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February 14, 2012

Via ECFS

Marlene H. Dortch, Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

**Re: Triangle Communication System, Inc.'s
Petitions for Agreement in Redefining the
Service Areas of Rural Telephone Companies in Montana**

**WC Docket No. 09-197
WC Docket No. 10-90 et al.**

Notice of Ex Parte Presentation

Dear Ms. Dortch:

Triangle Communication System, Inc. ("TCS"), by its attorney, hereby submits this *ex parte* filing addressing the TCS Petitions for Redefinition filed on August 4, 2011 requesting Federal Communications Commission ("FCC" or "Commission") agreement with the Montana Public Service Commission's ("MPSC") decision to redefine the service areas of two rural telephone companies – Central Montana Communications ("CMC") and Triangle Telephone Cooperative Association, Inc. ("TTCA").¹ On November 14, 2011, the Commission initiated a proceeding to consider the Redefinition Petitions pursuant to section 54.207 of the Commission's rules.² On February 10, 2012, TCS's counsel, Kenneth Johnson of Bennet & Bennet, PLLC, spoke to Alexander Minard of the FCC's Wireline Competition Bureau regarding this proceeding. TCS's counsel discussed the need for a timely decision in this matter in order to

¹ Wireless Competition Bureau Seeks Comment on Triangle Communication System, Inc.'s Petitions for Agreement in Redefining the Service Areas of Rural Telephone Companies in Montana, WC Docket No. 09-197, *Public Notice*, DA 11-1417 (August 17, 2011).

² Wireless Competition Bureau Initiates Proceeding to Consider Triangle Communication System, Inc.'s Petitions for Agreement in Redefining the Service Areas of Rural Telephone Companies in Montana, WC Docket No. 09-197, *Public Notice*, DA 11-1884 (November 14, 2011).

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provide TCS with the certainty it needs to participate in the Commission's Phase I Mobility auction scheduled to take place on September 27, 2012.³

TCS is an eligible telecommunications carrier ("ETC"), designated by the State of Montana, and has access to spectrum. ETC status and access to spectrum are required in order for an entity to participate in the Commission's Mobility Fund auctions.⁴ From a technical standpoint, TCS appears to have the qualifications necessary to participate in the upcoming Mobility Fund auction. However, there remains a degree of uncertainty regarding TCS's ETC status since the Communications Act of 1934, as amended, requires FCC confirmation when a state commission, after taking into consideration recommendations of the Federal-State Joint Board ("Joint Board"), establishes a different definition of service area for a rural telephone company.⁵ While TCS believes it qualifies to participate in the pending Mobility Fund Phase I Auction, it makes policy sense and is in the public interest for the FCC to remove any uncertainty about TCS's ETC status *well in advance of the Phase I Auction*.⁶ Accordingly, TCS requests that the FCC either 1) expeditiously rule on TCS's Petitions for Redefinition to provide clarity on TCS's ETC status; or 2) clarify that, as a state-designated ETC, TCS has permission to participate in the pending Auction. TCS believes the first option of simply ruling on TCS's Petitions is the better option since it explicitly takes Section 214(e)(5) into account.

In the FCC's recent *Clarification Order* concerning the *USF/ICC Transformation Order*, the Commission clarified "that an applicant must have obtained any Commission approvals necessary for the spectrum access prior to submitting an application to participate in competitive bidding."⁷ This demonstrates the FCC's acknowledgment that certainty is an essential ingredient in any successful auction and that participants need to have their status squared away prior to the application process. This recognition of the need for certainty and timeliness is buttressed by the FCC's promise that it "will make every effort to process such [ETC] applications in a timely fashion."⁸

TCS's counsel also discussed the FCC's recent decision to eliminate its now "obsolete" Section 54.315 disaggregation rule.⁹ The FCC concluded that the abolishment of the identical

³ See FCC Announces Steps to Close Nation's Gaps in Advanced Mobile Service Through the Mobility Fund Phase I Auction, FCC News Release (February 10, 2012).

