

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of:

Federal-State Joint Board on)	CC Docket No. 96-45
Universal Service)	
)	
Petition of the Minnesota Public Utilities)	
Commission for Agreement With Changes)	
in Definition of Service Areas for)	
Exchanges Served by CenturyTel,)	
Citizens Telecommunications Company,)	
Frontier Communications of)	
Minnesota, Inc., Mid-State Telephone)	
Company, Scott-Rice Telephone, United)	
Tel Co of Minnesota (UTC of Minnesota))	
Federated Telephone Company, Melrose)	
Telephone Company, Winsted Telephone)	
Company (TDS Telecom), Eckles)	
Telephone Company (Blue Earth Valley)	
Telephone Company), Lakedale Telephone)	
Company, and Farmers Mutual Telephone)	
Company.)	

To: Chief, Wireline Competition Bureau

REPLY COMMENTS OF MIDWEST WIRELESS COMMUNICATIONS, LLC

Midwest Wireless Communications, LLC (“Midwest”), by counsel and pursuant to the Commission’s *Public Notice* dated April 12, 2004,¹ provides reply comments in support of the petition of the Minnesota Public Utility Commission (“MPUC”) seeking FCC concurrence with the MPUC’s decision to redefine the service areas of the above-referenced incumbent local

¹ *Parties Are Invited To Update The Record Pertaining To Pending Petitions For Eligible Telecommunications Carrier Designations*, DA-04-999 (rel. April 12, 2004). These comments are filed with the Chief, Wireline Competition Bureau, who has delegated authority pursuant to 47 C.F.R. Section 54.207(e); see also, *Wireline Competition Bureau Initiates Proceeding to Consider the Minnesota Public Utility Commission’s Petition to Redefine Rural Telephone Company Service Areas in the State of Minnesota*, (Public Notice) DA 03-3594 (rel. November 7, 2003).

exchange carriers (“ILECs”) as provided under Section 54.207 of the Commission’s rules, 47 C.F.R. Section 54.207. These reply comments respond to comments filed by Citizens Telecommunications Company of Minnesota, LLC and Frontier Communications of Minnesota, Inc. (“Citizens”), TDS Telecommunications Corp. (“TDS”), and CenturyTel of Alabama, LLC, CenturyTel of Eagle, Inc., and CenturyTel, Inc. (“CenturyTel”).

I. THIS CASE IS ABOUT SERVICE AREA REDEFINITION; IT IS NOT ABOUT ETC DESIGNATION.

In its comments, Midwest headlined that this case is solely about whether the FCC should concur with the MPUC’s decision to redefine affected rural ILEC service areas so that each wire center is a separate service area. It is not about designating Midwest, nor is it about defining where Midwest should be an ETC. Those decisions have been made by a final and unappealable order over which this Commission, pursuant to Section 214(e)(2), has no authority to countermand. The MPUC’s statutory authority thereunder is controlling.

Each of CenturyTel, TDS, and Citizens ask the FCC to take action that it has no authority to take. For example, CenturyTel “urges the FCC to require that Midwest Wireless not be designated below the wire center level.”² TDS urges the Commission “to deny the Petition on the ground that, under the *Highland Cellular* decision, redefining the rural service areas of the TDS RLECs as proposed would be inconsistent with the public interest.”³ Citizens stated: “The Minnesota Commission’s proposal to disaggregate the Minnesota rural ILEC study areas to

² CenturyTel Comments at p. 11.

³ TDS Comments at p. 2.

cover only portions of a rural wire center is in direct conflict with the standard set forth in the Commission's *Highland Cellular* order."⁴

Each of the arguments cited above is properly made in an ETC designation proceeding. None are appropriately addressed in a service area redefinition proceeding. The MPUC has defined Midwest's ETC service area below the wire center. Under Section 214(e)(2) of the Act, states are charged with defining the service area for a competitive ETC. The MPUC has exercised its statutory authority in Midwest's case by a final and unappealable order. As Midwest stated in its comments, this proceeding is not about where Midwest will be designated – it is about whether to redefine ILECs along wire center boundaries.

