

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION

Petition of Midwest Wireless
Communications, LLC, for Designation
as an Eligible Telecommunications
Carrier Under 47 U.S.C. § 214(e)(2)

**FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
RECOMMENDATION**

This matter came on for hearing before Administrative Law Judge Kathleen D. Sheehy on November 4 through November 8, 2002, in the Small Hearing Room of the Minnesota Public Utilities Commission, 200 Metro Square Building, 121 East 7th Place, St. Paul, Minnesota. The record closed on December 10, 2002, upon receipt of post-hearing briefs.

Scott J. Bergs and Byron E. Starns, Leonard, Street & Deinard, P.A., Suite 2300, 150 South Fifth Street, Minneapolis, MN 55402, and David A. LaFuria, Lukas Nace Gutierrez & Sachs, Chartered, Suite 1200, 1111 19th Street, NW, Washington, DC 20036, appeared on behalf of Midwest Wireless Communications, LLC (Midwest Wireless).

Linda S. Jensen, Assistant Attorney General, 525 Park Street, Suite 200, St. Paul, MN 55103-2106, appeared on behalf of the Department of Commerce (the Department).

Richard J. Johnson and Dan Lipschultz, Moss & Barnett, PA, 4800 Wells Fargo Center, 90 South Seventh Street, Minneapolis, MN 55402, appeared on behalf of the Minnesota Independent Coalition (the MIC).

Kevin Saville, Associate General Counsel, Citizens Communications, 2378 Wilshire Boulevard, Mound, MN 55364, on behalf of Citizens Telecommunications Company of Minnesota, Inc., (Citizens) and Frontier Communications of Minnesota, Inc. (Frontier).

Lillian Brion appeared on behalf of the staff of the Minnesota Public Utilities Commission.

NOTICE

Notice is hereby given that pursuant to Minn. Stat. § 14.61, and the Rules of Practice of the Public Utilities Commission and the Office of Administrative Hearings, exceptions to this report, if any, by any party adversely affected must be filed by January 10, 2003, and replies to exceptions must be filed by January 17, 2003.

Questions regarding the filing of exceptions should be directed to Dr. Burl Haar, Executive Secretary, Minnesota Public Utilities Commission, Suite 350 Metro Square, 121 Seventh Place East, St. Paul, MN 55101. Exceptions must be specific and stated and numbered separately. Oral argument before a majority of the Commission will be permitted to all parties adversely affected by the Recommendation who request such argument. Such request must accompany the filed exceptions or reply, and an original and 14 copies of each document should be filed with the Commission.

The Minnesota Public Utilities Commission will make the final determination of the matter after the expiration of the period for filing exceptions as set forth above, or after oral argument, if such is requested and had in the matter.

Further notice is hereby given that the Commission may, at its own discretion, accept or reject the Administrative Law Judge's Recommendation and that said Recommendation has no legal effect unless expressly adopted by the Commission as its final order.

STATEMENT OF ISSUE

The issue in this matter is whether Midwest Wireless should be designated as an Eligible Communications Carrier (ETC) under 47 U.S.C. § 214(e)(2).

The Administrative Law Judge concludes that Midwest Wireless should be designated as an ETC in its proposed service area.

Based upon all the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

STATUTORY FRAMEWORK

1. The purpose of high-cost universal service support is to help provide access to telecommunications service in areas where the cost of such service otherwise might be prohibitively expensive. Historically, this purpose has been achieved both through explicit monetary payments and implicit support flows to enable carriers to serve high-cost areas at below-cost rates.¹ Explicit subsidies provide carriers with specific grants that can be used to pay for or reduce the charges for telephone service. Implicit subsidies are reflected in some state rate designs and, to a lesser extent, the federal interstate access charge system, which have provided implicit high-cost support

¹ *In the Matter of Federal-State Joint Board on Universal Service, Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket Nos. 96-45, 00-256 Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking, ¶ 13 (May 10, 2001) (*Fourteenth Report and Order*).

flowing from (1) urban areas to rural areas; (2) business customers to residential customers; (3) vertical services to basic service; and/or (4) long distance service to local service.² For obvious reasons, a system of implicit subsidies can work well only under regulated conditions.

2. With the passage of the Telecommunications Act of 1996, Congress established principles for the preservation and advancement of universal service in a competitive telecommunications environment. Section 254 of the Act provides that consumers in all regions of the nation, including consumers in rural, insular, and high-cost areas, should have access to telecommunications services at rates that are affordable and reasonably comparable to rates charged for similar services in urban areas.³ Section 254 of the Act also provides that federal universal service support mechanisms should be specific, predictable, and sufficient to preserve and advance universal service.⁴ In Section 214, Congress explicitly made universal service subsidies available to competitors willing to take on ETC obligations in both rural and non-rural areas.⁵

