

ORIGINAL

McDEVITT & MILLER, LLP  
Dean J. (Joe) Miller (ISB #1968)  
420 West Bannock Street  
P.O. Box 2564-83701  
Boise, Idaho 83702  
Phone (208) 343-7500  
Facsimile (208) 336-6912  
joe@mcdevitt-miller.com

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BRIGGS AND MORGAN, P.A.  
Philip R. Schenkenberg (MN #260551)  
2200 IDS Center  
80 South Eight Street  
Minneapolis, Minnesota 55402  
Phone (612) 977-8400  
Facsimile (612) 977-8650  
pschenkenberg@briggs.com

ATTORNEYS FOR WWC HOLDING  
CO., INC. d/b/a CELLULARONE®

**BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION**

In the Matter of the Application of **WWC** )  
**HOLDING CO., INC. d/b/a CELLULAR-** )  
**ONE®** Seeking Designation as an Eligible )  
Telecommunications Carrier that may receive )  
Federal Universal Service Support )

Case No. WST-T-05-01

**WESTERN WIRELESS'  
COMMENTS IN SUPPORT  
OF APPLICATION**

**I. INTRODUCTION**

WWC Holding Co., Inc. d/b/a CellularOne® ("Western Wireless" or the "Company"), submits its Comments in support of its Application to be designated as a federal eligible telecommunications carrier ("ETC") in the State of Idaho. Western Wireless meets the basic requirements for designation as an ETC under 47 U.S.C. § 214(e), and it has demonstrated that granting its Application will serve the public interest. The Commission should grant Western Wireless' Application on modified procedure and promptly allow the benefits of this designation to flow to Idaho consumers.

## **II. BACKGROUND ON WESTERN WIRELESS**

As set forth in the Application, Western Wireless, through its subsidiaries (including WWC Holding Co., Inc.), provides telecommunications services to more than 1.2 million subscribers in rural license areas in 19 states west of the Mississippi. App., ¶ 5. Western Wireless currently provides its commercial mobile radio services ("CMRS") subject to regulation by the FCC under the "CellularOne" national brand name.

## **III. WESTERN WIRELESS MEETS THE BASIC REQUIREMENTS FOR DESIGNATION AS AN ELIGIBLE TELECOMMUNICATIONS CARRIER**

Under 47 U.S.C. § 214(e)(2), the Commission has jurisdiction and authority to designate Western Wireless as an ETC in the areas set forth on Attachments 1 and 2 to the Application (the "Designated Areas"). The requirements for ETC designation are set forth in 47 U.S.C. § 214(e)(1)-(2) and 47 C.F.R. § 54.101. Western Wireless' Application contains facts that demonstrate that Western Wireless: (1) is a common carrier; (2) provides the FCC's supported services; and (3) will meet all service and advertising obligations of an ETC. In addition, in areas served by rural telephone companies, Western Wireless' ETC designation serves the public interest.

### **A. Western Wireless is a Common Carrier**

As a CMRS provider, Western Wireless is a "common carrier" under federal law, as required by 47 U.S.C. § 214(e)(1). App., ¶ 9. Western Wireless will provide the supported services using its own facilities, or a combination of its own facilities and leased facilities. App., ¶ 9. Western Wireless satisfies this requirement.

### **B. Western Wireless Offers All Required Services and Functionalities**

The second requirement for ETC designation is that the applicant provide the services or functionalities set forth in 47 C.F.R. § 54.101(a)(1)-(9) throughout the requested designated

service areas. 47 U.S.C. § 214(e)(1)(A). Western Wireless' Application demonstrates how it currently provides the services and functionalities identified by the FCC in 47 C.F.R. § 54.101(a). App., ¶ 11. As a designated ETC in 15 states, there should be no dispute regarding Western Wireless' ability to provide these functionalities to Idaho universal service customers.

**C. Western Wireless Will Advertise the Availability of the Supported Services**

The third requirement for ETC designation is that the applicant advertise the availability of the supported services and charges therefor using media of general distribution. 47 U.S.C. § 214(e)(1)(B). The Company currently offers and advertises the federally supported services in the Designated Areas through several media, including newspaper, television, radio, and billboard advertising. Western Wireless also maintains various retail store locations throughout its authorized service areas, which provide an additional source of advertising. Once designated, Western Wireless will advertise the availability of and charges for its universal service offerings through media of general distribution. App., ¶ 12.

**IV. WESTERN WIRELESS' DESIGNATED AREAS AND COMMITMENT TO SERVE**

An applicant for ETC designation may be designated in an area served by a non-rural telephone company for a service area determined by the Commission. 47 U.S.C. § 214(e)(5). For areas served by a rural telephone company, Section 214(e)(5) of the Act provides that the ETC's designated service area shall be the rural telephone company's study area. A rural telephone company's "study area" is generally defined as all of the company's existing certificated exchange area in a given state. *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Report and Order*, FCC 97-157, ¶ 172, n.434 (May 8, 1997) ("*Universal Service Order*"). However, the FCC's rules recognize that a competitive ETC can be designated on a wire center basis if the FCC and the Commission establish a different

service area in accordance with 47 C.F.R. § 54.207(c)-(d). In the Application, Western Wireless seeks designation in three non-rural wire centers, one rural telephone company study area, and 18 rural telephone company wire centers.

**A. Non-Rural Wire Centers**

Western Wireless seeks ETC designation in the following three Qwest non-rural wire centers:

<b><u>Company Name</u></b>	<b><u>Wire Center Locality</u></b>	<b><u>Wire Center Code</u></b>
Qwest Corporation (SAC 475103)	Emmett	EMMTIDMA
	New Plymouth	NPMOIDMA
	Weiser	WESRIDMA

Under 47 U.S.C. § 214(e)(5) Western Wireless can be designated immediately within these areas. This is consistent with the Commission's action in the ClearTalk case, in which it designated ClearTalk in the Qwest wire centers where ClearTalk was able to serve. *In the Matter of the Petition of IAT Communications*, Case No. GNP-T-03-8, Order No. 29261 (June 11, 2003).

**B. Rural Telephone Company Study Area**

Western Wireless seeks designation in the entire study area of Farmers Mutual Telephone Co., which is a rural telephone company. Under 47 U.S.C. § 214(e)(5) Western Wireless can be immediately designated in this rural telephone company study area.

**C. Rural Telephone Company Wire Centers**

Western Wireless seeks designation in 18 rural telephone company wire centers that are within four rural telephone company study areas:

<b><u>Company Name</u></b>	<b><u>Wire Center Locality</u></b>	<b><u>Wire Center Code</u></b>
Cambridge Telephone Co.	Cambridge	CMBRIDXC
	Council	CNCLIDXC
	Cuprum	CRPMIDXC
	Indian Valley	INVYIDXC

Citizens Telecom Idaho – Frontier Comm. of Idaho	Cascade	CSCDIDXC
	Donnelly	DNLYIDXC
	Garden Valley	GRVYIDXC
	Horseshoe Bend	HRBNIDXC
	McCall	MCCLIDXC
	New Meadows	NWMDIDXC
	Riggins	RGNSIDXC
	Sweet	SWETIDXC
	White Bird	WHBRIDXX
Midvale Telephone Exchange, Inc.	Midvale	MDVAIDXC
Qwest Corporation (SAC 475162)	Cottonwood	CTWDID01
	Grangeville	GAVLID01
	Kamiah	KAMHID01
	Kooskia	KOSKID01

Under federal law, Western Wireless can be designated in these areas only if the Commission acts, subject to the consent of the FCC, to redefine these ETC service areas from the study area to the wire center. 47 U.S.C. § 214(e)(5); 47 C.F.R. § 54.207(b). Western Wireless addresses the standards for redefinition in Section VIII below.

**D. Western Wireless Has Excellent Existing Coverage and Has Committed to Serve Those Who Request Service**

An applicant for ETC designation must demonstrate an intent and ability to offer service throughout its Designated Areas. Western Wireless meets this standard through a combination of its licenses, its extensive current network coverage, and its commitment to meet the service obligations of an ETC.

As noted in the Application, Western Wireless seeks designation only in wire centers where it can currently cover at least 85% of the population. App., ¶¶ 14, 71. This conservative, internal standard adopted by Western Wireless ensures that Western Wireless has the ability to meet the service standards imposed on ETCs. In contrast, Virginia Cellular was designated by the FCC even though at the time of its designation there were 157,000 people beyond its existing

signal coverage. *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, ¶ 16, n.50 (rel. Jan. 22, 2004) ("*Virginia Cellular Order*"). Western Wireless' current signal coverage in the Designated Areas is much greater than that shown by Virginia Cellular and approved by the FCC.

Western Wireless' Application also explains that it has made additional service improvement commitments in its Designated Areas based on the assumption that it will have access to universal service funding starting in 2005. Western Wireless expects to build five cell sites within the designated areas in 2005 alone – an investment level that could not be justified in the absence of universal service funding. App., ¶¶ 15-16. The location of cell sites was based on input from the Company's engineering and marketing departments, and was designed to provide consumers in these area better, more complete coverage. App., ¶ 17. This demonstrates a commitment – starting even before designation has been received – to use ETC designation to bring tangible benefits to consumers in the Designated Areas, and to meet the service commitments of an ETC. Western Wireless has proposed to report to the Commission regarding the company's progress in meeting these commitments and making new network upgrades.

Finally, as discussed below, Western Wireless accepts the six step process for responding to requests for service from consumers that the FCC approved in the *Virginia Cellular Order*. Western Wireless' current capability and its clear commitments combine to make clear that Western Wireless can and will meet the service obligations of an ETC.

