

MOSS & BARNETT

A Professional Association

4800 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-4129
Telephone 612.347.0300
Facsimile 612.339.6686
www.moss-barnett.com

THOMAS A. KELLER III
JAMES E. O'BRIEN
EDWARD L. WINER
WILLIAM A. HAUG
CHARLES A. PARSONS, JR.
RICHARD J. JOHNSON
ROBERT J. LUKES
JAMES A. RUBENSTEIN
THOMAS R. SHERAN
EDWARD J. BLOMME
JEFFREY L. WATSON
THOMAS J. SHROYER
DAVID P. JENDRZEJEK
CURTIS D. SMITH
DAVE F. SENGER
MITCHELL H. COX
MICHAEL J. BRADLEY
PETER A. KOLLER
RICHARD J. KELBER
KEVIN M. BUSCH
SUSAN C. RHODE
THOMAS A. JUDD
DEANNE M. GRECO
CASS S. WEIL
GLEN E. SCHUMANN
JANNA R. SEVERANCE
M. CECILIA RAY
NANCY M. KISKIS
BARRY LAZARUS
PAUL B. ZISLA
BRIAN T. GROGAN
J. MICHAEL COLLOTON
JOSEPH G. MATERNOWSKI
JAYMES D. LITTLEJOHN
MICHAEL R. NIXT
JAMES F. BALDWIN
DAVID S. JOHNSON
PHILIP J. YOUNG
ARTHUR W. DICKINSON
BEN M. HENSCHEL
DAN LIPSCHULIZ
JOHN K. ROSSMAN
MARK B. PETERSON
MATHEW M. MEYER
TIMOTHY L. GUSTIN
YURI B. BERNDT
DAVID L. BIEK
MARSHA STOLT
MARCY R. FROST
MATTHEW B. JOHNSON
ELIZABETH H. KIERNAT
JAMES J. VEDDER
MICHAEL S. PONCIN
JANA AUNE DEACH
JENNIFER A. REUSSÉ
CINDY J. ACKERMAN
ANTHONY A. DORLAND
CHRISTOPHER D. STALL
JOSEPH G. SOCHA
GREGORY L. KOELLER
LORIE A. KLEIN
TERESE A. WEST
JEFFREY L. BODENSTEINER
JULIA M. DAYTON
J. VINCENT STEVENS
BRADLEY J. HINTZE

MICHAEL J. BRADLEY
612.347.0337
BradleyM@moss-barnett.com

June 20, 2006

VIA FEDERAL EXPRESS

Patricia Van Gerpen
South Dakota Public Utilities Commission
State Capitol Building
500 East Capitol
Pierre, South Dakota 57501

Re: In the Matter of the Application of PrairieWave Telecommunications, Inc. for
Designation as an Eligible Telecommunications Carrier in the Contiguous Wire Centers
of Centerville and Viborg
Docket No.: TC05-016

Dear Ms. Van Gerpen:

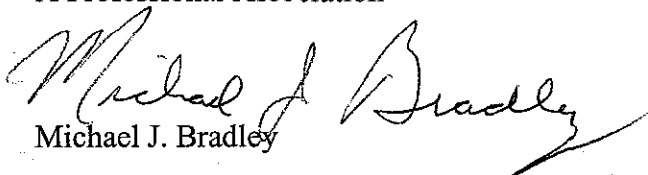
Enclosed for filing please find the original and 10 copies of the Initial Brief on behalf of Fort
Randall Telephone Company in the above-referenced docket. Also enclosed are eleven copies of
Replacement Attachment E to the Stipulation of Facts, which we filed on May 4, 2006, on behalf
of Fort Randall Telephone Company, PrairieWave Telecommunications, Inc. and South Dakota
Telecommunications Association.

Also enclosed is a Certificate of Service.

Very truly yours,

OF COUNSEL
THOMAS E. HARMS
ARTHUR J. GLASSMAN

MOSS & BARNETT
A Professional Association


Michael J. Bradley

MJB/jjh

Enclosures

cc: All parties of record
895176v1

Certificate of Service

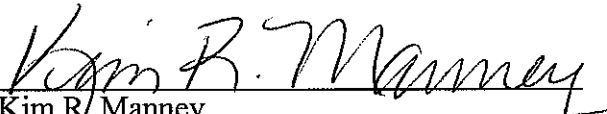
I hereby certify that an original and ten copies of the above and foregoing Initial Brief on behalf of Fort Randall Telephone Company were sent via email and overnight service on the 20th day of June, 2006, to the following:

Patricia Van Gerpen
Executive Director
South Dakota Public Utilities Commission
Capitol Building, First Floor
500 East Capitol Avenue
Pierre, South Dakota 57501

and a true and correct copy was sent by overnight service to the following:

Rolayne Ailts Wiest
South Dakota Public Utilities Commission
Capitol Building
500 East Capitol Avenue
Pierre, South Dakota 57501

and a true and correct copy by overnight service or United States Mail, postage prepaid, to the persons on the attached list.


