

Gary Hanson, Chair
Bob Sahr, Vice-Chair
Dustin Johnson, Commissioner

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

500 East Capitol Avenue
Pierre, South Dakota 57501-5070
www.state.sd.us/puc

Capitol Office
(605) 773-3201
(605) 773-3809 fax

Transportation/Warehouse
(605) 773-5280
(605) 773-3225 fax

Consumer Hotline
1-800-332-1782

February 11, 2005

Ms. Pam Bonrud
Executive Director
Public Utilities Commission
500 East Capitol
Pierre, SD 57501

Re: In the Matter of the Filing by RCC Minnesota, Inc.
and Wireless Alliance, L.L.C. d/b/a Unicel for
Designation as an Eligible Telecommunications Carrier
Docket TC03-193

Dear Ms. Bonrud:

Enclosed for filing you will find Staff's Brief with reference to the above captioned matter. By copy of this letter I am serving a copy of the enclosure on those noted below, which is intended as service upon them by mail.

Very truly yours,



John Smith
Commission Counsel

JS:dk
Enc.

cc: Mr. Talbot J. Wiczorek
Mr. David A. LaFuria
Mr. Darla Pollman Rogers
Mr. Richard Coit
Mr. James Cremer
Ms. Meredith Moore

Enc.

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

*John did not
have me proof
this before it
went out. dk*

IN THE MATTER OF THE FILING BY RCC)
MINNESOTA, INC. AND WIRELESS)
ALLIANCE, L.L.C. D/B/A UNICEL FOR)
DESIGNATION AS AN ELIGIBLE)
TELECOMMUNICATIONS CARRIER)

STAFF'S BRIEF

TC03-193

I. PROCEDURAL HISTORY

On November 18, 2003, the Public Utilities Commission (Commission) received a petition (Petition) from RCC Minnesota, Inc. (RCC) and Wireless Alliance, L.L.C. d/b/a Unicel (Wireless Alliance) (together, Petitioners) requesting designation as an eligible telecommunications carrier (ETC) for service areas in northeastern and southeastern South Dakota. On November 20, 2003, the Commission electronically transmitted notice of the filing and the intervention deadline of December 5, 2003, to interested individuals and entities. On December 16, 2003, the Commission granted intervention to James Valley Cooperative Telephone Company, Union Telephone Company, Stockholm-Strandburg Telephone Company, Venture Communications Cooperative, Interstate Telecommunications Cooperative, Inc., Sioux Valley Telephone Company, PrairieWave Community Telephone, Inc., South Dakota Telecommunications Association, Roberts County Telephone Cooperative Association, RC Communications, Inc., and Alliance Communications Cooperative, Inc. The hearing was held on this matter on October 13 and 14, 2004. On October 21, 2004, the Commission issued an Order Setting Briefing Schedule. Pursuant to the order Petitioners were to file their brief 21 days after receiving the transcript of the hearing; Intervenor and Staff were to file their briefs 21 days after receipt of Petitioners' brief; and Petitioners were to file their reply briefs 10 days after receipt of the Intervenor and Staff's briefs. Petitioners filed their Brief on January 5,

2005. By stipulation of the parties on January 14, 2004, the date for filing of Intervenors' and Staff's briefs was extended to February 7, 2005, and by stipulation of the parties on February 3, 2005 was extended to February 11, 2005.

II. JURISDICTIONAL STATEMENT

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, 49-31-78, 49-31-81; ARSD 20:10:32:42 through 20:10:32:46, inclusive; and 47 U.S.C. § 214(e)(1) through (5).

III. ARGUMENT

A. Universal Service Criteria

Commission Staff agrees with Petitioners that, viewed jointly, they have met their burden of demonstrating their capability to provide the nine categories of services and functionalities required by the FCC in 47 C.F.R. § 54.101(a) for receipt of universal service funds and therefore for designation as an ETC to receive such support pursuant to 47 U.S.C. § 214(e). In its Findings of Fact, Conclusions of Law and Order in Docket No. TC98-146, in which the Commission designated GCC License Corporation as an ETC in certain rural service areas in South Dakota, the Commission stated these services and functionalities to be:

(1) voice grade access to the public switched network; (2) local usage; (3) dual tone multi-frequency signaling or its functional equal; (4) single party service or its functional equivalent; (5) access to emergency services; (6) access to operator services; (7) access to interexchange service; (8) access to directory assistance; and (9) toll limitation for qualifying low-income consumers. Conclusion of Law 4.

