

FOCUS - 4 of 10 DOCUMENTS

APPLICATION OF UNITED STATES CELLULAR CORPORATION  
FOR WAIVER OF CERTAIN WIRELESS ETC RULES

CAUSE NO. PUD 200500055; ORDER NO. 510743

Oklahoma Corporation Commission

*2005 Okla. PUC LEXIS 180*

September 2, 2005, Done and Performed

**[\*1]** APPEARANCES: Dallas Ferguson, Attorney United States Cellular Corporation; Ron Comingdeer, Attorney Atlas Telephone Company, Beggs Telephone Company, Bixby Telephone Company, Canadian Valley Telephone Company, Oklahoma Telephone & Telegraph, Santa Rosa Telephone Cooperative, Shidler Telephone Company, South Central Telephone Association, Terral Telephone Company and Valliant Telephone Company; Kimberly K. Brown, Attorney Chouteau Telephone Company, Pine Telephone Company, and Totah Telephone Company; Cody B. Waddell, Attorney Oklahoma Communications Systems, Inc., and Mid-America Telephone, Inc.; Bennett Abbott, Assistant General Counsel Public Utility Division, Oklahoma Corporation Commission

**PANEL:** JEFF CLOUD, Chairman; DENISE A. BODE, Vice Chairman; BOB ANTHONY, Commissioner

**OPINION: FINAL ORDER ADOPTING THE REPORT OF THE ADMINISTRATIVE  
LAW JUDGE AND DISMISSING CAUSE**

BY THE COMMISSION:

The Oklahoma Corporation Commission being regularly in session and the undersigned Commissioners being present and participating, there comes on for consideration the August 5, 2005, Report of the Administrative Law Judge.

**PROCEDURAL HISTORY**

On February 1, 2005, United States Cellular Corporation ("USCC") **[\*2]** filed its Application requesting the Commission issue an Order waiving the Application of the Commission's rules set forth in OAC 165:55-23-11(a)(1)(A); 55-23-11(a)(1)(G); and 55-23-15(c) to USCC and provide that USCC is not required to comply with such rules in connection with its operations as a wireless eligible telecommunications carrier ("ETC") in Oklahoma.

On February 22, 2005, the Commission issued Order 501477 establishing a procedural schedule. Pursuant to Order No. 501477, on February 28, 2005, Applicant filed the Direct Testimony of Bradley L. Stein in support its Application.

On March 18, 2005, the RTCs filed a Motion to Dismiss the Application with prejudice.

On March 24, 2005, the Motion to Dismiss came on for hearing whereupon the Applicant requested a continuance until April 5, 2005, to allow the Applicant time to file a written response to the Motion to Dismiss.

On April 4, 2005, the Applicant filed its Response to the Motion to Dismiss.

On April 5, 2005, the Motion to Dismiss came on for hearing before the Administrative Law Judge ("ALJ").

On August 5, 2005, the Report of the Administrative Law Judge was filed.

There were no appeals filed to the Report of the Administrative [\*3] Law Judge.

### **FINDINGS OF FACT**

The Commission, having considered the Report of the Administrative Law Judge, attached hereto as Exhibit A, and made a part hereof, finds that the Report of the Administrative Law Judge shall be adopted, granting the Motion to Dismiss filed by Atlas Telephone Company, Beggs Telephone Company, Bixby Telephone Company, Canadian Valley Telephone Company, Oklahoma Telephone & Telegraph, Santa Rosa Telephone Cooperative, Shidler Telephone Company, South Central Telephone Association, Terral Telephone Company and Valliant Telephone Company.

### **ORDER**

IT IS THEREFORE THE ORDER OF THE OKLAHOMA CORPORATION COMMISSION that the Report of the Administrative Law Judge attached hereto as "Attachment A" is hereby approved.

IT IS FURTHER ORDERED that the above findings are hereby the Order of the Commission.

IT IS FURTHER ORDERED that United States Cellular Corporation shall be bound by OAC 165:55-23-1 *et seq.* USCC has an obligation to comply with the Subchapter 23 rules in addition to complying with all the conditions set forth in Order No. 495563, in order to retain its eligible telecommunications carrier designation within the services areas of the rural telephone [\*4] companies in Oklahoma.

