

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 Eighth 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

**COMMENTS OF
WESTERN WIRELESS**

COMMENTS OF WWC HOLDING CO., INC. d/b/a CELLULAR ONE®

I. INTRODUCTION

WWC Holding Co., Inc. d/b/a Cellular One® ("Western Wireless") submits these comments in response to the Notice of Request for Additional Public Comment, Order No. 29791 issued by the Idaho Public Utilities Commission on May 27, 2005 ("*Notice and Order*").

In the *Notice and Order*, the Commission (1) granted immediate eligible telecommunications carrier ("ETC") designation to Western Wireless in the non-rural telephone company service areas identified in Western Wireless' Application; (2) asked for public comment on the merits of recent Federal Communications Commission ("FCC") guidelines promulgated in the FCC's March 17, 2005 Report and Order ("*March 2005 Order*");¹ and (3) determined to convene a technical hearing on Western Wireless' application relating to rural telephone company service areas.

In the *March 2005 Order*, the FCC adopted rules imposing new requirements for the ETC designation proceedings conducted by the FCC under 47 U.S.C. § 214(e)(6), and establishing new reporting requirements for carriers previously designated as ETCs by the FCC. While these new requirements apply only to carriers designated by the FCC, the FCC has encouraged states to consider adopting the designation and reporting requirements for state-designated ETCs. *March 2005 Order*, ¶¶ 1, 58. Western Wireless appreciates this opportunity to provide comment on the appropriate action for the Commission to take in light of the issues raised in the *March 2005 Order*.

¹ *Federal-State Joint Board on Universal Service*, CC Docket 96-45, Report and Order, FCC 05-46 (rel. March 17, 2005) ("*March 2005 Order*").

II. THE NEW DESIGNATION STANDARDS SHOULD NOT APPLY TO PENDING APPLICATIONS.

Because the new standards for ETC designation contained in the *March 2005 Order* apply only to ETC designation petitions filed with the FCC after the effective date of the new rules, new designation standards should not apply to Western Wireless' pending Application.

Under well-established Idaho law, the Commission must apply the substantive administrative rules in effect at the time a proceeding is commenced. *See, e.g., Canal/Norcrest/Columbus Action Comm. v. City of Boise*, 137 Idaho 377, 48 P.3d 1266 (2002) ("In Idaho 'an applicant's rights are determined by the ordinance in existence at the time of filing an application for the permit.'") (citing *Payette River Property Owners Ass'n v. Board of Comm'rs of Valley County*, 132 Idaho 551, 555, 976 P.2d 477, 481 (1999) and *South Fork Coalition v. Board of Comm'rs*, 117 Idaho 857, 860-61, 792 P.2d 882, 885-86 (1990)). In contrast, subsequent changes in procedural rules are applicable to existing proceedings. *See, e.g., University of Utah Hosp. v. Pence*, 104 Idaho 172, 657 P.2d 459 (1982); *see also Ventura v. State Equal Opportunity Comm'n*, 246 Neb. 116, 123, 517 N.W.2d 368, 374-75 (1994) (stating that in contrast to substantive law, the procedural rules to be applied are those in effect on the date of the administrative hearing); *Dolese Bros. Co. v. State of Oklahoma ex rel. Oklahoma Tax Comm'n*, 64 P.3d 1093, 1098 (Okla. 2003) ("Generally, substantive administrative rules and regulations apply only to conduct that occurs after their effective date.") (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)).

The FCC's *March 2005 Order* itself does not apply to applications that are currently pending at the FCC. When the FCC's new rules become final on June 24, 2005, Rule 47 C.F.R. § 54.202 will read:

§ 54.202 Additional requirements for Commission designation of eligible telecommunications carriers.

(a) 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...

47 C.F.R. § 54.202 (emphasis added). Moreover, new reporting requirements would apply at the federal level only to applications filed "on or after the effective date" of the new rules:

(b) Any common carrier that has been designated under section 214(e)(6) as an eligible telecommunications carrier or that has submitted its application for designation under section 214(e)(6) before the effective date of these rules must submit the information required by paragraph (a) of this section no later than October 1, 2006, as part of its annual reporting requirements under section 54.209.

47 C.F.R. § 54.202(b) (emphasis added).

As the Commission stated in the *Notice and Order*, "[i]t is undisputed that Western Wireless' Application was filed before the FCC issued its new ETC rules." *Notice and Order*, p. 6. To be consistent with the FCC's action and principles of administrative law, the Commission should not apply new substantive designation standards to Western Wireless' pending Application.

