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IDAHO PUBLIC UTILITIES COMMISSION

**BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION**

In the Matter of the Application of T- )  
Mobile West Corporation For Designation )  
as an Eligible Telecommunications )  
Carrier Pursuant to 47 U.S.C. § 214(e)(2) )

Case No. TMW-T-10-1

**COMMENTS OF ALLIED WIRELESS COMMUNICATIONS CORPORATION, IDAHO TELECOM ALLIANCE, CTC TELECOM, INC., SYRINGA WIRELESS, LLC AND RURAL TELEPHONE COMPANY; PROTEST TO USE OF MODIFIED PROCEDURE; AND REQUEST FOR HEARING**

In Order No. 32240, the Idaho Public Utilities Commission (the "Commission"), in the above-entitled case, requested comments from interested parties on T-Mobile West Corporation's Application for Designation as an Eligible Telecommunications Carrier (the "Application") on or before June 2, 2011. Allied Wireless Communications Corporation ("Allied Wireless"), the Idaho

Telecom Alliance (“ITA”) on behalf of its member companies, CTC Telecom, Inc., dba CTC Wireless (“CTC”), Syringa Wireless, LLC (“Syringa Wireless”) and Rural Telephone Company, dba RTC Wireless (“RTC”), respectfully provide these Comments to the Application of T-Mobile West Corporation (“T-Mobile” or “Applicant”) for designation as an Eligible Telecommunications Carrier (“ETC”). For the reasons set forth below, the Commission should not grant T-Mobile’s Application on an expedited, modified procedure basis. Instead, the Commission should commence an adjudicative proceeding, set the matter for hearing and should ultimately deny the petition. Allied Wireless, ITA, CTC, Syringa Wireless and RTC may be collectively referred to herein as the “Commenting Parties.”

### **INTRODUCTION**

The Commenting Parties certainly appreciate that the Commission has, in recent years, streamlined the process for ETC applications and reduced the administrative burden on ETC applicants. Indeed, Allied is a very recent beneficiary of the use of modified procedure to grant ETC status. Order No. 32209, *In the Matter of the Application of Allied Wireless Communications Corporation*, Case no. ALL-T-10-01 (Idaho PUC March 22, 2011)(hereafter “*Allied Order*”). However, T-Mobile’s ETC Application is unlike any that have yet come before this Commission. It is the only application by a prospective CETC that is about to be acquired by an even larger national carrier, thus bringing the legitimacy of T-Mobile’s proposed service improvement plan into obvious question. It is also the first application by a carrier that has publicly admitted it lacks adequate spectrum to provide in-building coverage in rural areas.

Under the circumstances, the Commission cannot reasonably conclude that granting T-Mobile’s Application would be in the public interest without a more formal investigation open

to broad participation by other CETCs and other interested parties. Without limitation, the Commission should take a hard look at the following issues:

1. What are the potential impacts of AT&T's acquisition of T-Mobile on T-Mobile's use of Federal Universal Service Funds ("FUSF") in Idaho? May AT&T agree or be forced to relinquish T-Mobile's FUSF support by the FCC as a condition of the FCC's grant of the AT&T-T-Mobile merger application? Why would the FCC not condition AT&T's acquisition of T-Mobile on AT&T's voluntary commitment to forgo USF high-cost support as was required of Verizon Wireless as a condition of Verizon Wireless' acquisition of Alltel<sup>1</sup> and of Sprint as a condition of Sprint's acquisition of Clearwire,<sup>2</sup> thereby depriving the State of Idaho of millions of dollars of FUSF high-cost support indefinitely?<sup>3</sup>

2. Even setting aside the AT&T merger, is T-Mobile truly committed to expanding its service into rural areas of Idaho? As discussed in detail below, would it not be appropriate for the Commission to initiate an investigation in light of findings in other state?

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<sup>1</sup> *Applications of Celco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and De Facto Transfer Leasing Arrangements and Petition for Declaratory Ruling That the Transaction Is Consistent with Section 310(b)(4) of the Communications Act*, WT Docket No. 08-95, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd 17444 (2008) ("Verizon Wireless Merger Order").

<sup>2</sup> *Sprint Nextel Corporation and Clearwire Corporation Applications for Consent to Transfer Control of Licenses, Leases, and Authorizations*, WT Docket No. 08-94, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd 17570 (2008) ("Sprint Nextel Merger Order").

<sup>3</sup> See, e.g., *High-Cost Universal Service Support, Federal-State Joint Board on Universal Service, Request for Review of Decision of Universal Service Administrator by Corr Wireless Communications, LLC*, WC Docket No. 05-337, CC Docket No. 96-45, Order and Notice of Proposed Rulemaking, 25 FCC Rcd 12854 (¶ 20) ("Corr Wireless Order") (instructing USAC "to reserve any reclaimed [high-cost support] funds [surrendered by Sprint and Verizon Wireless] as a fiscally responsible down payment on proposed broadband universal service reform, as recommended in the National Broadband Plan").

## DISCUSSION

### **I. AT&T's Proposed Acquisition of T-Mobile Requires Further Investigation and Analysis Before the Commission Can be Certain That T-Mobile's Application is in the Public Interest.**

The Staff appears to have asked T-Mobile to explain the impact of the proposed AT&T merger on the ETC Application.<sup>4</sup> But T-Mobile's answer is woefully inadequate to address the many potentially significant issues that the merger creates for T-Mobile's Application.<sup>5</sup> At this early stage of the merger proceeding and absent any discovery directed to either AT&T or T-Mobile, it is premature to draw any conclusions about the merger impact either way, with the one exception that the Commission should not be rushed into a decision with limited facts when the merger calls into question the legitimacy of the service improvement plan submitted by T-Mobile, as well as the real possibility that any high-cost support received by T-Mobile might ultimately be removed from the state's CETC support allocation and claimed by the Federal Communications Commission.<sup>6</sup>

The Texas PUC and its staff appear to have conducted one of the most thorough reviews to date of a T-Mobile ETC Application. Texas PUC Staff is so concerned about the impact of AT&T's acquisition that the merger is one of the key reasons Texas PUC Staff is opposed to T-Mobile's ETC Application. Texas PUC Staff noted the most obvious concern, which is that T-Mobile may well win FUSF support in Texas, only to relinquish it shortly thereafter as a potential FCC merger condition. *See generally*, Commission Staff's Initial Brief, *Application of*

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<sup>4</sup> Since the Staff's discovery is not on the PUC's website, the depth and breadth of the Staff's investigation is not currently known to Allied Wireless.

<sup>5</sup> According to the April 20, 2011 Decision Memorandum in this case, T-Mobile responded it "will be the designated ETC legal entity with the obligations and responsibilities of a universal service provider in Idaho."

<sup>6</sup> *See Corr Wireless Order, supra.*

*T-Mobile West Corp. For Designation as an Eligible Telecommunications Carrier (Rural)*, SOAH Dkt. 473-10-5443, Dkt. No. 38387 (submitted Apr. 21, 2011)(“*Texas Staff Brief*”).<sup>7</sup> This Commission should share the same concern.

If recent FCC history is a guide, not only will this happen, but **the relinquished support will not return to Idaho**. As the Texas PUC Staff noted, this permanent reduction of the CETC cap in a state could come at a high price to that state and its rural communities. *Texas Staff Brief* at 37-38.

There are other reasons to be concerned about the impact of AT&T’s acquisition. Attachment A hereto is a portion of the coverage maps from AT&T’s and T-Mobile’s websites showing Idaho. The two carriers largely appear to cover the same areas in Idaho. The obvious question is whether the new cell sites that T-Mobile plans to build using FUSF support are in areas that AT&T already has coverage? Since T-Mobile filed its build plan confidentially, the Commenting Parties do not know the answer to this key question.

Without an investigation, it is entirely possible that the combined AT&T/T-Mobile entity could end up receiving FUSF support to build cell towers in areas where it has already built towers without FUSF support. This is a matter that the Oregon PUC staff, public counsel, and private intervenors appear to be investigating.<sup>8</sup> It is difficult to see how allocating scarce and

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<sup>7</sup> Copy attached as Attachment C for ease of reference.

<sup>8</sup> See generally, OPUC Dkt. UM 1511, <http://apps.puc.state.or.us/edockets/docket.asp?DocketID=16547>. The state’s public counsel—the Citizen’s Utilities Board—as well as the Oregon Cable Telecommunications Association and United States Cellular have intervened. The Oregon PUC has entered a protective order so that intervenors have access to T-Mobile’s confidential build plan and coverage maps. The OPUC has ordered three rounds of pre-filed testimony and a two day hearing. *Id.*, Prehearing Conference Memorandum (March 8, 2011). The first public filing that would disclose the scope of the issues in Oregon was T-Mobile’s scheduled filing of testimony, which was due yesterday, June 1, 2011. However, on the due date T-Mobile requested a one day extension of time to file, which effectively precludes discussion of the testimony in these Comments. <http://edocs.puc.state.or.us/efdocs/HDA/um1511hda103649.pdf>.

capped USF high-cost dollars without considering these key issues is in the State of Idaho's public interest.

Another development in the AT&T merger that is too recent for Texas PUC Staff to have included in its brief are recent statements and testimony by AT&T witnesses to the effect that AT&T does not need or plan to use FUSF to complete its 4G build out. AT&T's Chairman, Chief Executive Officer and President, Randall Stephenson, recently testified before Congress concerning the many benefits that the proposed acquisition would provide to rural Americans:

This transaction will benefit consumers in many ways: improving service quality and network capacity, fostering innovation, increasing competitive pressure, and helping to ensure that America remains the global leader in mobile broadband. Consumers all across the nation will share in these benefits as the transaction will allow the combined company to build out an advanced new 4G LTE network and bring state-of-the-art mobile broadband to over 97 percent of the American population – more than any other provider and far more than AT&T alone was planning before the transaction.

This represents a private market solution to effectively address the important public policy objective of bringing high-speed mobile broadband to rural, suburban and urban communities across the nation – *all without any subsidies or taxpayer dollars*. This means private capital investment, much of which would not occur but for this transaction, will drive substantial benefits – including private sector jobs in the combined company, in the vendors who support its efforts, in the communities served by the expanded LTE coverage, and in the larger ecosystem of innovative firms whose services will ride on the network (emphasis added).<sup>9</sup>

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<sup>9</sup> "How Will the Proposed Merger Between AT&T and T-Mobile Affect Wireless Telecommunications Competition?" United States House of Representatives Committee on the Judiciary; Subcommittee on Intellectual Property, Competition and the Internet, Hearing conducted May 26, 2011, at [http://judiciary.house.gov/hearings/hear\\_05262011.html](http://judiciary.house.gov/hearings/hear_05262011.html).

