

Public Service Commission

Richard E. Hitt, General Counsel

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September 29, 2003 DOCKET FILE COPY ORIGINAL

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
9300 East Hampton Drive
Capitol Heights, MD 20743

VIA Federal Express overnight service

Irene Flannery
Universal Service Administrative Company
2000 L Street NW, Suite 200
Washington, D.C. 20036

VIA Federal Express overnight service

Re: Easterbrooke Cellular Corporation, dba Cellular One
Initial Certification Pursuant to 47 C.F.R. § 54.313
CC Docket No. 96-45
(WVPSC Case No. 03-0935-T-PC)

Dear Ms. Dortch and Ms. Flannery:

The Public Service Commission of West Virginia has designated Easterbrooke Cellular Corporation, doing business as Cellular One, as an eligible telecommunications carrier, pursuant to 47 U.S.C. § 214(e), for those areas of Easterbrooke's territory served by Citizens Telecommunications Company of West Virginia, doing business as Frontier Communications of West Virginia. This designation is reflected in a Commission order entered on August 27, 2004, which modified and adopted a May 14, 2004, Recommended Decision.

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The Order required the Commission Staff to provide to the FCC and the Universal Service Administrative Company, as requested in the FCC's Public Notice DA 97-1892 (Rel. September 29, 1997), a certified copy of the Order designating Easterbrooke as an ETC in Frontier's service territory, along with a list of the areas designated to be served by Easterbrooke.¹

In compliance with both the WVPSC Order and the FCC directive, I am enclosing certified copies of both the Recommended Decision entered May 14, 2004,

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¹ This language is generally included in Commission Orders designating eligible telecommunications carriers. In this letter Easterbrooke's designation is described, so there is no separate attachment.

Ms. Dortch, FCC
Ms. Flannery, USFC
Easterbrooke Cellular Corporation
WVPSC Case No. 02-1118-T-PC
Page 2

and the Commission Order entered August 27, 2004. These certified copies are being filed to verify that Easterbrooke has received initial certification as an eligible telecommunications carrier.

The Commission's order also required **Easterbrooke** to elect whether it will a) serve the entirety of WV RSA 5, plus those portions of Frontier's Walkersville, Thomas and Davis wire centers, which extend beyond WV RFA 5 (Easterbrooke's FCC licensed service territory), or b) withdraw the portions of the Walkersville, Thomas and Davis wire centers which are within WV RSA 5 from Easterbrooke's ETC petition.

The Commission's order also required **Staff** to file the appropriate petition, within 60 days, with the Federal Communications Commission, pursuant to § 214(e) of the Communications Act of 1934, seeking concurrence in the redefinition of Easterbrooke's service area for ETC purposes, depending upon which option Easterbrooke chooses. That filing will be separately made.

Please contact the undersigned if there are any questions concerning this matter.

Sincerely,



Caryn Watson Short
Supervising Attorney
Public Service Commission of West Virginia
WV State Bar No. 4962
(304) 340-0338

cc: Sandra Squire, WVPSC Executive Secretary (w/o attachments)
Robert R. Rodecker, WV Counsel for Easterbrooke (w/o attachments)
Patrick W. Pearlman, Counsel for WV Consumer Advocate (w/o attachments)

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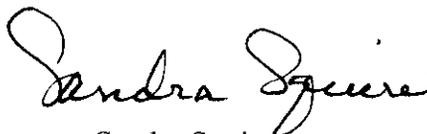
PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

CERTIFICATION OF TRUE COPY

RE: CASE NO. 03-0935-T-PC
EASTERBROOKE CELLULAR CORPORATION

I, Sandra Squire, Executive Secretary of the Public Service Commission of West Virginia, certify that the attached is a true copy of the August 27, 2004 Commission Order and the May 14, 2004 Recommended Decision in Case No. 03-0935-T-PC, Easterbrooke Cellular Corporation, as the same appears on file and of record in my office.

Given under my hand and the seal of the Public Service Commission of West Virginia, in the City of Charleston, Kanawha County, this 28th day of September, 2004.



Sandra Squire
Executive Secretary

SS/s
Attachments

**PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON**

At a session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA in the City of Charleston on the 27th day of August, 2004.

CASE NO. 03-0935-T-PC

EASTERBROOKE CELLULAR CORPORATION,
doing business as CELLULAR ONE,

Petition for consent and approval to be designated as an eligible telecommunications carrier in the areas served by Citizens Telecommunications Company of West Virginia, doing business as Frontier Communications of West Virginia.

COMMISSION ORDER

This case involves Easterbrooke Cellular Corporation, doing business as Cellular One's (Easterbrooke) petition to be designated an eligible telecommunications carrier (ETC) in its service territory, which is also served by Citizens Telecommunications of West Virginia dba Frontier Communications of West Virginia (Frontier), a rural telephone company (RTC). The Chief Administrative Law Judge entered a Recommended Decision, granting Easterbrooke ETC status in Frontier's wire centers, upon various conditions. Both Frontier and the Consumer Advocate Division (CAD) filed exceptions. The Commission adopts the Recommended Decision, with one exception, and imposes additional requirements upon Easterbrooke as an ETC.

GENERAL FACTUAL BACKGROUND

Easterbrooke's Background Information

Easterbrooke was established in 1990 as an authorized wireless carrier in West Virginia and also provides service through interconnection agreements with Verizon. In 2003, Easterbrooke was designated an ETC in wire centers served by Verizon within

Easterbrooke's service territory. Easterbrooke now seeks ETC status for that part of its service territory served by Frontier, an RTC. *See* Easterbrooke's petition at p. 2. Easterbrooke currently serves approximately 1,868 customers total in the two study areas in question: 305 in the Mountain State study area and 1,563 in the St. Mary's study area. *See* CAD's Initial Brief at p. 3.

Easterbrooke is the Frequency Block A cellular licensee of WV Rural Service Area 5 (RSA 5), encompassing Braxton, Clay, Nicholas, Pocohontas, Randolph, Tucker, Upshur and Webster Counties. *Id.* As of December 2003, the company had constructed 38 cell sites and will continue to add sites as warranted. All of the cell sites are connected via T-1 lines and microwave links to Easterbrooke's switch in Elkins, which in turn is connected to the public switched telephone network (PSTN) pursuant to the Verizon interconnection agreement.

Frontier's Background Information

Frontier is a local exchange carrier providing service to customers in 34 of the 55 West Virginia counties. It is the incumbent local exchange carrier (ILEC) and carrier of last resort in its study areas, serving approximately 156,717 customers. Frontier is also a rural telephone company and its service territory is divided into three study areas representing the service territories of three different telephone companies acquired by Frontier over the years: 1) Bluefield study area (wire centers previously served by General Telephone Co.; located primarily in Mercer and McDowell Counties and a portion of the Eastern Panhandle; serves approximately 93,847 access lines); 2) St. Mary's study area (wire centers previously served by Contel and scattered throughout state; serves 36,981 access lines); 3) Mountain State study area (wire centers originally served by Mountain State Telephone Co.; located primarily in Webster, Pocahontas and Randolph counties and rural portions of other counties; serves 25,889 access lines). Frontier receives a total of \$32 million annually in federal high-cost support for its three study areas. *See* CAD's Initial Brief at pp. 3-4.

The 18 Frontier wire centers affected by Easterbrooke's petition fall into two of the three study areas, namely St. Mary's and Mountain State study areas. The following wire centers fall within the St. Mary's study area: Davis, Thomas, Canaan Valley, Parsons, Clay, Harman, Ivydale, Widen and Birch River. These are located primarily in Clay, Nicholas and Tucker Counties and produce support of approximately \$2.27 million per year. The St. Mary's study area receives an average of \$16.81 per line in monthly high-cost support (for the Fourth Quarter of 2003). These nine wire centers contain 10,241 customers, or about 6.5% of Frontier's customer base in West Virginia. *Id.* at pp. 4-5.

The Mountain State study area contains the following wire centers: Webster Springs, Mill Creek, Cowen, Arbovale, Marlinton, Hillsboro, Snowshoe, Walkersville and Hacker Valley. These are located primarily in Webster, Pocahontas and Randolph Counties and produce support of approximately \$7.9 million per year. This study area receives approximately \$37.76 per line in monthly high-cost support (for the Fourth Quarter of 2003). These nine wire centers contain 14,459 customers, or about 9% of Frontier's total customer base. *Id.*

PROCEDURAL BACKGROUND¹

On June 19, 2003, Easterbrooke filed a petition, pursuant to Section 214(e)(2) of the Communications Act of 1932, as amended by the Telecommunications Act of 1996 (the Act), seeking ETC designation in those areas of its service territory served by RTCs. Given the designation, Easterbrooke would then be eligible to receive universal service support and to offer services that are supported by federal universal support mechanisms, either using its own facilities or a combination of its own facilities and the resale of another carrier's services.

Easterbrooke asserted it meets and exceeds the criteria for ETC designation. Easterbrooke said offering to customers in Frontier's service territory a choice of plans and services would be in the public interest. Further, Easterbrooke indicated it is capable of providing and has commenced provision of the required services in one or more of the designated areas.

This matter was referred to the Division of Administrative Law Judges (ALJ) by Commission Order entered on July 22, 2003.

Pursuant to an October 21, 2003, Procedural Order, the Chief ALJ granted petitions to intervene on behalf of Frontier and the CAD. She also indicated she believed the issue in this case (i.e. whether designation is in the public interest) was the same as that in the pending *Highland Cellular, Inc. (Highland Cellular)* case² and that it would be inefficient for the parties to relitigate the same issues. She suggested the parties enter

¹A detailed account of the procedural history is set forth in the Recommended Decision, entered on May 14, 2004. The Recommended Decision also sets forth specific arguments made in initial pleadings. Only the relevant portions of the ALJ's detailed account will be included herein.

²*Highland Cellular, Inc.*, Case No. 02-1453-T-PC. An Order in *Highland Cellular* is being entered contemporaneously with the Order in this case.

a joint stipulation and agreement for settlement, providing for Easterbrooke's designation if the Commission affirmed Highland's designation. On October 29, 2003, Commission Staff (Staff) filed an Interim Joint Staff Memorandum, indicating that the parties met and it became clear that although similarities among the cases existed, there were certain "significant and intransigent" issues which the parties to this case wanted to litigate.

Consequently, on November 3, 2003, the CAD filed two motions, one requesting a continuance of the hearing and modification of the procedural schedule, and one requesting an extension of the ALJ's due date. The CAD listed three issues that differed from the issues in *Highland Cellular*: 1) the CAD wanted to present testimony/evidence regarding its "benchmark standard" for determining whether the public interest warrants designating additional ETCs in an RTC's study area³; 2) issues could exist relating to Easterbrooke's ability to serve the wire centers in Frontier's service territory; and 3) there may be issues regarding whether Easterbrooke provides the services supported by universal service which differ from the issues in *Highland Cellular*.

