

Fahn, Patrick J.

From: Bonner, Douglas G. [doug.bonner@snrdenton.com]
Sent: Thursday, June 23, 2011 2:35 PM
To: Nitschke, Darrell D.
Cc: Jeffcoat-Sacco, Illona; donn@srt.com; jones@law.und.edu; Fahn, Patrick J.
Subject: Standing Rock Telecommunications, Inc. ETC Designated Service Area - Application, ND PSC Case No. PU-10-574; OAH File No. 20100288
Attachments: FCC 11-102 Standing Rock Order on Reconsideration.pdf

Dear Mr. Nitschke,

As you will recall, this matter has been stayed by the North Dakota Commission following Standing Rock Telecommunications, Inc.'s ("Standing Rock") filing of a motion for stay of this matter on October 7, 2010, in order to permit the FCC to rule on Standing Rock's petition for reconsideration of the FCC's ETC Designation Order, filed on September 23, 2010.

The FCC has now adopted an order on Standing Rock's petition for reconsideration. Please find enclosed the Federal Communications Commission's ("FCC") June 21, 2011 Memorandum Opinion and Order on Reconsideration of the ETC designation order for Standing Rock Telecommunications, Inc. The Order designates Standing Rock Telecommunications, Inc. as an ETC throughout the entire Standing Rock Sioux Reservation, effective immediately, for partial and entire wire centers that are within Reservation boundaries. Furthermore, the FCC's Order holds that no redefinition of rural telephone company service areas is necessary for entire areas that are within federally-recognized Reservation boundaries which are subject to FCC jurisdiction. Accordingly, state commission consent is no longer necessary for Standing Rock's ETC Designation to be effective.

Because the FCC has now clarified that no redefinition (and therefore no accompanying state commission consent) is required in connection with Standing Rock Telecommunications, Inc.'s designation as an Eligible Telecommunications Carrier, Standing Rock Telecommunications, Inc. hereby withdraws its previously filed request in ND PSC Case No. PU-10-574. The related administrative hearing matter may now be closed. Thank you.

Sincerely,

Doug Bonner

Counsel to Standing Rock Telecommunications, Inc.

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20 PU-10-574 Filed: 6/23/2011 Pages: 14
Email withdrawing application

Standing Rock Telecommunications, Inc.

Doug Bonner, Counsel to Standing Rock

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**Before the
Federal Communications Commission
Washington, D.C. 20554**

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| In the Matter of |) | |
| |) | |
| Telecommunications Carriers Eligible for Universal Service Support |) | WC Docket 09-197 |
| |) | |
| Standing Rock Telecommunications, Inc. Petition for Designation as an Eligible Telecommunications Carrier |) | |
| |) | |
| Petition of Standing Rock Telecommunications, Inc. to Redefine Rural Service Areas |) | |
| |) | |
| Petition for Reconsideration of Standing Rock Telecommunications, Inc.'s Designation as an Eligible Telecommunications Carrier on the Standing Rock Sioux Reservation |) | |

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: June 21, 2011

Released: June 22, 2011

By the Commission:

I. INTRODUCTION

1. In this order, we designate Standing Rock Telecommunications, Inc. (Standing Rock), a Tribally owned telecommunications carrier, as an eligible telecommunications carrier (ETC) throughout the entire Standing Rock Sioux Reservation (Reservation), effective immediately. In so doing, we expand the existing ETC designation conferred by the Wireline Competition Bureau (Bureau) in the *Standing Rock Order*¹ and address Standing Rock's request for partial reconsideration of that order.² Our actions here make Standing Rock eligible to receive federal universal service support so that it can bring wireless service to the sparsely populated Reservation, which straddles the border of North Dakota and South Dakota.

2. Designating Standing Rock throughout the entire Reservation without delay is founded on both the historical federal trust relationship we share with federally recognized Tribes and our commitment to promote the availability of affordable communications services to underserved consumers, many of whom reside today on Tribal lands. Tribal governments play a vital role in serving the needs and interests of their local communities, often in remote, low-income, and underserved regions of the country. The Commission has a longstanding policy of promoting Tribal self-sufficiency and economic development and of helping ensure that Tribes have adequate access to communications

¹ *Telecommunications Carriers Eligible for Universal Service Support; Standing Rock Telecommunications, Inc. Petition for Designation as an Eligible Telecommunications Carrier; Standing Rock Telecommunications, Inc.; Petition to Redefine Rural Service Areas*, WC Docket No. 09-197, Memorandum Opinion and Order, 25 FCC 12388 (Wireline Comp. Bur. 2010) (*Standing Rock Order*).

² *Petition for Reconsideration of Standing Rock Telecommunications, Inc.*, WC Docket 09-197 (filed Sept. 23, 2010) (*Petition for Reconsideration*).

services.³ Expanding Standing Rock's ETC designation throughout the Reservation empowers the Standing Rock Sioux Tribe to own and operate the critical communications infrastructure needed to protect the health and safety of Tribal consumers, spur local economic development, preserve Tribal language and culture, and further the education of consumers through distance education programs.