Staff concurs with Petitioners that the record amply demonstrates that Petitioner will have the capability in its requested designated service areas to provide the required universal services. See specific record citations in Petitioner's Brief, A. pp. 4-6.

Staff does, however, wish to at least raise a technical concern with the fact that each of Petitioners is separately licensed in each of the respective proposed service areas and has no authority to provide service in the other area. Each of Petitioners independently operates and maintains its own network. TR Vol. I, p. 99; Staff Ex 2. Petitioners' witness testified that Petitioners' parent, Rural Cellular Corporation, would be bound by the obligations imposed by the requested designation, that Petitioners are jointly operated using essentially the same staff and that the licenses could be transferred at any time with only notice to the FCC. TR Vol. I, p. 100-102. Petitioners' witness also testified that the Minnesota Commission had approved a joint designation without evidence of a formal joint operating agreement. TR Vol. I, p. 101. Although Staff does not have a strong objection to issuance of a joint designation, Staff does question whether such a designation meets the legal requirements for designation under 47 U.S.C. 214(e), SDCL 49-31-78 and ARSD 20:10:32:42 since as of this time, each entity is only authorized to provide service, and hence meet the obligatory universal service requirements, within its licensed territory.

B. Definition of Service Areas

Petitioners request that the portions of all Qwest wire centers lying within the proposed service areas be immediately designated. These entire and partial wire centers are set forth on Petitioners' Ex 4, Exhibit B as amended by the testimony of Kyle Gruis, which added six partial Qwest wire centers. TR Vol. II at 9-10. The additional Qwest partial wire centers are Huron, Iroquois, DeSmet, Arlington, Madison and Lake Preston. Additionally, the Forman wire center listed on Petitioners' Ex 4, Exhibit B was transferred from Qwest to Dickey Rural Communications, Inc. TR Vol. I, p. 33; Docket No. TC95-076. Since Dickey Rural was not noticed in this proceeding, this wire center must be excluded from the wire centers to be included in Petitioners' designated service areas. TR Vol. II at 12. Qwest did not intervene in this proceeding. With the above corrections,

Staff therefore recommends that the entire and partial Qwest wire centers located within Petitioners' proposed service areas be included within Petitioners' designated areas.

With respect to rural areas, 47 U.S.C. § 214(e)(5) provides:

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 this title, establish a different definition of service area for such company.

Petitioners have requested that the Commission establish a different definition of service area for them in those areas proposed for designation located within the service areas of rural telephone companies. Specifically, Petitioners request that their service areas be defined along the lines within which they are licensed by the FCC to provide wireless service. These lines occur on county boundary lines. The licensed area of RCC includes the entirety of the counties of Clark, Codington, Day, Deuel, Grant, Hamlin, Marshall and Roberts. The licensed area of Wireless Alliance includes the entirety of the counties of Lincoln and Minnehaha. The incumbent rural companies' study areas in many cases, however, do not coincide with these county line boundaries. Because ETCs are required to provide the required services throughout their designated service areas, the Commission and the FCC are therefore required to establish different definitions of Petitioners' service areas before they may be designated as ETCs.

Assuming that such a redefinition will redefine only Petitioners' service areas and not the incumbent ETCs' service areas for their own purposes, Staff believes (i) that, with the exception noted below, Petitioners have met their burden of demonstrating why such a redefinition makes sense and is in the public interest and (ii) that the opposing evidence does not establish sufficient grounds to deny Petitioners' request for redefinition of its service areas to coincide with its wireless license areas. Intervenors argue that Petitioners' redefinition ought not to be permitted to go below the entire wire

center level. In *Highland Cellular*, the FCC refused to redefine and designate below the wire center level, stating its reason as follows in para. 33:

A rural telephone company's wire center is an appropriate minimum geographic area for ETC designation because rural carrier wire centers typically correspond with county and/or town lines.

