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January 10, 2002

RECEIVED

JAN 10 2002

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**BY HAND DELIVERY**

Ms. Magalie Roman Salas  
Office of the Secretary  
Federal Communications Commission  
236 Massachusetts Avenue, N.E.  
Suite 110  
Washington, D.C. 20002

Re: **RFB Cellular, Inc.**  
**CC Docket No. 96-45** ✓  
**Petition for Waiver of Deadline in 47 C.F.R. §54.314(d)**

Dear Ms. Salas:

On behalf of RFB Cellular, Inc., enclosed for filing are an original and four (4) copies of the above-referenced Petition for Waiver. Pursuant to §1.1105 of the Commission's rules, there is no filing fee associated with this request.

Also enclosed is a "Stamp and Return" copy of this filing to be stamped with the FCC's date of filing and then returned to our messenger.

Sincerely,

  
James F. Ireland

Enclosures:

- Original + 4 copies
- Stamp and Return Copy

cc: **By Hand-Delivery to FCC:**

Sharon Webber, Esq., Accounting Policy Division, FCC – Room 5A425

No. of Copies rec'd 014  
List ABCDE

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

**RECEIVED**

JAN 10 2002

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re )  
 )  
RFB CELLULAR, INC. ) CC Docket No. 96-45  
 )  
Petition of Waiver of Deadline )  
In 47 C.F.R. §54.314(d) )

**WAIVER – EXPEDITED ACTION REQUESTED**

**PETITION OF RFB CELLULAR, INC.  
FOR WAIVER OF DEADLINE IN 47 C.F.R. § 54.314(d)**

RFB Cellular, Inc. (“RFB”), by its counsel and pursuant to Sections 1.3 and 1.925 of the Commission’s rules,<sup>1</sup> hereby petitions the Commission for a waiver of the October 1, 2001 filing deadline set forth in Section 54.314(d)(1)<sup>2</sup> of the Commission’s rules and requests that the Commission accept RFB’s annual certification for high-cost universal support to allow RFB to receive support beginning with the first quarter of 2002. Pursuant to §1.1105 of the Commission’s rules, there is no filing fee associated with this request.<sup>3</sup>

RFB is a competitive Eligible Telecommunications Carrier (“ETC”) in the State of Michigan and is eligible to receive rural high-cost universal service support pursuant to Section 54.307 of the Commission’s rules, which provides for support to competitive ETCs.<sup>4</sup> In order to obtain support beginning in the first quarter of 2002, a wireless competitive ETC must generally file a certification with the FCC by October 1, 2001, stating that all federal high cost

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<sup>1</sup> See 47 C.F.R. §1.3; 47 C.F.R. §1.925.

<sup>2</sup> See 47 C.F.R. §54.314(d)(1).

<sup>3</sup> See 47 C.F.R. §1.1105

<sup>4</sup> See 47 C.F.R. §54.307. See Michigan PSC ETC Order (Attachment 1). RFB provides Commercial Mobile Radio Service (“CMRS”) to customers pursuant to cellular licenses KNKN848 and KNKN834.

support it receives will be used for the provision, maintenance and upgrading of facilities and services for which the support is intended (the §54.314 Certification).<sup>5</sup> However, as explained below, the Commission's new certification rules fail to provide a supplemental certification mechanism for carriers that are granted ETC designation after October 1, 2001, thereby creating a delay in funding of up to six months for new ETCs.<sup>6</sup> As a result, RFB will be denied universal service support for the first quarter of 2002 unless the Commission grants this waiver request. As set forth below, a waiver of the October 1, 2001 certification deadline to allow RFB to receive universal service support beginning with the first quarter of 2002 would be consistent with the Commission's well-established pro-competitive and competitively neutral universal service policies and would serve the public interest.

