

TC98-111

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DJ-Comm 6/60

TC98-111

DOCKET NO.

In the Matter of — IN THE MATTER OF THE FILING BY  
 — DAKOTA TELECOM, INC. FOR  
 — DESIGNATION AS AN ELIGIBLE  
 — TELECOMMUNICATIONS CARRIER

## Public Utilities Commission of the State of South Dakota

DATE	MEMORANDA
6/4 98	Filed and docketed;
6/4 98	TC Log Filing;
6/10 98	Petition signed by Kathleen A. Harnett (Respondent Petition signed by William P. Hanson);
6/18 98	Petition for Intervention and Initial Comments by Earl Rensell Tele. Co.;
6/19 98	Petition to Intervene by SDITC;
6/29 98	Notice for Admission by Resident Practicing Attorney (William P. Hanson);
8/5 98	Order Granting Intervention;
8/7 98	Order for and Notice of Hearing;
8/20 98	Published Testimony of Thomas A. Hertz;
8/20 98	Notice of Appearance of Counsel (Carole E. Anderson) DTIC;
9/3 98	Published Direct Testimony of Bruce C. Hanson;
9/3 98	Re-Hearing Brief;
9/3 98	Notice that Nonresident Attorney he admitted (see Doc. No. 10);
9/3 98	Order Granting that Nonresident Attorney be admitted (see Doc. No. 10);
9/4 98	Notice for Judicial Notice;
9/8 98	Staff Resistance to Motion for Judicial Notice;
9/17 98	Transcript of Hearing held on 9/14/98;
10/2 98	Initial Brief of DTIC;
10/19 98	Reply Brief of SDITC;
10/26 98	Rebuttal Brief of DTIC;
12/11 98	Order Denying Request for ETC Reconsideration; Notice of Entry of Order;
12/11 98	Docket Closed



DAKOTA TELECOM, INC.

P.O. BOX 127  
IRENE, SOUTH DAKOTA 57037  
(605) 263-3921  
SD WATS 800-952-0004  
MN AND IA WATS 800-239-7501

TC 98-111

June 3, 1998

RECEIVED

JUN 04 1998

SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION

William Bullard, Jr.  
Executive Director  
South Dakota Public Utilities Commission  
500 East Capitol  
Pierre, SD 57501

Re: Petition of Dakota Telecom, Inc. for Designation as an Eligible  
Telecommunications Company

Dear Mr. Bullard:

Enclosed for filing are an original and ten copies of the Petition of Dakota  
Telecom, Inc. for Designation as an Eligible Telecommunications  
Company. Dakota Telecom, Inc. requests expedited processing of this  
Petition.

Thank you for your attention to this matter.

Sincerely,

Kathleen Armstrong Marmet  
Attorney  
Dakota Telecom, Inc.

Enclosure: Original and 10 copies



TC98-111

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

**IN THE MATTER OF THE REQUEST )  
BY DAKOTA TELECOM, INC. FOR )  
DETERMINATION OF ELIGIBLE )  
TELECOMMUNICATIONS CARRIER )  
STATUS PURSUANT TO 47 USC 214 )**

Docket TC98-

**RECEIVED**

JUN 04 1998

SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION

COME NOW DAKOTA TELECOM, INC. ("DTI") and Petitions the South Dakota Public Utilities Commission ("the Commission") as follows:

1. By this filing, DTI is requesting that the Commission designate DTI as an Eligible Telecommunications Company, as that term is used in 47 USC 214 (c) (1), for the following South Dakota exchanges:

Centerville (552) and Viborg (766).

2. DTI offers the following services throughout these territories using its own facilities and will continue to offer all services that are supported by Federal universal service support mechanisms, as supplemented by State regulations under section 254 (f) of the Telecommunications Act, as amended. ("the Federal Act"):

- 1) voice grade access to the public switched network throughout the Centerville and Viborg exchanges which meets or exceeds standard telephone audio bandwidth.
- 2) local usage, which means that a customer receives unlimited local calling services for a monthly base rate
- 3) dual tone multi-frequency signaling throughout the Centerville and Viborg Exchanges
- 4) single party service for all customers throughout the Centerville and Viborg exchanges
- 5) access to emergency services, with 911 services currently provided, and capacity to support enhanced 911 services when Turner County implements enhanced 911 systems for the Centerville and Viborg exchanges
- 6) access to operator services which provide assistance to consumers in the Centerville and Viborg exchanges to arrange for billing or completion, or both, of a telephone call
- 7) access to interexchange service
- 8) access to directory assistance which enables customers in the Centerville and Viborg exchanges to request information contained in directory listings

- 9) toll blocking for qualifying low-income consumers.
3. DTI makes Lifeline and Link Up programs available to qualifying low-income consumers throughout the Centerville and Viborg exchanges consistent with state and federal rules and orders.
4. To provide these services in these exchanges, DTI uses facilities which it either owns or leases. DTI has advertised, and will continue to advertise the availability of its services and the rates for the services using media of general distribution in the area served by the Centerville and Viborg exchanges.
5. DTI's rates for services that are supported by Federal universal service support mechanisms are below those previously charged by US West Communications, Inc. prior to selling the Centerville and Viborg Exchanges to Fort Randall Telephone Company.
6. DTI further requests that the Commission designate the area served by the Centerville and Viborg exchanges as a "service area" for DTI as that term is defined in 47 USC 214 (e) (5).
7. Designation of the Centerville and Viborg exchanges as a "service area" is in the public interest and consistent with criteria recommended by the FCC<sup>1</sup>, because these exchanges are a contiguous area, and are not contiguous with any other part of the current Fort Randall Telephone Company's or any other telecommunications carrier's, service or study area.
8. Fort Randall Telephone Company is currently designated as an Eligible Telecommunications Company in the Centerville and Viborg exchanges. Designation of DTI as a second eligible

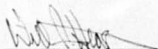
<sup>1</sup> FCC 97-137, CC Docket No. 96-43 Report & Order In the Matter of Federal-State Joint Board on Universal Service, released 3/3/97, amended 6/4/97, 1199. We also conclude, based on additional information presented to us in response to the Recommended Decision, that universal service policy objectives may be best served if a state defines rural service areas to consist only of the contiguous portion of a rural study area, rather than the entire rural study area. We conclude that requiring a carrier to serve a non-contiguous service area as a prerequisite to eligibility might impose a serious barrier to entry, particularly for wireless carriers (493). We find that imposing additional burdens on wireless entrants would be particularly harmful to competition in rural areas, where wireless carriers could potentially offer service at much lower costs than traditional wireline service (494). Therefore, we encourage states to determine whether rural service areas should consist of only the contiguous portions of an ILEC's study area, and to submit such a determination to the Commission according to the procedures we describe above. We note that state commissions must make a special finding that the designation is in the public interest in order to designate more than one eligible carrier in a rural service area (495) and we anticipate that state commissions will be able to consider the issue of contiguous service areas as they make such special findings.

telecommunications carrier in these exchanges is in the public interest. Eligible Telecommunications Company status will enable DTI to compete on an equal basis with Fort Randall Telephone Company, improving the ability of DTI to offer services supported by Universal Service Fund Support at competitive prices.

WHEREFORE, DTI respectfully requests that this Commission designate DTI as an Eligible Telecommunications Carrier in the service area defined by the Centerville and Viborg exchanges as set forth above.

Dated this 25<sup>th</sup> day of June, 1998.

Dakota Telecom, Inc.



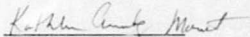
William P. Heaston, General Counsel  
Kathleen A. Marmet, Attorney  
PO Box 66  
Irene, SD 57037  
(605) 263-3301 Phone  
(605) 263-3995 Fax

CERTIFICATE OF SERVICE

I, Kathleen Armstrong Marmet, hereby certify that on the 3<sup>rd</sup> day of June, 1998, I mailed by United States mail, first class postage prepaid, one original and ten true and correct copies of the Petition of Dakota Telecom. Inc. for Designation as an Eligible Telecommunications Company to:

William Bullard, Jr.  
Executive Director  
South Dakota Public Utilities Commission  
500 East Capitol  
Pierre, SD 57501

Dated this 3rd day of June, 1998.

  
Kathleen Armstrong Marmet

TC98-111	Dakota Telecom, Inc. is requesting that the Commission designate it as an Eligible Telecommunications Company, as that term is used in 47 USC 214(e)(1), for the following South Dakota exchanges: Centerville (552) and Viborg (766). Fort Randall Telephone Company is currently designated as an Eligible Telecommunications Company in the Centerville and Viborg exchanges. (Staff: HB/C4)	06/04/98	06/19/98
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PAGE 2 OF 2

South Dakota Public Utilities Commission State Capitol 500 E. Capitol Pierre, SD 57501-5070 Phone: (605) 773-3705 Fax: (605) 773-3809		<h2 style="text-align: center;">TELECOMMUNICATIONS SERVICE FILINGS</h2> <p style="text-align: center;">These are the telecommunications service filings that the Commission has received for the period of:</p> <h1 style="text-align: center;">05/29/98 through 06/04/98</h1> <p style="text-align: center;">If you need a complete copy of a filing filed, overnight expressed, or mailed to you, please contact Delaine Kolbo within five days of this filing.</p>	
DOCKET NUMBER	TITLE/STAFF/SYNOPSIS	DATE FILED	INTERVENTION DEADLINE
<b>REQUEST FOR PUBLIC COMMENTS</b>			
TC98-109	<p>At its April 22, 1998, regularly scheduled meeting, the Public Utilities Commission (Commission) voted to open a docket concerning the Federal Communications Commission's (FCC) Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996 Report and Order (Report and Order) of September 20, 1996, which required the Commission to establish a policy on public interest payphones by September 20, 1998. The FCC concluded that the primary responsibility for administering and funding of public interest payphone programs should be left to the states. The FCC's definition of a "public interest telephone" is a payphone which (1) fulfills a public policy objective in health, safety, or public welfare, (2) is not provided for a location provider with an existing contract for the provision of a payphone, and (3) would not otherwise exist as a result of the operation of the competitive marketplace. Report and Order, FCC 96-388, ¶ 282. To initiate this procedure, the Commission is requesting written comments from telecommunications companies and other interested persons and entities on whether the Commission needs to take any measures to ensure that payphones serving important public interests will continue to exist in light of the elimination of subsidies and other competitive provisions established pursuant to Section 276 of the 1996 Act. Written comments shall be filed with the Commission on or before June 19, 1998. Following the filing of comments, the Commission will determine what action, if any, needs to be taken. (Staff: HB/KC)</p>	Opened 06/01/98	Comments By 06/19/98
<b>REQUEST FOR CERTIFICATE OF AUTHORITY</b>			
TC98-110	<p>Application by Net2000 Group, Inc. for a Certificate of Authority to operate as a telecommunications company within the state of South Dakota. (Staff: TS/EM) "Net2000 proposes to offer a full range of 1+ interexchange services, including, but not limited to, MTS, private line, WATS, calling card, prepaid calling card, toll free, ISDN, and frame relay service products."</p>	06/01/98	06/19/98
<b>NONCOMPETITIVE TELECOMMUNICATIONS FILINGS</b>			
TC98-090	<p>In The Matter Of The Establishment Of Switched Access Rates For The Local Exchange Carrier Association (LECA) (Staff: HB/KC) On behalf of its member companies, LECA submitted revised tariff pages implementing the cost study revenue requirement that was filed by each member company. This revision includes the revenue requirements of Beresford Municipal Telephone Company, Union Telephone Company, Baltic Telecom Cooperative and Golden West Telecom Cooperative.</p>	05/29/98	06/19/98
<b>REQUEST FOR ELIGIBLE TELECOMMUNICATIONS COMPANY STATUS</b>			

PAGE 1 OF 2



TC 98-111

June 8, 1998

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JUN 10 1998

SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION

Tradition

Technology

Talent

Teamwork

William Bullard, Jr.  
Executive Director  
South Dakota Public Utilities Commission  
500 East Capitol  
Pierre, SD 57501

Re: Petition of Dakota Telecom, Inc. for Designation as an Eligible  
Telecommunications Company

Dear Mr. Bullard:

Enclosed for filing are an original and ten copies of the Petition of Dakota  
Telecom, Inc. for Designation as an Eligible Telecommunications  
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Petition.

Thank you for your attention to this matter.

Sincerely,

Kathleen Armstrong Marmet  
Attorney  
Dakota Telecom, Inc.

Enclosure: Original and 10 copies

*This replaces  
the first filing  
which was  
signed by Bill  
Heston as  
Dakota Telecom  
Attorney*

HEADQUARTERS

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29705 43rd Avenue  
Bismarck, South Dakota  
58103-0066

605.263.3301  
800.239.7501  
Fax 605.263.3991

www.dtg.com

LAW OFFICES  
**MOSS & BARNETT**

A PROFESSIONAL ASSOCIATION

4800 NORTHWEST CENTER  
90 SOUTH SEVENTH STREET  
MINNEAPOLIS, MINNESOTA 55402-4129

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WINTER'S CREDIT CARD NUMBER

347-0337

WINTER'S E-MAIL ADDRESS  
BradleyM@moos-barnett.com

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MICHAEL J. COLE  
PATRICK P. BLANDY  
WALTER A. HIGDON

June 17, 1998

William Bullard  
Executive Director  
South Dakota Public Utilities Commission  
State of South Dakota  
500 East Capitol  
Pierre, South Dakota 57501

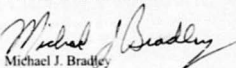
Re: In the Matter of the Request by Dakota Telecom, Inc. for Determination of  
Eligible Telecommunications Carrier Status Pursuant to 47 U.S.C. 214  
Docket No. TC98-111

Dear Mr. Bullard:

Enclosed please find an original and eleven copies of the Petition for Intervention and  
Initial Comments on behalf of Fort Randall Telephone Company. Also enclosed is a Certificate  
of Service.

Very truly yours,

MOSS & BARNETT  
A Professional Association

  
Michael J. Bradley

MJB/jjh  
Enclosures  
188865/1

RECEIVED  
JUN 16 1998  
SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION

MOSS & BARNETT  
1896  
A PROFESSIONAL ASSOCIATION

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

RECEIVED  
JUL 18 1998  
SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION

IN THE MATTER OF THE REQUEST	)	TC98-111
BY DAKOTA TELECOM, INC. FOR	)	
DETERMINATION OF ELIGIBLE	)	<b>PETITION FOR INTERVENTION</b>
TELECOMMUNICATIONS CARRIER	)	<b>AND INITIAL COMMENTS BY FORT</b>
STATUS PURSUANT TO 47 U.S.C. 214	)	<b>RANDALL TELEPHONE COMPANY</b>

Dakota Telecom, Inc. has filed a petition requesting that it be designated as an eligible telecommunications carrier ("ETC"), pursuant to 47 U.S.C. § 214(e), for the Centerville and Viborg exchanges. Fort Randall Telephone Company ("Fort Randall") is currently designated as an ETC for its entire study area, which includes the Centerville and Viborg exchanges.

Dakota Telecom, Inc. asserts that the request is appropriate in order to allow fair competition between itself and Fort Randall. To the contrary, granting the request would not foster fair competition. Consequently, Fort Randall petitions to intervene to explain that the burdens imposed on it as an ETC are significantly greater than would be imposed on Dakota Telecom, Inc. if its petition were granted.

Fort Randall is required to provide the services required to qualify as an ETC in all eight of the exchanges it serves. Further, the FCC requires Fort Randall to apply for universal service support based on its statewide operations. In fact, Fort Randall and its affiliate, Mt. Rushmore Telephone Co., are required to use the same study area, averaging their costs and entitlements for the entire area. Dakota Telecom, Inc. seeks an unfair advantage by attempting to qualify based on service to a small portion of that service area.

Dakota Telecom, Inc. has apparently elected this approach because of the economies it gains by being able to restrict its facilities to the two exchanges that are directly contiguous to its



local exchange switch. Under this approach, Fort Randall should have been allowed to request ETC status only for its Wagner and Tyndall exchanges (the exchanges are directly contiguous and Fort Randall operates a switch in Wagner).

Fort Randall is a Rural Telephone Company. 47 U.S.C. § 214(e) expressly recognizes that the standards imposed on a competitive local exchange carrier are greater in a Rural Telephone Company service area. Dakota Telecom, Inc. has intentionally elected not to satisfy those standards.

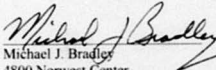
It is also premature to make an exception to the standards established by Section 214(e). The FCC and the Joint Board have yet to determine how universal service support will be determined and applied, particularly for Rural Telephone Companies. Any decision as important as how economic support will be distributed to support state-of-the-art telecommunications service in rural South Dakota should be based on a full understanding of the long-term consequences of such a decision.

Therefore, Fort Randall requests permission to intervene and provide the South Dakota Public Utilities Commission with the information needed to make a reasoned decision with respect to the Dakota Telecom, Inc. petition.

Dated: June 17, 1998

Respectfully submitted,

MOSS & BARNETT  
A Professional Association

A handwritten signature in cursive script, reading "Michael J. Bradley". The signature is written in dark ink and is positioned above the printed name and address.

Michael J. Bradley  
4800 Norwest Center  
90 S Seventh Street  
Minneapolis, Minnesota 55402  
Telephone: 612-347-0337

Attorneys on behalf of Fort Randall Telephone  
Company

Certificate of Service

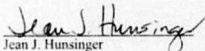
I hereby certify that an original and eleven copies of the above and foregoing Petition for Intervention and Initial Comments on behalf of Fort Randall Telephone Company were sent via Federal Express on the 17th day of June, 1998, to the following:

William Bullard  
Executive Director  
South Dakota Public Utilities Commission  
State of South Dakota  
500 East Capitol  
Pierre, South Dakota 57501

and a true and correct copy was sent by Federal Express to the following:

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

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

  
Jean J. Hunsinger

William P. Heaston  
Dakota Telecom, Inc.  
29705 453rd Avenue  
P O Box 66  
Irene, SD 57037

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

Richard D. Coit, Executive Director  
SDITC  
St. Charles Hotel  
207 E Capitol, Suite 206  
P O Box 57  
Pierre, SD 57501

# SDITC

South Dakota Independent  
Telephone Coalition, Inc.

Richard D. Coit  
Executive Director  
rcsditc@sd.cybernetx.net

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JUN 19 1998

SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION

June 17, 1998

Mr. Bill Bullard, Executive Director  
South Dakota Public Utilities Commission  
500 E. Capitol Avenue  
Pierre, SD 57501

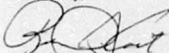
RE: TC98-111

Dear Bill:

Enclosed for filing you will find the original and ten copies of SDITC's Petition to Intervene in the above referenced docket.

Thank you for your assistance in this matter.

Sincerely,



Richard D. Coit  
Executive Director and General Counsel



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

RECEIVED

JUN 14 1998

SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION

IN THE MATTER OF THE REQUEST BY )  
DAKOTA TELECOM, INC FOR )  
DETERMINATION OF ELIGIBLE ) DOCKET TC98-111  
TELECOMMUNICATIONS COMPANY )  
STATUS PURSUANT TO 47 USC 214 )

**SDITC Petition to Intervene**

The South Dakota Independent Telephone Coalition ("SDITC") hereby petitions the Commission for intervention in the above captioned proceeding pursuant to SDCL 1-26-17.1 and ARSD §§ 20:10-01:15.02, 20:10-01:15.03 and 20:10-01:15.05. In support hereof, SDITC states as follows:

1. SDITC is an incorporated organization representing the interests of numerous cooperative, independent and municipal telephone companies operating throughout the State of South Dakota.

2. As expressly noted in the Bylaws of SDITC, duly adopted by the Coalition, "one of the primary purposes for the formation and existence of the South Dakota Independent Telephone Coalition is representation by the Coalition before the South Dakota Public Utilities Commission." The member companies of SDITC have delegated to the SDITC Board of Directors and its President the authority to intervene on their behalf in PUC proceedings which will or might potentially impact their common interests.

3. Dakota Telecom, Inc. ("Dakota") has filed a petition requesting that it be designated as an eligible telecommunications carrier ("ETC"), pursuant to 47 U.S.C. § 214(e), for the Centerville and Viborg exchange areas. Fort Randall Telephone Company ("Fort Randall"), an SDITC member company, has been designated by this Commission as an ETC for its current study area in South Dakota, which, in part, includes the Centerville and Viborg exchanges.

4. SDITC seeks intervention in this proceeding based on the interests of its member company Fort Randall and also based on the interests of its other member companies which will very likely be impacted by this proceeding. The petition filed herein by Dakota asks the Commission to designate Dakota as a second ETC for the Centerville and Viborg exchanges which would qualify the company for federal universal service support. The Dakota petition

raises certain issues that will require the Commission to interpret and apply the provisions of Section 214(e) of the Federal Telecommunications Act of 1996 and also the provisions of SDCL 49-31-78 which will come into effect on July 1, 1998. The issues raised concerning rural service areas and the designation of more than one ETC in a rural service area have not previously been addressed by this Commission in any other proceedings and, consequently, SDITC is concerned that any substantive or procedural decisions made herein could be precedent setting and affect later similar cases involving other SDITC members.

5. In regards to the petition filed by Dakota, SDITC concurs in the position stated in Fort Randall's petition to intervene also filed in this Docket. SDITC disagrees with the statements of Dakota alleging that granting its request for ETC designation for Centerville and Viborg would be in the public interest. Granting the request would give Dakota Telecom an unfair advantage in its competition with Fort Randall and we believe would also be contrary to the goals of preserving and advancing universal service. In addition, as Fort Randall has stated in its petition to intervene, it would be "premature to make an exception to the standards established by Section 214(e). The FCC and the Joint Board have yet to determine how universal service support will be determined and applied, particularly for Rural Telephone Companies. Any decision as important as how economic support will be distributed to support state-of-the-art telecommunications service in rural South Dakota should be based on a full understanding of the long-term consequences of such a decision."

6. Based on all of the foregoing, SDITC, as an authorized representative of its member companies, is an interested party to this proceeding and seeks intervening party status.

Dated this 17 day of June, 1998.

Respectfully submitted:

THE SOUTH DAKOTA INDEPENDENT  
TELEPHONE COALITION

By: 

Richard D. Coit  
Executive Director and General Counsel

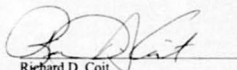
### CERTIFICATE OF SERVICE

I hereby certify that a copy of SDITC's Petition to Intervene was delivered by the United States Postal Service via First Class Mail on the 17<sup>th</sup> day of June, 1998, to the following persons:

William Bullard Jr.  
Executive Director  
South Dakota Public Utilities Commission  
State of South Dakota  
500 East Capitol Avenue  
Pierre, SD 57501

Kathleen A. Marmet  
Attorney for Dakota Cooperative  
Telecommunications, Inc.  
PO Box 66  
Irene, SD 57037-0066

Mike Bradley  
Moss & Barnett  
4800 Norwest Center  
90 South Seventh Street  
Minneapolis, MN 55402



Richard D. Coit  
Executive Director  
SDITC  
207 East Capitol Avenue, Suite 206  
Pierre, SD 57501



RECEIVED

JUN 29 1998

STATE OF SOUTH DAKOTA )  
COUNTY OF HUGHES )

IN CIRCUIT COURT  
SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION  
SIXTH JUDICIAL CIRCUIT

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE REQUEST BY )  
DAKOTA TELECOM, INC. FOR )  
DETERMINATION OF ELIGIBLE )  
TELECOMMUNICATIONS CARRIER )  
STATUS PURSUANT TO 47 USC 214 )

MOTION FOR ADMISSION BY  
RESIDENT PRACTICING ATTORNEY

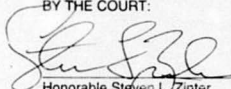
TC98-111

It is hereby

ORDERED that the Motion for Admission for William P. Heaston, a non-resident attorney, to appear on behalf of Dakota Telecommunications Group, Inc. and Dakota Telecom, Inc., before the Public Utilities Commission and this Court relating to this matter is granted.

Dated: 6/25, 1998.

BY THE COURT:



Honorable Steven L. Zinter  
Circuit Court Judge  
Sixth Judicial Circuit

ATTEST:

Mary L. Erickson  
Clerk of Courts

BY:

Deputy

(SEAL)

(State of South Dakota)  
County of Hughes ) ss

I hereby certify that the foregoing instrument is a true and correct copy of the original on file in my office.

Dated this 25 day of June 1998

MARY L. ERICKSON, Clerk of Court

By: Sharon McEntaffer  
Clerk of Court (Deputy)

STATE OF SOUTH DAKOTA  
SIXTH JUDICIAL CIRCUIT, HUGHES CO.

FILED

JUN 25 1998

Mary L. Erickson CLERK  
By: Sharon McEntaffer Deputy

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

IN THE MATTER OF THE FILING BY DAKOTA ) TELECOM, INC., FOR DESIGNATION AS AN ) ELIGIBLE TELECOMMUNICATIONS CARRIER )	ORDER GRANTING INTERVENTION TC98-111
--	--

On June 4, 1998, the South Dakota Public Utilities Commission (Commission) received a filing from Dakota Telecom, Inc. (Dakota) requesting that the Commission designate it as an Eligible Telecommunications Carrier pursuant to 47 U.S.C. § 214 (e) (1). Dakota seeks this designation for the following South Dakota exchanges: Centerville (552) and Viborg (766). Fort Randall Telephone Company (Fort Randall) is currently designated as an Eligible Telecommunications Carrier in the Centerville and Viborg exchanges.

The Commission has jurisdiction in this matter pursuant to SDCL Chapter 1-26, 49-13 and 49-31, specifically 49-31-1(1), 49-31-1.3(2), 49-31-3.1, 49-31-3.4, 49-31-7, 49-31-11, 49-31-12.4 and the Commission's Order in TC92-026.

Petitions to intervene have been received from parties on the respective dates as follows: Fort Randall, June 18, 1998 and the South Dakota Independent Telephone Coalition (SDITC), June 19, 1998.

On July 23, 1998, at a duly noticed meeting, the Commission found that the Petitions to Intervene were timely filed and demonstrated good cause to grant intervention. It is therefore

ORDERED that the Petitions to Intervene of Fort Randall and SDITC are granted.

Dated at Pierre, South Dakota, this 5<sup>th</sup> day of August, 1998.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.

By \_\_\_\_\_

Date: 8/6/98

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION

James A. Burg  
JAMES A. BURG, Chairman

Pam Nelson  
PAM NELSON, Commissioner

Laska Schoenfelder  
LASKA SCHOENFELDER, Commissioner

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

<b>IN THE MATTER OF THE FILING BY DAKOTA )</b>	<b>ORDER FOR AND NOTICE</b>
<b>TELECOM, INC. FOR DESIGNATION AS AN )</b>	<b>OF HEARING</b>
<b>ELIGIBLE TELECOMMUNICATIONS CARRIER )</b>	<b>TC98-111</b>

On June 4, 1998, the South Dakota Public Utilities Commission (Commission) received a request from Dakota Telecom, Inc. (DTI) requesting designation as an eligible telecommunications carrier for the Centerville and Viborg exchanges in South Dakota.

The Commission electronically transmitted notice of the filing and the intervention deadline to interested individuals and entities on June 4, 1998, with an intervention deadline of June 19, 1998. Petitions to Intervene were received from Fort Randall Telephone Company (Fort Randall) and South Dakota Independent Telephone Coalition, Inc. (SDITC). Fort Randall and SDITC were granted intervention by Order dated August 5, 1998.

The Commission has jurisdiction over this matter pursuant to SDCL Chapters 1-26 and 49-31, including 1-26-18, 1-26-19, 49-31-3, 49-31-7, 49-31-7.1, 49-31-11, and 49-31-78.

The procedural schedule for testimony and a hearing on this matter shall be as follows:

<b>DATE</b>	<b>PROCEDURAL SCHEDULE</b>
August 20, 1998	Petitioner's Prefiled Testimony Due
September 4, 1998	Intervenors' Prefiled Testimony Due
September 14, 1998	Hearing commencing at 1:30 p.m. in Room 412 of the State Capitol, Pierre, South Dakota

The issue at the hearing shall be as follows: (1) whether DTI should be granted designation as an eligible telecommunications carrier for the Centerville and Viborg exchanges.

The hearing shall be an adversary proceeding conducted pursuant to SDCL Chapter 1-26. All parties have the right to be present and to be represented by an attorney. These rights and other due process rights shall be forfeited if not exercised at the hearing. If you or your representative fail to appear at the time and place set for the hearing, the Final Decision will be based solely on the testimony and evidence provided, if any, during the hearing or a Final Decision may be issued by default pursuant to SDCL

1-26-20. After the hearing the Commission will consider all evidence and testimony that was presented at the hearing. The Commission will then enter Findings of Fact, Conclusions of Law, and a Final Decision regarding this matter. As a result of this hearing, the Commission may either grant or deny the request from DTI requesting designation as an eligible telecommunications carrier. The Commission's decision may be appealed by the parties to the state Circuit Court and the state Supreme Court as provided by law. It is therefore

ORDERED that a hearing shall be held at the time and place specified above on the issue of whether DTI should be granted designation as an eligible telecommunications carrier.

Pursuant to the Americans with Disabilities Act, this hearing is being held in a physically accessible location. Please contact the Public Utilities Commission at 1-800-332-1782 at least 48 hours prior to the hearing if you have special needs so arrangements can be made to accommodate you.

Dated at Pierre, South Dakota, this 7 day of August, 1998

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.

By

Date

*Nicholas Keller*  
8/7/98

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION  
Commissioners Burg, Nelson and  
Schoenfelder

*William Bullard, Jr.*  
WILLIAM BULLARD, JR.  
Executive Director



RECEIVED

AUG 20 1998

SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION

By Overnight Mail

August 19, 1998

William J. Bullard  
Executive Director  
South Dakota Public Utilities Commission  
500 East Capitol  
Pierre, SD 57501

Tradition

Technology

Talent

Teamwork

RE: TC98-111 PREFILED TESTIMONY OF THOMAS W. HERTZ  
NOTICE OF APPEARANCE OF COUNSEL

HEADQUARTERS  
913 Box 96  
29705 45th Avenue  
Brent, South Dakota  
57037-0066

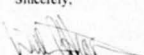
605.263.3301  
800.279.7501  
Fax 605.263.3995

[www.dtg.com](http://www.dtg.com)

Dear Mr. Bullard:

Enclosed for filing is the original and ten copies of the PREFILED TESTIMONY OF THOMAS W. HERTZ and attachments for the above referenced docket. Also enclosed is an original and ten copies of NOTICE OF APPEARANCE OF COUNSEL. This TESTIMONY and NOTICE is being served to the parties listed on the service list this same date.

Sincerely,



William P. Heaston  
General Counsel

Enclosures

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF SOUTH DAKOTA

RECEIVED

AUG 20 1998

IN THE MATTER OF THE REQUEST BY )  
DAKOTA TELECOM , INC. FOR )  
DETERMINATION OF ELIBIBLE )  
TELECOMMUNICATIONS COMPANY )  
STATUS PURSUANT TO 47 USC 214 )

DOCKET TC98-111

SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION

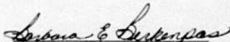
---

NOTICE OF APPEARANCE OF COUNSEL

NOTICE IS HEREBY GIVEN that:

Barbara E. Berkenpas will be substituted in the above captioned matter for Kathy A. Marmet and requests being added to the service list. Ms. Berkenpas is employed by Dakota Telecommunications Group, Inc. ("DTG") as an attorney and is an active member of The State Bar of South Dakota, membership number 1925.

Dated this 18<sup>th</sup> day of August, 1998.

  
Barbara E. Berkenpas, Attorney  
PO Box 66  
Irene, SD 57037  
(605) 263-3301 Phone  
(605) 263-3995 Fax

RECEIVED

AUG 20 1998

**CERTIFICATE OF SERVICE**

**SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION**

I, Kristie Lyngstad, hereby certify that on the 19<sup>th</sup> day of August, 1998, I mailed by United States mail, first class postage prepaid, one original and 10 copies of the PREFILED TESTIMONY OF THOMAS W. HERTZ and the NOTICE OF APPEARANCE OF COUNSEL to:

Richard D. Coit  
Executive Director  
South Dakota Independent Telephone Coalition  
207 East Capitol, Suite 206  
P.O. Box 57  
Pierre, SD 57501

Michael J. Bradley  
Moss & Barnett  
4800 Norwest Center  
90 South Seventh Street  
Minneapolis, MN 55402-4129

Dated this 19<sup>th</sup> day of August, 1998.

  
\_\_\_\_\_  
Kristie Lyngstad



# South Dakota Public Utilities Commission

State Capitol Building, 500 East Capitol Avenue, Pierre, South Dakota 57501-5070



August 20, 1998

Barbara E. Berkenpas  
Dakota Telecom, Inc.  
PO Box 127  
Irene, SD 57037

RE: TC98-111 FILING BY DAKOTA TELECOM, INC. AS AN ELIGIBLE  
TELECOMMUNICATIONS CARRIER

Dear Ms. Berkenpas:

Please submit one copy of each data request sent by Dakota Telecom, Inc. to any party in this proceeding and the corresponding data responses received by Dakota Telecom, Inc., to myself at the Commission.

If you have any questions, please contact me at the Commission.

Sincerely,

*Dave Jacobson*

Dave Jacobson

cc: Rolayne Wiest  
Camron Hoseck  
Michael Bradley  
Richard Coit

Capitol Office  
Telephone (605)773-3201  
FAX (605)773-3809

Transportation/  
Warehouse Division  
Telephone (605)773-5280  
FAX (605)773-3225

Consumer Hotline  
1-800-332-1782

TTY Through  
Relay South Dakota  
1-800-877-1113

Internet  
bill@pac.state.sd.us

Jim Burg  
Chairman  
Pam Nelson  
Vice-Chairman  
Laska Schoenfelder  
Commissioner

William Ballard Jr.  
Executive Director

Edward R. Anderson  
Harlan Best  
Martin C. Bettmann  
Charlie Bell

Sue Cohen  
Karen E. Cramer  
Maletta Fischbach

Sharon Fugitt  
Lewis Hammond  
Katie Hartford

Leri Healy  
Camron Hoseck  
Dave Jacobson

Bob Knadig  
DeLaine Kollis  
Jeffrey P. Lorenson

Terry Norum  
Gregory A. Radin  
Tamara Stangor

Steven M. Wegman  
Rolayne Alts Wiest





# South Dakota Public Utilities Commission

State Capitol Building, 500 East Capitol Avenue, Pierre, South Dakota 57501-5070



August 20, 1998

Michael J. Bradley  
Moss & Barnett  
4800 Norwest Center  
90 South Center Street  
Minneapolis, MN 55402

Capitol Office  
Telephone (605) 773-3201  
FAX (605) 773-3809

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Lucia Schoenfelder  
Commissioner

William Ballard Jr.  
Executive Director

Edward R. Anderson  
Harlan Best  
Martin C. Bettmann  
Charlie Hollie  
Sue Cohen  
Karen E. Cooner  
Marlette Fischbach  
Shirleen Fugitt  
Lewis Hammond  
Katie Hartford  
Lara Healy  
Camron Hovick  
Dave Jacobson  
Bob Knudsen  
Debbie Kolbo  
Jeffrey P. Lortenson  
Terry Norum  
Gregory A. Ralier  
Tammie Stangor  
Steven M. Wiegman  
Rosalynne Ault West

RE: TC98-111 FILING BY DAKOTA TELECOM, INC. AS AN ELIGIBLE  
TELECOMMUNICATIONS CARRIER

Dear Mr. Bradley:

Please submit one copy of each data request sent by Fort Randall Telephone Company to any party in this proceeding and the corresponding data responses received by Fort Randall Telephone Company to myself at the Commission.

If you have any questions, please contact me at the Commission.

Sincerely,

Dave Jacobson

cc: Rolayne Wiest  
Camron Hovick  
Barbara E. Berkenpas  
Richard Coit



# South Dakota Public Utilities Commission

State Capitol Building, 500 East Capitol Avenue, Pierre, South Dakota 57501-5070



August 20, 1998

Richard D. Coit  
SDITC  
207 E. Capitol Ave.  
Suite 206  
Pierre, SD 57501

RE: TC98-111 FILING BY DAKOTA TELECOM, INC. AS AN ELIGIBLE  
TELECOMMUNICATIONS CARRIER

Dear Mr. Coit:

Please submit one copy of each data request sent by SDITC to any party in this proceeding and the corresponding data responses received by SDITC to myself at the Commission.

If you have any questions, please contact me at the Commission.

Sincerely,

Dave Jacobson

cc: Rolayne Wiest  
Cameron Hoseck  
Barbara E. Berkenpas  
Michael Bradley

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Telephone (605)773-3201  
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DeLaine Kolbo  
Jeffrey P. Lorenson  
Terry Norum  
Gregory A. Rados  
Tamara Stangor  
Steven M. Wegman  
Rolayne Alth Wiest



# South Dakota Public Utilities Commission

State Capitol Building, 500 East Capitol Avenue, Pierre, South Dakota 57501-5070



August 20, 1998

Camron Hoseck  
Staff Attorney  
South Dakota Public Utilities Commission  
500 E. Capitol Ave.  
Pierre, SD 57501

RE: TC98-111 FILING BY DAKOTA TELECOM, INC. AS AN ELIGIBLE  
TELECOMMUNICATIONS CARRIER

Dear Mr. Hoseck:

Please submit one copy of each data request sent by Commission Staff to any party in this proceeding and the corresponding data responses received by Commission Staff to myself at the Commission.

If you have any questions, please contact me at the Commission.

Sincerely,

Dave Jacobson

cc: Rolayne Wiest  
Richard Coit  
Barbara E. Berkenpas  
Michael Bradley

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Karm E. Cremer  
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Lewin Hammond  
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Camron Hoseck  
Dave Jacobson  
Bob Knadiz  
Delane Kutho  
Jeffrey P. Lorenson  
Terry Norum  
Gregory A. Raskov  
Tamara Stangor  
Steven M. Wagnon  
Rosalynne Alts West

# SDITC

## South Dakota Independent Telephone Coalition, Inc.

**Richard D. Coit**  
Executive Director  
readitc@sd.cybernet.net

September 3, 1998

William Bullard  
Executive Director  
South Dakota Public Utilities Commission  
500 East Capitol Avenue  
Pierre, SD 57501

RECEIVED

SEP 03 1998

SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION

RE: Docket TC98-111, Request by DTI for ETC Status

Dear Bill:

Enclosed for filing in the above referenced matter are the original and ten (10) copies of the Pre-filed Direct Testimony of Bruce Hanson and the Pre-hearing Brief of Fort Randall Telephone Company and the SDITC.

Also, I've attached for your information a copy of a Motion filed with the Circuit Court, Sixth Judicial Circuit requesting Mike Bradley's admission "Pro Hac Vice" in the administrative proceeding and a copy of the resulting Court Order.

As noted in the certificate of service attached to the Pre-hearing Brief, the testimony and brief have been mailed to counsel for DTI.

Please distribute these as needed to Commissioners and Staff.

Thank you for your assistance.

Sincerely,



Richard D. Coit, Executive Director  
and General Counsel

Michael J. Bradley, Moss & Barnett

Attorney's on behalf of the South Dakota  
Independent Telephone Coalition and  
Fort Randall Telephone Company



RECEIVED

SEP 03 1998

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE REQUEST BY  
DAKOTA TELECOM, INC. FOR DETERMINATION  
OF ELIGIBLE TELECOMMUNICATIONS  
COMPANY STATUS PURSUANT TO 47 U.S.C. § 214

DOCKET TC98-111

PRE-HEARING BRIEF

**PRELIMINARY STATEMENT**

Fort Randall Telephone Company ("Fort Randall") and the South Dakota Independent Telephone Coalition ("SDITC") file this pre-hearing brief to clarify the issues presented by the Dakota Telecom, Inc. ("DTI") petition for eligible telecommunications carrier ("ETC") status and to present preliminary legal arguments relevant to such issues.

This proceeding was initiated by DTI's filing of a petition on or about June 3, 1998, whereby DTI requests designation as an ETC, as that term is used in 47 U.S.C. § 214(c), for the local exchanges of Centerville and Viborg located in southeastern South Dakota.

In conjunction with its request for designation as an ETC, DTI is asking the South Dakota Public Utilities Commission ("Commission") to establish a service area for DTI that is different than Fort Randall's current service area.

Currently, Fort Randall serves as an ETC throughout its service area. As indicated in the pre-filed testimony of Bruce Hanson, Fort Randall's service area is also its study area, which is comprised of seven exchanges served by Fort Randall and one exchange served by Mt. Rushmore. In addition to providing the services required to be an ETC in Centerville and Viborg, Mt. Rushmore is also required to meet those service obligation in its Wagner, Lake Andes, Tyndall, Tabor, and Hermosa exchanges.

The Commission, in its December 17, 1997 Order in Docket No. TC97-075, designated Fort Randall as an ETC after determining that it is meeting all of the required ETC service obligations throughout its study area in accordance with 47 U.S.C. § 214(e)(5).

Fort Randall and SDITC filed petitions to intervene in this matter and were granted intervening party status by a Commission Order dated August 5th, 1998.

With regard to DTI's petition, Fort Randall and SDITC will demonstrate that: (1) DTI does not meet the ETC qualifications prescribed under federal law; (2) establishing an ETC service area limited to the Centerville and Viborg exchanges would be inconsistent with orders of the Federal Communications Commission ("FCC") and Federal-State Joint Board ("Joint Board") on Universal Service; and (3) the Commission cannot, at this time, reasonably determine that designating DTI as an additional ETC is in the public interest, as required by 47 U.S.C. § 214(e)(2).

#### STATEMENT OF ISSUES

- I. Whether DTI meets the requirements imposed on ETC's pursuant to 47 U.S.C. § 214(e)(1) and 47 C.F.R. § 54.101?
- II. Whether the Commission should establish a service area for DTI, for ETC designation purposes, that is different than Fort Randall's service area?
- III. Whether the Commission should redefine Fort Randall's service area and establish a separate service area limited to the Centerville and Viborg exchanges?
- IV. Whether the Commission should, at this time, find that more than one ETC in the Fort Randall service area is in the public interest?

## ARGUMENT

### **I. DTI DOES NOT MEET THE ETC QUALIFICATIONS IMPOSED BY 47 U.S.C. § 214(e)(1) AND 47 C.F.R. § 54.201.**

#### **A. DTI Is Not Offering Its Services Throughout Fort Randall's Service Area.**

In order for a telecommunications carrier to qualify as an ETC, the carrier must meet the universal service obligations established by 47 U.S.C. § 214(e)(1). More specifically, that section provides that an ETC:

... shall, throughout the service area for which the designation is received –

(A) offer the services that are supported by Federal universal service support mechanisms under section 254(c), either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and

(B) advertise the availability of such services and the charges therefor using media of general distribution.

FCC rules specifically list the services that are supported by the Federal universal service support mechanisms and which, accordingly, are imposed as service requirements on all ETCs pursuant to 47 U.S.C. § 214(e)(1).<sup>1</sup> In addition, the FCC's rules, consistent with the Federal Act, also note that such services must be offered and advertised "throughout the service area for which the designation is received . . ."<sup>2</sup>

With respect to the designation of additional ETCs within an area served by a rural telephone company, the competing ETC's service area for making such designations is the rural telephone carrier's service area.<sup>3</sup> Thus, in this case, DTI, as a condition to receiving an ETC

---

<sup>1</sup> 47 C.F.R. § 54.101.

<sup>2</sup> 47 C.F.R. § 54.201(d).

<sup>3</sup> The service area issues presented by DTI's petition are specifically argued in Sections II and III, of this Pre-Hearing Brief.

designation, must first establish that it is offering all of the services listed in 47 C.F.R. § 54.101 throughout Fort Randall's service area.

As provided under 47 U.S.C. § 214(c)(5) and 47 C.F.R. § 54.207(b):

In the case of an area served by a rural telephone company, "service area" means such company's "study area" unless and until the Commission and the States, after taking into account recommendations of a Federal-State Joint Board instituted under section 410(c) of the Act, establish a different definition of service area for such company.

As indicated in Mr. Hanson's testimony, Fort Randall's study area includes five other exchanges in addition to Centerville and Viborg and the one exchange served by Mt. Rushmore.<sup>4</sup>

DTI is not seeking ETC status in this proceeding on the basis that it is offering services throughout Fort Randall's study area. DTI is requesting ETC designation based on services it claims to be offering throughout the Centerville and Viborg exchanges. Therefore, the DTI Petition is deficient. DTI does not meet the ETC service requirements set forth in 47 C.F.R. § 54.101 throughout the area served by a rural telephone company, which is Fort Randall's current study area.

Even though DTI may be seeking a redefinition or disaggregation of Fort Randall's service area, no such redefinition or disaggregation has yet occurred and, only if and after such a change were to occur, would DTI have any possible claim that it meets the ETC service requirements and should be considered for ETC designation.

**B. DTI Is Not Offering And Advertising Its Services Throughout The Centerville And Viborg Exchanges.**

It is also readily apparent that DTI is not effectively offering its services throughout even the Centerville and Viborg exchanges. Thus, even if Fort Randall's service area were redefined

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<sup>4</sup> Prefiled Testimony of Bruce Hanson, dated September 3, 1998, p. 3.



through action of the Commission and the FCC, and a separate service area was established for Centerville and Viborg. DTI would still not meet the ETC qualifications.

As pointed out in Mr. Hanson's testimony, the exchanges of Centerville and Viborg contain approximately 1,377 access lines. Presently, of that total, DTI serves approximately 147 lines and of that 147 only three of the lines are rural (located outside the Centerville/Viborg city limits). Further, two of these rural customers, to Mr. Hanson's knowledge, are employees of DTI and are only testing out the wireless service described in Mr. Hertz's testimony.<sup>5</sup> The fact that only three rural customers, including only one rural customer who is not an employee, have subscribed to DTI's service clearly demonstrates that DTI is not in fact "offering" its services to all customers as required under the federal ETC provisions.

The federal law requires that any entity seeking ETC designation "offer" and "advertise the availability" of all of the services supported by the federal universal service support mechanisms throughout the applicable rural service area.<sup>6</sup> The requirement that services be "offered," in order to have any real effect, must be interpreted to require that the relevant services be offered under reasonable terms and conditions and at reasonable prices. In implementing the federal ETC provisions and in specifically making a determination as to whether the established ETC services are being offered, some standard of reasonableness should be applied. The carrier seeking ETC designation should have to show that it is offering the required services under such terms, conditions and prices that a reasonable customer might find the services acceptable for purchase.

---

<sup>5</sup> *Id.*, p. 5.

<sup>6</sup> 47 U.S.C. § 214(e)(1) and 47 C.F.R. § 54.201(d).

The South Dakota Legislature, in recently enacting House Bill 1160, understood the need for some clarification as to what constitutes an "offering" of service. SDCL 49-31-73 which was part of HB 1160 provides, generally, that any applicant proposing to provide local exchange service in the service area of a rural telephone company must satisfy the ETC service obligations imposed by 47 U.S.C. § 214(e)(1). It further specifically states that the services required to be provided as set forth in 47 U.S.C. § 214(e)(1) "shall be provided at prices and on terms which reflect a good faith offering of the services throughout the service area of the incumbent rural telephone company."

The Commission, in this review process, should impose a similar standard in reviewing DTI's ETC request. Any carrier seeking designation should be required to establish that it has acted in good faith and made a reasonable offering of the required services. To determine whether a carrier has in fact made such an offering, the Commission should consider a number of factors, including: (1) whether the services being offered meet customer expectations with respect to service quality; (2) whether the services are actually available for use by a requesting customer within a reasonable period of time; (3) whether the prices assigned to the service can be viewed as competitive in the relevant market; and (4) whether any terms or conditions of service are imposed that can be viewed as being designed to turn away certain customers.

Based on the extreme low penetration that DTI has achieved with its service in the rural areas of the Centerville and Viborg exchanges, it is obvious that DTI has, in some manner, failed to offer its services to the rural customers as is contemplated by the ETC qualification provisions.

This failure to effectively offer the required services can, at least to some degree, be explained by the advertising materials that DTI has provided as Exhibit A to its pre-filed

testimony. The materials provided indicate that DTI or DTG has specifically targeted only the customers located in the towns of Centerville and Viborg and that it appears to be avoiding rural customers within the exchanges. A number of the enclosed items reference DTG's hybrid fiber/coaxial telecommunications network but, as indicated in Mr. Hertz's pre-filed testimony, this is not the system that will be used to provide service to rural customers located in the Centerville and Viborg exchanges.<sup>7</sup> According to his testimony, rural customers located outside the city limits of Centerville and Viborg would receive service through a fixed wireless system.<sup>8</sup> Yet, none of the materials in Exhibit A make any reference to the service that is available to rural customers through DTG's wireless system. Also, the local telephone services of DTG are, in many cases, advertised in conjunction with the company's cable TV services.<sup>9</sup> Rural customers who do not have access to cable TV services would, as a result, likely conclude that the telephone services being offered are also limited to customers located in the cities of Centerville and Viborg. Finally, one of the advertisements specifically states that the services are being introduced "in the cities of Centerville and Viborg," and one of the brochures references customers who "live in Centerville" or who "live in Viborg."<sup>10</sup> None of the advertisements or brochures would give rural customers outside of the city limits of Centerville or Viborg a clear indication that the DTG telephone services are also available to them.

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<sup>7</sup> See 1998 Southeastern South Dakota Regional Telephone Directory, DTG ON-NET brochure, and advertisement in *SOUTHEAST TRUMPET* dated January 14, 1998.

<sup>8</sup> Pre-filed Testimony of Thomas Hertz, p. 3.

<sup>9</sup> See brochure entitled *Introducing TELECOMMUNICATIONS SERVICES in Centerville and Viborg* and advertisements in *SOUTHEAST TRUMPET* dated January 14, March 4, and April 1, 1998.

<sup>10</sup> See advertisement in *SOUTHEAST TRUMPET* dated March 11, 1998, and *Introducing TELECOMMUNICATIONS SERVICES in Centerville and Viborg* brochure, respectively.

Therefore, even if the Commission were willing to establish a separate study area limited to the Centerville and Viborg exchanges, it should not grant DTI ETC status to serve those exchanges. The purpose of granting ETC status is to support service to the highest cost, most isolated customers. DTI has, to date, avoided service to those customers who cannot easily be served.

## **II. THE COMMISSION SHOULD NOT ESTABLISH DIFFERENT ETC SERVICE AREAS FOR DTI AND FORT RANDALL.**

DTI's petition and its pre-filed testimony indicate that DTI is not requesting a redefinition of Fort Randall's service area. Rather, DTI asks the Commission to establish Centerville and Viborg as DTI's own unique ETC service area without adjusting Fort Randall's service area.<sup>11</sup> In his pre-filed testimony, Mr. Hertz claims that the Commission can make such a service area determination without FCC involvement. Contrary to DTI's claims, establishing a separate ETC service area for DTI would be inconsistent with the recommendations of the Joint Board set forth in FCC 96J-3, CC Docket No. 96-45, *Recommended Decision (In the Matter of Federal-State Joint Board on Universal Service)*, released November 8, 1996, and the findings of the FCC in the same docket FCC 97-157, *Report and Order*, released May 8, 1997. Further, establishing a separate service area for DTI would require FCC approval.

The Act, the Joint Board recommendations, and the FCC findings all envision that state commissions will establish the same service areas for ETC purposes for a rural telephone company and any competing local exchange carrier.

The Act states that, at least initially:

In the case of an area served by a rural telephone company, "service area" means such company's "study area" . . .

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<sup>11</sup> DTI Petition, ¶ 6; and Prefiled Testimony of Thomas W. Hertz, dated August 21, 1998, pp. 4-5.

(47 U.S.C. § 214(e)(5).) It is important to note that the Act defines the service requirements for an "area" rather than for a "rural telephone company." The Act does not say, for example: "In the case of a rural telephone company its service area will be its study area." Consequently, the ETC service obligations are the same for rural telephone companies and for competing local exchange carriers in areas served by rural telephone companies.

The importance of establishing the same service area for both rural telephone companies and competitive carriers was expressly identified by the Joint Board and FCC. In particular, both expressed a concern that, if a rural telephone company and a competitive ETC had different service areas, it could result in undesirable "cream skimming" by the competitor. To avoid this problem, the Joint Board recommended that the FCC establish the current study area as the service area for both rural telephone companies and any competing local exchange carriers seeking ETC status, stating:

Service areas for areas served by rural telephone companies. We recommend that the Commission retain the current study areas of rural telephone companies as the service areas for such companies. Section 214(e)(5) provides that for an area served by a rural telephone company, the term "service area" means such company's study area "unless or until the Commission and the States, after taking into account the recommendations of a Federal-State Joint Board instituted under section 410(e), establish a different definition of service area for such company." We find no persuasive rationale in the record for adopting, at this time, a service area that differs from a rural telephone company's present study area. We note that some commenters argue that Congress presumptively retained study areas as the service area for rural telephone companies in order to minimize "cream-skimming" by potential competitors. Potential "cream skimming" is minimized because competitors, as a condition of eligibility, must provide services throughout the rural telephone company's study area. Competitors would thus not be eligible for universal service support if they sought to serve only the lowest cost portions of a rural telephone company's study area.

FCC 96J-3, Recommended Decision, ¶ 172, emphasis added, footnotes omitted. The above language clearly indicates that the Joint Board understood that competitors seeking ETC status could only qualify for such status pursuant to 47 U.S.C. § 214(e)(1) if they offered all of the

services supported by federal universal service support mechanisms to all customers throughout the existing rural telephone company service area.

The Joint Board's recommendation was concurred in and adopted by the FCC. The FCC, in its Report and Order, stated:

Adoption of Study Areas. We agree with the Joint Board that, at this time, retaining the study areas of rural telephone companies as the rural service areas is consistent with section 214(e)(5) and the policy objectives underlying section 254. We agree with the Joint Board that, if competitors, as a condition of eligibility, must provide services throughout a rural telephone company's study area, the competitors will not be able to target only the customer that are the least expensive to serve and thus undercut the ILEC's ability to provide service throughout the area.

FCC 97-157, Report and Order, ¶ 189, emphasis added, footnotes omitted.

Under current FCC rules, a competitive ETC would receive the same amount of support per line as the rural telephone company.<sup>12</sup> This average support per line, calculated on a study area basis, may be significantly higher or lower than the actual costs associated with providing service within a limited part of the study area or a particular exchange or exchanges within the area. Therefore, to assure fair competition, both carriers should have the same service obligations.

The FCC, in its Report and Order, agreed that universal service funding should not be implemented in a manner that results in "uneconomic incentives."<sup>13</sup> The FCC commented on these concerns in discussing specifically the "potential dissimilarities between the level of disaggregation of universal service support and the level of disaggregation of unbundled network

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<sup>12</sup> 47 C.F.R. § 54.307(a)(1).

<sup>13</sup> FCC 97-157, Report and Order, ¶¶ 171-176.

element prices."<sup>14</sup> The FCC concluded that it was necessary to "limit the ability of competitors to make decisions to enter local markets based on artificial economic incentives created under the modified existing [universal service funding] mechanism."<sup>15</sup>

In addition, the FCC noted its expectation that state commissions, in the process of making eligibility determinations, would play an important part in minimizing the risk of such anticompetitive behavior.<sup>16</sup> Specifically, the FCC requested that state commissions making ETC eligibility determinations should consider whether the competitive carrier seeking designation as

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<sup>14</sup> *Id.*, ¶ 173. The FCC, in its Report and Order, offered the following explanation as to how a competitor utilizing unbundled elements might be in a position to receive a level of universal service support in excess of its actual cost and thereby gain an advantage over incumbent LECs:

This asymmetry could arise because of the procedures currently used to calculate the cost of serving a customer. Because it is administratively infeasible to calculate the precise cost of providing service to each customer in a service area, and because rate averaging and the absence of competition generally have allowed it, the cost of providing service has been calculated over a geographic region, such as a study area, and the total cost of providing service in that area has been averaged over the number of customers in that area. This average cost provides the basis for calculating universal service support in that area. To illustrate, the average cost of providing service in a study area might be \$50.00 per customer, but the cost of providing service might be \$10.00 in urban portions of the area, \$40.00 in the suburban portions, and \$100.00 in the outlying regions. Although the cost of providing the supported services will be calculated at the study area level in 1998, the cost of unbundled network elements is calculated by the states, possibly over geographic areas smaller than study areas. Thus, the total support to a carrier per customer in a study area might be \$20.00, but the price of purchasing access to unbundled network elements to serve a customer in that study area might be \$10.00, \$60.00, or \$100.00, depending on where the customer is located. Consequently, a CLEC might pay \$10.00 to purchase access to an unbundled network element in order to serve a customer in a city, but receive \$20.00 in universal service support.

*Id.*, ¶ 172 (footnotes omitted).

<sup>15</sup> *Id.*, ¶ 173.

<sup>16</sup> *Id.*, ¶ 176.

an ETC would be in a position to exploit the asymmetry between its actual costs incurred for unbundled elements and the level of universal service support.<sup>17</sup>

The risk of a competitor having lower costs than the level of universal service support exists if competitors seeking ETC status are allowed to limit their services to portions of a rural service area, where the competitor's actual costs may be below the average service area costs.

In deciding to retain the existing study areas, the Joint Board and the FCC also explained that universal service support for rural telephone companies will be determined based on their embedded costs; and that it would not be possible to determine the cost of service on a less than total company basis. The difficulties of attempting to disaggregate the costs of serving only Centerville and Viborg are explained in Mr. Hanson's prefiled testimony.

In an effort to support its request to have Centerville and Viborg designated as a separate service area, DTI quotes from paragraph 190 of the FCC's Report and Order. In that paragraph the FCC indicated that it may be appropriate for states to modify the service area for the area served by a rural telephone company to include only the contiguous portions of the rural telephone company's study areas. A review of the entire paragraph, demonstrates that it does not support DTI's request in this case:

We also conclude, based on additional information presented to us in response to the Recommended Decision, that universal service policy objectives may be best served if a state defines rural service areas to consist only of the contiguous portion of a rural study area, rather than the entire rural study area. We conclude that requiring a carrier to serve a non-contiguous service area as a prerequisite to eligibility might impose a serious barrier to entry, particularly for wireless carriers. We find that imposing additional burdens on wireless entrants would be particularly harmful to competition in rural areas, where wireless carriers could potentially offer service at much lower costs than traditional wireline service. Therefore, we encourage states to determine whether rural service areas should consist of only the contiguous portions of an ILEC's study area, and to submit such a determination to the Commission according to the

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<sup>17</sup> *Id.*



procedures we describe above. We note that state commissions must make a special finding that the designation is in the public interest in order to designate more than one eligible carrier in a rural service area, and we anticipate that state commissions will be able to consider the issue of contiguous service areas as they make such special findings.

*Id.*, ¶ 190, (emphasis added, footnotes omitted.) The above language documents two flaws in DTI's argument. First, the suggestion that contiguous areas may be appropriate was raised in the context of overcoming a total barrier (license limitation for wireless providers) to being able to provide service. There is no total barrier to DTI being able to serve the same exchanges as Fort Randall serves. Second, the Commission cannot independently change the study area but must, instead, submit the issue to the FCC pursuant to 47 C.F.R. § 54.207(c).

Further, as Mr. Hanson explains in his testimony, if the Commission is inclined to deviate from the Joint Board recommendation and the FCC's acceptance of that recommendation, contiguous areas are not a rational alternative. Rather, any separate service areas should take into consideration the actual service characteristics of the rural telephone company. In this case, Centerville and Viborg are not a stand-alone service area for Fort Randall. Rather, they are part of a local network served by Fort Randall's host switch in Wagner. Therefore, any service area for Fort Randall should necessarily include the Wagner exchange and its subtending end offices.

The FCC and the Joint Board have established a uniform nation-wide standard for the service obligations for both rural telephone companies and for their competitors. Before that policy is changed, the Joint Board should evaluate and make recommendations on the appropriate alternative to using the existing study areas. DTI's petition does not provide a basis for changing the existing standards. National policy should be based on more than the competitive preferences of a single carrier.