In his earlier testimony, Mr. Stephenson explicitly agreed that AT&T would, "accept as a condition of the merger a prohibition on AT&T from using any Universal Service Fund money for its rural broadband build-out."<sup>10</sup>

Before designating T-Mobile as an ETC, eligible to receive high-cost support purportedly needed to build out its proposed ETC service area, the Commission must examine Mr. Stephenson's comments and determine what AT&T will do in Idaho if it acquires T-Mobile. Will it build out the entire proposed ETC service area with 4G LTE on its own, without high-cost support? The Commission needs to know, and T-Mobile is in no position today to know AT&T's true intentions, let alone make commitments as to what will really happen with USF support after the merger.

## **II. Is T-Mobile Truly Committed and Able to Expand Its Service Into Rural Areas?**

While several state commissions have approved T-Mobile's ETC applications, others are thoroughly investigating and apparently finding reasons to be concerned about the public interest separate and apart from the merger questions. One of the biggest questions is T-Mobile's commitment and ability to meaningfully expand service into rural areas. Again, due to T-Mobile's confidential filings, it is difficult to know exactly what the facts are in the other states, just as here in Idaho. But reading between the lines, one can get the idea. As Texas PUC Staff stated:

T-Mobile's proof that its designation will provide a "material benefit" seems to rely entirely on its new and planned cell site deployment and its Service Improvement Plan (SIP). [Footnote omitted]. Yet, the information provided by T-Mobile in its deployment plan and its SIP is virtually meaningless. [Followed by 8 lines of redacted text.] \* \* \* Additionally, T-Mobile's allocation methodology

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<sup>10</sup> <http://www.senate.gov/fplayers/CommPlayer/commFlashPlayer.cfm?fn=judiciary051111&st=xxx>

makes it impossible to tell whether T-Mobile plans to invest any particular amount of money in Texas, much less in any particular rural study area, because many "network" components can be located anywhere. [Followed by 15 lines of redacted text.] \* \* \* T-Mobile must show that if it is designated as an ETC it commits to provide some new primary benefit in and for the rural study areas for which it seeks designation.

Two examples help explain Staff's position [Followed by 3½ pages of redacted text.]

*Texas Staff Brief* at 20-26. Whatever is in T-Mobile's secret build plan, it has raised great concern in states where parties have been able to dig beneath the surface of the boilerplate representations made by T-Mobile in its public filings. The Commission should commence a formal docket and subject T-Mobile's plans to further scrutiny to ensure that T-Mobile meets the requirements to be an ETC.

Of the four major wireless carriers, T-Mobile may have the least expansive coverage in Idaho's rural areas. Attachment B hereto is T-Mobile's coverage map in the Northwest. T-Mobile's coverage appears to follow the Interstate highways and, to some extent, major secondary highways. It is a "red flag" that should cause any state commission to investigate the situation thoroughly to ensure not only that T-Mobile is committed to expanding coverage to high cost rural areas, but also that it is capable of doing so. Therefore, the Commission should ensure that T-Mobile's initial and all subsequent build plans are properly targeted to high cost areas of the State, not just filling in urban and suburban coverage. Again, public data is scarce, but Texas PUC Staff's investigation found the following:

[T-Mobile submitted a] list of new and proposed cell sites, its maps and its SIP. Yet, the combination of the information provided in these exhibits demonstrate that T-Mobile has not made a specific or enforceable commitment to improve signal quality, coverage, or capacity or otherwise further the provision of the supported services in its requested rural study areas. [4 lines redacted] Therefore, it is unclear whether or how much signal improvement might result in any given

rural study area. Additionally, it appears that T-Mobile's primary reason for requesting some rural study areas is because they neighbor high value non-rural areas in which T-Mobile cannot get high-cost support. Therefore, since all of the new cell sites deployed by T-Mobile in the future will provide 4G data speeds, it appears that T-Mobile will be building its new 4G network in non-rural areas on the backs of its rural customers and their rural ILECs. T-Mobile has not demonstrated that any federal high cost support it receives as an ETC will be used to improve signal quality, coverage, or capacity, or otherwise be used to further the provision of supported services in the rural study areas for which it seeks designation.

*Texas Staff Brief* at 35-36 (emphasis added). T-Mobile may be facing similar challenges to and concerns about its build plans in Oregon, although since T-Mobile recently requested a continuance there, the issues have not yet been publicly identified. *See* Note 8, *supra*.

This Commission knows it need not rubber stamp ETC applications. *See, e.g.,* Order Nos. 29541, 30212, and 30867 in *IAT Communications, Inc. dba NTCH-Idaho, Inc. and NPCR, Inc. dba Nextel Partners* (Case No. GNR-T-03-08) and *Inland Cellular Telephone Company* (Case No. INC-T-06-02) and *CTC Telecom, Inc.* (Case No. CTL-T-09-01)(partially denied). The Commission denied those applications because they “failed the public interest test due to either partial service area coverage or by placing too much emphasis on competition . . . rather than explaining how the particular application’s ETC designation would benefit all customers in its ETC service area.” *Allied Order* at 4 (emphasis added). T-Mobile’s ETC Application appears to suffer from both of these infirmities which the Commission noted in its recent order designating Allied Wireless an ETC.

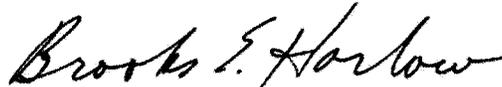
T-Mobile proposes ETC designation in 70 non-rural wire centers and a handful of adjacent rural ILEC study areas. Is this another case of T-Mobile “building in non-rural areas on the backs of its rural customers”? An investigation is needed to ensure that the public interest is served, not just T-Mobile’s.

## CONCLUSION

The Commission should not approve T-Mobile's ETC Application based on the record currently before it or on an expedited, modified procedure basis. Pursuant to Commission Order 32240, page 3, the Commenting Parties hereby protest the use of modified procedure in this matter. T-Mobile has failed to provide sufficient information to determine the effects of the proposed AT&T merger on T-Mobile's build-out plans and use of FUSF funds, and the Commenting Parties respectfully request the opportunity to conduct discovery and present evidence. Pursuant to Commission Order 32240, page 3, the Commenting Parties hereby request a hearing be set in this matter.

Respectfully submitted this 2nd day of June 2011.

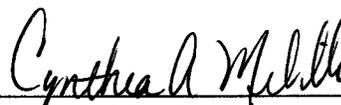
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**CERTIFICATE OF SERVICE**

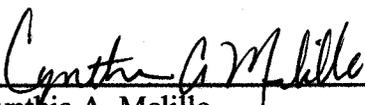
I HEREBY CERTIFY that on the 2<sup>nd</sup> day of June 2011, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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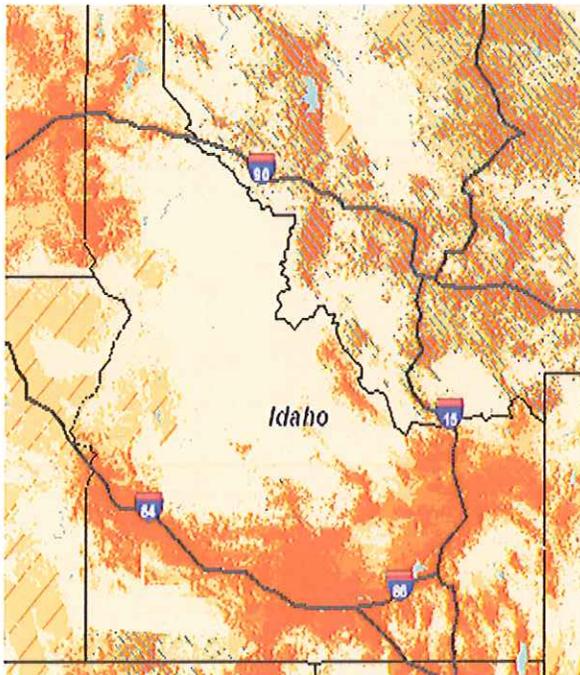
- U.S. Mail
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\_\_\_\_\_  
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**ATTACHMENT A**



<http://www.t-mobile.com/coverage/pcc.aspx>



<http://www.wireless.att.com/coverageviewer/#?type=voice&lat=44.71854963746836&lon=-112.94464014625532&sci=3>

**ATTACHMENT B**



**ATTACHMENT C**

[attached]



Control Number: 38387



Item Number: 132

Addendum StartPage: 0

SOAH DOCKET NO. 473-10-5443  
DOCKET NO. 38387

APPLICATION OF T-MOBILE WEST CORPORATION FOR DESIGNATION AS AN ELIGIBLE TELECOMMUNICATIONS CARRIER (RURAL) PURSUANT TO 47 U.S.C. § 214(e) AND P.U.C. SUBSTANTIVE RULE 26.418	§ § § § § § § § § §	BEFORE THE STATE OFFICES  OF  ADMINISTRATIVE HEARINGS
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COMMISSION STAFF'S INITIAL BRIEF

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**SOAH DOCKET NO. 473-10-5443  
DOCKET NO. 38387**

<b>APPLICATION OF T-MOBILE WEST CORPORATION FOR DESIGNATION AS AN ELIGIBLE TELECOMMUNICATIONS CARRIER (RURAL) PURSUANT TO 47 U.S.C. § 214(e) AND P.U.C. SUBSTANTIVE RULE 26.418</b>	§ § § § § § § §	<b>BEFORE THE STATE OFFICES  OF  ADMINISTRATIVE HEARINGS</b>
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**COMMISSION STAFF'S INITIAL BRIEF**

**I. SUMMARY OF POSITION**

This is an application of T-Mobile West Corporation ("T-Mobile") to be designated an Eligible Telecommunications Carrier (ETC) so that it may receive federal universal service funds (FUSF) in various rural study areas in the state of Texas. First, a brief explanation of the universal service fund is warranted. Congress stated in the Federal Telecommunications Act ("FTA") that "Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications [...] services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas."<sup>1</sup> In order to support carriers in this effort, the FTA further established a universal service fund so that there would be "specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service."<sup>2</sup> A telecommunications carrier can seek such funding after it has been certified as an ETC by a state regulatory commission<sup>3</sup> and it meets the various obligations for such universal service funding.<sup>4</sup>

<sup>1</sup> Telecommunications Act of 1996, 47 U.S.C.A 254(b)(3) (West 2001 & Supp. 2002) (FTA § 254(b) (3)).

<sup>2</sup> See for example, FTA § 254(b)(5).

<sup>3</sup> See generally FTA § 214(e)(1) and (2).

