BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

In the Matter of the Petition of Cellco Partnership and its Subsidiaries and Affiliates to Amend and Consolidate Eligible Telecommunications Carrier Designations in the State of South Dakota and to Partially Relinquish ETC Designation	DOCKET NO. TC10-090

DIRECT TESTIMONY OF

PETER BLUHM

ON BEHALF OF JAMES VALLEY WIRELESS, LLC

Filed February 4, 2011

<u>SECTION 1- WITNESS BACKGROUND AND PURPOSE OF TESTIMONY</u>

Q. PLEASE STATE YOUR NAME, ADDRESS AND POSITION.

A. My name is Peter Bluhm. My business address is 566 East Hill Road, Middlesex, Vermont 05602. I am employed as a Consultant by Rolka, Loube, Saltzer Associates, with principal offices in Harrisburg, Pennsylvania. I have been retained by James Valley Wireless, LLC to testify in this matter.

Q. PLEASE RELATE YOUR DIRECT EXPERIENCE AND QUALIFICATIONS.

A. I received a Juris Doctor degree in 1975 from Albany Law School. Since 1976, I have been admitted to practice law in Vermont state courts. At various times since 1976, I have also been admitted to the U.S. District Court for Vermont and to the Second and Eleventh Circuit Courts of Appeal. I also hold a Masters of Public Administration Degree from the State University of New York at Albany and a Bachelors degree from the University of Rochester.

From 1990 through 2007, I was employed by the Vermont Public Service Board. For most of those years my title was Policy Director. In that capacity, I had several broad responsibilities, mainly in telecommunications, but also in other policy areas where the state legislature was active. I drafted and successfully lobbied for Vermont's Universal Service Fund statute, passed in 1994. I also administered the Vermont Universal Service Fund from 1995, when it began, through 2007. During this same period, 1990 through 2007, I also served as a Hearing Officer for the Board, and I prepared recommended decisions on a variety of subjects, including the designation of Eligible Telecommunications Carriers (ETCs).

While at the Vermont PSB, I also was involved for many years in federal telecommunications policy, and in particular how federal telecommunications policy affects the states. I served as a staff member on the Universal Service Joint Board almost continuously from 1998 through 2007. In that capacity, I assisted the Joint Board in preparing its 2005 recommended decision on the designation of ETCs. I also was heavily involved in writing the Joint Board's 2007 recommended decision on restructuring universal service funds for broadband. From 1998 through 2007, I also served continuously as a staff member on the Separations Joint Board.

Upon leaving the Public Service Board at the end of 2007, I accepted the position of Telecommunications Principal at the National Regulatory Research Institute. In that capacity, I wrote several reports, usually with co-authors, including a paper on state carrier-of-last-resort policies and a paper on state universal service funds. During this period, I also began teaching annually at the "Camp NARUC" summer program offered by the Institute of Public Utilities at Michigan State University.

Since September 2009, I have been offering consulting service, chiefly regarding universal service policy. My most significant activity in 2010 was to assist Great Plains Communications, a Nebraska company, in FCC advocacy regarding universal service. In 2009, I also gave testimony before the Alaska Public Utilities Commission regarding carrier of last resort policy. I am currently assisting the state commissioner members of the Federal-State Joint Board on Universal Service and the Wyoming Public Service Commission on universal service issues.

Q. WOULD YOU PLEASE SUMMARIZE AND STATE THE PURPOSE OF YOUR TESTIMONY?

A. My testimony reviews the history of the ETC designations at issue in this proceeding, analyzes that history in terms of relevant federal law and universal service policy, and makes recommendations regarding appropriate remedies regarding past and future eligibility for federal high-cost support to the applicant.

Specifically, I recommend that the Commission clarify that:

a) RCC's authority to be an ETC in the state expired as of the merger closing date, August 6, 2008. Therefore, Cellco was not an ETC on or after August 6, 2008.

b) WWC's authority to be an ETC in the state expired as of the merger closing date, January 9, 2009. Therefore, Cellco was not an ETC on or after January 9, 2009.

c) The ETC designation previously held by RCC Minnesota, Inc. and Wireless Alliance, LLC, d/b/a Unicel and the ETC designation previously held by WWC License, LLC, successor to GCC License Corporation is not available for use by Cellco for Verizon legacy customers.

d) Because of a), b), and c), South Dakota's CETC funding entitlement should not be reduced due to Cellco's voluntary commitment to reduce its support gradually to zero in 2012, and the FCC's decisions about how Cellco's phased-down funding should be redistributed are, therefore, inapplicable to South Dakota.

e) Future funding for wireless CETCs could be an important tool in ensuring that competitive ETCs in South Dakota will have sufficient funds to build cell sites in currently unserved rural areas of the state.

I also recommend that the Commission inform USAC of the above determinations in a letter and require USAC to have Cellco refund past overpayments of CETC support. The Universal Service Administrative Company ("USAC") provides support based on determinations from state commissions as to the validity of claims to ETC status. By issuing the requested clarifications, the Commission may prevent losses in high-cost support to South Dakota competitive carriers and the consequent reduced ability to extend service to unserved rural areas.

<u>SECTION 2 – FACTUAL BACKGROUND</u>

Q. HAS CELLCO EVER BEEN DESIGNATED AS AN ETC IN SOUTH DAKOTA?

A. No. Cellco has never been designated an ETC in South Dakota. Cellco has been operating a network in South Dakota for many years, but it has never applied for ETC status in the state.

Q. BEFORE 2008, WAS RCC AN ETC IN SOUTH DAKOTA?

A. Yes. RCC Minnesota, Inc. ("RCC") was designated as an ETC in South Dakota in 2005.[1] From 2005 until RCC was acquired by Cellco on August 6, 2008, RCC was designated as an ETC in South Dakota.

Q: PLEASE DESCRIBE THE CELLCO-RCC MERGER AND THE FCC APPROVAL ORDER.

A: On August 6, 2008, Cellco acquired Rural Cellular Corporation and each of its subsidiaries and affiliates, including RCC ("Cellco-RCC merger"). The FCC approved the merger in an Order released on August 1, 2008.[2]

The FCC's Order addressed ETC issues. The FCC specifically found that after the transaction closed, ETC obligations in effect prior to the proposed transaction would remain in effect.[3] Further, the FCC noted that if any failure to comply with ETC requirements or other "predicted or unpredicted public interest harms" should occur, parties could "seek remedies from

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[1] *Filing by RCC Minnesota, Inc. and Wireless Alliance, LLC, d/b/a Unicel for Designation as an Eligible Telecommunications Carrier*, TC03-139, Order Designating RCC Minnesota, Inc. and Wireless Alliance, LLC, d/b/a Unicel as Eligible Telecommunications Carriers; Findings of Fact and Conclusions of Law; and Notice of Entry of Order (June 6,2005) ("RCC Order").

[2] *Applications of Cellco Partnership d/b/a Verizon Wireless and Rural Cellular Corporation For Consent To Transfer Control of Licenses, Authorizations, and Spectrum Manager Leases and Petitions for Declaratory Ruling that the Transaction Is Consistent with Section 310(b)(4) of the Communications Act, Memorandum Opinion and order and Declaratory Ruling*, 23 FCC Rcd. 12463, WT Docket No. 07-208, FCC 08-181 (rel. Aug., 1, 2008) ("*Cellco-RCC Merger Order*").

[3] *Cellco-RCC Merger Order* ¶ 125. The *Cellco-RCC Merger Order* certainly did not make it permissible for Cellco to use the former ETC designation of RCC as a means of including the then existing Verizon customers in South Dakota.

the relevant state commission or the Commission as appropriate."[4] The FCC also addressed issues regarding the expiration of RCC's obligation to provide analog service, an impending conversion from GSM protocol to CDMA protocol networks, and the cost of replacement handsets to customers.[5]

Q: WHAT IS THE CURRENT STATUS OF THE RCC NETWORK?

A: It is my understanding that all of the former RCC customers have been fully integrated into the consolidated Verizon Wireless operations.[6]

Q. BEFORE 2009, WHAT MARKETS DID WESTERN WIRELESS, ALLTEL OR ATLANTIS HOLDINGS OWN AND OPERATE IN SOUTH DAKOTA?

A. WWC or its predecessors were designated as an ETC by virtue of a series of designation orders, the last of which was issued in 2005.[7] By the beginning of 2009, WWC License, LLC ("WWC") held FCC authorizations and operated the following markets: South Dakota Rural Service Area ("RSA") Nos. 1, 2, 3, 4, 5, 6, 7, 8, and 9 and the Rapid City Metropolitan Statistical Area ("Rapid City MSA"). A list of the non-rural and rural ILEC service areas can be found at Exhibit B to Cellco's Petition. In 2005, WWC was acquired by Alltel Corporation ("Alltel"). In 2007, Alltel was acquired by Atlantis Holdings, LLC ("Atlantis Holdings").

