

**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	)	TC10-090
AMEND AND CONSOLIDATE ELIGIBLE	)	
TELECOMMUNICATIONS CARRIER	)	
DESIGNATIONS IN THE STATE OF	)	
SOUTH DAKOTA AND TO PARTIALLY	)	
RELINQUISH ETC DESIGNATION	)	

**REPLY BRIEF IN SUPPORT OF MOTION TO STRIKE TESTIMONY OF WITNESS  
PETER BLUHM**

Cellco Partnership d/b/a Verizon Wireless (“Cellco”), on behalf of itself and its subsidiaries and affiliates offering commercial mobile radio services (“CMRS”) in the State of South Dakota (collectively, “Petitioners”) have moved to strike selected testimony proffered by Peter Bluhm on behalf of intervenor James Valley Wireless, LLC (“James Valley Wireless”). James Valley Wireless’ Opposition to Petitioners’ Motion to Strike (“Opposition”) provides no compelling reason why Petitioners’ motion to strike should not be granted. Indeed, the Opposition spends no time discussing the specific Bluhm testimony that is the subject of the motion to dismiss; instead, James Valley Wireless’ has used the Opposition to improperly present argument, before hearing, on the merits. Moreover, the Opposition clearly demonstrates that the entire point of James Valley Wireless’ intervention in this docket is to seek its own affirmative relief, even though James Valley Wireless has not filed a complaint. Petitioners’ motion to strike should be granted.

**I. JAMES VALLEY WIRELESS DOES NOT DISPUTE THAT THE COMMISSION MUST STRIKE IRRELEVANT EVIDENCE**

A motion to strike, such as that brought by Petitioners, is relatively uncommon in proceedings before the Commission. But, there is no dispute between the Petitioners and James

Valley Wireless that if the Commission determines that the objected-to portions of the Bluhm testimony are “irrelevant, incompetent, immaterial, or unduly repetitious,” they “shall be excluded.” SDCL 1-26-19; Opposition at 3.

Petitioners have identified the specific passages of Bluhm’s testimony that are irrelevant, incompetent, and immaterial. Brief in Support of Motion to Strike Testimony of Witness Peter Bluhm (“Brief”) at 11-14. Petitioners have explained why this testimony is irrelevant, incompetent, and immaterial: (1) it relates to issues other than those presented in the Petition; (2) it seeks affirmative relief on behalf of James Valley Wireless, even though James Valley Wireless gave no suggestion when it intervened that it opposed the Petition; and (3) it recommends that the Commission take actions, such as retroactively revoking the WWC License, LLC (“WWC”) and RCC Minnesota, Inc. (“RCC”) ETC designations and requiring USAC to withhold universal service funding from Petitioner, that the Commission cannot lawfully take. Brief at 4-11. Upon a Commission determination that the objected-to testimony is irrelevant, incompetent, and immaterial, it should be stricken before hearing.

**II. JAMES VALLEY WIRELESS’ “PUBLIC INTEREST” AND “QUALIFICATIONS” JUSTIFICATIONS ARE INADEQUATE**

In response to Petitioners’ motion to strike, James Valley Wireless generally argues that the objected-to portions of the Bluhm testimony relate to the public interest standard for designating an ETC set forth in 47 U.S.C. § 214(e)(2). Opposition at 4. This is incorrect. The Commission has adopted a rule that sets forth the public interest standard. A.R.S.D. § 20:10:32:43.07. The Commission’s rule identified increased consumer choice, the impact on the universal service fund, the advantages and disadvantages of the ETC’s service offerings, commitments made regarding service quality, the ETC’s ability to provide the supported services throughout the designated area, and the possibility of detrimental effects on the provisioning of

universal service by the incumbent local exchange carrier as the factors to be considered in making the public interest determination. But, the objected-to passages of the Bluhm testimony do not relate to these issues at all. James Valley Wireless' justification of the Bluhm testimony as relating to the public interest standard therefore rings hollow, and should be rejected.

As part of its efforts to incorrectly expand the scope of the "public interest" standard, James Valley Wireless asserts that it is appropriate to present evidence relating to Petitioner' "qualifications." Opposition at 5. The Commission's rules relating to ETC designation do not speak of ETC "qualifications" – they instead focus on "requirements," *i.e.*, technical capabilities, such as the requirement to be a common carrier, the requirement to provide the nine "Supported Services," etc. James Valley Wireless' attempt to distort the public interest standard so as to include alleged "qualifications" such as candor should be rejected. Similarly, James Valley Wireless' efforts to introduce evidence about other issues that are irrelevant to ETC designation and compliance, such as line count reporting and the impact on other competitive ETCs' receipt of universal service funding, as "qualifications" or as part of the "public interest" standard should be rejected.