3. In accordance with these statutory directives, the FCC has attempted to reform “the patchwork system of largely implicit universal subsidies” that existed before passage of the Act.⁶ The FCC has adopted the principle that federal support mechanisms should be “competitively neutral,” meaning they should not unfairly advantage or disadvantage particular service providers or technologies.⁷ All telecommunications carriers, including commercial mobile radio service (CMRS) carriers that provide supported services, regardless of the technology used, may be eligible to receive federal universal service support if they satisfy section 214(e)(1) of the Act.⁸ Because such support is portable, a competitive ETC receives the same per-line high-cost support as an ILEC for lines that it captures from the ILEC, as well as for any new lines that the competitive ETC serves in the high-cost areas of the ILEC.⁹ At least until the FCC establishes a new mechanism, rural ILECs do not lose any high-cost support when competitors take lines away. Although the FCC has acknowledged that this mechanism increases the support required to provide universal service, the increases in the amount of the fund are designed to provide carriers serving rural areas with increased incentives to invest in new infrastructure and technologies.¹⁰ Recently, the FCC declined to freeze support in competitive study areas in part because it might have the consequence of discouraging investment in rural infrastructure. The FCC intends to closely monitor excessive fund growth that may result from competition, and it is currently considering possible measures to address this issue.¹¹

² *Id.*, quoting *Ninth Report and Order*, 14 FCC Rcd at 20441 ¶ 15.

³ 47 U.S.C. § 254(b)(3).

⁴ *Id.* § 254(b)(5).

⁵ 47 U.S.C. § 214(e)(2).

⁶ *Fourteenth Report and Order* ¶ 3.

⁷ *First Report and Order*, 12 FCC Rcd at 8801-03 ¶¶ 46-51; see 47 U.S.C. § 254(b)(7).

⁸ See 47 C.F.R. § 54.201(h).

⁹ *Fourteenth Report and Order* ¶ 178, citing *Ninth Report and Order*, 14 FCC Rcd at 20480 ¶ 90.

¹⁰ *Id.* ¶¶ 22, 43

¹¹ *Id.* ¶¶ 131, 209.

4. A common carrier designated as an ETC must, throughout the service area for which the designation is received, offer the services supported by federal universal service support mechanisms, either using its own facilities or a combination of its own facilities and resale of another carrier's services, and must advertise the supported services and the charges therefor using media of general distribution.¹² The services a carrier must provide to receive ETC designation include the following: voice grade access to the public switched network; local usage; dual tone multi-frequency signaling or its functional equivalent; single party service or its equivalent; access to emergency services; access to operator services; access to interexchange services; access to directory assistance; and toll limitation to qualifying low-income customers.¹³ In addition, in areas served by rural companies, a state commission may designate more than one ETC so long as the additional designation is in the public interest.¹⁴

5. Moreover, the FCC has determined that a competitive carrier need not offer the supported services throughout the service area prior to designation as an ETC, concluding that a new entrant faces a substantial barrier to entry if the incumbent LEC is receiving universal service support that is not available to the new entrant for serving customers in high-cost areas.¹⁵ Requiring a prospective new entrant to provide service throughout a service area before receiving ETC status "has the effect of prohibiting competitive entry in those areas where universal service support is essential to the provision of affordable telecommunications service and is available to the incumbent LEC."¹⁶

6. In reaching this conclusion, the FCC reasoned as follows:

No competitor would ever reasonably be expected to enter a high-cost market and compete against an incumbent carrier that is receiving support without first knowing whether it is also eligible to receive such support. We believe that it is unreasonable to expect an unsupported carrier to enter a high-cost market and provide a service that its competitor already provides at a substantially supported price. Moreover, a new entrant cannot reasonably be expected to be able to make the substantial financial investment required to provide the supported services in high-cost areas without some assurance that it will be eligible for federal universal service support. In fact, the carrier may be unable to secure financing or finalize business plans due to uncertainty surrounding its designation as an ETC.¹⁷

¹² 47 U.S.C. § 214(e)(1).

¹³ 47 C.F.R. § 54.101(a).

¹⁴ 47 U.S.C. § 214(e)(1).

¹⁵ *In the Matter of the Federal-State Joint Board on Universal Service, Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, CC Docket No. 96-45, FCC 00-248, Declaratory Ruling ¶ 12 (July 11, 2000).

¹⁶ *Id.*

¹⁷ *Id.* ¶ 13.

7. Accordingly, the FCC envisioned that, in order to be competitively neutral, the procedure for designating carriers as ETCs should be functionally equivalent for incumbents and new entrants. The FCC has indicated that it might not accept as “competitively neutral” a process in which an incumbent is able to self-certify that it meets the criteria for ETC designation, but a new entrant is subject to a more rigorous, protracted state proceeding.¹⁸ In order to meet its obligations to reasonably demonstrate to a state commission its ability and willingness to provide service upon designation, a new entrant may rely on appropriately supported descriptions of the proposed service technology; a demonstration of the extent to which the carrier may otherwise be providing telecommunications services within the state; a description of the extent to which the carrier has entered into interconnection and resale agreements; or a sworn affidavit signed by a representative of the carrier to ensure compliance with the obligation to offer and advertise the supported services. Something more than vague assertions of intent are required to demonstrate a carrier’s capability and willingness to provide service upon designation.¹⁹

PROCEDURAL BACKGROUND

8. On April 18, 2002, Midwest Wireless filed its petition for designation as an ETC with the PUC.

9. On July 5, 2002, the MPUC ordered Midwest Wireless to file additional information necessary to critically evaluate such issues as affordability of rates, service quality, whether the service substitutes for or is in addition to the existing basic wired local service, and the implications on the cost of universal service support. It referred the petition to the Office of Administrative Hearings for a contested case proceeding.²⁰

10. Pursuant to the Commission’s Order, on July 15, 2002, Midwest Wireless made a supplemental filing in support of its petition, and additional supplemental filings were made on July 19, 2002, and November 1, 2002.

