

ITEM NO. 9

**PUBLIC UTILITY COMMISSION OF OREGON
STAFF REPORT
PUBLIC MEETING DATE: July 1, 2003**

REGULAR X **CONSENT** _____ **EFFECTIVE DATE** N/A

DATE: June 20, 2003

TO: John Savage

FROM: John Wright through Dave Booth and Phil Nyegaard

SUBJECT: RCC MINNESOTA, INC.: (Docket No. UM 1083) Application for Designation as an Eligible Telecommunications Carrier Pursuant to the Telecommunications Act of 1996.

STAFF RECOMMENDATION:

Staff recommends the Commission conduct an investigation of the application by RCC Minnesota, Inc., a commercial mobile radio service (CMRS) carrier, for classification as an Eligible Telecommunications Carrier (ETC) qualified to receive federal universal service fund (USF) support.¹

DISCUSSION:

This application, the first in Oregon by a CMRS carrier seeking to be designated as an ETC, raises two key issues.² First, is it appropriate for the Commission to assert jurisdiction over the process of designating CMRS carriers as ETCs for the federal USF purposes? Second, if the Commission does assert jurisdiction, what are the public policy ramifications of granting federal ETC status to CMRS carriers?³

A. Overview of the RCC Minnesota Application

RCC Minnesota provides CMRS service over a geographic area that encompasses approximately two-thirds of the State of Oregon. In this application, the Company seeks designation as a federal ETC in the incumbent local exchange carrier (ILEC) service territories listed below.

¹ "CMRS" is an FCC term that includes mass market PCS and cellular service.

² A similar application was made by United States Cellular in Docket UM 1084.

³ The eligibility of CMRS carriers to receive federal USF support was affirmed in FCC Order No. 00-2895 which affirmed the policy of "technological neutrality" between competing services and explicitly rejected denying CMRS carriers eligibility to receive federal USF support.

1. 40 wire centers served by Qwest Corporation (Qwest) and 19 wire centers served by Verizon Northwest, Inc. (Verizon). Qwest and Verizon are classified as non-rural carriers by the FCC. In approximately half of these wire centers, RCC Minnesota provides only partial geographic coverage.
2. Complete geographic coverage of eleven rural ILEC service territories encompassing approximately 27 wire centers.⁴
3. Partial geographic coverage of the service territories of five rural ILECs that include over 80 wire centers.⁵

Note that because FCC cellular licenses do not necessarily conform to ILEC boundaries, RCC Minnesota often provides only partial geographic coverage of ILEC service territories. The fact that CMRS carriers provide only partial geographic coverage of ILEC wire centers has been a source of controversy in other jurisdictions. This will likely be the case for RCC Minnesota's application as well.⁶

B. State Designation of Federal ETCs

State involvement in the process of designating common carriers as federal ETCs stems from 47 U.S.C. § 214(e)(2) which requires state commissions to designate a common carrier as an ETC if it offers and advertises services supported by the federal universal service support mechanism throughout its designated service area.⁷ This Commission has made the requisite ETC designations for all Oregon ILECs and, as required by FCC regulations, re-certifies ILECs on an annual basis.

⁴ Eagle Telephone System, Inc., Helix Telephone Company, Malheur Home Telephone Company, Monroe Telephone Company, Oregon Telephone Corporation, Peoples Telephone Company, Pine Telephone Company, Pioneer Telephone Company, Roome Telecommunications, Inc., Scio Mutual Telephone Association, Stayton Cooperative Telephone Company. Also listed in the application is Asotin Telephone Company in Washington.

⁵ Midvale Telephone Exchange, Inc., CenturyTel of Eastern Oregon, Inc., CenturyTel of Oregon, Inc., Oregon-Idaho Utilities, Inc., United Telephone - Northwest. Also listed in the application is Humboldt Telephone Company of Nevada.

⁶ On page three of its application, RCC Minnesota argues that in order to accommodate CMRS carriers, states may approve competitive ETC service area boundaries that are not identical with ILEC wire center boundaries. However, the Company cites no federal statute or regulation to support this contention.

⁷ 47 C.F.R. § 51.101(a) specifies the following services as being supported by federal universal service support mechanisms: a) voice grade access to the public switched network; 2) local usage; 3) dual tone multi-frequency signaling or its functional equivalent; 4) single-party service or its functional equivalent; 5) access to emergency services; 6) access to operator services; 7) access to interexchange services; 8) access to directory assistance; 9) toll limitation for qualifying low income consumers. An ETC must offer all of these services to receive federal USF support.

In areas served by non-rural ILECs, 47 U.S.C. § 214(e)(2) also provides that state commissions "**shall**" designate more than one common carrier as a federal ETC within a specific service area. Therefore, if a carrier meets the requisite criteria of offering and advertising services supported by the federal USF mechanism, a state commission must grant ETC status with no latitude for deviation.

In areas served by rural ILECs, 47 U.S.C. § 214(e)(2) allows state commissions significantly greater latitude. State commissions "**may**" designate more than one ETC in a rural service area if they find such a designation to be in the public interest. In theory, this gives state commissions discretion to decline an ETC application based on a public policy rationale even if the applicant complies with requisite criteria of offering and advertising USF supported services.

