

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

In the Matter of)
)
)
Federal-State Joint Board on)
Universal Service)
)
)
Petition by Sagebrush Cellular, Inc.)
For Commission Agreement in)
Redefining the Service areas of Rural)
Telephone Companies in the State of)
North Dakota Pursuant to)
47 C.F.R. Section 54.207(c))

CC Docket No. 96-45

**PETITION FOR COMMISSION AGREEMENT IN REDEFINING THE SERVICE
AREAS OF RURAL TELEPHONE COMPANIES IN NORTH DAKOTA**

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Summary

Sagebrush Cellular, Inc. ("Sagebrush") requests the Commission's concurrence with the proposal by the North Dakota Public Service Commission ("NDPSC") to redefine the service area of one rural incumbent local exchange carrier ("ILEC") pursuant to the process set forth in Section 54.207(c) of the Commission's rules. Sagebrush requests concurrence on redefining the service area of Northwest Communications Cooperative ("NCC") which serves the study area named Northwest Communications Cooperative.

Sagebrush provides PCS telephone service in rural areas of Montana and North Dakota and was recently designated as an eligible telecommunications carrier ("ETC") pursuant to Section 214(e) of the Act by the North Dakota Public Service Commission ("NDPSC") (See December 31, 2007 NDPSC Order, Attachment 1). By granting ETC status to Sagebrush, NDPSC found that the use of federal high-cost support to develop its competitive operations would serve the public interest. Because Sagebrush's FCC licensed service territory does not correlate with rural ILEC service areas, the Act provides that the affected rural ILEC service areas must be redefined before designation in certain areas can take effect. Accordingly, the NDPSC has proposed that each wire center of NCC should be redefined as a separate service areas so that Sagebrush's designation can become effective throughout that portion of NCC's service area which it is licensed to provide service. Consistent with the NDPSC's order and with previous actions taken by the FCC and several other states, redefinition is

requested such that each wire center of NCC is reclassified as a separate service area.

The proposed redefinition is warranted under the Commission's competitively neutral universal service policies, and it constitutes precisely the same relief granted to similarly situated carriers by the Commission and several states. Unless NCC's service area is redefined, Sagebrush will be unable to use high-cost support to improve and expand service to consumers in many areas of its licensed service territories and consumers will be denied the benefits. As the Commission and several states have consistently held, competitive and technological neutrality demand the removal of these artificial barriers to competitive entry. Moreover, the requested redefinition satisfies the analysis provided by the Federal-State Joint Board on Universal Service ("Joint Board") in that it eliminates the payment of uneconomic support or cream-skimming opportunities, duly recognizes the special status of rural carriers under the Act, and does not impose undue administrative burdens on NCC.

The NDPSC's proposed redefinition is well-supported by the record at the state level, and all affected parties were provided ample opportunity to ensure that the Joint Board's recommendations were taken into account. Accordingly, Sagebrush requests that the Commission grant its concurrence expeditiously and allow the proposed redefinition to become effective without further action.

PETITION FOR COMMISSION AGREEMENT IN REDEFINING THE SERVICE AREAS OF RURAL TELEPHONE COMPANIES IN NORTH DAKOTA

Sagebrush Cellular, Inc. ("Sagebrush") submits this Petition seeking the FCC's agreement with the decision of the North Dakota Public Service Commission ("NDPSC") to redefine the service area of one rural incumbent local exchange carrier ("ILEC") doing business in North Dakota, so that each of the ILEC's wire centers constitutes a separate service area. Sagebrush provides service in the northwest part of North Dakota through its Personal Communications Service ("PCS") authorizations. Sagebrush was recently granted eligible telecommunications carrier ("ETC") status by the NDPSC pursuant to Section 214(e)(2) of the Communications Act of 1934, as amended (the "Act"). In its designation order, the NDPSC proposed to redefine one rural ILEC service area such that Sagebrush designation would take effect upon a grant of concurrence by the FCC. As set forth below, classifying each individual wire center of the affected ILEC as a separate service area will foster federal and state goals of encouraging competition in the telecommunications marketplace and extending universal service to rural North Dakota consumers.

