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Before the
ARIZONA CORPORATION COMMISSION

2003 AUG 22 A 10: 55

IN THE MATTER OF THE APPLICATION) Docket No. T-03887A-03-0316
OF ALLTEL COMMUNICATIONS, INC.)
FOR DESIGNATION AS AN ELIGIBLE)
TELECOMMUNICATIONS CARRIER)
PURSUANT TO SECTION 214(e)(2) OF)
THE COMMUNICATIONS ACT OF 1934)

AZ CORP COMMISSION
DOCUMENT CONTROL

INITIAL COMMENTS OF TABLE TOP TELEPHONE COMPANY, INC.

Table Top Telephone Company, Inc., (TTTC), by and through its consultant, hereby presents its initial comments as an intervenor in the matter of ALLTEL Communications application for Eligible Telecommunications Carrier (ETC) status in the state of Arizona before the Arizona Corporation Commission (ACC). TTTC asserts that ALLTEL's application should be denied by the ACC because it does not meet any public interest test.

TTTC does not believe that the petitioner's application is in the public interest for the following reasons:

- 1) ALLTEL fails to present any facts to support a public interest benefit from grant of its request;
- 2) For rural service areas, the benefits must exceed the costs if a designation of more than one ETC in a rural service area is to be made;
- 3) Critical issues are presently before the Joint Board regarding the designation of competitive ETC's; and
- 4) ALLTEL's status as a national carrier will lead to significant and potentially unfunded increases to federal USF, as well as potentially impact Arizona USF.

Arizona Corporation Commission

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The application should be denied, or in the alternative stayed, until the Joint Board and the FCC complete their ongoing review of ETC certification issues.

**ALLTEL FAILS TO PRESENT ANY FACTS TO SUPPORT A PUBLIC INTEREST
BENEFIT FROM GRANT OF ITS REQUEST**

Is the ACC obligated to grant the request?

The short answer is NO. Throughout the debate over the last seven years as to what Congress meant to happen with the implementation of the Telecommunications Act of 1996 (TA 96), parties have looked to what key legislators stated during the debate on this industry-defining legislation. The need to protect and advance universal service was one of the “fundamental concerns of the conferees in drafting this conference agreement.” It seems fairly evident that if the ACC decides to grant authority to more than one ETC in a rural area, it should only be after a public interest test is applied and it is clearly determined that the benefits exceed the costs. Simply stated, Congress did not intend for this nations’ rural areas to be sacrificed on the altar of competition.

Why the separate and special consideration for rural carriers?

As the ACC is well aware, the Joint Board and the FCC carefully studied the differences between urban and rural carriers in the Rural Task Force process.

During the Rural Task Force deliberations¹, the RTF reached nine conclusions with respect to the rural difference issue. These differences were referenced in the FCC’s Rural Access Reform Order that was released on November 8, 2001 (MAG Order (FCC 01-304)).

¹ The RTF demonstrated empirically that the rural carriers have different characteristics from urban carriers. The nature and scope of these significant differences within the subset of rural carrier markets has been placed in the public record by the RTF via its White Paper 2, entitled The Rural Difference, released in January, 2000. This second of five White Papers offered a very detailed empirical analysis of the major rural carrier differences.

In paragraph 4 of its Rural Access Reform Order, the FCC references these rural differences in footnote 9.² This issue is relevant to making a determination of whether the public interest test is met with respect to certifying an additional ETC in a rural service area.

Because of these rural differences, Congress indicated its clear intent that a separate standard³ should apply for the designation of additional ETCs in rural carrier service areas. Both the evidence in the public record of federal CC Docket No. 96-45, as well as a recent appellate court decision supports this legislative mandate.

The vague generalizations and assertions offered in ALLTEL's petition fall short of meeting even a threshold public interest test. There are several specific shortcomings in the ALLTEL petition. First, the reference at page 10 to the Smith Bagley proceedings fails to note the tribal issues present in that situation which are not present in ALLTEL's instant petition. Further, ALLTEL makes no substantive assurance that it will **actually invest** in Arizona infrastructure with support dollars as opposed to placing such monies in its corporate treasury, and does not appear to offer ACC staff any opportunity to review the disposition of such funds. Both of these points contribute to a failure to demonstrate the petition is in the public interest. To summarize, a thorough public interest test should involve more than a vague assertion from the petitioning carrier promising to provide the services and serve the public interest.

² *"They also rely more heavily on revenues from interstate access charges and universal service support."*

³ Upon request and consistent with the public interest, convenience, and necessity, the State commission **may**, in the case of 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 by the State commission, 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 State commission shall find that the designation **is in the public interest**. 47 U.S.C. § 214(e)(2) (emphasis added).