OFFERING THE SERVICES DESIGNATED FOR SUPPORT

11. In its Petition and supplemental filings, and through its witnesses at the hearing, Midwest Wireless maintains that it complies with the requirements of § 214(e)(1)(A) to offer the services supported by the federal universal service support mechanisms under § 254(c). Midwest Wireless is a Commercial Mobile Radio Service (CMRS) provider that is licensed to provide service in Minnesota Rural Service Areas 7 through 11.²¹ In support of its petition Midwest provided a map of its existing facilities and approximately 200 cell sites throughout southern Minnesota. Each base station is

¹⁸ *Id.* ¶ 21 & n. 39.

¹⁹ *Id.* ¶ 24.

²⁰ *In the Matter of the Petition by Midwest Wireless Communications, LLC for Designation as an Eligible Telecommunications Carrier Under 47 U.S.C. § 214(e)(2)*, Docket No. P-573/AM-02-686, Order Requiring Additional Filings, Varying Time Period and Notice and Order for Hearing (July 5, 2002).

²¹ Ex. 7.

interconnected to the switch facility located in Owatonna, Minnesota. The map depicts Midwest-owned fiber routes, microwave equipment, and copper and fiber facilities leased from local, regional, national providers and displays computer-generated propagation signal levels within Midwest's licensed area.²²

12. Midwest intends to provide universal service through the use of both its conventional cellular offerings, which use a .6-watt handheld phone, and what it calls its basic universal service (BUS) offering, which will use a 3-watt telephone that is either digital or analog, depending on the type of customer premise equipment used.²³ Midwest calls the BUS offering a wireless local loop service, and it is designed to compete with wireline service by LECs.²⁴ The BUS offering will be provided over the same facilities Midwest uses to provide its conventional cellular offerings. Midwest intends to charge a flat rate of \$14.99 per month for the BUS offering, which includes unlimited local calls and expanded local calling areas.²⁵ A customer on any of Midwest's rate plans could choose to use a 3-watt telephone.²⁶

13. Only Citizens/Frontier dispute that Midwest Wireless is capable of offering the nine supported services upon designation as an ETC. They maintain that Midwest Wireless has offered no reliable assurances of how it will accomplish the provision of service throughout its service area or what its timetable would be for enhancing its existing network to provide the required service throughout its service area.

14. A carrier requesting ETC status is not required to provide ubiquitous service at the time of its application. The issue is whether Midwest is capable of following through on its commitment to provide universal service upon request in the future, should it receive ETC designation and universal service support funds. Midwest Wireless has constructed, without any public subsidy, a reliable network that already serves approximately 88,000 customers in much of southern Minnesota.²⁷ Midwest is clearly capable of providing service throughout its proposed service area using a combination of the 3-watt telephone, external antennas, repeater technology, construction of additional cell sites, and if necessary, resale of another carrier's service.²⁸

²² *Id.*

²³ The Telular (analog) unit is about the size of a laptop computer and provides a dial tone; customers may connect conventional telephones or fax machines to it. It is powered by electricity from an electrical outlet or a battery that has 18 hours of stand-by. The Audiovox (digital) unit looks like a conventional desk telephone. It also operates by electricity or a battery with six and one-half hours of stand-by. See *Tr. 2:23-26*. It is unclear whether this unit is still available from Audiovox. See *Tr. 2:102*.

²⁴ *Tr. 1:129-35*.

²⁵ Exs. 12 & 13 (for BUS offering, all of southern Minnesota would fall into 36 local calling areas, as opposed to many more local exchange areas).

²⁶ *Tr. 2:39*.

²⁷ Midwest's churn rate (the rate at which its customers disconnect from its network) is significantly lower than average for the wireless industry. *Tr. 3:26*.

²⁸ Midwest Wireless recently was granted ETC status in Iowa based on essentially the same universal service plan proposed here. See *In re: Midwest Wireless Iowa, LLC*, Docket No. 199 IAC 39.2.4, Order Designating Eligible Carrier (July 12, 2002). See also *In the Matter of Federal State Joint Board on Universal Service, RCC Holdings, Inc. Petition for Designation as an Eligible Telecommunications Carrier*

15. **Voice Grade Access to the Public Switched Network.** Midwest provides voice grade access to the public switched telephone network. Voice grade access is “the ability to make and receive phone calls within a bandwidth of approximately 2700 Hertz between the 300 and 3500 Hertz frequency range.”²⁹ Through interconnection arrangements with incumbent local exchange carriers, Midwest provides all its customers with the ability to make and receive calls within the prescribed frequency range. Midwest Wireless meets this requirement.