A Commission Order was entered on November 7, 2003, which, among other things, removed the CAD's benchmark proposal from this proceeding and deferred it to Case No. 03-1199-T-GI⁴, opining it would be grossly unfair to litigate in this proceeding a matter of policy which would have general applicability to all future ETC applicants, when the general investigation was started for that purpose.

On November 17, 2003, the CAD filed a petition for reconsideration with the ALJ on the issue involving the benchmark proposal. While Easterbrooke opposed the CAD's petition for reconsideration, Frontier supported the petition. By Procedural Order entered on December 12, 2003, the Chief ALJ denied the CAD's petition for reconsideration.

A hearing was held, as scheduled, on January 20, 2004. Prior to calling witnesses, the parties indicated a Joint Stipulation and Agreement for Partial Settlement (Joint Stipulation) had been entered with regard to several issues which would normally be addressed. See Joint Exhibit No. 1.

³This standard was proposed by the CAD in the *Highland Cellular* case, but there was no evidence/testimony to support the proposal. The CAD pointed out that Easterbrooke and Frontier oppose aspects of this proposal and wished to introduce their own testimony and evidence on this issue.

⁴The general investigation established with regard to the conditions which would be applicable to all ETC applicants in West Virginia in the future.

Subsequent to the hearing, Easterbrooke, Frontier and the CAD filed Initial Briefs and Proposed Findings of Fact and Conclusions of Law, and those three parties also filed Reply Briefs. Staff did not file an initial or reply brief in this matter.

On February 24, 2004, Frontier filed correspondence regarding the exchange of traffic between Frontier and Easterbrooke.

Joint Stipulation

As part of the Joint Stipulation, the parties agreed that Easterbrooke is a common carrier and that Easterbrooke, throughout its commercial mobile radio service (CMRS) licensed area, offers and advertises, using media of general distribution, the following services: (1) local usage; (2) dual tone multi-frequency (DTMF) signaling or its functional equivalent; (3) single party service or its functional equivalent; (4) access to emergency services; (5) access to operator services; (6) access to interexchange services; (7) access to directory assistance; and (8) toll limitation for qualifying low-income consumers. The Stipulation further acknowledges that Easterbrooke does not offer or advertise the services listed above outside of its CMRS licensed area. Easterbrooke agrees it will offer Lifeline and Link Up services throughout its designated service area upon being designated as an ETC.

Easterbrooke further agreed to abide by the following conditions as long as it retains its ETC designation in West Virginia:

A. As an ETC, Easterbrooke will be obliged to provide service to existing or potential customers upon reasonable request. Such requests may come from consumers who reside within Easterbrooke's CMRS license area, but are unable to receive an adequate signal. In response to such requests, Easterbrooke will take the following steps:

1. If a request comes from a party within its existing network, Easterbrooke will make commercially reasonable efforts to provide service as soon as practicable;
2. If a request comes from a party residing in an area that lies within Easterbrooke's CMRS license area, but which is not receiving service from Easterbrooke's authorized facilities, Easterbrooke will take a series of steps to provision service, namely:

First, it will determine whether the requesting party's equipment can be modified or replaced to provide acceptable service in a cost-effective manner.

Second, it will determine whether a roof-mounted antenna or other network equipment can be deployed in a cost-effective manner at the requesting party's premises to provide service;

Third, it will determine whether adjustments at the nearest cell site can be made to provide service;

Fourth, it will determine whether a cell-extender or repeater can be employed in a cost-effective manner to provide service;

Fifth, it will determine whether there are any other reasonable adjustments to the network or customer facilities which can be made to provide service;

Sixth, Easterbrooke will explore the possibility of offering the resold services of carriers that have facilities available to that location; and

Seventh, Easterbrooke will determine whether an additional cell site can be constructed to provide service, and evaluate the costs and benefits of using scarce high-cost support to serve the number of persons or parties requesting service through such additional cell site. If there is no possibility of providing service short of constructing a new cell site, Easterbrooke will report this fact to the Commission, for informational purposes, along with the projected costs of construction and Easterbrooke's determination as to whether the request for service is reasonable and whether high-cost funds should be expended on the request.

Next, Easterbrooke also agreed to the following conditions: to periodically identify for the Staff and the CAD unserved areas within its ETC designated service areas and to inform the Staff and the CAD of its plans to deploy wireless facilities in its service territory; to file with the Commission copies of its terms and conditions of service; to provide the Commission, on an informational basis, a copy of its rate plans, including its Tel-Assistance, Link Up and Lifeline discounts available to qualifying low-income

customers; and to file annually with the Commission information as required by the Commission in order to certify compliance with 47 U.S.C. § 254(e). Such information shall include the amount of federal universal service funding received by Easterbrooke during the previous year and a statement of how such funds were spent or invested in compliance with 47 U.S.C. § 254(e).

The parties reached no agreement regarding whether Easterbrooke offered access to the public telephone network or whether designating Easterbrooke as an ETC in Frontier's service area is in the public interest. Finally, except for the extent to which the parties agreed to a different condition in the Stipulation, the parties agreed that they would be bound by the final, non-reviewable decision in *Highland Cellular* with respect to the following issues: whether Easterbrooke will be required to comply with the conditions that Frontier has proposed to apply to Easterbrooke⁵ and whether Easterbrooke's designated service area lawfully may be less than the entirety of each Frontier study area in which it is designated as an ETC.⁶

⁵Those conditions are: 1) provide equal access; 2) comply with the Winfield Plan; 3) comply with the *Rules and Regulations for the Government of Telephone Utilities*, including those rules from which wireless carriers are otherwise exempt, especially those in Section 2 of the Rules; 4) file informational tariffs, and post them on its web site; 5) reduce rates by the amount of per-line USF monies received, or in the alternative, use all USF monies received for incremental capital investment, or a combination of the two; 6) submit to annual Commission review of how USF receipts were used, including a review of infrastructure development plans; 7) take all necessary steps to provide service to all consumers who make reasonable requests by modifying or building out the wireless network or by providing service using wireline or other technologies, including through resale and the use of unbundled network elements, as necessary; and 8) the designation exists only as long as an incumbent LECs' universal service receipts are not reduced when an additional ETC is designated in their study areas.

⁶More specifically: "1. If the final, non-reviewable decision in *Highland Cellular, Inc.* provides that Highland must serve whole Frontier study areas, then Easterbrooke must serve the entirety of each Frontier study area in which it is designated as an ETC; and 2. If the final, non-reviewable decision in *Highland Cellular, Inc.* provides that Highland is not required to serve whole Frontier study areas, then Easterbrooke will not be required to serve the entirety of each Frontier study area in which it is designated as an ETC. In such case, Easterbrooke may be designated to serve an area to be determined by the Commission, subject to concurrence by the FCC pursuant to 47 C.F.R. § 54.207(b) and (c)."

Finally, the Joint Stipulation provided that any designation of Easterbrooke as an ETC in Frontier's service area would become effective following both the issuance of a final, non-reviewable decision in *Highland Cellular* and the issuance, if necessary, under 47 U.S.C. § 214(e)(5) and 47 C.F.R. § 54.207(c) of an FCC order concurring in the Commission's proposed designated service area for Easterbrooke.

Recommended Decision

The Chief ALJ entered a Recommended Decision on May 14, 2004, granting Easterbrooke's petition for ETC designation in the wire centers served by Frontier. The Chief ALJ set forth, in detail, the evidence presented by the parties, as well as the Joint Stipulation. In light of the parties' agreement on various issues as set forth in the Joint Stipulation, issues existed with regard to whether Easterbrooke provides access to the public switched telephone network and whether ETC designation is in the public interest.

ALJ's Discussion Regarding Access to Public Switched Telephone Network

Frontier argued Easterbrooke does not provide access to the public switched telephone network because it has no interconnection agreement with Frontier. The Chief ALJ explained that Easterbrooke routes its telecommunications traffic through its existing T-1 facilities to access tandems operated by Verizon. All of the traffic between Frontier and Easterbrooke is transported and terminated in this way. However, Easterbrooke and the CAD pointed out there is no federal or state requirement that Easterbrooke and Frontier have a direct interconnection for the purpose of transporting traffic.

Frontier advised it had opened in its switches the 642, 644 and 651 NXX codes used by Easterbrooke, but has not opened the 704 NXX code used by Easterbrooke and will not do so until Easterbrooke enters into an interconnection agreement with it. Easterbrooke noted in its reply brief that Easterbrooke has not yet implemented the 704 NXX code, so the fact that this code is not open in Frontier's switch would not affect customer traffic.

The ALJ opined Easterbrooke was not required to have a direct interconnection with Frontier and that there was no legitimate question that Easterbrooke provides access to the public switched telephone network.

ALJ's Discussion Regarding Public Interest

According to the Chief ALJ, Frontier and the CAD advocated a public interest test that looks not at the local area that is being served by the applicant for ETC status and the additional area that could be better served if it was granted ETC status, but, instead, at a broader analysis of the health and longevity of the high cost USF. The Chief ALJ noted that while the FCC has clearly decided the USF is an item to be considered, it is equally clear that the FCC has not adopted the rather broad public interest test relied upon by Frontier and the CAD. The FCC, in its decisions on whether or not to designate applicants for ETC status, has relied upon a more local analysis of the public interest as advocated in this proceeding by Easterbrooke. Here, the Chief ALJ followed the lead of the FCC and analyzed the public interest of the territory covered by the application.

The Chief ALJ explained that Easterbrooke's testimony indicated that, with ETC status, it will enhance its network through the operation of additional cell towers, provide customers with advanced services and the highest quality of service and provide competitive telecommunications services to rural West Virginia; it will also greatly improve its service to rural or remote areas and reduce or eliminate "dead spots" due to terrain characteristics, by constructing new cells and installing repeaters and extenders, as well as by incorporating emerging and innovative technologies.

Additionally, the Chief ALJ addressed the unique engineering and financial challenges posed by the existence of the National Radio Quiet Zone in this service territory, an issue which does not affect wireline carriers. The Quiet Zone encompasses approximately 13,000 square miles and was designed to minimize possible harmful interference with the National Radio Astronomy Observatory at Green Bank and the Naval Radio Research Observatory at Sugar Grove. There are significant restrictions and limitations upon construction and operation of new or modified radio transmission sites in the Quiet Zone, and, as a result, there is dramatically reduced effective radiated power for any sites in that Quiet Zone that are approved for transmission. Restrictions also impact location and antenna configuration. As a result, CMRS carriers affected by the Quiet Zone have significantly higher coverage costs than they otherwise would experience, with significantly reduced signal strength, resulting in reduced service capabilities. Easterbrooke has taken what steps it can take before the FCC to expand construction within the Quiet Zone, but the additional infrastructure that Easterbrooke can

install with USF funding will allow it to overcome those Quiet Zone difficulties to some degree.

