

EXHIBIT 23b.2

NEW MEXICO RELINQUISHMENT DOCUMENTATION

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF THE PETITION OF)
BOOMERANG WIRELESS, LLC D/B/A)
enTOUCH WIRELESS FOR LIMITED)
DESIGNATION AS AN ELIGIBLE)
TELECOMMUNICATIONS CARRIER)
PURSUANT TO 47 U.S.C. § 214(e)(2))
_____)

Case No. 13-00215-UT

ORDER RECOMMENDING DISMISSAL OF PROCEEDING

THIS MATTER comes before the Hearing Examiner upon the Motion to Withdraw Petition for Designation as an Eligible Telecommunications Carrier (“Motion”) filed by Boomerang Wireless, LLC (“Boomerang”) with the New Mexico Public Regulation Commission (“Commission”) on May 9, 2018. Being fully informed, the Hearing Examiner **FINDS and CONCLUDES:**

INTRODUCTION

Boomerang moves the Hearing Examiner by the Motion for permission to withdraw its Petition in this case wherein Boomerang has sought designation as an Eligible Telecommunications Carrier (ETC) to provide federal Lifeline service to eligible consumers in New Mexico. Boomerang asserts that the Petition should be dismissed without prejudice.¹

Pursuant to the Commission’s rules of procedure, as Boomerang’s Motion is framed, pleadings such as petitions and applications may be withdrawn “only with leave of the commission or presiding officer and upon such conditions as the commission or

¹ Motion at 3.

presiding may deem appropriate.”² The Motion’s concluding prayer for relief states that “for good cause discussed above, Boomerang moves the Commission to approve this Motion to Withdraw its Petition in this proceeding without prejudice.”³ While the Motion requests that the Petition be withdrawn, it does not go the next logical step and request that *this proceeding* be dismissed or closed.

The Hearing Examiner believes that if the Petition in this matter is to be withdrawn, then this protracted proceeding should be dismissed and the docket closed. The Commission’s rule governing motions to dismiss provides that

Staff or a party to a proceeding may at any time move to dismiss a portion or all of a proceeding for lack of jurisdiction, failure to meet the burden of proof, failure to comply with the rules of the commission, or for *other good cause shown*. The presiding officer may *recommend dismissal* or the commission may dismiss a proceeding on their own motion.⁴

Therefore, consistent with applicable Commission procedure, in this Order the Hearing Examiner treats Boomerang’s Motion as a request for dismissal of the proceeding without prejudice for good cause shown and, after considering relevant aspects of the record, makes his recommendation to the Commission as to the appropriate disposition of this case accordingly.

BACKGROUND

On September 14, 2017, the Hearing Examiner issued a Recommended Decision (RD) in this case. In the RD, the Hearing Examiner found that Boomerang met all applicable requirements for designation as a Lifeline-only ETC and recommended approval

² 1.2.2.10(E)(1) NMAC.

³ Motion at 3.

⁴ 1.2.2.12(B) NMAC (emphasis added).

of the Petition. However, the Hearing Examiner stressed that he had arrived at his guarded recommendation only after overcoming serious concerns regarding Boomerang's conduct and practices, both as a petitioner-litigant in this case and Lifeline provider in other jurisdictions. The Hearing Examiner summed up the essential dilemma as follows:

Given the matters of concern brought to light over the course of this proceeding, the ultimate question on the merits of whether the Commission should grant Boomerang ETC designation in New Mexico is a much closer call than one not quite as well-versed with the record of this case might have anticipated or expect.⁵

As explained in painstaking detail in the RD, the Hearing Examiner's reservations related primarily to a pervasive pattern of troubling conduct Boomerang revealed primarily, but not exclusively, at hearing and through compulsory responses to Bench Requests issued over the course of this protracted proceeding. The Hearing Examiner's apprehensions persist because Boomerang has exhibited similarly inappropriate behavior in this case since the RD was issued. Therefore, because the Hearing Examiner neither cannot nor should not ignore Boomerang's post-RD actions in making his recommendation to the Commission on the final disposition of this case, the unacceptable conduct described in the RD – and subsequently found by the Commission itself – is discussed below.

Getting back to the RD, Boomerang did not challenge or even question any of the RD's findings or conclusions. To the contrary, Boomerang swiftly filed a notice of waiver of exceptions to the RD on September 19, 2017. Boomerang stated in the notice that it waived any exceptions to the RD and that Staff had notified Boomerang that Staff also waived exceptions. Nonetheless, Boomerang's explicit waiver of exceptions notwithstanding, on December 7, 2017 Boomerang filed a "Motion for Exception Out of Time with

⁵ Recommended Decision (RD), Case No. 13-00215-UT (Sept. 24, 2017), at 88.