16. **Local Usage.** The FCC requires that a universal service offering include some (as yet unspecified) minimum level of local usage, which is defined as “an amount of minutes of use of exchange service, prescribed by the Commission, provided free of charge to end users.”³⁰ Midwest’s BUS offering provides unlimited calling for calls originating from the local calling area and terminating at a number within the local calling area. Midwest has many other service plans that have varying home calling areas and varying numbers of local calling minutes. Midwest has also committed to comply with any and all minimum local usage requirements adopted by the FCC.³¹

17. The Department contends that Midwest Wireless meets the local usage requirement only for the BUS offering, as the BUS offering is the only offering that provides unlimited local usage at what the Department considers to be an affordable rate. The FCC does not require that all of an ETC’s calling plans offer unlimited or any set amount of local usage. The FCC requires only that the ETC “offer” local usage.³² Furthermore, ETC status is awarded to a carrier, not to a carrier’s individual rate plans.³³ In considering ETC petitions, the FCC has never examined individual rate plans beyond determining that a carrier offered local usage, and it has never qualified only certain rate plans that offer certain amounts of local usage.³⁴

Throughout its Licensed Service Area in the State of Alabama, CC Docket No. 96-45, DA 02-3181, Memorandum Opinion and Order ¶¶ 15-18 (Nov. 26, 2002) (*RCC/Alabama ETC Order*) (rejecting similar arguments).

²⁹ 47 C.F.R. § 54.101(a)(i).

³⁰ 47 C.F.R. § 54.101(2).

³¹ Ex. 8 at 2.

³² 47 U.S.C. § 214(e)(1)(A).

³³ *Id.* §§ 214(e)(1), (2).

³⁴ In its most recent decision, the FCC determined that a wireless carrier that had stated its willingness to include a “variety of local usage plans” and its intent to comply with any local usage requirements adopted by the FCC was not required to provide a detailed description of its planned universal service offerings beyond its commitment to provide, or statement that it is now providing, all of the services supported by the universal service support mechanism. *RCC/Alabama ETC Order* ¶ 19. The Department cites a state decision for the proposition that individual rate plans may be subject to qualification, but in that case the Texas Commission was analyzing whether a carrier’s lines met the qualifications as an “ETP” for the *state* universal service fund. See *Application of WWC Texas RSA Limited Partnership for Designation as an Eligible Telecommunications Carrier Pursuant to 47 U.S.C. § 214(e) and PUC Subst. R. 26.418*, Docket No. 22289, SOAH Docket No. 473-00-1167, Order ¶¶ 39-84 (Oct. 30, 2000).

18. Midwest Wireless has established that it meets the local usage requirement.³⁵

19. **Dual tone multi-frequency signaling or its functional equivalent.** Dual tone multi-frequency (DTMF) signaling is a method of signaling that facilitates the transportation of signaling throughout the network, shortening call set-up time. Midwest's network uses out-of-band digital signaling and in-band multi-frequency signaling that is functionally equivalent to DTMF signaling. These methods provide network benefits equivalent to DTMF.³⁶ Midwest has satisfied this requirement.

20. **Single party service or its equivalent.** Midwest provides the functional equivalent of single-party service by providing a dedicated message path for the length of a user's transmission.³⁷ Midwest Wireless has satisfied this requirement.

21. **Access to emergency services.** Midwest Wireless provides its customers with access to emergency service by dialing 911, and it has complied with all applicable E-911 regulations and states that it will continue to do so as those requirements change. The FCC currently requires wireless carriers to provide access to E911 service, which includes the capability of providing both automatic numbering information (ANI) and automatic location information (ALI), only if a local emergency service provider has made arrangements for the delivery of ALI and ANI from carriers. Beginning in 2003, additional requirements become effective. Midwest Wireless has established that complies with all current FCC requirements and commits that it will comply with all future requirements. Midwest Wireless satisfies the requirement of providing access to emergency services.

22. **Access to operator services.** Midwest Wireless provides its customers with access to operator services that may be accessed by dialing 0, 611, or 411.³⁸ Midwest satisfies this requirement.

23. **Access to interexchange services.** Midwest provides its customers with the ability to make and receive interexchange or toll calls through direct interconnection arrangements that Midwest has with several interexchange carriers. Midwest's customers may access the interexchange carrier of their choice by use of calling cards, pre-paid cards, and by dialing the toll-free numbers provided by interexchange carriers. Midwest satisfies this requirement.

24. **Access to directory assistance.** Midwest provides its customers with access to directory assistance by dialing 411, (NPA) 555-1212, or 0.³⁹ Midwest Wireless satisfies this requirement.

³⁵ The contention of the Department, MIC, and Citizen's/Frontier that local usage and price are inextricably related and are both properly analyzed as "affordability" factors under the public interest criterion are addressed below in the public interest section.

³⁶ Ex. 8 at 2.

³⁷ 47 C.F.R. § 54.101(a)(4).

³⁸ Ex. 8 at 3.

³⁹ *Id.*

25. **Toll limitation to qualifying low-income customers.** Upon designation as an ETC, Midwest will participate in Lifeline and Link-up. Today, Midwest provides toll blocking services for international calls. Midwest will use the same technology to provide toll blocking to Lifeline customers at no additional charge. Midwest meets this requirement.

26. The Department maintains (for the first time in its brief) that Midwest should also be required to offer Minnesota's telephone assistance plan (TAP) to qualifying consumers and contribute to the fund that supports elderly and disabled low income consumers.⁴⁰ The Department maintains that, although radio common carriers are not considered telecommunications carriers under chapter 237, Midwest's wireless local loop offering is not a "radio" service because it is not mobile. Midwest Wireless maintains that although support of this state program may be a legitimate requirement for receipt of any state universal service funds, mobile carriers are otherwise exempt from the TAP program.