Kim R. Manney

Karen Cremer
South Dakota Public Utilities Commission
Capitol Building
500 East Capitol Avenue
Pierre, South Dakota 57501

William P. Heaston
PrairieWave Communications, Inc.
5100 South Broadband Lane
Sioux Falls, SD 57108

Richard D. Coit
SDTA
320 E. Capitol Avenue
P.O. Box 57
Pierre, SD 57501-0057

Bruce Hanson
Hanson Communications, Inc.
227 S Main Street
Clara City, MN 56222

Mark Hanson
Fort Randall Telephone Company
722 W Highway 46
Wagner, SD 57380

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

**IN THE MATTER OF THE APPLICATION
OF PRAIRIEWAVE COMMUNICATIONS
INC. FOR DESIGNATION AS AN
ELIGIBLE TELECOMMUNICATIONS
CARRIER IN THE CONTIGUOUS WIRE
CENTERS OF CENTERVILLE AND
VIBORG**

TC05-016

INITIAL BRIEF OF FORT RANDALL TELEPHONE COMPANY

I. Introduction.

This Initial Brief is submitted on behalf of Fort Randall Telephone Company ("Fort Randall") in response to the Application by PrairieWave Communications Inc. ("PrairieWave") for designation as an eligible telecommunications carrier ("ETC") in the Centerville and Viborg wire centers ("Application"). Fort Randall, PrairieWave and the South Dakota Independent Telephone Coalition have entered into a Stipulation of Facts ("Stipulation"), which provides the factual information needed to evaluate the Application, and the Parties have agreed to submit this matter to the South Dakota Public Utilities Commission ("Commission") based on that Stipulation and simultaneous initial and reply briefs. Commission Staff is expected to comment separately on this matter.

Fort Randall is a rural telephone company and certified ETC with a single study/service area in South Dakota, serving eight wire centers. Stipulation ¶¶ 4 and 11. PrairieWave is not seeking ETC status in the other six exchanges included in Fort Randall's service/study area, and has no current plans to offer any telecommunications service in those six wire centers.¹ These

¹ Fort Randall's service/study area also includes the Tabor, Tyndall, Wagner, Lake Andes, Hermosa and Keystone wire centers. Fort Randall provides local exchange service in the Keystone and Hermosa wire centers d/b/a Mt. Rushmore Telephone Company. Fort Randall has been certified as an ETC in each of

six wire centers have a lower population per mile than Centerville and Viborg, which would lead to creamskimming of the type the Federal Communications Commission ("FCC") has found impermissible. Creamskimming is impermissible even if PrairieWave were prevented from serving the entire Fort Randall service area, which it is not.²

This is the second application by PrairieWave for ETC designation in the Centerville and Viborg wire centers.³ The Commission denied the first request in its December 11, 1998 ORDER DENYING REQUEST FOR ETC DESIGNATIONS; NOTICE OF ENTRY OF ORDER, in TC98-111. *Id.* ¶ 10. The first application was denied because, as in this current case, DTI (PrairieWave's predecessor) proposed to serve only Centerville and Viborg, rather than Fort Randall's entire service/study area. While the FCC subsequently provided additional direction with regard to evaluating ETC applications, the fundamental standards have not changed, and PrairieWave's current Application should also be denied.

PrairieWave treats the ETC application process as though its promise to satisfy the required service offering obligations contained in 47 U.S.C. Section 214(e) is, by itself, sufficient to justify approval of its Application. To the contrary, the FCC has made it clear that meeting the ETC service obligations is merely the first step in determining whether granting the Application would be in the public interest, and that an application for ETC status in a rural telephone company service area requires further evidence of public benefit. *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, REPORT AND ORDER, released March 17, 2005 ("REPORT AND ORDER"), at ¶¶ 40-64. See also, SDCL

the eight wire centers it serves (Docket No. TC97-075, dated December 17, 1997). Stipulation ¶¶ 4 and 29.

² *Virginia Cellular*, CC. Docket No. 96-45, MEMORANDUM AND ORDER, released January 22, 2004, ¶ 35.

³ The first request was by Dakota Telecom Inc. ("DTI"), PrairieWave's predecessor, Stipulation ¶ 6.

§ 49-31-78, requiring a finding that the additional designation would be in the public interest as a precondition to designating more than one ETC in an area served by a rural telephone company.

While the unique service characteristics of wireless service (mobility, large calling scopes and safety) has resulted in numerous instances of *mobile* wireless carriers being found to satisfy the customer choice/service advantage portion of the FCC test for evaluating ETC applications, PrairieWave is a wireline/fixed-wireless service provider and does not offer the added service benefits of a mobile wireless provider. Further, if PrairieWave is entitled to ETC status under the Stipulated facts of this case, Fort Randall can envision no circumstance in which a CLEC would not qualify for duplicative ETC status in portions of a rural telephone company service area by simply promising to meet the service checklist -- rendering meaningless both the public interest test and the prohibition against creamskimming in areas served by rural telephone companies.