It is a fact that the FCC has made findings in *Virginia Cellular* and *Highland Cellular* that suggest a new line of FCC thinking on ETC designations made pursuant to Section 214(e)(6). But that line of thinking represents precedent that is not binding on states making ETC designations under Section 214(e)(2). Rather, having been made in another jurisdiction, those decisions may be treated by states as persuasive authority at most.⁵ Moreover, both *Virginia*

⁴ Citizens Comments at p. 6. Citizens' argument is puzzling given its recent assertions to the West Virginia Public Service Commission that "states have independent discretion to decide on their own when it is appropriate to relieve an [ETC] applicant of its statutory duty to serve whole [rural ILEC] study areas" and that "[t]o treat the FCC's Section 214(e)(6) decisions as binding precedent is to annul Congress' delegation of authority to the [state] Commission in Section 214(e)(2) and to abrogate that authority." Citizens Telecommunications Company of West Virginia d/b/a Frontier Communications of West Virginia, Case No. 03-0935-T-PC, Exceptions to Recommended Decision (filed June 1, 2004) at pp. 28, 32.

⁵ See, e.g., AT&T Wireless PCS of Cleveland, Inc., et al., Order Granting Petition for Designation as an Eligible Telecommunications Carrier, Order No. 1 (WUTC, April 13, 2004) at para. 34 ("...the FCC's decision in *Virginia Cellular* is not binding on this Commission. In *Virginia Cellular*, the FCC intended to apply the framework in that decision to other ETC designations pending before the FCC. The FCC did not—indeed cannot—bind state commissions to its analysis." See also *Federal-State Joint Board on Universal Service (Recommended Decision)*, FCC 04J-1 (released Feb. 27, 2004) ("We believe that federal guidelines concerning ETC qualifications should be flexible and nonbinding on the states. Under our recommendation, state commissions would retain their rights to determine eligibility requirements for designating ETCs. Each state commission will be uniquely qualified to determine its own ETC eligibility requirements as the entity most familiar with the service area for which ETC designation is sought").

Cellular and *Highland Cellular* are on appeal and the FCC’s reasoning on service area designations is likely to be ultimately decided in the courts.

Under Section 214(e)(2), the FCC is without authority to force a state to revisit its ETC designation, and specifically its determination to define a competitive ETC throughout its FCC-licensed service area. There are plenty of reasons why a competitive ETC should be designated in the manner chosen by the MPUC – and those reasons were thoroughly litigated in the ETC designation proceeding in Minnesota. The MPUC landed in a different place than the FCC and it is entitled to do so. Accordingly, Citizens’ unsupported suggestion that the FCC’s recent designation cases “apply to all ETC designations in rural areas”⁶ misapprehends the scope of FCC’s authority. The FCC’s decisions only apply to future designations *made by the FCC* in rural areas.

Separate and apart from its designation of Midwest, the MPUC is requesting that the service areas of affected rural ILECs be redefined. True to its mandate, the MPUC has worked through the three Joint Board criteria – again in a contested case proceeding – and determined that consumers in Minnesota are best served by redefining rural ILECs along wire center boundaries. All the MPUC is asking is for the FCC to respect that decision.

Remarkably, none of the commenters made a single argument relevant to the Joint Board’s analysis as set forth by the MPUC in its petition or as discussed by Midwest in its comments. In fact, some of their arguments completely misperceive what action the MPUC took. For example, Citizens states that it argued unsuccessfully to the MPUC that “sub-wire center disaggregation was inappropriate”⁷ Holding aside the fact that Citizens improperly terms service

⁶ Citizens Comments at p. 5.

⁷ *Id.* at p. 3.

area redefinition under 47 C.F.R. Section 54.207 to be “disaggregation”, the MPUC did not: (a) disaggregate Citizens’ support below the wire center level; or (b) redefine Citizens’ service area below the wire center level. The MPUC did not modify Citizens’ support in any way. All it did was recommend to the FCC that Citizens’ service area be redefined along wire center boundaries so that a major obstacle to competitive ETC designations could be removed.