<sup>4</sup> See generally FTA § 254(b); P.U.C. SUBST. R. Chapter 26, Subchapter P.

T-Mobile is a facilities-based Commercial Mobile Radio Service (CMRS)<sup>5</sup> provider with its own switching, network facilities, cell sites, transmit and receive radios, and spectrum in Texas.<sup>6</sup> On June 6, 2010, T-Mobile filed its Application for Designation as an Eligible Telecommunications Carrier (RURAL) Pursuant to 47 U.S.C. §214(e) and P.U.C. Subst. R. 26.418 (Application). T-Mobile seeks designation as an ETC in portions of Texas served by rural incumbent local exchange carriers (R-ILEC) that were identified in its application.<sup>7</sup> If T-Mobile is designated as an ETC in the rural study areas for which it seeks designation it will be eligible to receive high-cost support for the customers from the FUSF for the customers it serves that are located in those study areas. In its Application, T-Mobile stated that it “is a facilities-based wireless telecommunications carrier with its own switching, transport, cell sites, and associated telecommunications facilities in its proposed designated ETC service area.<sup>8</sup> While an ETC may meet its universal service obligation by combining its own facilities with the resale of another carrier’s services, T-Mobile intends to use its own facilities to meet its universal service obligation.”<sup>9</sup>

As explained in this brief, for the following reasons, T-Mobile West Corporation (T-Mobile or the Company) should not be granted designation as an ETC in portions of Texas served by rural telecommunications carriers under 47 U.S.C. §214(e) and pursuant to P.U.C. SUBST. R. 26.418.

- T-Mobile has numerous rural study areas in which it has such poor signal strength that Staff is unable to determine whether the service provided could actually be used to provide the services required of an ETC.

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<sup>5</sup> 47 C.F.R. §20.3, P.U.C. SUBST. R. 26.5(40).

<sup>6</sup> Direct Testimony of Daniel Piekarczyk at 8.

<sup>7</sup> T-Mobile West Application for Designation as an Eligible Telecommunications Carrier (Rural) at 2, referencing Attachment A (Application).

<sup>8</sup> Application at 6.

<sup>9</sup> T-Mobile West Application for Designation as an Eligible Telecommunications Carrier (Rural) at 6 (June 28, 2010) (Application).

- T-Mobile plans to place the majority of its new cell sites in non-rural areas that border rural areas; its new cell sites will provide four gigabit data speeds to the non-rural customers with only a secondary benefit to the neighboring rural wire center.
- In some places T-Mobile does not have its own facilities but relies on “partner” service, yet T-Mobile does not characterize the services it provides on a “partner” carrier’s network as resale or as unbundled network elements (UNEs) and has provided no information on its “partner” carrier’s signal strength or service quality.
- T-Mobile has not made an unconditional commitment to serve throughout its requested service areas as required by P.U.C. SUBST. R. 26.418(g)(1)(B)(ii).
- T-Mobile wrongfully considers the six-step process described in 47 C.F.R. §54.202(a)(1)(i)(B) to be a “condition” on a carrier’s obligation to demonstrate its willingness to serve throughout a rural study area.
- T-Mobile has failed to demonstrate that its designation as an ETC in the portions of Texas served by rural telecommunications carriers is in the public interest.

Under Texas and FCC rules, the grant of FUSF support is based on ownership of facilities to serve certain areas that are more expensive to serve, and both the federal and Texas rules require that the company seeking the designation own facilities to provide the service in the areas in which it would be designated as an ETC or have access to the facilities of other carriers through a purchase of UNEs or a resale agreement. These rules are intended to ensure that actual facilities have been deployed to support the provision of service to the area for which the designation is sought. T-Mobile’s application does not comply with these rules. In the areas where T-Mobile does plan to install new facilities, the facilities are not located so that they will actually improve service to the rural customers who are the intended beneficiaries of rural FUSF support. Instead, these high-capacity facilities are clearly designed and located with the

objective of improving service to non-rural areas where T-Mobile is competing for customers who want service that goes well beyond the basic services that FUSF is intended to support. The requirements in Texas and Federal Communications Commission (FCC) rules also have a competitive policy implication. The Public Utility Commission of Texas (Commission) has held other competitive carriers that applied for ETC status to a high standard of compliance with the rules. In order to maintain competitive neutrality with respect to telephone providers, the Commission should hold T-Mobile's application to the same standards.

The FCC has adopted, either formally or informally, policies to control or reduce the amount of FUSF support for basic local telephone service. In part, these policies stem from increases in the level of FUSF support that have been awarded to competitive local exchange carriers. Another basis for these policies is the adoption of a National Broadband Plan that contemplates that support for basic local service would be phased out and would be replaced by a Connect America Fund, which would support broadband deployment in unserved and underserved areas. These policies include a cap on payments, by state, to competitive ETCs. This cap means that as additional competitive carriers are designated as ETCs and acquire customers, the amount of support for the competitive ETCs in a state is shared among the carriers, reducing the amount of support for all of them. A second policy that the FCC has adopted is to condition the approval of a merger among telecommunications carriers on their agreement to surrender their ETC status. A third policy is a recent decision that if an ETC gives up its designation, the cap for each state for support to competitive ETCs is reduced by the amount of support that the carrier received in each state.

The impact of these FCC policies on Texas could mean that if this application is granted, T-Mobile would begin receiving FUSF support, which in the first instance would reduce the level of support for other competitive ETCs in Texas. In order to obtain FCC approval of the proposed T-Mobile merger with AT&T, it is likely that T-Mobile would have to agree to surrender this status. It seems likely that Commission action on the T-Mobile application for ETC status will occur before FCC action on the merger, so that if the Commission were to grant

the application, T-Mobile would begin receiving FUSF support, and the amount it is receiving when the merger is approved would then be lost to Texas competitive ETCs.

If the T-Mobile application were fully compliant with the FCC and Commission rules, the Commission would be facing a perhaps difficult choice between near-term investments by T-Mobile in facilities in high-cost areas that could improve service options for customers in those areas versus the likely future loss of FUSF support statewide. But the Commission faces a far clearer choice in this matter, because T-Mobile is not investing in facilities to serve customers in high-cost areas. To a large extent, it is relying on partner arrangements that do not represent an investment in facilities to serve these areas. Moreover, its investments in facilities are clearly aimed at enhancing service to non-rural customers, by providing high-speed, mobile data service. It is beneficial to Texas customers to have a company that is willing to make this investment, but this is not an investment that the FUSF supports. In effect, T-Mobile plans to milk the FUSF support for rural areas to fund its competitive efforts in non-rural areas. The Application is not consistent with FCC and Commission rules, and it is contrary to the public interest. The issues of non-compliance with the Lifeline rule are not so fundamental, and T-Mobile could amend its tariffs to comply with the rule. In the absence of a commitment from T-Mobile to conform its tariffs to the Commission rule, the Application should be denied.

## **II. LEGAL FRAMEWORK FOR USE AND ETC DESIGNATION**

The Communications Act of 1934, as amended (the Act) requires the FCC to develop universal service policies to ensure, among other things, that consumers in rural and high cost areas have services that are reasonably comparable to those provided in urban areas at reasonably comparable rates.<sup>10</sup> In order to receive federal universal service support, a telecommunications carrier must be designated an ETC under section 214(e) of the Act and must offer the supported

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<sup>10</sup> FTA § 254(b).

services throughout that entire service area.<sup>11</sup> A common carrier designated as an ETC by a State commission pursuant to paragraph 214(e)(2) shall be eligible to receive universal service support in accordance with section 254 of the Act. A carrier that is designated as an ETC shall throughout the service area for which the designation is received: (1) offer the services that are supported by Federal universal service support mechanisms under section 254(c) of the Act, either using its own facilities or a combination of its own facilities and resale of another carrier's services (including services offered by another ETC); and (2) advertise the availability of such services and the charges therefore using media of general distribution.<sup>12</sup> If an area is served by a rural telephone company, the Act defines the service area for purpose of designating an ETC to be the rural telephone company's entire study area.<sup>13</sup> Before designating an additional ETC for an area served by a rural telephone company, the relevant State commission shall find that the designation is in the public interest.<sup>14</sup>

A State commission may adopt regulations not inconsistent with the FCC's rules to preserve and advance universal service.<sup>15</sup> However, a State commission may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support the FCC's definitions or standards that do not rely on or burden Federal universal service support mechanisms.<sup>16</sup> P.U.C. SUBST. R. 26.418, relating to Designation of Common Carriers as Eligible Telecommunications Carriers to Receive Federal Universal Service Funds, provides the Commission's criteria, requirements and procedures for ETC designation made by the Commission.

Generally, P.U.C. SUBST. R. 26.418 mirrors the federal requirements, with the exception of the additional requirements provided in 47 C.F.R. §54.202, which apply to ETC designations made by the FCC. The Commission has not formally adopted the additional requirements

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<sup>11</sup> FTA § 254(e).

<sup>12</sup> FTA § 214(e)(1).

<sup>13</sup> FTA § 214(e)(5); Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, 12 FCC Rcd. 8776, 8880-81, paras, 187-188 (1997).

<sup>14</sup> FTA § 214(e)(2).

<sup>15</sup> FTA § 254(f).

<sup>16</sup> FTA § 254(f).

provided in 47 C.F.R. §54.202, but the Commission has in a series of ETC decisions elaborated on the comprehensive requirements in P.U.C. SUBST. R. 26.418, and some of the §54.202 requirements are already reflected in those decisions.<sup>17</sup> The Commission also stated that some aspects of §54.202 have been addressed by the Commission in previous ETC dockets under its public interest analysis, but that others have not.<sup>18</sup> For example, the 47 C.F.R. §54.202(a)(1)(ii) requirement that applicant's submit a five-year plan for network upgrades and reporting requirements for network outages have not been ordered by the Commission.<sup>19</sup> However, Staff has requested and been provided five-year plans for network upgrades in recent ETC applications with the Commission.<sup>20</sup>

For ETC designations in rural service areas, 47 U.S.C. 214(e) and P.U.C. SUBST. R. 26.418 require the Commission to conduct a public interest analysis. The public interest analysis for ETC designations in rural areas is necessarily stringent.<sup>21</sup> The FCC has said that the value of increased competition, by itself, is not sufficient to satisfy the public interest test in rural areas.<sup>22</sup> When the FCC undertakes a public interest analysis for an application for a competitive ETC designation in a rural area it weighs 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

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<sup>17</sup> *Application of Mid-Tex Cellular, Ltd. for Designation as an Eligible Telecommunications Carrier (ETC)*, Docket No. 30666, Preliminary Order at 3 (May 6, 2005) (citing to *Application of NPCR d/b/a Nextel Partners for Eligible Telecommunications Carrier Designation*, Docket No. 27709, Order at 8-9 (June 30, 2004) (Mid-Tex Order); *Application of WWC Texas RSA Limited Partnership, d/b/a Cellularone (Western Wireless) to Amend its Designation as an Eligible Telecommunications Carrier (ETC) in Certain Areas Served by Non-Rural Telephone Companies*, Docket No. 28688, Order at 3 (Nov. 24, 2004); *Application of Dobson Cellular Systems, Inc. for Designation as a Federal Eligible Telecommunications Carrier and Petition to Redefine Certain Rural Service Areas*, Docket No. 28462, Order at 2 (Jan. 14, 2005) (Dobson Redefinition Order).

