

**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

**JAMES VALLEY WIRELESS, LLC'S OPPOSITION TO VERIZON WIRELESS'
MOTION TO STRIKE TESTIMONY
OF WITNESS PETER BLUHM**

James Valley Wireless hereby opposes the Motion to Strike Testimony of Witness Peter Bluhm ("Motion to Strike") and the accompanying Brief in Support of Motion to Strike ("Brief") filed on April 12, 2011, by Cellco Partnership d/b/a Verizon Wireless ("Verizon Wireless"). The Direct Testimony of Peter Bluhm on behalf of James Valley Wireless, LLC ("Bluhm Testimony") is appropriately focused on the qualifications of Verizon Wireless to be granted ETC status in South Dakota.¹ For the reasons set forth below, the entirety of the discussion set forth in the Bluhm Testimony is relevant and useful to this Commission in reaching a determination as to whether it should grant, grant with conditions, or deny the application of Verizon Wireless.

Background

This proceeding arises from the mergers of Verizon Wireless and RCC in 2008 and Verizon Wireless and Alltel Corporation ("Alltel") in 2009. The FCC approved the Verizon Wireless/RCC merger on July 31, 2008, and it approved the Verizon Wireless/Alltel merger on

¹ The Bluhm Testimony was originally filed on February 4, 2011; a revised version of the Bluhm Testimony was filed on March 25, 2011.

November 8, 2008.² As part of the Verizon Wireless/Alltel merger, Verizon Wireless voluntarily obligated itself to phase-out its receipt of all federal USF support in 20% increments starting in 2009. Verizon Wireless consummated the RCC merger transaction on August 7, 2008, and the Alltel merger transaction on January 9, 2009.

On September 3, 2010, more than 19 months after consummating its merger with Alltel, and more than two years after consummating its merger with RCC, Verizon Wireless filed with the Commission a self-styled application to "amend and consolidate" the Eligible Telecommunications Carrier ("ETC") designations held by several entities, including WWC License, LLC ("WWC"), a subsidiary of Alltel Communications, LLC and RCC Minnesota, Inc. to "reflect" Verizon Wireless as the designated ETC entity (the "Application"). Nowhere in the Application does Verizon Wireless disclose or address many critical issues, including the following:

- That Verizon Wireless had provided service across most of South Dakota for many years without ever having sought an ETC designation from the Commission;
- That Verizon Wireless had divested all of the tangible and intangible assets of Alltel, including all of Alltel's customers, across the entire state of South Dakota;
- That despite the complete divestiture of Alltel's assets and customers in South Dakota, Verizon Wireless had – without any prior approval from this Commission – stepped into the ETC designations granted to WWC and RCC;
- That Verizon Wireless (under the guise of WWC's and RCC's ETC designations) was filing line counts with USAC for legacy (*i.e.* pre-merger) Verizon Wireless customers – customers for which Verizon Wireless had never before sought high-cost support;

² See *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*, WT Docket No. 07-208, *Memorandum Opinion and Order and Declaratory Ruling*, 23 FCC Rcd 12463 (2008) and *Application 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 and Petition for Declaratory Ruling That the Transaction Is Consistent with Section 310(b)(4) of the Communications Act*, WT Docket No. 08-95, *Memorandum Opinion and Order and Declaratory Ruling*, 23 FCC Rcd 17444 (2008).

- That the addition of legacy Verizon Wireless customers to the reported line counts had increased the number of lines (customers) being reported to USAC and, therefore, had increased the amount of uncapped support sought by Verizon Wireless and the amount of capped support received by Verizon Wireless;
- That the addition of legacy Verizon Wireless customers to the reported line counts and the corresponding increase in uncapped support sought by Verizon Wireless had reduced the level of high-cost support available to other CETCs in South Dakota; and
- Why Verizon Wireless had waited more than one and one half years after consummating its merger with Alltel, and more than two years after consummating its merger with RCC, before filing its Application.