II. BACKGROUND

A. Designation of Eligible Telecommunications Carriers

3. The Communications Act of 1934, as amended (Act), seeks to ensure that low-income consumers and those in rural, insular, and high-cost areas, have access to services that are reasonably comparable to those enjoyed by urban consumers at reasonably comparable rates.⁴ A telecommunications carrier must be designated as an ETC and must offer services throughout its entire service area in order to receive universal service support.⁵

4. *Jurisdiction to Designate ETCs.* Although state commissions have primary responsibility for designating ETCs,⁶ that responsibility shifts to the Commission for a carrier "providing telephone exchange service and exchange access that is not subject to the jurisdiction of a State commission."⁷ The Commission has established a framework for determining whether a state commission or the Commission itself has jurisdiction to designate ETCs on Tribal lands.⁸ First, a carrier serving Tribal lands must petition the Commission for a determination on whether the state has jurisdiction over the carrier.⁹ The Commission then determines whether the carrier is subject to the jurisdiction of a state commission or whether it is subject to a Tribal authority given the Tribal interests involved. In the latter case, the Commission has jurisdiction to designate the carrier as an ETC¹⁰ and will proceed to consider the merits of the carrier's petition for designation.¹¹

³ *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, Policy Statement, 16 FCC Rcd 4078, 4080-81 (2000) (*Tribal Policy Statement*).

⁴ 47 U.S.C. § 254(b)(3).

⁵ 47 U.S.C. § 254(e) (stating that only an ETC is "eligible to receive specific Federal universal service support").

⁶ 47 U.S.C. § 214(e)(2); *see Federal-State Joint Board on Universal Service; Promoting Deployment and Subscriberhip in Unserved and Underserved Areas, Including Tribal and Insular Areas; Smith Bagley, Inc., Cheyenne River Sioux Tribe Telephone Authority, Western Wireless Corporation, Wyoming, Cellco Partnership d/b/a/ Bell Atlantic Mobile, Inc., Petitions for Designation as an Eligible Telecommunications Carrier and for Related Waivers to Provide Universal Service*, CC Docket No. 96-45, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12208, 12255, para. 93 (2000) (*Twelfth Report and Order*), *recon. by Promoting Deployment and Subscriberhip in Unserved and Underserved Areas, Including Tribal and Insular Areas*, CC Docket No. 96-45, Twenty-Fifth Order on Reconsideration, Report and Order, Order, and Further Notice of Proposed Rulemaking, 18 FCC Rcd 10958 (2003) (*Tribal Recon. Order*).

⁷ 47 U.S.C. § 214(e)(6); *see, e.g., Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier for the Commonwealth of Virginia*, CC Docket No. 96-45, Memorandum Opinion and Order, 19 FCC Rcd 1563 (2004) (*Virginia Cellular Order*); *Highland Cellular, Inc. Petition for Designation as an Eligible Telecommunications Carrier for the Commonwealth of Virginia*, CC Docket No. 96-45, Memorandum Opinion and Order, 19 FCC Rcd 6422 (2004) (*Highland Cellular Order*).

⁸ *Twelfth Report and Order*, 15 FCC Rcd at 12265-69, paras. 115-27; *Tribal Recon. Order*, 18 FCC Rcd at 10964 n.28.

⁹ *Twelfth Report and Order*, 15 FCC Rcd at 12265-69, paras. 115-27.

¹⁰ *Id.* at 12266-12267, paras. 120-22.

¹¹ *Id.* at 12265, para. 115.

5. *ETC Designation.* Pursuant to the Act, the Commission may, with respect to an area served by a rural telephone company,¹² and shall, in all other cases, designate more than one common carrier as an ETC for a service area so long as the requesting carrier meets certain requirements.¹³ The Commission must determine that a designation is in the public interest before designating a competitive ETC in an area served by a rural telephone company.¹⁴

6. A common carrier seeking designation as an ETC under section 214(e)(6) on any part of Tribal lands shall provide a copy of its petition to the affected Tribal government and Tribal regulatory authority, as applicable, at the time it files its petition with the Commission.¹⁵ The Commission strongly encourages the participation of Tribal authorities in the designation process of carriers seeking to serve on Tribal lands.¹⁶

B. Standing Rock Petitions

7. Standing Rock is a Tribally owned commercial mobile radio service (CMRS) provider operating within the boundaries of the Standing Rock Reservation.¹⁷ The Reservation encompasses territory located in both North Dakota and South Dakota.¹⁸ Standing Rock is licensed to provide personal communications service throughout the Reservation, and its licensed service area covers parts of the service areas of the following incumbent rural telephone companies operating within the boundaries of the Reservation: Cheyenne River Sioux Tribe Telephone Authority (Cheyenne River), West River Cooperative Telephone Company (West River Cooperative), West River Telecommunications of Mobridge (West River of Mobridge), and West River Telecommunications (West River).¹⁹ Standing Rock's licensed service area also includes part of the study area of Qwest Communications (Qwest), a non-rural telephone company operating within the boundaries of the Reservation.²⁰

8. On August 24, 2010, the Bureau designated Standing Rock as an ETC in certain portions of the Reservation.²¹ Specifically, the Bureau designated Standing Rock as an ETC throughout the service area of Qwest within the Reservation's boundaries as well as the Fort Yates, McLaughlin, and Selfridge wire centers of West River.²² The Bureau did not act on Standing Rock's petition for

¹² See 47 U.S.C. § 153(37) (defining "rural telephone company").

¹³ See 47 U.S.C. § 214(e)(1); 47 C.F.R. § 54.202(a); *Procedures for FCC Designation of Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act*, CC Docket No. 96-45, Public Notice, 12 FCC Rcd 22947, 22948-49 (1997) (*Section 214(e)(6) Public Notice*). For example, all ETCs must offer and advertise the services supported by the federal universal service mechanisms throughout their designated service areas. 47 U.S.C. § 214(e)(1).

¹⁴ 47 U.S.C. § 214(e)(6); 47 C.F.R. § 54.202(c).

¹⁵ 47 C.F.R. § 54.202(d).