II. PrairieWave's Application Should Be Denied.

The following discussion will address the most recent standards articulated by the FCC, in the REPORT AND ORDER, and the recent Commission decisions *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*, Findings of Fact and Conclusions of Law; Notice of Entry of Order, Docket No. TC03-193 (dated June 6, 2005) ("*RCC/WALLC*"); and *In the Matter of the Filing by Brookings Municipal Utilities d/b/a Swiftel Communications for Designation as an Eligible Telecommunications Carrier*, February 10, 2006, ORDER GRANTING ELIGIBLE TELECOMMUNICATIONS DESIGNATION, TC-4-214 ("*Swiftel*").

Section 214(e)(2) of the Act provides in part:

Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of 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 by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1) [establishing service obligations, including the obligation to serve the entire service area]. 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.

The REPORT AND ORDER, ¶ 40, summarizes the Commission's obligations with respect to reviewing an ETC application as follows:

Under section 214 of the Act the [FCC] and state commissions must determine that an ETC designation is consistent with the public interest, convenience and necessity. The Commission must also consider whether an ETC designation serves the public interest consistent with Section 254 of the Act [universal service goals] ... The public interest of a particular ETC designation must be analyzed in a manner that is consistent with the purposes of the Act itself, including the fundamental goals of preserving and advancing universal service; ensuring the availability of quality telecommunications services at just, reasonable, and affordable rates; and promoting the deployment of advanced telecommunications and information services to all regions of the nation, including rural and high-cost areas.

Applying the above standards, the FCC adopted 47 C.F.R. § 54.202 (c) *Public Interest Standard*, which provides:

Prior to designating an eligible telecommunications carrier pursuant to section 214(e)(6), the Commission determines 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 carrier, the Commission shall also conduct a creamskimming analysis that compares the population density of each wire center in which the eligible 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.

While the FCC's ETC standards are not binding on the Commission, the FCC has encouraged their use by state commissions. REPORT AND ORDER ¶ 1.⁴

In the *Swiftel* proceeding, the Commission approved a wireless ETC application for portions of several rural telephone company service areas, including Fort Randall's service area.⁵ The following analysis will demonstrate that PrairieWave's Application is not comparable to prior wireless applications seeking ETC authority that have been approved by the Commission. In particular, PrairieWave's service proposal: (1) provides no advantages over the existing Fort Randall service and there is a significant probability that PrairieWave's higher priced (residential), fixed-wireless service will be of lower quality than the service provided by Fort Randall; (2) there is no legal or other barrier (other than lack of available profit) to PrairieWave serving Fort Randall's entire service area; (3) granting the Application would result in undeniable and harmful creamskimming; (4) the universal service payments to PrairieWave would result in a windfall to PrairieWave with little or no customer benefits; (5) there is a potential significant impact on Fort Randall's ability to continue providing high quality service at affordable rates, particularly to the out-of-town customers in Centerville and Viborg; and (6) in the long term, there could be a significant adverse impact on the Universal Service Fund if duplicative ETCs are consistently certified by the Commission.

The burden of proof is on PrairieWave to demonstrate that approving its Application is in the public interest. *Virginia Cellular*, CC. Docket No. 96-45, MEMORANDUM AND ORDER, released January 22, 2004, ¶ 26. PrairieWave has failed to satisfy that burden of proof.

⁴ The Report and Order ¶ 1 states in part: "[A]s recommended by the Joint Board, we encourage states that exercise jurisdiction over ETC designations pursuant to section 214(e) of the Act, to adopt these requirements when deciding whether a common carrier should be designated as an ETC. We believe that application of these additional requirements by the Commission and state commissions will allow for a more predictable ETC designation process."

⁵ *Swiftel* was granted ETC authority for the Centerville, Tabor, Tyndall and Viborg wire centers. Order Granting Eligible Telecommunications Designation, p. 6.

A. Granting ETC Status Would Not Improve Customer Choice.

One of the considerations is whether granting ETC status would increase customer choice. However, “the value of increased competition, by itself, is unlikely to satisfy the public interest test.” REPORT AND ORDER ¶ 21. In addition, in this case, granting duplicative ETC status would have little or no impact on customer choice.

PrairieWave has been providing local service in the Centerville and Viborg exchanges since 1997. Stipulation ¶ 15. When DTI (PrairieWave’s predecessor) requested an interconnection agreement with Fort Randall to support local competition, the two carriers entered into a Settlement Agreement, which required DTI to provide local service within the entire Centerville/Viborg wire centers by the end of 1999, Stipulation Attachment A, ¶ 1, which the Commission approved in its December 12, 1997 ORDER APPROVING SETTLEMENT AGREEMENT AND CLOSING DOCKET in Docket NoTC97-062. The requirement to provide service throughout the Centerville and Viborg exchanges was consistent with the Commission’s authority, under 47 U.S.C. § 253(f) and SDCL § 49-31-73, to require service throughout the exchanges as a precondition to offering competitive local service within a rural telephone company service area.

