might be worth exploring if competitive ETCs offered unlimited local usage.[22] Staff pointed out that FCC rules do not require ETCs to provide per-minute blocking, but stressed that the purpose of Lifeline service is to allow those customers to have affordable service and avoid additional charges.[23] CURB also noted that per-minute blocking would be a form of service disconnection, yet acknowledged the desirability of allowing Lifeline customers to avoid additional charges. CURB supported a free per-minute blocking option for Lifeline customers for local usage, but stressed that access to 911 service must be ensured.[24] RCC and USCOC suggested Lifeline customers that are concerned about exceeding their local usage minutes could take service from a wireline ETC that allows unlimited local usage or select a plan with more usage minutes.[25] Staff's Report concluded by recommending the Commission require ETCs to offer a free per-minute blocking option for Lifeline customers for local usage, while ensuring access to 911 service at all times, as suggested by CURB.[26]

16. The Commission is persuaded that free optional per-minute blocking of local usage will assist Lifeline customers in managing their communications bills and adopts such free optional blocking as a requirement for ETCs that do not provide unlimited local usage. The Commission finds that customers must be assured access to 911 service at all times even if they choose optional per-minute blocking.

Billing standards

17. Carriers subject to the Commission's jurisdiction are currently required to comply with the Commission's billing standards. The Commission's jurisdiction over

[22] Staff Reply Comments, ¶ 11.
[23] Staff Comments, ¶ 13.
[24] CURB Comments, ¶ 7, CURB Reply Comments, ¶ 12.
[25] RCC and USCOC Reply Comments, ¶ 22.
[26] Report, p. 9.

wireless carriers is limited by K.S.A. 66-104a and K.S.A. 66-1,143. However, wireless carriers that seek ETC status make themselves subject to the Commission's jurisdiction for the purpose of obtaining ETC designation. The Commission has not yet decided whether to require wireless ETCs to comply with the billing standards. The Commission is addressing billing standards revisions in Docket No. 06-GIMT-187-GIT (06-187 docket). The order opening that docket stated the Commission would address applicability of the standards and whether technological differences in providing service would require differing standards for different types of service providers in that docket.

18. In this docket, Staff recommends the Commission require all ETCs to comply with the billing standards to be established in the 06-187 docket.[27] CURB agreed that all ETCs should be required to comply with the billing standards and cited paragraphs from the FCC's Truth-in-Billing Order[28] to support its conclusions that the FCC has not exempted wireless ETCs from a requirement to comply with state billing standards.[29] SIA and ITG agreed that all ETCs should be required to comply with billing standards. ALLTEL, RCC and USCOC and Sprint all asserted wireless ETCs should not be required to comply with state specific billing standards, arguing federal rules and compliance with the CTIA Consumer Code provide the protection needed by consumers.[30]

19. The Commission finds it would be premature to make a determination regarding applicability of billing standards in this docket, since the Commission does not

[27] Staff Comments, ¶ 16.
[28] In the Matter of Truth-in-Billing and Billing Format, *Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking*, 20 FCC Rcd 6448, 6456, 6458 (March 188, 2005.) (Truth-in-Billing Order)
[29] CURB Comments, ¶ 9.
[30] ALLTEL Comments, ¶¶ 21-25, RCC and USCOC Comments, ¶25, Sprint Comments, p. 6.

yet have the benefit of the parties' work in the billing standards docket. The Commission will determine applicability of billing standards in the 06-187 docket.

Carrier of Last Resort Responsibilities

20. Both the Federal and State Acts address carrier of last resort responsibilities. The Federal Act, § 214(e)(4) establishes a procedure for carriers to relinquish ETC status in a service area that has at least two ETCs and for state commissions to ensure that the remaining ETC can provide service to all customers in the service area. K.S.A. 66-2009(a) simply designates the local exchange carrier providing service before January 1, 1996, or its successor as the carrier of last resort. The Commission asked parties to comment on whether it should consider the effect of designating an additional ETC in a service area on the carrier of last resort as part of the public interest test, and if so, what criteria should apply. If the Commission decides to consider the public interest effect of designating an additional ETC, should it limit that consideration to state designation, considering the differing statutes.

21. CURB's Comments recommended the Commission consider the impact of designating an additional ETC on the carrier of last resort as part of the public interest test for both state and federal designation because of the need to ensure universal service.[31] SWBT argues ETCs should be required to demonstrate that they can serve as carriers of last resort.[32] SIA and ITG agreed with CURB that the Commission should consider the public interest of designating an additional ETC specifically in terms of the impact on the incumbent carrier's ability to meet its carrier of last resort obligations. They recommended the Commission require ETC applicants to demonstrate that their

[31] CURB Reply Comments, ¶ 17.
[32] SWBT Comments, ¶ 11.

