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IDAHO PUBLIC
UTILITIES COMMISSION

Attorneys for Idaho Telephone Association
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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

**IDAHO TELEPHONE ASSOCIATION'S
MOTION TO DISMISS**

The Idaho Telephone Association ("ITA"), by and through its attorneys of record, Givens Pursley LLP, pursuant to Rule 56 of the IPUC Rules of Procedure, IDAPA 31.01.01.056, hereby files this Motion to Dismiss the Application of Western Wireless in the above-entitled action for failure to state a claim upon which relief can be granted. In support of its Motion, the ITA states as follows:

STATEMENT OF THE CASE

On February 17, 2005, WWC Holding Co., Inc., d/b/a CellularOne ("Western Wireless" or Applicant) filed with the Idaho Public Utilities Commission ("Commission") an Application for Designation as an Eligible Telecommunications Carrier. Western Wireless's application requests an eligible telecommunications carrier ("ETC") designation for its wireless

telecommunications service within the service areas of the following incumbent local exchange carriers (“ILECs”): Qwest Corporation (“Qwest”), Citizens Telecommunications Company of Idaho (“Citizens”), Farmers Mutual Telephone Company (“Farmers”), Cambridge Telephone Company (“Cambridge”), and Midvale Telephone Exchange, Inc. (“Midvale”). All of these ILECs except Qwest are “rural telephone companies” as that term is defined in 47 U.S.C. § 153(37).

In Order No. 29749, the Commission issued its Notice of Application and Notice of Modified Procedure in this matter. The Idaho Telephone Association¹ petitioned to intervene on February 23, 2005, and the Commission granted its petition in Order No. 29722, issued on March 10, 2005.

ARGUMENT

In its Application, Western Wireless alleges that “the requirements for ETC designation are set forth in 47 U.S.C § 214(e)(1)-(2) and 47 C.F.R. § 54.101.” Application § A(8). Section 214(e)(1) of the Telecommunications Act of 1996, provides that an applicant for ETC status:

- shall, throughout the service area for which such designation is received—
- (A) offer the services that are supported by Federal universal support mechanisms under section 254 . . . ; and
- (B) advertise the availability of such services and the charges therefore using media of general distribution.

47 U.S.C. § 214(e)(1). Section 214(e)(5) further provides:

In the case of an area served by a rural telephone company “service area” means such company’s “study area” unless and until the Commission and the States after

¹ The ITA is authorized to represent member companies in regulatory proceedings and in other public policy matters. ITA member companies include: Albion Telephone Company, Cambridge Telephone Company, Custer Telephone Cooperative, Inc., Farmers Mutual Telephone Company, Filer Mutual Telephone Company, Inland Telephone Company, Midvale Telephone Company, Mud Lake Telephone Cooperative Association, Project Mutual Telephone Cooperative Association, Direct Communications – Rockland, Rural Telephone Company, Silver Star Telephone Company, Oregon-Idaho Utilities, and Fremont Telecom.

taking into account recommendations of a Federal-State Joint Board instituted under section 410(c), establish a different definition of service area for such company.

Section 54.101 of the Code of Federal Regulations essentially repeats this statutory language.

Applicant's characterization of the governing law was correct at the time it filed its Application. Since that time, however, the Federal Communications Commission has adopted additional regulatory requirements for ETC applications in cases such as this.

See In the Matter of Federal-State Joint Board On Universal Service, CC Docket 96-45 March 17, 2005 (hereafter *Order*). These additional substantive requirements are set forth in pertinent part below:

§ 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:

(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; and

(B) submit a five-year plan that describes with specificity proposed improvements or upgrades to the applicant's network on a wire center-by-wire center basis throughout its proposed designated service area. Each applicant shall demonstrate how signal quality, coverage or capacity will improve due to the receipt of high-cost support; the projected start date and completion date for each improvement and the estimated amount of investment for each project that is funded by high-cost support; the specific geographic areas where the improvements will be made;

and the estimated population that will be served as a result of the improvements. If an applicant believes that service improvements in a particular wire center are not needed, it must explain its basis for this determination and demonstrate how funding will otherwise be used to further the provision of supported services in that area.

