

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

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**IN THE MATTER OF THE  
APPLICATION OF BOOMERANG  
WIRELESS LLC DBA ENTOUCH  
WIRELESS FOR DESIGNATION AS  
AN ELIGIBLE  
TELECOMMUNICATIONS CARRIER  
IN CERTAIN EXCHANGES WITHIN  
THE STATE OF SOUTH DAKOTA**

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**MOTION TO DISMISS  
TC15-002**

COMES NOW, Staff (Staff) of the South Dakota Public Utilities Commission (Commission) and hereby files this Motion to Dismiss. Staff moves the Commission for an order dismissing the Application of Boomerang Wireless LLC dba enTouch Wireless for Designation as an Eligible Telecommunications Carrier in Certain Exchanges within the State of South Dakota (Application) for failure to state a claim upon which relief can be granted, pursuant to SDCL 15-6-12(b)(5).

**I. Background**

On January 22, 2015, the Commission received a filing from of Boomerang Wireless LLC dba enTouch Wireless (Boomerang) requesting designation as an eligible telecommunications carrier (ETC) in rural areas of South Dakota.<sup>1</sup> South Dakota Telecommunications Association was granted intervention in this docket on February 19, 2015. Boomerang filed an Amended Application on July 15, 2016. Boomerang is a common carrier and reseller of wireless services.<sup>2</sup> In paragraph 46 of its Amended Application, Boomerang stated that it would supplement its application prior to December 1, 2016, to update its lifeline

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<sup>1</sup> Boomerang received designation for non-rural areas in Docket No. TC13-035 on April 28, 2017

<sup>2</sup> See paragraph 9 of Amended Application

plans consistent with the FCC's 2016 Lifeline Order. Such supplement has not been filed in this docket.

In November 2017, the Federal Communications Commission (FCC) announced changes in the Lifeline program to “encourage facilities-based Lifeline service and improve program management to benefit customers.”<sup>3</sup> This action by the FCC creates additional questions as to whether or not Boomerang could function as an ETC in rural areas of South Dakota.

## **II. Legal Analysis**

A motion to dismiss for failure to state a claim tests the legal sufficiency of the pleading, not the facts which support it. *Nygaard v. Sioux Valley Hospitals & Health System*, 2007 SD 34, ¶9 731 NW2d 184. “In determining whether to grant a motion under SDCL 15-6-12(b)(5), the [Commission] considers the complaint’s allegations and any exhibits which are attached and accepts the pleader’s description of what happened along with any conclusions which may reasonably be drawn therefrom.” *Eide v. E.I. Du Pont De Nemours & Co.*, 1996 SD 11, ¶8, 542 NW2d 769, 771 (quoting *Schlosser v. Norwest Bank N.A.*, 506 N.W.2d 416, 418 (S.D.1993).

Because neither the Application nor the Amended Application propose to offer lifeline plans consistent with the current mandates of the FCC, even if the Commission were to grant Boomerang’s request for designation, Boomerang would not be able to offer the plans it seeks to offer, as they have since become obsolete and out of compliance with FCC requirements in the FCC’s 2016 Lifeline Order. Therefore, the Commission is unable to grant Boomerang the relief it requests – ETC designation in rural areas – based upon the Applications in this docket. Even if the Commission were to assume as true Boomerang’s ability to deliver on all of the commitments it makes in the Applications, ETC status could not be granted.


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<sup>3</sup> See FCC News Release, dated November 16, 2017 ([https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-347792A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-347792A1.pdf))

### III. Conclusion

While Staff stands ready and willing to work with Boomerang and any other interested party on this issue, the pending docket and the information therein is simply too stale to utilize. If Boomerang desires to pursue ETC status in rural areas, a new application would be appropriate. Thus, Staff requests Boomerang's Application for designation as an ETC in rural exchanges be dismissed without prejudice.

Dated this 2nd day of March 2018.

  
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Kristen N. Edwards  
Staff Attorney  
South Dakota Public Utilities Commission  
500 East Capitol Avenue  
Pierre, SD 57501  
Phone (605)773-3201  
[Kristen.edwards@state.sd.us](mailto:Kristen.edwards@state.sd.us)