I. IF ADOPTED, THE FCC'S NEW DESIGNATION REQUIREMENTS SHOULD BE MODIFIED BY THE IDAHO COMMISSION

Western Wireless generally supports the Commission's adoption of ETC designation standards consistent with FCC's new Rules, so long as the Commission adopts those rules on a going-forward basis. In a few instances, however, as detailed below, Western Wireless proposes modifications it believes will be more efficient and best serve universal service goals in the state of Idaho. Western Wireless will address each separate part of new FCC Rule 54.202 in order.

A. The Commission Should Allow a Wireless ETC Applicant to Demonstrate a Commitment and Ability to Provide the Supported Services Using the Standard in FCC Rule 54.202(a)(1)(A)

New FCC Rule 54.202(a)(1)(A) requires applicants seeking ETC designation from the FCC to commit to provide service throughout its proposed designated service area to all customers who make a reasonable request for service. Under the rule, if the ETC's network already passes or

covers a potential customer's premises, the ETC should provide service on a timely basis. If a potential customer within the applicant's licensed area but outside of its coverage seeks service, the ETC should provide service within a reasonable time if service can be provided at a 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; or (f) employing, leasing or constructing an additional cell site, cell extender, repeater or other similar equipment. Although the FCC's new rules apply to all applicants seeking designation from the FCC, the language of the rule focuses on wireless technology.

Western Wireless supports the Commission's adoption of the standards in this rule. By establishing a clear process for addressing requests for service in the wireless context, the FCC has resolved an issue that has troubled state commissions in the past. *See In the Matter of the Application of NPCR, Inc.*, Case No. GNR-T-03-16, Order No. 29541, p. 20 (July 23, 2004) ("*Nextel Order*") (commission concerned that wireless ETC applicant did not have a procedure for addressing requests for service). Going forward, the Commission should adopt this six step process as a method for ETCs to meet their obligation to respond to reasonable requests for service.

Because this rule is focused on wireless technology, it would not apply to landline ETC applicants, even though landline carriers also have an obligation to provide service upon reasonable request. Western Wireless has not reviewed the service extension requirements applicable to potential landline ETC applicants, but the Commission should consider whether different service extension standards are necessary for landline carriers to serve the goals of 47 U.S.C. § 214(e).

B. The Commission Should Not Require a Five Year Service Improvement Plan, But Should Adopt Reporting Requirements that Solicit Targeted and Reliable Data Each Year

New FCC Rule 54.202(a)(1)(B) requires an applicant seeking ETC designation from the FCC to submit a five-year plan that describes proposed improvements or upgrades to the applicant's network on a wire-center-by-wire-center basis. A five year plan will be speculative and cause significant administrative burdens. Rather than adopting this requirement, the Commission should instead focus its efforts on the annual certification process and require all carriers to file detailed expenditure and network improvement information covering a 24-month period. This will provide better information for the Commission and reduce unnecessary regulatory expenses for all carriers in the state. Information should be reported based on each carrier's own ETC service area in the state, not on a wire center basis. For designation purposes, the Commission should require a new applicant to provide detailed information regarding the current year's plans, and then to provide 24 months of information during the annual certification process.

1. The Commission should not require a five year service improvement plan

New FCC Rule 54.202(b) requires that an applicant for ETC designation under Section 214(e)(6) must file a five-year service improvement plan for using support to improve its network. The new rule does not, however, require a carrier to demonstrate that it will complete construction of its network or reach ubiquitous service levels within five years. Moreover, as market conditions change, carriers will be permitted to amend their service improvement plans in subsequent years. Nonetheless, this is a burdensome new regulatory requirement that will require an applicant to prepare expenditure projections far beyond what is regularly done in the dynamic telecommunications industry.

First, all carriers, regardless of their technology, will have substantial difficulty creating a five-year service improvement plan. Western Wireless does not today plan this far ahead, and will likely have difficulty doing so with any degree of confidence. As the Commission is aware, the telecommunications industry is in a period of rapid technological change, both with regard to the technologies being used and the services being provided. Consumer demand for specific wireless services is difficult to predict, and is subject to rapid change. The business and investment climate is uncertain, and no company knows what capital will be available for investment three, four, or five years in the future. Moreover, no one knows how federal universal service funding will be calculated and distributed over the long run, much less how much any particular carrier will receive.

For these reasons, Western Wireless' plans for network improvement are generally developed the year prior to their implementation. This procedure allows Western Wireless to plan based on what customers are demanding, on what technology is most efficient, and on what capital and universal service funding is available. In contrast, a five-year projection would be speculative and will not necessarily drive the actual planning that a carrier does for years three, four and five of the plan.

