

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

In the Matter of)	
)	
Federal-State Joint Board on)	
Universal Service)	CC Docket No. 96-45
)	
Petition by the Minnesota Public)	DA 03-2641
Utilities Commission to Redefine)	
Rural Telephone Company Service)	
Areas in the State of Minnesota)	

REPLY COMMENTS OF MIDWEST WIRELESS COMMUNICATIONS, L.L.C.

David A. LaFuria
Steven M. Chernoff
Lukas Nace Gutierrez & Sachs, Chartered
1111 Nineteenth Street, N.W.
Suite 1200
Washington, D.C. 20036

September 9, 2003

Attorneys for Midwest Wireless Communications, L.L.C.

SUMMARY

The service area redefinition proposed by the Minnesota Public Utilities Commission (“MPUC”) promotes the pro-competitive, deregulatory goals of the Telecommunications Act of 1996 and fully takes into consideration the recommendations of the Federal-State Joint Board on Universal Service (“Joint Board”). Midwest Wireless Communications, L.L.C., a commercial mobile radio service provider that recently was designated as an eligible telecommunications carrier in Minnesota, believes the proposed redefinition will remove barriers to competitive entry and, therefore, strongly supports the MPUC’s Petition.

Despite the overwhelming precedent at the FCC and state level in which rural ILEC service areas were redefined in a manner that is substantially identical to the MPUC’s proposal, several ILECs and their representatives urge the FCC to prevent the same result in this case. These ILEC commenters do not attempt to distinguish this case, nor do they even acknowledge the many prior cases in which the same result was achieved. Instead, they rehash the same arguments that were soundly and properly rejected at the state level. The MPUC held a rigorous adversarial proceeding that lasted over a year before issuing the decision in which it approved the redefinition proposal that is now before the FCC. Commenters claiming that the MPUC issued a “blanket” approval, or otherwise did not fully consider the applicable statutory requirements, are simply mistaken.

Finally, there is no legal basis for the ILECs’ anticompetitive request delay the Petition until the Joint Board completes its review of applicable rules. The FCC’s current redefinition rules were validly adopted and should be enforced until such time as they are changed.

For all of these reasons, the FCC should grant its concurrence and allow the proposed service area redefinition to become effective without further action.

TABLE OF CONTENTS

I. INTRODUCTION.....	2
II. PROMPT SERVICE AREA REDEFINITION PROMOTES THE PRO- COMPETITIVE, DEREGULATORY GOALS OF THE ACT	4
III. THE PROPOSED SERVICE AREA REDEFINITION IS CONSISTENT WITH THE ACT AND COMMISSION PRECEDENT	7
IV. THE PETITION AND THE RECORD AT THE STATE LEVEL PROVIDE AMPLE EVIDENCE THAT THE MPUC’S PROPOSAL TAKES THE JOINT BOARD’S RECOMMENDATIONS INTO ACCOUNT.....	10
V. THE ILECS’ “RESALE” ARGUMENTS SHOULD BE REJECTED.....	15
VI. THERE IS NO BASIS FOR SUSPENSION OF THE FCC’S REDEFINITION PROCEDURES PENDING THE JOINT BOARD REFERRAL	16
VII. CONCLUSION.....	17

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

In the Matter of)	
)	
Federal-State Joint Board on)	
Universal Service)	CC Docket No. 96-45
)	
Petition by the Minnesota Public)	DA 03-2641
Utilities Commission to Redefine)	
Rural Telephone Company Service)	
Areas in the State of Minnesota)	

REPLY COMMENTS OF MIDWEST WIRELESS COMMUNICATIONS, L.L.C.

Midwest Wireless Communications, L.L.C. (“Midwest”), by counsel, hereby replies to the comments submitted in response to the Commission’s *Public Notice*¹ regarding the Petition by the Minnesota Public Utilities Commission (“MPUC”) for Commission agreement in redefining the service areas of several Minnesota incumbent local exchange carriers (“ILECs”).² Cellular Mobile Systems of St. Cloud d/b/a Cellular 2000 and Minnesota Southern Wireless Company d/b/a HickoryTech (“CMS/HickoryTech”), the Alaska Telephone Association (“ATA”), Citizens Telecommunications Company of Minnesota, Inc. and Frontier Communications of Minnesota, Inc. (“Citizens/Frontier”), CenturyTel, Inc. (“CenturyTel”), Minnesota Independent Coalition (“MIC”) and the United States Telecom Association (“USTA”)

¹ The Wireline Competition Bureau Seeks Comment on the Minnesota Public Utilities Commission’s Petition to Redefine Rural Telephone Company Service Areas in the State of Minnesota, *Public Notice*, DA 03-2641 (rel. Aug. 12, 2003) (“*Public Notice*”).