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[4] *Id.*.

[5] *Id.*, ¶¶ 127-132.

[6] Wood Direct at 10.

[7] *Filing by GCC License Corporation for Designation as an Eligible Telecommunications Carrier*, TC98-146, Findings of Fact and Conclusions of Law; Notice of Entry of Order (Oct. 18, 2001); *Filing by GCC License Corporation for Designation as an Eligible Telecommunications Carrier*, TC98-146, Order Designating Western Wireless as an ETC for Areas Served by Certain Rural Telephone Companies (Jan. 6, 2003); *Filing by WWC License, LLC d/b/a CellularOne for Designation as an Eligible Telecommunications Carrier in Other Rural Areas*, 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 (Jan. 3, 2005).

Q. AT THE BEGINNING OF 2009, DID CELLCO AND/OR ITS SUBSIDIARIES PREVIOUSLY HOLD FCC AUTHORIZATIONS IN SOUTH DAKOTA?

A. Yes. Cellco and/or its subsidiaries held FCC authorizations throughout the entirety of the South Dakota RSA Nos. 1, 2, 3, 4, 5, 6, 7, 8, and 9 and the Rapid City MSA. Cellco operated without designation as an ETC.

Q. PLEASE DESCRIBE THE CELLCO – ALLTEL MERGER.

A. On January 9, 2009, Cellco acquired ALLTEL Corporation, which at that time was owned by Atlantis. As a result of the *Cellco-Alltel Merger Order*, WWC is now a subsidiary of Cellco. WWC is now also affiliated with Verizon Wireless (VAW), LLC, AirTouch Cellular, Rural Cellular Corporation, RCC Minnesota, Inc., and Wireless Alliance, LLC, each of which is listed in the Cellco organizational chart as having some interests in wireless licenses in South Dakota. WWC is now affiliated with other Cellco subsidiaries as well. Cellco's organizational chart, as provided in discovery, presents a somewhat confusing array of parent, subsidiary, and affiliated companies, with multiple legal entities shown as owning or controlling South Dakota wireless assets.

Q. PLEASE SUMMARIZE THE FCC ORDER APPROVING CELLCO'S ACQUISITION OF ALLTEL.

A. The *Cellco-Alltel Merger Order* was released on November 10, 2008. The Order recited Cellco's claims, apparently with approval, that the transaction would better support the increasing demand for broadband services and applications.[8] The Order also discussed several service quality issues, including improved spectral efficiency, enhanced service quality and reliability, higher data rates, and increased ability to meet public safety requirements and

[8] *Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and De Facto Transfer Leasing Arrangements*, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd. 17444, 17506-07, ¶ 135, WT Docket No. 08-95, FCC 08-258 (rel., Nov. 10, 2008) ("*Cellco-Alltel Merger Order*").

emergency preparedness.[9] The *Cellco-Alltel Merger Order* omitted one important element that had been in the *Cellco-RCC Merger Order*. The *Cellco-Alltel Merger Order* did not specifically state that all existing ETC obligations would continue in effect. In spite of this, Cellco chose to treat the prior ETC designations as applicable to its then existing Verizon customers in South Dakota and elected to behave as if the Verizon Wireless legacy network had received an ETC designation.

Q. DID THE FCC AND U.S. DEPARTMENT OF JUSTICE IMPOSE DIVESTITURE CONDITIONS ON CELLCO'S ACQUISITION OF ALLTEL?

A. Yes. As a condition of their approval of Cellco's acquisition of Alltel, the FCC and DOJ required Cellco to divest the former Alltel assets and subscribers of many rural service areas, including South Dakota RSA Nos. 1, 2, 3, 4, 5, 6, 7, 8, and 9 and the Rapid City MSA. Cellco was permitted to retain its legacy Verizon Wireless assets and subscribers in these and other areas.

Q. TODAY, WHO OWNS THE FORMER ALLTEL ASSETS AND SUBSCRIBERS IN THE DIVESTED AREAS?

A. My understanding is that, on June 22, 2010, Cellco transferred its WWC subscribers and assets in South Dakota to AT&T Mobility, or an affiliated company. AT&T Mobility is not an ETC in South Dakota.

Q. AFTER CELLCO DIVESTED THE PROPERTIES LISTED ABOVE, WHAT PART OF WWC'S ASSETS OR OPERATIONS REMAINED WITHIN THE CELLCO CORPORATE STRUCTURE?

A. As I understand it, the only WWC asset that remained within Cellco was the grant of ETC status to WWC. Cellco's request to transfer that ETC designation is the subject of this docket.

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[9] *Cellco-Alltel Merger Order*, ¶ 137.

Q. PLEASE SUMMARIZE YOUR UNDERSTANDING OF THE STATUS OF THE CUSTOMERS AND NETWORK IN THE DIVESTED AREAS.

A. The former WWC network, which was constructed in part with federal high-cost support, is now owned and operated by AT&T, which is not currently an ETC in South Dakota. Before the Alltel merger, Cellco had its own network, doing business as Verizon Wireless, that operated without ETC status (legacy Verizon Wireless network). Cellco continues to serve these original subscribers using the legacy Verizon Wireless network. Cellco has claimed federal high-cost universal service support for at least some of these legacy Verizon Wireless subscribers. Cellco has not explained clearly how many customers (or lines) were originally served by Alltel nor how many lines were added when Cellco began counting legacy Verizon Wireless lines for support.[10]

Q. PLEASE SUMMARIZE YOUR UNDERSTANDING OF THE STATUS OF THE CUSTOMERS AND NETWORK IN THE MERGED AREAS?

A. Cellco stated in its Petition in this docket that the Alltel (WWC) and Cellco networks are fully integrated.[11] Yet, as a result of the divestiture requirements imposed by the U.S. Department of Justice, Cellco has divested all of the Alltel network and assets in South Dakota to AT&T. It is difficult to understand how the WWC network can be fully integrated with Cellco and at the same time belong to AT&T.

<u>SECTION 3 –FEDERAL HIGH-COST SUPPORT</u>

Q. WHAT IS AN "ELIGIBLE TELECOMMUNICATIONS CARRIER"?

A. The term "eligible telecommunications carrier" ("ETC") is a term created in the Telecommunications Act of 1996. An ETC is a communications common carrier that is determined to be eligible to participate in the federal high-cost support mechanism. Federal

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[10] *See* Cellco Response to James Valley Interrogatory-1.

[11] Petition at 3.

high-cost support provides funds to construct, maintain, and operate telecommunications facilities in areas deemed to be high-cost, so that telecommunications carriers can provide basic telephone service to consumers at an affordable price.

Q. WHO IS AUTHORIZED TO DESIGNATE A CARRIER AS AN ETC, AND USING WHAT STANDARDS?

A. Section 214(e)(2) vests in the state commissions primary authority to designate carriers as an ETC. If a state refuses jurisdiction, the FCC may designate a carrier as an ETC pursuant to Section 214(e)(6). The basic statutory language authorizing state commissions to designate an ETC is set forth below (italics added):

> (2) Designation of eligible telecommunications carriers
>
> A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the State commission. Upon request and *consistent with the public interest, convenience, and necessity,* the State commission may, in the case of an area served by a rural telephone company, 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). 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 italicized language illustrates that a state commission undertaking an ETC designation case must examine in all cases whether granting a designation is "consistent with the public interest, convenience, and necessity" and in cases affecting areas served by a rural telephone company, the commission must find that the designation is in the public interest.

Q. ONCE A CARRIER IS DESIGNATED AS ELIGIBLE TO BE A COMPETITIVE ETC, HOW DOES IT RECEIVE FUNDING FROM THE FEDERAL HIGH-COST SUPPORT MECHANISM?

A. A competitive ETC ("CETC") is a carrier that is not an incumbent local exchange carrier ("ILEC"). Section 54.307 of the FCC's rules, 47 C.F.R § 54.307, requires a CETC to file with the Universal Service Administrative Company ("USAC") a report containing a count of its lines on a quarterly basis. A line count filing must be broken out such that the number of the CETC's lines are reported, by billing address, in each ILEC service area. In addition, the CETC must make several certifications throughout the year with the FCC and USAC, in order to maintain its eligibility.

Q. HOW DOES USAC CALCULATE THE AMOUNT OF HIGH-COST SUPPORT THAT A CARRIER RECEIVES?

A. According to 47 C.F.R. § 54.307, for each line that it serves, a CETC is entitled to receive the same amount of high-cost support as is provided to the ILEC serving that customer. If an ILEC receives $5.00 per line, per month, for a customer, then the CETC is entitled to receive $5.00 per line, per month, when it serves a customer in the ILEC's service area. USAC uses the line count filings made by a CETC and the high-cost support per line that it provides to ILECs in the same area as the basis for calculating USF high-cost support distributions. As described in more detail below, this preliminary amount can be reduced by a state-by-state CETC interim cap factor that applies to CETC high-cost support distributions. In the case of Interstate Access Support ("IAS"), the CETC's per-line support is, in addition, reduced by a nationwide IAS cap factor. USAC keeps records of every line count filing made, and every disbursement made to every carrier. Records of what USAC estimates to pay out to carriers, and what it actually pays out, are available on USAC's web site.