Accompanying Affidavit and Exception.” As elaborated on below, the Commission expressly rejected Boomerang’s so-called “exception” in its Order remanding this case to the Hearing Examiner for further proceedings (“Remand Order”)⁶ on January 31, 2018.

After the RD was issued, the Federal Communications Commission (FCC) released an order adopting several major reforms to the Tribal Lifeline program. Among the most controversial modifications attempted in the *2017 Lifeline Order*,⁷ the FCC limited eligibility for the Tribal Lifeline enhanced subsidy to facilities-based service providers receiving USF high-cost support thereby blocking resellers from providing Tribal Lifeline (the Tribal Facilities Requirement) and limited eligibility for that program to redefined rural Tribal areas (the Tribal Rural Limitation) further limiting the ability of some carriers to provide service to Tribal-eligible consumers.⁸ On appeal of the *2017 Lifeline Order* by numerous parties including Boomerang, in August 2018 the United States Court of Appeals for the D.C. Circuit stayed the Tribal Facilities Requirement and Tribal Rural Limitation pending further order of the Court.⁹

Ultimately, on February 1, 2019, a three-judge panel of the D.C. Circuit issued a unanimous decision in *National Lifeline Association v. FCC* rejecting the *2017 Lifeline Order* on both substantive and procedural grounds, thus vacating the Order and remanding the matter to the FCC to conduct a new notice and comment proceeding.¹⁰ On substance,

⁶ See Order Remanding Matter to Hearing Examiner for Further Proceedings in light of Changes in Federal Law, Case No. 13-00215-UT, at 9-10, ¶ 19 (Jan. 31, 2018).

⁷ *Fourth Report and Order, Order on Reconsideration, and Memorandum Opinion and Order, Notice of Proposed Rulemaking, and Notice of Inquiry*, WC Docket Nos. 17-287, 11-42, and 09-197, FCC 17-155, 32 FCC Rcd 10475 (rel. Dec. 1, 2017) (*2017 Lifeline Order*).

⁸ *Id.* at 10476, ¶ 1, 10477-480, ¶¶ 3-9, 10483-486, ¶¶ 21-30.

⁹ *Nat’l Lifeline Ass’n v. FCC*, Case Nos. 18-1026 & 1080, Order, 2018 WL 4154794, at *1, (D.C. Cir. Aug. 10, 2018) (per curiam).

¹⁰ *Nat’l Lifeline Ass’n v. FCC*, 915 F.3d 19 (D.C. Cir. 2019).

the D.C. Circuit panel determined that the FCC acted arbitrarily and capriciously in adopting the Tribal Facilities Requirement and the Tribal Rural Limitation.¹¹ On procedure, the D.C. Circuit found that the FCC's adoption of the Tribal Rural Limitation was not a logical outgrowth of the FCC proposal in the notice of proposed rulemaking and, thus, the FCC failed to provide sufficient notice of the policy change under the Administrative Procedures Act. The Court further found that the FCC improperly made the substantive changes to its former policies without commencing a new notice and comment rulemaking proceeding.¹² To date, the FCC has not initiated the post-remand notice of proposed rulemaking and proceeding.

In its Jan. 23, 2018 Remand Order, the Commission found the *2017 Lifeline Order* had "dramatically changed the circumstances" of Boomerang's Petition. Continuing, the Commission stated:

As noted in the RD, the Hearing Examiner properly undertook a balancing of relevant considerations, resulting in a "close[] call" in favor of Boomerang's Amended Petition. Boomerang's positive record on Tribal Lifeline was a major factor in the Hearing Examiner's recommendation to grant (with numerous conditions) the Amended Petition. If the FCC Order withstands appeal, it appears that Boomerang will be prevented by federal law from providing Tribal Lifeline service in New Mexico (and other states). The Commission desires that the Hearing Examiner reconsider his RD in light of the FCC Order.¹³

The Commission thus instructed the Hearing Examiner to:

take all action necessary and convenient within the limits of his authority to reconsider this matter in light of the FCC Order. The Hearing Examiner may, as he sees fit, reopen the record for further taking of evidence, hold additional hearings, preserve as much of the

¹¹ *Id.* at 31-32.

¹² *Id.* at 33-35.