A second example: TDS argues that the MPUC “ignores the categorical nature of the Commission’s conclusion ‘that making designations for a portion of a rural telephone company’s wire center would be inconsistent with the public interest.’” (footnote omitted).⁸ In fact, neither the standard articulated by the Joint Board for redefining a service area nor 54 C.F.R. Section 54.207 mentions anything about a public interest finding in a service area redefinition proceeding. The public interest standard applies to ETC designations under Section 214(e)(2) and the MPUC has made that finding. As the agency making the public interest determination, the MPUC was entitled to make the judgment that there is no “absolute ban on redefinition below the wire center level”⁹ and that such designations may, in fact, be in the public interest.¹⁰ Attempts by ILECs to invite the FCC to engage in a public interest analysis that was already completed by the state pursuant to its exclusive authority under the Act¹¹ are unsupported and meritless.

⁸ TDS Comments at p. 4.

⁹ MPUC Supplemental Comments at p. 2.

¹⁰ The MPUC’s determination was appropriate, especially given its finding that “many Minnesota telephone companies, including Citizens and Frontier, have already elected to disaggregate their own service areas to the exchange level for universal service purposes, and to subdivide exchanges into cost zones.” *Id.* at p. 3.

¹¹ See CenturyTel Comments at p. 2 (“Because grant of [the MPUC’s petition] would not be ‘consistent with the public interest, convenience, and necessity,’ CenturyTel continues to oppose [it.]”) (citation omitted).

This case is about whether the FCC concurs with the MPUC's finding that redefining rural ILEC service areas along wire center boundaries is consistent with the three concerns expressed by the Joint Board. As stated in Midwest's comments, the MPUC has thoroughly explored these issues in a contested case proceeding and determined that redefinition in this manner is best for Minnesota's rural citizens.

II. THE MPUC'S DECISION IS BEST FOR MINNESOTA CONSUMERS.

Aside from the fact that the MPUC's decision complies with the three concerns enunciated by the Joint Board, there is a very practical reason why the MPUC's decision to redefine rural ILECs along wire center boundaries is the best decision for Minnesota's rural consumers. Besides Midwest, RCC Minnesota, Inc. and several other wireless carriers have been designated throughout nearly all of the rural areas within Minnesota. It is clear that the MPUC believes that introducing multiple ETCs throughout rural Minnesota will alleviate any possible cream skimming concerns that ILECs have expressed. Midwest and RCC alone serve the vast majority of rural Minnesota. Accordingly, the FCC's stated concern in *Highland Cellular* that there would be substantial areas where there is no competitive ETC¹² does not apply in Minnesota. Redefinition enables more competitive ETC designations to take effect, providing rural consumers with increased competitive options. These considerations, taken into account by the MPUC in the course of its ETC designation process, are precisely why the FCC should defer to a state's better judgment in service area redefinition proceedings.¹³

¹² See *Highland Cellular, supra*, at ¶ 33 ("Because consumers in rural areas tend to have fewer competitive alternatives than consumers in urban areas, such consumers are more vulnerable to carriers relinquishing ETC designation.")

¹³ See *id.* at ¶ 42 ("We find that the Virginia Commission is uniquely qualified to examine the proposed redefinition because of its familiarity with the rural service area in question.")

Even assuming the FCC could reopen the state’s public interest analysis, speculation by commenters that consumers could be harmed is completely unfounded. For example, TDS states (without any support) that if a CETC serves only a portion of a rural ILEC wire center, it will be more likely to relinquish ETC status “because the CETC will not have invested much in the market”.¹⁴ The FCC did not include any such reasoning in *Highland Cellular*, and TDS fails to provide any authority in support. Moreover, TDS’ assertion is nonsensical, given that denying ETC status in those wire centers will only further restrict the area in which the CETC can invest. If the object is to enable the CETC to make maximum investments in rural areas, the most logical way to achieve that goal is to designate the CETC in as large an area as possible, including portions of wire centers at the periphery of its licensed service area.