Further, Easterbrooke's service territory, WV RSA 5, has a low population density, extremely challenging terrain, low incomes and high poverty levels, which render it more difficult for Easterbrooke to provide broad coverage and reliable service. Easterbrooke said it will be able to construct new facilities in the rural high-cost areas of WV RSA 5 and improve service in those areas where signal strength is weak due to topography. Improved telecommunications infrastructure will facilitate commercial and residential development in sparsely populated areas and spur economic development.

A comparison of Easterbrooke's service offerings and rate plans with Frontier's tariffs on file with the Commission indicate that Easterbrooke will be able to offer customers in WV RSA 5 with a larger local calling area⁷ than Frontier. Other evidence presented included: calls placed from within the home area to anywhere in West Virginia incur no additional toll or long distance charges, although off-network roaming charges can apply; Easterbrooke can offer quality affordable service to consumers in areas where landline service is unavailable; the availability of a portable high quality wireless service is especially important for health and safety in rural areas where wireline service may be physically unavailable.

The Chief ALJ discussed the FCC's most recent pronouncement⁸ on designating an additional ETC in an RTC service area, noting that it must consider whether the benefit of an additional ETC in the subject wire centers outweighs any potential harms. The FCC further noted that this balancing of benefits and costs is a fact-specific exercise. Among other elements, the FCC weighed the benefits of increased competitive choice, the impact of the designation on the universal service fund, the unique advantages and disadvantages of the competitor's service offerings, any commitments made regarding the quality of telephone service and the competitive ETC's ability to satisfy its obligation to serve the designated service areas within a reasonable timeframe.

The Chief ALJ also addressed the FCC's analysis of the impact of the ETC designation on the USF and found it to be significantly different from the ones advocated by either the CAD or Frontier. The Chief ALJ opined the FCC attempted to estimate the

⁷Easterbrooke's home calling area under all of its plans includes the eight counties in the WV RSA 5, Braxton, Clay, Nicholas, Pocahontas, Randolph, Tucker, Upshur and Webster.

⁸*Highland Cellular, Inc.*, CC Docket No. 96-45, FCC 04-37, Memorandum Opinion and Order, (rel. April 12, 2004) (*Highland Cellular MO&O*).

impact on the USF of granting the individual application and concluded that the impact would not be significant.

Based on the information in the record on the tangible benefits to be gained by the customers in WV RSA 5 from Easterbrooke's ETC designation, and the lack of substantive impact of the designation of Easterbrooke as an ETC on the overall USF, the Chief ALJ determined that Easterbrooke met its public interest test with respect not only to the issue of impact on the USF, but also with respect to the more fact-specific analysis regarding the service territory for which it is seeking ETC designation.

The Chief ALJ, referencing the FCC's opinions in *Highland Cellular MO&O* and *Virginia Cellular*⁹, discussed the Cellular Telecommunications Industry Association (CTIA) Consumer Code for Wireless Service (Consumer Code). The CTIA Consumer Code sets out certain principles, disclosures and practices for the provision of wireless service. Under that Consumer Code, wireless carriers agree to disclose rates and terms of service to customers; provide maps showing where service is generally available; provide contract terms to customers and confirm changes in service; allow a trial period for new service; provide specific disclosures in advertising; separately identify carrier charges from taxes on billing statements; provide customers the right to terminate service for changes to contract terms; provide ready access to customer service; promptly respond to customer inquiries and complaints received from government agencies; and abide by policies for the protection of consumer privacy. The Chief ALJ found the CTIA Consumer Code represents a fairly reasonable level of service and commitment to a cellular telephone company's customers. Accordingly, the Chief ALJ conditioned Easterbrooke's ETC designation upon its compliance with the provisions of the CTIA Consumer Code.

With that requirement, the Chief ALJ determined since Easterbrooke is providing the nine services supported by the Universal Service Fund; has committed to comply with the advertising requirements established by the Commission in *Gateway*; has agreed to comply with other potential restrictions and conditions based upon the West Virginia Public Service Commission's own *Highland Cellular* proceeding; and has demonstrated that it is in the public interest to designate it as an ETC, Easterbrooke should be designated an ETC within its service territory of WV RSA 5, with certain specified amendments and conditions.

⁹*Virginia Cellular, LLC, Memorandum Opinion and Order*, Docket 96-45, FCC 03-338 (rel. January 22, 2004)(*Virginia Cellular MO&O*).

ALJ's Discussion Regarding ETC Service Area

There were issues about the exact contour of the service area to be included in Easterbrooke's ETC designation. Easterbrooke requested ETC designation for its entire service territory of WV RSA 5, encompassing eight counties. Easterbrooke had previously been designated as an ETC for the portion of its licensed territory served by Verizon, a non-rural telecommunications carrier. The instant petition covers the remainder of its licensed territory in West Virginia, within portions of Frontier's Mountain State and St. Mary's study areas. However, the boundaries of the specific Frontier wire centers covered by Easterbrooke's petition in this case do not conform precisely to the boundary of WV RSA 5 in two instances: 1) Frontier's Walkersville wire center serves a portion of northern Braxton County where Easterbrooke is licensed, but mainly serves southern Lewis County where Easterbrooke does not have a license; and 2) the Thomas and Davis wire centers in Tucker County serve the western portion of Grant County, which also is not included in WV RSA 5.

The CAD recommended the Commission specify that Easterbrooke is granted ETC status within the entire boundaries of designated wire centers, whether or not the boundaries of those wire centers extend beyond the boundary within which Easterbrooke is licensed to provide wireless service. The CAD noted in its Initial Brief that Easterbrooke's wireless signal extends beyond the boundaries of the eight counties within which it is licensed to provide wireless service and that, in order to provide the supported services, Easterbrooke is not limited to providing wireless service, but may provide service through the resale of wireline or other wireless services.

The Chief ALJ noted the FCC's apparent modification of its position on this issue in *Virginia Cellular MO&O* and *Highland Cellular MO&O*. The FCC concluded that making an ETC designation for a portion of an RTC's wire center is inconsistent with the public interest. Particularly, the FCC concluded that, prior to designating an additional ETC in an RTC service area, the competitor must commit to provide the supported services to customers throughout a minimum geographic area. The FCC concluded that an RTC's wire center is an appropriate minimum geographic area for ETC designation because rural carrier wire centers typically correspond to county and/or town. The Chief ALJ pointed out, however, that the wire centers in question extend beyond county lines and do not appear to reflect specific community geographic boundaries. Nevertheless, the Chief ALJ opined the FCC reasoning would be appropriate here, particularly when looked at in conjunction with the CAD's arguments for requiring that the competitive carrier commit to providing service throughout a rural carrier's wire center, such as to

avoid administrative and service-related problems that could occur if Easterbrooke were designated as an ETC in less than an entire wire center.

Thus, the Chief ALJ gave Easterbrooke the option of either withdrawing the Thomas, Davis and Walkersville wire centers from its requested ETC designated territory or obtaining a certificate of convenience and necessity from the Commission to serve the specific portions of Lewis County and Grant County for which it does not have authority at this time. Given the very specific location of the territory in question, the Chief ALJ did not expect Easterbrooke would be required to fulfill the statewide publication requirement usually imposed upon applications for telecommunications certificates of convenience and necessity, but, instead, would be required to publish notice of its application in only Lewis and Grant Counties. In any event, Easterbrooke would be required to serve either all of the Walkersville, Thomas and Davis wire centers or be granted ETC designation in no part of them.

The Chief ALJ also addressed Frontier's argument that allowing Easterbrooke to serve anything less than the entirety of the St. Mary's and Mountain State study areas amounts to allowing Easterbrooke to cream skim Frontier's service territory. With respect to the wire centers in the St. Mary's study area, Easterbrooke is seeking ETC designation in two low-cost wire centers, five medium-cost wire centers and two high-cost wire centers, while, in the Mountain State study area, Easterbrooke is seeking designation in six medium-cost wire centers and three high-cost wire centers. These wire centers are all contiguous and make up WV RSA 5. Therefore, the Chief ALJ concluded that Easterbrooke is not attempting to cream skim Frontier's service territory and that granting ETC designation in the specified wire centers will not permit cream skimming by Easterbrooke, since it is obligated to serve all areas and all customers within its designation.

Frontier also argued that Easterbrooke should be required to serve all wire centers within the Mountain State and St. Mary's study areas. However, the Chief ALJ noted that the FCC has concluded that requiring a carrier to serve a non-contiguous service area as a prerequisite of eligibility might impose a serious barrier to entry, particularly to wireless carriers.

The Chief ALJ thought both Frontier and the CAD attempted to elevate the boundaries of a study area to some sort of mystical importance, as the study areas simply reflect the service territories of the previous holders of Frontier's certificated service territory. While it is true that universal service support is flowed through on a study area basis, given the actual meaning of what study areas are and how they were derived, and further given Frontier's disaggregation plan, which targets its universal service support

to higher-cost exchanges and away from lower-cost exchanges within the study areas, the Chief ALJ was not convinced that any study area analysis is really appropriate, at least where the study areas are large and non-contiguous.

The Chief ALJ also expressed various concerns with the CAD's public interest analysis regarding per line support by study area as a means for determining whether additional ETC designations should be granted in RTC study areas. The Chief ALJ determined the CAD's analysis was misplaced.

ALJ's Discussion Regarding Policy Concerns

Finally, the Chief ALJ stated her belief:

that there are certain policy issues relating specifically to the regulation provided by the Public Service Commission of West Virginia under the statutory scheme set forth in Chapter 24 of the West Virginia Code which no party to this proceeding has addressed. Under West Virginia Code §§24-2-11(a), no public utility, person or corporation may begin the construction of any plant, equipment, property or facility for furnishing any of the services under the jurisdiction of the Public Service Commission nor apply for nor obtain any franchise, license or permit from any municipality or other governmental agency unless and until the Public Service Commission finds that the public convenience and necessity require the proposed service, construction, etc. The certificates granted to Frontier, Hardy and any other telecommunications provider in the State of West Virginia, whether they are wireless carriers or wireline carriers, interexchange carriers or CLECs, are exactly the same and the Commission had to make exactly the same finding of public convenience and necessity in order to grant them, whether or not those findings are explicitly stated in the orders. Given this similarity of certificates, the ALJ finds it discomfiting to be expected to pick and choose among carriers whose certificates have equal standing and whose services the Public Service Commission has already concluded are required by the public convenience and necessity. Denial of ETC designation to any ETC applicant in West Virginia means that the Public Service Commission is automatically placing that carrier at a financial and competitive disadvantage relative to the incumbent local exchange carrier and, possibly, previously granted ETC designees, by denying subsequent ETC applicants the same access to Universal Service Funding support as it granted to prior ETC designees or the incumbent

providers. Once the Public Service Commission has concluded that the public convenience and necessity require a particular service, the undersigned is hard-pressed to understand under what legal basis under Chapter 24 of the West Virginia Code the Commission then makes an affirmative decision to discriminate between those providers by denying access to subsidy funds to some, while granting it to others.