C. State Jurisdictional Authority over CMRS Carriers

Although 47 U.S.C. § 214(e)(2) grants state commissions primary authority to make federal ETC designations, 47 U.S.C. § 214(e)(6) allows the FCC to assume this role in cases where the applicant is not subject to state commission jurisdiction. The FCC provided extensive guidance regarding the provisions of 47 U.S.C. § 214(e)(6) in FCC Order No. 00-208, which affirmed the primacy of state jurisdictional authority as it relates to federal ETC designations. The FCC will act on applications for federal ETC designation only after a common carrier has received an "affirmative statement" from a state commission, or court of competent jurisdiction, that the state commission lacks jurisdictional authority.

Notwithstanding the guidance provided by the FCC, the question of whether a state commission has regulatory jurisdiction over CMRS carriers ultimately requires a legal analysis of each state's controlling statutes. Staff's research indicates that the following states have elected to assert jurisdictional authority over the designation of CMRS carriers as federal ETCs:⁸

California	Kansas	Nevada	Oklahoma
Colorado	Minnesota	New Mexico	South Dakota
Iowa	Nebraska	North Dakota	Texas

Based on information provided by legal counsel representing RCC Minnesota, Staff is aware that commissions in Alabama, Delaware, Virginia, and Guam have declined to assert jurisdiction over the designation of CMRS carriers as federal ETCs.⁹

⁸ According to comments filed by Western Wireless in response Docket 96-45, May 5, 2003. Attachment E, page 2 of these comments provides a schedule of states where Western Wireless has applied for federal ETC designation.

The Commission's regulatory authority over CMRS carriers is primarily governed by the following statutes:

1. ORS 756.310(8)(b) which excludes CMRS carriers from paying the PUC fee assessment;
2. ORS 759.005(b)(2)(e) which defines "radio common carrier" in a manner that essentially includes CMRS service;
3. ORS 759.005(2)(g)(A) which excludes CMRS service from the definition of "telecommunications service" regulated by the Commission.
4. ORS 759.450(8)(a) which excludes CMRS carriers from minimum service quality standards;
5. ORS 759.425(6) which excludes CMRS service from the "retail telecommunication service" upon which the Oregon universal service fund surcharge is assessed;
6. ORS 759.425(7)(a) which provides an exception to ORS 759.425(6) and allows CMRS carriers to seek designation as an ETC in order to participate in Oregon's universal service fund program.

The Commission's jurisdictional authority may be challenged by RCC Minnesota (or some other CMRS carrier in the future). If so, the matter will ultimately require a legal determination beyond the scope of this public meeting memorandum. For this reason, Staff recommends this application be set for hearing to allow for a careful review of the jurisdictional issues in question.

E. The Public Interest Requirement of U.S.C. 47 § 214(e)(2)

Staff is unaware of any state or federal decision denying federal ETC status to a competitive carrier in a rural area based on the public interest requirement contained in 47 U.S.C § 214(e)(2).¹⁰ Nonetheless, there remains significant disagreement regarding the appropriate public interest criteria to be used when considering such applications. This disagreement is caused in no small part by the failure of Congress to give

⁹ December 6, 2002, letter from David A. LaFuria, Counsel for RCC Minnesota, Inc., to Phil Nyegaard, Oregon PUC Staff. Note that the Wyoming Commission declined to assert jurisdiction over CMRS carriers in a 1999 decision involving Western Wireless (Docket No. 70042-TA-98-1, Record No. 4432). However, in September 2002, the Wyoming Commission granted federal ETC status to a CMRS carrier, Pxyis Communications in Docket No. 62017-RA-01-1, Record No. 6724.

¹⁰ Staff's research on this matter is not exhaustive.

guidance regarding the exact public interest criteria to be used when regulatory agencies attempt to comply with 47 U.S.C § 214(e)(2).

CMRS carriers invariably point to the Telecommunications Act of 1996 which had the stated goal of promoting local competition when attempting to justify why their receipt of federal ETC status is in the public interest. To date, state commissions and the FCC have apparently unanimously agreed with this argument. In contrast, rural ILECs often argue that competitive ETC applications are not in the public interest for the following reasons:

1. Granting ETC status to more than one carrier in rural areas impairs the long-term financial viability of federal USF programs;
2. Granting ETC status to more than one carrier creates incentives for inefficient and uneconomic competition in high cost rural areas;
3. CMRS carriers have failed to demonstrate service availability to all customers in geographically diverse rural service areas; and,
4. CMRS carriers are not required to comply with the same service quality standards required of rural ILECs.

In a letter to Staff recommending the Commission investigate the applications of RCC Minnesota and United States Cellular, these same concerns were expressed by the Oregon Telecommunications Association (OTA).¹¹ In addition, as part of a review of the FCC's universal service rules, the Federal-State Joint Board on Universal Service (Joint Board) is currently reviewing the ETC designation process and the public interest standard contained in 47 U.S.C § 214(e)(2).

Given the importance the public policy issues raised by this application, and the fact it is the first of this type to be received by the Commission, Staff concurs with OTA and recommends a thorough investigation.

OPTIONS FOR COMMISSION ACTION:

The Commission has three options for action:

1. Approve or deny the application of RCC Minnesota.
2. Make an affirmative statement that the Commission lacks jurisdictional authority and decline further consideration.

¹¹ June 13, 2003, letter from Brant Wolf, EVP of the Oregon Telecommunications Association to Dave Booth, Oregon PUC Staff. A copy has been provided to the Commissioners at Mr. Wolf's request.

3. Set the matter for hearing to further investigate the relevant jurisdictional and public policy issues.

Staff recommends option #3 for the reasons outlined above.

PROPOSED COMMISSION MOTION:

That the application by RCC Minnesota, Inc. for designation as an Eligible Telecommunications Carrier qualified to receive federal Universal Service Support be investigated.