27. Midwest's wireless local loop offering is a mobile service. Although it is not as convenient to use on a mobile basis as the conventional cellular phone, it can be moved and used in a mobile fashion using a battery back-up or an AC adaptor.⁴¹ It uses the existing wireless network to provide service.⁴² The FCC has determined that a BUS offering virtually identical to Midwest's is properly classified as a mobile service.⁴³ Under state law, radio common carriers are not required to contribute to the TAP program.

ADVERTISING THE SUPPORTED SERVICES

28. An ETC must advertise the availability and prices charged for the services that are supported by federal universal service support.⁴⁴ It must also publicize the availability of Lifeline and Link-Up services in a manner reasonably designed to reach those likely to qualify for those services.⁴⁵ Midwest maintains that upon designation it intends to advertise through media of general distribution, including newspaper, direct mailings, public exhibits and displays, bill inserts, and telephone directory advertising.⁴⁶ It provided an estimated budget and a sample print advertisement.⁴⁷

⁴⁰ See Minn. Stat. § 237.70, subd. 6.

⁴¹ Tr. 2:233-26, 38-39.

⁴² Ex. 8 at 4.

⁴³ *In the Matter of the State Independent Alliance and the Independent Telecommunications Group for a Declaratory Ruling that the Basic Universal Service Offering Provided by Western Wireless in Kansas Is Subject to Regulation as Local Exchange Service*, WT-Docket No. 00-239, FCC 02-164, Memorandum Opinion and Order ¶ 17 (June 4, 2002).

⁴⁴ 47 U.S.C. § 214(e)(1)(B).

⁴⁵ 47 C.F.R. § 54.405(b); *id.* § 54.411(d).

⁴⁶ Midwest Petition at 8; Ex. 15 at 5-6.

⁴⁷ Midwest Supplemental Filing § B, Exs. B & C.

29. The Department maintains that the submitted advertising plan is not clear as to whether Midwest will separately advertise the BUS offering or will merely direct customers to the company so that Midwest can offer a conventional, higher-priced cellular offering. The Department maintains that, prior to final approval, Midwest should be required to submit an advertising plan that contains more definitive information regarding Midwest's plans specifically to advertise its ETC offerings and the availability of Lifeline and Linkup for qualifying customers.

30. Midwest has expressed its willingness to work with the Department and Commission staff to reach agreement on an acceptable advertising plan within 30 days of designation as an ETC.⁴⁸

31. Midwest Wireless has demonstrated that upon designation it will advertise the supported services.

THE PUBLIC INTEREST

32. When a carrier is seeking designation as an ETC in exchanges where the incumbent LEC is a rural carrier, state commissions are charged with determining whether an additional designation is in the public interest.⁴⁹ The exchanges in which Midwest Wireless seeks designation are served by incumbents that are rural carriers, so a public interest finding is necessary before Midwest Wireless may be designated as an ETC.

33. Federal law allows the FCC to perform ETC designations when the carrier seeking designation is not subject to the jurisdiction of a state commission.⁵⁰ In those cases involving rural carriers, the FCC makes a public interest determination in the same manner that a state commission would. The FCC has typically analyzed the public interest factor by examining whether consumers are likely to benefit from increased competition; whether designation of an ETC will provide benefits not available from incumbent carriers; and whether consumers would be harmed should the incumbent carrier exercise its option to relinquish its ETC designation under § 214(e)(4).⁵¹

34. In general the FCC has presumed that competition will benefit consumers by increasing customer choice and providing new services and technologies. The FCC has also presumed that competition will benefit rural consumers by allowing them to choose service based on pricing, service quality, customer service, and service availability, and in addition that competitive service will facilitate universal service to the benefit of rural consumers by creating incentives to ensure that quality services are available at just, reasonable, and affordable rates.⁵²

⁴⁸ Tr. 1:119.

⁴⁹ 47 U.S.C. § 214(e)(2).

⁵⁰ *Id.*

⁵¹ See *RCC/Alabama ETC Order* ¶¶ 22-25.

⁵² *Id.*

35. The FCC has rejected the suggestions of rural ILECs that it is necessary to adopt eligibility criteria beyond those set forth in § 214(e) to prevent competitive carriers from attracting only the most profitable customers, providing substandard service, or subsidizing unsupported services with universal services funds, concluding that the statutory requirements limiting eligibility to common carriers and requiring eligible carriers to offer services throughout the service area and to use support funds only for the intended purposes are sufficient.⁵³ Specifically, the FCC has said:

We also believe that the forces of competition will provide an incentive to maintain affordable rates and quality service to customers. Competitive ETCs will receive universal service support only to the extent that they acquire customers. *In order to do so, it is reasonable to assume that competitive ETCs must offer a service package comparable in price and quality to the incumbent carrier.* In addition, we emphasize that a carrier's ETC designation may be revoked if the carrier fails to comply with the statutory ETC and common carrier obligations.⁵⁴

