

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of)	
)	
BEAVER CREEK TELEPHONE)	DOCKET NO. UT-990392
COMPANY)	
)	
for designation as an Eligible)	ORDER GRANTING DESIGNATION AS
Telecommunications Carrier)	AN ELIGIBLE TELECOMMUNICATIONS
.....)	CARRIER

BACKGROUND

The Federal Telecommunications Act of 1996 (Act), substantially altered national telecommunications policy and contemplated that the states, acting through their state public utility commissions, would implement that policy by conducting various proceedings as outlined in the Act. The federal policy embodied in the Act coincides, to a great extent, with the preexisting telecommunications policies of Washington State as expressed by the Legislature and implemented by this Commission.

The Act, as well as Washington law, embraces the policy that certain telecommunications services should be universally available. Congress articulated the basics of what should be included as part of “universal service,” in 47 U.S.C. §254(b), and established a Federal-State Joint Board on Universal Service to recommend to the Federal Communications Commission the details of what should be included within the concept of universally available telecommunications service. These services are to be supported in high-cost areas by money from a fund which is supported by carrier contributions. 47 U.S.C. §254(d); Recommended Decision, In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45 (November 8, 1996), and First Report and Order, In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45 (May 8, 1997) (Universal Service Order).

Congress provided that certain carriers, when designated “eligible telecommunications carriers” (ETCs), may draw from the fund for their provision of the described services in high-cost areas. The following services must be provided by a telecommunications carrier in order to be eligible for federal universal-service support: single-party service; voice-grade access to the public switched network; dual-tone multi-frequency signaling or its functional equivalent; access to emergency services, including, in some circumstances, access to 911 and E911; access to operator services; access to interexchange services; access to directory assistance; and lifeline and link-up programs, including free toll-limitation services for qualifying low-income

consumers.

Congress left to the state public utility commissions the task of designating "eligible telecommunications carriers." 47 U.S.C. § 214(e)(2). In 1998, the Washington State Legislature authorized the Commission to take actions, conduct proceedings, and enter orders as permitted or contemplated for a state commission under the Federal Telecommunications Act of 1996. RCW 80.36.610.

MEMORANDUM

I. PETITION

On September 13, 1999, Beaver Creek Telephone company filed with the Commission a petition seeking designation as an eligible telecommunications carrier for the service areas known as the Silverton exchange and the Devil's Club exchange, as defined by the Commission in Docket No. UT-991338. Beaver Creek did *not* include in its petition a request for a waiver for compliance with toll control as defined in 47 C.F.R. §54.400(c).

Beaver Creek does not currently provide telecommunications service to any customers and has no facilities in place with which to provide service. This designation is sought in aid of its efforts to raise capital for the purpose of investing in facilities to provide service in the named exchanges. The requirements of section 214(e) and 47 C.F.R. Part 54 will apply to Beaver Creek at the time it commences local exchange service in the Silverton or Devil's Club exchanges.

II. STATUTORY BACKGROUND AND JURISDICTION

Section 214(e) of the Act sets forth the standards and processes for a state public utility commission designation of an eligible telecommunications carrier.¹

¹ (1) ELIGIBLE TELECOMMUNICATIONS CARRIERS.--A common carrier designated as an eligible telecommunications carrier under paragraph (2) or (3) shall be eligible to receive universal service support in accordance with section 254 and shall, throughout the service area for which the designation is received--

(A) offer the services that are supported by Federal universal service support mechanisms under section 254(c), either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and

(B) advertise the availability of such services and the charges therefor using media of general distribution.

This section in effect states two general criteria for designating a carrier as an ETC: (1) the carrier must offer the “services” that are supported by the federal fund, and (2) the carrier must advertise the availability of those services. The carrier must fulfill these criteria “throughout the service area for which the designation is

(2) DESIGNATION OF ELIGIBLE TELECOMMUNICATIONS CARRIERS.--A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the State commission. Upon 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 for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.

(3) DESIGNATION OF ELIGIBLE TELECOMMUNICATIONS CARRIERS FOR UNSERVED AREAS.--If no common carrier will provide the services that are supported by Federal universal service support mechanisms under section 254(c) to an unserved community or any portion thereof that requests such service, the Commission, with respect to interstate services, or a State commission, with respect to intrastate services, shall determine which common carrier or carriers are best able to provide such service to the requesting unserved community or portion thereof and shall order such carrier or carriers to provide such service for that unserved community or portion thereof. Any carrier or carriers ordered to provide such service under this paragraph shall meet the requirements of paragraph (1) and shall be designated as an eligible telecommunications carrier for that community or portion thereof.