PrairieWave’s response to that obligation was to provide service outside of the Centerville and Viborg town boundaries to at most 17 customers, using a fixed-wireless technology. In April 2004, PrairieWave withdrew its only service offering to those customers. Stipulation ¶ 9. PrairieWave’s withdrawal of service to the out-of-town customers in those exchanges is contrary to PrairieWave’s existing service obligations. Therefore, PrairieWave should not be allowed to rely on its “plan” to serve out-of-town customers as providing customer choice or as a benefit that could result from granting it ETC status. To the contrary, serving out-

of-town customers in the Centerville and Viborg wire centers would merely satisfy an existing service obligation that is unrelated to being an ETC.

PrairieWave is proposing to provide service to the out-of-town portions of the Centerville and Viborg wire centers using an experimental, non-mobile *fixed-wireless*, voice-over-internet-protocol (“VoIP”) technology; a WaveRider LM4000 Matrix fixed-wireless system, using unlicensed radio frequency. Stipulation ¶ 23. PrairieWave is currently providing service to 4 persons (all of whom are PrairieWave employees) using the WaveRider LM4000 Matrix fixed-wireless system; and those four employees are the only people in the **United States** receiving local service using that system. *Id.* ¶ 25. PrairieWave is itself uncertain whether it can make that system work, and proposes to use a different fixed-wireless system if necessary. *Id.* ¶ 26. In fact, PrairieWave recognizes that the proposed fixed-wireless offering may not become operational:

PrairieWave has stated its intent to specifically target customers outside the towns’ corporate limits if the petition is granted and **if the wireless service becomes operational** as specified in the 3-year plan submitted to the Commission.

Id. ¶ 50 (emphasis added). It is noteworthy that the last attempt to provide service using a fixed-wireless service failed, with only 17 customers electing to take the service, and PrairieWave eventually withdrawing the service. *Id.* ¶ 9. If PrairieWave is unable to make its fixed-wireless service work, it has only agreed to serve out-of-town customers “if service can be provided at reasonable cost.” *See id.* ¶ 57. Currently, PrairieWave only offers wireline service to three out-of-town customers and none live more than one mile outside of town. *Id.* ¶ 22.

For the in-town customers, granting ETC status will provide no additional choice. For the out-of-town customers, in addition to the unknown and unproven quality of the service that PrairieWave intends to offer, PrairieWave’s residential service is priced \$2.95, 42% higher than

Fort Randall's residential rate. *Id.* ¶ 16. It cannot reasonably be argued that offering a customer service using an unproven technology at a higher residential rate is offering meaningful customer choice. Further, even if out-of-town customers were interested in taking the service, it can be reasonably assumed that PrairieWave would not garner more than the 30% market share it has attained during the 9 years it has offered local service to in-town customers. *See id.* ¶ 36. That means that a maximum of 140 out-of-town customers might accept service from PrairieWave.

It is important to recognize that PrairieWave's out-of-town service offering need not be successful for PrairieWave to obtain a significant windfall, as PrairieWave would receive an estimated \$84,000 per-year in universal service payments for its current customers. *Id.* ¶ 56.

Therefore, PrairieWave cannot rely on the availability of choice as providing meaningful support to its Application. This point will be further developed in the following section, which demonstrates that, even if PrairieWave's fixed-wireless service operates as intended, it will not result in improved telecommunications service.

B. Advantages and Disadvantages of PrairieWave's Service Offerings.

A second criteria to be considered is whether there are any unique advantages or disadvantages related to PrairieWave's service offerings. 47 C.F.R. § 54.202(c). PrairieWave will not offer any services not already available to customers in Centerville and Viborg. Therefore, it offers no service advantages. PrairieWave asserts that it will offer service to out-of-town customers using an unproven technology. That should be considered a significant disadvantage with respect to PrairieWave's service offering. Further, there is no assertion that Fort Randall's local service quality is inadequate. *Id.* ¶ 20.

Both Fort Randall and PrairieWave use a Lucent 5ESS switch to serve their respective customers in Centerville and Viborg, and both PrairieWave and Fort Randall offer high-speed

internet access, voicemail, numeric paging, call forwarding, three-way calling and call waiting.

Id. ¶ 17.

Fort Randall's residential rate is lower than PrairieWave's, and PrairieWave's business rate is lower than Fort Randall's. The out-of-town customers are almost exclusively residential.

