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BEFORE THE ARIZONA CORPORATION COMMISSION

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APR - 2 2004

DOCKETED BY *nac*  
DOCKET NO. T-03887A-03-0316

IN THE MATTER OF APPLICATION OF ALLTEL COMMUNICATIONS, INC. FOR DESIGNATION AS AN ELIGIBLE TELECOMMUNICATIONS CARRIER PURSUANT TO SECTION 214(e) (2) OF THE COMMUNICATIONS ACT OF 1934.

STAFF'S REPLY BRIEF

**I. INTRODUCTION.**

In its prodigious closing brief, ALECA contends that Alltel does not meet the requirement to offer services throughout its ETC service area, and that granting ETC status to Alltel would not be in the public interest. ALECA brief at 5. These contentions are unsubstantiated and should be rejected. ALECA also claims that Staff failed to conduct "a rigorous, independent inquiry". Staff's analysis was vigorous, thorough and independent. ALECA's claims should be rejected, and Alltel's application for ETC status should be granted. Staff will also briefly comment on certain aspects of Alltel's brief.

**II. ALLTEL SATISFIES THE REQUIREMENT TO OFFER SERVICE THROUGHOUT ITS ETC SERVICE AREA.**

A common carrier that is designated an ETC must offer the supported services "throughout the service area for which the designation is received." 47 U.S.C. § 214(e) (1). In its *Virginia Cellular* order<sup>1</sup>, the FCC stated that this requirement does not mean that an ETC applicant must show that "it can provide ubiquitous service." *Virginia Cellular* at ¶ 23. Instead, the FCC has accepted a commitment to improve the carriers' network. *Id.* Alltel has made such a commitment. *See* Tr. at 94, 108 (discussing expansion plans). ALECA points to a Minnesota decision where Nextel did not offer service in "large areas of its service area". ALECA brief at 8. But Alltel already offers service

<sup>1</sup> 19 FCC Rcd 1563, FCC 03-338, Rel. January 22, 2004.

1 in approximately 75% of its licensed area. Tr. at 117. ALECA also points to orders from various  
2 other states. But decisions from other states are inconsistent. See *Airadigm Communications, Inc.*  
3 Final Decision, Docket 7989-TI-105 at 5-6 (Wisc. P.S.C. March 26, 2004) (Attached as Exhibit A)  
4 (pointing to service to part of service area and affidavit).

5 The Commission should follow the FCC's recent *Virginia Cellular* order and its own  
6 precedent in the Commission's *Smith Bagley* and *Sprint* orders. In its first *Smith Bagley* order the  
7 Commission noted that Smith Bagley did not provide service in parts of Coconino County and "other  
8 unserved areas", but accepted Smith Bagley's commitment for "further expansion". Decision 63269  
9 at 12. The Commission should likewise accept Alltel's commitment, which will be closely  
10 monitored by Staff.

11 ALECA provides a nine-point list purporting to show that Alltel fails to meet this  
12 requirement. The first, second, third, and eighth points concern the absence of specific plans for  
13 network expansion. The Commission did not require such plans from Smith Bagley, and it should  
14 not require them here. Instead, Alltel should be afforded flexibility to make the best use of the FUSF  
15 funds, rather than requiring adherence to fixed plans that may not be appropriate as circumstances  
16 change. ALECA's fourth point concerns use of special equipment. ALECA has not demonstrated  
17 that such special equipment provides a cost effective means of extending service. ALECA's fifth and  
18 sixth points concern specific plans to address customer requests to extend service. This Commission  
19 has never required such specific plans. ALECA's seventh point is that Alltel does not have plans to  
20 serve customers by resale. But the FUSF grants funds to maintain and extend a carrier's own  
21 infrastructure, not for buying wholesale service from other carriers. See 47 U.S.C. § 254(e) (FUSF  
22 funds to be used for "provision, maintenance, and upgrading of facilities and services"). Finally,  
23 ALECA objects that Alltel has not accepted carrier of last resort obligations. But the Commission  
24 has always imposed such obligations on ILECs, not wireless carriers. Tr. at 252. Further, ALECA's  
25 witness admitted that none of its members were likely to relinquish their own ETC certifications.  
26 Tr. at 193.