A requirement to prepare detailed service improvement plans for five years will be a burdensome and expensive regulatory obligation. The budgeting process that a carrier undertakes for just one upcoming year can take literally hundreds of hours to research, create, review and approve. Moreover, when market dynamics and estimated support change from year to year, plans made for years 3-5 will have to be redone, and the initial costs will have been unnecessarily incurred. The Commission should not impose a regulatory obligation that has a high cost and few benefits. Carriers and consumers would be better served by having Idaho ETCs spend scarce

resources to meet market demands instead of to create and recreate future non-binding network plans.

It would be especially unfair to require Western Wireless to provide a five-year service improvement plan as part of this pending case. The concept of a five-year plan was first introduced less than 12 weeks ago. The federal rule requiring a five-year plan has not yet been published, and Western Wireless will have 18 months at the federal level to conduct this analysis and create a process for developing a five-year plan. At this early stage, Western Wireless does not have a need for a five-year plan, has not prepared one for Idaho, and there is no industry standard or FCC-endorsed model upon which to base a five-year plan. In addition, FCC-designated ETCs may ask the FCC to reconsider, modify or clarify the five-year service improvement plan. If the FCC's five-year plan requirement is modified as a result of these requests, this Application will have been processed based on standards that were never enforced at the federal level. Under these circumstances it would be unfair to require Western Wireless to file such a plan during the designation process in this case.

2. The Commission Should Require Targeted, Reliable Information Covering a 24 Month Period

Instead of requiring a five-year service improvement plan as set forth in the *March 2005 Order*, the Commission should focus its efforts on the annual process required by 47 C.F.R. §§ 54.313-.314 in which the Commission certifies to the FCC and the Universal Service Administrative Corporation ("USAC") that ETCs it has designated will use federal universal service support for the purposes for which it is intended. The Commission should, as part of this process, require all ETCs to file detailed and targeted expenditure information for a 24-month period. In this way the Commission can obtain detailed, accurate information that it can use to assess whether ETCs are spending universal service funds appropriately. Then, in the designation

process the Commission should require an ETC applicant to show its plans for the current year and to commit to complying with the annual certification process that is adopted.

Western Wireless supports Commission oversight and monitoring of all ETCs' use of funds. In the past, the Commission has done little review of ETCs' use of funds prior to issuing an annual certification to the FCC and USAC. Instead, the Commission has accepted and relied on a self certification from each carrier. While this process is sufficient, the Commission can do more to ensure that all carriers are using funds appropriately. Western Wireless supports this process, which will do more for universal service than establishing unneeded barriers in the designation process.

Going forward, the Commission should increase accountability in this certification process by requiring all ETCs to make detailed filings that look at spending and planning for a two-year period. This approach to the certification process has been implemented by other states, including West Virginia, Maine, Vermont, Oregon, and South Dakota. Western Wireless suggests the following model that will provide targeted and reliable data each year, in advance of the deadline for state certification to the FCC:

- Information would be filed on the June 1 prior to the October 1 certification deadline.
- The filing would describe how much support the carrier received in the prior calendar year, and would describe how that support was used for the provision, maintenance, or upgrading of the company's facilities and services to provide supported services. The filing would explain any changes from plans that have been previously provided to the Commission.
- The filing would provide an estimate of how much support the carrier anticipates receiving in the current calendar year, and would describe how that support has been used and will be used, for the provision, maintenance, or upgrading of the company's facilities and services to provide supported services. The filing would identify specific construction projects and, if necessary, maps, depicting how coverage will be improved during the year.

- The filing would include an affidavit from a company representative stating that support received in the following calendar year would be used only for its intended purposes.
- Such filings would be designated as "trade secret" and not available for public disclosure.

This detailed, reliable, and accurate information would allow the Commission to ensure that funds are being spent as required by law and to issue FCC certifications necessary for continued receipt of support. This process would also allow the Commission to monitor the evolution of carriers' network infrastructure over time in relation to the federal universal service support received. A filing of this nature, rather than a five-year service improvement plan, will best serve the goals of universal service in Idaho.

With this added focus on the annual certification process the Commission should require an ETC applicant to provide detailed information on its current year's plans for its requested designated areas and to commit to complying with the annual certification process. By not making a speculative five-year service improvement plan a barrier to entry, and ensuring a proper focus in the way in which funds are spent, the Commission can best serve the interests of the consumers in the state of Idaho.

3. The Commission should not require reporting at the wire center level

If the Commission requires ETC applicants or designated ETCs to file reports regarding their network plans or use of support, those reports should be made for the ETC's designated area in Idaho, not at the wire center level. Western Wireless' network is not engineered around wire centers, and Western Wireless does not track capital investment, coverage, or demand on a wire center basis. Instead, because wireless service transcends geographic boundaries, wireless carriers generally divide their service areas into markets that are much larger than wire centers and do not follow wire center boundaries. Organizing and tracking capital investment, coverage, network

planning and customer demographics by wire center would require a substantial reconfiguration of wireless carriers' business and accounting practices. In addition, because rural telephone company support amounts are generally averaged over an entire study area, a competitor's planning should not take place below the study area level. The Commission should order that all ETCs must provide information based on their entire ETC service area in the state of Idaho rather than by wire center.