I. BACKGROUND

Pursuant to Section 214(e) of the Communications Act of 1934, as amended (the "Act"), state commissions generally have authority to designate carriers that satisfy the requirements of the federal universal service rules as

ETCs and to define their service areas.¹ In rural areas, service areas are generally defined as the ILEC's study area. However, the Act explicitly sets forth a process whereby a competitive ETC may be designated for service area that differs from that of the ILEC. Specifically, Section 214(e) of the Act provides:

... "service area" means such company's "study area" unless and until the Commission and the States, after taking into account recommendations of a Federal-State Joint Board instituted under Section 410(c), establish a different definition of service area for such company.²

The FCC and the Federal-State Joint Board on Universal Service ("Joint Board") have recognized that a strict rule requiring a competitive ETC to serve an area exactly matching a rural ILEC's study area would preclude competitive carriers that fully satisfy ETC requirements from bringing the benefits of competition to consumers throughout their service territory.³ Therefore, the FCC established a streamlined procedure for the FCC and states to act together to redefine rural ILEC service areas.⁴ Using this procedure, the FCC and state commissions have applied the analysis contained in Section 214(e) and concluded that it is necessary and appropriate to redefine the LEC service areas along wire center boundaries to permit the designation of competitive ETCs in

¹ 47 U.S.C. § 214(e).

² *Id.*

³ See *Petition for Agreement with Designation of Rural Company Eligible Telecommunications Carrier Service Areas and for Approval of the use of Disaggregation of Study Areas for the Purpose of Distributing Portable Federal Universal Service Support, Memorandum Opinion and Order*, 15 FCC Rcd 9924, 9927 n. 40 (1999) ("Washington Redefinition Order"), citing *Federal-State Joint Board on Universal Service, Recommended Decision*, 12 FCC Rcd 87, 181 (1996) ("Joint Board Recommended Decision").

⁴ See 47 C.F.R. § 54.207(c). See also *Federal-State Joint Board on Universal Service, Report and Order*, 12 FCC Rcd 8776, 8881 (1997) ("First Report and Order").

those areas.⁵ This process, as well as the underlying necessity of redefinition, was reaffirmed in the FCC's *ETC Report and Order* released March 17, 2005.⁶

Sagebrush petitioned the NDPSC for ETC status for purposes of receiving high-cost support from the federal universal service fund (The "Application" attached as Attachment 2). Sagebrush's licensed PCS spectrum completely overlaps the Nemont Telephone Cooperative, Inc.-ND study area. Therefore, Sagebrush does not request or require any redefinition of the Nemont Telephone Cooperative, Inc.-ND study area.

Sagebrush licensed spectrum covers only a portion of the Northwest Communications Cooperative ("NCC") study area (Code 381625). Accordingly, Sagebrush requests the Commission's concurrence with the NDPSC redefinition for the wire centers in the NCC study area that overlap with Sagebrush's licensed PCS spectrum.

An attachment to the Application to the NDPSC listed all of the wire centers in NCC's study area. As Sagebrush's Application to NDPSC explained, this reclassification is necessary because the boundaries of NCC's study area and the boundaries of Sagebrush licensed spectrum do not completely overlap.

The NDPSC granted Sagebrush's Petition on December 31, 2007, concluding that a grant of ETC status was in the public interest. See *NDPSC Order, Attachment 1*. The NDPSC also granted Sagebrush's request for

⁵ See, e.g., *Public Notice, Smith Bagley, Inc. Petitions for Agreement to Redefine the Service Areas of Navajo Communications Company, Citizens Communications Company of the White Mountains, and CenturyTel of the Southwest, Inc. On Tribal Lands Within the State of Arizona*, DA 01-409 (rel. Feb. 15, 2002) (effective date May 16, 2002); *Washington Redefinition Order*, supra, 15 FCC Rcd at 9927-28.

⁶ *Federal-State Joint Board on Universal Service, Report & Order*, 20 FCC Rcd 6371 (2005) ("*ETC Report and Order*").

redefinition, conditioning ETC status on FCC concurrence with the redefinition pursuant to the process established under Section 54.207(c) of the Act. 47 C.F.R. § 54.207(c).