<sup>18</sup> *Mid-Tex Order* at 3.

<sup>19</sup> *Id.*

<sup>20</sup> *Application of Worldcall Interconnect Inc. for Designation as an Eligible Telecommunications Carrier and Eligible Telecommunications Provider*, Docket No. 35728, Order No. 18, *Notice of Approval for Designation as an Eligible Telecommunications Carrier and Eligible Telecommunications Provider* at 4 -5. (January 9, 2009); *Application of Worldcall Interconnect Inc. for Designation as an Eligible Telecommunications Carrier and Eligible Telecommunications Provider*, Docket No. 36077, Order No. 9, *Notice of Approval for Designation as an Eligible Telecommunications Carrier and Eligible Telecommunications Provider*, at 3 - 4. (January 9, 2009) *Application of Mid-Tex Cellular, LTD. to Amend its Designation as an Eligible Telecommunications Carrier (ETC) Pursuant to P.U.C. SUBST. R. 26.418 and for Designation as an Eligible Telecommunications Provider (ETP) Pursuant to P.U.C. SUBST. R. 26.417*, Commission Staff's Final Recommendation at Pg 10 (February 14, 2011)

<sup>21</sup> *In the Matter of the Federal-State joint board on Universal Service Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, CC Docket No. 96-45, Memorandum Opinion and Order, 19 FCC Rcd. 1563, 1565, para4 (2004) (Virginia Cellular Order).

<sup>22</sup> *Id.*

regarding quality of service provided by competing providers, and the competitive ETC's ability to provide the supported services throughout the designated area within a reasonable time.<sup>23</sup> The FCC also imposed certain ongoing conditions on the commitments made by a wireless competitive ETC applicant because of the increased frequency of petitions for competitive ETC designations and the potential impact of such designations on consumers in rural areas.<sup>24</sup>

Staff has conducted an analysis of T-Mobile's Application relative to whether it is in the public interest to designate T-Mobile as a competitive ETC in the rural study areas for which it seeks designation, including a "cream skimming" analysis. T-Mobile does not believe a "cream skimming" analysis can be used in the analysis of its Application because it has requested designation for entire rural study areas.<sup>25</sup> However, this is not correct. The FCC has not prohibited state commissions from conducting a "cream skimming" analysis for ETC designations in their rural-areas. The FCC has only recommended that the states follow its lead on this issue.<sup>26</sup> In this case T-Mobile is the first wireless additional or competitive ETC (C-ETC) application that the Commission has reviewed that will have a virtually statewide ETC designation. Therefore, T-Mobile's impact on federal and state universal service funds and funding, other carriers and Texas consumers will be larger than that of any other C-ETC in Texas. In this context, it is appropriate, as part of its public interest analysis, for the Commission to consider a "cream skimming" analysis of T-Mobile's Application.

### III. PROCEDURAL HISTORY

On June 28, 2010, T-Mobile filed its Application of T-Mobile West Corporation for Designation as an Eligible Telecommunications Carrier (Rural) (Application). On July 14, 2010, T-Mobile's Application was deemed sufficient for further review. This proceeding was referred to the State Office of Administrative Hearings (SOAH) on July 26, 2010. Texas Statewide Telephone Cooperative, Inc. (TSTCI), DialToneServices, L.P. (DTS), United Telephone Company of Texas, Inc. d/b/a CenturyLink; Central Telephone Company of Texas, Inc. d/b/a CenturyLink; CenturyTel of San Marcos, Inc. d/b/a CenturyLink; CenturyTel of Lake Dallas,

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Rebuttal Testimony of Gene DeJordy at 12.

<sup>26</sup> *In the Matter of Federal State Joint Board on Universal Service*, CC Docket No. 96.45, Report and Order at para. 49 (rel. March 17, 2005).

Inc. d/b/a CenturyLink; CenturyTel of Port Aransas, Inc. d/b/a CenturyLink (collectively CenturyLink), Valley Telephone Cooperative, Inc. (Valley), Consolidated Communications of Texas Company and Consolidated Communications of Fort Bend Company (collectively Consolidated) were granted intervention status.<sup>27</sup>

A Preliminary Order was adopted by the Commission on August 19, 2010. The hearing on the merits originally scheduled for December 15-16, 2010, was delayed to March 22-23, 2011 because the undersigned Commission attorney had emergency surgery. Staff appreciates T-Mobile and all other parties cooperation with this delay. The hearing on the merits was held on March 22-23, 2011. This filing is Staff's initial post-hearing brief. This brief addresses the issues raised in the August 19, 2010 Preliminary Order and the impact on the Application of the March 20, 2011 announced acquisition by AT&T, Include of T-Mobile's parent company.

**IV. DOES T-MOBILE'S APPLICATION FOR ETC DESIGNATION IN RURAL ILEC STUDY AREAS SATISFY THE APPLICABLE REQUIREMENTS OF 47 C.F.R. § 54.201, 47 U.S.C. § 214(E), P.U.C. SUBST. R. 26.412 AND P.U.C. SUBST. R. 26.418? (PRELIMINARY ORDER ISSUE NO. 1)**

Within each relevant service area, 47 U.S.C. 214(e) requires an ETC to provide the services required of an ETC using *its own facilities or a combination of its own facilities and resale*.<sup>28</sup> The Commission has said that a carrier must offer evidence that it *is capable of and committed to* providing the supported services upon designation.<sup>29</sup> P.U.C. SUBST. R. 26.418(g)(1)(B)(ii) requires applicants to show that the applicant assumes the obligation to offer each of the services that are supported by the FUSF support mechanisms under 47 U.S.C. §254(c) to any customer in the service area for which it seeks designation.<sup>30</sup> Additionally, P.U.C. SUBST. R. 26.418(c)(1) requires T-Mobile to provide the services supported by universal

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<sup>27</sup> SOAH Order No. 3 at 1 (August 4, 2010); SOAH Order No. 4 at 1 (August 16, 2010).

<sup>28</sup> FTA § 214(e).

<sup>29</sup> *Nextel at 5 (citing to Application of Dobson Cellular Systems, Inc. for Designation as an Eligible Telecommunications Carrier and Petition to Redefine Certain Rural Service Areas, Docket No. 28462, Order on Remand at 2 ( May 19, 2004), and Application of WWC Texas RSA Limited Partnership, d/b/a CellularOne (Western Wireless) to Amend its Designation as an Eligible Telecommunications Carrier (ETC) Designation in Certain Areas Served by Non-Rural Telephone Companies, Docket No. 28688, Order on remand at 1-2 (May 28, 2004)).*

<sup>30</sup> P.U.C. SUBST. R. 26.418(g)(1)(B)(ii).

service support mechanisms as provided in 47 C.F.R. 54.101. Therefore in any given service area, T-Mobile must demonstrate that it has sufficient signal strength using *its own facilities* to provide the services required of an ETC to at least one customer.

The FCC's rules clarify the term "facilities," as 47 C.F.R. 54.201(e) provides that "[f]or the purposes of this section the term facilities means any physical components of the telecommunications network that are used in the transmission or routing of the services that are designated for support pursuant to subpart B of this part. Subsection (f) of that section provides that "[f]or purposes of this section, the term "own facilities" includes, but is not limited to, facilities obtained as unbundled network elements pursuant to part 51 of this chapter, provided that such facilities meet the definitions of the term "facilities" under this subpart." Subsection (g) of this section provides that "[a] state commission shall not require a common carrier, in order to satisfy the requirements of paragraph (d)(1) of this section, to use facilities that are located within the relevant service area, as long as the carrier uses the facilities to provide the services designated for support . . . within the service area." Staff has several issues with T-Mobile's application in this regard.

First, T-Mobile stated that the backhaul backbone services that it uses to provide service in Texas are a "facility" for purposes of 47 U.S.C. § 214(e)<sup>31</sup> and Staff agrees. However, Staff does not agree that showing that a backhaul backbone pipe travels through a rural study area, absent any other facilities in that study area, satisfies 47 U.S.C. § 214(e), because absent other facilities in or very near the service area, such as cell sites, T-Mobile cannot provide the services required of an ETC in that service area. By analogy, if an oil company had a pipeline running through a service area, but no service stations, could anyone in the service area access the gasoline in the pipeline? The answer is clearly no.

Second, T-Mobile relies on "partner service" to provide service in many rural service areas.<sup>32</sup> Yet, T-Mobile has not stated that "partner service" is resale, or that it is an unbundled

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<sup>31</sup> Tr. at 297 (March 23, 2011).

<sup>32</sup> See generally Direct Testimony of Daniel Piekarczyk, DP-4.

network element (UNE). Since “partner service” is not T-Mobile’s own facility or an UNE, it is not a “facility” for purposes 47 U.S.C. § 214(e). In addition, T-Mobile did not provide any information on the quality of service (i.e. signal strength and coverage area) provided by its “partners.” Therefore, in those rural study areas in which T-Mobile can only offer service by using a “partner’s” service, T-Mobile should not be designated as an ETC.