In this case, the evidence contradicts that finding. The rural company study area and wire center boundaries simply do not correlate whatsoever with county boundary lines. Staff has been unable to find any evidence in this record that provides a convincing reason for not approving a redefined service area for Petitioners that corresponds with their licensed area.

In the case of a competitive wire line carrier seeking an ETC designation, requiring the competitive carrier to serve the entirety of a wire center or, perhaps in most cases, even the entirety of a study area makes perfect sense. In such cases, the Commission has authority to establish local exchange area boundaries and to certify local service authority and can consider the effects on universal service in connection with such proceedings. In such cases, it seems only reasonable that a competitor be compelled to commit to the same service area that the incumbent is compelled to serve to avoid giving unfair competitive advantage to the competitor. In the case of wireless service, however, the licensing of spectrum and coverage areas is performed by the FCC completely divorced from the context of the issues involved in wire line local exchange service definition or ETC designation. Furthermore, the coverage characteristics of wireless service bear essentially no resemblance to those of land line local exchange service. TR 82-84.

It might be argued that this creates a potential for cream skimming. Staff, however, is unable to find evidence in the record to support the fact that approving partial wire centers in this case will create a cream skimming situation. Although there is evidence that in some cases Petitioners will serve lower cost areas of incumbent study areas than the part it will not serve, there does not seem

to be much of a correlation to wire center boundaries significantly effecting this outcome. It seems rather to be more a function of the geographic fact of life in South Dakota that as you go west, population density in rural areas decreases. Furthermore, the evidence is undisputed that Petitioners' motivation in selecting its proposed service areas was based not on selectively choosing to serve specific incumbent low-cost wire centers, but on fact that these are the areas for which Petitioners hold spectrum licenses. Furthermore, Staff agrees with Petitioners' analysis in its Brief, pp. 30-33 that the intra-study-area cost disparities in this case do not rise to the levels deemed significant enough in *Virginia Cellular, infra*, and *Highland Cellular, infra*, to warrant denial of designation in certain study areas.

Staff would therefore recommend that Petitioners' service areas be defined as that portion of the RLEC study areas lying within Petitioners' proposed service areas excluding those wire centers belonging to incumbent ETCs who were not given the notice of this proceeding as required by ARSD 20:10:32:46. The companies to whom notice was not given are Dickey Rural Communications, Inc., Red River Telecom, Inc., Citizens Telecommunications Company of Minnesota, Inc., Fort Randall Telephone Company and Beresford Municipal Telephone Co. TR Vol. II, at 12.

In the event that the Commission does not wish to redefine the service areas below the rural LEC wire center level, Petitioners alternatively request that service areas be redefined at the wire center level. Petitioners further request that RLEC wire centers having an insubstantial incursion into Petitioners' proposed service areas be omitted from Petitioners' request and that those RLEC wire centers having a substantial incursion into the proposed service areas be included¹. TR 33-35, 78; Petitioners Ex 4, Exhibit D. Petitioners committed on the record to providing service to the portions

¹Staff notes that Table 1 in Petitioners' Brief omits the Hartford wire center of Union Telephone Company that was included as a "Y" on Petitioners Ex 4, Exhibit D.

of such wire centers lying outside of their licensed service territory through resale, extension or roaming arrangements. Tr 74; Petitioners Ex 4, Exhibit D

Even if the Commission does not wish to divide rural wire centers, Staff recommends that Petitioners proposed service areas be approved as originally requested with respect to all non-rural wire centers, for those rural wire centers lying wholly within the proposed service areas, except in cases where the existing rural ETC was not served with the notice required by ARSC 20:10:32:46 and in the in-state portion of all wire centers that cross state boundary lines, except in cases where the existing rural ETC was not served with the notice required by ARSC 20:10:32:46. Petitioners Ex 4, Exhibits B and C, as amended by testimony at TR Vol. I, p. 33, TR Vol. II, p. 10.