36. Midwest Wireless has committed to using universal service support to improve its coverage and increase the availability of services to areas that are not served today. In its prefiled testimony and during the hearing, Midwest Wireless committed that upon designation as an ETC (assuming all lines were "qualified") it would build 15 specific cell sites in high-cost areas that it would not otherwise include in its network expansion plans because of cost issues.⁵⁵ In addition, Midwest Wireless has committed to use all universal service funds it receives only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.⁵⁶

37. Although Midwest Wireless has been successful in obtaining conventional cellular customers, it does not currently compete for basic local exchange service.⁵⁷ Designation of Midwest as an ETC would provide the support necessary to allow Midwest to provide the BUS service and to enhance its network so that it can compete for basic local exchange service with both its BUS and conventional cellular offerings. Competition would benefit consumers in southern Minnesota by increasing customer choice (from no choice in most areas to more than one) and providing new services made possible by wireless technologies (mobility, numeric paging, text messaging, voice mail, caller ID, call waiting, three-way calling, call forwarding, etc). In addition, competition would benefit rural consumers by allowing them to choose service, as do consumers in urban areas, based on size of local calling area, amount of local calling, price, service quality, customer service, and service availability. It would allow

⁵³ *In the Matter of Federal-State Joint Board on Universal Service, Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier in the State of Wyoming*, CC Docket No. 96-45, Memorandum Opinion and Order ¶¶ 12-13 (Dec. 22, 2000).

⁵⁴ *Id.* ¶ 13 (emphasis added).

⁵⁵ Tr. 1:39; 2:9.

⁵⁶ Tr. 1:119.

⁵⁷ Tr. 4:149-50.

consumers increased access to emergency services. Designation of Midwest Wireless as an ETC would also facilitate universal service to the benefit of rural consumers by creating incentives for both competitors and incumbents to make infrastructure investments that should ensure that quality services are available at just, reasonable, and affordable rates.

38. There is no evidence that designation of Midwest Wireless would harm consumers. No ILEC will lose support as a result of Midwest's designation, and there is no evidence that the local service market in any exchange is insufficient to support competitive entry or that any ILEC would likely relinquish its carrier of last resort obligations.

39. Under any standards articulated by the FCC, Midwest Wireless has established that its designation as an ETC is in the public interest.

40. The bulk of the controversy in this proceeding concerns whether or to what extent the state may impose additional requirements under the umbrella of the "public interest" determination. States may adopt regulations that are not inconsistent with the FCC's rules in order to preserve and advance universal service.⁵⁸ States may not, however, regulate the entry or rates charged by CMRS providers.⁵⁹ There is no question but that states may regulate terms and conditions of CMRS such as customer billing practices and consumer protection requirements, and that states may impose on CMRS providers requirements related to universal service if they do not constitute rate or entry regulation.⁶⁰

41. The Department contends first that the BUS offering is not a mobile service, making it subject to state regulation of any sort (including rate) that would be applicable to an ILEC. This argument was rejected above. The BUS offering is a mobile service.

42. The Department, MIC, and Frontier/Citizens further argue that, even if the BUS offering is considered a mobile service, the state has the authority to require Midwest Wireless to show that all of its rate plans meet some (largely unspecified) affordability standard in order to satisfy the public interest standard. According to these parties, only Midwest's BUS offering, which offers unlimited local calling for a flat rate of \$14.99, meets this affordability standard.

43. The provision of quality telephone services at just, reasonable, and affordable rates is an express goal of the Telecommunications Act of 1996. The FCC's universal service mechanisms were formulated for the purpose of furthering these goals. There can be no doubt that "affordability" is an important aspect of protecting the public interest. In a competitive environment, however, the concept of affordability has limited meaning. If a wireless product is not affordable, a consumer will not buy it. The

⁵⁸ 47 U.S.C. § 254(f); *TOPUC v. FCC*, 183 F.3d 393, 418 (5th Cir. 1999).

⁵⁹ 47 U.S.C. § 332(c)(3).

⁶⁰ 47 U.S.C. § 332(c)(3)(A); *CTIA v. FCC*, 168 F.3d 1332 (D.C. Cir. 1999).

consumer has the choice of selecting another provider or simply keeping the heavily subsidized local service provided by the ILEC. Accordingly, the FCC has essentially presumed that competition will ensure that rates are reasonable.⁶¹ As Midwest Wireless has indicated, it must price its BUS offering at a level that can compete with ILEC rates.⁶²

44. If a state nonetheless wishes to consider affordability, it must do so in a manner that is competitively neutral. The way that the Department and the ILECs wish to analyze the affordability of Midwest's rate plans is not competitively neutral. In their view, Midwest Wireless should receive a federal subsidy that will allow it to compete for local service only if it competes on the terms that are available to ILECs: unlimited local calling for flat rates, with affordability of all rate plans determined by reference to ILEC rates that are chock full of both explicit and implicit subsidies.⁶³ This approach favors one type of provider (ILECs) and one type of technology (landlines). Wireless networks are not limited by traditional exchange areas, and wireless carriers do not and cannot compete on landline terms. They have to compete for local service by offering something different and more desirable to consumers, such as mobility, larger local calling areas, or more flexible rate plans,⁶⁴ and there is nothing in the law that requires a wireless carrier's offerings to be priced comparably to what is offered by an ILEC. A wireless carrier's rate plans simply cannot be compared service-by-service or dollar-for-dollar with an ILEC's.⁶⁵