II. DISCUSSION

The NDPSC's proposal to redefine rural ILEC service areas is consistent with FCC rules, the recommendations of the Joint Board, and the competitively neutral universal service policies embedded in the Act. Specifically, redefining the NCC service area so that each wire center is a separate service area will promote competition and the ability of rural consumers to have similar choices among telecommunications services and at rates that are comparable to those available in urban areas. The proceedings at the state level provided all affected parties with an opportunity to comment on the proposed redefinition, and the NDPSC fully supported Sagebrush's application. The record at the state level, including Sagebrush's application and the NDPSC Order, demonstrates that the requested redefinition fully comports with federal requirements and provides the FCC with ample justification to concur. NCC fully supports NCC's application (Attachment 3).

A. THE REQUESTED REDEFINITION IS CONSISTENT WITH FEDERAL UNIVERSAL SERVICE POLICY.

Congress, in passing the 1996 amendments to the Act, declared its intent to "promote competition and reduce regulation" and to "encourage the rapid deployment of new telecommunications technologies." As part of its effort to further these pro-competitive goals, Congress enacted new universal service provisions that, for the first time, envision multiple ETCs in the same market. In

furtherance of this statutory mandate, the FCC has adopted the principle that universal service mechanisms be administered in a competitively neutral manner, meaning that no particular type of carrier or technology should be unfairly advantaged or disadvantaged.

Consistent with this policy, the FCC and many state commissions have affirmed that ETC service areas should be defined in a manner that removes obstacles to competitive entry.

B. THE REQUESTED REDEFINITION SATISFIES THE THREE JOINT BOARD FACTORS UNDER SECTION 54.207(c)(1) OF THE COMMISSION'S RULES.

A Petition to redefine an ILEC's service area must contain "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. In the Recommended Decision that laid the foundation for the FCC's First Report and Order, the Joint Board enumerated three factors to be considered when reviewing a request to redefine an ILEC's service area.

First, the Joint Board expressed concern as to whether the competitive carrier is attempting to "cream skim" by only proposing to serve the lowest cost exchanges. As a wireless carrier, Sagebrush is restricted to providing service in those areas where it is licensed by the FCC. Sagebrush is not picking and choosing the lowest-cost exchanges; on the contrary, the NDPSC designated Sagebrush for an ETC service area that is based on the geographic limitations of

its licensed service territory. Sagebrush has not attempted to select areas to enter based on support levels.

Opportunities for receiving uneconomic levels of support are further diminished by the FCC's decision to allow rural ILECs to disaggregate support below the study-area level. By moving support away from low-cost areas and into high-cost areas, ILECs, such as NCC, have had the ability to minimize or eliminate cream-skimming and the payment of uneconomic support of competitors. Furthermore, any ILECs that failed to disaggregate support effectively may modify their disaggregation filings subject to state approval.⁷

Sagebrush's Application also makes clear that it meets the FCC's criteria in its analysis of population density as a means of determining the likelihood of Sagebrush receiving uneconomic levels of support. Based upon the FCC's assumption in *Virginia Cellular* that "a low population density typically indicates a high-cost area," Sagebrush's Application provided population density figures to demonstrate that no cream skimming will result from designation in the proposed areas.

The term "cream-skimming" implies that a wireless company would intentionally choose to serve low-cost areas and obtain support while avoiding sparsely populated, high-cost areas. The reality is that there is no "cream" to skim within the NCC study area, because the entire study area is sparsely populated, varying in population between two to three persons per square mile. As indicated in Attachment 3 to this Petition, the areas that Sagebrush proposes to serve have a weighted average of 3.05 persons per square mile. The

⁷ See 47 C.F.R. §§ 54.315(b)(4); 54.315(c)(5), 54.315 (d)(5).

exchanges that Sagebrush proposes not to serve (because it lacks license spectrum to do so) contains a weighted average of 2.03 persons per square mile. By any standard, Sagebrush is choosing to serve one of the most sparsely populated regions in the United States.

In sum, Sagebrush is not proposing to serve "only the low-cost, high revenue customers in a rural telephone company's study area." See *Virginia Cellular, supra*, 19 FCC Red at 1579. This fact, in conjunction with the availability of disaggregation to NCC, demonstrates that cream-skimming will not result from a grant of this Petition.