OKLAHOMA CORPORATION COMMISSION

JEFF CLOUD, Chairman

DENISE A. BODE, Vice Chairman

BOB ANTHONY, Commissioner

DONE AND PERFORMED THIS 2 DAY OF SEPTEMBER, 2005, BY ORDER OF THE COMMISSION

ATTACHMENT "A"

Before Maribeth D. Snapp, Administrative Law Judge

### **REPORT AND RECOMMENDATION OF THE ADMINISTRATIVE LAW JUDGE**

This Cause comes on for hearing the Motion to Dismiss filed by Atlas Telephone Company, Beggs Telephone Company, Bixby Telephone Company, Canadian Valley Telephone Company, Oklahoma Telephone & Telegraph, Santa Rosa Telephone Cooperative, Shidler Telephone Com-

pany, South Central Telephone Association, Terral Telephone Company and Valliant Telephone Company (hereinafter referred to as "RTCs"), before Maribeth D. Snapp, Administrative Law Judge of the Corporation Commission of Oklahoma.

### PROCEDURAL HISTORY

On February 1, 2005, United States Cellular Corporation ("USCC") filed its Application requesting the Commission issue an Order waiving the Application of the Commission's rules set forth in OAC 165:55-23-11(a)(1)(A); 55-23-11(a)(1)(G); and 55-23-15(e) to USCC and provide that USCC is not required to comply with such rules in connection [\*5] with its operations as a wireless eligible telecommunications carrier ("ETC") in Oklahoma.

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### ARGUMENTS

Counsel for the RTC's presented their arguments in support of the Motion To Dismiss. Counsel argued that the obligations to which USCC requests a waiver arise out of the Commission's Order No. 495563 issued in Cause No. PUD 200300195 by the Commission on September 28, 2004. In Order No. 495563 the Commission set forth four conditions for USCC to meet as a condition of being designated [\*6] an ETC. One of the conditions was that USCC agree to be bound by all of the requirements in Subchapter 23 of the Commission's Telecommunications Service rules (OAC 165:55-23-1 *et seq.*). USCC filed its Notice of Acceptance in that cause on September 29, 2004 accepting all of the conditions for ETC designation contained in the Report of the ALJ, adopted by the Commission in Order No. 495563, and the additional conditions set forth by the Commission in such order.

Counsel for the RTC's argued that USCC has already had two opportunities to convince the Commission that its Oklahoma ETC operations should not be subject to the requirements and obligations of the rules for which it now seeks a waiver. The first opportunity was in Cause No. PUD 200300195. In that cause the ALJ recommended that it is in the public interest to designate USCC as an ETC for the purpose of receiving federal universal service funding *only if* USCC agreed, among other requirements, to be bound by the requirements of OAC 165:55-23-1 *et seq.* with regard to all of its product offerings for which it seeks funding, not just for its Lifeline and Link Up services. That recommendation, in addition to others made [\*7] by the ALJ, was adopted by the Commission in Order No. 495563. The second opportunity USCC had to challenge the applicability of the rules from which it now seeks a waiver, was during rulemaking RM 200400001 in which the Commission initially approved the rules codified in Subchapter 23 of the Commissions Telecommunications Service rules, Chapter 55. Subchapter 23 applies to all wireless ETCs operating in

Oklahoma. Counsel argued that USCC failed on both attempts to convince the Commission that these rules should not apply to USCC's Oklahoma ETC operations, and failed to allege any change of facts or law that could be relied on by the Commission to waive the application of the rules now. Counsel further argued that USCC should not be given a third bite at the apple.

Counsel for the RTC's argued that USCC did not allege in its application, in its testimony or in its response filed to the motion to dismiss, any change of conditions or circumstances that have transpired since USCC filed its Notice of Acceptance on September 29, 2004, on which the Commission can rely as justification for granting the requested waivers. The reasons behind this application for waiver have already been presented [\*8] by USCC and rejected by the Commission. Counsel further argued that USCC has not alleged any facts nor pled any law that has not already been presented to the Commission. The Commission rejected USCC arguments on two previous occasions and the Commission should not entertain hearing the same old arguments again. Counsel argued that USCC admitted in testimony filed by Bradley L. Stein in this Cause that USCC's lawyers have and will continue to present the legalities of the wireless ETC rules to the Commission. Counsel argued that the doctrine of *collateral estoppel* prevents USCC from re-litigating the same issues in this cause, particularly when no change of conditions or circumstances have been pled or alleged in USCC's case in chief.

Counsel for the RTC's further argued that OAC 165:55-1-6 does not apply to USCC because USCC is not a telecommunications service provider, an IXC or an end-user.

Counsel for the RTC's argued that allowing USCC to go forward with this Application is an unnecessary duplication of proceedings and would result in consuming valuable Commission time for the sole purpose of re-litigating issues that have already been presented to and rejected by the Commission. [\*9] Counsel for the RTC's requested that the Application be dismissed with prejudice.