C. The Commission Should Require ETC Applicants to Demonstrate An Ability to Remain Functional in Emergency Situations, but Should Apply That Standard on a Competitively Neutral Basis

FCC Rule 54.202(a)(2) requires an applicant seeking ETC designation from the FCC to demonstrate that it is able to remain functional in emergency situations, including a demonstration that it has a reasonable amount of backup power, is able to re-route traffic around damaged facilities, and is capable of managing traffic spikes resulting from emergency situations. Western Wireless does not oppose the adoption of a wireless standard in Idaho, so long as the Commission, applies this standard in a competitively-neutral manner. The Commission should understand how wireless networks are engineered to address issues related to power loss, loss of facilities, and traffic spikes, and may want to consider adopting a requirement that an ETC applicant commit to industry-standard best practices for addressing emergency situations.

Wireless carriers generally maintain backup power at both cell sites and switches that will allow the network to remain functional for 4-8 hours during a loss of external power. In addition, carriers may have one or more backup generators available to a service area if external power is lost for an extended period of time. Western Wireless believes that this is sufficient and meets the standard in the new FCC Rule.

With regard to re-routing traffic around damaged facilities, Western Wireless generally engineers a degree of redundancy into its transport network, but it will not be possible for all calls

to be delivered when a cell site goes down. For example, while a cell site is down, a customer's signal may be picked up by an adjacent site or by another carrier's site in the area, but if there is no site that can pick up the signal, a call cannot be "re-routed." This is similar to what occurs when a landline customer's loop is damaged, as there is simply no way for a call to travel from the customer's house to the landline switch. In both cases, the carrier's inability to "re-route" a call is a function of the technology and network engineering, and should not be seen as lack of ability or commitment to provide service in emergency situations.

With regard to traffic spikes, wireless companies generally engineer their networks so that fewer than 2% of calls are blocked at cell sites at the busiest hour of the day, and fewer than 1% of calls are blocked at the switch. In addition, excess digital traffic at a cell site can be "pushed" to open analog channels, increasing capacity and reducing blocking. However, if an emergency situation causes usage at twice the level of busy hour usage, the capacity engineered into the system will be exceeded. Because such emergency situations are extremely rare and unpredictable, no wireless carrier could justify spending capital resources to overbuild capacity at every cell tower. The Commission should keep these network engineering issues in mind as it applies a standard that ETC applicants demonstrate an ability to manage traffic spikes.

In requiring an ETC to "demonstrate its ability to remain functional in emergency situations" the Commission should understand the technical issues inherent in ETCs' networks and require a showing that the applicant follows best practices in the industry for its technology. The Commission should be careful not to disqualify an applicant based on limitations that are inherent in the carrier's technology.

D. FCC Rule 54.202(a)(3) Concerning Applicable Consumer Protection and Service Quality Standards Should be Adopted For Wireless ETC Applicants

FCC Rule 54.202(a)(3) requires carriers seeking ETC designation from the FCC to make specific commitments to meet objective consumer protection and service quality standards. The FCC has further provided that for a wireless applicant, a commitment to comply with the CTIA Consumer Code satisfies the requirement. 47 C.F.R. § 54.202(a)(3) ("A commitment by wireless applicants to comply with the Cellular Telecommunications and Internet Association's Consumer Code for Wireless Service will satisfy this requirement.").

Western Wireless supports Commission adoption of this FCC Rule. The CTIA Code sets forth certain principles, disclosures and practices for the provision of wireless service that benefit consumers: The CTIA Code, which is available at http://www.wow-com.com/pdf/The_Code.pdf provides that wireless carriers agree to:

(1) [D]isclose rates and terms of service to customers; (2) make available maps showing where service is generally available; (3) provide contract terms to customers and confirm changes in service; (4) allow a trial period for new service; (5) provide specific disclosures in advertising; (6) separately identify carrier charges from taxes on billing statements; (7) provide customers the right to terminate service for changes to contract terms; (8) provide ready access to customer service; (9) promptly respond to consumer inquiries and complaints received from government agencies; and (10) abide by policies for protection of consumer privacy.

The FCC has repeatedly determined that for a wireless carrier seeking ETC designation, a commitment to comply with the CTIA Code constitutes a specific commitment to meet objective consumer protection measures. *March 2005 Order*, ¶ 28; *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, ¶ 30 & fn.94 (rel. Jan. 22, 2004). While the Commission did not endorse the CTIA Code in the Nextel ETC case, the FCC's codification of this standard and the lack of any other "applicable" ETC standards should convince

the Commission to change course. Because adherence to the principles and practices set forth in the CTIA Code ensures that wireless carriers provide high-quality consumer service that leads to consumer satisfaction, Western Wireless supports the Commission's adoption of this FCC standard.

