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Attorney for the Commission Staff

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF W)
HOLDING CO., INC. DBA CELLULAR-ONE®)
SEEKING DESIGNATION AS AN ELIGIBLE)
TELECOMMUNICATIONS CARRIER THAT MA)
RECEIVE FEDERAL UNIVERSAL SERVICE)
SUPPORT)

CASE NO. WST-T-05-1

COMMENTS OF THE
COMMISSION STAFF

COMES NOW the Staff of the Idaho Public Utilities Commission, by and through its Attorney of record, Kira Dale Pfisterer, Deputy Attorney General, and submits the following comments in response to Order No. 29791 issued on May 27, 2005.

BACKGROUND

On February 25, 2005, in the *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45 (FCC 05-46) (hereinafter the "*FCC Order*"), the Federal Communications Commission (FCC) adopted additional minimum requirements for a telecommunications carrier to be designated as an eligible telecommunications carrier (ETC), and thus be eligible to receive federal universal service funds (USF). The *FCC Order*, builds on the existing statutory framework for ETC designation. Staff has reviewed the *FCC Order* and recommends that the Commission adopt and utilize these same requirements when reviewing ETC Applications.

The Telecommunications Act of 1996 (the "1996 Act") grants state commissions the authority to determine whether a telecommunications carrier meets the requirements to be designated as an ETC. 47 U.S.C. §§ 214(e)(2) and 254; 47 C.F.R. § 54.201. To encourage competition and universal service, the 1996 Act allows qualifying telecommunications carriers to receive universal service support for providing service in high cost areas of the nation.

Most ETC designation proceedings are performed by the state commissions pursuant to 47 U.S.C. §214(e)(2). Where a carrier is not subject to state jurisdiction, the FCC is responsible for ETC designations under 47 U.S.C. § 214(e)(6). The rules promulgated by the FCC and discussed in the *FCC Order* are for those instances in which the FCC is designating the ETC. The requirements outlined in *FCC Order* are not binding upon the state commissions, but are permissive guidelines that the FCC encourages the states to adopt in a manner that is consistent with state law and policies. The FCC also encourages the state commissions to adopt these requirements in the interest of uniformity and predictability and to improve the long-term sustainability of the federal USF.

The New ETC Requirements

In the recent Order, the FCC adopted five basic ETC eligibility requirements, a framework for conducting the required public interest determination, and annual reporting requirements. To satisfy the basic eligibility requirements, the FCC requires that an ETC Applicant to:

- (1) provide a five-year plan demonstrating how high-cost universal service support will be used to improve its coverage, service quality, or capacity in every wire center for which it seeks designation and expects to receive universal service support;
- (2) demonstrate its ability to remain functional in emergency situations;
- (3) demonstrate that it will satisfy consumer protection and service quality standards;
- (4) offer local usage plans comparable to those available from the incumbent local exchange carrier (LEC) in the areas for which it seeks designation; and
- (5) acknowledge that it may be required to provide equal access if all other ETCs in the designated service area relinquish their designation pursuant to Section 214(e)(4) of the 1996 Act.

In addition to these five requirements, the *FCC Order* also addresses a number of other issues, including a public interest analysis to be applied whenever a carrier seeks ETC status in an area already served by at least one ETC, and annual certification and reporting requirements that bolster the initial designation requirements. The FCC makes these requirements applicable

on a prospective basis to all ETCs previously designated by the Commission. Previously designated ETCs must submit evidence demonstrating how they comply with this new ETC designation framework by October 1, 2006.¹

STAFF COMMENTS

Staff recommends that the Commission adopt each of the five basic requirements, the public interest analysis, and the annual reporting requirements. The merits of each requirement are discussed in greater detail below.

ETC Eligibility Requirements

1. Commitment and Ability to Provide the Supported Services: § 54.202(a)(1)(A) and (B)

The FCC requires: (1) a specific commitment from the Applicant to provide service throughout the proposed service area to all customers making a reasonable request for service; and (2) the submission of a five-year network improvement plan. The rule also further describes what constitutes a reasonable request for service and what should be included in the five-year network improvement plan.