(4) RELINQUISHMENT OF UNIVERSAL SERVICE.--A State commission shall permit an eligible telecommunications carrier to relinquish its designation as such a carrier in any area served by more than one eligible telecommunications carrier. An eligible telecommunications carrier that seeks to relinquish its eligible telecommunications carrier designation for an area served by more than one eligible telecommunications carrier shall give advance notice to the State commission of such relinquishment. Prior to permitting a telecommunications carrier designated as an eligible telecommunications carrier to cease providing universal service in an area served by more than one eligible telecommunications carrier, the State commission shall require the remaining eligible telecommunications carrier or carriers to ensure that all customers served by the relinquishing carrier will continue to be served, and shall require sufficient notice to permit the purchase or construction of adequate facilities by any remaining eligible telecommunications carrier. The State commission shall establish a time, not to exceed one year after the State commission approves such relinquishment under this paragraph, within which such purchase or construction shall be completed.

(5) SERVICE AREA DEFINED.--The term “service area” means a geographic area established by a State commission for the purpose of determining universal service obligations and support mechanisms. 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), establish a different definition of service area for such company.

received.” 47 U.S.C. §214(e)(1).

The Commission has jurisdiction over this petition both because of the 1996 Act and because of those provisions of state law which give the Commission authority over the rates and practices of telecommunications companies and its power to define the scope and nature of a carrier’s service obligation. RCW 80.01.040(3), 80.36.080, 80.36.090, 80.36.140, 80.36.230, 80.36.610.

A. Designation for Areas Other than a Petitioner’s Study Area

Section 214(e)(5) of the Act governs the determination of the geographic area in which the ETC will serve:

The term “service area” means a geographic area established by a State commission for the purpose of determining universal service obligations and support mechanisms. 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), establish a different definition of service area for such company.

As stated, “a service area means a geographic area established by the Commission.” For non-rural companies, the authority to determine the geographic area of service areas is without limitation. In the case of an area served by a rural carrier, however, 214(e)(5) defines the service area as the carrier’s “study area”² unless the Commission and the FCC³ establish a different definition of service area. In establishing a service area different than the study area, the Commission must “take into account” the recommendations of the Federal-State Joint Board.⁴

The language “take into account” requires not that we are bound to accept the study area, but only that we consider the Joint Board recommendations. We

² A “study area” is generally an incumbent LEC’s pre-existing service area in a given state. The study area boundaries were fixed as of November 15, 1984. MTS and WATTS Market Structure: Amendment of part 67 of the Commission’s Rules and Establishment of a Joint Board, Decision and Order, 50 Fed. Reg. 939 (1985).

³ The FCC has established a procedure for reviewing state orders that make designations of areas other than the study area as the service area. Its procedure anticipates that initial action will be taken by the states; designations are deemed approved if the FCC does not act within 90 days of noticing the receipt of the state order. See 47 C.F.R. §54.207.

⁴ Recommended Decision, In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45 (November 8, 1996).

have done so.⁵ We also have considered the FCC discussion of this issue in its Universal Service Order.⁶

The FCC also noted that the “states should exercise this authority [to designate service areas] in a manner that promotes the pro-competitive goals of the 1996 Act . . .” Universal Service Order ¶184.⁷ As recommended by Staff, the pro-competitive goals of the Act favor designation of smaller, rather than larger, service areas. The caution by the FCC and the Joint Board that areas not be “unreasonably large,” Universal Service Order ¶184, supports this conclusion.

In this instance, as a company newly registered with the Commission as a local exchange carrier in September 1999, Beaver Creek does not have a study area. In the registration filing and materials accepted by the Commission, Beaver Creek represented that it intends to serve two geographically separate, newly created exchanges located where no other carrier has an exchange map on file. There is therefore no need for the Commission to make any determinations with respect to incumbent rural local exchange companies for FCC concurrence.

B. Waiver for Requirement of Providing Toll Control

All petitioners who requested designation as an ETC prior to Beaver Creek’s petition requested a waiver for provision of toll limitation as a prerequisite for obtaining ETC designation. Those petitioners demonstrated in their petitions and at the hearing of their petitions that exceptional circumstances exist which warrant the granting of a waiver for providing toll limitation as authorized by 47 C.F.R. §54.101(c). Those same exceptional circumstances, rooted in a lack of technological ability to provide toll control, will likely apply to Beaver Creek Telephone at the time it begins service. If so, the Commission will entertain a request for a waiver of toll control at that time.

C. Service Quality Issues

In the deliberations on the Commission’s first ETC designations in December 1997, staff originally urged the Commission to include as a condition of granting ETC status a requirement that the carriers, abide by Commission service-

⁵ We concur with the analysis of staff in its memorandum presented at the November 26, 1997, open meeting. This Commission may deviate from study area designations and ask the FCC to concur.

⁶ First Report and Order, In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45 (May 8, 1997).

⁷ We recognize that the cited paragraph of the Universal Service Order is in the context of non-rural service areas. However, the principle that the process for designating ETC and service areas should promote the pro-competitive policies of the Act should apply also to the designation of rural service areas, recognizing of course that such designation is subject to FCC process and review.

quality standards set forth in WAC 480-120. A number of carriers contested the Commission's authority to so condition the designation. We need not reach that issue of legal authority because we conclude that the carriers' obligation to "offer the services that are supported by Federal universal service support mechanisms," as required by 47 U.S.C. §214(e)(A), requires not just willingness to offer the services, but actual performance of the services. Such performance in turn implies performance of the services at an adequate service level. As set forth below, whether an ETC-designated carrier is actually performing such service could arise in a proceeding to modify, revoke, or suspend the designation.