Each of these matters was ascertained through discovery in this proceeding and in proceedings in other states regarding similar applications. Each of these matters is essential to the Commission's determination as to whether to grant the Application, and thus, each of these matters is appropriately addressed in the Bluhm Testimony.

Rules of Evidence - Relevancy Standard

The South Dakota Administrative Procedures Act (SDCL 1-26) applies the South Dakota Rules of Evidence (SDCL 19-9 to 19-18) in contested cases. In *Dubray v. SD Dept. of Social Services*, 2004 S.D. 130, 690 N.W.2d 657 the court held the

rules of evidence generally apply in administrative proceedings. SDCL 1-26-19 provides in relevant part:

In contested cases:

(1) Irrelevant, incompetent, immaterial, or unduly repetitious evidence shall be excluded. The rules of evidence as applied under statutory provisions and in the trial of civil cases in the circuit courts of this state, or as may be provided in statutes relating to the specific agency, shall be followed.

Under the Rules of Evidence, relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or

less probable than it would be without the evidence." SDCL 19-12-1 (Rule 401). The courts have interpreted this rule as admitting

evidence having any tendency to make the existence of a fact more or less likely. SDCL 19-12-1. This Court has been very clear that it construes the question of relevancy very liberally. For example, we recently stated, [t]he law favors admitting relevant evidence no matter how slight its probative value. ... 'It is sufficient that the evidence has a tendency to make a consequential fact even the least bit more probable or less probable than it would be without the evidence.'

State v. Jolley, 2003 S.D. 5, 656 N.W.2d 305. More importantly, with respect to expert testimony, "[w]e interpret our rules of evidence liberally with the "general approach of relaxing the traditional barriers to "opinion" testimony.". *Burley v. Kyttec Inn. Sports Eq., Inc.*, 2007 S.D. 82, 737 N.W.2d 397.

Finally, the courts give judges and administrative agencies great latitude in admitting evidence. Under the standard of review of evidentiary rulings, the rulings are only reversible

when error is demonstrated and shown to be prejudicial error. Error is prejudicial when, in all probability it produced some effect upon the final result and affected rights of the party assigning it. Put simply, our review requires a two-step process; first, to determine whether the trial court abused its discretion in making an evidentiary ruling; and second, whether this error was a prejudicial error that "in all probability" affected the jury's conclusion.

Supreme Pork, Inc. v. Master Blaster, Inc., 2009 S.D. 20, 764 N.W.2d 474. Measured against these standards, the Bluhm Testimony is clearly relevant and admissible.

Public Interest Standard for Granting ETC Status

Pursuant to Section 214(e)(2) of the Communications Act of 1934, as amended (the "Act"), this Commission has exclusive jurisdiction to designate ETCs in the State of South Dakota.

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 [Section 214(e)(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 [Section 214(e)(1)].³

In order to satisfy the statutory obligations of Section 214(e)(2) and the requirements of South Dakota law, the Commission must find that an application is "consistent with the public interest, convenience and necessity."

In examining the public interest, the Commission must, of necessity, examine the qualifications of the applicant. In reviewing the qualifications of the applicant, a relevant line of inquiry is the candor of the applicant. James Valley Wireless submits that Verizon Wireless has not been candid with the Commission. The very caption of the Application – that Verizon Wireless seeks authority "to amend and consolidate [ETC] designations" is misleading on its face. Contrary to the assertion in the Brief,⁴ the fact that the Commission's scheduling orders simply mirror the Application's caption can hardly be dispositive of the scope of the issues to be addressed at hearing where, as here, the applicant's caption is highly misleading as to what the applicant is really seeking. The Minnesota Public Utilities Commission ("Minnesota PUC") addressed the very same issue, "finding that Verizon's caption of its petition failed to indicate that Verizon was seeking designation as an ETC" and that "[t]his mischaracterization deprived potentially interested persons appropriate notice of the actions requested and their possible consequences."⁵ As a result, the Minnesota PUC ruled 5 – 0 to deny Verizon's application.

³ 47 U.S.C. § 214(e)(emphasis added).