With respect to rural wire centers lying partially within and partially outside the proposed service area boundaries, Staff recommends (i) that Petitioners' request for redefinition of service areas at the wire center level be approved, (ii) that those wire centers listed on Petitioners' Ex 4, Exhibit D, whether entirely or partially located within Petitioners' licensed areas which Petitioners have committed to serve in their entirety, be included within Petitioners' service areas and (iii) that the following wire centers be excluded from Petitioners' service areas: (a) with the exception noted in the following sentence, those partial wire centers listed on Petitioners' Ex 4, Exhibit D as amended by Petitioners' testimony which Petitioners have requested to be excluded; and (b) wire centers belonging to companies that did not receive notice of this proceeding. Tr Vol. I, pp. 33-35; Tr Vol. II, pp. 12-14, 78. Staff has concerns with Petitioners' proposed omission of the Rural Beresford wire center from its proposed service area and would recommend that such wire center be included in its entirety. The exclusion of Rural Beresford does strike Staff as a potential cream skimming situation since in all other cases where such a significant area of a wire center is within Petitioners' licensed area, Petitioners have requested inclusion.

47 U.S.C. § 214(e)(1)(a) expressly allows the required ETC services to be provided through a combination of the requesting carrier's own facilities and through resale. Petitioners committed on the record to serving the portion of included wire centers lying outside of their licensed area through either resale, extension or roaming. Staff recommends that this commitment should be made a condition of Petitioners designation, and we have included our draft of such a condition in Section E. below.

C. Service Throughout the Service Areas

The FCC has made it clear in its recent decisions that an applicant for ETC status need not be actually providing the required services throughout the entirety of the service area prior to receiving designation. As the FCC stated in *Federal-State Joint Board on Universal Service, Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier for the State of Virginia*, CC Docket No. 96-45, Memorandum Opinion and Order, FCC 03-338, para. 4 (rel. Jan. 22, 2004) ("*Virginia Cellular* "), para. 17:

Initially, we note that the Commission has held that to require a carrier to actually provide the supported services before it is designated an ETC has the effect of prohibiting the ability of prospective entrants from providing telecommunications service. Instead, "a new entrant can make a reasonable demonstration . . . of its capability and commitment to provide universal service without the actual provision of the proposed service." (footnotes omitted).

Petitioners in this case presented evidence that they would construct four additional towers in the two service areas if the Commission were to grant it ETC designation. Two of these towers would be constructed in each of the separate areas. TR Vol. II, 33-34. Petitioners presented no evidence of specific build-out commitments beyond the construction of these four towers; however, Petitioners' witness did testify that their build-out would continue beyond the four towers. TR Vol. II, p. 55.

Two issues are nevertheless raised by Petitioner's commitments. The first involves whether Petitioners should be simply trusted to live up to their commitments involving service area build-outs, service quality, response to requests for service and providing the basic universal service services and facilities. The second involves whether the stated commitment of Petitioners to build out, together with the commitment to provide service in special situations via higher powered antennae, hand sets, etc., meets the "throughout the service area" requirement of 47 U.S.C. § 214(e)(1).

The FCC made clear in *Virginia Cellular* and in *Federal-State Joint Board on Universal Service, Highland Cellular, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, CC Docket No. 96-45, Memorandum Opinion and Order, FCC 04-37 (rel. April 12, 2004) ("*Highland Cellular*") that it believed that the commitments made by an applicant for ETC status should be given binding legal effect through conditions attached to the designation. *Virginia Cellular*, para. 4 and 46; *Highland Cellular*, para. 4 and 43. Because the certification under 47 C.F.R. § 54.314 involves merely a certification that universal service funds are in fact being spent on the provision, maintenance and upgrading of facilities for which support is intended, the Staff has concerns about whether the annual certification process will really provide a self-executing process for review of Petitioners' compliance with their commitments and, particularly, progress toward achieving the statutorily mandated objective of service "throughout the service area for which it is designated." In its recent decisions, the FCC indicated that it shares the view that the annual certification review does not adequately provide the means for the agency to enforce the ETC designee's commitments and obligations to provide universal service throughout the service area. In *Virginia Cellular* and *Highland Cellular*, the FCC did not point to denial of the annual certification as its means of enforcement, but rather to its "authority to revoke its ETC

designation." In order to give unambiguous legal significance to the "commitments" made by petitioner in *Virginia Cellular*, the FCC stated in para. 46:

We adopt the commitments that Virginia Cellular has made as conditions on our approval of its ETC designation for the Commonwealth of Virginia.

