

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

**APPLICATION OF BOOMERANG
WIRELESS, LLC d/b/a enTOUCH
WIRELESS FOR DESIGNATION AS AN
ELIGIBLE TELECOMMUNICATIONS
CARRIER IN CERTAIN EXCHANGES
WITHIN THE STATE OF SD**

TC15-002

**SDTA RESPONSE TO BOOMERANG
MOTION FOR EXPEDITED GRANT OF
REQUEST FOR ETC DESIGNATION**

**SDTA RESPONSE TO BOOMERANG WIRELESS MOTION
FOR EXPEDITED GRANT OF REQUEST FOR ETC DESIGNATION
OR GRANT OF ETC DESIGNATION ON AN INTERIM BASIS**

The South Dakota Telecommunications Association ("SDTA") hereby responds to the Motion filed by Boomerang Wireless d/b/a enTouch Wireless ("Boomerang") in the above captioned proceeding, wherein Boomerang requests either an expedited grant of its request for Lifeline Eligible Telecommunications Carrier (ETC) Designation for certain rural exchange areas in South Dakota, or in the alternative, action by the Commission granting its requested designation on an interim basis. SDTA opposes Boomerang's Motion and the proposal for expedited or interim relief, for the reasons state below:

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

2. As stated in SDTA's Petition to Intervene filed in this matter on May 9, 2015:

In regards to any Petition for ETC Designation extending to rural service areas the additional "public interest" requirement set forth in 47 U.S.C. § 214(e)(2) and SDCL § 49-31-78 applies and state commissions are not obligated to grant multiple ETC designations in such areas. SDTA questions whether granting the additional ETC designation requested by Boomerang would be in the best interest of South Dakota consumers residing in the impacted member company rural service areas. As the FCC has appropriately noted, the Lifeline program does play a role in assisting with telecommunications infrastructure deployment in high cost areas and that role has become more critical as rural rate-of-return carriers face greater financial pressures resulting from FCC reforms that have reduced federal high cost funding and inter-carrier compensation revenues.

3. The FCC's "Lifeline Modernization Order" adopted in March of 2016 and its new rules adopted with that Order established a separate federal process through which

interested carriers may seek a federal “Lifeline Broadband Provider” (“LBP”) designation. The FCC in establishing the separate federal process did not, however, restrict State commission authority to address petitions/applications for ETC designation as they relate to the provisioning of voice supported Lifeline services.¹ Boomerang has indicated that it will continue to pursue the “Application for ETC Designation” (hereinafter referenced as “Application”) filed in this Docket. Because Boomerang’s request for designation extends to rural service areas, this Commission is legally obligated to fully review and consider all facts relevant to the applicable public interest standard.

4. Further, this being a contested case proceeding, the Commission is required under state statute and its administrative rules (SDCL §1-26-16 and ARSD §20:10:01:15) to give all parties “an opportunity for hearing conducted in accordance with the provisions of SDCL chapter 1-26 . . .” The provisions of SDCL § 1-26-18 more specifically set forth the rights of parties in contested administrative proceedings, noting the following: the right to appear in person or by counsel and be present during the giving of all evidence, the right to a reasonable opportunity to inspect all documentary evidence, the right to examine and cross-examine witnesses, the right to present evidence in support of the party’s interest, and the right to compel the attendance of witnesses and the production of evidence in the party’s behalf. Any agency, under this same statute, is given the right to dispose of any defense or claim upon the motion of any party, but only (1) if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits , if any, show that there is no genuine issue as to any material fact and a party is entitled to a judgment as a matter of law”; or (2) “at the close of the evidence offered by the proponent of the defense or claim if it determines that the evidence offered by the proponent of the defense or claim is legally insufficient to sustain the defense or claim.” *Emphasis added.*

Contrary to what may be suggested by Boomerang’s Motion, there are “genuine issues of material fact” related to Boomerang’s Application that have not yet been decided

¹ *In the Matter of Lifeline and Link Up Reform and Modernization*, WC Docket 11-42, 09-197, & 10-90, Third Report and Order, Further Report and Order, and Order on Reconsideration, FCC 16-38, (released April 27, 2016) and 47 U.S.C. §54.202 et. seq. This “Order” has been appealed to the United States Court of Appeals for the District of Columbia (10th Circuit), *State of Wisconsin, Et Al. v. Federal Communications Commission and United States of America*, Case No. 16-1219, Petition for Review filed June 31, 2016. The appeal was filed by numerous states, including South Dakota, and challenges specifically the Order’s creation of “a new, federal Eligible Telecommunications Carriers (ETC) designation process and its asserted preemption of the State commission’s primary authority to designate ETCs with respect to broadband services.” Petition for Review, p. 2.