Third, T-Mobile provides inadequate signal strength in some rural study areas. Inadequate signal strength shows inability and lack of commitment by T-Mobile. Ms. Kayser stated that she reviewed T-Mobile’s maps and concluded that the quality of signal provided and the coverage area don’t allow for all end users throughout entire study areas to receive adequate service from T-Mobile.<sup>33</sup> Staff witness Ms. Liz Kayser testified that T-Mobile depicted its coverage area in shades of purple, with darker purple indicating a strong signal and lighter purple indicating a poor signal strength and therefore inadequate service.<sup>34</sup>

Further, Ms. Kayser testified that if the signal strength in a given wire center is so weak that it is unusable, T-Mobile cannot avail itself of the six-step process provided in 47 C.F.R. 54.202(a)(1)(i)(B).<sup>35</sup> Ms. Kayser testified that in rural study areas, T-Mobile has not demonstrated it is *able* to serve a single customer in that study area *using its own facilities* as required in 47 U.S.C. 214(e) unless its strongest signal strength reaches at least some portion of the rural study area.<sup>36</sup> In rural study areas reached by T-Mobile’s strongest signals, if there are some customers that T-Mobile cannot serve, the company is then permitted to take advantage of the six-step process provided in 47 C.F.R. 54.101(a)(1)(i)(B).<sup>37</sup>

Ms. Kayser’s testimony is consistent with *Dobson* where the six-step process was invoked only after a discussion of Dobson’s generally adequate signal strength, acknowledgement of certain “dead spots,” and Dobson’s unconditional commitment to serve any

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<sup>33</sup> Direct Testimony of Liz Kayser at 12.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Tr. at 303 (March 23, 2011)

<sup>37</sup> Tr. at 301 (March 23, 2011).

consumer within the study area, including its commitment to take additional steps if a customer's signal coverage was unsatisfactory.<sup>38</sup> Dobson sought certification in only four rural study areas.<sup>39</sup> The T-Mobile Application dwarfs the *Dobson* application. Yet even in a much smaller application, the Commission required Dobson to notify the Commission if it could not provide service after taking the additional steps, and the Commission would determine whether Dobson had failed to meet its service obligations.<sup>40</sup> Ms. Kayser's testimony is also consistent with the language of 47 C.F.R. 54.202(a)(1)(i), which requires a commitment to serve all customers making a reasonable request for service, and requires ETCs to provide service within a reasonable period of time, if the potential customer is within the applicant's licensed service area but outside its existing network coverage . . . then lists the six-step process.<sup>41</sup>

T-Mobile's questioning on this subject seems to indicate that T-Mobile believes that even with unusable signal strength, it is permitted to avail itself of the six-step process provided in 47 C.F.R. 54.202(a)(1)(i)(B) to attempt to reach customers that make a reasonable request for service.<sup>42</sup> T-Mobile seems to make the argument that an unusable weak signal or even a partner's service satisfies 47 U.S.C. 214(e) and that the six-step process then satisfies the service obligations of P.U.C. SUBST. R. 26.418(g)(1)(B)(ii). Staff disagrees. Unless T-Mobile demonstrates that it has *usable* signal strength in each rural study area with which it can provide the services required of an ETC to at least one customer in that rural study area, it has not demonstrated that it is *able* to provide the services required of an ETC as required in 47 U.S.C. 214(e) and is therefore not eligible for designation in that study area.

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<sup>38</sup> *Application of Dobson Cellular Systems, Inc. for Designation as an Eligible Telecommunications Carrier (Etc) Pursuant to 47 U.S.C 214(e) and P.U.C. SUBST. R. 26.418*, Docket No 29144, Order at 13-14, Findings of Fact 47-50 (Feb. 2, 2005) (Dobson Order)

<sup>39</sup> *Application of Dobson Cellular Systems, Inc. for Designation as an Eligible Telecommunications Carrier (Etc) Pursuant to 47 U.S.C 214(e) and P.U.C. SUBST. R. 26.418*, Docket No 29144, Application, Attachment B (January 19, 2004).

<sup>40</sup> *Id.* at 14, Finding of fact 51.

<sup>41</sup> 47 C.F.R. 54.202(a)(1)(i)

<sup>42</sup> Tr. At 239 (March 22, 2011); Tr. at 300-305 (March 23, 2011).

Although an ETC is given time to *extend* its service to reach all customers within a given service area after designation, it is required to demonstrate that *upon designation* it is *able* to provide the supported services using *its own facilities* or *a combination of its own facilities and resale*.<sup>43</sup> T-Mobile seems to confuse the six-step process in 47 C.F.R. 54.101(a)(1) with the time an ETC is given to *extend* service throughout a service area after designation. But that is not correct. The time a carrier is given to *extend* service throughout a service area after designation starts from the assumption that the carrier is able to provide the supported services within the service area. It does not mean a carrier is entitled to designation in a rural study in which it is not capable of providing the services required of an ETC to any customer. The six-step process is part of the commitment to serve by a carrier that has demonstrated its *ability* and *commitment* to serve *upon designation*. T-Mobile cannot base its ability to serve on the six-step process in 47 C.F.R. 54.101(a)(1); it must show its *ability* to serve at least a single customer in a given study area. For all these reasons, T-Mobile has not met its burden to prove that it satisfies the applicable requirements of 47 C.F.R. 54.101, 47 U.S.C. 214(e), P.U.C. SUBST. R. 26.412 or P.U.C. SUBST. R. 26.418.

**V. DO THE FACTS DEMONSTRATE THAT T-MOBILE'S  
APPLICATION FOR ETC IS IN THE PUBLIC INTEREST AS  
REQUIRED BY P.U.C. SUBST. R. 26.418(E)(2)? (PRELIMINARY  
ORDER ISSUE NO. 2)**

In order for T-Mobile to prove that its designation as a C-ETC in the rural areas listed in its Application is in public interest the Company must demonstrate that ETC designation will result in a material benefit above and beyond the status quo of its existing operations in the

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<sup>43</sup> *Nextel* at 5 (citing to *Application of Dobson Cellular Systems, Inc. for Designation as an Eligible Telecommunications Carrier and Petition to Redefine Certain Rural Service Areas*, Docket No. 28462, Order on Remand at 2 (May 19, 2004), and *Application of WWC Texas RSA Limited Partnership, d/b/a CellularOne (Western Wireless) to Amend its Designation as an Eligible Telecommunications Carrier (ETC) Designation in Certain Areas Served by Non-Rural Telephone Companies*, Docket No. 28688, Order on remand at 1-2 (May 28, 2004)).

requested rural ETC service areas.<sup>44</sup> Although the Commission has declined to adopt specific criteria for assessing the public interest, as they are dependent on the facts of each individual case, the Commission has stated that applicants could include detail on the following issues: (1) service offerings, including additional service offerings for the proposed ETC designation areas, (2) additional service quality commitments, (3) detailed coverage areas, (4) continuation of service commitments, such as back-up power capability, (5) consumer protection standards, and (6) information regarding how the company will better serve the consumer if granted designations.<sup>45</sup>

**a. Has T-Mobile's application demonstrated that it is in the public interest by demonstrating that ETC designation will result in a *material benefit above and beyond the status quo of T-Mobile's existing operations in its requested ETC service areas*?**

During the hearing on the merits, T-Mobile relied directly on the Commission's finding in *Nextel Partners* concerning the issue of "material benefit." T-Mobile's attorney asked T-Mobile witness Mr. Piekarczyk the following question: "[a]nd the Commission concluded in *Nextel* that increased choice for telecommunications service and increased access to enhanced services results in Texas consumers being more likely to have lower prices, higher quality and the deployment of new telecommunications technologies. Do you recall that?"<sup>46</sup> Mr. Piekarczyk answered "yes."<sup>47</sup> Yet, the question and Mr. Piekarczyk's answer are absolutely wrong and misleading. The quoted *Nextel Partners* finding is a general presumption that the Commission's applies in *non-rural* area C-ETC designation applications, which are *per se* in the public interest.<sup>48</sup> Quite the opposite is true for C-ETC designation applications in *rural* areas. In rural

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<sup>44</sup> *Application of NPCR, Inc. d/b/a Nextel Partners for Eligible Telecommunications Carrier Designation*, Docket No. 27709, Final Order at 9 (June 30, 2004) (ordering ETC applicants in rural areas to demonstrate that designation is of material benefit above and beyond the status quo of its existing operations in the requested areas) (*Nextel Partners*).

<sup>45</sup> *Id.*

<sup>46</sup> Tr at 314 (March 23, 2011).

<sup>47</sup> *Id.*

<sup>48</sup> *Nextel Partners* at 12.

C-ETC applications, the applicant has the burden to prove their designation is in the public interest.<sup>49</sup> The application is subject to stringent review.<sup>50</sup> The review is fact specific.<sup>51</sup>

In conducting the review of rural C-ETC applications, the FCC weighs whether the benefits of an additional C-ETC outweigh any potential harm.<sup>52</sup> The FCC weighs 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.<sup>53</sup> Consistently and recently, the FCC stated that it is reining in high-cost support to C-ETCs because it results in "duplicative voice services."<sup>54</sup> Therefore there is no general presumption that the customer benefit from increased competition makes a C-ETC designation in a rural study area *per se* in the public interest. Instead, T-Mobile must prove that its designation will result in a "material benefit" that will go above and beyond the status quo of its existing operations in the rural study areas for which it seeks designation in order to warrant approval.

T-Mobile's application presented unique challenges for Commission review. Staff has never reviewed a wireless C-ETC application that is effectively a statewide application. Prior wireless C-ETC applications have involved much smaller geographic scopes, with one or two

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<sup>49</sup> *Application of WWC Texas RSA Limited Partnership, d/b/a Cellularone (Western Wireless) for Designation as an Eligible Telecommunications Carrier in Certain Areas served by Rural telephone Companies*, Docket No. 30710, Order at 9, Conclusion of Law No. 11 (August 16, 2005) (Western Wireless Order) (citing to *Nextel Partners* and *Dobson*, the applicant bears the burden of showing that its designation would be in the public interest for rural ILEC study areas).

<sup>50</sup> *In the Matter of the Federal-State joint board on Universal Service Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, CC Docket No. 96-45, Memorandum Opinion and Order, 19 FCC Rcd. 1563, 1565, para4 (2004).

<sup>51</sup> *Dobson Order* at 6.

<sup>52</sup> *In the Matter of Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, CC Docket No. 96-45, memorandum Opinion and Order, FCC 03-338, Para. 28 (rel. Jan. 22, 2004) (Virginia Cellular).

<sup>53</sup> *Virginia Cellular* at para. 4.