### 27 **III. GRANTING ETC STATUS TO ALLTEL IS IN THE PUBLIC INTEREST.**

28 As described in Staff's Closing Brief, Alltel will provide many benefits, including increased

1 competition, mobility and a larger local calling area. These factors support a public interest finding.  
2 *See In re Application No. C-1889 of GCC License Corp.*, 647 N.W.2d 45, 55 (Neb. 2002)  
3 (competition mobility and expanded local calling area support public interest findings).

4 Remarkably, ALECA implies that there are no “underserved” areas in its members’ service  
5 areas. ALECA brief at ¶ 14. While ALECA objects that Alltel did not perform studies, the  
6 Commission hardly needs detailed studies to know that far too many customers in rural Arizona lack  
7 access to adequate telecommunications services. Alltel’s inability to identify specific customers who  
8 are underserved does not disprove the existence of this need. Further, Alltel’s proposed ETC area  
9 includes tribal areas. (Staff Report, Ex. S-1 at 10). The Commission has already determined that  
10 tribal areas in Arizona receive severely inadequate telecommunications service. *Smith Bagley*,  
11 Decision No. 63269 at 11-12. Alltel will offer service under its lifeline tariff on tribal lands for only  
12 \$1.00 a month. (Krajci Rebuttal, Ex. A-4 at 5). The public interest will be served by extending  
13 service and competition in underserved and tribal areas.

14 ALECA also claims that Alltel’s prices do not compare well with the prices of its members.  
15 ALECA brief at 15-16. But Staff testified that wireless rates cannot simply be compared to wireline  
16 rates because the services provided are different. Tr. at 237 and 358.

#### 17 **IV. STAFF CONDUCTED A RIGOROUS REVIEW.**

18 ALECA attacks Staff’s review of the application as not sufficiently rigorous. ALECA would  
19 be better served by focusing on the merits of Alltel’s application, rather than Staff’s actions. In any  
20 event, Staff’s review was quite rigorous. ALECA points to Staff’s failure to require specific  
21 construction plans, citing to the FCC’s *Virginia Cellular* order. But that order merely noted Virginia  
22 Cellular’s “estimates”, rather than requiring specific plans. *Virginia Cellular* at ¶ 16. Next, ALECA  
23 objects that Staff did not conduct field visits. ALECA brief at 21. But ALECA does not cite any  
24 requirement to conduct such visits, nor did it demonstrate that the staff of any other Commission  
25 conducted such visits in an ETC case. ALECA then attempts to rely on material that was not  
26 received into evidence.<sup>2</sup> ALECA also objects that Staff did not verify the existence of unserved

27 \_\_\_\_\_  
28 <sup>2</sup> ALECA brief at 21 (referring to data request MK 1-19). This data request was admitted as ALECA-  
14 solely for the purpose of showing that Staff asked a particular question, and specifically not for the  
content of the answer. Tr. at 328.

1 customers and did not directly compare the rates of Alltel to the rates of ALECA members. For the  
2 reasons discussed above, these claims are without merit. Next, ALECA points to Staff's failure to  
3 extract specific quality of service commitments from Alltel, even though this Commission has never  
4 required such commitments in ETC cases. Indeed, Alltel has won various awards for customer  
5 satisfaction in Arizona. (Staff Report, Ex. S-1 at 11). Lastly, ALECA suggests that Staff did not  
6 consider the impact of this case on the FUSF. But Staff's witness testified that the impact on the  
7 FUSF of granting Alltel ETC status would be minimal. Tr. at 244.

8 **V. RESPONSE TO ALLTEL.**

9 Alltel objects to Staff's proposed condition that Alltel be required to follow the Commission's  
10 customer service and termination of service rules. Alltel would prefer to follow these rules only for  
11 its Lifeline and Link-Up services. Alltel brief at 13. If Alltel is to receive government subsidies, it is  
12 only fair for it to have to follow reasonable consumer protection rules. Further, Staff's proposed  
13 condition is the same as a condition recently approved by this Commission. *Sprint Spectrum, L.P.*,  
14 Decision No. 66787 (Feb. 13, 2004) at 6-7.