designation will not negatively affect the incumbent carrier's ability to fulfill its carrier of last resort obligations.[33] ALLTEL cited to 47 C.F.R. § 54.205, which addresses relinquishment of ETC obligations, asserting that the Commission need not consider the effect of ETC designation on carrier of last resort obligations.[34] RCC and USCOC argued that the FCC has exempted competitive ETCs from carrier of last resort obligations and that this is justified because incumbent carriers are able to recover costs to meet carrier of last resort obligations through the high cost support mechanism, while the competitive ETC is limited to the support available for each line it serves.[35] Staff observed 47 U.S.C. § 214(e)(1) obligates ETCs to provide service throughout their designated service area which ensures their ability to serve all customers if the need arises for them to assume COLR responsibilities. However, Staff maintained that it is not reasonable to require an ETC applicant to demonstrate its ability to assume carrier of last resort obligations at some unknown future time. Staff added the incumbent carrier's ability to serve as carrier of last resort is a function of the availability of sufficient KUSF support regardless of designation of competitive ETCs. Staff recommended against considering the effect on the carrier of last resort in designating competitive ETCs.[36] Sprint similarly argued that the ETC designation process should not be used to attempt to control the size of the federal USF or the KUSF. Sprint also opined it would violate the competitive neutrality principle to add this consideration to the ETC designation process.[37]

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[33] SIA and ITG Comments, ¶ 13.
[34] ALLTEL Comments, ¶¶ 26, 27.
[35] RCC and USCOC Comments, ¶ 26.
[36] Staff Reply Comments, ¶¶ 13, 14, Report, p. 13.
[37] Sprint Comments, pp. 14, 6-7.

22. The Commission finds that the effect on carriers of last resort shall not be part of the ETC designation process. The FCC has not adopted this consideration for its designation process and it is responsible for the federal USF and its ability to meet obligations. Although the Commission is concerned that designation of an increasing number of ETCs and payment of support to ETCs for lines they serve and to rural incumbent carriers for support based on embedded cost, regardless of lines served, will increase the size of the KUSF, we believe the Legislature has made it clear that the KUSF should support all ETC lines, without considering the effect on the carrier of last resort. The Legislature enacted SB 349 in the 2006 Legislative session continuing to base support for rate of return regulated companies on embedded cost. It did not amend the statutes controlling designation of ETCs and distribution of support, which it could have done since the issue of growth of the KUSF was squarely before it. The Commission finds this is an indication that ETC designations should continue to be made without consideration of the effect on carriers of last resort.

Build-Out Plans

23. The Commission required ALLTEL and RCC to provide updates regarding their ability to provide service throughout the service areas where the companies were granted designation as an ETC. Both companies indicated they would follow a multi-step process to determine their ability to provide service to a particular requesting customer. Based on concerns of other parties regarding the commitment of ALLTEL and RCC to serve throughout their territory, the Commission required the carriers to submit maps on an annual basis detailing their existing infrastructure and the approximate coverage available from those facilities. The Commission also required the

carriers to report each quarter the number of instances in which they had refused to serve a customer. Those reports were to include the location of the customer, an explanation of why none of the options in the six-step process could be utilized to serve the customer, and the carrier's progress in establishing interconnection arrangements which would permit resale of a wireless or wireline carrier's service.[38]

24. In the *FCC Order*, the FCC stated state commissions should determine what constitutes a reasonable request for service. In making this determination, the FCC encouraged State commissions to examine any build-out commitments made by the ETC applicant, current line extension policies applicable to incumbent ETCs and carrier of last resort obligations.[39] The FCC made clear that an ETC should provide service immediately when its network passed or covered the potential customer's premises. When a potential customer requested service in the applicant's licensed area but outside its existing network coverage, the FCC required the ETC to provide service within a reasonable period of time if service could be provided at reasonable cost by: "(1) modifying or replacing the requesting customer's equipment; (2) deploying a roof–mounted antenna or other equipment; (3) adjusting the nearest cell tower; (4) adjusting network or customer facilities; (5) reselling services from another carrier's facilities to provide service; or (6) employing, leasing, or constructing an additional cell site, cell extender, repeater, or other similar equipment."[40] The FCC requires ETCs which it has designated to file notice within 30 days of the ETC's determination that it cannot meet a request for service. The FCC also requires ETC applicants to submit a five-year plan describing with specificity their proposed network improvements and upgrades on a wire

[38] Report, p. 14.
[39] *FCC Order*, ¶ 21.
[40] *Id.* at ¶ 22.

center-by-wire center basis throughout their designated service areas that would not be made absent the receipt of support. The plan must specify

> (1) how signal quality, coverage, or capacity will improve due to the receipt of high-cost support throughout the area for which the ETC seeks designation;
>
> (2) the projected start date and completion date for each improvement and the estimated amount of investment for each project that is funded by high-cost support;
>
> (3) the specific geographic areas where the improvements will be made; and
>
> (4) the estimated population that will be served as a result of the improvements.[41]

25. The Commission requested that the parties review the FCC requirements and provide comments on the value of this Commission's annual mapping and quarterly reports requirement, as well as the FCC's five-year build-out requirement. The Commission also requested comment on what constitutes a "reasonable request."[42]