<sup>54</sup> *In the Matter of High-Cost Universal Service Support*, WC Docket No. 05-337, Order at ¶ 5 (December 30, 2010).

wire centers, and the carriers have demonstrated that their designation was in the public interest by committing to infrastructure investments within their designated area that specifically and directly benefited the customers in that area. For example, in Docket No. 29144, Dobson Cellular Systems, Inc. (Dobson) sought designation in four rural study areas.<sup>55</sup> As a condition of designation, Dobson agreed to build three cell site towers to provide signal strength and reception improvements within its rural study areas, follow the Cellular Telecommunications and Internet Association's (CTIA) consumer Code for Wireless Service, add six hours of back-up power, install two portable generators dedicated to serving the ETC areas, and purchase a Cell on Light Truck (COLT) to ensure continuity of service.<sup>56</sup>

In Docket No. 30666, Mid-Tex Cellular, Ltd. (Mid-Tex) sought designation in two rural study areas.<sup>57</sup> As a condition of designation, Mid-Tex agreed to construct an additional 12 cell site towers within two years to improve capacity and coverage within its designated areas, equip each cell site with a permanent backup generator capable of at least six hours of backup power, purchase a mobile cell site to serve the designated areas in an emergency, follow the CTIA's consumer Code for Wireless Service, and to include some amount of local usage in every service plan that was eligible for universal service support.<sup>58</sup>

In Docket No. 35252, Texas RSA 7BX, L.P. (Texas RSA) sought designation in one rural study area that contained thirteen exchanges.<sup>59</sup> Texas RSA agreed to use universal service support for Phase II E911 when it was requested, to deploy equipment to support data transmission services throughout the area, to provide continued maintenance of the network,

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<sup>55</sup> *Application of Dobson Cellular Systems, Inc. for Designation as an Eligible Telecommunications Carrier (Etc) Pursuant to 47 U.S.C 214(e) and P.U.C. SUBST. R. 26.418, Docket No 29144, Application, Attachment B (January 19, 2004).*

<sup>56</sup> *Application of Dobson Cellular Systems, Inc. for Designation as an Eligible Telecommunications Carrier (Etc) Pursuant to 47 U.S.C 214(e) and P.U.C. SUBST. R. 26.418, Docket No 29144, Order at 6 (February 2, 2005).*

<sup>57</sup> *Application of Mid-Tex Cellular Ltd. for Designation as an Eligible Telecommunications Carrier (ETC), Docket No. 30666, Application, Attachment B (January 20, 2005)*

<sup>58</sup> *Application of Mid-Tex Cellular Ltd. for Designation as an Eligible Telecommunications Carrier (ETC), Docket No. 30666, Order at 4-5(August 9, 2005)*

<sup>59</sup> *Application of Texas RSA 7BS, L.P. d/b/a peoples Wireless Services for Designation as an Eligible Telecommunications Carrier, Docket No. 35252, Application, Attachment C (January 18, 2008).*

including battery back-up of its cell sites and to deploy back-up power generators to all of its cellular tower sites, if granted ETC designation.<sup>60</sup> Thus historically, the Commission required some kind of specific build-out plan within the rural study area. Additionally, carriers have been ordered to provide new services, new infrastructure, new service quality assurance, and/or new emergency backup as evidence that their designation would provide a material benefit above and beyond the status quo of their existing operations in their requested ETC service areas.

T-Mobile's proof that its designation will provide a "material benefit" seems to rely entirely on its new and planned cell site deployment and its Service Improvement Plan (SIP).<sup>61</sup> Yet, the information provided by T-Mobile in its deployment plan and its SIP is virtually meaningless.

[REDACTED]

While Staff appreciates the necessity and importance of "network" investments by carriers, the fact is all carriers, even landline carriers, are converting to "soft switches," even replacing old electronic/digital switches that are not fully amortized, because of the extremely low cost to acquire, install and maintain "soft switches." More importantly, while an insufficient "network," whether because of too few switches or not enough backbone bandwidth, might

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<sup>60</sup> *Application of Texas RSA 7BS, L.P. d/b/a peoples Wireless Services for Designation as an Eligible Telecommunications Carrier*, Docket No. 35252, Order No. 3 at 4 (March 10, 2008).

<sup>61</sup> Rebuttal Testimony of Daniel Piekarczyk, Exhibit DP-8, List of Cell Sites Built in 2010 (DP-8) and Planned for 2011 and DP-10, Service Improvement Plan or SIP (DP-10).

<sup>62</sup> *See generally* Direct Testimony of Daniel Piekarczyk, DP-10.

<sup>63</sup> Tr. at 148-149 (March 22, 2011).

<sup>64</sup> Tr. at 149.

result in insufficient resources for some users for some calls, on the whole it is infrastructure investments much closer to the end user, such as cell sites, that impact whether a wireless carrier's service is actually usable for the services required of an ETC. Without cell sites in the vicinity of the end user customer, they have no signal, or a signal that is too weak to be useful, and can never make any calls, regardless of whether the overall "network" is sufficient. Additionally, T-Mobile's allocation methodology makes it impossible to tell whether T-Mobile plans to invest any particular amount of money in Texas, much less in any particular *rural* study area, because many "network" components can be located anywhere.

[REDACTED]

Additionally, since all new cell sites installed by T-Mobile will operate at "4G" data speeds,<sup>67</sup> it seems clear that T-Mobile's intent is to build out its high-speed

<sup>65</sup> See generally Direct Testimony of Daniel Piekarczyk, Exhibit DP-8.  
<sup>66</sup> Rebuttal Testimony of Daniel Piekarczyk, Exhibit 4.  
<sup>67</sup> Tr. at 223 (March 22, 2011).

data network using universal service support intended for voice services provided for customers in rural study areas, while making no commitment to provide an improved signal, additional services, additional network protections, or additional customer service to rural T-Mobile customers.

The Commission does not impose a “needs based” test on C-ETC applicants.<sup>68</sup> However, the Commission does look at the applicant’s new commitments, such as infrastructure spending commitments and capital expenditures as a result of its designation, reporting to the Commission on customer complaints and customer satisfaction, etc.<sup>69</sup> The Commission has required applicants to track their expenses and investments in each rural study area, and submit it to the Commission on an annual basis.<sup>70</sup> Therefore T-Mobile must show that if it is designated as an ETC its commits to provide some new primary benefit in and for the rural study areas for which it seeks designation.

Two examples help explain Staff’s position

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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<sup>68</sup> *Dobson Order* at 6-7.  
<sup>69</sup> *Id.*  
<sup>70</sup> *Id.* at 7-8; *Application of New Cingular Wireless PCS, LLC for Designation as an Eligible Telecommunications Carrier (ETC) in Lieu of Dobson Cellular Systems, Inc. Pursuant to 47 U.S.C. § 214(e) and P.U.C. SUBST. R. 26.418*, Docket No. 36346, Order No. 8 at 5 (April 7, 2009).  
<sup>71</sup> Direct Testimony of Daniel Piekarczyk, Exhibit DP-4, La Salle County (Staff understands that T-Mobile believes it provided bates stamped maps with its confidential filing on September 24, 2010; however, Central Records does not have such a filing and Staff does not have a bates stamped copy of T-Mobile’s maps as provided in DP-4. Therefore, Staff will footnote to the specific county or generally if more than one county is implicated in the text).  
<sup>72</sup> *Id.*

[REDACTED]

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<sup>73</sup> Based on approximate distance from Cotulla to Millett being 11.1 miles.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> Tr. at 181 (March 22, 2011).

[REDACTED]

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<sup>78</sup> Rebuttal Testimony of Jeff Hooper at 5.

<sup>79</sup> *Id.*

<sup>80</sup> Direct Testimony of Daniel Piekarczyk, Exhibit DP-4, Williamson County.

[REDACTED]

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81 Tr. at 181 (March 22, 2011).  
82 Direct Testimony of Daniel Piekarczyk, Exhibit DP-10 at 31.  
83 Direct Testimony of Daniel Piekarczyk, Exhibit DP-4, Williamson County.  
84 Direct Testimony of Daniel Piekarczyk, Exhibit DP-10 at 31.  
85 Direct Testimony of Daniel Piekarczyk, Exhibit DP-4, Williamson County.  
86 Direct Testimony of Daniel Piekarczyk, Exhibit DP-10 at 1.  
87 Direct Testimony of Daniel Piekarczyk, Exhibit DP-4, Williamson County.  
88 Direct Testimony of Daniel Piekarczyk, Exhibit DP-10 at 1.

[REDACTED]

In the cases cited above, the carriers that were granted ETC designation committed to new infrastructure, new levels of customer service, new equipment to deal with emergencies and/or offered new packages of service to their customers in their designated rural study areas. In contrast, T-Mobile's Application seems to rely on its existing network to base its entitlement for designation as an ETC. T-Mobile's own witness Mr. Gene DeJordy testified that where T-Mobile has already built out it does not need to be an ETC.<sup>89</sup>

[REDACTED]

T-Mobile asks for designation as an ETC in 483 rural wire centers.<sup>90</sup> [REDACTED]

[REDACTED]

<sup>89</sup> Tr. at 188 (March 22, 2010).  
<sup>90</sup> Rebuttal Testimony of Gene DeJordy at 11.  
<sup>91</sup> See generally Direct Testimony of Daniel Piekarczyk, Exhibit DP-8.

[REDACTED]

The FCC has said that “cream skimming” occurs when an entity offers service only to those customers who are the least expensive to serve.<sup>96</sup> The FCC stated that population density is a good metric for approximating the costs of serving an area, and that one means of evaluating cream-skimming has been to compare the population density of the wire centers in which the competitive ETC seeks to provide service against that of the wire centers in the study area in which the competitive ETC does not seek to provide service.<sup>97</sup> Therefore, Mr. DeJordy’s testimony regarding the relative population density within the rural areas for which T-Mobile

<sup>92</sup> AT&T takes no high-cost loop support and therefore does not make an annual certification filing with the Commission in Docket No. 24481. C-ETCs do not get high-cost loop support unless the Incumbent Local Exchange Carrier takes high cost loop support.

<sup>93</sup> Direct Testimony of Daniel Piekarczyk, Exhibit DP-8 at 13 (2011 List)

<sup>94</sup> Direct Testimony of Daniel Piekarczyk, Exhibit DP-4, Williamson County.

<sup>95</sup> *Id.*

<sup>96</sup> *In the Matter of Telecommunications Carriers Eligible for Universal Service Support Federal State Joint Board on Universal Service Cellular Properties Petition for Commission Agreement in Redefining the Service Area of Wabash Telephone Cooperative, Inc. in the State of Illinois Pursuant to 47 C.F.R. Section 54.207(c)*, WC Docket No. 09-197, CC Docket No. 96-45, Order at para.5 (rel. March 7, 2011).

<sup>97</sup> *Id.*

seeks designation was no surprise.<sup>98</sup> However, if T-mobile is serving a large percentage of the population in a low population density area, it may be cream skimming because even in low population density areas there will be concentrations of the population and much larger areas with little or no population. Mr. DeJordy's evidence shows that T-Mobile is serving only the concentrations of population, even in the low density portions of the rural study areas for which it seeks designation. For example, [REDACTED]

[REDACTED]

[REDACTED] However, even if Mr. DeJordy's analysis were correct, the FCC also said that population density was just "one" method for evaluating whether cream skimming was occurring.

