

DECISION MEMORANDUM

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LEGAL

FROM: KIRA DALE PFISTERER

DATE: MAY 6, 2005

RE: CASE NO. WST-T-05-1
APPLICATION OF WESTERN WIRELESS FOR ETC DESIGNATION

On February 17, 2005, WWC Holding Co., Inc. d/b/a CellularOne® (“Western Wireless” or the Company) submitted an Application requesting that it be designated as a federal eligible telecommunications carrier (ETC) in certain service areas in Idaho. ETC designation would allow Western Wireless to receive federal universal service support.

While the Western Wireless Application was pending, the Federal Communications Commission (FCC) adopted new rules governing ETC designation proceedings under the jurisdiction of the FCC pursuant to 47 U.S.C. § 214(e)(6). *In the Matter of the Federal-State Joint Board on Universal Service*, CC Docket No. 96-45 March 17, 2005 (“*FCC Order*”). Although these rules are not binding on ETC designation proceedings before the state commissions, the FCC encourages the states to adopt them at least as minimum standards.

On April 1, 2005, the Commission issued a Notice of Application, Notice of Modified Procedure, and Order allowing for a 28-day comment period. *See* Order No. 29749. The Commission’s Order urged all parties submitting comments to address the new requirements in the *FCC Order*. The Commission received timely comments from: (1) Western Wireless, (2) the Commission Staff, (3) Citizens Telecommunications Company of Idaho dba Frontier Communications of Idaho (“Frontier”); and (4) CenturyTel of the Gem State, Inc. and CenturyTel of Idaho, Inc. (“CenturyTel”). In addition, the Idaho Telephone Association (ITA) filed a related Motion to Dismiss on April 14, 2005. The Commission decided to deny the Motion in part at a decision meeting on May 3, 2005. This Memo outlines the comments on the Application and FCC rules and describes the remaining issue set forth in ITA’s Motion.

I. BACKGROUND

The Commission has jurisdiction and authority to designate Western Wireless an ETC pursuant to the Telecommunications Act of 1996 (the "Act") as set forth in 47 U.S.C. § 214(e)(1)-(2) and 47 C.F.R. § 54.101. To be designated an ETC, the telecommunications provider must: (1) be a "common carrier" as defined by 47 U.S.C. § 153(10); (2) offer throughout its proposed service areas the services set forth in 47 C.F.R. § 54.101(a)¹; and (3) must advertise the availability of its universal service offering and the charges therefore using media of general distribution. 47 U.S.C. 214(e)(1).

In addition, in those service areas that are already served by an incumbent local exchange carrier (LEC), the Act provides that, "[u]pon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier." 47 U.S.C. § 214(e)(2). For those service areas served by a rural telephone company, the Act further provides that "[b]efore designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find the designation is in the public interest." *Id.*

The new FCC rules, addressed by all parties commenting on the Application, build on the statutory framework outlined above and provide additional requirements relevant to both initial ETC designation as well as annual reporting requirements. Pursuant to the new FCC requirements, in order to be eligible for ETC status, the telecommunications provider must demonstrate: (1) the commitment and ability to provide supported services; (2) the ability to remain functional in emergencies; (3) a commitment to consumer protection and service; (4) a local usage plan comparable to that of the incumbent LEC; and (5) recognition that the carrier may someday be asked to provide equal access. To meet the above standards, the FCC rules require various commitments and reporting requirements, plus submission of a five-year network improvement plan demonstrating how universal support funds will be used to improve coverage, signal strength, or capacity that would not occur absent receipt of high-cost support.

¹ The supported services are: (1) voice grade access to the public switched network; (2) local calling; (3) touch tone signaling or its functional equivalent; (4) single-party service or its functional equivalent; (5) access to 911 emergency services where available; (6) access to operator services; (7) access to long-distance service; (8) access to directory assistance; and (9) toll limitation service. 47 C.F.R. § 54.101(a). In addition, ETCs are also required by FCC Regulations §§ 54.405 and 54.411 to offer qualifying low-income customers both "Lifeline and Link Up" programs as a condition precedent to receiving federal universal service support.

