

Agenda Date: March 16, 2005
Item Number: A1

Docket: UT-023033

Company Name: RCC Minnesota, Inc., d/b/a Cellular One (RCC)

Staff: Robert Shirley, Telecommunications Policy Analyst

Recommendation:

Grant the request of RCC Minnesota, Inc., to modify the order designating it as an eligible telecommunications carrier (ETC) by removing the requirement to petition the FCC for concurrence in designation as an ETC for service areas that overlap only in part the service areas (exchanges) of rural telephone companies.

Background:

RCC's Petition for Modification

The Commission designated RCC Minnesota, Inc., d/b/a Cellular One (RCC) as an eligible telecommunications carrier (ETC) in 2002. An ETC is eligible to receive federal universal service support in exchange for serving customers in designated service areas where Congress has determined support is necessary to insure access to telecommunications services. *47 U.S.C. § 214(e); 47 U.S.C. § 254*. In the Commission's order designating RCC as an ETC, the Commission designated RCC for an area that consists of some entire exchanges and some portions of exchanges and it ordered RCC to "petition the FCC for concurrence in designation as an ETC for areas that are parts of ILEC exchanges." *RCC Designation Order, ¶ 90*.

On February 14, 2005, RCC petitioned the commission to remove the requirement for RCC to petition the FCC. RCC maintains in its petition for modification that concurrence by the FCC with the designations made by the Commission in 2002 is unnecessary and not supported by law. *Petition for Modification at 2*. RCC contends the relevant statute and FCC rule do not require concurrence, and RCC cites a recent order by this Commission in support of that contention.

RCC made an effort beginning in 2003 to correct what it perceives as the Commission's error. RCC contacted the Commission by letter and requested the Commission state if the Commission intended that RCC file for concurrence with the FCC. *Id. at 2-3*. In that correspondence, as in the instant petition, RCC explained why it believes there is no requirement and thus no need for a petition. The Commission Secretary responded in a letter that "[t]he Commission does not require companies to take unnecessary actions." *Id.* RCC implies in its petition that the Universal Service Administrative Company did not change its position after reviewing the correspondence, and RCC now asks for an order that modifies the ETC Designation Order. *Id. at 3*.

WITA Comments In Opposition

The Washington Independent Telephone Association (WITA) filed comments in opposition to RCC's request. WITA's position is that under FCC rules the Commission's designation of RCC for a service area that overlaps only in part a rural telephone company service area is a redefinition of the rural telephone company's service area and therefore requires FCC concurrence. *WITA Comments at 1.*

WITA cites a recent *Recommended Decision* by the Federal-State Joint Board on Universal Service that WITA states supports the position that service areas for rural telephone companies should be the service area for a new ETC. The paragraph states there is a "presumption that a rural carrier study area should be the service area for a new ETC, unless and until the state and the [FCC] working in concert decide a different service area definition would better serve the public interest."¹ WITA states that "[w]hile the quoted paragraph uses the term "study areas," the analysis is the same once the initial change from study area to the exchange level for the service area has been made." *WITA Comments at 2.*

WITA also asserts that the FCC concluded in two recent orders (*Highland Cellular* and *Virginia Cellular*) that designation of an additional ETC for an area other than a rural telephone company's *study area* requires redefinition of the rural telephone company's study area through concurrence between the state and the FCC. WITA quotes from *Highland Cellular*: "In order to designate Highland Cellular as an ETC in a service area that is different from the affected rural telephone company *study area*, we must redefine the service areas of the rural telephone company in accordance with Section 214(e)(5) of the Act." *WITA Comments at 3 (Italics added).*

RCC's Response to WITA's Opposition

RCC responds to WITA's opposition and contends that RCC was designated as an ETC throughout its licensed service area in Washington *RCC Response at ¶ 3.* RCC claims there is no need for concurrence from the FCC because the FCC has already concurred in redefinition of the service area of rural telephone companies in Washington. *Id., ¶ 6.*

RCC rejects WITA's "claim that a new concurrence petition must be filed with the FCC following the designation of RCC is founded on the erroneous notion that the ETC service area for a competitor must be redefined *to match the C[ompetitive]ETC's*

