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RECEIVED
FEB 14 2005
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

Re: Docket TC03-193

Dear Pam:

Enclosed herein are the original and ten copies of the REPLY BRIEF OF INTERVENORS in the above-referenced docket.

By copy of this letter, I am also serving those persons named on the Certificate of Service with a copy of the Reply Brief.

Sincerely yours,



Darla Pollman Rogers
Attorney at Law

DPR/ph

Enclosures

CC: Talbot J. Wiczorek
David A. LaFuria
Meredith A. Moore
Richard D. Coit
James M. Cremer

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

RECEIVED
FEB 14 2005
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

IN THE MATTER OF THE PETITION
OF RCC MINNESOTA, INC., AND
WIRELESS ALLIANCE, L.L.C., FOR
DESIGNATION AS AN ELIGIBLE
TELECOMMUNICATIONS CARRIER
UNDER 47 U.S.C. § 214(e)(2)

Docket No. TC03-193 .

REPLY BRIEF OF INTERVENORS

This Reply Brief is filed on behalf of all intervening parties in the above-captioned Commission proceeding, including the South Dakota Telecommunications Association (“SDTA”) and the following South Dakota rural local exchange carriers (“RLECs”) whose rural service areas are subject to the Petition for Eligible Telecommunications Carrier (“ETC”) Designation filed by RCC MINNESOTA, INC., AND WIRELESS ALLIANCE, L.L.C. (collectively, “RCC”): Alliance Communications Cooperative, Inc.; Interstate Telecommunications Cooperative; James Valley Telecommunications; PrairieWave Community Telephone; Roberts County Telephone Cooperative/RC Communications; Sioux Valley Telephone Company and Union Telephone Company, Stockholm-Strandburg Telephone Company; and Venture Communications Cooperative.

Throughout this Reply Brief, references to testimony provided at the hearing in this matter held October 13-14, 2004, will be designated “TR” with additional reference to the appropriate page number or numbers of the hearing transcript. All references to prefiled testimony or exhibits admitted into evidence at the hearing will be designated either “RCC EXH” or “Intervenors’ EXH” with additional reference to the ap-

appropriate page number or numbers. References to any portion of the transcript that contain information identified as confidential will be designated "CTR."

PROCEDURAL BACKGROUND

On or about November 18, 2003, this Commission received a Petition from RCC requesting that an order be issued designating the company as an eligible telecommunications carrier ("ETC") in the study areas of the following rural telephone companies operating in South Dakota: Alliance Communications Cooperative, Inc. ("Alliance"); Interstate Telecommunications Cooperative ("ITC"); James Valley Telecommunications ("James Valley"); PrairieWave Community Telephone ("PrairieWave"); Roberts County Telephone Cooperative/RC Communications (collectively "Roberts County"); Sioux Valley Telephone Company and Union Telephone Company (collectively "Sioux Valley"), Stockholm-Strandburg Telephone Company ("Stockholm-Strandburg"); and Venture Communications Cooperative ("Venture"). (RCC EXH 1).

Subsequent to its receipt of the Petition for ETC Designation from RCC, this Commission publicly noticed the filing and established a period for intervention by interested parties. In response to that notice, the Commission received petitions to intervene from SDTA, as well as from each of the individual rural telephone companies affected by the RCC filing. By Order dated December 22, 2003, the Commission granted all petitions to intervene, extending party status to SDTA and each of the rural telephone companies affected.

By Orders dated April 21, 2004, August 26, 2004, and September 13, 2004, the Commission established a timeline for discovery, a schedule for the presentation of prefiled testimony by the parties, and dates for an administrative hearing. On Oc-

tober 13-14, 2004, pursuant to that schedule, a hearing before this Commission was held for the purpose of taking evidence and hearing argument on the RCC Petition for ETC Designation.

At that hearing, Intervenors presented testimony through the following witnesses: Glenn Brown, a Telecommunications consultant specializing in universal service issues with the firm of McLean and Brown (Intervenors' EXHs 1 and 2; TR Vol. 2, at 197-286); Sue Vanicek, an economist and consultant with TELECOM Consulting Resources (Intervenors' EXHs 3 and 4); James Groft, General Manager of James Valley (Intervenors' EXH 6; TR Vol. 2, at 328-334); Dennis Law, General Manager of Sioux Valley (Intervenors' EXH 5; TR Vol. 2, at 315-327); Randy Houdek, General Manager of Venture (Intervenors' EXH 7; TR Vol. 2, at 335-356); and William Heaston, General Manager of PrairieWave (Intervenors' EXH 8; TR Vol. 2, at 287-314). RCC presented its case through Elizabeth Kohler, the Vice President of Legal Services of RCC (RCC EXHs 1 and 2; TR Vol. 1, at 24-164); Don Wood, a consultant with the firm of Wood & Wood, an economic and financial consulting firm (RCC EXHs 7 and 8; TR Vol. 2, at 87-196); and Kyle Gruis, the Senior Engineering Director for RCC (RCC EXHs 5 and 6, TR Vol. 2, at 5-87).

ARGUMENT

I. ETC Designation Requirements

RCC has filed its Petition for ETC Designation pursuant to both federal and state statute, under 47 § 214(e) and South Dakota Codified Laws § 49-31-78. Specific statutory provisions applying to the designation of common carriers as ETCs are contained in 47 U.S.C. § 214(e). SDCL § 49-31-78, more generally, provides this Com-

mission with sufficient state authority to properly implement the federal provisions. In addition to the federal and state statutes, both federal and state administrative rules applying to ETC designation have also been adopted. The federal rules are found in 47 C.F.R. §§ 54.201 thru 54.207 and the state administrative rules are contained within ARSD §§ 20:10:32:42 thru 20:10:32:47.

The requirements for ETC designation as established under federal and state law can generally be summarized to require: (1) that to be eligible for ETC status, a carrier must offer services that are supported by Federal universal service support mechanisms (the FCC rules currently identify nine supported services) throughout the service area for which the designation is received, and advertise the availability of such services in media of general distribution (47 U.S.C. § 214(e)(1)); and (2) in rural service areas, in order for a State commission to designate more than one ETC, it must first find that the designation is in the public interest (47 U.S.C. § 214(e)(2)). More specifically, the provisions of 47 U.S.C. § 214(e)(2) state:

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 and eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph [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. (Emphasis added.)

In regard to the above referenced ETC requirements and as to the question of whether RCC's current Petition for ETC Designation meets these requirements, RCC suggests that the answer is very clear, arguing in its Brief to the Commission that a grant of its petition is "unquestionably in the public interest for South Dakota." RCC first at-

tempts to give the impression that the answer to the “public interest” question is an easy one, by misquoting provisions found in the Telecommunications Act of 1996. RCC, through a number of statements, improperly suggests that Congress actually intended, with its enactment of the 1996 Act, to subsidize competitive entry into rural areas. The statement is made indicating that the federal Universal Service Fund (USF) was created by the 1996 Act. This statement is obviously not true, and in the context presented, appears intended by RCC to suggest that subsidizing competitive entry is a primary purpose of the USF. RCC then goes further to state specifically that “Congress mandated” that states, in making competitive ETC designations, do so “on a competitively neutral basis.” This suggests that the “competitively neutral” requirement as it applies to ETC designations was specifically adopted by Congress as part of the ETC designation provisions.¹ This also is not true. Further it appears intended to minimize the significance of the public interest standard and to distort the intended purpose of that standard as it applies to request for ETC designation. Contrary to RCC’s portrayal, the separate and additional “public interest” standard adopted in 47 U.S.C. § 214(e) has a real purpose, and was intended by Congress to give recognition to the different economic circumstances and unique universal service concerns presented in high-cost rural areas.