Q. PLEASE DESCRIBE USAC AND ITS FUNCTIONS.

A. USAC is a government chartered corporation, responsible for administering the federal universal service fund. USAC's charter provides that its authority is administrative in nature, that is, USAC has no policy-making authority. All policy making resides at the FCC. USAC performs many administrative functions relating to the collection of contributions from customers and the distribution of funds to eligible companies.

Q. PLEASE DESCRIBE THE "INTERIM" CETC CAP ON UNIVERSAL SERVICE SUPPORT.

A. In 2008, the FCC placed an "interim" cap on federal high-cost support flowing to competitive carriers. The cap is "state-by-state" which means that monthly support to each state for competitors is capped at the level that the state was entitled to receive in the month of March 2008. The total claims within each state are compared to the state's total capped budget, and each carrier's payments are reduced proportionately. CETCs within the state can see their support go up or down. For example, market share changes among companies can shift support within the state under the cap.

In addition, the FCC imposed a separate nationwide cap on the amount of IAS received by CETCs ("IAS adjustment"). The IAS adjustment is performed before each state's cap reduction is calculated.

Q. WHAT HAPPENS UNDER THE CAP WHEN A COMPETITIVE CARRIER RELINQUISHES ITS ETC DESIGNATION?

A. If a carrier relinquishes its ETC designation, it is no longer eligible to draw from the federal high-cost support mechanism. Any high-cost support that was flowing to the relinquishing carrier reverts to the FCC, to be repurposed for other universal service priorities and is not made available for redistribution to other CETCs within the state. For example, if the cap in South Dakota is one dollar ($1.00), and there are two CETCs in South Dakota, and each has 50% market share, each carrier receives 50 cents of support under the CETC cap. If one carrier relinquishes ETC status, then the cap is reduced to 50 cents and the remaining carrier continues to receive 50 cents. If the remaining carrier's line counts increase, it will not receive additional support, but will remain capped at 50 cents. In other words, the state loses the investment funds that the relinquishing carrier returns to the FCC. If a new CETC is subsequently designated, then its line counts are factored into the reduced cap, and each carrier's support is adjusted accordingly. The FCC's decision to "repurpose" support when a carrier relinquishes ETC designation was made on December 30, 2010.[12] Because the order remains subject to petitions for reconsideration, it is not yet a final order, however the FCC has made the order effective as of December 30, 2010.

Q. CELLCO AGREED TO PHASE DOWN ITS HIGH-COST SUPPORT. HOW DOES THE PHASE DOWN IN SUPPORT AFFECT THE STATE CAP AMOUNT?

A. As part of its merger with Alltel, Cellco voluntarily agreed to phase down its receipt of USF high-cost support distributions nationally (for properties that are *not* divested) at a rate of 20% per year over five years. The phase down of Cellco high-cost support in South Dakota began in 2009, with a 20% reduction. In 2010, its support was reduced by 40%. In 2011, its support is reduced 60%. In 2012, its support will be reduced 80%. Starting in 2013, Cellco's high-cost support in South Dakota will be zero.

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[12] *High-Cost Universal Service Support Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Order, 2010 WL 5477265, FCC 10-205 (rel. Dec. 30, 2010).

In a 2010 order, the FCC clarified that the Cellco phase-down reduces the funding available to other CETCs in each state.[13] Accordingly, when USAC reduces Cellco's support in South Dakota pursuant to its merger commitment, those funds are reclaimed by USAC and the CETC cap base amount in South Dakota is reduced accordingly. These phase-down funds will be retained by the FCC for future use, and not provided contemporaneously to other CETCs in South Dakota. As with a relinquishment, support funds that are not provided to Cellco because of the phase-down in South Dakota are removed from South Dakota indefinitely and are no longer available to other carriers who would want, and be required, to invest them in new infrastructure or use them for operating expenses and maintenance.

Q: DO STATES HAVE AN IMPORTANT ROLE SUPERVISING THE USE OF FEDERAL HIGH-COST FUNDS?

A: Yes. States not only must consider public interest issues when they initially designate a carrier, but they have broad responsibility for continuing supervision over the use of federal funds. States may even enforce state-imposed designation conditions.

For an ETC (including a CETC) to receive federal support for operations within a state, that state must file an annual certification stating that "all federal high-cost support provided to such carriers within that State will be used only for the provision, maintenance, and upgrading of facilities and services for which the support is intended."[14] Some states have declined jurisdiction to designate ETCs and, in these states, the ETCs must file annual affidavits with the FCC. The affidavits must cover a variety of subjects, including, for example, annual progress

[13] *See High-Cost Universal Service Support*, WC Docket No. 05-337, CC Docket No. 96-45, Order and Notice of Proposed Rulemaking, 51 Communications Reg. (P&F) 434, FCC 10-155 (rel., Sept. 3, 2010). The FCC stated that the phase-down did not reduce statewide cap levels, but it ruled that the full amount of Cellco's uncapped support would be used in statewide cap calculations, even when Cellco could no longer receive that amount according to the phase-in condition. "Declining to redistribute" Cellco's support thus produced the same result as reducing the statewide cap level.

[14] 47 C.F.R. §§ 54.313(a) (for nonrural carriers), 54.314(a) (for rural carriers). A self-certification affidavit from the ETC to the FCC is used in cases where the state does not have jurisdiction.

reports on the ETC's multi-year service quality improvement plan, detailed information on prolonged outages, and information on the number of unfulfilled service requests.[15]

In a majority of states, this supervision of universal service is performed by state utility commissions. The FCC has encouraged state commissions to adopt these same annual reporting requirements and to also require submission of "any other information that they believe is necessary to ensure that ETCs are operating in accordance with applicable state and federal requirements." The FCC took this action because it found that state commissions are "uniquely qualified to determine what information is necessary to ensure that ETCs are complying with all applicable requirements, including state-specific ETC eligibility requirements." The FCC also explicitly recognized state authority to rescind an ETC designation for failure to comply with the requirements of federal law or any other conditions imposed by the state.[16]

<u>SECTION 4 – EFFECTS ON UNIVERSAL SERVICE IN SOUTH DAKOTA</u>

Q: AT THE TIME OF THE 2008 CELLCO-RCC MERGER, WERE POTENTIALLY SIGNIFICANT UNIVERSAL SERVICE EFFECTS FORESEEABLE IN SOUTH DAKOTA?

A: Yes. First, there were risks from operational changes. An existing wireless business operation in South Dakota was being acquired by the owner of a second operating wireless network. Reading the *Cellco-RCC Merger Order*, it is apparent that there was an issue at the time about elimination of analog signals. This issue was particularly troublesome in rural areas because of the tendency for analog systems to work better under some circumstances with weak signals. There was also an issue involving the proposed conversion from RCC's "GSM" format to Verizon Wireless' "CDMA" format, and the pricing of replacement handsets.

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[15] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, FCC 05-46, 20 FCC Rcd. 6371 (2005), ¶ 69.

[16] *Id.,* ¶ 71.

Second new ownership, compounded by a plan to convert from GSM to CDMA formats, raised a host of universal service issues. In this proceeding, Cellco's testimony now makes a wide variety of commitments that are required to obtain ETC designation. All of these matters were at issue in August of 2008.

Third, having obtained RCC's assets, there was a possibility that Cellco might add its existing Verizon Wireless line count in its quarterly reports to USAC, thereby increasing the line count for South Dakota. In other words, having acquired RCC's assets, Cellco might elect to behave as if the Verizon Wireless legacy network had received an ETC designation. Because of the CETC Cap and the phase-down, this raised additional risks for the state. Under the CETC cap imposed by the FCC, the designation of an additional CETC in the state can reduce support to other CETCs. While the Commission might not deny an application for CETC designation on the ground that it might reduce support to other CETCs, a timely application for ETC designation from Cellco would have allowed the Commission to evaluate the likely impacts on other South Dakota CETCs and how these other CETCs would be able to serve rural areas of South Dakota.

The FCC took some positive steps to mitigate the universal service risks. Most important, the *Cellco-RCC Merger Order* stated that existing ETC obligations would remain in effect. The FCC also indicated that if unpredicted public interest harms should occur, parties were welcome to seek remedies from state commissions where RCC was designated as an ETC.

At least some of the issues pending in 2008 can – and should – be considered as legitimately within the scope of a public interest evaluation in an ETC designation case. For example, the FCC decided not to ask Cellco to provide any more information about the impending conversion from GSM to CDMA protocol. The FCC stated that Verizon Wireless had broad experience with conversions and had provided sufficient details of its conversion plan.

