

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

In the Matter of)	
)	WC Docket No. 09-197
Telecommunications Carriers Eligible to)	
Receive Universal Service Support)	
)	
Boomerang Wireless, LLC)	
)	
Petition for Designation as an Eligible)	
Telecommunications Carrier in Alabama,)	
Connecticut, Delaware, the District of)	
Columbia, New Hampshire, New York)	
North Carolina, Tennessee, and Virginia)	

**PETITION OF BOOMERANG WIRELESS, LLC FOR DESIGNATION
AS AN ELIGIBLE TELECOMMUNICATIONS CARRIER IN ALABAMA,
CONNECTICUT, DELAWARE, THE DISTRICT OF COLUMBIA, NEW HAMPSHIRE,
NEW YORK, NORTH CAROLINA, TENNESSEE, AND VIRGINIA**

Michael P. Donahue
Jacqueline R. Hankins
HELEIN & MARASHLIAN, LLC
1420 Spring Hill Road, Suite 205
McLean, Virginia 22102
Tel: (703) 714-1300
Fax: (703) 714-1330
Email: mpd@commlawgroup.com
jrh@commlawgroup.com

Counsel for Boomerang Wireless, LLC

December 29, 2010

SUMMARY

Boomerang Wireless, LLC d/b/a Ready Mobile (f/k/a Boomerang Wireless, Inc.) (“Boomerang” or “Applicant”), pursuant to Section 214(e)(6) of the Communications Act of 1934, as amended (the “Act”)¹ and Sections 54.201-54.209 of the Federal Communications Commission’s (“FCC” or “Commission”) rules,² submits this Petition for Designation as an Eligible Telecommunications Carrier (“ETC”). Boomerang requests ETC designation for the limited purpose of offering Lifeline services to end-user customers in the identified states. Boomerang offers affordable and reliable telecommunications services to low income end-user customers. Boomerang’s prepaid wireless services combined with low-cost handsets provide a reasonable alternative to traditional post-paid services. Boomerang provides low income customers who might not otherwise be able to afford traditional services with dependable voice and data services, as well as additional features and functionalities including, for example, call waiting, caller ID and voicemail.

Sections 214(e) and 254 of the Act and the Commission’s rules expressly authorize the FCC to designate Boomerang as an ETC. Specifically, Section 214(e)(6) of the Act provides that the FCC may confer ETC status on a common carrier where the carrier's services do not fall subject to the jurisdiction of a state commission.³ Boomerang provides herewith affirmative statements conclusively proving that the states in which it seeks ETC designation lack jurisdiction to confer ETC status to Boomerang. Further, Boomerang meets the statutory and regulatory requirements for ETC designation. And, finally, consumers will benefit greatly from

¹ 47 U.S.C. § 214(e)(6).

² 47 C.F.R. §§ 52.210-52.209.

³ 47 U.S.C. § 214(e)(6).

such designation in the form of low-cost, high-quality wireless service and access to a host of add-on features. As such, grant of this application is in the public interest, and Boomerang respectfully requests that the Commission grant this application on an expedited basis.

Table of Contents

SUMMARY	i
Table of Contents	iii
I. Background	2
II. ETC Designation	3
III. The Commission Has Authority to Confer ETC Status on Applicant	4
IV. Applicant Meets the Requirements for ETC Designation	6
A. Boomerang Qualifies as a Common Carrier.....	6
B. Boomerang Will Provide Services Through a Combination of Facilities Based and Resold Services.....	7
C. Boomerang Offers the Services and Functionalities Supported by the Federal Low-Income Universal Service Program	8
(1) <i>Voice grade access to the public switched network.</i>	8
(2) <i>Local usage.</i>	8
(3) <i>Dual tone multi-frequency signaling or its functional equivalent.</i>	10
(4) <i>Single-party service or its functional equivalent.</i>	10
(5) <i>Access to emergency services.</i>	10
(6) <i>Access to operator services.</i>	11
(7) <i>Access to interexchange service.</i>	11
(8) <i>Access to directory assistance.</i>	11
(9) <i>Toll limitation for qualifying low-income consumers.</i>	12
D. Boomerang Will Advertise the Availability and Pricing for its Universal Service Qualifying Offerings	12
E. Boomerang Will Satisfy its Statutory Obligations as an ETC.....	12
(1) <i>Continued Functionality in Emergencies</i>	12
(2) <i>Compliance with Consumer Protection Standards</i>	13
(3) <i>Commitment to Provide Service</i>	13

(4)	<i>Offering of Comparable Local Usage Plan</i>	13
(5)	<i>Equal Access Acknowledgement</i>	14
(6)	<i>Annual Certification</i>	14
(7)	<i>Certification and Verification of Consumer Qualification for Lifeline</i>	14
V.	Designating Boomerang as an ETC is in the Public Interest	15
VI.	Anti-Drug Abuse Certification	16
VII.	Conclusion	17

**Before the
FEDERAL COMMUNICATIONS COMMISSION**

Washington, D.C. 20554

In the Matter of)	
)	WC Docket No. 09-197
Telecommunications Carriers Eligible to)	
Receive Universal Service Support)	
)	
Boomerang Wireless, LLC)	
)	
Petition for Designation as an Eligible)	
Telecommunications Carrier in Alabama,)	
Connecticut, Delaware, the District of)	
Columbia, New Hampshire, New York)	
North Carolina, Tennessee, and Virginia)	

**PETITION OF BOOMERANG WIRELESS, LLC FOR DESIGNATION
AS AN ELIGIBLE TELECOMMUNICATIONS CARRIER IN ALABAMA,
CONNECTICUT, DELAWARE, THE DISTRICT OF COLUMBIA, NEW HAMPSHIRE,
NEW YORK, NORTH CAROLINA, TENNESSEE, AND VIRGINIA**

Boomerang Wireless, LLC d/b/a Ready Mobile (f/k/a Boomerang Wireless, Inc.) (“Boomerang” or “Applicant”), pursuant to Section 214(e)(6) of the Communications Act of 1934, as amended (the “Act”)⁴ and Sections 54.201-54.209 of the Federal Communications Commission’s (“FCC” or “Commission”) rules,⁵ hereby submits this Petition for Designation as an Eligible Telecommunications Carrier (“ETC”). Boomerang seeks ETC status for the limited purpose of offering Lifeline services to end-users in the States of: Alabama, Connecticut, Delaware, the District of Columbia, New Hampshire, New York, North Carolina, Tennessee, and Virginia.

⁴ 47 U.S.C. § 214(e)(6).

⁵ 47 C.F.R. §§ 52.210-52.209.

As demonstrated herein, Boomerang meets each of the statutory and regulatory prerequisites for such designation. In addition, designating Boomerang an ETC will provide consumers in these states an additional option for affordable and reliable services. Accordingly, Boomerang respectfully requests that the FCC grant this Petition expeditiously and designate it as an ETC in the following states: Alabama, Connecticut, Delaware, the District of Columbia, New Hampshire, New York, North Carolina, Tennessee, and Virginia.

I. Background

Using the underlying Sprint Nextel (“Sprint”) network, Boomerang provides handsets and domestic and international voice and data services to low-income customers. The Sprint network is a digital wireless communications network that uses Code Division Multiple Access (“CDMA”) technology. Boomerang operates as a Mobile Virtual Network Operator (“MVNO”). It uses Sprint’s network infrastructure to deliver its voice and data service offerings. Boomerang packages capacity purchased from Sprint with services provided through its own facilities. In addition to Sprint’s network, Boomerang relies upon its own facilities located at its Marion, Iowa-based data center, which include operational support and billing, directory assistance, and operator services infrastructure.

Further, Boomerang purchases Sprint-ready handsets (compatible with Sprint’s network), refurbishes and rebrands them, and offers them to customers. In conjunction with its own branded handsets, it offers customers an integrated prepaid wireless service. Because such services offer affordability and flexibility, they attract a variety of consumers, many in lower income brackets, which qualify for Lifeline assistance. Boomerang provides these customers with a unique combination of reliable nationwide and international mobile communications services that are otherwise not readily accessible to its target market consumers. Boomerang

provides customers with a variety of prepaid plans, with airtime divided into “units” of time over a one-month period. Boomerang’s affordable plans each include a minimum of 68 units of airtime, where one unit equates to one minute of domestic talk time or one text message.

Boomerang serves a variety of immigrant populations and recognizes the need for Spanish language services. Boomerang’s customer support agents are bilingual, and it offers Spanish language handset options. Boomerang advertises the availability and prices of its services through a variety of mediums including its extensive retail distribution network which includes CVS, Walgreens, Rite Aid and Dollar General stores, among others, and online. Sprint provides wireless service throughout the States of Alabama, Connecticut, Delaware, the District of Columbia, New Hampshire, New York, North Carolina, Tennessee, and Virginia. Pursuant to its contract with Sprint, Boomerang resells service throughout these states, and, as such, requests ETC designation for the entire state. Boomerang will offer Lifeline service throughout the service areas where it receives ETC designation. Lifeline customers will have access to the same services and features offered to other customers.⁶

II. ETC Designation

While the authority to designate ETCs traditionally falls on state utility commissions, Section 214(e)(6) of the Act authorizes the FCC to designate a common carrier as an ETC if the carrier's services do not fall subject to the jurisdiction of a state commission.⁷ To demonstrate that it is not subject to a state’s jurisdiction, a carrier must submit an “affirmative statement” from the state commission showing that it lacks jurisdiction to confer ETC status.⁸ For the

⁶ For more information on Boomerang’s services offerings, please visit <http://www.readymobile.com/index.php>

⁷ 47 U.S.C. § 214(e)(6).

⁸ See *Federal-State Joint Board on Universal Service; Promoting Deployment and Subscriberhip in Unserved and Underserved Areas, Including Tribal and Insular Areas*,

reasons discussed below, the Commission has jurisdiction over Boomerang's application. In addition, to receive an ETC designation, a petitioning carrier must:

- (1) Be a common carrier;
- (2) Provide the supported services through a combination of facilities and resale;
- (3) Offer services supported by federal USF support mechanisms;
- (4) Advertise the availability and pricing of its universal service support qualifying services;
and
- (5) Comply with regulations applicable to ETCs, including:
 - a. Providing continued functionality in emergencies;
 - b. Complying with consumer protection standards;
 - c. Committing to provide quality service;
 - d. Offering various local usage plans;
 - e. Acknowledging equal access requirements;
 - f. Submitting annual certifications; and
 - g. Verifying and certifying customer qualification for Lifeline and Link-Up programs.⁹

Boomerang meets the above criteria, and designating it as an ETC would be in the public interest. Therefore, Boomerang respectfully requests that the Commission grant its application.

III. The Commission Has Authority to Confer ETC Status on Applicant

ALABAMA:

On March 12, 2002, the Alabama Public Service Commission issued an order finding that its "jurisdiction to grant Eligible Telecommunications Carrier status for universal service

Twelfth Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd. 12208, 12264 (2000).

⁹ 47 C.F.R. § 54.202.

purposes does not extend to providers of cellular services, broadband personal communications services, and commercial mobile radio services,” and that "wireless providers seeking ETC status should pursue their ETC designation request with the FCC." A copy of Order is attached hereto as Exhibit A.

CONNECTICUT:

The Connecticut Department of Public Utility Control recently confirmed that it lacks jurisdiction over this ETC petition. The letter is attached as Exhibit B.

DELAWARE:

The Delaware Public Service Commission issued an Order on October 11, 2005 clarifying that as a “federal default state,” it does not administer its own ETC program. The Order is attached hereto as Exhibit C.

WASHINGTON, D.C.

The District of Columbia Public Service Commission recently confirmed that it lacks jurisdiction to designate Boomerang as an ETC pursuant to D.C. ST. § 34-2006(b). The letter is attached hereto as Exhibit D.

NEW HAMPSHIRE:

On December 5, 2003, the New Hampshire Public Utilities Commission issued an Order concluding that it lacks jurisdiction to consider petitions for ETC status filed by cellular carriers. The Order is attached as Exhibit E.

NEW YORK:

The New York Public Service Commission recently confirmed that it lacks jurisdiction to entertain this ETC petition. The letter is attached as Exhibit F.

NORTH CAROLINA:

On August 22, 2003, the North Carolina Utilities Commission released an Order concluding that "the Commission lacks jurisdiction over CMRS services and the appropriate venue for the designation of ETC status for such services is with the FCC." A copy of the North Carolina Utilities Commission's Order is attached as Exhibit G.

TENNESSEE:

On April 11, 2003, the Tennessee Regulatory Authority issued an Order finding that its statutory "lack of jurisdiction over CMRS providers" precludes it from processing ETC petitions. A copy of the Order is attached as Exhibit H.

VIRGINIA:

On April 9, 2004, the Virginia State Corporation Commission issued an Order stating that "§ 214(e)(6) of the Act is applicable" to wireless ETC petitions "because [the Virginia Commission] has not asserted jurisdiction over CMRS carriers," and that wireless ETC applicants "should apply to the Federal Communications Commission." A copy of the Order is attached hereto as Exhibit I.

Accordingly, for each of the above states, Boomerang requests that the Commission exercise its authority under Section 214(e)(6) and determine that it is not subject to a state commission's ETC jurisdiction.

IV. Applicant Meets the Requirements for ETC Designation

A. Boomerang Qualifies as a Common Carrier

The Act defines a common carrier as "any person engaged as a common carrier for hire, in interstate or foreign communications by wire or radio..."¹⁰ The Act further defines a "person"

¹⁰ 47 U.S.C. § 153(10).

to include “an individual, partnership, association, joint-stock company, trust, or corporation.”¹¹ As a company providing interstate and foreign communications by radio,¹² Boomerang meets the definition of “common carrier.”