¹ Commission Staff notes that the *Recommended Decision* includes a footnote concerning redefinition of service areas of several rural telephone companies that each had service areas equal in to the company's *study area*. In comparison, the Commission and the FCC agreed on service areas smaller than study areas for all rural telephone companies in Washington in September 1999. See *Petition for Agreement with Designation of Rural Company Eligible Telecommunications Carrier Service Areas and for Approval of the Use of Disaggregation of Study Areas for the Purpose of Distributing Portable Federal Universal Service Support, Memorandum Opinion and Order*, 15 FCC Rcd 9924 (1999).

proposed ETC service area.” Id., ¶ 7 (italics in original; footnote omitted). RCC supports its position by stating that “a number of states have designated CETCs to be an ETC throughout their FCC-licensed service area, even where it results in some ILEC wire centers (or exchanges) being only partially covered, while also redefining the rural ILEC service area so that each wire center (or exchange) is a separate service area” Id., ¶ 8 (footnote omitted). RCC points to the Commission’s recent statement:

The Act contemplates that service areas may have multiple ETCs. Where there are multiple ETCs, their service areas may coincide or overlap, in whole or in part. There is no requirement that coincident or overlapping service areas have identical boundaries.

Sprint PCS Rural Order, ¶ 11.²

RCC characterizes WITA’s opposition as an attempt to relitigate an issue WITA has raised before and the Commission has decided before, in both the *RCC Designation Order* and the *Sprint PCS Rural Order*. *RCC Response, ¶ 11 and n.9*. RCC concludes by stating that Washington citizens have lost the benefit of substantial federal support that would have been invested in wireless infrastructure in the state’s rural areas.

Commission Staff Analysis

Legal Analysis

Commission Staff’s analysis is the statute gives no support to the conclusion that ETC service areas of rural telephone companies and “additional requesting carriers” must be identical, and if not identical, that concurrence between the FCC and the state commission is required. *47 U.S.C. § 214(e)(2), (5)*. The sentence that gives rise to a need for concurrence in limited circumstances states:

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

47 U.S.C. § 214(e)(5) (Italics added).

Commission Staff’s view is the statute does not support a concurrence requirement for a state designation of an additional requesting carrier for a service area of any geographic

² *In the Matter of the Petition of Sprint Corporation, d/b/a/ Sprint PCS, Sprintcom, Inc., Sprint Spectrum, L.P., and WirelessCo., L.P. for Designation as an Eligible Telecommunications Carrier, Order Granting Designation as an Eligible Telecommunications Carrier, Docket No. UT-043120, Order No. 01(Corrected) (Jan. 13, 2005) (“Sprint PCS Rural Order”).*

size, including a service area that overlaps only in part the service area of a rural telephone company.

Similarly, the FCC rule concerning state and federal concurrence on establishment of service areas for rural telephone companies is concerned only with changes to service areas established for rural telephone companies, and not with service areas of ETCs that are not rural telephone companies. The Commission followed the concurrence procedure when it requested FCC concurrence in the redefinition of each rural exchange as a separate service area for federal universal service purposes. The Commission has not modified rural telephone company service areas in any way since the FCC concurred in 1999.

The rule states, in pertinent part:

(a) The term service area means a geographic area established by a state commission for the purpose of determining universal service obligations and support mechanisms. A service area defines the overall area for which *the carrier* shall receive support from federal universal service support mechanisms.

(b) In the case of a service area served by a rural telephone company, service area means *such company's* "study area" unless and until the Commission and the states, after taking into account recommendations of a Federal-State Joint Board instituted under section 410(c) of the Act, establish a different definition of service area for such company.

(c) If a state commission proposes to define a service area served by a rural telephone company to be other than *such company's* study area, the Commission will consider that proposed definition in accordance with the procedures set forth in this paragraph.

47 C.F.R. § 54.207 (Italics added)

Subsection (a) concerns service areas for individual carriers, not multiple carriers, as demonstrated by the singular phrase "the carrier." Subsections (b) and (c) each refer to service areas for rural telephone companies and then refer back to "such company's" study area, and do not refer to other carriers, other ETCs, or, in the statutory phrase from Section 214(e)(2), "additional requesting companies." If the rule applied to concurrence in establishment of service areas for additional ETCs, it would state that.