26. ALLTEL, RCC and USCOC, and Sprint argued against a requirement to submit a five-year plan, asserting that things change too fast in the industry and the five-year plan would represent little more than a guess. ALLTEL suggested a two-year plan. ALLTEL wanted the mapping requirement discontinued while RCC and USCOC found the Commission's requirement of maps to be a better approach than adoption of a five-year plan.[43] Sprint also argued a requirement that only competitive ETCs submit a five-year plan would be anti-competitive.[44] CURB, SIA and ITG and SWBT recommended the Commission adopt a five-year plan.[45] SWBT stressed the five-year plan demonstrates a commitment to build out and noted that a USCOC witness in a Missouri proceeding

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[41] *Id.* at ¶ 23.
[42] Order Opening Docket, ¶ 11.
[43] ALLTEL Comments, ¶¶ 28-34, RCC and USCOC Comments ¶¶ 28-34.
[44] Sprint Comments, p. 8.
[45] CURB Reply Comments, ¶ 18, SIA and ITG Comments, ¶ 13

testified the company could prepare a five-year plan in thirty days.[46] Staff suggested the Commission adopt ALLTEL'S suggestion to require a two-year plan.[47]

27. CURB recommended a definition of "reasonable request" for service.[48] SWBT expanded on CURB's definition suggesting it be defined as "any request for service at a permanent residence or business location within the service areas, by a verifiable party and subject to the normal customer screening processes for a type and quantity of service normally requested by similar customers." SWBT asserted that its additional language would address the type of location to be served, as well as the type and quantity of service requested.[49] Sprint expressed opposition to any requirement to provide service in a particular manner, but stated it would not object to a requirement mirroring the FCC. RCC and USCOC expressed support for the Commission's current method to address customer requests.[50]

28. Staff's Report recommended the following:

- adopt the FCC's requirement for a build-out plan but modify the requirement to two years;
- adopt SWBT's recommended definition for a "reasonable request" for service: "any request for service at a permanent residence or business location within the service areas, by a verifiable party and subject to the normal customer screening processes for a type and quantity of service normally requested by similar customers";
- require an ETC to follow the FCC's six-step process to determine whether it can provide service to a particular requesting customer;[51]
- require all competitive ETCs to submit maps on an annual basis detailing their existing infrastructure and the approximate coverage available from those facilities; and

[46] SWBT Reply Comments, ¶¶ 3-6, 9.
[47] Staff Reply Comments, ¶ 30.
[48] CURB Comments, ¶ 13.
[49] SWBT Reply Comments, ¶ 13.
[50] RCC and USCOC Comments, ¶ 27.
[51] *FCC Order*, ¶ 22. The Commission required ALLTEL and RCC to follow this multi-step process in its orders designating the carriers as ETCs.

- require all ETCs to provide a report each quarter of the number of instances in which the companies refused to serve a customer. The report should include the location of the customer, an explanation of why none of the options in the multi-step process could be utilized to serve the customer, and the carrier's progress in establishing interconnection arrangements which would permit resale of a wireless or wireline carrier's service.

29. The Commission finds Staff's recommendations reasonable and adopts them. Competitive ETCs shall file build-out plans providing information on the four categories set out in ¶ 24 above. Decreasing the build-out plan requirement to two years will provide the Commission with information to determine that the ETC is making progress on extending its service, while recognizing that a five-year plan may be overly hypothetical for the fast-moving industry. SWBT's proposed definition of a "reasonable request for service" provides appropriate guidance to companies and will aid the Commission in resolving any disputes that might arise over this issue. The Commission adopted the FCC's six-step process to determine the ability to provide service to a requesting customer in the ALLTEL and RCC dockets and finds it is reasonable for all ETCs to use this process. Although some parties have objected to the mapping requirement imposed by this Commission, the Commission has found it useful to receive maps from the ETCs and adopts it on a going forward basis. Maps from competitive ETCs are especially useful since they document the increased service coverage a competitive ETC achieves by use of its universal service support. ILECs as carriers of last resort are required to serve all customers in their service areas, but are nevertheless required to file annual maps. See ¶ 56 below. Any competitive ETC that has not filed a map setting out its infrastructure and service coverage shall work with Staff to submit maps within 90 days of the date of this order. ETCs that have already filed maps shall file updated maps on December 31, 2006. Starting with certifications filed in August,

2007, competitive ETCs shall file maps with their annual certification. Finally, the Commission continues its requirement that competitive ETCs file quarterly reports on the instances in which they have refused service to customers. Any ETC that has not previously been required to file quarterly reports, shall start doing so at the end of the next quarter following this order. Consistent with the requirements in the ALLTEL and RCC dockets, these reports shall be filed on the first business day of January, April, June and September each year.

Termination fees.