Throughout its Brief, RCC sticks to the general theme that granting its requested designation will increase competition, and that as a result, its requested designation must be in the public interest. This view is out of step with the intent of Congress in adopting the separate public interest test applicable to rural service areas. It is also incon-

¹ RCC cites to 47 U.S.C. §§ 254(b)(3) as the support for this “competitively neutral” reference. That section of the 1996 Act includes no such reference. A reference to “competitive neutrality” is found in Section 253 of the Act relating to the “Removal of Barriers to Entry,” but ETC designation provisions are not mentioned specifically in that Section.

sistent with recent FCC ETC decisions and the Federal-State Joint Board Recommendations that very clearly have changed the standard of review that applies to applications for ETC designation.²

RCC, looking to its evidence presented in this matter and the arguments in its Brief, appears unwilling to accept the changed federal standards now applicable to ETC designations. RCC makes many generalized statements concerning the benefits of increased competition and how these benefits are consistent with the public interest. When it comes to providing specific information that would permit the quantification of any of the alleged benefits for specific rural service areas, the company fails to produce. Furthermore, the company has failed to address in any meaningful way the very real universal service concerns presented by multiple ETC designations in low density, high cost rural areas. The company refuses to acknowledge that there may be certain service areas where there should be a limit on the number of carriers granted ETC status, or that in certain high-cost rural areas, multiple designations may ultimately cause hardship and render it difficult for any service provider to continue facilities investment and provide quality service.

As this Commission recognized in its recent decision in Docket TC03-191, In the Matter of the Filing by WWC License, LLC d/b/a Cellular One for Designation as an Eligible Telecommunications Carrier in Other Rural Areas, it is no longer suf-

² Memorandum Opinion and Order, CC Docket 96-45, FCC 03-338 *Virginia Cellular Order*, released January 22, 2004, and Memorandum Opinion and Order, CC Docket 96-45, FCC 04-37 *Highland Cellular Order*, released April 12, 2004. *In the Matter of the Federal-State Joint Board on Universal Service*, CC Docket 96-45, Recommended Decision, FCC 04J-1.

ficient to simply argue general competitive benefits.³ Both this Commission and the FCC have now recognized that the “public interest” test envisioned by Congress requires a much more realistic balancing of benefits and costs.

A. Virginia Cellular and Highland Cellular Decisions.

In a number of recent decisions, including Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia (hereinafter referenced as “Virginia Cellular” or “Virginia Cellular Order”) and Highland Cellular, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia (hereinafter referenced as “Highland Cellular” or “Highland Cellular Order”) the FCC signaled a change in the legal standard applied in ETC designation cases.⁴

In its Virginia Cellular Order, released on January 22, 2004, the FCC acknowledged “the need for a more stringent public interest analysis for ETC designations in rural telephone company service areas.”⁵ Stepping away from the loose standards applied in its earlier ETC designation decisions, the FCC concluded that “the value of increased competition, by itself, is not sufficient to satisfy the public interest test in rural areas.”⁶ Instead, in determining whether designation of a competitive ETC in a rural telephone company’s service area is in the public interest, the FCC indicated that numerous factors should be weighed, including “the benefits of increased competitive choice,

³ Order Designating Western Wireless as an Eligible Telecommunications Carrier; Findings of Fact and Conclusions of Law; and Notice of Entry of Order, Docket TC03-191, released January 3, 2005 (*WWC Order*), Findings of Fact par. 18.

⁴ Memorandum Opinion and Order, CC Docket 96-45, FCC 03-338 *Virginia Cellular Order*, released January 22, 2004, and Memorandum Opinion and Order, CC Docket 96-45, FCC 04-37 *Highland Cellular Order*, released April 12, 2004.

⁵ *Virginia Cellular Order* at par. 4.

⁶ *Id.*

the impact of the designation on the universal service fund, the unique advantages and disadvantages of the competitor's service offering, any commitments made regarding quality of telephone service, and the competitive ETC's ability to satisfy its obligations to serve the designated service areas within a reasonable time frame."⁷ The FCC described the consideration of these factors as a "balancing of benefits and costs," and stated that it is a "fact-specific exercise."⁸ Further, it was clarified that in determining whether these standards are met and the public interest is served, the burden of proof is on the ETC applicant.⁹

In regard to the Virginia Cellular ETC application, in addition to applying these new public interest standards, the FCC imposed certain conditions on the ETC applicant to ensure that the company would satisfy its obligations under Section 214(e) of the Federal Act. This included conditions designed to ensure that the company would meet its obligations to serve throughout the designated service area within a reasonable time and aimed at ensuring a high quality service.¹⁰ As one condition, Virginia Cellular was ordered to "submit records and documentation on an annual basis detailing its progress towards meeting its build-out plans in the service areas" where it was designated an ETC. The conditions were deemed appropriate steps by the FCC "in light of the frequency of petitions for competitive ETC designations and the potential impact of such designations on consumers in rural areas."¹¹

⁷ *Id.* at par. 28.

⁸ *Id.*

⁹ *Id.* at par. 26.

¹⁰ *Id.* at par. 46.

¹¹ *Id.* at par. 4.

The FCC confirmed its tougher stance toward competitive ETC applications in its Highland Cellular Order. The same new standards articulated in Virginia Cellular were applied and similar conditions were imposed.¹²

While RCC may wish to see things otherwise, the FCC, by its recent decisions in Virginia Cellular and Highland Cellular, has tightened significantly the ETC qualification criteria. Citing generalized benefits of competition in support of a filed ETC application is no longer sufficient to satisfy the public interest test. The FCC has rightly given recognition in Virginia Cellular and Highland Cellular to growing concerns over the long term sustainability of the current federal USF, and regarding the use of federal universal service funding as a means of subsidizing competitive entry in the lowest density, highest cost rural areas. As explained by Commissioner Kathleen Q. Abernathy in her separate statement in Virginia Cellular:

In this Order, the Commission has taken the important (albeit incremental) step toward establishing a more rigorous framework for evaluating ETC applications. When the Commission initially exercised its authority to grant ETC status in areas where state commissions lack jurisdiction, it appeared to regard entry by any new competitor as per se consistent with the public interest. While promoting competition is undoubtedly a core goal under the Telecommunications Act of 1996, the use of universal service funding to engender competition where market forces alone cannot support it presents a complex question. Particularly, in rural study areas, where the cost of providing service typically far exceeds retail rates, regulators must carefully consider whether subsidizing the operations of an additional ETC promotes the public interest.¹³

It is not appropriate for this Commission simply to assume that increased competition will provide additional benefits to consumers. As indicated by the FCC, the

¹² *Highland Cellular Order* at pars. 22 and 43.

¹³ *Virginia Cellular Order*, Separate Statement of Commissioner Kathleen Q. Abernathy.

analysis must be “fact specific,” and this requires an analysis of both benefits and harms specific to each of the rural service areas identified in the ETC Petition.

B. Further Changes to ETC Designation Guidelines

In looking to the federal decisions for guidance, this Commission should recognize that the changes to the ETC designation process made through Virginia Cellular and Highland Cellular are not the final changes to be made by the FCC in regard to the application of the Section 214(e) public interest standard. Rather, the changes brought on by Virginia Cellular and Highland Cellular are only first steps toward reforming the current ETC designation process. Further changes from the FCC can be expected soon. The FCC, on June 8, 2004, released a Notice of Proposed Rulemaking seeking comments on the Recommended Decision of the Federal-State Joint Board (FCC 04J-1), which proposes various changes regarding the “public interest” standard applicable to ETC requests in rural service areas and regarding generally the “portability” of universal service support.¹⁴ Pursuant to the process established for reviewing recommendations of the Joint Board, the FCC is obligated to render its decision concerning such recommendations by no later than February 25, 2005. Contrary to RCC’s argument, this Commission should give consideration in this process to the Joint Board’s Recommended Decision and the specific proposals made therein.