### **III. JAMES VALLEY WIRELESS CANNOT BE PERMITTED TO MAKE RECOMMENDATIONS FOR AFFIRMATIVE RELIEF AGAINST PETITIONERS**

Petitioners have already described how James Valley Wireless never indicated, at the time of its intervention, that it would be pursuing its own affirmative relief in this docket. Brief at 4. In its Opposition, James Valley Wireless provides no meaningful justification for why it is entitled to have a witness make "recommendations" for "remedies" against Petitioners, even though James Valley Wireless has never filed a complaint or petition seeking relief.

The Commission's rules contemplate that if an entity wants relief from the Commission, it must file a complaint, after which specific procedures must be followed. Specifically, the

Commission's rules define an "Applicant" or "petitioner" as "a party seeking approval, authority, or other relief." A.R.S.D. 20:10:01:01.01. This rule thus contemplates that to seek affirmative relief, an entity must file a petition or complaint. James Valley Wireless has not filed a complaint seeking affirmative relief against Petitioners, yet James Valley Wireless is trying to hijack this proceeding and use it to collaterally attack Petitioners on issues that are already pending before other tribunals. Indeed, the Opposition itself admits that the Bluhm testimony "makes recommendations as to...appropriate remedies." Opposition at 7. If James Valley Wireless has somehow been harmed by the Petitioners, it has the opportunity to bring its own complaint.<sup>1</sup> Because James Valley Wireless has not done so, the Commission should find that James Valley Wireless' requests for affirmative relief, embodied in the Bluhm testimony, are not properly before the Commission and therefore the Bluhm testimony stating and supporting those requests should be stricken.

**IV. JAMES VALLEY WIRELESS HAS IMPROPERLY USED THE OPPOSITION TO INTRODUCE ARGUMENT ON THE MERITS**

James Valley Wireless' Opposition does not attempt to make a point-by-point rebuttal to Petitioners' identification of the testimony to be stricken. Rather, it appears that James Valley has tried to use its Opposition as a "Trojan Horse" in which it improperly, in advance of the hearing, presents James Valley Wireless' arguments about the merits of the Petition. For example, James Valley Wireless describes proceedings in Minnesota and Georgia which are not

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<sup>1</sup> James Valley Wireless' misrepresentation of the Order of the Georgia Public Service Commission ("PSC") is telling in this regard. Opposition at 6. The Georgia PSC Order referred to was the result of a petition for declaratory relief filed by competitive ETCs in Georgia. Although Petitioners do not entirely agree with the Georgia PSC's decision in that case, it was at least procedurally appropriate for the Georgia PSC to issue that Order. Here, in contrast, no such petition has been filed by James Valley Wireless, and thus the type of relief issued in Georgia is not properly available in this proceeding.

even discussed in Bluhm's testimony.<sup>2</sup> Opposition at 5-6. This is improper – the Opposition should not be used as a vehicle to introduce information to the Commission before the hearing takes place.

Similarly, other passages of the James Valley Wireless Opposition contain wild and speculative allegations directed toward the Petitioner, even though no evidence has come into the record yet, as well as legal arguments that would be more appropriate in a post-trial brief. Opposition at 2-3, 5-6 (allegations of lack of candor); 10 (allegation that WWC has no assets in South Dakota, which is misleading because WWC obviously has use of Verizon Wireless' assets); 11 (argument about scope of authority under 47 U.S.C. § 214(e)(2)). The Commission should reject James Valley Wireless' attempt, under the guise of an argument in response to Petitioners' motion to strike, to pre-argue the merits of the case.

**V. JAMES VALLEY WIRELESS DISTORTS THE NATURE OF THE RELIEF SOUGHT IN THE PETITION**

James Valley Wireless suggests that the Petition failed to disclose certain issues, and therefore it is appropriate for Bluhm to discuss them in his testimony. Opposition at 2-3. But, the issues identified by James Valley Wireless are not relevant to the relief sought in the Petition.

The Petition seeks to amend and consolidate the ETC designations currently held separately in the name of WWC and RCC to reflect Cellco and its subsidiaries and affiliates as the designated entity. This relief is simple and limited in scope: it is intended to clarify to the Commission and to the public that the ETC obligations and requirements applicable to WWC and RCC continue to be satisfied by the collective Verizon Wireless operations in South Dakota. This will continue to be the case so long as WWC and RCC remain ETCs, whether or not the Petition is granted. The point of the Petition is to make a public record of, and minimize

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<sup>2</sup> James Valley Wireless' reference to the Minnesota Public Utilities Commission's recent Order (Opposition at 5) is misplaced, as the MPUC did not rule on the merits – it did “not reach the substance of Verizon's request.” See Exhibit 1 to Opposition, at 1.

confusion about, that reality. The Petition does not seek a new ETC designation, or the transfer of an ETC designation from one entity to another.