by this Commission or resolved by the parties. No evidentiary hearing has been held in this matter and the parties have not by stipulation agreed upon any facts that could form a valid basis for a Commission decision on the pending ETC Application. Boomerang seeks an expedited decision from this Commission based only on a scant five-page Motion that is unaccompanied by any party admissions or any individual affidavits addressing material factual issues (either related to the established statutory ETCservice obligations or the additional public interest review required by law). Remarkably, the Motion includes but a single reference to the “public interest” standard applying to rural service areas, noting only that a “grant of Boomerang’s petition would serve the public interest by allowing the company to continue to provide essential voice and broadband services” to customers it obtained earlier through its transfer arrangements with Budget Prepay, Inc.

As the applicant/petitioner in this Docket, Boomerang has the burden of proof and the burden to present evidence supporting its requested ETC designation.² Neither the Motion filed by Boomerang nor anything currently on file in this proceeding indicates that Boomerang has met these burdens. The record before the Commission is simply not sufficient for this Commission to make legitimate factual findings and to reasonably conclude, as a matter of law, that granting Boomerang’s requested Lifeline ETC designation would be in the public interest. Until the Commission receives evidence on the factual issues still disputed by the parties, it is barred procedurally from granting Boomerang’s Motion.

5. In addition to this procedural barrier, there are other compelling reasons for not granting Boomerang’s pending ETC Application on either an expedited or interim basis. First, it should be noted that even though this Commission has not yet ruled on Boomerang’s Application for Lifeline ETC designation in this Docket or its filing in Docket TC13-035 seeking Lifeline ETC designation in CenturyLink areas within South Dakota, in December of 2016, Boomerang began serving Lifeline customers in various parts of this State, in both non-rural and rural service areas. And further, Boomerang admits in its Motion that the Lifeline service it is providing includes a voice component.

² See ARSD § 20:10:15.01.

Boomerang indicates in its Motion, that it already has Lifeline customers in the State based on agreements it has with Budget Prepay, Inc. and Total Call Mobile, LLC, noting specifically that “as a result of these transactions ... [it] acquired approximately 1,741 Lifeline subscribers in South Dakota.” It appears that agreements were executed by the various companies for the sole purpose of transferring Lifeline service customers to Boomerang’s Lifeline service (a bundled plan including 500 Mb of data and 250 voice/text units each month). In regards to the two identified transferring companies, Budget Prepay and Total Call Mobile, SDTA would highlight the following key facts: (1) Budget Prepay, Inc. filed its application for Lifeline ETC designation with the Commission on August 12, 2012 (Docket TC12-125) and received its requested designation by Commission Order dated September 24, 2012. This Order limited Budget Prepay’s Lifeline ETC designation to “non-rural wire centers”³; and (2) Total Call Mobile filed its petition for Lifeline ETC designation with the Commission on December 14, 2012 (Docket TC12-192) and ultimately never received an ETC designation from the Commission. Its petition was dismissed without prejudice and the docket was closed on February 22, 2016.⁴

SDTA questions the nature and terms of these “transfer” transactions. There is also reason to question whether certain text in Boomerang’s Motion suggesting that South Dakota Lifeline customers were transferred from Total Call Mobile is accurate.⁵ If the suggestion by Boomerang that some of its Lifeline customers “acquired” in South Dakota were transferred from Total Call Mobile is true, Total Call Mobile was and may still be providing Lifeline services to customers unlawfully without having the required ETC authority.⁶ It appears more likely from information provided by Boomerang in response to a recent Commission Staff Data Request that all of the South Dakota Lifeline customers now being served by Boomerang were transferred from Budget Prepay.⁷ As to these Lifeline customers, the validity of at least some of the transfers must be examined because it appears from the information provided by Boomerang that not all of the transferred

³ See “Exhibit A” attached to “Order Granting Designation as a Lifeline-Only Eligible Telecommunications Carrier.”

⁴ See “Order Dismissing Without Prejudice and Closing the Docket.”

⁵ See Motion, p.3.

⁶ Unlike Boomerang, Total Call Mobile, LLC has not at any time received a Lifeline Broadband Provider designation from the FCC.