¹³ Remand Order, at 10, ¶ 20.

current record as he considers relevant and not stale, consider the potential impact of the pending appeal of the FCC order and other issues of particular significance or concern in the record, and consider any potential relief that may be requested by Boomerang and/or Staff in light of the changed circumstances.¹⁴

On February 9, 2018, Boomerang filed a motion requesting a rehearing of the Remand Order, staying the effect of the remand, and asking for oral argument. The Commission denied Boomerang's motion in its entirety by Order issued on February 21, 2018. Because the Commission's Order makes probative findings material to determining the appropriate resolution of this matter, the Feb. 21, 2018 Order Denying Rehearing is addressed below.

THE MOTION TO WITHDRAW

In the instant Motion, Boomerang cites the *2017 Lifeline Order* as the principal basis for withdrawing the Petition. Boomerang reasons that since it is seeking only federal Lifeline support in this proceeding, any decision by the FCC following the D.C. Circuit appeal would likely impact any final decision that would be made in New Mexico. Boomerang submits that the withdrawal of its Petition will preserve judicial and administrative economy and avoid additional expenditures of time and resources on the part of Boomerang, Staff, and the Commission.¹⁵ For those reasons, Boomerang asserts that the withdrawal of its Petition without prejudice is appropriate.

Finally, with regard to positions on the Motion, the only other party in the proceeding, Staff of the Telecommunications Bureau of the Utility Division ("Staff") of the Commission, does not oppose it.

¹⁴ *Id.*

¹⁵ *Id.* at 3.

DISCUSSION

On September 14, 2017, the Hearing Examiner issued contemporaneously with the RD a Protective Order granting Boomerang limited and narrow protection to small portions of a document that had been a source of inordinate and utterly avoidable controversy in this case since at least March 2016. The document consists of a Boomerang appeal to the FCC of a decision by the Universal Service Administrative Company (USAC) approving, among other things, two unfavorable findings against Boomerang's advertising and business strategies. The negative findings were made in an audit report issued by the USAC's Internal Audit Division (IAD) focusing on Boomerang's compliance with Lifeline mechanisms in providing Lifeline service in the State of Maryland. Boomerang's appeal to the FCC (filed Dec. 18, 2015) of the USAC decision upholding the IAD's Maryland audit report findings¹⁶ is styled in FCC parlance a "Request for Review" (hereinafter "FCC Request for Review"). As of this writing, the FCC has not issued a decision on the merits of Boomerang's Request for Review.

Concerning the FCC Request for Review's relation to this case, Boomerang refused to provide the Commission or Staff a copy of the document in any form other than the entirely redacted version Boomerang filed without leave either by motion or otherwise in response to a Bench Request the Hearing Examiner had issued on March 23, 2016. As Boomerang's misconduct is described in the RD, the Hearing Examiner found that "[i]n response to the 4th BR Order, on March 30, 2016 Boomerang filed a copy of FCC Request for Review redacted *in its entirety*, thus placing before the Commission quite literally eighty (80) completely blacked-out pages of a 97-page submission. Boomerang did not

¹⁶ The USAC decision, issued Oct. 29, 2015, is entitled Administrator's Decision on Lifeline Program Appeal ("USAC Appeal Decision"). See Attach. 1 to 7th Resp. to Am. 2nd BR Order, Administrator's Decision on Lifeline Program Appeal, USAC Audit No. LI2014BE013 (Oct. 19, 2015).

consult the Hearing Examiner or Staff before filing the completely redacted document, nor did it propose or request that the Request for Review be granted confidential treatment – treatment Boomerang wound up requesting anyway after further on and off the record proceedings . . . with the filing of a Motion for Protective Order on December 29, 2016.”¹⁷

In the Motion for Protective Order, Boomerang argued that the FCC Request for Review was entitled to blanket protection from public disclosure because it contained allegedly trade secret and competitively sensitive information. The literal FCC Request for Review, effectively a brief-in-chief or typical appellate brief, consisted merely of the first 15 pages¹⁸ of the 81-page document.¹⁹ The remaining *sixty-six pages* of attachments to the document for which Boomerang was claiming blanket protection *had already been placed by Boomerang in the public record* of this very case, as detailed in the Hearing Examiner’s Order on Boomerang’s Motion for Protective Order (“Confidentiality Order”).²⁰

Consequently, for reasons explicated in the Confidentiality Order, the Hearing Examiner directed Boomerang to file in the public record a version of the FCC Request for Review containing, per the Hearing Examiner’s specific instructions, four discrete and

¹⁷ RD at 21-22 and n.47.

¹⁸ And of the 15 pages, the first 4 pages of the FCC Request for Review consisted of a cover page, a 2½ page summary, and a short table of contents.