### III. THE COMMISSION CANNOT UNILATERALLY REDEFINE THE CURRENT SERVICE AREA AND ESTABLISH A SEPARATE SERVICE AREA LIMITED TO CENTERVILLE AND VIBORG EXCHANGES.

As the previous sections of this Brief explain, rural telephone companies and competitive ETCs must provide service throughout the service area, and the service area for areas served by a rural telephone company is its study area. The FCC, however, has provided a procedure for changing such service areas.

The FCC's Report and Order and the rules adopted under such order make it clear that state commissions cannot act unilaterally to change the existing service areas for areas served by rural telephone companies. As stated in the FCC's Report and Order:

... in contrast with non-rural service areas, the Act requires the Commission and the states to act in concert to alter the service areas for areas served by rural carriers. ... We [the FCC] conclude that the plain language of section 214(c)(5) dictates that neither the Commission nor the states may act alone to alter the definition of service areas served by rural carriers ...<sup>18</sup>

The FCC rules, 47 C.F.R. § 54.207(c), prescribe a specific process for reviewing current rural telephone company service areas and mandate the initiation of a process before the FCC, and FCC approval of any state proposed redefinition of a service area served by a rural telephone company. The rules further indicate that any state proposed redefinition or disaggregation of a rural service area may not take effect until after the FCC has indicated its agreement with or concurrence in the proposed redefinition.

The federal rules (Section 54.207(c)(1)(ii)) provide that a state commission or other party seeking the FCC's agreement in redefining a service area served by a rural telephone company must submit a petition to the FCC, and that petition, in part, must include:

... the state commission's ruling or other official statement presenting the state commission's reasons for adopting its proposed definition, including an analysis

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<sup>18</sup> FCC 97-157, Report and Order, ¶¶ 186-187.

that takes into account the recommendations of any Federal-State Joint Board convened to provide recommendations with respect to the definition of a service area served by a rural telephone company.

(Emphasis added.)

The Joint Board has made its recommendations as to the appropriate service areas for rural telephone companies and concluded that the current "study areas" should be established as rural service areas.<sup>19</sup> The Joint Board retained study areas as the service areas for rural telephone companies based on a recognition that Congress had "presumptively retained study areas as the service area for rural telephone companies in order to minimize 'cream skimming' by potential competitors."<sup>20</sup> In addition, the retention of study areas was consistent with the current practice of determining universal service costs for rural carriers at the study area level.<sup>21</sup>

The Joint Board did not establish any exception to its decision to retain "study areas" as rural service areas. It was recommended by the Joint Board that the FCC "encourage states, where appropriate to foster competition, to designate service areas that do not disadvantage new entrants" and recommended "that the geographic size of the state designated service areas should not be unreasonably large."<sup>22</sup> These recommendations, however, were made only in its process of addressing service area issues related to non-rural carriers. With respect to rural companies, the Joint Board did not recommend that state commissions disaggregate the existing rural service areas or study areas. With respect to rural telephone companies, the Joint Board specifically acknowledged that, in many respects under the 1996 Telecommunications Act, rural telephone

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<sup>19</sup> FCC 96J-3, Recommended Decision, ¶¶ 172-174.

<sup>20</sup> *Id.*, ¶ 172.

<sup>21</sup> *Id.*, ¶ 174.

<sup>22</sup> *Id.*, ¶ 176.

companies are on a "different competitive footing from other local exchange companies."<sup>23</sup> The FCC concurred in the Joint Board's recommendation to retain the study areas of rural telephone companies as rural service areas.

DTI contends that the Commission should consider establishing Centerville and Viborg as a separate service area based on language in the FCC's Report and Order encouraging state commissions to consider whether designating rural service areas that consist of only the contiguous portions of an incumbent LEC study areas would be in the public interest. However, the Joint Board has not had an opportunity to respond to the FCC's suggestion and, as Mr. Hanson testifies, the use of contiguous areas would not reflect the manner in which many rural telephone companies provision service or the cost of providing such service.

Therefore, the Commission should, consistent with the Joint Board Recommendations, reject DTI's request to redefine the existing service area of Fort Randall. Any exceptions to retaining the study areas as the service area should be narrowly applied to situations where use of the study area creates an absolute barrier to entry. In this case, DTI is not faced with an absolute barrier to entry, and any exception to the general policy should be limited in order to prevent the problems inherent in the disaggregation of the current study areas.

**IV. THE COMMISSION CANNOT REASONABLY DETERMINE THAT DESIGNATING AN ADDITIONAL ETC IN THE CENTERVILLE AND VIBORG EXCHANGES WOULD BE IN THE PUBLIC INTEREST.**

Both federal and state law require that, before the Commission may designate more than one eligible telecommunications carrier within a rural service area, it must find that designating an additional ETC would be in the public interest. Because Fort Randall does not currently receive universal service support, the Commission should delay a determination of whether

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<sup>23</sup> *Id.*, ¶ 173.

designating two ETCs would be in the public interest until the consequences of that decision are known.

With regard to the designation of more than one ETC in any service area, 47 U.S.C.

§ 214(e)(2) provides:

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.

(Emphasis added.) SDCL 49-31-78 includes similar language stating in part that "[t]he [C]ommission may not in an area served by a rural telephone company designate more than one eligible telecommunications carrier absent a finding that the additional designation would be in the public interest."

The above provisions recognize the different economies and costs faced by rural carriers in providing service and reflect Congress' and our State Legislature's concern that designating more than one ETC in rural service areas, with the resulting sharing of any available universal service funding, may be counter productive to preserving and advancing universal service. The provisions establish a presumption that it is not in the consumers' best interest to designate more than one ETC in rural service areas and require an affirmative public interest finding to rebut the presumption.

In order for this Commission to reasonably make a determination that designating an additional ETC in the Centerville and Viborg exchanges would be in the public interest, it must have a reasonable basis to gauge the impact of such a determination on Fort Randall and the affected telephone subscribers. A number of proceedings are pending at the federal level which have the potential to significantly affect the future ability of rural carriers like Fort Randall to provide universal and affordable state-of-the-art services to rural subscribers. The FCC is currently: (1) in the process of reviewing the interstate-intrastate cost separation procedures utilized by incumbent local exchange carriers; (2) reviewing proposals which would substantially reform the interstate access charges of rate-of-return regulated LECs, including rural telephone companies; and (3) engaged in the process of reforming the methods for determining the level and distribution of universal service support payments to rural carriers.

In determining whether it is in the public interest to designate an additional ETC for the Centerville and Viborg exchanges, the Commission should be concerned with the potential impact which sharing limited support funds between two or more carriers will have on rural consumers. At this time, it is impossible to make any reasonable determinations regarding the impact on consumers. As Mr. Hanson testifies:<sup>24</sup>

No one can reasonably predict the consequences of having two ETCs serving very small exchanges like Centerville and Viborg without knowing: 1) how the support will be determined; 2) the level of that support; and 3) the service demands that must be met. Clearly, the Commission should have more information before deciding that sharing universal service support is in the public interest.

Because Fort Randall currently receives no universal service support, designating two ETCs in the Centerville and Viborg exchanges would provide DTI with no universal service

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<sup>24</sup> Prefiled Testimony of Mr. Hanson, p. 10.

support. Therefore, there is no apparent public benefit to making such a determination at this time. In addition, because of the pending federal proceedings, there are too many unknown factors for the Commission to make an informed and reasonable decision as to how future consumers might be impacted by designating more than one ETC in the Centerville and Viborg exchanges.

As discussed earlier, there is also substantial cause to question whether DTI is committed to serving rural customers within these exchanges. DTI should not be allowed to share in universal service support until it actually provides service to the high cost rural customers justifying such support.

Fort Randall and SDITC urge the Commission to defer any decision as to whether it is in the public interest to designate more than one ETC in Centerville and Viborg until the pending federal reforms are more adequately defined, and Fort Randall begins receiving universal service support.

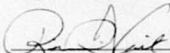
#### **V. CONCLUSION.**

DTI's petitions should be denied without prejudice. The reasons for denial include: (1) DTI's current failure to offer its services to rural customers in the Centerville and Viborg exchange; (2) DTI's failure to provide any service outside the Centerville and Viborg exchanges, thus failing to offer its services throughout the appropriate service area; (3) the inappropriateness

of changing the current service area at this time; and (4) the inability to determine that designating multiple ETCs in the Centerville and Viborg exchanges is in the public interest.

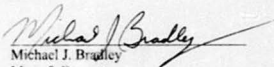
Dated September 3, 1998

Respectfully submitted,



Richard D. Coit, Executive Director and  
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and



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Attorneys on behalf of the South Dakota  
Independent Telephone Coalition and Fort Randall  
Telephone Company

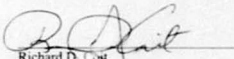


**CERTIFICATE OF SERVICE**

I hereby certify that an original and ten copies of the above and foregoing Pre-Hearing Brief of Fort Randall Telephone Company and the SDITC and the Pre-Filed Direct Testimony of Bruce Hanson were hand delivered on the 3rd day of September, 1998, to the following:

William Bullard Jr.  
Executive Director  
South Dakota Public Utilities Commission  
State of South Dakota  
500 East Capitol Avenue  
Pierre, SD 57501

and a true and correct copy was sent by United States Mail, postage prepaid, to each person on the attached list.

  
Richard D. Coit  
Executive Director  
SDITC  
207 East Capitol Avenue, Suite 206  
Pierre, SD 57501

\* \* \*

William P. Heaston  
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SEP 03 1998

STATE OF SOUTH DAKOTA  
COUNTY OF HUGHES  
SIXTH JUDICIAL CIRCUIT

SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION

In the Matter of the Petition That Michael J. )  
Bradley be Permitted to Appear Before the )  
South Dakota Public Utilities Commission )  
in Administrative Hearings )

No. \_\_\_\_\_

-----◆-----  
**MOTION THAT NONRESIDENT  
ATTORNEY BE ADMITTED  
PRO HAC VICE**  
-----◆-----

Pursuant to S.D.C.L. § 16-18-2, the undersigned attorney, a member in good standing of the state bar of South Dakota, moves for an order from the Court admitting Michael J. Bradley pro hac vice to appear before the South Dakota Public Utilities Commission in the following administrative hearing conducted under S.D.C.L. ch. 1-26:

In the Matter of the Request by Dakota Telecom, Inc. for Determination of  
Eligible Telecommunications Carrier Status Pursuant to 47 U.S.C. 214  
Docket No. TC98-111

The undersigned will serve as the resident practicing attorney in accordance with the requirements of Section 16-18-2.

Mr. Bradley is a reputable attorney and the undersigned attorney recommends his admission to practice before the South Dakota Public Utilities Commission in the above entitled administrative hearing conducted under S.D.C.L. ch. 1-26.

Dated: August 2, 1998

Respectfully submitted,



Richard D. Coit, Executive Director  
SDITC  
St. Charles Hotel  
207 E Capitol, Suite 206  
P O Box 57  
Pierre, SD 57501

STATE OF SOUTH DAKOTA  
CIRCUIT COURT, HUGHES CO.

**FILED**

AUG 2 8 1998

*May J. Erickson* **CLERK**

\_\_\_\_\_  
Deputy

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SEP 03 1998

STATE OF SOUTH DAKOTA  
COUNTY OF HUGHES  
SIXTH JUDICIAL CIRCUIT

SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION

In the Matter of the Petition That Michael J. )  
Bradley be Permitted to Appear Before the )  
South Dakota Public Utilities Commission )  
in Administrative Hearings )

*Bar*  
No. 98-12

-----◆-----  
ORDER GRANTING THAT NONRESIDENT  
ATTORNEY BE ADMITTED  
PRO HAC VICE  
-----◆-----

The Motions that Michael J. Bradley be admitted pro hac vice to appear before the South Dakota Public Utilities Commission in the following administrative hearing conducted pursuant to S.D.C.L. ch. 1-26 are granted.

In the Matter of the Request by Dakota Telecom, Inc. for Determination of  
Eligible Telecommunications Carrier Status Pursuant to 47 U.S.C. 214  
Docket No. TC98-111

Dated: 8/28, 1998

  
\_\_\_\_\_  
Circuit Court Judge

STATE OF SOUTH DAKOTA  
CIRCUIT COURT, HUGHES CO.

FILED

*12-25*  
AUG 28 1998

*May J. Evers* CLERK  
By \_\_\_\_\_ Deputy



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SEP 04 1998

SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION

September 1, 1998

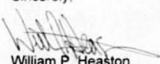
William J. Bullard  
Executive Director  
South Dakota Public Utilities Commission  
500 East Capitol  
Pierre, SD 57501

**RE: TC98-111 MOTION FOR JUDICIAL NOTICE**

Dear Mr. Bullard:

Enclosed for filing is the original and ten copies of the MOTION FOR JUDICIAL NOTICE and attachments for the above referenced docket. This NOTICE is being served to the parties listed on the service list this same date.

Sincerely,



William P. Heaston  
General Counsel

Enclosures

**HEADQUARTERS**  
P.O. Box 66  
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800-238-7521  
Fax 605-283-3995

[www.dtg.com](http://www.dtg.com)

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

<b>IN THE MATTER OF THE REQUEST BY )</b>	
<b>DAKOTA TELECOM, INC. FOR )</b>	
<b>DETERMINATION OF ELIGIBLE )</b>	<b>DOCKET TC98-111</b>
<b>TELECOMMUNICATIONS COMPANY )</b>	
<b>STATUS PURSUANT TO 47 USC 214 )</b>	

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**MOTION FOR JUDICIAL NOTICE**

DAKOTA TELECOM, Inc. ("DTI"), pursuant to SDCL 1-26-19, motions the South Dakota Public Utilities Commission ("the Commission") to take judicial notice of the attached documents which demonstrate a need for disaggregated service areas.

The attached documents include:

1. The Federal Communications Commission (FCC) public notice DA 98-1691 in which the Common Carrier Bureau seeks comment on the Washington Utilities and Transportation Commission's and twenty rural telecommunications companies petition for agreement with designation of rural company eligible telecommunications carrier service areas at the exchange level and for approval of the use of disaggregation of study areas for the purpose of distributing portable federal universal service support. CC Docket No. 96-45.

2. A copy of the underlying file from the Washington Utilities and Transportation Commission ("WUTC") and from the Attorney General of Washington's Office which are relevant to issues in this docket, and should be available to the Commission.

Dated this 23<sup>rd</sup> day of September, 1998.

Dakota Telecom, Inc.



---

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Barbara E. Berkenpas  
PO Box 66  
Irene, SD 57037  
(605) 263-3301 Phone  
(605) 263-3995 Fax

Its Attorneys

### CERTIFICATE OF SERVICE

I, Kristie Lyngstad, hereby certify that on the 2nd day of September, 1998, I mailed by United States mail, first class postage prepaid, one original and 10 copies of the MOTION FOR JUDICIAL NOTICE to:

William Bullard  
Executive Director  
South Dakota Public Utilities Commission  
State of South Dakota  
500 East Capitol  
Pierre, South Dakota 57501

And a true and correct copy was sent by United States mail, first class postage prepaid to:

Richard D. Coit  
Executive Director  
South Dakota Independent Telephone Coalition  
207 East Capitol, Suite 206  
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Moss & Barnett  
4800 Norwest Center  
90 South Seventh Street  
Minneapolis, MN 55402-4129

Dated this 2nd day of September, 1998.

  
Kristie Lyngstad





# South Dakota Public Utilities Commission

State Capitol Building, 500 East Capitol Avenue, Pierre, South Dakota 57501-5070



September 8, 1998

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Mr. Richard D. Coit  
Executive Director  
SDITC  
P. O. Box 57  
Pierre, SD 57501-0057

Re: In the Matter of the Filing by Dakota Telecom, Inc.  
for Designation as an Eligible Telecommunications Carrier

Dear Counsel:

Enclosed each of you will find a copy of Staff Resistance to Motion for Judicial Notice  
in the above captioned matter. This is intended as service upon you by mail.

Very truly yours,

Camron Hoseck  
Staff Attorney

CH dk  
Enc.

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

IN THE MATTER OF THE FILING BY DAKOTA )	STAFF RESISTANCE TO
TELECOM, INC. FOR DESIGNATION AS AN )	MOTION FOR JUDICIAL
ELIGIBLE TELECOMMUNICATIONS CARRIER )	NOTICE
)	TC98-111

Dakota Telecom, Inc. (DTI) has filed a Motion for Judicial Notice pursuant to SDCL 1-26-19. The documents include:

1. a public notice by the FCC seeking comment on a Washington state petition, and
2. a file from Washington Utilities and Transportation Commission.

SDCL 1-26-19(3), as paraphrased says that notice may be taken of judicially cognizable facts and, additionally, technical or scientific facts.

Staff submits that neither of DTI's submittals are judicially cognizable facts or technical or scientific facts. They are pleadings or filings and other notice documents which are part of another proceeding, not in this state. The only facts which they establish are: (1) that the FCC sought comments; and (2) that Washington Utilities and Transportation Commission has a file on the subject. Neither of these facts prove or disprove an issue before the South Dakota Public Utilities Commission in this case.

This is not evidence and should be excluded from the record. It does not establish facts contemplated by SDCL 1-26-19(3).

Dated this 8<sup>th</sup> day of September, 1998.



Camron Hoseck  
Staff Attorney  
South Dakota Public Utilities Commission  
500 East Capitol  
Pierre, SD 57501  
Telephone (605) 773-3201

CERTIFICATE OF SERVICE

I hereby certify that copies of Staff Resistance to Motion for Judicial Notice were served on the following by mailing the same to them by United States Post Office First Class Mail, postage thereon prepaid, at the address shown below on this the 8th day of September, 1998.

William P. Heaston  
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Carlton Hoseck  
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SEP 17 1998

THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION

ORIGINAL

----- )  
IN THE MATTER OF THE FILING BY )  
DAKOTA TELECOM, INCORPORATED; )  
FOR DESIGNATION AS AN )  
ELIGIBLE TELECOMMUNICATIONS CARRIER. ) TC98-111  
----- )

HEARD BEFORE THE PUBLIC UTILITIES COMMISSION

PROCEEDINGS: September 14, 1998  
Room 412, Capitol Building  
Pierre, South Dakota

PUC COMMISSION: Jim Burg, Chairman  
Laska Schoenfelder, Commissioner  
Pam Nelson, Commissioner

COMMISSION STAFF  
PRESENT: Rolayne Ailts Wiest  
Camron Hoseck  
Harlan Best  
David Jacobson

Reported by: Lori J. Grode, RMR

A P P E A R A N C E S

For DTG: William P. Heaston  
 and Barbara E. Berkenpas  
 29705 453rd Avenue  
 P.O. Box 66  
 Irene, SD 57037-0066

For Ft. Randall: Mike Bradley  
 4800 Norwest Center  
 90 S. Seventh Street  
 Minneapolis, MN 55402-4119

For SDITC: Richard D. Coit  
 P.O. Box 57  
 Pierre, SD 57501

I N D E X

WITNESSES:	PAGE
Thomas W. Hertz	25
Bruce Hanson	58

E X H I B I T S

No. 1, DTI's Petition

No. 2, Hertz Prefiled Testimony

No. 3, Bruce Hanson Prefiled Testimony

No. 4, Map of Territory

No. 5, Washington Order

P R O C E E D I N G S

CHAIRMAN BURG: I will begin the hearing in Docket TC98-111, In the Matter of the Filing by Dakota Telecom, Incorporated, for Designation as an Eligible Telecommunications Carrier.

The time is approximately 1:35, and the date is September 14, 1998. The location of the hearing is Room 412 of the State Capitol Building, Pierre, South Dakota. I'm Jim Burg, Commission Chairman.

Commissioners Laska Schoenfelder and Pam Nelson are also present. I'm presiding over this hearing.

This hearing was noticed pursuant to the Commission's Order For and Notice of Hearing issued August 7, 1998. The issue at this hearing is whether Dakota Telecom, Incorporated, should be granted designation as an eligible telecommunications carrier for the Centerville and Viborg Exchanges.

All parties have the right to be present and to be represented by an attorney. All persons so testifying will be sworn in and subject to cross-examination by the parties. The Commission's final decision may be appealed by the parties to the South Dakota Circuit Court and the State Supreme Court.

Rolayne Wiest will act as Commission

1 counsel. She may provide recommended rulings on  
2 procedural and evidentiary matters. The Commission may  
3 overrule its counsel's preliminary rulings throughout  
4 the hearing. If not overruled, however, the  
5 preliminary rulings will become the final rulings.

6 At this time I will take appearances of the  
7 parties. DTI.

8 MR. HEASTON: On behalf of DTI, William P.  
9 Heaston and Barbara E. Berkenpas.

10 CHAIRMAN BURG: Fort Randall.

11 MR. BRADLEY: Fort Randall is represented by  
12 Mike Bradley and South Dakota counsel, Rich Coit.

13 CHAIRMAN BURG: SDITC.

14 MR. COIT: Rich Coit appearing on behalf of  
15 South Dakota Independent Telephone Coalition and also  
16 as local counsel for Fort Randall.

17 CHAIRMAN BURG: Staff.

18 MR. HOSECK: Camron Hoseck on behalf of  
19 staff.

20 CHAIRMAN BURG: At this time I'm going to  
21 turn it over to Rolayne to conduct the hearing.

22 MS. WIEST: Is there anything that we need to  
23 go over before I ask if anybody wants to have an  
24 opening statement? Do you want to deal with the Motion  
25 for Judicial Notice?

1 MR. HEASTON: That would be the only thing up  
2 front would be to ask the Commission to take notice of  
3 the Order which is contained in the filing in the FCC  
4 -- to the FCC by the Washington Utilities and  
5 Transportation Commission regarding the establishment  
6 of exchange by exchange service areas for the  
7 independent telephone companies in that state. And we  
8 would ask that the Commission take judicial notice of  
9 that Order and the filing before the FCC.

10 MS. WIEST: Mr. Bradley.

11 MR. BRADLEY: Mr. Coit will address that for  
12 us.

13 MR. COIT: We have some comments with regard  
14 to the motion whether or not the documents from the  
15 state of Washington are admitted into evidence in this  
16 case or are given judicial notice. We don't believe  
17 that the documents support what DTI is attempting to do  
18 in this case. We filed a Prehearing Brief.  
19 Mr. Bradley will comment further during the opening  
20 statement on the arguments in our Prehearing Brief.

21 But as indicated in that brief, DTI, in its  
22 petition for ETC designation, is not asking that the  
23 Commission change or redefine Fort Randall's current  
24 service area, but rather is asking that the Commission  
25 establish a different ETC service area for DTI limited



1 to the Centerville and Viborg Exchanges.

2           The Washington petition that was filed with  
3 the FCC does not support DTI's claim in this case that  
4 the Commission may establish different ETC service  
5 areas between incumbent LEC's and competitive LEC's.  
6 The Washington petition, consistent with the Joint  
7 Board and FCC orders, also indicates that rural  
8 telecoms and CLEC's should receive the same ETC service  
9 areas.

10           The Washington petition asked for two  
11 things: First, the Washington petition proposes a  
12 redefinition of the service areas for all incumbent  
13 rural telephone companies in that state, I believe; or  
14 at least a good number of the rural telephone companies  
15 in that state. It asks for that pursuant to the FCC  
16 Rule 47 CFR Section 54.207 which sets forth a process  
17 for changing rural telephone company service areas.

18           In addition, the petition seeks, in  
19 conjunction with trying to redefine the service area,  
20 to change the method by which universal service is  
21 ported between incumbent providers and competitive  
22 providers and specifically looks at coming up with some  
23 means of disaggregating the costs below a study area  
24 level. So the petition does not suggest that this  
25 Commission could designate a different service area for

1 DTI, one that is different from -- different ETC  
2 service area for DTI than is different than the one  
3 Fort Randall currently has.

4 The petition also directly supports the  
5 position stated in our Prehearing Brief that the  
6 Commission cannot unilaterally act to change the  
7 service area of a rural telephone company. As  
8 mentioned, the petition asks for, or proposes a  
9 redefinition and asks for FCC approval. The effective  
10 date of the changed definition proposed for -- the  
11 change in service area definition proposed by  
12 Washington, the effective date is actually December,  
13 the end of the December 1998. And that was in  
14 recognition of the fact that the FCC would have to  
15 approve the proposed change in the rural telephone  
16 company service areas.

17 Finally -- and we believe this is very  
18 important -- the Washington petition indicates that the  
19 methods for determining universal service costs also  
20 have to be addressed in the context of looking at what  
21 is the appropriate service area for ETC's. The  
22 petition supports concerns set forth in our brief that  
23 the ETC service areas cannot be changed without at the  
24 same time changing the method of determining universal  
25 service costs.

1           The area over which ETC's have service  
2 obligations must match the area considered in  
3 determining the universal service costs or competitors  
4 will be in the position to arbitrage the existing USF  
5 mechanisms. Specifically, competitors will be in a  
6 position to offering -- limit their service offerings  
7 to the lowest cost areas within a within a study area,  
8 but collect support per line based on average study  
9 area costs.

10           The Washington Commission has indicated just  
11 briefly earlier it proposed a redefinition of rural  
12 service areas, but also proposed a different method for  
13 porting universal service support. Or, in other words,  
14 a different method for determining universal service  
15 costs.

16           What Dakota is attempting to do in this case  
17 is try to change what is really a national policy based  
18 on its specific petition. We don't believe the  
19 Commission should look at changing a national policy  
20 without opening a process where all companies could  
21 participate. And, specifically, we believe that's  
22 important because in conjunction with looking at the  
23 service area, you'd also have to look at somehow  
24 disaggregating costs below the study area level. And  
25 that kind of a looking at that kind of a proposal, as

1 in the Washington case, they did it on a statewide  
2 basis looking at all rural telephone companies. And we  
3 believe that the Commission should proceed in the same  
4 way.

5           Really what Dakota is asking the Commission  
6 to do is to review the Joint Board recommendations as  
7 to the definition of a rural service area, and we  
8 believe that a broader approach is necessary in terms  
9 of looking at those issues. That's all I have.

10           CHAIRMAN BURG: Mr. Hoseck.

11           MR. HEASTON: Thank you. Mr. Chairman,  
12 members of the Commission: Staff's objection to the  
13 judicial notice in this matter is a little more basic.  
14 It is this: In that the APA, the Administrative  
15 Procedures Act, provides that notice may be taken of  
16 cognizable facts and technical or scientific facts.

17           As I read these documents, neither of them  
18 fall into that category. And, therefore, we object to  
19 the Commission taking judicial notice. Thank you.

20           MS. WIEST: Anything, Mr. Heaston?

21           MR. HEASTON: Thank you. First, with regard  
22 to Mr. Coit's objection. I think if you reviewed the  
23 Washington Utility Commission filing with the FCC, you  
24 know that they didn't take a back seat to the FCC.  
25 They designated -- there is an order in there, and

1 that's why I want you to take judicial notice of this.  
2 There is an order in there that designates each  
3 exchange in the state of Washington, regardless of who  
4 serves that exchange, whether it's U S West, GTE, or an  
5 independent telephone company, designates each one as a  
6 service area. And they set a date by which that would  
7 happen by the end of this year.

8 Now, they realize that the federal statute  
9 does require that there be -- that an issue has arisen  
10 because of that as to what the service area will be of  
11 the incumbent company and how they will be treated in  
12 the study area for growing U.S.F. funds, and that is  
13 the FCC's prerogative. But what they're asking the FCC  
14 to do is give the same advantage to the competitor that  
15 they've -- that they're giving same the advantage to  
16 the incumbent company that they've now given to the  
17 competitor, and that is creating this  
18 exchange-by-exchange service area.

19 So this is exactly the issue we've got here.  
20 Where do you start? Where is the chicken and the egg?  
21 Where do you start? Is it the competition has to be  
22 there first, or does this Commission, which has the  
23 exclusive right both under state law and under federal  
24 law to determine what the service area is going to be.  
25 Then it becomes an issue much how you're going to port

1 the funds, and that's the FCC out of the universal  
2 service -- under the federal universal service fund.

3 But if you have a state universal service  
4 fund, this case wouldn't go anywhere outside of this  
5 state because it would still be just a state  
6 jurisdiction. Initially it's the state commission that  
7 has to make the determination on what the service area  
8 is going to be. Then you go to the FCC with the issue  
9 of how do you take care of the incumbent company.  
10 What's their service area going to be? Right now it's  
11 frozen, the study areas by federal law, but the FCC can  
12 change that.

13 But you've got to start somewhere, and where  
14 you have got to start is where the Washington Utilities  
15 Company did and that is declare something other than  
16 the study area to be the service area for the  
17 competitive company, and then get to the FCC and have  
18 them change it for the incumbent company to control the  
19 distribution of U.S.F. funds.

20 So this is identical to what's in the  
21 Washington filing and the Washington Order. And that's  
22 all we're asking here is to get this ball started in  
23 the state of South Dakota to determine what competition  
24 requires. Because as is pointed out, if you're going  
25 to get competition in the rural areas, you have to

1 provide an incentive to do that. If you're going to  
2 have choices and you're going to have lower prices, if  
3 the rural areas are going to realize the benefits of  
4 competition, then you've got to reduce these. The  
5 study area doesn't work. It's got to be something  
6 less. It's got to be a service area.

7 Washington, as it said, we would go along  
8 with exchange by exchange. We're asking for just the  
9 two contiguous exchanges. We're not asking exchange by  
10 exchange. We're a larger area than that even. So  
11 that's the same.

12 As to Mr. Hoseck's objection, this is  
13 something that is a public record. It's on file. It  
14 contains an Order from the Washington Utilities  
15 Commission. This Commission has traditionally taken  
16 judicial notice of documents like this, especially the  
17 Order and the filings of other similar commissions.  
18 These are judicially-noted facts, and we would ask that  
19 under the APA this is something that would meet the  
20 criteria and would be -- should be admitted or taken  
21 judicial notice of. This doesn't go to the weight of  
22 it. It just goes to the notice requirement.

23 CHAIRMAN BURG: I do have a question. In  
24 Washington State's Order, if the FCC shouldn't act on  
25 allowing the incumbent LEC's territory to become the

1 same exchange by exchange is what they've ordered, does  
2 it still go into place for CLEC's for that to be their  
3 territory?

4 MR. HEASTON: It will go into effect for  
5 CLEC's for U S West and GTE exchanges, yes.

6 CHAIRMAN BURG: Those are nonrural.

7 MR. HEASTON: Those are nonrural. In the  
8 rural I think the recommendation is to delay the  
9 implementation to give the FCC a chance to catch up.

10 CHAIRMAN BURG: I mean this is premature, but  
11 are you recommending the same procedure here?

12 MR. HEASTON: I would think that would be the  
13 appropriate procedure, yes, especially if the evidence  
14 will show there's no money being drawn out of the  
15 U.S.F. Now, according to prefiled testimony that I  
16 read, that this would not be a problem, but we've got  
17 to start sometime.

18 MS. WIEST: Anything else?

19 CHAIRMAN BURG: Maybe just one follow-up  
20 question. Why did you not ask for the territory  
21 changes before you asked for ETC status then in a  
22 two-stage, or at least make it a preliminary part of  
23 the ETC request?

24 MR. HEASTON: It makes no sense outside of  
25 ETC status. That's the whole reason for doing it is to



1 apply for ETC status. I mean what the study area is  
2 otherwise is meaningless.

3 CHAIRMAN BURG: I mean the policy needed to  
4 be changed. Wouldn't the policy needed to be changed  
5 before the ETC status makes sense from what you've  
6 said?

7 MR. HEASTON: I think you're stuck with a  
8 statute, the Communications Act of '96, which state  
9 legislature pretty much pulled into 49-31-73 through  
10 78. And so you've got that requirement that there be  
11 an ETC designation. For example, if you read 49-31-73,  
12 it requires that a company, in order to enter into a  
13 local exchange of a rural company has to qualify as an  
14 ETC before you can even let them compete. So, you  
15 know, to me the whole thing is ETC status. I mean  
16 that's what you've got to have.

17 MS. WIEST: Anything else? I would deny the  
18 motion for judicial notice. This is a petition to the  
19 FCC from the Washington Commission. DTI can certainly  
20 make these legal arguments. I don't think we need the  
21 petition from the Washington Commission.

22 MR. HEASTON: If I may, what about the  
23 Order? Will you take judicial notice of the Order,  
24 which is in there setting up the --

25 MS. WIEST: We have taken judicial notice of

1 Orders in the past. Is there any objection?

2 CHAIRMAN BURG: I'm trying -- I suppose my  
3 question is what's the difference? Does the Order  
4 authorize the petition be filed? Or what does the  
5 Order -- I mean, does the Order go beyond that? From  
6 what I understand, if the Order is merely authorizing  
7 the petition to be filed, then I do not see the  
8 validity of it. If it's more than that, there may be a  
9 reason to.

10 MR. HEASTON: No, the Order sets up the  
11 individual exchange-by-exchange designation as the  
12 service area.

13 CHAIRMAN BURG: But is it dependent upon the  
14 decision of the FCC?

15 MR. HEASTON: Only to the extent that the FCC  
16 will have to change the study areas for the incumbent  
17 company in order to make this whole thing work.

18 CHAIRMAN BURG: The Order isn't valid until  
19 that occurs?

20 MR. HEASTON: I think the Order is valid. I  
21 don't think there's any decision as to one is  
22 challenging the validity of the Order. No one appealed  
23 it, I'm aware of.

24 MR. COIT: I think that Order also clearly  
25 indicates you can't just look at the service area

1 alone. You have to look at how costs are determined  
2 for U.S.F. purposes. And I might be wrong, but I think  
3 that Order basically conditioned the change in service  
4 area upon some FCC approval of the method proposed for  
5 changing the way of determining U.S.F. costs. So I  
6 think isn't that held up, Bill?

7 MR. HEASTON: I don't think so. The Order  
8 speaks for itself, and it does talk about doing other  
9 things, but the Order -- and this Commission has  
10 routinely taken judicial notice of Orders of other  
11 commissions, and this is relevant.

12 MS. WIEST: We'll take judicial notice of the  
13 Order which is found as an attachment to the petition,  
14 and I have it. I think it was Appendix A; is that  
15 right? So we could take judicial notice of Appendix A  
16 in the attachment of the --

17 MR. HEASTON: I'll have that marked  
18 separately as Exhibit 5.

19 MS. WIEST: Are there any other motions?  
20 What's Exhibit 4?

21 MR. HEASTON: I'm going to introduce a map of  
22 the South Dakota Association of Telephone Cooperatives,  
23 a colored map of the various -- through Mr. Hertz.

24 MS. WIEST: Any other motions? Do any of the  
25 parties wish to make an opening statement?

1 Mr. Heaston.

2 MR. HEASTON: I think I just made mine.

3 MS. WIEST: Mr. Bradley?

4 MR. BRADLEY: Thank you. Nearly all

5 Commission decisions reflect a mixture of fact, law,  
6 and policy. And in this particular proceeding the  
7 legal requirements are abnormally important. For that  
8 reason, Fort Randall and SDITC filed a Joint Prehearing  
9 Brief, along with the prefiled testimony of Bruce  
10 Hanson.

11 Fort Randall Telephone Company is a rural  
12 telephone company. It has been designated by this  
13 Commission as an eligible telecommunications carrier,  
14 ETC. And in order for Fort Randall to qualify as an  
15 ETC, it was required to meet the service obligations  
16 and requirements of the law in all of its seven  
17 exchanges. DTI is requesting that the Commission allow  
18 DTI to be designated as an ETC for two of those seven  
19 exchanges, the Centerville and Viborg Exchanges.

20 In our brief we identified four issues. The  
21 first issue is whether DTI meets the minimum  
22 requirements imposed on ETC's. That issue is itself  
23 divided into two subparts. The first one is whether  
24 DTI satisfies the ETC service obligations throughout  
25 the area served by Fort Randall. And the second part

1 is whether DTI meets the service obligations directly  
2 within the Centerville and Viborg Exchanges.

3 The evidence that will be presented today  
4 will demonstrate that DTI does not meet ETC service  
5 obligations in Centerville and Viborg. And if the  
6 Commission agrees, there's no reason to proceed further  
7 with any of the other issues in this case.

8 The evidence will show that DTI currently  
9 serves approximately 10 percent of the access lines in  
10 Centerville and Viborg. Out of the 147 access lines  
11 served by DTI, only two of those are rural customers.  
12 And of those two, both happen to be DTI employees.  
13 That means that out of the approximately 485 rural  
14 access lines in Centerville and Viborg, only two are  
15 being served by DTI, and they both happen to be  
16 employees. DTI should not be allowed to qualify for  
17 ETC status until this shows greater support for rural  
18 customers, the very customers for whom universal  
19 service was intended to benefit.

20 Not enough for DTI to argue that it intends  
21 to qualify at a future date, the law requires that  
22 standards be met in advance of qualification. Should  
23 the Commission, however, in some way find that DTI is  
24 meeting the service obligations in Centerville and  
25 Viborg, then that opens up the remaining issues in our

1 brief.

2           The Joint Board recommendations and the FCC's  
3 Report and Order provides that before a company  
4 carrier, competing carrier, like DTI can qualify for  
5 ETC status, it must meet those service obligations  
6 throughout the rural telephone company's service area.

7           In paragraph 1172 of the recommendation, the  
8 Joint Board explained that by requiring both of the  
9 rural telephone company and the competitor to serve the  
10 entire service area, potential cream skimming was  
11 prevented, stating, quote, "potential cream skimming is  
12 minimized because competitors, as a condition of  
13 eligibility, must provide services throughout the rural  
14 telephone company's study area." Competitors would  
15 thus not be eligible for universal service support if  
16 they sought to serve only the lowest cost portions of a  
17 rural telephone study care. The FCC agreed.

18           Paragraph 189, it stated, "We agree with the  
19 Joint Board that at this time retaining the study areas  
20 of rural telephone companies as the rural service area  
21 is consistent with Section 214(e)(5)." And the policy  
22 object is underlined Section 254. We agree with the  
23 Joint Board that if competitors, as a condition of  
24 eligibility, must provide services throughout the rural  
25 telephone company study area, the competitors will not

1 be able to target only the customers that are the least  
2 expensive to serve and thus undercut the ILEC's ability  
3 to provide service throughout the area.

4 In addition to preventing competitors from  
5 cream skimming, or gaming the universal system through  
6 selective service decisions, the FCC and the Joint  
7 Board recognized the inherent difficulties of  
8 authorizing a service area only in part of the area due  
9 to the fact that the rural telephone companies'  
10 entitlements to universal service is based on embedded  
11 costs. These companies are unable to determine the  
12 cost of service on an exchange-by-exchange basis. Fort  
13 Randall's study area includes all seven of its  
14 exchanges. And attached to Bruce Hanson's testimony is  
15 a map of those exchanges. It's undisputed that DTI  
16 fails to meet the obligation to serve all seven  
17 exchanges.

18 The Commission could, based on finding that  
19 DTI does not meet the service obligations throughout  
20 the service area of Fort Randall, dismiss the  
21 petition. DTI asks the Commission to go farther and to  
22 ignore the Joint Board's recommendation and adoption of  
23 those recommendations by the FCC and said that you  
24 disaggregate Fort Randall's service area to allow  
25 Centerville and Viborg Exchanges to qualify as a

1 separate service area. DTI's only justification for  
2 ignoring the Joint Board's recommendation, which were  
3 adopted by the FCC as a single paragraph in the FCC's  
4 Report and Order. In that paragraph 190, the FCC  
5 raised a concern that using study areas may --  
6 underline the word "may" -- as the FCC did act as a  
7 legal barrier to entry for those wireless providers  
8 whose licenses do not extend to the full service area.  
9 In this case DTI serves Centerville and Viborg by a  
10 Lucent 5E switch. That's the same switch that Fort  
11 Randall uses to serve Wagner, which hosts office and  
12 the five subtending exchanges include Centerville and  
13 Viborg. DTI can provide service in those same six  
14 exchanges using the host remote configuration just as  
15 easily as can Fort Randall.

16           Should the Commission, however, allow a  
17 different service area for DTI, it would also be  
18 necessary, as they did in Washington, to make a  
19 corresponding change to the service area for Fort  
20 Randall. This is necessary to prevent gaming of the  
21 universal system support funds. In addition, any  
22 change in the service area shouldn't be based, we  
23 believe, on contiguous exchanges. Such a concept is  
24 arbitrary and was not addressed by the Joint Board, has  
25 no correlation to the way in which service is actually



1 provided and the cost of providing service.

2           Therefore, if the Commission is inclined to  
3 reject the recommendation of the Joint Board, it should  
4 open a different proceeding to determine what would be  
5 an appropriate methodology. And we assert that the  
6 appropriate methodology would be to reflect the  
7 operating and cost characteristics of the individual  
8 rural telephone companies.

9           In this particular case, Centerville and  
10 Viborg are not as a stand-alone service area for Fort  
11 Randall. Rather, they are part of a local network  
12 served by Fort Randall's host switch in Wagner.  
13 Therefore, the service area that incorporates  
14 Centerville and Viborg should necessarily including the  
15 Wagner host exchange and the three other subtending end  
16 offices. Pursuant to 47 CFR Section 54.207(c)(1)(2),  
17 any change in the service area for an area served by a  
18 rural telephone company requires FCC approval.

19           Once the Commission resolves the issue of the  
20 appropriate study area, and if it decides that DTI  
21 satisfies the service obligations of an ETC, then  
22 there's the fourth issue to address, which we just  
23 addressed in our brief, whether there should be two  
24 ETC's in the same service area. A competing ETC may  
25 only be authorized for areas served by a rural

1 telephone company if multiple ETC's would be in the  
2 public interest. And we respectfully request the  
3 Commission to decline to authorize two ETC's at this  
4 time.

5 First, the ETC current service level to rural  
6 service customers is so limited it shouldn't be allowed  
7 to qualify. Second, Fort Randall is currently barred  
8 by the FCC from receiving any universal service until  
9 at least January 1, 2001. It's barred because all  
10 seven of its exchanges were purchased from U S West,  
11 which was not receiving universal service support at  
12 the time of the sale. As such, granting ETC status to  
13 DTI would not provide DTI with any aid to support  
14 services in Centerville and Viborg and would provide no  
15 apparent public benefit.

16 Third, the entire system under which rural  
17 telephone companies receives universal service support  
18 is under review. Before the Commission could  
19 reasonably determine dividing the limited aid available  
20 to Fort Randall in the future is in the public interest  
21 it should have three things: One, how much aid will  
22 Fort Randall actually receive? Two, what service  
23 obligations will be imposed on Fort Randall? And,  
24 three, whether other sources of universal service  
25 support such as interstate access charges will change.

1           Clearly the Commission should have more  
2 information than it has now before it determines that  
3 sharing universal service support is in the public  
4 interest.

5           In conclusion, DTI's petition should be  
6 denied for several reasons, but it should be denied  
7 without prejudice. The reasons for denial including,  
8 one, DTI's current failure to offer its services to  
9 rural customers in Centerville and Viborg; two, DTI's  
10 failure to provide any service outside of Centerville  
11 and Viborg, thus failing to provide service throughout  
12 the servicing area; three, the inappropriateness of  
13 changing the current service area at this time; and,  
14 four, the inability to determine designating multiple  
15 ETC's in Centerville and Viborg Exchanges is in the  
16 public interest. Thank you.

17           MS. WIEST: Mr. Coit.

18           MR. COIT: Nothing further. We concur in the  
19 comments of Mr. Bradley.

20           MS. WIEST: Mr. Hoseck.

21           MR. HOSECK: No, nothing.

22           MS. WIEST: Mr. Heaston, first witness.

23           MR. HEASTON: We'd call Mr. Hertz to the  
24 stand, please.

25

1                   **TOM HERTZ,**

2                   called as a witness, being first duly sworn,  
3                   was examined and testified as follows:

4                   DIRECT EXAMINATION

5           BY MR. HEASTON:

6           Q.     Would you please state your name.

7           A.     My name is Tom Hertz.

8           Q.     And what is your occupation and by whom are  
9           you employed?

10          A.     I am a CEO running Dakota Telecommunications  
11          Group, Inc., which is the parent company of DTI,  
12          petitioner in this docket.

13          Q.     And DTI stands for what?

14          A.     Dakota Telecom, Inc.

15          Q.     Did you provide prefiled testimony in this  
16          docket?

17          A.     Yes, I did.

18          Q.     Did we also file a petition in this docket?

19          A.     Yes, we did.

20          Q.     I'll ask you to take a look at what has been  
21          marked as Exhibit 1. What is that?

22          A.     Exhibit 1 is labeled Petition, and it's  
23          captioned TC Docket 98-111. It has a South Dakota  
24          Public Utility Commission filing stamp on it, and that  
25          was filed by Kathleen Marmet, an attorney employed by

1 DTI, on the 8th of June.

2 Q. And I ask you to also look what has been  
3 marked as Exhibit No. 2. Could you identify that,  
4 please?

5 A. Yes, I can. Exhibit No. 2 is my prefiled  
6 testimony in this docket prepared by me in preparation  
7 for Docket TC98-111.

8 Q. Do you have any additions, corrections, or  
9 deletions to make to that testimony?

10 A. No, I do not.

11 Q. If I were to ask you the questions contained  
12 in that prefiled testimony, would your answers be the  
13 same today?

14 A. Yes, they would.

15 Q. Does that testimony contain any exhibits?

16 A. Yes, it does. It contains several exhibits.  
17 I don't think they're marked individually. But they  
18 are, among other things, advertising materials, or  
19 copies of advertising materials that we are using, or  
20 have used in the past in the Viborg and Centerville  
21 Exchanges, along with some of other our areas. I think  
22 that's marked as Exhibit A. Exhibit B is a section of  
23 the FCC Rules in 97-157, which includes paragraphs 127  
24 through 198 of that Order. And Exhibit C is a copy  
25 that sets forth the designations or the source of the

1 frozen study area rule that we've talked about in  
2 various parts of the testimony. That's a one-page  
3 exhibit. Exhibit D is an excerpt from a NECA, National  
4 Exchange Carriers Association, manual talking about the  
5 cost and average schedule issue and study areas. All  
6 of these exhibits are referenced in the body of the  
7 testimony.

8 MR. HEASTON: I'd move the admission of  
9 Exhibits 1 and 2.

10 MS. WIEST: Any objection? If not, they've  
11 been admitted.

12 Q. I hand you what's been marked as Exhibit 4.  
13 Can you identify that, please?

14 A. Exhibit 4 is a January 1997 version of a map  
15 of South Dakota telephone exchanges. I believe it's  
16 prepared by the South Dakota Association of Telephone  
17 Cooperatives. We have received copies of this many  
18 times in the past. This appears to be the latest  
19 version that was issued.

20 Q. Is that map color-coded?

21 A. Yes, it is.

22 Q. And in what color is Dakota Telephone  
23 Cooperative designated?

24 A. It's labeled as Dakota Telephone -- excuse  
25 me, Dakota Cooperative Telephone. Of course the

1 current name is Dakota Telecommunications Group, Inc.  
2 It's in a brown color.

3 Q. Okay. And what about the Fort Randall  
4 Exchanges, how is that designated on there?

5 A. Fort Randall Exchanges, I think, are  
6 designated on here as Rushmore Telephone Company, and  
7 they're in a gray color, and that includes the Viborg  
8 and Centerville Exchanges as well as the other  
9 exchanges that they have throughout the state.  
10 including those exchanges West River and the Hermosa  
11 area.

12 Q. Is there a number associated with those gray  
13 areas?

14 A. The gray areas are numbered six, and the logo  
15 on the map states Mount Rushmore Telephone. The  
16 presumption is that that is now Fort Randall Telephone.

17 Q. But those are what you understand to be the  
18 Fort Randall numbers, the exchanges numbered six, or  
19 what you understand to be the Fort Randall Exchanges?

20 A. Yes.

21 MR. HEASTON: I'd offer Exhibit No. 4.

22 MS. WIEST: Any objection? If not, it's been  
23 admitted.

24 MR. HEASTON: I have no further questions.  
25 Mr. Hertz is available for cross-examination.

1 MS. WIEST: Mr. Bradley.

2 CROSS-EXAMINATION

3 BY MR. BRADLEY:

4 Q. Thank you. Mr. Hertz, DTI is asking that its  
5 service area be the Centerville and Viborg Exchanges?

6 A. DTI is asking for ETC status, a determination  
7 by the South Dakota Public Commission, Public Utilities  
8 Commission of eligible telecommunications carrier  
9 status for the Viborg and Centerville Exchanges. DTI  
10 also serves other non-Fort Randall Exchanges.

11 Q. If DTI is granted ETC status for Centerville  
12 and Viborg as its service area, do you agree that Fort  
13 Randall should have its service area disaggregated to  
14 establish Centerville and Viborg as a stand-alone  
15 service area for Fort Randall?

16 A. I don't know that's necessarily the case.  
17 The FCC said in various dockets that it is possible to  
18 have more than one ETC in a given service area.

19 Q. My question to you is do you agree that Fort  
20 Randall should have its service area disaggregated to  
21 establish Centerville and Viborg as a stand-alone  
22 service area for Fort Randall?

23 A. Are you asking to speculate whether I think  
24 that's wise?

25 Q. Correct.



1           A. I really don't have an opinion on that. What  
2 I'm here to discuss today is whether or not Dakota  
3 should be granted DTI status, not what should happen to  
4 Fort Randall's study area.

5           Q. If DTI and Fort Randall receive funding based  
6 on the cost of serving the same service area, should it  
7 in fact be based on the same service area costs?

8           A. Not necessarily. It depends how you define  
9 service area.

10          Q. If DTI has a smaller service area than Fort  
11 Randall and DTI's costs will not affect those of Fort  
12 Randall, will it?

13          A. I don't think that's necessarily the case.  
14 The costs are in some cases in the models that are  
15 being discussed are disaggregated much further than  
16 even the exchange basis. They go down to individual  
17 census block areas.

18          Q. If ETC service areas are disaggregated for  
19 Fort Randall, would that change the current demands on  
20 the U.S.F. funds, assuming no cap in place?

21          A. Would you repeat the question, please?

22          Q. Certainly. Ignoring the fact that Dakota --  
23 excuse me. Ignore the fact that Fort Randall currently  
24 receives no U.S.F. and has a cap on receipt of U.S.F.,  
25 if ETC service areas are disaggregated, would that

1 change the current demands on the U.S.F. fund?

2 A. The demands on the U.S.F. fund are based on  
3 costs studies done according to NECA and FCC  
4 procedures. If those procedures have to be changed, if  
5 the basis for determining studies areas are changed,  
6 that's something that the FCC and the state have to  
7 decide. If you're asking is the total amount of  
8 support going to go up or is it going to go down, I  
9 don't know the answer to that question.

10 Q. Let's take a hypothetical. Assume there's a  
11 company with 20 exchanges and that company currently  
12 earns no U.S.F. based on its total company costs. If  
13 we now determine U.S.F. on an exchange by exchange  
14 basis, would it be possible for that company to receive  
15 U.S.F. funds?

16 A. It's possible. But I don't know until the  
17 rules are developed as to how that's actually going to  
18 turn out.

19 Q. Well, should this Commission know what the  
20 rules are going to be before it makes such a decision?

21 A. I don't think the Commission can know what  
22 the rules are going to be before it makes a decision  
23 because it never gets to the FCC for a decision in the  
24 first place unless the state takes some action.

25 Q. In the Washington case didn't the Commission

1 act to assure that the U.S.F. funds would remain  
2 unchanged for the state of Washington?

3 A. That was part of what their discussion  
4 consisted of in the documentation surrounding the  
5 Order, yes.

6 Q. Mr. Hertz, on your prefiled testimony, page  
7 one, line 12, you state that being an ETC makes that  
8 carrier eligible for universal service support for  
9 service to schools and libraries. Isn't it true that  
10 as a matter of law providers of services to schools and  
11 libraries do not need to be an ETC?

12 A. My understanding is, is that depending on  
13 what services we're talking about for schools and  
14 libraries, there may be some requirement or some  
15 advantage to being an ETC when applying for those kinds  
16 of support.

17 Q. The question, Mr. Hertz, isn't it true that  
18 pursuant to the FCC's Rules 54.201(a)(3), that a  
19 provider of services to a school district does not have  
20 to be an ETC to qualify for those universal service  
21 programs?

22 MR. HEASTON: Would you please show Mr. Hertz  
23 a copy of that?

24 MR. BRADLEY: Sure.

25 MS. WIEST: What was that cite again?

1 MR. BRADLEY: It is 54.201(a)(3).

2 A. I will agree that what Mr. Bradley has showed  
3 me says what it says he says.

4 Q. Thank you. Your direct testimony, page 20,  
5 line 21 through page 21, line two, explains that two  
6 different types of facilities DTI uses to serve  
7 customers in the Centerville and Viborg Exchanges.

8 A. What page was that?

9 Q. Page 20, the bottom, line 21, going over to  
10 page 21, line two.

11 MR. HEASTON: Direct testimony?

12 MR. BRADLEY: His direct, I'm sorry.

13 Q. It's page two, line 21, through page three.  
14 And looking at that it says, if I understand it, for  
15 customers within the cities of Centerville and Viborg,  
16 DTI uses fiberoptic cable to the neighborhood node and  
17 coaxial cable to the premises.

18 A. That's not entirely true. We do have some  
19 customers in Viborg that are on copper twisted pair  
20 directly from the CO. DTI's cable facilities at this  
21 time do not extend beyond Centerville and Viborg city  
22 limits. The local distribution plant, or what's  
23 commonly referred to as the local loop, does not extend  
24 beyond the city limits. Well, that's not entirely true  
25 either. We do have some customers in some areas that

1 we are serving with wireline facilities that are  
2 outside of Viborg and Centerville city limits. I  
3 believe there are two or three rural customers in the  
4 Centerville Exchange which prior to the time that Fort  
5 Randall acquired those are being served on copper  
6 facilities. We also have a wireless facility that  
7 serves a number of customers outside of these  
8 boundaries.

9 Q. You were serving them prior to the purchase  
10 by Fort Randall?

11 A. The two or three that we talked about. This  
12 was a subject of discussion, I think, in our prior  
13 hearing because we had maybe two or three customers  
14 that were on the fringes of those exchanges that wanted  
15 service from Dakota, and we provided it at that time.

16 Q. And you provided it by running an exchange  
17 from those customers' houses to your switched DTG  
18 switch?

19 A. Those are hard wire connections if that's the  
20 question, yes.

21 Q. What's their local service area?

22 A. I don't recall. I believe that they actually  
23 had prefix changes at the time that those were  
24 provided, so they're not really relevant. But in the  
25 interests of saying do we have local loop facilities

1 outside of Viborg and Centerville, the answer is, yes,  
2 we do.

3 Q. You talk about using a fixed wireless service  
4 for customers outside of Centerville and Viborg  
5 Exchanges?

6 A. Yes.

7 Q. What types of facilities will DTI need to  
8 install, if any, before you can offer that service  
9 throughout the entire exchanges?

10 A. We do offer that throughout the entire  
11 exchanges now.

12 Q. You're not going to have to put towers up?

13 A. We put the towers up.

14 Q. Can cable service be offered using those  
15 fixed wireless technologies?

16 A. Cable television, is that the question?

17 Q. That's the question.

18 A. No.

19 Q. In its advertising has DTI advertised its  
20 wireless service?

21 A. We have probably listed all the services we  
22 offer in the advertising. The advertising is generally  
23 not community specific.

24 Q. What is the name of DTG's long distance  
25 affiliate?

1 A. That is DTG Communications.

2 Q. What percentage of DTI's customers are  
3 presubscribed to DTG Communications?

4 A. I don't know the answer to that question.

5 Q. Can you give me a ball park?

6 MR. HEASTON: Objection. I don't understand  
7 the relevance.

8 MR. BRADLEY: The relevance is whether you're  
9 only packaging your programs to those customers who  
10 will take all of your services, whether you're actually  
11 offering as you're required to by law intraLATA equal  
12 access.

13 MR. HEASTON: You're not required by law in  
14 the state of South Dakota to provide intraLATA, but  
15 regardless what we provide long distance wise and how  
16 we package the services is not the relevant issue  
17 here. The relevant issue is whether we offer local  
18 exchanges services to the entire exchange of  
19 Centerville and Viborg. I don't see what this has to  
20 do with. That's not one of the criteria in the list.

21 MS. WIEST: Objection overruled.

22 Q. The question, Mr. Hertz, was could you give  
23 us a ball park of what percentage of your local  
24 customers are also taking long distance service from  
25 your affiliate?

1           A.   No, I can't. I don't have those numbers. We  
2   offer long distance services throughout the areas that  
3   we provide CLEC services. We also offer long distance  
4   services throughout the state of South Dakota in U S  
5   West exchanges primarily.

6           Q.   Which company is providing switching service  
7   for DTI?

8           A.   Right now that is being provided by DTG, the  
9   parent company.

10          Q.   And that's using a Lucent 5E switch?

11          A.   That is correct.

12          Q.   That's the same type of switch Fort Randall  
13   uses in Wagner?

14          A.   I don't know what Fort Randall uses, but I  
15   understand they have Lucent equipment.

16               MR. BRADLEY: I have no further questions.

17               MS. WIEST: Mr. Coit.

18               MR. COIT: No questions.

19               MS. WIEST: Mr. Hoseck.

20                       CROSS-EXAMINATION

21   BY MR. HOSECK:

22          Q.   Mr. Hertz, hypothetically, if the Commission  
23   was to grant your petition today, what, as a practical  
24   effect, would be the difference to your company  
25   tomorrow?



1       A.    The practical effect in the next 24 hours is  
2   probably zero.  The process of being designated an ETC  
3   is a requirement that has been put upon us by both  
4   federal law if we are ever going to receive any  
5   universal service support or other funds out of any  
6   interstate pooling mechanism.  And if the state of  
7   South Dakota does decide to create or invent an  
8   intrastate pool mechanism, I presume there would be  
9   similar requirements there.

10       Secondly, and without conceding that the July  
11   1st, 1998, law applies to us since we started all this  
12   process well before the current law was adopted, it  
13   seems to say -- in fact, it specifically says that we  
14   can't serve in a rural telephone company service area  
15   without being an ETC.  And that's in 49-31-73, I think,  
16   is the cite for that.  I'm not positive, but I think  
17   that's what it is now.  Again, we don't concede that  
18   law necessarily applies here.  But if it does, then we  
19   have got to be an ETC in order to serve in a rural  
20   telephone come area.

21       Now, it's like any other designation under  
22   federal or state law, while there may not be an  
23   immediate consequence, there are usually ramifications  
24   that roll off of these.  And certain definitions are  
25   often used to decide other issues.  It's a little bit

1 like the definition of common carrier. There were  
2 certainly obligations that go with being a common  
3 carrier that once you are one, you pick up that burden,  
4 even though nothing might happen to you in the next 48  
5 hours or 30 days by being so. But there are  
6 obligations that go with being an ETC, and there are  
7 benefits that go with being an ETC, which given the  
8 current state of the rule-making process, are at the  
9 very least uncertain.

10 Q. What about this business of the freeze of the  
11 support funds, the universal service support funds?  
12 How does that have a bearing on any answer you might  
13 give along that line?

14 A. That's an interesting question because a  
15 number of these small independent companies who  
16 originally agreed to a freeze or cap on their U.S.F. as  
17 part of the U S West accusations, for example, have now  
18 turned around and petitioned the FCC to raise that cap  
19 or remove that cap and allow them to remove the support  
20 they qualify for. There's a variety of reasons they  
21 claim that makes that necessary, but the point is a  
22 freeze or a cap is something that's placed there for  
23 some indefinite period of time, but it's not likely to  
24 stay there forever. The rules are claiming the cap may  
25 go off, the amount of support may go up, the amount of

1 support may go down.

