

B W B

BRANTLEY, WILKERSON & BRYAN, P.C.
ATTORNEYS & COUNSELORS

405 SOUTH HILL STREET
MONTGOMERY, ALABAMA 36104
TEL. 334.265.1500

October 2, 2002

MAILING ADDRESS
POST OFFICE BOX 830
36101-0830
FAX 334.265.0319

BY ELECTRONIC FILING

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: CC Docket No. 96-45: Petitions of RCC Holdings, Inc. and Cellular South License, Inc. for Designation as Eligible Telecommunications Carriers (“ETCs”) in the state of Alabama (DA Nos. 02-746 and 02-1465)

EX PARTE FILING

Dear Ms. Dortch:

The Alabama Rural Local Exchange Carriers (“Alabama Rural LECs”) submit this *ex parte* letter in response to the September 20, 2002 *ex parte* filing made by Cellular South License, Inc. (“CS”) and RCC Holdings, Inc. (“RCC”) (collectively, the “Petitioners”) (the “CS/RCC *ex parte* presentation”). In the CS/RCC *ex parte* presentation the Petitioners purport to rebut an *ex parte* presentation made by the Alabama Rural LECs on September 4, 2002.

In the CS/RCC *ex parte* presentation, the Petitioners include a lengthy criticism of the McLean & Brown (M&B) white paper, USF *Portability - Getting it Right* (the “M&B white paper”), that was used by the Alabama Rural LECs in their discussion of the public interest analysis required prior to designation of an additional ETC in the territory served by a rural telephone company. As will be briefly summarized below, the Petitioners totally mischaracterize the M&B white paper. What is more important, however, is that the CS/RCC *ex-parte* presentation does not provide a substantive response to any of the factual and legal issues presented by the Alabama Rural LECs. These include:

- For an ETC application for an area served by a rural telephone company to be in the public interest it must be clearly demonstrated that the public benefits exceed the public costs.
- In sparsely populated rural areas, publicly available data from the Commission's proxy model proceeding indicates that the cost of basic telephone service is high, and increases geometrically as density reaches very low levels.
- Data from the 2000 Census indicates that in many of the rural study areas for which CS/RCC seeks ETC status the population density is very low.
- CS/RCC are currently providing service in portions of these study areas and competing for and winning customers without receiving any universal service support.
- CS/RCC has not demonstrated that approval of their application will generate sufficient public benefits to overcome the substantial public costs that it will create.

The CS/RCC *ex parte* presentation contains an attachment titled *Declaration of Don J. Wood*, (the "*Wood Declaration*") which contains serious misstatements concerning the M&B white paper. For example, the *Wood Declaration* states that "McLean & Brown have used a static model that fails to consider key variables"¹ and, that "[b]y utilizing only a static, short-term framework, they [the Alabama Rural LECs] have omitted what is arguably the primary benefit of competitive market forces: the creation of incentives for efficient operation".² The *Wood Declaration* goes on to speculate that "[u]nder the M&B version of economic theory, 'rational' decisions are made by considering only immediate, short-term consequences and in a purely static environment"³ and that "[t]heir short-term static analysis ignores important longer-term impacts on efficiency and unit cost".⁴ The *Wood Declaration* takes the Petitioners' misinterpretation of what the white paper says one step further by stating, "[i]n M&B's short-term, static model, only movement along the cost curve is possible. No shifts in the curve are permitted."⁵

In fact, the M&B white paper contains none of the above quoted language or concepts. Rather, it states that its purpose is to "outline a framework to examine the issue of portability of high-cost universal service support".⁶ It further states that the determination of whether a

¹ *Wood Declaration*, p. 3., CS/RCC *ex parte* presentation (September 20, 2002).

² *Id.* at p. 4.

³ *Id.* at p. 5.

⁴ *Id.* at p. 12.

⁵ *Id.* at p. 13.