E. The Commission Should Not Require a Competitive ETC to Demonstrate that It has a Comparable Local Usage Plan

New FCC Rule 54.202(a)(4) requires an ETC applicant to show that it has one local usage plan that is "comparable" to that offered by the incumbent ETC in the area. This is unnecessary, not competitively neutral, requires the Commission to do the job of consumers, and should not be adopted.

The Act is designed to achieve the goal of universal service through the operation of competitive markets in rural areas. *Alenco Communications Inc. v. F.C.C.*, 201 F.3d 608, 614-15 (5th Cir. 2000). A fundamental principle of our free market system is that when competitive markets exist and consumer preferences are allowed to drive the goods and services provided, consumers win. It is this policy that has led the wireless industry from its infancy 15 years ago to where it is today. Wireless service offerings look the way they do today because companies have innovated and consumers have responded. For example; "National" plans, free in-network calling, inexpensive state-of-the-art handsets, and per-second billing, exist because of competition and consumer demand, not because of regulatory mandates. It would be difficult to argue that regulators could have done a better job than consumers have done over this period of driving the industry's success in meeting customer needs.

Western Wireless is confident that it provides service plans that would be found "comparable" to the ILECs' plans. But Western Wireless is opposed to this exercise being conducted at all. Western Wireless should be allowed to offer the FCC's supported services within service plans that are designed to satisfy consumers in a competitive market, not to satisfy

regulators. It is significant that there is no evidence that a comparability exercise will produce a result that will bring consumers something that they want but cannot get from competitive markets. In addition, making the ILEC's service offering the baseline is at odds with the principle of competitive neutrality, which provides that no carrier should be placed at a disadvantage due to its technology or regulatory status. *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, FCC 97-157, ¶ 47 (rel. May 8, 1997) ("*Universal Service Order*"). The Commission should not adopt this requirement in Idaho.

If the Commission does adopt this requirement it should make clear that this comparability analysis will be conducted with reference to one plan available from the applicant (as opposed to all plans that contain the supported services). The Commission should also commit to conducting a broad comparability test that looks at more than just the number of available minutes and the prices, instead recognizing that value can come in the form of mobility, larger local calling areas, and other features of wireless service. *See March 2005 Order*, ¶ 33.

F. The Commission Should Not Require An Equal Access Certification

Rule 54.202(a)(5) requires a carrier seeking ETC designation from the FCC to certify that "the carrier acknowledges that the [FCC] may require it to provide equal access to long distance carriers in the event that no other eligible telecommunications carrier is providing equal access within the service area." Western Wireless believes it is not necessary to require an ETC applicant to make this acknowledgment. Under 47 U.S.C. § 332(c)(8), the FCC, not a state commission, has the authority to require a CMRS provider to provide equal access:

A person engaged in the provision of commercial mobile services, insofar as such person is so engaged, shall not be required to provide equal access to common carriers for the provision of telephone toll services. If the Commission [i.e., the FCC] determines that subscribers to such services are denied access to the provider of telephone toll services of the subscribers' choice, and that such denial is contrary to the public interest, convenience, and necessity, then the Commission shall prescribe regulations to afford subscribers unblocked access to the provider of

telephone toll services of the subscribers' choice through the use of a carrier identification code assigned to such provider or other mechanism.

47 U.S.C. § 332(c)(8) (emphasis added). In the *March 2005 Order*, the FCC cited Section 332 and said that "if such circumstances arise, the Commission should consider whether to impose an equal access or similar requirement under the Act." *March 2005 Order*, ¶ 35. As a result, it will be the FCC that considers this issue in the case of the unusual circumstances contemplated. An "acknowledgment" to the Idaho Commission that the FCC may require it to provide equal access is unnecessary and adds nothing to the ETC designation process.

G. The Commission should Set a June 1 Reporting Deadline

New FCC Rule 54.202(b) requires designated ETCs or carriers with applications pending to submit the information required by Rule 54.202(a) by October 1, 2006, as part of its annual reporting under FCC Rule 54.209. Western Wireless supports Commission adoption of this standard for two important reasons.

First, as noted above, the FCC made clear that carriers with applications currently pending (like Western Wireless in this case) should not be required to meet these new standards in the designation process. Instead, new substantive and reporting standards would be applicable beginning in 2006. Second, this FCC rule requires that all carriers, not just competitive ETCs or wireless ETCs, must meet new reporting requirements. This is consistent with the FCC's statements in the *March 2005 Order*:

We do not believe that different ETCs should be subject to different obligations, going forward, because of when they happened to first obtain ETC designation from the Commission or the state.