30. Many ETCs enter into contracts with customers for the provision of service. Those contracts often include termination fees to ensure the ETC recovers the cost of providing equipment, such as a wireless phone. The Commission requested comments on the following:

- Should termination fees be allowed for service plans for residential and small business customers that subscribe to local service?
- Should all ETCs be required to offer at least one plan without a long-term contract?
- If so, how would the Commission ensure that the pricing of such a plan not be so high as to assure that no customer would take it?[52]

31. Staff, CURB, SWBT and SIA and ITG recommended that all companies be required to offer at least some plans without termination fees.[53] SIA and ITG argued that although wireless carriers have sought to justify imposition of a termination fee by their provision of discounted equipment, there is no evidence that the

[52] Order Opening Docket, ¶ 12.
[53] Staff Reply Comments, ¶ 18, CURB Comments, ¶¶ 14-15, SWBT Comments, ¶ 13, SIA and ITG Comments, ¶ 14.

early termination fee is based on the cost of the equipment.[54] CURB stressed that customers must be informed of the difference in terminating local service obtained from an incumbent provider on a month to month basis and the contract obligations they incur, including the termination liability, when purchasing service pursuant to a contract. CURB urged the Commission to require competitive ETCs to offer at least one plan that does not require a contract and a termination fee.[55] Staff agreed the Commission should require competitive ETCs to offer at least one plan without a termination fee, noting that the FCC received over 1000 complaints during 2005 regarding termination fees.[56]

32. ALLTEL, RCC and USCOC and Sprint argued the Commission should not impose any requirements with respect to termination fees. These carriers relied on 47 U.S.C. § 332(c)(3)(A) for their contention that the Commission cannot address termination fees because they are part of a wireless carrier's rate structure and the Commission is preempted from imposing any conditions regarding their rate structure.[57] Cingular observed that any suggestion that wireless ETCs offer one or more term plans that they currently offer without an early termination fee would run afoul of the prohibition against regulation of rates for commercial mobile radio service providers.[58] In its Reply Comments, Staff agreed with Cingular and made clear its proposal did not expect that a company offer a term plan that it currently offers without a termination fee, but that it design a plan without a termination fee.[59] Staff's Report recommended the Commission require all ETCs to offer at least one plan without an early termination fee.

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[54] SIA and ITG Comments, ¶ 14.
[55] CURB Comments, ¶ 13.
[56] Staff Reply Comments, ¶ 18.
[57] ALLTEL Reply Comments, ¶13, Sprint Comments, pp. 9-10. RCC and USCOC Reply Comments, ¶ 5.
[58] Cingular Comments, pp. 6-7.
[59] Staff Reply Comments, ¶ 20.

33. The Commission recognizes the limitations within which it must act with respect to services offered by wireless carriers. 47 U.S.C. § 332(c)(3)(A) prohibits state commissions from regulation of the rates and entry of CMRS carriers. K.S.A. 66-1,143 et seq. is even more restrictive in terms of regulation of wireless carriers. However, wireless carriers that seek ETC designation for the purpose of receiving universal service support submit themselves to the Commission jurisdiction and assent to the imposition of certain conditions for the purpose of receiving that designation. See also ¶ 17. The Commission agrees with Staff that it is reasonable that all ETCs offer at least one plan without a termination fee and finds that all ETCs shall offer at least one plan without a termination fee. The pricing of that plan is outside the Commission's control, but the Commission is confident that ETCs will offer a good faith plan without a termination fee. The Commission recognizes this is likely to be a one-of-a-kind plan, not a current term plan that simply eliminates the termination fee. The Commission requires ETCs over which it does not have rate-setting authority to include information about such a plan in their advertising. See also ¶¶ 12-13.

Emergency Situations

34. The FCC decided it would consider the ability of an ETC to remain functional in emergency situations in designating future ETCs. An applicant must demonstrate that it has sufficient back-up power to ensure functionality without an external source of power, can reroute traffic around damaged facilities and manage traffic spikes in emergencies. The FCC requires ETCs designated by it to certify their ability to function in emergencies annually and to submit outage data. The Commission requested

comment on whether it should impose similar requirements and also asked whether any Kansas-specific factors needed to be considered.

35. SIA and ITG, ALLTEL, RCC and USCOC, CURB and Staff either support or do not object to adoption of the FCC's requirement that ETCs certify their ability to function in emergency situations.[60] CURB recommended ETCs report how long their back-up power will last for each location. Such a report would enable the Commission to require remedial action if back-up power is obviously insufficient.[61] Staff noted the difficulty in establishing a benchmark because different emergencies will require different levels of back-up power.[62] Sprint is the only party that objected to addressing ability to remain functional in emergency situations, arguing that it has no relationship to universal service funding and is duplicative of existing obligations.[63] Staff's Report recommended an applicant be required to demonstrate it has a reasonable amount of back-up power and that ETCs certify, on an annual basis, their ability to function in emergency situations. In connection with other reporting requirements, ETCs should also submit outage data for their service areas.