¹⁹ Attached to the FCC Request for Review proper as Exhibit A was the 4-page USAC Appeal Decision. Exhibit B was the 22-page USAC Independent Auditor’s Report dated August 7, 2014. Exhibit C was Boomerang’s Jan. 23, 2015 Request for Review to USAC (“USAC Request for Review”) of the Independent Auditor’s Report, which totaled 18 pages. The remainder of the document consisted of the Independent Auditor’s Report, itself an attachment to the USAC Request for Review.

²⁰ See Confidentiality Order at 5-6, ¶ 9 (“The Hearing Examiner’s ruling does not mean, however, that the entire FCC Request for Review document is protectable from public disclosure, because it is not. *In fact, almost all the information in the document at issue has already been disclosed in this case.* In the order of attachments to the FCC Request for Review, the USAC Appeal Decision was produced on November 10, 2015. The Independent Auditor’s Report was disclosed on October 31, 2014. And the USAC Request for Review that formed the basis of Boomerang’s eventual appeal of the USAC Appeal Decision was submitted with discrete redactions on 4 pages of the 18-page document on February 4, 2015. Thus, the only document that has not been publicly disclosed to date is the FCC Request for Review which, like the USAC Request for Review, is in effect a brief-in-chief or appellate brief.”) (emphasis added; internal citations omitted).

minimal redactions of text in a footnote and on two pages of the otherwise completely non-confidential 81-page document.²¹ In addition, the Confidentiality Order directed Boomerang to submit the fully unredacted Request for Review under seal for placement in the confidential record. Boomerang was required to make both the confidential and public record filings within five business days of the Order. On September 21, 2017, Boomerang filed a motion requesting that the Commission extend the deadline for filing the redacted version of the FCC Request for Review to September 27, 2017.

On September 27, 2017, Boomerang submitted its so-called Compliance Filing. Boomerang did not contest any aspect of the Confidentiality Order in the filing. To the contrary, Boomerang purported to fully comply with the Order.²² Regrettably but not surprisingly, Boomerang's filing failed to meet the specifications of the Hearing Examiner's Order in spectacular fashion. Put more bluntly, hewing to the pattern of objectionable conduct chronicled at length in the RD, Boomerang's filing grossly violated the Hearing Examiner's Order, as shown below.

The predicate for the Hearing Examiner's examination of Boomerang's filings is founded in the Commission's Remand Order, which recognized Boomerang's motion to

²¹ See Confidentiality Order at 6-7, ¶ 10 ("Specifically, in footnote 9 on page 5 of the USAC Request for Review, the redacted text beginning with the second sentence is the equivalent of the second and third paragraphs sentences in footnote 13 on page 6 of the FCC Request for Review; on page 7, the four single-spaced and indented headings and quotations redacted in the USAC document correspond to those on page 8 of the FCC document; and the single-spaced and indented heading and quoted text on page 8 of the USAC document correspond to the same at on page 9 of the FCC document. Besides the foregoing, there is absolutely nothing else in the FCC Request Review that could be considered trade secret information, i.e., information Boomerang purports to be related to its "business strategies, outreach plans, marketing plans, penetration assessments, and other internal procedures.") (correction indicated in legislative format; citation omitted)

²² See Boomerang . . . Re-Dacted Compliance Filing Pursuant to Order on Boomerang's Motion for Protective Order (Sept. 27, 2017), at 1-2 ("Consistent with its Motion for Extension of Time, Boomerang files this Compliance Filing as Ordered in section B. and C. in the Order on Boomerang's Motion for Protective Order filing, . . . for the public record a redacted version of the FCC Request for Review *with the Specifications set forth in paragraphs 10 and 11* (pursuant to the Protective Order).") (emphasis added).

extend the deadline for filing a properly redacted version of the FCC Request for Review in line with the Sept. 14, 2018 Order.²³ However, the Commission did not acknowledge Boomerang's Sept. 27, 2017 filing, nor did it acknowledge Boomerang's Oct. 6, 2017 "Amended Redacted Compliance Filing" also discussed below. The Commission's omission of the two filings was no mere oversight. In fact, the omission speaks forcefully to the violations of the Hearing Examiner's Order pervading Boomerang's redacted filings because the Commission expressly remanded the redaction issues to the Hearing Examiner:

The Commission also remands Boomerang's Motion to Extend Deadline to Comply with Order on Boomerang's Protective Order for consideration by the Hearing Examiner. The Hearing Examiner is familiar *with the issues concerning Boomerang's filing and redaction of the FCC Request for Review*.²⁴

Turning, then, to Boomerang's patent flouting of the Confidentiality Order, even a cursory glance at its Sept. 27, 2017 filing reveals that Boomerang made manifold unauthorized redactions to the FCC Request for Review – approximately *fifty* discrete pieces of blocked text, including, at the extreme end of the spectrum, one full page containing five paragraphs of blacked-out text. Underscoring the flagrant disregard of the Hearing Examiner's admonitions²⁵ and instructions,²⁶ the "compliance filing" spotlighted Boomerang's serial attempts to withhold from public disclosure relevant information already appearing in the public record of this case. Unquestionably, among the most ludicrous of the illicit redactions, Boomerang expunged from its filing the salient fact *stated three separate times in the RD* that Boomerang had confined the advertising of its

²³ Remand Order (Jan. 31, 2018), at 7, ¶ 16.