Nevertheless, the FCC promised to monitor any problems that might arise.[17] South Dakota might have wanted to know at least something about this conversion, possibly more than the FCC required.

All of these issues would understandably have been of interest to the Public Utilities Commission of South Dakota at the time of RCC merger. As far as I am aware, none has been examined until the present petition was filed.

Q: AT THE TIME OF THE 2009 CELLCO-ALLTEL MERGER, WERE POTENTIALLY SIGNIFICANT UNIVERSAL SERVICE EFFECTS FORESEEABLE IN SOUTH DAKOTA?

A: Yes. This merger accomplished far more than the financial and legal substitution of one holding company for another. Notably, an existing wireless business operation in South Dakota was acquired by the owner of a second operating wireless network. In addition, two unusual features of the merger raised additional risks to universal service for South Dakota's citizens. These risks strongly suggest that Cellco should have applied for ETC designation earlier, before the merger closed, or at the very latest, immediately thereafter.

First, there were risks from operational changes. As I understand Cellco's testimony, Cellco planned to "fully integrate" the Alltel network with its existing Verizon Wireless network.[18] Of course, it is far from clear how two networks could be "fully integrated" at the same time that one of them was being divested to a trust, and eventually sold to AT&T Mobility. Setting this aside and assuming there was some kind of integration, there would have been at least some uncertainty about which facilities and subscribers would benefit and how. For example, coverage for some existing customers might be interrupted as signal protocols are changed or as certain kinds of signals were withdrawn from existing cell towers. Customers

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[17] *Cellco-RCC Merger Order*, ¶ 132.

[18] Wood Direct at 11.

might be required to purchase new phones or required to subscribe to new monthly plans with different prices and terms. Finally, future federal support might be used for the capital expenditures required for network integration, which was a cost of the merger, rather than to extend service to new areas.

Second, new ownership raised the same host of universal service issues discussed in the preceding answer.

Third, the possibility that Cellco might seek support for its legacy Verizon Wireless lines raised an additional universal service risk. Under the CETC cap imposed by the FCC, the designation of an additional CETC in a state, like South Dakota, can reduce support to other CETCs in the state. A timely application for ETC designation from Cellco would have allowed the Commission to evaluate the likely impacts on other South Dakota CETCs and how these other CETCs would be able to serve rural areas of South Dakota.

Fourth, the unique merger conditions imposed by the FCC and DOJ on the merger created additional risks to universal service in South Dakota. The phase-down of support to Cellco, 20% per year, meant that the total amount of federal support available to Cellco would decline. We now know that any support lost to Cellco due to the phase-down (or if Cellco relinquishes its ETC designation) will be lost to South Dakota indefinitely. The net result is that it now seems likely that the total amount of funds available to South Dakota CETCs will decline. At the time of the merger, this may not have been a possibility, but it was nevertheless one that the Commission legitimately would have been able to consider in assessing whether designation of Cellco as an ETC was in the public interest and whether the Commission should have imposed a condition on Cellco requiring the Company to refrain from reporting its legacy Verizon Wireless lines in order and collect high-cost support. Although that inquiry never happened at the time of the merger because of Cellco's decision not to bring the issue to the Commission's attention, it now seems that Cellco is trying to assert that South Dakota simply has to accept that it will have less federal high-cost support to promote improved wireless service in rural areas.

Finally, the DOJ and FCC also required that Cellco divest the entirety of its newly acquired Alltel/WWC network and subscribers in South Dakota. The Alltel/WWC network was constructed with universal service funding and was subject to the Commission's universal service supervision. It was apparently not clear at the time of the merger what would be required to be divested, to whom, or whether the buyer would be an ETC.[19] Therefore the merger had the potential to make the Alltel/WWC network ineligible for support in the state, with potential effects on both signal coverage and Lifeline coverage. Moreover, even if the DOJ or FCC subsequently decided that no divestiture was necessary, Cellco's acquisition of the Alltel/WWC network ushered in an entirely new controlling party, which the Commission had never before examined to determine whether the public interest would be served by allowing it to draw from the federal fund.

All of these issues would understandably have been of interest to the Public Utilities Commission of South Dakota at the time of merger. As far as I am aware, none has been examined until the present petition was filed.

Q. AFTER THE MERGERS, WHAT LINE COUNTS DID CELLCO FILE AT USAC?

A. I base the following observations on Cellco's testimony and discovery responses, as well as USAC quarterly reports. It is important to understand that there are timing differences

[19] The Alltel/WWC network was ultimately divested to AT&T Mobility, LLC, which is not an ETC in South Dakota.

between the "measured as" date of a report, the date the report date itself, and the date that data are reported by USAC and used by USAC to calculate support.

Cellco began in 2009 making count reports to USAC that counted legacy Cellco (Verizon Wireless) customers. For the Alltel/WWC area, these augmented line counts apparently began in June 2009 for one federal program ("IAS"). By September of 2009, Cellco began reporting augmented line counts for all federal programs that included "all lines the company serves."[20] Because of the lags built into USAC data systems, these larger line counts generally appeared in USAC reports for the first quarter of 2010. Based on this pattern, I conclude that Cellco behaved in the latter part of 2009 as though it was an authorized ETC for all of its current subscribers and operations within the South Dakota service area originally designated to Alltel/WWC.

Q. DO YOU CONCLUDE THAT CELLCO ADDED MANY VERIZON WIRELESS LINES TO THE FORMER ALLTEL/WWC LINE COUNTS?

A. Yes. My conclusion is based on Cellco's discovery responses and public data from USAC. Cellco admits that it reported "all lines in service" beginning in 2009. The USAC data do not separately identify the portion based on legacy Verizon Wireless lines. Nevertheless, the USAC reports showed that Alltel/WWC line counts increased significantly between the date of the merger in early 2009 and the end of 2010. I illustrate by comparing data from 2008Q4 with 2010Q4. There are two relevant subsets of line count data.

- The first set of line counts concerns areas served by rural ILECs. These counts are important because they generally produce higher per-line levels of support. In these areas, the total Alltel/WWC line counts increased from 70,780 to 87,919, an increase of approximately 24%.

[20] See, *e.g.*, Cellco response to James Valley Interrogatory No. 3.

- The second set concerns South Dakota's only non-rural area, the Qwest ILEC area. Total Alltel/WWC line counts increased from 115,968 to 126,039, an increase of approximately 9%.

In both cases, the increase is substantial. Some of these increased numbers are undoubtedly due to new sales. Nevertheless, it appears likely that Cellco reported thousands of Verizon Wireless lines in the Alltel/WWC area.

Q. DO YOU CONCLUDE THAT CELLCO ADDED MANY VERIZON WIRELESS LINES TO THE FORMER RCC LINE COUNTS?

A. Yes, based on the same data as above. Once again, using USAC data, the total RCC line counts increased substantially between 2008Q4 and 2010Q4:

- In rural areas the line counts increased from 3,490 to 6,936, an increase of approximately 95%.
- In the Qwest area from 3,889 to 5,537, an increase of approximately 42%.

As above, the USAC data cannot separate between new sales and added Verizon Wireless legacy lines. In this case, however, the inference is even stronger because the growth percentages are so much larger.

Q. WHAT LINE COUNTS SHOULD HAVE BEEN FILED IN SOUTH DAKOTA?

A. It was improper for Cellco to report any lines that were part of the Verizon Wireless legacy network built before the Cellco-Alltel merger. Even if the Commission were to determine that Alltel/WWC has remained an ETC, then lines owned and operated by other sister entities should not have been submitted to USAC. Therefore, it was improper for Cellco to submit any lines that had been associated with the Verizon Wireless legacy network without Cellco first being designated by this Commission. As I understand the facts, Cellco did not inform this

Commission that it was filing line counts for the legacy Cellco network until it filed its petition in this case.[21]

Q. DID THE CETC CAP APPLY AT ANY TIME IN SOUTH DAKOTA?

A. Yes. The CETC cap had effects in South Dakota in at least five quarters, beginning in the last quarter of 2009 and continuing at least through the last quarter of 2010. The following table shows the percentage of eligibility that was paid to South Dakota CETCs during this period.

Period	Percent of Eligibility Actually Paid
2009Q4	83%
2010Q1	75%
2010Q2	75%
2010Q3	77%
2010Q4	77%

In 2010Q2, for example, the table shows 75%. This means that USAC applied a 25% reduction to support that would otherwise have been available. It appears at the time of writing that the cap ration will be 54% for the first quarter of 2011, but I consider the USAC publication for 2011 data to be preliminary.