B. Boomerang Will Provide Services Through a Combination of Facilities Based and Resold Services

The Commission’s rules define the term “facilities” as “any physical components of the telecommunications network that are used in the transmission or routing of the service that are designated for support pursuant to subpart B of this part.”¹³ Section 54.201(f) provides that “the term ‘own facilities’ includes, but is not limited to, facilities obtained as unbundled network elements pursuant to part 51 of this chapter, provided that such facilities meet the definition of the term ‘facilities’ under this subpart.”¹⁴

As previously indicated, Boomerang provides service as a MVNO. It purchases capacity on a wholesale basis from Sprint and resells service packages to customers. Thus, it provisions its basic voice and data services on a resale basis. However, Boomerang incorporates its own switching facilities to provide certain services to customers, including switching for Directory Assistance, Operator Services, Customer Service and international long distance. Thus, Boomerang meets the statutory requirement mandating that ETCs provide service “either using its own facilities or a combination of its own facilities and resale of another carrier’s services.”¹⁵

¹¹ 47 U.S.C. § 153(32).

¹² Boomerang qualifies as a Commercial Mobile Radio Service (“CMRS”) provider. *See* 47 C.F.R. § 20.3.

¹³ 47 C.F.R. § 54.201(e).

¹⁴ 47 C.F.R. § 54.201(f).

¹⁵ 47 U.S.C. § 214(e)(1).

C. Boomerang Offers the Services and Functionalities Supported by the Federal Low-Income Universal Service Program¹⁶

Section 54.101 of the Commission's rules set forth services supported by the federal universal service support mechanisms. The rules further require that carriers offer each of the listed services to receive ETC designation.¹⁷ Boomerang will provide each of the enumerated supported services and will offer them throughout the service areas where it receives ETC designation. Boomerang will provision such services through a combination of its own facilities and resale of Sprint's services. These services include:

(1) Voice grade access to the public switched network.

Voice grade access "enables a user of telecommunications services to transmit...and to receive voice communications" including signaling for outgoing and incoming calls. And, "bandwidth for voice grade access should be, at a minimum, 300 to 3,000 Hertz."¹⁸

Boomerang's underlying carrier, Sprint, has executed interconnection agreements with local exchange carriers ("LECs") to provide connectivity to the public switched telephone network ("PSTN") in each of the states in which Boomerang requests ETC designation. Through its agreement with Sprint, Boomerang enables customers to make and receive calls on the PSTN with a minimum bandwidth of 300 to 3000 Hertz.

(2) Local usage.

"Local usage" means "an amount of minutes of use of exchange service, prescribed by the Commission, provided free of charge to end users."¹⁹ The Commission has construed this Section to require ETC-designated carriers to offer varying rate plans with different amounts of

¹⁶ 47 C.F.R. § 54.201(d).

¹⁷ 47 C.F.R. § 54.101(b).

¹⁸ 47 C.F.R. § 54.101(a)(1).

¹⁹ 47 C.F.R. § 54.101(a) (2).

local usage.²⁰ Each of Boomerang's affordable plans include a minimum of 68 units of airtime, where one unit equates to one minute of domestic talk time or one text message. In addition, Boomerang offers rate plans with various amounts of local usage. For example,

- Get Ready:
 - \$20.00 - 500 minutes, 1,000 texts, 20MB web, good for 30 days
 - \$30.00 – 1,000 minutes, 1,200 texts, 30 MB web, good for 30 days
- Unlimited:
 - \$9.99 – Unlimited minutes & texts, good for 3 days
 - \$14.99 – Unlimited minutes & texts, good for 7 days
 - \$50.00 – Unlimited minutes & texts, good for 30 days
- Nights & Weekends:
 - \$10.00 – 30 minutes, \$0.10/ text, good for 7 days
 - \$20.00 – 80 minutes, \$0.10/ text, good for 14 days
 - \$30.00 – 140 minutes, \$0.10/ text, good for 30 days
 - \$50.00 – 250 minutes, \$0.10/ text, good for 30 days
 - \$75.00 – 500 minutes, \$0.10/ text, good for 30 days
 - \$100.00 – 750 minutes, \$0.10/ text, good for 30 days
 - \$150.00 – 1,250 minutes, \$0.10/ text, good for 30 days
- Anytime:
 - \$5.00 – 50 units (total minutes & texts), good for 10 days
 - \$25.00 – 500 minutes, 50 texts, good for 30 days

²⁰ See, *Western Wireless Corp., Petition for Designation as an Eligible Telecommunications Carrier in the State of Wyoming*, CC Docket No. 96-45, Memorandum Opinion and Order, 16 FCC Rcd. 48, 52 (2000).

- \$45.00 – 950 minutes, 100 texts, good for 30 days
- Anytime Talk & Text:
 - \$20.00 - 500 minutes, good for 30 days
 - \$30.00 – 1,000 minutes, good for 30 days

(3) Dual tone multi-frequency signaling or its functional equivalent.

“Dual tone multi-frequency” (DTMF) is “a method of signaling that facilitates the transportation of signaling through the network, shortening call set-up time.”²¹ All handsets sold by Boomerang are DTMF-capable.

(4) Single-party service or its functional equivalent.

For wireless providers, “single-party service” is a telecommunications service that provides a “dedicated message path for the length of a user’s particular transmission.”²² Single-party service effectively allows only one party service by a subscriber line in contrast to a multi-party line which grants multiple parties access to a single line. Boomerang provides customers with single-party access for the duration of each telephone call.

(5) Access to emergency services.

Access to emergency services includes “access to services, such as 911 and enhanced 911, provided by local governments or other public safety organizations.”²³ Consumers can place 911/E911 emergency calls with Boomerang’s service. Further, all handsets are E911 capable, *i.e.*, they can deliver automatic number information (“ANI”) and automatic location information (“ALI”). In addition to providing reliable access to emergency services, Boomerang

²¹ 47 C.F.R. § 54.101(a) (3).

²² 47 C.F.R. § 54.101(a)(4).

²³ 47 C.F.R. § 54.101(a)(5).

and Sprint have put numerous mechanisms in place to allow the network to remain functional during emergencies as discussed further below.

(6) Access to operator services.

“Access to operator services” is defined as “access to any automatic or live assistance to a consumer to arrange for billing or completion, or both, of a telephone call.”²⁴ Boomerang provides live operator assistance, through operators employed and trained by Boomerang, to all customers for purposes of billing, customer service and call completion. Operator services are provided through Boomerang’s own switching facilities.

(7) Access to interexchange service.

“Access to interexchange service” is defined as the “use of the loop, as well as that portion of the switch that is paid for by the end user, or the functional equivalent of these network elements in the case of a wireless carrier, necessary to access an interexchange carrier’s network.”²⁵ In other words, interexchange services allow customers to make traditional long distance calls. Boomerang’s customers can complete both domestic long distance and international calls over Sprint’s network.

(8) Access to directory assistance.

“Access to directory assistance” means “access to a service that includes, but is not limited to, making available to customers, upon request, information contained in directory listings.”²⁶ Boomerang provides customers with access to directory assistance through its own facilities. Through Boomerang’s directory assistance, customers can receive directory listing information, and request connection to listed telephone numbers.

²⁴ 47 C.F.R. § 54.101(a)(6).

²⁵ 47 C.F.R. § 54.101(a)(7).

²⁶ 47 C.F.R. § 54.101(a)(8).

(9) *Toll limitation for qualifying low-income consumers.*²⁷

Toll limitation includes “either toll blocking or toll control.”²⁸ Boomerang allows customers at their option to engage in toll blocking or toll control.

D. Boomerang Will Advertise the Availability and Pricing for its Universal Service Qualifying Offerings²⁹

As indicated, Boomerang will advertise both the availability and pricing of its USF-qualifying offerings. Its advertisements will be posted in various retail stores included in its distribution network such as CVS, Walgreens, Rite Aid and Dollar General stores, among others. Likewise, Boomerang’s services and pricing will be available online at <http://www.readymobile.com/index.php>.

E. Boomerang Will Satisfy its Statutory Obligations as an ETC

Boomerang will satisfy each of the statutory requirements triggered by ETC status.

(1) *Continued Functionality in Emergencies*

Section 54.202 of the Commission’s rules requires that an ETC demonstrate its “ability to remain functional in emergency situations, including a demonstration that it has a reasonable amount of back-up power to ensure functionality without an external power source, is able to reroute traffic around damaged facilities, and is capable of managing traffic spikes resulting from emergency situations.”³⁰ Boomerang will remain functional in emergencies. Boomerang, as well as its underlying carrier, Sprint, have created back-up systems to ensure full functionality in the event of a loss of power or network functionality. And, Boomerang’s switching facilities are housed in a carrier-class data center with fully redundant power and HVAC, a controlled

²⁷ 47 C.F.R. § 54.101(a)(9).

²⁸ 47 C.F.R. § 54.400(d).

²⁹ 47 C.F.R. § 54.201(d)(2).

³⁰ 47 C.F.R. § 54.202(2).

temperature and humidity environment, fire-threat detection and suppression, year-round critical monitoring and secure access with biometric security. The facility features redundant generators and redundant fiber optic connectivity. The data center is a reinforced concrete building located in a secure area and collocated with the area electrical utility headquarters. It is powered from separate paths independent of any one electrical generation plant. All systems within the facility are implemented on redundant servers, each with redundant data network and power.

(2) Compliance with Consumer Protection Standards

Section 54.202(3) requires each ETC to “[d]emonstrate that it will satisfy applicable consumer protection and service quality standards. A commitment by wireless applicants to comply with the Cellular Telecommunications and Internet Association’s Consumer Code for Wireless Service will satisfy this requirement.”³¹ Boomerang hereby commits to comply with the Cellular Telecommunications and Internet Association’s (“CTIA”) Consumer Code for Wireless Service.

(3) Commitment to Provide Service

Section 54.202(a)(1)(i) requires each ETC applicant to “[c]ommit to provide service throughout its proposed designated service area to all customers making a reasonable request for service.”³² Boomerang hereby commits to provide service to any customer making a reasonable request for service throughout its designated service areas.

(4) Offering of Comparable Local Usage Plan.

Pursuant to Section 54.202(a)(4), an ETC applicant must demonstrate “that it offers a local usage plan comparable to the one offered by the incumbent LEC in the service areas for

³¹ 47 C.F.R. § 54.202(3).

³² 47 C.F.R. § 54.202(a)(1)(i).

which it seeks designation.”³³ Each of Boomerang’s rate plans is comparable to those offered by ILECs in the service areas for which it seeks ETC designation. In fact, Boomerang’s rate plans are superior in many respects to rate plans offered by ILECs in its service areas because they provide greater flexibility, reliable service, additional functionalities and features, and lower cost alternatives to ILEC providers’ services.

(5) Equal Access Acknowledgement

Section 54.202(a)(5) requires each ETC application to certify “that the carrier acknowledges that the Commission may require it to provide equal access to long distance carriers in the event that no other eligible telecommunications carrier is providing equal access within the service area.”³⁴ Boomerang hereby acknowledges this requirement, and commits to abide by any Commission instruction pursuant to this Section.

(6) Annual Certification

Section 54.202(b) requires ETC applicants to submit an annual certification attesting to compliance with certain mandates enumerated in Section 54.202(a).³⁵ Boomerang hereby commits to submit timely certifications meeting the requirements of Section 54.202(a). Likewise, Boomerang will meet its annual reporting requirements under Section 54.209.

(7) Certification and Verification of Consumer Qualification for Lifeline

Section 54.410 requires ETCs to make certain certifications regarding its customers’ qualification for Lifeline support.³⁶ Boomerang will verify and certify consumer eligibility to participate in the Lifeline program in accordance with this Section.

³³ 47 C.F.R. § 54.202(a)(4).

³⁴ 47 C.F.R. § 54.202(a)(5).

³⁵ 47 C.F.R. § 54.202(b).

³⁶ 47 C.F.R. § 54.410.

V. Designating Boomerang as an ETC is in the Public Interest

Section 54.202(c) of the Commission's rules mandate that ETC designations must serve the public interest. In considering whether any designation is in the public interest, "the Commission shall consider the benefits of increased consumer choice, and the unique advantages and disadvantages of the applicant's service offering."³⁷ First, Boomerang's service offers increased consumer choice and has unique advantages for consumers in the geographic areas served. For example, Boomerang's service provides a low-cost, reliable alternative to traditional rate plans. It allows customers to rely upon the extensive network of Sprint, while taking advantage of Boomerang's additional features and services provided by its secure facilities.

Second, Boomerang's service meets the goals of the Act. For example, the Act aimed to "secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies" to all American consumers.³⁸ Conferring ETC status upon Boomerang will provide consumers with higher quality services at lower prices in the designated service areas. Boomerang's plans incorporate features specifically designed for lower income individuals in both rural and urban areas. Further, Boomerang's prepaid services offer flexibility, providing customers with custom plans for voice and data services. Boomerang's plans allow customers that might not otherwise have access to expensive post-paid plans, to subscribe to voice and data services without the hurdle of a credit check or the commitment of a contract. And, the service allows customer to purchase minutes on an "as needed" basis.

Third, designation of Boomerang as an ETC meets the Commission's stated goals for promoting competition and increasing customer choice. The Commission has determined that

³⁷ 47 C.F.R. § 54.202(c).

³⁸ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

“designation of competitive ETCs promotes competition and benefits consumers in rural and high-cost areas by increasing customer choice, innovative services, and new technologies.”³⁹

Boomerang adds competition to the marketplace with the addition of its affordable innovative services. Further, its presence as a competitor of ILECs will incentivize incumbent carriers to improve their services and expand their networks to remain competitive.

Finally, because Boomerang will remain compliant with each of its ETC responsibilities, the Commission should designate it as an ETC in the proposed service areas.

VI. Anti-Drug Abuse Certification

No party to this Petition is subject to denial of federal benefits pursuant to Section 5301 of the Anti-Drug Abuse Act of 1998, 21 U.S.C. § 862.

³⁹ See *In the Matter of Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier in the State of Wyoming*, Memorandum Opinion and Order, CC Docket No. 96-45, 16 FCC Rcd. 48, 55 (2000).

VII. Conclusion

Based on the foregoing, Boomerang respectfully requests that the Commission expeditiously grant this Petition and designate it as an ETC in the proposed service areas.