Although 47 C.F.R. 54.201(g) permits ETCs to serve end users with facilities that are not within the study area,<sup>102</sup> T-Mobile's Application goes beyond the intent of this rule. This approach is consistent with the FCC and Commission rules and with the FCC's expressions of concern high cost support should be reined in for "duplicative voice services."<sup>103</sup> T-mobile has not demonstrated that ETC designation is in the public interest because it will not result in a

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<sup>98</sup> Rebuttal Testimony of Gene DeJordy at 11.  
<sup>99</sup> Direct Testimony of Daniel Piekarczyk, Exhibit DP-4, Anderson County.  
<sup>100</sup> Rebuttal Testimony of Gene DeJordy, Exhibit GD-1 at 6.  
<sup>101</sup> Tr. at 345-347 (March 23, 2011)  
<sup>102</sup> 47 C.F.R. 54.201(g).  
<sup>103</sup> *In the Matter of High-Cost Universal Service Support*, WC Docket No. 05-337, Order at ¶ 5 (December 30, 2010).

material benefit above and beyond the status quo of T-Mobile's existing operations in its requested rural service areas.

**b. In what specific ways would designation of T-Mobile as an ETC in its requested service area be in the public interest as asserted in its application in terms of benefits from competitive pricing and new services?**

The FCC has said that the value of increased competition, by itself, is not sufficient to satisfy the public interest test in rural areas.<sup>104</sup> Yet, T-Mobile has not demonstrated that it will offer new "competitive pricing and new services" if it is designated as an ETC. T-Mobile witness Mr. Daniel Piekarczyk stated T-Mobile's designation as an ETC would be in the public interest because consumers will benefit from competitive pricing and new services, such as T-Mobile's Lifeline Plan.<sup>105</sup> Lifeline service is a requirement for carriers that are designated as ETCs; so Lifeline service is not "beneficial new competitive pricing" or a "new services" for purposes of a public interest analysis. Mr. Piekarczyk did not list any new service offerings, other than Lifeline, that T-Mobile will offer as a result of ETC designation. Mr. Piekarczyk did not state that T-Mobile will offer additional free minutes for any plan for which universal service support is received. The only thing Mr. Piekarczyk said was that "[a]s T-Mobile expands its network in Texas, existing T-Mobile subscribers and subscribers without existing access to T-Mobile's service will benefit from T-Mobile's high level of service quality and more service options." Thus, T-Mobile points to its existing pricing and services to satisfy the public interest requirement. T-Mobile has failed to meet its burden of proof on this issue.

**c. In what specific ways would designation of T-Mobile as an ETC in its requested service area be in the public interest as asserted in its application in terms of the provision of a higher level of service quality and better customer service?**

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<sup>104</sup> *Id.*

<sup>105</sup> Direct Testimony of Daniel Piekarczyk at 13.

Section IV of this brief discusses the inadequacy of T-Mobile's signal in some rural areas and with the fact that T-Mobile has provided no information relative to the service quality or signal strength the Commission can expect in its partner's service areas. This section of the brief is T-Mobile's lack of new commitments or to a higher level of service quality or customer service than it already provides.

T-Mobile already adheres to the CTIA Consumer Code for service quality.<sup>106</sup> T-Mobile witness Mr. Jeff Hooper stated that T-Mobile already has the capability to ensure functionality in emergency situations, has a reasonable amount of back-up power to ensure functionality without an external power source, is able to reroute traffic around damaged facilities and is capable of managing traffic spikes resulting from emergency situations.<sup>107</sup> In its Application, T-Mobile states that it has the following capabilities to remain functional in emergency situation:

- 1) Availability of fixed and portable back-up power generators at various network locations throughout T-Mobile's network that can be deployed in emergency situations.
- 2) Ability to reroute traffic around damaged or out-of-service facilities through the deployment of cell-on-wheels (COWS), redundant facilities, and dynamic rerouting of traffic over alternate facilities.
- 3) A network control center that monitors network traffic and anticipates traffic spikes, and can then (i) deploy network facilities to accommodate capacity needs, (ii) change call routing, and (iii) deploy COWS to temporarily meet traffic needs until long-solutions, such as additional capacity and antenna towers can be deployed.
- 4) A majority of sites not equipped with fixed generators have battery back-up systems installed to maintain service in the event of a widespread power outage.<sup>108</sup>

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<sup>106</sup> Application at 9.

<sup>107</sup> Direct Testimony of Jeff Hooper at 6.

<sup>108</sup> Application at 8-9.

Therefore, without universal service support T-Mobile has built a very robust network. However, from the evidence provided by T-Mobile, it does not appear that T-Mobile is committing to any new infrastructure or services as a result of designation. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] It is not clear whether any customers in the rural study areas for which T-Mobile requests designation that do not currently have access to T-Mobile service will have access because of T-Mobile's designation as an ETC. Additionally, T-Mobile points to its existing functionality in emergency situations and its existing pricing to support its Application, not a heightened level of service quality and customer service. T-Mobile has not demonstrated that its designation will result in anything above the status quo of its existing service relative to the provision of a higher level of service quality or better customer service.

**VI. HAS T-MOBILE'S APPLICATION PROVIDED SUFFICIENTLY DETAILED SERVICE AREA MAPS SUCH THAT ANY PERSON MAY ASCERTAIN WHETHER A CUSTOMER FALLS WITHIN T-MOBILE'S REQUESTED ETC SERVICE AREA?  
(PRELIMINARY ORDER ISSUE NO. 3)**

T-Mobile's maps are detailed enough to be able to tell whether a customer falls within the area for which T-Mobile seeks designation; however these maps do not indicate whether the customer will have a signal of sufficient strength to be usable for the services required of an ETC. This is especially true in the areas shown as partner service areas, for which no signal strength information has been provided.

**VII. DOES T-MOBILE'S APPLICATION ADEQUATELY DEMONSTRATE AN ABILITY AND UNCONDITIONAL WILLINGNESS TO SERVE END USERS THROUGHOUT ITS REQUESTED ETC SERVICE AREA, CONSISTENT WITH THE COMMISSION'S PRECEDENT IN PRIOR ETC APPLICATIONS**

**BY WIRELESS CARRIERS, INCLUDING THE COMMISSION'S  
DECISIONS IN THE *DOBSON CELLULAR*<sup>109</sup> AND *NEXTEL  
PARTNERS CASES*?<sup>110</sup> (PRELIMINARY ORDER ISSUE NO. 4)**

All ETC designation applicants in Texas are required to demonstrate an ability and unconditional willingness to serve all end users in their ETC service area.<sup>111</sup> Therefore, T-Mobile must first make an unconditional commitment to serve all customers throughout its requested ETC service area.

In *Dobson*, the Commission placed certain additional conditions on the company, including Dobson's agreement to provide a conventional handset and to follow the additional steps for providing service included in 47 C.F.R. 54.202(a)(1)(i)(B).<sup>112</sup> Therefore, T-Mobile must also commit to taking the six-steps provided in 47 C.F.R. 54.202(a)(1)(i)(B) to reach those customers that do not have sufficient signal quality.

The Commission also imposed certain reporting requirements on Dobson; including a requirement to track expenses and investment for each study area, and submit the following information for each study area on an annual basis with the company's FUSF certification application: (1) an affidavit attesting to the company's annual, as well as aggregate, expenses and investment in each study area, with all relevant data attached; (2) the results of an annual customer satisfaction survey and any relevant background documents, such as a copy of the survey itself; and (3) the total number of complaints received, per 1,000 handsets.<sup>113</sup> Therefore, if designated, T-Mobile should be required to provide similar reports to the Commission.

Most importantly, T-Mobile must show it has adequate signal strength in rural study areas to demonstrate its commitment to serve. Ms. Kayser stated that she reviewed T-Mobile's maps and concluded that the quality of signal provided and the coverage area don't allow for all

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<sup>109</sup> *Dobson Redesignation Order* at 7, Finding of Fact 7A.

<sup>110</sup> *Application of NPCR, Inc. d/b/a Nextel Partners for Eligible Telecommunications Carrier Designation*, Docket No. 27709, Order at 11, Finding of Fact 14A (June 30, 2004).

<sup>111</sup> P.U.C. SUBST. R. 26.418(g)(1)(B)(ii).

<sup>112</sup> *Dobson Order* at 11, Finding of Fact 14A.

<sup>113</sup> *Dobson Order* at 19, Finding of Fact 100B.

end users throughout entire study areas to receive adequate service from T-Mobile.<sup>114</sup> Ms. Kayser stated that T-Mobile depicted its coverage area in shades of purple, with darker purple indicating a strong signal and lighter purple indicating a poor signal strength and therefore inadequate service.<sup>115</sup>

T-Mobile's questioning on this subject indicates that T-Mobile believes that the six-step process provided in 47 C.F.R. 54.202(a)(1)(i)(B) is a "condition" on its required unconditional commitment.<sup>116</sup> T-Mobile seems to think that even with unusable signal strength, it is permitted to avail itself of the six-step process provided by in 47 C.F.R. 54.202(a)(1)(i)(B). This position is inconsistent with the FCC rules and precedent. The six-step process is not a "condition" on the required unconditional commitment to serve throughout a service area.

Ms. Kayser testified that in rural study areas, T-Mobile has not demonstrated it is *able* to serve a single customer in the study area *using its own facilities* as required in 47 U.S.C. 214(e) unless its strongest signal strength reaches at least some portion of the rural study area.<sup>117</sup> Further, in rural study areas reached by T-Mobile's strongest signals, if there are some customers that they cannot serve, they are then permitted to take advantage of the six-step process provided in 47 C.F.R. 54.202(a)(1)(i)(B).<sup>118</sup> Ms. Kayser testified that if the signal strength in a given wire center is so weak that it is unusable, T-Mobile is not able to serve customers in that wire center, is not eligible for designation as an ETC, and cannot avail itself of the six-step process provided in 47 C.F.R. 54.202(a)(1)(i)(B).<sup>119</sup>

Ms. Kayser's testimony is consistent the Commission's decision in *Dobson* where the six-step process was invoked only after a discussion of Dobson's generally adequate signal strength, acknowledgement of certain "dead spots," and Dobson's unconditional commitment to serve any consumer within the study area, and its commitment to take additional steps if a

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<sup>114</sup> Direct Testimony of Liz Kayser at 12.

<sup>115</sup> *Id.*

<sup>116</sup> Tr. at 309 - 310 (March 23, 2011)

<sup>117</sup> Tr. at 303 (March 23, 2011)

<sup>118</sup> Tr. at 301 (March 23, 2011).