¹⁶ *Twelfth Report and Order*, 15 FCC Rcd at 12266-69, paras. 119-26.

¹⁷ Petition of Standing Rock Telecommunications, Inc. for Designation as an Eligible Telecommunications Carrier, WC Docket No. 09-197, at 5-6 (filed Dec. 18, 2009) (Standing Rock ETC Petition).

¹⁸ Standing Rock ETC Petition at 3, 5-6 and Exh. VIII.

¹⁹ Standing Rock ETC Petition at 17.

²⁰ *Id.*

²¹ *Standing Rock Order*, 25 FCC Rcd at 12388, para. 1. Standing Rock's service area code (SAC) is 389014. Neither state commission contested the authority of the Commission to consider Standing Rock's ETC designation petition. See, e.g., South Dakota Commission Comments, WC Docket No. 09-197, at 2 (filed Feb. 18, 2010) (requesting that the Commission review Standing Rock's petition on the merits).

²² The Bureau designated Standing Rock an ETC in the McIntosh and Morrystown wire centers within Qwest's service area; the portion of Qwest's Timberlake wire center within the Reservation's boundaries and the Fort Yates, (continued . . .)

designation in several partial wire centers of rural telephone companies, noting that the Commission has never addressed the precise issue of whether a Tribe should be permitted to serve all residents of its Reservation for the purposes of receiving universal service support.²³ The Bureau, therefore, referred to the full Commission the issue of whether Standing Rock, a Tribally owned carrier, should be permitted to serve rural partial wire centers in order to encompass the entire reservation.²⁴ Because the Bureau designated Standing Rock in some but not all of the wire centers of West River, the Bureau proposed to redefine West River's service area and forwarded the proposed redefinition to the North Dakota Public Service Commission (North Dakota Commission) for concurrence in accordance with the Commission's rules and requirements.²⁵

9. On September 23, 2010, Standing Rock filed a petition for reconsideration of certain portions of the *Standing Rock Order*, arguing that its designation in some but not all of West River's service area within the Reservation should not be conditioned on the consent of the North Dakota Commission to redefine the service area of West River.²⁶

III. DISCUSSION

10. We agree with the Bureau's previous determination that this Commission has jurisdiction to designate Standing Rock within the Reservation,²⁷ and that Standing Rock has met the statutory and regulatory requirements for being designated an ETC. The only questions presently before us are whether we should designate Standing Rock as an ETC for the entire Reservation, including several rural partial wire centers, and whether designating Standing Rock throughout the rural service areas within the Commission's jurisdiction requires that we redefine the service area of the incumbent rural telephone companies before Standing Rock's designation can become effective. After careful review of the record, we designate Standing Rock as an ETC for the entire Reservation. We further conclude that redefinition is not necessary here and therefore that Standing Rock's designation is effective immediately.

(. . . continued from previous page) _____

McLaughlin, and Selfridge wire centers within West River's study area. *Standing Rock Order*, 25 FCC Rcd at 12396, para. 25. In the *Highland Cellular Order*, the Commission held that "a rural telephone company's wire center is an appropriate minimum geographic area for ETC designation." 19 FCC Rcd at 6438, para. 33. The Commission has not imposed a similar requirement on non-rural companies' service areas.

²³ *Standing Rock Order*, 25 FCC Rcd at 12396, para. 29. Standing Rock sought designation to serve the following partial rural wire centers: (1) the St. Anthony wire center within West River's service area; (2) the Lemmon and Meadow wire centers within West River Cooperative's service area; (3) the Mobridge wire center within West River of Mobridge's service area; and (4) the Isabel wire center within Cheyenne River Sioux Tribe Telephone Authority's service area. Petition of Standing Rock Telecommunications, Inc. to Redefine Rural Service Areas, WC Docket No. 09-197, at 5 (filed Feb 18, 2010) (*Standing Rock Redefinition Petition*).

²⁴ *Standing Rock Order*, 25 FCC Rcd at 12396-97, para. 29.

²⁵ *Id.* at 12396, paras. 25-28.

²⁶ See Petition for Reconsideration of Standing Rock Telecommunications, Inc., WC Docket 09-197 (filed Sept. 23, 2010) (*Standing Rock Petition for Reconsideration*). The Bureau sought comment on Standing Rock's petition for reconsideration. *Comment Sought on Standing Rock Petition for Reconsideration of the Standing Rock ETC Designation and Redefinition Order*, WC Docket 09-197, Public Notice, 25 FCC Rcd 14470 (Wireline Comp. Bur. 2010). Appendix A lists commenters on the referred issue of partial wire centers as well as on Standing Rock's petition for reconsideration.

²⁷ No party argues that either the North Dakota Commission or the South Dakota Public Utilities Commission has jurisdiction to designate Standing Rock, a Tribally owned, Tribally operated carrier that seeks to serve its own reservation as an ETC.

A. Standing Rock May Serve Its Entire Reservation

11. In the *Standing Rock Order*, the Bureau referred to the full Commission the question of whether Standing Rock should be permitted to serve rural partial wire centers in order to encompass the entire Reservation.²⁸ We find that because Standing Rock proposes to serve its entire community, it would be in the public interest to designate Standing Rock on the entire Reservation, including any rural partial wire centers.