2           As you're well aware here in South Dakota,  
3 Western Wireless has filed a petition for it to become  
4 an ETC for the entire state of South Dakota. There the  
5 underlying theory of -- they're filing, I think,  
6 without knowing the actual facts. But the underlying  
7 theory seems to be is that wireless carriers can  
8 provide service more cost-effectively in rural areas,  
9 therefore, the amount of U.S.F. should go down,  
10 therefore, they ought to be allowed to get some of it.  
11 That certainly isn't a message the incumbents are going  
12 to be happy with. But the point of the discussion is  
13 here that these things are not locked in stone. They  
14 do change with time. And we believe that we need to do  
15 this at this time. The only way to get the ball  
16 rolling is to give it a push.

17           MR. HOSECK: Thank you. No further  
18 questions.

19           MS. WIEST: Commissioners?

20           COMMISSIONER SCHOENFELDER: Mr. Hertz, I have  
21 some about the technology you deploy. Is it true that  
22 you only have two customers that are wireless?

23           A. No. We have 17 customers that are wireless.

24           COMMISSIONER SCHOENFELDER: I needed to know  
25 that. I also need -- but in these two exchanges?

1 A. Yes.

2 COMMISSIONER SCHOENFELDER: I'm interested in  
3 these two exchanges. I'm not interested --

4 A. I'm limiting my discussion to that. Now, out  
5 of that 17, there are approximately right now nine  
6 paying customers. We have some test circuits, and we  
7 have about five customers who are our employees who  
8 would normally be paying for local service, but as part  
9 of a company benefit or company policy, our company --  
10 our employees do not pay for local exchange service.  
11 They still pay for toll calls and all the taxes on the  
12 bills, but they don't pay for local exchange service.

13 COMMISSIONER SCHOENFELDER: Perhaps it's the  
14 way I read it, but your testimony in your prefiled  
15 testimony, I'm a little bit confused about what  
16 wireless provides and what is provided for by the  
17 Lucent, the 5E switch. Now, is your wireless switched  
18 at that 5E switch?

19 A. Yes, it is.

20 COMMISSIONER SCHOENFELDER: Okay. Does then  
21 -- so help me through this technology. Does 911 work  
22 on those wireless, on the fixed wireless --

23 A. Yes.

24 COMMISSIONER SCHOENFELDER: -- instances?  
25 And you talk about how many kilobytes. What kind of

1 Internet usage do they have, then, if they have any on  
2 the wireless?

3 A. Right now the maximum speed we've been able  
4 to achieve on the wireless local loop for Internet  
5 service is about 24 to 26 K. That's throughput. But  
6 all the CLASS --

7 COMMISSIONER SCHOENFELDER: But stop there  
8 and tell me what that means. Can I get Caller ID?

9 A. Yes.

10 COMMISSIONER SCHOENFELDER: Can I get CLASS  
11 services that way?

12 A. Yes.

13 COMMISSIONER SCHOENFELDER: My Internet will  
14 work there?

15 A. Yes.

16 COMMISSIONER SCHOENFELDER: Fast or slow, my  
17 language, not technological. I don't understand that.

18 A. Right now the fastest available speed on a  
19 dial-up connection is 33.6. That's a theoretical  
20 limit. As a practical matter, most people get 28.8,  
21 somewhere in that range. The best we're able to do on  
22 wireless at this point is about 24 to 26 K. So it is a  
23 little bit less than good copper links. It is much  
24 better than poor copper links. We have some in our own  
25 ILEC service territory that's on what's called carrier,

1 CMA carrier, and those people out there at times --  
2 seems to depend on weather. We're replacing a lot of  
3 this. Sometimes they can barely get 1,200 block out of  
4 it. So it is substantially better than the old  
5 carrier. It is not as good as in terms of Internet  
6 speed a direct copper connection or coax cables. But  
7 it is substantially better than the old copper is.

8 Now, all the CLASS services that they -- all  
9 Caller ID, call waiting, call forwarding, all these  
10 things work just like they do on a regular telephone.  
11 A customer can plug a regular telephone into this box.  
12 It doesn't have to be special equipment on the  
13 customer's end. To the customer it looks just like any  
14 other telephone. And when it gets to our switch, it  
15 looks like any other telephone. It's just that that  
16 last mile, the local loop, is a wireless link in this  
17 case. Now, that technology is changing very, very  
18 rapidly. The fact is is that a year ago 14.4 was as  
19 fast as you could go on Internet service on a wireless,  
20 whereas now we're looking at services this fall in the  
21 56 K range.

22 COMMISSIONER SCHOENFELDER: You're talking  
23 strictly fixed wireless?

24 A. Strictly fixed wireless.

25 COMMISSIONER SCHOENFELDER: How expensive is

1 your customer premise equipment for that? I mean is it  
2 substantially more than I would have if I had a  
3 wireline link?

4 A. It depends on what you count on customer  
5 premises equipment. For the customer himself or  
6 herself, there is no difference. They buy a standard  
7 telephone.

8 COMMISSIONER SCHOENFELDER: Okay. And this  
9 works like the piece of box you plug into the NID?

10 A. Yes.

11 COMMISSIONER SCHOENFELDER: So you can reach  
12 911?

13 A. Yes.

14 COMMISSIONER SCHOENFELDER: Operator  
15 services?

16 A. Yes.

17 COMMISSIONER SCHOENFELDER: Not necessarily  
18 the wireless. I'm a little confused where it is DTI  
19 provides operator services through AT&T until September  
20 1st. So now today if I were to -- if I had a DTI phone  
21 in Centerville or Viborg, I would now reach DTG. Do  
22 you have your own operators in place? Or I'm a little  
23 confused on are you still using WorldCOM and U S West?

24 A. It depends. We have our own 7 by 24 operator  
25 services operation. In fact, under contract we provide

1 operator services to most the independent companies in  
2 the state of South Dakota. We also use that for our  
3 own customers.

4 COMMISSIONER SCHOENFELDER: I'm assuming you  
5 don't, but I need to have you tell me if you have party  
6 line services in this area.

7 A. No, we do not.

8 COMMISSIONER SCHOENFELDER: Okay. And you  
9 say you don't provide the toll control, but you can  
10 provide the toll blocking?

11 A. Yes.

12 COMMISSIONER SCHOENFELDER: What about  
13 Lifeline, Link Up?

14 A. Those will be available. There is -- my  
15 understanding is there's some question -- and I haven't  
16 kept up on this, I apologize, Commissioner. But my  
17 understanding is if it's required that the independents  
18 in the CLEC's provide Lifeline Link Up, we will do so.  
19 But there's no technological barrier to doing so.

20 COMMISSIONER SCHOENFELDER: Okay. But you  
21 would expect to have that be eligible then from  
22 universal service funds if you were declared an ETC in  
23 these two exchanges?

24 A. Yes.

25 COMMISSIONER SCHOENFELDER: Would that be the



1 only advantage right now for you to have ETC  
2 designation in those areas until there would be  
3 universal service funds available or the freeze would  
4 be off?

5 A. The question there is until there's enough  
6 people out there doing this, there's not much impetus  
7 for the FCC to get the rules developed and get the  
8 final regulations out. So we know what to do. It  
9 seems to me that we have to start this ball rolling.  
10 It seems to me that we're far enough along with our own  
11 facilities based local exchange services that we ought  
12 to be able to do what we say we're going to do here.  
13 One of the things the Commission asked us to do in the  
14 Order approving our request to provide services in  
15 those areas in the first place a little over a year ago  
16 when the Commission, I think, issued the Order on that  
17 docket allowing us to do business in those areas was  
18 that we would be able to serve all the customers in  
19 those exchanges. We have done that. We are offering  
20 services to all those customers in those exchanges.

21 COMMISSIONER SCHOENFELDER: Have you ever  
22 turned a customer down?

23 A. No, we have not.

24 COMMISSIONER SCHOENFELDER: In those two  
25 exchanges? That's what I'm interested in.

1 A. Not to my knowledge, no, we have not.

2 COMMISSIONER SCHOENFELDER: Thank you.  
3 That's all I have.

4 CHAIRMAN BURG: I just have a couple. In  
5 your opinion, does the law allow a new service area to  
6 be established as you're requesting, the DTI, the  
7 federal law?

8 A. We're not requesting a new service area be  
9 established. All we're asking, requesting is that we  
10 be designated as an ETC, or that the Commission agree  
11 that we can be designated as an ETC under FCC rules.  
12 And before we can go to the FCC, we have to come to the  
13 state Commission. That's the way the laws read at this  
14 time.

15 CHAIRMAN BURG: True. But you want it for a  
16 different area -- there is no service area like you're  
17 requesting it for today; is that right?

18 A. Yes, the service areas exist now. There's  
19 Fort Randall. It has Viborg and Centerville Exchanges  
20 as part of their study area.

21 CHAIRMAN BURG: But there is no study area  
22 that is a designated as the one that you're  
23 requesting. Would that be true? Aren't you requesting  
24 for Viborg and Centerville only?

25 A. We're requesting for those two exchanges to

1 be designated as an eligible telecommunications  
2 company. At some point down the road -- I'm not sure  
3 when that's going to occur -- that is going to have  
4 some cost study implications, universal service  
5 implications for CLEC's, ILEC's, and everyone else. In  
6 order to start that process rolling, we have got to be  
7 designated as an ETC. Now, there can be multiple ETC's  
8 in one study area. There's no prohibition on having  
9 more than one ETC in a given study area.

10 CHAIRMAN BURG: But there is no study area  
11 that's contiguous with what you've requested.

12 A. The only contiguous study area with what we  
13 requested is the rest of DTG's affiliated company here,  
14 the old Dakota Cooperative Exchanges.

15 CHAIRMAN BURG: And you've not asked for ETC  
16 status in that area?

17 A. You've given us ETC status in that area. You  
18 did that for all the rural telephone companies.

19 CHAIRMAN BURG: But I guess what it appears  
20 to me that you're asking for is ETC status in this  
21 docket for Viborg and Centerville Exchanges only; is  
22 that correct?

23 A. Yes, that is correct.

24 CHAIRMAN BURG: And that is not a study area,  
25 nor a service area right now; is that correct?

1       A.    It is a service area, but it's not a study  
2 area by itself.

3           CHAIRMAN BURG:  Is it a service area by  
4 itself?

5       A.    Well, we think so.

6           CHAIRMAN BURG:  As designated any place?  I  
7 mean the way I was reading the rules, study areas and  
8 service areas are contiguous under the Federal Act  
9 currently.  Is that the way you see it?

10       A.    Contiguous or --

11           CHAIRMAN BURG:  Yes.  They're the same.

12       A.    For rural telephone companies the FCC has  
13 said that their study areas and service areas, I think,  
14 are the same.  But they also suggested that to reduce  
15 barriers to competition, to increase the choice  
16 available to the customers out there, that the states  
17 consider disaggregating, or looking at just contiguous  
18 areas as an appropriate service area as opposed to the  
19 entire study area for a cooperative or for a small  
20 company.

21           CHAIRMAN BURG:  And they also said that  
22 service areas could be different for nonrural areas; is  
23 that right?

24       A.    I'm assuming you're talking about U S West  
25 exchanges.

1           CHAIRMAN BURG: They just said nonrural. Has  
2 the FCC granted any alterations to a service area to  
3 date, or has the FCC recognized a new service area such  
4 as you're seeking any place in the United States?

5           A. My understanding is that they did, in fact,  
6 grant dual status. Or, in other words, have more than  
7 one ETC in a given study area. In the classic case in  
8 Kansas, that was a dispute between Sprint and an  
9 independent telephone company, and one of them was a  
10 cable company. But what actually ended up happening  
11 there is that the one company sold out to the other  
12 company, so it became a moot question. But prior to  
13 that time, I believe, there's an FCC Order that  
14 actually says that more than one company could be an  
15 ETC in a given area.

16           CHAIRMAN BURG: I agree with that, and I  
17 understand that. But so far I'm not aware that they've  
18 allowed it, any sub area of a study or service area, to  
19 be separately -- to get a separate ETC. That's what  
20 I'm asking you, if you're aware of any.

21           A. Only the case that I just mentioned,  
22 Commissioner.

23           CHAIRMAN BURG: And that was a sub area. It  
24 was not the entire prior ETC?

25           A. That's my understanding. That's my

1 understanding of what the circumstances were.

2 CHAIRMAN BURG: The difficulty so far that  
3 I'm having is to determine whether we can grant an ETC  
4 before we have a separate study area or service area  
5 that that ETC request encompasses. And maybe it's the  
6 chicken and egg, as Mr. Heaston mentioned earlier. I'm  
7 not sure. But that's the difficulty and that's the  
8 question that I need answered somehow today.

9 A. I understand your concern, Commissioner. I  
10 guess what I see this proceeding doing here is  
11 certainly not making the final determination. The  
12 final determination is going to be up to the FCC. But  
13 the Commission has to take some action before the FCC  
14 will look at it.

15 CHAIRMAN BURG: Thank you.

16 MS. WIEST: Just to clarify then, so in order  
17 to designate DTI as an ETC for Centerville and Viborg,  
18 is it your position that we do or don't have to change  
19 Fort Randall's service area, which we have previously  
20 designated as its study area?

21 A. I don't think that the Commission in South  
22 Dakota has had anything to do with study area  
23 designations. That's been done by the FCC, and that's  
24 been done for interstate cost settlement purposes only.

25 MS. WIEST: Right. But we did designate

1 service area.

2 A. You designated ETC status. The Commission in  
3 a docket -- in a recent docket the Commission gave all  
4 the incumbents ETC status in their certified service  
5 areas.

6 MS. WIEST: And we designated service areas  
7 in that same order.

8 A. I didn't read it that way. I don't know that  
9 it makes a difference. I guess the fact of the matter  
10 is you can designate someone as an ETC. You could have  
11 nine companies be a ETC in Fort Randall's study area if  
12 you so choose. The question is, is it in the public  
13 interest? Are the consumers going to benefit? That's  
14 really the threshold issue here. And our position is,  
15 yes, the consumers benefit. They've already benefitted  
16 because the costs have gone down. Shortly after we got  
17 there, Fort Randall cut their prices. We've increased  
18 the level of our services. The bottom line here is  
19 that the customers, the consumers in those two  
20 exchanges, are benefitting by what we have done. And  
21 the question I have -- or that the Commission has to  
22 decide is the consumer benefit, what we're here to  
23 promote today, or are we here to protect the incumbent  
24 telephone company?

25 MS. WIEST: But does the Commission have to

1 petition the FCC to change Fort Randall's service area?

2 A. No. We're not asking you to change Fort  
3 Randall's service area. We're asking for a designation  
4 as an additional eligible telecommunications carrier  
5 for those exchanges. Once you grant that to us, then  
6 we take it to the FCC, and then the FCC decides based  
7 on whatever criteria they have whether or not that's  
8 appropriate. And then they decide whether or not to  
9 change the study area boundaries. The South Dakota  
10 Commission cannot change study area boundaries. This  
11 study area only has to do with interstate settlements.

12 MS. WIEST: I'm not talking about changing  
13 study areas. Anything else, Mr. Heaston?

14 MR. HEASTON: No, I have nothing further.

15 MS. WIEST: Any other questions of this  
16 witness?

17 REDIRECT EXAMINATION

18 BY MR. BRADLEY:

19 Q. I just want to clarify, Mr. Hertz, the  
20 classic decision you mentioned, that was before the  
21 Commission's rules and before the Joint Board's  
22 recommendation -- I should say before the Joint Board  
23 recommendation and before the FCC rules that adopted  
24 that recommendation?

25 A. I think all that stuff happened



1 contemporaneously. The proceeding actually started  
2 before the '96 Act was passed and then continued after,  
3 and some of the rules were issued before the final  
4 determination in that case. So the only reason I bring  
5 it up is that it has, in fact, been considered by the  
6 FCC and they have, in fact, issued a ruling on it.  
7 Now, whether or not they would issue the same ruling  
8 today is speculation. I don't know.

9 MR. BRADLEY: I have no further questions.

10 COMMISSIONER NELSON: I guess I have one. I  
11 guess I'm sort of confused. I don't see how you can  
12 argue that letting you be an ETC in Fort Randall's  
13 service area doesn't change Fort Randall's service  
14 area. Because you're already an ETC; just not there.  
15 But if I'm understanding what you're telling me is that  
16 you need to be designated an ETC in Fort Randall's  
17 area. I find that argument inconsistent. I don't get  
18 it. How could you have it one way?

19 A. We're required by federal law to do this.  
20 And if the new law in South Dakota, the legislature  
21 just passed, applies to us, which we don't necessarily  
22 agree that it does, we have to be an ETC before we can  
23 serve in that territory. That's what the law says.

24 COMMISSIONER NELSON: I understand that. But  
25 I don't see how then you maintain that that doesn't

1 change Fort Randall's service area.

2 A. Service area means where you're obligated to  
3 provide service if a customer asks for it. So if we're  
4 added to the list of eligible telecommunication  
5 carriers in the Viborg and Centerville Exchanges, that  
6 means to us that any customer in those exchanges that  
7 asks us for service, we have to provide it. If asked  
8 Fort Randall for service in those exchanges, Fort  
9 Randall has to provide it as long as they're an ETC.  
10 So it hasn't changed anything for them. If a customer  
11 decides after six months with us that they would rather  
12 go back to Fort Randall and if Fort Randall is still an  
13 ETC, there then Fort Randall has to serve them. If  
14 Fort Randall decides to relinquish its ETC status in  
15 that area and they can choose to do so, then they no  
16 longer have the obligations to serve each and every  
17 customer in those two exchanges.

18 COMMISSIONER NELSON: Who would be the  
19 carrier of last resort?

20 A. If you have an ETC, then they're both  
21 carriers of last resort. It's only when you don't have  
22 more than one carrier that you really have a carrier of  
23 the last resort. If our obligations to serve those  
24 customers are the same as Fort Randall's, then we're  
25 both technically carriers of last resort. Either one

1 of us has got to offer services to all the members or  
2 to all the customers in those exchanges, and the  
3 customer has a choice. And the idea is if the customer  
4 has a choice, he's going to get a better deal. And  
5 right now that's the case. If it's purely on price  
6 alone, Fort Randall gets the customer. They have a  
7 lower price than we do, at least, in those exchanges.  
8 I don't know about their other exchanges. But where  
9 we're competing with them, they've lowered their  
10 prices.

11 COMMISSIONER NELSON: Thank you.

12 CHAIRMAN BURG: I have a couple more. You're  
13 offering service in those territories right now; right?

14 A. Yes, we are.

15 CHAIRMAN BURG: Without ETC status?

16 A. Yes. You gave us permission to do so.

17 CHAIRMAN BURG: So the opportunity to offer  
18 customers in that area choice is already there; is that  
19 correct?

20 A. The customers we choose, yes. Right now we  
21 don't have to offer it to everybody.

22 CHAIRMAN BURG: That's true. And what you're  
23 asking is to offer it in part of Fort Randall's  
24 territory, but not all of it?

25 A. All of the Viborg and Centerville Exchanges.

1           CHAIRMAN BURG: Not all of Fort Randall's  
2 territory that they have an ETC designation for; is  
3 that correct?

4           A. That is correct.

5           CHAIRMAN BURG: I want to go back to another  
6 thing. You said that you feel -- I just want a  
7 clarification on this. You feel that the law that the  
8 legislature passed in 1998 does not necessarily apply  
9 in this situation. Do you want to explain why?

10          A. I don't concede that it does because first of  
11 all, we started construction when U S West still owned  
12 the exchanges. We started offering services and had  
13 permission to do so under the old law when there was no  
14 mention of some of the things that are in the new law.  
15 We filed this proceeding with the Commission prior to  
16 July 1st of 1998, and the law that was in effect prior  
17 to that time did not include these provisions. So I  
18 don't concede that it does apply. It may be determined  
19 somewhere down the road that it does, in fact, apply to  
20 us. I don't know that. I mean, obviously, that's a  
21 decision for the Commission and the courts to make.  
22 I'm not ready to concede jurisdiction on that issue.

23          CHAIRMAN BURG: Thank you.

24          MS. WIEST: Any other questions? Thank you.  
25 Any other witnesses, Mr. Heaston?

1 MR. HEASTON: No, I have no further  
2 witnesses, and we rest our case.

3 MS. WIEST: Mr. Bradley.

4 MR. BRADLEY: Thank you. I would like to  
5 call as our only witness, Bruce Hanson.

6 BRUCE HANSON,  
7 called as a witness, being first duly sworn,  
8 was examined and testified as follows:

9 DIRECT EXAMINATION

10 BY MR. BRADLEY:

11 Q. Would you please state and spell your name  
12 for the record.

13 A. Bruce Hanson, B-r-u-c-e H-a-n-s-o-n.

14 Q. And by whom are you employed?

15 A. Hanson Communications.

16 Q. Have you prefiled direct testimony in this  
17 case?

18 A. Yes, I did.

19 Q. Any corrections or deletions you'd like to  
20 make to that prefiled direct testimony?

21 A. Yes, there are some corrections. Page two,  
22 line ten, second to the last word, "proscribed" should  
23 have been "prescribed." And page four, line 18,  
24 beginning with the sentence, "of those, only two" is  
25 what I have instead of "three" are rural customers.

1 And beginning with the next sentence, striking "two of  
2 those three," and just saying "both customers are  
3 employees of DTI." And then on line 21, beginning with  
4 the sentence "only one," striking "only one rural" and  
5 inserting "no customers out of 485," striking the word  
6 "is" and inserting the word "are" being served by DTI  
7 using wireline.

8 Q. With those corrections, if I asked you those  
9 same questions today, would your answers be the same?

10 A. Yes.

11 MR. BRADLEY: I would like to move Exhibit  
12 No. 3.

13 MS. WIEST: Any objection? If not, it's been  
14 admitted.

15 Q. Has Fort Randall received Commission approval  
16 as an ETC?

17 A. Yes, they have.

18 Q. For what service area?

19 A. For the seven exchanges that Fort Randall  
20 operates in.

21 Q. What is Fort Randall's study area?

22 A. Fort Randall's study area includes the seven  
23 exchanges that it presently serves. And in addition to  
24 that, the Mount Rushmore Telephone Company Exchange to  
25 have Keystone.

1 Q. Why is the Mount Rushmore Exchange included  
2 within this service area?

3 A. As a part of the rural --

4 Q. Excuse me, study area.

5 A. As a part of the acquisition that Fort  
6 Randall had, or Hanson Communications, the parent, had  
7 in South Dakota, one of the requirements by the FCC was  
8 that both study areas -- or that only one study area  
9 exist for the operations in South Dakota. And so we  
10 had one small exchange, Keystone, and it became  
11 incorporated into the Fort Randall study area. So I  
12 mean -- the Fort Randall exchanges, the acquired  
13 exchanges, became a part of Mount Rushmore's original  
14 study area.

15 Q. Are the Centerville and Viborg Exchanges able  
16 to provide service on a stand-alone basis?

17 A. Not on a stand-alone basis.

18 Q. What services are required for Centerville  
19 and Viborg in order to provide service?

20 A. We have a common host switch that sits in  
21 Wagner, South Dakota; and it provides some of the  
22 common processing and administration functions of the  
23 computers that provide telephone service in Centerville  
24 and Viborg. And so those links back to the host switch  
25 are integral in providing service.

1 Q. In addition providing switching services to  
2 Centerville and Viborg from a host switch in Wagner,  
3 are there other centralized services provided through  
4 as kind of a company-wide service?

5 A. We provide common billing functions through  
6 one billing system. In addition to that, our staff,  
7 the people that work for us, are dispatched out of a  
8 common location and share functions throughout all of  
9 our exchanges to be more efficient. In addition to  
10 that, you know, all of our accounting, bookkeeping,  
11 payables, things like that, are done commonly.

12 Q. Does DTI serve customers throughout Fort  
13 Randall's service area?

14 A. No, they do not.

15 Q. What exchanges does it serve?

16 A. They serve the exchanges of Centerville and  
17 Viborg.

18 Q. On your direct testimony you state that there  
19 are approximately 1,377 access lines and that DTI  
20 serves approximately 10 percent of those access lines.

21 A. That's correct.

22 Q. Of the approximately 485 customers located  
23 outside of the city limits of Centerville and Viborg,  
24 how many actually requested disconnection of service  
25 from Fort Randall?



1       A.   We've had three customers that have -- well,  
2 no, two customers that have asked for disconnections.

3       Q.   So when we heard Mr. Hertz testify that there  
4 were 17 customers taking wireless service, would you  
5 assume that 15 of those are still taking your wireline  
6 service?

7       A.   Yes.

8       Q.   And do you have any reason why a customer  
9 would be taking both services?

10      A.   I can't get in their heads, but there may be  
11 any number of reasons. Maybe a calling area, calling  
12 scope, or maybe a toll plan that might be more  
13 beneficial for them. I don't know.

14      Q.   Are DTI's residents long business rates  
15 higher or lower than Fort Randall's rates?

16      A.   They're higher.

17      Q.   Does Fort Randall receive any universal  
18 service funding?

19      A.   No, they do not.

20      Q.   Why not?

21      A.   Again, with the sale we represented to the  
22 FCC, the amount, or the level of support that we would  
23 receive after the acquisition was completed and because  
24 Mount Rushmore Telephone Company was an average  
25 scheduled company, they became large enough that they

1 would no longer receive any funds for universal  
2 service. And so the universal service that Mount  
3 Rushmore, the single exchange Keystone, used to get  
4 went away with the acquisition because it was a larger  
5 group of exchanges. And it was a portion or a part of  
6 the order that came back to us that said, "You'll no  
7 longer receive support."

8 Q. Did that order indicate how long the freeze  
9 would last?

10 A. They indicated that until the rules changed,  
11 in the order that nothing would change, that we would  
12 continue to get zero support.

13 Q. What is your expectation as to what that  
14 means?

15 A. The expectation is that until January 2001  
16 nothing is going to happen with U.S.F.

17 Q. Is there any way to know universal service  
18 funding will be available to Fort Randall after January  
19 2001?

20 A. Not presently.

21 Q. Is there any way to know what services would  
22 be required by an ETC in the year 2001?

23 A. I would speculate -- well, I shouldn't  
24 speculate. For sure, the things that are in the law  
25 are going to be the minimum, but there could during

1 that period of time be additional services that might  
2 be asked for.

3 Q. If the FCC reduces the current level of  
4 revenues from interstate access, what effect would that  
5 have on affordability of local rates?

6 A. It would cause the rates to increase.

7 Q. Would that make universal service fund  
8 support even more important?

9 A. Yes.

10 Q. In your opinion, should the Commission grant  
11 the DTI petition or change the Fort Randall service  
12 area before it knows the consequences of such a  
13 decision?

14 A. No.

15 Q. If the Commission decides to disaggregate  
16 Fort Randall's study area, should it be changed based  
17 on which exchanges are directly contiguous?

18 A. No.

19 Q. If the Commission is going to consider a  
20 change in Fort Randall's service area, what would be a  
21 more reasonable approach?

22 A. One approach would be to take a look at  
23 functionally how the Fort Randall is operating and look  
24 at the areas where common hosts and remotes are being  
25 used to provide service.

1 Q. Is the use of a host remote relationship  
2 unusual?

3 A. No, it's common.

4 Q. Does the use of a host remote relationship  
5 allow to you provide services like ISDN that would not  
6 otherwise be possible?

7 A. It provides -- it allows you to provide it  
8 more affordably for sure because you can stretch the  
9 investment over a greater number of customers or  
10 potential customers, yeah.

11 Q. If the Commission decides to grant DTI's  
12 request to have a separate service area for Centerville  
13 and Viborg, should it also allow Fort Randall to have  
14 disaggregated service areas that include Centerville  
15 and Viborg as a stand-alone service area?

16 A. Yes.

17 MR. BRADLEY: I have no further questions.

18 MS. WIEST: Mr. Heaston.

19 MR. HEASTON: Thank you.

20 CROSS-EXAMINATION

21 BY MR. HEASTON:

22 Q. I assume, Bruce, that you've had an  
23 opportunity in preparation for testifying and just  
24 running your business that you've had the opportunity  
25 to review the Telecommunications Act of '96 with regard

1 to what you're testifying about?

2 A. I have.

3 Q. And that you've also reviewed the FCC orders  
4 in that regard, especially those that have been cited  
5 by your counsel and so on in the briefs?

6 A. No, I have not.

7 Q. How about South Dakota state law, especially  
8 that which was passed in this most recent session?

9 A. I've read it.

10 Q. Okay. Based on your review, what review  
11 you've done, do you recall anything in the discussion  
12 of service areas and designation of an ETC that stated  
13 that you had to have the funds available or that there  
14 had to be no cap on funds or there had to be any  
15 particular rule in place with regard to the federal  
16 universal service funding?

17 A. I'm not aware that they got that specific  
18 about the level of funding.

19 Q. Do you think that this cap is going to be on  
20 there forever?

21 A. Again, speculation. Mike asked the same  
22 question. I think post January 1, 2001, you know,  
23 there is some -- there will be some re-working of how  
24 that funding formula is made. But so, yeah, after that  
25 period of time, I'm sure there's going to be a

1 different way of funding.

2 Q. Well, to the extent that you've read what's  
3 in the '96 Act, Telecommunications Act of 1996, is it  
4 your understanding that the universal service funding  
5 is intended to fund those insular high cost and low  
6 income areas of a service area in order to provide  
7 universal service within those areas?

8 A. Well, that was certainly the intent. You  
9 know, my belief of the intent is similar to what you  
10 said is to make it affordable.

11 Q. And you certainly believe that the exchanges  
12 that you serve here in South Dakota qualify, at least,  
13 in part as high cost exchanges?

14 A. Yes, I would agree that they would -- they  
15 would constitute what the law says.

16 Q. In order for the law to work, the rules do  
17 have to change and funding does have to become  
18 available to keep service affordable in those areas?

19 A. Well, I think certainly the rural sale had a  
20 different flavor for the FCC. And if in our particular  
21 case what they were trying to do is insure that in  
22 conjunction with any of these rural sales that there  
23 wasn't a significant impact or draw on the universal  
24 service fund. And so in that particular case they  
25 asked ahead of time, you know, what impact is this

1 going to have on us on our limited fixed funds because  
2 they were capped. And it probably will change but  
3 probably not before the rules change on it.

4 Q. Is there anything from your memory or your  
5 review of the law in this area that indicates that  
6 there has to be a certain level of market penetration  
7 by a competitor before anybody can be designated an  
8 eligible telecommunications carrier? I mean have you  
9 ever read anything that says anything about market  
10 penetration being an issue, other than your counsel's  
11 brief, but prior to that in the law or anything else  
12 that you reviewed of that being one of the criteria?

13 A. One of the criteria that I remember all along  
14 has been that they provide service throughout the  
15 service area.

16 Q. Is the word provide or is the word offer?

17 A. That, I don't remember.

18 Q. Well, if the word is offer, that's different  
19 than provide, isn't it?

20 A. I don't know.

21 Q. You can offer something, right, Bruce, but  
22 you don't have to provide it unless somebody asks for  
23 it?

24 A. We're getting under the distinction of  
25 definitions, and I don't know.

1 Q. This is plain English.

2 A. Both words can mean the same to me.

3 Q. This is plain English. When you offer to do  
4 something and when you actually do it, there's a  
5 difference, isn't there?

6 A. Correct, yeah, there would be a difference  
7 between the word offer and provide, yeah.

8 Q. I mean a competitive carrier doesn't have to  
9 provide service to the entire exchange to every  
10 customer. I mean there's got to be room left for  
11 customers for incumbents; right?

12 A. We hope so.

13 Q. So it's just an offer. It's not the actual  
14 provisioning in there. And you're not aware of  
15 anything in your memory that says whether the  
16 competitive company has five percent of the market or  
17 10 percent of the market or 20 percent of the market or  
18 50 percent of the market is something the Commission  
19 should consider in granting eligible telecommunications  
20 carrier status to a company?

21 A. Well, the question goes beyond, you know,  
22 what I --

23 Q. Do you remember seeing anything like that?

24 A. No, I don't remember.

25 Q. I mean, suppose you were to get down to 20



1 percent in a market. Is there something that says you  
2 cannot be the eligible telecommunications carrier in  
3 the market, you, as the incumbent?

4 A. You're getting beyond where I normally tread  
5 here in terms of understanding the Act. I really don't  
6 believe there was never any indication of percentages,  
7 I will agree. And so, you know, your question doesn't  
8 lead me to an answer.

9 Q. Have you cut prices for local service in  
10 Centerville and Viborg since you've taken over those  
11 exchanges?

12 A. Yes, we have.

13 Q. And from what to what?

14 A. That, I don't remember. I know what they  
15 are. I do believe I know what they are. \$10 and \$16.  
16 \$10 for residential lines and \$16 for a business line.

17 Q. Did you cut your prices in your Fort Wagner  
18 Exchange when you took over?

19 A. What we did in Fort Randall's exchange?

20 Q. No, in the Wagner Exchange, I'm sorry.

21 A. In the Wagner Exchange, yes, we did. We  
22 reduced rates \$3.00 initially and then also  
23 incorporated with the basic rate Touchtone and some on  
24 command type services as far as collating and things  
25 like that.

1 Q. Was the cut in price an elimination of zone  
2 pricing?

3 A. Elimination of zone pricing? Yes.

4 Q. Was the cut in price in Viborg and  
5 Centerville merely an elimination of zone pricing?

6 A. No.

7 Q. Was it in response to competitive pressure  
8 that you reduced prices in Viborg and Centerville?

9 A. Yes.

10 Q. In operating the Fort Randall Telephone  
11 Company, is that a completely stand-alone operation?

12 A. Stand-alone to what?

13 Q. As far as a business. I mean do you use  
14 anything out of your other communications companies in  
15 Minnesota to help you run the Fort Randall Company?

16 A. It's a stand-alone operation in terms of its  
17 basic function. We do have some overheads that get  
18 allocated from the parent company down to the sub.

19 Q. Okay. And what would be examples of some of  
20 these overheads?

21 A. An example would be we have common staff that  
22 work payables, but they may work multiple company  
23 payables. And so any time that they work for Fort  
24 Randall, their hours would be charged to the sub. They  
25 may be employed by the parent corporation, but their

1 time and efforts are billed back to the subsidiaries.  
2 And so in that extent we do have some common costs that  
3 are held up at the parent but distributed down to the  
4 sub.

5 Q. Currently you do do some allocating of costs  
6 within your operations between the parent company,  
7 which if I remember, is located in Minnesota and the  
8 company in Fort Randall which is located in South  
9 Dakota?

10 A. That's correct.

11 Q. Don't you also do some jurisdictional  
12 operation work in that regard between the parent and  
13 the sub?

14 A. Describe for me jurisdiction.

15 Q. During the FCC and the intrastate  
16 jurisdiction being the interstate/intrastate  
17 jurisdictions.

18 A. Not presently we don't.

19 Q. Now, when you testified in Docket Number  
20 TC97-062 on November 3rd of 1997 --

21 A. Which docket was that?

22 Q. This is the Matter of the Filing by Dakota  
23 Telecom and Dakota Telecom Systems and Dakota  
24 Cooperative Telecommunications for Interconnection with  
25 Fort Randall Telephone Company?

1 A. Okay.

2 Q. And apparently in your prefiled testimony you  
3 had provided testimony concerning costs coming from  
4 what's termed a BCPM model, a Benchmark Cost Proxy  
5 Model. Do you remember that testimony?

6 A. Yes, I do, vaguely though.

7 Q. All right. But apparently in preparation for  
8 that testimony you gained some familiarity with what  
9 the Benchmark Cost Proxy Model was?

10 A. Yes.

11 Q. Isn't it your understanding that this  
12 Benchmark Cost Proxy Model does do cost allocations  
13 down to areas smaller than an exchange census block  
14 groups?

15 A. I've got to remember because we looked at  
16 both the Hatfield and the BCPM. I'm trying to remember  
17 the two.

18 Q. Don't they both?

19 A. Yes, they both do.

20 Q. They both do?

21 A. Yes.

22 Q. And in that case you did testify that the  
23 BCPM costs for a rural loop in the Fort Randall areas  
24 was \$108.09 and for the unbundled loop in the urban  
25 area was \$70.30 approximately; right?

1 A. Yeah.

2 Q. There is a model that works with your cost  
3 structure at Fort Randall that will disaggregate costs  
4 down to within a BC? There are models that will do  
5 that; isn't that correct?

6 A. There are models, yes. Nobody adopting any  
7 of those because there are some fairly severe skewing  
8 that goes onto the rural, obviously, from the loop  
9 costs.

10 Q. But there are models?

11 A. There are models.

12 MR. HEASTON: I have no further questions.

13 MS. WIEST: Mr. Coit.

14 MR. COIT: I don't have any questions.

15 CHAIRMAN BURG: Mr. Hoseck.

16 MR. HOSECK: Yes, thank you.

17 CROSS-EXAMINATION

18 BY MR. HOSECK:

19 Q. Mr. Hanson, with regard to the switching  
20 configuration, right now the Centerville and Viborg  
21 Exchanges are -- how are they handled as far as  
22 switching is concerned?

23 A. They are remote switches, so they're commonly  
24 -- well, there's a common processor that sits in  
25 Wagner the 5E switch operates. It has a common switch

1 and then it also has remote offices that have some  
2 switching ability so they can complete local type  
3 calls. They complete calls where, say, a local trunk  
4 is terminated. So, for example, in the case of Dakota,  
5 we have a DS1 that connects the Viborg central office  
6 to their central office in Viborg. And if the  
7 umbilical, for whatever reason, were severed between  
8 our Wagner office and the Centerville or Viborg office,  
9 calls could still be completed towards Dakota's way in  
10 terms of their CLEC activity, but calls probably to the  
11 outside world would not be able to be completed.

12 Q. If I lived in either Viborg or Centerville  
13 and made a call within either one of those exchanges,  
14 or from one exchange to the other, does that -- is that  
15 switching dependent in any manner upon what you have in  
16 Wagner?

17 A. Only to the extent that if it had to go back  
18 for any kind of Caller ID type information, it would  
19 have to go back to the host for that. But if it was a  
20 straight plain old telephone service call between two  
21 locations, the network is designed to hold that within  
22 the remote structure. If it goes -- I'm sorry. If it  
23 goes between Viborg and Centerville, then it does do  
24 some routing back to the host because there isn't a  
25 direct physical connection between the two remotes.

1 Q. I want to discuss with you a little bit this  
2 universal service fund freeze that you have in your  
3 prefiled testimony, this January 1st, 2001, date. Is  
4 it your understanding that that is pretty much set in  
5 concrete?

6 A. No, but that was the -- well, the law said  
7 that that's when it was going to happen. But, you  
8 know whether or not it does or not, you know, is  
9 subject to change, I suppose.

10 Q. Mr. Hertz testified a little bit about the  
11 possibility that this date could change if there were  
12 petitioning or something of that nature that went on  
13 with the FCC. The question I have is does Fort Randall  
14 have any type of a petition or any pleading or any  
15 other type of action pending to change that freeze  
16 date?

17 A. To change the freeze on the dollar amounts?

18 Q. Yeah, the freeze on it. In other words, the  
19 freeze that's in effect until 2001.

20 A. Along with a number of our companies that  
21 purchased the former U S West exchanges in South  
22 Dakota, we joined in in that petition. There is a  
23 petition before the FCC to revisit a portion of the  
24 common carrier's decision on the freezing --

25 Q. Go ahead.

1 A. -- of the U.S.F.

2 Q. That would include the termination date of  
3 that; is that correct?

4 A. Correct. Wait a minute, you mean the 2001  
5 date?

6 Q. Yes.

7 A. No, it does not include that. All it's doing  
8 is it's saying to the FCC we want you to revisit the  
9 issue of whether or not there should be a cap at all.  
10 We're talking about in the 2001 is that a different  
11 methodology is to be established that will adjust  
12 interstate rates, and along with that look at the issue  
13 of the universal service fund. And so the methodology  
14 that we've been using in the past is going to change  
15 effective 2001.

16 MR. HEASTON: Okay. Thank you. No further  
17 questions.

18 MS. WIEST: Commissioners?

19 COMMISSIONER SCHOENFELDER: I have a couple.  
20 But let's talk about the date a little bit because if  
21 I'm recalling right, isn't that the order from the FCC  
22 that says January 1, 2001, is when you will move away  
23 from the existing methodology to a forward-looking  
24 methodology for all rural telecoms?

25 A. Yes.



1 COMMISSIONER SCHOENFELDER: And there is some  
2 indication that's subject to change, however, that's  
3 still in the order, I think?

4 A. Yes.

5 COMMISSIONER SCHOENFELDER: I want to go back  
6 to your allocation, your argument about the allocation  
7 of cost, I believe, is what it is when you talk about  
8 the network architecture that you have. Is that right?

9 A. Correct.

10 COMMISSIONER SCHOENFELDER: But there is  
11 nothing is there in your mind in the -- as an ETC  
12 designation that says that the network architecture  
13 would affect anybody's ETC designation?

14 A. No. But what we're talking about is  
15 universal service fund.

16 COMMISSIONER SCHOENFELDER: You're talking  
17 about the allocation of the costs that you would use to  
18 request universal service funding?

19 A. Correct, yeah. I mean what I was talking  
20 about is that if we're going to try to figure out what  
21 it costs to provide service in those communities, which  
22 is a function of determining the draw that you would  
23 potentially have --

24 COMMISSIONER SCHOENFELDER: Right.

25 A. -- you've got to take a look at, you know,

1 how your host remote configuration works. Because  
2 there are some common costs that are just sitting out  
3 spinning away.

4 COMMISSIONER SCHOENFELDER: You're going to  
5 have to divide those costs any way, are you not?

6 A. Traditionally we wouldn't divide them down to  
7 an exchange basis.

8 COMMISSIONER SCHOENFELDER: What if you have  
9 to do that, though, under the new order?

10 A. Under the new rule, then, yeah, somewhere if  
11 they --

12 COMMISSIONER SCHOENFELDER: You're going to  
13 have to come up with a methodology to do that. What  
14 I'm saying, there's nothing there that stops people or  
15 allows people to be an ETC based on either one of those  
16 arguments; is that right? Is there anything in the  
17 order or in the law that says your costs have to be  
18 allocated right or your network has to be configured  
19 right to be become an ETC?

20 A. No, that's right.

21 COMMISSIONER SCHOENFELDER: I think that's  
22 right. And I was confused a little bit. But then I  
23 have to ask you why you don't separate for  
24 jurisdictions, because you must have to do common costs  
25 carrier common line costs for intra and interstate.

1 You have to have jurisdictional separations. I don't  
2 understand how you cannot.

3 A. Not right now.

4 COMMISSIONER SCHOENFELDER: Because under the  
5 average schedule?

6 A. We're average schedule on the interstate  
7 basis. And on the intrastate basis until 1999 April of  
8 1999, we, Fort Randall, is not required to file a  
9 jurisdictional separation cost.

10 COMMISSIONER SCHOENFELDER: I wanted to make  
11 sure because I couldn't understand.

12 A. That's the only reason.

13 COMMISSIONER SCHOENFELDER: Then I want to  
14 ask your opinion of the order. And let's go back to  
15 this 17 wireless customers Mr. Hertz says he has and  
16 you say he only has two. And I understand where the  
17 discrepancy is coming in. Now, when we decide that  
18 whoever is going to be an ETC, I believe the universal  
19 service order says that only the primary line will  
20 receive support.

21 A. Okay.

22 COMMISSIONER SCHOENFELDER: So which is the  
23 primary line, then, the wireless or the wireline if I  
24 have two? This is a serious question. I'm not  
25 kidding.

1           A.    I mean I'm laughing only from the perspective  
2 of, you know, how do you police it? How do you  
3 decide? I really don't know how you decide.

4           COMMISSIONER SCHOENFELDER: I think it's  
5 something that might not have been contemplated in the  
6 order, but I can't -- I can't remember that part of  
7 it.

8           A.    That's why for us, when we looked at the  
9 number of customers that had left us, we would only  
10 look at the customers that would inform us that they  
11 had disconnected and that they wanted service removed;  
12 and then in the case of a referral announcement said we  
13 want you to put on a referral announcement that says  
14 the number has been changed. That's the only ones that  
15 we are aware of. That's where I come up with the  
16 number.

17          COMMISSIONER SCHOENFELDER: I have another  
18 question about Lifeline Link Up and I'll let you go.

19          A.    Sure.

20          COMMISSIONER SCHOENFELDER: Do you offer that  
21 now?

22          A.    Yeah.

23          COMMISSIONER SCHOENFELDER: Do you have  
24 people that take in in those two exchanges?

25          A.    Yes, we do.

1 COMMISSIONER SCHOENFELDER: If you --

2 A. I have -- okay, I have them in Fort Randall's  
3 exchanges, but I don't know -- I can't --

4 COMMISSIONER SCHOENFELDER: Okay. But do you  
5 receive universal service support for those Lifeline  
6 Link Up?

7 A. We, do not.

8 COMMISSIONER SCHOENFELDER: You just write it  
9 out of your own pocket?

10 A. Yeah.

11 COMMISSIONER SCHOENFELDER: Thank you.

12 CHAIRMAN BURG: I just want to follow up.  
13 Why are you not eligible? Just because of the freeze  
14 of universal --

15 A. No. We just haven't done anything with it.  
16 I mean we just -- it's small dollars and a lot of work  
17 and we just don't do it.

18 MS. WIEST: You could apply for it?

19 A. Yes, we could.

20 CHAIRMAN BURG: I don't think I have any  
21 questions.

22 MS. WIEST: On your petition you said you  
23 joined in a petition to the Common Carrier Bureau and  
24 that was to?

25 A. No. And I'd have to figure out exactly what

1 it is, but a number of telephone companies that were  
2 part of that rural sale.

3 MS. WIEST: In South Dakota?

4 A. In South Dakota requested to the FCC for them  
5 to consider portions of the order associated with the  
6 rural sale. And we joined with those other telephone  
7 companies asking the FCC to take a look at what the  
8 common carrier had decided on that rural sale decision.

9 MS. WIEST: And part of that would be the  
10 lifting of the cap?

11 A. Lifting of the cap.

12 MS. WIEST: Would another part be getting  
13 separate study areas for the sale of exchanges?

14 A. Yes.

15 MS. WIEST: So let's say if the cap were  
16 lifted, do you know would Fort Randall then be eligible  
17 for universal service funds?

18 A. In the present formula as of July 1, yes,  
19 they would.

20 MS. WIEST: And if you did manage to get  
21 separate study areas so that it would be, I assume, it  
22 would be Mount Rushmore and then all of the sole  
23 exchanges would be the other study area?

24 A. Uh-huh.

25 MS. WIEST: Under that scenario, would then

1 both Mount Rushmore and the Fort Randall Exchanges be  
2 eligible for universal service funds?

3 A. Yes, they would.

4 MS. WIEST: Do you have an indication as to  
5 when the FCC is going to act on this petition?

6 A. No. It's been sitting there for a long time.

7 MS. WIEST: For a long time. Okay. Any  
8 other questions?

9 CHAIRMAN BURG: This is a real hypothetical.  
10 Do you have any idea whether if Viborg and Centerville  
11 were separate exchanges they would be eligible for any  
12 universal service funds?

13 A. Yes, they would.

14 CHAIRMAN BURG: They would.

15 MS. WIEST: Mr. Bradley.

16 MR. BRADLEY: Just a few questions.

17 REDIRECT EXAMINATION

18 BY MR. BRADLEY:

19 Q. You had a series of questions concerning the  
20 meaning of the word offer. If a company has  
21 successfully offered to customers who have low cost and  
22 has unsuccessfully offered to customers with a high  
23 cost, do you have an opinion considering the validity  
24 of the second offer?

25 MR. HEASTON: Objection. I don't see how

1 that's relevant. Again, there's nothing in the statute  
2 that has to talk about the validity of an offer.

3 MR. BRADLEY: You're welcome to make your  
4 brief, but you've made a policy argument about what  
5 offered means and I'm asking him in his opinion whether  
6 that's a valid offer.

7 MR. HEASTON: The word valid does not appear  
8 in front of the offer in the statute.

9 MR. BRADLEY: I'll ask Rolayne.

10 MS. WIEST: Objection overruled. You can  
11 answer it.

12 A. No, I wouldn't consider that to be good  
13 faith.

14 Q. Now, do you think Congress intended that  
15 offers had to be valid or good faith?

16 A. Yes.

17 Q. Do you think Congress wouldn't want to give  
18 money to someone who was trying to defraud the fund?

19 A. Certainly wouldn't.

20 Q. With regard -- not to suggest that I think  
21 there's a frauding here, but it goes to the issue of  
22 good faith. And with regard to the use of the BCPM  
23 Model or the Hatfield Model, are you aware has the FCC  
24 decided whether those two models should be used for  
25 determining future costs for rural telephone companies?



1           A.    I think they've decided just the opposite.  
2 They enjoined a group of people to figure out a better  
3 model because of the problem that comes when you start  
4 dealing with rurals.

5           Q.    And the expectation is that model would be  
6 available in time to implement the 2001 deadline?

7           A.    Probably, yes.

8           Q.    Which would deal with Commissioner  
9 Schoenfelder's concern we're going to address this in  
10 the future?

11          A.    Yes.

12          Q.    And that would also address the issues  
13 related how to unbundle network elements' architecture?

14          A.    Yes.

15               MR. BRADLEY: I have no further questions.

16               MS. WIEST: Any other questions of this  
17 witness? Thank you. Any other witnesses,  
18 Mr. Bradley?

19               MR. BRADLEY: We have no further witnesses.

20               CHAIRMAN BURG: Any witnesses, Mr. Coit?

21               MR. COIT: No witnesses.

22               MS. WIEST: Any witnesses?

23               MR. HOSECK: None.

24               MS. WIEST: We'll recess for ten minutes.

25               (AT THIS TIME A SHORT RECESS WAS TAKEN.)

1 MS. WIEST: Let's go back on the record. Did  
2 you have any rebuttal, Mr. Heaston?

3 MR. HEASTON: No, I do not.

4 MS. WIEST: I think the question is do we  
5 want briefs on these? Do the Commissioners or parties  
6 want to brief this? Mr. Heaston?

7 MR. HEASTON: Well, since he's already filed  
8 a brief, as long as I get the last word, I guess I'm  
9 going to file -- I will file a short brief outlining  
10 the issues. But then if they file another one, I would  
11 like to be able to respond to that.

12 MS. WIEST: Were you going to file one,  
13 Mr. Bradley?

14 MR. BRADLEY: We would expect to do just a  
15 very brief reply brief, and I do mean brief, which  
16 would pick up any arguments we hadn't anticipated, and  
17 also we'd pick up any unusual fact situations that  
18 developed today. So we had contemplated that and part  
19 of this was also working with my counsel's schedule  
20 going on vacation next week, that if Dakota filed the  
21 first brief, we would do a reply brief. In other  
22 words, that will allow you to do a reply to our brief,  
23 essentially, and we would do a reply brief.

24 (A DISCUSSION WAS HELD OFF THE RECORD.)

25 MS. WIEST: Does anybody want to make a

1 closing statement?

2 MR. HEASTON: Not me. I don't have a  
3 closing. I'll save it for the brief.

4 MR. BRADLEY: My opening was adequate. Thank  
5 you.

6 MR. COIT: Nothing.

7 CHAIRMAN BURG: Mr. Hoseck?

8 MR. HOSECK: I still have a closing.

9 Mr. Chairman, Members of the Commission: Staff's  
10 position on this filing is that it should be dismissed  
11 on a couple of grounds. One of which is the lack of  
12 ripeness, or in the alternative, that it is moot. Such  
13 as in Mr. Bradley suggested that if any dismissal did  
14 occur, that it should be without prejudice.

15 The reason for staff's position on this is  
16 that if the purpose of becoming an ETC is to receive  
17 universal service support, and Fort Randall does not  
18 receive such support; that it would appear at this  
19 point in time -- now, I want to stress at this point in  
20 time, that this is a filing which really can accomplish  
21 nothing if the Commission was to grant the petition of  
22 Dakota.

23 The second thing of concern to staff in this  
24 matter is this business of the study area service area  
25 change. One thing that these proceedings seem to have

1 ignored and that is that on December 9 -- 17th, rather,  
2 1997, this Commission made a determination that Fort  
3 Randall's study area was set as its service area. The  
4 petition presently before the Commission does not seek  
5 to change that aspect. In other words, that  
6 determination has been made; and this is a collateral  
7 attack upon that and seeks the determination of an ETC  
8 for two exchanges which are within the entire Fort  
9 Randall service area. This is a technical objection  
10 but one that we think is serious.

11 Finally, should the Commission decide to act  
12 upon this petition, staff would suggest at the most if  
13 the Commission could do is to recommend a change in the  
14 in -- as I read the law, take a concerted action  
15 between both the FCC and the Public Utilities  
16 Commission to change this study area. But in the  
17 totality of the situation, staff's position is that  
18 this is a matter that is really premature for the  
19 Commission to consider. Thank you.

20 MS. WIEST: Anything else? If not, that will  
21 close the hearing.

22 (THE HEARING CONCLUDED AT 3:35 P.M.)  
23  
24  
25


1 STATE OF SOUTH DAKOTA )  
2 COUNTY OF HUGHES )  
3

4 I, Lori J. Grode, RMR, Notary Public, in and  
5 for the State of South Dakota, do hereby certify that  
6 the above hearing, pages 1 through 89, inclusive, was  
7 recorded stenographically by me and reduced to  
8 typewriting.

9 I FURTHER CERTIFY that the foregoing  
10 transcript of the said hearing is a true and correct  
11 transcript of the stenographic notes at the time and  
12 place specified hereinbefore.

13 I FURTHER CERTIFY that I am not a relative or  
14 employee or attorney or counsel of any of the parties,  
15 nor a relative or employee of such attorney or counsel,  
16 or financially interested directly or indirectly in  
17 this action.

18 IN WITNESS WHEREOF, I have hereunto set my  
19 hand and seal of office at Pierre, South Dakota, this  
20 17th day of September 1998.

21  
22   
23 \_\_\_\_\_  
24 Lori J. Grode, RMR, RPR  
25

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE REQUEST )  
BY DAKOTA TELECOM, INC. FOR )  
DETERMINATION OF ELIGIBLE )  
TELECOMMUNICATIONS COMPANY) )  
STATUS PURSUANT TO 47 USC 214 )

Docket TC98-111

PETITION

RECEIVED

JUN 10 1998

SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION

COME NOW DAKOTA TELECOM, INC. ("DTI") and Petitions the South Dakota Public  
Utilities Commission ("the Commission") as follows:

1. By this filing, DTI is requesting that the Commission designate DTI as an Eligible  
Telecommunications Company, as that term is used in 47 USC 214 (c) (1), for the following  
South Dakota exchanges:

Centerville (552) and Viborg (766).

2. DTI offers the following services throughout these territories using its own facilities and will  
continue to offer all services that are supported by Federal universal service support mechanisms,  
as supplemented by State regulations under section 254 (f) of the Telecommunications Act, as  
amended. ("the Federal Act"):

- 1) voice grade access to the public switched network throughout the Centerville and Viborg  
exchanges which meets or exceeds standard telephone audio bandwidth.
- 2) local usage, which means that a customer receives unlimited local calling services for a  
monthly base rate
- 3) dual tone multi-frequency signaling throughout the Centerville and Viborg Exchanges
- 4) single party service for all customers throughout the Centerville and Viborg exchanges
- 5) access to emergency services, with 911 services currently provided, and capacity to  
support enhanced 911 services when Turner County implements enhanced 911 systems  
for the Centerville and Viborg exchanges
- 6) access to operator services which provide assistance to consumers in the Centerville and  
Viborg exchanges to arrange for billing or completion, or both, of a telephone call
- 7) access to interexchange service
- 8) access to directory assistance which enables customers in the Centerville and Viborg  
exchanges to request information contained in directory listings



- 9) toll blocking for qualifying low-income consumers.
3. DTI makes Lifeline and Link Up programs available to qualifying low-income consumers throughout the Centerville and Viborg exchanges consistent with state and federal rules and orders.
4. To provide these services in these exchanges, DTI uses facilities which it either owns or leases. DTI has advertised, and will continue to advertise the availability of its services and the rates for the services using media of general distribution in the area served by the Centerville and Viborg exchanges.
5. DTI's rates for services that are supported by Federal universal service support mechanisms are below those previously charged by US West Communications, Inc. prior to selling the Centerville and Viborg Exchanges to Fort Randall Telephone Company.
6. DTI further requests that the Commission designate the area served by the Centerville and Viborg exchanges as a "service area" for DTI as that term is defined in 47 USC 214 (c) (5).
7. Designation of the Centerville and Viborg exchanges as a "service area" is in the public interest and consistent with criteria recommended by the FCC<sup>1</sup>, because these exchanges are a contiguous area, and are not contiguous with any other part of the current Fort Randall Telephone Company's or any other telecommunications carrier's, service or study area.
8. Fort Randall Telephone Company is currently designated as an Eligible Telecommunications Company in the Centerville and Viborg exchanges. Designation of DTI as a second eligible

<sup>1</sup> FCC 97-137, CC Docket No. 96-43 Report & Order In the Matter of Federal-State Joint Board on Universal Service, released 5/8/97, amended 6/4/97, 1190. We also conclude, based on additional information presented to us in response to the Recommended Decision, that universal service policy objectives may be best served if a state defines rural service areas to consist only of the contiguous portion of a rural study area, rather than the entire rural study area. We conclude that requiring a carrier to serve a non-contiguous service area as a prerequisite to eligibility might impose a serious barrier to entry, particularly for wireless carriers (493). We find that imposing additional burdens on wireless entrants would be particularly harmful to competition in rural areas, where wireless carriers could potentially offer service at much lower costs than traditional wireline service (494). Therefore, we encourage states to determine whether rural service areas should consist of only the contiguous portions of an ILEC's study area, and to submit such a determination to the Commission according to the procedures we describe above. We note that state commissions must make a special finding that the designation is in the public interest in order to designate more than one eligible carrier in a rural service area (495) and we anticipate that state commissions will be able to consider the issue of contiguous service areas as they make such special findings.

telecommunications carrier in these exchanges is in the public interest. Eligible

Telecommunications Company status will enable DTI to compete on an equal basis with Fort

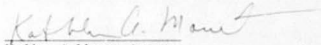
Randall Telephone Company, improving the ability of DTI to offer services supported by

Universal Service Fund Support at competitive prices.

WHEREFORE, DTI respectfully requests that this Commission designate DTI as an Eligible Telecommunications Carrier in the service area defined by the Centerville and Viborg exchanges as set forth above.

Dated this 8<sup>th</sup> day of June, 1998.

Dakota Telecom, Inc.

  
Kathleen A. Marnet, Attorney  
PO Box 66  
Irene, SD 57037  
(605) 263-3301 Phone  
(605) 263-3995 Fax

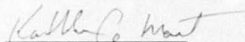


CERTIFICATE OF SERVICE

I, Kathleen Armstrong Marmet, hereby certify that on the 8<sup>th</sup> day of June, 1998, I mailed by United States mail, first class postage prepaid, one original and ten true and correct copies of the Petition of Dakota Telecom, Inc. for Designation as an Eligible Telecommunications Company to:

William Bullard, Jr.  
Executive Director  
South Dakota Public Utilities Commission  
500 East Capitol  
Pierre, SD 57501

Dated this 8<sup>th</sup> day of June, 1998.

  
Kathleen Armstrong Marmet

**EXHIBIT A**



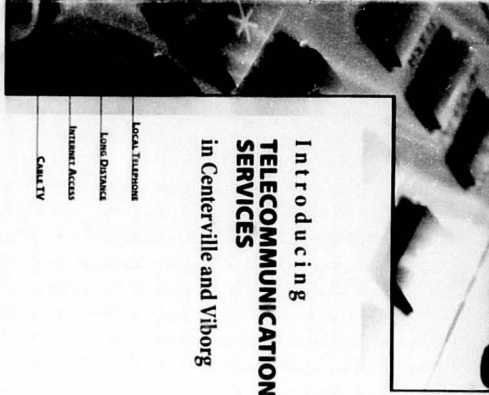
www.dtg.com

from  
**Dakota Telecom, Inc.**  
DTI is a wholly-owned subsidiary company of  
Dakota Telecommunications Group, Inc. (DTG).