The FCC's requirement regarding the commitment and ability to provide the supported services, as reflected in 47 C.F.R. § 54.202(a)(1)(A) and (B) is consistent with past decisions by the Idaho Commission. In Order No. 29541, the Commission states, "A carrier requesting ETC status is not required to provide 'ubiquitous' service throughout its service area prior to being designated as an ETC. However, an Applicant must demonstrate that the capability and commitment to provide service is something more than a 'vague assertion' of intent on the part of a carrier to provide service." *Western Wireless*, 15 F.C.C.R. at 15178 at ¶ 24 (2000). Thus, an Applicant must reasonably demonstrate to the state commission its ability and willingness to provide service upon designation. To demonstrate a commitment to serve an entire area for which it seeks designation, the Commission expects an Applicant to provide some evidence that it has a generalized plan to meet the needs of consumers in rural areas and the goals of universal service. *Id.*

¹ Federal-State Joint Board on Universal Service, CC Docket No. 96-45 (FCC 05-46) ¶ 2.

This requirement also supports the statutory requirements of the 1996 Act. Section 254(e) of the 1996 Act requires that any financial support received in furtherance of the goal of universal service must be used only for the provisioning, maintenance and upgrading of facilities and services for which the support is intended. Staff supports the new FCC Annual Reporting Requirements as a condition of continued universal service support to ensure that ETCs continue to comply with the conditions of the ETC designation and the universal service funds are used for their intended purposes.

2. Ability to Remain Functional in Emergency Situations: § 54.202(a)(2)

Staff believes that an Applicant's ability to demonstrate functionality during emergency situations is an important public safety goal. It is the Staff's opinion that consumers have the right to expect an ETC designated carrier to plan and be prepared for reasonable emergency situations that may occur in their designated service areas. Emergency planning by an ETC designated carrier demonstrates their commitment to quality of service and reliability. In order to meet this requirement, an ETC Applicant should demonstrate 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 (FCC 05-46, ¶ 25).

3. Consumer Protection: § 54.202(a)(3)

Staff agrees with the Joint Board recommendation that State commissions exercising jurisdiction over ETC designations should have the flexibility to either follow the Commission's framework or impose other requirements consistent with federal law to ensure that supported services are offered in a manner that protects consumers. The FCC encourages states that impose requirements on the ETC to do so only to the extent necessary to further universal service goals. This practice is consistent with Section 254(b) and was used as a guideline by the Idaho Commission in the *ClearTalk* Order No. 29541.

The Staff believes it is reasonable and consistent to expect an ETC to provide a set of fair, just, reasonable, and non-discriminatory rules to address consumer complaints. Staff agrees with the FCC that a commitment to comply with the Cellular Telecommunications and Internet Association's Consumer Code for Wireless Service will satisfy this requirement for wireless

ETC applicants (FCC 05-46, ¶ 28).² Staff believes additional commitments may be required on a case-by-case basis, as provided in the FCC Rules, but has no additional consumer protection requirements to recommend at this time.

4. Local Usage: § 54.202(a)(4)

In the *FCC Order*, the FCC determined that an ETC should provide some minimum amount of local usage as part of its “basic service” package of supported services, but declined to specify the exact amount of local usage required. Staff believes consumers should have a choice of service comparable to the incumbent local exchange company’s (ILEC) basic service package. This may not be a fully flat rated plan, but it should be sufficient to allow minutes of use that will meet most customer needs. Determining whether a service offering is “comparable” to that offered by the ILEC will depend on the circumstances of each ETC application.

5. Equal Access: § 54.202(a)(5)

Equal access includes, but is not limited to, the ability to access the presubscribed long distance carrier of the customer’s choice by dialing a single digit “1” versus a multiple digit access code (NXX).

Under Section 214(e)(4), a State commission shall permit an ETC to relinquish its designation as an ETC carrier in any area served by more than one ETC. Prior to permitting a telecommunications carrier designated as an ETC to cease providing universal service in an area, the State commission must determine how the customers will be served by the remaining ETC or ETCs. The State commission should examine whether it is in the public interest to require the remaining ETC to provide equal access. Further, the commission may treat another carrier as the incumbent LEC if the carrier occupies a position in the market that is comparable to the position occupied by the departing ILEC, if the carrier has substantially replaced an ILEC, and if such treatment is consistent with the public interest, convenience and necessity. An obligation

² Under the CTIA Consumer Code, wireless carriers agree to: (1) disclose rate 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.

imposed on ILECs is the requirement to offer equal access in connection with their wireline services.

As a public interest determination, Staff feels this obligation should also be imposed on any common carrier applying for ETC designation should the ILEC or other ETCs in that service area relinquish their ETC designation.

Public Interest Determination: § 54.202(c)

In addition to the five basic eligibility criteria discussed above, the FCC Requirements set forth the analytical framework the Commission may use to determine whether the public interest would be served by an applicant's designation as an ETC. The new fact-specific requirements provide better-defined guidelines for conducting the public interest analysis. The new FCC public interest guidelines include: 1) cost-benefit analysis; 2) potential for creamskimming effects; and 3) impact on the universal service support fund.³ These guidelines are consistent with past decisions of this Commission and Staff supports the various considerations.