Counsel for USCC responded by arguing that although the RTCs' motion does not say so explicitly, it appears to argue that USCC is precluded by the collateral attack doctrine from submitting its application for waiver. Counsel argued that the collateral attack doctrine has no application under the present facts. He stated that there is no question that Order No. 495563 (the "Designation Order"), which the Commission entered in Cause No. PUD 200300195 designating USCC an ETC, required USCC to comply with the Commission's Wireless ETC Rules (the "ETC Rules"), set forth at OAC 165: 55-23-1, *et seq.*, as a condition to such ETC designation. USCC argued that pursuant to the Designation Order, USCC's ETC operations in Oklahoma are required to comply with the ETC Rules that are in effect, unless those rules, or some of them, have been specifically waived or found to be invalid with respect to USCC's ETC operations in the state.

USCC's Counsel argued that an examination of USCC's Application in this cause shows that it does not attack the Designation Order or allege that the ETC Rules are not in effect. Instead, [\*10] by applying for a waiver, USCC is simply seeking to exercise a right the Commission has expressly provided in Rule OAC 165: 55-1-6. That rule states:

Whenever compliance with any requirement of this Chapter would result in unreasonable hardship upon or excessive expense to the telecommunications service provider, IXC or the end-user, or for other good cause shown, the Commission may, by order,

waive or modify the requirements of this Chapter upon application of any interested person.

USCC's counsel argued that the collateral attack doctrine prohibits orders, rules and regulations of the Commission from being attacked collaterally and provides that the sole method of reviewing such orders and inquiring into and determining their validity shall be by appeal to the Supreme Court. *See, e.g., Marshall Oil Corp. v. Adams*, 688 P.2d 37, 1983 OK 102. He argued that this means the Commission's "power to repeal, amend or modify, previous orders, or in other words, change them, is limited." *Anson Corp. v. Ronald M. Hill, Hill Resources, Inc., David A. Galbraith and Trepco 1981-1 Drilling Program*, No. 70, 661, 1991 OK 137. [\*11]

USCC's counsel stated that in this proceeding, U.S. Cellular is clearly not collaterally attacking the Designation Order because it is not requesting that such Order be modified, repealed, or amended, nor is it questioning the Order's validity. Rather, in this proceeding, USCC is seeking a waiver of certain ETC Rules, and, as shown by the rule quoted above, the Commission has expressly provided a method for parties to seek such waivers.

USCC's counsel further argued that the RTCs' motion also appears to allege that USCC's request for waiver in this proceeding constitutes a collateral attack on the Commission's approval of the ETC Rules in RM 200400001. USCC's counsel stated that this reasoning is also flawed. He stated that USCC is not seeking to attack the validity of the Commission's approval of the ETC Rules; instead, USCC is requesting relief from certain rules for the reasons set forth in its Application. Accordingly, USCC's counsel stated that the Application in this proceeding does not constitute a collateral attack on either the Designation Order or the Commission's approval of the ETC Rules in RM 200400001.

USCC's counsel also argued it should be noted that orders the Commission [\*12] issued designating other wireless carriers ETCs after USCC's ETC designation, include language that contemplates the parties being designated ETCs by those orders may seek waivers from certain ETC Rules. *See, e.g., Application of Pine Cellular Phones, Inc.*, Cause No. PUD 200400629, Order No. 501836 (March 1, 2005); *Application of Cellular Network Partnership d/b/a Pioneer/Enid Cellular*, Cause No. PUD 200400464, Order No. 501835 (March 1, 2005). The orders in both of those causes state that the wireless carriers designated ETCs therein are to provide 500 minutes of local usage for the supported services for which they request universal service funding and unlimited local usage for their Lifeline service offerings. Both orders then specifically provide that the wireless ETCs may seek waivers of this requirement if they are unable to comply with it. USCC argued that these statements clearly show that the Commission considers it appropriate, and even anticipates the possibility, that a wireless ETC may seek a waiver of the Commission's ETC Rules or requirements of an ETC designation order pursuant to Rule OAC 165:55-1-6, and that such a request for waiver will not be construed [\*13] a collateral attack.

USCC's counsel argued that the issues to be decided in this waiver proceeding are different than the issues decided in either USCC's ETC designation proceeding or in the ETC rulemaking proceeding. He stated that in the designation proceeding, the Commission was asked to determine whether USCC's designation as an ETC was in the public interest and whether USCC met the requirements for such designation specified in 47 U.S.C. § 214(e)(1). He further argued that in USCC's Designation Order, the Commission determined that the ETC Rules apply to USCC's operations as an ETC in Oklahoma. He argued that the Designation Order did not address the waiver of specific ETC Rules or determine whether such a waiver for USCC would be appropriate. He argued that those

issues were simply not presented to the Commission. He further argued that the issue of whether USCC or any specific wireless ETC should be exempted from particular ETC Rules was not presented to the Commission in the rulemaking proceeding that resulted in Commission approval of the ETC Rules. USCC's counsel argued that for the reasons set forth in Applicant's Response to Motion [\*14] to Dismiss and as presented during oral arguments, the Commission should deny the RTCs' Motion to Dismiss and proceed to reach the merits of USCC's Application.