⁴ Brief at p. 3.

⁵ *In the Matter of the Joint Petition of Cellco Partnership and its Affiliates (Verizon Wireless or Verizon) to Amend and Consolidate Eligible Telecommunications Carrier (ETC) Designations*, Order Denying Petition, Docket No. P-

In reviewing yet another virtually identical situation in Georgia, the Georgia Public Service Commission issued an Order on February 21, 2011, unanimously and conclusively finding that Verizon Wireless had never been designated as an ETC in Georgia, and that Verizon Wireless had never been authorized to receive high-cost funding from the federal USF for its "legacy" Verizon Wireless customers in Georgia.⁶ The Georgia PSC determined that "Verizon Wireless ... served areas in Georgia prior to the acquisition of Alltel, but [Verizon Wireless] ha[d] never been designated by the [Georgia PSC] as an ETC."⁷ On the same day that it issued its Order, the Georgia PSC also sent a letter to USAC instructing USAC to "take whatever action it deems necessary and appropriate" based on the findings in the Order.⁸

In fact, Verizon Wireless has shown a pattern and practice of being disingenuous with regard to its real motives in filing numerous ETC amendment applications with multiple state commissions seeking to "amend and consolidate" ETC designations awarded to entities subsequently purchased by Verizon Wireless. As noted previously, Verizon Wireless consciously failed to disclose many salient facts in its Application. It is appropriate, and indeed imperative, for the Bluhm Testimony to highlight these facts and explain their relevance to Commission consideration of the Application.

In examining the public interest, the Commission must also thoroughly review the impact that a grant of the Application would have on consumers in South Dakota. A relevant line of inquiry in any such review is the impact on funding for other CETCs in South Dakota.

6182, 6152, 5695/M-10-862 (issued Apr. 25, 2011) ("*Minnesota PUC Order*") at p.1. **Attached hereto as Exhibit 1.**

⁶ See *Petition for Expedited Declaratory Ruling Regarding the Filing of Unauthorized Line Counts by Cellco Partnership d/b/a Verizon Wireless for Purposes of Receiving High-Cost Support From the Federal Universal Service Fund*, Docket No. 33387, Order on Joint Petition for Declaratory Ruling (February 21, 2011) ("*Georgia PSC Order*") at pp. 3 and 5 (emphasis added). **Attached hereto as Exhibit 2.**

⁷ *Id.* at p. 1.

⁸ Georgia PSC Letter to USAC, February 21, 2011. **Attached hereto as Exhibit 3.**

James Valley Wireless, for example, is using high-cost support to expand and improve coverage in rural and unserved areas of South Dakota. However, under the *Interim Cap Order*, increased support to an existing ETC or support to a newly designated carrier will result in a corresponding loss of support to other ETCs if the state is over the interim cap amount (which was the case in South Dakota for much of the period at issue). Therefore, before designating a new carrier, including Verizon Wireless, the Commission must ensure that such designation will serve the public interest by, among other things, ensuring that the new carrier meets the many prerequisites to be designated as an ETC, and that any new ETC will efficiently use high-cost support to expand and improve coverage to rural and unserved areas.

The Bluhm Testimony appropriately discusses the financial impact on other CETCs if Verizon Wireless were to be designated as an ETC. As noted above, such an inquiry is highly relevant to the Commission's public interest inquiry. The Bluhm Testimony addresses the financial impact of unauthorized and unlawful line counts on other CETCs. Although Verizon Wireless did not specifically ask for authority in its Application to add legacy Verizon Wireless customers to the line count filings made under the WWC and RCC ETC designations, Verizon Wireless had, in fact, been doing just that for many months before it even filed its Application. The Commission must be aware of such behavior in evaluating the qualifications of Verizon Wireless to be designated as an ETC in South Dakota.