James Valley Wireless improperly attempts to distort the simple and narrow *pro forma* relief sought in the Petition. The most egregious aspect of James Valley Wireless' misunderstanding of the Petition is its assertion that the Petitioners have not been candid with the Commission. Opposition at 2-3, 5-6. This assertion is absolutely untrue. Much of the information that James Valley Wireless alleges was not disclosed in the Petition was publicly available information when the Petition was filed. Petitioners have consistently disclosed all required information about their receipt and use of support to the Commission through the annual report and certification process. Indeed, the Commission's 2010 certification of WWC's and RCC's use of support was made after the Petition was filed – thus, the Commission was apprised of the divestiture and other issues addressed in the Petition in advance of the certification.

The reason why the information identified on pp. 2-3 of the Opposition was not addressed at length, or at all, in the Petition is because that information is not relevant to the Petition. The fact that James Valley Wireless and Bluhm seek to focus on this information demonstrates that they are misconstruing the nature of the Petition. Bluhm's testimony on allegedly "undisclosed" information is irrelevant and should be stricken.

A similar analysis governs other issues James Valley Wireless (and its witness, Bluhm) seek to focus on – line count reports submitted to USAC, the effect of granting the Petition on James Valley Wireless' receipt of support, and "remedies" that should allegedly be imposed on Petitioners. All of these issues are outside the scope of the relief sought in the Petition. The public interest analysis that James Valley Wireless allegedly wants to engage in was already conducted when WWC and RCC were originally designated as ETCs. The alleged line count reporting problems, and the effect of granting the Petition on James Valley Wireless, are not

relevant to whether WWC and RCC, as part of the Verizon Wireless affiliates and subsidiaries providing service in South Dakota, are capable of continuing to satisfy the ETC obligations. Therefore, the passages of Bluhm's testimony that relate to these issues (identified in detail in Petitioners' Brief) should be stricken.

**VI. THE COMMISSION SHOULD NOT ALLOW TESTIMONY THAT FAILS TO RECOGNIZE THE LIMITATIONS ON THE COMMISSION'S LEGAL AUTHORITY**

The Petitioners have already explained how much of Bluhm's testimony is dedicated to recommending that the Commission take actions that are outside its legal authority, such as (1) determining that the RCC and WWC ETC designations "expired" in 2008 and 2009 (Bluhm 4:1-4); (2) determine that "the FCC's decisions about how Cellco's phased-down funding should be redistributed are...inapplicable to South Dakota" (Bluhm 4:11-12); (3) "require USAC to have Cellco refund past overpayments of CETC support" (Bluhm 4:17); and (4) analyzing and making recommendations about line count reports submitted by WWC and RCC. Brief at 9-13.

James Valley Wireless offers only two responses to Petitioners' arguments about the scope of the Commission's authority: it suggests that the Commission's authority under 47 U.S.C. § 214(e) somehow includes the authority to retroactively revoke an ETC designation; and it makes the bald assertion that the Commission is the entity "best poised" to make decisions about universal service funding for South Dakota. Opposition at 11-12. Neither of these arguments can be the basis for allowing Bluhm's testimony about unlawful "recommendations" to be admitted into the record.

It is of course true that the Commission's statutory authority concerning a federal ETC is derived from 47 U.S.C. § 214(e). But that does not mean that the Commission has untrammelled authority to take any action it wants relating to an ETC. Rather, the Commission's decisions relating to ETCs must be consistent with Section 214(e) and with its own rules. Nothing in

Section 214(e) or in the Commission's rules allows retroactive revocation, or empowers the Commission to override USAC or FCC decisions. And the Commission's own rule relating to ETC revocation, A.R.S.D. 20:10:32:49, does not contain anything that allows retroactive revocation. The Commission's authority under Section 214(e) to determine, in an initial ETC designation, whether an applicant satisfies the applicable requirements, is not the same as authority to determine that an existing ETC designation can be retroactively revoked.