Service	PrairieWave	Fort Randall
Residential	\$9.95	\$7.00
Business	\$17.50	\$23.34

PrairieWave offers calling without additional charge to PrairieWave customers in the Centerville and Viborg wire centers to other PrairieWave customers located in exchanges served by PrairieWave's host switch in Viborg. Some of those exchanges have Extended Area Service ("EAS") with Centerville and Viborg and would not be subject to a long distance charge in any event. *Id.* ¶ 18.⁶ The value of this very limited extended calling plan, while undoubtedly of value to some customers, should not be considered material because Fort Randall customers in Centerville and Viborg have access to the numerous other extended calling plans provided by the five wireless carriers and more 41 long distance carriers that offer service to Fort Randall's customers. *Id.* ¶¶ 19 and 25. The five wireless providers offer a number of calling plans, including very large "local" calling plans. *Id.* ¶ 25.

PrairieWave's higher-priced (residential), duplicative service offering (if its service offering is successful) stands in stark contrast to the wireless ETC service offerings that have been approved. *See e.g., RCC/WALLC* ¶¶ 27 and 29, approving ETC status in part based on a finding of increased choice, expanded local calling areas, mobility, varying amounts of minutes

⁶ Fort Randall customers in the Centerville wire center have EAS to Viborg. Fort Randall customers in the Viborg wire center have EAS to Davis, Hurley, Flyger, and Irene. Stipulation ¶ 19.

of use, and safety features. In contrast, PrairieWave's wireless/wireline service is fixed. Thus, the added benefit of mobility and safety are not present. Nor is the ubiquitous, large calling scope associated with mobile wireless service available. In fact, there is no material difference in the service offerings between PrairieWave and Fort Randall (other than PrairieWave's lower business but higher residential rates). Finally, in contrast to the mobile wireless service, the VoIP fixed-wireless technology proposed by PrairieWave is unlicensed spectrum and is currently connected to only four persons in the entire United States (all of whom are PrairieWave employees). *Id.* ¶ 23.

The last attempt by PrairieWave to provide service to out-of-town customers only garnered 17 customers and the service was later discontinued. *Id.* ¶ 9. Clearly, customers deemed the higher-priced residential, fixed-wireless service inadequate.

PrairieWave cannot, therefore, meaningfully rely on service advantages as providing meaningful support to its Application. In fact, the unproven nature of an unlicensed fixed-wireless VoIP service should be considered a disadvantage.

C. Granting ETC Status Would Result In Prohibited Creamskimming.

Granting PrairieWave's request would result in inappropriate creamskimming because Centerville and Viborg have a lower cost of service than the other six exchanges in the Fort Randall service area. Under the FCC established standards, that fact alone justifies denying the Application, even if there were a barrier to PrairieWave's ability to serve the entire service area.

Section 214(e)(5) defines a service area as follows:

The term "service area" means a geographic area established by a State commission (or the [FCC] under paragraph (6)) for the purpose of determining universal service obligations and support mechanisms. In the case of an area served by a rural telephone company, "service area" means such company's "study area" unless and until the [FCC] and the States, after taking into account

recommendations of a Federal-State Joint Board instituted under section 410(c) of this title, establish a different definition of service area of such company.

Fort Randall's study area consists of eight wire centers as shown on Attachment E of the Stipulation.⁷ PrairieWave only provides service in two of those wire centers – Centerville and Viborg. PrairieWave selected those two wire centers for one reason. The cost of serving customers in Centerville and Viborg is significantly lower than the cost of providing service in any of the other six wire centers.

There are two factors that make service in the Centerville and Viborg exchanges significantly lower than in the other six wire centers. First, the population density per mile is nearly twice as high. Second, PrairieWave located its 5ESS switch in Viborg. That makes Viborg and the contiguous Centerville wire centers PrairieWave's center of operations, with its home offices in Irene. In fact, PrairieWave's ILEC operations surround the Centerville and Viborg exchanges (*see* Stipulation, Attachment E).

a) There Is No Obstacle To PrairieWave Serving The Entire Serving Area.

There are no legal or technical obstacles to PrairieWave providing service throughout the Fort Randall service area. In addition, six of the eight Fort Randall wire centers are contiguous to other wire centers served by PrairieWave. Therefore, PrairieWave lacks a legal or operational justification for serving only the Centerville and Viborg wire centers.