II. COMMENTS

The following analysis considers the comments in two parts: first as they relate to the Western Wireless Application and second, as they relate to the new FCC rules outlined in the *FCC Order*. All parties agree that the Western Wireless Application does not meet the new FCC rules. Further, the parties agree that Western Wireless meets the basic service requirements for ETC designation. The points of contention are: (1) whether granting Western Wireless ETC status is in the public interest and (2) whether Western Wireless should be held to any or all of the new requirements in the FCC rules.

A. Comments on the Western Wireless Application

1. *Western Wireless*

Western Wireless argues that the Commission should grant the Application in its entirety on Modified Procedure. Western Wireless seeks immediate ETC designation in the identified Qwest, non-rural wire centers and in the Farmers Mutual Telephone Co. study area. In addition, Western Wireless seeks conditional ETC designation in 18 rural telephone company wire centers located within four rural telephone company study areas.

Western Wireless argues that its Application meets the public interest test set forth in the FCC's *Virginia Cellular Order* and adopted by this Commission in the ClearTalk/Nextel decision. *See* Order No. 29541. Essentially, this standard entails a cost-benefit analysis balancing the advantages of ETC designation against the drawbacks.

For advantages, Western Wireless first argues that ETC designation will promote competition in Idaho to the benefit of consumers. According to Western Wireless, ETC designation will allow the Company greater opportunities to compete and expand network facilities in Idaho, resulting in more choices for basic service and greater access to the advanced services provided on the Western Wireless network. Western Wireless notes that ETC designation will bring choices not available from incumbent LECs, including the benefit of mobility and expanded local calling areas, which Western Wireless argues are of particular importance in rural areas. Further, the implementation of Phase 2 E911 will allow customers to be located by emergency service providers via global positioning system ("GPS") technology. Finally, Western Wireless argues that ETC designation will provide greater competition specifically in the Lifeline and Link Up programs.

Second, Western Wireless argues that it has demonstrated a commitment to provide responsive customer service. Western Wireless has adopted and complies with the Cellular and Telecommunications and Internet Association ("CTIA") Consumer Code for Wireless Service. In addition, Western Wireless explains that its current customer service policies are generally consistent with the Commission's customer service rules applicable to landline carriers.

Third, Western Wireless argues that it has the ability to provide service throughout the designated service areas. Western Wireless currently serves more than 85% of the population in which it seeks designation and plans to build five new cell sites in 2005, provided that it obtains universal support. Moreover, Western Wireless states that it is committed to implementing the six-step process for addressing requests for service set forth in the *Virginia Cellular Order*.

In addition, Western Wireless states that it will make annual reports to the Commission demonstrating how it has complied with the above commitments. Western Wireless pledges that it will submit annual reports regarding (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.

Ultimately, Western Wireless argues that granting it ETC status is in the public interest, because there are no drawbacks to weigh against the identified benefits. Western Wireless warns that the Commission should not presume that rural telephone companies will be adversely impacted by the entry of a competitive ETC, and instead should consider the positive effect competition might have on the services provided by rural LECs. *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. In addition, the Company argues that its designation will not significantly impact the universal service fund.

Finally, because Western Wireless serves some of the rural study areas only in part, it can be designated an ETC in these areas only if the Commission with the consent of the FCC, redefines the ETC service areas from the study area to the wire center. *See* 47 U.S.C. § 54.207(b). Western Wireless argues that it meets the standards for redefinition for the 18 rural telephone company wire centers identified in the Application. In addition, the Western Wireless Comments add an analysis of the creamskimming issue for the designated areas requiring

redefinition. According to Western Wireless, there is no risk of creamskimming that would justify a denial of the redefinition request.

2. The Commission Staff

After reviewing the Western Wireless Application in light of the existing ETC standards articulated most recently in the Commission's ClearTalk/Nextel decision, Staff recommends that the Commission grant Western Wireless immediate ETC designation in the non-rural areas identified in the Application but believes more information is necessary to process the Application as it applies to rural areas. However, before conducting a lengthy analysis of the Application as it applies to these rural areas, Staff decided to wait until the Commission determined the issue of what standards to apply. That way, Western Wireless may amend or resubmit its Application in a single effort.