(2) demonstrate its ability to remain functional in emergency situations, including a demonstration that it has a reasonable amount of back-up power to ensure functionality without an external power source, is able to reroute traffic around damaged facilities, and is capable of managing traffic spikes resulting from emergency situations.

(3) demonstrate that it will satisfy applicable consumer protection and service quality standards. A commitment by wireless applicants to comply with the Cellular Telecommunications and Internet Association's Consumer Code for Wireless Service will satisfy this requirement. Other commitments will be considered on a case-by-case basis.

(4) demonstrate that it offers a local usage plan comparable to the one offered by the incumbent LEC in the service areas for which it seeks designation.

(5) certify that the carrier acknowledges that the Commission 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.

47 C.F.R. § 54.202 (emphasis added). While the FCC did not make these rules mandatory for state commissions, it did so in part because it wished to allow state commissions "to maintain the flexibility to impose additional eligibility requirements in state ETC proceedings," *Order* ¶ 61 (emphasis added). The FCC did, however, strongly "encourage" the states to adopt its policies as a minimum requirement, *Order* ¶ 58-59, and pointedly noted that it has "the authority to revoke a carrier's ETC designation." *Order* ¶ 63.

Under these circumstances, the ITA respectfully submits that the Idaho Commission should adopt the FCC's minimum requirements for ETC applicants. These requirements are patently consistent with the intent of the Act, and will provide all stakeholders with uniform and clear guidelines for what has heretofore been largely an *ad hoc* process that varies from state to state and applicant to applicant. Assuming the Commission decides to follow the FCC's and

Joint Board's lead, Western Wireless's application is defective because it does not include the commitments and certifications required by subsections 54.202(a)(1)(A), 54.202(a)(2), and 54.202(a)(5), nor the five year plan required by 54.202(a)(1)(B). This defect cannot be rectified by further proceedings or submissions because the required showings must be included in the application.

Furthermore, insofar as the application pertains to rural telephone company service areas, it should not be processed under Modified Procedure. This is so because the FCC also adopted a new public interest test that requires an evidentiary investigation and specific findings of fact before granting an ETC application such as this:

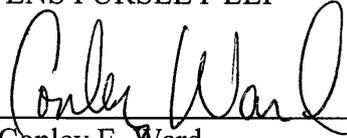
(c) Public Interest Standard. Prior to designating an eligible telecommunications carrier pursuant to section 214(e)(6), the Commission determine (sic) that such designation is in the public interest. In doing so, the Commission shall consider the benefits of increased consumer choice, and the unique advantages and disadvantages of the applicant's service offering. In instances where an eligible telecommunications carrier applicant seeks designation below the study area level of a rural telephone company, the Commission shall also conduct a creamskimming analysis that compares the population density of each wire center in which the eligible telecommunications carrier applicant seeks designation against that of the wire centers in the study area in which the eligible telecommunications carrier applicant does not seek designation. In its creamskimming analysis, the Commission shall consider other factors, such as disaggregation of support pursuant to § 54.315 by the incumbent local exchange carrier.

47 C.F.R. § 54.202(c). Again, this is not mandatory for state commissions, but it is certainly advisable and in the public interest.

WHEREFORE, the ITA respectfully moves this Commission for an order dismissing Western Wireless's Application for failure to state a claim upon which relief can be granted. The ITA does not request oral argument on this motion, but is prepared to provide oral argument if the Commission so orders.

DATED this 14th day of April 2005.

GIVENS PURSLEY LLP

By  _____
Conley E. Ward
Attorneys for Idaho Telephone Association

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of April 2005, I caused to be served a true and correct copy of the foregoing document by the method indicated below and addressed to the following:

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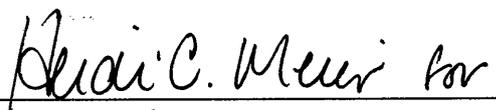
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