12. As part of its public interest analysis in designating an additional ETC in a rural telephone company's service area, the Commission has determined that a competitive ETC must commit, prior to designation, to provide the supported services to customers throughout a "minimum geographic area."²⁹ In the past, the Commission has generally required competitive ETCs to serve entire rural wire centers because "rural wire centers typically correspond with county and/or town lines" and "requiring an ETC to serve entire communities will make it less likely that the competitor will relinquish its ETC designation at a later date."³⁰ The rural partial wire centers that Standing Rock seeks to serve by definition do not "correspond with county and/or town lines" and cannot be viewed as hard-and-fast boundaries between different communities. Instead, these rural wire centers criss-cross the boundaries between the state of North Dakota, the state of South Dakota, and the Reservation, illustrating the fact that not all rural wire centers follow political or governmental jurisdictional lines. We expect that a similar situation occurs in other reservations, especially given the history of the deployment of telecommunications services on Tribal lands.³¹

13. The Commission has generally favored ETC designation if it would promote universal service goals, such as the need to ensure that reasonably comparable services are available for consumers throughout the nation, including consumers in rural areas.³² These goals take on acute importance when considering a designation on Tribal lands, where the Commission has assumed a special role in "promoting access to wireless radio and other communications services," given that rates of telephone and broadband penetration are "significantly lower" on Tribal lands than elsewhere in the United States.³³ Specifically with respect to Standing Rock, the Bureau has already concluded that the company will provide a variety of benefits to consumers residing on the Reservation, including improved quality of service,³⁴ increased consumer choice, and access to communications services critical to public safety and emergency services needs.³⁵ We agree that Standing Rock's mobile wireless service will provide additional benefits to consumers on the Reservation. For example, access to the service will mitigate the

²⁸ *Standing Rock Order*, 25 FCC Rcd at 12397-98, para. 29.

²⁹ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 20 FCC Rcd 6371, 6406, para. 77 (2005) (*ETC Designation Order*); *Highland Cellular Order*, 19 FCC Rcd at 6438, para. 33.

³⁰ *Highland Cellular Order*, 19 FCC Rcd at 6438, para. 33; *see also ETC Designation Order*, 20 FCC Rcd at 6406, para. 79; *Cellular Properties Redefinition Order*, DA 11-441, at 4, para. 7.

³¹ *See, e.g.*, NTTA Referral Comments at 2 (arguing that service providers have historically drawn "artificial boundaries" to provide service rather than defining service areas to serve the "tribal community in its entirety").

³² *Highland Cellular Order*, 19 FCC Rcd at 6438, para. 33.

³³ *Improving Communications Services for Native Nations by Promoting Greater Utilization of Spectrum over Tribal Lands*, WT Docket No. 11-40, Notice of Proposed Rulemaking, FCC 11-29, at 3-4, paras. 4-5 (rel. Mar. 3, 2011); *see also Improving Communications Services for Native Nations*, CG Docket No. 11-41, Notice of Inquiry, FCC 11-30 (rel. Mar. 4, 2011); NTTA Referral Comments at 1.

³⁴ In its reply comments to the initial Public Notice seeking comment on its ETC designation and redefinition petitions, the Standing Rock Sioux Tribe stated that it "has been working for nearly a decade to address service issues on the [R]eservation that were prevalent with incumbent service providers." *See Standing Rock Sioux Tribe Reply Comments* at 5 (filed Mar. 30, 2010).

³⁵ *Standing Rock Order*, 25 FCC Rcd at 12394, para. 20.

health and safety risks associated with living on this remote and rural Tribal land, where consumers must often travel significant distances for work, school, medical attention or other needs. Moreover, with an average annual income of \$10,000 and a high school graduation rate of 60 percent or less,³⁶ the reliable and affordable communications services that Standing Rock will provide are needed throughout the Reservation.³⁷

14. We define the “community” here as the population of the Reservation and designate Standing Rock’s service area to be the entire Reservation so that it can serve its entire community. We conclude that this approach comports with our universal service policy goals as well as the underlying purposes of our policy to require a minimum geographic area for ETCs to serve.³⁸ Similarly, aligning Standing Rock’s service area with its own Tribal government’s political boundaries should encourage Standing Rock to continue to serve the entire population governed by the Standing Rock Sioux Tribe, making it unlikely that Standing Rock would relinquish its ETC designation at a later date.

15. We also find that this conclusion aligns with the nature of Tribal sovereignty. Congress usually intends that its “statutes . . . be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.”³⁹ This canon is “rooted in the unique trust relationship between the United States and the Indians.”⁴⁰ The Commission has recognized its “fiduciary duty to conduct [itself] in matters affecting Indian tribes in a manner that protects the interest of the tribes” and its corresponding obligation to interpret “federal rules and policies . . . in a manner that comports with tribal sovereignty and the federal policy of empowering tribal independence.”⁴¹ Recognizing that all residents of the Reservation reside within a sovereign community better respects the inherent sovereignty of Tribal governments than a rigid policy that defines the requisite minimum geographic area as the population of a wire center regardless of its conformance with political and jurisdictional boundaries. Thus, we find that deviating from the general requirement that competitive ETCs serve entire rural wire centers is justified.

16. We believe that not allowing Standing Rock to receive support to serve residents of the Reservation that live in rural partial wire centers would undermine the public interest under these

³⁶ See Joe Sneve, *Tribes Excited About Wireless Possibilities*, ARGUSLEADER.COM, Aug. 2, 2010 (last visited May 26, 2011).