⁶ M&B white paper at p. 1.

particular ETC grant is in the public interest can be determined by answering the question “do the public benefits of having multiple ETCs exceed the public costs of supporting multiple ETCs?”⁷ The white paper provides a brief outline of some of the benefits and costs of ETC designation, and spends several pages describing two of the major costs of ETC designation – increased fund size, and, in very sparsely populated rural areas, the impact of multiple ETCs on network efficiency. It concludes this portion of the discussion by saying “[o]ne approach to this problem would be to set out an approximation of the costs associated with the CETC portability, and challenge the party seeking access to high-cost funding to demonstrate that the public benefits exceeded this level.”⁸ There is no discussion of a “static model”, as there is no model presented for the cost/benefit comparison or for the quantification of what the benefits might be. There is no discussion of “short-term” or “long-term”, or shifts “along a curve” or “in a curve” – just a simple request that benefits and costs be in reasonable balance, and that the party making the request bear the burden of demonstrating that the benefits their designation will bring will exceed the costs. Indeed, in conclusion of this section the paper states “[t]he job of the policy maker thus becomes one of determining if there is a proper balance of benefits to costs to conclude that a CETC grant is in the public interest.”⁹

⁷ *Id.* at p. 2.

⁸ *Id.* at p. 7.

⁹ *Id.* The mischaracterization of the analytical framework contained in the M&B paper is critical in the context of the instant proceeding. While time does not permit a full rebuttal of every point in the *Wood Declaration*, other concerns include:

- The *Wood Declaration* is critical of the use of the BCPM 3.0 results (*Wood Declaration* at p. 9-12). However, this is the only publicly available data that provides estimates of forward-looking costs for all rural and non-rural study areas. The purpose is to illustrate the nature of the density/cost relationship, particularly that costs increase dramatically in sparsely populated areas. As stated in the white paper other proxy models (i.e., HCPM and HAI) “show a similar relationship of density to cost”. (M&B white paper at p. 4)
- The *Wood Declaration* is critical of the scale used on Chart 3 of what it calls a “distorted” scale. The scale used is logarithmic in nature, and is a common method for displaying data over a wide range of values. This scale is particularly appropriate in this case, as the segment of the chart of interest to this analysis consists of the relationship of cost in areas of less than 100 households per square mile to costs in areas with density above this level. The charts appended to the *Wood Declaration* are virtually useless in examining costs in the under 100 household per square mile portion of the chart.
- The second chart appended to the *Wood Declaration* purports to show two cost curves, one labeled “Embedded Cost”, the other “Economic Cost”. The “Economic Cost” curve appears to be the BCPM 3.0 results, however no source or other factual foundation is provided for the “Embedded Cost” curve. Furthermore, the data point illustrated on the chart appears to be in the range of between 1,000 and 2,000 households per square mile.

In their Reply Comments in this proceeding, as well as in the group's *ex parte* presentation on September 4, 2002, the Alabama Rural LECs presented facts and data that demonstrated that many of the rural study areas for which CS/RCC seek ETC designation are very sparsely populated. As Commissioner Martin has observed¹⁰, this means there will be the potential for significant network efficiency losses with the designation of multiple ETCs.¹¹ The Alabama Rural LECs also pointed out that both CS and RCC already compete in portions of these study areas and serve customers for whom they are requesting high-cost support. This means that there will be significant increases in the size of the fund. On page two of its *ex parte* presentation, CS/RCC contend that the Rural LECs are not harmed because funding to them is not immediately decreased. However, this ignores additional burden imposed on the Universal Service Fund and the long-term impact on available support dollars that will inevitably result in an increased financial burden on other customers. An assertion that "the 'customer list' problem is not a problem at all"¹² fails to address these long-term consequences. The combined impact of these two cost elements suggest that there are significant costs that must be overcome by equal or greater public interest benefit for the CS/RCC designation requests to be in the public interest.

The Alabama Rural LECs have presented data that indicates the interests of rural customers located in their service areas will be harmed and that the public interest will not be served should the RCC/CS petitions for ETC designation be granted.¹³ Petitioners have failed to contradict this

This would be typical of a densely populated urban or suburban area, and would not be indicative of the rural areas for which CS/RCC seek ETC designation. All of these areas have density less than 100 households per square mile, and many have density less than 10.