James Valley Wireless provides no legal citation for its second argument, that the Commission is the entity "best poised" to make decisions about the provision of federal universal service support to South Dakota. This is because the argument is contrary to law and common sense. It is elementary that the Commission cannot override the FCC's universal service support decisions. Similarly, the Commission cannot make determinations about line count reports that are made to USAC and pursuant to the FCC's authority. By striking the objected-to portions of the Bluhm testimony, the Commission will make clear that it will adhere to the law, rather than caving in to James Valley Wireless' request that it defy the FCC.

## **VII. CONCLUSION**

James Valley Wireless' Opposition provides no meritorious reason why the objected-to passages of the Bluhm testimony should not be stricken. Instead, it improperly injects argument about issues that aren't even in Bluhm's testimony into the proceeding. Moreover, through Bluhm's testimony, James Valley Wireless improperly seeks affirmative relief that is contrary to the Commission's rules and is outside the scope of the Commission's authority. The Commission should exercise authority as a gatekeeper over its proceedings now; otherwise James Valley Wireless will use the upcoming hearing as a vehicle to waste the Commission's time with unsupported arguments relating to relief that cannot be granted. The identified passages of the Bluhm testimony should be stricken before hearing.



Respectfully submitted,

GUNDERSON, PALMER, NELSON &  
ASHMORE, LLP

Dated: May 1, 2011

By \_\_\_\_\_

Talbot J. Wieczorek

Assurant Building  
440 Mt. Rushmore Road  
P.O. Box 8045  
Rapid City, SD 57709-8045  
Telephone: (605) 342-1078  
Facsimile: (605) 342-0480

Mark J. Ayotte (MN # 166315)  
Matthew A. Slaven (MN #288226)  
Andrew M. Carlson (MN #284828)  
BRIGGS AND MORGAN, P.A.  
2200 IDS Center  
80 South Eighth Street  
Minneapolis, MN 55402-2157  
Telephone: (612) 977-8400  
Fax: (612) 977-8650  
mayotte@briggs.com  
mslaven@briggs.com  
acarlson@briggs.com

*COUNSEL FOR CELLCO PARTNERSHIP  
D/B/A VERIZON WIRELESS AND ITS  
SUBSIDIARIES AND AFFILIATES*

## CERTIFICATE OF SERVICE

THE UNDERSIGNED CERTIFIES THAT ON THE 2ND DAY OF MAY, 2011, I SERVED A TRUE AND CORRECT COPY OF CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS'S **REPLY BRIEF IN SUPPORT OF MOTION TO STRIKE TESTIMONY OF WITNESS PETER BLUHM** IN THE ABOVE-ENTITLED MATTER, VIA ELECTRONIC MAIL TO:

KARA SEMMLER  
STAFF ATTORNEY  
SDPUC  
500 EAST CAPITOL  
PIERRE SD 57501  
[karen.cremer@state.sd.us](mailto:karen.cremer@state.sd.us)

BRIAN ROUNDS  
STAFF ANALYST  
SDPUC  
500 EAST CAPITOL  
PIERRE SD 57501  
[brian.rounds@state.sd.us](mailto:brian.rounds@state.sd.us)

DARLA POLLMAN ROGERS  
ATTORNEY AT LAW  
RITER ROGERS WATTIER & NORTHRUP LLP  
PO BOX 280  
PIERRE SD 57501-0280  
[dprogers@riterlaw.com](mailto:dprogers@riterlaw.com)

MARGO D NORTHRUP  
ATTORNEY AT LAW  
RITER ROGERS WATTIER & NORTHRUP LLP  
PO BOX 280  
PIERRE SD 57501-0280  
[m.northrup@riterlaw.com](mailto:m.northrup@riterlaw.com)

JAMES M. CREMER  
ATTORNEY AT LAW  
BANTZ GOSCH & CREMER LLC  
PO BOX 970  
ABERDEEN SD 57402-0970  
[jcremer@bantzlzlaw.com](mailto:jcremer@bantzlzlaw.com)

RICHARD D. COIT  
SDTA  
PO BOX 57  
PIERRE SD 57501  
[richcoit@sdtaonline.com](mailto:richcoit@sdtaonline.com)

TODD B LANTOR  
ATTORNEY AT LAW  
LUKAS NACEGUTIERREZ & SACHS LLP  
8300 GREENSBORO DRIVE STE 1200  
MCLEAN VA 22102-3663  
[tlantor@fcclaw.com](mailto:tlantor@fcclaw.com)

DAVID A LAFURIA  
ATTORNEY AT LAW  
LUKAS NACEGUTIERREZ & SACHS LLP  
8300 GREENSBORO DRIVE STE 1200  
MCLEAN VA 22102-3663  
[dlafuria@fcclaw.com](mailto:dlafuria@fcclaw.com)



Talbot J. Wiczorek