This is consistent with the Commission's treatment of GCC's commitments in Docket No. 98-146 and of Western Wireless's commitments in Docket No. TC03-191, which the Commission included as conditions to its orders granting ETC designation. See also ARSD 20:10:32:49, "Revocation of eligible telecommunications carrier status."

As to the issue of whether building out service to areas within Petitioners' designated service areas that meet their build-out criteria, TR Vol. II, 51-55, coupled with the special-case service methods, meets the statutory requirement of service "throughout the service area," Staff does have concerns given Petitioners' stated reliance on stand-alone return on investment evaluations for each incremental build-out project. TR Vol. II, pp. 51-53; Petitioners Ex 1 at 11-12. Staff believes that such a decision-making process may not adequately recognize the responsibilities of providing service throughout the service area and may create a competitive disparity between Petitioners and the incumbent ETCs who have carrier of last resort responsibility and who are compelled to discharge that obligation by, in effect, shifting universal service support and other revenues from lower cost areas to very high cost, unprofitable locations, i.e., subsidizing service to their highest cost areas. TR Vol. II, 345-348.

Staff's position, however, is that decisions concerning compliance with service area coverage can best be addressed in the context of the specific circumstances presented at such time as that issue is raised. Factors such as additional facility cost, relationship to the capital budget and overall build-out plan, then current operation and maintenance costs, number of persons to be benefited, new technologies and the provision of service to arterial highways and other public service issues can be

weighed by the Commission at such time. Suffice it to say for now that a condition of granting Petitioners ETC designation in the proposed service area should be that Petitioner continue to advance toward the statutory objective of offering service "throughout the service area for which the designation is received" and that service provision through customer equipment or facilities should be limited to special circumstances.

D. Public Interest

In the rural service areas for which Petitioners seek ETC designation, the Commission is also required to find that the designation is in the public interest. 47 U.S.C. § 214(e)(2); ARSD 20:10:32:42. In *Virginia Cellular* and *Highland Cellular*, the FCC laid out some specific factors to be considered in making the public interest determination, stating them as follows in *Highland Cellular*, para. 4:

[I]n determining whether designation of a competitive ETC in a rural telephone company's service area is in the public interest, we weigh numerous factors, including the benefits of increased competitive choice, the impact of multiple designations on the universal service fund, the unique advantages and disadvantages of the competitor's service offering, any commitments made regarding quality of telephone service provided by competing providers, and the competitive ETC's ability to provide the supported services throughout the designated service area within a reasonable time frame. (emphasis supplied).

Staff believes Petitioners have demonstrated that they will offer competitive choice in wireless service, have committed to providing quality wireless service and customer service and have the ability and have stated a commitment to provide the supported services throughout the designated service area within a reasonable time frame. Staff also agrees with Petitioners that the evidence in the record is not sufficient to demonstrate that their designation as an ETC in the proposed service areas will have such a detrimental effect on the incumbent ETCs as to pose a serious threat to the provision of universal service within Petitioners proposed designated service areas. Staff is unable to offer a basis in the record for this Commission to make findings with respect to how Petitioners'

particular designation(s), or any particular designation, would affect the universal service fund generally.