**V. WESTERN WIRELESS SHOULD BE DESIGNATED AS AN ADDITIONAL ETC IN NON-RURAL WIRE CENTERS SERVED BY QWEST**

The Commission should, based on the Application, immediately designate Western Wireless as an ETC in the non-rural wire centers served by Qwest. This is fully consistent with

Section 214(e)(2), which provides that "a State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier..." 47 U.S.C. § 214(e)(2) (emphasis added). This is also consistent with the Commission's action in the ClearTalk docket, in which it designated ClearTalk as an ETC based on its application. *In the Matter of the Petition of IAT Communications, Inc.*, Case No. GNR-T-03-8, Order No. 29261 (June 11, 2003). Western Wireless respectfully requests that the Commission grant its Application immediately as to the Qwest wire centers set forth on Attachment 1 to the Application.

**VI. WESTERN WIRELESS' DESIGNATION AS AN ETC FOR THE DESIGNATED AREAS IN THE STATE OF IDAHO WOULD SERVE THE PUBLIC INTEREST**

For areas served by rural telephone companies, the Commission must find that designation serves the public interest in accordance with 47 U.S.C. § 214(e)(2). The Commission should find that designating Western Wireless as an ETC in its Designated Areas will serve the public interest.

**A. Western Wireless' Application Meets the Standards Set Forth in the FCC's Virginia Cellular Order**

In January of 2004 the FCC issued its *Virginia Cellular Order*, in which it established a framework for a more rigorous public interest standard applicable to ETC applications filed before the FCC. As noted by the Commission, the FCC has evaluated the public interest in light of:

- 1) whether customers are likely to benefit from increased competition; 2) whether designation of an additional ETC would provide benefits not available from incumbent carriers; 3) whether customers would be harmed if the incumbent carrier exercised its option to relinquish its ETC designation; 4) the impact of multiple designations on the universal service fund; 5) the unique advantages and disadvantages of the competitor's service offering; 6) any commitments made regarding quality of telephone service provided by competing providers; 7) and the competitive ETC's ability to provide the supported services throughout the designated service area within a reasonable time frame.

See *In the Matter of the Application of NPCR, Inc.*, Case No. GNR-T-03-16, Order No. 29541, p. 21 (July 23, 2004). Because Western Wireless seeks designation consistent with the FCC's *Virginia Cellular Order*, this Commission should find that Western Wireless' application serves the public interest.

**1. Designating Western Wireless as an ETC Will Promote Competition in Idaho and Provide Benefits Not Available From Incumbent Carriers**

The public interest is served where designation of an additional ETC will promote competition to the benefit of consumers. *Virginia Cellular Order*, ¶ 28. This is consistent with the express purposes of the Act, which is: "To promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Pub. L. No. 104-104, 110 Stat. 56 (1996) (emphasis added). Western Wireless' designation will promote competition to the benefit of Idaho consumers.

The Commission must begin with a presumption that increased competition can be expected to lead to better service and the provision of new, innovative services. *In the Matter of Western Wireless Corp. Petition for Designation as an Eligible Telecommunications Carrier in the State of Wyoming*, CC Docket No. 96-45, Memorandum Opinion and Order, DA 00-2896, ¶¶ 16-22 (rel. Dec. 26, 2000) ("*Wyoming Order*"). As explained in the Application, granting ETC status to Western Wireless will allow it a greater opportunity to compete in Idaho, and a greater ability to expand network facilities in the state. App., ¶¶ 14-17. Ultimately, this means that Idaho consumers will have more choices for basic service, as well as more access to the advanced services provided on Western Wireless' wireless network. App., ¶ 28.

The Commission should find that designating Western Wireless will bring choices not available from incumbent ETCs. For example, Western Wireless' service offerings provide the benefit of mobility, which is of great importance in rural areas. *Virginia Cellular Order*, ¶ 29. This means that universal service customers can connect to the public switched network while traveling down the street, across town, or across the country. Western Wireless provides universal service offerings with expanded local calling areas, which is of great benefit to rural consumers who otherwise have to pay toll charges to reach local government offices, health care providers, businesses or family outside of a restricted landline calling area. *See Universal Service Order*, ¶ 114. In addition, with the implementation of Phase 2 E911, customers calling 911 will be able to be located by emergency service providers via global positioning system ("GPS") technology. App., ¶ 36. This capability can literally save a life.

As an ETC, Western Wireless will be a provider of Lifeline and LinkUp services in the state. App., ¶ 37. Lifeline and LinkUp programs provide low income consumers with a discount for startup costs and recurring charges, which is an important part of ensuring high subscribership levels. *Universal Service Order*, ¶ 346. Because only a designated ETC can participate in these programs, granting Western Wireless' Application will spur competition in this very important part of the universal service market.

The Commission should thus find that Western Wireless' designation will increase competition and bring benefits not available from incumbent LECs, which serves the public interest in accordance with the *Virginia Cellular Order*.

## **2. Western Wireless Provides Responsive Customer Service and Abides by the CTIA Code**

In the *Virginia Cellular Order* the FCC recognized that although wireless carriers are not subject to service quality regulation, a wireless carrier could demonstrate a commitment to

providing high quality service. *Virginia Cellular Order*, ¶ 30. Western Wireless has a strong track record of providing responsive customer service, including 24-hour customer service, technical and operational support. App., ¶ 47. In addition, Western Wireless has adopted and complies with the Cellular Telecommunications and Internet Association ("CTIA") Consumer Code for Wireless Service, which sets forth certain principles, disclosures and practices for the provision of wireless service to the benefit of consumers. App., ¶ 32.

Finally, Western Wireless explained in its Application how its current customer service policies are generally consistent with the Commission's customer service rules applicable to landline carriers. App., ¶¶ 43-56.

The Commission should find that Western Wireless' customer service policies and commitments serve the public interest.

### **3. Western Wireless Has the Ability to Provide Service Throughout the Service Areas**

The *Virginia Cellular Order* (and the Commission's ClearTalk/Nextel Partners Order) looked to whether an ETC applicant can provide service throughout its Designated Areas. Western Wireless can currently provide service to more than 85% of the population in which it seeks designation, and commits to providing service in accordance with all obligations of an ETC. App., ¶¶ 14, 22, 71. In addition, Western Wireless is constructing approximately five new cell sites in the 2005 time frame, and commits to further expanding its network in ways that extend and enhance customer service areas. App., ¶¶ 15-17.

Western Wireless also commits to implementing the six step process for addressing requests for service that was approved by the FCC in the *Virginia Cellular Order*.

- First, Western Wireless will provide service immediately where its existing facilities reach.

- Second, Western Wireless will determine whether the customer's equipment can be modified or replaced to provide service to the desired location.
- Third, Western Wireless will determine whether adjustments at the nearest cell site can be made to provide service.
- Fourth, Western Wireless will determine whether there are any other adjustments to either the network or the customer facilities that can be made to provide service.
- Fifth, Western Wireless will explore the possibility of offering service via resale or roaming agreements with other carriers.
- Sixth, Western Wireless will determine whether additional network infrastructure, such as an additional cell site, extender, or repeater, could be constructed to provide service, and evaluate the costs and benefits of using high-cost universal service support to serve a number of customers requesting service.

*See Virginia Cellular Order*, ¶ 15. Western Wireless will make a report to the Commission identifying any customers unable to receive service from Western Wireless under this standard. Western Wireless suggests that the Commission accept these commitments in designating Western Wireless as an ETC.

The FCC has also recognized that a carrier with extensive existing coverage need not submit a formal build plan to demonstrate its intent and ability to provide service throughout an ETC service area. In its *Highland Cellular Order*, the FCC recognized that the applicant had made no specific build-out commitments for areas in which the Company was designated. *Highland Cellular, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, CC Docket No. 96-45, *Memorandum Opinion and Order*, FCC 04-37, ¶ 17, n.51 (rel. April 12, 2004) ("*Highland Cellular Order*"). Instead, the applicant committed generally to use universal service funding over time to provide better, more complete coverage. *Id.*

The Commission should find that based on Western Wireless' extensive existing network facilities, its plans to build five cell sites in 2005, and its willingness to abide by the six-step process for addressing requests for service, it can provide service throughout the Designated Areas, consistent with the public interest.

**4. Western Wireless Commits to Making Reports Like Those in *Virginia Cellular***

In *Virginia Cellular* the Applicant agreed to make an annual report the FCC regarding complaints received, unfilled requests for service, and progress on buildout and service improvement activities. *Virginia Cellular Order*, ¶ 46. Western Wireless similarly commits to reporting to this Commission on an annual basis 1) the number of complaints received, 2) details regarding unfilled requests for service, and 3) details regarding completed and anticipated network improvements in the Designated Areas. The Commission should condition Western Wireless' designation on these reporting requirements, which serve the public interest consistent with the FCC's *Virginia Cellular Order*.

**5. There Will be no Significant Adverse Impacts From Western Wireless' Designation as an ETC**

The FCC has previously recognized the possibility that ETC designation could adversely affect consumers if incumbent ETCs relinquished ETC designation. *Wyoming Order*, ¶ 18. The Commission should find that such a possibility is not likely to occur, and would not justify a denial of the Application. First, the FCC has been clear that one cannot presume that rural telephone companies will be adversely impacted by the entry of a competitive ETC, and instead suggested competition would have a positive effect on the services provided by rural LECs:

We reject the general argument that rural areas are not capable of sustaining competition for universal service support. We do not believe that it is self-evident that rural telephone companies cannot survive competition from wireless providers. Specifically, we find no merit to the contention that designation of an

additional ETC in areas served by rural telephone companies will necessarily create incentives to reduce investment in infrastructure, raise rates, or reduce service quality to consumers in rural areas. To the contrary, we believe that competition may provide incentives to the incumbent to implement new operating efficiencies, lower prices, and offer better service to its customers.