²⁴ *Id.* at 11, ¶ 21 (emphasis added).

²⁵ See *supra* n.20 and accompanying text.

²⁶ See *supra* n.21 and accompanying text.

Maryland Lifeline offering to its “website and Facebook pages.”²⁷ Other redactions of material facts expressly referenced in the RD are as equally egregious.²⁸

In short, suffice it to say that Boomerang’s blatant contravention of the Confidentiality Order recalls Boomerang’s prior attempts to withhold from Staff, the Hearing Examiner (and, hence, Commission), and the public, without colorable justification or authority,²⁹ non-confidential information highly relevant to determining Boomerang’s capacity and fitness to provide Lifeline service in New Mexico.

²⁷ See RD at 63, 66, n.243.

²⁸ *Id.* at 66, n.243, 67 (compare indented quotation in the RD with redactions of same text in Request of Review, pp. 5-6), and 68 (redacted “based on specific market factors” in indented quote atop page 68 of the RD).

²⁹ RD, at 21-22, footnote 47 states in full: “Boomerang’s rationale for submitting to Commission the stack of effectively blank pages shifted subtly but nonetheless perceptibly over time. Boomerang claimed, as it eventually asserted in support of its Dec. 29, 2016 motion for a protective order requesting confidential treatment of the Request for Review, that it was “unable to produce the non-redacted document to the NMPRC as it contains confidential information pertinent to Boomerang’s marketing research, balancing and business direction. The Request for Review contains legal arguments, interpretations of rules based on information from the audit, work product documentation and is unable to be sent to the NMPRC or otherwise submitted ... in the [9th Supp. Resp. to Initial BR Order No. 6 filed Feb. 4, 2015]. But, in addition, Boomerang claimed unequivocally that, “[a]ccording to Boomerang’s FCC counsel *and consistent with FCC practice, anything other than complete redaction would require an amended filing at the FCC and also would reset the clock at the FCC.*” 1st Resp. to 4th BR Order at 4-5 (emphasis added); *see id.* Tr. (8/03/2016) 15. Subsequently however, Boomerang hedged the “reset the clock” rationale: “[L]ocal counsel had been informed by Boomerang’s D.C. counsel, that submission of even a portion of the confidential material, even in a redacted form, *would likely require* new filings at the FCC and *would potentially* subject even a partially redacted version to third party access, review and comment at the FCC.” Am. Jt. Mot. for *in camera* review of Boomerang’s Appeal of USAC Maryland Audit (Oct. 14, 2016) at 2, ¶ 5 (emphasis added). Boomerang clung to the qualified “reset” rationale in support of its motion for protective order, alleging that if the “documentation [Request for Review apparently in fully unredacted form] were “*made public*” it “... *could* further delay FCC proceedings according to our D.C. counsel” Boomerang Mot. for Protective Order (Dec. 29, 2016), Affidavit of Kim Lehrman, at 2 (emphasis added). Although repeatedly asked by the Hearing Examiner at status conferences both on the record and off in Aug. 2016 for specific legal authority for the proposition that Boomerang would be placed in jeopardy of having to “restart” or “reset” the “clock” on its FCC appeal of the USAC audit findings (e.g., Tr. (8/3/2016) 26-29, 42), Boomerang to date has not provided this Commission any authority in the FCC’s rules or otherwise for what therefore amounts to an unsupported argument for filing the “complete redaction” in the first instance. The sole authority Boomerang has repeatedly cited is silent on the issue. That authority is the process in the FCC’s rules at 47 C.F.R. § 0.459(b)(3)-(b)(6) whereby carriers may request that information filed with the FCC “not be made routinely available to public inspection.” 47 C.F.R. § 0.459(a)(1). Under the Section 0.459 process, the FCC may defer acting on requests that material or information be withheld from public inspection until a request for inspection is made, in which case the FCC will treat the materials as confidential pending a final ruling. The FCC will make a formal ruling on a request for confidentiality if a response in opposition to a confidentiality request is filed and the arguments of the opposing parties have been considered. Hence, by operation of the

Continued . . .