## **BACKGROUND**

RFB is a small CMRS carrier serving cellular customers in the rural areas of the Upper and Lower Peninsula of Michigan. On October 15, 2001, RFB submitted an application to the Michigan Public Service Commission (the "MPSC") requesting designation as an ETC to receive high-cost support in certain rural service areas in Michigan. On November 20, 2001, the MPSC issued an Order designating RFB as an ETC in Michigan. On December 6, 2001, pursuant to Section 54.314 of the Commission's rules, RFB filed its §54.314 Certification with the Universal Service Administrative Company ("USAC") and the Commission.<sup>7</sup>

Pursuant to Section 214(e) of the Communications Act of 1934, as amended (the "Act"), RFB became eligible to begin receiving rural high-cost universal service support on

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<sup>5</sup> See 47 C.F.R. §54.314(b).

<sup>6</sup> See 47 C.F.R. §54.314.

<sup>7</sup> See Attachment 2.

November 20, 2001, the date that the MPSC granted ETC status to the company.<sup>8</sup> However, the recently adopted Section §54.314 Certification rules established an October 1, 2001 filing deadline for Certifications to obtain support commencing with the first quarter of 2002.<sup>9</sup> In RFB's case, the October 1 filing deadline fell some 50 days prior to its receipt of ETC status from the MPSC and therefore RFB was unable to make the October 1 Certification for first quarter 2002 support.

In addition to the October 1 deadline, Commission rules provide a mechanism for “untimely” certifications to be made on a quarterly basis (by January 1, April 1 and July 1), however, such certifications will not trigger support until two quarters following the quarter that the “untimely” certification is made.<sup>10</sup> The certification process for “untimely” filings was intended to provide some protection to carriers that already receive support, but through their own fault neglect to file a timely October 1 certification. The penalty for neglecting to timely file is the loss of up to six months of support.<sup>11</sup> However, the Commission's rules do not contemplate ETC's, like RFB, that receive eligibility following the October 1, 2001 filing deadline, and therefore through no fault of their own miss the October 1 deadline. Filings by such ETC's should not be subject to the same untimely filing penalty applicable to carriers who miss the deadline through their own oversight.

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<sup>8</sup> 47 U.S.C. §214(e).

<sup>9</sup> *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Fourteenth Report and Order and Twenty-Second Order on Reconsideration, *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket No. 00-256, Report and Order, 16 FCC Rcd 11244 (released May 23, 2001)(Rural Task Force Order).

<sup>10</sup> See 47 C.F.R. §54314(d). In creating the quarterly filing dates, the Rural Task Force Order states, “*In the event that a certification is filed untimely, the carriers subject to that certification will not be eligible for support until the quarter for which USAC's subsequent filing is due. For example, if a state files a section 254(e) certification after October 1, 2001, but on or before January 1, 2002, the carrier would not be eligible for support until the second quarter of 2002.*” Rural Task Force Order at 11319, para 191.

<sup>11</sup> For example, if a certification was not filed until January 2, 2002 the carrier would not receive support until the quarter beginning July 1, 2002.

Absent a waiver of the Commission's rules, RFB's support will not begin until April 2002. The Commission did not intend this result. Since the majority of newly designated ETCs are competitive carriers, this timing problem with the rules unfairly disadvantages new entrants and violates the Commission's well-established universal service policy of competitive neutrality. Furthermore, the Commission has repeatedly recognized that designation of competitive ETCs promotes competition and benefits consumers in rural and high-cost areas.<sup>12</sup> Forcing competitive ETCs such as RFB to experience a delay in receipt of universal service support of up to 6 months *after receiving ETC designation* is not in the public interest and undermines the Commission's commitment to resolve Section 214(e) ETC designations expeditiously. The Commission committed to resolving ETC requests within 6 months (and encouraged states to do the same) out of concern that excessive delay in the designation of competing providers may hinder competition and the availability of service in high-cost areas.<sup>13</sup>

### **REQUEST FOR WAIVER**

Section 1.3 of the Commission's rules, provides the Commission with discretion to waive application of any of its rules upon a showing of good cause. In addition, Section 1.925(b)(3) provides for waiver where it is shown that:

- (i) The underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or

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<sup>12</sup> *Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier In the State of Wyoming; Federal-State Joint Board on Universal Service, Memorandum Opinion and Order, CC Docket No. 96-45, 12 FCC Rcd 48 (2000); Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota; Federal-State Joint Board on Universal Service, Memorandum Opinion and Order, CC Docket No. 96-45, FCC 01-283 (rel. October 5, 2001).*