## Introducing TELECOMMUNICATIONS SERVICES in Centerville and Viborg

Local Television  
Long Distance  
Internet Access  
Cable TV

Headquarters  
2000 42nd Avenue  
Centerville, IA 50003  
(515) 339-0066



Cable Channel	lineup
1	TELEVISION
2	TELEVISION
3	TELEVISION
4	TELEVISION
5	TELEVISION
6	TELEVISION
7	TELEVISION
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60	TELEVISION

See us at the "Pioneer Channel"

## DTI Cable Television

DTI's new cable system offers:

**43** basic channels

for only

**\$24.95** per month

**HBO & Showtime**

for only \$7.95 each per month

**AND COMING SOON...**

7 more premium channels

**Cinemax**

**Cinemax II**

**Showtime II**

**HBO II**

**Encore**

**Encore Plex**

**Starz**

4 pay-per-view channels

**Special Offer!**  
If you purchase cable television service from DTI, you can get Unlimited Internet Access for \$14.95/month.

If you have questions concerning DTI's new cable offerings or other DTG services, please contact us at (605) 263-3301 or (800) 239-7501.

## Dakota Telecom, Inc. (DTI)

At Dakota Telecom, Inc. we're more than just a phone and a cable company. We're part of your community.

As a business partner, we bring you high-quality telephone and cable television services.

As part of a larger company, we can also offer you low-cost long distance and high-speed internet services to fulfill all your telecommunication needs.

As a community member, we support the people of the communities we serve. We show our support through contributions to education, athletics and medical care; donations to fundraisers and benefits; and membership in economic and community development associations. The Distance Learning Project is one of the great programs we are proud to share with Centerville and Viborg.

DTI is a wholly-owned subsidiary company of Dakota Telecommunications Group, Inc. (DTG).

**Dakota Telecom, Inc.**  
P.O. Box 66  
Irene, SD 57037-0066

(605) 263-3301  
800-239-7501  
(605) 263-3995 fax

e-mail: info@dtg.com

www.dtg.com



## Internet Services

DTG offers full, unrestricted access to the Internet.

World Wide Web (WWW)

Newsgroups

E-mail

File Transfer Protocol (FTP)

Internet Relay Chat (IRC)

We utilize the fastest modems on the market to provide you the fastest access and the quickest download times.

**Unlimited Internet  
for \$14.95/month**  
(regularly \$17.95/month)

Other valid if you sign up for DTI cable television and/or telephone services.

**This special offer includes:**

- FREE Software & Activation
- Unlimited Access Hours
- Two mailboxes (Additional mailboxes \$5.00 each)
- Superior technical support Monday-Friday, 8 a.m. to 8 p.m.

(These packages require account activation.)

**Other Available Internet Packages: (monthly charges)**

Casual Access (10 hours/month) - \$8.95

Guaranteed Access (25 hours/month) - \$14.95

Unlimited Access - \$17.95

**Account Activation: (one-time charge)**

Basic Activation - \$15.00 (for users with their own software)

Deluxe Activation - \$19.95 (includes a licensed version of Microsoft Internet Explorer and a pre-configured dial-up kit.)

*We look forward to seeing you at one of our community meetings!*

**PLEASE**  
Sign up for DTT Cable TV or telephone service at one of these meetings and receive a service certificate for **\$25 OFF** your first month's bill!

*Refreshments will be served and everyone gets a FREE gift just for coming!*

DTT invites you to attend any of the above listed meetings. We will answer any questions you may have and give you the opportunity to sign up for any of the services listed in this brochure.

**Wednesday, November 19**  
1:30-2:30 p.m.  
Senior Citizens' Center

**Wednesday, November 15**

9:00-10:30 a.m.  
Centerville School Gymnasium

**CENTERVILLE**

**VIBORG**

7:00-8:30 p.m.  
Viborg School Gymnasium

Come visit with us about the new communication opportunities available from Dakota Telecom, Inc. (DTI).

**You may already have our Cable TV service... now see what else we can do for you!**

## INFORMATION & SIGN-UP MEETINGS

## Long Distance

Your long distance should be simple and affordable. DTI has a long distance plan especially for you.

### 13¢ per minute

**One guaranteed rate**  
24 hours a day, 7 days a week

**6-second billing**  
Call time is calculated in six-second intervals instead of full minutes, so you're not paying for time you're not using!

**No Risk guarantee**

We also provide a detailed long distance analysis at no cost for businesses. Special term rates are available. Please call 888-269-4DTI to talk to one of our Communications Consultants.

#### PLEASE NOTE:

Regulations require written authorization to switch from your current long distance provider to DTI's plan. Signing the form that accompanies this brochure serves as written authorization.



If you purchase long distance service from DTI, you can get Unlimited Internet Access for \$14.95/month.

## Local Telephone

DTI offers both residential and business local telephone service at very competitive prices.

#### PLEASE NOTE:

When you switch to DTI, your telephone number will change. The first three numbers, the prefix, will change. For your convenience, the last four digits will remain the same.

#### For Centerville:

You live in Centerville and your telephone number is 863-1234. When you switch to DTI telephone service, your telephone number will be **552-1234**.

#### For Viborg:

You live in Viborg and your telephone number is 326-1231. When you switch to DTI telephone service, your telephone number will be **766-1231**.

Centerville & Viborg: If you want DTI to provide your local telephone service and want to keep your current long distance provider, you need to contact your current long distance provider and tell them your new telephone number.

**Pick one custom calling package FREE for 3 months!**

**Package A** - Call Waiting, Call Forwarding & Speed Calling (8 numbers)

**Package B** - Caller ID\*, 3-Way Calling & Call Waiting

\*Caller ID feature requires Caller ID box

You may choose either of the packages and enjoy the features **FREE** for three months. After the three-month free trial, you may decide to purchase the features package, purchase another features package, or drop the package.

## Residential Telephone

#### Required (monthly) Charges:

Residence Access .....	\$12.75
Business Access Line .....	3.50
State of SD Impaired Tax .....	0.15
County 911 Tax .....	0.75
<b>Total .....</b>	<b>\$17.15*</b>

## Business Telephone

#### Required (monthly) Charges:

<b>Single Line</b>	
Business Access .....	\$17.50
Business Access Line (single) .....	3.50
State of SD Impaired Tax .....	0.15
County 911 Tax .....	0.75
<b>Total (single line) .....</b>	<b>\$21.90*</b>
<b>Two or more Lines</b>	
Business Access .....	\$17.50
Business Access Line .....	6.00/per line
State of SD Impaired Tax .....	0.15
County 911 Tax .....	0.75
<b>Example: Total (double line) .....</b>	<b>\$48.80*</b>

\* Example totals do not include applicable sales tax.

## Add-on Options

#### Optional (monthly) Charges:

100 Wiring Maintenance .....	\$1.00
Touch Tone Line Access .....	FREE
Unlisted Phone Number .....	0.50
Extra Listing .....	0.35
Rotary Hunt (per line) .....	3.00

#### FREE for 3 Months!

#### Custom Calling Features

**Package A** - Call Waiting, Call Forwarding & Speed Calling (8 numbers)

**Package B** - Caller ID, 3-Way Calling & Call Waiting

If you purchase local telephone service from DTI, you can get Unlimited Internet Access for \$14.95/month.



**This summer, you saw  
some of our construction.  
Recently, you read  
about our new services.**



**Now, you can enjoy crisp, clear telephone  
service through our new fiber optic network.**

Dakota's new fiber optic digital lines offer such a great quality of sound that you'll find yourself having to turn your telephone's volume *down* rather than *up*! And the only noise on your line will be the person on the other end of the conversation. You can really **hear the difference!**

Also, you can get many handy and useful services from Dakota that are not available at all from your current provider. Some of these new services will be offered on a trial basis, so you can try them out (for several months) for FREE. Call today for our higher quality telephone service.

LOCAL TELEPHONE  
LONG DISTANCE  
CABLE TV  
INTERNET ACCESS  
OPERATOR SERVICES  
WEB DEVELOPMENT  
LAN/WAN NETWORKING

Dakota Telecom, Inc., is a wholly owned subsidiary of



**1-800-239-7501 or 605-263-3301**

www.dtg.com • P.O. Box 66 • 29705 453RD AVENUE • IRINE, SOUTH DAKOTA 57037-0066

**TRANSFORMING COMMUNICATIONS**

**BRING THIS COUPON**  
**SAVE \$10.00**  
 With This Coupon On any  
**NEW SPRING ARRIVAL**  
 of \$50.00 Value or More  
 Expires Monday, March 16, 1988

*Hidden Staircase*  
 Downtown Centerville  
**TEN DOLLARS**

Not Valid  
 with any other  
 Promotional  
 Discounts

*Your Friend in Lennox and Tea*  
**Valley Exchange Bank**  
 Growing with Lennox Since 1883  
 Lennox-647-2261  
 Tea-368-2051

**- ATTENTION -**  
**JUBILEE FOODS**  
**WEEKLY GROCERY SPECIALS**  
**INSERT WILL NOW**  
**BE DELIVERED**  
**TO YOUR HOME**  
**BY THE**  
**SOUTHEAST TRUMPET**

**Jubilee**  
 foods  
 BERESFORD, SD

Beresford, SD  
 OPEN  
 Monday - Saturday  
 7am - 9pm  
 Sunday  
 9am - 6pm

## IMPORTANT NOTICE

Dakota Telecom is pleased to introduce telephone service to the cities of Centerville & Viborg.

**Dakota's new telephone prefixes are:**  
**552 - Centerville**  
**766 - Viborg**

As new customers sign up for our service, their telephone numbers are changing to these new prefixes with the last four digits of their telephone number staying the same. If you are unable to reach friends & family using the old prefixes, you are encouraged to try the new ones!

**DAKOTA TELECOM, INC.**  
 1-800-239-7501 • (605) 263-3301

**Conni's Cafe** 317 N. Broadway  
 Marion 648-3618

We use real potatoes for all our hash-browns, mashed potatoes, home fries, and french fries.

*Fresh soups made daily.*

**10% OFF DINNER MEALS**  
 Served 11:00 a.m. - 1:00 p.m.  
 DAILY THROUGH MARCH 11th

**Good-Of**  
**Home Cooking!**

COUPON



Open 6:30 a.m. - 1:00 p.m.  
 Sunday 7 a.m. - 1:30 p.m.

**Valley View Golf Course**  
 of  
**Freeman, South Dakota 57029**  
 is offering

**first time family memberships**  
 for \$ 200 plus tax.

Plan now for a season of fun  
 for you and your family.

For more information contact

**Mr. Ron Rembold at**  
**605-925-7810**

**Mr. Todd Graber at**  
**605-925-4128**

or apply to  
**Mr. Ron Rembold**  
 Box 563

Freeman, South Dakota 57029



*the power of human connections*

## Interesting Name For A Power Company



You know him as Bill, Or Dave, Or Mike. You live down the street from him. You sit next to him in church. You see him down at the cafe at lunch. He is your neighbor. Your friend. He is your power company. And whenever you flip on a light, or take a hot shower, or dry a load of laundry, he's there. In your Touchstone Energy partner. And he brings you the power. The power of human connections.

**TURNER-HUTCHINSON**  
**ELECTRIC COOPERATIVE**  
 648-3619

A Touchstone Energy Partner



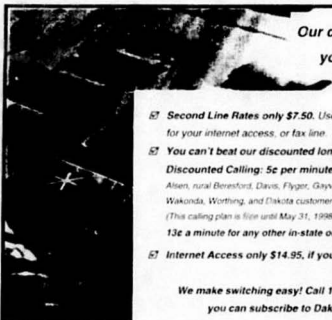
**NEXT**

**DOCUMENT (S)**

**BEST IMAGE**

**POSSIBLE**





**Our competitive rates make it easy for  
you to choose Dakota Telecom.**

**Second Line Rates only \$7.50.** Use your second line as another phone line,  
for your internet access, or fax line.

**You can't beat our discounted long distance rates!**

**Discounted Calling: 5¢ per minute calling to the following communities:**

Allen, rural Beresford, Davis, Flyger, Gayville, Hurley, Irene, Monroe, Parker, Votn,  
Wakonda, Worthing, and Dakota customers in Centerville and Viborg

(This calling plan is in effect until May 31, 1998. On June 1, calls will be 5¢ per minute.)

**13¢ a minute for any other in-state or out-of-state calls.**

**Internet Access only \$14.95, if you have one other Dakota service.**

**We make switching easy! Call 1-800-239-7501 for information on how  
you can subscribe to Dakota Telecom telephone service.**

*Dakota is pleased to welcome the following new customers:*

#### CENTERVILLE

Biseman, Doug	498-2377
Dorger, Elaine and Beverly	552-3214
Duestendorfer, Ken	552-3150
Loaman, Floyd and Eleanor	552-2521
Peterson, Jon and Joan	552-2265
Wieders, Carolea	552-2477

#### TEA

Andrews, Gary	498-5255
Akers, Brad and Lon	498-5885
Ault, Max	498-9160
Berkelson, Steve	498-5253
Behrns, Ruby	498-5870
Biseman, Jeff	498-7375
Binkley, Jack	498-6650
Borchard, David & Ellen	498-5232
Christen, David and Julie	498-2988
Carpus, Scott and Tanya	498-5958
Cullen, Patrick and Julie	498-2258
Cummings, Dennis	498-5801
DeBaren, K.	498-5699
Gelman, Denise	498-3002
Guernsey, Steven	498-4102
Hammann, Mary	498-3145
Hastings, Chad	498-5561
Haugen, Brad	498-5583
Irene, Laura	498-5142
Irene, Violet	498-2565
Jensen, Ken and Jill	498-2640
Jorgensen, Chad	498-2058
Jorgensen, Lynn	498-2348
Kemper, Diane	498-2523
Kimmel, Peggy	498-5519
Kirchman, Mark and Karl	498-5932
Kiscenko, Kelle	498-5878
McDonald, Jeff	498-2138
Miller, Mark	498-5695
Miller, Richard and Renee	498-5973
Miller, Stephen	498-5464
Morrison, Jay	498-2323
Mow, Scott and Lisa	498-2159
Munay, Trisha	498-3135

#### TEA continued

Neggers, Paul and Rhonda	498-2206
Nelson, Duane and Connie	498-2679
Noeller, Theresa	498-9664
Northrup, Troy and Melissa	498-3000
Olsen, Delmar and Kathy	498-5682
Paylor, William and Judy	498-2522
Peterson, Jana Lee	498-3142
Rabunberg, Curtis	498-5638
Ria, Rob and Lisa	498-2962
SAB Enterprise	498-4106
Saureman, John	498-5373
Schmidt, James and Melissa	498-3004
Shirley, David and Roxanne	498-5906
Sims, Dave and Lisa	498-5410
Swartz, G.	498-2099
Tate, Doris and Sandy	498-2212
TenMast, Harry	498-2785
Townsend, Terry	498-2257
Uptgraff, Craig	498-2120
Vandewall, Julie	498-2251
Vinz, Duane	498-2520
Yeager, Derrick	498-6652

#### VIBORG

DeVries, Anne	766-4145
Remington Construction	766-4050
Rice, Daniel	766-4146

**Effective March 30, 1998**

Bapco	766-5169
Bapco (fax)	766-5138

**Call now!  
1-800-239-7501  
or 605-263-3301**



**Dakota Telecom, Inc.**, is a  
wholly owned subsidiary of DTG.

**Destination pay for sale**  
Family sized. Worned and  
shon. \$30. 605-957-0678.

E1

**For Sale:** Pickup, box  
camper, steps & work stove,  
refrigerator, and furnace \$550.  
326-5037. 4/1

**For Sale:** Dark pine dining  
room set. Large rectangle table  
with 2 leaves, 2 captain chairs,  
and 2 side benches. \$100.00.  
Call 552-2788. leave message  
if no answer. 3/26

**For Sale:** Large split level  
home in Viborg, a great buy.  
326-5037. 4/1

**For Sale:** 17 Shasta camper  
trailer - well content, good  
condition. 1980 F250 Ford  
pickup. 263-3286. 3/26/98

**A-I Electric**  
Licensed-Insured-Bonded  
Residential-Commercial-Industrial



**Free Estimates**

Phone 605-253-2398 • Beresford  
Cell 605-351-3366 or 605-640-3301

**Beresford  
Kindergarten Roundup**  
Monday Evening, April 6, 1998  
Beresford Elementary School  
Last Names A-J 5:30-6:30  
K-Z 7:00-8:00



Follow-up testing will be Tuesday,  
Wednesday and Thursday, April 7, 8, 9.

(Bring Birth certificate, S.S. number and immunization records)

Any questions, contact  
Beresford Schools: 763-5012

Serving the  
Viborg Area  
for 19 Years

Completely Updated  
Equipment for  
Computer Controlled  
Vehicles

**10% OFF**  
Triple A Candidates will receive 10% OFF repair  
work done from 3/18/98 to 4/30/98

**VIBORG REPAIR  
& TOWING**

326-5564 or 1-800-798-7047

Steve & Nancy Wiggins Owners  
1011 Industrial St Viborg

Quality Car  
Repair at  
Competitive  
Prices

AAA  
Emergency  
Services

AAA  
AUTO  
CARE  
CENTER

Want to sell the car, truck  
or trailer. Use the Southeast  
Trumpet Classified. Only  
\$4.00 for 30 words, to 11,000  
homebids. Call 605-326-  
5207.

1998 Holiday Rambler  
Motor Lite 32 Chevy 452  
HdI pick-up 2 ac's, queen bed,  
microwave, T.V., 6-8 KW  
Gen., sag axle, 30K miles,  
always garaged, one owner,  
non-smoker, no pets, must  
conform. \$25,000. 1-800-352-  
5220. 4/22

Notice: St. John Cemetery  
Board will hold their annual  
meeting April 21, 1998 at 7:00  
p.m. in St. Teresa's Catholic  
Church (Nancy Hall) at 901 S.  
3rd St. Beresford, SD.  
Everyone is welcome to attend.  
3/26/98

**SPRING HOUSE  
PAINTING: FREE  
ESTIMATES:** We sandblast  
and paint. Wood or steel. We  
also do machinery, truck  
bodies, tractors, antennas, etc.  
30 years experience. Call D & B  
L. Sandblasting and Painting,  
Charter 641-5666.

3/26/98

**For Sale:** DTG Shares,  
\$8.25 per share. Call 297-  
1226. 4/1

**Pedersen Painting &  
Wallcovering:** Providing  
excellent service for 25 years.  
Commercial/Residential  
interior/exterior. Mike 605-  
753-2630. 4X4/22

**1994 Ford F350 Power  
stroke dually 5 spd, 432, crew  
cab, new tires, 5th wheel ball  
hitch, XL tow package, full  
running boards, 58,000 miles,  
ext. warranty \$19,500.00  
negotiable. 605-763-5949.**

3/26/98

**Pedersen Painting &  
Wallcovering:** Providing  
excellent service for 25 years.  
Commercial/Residential  
interior/exterior. Mike 605-  
753-2630. 4X4/22

**17' Alacrafts Canoe**  
\$175, Regal Electric Range  
\$25, Microwave Oven \$10.  
Want to buy Old authentic  
Indian arrowheads. 297-4441.

3/26/98

**TURNER COUNTY  
HIGHWAY DEPT.** is now  
taking applications for truck  
drivers, road maintainers, and  
bridge repair workers.  
Responsible, low road repair  
experience, and above  
minimum \$8.50. Solid Drivers  
license with C D-I preferred.  
Must pass Pre-Employment  
Drug test. Turner County is an  
Equal Opportunity Employer.  
Applications can be picked up at  
Turner County Highway Dept.  
Box 508, Parker, SD 57053 or  
call 605-797-3484. 4/1.

**The Only One**  
Good Food • Video Lottery



**On-Off Sale Liquor**

201 S. Main, Lennox 647-5125  
Mon.-Sat. 8 a.m. to 2 a.m. Sun. Noon to 8:00 p.m.

**EUROPEAN travel**

**JOIN THE RUPPER  
TRAVEL GROUP!**

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**EXHIBIT B**

## **VI. Carriers Eligible for Universal Service Support**

### **A. Overview**

127. In this section, we discuss which telecommunications carriers will be eligible to receive support from the federal universal service support mechanisms. We address eligibility for support for services provided to schools and libraries below in section X. We conclude that the plain language of section 214(e) precludes adoption of additional eligibility criteria beyond those enumerated in that section. Accordingly, as recommended by the Joint Board, we adopt without expansion the statutory criteria set out in section 214(e) as the rules governing eligibility.

128. We interpret the term "facilities" in section 214(e)(1) to mean any physical components of the telecommunications network that are used in the transmission or routing of the services designated for support under section 254(c)(1). We further conclude that a carrier that offers any of the services designated for universal service support, either in whole or in part, over facilities obtained as unbundled network elements pursuant to section 251(c)(3) satisfies the "own facilities" requirement of section 214(e). Consistent with the Joint Board's recommendation, we find that no additional measures are necessary to implement the advertising requirement of section 214(e)(1) and the provisions of section 254(e) that limit the purposes for which universal service funds may be used.

129. We recognize that the states have responsibility for designating the service areas of non-rural carriers. We also agree with the Joint Board, however, that states should not designate service areas that are unreasonably large because we recognize, as did the Joint Board, that an unreasonably large service area could greatly increase the scale of operations required of new entrants. Thus, unreasonably large service areas may prohibit or have the effect of prohibiting the ability of entities to provide local exchange service and are not necessary to preserve and advance universal service. State designation of an unreasonably large service area could, therefore, violate section 253 as a market entry barrier. We conclude, as did the Joint Board, that rural telephone companies' study areas will be used as their designated service areas, although we encourage states to consider disaggregating a rural telephone company's study area into service areas composed of the contiguous portions of that study area. Finally, we agree with the Joint Board that no additional regulations are necessary at this time to govern the designation of carriers to serve unserved areas.

### **B. Eligible Telecommunications Carriers**

#### **1. Background**

130. Section 254(e) provides that, after the effective date of the Commission's regulations implementing section 254, "only an eligible telecommunications carrier designated

under section 214(e) shall be eligible to receive specific Federal universal service support.<sup>299</sup> The legislative history indicates that "this restriction should not be construed to prohibit any telecommunications carrier from using any particular method to establish rates or charges for its services to other telecommunications carriers, to the extent such rates or charges are otherwise permissible under the Communications Act or other law."<sup>300</sup> Section 254(e) further prescribes that a carrier receiving universal service support "shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended."<sup>301</sup> Additionally, section 254(k) prohibits a carrier from using non-competitive services to subsidize services that are subject to competition.<sup>302</sup>

131. Section 214(e)(1) provides that:

A common carrier designated as an eligible telecommunications carrier under [subsection 214(e)(2)] or [subsection 214(e)(3)] shall be eligible to receive universal service support in accordance with section 254 and shall, throughout the service area for which the designation is received--

- (A) offer the services that are supported by Federal universal service support mechanisms under section 254(c), either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and
- (B) advertise the availability of such services and the charges therefore using media of general distribution.<sup>303</sup>

132. Pursuant to section 214(e)(2), state commissions must, either upon their 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

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<sup>299</sup> 47 U.S.C. § 254(e). Section 254(h)(1)(B)(ii) states that telecommunications carriers providing service to schools and libraries under section 254(h)(1)(B) shall receive support "notwithstanding the provisions of [section 254(e)]." 47 U.S.C. § 254(h)(1)(B)(ii).

<sup>300</sup> Joint Explanatory Statement at 131-32.

<sup>301</sup> 47 U.S.C. § 254(e).

<sup>302</sup> 47 U.S.C. § 254(k). The Commission intends to address issues related to section 254(k) in a separate proceeding.

<sup>303</sup> 47 U.S.C. § 214(e)(1).

commission.<sup>304</sup> Section 214(e)(2) also provides for the designation of more than one carrier as an eligible telecommunications carrier. It states, in part:

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,<sup>305</sup> 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 [subsection 214(e)(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.<sup>306</sup>

Section 214(e) also contains provisions governing a carrier's relinquishment of its eligible carrier designation in areas served by more than one eligible carrier. The statute requires states to permit eligible carriers to relinquish their designation after giving the state notice. The statute requires remaining eligible carriers to serve the relinquishing carrier's customers and requires the relinquishing carrier to give notice sufficient to permit remaining carriers to construct or purchase facilities, if necessary.<sup>307</sup>

133. The Joint Board recommended that the Commission adopt, without elaboration,

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<sup>304</sup> 47 U.S.C. § 214(e)(2).

<sup>305</sup> 47 U.S.C. § 153(37) provides as follows:

The term "rural telephone company" means a local exchange carrier operating entity to the extent that such entity:

- (A) provides common carrier service to any local exchange carrier study area that does not include either:
  - (i) any incorporated place of 10,000 inhabitants or more, or any part thereof, based on the most recently available population statistics of the Bureau of the Census; or
  - (ii) any territory, incorporated or unincorporated, included in a urbanized area, as defined by the Bureau of the Census as of August 10, 1993;
- (B) provides telephone exchange service, including exchange access, to fewer than 50,000 access lines;
- (C) provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or
- (D) has less than 15 percent of its access lines in communities of more than 50,000 on the date of enactment of the Telecommunications Act of 1996.

<sup>306</sup> 47 U.S.C. § 214(e)(2).

<sup>307</sup> 47 U.S.C. § 214(e)(4).

the statutory criteria set out in section 214(e) as the rules that will govern eligibility.<sup>308</sup> The Joint Board rejected arguments that all eligible telecommunications carriers should be required to meet the same obligations that are imposed on incumbent LECs after finding that such regulation would be unnecessary to protect incumbents and would chill competitive entry into high cost areas.<sup>309</sup> The Joint Board recommended that the Commission find that a carrier may satisfy the criteria of section 214(e) regardless of the technology used by that carrier,<sup>310</sup> and that the Commission should exclude no class of carriers, such as price cap carriers, from eligible status.<sup>311</sup> The Joint Board also recommended that, at this time, the Commission adopt no national guidelines to implement the statutory requirement that carriers advertise the availability and rates of federally supported services throughout their service areas.<sup>312</sup> Further, the Joint Board found that the plain language of section 214(e)(1) precludes states from requiring eligible carriers to offer service wholly over their own facilities,<sup>313</sup> and also precludes states from designating "pure" resellers as eligible carriers.<sup>314</sup> The Joint Board recommended that the Commission reject arguments that it forbear from the section 214(e)(1) facilities requirement because the record before it did not demonstrate that the three statutory criteria for forbearance had been met.<sup>315</sup> Finally, the Joint Board recommended that the Commission not adopt rules to implement section 254(e), which requires that an eligible carrier shall use universal service funds only to support the services and facilities for which it is intended.<sup>316</sup>

## 2. Discussion

### a. Eligibility Criteria

134. Adoption of Section 214(e)(1) Criteria. Consistent with the Joint Board's recommendation and the record before us, we adopt the statutory criteria contained in section 214(e)(1) as the rules for determining whether a telecommunications carrier is eligible to receive

<sup>308</sup> Recommended Decision, 12 FCC Rcd at 169.

<sup>309</sup> Recommended Decision, 12 FCC Rcd at 170.

<sup>310</sup> Recommended Decision, 12 FCC Rcd at 169-70.

<sup>311</sup> Recommended Decision, 12 FCC Rcd at 171-72.

<sup>312</sup> Recommended Decision, 12 FCC Rcd at 174.

<sup>313</sup> Recommended Decision, 12 FCC Rcd at 173.

<sup>314</sup> Recommended Decision, 12 FCC Rcd at 172-73.

<sup>315</sup> Recommended Decision, 12 FCC Rcd at 173.

<sup>316</sup> Recommended Decision, 12 FCC Rcd at 174.



universal service support.<sup>317</sup> Pursuant to those criteria, only a common carrier may be designated as an eligible telecommunications carrier, and therefore may receive universal service support. In addition, section 214(e) provides that each eligible carrier must, throughout its service area: (1) offer the services that are supported by federal universal service support mechanisms under section 254(c);<sup>318</sup> (2) offer such services using its own facilities or a combination of its own facilities and resale of another carrier's services, including the services offered by another eligible telecommunications carrier; and (3) advertise the availability of and charges for such services using media of general distribution.<sup>319</sup>

135. Statutory Construction of Section 214(e). We conclude that section 214(e)(2) does not permit the Commission or the states to adopt additional criteria for designation as an eligible telecommunications carrier.<sup>320</sup> As noted by the Joint Board, "[s]ection 214 contemplates that any telecommunications carrier that meets the eligibility criteria of section 214(e)(1) shall be eligible to receive universal service support."<sup>321</sup> Section 214(e)(2) states that "[a] state commission shall . . . designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier . . . ."<sup>322</sup> Section 214(e)(2) further states that ". . . 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)."<sup>323</sup> Read together, we find that these provisions dictate that a state commission must designate a common carrier as an eligible carrier if it determines that the carrier has met the requirements of section 214(e)(1).

<sup>317</sup> See Recommended Decision, 12 FCC Rcd at 169. Accord Ameritech comments at 8; California PUC comments at 9; CNMI comments at 39; CompTel comments at 13; GCI comments at 4; Maryland PSC at 8-9; Sprint comments at 20; Texas PUC comments at 5; TCA comments at 3; WorldCom comments at 14; AT&T reply comments at 13-14; CPI reply comments at 12. Section 254(e) does not govern the ability of carriers to receive funds distributed pursuant to section 254(h)(1)(B). See 47 U.S.C. § 254(h)(1)(B)(ii). We address eligibility for support for services provided to schools and libraries *infra* in section X.B.2.b.

<sup>318</sup> We note that a carrier that currently is unable to provide single-party service, access to enhanced 911 service, or toll-limitation services may petition its state commission to receive universal service support for a designated period of time until the carrier has completed the network upgrades necessary to offer these services. See *supra* section IV and *infra* section VIII.

<sup>319</sup> 47 U.S.C. § 214(e); Recommended Decision, 12 FCC Rcd at 169-70.

<sup>320</sup> Accord CompTel comments at 13; WorldCom comments at 14; AT&T reply comments at 14; GCI reply comments at 2.

<sup>321</sup> Recommended Decision, 12 FCC Rcd at 171 (emphasis added).

<sup>322</sup> 47 U.S.C. § 214(e)(2) (emphasis added).

<sup>323</sup> 47 U.S.C. § 214(e)(2) (emphasis added).

Consistent with the Joint Board's finding, the discretion afforded a state commission under section 214(e)(2) is the discretion to decline to designate more than one eligible carrier in an area that is served by a rural telephone company; in that context, the state commission must determine whether the designation of an additional eligible carrier is in the public interest.<sup>324</sup> The statute does not permit this Commission or a state commission to supplement the section 214(e)(1) criteria that govern a carrier's eligibility to receive federal universal service support.

136. In addition, state discretion is further limited by section 253: a state's refusal to designate an additional eligible carrier on grounds other than the criteria in section 214(e) could "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service"<sup>325</sup> and may not be "necessary to preserve universal service."<sup>326</sup> Accordingly, we conclude that section 253 also precludes states from imposing additional prerequisites for designation as an eligible telecommunications carrier.<sup>327</sup> Although section 214(e) precludes states from imposing additional eligibility criteria, it does not preclude states from imposing requirements on carriers within their jurisdictions, if these requirements are unrelated to a carrier's eligibility to receive federal universal service support and are otherwise consistent with federal statutory requirements.<sup>328</sup> Further, section 214(e) does not prohibit a state from establishing criteria for designation of eligible carriers in connection with the operation of that state's universal service mechanism, consistent with section 254(f).<sup>329</sup>

137. Consistent with the findings we make above, we disagree with GTE's assertion that the use of the phrases "a carrier that receives such support" and "any such support . . ." instead of the phrase "such eligible carrier" in section 254(e) indicates that Congress intended to

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<sup>324</sup> Recommended Decision, 12 FCC Red at 171-72. Before designating an additional eligible carrier for an area served by a rural telephone company, a state commission must find that the designation "is in the public interest." 47 U.S.C. § 214(e)(2).

<sup>325</sup> 47 U.S.C. § 253(a).

<sup>326</sup> 47 U.S.C. § 253(b).

<sup>327</sup> See California PUC comments at 9-10 (stating that it has already imposed carrier of last resort (COLR) obligations upon eligible carriers). See also *infra* this section for our discussion concluding that COLR regulation is unnecessary in light of the requirements of section 214(e).

<sup>328</sup> See, e.g., 47 U.S.C. § 253(b).

<sup>329</sup> State adoption of a second set of eligibility criteria for a state universal service mechanism would have no effect upon the statutory eligibility criteria for the federal universal service mechanisms. Section 254(f) provides that: "A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms." 47 U.S.C. § 254(f).

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require carriers to meet criteria in addition to the eligibility criteria in section 214(e).<sup>330</sup> We conclude that the quoted language indicates only that a carrier is not entitled automatically to receive universal service support once designated as an eligible telecommunications carrier. For example, a carrier must meet the section 214(e) criteria as a condition of its being designated an eligible carrier and then must provide the designated services to customers pursuant to the terms of section 214(e) in order to receive support. Indeed, the language of section 254(e), which states that "only an eligible telecommunications carrier designated under section 214(e) shall be eligible to receive" universal service support, suggests that a carrier is not automatically entitled to receive universal service support once designated as eligible.<sup>331</sup> The language of section 254(e) does not imply, however, that the Commission or the states may expand upon the criteria for being designated as an eligible carrier.

138. We further reject GTE's contention that our interpretation would convert section 214(e) into an entitlement and would allow an eligible carrier to receive universal service support "regardless of whether the [eligible carrier] abides by the federal funding mechanism, and regardless of whether the [eligible carrier] makes any real contribution to preserving and advancing universal service."<sup>332</sup> We disagree with GTE to the extent that it suggests that a carrier, once designated as an eligible carrier, is not required to continue to comply with federal universal service requirements.<sup>333</sup> As discussed immediately above, a carrier's continuing status as an eligible carrier is contingent upon continued compliance with the requirements of section 214(e) and only an eligible carrier that succeeds in attracting and/or maintaining a customer base to whom it provides universal service will receive universal service support. Moreover, contrary to the suggestion of GTE, an eligible carrier is "preserving and advancing universal service"<sup>334</sup> by providing each of the core services designated for support to low-income consumers or in rural, insular, or high cost areas,<sup>335</sup> and by offering those services in accordance with the specific

<sup>330</sup> See GTE reply comments at 8. Section 254(e) provides, in relevant part: "A carrier that receives such support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. Any such support should be explicit and sufficient to achieve the purposes of this section."

<sup>331</sup> 47 U.S.C. § 254(e) (emphasis added).

<sup>332</sup> GTE reply comments at 6-9 (citing 47 U.S.C. § 254(i), which states that the Commission and the states should ensure that universal service is available at rates that are just, reasonable, and affordable). See *infra* section VII.C. for a description of GTE's competitive bidding proposal.

<sup>333</sup> GTE reply comments at 7 (suggesting that designation as eligible carrier would be converted into entitlement granted regardless of whether eligible carrier abides by federal funding mechanism or makes contributions to preserving and advancing universal service).

<sup>334</sup> GTE reply comments at 7.

<sup>335</sup> The core services are defined *supra* in section IV.

eligibility criteria contained in section 214(e).

139. Additionally, we are not persuaded by GTE's argument that our interpretation of section 214(e) precludes adoption of its proposed competitive bidding mechanism and, therefore, violates the Commission's duty to consider this proposal fully.<sup>336</sup> First, the authority cited by GTE does not compel us to consider a proposal that is incompatible with the statute.<sup>337</sup> Second, as we explain below,<sup>338</sup> we find that we may be able to craft a competitive bidding mechanism that is compatible with the statute, including section 214(e), and we intend, consistent with the Joint Board's recommendation and as suggested by GTE, to continue to explore this option further.<sup>339</sup>

140. GTE contends that, even if the Commission may not add eligibility criteria, the Commission may nonetheless impose additional obligations on eligible carriers by conditioning the acceptance of federal universal service support upon compliance with particular obligations, as the Commission now does in the Lifeline Assistance program.<sup>340</sup> Moreover, GTE asserts that several recommendations of the Joint Board imply that the Joint Board believed that the Commission and the states have authority to impose additional eligibility criteria. For example, GTE cites as support for this view the Joint Board's recommendation that the Commission rely on service quality data collected by states to ensure that the first universal service principle -- that "quality services" be available -- is realized.<sup>341</sup> We reject GTE's argument because it appears to seek the imposition of additional eligibility criteria by recharacterizing the criteria as "conditions." Moreover, its reference to our existing Lifeline Assistance program is not relevant for purposes of construing section 214(e). The Commission created the existing Lifeline Assistance program in 1985 pursuant to its authority in sections 1, 4(i), 201, and 205. None of

<sup>336</sup> GTE reply comments at 11-13 n.22 (citing Commission's duty to consider fully all reasonable alternatives in *Brookings Man. Tel. v. FCC*, 822 F.2d 1153, 1169 (D.C. Cir. 1987)).

<sup>337</sup> *Brookings Man. Tel. v. FCC*, 822 F.2d at 1169 (D.C. Cir. 1987) ("[A]n agency has a duty to consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives. Of course, . . . the duty extends only to significant and viable alternatives. . . .") (citations omitted) (emphasis added).

<sup>338</sup> See *infra* section VII.E.

<sup>339</sup> Recommended Decision, 12 FCC Rcd at 265-66; GTE reply comments at 43-46 (urging the Commission to issue a further notice of proposed rulemaking to "build upon the existing public record and create a sufficient record on the specifics of a workable auction mechanism").

<sup>340</sup> See GTE reply comments at 10.

<sup>341</sup> GTE reply comments at 10-11 (citing Recommended Decision, 12 FCC Rcd at 140). The first universal service principle is contained in section 254(b)(1), which states that "[q]uality services should be available at just, reasonable, and affordable rates." 47 U.S.C. § 254(b)(1).

these provisions provide specific guidance on the interpretation of section 214(e).<sup>342</sup> In addition, contrary to GTE's suggestion, the Joint Board's consideration of whether to impose service quality standards did not reference the possibility of adopting additional criteria under section 214(e).<sup>343</sup> Rather, the Joint Board relied on the first universal service principle in section 254(b)(1) when it considered the Commission's authority to incorporate minimum service standards into the definitions of services designated for support pursuant to section 254(c)(1).<sup>344</sup>

141. The terms of section 214(e) do not allow us to alter an eligible carrier's duty to serve an entire service area. Consequently, we cannot, as WinStar requests, modify the requirements of section 214(e) for carriers whose technology limits their ability to provide service throughout a state-defined service area.<sup>345</sup> We note, however, that any carrier may, for example, use resale to supplement its facilities-based offerings in any given service area.<sup>346</sup>

142. Additional Obligations as a Condition of Eligibility. Several commenters maintain that, in order to create an equitable and sustainable federal universal service system and to prevent competitive carriers from attracting only those customers that order the most profitable services, the Commission must subject all eligible carriers to the regulatory requirements that govern ILECs, including pricing, marketing, service provisioning, and service quality requirements, as well as carrier of last resort (COLR) obligations.<sup>347</sup> We reject proposals to impose these additional obligations as a condition of being designated an eligible telecommunications carrier pursuant to section 214(e) because section 214(e) does not grant the

<sup>342</sup> We note that we are changing the Lifeline Assistance program in this Order pursuant to section 254 and sections 1.40(i), 201, and 205. In doing so, however, we are designating a bundle of services for universal service support that are collectively referred to as Lifeline service. Thus, provision of Lifeline service is not an additional obligation of eligible carriers, but instead is a supported service that must be provided by eligible carriers. See *infra* section VIII.

<sup>343</sup> See Recommended Decision, 12 FCC Rcd at 140-41.

<sup>344</sup> See Recommended Decision, 12 FCC Rcd at 140-41. We note that the Joint Board declined to recommend that the Commission exercise its authority under section 254(b)(1) and (c)(1) to impose additional service quality standards. See *supra* section IV E.

<sup>345</sup> WinStar comments at 12-13 (stating that its 39 GHz technology allows it to offer service only to customers within line-of-sight of its facilities).

<sup>346</sup> Section 214(e) expressly allows an eligible telecommunications carrier to offer service using a "combination of its own facilities and resale of another carrier's services . . ." 47 U.S.C. § 214(e)(1).

<sup>347</sup> See, e.g., Ameritech comments at 8; Ameritech comments, app. A at 37-42; Cincinnati Bell comments at 7-8; Evans Tel. Co. comments at 12-13; GTE comments at 50; Roseville Tel. Co. comments at 16; SBC comments at 19-20; USTA comments at 23-24; CWA reply comments at 9-10; USTA reply comments at 14. In addition, SBC and USTA argue that, irrespective of the obligations of ILECs, all eligible carriers should assume quality of service obligations. See SBC comments at 20; USTA at 23 (citing 47 U.S.C. § 254(b)(1)).

Commission authority to impose additional eligibility criteria.

143. We emphasize that, even if we had the legal authority to impose additional obligations as a condition of being designated an eligible telecommunications carrier, we agree with the Joint Board that these additional criteria are unnecessary to protect against unreasonable practices by other carriers.<sup>348</sup> As the Joint Board explained, section 214(e) prevents eligible carriers from attracting only the most desirable customers by limiting eligibility to common carriers<sup>349</sup> and by requiring eligible carriers to offer the supported services and advertise the availability of these services "throughout the service area."<sup>350</sup> For this reason, we reject GTE's suggestion that we require carriers to offer the services designated for support on an unbundled basis.<sup>351</sup> Similarly, we agree with the Joint Board's analysis and conclusion that exit barriers comparable to those imposed on ILECs are unnecessary because section 214(e)(4) already imposes exit barriers similar to the protections imposed by traditional state COLR regulation.<sup>352</sup> We conclude that additional exit barriers are not only incompatible with the requirements of section 214(e)(1), but also that they are not warranted: parties have neither demonstrated that the exit barriers set forth in section 214(e)(4) are significantly different from the restrictions contained in traditional state COLR requirements,<sup>353</sup> nor have they demonstrated that the section

<sup>348</sup> Recommended Decision, 12 FCC Rcd at 170-71. We note that, in the *Local Competition Order*, we concluded that states may not unilaterally impose on non-ILECs the additional obligations imposed on ILECs by section 251(c). *Local Competition Order*, 11 FCC Rcd at 16,109-10. We stated that we did not anticipate imposing such additional obligations on a non-ILEC absent a clear and convincing showing that the non-ILEC occupies a position in the telephone exchange market comparable to the position held by an ILEC, that the non-ILEC has substantially replaced an ILEC, and that such treatment would serve the public interest, convenience, and necessity and the purposes of section 251. *Local Competition Order*, 11 FCC Rcd at 16,109-10.

<sup>349</sup> The Communications Act requires common carriers to furnish "communications service upon reasonable request therefore." 47 U.S.C. § 201(a), and states that "[i]t shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services . . ." 47 U.S.C. § 202(a).

<sup>350</sup> 47 U.S.C. § 214(e)(1).

<sup>351</sup> GTE comments at 16, 49-50.

<sup>352</sup> Recommended Decision, 12 FCC Rcd at 171. Pursuant to section 214(e)(4) of the Act, an eligible carrier seeking to exit a service area served by more than one eligible carrier must notify the relevant state commission of that carrier's intent to relinquish its designation as an eligible carrier. The Act then requires the state commission, before permitting the carrier to cease providing service, to ensure that the remaining carriers will serve the relinquishing carrier's customers. The state commission must also require notice sufficient to permit any remaining eligible carrier to purchase or construct adequate facilities. 47 U.S.C. § 214(e)(4).

<sup>353</sup> See, e.g., New Mexico Stat. Ann. § 63-9A-6.2 ("any telecommunications company which has a certificate of public convenience and necessity permitting it to provide message telecommunications service . . . shall not be allowed to terminate or withdraw from providing message telecommunications service . . . without an order of the

214(e) requirements are insufficient to protect subscribers. Moreover, we are reluctant to impose additional exit barriers or other additional requirements on carriers seeking to offer local service based on our finding that such additional requirements would raise potential competitors' expected costs of entry and thus discourage competition. Finally, for the reasons stated above, we reject other suggestions that we impose additional criteria for designation as an eligible telecommunications carrier because the proponents of these suggestions have presented insufficiently persuasive justifications for their inclusion.<sup>354</sup>

144. We further conclude that adopting the eligibility criteria imposed by the statute without elaboration is consistent with the Joint Board's recommended principle of competitive neutrality because, once the forward-looking and more precisely targeted high cost methodology is in place, all carriers will receive comparable support for performing comparable functions. Several ILECs assert that the Joint Board's recommendation not to impose additional criteria is in conflict with its recommended principle of competitive neutrality because some carriers, such as those subject to COLR obligations or service quality regulation, perform more burdensome and costly functions than other carriers that are eligible for the same amount of compensation.<sup>355</sup> The statute itself, however, imposes obligations on ILECs that are greater than those imposed on other carriers,<sup>356</sup> yet section 254 does not limit eligible telecommunications carrier designation only to those carriers that assume the responsibilities of ILECs. We find that the Joint Board correctly concluded that the imposition of additional eligibility criteria would "chill competitive entry into high cost areas."<sup>357</sup> We agree with the Joint Board's finding and conclude that the imposition of additional criteria, to the extent that they would preclude some carriers from being designated eligible pursuant to section 214(e), would violate the principle of competitive neutrality.

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commission upon a finding there is another telecommunications company in place capable of providing service without interruption").

<sup>354</sup> See MFS comments at 7 (suggesting that Commission require eligible carriers to adhere to technical standards that Rural Utility Service imposes upon its borrowers); Ohio PUC reply comments at 3-4 (suggesting that, as condition of eligibility, Commission require non-rural carriers to provide interconnection under section 251(c)(2), unbundled network elements under section 251(c)(3), and wholesale services under section 251(c)(4)); CWA reply comments at 8 (suggesting that Commission foreclose carriers that violate National Labor Relations Act from receiving universal service support for twelve-month period following National Labor Relations Board decision of labor-law violation). See also *supra* our discussion in section IV regarding the merits of MFS's suggestion.

<sup>355</sup> Ameritech comments at 7-8, 9; GTE comments at 13-14, 48; SBC comments at 22; CWA reply comments at 10; GTE reply comments at 17.

<sup>356</sup> Compare 47 U.S.C. § 251(c) (imposing duties on incumbent local exchange carriers only) with 47 U.S.C. § 251(a), (b) (imposing duties on all telecommunications carriers and all local exchange carriers).

<sup>357</sup> Recommended Decision, 12 FCC Rcd at 170.

145. Treatment of Particular Classes of Carriers. We agree with the Joint Board's analysis and recommendation that any telecommunications carrier using any technology, including wireless technology, is eligible to receive universal service support if it meets the criteria under section 214(e)(1).<sup>358</sup> We agree with the Joint Board that any wholesale exclusion of a class of carriers by the Commission would be inconsistent with the language of the statute and the pro-competitive goals of the 1996 Act.<sup>359</sup> The treatment granted to certain wireless carriers under section 332(c)(3)(A) does not allow states to deny wireless carriers eligible status.<sup>360</sup> We also agree with the Joint Board that non-ILECs and carriers subject to price cap regulation should be eligible for support.<sup>361</sup> We agree with the Joint Board that price cap regulation is an important tool for smoothing the transition to competition and that its use should not foreclose price cap companies from receiving universal service support.<sup>362</sup> We find that requiring price cap carriers to cover their costs of providing universal service through internal cross-subsidies, as Time Warner suggests, would violate the statutory directive that support for universal service be "explicit."<sup>363</sup> Consequently, in our decision here and in the *Access Charge Reform Order*, we adopt a plan to eliminate implicit subsidies as we identify and make explicit universal service support.<sup>364</sup> Because we have determined that we will not exclude price cap companies from eligibility, we agree with the Joint Board that we need not delineate the difference between price cap carriers and other carriers, as proposed in the Further Comment Public Notice.<sup>365</sup>

146. We do not adopt, at this time, a rule stating that a wireless carrier may receive support only if the wireless carrier is a customer's primary carrier and the customer pays

<sup>358</sup> See Recommended Decision, 12 FCC Rcd at 170 (stating that eligibility is not limited to a specific use of technology). *Accord* Vanguard comments at 2; Centennial reply comments at 13; Motorola reply comments at 16-17.

<sup>359</sup> Recommended Decision, 12 FCC Rcd at 169-70.

<sup>360</sup> See Centennial reply comments at 13; Recommended Decision, 12 FCC Rcd at 171-72.

<sup>361</sup> Recommended Decision, 12 FCC Rcd at 171-72.

<sup>362</sup> Recommended Decision, 12 FCC Rcd at 172.

<sup>363</sup> 47 U.S.C. § 254(e).

<sup>364</sup> *Access Charge Reform Order* at section IV.A.

<sup>365</sup> Recommended Decision, 12 FCC Rcd at 172. See also Further Comment Public Notice at 5 (seeking comment on the definition of price cap carriers).



unsubsidized rates for its wireline service, as suggested by NYNEX.<sup>366</sup> In addition, in light of our decision above that, under the modified existing high cost mechanism all business and residential connections will be supported, we conclude that such a rule is not necessary at this time.<sup>367</sup> We also note that, to the extent that NYNEX's proposal is designed to prevent wireless carriers from receiving support for customers that they do not serve, such a rule is unnecessary because federal laws against fraud already prohibit wireless carriers, or any other carriers, from receiving universal service support for customers that they do not serve.<sup>368</sup>

147. We note that not all carriers are subject to the jurisdiction of a state commission.<sup>369</sup> Nothing in section 214(e)(1), however, requires that a carrier be subject to the jurisdiction of a state commission in order to be designated an eligible telecommunications carrier. Thus tribal telephone companies, CMRS providers, and other carriers not subject to the full panoply of state regulation may still be designated as eligible telecommunications carriers.

148. Advertising. We agree with the Joint Board's analysis and recommendation that we not adopt, at this time, nationwide standards to interpret the requirement of section 214(e)(1)(B) that eligible carriers advertise, throughout their service areas, the availability of, and charges for, the supported services using media of general distribution.<sup>370</sup> We agree with the Joint Board that, in the first instance, states should establish any guidelines needed to govern such advertising.<sup>371</sup> We agree with the Joint Board that the states, as a corollary to their obligation to designate eligible telecommunications carriers, are in a better position to monitor the effectiveness of carriers' advertising throughout their service areas. We also agree with the Joint Board that competition will help ensure that carriers inform potential customers of the

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<sup>366</sup> See NYNEX comments at 5-6 (asserting that, because there is no dedicated loop for wireless service, wireless carrier could claim it was providing universal service to customer even if customer did not use, or own, mobile phone); CWA reply comments at 10-11.

<sup>367</sup> See *supra* section IV and *infra* section VII.

<sup>368</sup> See, e.g., 18 U.S.C. § 1001 (imposing criminal penalties for, *inter alia*, making fraudulent statements to any agency of the United States); 47 U.S.C. § 502 (establishing conditions under which fines for violation of Communications Act generally are allowed); 47 U.S.C. § 503(b) (establishing conditions under which forfeiture penalties for violation of Act or Commission rules generally are allowed). Accord PCIA reply comments at 32.

<sup>369</sup> See letter from L. Marie Guillory, Regulatory Counsel, NTCA to William F. Caton, Secretary, FCC (May 7, 1997) (describing meeting on April 16, 1997).

<sup>370</sup> Recommended Decision, 12 FCC Rcd at 174-75. See NPRM at para. 46 (seeking comment on whether Commission should adopt guidelines defining steps sufficient to meet section 214(e)(1)'s advertising requirement).

<sup>371</sup> Recommended Decision, 12 FCC Rcd at 174-75.

services they offer.<sup>372</sup> Although we decline to adopt nationwide standards for interpreting section 214(e)(1)(B), we encourage states, as they determine whether to establish guidelines pursuant to that section, to consider the suggestion of Roseville Tel. Co. that the section 214(e)(1)(B) requirement that carriers advertise in "media of general distribution" is not satisfied by placing advertisements in business publications alone, but instead compels carriers to advertise in publications targeted to the general residential market.<sup>373</sup> In response to the comments of CPI, we conclude that no further regulations are necessary to define the term "throughout."<sup>374</sup> The dictionary definition -- "in or through all parts; everywhere" -- requires no further clarification.<sup>375</sup>

149. **Relinquishment of Eligible Carrier Designation.** We conclude that no additional measures are needed to implement section 214(e)(4), the provision that reserves to the states the authority to act upon an eligible carrier's request to relinquish its designation as an eligible carrier.<sup>376</sup> We note that we received no recommendation from the Joint Board with respect to this issue and that no commenter responded to the question asked in the Commission's NPRM that invited commenters to identify Commission regulations that are inconsistent with section 214(e)(4).<sup>377</sup>

#### b. Section 214(e)(1) Facilities Requirement

150. Section 214(e)(1) requires that, in order to be eligible for universal service support, a common carrier must offer the services supported by federal universal service support mechanisms throughout a service area "either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier)."<sup>378</sup> In interpreting the facilities requirement, we first address the meaning of the term "facilities" and then address the meaning of the phrase "own facilities."

<sup>372</sup> Recommended Decision, 12 FCC Rcd at 174-75.

<sup>373</sup> See Roseville Tel. Co. comments at 16.

<sup>374</sup> CPI reply comments at 13 n.24.

<sup>375</sup> See, e.g., WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY (1984).

<sup>376</sup> See 47 U.S.C. § 214(e)(4).

<sup>377</sup> NPRM at para. 49. See also, e.g., 47 C.F.R. § 63.60-100.

<sup>378</sup> 47 U.S.C. § 214(e)(1)(A) (emphasis added). Hereinafter we will refer to this requirement as the "section 214(e) facilities requirement."

151. Defining the Term "Facilities" in Section 214(e)(1). We note that the Joint Board made no recommendation regarding the type of facilities a carrier must provide to satisfy the facilities requirement of section 214(e)(1).<sup>379</sup> We interpret the term "facilities," for purposes of section 214(e), to mean any physical components of the telecommunications network that are used in the transmission or routing of the services designated for support under section 254(c)(1).<sup>380</sup> As discussed immediately below, we conclude that this interpretation strikes a reasonable balance between adopting a more expansive definition of "facilities," which would undermine the Joint Board's recommendation to exclude resellers from eligible status, and adopting a more restrictive definition of "facilities," which we fear would thwart competitive entry into high cost areas.

152. We adopt this definition of "facilities," in part, to remain consistent with the Joint Board's recommendation that "a carrier that offers universal service solely through reselling another carrier's universal service package" should not be eligible to receive universal service support.<sup>381</sup> We reject the suggestion of some commenters that we adopt a more expansive definition of facilities, based on our conclusion that such an interpretation would render meaningless the facilities requirement of section 214(e) by permitting any carrier, including a "pure" reseller, to meet the definition.<sup>382</sup> By encompassing only physical components of the telecommunications network that are used to transmit or route the supported services, this definition, in effect, excludes from eligibility a "pure" reseller that claims to satisfy the facilities requirement by providing its own billing office or some other facility that is not a "physical component" of the network, as defined in this Order.<sup>383</sup> We find that our determination to define "facilities" in this manner is consistent with congressional intent to require that at least some portion of the supported services offered by an eligible carrier be services that are not offered through "resale of another carrier's services."<sup>384</sup> For these reasons, we reject EXCEL's suggestion that a carrier that establishes a billing office would meet the definition of "facilities" for purposes of section 214(e).<sup>385</sup>

<sup>379</sup> Compare, e.g., Cathey, Hutton comments at 7 (asserting that "facilities" should be defined as loop and switching facilities only) with EXCEL comments at 9 (asserting that billing offices should qualify as "facilities").

<sup>380</sup> For example, we would include within this definition: local loops, switches, transmission systems, and network control systems.

<sup>381</sup> Recommended Decision, 12 FCC Rcd at 173.

<sup>382</sup> See, e.g., MFS reply comments at 13 n.32 (suggesting "de minimis" use of facilities would satisfy section 214(e)).

<sup>383</sup> See, e.g., EXCEL comments at 9 (asserting that billing offices should qualify as "facilities").

<sup>384</sup> 47 U.S.C. § 214(e)(1)(A).

<sup>385</sup> See EXCEL comments at 9.

153. We also decline to adopt a more restrictive definition of the term "facilities," as some commenters suggest.<sup>386</sup> For example, we reject the suggestion that we define "facilities" as both loop and switching facilities based on our concern that such a restrictive definition would erect substantial entry barriers for potential competitors seeking to enter local markets and, therefore, would unduly restrict the class of carriers that may be designated as eligible telecommunications carriers.<sup>387</sup> Rather, we conclude that the definition of "facilities" that we adopt will serve the goals of universal service and competitive neutrality to the extent that it does not dictate the specific facilities that a carrier must provide or, by implication, the entry strategy a carrier must use and, therefore, will not unduly restrict the class of carriers that may be designated as eligible.

154. Whether the Use of Unbundled Network Elements Qualifies as a Carrier's "Own Facilities". We conclude that a carrier that offers any of the services designated for universal service support, either in whole or in part, over facilities that are obtained as unbundled network elements pursuant to section 251(c)(3) and that meet the definition of facilities set forth above,<sup>388</sup> satisfies the facilities requirement of section 214(e)(1)(A).<sup>389</sup>

155. In making this decision, we first look to the language of section 214(e)(1)(A), which references two classes of carriers that are eligible for support -- carriers using their "own facilities" and carriers using "a combination of [their] own facilities and resale of another carrier's services."<sup>390</sup> Neither the statute nor the legislative history defines the term "own" as that term appears within the phrase "own facilities" in section 214(e)(1)(A).<sup>391</sup> In addition, neither category in section 214(e)(1)(A) explicitly refers to unbundled network elements. Notwithstanding the lack of an express reference to unbundled network elements in section

<sup>386</sup> See, e.g., Cathey, Hutton comments at 7 (asserting that "facilities" should be defined as loop and switching facilities only).

<sup>387</sup> See, e.g., Cathey, Hutton comments at 7.

<sup>388</sup> We note that, because the definition of "facilities" we adopt above differs from the statutory definition of "network element," not all unbundled network elements will meet the facilities requirement of section 214(e). See 47 U.S.C. § 153(29). Thus, for example, operations support systems functions (OSS) as defined in the *Local Competition Order*, would not meet the definition of "facilities" that we adopt herein. See *Local Competition Order*, 11 FCC Rcd at 15,763-68. See also 47 C.F.R. § 51.319(f).

<sup>389</sup> Accord, e.g., Compel comments at 13-14 (urging Commission to find that carriers that purchase access to unbundled network elements are eligible for universal service support). Section 251(c)(3) requires ILECs "to provide, to any requesting telecommunications carrier . . . nondiscriminatory access to network elements on an unbundled basis . . ." 47 U.S.C. § 251(c)(3).

<sup>390</sup> 47 U.S.C. § 214(e)(1)(A).

<sup>391</sup> See generally 47 U.S.C. § 153; Joint Explanatory Statement at 141-42.

214(e), however, we conclude that it is unlikely that Congress intended to deny designation as eligible to a carrier that relies, even in part, on unbundled network elements to provide service, given the central role of unbundled network elements as a means of entry into local markets.<sup>392</sup> Because the statute is ambiguous with respect to whether a carrier providing service through the use of unbundled network elements is providing service through its "own facilities" or through the "resale of another carrier's services," we look to other sections of the Act and to legislative intent to resolve the ambiguity.