Second, the Joint Board recommended that the FCC and the States consider the rural carrier's special status under the 1996 Act. In reviewing Sagebrush's Petition, the NDPSC weighed numerous factors in ultimately determining that such designation was in the public interest. Congress mandated this public-interest analysis in order to protect the special status of rural carriers in the same way it established special considerations for rural carriers with regard to interconnection, unbundling, and resale requirements. No action in this proceeding will affect or prejudice any future action the NDPSC or the FCC may take with respect to NCC's status as a rural telephone company, and nothing about service area redefinition will diminish NCC's status as such.

Third, the Joint Board recommended that the FCC and the States consider the administrative burden a rural ILEC would face. In the instant case, Sagebrush's request to redefine the affected NCC service area along wire center boundaries is made solely for ETC designation purposes. Defining the service

are in this manner will in no way impact the way the NCC calculates its costs, but is solely to enable Sagebrush to begin receiving high-cost support in those areas in the same manner as NCC. NCC may continue to calculate costs and submit data for purposes of collecting high-cost support in the same manner as it does not.

Should NCC choose to disaggregate support out of concerns about cream-skimming by Sagebrush or any other carrier, this disaggregation of support will not represent an undue administrative burden. The FCC placed that burden on rural ILECs in its *Fourteenth Report and Order* independent of service area redefinition and made no mention this process being a factor in service area redefinition requests. To the extent those ILECs may find this process burdensome, the benefit of preventing cream-skimming and the importance of promoting competitive neutrality will outweigh any administrative burden involved.

In sum, the proposed redefinition fully satisfies both the Joint Board's recommendations and the *Virginia Cellular* analysis.

C. THE PROPOSED REDEFINITION ALONG WIRE-CENTER BOUNDARIES IS CONSISTENT WITH THE FCC'S "MINIMUM GEOGRAPHIC AREA" POLICY.

In its April 2004 *Highland Cellular* decision, the FCC declared that an entire rural ILEC wire center "is an appropriate minimum geographic area for ETC designation".⁸ The FCC reiterated this finding in its *ETC Report and Order*.⁹ As set forth in the attached NDPSC Order, Sagebrush's designated ETC service

⁸ *Highland Cellular, supra*, 19 FCC Rcd at 6438.

⁹ See *ETC Report and Order, supra*, 20 FCC Rcd at 6405.

area does not include any partial rural ILEC wire centers. Accordingly, the instant request for concurrence with redefinition to the wire-center level, and not below the wire center, is consistent with FCC policy.

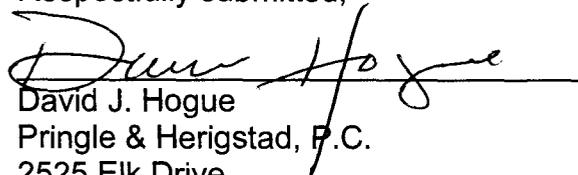
III. CONCLUSION

Sagebrush stands ready to provide reliable, high-quality telecommunications service to northwest North Dakota rural consumers by investing federal high-cost support in building, maintaining and upgrading wireless infrastructure throughout their licensed service territories, thereby providing facilities-based competition in many of those areas for the very first time. The NDPSC has found that Sagebrush's use of high-cost support will increase the availability of additional services and increase investment in rural North Dakota and therefore serve the public interest. Yet, without the FCC's concurrence with the rural service area redefinition proposed herein, Sagebrush will not be able to bring those benefits to consumers in many areas in which they are authorized by the FCC to provide service.

The relief proposed herein is exactly the same in all material respects as that granted by the FCC and state commissions to numerous other carriers throughout the country, and the FCC is well within its authority to grant its prompt concurrence. Sagebrush submits that the benefits of permitting its ETC designation to take effect throughout its proposed service area are substantial, and those benefits will inure to rural consumers who desire Sagebrush service, particularly those consumers who are eligible for Lifeline and Link-Up benefits and currently have no choice of service provider. Accordingly, Sagebrush

requests that the Commission grant its concurrence with the NDPSC's decision to redefine the NCC service area so that each of the wire enters listed in Attachment 4 hereto constitutes a separate service area.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "David J. Hogue", is written over a horizontal line.

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