Respectfully submitted,



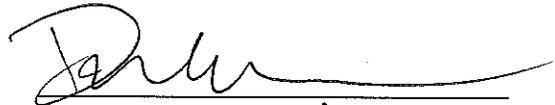
Michael P. Donahue
Jacqueline R. Hankins
HELEIN & MARASHLIAN, LLC
1420 Spring Hill Road, Suite 205
McLean, Virginia 22102
Tel: (703) 714-1300
Fax: (703) 714-1330
Email: mpd@commlawgroup.com
jrh@commlawgroup.com

Counsel for Petitioner

Dated: December 29, 2010

CERTIFICATION

I, Dennis Henderson, CEO of Boomerang Wireless, LLC do hereby affirm under penalty of perjury that I have reviewed all of the factual assertions set forth in the foregoing application for ETC status and that all such statements made therein are true and correct to the best of my knowledge, information and belief.



Name: Dennis Henderson
Title: CEO

EXHIBIT A

Alabama Public Service Commission

Orders

**PINE BELT CELLULAR, INC. and PINE
BELT PCS, INC.,**

Joint Petitioners

**PETITION: For ETC status and/or
clarification regarding the jurisdiction of
the Commission to grant ETC status to
wireless carriers.**

DOCKET U-4400

ORDER

BY THE COMMISSION:

In a joint pleading submitted on September 11, 2001, Pine Belt Cellular, Inc. and Pine Belt PCS, Inc. (collectively referred to as "Pine Belt") each notified the Commission of their desire to be designated as universal service eligible telecommunications carriers ("ETCs") for purposes of providing wireless ETC service in certain of the non-rural Alabama wireline service territories of BellSouth Telecommunications, Inc. ("BellSouth") and Verizon South, Inc. ("Verizon"). The Pine Belt companies noted their affiliation with Pine Belt Telephone Company, a provider of wireline telephone service in rural Alabama, but clarified that they exclusively provide cellular telecommunications and personal communications (collectively referred to as "CMRS" or "wireless") services in their respective service areas in Alabama in accordance with licenses granted by the Federal Communications Commission ("FCC"). The pivotal issue raised in the joint pleading of Pine Belt companies is whether the Commission will assert jurisdiction in this matter given the wireless status of the Pine Belt companies.

As noted in the filing of the Pine Belt companies, state Commissions have primary responsibility for the designation of eligible telecommunications carriers in their respective jurisdictions for universal service purposes pursuant to 47 USC §214(e). The Commission indeed established guidelines and requirements for attaining ETC status in this jurisdiction pursuant to notice issued on October 31, 1997.

For carriers not subject to state jurisdiction, however, §214(e)(6) of the Telecommunications Act of 1996 provides that the FCC shall, upon request, designate such carriers as ETCs in non-rural

service territories if said carriers meet the requirements of §214(e)(1). In an FCC Public Notice released December 29, 1997 (FCC 97-419) entitled "Procedures for FCC designation of Eligible Telecommunications Carriers pursuant to §214(e)(6) of the Telecommunications Act", the FCC required each applicant seeking ETC designation from the FCC to provide, among other things, "a certification and brief statement of supporting facts demonstrating that the Petitioner is not subject to the jurisdiction of a state Commission."

The Pine Belt companies enclosed with their joint pleading completed ETC application forms as developed by the Commission. In the event the Commission determines that it does not have jurisdiction to act on the Pine Belt request for ETC status, however, the Pine Belt companies seek an affirmative written statement from the Commission indicating that the Commission lacks jurisdiction to grant them ETC status as wireless carriers.

The issue concerning the APSC's jurisdiction over providers of cellular services, broadband personal communications services, and commercial mobile radio services is one that was rather recently addressed by the Commission. The Commission indeed issued a Declaratory Ruling on March 2, 2000, in Docket 26414 which concluded that as the result of certain amendments to the Code of Alabama, 1975 §40-21-120(2) and (1)(a) effectuated in June of 1999, the APSC has no authority to regulate, *in any respect*, cellular services, broadband personal communications services and commercial mobile radio services in Alabama. Given the aforementioned conclusions by the Commission, it seems rather clear that the Commission has no jurisdiction to take action on the Application of the Pine Belt companies for ETC status in this jurisdiction. The Pine Belt companies and all other wireless providers seeking ETC status should pursue their ETC designation request with the FCC as provided by 47 USC §214(e)(6).

IT IS, THEREFORE, ORDERED BY THE COMMISSION, That the Commission's jurisdiction to grant Eligible Telecommunications Carrier status for universal service purposes does not extend to providers of cellular services, broadband personal communications services, and commercial mobile radio services. Providers of such services seeking Eligible Telecommunications Carrier status should accordingly pursue their requests through the Federal Communications Commission.

IT IS FURTHER ORDERED, That this Order shall be effective as of the date hereof.

DONE at Montgomery, Alabama, this 12th day of March, 2002.

ALABAMA PUBLIC SERVICE COMMISSION

Jim Sullivan, President

Jan Cook, Commissioner

George C. Wallace, Jr., Commissioner

ATTEST: A True Copy

Walter L. Thomas, Jr., Secretary

EXHIBIT B



STATE OF CONNECTICUT

DEPARTMENT OF PUBLIC UTILITY CONTROL

November 8, 2010
In reply, please refer to:
UR:PAP

Jacqueline Hankins
Helein & Marashlian
1420 Spring Hill Rd
Suite 205
McLean, VA 22102

Re: Request for Letter Clarifying Jurisdiction Over Wireless ETC Petitions

Dear Ms. Hankins:

The Department of Public Utility Control (Department) acknowledges receipt of your October 25, 2010 letter filed on behalf of Boomerang Wireless, LLC d/b/a Ready Mobile (Ready Mobile) requesting clarification as to whether the Department claims jurisdiction to designate wireless eligible telecommunications carriers (ETC) in Connecticut.

The Department does not regulate or license mobile carrier services' rates and charges and therefore, Ready Mobile should apply to the Federal Communications Commission for purposes of being designed an ETC.

Sincerely,

DEPARTMENT OF PUBLIC UTILITY CONTROL

Kimberley J. Santopietto
Executive Secretary

EXHIBIT C

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE

IN THE MATTER OF THE APPLICATION OF)
VERIZON DELAWARE INC., TO MODIFY THE)
LIFELINE SERVICE BY ADDING AN INCOME) PSC DOCKET NO. 05-016T
QUALIFIER TO THE ELIGIBILITY CRITERIA)
(FILED JUNE 17, 2005))

ORDER NO. 6736

This 11th day of October, 2005, the Commission determines and Orders the following:

1. In the jargon of the federal Lifeline/Link-Up program, Delaware is a "federal default State." Delaware has never, by either state law or state regulation, ordained, nor funded, a stand-alone program to provide discounts on basic telephone services charges for low-income subscribers. Consequently, it was not until 1997, when the Federal Communications Commission ("FCC") revamped the federal Lifeline/Link-Up program, that Delaware subscribers first became eligible for participation in the federal Lifeline program.¹ And given that in a "federal default State" only federally-raised monies are used to reimburse eligible carriers for the Lifeline and Link-Up discounts, it is the FCC, and not the state commission, that gets to call the tune about who should be eligible to receive these federally-subsidized price reductions.

2. Since 1997, Verizon Delaware Inc. ("VZ-DE") has been designated as an "eligible telecommunications carrier" and has offered

¹See PSC Order No. 4684 (Dec. 16, 1997) (summarizing Delaware history and electing to allow "Tier 2" federal support to eligible Delaware subscribers).

federal Lifeline discounts on the federal list of supported services.² And even though in "default" States, Lifeline is almost an exclusively federal program, VZ-DE has, since 1997, filed at the State level, tariff provisions setting forth its Lifeline offerings.³

3. In 2004, the FCC changed some of the "eligibility" rules describing which subscribers may participate in the federal Lifeline/Link-Up program.⁴ In particular, the 2004 amendments added additional programs to the list of "eligible" programs where participation confers federal default Lifeline/Link-Up eligibility.⁵ The 2004 amendments also introduced an additional eligibility criteria premised on the subscriber's household income.⁶ Eligible telecommunications carriers, such as VZ-DE, were given one year to implement this new, additional income-based eligibility criteria.⁷

4. To implement these changes prescribed by the FCC, VZ-DE initially filed revisions to the Lifeline and Link-Up portions of its

²See PSC Order No. 4680 (Dec. 17, 1997) ("ETC" designation for VZ-DE). See also PSC Dckt. No. 97-023T (initial Lifeline tariff filing by VZ-DE).

³From December 2000 through December 2003, VZ-DE offered, under its state tariff, an "expanded" Lifeline program for Delaware. The discounts under such program exceeded the Tiers 1 & 2 levels normally available in a default State. VZ-DE offered this expanded program to fulfill a condition imposed by the FCC in approving the Bell Atlantic-GTE merger. See PSC Order No. 6317 (Dec. 9, 2003) (explaining content and cause of this expanded Lifeline offering). Whether Delaware remained a "default State" during this period when VZ-DE subsidized the deeper discounts is an issue that need now be explored or resolved. This "expanded" program ended in December 2003.

⁴In the Matter of Lifeline and Link-Up, Report and Order and Further NPRM, 19 FCC Rcd. 8302 (FCC 2004) ("Lifeline Order").

⁵47 C.F.R. §§ 54.409(b) (Lifeline eligibility criteria in "default" State); 54.415(b) (Link-Up eligibility criteria in "default" State).

⁶47 C.F.R. §§ 54.409(b), 54.410 (Lifeline); 54.415(b), 54.416 (Link-Up).

⁷47 C.F.R. §§ 54.410(a)(ii), 54.416.

State tariff. These changes incorporated into the State tariff provisions the expanded list of "eligibility-conferring" programs.⁸ At the same time, the Commission Staff began discussions with VZ-DE to determine whether, under the applicable federal default rules, it was appropriate for VZ-DE to continue to include in its State tariff Lifeline provisions language that conditioned Lifeline eligibility on the subscriber foregoing the ability to purchase many optional or vertical services.⁹ Eventually, VZ-DE revised its State tariff Lifeline provisions to delete the questioned restrictions.¹⁰ Then in June 2005, VZ-DE filed another Tariff revision to reflect its implementation of the household-income criteria for eligibility for Lifeline and Link-Up discounts.¹¹ Finally, on September 9, 2005, VZ-DE submitted another set of revised tariff sheets reflecting further textual revisions, as originally suggested by Staff. In part, these final changes sought to make the State tariff's description of how VZ-DE would administer its Lifeline/Link-Up program to more closely parallel the governing federal default rules.¹²

⁸See PSC Dckt. No. 04-017T (filed July 26, 2004; eff. July 27, 2004).

⁹That restriction - limiting Lifeline subscribers to a small group of designated vertical services - had been a continual part of VZ-DE's state-tariffed Lifeline offerings since 1997. In its Lifeline Order, the FCC expressed its belief that "any restriction on the purchase of vertical services may discourage qualified consumers from enrolling and may serve as a barrier to participation in the [Lifeline] program. Lifeline Order at ¶ 53.

¹⁰See PSC Dckt. No. 05-008T (filed April 8, 2005; eff. April 16, 2005).

¹¹See PSC Dckt. No. 05-016T (filed June 17, 2005; eff. June 22, 2005).

¹²See PSC Dckt. No. 05-016T, amended tariff sheets filed on September 9, 2005 but with effective date of June 22, 2005).

5. The Commission enters this Order not so much to "approve" the various Lifeline filings made by VZ-DE but to recount the course of the filings made since the FCC changed its federal Lifeline/Link-Up program in 2004. Indeed, given that Delaware is a "default" State, VZ-DE's Lifeline/Link-Up offerings are governed more by the federal default rules than by any "approved" State tariff provision. Any State tariff provision that might conflict with a federal default rule would necessarily have to yield. However, the Commission will accept the Lifeline and Link-Up tariff filings lodged by VZ-DE. The Commission believes that VZ-DE's last submission (in September 2005) sets forth a Lifeline and Link-Up offering that is consistent with the federal default rules. However, the filing and acceptance of the State tariff provisions should not be seen as foreclosing any later challenge that VZ-DE's program falls short of the federal directives.

Now, therefore, **IT IS ORDERED:**

1. That, as explained in the body of this Order, the Commission accepts the tariff filings made by Verizon Delaware Inc., to implement its responsibilities to provide federal Lifeline and Link-Up in this "federal default" jurisdiction. In particular, the Commission now accepts the tariff revision filing made September 9, 2005 pertaining to the following leaves in P.S.C.-Del.-No. 1:

Section 20D, Fourteenth Revised Sheet 1 (Link-Up);

Section 20D, Fifth Revised Sheet 2 (Link-Up); and

Section 20E, Eighth Revised Sheet 2 (Lifeline).

2. That the Commission reserves the jurisdiction and authority to enter such further Orders in this matter as may be deemed necessary or proper.

BY ORDER OF THE COMMISSION:

/s/ Arnetta McRae
Chair

Vice Chair

/s/ Joann T. Conaway
Commissioner

/s/ Jaymes B. Lester
Commissioner

/s/ Dallas Winslow
Commissioner

ATTEST:

/s/ Norma J. Sherwood
Acting Secretary

EXHIBIT D



Public Service Commission of the District of Columbia
1333 H Street, N.W., 2nd Floor, West Tower
Washington, D.C. 20005
(202) 626-5100
www.dcpssc.org

November 19, 2010

Via First Class & Certified Mail

Ms. Jacqueline Hankins
Helein & Marshlian, LLC
1420 Spring Hill Road, Suite 205
McLean, VA 22102

Dear Ms. Hankins:

Thank you for your October 25, 2010 letter requesting information on whether the Public Service Commission of the District of Columbia ("Commission") designates wireless telecommunications carriers as eligible telecommunications carriers ("ETC") for the purposes of receiving federal universal service funding. Please be advised that, pursuant to section 34-2006(b) of the District of Columbia Code, the Commission does not have jurisdiction over wireless carriers. Thus, the Commission has no authority to designate wireless telecommunications carriers as ETCs.

Attached please find a copy of the relevant section of the District of Columbia Code for your information. Should you need anything further, please contact Lara Walt at 202-626-9191 or lwalt@psc.dc.gov.

Sincerely,

A handwritten signature in cursive script, appearing to read "Richard A. Beverly".