Staff, for its part, promptly called the Commission's attention to Boomerang's violations of the Confidentiality Order. Staff's due diligence is evinced in Staff Counsel's October 2, 2017 email to the General Counsel, which reads as follows:

Staff's review . . . found that Boomerang had redacted *much more material than was authorized to be held confidential* and redacted as stated in the HE's Order. Staff therefore called the attorney for Boomerang . . . to inform him of Staff's finding that their Compliance filing was not in compliance with the [Confidentiality Order].³⁰

Apparently reacting to Staff's email to the General Counsel regarding the unauthorized redactions, on October 6, 2017 Boomerang filed – once again without seeking prior leave by Motion or otherwise – the Amended Redacted Compliance Filing. In the amended filing, Boomerang failed to explain or even try to rationalize why it had seen fit to make numerous additional unauthorized redactions of text already appearing unredacted in the public record and, thus, defy the Hearing Examiner's findings regarding the non-confidential documents covered by the Confidentiality Order.³¹ Instead, Boomerang deigned merely to observe, in passing, the obvious:

Subsequent discussions with Staff and further review of its redacted public version revealed that the September 27, 2017 public filing contained more redacted language than what was specified by the Hearing Examiner at paragraph 11 in his Order on Boomerang's Motion for Protective Order that was issued on September 14, 2017.³²

Continued from previous page

FCC rule the Request for Review is currently on file in the FCC's internal docket and is not available for public inspection, although the FCC has not acted on Boomerang's request for confidentiality and, in the ordinary course, apparently would not absent a request for public inspection or some other opposition to confidential treatment pursuant to the procedure for challenging confidentiality claims under Section 0.459. *See also* Order on Boomerang's Motion for Protective Order, Case No. 13-00215-UT (Sept. 2017), at 2-3, n.14 and accompanying text, and n.20 and accompanying text." (emphasis all in original).

³⁰ Email correspondence from Joan Ellis to Russell Fisk dated Oct. 2, 2017 (filed in case record on October 5, 2017 as a Notice of Filing) (emphasis added).

³¹ *See supra* n.20 and accompanying text.

³² Amended Compliance Filing (Oct. 6, 2017) at 1.

Boomerang's abuse of procedural norms continued unabated in December 2017 with its filing of a specious motion for "exception out of time."³³ As reflected in the record, the motion was preceded by an email from Boomerang to the Commission's General Counsel dated November 29, 2017 with the subject line "Boomerang Wireless, Discussions with Staff." The email stated, in pertinent part, that counsel for Boomerang was then

proposing that we [Boomerang] file a Motion for Exceptions for [sic] Out of Time. Because of the new FCC orders on lifeline, and additional minutes required for Tribal Lifeline Support, it would be an added benefit to the Tribal community, and we would not like it to be remanded back to the Hearing Examiner to hassle over."³⁴

Boomerang's email communication to the General Counsel is profoundly troubling for at least three reasons. First, as the Commission later found, Boomerang had already expressly waived exceptions to the RD. Second, what Boomerang eventually filed as an "exception" was plainly nothing of the sort. Instead, what Boomerang was actually attempting was to interject new facts and argument (regarding the purported "added benefit to the Tribal community" of "additional minutes required for Tribal Lifeline Support") into the evidentiary record that, pursuant to the RD, had already closed.³⁵ Third, and most tellingly, scheming to avoid remanding the matter "back to the Hearing Examiner *to hassle over*," Boomerang's exception was a gratuitously contrived ploy to circumvent the Hearing Examiner and his continuing Bench Request Orders.

The Commission saw through Boomerang's transparent ruse. In its Remand Order, the Commission categorically rejected Boomerang's spurious exception, finding:

³³ See Boomerang Wireless LLC's Motion for Exception Out of Time with Accompanying Affidavit and Exception (Dec. 6, 2017).

³⁴ Email correspondence dated Nov. 29, 2017 from Amanda Edwards to Russell Fisk (filed in the case record as a Notice of Filing on Dec. 5, 2017).

³⁵ RD at 96, ¶ T.