36. The Commission finds that an ETC applicant shall demonstrate that it has sufficient back-up power to remain functional without external power in emergency situations, is able to reroute traffic around damaged facilities and can manage emergency traffic spikes. The Commission agrees that it would be difficult to establish benchmarks because the cause and duration of an emergency cannot be identified in advance. As recommended by Staff, each ETC shall certify annually that it meets the requirement for

[60] SIA and ITG Comments, ¶ 16, ALLTEL Comments, ¶ 35, RCC and USCOC Comments, ¶¶ 37-38, CURB Comments, ¶ 16, Staff Comments, ¶ 26.
[61] CURB Comments, ¶ 16.
[62] Staff Reply Comments, ¶ 22.
[63] Sprint Comments, pp. 10-11.

sufficient back-up power, rerouting and spike handling as part of the annual certification filing. The Commission will not establish benchmarks, but expects that over time a pattern will emerge from the reports which will establish what is needed to handle emergency situations. The Commission also requires ETCs to submit, as part of their annual certification, data on outages and directs Staff to incorporate this reporting in the annual certification form filed with the Commission each August.

Consumer Protection and Service Quality Standards.

37. The FCC required FCC designated ETCs to comply with the Cellular Telecommunications and Internet Association's Consumer Code for Wireless Service (CTIA Code) and determined that compliance would meet the FCC's consumer protection requirements.[64] It also required ETCs to report complaints.[65] See also ¶¶ 52 and 57of this Order. The FCC noted state commissions may decide to follow the FCC or impose other requirements consistent with federal law. If a state commission were to impose other requirements the FCC reminded the state commissions to assess the necessity of the requirement and the burden on the competitive ETC.[66] The FCC rejected the argument that consumer protection requirements for wireless ETCs are necessarily inconsistent with 47 U.S.C. § 332(c)(3).[67] This Commission accepted ALLTEL's and RCC's commitment to comply with the CTIA Code and to report the number of complaints per 1,000 handsets in their respective designation dockets. The Commission also noted it was considering revision to quality of service standards in Docket No. 05-

[64] *FCC Order*, ¶ 28.
[65] *Id.* at ¶ 69.
[66] *Id.* at ¶ 30.
[67] *Id.* at ¶ 31.

GIMT-187-GIT (05-187 docket) and requested comments on the relationship between the 05-187 docket and this one.

38. SIA and ITG, Staff and CURB recommended the Commission require all ETCs to comply with the quality of service standards established in the 05-187 docket.[68] RCC and USCOC, Sprint and ALLTEL suggested the Commission follow the FCC and require compliance with the CTIA Code.[69] RCC and USCOC also suggested the Commission require ETCs to include the Commission address and phone number for customer complaints on their bills.[70] Staff's Report noted the Commission determined in a March 7, 2006 Order in the 05-187 docket not to modify quality of service standards at this time and recommended the Commission continue requiring wireless ETCs to meet the CTIA Code and report the number of complaints per 1,000 handsets.

39. The Commission finds it appropriate to require all wireless ETCs to comply with the CTIA Code and to report the number of complaints they receive per 1,000 handsets on January 31, 2007 and each year after that as part of the annual certification filed in August.[71] Wireless ETCs that are not already following these requirements shall begin doing so as of the date of this Order and shall file their first Report January 31, 2007. Facilities-based wireline carriers are subject to the Commission's quality of service standards and report on their compliance with those standards. The Commission will address RCC's and USCOC's suggestion that ETCs include the Commission's telephone number on customer bills in the 06-187 docket.

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[68] SIA and ITG Comments, ¶¶ 17-18, CURB Comments, ¶ 17.
[69] RCC and USCOC Comments, ¶ 39, Sprint Comments, p. 11, ALLTEL Comments, ¶¶ 21, 37.
[70] RCC and USCOC Comments, ¶ 41.
[71] Wireline ETCs are required to comply with the Commission's quality of service standards.

Equal Access

40. The FCC puts ETCs on notice that they may at some future time become required to provide equal access if no other ETC does so in the service area. K.S.A. 66-1,187(p) includes equal access in the definition of universal service. The Commission has declined to require wireless ETCs to provide equal access because 47 U.S.C. § 332(c)(8) prohibits requiring CMRS providers to provide equal access. Appeals of this Commission's decision on this issue are pending in multiple fora, waiting for a decision by the FCC.[72]

41. RCC and USCOC and Sprint asserted imposition of a requirement to provide equal access is prohibited by 47 U.S.C. § 332(c)(8).[73] SIA and ITG contend that requiring only wireline ETCs to provide equal access imposes dissimilar burdens that distort market competition.[74] CURB recommended that ETCs be required to fully disclose their policy on equal access and its effect on the customer at the time of the first contact with the customer. Staff recommended against adoption of any equal access requirements at this time.

42. The Commission agrees with Staff that adoption of any requirement regarding equal access is unnecessary at this time. K.S.A. 66-1,187(p) requires equal access as a part of universal service, thus, with the exception of CMRS providers that are

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[72] The following actions are pending: 1) *Petition for Judicial Review* of Commission Orders dated October 15 and November 30, 2001, in Docket No. 99-GCCZ-156-ETC is pending in Nemaha County District Court, Case No. 01-C-40. 2) In the Matter of the Petition of the State Independent Alliance and the Independent Telecommunications Group for a Declaratory Ruling That the Basic Universal Service Offering Provided by Western Wireless in Kansas is Subject to Regulation as Local Exchange Service. WT Docket No. 00239. *Memorandum and Order.* Rel. August 2, 2002. Petition for Reconsideration filed at the FCC by Petitioners with the FCC is pending. 3) *Petition for Judicial Review*, United States Telecom Association v. Federal Communications Commission and United States of America. No. 02-1301, (Appeal of the August 2, 2002 *Memorandum and Order)* is pending in the United States Court of Appeals for the District of Columbia.