³⁷ In an *ex parte* meeting with Commission staff, Chairman Charles Murphy of the Standing Rock Sioux Tribe, “outlined the historical problems with lack of reliable and affordable communications options throughout the Standing Rock [R]eservation.” See Letter from Douglas G. Bonner, Counsel for Standing Rock Telecommunications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 09-197, at 2 (filed July 16, 2010). Chairman Murphy also discussed the unique communications needs on the Reservation, given its rural and very isolated location and harsh weather conditions. *Id.*

³⁸ In evaluating the merits of a proposed rural service area in a competitive ETC designation, the Commission historically has focused on minimizing cream-skimming (*i.e.*, the ability of a competitor to serve only the least expensive customers, thereby undermining the ability of an incumbent LEC to provide service to its entire study area) and assessing the impact of the designation on the ability of the affected rural telephone company to serve its entire rural service area. *ETC Designation Order*, 20 FCC Rcd at 6392, para. 48; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 8881-82, para. 189 (1997) (*Universal Service First Report and Order*) (subsequent history omitted). We do not find that cream-skimming is a significant concern because Standing Rock has requested to serve the entire Reservation, in effect serving an entire community within the sovereign boundaries of the Reservation. See 47 C.F.R. § 54.202(c); Standing Rock ETC Petition at 3, 6.

³⁹ *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

⁴⁰ *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985).

⁴¹ *Twelfth Report and Order*, 15 FCC Rcd at 12266, para. 119.

circumstances.⁴² Geographically, rural wire centers only partially within a Reservation are unlikely to be in the heart of the rural carrier's territory and are more likely to be at the periphery of a given service area. Such areas may be less populated, more rural, and more in need of universal service support. Standing Rock's petition confirms that the rural partial wire centers at issue in the instant matter have these characteristics.⁴³ Further, where, as here, the community of Tribal residents includes some who live in rural partial wire centers, a requirement to serve only entire rural wire centers would perversely preclude a Tribal carrier from receiving support to serve all residents on Tribal lands.⁴⁴

17. Some commenters are concerned that designating Standing Rock in rural partial wire centers in this proceeding may release a flood of requests for designation in rural partial wire centers.⁴⁵ We do not share this concern and reiterate that our decision is based on the facts in this proceeding. The Commission is still committed to applying the minimum geographic area policy "rigorously."⁴⁶ As previously noted, designating Standing Rock on the entire Reservation is consistent with the Commission's policy of serving a minimum geographic area. Specifically, by designating Standing Rock on the entire Reservation, we ensure that Standing Rock's service area includes the highest-cost portions of the Reservation and we guard against the possibility that Standing Rock will relinquish its ETC designation in the future. We note that competitive ETCs seeking to serve rural partial wire centers have a heavy burden to show, among other things, that the proposed service area is consistent with our analysis in this proceeding of what constitutes an appropriate minimum geographic area and other precedent.

B. Redefinition Is Not Needed When a Commission Designates a Carrier Throughout the Entire Rural Service Area Within Its Jurisdiction

18. In conjunction with its petition for ETC designation, Standing Rock petitioned the Commission for redefinition of the service areas of four rural telephone companies.⁴⁷ Because the Bureau only designated in a portion of the service area of one of those companies—West River—the Bureau concluded that redefinition of that rural telephone company's service area was necessary before Standing Rock's designation within that service area could be effective. Accordingly, the Bureau proposed to redefine West River's service area at the wire-center level and sought the concurrence of the North Dakota Commission.⁴⁸ Standing Rock has petitioned the Commission to reconsider that portion of the Bureau's order.⁴⁹

19. Consistent with our precedent, we conclude that, because we here designate Standing Rock to serve the part of the service area of each of the rural telephone companies that lies within the limits of our jurisdictional authority, redefinition is unnecessary and no state commission need consent before Standing Rock's designation takes effect. No party disputes that when a commission designates a

⁴² *But see, e.g.*, Rural Telephone Companies Referral Comments at 3–4 (arguing that the Commission should not "step[] away" from its "existing standard" of requiring designation in entire wire centers).

⁴³ *See* Standing Rock ETC Petition, Exh. VIII.

⁴⁴ *See* NTTA Referral Comments at 2.

⁴⁵ US Telecom Referral Comments at 1–3; CenturyLink Referral Comments at 2–3; Windstream Referral Comments at 3–5. A majority of commenters do not oppose the designation of Standing Rock below the wire center level for purposes of serving the entire Reservation.

⁴⁶ *ETC Designation Order*, 20 FCC Rcd at 6406, para. 79.

⁴⁷ Standing Rock requested redefinition of the service areas of West River, West River Cooperative, West River of Mobridge, and the Cheyenne River Sioux Tribe Telephone Authority. *See* Standing Rock Redefinition Petition at 6. These rural service areas cover areas in both North Dakota and South Dakota.

⁴⁸ *Standing Rock Order*, 25 FCC Rcd at 12396, paras. 26–27.

⁴⁹ Petition for Reconsideration at 1.

carrier throughout an entire rural service area, section 214(e)(5) does not require redefinition. In the *Virginia Cellular Order*, the Commission did not need to redefine any of the rural service areas that Virginia Cellular could “serve completely.”⁵⁰ Nor did the Bureau suggest redefinition or state consent was necessary when it designated Hopi Telecommunications as an ETC throughout the “entire study area” of the local rural telephone company.⁵¹

20. Similarly, the Commission has found redefinition unnecessary when it has designated carriers as ETCs throughout a rural telephone company’s entire service area *within its jurisdiction*. In the *Western Wireless Wyoming Order*, for example, the Bureau designated Western Wireless throughout several rural service areas within the state of Wyoming, but recognized that its jurisdiction did not extend to the portions of the rural service areas that extended beyond Wyoming’s borders.⁵² The Bureau noted that the redefinition procedures of the Act and our rules were “inapplicable” in cases where “study areas . . . cross state boundaries.”⁵³ On reconsideration, the Commission affirmed the Bureau’s reading of the Act,⁵⁴ holding that “the statute simply does not address circumstances in which an existing study area for a rural carrier may extend beyond state borders, and in which two or more states might have been involved in establishing the service area.”⁵⁵ To fill in this statutory “gap,”⁵⁶ the Commission held that when a designation “encompasses the maximum geographic area for which the Commission has jurisdiction,” there is “no basis for delaying the ETC designation or pursuing additional procedures to consult with neighboring state commissions.”⁵⁷ The Commission applied this same interpretation of the Act in the *Western Wireless Pine Ridge Order* when it designated a carrier to serve the entire Pine Ridge reservation.⁵⁸

⁵⁰ See *Virginia Cellular Order*, 19 FCC Rcd at 1580, para. 36.