Unlike wireless carriers who are often legally unable to serve entire rural telephone company service areas, there is no legal limitation on PrairieWave's ability to serve Fort Randall's entire service area. Nor is there a technical inability to serve the entire Fort Randall service area. PrairieWave currently offers service to 35 South Dakota, Minnesota and Iowa wire

⁷ The Stipulation, Attachment E, as originally filed, only shows the Fort Randall wire centers. The Parties had intended to provide a map that showed both Fort Randall's and PrairieWave's wire centers. Included with this filing is an agreed upon replacement map showing the wire centers served by both carriers.

centers using its Viborg host switch. The location of those exchanges are provided in Stipulation, Exhibit B, and are depicted on the map provided as Stipulation, Exhibit E. The eight Fort Randall wire centers are closer to PrairieWave's two host switches than a number of the other wire centers that PrairieWave has voluntarily elected to serve. See Stipulation ¶ 12. Fort Randall's Lake Andes and Wagner exchanges are closer than fourteen of the wire centers served by PrairieWave that home on Viborg. The Fort Randall Tabor and Tyndall exchanges are closer than seventeen of the wire centers served by PrairieWave that home on Viborg **and are contiguous** to the Yankton wire center served by PrairieWave. Fort Randall's Hermosa and Keystone **are also contiguous** with Rapid City, where PrairieWave provides local service and has a host switch. Based on the map provided in Stipulation Exhibit E, it appears that the Fort Randall Hermosa and Keystone wire centers are approximately the same distance from the PrairieWave host switch, located in the contiguous Rapid City wire center, as at least six of the PrairieWave wire centers that currently home on that host switch. Therefore, even if PrairieWave could justify not serving non-contiguous wire centers, six of the eight Fort Randall wire centers are contiguous to wire centers already served by PrairieWave.

There is only one reason PrairieWave has not elected to serve Fort Randall's other six wire centers – there is simply not enough “cream” to justify a business case for serving those wire centers.

b) Service To Only More Dense Areas Is Prohibited Creamskimming.

While the FCC will look to whether there are legal or technical problems that prevent a CLEC serving an entire rural telephone company service area, even where there is such a barrier, it will deny an ETC application if granting it would result in prohibited creamskimming. *In the Matter of Federal-State Joint Board on Universal Service, Highland Cellular, Inc. Petition for*

Designation as Eligible Telecommunications Carrier in the Commonwealth of Virginia CC.

Docket No. 96-45 MEMORANDUM AND ORDER ("*Highland*") ¶¶ 29 and 33; and *Virginia Cellular* ¶ 35.. The Commission has adopted this more stringent public interest standard.

RCC/WALLC, Findings of Fact and Conclusions of Law; Notice of Entry of Order, Docket No. TC03-193 (dated June 6, 2005) ¶ 24.

In *Virginia Cellular*, ¶ 32, the FCC defined rural creamskimming as occurring when competitors seek to serve only the low-cost, high revenue customers in a rural telephone company's study area. *See also*, *RCC/WALLC* ¶ 46. PrairieWave has done both, singling out the low-cost, high density Centerville and Viborg wire centers in which to offer service; and offering a lower-priced business service than Fort Randall (to capture the higher revenue business customers), while offering a higher-priced residential service than Fort Randall (discouraging service to the lower-revenue residential customers).

The FCC developed a population density analysis to determine whether serving part of a rural telephone company's study area would result in an unfair competitive advantage (creamskimming). *Virginia Cellular* ¶ 32.

The FCC reaffirmed the use of the population density test developed in *Virginia Cellular* as the appropriate test for creamskimming in the REPORT AND ORDER, ¶ 49, explaining:

By serving a disproportionate share of the high-density portion of a service area, an ETC may receive more support than is reflective of the rural incumbent LEC's costs of serving that wire center because support for each line is based on the rural telephone company's average cost for serving the entire service area unless the incumbent LEC has disaggregated its support. Because line density is a significant cost driver, it is reasonable to assume that the highest-density wire centers are the least costly to serve, on a per-subscriber basis. The effects of creamskimming also would unfairly affect the incumbent LEC's ability to provide service throughout the area since it would be obligated to serve the remaining high-cost wire centers in the rural service area while ETCs could target the rural incumbent LEC's customers in the lowest cost areas and also receive support for serving the customers in these areas. In order to avoid disproportionately

burdening the universal service fund and ensure that incumbent LECs are not harmed by the effects of creamskimming, the Commission strongly encourages states to examine the potential for creamskimming in wire centers served by rural incumbent LECs. This would include examining the degree of population density disparities among wire centers within rural service areas, and the extent to which an ETC applicant would be serving only the most dense areas within a rural service area, and whether the incumbent LEC has disaggregated its support to a smaller level than the service area (*e.g.*, at the wire center).

This standard is also contained in 47 C.F.R. § 54.202 (c) *Public Interest Standard*.⁸ The Parties have further stipulated to using population density for determining whether creamskimming would occur, and that: “A low population density typically indicates a high-cost service area, and a high population density typically indicates a low-cost area.” Stipulation ¶ 33.

c) Centerville/Viborg have a much higher population density than Fort Randall’s overall study area.

The population density is 15.5 persons per square mile in the Centerville/Viborg wire centers. In comparison, Fort Randall’s overall population density for its entire study area is only 9.1 persons per square mile. *Id.* ¶ 34. This fact, by itself, requires that the Application be denied.