Requiring adequate service also is consistent with the pro-competitive policies of the 1996 Act. No company should be able to obtain a competitive advantage by avoiding its service-quality responsibilities. The Commission expects that all companies receiving ETC status will comply with relevant Commission rules.

D. Modification, Revocation, or Suspension

Given the changing dynamics of the market in the local exchange, the Commission may from time to time reopen these proceedings in order to modify the geographic area for which companies are designated. Such a proceeding may be commenced by the designated company, a petitioner for ETC status, by the Commission on its own motion, or by another appropriate person or entity.

In addition to geographic area modifications, the Commission has the authority to modify, revoke, or suspend the designations, should the prerequisites to the original designation cease to exist.⁸ For example, should the company no longer advertise its services throughout the designated area as required by 47 U.S.C. §214(e)(B), the Commission may revoke the designation or suspend it until the deficiency is corrected. Likewise, should the company cease to "offer the services that are supported by Federal universal service support mechanisms" as required by 47 U.S.C. §214(e)(A), the Commission may revoke or suspend the original designation. In making the determination of whether a designated company continues to offer such services, the Commission will look not just to the advertised availability of the services, but to the actual and timely delivery of those services. In determining whether a designated carrier is providing such service the Commission will be guided by currently accepted industry standards, including, but limited to, the quality of service rules

⁸ Though the federal Act does not specify the means for revocation or modification of an ETC designation, the Commission has authority under state law to reopen any matter before it. RCW 80.04.210. Further, the federal Act contemplates such as it allows a state commission to designate ETCs on its own motion. 47 U.S.C. §214(e)(1)(2). There is nothing in that provision which limits a state commission on its own motion from re-designating a company already designated and in effect modifying the prior designation.

contained in chapter 480-120 WAC.⁹

In this instance, because Beaver Creek is not providing service at this time, service-quality rules and other matters that would be considered in a modification, revocation or suspension of its status do not yet apply.

The Commission may modify this order for other reasons permitted by the Act.

FINDINGS OF FACT

1. Beaver Creek Telephone Company is a telecommunications company authorized to conduct business in the state of Washington.

2. Beaver Creek Telephone Company has certified that it qualifies as a rural telephone company as defined in 47 U.S.C. §153(47) and 47 C.F.R. §51.5. The Commission finds that such certification is appropriate.

3. After taking into account and considering fully the recommendations of the Federal-State Joint Board, the Commission finds that the appropriate service areas for the petitioner are at the exchange level with Silverton and Devil's Club as separate geographic designations.

4. The petitioner will offer all of the services that are to be supported by the federal universal service support mechanisms set forth in 47 C.F.R. §54.101(a).

5. The petitioner will provide advertisement of the availability of the services that are to be provided by the federal universal-service support services at the time it first provides service, except as otherwise waived by this Order, and the charges therefor, using media of general distribution as required by 47 U.S.C. §214(e)(1)(B).

6. The petitioner did not petition for a waiver of the requirement to provide toll control as defined in 47 C.F.R. §54.400.

7. The petitioner has committed to file tariffs to provide toll blocking without charge to low income consumers, if necessary, at the time it provides service.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter of this proceeding and the petitioner.

⁹ Obviously, there are some differences between wireless companies and wireline companies that make strict application of set standards to all companies difficult. However, the Commission will insist that all companies provide quality service to all customers within the designated service area for that company.

2. Granting the relief requested in the petition, except as otherwise modified by this Order, is consistent with the public interest, convenience, and necessity, and is consistent with applicable state and federal law.

3. The petitioner is a rural telephone company as defined by 47 U.S.C. §153(47).

4. The Commission need not designate a petitioner for a study area, and in the case of Beaver Creek Telephone Company, the petitioner has no study area at this time. The Commission, after taking into account the recommendations of the Federal-State Joint Board, may designate companies for geographic areas other than their study areas without conducting an adjudicatory proceeding prior to such designation.

5. The Commission has authority to modify, suspend, or revoke this designation, including the service areas accompanying this designation, at a future date.

ORDER

1. The petition of Beaver Creek Telephone Company for designation as an eligible telecommunications carrier is granted.

2. The geographic areas for which the separate designations as an eligible telecommunications carrier are granted are the Silverton exchange and the Devil's Club exchange.

3. The petitioner may request a waiver of the requirement to provide toll control in the future.

4. The Commission accepts the petitioner's certification that it qualifies as a rural telephone company pursuant to 47 U.S.C. §153(47) and 47 C.F.R. §51.5.

5. Beaver Creek must provide the required services at the time it first provides service to the Silverton exchange and the Devil's Club exchange.

6. Beaver Creek may only claim the benefits of designation as an eligible telecommunications carrier at such time as it commences local exchange service in the Silverton exchange or the Devil's Club exchange.

DATED at Olympia, Washington, and effective this day of
November 1999.

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

WILLIAM R. GILLIS, Commissioner