Richard A. Beverly
General Counsel

Enclosure



D.C. Council Home

Home Search Help ©



Welcome to the online source for the District of Columbia Official Code

DC ST § 34-2006

Formerly cited as DC ST 1981 § 43-1456

DC ST § 34-2006

Formerly cited as DC ST 1981 § 43-1456

District of Columbia Official Code 2001 Edition Currentness

Division V. Local Business Affairs

Title 34. Public Utilities. (Refs & Annos)

Subtitle V. Telecommunications.

Chapter 20. Telecommunications Competition. (Refs & Annos)

➔ § 34-2006. Exemptions.

(a) This chapter shall not apply to cable television services performed pursuant to an existing cable television franchise agreement with the District of Columbia which is in effect on September 9, 1996. To the extent that a cable television company seeks to provide local exchange services within the District of Columbia, such company shall be regulated under the provisions of this chapter for their local exchange services.

(b) Pursuant to the federal Telecommunications Act of 1996, this chapter shall not apply to licensed or unlicensed wireless services authorized by the Federal Communications Commission operating in the District of Columbia.

(c) This chapter shall not:

- (1) Apply to the provision, rates, charges, or terms of service of Voice Over Internet Protocol Service or Internet Protocol-enabled Service;
- (2) Alter the authority of the Commission to enforce the requirements as are otherwise provided for, or allowed by, federal law, including the collection of Telecommunications Relay Service fees and universal service fees;
- (3) Alter the authority of the Office of Cable Television and Telecommunications with respect to the provision of video services in the District of Columbia; or
- (4) Alter the Commission's existing authority over the regulation of circuit-switched local exchange services in the District of Columbia.

CREDIT(S)

(Sept. 9, 1996, D.C. Law 11-154, § 7, 43 DCR 3736; June 5, 2008, D.C. Law 17-165, § 3(c), 55 DCR 5171.)

HISTORICAL AND STATUTORY NOTES**Prior Codifications**

1981 Ed., § 43-1456.

Effect of Amendments

D.C. Law 17-165 added subsec. (c).

Legislative History of Laws

For legislative history of D.C. Law 11-154, see Historical and Statutory Notes following § 34-2001.

For Law 17-165, see notes following § 34-403.

References in Text

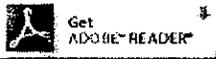
The federal Telecommunications Act of 1996, referred to in (b), is Pub. L. 104- 104, which is codified throughout Title 47 of the United States Code.

DC CODE § 34-2006

Current through September 17, 2010

Copyright © 2010 By the District of Columbia. All Rights Reserved.
END OF DOCUMENT

© 2010 Thomson Reuters. No Claim to Orig. U.S. Govt. Works.
Adobe Reader is required to view PDF images.



Docs In Sequence

Westlaw, part of Thomson Reuters
[© 2010 West](#) | [Privacy](#) | [Accessibility](#)



EXHIBIT E

DT 03-128

RCC MINNESOTA, INC.
RCC ATLANTIC, INC.

**Petition for Designation as an Eligible
Telecommunications Carrier**

Order Regarding Jurisdiction of the Commission

O R D E R N O. 24,245

December 5, 2003

Appearances: Gallagher, Callahan and Gartrell by Andrew B. Eills, Esq. for RCC Minnesota, Inc. and RCC Atlantic, Inc.; Primmer and Piper by Trevor R. Lewis, Esq. and Paul J. Phillips, Esq. for the New Hampshire Telephone Association; Preti Flaherty by Joseph G. Donahue, Esq. and Benjamin M. Sanborn, Esq. for the Union Telephone Company; Victor D. Del Vecchio, Esq. for Verizon New Hampshire; F. Anne Ross, Esq. for the Office of Consumer Advocate; and Suzanne Amidon, Esq. for Commission Staff.

I. PROCEDURAL BACKGROUND

On June 27, 2003, RCC Minnesota, Inc., and RCC Atlantic, Inc. (collectively RCC) filed with the New Hampshire Public Utilities Commission (Commission) a petition for Designation as an Eligible Telecommunications Carrier (ETC) pursuant to Section 214(e) (2) of the Telecommunications Act as amended and 47 C.F.R. § 54.201 of the Federal Communications Commission's (FCC) rules. RCC Minnesota, Inc. is authorized by the FCC as a Personal Communications Service carrier in the Manchester-Nashua-Concord, New Hampshire Basic Trading Area and as the Cellular Radiotelephone Service provider in Portsmouth-Dover-Rochester, New Hampshire-Maine New England Cellular Market Area. RCC Atlantic, Inc. d/b/a Cellular One is authorized by the

FCC as a Cellular Radiotelephone Service provider in New Hampshire Rural Service Area 1-Coos, New Hampshire. These FCC authorizations designate RCC's service area. RCC provides only cellular mobile radio communications services (hereinafter referred to as cellular service) in these areas.

In connection with its petition, RCC requests that the Commission redefine the service area of Granite State Telephone (GST) to classify each wire center as a separate service area. RCC states that redefining GST's service area is necessary to facilitate advance universal service for those customers of RCC living in GST's service area. If granted, the designation would make RCC eligible to receive financial support from the federal Universal Service Fund (USF).

Because RCC provides only cellular services in New Hampshire, the threshold question for the Commission is whether RSA 362:6 or other statutory provisions gives the Commission jurisdiction to make an ETC finding. On July 29, 2003, the Commission issued an Order of Notice directing RCC and interested parties to file with the Commission no later than August 21, 2003 Memoranda of Law addressing the Commission's jurisdiction. The Commission requested that RCC and other interested parties delineate whether the Commission is barred from asserting jurisdiction to designate RCC as an ETC in light of NH RSA 362:6, which states:

The term "public utility" shall not include any individual, partnership, corporation, company, association, or joint stock association, including any trustee, administrator, executor, receiver, assignee, or other personal representative who provides purchases or sells cellular mobile radio communication services. Such services shall not be subject to the jurisdiction of the public utilities commission pursuant to this title.

The Order scheduled a hearing on the jurisdictional issue for August 28, 2003, instructed RCC to publish notice of the Order in a newspaper of statewide circulation, and set a deadline of August 25, 2003 for Petitions to Intervene. RCC filed an affidavit of publication with the Commission on August 14, 2003.

On July 30, 2003, the Office of Consumer Advocate (OCA) notified the Commission that it would participate in this matter on behalf of residential ratepayers consistent with RSA 363:28. On August 20, 2003, the New Hampshire Telephone Association (NHTA), on behalf of independent telephone companies Bretton Woods Telephone Company, Dixville Telephone Company, Dunbarton Telephone Company, Granite State Telephone, Kearsarge Telephone Company, Northland Telephone Co. of New Hampshire, Hollis Telephone Company, Merrimack County Telephone and Wilton Telephone Company (collectively ITCs) filed a Petition to Intervene and a Memorandum of Law. The ITCs also filed a Motion of Paul Phillips, Esq. for Admission Pro Hac Vice, to represent the ITCs in this matter.

On August 21, 2003, Verizon New Hampshire (Verizon) filed a motion to intervene and a Memorandum of Law, and OCA and RCC each filed Memoranda of Law. Also on August 21, 2003, Union Telephone Company (UTC) filed a Petition to Intervene and a Memorandum of Law. UTC also requested that the Commission authorize the appearance of Attorneys Joseph G. Donahue and Benjamin M. Sanborn on behalf of UTC.

The Commission, at a hearing on August 28, 2003, granted all Petitions to Intervene and Motion for Admission Pro Hac Vice filed on behalf of Mr. Phillips. The Commission also granted UTC's request to authorize Mr. Donahue and Mr. Sanborn to appear before the Commission.

II. POSITION OF THE PARTIES

A. RCC

RCC argues that the Commission has jurisdiction over RCC for the purpose of designating RCC as an ETC in the State of New Hampshire. RCC asserts that nothing in RSA 362:6 prohibits the Commission from determining the status of RCC as an eligible carrier pursuant to Section 214(e)(6) of the Telecommunications Act of 1996. 47 U.S.C. § 214(e)(6). RCC points out that Congress specifically gave state commissions the first opportunity to review and make ETC designation decisions, and that only in the

event that a state commission declined to accept jurisdiction should the matter of designation be moved to the FCC for action.

RCC also argues that the FCC, in its First Report and Order in its Universal Service Docket, specifically stated that "not all carriers are subject to the jurisdiction of a state commission. Nothing in section 214(e)(1), however, requires that a carrier be subject to the jurisdiction of a state commission in order to be designated an eligible telecommunications carrier. Thus tribal telephone companies, cellular providers and other carriers not subject to the full panoply of state regulation may still be designated as eligible telecommunications carriers." First Report and Order, 12 FCC Rcd 8776,8859 (May 7, 1997). RCC concludes that the Commission is therefore not barred from designating a cellular provider as an ETC.

RCC points out that the New Hampshire legislature contemplated the eligibility of cellular providers for status as a carrier in a state universal fund program. See RSA 374:22-p, IV(c). RCC argues that the New Hampshire legislature's inclusion of cellular providers in the state USF program indicates that the legislature intended the Commission to have some authority over cellular providers. RCC points out that paragraph IV(a) of RSA 374:22-p requires every provider of "intrastate telephone services", including providers of "cellular mobile telecommunications services", to contribute to the state

USF once it is established. Because the state USF law required implementation to be consistent with the federal law, and because under federal law wireless providers qualify for ETC status, RCC argues that it would be implausible under the New Hampshire law that an intrastate telephone service provider would be required to contribute to a USF without being eligible to receive universal service support.

RCC argued that the Commission should find that it has jurisdiction to designate any cellular provider as an ETC for purposes of the federal USF program.

B. Independent Telephone Companies

The ITCs argue that the Commission has jurisdiction under state and federal law to hear the Petition. They state that the request for designation as an ETC in New Hampshire involves a legal determination distinct from the regulation of cellular providers addressed in RSA 362:6 and that the Commission, in determining whether to designate RCC as an ETC, would not be "regulating" a cellular company in any manner. Instead, the Commission would be making a determination of whether RCC is eligible to receive federal universal service support. The ITCs aver that rather than constituting regulation, designation of RCC as an ETC would be conferring a benefit, and in the case of rural telephone companies' service territories, action requiring discretion and evaluation of the public

interest. 47 U.S.C. § 214(e)(2). The ITCs argue that the Commission is the best qualified authorized body to deliberate the issues involving public interest.

In connection with RCC's request that the Commission redefine the service area of GST, the ITCs point to federal law which expressly seeks to have state commissions serve as the sole tribunal with the initial authority to respond to a petitioner's request to redefine a rural service area. 47 C.F.R. § 54.207(c)(1). The ITCs state that even where the redefinition of the rural service area is initiated by the FCC on its own motion, the FCC must first seek the agreement of the state commission for such redefinition. 47 C.F.R. § 54.207(d). Because RCC's petition to redefine GST's rural service areas must first be filed with the Commission, and because such a petition has meaning only when considered in conjunction with a request for ETC status, the ITCs argue that the Commission has ancillary jurisdiction over the petition for designation of ETC status. See ITCs Brief pp. 5-7.

C. Union Telephone Company

UTC also believes that the Commission has jurisdiction over RCC's petition. UTC argues that RSA 362:6 states that a cellular provider is not a "public utility", but that a carrier does not have to be a public utility to qualify for ETC designation pursuant to 47 U.S.C. § 214(e)(2).

UTC notes that the purpose of this proceeding is for the Commission to make the factual and policy determinations as to whether RCC meets the statutory requirements in Section 214(1) and whether designation of RCC as an ETC is in the public interest. UTC points out that the federal law gives state commissions the authority to designate ETCs because state commissions are in the best position to determine whether such designation is in the public interest.

UTC also states that the Commission's findings regarding the public interest can be conditioned on the basis of certain commitments or actions being undertaken by cellular providers without necessarily engaging in the exercise of jurisdiction over the services of such a carrier. UTC argues that if the carrier declined to meet the conditions of eligibility, the designation as an ETC could be found not to be in the public interest, and thus there would be no affirmative regulation as a public utility. UTC concludes that because RSA 362:6 is not a bar to the Commission's exercise of jurisdiction in this case, the Commission can, and should, take jurisdiction over RCC's petition.

D. Verizon New Hampshire

Verizon argues that the Commission, under state law, lacks authority to designate RCC as an ETC eligible to receive USF support. Verizon argues that consistent with the 1996 Act

and the FCC Rules, the Commission should provide an affirmative statement that it does not regulate cellular carriers, thereby allowing RCC to request such designation directly from the FCC.

Verizon states that the federal law which confers primary responsibility on states to designate ETCs that meet the eligibility requirements of the 1996 Act was amended in 1997 to take into account situations where the petitioning carrier was not subject to the jurisdiction of a state commission. The law provides that in such a situation, petitions should request the FCC rather than the state commission to designate a carrier as an ETC consistent with the applicable law. 47 U.S.C. § 214(e)(6).

Verizon argues that RSA 362:6 specifically excludes from the definition of a public utility any entity that "provides, purchases or sells cellular mobile radio communication services. Such services shall not be subject to the jurisdiction of the public utilities commission pursuant to this title." RSA 362:6. Verizon states that the Commission has only that authority delegated to it by the legislature and, in this case, authority to regulate cellular providers has been specifically withheld.

Verizon argues that the legislature affirmed its decision to withhold Commission jurisdiction of cellular in 2001, when it created standards for affordable telephone service. See RSA 374:22-p. The statute provides that "subject to RSA 362:6;;

the commission shall require every provider of intrastate telephone service to participate in outreach programs designed to increase the number of low-income telephone customers on the network through increased participation in any universal service program approved by the commission and statutorily established by the legislature." RSA 374:22-p II. Verizon states that the exclusion of CMRS providers from outreach requirements underscores the Commission's lack of authority over CMRS providers. Verizon argues that the Commission would consequently be barred from directing cellular providers to undertake outreach to benefit low income customers. Verizon further argues that in any event, the legislature has not established a state universal service fund, a condition precedent to universal service implementation, and therefore the Commission has no authority to implement RSA 374:22-p.