[T]he instant Motion is inappropriate and misplaced and, therefore, warrants denial. Boomerang explicitly waived its right to file exceptions to the Recommended Decision well over two months ago and fails to acknowledge its deliberate waiver in the Motion, much less articulate why such waiver should now be rescinded. Moreover, the so-called “exception” Boomerang purports to now lodge doesn’t actually except to, take issue with, or even propose to alter or clarify any aspect of the Recommended Decision. In reality, all the pleading at issue does is simply inform the Commission that Boomerang has made substantive changes to its minimum standard and Tribal Lifeline plans. As it surely must know, Boomerang already has appropriate and indeed compulsory mechanisms for informing the Commission of material changes to its Lifeline offerings. The first reporting mechanism resides in one of the standing Bench Requests issued by the Hearing Examiner, which requires Boomerang to provide the Commission information such as the changes at issue on a continuing basis. In fact, the record shows that Boomerang has notified the Commission of similar prior changes to the terms and conditions of its proposed Lifeline offerings in New Mexico in express conformity with the Amended Second Bench Request Order issued on February 27, 2015. The second mechanism would be the compliance filing provision embodied in decretal paragraph H of the RD, pp. 91-92, which requires – only *after* Commission approval of the RD – Boomerang to submit, among other items listed, a “description of Boomerang’s Lifeline rate plans, terms, and conditions.”³⁶

The transgressions found by the Commission in the Remand Order were not confined to Boomerang’s bogus exception and repeated attempts to conceal non-confidential information from public access. In point of fact, the Commission recognized the Hearing Examiner’s findings regarding Boomerang’s improper course of conduct at length. In brief, the Commission addressed the following findings.

- As to improper or inadequate advertising and outreach practices:
 - Failing to continuously provide active outreach and advertising in certain states (Maryland, South Carolina, and Texas) and demonstrating a propensity to unilaterally withdraw from states without receiving the

³⁶ Remand Order at 9-10, ¶ 19 (italics in original; internal citations omitted).

jurisdictions' authority to cease providing Lifeline service before pulling out.

- Asserting an “internet-only” advertising presence argument in Boomerang’s Maryland FCC appeal, a position squarely at odds with Commission requirements and precedent relating to the benchmark level of advertising and marketing efforts necessary to reach qualifying Lifeline consumers throughout the New Mexico service area for which Boomerang would be designated to provide Lifeline service.
- Engaging in a virtually if not blatant misleading and deceptive nationwide advertising campaign on Boomerang’s enTouch Wireless website relating to the false enticement of a “free phone” with standard Lifeline service when, in fact, Boomerang’s curiously circumspect responses to **three (3)** successive supplemental Bench Requests focused specifically on Boomerang’s proposed Lifeline plans ultimately revealed that in 30 of the 31 states in which Boomerang was providing Lifeline service (except California) standard offering (non-Tribal) customers were not offered or provided any such device free of charge.³⁷
- As to unacceptable conduct in this proceeding:
 - Resisting production of the FCC Request for Review, including, but not limited to, “submission by Boomerang of the FCC Request for Review that was redacted ‘in its entirety,’ in violation of the Hearing Examiner’s Fourth Bench Request Order”³⁸
 - Exhibiting a pattern of belated disclosures of documents in response to bench request orders.³⁹

Subsequently, in its Feb. 21, 2018 Order denying Boomerang’s motion for rehearing and requesting a stay of the mandate of the Remand Order, the Commission upbraided Boomerang in no uncertain terms for a number of what the Commission found to be “material misrepresentations” Boomerang made in its motion for rehearing, misrepresentations “which,” according to the Commission, “undermine both the arguments made by Boomerang and Boomerang’s credibility in this matter.”⁴⁰ The Commission

³⁷ Remand Order at 4-5, ¶¶ 9-10. See RD at 77-76.

³⁸ *Id.* at 5, ¶ 11.

³⁹ *Id.*

⁴⁰ Order Denying Rehearing (Feb. 21, 2018), at 8, ¶¶ 21, 22.

emphasized that the misrepresentations Boomerang made in the motion for rehearing were “not innocent misrepresentations.”⁴¹ Thus, the Commission’s rebuke of Boomerang was forthright and unmistakable. Indeed, roundly rejecting the Boomerang’s motion for rehearing, the Commission invoked the term “misrepresentations” either alone or modified by “material” or “not innocent” no less than six times. In the end, expressly connecting its reproof of Boomerang to the derogatory findings in the RD cited above, the Commission found that

[t]he above misrepresentations are particularly disturbing in light of the questionable conduct by Boomerang in the course of this proceeding, instances of which were cited by the Hearing Examiner in his RD and the Commission in its Remand Order.⁴²

The Commission’s adoption of the Hearing Examiner’s earlier findings and trenchant conclusion have elucidated the Hearing Examiner’s analysis in this matter.

FINDINGS, CONCLUSIONS, AND RECOMMENDATION

As this Order illustrates, the extensive record of this proceeding is rife with instances of Boomerang’s engaging in conduct and practices sufficiently transgressive to warrant censure and sanction. Cast in this light, one could fairly determine that Boomerang has failed to demonstrate the requisite fitness and character essential to be entrusted with providing Lifeline service to New Mexico’s disproportionately impoverished, underserved, and in certain instances, unserved communities in exchange for the lucrative remuneration Boomerang would stand to gain directly in the form of publicly funded subsidies.