*Wyoming Order*, ¶ 22. The Texas Commission went further, finding that even considering alleged impacts on ILECs would violate 47 U.S.C. § 253(a) and principles of competitive neutrality. *Public Utility Comm'n of TX v. Texas Telephone Assoc.*, \_\_\_ S.W.3d \_\_\_, 2005 WL 770620, at \*6-7 (Tex. Ct. App. Apr. 7, 2005) (affirming Texas PUC's designation of Western Wireless) (Exhibit C). Moreover, the FCC has already recognized that Western Wireless would be well suited to providing universal service in the unlikely event that incumbent ETCs ceased to provide service. *Wyoming Order*, ¶ 19. The Commission should reject any claim that this remote possibility would weigh against designation.

In addition, Western Wireless' designation will not create an adverse impact on the universal service funds. As the FCC observed, funding to competitive ETCs has resulted in a very small percentage increase in the size of the fund, while disbursements to incumbent landline carriers continue to substantially increase the fund. *Virginia Cellular*, ¶ 31 & n.98. The Second Quarter 2005 projections of the Universal Service Administrative Corporation ("USAC") show that if designated, Western Wireless would be eligible to receive \$58,125 per quarter for Idaho lines. A snapshot of the projections for all Idaho carriers is Exhibit A hereto. If the high-cost universal service fund is (as estimated by USAC) \$992 million for the Second Quarter of 2005, then Western Wireless would only receive approximately .0001% of the total high-cost support available to all ETCs. This negligible impact is far less than the increases the FCC has found inconsequential in recent decisions. *In the Matter of Advantage Cellular Systems, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the State of Tennessee*, CC Docket No. 96-45, *Order*, DA 04-3357, ¶ 25, n.82 (rel. Oct. 22, 2004) (0.419% increase

inconsequential); *In the Matter of NPCR, Inc. d/b/a Nextel Partners Petition for Designation as an Eligible Telecommunications Carrier in the State of Alabama, Florida, Georgia, New York, Pennsylvania, Tennessee, and Virginia*, CC Docket no. 96-45, Order, DA 04-2667, ¶ 21, n.69 (rel. Aug. 25, 2004) (1.88% increase inconsequential). The FCC further recognized that broad funding issues would be addressed by the Joint Board and the FCC on a going-forward basis.

The Commission should find there would be no adverse impacts associated with Western Wireless' designation, that the benefits of designation outweigh any adverse impacts, and that the public interest is thus served by granting Western Wireless' Application.

**VII. WESTERN WIRELESS HAS MADE COMMITMENTS SIMILAR TO THOSE SUGGESTED IN THE RECENT FCC REPORT AND ORDER, AND WOULD PARTICIPATE IN A RULEMAKING TO ESTABLISH REPORTING REQUIREMENTS FOR ALL ETCS**

The Idaho Telecommunications Association ("ITA") has filed a motion to dismiss Western Wireless' application based on its claim that the Application must meet standards identified in the FCC's March 17, 2005 Report and Order. *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, FCC 05-46 (rel. Mar. 17, 2005) ("*2005 Report and Order*"). Western Wireless' response explains that those standards do not apply to state proceedings, and apply at the federal level only to applications filed after the effective date of the new rules. While the Commission could adopt those standards (or similar standards) in a rulemaking proceeding, any requirements would be prospective and would not be applied in considering this Application. Nonetheless, the Commission should find that Western Wireless' Application is generally consistent with the new FCC Rules adopted in the *2005 Report and Order*.

New Rule 54.202(a)(1)(A) essentially codifies the *Virginia Cellular Order's* holding regarding the appropriate way to address requests for service:

On or after the effective date of these rules, in order to be designated an eligible telecommunications carrier under section 214(e)(6), any common carrier in its application must:

- (1) (A) commit to provide service throughout its proposed designated service area to all customers making a reasonable request for service. Each applicant shall certify that it will (1) provide service on a timely basis to requesting customers within the applicant's service area where the applicant's network already passes the potential customer's premises; and
- (2) 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, if service can be provided at reasonable cost by
  - (a) modifying or replacing the requesting customer's equipment;
  - (b) deploying a roof-mounted antenna or other equipment;
  - (c) adjusting the nearest cell tower;
  - (d) adjusting network or customer facilities;
  - (e) reselling services from another carrier's facilities to provide service; or
  - (f) employing, leasing or constructing an additional cell site, cell extender, repeater, or other similar equipment;

47 C.F.R. § 54.202(a)(1)(A). As noted above, Western Wireless has committed to implementing this process, and to reporting to the Commission when service requests cannot be fulfilled.

New federal Rules 54.202 and 54.209 will require carriers with pending applications at the FCC to file, beginning in 2006, a five-year service improvement plan, and to make annual reports addressing the progress towards meeting five year service improvement plans. If the Commission adopts a similar rule requiring all ETCs designated by the Idaho Commission to make these filings Western Wireless would certainly comply. At this time, in the absence of any such rule, Western Wireless proposes that it file detailed information in early 2006 that will describe improvements made in 2005 and projected for 2006. App., ¶ 18. The same kind of reporting would be made in subsequent years. *Id.* In Western Wireless' experience, a detailed filing covering two years would be far more useful to the Commission than a five year plan. Because telecommunications carriers generally do not have definitive plans for 2, 3 or 5 years out, a detailed filing for a condensed time period will provide more information and better information as the Commission exercises its authority to oversee ETCs. Western Wireless

believes this to be true for wireless ETCs as well as landline ETCs, and would expect to support this approach (as an alternative to a five-year plan) if the Commission initiates a rulemaking to create Idaho-specific reporting requirements. In the meantime, however, the Commission should be satisfied that Western Wireless' commitment to report on plans and progress for a two year period, beginning in 2006, is similar to this new FCC standard, and serves the public interest.

New federal Rule 54.202(c) provides that a public interest test shall consider the benefits of increased choice and the advantages of an applicant's services. 47 C.F.R. § 54.202(c). This is nothing new to Western Wireless, and instead are factors already addressed in Western Wireless' Application and discussed above. New federal Rule 54.202(a)(3) addresses consumer protection and service quality standards, and allows wireless carriers to make the appropriate showing by committing to comply with the CTIA Code – something that Western Wireless has already done.

Western Wireless does not intend to suggest that its Application fully meets these new standards (which did not exist when the Application was filed), but instead that these rules should not be used to deny Western Wireless' Application. Western Wireless' Application is consistent with the spirit of the *2005 Report and Order* and new federal rules, which encourage the designation of competitive ETCs that step up to meet service quality, service extension, and reporting standards that serve universal service goals. Any mandatory requirements for Idaho ETCs (including Western Wireless) that are adopted in a rulemaking would apply to Western Wireless on a going forward basis.

**VIII. THE COMMISSION SHOULD CONDITIONALLY DESIGNATE WESTERN WIRELESS AS AN ETC IN WIRE CENTERS WHERE IT CAN PROVIDE UNIVERSAL SERVICES**

As noted above, Western Wireless seeks designation in 18 rural telephone company wire centers, which requires the Commission to "redefine" four ETC service areas from the study area to the wire center level. 47 U.S.C. § 214(e)(5); 47 C.F.R. § 54.207(b). The Commission should

find that this request meets all applicable standards for approval, and should conditionally designate Western Wireless in the wire centers set forth on Attachment 2 to the Application.

The FCC identified three factors initially recommended by the Joint-Board, which should be considered by the Commission and the FCC when determining the appropriateness of redefining the service area to the level of the wire center. All these factors are identified and discussed at length in the Application. App., ¶¶ 57-75. Western Wireless will not repeat those arguments herein.

Western Wireless does wish to supplement the Application with a "creamskimming" analysis, based on publicly-available information, that confirms there is no risk of creamskimming that would justify a denial of Western Wireless' redefinition request. Exhibit B hereto identifies the area and population of each wire center in the four affected rural telephone company study areas. The population density is calculated by dividing population by the number of square miles. The "Cumulative Calculation" column at the far right shows the total density for wire centers included as compared to total density for wire centers excluded.

For Citizens, Western Wireless seeks designation in nine of the 18 wire centers in the study area. The density of the area included in the Application, which is 4 persons per square mile, is essentially the same as the area not included, which is 3.63 persons per square mile. This approximate difference is similar to that approved in the FCC's *Virginia Cellular Order*. *Virginia Cellular Order*, ¶ 34 (density of 2.30 for included wire centers, essentially the same as 2.18 density for excluded wire centers). Moreover, any minimal concerns this would create are eliminated by Citizens' disaggregation of support on a wire center basis. App., ¶ 27.

For the areas within Qwest's rural study area, Western Wireless will serve four wire centers with an average density of 12.08 persons per square mile, while excluding three wire

centers with a much higher density – 42.36 persons per square mile. This shows that this redefinition poses no risk of creamskimming.

For Midvale, Western Wireless seeks designation in only the Midvale wire center, which has a low population density of 0.89 persons per square mile. This is approximately equivalent to the average density of the remaining wire centers, which is 0.29 persons per square mile. There is no reason to believe that small difference creates any creamskimming concerns.

Finally, for Cambridge Tel., Western Wireless can serve four of the five Cambridge wire centers. The one wire center that cannot be served is Lowman, which has a population density of .37. This is lower than the 2.33 average density for the remaining wire centers. However, Cambridge has disaggregated support, and under its disaggregation plan filed May 14, 2002, the available support is as follows:

		Lines	HCLS	LTS	ICLS	LSS	TOTAL
Cambridge	CMBRIDXC	618	\$ 10.04	\$ 7.79	\$ 3.12	\$ 9.09	\$ 30.04
Council	CNCLIDXC	1,102	\$ 6.25	\$ 4.85	\$ 1.94	\$ 7.08	\$ 20.12
Cuprum	CPRMIDXC	54	\$ 57.11	\$ 44.31	\$ 17.76	\$ 20.32	\$139.50
Indian Valley	INVYIDXC	174	\$ 13.21	\$ 10.25	\$ 4.11	\$ 14.99	\$ 42.56
Lowman	LWMNIDXC	273	\$ 31.53	\$ 24.47	\$ 9.81	\$ 11.19	\$ 77.00
		2,221	\$118.14	\$ 91.67	\$ 36.74	\$ 62.67	

This example demonstrates why disaggregation mitigates concerns over redefinition. While Western Wireless is not able to serve the second-highest cost wire center (Lowman), it will also not be eligible for the second highest support amount. Moreover, Western Wireless will serve the highest cost wire center, and so clearly is not seeking to avoid the highest cost areas. The Commission should thus approve Western Wireless' designation in the four Cambridge wire centers where it can serve.