In Staff's view, the only significant public interest issue in this case is whether it is in the public interest to designate multiple ETCs in rural areas which provide the same mode of service as an existing ETC designated for such area. In the case of Petitioners' proposed service areas, the entirety of the rural portion of such proposed areas is currently within the service area of WWC License LLC d/b/a Western Wireless d/b/a Cellular One. Order Designating Western Wireless as an Eligible Telecommunications Carrier, Docket No. TC03-191, TR Vol. I, p. 104; Amended Order Designating Western Wireless as an Eligible Telecommunications Carrier, Docket No. TC03-191; Order Designating Western Wireless as an ETC for Areas Served by Certain Rural Telephone Companies, Docket No. TC98-146. In the above-quoted paragraph from *Highland Cellular*, the FCC stated one of the public interest factors to be "the unique advantages and disadvantages of the competitor's service offering." In Docket No. TC03-191, the Commission found in Finding of Fact 20:

The Commission finds that Western Wireless' service offerings will bring benefits, including increased choices, expanded local calling areas, and mobility.

Although the Petitioners' service will provide competitive choice among wireless services, the desirable qualities of mobility and expanded local calling area will not be dependent on their designation as an ETC. Western Wireless, the existing wireless ETC designee in Petitioners' proposed area, is already obligated to provide service in these areas, and its services will offer these qualities.

Evidence in the record demonstrates that to provide ubiquitous service in the very low density, high cost areas of South Dakota, it is necessary for the incumbent rural LECs to shift revenues, including Universal Service Funds, from their lower cost areas to their high cost areas, i.e., from the towns, small as they are, to the money-losing, isolated customer or dispersed rural customer

areas. TR Vol. II, pp. 241-243, 345-348. To the extent that multiple ETC are competing for the same customer revenue and USF funds in the lower cost areas, the funds that any carrier will receive are likely to be reduced. This will leave less excess revenue to invest in facilities in the low density, very high cost areas. TR Vol. II, pp. 244-246. In the case of wireless service, this problem may be exacerbated by the fact that the investment to serve an unserved area must be made in very substantial increments in the form of new tower construction.

As a matter of public policy and the public interest, it may fairly be asked based upon even the limited record in this case on this issue, whether it makes sense to subsidize the build-out of two or more overlapping networks in areas where achieving the construction, operation and maintenance of even one system is challenging. The FCC concluded in *Highland Cellular*, para. 4:

We conclude that the value of increased competition, by itself, is not sufficient to satisfy the public interest test in rural areas.

Unlike the situation where the first wireless carrier in an area is seeking ETC designation, in this case the benefits such as expanded local calling, toll free long distance, mobility and public safety will already be provided by the existing wireless ETC. Might it not then be asked whether all that is left is "competition, by itself"? At the heart of this issue are the same realities that have lead to societal acceptance and sanctioning of monopoly franchises over the years in rural areas as a means of providing essential services that require large capital investments in facilities that, even with a revenue return from every available customer, oftentimes require very significant subsidy levels to repay.

Despite Staff's doubts about the wisdom of authorizing subsidies for multiple like-mode carriers serving the same areas, however, Staff concludes that neither the Telecommunications Act of 1996, decisions of the FCC nor state law provide a sufficiently developed legal or regulatory framework to justify establishing, in effect, a wireless ETC monopoly in high-cost, rural areas. Staff accordingly recommends granting Petitioners' request for designation as an eligible telecommunications

carrier or carriers in the service areas as defined above. Because FCC approval will be required for service area redefinition in those areas other than the Qwest non-rural wire centers and those rural study areas lying wholly within Petitioners proposed service areas, the designation for the remaining areas requiring redefinition under section 214(e)(5) should be made subject to the condition that the FCC approves the service area redefinition .

E. Staff's Proposed Conditions

In accordance with the above recommendations, Staff proposes that the Commission impose the following as conditions upon its designation of Petitioners as ETCs in the service areas as defined in accordance with Section :

1. The designation of Petitioners in those portions of their respective services areas requiring FCC approval of the redefinition pursuant to 47 U.S.C. § 214(e)(5) will become effective upon the effective date of the FCC order or orders approving such redefinition.