In light of the failure of Verizon Wireless to obtain authority to include legacy Verizon Wireless customers in the line count filings made under the WWC and RCC ETC designations, the Bluhm Testimony appropriately makes recommendations as to the appropriate remedies that the Commission can implement. In particular, Bluhm "recommend[s] that the Commission inform USAC ... in a letter and require USAC to have [Verizon Wireless] refund

past overpayments of CETC support."⁹ Contrary to the Brief, such a recommendation is not irrelevant or immaterial.¹⁰ The information gathered at discovery makes such a recommendation entirely appropriate. Further, in the event that the Commission were to grant the Application, Commission action to reverse past wrongdoing as a condition to grant would be fully warranted. In any event, this Commission is more than qualified to accept, reject or modify the recommendations and remedies proposed in the Bluhm Testimony. As such, there is no reason to strike the information at issue in the Bluhm Testimony.

The Brief focuses much of its energy on the recommendation in the Bluhm Testimony that the Commission retroactively revoke the WWC and RCC ETC designations. Verizon Wireless provides the following reasons to justify its request to strike Mr. Bluhm's recommendation for the retroactive revocation of the WWC and RCC ETC designations: (1) the ETC designations have been continuously in place without controversy since 2000 and 2005, respectively;¹¹ (2) if granted, Mr. Bluhm's recommendations could have the effect of reversing the Commission's prior decisions, in 2009 and 2010, to certify WWC's and RCC's use of universal service support;¹² (3) James Valley Wireless gave no indication at the time of its intervention that it would seek some sort of affirmative relief;¹³ and (4) that this Commission does not have the legal authority to effectuate the retroactive revocation of the WWC and RCC ETC designations.¹⁴

The argument made by Verizon Wireless that the WWC and RCC ETC designations have been continuously in place – allegedly, according to Verizon Wireless, without controversy – is

⁹ Bluhm Testimony at p. 4.

¹⁰ Brief at p. 6.

¹¹ Brief at p. 8.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 9. Verizon Wireless acknowledges in its Brief that the "expiration" that Mr. Bluhm recommends "is functionally the same as a retroactive revocation." *Id.*

irrelevant to the merits of the arguments made by Mr. Bluhm. The fact of the matter is that these ETC designations have certainly not been without controversy since James Valley Wireless filed its petition to intervene in this proceeding. Since that time, the Commission and other parties involved in this case have learned that Verizon Wireless has taken the ETC designations given to WWC and RCC and unilaterally decided that, despite the fact that Verizon Wireless was required to divest itself of literally every asset formerly held by Alltel in the State of South Dakota, including all former Alltel customers and network infrastructure, it would use these ETC designations to obtain high-cost support on "legacy" Verizon Wireless lines and for the "legacy" Verizon Wireless network. Of course, this is despite the fact that Verizon Wireless has never been designated an ETC by this Commission.

The argument made by Verizon Wireless that Mr. Bluhm's recommendations could have the effect of reversing the Commission's prior decisions, in 2009 and 2010, to certify WWC's and RCC's use of universal service support is nothing more than a "red herring." If the decisions made by the Commission, in 2009 and 2010, to certify WWC's and RCC's use of universal service support were based on misrepresentations by Verizon Wireless to the Commission concerning the Company's collection and use of universal service support, then those certifications – and the basis for those decisions – may need to be revisited and additional actions by this Commission may be appropriate, including the retroactive revocation of the ETC designations at issue, as suggested by Mr. Bluhm. Of course, to the extent that this Commission concludes that the retroactive revocation of one or both ETC designations is appropriate, this would not be the first time that staff at a state commission would have made such a recommendation regarding an ETC designation held by a Verizon Wireless subsidiary. In

January, Nevada PUC Staff filed a Petition with the Nevada PUC seeking the *nunc pro tunc* revocation of the ETC designation given to WWC, now a subsidiary of Verizon Wireless.¹⁵

In addition to all of the reasons set forth above, the failure of the Application to disclose that all of the Alltel assets were required to be divested and were in fact divested, it is appropriate for the Bluhm Testimony to recommend that Alltel's ETC designation be revoked. After all, following divestiture, Alltel had no customers or assets in South Dakota, so there was no reason for Alltel to hold an ETC designation. This fact is highly relevant to the Application, which seeks, on its face, to "amend and consolidate" the very Alltel ETC designation that might no longer be valid. This Commission can hardly determine whether, and to what extent, an ETC certification can be "amended and consolidated" without looking at the ETC designation itself and determining what, if anything, is available to be "amended or consolidated." Again, this is a matter that the Commission can and must determine as the expert agency. Grant of the Motion to Strike would prematurely remove this important aspect of this issue from consideration.