⁵¹ See *Federal-State Joint Board on Universal Service; Hopi Telecommunications, Inc. Petition for Designation as an Eligible Telecommunications Carrier for the Hopi Reservation in Arizona*, CC Docket No. 96-45, Order, 22 FCC Rcd 1866, 1874, paras. 23–24 (Wireline Comp. Bur. 2007) (designating a Tribal carrier as an ETC throughout a rural incumbent’s “entire study area”); see also *Federal-State Joint Board on Universal Service; Smith Bagley, Inc. Petition for Designation as an Eligible Telecommunications Carrier for the Navajo Reservation in Utah*, CC Docket No. 96-45, Order, 22 FCC Rcd 2479, 2488, paras. 28–29 (Wireline Comp. Bur. 2007) (designating a non-Tribal carrier as an ETC through a rural incumbent’s “entire study area”).

⁵² *Federal-State Joint Board on Universal Service; Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier in the State of Wyoming*, CC Docket No. 96-45, Order, 16 FCC Rcd 48, 58–59, para. 24 (Wireline Comp. Bur. 2001) (*Western Wireless Wyoming Order*).

⁵³ *Id.* at 59 n.71.

⁵⁴ *Federal-State Joint Board on Universal Service; Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier in the State of Wyoming*, CC Docket No. 96-45, Order on Reconsideration, 16 FCC Rcd 19144 (2001) (*Western Wireless Recon. Order*).

⁵⁵ *Id.* at 19148, para. 9.

⁵⁶ See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843–44 (1984).

⁵⁷ *Western Wireless Recon. Order*, 16 FCC Rcd at 19147, para. 8; see also *Western Wireless Wyoming Order*, 16 FCC Rcd at 59 n.72.

⁵⁸ *Federal-State Joint Board on Universal Service; Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota*, Memorandum Opinion and Order, CC Docket No. 96-45, 16 FCC Rcd 18133, 18140, para. 18 (2001) (*Western Wireless Pine Ridge Order*) (“We conclude that the federal-state process in section 214(e)(5) contemplates situations in which only one entity, either the state commission or this Commission, has the authority to designate the rural telephone company’s entire study area as the ETC’s service area. The statute does not address circumstances in which an existing study area for a rural carrier may extend beyond jurisdictional boundaries . . .” (footnote omitted)); accord *Federal-State Joint Board on Universal Service; Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers; Petitions for Reconsideration filed by:*

(continued . . .)

21. Accordingly, consistent with precedent, we conclude that this Commission has jurisdiction to designate Standing Rock as an ETC within the Reservation, but not beyond it, and may therefore define Standing Rock's service area to encompass the parts of the rural service areas that lay within our jurisdiction. As discussed above, we find it appropriate to designate Standing Rock throughout the entire Reservation, including the rural service areas of West River, West River Cooperative, West River of Mobridge, and Cheyenne River within the Reservation's boundaries.⁵⁹ Because we designate Standing Rock throughout the entire rural service areas within our jurisdiction—an area that “encompasses the maximum geographic area for which the Commission has jurisdiction”⁶⁰—we conclude that redefinition of the service areas of any of the subject rural telephone companies is not required.⁶¹ As such, Standing Rock's designation throughout the Reservation is effective immediately and not dependent on the assent of any state commission.⁶²

22. We disagree with West River's attempt to distinguish relevant Commission precedent, specifically, the *Western Wireless Pine Ridge Order*, from the present case based on the facts that that order “involved a non-tribally owned carrier” seeking to serve “members of the tribe” (but not non-members) “in a different state with a different regulatory history.”⁶³ We find that the distinctions cited by West River are immaterial to the question at hand; indeed, the two cases parallel each other in all material respects. As in the *Western Wireless Pine Ridge Order*, the service areas of the rural telephone companies at issue here extend beyond the boundaries of Tribal lands (and hence beyond the Commission's jurisdiction), and the Commission is designating the competitive ETC to serve the entire rural service areas within its jurisdiction.

23. We also disagree with Standing Rock's assertion that the Commission may redefine the service area of a rural telephone company without any state's consent.⁶⁴ Standing Rock premises this argument on, among other things, canons of interpretation, the legislative history of section 214(e)(6) of the Act, and dicta in the *Western Wireless Pine Ridge Order*.⁶⁵ As we have held in the past, however, the “plain language of section 214(e)(5) dictates that neither the Commission nor the states may act alone to

(. . . continued from previous page)

Coalition of Rural Telephone Companies Competitive Universal Service Coalition Illinois Commerce Commission National Telephone Cooperative Association, CC Docket Nos. 96-45, 00-256, Order on Reconsideration, 17 FCC Rcd 11472, 11479 n.47 (2002) (characterizing the situation where “an existing study area for a rural carrier extends beyond jurisdictional boundaries, such as state lines or tribal lands” as an “exception” to the normal requirements of section 214(e)(5) of the Act).

⁵⁹ See *supra* section III.A.