² Petition of the Minnesota Public Utilities Commission for Agreement With Changes in Definition of Service Areas for Exchanges Served by CenturyTel et al., CC Docket No. 96-45 (filed July 8, 2003) (“Petition”). Although the Petition was filed with the Secretary’s office on July 8, 2003, and was listed in that week’s Daily Filings as filed on that date, Midwest was advised by Wireline Competition Bureau staff that a date-stamped copy was not received by the Bureau until August 7, 2003. Accordingly, the *Public Notice* incorrectly lists the Petition as having been filed on August 7, 2003.

submitted comments in this proceeding. As demonstrated below, no commenter has raised any issue that would justify opening a proceeding or otherwise delaying a grant of the Petition.

I. INTRODUCTION

The redefinition proposed by the MPUC meets the applicable criteria established by the FCC and the Joint Board. Redefinition along wire-center boundaries is an essential step needed to remove barriers to competitive entry, and it is consistent with prior actions taken by the FCC and numerous state commissions. One need look no further than the docket sheet attached as Exhibit A to CMS/Hickorytech's comments to dispel any illusion that the universal service goals of the Act – including the Joint Board's recommendations pertaining to service area redefinition – were not thoroughly and conscientiously considered during the rigorous, year-long adversarial proceeding that was undertaken at the state level. That proceeding resulted in an order in which the MPUC concluded, *inter alia*, that “the record does not support the suggestion that the Company is targeting areas based on their cost characteristics. Rather, the Company is targeting all areas within its licensed service territory”; “The Commission is not persuaded that this [redefinition] will result in significant additional administrative burdens”; and “[redefining] these service areas is consistent with the regulatory status accorded rural telephone companies under the Act [which will] remain unchanged”. Accordingly, the MPUC determined that it would “petition the FCC to disaggregate, for ETC purposes, the service areas of the relevant incumbent telephone companies to the extent necessary to permit the Company to obtain ETC designation throughout its CMRS licensed service territory.”

The comments submitted by ILECs and their representatives do nothing to call this reasoned proposal into question. The ILECs recycle essentially the same arguments the MPUC soundly and properly rejected after a lengthy discovery process, direct and responsive testimony

submitted by no fewer than eleven witnesses, a hearing that lasted a full week, and multiple rounds of legal briefing. The ILECs and their representatives are now engaged in a last-ditch effort to thwart the MPUC's will and derail competition. Not unexpectedly, the ILEC commenters downplay or ignore the overwhelming weight of precedent in which the FCC and several other states granted service area redefinition substantially identical to that requested by the MPUC. Moreover, those commenters ignore the substantial record and precedent that support a grant of the Petition in a transparently self-serving attempt to manufacture a case of first impression. These efforts should be rejected, as similar efforts have been rejected in prior cases.

Some commenters seized upon alleged "factual defects" in the Petition to intentionally cloud what should be a relatively straightforward analysis. These commenters wrongly urge rejection of the Petition based on the fact that the MPUC: (1) stated that disaggregation under Section 54.315 obviates the need for service area redefinition under Section 54.207(c); (2) requested "sub-wire center" redefinition for wire centers that are only partially covered by Midwest's licensed service area; and (3) stated that it is necessary to redefine an ILEC's "study area and/or service area[s]". However, a look at what Midwest requested, and what the MPUC granted in the proceeding below, demonstrates that the clear intent of the Petition is to request concurrence with Midwest's proposal to redefine all affected rural ILECs' service areas along wire center boundaries.³

³ It is important to note that the MPUC is authorized to propose to the FCC no more and no less than what was set forth in MPUC's own order granting ETC status. If the Petition contains imperfect draftsmanship, the MPUC will have ample opportunity to clarify its request and confirm its intention, through its reply comments or in *ex parte* submissions, within the confines of the 90-day period during which the FCC may consider whether to open a proceeding. What the FCC should *not* do is be swayed by the ILECs' anticompetitive demands for delay or outright rejection.

