

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)<sup>1</sup>

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

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<sup>1</sup> 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.

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Thomas B. Getz  
Chairman

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Susan S. Geiger  
Commissioner

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Graham J. Morrison  
Commissioner

Attested by:

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Michelle A. Caraway  
Assistant Executive Director