[73] RCC and USCOC Comments, ¶¶ 42-44, Sprint Comments, pp. 11-12..

[74] SIA and ITG Comments, ¶ 19.

exempted from a requirement to provide equal access by virtue of 47 U.S.C. § 332(c)(8), other ETCs must provide equal access. The Commission further notes that pending appeals may not have an effect on this issue, since they raise a very narrow issue: whether Western Wireless' Basic Universal Service offering is a CMRS service. A decision on that narrow issue may not resolve whether the Commission may require wireless ETCs to provide equal access.[75]

Public Interest Analysis

43. In the ALLTEL and RCC orders the Commission used the analysis developed by the FCC in its designation of Virginia Cellular and Highland Cellular.[76] In the *FCC Order*, the FCC observed that although it had adopted one set of criteria applicable to both rural and non-rural service areas for determining whether it is in the public interest to designate an additional ETC in the particular area, it might weight certain factors differently for the different areas. The FCC made clear that the burden to prove that an ETC designation is in the public interest is on the applicant. Although a choice of providers is considered to be a benefit, it alone does not satisfy the FCC's public interest test. The FCC made clear it would consider mobility, calling scope, comparability of services between urban and rural areas, dropped calls and poor coverage in assessing the public interest.[77]

44. The FCC also determined it would consider whether an ETC applicant was requesting "designation in a disproportionate share of the high-density wire centers in an incumbent LEC's service area." [78] Since high-density wire centers generally have a

[75] Western Wireless' Kansas properties were purchased by USCOC in 2005.
[76] *Virginia Cellular*, 19 FCC Rcd 1576, *Highland Cellular*, 19 FCC Rcd 6433.
[77] *FCC Order*, ¶ 44.
[78] *Id.* ¶ 49.

lower cost to serve them, the ILEC, which must serve its entire service area, might be disadvantaged by this type of "creamskimming," because the competitive ETC receives support per line based on the ILEC's average cost for the entire service area, unless the ILEC has disaggregated its service area for receipt of support. The FCC encouraged states to also examine the potential for creamskimming when considering ETC designations.[79] The Commission relied on a creamskimming analysis in determining whether it was in the public interest to designate ALLTEL and RCC as ETCs in their requested rural service areas. In those dockets the question was raised whether there should be a bright-line test to trigger a decision that disparity in population densities between areas served by the rural incumbent and the applicant was such that it would not be in the public interest to grant ETC status. The FCC declined to adopt a test.[80]

45. The increase in the number of designated ETCs, both at the federal and state level has raised concern about the growth in the size of the universal service funds. The FCC determined that it would consider the impact of a designation on the size of the federal USF. The FCC determined that it would look at the amount of support per line that would be ported to an applicant in a particular study area. The FCC suggested a "state may be justified in limiting the number of ETCs in that study area, because funding multiple ETCs in such areas could impose strains on the universal service fund."[81] The FCC adopted no test for this determination but noted factors such as topography, population density, distance between wire centers and loop length drive support levels and must be considered. Finally, the FCC cautioned growth of the fund resulting from

[79] *Id.*
[80] *Id.* at ¶ 53.
[81] *Id.* at ¶ 55.

additional ETCs must be balanced against giving customers access to services that are comparable to those available in urban areas and competitive neutrality.[82]

46. The Commission requested comments on a) whether to consider increased consumer choice and advantages and disadvantages of an ETC's service offerings for both state and federal purposes; b) whether to adopt a population density analysis for both state and federal purposes, and if so whether a bright line test should be established; and c) whether to consider the impact of designation of an additional ETC on the size of the federal USF and the KUSF, and if so whether to examine the per-line support amount that would be ported to the competitive ETC.[83]

a) Consumer choice.

47. With respect to considering increased consumer choice as a criterion of the public interest analysis SIA and ITG agreed that the Commission should consider the value of increased customer choice while keeping in mind the FCC's conclusion that increased choice by itself does not support a finding that it is in the public interest to designate an additional ETC in a service area. They also stressed the need for consistency and predictability.[84] RCC and USCOC agreed that the benefits of competition should be a factor and cautioned against considering the number of ETCs already designated in a particular area. They stressed the importance of considering the needs of consumers, not carriers.[85] SWBT expressed general agreement with this position.[86] Sprint urged the Commission to only consider whether the applicant meets the

[82] *Id.* at ¶ 56.
[83] Order Opening Docket, ¶ 16.
[84] SIA and ITG Comments, ¶ 20.
[85] RCC and USCOC Comments, ¶¶ 45-50.
[86] SWBT Comments, ¶ 15.