As a result, Western Wireless demonstrates that there will be no inadvertent creamskimming associated with its request to redefine these four rural telephone company study

areas. The Commission should approve Western Wireless' request for conditional designation in the wire centers set forth on Attachment 2 to the Application.

#### **IX. CONCLUSION**

The Act establishes clear, consistent and competitively fair mechanisms for allowing carriers, including a CMRS provider, to be designated as an ETC for the purpose of federal universal service support. Western Wireless provides the supported services, satisfies all applicable requirements, and can and will meet the obligations of an ETC. For rural customers, Western Wireless' designation as an additional ETC will bring new technology, lower rates, and better service, and so is clearly in the public interest.

Western Wireless respectfully requests the Commission to follow the directives and principles of the Act and to grant its Application by issuing an order designating Western Wireless as an ETC in the rural telephone company study areas and the non-rural wire centers listed on Attachment 1 pursuant to 47 U.S.C. § 214(e). Western Wireless further requests an order conditionally designating Western Wireless as an ETC in the wire centers of the rural telephone companies as set forth in Attachment 2 subject to the Commission redefining the service areas from the study area to the wire center level for the rural telephone companies identified, consistent with the purposes of 47 C.F.R. § 54.207.

Dated: April 28, 2005

Respectfully submitted,

**WWC HOLDING CO., INC.**  
**d/b/a Cellular One®**

By 

**McDEVITT & MILLER, LLP**

Dean J. (Joe) Miller  
420 West Bannock Street  
P.O. Box 2564-83701  
Boise, Idaho 83702  
Phone (208) 343-7500  
Facsimile (208) 336-6912

**BRIGGS AND MORGAN, P.A.**

Philip R. Schenkenberg (MN #260551)  
2200 IDS Center  
80 South Eighth Street  
Minneapolis, Minnesota 55402  
Phone (612) 977-8400  
Facsimile (612) 977-8650

**COUNSEL FOR APPLICANT**  
**WWC HOLDING CO., INC.**  
**d/b/a CELLULAR ONE®**

## CERTIFICATE OF SERVICE

I certify that the original and seven copies of the foregoing Application of Western Wireless were filed on April 28, 2005 with:

Jean Jewell, Secretary  
Idaho Public Utilities Commission  
P.O. Box 83720  
Boise, Idaho 83720-0074

and true and correct copies were forwarded on April 28, 2005, via the method(s) indicated below, to the following:

Conley Ward  
GIVENS PURSLEY, LLP  
P.O. Box 2720  
Boise, Idaho 83701-2720  
*Attorneys for Idaho Telephone Association*

Hand Delivered  
Federal Express  
 U.S. Mail  
Telecopy

Morgan W. Richards, Jr.  
MOFFAT THOMAS  
101 So. Capitol Blvd., 10th Floor  
P.O. Box 829  
Boise, Idaho 83701-0829  
*Attorneys for Citizens Telcom*

Hand Delivered  
Federal Express  
 U.S. Mail  
Telecopy

Mary S. Hobson  
STOEL RIVES, LLP  
101 S. Capitol Blvd., Suite 1900  
Boise, Idaho 83702-5958  
*Attorneys for Qwest Communications*

Hand Delivered  
Federal Express  
 U.S. Mail  
Telecopy

Allan T. Thoms  
VERIZON  
17933 NW Evergreen Parkway  
P.O. Box 1100  
Beaverton, Oregon 97075

Hand Delivered  
Federal Express  
 U.S. Mail  
Telecopy





## Population Density Analysis Western Wireless ETC Application -- Idaho

Study Area Code	Company Name	WC Code	Area_SqMl	Population	Density (population per sq. mi.)	Included?	Cumulative Calculation
474427	CITIZENS TELECOM IDAHO-FRONTIER COMM OF IDAHO	CSCDDIDXC	723.395	2197	3.04	Y	
474427	CITIZENS TELECOM IDAHO-FRONTIER COMM OF IDAHO	DNLVIDXC	520.173	773	1.49	Y	
474427	CITIZENS TELECOM IDAHO-FRONTIER COMM OF IDAHO	GRVVIDXC	256.671	1734	6.76	Y	
474427	CITIZENS TELECOM IDAHO-FRONTIER COMM OF IDAHO	HRBNIDXC	376.784	1672	4.44	Y	
474427	CITIZENS TELECOM IDAHO-FRONTIER COMM OF IDAHO	MCCLIDXC	546.722	4748	8.68	Y	
474427	CITIZENS TELECOM IDAHO-FRONTIER COMM OF IDAHO	NWMDIDXC	301.261	1229	4.08	Y	
474427	CITIZENS TELECOM IDAHO-FRONTIER COMM OF IDAHO	RGNSIDXC	320.015	1039	3.25	Y	
474427	CITIZENS TELECOM IDAHO-FRONTIER COMM OF IDAHO	SWETIDXC	354.393	854	2.41	Y	
474427	CITIZENS TELECOM IDAHO-FRONTIER COMM OF IDAHO	WHBRIDXC	324.849	646	1.99	Y	
474427	CITIZENS TELECOM IDAHO-FRONTIER COMM OF IDAHO	ABRDIDXC	141.563	2989	21.11	N	Density of Included WCs 4.00
474427	CITIZENS TELECOM IDAHO-FRONTIER COMM OF IDAHO	CARYIDXC	514.71	903	1.75	N	
474427	CITIZENS TELECOM IDAHO-FRONTIER COMM OF IDAHO	EKCVIDXA	4100.16	1652	0.40	N	
474427	CITIZENS TELECOM IDAHO-FRONTIER COMM OF IDAHO	FRFDIDXC	955.543	991	1.04	N	
474427	CITIZENS TELECOM IDAHO-FRONTIER COMM OF IDAHO	HMDLIDXC	56.503	4920	87.08	N	
474427	CITIZENS TELECOM IDAHO-FRONTIER COMM OF IDAHO	MRNGIDXC	35.8321	2463	68.74	N	
474427	CITIZENS TELECOM IDAHO-FRONTIER COMM OF IDAHO	PARMIDXC	96.8661	4432	45.75	N	
474427	CITIZENS TELECOM IDAHO-FRONTIER COMM OF IDAHO	SPFDIDXC	191.209	771	4.03	N	
474427	CITIZENS TELECOM IDAHO-FRONTIER COMM OF IDAHO	WLDRIDXC	39.8527	3151	79.07	N	Density of Excluded WCs 3.63



EXHIBIT B

472215	CAMBRIDGE TELEPHONE COMPANY	CMBRIDXC	382.821	989		2.58	Y	Density of Included WCs	2.33
472215	CAMBRIDGE TELEPHONE COMPANY	CNCLIDXC	206.741	1795		8.68	Y	Density of Included WCs	
472215	CAMBRIDGE TELEPHONE COMPANY	CPRMIDXC	443.944	44		0.10	Y	Density of Excluded WCs	0.37
472215	CAMBRIDGE TELEPHONE COMPANY	INVVIDXC	296.049	274		0.93	Y	Density of Included WCs	
472215	CAMBRIDGE TELEPHONE COMPANY	LWMNIDXC	722.209	265		0.37	N	Density of Excluded WCs	0.37
472226	MIDVALE TELEPHONE EXCHANGE, INC.	MDVAIDXC	865.129	773		0.89	Y	Density of Included WCs	0.89
472226	MIDVALE TELEPHONE EXCHANGE, INC.	LKVWIDXC	669.245	355		0.53	N	Density of Included WCs	
472226	MIDVALE TELEPHONE EXCHANGE, INC.	STNLIDXC	2193.39	856		0.39	N	Density of Included WCs	
472226	MIDVALE TELEPHONE EXCHANGE, INC.	WRLKIDXC	201.156	(See note below)			N	Density of Excluded WCs	0.29
472226	MIDVALE TELEPHONE EXCHANGE, INC.	WRRNIDAA	899.313	353		0.39	N	Density of Excluded WCs	
472226	MIDVALE TELEPHONE EXCHANGE, INC.	YLPNIDXC	1821.6	65		0.04	N	Density of Excluded WCs	
475162	QWEST CORPORATION	CTWVID01	570.466	2662		4.67	Y	Density of Included WCs	12.08
475162	QWEST CORPORATION	GAVLID01	270.156	5245		19.41	Y	Density of Included WCs	
475162	QWEST CORPORATION	KAMHID01	217.338	3827		17.61	Y	Density of Included WCs	
475162	QWEST CORPORATION	KOSKID01	28.3113	1384		48.89	Y	Density of Included WCs	
475162	QWEST CORPORATION	LSTINDSH	770.295	51422		66.76	N	Density of Included WCs	
475162	QWEST CORPORATION	LAPWID01	121.441	2675		22.03	N	Density of Included WCs	
475162	QWEST CORPORATION	CRGMID01	369.045	1979		5.36	N	Density of Included WCs	
475162	QWEST CORPORATION	NZPRID01	78.5406	663		8.44	N	Density of Excluded WCs	42.36

\*\* Census data showed 0 population, so this wire center was excluded in calculating cumulative density.

--- S.W.3d ---

2005 WL 770620 (Tex.App.-Austin)

(Publication page references are not available for this document.)