<sup>13</sup> *Federal-State Joint Board on Universal Service; Promoting Deployment and Subscriberhip in Unserved and Underserved Areas, Including Tribal and Insular Areas, CC Docket No. 96-45, Twelfth Report and Order, 15 FCC Rcd. at 12264-65, para 114.*

- (ii) In view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.<sup>14</sup>

Federal courts also have recognized that “a waiver is appropriate only if special circumstances warrant a deviation from the general rule and such a deviation would serve the public interest.”<sup>15</sup> The Commission “may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest.”<sup>16</sup>

As explained above, the Section §54.314 Certification process creates an unintended consequence with respect to RFB by delaying USF support beyond the first quarter of 2002. This result is inconsistent with and frustrates the underlying purposes of the Commission’s rules, and is inequitable and unduly burdensome to RFB. This result is magnified given the current negative state of the capital markets, which has had a devastating nationwide impact on competitive carriers. Strict application of the Section 54.314 Certification process is inconsistent with the public interest.

For the reasons stated herein, RFB submits that granting a waiver of the filing deadline set forth in Section 54.314(d) of the rules to allow RFB to receive universal service support beginning with the first quarter of 2002 is appropriate, consistent with the Commission’s statutory goal of preserving and advancing universal service, and will advance the public interest. Expedited action is requested to minimize the economic and competitive damage that further delay in the receipt of support is causing to RFB. In light of the unprecedented decline of the competitive carrier industry and the associated tightening of capital markets for competitive

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<sup>14</sup> See 47 C.F.R. §1.925(b)(3)

<sup>15</sup> *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); see also *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

<sup>16</sup> *Northeast Cellular Telephone Co.*, 897 F.2d at 1166 (citing *WAIT Radio* 418 F.2d at 1159).

carriers over the past 12 months, it is critical that support begin at the earliest possible date to maintain competition and to level the playing field with incumbent carriers.

Respectfully submitted,

**RFB CELLULAR, INC.**

By:   
James F. Ireland  
Its Attorney

**COLE, RAYWID & BRAVERMAN, L.L.P.**  
1919 Pennsylvania Avenue, NW  
Suite 200  
Washington, D.C. 20006  
(202) 659-9750

January 10, 2002

# **ATTACHMENT 1**

COLE, RAYWID & BRAVERMAN, L.L.P.

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November 21, 2001

**VIA TELECOPIER & FEDERAL EXPRESS**

Christine Boreyko  
NECA  
Room S-2081  
80 South Jefferson Road  
Whippany, NY 07981

**Re: Michigan PSC Order Designating RFB Cellular, Inc. ETC Status**

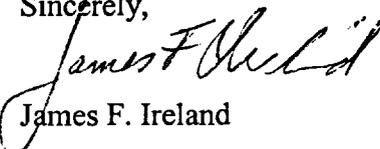
Dear Ms. Boreyko:

Enclosed is a copy of an Opinion and Order issued by the Michigan Public Service Commission on November 20, 2001 granting RFB Cellular, Inc. ("RFB") status as an eligible telecommunications carrier ("ETC") in the State of Michigan for purposes of receiving federal universal service support in Michigan.

RFB filed its Data Submission with NECA on November 1, 2001 in anticipation of its ETC designation and hereby requests that USAC take the steps necessary to process and distribute its universal service support as soon as possible.

Should there be any questions regarding this matter, please contact the undersigned.

Sincerely,

  
James F. Ireland

Enclosures

cc: Irene Flannery (USAC)

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application of
RFB CELLULAR, INC., for designation as an
eligible telecommunications carrier pursuant to
Section 214(e)(6) of the Communications Act
of 1934.