2. As part of its obligations as an ETC, an ETC is required to make available Lifeline and Link-Up services to qualifying low-income consumers. 47 C.F.R. § 54.405; 47 C.F.R. § 54.411.1. With respect to the advertising of its universal service offering, Petitioners state, "Upon designation, we meet with the state's low-income assistance program director to understand whether the state has any outreach efforts that we can participate in. We specifically include in our advertising notice that low-income consumers may obtain Lifeline and Link-up benefits from us. We have provided examples of that advertising in this case." Petitioners Ex 2; Staff Ex 2. The advertising materials provided in Staff Exhibit 2 are materials used by Petitioners in other states. Consistent with Petitioners commitments, on or

before June 1, 2005, Petitioners shall file the advertising materials for Lifeline and Link-Up in South Dakota and their plan for disseminating such materials throughout its service areas.

3. On or before June 1, 2005, Petitioners shall file with the Commission their service agreement or agreements pursuant to which they intend to offer their universal service offerings in South Dakota. Such agreements shall conform to the Commission's service quality rules and shall also advise customers that they may qualify for financial assistance under the federal Link-Up and Lifeline programs and provide basic information on how to apply.

4. Petitioners agreed at the hearing that they will permit adjudication of customer disputes before the Commission. TR Vol. I, pp.106-108. Nothing in Petitioners' service agreement shall compel submission of disputes to compulsory arbitration and thereby deprive customers of access to the complaint procedures of SDCL Chapter 49-13 and ARSD Chapter 20:10:01 which allow consumers to file complaints with the Commission. The service agreement shall affirmatively state that any disputes or claims arising under the service agreement will be subject to the Commission's complaint jurisdiction.

5. In order to avoid splitting rural telephone company wire centers in Petitioners' designated service areas, Petitioners have been designated as an ETC in portions of rural telephone company wire centers that lie outside the boundaries of the areas in which Petitioners have been licensed by the FCC to provide wireless service. Petitioners shall provide service to requesting customers in such areas by extension or reseller arrangements with other carriers as provided in 47 U.S.C. § 214(e)(1)(A). Such service shall be provided at prices and upon terms and conditions that are comparable to what is provided within its licensed areas. TR Petitioners Ex 1 at 22-23.

6. Consistent with its obligation pursuant to section 214(e)(1), Petitioners shall continue to build out facilities and extend service to meet the statutory objective of offering service "throughout the service area for which the designation is received. . . ." The Commission notes that Petitioners have committed to using their universal service funds to bring service to the areas to which they do not yet provide coverage. TR. at 95-97.

7. In addition to their annual certification filings under 47 C.F.R. §§ 54.313 and 54.314, Petitioners shall submit records and documentation by January 1 of each year commencing with January 1, 2006, detailing their progress towards meeting the statutory objective of offering service throughout the service area for which the designation is received. At a minimum, such information shall detail the location and cost of material capital expenditures made by Petitioners within the State of South Dakota during the preceding annual period and shall include their proposed capital budgets for the State of South Dakota for the ensuing year. Petitioners shall work with Commission Staff to determine what constitutes "material" expenditures. If they are unable to agree, the procedure of Condition 13 shall be followed to resolve the dispute.

8. On or before January 1 of each year beginning in 2006, Petitioners shall submit a proposed plan for the upcoming calendar year which sets forth Petitioners' proposed plan(s) for construction of new facilities and service enhancements to existing facilities. The plan(s) shall be submitted by January 1 of each year. Following the first filing, Petitioners' subsequent annual filings shall also submit a report stating whether the proposed plan was implemented, any deviations from the previous year's proposed plan, and the reasons for any deviations. Following this annual filing, Petitioners shall meet with Commission Staff to discuss the proposed plans and any deviations from a previous year's proposed plans.

9. Petitioners shall construct the 4 additional cell sites during 2005 as they committed to do in this proceeding. If they are unable to construct all 4 cell sites during 2005, Petitioners shall submit a report detailing the reasons why they were unable to do so and shall thereafter submit monthly reports detailing their progress toward meeting this goal. The initial report shall be due by January 1, 2006.

10. Petitioners shall commit to and abide by the terms of the Cellular Telecommunications Industry Associates Consumer Code for Wireless Service as it is amended from time to time.

11. By January 1 of each year, Petitioners shall provide an annual report detailing the consumer complaints that they have received during the previous one year period. This report shall include the nature and location of the complaints.