...

[W]e encourage state commissions to apply the reporting requirements to all ETCs, not just competitive ETCs.

Id. ¶¶ 20, 71. As a result, if the Commission adopts new reporting requirements it should require all designated ETCs, and carriers with applications currently pending, to meet these reporting requirements for the first time in 2006.

Second, because states themselves must certify to the FCC by October 1, carriers should report to state commissions before October 1 so states can evaluate the filed information before issuing its certification. As noted above, Western Wireless supports a June 1 filing requirement to ensure there is sufficient time in the certification process.

H. The Commission Should Adopt A Public Interest Analysis Consistent With That Set Forth In Rule 54.202(c)

FCC Rule 254.202(c) provides that in evaluating whether an ETC designation would serve the public interest in accordance with 47 U.S.C. § 214(e)(2), the FCC will consider the benefits of competitive choice and the advantages of the applicant's service offerings. The Commission should adopt this framework for evaluating the public interest, and should depart from the public interest factors the Commission relied on in the Nextel ETC case.

In the Nextel case the Commission applied a public interest standard that is very difficult for a competitor to meet, and that if applied consistently will make it unlikely that Idaho consumers will receive the full benefits of the universal service program. For example, the Commission noted that the applicant had not proven that it "needed to receive support in order to extend service." *Nextel Order*, p. 22. However, there is no "needs test" under the federal universal service program, and the application of such a test is discriminatory. By adopting a public interest standard that does not contain a needs test the FCC has implicitly agreed that such a showing is not required to serve the public interest. As it moves forward, the Commission should not impose a "needs" test that clearly does not exist.

The Commission's real concern in the Nextel case was that it was not sure that federal universal service support received by the applicant would be spent appropriately in Idaho. *Nextel Order*, p. 22. If the Commission accepts Western Wireless' recommendation to change the certification process to ensure Commission review of detailed expenditure and funding information, that concern will be addressed every year. Because this will be considered in the annual certification process, the Commission need not (and should not) consider this as a threshold public interest issue.

The Commission's public interest analysis in the Nextel case also relied on its decision that the "designating ETCs in rural areas puts additional stress on the USF and the public interest is not served in this case by subsidizing multiple carriers in rural high cost areas." *Nextel Order*, p. 23. In its *March 2005 Order* the FCC rejected this kind of general conclusion, refusing to adopt a rebuttable presumption that the public interest is not served by additional ETC designations. *March 2005 Order*, ¶ 57. The FCC has signaled that continued ETC designations in rural areas are good for consumers and finding issues will be managed by the Joint Board and FCC on an ongoing basis. The Commission should follow this guidance, adopt the FCC's public interest test, and welcome competitive ETCs as joint participants in delivering universal services to rural Idaho.

I. The Commission Should Adopt and Supplement FCC Rule 54.202(c) to Codify a Creamskimming Analysis

FCC Rule 54.202(c) also provides that where an ETC applicant seeks designation below the study area level of a rural telephone company, the FCC will conduct a creamskimming analysis. The FCC Rule 54.202(c) specifies that a creamskimming analysis will include two elements: 1) a comparison of the population density of the rural telephone company's wire centers for which the ETC applicant seeks designation to the population density of the rural telephone company's wire

centers for which the ETC applicant does not seek designation; and 2) a consideration of whether the incumbent local exchange carrier has disaggregated support.

Western Wireless supports a Commission rule describing how it should proceed when an ETC applicant seeks to serve in a portion of a rural telephone company study area. To ensure clarity and certainty in this process, however, the Commission should further provide that if the rural telephone company has disaggregated support or if the population density analysis does not demonstrate creamskimming, the Commission shall authorize the applicant's designation in the wire centers where designation is sought. Whether disaggregation has occurred is important because disaggregation targets support, minimizing or eliminating any chance of creamskimming. *March 2005 Order*, ¶ 51. And as the FCC has observed, the population density analysis is important because it provides an objective means for identifying whether the ETC applicant is seeking to serve only the lower cost wire centers to the exclusion of less profitable areas. *March 2005 Order*, ¶ 50. These supplements to FCC Rule 54.202(c) will provide needed clarity and predictability to the Commission's creamskimming analysis.

J. FCC Rule 54.202(d) Concerning ETC Designation for Tribal Lands

FCC Rule 54.202(d) establishes additional standards for FCC ETC designation requests on tribal lands. Western Wireless does not know whether a competitive ETC would seek designation for tribal lands in Idaho before the Commission under 47 U.S.C. § 214(e)(2), or before the FCC under 47 U.S.C. § 214(e)(6). Western Wireless does not oppose the Commission's adoption of a rule like FCC Rule 54.202(d) if there are applicable tribal lands in the state.