Equally if not more important is the difference in the in-town versus out-of-town population density. Prairie Wave is proposing to offer an unproven service to a handful of out-of-town customers so that it can be entitled to universal service funding for a much larger and more dense group of in-town customers. The population density within the city limits of Centerville and Viborg is 1,622.0 persons per square mile while the population density outside the city limits is only 5.7 persons per mile. Two thirds of the population lives within the much

⁸ Section 54.202(c) provides: “In instances where an eligible telecommunications carrier applicants seeks designation below the study area level of a rural telephone carrier, the Commission shall also conduct a creamskimming analysis that compares the population density of each wire center in which the eligible 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.”

denser city limits. The FCC has identified such disparity as another form of creamskimming, stating:

Even if a carrier seeks to serve both high and low density wire centers, the potential for creamskimming still exists if the vast majority of customers that the carrier is proposing to serve are located in the low-cost, high-density wire centers.

REPORT AND ORDER ¶ 51.

As the FCC notes, and the Commission agreed in *RCC/WALLC*, ¶ 47, another factor that can increase the risk of creamskimming is if the rural ILEC has not disaggregated its support to a smaller level than the service area (*e.g.*, at the wire center). Fort Randall has a single service area within the meaning of 47 U.S.C. § 214(e)(5) and 47 C.F.R. § 54.207(b) that includes all eight wire centers in the Fort Randall study area for Universal Service Fund purposes. Fort Randall has not disaggregated its study area or targeted its federal universal support as described in 47 C.F.R. § 54.315. Stipulation ¶ 30. Fort Randall currently receives approximately \$15.34 per-line-per month of high-cost support for all lines served throughout the study area. *Id.* ¶ 37.

Consequently, approving the Application would result in exactly the type of harm the FCC seeks to avoid. PrairieWave would receive universal support for serving its existing low-cost in-town customers, while Fort Randall would need to use its support dollars to serve its high-cost customers in the other six wire centers. Fort Randall would also need to serve the vast majority (if not all) of the Centerville and Viborg out-of-town customers.

D. The Universal Service Payments Would Result In Little Or No Customer Benefits.

The purpose of becoming an ETC is to obtain funds that will be used to support service in the high-cost area for which the support is provided. However, in this case, PrairieWave would receive approximately \$84,000 per year, regardless of whether any additional customers take service from PrairieWave. Because PrairieWave would receive the funds for use in Centerville

and Viborg, and because there would be no other qualified high-cost service areas in which it could properly use the funds, there would be little or not consumer benefit associated with these payments in the Centerville and Viborg wire centers, which would be contrary to the intent and purpose of granting ETC status.

The FCC has made it clear that universal service support must be used “to alleviate poor service quality in the ETC’s service area.” REPORT AND ORDER ¶ 45. 47 C.F.R.

§ 54.202(6)(ii) requires:

Each applicant shall demonstrate how signal quality, coverage or capacity will improve due to the receipt of high-cost support 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 provisions of supported services **in that area**.

(Emphasis added.)

PrairieWave has identified only a three-year plan in which universal service funding would fully pay for the build-out of an unproven VoIP fixed-wireless system that may improve PrairieWave’s coverage, but it has not been proven that this would improve service for the out-of-town customers—service which PrairieWave concedes is currently adequate. Stipulation ¶ 20. After the three-year period, PrairieWave will receive funding for a service area that is very small and for which service is already state-of-the-art.

Consequently, the cost to the universal service fund will exceed any meaningful benefit.

PrairieWave has failed to meet its burden of proof that granting ETC status would result in adequate benefit from the funds provided.

E. There Is A Potential Significant Impact On Fort Randall’s Ability To Continue Providing High-Quality Service At Affordable Rates.

The Act places rural telephone companies on a different competitive footing from other LECs. *Swiftel* at 5-6. In recognition of that fact, the Commission in *RCC/WALLC*,

¶ 18, stated the following additional test for evaluating ETC requests in a rural telephone company service area:

The question of whether it is in the public interest to designate an additional ETC in an area served by a rural telephone company necessarily requires a two-part analysis. The first part of the analysis is whether consumers will realize benefits from increased competition. The fact that the area in question involves a rural area leads to a second part of the public interest analysis: whether the rural area is capable of supporting competition. Or, in other words, will the introduction of competition in rural telephone company areas have detrimental effects on the provisioning of universal service by the incumbent carriers. As evidenced by 47 U.S.C. § 254(b)(3), Congress was concerned with the advancement and preservation of universal service in rural areas.

Granting PrairieWave's application would have significant impact on Fort Randall's ability to advance and preserve universal service, particularly for the out-of-town customers.

In *RCC/WALLC* and *Swiftel*, the ILEC would continue to receive the same amount of high-cost support. *RCC/WALLC* ¶¶ 36-37, and *Swiftel* ¶ 5-6. In the current case, Fort Randall receives support on a per-line-basis. As such, if PrairieWave captures additional customers, the amount lost would be some portion of the \$15.34 per-line depending on the effect that losing additional lines would have on the average schedule calculation. Stipulation ¶56. As the Commission noted in *RCC/WALLC*, § 37, "wireless services are often used as a second telephone, not as a substitute for the ILEC's wireline services. In stark contrast, each customer captured by PrairieWave would be a customer lost to Fort Randall.