Case No. U-13145

At the November 20, 2001 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. Laura Chappelle, Chairman
Hon. David A. Svanda, Commissioner
Hon. Robert B. Nelson, Commissioner

OPINION AND ORDER

On October 15, 2001, RFB Cellular, Inc., (RFB) filed an application requesting that the Commission designate it as an eligible telecommunications carrier, pursuant to 47 USC 214(e)(6), for purposes of receiving federal universal service support in Michigan. RFB is a wireless telecommunications carrier providing service in the eastern upper peninsula and the northeastern lower peninsula. It represents that it offers the services supported by the federal universal service mechanisms using its own facilities or a combination of its own facilities and the resale of other carriers' services. It says that it advertises the availability of those services and charges in media of general distribution as required by federal law. It says that it currently provides or is capable of providing each of the services and functionalities supported by universal service using its existing cellular network infrastructure and spectrum and within its current mobile cellular offerings.

On November 16, 2001, CenturyTel of Michigan, Inc., CenturyTel of Upper Michigan, Inc., Chippewa County Telephone Company, Hiawatha Telephone Company, TDS Telecom/Chatham, TDS Telecom/Sanford, and Upper Peninsula Telephone Company [collectively, the rural ILECs (incumbent local exchange carriers)] filed comments. They request that the Commission issue a notice of opportunity to comment to permit the filing of more extensive comments. If the Commission will not issue such a notice, they request that the Commission find the requested designation to be contrary to the public interest. If the Commission disagrees and concludes that it should approve the application, they request that the Commission impose at least the conditions that were imposed by the Colorado Public Utilities Commission in a similar case.

The rural ILECs were previously designated as eligible telecommunications carriers, and assert that the Commission should not designate a second eligible carrier in the areas they serve. They assert that designating a second carrier might result in their not receiving sufficient universal service support and could potentially harm their networks. They assert that their costs are, for the most part, fixed for the life of the network, and, as a result, when they lose customers to a competitive carrier, they will experience a loss of revenue but only a small reduction in costs. They also say that wireless carriers are not subject to the same regulations and requirements that apply to the ILECs. They note, for example, that the rates of wireless carriers are not subject to regulation and wireless carriers are exempt from a range of regulations, such as those governing slamming and quality of service. They say that without jurisdiction over a wireless carrier such as RFB, the Commission will lack power to protect wireless customers. They also assert that granting the application will provide RFB an unfair competitive advantage and discourage investment. They say that universal service funds are based on the embedded cost of the rural ILECs to provide landline service, although a wireless carrier's costs are entirely unrelated to those costs,

and that their current and future investment in the network will be at risk. They assert that rural landline service is more reliable and more desirable than rural wireless service because of, among other things, interference and power supply issues associated with wireless service and the greater bandwidth for data transmission of landline service. Finally, they express a concern about granting the designation when RFB does not serve all of the rural ILECs' study areas.

Pursuant to 47 USC 214(e)(2), the Commission may designate more than one carrier in a rural area as an eligible telecommunications carrier if the Commission finds doing so consistent with the public interest, convenience, and necessity. The rural ILECs do not argue otherwise as a matter of law, but rather argue that doing so is not in the public interest. The Commission disagrees. On numerous occasions, the Commission has found that competition can be advantageous to the citizens of this state. In this case, designating RFB as an eligible telecommunications carrier is likely to promote competition and provide benefits to customers in rural and high-cost areas by increasing customer choice, while promoting innovative services and new technologies and encouraging affordable telecommunication services. Further, RFB provides service where there are few, if any, competitive local exchange carriers.

To the extent that the rural ILECs claim that wireless service is inferior to landline service in a variety of ways, the Commission would only respond that it is preferable for customers to have a choice between the two rather than deprive them of the opportunity to benefit from competition when they find it advantageous. To the extent that the rural ILECs are concerned that wireless service providers are not subject to the same regulations designed to protect customers, the Commission finds sufficient protection for customers in their right to choose not to use wireless service and to choose from whom to take service. Furthermore, the Legislature has decided that the Commission should not regulate wireless service. For that reason, the Commission must also

decline to adopt the conditions proposed by the rural ILECs, which would require that the Commission regulate wireless service, although, consistent with prior designations, the Commission reserves the right to conduct audits as needed to determine that the funds are used for permitted purposes.