15 **VI. CONCLUSION.**

16 Arizona's consumers deserve the increased service, enhanced competition, and greater choice  
17 that will be the result of granting Alltel's Application. As the Washington Court of Appeals stated:  
18 "Congress did not mention protecting the private interests of rural telcos, who often are "exclusive"  
19 ETCs simply by default as the sole provider operating in a particular area. Rather, customers'  
20 interest, not competitors', should control agencies' decisions affecting universal service."  
21 *Washington Independent Telephone Assoc. v. Washington Utilities and Transportation Comm'n*, 41  
22 P.3d 1212, 1218 (Wash. App. 2002) *aff'd* 65 P.3d 319 (Wash. 2003).

23 **RESPECTFULLY SUBMITTED** this 2<sup>nd</sup> day of April 2004.

24  
25   
26 Timothy J. Sabo  
27 Attorney, Legal Division  
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2 of the foregoing were filed this 2<sup>nd</sup> day  
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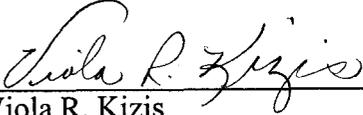
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Date Mailed  
March 26, 2004

BEFORE THE  
PUBLIC SERVICE COMMISSION OF WISCONSIN

Application of Airadigm Communications, Inc., for Designation  
as an Eligible Telecommunications Carrier

7989-TI-105

**FINAL DECISION**

This is the final decision in this proceeding to determine whether to designate Airadigm Communications, Inc. (Airadigm), as an Eligible Telecommunications Carrier (ETC), pursuant to 47 U.S.C. § 214(e)(2) and Wis. Admin. Code § PSC 160.13. Designation as an ETC makes a provider eligible to receive universal service fund (USF) monies.

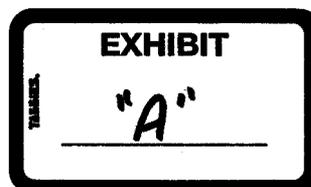
**Introduction**

Airadigm filed an application for ETC designation on November 28, 2003. The Commission issued a Notice of Investigation on December 19, 2003. That Notice requested comments, to be filed on or before January 15, 2004. CenturyTel and TDS Metrocom filed comments. The Commission discussed this matter at its March 11, 2004, open meeting. A list of parties interested in this proceeding may be found in Appendix A.

Airadigm requested ETC designation for the exchanges shown in Appendix B. The territories for which ETC designation is requested are served by a mix of rural and non-rural telecommunications carriers.

**Findings of Fact**

1. The wireless industry, its customary practices, its usual customer base, and Airadigm's desire not to obtain state USF money create an unusual situation.



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2. It is reasonable to adopt different ETC eligibility requirements and obligations for Airadigm than specified by Wis. Admin. Code § PSC 160.13.
3. It is reasonable to require Airadigm to meet only the federal requirements for ETC status in order to be eligible for ETC designation.
4. It is reasonable to relieve Airadigm from ETC obligations other than those imposed under federal law.
5. It is reasonable to require that Airadigm not apply for state USF funds and that if it ever does, all state requirements for and obligations of ETC status shall again be applicable to it.
6. Airadigm meets the federal requirements for ETC designation.
7. It is in the public interest to designate Airadigm as an ETC in certain areas served by rural telephone companies.
8. It is reasonable to grant Airadigm ETC status in the non-rural wire centers indicated in its application, to the extent that the wire centers are located within the state.
9. It is reasonable to grant Airadigm ETC status in the rural service territories indicated in its application, to the extent such areas are located within the state.

#### **Conclusions of Law**

1. The Commission has jurisdiction and authority under Wis. Stat. §§ 196.02, and 196.218; Wis. Admin. Code ch. PSC 160; 47 U.S.C. §§ 214 and 254; and other pertinent provisions of the Telecommunications Act of 1996, to make the above Findings of Fact and to issue this Order.
2. The law does not require the Commission to conduct a hearing in this docket, as requested by CenturyTel and TDS Telecom.