It is clear that the **only** reason PraireWave is proposing to serve out-of-town customers is so that it might qualify for ETC funding for **all** of the customers it serves within Centerville Viborg. No other business case would possibly support building a redundant system to serve at most 140 predominantly residential customers.⁹ The lack of a business case to serve that limited

⁹ A 30% market share of the available 461 out-of-town customers would garner PrairieWave at most 140 predominantly residential customers. See Stipulation 36

market is demonstrated by the fact that PrairieWave never promoted its prior wireless service and abandoned it in April, 2004. See *Id.* ¶ 9.

Either PrairieWave's fixed-wireless VoIP system will similarly fail, in which case it should not have been approved, or, if successful, it will leave Fort Randall with maintaining a wireline system for approximately 320 out-of-town customers.¹⁰ PrairieWave's decision to use an unproven, fixed-wireless VoIP technology rather than use wireline technology to serve the out-of-town customers is ample proof that serving so few customers using wireline technology would place an unreasonable burden on Fort Randall.

Fostering uneconomic out-of-town competition while providing Universal Service Fund support to PrairieWave's existing in-town service is not in the public interest. If PrairieWave's application is approved under these facts, there is no conceivable case in which an application for duplicate ETC certification in rural telephone company service areas would not be approved.

F. The Long-Term Impact On The Universal Service Fund Could Be Significant

The final test that the FCC employs is to consider the impact that granting ETC status would have on the size and sustainability of the high-cost fund. REPORT AND ORDER ¶ 54. As the FCC acknowledges, it is unlikely that any individual ETC designation would have a substantial impact on the overall size of the fund. *Id.* Instead, the FCC suggests that the analysis be based on the impact on the per-line support provided to the area.

In this case, the per-line support would increase. PrairieWave would receive an estimated additional \$15.34 per line for its in-town customers in Centerville and Viborg, totaling approximately \$7,000 per month (\$84,000 per year). Fort Randall would continue to receive the same amount it currently receives (\$194,400 per year) for serving the Centerville and Viborg

¹⁰ See Stipulation 36. There are 461 out-of-town customers. If PrairieWave were to capture 30% of those customers, that would leave only 320 out-of-town customers for Fort Randall to serve.

wire centers,¹¹ reduced if PrairieWave captures additional customers. As a result, the cost to the Federal Universal Service Fund for the Centerville and Viborg wire centers would increase by approximately \$84,000 per year. *Id.* ¶ 56. The result would be to increase the cost to the Universal Service Fund for the Centerville/Viborg wire cents by 44% (from \$194,400 to \$278,400).

If considered in isolation, the impact is small. But as a catalyst for other future requests, the impact could be very significant. Further, the negative impact on the fund provides one more negative consequence that would result from approving the Application.

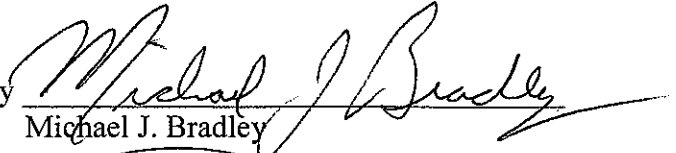
III. Conclusion.

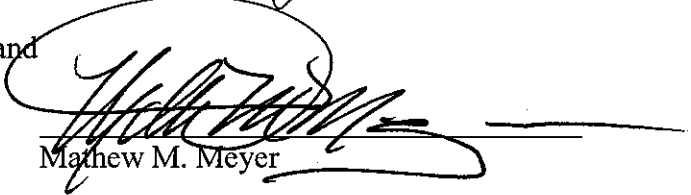
PrairieWave's Application for ETC status should be denied. PrairieWave has failed to satisfy its burden of proving that granting it ETC status would improve customer choice; or would improve service to either the out-of-town customers or the in-town customers. In addition, approving the Application would: (1) result in prohibited creamskimming; (2) provide little or no benefit to the area for which high-cost support would be provided; (3) harm Fort Randall's ability to continue providing quality service in the area; and (4) would have an immediate, but small, negative impact on the Universal Service Fund, and could act as a catalyst for a much large negative impact on the Fund in the long-run. When all of these factors are considered in the aggregate, the Application should be denied.

¹¹ \$15.34 x 1,056 lines. Stipulation ¶¶ 36-37.

Dated: June 20, 2006

Respectfully submitted,

By 
Michael J. Bradley

and 
Mathew M. Meyer

MOSS & BARNETT
A Professional Association
4800 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-4129
Telephone: 612-347-0337

Attorneys on Behalf of Fort Randall Telephone
Company