156. In so doing, we conclude that Congress did not intend to deny designation as eligible to a carrier that relies exclusively on unbundled network elements to provide service in a high cost area, given that the Act contemplates the use of unbundled network elements as one of the three primary paths of entry into local markets.<sup>393</sup> We have consistently held that Congress did not intend to prefer one form of local entry over another.<sup>394</sup> As we recognized in the *Local Competition Order*, "[t]he Act contemplates three paths of entry into the local market -- the construction of new networks, the use of unbundled elements of the incumbent's network, and resale. The 1996 Act requires us to implement rules that eliminate statutory and regulatory barriers and remove economic impediments to each."<sup>395</sup> In the Recommended Decision, the Joint Board explicitly stated that "[c]ompetitive neutrality" is "embodied in" section 214(e).<sup>396</sup> Indeed, the Joint Board recommended "that the Commission reject arguments that only those telecommunications carriers that offer universal service wholly over their own facilities should be eligible for universal service [support]."<sup>397</sup> Further, we agree with CompTel that the Joint Board's recommendation that a carrier may meet the eligibility criteria of section 214(e) "without regard to the technology used by that carrier" demonstrates that this interpretation is

<sup>392</sup> *Local Competition Order*, 11 FCC Red at 15,509. If we were to determine that unbundled network elements are *neither* a carrier's "own facilities" *nor* "resale of another carrier's services," then a carrier that offers universal service by using facilities that it has constructed along with a *single unbundled network element* would be excluded from eligible status because the carrier would not be using the precise "combination" allowed under section 214(e) -- namely, a combination of "its own facilities" and "resale of another carrier's services." 47 U.S.C. § 214(e)(1). We cannot reconcile this result with the Joint Board's principle of competitive neutrality or the goals of universal service and section 254.

<sup>393</sup> 47 U.S.C. § 251(c)(3).

<sup>394</sup> See, e.g., *Local Competition Order*, 11 FCC Red at 15,509 ("Section 251 neither explicitly nor implicitly expresses a preference for one particular entry strategy").

<sup>395</sup> *Local Competition Order*, 11 FCC Red at 15,509.

<sup>396</sup> Recommended Decision, 12 FCC Red at 101.

<sup>397</sup> Recommended Decision, 12 FCC Red at 173.

consistent with the Joint Board's approach.<sup>398</sup>

157. We conclude that the phrase "resale of another carrier's services" does not encompass the provision of service through unbundled network elements. The term "resale" used in section 251 refers to an ILEC's duty to offer, at wholesale rates, "any telecommunications service that the carrier provides at retail"<sup>399</sup> as well as the duty of every LEC not to prohibit "the resale of its telecommunications services."<sup>400</sup> Section 251 makes it clear that an ILEC's duty to offer retail services at wholesale rates is distinct from an ILEC's obligation to provide "nondiscriminatory access to network elements on an unbundled basis."<sup>401</sup> We find that the statute's use, in section 214(e)(1), of the term used in subsections 251(b)(1) and 251(c)(4) -- "resale" -- suggests that Congress contemplated that the provision of services via unbundled network elements was different from the "resale of another carrier's services." In addition, to interpret the phrase "resale of another carrier's services" to encompass the provision of a telecommunications service through use of unbundled network elements obtained from an ILEC would require the Commission to find that the provision of nondiscriminatory access to an unbundled network element by an ILEC is the provision of a "telecommunications service" -- an interpretation that is not consistent with the Act. A "network element" is defined as a "facility or equipment used in the provision of a telecommunications service" that also "includes features, functions, and capabilities that are provided by means of such facility or equipment . . . ." <sup>402</sup> A "network element" is not a "telecommunications service."<sup>403</sup>

158. We conclude that, when a requesting carrier obtains an unbundled element, such element -- if it is also a "facility" -- is the requesting carrier's "own facility" for purposes of Section 214(e)(1)(A) because the requesting carrier has the "exclusive use of that facility for a period of time."<sup>404</sup> The courts have recognized many times that the word "own" -- as well as its

<sup>398</sup> CompTel comments at 14 (citing Recommended Decision, 12 FCC Rcd at 170 n.513).

<sup>399</sup> 47 U.S.C. § 251(c)(4).

<sup>400</sup> 47 U.S.C. § 251(b)(1).

<sup>401</sup> 47 U.S.C. § 251(c)(3), (c)(4).

<sup>402</sup> 47 U.S.C. § 153(29) (emphasis added).

<sup>403</sup> 47 U.S.C. § 153(29). Section 153(46), in defining "telecommunications service," makes a clear distinction between "service" and "facilities" -- a "telecommunications service" is "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46).

<sup>404</sup> *Local Competition Order*, 11 FCC Rcd at 15,635; see also BLACK'S LAW DICTIONARY 1106 (6th ed. 1990) ("ownership" is "a collection of rights to use and enjoy property" that may be "shared with one or more persons when the time of enjoyment is deferred or limited or when the use is restricted").

numerous derivations -- is a "generic term" that "varies in its significance according to its use" and "designate[s] a great variety of interests in property."<sup>405</sup> The word "ownership" is said to "var[y] in its significance according to the context and the subject matter with which it is used."<sup>406</sup> The word "owner" is a broad and flexible word, applying not only to legal title holders, but to others enjoying the beneficial use of property.<sup>407</sup> Indeed, property may have more than one "owner" at the same time, and such "ownership" does not merely involve title interest to that property.<sup>408</sup>

159. Additionally, we note that section 214(e)(1) uses the term "own facilities" and does not refer to facilities "owned by" a carrier. We conclude that this distinction is salient based on our finding that, unlike the term "owned by," the term "own facilities" reasonably could refer to property that a carrier considers its own, such as unbundled network elements, but to which the carrier does not hold absolute title.

160. In the context of section 214(e)(1)(A), unbundled network elements are the requesting carrier's "own facilities" in that the carrier has obtained the "exclusive use" of the facility for its own use in providing services, and has paid the full cost of the facility, including a reasonable profit, to the ILEC.<sup>409</sup> The opportunity to purchase access to unbundled network elements, as we explained in the *Local Competition Order*, provides carriers with greater control over the physical elements of the network, thus giving them opportunities to create service offerings that differ from services offered by an incumbent.<sup>410</sup> This contrasts with the abilities of

<sup>405</sup> BLACK'S LAW DICTIONARY 1105 (6th ed. 1990); 73 C.J.S. *Property* § 24 (1972) (citing cases).

<sup>406</sup> 73 C.J.S. *Property* § 26 (1972), quoted in *Blumenfeld v. United States*, 306 F.2d 892 (8th Cir. 1962).

<sup>407</sup> See, e.g., *Colley v. Carleton*, 571 S.W.2d 572 (Tex. 1978) (The term "owner," as used in section of compensation statute dealing with partial taking, includes lessee for years as well as any other person who has interest in property); *Bowen v. Metropolitan Bd. of Zoning Appeals in Marion County*, 317 N.E.2d 193, 200 (Ind. 1974) ("The only reasonable sense in which 'owner' could be said to be used on application form for zoning variance is in the sense of owner of the right to use the property, and would include lessee under 99 year lease."); *United States v. Ninety-Nine Diamonds*, 139 F. 961, 970-971 (8th Cir. 1905), quoting *Camp v. Rogers*, 44 Conn. 291, 298 (1877) ("A person who hired a carriage for a limited time was held to have a special property interest in it, and to be the owner within the meaning of a statute which provided a remedy against one who 'shall drive against another vehicle and injure its owner.'").

<sup>408</sup> 73 C.J.S. *Property* §§ 25-26 (1972); *Judd v. Landon*, 1 N.W.2d 861 (Minn. 1942); *United States v. Ninety-Nine Diamonds*, 139 F. 961 (8th Cir. 1905) ("The fact that the term 'owner' is not limited in its signification to one who holds a perfect title to property must not be overlooked. The word has other meanings, and must have its appropriate signification in each case in view of the subject, object, and terms of the legislation in which it is found. Thus, there may be many joint owners of the same property, yet each would undoubtedly be an owner.")

<sup>409</sup> See 47 U.S.C. § 252(d)(1).

<sup>410</sup> *Local Competition Order*, 11 FCC Rcd at 15,631-32, 15,667.

wholesale purchasers, which are limited to offering the same services that an incumbent offers at retail.<sup>411</sup> This greater control distinguishes carriers that provide service over unbundled network elements from carriers that provide service by reselling wholesale service and leads us to conclude that, as between the two terms, carriers that provide service using unbundled network elements are better characterized as providing service over their "own facilities" as opposed to providing "resale of another carrier's services."

161. In addition, we conclude that our interpretation of the term "own facilities" is consistent with the goals of universal service and that any contrary interpretation would frustrate the goals of the Act and lead to absurd results. For example, it is appropriate for Congress to deny pure resellers universal service support because pure resellers receive the benefit of universal service support by purchasing wholesale services at a price based on the retail price of a service -- a price that already includes the universal service support payment received by the incumbent provider.<sup>412</sup>

162. Unlike a pure reseller, a carrier that provides service using unbundled network elements bears the full cost of providing that element, even in high cost areas. Section 252(d)(1)(A)(i) requires that the price of an unbundled network element be based on cost;<sup>413</sup> a carrier that purchases access to an unbundled network element incurs all of the forward-looking costs associated with that element. As discussed below, we conclude that universal service support should be provided to the carrier that incurs the costs of providing service to a customer.<sup>414</sup> Because a carrier that purchases access to an unbundled network element incurs the costs of providing service, it is reasonable for us to find that such a carrier should be entitled to universal service support for the elements it obtains.

163. We conclude that interpreting the term "own facilities" to include unbundled network elements is the most reasonable interpretation of the statute, given Congress's intent that all three forms of local entry must be treated in a competitively neutral manner. For example, suppose that the cost of providing service to a customer in a high cost area, on a forward-looking basis, is \$50.00 per month, and suppose that the universal service support payment for serving that customer is \$20.00. This would leave \$30.00 for the carrier to collect from the subscriber. A carrier that builds all the facilities it uses to provide service to that customer would be entitled to the \$20.00 payment and would, assuming that it bills the customer \$30.00, fully recover its \$50.00 per-month costs. Under the pricing rule in section 252(d)(3), a carrier that serves the same customer by reselling wholesale service would receive a discount off of the retail rate of

<sup>411</sup> *Local Competition Order*, 11 FCC Rcd at 15,631-32, 15,667.

<sup>412</sup> The eligibility of resellers is discussed *infra* this section.

<sup>413</sup> 47 U.S.C. § 252(d)(1)(A)(i).

<sup>414</sup> See *infra* section VII.



\$30.00.<sup>415</sup> For example, a reseller might receive a 20 percent discount, which would result in a wholesale price of \$24.00 per month, thus allowing it to charge, depending on its costs of doing business, a retail price of \$30.00. As a result, both the carrier that constructs its facilities and the carrier that serves customers through resale benefit, directly or indirectly, from the full \$20.00 per-customer universal service support payment. With regard to these two methods of providing service, therefore, the universal service high cost system is "competitively neutral."

164. If the term "own facilities" is interpreted *not* to include service provided through unbundled network elements, however, a carrier providing service using unbundled network elements would suffer a substantial cost disadvantage compared with carriers using other entry strategies. Under this interpretation, a carrier providing service using unbundled network elements to the same customer would pay the ILEC the full \$50.00 forward-looking monthly cost to serve that customer, yet it would be unable to collect the \$20.00 per-month support payment because it would not qualify as an "eligible carrier."<sup>416</sup> As a result, the costs this carrier must recover from its customer would be well above the amount that a carrier serving a customer using facilities it constructed, or a carrier serving a customer using wholesale service, must recover from its customer. Such a structure would create a strong disincentive for this type of entry and is not consistent with the Joint Board's principle of "competitive neutrality." In effect, excluding a competitive local exchange carrier (CLEC) that uses exclusively unbundled network elements from being designated an eligible carrier could make it cost-prohibitive for CLECs choosing this entry strategy to serve high cost areas because ILECs serving those areas will receive universal service support. We cannot reconcile these implications with the "pro-competitive" goals of the 1996 Act and the goals of universal service and section 254. As a result, the most reasonable interpretation of section 214(e)(1)(A) is that the phrase "own facilities" includes the provision of service through unbundled network elements, and that a carrier, as described above, that uses exclusively unbundled network elements to serve customers would be entitled to receive the \$20.00 support payment, subject to the cap that we describe below,<sup>417</sup> that would allow it to compete with carriers utilizing other entry strategies.

165. To hold otherwise would threaten the central principles of the universal service

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<sup>415</sup> 47 U.S.C. § 252(d)(3) (requiring wholesale rates to be based on retail rates excluding avoided costs).

<sup>416</sup> For example, if we were to conclude that unbundled network elements were not included within the term "own facilities," a cable operator that provides universal service through a mixture of unbundled network elements (such as switching capabilities) and cable lines that it constructed and maintains would not be an eligible carrier because it would not, in this situation, resell "another carrier's services."

<sup>417</sup> We conclude below that a CLEC serving a customer in a high cost area exclusively through the use of unbundled network elements will receive the lesser of the total amount of support given to the ILEC or the price of the unbundled network elements to which it obtains access. We also conclude that the ILEC will receive the difference between the unbundled network element price and the support amount. See *infra* section VII; see also *infra* further discussion this section.

system and the 1996 Act. In the *Local Competition Order*, we explicitly stated that, in enacting section 251(c)(3), Congress did not intend to restrict the entry of CLECs that use exclusively unbundled network elements.<sup>418</sup> Indeed, entry by exclusive use of unbundled elements might be common in high cost areas -- for example, a carrier considering providing service to a single high-volume customer or only to a portion of a high cost area might be encouraged to offer service using unbundled elements throughout an entire service area if it could compete with the incumbent and other entrants that may already be receiving a payment from the universal service fund.

166. If we interpreted the term "own facilities" not to include the use of unbundled network elements, the end result would be that the entry strategy that includes the exclusive use of unbundled network elements would be the *only* form of entry that would not benefit from, either directly or indirectly, universal service support. A carrier that has constructed all of its facilities would certainly be eligible for support under section 214(e)(1), as would an entrant that offers service through a mix of facilities that it had constructed and resold services. A pure reseller indirectly receives the benefit of the support payment, because, as discussed above, the retail rate of the resold service already incorporates the support paid to the underlying incumbent carrier. Such an environment -- in which some forms of entry are eligible for support but one form of entry is not -- is not "competitively neutral."<sup>419</sup> In addition, this outcome would create an artificial disincentive for carriers using unbundled elements to enter into high cost areas. Thus, a carrier may be discouraged from offering the supported services throughout a service area via unbundled elements *solely* because support may be available to its competitors and not to itself. By effectively precluding this form of entry and its attendant benefits, consumers in high cost areas would be denied the fullest range of telecommunications services that Congress sought to bring "to all regions of the Nation."<sup>420</sup>

167. Several commenters urge us to adopt an interpretation of the term "own facilities" that would exclude the use of unbundled network elements.<sup>421</sup> These commenters assert that, in light of the Joint Board's recommendation that support be "portable," a narrow interpretation of

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<sup>418</sup> *Local Competition Order*, 11 FCC Rcd at 15,666-67 (Congress did not intend to limit this form of entry by imposing a facilities-ownership requirement in conjunction with section 251(c)(3) because it "would seriously inhibit the ability of potential competitors to enter local markets through the use of unbundled elements, and thus would retard the development to local exchange competition.").

<sup>419</sup> If we were to determine that unbundled network elements are "resale of another carrier's services," then a carrier that offers universal service exclusively through the use of unbundled network elements would be excluded from eligible status because section 214(e) requires an eligible carrier to provide service, at least in part, over its own facilities. 47 U.S.C. § 214(e).

<sup>420</sup> 47 U.S.C. § 254(b)(3).

<sup>421</sup> See, e.g., Lufkin-Conroe reply comments at 15-16.

the section 214(e) facilities requirement is necessary to ensure that ILECs receive adequate funds to construct, maintain, and upgrade their telecommunications networks.<sup>422</sup> We are not persuaded by these arguments because we find that the pricing rule in section 252(d)(1) that applies to unbundled network elements assures that the costs associated with the construction, maintenance, and repair of an incumbent's facilities, including a reasonable profit, would already be recovered through the payments made by the carrier purchasing access to unbundled network elements.<sup>423</sup> The carrier purchasing access to those elements will, in turn, receive a universal service support payment.<sup>424</sup> To the extent that these commenters' arguments are premised on their contention that unbundled network element prices do not compensate ILECs for their embedded costs, and that ILECs are constitutionally entitled to recovery of their embedded costs, we will address that issue in a later proceeding in our *Access Charge Reform* docket.<sup>425</sup>

168. Although the states have the ultimate responsibility under section 214(e) for deciding whether a particular carrier should be designated as eligible, we are fully authorized to interpret the statutory provisions that govern that determination. This language appears in a federal statute, establishing a federal universal service program. It is clearly appropriate for a federal agency to interpret the federal statute that it has been entrusted with implementing. Moreover, we believe it is particularly important for us to set out a federal interpretation of the "own facilities" language in section 214, particularly as it relates to the use of unbundled network elements. We note that the "own facilities" language in section 214(e)(1)(A) is very similar to language in section 271(c)(1)(A), governing Bell operating company (BOC) entry into interLATA services.<sup>426</sup> While we are not interpreting the language in section 271 in this Order, given the similarity of the language in these two sections, we would find it particularly troubling to allow the states unfettered discretion in interpreting and applying the "own facilities" language in section 214(e). In order to avoid the potential for conflicting interpretations from different states, we believe it is important to set forth a single, federal interpretation, so that the "own facilities" language is consistently construed and applied.

<sup>422</sup> SBC comments at 21 (citing Recommended Decision, 12 FCC Rcd at 238); Lufkin-Controe reply comments at 15-16.

<sup>423</sup> See 47 U.S.C. § 252(d)(1) (requiring, *inter alia*, that rates for unbundled network elements be based on cost and reasonable profit).

<sup>424</sup> See *infra* section VII where we conclude that providers who provide serving using exclusively unbundled network elements may not receive universal service support in excess of the cost to them of those elements.

<sup>425</sup> *Access Charge Reform Order* at section I.

<sup>426</sup> Compare section 214(e)(1)(A), "using its own facilities or a combination of its own facilities and resale of another carrier's services" with section 271(c)(1)(A), "telephone service may be offered . . . either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier." 47 U.S.C. §§ 214(e)(1)(A), 271(c)(1)(A) (emphasis added).

169. **Level of Facilities Required to Satisfy the Facilities Requirement.** We adopt the Joint Board's analysis and conclusion that a carrier need not offer universal service *wholly* over its own facilities in order to be designated as eligible because the statute allows an eligible carrier to offer the supported services through a combination of its own facilities and resale.<sup>427</sup> Although the Joint Board did not reach this issue, we find that the statute does not dictate that a carrier use a specific level of its "own facilities" in providing the services designated for universal service support given that the statute provides only that a carrier may use a "combination of its own facilities and resale" and does not qualify the term "own facilities" with respect to the amount of facilities a carrier must use. For the same reasons, we find that the statute does not require a carrier to use its own facilities to provide each of the designated services but, instead, permits a carrier to use its own facilities to provide at least one of the supported services.<sup>428</sup> By including carriers relying on a combination of facilities and resale within the class of carriers eligible to receive universal service support, and by declining to specify the level of facilities required, we believe that Congress sought to accommodate the various entry strategies of common carriers seeking to compete in high cost areas. We conclude, therefore, that, if a carrier uses its own facilities to provide at least one of the designated services, and the carrier otherwise meets the definition of "facilities" adopted above, then the facilities requirement of section 214(e) is satisfied. For example, we conclude that a carrier could satisfy the facilities requirement by using its own facilities to provide access to operator services, while providing the remaining services designated for support through resale.

170. In arriving at this conclusion, we compare Congress's use of qualifying language in the section 271(c)(1)(A) facilities requirement with the absence of such language in the section 214(e) requirement. Section 271(c)(1)(A) provides that a BOC that is seeking authorization to originate in-region, interLATA services must, *inter alia*, enter into interconnection agreements with competitors that offer "telephone exchange service either exclusively over their own facilities or *predominantly* over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier."<sup>429</sup> By contrast, section 214(e) does not mandate the use of any particular level of a carrier's own facilities.<sup>430</sup>

171. Several ILECs assert that eligible carriers that furnish only a *de minimis* level of facilities should not be entitled to receive universal service support.<sup>431</sup> ILECs are concerned that,

<sup>427</sup> Recommended Decision, 12 FCC Rcd at 173.

<sup>428</sup> See EXCEL comments at 8.

<sup>429</sup> 47 U.S.C. § 271(c)(1)(A) (emphasis added).

<sup>430</sup> 47 U.S.C. § 214(e)(1)(A).

<sup>431</sup> Lufkin-Conroe reply comments at 15-16.

unless a carrier is required to provide a substantial level of its own facilities throughout a service area, a CLEC may be able to receive a level of support in excess of its actual costs, and thereby gain a competitive advantage over ILECs.<sup>432</sup> For example, ILECs argue that, because the prices of unbundled network elements may be averaged over smaller geographic areas than universal service support, the cost that a competitive carrier will incur for serving a customer using unbundled network elements will not match the level of universal service support the CLEC will receive for serving that customer.<sup>433</sup>

172. This asymmetry could arise because of the procedures currently used to calculate the cost of serving a customer. Because it is administratively infeasible to calculate the precise cost of providing service to each customer in a service area, and because rate averaging and the absence of competition generally have allowed it, the cost of providing service has been calculated over a geographic region, such as a study area,<sup>434</sup> and the total cost of providing service in that area has been averaged over the number of customers in that area.<sup>435</sup> This average cost provides the basis for calculating universal service support in that area.<sup>436</sup> To illustrate, the average cost of providing service in a study area might be \$50.00 per customer, but the cost of providing service might be \$10.00 in urban portions of the area, \$40.00 in the suburban portions, and \$100.00 in outlying regions. Although the cost of providing the supported services will be calculated at the study-area level in 1998, the cost of unbundled network elements is calculated by the states, possibly over geographic areas smaller than study areas.<sup>437</sup> Thus, the total support given to a carrier per customer in a study area might be \$20.00, but the price of purchasing access to unbundled network elements to serve a customer in that study area might be \$10.00, \$60.00, or \$100.00, depending on where the customer is located. Consequently, a CLEC might pay \$10.00 to purchase access to an unbundled network element in order to serve a customer in a

<sup>432</sup> See, e.g., SBC comments at 21.

<sup>433</sup> See, e.g., NYNEX comments at 32-33.

<sup>434</sup> A "study area" is usually an ILEC's existing service area in a given state. The study area boundaries are fixed as of November 15, 1984. MTS and WATS Market Structure: Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, *Decision and Order*, 50 Fed. Reg. 939 (1985 *Lifeline Order*) (adopting with minor modifications the Joint Board recommendations issued in MTS and WATS Market Structure: Amendment of the Commission's Rules and Establishment of a Joint Board, *Recommended Decision and Order*, 49 Fed. Reg. 48,325 (1984)).

<sup>435</sup> These calculations are performed by carriers that submit this data to NECA, which, in turn, submits it to the Commission as part of its duties pursuant to part 36 of our rules. See generally 47 C.F.R. § 36.601 *et seq.*

<sup>436</sup> See *infra* section VII B for a more detailed explanation of the calculation of high cost support.

<sup>437</sup> The *Local Competition Order* required states to create a minimum of three rate zones for calculating the price of unbundled network elements. *Local Competition Order*, 11 FCC Red at 15,882-83. This requirement is now stayed, pending review in the U. S. Court of Appeals for the Eighth Circuit. See *supra* note 7.

city, but receive \$20.00 in universal service support.

173. We emphasize that the uneconomic incentives described above are largely connected with the modified existing high cost mechanism that will be in place until January 1, 1999.<sup>438</sup> We also conclude, based on the reasons set forth immediately below, that the situation described by the ILECs will occur, at most, infrequently during this period. We conclude that the ILECs' concerns should be significantly alleviated when the forward-looking and more precisely targeted methodology to calculate high cost support becomes effective. Specifically, in our forthcoming proceeding on the high cost support mechanism that will take effect January 1, 1999, we intend to address fully any potential dissimilarities between the level of disaggregation of universal service support and the level of disaggregation of unbundled network element prices.<sup>439</sup> Nevertheless, we agree with the ILECs that we should limit the ability of competitors to make decisions to enter local markets based on artificial economic incentives created under the modified existing mechanism.

174. To this end, we take the following actions to reduce the incentives that a CLEC may have to enter a rural or non-rural market in an attempt to exploit the asymmetry described above. First, we conclude that a carrier that serves customers by reselling wholesale service may not receive universal service support for those customers that it serves through resale alone.<sup>440</sup> In addition, we conclude below that a CLEC using exclusively unbundled network elements to provide the supported services will receive a level of universal service support not exceeding the price of the unbundled network elements to which it purchases access.<sup>441</sup>

175. In markets served by non-rural carriers, we conclude that the risk of the anticompetitive behavior described above is minimal because, as of January 1, 1999, universal service support for non-rural high cost carriers will be determined using a forward-looking methodology that will more precisely target support. We doubt that carriers will incur the costs necessary to meet the eligibility requirements of section 214(e) in order to exploit this opportunity when the support mechanisms will soon change. Further, the incentive for a CLEC to enter an area served by a non-rural carrier to gain an unfair advantage is diminished because the level of universal service support per customer in these areas is small relative to the start-up costs of attracting customers and the cost of providing service to those customers using

<sup>438</sup> We discuss below other uneconomic incentives arising from the asymmetry between the price of unbundled network elements and the level of universal service support. See *infra* section VII.

<sup>439</sup> See also *infra* section VII.

<sup>440</sup> See *supra* this section and *infra* section VII.

<sup>441</sup> We further conclude *infra* that a CLEC will get the lesser of the unbundled network element price for the loop or the ILEC's per-line payment from the high cost loop support and LTS, if any. See *infra* section VII.D.1. See also section VII.D.2. for a discussion of portable support in areas served by rural ILECs.

unbundled network elements.<sup>442</sup>

176. We also expect that state commissions, in the process of making eligibility determinations, will play an important part in minimizing the risk of anticompetitive behavior as described above. Under section 214(e)(3), a state commission must make a finding that designation of more than one eligible carrier is in the public interest in a service area that is served by a rural telephone company.<sup>443</sup> Accordingly, under section 214(e)(3), a state commission may consider whether a competitive carrier seeking designation as an eligible carrier will be able to exploit unjustly the asymmetry between the price of unbundled network elements and the level of universal service support. Under section 251(f), rural telephone companies are not required to provide, *inter alia*, nondiscriminatory access to unbundled network elements pursuant to section 251(c)(3) until the relevant state commission determines that a bona fide request under section 251(c) for such access "is not unduly economically burdensome, is technically feasible, and is consistent with section 254 (other than subsections (b)(7) and (c)(1)(D) thereof)."<sup>444</sup> Thus, state commissions may also consider whether a CLEC's request for nondiscriminatory access to unbundled network elements is consistent with universal service, and will be able to take into account the arguments of ILECs to the extent that they are not addressed by the measures discussed herein.

177. *Location of Facilities for Purposes of Section 214(e).* Although we conclude above that the term "facilities" includes any physical components of the telecommunications network that are used in the transmission or routing of the supported services, we find that the

<sup>442</sup> The total amount of explicit per-loop support for the BOCs, which provide service to over 75% of the nation's presubscribed access lines, ranges, according to our estimates, between approximately \$0.04 and approximately \$0.73 per customer. The highest level of universal service support that a CLEC could receive, according to our estimates, is \$13.55, which occurs in the study area of United Telephone in Texas. In Texas, GTE receives \$0.28 per customer per month and SWBT receives no universal service support. This level of universal service support compares with a price range of \$15.00 to \$25.49 per month for each loop leased as an unbundled network element in Texas. *Arbitration Award*, Consolidated Dockets Nos. 16189, 16196, 16226, 16285, and 16290 (Public Utility Commission of Texas Nov. 7, 1996) at 40 (adopting an interim rate of \$15.00 for SWBT); *Arbitration Award*, Docket Nos. 16300/16355 (Public Utility Commission of Texas Dec. 12, 1996) at 164 (adopting an interim rate of \$25.49 for GTE). The amount of universal service support that a carrier receives per customer in a high cost area can be approximated by dividing a carrier's total support in a state by the number of loops the carrier has in that state. For example, BellSouth received \$11,317,044.94 for 1,291,819 loops in South Carolina in 1995. This calculation yields a support level of approximately \$7.73 per loop per month. See NECA *Annual Filing*, Study Area Detail at 33 (1996). The \$0.04 rate occurs for U S West in Idaho and BellSouth in Kentucky. *Id.* at 7, 15. See also STATISTICS FOR COMMUNICATIONS COMMON CARRIERS, tbl. 2.3 (1995-96 ed.)

<sup>443</sup> See *supra* section VI.B.2.a.

<sup>444</sup> 47 U.S.C. § 251(f)(1)(B). See also 47 U.S.C. § 253(f) (allowing state commission to require telecommunications carrier to meet eligibility criteria of section 214(e) in order to be permitted to provide service in service area served by rural telephone company).

statute does not mandate that the facilities be physically located in that service area. For example, a switch located in San Antonio, Texas that is used to provide the supported services throughout the service area encompassing Dallas, Texas would be considered "facilities" for purposes of determining a carrier's eligibility to receive universal service support for the service area encompassing Dallas. We find that it is reasonable to draw a distinction between particular facilities based on the relationship of those facilities to the provision of specific services as opposed to their physical location within a service area both for reasons of promoting economic efficiency as well as competitive neutrality. Specifically, we find that, for example, allowing a carrier the flexibility to offer supported services in the service area encompassing San Antonio and in the service area encompassing Dallas through a single switch is economically efficient because it does not create artificial incentives to deploy redundant facilities when those facilities are not otherwise economically justified. In addition, we conclude that our determination not to impose restrictions based solely on the location of facilities used to provide the supported services is competitively neutral in that it will accommodate the various technologies and entry strategies that carriers may employ as they seek to compete in high cost areas.

178. Eligibility of Resellers. We adopt the Joint Board's analysis and conclusion that section 214(e)(1) precludes a carrier that offers the supported services solely through resale from being designated eligible in light of the statutory requirement that a carrier provide universal service, at least in part, over its own facilities.<sup>445</sup> EXCEL contends that the Joint Board's recommendation to exclude resellers is based on the flawed assumption that the meaning of the term "facilities" is commonly understood, and thus asserts that we should not adopt the Joint Board's recommendation.<sup>446</sup> We reject this assertion because, under any reasonable interpretation of the term "facilities," a "pure" reseller uses none of its own facilities to serve a customer. Rather, a reseller purchases service from a facilities owner and resells that service to a customer. We also are not persuaded by commenters' arguments that, unless a reseller receives support directly from federal universal service mechanisms, it will be forced to absorb higher costs incurred in providing services in high cost areas and, ultimately, to increase prices charged to customers in those areas.<sup>447</sup> As explained above, resellers should not be entitled to receive universal service support directly from federal universal service mechanisms because the universal service support payment received by the underlying provider of resold services is reflected in the price paid by the reseller to the underlying provider.<sup>448</sup>

<sup>445</sup> Recommended Decision, 12 FCC Rcd at 172-73.

<sup>446</sup> See EXCEL comments at 7-8 (citing Infrastructure Sharing Provisions in the Telecommunications Act of 1996, *Notice of Proposed Rulemaking*, CC Docket 96-237, FCC 96-456 (rel. Nov. 22, 1996) which sought comment on meaning of "telecommunications facilities").

<sup>447</sup> EXCEL comments at 5-6, 14-15; TRA reply comments at 11.

<sup>448</sup> See *supra* section VI.B.2.b.



179. We conclude that no party has demonstrated that the statutory criteria for forbearance have been met<sup>449</sup> and therefore we agree with the Joint Board that we cannot exercise our forbearance authority to permit "pure" resellers to become eligible for universal service support, as some commenters have proposed.<sup>450</sup> In order to exercise our authority under section 10(a) of the Act to forbear from applying a provision of the Act, we must determine that: (1) enforcement of the provision "is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;" (2) enforcement of such provision "is not necessary for the protection of consumers;" and (3) "forbearance from applying such provision . . . is consistent with the public interest."<sup>451</sup> In addition, we must consider "whether forbearance . . . will promote competitive market conditions."<sup>452</sup> If pure resellers could be designated eligible carriers and were entitled to receive support for providing resold services, they, in essence, would receive a double recovery of universal service support because they would recover the support incorporated into the wholesale price of the resold services in addition to receiving universal service support directly from federal universal service support mechanisms. Making no finding with respect to the first two criteria, we conclude that it is neither in the public interest nor would it promote competitive market conditions to allow resellers to receive a double recovery. Indeed, allowing such a double recovery would appear to favor resellers over other carriers, which would not promote competitive market conditions. Allowing resellers a double recovery also would be inconsistent with the principle of competitive neutrality because it would provide inefficient economic signals to resellers.

180. TRA cites the Commission's decision not to impose a facilities requirement with respect to section 251(c)(3) in the *Local Competition Order* to support its contention that the Commission should forbear from the facilities requirement in section 214(e).<sup>453</sup> TRA specifically cites the Commission's finding that any facilities requirement the Commission could construct "would likely be so easy to meet it would ultimately be meaningless."<sup>454</sup> In addition to our finding that the statutory forbearance criteria have not been met, we also reject this assertion because, unlike section 251(c)(3), which does not explicitly require a carrier to own facilities in

<sup>449</sup> 47 U.S.C. § 160.

<sup>450</sup> Recommended Decision, 12 FCC Rcd at 173. See, e.g., EXCEL comments at 11-13; Telco comments at 8-10; TRA comments at 15-16. See also 47 U.S.C. § 160.

<sup>451</sup> 47 U.S.C. § 160(a).

<sup>452</sup> 47 U.S.C. § 160(b).

<sup>453</sup> TRA comments at 12 (citing *Local Competition Order*, 11 FCC Rcd at 15,670).

<sup>454</sup> TRA comments at 12 (citing *Local Competition Order*, 11 FCC Rcd at 15,670).

order to obtain access to unbundled network elements, section 214(e)(1)(A) expressly mandates the use of a carrier's "own facilities" in the provision of the services designated for universal service support.<sup>455</sup>

**c. Requirements of Section 254(e) Pertaining to Intended Uses of Universal Service Funds**

181. We adopt the Joint Board's recommendation that no additional guidelines are necessary to interpret section 254(e)'s requirement that a carrier that receives universal service support shall only use that support for the facilities and services for which it is intended.<sup>456</sup> We agree with the Joint Board's conclusion that the optimal approach to minimizing misuse of universal service support is to adopt mechanisms that will set universal support so that it reflects the costs of providing universal service efficiently.<sup>457</sup> We conclude that we will adopt the Joint Board's recommended approach to minimizing the misuse of support by taking steps to implement forward-looking high cost support mechanisms and implementing the rules set forth in our accompanying *Access Charge Reform Order*.<sup>458</sup> We also agree with the Joint Board that competitive markets, which we anticipate will develop over time, will minimize the incentives and opportunities to misuse funds.<sup>459</sup> We adopt the Joint Board's recommendation that we rely upon state monitoring of the provision of supported services to ensure that universal service support is used as intended until competition develops.<sup>460</sup> We agree with the Joint Board and the North Dakota PSC that, if it becomes evident that federal monitoring is necessary to prevent the misuse of universal service support because states are unable to undertake such monitoring, the Commission, in cooperation with the Joint Board, will consider the need for additional action.<sup>461</sup> In addition, we agree with the Joint Board that no additional rules are necessary to ensure that only eligible carriers receive universal service support because a carrier must be designated as an eligible carrier by a state commission in order to receive funding.<sup>462</sup> Finally, as discussed below,

<sup>455</sup> Compare *Local Competition Order*, 11 FCC Rcd at 15,670 (interpreting section 251(c)(3)) with 47 U.S.C. § 214(e) and interpretation herein.

<sup>456</sup> Recommended Decision, 12 FCC Rcd at 174. See also NPRM at para. 41 (seeking comment on this issue).

<sup>457</sup> Recommended Decision, 12 FCC Rcd at 174.

<sup>458</sup> See *infra* section VII; *Access Charge Reform Order* at section IV.A.

<sup>459</sup> Recommended Decision, 12 FCC Rcd at 174.

<sup>460</sup> Recommended Decision, 12 FCC Rcd at 174.

<sup>461</sup> Recommended Decision, 12 FCC Rcd at 174; North Dakota PSC comments at 2.

<sup>462</sup> Recommended Decision, 12 FCC Rcd at 174. We note that below we adopt a rule stating that the administrator of the universal service support mechanisms shall not disburse funds to a carrier providing service to

because the services included in the Lifeline program are supported services,<sup>463</sup> we note that only eligible carriers may receive universal service support for these services, as required by section 254(e).<sup>464</sup>

## C. Definition of Service Areas

### 1. Background

182. Section 214(e)(5) defines the term "service area" as "a geographic area established by a State commission for the purpose of determining universal service obligations and support mechanisms."<sup>465</sup> For areas served by a rural telephone company,<sup>466</sup> section 214(e)(5) provides that the term "service area" means the rural telephone company's study area<sup>467</sup> "unless and until the Commission and the States, after taking into account the recommendations of a Federal-State Joint Board instituted under section 410(c), establish a different definition of service area for such company."<sup>468</sup>

183. The Joint Board concluded that the states have primary responsibility for designating non-rural service areas.<sup>469</sup> In arriving at this conclusion, the Joint Board also strongly encouraged the states to designate service areas that are not unreasonably large.<sup>470</sup> The Joint Board recommended that rural telephone companies' existing study areas be used as service areas for the purposes of section 214(e)(5).<sup>471</sup> Finally, the Joint Board found that it would be

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customers until the carrier has provided, to the administrator, a true and correct copy of the decision of a state commission designating that carrier as an eligible telecommunications carrier. See *infra* section VI.E.

<sup>463</sup> We have determined that Lifeline service includes the services designated for high cost support as well as toll limitation service. See *infra* section VIII.

<sup>464</sup> See *infra* section VIII.

<sup>465</sup> 47 U.S.C. § 214(e)(5).

<sup>466</sup> The term "rural telephone company" is defined at 47 U.S.C. § 153(37). This definition is reproduced *supra* at a note to section VI.B.1.

<sup>467</sup> The term "study area" is defined *supra* at a note to section VI.B.2.b.

<sup>468</sup> Hereinafter we refer to a service area served by a rural telephone company as a "rural service area" and all other service areas as "non-rural service areas."

<sup>469</sup> Recommended Decision, 12 FCC Rcd at 179.

<sup>470</sup> Recommended Decision, 12 FCC Rcd at 179.

<sup>471</sup> Recommended Decision, 12 FCC Rcd at 179.

consistent with the Act for the Commission to base the actual level of support a carrier receives on a high cost area that is a sub-unit of a state-designated service area.<sup>472</sup>

## 2. Discussion

### a. Non-Rural Service Areas

184. State Adoption of Non-Rural Service Areas. We adopt the Joint Board's finding that subsections 214(e)(2) and 214(e)(5) require state commissions to designate the area throughout which a non-rural carrier must provide universal service in order to be eligible to receive universal service support.<sup>473</sup> We agree with the Joint Board that, although this authority is explicitly delegated to the state commissions, states should exercise this authority in a manner that promotes the pro-competitive goals of the 1996 Act as well as the universal service principles of section 254.<sup>474</sup> We also adopt the Joint Board's analysis and recommendation that states designate service areas that are not unreasonably large.<sup>475</sup> Specifically, we conclude that service areas should be sufficiently small to ensure accurate targeting of high cost support and to encourage entry by competitors.<sup>476</sup> We also agree with the Joint Board's determination that large service areas increase start-up costs for new entrants, which might discourage competitors from providing service throughout an area because start-up costs increase with the size of a service area and potential competitors may be discouraged from entering an area with high start-up costs.<sup>477</sup> As such, an unreasonably large service area effectively could prevent a potential competitor from offering the supported services, and thus would not be competitively neutral, would be inconsistent with section 254, and would not be necessary to preserve and advance universal service.

185. We agree with the Joint Board that, if a state commission adopts as a service area for its state the existing study area of a large ILEC, this action would erect significant barriers to entry insofar as study areas usually comprise most of the geographic area of a state, geographically varied terrain, and both urban and rural areas. We concur in the Joint Board's finding that a state's adoption of unreasonably large service areas might even violate several

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<sup>472</sup> Recommended Decision, 12 FCC Rcd at 181-82.

<sup>473</sup> Recommended Decision, 12 FCC Rcd at 180-81.

<sup>474</sup> Recommended Decision, 12 FCC Rcd at 180-81.

<sup>475</sup> Recommended Decision, 12 FCC Rcd at 180-82.

<sup>476</sup> Recommended Decision, 12 FCC Rcd at 181.

<sup>477</sup> Recommended Decision, 12 FCC Rcd at 181.

provisions of the Act.<sup>478</sup> We also agree with the Joint Board that, if a state adopts a service area that is simply structured to fit the contours of an incumbent's facilities, a new entrant, especially a CMRS-based provider, might find it difficult to conform its signal or service area to the precise contours of the incumbent's area, giving the incumbent an advantage.<sup>479</sup> We therefore encourage state commissions not to adopt, as service areas, the study areas of large ILECs. In order to promote competition, we further encourage state commissions to consider designating service areas that require ILECs to serve areas that they have not traditionally served. We recognize that a service area cannot be tailored to the natural facilities-based service area of each entrant, and we note that ILECs, like other carriers, may use resold wholesale service or unbundled network elements to provide service in the portions of a service area where they have not constructed facilities. Specifically, as noted by the Joint Board, section 254(f) prohibits states from adopting regulations that are "inconsistent with the Commission's rules to preserve and advance universal service."<sup>480</sup> As noted by the Joint Board, state designation of an unreasonably large service area could also violate section 253 if it "prohibit[s] or ha[s] the effect of prohibiting the ability of an entity to provide any interstate or intrastate telecommunications service,"<sup>481</sup> and is not "competitively neutral" and "necessary to preserve and advance universal service."<sup>482</sup>

#### b. Rural Service Areas

186. Authority to Alter Rural Service Areas. We find that, in contrast with non-rural service areas, the Act requires the Commission and the states to act in concert to alter the service areas for areas served by rural carriers. Section 214(e)(5) states:

In the case of an area served by a rural telephone company, 'service area' means such company's 'study area' unless and until the *Commission and the States*, after taking into account the recommendations of a Federal-State Joint Board instituted under section 410(c), establish a different definition of service area for such company.<sup>483</sup>

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<sup>478</sup> Recommended Decision, 12 FCC Rcd at 181.

<sup>479</sup> See Teleport comments at 5; WorldCom comments at 15; APC reply comments at 4.

<sup>480</sup> 47 U.S.C. § 254(f).

<sup>481</sup> 47 U.S.C. § 253(a).

<sup>482</sup> 47 U.S.C. § 253(b).

<sup>483</sup> 47 U.S.C. § 214(e)(5) (emphasis added). A "rural telephone company" is defined at 47 U.S.C. § 153(37); this definition is reproduced *supra* at a note to section V.B.1. The term "study area" is defined *supra* at a note to section V.B.2.b.

187. We conclude that the plain language of section 214(e)(5) dictates that neither the Commission nor the states may act alone to alter the definition of service areas served by rural carriers. In addition, we conclude that the language "taking into account" indicates that the Commission and the states must each give full consideration to the Joint Board's recommendation and must each explain why they are not adopting the recommendations included in the most recent Recommended Decision or the recommendations of any future Joint Board convened to provide recommendations with respect to federal universal service support mechanisms. Furthermore, although the Joint Board did not address this issue, we conclude that the "pro-competitive, de-regulatory" objectives of the 1996 Act would be furthered if we minimize any procedural delay caused by the need for federal-state coordination on this issue.<sup>484</sup> Therefore, we conclude that we should determine, at this time, the procedure by which the state commissions, when proposing to redefine a rural service area, may obtain the agreement of the Commission.

188. Under the procedures we adopt, after a state has concluded that a service area definition different from a rural telephone company's study area would better serve the universal service principles found in section 254(b), either the state or a carrier must seek the agreement of the Commission. Upon the receipt of the proposal, the Commission will issue a public notice on the proposal within 14 days. If the Commission does not act upon the proposal within 90 days of the release date of the public notice, the proposal will be deemed approved by the Commission and may take effect according to the state procedure.<sup>485</sup> If the Commission determines further consideration is necessary, it will notify the state commission and the relevant carriers and initiate a proceeding to determine whether it can agree to the proposal. A proposal subject to further consideration by the Commission may not take effect until both the state commission and this Commission agree to establish a different definition of a rural service area, as required by section 214(e)(5). Similarly, if the Commission initiates a proceeding to consider a definition of a rural service area that is different from the ILEC's study area, we shall seek the agreement of the relevant state commission by submitting a petition to the relevant state commission according to that state commission's procedure. No definition of a rural service area proposed by the Commission will take effect until both the state commission and this Commission agree to establish a different definition. In keeping with our intent to use this procedure to minimize administrative delay, we intend to complete consideration of any proposed definition of a service area promptly.

189. Adoption of Study Areas. We agree with the Joint Board that, at this time, retaining the study areas of rural telephone companies as the rural service areas is consistent with

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<sup>484</sup> See Joint Explanatory Statement at 113.

<sup>485</sup> Although the Commission intends to fully coordinate the two proceedings, it is important to note that approval of a service area change would not indicate Commission approval of a study area waiver.

section 214(e)(5) and the policy objectives underlying section 254.<sup>486</sup> We agree with the Joint Board that, if competitors, as a condition of eligibility, must provide services throughout a rural telephone company's study area, the competitors will not be able to target only the customers that are the least expensive to serve and thus undercut the ILEC's ability to provide service throughout the area.<sup>487</sup> In addition, we agree with the Joint Board that this decision is consistent with our decision to use a rural ILEC's embedded costs to determine, at least initially, that company's costs of providing universal service because rural telephone companies currently average such costs at the study-area level.<sup>488</sup> Some wireless carriers have expressed concern that they might not be able to provide service throughout a rural telephone company's study area because that study area might be noncontiguous.<sup>489</sup> In such a case, we note that this carrier could supplement its facilities-based service with service provided via resale. In response to the concerns expressed by wireless carriers, however, we also encourage states, as discussed more fully below, to consider designating rural service areas that consist of only the contiguous portions of ILEC study areas. Further, we agree with TCA that any change to a study area made by the Commission should result in a corresponding change to the corresponding rural service area.<sup>490</sup> Thus, we encourage a carrier seeking to alter its study area to also request a corresponding change in its service area, preferably as a part of the same regulatory proceeding. If the carrier is not initiating any proceedings with this Commission,<sup>491</sup> it should seek the approval of the relevant state commission first, and then either the state commission or the carrier should seek Commission agreement according to the procedures described above. We agree with the Joint Board that this differing treatment of rural carriers sufficiently protects smaller carriers and is consistent with the Act.<sup>492</sup>

190. We also conclude, based on additional information presented to us in response to the Recommended Decision, that universal service policy objectives may be best served if a state defines rural service areas to consist only of the contiguous portion of a rural study area, rather than the entire rural study area. We conclude that requiring a carrier to serve a non-contiguous service area as a prerequisite to eligibility might impose a serious barrier to entry, particularly

<sup>486</sup> Recommended Decision, 12 FCC Red at 179-80.

<sup>487</sup> Recommended Decision, 12 FCC Red at 179-80.

<sup>488</sup> Recommended Decision, 12 FCC Red at 180.

<sup>489</sup> Nextel comments at 9; Vanguard comments at 4.

<sup>490</sup> See TCA comments at 4.

<sup>491</sup> We note that we sought comment in the NPRM on whether to amend our rules to revise existing study area boundaries. NPRM at para. 45. Any potential changes in the method used to redefine study areas might result in a change in the procedure to obtain a waiver, or, might result in the need for fewer waivers.

<sup>492</sup> See, e.g., 47 U.S.C. § 251(f)(1).

for wireless carriers.<sup>493</sup> We find that imposing additional burdens on wireless entrants would be particularly harmful to competition in rural areas, where wireless carriers could potentially offer service at much lower costs than traditional wireline service.<sup>494</sup> Therefore, we encourage states to determine whether rural service areas should consist of only the contiguous portions of an ILEC's study area, and to submit such a determination to the Commission according to the procedures we describe above. We note that state commissions must make a special finding that the designation is in the public interest in order to designate more than one eligible carrier in a rural service area,<sup>495</sup> and we anticipate that state commissions will be able to consider the issue of contiguous service areas as they make such special findings.

191. We reject Cox's suggestion that carriers could cooperate with each other to provide service throughout a service area.<sup>496</sup> Given that section 214(e)(1) requires an eligible carrier to provide service "throughout" a service area, we find that the statute does not permit a cooperative arrangement, such as that advocated by Cox, because neither individual carrier could satisfy this explicit condition of eligibility.<sup>497</sup>

#### c. Support Areas

192. We agree with the Joint Board's analysis and conclusion that it would be consistent with the Act for the Commission to base the actual level of universal service support that carriers receive on the cost of providing service within sub-units of a state-defined service area, such as a wire center or a census block group (CBG).<sup>498</sup> We reject Bell Atlantic's argument that the language in section 214(e)(5) gives the states exclusive authority to establish non-rural service areas "for the purpose of determining universal service obligations and support

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<sup>493</sup> See Cox comments at 7 (describing gaps of 70 to 80 miles between parts of Nebraska company's study area); Nextel comments at 9 (explaining that some wireless service providers are licensed within prescribed geographic regions).

<sup>494</sup> See Nextel comments at 1-2 (stating that in many circumstances wireless service providers offer only cost-efficient alternative for delivery of communications to rural and high cost areas); Vanguard comments at 2-3 (stating that wireless providers are well-suited to provide universal service in high cost areas, referring to Vanguard's provision of service to consumers who live in areas with extreme terrain in the Ohio Valley, and Vanguard's provision of service connecting fire watch towers in remote areas for Pennsylvania Park Service); see also Ameritech comments, app. A at 16 (noting that minimum efficient scale of wireless technology is lower for wireless than for wireline service).

<sup>495</sup> 47 U.S.C. § 214(e)(2).

<sup>496</sup> See Cox comments at 8.

<sup>497</sup> 47 U.S.C. § 214(e)(1).

<sup>498</sup> Recommended Decision, 12 FCC Rcd at 181-82. See *infra* discussion in section VII.



mechanisms.<sup>499</sup> As the Joint Board concluded, the quoted language refers to the designation of the area throughout which a carrier is obligated to offer service and advertise the availability of that service, and defines the overall area for which the carrier may receive support from federal universal service support mechanisms.<sup>500</sup> Bell Atlantic is therefore incorrect when it argues that the approach recommended by the Joint Board ignores the phrase "and support mechanisms."<sup>501</sup> The universal service support a carrier will receive will be based on the Commission's determination of the cost of providing the supported services in the service area designated by a state commission.<sup>502</sup>

193. We conclude that, consistent with our decision to use a modification of the existing high cost mechanisms until January 1, 1999, the Commission will continue to use study areas to calculate the level of high cost support that carriers receive.<sup>503</sup> Because we are continuing to use study areas to calculate high cost support until January 1, 1999, if a state commission follows our admonition to designate a service area that is not unreasonably large, that service area will likely be smaller than the federal support areas during that period. We conclude that the decision to continue to use study areas to calculate the level of high cost support is nonetheless consistent with the Act for two reasons. First, as the Joint Board found, the Act does not prohibit the Commission from calculating support over a geographic area that is different from a state-defined service area.<sup>504</sup> Second, so long as a carrier does not receive support for customers located outside the service area for which a carrier has been designated eligible by a state commission, our decision is consistent with section 214(e)(5)'s requirement that the area for which a carrier should receive universal service support is a state-designated service area. We agree with the Joint Board, however, that calculating support over small geographic areas will promote efficient targeting of support.<sup>505</sup> We therefore adopt the Joint Board's recommendation and conclude that, after January 1, 1999, we will calculate the amount of support that carriers receive over areas no larger than wire centers.<sup>506</sup> We will further define

<sup>499</sup> Bell Atlantic comments at 14 (*citing* 47 U.S.C. § 214(e)(5)).

<sup>500</sup> Recommended Decision, 12 FCC Red at 181.

<sup>501</sup> See Bell Atlantic comments at 14.

<sup>502</sup> Sprint PCS comments at 9; SBC comments at 31. See also Letter from Jay C. Keithly, Sprint, to William F. Caton, FCC at exhibit 2 (Oct. 14, 1996); letter from Whitney Hatch, GTE to William F. Caton, FCC at 4-5 (Sept. 18, 1996).

<sup>503</sup> The term "study area" is defined *supra* at a note to section VLB 2.b.

<sup>504</sup> Recommended Decision, 12 FCC Red at 181-82.

<sup>505</sup> Recommended Decision, 12 FCC Red at 181.

<sup>506</sup> See *infra* section VII.

support areas as part of our continuing effort to perfect the method by which we calculate forward-looking economic costs.

#### **D. Unserved Areas**

##### **1. Background**

194. Section 214(e)(3) provides that, if no common carrier is willing to provide the services supported by universal service support mechanisms to a community or portion of a community that requests such services, "the Commission, with respect to interstate services, or a State, with respect to intrastate services, shall determine which common carrier or carriers are best able to provide such services to the requesting unserved community or portion thereof and shall order such carrier or carriers to provide such services for that unserved community or portion thereof."<sup>507</sup> Any carrier ordered to provide service to an unserved community is to be designated as the eligible telecommunications carrier for that community or portion of a community.<sup>508</sup> The Joint Explanatory Statement states that section 214(e)(3) "makes explicit the implicit authority of the Commission, with respect to interstate services, and a State, with respect to intrastate services, to order a common carrier to provide [the supported services]."<sup>509</sup>

195. Because of the lack of information in the record, the Joint Board recommended that the Commission not adopt particular rules implementing section 214(e)(3).<sup>510</sup> Although the Joint Board supported the use of competitive bidding,<sup>511</sup> it concluded that it could not recommend a particular competitive bidding proposal because no proposal before it was sufficiently detailed to support a recommendation.<sup>512</sup>

##### **2. Discussion**

196. We agree with the Joint Board that we should not adopt rules at this time governing how to designate carriers for unserved areas.<sup>513</sup> We conclude, as did the Joint Board,

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<sup>507</sup> 47 U.S.C. § 214(e)(3).

<sup>508</sup> 47 U.S.C. § 214(e)(3).

<sup>509</sup> Joint Explanatory Statement at 141.

<sup>510</sup> Recommended Decision, 12 FCC Rcd at 184.

<sup>511</sup> Recommended Decision, 12 FCC Rcd at 265.

<sup>512</sup> Recommended Decision, 12 FCC Rcd at 184.

<sup>513</sup> Recommended Decision, 12 FCC Rcd at 184.

that the record remains inadequate for us to fashion a cooperative federal-state program to select carriers for unserved areas, as proposed in the NPRM.<sup>514</sup> We conclude that, consistent with the Joint Board's recommendation, if, in the future, it appears that a cooperative federal-state program is needed, we will then revisit this issue and work with state commissions and the Joint Board to create a program. We seek information that will allow us to determine whether additional measures are needed. Therefore, we strongly encourage state commissions to file with the Common Carrier Bureau reports detailing the status of unserved areas in their states. In order to raise subscribership to the highest possible levels, we seek to determine how best to provide service to currently-unserved areas in a cost-effective manner. We seek the assistance of state commissions with respect to this issue.

197. We reject the arguments of TCA that the issue of how universal service should be made available in unserved areas is one for state commissions alone: section 214(e)(3) clearly apportions to the Commission the responsibility for designating a carrier to provide interstate services to unserved areas.<sup>515</sup> We also agree with the Joint Board that a properly structured competitive bidding system could have significant advantages.<sup>516</sup> We conclude, however, that the record is insufficient, at this time, to support the use of competitive bidding to select carriers for unserved areas.<sup>517</sup> We conclude below that the possibility of using competitive bidding warrants further inquiry and we intend, in cooperation with the Joint Board and the state commissions, to undertake this inquiry shortly.<sup>518</sup>

#### E. Implementation

198. The administrator of the universal service support mechanisms shall not disburse funds to a carrier providing service to customers until the carrier has provided, to the administrator, a true and correct copy of the decision of a state commission designating that carrier as an eligible telecommunications carrier. A state commission seeking to alter a rural service area has the choice of either filing itself, or requiring an affected eligible

<sup>514</sup> See NPRM at para. 47. No specific program using competitive bidding to select carriers for unserved areas was proposed to the Joint Board, *see Recommended Decision*, 12 FCC Rcd at 182-84, and no program was proposed in response to the Recommended Decision.

<sup>515</sup> 47 U.S.C. § 214(e)(3) ("If no common carrier will provide [the supported services] to an unserved community . . . the Commission, with respect to interstate services, or a State commission, with respect to intrastate services, shall determine which common carrier or carriers are best able to provide such service . . . and shall order such carrier or carriers to provide such service . . .") (emphasis added).

<sup>516</sup> Recommended Decision, 12 FCC Rcd at 265.

<sup>517</sup> Recommended Decision, 12 FCC Rcd at 184.

<sup>518</sup> See *infra* section VII.C.

telecommunications carrier to file, a petition with the Commission seeking the latter's agreement with the newly defined rural service area. We delegate authority to the Common Carrier Bureau to propose and act upon state proposals to redefine a rural service area.

**EXHIBIT C**

#### Remote Trunk Arrangement (RTA)

Arrangement that permits the extension of TSPS functions to remote locations.

#### Reservation

That amount or quantity of property kept or set apart for a specific use.

#### Reserved

Kept or set apart for a specific use.

#### Separations

The process by which telecommunication property costs, revenues, expenses, taxes and reserves are apportioned among the operations.

#### Service Observing Unit

A unit of work measurement which is used as the common denominator to express the relative time required for handling the various work functions at service observing boards.

#### Sheath Kilometers

The actual length of cable in route kilometers.

#### Special Services

All services other than message telephones, e.g., teletypewriter exchange service (TWX), private line services.

#### Station-to-Station Basis

The term applied to the basis of toll rate making which contemplates that the message toll service charge (telephone or TWX) covers the use made of all facilities between the originating station and the terminating station, including the stations, and the services rendered in connection therewith.

#### Study Area

**Study area boundaries** shall be **frozen** as they are on November 15, 1984

#### Subscriber Line or Exchange Line

A communication channel between a telephone station, PBX or TWX station and the central office which serves it.

#### Subtributary Office

A class of tributary office which does not have direct access to its toll center, but which is connected to its toll center office by means of circuits which are switched through to the toll center at another tributary office.

#### Tandem Area

The general areas served by the local offices having direct trunks to or from the tandem office. This **area** may consist of one or more communities or may include only a portion of a relatively large city.

**EXHIBIT D**

# COST/AVERAGE SCHEDULE ISSUE

Issue Number: 8.5 DATA REPORTING ON CROSS-STUDY AREA SERVICES  
(CONT'D)

## Issue

If a NECA member exchange carrier directly provides regulated local telephone exchange service beyond its local exchange franchise or service territory, determined as of November 15, 1984, must it obtain a waiver of the FCC's "frozen study area" rule before reporting data on the associated costs, loops, etc. to NECA for USF and pooling purposes?

## Rules

The Part 36 rules state that "study area boundaries shall be frozen as they are on November 15, 1984."<sup>1</sup> The study area boundaries are frozen for separations purposes with USF calculated separately for each study area. The rule was promulgated by the Commission in response to concerns, voiced by the Federal-State Joint Board in CC Docket 80-286, that telephone companies might attempt to "spin off" high cost exchanges within existing study areas as separate companies to maximize USF support.<sup>2</sup> The Joint Board described its understanding of the new definition as follows:

"Under the [frozen study area] approach an existing company study area purchased by a holding company which owned other companies within the same state could continue to be treated separately for separations purposes. Areas in which telephone service was instituted for the first time could also be treated as a separate study area if separately incorporated. In either case, the parent company would also have the option of folding the new service territory into one of its existing companies and using the average NTS costs for the expanded service area in determining the high cost assistance. We expect this to be the case when the benefits of consolidated operations exceed the reduction in high cost support. However, companies would be prohibited from setting up high cost exchanges within their existing service territory as separate companies to maximize high cost support. This definition would facilitate administration of the high cost fund, eliminate record keeping burdens, and remove the disincentive for purchase of high cost companies or

<sup>1</sup> 47 C.F.R. §36 Appendix-Glossary.