In regard to the public interest analysis required under 47 U.S.C. § 214(e)(2), the Joint Board found, as the FCC did in the Virginia Cellular and Highland Cellular cases, that competition by itself is not sufficient to justify that a particular ETC

¹⁴ *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Notice of Proposed Rulemaking, FCC 04-127, released June 8, 2004.

designation is in the public interest.¹⁵ The Joint Board expressed strong support for the application of a “rigorous” ETC designation process and a “fact-intensive” inquiry into the public interest.¹⁶ As justification for adopting a rigorous standard of eligibility, the Joint Board referenced specifically the characteristics of rural carrier service areas. The Joint Board included in its Recommended Decision a discussion of the types of public interest factors that should be considered pursuant to Section 214(e)(2) of the Federal Act. Among the various factors identified, it was specifically pointed out by the Joint Board that, in making public interest determinations, states “may properly consider the level of federal high-cost per-line support to be received by ETCs.”¹⁷ The Joint Board concluded that:

. . . one relevant factor in considering whether or not it is in the public interest to have additional ETCs designated in any area may be the level of per-line support provided to the area. If the per-line support level is high enough, the state may be justified in limiting the number of ETCs in that study area, because funding multiple ETCs in such areas could impose strains on the universal service fund. Moreover, if the Commission were to cap per-line support upon entry of a competitive ETC and impose a primary connection restriction, as discussed below, designating an excessive number of ETCs could dilute the amount of support available to each ETC to the point that each carrier’s ability to provide universal service might be jeopardized. . .¹⁸

Further, according to the Joint Board, these circumstances support the “belief that state commissions should apply a particularly rigorous standard to the minimum qualifications of applicants seeking ETC designation in rural carrier service areas.”¹⁹ (Emphasis added.)

¹⁵ Recommended Decision at par. 38.

¹⁶ *Id.* at pars. 9 and 12.

¹⁷ *Id.* at par. 43.

¹⁸ *Id.*

¹⁹ *Id.*

Even though the above recommendations have not been formally adopted by the FCC, Intervenor believe this Commission should not (as RCC argues) ignore them in this process of reviewing RCC's pending ETC Petition. Instead, the additional standards should be used as a means by which this Commission can more effectively protect the public interest for the benefit of South Dakota consumers. The Joint Board recommendations are intended to address very real inadequacies in the FCC's current ETC rules, inadequacies that are now very apparent to not just the FCC, but State commissions across this country. Ignoring the recommendations ignores these inadequacies, and makes it more difficult for this Commission to make a decision that is consistent with the public interest and the intent of both the federal and state statutes applying to ETC designations.

II. RCC has Failed to Meet its Burden of Proof that its Application for ETC Status is in the Public Interest.

It is RCC's burden as the petitioning party to affirmatively establish that its request for ETC designation is consistent with all of the ETC designation criteria and that it should be granted. Affirmative evidence must be presented showing that designation is appropriate, and RCC bears the burden of providing such evidence. The Commission does not in this proceeding start with a presumption that RCC should be granted designation.

Based on an application of the new ETC designation standards set forth in Virginia Cellular and Highland Cellular and taking into account the Joint Board's Recommended Decision, Intervenor believe that this Commission can only fairly conclude that RCC has failed to meet its burden that its request for ETC designation is in the "public interest" for the following reasons: (1) RCC has not demonstrated the "capability and

commitment” or the “ability” to provide the supported services throughout the designated service areas within a reasonable time frame; (2) RCC has not sufficiently demonstrated that its designation would bring additional service benefits to each of the identified rural service areas that would support a finding that the benefits of designation outweigh the costs and would be in the public interest; and (3) the request for service area redefinition made in conjunction with the request for ETC status would permit prohibited cream-skimming, would undermine the ability of the incumbent rural LECs to serve throughout the entirety of the established rural study areas, and would otherwise be inconsistent with the public interest.

A. RCC has not Demonstrated an “Ability” to Provide the Supported Services Throughout the Designated Service Areas within a Reasonable Time Frame.

Section 214(e)(1) of the Act²⁰ provides that a common carrier designated as an ETC must offer all the services that are supported by the Federal universal service support mechanisms “throughout the service area for which the designation is received.” Thus, before RCC can be designated an ETC eligible for support, it must demonstrate that it can provide the supported services throughout the areas where it is seeking designation. The FCC in Virginia Cellular further clarified this requirement stating that the ETC applicant must demonstrate its ability to “provide the supported services throughout the designated service area within a reasonable time frame.”²¹ In its Recommended Decision, the Joint Board similarly concluded that state commissions should require ETC applicants to “demonstrate their capability and commitment to provide service throughout the designated service area to all customers who make a reasonable request for service.”²²

²⁰ 47 U.S.C §214(e)(1).

²¹ *Virginia Cellular Order* at pars. 4, 46.

²² Recommended Decision at par. 23.

The Joint Board found that states may choose to implement this requirement by requiring a “formal build-out plan for areas where facilities are not yet built out at the time the ETC application is considered,” and that “states should examine compliance with build-out plans” as part of the annual ETC certification process.²³

In regard to the requirement that the ETC applicant must provide its services throughout the requested service areas, this Commission should find that RCC has not shown either a “commitment” or “ability” to provide the supported telecommunications services throughout the areas in which it is seeking designation within a reasonable time frame. In spite of clear direction in the FCC Orders and the Recommended Decision calling for specific information as to how the ETC applicant will meet its universal service obligations, RCC has not provided any build-out plan to support its application for ETC status. Rather, RCC has offered in testimony only minimal information concerning an “initial” commitment to deploy facilities. TR Vol. 1, at 128.

RCC has requested ETC designation in ten separate rural study areas and in certain study areas it has requested ETC designation in only some of the wire centers. If granted designation in these areas, RCC would receive significant amounts of federal universal service funding based on the funding provided to the rural LECs in the respective service areas. In eight of these study areas, RCC commits to nothing more than serving the areas within South Dakota that it currently serves, and meeting requests for service from customers outside of its current serving area with high-powered customer premise equipment and roof-mounted antennas. In none of the ten requested areas has RCC presented an actual build-out plan showing how it would expand to serve throughout the requested service areas in a reasonable time frame.

²³ *Id.* at pars. 24, 47.

RCC witness Kyle Gruis describes four new cell sites that RCC intends to construct/deploy if granted ETC status in this proceeding. TR Vol. 1, at 34-35. The two cell sites described in the RCC licensed area would be in or near the towns of Willow Lake and Toronto. Mr. Gruis indicated that these towers would be limited to serving only the towns of Toronto, Astoria, Willow Lake, Bryant and Hazel, locations within the service area of Interstate Telecommunications Cooperative (ITC). Two additional cell sites were described that are planned for construction/deployment in the licensed service area of Wireless Alliance. These two cell sites would be in or near the towns of Lyons and Baltic, and serve the communities of Lyons, Baltic, Renner and Crooks, locations limited to the Baltic and Qwest study areas.

These plans for the deployment of four additional cell sites covering only two of the ten rural service areas affected by the RCC application are described as being an “initial commitment” covering a period of 18 months. TR 80, 128. Beyond these four cell sites and this initial period of 18 months, RCC has offered no build-out information. Furthermore, both Mr. Gruis and RCC witness, Elizabeth Kohler, were questioned at the hearing concerning an expected timeframe for completing a build-out throughout the identified service areas where RCC is seeking designation, and both refused to make any sort of a timeframe commitment. Ms. Kohler referenced in her prefiled-written testimony a “build-out that could take many years,” and when asked by SDTA counsel whether RCC could identify a timeframe by which its service would be available throughout the requested service areas, she simply refused to answer based on a belief that the law does not require such a commitment within a certain time or by a certain date. TR 63, 64. Questions concerning the time frame by which RCC may offer service throughout the

identified service areas also were asked by Staff Counsel of Ms. Kohler, and she again was unwilling to provide any helpful information. Mr. John Smith specifically asked Ms. Kohler whether each of the service areas would be substantially covered within a five-year timeframe. In response, she stated that she was “really hesitant to use date-certain parameters like five years. . .” TR 95. In referring to a map of RCC’s current signal coverage, she further stated, “I don’t know that I envision five years from now a scenario where that will be completely orange, I just don’t think that is the demographics of South Dakota.” TR 95-96. When questioned by Staff Counsel at hearing whether it was the company’s objective to “substantially” cover or build-out the identified service areas within a reasonable period of time, Mr. Gruis also was unwilling to provide any specific information. TR 53-55.