II. PROMPT SERVICE AREA REDEFINITION PROMOTES THE PRO-COMPETITIVE, DEREGULATORY GOALS OF THE ACT

Service area redefinition is a vital means of removing barriers to competition. For this reason, petitions for concurrence with service area redefinition must be reviewed in the context of the congressional mandate to promote new technologies and facilitate competitive entry “in all telecommunications markets.”⁴ Indeed, the statutory provisions governing service area redefinition were adopted as part of the Telecommunications Act of 1996 (“Act”),⁵ a sweeping piece of legislation that specifically commanded the FCC to establish a “pro-competitive, deregulatory national policy framework” designed to accelerate the deployment of advanced telecommunications to all Americans. When it adopted this legislation, Congress recognized that the existing system of universal service subsidies — under which incumbent local exchange carriers (“ILECs”) had exclusive access to implicit and explicit universal service subsidies — could not be justified in a regulatory environment that sought to foster competition.⁶ Therefore, Congress directed the FCC to reform the system to ensure that universal service subsidies become explicit, predictable, and sufficient to achieve the purposes of the Act.⁷

Soon after the passage of the Act, the FCC reaffirmed Congress’s assessment of the necessity of making universal service subsidies transparent and accessible to competitors. In the *Local Competition Order*, the FCC stated:

The present universal service system is incompatible with the statutory mandate to introduce efficient competition into local markets, because the current system distorts competition in those markets. For example, without universal service reform, facilities-based entrants would be forced to compete against monopoly

⁴ See Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. at 113.

⁵ Pub. L. No. 104-104, 110 Stat. 56 (1996). The Act amends the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.*

⁶ See *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 406 (5th Cir. 1999) (“*TOPUC*”) (“Because opening local telephone markets to competition is a principal objective of the Act, Congress recognized that the universal service system of implicit subsidies would have to be re-examined.”).

⁷ 47 U.S.C. §§ 253(b)(5), 254(e).

providers that enjoy not only the technical, economic, and marketing advantages of incumbency, but also subsidies that are provided only to the incumbents.⁸

To remedy this competitive disparity, the FCC ruled that the principle of competitive and technological neutrality would guide the formulation of its universal service policies.⁹

Specifically, the FCC declared:

Universal service support mechanisms and rules should be competitively neutral. In this context, competitive neutrality means that universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another.¹⁰

The FCC has consistently reaffirmed the pro-competitive goals of its universal service and ETC designation policies,¹¹ and it recently confirmed that “[c]ompetitive neutrality is a fundamental principle of the Commission’s universal service policies.”¹²

Despite the Commission’s dedication to competitive neutrality and its congressional mandate to promote competition, some commenters nevertheless seek to preclude outright the

⁸ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, 11 FCC Rcd 15499, 15506-07 (1996) (“*Local Competition Order*”).

⁹ See generally, CC Docket No. 96-45; see also, *Notice of Proposed Rulemaking and Order Establishing Joint Board*, 11 FCC Rcd 18092 (1996); *Federal-State Joint Board on Universal Service, Report and Order*, 12 FCC Rcd 8776 (1997) (“*First Report and Order*”); *Ninth Report and Order and Eighteenth Order on Reconsideration*, 14 FCC Rcd 20432 (1999) (“*Ninth Report and Order*”); *Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking*, 16 FCC Rcd 11244 (2001) (“*Fourteenth Report and Order*”).

¹⁰ *First Report and Order, supra*, 12 FCC Rcd at 8801.

¹¹ See, e.g., *Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota*, 16 FCC Rcd 18133, 18137 (2001) (“Designation of qualified ETCs promotes competition and benefits consumers by increasing customer choice, innovative services, and new technologies.”); *Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier in the State of Wyoming*, 16 FCC Rcd 48 (2000) (“*Wyoming ETC Order*”) (“[C]ompetition will result not only in the deployment of new facilities and technologies, but will also provide an incentive to the incumbent rural telephone companies to improve their existing network to remain competitive, resulting in improved service to Wyoming consumers. In addition, we find that the provision of competitive service will facilitate universal service to the benefit of consumers . . . by creating incentives to ensure that quality services are available at ‘just, reasonable, and affordable rates.’”) (footnote omitted).

¹² *Guam Cellular and Paging, Inc., Petition for Waiver of Section 54.314 of the Commission’s Rules and Regulations*, CC Docket No. 96-45, DA 03-1169 at ¶ 7 (Tel. Acc. Pol. Div. rel. April 17, 2003).

designation of ETC applicants whose licensed boundaries differ from those of the incumbents. While such a policy would do much to preserve the ILECs' lock on the local exchange market, it is at odds with the service area redefinition provisions of the Act and the FCC's rules, which seek to ensure that the principle of competitive neutrality is served when new ETCs seek to serve an area that differs from an ILEC's study area. Specifically, Section 214(e)(5) of the Act states:

In the case of an area served by a rural telephone company, "service area" means such company's "study area" unless and until the Commission and the States, after taking into account recommendations of the Federal-State Joint Board instituted under Section 410(c), establish a different definition of service area for such company.¹³

USTA's description of this section as a "directive against redefining a rural telephone company's service area"¹⁴ is simply mistaken. To the contrary, it provides an explicit means for CMRS providers that are otherwise qualified for ETC designation to receive support in study areas they lack the ability to serve entirely.