⁶⁰ *Western Wireless Recon. Order*, 16 FCC Rcd at 19147, para. 8.

⁶¹ See *id.*; *Western Wireless Pine Ridge Order*, 16 FCC Rcd at 18140, para. 18; *RTF Recon. Order*, 17 FCC Rcd at 11479 n.47. We accordingly disagree with West River's suggestion that the Act requires redefinition even when Standing Rock could not conform its service area to West River's absent designation by both the Commission and the North Dakota Commission. West River Recon Comments at 5–6.

⁶² See Twin Houses Recon Comments at 4 (arguing that state consent should not be required before Standing Rock's designation is effective). Accordingly, we disagree with the suggestion of several commenters that we must deny Standing Rock's petition for reconsideration in its entirety. See, e.g., North Dakota Recon Comments at 2–3; South Dakota Recon Reply at 2–3.

⁶³ West River Recon Comments at 6–7; see also SDTA Recon Comments at 2–3 (explaining that the *Western Wireless Pine Ridge Order* predates more recent precedent without explaining how the two might conflict).

⁶⁴ See Standing Rock Petition for Reconsideration at 5 (arguing that the Commission alone has authority to redefine a rural service area in these circumstances); Cheyenne River Recon Comments at 5 (same); Standing Rock Recon Reply at 2 (same); see also Standing Rock Petition for Reconsideration at 13 (suggesting that if the Commission needs concurrence to redefine a rural service area, that concurrence should come from the Standing Rock Sioux Tribe, not a state commission).

⁶⁵ See Standing Rock Petition for Reconsideration at 4–11.

alter the definition of service areas served by rural carriers.”⁶⁶ Accordingly, if we were to seek to redefine the service area of any of the rural telephone companies at issue here, we would need to seek the assent of the appropriate state commission.⁶⁷ Because we conclude that redefinition is not necessary, however, no such assent is needed.⁶⁸

24. Given that Standing Rock only seeks to serve areas within the Reservation and given that Standing Rock may do so as an ETC without redefinition, we dismiss Standing Rock’s petition for redefinition without prejudice.

C. Procedural Matters

25. Standing Rock is still bound by the certifications and commitments imposed on it in the *Standing Rock Order* as well as all other obligations of federally designated ETCs. These obligations apply to Standing Rock throughout its service area. We note that Standing Rock may not have filed the certifications and data required of ETCs that receive high-cost support given its pending petition for reconsideration. Absent waiver of these requirements, Standing Rock may not be eligible to receive universal service support immediately. Because Standing Rock has not yet received universal service support, however, and because Standing Rock timely sought reconsideration of a portion of the order that imposed these obligations on Standing Rock, we find good cause to waive sections 54.307, 54.313, and 54.314 of our rules to the extent necessary so that Standing Rock may be treated as a newly designated ETC throughout its service area for the purpose of complying with these rules.⁶⁹

26. We also note that North Dakota has not filed a rate-comparability certification on behalf of its non-rural carriers, as required by section 54.316 of our rules,⁷⁰ which could be construed as prohibiting Standing Rock (which has registered with the Universal Service Administrative Company as a carrier located in North Dakota) from receiving universal service support under section 54.309 of our rules.⁷¹ Support under that provision is provided on a wire center basis, and the wire centers for which

⁶⁶ *Universal Service First Report and Order*, 12 FCC Rcd at 8880, para. 187 (citing 47 U.S.C. § 214(e)(5)); see West River Recon Comments at 4, 6; North Dakota Commission Recon Comments at 2; South Dakota Commission Recon Reply at 2; SDTA Recon Comments at 2; see also 143 Cong. Rec. S12568 (daily ed. Nov. 13, 1997) (statement of Sen. McCain) (“States . . . have no jurisdiction over tribally owned common carriers which may or may not be regulated by a tribal authority that is not a State commission per se.”); 143 Cong. Rec. H10808 (daily ed. Nov. 13, 1997) (statement of Rep. Hayworth) (“Some, not all, but some States have no jurisdiction over tribal-owned carriers, which may or may not be regulated by a tribal authority that is not a State commission per se.”); Telecommunications Carriers Not Subject to Jurisdiction of State Commissions Act, Pub. L. No. 105-125, 111 Stat. 2540 (1997) (inserting references to the Commission’s authority in paragraphs (1), (3), (4), and (5) of section 214(e) in parallel to existing references to the authority of state commissions, and adding paragraph (6) to parallel section (2)).

⁶⁷ As such, our reading of the Act does not “write out of the statute” section 214(e)(5)’s last sentence, as West River argues that Standing Rock’s interpretation does. See West River Recon Comments at 6.

⁶⁸ We note that the Commission has previously disavowed any across-the-board rule regarding when a state commission has jurisdiction over a carrier—Tribal or otherwise—that seeks to serve residents of Tribal lands. See *Twelfth Report and Order*, 15 FCC Rcd at 12261, para. 107 (“Nor do we find persuasive claims that the Commission generally has authority to make all eligible telecommunications carrier determinations over carriers providing telecommunications service on tribal lands.”); *id.* at 12259, para. 102 (noting that the “exercise of state commission jurisdiction over carriers providing service on tribal lands varies from state to state”). We do not depart from that precedent here.

⁶⁹ See 47 C.F.R. §§ 54.307(d) (setting forth high-cost filing procedures for newly designated competitive ETCs), 54.313(d)(3)(vi) (setting forth non-rural certification procedures for newly designated ETCs), 54.314(d)(6) (setting forth rural certification procedures for newly designated ETCs).