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3. Neither federal law nor state law create a substantial, or property, interest in exclusive ETC status for incumbent rural ETCs.

4. Even if “notice and opportunity for hearing” as provided by Wis. Stat. § 196.50(2)(f) is applicable in this case, or if process is due to the current ETCs in the rural areas at issue on any other basis, the Notice Requesting Comments, dated September 12, 2003, satisfies this requirement.

### **Opinion**

On December 20, 2002, the Commission granted the U.S. Cellular ETC status as applied for in Docket No. 8225-TI-102. *Application of United States Cellular Corporation for Designation as an Eligible Telecommunications Carrier in Wisconsin*, Docket No. 8225-TI-102, 2002 WL 32081608, (Wisconsin Public Service Commission, December 20, 2002). The instant application is substantively similar to the application of U.S. Cellular. The Commission reaffirms its decision in Docket No. 8225-TI-102 and relies on the opinion issued in the Final Decision in that docket, to approve Airadigm’s application.

ETC status was created by the FCC, and codified in 47 U.S.C. § 214(e)(2). Under FCC rules, the state commissions are required to designate providers as ETCs. 47 U.S.C. § 214(e)(2), 47 C.F.R. § 54.201(b). Designation as an ETC is required if a provider is to receive federal universal service funding. ETC designation is also required to receive funding from some, but not all, state universal service programs.

The FCC established a set of minimum criteria that all ETCs must meet. These are codified in the federal rules. 47 U.S.C. § 214(e)(1), 47 C.F.R. § 54.101(a). The 1996 Telecommunications Act states that: “States may adopt regulations not inconsistent with the

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Commission's rules to preserve and advance universal service." 47 U.S.C. § 254(f). A court upheld the states' right to impose additional conditions on ETCs in *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 418 (5<sup>th</sup> Cir. 1999). While states must designate multiple ETCs if more than one provider meets the requirements and requests that status in a non-rural area, it must determine that it is in the public interest before designating more than one ETC in a rural area. 47 C.F.R. § 54.201. The Commission has already designated one ETC in each rural area.

In the year 2000, the Commission promulgated rules covering ETC designations and requirements in Wisconsin. Wis. Admin. Code § PSC 160.13. Those rules govern the process for ETC designation and set forth a minimum set of requirements for providers seeking ETC designation from the Commission. The application filed by Airadigm asks that it be designated as an ETC for federal purposes only. It states that it is not seeking designation as an ETC for state purposes and, therefore, is not required to meet the additional state requirements.

States must examine the federal requirements, but are allowed to create additional requirements. Wisconsin has done so. The Commission's requirements for ETC designation clarify and expand upon the more basic FCC rules. There is no provision in the rule for designation as an ETC for federal purposes only. If a provider seeks to be designated as an ETC, it must follow the procedures and requirements in Wis. Admin. Code § PSC 160.13 and, if such a designation is granted, that designation serves to qualify the provider for both state and federal universal service funding. However, Wis. Admin. Code § PSC 160.01(2)(b) provides that:

Nothing in this chapter shall preclude special and individual consideration being given to exceptional or unusual situations and upon due investigation of the facts and circumstances involved, the adoption of requirements as to individual providers or services that may be lesser, greater, other or different than those provided in this chapter.

Airadigm's request for ETC status presents an unusual situation. The wireless industry, its customary practices, and its usual customer base are quite different than those of wireline companies. Additionally, Airadigm has stated that it has no desire to obtain state USF money. The Commission finds that under the particular circumstances of this case, it is reasonable to adopt different ETC requirements for Airadigm to meet, and to grant ETC status to Airadigm with certain limitations.

Because Airadigm only wishes to obtain federal USF support, the Commission shall adopt the federal requirements for ETC status as the requirements that Airadigm must meet to obtain ETC status. The federal requirements are found in 47 U.S.C. § 214(e)(1) and 47 C.F.R. §§ 54.101(a), 54.405 and 54.411. Further, the Commission relieves Airadigm from ETC obligations other than those imposed under federal law. However, since Airadigm will not be subject to the state requirements and state obligations, the Commission requires that Airadigm not apply for state USF money. If Airadigm ever does apply for state USF money, then all of the state requirements for and obligations of ETC status shall again be applicable to Airadigm.