Recognizing the need to remove this obstacle to competitive entry while giving due consideration to the Joint Board's recommendations, the FCC adopted a streamlined federal-state process for redefining service areas pursuant to Section 214(e)(5) of the Act.¹⁵ Specifically, after being subjected to notice and comment, a state's proposal to redefine a LEC service area

¹³ 47 U.S.C. § 214(e)(5).

¹⁴ USTA Comments at p. 8.

¹⁵ See 47 C.F.R. § 54.207(c)(3)(ii). See also *First Report and Order*, supra, 12 FCC Rcd at 8881. CenturyTel's assertion that the FCC and the states are required to provide "physical evidence" that they considered the Joint Board's recommendations (CenturyTel Comments at p. 2) borders on absurd. The Act requires only that the FCC and the states take those recommendations into account. In contrast to other statutory provisions, Section 214(e)(5) does not require a written decision. See, e.g., 47 U.S.C. § 271(d)(3) ("... the Commission shall issue a written determination approving or denying the authorization requested in the application for each State . . . The Commission shall state the basis for its approval or denial of the application."); 47 U.S.C. § 309(d)(2) ("If the Commission finds . . . it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition."); 47 U.S.C. § 626(c)(3) ("the franchising authority shall issue a written decision granting or denying the proposal for renewal . . . and transmit a copy of such decision to the cable operator. Such decision shall state the reasons therefor.").

automatically becomes effective 90 days after the proposal is placed on public notice, unless there are unusual circumstances that require further consideration in a new notice-and-comment proceeding. On multiple occasions, the Commission has utilized this procedure to consider requests for concurrence with proposed rural ILEC service area redefinitions, granting its concurrence and allowing the redefinition to take effect.¹⁶ The same process should be applied here, that is, the proposed service area redefinition should be allowed to enter into effect unless there is a specific showing that harm would result. As demonstrated below, no party has provided any reason to delay or deny the MPUC's proposal.

III. THE PROPOSED SERVICE AREA REDEFINITION IS CONSISTENT WITH THE ACT AND COMMISSION PRECEDENT

Consistent with federal universal service objectives, the service area redefinition proposed in the MPUC's Petition appropriately seeks to redefine rural ILEC service areas in a competitively neutral manner. Commercial mobile radio service ("CMRS") providers like Midwest are restricted to serving those areas within their FCC-authorized Cellular Geographic Service Area ("CGSA"), which generally does not correspond to the rural LEC study area boundaries. Thus, when a CMRS carrier serving customers within a rural LEC study area seeks designation as an ETC, it cannot be designated, and therefore cannot receive any high-cost support, unless the state and the FCC agree to redefine the affected rural LEC's service area. In

¹⁶ See, e.g., *Smith Bagley, Inc. Petitions for Agreement to Redefine the Service Areas of Navajo Communications Company, Citizens Communications Company of the White Mountains, and CenturyTel of the Southwest, Inc. on Tribal Lands within the State of Arizona*, DA 01-409 (WCB rel. Feb. 15, 2001); *Smith Bagley, Inc. Petitions to Redefine the Service Area of Table Top Telephone Company on Tribal Lands within the State of Arizona*, DA 01-814 (WCB rel. April 2, 2001); *Smith Bagley, Inc. Petitions to Redefine the Service Area of CenturyTel of the Southwest, Inc. in the State of New Mexico*, DA 02-602 (WCB rel. March 13, 2002).

fact, if such service area redefinition does not occur, CMRS carriers will be effectively precluded from competing in those areas solely because of the technology they use.¹⁷

The FCC and several state commissions have redefined rural ILEC service areas under Section 214(c)(5) of the Act to allow CMRS providers' ETC status to take effect throughout their licensed service areas. For example, in 1999, the FCC concurred with a proposal by the Washington Utilities and Transportation Commission and roughly 20 rural ILECs both to disaggregate support and to redefine each of the ILECs' wire centers along wire center boundaries. In that case, the FCC concluded:

[O]ur concurrence with rural LEC petitioners' request for designation of their individual exchanges as service areas is warranted in order to promote competition. The Washington Commission is particularly concerned that rural areas . . . are not left behind in the move to greater competition. Petitioners also state that designating eligible telecommunications carriers at the exchange level, rather than at the study area level, will promote competitive entry by permitting new entrants to provide service in relatively small areas . . . We conclude that this effort to facilitate local competition justifies our concurrence with the proposed service area redefinition.¹⁸

Last year, the FCC granted its concurrence with a proposal by the Colorado Public Utilities Commission ("COPUC") to redefine the service area of CenturyTel of Eagle, Inc., also along wire center boundaries. In its petition seeking FCC concurrence, COPUC explained that, as in the Washington case, redefinition was necessary to permit competitive entry in rural areas where consumers lack choices:

¹⁷ See *First Report and Order*, *supra*, 12 FCC Rcd at 8879-80 ("...if a state adopts a service area that is simply structured to fit the contours of an incumbent's facilities, a new entrant, especially a CMRS-based provider, might find it difficult to conform its signal or service area to the precise contours of the incumbent's area, giving the incumbent an advantage.").

¹⁸ *Petition for Agreement with Designation of Rural Company Eligible Telecommunications Carrier Service Areas and for Approval of the Use of Disaggregation of Study Areas for the Purpose of Distributing Portable Federal Universal Service Support*, Memorandum Opinion and Order, 15 FCC Rcd 9924, 9927-28 (1999).

[M]aintaining CenturyTel's rural service area in a multiple, non-contiguous exchange configuration, in effect, precludes potential competitive providers from seeking ETC designation even for areas where those companies can provide service, and can meet all other requirements for designation as an ETC. CenturyTel will receive universal service support, but competitive providers will not. This circumstance is a barrier to entry.¹⁹

After considering COPUC's petition and comments submitted by both ILEC and competitive ETC representatives, the FCC granted its concurrence by allowing the proposed redefinition to go into effect without opening a proceeding. The FCC has concurred with similar proposals in New Mexico and Arizona to permit wireless competitive ETCs to receive high-cost support in rural ILEC study areas they cannot cover completely.²⁰ Additionally, the FCC has proposed the redefinition of several Alabama rural ILEC service areas along wire center boundaries to permit two newly designated wireless ETCs to begin receiving support throughout their licensed service areas.²¹ Similarly, in December 2002, the Wisconsin Public Service Commission, in granting ETC status to United States Cellular Corporation, agreed with the applicant's proposal to redefine rural ILEC service areas so as to allow a CMRS carrier to be designated throughout its entire licensed service territory.²² Finally, there is the previous case in which the MPUC itself obtained the FCC's concurrence with its proposal to redefine all of the wire centers of Frontier Communications of Minnesota, Inc. ("Frontier") as separate service areas.²³

¹⁹ Petition by the Public Utilities Commission of the State of Colorado to Redefine the Service Area of CenturyTel of Eagle, Inc., Pursuant to 47 CFR § 207(c) at p. 4 (filed Aug. 1, 2002) at p. 12.

²⁰ See *CenturyTel Arizona Notice, supra; CenturyTel N.M. Notice, supra; Table Top Notice, supra.*

²¹ See *RCC Holdings, Inc.*, DA 02-3181 at ¶ 26 (W.C.B. rel. Nov. 27, 2002) ("RCC Alabama ETC Order") (app. for rev. pending) at ¶¶ 33, 37.

²² United States Cellular Corporation, 8225-TI-102 (Wisc. PSC Dec. 20, 2002) at p. 9 (petition for FCC concurrence not yet filed).

²³ Petition of the Minnesota Public Utilities Commission for FCC Agreement to Redefine the Service Area of Frontier Communications of Minnesota, Inc., CC Docket No. 96-45 (filed Oct. 26, 2000).

The ILEC commenters have opted to ignore applicable precedent, completely failing to distinguish this case. Indeed, the redefinition requested by Midwest and approved by the MPUC is, in all relevant respects, the same as that granted in the cases described above. Specifically, in its petition for ETC status, Midwest stated: “To enable Midwest Wireless to be designated as an ETC in the area requested, Midwest Wireless asks that the MPUC classify each wire center of the affected LECs ... as a separate service area.”²⁴ In its order designating Midwest as an ETC, the MPUC stated, “the Commission finds the Company’s request reasonable, and will grant it.”²⁵

As in the prior cases discussed above, the proposed redefinition will remove the last obstacle facing competitive carriers seeking to provide consumers in the affected ILECs’ service areas with high-quality service and an array of pricing plans as a real competitive alternative to LEC service. No commenter has advanced any credible argument that would distinguish this case from the many prior cases in which substantially identical redefinition was achieved. The MPUC’s proposal will serve the public interest, is consistent with FCC and state precedent, and should be allowed to become effective without further action.