In addition to these vague responses, there is further reason to question the company’s commitment or ability to make the supported services available throughout the service areas given its position on “carrier of last resort” responsibilities. Section 214(e)(4) of the Act, which allows ETCs to relinquish their designation as long as there is one ETC remaining, makes clear that ETCs must be willing to accept carrier-of-last-resort type obligations. Thus, pursuant to Section 214, when an ETC seeks to relinquish its designation 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. . .”²⁴ In issuing the Virginia Cellular Order, three of the five FCC Commissioners, in separate written statements accompanying the Order, specifically listed the ability to perform “carrier of last resort” responsibilities as an important ele-

²⁴ 47 U.S.C. §214(e)(4).

ment of ETC designation. In addition, in a speech given around the time of Virginia Cellular, FCC Commissioner and Joint Board Chair Kathleen Abernathy stated:

[T]he Commission made clear that any carrier that wants to be an ETC must offer quality services at affordable rates throughout the designated service area. The ETC also must be ready, willing, and able to serve as a carrier of last resort and otherwise be prepared to fulfill the goals set forth in section 254 of the Act. To this end, the FCC required Virginia Cellular to submit build-out plans to document its proposed use of federal universal service funding for infrastructure investment.²⁵

Despite this emphasis by the FCC that ETC applicants, including wireless carriers, must be ready, willing and able to serve as carriers of last resort to support universal service goals, RCC has very clearly indicated its unwillingness to accept carrier of last resort obligations. Ms. Kohler, in responding to a number of questions from Intervenors concerning carrier of last resort obligations, indicated repeatedly that it is RCC's view that the company was obligated to fulfill only "reasonable requests" for service. She explained that there may be exceptions where RCC is not obligated to extend service, and that it is the ILEC that is the "carrier of last resort." TR Vol. 1, at 58-59.

This refusal to accept carrier of last resort obligations demonstrates further a lack of commitment on the part of RCC and cannot fairly be ignored in making a determination as to whether RCC meets the Section 214(e) ETC criteria. Clearly, the intent of the criteria established by the FCC that the ETC applicant demonstrate an "ability to provide the supported services throughout the designated service area within a reasonable time frame" is intended to ensure that the carrier will within a reasonable time be capable of meeting carrier of last resort obligations. RCC has failed to provide any specifics on the record as to when it might be capable of providing its services throughout the re-

²⁵ *Ensuring the Sustainability of Universal Service*, Remarks by FCC Commissioner Kathleen Q. Abernathy (As prepared for delivery) OPASTCO Winter Meeting, January 21, 2004

requested service areas, and it has also displayed an obvious unwillingness to accept all requests for service, consistent with the obligations of carrier of last resort status. Under these circumstances, it is difficult to comprehend how this Commission could reasonably determine that RCC has demonstrated a sufficient commitment or ability to make its services available throughout the requested service areas within a reasonable time frame as required under the new FCC standards. The evidence of record falls far short of demonstrating any measurable commitment.

As testified to by Mr. Glenn Brown, this Commission must assure itself that the new ETC will actually build sufficient facilities within a reasonable period of time to serve throughout the entire study area. Unless a prospective ETC applicant is willing to commit to formal plans to construct facilities throughout the proposed service area, the benefits of its ETC designation is greatly diminished. RCC has made no such commitment in this proceeding. If carriers can obtain ETC status and “high-cost” funding without some form of enforceable commitment to actually expand their network into high-cost areas, then only the carrier will benefit from its designation as an ETC, not the public.

If a carrier can gain access to high-cost funds for serving its current predominantly low-cost customer base without making any enforceable commitment to serve the entire area, then there is a significant risk that the remote facilities will never be built, and the most rural customers will remain unserved by the wireless ETC. The reason is simple: once the carrier has the funding in hand, it faces a very different set of business incentives regarding investments in remote areas. Construction of these facilities will generate substantial cost, yet yield relatively little incremental revenue. In essence,

the carrier is back where it started, with no incentive to make investments that make no business sense. Unless the Commission requires specific build-out plans and firm and enforceable commitments for such investment as a precondition to granting ETC status, then it is highly likely that the carrier will not build facilities to serve the remote customers, and that scarce high-cost funds will provide a windfall to carriers serving predominantly low-cost markets. The losers in this scenario would be rural consumers who could face the prospect of having no carrier willing or able to make the investments necessary to function as carrier of last resort. It would also be difficult, if not impossible, for carriers to invest to bring rural consumers access to advanced services, including broadband services.

B. RCC has not Sufficiently Demonstrated that its Designation
would bring Additional Service Benefits to each of the Identified
Rural Service Areas that would Support a Finding that the
Benefits of Designation Outweigh the Costs.

Intervenors also believe this Commission should reject RCC's ETC Petition because RCC has failed to establish that its designation would provide public benefits outweighing the substantial public costs and harm to consumers that it would create.

As noted above, both the FCC and the Joint Board have indicated that it is not sufficient for an applicant seeking ETC designation simply to claim generalized competitive benefits. The "balancing of benefits and costs" is intended to be a "fact specific exercise," and various factors are to be considered in this process.²⁶ With respect to RCC's ETC request, in attempting to measure the alleged public benefits, Intervenors believe that two of these factors are particularly relevant. The FCC has indicated, specifically, that "the unique advantages and disadvantages of the competitor's service offering"

²⁶ *Virginia Cellular Order* at par. 28.

are to be considered, and also “any commitments made regarding quality of service.”²⁷ Intervenor believe that RCC’s request for designation is especially deficient when considering these factors. The purported benefits offered by RCC consist of nothing more than generalized statements regarding the generic benefits of competition. Noticeably missing from RCC’s description of benefits are any of the facts and data that the FCC and Joint Board believe are necessary to conduct a “fact-intensive” analysis that would permit this Commission to fairly determine what “unique advantages” are delivered by RCC’s service offerings. In addition, there are no facts on the record to support any finding that RCC has made specific service quality commitments or that granting RCC ETC designation would lead to improved service quality. As already indicated, RCC has refused to give adequate information concerning its plans to “build out” the proposed service areas, and other information was provided by RCC’s witnesses that give reason to question the level of service quality that RCC would provide.

C. What are the Unique Advantages of RCC’s Service Offering?

As testified to by Mr. Brown, “the real question before this Commission is what additional competition and increased benefits will come from designating RCC as an ETC in the requested study areas, and paying it high-cost support for all of its pre-existing customers.” (Reply Testimony, p. 23). Looking to RCC’s arguments, the impression is given that RCC does not currently compete in the affected service areas, and that only if RCC is granted ETC designation would there be competition in rural areas in the state of South Dakota. Nothing could be further from the truth. RCC and a number of other wireless service providers are already competing in these areas today. And, in

²⁷ *Id.*

fact, in each of the affected service areas, this Commission has already designated two carriers as being eligible for federal universal service funding.

Admittedly, RCC's current cellular signal coverage does not extend throughout the entire geographic area of each of the proposed service areas. This being the case, there is at least the possibility that granting designation to RCC could bring some benefit in the form of greater cellular signal coverage. But, as pointed out earlier in this brief, RCC has made only limited commitments to expand its facilities. It has not submitted any "build out plan" and also has flatly refused to make any commitments as to when its services might actually be available throughout the entirety of the requested service areas. Under these circumstances, there is an insufficient record to conclude that customers would, in fact, experience improved or better cellular signal coverage as a result of an RCC designation.

In considering claimed public benefits, this Commission should also carefully examine the actual wireless coverage that consumers will experience. A key factor should be what benefit the consumers will actually experience in terms of expanded ability to use their mobile service over wider areas in return for the increased universal service fund assessments. (Glenn Brown Reply Testimony, p. 28) If a wireless carrier merely offers to provide higher powered customer premise equipment and external antennas to a few customers in remote locations so that it can qualify for funding, this is clearly not worth the cost of providing "high-cost" support to all of that carrier's existing customer base.