Public Utility Commission of Texas and WWC  
Texas RSA Limited Partnership,

Appellants

v.

Texas Telephone Association and Texas Statewide  
Telephone Cooperative, Inc.,

Appellees

NO. 03-03-00765-CV

Court of Appeals of Texas, Austin.

NO. 03-04-00026-CV

Filed: April 7, 2005

FROM THE DISTRICT COURTS OF TRAVIS  
COUNTY, 201ST & 261ST JUDICIAL  
DISTRICT NOS. GN1-00035 & GN1-02552,  
HONORABLE PAUL DAVIS, JUDGE  
PRESIDING

Before Justices Kidd, Patterson and Puryear;

**OPINION**

David Puryear, Justice

This case concerns the application by Western Wireless Corporation Texas RSA Limited Partnership ("Western Wireless") for state and federal subsidies. Western Wireless sought designation as an eligible telecommunications provider and carrier by the Public Utility Commission ("the Commission") in order to be eligible to receive subsidies from both federal and state universal service funds. Texas Telephone Association and Texas Statewide Telephone Cooperative, Inc. (collectively "Texas Telephone") filed motions to intervene to object to Western Wireless receiving the subsidies. The Commission granted Western Wireless's application. In addition, the Commission found that Western Wireless's description of its basic telecommunications service and the tariff rate that it would charge for the service complied with the Commission's requirements. Texas Telephone appealed both of these decisions of the Commission, and the district court reversed.

Western Wireless and the Commission appeal to this court. We will reverse the judgment of the district court and render judgment affirming the order of the Commission.

**STATUTORY FRAMEWORK**

One of the goals of the Federal Communications Commission ("FCC") is to ensure that all Americans have access to affordable phone service. See *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 614-15 (5th Cir.2000). As a way of reaching this goal, the Universal Service Mandate provides that access to telephone service be provided to low-income consumers and those in rural, higher-cost areas. 47 U.S.C.A. § 254(b)(2)-(5) (West 2001). To effectuate this mandate, the FCC and state regulatory agencies have, in the past, provided subsidies to companies providing phone service to customers in rural areas and low-income customers. See *In re Federal-State Joint Bd. on Universal Serv.*, Report and Order, CC Docket No. 96-45, 12 FCC Rcd. 8776, ¶ 10 & n.15 (rel. May 8, 1997) ("Universal Service Order").

In 1996, Congress amended the Communications Act of 1934. Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56 (codified in various sections of titles 15 and 47 of the United States Code) ("Federal Telecommunications Act"). The purpose of the amendment was to promote competition to secure lower prices and to provide better services for consumers. *Id.* By requiring local carriers to share their networks with competitors, the goals of competition and market entry would be enhanced. See *AT & T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999); see generally 47 U.S.C.A. § § 251-53 (West 2001 & Supp.2004). Congress directed that state and federal programs be adopted to advance universal service. 47 U.S.C.A. § 254(b)(5).

As a result, Texas and the federal government have established universal service funds to award subsidies to companies providing service to low income and rural, high-cost areas. See 47 U.S.C.A. § 254(e)-(f) (West 2001); *Tex. Util. Code Ann. § § 56.001-56.026* (West 2002 & Supp.2004-05). The subsidies are available only to carriers meeting the requirements established by the Public Utility Regulatory Act ("PURA") (*Tex. Util. Code Ann. § § 11.001-64.158* (West 1998 & Supp.2004-05)), the Federal Telecommunications Act, and rules issued by the Commission and the FCC. In order to be eligible to receive these state and federal subsidies, an applicant must be designated as an "eligible telecommunications provider or carrier." 47 U.S.C.A. § 214(e)(1) (West 2001); 16 Tex. Admin.

Code § 26.417(a) (2004). Although the Commission can designate more than one eligible carrier or provider in a given area, in rural areas the Commission can only designate more than one carrier or provider if the Commission finds multiple designations to be in the "public interest." 47 U.S.C.A. § 214(e)(2) (West 2001); 16 Tex. Admin. Code § § 26.417(d), 418(e) (2004). When carriers receive these subsidies, they are required to provide basic telecommunications services to all customers within the rural areas they serve and to low-income consumers who cannot obtain service with other carriers. Tex. Util.Code Ann. § 54.251(a)(2), (b) (West Supp.2004-05).

### THE CONTROVERSY

Western Wireless is a telecommunications carrier that provides commercial mobile radio service ("CMRS") to 107 counties in Texas. [FN1] The services Western Wireless provides to its customers include but are not limited to the following: (1) the ability to make and receive phone calls within a specific bandwidth by use of arrangements with local telephone companies; (2) certain amounts of free local use of phone services; (3) an equivalent of dual-tone, multi-frequency signaling; (4) single-party service where one subscriber, not multiple parties, is served through an access line; (5) access to emergency services; (6) access to operator services; (7) access to interexchange services, which gives customers the ability to make and receive interexchange or toll calls; (8) access to directory assistance; (9) toll blocking services that allow customers to block the completion of outgoing toll calls; and (10) mobile cellular service.

FN1. The definition of commercial mobile service reads, in relevant part, as follows:

[A]ny mobile service (as defined in section 153 of this title) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission 47 U.S.C.A. § 332(d)(1) (West 2001).

The definition of mobile service reads, in relevant part, as follows:

[A] radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves, and includes (A) both one-way and two-way radio communication services, (B) a mobile service which provides a regularly

interacting group of base, mobile, portable, and associated control and relay stations (whether licensed on an individual, cooperative, or multiple basis) for private one-way or two-way land mobile radio communications by eligible users over designated areas of operation, and (C) any service for which a license is required in a personal communications service established pursuant to the proceeding entitled "Amendment to the Commission's Rules to Establish New Personal Communications Services" (GEN Docket No. 90-314; ET Docket No. 92-100), or any successor proceeding. 47 U.S.C.A. § 153(27) (West 2001).

In March 2000, Western Wireless filed applications with the Commission to become an eligible provider and an eligible carrier in order to receive subsidies from the state and federal universal service funds for providing basic local telecommunication services. Western Wireless requested these designations in areas that already had incumbent service providers. In its application, Western Wireless requested designations in the "study areas" [FN2] of fourteen rural-incumbent carriers of which Texas Telephone is one.

FN2. A "study area" is the term used to describe the geographical area a rural telephone company serves. 47 U.S.C.A. § 214(e)(5) (West 2001). For rural telephone companies, a study area is the same as a service area. *Id.*

One of the other rural incumbent carriers is the Southwest Arkansas Telephone Cooperative, Inc. ("Southwest"). Southwest's study area includes seven local exchanges in Arkansas and one in Texas. Western Wireless applied for eligible carrier status only in the Texas portion of Southwest's study area.

The Commission issued notice of Western Wireless's applications to be considered an **eligible telecommunications** provider and carrier and set up a separate "designation docket." Texas Telephone filed motions to intervene. Texas Telephone is an **eligible telecommunications** provider and carrier in areas where Western Wireless is seeking to be granted eligibility. The Commission then referred the applications to the State Office of Administrative Hearings.

As a preliminary matter, Texas Telephone insisted

that Western Wireless was required to obtain a certificate of convenience and necessity, a certificate of operating authority, or a service provider certificate of operating authority (we will refer to each of these as a "CCN") before receiving a designation as an eligible provider. The Commission rejected this argument and initially determined that Western Wireless was not required to be certificated in order to be an eligible provider.

At the hearing before the administrative law judge, Texas Telephone contended that, in addition to the CCN requirement, Western Wireless's application should be denied for the following two reasons: (1) Western Wireless's application would not be in the public interest and (2) Western Wireless did not apply to all of the local exchanges in the Southwest study area. The administrative law judge submitted a proposal for decision to the Commission and recommended Western Wireless's applications be granted.

The Commission adopted the proposal for decision. The Commission concluded that the designation of Western Wireless as an eligible provider and carrier was in the public interest. The Commission refused to condition Western Wireless's carrier designation on obtaining a similar designation in Arkansas.

In its Designation Order, the Commission also established the need for a separate "compliance docket." Under existing Commission rules, to be eligible for universal service funding, an applicant must charge rates that did not exceed 150% of the incumbent carrier's existing rate for basic local telecommunications services. 16 Tex. Admin. Code § 26.417(c)(1)(B) (2004). Initially, in the Designation Order, the Commission found that Western Wireless's proposed rate of \$14.99 did not appear to meet the 150% requirement. Therefore, the Designation Order required, in a separate compliance docket, that Western Wireless file a tariff with proposed rates that were no higher than 150% of the incumbents' existing rates and required Western Wireless to provide a description of the content, pricing, terms, and conditions of Western Wireless's universal offering to determine whether the service complied with the Commission's requirements.

During the compliance proceeding, Western Wireless filed a proposed tariff and two additional amended tariffs with the Commission. In response, Texas Telephone filed a list of concerns for the Commission to consider when deciding whether to approve Western Wireless for subsidies. Texas

Telephone asserted that Western Wireless's proposed rate of \$14.99 in its second amended tariff did not meet the 150% requirement.

In the interim period between the Designation Order and the compliance proceeding, the Commission enacted a new rule. See Tex. Admin. Code § 26.25(e)(8) (2002), *repealed by* 27 Tex. Reg. 9568 (2002). The rule required providers to list all of the fees and surcharges in the amount charged for providing basic local service in order to allow consumers to compare the services and rates charged by various providers. In March 2001, after the rule had become effective, the Commission issued a "notice of approval" approving Western Wireless's tariff compliance filing. In making this determination, the Commission specified that its approval was based, in part, on application of the new rule. Texas Telephone filed exceptions to the notice of approval and challenged the conclusion that Western Wireless's tariff satisfied the 150% requirement.