⁴ See *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 at ¶ 394, (Nov. 18, 2011) (*USF/ICC Transformation Order*), *pets. for review pending*, *Direct Commc'ns Cedar Valley, LLC v. FCC*, No. 11-9581 (10th Cir. filed Dec. 18, 2011) (and consolidated cases) ("*USF/ICC Transformation Order*").

⁵ 47 U.S.C. § 214(e)(5); 47 C.F.R. §§ 54.207(b) and (c).

⁶ Certainty about TCS's ability to participate in the auction will not only benefit TCS, allowing it to ensure that the significant financial expenditures made in preparation for the auction are justifiable, it will allow potential auction competitors to more accurately assess their own strategic position in preparation for the auction by clarifying the entities that may lawfully participate. TCS expects that an FCC decision on this matter by May 2012 would provide TCS with the time it needs to prepare for the September 27, 2012 Phase I Auction.

⁷ See *Connect America Fund et al.*, WC Docket No. 10-90 et al., Order, DA 12-147 at ¶ 19, (February 3, 2012) ("*Clarification Order*").

⁸ *USF/ICC Transformation Order* at ¶ 390.

⁹ *Clarification Order* at ¶ 16.

support rule makes the need for disaggregation moot.¹⁰ Likewise, the elimination of identical support lessens, if not moots, the need to address creamskimming concerns in the application of FCC Rule Section 54.207. Unfortunately, unlike Rule Section 54.315, Rule Section 54.207 stems from a specific and direct statutory mandate. Accordingly, the FCC cannot eliminate the rule.¹¹ However, the FCC can and should de-emphasize the need under Rule Section 54.207 for a rigorous creamskimming analysis based on the new universal service policies and rules established in the *USF/ICC Transformation Order*. By establishing separate Mobility Funds and eliminating the identical support rule,¹² the FCC has removed mobile carriers from the legacy, rate-of-return universal service regime. Competitive concerns that redefining the service areas of rural telephone companies CMC and TTCA might have a harmful impact on the universal service fund or negative effect on rural telephone companies have been effectively mooted by the FCC's recognition of wireless service as a complement¹³ to wireline broadband service and the Commission's proposed use of competitive bidding to determine wireless ETC support levels.¹⁴ As TCS's counsel noted, the FCC is operating under a new universal service regime and creamskimming concerns are, like the disaggregation rule,¹⁵ a relic of the past.

Pursuant to Section 1.1206 of the Commission's Rules, this letter is being filed via ECFS with your office. Should you have any questions or require additional information, please do not hesitate to contact the undersigned.

Respectfully submitted,

/s/
Kenneth C. Johnson
Counsel for Triangle Communication
System, Inc.

cc (via email): Trent Harkrader
Alexander Minard

¹⁰ *Id.*

¹¹ TCS does not consider forbearance from enforcing FCC Rule Section 54.207 as a viable legal option since the FCC would also be forbearing from enforcing a statute – in this case 47 U.S.C. § 214(e)(5). There is no good reason for the FCC to test the legal boundaries of its forbearance authority when it is seeking auction certainty.

¹² *USF/ICC Transformation Order* at ¶ 498.

¹³ *Id.* at ¶ 53. See also fn. 826.

¹⁴ *Id.* at ¶ 1121, *et. seq.*

¹⁵ By eliminating its disaggregation rule – specifically used in the past by the FCC to provide a remedy to creamskimming, the FCC has already implicitly acknowledged and set precedent that creamskimming is no longer an acute policy concern. See *in re Telecommunications Carriers Eligible for Universal Service Support*, WC Docket No. 09-197, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Cellular Properties Petition for Commission Agreement in Redefining the Service Area of Wabash Telephone Cooperative, Inc. in the State of Illinois Pursuant to 47 C.F.R. Section 54.207(c)*, Order, DA 11-441 (March 7, 2011) (promoting the use of disaggregation to assuage creamskimming concerns).