In an earlier decision, the Federal Communications Commission addressed the need for more than vague generalities. Specifically, the FCC's Declaratory Ruling on the Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission (CC Docket No. 96-45, FCC 00-248, released Aug. 10, 2000) supports the need for something more than a vague assertion of intent. At that time, the FCC stated:

We caution that a demonstration of the capability and commitment to provide service must encompass something more than a vague assertion of intent on the part of a carrier to provide service. The carrier [requesting ETC status] must reasonably demonstrate to the state commission its ability and willingness to provide service upon designation. FCC 00-248, at ¶ 24 (emphasis added).

FOR RURAL SERVICE AREAS, THE BENEFITS MUST EXCEED THE COSTS IF A DESIGNATION OF MORE THAN ONE ETC IN A RURAL SERVICE AREA IS TO BE MADE

Throughout the debate over the last seven years as to what Congress meant to happen with the implementation of TA 96, parties have looked to what key legislators stated during the debate on this industry-defining legislation.

Senator Byron Dorgan, who introduced the language that requires a public interest test before designating a second ETC in a rural area, stated⁴:

The protection of universal service is the most important provision in this legislation. S.652 contains provisions that make it clear that universal service must be maintained and that citizens in rural areas deserve the same benefits and access to high quality telecommunications services as everyone else. (emphasis added)

Senator Kerry of Massachusetts added: "The conference report also maintains universal service as a cornerstone of our Nation's communications system."⁵

Senator Hollings of South Carolina offered: "The need to protect and advance universal service is one of the fundamental concerns of the conferees in drafting this conference agreement."⁶

⁴ Congressional Record of June 8, 1995, S 7951-2.

⁵ 142 Cong. Rec. S687, S710.

⁶ 142 Cong. Rec. S687, S688.

Which of the many court cases support this position?

A compelling judicial history, spanning five decades, supports this position of rural areas receiving special consideration. In Federal Commission v. RCA Communications, 346 U.S. 86, 97 L. Ed. 1470, 73 S. Ct. 998 at 1004 (1953), Justice Frankfurter stated the applicable standard:

Our difficulty arises from the fact that while the Commission recites that competition may have beneficial effects, it does so in an abstract, sterile way. Its opinion relies in this case not on its independent conclusion, from the impact upon it of the trends and needs of this industry, that competition is desirable, but primarily on its reading of national policy . . .

To say that national policy without more suffices for authorization of a competing carrier wherever competition is reasonably feasible would authorize the Commission to abdicate what would seem to us one of the primary duties imposed on it by Congress.

A careful reading of the oft-cited Alenco case reveals some interesting facts. For example, in Alenco, the Court explicitly emphasized the need to balance the objectives of universal service and competition:

The FCC must see to it that *both* universal service and local competition are realized; one cannot be sacrificed in favor of the other. The Commission therefore is responsible for making the changes necessary to its universal service program to ensure that it survives in the new world of competition.

Alenco, 201 F.3d at 615 (emphasis in original).

What are the implications for the ALLTEL petition? What this Alenco case means is that the advancement of competition cannot be the primary reason for distinguishing a second ETC in a rural area. The objective advancement of universal service is a required element of prudent public policy.

A recent appellate court decision also serves to support legislative intent with regard to recognizing a distinction between rural and non-rural service areas. In the *Iowa Utilities Board v. FCC* (*Iowa Utilities Board v. FCC*, 219 F.3d at 761-763) case heard by the Eighth Circuit Court of Appeals, the findings of the Court included the following relevant passage:

There can be no doubt that it is an economic burden on an ILEC to provide what Congress has directed it to provide to new competitors in [the statute]. Because the small and rural ILECs, while they may be entrenched in their markets, have less of a financial capacity than larger and more urban ILECs to meet such a request, the Congress declared that their statutorily-granted exemption from doing so should continue unless the state commission found all three prerequisites for terminating the exemption, or determined that all prerequisites for suspension or modification were met in order to grant an ILEC affirmative relief.

CRITICAL ISSUES ARE PRESENTLY BEFORE THE JOINT BOARD REGARDING STANDARDS FOR DESIGNATING COMPETITIVE ETC'S

A number of key issues are under consideration before the Joint Board, including whether the FCC should provide standards or guidelines for the states to follow in ETC designation proceedings. One of the areas that may be addressed includes the use by the applicant of an affidavit to place certain assertions on the record. Within its examination of potential standards for use by the ACC, it is anticipated that the Joint Board will consider whether a general affidavit should be all that is required to demonstrate both the ability and willingness to provide the nine delineated services under 47 C.F.R. § 54.101. In addition, consideration may be given to whether an affidavit is sufficient to satisfy the inquiry into the public interest⁷ under 47 U.S.C. § 214(e)(2).

One of the prior state decisions that are likely to be reviewed by the Joint Board, and subsequently the FCC, is the recent Utah decision. In the state of Utah, the state commission investigated Western Wireless Holding Company's petition for ETC designation.⁸ When Western Wireless failed to demonstrate, among other things, its ability to serve the rural public given the topography of the individual rural communities at issue, the Utah Commission rejected Western Wireless's Petition for ETC designation because it was not "in the public interest."