The Commission issued notice that it would consider the exceptions filed by Texas Telephone in an open meeting and gave notice of the meeting to all parties including Texas Telephone. Both Texas Telephone's and Western Wireless's counsel attended the open meeting. At the meeting, Western Wireless contended that, after including all the charges listed in the new rule for comparison to the incumbent's rate, its \$14.99 rate complied with the 150% requirement.

After considering Texas Telephone's exceptions, the Commission issued its Compliance Order and approved Western Wireless's tariff compliance filing, which included the basic service rate of \$14.99. The Commission noted that its decision was based, in part, on the newly enacted Rule 26.25(e)(8).

Texas Telephone filed a motion for rehearing of the Compliance Order on May 29, 2001, contending there were procedural flaws in the Commission's action and contending Western Wireless's final compliance filing failed to meet the requirements of the Commission's Designation Order and rules. During the Commission's open meeting on June 14, 2001, the Commissioners orally extended the time to act upon the motion for rehearing until July 16, 2001. However, the written order extending the Commission's time to act was not reduced to writing and signed until August 2, 2001.

#### DISTRICT COURT'S JUDICIAL REVIEW

Texas Telephone appealed the Designation Order granting Western Wireless the status of an eligible provider and carrier. Western Wireless intervened in support of the Commission. The district court concluded that the Commission had committed the following three errors in deciding its Designation Order: (1) the Commission should have required Western Wireless to be certified before granting Western Wireless an eligible provider designation; (2) the Commission applied an incorrect legal standard when it considered whether designating Western Wireless as an eligible carrier and provider was in the public interest; and (3) the Commission should not have granted Western Wireless's designation in only the single exchange of the Southwest study area that was in Texas.

Texas Telephone also appealed the Commission's Compliance Order and filed a petition seeking administrative review. *See* Tex. Util.Code Ann. § 15.001 (West 1998). Texas Telephone alleged that the Compliance Order impermissibly attempted to modify a finding of fact in the Designation Order, [FN3] that the attempt to modify the finding was not supported by substantial evidence, and that the Commission had deprived Texas Telephone of due process.

FN3. Finding of Fact number 44 in the Designation Order had preliminarily determined that Western Wireless's \$14.99 base rate did not comply with the 150% requirement in the Commission's rules.

In response, Western Wireless filed a plea to the jurisdiction contending that the district court did not have jurisdiction because the appeal was not filed within 30 days as required by the Administrative Procedure Act. *See* Tex. Gov't Code Ann. § 2001.176 (West 2000). Western Wireless also urged that because the compliance proceeding was not a contested-case proceeding, Texas Telephone had no right to file an appeal.

Texas Telephone then amended its petition for judicial review seeking relief under the Uniform Declaratory Judgment Act ("UDJA"). *See* Tex. Civ. Prac. & Rem.Code Ann. § § 37.001-.011 (West 1997). Texas Telephone asked the trial court to declare the Compliance Order void for the following reasons: (1) the Commission had exceeded its statutory authority by changing a finding of fact in a final order that was on appeal and (2) the Commission deprived Texas Telephone of procedural due process by entering findings of fact and

conclusions of law without giving Texas Telephone the right to notice and a hearing as required in a contested case. *See* Tex. Gov't Code Ann. § 2001.081 (West 2000). Western Wireless amended its plea to the jurisdiction seeking dismissal of Texas Telephone's declaratory-judgment action.

The district court consolidated the Designation Order and the Compliance Order appeals. The district court denied Western Wireless's plea to the jurisdiction and reversed and remanded both of the Commission's orders. The district court granted Texas Telephone's request for declaratory relief by holding that the Compliance Order was void. Western Wireless and the Commission appeal these decisions of the district court.

## DISCUSSION

Western Wireless and the Commission contend, on appeal, that the district court erred in reversing both the Designation Order and the Compliance Order. Regarding the Designation Order, Western Wireless asserts that it was not necessary for it to obtain a certificate in order to provide local service and asserts that the public interest was served by granting its designation requests. Further, Western Wireless urges that it need not seek eligibility designations in another state before being approved to receive universal fund subsidies in Texas. Regarding the Compliance Order, Western Wireless contends that the district court erred by granting Texas Telephone's declaratory-judgment action, that Texas Telephone's petition for judicial review was not timely filed, that the Commission correctly determined that the \$14.99 rate complied with all relevant requirements, and that the Commission did not deprive Texas Telephone of due process.

### Designation Order

#### *Certificate Requirement*

The Commission granted Western Wireless's application for state universal service funding without requiring Western Wireless to obtain a CCN. The district court concluded that this decision was in error. Section 54.001 of PURA generally requires a person to obtain a CCN in order to provide basic local telecommunication services. Tex. Util.Code Ann. § 54.001 (West 1998). However, section 51.003 of PURA exempts a provider of CMRS from the provisions of PURA except where otherwise expressly provided by statute. *Id.* § 51.003 (West 1998) (emphasis added).

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(Publication page references are not available for this document.)

The Commission, in its Designation Order, found that Western Wireless is a CMRS provider that provides services primarily in rural areas of the United States. Further, the Commission concluded that Western Wireless is exempt from the requirements of PURA because Western Wireless is a CMRS provider. *See id.* § 51.003(5).

Texas Telephone asserts that the district court correctly decided that the Commission had erred by not requiring Western Wireless to obtain a CCN. Texas Telephone contends that the exemption for CMRS providers does not apply to the certification requirement because PURA *expressly* provides otherwise. Section 54.001 of PURA applies to *persons* wanting to provide telephone service, and section 11.003(14) of PURA defines a *person* as including a corporation. *See id.* §§ 54.001, 11.003(14) (West Supp.2004-05). From this, Texas Telephone surmises that because Western Wireless is a *corporation*, the term *person* includes Western Wireless. Consequently, Texas Telephone insists Western Wireless must obtain a CCN before providing basic local telecommunications services. Further, Texas Telephone asserts that because section 11.003(14) of PURA specifically excludes electric cooperatives from the definition of *person* but does not exclude CMRS providers from the definition, then the principle of *expressio unius est exclusio alterius* implies that CMRS providers are included in the definition of a *person* and are, therefore, required to obtain a CCN in order to provide basic local telecommunication service. *See Dallas Merchant's & Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 493 n.7 (Tex.1993).

We disagree with Texas Telephone's position. The Commission determined that Western Wireless is a CMRS provider. [FN4] Section 51.003 of PURA specifically excludes providers of CMRS from the provisions of PURA unless otherwise *expressly provided*. Tex. Util.Code Ann. § 51.003. CMRS providers are not expressly included in the sections of PURA delineating the CCN requirements. *See id.* §§ 54.001-.003 (West 1998). On the contrary, in section 54.003, PURA again specifically exempts telecommunications utilities from the CCN requirement in order to provide CMRS. *Id.* § 54.003. Because the district court erroneously concluded that the Commission erred by not requiring Western Wireless to obtain a CCN to provide basic service, we reverse the decision of the district court.

FN4. It is worth noting that Texas Telephone does not contest Western

Wireless's classification as a CMRS provider. They only dispute what effect that classification has on the requirement to obtain a CCN.

#### *Public Interest*

The district court also concluded that the Commission applied an incorrect standard when determining whether granting Western Wireless's application for universal service funding was in the "public interest." For rural areas served by a rural telephone company, the Commission may designate an additional carrier under federal law or an additional provider under state law if the Commission finds that the designation is in the public interest. *See* 47 U.S.C.A. § 214(e)(2); 47 C.F.R. § 54.201(c) (2003); 16 Tex. Admin. Code §§ 26.417(d)(2), .418(e)(2) (2004). Although a "public interest" determination is not necessary for a competing company to provide service in an area already served by an incumbent telecommunications service provider, a "public interest" finding is necessary to receive subsidies from the state and federal universal service funds. In other words, the Commission determines whether a provider has satisfied all the requirements necessary to receive the state and federal subsidies but does not determine whether a company may, on its own and without government financial support, decide to compete in an area already served by an incumbent telecommunications provider.

None of the statutes requiring a public interest analysis specify what factors are required to be considered for the public interest requirement to be satisfied. However, public interest determinations often involve consideration of how the action will impact consumers. *See, e.g., Federal Power Comm'n v. Texaco, Inc.*, 417 U.S. 380, 392 (1974) (protecting consumers from high rates serves public interest); *Continental Oil Co. v. Federal Power Comm'n*, 378 F.2d 510, 532 (5th Cir.1967) (public interest has strong emphasis on consumer interest). Further, section 11.002 of PURA states that the Act was enacted to protect the public interest inherent in the service of public utilities and that the purpose of the title is to establish a system to assure rates that are just and reasonable to consumers and utilities. Tex. Util.Code Ann. § 11.002 (West Supp.2004-05).

Public interest determinations also involve considering how actions will affect competition. *See, e.g., Otter Tail Power Co. v. United States*, 410 U.S. 366, 374 (1973) (policy of Federal Power Act to

maintain competition to maximum extent possible consistent with public interest); Tex. Util. Code Ann. § 51.001 (West Supp.2004-05) (to encourage development of competitive telecommunications environment, new rules must be formulated to protect public interest). Competition is generally presumed to be in the public interest and not contrary to it. American Transfer & Storage Co. v. Interstate Commerce Comm'n, 719 F.2d 1283, 1300 (5th Cir.1983). Further, the Federal Telecommunications Act was amended to promote competition among telecommunication providers to obtain lower prices and better services for consumers.

Public interest determinations are dependent upon the special knowledge and expertise of the Commission. See Amtel Communications, Inc. v. Public Util. Comm'n, 687 S.W.2d 95, 99 (Tex.App.--Austin 1985, no pet.). It is the Commission's task to assess competing policies and determine what is in the public interest. *Id.* The legislature intended the Commission to make whatever accommodations and adjustments necessary when determining what is in the public interest. See *id.* at 101. In balancing these considerations, the agency is required to exercise its expertise to further the overall public interest. See Public Util. Comm'n v. Texland Elec. Co., 701 S.W.2d 261, 266 (Tex.App.--Austin 1985, writ ref'd n.r.e.).