Staff agrees that Western Wireless has demonstrated that it offers all of the required services and functionalities. However, Staff does not have enough information to (1) conduct an appropriate public interest determination and (2) analyze whether it is appropriate to redefine the rural service areas at the wire center level. At a minimum, Staff would like to see maps and other information demonstrating the current network coverage area and the coverage area that would result from the build-outs Western Wireless has planned in the event it is granted ETC designation and receives federal universal service support. Without this information, Staff cannot conclude that granting Western Wireless ETC designation is in the public interest.

3. Frontier

Frontier argues that Western Wireless has not met the public interest test and has failed to demonstrate that the benefits of ETC designation outweigh the costs. Frontier questions what benefits can be attributed to granting Western Wireless ETC designation, noting that the value of increased competition, by itself, is unlikely to satisfy the public interest test. In addition, Frontier states that Western Wireless has not made any commitments about what rates it will charge or how its prices might be lowered as a result of the universal service support. Further, despite Western Wireless' statements of intent, the Company has not truly committed to increasing investments in rural Idaho.

While Frontier sees no benefit to ETC designation, it identifies at least one cost attributed to ETC designation and that is the direct financial burden on the federal universal

service fund. Therefore, on balance, Frontier suggests that ETC designation is not in the public interest.

4. *CenturyTel*

CenturyTel submitted comments specific to the new FCC rules, encouraging the Commission to adopt these rules. CenturyTel also supported ITA's Motion to Dismiss but otherwise did not comment on the substance of the Western Wireless Application.

B. Comments Specific to the FCC Rules

The majority of the comments received are in favor of the Commission adopting the new FCC guidelines in its consideration of ETC designations, including the Application of Western Wireless. Nonetheless, Western Wireless is strongly opposed to applying the new standards to its Application, which was filed before the *FCC Order* was issued. Western Wireless suggests that the Commission could adopt the FCC's standards, or similar standards, in a rulemaking proceeding; however, any requirements would be prospective and should not be applied when considering this Application.

1. *Western Wireless*

Western Wireless admits that the filing does not meet the new standards, which were not in place when the Application was filed but argues that the new standards should not be used to deny the Application. In the alternative, Western Wireless argues that its Application is generally consistent with the new FCC rules, and seems to suggest that it would be willing to comply with at least some of the new requirements. Specifically, Western Wireless discusses the five-year service improvement plan and annual reports regarding such a plan. Western Wireless argues that a detailed filing covering two years of planned improvements would be more useful to the Commission, because telecommunications carriers generally do not have definitive plans further than two years in advance; nonetheless, the Company offers to provide a five-year service plan provided that the Commission determines such a requirement is necessary.

Ultimately, Western Wireless' central argument is that the FCC rules cannot and should not apply to its Application. Support for this argument is found in the Company's April 28, 2005 response to ITA's Motion to Dismiss.

2. *Staff*

Staff supports the Commission adopting the FCC rules and applying them to the Western Wireless Application. However, Staff notes that the FCC suggested that there are areas

within the rules that allow for state-specific determinations. In light of the room for interpretation, Staff recommends that the Commission put the new requirements set forth in the *FCC Order* out for public comment with a 28-day comment period before ultimately deciding what requirements to adopt.

3. *Frontier*

Frontier argues that the Commission, as part of its ETC designation analysis, should require that Western Wireless meet all of the conditions recommended in the *FCC Order*. Further, because the Western Wireless Application does not meet these standards, Frontier supports ITA's Motion to Dismiss.