<sup>2</sup> Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, Decision and Order, 97 FCC Rcd 682 (1984).



# COST/AVERAGE SCHEDULE ISSUE

Issue Number: 8.5 DATA REPORTING ON CROSS-STUDY AREA SERVICES  
(CONT'D)

expansion of service into high cost areas...<sup>3</sup>

## Analysis

Since the FCC does not regulate local exchange service territories or franchises per se, it appears that the "frozen study area rule" applies only to telephone company accounting, separations, and tariffing practices.<sup>4</sup> Under this interpretation, a telephone company would not require a waiver of the rule to offer local exchange service outside its study area boundary, but would require a waiver to include the costs and revenues associated with providing such service in its interstate tariffs. This, in turn, suggests that NECA should not accept data on investment, expenses, revenues or presubscribed lines associated with access service provided outside of a company's frozen study area boundary unless the FCC grants a waiver of the study area rule.

To resolve member company questions, NECA sent a letter to the Commission seeking clarification of the study area waiver rule.<sup>5</sup> On July 16, 1996 the Commission released a Memorandum Opinion and Order (MO&O)<sup>6</sup> responding to NECA's letter of November 29, 1995. In the MO&O, the Commission clarified the frozen study area boundary rule by identifying the circumstances under which waivers would not be necessary. Study

<sup>3</sup> MTS and WATS Market Structure, CC Docket No. 80-286, Recommended Decision and Order, (Federal-State Joint Board, CC 1001, Released Nov. 23, 1984), 49 Fed. Reg. 48325, 48337-38 (Dec. 12, 1984) (Joint Board Order) (emphasis added).

<sup>4</sup> The Commission has broad jurisdiction over rates and accounting methods. The part 32 rules, for example, establish specific accounting rules for telephone companies. Part 36, which contains the "frozen study area rule" in its Appendix-Glossary, provides specific direction to telephone companies with respect to allocation of investment, revenues, and expenses, taxes, and reserves between the state and interstate jurisdictions. Part 36 rules also govern USF expense adjustment calculations and USF data reporting to NECA. The Part 69 rules provide direction regarding access tariffs, pooling, and NECA governance and operations, and specifically direct NECA to bill, collect and distribute USF and Lifeline Assistance amounts to qualified carriers.

<sup>5</sup> Letter of Richard A. Askoff, NECA, to Kenneth Moran, Chief, FCC Accounting and Audits Division (November 29, 1995).

<sup>6</sup> Request for Clarification Filed by the National Exchange Carrier Association, Inc. and Petitions for Waivers Filed by Alaska Telephone Company, Dacor Telephone Company and Kingsgate Telephone, Inc. Concerning the Definition of "Study Area" Contained in the Part 36 Appendix-Glossary of the Commission's Rules, Memorandum Opinion and Order, 11 FCC Rcd 8156 (1996).

## COST/AVERAGE SCHEDULE ISSUE

### Issue Number: 8.5 DATA REPORTING ON CROSS-STUDY AREA SERVICES (CONT'D)

area waivers are required whenever a company seeks to create or reconfigure study areas except when:

- a) A separately incorporated company is establishing a study area for a previously unserved territory (see attachment A for guidelines for unserved territories).
- b) A company is combining a previously unserved territory with one of its existing study areas in the same state.
- c) A holding company is consolidating existing study areas in the same state.

The Commission considered, but was not persuaded, that a standard should be established that would eliminate the need for waiver petitions for transfers of exchanges serving small numbers of subscribers. The Commission deferred action on this consideration to the outcome of the reform of universal service rules scheduled for May 8, 1997 completion.

#### Conclusion

Except for those situations described in the preceding paragraph, NECA will not accept data for pooling and USF purposes for services provided to customers outside the frozen study area boundaries unless an FCC study area waiver is obtained. This includes reporting of access revenues from customers outside the frozen study area. In the absence of such a waiver, all costs associated with the facilities providing service outside the study area boundaries should be removed prior to application of the separations process and USF reporting. Additionally, any associated traffic measurements should be adjusted accordingly. Part 64 type principles should be applied to exclude costs of providing out-of-boundary services (see attachment B for cost companies and attachment C for average schedule companies).

This issue addresses only those situations where a NECA member exchange carrier provides local exchange service directly to subscribers outside of its frozen study area.<sup>7</sup> NECA does not take any position on whether non-member carriers are subject to the FCC's accounting rules. Member companies that provide local exchange services

<sup>7</sup> For example, this issue does not apply to jointly provided services between member exchange carriers.

## **COST/AVERAGE SCHEDULE ISSUE**

**Issue Number: 8.5 DATA REPORTING ON CROSS-STUDY AREA SERVICES  
(CONT'D)**

outside of their frozen study area indirectly (i.e., through a separate subsidiary, partnership, joint venture, consortium or similar structure) are required to comply with the affiliate transaction rules specified in Parts 32 and 64 of the Commission's rules. Costs and revenues associated with unregulated services provided by NECA member companies, and regulated services provided by non-member affiliates of NECA companies, are excluded from NECA pooling and USF processes. This treatment is applicable for all data months open under NECA's twenty-four month settlement window.

It is important to note that this issue only addresses circumstances in which NECA will or will not accept data reporting for USF and pooling purposes. NECA is not taking any position on whether an exchange carrier can offer service outside its current study area.

Also, because of the uncertainties in this area, ECs involved in providing service outside of the "frozen" study area boundaries need to make their own judgment whether a study area waiver is required based upon Commission rules.

Prefiled Testimony of Thomas W. Hertz  
Dakota Telecom, Inc.  
Docket No. TC98-111  
August 21, 1998

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SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION

1 Q. Please state your name, title, occupation, and work address.

2 A. I am Thomas W. Hertz, Chief Executive Officer of Dakota Telecommunications  
3 Group (DTG) and its subsidiary Dakota Telecom, Inc. (DTI) the competitive local  
4 exchange carrier (CLEC). My business address is P.O. Box 66, Irene, South Dakota  
5 57037.

6 Q. What is the purpose of your testimony in this docket?

7 A. I am testifying in support of DTI's application for eligible telecommunications  
8 carrier (ETC) status in the Centerville and Viborg service area.

9 Q. What is the significance of ETC status?

10 A. Under federal law, the designation of ETC status for a common carrier makes that  
11 carrier eligible for federal universal service support to provide service to consumers in  
12 rural, insular and high cost areas, to low income consumers, and to schools and libraries,  
13 which are located in that company's service area.

14 Q. Is DTI a common carrier?

15 A. Yes, DTI is a common carrier in the Centerville and Viborg service area. That  
16 means that DTI provides telecommunications services throughout the Centerville and  
17 Viborg service area for hire to any customer willing to pay for that service. A definition  
18 of common carrier is found at 47 U.S.C. § 153(10).

19 Q. What criteria must a common carrier meet in order to be designated as an  
20 ETC?

21 A. The criteria are stated in 47 U.S.C. § 214(e)(1). DTI must offer services  
22 supported by the federal universal service fund support mechanisms under 47 U.S.C. §



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1 254(c) using its own facilities or a combination of its own facilities and the resale of  
2 another carrier's services, and must advertise the availability of such services and its  
3 charges using media of general distribution.

4 **Q. Does DTI provide supported services using its own facilities?**

5 **A.** Yes it does. DTI provides the supported services in the Centerville and Viborg  
6 service area using only its own facilities. DTI does not use any unbundled network  
7 elements from the incumbent carrier, Ft. Randall Telephone Company, nor does it  
8 provide any service through the resale of Ft. Randall's services.

9 **Q. What services are supported by federal universal service support**  
10 **mechanisms?**

11 **A.** Those services are listed by the Federal Communications Commission (FCC) in  
12 its rules in 47 C.F.R. §§ 54.101, 54.405 and 54.411. The services are: (a) voice grade  
13 access to the public switched network; (b) local usage; (c) dual tone multi-frequency  
14 signaling; (d) single-party service; (e) access to emergency services; (f) access to operator  
15 services; (g) access to interexchange service; (h) access to directory assistance; (i) toll  
16 limitation for qualifying low-income consumers; and (j) Lifeline and Link Up services to  
17 low-income consumers.

18 **Q. Does DTI provide those services designated for support in the Centerville**  
19 **and Viborg service area?**

20 **A.** Yes it does. The telecommunications service DTI deploys uses fiber optic cable  
21 to the neighborhood node and then coaxial cable to the premises. The service is better  
22 than the traditional twisted pair, copper facility and provides not only very good voice

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1 service, but also Internet access up to 50 kbps. Outside the city limits of Centerville and  
2 Viborg, DTI employs a fixed wireless system for telephone service. This service  
3 provides significantly better voice service than the traditional twisted pair, copper  
4 facilities, and we have measured Internet access speeds in excess of 24 kbps, even for  
5 customers on the far end of the system. DTI does provide local usage as that term is  
6 defined in 47 C.F.R. § 54-101(a)(2). Dual tone multi-frequency signaling is the same as  
7 touch tone signaling (i.e., touch tone dialing). It is the industry standard and is provided  
8 in the 5E Lucent switch in Viborg and over the fixed wireless system. DTI only has  
9 single-party service to its customers. DTI's switch does provide access via 911 dialing to  
10 all emergency services provided through the affected local government public service  
11 access point (PSAP). DTI provides operator services through AT&T until September 1,  
12 1998, when DTG becomes the operator services provider. Interstate (interLATA)  
13 directory assistance is provided by Worldcom. Intrastate (or intraLATA) directory  
14 service is from U S WEST. Long distance service is provided in the interstate (or  
15 interLATA) jurisdiction by the presubscribed interexchange carrier (PIC). DTG  
16 Communications, Inc. provides the intrastate (or intraLATA) service. Like all other  
17 companies, DTI cannot provide toll control, but does provide toll blocking, which meets  
18 the current FCC requirement for toll limitation. Finally, DTI will provide Lifeline  
19 service and the Link Up program to eligible low-income consumers in the service area.

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1   **Q.    Does DTI advertise the availability and price of its services in the service**  
2   **area using media of general distribution?**

3   **A.    Yes, it does. Attached as Exhibit A to my testimony are examples of that**  
4   **advertising.**

5   **Q.    What is DTI's service area for purposes of an ETC designation?**

6   **A.    The service area should be limited to the area encompassed by the Viborg and**  
7   **Centerville exchanges. I have attached as Exhibit B to my testimony an excerpt of the**  
8   **FCC's Report and Order in CC Docket No. 96-45, as amended, dated June 4, 1997 (FCC**  
9   **97-157). I have included pages 71 to 110, or paragraphs 127 to 198. The FCC has stated**  
10   **in ¶¶ 186-191 of Exhibit B that universal service policy objectives may be best served if a**  
11   **state defines a rural service area to consist only of the contiguous portion of a rural study**  
12   **area, rather than the entire rural study area. The Viborg and Centerville service area is**  
13   **not contiguous with the rest of Ft. Randall's study area in South Dakota. Also the**  
14   **encouragement of the FCC in ¶¶ 189 and 190, regarding wireless service perhaps being**  
15   **the most effective and efficient competitive provider in rural areas, is directly applicable**  
16   **to DTI's wireless service to the more rural customers in the service area. Failure to grant**  
17   **a service area limited to the contiguous area represented by the exchanges of Viborg and**  
18   **Centerville would be a serious barrier to entry as stated in ¶ 190.**

19   **Q.    Can this Commission make this service area determination on its own?**

20   **A.    Yes, I believe so. In 47 U.S.C. § 214(e)(1), ETC status is for a "service area."**  
21   **The language of 47 U.S.C. § 214(e)(5) defines a service area as a geographic area**  
22   **established by this Commission for the purpose of determining universal service**

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obligations and support mechanisms. The section goes on to state that in the case of a rural telephone company, a service area is the company's study area unless a different definition is provided through collaborative efforts of the FCC and this Commission with the guidance of the Federal-State Joint Board. That latter language is necessarily limited to incumbent companies that have a study area. DTI does qualify as a rural telephone company as that term is defined by 47 U.S.C. § 153(37). However, DTI as a new entrant in the Viborg and Centerville market does not have a recognized study area.

**Q. Is that the only issue with regard to the designation of DTI's service area?**

**A.** No, it is not. The applicable statute defines the service area of the incumbent rural telephone company as that company's study area. A study area is defined by the FCC. Since late 1984, those study areas have been "frozen" by the FCC. I have attached a page from the FCC's Part 36 rules, Appendix-Glossary, as Exhibit C to my testimony, which contains the applicable language. I have also attached a National Exchange Carrier Association (NECA) document discussing cost issues, Issue Number 8.5 (Exhibit D to my testimony), which suggests that NECA will not approve funding without a FCC study area waiver. Sections 189 and 190 of Exhibit B urge the Commission and/or the affected carrier, in this case Ft. Randall, to seek a "corresponding change in its service area." Whether this is the same as a study area waiver is not clear. Clearly the FCC wants this Commission to consider the service area issue with a bias to encouraging competition. However, none of what I have explained in this answer should inhibit the Commission from granting DTI's request in this docket.



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1    **Q.    Is there any other matter which the Commission must consider in granting**  
2    **this request?**

3    **A.    Yes, there is. Section 214(e)(2) of the statute does not require the Commission to**  
4    **grant this request, that is, to designate more than one ETC for the Viborg and Centerville**  
5    **service area. Before the Commission can designate DTI as a second ETC, it must find**  
6    **that the designation is in the public interest.**

7    **Q.    Is the designation of DTI as a second ETC in the Viborg and Centerville**  
8    **service area in the public interest?**

9    **A.    Yes, it is. The term "public interest" can be a difficult one to define and to get**  
10   **one's arms around, but there is some significant discussion in the FCC Order at Exhibit B**  
11   **and in South Dakota law which will help in this determination. Qualifying DTI for ETC**  
12   **status provides the incentive for DTI, as it does for Ft. Randall, to provide high quality**  
13   **local exchange telephone service to all of the customers in the Viborg and Centerville**  
14   **service area. The whole point of the public interest test is not to protect the incumbent**  
15   **company, but to provide the customer in the rural, insular and high cost service areas**  
16   **with access to the same modern telecommunications services enjoyed by customers in the**  
17   **more urbanized areas. Because DTI is willing and able to provide those services to all**  
18   **consumers in the Viborg and Centerville service area, the application should be granted.**  
19   **The public interest is embodied in the universal service principles found at 47 U.S.C. §**  
20   **254(b) - quality service at affordable prices and access to services in all areas. The**  
21   **public interest is defined in 47 U.S.C. § 254 (c) as service which is essential to education,**  
22   **public health and public safety; which is available through market choices, and which is**

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1    deployed by companies like DTL. For South Dakota, the public interest is expressed in  
2    SDCL § 49-31-60, which envisions a telecommunications infrastructure that meets the  
3    advanced telecommunications needs of the citizens of South Dakota. DTI has the  
4    facilities and expertise to provide universal service.

5    **Q.    Does this conclude your testimony?**

6    **A.    Yes, it does.**

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE REQUEST BY DAKOTA )  
TELECOM, INC. FOR DETERMINATION OF )  
ELIGIBLE TELECOMMUNICATIONS CARRIER )  
STATUS PURSUANT TO 47 U.S.C. § 214 )

TC98-111

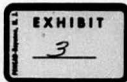
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SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION

PREFILED DIRECT TESTIMONY OF

BRUCE C. HANSON



1                   PREFILED DIRECT TESTIMONY OF BRUCE C. HANSON

2   Q. Please state your name and business address.

3   A. Bruce C. Hanson, Hanson Communications Incorporated, Clara City, Minnesota.

4   Q. By whom are you employed and what is your position?

5   A. I am Treasurer of Hanson Communications, which operates two independent telephone  
6       companies in South Dakota -- Mt. Rushmore Telephone Company ("Mt. Rushmore") and  
7       Fort Randall Telephone Company ("Fort Randall"). I am also treasurer of Fort Randall,  
8       which currently operates seven exchanges in South Dakota.

9   Q. What is your educational and professional background?

10   A. I have a Bachelor of Arts degree from Bethel College, located in Minnesota. I have been  
11       employed in a variety of positions within the telephone companies owned and operated  
12       by Hanson Communications and, for approximately, sixteen years I have been  
13       responsible for the financial and business operations of these companies.

14   Q. What is the purpose of your testimony?

15   A. I will respond to the request of Dakota Telecom Inc ("DTI") to qualify as an eligible  
16       telecommunications carrier ("ETC"). More specifically, I will explain that: 1) Fort Randall  
17       is currently prevented from receiving universal service funds; thus, making it impossible to  
18       determine whether authorizing any changes in Fort Randall's service area or authorizing  
19       more than one ETC in that service area is in the public interest; and 2) provide a factual basis  
20       for concluding that DTI is not meeting the service obligations of an ETC in the Centerville  
21       and Viborg exchanges.

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1 separations at the study area level. For jurisdictional separations purposes, the  
2 Commission froze all study area boundaries effective November 15, 1984.  
3 The Commission took that action primarily to assure that ILECs do not set up  
4 high-cost exchanges within their existing service territories as separate study  
5 areas to maximize interstate cost allocations.  
6

7 Q. Does Fort Randall receive any universal service funds?  
8

9 A. Not at this time. At the time Fort Randall acquired its exchanges from U S WEST  
10 Communications, Inc., the FCC, in DA 96-570, AAD 95-124, Memorandum Opinion and  
11 Order, released April 11, 1996, froze the amount Fort Randall could receive at zero until after  
12 the cap on universal service funding is lifted. This freeze was extended to the Centerville,  
13 Viborg exchanges by the FCC in AAD 97-24, Memorandum and Order, released April 18,  
14 1997. It is my understanding that this limitation will apply until at least January 1, 2001.

15 Q. What is the relevance of DTI's request under these circumstances?

16 A. If DTI is granted ETC status, it will receive no universal service support unless and until the  
17 cap is removed. Further, it is impossible to determine at this time the consequences of  
18 granting DTI's petition. Therefore, it is my recommendation that the Commission not grant  
19 DTI's request at this time, and that any determination of the appropriateness of either  
20 changing Fort Randall's service area or of approving two ETCs in the Fort Randall service  
21 area await until after the consequences of such decisions can be determined.

22 **DTI's Service Area And Service Offerings**

23 Q. Is DTI offering service throughout the area in which Fort Randall provides service?

24 A. No. DTI only provides service in the Centerville and Viborg exchanges and offers no service  
25 in Fort Randall's Tabor, Tyndall, Wagner, Lake Andes, or Hermosa exchanges or in Mt.  
26 Rushmore's exchange.

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1 Q. DTI has limited its request for ETC status to the Centerville and Viborg exchanges. Does  
2 DTI qualify based on its service in those two exchanges?

3 A. Whether service in only two of Fort Randall's exchanges qualifies under the Act and the  
4 FCC's rules is a legal question that will be addressed in the joint brief by Fort Randall and  
5 the SDITC.

6 Q. If the Commission decides to divide Fort Randall's study area and make Centerville and  
7 Viborg a stand-alone service area, would DTI meet the requirements of an ETC in those two  
8 exchanges?

9 A. No. In order to qualify, the applicant must offer the services supported by federal universal  
10 service support mechanism throughout the service area. Mr. Hertz asserts that DTI is  
11 meeting this obligation in the Centerville and Viborg exchanges by offering wireline service  
12 to customers in the urban areas and wireless service to the rural customers of those  
13 exchanges. The following facts will not support a conclusion that DTI is actually serving the  
14 rural customers of these two exchanges.

15 As of November, just prior to when DTI began offering service in these exchanges, Fort  
16 Randall served 1,377 access lines in these two exchanges. Today, Fort Randall serves 1,230  
17 access lines in these exchanges. Therefore, DTI is serving approximately 147 access lines or  
18 roughly 10 percent of the available access lines. Of those, only three are rural customer  
19 (i.e., customers located outside of the city limits of Centerville and Viborg). Two of those  
20 three customers are employees of DTI, and they are testing the wireless system described by  
21 Mr. Hertz in his testimony. Only one rural customer (out of 485) is being served by DTI  
22 using wireline service.

DTI's very low market penetration may be explained in part by the fact that its rate for residential local telephone service of \$12.75 per month is \$2.75 higher than Fort Randall's comparable rate, and DTI's local business rate of \$17.50 per month is \$1.50 higher than Fort Randall's comparable rate. It appears that DTI is seeking to compete based on offering bundled local, long-distance, and cable services, and that it is effectively seeking to avoid rural customers that only want plain old telephone service.

Based on these facts, I do not believe that DTI is meeting the service obligations of an ETC in the Centerville and Viborg exchanges. Even if it were determined that DTI meets the minimum service requirements, the Commission has authority to limit ETC status to a single provider in rural service areas. The Commission should not grant ETC status to a second carrier in an area served by a rural telephone company when that second carrier is not actively serving all of the customer groups in the service area.

**Fort Randall And DTI Should Have The Same Service Area**

Q. DTI has asserted that the Commission can establish a service area that is different than Fort Randall's service area. Do you agree?

A. This is a legal issue, which will be addressed in Fort Randall and SDITC brief. In addition, Fort Randall cannot currently receive universal service funding. This prohibition, however, is not permanent, and the consequences of changing Fort Randall's study area on the ability to meet future customer needs in the Centerville and Viborg exchanges is, at best, speculative. However, it is reasonable to conclude that the ETC service areas for Fort Randall and DTI should be the same.

Q. Please explain.



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1 A. The exchanges served by Fort Randall are all too small to serve on a stand-alone basis if we  
2 are to provide the types of quality services envisioned by the Act and the South Dakota  
3 Legislature. Therefore, when serving small rural exchanges, it is standard procedure to  
4 install a host switch that provides the desired services both in the host exchange and also in  
5 subtending offices, which are served by a remote switch. Fort Randall has a Lucent SE host  
6 switch in Wagner which serves the subtending offices of Centerville, Viborg, Lake Andes,  
7 Tyndall, and Tabor.

8 Centerville and Viborg are particularly small exchanges, which could not be served  
9 effectively on a stand-alone basis. As such, these are high cost exchanges, which Fort  
10 Randall can best serve using its host switch located in Wagner. Therefore, Fort Randall's  
11 cost of serving these two exchanges includes some of the cost of the Wagner host switch and  
12 the transport facilities interconnecting these three exchanges. DTI, however, is served by an  
13 affiliate's switch located in Viborg. As such, by limiting its service area to the Centerville  
14 and Viborg exchanges, DTI has a significant cost advantage over Fort Randall. (DTI obtains  
15 the needed economies of scale by using its affiliate's switch, which also serves local  
16 customers outside of Centerville and Viborg.) That advantage would be eliminated if DTI  
17 also served Wagner, Tyndall, Lake Andes and Tabor.

18 A competitive LEC ("CLEC") should not be allowed to selectively serve areas where the  
19 CLEC has a cost advantage over the rural telephone company and then deprive the rural  
20 telephone company of the universal service support to its high cost areas. The Fort Randall  
21 and SDITC Brief discusses those portions of the Joint Board Recommendations and FCC  
22 Order that seek to prevent the use of universal service support to gain an unfair advantage

over a rural telephone company by establishing the same service area for both the rural telephone company and the CLEC.

Q. If the Commission decides to support a service area for DTI that is limited to Centerville and Viborg, should it also recommend a change in Fort Randall's study area to make those exchanges a separate study area?

A. This question involves a legal issue that will be addressed in the Fort Randall/SDITC Brief. However, if the Commission allows DTI to have its entitlement determined on service to the Centerville and Viborg exchanges, then it would be appropriate to allow Fort Randall the same right, so that the support payments (when they become available) would reflect the cost of serving these two exchanges, rather than the cost of serving all of Fort Randall's and Mt. Rushmore's customers.

**Fort Randall's Service Area/Study Area Should Not Be Changed At This Time**

Q. Are there problems associated with changing the Fort Randall's study area to establish Centerville and Viborg as a separate service area?

A. The Fort Randall and SDITC Brief will discuss the legal issues raised by this question. Because of the current cap on Fort Randall's receipt of universal service funds, changing Fort Randall's service area would not change the amount of universal service funding it receives. At the time the cap is removed, there is also likely to be a significant change in how universal service payments are made. Until that information is known, it is impossible to estimate the economic consequences of changing the current service area and establishing Centerville and Viborg as a separate service area. In addition, any change in the use of the study area to set universal service support will need to recognize the difficulties inherent in determining the cost of service on less than a total company basis. The limitations on the ability to develop a

disaggregated cost are made even more difficult for exchanges like Centerville and Viborg that are served by a host switch. I am not aware of any accepted embedded cost methodology for allocating the costs of a host exchange to subtending offices.

Q. What is your recommendation to the Commission on the issue of changing rural telephone company study areas?

A. As the Commission is well aware, these questions involve very complex issues that should be resolved using a uniform nationwide practice. The Federal-State Joint Board has recommended that, for areas served by rural telephone companies, both incumbent LECs and CLECs should have their service areas determined based on the rural telephone company's study area. Nothing has occurred to justify a change in that recommendation.

Q. The FCC adopted the Federal-State Joint Board recommendation but in its order also stated that a State Commission may change the service area from the current study area to reflect those portions of the study area that are contiguous. Please comment.

A. In the first instance, the FCC was concerned that requiring a CLEC to serve the entire study area might not be legally possible, citing the service area limitations imposed on wireless providers. There is no legal barrier that prevents DTI from serving all of Fort Randall's service area.

Even if the Commission were to decide that Fort Randall's entire study area would create a barrier to entry because of the inclusion of the Hermosa and Mt. Rushmore's exchanges, there is no reason to limit Fort Randall's service area to Centerville and Viborg exchanges. The FCC did not explain why it chose "contiguous" areas. In the context of wireline service, contiguous is not a logical basis for determining service areas. Instead, if a change is going to occur, the service area should be determined based on logical service area configurations.

1 For Fort Randall, a logical service area would include its host exchange in Wagner and the  
2 subtending exchanges of Tyndall, Tabor, Lake Andes, Centerville and Viborg. It is only by  
3 including all of those exchanges that a fair division of operating costs can be reflected. DTI  
4 can serve that cluster of exchanges just as easily as Fort Randall. The switch being used by  
5 DTI is fully capable of acting as a host switch to support full facilities-based services in those  
6 exchanges.

7 **The Commission Should Not Authorize Two ETCs For The Centerville/Viborg Exchanges**

8 Q. The Commission is directed to allow only one ETC in areas served by rural telephone  
9 companies unless it determines that having two ETCs is in the public interest. Based on  
10 currently available information, can the Commission reasonably determine that two ETCs for  
11 the Centerville and Viborg exchanges are in the public interest?

12 A. Mr. Hertz, pp. 1 and 6, explains that DTI is requesting that it be named an ETC in order to  
13 become eligible for federal universal service support and that the benefits such support would  
14 provide to DTG's customers satisfy the public interest test of Section 214(e)(2). In this case,  
15 there is no universal service support available to DTG by becoming an ETC. Therefore,  
16 under DTG's test, the designation of a second ETC would not be in the public interest.

17 I also believe that there are too many unknown factors to make an informed decision on  
18 this issue at this time. First, while Fort Randall currently receives no universal service  
19 support, presumably that limitation will change in the coming years. No one can reasonably  
20 predict the consequence of having two ETCs serving very small exchanges like Centerville  
21 and Viborg without knowing: 1) how the support will be determined; 2) the level of that  
22 support; and 3) the service demands that must be met. Clearly, the Commission should have

8 1 4 9 . 5 5 .  
1 more information before deciding that sharing universal service support is in the public  
2 interest.

3 Therefore, just as the Commission should not support a change in Fort Randall's study  
4 area at this time, it should not, at this time, support allowing two ETCs in the Centerville and  
5 Viborg exchanges.

6 Finally, even if it were possible to determine, as a matter of general policy, that it would  
7 be in the public interest to designate two ETCs in a rural service area, the failure of DTI to  
8 serve rural customers should bar it from qualifying. DTI should not be allowed to share in  
9 universal service support until it actually provides universal service.

10 Q. Does this complete your testimony?

11 A. Yes.

**DOCUMENT (S)**

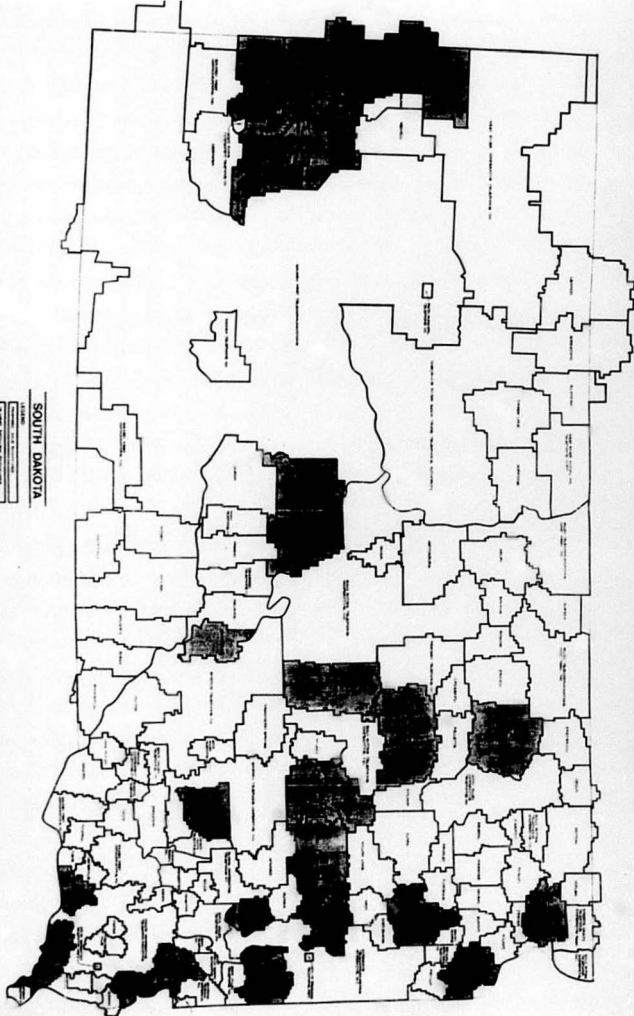
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**SOUTH DAKOTA**

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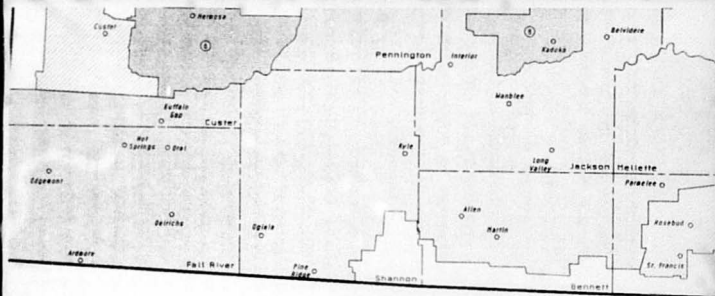
1	Area of 100,000 or more acres
2	Area of 50,000 to 99,999 acres
3	Area of 25,000 to 49,999 acres
4	Area of 10,000 to 24,999 acres
5	Area of 5,000 to 9,999 acres
6	Area of 1,000 to 4,999 acres
7	Area of less than 1,000 acres





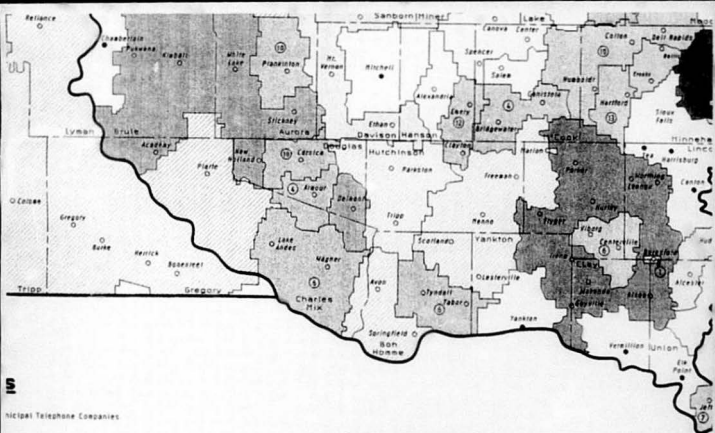






## South Dakota Cooperatives and Subsidiaries

- |   |  |   |
|---|--|---|
|  Battis Telecom, Inc.               |  James Valley Telephone Cooperative         |  Spillcock Telecom Cooperative, Inc.           |
|  East Plains Telecom, Inc.          |  Accent Communications, Inc.                |  Spillcock Properties, Inc.                    |
|  Interstate Telephone Company, Inc. |  Sanborn Telephone Cooperative              |  Sully Buttes Telephone Cooperative, Inc.      |
|  Intrastate Telephone Company, Inc. |  SAREM, Inc.                                |  Venture Communications, Inc.                  |
|  Midstate Telephone Company         |  Golden West Telecommunications Coop., Inc. |  Valley Telecommunications Coop., Inc.         |
|  Heartland Communications, Inc.     |  Vivian Telephone Company                   |  Valley Cable & Satellite Communications, Inc. |
|  West River Telephone Cooperative   |  McCook Cooperative Telephone Company       |  Roberts County Telephone Cooperative Assn.    |
|  Stateline Telecommunications, Inc. |  Hanson Communications, Inc.                |  RC Communications                             |
|   |  |  Dakota Cooperative Telecommunications, Inc.   |



15

Local Telephone Companies

State Telephone Companies

Consolidated Telephone Coop.  
Valley Telephone Co.  
West River Telecommunications Cooperative

harity



**South Dakota Association of  
Telephone Cooperatives, Inc.  
January, 1997**

SERVICE DATE

DEC 23 1997

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In The Matter of the Petitions of	)	DOCKET NOS.
	)	
YELM TELEPHONE COMPANY; THE TOLEDO	)	UT-970333; UT-970334
TELEPHONE COMPANY; McDANIEL TELEPHONE	)	UT-970335; UT-970336
COMPANY; MASHELL TELECOM, INC.; LEWIS	)	UT-970337; UT-970338
RIVER TELEPHONE COMPANY; HOOD CANAL	)	UT-970339; UT-970340
TELEPHONE COMPANY; ELLENSBURG	)	UT-970341; UT-970342
COMPANY; ASOTIN TELEPHONE	)	UT-970343; UT-970344
COMPANY; TELEPHONE UTILITIES OF	)	UT-970345; UT-970346
WASHINGTON, INC.; PEND OREILLE TELEPHONE	)	UT-970347; UT-970348
COMPANY; TENINO TELEPHONE COMPANY;	)	UT-970349; UT-970350
KALAMA TELEPHONE COMPANY; UNITED	)	UT-970351; UT-970352
STATES CELLULAR CORPORATION; PIONEER	)	UT-970353; UT-970354
TELEPHONE COMPANY; HAT ISLAND	)	UT-970356
TELEPHONE COMPANY; GTE NORTHWEST,	)	
INCORPORATED; UNITED TELEPHONE COMPANY	)	ORDER DESIGNATING
OF THE NORTHWEST; WESTERN WAHIAKUM	)	ELIGIBLE
COUNTY TELEPHONE COMPANY; INLAND	)	TELECOMMUNICATIONS
TELEPHONE COMPANY; ST. JOHN CO-OPERATIVE	)	CARRIERS
TELEPHONE AND TELEGRAPH COMPANY;	)	
WHIDBEY TELEPHONE COMPANY; U S WEST	)	
COMMUNICATIONS, INC.; and COWICHE	)	
TELEPHONE COMPANY, INC.	)	
	)	
for designation as an Eligible Telecommunications	)	
Carrier.	)	
	)	

I. INTRODUCTION

The Federal Telecommunications Act of 1996 (1996 Act), substantially revised the national telecommunications policy and contemplated that the states, acting through their state public utility commissions, implement that policy by conducting various proceedings. The federal policy embodied in the Act coincides, to a great extent, with the preexisting policy of the State of Washington as expressed by the Legislature and implemented by this Commission.

The 1996 Act (as well as Washington law) embraces the policy that certain telecommunications services should be available universally. Congress articulated the basics of what should be included as part of "universal service," 47 U.S.C. §254(b), and established a

EXHIBIT

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Federal-State Joint Board on Universal Service to recommend to the FCC the details of what should be included within the concept of such service. These services are to be supported in high cost areas by money from a fund which is supported by carrier contributions. 47 U.S.C. §254(d); Recommended Decision, In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45 (November 8, 1996), and First Report and Order, In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45 (May 8, 1997) (Universal Service Order).

Congress stated that certain carriers, designated "Eligible Telecommunications Carriers" (ETCs), may draw from the fund for their provision of the described services in high cost areas. The following services must be provided by a carrier in order to be eligible for federal universal service support: single-party service; voice grade access to the public switched network; dual tone multi-frequency signaling or its functional equivalent; access to emergency services, including, in some circumstances, access to 911 and E911; access to operator services; access to interexchange services; access to directory assistance; and lifeline and link-up programs, including free toll limitation services for qualifying low-income consumers.

Congress left the task of designating such carriers to the state commissions. 47 U.S.C. § 214(e)(2). In these proceedings, we undertake that task.

## II. PETITIONS

Twenty-three companies filed petitions for eligible telecommunications carrier designation with the Commission.<sup>1</sup> The docket numbers assigned, the petitioners, and a brief description of the petitions are as follows:

Docket No. UT-970333 On October 1, 1997, Yelm Telephone Company (Yelm) filed a Petition seeking designation for its study area consisting of the exchanges served on December 10, 1997, as indicated by its tariffs. Yelm included in its petition a request for a waiver for compliance with toll control as defined in 47 C.F.R. §54.400(c) and requested additional time to complete network upgrades pursuant to 47 C.F.R. §54.101(c).

Docket No. UT-970334 On October 1, 1997, The Toledo Telephone Company (Toledo) filed a Petition seeking designation for its study area consisting of the exchanges served on December 10, 1997, as indicated by its tariffs. Toledo included in its petition a request for a waiver for compliance with toll control as defined in 47 C.F.R. §54.400(a)(3) and requested additional time to complete network upgrades pursuant to 47 C.F.R. §54.101(c).

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<sup>1</sup> A twenty-fourth petition was filed by Nextlink, UT-970355; it was withdrawn prior to commencement of the initial open meeting on November 26, 1997.

Docket No. UT-970335 On October 1, 1997, McDaniel Telephone Company (McDaniel) filed a Petition seeking designation for its study area consisting of the exchanges served on December 10, 1997, as indicated by its tariffs. McDaniel included in its petition a request for a waiver for compliance with toll control as defined in 47 C.F.R. §54.400(a)(3) and requested additional time to complete network upgrades pursuant to 47 C.F.R. §54.101(c).

Docket No. UT-970336 On October 1, 1997, Mashell Telecom, Inc. (Mashell) filed a Petition seeking designation for its study area consisting of the exchanges served on December 10, 1997, as indicated by its tariffs. Mashell included in its petition a request for a waiver for compliance with toll control as defined in 47 C.F.R. §54.400(a)(3) and requested additional time to complete network upgrades pursuant to 47 C.F.R. §54.101(c).

Docket No. UT-970337 On October 1, 1997, Lewis River Telephone Company (Lewis River) filed a Petition seeking designation for its study area consisting of the exchanges served on December 10, 1997, as indicated by its tariffs. Lewis River included in its petition a request for a waiver for compliance with toll control as defined in 47 C.F.R. §54.400(a)(3) and requested additional time to complete network upgrades pursuant to 47 C.F.R. §54.101(c).

Docket No. UT-970338 On October 1, 1997, Hood Canal Telephone Company (Hood Canal) filed a Petition seeking designation for its study area consisting of the exchanges served on December 10, 1997, as indicated by its tariffs. Hood Canal included in its petition a request for a waiver for compliance with toll control as defined in 47 C.F.R. §54.400(a)(3) and requested additional time to complete network upgrades pursuant to 47 C.F.R. §54.101(c).

Docket No. UT-970339 On October 1, 1997, Ellensburg Telephone Company (Ellensburg) filed a Petition seeking designation for its study area consisting of the exchanges served on December 10, 1997, as indicated by its tariffs. Ellensburg included in its petition a request for a waiver for compliance with toll control as defined in 47 C.F.R. §54.400(a)(3) and requested additional time to complete network upgrades pursuant to 47 C.F.R. §54.101(c).

Docket No. UT-970340 On October 1, 1997, Asotin Telephone Company (Asotin) filed a Petition seeking designation for its study area consisting of the exchanges served on December 10, 1997, as indicated by its tariffs. Asotin included in its petition a request for a waiver for compliance with toll control as defined in 47 C.F.R. §54.400(a)(3) and requested additional time to complete network upgrades pursuant to 47 C.F.R. §54.101(c).

Docket No. UT-970341 On October 6, 1997, Telephone Utilities of Washington, Inc. (Telephone Utilities) filed a Petition seeking designation for its study area consisting of the exchanges served on December 10, 1997, as indicated by its tariffs. Telephone Utilities included in its petition a request for a waiver for compliance with toll control as defined in 47 C.F.R. §54.400(a)(3) and requested additional time to complete network upgrades pursuant to 47 C.F.R. §54.101(c).

Docket No. UT-970342 On October 9, 1997, Pend Oreille Telephone Company (Pend Oreille) filed a Petition seeking designation for its study area consisting of the exchanges served on December 10, 1997, as indicated by its tariffs. Pend Oreille included in its petition a request for a waiver for compliance with toll control as defined in 47 C.F.R. §54.400(a)(3) and requested additional time to complete network upgrades pursuant to 47 C.F.R. §54.101(c).

Docket No. UT-970343 On October 15, 1997, Tenino Telephone Company (Tenino) filed a Petition seeking designation for its study area consisting of the exchanges served on December 10, 1997, as indicated by its tariffs. Tenino included in its petition a request for a waiver for compliance with toll control as defined in 47 C.F.R. §54.400(a)(3) and requested additional time to complete network upgrades pursuant to 47 C.F.R. §54.101(c).

Docket No. UT-970344 On October 15, 1997, Kalama Telephone Company (Kalama) filed a Petition seeking designation for its study area consisting of the exchanges served on December 10, 1997, as indicated by its tariffs. Kalama included in its petition a request for a waiver for compliance with toll control as defined in 47 C.F.R. §54.400(a)(3) and requested additional time to complete network upgrades pursuant to 47 C.F.R. §54.101(c).

Docket No. UT-970345 On October 15, 1997, United States Cellular Corporation (U.S. Cellular) filed a Petition seeking designation for the following exchanges: Centralia; Chehalis; Winlock; Castlerock; Longview-Kelso; Woodland; Yakima; George; and Quincy. U.S. Cellular included in its petition a request for a waiver for compliance with toll control as defined in 47 C.F.R. §54.400(a)(3) and requested additional time to complete network upgrades pursuant to 47 C.F.R. §54.101(c). The petition also requested additional time to complete the network upgrades pursuant to 47 C.F.R. §54.101(c) in order to comply with the E911 requirements of 47 C.F.R. §54.101(a)(5).

Docket No. UT-970346 On October 17, 1997, Pioneer Telephone Company (Pioneer) filed a Petition seeking designation for its study area consisting of the exchanges served on December 10, 1997, as indicated by its tariffs. Pioneer included in its petition a request for a waiver for compliance with toll control as defined in 47 C.F.R. §54.400(a)(3) and requested additional time to complete network upgrades pursuant to 47 C.F.R. §54.101(c).

Docket No. UT-970347 On October 17, 1997, Hat Island Telephone Company (Hat Island) filed a Petition seeking designation for its study area consisting of the exchanges served on December 10, 1997, as indicated by its tariffs. Hat Island included in its petition a request for a waiver for compliance with toll control as defined in 47 C.F.R. §54.400(a)(3) and requested additional time to complete network upgrades pursuant to 47 C.F.R. §54.101(c).

Docket No. UT-970348 On October 17, 1997, GTE Northwest, Incorporated (GTE) filed a Petition seeking designation for its study area consisting of the exchanges served on December

10, 1997, as indicated by its tariffs. GTE included in its petition a request for a waiver for compliance with toll control as defined in 47 C.F.R. §54.400(a)(3) and requested additional time to complete network upgrades pursuant to 47 C.F.R. §54.101(c).

Docket No. UT-970349 On October 30, 1997, United Telephone Company of the Northwest (SPRINT/United) filed a Petition seeking designation for its study area consisting of the exchanges served on December 10, 1997, as indicated by its tariffs. United included in its petition a request for a waiver for compliance with toll control as defined in 47 C.F.R. §54.400(a)(3) and requested additional time to complete network upgrades pursuant to 47 C.F.R. §54.101(c).

Docket No. UT-970350 On October 22, 1997, Western Wahkiakum County Telephone Company (Wahkiakum) filed a Petition seeking designation for its study area consisting of the exchanges served on December 10, 1997, as indicated by its tariffs. Wahkiakum included in its petition a request for a waiver for compliance with toll control as defined in 47 C.F.R. §54.400(a)(3) and requested additional time to complete network upgrades pursuant to 47 C.F.R. §54.101(c).

Docket No. UT-970351 On October 23, 1997, Inland Telephone Company (Inland) filed a Petition seeking designation for its study area consisting of the exchanges served on December 10, 1997, as indicated by its tariffs. Inland included in its petition a request for a waiver for compliance with toll control as defined in 47 C.F.R. §54.400(a)(3) and requested additional time to complete network upgrades pursuant to 47 C.F.R. §54.101(c).

Docket No. UT-970352 On October 24, 1997, St. John Co-operative Telephone and Telegraph Company (St. John) filed a Petition seeking designation for its study area consisting of the exchanges served on December 10, 1997, as indicated by its tariffs. St. John included in its petition a request for a waiver for compliance with toll control as defined in 47 C.F.R. §54.400(a)(3) and requested additional time to complete network upgrades pursuant to 47 C.F.R. §54.101(c).

Docket No. UT-970353 On October 24, 1997, Whidbey Telephone Company (Whidbey) filed a Petition seeking designation for its study area consisting of the exchanges served on December 10, 1997, as indicated by its tariffs. Whidbey included in its petition a request for a waiver for compliance with toll control as defined in 47 C.F.R. §54.400(a)(3) and requested additional time to complete network upgrades pursuant to 47 C.F.R. §54.101(c).

Docket No. UT-970354 On October 24, 1997, U S WEST Communications, Inc. (USWC) filed a Petition seeking designation for the Seattle, Tacoma, Bellevue, Des Moines, Federal Way, Renton, Olympia, Spokane, Yakima and Vancouver exchanges. USWC included in its petition a request for a waiver for compliance with toll control as defined in 47 C.F.R. §54.400(a)(3) and requested additional time to complete network upgrades pursuant to 47 C.F.R. §54.101(c).



Docket No. UT-970356 On October 24, 1997, Cowiche Telephone Company Inc. (Cowiche) filed a Petition seeking designation for its study area consisting of the exchanges served on December 10, 1997, as indicated by its tariffs. Cowiche included in its petition a request for a waiver for compliance with toll control as defined in 47 C.F.R. §54.400(a)(3) and requested additional time to complete network upgrades pursuant to 47 C.F.R. §54.101(c).

Because of the common issues included in these petitions, we have consolidated them for purposes of this order.

### III. STATUTORY BACKGROUND AND JURISDICTION

Section 214(e) of the 1996 Act sets forth the standards and processes for a state commission designation of an ETC.

(1) **ELIGIBLE TELECOMMUNICATIONS CARRIERS.**--A common carrier designated as an eligible telecommunications carrier under paragraph (2) or (3) shall be eligible to receive universal service support in accordance with section 254 and shall, throughout the service area for which the designation is received--

(A) offer the services that are supported by Federal universal service support mechanisms under section 254(c), either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and

(B) advertise the availability of such services and the charges therefor using media of general distribution.

(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.

(3) **DESIGNATION OF ELIGIBLE TELECOMMUNICATIONS CARRIERS FOR UNSERVED AREAS.**--If no common carrier will provide the services that are supported by Federal universal service support mechanisms under section 254(c) to an unserved community or any portion thereof that requests such service, the Commission, with respect to interstate services, or a State commission, with respect to intrastate services, shall determine which common carrier or carriers are best able to provide such service to the requesting

unserved community or portion thereof and shall order such carrier or carriers to provide such service for that unserved community or portion thereof. Any carrier or carriers ordered to provide such service under this paragraph shall meet the requirements of paragraph (1) and shall be designated as an eligible telecommunications carrier for that community or portion thereof.

(4) RELINQUISHMENT OF UNIVERSAL SERVICE.--A State commission shall permit an eligible telecommunications carrier to relinquish its designation as such a carrier in any area served by more than one eligible telecommunications carrier. An eligible telecommunications carrier that seeks to relinquish its eligible telecommunications carrier designation for an area served by more than one eligible telecommunications carrier shall give advance notice to the State commission of such relinquishment. Prior to permitting a telecommunications carrier designated as an eligible telecommunications carrier to cease providing universal service in an area served by more than one eligible telecommunications carrier, the State commission shall require the remaining eligible telecommunications carrier or carriers to ensure that all customers served by the relinquishing carrier will continue to be served, and shall require sufficient notice to permit the purchase or construction of adequate facilities by any remaining eligible telecommunications carrier. The State commission shall establish a time, not to exceed one year after the State commission approves such relinquishment under this paragraph, within which such purchase or construction shall be completed.

(5) SERVICE AREA DEFINED.--The term "service area" means a geographic area established by a State commission for the purpose of determining universal service obligations and support mechanisms. In the case of an area served by a rural telephone company, "service area" means such company's "study area" unless and until the Commission and the States, after taking into account recommendations of a Federal-State Joint Board instituted under section 410(c), establish a different definition of service area for such company.

This section in effect states two general criteria for approval of an ETC: (1) the carrier must offer the "services" that are supported by the federal fund and (2) the carrier must advertise the availability of those services. The carrier must do these "throughout the service area for which the designation is received." 47 U.S.C. §214(e)(1). The definition and scope of the "service area" are the main points of contention in these proceedings.

The Commission has jurisdiction over this petition both because of the 1996 Act and because of those provisions of state law which give the Commission authority over the rates and practices of telecommunications companies and its power to define the scope and nature of a carrier's service obligation. See RCW 80.01.040(3); 80.36.080, 80.36.090, 80.36.140; 80.36.230.

The Commission in these proceedings must determine whether each Petitioner meets the prerequisites for designation as an ETC and also whether the Commission may and

should define as a "service area" some geographic area other than what is currently in the carrier's "study area."<sup>2</sup>

#### IV. PROCEEDINGS BEFORE THE COMMISSION

The Commission Staff (Staff) coordinated the process of the Petitions and undertook an evaluation of the law and the facts applicable to each. These were presented to the Commission at its open public meeting on November 26, 1997. At that meeting, the Commission also heard testimony from the following: Richard Finnigan (representing Yelm, Toledo, McDaniel, Mashell, Lewis River, Hood Canal, Ellensburg, Pend Orielle and Asotin telephone companies and the Washington Independent Telephone Association); Rob Snyder (representing Tenino, Kalama, Pioneer, Hat Island, Western Wahkiakum, Inland, St. John, and Whidbey telephone companies); Simon fitch (representing Public Counsel); Joan Gage (representing GTE Northwest); Theresa Jensen (representing USWC); and Judy Endejan (representing U.S. Cellular).

At the November 26, 1997 meeting, the Commission continued its consideration of the Petitions until the regulatory scheduled December 10, 1997, meeting. At that time, the Commission heard testimony again from Staff as well as from the following: Richard Finnigan (representing Yelm, Toledo, McDaniel, Mashell, Lewis River, Hood Canal, Ellensburg, Pend Orielle and Asotin telephone companies and the Washington Independent Telephone Association (WITA)); Rob Snyder (representing Tenino, Kalama, Pioneer, Hat Island, Western Wahkiakum, Inland, St. John, and Whidbey telephone companies); Mr. Glen Harris (representing SPRINT/United); and Joan Gage (representing GTE Northwest).

In addition, the Commission received written material submitted by Commission staff and the Washington Independent Telephone Association.

#### V. POSITIONS OF THE PARTIES

##### A. Commission Staff

Staff recommended that the petitions be granted as modified by the staff's written recommendation with supporting material. Staff recommended the Commission make all service area designations at the exchange level. The designations for GTE, USWC, and U.S. Cellular were to be effective January 1, 1998, and the same effective date for all single exchange rural telephone companies. Staff recommended that Telephone Utilities and SPRINT/United be

<sup>2</sup> A "study area" is generally an incumbent LEC's pre-existing service area in a given state. The study area boundaries are fixed as of November 15, 1984. Universal Service Order ¶ 172, n.434 citing. MTS and WATS Market Structure: Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, Decision and Order, 50 Fed. Reg. 939 (1985).

designated at the study area level from January 1, 1998, through March 31, 1998, and thereafter designated at the exchange level. Staff's recommendation for small multi-exchange rural telephone companies was study area designation from January 1, 1998, through June 30, 1998, and thereafter at the exchange level.

The purpose for the proposed delayed effective dates for exchange level designation was to permit the Federal Communications Commission (FCC) sufficient time to consider this Commission's petition to the FCC for agreement with the deviation from study area designations. See 47 U.S.C. § 214(e)(5); Universal Service Order ¶¶ 186-88.

Staff also recommended a section in the order requiring each ETC to meet service quality standards as a condition of becoming an ETC.

Whidbey presented a unique case. In 1995, the Commission permitted Whidbey to serve a number of customers in an area they termed a Supplemental Service Area (SSA). This area is in the Coupeville exchange which is served by GTE. Whidbey has never received high-cost support for the approximately 600 customers in this area. Staff recommended that the SSA not be included in the service area designation for Whidbey.

The staff recommendation was modified for the December 10 open meeting. The recommendations on service area designations remained the same for all companies except Telephone Utilities and SPRINT/United. Their various groups of contiguous exchanges were to be designated service areas January 1, 1998, and then the exchange-level designation effective date was to be pushed back to July 1, 1998, with the other multi-exchange rural companies. The proposal for a separate section on service quality standards for qualification as an ETC was dropped as the Staff suggested because service of adequate quality is inherent in the Act's requirement that an ETC provide "service."

#### B. Rural Local Exchange Companies

Rural local exchange companies of all sizes, with and without non-contiguous exchanges, were opposed to any designation other than at the study area level. This opposition was based on the FCC plan to permit competitors to receive universal service funds based on study area average costs. In the November 26 meeting they suggested study area level designations followed by a series of workshops to see how effectively staff and the companies could devise a method of disaggregating study area cost data to the exchange level. Upon successful completion of this task, they proposed a joint petition to the FCC which, if successful, would result in their support for exchange level designations. They maintained this position at the December 10 meeting.

Counsel for WITA argued that initial designation at the study area was legally mandated unless the Commission conducted a formal adjudicatory proceeding under the state Administrative procedure Act (APA), chapter 34.05 RCW. WITA contended that designation

was "licensing" under the APA, and, before any license could be modified, a formal hearing must be held.

C. USWC

USWC did not present any testimony. Its petition was for ten exchanges only, all of which are in urban or small city locations.<sup>3</sup>

D. GTE

GTE supported designation of all their exchanges individually at the exchange level beginning January 1, 1998.

E. U.S. Cellular

U.S. Cellular asked for designation in ten non-rural exchanges. Seven are presently served by USWC, and three are served by GTE. Although non-rural under the 1996 Act, much of the area covered by these ten exchanges is quite rural in fact. U.S. Cellular also asked that the Commission not attempt to assert jurisdiction over the company beyond the designation of it as an ETC. U.S. Cellular represented in its petition that it would participate in Lifeline and Link-up if designated.

F. Public Counsel

Public counsel recommended that, in addition to retaining the authority to suspend or revoke designation, the Commission state it has authority to modify the designations.

G. Whidbey Telephone Company

Whidbey Telephone Company opposed the staff recommendation that the Supplemental Service Area created in 1995 be excluded from its service area designation as an ETC.

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<sup>3</sup> USWC stated it would continue to participate in the Washington Telephone Assistance, Lifeline, Link-up Programs and offer the discounts in 1998 to customers USWC serves in all exchanges regardless of ETC status. USWC understands it will not receive reimbursement from federal sources for discounts given to customers in areas for which USWC is not an ETC.

## VI. DISCUSSION

A. Need for a Hearing

The Commission concludes that there is no need for an "adjudicative proceeding" under the state Administrative Procedure Act as a prerequisite to designation of a carrier for a geographic area other than the carrier's study area. Indeed, given the time line within which Congress and the carriers have asked state commissions to act, protracted adjudicative proceedings seem counter to the interests of those suggesting the need for a hearing.

We do not accept that this is a "licensing" proceeding under the APA. However, we need not decide that because even if this is a licensing proceeding, this is not a proceeding to modify a license as counsel for a number of the small rural companies contends. While a hearing may be required to modify a license, it is not required for an initial license. Even if ETC designation constitutes the granting of a license, it is an initial license and therefore not covered by our APA.

B. Designation for Areas Other than a Petitioner's Study Area

Section 214(e)(5) of the Act governs the determination of the geographic area in which the ETC will serve:

The term "service area" means a geographic area established by a State commission for the purpose of determining universal service obligations and support mechanisms. In the case of an area served by a rural telephone company, "service area" means such company's "study area" unless and until the Commission and the States, after taking into account recommendations of a Federal-State Joint Board instituted under section 410(c), establish a different definition of service area for such company.

As stated, "a service area means a geographic area established by the Commission." For non-rural companies, the authority to determine the geographic area of service areas is without limitation. In the case of an area served by a rural carrier, however, 214(e)(5) defines the service area as the carrier's "study area" unless the Commission and the FCC<sup>4</sup> establish a different definition of service area. In establishing a service area different than

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<sup>4</sup> The FCC has established a procedure for reviewing state orders which make designations of areas other than the study area as the service area. Its procedure anticipates that initial action will be taken by the states; designations are deemed approved if the FCC does not act within 90 days of noticing the receipt of the state order. See 47 C.F.R. §54.207.

the study area, the Commission must "take into account" the recommendations of the Federal-State Joint Board.<sup>5</sup>

The language "take into account" connotes not that we are bound to accept the study area, but only that we consider the Joint Board recommendations. We have done so.<sup>6</sup> We also have considered the FCC discussion of this issue in its Universal Service Order.<sup>7</sup>

The FCC also noted the "states should exercise this authority [to designate service areas] in a manner that promotes the pro-competitive goals of the 1996 Act . . . ." Universal Service Order ¶184.<sup>8</sup> As recommended by Staff, the pro-competitive goals of the Act favor designation of smaller, rather than larger, service areas. The caution by the FCC and the Joint Board that areas not be "unreasonably large," Universal Service Order ¶184, supports this conclusion.

However, we understand the concerns of the rural carriers about immediate designation at the exchange level. Therefore, we concur with the proposal that the Commission initiate on an expeditious basis a series of workshops in order to fully develop the issues and, if possible, a consensus proposal for disaggregation of study area costs to exchange-level costs. Based on representations by counsel for a number of the rural companies, we are optimistic that these workshops will produce a consensus approach consistent with the competitive goals of the Act. We will order that the service areas for the rural carriers be the carriers' study areas through December 31, 1998. On January 1, 1999, the service areas shall be at the exchange level. Should the FCC fail to accept a proposal coming out of the workshops, we may reconsider this portion of the order.

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<sup>5</sup> Recommended Decision, In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45 (November 8, 1996).

<sup>6</sup> We concur with the analysis of staff in its memorandum presented at the November 26, 1997, open meeting. This Commission may deviate from study area designations and ask the FCC to concur.

<sup>7</sup> First Report and Order, In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45 (May 8, 1997).

<sup>8</sup> We recognize that the cited paragraph of the Universal Service Order is in the context of non-rural service areas. However, the principle that this ETC and service area designation process should promote the pro-competitive policies of the Act should apply also to the designation of rural service areas, recognizing of course that such designation is subject to FCC process and review.

