundary lines (and Petitioners' proposed boundaries would), Staff nevertheless feels constrained to accept the FCC's decision as controlling on this issue given the adamance of its assertions on this issue and the fact that it will have to approve any redefinition. Staff accordingly recommends that the Commission redefine the RLEC study areas that are partially within Petitioners' licensed area along RLEC wire center lines as set forth in Staff's Brief, p. 7. Staff reiterates its position that the Beresford Rural wire center should not be allowed to be omitted from the service area in order to avoid a potential creamskimming result.

B. The Last Sentence of ARSD 20:10:32:42

In its original brief, Staff cited to ARSD 20:10:32:42 but did not explicitly discuss the last sentence and its effect on this case. Staff rather focused on the *Virginia Cellular* and *Highland Cellular* decisions regarding what factors should be considered in resolving a request for service area redefinition under ARSD 20:10:32:45. Implicit in this treatment was Staff's construction of the last sentence of ARSD 20:10:32:42 as being subject to redefinition under ARSD 20:10:32:45 in the same manner and employing the same decisional factors as the FCC has specified for decisions under 47 U.S.C. § 214(e)(5) and the FCC's rules. *USF Order*, paras. 48-52; 73-75. Staff believes that the last sentence of ARSD 20:10:32:42 could legitimately be construed as expressing a stronger policy statement than 47 U.S.C. § 214 (e)(5) that competitive ETCs be required to serve the entirety of the

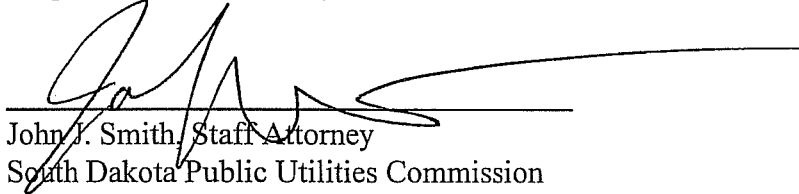
rural ETCs' study areas. Staff nevertheless continues to believe that this rule is subject to the redefinition option provided in ARSD 20:10:32:45 and that the best guidance on standards applicable to redefinition are found in the FCC's recent decisions including the *USF Order*.

IV. CONCLUSION

The *USF Order* alters and clarifies the standards applicable to designation of ETCs in several important areas. At some point, these revised standards will likely be adopted in whole or in part by the Commission and applied both to new applicants, such as Petitioners, and existing ETCs. The Commission may elect to apply such standards in this case to Petitioners' application. If it does so, however, it should do so with due regard for Petitioners' right to make a record on the basis of known standards. The Commission should also seriously consider whether its adoption of new standards might better and more fairly be accomplished via a rule-making where their impact on all ETCs would be considered and where all industry participants would have the opportunity to present their views.

Dated at Pierre, South Dakota, this 8th day of April, 2005.

Respectfully submitted by



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CERTIFICATE OF SERVICE

The undersigned certifies that on the 8th day of April, 2005, I served a true and correct copy of the foregoing Staff's Brief by email and first class mail to:

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