IV. THE PETITION AND THE RECORD AT THE STATE LEVEL PROVIDE AMPLE EVIDENCE THAT THE MPUC’S PROPOSAL TAKES THE JOINT BOARD’S RECOMMENDATIONS INTO ACCOUNT

Although some ILEC commenters attempt to complicate the picture, the requirements for redefining a rural ILEC service area are straightforward. Specifically, under Section 214(e)(5), a service area may be redefined as something other than an ILEC’s study area if “the Commission and the States, after taking into account recommendations of a Federal-State Joint Board ...

²⁴ Verified Petition of Midwest Wireless Communications, L.L.C. for Designation as an Eligible Telecommunications Carrier (filed April 18, 2002) (“Midwest ETC Petition”) at ¶ 37.

²⁵ Midwest Wireless, L.L.C., Order Granting Conditional Approval and Requiring Further Filings, Docket No. PT-6153/AM-01-686 (issued March 19, 2003) (“Midwest ETC Order”) at p. 14.

establish a different definition of service area for such company.”²⁶ After a state has conducted its own analysis and concluded that redefinition is justified, the state commission or another party must seek the FCC’s concurrence by submitting a petition that includes: (1) a description of the proposed redefinition; and (2) the state commission’s ruling or other statement presenting the reasons for the proposed redefinition, including an analysis that takes the Joint Board’s recommendations into account.²⁷

Consistent with this requirement, the Petition provided both a description of the proposed redefinition²⁸ and an analysis of the proposed redefinition under the framework provided in the Joint Board’s recommendations. Specifically, with regard to the Joint Board’s recommendations, the Petition explains that (1) the Joint Board’s concerns regarding uneconomic receipt of high levels of support in low-cost areas (commonly referred to as “cream skimming”) are minimized, if not eliminated, by the rural ILECs’ ability to disaggregate and target support on a more granular level than the entire study area; (2) the proposed redefinition takes into account the special status of rural carriers under the Act; and (3) the proposed redefinition will not impose any undue administrative burden on the affected rural ILECs, since they already have the ability to calculate support down to the wire-center level (and many in fact have already done so).²⁹

The Petition also provides a detailed account of the proceeding below, which laid the groundwork and provided a sound basis for the MPUC’s adoption of Midwest’s service area redefinition proposal.³⁰ In that proceeding, Midwest, Citizens/Frontier, MIC, and other parties

²⁶ 47 U.S.C. § 214(e)(5).

²⁷ 47 C.F.R. § 54.207(c)(1).

²⁸ See Petition at p. 2.

²⁹ See *id.* at pp. 11-12.

³⁰ See *id.* at pp. 6-8.

had several opportunities to brief the MPUC on the merits of Midwest's service area redefinition proposal. The parties submitted direct, reply, rebuttal, and surrebuttal testimony from at least eleven witnesses, including expert witnesses who dealt extensively with the service area redefinition issue. Midwest responded to dozens of interrogatories propounded by parties seeking information to aid their analysis and advocacy regarding Midwest's proposal. The MPUC received a thoroughgoing analysis of the proposed service area redefinition from all parties, including how it relates to the Joint Board's recommendations. On the basis of the fulsome record before it, the MPUC properly concluded that the proposed service area redefinition is warranted pursuant to the Joint Board's recommendations.

The MPUC found that cream skimming was unlikely to result because of the rural ILECs' opportunity to disaggregate support under Section 54.315 of the FCC's rules.³¹ Specifically, under the disaggregation framework adopted by the FCC in May 2001, all rural ILECs had the opportunity to target support levels more accurately in order to reduce the possibility that competitors will receive improper incentives to enter low-cost areas.³² The MPUC noted that some of the affected ILECs, including Citizens/Frontier, had already disaggregated support pursuant to those rules, effectively moving support out of low-cost areas in which a competitor might otherwise be able to receive uneconomic levels of support.³³ In light of the discussion in the Petition and the Midwest ETC Order, we find CenturyTel's claim that "[t]here is no indication in the Petition or the Minnesota PUC's order designating Midwest as a

³¹ See Petition at p. 12, quoting Midwest ETC Order at p. 14 ("Disaggregation reduces the opportunity for cream-skimming; a competitive ETC that targeted only low-cost areas would also receive only low levels of subsidies.").

³² See 47 C.F.R. § 54.315(a). See also *Fourteenth Report and Order*, *supra*.