¹⁰ *Second Report and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 00-256, *Fifteenth Report and Order*, CC Docket 96-45 and *Report and Order*, CC Dockets 98-77 and 98-166 (Nov. 8, 2001), *Separate Statement of Commissioner Kevin J. Martin*.

¹¹ As shown on the handout used during our ex-parte meeting, in many of the rural study areas both CS and RCC have applied for CETC status, meaning there could be three.

¹² CS/RCC *ex parte* presentation, p. 2, para. 3.

¹³ Participation by the APSC in these proceedings provides further support for a determination that the public interest standard is not met. See, *Federal-State Joint Board on Universal Service; Guam Cellular and Paging Inc. d/b/a Guamcell Communications Petition for Designation as an Eligible Telecommunications Carrier in the Territory of Guam*, Memorandum Opinion and Order, CC Docket 96-45, n.39 (indicating that the failure of the Guam Commission to challenge Guamcell's petition for ETC designation provided support that its grant by the Commission was in the public interest).

showing by presenting facts and data demonstrating that a grant of the Petitions would provide benefits that would outweigh the costs that have been identified by the Alabama Rural LECs. The Petitioners' sole argument, that long-term competition inspired efficiency gains will always justify ETC status in rural areas, ignores the undeniable immediate impact of the ETC designation on the Universal Service Fund and would render meaningless the provisions of the Act distinguishing between rural and non-rural areas for purposes of ETC designation.¹⁴ Furthermore, as previously stated, both CS and RCC are already operating in portions of the rural Alabama study areas in which they seek ETC designation. They are competing for and winning customer lines, and likely displacing interstate and intrastate access minutes with bundles of "free" long distance calling. They are doing this today without the benefit of explicit high-cost support; thus, many of these efficiency gains are already occurring in the marketplace without the costs associated with the designation of additional ETCs.

The Alabama Rural LECs are not alone in raising serious concerns about these petitions, and their long-term impact on rural service. The APSC, the regulatory agency with day-to-day contact with customers and local service issues, has expressed grave concern. The APSC understands that the competition inspired efficiency gains cited by the Petitioners are largely an illusion for very small rural carriers such as Millry Telephone Company, Inc., requiring any cost cutting to come at the expense of APSC mandated service standards. The APSC also understands that certification of multiple ETCs in rural areas by the FCC will likely make it impossible for the state to create and maintain a state universal service fund that allows participation by the same carriers that have been certified for purposes of federal funding. This will obviously complicate and hinder the development of a state universal service fund by the APSC, who, the FCC has noted, "has the primary role ... to ensure reasonable [rate] comparability within its borders (i.e., to apply state and federal support to make local rates reasonably comparable within the state)."¹⁵ Nothing in the Petitioners' submission addresses these realities. The ultimate losers will be the rural customers who rely on the Alabama Rural LECs to provide local telephone service.

Petitioners have not met their burden, and thus their petitions are due to be denied. Alternatively, the Commission should delay a decision on these Petitions pending the more complete review of the entire subject of USF portability in the upcoming rulemaking as described in the Motion to Suspend Procedural Dates filed by the Alabama Rural LECs on September 16, 2002.

¹⁴ 47 USC §214.

¹⁵ Federal-State Joint Board on Universal Service, Ninth Report and Order, 14 FCC Rcd 20432, 20454 (1999), rev'd and remanded, 258 F. 3d 1191 (10th Cir. 2001).

Marlene Dortch, Secretary
October 2, 2002
Page 6

Consistent with Commission rules, we are filing one electronic copy of this *ex parte* letter and request that you place it in the record of the above-referenced proceedings.

Sincerely,

A handwritten signature in black ink that reads "Mark D. Wilkerson" with a stylized flourish at the end that includes the number "155".

Mark D. Wilkerson

cc: Matthew Brill
Anita Cheng
Eric Einhorn
Samuel Feder
Jordan Goldstein
Shannon Lipp
William Maher
Carol Matthey
Mark Seifert
Bryan Tramont
Cara Voth
Romanda Williams
Alabama Public Service Commission
CTIA
Verizon Mid-States/Verizon South, Inc.
ALLTEL Corporation
Lukas, Nace, Guitierrez & Sachs, Chartered