WITA's opposition relies largely on a quotation from the *Recommended Decision* that refers to "a *presumption* that a rural carrier's *study area* should be the service area for a new ETC, unless and until the state and the [FCC] working in concert decide that a

different service area definition would better serve the public interest.” *WITA Comments at 2 (Quoting Recommended Decision)*. The Commission moved from presumption to conclusion when it decided to define each exchange as a separate service area. Having established smaller service areas and deaveraged support for each such service area, the concern about cream skimming underlying the *Recommended Decision* is no longer present.

This analysis is consistent with the Commission position on this question as stated in two very recent orders:

The only restriction on state commission decisions regarding service areas is that a rural telephone company must be designated as an ETC for its entire “study area” (all the areas it serves in one state combined) unless the state and the FCC agree to establish a different service area for a rural company. *47 U.S.C. § 214(e)(5)*. This restriction on state commission determination of the service area does not prevent a state from designating another carrier as an ETC for an area that is coincident with, or overlaps in whole or in part, a portion of a rural telephone company’s study area or service area. *47 U.S.C. § 214(e)(2)*.

*Sprint PCS Rural Order, ¶ 32, n.10.*³

Commission Staff also agrees with RCC’s contention that there is no support for the conclusion that an ETC service area for a competitor must be redefined to match the rural telephone company’s proposed ETC service area. *RCC Response, ¶ 7*. The Commission stated this in a recent order that designated a rural telephone company for three new ETC service areas.⁴

Policy Analysis

In its petition for modification, RCC addressed cream skimming. Cream skimming has been raised as an issue by WITA in opposition to the ETC designation of five wireless carriers for service areas coincident with or overlapping in whole or in part the service areas of rural telephone companies. Since 1997, the Commission has concluded that cream skimming is not a concern once rural telephone company service areas are redefined from the study area to the exchange level *and* federal support is disaggregated. The Commission concluded in a recent order:

³ See also *In the Matter of Petition of Hood Canal Telephone Company for Designation as an Eligible Telecommunication Carrier*, Order Granting Designation as an Eligible Telecommunications Carrier, Docket No. UT-043121, Order No. 1, ¶ 18, n.9 (Dec. 29, 2004) (“*Hood Canal Order*”).

⁴ See *Hood Canal Order*, ¶ 9.

Sprint requests designation for areas smaller in size than entire exchanges, consistent with its license as a broadband PCS carrier. Sprint's request for ETC designation for areas that cover only portions of incumbent exchanges presents the identical issue encountered with RCC Minnesota when the Commission considered, and granted, its petition for designation at less than the exchange level. The Commission determined that the federal support mechanism *eliminates* the concern for cream-skimming because support is available equally to all ETCs. Separately, because Sprint's license boundaries were set by the FCC and the recommended designation is for its entire licensed areas that coincide with Qwest and Verizon exchanges, Sprint cannot choose to avoid serving sparsely populated areas contained within the limits of its license.

*Sprint PCS Non-rural Order*⁵

Commission Staff believes that many precedents of the Commission support the conclusion that cream skimming is not a concern when federal support is disaggregated (as it is in Washington)⁶ and a wireless carrier seeks to serve to the extent of its licensed service area, even when the result is an ETC designation for a service area that overlaps only in part the service area of a rural telephone company. The approach of taking geographic boundaries as they are recognizes the technological differences that exist between carriers, and takes into account the variations in the statutory and regulatory requirements placed on wireline and wireless carriers (for example, a wireline carrier may serve anywhere in Washington but a wireless carrier may serve only within the boundaries of its license).

Recommendation:

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⁵ *In the Matter of the Petition of Sprint Corporation, d/b/a Sprint PCS, et al., for Designation as an Eligible Telecommunications Carrier*, Order Granting Designation as an Eligible Telecommunications Carrier, WUTC Docket No. UT-031558, order No. 1, ¶ 9 (footnote omitted, italics added) (Oct. 29, 2003) ("*Sprint PCS Non-rural Order*").

⁶ In the FCC's *Virginia Cellular* and *Highland Cellular* orders cited by WITA the FCC was making decisions concerning competition for rural telephone companies that had not had their service areas redefined from their study areas, and had not disaggregated federal support.