The Commission finds that Airadigm has met the requirements for ETC designation; it will offer supported service to all customers in its designation areas and will advertise these services. In the FCC Declaratory Ruling *In the Matter of Federal-State Joint Board on Universal Service, Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, FCC 00-248 (released 8/10/00), par. 24 (South Dakota Decision) the FCC has stated:

A new entrant can make a reasonable demonstration to the state commission of its capability and commitment to provide universal service without the actual provision of the proposed service. There are several possible methods for doing so, including, but not

limited to: (1) a description of the proposed service technology, as supported by appropriate submissions; (2) a demonstration of the extent to which the carrier may otherwise be providing telecommunications services within the state; (3) a description of the extent to which the carrier has entered into interconnection and resale agreements; or, (4) a sworn affidavit signed by a representative of the carrier to ensure compliance with the obligation to offer and advertise the supported services.

If this is sufficient for a new entrant, it would seem to be even more so for someone who has already started to serve portions of the exchanges. Airadigm submitted an affidavit ensuring compliance and, as mentioned earlier, is not only providing service in other areas of the state but also in parts of the areas for which it has requested ETC status.

The Commission finds that Airadigm meets the requirement to offer service to all requesting customers. It has stated in its application and comments that it will do so. In the comments it is argued that the applicant will not provide service to all customers in the indicated exchanges and thus, because of the issue of “cellular shadows,” the applicant will not meet the same standard that is applied to wireline providers. However, this is a case where “the devil is in the details.” It is true that the purpose of universal service programs is to ensure that customers who might not otherwise be served at affordable rates by a competitive market still receive service. However, like for wireline companies, access to high cost assistance is what helps ensure that service is provided. For Airadigm, access to high cost assistance is exactly what will make expanding service to customers requesting service in the areas for which it is designated as an ETC “commercially reasonable” or “economically feasible.” As the FCC has said:

A new entrant, once designated as an ETC, is required, as the incumbent is required, to extend its network to serve new customers upon reasonable request. South Dakota Decision, par. 17.

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Airadigm, like wireline ETCs, must fulfill this mandate, and access to high cost funding is what will help make doing so possible. The issue of “dead spots” is not significantly different from a wireline ETC that does not have its own lines in a portion of an exchange, perhaps a newly developed area. After obtaining a reasonable request for service, the wireline is required to find a way to offer service, either through extending its own facilities or other options. So too, Airadigm must be given a reasonable opportunity to provide service to requesting customers, whether through expansion of its own facilities or some other method.

Airadigm has also stated in its affidavit, application, and comments that it will advertise the designated services as required under 47 U.S.C. § 214(e)(1)(B), including the availability of low income programs.

Other objections to Airadigm’s designation focus on an alleged inability to meet certain additional state requirements in Wis. Admin. Code § PSC 160.13. These are moot, however, since the Commission has adopted different requirements for Airadigm.

Some of the exchanges for which Airadigm seeks ETC status are served by non-rural ILECs (SBC or Verizon); a list is shown in Appendix B. Under Wis. Admin. Code § PSC 160.13(3) and 47 U.S.C. § 251(e)(2), the Commission must designate multiple ETCs in areas served by such non-rural companies. However, the Commission may only designate multiple ETCs in an area served by a rural company if designating more than one ETC is in the public interest. Some of the exchanges for which Airadigm seeks ETC status are served by rural telephone companies.

The Commission finds that designating Airadigm as an additional ETC in these areas is in the public interest. In its determination, the Commission is guided by the Wis. Stat.

§ 196.03(6) factors to consider when making a public interest determination:

- (a) Promotion and preservation of competition consistent with ch. 133 and s. 196.219.
- (b) Promotion of consumer choice.
- (c) Impact on the quality of life for the public, including privacy considerations.
- (d) Promotion of universal service.
- (e) Promotion of economic development, including telecommunications infrastructure deployment.
- (f) Promotion of efficiency and productivity.
- (g) Promotion of telecommunications services in geographical areas with diverse income or racial populations.