C. Designation of Whidbey

Whidbey poses some unique issues. In Docket No. UT-95-0030, Whidbey was authorized to provide service in the so-called Supplemental Service Area (SSA) outside of its historical South Whidbey Exchange and within the Coupeville Exchange served by GTE. While that did in one sense expand the area which Whidbey serves, it had no impact in redrawing exchange lines, nor did it change Whidbey's "study area." See Universal Service Order ¶182, n.467; ¶172, n.434 ("study area boundaries are fixed as of November 15, 1984").

While the Commission has authority to designate an area other than a study area and other than an exchange area, we see no compelling reason to grant Whidbey's request to be designated as an ETC for the SSA. The present policy is to designate all ETCs at the exchange level so that the obligation to serve is equal where there is, or may be, competition. At the same time, the amount of universal service support would also be the same per customer for each ETC in a given exchange. Whidbey may request ETC designation in the Coupeville exchange, where it already has customers, and be a full competitor of GTE. Another option open to Whidbey is to request the Commission to create a new exchange or service area equal to the SSA and designate it (and, presumably, GTE) as an ETC in that area.

D. Jurisdiction Over Cellular Companies

The FCC has concluded wireless carriers are eligible to be designated as ETCs provided they have the ability to serve all potential customers in a service area, which they may accomplish through combining their services with land line services of another carrier.<sup>9</sup> Though state law limits the Commission's power to regulate wireless carriers, RCW 80.36.370(6), U.S. Cellular nevertheless filed a petition with the Commission seeking designation, conceding the Commission's jurisdiction for that purpose, citing section 214(c)(2) of the Act and RCW 80.01.040(3) as the basis for its Petition. No other party has contested the Commission's jurisdiction, and we conclude that we have such jurisdiction for the purpose of ETC designation and related issues. The Commission does not assert jurisdiction over U.S. Cellular beyond that necessary to designate it as an ETC under 47 U.S.C. § 214(e) and to enforce, modify, suspend, or revoke this order with respect to U.S. Cellular.

E. Waiver for Requirement of Providing Toll Control

All Petitioners have requested a waiver for provision of toll limitation as a prerequisite for obtaining ETC designation. The Petitioners have demonstrated in their Petitions and at the hearings that exceptional circumstances exist which warrant the granting of a waiver for providing toll limitation as authorized by 47 C.F.R. §54.101(c).

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<sup>9</sup> Universal Service Order ¶¶ 141, 145.



F. Waiver of E911 Service for U.S. Cellular

U.S. Cellular's request for waiver of E911 as authorized by 47 C.F.R. §54.101(c) also is justified by exceptional circumstances as outlined in U.S. Cellular's Petition.

G. Service Quality Issues

Staff originally urged the Commission to include as part of the condition of granting ETC status a requirement that the carriers, including U.S. Cellular, abide by Commission service quality standards set forth in WAC 480-120. A number of carriers contested the Commission's authority to so condition the designation. We need not reach that issue of legal authority as we conclude that the carriers' obligation to "offer the services that are supported by Federal universal service support mechanisms," as required by 47 U.S.C. §214(e)(A), connotes not just willingness to offer the services, but actual performance of the services. Such performance in turn connotes performance of the services at an adequate service level. As set forth below, whether an ETC-designated carrier is actually performing such service could arise in a proceeding to modify, revoke, or suspend the designation.

Requiring adequate service also is consistent with the pro-competitive policies of the 1996 Act. No company should be able to obtain a competitive advantage by avoiding its service quality responsibilities. The Commission expects that all companies receiving ETC status will comply with relevant Commission rules.

H. Modification, Revocation, or Suspension

Given the changing dynamics of the market in the local exchange, the Commission may from time to time reopen these proceedings in order to modify the geographic area for which the companies are designated. Such a proceeding may be commenced by the designated company, a petitioner for ETC status, by the Commission on its own motion, or by another appropriate person or entity.

In addition to such geographic area modifications, the Commission has the authority to modify, revoke, or suspend the designations should the prerequisites to the original designation cease to exist.<sup>10</sup> For example, should the company no longer advertise its services

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<sup>10</sup> Though the federal Act does not specify the means for revocation or modification of an ETC designation, the Commission has authority under state law to reopen any matter before it. RCW 80.04.210. Further, the federal Act contemplates such as it allows a state commission to designate ETCs on its own motion. 47 U.S.C. §214(e)(1)(2). There is nothing in that provision which limits a state commission on its own motion from redesignating a company already designated and in effect modifying the prior designation.

throughout the designated area as required by 47 U.S.C. §214(e)(B), the Commission may revoke the designation or suspend it until the deficiency is corrected. Likewise, should the company cease to "offer the services that are supported by Federal universal service support mechanisms" as required by 47 U.S.C. §214(e)(A), the Commission may revoke or suspend the original designation. In making the determination of whether a designated company continues to offer such services, the Commission will look not just to the advertised availability of the services, but to the actual and timely delivery of those services. In determining whether a designated carrier is providing such service the Commission will be guided by currently accepted industry standards, including, but limited to, the quality of service rules contained in chapter 480-120 WAC.<sup>11</sup>

The Commission may modify this order for other reasons permitted by the Act.

#### VII. FINDINGS OF FACT

From the above, the Commission enters the following summary findings of fact:

1. The Petitioners are telecommunications companies doing business in the state of Washington.
2. The wireline petitioners other than Whidbey currently serve the exchanges set forth on their exchange area maps on file with the Commission as of December 10, 1997. The sum of those exchanges constitute the study areas for the respective companies.
3. Petitioner U.S. Cellular currently serves in various exchanges, including the Centralia; Chehalis; Winlock; Castlerock; Longview-Kelso; Woodland; Yakima; George; and Quincy exchanges for which it filed as an ETC.
4. Whidbey currently serves the South Whidbey and the Point Roberts Exchanges. Whidbey also serves the "Supplemental Service Area" (SSA) which is located in the Coupeville Exchange, served by GTE. The study area for South Whidbey does not include its SSA.<sup>12</sup>

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<sup>11</sup> Obviously, there are some differences between wireless companies and wireline companies that make strict application of set standards to all companies difficult. However, the Commission will insist that all companies provide quality service to all customers within the designated service area for that company.

<sup>12</sup> We recognize that study areas are fixed by the FCC and that Whidbey may petition the FCC to add the SSA to its study area. The finding we make in this order is done without such a petition on file and does not constitute our support or opposition to such a petition; we

5. All Petitioners except US West, GTE, and U.S. Cellular have certified that they qualify as rural telephone companies as defined in 47 U.S.C. §153(47) and 47 C.F.R. §51.5. The Commission finds that such certifications are appropriate.

6. After taking into account and considering fully the recommendations of the Federal-State Joint Board, the Commission finds that the appropriate service areas for the Petitioners are as follows:

(a). For non-rural companies, the appropriate service areas are the individual exchanges for which they petitioned, designated on an individual basis, effective January 1, 1998;

(b). For single-exchange rural companies, the appropriate service areas are their respective single exchanges, effective January 1, 1998;

(c). For multi-exchange rural telephone companies, the appropriate service areas are their study areas through December 31, 1998, and thereafter the appropriate service areas are their exchanges, designated individually as separate service areas. In the event of a waiver from the FCC on disaggregation of costs prior to December 31, 1998, the Commission may modify this determination and move the effective date forward.

7. The Petitioners offer all of the services that are to be supported by the federal universal service support mechanisms set forth in 47 C.F.R. §54.101(a).

8. The Petitioners are providing or will provide soon after January 1, 1998, advertisement of the availability of the services that are to be provided by the federal universal service support services, except as otherwise waived by this Order, and the charges therefor, using media of general distribution as required by 47 U.S.C. §214(e)(1)(B).

9. The Petitioners do not currently have the technical capability of providing toll control as defined in 47 C.F.R. §54.400. Exceptional circumstances exist which justify the granted waiver.

10. U.S. Cellular does not currently have the technical capability of providing E911 services. Exceptional circumstances exist which justify the granted waiver.

11. The petitioners have committed to file tariff revisions to provide toll blocking without charge to low income consumers, if necessary, at an early date.

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will comment at the appropriate time and in the appropriate manner in the event Whidbey files such a petition.

### VIII. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter of these proceedings and all parties to them.
2. Granting the relief requested in the petitions, except as otherwise modified by this Order, is consistent with the public interest, convenience, and necessity and is consistent with applicable state and federal law.
3. All the Petitioners except US West, GTE, and U.S. Cellular are rural telephone companies as defined by 47 U.S.C. §153(47).
4. The Commission need not designate all rural company Petitioners for their study areas in these proceedings. The Commission, after taking into account the recommendations of the Federal-State Joint Board, may designate such companies for geographic areas other than their study areas without conducting an adjudicatory proceeding prior to such designation.
5. The Commission has authority to modify, suspend, or revoke these designations, including the service areas accompanying those designations, at a future date.

### ORDER

Based on the foregoing, the Commission orders as follows:

1. The Petitions in Docket Nos. UT-970333 through UT-970354 and Docket No. UT-97056 are consolidated for purposes of this order.
2. The Petitions for designation as Eligible Telecommunications Carriers are granted as described in this Order.
3. The geographic areas for which the designations are made are as follows:
  - (a) For non-rural companies, GTE, U.S. Cellular and USWC, the service areas are the individual exchanges for which they petitioned, designated on an individual basis, effective January 1, 1998;
  - (b) For each single-exchange rural company, (Hat Island, Hood Canal, Kalama, Toledo and St. John), the service area is its single exchange, effective January 1, 1998;
  - (c) For each multi-exchange rural telephone company, (Asotin, Cowiche, Ellensburg, Inland, Lewis River, Mashel, McDaniel, Pend Oreille, Pioneer, SPRINT/United, Telephone Utilities, Tenino, Western Wahkiakum, Whidbey, and Yelm), the service area is each company's study area through December 31, 1998. Thereafter the appropriate service area is each exchange designated individually as a separate service area. In the event of a waiver from

the FCC on disaggregation of costs prior to December 31, 1998, then the Commission may modify this determination and move the effective date forward;

(d) For Whidbey Telephone Company, the service area is as described in (c) above, and it does not include the Supplemental Service Area.

4. The Petitioners requests for waivers of the requirement of providing toll control are granted.

5. U.S. Cellular's request for waiver of the requirements to provide E911 service is granted.

6. The companies, with the exception of GTE, USWC, and U.S. Cellular, have appropriately certified that they are rural telephone companies pursuant to 47 U.S.C. §153(47) and 47 C.F.R. §51.5.

7. The rural telecommunications parties to the proceeding shall participate in workshops on the disaggregation of costs from the study area level to the exchange level. The parties will prepare a methodology for disaggregation which can be presented in a joint petition to the FCC from the Commission and the rural companies, the purpose of which will be to receive a waiver from the FCC on payment of universal service support based on study area average loop costs. The parties and the staff shall make their best effort to complete this process expeditiously. An interim report is due to the Commission not later than March 1, 1998. A final report and material for the petition are due not later than April 30, 1998. These workshops are premised on the representations made by parties that exchange level designations would be acceptable if the FCC were to permit disaggregation of costs. The Secretary, or a staff designee, shall notify the parties through their representatives of time, date, and place of workshops and prepare such reports as this order requires.

DATED at Olympia, Washington, and effective this 23rd day of December, 1997.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

  
ANNE LEVINSON, Chairwoman

  
RICHARD HEMSTAD, Commissioner

  
WILLIAM R. GILLIS, Commissioner



October 1, 1998

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SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION

Tradition

Technology

Talent

Teamwork

Mr. William J. Bullard  
Executive Director  
South Dakota Public Utilities Commission  
500 East Capitol  
Pierre, South Dakota 57501

RE: TC98-111 Initial Brief of Dakota Telecom, Inc., ("DTI")

Dear Mr. Bullard:

Enclosed for filing is the original and ten copies of the INITIAL BRIEF OF DAKOTA TELECOM, INC. and APPENDIX 1 for the above reference docket. This BRIEF is being served to the parties listed on the service list this same date.

Sincerely,

Kristie Lyngstad  
Administrative Assistant

Enclosures

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

**SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION**

**IN THE MATTER OF THE FILING BY )  
DAKOTA TELECOM, INC., FOR )  
DESIGNATION AS AN ELIGIBLE )  
TELECOMMUNICATIONS CARRIER )**

**Docket No. TC98-111**

**Initial Brief of Dakota Telecom, Inc. (DTI)**

**Introduction**

On June 4, 1998, DTI filed a request to be designated an eligible telecommunications carrier (ETC) consistent with the provisions of 47 U.S.C. § 214(e) and rules promulgated by the Federal Communications Commission (FCC) pursuant thereto. Fort Randall Telephone Company (Ft. Randall) and the South Dakota Independent Telephone Coalition (SDITC) petitioned to intervene. Their petitions were granted. The Commission set a procedural schedule and the hearing was held as scheduled on September 14, 1998, beginning at 1:30 P.M. in Room 412 of the State Capitol Building in Pierre, South Dakota. At the conclusion of that hearing a briefing schedule was established with the initial DTI brief due two weeks after receipt of the transcript. The transcript was received on September 21, 1998. This brief is due no later than October 5, 1998.

The facts as presented and made a part of the record in the hearing will be incorporated in this Argument. References to the transcript of the hearing shall be noted as "R." plus the appropriate page number. References to hearing exhibit will be "Ex." plus the exhibit number and a page number and/or attached exhibit, if appropriate.

## Issue

**Whether DTI should be designated an ETC for a service area that encompasses only the local service telephone exchanges of Centerville and Viborg.**

## Argument

1. DTI meets the basic criteria in federal law to be designated an ETC. DTI is a competitive local exchange carrier (CLEC) providing local exchange telecommunications services in the Centerville and Viborg exchanges. The services being offered are those services supported by federal universal service fund support mechanisms using DTI's own facilities (Ex. 2, p. 2-3). DTI advertises the availability of those services in media of general distribution (Ex. 2, p. 4 and Exhibit A). A review of the materials in Exhibit A demonstrates that the services are advertised in local (urban and rural) community newspapers, and in a community-wide telephone directory which lists the telephone numbers for both exchanges in their entirety, i.e., urban and rural. DTI makes no distinction between the urban areas represented by the towns of Centerville and Viborg and the rural areas adjacent to those towns, so long as the customer resides within the exchange boundaries (Ex. 2, Exhibit A; R. 35, 46). DTI has provided local exchange service to anyone who has asked for it in the Centerville and Viborg exchanges (R. 46-47).

Thus, DTI meets the basic statutory criteria to be an ETC, regardless of the nature of the company with whom it competes. DTI offers to provide the local exchange service in a readily recognizable service territory, and it advertises that availability in media of general distribution.



2. The designation of additional ETCs within the service territory of a rural telephone company is allowed so long as it is in the public interest. Federal law is permissive regarding the Commission's authority to designate an additional carrier as an ETC in the service area of an incumbent rural telephone company. 47 U.S.C. § 214(e)(2). The Commission must also find that such additional designation is in the public interest. Id. If competition is to come and flourish in rural areas of South Dakota, the competitor must have the ability to serve those high cost, insular and low income customers with the same eligibility for financial support, if any, provided by federal and state universal service funding mechanisms.

The heart of the public interest concern is the need to insure that the rural, high cost or low income areas are not left behind in realizing the benefits from competition – a choice of service providers which drives service availability, service quality, and affordable service prices. To fulfill the needs of rural South Dakota, this Commission must encourage competitive entry in the rural local exchange market at every reasonable opportunity. Attached as Appendix 1 to this brief are the arguments presented by the Washington Utilities and Transportation Commission (WUTC) to the Federal Communications Commission (FCC) to support its determination that individual exchange service areas are appropriate in rural telephone company exchanges in order to promote the benefits of competition enumerated above. Those legal analyses and arguments are incorporated by reference in this brief.

As the WUTC insightfully reminds all of us, the designation of the service area impacts the ease with which competition will come to rural areas, and the broader the service area, the greater and more costly the service obligation. Thus the service area

This Commission should, as the WUTC has already done for the rural areas in its state, promote and nurture the interests of rural economic development, customer choice, service quality and availability, and affordable service prices, by designating DTI as an ETC for the Centerville and Viborg exchanges.

reason to grant DTI's request (Ex. 3, p. 3). That suggestion is irrelevant.<sup>1</sup> The actual receipt for that funding is not one of the statutorily specified criteria. If Ft. Randall does not presently receive funds using that theory, then it should not qualify as an ETC either. The relevant issue is the eligibility to receive the funding. Ft. Randall, as the ETC, is eligible to receive that funding when it becomes available.<sup>2</sup> DTI should also be eligible to receive that support when that support becomes available. If there is ever going to be competitive entry into exchanges like Centerville and Viborg, then the issue of eligibility must be decided, not whether there is funding already available. Determining what is funded, how it is funded, and how much that funding will be is at best speculative, even after the appropriate mechanisms are implemented. Constant change is the only certainty. If actual funding is to be a criterion, then there will never be competitive entry.

There is nothing in the law to even hint that market penetration by a competitor should be a criterion (Ex. 3, p. 4-5). Mr. Hanson could not point to any provision of the law that would support such a view (R. 69-70). In any event, where would the Commission draw this bright line? At 10%, 20%, 50%, or some higher number? At what level of market loss, then, should the incumbent perhaps lose its designation as the

<sup>1</sup> It will be interesting to see the reaction when DTI asks to be designated an ETC for U S WEST service areas which will more than likely be for individual U S WEST exchanges, and not for the all of the exchanges U S WEST serves in the aggregate in South Dakota. A quick look at the map (Ex. 4) demonstrates that those exchanges are widely dispersed. It is common knowledge that U S WEST does not now receive any support in those exchanges from any universal service funding mechanism. Although the rules may be slightly different for a nonrural company, there is nothing in any legislation to suggest that service areas cannot be disaggregated or that actual receipt of universal service funds is a prerequisite to ETC status.

<sup>2</sup> There is no basis for assuming that the funding will not be available. Even based on the limited record in this proceeding, the funding will be available probably sooner rather than later. As Mr. Hanson told the Commission, the Centerville and Viborg exchanges meet the definition of a high cost area (Ex. 3, p. 6; R. 67). Mr. Hanson certainly expects that those exchanges will receive funding, and in fact his company is a part of an effort to remove the current fund cap to allow funding to flow to those two exchanges (R. 73-74). Similarly, Mr. Hoseck's argument that the application is premature (R. 88-89) is not consistent with the law. DTI's application is timely, and it is a decision this Commission needs to make to lead the way to better, affordable, competitive services in rural areas.

ETC? Based on Ft. Randall's argument, if an arbitrary market share number is good to gain eligibility for funding, falling below a minimum should be a basis to revoke eligibility for funding.

Ft. Randall's prehearing brief (p. 6) suggests that designation for ETC status is dependent on certain additional criteria keyed to customer expectations, pricing levels, or other terms and conditions of service, which are not otherwise specified in any statute. The attempt to add this gloss to the public interest criterion creates a definite barrier to entry which is expressly prohibited by 47 U.S.C. § 253(a). The basic requirements are offer and advertise. Those standards cannot be changed, even under the guise of a public interest standard, to a standard of "provide" and, by the way, "provide in this manner." DTI will agree that the recently enacted SDCL § 49-31-73 does have a "good faith" standard, a standard not found in federal law and one which may violate federal law by creating a barrier to entry by effectively requiring ETC status just to enter the market. However that standard does not apply to DTI in this case.<sup>3</sup> Even if it does apply, "good faith" means that if the service is offered, and a customer signs up for the service, then service will be provided. Service quality, price, customer expectations are the "stuff" of competition, not an excuse for preemptive regulation. If a company does not provide quality service at an affordable price, then no one will take the service. If no one takes the service, the ETC designation is meaningless because even though the company may be eligible to receive funding, it will not receive funding because it has no customers.

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<sup>3</sup> That provision of South Dakota law did not become effective until July 1, 1998. This petition was filed prior to that. In any event SDCL § 49-31-74, preserves the status quo for those telecommunications companies certified to provide service in Ft. Randall's service area prior to July 1, 1998.

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4. It is imperative that the Commission approve a service area which encompasses only the Centerville and Viborg exchanges. With reference again to the arguments presented to the FCC by the WUTC in Appendix A to this brief, customer benefit is only enhanced by creating sensible and reasonable service territories in rural areas. The Commission cannot take its eye off the mark in this whole debate. Federal and state legislation is for the benefit of the consumer. This Commission's charter is to encourage universal service in all areas of South Dakota at affordable prices. The Commission's main constituency is the consumer. Protection of the monopoly prerogatives of an incumbent telephone company is not a goal to be desired or to be achieved, certainly not under a protective cover maintained by this Commission.

Federal law explicitly states that the service area designations for eligibility for universal service funding will be done by this Commission (47 U.S.C. § 214(e)(2)). As an interim measure, the law creates temporary service areas for rural telephone companies tied to study areas already designated by the FCC, but again explicitly leaves the door open to this Commission and the FCC to create service areas that will accomplish the purposes of the law (47 U.S.C. § 214(e)(5)). The FCC, in its order implementing the law, explicitly encouraged this Commission to consider designating service areas which more reasonably and accurately describe areas which are logical divisions of contiguous customer service provisioning areas (In the Matter of Federal-State Joint Board on Universal Service, First Report and Order, CC Dkt. No. 96-45, 12 FCC Rcd. 8776, ¶¶186-191 (May 8, 1997)). The creation of a service area containing the contiguous exchanges of Centerville and Viborg are a ideal opportunity for this Commission to energize competition in the rural areas of South Dakota.

The arguments around network configuration, cost identification, and access rate restructuring are a smoke screen (Ex. 3, p. 6-10). How Ft. Randall configures its network (i.e. the Wagner host and the Centerville and Viborg remotes) is a business decision solely within the discretion of Ft. Randall's management. The Commission must assume that it is the most efficient, cost-effective manner to provide service. If it isn't, then this Commission cannot be put in the position of protecting bad management decisions. Mr. Hanson has run cost models and has told you what those models develop as the costs to provide service in the Centerville and Viborg exchanges (R. 73)<sup>4</sup>. Mr. Hanson can even tell you what he believes should be the support the Centerville and Viborg exchanges are entitled to if he can get the funding cap removed (R. 73, 84). Mr. Hanson is a well-qualified and professional manager for his company. He can tell you what the universal service fund support would be if Centerville and Viborg were designated as a separate service area (R. 84).

5. DTI believes that the designation of Centerville and Viborg as an ETC service area for DTI may put a burden on Ft. Randall and the Commission to seek a restructuring of Ft. Randall's study area accordingly, but only if that is what the

Commission wants to do. There is nothing in the statute that requires the restructuring of Ft. Randall's service area just because this Commission has designated two exchanges as the CLEC's service area for ETC purposes. Section 214(e)(2) of Title 47 says very clearly that a service area is designated by the State commission alone. If the State commission wants to create unique service territories in nonrural company areas, the commission and the commission alone makes that determination. If, however, this Commission wants to change the service area of Ft. Randall, it must do so in concert with the FCC and the Joint Board (47 U.S.C. § 214(e)(5)). There is nothing in the statute which requires this Commission to ensure that the service area of a CLEC coincide with the service area of an incumbent carrier, regardless whether the incumbent is U S WEST or Ft. Randall.

DTI does not object to any action by the Commission which would seek to disaggregate Ft. Randall's service area to reflect the Commission's decision in this case. Indeed, regardless of the model or method used to determine the nature and degree of funding, it will be targeted to areas at least as small as an exchange if not smaller to insure that the appropriate insular, high cost or low income areas receive the support.

#### **Conclusion**

Based on the evidence of record and the legal and factual arguments presented above, DTI respectfully requests that its petition to be designated an ETC for the Centerville and Viborg exchanges be granted.

Respectfully submitted on October 5, 1998.



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## APPENDIX 1

## APPENDIX 1



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## SUMMARY

In implementing the provisions of the Telecommunications Act of 1996 (Federal Act) relating to universal service, 47 U.S.C. §214(e), the Washington Utilities and Transportation Commission (WUTC) approved service areas for fifteen rural telecommunications companies in Washington as the companies' respective individual exchanges. Because these designations are not for the companies' "study areas," agreement by the Commission is required pursuant to 47 U.S.C. §214(e)(5) and 47 C.F.R. §54.207.

This Petition filed by the WUTC and twenty rural telecommunications companies in Washington seeks such approval and, in conjunction with that approval, a waiver from the Commission's existing method of "porting" available universal service funds set forth in 47 C.F.R. §54.307. Specifically, we seek approval for the use of disaggregation of study areas for the purpose of distributing such federal universal service support. The proposed methodology, reached after a series of workshops involving the WUTC staff and company representatives, acknowledges that there is substantial variation in density and lengths of the local loops and would require greater federal universal service support for loops inside a "core area" (lower cost areas) and lesser for loops in a "fringe area" (higher cost areas). However, there would be no increase in the aggregate amount of such support for Washington's rural companies.

Granting this Petition would encourage competition in rural areas by limiting the requirement that competitors enter into an incumbent's entire "study area" (which may include widely dispersed exchanges), but it would minimize incentives of competitors to seek and serve only low cost customers within a given rural exchange.

## I.

### INTRODUCTION

Pursuant to section 214(e)(5) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (Federal Act), 47 U.S.C. §214(e)(5), and 47 C.F.R. §54.207, the Washington Utilities and Transportation Commission (WUTC) and twenty rural telephone companies<sup>1</sup> petition the Federal Communications Commission (Commission) for agreement with the WUTC's service area designations which differ from the "study areas" of those companies designated as eligible telecommunications carriers (ETCs) under the Federal Act. As more fully articulated below, the WUTC designated the service areas as individual exchange areas which are served by the designated companies.

Pursuant to 47 C.F.R. §1.3, we also petition the Commission for a waiver of the existing method of "porting" available universal service funds set forth in 47 C.F.R. §54.307 and for approval of a proposed alternative methodology.<sup>2</sup> The proposed methodology reflects the

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<sup>1</sup>The following companies join in this petition to the extent set forth in footnote 2, below: Asotin Telephone Company; CenturyTel of Cowiche; CenturyTel of Washington, formerly Telephone Utilities of Washington; Ellensburg Telephone Company; Hat Island Telephone Company; Hood Canal Telephone Co., Inc.; Inland Telephone Company; Kalama Telephone Company; Lewis River Telephone Company; Mashell Telecom, Inc.; McDaniel Telephone Company; Pend Oreille Telephone Company; Pioneer Telephone Company; St. John, Co-operative Telephone And Telegraph Company; Tenino Telephone Company; The Toledo Telephone Co., Inc.; United Telephone Company of the Northwest; Western Wahkiakum County Telephone Company; Whidbey Telephone Company; and Yelm Telephone Company. Each of these companies is a "rural telephone company," as defined in section 3(37) of the Federal Act, 47 U.S.C. § 153(37).

<sup>2</sup>Because these separate requests are intertwined, they are made jointly. However, the rural company petitioners join in the request for Commission concurrence in the WUTC's establishment of service areas differing from "study areas" only if the petition for waiver is granted and use of disaggregated study-area support, as proposed in this petition, is approved by the Commission. Absent such waiver and approval, the rural company petitioners oppose

differences in costs for each exchange of the multi-exchange rural companies and also reflects the differences in costs between densely populated and sparsely populated areas within exchanges. We request that the amount of federal universal service support made portable be based on the disaggregation of the service areas into two zones per exchange or wire center ("core area" and "fringe area" described in Appendix E). We do not request, and the proposed methodology does not require, any increase in the amount of federal universal service support funds for Washington.

Consistent with the Federal Act, and with provisions of state law, the overall purpose of the WUTC's actions in designating ETCs, and in filing the petition in these matters, is to promote competition, both in urban areas and in areas served by rural telephone companies.

## II.

### PETITION FOR CONCURRENCE WITH WUTC'S ESTABLISHMENT OF SERVICE AREAS AS THE RESPECTIVE INDIVIDUAL EXCHANGES OF THE COMPANIES

#### A. Applicable Law.

The Federal Act requires designation of "eligible telecommunications carriers" (ETCs) for purposes of implementing the universal service provisions of the Federal Act. Under the Federal Act, state commissions are to designate companies as ETCs for specific "service areas."

47 U.S.C. §214(e)(2). That provision states:

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,

---

Commission agreement with the WUTC's service area designations and respectfully request that this petition be denied in its entirety.

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 Federal Act defines "service area" as "a geographic area established by a State commission for the purpose of determining universal service obligations and support mechanisms." 47 U.S.C. §214(e)(5)

The designation of the service area impacts the ease with which competition will come to rural areas. The designation defines the geographic reach of the obligation of companies which operate in rural areas.<sup>3</sup> The broader the service area, the greater (and more costly) the service obligation. This geographic scope helps define the magnitude of barriers to entry to competitors in rural areas. The wider the service area defined by the state commission, the more daunting the task facing a potential competitor seeking to enter the market.

While conferring on state commissions substantial authority to establish the "service area" for an ETC, the Federal Act states that for rural telephone companies, the service area will

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<sup>3</sup>Section 214(e)(1) of the Federal Act states:

A common carrier designated as an eligible telecommunications carrier under paragraph (2) or (3) shall be eligible to receive universal service support in accordance with section 254 and shall, throughout the service area for which the designation is received --

(A) offer the services that are supported by the Federal universal service support mechanisms under section 254(c), either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and

(B) advertise the availability of such services and the charges therefor using media of general distribution.



be the company's "study area"<sup>4</sup> "unless and until the Commission and the States, after taking into account recommendations of a Federal State Joint Board [Universal Service Joint Board], establish a different definition of service area for such company. 47 U.S.C. § 214(e)(5).

This petition, required by 47 C.F.R. § 54.207, seeks Commission agreement in the designations of the WUTC.

B. Procedural History of the WUTC's ETC Designations.

In Fall 1997, twenty-three companies filed petitions with the WUTC seeking designation as ETCs. The WUTC held hearings at two open meetings on the petitions, considered the petitions and various staff analyses, and designated ETCs by order dated December 23, 1997.<sup>5</sup> The WUTC designated five single-exchange rural telephone companies as ETCs for service areas consisting of their respective study areas. In addition, the WUTC designated fifteen multi-exchange rural telephone companies as ETCs and defined the service areas for these multi-exchange companies to be their respective study areas for a limited period of time, through December 31, 1998. The WUTC order established the appropriate service areas for these multi-exchange companies thereafter to be the companies' respective exchanges, designated individually as separate service areas.

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<sup>4</sup> A "study area" is generally an incumbent company's pre-existing service area in a given state. Generally, the study area boundaries are fixed as of November 15, 1984. In the Matter of Federal-State Joint Board on Universal Service, First Report and Order, CC Dkt. No. 96-45, 12 FCC Red. 8776, ¶172, n.434 (May 8, 1997) ("Universal Service Order"), citing MTS and WATS Market Structure: Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, Decision and Order, 50 Fed. Reg. 939 (1985).

<sup>5</sup> See Order Designating Eligible Telecommunications Carriers, WUTC Docket Nos. UT-970333 through UT-970354 and UT-970356 ("WUTC Order", attached as Appendix A).

At the request of rural telephone companies, the WUTC order which designated ETCs also required the parties to participate in workshops on the disaggregation of costs from the study area level to the exchange level.<sup>6</sup> The order stated, in part:

The parties will prepare a methodology for disaggregation which can be presented in a joint petition to the FCC from the [WUTC] and the rural companies, the purpose of which will be to receive a waiver from the FCC on payment of universal service support based on study area average loop costs<sup>7</sup>

The order went on to say "[t]hese workshops are premised on the representations made by parties that exchange level designations would be acceptable if the FCC were to permit disaggregation of costs."<sup>8</sup> The companies requested the ability to disaggregate below the exchange level, if the information could be developed to do so, and the Commission has endorsed this effort.

C. The Commission Should Concur with the WUTC's Establishment of the Service Areas as the Companies' Respective Exchange Areas.

1. In Establishing a Service Area Other than a Company's Study Area, the WUTC and the Commission Must "Take into Account" the Recommendations of the Joint Board.

The Federal Act contemplates a joint federal-state process for establishing a service area which differs from a company's study area.<sup>9</sup> Neither the Federal Act nor the implementing

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<sup>6</sup> The WUTC Order, at 18, referred to costs. In order to determine the amount of federal universal service support that should be made portable for each exchange, it is necessary to disaggregate study area costs to the exchange or wire center level so that the relative amount of support can be assigned. The effort to disaggregate costs to the exchange or wire center level is required because companies generally track costs at the study area level.

<sup>7</sup> See WUTC Order at 18.

<sup>8</sup> *Id.*

<sup>9</sup> The Commission's Universal Service Order ¶187 states:

We conclude that the plain language of section 214(e)(5) dictates that  
JOINT PETITION RE: ETC DESIGNATIONS - 5

Commission Universal Service Order articulate specific standards for the states or the Commission to follow in establishing a service area other than the study area. The only requirement is to "take into account" the Joint Board's recommendations.

The Joint Board recommended that the service areas for areas served by rural companies remain the study areas of those companies, but included the caveat that its recommendation was "at this time," implying that as circumstances change, so might its recommendation. In the Matter of Federal-State Board on Universal Service, CC Dkt. 96-45, 12 FCC Rcd. 87, ¶172 (Nov. 8, 1996) (Joint Board Recommendation). The Board stated three reasons for recommending retention of the study area as the service area "at this time."

First, the Joint Board noted that some commenters were concerned about "cream skimming." By retaining a larger study area,

[p]otential "cream skimming" is minimized because competitors, as a condition of eligibility, must provide services throughout the rural telephone company's study area. Competitors would thus not be eligible for universal service support if they sought to serve only the lowest cost portions of a rural telephone company's study area.

*Id.*

Second, the Board noted that the Federal Act "in many respects places rural telephone companies on a different competitive footing from other local exchange companies," and cited

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neither the Commission nor the states may act alone to alter the definition of service areas served by rural carriers. In addition, we conclude that the language "taking into account" indicates that the Commission and the states must each give full consideration to the Joint Board's recommendation and must each explain why they are not adopting the recommendations included in the most recent Recommended Decision or the recommendations of any future Joint Board convened to provide recommendations with respect to the federal universal service support mechanisms.

various provisions in the Federal Act which treat such companies differently. Joint Board Recommendation ¶173.<sup>10</sup>

Finally, the Board was concerned about the administrative difficulties rural companies may encounter in calculating costs at something other than at a study area level.<sup>11</sup>

The first two of the Board's concerns relate to competition in the areas served by rural companies. The last one relates to administrative concerns. As articulated below, the WUTC "took into account" these concerns, and there exists ample reason for the Commission to concur

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<sup>10</sup>The Joint Board stated:

For example, rural telephone companies are initially exempt from the interconnection, unbundling, and resale requirements of 47 U.S.C. §251(c). The 1996 Act continues this exemption until the relevant state commission finds, *inter alia*, that a request of a rural telephone company for interconnection, unbundling, or resale would not be unduly economically burdensome, would be technically feasible, and would be consistent with section 254. Moreover, while a state commission must designate other eligible carriers for non-rural areas, states may designate additional eligible carriers for areas served by a rural telephone company only upon a specific finding that such a designation is in the public interest.

Joint Board Recommendation ¶173.

<sup>11</sup>The Board stated:

Another reason to retain existing study areas is that it is consistent with our recommendation that the determination of the costs of providing universal service by a rural telephone company should be based, at least initially, on that company's embedded costs. Rural telephone companies currently determine such costs at the study-area level. We conclude, therefore, that it is reasonable to adopt the current study areas as the service areas for rural telephone companies rather than impose the administrative burden of requiring rural telephone companies to determine embedded costs on a basis other than study areas.

Joint Board Recommendation ¶174.

JOINT PETITION RE: ETC DESIGNATIONS - 7

with the WUTC's reasons for establishing service areas as the individual exchanges of the companies.

2. Procompetitive Policies of Both Federal and State Law Suggest Establishment of Service Areas at the Exchange Level, Notwithstanding the Recommendations of the Joint Board.

Washington has several multi-exchange rural telephone companies and some of those have exchanges spread across the state. Though, in part, the WUTC made ETC designations for the purpose of determining which companies could receive federal universal service funds, the WUTC also made ETC designations as a part of its efforts to bring competition to all parts of Washington.

The WUTC is particularly concerned that rural areas, of which there are many in Washington, not be left behind in the process of deregulation and the move to greater competition. Citing to the recommendations of its staff, the WUTC concluded the pro-competitive goals of the Federal Act and various provisions of state law<sup>12</sup> would be better served by designation of smaller, rather than larger, service areas.<sup>13</sup>

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<sup>12</sup>See RCW 80.36.300(5); Electric Lightwave, Inc. v. Washington Utilities & Transportation Comm'n, 123 Wn.2d 530, 538-39, 869 P.2d 1045 (1994). The WUTC has stated its procompetition goals in a number of administrative proceedings. See, e.g., Washington Utilities & Transportation Comm'n v. US West Communications, No. UT-950200, 15th Supp. Order, 169 P.U.R. 4th 417, 427, 484 (WUTC April 11, 1996), aff'd, US West Communications, Inc. v. Washington Utilities & Transportation Comm'n, 134 Wn.2d 74, 949 P.2d 1337 (1997).

<sup>13</sup> WUTC Order at 12. That rationale was included in the memorandum to the Commissioners presented by Commission staff at the November 26, 1997 open meeting at which the WUTC orally approved the designations and the establishment of the service areas (the formal order was issued on December 23, 1998. A copy of that memorandum, dated November 24, 1997, is included as Appendix B. That memorandum stated in part:

Promotion of Competition

Universal service support will be made available to companies serving

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The WUTC also considered and granted a petition for ETC designation from a wireless carrier.<sup>14</sup> Entry of such a carrier into the ETC process highlights the anti-competitive result that could flow from a study-area designation for a multi-exchange rural telephone company. Because wireless and wireline service territories are geographically different, it would generally be impossible for either one to compete in the other's service area or service territory if the areas were to stretch across an entire state. Smaller, rather than larger, service area designations for ETCs promote competition and speed deregulation.

An important purpose of the Federal Act of 1996 was to promote competition in the local telephone market. The WUTC examined the effect that study-area ETC designation of rural

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customers in high-cost locations to preserve those customers' participation on the network and to advance universal service through competition that will eventually result in lower prices. Payments to companies serving high-cost customer locations is necessary to maintain incumbent service in those areas as well as to induce competition from other carriers.

Because only ETCs are eligible for federal universal service support, it is important to designate as many carriers as possible to foster competition in high-cost locations. Promotion of competition as a policy principle naturally leads to a policy of designating any qualifying carrier that petitions. It might also lead to situations in which the Commission would act on its own motion to designate a qualifying, but not petitioning, carrier.

#### Exchange Level Service Areas

Staff recommends designation of ETCs at the exchange level rather than the study area level. The purpose is to promote competitive entry by making it easier for new entrants to get started in relatively small areas and for competing carriers to align their ETC service areas with their own service areas.

Appendix B, at 8 (footnote omitted). The WUTC also considered an earlier staff memorandum, original sent to one Commissioner, but later made available to all. See Appendix C.

<sup>14</sup> See WUTC Order at 4, U.S. Cellular Petition for ETC designation, Docket No. UT-970345.

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companies would have on competition. There are fifteen multi-exchange rural companies in Washington. Some of those have large study areas in which some or all of the exchanges are non-contiguous.<sup>15</sup> Because of the large and non-contiguous study areas of some of the incumbents, the WUTC determined that ETC designation of incumbent, rural telephone companies at their study area level would inhibit the development of competition because competitive ETCs would have to enter an entire study area in order to compete with an incumbent.

The WUTC also compared the multi-exchange rural company study areas to those of the non-rural companies. The non-rural companies in Washington serve areas just as rural as the territory served by the rural companies. Because of the similarities, designation of rural companies at the study area level and the designation of non-rural companies at the exchange level invites uneven competition. The WUTC determined that competitors would be more likely to enter rural areas if they could serve several contiguous exchanges without regard to the nature of the incumbent as either rural or non-rural.<sup>16</sup>

3. The Commission Took into Account the Joint Board's Concerns About Administrative Burdens on Rural Companies if Service Areas Other than the Study Areas Were to Be Established.

The WUTC acknowledged the administrative concerns expressed by the rural companies during the WUTC process. See WUTC Order at 9. However, at the request of the rural companies seeking ETC designation, the WUTC delayed the effective date of exchange-level designations and worked with rural companies to develop a methodology for determining how

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<sup>15</sup> See the Washington State exchange map accompanying this petition as Appendix D.

<sup>16</sup> See WUTC Order at 12, n. 8.

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federal universal service funds for ETC study areas could be made portable on a disaggregated basis. Those concerns not only were taken into account by the WUTC, but they were accommodated, as reflected in Part III, below.<sup>17</sup>

### III.

#### PETITION FOR APPROVAL OF USE OF DISAGGREGATION OF STUDY AREAS FOR PURPOSE OF DETERMINING PORTABLE FEDERAL UNIVERSAL SERVICE SUPPORT

- A. The WUTC and the Rural Company Petitioners Agreed on a Methodology for Disaggregating Federal Universal Service Support from the Study Area Level So That Higher Cost Areas Would Receive Higher Support, and Lower Cost Areas Would Receive Lower Support.

Company cost records generally are not kept at the exchange level and some multi-exchange rural companies serve exchanges with a wide range of costs. Pursuant to the WUTC Order, the WUTC staff and rural companies held four meetings and developed a methodology for disaggregating federal universal service support from the study area level.<sup>18</sup> In the process, the WUTC and the rural companies concluded that there is a substantial variation in costs within exchanges. The difference is generally associated with loop length: loops terminating closer to the switch are less expensive than loops which are longer. As a result, as part of our Petition we request that intra-exchange federal universal service support from the Universal Service

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<sup>17</sup>The analysis set forth in the preceding sections is the analysis and position of the WUTC. The rural companies disagree with the WUTC's actions and the basis stated for that action. However, the rural companies are willing to accept ETC service-area designation on an exchange basis if the following Petition for Approval of Use of Disaggregation of Study Areas for Purpose of Determining Portable Federal Universal Service Support is granted.

<sup>18</sup> The result of this effort is explained in detail in the appendices to this Petition. There is a full explanation of the issues examined, the data relied upon, and the method for determining the level of federal universal service support which we recommend be made portable for support of incumbents and competitors alike.



Administrative Company (USAC) vary, with support lower for loops within any area designated as a "core area" and greater support for loops outside the core area, in what has been labeled the "fringe area." A discussion of the methodology development is included as Appendix E. This approach does not require the determination of embedded cost of service at a level below the study area. Instead, it takes the actual support for a company and disaggregates on a geographic basis the existing support determined on a study area basis.

Essentially, the Benchmark Cost Proxy Model (BCPM) was adapted to provide cost information at the census block group (CBG) level within a given wire center. Each CBG was classified as either a "zone A" or a "zone B," depending on whether the average per-line cost was below or above the average in the wire center. The support amount per zone is calculated as the difference between the per-line proxy cost for each zone and Commission benchmarks (\$31 for residential service and \$51 for business service). The resultant support amount was adjusted by a "reconciliation factor" which adjusted the aggregate amount to meet the actual 1998 federal universal service fund amount reported by the National Exchange Carrier Association (NECA). This adjustment insures that the aggregate amount under this proposed methodology does not exceed the amount available under the current method. Thus, the BCPM output date is used for the derivation of the reallocation factor, not to set the amount of the USF support for a company.

The method for determining core and fringe areas and the 1998 per loop support amounts associated with each area are contained in Appendix F.<sup>19</sup> This methodology will place higher

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<sup>19</sup>Hat Island Telephone Company ("Hat Island") is not included in Appendix F due to an absence of reliable CBG data. Hat Island is a single-exchange company. For Hat Island, FUSF support and support portability would be unaffected by the granting of this petition until the methodology described in this petition can be applied to Hat Island, where upon the methodology described in this petition would be applied to Hat Island on a going-forward basis.

levels of support in higher cost areas and correspondingly lower levels of support in lower cost areas. The companies have reviewed their internal support and operating systems. Disaggregation under this methodology (two areas within a wire center) is relatively easy to administer and track. The information can be supplied to or developed by USAC and can be provided to competitors by USAC or made available to them through other means. The support which is available for porting in each area is uniquely identified by a combination of wire center and CBG.

B. Approval of the Proposed Alternate Methodology for Distribution of Portable Universal Funds Is in the Public Interest.

Competitors should compete for customers, not for universal service support. The need for the variation in support is to avoid potential "cream-skimming." If ETC designation occurs at the exchange level, rather than the study area level, and universal service support is not geographically disaggregated, a competitive ETC could receive a windfall by entering a relatively low cost exchange and receiving average study area support per line. Similarly, a competitive ETC could enter an exchange and receive a windfall for serving mostly customers located near the wire center or suffer losses if the majority of customers subscribing to its services are those at the greatest distances from the wire center. The same problematic situations are avoided for an incumbent that loses customers that are not evenly distributed throughout its service area.

This alternate methodology is in the public interest. It promotes the pro-competitive policies of the Federal Act and the laws and policies of the State of Washington. It also provides an opportunity for the Commission to test a revised methodology, perhaps with an eye to revising the current rules on porting of universal service funds.

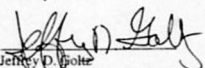


support as described in Appendix E of this petition, and (b) agreement with the calculated support levels which appear in Appendix F of this petition for 1998. The amounts for future years would be determined by applying the methodology described above to total study area support amounts available for those years.

Dated, this 14th day of August, 1998.

Respectfully submitted,

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## APPENDIX A

## APPENDIX B

November 24, 1997

TO: Commissioners Levinson, Gillis and Hemstad  
FROM: Bob Shirley, Regulatory Consultant  
RE: Designation of Eligible Telecommunications Carriers

The Commission will be requested to grant petitions for designation of Eligible Telecommunications Carriers (ETCs) at its November 26, 1997 meeting. At this time, staff is certain that differences of opinion among carriers on some of the decisions inherent in the designation of ETCs will persist and that no completely satisfactory compromise exists. Accordingly, where decisions must be made that are not susceptible of compromise, staff recommends that the guiding principle on which decisions are based be the promotion of competition. In the recommendations at the end of this memo staff has relied on promotion of competition as its guide.

## LAW

### Relevant Sections and FCC Orders

Three subsections of the Telecommunications Act of 1996 guide the designation of ETCs. They are 47 U.S.C. 214(e) and 47 U.S.C. 254(e) and (f). They are in Tabs 1 & 2. Definitions from the Telecommunications Act are in Tab 3.

There is also considerable discussion of designation of ETCs in the Recommended Decision of the Federal-State Joint Board and the Universal Service First Report and Order. Several paragraphs from these documents are reprinted and placed in Tabs 4 & 5.

### The Importance of Designation

Only designated carriers are eligible for *federal*<sup>1</sup> universal service funds. The amount of money involved nationally will eventually be counted in billions of dollars annually. One estimation of the difference between the cost of providing rural service and the revenue paid by rural customers is \$8.7 billion dollars.<sup>2</sup> Those companies which already serve

<sup>1</sup> State universal service programs can differ from the federal program. It is not clear, however, the nature and extent to which they may differ. This issue is addressed in more detail below.

<sup>2</sup> Weinhaus, Carol, "The Shell Game: Options for Universal Service," Telecommunications Industries Analysis Project, Boston, October 2, 1997, p. 2 and n.6, citing Carol Weinhaus, Sandra Makeeff, et al., "What is the Price of Universal Service? Impact of Deaveraging Nationwide Urban/Rural Rates," Presentation at the July, 1993 National Association of Regulatory Utility Commissioners (NARUC) Meeting, San Francisco, CA,

high-cost customers, and those who wish to compete in areas with high-cost customers, will need ETC designation to deliver service at competitive prices and to recoup uncovered costs from universal service funds.

#### Definition of an Eligible Telecommunications Carrier (ETC)

An ETC is a common carrier<sup>1</sup> that meets the requirements of 47 U.S.C. 214(e)(1)<sup>2</sup> to offer the services supported by federal universal service support mechanisms (what we refer to as basic services) and to advertise the availability of those services through media of general distribution.<sup>3</sup> An ETC must be willing to provide basic service to any customer in its service area. The only other attribute of an ETC is that it is associated with a particular geographic service area; state commissions establish service areas.

#### Required Basic Services

ETCs must offer, at a minimum, the FCC list of basic services to qualify as an ETC and receive federal universal service support.<sup>4</sup> The FCC has defined basic services to include: 1) Single-party service; 2) Voice grade access to the public switched network; 3) Support for local usage; 4) Dual tone multi frequency signaling (touch-tone); 5) Access to emergency services (911); 6) Access to operator services; 7) Access to Interexchange services; 8) Access to directory assistance; and 9) Toll limitation services.<sup>5</sup>

If a carrier needs additional time to make network upgrades in order to meet the single party service, enhanced 911 or toll limitation requirements, state commissions are authorized to grant petitions which give additional time for these activities.<sup>6</sup> All the petitions before the Commission request a waiver for toll restriction enhancements. The wireless petitioner has requested a waiver for enhanced 911.

#### Initial State Designations Required by December 31, 1997

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Telecommunications Industries Analysis Project, July 26, 1993, figure 3, page 11.

<sup>1</sup> "Common Carrier" is defined at 47 U.S.C. 153(10) and means "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio..." See Tab 3.

<sup>2</sup> Hereafter, "47 U.S.C." will not be repeated unless necessary to assure proper reference.

<sup>3</sup> Whether or not states can order additional requirements, such as meeting state service quality standards, is an issue in dispute. This will be discussed in the policy section of the memo.

<sup>4</sup> 47 C.F.R. 54.101(b)

<sup>5</sup> 47 C.F.R. 54.101(a)

<sup>6</sup> 47 C.F.R. 54.101(c)



Section 254(e) requires designation as an ETC as a prerequisite to receipt of federal universal service support. The FCC has announced it will make distributions of federal universal support in 1998 only to designated ETCs.<sup>9</sup> States are required by 214(e)(2) to make designations. The Commission must take action prior to December 31, 1997 in order to guarantee the continuation of federal support to those carriers that depend upon this support to meet their revenue requirements.<sup>10</sup>

There are requests for designation by some carriers that do not depend on federal universal service support to meet their revenue requirements. There is no clear deadline by which the Commission must act on these requests for designation, however, competition is promoted when there are numerous ETCs.

#### Commission May Make Designations on Its Own Motion

Section 214(e)(2) permits designation of ETCs on the Commission's own motion. One apparent reason for this authority is to enable state commissions to guarantee that at least one company in every area of the state will be responsible for offering basic service to any customer in need of service. Another possible reason for the authority to designate on the Commission's own motion could be promotion of competition.

#### Rural and Non-Rural Companies Treated Differently

Rural and non-rural companies<sup>11</sup> are treated differently in 214(e) with respect to the number of ETCs designated in a given service area and the size of service areas. In the case of an area served by a non-rural telephone company, state commissions *shall*

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<sup>9</sup> 47 C.F.R. 54.201(a)

<sup>10</sup> The independent companies receive substantial amounts of their annual revenue from federal high-cost support.

<sup>11</sup> Rural Telephone Company is defined in section 3(37) (47 U.S.C. 153(37)). The term "rural telephone company" means a local exchange carrier operating entity to the extent that such entity-

- (A) provides common carrier service to any local exchange carrier study area that does not include either:
  - (i) any incorporated place of 10,000 inhabitants or more, or any part thereof, based on the most recently available population statistics of the Bureau of the Census; or
  - (ii) any territory, incorporated or unincorporated, included in a urbanized area, as defined by the Bureau of the Census as of August 10, 1993;
- (B) provides telephone exchange service, including exchange access, to fewer than 50,000 access lines;
- (C) provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or
- (D) has less than 15 percent of its access lines in communities of more than 50,000 on the date of enactment of the Telecommunications Act of 1996.



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the case of an area served by a rural carrier, however, 214(c)(5) defines the service area as the carrier's "study area"<sup>15</sup> unless the Commission and the FCC<sup>16</sup> establish a different definition of service area. In establishing a service area different than the study area, the Commission must "take into account" the recommendations of the Federal-State Joint Board.

The "take into account" language concerning the recommendations of the Federal-State Joint Board is significant because in the policy and recommendations section of this memo staff will suggest taking actions on service area designation which are different than the positions taken by the Joint-Board. There are no decisions interpreting this section; however, I found decisions addressing similar issues. In general, decisions made by agencies which require that the agency interpret statute and examine certain issues are reviewed under the analysis established in the *Overton Park* and *Chevron* line of cases.<sup>17</sup> The interpretation of the statute must be reasonable and great deference is given to agencies. An analysis and determination is not arbitrary or capricious if the agency examines the relevant information and articulates a satisfactory explanation for its action.

The D.C. circuit examined the meaning of "take into account" in *Huls America Inc. v. Browner*, 83 F.3d 445 (D.C. Cir. 1996) (affirming the district court) (Complete case in Tab 8). It is not precisely on point because the statute involved a list of several things to be taken into account and the list contained the disjunctive "or." The main focus was on whether the EPA could base its decision on only one criterion from the list. The Court determined the statute was ambiguous and then under *Chevron* determined the EPA's interpretation that it could focus on only one factor was permissible.<sup>18</sup> The Court then examined the manner in which EPA applied this criterion and conclude that this inquiry for arbitrariness or capriciousness was narrow and that "we review only to ensure that the agency examined the relevant data and articulated a satisfactory explanation for its action and will not substitute our judgment for that of the agency." (*Huls* at 452) (citation

<sup>15</sup> A "study area" is generally an incumbent LEC's pre-existing service area in a given state. The study area boundaries are fixed as of November 15, 1984. MTS and WATS Market Structure: Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, Decision and Order, 50 Fed. Reg. 939 (1985).

<sup>16</sup> The FCC has established a procedure for reviewing state orders which make designations of areas other than the study area as the service area. Its procedure anticipates that initial action will be taken by the states; designations are deemed approved if the FCC does not act within 90 days of noticing the receipt of the state order. See 47 C.F.R. 54.207.

<sup>17</sup> These are federal cases; the first review of the Commission's orders will be by the FCC. Washington cases are referred to in footnotes.

<sup>18</sup> Washington's approach is similar, if not identical. "This deference to an agency's interpretation of a statute will be given only when a statute is ambiguous." *ARCO v. Utils. & Transp. Comm'n*, 125 Wn.2d 805, 810 (citing *Waste Mgt. of Seattle, Inc. v. Utils. & Transp. Comm'n*, 123 Wn.2d 621, 628). Complete case in Tab 10.

omitted)" Applying this standard, the Court determined that while there were several ways to measure the criterion (toxicity of a chemical compound in this case) and that "EPA's discussion of the evidence...is certainly of less than ideal clarity, its comments are sufficient for us to discern its rationale for denying delisting." (Huls at 454.)

Attorneys for some companies and an association of providers have suggested that "take into account" essentially means the Commission must follow the recommendations of the Joint Board; alternatively, it could be fairly interpreted to mean the commission must consider the recommendations and either follow them in whole or in part, or deviate from them entirely. Following *Chevron* and *Huls*, the statute is ambiguous and the Commission's interpretation need only be reasonable and great deference must be given to the agency. If the Commission determines that the reasonable interpretation is that it need not follow the recommendations, it must then examine the relevant material (e.g. the Joint Board recommendations and the FCC Report and Order) and "articulate a satisfactory explanation for its action." (Huls at 452) (citation omitted).<sup>20</sup>

#### Additional State Requirements for ETCs--Service Quality Standards

The language of 214(e) lists only two requirements for ETCs: that they be willing to provide basic service to any customer in a geographic service area and that they advertise the availability of this basic service. The FCC has concluded that states do not have the authority to adopt additional criteria for designation as an ETC.<sup>21</sup> The FCC reaches this conclusion only by examining 214(e); it does not also examine 254(f). States may, under 254(f), "adopt...additional definitions and standards to preserve and advance universal service."<sup>22</sup> These definitions or standards, however, must not have the effect of setting up

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<sup>19</sup> "Both the "substantial evidence" and the "arbitrary and capricious" standards are highly deferential. As we have stated previously, "[w]e will not set aside a discretionary decision absent a clear showing of abuse." *ARCO* at 812 (citing *Jensen v. Department of Ecology*, 102 Wn.2d 109, 113)

<sup>20</sup> In *ARCO*, speaking of a method to determine reasonableness rather than an interpretation, the court states: "It should be pointed out that the evidence need not support the contention that the approved method is the most just and reasonable. It may very well be that the method proposed by Respondents, and rejected by the Commission, is just and reasonable. There may in fact be many different methods that would meet the standard. We need only decide, however, whether the record can support the Commission's determination that the approved method is one of these." *ARCO* at 814 (emphasis in original). By analogy, the Commission's interpretation and application of "take into account" need only be one of any number of reasonable interpretations and applications.

<sup>21</sup> ¶ 135. First Report and Order, In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45 (May 8, 1997).

<sup>22</sup> The complete text of 254(f) is in Tab 2. The sentence from which this is excerpted is ambiguous in that it could refer only to collection and disbursement of funds or, as is suggested, it is authority to provide for standards which ETCs must meet in order to be eligible to receive universal service support. The latter is reasonable and under *Chevron* could be determined a permissible construction.



254(f) permitting adoption of additional standards and definitions is very broad and should support suspension and revocation. Staff's recommendation is that all orders contain a paragraph which states that ETC designation may, after notice and an opportunity to be heard, may be either suspended or revoked by the Commission.

#### Severability

The final orders for these designations may contain some findings, conclusions and ordering clauses which may be contested by some of the designees. Where there is a deviation from the study area designation, there will be a review by the FCC which may agree or disagree with the state's approach. I recommend that each final order contain a severability clause so that if one part of the order is challenged and invalidated (the requirement for meeting service quality standards, for example), the remainder of the order will be in force.

### **POLICY**

#### Promotion of Competition

Universal service support will be made available to companies serving customers in high-cost locations to preserve those customers' participation on the network and to advance universal service through competition that will eventually result in lower prices. Payments to companies serving high-cost customer locations is necessary to maintain incumbent service in those areas as well as to induce competition from other carriers.

Because only ETCs are eligible for federal<sup>26</sup> universal service support, it is important to designate as many carriers as possible to foster competition in high-cost locations. Promotion of competition as a policy principle naturally leads to a policy of designating any qualifying carrier that petitions. It might also lead to situations in which the Commission would act on its own motion to designate a qualifying, but not petitioning, carrier.

#### Exchange Level Service Areas

Staff recommends designation of ETCs at the exchange level rather than the study area level. The purpose is to promote competitive entry by making it easier for new entrants to get started in relatively small areas and for competing carriers to align their ETC service areas with their own service areas.

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<sup>26</sup> The draft report to the Legislature on universal service and staff work leading up to ETC designations has assumed that the state universal service mechanisms which will eventually be adopted in Washington will not be substantially different than the federal mechanisms.

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A study area is composed of all of a companies exchanges. The USWC study area, for example, is very large, as is that of GTE, Sprint/United and PTL. Because designation requires an ability and willingness to serve all potential customers in a service area, to designate at the study area would require new entrants to take on service expectations for hundreds of square miles of territory and up to two million customers in the case of USWC. It would be unlikely that a new entrant could compete on such a large scale; it would be nearly impossible for a cable operator or a wireless company to have the ability to serve such large areas.

The use of exchange-level boundaries (the smallest geographical units available to us at this time) will also result in more targeted universal service support. Support will go to companies that serve high-cost customer locations in those exchanges which have high average loop costs.<sup>27</sup> Support will be available to incumbents and new entrants; the amount of support will be directly proportional to the number of customers served through a carrier's facilities, unbundled network elements, resale, or a combination of the three. Cream-skimming is discouraged by maintaining the requirement to serve all potential customers--incumbents and new entrants alike will have to advertise to high-cost as well as low-cost customers and then serve whoever requests their service. Smaller units of geographic area should be used when it becomes feasible to do so in order to target universal service funds more narrowly and reduce the over-all size of the fund.