Recommended Decision at p. 57.

ALJ's Actions

In addition to granting the petition, the Chief ALJ further ordered Easterbrooke to notify the PSC and all parties within 30 days which of the following options it chose: 1) it will commit to serving the entirety of Frontier's Walkersville, Thomas and Davis wire centers, even though those are partially outside of Easterbrooke's FCC licensed service territory; or 2) it will withdraw the portions of the Walkersville, Thomas and David wire centers which are within WV RSA5 from its ETC petition. The designation was conditioned upon Easterbrooke's compliance with the Consumer Code for Wireless Service of the Cellular Telecommunications Industry Association. The Chief ALJ also ordered Staff to file the appropriate petition with the FCC, within 60 days, seeking concurrence in the redefinition of Easterbrooke's service area for ETC purposes as being the entirety of WV RSA 5, plus the portions of the Frontier's Walkersville, Thomas and Davis wire centers which extend beyond the boundaries of WV RSA 5, if Easterbrooke chooses that option, or with the elimination from Easterbrooke's ETC service territory of the portions of the Walkersville, Thomas and Davis wire centers which are located in WV RSA 5, if Easterbrooke chooses that option.

Exceptions of Frontier

On June 1, 2004, Frontier filed "Exceptions to the Recommended Decision," asserting that under the Joint Stipulation, the issues to be decided based upon *Highland Cellular* are a) whether Easterbrooke's designated service area would consist of all of Frontier's study area or the area for which Easterbrooke holds a wireless license; and b) whether various additional conditions and criteria would apply to Easterbrooke. Regardless, Frontier argues the Chief ALJ decided what Easterbrooke's designated area should be and directed Staff to move forward. Also, the Chief ALJ did not impose the additional conditions applicable, if approved in *Highland Cellular*.

With regard to access to the public switched network, Frontier attached a letter from Easterbrooke refusing to interconnect. Frontier said it will seek arbitration of an interconnection agreement. Frontier argues that Easterbrooke should not be deemed to provide this service until it enters an interconnection agreement with Frontier and it demonstrates customers assigned all of its NXXs can make calls to and receive calls from Frontier customers.

Frontier makes numerous arguments with respect to the public interest analysis and maintains that Easterbrooke's ETC designation would not be in the public interest. Frontier's arguments include, but are not limited to, assertions that competition benefits and mobility are not sufficient, that Easterbrooke will receive a revenue windfall, and that the impact on the overall size of the universal service fund must be evaluated. Frontier states that focusing, as the ALJ did, on the relatively small impact that any single ETC has on the overall size of the fund is a sure way to bankrupt the fund. Frontier also emphasized that Congress did not intend for promotion of competition to satisfy the public interest test. If it were, there would be no need for the test since designating additional ETCs always promotes competition. Had Congress intended for the promotion of competition to satisfy this test, it would have commanded the Commission to designate multiple ETCs in RTCs' study areas.

Frontier also maintains that the fact a rural study area qualifies for high cost support is an implicit recognition that the costs of providing service in that study area are so high that the goals of universal service would not be achieved but for the support. The rates would be too high or service offerings would be too few and of too poor quality.

Frontier takes issue with the Chief ALJ's omission of reference to the Joint Board's recent recommendation regarding portability of universal service funds among ETCs, wherein it addressed several issues relating to the designation process and specifically recommended several factors that the Commission should consider in evaluating the public interest test. Frontier set forth the Joint Board's recommendations for addressing the public interest.

In response to the Chief ALJ's discussion of policy concerns, Frontier states that the public interest considerations in deciding to certificate a carrier are wholly different from those at issue in deciding whether to designate a particular carrier to be an ETC in an RTC's service area. The fact that it may be in the public interest to certificate yet

another competitor does not mean it is in the public interest to designate that carrier an ETC.

With regard to redefinition issues, Frontier argues that Section 214(e)(5) requires a Joint Board recommendation regarding each proposal for redefinition and that has not happened here. Thus, Frontier argues it would be unlawful to designate Easterbrooke to serve any area other than the whole Frontier study areas. Frontier argues that all but one of the FCC decisions cited by the ALJ are Section 214(e)(6)¹⁰ decisions and the Commission is not bound by the one rulemaking decision cited. To treat the FCC's Section 214(e)(6) decisions as binding precedent is to annul Congress' delegation of authority to the Commission in Section 214(e)(2) and to abrogate that authority.

In sum, Frontier says the ALJ erred by failing to enforce the Joint Stipulation, by finding Easterbrook provides access to the public switched network, by finding that ETC designation of Easterbrooke is in the public interest, and by abrogating the Commission's express statutory authority.

Exceptions of the CAD

The CAD filed exceptions to the Recommended Decision on June 1, 2004. The CAD's general arguments on exception were that the Chief ALJ erred in concluding that designating Easterbrooke as an ETC in portions of Frontier's Mountain State Study area was in the public interest and that the Chief ALJ's suggestion that, as a policy matter, there is no basis to discriminate between carriers as part of the public interest test is inconsistent with the Act.

As background, it should be noted that in its initial memo to the Chief ALJ, the CAD argued that Easterbrooke's ETC designation is in the public interest for exchanges in Frontier's St. Mary's study area, but not in the public interest for the Mountain State exchanges. In the Mountain State study area, the CAD says the levels of universal service funding necessary to support the incumbent's network are too high to warrant designation of an additional ETC. The analysis should be based on facts relevant to the particular

¹⁰Under this section, the FCC plays the same role as a state commission to designate ETCs in a state in those limited instances when the utility commission in that state lacks jurisdiction under state law to do so.

carrier and the particular study area in question. In addition, the CAD thinks the impact on the federal fund should be considered. The CAD explained the costs of providing service in each study area can be gauged by the amount of universal service support the area receives, the percentage of incumbent revenue universal service subsidies represent, and a comparison of support to the average residential rates for phone service (in West Virginia and nationally).

On exception, the CAD first argues the Chief ALJ erred in concluding that it was in the public interest to designate Easterbrooke as an ETC in portions of Frontier's Mountain State study area. The CAD sets forth various errors it believes the Chief ALJ made in making the determination. The CAD says the Chief ALJ erroneously concluded the CAD did not consider Easterbrooke's proposed service area in conducting its public interest analysis. According to the CAD, its recommendation was based on a cost-benefit analysis and that it fully balanced the benefits from an additional ETC in the St. Mary's and Mountain State study areas against the relative costs of Easterbrooke's designation in the particular study areas in which it sought designation. Also, the CAD asserts the Chief ALJ erroneously concluded that rural study areas are irrelevant to the public interest analysis and that she overlooked the CAD's testimony and rejected the per-line analysis of support at the wire center level. By rejecting its proposal that per-line support be considered in determining public interest, the CAD says the Chief ALJ essentially concluded that RTC study areas are irrelevant. The CAD also disputes the Chief ALJ's assertion that there is anything "peculiar" about the CAD's use of per-line support averaged over a study area rather than focused on a particular wire center.

The CAD asserts the Chief ALJ erred in considering only the particular impact upon the federal universal service fund of Easterbrooke's ETC designation. The Chief ALJ was right that the FCC did not engage in the analysis of loop support by study area advocated by the CAD, the CAD said. However, she was wrong that it is the impact of an individual ETC application on the fund that the FCC considers in its public interest analysis. The CAD states the FCC made clear that numerous factors must be weighed, including the impact of multiple designations on the fund. Considering the size of the high-cost portion of the fund (\$3.2 billion annually), very few individual ETC designations would ever impact it.

The CAD also argues the Chief ALJ's refusal to give the 2004 Joint Board's Recommended Decision any precedential value was clearly erroneous. The CAD says this should have been considered persuasive authority instead of being ignored. Although

the Joint Board's decision constitutes only recommendations, the Chief ALJ underestimated their importance.

Finally, the CAD disagrees with the Chief ALJ's suggestion that, as policy, there is no basis to discriminate between carriers as part of the public interest determination. The CAD asserts the Chief ALJ is not empowered to question the policies underlying the Act's universal service and ETC provisions. The Act expressly commands the Commission to choose whether multiple ETCs should be designated in rural study areas. That is not resolved simply because a carrier is certificated by the Commission. The CAD says the Chief ALJ's reasoning makes a mockery of the ETC process and ignores the fact that issuance of a certificate imposes no particular obligations upon a carrier whereas ETC status imposes rigorous obligations.

In sum, the CAD says the Commission should reject the portions of the Recommended Decision which conclude that ETC designation of Easterbrooke in portions of Frontier's Mountain State study area is in the public interest and which suggest that, as a policy matter, there is no basis to discriminate between carriers as part of the public interest determination.

Parties' Various Responses

On June 11, 2004, Frontier replied to the CAD's exceptions and generally agreed that the amount of per-line support flowing to a study area is relevant and important. However, Frontier thinks CAD's per-line support proposal fails to adequately protect universal service and the public interest. Frontier also criticizes the Chief ALJ for not discussing the Joint Board's recommendations. Frontier also agrees with the CAD that the Chief ALJ cannot overturn Congress' policy determination.

On June 11, 2004, Easterbrooke filed a reply to Frontier's exceptions and took the position that no clarification of the Recommended Decision is necessary since the Joint Stipulation was properly applied. Easterbrooke also argues the Chief ALJ correctly concluded Easterbrooke provides access to the public switched telephone network, since it is not required to have direct interconnection with Frontier under the Act. With regard to the public interest analysis, Easterbrooke states that despite the Chief ALJ's "policy" discussion, she set forth the evidence relied upon and effectively communicates that designation would serve the public interest and fulfill the dual goals of advancing competition and advancing universal service. Easterbrooke further agreed with the Chief

ALJ's finding that the Joint Board's recommendations are unpersuasive and that she was justified in relying on the FCC opinions. Easterbrooke asserts the Chief ALJ did not treat those decisions as binding precedent, but accorded considerable weight to them. She applied existing precedent and arrived at her own conclusions.