⁷⁰ See 47 C.F.R. § 54.316.

⁷¹ See 47 C.F.R. § 54.309.

Standing Rock would be eligible for support are considered to be South Dakota wire centers, though they straddle the border between North and South Dakota (as does Standing Rock's service area).⁷² For these reasons, and because South Dakota has filed the necessary certification, we waive section 54.316 of our rules to the extent necessary so that Standing Rock may receive support for the lines it has served in these non-rural wire centers since its initial designation.

IV. ORDERING CLAUSES

27. ACCORDINGLY, IT IS ORDERED that, pursuant to the authority contained in sections 4(i), 214(e), and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 214(e), 254, section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, Standing Rock Telecommunications, Inc. IS DESIGNATED AN ELIGIBLE TELECOMMUNICATIONS CARRIER for its licensed service area on the Standing Rock Sioux Reservation, as described herein.

28. IT IS FURTHER ORDERED that the petition for reconsideration filed by Standing Rock on September 23, 2010 IS GRANTED to the extent discussed herein and otherwise DISMISSED.

29. IT IS FURTHER ORDERED that the petition for redefinition filed by Standing Rock on February 18, 2010 IS DISMISSED without prejudice.

30. IT IS FURTHER ORDERED that Standing Rock Telecommunications, Inc. SHALL SUBMIT additional information pursuant to section 54.209 of the Commission's rules, 47 C.F.R. § 54.209, no later than October 1, 2011, as part of its annual reporting requirements.

31. IT IS FURTHER ORDERED that, pursuant to section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, sections 54.307, 54.313, 54.314, and 54.316 of the Commission's rules, 47 C.F.R. §§ 54.307, 54.313, 54.314, 54.316, ARE WAIVED to the extent discussed herein.

32. IT IS FURTHER ORDERED that a copy of this Order SHALL BE TRANSMITTED by the Wireline Competition Bureau to the North Dakota Public Service Commission, the South Dakota Public Utilities Commission, and the Universal Service Administrative Company.

33. IT IS FURTHER ORDERED that, pursuant to section 1.102(b)(1) of the Commission's rules, 47 C.F.R. § 1.102(b)(1), this Order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁷² Wire centers are assigned to a single state, based on their CLLI codes, for purposes of support under 47 C.F.R. § 54.309, without regard to how many state boundaries they may cross. The wire centers at issue here are the McIntosh (CLLI code MCINSDCO), Morristown (MRTWSDCO), and Timberlake (TMLKSDCO) wire centers.

APPENDIX A

List of Commenters

Telecommunications Carriers Eligible for Universal Service Support, WC Docket No. 09-197, Comment Sought on Whether Standing Rock Telecommunications, Inc. Should Be Designated as an Eligible Telecommunications Carrier in Partial Rural Wire Centers So That It Can Serve the Entire Standing Rock Sioux Reservation , 25 FCC Rcd 12405 (Wireline Comp. Bur. 2010)

| <u>Commenter</u> | <u>Abbreviation</u> |
|--|---------------------------|
| South Dakota Telecommunications Association, North Dakota Association of Telecommunications Cooperatives, West River Cooperative Telephone Company, West River Telecommunications Cooperative | Rural Telephone Companies |
| United States Telecom Association | US Telecom |
| California Association of Tribal Governments | California Tribes |
| Windstream Communications, Inc. | Windstream |
| National Tribal Telecommunications Association | NTTA |
| CenturyLink | CenturyLink |

Telecommunications Carriers Eligible for Universal Service Support, WC Docket No. 09-197, Comment Sought on a Petition by Standing Rock Telecommunications, Inc. to Reconsider, 25 FCC Rcd 1828 (Wireline Comp. Bur. 2010)

| <u>Commenter</u> | <u>Abbreviation</u> |
|--|-------------------------|
| Cheyenne River Sioux Tribe Telephone Authority | Cheyenne River |
| Coeur d'Alene Tribe | Coeur d'Alene Tribe |
| North Dakota Public Service Commission | North Dakota Commission |
| Tehan Woglake, Inc. | Tehan Woglake |
| West River Telecommunications Cooperative | West River |

| <u>Reply Commenter</u> | <u>Abbreviation</u> |
|---|-------------------------|
| South Dakota Public Utilities Commission | South Dakota Commission |
| South Dakota Telecommunications Association | SDTA |
| Standing Rock Telecommunications, Inc. | Standing Rock |
| Twin Houses Consulting, LLC | Twin Houses |

APPENDIX B

**Standing Rock Telecommunications, Inc.'s
Designated Service Area**

| Wire Center | State | Incumbent Carrier | CLLI Code |
|--------------------|---------------------------|------------------------------------|------------------|
| Fort Yates | North Dakota | West River Telecom. | FTYTNDXA |
| Isabel* | South Dakota | Cheyenne River | ISBLSDXA |
| Lemmon* | North Dakota/South Dakota | West River Cooperative | LMMNSDXA |
| McIntosh | South Dakota | Qwest | MCINSDCO |
| McLaughlin | North Dakota | West River Telecom. | MCLGSDXA |
| Meadow* | South Dakota | West River Cooperative | MEDWSDXA |
| Mobridge* | South Dakota | West River Telecom. of Mobridge | MBRGSDXA |
| Morristown | South Dakota | Qwest | MRTWSDCO |
| Selfridge | North Dakota | West River Telecom. | SLRGNDXA |
| St. Anthony* | North Dakota | West River Telecom. | STATNDXB |
| Timberlake* | South Dakota | Qwest | TMLKSDCO |

* Only those areas within the boundaries of the Standing Rock Sioux Reservation.