⁷ In virtually every other context, when a party is seeking the opportunity to obtain public money, that party has the burden of proving that it is entitled to the money. See, e.g., Richardson v. Perales, 402 U.S. 389, 393, 91 S. Ct. 1420, 28 L. Ed. 2d 842 (1971) (discussing claimants failure to carry his burden of proof necessary to demonstrate entitlement to disability benefits).

⁸ In the Matter of the Petition of WWC Holding Co., Inc. for Designation as an Eligible Telecommunications Carrier, Public Service Commission of Utah, Docket No. 98-2216-01 (July 21, 2000) affirmed by WWC Holding Company, Inc. v. Public Service Commission of Utah, 44 P.3d 714 (2002).

Timing Issues – There is time to do this right

In its 25th Order on Reconsideration in CC Docket No. 96-45 released in late May, the FCC declined to establish a six-month time limit for the processing of requests from carriers seeking ETC status. With this ruling, the ACC has the ability to take the time to do its analysis of ALLTEL's petition in a prudent and thoughtful manner. We respectfully encourage the ACC to do so.

Differences between impacted companies should be considered

We also raise the question of whether the petitioning carrier should have to address how designation of an additional ETC will affect each rural area individually, or whether it should be permitted to lump all rural areas together for the purpose of demonstrating its services and the public interest.

ALLTEL'S STATUS AS A NATIONAL CARRIER WILL LEAD TO SIGNIFICANT AND UNFUNDED INCREASES TO FEDERAL AND STATE USF

The past seven years have provided a test of regulators' ability to balance the tension of the two foundational goals of TA 96, universal service and competition. Comments that capture some of the lessons learned for rural areas are found in the comments of two current FCC commissioners.

In his oft-quoted dissent in the Rural Access Reform Order⁹, Commissioner Martin succinctly captures the issue in the following:

I also note that I have some concerns with the Commission's policy – adopted long before this Order - of using universal support as a means of creating "competition" in high cost areas. I am hesitant to subsidize multiple competitors to serve areas in which costs are prohibitively expensive for even one carrier. This policy may make it difficult for any one carrier to achieve the economies of scale necessary to serve all of the customers in a rural area, leading to inefficient and/or stranded investment and a ballooning universal service fund. It is thus with real pause that I sign on to an Order that may further this policy. I will continue to examine these issues as well as the other concerns raised regarding the impact that our policies may have on rural America.

Commissioner Jonathan Adelstein addressed the concerns of a ballooning universal service fund and the need to **balance** competition against the public good, stating in part¹⁰:

"The public interest also demands that regulators seriously consider whether a market can support more than one carrier with universal service. If not, then new designations shouldn't be given as a matter of course just because it appears they meet other qualifications."

⁹ Separate Statement of Commissioner Kevin J. Martin in *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, Federal-State Joint Board on Universal Service, Access Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation, Prescribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers*, 16 FCC Rcd 19613 (2001).

¹⁰ Commissioner Adelstein, "Rural America and the Promise of Tomorrow," NTCA Annual Meeting & Expo, **Phoenix, Arizona** (remarks delivered on February 3, 2003).

What is the current trend?

During the short time that the FCC has allowed CETCs to claim as much USF funding as they can, the demands on the fund have increased.¹¹ It has increased in size to the point that for the first time the FCC has had to borrow funds to cover a shortfall in the USF.¹² In justifying this action, the FCC stated in part:

In the *Schools First Report and Order*, the Commission concluded that unused funds from the schools and libraries support mechanism would be applied to stabilize the collection requirement for universal service in the third and fourth quarters of 2002, and the first quarter of 2003, if necessary, while it examines whether more fundamental reform of the basis for assessing universal service contributions is warranted.¹³

These actions indicate that the FCC is concerned about the sustainability of the current support mechanism, even at current levels of support funding.

¹¹ For example, the Universal Service Administration Company's 2nd quarter 2003 report shows the number of rural ILEC study areas that now have a competitive ETC has increased to 409, up from 141 in just one quarter.

¹² *Proposed Fourth Quarter 2002 Universal Service Contribution Factor*, CC Docket No. 96-45, Public Notice DA 02-2221, released September 10, 2002, at page 2.

¹³ *Id.*, at 2-3.

Conclusion

Thus, the argument that existing ETCs are simply seeking to eliminate all competition is false. Existing ETCs in rural areas are simply attempting to keep the protections Congress intended until it is objectively demonstrated that the public interest warrants designation of an additional ETC. The public interest demands that regulators carefully consider whether a market can support more than one carrier with universal service in each individual market.

The application should be denied, or in the alternative stayed, until the Joint Board and the FCC complete their instant review of ETC designation issues.

Respectfully submitted,

ON BEHALF OF TABLE TOP TELEPHONE COMPANY

By



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