Throughout its Application and testimony, RCC stresses mobility as a key benefit of its service. In rural areas with weak signal strength, where RCC suggests that

consumers would receive service through high-powered equipment and roof-mounted antennas, mobility would not be the same as in the more urban areas. (Glenn Brown, Reply Testimony, p. 29). The Commission should find that increasing cellular signal coverage means something more than giving the rural consumer the opportunity to purchase a “signal booster” or “high-powered antenna.” (Blundell Prefiled Testimony, p. 11, Lines 10-16.) Where a wireless ETC accepts federal universal service funds, the quality of the signal coverage provided to rural consumers should be an essential part of the Commission’s public interest analysis. If a wireless carrier accepts federal universal service funding for serving high-cost, rural areas, then it should be required to invest that money in a network that provides signal quality reasonably comparable to that experienced in urban areas. RCC has been unwilling in this case to commit to any formal plans to construct facilities throughout the requested service areas. Absent such a commitment, there is absolutely no basis to fairly conclude that the benefits of designation outweigh the costs.

RCC attempts to attach some uniqueness to its service offerings and to its requested ETC designation by contending that granting its designation will for the first time give customers in the affected rural service areas a choice with respect to their “primary” telephone service. (Kohler Prefiled Direct Testimony, pp. 4, 7.) Intervenors challenge the accuracy of these statements. As mentioned earlier, other competing wireless carriers are already offering services in all of the affected service areas. Moreover, as pointed out by Intervenors’ witness, Sue Vanicek, RCC’s argument is premised on the assumption that wireless and landline services are viewed by end-user customers as “substitutable” services, which is generally not the case.

Wireless service is a complementary service to wireline service, not a direct substitute.²⁸ If wireless service was directly substitutable for wireline service, it is doubtful that consumers would subscribe to both services, as they would be paying twice for the same features and functions. The Joint Board has noted that much of the growth in support received by CETCs was for wireless connections that supplement, rather than replace, wireline service.²⁹ Also, as noted by Ms. Kohler, only 3-5 percent of wireless customers in the United States use their wireless phone as their primary phone line.³⁰ Due to the fact that wireline and wireless service are not direct substitutes, the theoretical benefits of competition, such as lower prices as suggested by Mr. Wood, are much less likely to occur than if the services were direct substitutes.

D. The Requested Designation Will not Result in Improved Service Quality

RCC also argues that granting its requested designation will result in improved service quality to consumers residing in the affected service areas. This claim of improved service quality is based on references to RCC's own level of service. It is also based on a contention that granting designation to RCC would provide incentives to the incumbent carriers to implement new operating efficiencies, lower prices, and offer better services.

Intervenors challenge the evidentiary support for these claims. The statements of RCC witnesses concerning improved service must be discounted by the lack of any specific or definite commitment by RCC to make its services available throughout

²⁸ See *In the Matter of the Petition of RCC Minnesota, Inc., and Wireless Alliance, L.L.C. d/b/a Unicel for Designation as an Eligible Telecommunications Carrier*, Docket No. TC03-193, Reply Testimony of Sue Vanicek (filed June 10, 2004) at 24:8-25:10.

²⁹ See *Recommended Decision* at para. 67.

³⁰ See *In the Matter of the Petition of RCC Minnesota, Inc., and Wireless Alliance, L.L.C. for Designation as an Eligible Telecommunications Carrier Under 47 U.S.C. Section 214(e)(2)*, Docket No. TC03-193, Direct Testimony of Elizabeth Kohler (filed May 10, 2004) at 7:10-11.

the requested service areas. In addition, other information was presented on the record that gives further reason to question whether the company is truly committed to providing a high quality service to its South Dakota customers. Mr. Gruis indicated in his testimony that the company's corporate offices are out-of-state in Alexandria, Minnesota, and that at present RCC and Wireless Alliance employ only two full-time network technicians for South Dakota, one who is located in Watertown and another who is located in Sioux Falls. TR Vol. 1 at 24. In addition, it was explained that these two individuals are not dispatched out of any company operations center, but instead are simply tied to personal alarm activated pagers. TR Vol. 1 at 33. Mr. Gruis, in commenting on RCC's "retail customer service locations" in South Dakota also indicated that the company has only seven such locations to cover its entire service area in South Dakota, and that five of these retail establishments are located in Sioux Falls and two in Watertown. TR Vol. 1 at 32. No others were identified to serve other parts of the State where RCC is licensed to provide its services. These facts indicate that limited human resources have been assigned to RCC's South Dakota operations, and run counter to the general claims made by RCC that it is committed to providing improved service quality.

There also is no support for RCC's claim that the incumbent rural carriers (Intervenors) will provide higher quality services if RCC is designated. First, the statements of RCC related to improved service obviously are not prefaced by any knowledge on the part of RCC's witnesses as to the present level of service that is provided by each of the rural telephone companies affected by RCC's ETC filing. RCC contends that quality of service will be improved, yet none of the RCC witnesses indicated that they have done studies of the service quality already provided or that they otherwise have specific

knowledge of the same. Very clearly, the claims of RCC related to service quality benefits are based on nothing more than conjecture, resting merely on the general assumption that better service quality flows from competition. Secondly, the testimony of Intervenor witnesses, Dennis Law, James Groft, William Heaston, and Randy Houdek, individuals who are employed by and work directly for the rural carriers, indicates that designation of RCC as an ETC would more likely have a negative impact and impair the availability and quality of their telecommunications services. (Dennis Law Reply Test., pp. 7, 8; William Heaston Reply Test., p. 5; James Groft Reply p. 7; Randy Houdek Reply, p. 7).

E. RCC Has Failed to Address the Public Costs of Designating Multiple ETCs in High-cost Rural Areas.

Not only has RCC failed to present sufficient evidence related to the public benefits that would result from its designation, the company also has failed to address in any meaningful way the very real universal service concerns presented by multiple ETC designations in low density, high cost rural areas. The company refuses to recognize that there are public costs associated with additional ETC designations, and in particular, has displayed a complete lack of regard for the potential that granting multiple ETC designations in certain high-cost rural areas may actually cause hardship and render it difficult for any service provider to continue facilities investment and provide quality service.

As indicated by Mr. Brown in his testimony, additional ETC designations do generate a public cost. Harm to consumers from an improper ETC designation can come in several forms. (Reply Testimony pp. 17, 18, 40.) First, there is the cost of providing support to the new ETC. With respect to these costs, under the current USF structure, total costs increase in proportion to the number of additional lines that are sup-

ported. This increase can be particularly large if, as is the case with RCC, the carrier already serves a significant number of lines in the lower-cost portions of the area for which it seeks ETC designation, and it requests funding for all such pre-existing lines. (Reply Testimony pp. 17-18). Second, in addition to increased USF costs, costs are imposed on consumers if they do not receive equal or greater benefits in return. If, in return for ETC designation, the applicant expands its network to areas that were previously unserved, and expands the area over which consumers can utilize mobile communications, then perhaps this could be a reasonable use of public funds. (Brown Reply Testimony, p. 40). If, on the other hand, the applicant merely offers to serve outlying customers with high-powered customer premise equipment and roof-top antennas as a means of meeting minimum funding qualifications, and its existing customers experience no tangible improvement in their service, then such funding would not be in the public interest and the cost of the increased funding assessments would result in harm to consumers. (Brown Reply Testimony, p. 40). Finally, in sparsely populated areas, there also can be increased public costs due to the loss in network efficiency caused by multiple providers serving in a less efficient manner than a single provider could serve. These higher costs could lead to significant harm to consumers if finite universal service support resources are spread so thinly that no carrier (wireline or wireless) can justify the investment to viably function as a carrier of last resort. (Brown Reply Testimony, p. 17).