established eligibility criteria.[87] CURB expressed its support for use of the FCC's factors and recommended each application be evaluated on its merits without recourse to a benchmark. CURB also recommended the Commission give separate consideration to any applicant that is an affiliate of a rural LEC.[88] Staff and Nex-Tech disagreed pointing out that federal universal service support can only be used for its intended purposes and ETCs must certify annually that they are in compliance with that requirement, thus the ETC's affiliation is not relevant. Nex-Tech also argued such special consideration would be discriminatory. Staff also responded to CURB's suggestion that an RLEC affiliate might merely resell the RLEC's service that 47 U.S.C.§ 214(e)(1)(A) requires an ETC to provide service using at least in part its own facilities, but that resale could be used in conjunction with the "own facilities."[89] Sprint also expressed opposition to considering the public interest when designating an ETC in non-rural service areas.[90] Staff and SWBT disagreed noting the FCC's determination that public interest concerns also exist in non-rural service area designations, although Staff noted the weight given to different factors might vary.[91]

b) Creamskimming analysis

48. CURB, Staff, SIA and ITG recommended the Commission adopt a population density analysis to determine whether it is in the public interest to grant ETC designation to an applicant.[92] CURB noted that the potential for creamskimming is decreased if support is disaggregated, but added that disaggregation may be expensive.[93]

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[87] Sprint Comments, pp. 14-15.
[88] CURB Comments, ¶¶ 24-25.
[89] Staff Reply Comments, ¶ 24, Nex-Tech Reply Comments, pp. 2-3.
[90] Sprint Comments, pp. 12-14.
[91] SWBT Reply Comments, ¶¶ 18-22, Staff Reply Comments, ¶ 25.
[92] CURB Comments, ¶ 31, Staff Comments, ¶ 35, SIA and ITG Comments, ¶ 20.
[93] CURB Comments, ¶ 31.

Neither CURB nor Staff recommended adoption of a bright-line test.[94] Sprint opposed adoption of a population density analysis to determine whether creamskimming is a possibility, because the incumbent may prevent it by disaggregating its support.[95] SWBT recommended the Commission perform a population density analysis for non-rural service areas if an applicant requests ETC designation for a partial wire center since the support is based on cost for the entire wire center and an ETC might get the support by serving only the low cost customers.[96] Staff pointed out that the Commission determined in the RCC Order, ¶ 28, that it would not designate an ETC for an area smaller than a wire center "at this time," thus this is not currently an issue in Kansas. Staff added that if the Commission were to change its position so as to authorize ETCs for areas that include partial wire centers, a population density analysis should be performed.[97]

c) Evaluation of level of support per line

49. Staff observed that the Commission has considered the effect of additional ETC designations on the size of the federal USF in ETC designation dockets, but added that considering the effect on the size of the federal USF or the KUSF of additional ETC designations may conflict with the objectives of both the federal and state telecommunications acts to encourage competition. Staff also expressed concern that consideration of the amount of per-line portable support might be anti-competitive and recommended against considering the amount of support as part of the public interest determination.[98] CURB disagreed with Staff, stressing that the amount of support per line was likely to affect the size of the KUSF and its sustainability. CURB argued

[94] CURB Reply Comments, ¶ 26, Staff Comments ¶ 34.
[95] Sprint Comments, p. 14.
[96] SWBT Comments, ¶ 17.
[97] Staff Reply Comments, ¶ 28.
[98] Staff Comments, ¶ 33.

conditions are currently imposed that may inhibit some carriers from requesting ETC designation in rural areas.[99] SWBT also disagreed with Staff, focusing on the universal service principles of the federal act to support its position that consideration of the size of the portable support does not conflict with the objectives of the Act. SWBT urged the Commission to consider the effect of the amount of portable support on the federal USF and the KUSF in designating ETCs.[100] Sprint opposed a bright-line test but expressed concern about the rapid growth of the universal service fund, but asserted "misusing the ETC designation process to control the size and growth of the fund would violate the principle of competitive neutrality...."[101] RCC and USCOC also opposed a bright-line test.[102] SIA and ITG recommended the Commission consider designating only one or two competitive ETCs in areas in which the incumbent receives a substantial amount of support.[103]

50. Based on its analysis of the Comments, Staff suggested the Commission retain increased consumer choice as one public interest criterion when designating additional ETCs. Staff advised the Commission to continue requiring a population density analysis when an ETC applicant seeks designation for an area that is smaller than the incumbent's study area to determine the potential for creamskimming. Staff recommended the Commission not adopt a bright-line test but consider the evidence on a case by case basis. Finally, Staff acknowledged the significance of sustainable high cost support and the possible need to address the size of the KUSF but observed that doing so

[99] CURB Reply Comments, ¶¶ 33-34, CURB Comments, ¶ 34.
[100] SWBT Comments, ¶ 18, SWBT Reply Comments, ¶ 15.
[101] Sprint Comments, pp. 14-15.
[102] RCC and USCOC Comments, ¶¶ 45-50.
[103] SIA and ITG Comments, ¶ 20.

by limiting qualified ETCs in areas where support payments are high, would seem to violate competitive neutrality requirements.