Also on June 11, 2004, Easterbrooke filed a reply to the CAD's exceptions. Easterbrooke argues the Chief ALJ's public interest analysis weighed the numerous benefits that would accrue to WV RSA 5 against the impact of Easterbrooke's particular designation on the USF. The CAD's argument concentrated solely on the growing size of the USF and amount of per-line support provided by that study area. By advocating its per line test, Easterbrooke says the CAD is essentially engaging in a "backdoor" attempt to elevate its public interest test to the level of importance of its originally proposed "benchmark" standard which was rejected by the Chief ALJ as not being a legitimate issue for the case. That proposal was deferred to the pending general investigation case (referenced above). Easterbrooke says the per line study area analysis is but one of many factors to be weighed and the Chief ALJ did that.

DISCUSSION

Pursuant to the Telecommunications Act of 1996, designation as an ETC is essential in order for common carriers of telecommunications services to be eligible to receive federal universal service support pursuant to 47 U.S.C. § 254. To be designated as an ETC, an applicant must: (1) be a common carrier; (2) offer the services supported by the federal universal service support mechanism under 47 U.S.C. § 254(c), either using its own facilities or a combination of its own facilities and resale, throughout the designated service area; (3) advertise the availability of such services and the charges therefor, using media of general distribution. 47 U.S.C. §§ 214(e)(1)(A)&(B); and (4) offer Link Up and Lifeline services to low-income subscribers. *See* 47 C.F.R. §§ 54.405 and 54.411.

47 U.S.C. § 214(e)(2) establishes the process to designate eligible telecommunications carriers as follows:

A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the State commission. Upon request and consistent with the public interest,

convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.

The supported services which the ETC applicant must provide are: 1) voice grade access to the public switched telephone network; 2) local usage; 3) dual-tone multi-frequency (DTMF) signaling or its functional equivalent; 4) single party service or its functional equivalent; 5) access to emergency services; 6) access to operator services; 7) access to interexchange services; 8) access to directory assistance; and 9) toll limitation for qualifying low-income customers. *See* 47 C.F.R. § 54.101(a). The applicant also must advertise the availability of these services throughout its service territory. If the incumbent local exchange carrier is a rural telephone company, the applicant seeking ETC status also must demonstrate that designating it as an ETC is in the public interest.

The Public Service Commission adopted general criteria for the advertising requirement in its Order of May 4, 2001, in *Gateway*, Case No. 00-1656- T-PC as follows:

1. The carrier must advertise in media targeted to the general residential market throughout its service area;
2. Such advertising should be placed in media substantially similar to the media in which the serving incumbent LEC advertises its services in the particular service area. This may mean newspaper or local magazine advertisements where the incumbent advertises its services in such publications, or use of broadcast media (radio or television) where the incumbent uses such media;
3. The carrier is required to maintain an Internet site where members of the public can obtain information regarding its services and rates; and
4. The carrier is required to advertise its services at least quarterly throughout the service areas for which it has been designated an ETC.

The FCC's regulations on the service area of an ETC are contained in 47 C.F.R. § 54.207, as follows:

(a) The term service area means a geographic area established by a state commission for the purpose of determining universal service obligations and support mechanisms. A service area defines the overall area for which the carrier shall receive support from federal universal service support mechanisms.

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

(c) If a state commission proposes to define a service area served by a rural telephone company to be other than such company's study area, the Commission will consider that proposed definition in accordance with the procedures set forth in this paragraph.

(1) A state commission or other party seeking the [FCC's] agreement in redefining a service area served by a rural telephone company shall submit a petition to the [FCC]. The petition shall contain:

- (i) The definition proposed by the state commission; and
- (ii) The state commission's ruling or other official statement presenting the state commission's reasons for adopting its proposed definition, including an analysis that takes into account the recommendations of any Federal-State Joint Board convened to provide recommendations with respect to the definition of a service area served by a rural telephone company.

Within 14 days after receiving the state commission's redefinition proposal, the FCC will issue a public notice of the proposal. 47 C.F.R. § 54.207(c)(2). The FCC then has 90 days within which to decide whether to initiate a proceeding regarding the proposal; if the FCC

fails to initiate a proceeding within 90 days after the release of its public notice, the state commission's proposal is deemed approved and may take effect according to state procedure. 47 C.F.R. § 54.207(c)(3). If the FCC decides to initiate a proceeding, then the state's redefinition will not take effect until the two agencies agree on a definition. *Id.*

Analysis Regarding Access to the Public Switched Telephone Network

Frontier continues to argue on exceptions that Easterbrooke does not satisfy Section 214(e)(2) of the Act because Easterbrooke does not provide access to the public switched network. Frontier bases this argument on its request for an interconnection agreement with Easterbrooke. Frontier says while it is true it has initiated negotiations, Easterbrooke has refused to interconnect. Frontier said it will seek arbitration of an interconnection agreement.

Section 251(a) of the Act says "Each telecommunications carrier has the duty-- (1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." Section 251(b) goes on to set forth the obligations of all local exchange carriers: "Each local exchange carrier has the following duties: . . . (5) RECIPROCAL COMPENSATION- The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." Additionally, "... each incumbent local exchange carrier has the following duties: (1) DUTY TO NEGOTIATE- The duty to negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements." *See* Section 251(c).

From a review of the transcript and Frontier's exceptions, we agree with the CAD's initial assertion that Frontier's concern appears to be monetary rather than service oriented, namely reciprocal compensation. Pursuant to the above, interconnections can be direct or indirect. Here, Easterbrooke routes telecommunications traffic to Frontier via access tandems operated by Verizon. *See* Transcript p. 27 (McGaw). Frontier argues on exception that Easterbrooke should not be deemed to provide access to the public switched network until it demonstrates that customers assigned all of its NXXs can make calls to and receive calls from Frontier customers. It appears Easterbrooke has not yet implemented the NXX code at issue, so the fact Easterbrooke's NXX code is not opened in Frontier's switch makes this a non-issue, as customer traffic would not be affected.

There is no solid evidence presented that customer calls between these two parties cannot be completed. It appears undisputed that the call routing architecture utilized by Easterbrooke ultimately allows traffic to flow to Frontier's customers and vice versa. Furthermore, according to witness testimony, neither Easterbrooke nor Frontier are aware of any customer complaints that their calls to customers on the other company's network could not be completed. *See* Transcript p. 39 (McGaw) and p. 140 (Swatts). Frontier's exception on this issue will be denied.

Public Interest Analysis

Having determined that Easterbrooke provides each of the supported services, since Frontier is an RTC and in accordance with 47 U.S.C. §214(e)(2), we are faced with whether designation of Easterbrooke as an ETC in Frontier's areas is in the public interest. This issue has been and continues to be the most debated. We conclude, as did the ALJ, that Easterbrooke has met its burden of proof and that such designation is in the public interest.

We note our agreement with Frontier's argument that competition alone is an insufficient basis to support a finding of public interest. Although a specific definition of "public interest" has never squarely been addressed, we believe this to be a fact specific analysis. We have considered whether the benefits of designating Easterbrooke as an ETC in Frontier's areas outweigh any potential harms. In doing so, we considered numerous factors including, but not limited to, the benefits of competitive choice, differences in service offerings, differences in service availabilities, commitments regarding quality of service, commitments regarding providing service upon request and agreements to a level of regulation greater than that imposed by the FCC and other states.

We acknowledge the CAD's arguments with respect to its proposed public interest analysis, namely the consideration of the per loop support by study areas. While we will not adopt the CAD's approach at this time, we believe that it is a valid attempt to apply some objective measure to the public interest analysis. However, we note that there are several implications and potentially conflicting outcomes of the CAD's "bright line" for determining when ETC status for competing carriers is contrary to the public interest that must be further developed before we adopt any "bright line" objective test.

We acknowledge that one argument in support of the CAD per loop support "bright line" is that the public interest may be best served when competition in an

extremely high cost study area comes from technology that is innovative and/or lower in cost than the incumbent high cost technology. However, high cost support that is based on the incumbent's high cost technology may encourage replication of such costly investment. This replication may not be desirable. Therefore, the prospect of this outcome may tend to support the CAD's suggested finding that providing ETC status in an exceptionally high cost study area would not be in the public interest. On the other hand innovative, lower cost technology may be available, but not at a cost so low as to be at or below the net (after high cost support) cost to the incumbent. Under this scenario, to deprive the new technology of any support at all creates a non-level playing field and may stifle the new technology.

A second, and perhaps more important, consideration for not adopting the CAD's per line support test at this time is the methodology currently used for administration of the high cost fund. We can appreciate the CAD's position as it relates to potential impact on the incumbent carrier in extremely high cost study areas. The incumbent has made significant investments to provide extended service throughout its service area. When such investment in some wire centers is so costly as to require large payments from the federal fund to support universal service, then loss of customers to subsidized competing carriers may have significant impacts on remaining incumbent customers in both high cost and low cost wire centers if there is a comparable loss of high cost support. Furthermore these impacts are much greater as the per loop costs increase. However, at the present time, the methodology for administration of the federal high cost fund is such that the incumbent will not lose high cost support if it loses customers to a competing carrier. Accordingly, the potential for an outcome that is contrary to the public interest when competing carriers receive ETC status in extremely high cost study areas will not occur under the present funding procedures. As we explain below, we are authorizing ETC status for Easterbrooke only under the current methodology for administration of the federal high cost fund. If this methodology changes, then we shall reconsider the public interest of ETC designation.

For the numerous reasons discussed by the Chief ALJ in the Recommended Decision, we find the public interest will be served by Easterbrooke's ETC designation in its service territory of WV RSA 5. We also believe that public health and safety would benefit where wire line service is unavailable.

Anti-competitive concerns were also considered, including the impact of Easterbrooke's designation on the universal service fund. We acknowledge the Joint Board's recommendations concerning the process for designation of ETCs and the rules

regarding high-cost universal service support¹¹ and recognize that the impact on the fund is a significant concern and a factor to be considered. We agree with Frontier and the CAD that the Chief ALJ's conclusion – that the impact of the individual ETC petition on the USF is to be considered – is erroneous.

On June 8, 2004, the FCC issued a Notice of Proposed Rulemaking, seeking comments on the Joint Board's recommendations.¹² Also in June, the FCC asked the Joint Board on Universal Service to review the Commission's rules relating to the high-cost universal service support mechanisms for rural carriers and to determine the appropriate rural mechanism to succeed the five-year plan adopted in the previous *Rural Task Force Order*, particularly asking for recommendations on a long-term universal service plan that ensures that support is specific, predictable, and sufficient to preserve and advance universal service.¹³

We recognize and share in the concerns regarding the overall impact to the fund through the designation of additional ETCs in rural carriers service areas, however, the issue is being addressed at the federal level. While Frontier's assertions regarding the fund have merit, they do not warrant rejection of Easterbrooke's petition at this time. We acknowledge that the outcome of the federal proceedings could affect the ETC designation process, as well as the support that ETCs may receive. However, any projections regarding future changes are only speculative. Under the current law, we conclude that Easterbrooke's designation as an ETC would be in the public interest. Nevertheless, with knowledge of the ongoing federal proceedings, we conclude it is reasonable to make Easterbrooke's designation subject to review, if and when the federal rules and regulations change.