TDS also argues, incorrectly, that if a CETC relinquishes its ETC status, “it could leave the CETC’s subscribers scrambling for a replacement service where few alternatives are available.”¹⁵ If an incumbent or competitor relinquishes ETC status, that does not mean that it goes out of business or ceases to serve consumers who are already on its network; it merely ceases to receive universal service support and is no longer subject to the attendant obligations to invest in network build-out and respond to requests for service beyond the reach of its network. Any customer unable to get service from a relinquishing CETC could simply return to the subsidized ILEC – as customers have been forced to do for decades. More fundamentally, however, TDS unwittingly makes the case for *more* ETC designations: if the goal is to provide consumers everywhere with a sufficient array of competitive options, then surely there is every reason to designate multiple ETCs, and in as many areas as possible.

¹⁴ TDS Comments at p. 4.

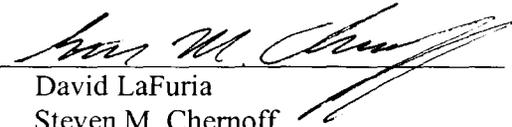
¹⁵ *Id.*

IV. CONCLUSION

Every month that passes, affected rural citizens of Minnesota, who pay into the universal service fund, are denied the benefits of high-cost support that Congress intended to deliver. It has been over 18 months since the MPUC determined that it was in the public interest to designate Midwest throughout its requested service area, and the Commission must act. The correct course is to respect the MPUC's better judgement as to what is best for its citizens and concur with the MPUC's service area redefinition as proposed.

Respectfully submitted,

MIDWEST WIRELESS COMMUNICATIONS, LLC

By: 
David LaFuria
Steven M. Chernoff
Its Attorneys

Lukas Nace Gutierrez & Sachs, Chartered
1111 19th Street, N.W.
Suite 1200
Washington, DC 20036
(202) 857-3500

June 9, 2004

CERTIFICATE OF SERVICE

I, Kimberly Verven, a secretary in the law office of Lukas, Nace, Gutierrez & Sachs, hereby certify that I have, on this 9th day of June, 2004, placed in the United States mail, first-class postage pre-paid, a copy of the foregoing *Comments of Midwest Wireless L.L.C.* filed today to the following:

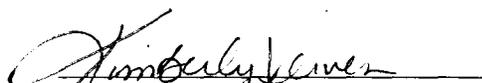
Mike Hatch, Esq.
Karen Finstad Hammel, Esq.
Attorneys for State of Minnesota
445 Minnesota Street, #1100
St. Paul, Minnesota 55101-2127

Karen Brinkmann, Esq.
Tonya Rutherford, Esq.
Latham & Watkins
Suite 1000
555 Eleventh Street, N.W.
Washington, D.C. 20004-1304

Caressa D. Bennet, Esq.
Rebecca L. Murphy, Esq.
Bennet & Bennet, PLLC
1000 Vermont Avenue, NW, 10th Floor
Washington, D.C. 20005

James Rowe, Esq.
Alaska Telephone Association
201 East 56th, Suite 114
Anchorage, Alaska 99519

Kevin Saville, Esq.
Citizens Telecommunications Company of
Minnesota, Inc.
2378 Wilshire Boulevard
Mound, Minnesota 55364


Kimberly Verven

Eric Einhorn, Chief
Telecommunications Access Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW, Room 5-C360
Washington, D.C. 20554

Diane Law Hsu, Deputy Chief
Telecommunications Access Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW, Room 6-A360
Washington, D.C. 20554

Anita Cheng, Assistant Chief
Telecommunications Access Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW, Room 5-A445
Washington, D.C. 20554

Thomas Buckley, Esq.
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW, Room
Washington, D.C. 20054

Gerard J. Waldron, Esq.
Mary Newcomer Williams, Esq.
Aaron Cooper, Esq.
Covington & Burling
1201 Pennsylvania Ave., N.W.
Washington, DC 20004