⁷ “Boomerang Wireless, LLC d/b/aa enTouch Wireless Amended Response to Staff Data Request 10-1 through 10-6” and the included “Attachment.”

customers reside in CenturyLink exchanges, that many instead are located within rural telephone company exchange areas. Boomerang's response to Staff data request 10-1, specifically, indicates that a total of 1,677 South Dakota Lifeline subscribers are currently being served by the company. Of that total, 100 of the "subscribers" are referenced as "Rural only" and another 30 subscribers are confusingly referred to as "Rural and Non-Rural." While without more detailed location information one cannot determine precisely where each of the transferred customers resides geographically and in what ILEC service area they are located, the data provided seems to confirm that many of the transferred Lifeline customers reside in rural telephone company exchanges. If this is the case and these customers did not at the time of sign-up reside in a CenturyLink exchange area, they were clearly ineligible under the applicable FCC rules to receive federal Lifeline assistance and should never have received Lifeline services from Budget Prepay.⁸ They, in turn, given this ineligibility, should never have been transferred to receive Boomerang's Lifeline service.⁹ Boomerang with its Motion is seeking Commission action that would allow it to continue Lifeline service to customers who at the time of their initial sign up may not have been eligible for Lifeline service based on their place of residence. In SDTA's view, the Commission should deny any relief to Boomerang that would effectively allow the company to either gain advantage or potentially profit from any earlier Budget Prepay actions that were unauthorized.

6. There is also a clear disconnect between Boomerang's Motion and the Application for Lifeline ETC designation pending in this Docket. The relief requested in Boomerang's Motion, even if granted by this Commission, would not give the company the authorization needed to serve many of the rural Lifeline customers previously transferred from Budget Prepay. Boomerang claims in its Motion that expedited action on its pending Lifeline ETC Application is required to avoid "harmful service disruption," suggesting that many rural customers will lose their Lifeline services if its ETC designation is not promptly

⁸ Budget Prepay, unlike Boomerang, did not receive a Lifeline Broadband Provider designation from the FCC. It only possesses a South Dakota ETC designation and that designation (received in Docket TC12-125) does not extend to any rural telephone company exchange areas.

⁹ The FCC rule restrictions on "Lifeline Benefit Portability" found in 47 C.F.R. §54.411 also raise questions regarding the validity of the Lifeline customer transfers, particularly if Budget Prepay is not, in fact, ceasing its South Dakota operations (47 C.F.R. 54.411 (c)(2)).

granted by the Commission. This is not an accurate statement based on the Boomerang Application for ETC designation in its current form.

The Application as filed only seeks designation in a limited number of rural telephone company exchange areas, specifically only within those rural areas including the “Pine Ridge, Rosebud, Lower Brule and Crow Creek reservations/tribal lands and areas adjacent thereto.” (See Application dated January 22, 2015, p. 2). In contrast, the “Attachment” provided as part of Boomerang’s recent data request responses (which lists customer numbers by “City and Zip Code”) lists multiple rural cities/towns but, few, if any of these are within the Tribal areas covered by the Application for ETC designation on file. And consequently, few, if any, of the Lifeline customers “acquired” by Boomerang through its transactions with Budget Prepay are customers that reside in the Pine Ridge, Rosebud, Lower Brule or Crow Creek Tribal areas. This clear discrepancy between Boomerang’s Application and its filed Motion, standing alone, warrants a Commission denial of the request for expedited or interim relief. Even if its’ pending Application for ETC designation is immediately granted, Boomerang would not possess the authority needed to provide Lifeline services and receive Lifeline subsidies for most, if not all, of the rural area customers it may now be serving.

7. SDTA is also of the view that this Commission should take no action granting additional Lifeline ETC designations to prepaid wireless companies until after the FCC, in accord with its’ “Order on Reconsideration” reversing its prior “Lifeline Broadband Provider” (LBP) designations, has completed its process of considering additional measures that may be necessary to prevent further waste, fraud, and abuse in the Lifeline program.¹⁰ With its Order on Reconsideration released February 3, 2017, the FCC set aside its prior orders granting Lifeline Broadband Provider (LBP) status to nine different companies, including several that had earlier received LBP designation for areas within South Dakota. The Order specifically revoked the LBP designations for those providers, returned the petitions to their status as petitions pending before the Wireline Competition Bureau, and removed them from the streamlined treatment set forth in the current FCC

¹⁰ In the Matter of Telecommunications Carriers Eligible for Universal Service Support, Lifeline and Link Up Reform and Modernization, WC Docket No. 09-197 and WC Docket No. 11-42, Order on Reconsideration, DA 17-128, released February 3, 2017.

rules.¹¹ The FCC took this action based on various considerations, but particularly highlighted the need to consider other actions necessary to preserve the integrity of the Lifeline program and further guard against recurring waste, fraud and abuse of the program. Relative to this noted concern, the FCC Order, in part, states:

“[i]n light of these indications that significant waste, fraud, and abuse exists in the Lifeline program, the Bureau concludes that reconsidering the December LBP Order and January LBP Order as part of the actions taken in this order serves the Commission’s stated goals of preventing waste, fraud, and abuse by providers receiving Lifeline reimbursements and minimizing the contribution burden on consumers and businesses. The December and January orders erred in finding that expanding the number of designated Lifeline providers to include Lifeline Broadband Providers will combat waste, fraud, and abuse absent further steps or time for the agency to consider measures designed to ensure those providers will comply with the Lifeline program rules. For example, on reconsideration we are persuaded that the Bureau’s orders reflect a too-simplistic evaluation of waste, fraud, and abuse concerns. Potential waste, fraud, and abuse through the use of the independent economic household worksheet, identity verification dispute resolution processes, address verification, and discrepancies between reimbursement requests and subscriber listings in the National Lifeline Accountability Database (NLAD) raise concerns that the above-listed petitions fail to resolve. We therefore reconsider the December and January Lifeline orders, return the LBP designation petitions to pending status and decline to designate the providers listed in those orders until the Bureau has additional time to assess measures that might be necessary to prevent further waste, fraud, and abuse in the program. *Emphasis Added.*”

SDTA agrees with the FCC that there are continuing deficiencies related to Lifeline subscriber eligibility that should first be addressed before additional Lifeline ETC designations are granted, especially within rural service areas. As some of the information brought forth in this case demonstrates, one area that should obviously be addressed is “address verification.” For some time, SDTA has communicated concern that insufficient safeguards or rules in place to verify the address information being provided by Lifeline applicants. The legal standards for reviewing Lifeline ETC petitions/applications are different for rural and non-rural service areas, yet no protections are in place to ensure that: (1) companies receiving Lifeline ETC designations are familiar with either the service area and/or local exchange boundaries of CenturyLink or of the rural incumbent local

¹¹ Id. At par. 1.

exchange carriers (ILECs) operating in this State; and (2) that they have internal processes in place to ensure that the customers applying for Lifeline services actually reside within authorized service areas. Requiring competitive Lifeline ETCs to take additional action and obtain information from Lifeline service applicants verifying not only their residential address, but also the physical location of residence, is essential to protect against the provisioning of Lifeline service in unauthorized service areas (where the Lifeline service provider has not received the required Lifeline ETC status). It is also critical given that the federal Low Income Program includes both “Basic” and “Enhanced” or “Tribal Lifeline” offerings and that the discounts provided under each (within non-Tribal and Tribal areas, respectively) are substantially different (\$9.25 for Basic Lifeline and \$34.25 for Enhanced or Tribal Lifeline).

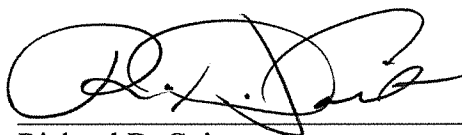
8. SDTA also believes that, before any Lifeline ETC designation is granted to Boomerang, the Commission should consider whether the transfer of Lifeline subscribers from Budget Prepay to Boomerang was in all respects in compliance with the South Dakota statutes and the Commission’s administrative rules that require notification to customers of “material” changes to rates, terms or conditions of a service and prohibit the changing of providers or services to customers without proper customer authorization (the practices of “slamming” and “cramming”). Boomerang has generally indicated in response to Commission Staff data requests that it notified customers before they were transferred, but, to SDTA’s knowledge, has not provided information indicating when customers were notified and whether any notices given were in compliance with the provisions of ARSD § 20:10:34:10. It also has not provided information regarding what customer authorization(s), if any, were obtained prior to customers being moved from Budget Prepay to Boomerang and prior to changes being made to their Lifeline service offerings. Boomerang suggests in its Motion that its Lifeline service offering was an improvement over the Lifeline service being provided by Budget Prepay, but this may not be true for all impacted customers. In its response to the Commission Staff Data Request 10-3, Boomerang stated that “Budget customers went from Budget’s 500Voice & 500Text to Boomerang’s 500MB & 250units (Talk & Text) to meet the LBP broadband minimum standard requirement.” Customers when moved to the Boomerang Lifeline service offering were admittedly put on an entirely different service package, one that included fewer total

minutes of use as it relates to voice and text services, including a reduction of 250 minutes or more in their "Voice" minutes.¹² This change certainly may not have been viewed as favorable by all customers. Given this and possibly other considerations there is some basis under the applicable state statutes to conclude that Boomerang should have obtained customer authorizations before accepting any customers through the transfer arrangement with Budget Prepay.

9. In closing, based on the foregoing, SDTA urges the Commission to deny Boomerang's Motion and reject the requests for expedited action on Boomerang's Application for Lifeline ETC designation or interim approval of the same.

Dated this 22nd day of March, 2017

SOUTH DAKOTA TELECOMMUNICATIONS ASSN



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¹² Pursuant to SDCL § 49-31-93 a "subscriber is not liable" for the "billing of unauthorized products or services."