It is within the Commission's authority to decide what public interest means in a particular case. See Hammack v. Public Util. Comm'n, 131 S.W.3d 713, 723 (Tex.App.--Austin 2004, pet. filed) (Commission may decide what statutory standard of "need" means in specific situations). The Commission has wide discretion in determining what factors to consider when deciding whether something serves the public interest. See El Paso Elec. Co. v. Public Util. Comm'n, 917 S.W.2d 846, 856 (Tex.App.--Austin 1995), *judgm't withdrawn and cause dism'd by agr.*, 917 S.W.2d 872 (Tex.App.--Austin 1996) (Commission given wide discretion to determine what property is "useful" under statute). Because administrative agencies are given their statutory powers with a view to achieving legislative purposes more fully and efficiently through the agency's specialized judgment, knowledge, and expertise, the methods chosen by the agency and its interpretation of the statute it is required to administer are entitled to due respect. Hammack, 131 S.W.3d at 723; cf. Federal Communications Comm'n v. WNCN Listeners Guild, 450 U.S. 582, 596 (1981) (Interstate Commerce Commission's determination of how public interest is best served is entitled to substantial

judicial deference).

Texas Telephone asserts that the Commission misconstrued the public interest standard. [FN5] Specifically, Texas Telephone alleges that the public interest analysis must include an analysis of the impact of an additional carrier on the incumbent rural carrier because, they argue, the addition of a second carrier might adversely impact existing services in rural areas and, therefore, customers in rural areas might be negatively impacted. As proof of their assertion that the Commission applied an incorrect standard, Texas Telephone cites to Findings of Fact 71 to 73 in the Designation Order in which the Commission concluded that prohibiting Western Wireless's ability to provide telecommunications service because of the effect on incumbent providers would be contrary to the universal service goals of the Federal Communications Act. [FN6]

FN5. Texas Telephone also contends that the Commission misconstrued the burden of proof for eligibility designations. Texas Telephone asserts that the burden of proof in a public interest determination is on the applicant and asserts that the incumbent is not required to show that the market will be harmed if the designation is granted. Federal-State Joint Bd. on Universal Service, Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia, Memorandum Opinion and Order, CC Docket No. 96-45, 19 FCC Rcd 1563, 1574-75, ¶ 26 (rel. Jan. 22, 2004); Federal-State Joint Bd. on Universal Service, In re Highland Cellular, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia, Memorandum Opinion and Order, CC Docket No. 96-45, 19 FCC Rcd 6422, 6431, ¶ 20 (rel. April 24, 2004); Federal-State Joint Bd. on Universal Service, Advantage Cellular, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the State of Tennessee, Order, CC Docket No. 96-45, 19 FCC Rcd 20985, 20991, ¶ 16 (rel. Oct. 22, 2004). Texas Telephone urges that Finding of Fact 74, which stated that the evidence did "not prove that any affected area" was "unable to support more than one" carrier, reveals that the Commission incorrectly required the incumbents to prove that the additional designation was not in the public

interest rather than requiring Western Wireless to prove that its designation was in the public interest. Texas Telephone asserts that by placing the burden of proof on Texas Telephone, the Commission prejudiced the incumbents' substantial rights, which is a clear error of law requiring a reversal of the Commission's decision. See Texas Dep't of Transp. v. Jones Bros. Dirt & Paving Contractors, 24 S.W.3d 893, 898 (Tex.App.-Austin 2000), *rev'd on other grounds*, 92 S.W.3d 477 (Tex.2002) ("court may reverse an agency determination only if substantial rights of appellant have been prejudiced").

However, because Texas Telephone did not raise the burden argument in their motion for rehearing before the Commission or in their petition for judicial review in the district court, they have failed to preserve the argument. Brown v. Texas Dep't of Ins., 31 S.W.3d 683, 687 (Tex.App.- Austin 2000, no pet.); see also Carrizales v. Texas Dep't of Protective and Regulatory Servs., 5 S.W.3d 922, 925 (Tex.App.-Austin 1999, *pet. denied*) (party may not raise an issue for first time on appeal). Further, even if the claim were not waived, there is no indication that the Commission improperly reversed the burden of proof. Rather, Finding of Fact 74 indicates that the Commission rejected Texas Telephone's assertions of harm to the incumbent but does not indicate that the burden of proof had been changed.

FN6. Findings of Fact 71 to 73 read as follows:

71. Prohibiting [Western Wireless's] ability to provide telecommunications service because of the alleged effect on incumbent providers would violate section 253(a) of the Act.

72. Subjecting [Western Wireless] to a public interest test based in part on the effect of the designation [upon] the incumbent providers is not competitively neutral, in that it favors the incumbent provider.

73. Prohibiting [Western Wireless's] ability to provide telecommunications service because of the alleged effect on incumbent providers would be contrary to the universal service goals of section 254(b) of the Act.

In further support of their assertion that a public interest analysis must involve consideration of the

impact on incumbent carriers, Texas Telephone points to three orders issued by the FCC in which the FCC granted three companies eligible carrier statuses in certain portions of the incumbent carriers' study areas. See *Federal-State Joint Bd. on Universal Service, Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, Memorandum Opinion and Order, CC Docket No. 96-45, 19 FCC Rcd 1563 (rel. Jan. 22, 2004) ("*Virginia Cellular Order*"); *Federal-State Joint Bd. on Universal Service, In re Highland Cellular, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, Memorandum Opinion and Order, CC Docket No. 96-45, 19 FCC Rcd 6422 (rel. April 24, 2004) ("*Highland Cellular Order*"); *Federal-State Joint Bd. on Universal Service, Advantage Cellular, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the State of Tennessee*, Order, CC Docket No. 96-45, 19 FCC Rcd 20985 (rel. Oct. 22, 2004) ("*Advantage Cellular Order*"). The FCC did not grant the companies the eligibility statuses they sought for certain portions of the rural incumbent carriers' study areas because granting the companies eligible carrier statuses would place the incumbent carriers at a competitive disadvantage. *Virginia Cellular Order* at 19 FCC Rcd 1579-80, ¶ 35; *Highland Cellular Order* at 19 FCC Rcd 6436-37, ¶¶ 31-32; *Advantage Cellular Order* at 19 FCC Rcd 20995-96, ¶ 24. The FCC concluded that granting the eligibility statuses in the portions denied would be against the public interest due to the possibility of "creamskimming." *Virginia Cellular Order* at 19 FCC Rcd 1579-80, ¶ 35; *Highland Cellular Order* at 19 FCC Rcd 6436-37, ¶¶ 31-32; *Advantage Cellular Order* at 19 FCC Rcd 20995-96, ¶ 24. Creamskimming occurs when competitors "seek to serve only the low-cost, high-revenue customers in a rural telephone company's study area." *Advantage Cellular Order* at 19 FCC Rcd 20993, ¶ 20. However, the Commission did grant eligible carrier statuses to the companies in areas where creamskimming would not occur and concluded that granting the eligibility statuses in those areas was in the public interest. Based on the three FCC orders and the Commission's Findings of Fact, Texas Telephone asserts that a public interest analysis must include the impact an additional carrier will have on an incumbent.

When describing the public interest analysis for a rural study area, the FCC listed the following factors as relevant to a consideration of whether the addition of another carrier was in the public interest:

[T]he benefits of increased competitive choice, the impact of the designation on the universal service fund, the unique advantages and disadvantages of the competitors service offering, any commitments made regarding quality of telephone service, and the competitive [eligible carrier's] ability to satisfy its obligation to serve the designated service areas within a reasonable time frame.

*Virginia Cellular Order* at 19 FCC Rcd 1575-76, ¶ 28; *Highland Cellular Order* at 19 FCC Rcd 6432, ¶ 22; *Advantage Cellular Order* at 19 FCC Rcd 20992, ¶ 18. While the factors listed by the FCC allow for consideration of the impact on incumbents, the factors do not require it. Further, a review of the record indicates that the Commission did consider the impact granting Western Wireless's designations would have on incumbents.

In its public interest analysis, the Commission concluded that the analysis is guided by the fundamental goal of preserving and advancing universal service. Further, the Commission concluded the public interest analysis is guided by the goal of ensuring the availability of *quality* telecommunication services at *affordable rates* and the goal of deploying advanced telecommunication services to all parts of the nation.

In making its determination, the Commission considered the effects of approving Western Wireless's designations on the competitiveness of the local telephone market and on the benefits to consumers. Specifically, in the Findings of Fact section of the Designation Order, the Commission found the following:

64. [Western Wireless] has committed to advertising the availability of supported services in a manner that fully informs the general public within the designated service areas.

66. The benefits competition is hoped to bring include lower prices, higher quality, and the rapid development of new telecommunications technologies.

69. The availability of [Western Wireless] as a second provider, which might not occur in the absence of the requested designations, will bring a choice of providers to consumers in rural areas, many of whom are now served by a single provider.

70. The choice of providers can reasonably be expected to provide consumers with greater range of service choices and pricing driven by the market place, rather than the monopolistic needs of a single provider.

The Commission also considered the impact on incumbents of granting Western Wireless's designation applications. Specifically, in the Findings of Fact section of the Designation Order, the Commission found the following:

74. The evidence in this case does not prove that any affected area is unable to support more than one [eligible carrier.]

75. Statutory tools are available to the Commission, including the Additional Financial Assistance provisions of P.U.C. Subst. R. 26.408, [FN7] to be used, if necessary and appropriate, to ameliorate the effects on incumbent providers of [Western Wireless's] designation as an [eligible carrier] and [eligible provider.]