45. In this case, Midwest Wireless has proposed pricing its BUS offering at a rate that all parties agree is affordable.

46. The Department and the ILECs contend that all of Midwest's rate plans must be reviewed and qualified for affordability, otherwise the bulk of its USF support will come from the 88,000 conventional cellular lines that are not regulated and are not in their view affordable, and they contend this is not in the public interest. The assumptions underlying this argument are unfounded. If Midwest has sold 88,000 lines, it is hard to argue that they are not affordable; at least these 88,000 or so consumers have found them to be affordable. No party has identified any harm to these or any consumers that might flow from Midwest's enhanced ability to provide service in remote areas, which would be difficult or impossible to serve without these funds. Furthermore, as noted above, the FCC has never qualified a carrier's individual rate plans and, once

⁶¹ See also *In the Matter of the Petition of Inland Cellular Telephone Company, d/b/a Inland Cellular, Eastern Sub-RSA Limited Partnership, and Washington RSA No. 8 Limited Partnership for Designation as an Eligible Telecommunications Carrier*, Docket No. UT-023040, Order Granting Petition for Designation as an Eligible Telecommunications Carrier ¶ 53 (Aug. 30, 2002) (declining to determine a particular amount of local usage that is acceptable as customers can choose if the amount offered is worth the price).

⁶² Tr. 1:133-35.

⁶³ Tr. 4:51.

⁶⁴ See Ex. 1 at 12.

⁶⁵ See *In the Matter of the Application of Smith Bagley, Inc., for Designation as an Eligible Telecommunications Carrier under 47 U.S.C. § 214(e)(2) and A.C.C. § R14-2-1203*, Order ¶ 27 (Dec. 15, 2000) (wireless carrier's \$24.99 rate for 30 minutes network-wide compares favorably with \$15.90 landline charge that has a smaller local calling area);

an applicant has established that it “offers” the supported services necessary for designation as an ETC, all of the carrier’s lines are eligible for support under a mechanism that is controlled by the FCC. The provision of support based on the carrier’s total number of lines in high-cost areas is entirely consistent with the policy decision made by the FCC to structure fund mechanisms in manner that encourages competition and investment in rural infrastructure.⁶⁶

47. Another CMRS provider, Minnesota Cellular, applied for and received ETC designation from the PUC in some of the same rural service areas that Midwest Wireless seeks to serve as an ETC.⁶⁷ In contrast to Midwest Wireless, Minnesota Cellular sought designation only for its basic universal service offering, maintaining that its other lines did not meet the qualifications for ETC designation.⁶⁸ In evaluating the affordability of Minnesota Cellular’s offering, the PUC concluded that Minnesota Cellular’s offering of at least one universal service package with unlimited local usage (which was priced within 10% of incumbent rates) is affordable by any reasonable standard. The Commission further concluded that if the package contains premium features or an expanded calling area as well, “that is between the company and the consumer.”⁶⁹ In finding that it was in the public interest to designate Minnesota Cellular as an ETC, the Commission rejected many of the same general economic arguments advanced here—that subsidy-fueled competition would harm ILECs and consumers, cause them to raise rates or stop investing in infrastructure, and jeopardize service should an ILEC relinquish ETC status.⁷⁰

48. Since the MPUC’s decision in the *Minnesota Cellular* case, the FCC has issued a number of orders on ETC eligibility. In none of them has the FCC ever evaluated the price or affordability of a universal service offering.

49. The Department argues that the cost of installation and customer premise equipment necessary to provide the BUS should be considered as part of an affordability analysis. Midwest provided evidence that it would absorb the cost of any external antenna necessary to provide BUS service and that it would develop a leasing plan that would allow customers to lease the Telular or Audiovox units for no more than \$5 per month. The Department is correct that these costs should be considered, but not as part of an affordability analysis. Customer premise equipment is not regulated for either ILECs or competitors. The cost of this equipment to the consumer is relevant, however, to determining whether a carrier has a bona fide intent to compete for local exchange service. A carrier that would charge \$350 or \$500 for equipment necessary to connect to its network would have little hope of competing for local service.

⁶⁶ See, e.g., Ex. 1 at 16-18.

⁶⁷ *In the Matter of Minnesota Cellular Corporation’s Petition for Designation as an Eligible Telecommunications Carrier*, Docket No. P-5695/M-98-1285, Order Granting Preliminary Approval and Requiring Further Filings (Oct. 27, 1999).

⁶⁸ Ex. 37.

⁶⁹ *Minnesota Cellular Order* at 10.

⁷⁰ *Id.* at 16-18. see also *RCC/Alabama Order* ¶ 26 (this type of evidence does not, in and of itself, demonstrate that designation of a competitor as an ETC will harm the affected rural telephone companies or undermine the Commission’s policy of promoting competition in all areas, including high-cost areas).

Midwest's commitment to provide this equipment to consumers for no more than \$5 per month was driven by its desire to compete for local service.⁷¹ Midwest has demonstrated that it is both willing and able to compete for local exchange service.