Q. HOW MUCH SUPPORT DID CELLCO RECEIVE BASED ON THE ALLTEL/RCC CERTIFICATION?

A. I base my estimate on the difference between the fourth quarter of 2008 and the fourth quarter of 2010. The total pre-cap support for all of the Western Wireless/Alltel entities in 2008 was approximately $3.1 million per month ($38 million per year). By the end of 2010 that had increased to approximately $4.0 million per month ($48 million per year). On an annualized basis, the difference was about $10 million.

[21] Cellco's response 5 to James Valley's second set of interrogatories.

Q. DID CELLCO'S ACTIONS AFFECT THE INTERIM CETC CAP IN SOUTH DAKOTA?

A. Yes. The addition of approximately $10 million per year to the uncapped statewide CETC support total had significant effects on other carriers because of the interim cap. At the end of 2008, total uncapped statewide CETC support was approximately $3.2 million per month, an amount that was only slightly higher than the statewide cap of approximately $3.1 million per month. The cap reduction at that time was slight, reducing support by approximately 3%. By the fourth quarter of 2010, the cap reduction factor was 0.77, meaning that all CETCs in the state experienced a 23% reduction in support. This change in the cap factor was largely due to the addition of lines by Cellco to the Alltel/Western Wireless line counts.

Q. HOW HAS THE RECENT SALE OF ALLTEL ASSETS TO AT&T MOBILITY CHANGED LINE COUNTS AND SUPPORT?

A. Cellco's assets were divested to AT&T Mobility on July 28, 2010. Cellco has acknowledged that following divestiture it should no longer receive support for Study Area Code 399002. This code had applied to the QWEST ILEC service area. It appears that AT&T Mobility acquired approximately 126,000 lines.[22]

Now that the sale to AT&T Mobility is complete, Cellco has established new SAC code, 399018 for its own use. USAC's 2011Q1 data show that Cellco has claimed a total of 46,721 lines for SAC 399018 in areas served by rural ILECs. It is not clear to me whether Cellco has claimed any lines in the Qwest area.

It does appear that Cellco is currently receiving support on former WWC/Alltel lines. For the current quarter, USAC reports two line entries for SAC 399018.[23]

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[22] In the fourth quarter of 2010, USAC reported that SAC 399002 contained more than 126,000 Cellco/WWC/Alltel lines eligible for federal support. USAC report HC-21 for Model-based support for 2010Q4.

[23] USAC Report HC01 for 2011Q1.

- The first entry shows support of $1.1 million per month, but another entry in that row shows that Cellco is not eligible for this support. It appears that Cellco is not receiving this amount.
- The second entry shows support of $1.7 million per month. USAC apparently believes that Cellco is eligible for this support.

Q. IS CELLCO AN ETC IN SOUTH DAKOTA? WHY DOES THAT MATTER?

A. No. Cellco is not an ETC in South Dakota. This is the key issue in this proceeding. Designation as an ETC requires two critical analyses under federal law. First, the carrier proposing to be an ETC must demonstrate that it will provide all of the supported services, and that it will advertise the availability of the supported services throughout the ETC service area. Second, when it seeks designation in an area served by a rural telephone company, it must demonstrate to the state commission that designation would serve the public interest. In all areas, the applicant must show that the ETC designation is consistent with the public interest, convenience, and necessity. Traditionally, an applicant seeking a favorable public interest finding offers sworn statements making commitments about future use of federal funds, and offers specific plans for how support will be used and what areas will be newly served.

South Dakota also has also established requirements for ETC applicants. These requirements confirm and, in some cases, expand the obligations of an ETC applicant. For example, ARSD 20:10:32:43.01 requires an applicant for designation as an ETC to commit to providing service throughout its proposed designated service area to all customers who make a reasonable request for service. Cellco witness Stevens now describes how Cellco proposes to offer service to customers who are located in areas where there is no signal coverage. This new commitment obligates Cellco to take costly steps such as determining whether adjustments to the nearest cell site could be made to provide service.[24]

This Commission has never found that the Cellco network provides the supported services. Both RCC and Alltel/WWC are now controlled by an entirely different entity, one that has never come before this Commission to demonstrate that granting it ETC status would serve the public interest. Under these facts, I do not see how Cellco can be considered an ETC in South Dakota without first obtaining this Commission's consent.

The question of ETC designation matters because of its likely effects on South Dakota's future ability to preserve and advance universal service. This is a question that is normally addressed under the public interest phase of ETC proceedings.

Probably the most important public interest consideration arises from the combined effect of the interim CETC cap and Cellco's voluntary commitment to the phase-down. Under the *Corr Wireless Order*,[25] all support reductions to Cellco as a result of its voluntary commitment to eliminate support by the end of 2012 will be removed from the pool of funds available for other carriers to access to build wireless networks in rural South Dakota. Likewise, if Cellco relinquishes support in South Dakota, its USF high-cost support dollars will be lost to the state indefinitely. As a former state regulator, I would have wanted to examine as early as possible the possibility of my state losing such funds. Given the time that has passed since the mergers, and especially in light of the FCC's subsequent actions, the Commission's options may be more limited than at the time of the mergers.

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[24] Stevens Direct at 22-23.

[25] *In the Matter of High-Cost Universal Service Support; Federal-State Joint Board on Universal Service; Request for Review by Corr Wireless Communications, LLC, of Decision of Universal Service Administrator*, CC Docket No. 96-45, WC Docket No. 05-337, Order and Notice of Proposed Rulemaking, 25 FCC Rcd. 12854 (2010) ("*Corr Wireless Order*"); *recon. pending*.

Q. DID CELLCO SEEK AUTHORITY FROM THIS COMMISSION PRIOR TO FILING AUGMENTED LINE COUNTS WITH USAC?

A. To the best of my knowledge, Cellco did not. Cellco's testimony indicates that it has relied on informal advice from the FCC and USAC concerning its line count reporting.

Q. WHAT EFFECT DOES INFORMAL ADVICE FROM THE FCC HAVE?

A. The threshold issue here is whether Cellco and its affiliated companies are ETCs in South Dakota. According to the federal statute, eligibility decisions are solely within the state commission's authority, and the FCC has no jurisdiction over whether a company is eligible. The FCC staff's informal advice on what lines should be counted, or not, has no effect on whether Cellco is eligible. Rather than seeking advice from the FCC on how to file line counts, Cellco should have come to this Commission to determine first what it needed to do to obtain (or retain) ETC status for the merged entity.

In any case, Cellco should not have relied upon informal FCC advice. Cellco claims to have relied on informal guidance provided by FCC staff as the foundation for its decision to report all of its lines within the RCC and WWC ETC designated areas, including legacy Cellco lines that had never been eligible for high-cost support. This decision appears to have been made despite the fact that the FCC has held on numerous occasions that parties who rely on FCC staff advice or interpretations do so at their own risk.[26] Moreover, when FCC staff advice is contrary to the Commission's rules, the Commission may still enforce its rules, despite any reliance by the public.[27]

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[26] *See e.g., AAT Electronics Corp.,* 53 RR 2d 1241, 1225-26 (1983), *aff'd*, *P&R Temmer v. FCC*, 743 F.2d 918, 931 (D.C. Cir. 1984).

[27] *See Malkan FM Associates v. FCC*, 935 F.2d 1313 (D.C. Cir. 1991) (affirming FCC's decision to enforce its rules despite earlier staff statements giving erroneous interpretation of the rules at an official seminar).

SECTION 5 – CERTIFICATIONS FILED WITH THIS COMMISSION

Q. WHAT DID CELLCO DO WITH RESPECT TO THE REQUIRED STATE CERTIFICATIONS?

A. As I understand the petition and discovery responses provided by Cellco, after it consummated the Cellco-Alltel merger, Cellco continued to submit required certifications to the FCC, USAC, and this Commission. In these certification filings, Cellco assumed that WWC, Alltel and Cellco were all more or less interchangeable. Some of these certification filings were made on behalf of "Cellco Partnership d/b/a Verizon Wireless." Other filings were made in the name of Alltel Communications, LLC.[28] This pattern continued even after Cellco divested the Alltel/WWC network. In a filing made in September of 2010, Cellco explicitly stated the casual approach it took to ETC status after the merger and the divestiture of the original WWC assets:

> *the fact that WWC's customers and assets were transferred to AT&T Mobility, LLC . . . does not inhibit the Commission in any way from certifying WWC as eligible to receive federal high-cost universal service support in 2011.*[29]

In other words, Cellco's certifications and line count reports:

- Assumed that upon acquiring RCC, Cellco had all the rights to support that had previously been held by RCC, even though RCC is now no more than a corporate shell. Further, Cellco assumed that operational integration with RCC entitled it to report legacy Verizon Wireless lines in the RCC service area as RCC lines.
- Assumed that upon acquiring Alltel, Cellco had all the rights to support that had previously been held by WWC, even though WWC is now no more than a corporate shell. Further, Cellco assumed that operational integration with Alltel entitled it to

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[28] *See e.g.,* Letter to Patricia Van Gerpen, Executive Director, SDPUC from Talbot J. Wieczorek, on behalf of WWC License LLC d/b/a Alltel Communications, LLC ("Alltel"), dated May 28, 2010, (GPNA File No. 05925.0029)(cover letter for annual filing under A.R.S.D. 20.10.32.54).