Verizon states that the Commission should issue an affirmative statement that it lacks jurisdiction to make a designation of ETC status and permit RCC to apply to the FCC for such designation. In the alternative, Verizon requests that if the Commission concludes it has jurisdiction to designate RCC as an ETC, the Commission should defer taking further action until the FCC resolves ETC eligibility and USF issues that are currently pending before the FCC. *Verizon Memorandum, pp.7-8.*

E. OCA

Like Verizon, the OCA argues that the Commission does not have jurisdiction over RCC's petition requesting designation as an ETC because RCC is a cellular provider, which RSA 362:6 specifically excludes from Commission jurisdiction. The OCA also argues that while RSA 374:22-p, the state's universal service fund program, includes cellular providers, RSA 374:22-p does not eliminate the exclusion created in RSA 362:6.

OCA notes 47 U.S.C. § 214(e)(6), which provides that if a state commission does not have jurisdiction over a carrier applying for ETC designation, the FCC is the regulatory agency with authority to make such designation for that carrier. OCA states in this case the Commission has no jurisdiction over cellular carriers and the petition by RCC should properly be brought to the FCC.

F. Staff

Staff argues that the Commission has jurisdiction in this matter. Staff concurs with the arguments of RCC. Specifically, Staff agrees that RSA 362:6 prohibits the Commission from regulating the services of a cellular provider. However, in this case, Staff points out that RCC requested designation as an ETC on its own volition and submitted a

petition to this Commission as contemplated by the federal. 47 U.S.C. § 214(e)(2). In Staff's view, state commissions could designate an entity not regulated by the Commission as an ETC, and such designation of ETC status does not constitute a regulation of service.

Staff states that the legislature, in enacting RSA 374:22-p, the state USF program, clearly contemplated that a cellular provider would be eligible for designation as a state USF provider. Staff points out that RSA 374:22-p IV(c) defines "providers of intrastate telephone services" to include CMRS providers, thus requiring cellular providers to contribute to the state USF. RSA 374:22-p IV(a). RSA 374:22-p IV(a) and 374:22-p IV(b)(3) also require the Commission to implement the state USF in a manner "consistent with the goals of applicable provisions of this title and the Federal Telecommunications Act." *Id.* Staff notes that under the federal law, cellular providers pay into the USF and are eligible for designation as an ETC. Staff argues that for the state program to operate consistently with the federal program, the legislature contemplated that cellular providers, which would be paying into the state USF, would be eligible for designation as an ETC under the state USF program. Staff argues that in both cases, the Commission should be the regulatory authority to make such designation.

Staff points out that RCC petitioned the Commission in the first instance because it was willing to submit to the Commission's jurisdiction for the purpose of being designated as an ETC. Staff argues that the Commission, in asserting jurisdiction over RCC, could stipulate with RCC regarding its conduct as an ETC provider in this state. Staff points out that if the Commission affirmatively finds that it lacks jurisdiction in this matter, the FCC could grant RCC's petition without any conditions recognizing the characteristics of the market that are unique to New Hampshire. Staff argues that accepting jurisdiction of this matter and proceeding toward a stipulation imposing conditions on RCC would be in the public interest, and would permit the Commission to deliberate the request to change the geographical territory of GST in the same proceeding. Staff concludes that the Commission has jurisdiction in this matter and should accept RCC's petition for action.

III. COMMISSION ANALYSIS

The question of the Commission's jurisdiction in this case is a question of law. Consequently, while the public policy arguments advanced by many of the Parties in this case may be compelling, we do not have a basis in this instance to "take" jurisdiction over this petition simply because we believe we are in the best position to determine whether it is in the public interest of New Hampshire customers to designate an entity as an

ETC. Jurisdiction must be based on a finding that an enabling statute or other New Hampshire statutory law delegates to the Commission the authority to regulate cellular carriers. We find that we do not have such authority over RCC's petition for ETC designation.

The New Hampshire Supreme Court has held that "[t]he PUC is a creation of the legislature and as such is endowed with only the powers and authority which are expressly granted or fairly implied by statute." *Appeal of Public Service Company of New Hampshire*, 122 NH 1062, 1066 (1982). Consequently, the Commission must look to its statutory authority to determine whether it has jurisdiction over cellular providers. RSA 362:6 expressly states that it does not. A cellular provider is not a public utility, and its "services shall not be subject to the jurisdiction of the public utilities commission pursuant to this title." RSA 362:6. We therefore must conclude that the Commission does not have jurisdiction over any cellular carrier because the New Hampshire legislature specifically removed cellular carriers from the jurisdiction of this Commission.

RCC, the ITCs and UTC argue that, notwithstanding RSA 362:6, federal law authorizes the Commission to designate any provider of telecommunications service as an ETC as long as such provider meets the requirements of the law. 47 U.S.C. § 214(e)(6). They argue that while the Commission cannot regulate

the services of a cellular provider, it is not prohibited from designating a cellular provider as an ETC. We disagree. Designation is posed as not constituting regulation but, in fact, designation is the equivalent of one of the traditional forms of regulation, that is, regulation over entry. By accepting RCC's petition, the Commission would be asserting jurisdiction over RCC, albeit in a limited capacity, which is prohibited by RSA 362:6.

RCC argues that the Commission should look beyond the narrow reading of RSA 362:6 and focus on its interplay with other New Hampshire laws. RCC states that the legislature, in enacting the state USF law, provided some authority to the Commission over cellular providers. RSA 374:22-p, IV(c). RCC asserts that the inclusion of cellular carriers in the category of eligible state USF providers, the requirement that such carriers contribute to any established state USF and the requirement that any state USF program be consistent with the Telecommunications Act should lead the Commission to conclude that the legislature intended to give it "some authority" over cellular providers.

We do not accept this argument. RSA 374:22-p, II recognizes the limitations on the Commission by RSA 362:6 by providing that "[s]ubject to RSA 362:6" the Commission shall require providers of instate telephone services to participate in certain outreach programs. Had the legislature decided to remove

the limitation on the Commission's jurisdiction when it enacted RSA 374:22-p in 2001, it could have done so. Instead, the legislature explicitly acknowledged that the Commission had no jurisdiction over cellular providers. For that reason, RCC's claim that the legislature intended to give the Commission jurisdiction over cellular providers by requiring a state USF program to be consistent with the Telecommunications Act (where cellular providers can be designated as USF providers) is not persuasive.

The ITCs argue that the Commission has implied jurisdiction over cellular providers such as RCC, citing *Appeal of PSNH*, 130 NH 285, 291 (1988). In that case, the disputed issue was whether the Commission had jurisdiction to grant long term rates for the purchase by PSNH of power from small power producers. As noted by the New Hampshire Supreme Court, however, the facts demonstrated "a rare instance of State and federal legislative coincidence" where both the Federal and State legislatures "enacted provisions to diversify electrical power production through the encouragement of small power producers and cogenerators." *Id* at 287.

The Commission finds no "legislative coincidence" between the RSA 362:6 and the provisions of Telecommunications Act (47 U.S.C. § 214(e)(2)). In fact, Congress contemplated that a carrier not subject to the jurisdiction of a state commission

could be eligible for designation as an ETC. In 1997, it amended the Telecommunication Act to provide that, in such a case, it is the FCC, not the state commission, that would have jurisdiction over such designation. 47 U.S.C. 214(e)(6)¹

The ITCs also argue that the Commission should take jurisdiction because RCC has petitioned to redefine the rural service area of GST, a public utility subject to the Commission's jurisdiction. The ITCs point out that the Commission would have to respond to the request to redefine GST's service area pursuant to FCC rules (47 C.F.R. §54.207). The ITCs argue that if this petition goes to the FCC, the FCC will still have to seek the agreement of the state to redefine GST's service area. They state that since redefinition of the service area is dependent on the designation of RCC as an ETC, the Commission could take jurisdiction of the designation as ancillary to the take of service area redefinition.

We share the ITCs' concern about the petitioned redefinition of GST's service area. However, should RCC petition the FCC for designation as an ETC, the Commission will still have an opportunity to determine whether the redefinition of GST's

¹ As pointed out by Verizon in its memorandum of law, RCC had petitioned the FCC for designation as an ETC after the Alabama Public Service Commission had determined it had no jurisdiction over RCC. *See in the Matter of Federal State Joint Board on Universal Service; RCC Holdings, Inc. Petition for Designation as an Eligible Telecommunications Carrier Throughout its Licensed Service Area in the State of Alabama*, Memorandum and Order, CC Docket No. 96-45, 17 FCC Rcd 23532, 2002 (November 27, 2002).

service area is in the public interest. See 47 C.F.R. §
54.207(d)(2). Consequently, even if it were possible to take

jurisdiction that does not exist, we do not have to do so to assure that redefinition of GST's service area is consistent with the public interest.

While we agree with those parties who believe that the Commission is in a better position than the FCC to determine the eligibility and designation of cellular providers as ETCs in New Hampshire, it is the state legislature, not this Commission, which must take steps to authorize those determinations through an amendment to RSA 362:6.

Based upon the foregoing, it is hereby

ORDERED, that the Commission, based on RSA 362:6, has no jurisdiction over RCC's petition to be designated as an ETC in the State of New Hampshire, and it is

FURTHER ORDERED, that this Order shall constitute an affirmative statement that this Commission lacks jurisdiction to designate RCC as an ETC in the State of New Hampshire.

By order of the Public Utilities Commission of New
Hampshire this fifth day of December, 2003.

Thomas B. Getz
Chairman

Susan S. Geiger
Commissioner

Graham J. Morrison
Commissioner

Attested by:

Michelle A. Caraway
Assistant Executive Director

EXHIBIT F

STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

THREE EMPIRE STATE PLAZA, ALBANY, NY 12223-1350

www.dps.state.ny.us

PUBLIC SERVICE COMMISSION

GARRY A. BROWN

Chairman

PATRICIA L. ACAMPORA

MAUREEN F. HARRIS

ROBERT E. CURRY JR.

JAMES L. LAROCCA

Commissioners



PETER MCGOWAN

General Counsel

JACLYN A. BRILLING

Secretary

October 28, 2010

TO WHOM IT MAY CONCERN:

Re: Boomerang Wireless CMRS Jurisdiction

We have received a letter from Boomerang Wireless, LLC d/b/a Ready Mobile (Boomerang Wireless), requesting a statement that the New York State Public Service Commission does not exercise jurisdiction over CMRS providers for the purpose of making determinations regarding Eligible Telecommunications Carrier designations under section 214 (e)(6) of 47 U.S.C. In response to this request, please be advised that section 5 (6)(a) of the New York State Public Service Law provides that:

Application of the provisions of this chapter to cellular telephone services is suspended unless the commission, no sooner than one year after the effective date of this subdivision, makes a determination, after notice and hearing, that suspension of the application of provisions of this chapter shall cease to the extent found necessary to protect the public interest.

The New York State Public Service Commission has not made a determination as of this date that regulation should be reinstated under section 5 (6)(a) of the Public Service Law. Consequently, based on the representation by Boomerang Wireless that it provides wireless service in New York over its own facilities and Sprint's network, the company would not be subject to New York State Public Service Commission jurisdiction for the purpose of making an Eligible Telecommunications Carrier designation.

Very truly yours,

Maureen J. McCauley
Maureen J. McCauley
Assistant Counsel

EXHIBIT G

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

DOCKET NO. P-100, SUB 133c

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of
Designation of Carriers Eligible for Universal)
Carrier Support) ORDER GRANTING PETITION

BY THE COMMISSION: On August 22, 2003, North Carolina RSA3 Cellular Telephone Company, d/b/a Carolina West (Carolina West), a commercial mobile radio service (CMRS) provider, filed a Petition seeking an affirmative declaratory ruling that the Commission lacks jurisdiction to designate CMRS carrier eligible telecommunications carrier (ETC) status for the purposes of receiving federal universal service support.

In support of its Petition, Carolina West stated that it was a CMRS provider authorized by the Federal Communications Commission (FCC) to provide cellular mobile radio telephone service in North Carolina, and that the FCC had clearly recognized that CMRS carriers such as Carolina West may be designated as ETCs. ETC status is necessary for a provider to be eligible to receive universal service support. Section 214(e)(6) of the Telecommunications Act provides that if a state commission determines that it lacks jurisdiction over a class of carriers, the FCC is charged with making the ETC determination. The FCC has stated that, in order for the FCC to consider requests pursuant to this provision, a carrier must provide an "affirmative statement" from the state commission or court of competent jurisdiction that the state lacks jurisdiction to perform the designation. To date, several state commissions have declined to exercise such jurisdiction.

North Carolina has excluded CMRS from the definition of "public utility." See, G.S. 62-3(23)j. Pursuant to this, the Commission issued its Order Concerning Deregulation of Wireless Providers in Docket Nos. P-100, Sub 114 and Sub 124 on August 28, 1995, concluding that the Commission no longer has jurisdiction over cellular services. Accordingly, Carolina West has now requested the Commission to issue an Order stating that it does not have jurisdiction to designate CMRS carriers ETC status for the purposes of receiving federal universal service support.

WHEREUPON, the Commission reaches the following

CONCLUSIONS

After careful consideration, the Commission concludes that it should grant Carolina West's Petition and issue an Order stating that it lacks jurisdiction to designate ETC status

for CMRS carriers. As noted above, in its August 28, 1995, Order in Docket Nos. P-100, Sub 114 and Sub 124, the Commission observed that G.S. 62-3(23)j, enacted on July 29, 1995, has removed cellular services, radio common carriers, personal communications services, and other services then or in the future constituting a mobile radio communications service from the Commission's jurisdiction. 47 USC 3(41) defines a "state commission" as a body which "has regulatory jurisdiction with respect to the intrastate operation of carriers." Pursuant to 47 USC 214(e)(6), if a state commission determines that it lacks jurisdiction over a class of carriers, the FCC must determine which carriers in that class may be designated as ETCs. Given these circumstances, it follows that the Commission lacks jurisdiction over CMRS services and the appropriate venue for the designation of ETC status for such services is with the FCC. Accord., Order Granting Petition, ALLTEL Communications, Inc., June 24, 2003.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 28th day of August, 2003.