Several smaller "independent" companies have objected to the staffs recommendation that rural company study areas not be used and that their service areas, like those of larger companies, should be designated at the exchange level. They refer to the recommendations of the Joint Board and the FCC Universal Service Order for support. (The relevant paragraphs are reprinted in whole in Tabs 4 & 5. The Joint Board concluded that maintaining the larger study areas would reduce cream skimming and is in line with present small-company accounting based on embedded costs. (§ 172-74). At the same time, the Joint Board recommended that non-rural company service areas be designated at least at the exchange level, and even suggested that the FCC should take action to disregard any state decision to make service area designations which are large in size. (§ 175-78). When read in their entirety, staff concludes that the reasons suggested for small unit designation of non-rural company service areas are equally persuasive for areas served by rural companies.

The treatment of all companies in a like manner will also prevent the occurrence of anomalous results which would seem to be unfair. The Moses Lake exchange, presently served by USWC, will be open to competition without a new entrant ETC having to take

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<sup>27</sup> This approach is the one recommended to the Legislature in the Draft USF report.

on any additional high-cost territory than that which is already associated with the exchange. Indeed, a new entrant could eschew ETC status, request interconnection and serve only downtown Moses Lake. Fifty miles west, however, a would-be new entrant ETC would have to serve all potential customers in the Ellensburg, Thorp, Selah, Kittitas, and Vantage exchanges. Entry into Ellensburg without ETC status would depend on Commission waiver of the interconnection exemption afforded small companies.

Another example of odd circumstances which can occur if study areas are not broken up into exchange-level service areas is presented by Inland Telephone. Inland serves Colton, Johnson, and Uniontown (all in Whitman County), Prescott (in Walla Walla County), Roslyn (in Kittitas County) and Dewatto and Toonerville (in Mason County). If their study area is maintained as their service area, a potential ETC competitor would have to be willing to serve any potential customer in four different areas spread across the state. PTI and, to a lesser extent, Sprint/United, are similarly dispersed across the state.

Companies with non-contiguous exchanges, such as those described above, present a particular problem for would-be wireless competitors. Wireless companies do not generally span such broad areas as an entire state. While the Joint Board did not recognize this problem, the FCC did and concluded that non-contiguous study areas should be broken up into smaller service areas. (See Tab 5, ¶ 190).

#### Multiple ETC Designation Is in the Public Interest

Where the subject of competition is concerned, the public interest in Washington is defined by RCW 80.36.300\* and *In re Electric Lightwave Inc.*. As explained in the first section of this memo, other states may have the option of not hearing a petition from a competitor asking to be designated along with an incumbent in a rural service area. In Washington, however, the decision in ELI strongly suggests that such a petition must be heard and, if the petitioner meets the requirements for an ETC, granted. However, the case can be made on policy grounds alone that it is in the public interest to designate all qualified petitioners for both non-rural and rural service areas alike.

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\* 80.36.30 Policy declaration. The legislature declares it is the policy of the state to:

- (1) Preserve affordable universal telecommunications service;
- (2) Maintain and advance the efficiency and availability of telecommunications service;
- (3) Ensure that customers pay only reasonable charges for telecommunications service;
- (4) Ensure that rates for noncompetitive telecommunications services do not subsidize the competitive ventures of regulated telecommunications companies;
- (5) Promote diversity in the supply of telecommunications services and products in telecommunications markets throughout the state; and
- (6) Permit flexible regulation of competitive telecommunications companies and services. [1985 c



Implicit universal service supports are substantial in high-cost areas served by so-called rural and non-rural companies alike.<sup>29</sup> There appear to be two ways to attempt to reduce the level of support, through competition or regulation. Regulation has not reduced supports in the recent past and it is not the option presently in favor. Competition, on the other hand, should result in cost-cutting and other efficiencies.

Consumer choice and service quality are additional policy grounds for promoting competition through designation of all qualifying ETC petitioners.<sup>30</sup> Competition is expected to give many urban dwellers and businesses a choice of carriers. Their ability to choose, and choose again, is a strong force exerted on the market that ensures efficient cost-cutting and high-quality service. Designation of additional ETCs in areas served by so-called rural companies means customer choice will expand to areas which often see such choices only long after they have arrived in urban areas.

#### Delayed Effect of Exchange-Level Service Area Designations

Staff will recommend that the designation of service areas at the exchange level for rural companies be delayed to give the FCC an opportunity to apply their procedure for review of such state decisions. This is in response to a concern expressed by WITA that it might be problematic if those designations were effective on January 1, 1998 and the FCC subsequently were to take issue with them. Here are the effective dates we will recommend (including the non-rural companies):

#### Non-Rural Companies and new Competitors

USWC	Designations at exchange level effective 1/1/98
GTE	Designations at exchange level effective 1/1/98
US Cellular	Designations at exchange level effective 1/1/98

#### Single-Exchange Rural Companies

Hat Island	Designation at exchange level effective 1/1/98
Hood Canal	Designation at exchange level effective 1/1/98

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<sup>29</sup> So-called high-cost companies may receive as much as 60% of total revenues from federal and state programs today. Many rural areas served by non-rural companies receive substantial support through price-averaging.

<sup>30</sup> See Additional State Requirements For ETCs, above, for legal support.

Mashel	Designation at exchange level effective 1/1/98
Kalama	Designation at exchange level effective 1/1/98
Toledo	Designation at exchange level effective 1/1/98
St. John	Designation at exchange level effective 1/1/98

### Large Multi-Exchange Rural Companies

PTI	Designation at study area level 1/1/98; At exchange level 4/1/98
Sprint/United	Designation at study area level 1/1/98; At exchange level 4/1/98

### Small Multi-Exchange Rural Companies<sup>11</sup>

Asotin (TDS)	Designation at study area level 1/1/98; At exchange level 7/1/98
Cowiche	Designation at study area level 1/1/98; At exchange level 7/1/98
Ellensburg	Designation at study area level 1/1/98; At exchange level 7/1/98
Inland	Designation at study area level 1/1/98; At exchange level 7/1/98
Lewis River(TDS)	Designation at study area level 1/1/98; At exchange level 7/1/98
McDaniel (TDS)	Designation at study area level 1/1/98; At exchange level 7/1/98
Pend Oreille	Designation at study area level 1/1/98; At exchange level 7/1/98
Pioneer	Designation at study area level 1/1/98; At exchange level 7/1/98
Tenino	Designation at study area level 1/1/98; At exchange level 7/1/98
West. Wahkiakum	Designation at study area level 1/1/98; At exchange level 7/1/98

<sup>31</sup> In some instances, these companies may have some exchanges that are separate in name only. Adjoining exchanges may be part of a single calling area and even served out of a common central office. Companies may wish to eliminate these historically derived boundaries, either before or after 7/1/98. Staff believes these adjustments would be reasonable unless they appear to unfairly hinder competition.

Whidbey Island      Designation at study area level 1/1/98; At exchange level 7/1/98

Yelm                  Designation at study area level 1/1/98; At exchange level 7/1/98

Whidbey Telephone Company

Whidbey Island has petitioned to have the Commission state in its order that it does not object to inclusion of the company's Supplemental Service Area (SSA) in the company's study area. If the Commission does this and the FCC amends the study area, then Whidbey will be eligible to receive universal service support for serving customers for which it has not received support in the past.

The history is not convoluted, but is also not clear. Historically, no exchange boundaries have overlapped and that was so at least until 1995 when Whidbey filed a new service exchange map which appeared to have a boundary approximately three miles farther north than had been the case.

GTE, which operates in the Coupeville exchange to the north protested the filing, but in their protest they said the filing "proposes to extend WTC's [Whidbey Telephone Company] exchange into presubscribed service territory of GTE..." Their initial filing in UT-950277, wherein they complained of the Commissions acceptance of the SSA tariff filing, GTE referred to Whidbey's territory as "including a portion of WTC's South Whidbey Exchange designated a Supplemental Service Area (the SSA)." Twice they refer to the SSA as part of the South Whidbey Exchange, but now they say it is in the Coupeville exchange and always has been.

Throughout the year of wrangling which went on and since the order in UT-950277, GTE has never changed its Coupeville exchange map. By that map, the SSA is indeed in the Coupeville exchange as well. The order in UT-950277 indicates in a statement in the "Background" section that the two exchanges overlap. "The SSA is a portion of WTC's South Whidbey Exchange which overlaps a portion of GTE's Coupeville exchange."

The policy that staff has recommended is that all filings be for complete exchange areas; inequities will result if companies can file for only portions of a service area (that is, exchange). Is Whidbey filing for a portion of the Coupeville exchange? Is GTE filing for a portion of the South Whidbey exchange?

The solution staff recommends relies on looking deeper into the exchange map filing. The January 10, 1995 filing contains a map with a key that refers to the supplemental area with boundaries marked by an "s" and to the exchange boundaries marked with an "e". The area in dispute is marked "e/s", for which there is no reference in the key. In the letter accompanying the filing dated January 10, 1995 and signed by David C. Henney,

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President and General Manager, he states: this tariff revision is being made for the purpose of establishing a Supplemental Service Area in the area that is north of the Company's existing South Whidbey Exchange boundary." He does not say that he is extending the boundary; rather, he seeks to create something new, an SSA.

The recommendation of the staff is that the Commission find that the South Whidbey exchange is bounded by the southern boundary of the Coupeville exchange; that the tariff filed in 95-0030 did not establish a new northern boundary of the South Whidbey exchange<sup>22</sup>; that Whidbey is designated an ETC for the South Whidbey exchange; that the SSA continues but that it is not recognized by the Commission for any universal service or similar support calculations; and that GTE may count those customers it has, if any, in the SSA as customers of the Coupeville exchange and that they have been so before and since the effective date of Whidbey's 95-0030 filing.<sup>23</sup>

#### Entry of Wireless

The petition by US Cellular, a wireless carrier, for ETC status in the USWC exchanges of Centralia, Chehalis, Winlock, Castle Rock, Yakima and Pasco and the GTE exchanges of Woodland, George and Quincy, is the first instance of a non-wireline carrier seeking designation in Washington.

Staff recommends approval of their ETC petition and designation in each of the several exchanges. We recommend this because they have filed in non-rural exchanges and because they can provide basic service to all potential customers in these exchanges. This is the same standard we have applied to all the petitions.

At the same time, we recognize there may be some issues unique to wireless which may present themselves. Staff recommends that the best way to get these issues on the table and resolved is to approve the petitions. This gives us one year to grapple with the issues prior to state and federal dollars being at stake for this particular cellular company and the incumbents who presently serve the exchanges for which the petition seeks designation.

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<sup>22</sup> If necessary, include a finding that the reference to overlapping exchange boundaries in the "Background" section of the Fifth Supplemental Order in UT-950277 was *dicta*.

<sup>23</sup> Neither company responded positively to staffs question about the possibility that they each file for ETC designation in the "other's" exchange.

APPENDIX C

September 10, 1997

TO: Commissioner Gillis

FROM: Bob Shirley, Regulatory Consultant

RE: Answers to Questions Related to Designation of Eligible Telecommunications Carriers for Purposes of Universal Service Funding and Additional Information on Service Area Definitions

The questions below are the one's you asked via e-mail on September 3. References to the Act and Orders are noted in the text; footnotes are used for explanation.

**1. Are the decisions to grant Eligible Telecommunication Carrier (ETC) status and the decision to grant a rural exemption the same?**

No, these decisions are not the same, but they do affect the nature and level of competition in areas served by rural telephone companies.<sup>1</sup> The designation of ETCs relates to eligibility for universal service funds and a resulting obligation to serve all customers in the ETC's service area, while the rural exemption is an exemption granted to rural telephone companies from the obligation to interconnect with competitors.

Designation of ETCs

Designation as an Eligible Telecommunications Carrier (ETC) will be the predicate to receiving universal service funds from the federal government through the so-called NECA process (36 C.F.R. 601 et seq.)<sup>2</sup> beginning January 1, 1998. State commissions are

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<sup>1</sup> Rural Telephone Company is defined in section 3(37) (47 U.S.C. 153(37)):

The term "rural telephone company" means a local exchange carrier operating entity to the extent that such entity-

(A) provides common carrier service to any local exchange carrier study area that does not include either-

(i) any incorporated place of 10,000 inhabitants or more, or any part thereof, based on the most recently available population statistics of the Bureau of the Census; or

(ii) any territory, incorporated or unincorporated, included in a urbanized area, as defined by the Bureau of the Census as of August 10, 1993;

(B) provides telephone exchange service, including exchange access, to fewer than 50,000 access lines;

(C) provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or

(D) has less than 15 percent of its access lines in communities of more than 50,000 on the date of enactment of the Telecommunications Act of 1996.

<sup>2</sup> NECA stands for National Exchange Carrier Association, which has been the administrator of the federal universal service fund.

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responsible for designation of ETCs; they may do this on their own motion or upon request of a carrier. 47 U.S.C. 214(e)(2). States are not required to designate more than one ETC in areas served by rural telephone companies; they must designate two or more ETCs in all other areas, "so long as each requesting carrier meets the requirements of paragraph [47 U.S.C. 214(e)](1)." 47 U.S.C. 214(e)(2). In order for a state to designate an additional carrier as an ETC in an area served by a rural telephone company, the state must find that it is "in the public interest" to do so. 47 U.S.C. 214(e)(2).

A designated ETC must agree to provide the services<sup>3</sup> supported by federal universal service funds and advertise the availability of their services. 47 U.S.C. 214(e)(1).<sup>4</sup> The service may be supplied using "its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier)."<sup>5</sup> 47 U.S.C. 214(e)(1)(A) (emphasis added).

#### Rural Exemption from Interconnection Requirements

Rural exemptions to the interconnection requirements are not tied to ETC status and are not made, initially, by state commissions. Interconnection requirements are governed by section 251 of the act. All local exchange carriers (LECs) have a duty to interconnect with other carriers and to not install network features which would frustrate interconnectivity or interfere with access by persons with disabilities. 47 U.S.C. 251(a). All LECs have an obligation to provide resale, number portability, dialing parity, access to rights-of-way, and to establish reciprocal compensation agreements. 47 U.S.C. 251(b).

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<sup>3</sup> The FCC defined basic service in its Universal Service Order. Paragraphs 62 through 82 define those services. They are: 1) Single party service; 2) Voice grade access to the public switched network; 3) Support for local usage; 4) Dial tone multi frequency signaling; 5) Access to emergency services (911); 6) Access to operator services; 7) Access to Interexchange services; 8) Access to directory assistance and white pages directories, and; 9) Toll limitation services. ¶ 62-82, First Report and Order, In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45 (May 8, 1997).

<sup>4</sup> The FCC has concluded that neither they nor the states may add requirements beyond the two found in 214(e)(1). ¶ 137, First Report and Order, In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45 (May 8, 1997). At the same time, the FCC has concluded that states may adopt regulations to define the advertising requirement. See ¶ 148.

<sup>5</sup> The FCC has concluded that carrier must be able to serve all potential customers in a service area, but may do so with its own facilities or by combining its facilities with those of another carrier. This is important for wireless carriers in particular. The FCC has concluded wireless carriers are eligible to be designated as ETCs provided they have the ability to serve all potential customers in a service area, which they may accomplish through combining their services with land line services of another carrier. ¶ 141 & ¶ 145, First Report and Order, In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45 (May 8, 1997).

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Additional obligations are placed on incumbent local exchange carriers (ILECs).<sup>6</sup> The ILECs are required to negotiate in good faith the agreements required by 251(b), provide convenient interconnection, provide nondiscriminatory access to unbundled network elements, offer services for resale at wholesale rates, give reasonable notice of changes that will affect interoperability and to provide for physical collocation of equipment from other LECs. 47 U.S.C. 251(c).<sup>7</sup> The exemption enjoyed by rural telephone companies is from these last six requirements placed on all ILECs. 47 U.S.C. 251(f). This exemption, however, is subject to termination by states. 47 U.S.C. 251(f)(1)(B). When in receipt of a notice from a party that it has made a "bona fide" request of a rural telephone company for interconnection, the state commission must make an inquiry and terminate the exemption if it finds the request for interconnection is not unduly economically burdensome, is technically feasible and is consistent with section 254 (governing universal service).<sup>8</sup> This commission terminated the exemption for GTE with respect to the former Contel exchanges.<sup>9</sup>

**2. Will the Act allow a rural ILEC to be designated an ETC but still open to the possibility of competition (either of the interconnected unbundled element or facilities based variety)?**

Yes, a rural ILEC designated as an ETC may face competition. Competition could come as a result of designation of a competitive local exchange carrier (CLEC) as a second ETC in an area served by a rural telephone company, through a finding that the interconnection exemption is no longer warranted and that the rural ILEC must lease unbundled elements to a CLEC, or through facilities based competition. CLEC competition through interconnection without ETC designation and facilities based competition would not result in eligibility to receive universal service funds nor the obligation to serve all customers in the service area.

<sup>6</sup> ILEC is defined in § 251(h) as providing service on the date of enactment of the 1996 Telecommunications act and membership in the exchange carrier association in accordance with 47 C.F.R. 69.601... 47 U.S.C. 251(h)

<sup>7</sup> Rural carriers may petition their state commission for a suspension or modification of the requirements of subsections (b) or (c) to avoid significant adverse economic impacts, to avoid unduly economically burdensome requirements and to promote the public interest. §251(f)(2).

<sup>8</sup> The FCC rule which placed a burden of proof on the rural telephone company to show that it is entitled to the continued exemption was vacated by the United States Court of Appeals for the Eighth Circuit. See *Iowa Utilities Board v. FCC*, slip opinion at <http://ls.wustl.edu/8th.cir> (July 18, 1997) vacating, *inter alia*, 47 C.F.R. 51.405.

<sup>9</sup> The termination was not based on a finding under 47 U.S.C. 251(f), but on a finding that GTE should be estopped from claiming the exemption after it had entered into interconnection negotiations pursuant to 47 U.S.C. 251(c). WUTC Docket UT-960324, Second Supp. Order (Dec. 11, 1996).



In order for the commission to designate a second ETC in an area served by a rural telephone company the commission must make a finding that the second designation is in the public interest. 47 U.S.C. 214(c)(2). The second carrier must meet the obligation to serve all customers who request their service and advertise the availability of their service. Only designation as an ETC entitles a carrier to federal universal service funds.<sup>10</sup>

3. Does the Act preclude a carrier designated as an ETC from competing in a territory of a carrier not designated as an ETC (e.g. Whidby into GTE territory)? How about an ETC competing directly within another ETC carrier?

No, an ETC may compete in other areas, both against ETCs and non-ETCs, and, where two or more ETCs have been designated for a particular service area, there must be competition. The one restriction is that a telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition. 47 U.S.C. 254(k). In the case of Whidby competing with GTE, the restriction would be that costs associated with competitive services provided through Whidby Islands facilities would have to be assigned in such a way that they were not supported by universal service funds.

4. Are ETC designated carriers assigned regions that are noncompetitive, at least for a period of time?

No, these are not "noncompetitive areas"; it is better to think of ETCs in terms of the obligation to serve all customers in exchange for eligibility to draw on universal service funds. As a practical matter, however, the combination of designation as an ETC in a rural area coupled with the exemption from interconnection and the FCC's intention to permit rural telephone companies to receive federal universal service fund support based

<sup>10</sup> The ETC designation is a requirement for federal universal service funds; it is not a requirement for state universal service funds. States are free to develop (or revise in the case of Washington) their own universal service program so long as their program "is not inconsistent" with FCC rules. 47 U.S.C. 254(f). Section 254 also includes a requirement that all carriers contribute to the state universal service fund in a non-discriminatory basis. Also, "[a] state may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that state only to the extent that such regulations adopt additional specific, predictable and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms." (Emphasis added). The Federal-State Joint Board quoted the Joint Explanatory Statement of the Committee on Conference to underscore state jurisdiction and authority. "Section 254(f) was intended to preserve state authority over universal service matters within certain parameters. Indeed, the Joint Explanatory Statement states that '[s]tate authority with respect to universal service is specifically preserved under new section 254(f).'" ¶ 819, Recommended Decision, In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45 (November 8, 1996) quoting Joint Explanatory Statement at 132.

upon embedded costs through 2000,<sup>11</sup> may result in some companies facing no competition in their service area for some years to come.

**5a. Are there implications associated with the fact that Washington does not have franchises?**

The lack of exclusive franchises for telecommunications companies in Washington will not inhibit designation of ETCs and definition of their service areas. The service areas associated with ETCs will not be exclusive service territories; the service areas define the area in which an ETC must serve customers.<sup>12</sup> Non-ETC companies may compete for any or all customers in those same areas, but the competitors will not receive universal service funds for serving high-cost customers unless they request and are awarded ETC status.

**5b. Do we want to presume that rural carriers that we choose to be ETCs should also be supported as natural monopolies as a matter of policy?**

The exemption from interconnection is more closely associated with monopoly power than is the ETC designation. In a situation where the Commission terminates the interconnection exemption of a rural telephone company, they may well face competition from non-ETC companies.

### **Additional Information on Service Area Definition**

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<sup>11</sup> The FCC does not intend to move rural telephone companies to a forward-looking economic cost mechanism for determining the necessary level of universal service support until after non-rural carriers begin using forward-looking economic cost mechanisms. The Universal Service Order states:

Consistent with our plan for non-rural carriers, we shall commence a proceeding by October 1998 to establish forward-looking economic cost mechanisms for rural carriers. Although a precise means of determining forward-looking economic cost for non-rural carriers will be prescribed by August 1998 and will take effect on January 1, 1999, rural carriers will begin receiving support pursuant to support mechanisms incorporating forward-looking economic cost principles only when we have sufficient validation that forward-looking support mechanisms for rural carriers produce results that are sufficient and predictable. Consistent with the Joint Board's recommendation that mechanisms for determining support for rural carriers incorporate forward-looking cost principles, rather than embedded cost, we will work closely with the Joint Board, state commissions, and interested parties to develop support mechanisms that satisfy these principles. See ¶ 252, First Report and Order, In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45 (May 8, 1997).

<sup>12</sup> "Our interpretation of RCW 80.36.230 enables the Commission to define the geographical limits of a company's obligation to provide service on demand and to delineate the boundaries between local and long distance calling." *In re Electric Lightwave, Inc.*, 123 Wn.2d 530, 537.

As important a factor as designation of ETCs is to maintaining available and affordable service for all customers, the definition of the company service areas may be the most important factor in promoting fair competition. The service area is the area in which an ETC must serve all customers. Competitive entry will be affected by the size and nature of service areas. For both non-ETC competitors and those seeking status as an additional ETC for a given service area, a large service area with many high-cost customers in relation to the total customer base will not be as attractive as will be a service area with fewer high-cost customers in relation to the total potential customers. Commission designation of service area boundaries will have a substantial effect on the level of competition which develops and whether it develops uniformly or in limited locations.

The definition of service area is addressed in the Act with states and the FCC each given a role. States are to establish service areas. In the case of rural telephone companies, however, the Act states that "service areas means such company's 'study areas'<sup>13</sup> unless and until the [FCC] and the States, taking into account recommendations of a Federal-State Joint Board...establish a different definition of service area for such company." 47 U.S.C. 214(e)(5).

The Joint-Board has recommended that rural telephone company service areas not be changed at the present time,<sup>14</sup> but they did recommend that service areas for non-rural companies be reduced in size to promote competition.<sup>15</sup> The FCC has adopted this recommendation<sup>16</sup> and established regulations for review of state decisions to vary from this recommendation.<sup>17</sup> Both acted from a view that the Act places rural telephone

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<sup>13</sup> A "study area" is generally an incumbent LEC's pre-existing service area in a given state. The study area boundaries are fixed as of November 15, 1984. MTS and WATS Market Structure: Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, Decision and Order, 50 Fed. Reg. 939 (1985).

<sup>14</sup> ¶ 172, Recommended Decision, In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45 (November 8, 1996).

<sup>15</sup> "The Joint Board thus recommends that the Commission urge the states to designate service areas for non-rural telephone company areas that are of sufficiently small geographic scope to permit efficient targeting of high cost support and to facilitate entry by competing carriers." ¶ 175, Recommended Decision, In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45 (November 8, 1996).

<sup>16</sup> ¶ 189, First Report and Order, In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45 (May 8, 1997). But see ¶ 190 in which the FCC concludes universal service policies will be best served if states adopt only contiguous exchanges of rural telephone companies as their service areas. To do otherwise, the FCC concluded, might present serious barriers to entry, particularly for wireless companies.

<sup>17</sup> 47 C.F.R. 54.207. The process requires states to forward a copy of their order and rationale for changing a service area of a rural telephone company to the FCC, which will provide notice of the petition within fourteen days and act on the petition within 90 days. The service area does not take effect until the FCC acts or until 90 days

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companies on "a different competitive footing" than non-rural companies as evidenced by the exemption from interconnection, unbundling and resale requirements.<sup>18</sup>

Notwithstanding the recommendations of the Joint Board and their adoption by the FCC, your staff is considering a recommendation that service areas for ETCs, both rural and others, be set initially at the exchange level. This consideration of exchange-level boundaries is as a result of the Joint Board's own discussion. The paragraphs quoted below appear to support smaller service areas generally, more so than they appear to support the status quo for rural telephone companies and smaller service areas only for non-rural companies.

176. We recommend that the Commission encourage states, where appropriate to foster competition, to designate service areas that do not disadvantage new entrants. Consequently, we recommend that the geographic size of the state designated service areas should not be unreasonably large. An unreasonably large area may deter entry because fewer competitors may be able to cover start-up costs that increase as the size of the area they must serve increases. This would be especially true if the states adopt as the service area the existing study areas of larger local exchange companies, such as the BOCs [Bell Operating Companies], which usually include most of the geographic area of a state, urban as well as rural. Additionally, if states simply structure service areas to fit the contours of an incumbent's facilities, a new entrant, especially a CMRS [Commercial Mobile Radio Service]-based provider, might find it difficult to conform its signal or service area to the precise contours of the incumbent's area.

177. We note that state adoption of unreasonably large service areas could potentially violate section 254(f), which prohibits states from adopting regulations that are "inconsistent with the Commission's rules to preserve and advance universal service."<sup>19</sup> State designation of an unreasonably large service area could also implicate section 253 if it "prohibit[s] or ha[s] the effect of prohibiting the ability of an entity to

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have passed without action, in which case the petition is deemed approved.

<sup>18</sup> This is the view expressed by the Joint Board and adopted by the FCC. See ¶ 173, Recommended Decision, In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45 (November 8, 1996).

<sup>19</sup> 47 U.S.C. § 254(f).

provide any interstate or intrastate telecommunications service,"<sup>20</sup> and is not "competitively neutral" and "necessary to preserve and advance universal service."<sup>21</sup>

178. Even if the state commission were to designate a large service area, however, we believe that it would be consistent with the 1996 Act to base the actual level of support, if any, that non-rural telephone company carriers would receive for the service area on the costs to provide service in sub-units of that area. We recommend that the Commission, where necessary to permit efficient targeting of universal support, establish the level of universal service support based on areas that may be smaller than the service area designated by the state. The service area designated by the state is the geographic area used for "the purpose of determining universal support obligations and support mechanisms."<sup>22</sup> We find that this language refers to the designation of the area throughout which a carrier is obligated to offer and advertise universal service. It defines the overall area for which the carrier will receive support from the "specific, predictable, and sufficient mechanism established by the Commission to preserve and advance universal service."<sup>23</sup> We conclude that this language would not bar the Commission from disaggregating the state-designated service area into smaller areas in order to: (1) identify high cost areas within the service area; and (2) determine the level of support payments that a carrier would receive for the overall service area based on the sum of the support levels as determined by the costs of serving each of the disaggregated areas (Emphasis added; footnotes appear in original text.)

Rural telephone companies are protected from competition not by designation as ETCs or by the size of their service areas. They are protected from competition by the exemption from interconnection. That exemption is subject to removal by a decision of the commission on a case-by-case basis. Any such decision, however, would be rendered far less significant if states cannot define service areas for rural telephone companies which, after interconnection is approved, are of a size that would promote competition.

There is work yet to be done on service area definition. There are already meetings

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<sup>20</sup> 47 U.S.C. § 253(a).

<sup>21</sup> 47 U.S.C. § 253(b).

<sup>22</sup> 47 U.S.C. § 214(e)(5).

<sup>23</sup> 47 U.S.C. § 254(d).

I, Kristie Lyngstad, hereby certify that on the 1<sup>st</sup> day of October, 1998, I mailed by United States mail, first class postage prepaid, one original and 10 copies of the INITIAL BRIEF OF DAKOTA TELECOM, INC. and APPENDIX 1 to:

Michael J. Bradley  
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4800 Norwest Center  
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Minneapolis, MN 55402-4129

Kristie Lyngstad  
Kristie Lyngstad

# SDITC

South Dakota Independent  
Telephone Coalition, Inc.

October 19, 1998

William Bullard, Jr.  
Executive Director  
South Dakota Public Utilities Commission  
500 East Capitol Avenue  
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Richard D. Coit  
Executive Director  
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RECEIVED

OCT 19 1998

SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION

RE: Docket TC98-111 (Dakota Telecom, Inc. Application for ETC Status)

Dear Bill:

Enclosed for filing with the Commission are the original and 10 copies of SDITC's Reply Brief in the above referenced docket.

Please distribute this Petition to the Commission and Staff as necessary.

Thank you for your assistance.

Sincerely,



Richard D. Coit  
Executive Director and  
General Counsel

cc: William P. Heaston  
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OCT 19 1998

SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION

DOCKET TC98-111

## REPLY BRIEF

### REPLY BRIEF OF FORT RANDALL AND SDITC

This Reply Brief is submitted on behalf of Fort Randall Telephone Company ("Fort Randall") and the South Dakota Independent Telephone Coalition ("SDITC") in response to the initial brief of Dakota Telecom, Inc. ("DTI") requesting that it be granted eligible telecommunications carrier ("ETC") status in the Centerville and Viborg exchanges. Fort Randall's and SDITC's Pre-hearing Brief anticipated many of the issues raised by DTI, and those discussions will not be repeated in this Reply.

## 1 DTI Does Not Satisfy The Service Obligations Of An ETC.

Federal law requires that any entity seeking ETC designation "offer" and "advertise the availability" of all the services supported by the federal universal service support mechanisms throughout the applicable rural service area. 47 U.S.C. § 214(e)(1) and 47 C.F.R. § 54.210(d). In order to have any meaning, the term "offered" must be interpreted to mean that the required services are provided under reasonable terms and conditions and at reasonable prices. DTI does not currently meet this requirement.

As the record indicates, DTI is not currently providing service throughout the Centerville and Viborg exchanges. While it provides service to 145 customers located within the towns of Centerville and Viborg, it provides primary service to only 2 customers (both of whom are employees) outside those city limits. Hanson Ex. 3, p. 4. At the hearing Mr. Hertz testified that DTI was actually providing service to 17 customers located outside of the city limits. (Tr. p.40.)



However, it appears that those additional 15 customers are taking DTI's service for the limited purpose of obtaining Internet access because none of those customers have disconnected their local service with Fort Randall. (Tr. p. 62.) Therefore, customers are using those access lines for purposes that do not include the services required by 47 C.F.R. § 54.101. In particular, customers would not use those lines for voice communications, access to 911, access to operator services, or access to directory assistance.<sup>1</sup>

DTI argues that federal law only mandates that the required services be offered and that no particular level of market penetration is required. While DTI is not required to obtain a particular level of market penetration to qualify as an ETC, the failure to have any penetration in the rural portions of the service area, while obtaining 16 percent penetration in the urban areas (see Ex 3, p.4), demonstrates that DTI has not provided a reasonable service offering to the rural customers.

DTI argues that requiring a carrier to make a "good faith offer" of the services may violate federal law.<sup>2</sup> Under DTI's interpretation, a carrier could qualify as an ETC even if it selectively served only low-cost urban customers as a result of offering rural customers lower quality service or service at a higher price than the service offered to urban customers.

To the contrary, the Telecommunications Act of 1996 ("Act") does not require the South Dakota Public Utilities Commission ("Commission") to be blind to situations that would be inconsistent with the goals of universal service. The Act makes it clear that services offered to rural customers must be comparable in quality and price to the services offered to urban

<sup>1</sup> While the FCC has temporarily allowed Rural Telephone Companies to qualify for universal service support for secondary lines (Report and Order Docket 97-157 para 96), a separate company that provides only internet access should not be considered as meeting the requirements of 47 C.F.R. § 54.101.

<sup>2</sup> SDCL § 49-31-73 requires a competitor in a rural telephone company service area to make a good faith offering of the same services required in order to qualify as an ETC.

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customers. More specifically, Section 254 of the Act provides the following principals to guide the application of universal service programs and policies:

The Joint Board and the [FCC] shall base policies for the preservation and advancement of universal service on the following principles:

.....  
(3) ACCESS IN RURAL AND HIGH COST AREAS- Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.

(Emphasis added.) The wireless service DTI offers to its rural customers differs from the wireline service it offers urban customers. The rural customers have spoken. They do not believe that this service is comparable to the service offered in urban areas and, consequently, have declined to use it to replace their existing local service.

Therefore, DTI has failed to meet the standards which are the benchmark for determining whether a competitive local exchange carrier ("CLEC") is offering its services to all customers throughout the service area; and DTI should not be granted ETC status at this time.

## **II. Fort Randall's Service Area Should Not Be Changed At This Time.**

As explained in the Fort Randall/SDITC Pre-hearing Brief, pp. 3-4 and 9-13, a CLEC must meet the service obligations of an ETC throughout the area served by a rural telephone company ("RTC"). For RTCs, like Fort Randall, that service area is their entire study area. DTI requests that its service area be restricted to the Centerville/Viborg exchanges.<sup>3</sup> This request is inconsistent with the Recommendations of the Federal- State Joint Board ("Joint Board") and the

<sup>3</sup> Fort Randall's study area includes five other exchanges in addition to the Centerville and Viborg exchanges and the one exchange served by Mt. Rushmore.

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Federal Communications Commission's ("FCC") Orders, and no change in service areas should occur at this time.

The FCC left open the possibility that a different service area might be appropriate if using the study area of an RTC would create an insurmountable barrier, such as would be the case for a wireless carrier whose license did not extend to the entire study area. In this current case, DTI has not disputed Mr. Hanson's testimony that DTI faces no legal barriers to the ability to serve the entire study area, and that DTI has the same ability to provide service beyond the Centerville and Viborg exchanges as Fort Randall. (Ex. 3, p. 9).

The FCC and the Joint Board have established a uniform nation-wide standard for the service obligations for both RTCs and for their competitors. Before that policy is changed, the Joint Board should evaluate and make recommendations on the appropriate alternative. DTI's petition does not provide a basis for changing the existing standards. National policy should be based on more than the competitive preferences of a single carrier.

In support of its request to create a new service area limited to the Centerville/Viborg exchanges, DTI relies heavily on action taken by the Washington Utilities and Transportation Commission ("WUTC"). On DTI's motion, this Commission has taken judicial notice of an Order Designating Eligible Telecommunications Carriers issued by the WUTC on December 23, 1997 (R. 16, Ex. #5) ("ETC Designation Order"). In addition, DTI attached to its Initial Brief, as Appendix 1, a copy of the petition the WUTC and various Washington State RTCs filed with the FCC.<sup>4</sup> DTI contends that the WUTC documents support changing DTI's service area obligation.

Contrary to DTI's suggestion, neither the WUTC ETC Designation Order nor the WUTC petition to the FCC support DTI's requested action. DTI is requesting a redefinition of Fort

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Randall's service area.<sup>5</sup> As explained in the Fort Randall/SDITC Pre-hearing Brief, pp. 8-15, the Commission cannot grant a different service area to DTI unless it also changes Fort Randall's service area, following a joint process involving both the Commission and the FCC. The Commission's December 17, 1997 Order, in Docket TC97-075, established Fort Randall's study area as the service area for ETC purposes. DTI is, in effect, attempting to circumvent the Commission's earlier service area determination. Fort Randall and SDITC agree with the following comments of Staff Counsel, Camron Hoseck:

One thing that these proceedings seem to have ignored and that is that on December 9 - 17th, rather, 1997, this Commission made a determination that Fort Randall's study area was set as its service area. The petition presently before the Commission does not seek to change that aspect. In other words, that determination has been made; and this is a collateral attack upon that and seeks the determination of an ETC for two exchanges which are within the entire Fort Randall service area. This is a technical objection, but one that we think is serious.

Both the Joint Board and the FCC recognized the importance of establishing the same ETC service area for both RTCs and CLECs. Both expressed a concern that, if an RTC and a competitive ETC had different service areas, it could result in undesirable "cream skimming" by the competitor. In response to this concern, in the process of adopting RTC study areas as ETC service areas, the Joint Board and the FCC expressly stated that competitors "as a condition of eligibility, must provide services throughout the rural telephone company's study area." FCC 96J-3, Recommended Decision, ¶ 172 and FCC97-157, Report and Order, ¶ 189.

Similarly, the WUTC's ETC Designation Order and its petition to the FCC requires that the service areas for competitor ETC be the same as the service areas for RTCs. More

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<sup>5</sup> *Petition for Agreement with Designation of Rural Company Eligible Telecommunications Carrier Service Areas at the Exchange Level and for Approval of the Use of Disaggregation of Study Areas for the Purpose of Distributing Portable Federal Universal Service Support*, CC Docket #96-45.

specifically, it adopts sub-exchange service areas for both CLECs and RTCs, thereby assuring symmetry in the service areas used to determine entitlement to ETC status and universal service compensation. In its petition to the FCC, the WUTC offered the following comments:

Competitors should compete for customers, not for universal service support. The need for variation in support is to avoid potential cream-skimming. If ETC designation occurs at the exchange level, rather than the study area level, and universal service support is not geographically disaggregated, a competitive ETC could receive a windfall by entering a relatively low cost exchange and receiving average study area support per line. Similarly, a competitive ETC could enter an exchange and receive a windfall for serving mostly customers located near the wire center or suffer losses if the majority of customers subscribing to its services are those at the greatest distances from the wire center.

The above comments indicate why the WUTC believed that it is necessary for changes in service area obligations be the same for both competitive ETCs and RTCs.

Even if the Commission agrees with the WUTC's proposal, it is important to recognize the very large hurdles that stand in the way of its implementation. In particular, the WUTC methodology requires that the current method of determining universal service funds (which relies on embedded costs at the study area level) be completely replaced. The WUTC has assumed that a methodology to determine the cost of service at the sub-exchange level can be developed. Exhibit 5, pp. 12 and 17-18. No such methodology currently exists.

The WUTC ordered a series of workshops between its staff and RTCs for the purpose of developing the methodology for determining such costs. It further indicated in its ETC Designation Order that if the FCC does not accept its proposal for disaggregating costs at the sub-exchange level that it will reconsider its service area designations. Exhibit 5, p. 12.

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<sup>5</sup> DTI asserts that it is not requesting a change in Fort Randall's service area. Rather, it is asking for a separate service area as a CLEC. DTI Brief at p.9. DTI does not, however, object to the Commission granting Fort Randall a separate service area that is limited to the Centerville/Viborg exchanges.

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The WUTC's assumptions need to be tested before being adopted by the Commission. The Commission is aware of the difficulties inherent in adopting a new costing methodology from its own experience in adopting cost accounting standards for intrastate access rates. Adopting new costing methodologies on a sub-study area basis can be expected to be equally or more difficult. In addition, DTI's assertion, Brief p.8, that total element long-run incremental cost ("TELRIC") methodologies exist to replace the use of embedded costs for RTCs is simply not correct. As Bruce Hanson explained, there is no existing costing methodology that establishes the cost of serving customers in a remote exchange served by a host exchange. (Ex. 3, p.8.) In addition, the FCC determined that the existing Hatfield and BCPM models would not work for RTCs and has established a Rural Task Force for the purpose of developing a TELRIC model for use in RTC service areas. The WUTC does not explain how it will be able to develop so quickly that which the FCC has predicted will take several years to develop.

The WUTC proceedings also demonstrates that no change can be made to the current service areas established for RTCs without involving the FCC in the process. DTI claims, Brief p. 9, that the Commission can establish DTI's ETC service area as Centerville and Viborg without FCC approval. As pointed out in the Fort Randall SDITC Pre-hearing Brief, pp. 8-13, the FCC's Report and Order and the rules adopted under such order make it clear that state commissions cannot act unilaterally to change the existing service areas for areas served by RTCs. As stated in the FCC's Report and Order, para 186-87:

... in contrast with non-rural service areas, the Act requires the Commission and the states to act in concert to alter the service areas served by rural carriers. ... We [the FCC] conclude that the plain language of section 214(e)(5) dictates that neither the Commission nor the states may act alone to alter the definition of service areas served by rural carriers ...

The FCC rules, 47 C.F.R. § 54.207(c), prescribe a specific process for reviewing current service areas served by RTCs and mandate FCC approval of any state proposed redefinition of a service area served by an RTC.

The process set forth in 47 C.F.R. § 54.207(c) is being followed by the WUTC. The WUTC is seeking FCC approval of the proposed new service areas set forth in its ETC Designation Order.

Therefore, the Commission could not establish a service area for DTI limited to Centerville and Viborg exchanges without also proposing a redefinition of Fort Randall's current service area and obtaining FCC approval of the change.

**III. THE COMMISSION CANNOT REASONABLY DETERMINE THAT DESIGNATING AN ADDITIONAL ETC IN THE CENTERVILLE AND VIBORG EXCHANGES WOULD BE IN THE PUBLIC INTEREST.**

Both federal and state law require that, before the Commission may designate more than one ETC within a service area served by an RTC, it must find that designating an additional ETC would be in the public interest. Fort Randall is not currently receiving any universal service support, and will not receive any support for at least two more years. Until the Commission knows the level of funding Fort Randall will receive, and until the Commission knows the obligations that will attach to that federal support in the year 2001, it is not possible to determine that sharing those support payments between two ETC would be in the public interest.

DTI's only countering argument is that being able to receive universal service support funds could improve its ability to compete. That, by itself, is not enough to satisfy the test established by Section 214(e), which requires:

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.

If Congress believed that improving a CLEC's ability to compete were enough to justify approving duplicate ETCs, it would not have imposed this special test. Instead, it would, as it did for nonrural service areas, have simply directed the Commission to authorize multiple ETCs:

... the State commission ... shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier .

Clearly, Congress has called for a more thoughtful analysis than proposed by DTI.

DTI attempts to draw analogies between this proceeding and a hypothetical future proceeding in which DTI seeks ETC status for limited U S WEST exchanges. (Brief p. 5, fn. 1.) This argument ignores the fact that there is no public benefit test that must first be satisfied in order to qualify as an ETC in U S WEST's service area. Similarly, there is no standard making U S WEST's study area its service area. Therefore, the proper standards to apply to such a future request are irrelevant in determining the issues currently before the Commission.

DTI asserts, Brief p. 7, that naming Centerville/Viborg as a stand alone service area would "energize competition". Not surprisingly, DTI does not provide any supporting evidence for this claim. In reality, naming DTI an ETC for this area would provide DTI with no new income. Further, DTI has installed all of its facilities without the aid of any federal support. Apparently DTI made a business case for its actions that do not require a federal subsidy.

Finally, as explained earlier, it appears that DTI is only offering secondary access service to the rural customers in Centerville and Viborg. Even if it were determined that such service could qualify for universal service support, the Commission should find that it would not be in the public interest to take universal service support away from the ETC that is providing full local service in order to give it to an internet access service provider.



While the FCC decided to allow RTCs to receive temporarily universal service support for secondary access lines, it stated:

We share the Joint Board's concern that providing universal service support in high cost areas for second residential connections, second residences, and businesses with multiple connections may be inconsistent with the goals of universal service in that business and residential consumers that presumably can afford to pay rates that reflect the carrier's cost to provide services nevertheless would receive supported rates.

First Report and Order, FCC 97-157, para. 95.

Fort Randall and SDITC urge the Commission to defer any decision as to whether it is in the public interest to designate more than one ETC in Centerville and Viborg until the pending federal reforms are more adequately defined, and Fort Randall begins receiving universal service support.

**V. CONCLUSION.**

DTI's petition should be denied without prejudice. The reasons for denial include:

(1) DTI's current failure to offer its services to rural customers in the Centerville and Viborg exchange; (2) DTI's failure to provide primary service outside the Centerville and Viborg exchanges, thus failing to offer its services throughout the appropriate service area; (3) the inappropriateness of changing the current service area at this time; and (4) the inability to determine that designating multiple ETCs in the Centerville and Viborg exchanges is in the public interest.

Dated October 19, 1998

Respectfully submitted,



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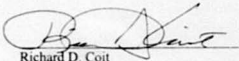
**RETAKE**

**CERTIFICATE OF SERVICE**

I hereby certify that an original and ten copies of the above and foregoing Reply Brief of Fort Randall Telephone Company and the SDITC were hand delivered on the 19th day of October, 1998, to the following:

William Bullard Jr.  
Executive Director  
South Dakota Public Utilities Commission  
State of South Dakota  
500 East Capitol Avenue  
Pierre, SD 57501

and a true and correct copy was sent by United States Mail, postage prepaid, to each person on the attached list.



Richard D. Coit  
Executive Director  
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Pierre, SD 57501

END

OF

RETAKE

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October 23, 1998

RECEIVED  
OCT 26 1998  
SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION

Mr. William J. Bullard  
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500 East Capitol  
Pierre, South Dakota 57501

Tradition

Technology

Talent

Teamwork

RE: TC98-111 Rebuttal Brief of Dakota Telecom, Inc. (DTI)

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Dear Mr. Bullard:

Enclosed for filing is the original and ten copies of the REBUTTAL BRIEF OF DAKOTA TELECOM, INC. for the above referenced docket. This BRIEF is being served to the parties listed on the service list this same date.

Sincerely,

Kristie Lyngstad  
Administrative Assistant

Enclosures



BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE FILING BY )  
DAKOTA TELECOM, INC., FOR )  
DESIGNATION AS AN ELIGIBLE ) Docket No. TC98-111  
TELECOMMUNICATIONS CARRIER )

**Rebuttal Brief of Dakota Telecom, Inc. (DTI)**

The abbreviated references to the record and exhibits are the same as in the initial brief.

**Argument**

The responses will be to the numbered items in the Fort Randall reply brief in the order in which those arguments were presented.

**1. DTI does satisfy the service obligations of an ETC.** There is nothing in either federal or state law which interprets the term "offer" as used in 47 U.S.C. § 214(e)(1) to mean that local exchange service is "provided under reasonable terms and conditions and at reasonable prices." Those conditions are not a part of any statute, rule or regulation regarding ETC status. Fort Randall has provided no cite to any authority for its statement on page 1 of its brief, and there is no legal, logical or other justification to add conditions.

DTI is providing service throughout the Centerville and Viborg exchanges. Mr. Hertz's testimony is not in dispute that DTI offers service, and that DTI has never refused service to anyone in those exchanges who has requested service (R. 46). Ft. Randall confuses "offer" with "acceptance." DTI offers its services throughout the named exchanges. Whether or not the customer accepts and purchases services from DTI is

entirely within the control of the customer, and it has nothing whatsoever to do with the statutorily-specified criteria for gaining ETC status.

Fort Randall's speculation as to why a Fort Randall customer would also subscribe to DTT's service is interesting. Despite the reference in Ft. Randall's brief, there is no mention of Internet service by Mr. Hanson at page 62 of the transcript. If the statement in the brief is accurate, however, then it is obvious that DTT's service offering is significantly superior to that of Fort Randall if the customer is seeking reliable high speed data service in the Centerville and Viborg exchanges. Regardless of the comment, it makes no difference what the customer does with the provided local exchange service. DTT's service can support voice or data, apparently at higher speeds than Ft. Randall's service can, or DTT would never have gained any Internet customers. DTT's local exchange service has all of the necessary attributes of basic voice grade service and can be used for normal voice communications (oral communications, access to 911, access to operator services, and access to directory services) such as Mr. Hanson did describe in part at page 62 of the transcript and as Mr. Hertz confirmed in his testimony (Ex. 2, p. 2-3; R. 40-45).

The distinction Fort Randall attempts to make between customers who live in town as "urban" and those who live out in the country as "rural" is not supported by the law. The Centerville and Viborg exchanges are rural service areas served by two rural telephone companies, one an incumbent (Fort Randall) and one a competitor (DTT). The definition of a rural telephone company (47 U.S.C. § 153(37)) makes no distinction for such sparsely populated exchanges. The use of the term "rural" in 47 U.S.C. § 251(f) and 47 U.S.C. §§ 254(b)(3), (g), and (h) does not make that distinction. The definition of

"rural markets" in 47 U.S.C. § 253(f) makes the entire exchanges that type of market. Thus there is no basis in fact or law for the arguments made by Fort Randall on pages 2 and 3 of its brief in reliance on making that distinction.

**2. Fort Randall's service area need not be changed at this time.** DTI's application does not mandate that Fort Randall's service area be altered to have a service area that conforms to the Centerville and Viborg exchanges. There is no arbitrary numerical requirement in law or regulation to limit the number of ETC's in a given service area, nor is there any legal requirement that a service area must, without exception, conform to a study area. Only this Commission has the authority to establish a service area for DTI (47 U.S.C. § 214(e)(2)).<sup>1</sup> If this Commission grants ETC status to DTI for the Centerville and Viborg exchanges, the question then becomes does the Commission need to do something to alter Fort Randall's service territory as a result. The answer to that question is "No." As Commission staff pointed out (R. 88-89), and as Fort Randall confirmed on page 5 of its brief, this Commission has already established Fort Randall's service territory. Thus, there is no need to do anything further.

With no cite to any legal authority, Fort Randall states that the "Commission cannot grant a different service area to DTI unless it also changes Fort Randall's service area." As Fort Randall points out in its footnote 5, DTI has no objection to the Commission and Fort Randall seeking to do that, but there is no requirement in law, regulation or policy to so do.

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<sup>1</sup> The language of the statute is crystal clear: "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, . . . designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission . . ." (Emphasis added). Similarly in 47 U.S.C. § 214(e)(5), the language is, "The term 'service area' means a geographic area established by a State commission . . ." (Emphasis added).

The remainder of the "sky is falling" arguments presented in Ft. Randall's brief are at best speculative and without basis in fact, law or logic. If Fort Randall receives no support from a universal service support mechanism in these exchanges, where is the "cream" to be skimmed? Mr. Hanson testified that he is familiar with cost methodologies which seek to target universal service support to areas smaller than an exchange (R. 73, 84). The methodologies do exist. We agree, this Commission cannot change Fort Randall's service area without FCC involvement. If that is important, then the granting of the ETC status for DTI for the Centerville and Viborg exchanges should be the springboard for that request and not a reason to deny the ETC status to DTI.

**3. The Commission can find that designating DTI as an ETC for the Centerville and Viborg exchanges is in the public interest.**

DTI restates the discussion of the public interest concerns found in section 2,3 and 4 of its initial brief and incorporates them by reference into this brief. Whether Fort Randall ever receives universal service fund support in the Centerville and Viborg exchanges, and whether or not it is successful in getting the cap removed, has no relevance and is of no concern in this application. Even if the Commission could predict the future and the amount of support, if any, is known, what difference does it make? Regardless of the funding available, DTI is given no special consideration. The relative rights and responsibilities of the two companies do not change.<sup>2</sup>

There is, however, something which does matter. This Commission did support recent legislation (SDCL 49-31-73), which imposes a requirement on competitive entrants in rural markets to be eligible for ETC status. If this provision is to have any

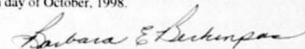
<sup>2</sup> DTI does not understand the logic expressed on page 9 of the brief around "energizing competition." DTI's good business sense and the successful execution of its business plan is now a reason for not granting ETC status?

meaning at all other than as a barrier to entry, and with due consideration for the language in 47 U.S.C. § 253(f), then DTI's application must be granted. Otherwise, there never will be a competitive entrant for a rural telephone company's exchange. The Commission's obligation in this docket is to make a ministerial determination of whether DTI meets a statutorily specified set of criteria. If those criteria are met, and the record establishes the necessary facts to show they have been met, then the only discretionary power left to the Commission is the determination of the public interest. Public interest must be measured from the viewpoint of the customers, not the incumbent telephone company. The facts conclusively show that all the customers in the Viborg and Centerville exchanges now enjoy a choice of two competent telecommunications providers with higher quality and more advanced services, and at competitively lower prices than the customers paid prior to DTI's entry into this market.

#### **Conclusion**

DTI has established that it meets the relevant criteria of 47 U.S.C. §§ 214(e)(1) and (e)(2), and SDCL §§ 49-31-73 and 49-31-78, to be designated an ETC in the Centerville and Viborg exchanges, and that such designation is in the public interest. The application should be granted.

Respectfully submitted this 26th day of October, 1998.



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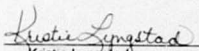
**CERTIFICATE OF SERVICE**

I, Kristie Lyngstad, hereby certify that on the 23<sup>rd</sup> day of October, 1998, I mailed by United States mail, first class postage prepaid, one original and 10 copies of the REBUTTAL BRIEF OF DAKOTA TELECOM, INC. to:

Richard D. Coit  
Executive Director  
South Dakota Independent Telephone Coalition  
207 East Capitol, Suite 206  
P.O. Box 57  
Pierre, SD 57501

Michael J. Bradley  
Moss & Barnett  
4800 Norwest Center  
90 South Seventh Street  
Minneapolis, MN 55402-4129

Dated this 23<sup>rd</sup> day of October, 1998.

  
\_\_\_\_\_  
(Kristie Lyngstad)

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

IN THE MATTER OF THE FILING BY DAKOTA	)	ORDER DENYING REQUEST
TELECOM, INC. FOR DESIGNATION AS AN	)	FOR ETC DESIGNATION;
ELIGIBLE TELECOMMUNICATIONS CARRIER	)	NOTICE OF ENTRY OF
	)	ORDER
	)	TC98-111

On June 4, 1998, the South Dakota Public Utilities Commission (Commission) received a filing from Dakota Telecom, Inc. (DTI) requesting designation as an eligible telecommunications carrier for the Centerville and Viborg exchanges in South Dakota.

The Commission electronically transmitted notice of the filing and the intervention deadline to interested individuals and entities on June 4, 1998, with an intervention deadline of June 19, 1998. Petitions to Intervene were received from Fort Randall Telephone Company (Fort Randall) and South Dakota Independent Telephone Coalition, Inc. (SDITC). Fort Randall and SDITC were granted intervention by Order dated August 5, 1998.

On August 7, 1998, the Commission issued an Order for and Notice of Hearing setting the hearing for September 14, 1998, commencing at 1:30 p.m., in Room 412 of the State Capitol, Pierre, South Dakota. The hearing was held as scheduled. The parties filed post-hearing briefs.

At its November 25, 1998, meeting, the Commission considered this matter. The Commission voted to deny DTI's request for designation as an eligible telecommunications carrier for the Centerville and Viborg exchanges (Commissioner Schoenfelder, dissenting).

Based on the evidence of record, the Commission makes the following Findings of Fact and Conclusions of Law.

**FINDINGS OF FACT**

1. On June 4, 1998, the Commission received a request from DTI requesting designation as an eligible telecommunications carrier (ETC) for the Centerville and Viborg exchanges in South Dakota.
2. Fort Randall serves the exchanges of Centerville, Viborg, Tabor, Tyndall, Wagner, Lake Andes, and Hermosa. Exhibit 3 at 3. As designated by the Federal Communications Commission (FCC), Fort Randall's study area consists of those seven exchanges and the one exchange served by Fort Randall's affiliate Mount Rushmore. Id. at 2.

3. Fort Rancall is a rural telephone company as defined by 47 U.S.C. § 153(37). Consistent with 47 U.S.C. § 214(e)(5), the Commission designated Fort Randall's study area as its service area in Docket TC97-075.

4. Thomas Hertz, Chief Executive Officer of Dakota Telecommunications Group and its subsidiary DTI, stated that DTI offers the services supported by the federal universal service fund support mechanisms in the Centerville and Viborg exchanges using its own facilities. Exhibit 2 at 2. DTI provides telecommunications service through the use of fiber optic cable to the neighborhood node and coaxial cable to the premises. *Id.* DTI uses a fixed wireless system for telephone service outside the city limits of Centerville and Viborg. *Id.* at 3.

5. Mr. Hertz stated that the Commission could designate the Viborg and Centerville exchanges as DTI's service area. *Id.* at 4. DTI was not asking the Commission to change Fort Randall's service area. *Tr.* at 53.

6. DTI provides service in the Centerville and Viborg exchanges but offers no service in Fort Randall's Tabor, Tyndall, Wagner, Lake Andes, or Hermosa exchanges or in Mt. Rushmore's exchange. Exhibit 3 at 3.

7. The Commission finds that when designating a second ETC in a rural telephone company's service area, the second ETC must serve the entire service area of the rural telephone company. The Commission finds that this position is consistent with the Federal-State Joint Board on Universal Service's (Joint Board) and the FCC's interpretations of section 214(e).

8. The Joint Board recommended that current study areas of rural telephone companies be retained as the service areas in order to minimize "cream-skimming." FCC 96J-3, CC Docket No. 96-45, *Recommended Decision (In the Matter of Federal-State Joint Board on Universal Service)*, released November 8, 1996, ¶ 172. If service areas were the same as study areas, the Joint Board recognized that competitors must then provide services throughout a rural telephone company's study area. *Id.* The FCC accepted the Joint Board's recommendation on this issue. FCC 97-157, *Report and Order (In the Matter of Federal-State Joint Board on Universal Service)* released May 8, 1997, ¶ 189. The FCC noted that if required to provide services throughout a rural telephone company's study area, "the competitors will not be able to target only the customers that are the least expensive to serve and thus undercut the ILEC's [incumbent local exchange carrier] ability to provide service throughout the area." *Id.* The FCC found that this would be consistent with its decision "to use a rural ILEC's embedded costs to determine, at least initially, that company's costs of providing universal service because rural telephone companies currently average such costs at the study-area level." *Id.*

9. The Commission finds that it would not be in the public interest to allow a competitive telephone company to be designated as a second ETC for a lesser service area than that



served by the rural telephone company. Designating a lesser service area for a competitive local exchange company may serve to undercut the incumbent rural telephone company's ability to provide services throughout its service area.

10. Since DTI does not currently serve Fort Randall's entire service area, the Commission denies DTI's request to designate DTI as an ETC for the Centerville and Viborg exchanges.

#### CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to SDCL Chapters 1-26 and 49-31, including 1-26-18, 1-26-19, 49-31-3, 49-31-7, 49-31-7.1, 49-31-11, and 49-31-78 and the federal Telecommunications Act of 1996, specifically 47 U.S.C. § 214(e).

2. Pursuant to SDCL 49-31-78, the Commission "shall designate a common carrier as an eligible telecommunications carrier for a service area designated by the Commission consistent with 47 U.S.C. § 214(e). . . ."

3. Fort Randall is a rural telephone company as defined by 47 U.S.C. § 153(37). Consistent with section 214(e)(5), the Commission designated Fort Randall's study area as its service area in Docket TC97-075.

4. For an area served by a rural telephone company, the Commission may not designate more than one ETC without finding that the additional designation is in the public interest. SDCL 49-31-78.

5. The Commission finds that it would not be in the public interest to allow a competitive telephone company to be designated as a second ETC for a lesser service area than that served by the rural telephone company. Since DTI does not currently serve Fort Randall's entire service area, the Commission denies DTI's request to designate DTI as an ETC for the Centerville and Viborg exchanges.

It is therefore

ORDERED, that DTI's request for designation as an ETC for the Centerville and Viborg exchanges is denied.

#### NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that this Order was duly entered on the 11<sup>th</sup> day of December, 1998. Pursuant to SDCL 1-26-32, this Order will take effect 10 days after the date of receipt or failure to accept delivery of the decision by the parties.

Dated at Pierre, South Dakota, this 11<sup>th</sup> day of December, 1998.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.

By Heldene Kells

Date 12/11/98

(OFFICIAL SEAL)

**BY ORDER OF THE COMMISSION:**

James A. Burg  
JAMES A. BURG, Chairman

Pam Nelson  
PAM NELSON, Commissioner

LASKA SCHOENFELDER, Commissioner  
dissenting