FN7. Rule 26.408 provides incumbent carriers serving rural and high-cost areas with additional financial support to allow carriers to provide basic services at reasonable rates. See Tex. Admin. Code § 26.408 (2004).

After considering the Congressional directives to both provide affordable phone service and to increase competition, the Commission concluded the public interest would be served by granting the designation application and concluded having a second provider would benefit consumers. Specifically, the Commission found the following:

65. The Texas Legislature and the United States Congress have clearly articulated a policy in favor of competitive telecommunications choices for citizens in all areas of the country-not just in urban areas.

81. The public interest will be served by granting Western Wireless's applications for designation as an [eligible carrier] and [eligible provider.]

The Commission considered the competitiveness of the local market, the benefits to consumers of having an additional provider, and whether the areas in question will be able to support the incumbent and an additional carrier and provider. When considering the impact on incumbents, the Commission also considered that monetary assistance is available to incumbents to ameliorate the effects of Western Wireless being designated as an eligible carrier and provider. The Commission did all that it was required to do: it weighed the potential benefits and the potential harms of granting Western Wireless's eligibility applications. Further, the Commission has wide discretion when determining if an action is in the public interest. See *El Paso Elec. Co.*, 917 S.W.2d at 856. Because we believe the district court

erred when it found that the Commission improperly concluded approving the designations for Western Wireless would be in the public interest, we will reverse that portion of the district court's decision.

#### *Southwest Study Area*

The district court also reversed the Designation Order issued by the Commission because the Commission granted the application for state and federal universal funding with respect to the Texas portion of Southwest's study area without requiring Western Wireless to show it could serve the remaining Arkansas portion of Southwest's study area. Texas Telephone contends that another company cannot be designated as eligible to receive universal funds in an area served by a rural telephone company unless the company seeks to serve the entire study area of the rural telephone company. [FN8] Further, Texas Telephone alleges Western Wireless should have applied to serve Southwest's entire study area and not just the portion that is present in Texas.

FN8. For a rural telephone company, the service area is the company's study area unless the state commission and the FCC both establish a different definition. See 47 U.S.C.A. 214(e)(5).

In order for an applicant to be designated as eligible to receive state or federal universal service support in an area served by a rural telephone company, the applicant must seek to serve the entire service area of the rural telephone company. See 47 U.S.C.A. § 214(e)(1); 16 Tex. Admin. Code § 26.417(f)(1)(B)(I) (2004). However, in a situation that is factually similar to the one before us, the FCC considered how to designate Western Wireless as an eligible carrier in the study area of a rural local exchange carrier that crossed over state borders. *In re Federal-State Joint Bd. on Universal Service: Western Wireless Corp. Petition for Designation as an Eligible Telecommunications Carrier in the State of Wyoming*, Memorandum Opinion and Order, CC Docket No. 96-45, 16 FCC Rcd. 48, ¶¶ 23-24 (rel. December 26, 2000) ("*Wyoming Order*"). The FCC concluded that the state commission's ability to designate did not reach beyond the state's borders. *Id.* The FCC also concluded that Congress did not envision that state commissions would have to obtain permission from another state before designating an applicant as an eligible carrier for an area within the designating state's borders. In addition, the FCC endorsed the Commission's decision in this case not

to require Western Wireless to apply for eligibility designations in Arkansas before approving its eligibility applications in Texas. *Id.* at ¶ 24 n.72.

Similarly, in the Designation Order, the Commission concluded that Congress gave it the power to designate eligible carriers only *within* Texas. Further, the Commission concluded that requiring Western Wireless to apply for eligibility designations in Arkansas would deprive the Commission of its independent authority to approve eligibility applications for areas that are within the boundaries of Texas. The Commission did exactly what it could do within the confines of this state: it granted Western Wireless's designations for the areas in Texas but also required a commitment to serve the entire study area. The maximum reach of the Commission extends only to the Texas border, and any designation issued by the Commission would have no effect in Arkansas. See State of Cal. v. Copus, 309 S.W.2d 227, 229 (Tex.1958) (holding that state statutes do not have extraterritorial effect).

Because the district court erred by reversing the Designation Order, we sustain Western Wireless's points that it did not need to obtain a CCN in order to provide local service, that the Commission's granting of the eligibility designations it requested served the public interest, and that it did not have to seek eligibility designations in Arkansas before being approved to receive universal service funds in Texas.

#### **Compliance Order**

In the Designation Order's Finding of Fact 44, the Commission concluded that the \$14.99 rate did not satisfy the 150% requirement. However, in the same order, the Commission set up a compliance docket to determine whether Western Wireless would be in compliance with Commission rules before receiving universal fund disbursements. Among other items to consider, the Commission directed Western Wireless to file a tariffed service rate that complied with the 150% requirement.

After the Designation Order was issued, rule 26.25 went into effect. See Tex. Admin. Code § 26.25 (2002), *repealed by* 27 Tex. Reg. 9568 (2002). This new rule listed requirements that must appear on telephone bills in order for customers to be able to compare the prices charged by different providers. *Id.* The rule required providers to include all of the fees and surcharges in the amount charged for basic local service. Western Wireless, in the compliance proceeding, again filed the \$14.99 rate. Texas

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(Publication page references are not available for this document.)

Telephone filed a list of concerns with the Commission including a complaint that the \$14.99 rate did not comply with the 150% requirement. However, the Commission staff and the Commission's Policy Development Division both agreed that the \$14.99 rate did fall within the 150% requirement when all the factors listed in rule 26.25 were considered. Specifically, the Commission found that by including the single line charge in the incumbent's rates for basic local service, as listed in the rule, Western Wireless's rate fell within the 150% requirement.

After the Commission's Policy Development Division issued its notice of approval, Texas Telephone filed a list of exceptions to the approval and again asserted that the \$14.99 rate did not comply with the 150% requirement. The Commission then agreed to consider Texas Telephone's exceptions in an open meeting and notified both Western Wireless and Texas Telephone of its intention to do so. Both Western Wireless's and Texas Telephone's counsel attended the open meeting. After the open meeting, the Commission signed the Compliance Order and approved Western Wireless's tariffed filing, which included the \$14.99 rate.

In its district court suit for judicial review, Texas Telephone contended that the finding of fact in the Compliance Order stating that the \$14.99 did comply with the 150% requirement was contrary to Finding of Fact 44 in the Designation Order. The district court concluded that the Commission violated section 2001.1775 of the Administrative Procedures Act, which prohibits an agency from modifying its findings in a contested case after judicial review of the case has begun, by attempting to alter a finding of fact in an order already on appeal. See Tex. Gov't Code Ann. § 2001.1775 (West 2000). In addition, the district court concluded that the Commission engaged in ad hoc adjudication by attempting to change the requirements of rule 26.417(c)(1)(B) without applying the proper rulemaking procedures.

However, these arguments ignore the fact that a new rule was promulgated between the time of the Designation Order and the Compliance Order. Agencies may revisit their prior adjudicated orders when changed circumstances occur. South Tex. Indus. Servs., Inc. v. Texas Dep't of Water Res., 573 S.W.2d 302, 304 (Tex.Civ.App.--Austin 1978, writ ref'd n.r.e.). An agency has exclusive original jurisdiction to determine the question of changed circumstances. Id. at 304. The new rule changed the circumstances

under which the original finding of fact occurred. The Commission correctly considered the effect that the new rule had on the proposed \$14.99 rate.

Further, the Designation Order approved Western Wireless's eligibility application and was not meant to be the final word on the subject of compliance because the order specifically created a compliance docket to determine, among other things, whether the tariffs proposed by Western Wireless would comply with the Commission's rules. The finding in the Designation Order was a preliminary finding and was unnecessary for Western Wireless to be designated as an eligible carrier and provider. As such, it does not have precedential value, and the Commission's new finding of fact does not violate section 2001.1775 of the Administrative Procedure Act. Cf. Central Power & Light Co. v. Public Util. Comm'n, 36 S.W.3d 547, 562 (Tex.App.--Austin 2000, pet. denied) (superfluous findings are analogous to immaterial jury findings, which courts may generally disregard); Texas Health Facilities Comm'n v. Charter Med.-Dallas, Inc., 665 S.W.2d 446, 453 (Tex.1984), superseded by statute on other grounds (some of Commission's findings were immaterial, irrelevant, and ignored by the court).

The district court also concluded that the Commission denied Texas Telephone due process because the Commission adjudicated a contested issue of fact without affording it the notice and hearing required in a contested case. However, nothing in the record indicates that any party requested that this case be treated as a contested case. In addition, Texas Telephone was able to file a list of exceptions regarding whether Western Wireless was in compliance with the Commission's rules and was able to present arguments at the public hearing. Texas Telephone was provided adequate notice of the public hearing, was present at the public hearing, and was able to express its concerns. It was not denied any due process rights.

Because the district court erred by declaring the Compliance Order void and by remanding the case to the Commission, we reverse the decision of the district court. [FN9]

FN9. Because we are reversing the decision of the district court and affirming the decision of the Commission, we need not address Western Wireless's claim that Texas Telephone's appeal was not filed within the time limit prescribed by the Administrative Procedure Act or its claim that the district

court erred by granting Texas Telephone's declaratory judgment action when the relief Texas Telephone requested was the same as the relief requested under the Administrative Procedure Act.

### CONCLUSION

Because we find that the trial court erred in reversing both the Designation Order and the Compliance Order, we sustain Western Wireless's points that Western Wireless was not required to obtain a CCN, that the Commission did not apply an incorrect public interest analysis, that Western Wireless did not need to obtain an eligibility designation in Arkansas, that the Commission correctly considered a new rule in determining whether the \$14.99 rate satisfied all necessary requirements, and that Texas Telephone was not deprived of due process. We, therefore, reverse the district court's judgment and render judgment affirming the Commission's two orders.

Justice Kidd Not Participating

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