The Commission finds that designating Airadigm as an ETC in areas served by rural companies will increase competition in those areas and, so, will increase consumer choice. While it is true that Airadigm is currently serving in at least some of these areas, the availability of high cost support for infrastructure deployment will allow Airadigm to expand its availability in these areas. Further, designation of another ETC may spur ILEC infrastructure deployment and encourage further efficiencies and productivity gains. Additional infrastructure deployment, additional consumer choices, the effects of competition, the provision of new technologies, a mobility option and increased local calling areas will benefit consumers and improve the quality of life for affected citizens of Wisconsin. As a result, the Commission finds that it is in the public interest to designate Airadigm as an ETC in the areas served by rural telephone companies for which it has requested such designation.<sup>1</sup>

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<sup>1</sup> Eighteen other state commissions and the FCC have approved wireless ETC applications as second ETCs in rural areas on similar grounds.

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The areas for which Airadigm is granted ETC status vary. Wis. Admin. Code § PSC 160.13(2) states that the areas in which a provider shall be designated as an ETC depend on the nature of the ILEC serving that area. If the ILEC is a non-rural telephone company, the designation area is the ILEC's wire center. The FCC has urged states not to require that competitive ETCs be required to offer service in the entire territory of large ILECs. It has found that such a requirement could be a barrier to entry. *Report and Order in the Matter of Federal-State Joint Board on Universal Service*, FCC 97-157 (released 5/8/97) pars. 176-177 (First Report and Order). Wisconsin's rule provision resolves this federal concern. As a result, Airadigm is granted ETC status in the SBC and Verizon wire centers for which it requested such status, to the extent that such wire centers are located within the state.

Wis. Admin. Code § PSC 160.13(2) provides that if the ILEC is a rural telephone company, the ETC designation area is different. For an area served by a rural telephone company, the designation area is generally the entire territory (study area) of that rural company. A smaller designation area is prohibited unless the Commission designates and the FCC approves a smaller area. 47 C.F.R. § 54.207(b). Airadigm's application contained a list of rural telephone company areas for which it requested ETC status. This list is shown in Appendix B. Airadigm is asking for designation in the entire study areas of the rural companies at issue.

The Commission also grants ETC status to Airadigm in the rural company study for which it requested such status, to the extent that such exchanges are located within the state.

### **Requests for Hearing**

In accordance with the Notice Requesting Comments, dated December 19, 2003, the Commission received a joint filing from two companies, which requested, on various grounds, the Commission conduct a contested case hearing before deliberation of the application. CenturyTel, Inc., and TDS Telecom Corporation claimed a right to a hearing under Wis. Admin. Code § PSC 160.13(3) and Wis. Stat. § 227.42. The law, however, does not require the Commission conduct a hearing in this docket as requested. Furthermore, even if “notice and opportunity for hearing” as provided by Wis. Stat. § 196.50(2)(f) is applicable in this case, or if process is due to the current ETCs in the rural areas at issue on any other basis, the Notice Requesting Comments, dated December 19, 2003, satisfies this requirement.

CenturyTel, Inc., and TDS Telecom Corporation claimed a right to a hearing under Wis. Admin. Code § PSC 160.13(3) and Wis. Stat. § 227.42.

Wis. Admin. Code § PSC 160.13 (3) states:

For an area served by an incumbent local exchange service provider that is a rural telephone company, the commission may only designate an additional eligible telecommunications carrier after finding that the public interest requires multiple eligible telecommunications carriers, pursuant to federal law and s. 196.50 (2), Stats. For an area served by an incumbent local exchange service provider that is not a rural telephone company, the commission may designate an additional eligible telecommunications carrier without making such a finding.

Wis. Stat. § 196.50(2), designates the process to certify a telecommunications utility.

Wis. Stat. § 196.50(2), states in part, “. . . after notice and opportunity for hearing, that the applicant possesses sufficient technical, financial and managerial resources to provide telecommunications service to any person within the identified geographic area.” According to

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the rule and statute it would appear that notice and opportunity for hearing is a required procedure in the instant case.