51. The Commission finds that it will continue to consider that designating an additional ETC will provide customers with choices as one of the public interest criteria. This is consistent with the objectives of K.S.A. 66-2001(b) and 47 U.S.C. § 253 which make clear that provision of service through competition is in the public interest. Like the FCC, the Commission will also consider mobility, calling scope, comparability of services between rural and urban areas, dropped calls and poor coverage. We further find that a population density analysis is valuable when designating an ETC for an area that does not cover the entire ILEC service area. At this time such an analysis will only apply in applications for designation in rural telephone company service areas when the applicant seeks designation that does not cover the entire service area. For non-rural applications, the Commission has to date declined to designate ETCs for an area that is smaller than the incumbent's service area which is a wire center. If the Commission, at some time in the future is persuaded to change that decision, a population density analysis should be performed for such designation applications to guard against creamskimming. The Commission agrees that a bright-line test for creamskimming would be desirable, but that establishing such a test is impractical. Further, a bright-line test might be misleading and result in denial of ETC designation for part of a service area even though other conditions make it clear that creamskimming is not an issue, as the Commission realized in the 06-519 docket.[104] The Commission will continue to analyze

[104] In the Matter of the Application of USCOC of Nebraska/Kansas LLC (U.S. Cellular) for Transfer of the Designation of Western Wireless Corporation as an Eligible Telecommunications Carrier. Docket No. 06-USCZ-519-ETC. *Order Granting USCOC of Nebraska/Kansas LLC's Petition for Reconsideration.* March 30, 2006. (06-519 docket.)

this issue based on the facts of each application. Finally, the Commission believes that giving consideration to the high level of per-line support in a particular service area is inappropriate because it would deprive customers in high-cost areas of the benefits of competition sought by the Federal and State Acts. This decision is also consistent with the Commission determination in ¶ 22 to not consider the effect on carriers of last resort when designating competitive ETCs.

Annual certification requirement

52. The FCC determined that carriers which it has designated as ETCs must submit the following information as part of their annual certifications due on October 1 of each year beginning in 2006:

> Progress reports on five-year service quality improvement plan. This report must include a map detailing the progress in meeting targets set out in the initial plan, an explanation of how FUSF support has been used to improve service quality, coverage, capacity, signal quality, etc, and an explanation of why any targets were not met. Information shall be provided at the wire center level.
>
> Detailed information on any outage lasting at least 30 minutes for any facilities that an ETC owns, operates, leases, or otherwise utilizes that potentially affect at least 10% of the end users in a service area, or that could affect 911. "An outage is defined as a significant degradation in the ability of an end user to establish and maintain a channel of communications as a result of failure or degradation in the performance of a communications provider's network."[105] The ETC must report: date and time of outage, description of the outage and resolution, particular services affected, geographic areas affected, steps taken to prevent it from happening again, and number of customers affected.
>
> Number of service requests not fulfilled. The ETC must provide a detailed explanation of how it attempted to serve the potential customer.
>
> Number of complaints per 1000 handsets or lines.
>
> Certification that the ETC is complying with quality of service standards.

[105] *FCC Order*, ¶ 69.

Certification that the ETC is able to function in an emergency.

Certification that the ETC is offering a local usage plan comparable to that of the incumbent.

Certification that the carrier acknowledges that it may be required to provide equal access in the event that there is no other ETC in the service area.[106]

The FCC encouraged states to also adopt these reporting requirements and to apply them to all ETCs.[107] The FCC added state commissions could adopt additional requirements to ensure that all ETCs conform to state and federal requirements.[108]

53. In the 05-GIMT-112-GIT docket (05-112 docket),[109] the Commission adopted forms for ETCs to complete to demonstrate their compliance with federal and Kansas requirements for use of universal service support. ETCs are required to provide certain accounting information and also a narrative of investment made in their service areas during the past year. As mentioned in ¶ 23, the Commission also requires RCC and ALLTEL to submit a map of their infrastructure and the approximate area it covers annually. The Commission sought comment on whether it should include the eight items required by the FCC in its certification requirements and also whether its mapping requirement should continue to apply and be expanded to include all ETCs.

54. Staff and CURB believe it would be useful for the Commission to incorporate the FCC's requirements for the annual certification of ETCs.[110] RCC and USCOC recommended ETCs be required to provide certain information which essentially is the information required by the Commission based on the 05-112 docket. RCC and

[106] Report, p. 31, based on *FCC Order*, ¶ 69.
[107] *FCC Order*, ¶¶ 19-20.
[108] *FCC Order*, ¶¶ 30-31.
[109] In the Matter of Certification of Compliance with Section 254(e) of the Federal Telecommunications Act of 1996, and non-Rural Carrier Certification of Urban/Rural Rate Comparability, April 13, 2005.
[110] Staff Comments, ¶ 38, CURB Comments, ¶ 41.