Intervenors strongly urge this Commission, in considering the costs associated with making multiple ETC designations, to recognize that there are certain rural service areas that cannot economically support multiple carriers. In these areas, while there may be some benefits associated with designating an additional ETC (provided suf-

ficient conditions are imposed ensuring improved cellular signal coverage), there are also considerable risks. “[T]o the extent that the ETC designation dilutes the finite pool of high-cost funds to the point where no carrier can viably serve as [a] carrier of last resort, then consumers will be harmed, and the public costs will be greatly increased.” (Brown Reply Testimony, p. 16). Furthermore, the stakes are significantly raised if the FCC follows the recommendation of the Joint Board and determines that high-cost support should be directed to only the customer’s primary line, or determines that the total funds available for distribution between multiple carriers must be limited.³¹ While we do not yet know what final action the FCC will take in response to the Joint Board Recommended Decision, it is inevitable that the current growth rate in universal service support will not be sustained, and that some form of control on the size of the USF will be implemented. When this occurs and multiple ETCs are faced with serving a particularly high-cost area with a fixed amount of universal service support, there will obviously be negative consequences. It is irrefutable that there are certain sparsely populated, high-cost areas that will never be economically capable of supporting multiple competitive carriers. In these areas, if the total support available for distribution between multiple ETCs becomes limited, there will obviously be negative consequences. None of the carriers providing service may find themselves with sufficient financial resources to continue investment in their networks or to viably serve as a carrier of last resort. This result carries the prospect of very substantial harm to consumers in the high-cost rural areas in South Dakota.

As FCC Commissioner Martin has noted in regard to the FCC’s policy of using federal universal service funding to create competition:

³¹ The Joint Board, by a vote of 5-3, that the policy of providing federal universal service support to all lines served by ETCs in high-cost areas be changed, finding that support should only be provided to one

I also note that I have some concerns with the Commission's policy – adopted long before this Order – of using universal service support as a means of creating “competition” in high cost areas. I am hesitant to subsidize multiple competitors to serve areas in which costs are prohibitively expensive for even one carrier. This policy may make it difficult for any one carrier to achieve the economies of scale necessary to serve all of the customers in a rural area, leading to inefficient and/or stranded investment and a ballooning universal service fund.³²

The Joint Board addressed this same concern in its recent Recommended Decision. The low customer densities and high per-customer cost characteristics of many rural carrier study areas were referenced as support for the adoption of a more rigorous standard in reviewing ETC applications, and more specifically as a means of guarding against unsustainable designations in the most economically challenged areas:

We believe that states making public interest determinations may properly consider the level of federal high-cost per-line support to be received by ETCs. High-cost support is an explicit subsidy that flows to areas with demonstrated levels of costs above various national averages. Thus, one relevant factor in considering whether or not it is in the public interest to have additional ETCs designated in any area may be the level of per-line support provided to the area. If the per-line support level is high enough, the state may be justified in limiting the number of ETCs in that study area, because funding multiple ETCs in such areas could impose strains on the universal service fund. Moreover, if the Commission were to cap per-line support upon entry of a competitive ETC and impose a primary-connection restriction, as discussed below, designating an excessive number of ETCs could dilute the amount of support available to each ETC to the point that each carrier's ability to provide universal service might be jeopardized. State commission consideration of high-cost support on a dollar per line basis would allow equivalent comparison of support among study areas.³³

It is particularly important that this Commission carefully evaluate the current RCC Petition in the manner envisioned by the Joint Board, given the low-density,

“primary line” at each customer's residence or business location. Recommended Decision, par. 56.

³² 15th Report and Order in CC Docket No. 96-45, Released November 8, 2001, Separate Statement of Commissioner Kevin J. Martin. Commissioner Martin reaffirms this statement in his separate statement concerning the Joint Board Recommended Decision.

³³ *Recommended Decision* par. 43.

high-cost characteristics of the rural service areas that are subject to the Petition. As indicated in Ms. Vanicek's testimony, the customer densities for the areas covered by the RCC Petition are generally quite low. (Intervenors' EXH 3, Appendix 1). Not surprisingly, the low-customer densities in these areas have led to universal service support amounts for each of the RLECs (on a per-line basis) that are quite high compared to national averages and even compared to statewide averages. (Intervenors' EXH 3, Appendix 2). Most of the companies receive amounts greater than \$15 per line per month, and four companies receive universal service support of more than \$30 per line per month. Of the total lines served by all rural telephone companies receiving support through USAC, only 17.6 percent receive support of over \$15 per line per month, and only 5.9 percent receive support of over \$30 per line per month. Thus, the South Dakota RLEC support amounts indicate that the areas at issue in this case are high-cost, even when compared to other areas that receive high-cost support throughout the nation. This being the case, as stated by the Joint Board, the review in this case should be "particularly rigorous."³⁴ Based on that review, Intervenors urge this Commission to reject the RCC Petition.

The rural service areas at issue, as evidenced by the specific customer densities and high cost support numbers presented; are not the type of areas that will support an unlimited number of ETCs. Moreover, contrary to the impression created by RCC, it cannot reasonably be assumed that the FCC will continue to distribute USF to multiple ETCs without limitation. The reality is that there is a finite amount of public funding to support rural telecommunications infrastructure. In making the decision regarding the designation of additional ETCs in high-cost rural areas, the Commission must

³⁴ Recommended Decision at par. 18.

carefully weigh the impact of the dilution of support that this will create, against the need to provide sufficient support, so that at least one carrier can viably remain as a carrier of last resort. This weighing process should lead to the conclusion that the benefits of granting the additional designation requested by RCC do not outweigh the costs. And, accordingly, the RCC Petition should be rejected by this Commission. At a minimum, if the Commission grants part or all of RCC's Petition, Intervenors request that the Commission impose the same conditions as imposed on Western Wireless in Docket TC03-191.³⁵

III. The SDPUC Should Reject RCC's Proposed ETC Service Area Definition

RCC asks the Commission to redefine the rural LECs' service areas to be coterminous with RCC's FCC-licensed service area. Where RCC's licensed service area includes an entire wire center, RCC requests redefinition at the wire-center level. However, where RCC's licensed service area includes only part of a wire center, RCC requests that the LEC's service area be redefined to something smaller than the wire center. The Commission should reject RCC's requests.

The first thing that must be understood about RCC's request is that the Commission is not being asked to define only RCC's ETC service area. Rather, the Commission is being asked to redefine the LECs' service areas to something less than the study area. If the Commission takes this step, the redefinition will be available to all carriers. The plain language of Section 214(e)(5) makes this clear. The FCC confirms this interpretation in Highland Cellular in which it stated "[w]e redefine the affected service area only to determine the portions of the rural service area in which to designate Highland Cellular and future competitive carriers seeking ETC designation in the same rural

³⁵ Amended Order Designating Western Wireless as an Eligible Telecommunications Carrier; Findings of Fact and Conclusions of Law; and Notice of Entry of Order, Docket TC03-191, released January 3, 2005

service area.”³⁶ Thus, all competitive carriers will be able to request ETC designation based on the new “service areas” defined by the Commission. For example, if the LECs’ service areas are redefined such that each wire center is a service area, ETCs will be able to request designation on a wire-center basis and they will be able to request ETC designation only for the wire centers that are the most attractive to them.

When the ETC service area equals the study area of the rural ILECs, all consumers in South Dakota have an equal possibility of benefiting from federal universal service funds brought into the state and from competitive services. If the Commission redefines ETC service areas, however, competitive carriers will be able to pick and choose which consumers in South Dakota will have the possibility of such benefits.

Perhaps more importantly, by redefining the LECs’ service areas to something less than the study area, the Commission would be reducing the potential universal service benefits currently available to consumers in South Dakota. It also would be taking a step back from the goal of bringing competition and effective wireless service to all consumers in South Dakota. Currently, each consumer in the rural ILECs’ study areas can request supported services from two carriers, the rural ILEC and Western Wireless, because each must provide supported services throughout the study area. Under the RCC redefinition proposal, however, competitive carriers will no longer be required to serve the entire study area in order to receive universal service benefits. Therefore, the Commission will lose a powerful motivator to require competitive carriers, especially wireless carriers, to extend their services to all parts of the study area.

(*WWC Order*), Page 7.

³⁶ *Highland Cellular, Inc.*, at ¶38 (2004) (Emphasis added.)