To the extent that the rural ILECS are concerned about the effects on themselves of competition from wireless carriers, the Commission does not agree that the public interest requires that they be protected from competition. In any event, some of those concerns might be better addressed to the Federal Communications Commission, which is responsible for disbursing the federal universal service funds. Likewise, the Commission does not conclude that it must deny the application on the basis that RFB's service territory does not exactly correspond to the study areas of the rural ILECs. RFB proposes to serve all ILEC exchanges within its service territory and thus does not propose to engage in "cream skimming."

Finally, the Commission concludes that it need not solicit comment on the application, which would only further delay action on the application. The rural ILECs have not offered any substantial reason for the Commission to deny the application, and the Commission doubts that additional comments would be productive. It therefore concludes that it should designate RFB as an eligible telecommunications carrier at this time.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1991 PA 179, as amended, MCL 484.2101 et seq.; the Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 USC 151 et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACRS, R 460.17101 et seq.

Page 4  
U-13145

b. RFB should be designated as an eligible telecommunications carrier.

THEREFORE, IT IS ORDERED that RFB Cellular, Inc., is designated as an eligible telecommunications carrier for purposes of receiving federal universal service support in Michigan.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ Laura Chappelle  
Chairman

( S E A L )

/s/ David A. Svanda  
Commissioner

/s/ Robert B. Nelson  
Commissioner

By its action of November 20, 2001.

/s/ Dorothy Wideman  
Its Executive Secretary

# **ATTACHMENT 2**

STAMP & RETURN

COLE, RAYWID & BRAVERMAN, L.L.P.

ATTORNEYS AT LAW

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December 6, 2001

RECEIVED

DEC - 6 2001

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**BY HAND DELIVERY**

Magalie R. Salas  
Office of the Secretary  
Federal Communications Commission  
9300 East Hampton Drive  
Capitol Heights, MD 20743

Re: **RFB Cellular, Inc. (SPIN 143000273)**  
**§54.314 Annual Certification**  
**CC Docket No. 96-45**

Dear Ms. Salas:

On behalf of RFB Cellular, Inc., enclosed is its §54.314 Certification. A copy of the certification is being hand delivered simultaneously to Irene Flannery at the Universal Service Administrative Company ("USAC").

On November 20, 2001, the Michigan Public Service Commission granted Eligible Telecommunications Carrier ("ETC") status to RFB for the purpose of receiving federal universal service support. RFB is a wireless carrier and is submitting a self-certification pursuant to §54.314(b) of the Commission's rules.

Should there be any questions regarding this filing, please contact the undersigned counsel.

Sincerely,

  
James F. Ireland (by cc)

Enclosures

cc: Irene Flannery, USAC (Hand Delivered)

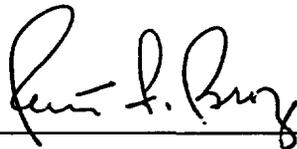
To: Federal Communications Commission  
Universal Service Administrative Company

Re: RFB Cellular, Inc. (SPIN #143000273)  
Federal Universal Service Certification  
CC Docket No. 96-45

**AFFIDAVIT OF ROBERT F. BROZ**

Robert F. Broz, of legal age, deposes and states the following under penalty of perjury:

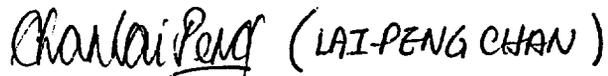
1. My name is Robert F. Broz. I am President of RFB Cellular, Inc.
2. I am filing this certification in connection with the Michigan Public Service Commission Order, dated November 20, 2001, designating RFB Cellular, Inc. as an Eligible Telecommunications Carrier ("ETC") in the State of Michigan under Section 214(e) of the Telecommunications Act of 1996.
3. I hereby certify that federal universal service support received by RFB Cellular, Inc. will be used only for the provision, maintenance and upgrading of facilities and services for which the support is intended, pursuant to Section 254(e) of the Telecommunications Act of 1996.



Robert F. Broz

December 3, 2001

SWORN TO AND SUBSCRIBED before me on the 3rd day of December, 2001.



Notary Public In and For the  
State of California

*County of Santa Barbara*

My commission expires: Sep 15, 2005