NORTH CAROLINA UTILITIES COMMISSION

A handwritten signature in cursive script that reads "Patricia Swenson".

Patricia Swenson, Deputy Clerk

pb082503.01

EXHIBIT H

TENNESSEE REGULATORY AUTHORITY



460 James Robertson Parkway
Nashville, Tennessee 37243-0505

November 3, 2010

Ms. Jacqueline Hankins, Esq.
Helein & Marashlian, LLC
The CommLaw Group
1420 Spring Hill Road, Suite 205
McLean, VA 22102

RE: Request for Letter Clarifying Jurisdiction over Wireless ETC Petitions

Dear Ms. Hankins:

Thank you for your letter sent to Mr. David Foster, Utilities Division Chief, dated October 25, 2010, inquiring about the Tennessee Regulatory Authority's ("Authority") jurisdiction to designate a wireless telecommunications carrier, such as Boomerang Wireless, LLC d/b/a Ready Mobile (f/k/a Boomerang Wireless, Inc., for Eligible Telecommunications Carrier ("ETC") certification in Tennessee. Your letter has been forwarded to me for review and response.

As your letter correctly indicates, the Authority does not assert that its state-delegated authority extends to wireless service providers. As a result, wireless carriers that seek ETC certification to provide such services in Tennessee are advised to file such requests with the Federal Communications Commission in accordance with 47 U.S.C.A. § 214(e)(6). The enclosed *Order Refusing Issuance of Declaratory Ruling*, issued on August 2, 2010,¹ provides detailed analysis of the Authority's wireless jurisdiction.

In Docket No. 02-01245, the Authority acknowledged the FCC's authority to perform ETC designations for carriers not subject to its jurisdiction, and announced that its *Order* of April 11, 2003 would serve as an affirmative statement that it lacks jurisdiction to designate ETC certification to wireless carriers.² For your convenience, I have enclosed a copy of the Authority's order in that docket. In addition, you may access these and other

¹ *In re Petition for Declaratory Ruling and Nunc Pro Tunc Designation of Nexus Communications as an Eligible Telecommunications Carrier to Offer Wireless Service in Tennessee*, Docket No. 10-00083, *Order Refusing Issuance of Declaratory Ruling* (August 2, 2010).

² *In re Application of Advantage Cellular Systems, Inc. to be Designated as an Eligible Telecommunications Carrier*, Docket No. 02-01245, *Order* (April 11, 2003).

Ms. Jacqueline Hankins, Esq.
Letter Clarifying Wireless Jurisdiction
November 1, 2010
Page 2

Authority docket, including all public filings and orders, online via the Tennessee Regulatory Authority's website located at <http://www.state.tn.us/tra/>.

I trust that you will find the information provided above to be of assistance and appreciate the opportunity to serve you. In the event you have additional questions or concerns, please feel free to contact me.

Sincerely,


Kelly Cashman Grams
Assistant General Counsel

cc: David Foster, Utilities Division Chief

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

April 11, 2003

IN RE:

APPLICATION OF ADVANTAGE CELLULAR
SYSTEMS, INC. TO BE DESIGNATED AS AN
ELIGIBLE TELECOMMUNICATIONS CARRIER

)
)
)
)
)
)
DOCKET NO.
02-01245

ORDER

This matter came before Chairman Sara Kyle, Director Deborah Taylor Tate and Director Pat Miller of the Tennessee Regulatory Authority (the "Authority"), the voting panel assigned in this docket, at the regularly scheduled Authority Conference held on January 27, 2003, for consideration of the *Application of Advantage Cellular Systems, Inc. To Be Designated As An Eligible Telecommunications Carrier* ("Application") filed on November 21, 2002.

Background

Advantage Cellular Systems, Inc. ("Advantage") is a commercial mobile radio service provider ("CMRS") seeking designation as an Eligible Telecommunications Carrier ("ETC") by the Authority pursuant to 47 U.S.C. §§ 214 and 254. In its *Application*, Advantage asserts that it seeks ETC status for the entire study area of Dekalb Telephone Cooperative, Inc., a rural cooperative telephone company. Advantage maintains that it meets all the necessary requirements for ETC status and therefore is eligible to receive universal service support throughout its service area.

The January 27, 2003 Authority Conference

During the regularly scheduled Authority Conference on January 27, 2003, the panel of Directors assigned to this docket deliberated Advantage's *Application*. Of foremost consideration was the issue of the Authority's jurisdiction. The panel unanimously found that the Authority lacked

jurisdiction over Advantage for ETC designation purposes.¹

This conclusion was implicitly premised on Tenn. Code Ann. § 65-4-104, which provides that:

The Authority has general supervisory and regulatory power, jurisdiction and control over all public utilities and also over their property, property rights, facilities, and franchises, so far as may be necessary for the purpose of carrying out the provisions of this chapter.

For purposes of Tenn. Code Ann. § 65-4-104, the definition of public utilities specifically excludes, with certain exceptions not relevant to this case, “[a]ny individual, partnership, copartnership, association, corporation or joint stock company offering domestic public cellular radio telephone service authorized by the federal communications commission.”

The Authority’s lack of jurisdiction over CMRS providers implicates 47 U.S.C. § 214(e), which addresses the provision of universal service. Where common carriers seeking universal service support are not subject to a state regulatory commission’s jurisdiction, 47 U.S.C. § 214(e)(6) authorizes the Federal Communications Commission (“FCC”) to perform the ETC designation.²

¹ This finding is not inconsistent with the Authority’s decision in *In re: Universal Service Generic Contested Case*, Docket 97-00888, *Interim Order on Phase I of Universal Service*, pp. 53-57 (May 20, 1998), in which the Authority required intrastate telecommunications carriers to contribute to the intrastate Universal Service Fund including telecommunications carriers not subject to authority of the TRA. The decision in Docket No. 97-00888 was based primarily on 47 U.S.C. § 254(f) which authorizes states to adopt regulations not inconsistent with the Federal Communications Commission’s rules on Universal Service and specifically requires every telecommunications carrier that provides intrastate telecommunications services to contribute to the preservation and advancement of universal service in that state. The *Interim Order* was issued prior to the effective date of 47 U.S.C. § 214(e)(6).

² 47 U.S.C. § 214(e)(6) states:

(6) Common carriers not subject to state commission jurisdiction

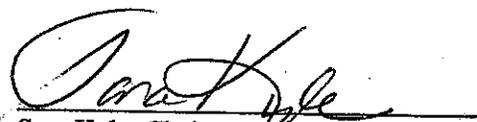
In the case of a common carrier providing telephone exchange service and exchange access that is not subject to the jurisdiction of a State commission, the Commission shall upon request designate such a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the Commission consistent with applicable Federal and State law. Upon request and consistent with the public interest, convenience and necessity, the Commission may, with respect to 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 under this paragraph, 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 Commission shall find that the designation is in the public interest.

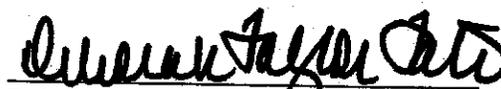
As a matter of "state-federal comity," the FCC requires that carriers seeking ETC designation "first consult with the state commission to give the state commission an opportunity to interpret state law."³ Most carriers that are not subject to a state regulatory commission's jurisdiction seeking ETC designation must provide the FCC "with an affirmative statement from a court of competent jurisdiction or the state commission that it lacks jurisdiction to perform the designation."⁴

The panel noted that the FCC is the appropriate forum for Advantage to pursue ETC status pursuant to 47 U.S.C. § 214(e)(6). This Order shall serve as the above mentioned affirmative statement required by the FCC.

IT IS THEREFORE ORDERED THAT:

The Application of Advantage Cellular Systems, Inc. To Be Designated As An Eligible Telecommunications Carrier is dismissed for lack of subject matter jurisdiction.


Sara Kyle, Chairman


Deborah Taylor Tate, Director


Pat Miller, Director

³ *In the Matter of Federal-State Joint Bd. on Universal Service, CC Docket No. 96-45, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking*, 15 F.C.C.R. 12208, 12264, ¶ 113 (June 30, 2000).

⁴ *See id.* (The "affirmative statement of the state commission may consist of any duly authorized letter, comment, or state commission order indicating that it lacks jurisdiction to perform designations over a particular carrier.")

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

August 2, 2010

IN RE:)	
)	
PETITION FOR DECLARATORY RULING)	DOCKET NO.
AND NUNC PRO TUNC DESIGNATION OF)	10-00083
NEXUS COMMUNICATIONS AS AN ELIGIBLE)	
TELECOMMUNICATIONS CARRIER TO)	
OFFER WIRELESS SERVICE IN TENNESSEE)	

ORDER REFUSING ISSUANCE OF DECLARATORY RULING

This matter came before Chairman Sara Kyle, Director Kenneth C. Hill and Director Mary W. Freeman of the Tennessee Regulatory Authority (“Authority” or “TRA”), the voting panel assigned to this docket, at a regularly scheduled Authority Conference held on May 24, 2010, for consideration of the *Petition for Declaratory Ruling and Nunc Pro Tunc Designation of Nexus Communications as an Eligible Telecommunications Carrier to Offer Wireless Service in Tennessee* (“*Petition*”) filed by Nexus Communications, Inc. (“Nexus”) on April 28, 2010.

BACKGROUND & PROCEDURAL HISTORY

On October 18, 2007, Nexus filed with the Authority an application for a Certificate of Public Convenience and Necessity (“CCN”) to provide competing facilities-based and resold local telecommunications services in Tennessee.¹ In its application, among other things, Nexus stated that it would be providing service through an interconnection/resale agreement with

¹ See *In re: Application of Nexus Communications, Inc. for a CCN to Provide Competing Local Exchange and Interexchange Telecommunications Services in Tennessee*, Docket No. 07-00241, *Application of Nexus Communications, Inc. for Authority to Provide Competing Local Exchange & Interexchange Service* (October 18, 2007).

BellSouth Telecommunications, Inc. d/b/a AT&T Tennessee (“AT&T Tennessee”) and had no plans to install facilities.² Nexus further agreed to adhere to all Authority policies, rules, and orders and to submit wireline activity reports as required.³ The application, however, makes no mention of Nexus providing wireless service in Tennessee. In an Order dated January 8, 2008, the TRA granted Nexus’ application for a CCN, authorizing Nexus to provide competing facilities-based and resold local telecommunications services in Tennessee as described in its application.⁴

On July 11, 2008, Nexus filed an application for designation as an eligible telecommunications carrier (“ETC”) with the Authority in Docket No. 08-00119.⁵ In its ETC application, Nexus stated that it was applying for designation in the service territory of AT&T Tennessee and provided a list of the wire centers for which it requested ETC status.⁶ In addition, Nexus stated that it was seeking designation only for low-income support⁷ and affirmed that it satisfied all statutory requirements for designation.⁸ Consistent with its CCN application, Nexus’ ETC application also omitted any mention that Nexus provided wireless service or that it intended to provide wireless service as an ETC.

² *Id.* at 1 and 7.

³ *Id.* at 11 and 13.

⁴ See *In re: Application of Nexus Communications, Inc. for a CCN to Provide Competing Local Exchange and Interexchange Telecommunications Services in Tennessee*, Docket No. 07-00241, *Initial Order Granting Certificate of Public Convenience and Necessity* (January 8, 2008).

⁵ See *In re: Application of Nexus Communications, Inc. for Designation as an Eligible Telecommunications Carrier*, Docket No. 08-00119, *Application for Designation as an Eligible Telecommunications Carrier* (July 11, 2008).

⁶ *Id.*

⁷ Lifeline and Link Up are two components of the Low Income Program of the Universal Service Fund. The Fund, administered by the Universal Service Administration Company (“USAC”), is designed to ensure that quality telecommunications services are available to low-income customers at just, reasonable and affordable rates. Lifeline support lowers the monthly charge of basic telephone service for eligible consumers. Link Up support reduces the cost of initiating new telephone service. The Federal Communications Commission’s rules concerning Lifeline and Link Up are codified at 47 C.F.R. § 54.400-417. See, *Assessment of Payments Made Under the Universal Service Fund’s Low Income Program*, 2008 WL 5205212 (2008).

⁸ See *In re: Application of Nexus Communications, Inc. for Designation as an Eligible Telecommunications Carrier*, Docket No. 08-00119, *Application for Designation as an Eligible Telecommunications Carrier* (July 11, 2008).

Thereafter, the Authority conducted a review of Nexus' qualifications in accordance with the information provided by Nexus in its ETC application. On October 27, 2008, finding the statutory requirements satisfied, the TRA granted Nexus' ETC application and, based thereon, issued an Order designating Nexus as an ETC in the Tennessee service area footprint of AT&T Tennessee.⁹ As designated by a state commission, like the TRA, Nexus' ETC designation enables it to receive federal low-income universal service support funding in accordance with, and subject to, the authority of the state commission to grant such designation under both state and federal law.¹⁰

Subsequently, on March 23, 2009, Nexus filed a petition requesting that the TRA amend its ETC Order to describe Nexus' services in Tennessee as "wireline and wireless."¹¹ Nexus' request for modification of the ETC Order revealed for the first time that Nexus serves its customers using both wireline and wireless technologies. On June 7, 2009, the TRA declined to amend the language of the ETC Order as Nexus requested and instead amended its ETC Order to definitively state that Nexus had ETC designation for "wireline local exchange services."¹²

On November 25, 2009, Steven Fenker, President of Nexus, filed a letter in Docket No. 08-00119 indicating that, based on the TRA's orders, Nexus applied for and was assigned two Study Area Codes enabling it to receive federal universal service low-income funding for the

⁹ See *In re: Application of Nexus Communications, Inc. for Designation as an Eligible Telecommunications Carrier*, Docket No. 08-00119, *Order Designating Nexus Communications, Inc. as an Eligible Telecommunications Carrier* ("ETC Order") (October 27, 2008).

¹⁰ 47 U.S.C.A. §§ 254(e) and §214(e)(2) and (6).

¹¹ See *In re: Application of Nexus Communications, Inc. for Designation as an Eligible Telecommunications Carrier*, Docket No. 08-00119, *Petition of Nexus Communications, Inc. for Clarification of Final Order* ("Petition for Clarification") (March 23, 2009).