II. THE COMMISSION SHOULD ADOPT NEW ANNUAL REPORTING REQUIREMENTS FOR ALL ETCs, BUT SHOULD MODIFY THE STANDARDS IN THE FCC'S NEW RULES

A. Any New Reporting Or Certification Requirements Must Apply To All ETCs

If the Commission proceeds to impose new reporting or certification requirements, it is of primary importance the new standards apply to all ETCs, not just competitive ETCs. The FCC's new Rules apply to all federally-designated ETCs, and the FCC has cautioned that state rules should not distinguish among ETCs based on how they are regulated or what communications technology is used:

We do not believe that different ETCs should be subject to different obligations, going forward, because of when they happened to first obtain ETC designation from the Commission or the state.

March 2005 Order, ¶ 20. Consistent with this policy principle, the FCC stated:

[W]e encourage state commissions to apply the reporting requirements to all ETCs, not just competitive ETCs.

Id. ¶ 71.

In 1997 the FCC adopted the principle of competitive neutrality as a core principle for its universal service rules. This principle means that universal service rules must not favor one competitor or one technology over another. *Universal Service Order*, ¶ 47. Because the obligation to spend universal service funds for the purposes for which they are intended applies to all ETCs, it would violate the principal of competitive neutrality to require only certain carriers to meet heightened reporting standards. *See March 2005 Order*, ¶ 20 ("These are responsibilities associated with receiving universal service support that apply to all ETCs, regardless of the date of initial designation."). To be consistent with this core principle, and as recommended by the FCC, any new reporting or certification requirements must apply to incumbent ETCs, competitive ETCs, and new ETC applicants.

B. The FCC's Service Improvement Reporting Requirements Should be Modified for Idaho

Consistent with Western Wireless' Comments regarding FCC Rule 54.202(a)(1)(B), Western Wireless supports Commission action that heightens the level and quality of reporting for certification process, but does not require carriers to file or maintain a five-year service improvement plan. *Supra.* pp. 9-10. By focusing their efforts on 24 months of detailed, accurate information, the Commission can assess whether ETCs are spending universal service funds appropriately and ensure that this program is best serving customers. In addition, any such reporting rules should modify the Rule to require an ETC to report service improvements and expenses for its entire designated area in the state of Idaho, rather than on a wire center basis. *Supra.*, p. 10-11.

C. Outage Reporting Should Track Reporting Already Required By Federal Law.

New FCC Rule 54.209(a)(2) requires ETCs to report detailed information on "any outage as the term is defined in 47 C.F.R. § 4.5." Western Wireless does not object to a Commission requirement that all ETCs file outage data, but if it does so the Commission should depart from the requirements of the FCC's new rule. All carriers providing voice communications (including all designated ETCs) recently became subject to federal outage reporting requirements. *In the Matter of New Part 4 of the Commission's Rules Concerning Disruptions to Communications*, ET Docket No. 04-35, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 04-188 (rel. Aug. 19, 2004) ("*Outage Order*"). The FCC rules promulgated in the *Outage Order* (47 C.F.R. § 4.1 *et seq.*) impose detailed reporting requirements, which are specifically tailored to the technology used by each type of voice service provider. Wireless carriers have the following obligation:

Wireless. All wireless service providers shall submit electronically a Notification to the Commission within 120 minutes of discovering that they have experienced on any facilities that they own, operate, lease, or otherwise utilize, an outage of at least 30

minutes duration: (1) of a Mobile Switching Center (MSC); (2) that potentially affects at least 900,000 user minutes of either telephony and associated data (2nd generation or lower) service or paging service; (3) that affects at least 1,350 DS3 minutes; (4) that potentially affects any special offices and facilities (in accordance with paragraphs (a) - (d) of section 4.5) other than airports; or (5) that potentially affects a 911 special facility (as defined in (e) of section 4.5), in which case they also shall notify, as soon as possible by telephone or other electronic means, any official who has been designated by the management of the affected 911 facility as the provider's contact person for communications outages at that facility, and they shall convey to that person all available information that may be useful to the management of the affected facility in mitigating the effects of the outage on callers to that facility. (DS3 minutes and user minutes are defined in paragraphs (d) and (e) of section 4.7.) In determining the number of users potentially affected by a failure of a switch, a concentration ratio of 8 shall be applied. For providers of paging service solely, however, the following outage criteria shall apply instead of those in subparagraphs (1) - (3), above: Notification must be submitted if the failure of a switch for at least 30 minutes duration potentially affects at least 900,000 user-minutes. Not later than 72 hours after discovering the outage, the provider shall submit electronically an Initial Communications Outage Report to the Commission. Not later than thirty days after discovering the outage, the provider shall submit electronically a Final Communications Outage Report to the Commission. The Notification and the Initial and Final reports shall comply with all of the requirements of section 4.11.