[29] *Request of WWC License, LLC for Certificate Regarding Its Use of Federal Universal Service Support,* Docket No. TC10-067, Supplemental Filing in Support of annual Certification of WWC License, LLC, filed Sept. 15, 2010.

report legacy Verizon Wireless lines in the Alltel/WWC service area as Alltel/WWC lines.

- Assumed that after divesting the entire Alltel/WWC network in South Dakota to a third party, Cellco continued to be eligible to receive support. Moreover, using the WWC name, Cellco continued to annually certify to the South Dakota commission that it is eligible to continue to receive support in these areas, even though WWC's network and customers have been sold.

Until the filing of this application, I am not aware that Cellco has taken any action in South Dakota to inform the Commission how its universal service claims and benefits were changing, or that it was using the RCC and WWC entities as a stratagem to extend its support eligibility to the legacy Verizon Wireless customers.

Q. WHAT IS THE EFFECT OF THESE CERTIFICATIONS AND LINE COUNTS?

A. The Commission relied on Cellco's 2009 and 2010 certifications when it certified to the FCC each year that WWC remained eligible on a continuing basis to receive federal high-cost support. These certifications triggered USAC to provide federal high-cost support payments to Cellco, even though it has never been designated as an ETC.

Q. DO YOU HAVE ANY CONCERNS ABOUT CELLCO'S CONDUCT DURING THE TIME BETWEEN THE ALLTEL ACQUISITION AND THE DIVESTITURE?

A. Yes. Cellco states that it continued to collect high-cost support for WWC – after the divestiture trust took over – until the properties were divested.[30] As I understand it, the support went to Cellco, but I am not aware that Cellco has produced any evidence of how it used the

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[30] Response 4 to James Valley's second set of Interrogatories.

funds. This Commission should ask for a full accounting of Cellco's use of support during that period of time, demonstrating what investments were made and how they were accounted for.

Q. WHY ARE ACCURATE CARRIER CERTIFICATIONS IMPORTANT?

A. There are not enough regulators to oversee every action taken by regulated entities. State commissions inevitably rely on certifications from regulated entities to ensure compliance with state regulations and policies. If state commissions cannot rely on those certifications, the system breaks down. Given the facts recited above, it is hard to see how the Commission could have exercised meaningful oversight of universal service in South Dakota.

This kind of messy problem could have been sorted through at the time of the two mergers. Now it is much more difficult to go back and determine what should have happened, and what effects those events should have on the future. This is precisely why this Commission should expect an ETC to appear before it promptly so as to explain a proposed merger or acquisition, rather than try after the fact to sort out which networks and customers went where, and what happened to various entitlements to support. Still, corrective action can still be taken.

<u>SECTION 6 – REMEDIES</u>

Q. IS A REMEDY AVAILABLE TO THIS COMMISSION?

A. In this case, the key provision of law suggests the appropriate relief. Federal law requires that any carrier seeking federal support in South Dakota must first be designated by this Commission. Under federal law, the question of whether Cellco is an ETC is solely a question for this Commission to determine using the applicable standards set forth in federal law, including section 214(e). It is clear that Cellco has never been designated as an ETC by this Commission.

Only the simplest remedy seems adequate. For failing to make an ETC application to this Commission within a reasonable time of its two acquisitions, the Commission should declare that Cellco has never been eligible and is not currently eligible for support. Specifically, the Commission should declare that:

a) RCC's authority to be an ETC in the State of South Dakota expired on the merger closing date, August 6, 2008. Therefore, Cellco was not an ETC on or after August 6, 2008.

b) WWC's authority to be an ETC in the state expired on the merger closing date, January 9, 2009. Therefore, Cellco was not an ETC on or after January 9, 2009.

Further, if the Commission agrees that RCC or WWC ceased to be ETCs in 2008 and 2009, it should inform USAC of its decision through an order in this proceeding. USAC is prohibited by law from providing high-cost support to any carrier that is not an ETC. Therefore, if USAC found that it had improperly paid support to Cellco in 2008, 2009, 2010, or 2011, USAC might seek repayment or impose offsets to recover those funds. More important, South Dakota might be able to avoid having the interim CETC cap amount for the state decline or minimize the decline caused by Cellco's voluntary phase-down commitment.

Q. IS THERE PRECEDENT FOR REQUIRING A NEW ETC DESIGNATION IN THIS SITUATION?

A. Yes. When it has done similar acquisitions, AT&T has requested authority from state commissions to transfer ETC status. In Texas, for example, the state commission extinguished Dobson's authority and granted new authority to the AT&T entity.[31] In Wisconsin, the state commission treated an application from AT&T as a request for new ETC designation for the

[31] Application of New Cingular Wireless, PCS, LLC for Designation as an Eligible Telecommunications Carrier (ETC) in Lieu of Dobson Cellular Cellular Systems, Inc., Pursuant to 47 U.S.C. § 214(e) and P.U.C. Subst. R. 26.418, Order No. 8, Notice of Approval of Designation as an Eligible Telecommunications Carrier and Relinquishment of Eligible Telecommunications Carrier Designation, Docket No. 36346 (dated Apr. 7, 2009).

merged entity.[32] By considering ETC issues on a timely basis, these states avoided the complex issues here that were created here by Cellco's 20-month delay in filing.

Q. HAVE OTHER STATES ADDRESSED THE ALLTEL MERGER PARTICULARLY?

A. Yes. In Nevada, Cellco filed an application for a transfer of ETC status from a former Alltel entity to Cellco. The Nevada staff and affected parties opposed Cellco's application on the same grounds as James Valley opposes it here – namely that Cellco should have qualified as an ETC before drawing from the federal fund, not after. Just prior to trial in Nevada, Cellco withdrew its application to transfer ETC status, and filed a petition to relinquish ETC status in the state. The Nevada Commission has granted Cellco's withdrawal and later voted to allow Cellco to relinquish ETC status.[33]

Q. HOW DID THE NEVADA COMMISSION RESPOND TO CELLCO'S RELINQUISHMENT?

A. The Nevada Commission has not officially announced a response to Cellco's decision to leave the state as an ETC. However, the Commission's staff has filed two relevant documents. The first was a petition for declaratory order seeking *nunc pro tunc* revocation of ETC status of WWC, as of January 9, 2009, the date that the Cellco-Alltel merger closed (the RCC merger was not in issue in Nevada). The second was a petition for an Order to Show Cause why Cellco should not be subject to administrative sanctions and fines for its lack of candor with the Nevada PUC throughout the course of its *pro forma* ETC amendment application proceeding and for failure to comply with the compliance terms of the ETC designation granted to WWC in Nevada. Nevada PUC Staff's position is the same as James Valley in this proceeding, that the Nevada

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[32] See Transfer of ETC Certification from American Cellular Corp. (ACC) to New Cingular Wireless PSC LLC (AT&T Mobility), Docket No. 8212-TI-100, Final Decision (Wis. PSC, July 28, 2008). See PSC REF#: 98109.

[33] Nevada Docket No. 10-12021.

PUC never designated Cellco as an ETC and therefore Cellco had no legal right to draw from the federal fund until designated.

The actions taken by Cellco in South Dakota are arguably even more alarming than in Nevada. In Nevada, Cellco divested WWC assets to AT&T for only <u>some</u> rural service areas. In South Dakota, Cellco divested <u>all</u> of the network and customers of WWC to AT&T. Therefore, Cellco's unauthorized actions are even more clearly improper in South Dakota because the Company has continued to collect high-cost support after selling the *entire* underlying network on which ETC designation had originally been granted.

Q. DID CELLCO HAVE AN OBLIGATION TO KEEP THE SOUTH DAKOTA COMMISSION INFORMED?

A. Yes. Regulated companies have an affirmative obligation to keep regulators informed of significant changes that affect the regulators' areas of responsibility, including universal service. The obligation to disclose is particularly important for a complex subject like federal universal service support. Because the mergers here created significant changes, Cellco should have informed the Commission of what it had done and what the likely consequences were. Of course, promptly seeking designation as an ETC would have necessarily provided the relevant information to the Commission. It is particularly difficult to understand how Cellco could have overlooked this step after the Alltel merger because that merger was approved with the added complexities of a novel phase-down provision and a full divestiture requirement.

Q. THE FCC GRANTED A *PRO FORMA* APPLICATION FROM CELLCO TO TRANSFER ETC STATUS FOR SOME CELLCO AREAS. SHOULD THAT PRECEDENT BE FOLLOWED HERE?