¹² See *In re: Application of Nexus Communications, Inc. for Designation as an Eligible Telecommunications Carrier*, Docket No. 08-00119, *Order Granting Petition for Clarification and Issuance of Amended Order*, p. 2, and attached thereto, *Amended Order Designating Nexus Communications, Inc. as an Eligible Telecommunications Carrier* ("Amended ETC Order"), p. 3 ¶ 3 (June 7, 2009).

provision of Lifeline service using both wireline and wireless technologies.¹³ In his letter, Mr. Fenker asserted that such action was consistent with Nexus' interpretation of Federal Communications Commission ("FCC") Rule 54.201(h), which directs state commissions to designate ETC status to qualified carriers regardless of the technology used to provide service. Moreover, Nexus contended that FCC rule § 54.201(h) broadly authorizes a state-designated ETC to provide service to, and receive federal universal service support funding for, low-income customers using any technology the carrier wishes to offer.¹⁴ In addition, Mr. Fenker stated that Nexus, as a "certified carrier," is subject to TRA enforcement of Lifeline and Link Up regulations as to both wireline and wireless service. Yet, Nexus also stated that it "voluntarily submits" to the TRA's jurisdiction and would comply with TRA rulings enforcing state and federal Lifeline and Link Up regulations "irrespective of the technology Nexus uses to provide service."¹⁵

THE PETITION

Subsequent to its notification from USAC that certain universal service support payments made to Nexus for wireless ETC service were not authorized,¹⁶ Nexus filed on April 28, 2010, a *Petition* urging the Authority to declare that the TRA has jurisdiction under federal and state law to designate Nexus as a wireless ETC, and further, to declare *nunc pro tunc* that Nexus' ETC designation includes authority to provide a wireless low-income offering, *i.e.*, Lifeline and/or Link Up service, in Tennessee.¹⁷ In its *Petition*, Nexus acknowledges that neither the initial ETC

¹³ See *In re: Application of Nexus Communications, Inc. for Designation as an Eligible Telecommunications Carrier*, Docket No. 08-00119, Letter from Steven Fenker, President, Nexus Communications, Inc. (November 25, 2009).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ As referenced in the *Petition*, p. 4 ¶ 13, a letter dated April 16, 2010, from USAC indicated that because Nexus did not appear to be authorized or designated by the TRA to provide wireless ETC service, disbursement of subsidies to Nexus for wireless low-income program subscribers would be discontinued and further, USAC might seek reimbursement from Nexus of monies previously paid to it for such unauthorized services.

¹⁷ *Petition for Declaratory Ruling and Nunc Pro Tunc Designation of Nexus Communications as an Eligible Telecommunications Carrier to Offer Wireless Service in Tennessee ("Petition")* (April 28, 2010).

Order nor the Amended ETC Order mentioned or specifically granted authority to Nexus to provide wireless ETC services.¹⁸ Despite this admission, Nexus reiterates its earlier contentions that based on the TRA's orders designating Nexus as an ETC and Nexus' interpretation of FCC Rules, specifically 47 C.F.R. § 54.201(h), it is justified in applying for and obtaining two Study Area Codes to provide federally-subsidized service to low-income customers using wireline¹⁹ and wireless technologies.²⁰

In its *Petition*, Nexus further asserts that the Authority is empowered to authorize Nexus to provide federally subsidized low-income wireless service not only under federal law, but also under state law.²¹ At paragraph 17, Nexus proffers its interpretation of Tenn. Code Ann. § 65-4-101(6)(F) concerning the limits of regulation upon providers of "domestic public cellular radio telephone service," commonly known as commercial mobile radio service ("CMRS") or wireless telephone service, and the statute's classification of providers of such services as "nonutilities." According to Nexus, Tenn. Code Ann. § 65-4-101(6)(F) does not preclude but, instead, preserves, the exercise of TRA jurisdiction over the wireless service of a certificated carrier that is subject to regulation under Chapter 5 of Title 65.²²

Nexus asserts that Tenn. Code Ann. § 65-4-101(6)(F) distinguishes between a CMRS provider that exclusively offers wireless service in competition with another CMRS provider and a CMRS provider that is classified as a public utility due to also furnishing services regulated by

¹⁸ *Petition*, pp. 2-3, ¶¶ 2 and 7 (April 28, 2010).

¹⁹ *Petition*, p. 3, ¶¶ 8-9 and footnote 2 (April 28, 2010) ("Nexus applied for a wireline code on July 24, 2009, and received it two days later on July 31, 2009."); see also, *Affidavit of Steven Fenker* attached to *Petition*, ¶ 16 (April 28, 2010) ("On July 29, 2009 Nexus submitted to USAC a Study Area Code ("SAC Code") request form for technology type 'wireline.' USAC after only a two day review of the Original Order issued Nexus a separate 'wireline' SAC Code on July 31, 2009.").

²⁰ *Petition*, p. 3 (April 28, 2010) ("Two months later, on August 21, 2009, USAC issued Nexus a wireless code for Tennessee."); see also, *Affidavit of Steven Fenker* attached to *Petition*, ¶ 15 (April 28, 2010) ("USAC after a two month review of the application and an analysis of both Orders, finally issued Nexus a separate "wireless" SAC Code on August 21, 2009.").

²¹ *Petition*, p. 5, ¶¶ 16-17.

²² *Petition*, pp. 5-6, ¶ 17(a-g).

the TRA. Further, Nexus contends that because it is subject to TRA jurisdiction for its wireline/landline services, it is likewise subject to TRA regulation as a CMRS provider for its wireless service, at least insofar as concerns designation of ETC.²³

On May 11, 2010, Nexus filed an *Amendment to Petition* supplementing its interpretation of the statutory provision at issue and inserting an additional argument in support of its assertion that the TRA's jurisdiction currently includes wireless telephone service. In its *Amendment to Petition*, Nexus asserts that the language of Tenn. Code Ann. § 65-4-101(6)(F) acts to deregulate only certain entities that provide wireless service, and not the service itself.²⁴ To illustrate its point, Nexus offers its comparative analysis of the language of the subject statute with language found in Tenn. Code Ann. § 65-5-203 (2006), which prohibits the exercise of TRA jurisdiction over broadband services. Based on its comparison of the statutes, Nexus contends that the regulatory exemption found in Tenn. Code Ann. § 65-4-101(6)(F) is not for uniform application. Rather, Nexus surmises that had the legislature intended to exempt wireless service from the TRA's jurisdiction, it could have done so using the language of the later-enacted broadband statute.²⁵ In other words, because Tenn. Code Ann. § 65-4-101(6)(F)²⁶ does not utilize language identical to the 2006 broadband statute, this somehow evidences an intent to provide, and not to remove, TRA jurisdiction for particular entities only, *i.e.*, that providers of wireless service that also offer a service that the TRA has jurisdiction to regulate, should be subject to TRA regulation for services that it provides that the TRA would not otherwise have jurisdiction.

Finally, Nexus contends that because it purports to supply landline telephone service and does not exclusively provide wireless telephone services and, thus, "is not one of those entities"

²³ *Petition*, p. 6, ¶ 17(d-f).

²⁴ *Amendment to Petition* (May 11, 2010).

²⁵ *Id.*

²⁶ Tenn. Code Ann. § 65-4-101(6)(F) was enacted prior to 1995, while the Tennessee Public Service Commission ("TPSC") was still in existence. In 1995, the 99th General Assembly abolished the TPSC and thereafter created the TRA in its stead to effectively govern and regulate public utilities in the state of Tennessee.

to which, under its interpretation of the statute, the regulatory exemption applies.²⁷ That is, because the TRA has jurisdiction over Nexus' landline service, it follows that the TRA also has jurisdiction and authority over Nexus' wireless service - but only to the extent necessary to designate it eligible to receive federal subsidies for wireless service to qualified low-income consumers. In short, Nexus claims that as a certificated competing local exchange carrier ("CLEC"), and therefore a public utility subject to TRA jurisdiction, it is and remains a public utility, if not for all of its services, then at least for the limited purpose of receiving wireless ETC designation.

FINDINGS AND CONCLUSIONS

In this docket, Nexus asks the TRA to declare that it has jurisdiction under federal and state law to designate Nexus as a wireless ETC provider, and further, to declare *nunc pro tunc* that the ETC designation for wireline services granted to Nexus by the TRA on October 27, 2008, included authority to provide wireless Lifeline and Link Up services in Tennessee, thereby, making Nexus eligible as of that date to receive federal universal support funding for provision of wireless services.

To preserve and advance universal telecommunications service, the United States Congress has made federal funding, or subsidies, available to telecommunications carriers that meet certain minimum requirements.²⁸ The Authority agrees with Nexus insofar as that, under federal law, state commissions, such as the TRA, hold relatively broad power to designate as ETCs telecommunications carriers that meet those requirements, thereby enabling such carriers to receive federal universal service subsidies.²⁹ In addition, under 47 C.F.R. § 54.201(h), a state commission that determines that a carrier has satisfied the prerequisites for ETC designation is

²⁷ *Id.*

²⁸ 47 U.S.C.A. § 254(e).

²⁹ 47 U.S.C.A. § 214(e)(2).

not restricted from granting, nor permitted to deny, ETC designation due to such carrier's chosen method of distributing service.³⁰ The TRA further recognizes that when a carrier seeking ETC designation is not subject to the jurisdiction of a state commission, whether due to the nature or geographical location of its service, federal law directs that the FCC perform the designation.³¹

Notwithstanding the potential authority that the TRA may have under federal law, ultimately, the TRA is a legislatively created body of the state and empowered only to exercise the jurisdiction, power, and authority delegated to it by the Tennessee General Assembly.³² In *BellSouth Advertising & Publishing Corp. v. TRA*, the Supreme Court of Tennessee stated, "In defining the authority of the TRA, this Court has held that '[a]ny authority exercised by the TRA must be the result of an express grant of authority by statute or arise by necessary implication from the expressed statutory grant of power.'"³³ The General Assembly has charged the TRA with "general supervisory and regulatory power, jurisdiction and control over all *public utilities*" within Tennessee.³⁴

While "public utility" is defined broadly within Tenn. Code Ann. § 65-4-101, the General Assembly has expressly excluded "nonutilities" from the TRA's jurisdiction.³⁵ "Nonutilities" has been defined to include any entity "offering domestic public cellular radio telephone service" (*i.e.*, CMRS and wireless service providers).³⁶

(6) . . . "Public utility" as defined in this section shall not be construed to include the following *nonutilities*:

(F) Any individual, partnership, copartnership, association, corporation or joint stock company offering *domestic public cellular radio telephone service* authorized by the federal communications commission . . .³⁷

³⁰ 47 C.F.R. § 54.201(h).

³¹ 47 U.S.C.A. § 214(e)(6).

³² *BellSouth Advertising & Publishing Corp. v. Tennessee Regulatory Auth.*, 79 S.W.3d 506, 512 (Tenn. 2002); *Tennessee Pub. Serv. Comm'n v. Southern Ry. Co.*, 554 S.W.2d 612, 613 (Tenn. 1977).

³³ *Id.*

³⁴ Tenn. Code Ann. § 65-4-104 (*emphasis added*).

³⁵ Tenn. Code Ann. § 65-4-101(6).

³⁶ Tenn. Code Ann. § 65-4-101(6)(F).

³⁷ Tenn. Code Ann. § 65-4-101(6)(F) (*emphasis added*).

In addition, the statute provides a regulatory exception to the complete removal of regulatory authority over such providers so long as competition is restricted to one CMRS provider in the same cellular geographical area. Even then, the TRA has limited jurisdiction to review only the customer rates of such providers:

*... until at least two (2) entities, each independent of the other, are authorized by the federal communications commission to offer domestic public cellular radio telephone service in the same cellular geographic area within the state, the customer rates **only** of a company offering domestic public cellular radio telephone service shall be subject to review by the Tennessee Regulatory Authority pursuant to §§ 65-5-101 – 65-5-104. . .*³⁸

The TRA's delegated authority over wireless service providers is limited to rates, conditioned on and extending only until the FCC has authorized two wireless providers to offer service in the same cellular geographical area of the state. Expressly set out within the statutory provision itself is the triggering event that rescinds the TRA's limited grant of jurisdiction over wireless providers:

*... Upon existence in a cellular geographical area of the conditions set forth in the preceding sentence, domestic public cellular radio telephone service in such area [where the FCC has authorized two providers], for all purposes, shall automatically cease to be treated as a public utility. . . . The [TRA's] authority . . . is expressly limited [to the absence of two authorized providers] and the authority shall have no authority over resellers of domestic public cellular radio telephone service. . . . This subdivision (6)(F) does not affect, modify or lessen the regulatory authority's authority over public utilities that are subject to regulation pursuant to chapter 5 of this title.*³⁹

The TRA has long recognized the plain language of Tenn. Code Ann. § 65-4-101(6)(F) limits, and removes, the TRA's authority over wireless service providers. Thus, the TRA has consistently acknowledged its lack of state-delegated authority over CMRS providers in both the

³⁸ *Id.*

³⁹ *Id.*

broad sense⁴⁰ and specifically as to ETC designation.⁴¹ As set forth extensively above, Nexus sought a ruling on the issue of wireless ETC designation previously when it filed its *Petition for Clarification* with the Authority in Docket No. 08-00119.⁴² Consistent with its previous rulings on matters involving wireless service, the Authority finds that it does not have jurisdiction over wireless providers based on the express definition of “nonutilities” found in Tenn. Code Ann. § 65-4-101(6)(F), and therefore, specifically does not have subject matter jurisdiction over the precise issue upon which the Company seeks a declaratory ruling.