12. By January 1 of each year, Petitioners shall provide a report itemizing the number of unfulfilled requests they received to provide service to a current customer's residence during the previous year and requests for service from potential customers within Petitioners' service area that went unfulfilled during the previous year, including the steps Petitioners took to provide service and the reasons why such request went unfulfilled. Following the submission of this report, Petitioners shall meet with Commission Staff to discuss the report.

13. In the event that Commission Staff believes that information beyond what Petitioners have provided is necessary for Staff and the Commission to perform their responsibilities relating to Petitioners' meeting its obligations under the law and this Order, Staff shall first make a request for such information to Petitioners. If Petitioners object to such request, Staff and Petitioners shall first confer in an effort to resolve the issue. If after such

conference, Staff and Petitioners are unable to reach agreement concerning the need for such information or the reasonableness of such request, Staff may petition the Commission for an order modifying the Conditions herein upon a showing of good cause therefor.

If any of the above reports are unable to be completed by the date set forth for such filing or there is other good cause for a different filing date, Petitioners shall work with Commission Staff to determine when the reports must be filed, and if the parties cannot agree, the procedure of Condition 13 shall be followed to resolve the dispute.

IV. CONCLUSION

The ETC designation sought by Petitioners in the rural service areas described in the Petition should be granted. The additional investment in rural wireless coverage and services that will occur as a result of Petitioners' receipt of additional universal service funds will provide a competitive wireless alternative in the service areas and is in the general public interest of South Dakota and of the service areas to be served. The detriment that might potentially occur to existing designees in these areas has not been sufficiently demonstrated to offset the benefits from these additional investments. The Commission should, however, through appropriate conditions backed up by adequate enforcement mechanisms, ensure that the public funds received by Petitioner in fact are devoted to a continuing program of investment to meet the objective of providing the universal service offerings throughout Petitioner's service area, including those locations where return on investment analysis would not justify such investments in the absence of the service area aggregate contribution to Petitioners of public ETC funds.

Dated at Pierre, South Dakota, this 11th day of February, 2005.

Respectfully submitted by



John J. Smith, Staff Attorney
South Dakota Public Utilities Commission
500 East Capitol Avenue
Pierre, SD 57501
ph (605) 773-3201
fax (605) 773-3809
email john.j.smith@state.sd.us
Attorney for Commission Staff

CERTIFICATE OF SERVICE

The undersigned certifies that on the 11th day of February, 2005, I served a true and correct copy of the foregoing Staff's Brief by email and first class mail to:

Talbot J. Wieczorek
Gunderson, Palmer, Goodsell & Nelson LLP
440 Mr. Rushmore Road, 4th Floor
P.O. Box 8045
Rapid City, SD 57709-8045
tjw@gpgnlaw.com

David A. LaFuria
Lukas, Nace Gutierrez & Sachs Chartered
1650 Tysons Boulevard, Suite 1500
McLean, VA 22102
DLaFuria@fcclaw.com

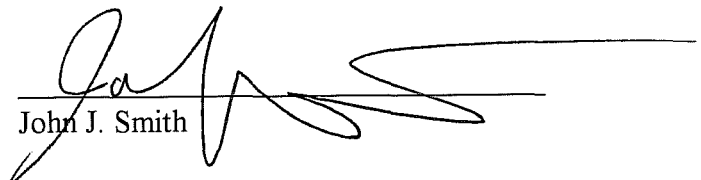
Richard Coit
South Dakota Telecommunications Assn.
PO Box 57
320 E. Capitol Ave.
Pierre, SD 57501-0057
richcoit@sdtanline.com

Darla Pollman Rogers
Riter, Rogers, Wattier & Brown
319 S. Coteau St.
PO Box 280
Pierre, SD 57501
dprogers@riterlaw.com

James Cremer
Bantz, Gosch & Cremer
305 6th Ave., SE
PO Box 970
Aberdeen, SD 57402

Meredith A. Moore
Cutler & Donahoe, LLP
100 N. Phillips Ave., 9th Floor
Sioux Falls, SD 57104-6725
meredithm@cutlerlawfirm.com

jcremer@midco.net



John J. Smith