In its exceptions, Frontier explains that the Joint Stipulation provides that Easterbrooke will be subject to the same certain conditions and eligibility criteria in addition to the minima provided for in federal law, as proposed in *Highland Cellular*, if

¹¹See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Recommended Decision, FCC 04J-1 (rel. Feb. 27, 2004).

¹²See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Notice of Proposed Rulemaking, FCC 04-127 (rel. June 8, 2004).

¹³See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order, FCC-04-125 (rel. June 28, 2004).

the final non-appealable order in *Highland Cellular* approves such conditions. As set forth in the *Highland Cellular* Order, issued contemporaneously herewith, we believe that reasonable conditions are imposed upon Easterbrooke, through the Joint Stipulations, such that Frontier's proposals will not be adopted. We find that through the Joint Stipulations, processes are in place to ensure the funds will be used for incremental construction in high costs areas and that there will be no windfall. As in *Highland Cellular*, we will adopt the Joint Stipulations.

Designated Service Area Analysis

As Easterbrooke's ETC designation is in the public interest, we must determine whether it is appropriate to redefine Frontier's service territory for the purpose of this proceeding. As explained in the Recommended Decision, Easterbrooke requested designation for its entire service territory of WV RSA 5, which encompasses eight West Virginia counties which fall within Frontier's Mountain State and St. Mary's study areas. The Chief ALJ explained that the boundaries of Frontier's wire centers, covered by this petition, do not conform precisely to the boundary of WV RSA 5 in two instances. Frontier argues that Easterbrooke must serve the entirety of Frontier's study areas.

With regard to the redefinition process, we reject Frontier's analysis. 47 C.F.R. § 54.207, as set forth above, states that a "service area means such company's 'study area' unless and until the Commission [the FCC] and the states, after taking into account recommendations of a Federal-State Joint Board . . . establish a different definition of service area for such company." Frontier misreads Section 214(e)(5) in asserting that the Joint Board must be convened each time a service area redefinition request is received. This section merely requires a Joint Board's recommendations be taken into account.

In her analysis, the Chief ALJ addresses the parties' concerns and adopted the CAD's recommendation that Easterbrooke be granted ETC status within the entire boundaries of designated wire centers, whether the boundaries of those wire centers extend beyond the boundary within which Easterbrooke is licensed to provide wireless service. In doing so, Easterbrooke was then given the option to either withdraw the Thomas, Davis and Walkersville wire centers from its requested ETC designated territory or obtain a certificate of convenience and necessity from the Commission to serve the specific portions of Lewis County and Grant County for which it does not now have authority at this time. We are persuaded by the CAD and the Chief ALJ's reasoning with regard to redefinition and will adopt the same. We further concur with the Chief ALJ's determination and analysis that Easterbrooke is not attempting to skim the cream.

Additional Requirements

While we adopt the ALJ's decision to grant Easterbrooke's petition for ETC designation in certain service areas, we also find it reasonable to impose certain additional requirements.

A general investigation, Case No. 03-1199-T-GI, was instituted with regard to the establishment of conditions for the granting of ETC status to carriers and the establishment of uniform standards for determining ETC compliance with applicable federal requirements regarding the use of federal USF money provided to them. The general investigation is pending. Should requirements be established as a result of that case which are not imposed at this time, Easterbrooke must comply with any such additional requirements.

We also support and adopt the Chief ALJ's requirement that Easterbrooke comply with the CTIA Consumer Code for Wireless Service, as it represents a reasonable level of service and commitment to a cellular telephone company's customers.

Easterbrooke's ETC designation shall be subject to the Commission's annual review of amount of USF monies received and the use of such funds. Specifically, the usage of the funds will be considered by this Commission as a factor in the annual re-certification process.

Chief ALJ's Policy Concerns

We agree with the exceptions of Frontier and the CAD regarding the Chief ALJ's discussion of certain policy issues, as quoted above and set forth in the Recommended Decision at page 57. Of particular concern to this Commission is the Chief ALJ's statement that it is

...discomfiting to be expected to pick and choose among carriers whose certificates have equal standing and whose services the Public Service Commission has already concluded are required by the public convenience and necessity. Denial of ETC designation to any ETC applicant in West Virginia means that the Public Service Commission is automatically placing that carrier at a financial and competitive disadvantage relative to the incumbent local exchange carrier and, possibly, previously granted ETC designees, by denying subsequent ETC applicants the same

access to Universal Service Funding support as it granted to prior ETC designees or the incumbent providers. Once the Public Service Commission has concluded that the public convenience and necessity require a particular service, the undersigned is hard-pressed to understand under what legal basis . . . the Commission then makes an affirmative decision to discriminate between those providers by denying access to subsidy funds to some, while granting it to others.

We disagree and reject this portion of the Recommended Decision for the reasons discussed by the CAD and Frontier. Specifically, we agree with Frontier that the public interest considerations in deciding to certificate a carrier are wholly different from those in deciding whether to designate a particular carrier to be an ETC in an RTC's service area. The fact that it may be in the public interest to certificate yet another competitor does not mean it is in the public interest to designate that carrier an ETC. We also agree with the CAD that the Chief ALJ cannot override Congress' policy decision that not every provider in RTCs' areas will get USF money (i.e., it must be in the public interest) and that the public interest determination is not resolved just because a carrier is certificated. Thus, the CAD and Frontier's exceptions will be granted to the extent they address this issue. Nevertheless, rejection of this proposition does not change the outcome of the decision.

FINDINGS OF FACT

1. On June 19, 2003, Easterbrooke filed a petition, pursuant to Section 214(e)(2) of the Act, seeking ETC designation in those areas of its service territory served by Frontier, an RTC.
2. This matter was referred to the ALJ Division by Commission Order entered on July 22, 2003.
3. By Procedural Order entered on October 21, 2003, Frontier and the CAD's petitions to intervene were granted.
4. On November 7, 2003, a Procedural Order was entered which, among other things, removed CAD's benchmark proposal from this proceeding and deferred it to Case No. 03-1199-T-GI.

to discriminate between carriers as part of the public interest test, is inconsistent with the Act.

11. On June 11, 2004, Frontier replied to the CAD's exceptions.

12. On June 11, 2004, Easterbrooke filed a reply to both Frontier's and the CAD's exceptions.

CONCLUSIONS OF LAW

1. We disagree with and reject the Chief ALJ's discussion of certain policy issues, as quoted above and set forth in the Recommended Decision at page 57 ("policy discussion"). Frontier's and the CAD's exceptions will be granted with respect to this issue.

2. It is reasonable and in the public interest to adopt the Joint Stipulation.

3. It is reasonable to conclude Easterbrooke offers or is capable of offering access to the public switched telephone network.

4. The CAD's public interest analysis, namely the consideration of the per loop support by study areas, should not be adopted at this time for the reasons discussed hereinabove.

5. It is reasonable to adopt the ALJ's finding and reasons in support thereof, as set forth in the Recommended Decision, that designating Easterbrooke is in the public interest.

6. 47 C.F.R. § 54.207 does not require that the Joint Board must be convened each time a service area redefinition request is received. This section merely requires a Joint Board's recommendations be taken into account.

7. It is reasonable to adopt the ALJ's finding and reasons in support thereof, as set forth in the Recommended Decision, that Easterbrooke's service area for ETC purposes should be defined as the entirety of WV RSA 5, with the certain specified amendments regarding the partial wire centers included within the boundaries of WV RSA 5.

8. In accordance with 47 C.F.R. § 54.207, FCC concurrence must be obtained with regard to the redefinition of the service areas. Accordingly, Staff should file the appropriate petition seeking such concurrence.

9. While the impact to the USF through the designation of additional ETCs in rural carriers' service areas is concern to be considered, the issue is being addressed at the federal level and does not warrant rejection of Easterbrooke's petition.

10. With knowledge of the ongoing federal proceedings, it is reasonable to make Easterbrooke's designation subject to review, if and when the federal rules and regulations change.

11. Easterbrooke should be required to comply with the CTIA Consumer Code.

12. In addition to the conditions set forth in the Recommended Decision, it is reasonable to require Easterbrooke to comply with additional requirements, including the following, Easterbrooke shall comply with any additional requirements which may be established as a result of Case No. 03-1199-T-GI, which is now pending and Easterbrooke shall submit to this Commission's annual review of the amount of USF monies received and the use of such funds. Specifically, the usage of the funds will be considered by this Commission as a factor in the annual re-certification process.

ORDER

IT IS, THEREFORE, ORDERED that Citizens Telecommunications of West Virginia dba Frontier Communications of West Virginia's exceptions are granted only to the extent set forth in the Discussion and Conclusions of Law. The remainder of Frontier's exceptions are denied.

IT IS THEREFORE ORDERED that the Consumer Advocate Division's exceptions are granted only to the extent set forth in the Discussion and Conclusions of Law. The remainder of the CAD's exceptions are denied.

IT IS FURTHER ORDERED that the portion of the Recommended Decision which suggests that, as a policy matter, there is no basis to discriminate between carriers as part of the public interest determination, is rejected.

IT IS FURTHER ORDERED that the remainder of the Recommended Decision, entered on May 14, 2004, is adopted and the following additional conditions are imposed:

- Easterbrooke Cellular Corporation, doing business as Cellular One shall comply with any additional requirements which may be established as a result of Case No. 03-1199-T-GI, which is now pending;
- Easterbrooke Cellular Corporation, doing business as Cellular One shall submit to this Commission's annual review of the amount of USF monies received and the use of such funds. Specifically, the usage of the USF funds will be considered by this Commission as a factor in the annual recertification process.

IT IS FURTHER ORDERED that the Joint Stipulation is hereby adopted.

IT IS FURTHER ORDERED that Easterbrooke Cellular Corporation, doing business as Cellular One's ETC designation, as granted herein, shall be subject to review if and when the federal rules and regulations are modified by the Federal Communications Commission.

IT IS FURTHER ORDERED that within sixty (60) days of the date of Order, Commission Staff shall file the appropriate petition with the Federal Communications Commission pursuant to Section 214(e) of the Communications Act of 1934, as amended, seeking FCC concurrence in the redefinition of Easterbrooke Cellular Corporation, doing business as Cellular One's service area for eligible telecommunications carrier purposes as being the entirety of WV RSA 5, plus the portions of Frontier's Walkersville, Thomas and Davis wire centers which extend beyond the boundaries of WV RSA 5, if Easterbrooke chooses that option, or with the elimination from Easterbrooke's ETC service territory of the portions of the Walkersville, Thomas and Davis wire centers which are located within WV RSA 5, if Easterbrooke chooses that option.