A. No. Verizon repeatedly mentions that the FCC granted its petition to transfer ETC status, and did so on a *pro forma* basis. The FCC case differed in four ways.

First, the FCC's decision was reached under different statutory authority. The FCC decision was under section 214(e)(6) of the Act, which applies only in states where the state itself does not designate ETCs. For that reason, the FCC order applied only in Alabama, North Carolina, and Virginia. States like South Dakota designate ETCs through state commissions under section 214(e)(2) of the Act. This Commission is not legally required to follow the FCC's precedent and, in this case, should not. Indeed, Congress gave states discretion to determine whether ETC status is "consistent with the public interest, convenience, and necessity,"[34] and the FCC itself has recognized that states should exercise independent judgment in determining whether granting ETC status is in the public interest.[35]

Second, the FCC's grant, allowing assignment of ETC status, did not apply to any areas where Cellco was required to divest.[36] In South Dakota, it is inappropriate for Cellco to rely on the FCC case because Cellco was required to divest *all* of the Alltel/WWC assets in South Dakota.

Third, Cellco filed its application here on September 3, 2010, exactly nine months after making its filing at the FCC on December 3, 2009. Cellco has not adequately explained why it delayed its filing in South Dakota.

Fourth, the FCC and this Commission's have different interests. It is now clear that the FCC had strong interests on both sides of its Cellco designation decision. The FCC certainly was responsible for promoting universal service, but it was also the source of the funding, and there were new priorities for that funding. As the later *Corr Wireless* decisions show, the FCC

[34] 47 U.S.C. § 214(e).

[35] *Texas Office of Pub. Util. Counsel v FCC*, 183 F3d 393 (5th Cir. 1999), *cert den* (2000) 530 US 1210, and cert den (2000) 530 U.S. 1223 *and appeal after remand, remanded, in part* (2001, CA5) 265 F3d 313, *cert den* (2002) 535 U.S. 986.

[36] *Federal-State Joint Board on Universal Service,* WC Docket No. 09-197, Order, 25 FCC Rcd. 5955, DA 10-992 (ETC Designation Order) π 3.

now appears to want to quickly reduce federal support to CETCs. The opportunity to generate funding for its broadband initiatives is almost certainly a major cause.

By May of 2010 when the ETC Designation order was issued, the FCC had already committed itself with some fanfare to its new National Broadband Plan and a new goal of funding broadband services. Later in 2010, the FCC issued the *Corr Wireless* Orders that prohibited redistribution to other CETCs when Cellco's (or Sprint's) support is phased down, whenever a CETC voluntarily relinquishes its ETC status. In any of these circumstances, a state can experience significant losses of CETC high-cost support, indefinitely.

Although the FCC's May, 2010 ETC Designation Order did not explicitly address the *Corr Wireless* issues, USAC's initial interpretation of that order held that support withdrawn from Cellco would not be redistributed to other carriers. Although the first *Corr Wireless* order ultimate adopted a different rationale, the result was the same. As Cellco's support is phased down, the FCC gets a larger purse to fund its broadband initiative.

South Dakota's interests are less complex. South Dakota benefits to the extent that South Dakota wireless carriers can receive and do use federal support to expand wireless signal coverage in rural areas and to provide services such as Lifeline that are not generally available except from ETCs.

Q. WHAT LEGAL AND POLICY REASONS SUPPORT REQUIRING CELLCO TO APPLY NOW FOR A DESIGNATION EVALUATING ALL THE USUAL ETC DESIGNATION ISSUES?

A. Federal and state governments are properly concerned to ensure that entities applying for ETC status are qualified, that their designation serves the public interest, that while they are designated their actions preserve and advance universal service, and that support provided to them is used lawfully. The Telecommunications Act plainly contemplates a shared responsibility between the federal and state governments to support universal service.[37] There are many reasons why states have been asked to assume supervisory responsibility over designating ETCs and ensuring the proper use of federal funds. An important reason is that states are on the front lines, and they hear the majority of complaints when service fails or is not offered in remote areas.

Some government-granted rights are properly treated as transferrable property interests. When the FCC approved the Alltel merger, for example, it expressly provided that the property acquired included all construction permits, plus all pending applications for construction permits.[38] Construction permits are generally granted or withheld based on how well a propose project matches prescribed zoning or other regulatory criteria.

For other government-granted rights, it is less clear that they are property capable of being sold without notice and approval. A dentist who sells her established practice and retires does not presuppose that the purchaser also buys her license to practice dentistry. Rather, professional licenses are personal to each licensee, and they are not and cannot be sold as a property interest of the business they make possible. Transfers of utility interests can be treated similarly. Many states, including South Dakota, review in advance the acquisition of one utility by another.[39]

ETC designations are very much like these non-transferrable rights. For professional licenses and utility CPCNs, the character, capabilities, past performance and future intentions of

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[37] *Qwest Corp. v. FCC,* 258 F.3d 1191, 1203 (10th Cir. 2001); *see* 47 U.S.C. § 254(b)(5) ("There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service").

[38] *Cellco-Alltel Merger Order*, π 239.

[39] *See, e.g.* S.D Codified Laws § 49-31-20 (prior approval required for merger or consolidation between competing telecommunications companies); § 49-31-59 (prior approval required for sale of telephone exchanges) § 49-34A-35 (prior approval required for purchase of property or business constituting an operating unit or system of electric utility).

the grantee are key issues. For ETC status, the intention to comply with fixed requirements (such as providing voice service and 911) are merely the starting point. State commissions can and do range widely into any matters affecting the public interest. These matters can cover specific promises of future intention, but they can also include evaluation of the applicant's character, capabilities, and past performance, as well as likely effects on other ETCs.

In contrast, Cellco appears in South Dakota to have treated its South Dakota ETC designation as a property right that:

1. Is freely transferrable among affiliated entities without notice to or consent from the relevant regulatory authority. On this basis, Cellco began reporting RCC and WWC/Alltel lines without first gaining ETC status.
2. Is expandable, once acquired, to all affiliated entities. On this basis, Cellco began reporting legacy Cellco lines for USF support, once again without first gaining ETC status.
3. Is not extinguished when all the assets that were the subject of a previous designation are divested. On this basis, Cellco has continued to report legacy Cellco lines for USF support after divesting them to AT&T Wireless.

Cellco's actions suggest that it believes that upon acquiring a designated ETC as a subsidiary, it was somehow entitled to receive support for its entire integrated operation indefinitely, and without making an application for ETC status itself for approximately 20 months. Cellco has essentially taken the position that it is entitled to support on any switched line it sells to a customer within the original ETC service area, from any network, without approval from the regulatory agency that grants ETC designation, without regard to the carrier that formerly held the subscription, and without regard to where that originally certified carrier's assets are now.

It is difficult to see how a state could accept this theory. It simply does not provide a clear set of expectations about who will provide universal services to South Dakota citizens, what facilities and services will be available and in what locations, and how and by whom federal support will be used. In cases such as this, I believe a fairly restrictive policy is appropriate. ETC status should be viewed as a right that is specific to a particular grantee. Without advance approval of (or at minimum notice to) the ETC-granting authority, ETC status should not be:

1. Separable from the networks, facilities and services for which approval was obtained or that existed prior to the acquisition.
2. Alienable or assignable as a property right from one affiliate to another.
3. Transferrable from one physical network to another or expandable to a physically independent network not previously covered.
4. Transferrable from one block of subscribers to another
5. Expandable to a different block of subscribers not previously covered.

I also encourage the Commission to make detailed findings, as the Nevada PUC Staff did, about how Cellco's behavior here as it has made more difficult the Commission's own task of preserving and advancing universal service in South Dakota.

Q. IS IT APPROPRIATE IN THIS PROCEEDING TO DISMISS THIS APPLICATION FROM CELLCO?

A. Cellco has tried to present this case as a routine adjustment that simply replaces one party for another and consolidates some loose ends. While its petition did not use the words *"pro* *forma,"* neither did Cellco ask explicitly for an ETC designation. Instead, Cellco presented the view that its petition should be routinely granted.

- The petition stated that Cellco sought only to "amend and consolidate" some existing designations.
- Cellco attached a brief favorable order from the Wireline Competition Bureau, in which the bureau chief, acting on delegated authority, granted similar relief, after considering the application on a *pro forma* basis.
- In a Supplemental Filing in September in another docket, Cellco characterized this docket as one in which it is seeking "*pro forma* amendment and consolidation" of the several designations held by WWC and RCC."[40]

This gambit might have lulled the parties into acquiescence and the Commission into granting the requested relief without a full consideration of the state's interests. In Nevada, Cellco filed a similar application, and the Nevada staff has concluded that Cellco materially misled that commission.

The Commission is best situated to determine whether Cellco's filings materially misled the Commission and the parties in their preparation for hearings – a conclusion already reached by Nevada PUC Staff involving a similar application filed by Cellco.