³³ See *id.*

competitive ETC that the state commission considered the disaggregation of support when it certified Midwest” completely unsupportable.³⁴

No commenter has even attempted to demonstrate that Midwest or any other carrier is targeting low-cost areas in which high levels of support are available. The only statement in this regard is MIC’s assertion that Midwest is “clearly focusing its service on more densely settled areas and heavily traveled highway corridors within its licensed area, as the locations of its tower sites make clear.”³⁵ MIC makes no reference to the record below, and provides no other evidence, that would tend to show that Midwest is “focusing its service” in this manner. But MIC misses the obvious point: the high-cost program was opened to competitors to provide them with critical funding for the construction and deployment of infrastructure to serve areas in which it would otherwise make no economic sense to serve. If Midwest’s service is primarily available in more densely settled areas, this is because it has not had the same access to funding the ILECs have had for decades. With high-cost support will come the opportunity to expand service into sparsely settled areas that traditionally lack choices in telecommunications service.

Moreover, as the MPUC noted, several of the affected ILECs have already taken action to reduce the possibility of cream skimming by more accurately targeting support levels to wire centers and cost zones within their study areas. Those ILECs that declined to avail themselves of the disaggregation rules were clearly not concerned with the possibility of cream skimming. Indeed, if there were such opportunities, that ILEC could easily have addressed any such concerns by disaggregating support under the simple procedures adopted by the FCC. Even if cream skimming opportunities exist, the rules provide adequate redress. Specifically, to remedy

³⁴ CenturyTel Comments at p. 4.

³⁵ MIC Comments at p. 8.

situations in which ILECs' initial selections are found to be inadequate, the FCC's rules provide ILECs and state commissions the ability to alter the disaggregation plans submitted in 2001.³⁶

The MPUC also concluded that the proposed service area redefinition properly took into account the affected ILECs' special status as rural telephone companies.³⁷ The MPUC correctly noted that the exemptions accorded to rural ILECs under Section 214(f) of the Act "remain unchanged" as a result of the proposed service area redefinition. The MPUC further noted that service area redefinition does not in any way diminish the careful consideration, including a determination of public interest, that the MPUC must give to any application for competitive ETC status in areas served by rural ILECs.³⁸

Finally, the MPUC concluded that the proposed service area redefinition would not impose significant additional administrative burdens on rural ILECs.³⁹ This finding is essentially unchallenged, as no commenter has provided any evidence – beyond conclusory assertions – of possible administrative burdens that the MPUC has already rejected. Citizens/Frontier appears to claim that rural ILECs will be burdened if they have to disaggregate support – *even though Citizens/Frontier itself appeared to have no trouble disaggregating support to the exchange level*. Because the ILECs' claims of administrative burden are not credible and have already been rejected based on a well-considered record, the MPUC's finding should be honored.

³⁶ See 47 C.F.R. §§ 54.315(b)(4); 54.315(c)(5), 54.315(d)(5).

³⁷ See Petition at p. 12, quoting Midwest ETC Order at p. 14.

³⁸ See *id.* Although some commenters would like to re-litigate the "public interest" case that was fully argued and resolved at the state level (see ATA Comments at pp. 2-3), the MPUC had exclusive jurisdiction over that question pursuant to Section 214(e)(2) of the Act. The determination that a grant of Midwest's petition would serve the public interest was made with finality by the MPUC and is not appealable to the FCC.

³⁹ See Petition at p. 12, quoting Midwest ETC Order at p. 14.

V. THE ILECs' "RESALE" ARGUMENTS SHOULD BE REJECTED

Some commenters incorrectly argue that competitive ETCs should be required to offer resold services if they lack the facilities to serve every portion of an ILEC's study area.⁴⁰ Tellingly, these commenters fail to cite any FCC or state decision requiring a competitive ETC to use resale as a condition for ETC status. Imposing such a requirement in an ad hoc fashion would be inappropriate for several reasons.

First, it would directly contradict the FCC's conclusions that an important benefit of competitive entry in rural areas is "the deployment of new facilities and technologies" as well as the creation of an "incentive to the incumbent rural telephone companies to improve their existing network to remain competitive."⁴¹ Second, because of the sunset of the FCC's rule requiring resale in November 2002, Midwest is by no means assured of the continued cooperation of other carriers or the ability to resell facilities pursuant to reasonable rates, terms, and conditions.