In fact, even the ILECs and Western Wireless, which currently must serve the entire study area, would be able to relinquish their ETC designation in select wire centers, pursuant to Section 214(e)(4) of the Act. Section 214(e)(4) requires the state Commission to permit an ETC to relinquish its designation in any area served by more than one ETC. Even if Western Wireless did not exercise its right under Section 214(e)(4), at a minimum, it is likely that competitive pressure would force it to focus its service efforts on the same limited area served by other competitive ETCs, such as RCC. Clearly such a result, and RCC's request, is not in the public interest of the citizens of South Dakota.

RCC argues that Western Wireless' designation as an ETC throughout the ILECs' study areas supports its request for redefinition because "when taking both carriers' designated ETC service areas into consideration, the rural LECs affected by RCC's redefinition request will be covered in their entirety by one competitive ETC."³⁷ RCC concludes that grant of its Petition will ensure that "consumers in virtually all of the affected rural ILECs' service territory will have the option of requesting service from at least one wireless carrier" subject to ETC requirements.³⁸ On the contrary, maintaining the study area as the ETC service area is more likely to ensure that all consumers have the option of obtaining service from a wireless ETC, namely Western Wireless. Grant of RCC's redefinition request would jeopardize the availability of a competitive ETC in all wire centers because Western Wireless would be able to relinquish its ETC designation on a wire center basis (or on a partial wire center basis if the Commission redefines certain parts of the LECs' service area to something smaller than the wire center).

³⁷ RCC Brief at 34.

³⁸ RCC Brief at 34.

In sum, RCC's request would exacerbate further the hodge-podge availability of competitive service – and wireless service – that already exists in South Dakota. Like the competitive service equivalent of “the rich get richer and the poor get poorer,” RCC's request may increase competitive options for a few select South Dakotans at the expense of the rest. Clearly, this is not in the public interest.

Undeterred by reality, RCC argues that redefinition is in the “public interest” because RCC is not licensed to serve the entire service territory of several SDTA member companies and, therefore, it cannot effectively compete in the entire territories of all ILECs in RCC's CGSA. In short, RCC argues that redefinition is in the public interest because it is in the interest of RCC.

As an initial matter, RCC proposes to serve the entire study area of RC Communications, Roberts County Telephone Cooperative, Stockholm-Strandberg, Union Telephone Company, and Valley Telephone Company-Minnesota. Therefore, there is no reason to redefine the service area of these carriers.

For the other rural ILECs, while it may be true that RCC's licensed territory does not match the study area boundaries of the rural ILECs, RCC has not met its burden of proof simply by reciting this fact. On the contrary, the Act contemplates that an ETC may not be able to meet the requirement to provide service throughout the designated service area through its own facilities. Thus, Section 214(e)(1)(A) states that an ETC must offer supported services “either using its own facilities or a combination of its own facilities and resale of another carrier's services...”³⁹ Moreover, RCC admits that it can provide service to consumers in areas beyond its licensed service territory and agrees

³⁹ 47 U.S.C. §214(e)(1)(A).

to do so in certain cases.⁴⁰ Without any factual evidence, however, RCC simply asserts that it cannot or will not provide service in all parts of the ILECs' study areas that are beyond its licensed service territory.

RCC also argues that its request to have an ETC service area that is coterminus with its licensed service area is similar to proposals that have been adopted by other state commissions and the FCC. As an initial matter, in Highland Cellular the FCC found that redefinition should not match the wireless carriers licensed area where the licensed area covers only partial wire centers. According to the FCC, wire centers typically correspond with county and/or town lines and, therefore, designation for partial wire centers should not be granted.⁴¹

Actions taken by other state commissions simply are not relevant to the analysis this Commission must conduct, which must be based on the facts specific to South Dakota. For example, RCC states that the Colorado Public Utilities Commission redefined CenturyTel's service area emphasizing that "in CenturyTel's service area, no company could receive designation as a competitive ETC unless it is able to provide service in 53 separate, non-contiguous wire centers located across the entirety of Colorado."⁴² This clearly is not the case in the rural ILECs' service territories, as a competitive ETC has already been designated to provide service in the entire study area of each of the rural ILECs. Moreover, although a couple of the rural ILECs have non-contiguous wire centers, the factual circumstances are far different from those of CenturyTel in Colo-

⁴⁰ RCC Brief at 20, citing Tr. Vol. 1 at 74, ll. 9-17.

⁴¹ Highland Cellular at ¶33.

⁴² RCC Brief at 25, citing a decision of the Colorado Public Utilities Commission (citation omitted).

rado. For example, none of the rural ILECs' study areas include wire centers "located across the entirety" of South Dakota.

RCC also points to a recommended decision by a Minnesota Administrative Law Judge (ALJ) where the ALJ concluded that "[t]he service area redefinition proposed by Midwest will benefit Minnesota consumers by promoting competitive entry and should be adopted."⁴³ This case also appears to be factually distinct from the situation in South Dakota where competitive entry has been achieved with the designation of Western Wireless, and redefinition would allow Western Wireless, which has committed to serve the entire study area, to serve only some portions of the study area.

Finally, RCC cites the Washington Commission action in which that Commission approved a petition filed by the rural LECs to redefine their service areas along wire center boundaries. This case is instructive, but not for the reason claimed by RCC. Rather, the Commission should wonder why the rural LECs sought redefinition of their own study areas. Possibly, it was to set up their efforts to target their services—and universal service—where they faced competition. Possibly, it was to be able to withdraw from providing service in the highest cost—and least profitable—wire centers. In any event, it is factually distinct from this case where the rural ILECs have demonstrated that redefinition would affect their ability to continue to serve the entire study area.

RCC also argues that the requested redefinition satisfies the three Joint Board factors under Section 214(e)(5) of the Act. RCC states that the Commission "must consider three factors in making a determination to redefine an ILEC service area: (1) whether the proposal would result in 'cream skimming,' (2) whether the ILEC would in-

⁴³ RCC Brief at 26, citing Midwest Minnesota ALJ Decision (citation omitted).

cur undue administrative burden; and (3) whether the ILEC's status as a rural carrier would be affected."⁴⁴

As an initial matter, although the rural ILECs agree that these factors should be considered, the Commission is not precluded from considering additional factors. In any event, the evidence demonstrates that "cream-skimming" or an effect like "cream-skimming" will occur as a result of the redefinition requests.

Cream-skimming, or an effect like cream-skimming, simply put, results when a carrier serves on average the low-cost and/or high revenue parts of the study area and not the high-cost and/or low revenue parts of the study area, or when a carrier serves the population centers that the ILEC relies on to offset the cost of serving high-cost areas. As explained by Mr. Houdek, "If you redefine a study area and they get support based on my cost and they only have to serve a small portion of the lower-cost area, it's cream-skimming." (TR Vol. 2 at 338, Lines 1-4.) Under both criteria, the rural ILECs have demonstrated cream-skimming.

As demonstrated in Mr. Brown's testimony, RCC is proposing to serve wire centers with comparatively high densities, and will not serve wire centers with lower densities for Baltic, James Valley, PrairieWave, Sioux Valley, Split Rock and Venture. In addition, the average density of the wire centers of these carriers is far below 100 households per square mile. As demonstrated by Mr. Brown, "below approximately 100 households per square mile costs increase geometrically as population density decreases." (Brown Surrebuttal Testimony 15, Lines 11-13.) This means that in very sparsely populated areas like rural South Dakota, a small difference in density would result in a much greater difference in cost to serve an area. Thus, for example, even in Venture's wire

⁴⁴ RCC Brief at 27.

centers, where the average density of wire centers to be served by RCC is 3.8 and the average density of wire centers outside of RCC's proposed ETC area is 1.3, the cost differential in serving these areas would be much greater.

Moreover, RCC is proposing to serve the main population centers of the rural LECs. For example, RCC proposes to serve the following wire centers:

Baltic- Crooks and Baltic
ITC- Lake Norden
James Valley- Groton⁴⁵
PrairieWave- Lennox
Sioux Valley- Valley Springs and Dell Rapids
Splitrock- Brandon and Garretson
Venture- Sisseton

In Highland Cellular, the FCC denied redefinition where the competitive carrier proposed to serve the highest density wire centers, even though some low-density wire centers also would be served. Similarly, the exchanges listed above represent the highest-density wire centers for each respective rural LEC.