IT IS FURTHER ORDERED that within the same sixty-day period, the Commission Staff shall provide to the Federal Communications Commission and the Universal Service Administrative Company a certified copy of this Order designating Easterbrooke Cellular Corporation, doing business as Cellular One, as an eligible telecommunications carrier for the specified wire centers and service territory, along with a list of the areas designated to be served by Easterbrooke.

IT IS FURTHER ORDERED that within thirty (30) days of this Order, Easterbrooke Cellular Corporation, doing business as Cellular One, shall file with this Commission an original and at least five (5) copies of its FCC-approved tariff and other pertinent information, for informational purposes and to be considered a common carrier in West Virginia. Easterbrooke Cellular Corporation, doing business as Cellular One,

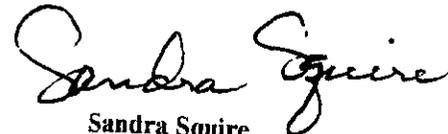
shall provide its wireless services in West Virginia under its then-current tariff and shall file updated tariffs in a timely manner as they approved.

IT IS FURTHER ORDERED that, upon entry hereof, this proceeding shall be removed from the Commission's active docket of cases.

IT IS FURTHER ORDERED that the Commission's Executive Secretary serve a copy of this order upon all parties of record by United States Certified Mail, return receipt requested, and upon Commission Staff by hand delivery.

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A True Copy, Teste:


Sandra Squire
Executive Secretary

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

Entered: May 14, 2004

CASE NO. 03-0935-T-PC

EASTERBROOKE CELLULAR CORPORATION,
doing business as CELLULAR ONE.

Petition for consent and approval to be designated as an eligible telecommunications carrier in the areas served by Citizens Telecommunications Company of West Virginia, doing business as Frontier Communications of West Virginia.

RECOMMENDED DECISION

PROCEDURE

On June 19, 2003, Easterbrooke Cellular Corporation, doing business as Cellular One (Easterbrooke), filed a petition with the Public Service Commission for designation as an eligible telecommunications carrier (ETC), pursuant to Section 214(e)(2) of the Communications Act of 1934, for the receipt of support from the Federal Universal Service Fund Program in those areas of Easterbrooke's service territory served by rural telephone companies (RTC). Easterbrooke represented that it satisfied all of the conditions set forth in Section 214(e)(1) of the Act and, therefore, is qualified for designation by the Commission as ETC.

According to the petition, Easterbrooke was established in 1990 and is an authorized wireless carrier operating in West Virginia. It is also a telecommunications carrier as defined by the Communications Act of 1934. By Recommended Decision entered on May 29, 2003, which became final on June 7, 2003, in Case No. 02-1118-T-PC, Easterbrooke was designated as an ETC for all wire centers served by Verizon within Easterbrooke's service territory. Easterbrooke is now seeking ETC status for that part of its service territory served by Citizens Telecommunications Company of West Virginia, doing business as Frontier Communications of West Virginia (Frontier), a rural telephone company. Easterbrooke attached a map of its service areas to its petition.

Easterbrooke listed the criteria which the Commission must apply in considering Easterbrooke's petition:

- (a) Easterbrooke must be a common carrier;
- (b) Easterbrooke must offer or be capable of offering the services supported by universal service, which the FCC has identified as:

1. voice-grade access to the public switched telephone network (PSTN);
2. local usage;
3. dual tone multi-frequency (DTMF) signaling or its functional equivalent;
4. single-party service or its functional equivalent;
5. access to emergency services;
6. access to operator services;
7. access to interexchange services;
8. access to directory assistance; and
9. toll limitation for qualifying low-income consumers;

- (c) Easterbrooke must make available or commit to make available the supported services throughout the designated service area; and
- (d) Easterbrooke must advertise or agree to advertise the availability of, and charges for, the supported services.

Easterbrooke asserted that it is capable of providing and has commenced the provision of the required services in one or more of the designated areas. Easterbrooke attached as Exhibit B to its petition a list of exchange and/or central office codes with respect to which it is currently providing, or has the present capability to provide, all federally supported services. A list of wire center codes comprising the requested ETC service area was also attached to the petition as Exhibit C. Easterbrooke filed a sample of the promotional materials currently being used, published or broadcast by Easterbrooke in West Virginia as Exhibit D. Easterbrooke asserted that it is capable of providing the required services within the part of its service territory served by Frontier and it provided specific information regarding its provision of each of the supported services set forth above. Easterbrooke also noted that, as an ETC, it would be required to offer Link-up and Lifeline services as part of its service offerings to low-income subscribers. It currently provides those services to its low-income subscribers in the areas where it has already been designated as an ETC. Upon designation as an ETC within Frontier's service area, it will also provide such services to its eligible customers in that service territory.

Easterbrooke pointed out that Section 214(e)(2) of the Act provides that a state commission may designate an eligible common carrier as an ETC in an area served by an RTC, so long as the designation is in the public interest. It also asserted that the Commission has previously found that the provision of increased choices in technology, services and prices for consumers in an RTC's service territory has been adequate to meet the public interest requirements for designation as an ETC in an RTC service territory. Citing Case No. 01-0488-T-PC, FiberNet, LLC, Recommended Decision entered November 14, 2001, final December 4, 2001, Easterbrooke noted that the Commission found in that case that FiberNet's assertion of greater consumer choice within Frontier's service territory was sufficient to meet the public interest requirement for designation as an ETC in those areas served by Frontier as an RTC.

Easterbrooke also noted that, as a wireless carrier, it will not be offering service in competition with Frontier, which is a local exchange carrier. Easterbrooke asserted that its services will complement, rather than compete with, Frontier's services. As a wireless carrier, Easterbrooke will offer customers in Frontier's service territory where Easterbrooke operates a choice of rate plans and services. The granting of the ETC designation for Easterbrooke in those areas served by Frontier will bring greater choice for customers and, therefore, is in the public interest. Accordingly, Easterbrooke requested that the Commission designate it as an eligible telecommunications carrier in the part of Frontier's service territory which overlaps Easterbrooke's authorized service area, for purposes of receiving federal universal service support, effective immediately.

On July 9, 2003, Staff Attorney Meyishi Blair filed the Initial Joint Staff Memorandum in this proceeding, attached to which was the Utilities Division Initial Recommendation prepared by Technical Analyst Dannie L. Walker. Commission Staff represented that it was in the process of reviewing this matter and would make appropriate recommendations once that review has been completed.

On July 16, 2003, Citizens Telecommunications Company of West Virginia, doing business as Frontier Communications of West Virginia, by counsel, filed a petition with the Public Service Commission to intervene in this proceeding, stating that it has a legal interest in the subject matter being addressed. Frontier noted that Easterbrooke must demonstrate that it provides all of the services supported by the Federal universal service program and that designating Easterbrooke as an additional ETC in Frontier's study areas is in the public interest. Frontier also stated that granting its motion will not delay or hinder the schedule with respect to the consideration of the Easterbrooke's request.

By Commission Order entered on July 22, 2003, the Commission referred this matter to the Division of Administrative Law Judges for a decision to be rendered on or before January 15, 2004.

On August 7, 2003, the Consumer Advocate Division of the Public Service Commission (CAD) filed a petition to intervene in this matter, on behalf of Frontier's ratepayers, representing that Easterbrooke's petition for designation as an ETC constituted a proceeding with the potential for adverse effects on Frontier's ratepayers.

On August 6, 2003, in another proceeding pending before the Commission, Case No. 03-0781-T-GI, a petition filed by the Consumer Advocate Division of the Public Service Commission to initiate a general investigation of Federal universal service funding for eligible telecommunications carriers, Commission Staff filed an initial recommendation that Easterbrooke's petition for designation as an ETC be held in abeyance pending the resolution of the issues raised by the CAD in its petition for general investigation.

On September 8, 2003, Easterbrooke filed a response herein to the Initial Staff Memorandum in Case No. 03-0781-T-GI, strongly objecting to the suggestion that its case be held in abeyance, asserting that such

recommendation is contrary to West Virginia law, as well as the Communications Act of 1934. Easterbrooke noted that it filed its petition prior to the Staff's request for abeyance and that the petition should be processed in a timely manner.

On September 9, 2003, Easterbrooke filed pages that had been inadvertently omitted from its September 8, 2003 filing.

Pursuant to Commission policy, the Final Joint Staff Recommendation in this proceeding was due no later than Wednesday, September 17, 2003.

By Procedural Order issued on October 21, 2003, a procedural schedule was adopted for the processing and resolution of this case, which, among other things, required Commission Staff to file its Final Joint Staff Recommendation no later than October 29, 2003; required a settlement to be filed, if the parties agreed with the discussion contained in that Order, no later than Friday, November 7, 2003; and scheduled this matter for hearing to be held on November 12, 2003, at the Public Service Commission Building, 201 Brooks Street, Charleston, West Virginia, and to continue on that date until concluded. Additionally, a schedule for the filing of the transcript and initial and reply briefs was also established. Finally, the Order granted the petitions to intervene filed in this proceeding by Frontier and the CAD.

In the discussion in that Procedural Order, the undersigned noted that a review of the petition and the petitions to intervene tended to indicate that the sole issue in dispute in this matter, i.e., whether it is in the public interest to designate Easterbrooke as an ETC in Frontier's service territory, given Frontier's status as an RTC, was identical to the issue which pending before the Commission on exceptions in Highland Cellular, Inc., Case No. 02-1453-T-PC. The undersigned expressed the opinion that, for all intents and purposes, the Commission's decision on exceptions in the Highland proceeding would decide the issue in this proceeding and that, given the similarity between the parties and counsel participating in this case and the parties and counsel who participated in the Highland case, any record generated from a hearing in this case would be fairly similar to, if not identical to, the record generated in the Highland proceeding. The undersigned expressed the opinion that it would not appear to be an efficient or reasonable use of the resources and time of either the parties or the Commission to completely relitigate the same issues that are currently pending before the Commission on exceptions in Highland. The undersigned expressed the opinion that it would be in all of the parties' interests to enter into a joint stipulation and agreement for settlement, providing for the designation of Easterbrooke as an ETC in Frontier's service territory, if the Commission affirms the ETC designation of Highland Cellular, Inc., in Case No. 02-1453-T-PC.