Third, any requirement to provide resold services can only be properly applied within Midwest's licensed service area, where it has an incentive and ability to construct facilities. Outside of its service area, long-term resale would be completely unworkable for Midwest and for Minnesota's consumers. Midwest would not be able to control other carriers' wireless networks, leaving it unable to provision service, improve service, or make any necessary network adjustments to provide appropriate service quality. Midwest would not be able to ensure that it

⁴⁰ See CenturyTel Comments at p. 5; MIC Comments at pp. 3-4; USTA Comments at pp. 10-11.

⁴¹ See *Wyoming ETC Order*, *supra*, 16 FCC Rcd at 55 (2000). See also Remarks of Michael K. Powell, Chairman, Federal Communications Commission, at the Goldman Sachs Communicopia XI Conference, New York, NY (Oct. 2, 2002) ("Only through facilities-based competition can an entity bypass the incumbent completely and force the incumbent to innovate to offset lost wholesale revenues.")

could meet any ETC commitments, such as toll blocking or toll limitation. At best, Midwest could offer a resold wireline service to customers, which is no choice at all.

VI. THERE IS NO BASIS FOR SUSPENSION OF THE FCC'S REDEFINITION PROCEDURES PENDING THE JOINT BOARD REFERRAL

The rural ILECs, faced with universal service rules that promise to level the competitive playing field in rural areas, have been increasingly vocal in demanding the suspension of those rules. In particular, the ILECs have used the FCC's referral to the Joint Board⁴² to argue, in effect, that all pro-competitive policies must be suspended until the Commission develops rules that are more ILEC-friendly.⁴³ These attempts to prevent the application of validly adopted FCC rules must be rejected.

The service area redefinition procedure embodied in the FCC's rules was adopted after being duly subjected to notice and comment in a full rulemaking proceeding and withstood a challenge in federal court. Whatever changes are wrought by the Joint Board's deliberations and subsequent FCC proceedings will apply to all ETCs, including those designated since the referral of issues to the Joint Board. Existing rules must be applied as written, until such time as they are changed through appropriate rulemaking procedures.

It is highly doubtful that the Joint Board's deliberations will yield any changes that are relevant to this proceeding, which concerns only the redefinition of a particular carrier's service area. Indeed, the redefinition issue constitutes only a small part of the referral, in the form of a question posed at the very end of the *Public Notice* — as to whether the FCC should provide

⁴² See Federal-State Joint Board on Universal Service Seeks Comment on Certain of the Commission's Rules Relating to High-Cost Universal Service Support and the ETC Designation Process, *Public Notice*, CC Docket No. 96-45, FCC 03J-1 (rel. Feb. 7, 2003) ("*Joint Board Notice*").

⁴³ See, e.g., CenturyTel Comments at pp. 7-8; Citizens/Frontier Comments at p. 6; MIC Comments at pp. 10-11; USTA Comments at pp. 3-4.

additional “guidance” regarding the manner in which disaggregation of support should be considered in redefining service areas.⁴⁴ It is difficult to imagine what kind of “guidance” would compel the rejection of the redefinition of service areas to the wire center level when some of the affected carriers have already disaggregated to the same level and the FCC’s rules provide for the possibility of revising disaggregation plans on an ongoing basis. Accordingly, the only practical effect of suspending the FCC’s concurrence with proposed service area redefinition would be to forestall competitive entry and protect incumbents, contrary to the goals of the 1996 Act.⁴⁵

VII. CONCLUSION

The MPUC’s proposal to redefine rural ILEC service areas is consistent with the Act’s “pro-competitive, de-regulatory” objectives, properly takes the Joint Board’s recommendations into account, and will not result in harm to any party. No commenter has provided any reason to delay the redefinition process provided under the FCC’s rules. Accordingly, the FCC should

[REMAINDER OF THIS PAGE INTENTIONALLY LEFT BLANK]

⁴⁴ See *Joint Board Notice, supra*, at ¶ 10.

⁴⁵ MIC’s casual assertion that the FCC “has taken a similar approach before” (p. 11) finds no support in the cited authority. The interim cap on high-cost loop support was adopted only through notice-and-comment proceedings of general applicability, not through case-by-case regulatory fiat as MIC urges in this case. See *Federal-State Joint Board on Universal Service, Report and Order*, 11 FCC Rcd 7920, 7922 (1996).

grant its concurrence and allow the proposed service area redefinition to become effective without taking any further action.

Respectfully submitted,

Midwest Wireless Communications, L.L.C.

By: 
David LaFuria, Esq.
Steven Chernoff, Esq.
Lukas Nace Gutierrez & Sachs, Chartered
1111 Nineteenth Street, N.W.
Suite 1200
Washington, D.C. 20036

Its Counsel

Dated: September 9, 2003