47 C.F.R. § 4.9(b). These standards are similar to, but not identical to, the standards in the new FCC Rule 54.209(a)(2).

The Commission would be best served by requiring that during the annual certification process all ETCs file copies of any service outage reports with the FCC pursuant to *Outage Order* since the prior year's certification. As required by the FCC, these filings should be designated as trade secret and not be available for public disclosure. *Outage Order*, ¶ 3. This will provide the Commission with sufficient information to allow it to monitor outages, without imposing a second set of standards for carriers to use in tracking and reporting outages.

D. ETCs Should Report on Their Responses To Requests for Service

New FCC Rule 54.209(a)(3) requires ETCs to report the number of unfilled requests for service and to identify how the carrier attempted to provide service to those customers in light of the FCC's six-step process for responding to requests for service. 47 C.F.R. § 54.209(a)(3).

Western Wireless supports Commission action codifying this six-step process and requiring all ETCs to reporting unfilled requests on an annual basis.

E. There is No Need for ETCs to Report Complaints

New FCC Rule 54.209(a)(4) requires FCC-designated ETCs to report the number of complaints per 1000 handsets. There is no evidence that such reporting is necessary to ensure the continued success of the federal universal service program in the state. The Commission should not impose reporting requirements in the absence of a demonstrated need. As discussed above, any such reporting requirements that the Commission adopts must apply equally to all Idaho ETCs.

F. Certification Regarding Applicable Service Quality Standards

New FCC Rule 54.209(a)(5) requires FCC-designated ETCs to certify that they are complying with applicable service quality standards and consumer protection rules. As noted above, the FCC has provided that the CTIA Consumer Code, rather than state-commission local exchange service quality standards, would apply to wireless ETCs. Western Wireless supports a Commission rule codifying this standard and would not object to a requirement that all wireless ETCs annually certify their compliance with this standard.

G. Certification Regarding the Ability to Remain Functional In Emergency Situations

New FCC Rule 54.209(a)(6) requires an FCC-designated ETC to certify that it is able to function in emergency situations. 47 C.F.R. § 54.209(a)(6). As noted above, Western Wireless does not object to a requirement that all ETCs certify that they are able to remain functional in emergency situations so long as the reporting requirement applies to all ETCs, and the underlying standard is applied on a competitively-neutral basis. Western Wireless, also notes that Rule 54.209(a)(6) contains a typographical error. It requires an ETC to certify that it is able to function in emergency situations "as set forth in 47 C.F.R. § 54.201(a)(2)." The proper cross-reference is

Section 54.202(a)(2), which is the new FCC Rule providing that ETC applicants should demonstrate an ability to remain functional in emergency situations.

H. Comparable Local Usage Plan

New FCC Rule 54.209(a)(7) requires ETCs to certify that they are offering a local usage plan comparable to that offered by the incumbent LEC in the relevant service areas. As set forth above, Western Wireless believes this requirement is unnecessary and not competitively neutral. If the Commission rejects the underlying substantive requirement, then no reporting is necessary.

I. Equal Access

New FCC Rule 54.209(a)(8) requires ETCs to certify that the FCC may require a wireless ETC to offer equal access to long distance carriers if no other ETC is providing equal access within the service area. As set forth above, Western Wireless believes this requirement is unnecessary. If the Commission rejects the underlying substantive requirement, then no reporting is necessary.

J. The Commission Should Establish a June 1 Filing Deadline

New FCC Rule 54.209(b) establishes an October 1 deadline for FCC-designated ETCs to file the information set forth in rule 54.209(a). As noted above, Western Wireless supports a state commission filing deadline of June 1, which will allow the Commission to review filed information and issue certifications to the FCC Rule before the October 1 deadline set forth in 47 C.F.R. §§ 54.313-.314.

III. FCC RULES 54.307, .313, .314, AND .809 NEED NOT BE ADOPTED

In the *March 2005 Order* the FCC amended 47 C.F.R. §§ 54.307, .313, .314 and .809 to address issues related to the federal funding mechanisms. Because these mechanisms are administered by USAC under the FCC's supervision, the Commission need not and should not adopt comparable rules.

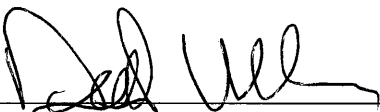
IV. CONCLUSION

Western Wireless appreciates the opportunity to offer these Comments as the Commission considers adopting new ETC designation and reporting requirements.

Respectfully submitted,

Dated: June 17, 2005

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 June 17, 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 June 17, 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 ☐