On October 29, 2003, Staff Attorney Blair filed an Interim Joint Staff Memorandum, attached to which was the Utilities Division Interim Report in this proceeding, prepared by Mr. Walker. According to Mr. Walker, after the entry of the October 21, 2003 Procedural Order, Staff met with representatives of Frontier, Easterbrooke and the CAD on October 27, 2003. Staff went into the meeting prepared to report the undersigned's recommendations; however, it became clear at the meeting that,

while there were many similarities between this case and the Highland case, there are certain "significant and intransigent" issues which the parties to this case desire to litigate. The attendees agreed that the CAD should seek an extension of the Administrative Law Judge's decision due date and a continuation of the hearing until sometime in January. Staff indicated that its substantive recommendation would be filed in the future.

On November 3, 2003, the CAD filed two documents in this proceeding, one with the Administrative Law Judge, responding to the Procedural Order and requesting a continuance of the hearing and a modification of the procedural schedule, and one to the Commission, requesting a 120-day extension of the Administrative Law Judge's existing decision due date. In the CAD motion directed to the Administrative Law Judge, the CAD listed three issues which it believed differed from the issues being considered by the Commission in Highland and which may warrant development at hearing. First, the CAD wishes to present testimony and evidence regarding its "benchmark standard" for determining whether the public interest warrants designating additional ETCs in a rural telephone company's study area. The CAD proposed this standard in its briefs filed in the Highland case, although there was no direct testimony or other evidence to support that proposal in the Highland case. Both Easterbrooke and Frontier oppose aspects of the CAD's proposal and would want to introduce their own testimony and evidence to support their positions regarding the CAD's proposal. Second, the wire centers in Frontier's service territory in which Easterbrooke seeks ETC status are not the same as those for which Highland sought ETC status. Accordingly, there may be issues relating to Easterbrooke's ability to serve those wire centers which differ from the issues before the Commission in Highland. Third, Easterbrooke's call routing arrangement with Frontier is different from the arrangement between Highland Cellular and Frontier. Accordingly, there may be issues relating to whether Easterbrooke provides the services supported by universal service which differ from the issues before the Commission in Highland.

The CAD motion went on to state that the parties are not prepared to go forward to hearing on these issues on November 12, 2003. The parties wish to conduct discovery regarding the issues that differ from those before the Commission in Highland. Further, Frontier's counsel had a scheduling conflict on that date. Finally, to the extent the CAD's benchmarking proposal would be at issue, the parties wanted to prefile testimony on that issue, as well as other issues that differ from the issues pending before the Commission in Highland. The CAD's motion set forth a proposed procedural schedule, which called for a deadline for submitting discovery requests of November 14, 2003; responses to discovery to be filed on or before December 5, 2003; prefiled testimony and prefiled rebuttal testimony to be filed on December 12 and December 19, 2003, respectively; and hearing to be conducted in January of 2004. Certain scheduling conflicts were listed for Easterbrooke in the month of January.

By Commission Order entered on November 7, 2003, the decision due date was extended to May 14, 2004.

By Procedural Order also issued on November 7, 2003, the undersigned cancelled the procedural schedule established by the Procedural Order issued on October 21, 2003, including the hearing date of November 12, 2003, since it was apparent that the parties were not prepared to go to hearing. The undersigned also adopted part of the procedural schedule proposed by the parties, i.e., the portion relating to discovery and the pre-filing of testimony. The Order noted that scheduling for the Easterbrooke hearing would have to await the scheduling of the hearings in the various Rule 30-C cases currently pending before the Commission. Additionally, the undersigned removed the CAD's benchmark proposal from this proceeding and deferred it to Case No. 03-1199-T-GI, the general investigation established by the Public Service Commission regarding the conditions which would be applicable to all ETC applicants in West Virginia in the future. The undersigned expressed the opinion that the CAD's benchmark standard was not a legitimate issue in this case, although it was appropriate for consideration in the general investigation. The undersigned determined that, in this proceeding, Easterbrooke would be held to the same standards which had been applied to other ETC applicants at the Public Service Commission to date, no less and no more. The undersigned further asserted that it would be grossly unfair and inappropriate to litigate in this proceeding a matter of policy which would have general applicability to all future ETC applicants before the Commission, when the general investigation was started expressly for that purpose. The undersigned also stated that, if the CAD's benchmarking proposal was the sole point on which the CAD would refuse to sign a stipulation and agreement for settlement in this matter or was the stumbling block to a more timely resolution of this case, the undersigned did not consider the CAD's participation in such a settlement to be critical.

On November 17, 2003, the CAD filed a petition for reconsideration with the Administrative Law Judge asking her to reconsider her Procedural Order of November 7, 2003. The CAD objected to the removal of the benchmarking standard from this proceeding and its deferral to the general investigation. The CAD argued strenuously that the benchmarking proposal was not a rule adopted by the Commission and that it would not be grossly unfair or inappropriate to consider its proposal in making the public interest determination required in this case. The CAD argued that its benchmarking proposal was an analytical framework for the public interest test that the CAD, as a party, should be entitled to present in this particular case concerning this particular application.

On November 18, 2003, the CAD filed a page which had been inadvertently omitted in its filing of November 17, 2003. In that page, the CAD argued that its benchmarking proposal simply advanced an objective, straightforward standard for making the public interest determination required in this proceeding.

On November 24, 2003, Easterbrooke filed its opposition to the CAD's petition for reconsideration. Easterbrooke argued that the ALJ correctly interpreted the CAD's suggested benchmarking standard as a potential rule of general applicability more properly considered in the general investigation. Easterbrooke pointed out that the definition of a rule set forth in West Virginia Code §29A-1-2(1), part of the West Virginia Administrative Procedures Act, would include the standard proposed by the

CAD and was properly the subject of a rulemaking and not an adjudication. Additionally, Easterbrooke argued that no compelling reasons exist for consideration of the CAD's proposal in this case. There are no facts or circumstances particular to Easterbrooke's application that demand a case-by-case adjudication of the CAD's proposed standards. Further, since the CAD's proposal will be dealt with in the general investigation, there was no urgent need to address it in this case. Easterbrooke argued that, since the CAD's proposed standard would significantly amend existing law, was intended to be applied generally to all ETC applicants and was already one of the designated subjects to be considered in the general investigation, the appropriate forum for evaluating that standard was a rulemaking or general investigation. Easterbrooke noted that the CAD proposal essentially would substitute one set of standards for another set and apply those new standards to pending and future ETC applicants. The CAD's proposed standard created a rebuttable presumption based upon a series of calculations which served as a threshold determination for the public interest, instead of the simultaneous consideration of a series of factors in evaluating where the public interest lies. By creating an immediate hurdle for ETC applicants to overcome, prior to consideration of any other factors, the proposed benchmark standard constituted a radical departure from current Public Service Commission practice and law.

Easterbrooke further noted that it would be unfair to future ETC applicants, and other elements of the public who would have an interest in the outcome of any proceeding regarding the benchmark standard, to force intervention by them in Easterbrooke's case for the sole purpose of litigating the validity of the CAD's proposed standards, when those parties would find it necessary, as well, to defend their interests in the general investigation. Further, many interested parties would not be aware of the impact that consideration of the proposed benchmark standard in the context of the Easterbrooke case may have on their own pending or future petitions for ETC designation and thus would not have received the requisite notice for intervention. Easterbrooke also argued that it was patently unfair to call upon it alone to bear the burden and expense of litigating what it believed, in essence, was a standard that may be applicable to all future ETC applicants. Easterbrooke characterized the CAD's argument as inaccurate and disingenuous with respect to the characterization of its proposed benchmark standard, stating that the proposed benchmark completely redefines the public interest inquiry for ETC applications. Easterbrooke also argued that it would be unfair to require it to be judged on the basis of different standards than those which have been applied to other ETC applicants at the Public Service Commission. Easterbrooke argued that the CAD's petition should be denied, because its proposed benchmark was, by any stretch of the imagination, a rulemaking proposal which should be considered only within the purview of the general investigation.

On December 2, 2003, the CAD filed its reply to Easterbrooke's opposition to the CAD petition for reconsideration. The CAD again argued that its benchmarking proposal provided an objective framework for the public interest determination and asserted that its benchmarks were presumptive only and could be overcome by specific evidence concerning particular applicants in particular areas. The CAD argued that its proposal did not limit or eliminate the public interest inquiry that the

Commission must make in response to a carrier's petition to be designated as an ETC in rural study areas. The CAD argued that its proposed standard was not a potential rule, and it argued that the Commission's adoption of the CAD's benchmarking proposal was something that might or might not occur in the general investigation. The CAD denied that consideration of its benchmarking proposal in this proceeding would deprive Easterbrooke or anyone else of due process. The CAD also argued that it was appropriate to consider the CAD's proposal because the CAD's proposal supported the public interest by considering who paid for the additional ETCs that are designated to receive federal universal service support in high cost rural areas. The CAD argued that Easterbrooke's claim that the CAD's proposal should be excluded from this case until the Commission may adopt a standard harms the public by insuring they will continue to pay for more and more ETCs, regardless of whether it makes economic sense to support additional ETCs.

On December 3, 2003, Frontier filed a response in support of the CAD's petition for reconsideration and in opposition to Easterbrooke's opposition to the CAD's petition for reconsideration. For the most part that document parroted the CAD's arguments, with one exception. Frontier made the argument that the undersigned had no authority to limit the issues in proceedings before her.

By Procedural Order issued on December 12, 2003, the CAD's petition to the Administrative Law Judge to reconsider her Order of November 7, 2003, was denied for the reasons set forth therein. Additionally, a procedural schedule was established for the processing and resolution of this case, which set this matter for hearing to be held on January 20 and 21, 2004, at the Public Service Commission Building, Charleston, West Virginia, and allowed all parties to file initial briefs on or before February 24, 2004, with reply briefs to be filed on or before March 5, 2004.

Easterbrooke and Frontier filed prepared direct testimony on December 12, 2003, as provided in the procedural schedule. Commission Staff and the CAD filed letters indicating that, while they were not filing prepared direct testimony, they reserved the right to file rebuttal testimony. Rebuttal testimony was filed by Easterbrooke, Frontier and the CAD on December 19, 2003.

On January 9, 2004, Robert R. Rodecker, a member in good standing with the West Virginia State Bar and local counsel for Easterbrooke, filed a Motion for Pro Hac Vice Admission of Michael F. Morrone, an attorney in good standing with the District of Columbia Bar, so that Mr. Morrone could assist and appear as co-council in this action before the Commission. An application for Pro Hac Vice Admission of Michael F. Morrone, setting forth Mr. Morrone's qualifications, was attached to the Motion as Exhibit A. A copy of the letter sent to the West Virginia State Bar transmitting the required filing fee and a copy of the Motion and Application filed with the Commission were also included as part of the January 9, 2004 filing.

On January 14, 2004, Frontier filed a motion to strike the prefiled rebuttal testimony of Easterbrooke witness Don J. Wood, arguing that Mr. Wood's rebuttal testimony contained legal argument that was inappropriate