[40] *Request of WWC License, LLC for Certification Regarding Its Use of Federal Universal Service Support,* Docket No. TC10-067, Supplemental Filing in Support of Annual Certification of WWC License, LLC, Sept 15, 2010, pp. 4, 8.

<u>SECTION 7 – CELLCO'S TESTIMONY IN SUPPORT OF ITS APPLICATION FOR ETC STATUS.</u>

Q. DO YOU HAVE ANY COMMENTS ON CELLCO'S TESTIMONY REGARDING ETC QUALIFICATIONS?

A. Yes. Although this petition was not originally filed as an ETC petition, if and when the Commission elects to proceed on the merits of designation of an ETC, I offer the following observations on the sufficiency of Cellco's *prima facie* case for ETC designation.[41]

a. Cellco's proposed building plan only goes through 2012, because its support will be discontinued at that time, and it appears that there will be many rural areas in South Dakota in 2012 where Cellco will not provide service. Without any support, it is unclear how Cellco would continue to function as an ETC following 2012, or whether it would be able to build facilities throughout the areas where service is still needed. The Commission should consider whether designating an ETC for such a short period will generate significant material benefits to South Dakota citizens and would be in the public interest.

b. Cellco does not appear to have demonstrated that it offers at least one local usage plan that is comparable to that offered by the various incumbent local exchange carriers in the areas. Cellco does say that it includes local usage in its current plans, but details are lacking.[42] It also appears that South Dakota may previously have required Alltel to offer a "BUS" plan, which presumably stands for "Basic Universal

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[41] *See Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, FCC 05-46, 20 FCC Rcd. 6371 (2005), ¶. 2.

[42] Stevens Direct at 18.

Service."[43] However, I have not found in Cellco's recent filings any description of a BUS plan, and none was found on Cellco's web site, after a reasonable search;

c. Cellco does not explain whether or how it provides toll blocking to retail subscribers.

d. Cellco reports that it has adopted a six-step process for provisioning service as an ETC. Yet, Cellco does not appear to have demonstrated that it is actively making customers aware of this policy. Cellco states that one customer has made a request for service such that Cellco went through the service provisioning process set forth in the Alltel/WWC commitment and the company disclosed no held orders.[44] Given that Cellco has been holding itself out as an ETC for two years, and given the scope of its geographic service area and the number of customers at issue, it is difficult to believe that if its rural customer base were informed at intake, or by periodic notices, that only one customer out of many thousands would have come forward claiming that it has inadequate service at its home or business. Questions concerning what kinds of notices a carrier is providing to its customers, how often such notices are being provided, and whether such notices are reasonably designed to elicit appropriate responses, should be addressed.

e. I do not believe Cellco has shown that it is in compliance with its Lifeline obligations. In response to an Interrogatory, Cellco states that approximately 4,100 Lifeline customers were transferred over to AT&T when the divestiture was consummated.[45] Cellco appears to have failed to provide those customers with notice that when they

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[43] *See*, *e.g.*, Eligible Telecommunications Carrier Certification and Annual Report on Behalf of WWC License LLC D/B/A Alltel Communications, LLC dated May 28, 2010 at p. 7 ("Alltel makes available its BUS offering, a comparable local usage plan, as well as other comparable service offerings in its Designated Area.").

[44] See, Cellco's response to James Valley Interrogatory 14.

[45] See, Cellco's response to James Valley Second Set of Interrogatories, Number 8.

became customers of AT&T they would no longer receive Lifeline benefits.[46] At this time, Cellco reports having 41 Lifeline customers in the entire state.[47] With thousands of customers, and with the economy being so poor over the past two years, it is certainly worth examining whether Cellco has sufficiently advertised the availability of Lifeline service.

f. Cellco's direct testimony leaves me in some doubt about the extent and quality of its wireless services, an issue that is properly examined in the course of a new, complete application for ETC status. Alltel/WWC had a large network in South Dakota. After divestiture, that network is no longer available to provide service to Cellco customers. Cellco states that it has 179 cell sites constructed within the state.[48] That statement fails to be *prima facie* evidence that that number of cell sites in the state is sufficient to provide a quality of service warranting a grant of ETC status. Without a clearer explanation of how many customers are served, the Commission should not conclude that a grant of ETC status would serve the public interest.

Q. DO YOU AGREE WITH CELLCO'S PUBLIC INTEREST ANALYSIS OF THE EFFECTS OF CETC SUPPORT?

A. Generally, yes. Cellco claims that:

> The fact that high-cost support remains available to incumbent and competitive ETCs within the designated area indicates the cost of providing services is sufficiently high and allows carriers to offer service in areas that might not be economically feasible to serve absent explicit universal service support.[49]

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[46] See, Cellco's response to SDTA Interrogatory 8.

[47] See, Cellco's response to James Valley Interrogatory 12.

[48] See, Cellco response to SDTA Interrogatory 7.

[49] Stevens Direct at 32.

I do agree with this statement as a general proposition. For two reasons, however, it does not seem to apply to Cellco's own operations.

First, Cellco has *voluntarily* agreed that its federal support will end at the end of 2012. The long-term impact upon rural South Dakota is likely to be significant. If Cellco's statement is correct that explicit high-cost support is needed to serve the many rural areas in the state that do not have high-quality services, then Cellco should have opposed a reduction in that support, rather than voluntarily agreed to forego support. It is difficult to see how a state commission can find it in the public interest to designate a company that has already agreed to permanently forego whatever support it was entitled to at the beginning of 2009.

Other companies presumably are willing and committed to use support to build out rural areas that Cellco concedes are in need of additional investment. To advance the public interest, this commission should seek to designate carriers that are committed, without qualification, to building cell sites in rural areas, and not to carriers that voluntarily agree to reducing eliminating support or to carriers that take contradictory positions before state and federal agencies.

Second, Cellco admits that all of the former Alltel/WWC customers who were transferred to AT&T can no longer request that service be provided pursuant to the six-step process set forth in the Cellco commitment, simply because AT&T is not an ETC in the state.[50] All of the investments that Alltel/WWC was providing to the State of South Dakota (*e.g.*, constructing new cell sites in rural areas) in furtherance of the very goals that Cellco states are worthy of a public interest finding in this case, have been passed to AT&T – a company that is not an ETC. High-cost support is no longer available to improve that network, and AT&T is not obligated to

[50] See, Cellco's response to SDTA Interrogatory 2.

provide anything like Cellco's six-step process. Even if AT&T applies for ETC status now, its support will be greatly reduced because Cellco *voluntarily* agreed to phase-out its support.

<u>SECTION 10 – CONCLUDING REMARKS</u>

Q. PLEASE SUMMARIZE YOUR RECOMMENDATIONS.

A. This controversy is solely within this Commission's jurisdiction to resolve. Under federal law, this Commission has sole authority to determine when a carrier is designated as an ETC, thereby becoming eligible for the support available to an ETC. The FCC's rules authorize a state commission to certify continuing eligibility and to revoke the ETC status of any carrier that does not comply with legal requirements to retain eligibility. My recommendation is that:

1) The Commission clarify that:
   a) RCC's authority to be an ETC in the state expired as of the merger closing date, August 6, 2008. Therefore, Cellco was not an ETC on or after August 6, 2008.
   b) WWC's authority to be an ETC in the state expired as of the merger closing date, January 9, 2009. Therefore, Cellco was not an ETC on or after January 9, 2009.
   c) The ETC designation previously held by RCC Minnesota, Inc. and Wireless Alliance, LLC, d/b/a Unicel and the ETC designation previously held by WWC License, LLC, successor to GCC License Corporation is not available for use by Cellco for Verizon legacy customers.
   d) Because of a), b), and c), South Dakota's CETC funding entitlement should not be reduced due to Cellco's voluntary commitment to reduce its support gradually to zero in 2012, and the FCC's decisions about how Cellco's phased-down funding should be redistributed are, therefore, inapplicable to South Dakota.

e) Future funding for wireless CETCs could be an important tool in ensuring that competitive ETCs in South Dakota will have sufficient funds to build cell sites in currently unserved rural areas of the state.

2) The Commission should inform USAC of the above determinations in a letter and require USAC to have Cellco refund past overpayments of CETC support.

3) If the Commission acts on the merits of an ETC designation for Cellco in this proceeding, it should carefully examine whether Cellco has carried its burden of proof on the questions described above and whether designation of Cellco as an ETC is actually in the State's public interest.

Q. DOES THIS CONCLUDE YOUR PREFILED TESTIMONY?

A. Yes. However, I would like to reserve the right to address the testimony of other parties that has not yet been filed.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the **Direct Testimony of Peter Bluhm on Behalf of James Valley Wireless, LLC** was served electronically on the 4th day of February 2011 upon the following:

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