Sections 214 and 254 of the 1996 Act require the State commission to determine if the ETC application is consistent with the public interest, convenience and necessity. The public interest benefits of a particular ETC designation must be analyzed in a manner that is consistent with the purposes of the 1996 Act itself, including the fundamental goals of promoting competition and preserving universal service; ensuring the availability of quality telecommunications services at just, reasonable, and affordable rates; and promoting the deployment of advanced telecommunications and information services to all regions of the nation, including rural and high-cost areas. Before designating an ETC, the Commission must make an affirmative determination that such designation is in the public interest, and must take into consideration the specific characteristics of the proposed service area, whether the area is served by a rural or non-rural carrier.

The public interest determination has been extensively used by this Commission in the past when evaluating ETC applications. In the *Clear Talk* Order No. 29541, the Commission stated, "In order to be designated as an ETC in a study area by a rural telephone company, the applicant must demonstrate and the Commission must find that it would be in the public interest.

³ Federal-State Joint Board on Universal Service, CC Docket No. 96-45 (FCC 05-46) ¶¶ 44-57.

A secondary issue is whether the Applicants are committed to bringing competition and providing universal services throughout these rural areas.”⁴

The Commission has determined that the Applicants have the burden to demonstrate that the public interest is served by designating them as an ETC in rural areas. In evaluating the “public interest,” this Commission weighs whether the potential benefits of ETC designation outweigh the potential harms.

In Order No. 29591, the Commission noted the FCC’s more stringent public interest analysis for ETC designations in rural telephone company service areas weighed numerous factors including: the benefits of increased competitive choice; the impact of multiple designations on the universal service fund; the unique advantages and disadvantages of the competitor’s service offering; any commitments made regarding quality of telephone service provided by competing providers; and the competitive ETC’s ability to provide the supported services throughout the designated service area within a reasonable time frame. Order No. 29541 at p.6, *quoting Virginia Cellular, LLC Petition for Designation as an ETC*, 19 F.C.C.R. 1563, 1565 (2004).

As demonstrated above, the public interest analysis included in the new FCC Rules essentially mirrors that applied in this Commission’s most recent ETC proceedings. Staff supports this analysis.

Annual Reporting Requirements: § 54.202(a)

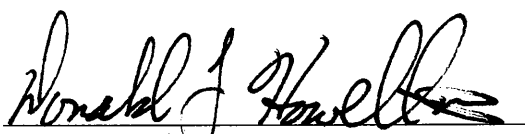
The FCC encourages state commissions to impose the annual certification and reporting analysis, as outlined in the *FCC Order*, on all previously designated ETCs. This would avoid duplicative or inapplicable eligibility criteria and reporting requirements. Staff believes that adoption of the new ETC requirements, which staff strongly supports, could become empty promises unless the additional annual reporting is provided to the Commission. Such reporting is necessary to ensure that the build-out of facilities, service availability, emergency preparedness, and quality of service are maintained by all ETCs. These reporting requirement will also ensure that universal service funds are used for their intended purposes.

⁴ Clear Talk Case No. GNR-T-03-8, Order No. 29541, p.1.

CONCLUSION

Staff agrees with the FCC, that a rigorous ETC designation process ensures that only fully qualified Applicants receive designation as ETCs and that all ETC Applicants are prepared to serve all customers within the designated service area. Uniform standards allow for a more predictable application process among the states. Staff supports the Commission's adoption of the new FCC requirements regarding: (1) the five basic ETC eligibility requirements; (2) the public interest analysis, and (3) the annual reporting requirements. Staff believes these new requirements build on the framework of the Commission's past decisions regarding ETC designation and further refine the analysis employed. By adopting the new requirements, the Commission will ensure that those companies approved as ETCs have demonstrated a commitment to the principles of universal service and competition and that only fully qualified carriers that are capable of and committed to providing universal service will be able to receive support. Staff does not comment on the annual certification requirements, as they remain largely unchanged and this Commission has no discretion in determining whether or not to adopt them.

Respectfully submitted this 17th day of June 2005.

for 
Kira Dale Pfisterer
Deputy Attorney General

Technical Staff: Grace Seaman

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE THIS 17TH DAY OF JUNE 2005, SERVED THE FOREGOING **COMMENTS OF THE COMMISSION STAFF**, IN CASE NO. WST-T-05-01, BY MAILING A COPY THEREOF, POSTAGE PREPAID, TO THE FOLLOWING:

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