Wis. Stat. § 196.50(2), however, does not apply to an application for ETC status of a wireless company to be an additional ETC in a rural area. Wis. Stat. § 196.202,<sup>2</sup> expressly restricts Commission jurisdiction over wireless providers. This statute prevents the Commission from applying almost every provision of Wis. Stat. ch. 196, to wireless providers, except for Wis. Stat. § 196.218(3).<sup>3</sup> This section only applies if, “the commission promulgates rules that designate [cellular] providers as eligible to receive universal service funding under both the federal and state universal service fund programs.” Wis. Stat. § 196.218(3), mandates telecommunications providers contribute to the Wisconsin Universal Service Fund (WUSF). (Wireless providers currently have been exempted.) This section, however, is wholly unrelated

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<sup>2</sup> Wis. Stat. § 196.202, states:

**Exemption of commercial mobile radio service providers. (2) Scope of regulation.**

A commercial mobile radio service provider is not subject to ch. 201 or this chapter, except as provided in sub. (5), and except that a commercial mobile radio service provider is subject to s. 196.218 (3) if the commission promulgates rules that designate commercial mobile radio service providers as eligible to receive universal service funding under both the federal and state universal service fund programs. If the commission promulgates such rules, a commercial mobile radio service provider shall respond, subject to the protection of the commercial mobile radio service provider's competitive information, to all reasonable requests for information about its operations in this state from the commission necessary to administer the universal service fund.

**(5) Billing.** A commercial mobile radio service provider may not charge a customer for an incomplete call.

<sup>3</sup> Wis. Stat. § 196.218 (3), states, in part:

**Contributions to the fund. (a) 1.** Except as provided in par. (b), the commission shall require all telecommunications providers to contribute to the universal service fund beginning on January 1, 1996. determined by the commission under par. (a) 4.

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to the requirements for eligibility to receive money from the WUSF and, otherwise, unrelated to this case.<sup>4</sup>

The Commission cannot apply Wis. Stat. § 196.50(2), to wireless providers. The Commission, therefore, cannot proceed under Wis. Stat. § 196.50(2)(f), when evaluating the ETC application of a wireless provider. As a matter of law, the reference to Wis. Stat. § 196.50(2)(b)(f), in Wis. Admin. Code § PSC 160.13, cannot apply to ETC applications of wireless providers, including Airadigm.

Wis. Stat. § 227.42 provides a right to a hearing, treated as a contested case, to any person filing a written request for a hearing with an agency who meets the following four part test:

- (a) A substantial interest of the person is injured in fact or threatened with injury by agency action or inaction;
- (b) There is no evidence of legislative intent that the interest is not to be protected;
- (c) The injury to the person requesting a hearing is different in kind or degree from injury to the public caused by the agency action or inaction; and
- (d) There is a dispute of material fact.

CenturyTel, Inc., and TDS Telecom Corporation own local exchange telephone companies that provide essential telecommunications service as ETCs in the rural areas at issue. These companies are competitors of Airadigm. On this basis, these companies claim they have a substantial interest protected by law, and will suffer special injury based on the ETC designation of Airadigm. Federal law and state law, however, do not

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<sup>4</sup> Like the Legislature, Congress has also limited the state role in regulating on wireless carriers. 47 U.S.C. § 332(c)(3); *Bastien v. AT&T Wireless Services, Inc.*, 205 F.3d 983 (7th Cir. 2000).