Specifically, Frontier argues that Western Wireless (1) did not submit a five-year network improvement plan pursuant to 47 C.F.R. § 54.202(1)(B); (2) failed to demonstrate the ability to remain functional in emergency situations pursuant to 47 C.F.R. § 54.202(2); (3) failed to show how its local usage plan is comparable to the incumbent LECs in the same service areas pursuant to 47 C.F.R. § 54.202(4); and (4) neglected to acknowledge its potential obligation pursuant to 47 C.F.R. § 54.202(1)(5) to provide equal access if all other ETCs in a designated area relinquish their designations. In addition, Frontier notes that the additional requirements described in the *FCC Order* and rules are minimum standards, and the states can implement additional standards as necessary to ensure that ETC petitions in rural areas are in the public interest.

4. *CenturyTel*

CenturyTel supports the new requirements in the FCC rules, as well as ITA's Motion to Dismiss. However, CenturyTel encourages the Commission to adopt additional, more rigorous requirements above and beyond the minimum eligibility requirements described in the *FCC Order*.

CenturyTel argues that the Commission should at a minimum adopt the FCC guidelines. CenturyTel argues that the new requirements are necessary in order to ensure that only qualified ETC designations are granted. According to CenturyTel, when only qualified carriers, capable and committed to providing universal service, receive funds, the long-term sustainability of the fund is improved and the ETC will be able and willing to serve all customers in a designated service area. CenturyTel also notes that if all the state commissions adopt the federal guidelines, it would allow for a more consistent and predictable application process

among the states. Further, because state decisions have national implications, clear national eligibility and certification standards are necessary to protect the long-term health of the fund and assure rural consumers that they will have access to high-quality, affordable local telephone service. The national standards also encourage ETCs to plan their long-term business and investment strategies and protect against inferior service offerings.

CenturyTel also emphasizes that the FCC noted certain rules allowed for state-specific determinations. Specifically, the FCC suggested that the state commissions could adopt a minimum local usage requirement; impose additional consumer protection and quality requirements; and identify additional, geographically-specific factors relevant to required emergency functionality. In addition to these FCC suggestions, CenturyTel proposes three additional requirements: (1) competitive ETCs should serve the incumbent LECs entire study area or receive support based on the incumbent LECs costs only for the area that the competitive ETC seeks to serve; (2) competitive ETCs should be required to assume carrier of last resort obligations; and (3) competitive ETCs should demonstrate adequate financial resources.

CenturyTel also comments on the problems with the current ETC designation process, which CenturyTel argues, allows competitive ETCs to obtain federal universal support based on the lowest possible standards of local exchange service with no clear benefit to consumers. Further, while the competitive ETCs do not undertake the same service commitments as incumbent LECs, they receive the same support. In contrast, fully regulated incumbent LECs are required to provide high-quality local exchange service and to serve as the carrier of last resort. In most rural areas, the incumbent LEC's ability to provide such support is dependent upon universal service funding. By allowing the competitive ETCs to receive additional funding, CenturyTel argues, the funds are not being used as intended by the Act and the universal service fund is overburdened, without increased benefits for rural customers. The end result harms the public and puts the incumbent LECs at a disadvantage.

Finally, CenturyTel identifies specific problems with wireless ETC designations in rural areas. According to CenturyTel, wireless ETC designations in rural areas do not attract competition to the markets. CenturyTel provides that the rural wireline providers are not necessarily losing lines to wireless carriers, and rural customers are not gaining access to new service offerings once the wireless carrier becomes an ETC.

III. REMAINING ISSUES

ITA's Motion to Dismiss, filed April 14, 2005, presented the Commission with two arguments. First, ITA argues that the Western Wireless Application should be dismissed for failure to comply with the FCC requirements. This aspect of the Motion was denied at a decision meeting on May 3, 2005.

The second aspect of the ITA Motion argued that Modified Procedure was not appropriate for a Commission decision on the merits of the Western Wireless Application as it applies to rural areas. ITA argued that a hearing is necessary to make the public interest determination required before designating a competitive ETC in an area served by a rural telephone company. The Commission decided to table discussion of that issue for a later time.

IV. COMMISSION DECISION

(1) Does the Commission wish to hold an evidentiary hearing on the Western Wireless Application as recommended by ITA in its Motion to Dismiss?

(2) If the Commission determines that a hearing is not necessary, does the Commission wish to approve or deny the Western Wireless Application?



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