As Mr. Houdek explained, Sisseton, a lower cost exchange, was purchased to offset the cost of its other exchanges, which are lower density and higher cost. According to Mr. Houdek, Venture bought the Sisseton exchange "to try to get some properties that were lower-cost to average our high-cost areas with." TR Vol. 2 at 345, Lines 12-14. When asked whether revenues from lower-cost areas, like Sisseton, are used to provide service to low density, high-cost areas, Mr. Houdek replied: "Exactly. If we had to make investments and offer services based purely on what each individual exchange or portions of an exchange would support, there would be some customers of ours that

⁴⁵ There is some uncertainty on the record as to whether RCC serves Groton.

would be very disappointed in the level of service.” TR Vol. 2 at 345, Lines 21-25. Further, Mr. Houdek stated, “When I start losing my low-cost customers, I’m losing money to spend on the high-cost customers.” TR Vol. 2, at 347, Lines 15-17. Similarly, Mr. Heaston, on behalf of PrairieWave, stated that the RCC proposed service area included the one town in the Lennox exchange “where most of the customers live and work.” TR Vol. 2 at 295, Lines 23-25. And, Mr. Law, on behalf of Sioux Valley, noted that RCC is not going to serve the high-cost exchanges of Corsica and Plankinton. TR Vol. 2 at 318, Lines 1-3. Whether RCC has intentionally targeted these exchanges or not, this amounts to cream-skimming.

RCC relies on the LEC’s ability to reallocate high cost support within the study area to support its claims that there is no cream-skimming. RCC seems to suggest that a LEC that did not reallocate support should not be able to argue against a redefinition of the study area because it chose not to reallocate support. RCC also suggests that where the LEC did reallocate support, it is not possible for cream-skimming to occur. RCC is wrong on both counts.

The Commission should draw no connection between whether a LEC reallocated support and whether RCC’s redefinition request meets the public interest requirement in Section 214(e) of the Act. First, LECs are not required to reallocate support. Second, Congress did not require that redefinition pursuant to Section 214(e) of the Act must be granted where there is reallocation of universal service support. In other words, the plain language of the Act does not tie redefinition with reallocation.

RCC also is wrong that reallocation of support would eliminate cream-skimming, and that where the LEC has already reallocated support it is not possible for

cream-skimming to occur. On the contrary, even the FCC has found that disaggregating high-cost support does not protect incumbent LECs against cream-skimming in every instance. For example, in Highland Cellular the FCC found that where the LEC's study area "includes wire centers with highly variable population densities, and therefore highly variable cost characteristics, disaggregation may be a less viable alternative for reducing cream-skimming opportunities."⁴⁶ The FCC went on to say that "[t]his problem may be compounded where the cost characteristics of the incumbent and competitor differ substantially."⁴⁷

The record evidence demonstrates that the same problems found in Highland Cellular that made reallocation ineffective to prevent cream-skimming are present in the study areas of the rural LECs. Reallocation also is ineffective to prevent cream-skimming because it is based on a point in the past -- not the present or future circumstances of the carrier. As explained by Mr. Houdek, "a disaggregation study is certainly more art than science. It's a game. You arbitrarily pick numbers that really have no relationship. By the time I file a disaggregation study, it's based on information that I have at a particular time. If I bury a fiber, if I buy a new switch, if I make any kind of investment in fiber loop electronics, then it's no longer- it was accurate to begin with, it's no longer accurate now." TR Vol. 2 at 341, Lines 2-10.

Thus, RCC's suggestion that any rural LEC can protect itself from cream-skimming if the Commission redefines the service area by reallocating its high-cost support clearly is wrong.

⁴⁶ *Highland Cellular* at ¶32.

⁴⁷ *Id.*

RCC also is wrong when it argues that the FCC's cream-skimming analysis "establishes conclusively" that there is no cream-skimming associated with RCC's request. RCC bases its faulty conclusion on the faulty premise that the FCC's order in Virginia Cellular means that the population differential between wire centers must be 8 to 1 before there can be cream-skimming.

Even if this were true, the FCC has no authority to dictate a formula that this Commission must use to evaluate cream-skimming and its effect on the public interest and service area redefinition. In any event, the FCC did not dictate any specific formula in Virginia Cellular to determine cream-skimming.

Moreover, reallocation is time-consuming, difficult and costly. RCC seems to believe that reallocation can be done easily by the LEC—and often. Intervenors disagree. Reallocation amounts to a cost study. To determine the most advantageous reallocation "path" under the FCC's rules, the LEC would need to assess a number of different scenarios. Even if the LEC could determine the most accurate reallocation of support, it would become outdated quickly as changes to the network are made and other factors that are the basis of the reallocation change. To suggest that the rural LECs spend time and money to reallocate support when the result would be ineffective is nothing more than an exercise in futility and the definition of "undue administrative burden."

Finally, RCC's request that certain LECs' service areas be redefined to something smaller than the wire center should be rejected. In addition to all of the issues discussed above, redefinition below the wire center presents additional concerns. First, RCC has not met its burden of proof in connection with this request because it has not identified clearly the parameters of the new service areas. Second, because RCC's pro-

posed service area is not clearly defined, RCC's proposal would result in consumer confusion, and possibly fraud in the administration of universal service. Under RCC's proposal, consumers in the same town or county would be treated differently for universal service purposes, seemingly at RCC's discretion. This would be confusing for consumers and virtually impossible for the Commission to monitor or review. For example, if RCC refused to serve a consumer on the basis that his or her location is outside of the service area, there would be no clear parameter to challenge this decision. Similarly, if RCC wanted to serve a consumer that was outside of the service area, there would be no clear parameter to challenge this decision. Or, the consumer could simply supply a billing address inside the service area for RCC to claim support, even if the service is used outside of a supported area.

Thus, RCC's request for service area redefinition should be denied. Defining the service area as something less than the study area would reduce the potential universal service benefits currently available to consumers in South Dakota and it would be taking a step back from the goal of bringing competition and effective wireless service to all consumers in South Dakota. It also would lead to cream-skimming and undermine the ability of the rural LECs to provide high quality, lower-cost services throughout their study areas. Accordingly, RCC's request should be denied as not in the public interest.

CONCLUSION

As demonstrated in the foregoing arguments, the public interest standard as redefined in the Virginia Cellular and Highland Cellular cases requires more than considering competition, which RCC urges this Commission to do. Under the cost/benefit

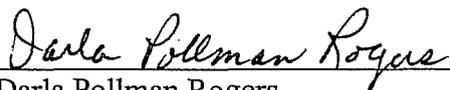
analysis, this Commission is charged with weighing potential benefits to the consumers of South Dakota versus potential harm to said consumers.

The refusal of RCC to commit to a build-out plan indicates a lack of commitment to provide additional benefits to rural consumers in South Dakota, should this Commission grant ETC designation. Balancing this against the potential harm to consumers, it appears that South Dakotans would receive few, if any, benefits for the additional funds that would be gained by RCC if ETC designation is granted.

Further, the Commission should reject RCC's proposed ETC service area redefinition. Defining the service area as something less than the study area would reduce universal service benefits currently available to consumers of South Dakota, and would lead to cream-skimming.

Accordingly, this Commission should (a) deny RCC's application for failure to meet the public interest standard; or (b) condition RCC's grant of ETC designation on conditions similar to those imposed in the Western Wireless grant of ETC designation.

Respectfully submitted this eleventh day of February, 2005.



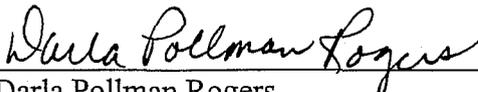
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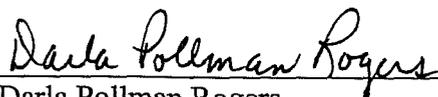
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