Counsel for Chouteau Telephone Company, Pine Telephone Company, and Totah Telephone Company supported the arguments of counsel for the RTC's.

Counsel for the Public Utility Division also argued in support to of the RTC's Motion to Dismiss.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After hearing arguments of counsel and having reading the pleadings filed in this cause and being fully apprised in the premises, the Administrative Law Judge finds that the Motion to Dismiss should be granted. The specific conditions, including the obligations of the rules for which USCC seeks a waiver, were specific responsibilities that USCC was required to accept in order to be designated an ETC. The ALJ report and the order issued by the Commission granting USCC its ETC designation in Oklahoma specifically found that it was NOT in the public interest to grant ETC status to USCC in a rural telephone company's service area, UNLESS USCC agreed to comply with the identified criteria IN ADDITION to complying with the Commission's [\*15] newly adopted wireless ETC rules.

The ALJ further finds that it is disingenuous at this point for USCC to seek to go around the requirements of this Commission by requesting a waiver of the rules. Whether you consider it an attack on the prior Commission order, or a waiver of the Commission rules, the cold hard facts are that this Commission found that it was not in the public interest to grant USCC ETC status in a service area of a rural telephone company unless they agreed to meet all the conditions set forth in Order No. 495563, including the rules for which USCC now seeks a waiver.

The ALJ further finds that USCC, although protesting the applicability of the conditions from the beginning of their quest to obtain ETC designation, had the choice to voluntarily accept the conditions as set forth in Order No. 495563 in order to be designated an ETC within the service areas of each of the 12 rural telephone companies it was seeking ETC designation for, or to continue to protest those conditions in some other form or fashion. Instead USCC filed a voluntary acceptance on September 29, 2004, indicating that they would in fact agree to be bound by the specific requirements of the Commission's [\*16] order that only granted ETC designation to USCC in the rural telephone company's service areas if it filed a document "accepting" the conditions set forth the Order No. 495563. USCC knew what obligations were imposed by OAC 165:55-23-1 *et seq.* because the rules became effective after the initial hearing on USCC's application for designation as an ETC and prior to the time USCC filed its voluntary acceptance of the conditions required to be an ETC.

The ALJ further finds that, as stated in Order No. 495563, in the absence of the acceptance filed by USCC, it would only have been designated as an ETC in the service areas of Southwestern Bell and Valor, both of which were non-rural telephone companies.

The ALJ finds that the permission to request an exemption from the applicability of the rules, which was granted to Pine Cellular Phones, Inc. in Cause No. PUD 200400629, Order No. 501838

and Cellular Network Partnership d/b/a Pioneer/Enid Cellular in Cause No. PUD 200400464, Order No. 501835, was limited to a situation where the ETC might not be able to comply with the Commission's rules for technical reasons. Additionally, the request for waiver was made prior to the carrier accepting [\*17] the conditions set forth by the Commission. There has been no suggestion by USCC that USCC was unaware of the implications of the Commission's rules prior to agreeing to be bound by the rules, only an indication that USCC does not want to comply with the requirements.

#### **RECOMMENDATION OF THE ADMINISTRATIVE LAW JUDGE**

It is the recommendation of the ALJ that the RTC's Motion to Dismiss to be granted. Even if a waiver of the rules were to be granted, USCC would still be obligated to comply with the requirements set forth in Order No. 495563. USCC's Application is not, in fact, requesting only a waiver of the rules at this point. USCC's request is essentially another attempt to tell the Commission, "don't make us play by the same rules that other wireless ETCs must comply with." The rules USCC seeks a waiver of are a part of the very same conditions that were established by the Commission for designating USCC as an ETC carrier in the rural telephone companies service areas. They were not simply suggestions but conditions to be met in order to reach the determination that it was in the public interest for USCC to be an ETC. If USCC had not agreed to be bound by the conditions of [\*18] the Commission, USCC would not have been granted ETC status in the rural telephone companies' service areas, because the public interest test would not have been met. Granting a waiver of the rules as requested by USCC has the effect of modifying Order No. 495563.

Any wireless carrier that is granted ETC status will be bound by OAC 165:55-23-1 *et seq.* USCC has an obligation to comply with the Subchapter 23 rules IN ADDITION to complying with all the conditions set forth in Order No. 495563, in order to retain its ETC designation within the service areas of the rural telephone companies in Oklahoma. The ALJ recommends that the Motion to Dismiss be granted.

Respectfully submitted this 5th day of August, 2005,

MARIBETH D. SNAPP

Administrative Law Judge