Tenn. Code Ann. § 4-5-223⁴³ provides that a state agency, upon petition for a declaratory order, must either convene a contested case hearing and issue a declaratory order or refuse to issue a declaratory order within sixty days of receipt of the petition. In the case of *Hughley v. State*, the Tennessee Supreme Court found that the lack of a contested case hearing on the

⁴⁰ See *In re: Sprint Communications Company, L.P.*, Docket No. 96-01411, *Final Order of Arbitration Awards* (March 26, 1997), PUR Slip Copy, 1997 WL 233027 *5 (during an Arbitration Conference held on March 26, 1997, the Authority acknowledged its lack of jurisdictional authority to regulate cellular wireless providers when, in ruling on a dispute between Sprint and BellSouth concerning the placement of combined traffic types (local, toll, and wireless) on the same trunk groups, and despite ultimately voting two to one on the specific issue, the Authority panel members all agreed that the Authority lacked jurisdiction over wireless.)

⁴¹ See *In re: Application of Advantage Cellular Systems, Inc. to be Designated as an Eligible Telecommunications Carrier*, Docket No. 02-01245, *Order* (April 11, 2003) (dismissing the application of Advantage Cellular Systems, Inc. for designation as an ETC because, as Advantage Cellular was a CMRS provider, the TRA lacked subject matter jurisdiction because the definition of public utilities under Tenn. Code Ann. § 65-4-101 specifically excludes CMRS providers. In addition the panel noted that under 47 U.S.C.A. § 214(e)(6), the FCC is authorized to perform ETC designations for carriers that are not subject to TRA jurisdiction and that its *Order* serves as an affirmative statement that it lacks jurisdiction to perform the ETC designation as to CMRS carriers.)

⁴² See *In re: Application of Nexus Communications, Inc. for Designation as an Eligible Telecommunications Carrier*, Docket No. 08-00119, *Petition of Nexus Communications, Inc. for Clarification of Final Order* (March 23, 2009).

⁴³ Tenn. Code Ann. § 4-5-223(a) provides:

- (a) Any affected person may petition an agency for a declaratory order as to the validity or applicability of a statute, rule, or order within the primary jurisdiction of the agency. The agency shall:
- (1) Convene a contested case hearing pursuant to the provisions of this chapter and issue a declaratory order, which shall be subject to review in the chancery court of Davidson County, unless otherwise specifically provided by statute, in the manner provided for the review of decisions in contested cases; or
 - (2) Refuse to issue a declaratory order, in which event the person petitioning the agency for a declaratory order may apply for a declaratory judgment as provided in § 4-5-225.

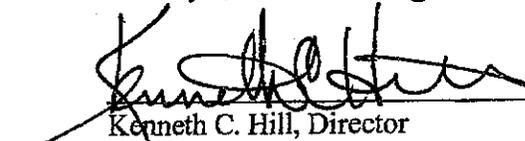
Tenn. Code Ann. § 4-5-223(c) states, “[i]f an agency has not set a petition for declaratory order for a contested case hearing within sixty (60) days after receipt of the petition, the agency shall be deemed to have denied the petition and to have refused to issue a declaratory order.”

petition constitutes refusal to issue a declaratory order under Tenn. Code Ann. § 4-5-223(a)(2), even when the agency provides a decision with reasons that may go to the merits of the petition.⁴⁴ Accordingly, for the above stated reasons, the panel voted unanimously to refuse to issue a declaratory order pursuant to Tenn. Code Ann. § 4-5-223(a)(2).

IT IS THEREFORE ORDERED THAT:

In accordance with Tenn. Code Ann. § 4-5-223(a)(2), the Tennessee Regulatory Authority refuses to issue a declaratory order on the *Petition for Declaratory Ruling and Nunc Pro Tunc Designation of Nexus Communications as an Eligible Telecommunications Carrier to Offer Wireless Service in Tennessee* filed by Nexus Communications, Inc.


Sara Kyle, Chairman


Kenneth C. Hill, Director


Mary W. Freeman, Director

⁴⁴ *Hughley v. State*, 208 S.W.3d 388 (Tenn. 2006) (holding that a letter of denial from the Department of Correction, issued without a hearing in response to a petition for declaratory order, is not equivalent to a “final order” in a contested case proceeding even when such response is issued after research and analysis of petitioner’s grounds for seeking same and purports to deny petitioner’s claims on the merits, and accordingly, the sixty-day statute of limitations established in Tenn. Code Ann. § 4-5-322(b)(1) is not applicable.).

EXHIBIT I

COMMONWEALTH OF VIRGINIA



P.O. BOX 1197
RICHMOND, VA
23218-1197

TELEPHONE: (804) 371-9420
FAX: (804) 371-9069

WILLIAM IRBY
DIRECTOR

STEVEN C. BRADLEY
DEPUTY DIRECTOR

KATHLEEN A. CUMMINGS
DEPUTY DIRECTOR

STATE CORPORATION COMMISSION DIVISION OF COMMUNICATIONS

November 17, 2010

Ms. Jacqueline Hankins
Helein & Marashlian, LLC
The CommLaw Group
1420 Spring Hill Road, Suite 205
McLean, Virginia 22102

Dear Ms. Hankins:

This is in response to your October 25, 2010 letter to me on behalf of Boomerang Wireless LLC, d/b/a Ready Mobile ("Boomerang") requesting clarification of the Virginia State Corporation Commission's ("Commission") jurisdiction over the designation of wireless Eligible Telecommunications Carriers ("ETC") in Virginia.

Only one wireless carrier, Virginia Cellular LLC, has sought designation as an ETC in Virginia. In that instance (Case No. PUC010263), by order dated April 9, 2002, the Commission determined, pursuant to Section 214 (e) (6) of the Telecommunications Act of 1996, that Virginia Cellular LLC should apply to the Federal Communications Commission for ETC designation because it had not asserted jurisdiction over CMRS carriers. A copy of this order is enclosed.

Very truly yours,

William Irby

WI/ctj

Enclosure

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

AT RICHMOND, APRIL 9, 2002

COMMONWEALTH OF VIRGINIA, ex rel.¹

At the relation of the

STATE CORPORATION COMMISSION

CASE NO. PUC970135

Ex Parte, in re: Implementation
of Requirements of § 214(e) of the
Telecommunications Act of 1996

IN RE:

APPLICATION OF VIRGINIA CELLULAR LLC

CASE NO. PUC010263

For designation as an eligible
telecommunications provider under
47 U.S.C. § 214(e) (2)

ORDER

On September 15, 1997, the State Corporation Commission ("Commission") established the docket in Case No. PUC970135 to consider the requests of local exchange carriers ("LECs") to be designated as eligible telecommunications carriers ("ETC designation") to receive universal service support pursuant to § 214(e) of the Telecommunications Act of 1996, 47 U.S.C. § 251 et seq., ("Act") and associated Federal Regulations.¹ The Commission's exercise of its jurisdiction under § 214(e) (2) of the Act has been to establish a simple and streamlined process for telecommunications carriers to certify their eligibility with a minimum of regulatory burden placed upon each applicant.

¹ 47 C.F.R. § 54.201-207.

All Virginia carriers receiving an ETC designation have merely been required to file an affidavit which, among other matters, certifies that all requirements of the Act for designation are met.²

Until the above-captioned Application was filed in Case No. PUC010263 by Virginia Cellular LLC ("Virginia Cellular" or "Applicant") for ETC designation, these proceedings have been uncontested. This is the first application by a Commercial Mobile Radio Service ("CMRS") carrier for ETC designation.³ Pursuant to the Order Requesting Comments, Objections, or Requests for Hearing, issued by the Commission on January 24, 2002, the Virginia Telecommunications Industry Association ("VTIA") and NTELOS Telephone Inc. ("NTELOS") filed their respective comments and requests for hearing on February 20, 2002. Virginia Cellular filed Reply Comments on March 6, 2002.⁴

The comments of NTELOS and VTIA both contest the sufficiency of the Application and claim Virginia Cellular has

² See Order issued November 21, 1997, in Case No. PUC970135, pp. 2-4 ("November 21, 1997, Order"). Also, the annual certification procedure to comply with 47 C.F.R. §§ 54.313 and 314 has been reduced to filing a form affidavit approved by the Commission in a Preliminary Order, issued August 29, 2001, in Case No. PUC010172.

³ Virginia Cellular is a CMRS carrier as defined in 47 U.S.C. § 153(27) and is authorized as the "A-band" cellular carrier for the Virginia 6 Rural Service Area, serving the counties of Rockingham, Augusta, Nelson, and Highland and the cities of Harrisonburg, Staunton, and Waynesboro.

⁴ On March 4, 2002, Virginia Cellular filed a Consent Motion requesting until March 6, 2002, to file Reply Comments. There being no objection, we now grant the Consent Motion.

failed to demonstrate how the public interest will be served.⁵ NTELOS and VTIA each allude in their comments to other expected applications for ETC designation by wireless and CLEC carriers to follow this case of first impression. For that reason, we are asked by VTIA and NTELOS to convene a hearing and establish certain standards for the provisioning of the nine services specified in 47 C.F.R. § 54.101.⁶ Each applicant is required to provide these nine services to be eligible for ETC designation.

VTIA further comments that "[i]t is not clear how the designation of Virginia Cellular as an ETC will affect the distribution of Universal Funds to the existing carriers in any given rural exchange area." Virginia Cellular replies that this "macroeconomic concern" need not be addressed with this Application. Rather, the Federal Communications Commission ("FCC") and the Federal State Joint Board on Universal Service

⁵ § 214(e)(2) of the Act requires that an ETC designation in areas served by a rural telephone company be based upon a finding that the designation is in the public interest. The Commission did recognize in its November 21, 1997, Order that any carrier seeking ETC designation in a rural area would have the burden of proving that such designation is in the public interest if challenged. Virginia Cellular is seeking ETC designation in the service territories of the following rural telephone companies: Shenandoah Telephone Company ("Shenandoah"), Clifton Forge Waynesboro Telephone Company ("NTELOS"), New Hope Telephone Company, North River Cooperative, Highland Telephone Cooperative, and Mountain Grove-Williamsville Telephone Company ("MGW").

⁶ The nine services required to be offered include: voice grade access to the public switched network; local usage; dual tone multi-frequency signaling or its functional equivalent; single-party service or its functional equivalent; access to emergency services; access to operator services; access to interexchange service; access to directory assistance; and toll limitation for qualifying low-income consumers. Also, the services must be advertised in appropriate media sources. See In Re: Federal-State Joint Board of Universal Service, Report and Order, CC Docket No. 96-45, ¶ 145 (May 8, 1997) ("Universal Service Report & Order").

are reported by Virginia Cellular to be conducting ongoing proceedings to ensure the solvency of the high-cost support fund.⁷ Presumably, VTIA views any public interest served by Virginia Cellular's ETC designation to depend upon whether there would be a consequent diminution of universal service funds.

Virginia Cellular cites the authority of § 214(e)(6) of the Act for this Commission to send Applicant to the FCC for ETC designation if this Commission declines to act on its Application.⁸ In its Reply Comments, Virginia Cellular reports that the "FCC has been actively processing ETC applications on behalf of states which have declined to exercise jurisdiction [over CMRS carriers]. Its internal processing time has been six months, and it has met that timeline in almost all of its proceedings [and] . . . most, if not all of the issues raised by the commenters have been previously addressed by the FCC in its prior orders involving applications for ETC status."⁹

The Commission finds that § 214(e)(6) of the Act is applicable to Virginia Cellular's Application as this Commission has not asserted jurisdiction over CMRS carriers and that the

⁷ Reply Comments at p. 5.

⁸ Pursuant to § 332(c)(3), 47 U.S.C. § 332(c)(3), state regulation of the entry of or the rates charged by any commercial mobile service or any private mobile service is preempted. The Commission has deregulated all Virginia radio common carriers and cellular mobile radio communications carriers. See Final Order issued October 23, 1995, Case No. PUC950062.

⁹ Reply Comments at p. 3.

Applicant should apply to the FCC for ETC designation.¹⁰ The Applicant points out that if Virginia Cellular is designated as an ETC carrier, then the Commission must redefine the service areas of NTELOS and Shenandoah, pursuant to 47 C.F.R.

§ 54.207(c).¹¹ The Applicant has indicated a willingness to propose a plan to redefine these companies' service areas and may submit such a plan with its application to the FCC for ETC designation.

If necessary, this Commission will participate with the FCC and Federal-State Joint Board in redefining the service areas of NTELOS and Shenandoah for "the purpose of determining universal service obligations and support mechanisms." (47 C.F.R.

§ 54.207(a))¹² Although the FCC will make the final determination on Virginia Cellular's requests, we need to leave this docket open in case there is additional action we must take with respect to defining the service areas of NTELOS and Shenandoah.¹³

¹⁰ The action is similar to that taken by the Commission in Case No. PUC010172 in its August 29, 2001, Order that required cooperatives to certify directly with the FCC.

¹¹ The Commission believes that the service area of MGW does not necessarily need to be redefined if Virginia Cellular is designated as an ETC in that territory. However, if the FCC determines otherwise, the Commission will consider additional action if necessary.

¹² Pursuant to 47 C.F.R. § 54.207(c), if the Applicant proposes to redefine these two companies' service areas, the FCC's procedures require the Commission's agreement on the definitions.

¹³ At this juncture, it is unclear whether the Commission will need to address the redefinitions once disaggregation plans are filed at the FCC pursuant to 47 C.F.R. § 54.315(a).

NOW UPON CONSIDERATION of all the pleadings of record and the applicable law, the Commission is of the opinion that Virginia Cellular should request the FCC to grant the requested ETC designation, pursuant to 47 U.S.C. § 214(e)(6).

Accordingly, IT IS ORDERED THAT Case No. PUC010263 will remain open for further order of the Commission.

AN ATTESTED COPY hereof shall be sent by the Clerk of the Commission to: all LECs certified in the Commonwealth of Virginia, as set out in Appendix A of this Order; David A. LaFuria, Esquire, Lukas Nace Gutierrez & Sachs, 1111 Nineteenth Street, N.W., Suite 1200, Washington, D.C. 20036; C. Meade Browder, Jr., Senior Assistant Attorney General, Division of Consumer Counsel, Office of Attorney General, 900 East Main Street, Second Floor, Richmond, Virginia 23219; William F. Caton, Acting Secretary, Federal Communications Commission, Office of the Secretary, 445 12th Street, S.W., Washington, D.C. 20554; and the Commission's Office of General Counsel and Division of Communications.