50. Some parties also advocate that in making the public interest determination, the benefits of designating an additional ETC should be weighed against the public costs, and they contend that one of the public costs to be considered is the financial impact of designation on the federal universal service fund. Assuming the FCC found all of Midwest's 88,000 lines to be eligible for support, Midwest would receive approximately \$6 million in high-cost federal support funds and \$2 million in other support funds. This amount represents one quarter of one percent of the high-cost portion of the federal USF.⁷²

51. The FCC recently made clear that concerns about the financial impact of designating competitors as ETCs on the federal fund are not relevant in a proceeding to designate a particular carrier as an ETC.⁷³ Even if it were relevant, designation of Midwest Wireless as an ETC in Minnesota would have a minimal impact on the federal fund and would not constitute a public cost that should outweigh the benefits of competition.

52. Midwest Wireless has established that its designation as an ETC is in the public interest. Designation of Midwest Wireless as an ETC is also consistent with the state goals articulated in Minn. Stat. § 237.011 of supporting universal service, maintaining just and reasonable rates, encouraging economically efficient deployment of infrastructure, encouraging fair and reasonable competition for local exchange service in a competitively neutral regulatory manner, maintaining or improving quality of service, promoting customer choice, and ensuring consumer protections in a competitive market.

SERVICE AREA REDEFINITION

53. Midwest has requested that the Commission redefine the service areas of the rural ILECs in the territory in which it operates to conform to Midwest's licensed service area. A service area is a geographic area established by a state for the purpose of determining universal service obligations and support mechanisms.⁷⁴

54. Midwest proposes disaggregation at the exchange level in areas served by CenturyTel and Lonsdale Telephone Company. Midwest also seeks disaggregation below the exchange level to conform to Midwest's licensed service area in the service areas of Citizens/Frontier, Mid-State Telephone, Scott-Rice Telephone, Sprint Minnesota, Federated Telephone, Melrose Telephone, Winsted Telephone, Eckles Telephone, Lakedale Telephone, and Farmers Mutual Telephone.

⁷¹ Tr. 1:135.

⁷² Tr. 4:102.

⁷³ *RCC/Alabama Order* at ¶ 3.

⁷⁴ 47 U.S.C. § 214(e)(5).

55. The service area redefinition proposed by Midwest will benefit Minnesota consumers by promoting competitive entry and should be adopted. Redefinition of a rural telephone company's service area requires the state commission's approval. Once approved by a state, a petition must be submitted to the FCC detailing the proposed service area definition and the reasons for the proposed definition.

56. In its initial order, the FCC noted that it had concerns about "cream-skimming" in that a competitor could seek to serve only the low-cost areas of an exchange, leaving the ILEC with only the high-cost areas. Since then, USF funding mechanisms have changed. An ILEC has the option to target its high-cost assistance to the high-cost areas within its exchange. In fact, Citizen's and Frontier both elected to disaggregate to the exchange level within the deadlines set by the FCC.

57. Midwest Wireless seeks redefinition of these service areas only to correspond to the areas in which it is licensed to serve. There is no evidence that it is attempting to "cream-skim" the low cost areas of these exchanges.⁷⁵ The affected carriers have had an opportunity to disaggregate universal service support within their territories, or could seek Commission approval to do so. Requiring disaggregation below the exchange level should not result in any significant additional administrative burden or affect the regulatory status of any rural telephone company.⁷⁶

58. The Department recommends that Midwest's proposal for disaggregation be granted.

59. The service area redefinition proposed by Midwest will benefit Minnesota consumers by promoting competitive entry and should be adopted.

COMPLIANCE FILING

60. The Department advocates that prior to final approval of Midwest Wireless as an ETC, Midwest should be required to submit a compliance filing for Commission review and approval containing a detailed investment plan that includes specific plans for investment in network infrastructure, baseline financial investments during 2001 and 2002; a formal tariff containing a detailed description of its universal service offering and all applicable terms and conditions, including Midwest's customer service agreement, network maintenance policies, billing and payment policies, and deposit policies. It also seeks quarterly progress reports detailing efforts to implement enhanced 911 service and annual reports detailing the use of universal service funds.

61. It does not appear that ILECs or other competitive ETCs have been required to submit the information sought in the investment plan. It would not be competitively neutral to require only Midwest Wireless to provide this investment information.

⁷⁵ Tr. 5:17-18.

⁷⁶ Ex. 44 at 21.

62. Midwest Wireless should be required to make a compliance filing containing all information the state typically gathers from ETCs to make its annual certification that ETCs in Minnesota are using high-cost funds in accordance with the law.⁷⁷ Midwest Wireless should also include information specifying all rates, terms, and conditions applicable to its BUS plan, including the options for customer premise equipment and the charges it plans to assess for it; its proposed advertising plan; and its proposed customer service agreement.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Administrative Law Judge makes the following:

RECOMMENDATION

1. Midwest Wireless should be designated as an ETC in its proposed service area in Minnesota;
2. The MPUC should petition the FCC for concurrence with Midwest's service area redefinition pursuant to 54 C.F.R. § 54.207(c);
3. The MPUC should certify its designation of Midwest Wireless as an ETC with the FCC pursuant to 47 C.F.R. § 54.314(a); and
4. The MPUC should direct Midwest Wireless to file make a compliance filing as described above.

Dated: December 31, 2002

KATHLEEN D. SHEEHY
Administrative Law Judge

⁷⁷ 47 C.F.R. §§ 54.3313, 54.314.