Verizon Wireless also contends that James Valley Wireless gave no indication at the time of its intervention that it would seek some sort of affirmative relief. This argument is also meritless. James Valley Wireless could not have contemplated at that early stage of the proceeding, particularly based upon the lack of any substance in Verizon Wireless' ETC amendment application, of the incredibly egregious nature of the line counting practices of Verizon Wireless with respect to its operations in South Dakota. Most of this information that

¹⁵ See Regulatory Operations Staff's Petition for Declaratory Order and Petition Seeking *Nunc Pro Tunc* Revocation Upon Complaint by Staff, Nevada PUC Docket No. 11-01035 (dated Jan. 27, 2011); see also Regulatory Operations Staff's Petition for an Order to Show Cause, Nevada PUC Docket No. 11-01036 (dated Jan. 27, 2011) (involves Nevada PUC Staff's Petition for an Order to Show Cause why Verizon Wireless and/or WWC License, LLC should not be administratively fined, for violation of a prior Commission Order and for lack of candor towards the Nevada Commission).

provided the basis for Mr. Bluhm's recommendations came subsequently through discovery and information learned in the course of other state proceedings in which Verizon Wireless' ETC amendment applications and/or conduct are similarly being challenged and the parties challenging Verizon Wireless are prevailing.¹⁶ Again, one of the fundamental purposes of this exercise is to ensure that if this Commission finds that Verizon Wireless took actions that violated state or federal rules or law, that the Commission has the opportunity to rectify the situation in a way that the Commission deems most appropriate. Mr. Bluhm has merely suggested that one potential option available to the Commission to cure the problems created by Verizon Wireless is to retroactively revoke the WWC and RCC ETC designations.

Finally, with respect to the contention that this Commission does not have the legal authority to effectuate the retroactive revocation of the WWC and RCC ETC designations, that contention appears to be without merit. As the FCC has stated itself, Congress delegated to the individual states in 47 U.S.C. § 214(e) the authority to determine whether an applicant was qualified to be an ETC. The FCC noted in particular its belief that Section 214(e)(2) "demonstrates Congress' intent that state commissions evaluate local factual situations in ETC cases and exercise discretion in reaching their conclusions regarding the public interest, convenience and necessity... [S]tate commissions, as the entities most familiar with the service area for which the ETC designation is sought, are particularly well-equipped to determine their own ETC eligibility requirements."¹⁷

This Commission is clearly the governmental entity best poised to evaluate Verizon Wireless' conduct in South Dakota, as well as what is and is not permissible under the ETC designations it provided to RCC and WWC, particularly since Verizon Wireless has never been

¹⁶ *Minnesota PUC Order at p. 1.*

¹⁷ *See In the Matter of Federal-State Joint Board on Universal Service*, 20 FCC Rcd. 6371, 6396, ¶ 61 (2005).

designated by this Commission as eligible for universal service support and Verizon Wireless has been providing service in South Dakota for years without any high-cost funding. This Commission is also the governmental entity best poised to answer the question of whether it is in the public interest for high-cost funding to be reduced for other CETCs in the State of South Dakota and to leave South Dakota permanently.

Conclusion

For the reasons set forth above, James Valley Wireless urges the Commission to deny the Motion to Strike filed by Verizon Wireless.

Dated this 28th day of April 2011.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of **James Valley Wireless, LLC's Opposition to Verizon Wireless' Motion to Strike Testimony of Witness Peter Bluhm** was served electronically on the 28th day of April 2011 upon the following:

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