<sup>119</sup> *Id.*

customer's signal coverage was unsatisfactory.<sup>120</sup> Additionally, in *Dobson*, the Commission required Dobson to notify the Commission if it could not provide service after taking the steps, and the Commission would determine whether Dobson had failed to meet its service obligations.<sup>121</sup> If designated, T-Mobile should be required to provide similar notification to the Commission.

As T-Mobile points out, the FCC has said a carrier can make the required showing of offering the supported services by providing a description of the proposed service technology, a demonstration of the extent to which the carrier provides telecommunications services within the state, a description of the extent to which the carrier has entered into interconnection and resale agreements with others, a sworn affidavit signed by the carrier's representative to ensure compliance, or other means that demonstrate the carrier's compliance, or other means that demonstrate the carrier's ability and willingness to provide service upon designation.<sup>122</sup> In that same order the FCC also cautioned that an applicant must make a demonstration of the capability and commitment to provide service that is more than a vague assertion of intent on the part of a carrier to provide service.<sup>123</sup> And the Commission has said that a carrier must reasonably demonstrate its ability and willingness to provide service upon designation."<sup>124</sup>

Although it is correct that an ETC applicant is not required to serve an entire service area on the date it is designated, it is required to demonstrate that in each service area, *upon designation* it is able to provide the supported services using *its own facilities or a combination*

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<sup>120</sup> *Dobson Order* at 13-14, Findings of Fact 47-50.

<sup>121</sup> *Id.* at 14, Finding of Fact 51.

<sup>122</sup> Rebuttal Testimony of Gene DeJordy at 9 (citing to *Federal-State Joint Board on Universal Service, Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, CC Docket No. 96-45, Declaratory Ruling, FCC 00-248 at para. 24 (rel. Aug. 10, 2000) (South Dakota Declaratory Ruling)).

<sup>123</sup> South Dakota Declaratory Ruling at para. 24.

<sup>124</sup> *Nextel* at 5 (citing to *Application of Dobson Cellular Systems, Inc. for Designation as an Eligible Telecommunications Carrier and Petition to Redefine Certain Rural Service Areas*, Docket No. 28462, Order on Remand at 2 (May 19, 2004), and *Application of WWC Texas RSA Limited Partnership, d/b/a CellularOne (Western Wireless) to Amend its Designation as an Eligible Telecommunications Carrier (ETC) Designation in Certain Areas Served by Non-Rural Telephone Companies*, Docket No. 28688, Order on remand at 1-2 (May 28, 2004)).

*of its own facilities and resale.*<sup>125</sup> An applicant cannot make the showing that it is committed to provide service throughout its requested area through total resale, using a partner's service and it cannot make this showing with a signal that is so weak it cannot be used to provide the services required of an ETC. For all these reasons, T-Mobile has not demonstrated an ability and unconditional willingness to serve end users throughout its requested ETC service area.

**VIII. IS T-MOBILE LICENSED BY THE FCC TO PROVIDE SERVICE IN ALL THE PROPOSED RURAL ILEC STUDY AREAS FOR WHICH IT IS SEEKING ETC DESIGNATION AND DOES T-MOBILE'S CURRENT FCC LICENSED NETWORK PROVIDE SUFFICIENT COVERAGE (WITH SUFFICIENT CALL QUALITY) THROUGHOUT THE REQUESTED ETC SERVICE AREA? (PRELIMINARY ORDER ISSUE NO. 5)**

T-Mobile is licensed by the FCC to provide service in all of the proposed rural study areas for which it seeks designation.

**IX. HAS T-MOBILE'S APPLICATIONS ADEQUATELY DEMONSTRATED THAT ANY FEDERAL HIGH COST SUPPORT IT MIGHT RECEIVE AS AN ETC WILL BE USED TO IMPROVE SIGNAL QUALITY, COVERAGE, OR CAPACITY, OR OTHERWISE BE USED TO FURTHER THE PROVISION OF SUPPORTED SERVICES IN THE SERVICE AREA? (PRELIMINARY ORDER ISSUE NO. 6)**

As discussed in section V.a, T-Mobile's evidence that it will improve signal quality in the rural study areas for which it seeks designation is its list of new and proposed cell sites, its maps and its SIP. Yet, the combination of the information provided in these exhibits demonstrate that T-Mobile has not made a specific or enforceable commitment to improve signal quality, coverage, or capacity or otherwise further the provision of the supported services in its requested rural study areas. [REDACTED]

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<sup>125</sup> FTA § 214(e).

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] Therefore, it is unclear whether or how much signal improvement might result in any given rural study area. Additionally, it appears that T-Mobile's primary reason for requesting some rural study areas is because they neighbor high value non-rural areas in which T-Mobile cannot get high-cost support. Therefore, since all of the new cell sites deployed by T-Mobile in the future will provide 4G data speeds, it appears that T-Mobile will be building its new 4G network in non-rural areas on the backs of its rural customers and their rural ILECs. T-Mobile has not demonstrated that any federal high cost support it receives as an ETC will be used to improve signal quality, coverage, or capacity, or otherwise be used to further the provision of supported services in the rural study areas for which it seeks designation.

**X. DOES T-MOBILE'S APPLICATION DEMONSTRATE THAT T-MOBILE WILL COMPLY WITH THE PUBLIC UTILITY REGULATORY ACT (PURA)<sup>126</sup> § 55.015 AND THE TEXAS LIFELINE RULE, P.U.C. SUBST. R. 26.412, INCLUDING LIFELINE DISCOUNTS ON ALL BUNDLES AND/OR PACKAGES OF SERVICES THAT T-MOBILE OFFERS TO ALL OF ITS CUSTOMERS? (PRELIMINARY ORDER ISSUE NO. 7)**

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<sup>126</sup> Public Utility Regulatory Act, TEX. UTIL. CODE ANN. §§ 11.001 – 66.016 (Vernon 2007 & Supp. 2010-2011).

T-Mobile does not include required elements in its proposed tariffs that are in strict compliance with the application of the Lifeline discount to bundled services.<sup>127</sup> T-Mobile should be directed to re-file its proposed tariffs to meet the requirements of P.U.C. SUBST. R. 26.412, including: 1) Lifeline discounts shall include automatic enrollment,<sup>128</sup> 2) Lifeline customers will receive access to bundled packages at the same price as other consumers less the Lifeline discount that shall only apply to that portion of the bundled package bill that is for basic network service,<sup>129</sup> and 3) Lifeline eligibility shall strictly follows the requirements detailed in P.U.C. SUBST. R. 26.412(d).<sup>130</sup>

**XI. IS THE MARCH 21, 2011 ANNOUNCEMENT THAT AT&T HAS ENTERED INTO AN AGREEMENT WITH DEUTSCHE TELEKOM TO ACQUIRE T-MOBILE USA RELEVANT TO THIS APPLICATION, AND IF SO, IN WHAT WAY?**

Because of the rapid increase in the number of C-ETCs and increasing universal service contribution burden on consumers, in May 2008, the FCC adopted an interim cap in on high-cost universal service support for C-ETCs.<sup>131</sup> Under this interim cap, support for C-ETCs is still calculated using the existing identical support rule, which enables C-ETCs to receive the same per-line support received by the R-ILEC in its service area.<sup>132</sup> If however, the total support for C-ETCs in a state exceeds the interim cap amount for that state, the support provided to all C-ETCs in the state is reduced proportionally.<sup>133</sup> In Texas, C-ETC support is already proportionally reduced to about \$0.65 to \$0.70 on each dollar of support requested.<sup>134</sup>

In December 2010, in order to rein in high-cost universal service support for “potentially duplicative voice services,” the FCC amended the interim cap rule so that a state’s interim cap

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<sup>127</sup> Direct Testimony of Elizabeth Kayser at 16-17.

<sup>128</sup> Direct Testimony of Elizabeth Kayser at 16-17, *see also* P.U.C. SUBST. R. 26.412(g)(1)(B).

<sup>129</sup> Direct Testimony of Elizabeth Kayser at 16-17, *see also* P.U.C. SUBST. R. 26.412(e)(7).

<sup>130</sup> Direct Testimony of Elizabeth Kayser at 16-17, *see also* P.U.C. SUBST. R. 26.412(d).

<sup>131</sup> *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, WC Docket no. 05-337, CC Docket No. 96-45, Order, 23 FCC Rcd. 8834, 8837-50, paras. 6-39 (2008).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> Tr. at 354 (March 23, 2011).

amount will be adjusted if a C-ETC serving in the state relinquishes its ETC status.<sup>135</sup> This change in funding for C-ETCs is consistent with the recommendations in the National Broadband Plan and could enable funds from the legacy high-cost program to be used more effectively to advance universal service broadband initiatives.<sup>136</sup> The FCC concluded that, on balance, the public interest would be better served by taking this step to reclaim such support rather than redistributing it, particularly as it proceeds with broader reforms to transition to a universal service system that promotes broadband deployment more directly.<sup>137</sup> Accordingly, if a C-ETC relinquishes its C-ETC status in a state, the cap amount for that state will be reduced by the amount of capped support that the C-ETC was eligible to receive in its final month of eligibility, annualized.<sup>138</sup>

Therefore, since it is not unusual for a carrier to “voluntarily” relinquish its ETC designation in a proceeding before the FCC to gain approval of a merger,<sup>139</sup> and for acquired companies to lose their corporate identity in a merger with AT&T,<sup>140</sup> the announcement two days before the commencement of the March 22, 2011 hearing on the merits that AT&T, Inc. and Deutsch Telekom had entered into an agreement for AT&T to acquire T-Mobile USA,<sup>141</sup> T-Mobile’s parent company creates the likelihood that t-Mobile is granted ETC status and the FCC approves the merger, the cap on FUSF funds for C-ETCs in Texas would be permanently reduced.

## XII. CONCLUSION

For all the reasons stated in this brief, T-Mobile’s Application for the designation as an ETC in the rural study areas for which it seeks designation should be denied.

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<sup>135</sup> *In the Matter of High-Cost Universal Service Support*, WC Docket No. 05-337, Order at ¶ 5 (December 30, 2010).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at para. 6.

<sup>139</sup> Tr. at 183-184 (March 22, 2011)

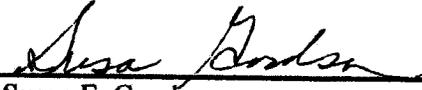
<sup>140</sup> Tr. at 403-404 (March 23, 2011).

<sup>141</sup> DTS Exhibit 16; <http://www.mobilizeeverything.com/home.php> (march 21, 2011)

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**CERTIFICATE OF SERVICE**

I certify that a copy of this document will be served on all parties of record on this the 21<sup>st</sup> of April 2011 in accordance with P.U.C. Procedural Rule 22.74.

  
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Susan E. Goodson