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create a substantial, or property, interest in exclusive ETC status for incumbent rural ETCs. *Alenco Communications v. FCC*, 201 F.3d 608 (2000) (“The purpose of universal service is to benefit the customer, not the carrier.”); *WITA v. WUTA*, 65 P.3d 319 (2003); *In re Application of GCC License Corp.*, 647 N.W.2d 45, 52, 264 Neb. 167, 177 (2002). (“[r]ather, customers’ interest, not competitors’, should control agencies’ decisions affecting universal service” and that “[t]he Telecommunications Act does not mention protecting the private interests of incumbent rural carriers, who are often exclusive ETCs simply by default as the sole service provider operating in a particular area.”) *See also*, *State ex rel. 1<sup>st</sup> Nat. Bank v. M&I Peoples Bank*, 95 Wis. 2d 303, 311 (1980). (Economic injury as the result of lawful competition does not confer standing.); *MCI Telecommunications v. Pub. Serv. Comm.*, 164 Wis. 2d 489, 496, 476 N.W.2d 575 (Ct. App. 1991); and *Wisconsin Power & Light v. PSC*, 45 Wis. 2d 253 (1969) (“ . . . the predominant purpose underlying the public utilities law is the protection of the consuming public rather than the competing utilities.”)

In addition, these companies also claim that granting Airadigm ETC status will reduce the amount of USF funds available to the public. However, the companies’ claim is entirely speculative. Further, as explained above, such result does not injure companies’ protected interest. Finally, increasing the number of carriers eligible for federal USF money will increase the amount of federal USF dollars brought into Wisconsin. The federal USF provides a benefit to customers through the assistance of carriers who commit to providing service in high-cost areas. The designation of more than one ETC in a particular high-cost area allows more carriers providing service in

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rural Wisconsin, such as Airadigm, to tap into money collected on a nation-wide basis so that more services and more provider choices can be afforded to these customers. As such, ETC designation, like the instant one, necessarily provides a benefit to customers.

The law does not require the Commission conduct a hearing in this docket. Even if “notice and opportunity for hearing” as provided by Wis. Stat. § 196.50(2)(f) is applicable in this case, or if process is due to the current ETCs in the rural areas at issue on any other basis, the Notice Requesting Comments, dated December 19, 2003, satisfies this requirement. *Waste Management of Wisconsin v. DNR*, 128 Wis. 2d 59, 78, 381 N.W.2d 318 (1985). (An appropriate “opportunity for hearing” may be exclusively through written comments.)

#### **Order**

1. Airadigm is granted ETC status in the non-rural wire centers indicated in its application; to the extent the wire centers are located within the state.
2. Airadigm is granted ETC status in the rural study areas for which it has requested such designation; to the extent the areas are located within the state.
3. Airadigm shall not apply for state USF support. If it ever does file for such support, the state eligibility requirements for, and obligations of, ETC status shall immediately apply to it.
4. Based on the affidavit of Kenneth R. Hoefle, President & COO, Airadigm is an ETC within the meaning of 47 U.S.C. § 214 (c) and is eligible to receive funding pursuant to 47 U.S.C. § 254 (2). This order constitutes the certification to this effect by the Commission.

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5. The requests for a contested case hearing by CenturyTel, Inc., and TDS Telecom Corp., are rejected.

6. Jurisdiction is maintained.

Dated at Madison, Wisconsin, \_\_\_\_\_

By the Commission:

\_\_\_\_\_  
Lynda L. Dorr  
Secretary to the Commission

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See attached Notice of Appeal Rights

Notice of Appeal Rights

Notice is hereby given that a person aggrieved by the foregoing decision has the right to file a petition for judicial review as provided in Wis. Stat. § 227.53. The petition must be filed within 30 days after the date of mailing of this decision. That date is shown on the first page. If there is no date on the first page, the date of mailing is shown immediately above the signature line. The Public Service Commission of Wisconsin must be named as respondent in the petition for judicial review.

Notice is further given that, if the foregoing decision is an order following a proceeding which is a contested case as defined in Wis. Stat. § 227.01(3), a person aggrieved by the order has the further right to file one petition for rehearing as provided in Wis. Stat. § 227.49. The petition must be filed within 20 days of the date of mailing of this decision.

If this decision is an order after rehearing, a person aggrieved who wishes to appeal must seek judicial review rather than rehearing. A second petition for rehearing is not an option.

This general notice is for the purpose of ensuring compliance with Wis. Stat. § 227.48(2), and does not constitute a conclusion or admission that any particular party or person is necessarily aggrieved or that any particular decision or order is final or judicially reviewable.

Revised 9/28/98