Therefore, the Hearing Examiner finds that, considered cumulatively, the preponderant weight of record facts establish ample grounds to dismiss this proceeding

⁴¹ *Id.* at 8-9, ¶ 23.

⁴² *Id.* at 9, ¶ 24.

with prejudice, a result which would constitute an adjudication on the merits definitively rejecting Boomerang's request for designation as an ETC in New Mexico.⁴³

While dismissal of the proceeding with prejudice is fully supported, certainly justifiable, and perhaps deserving, the Hearing Examiner finds that certain countervailing factors militate against the permanent denial of Boomerang's request for ETC designation in New Mexico at this time. For one, the Hearing Examiner found in his RD that, at the time of issuance, Boomerang had satisfied all applicable requirements for ETC designation to provide standard Lifeline and Tribal Lifeline service and, setting aside major concerns, recommended approval of the Petition. In addition, the present posture of this case gives the Hearing Examiner some pause to the extent that the case is back before him on a post-RD remand wherein a hearing on the issues within the Hearing Examiner's remit has not been conducted, irrespective, but mindful, of Boomerang's desire to withdraw its Petition without further consideration.

Therefore, having balanced the several interests and concerns implicated, and acting out of an abundance of fairness and probity, the Hearing Examiner finds that a just and reasonable resolution of this matter is to dismiss the case without prejudice. At the same time, the adverse findings made and censures conveyed in this Order and prior ones shall serve, fundamentally, to inform any prospective proceeding should Boomerang ever elect to pursue ETC designation in New Mexico again or, for that matter, seek other relief from this Commission.

⁴³ See *Shutler v. Augusta Health Care for Women, P.L.C.*, 630 S.E.2d 313, 316 (Va. June 8, 2006) ("[A]s a general rule, a dismissal 'with prejudice' constitutes 'an adjudication on the merits, and final disposition, barring the right to bring or maintain an action on the same claim or cause.' . . . Furthermore, a dismissal with prejudice generally 'is conclusive of the rights of the parties as if the suit had been prosecuted to a final disposition adverse to the plaintiff.'") (internal citations omitted).

Accordingly, the Hearing Examiner concludes for the reasons stated and in the interests of administrative efficiency and adjudicative economy that the appropriate disposition of this matter is to dismiss this proceeding without prejudice but also with the Commission's material findings and condemnations preserved by this Order for posterity.

THEREFORE, the Hearing Examiner recommends that the Commission accept and adopt the statements, determinations, and findings of fact and conclusions of law set forth above and **ORDER** as follows:

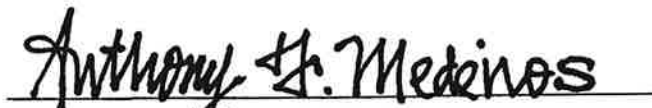
A. The Motion is GRANTED consistent with, and subject to, the foregoing findings and conclusions.

B. This Proceeding is DISMISSED without prejudice.

C. This docket is closed.

ISSUED at Santa Fe, New Mexico this 31st day of May 2019.

NEW MEXICO PUBLIC REGULATION COMMISSION


Anthony F. Medeiros
Hearing Examiner

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF THE PETITION OF)
BOOMERANG WIRELESS, LLC D/B/A)
enTOUCH WIRELESS FOR LIMITED)
DESIGNATION AS AN ELIGIBLE)
TELECOMMUNICATIONS CARRIER)
PURSUANT TO 47 U.S.C § 214(e)(2))

Case No. 13-00215-UT

CERTIFICATE OF SERVICE

I CERTIFY that on this date I sent to the parties listed below, via email only, true and correct copies of the **Order Recommending Dismissal of Proceeding** issued May 31, 2019.

Jeffrey Albright	JA@JalbLaw.com ;
Samantha A. Updegraff	SUpdegraff@lrrc.com ;
Amanda Edwards	AE@JalbLaw.com ;
Scott Kikotan	skokotan@readywireless.com ;
Summer Algharib	salgharib@readywireless.com ;
Kim Lehrman	klehrman@entouchwireless.com ;
Julia Redman-Carter	Jrcarter@readywireless.com ;
Joan Ellis	Joan.Ellis@state.nm.us ;
Michael Ripperger	Mike.Ripperger@state.nm.us ;
Mark Cessarich	Mark.Cessarich@state.nm.us ;
Russell Fisk	Russell.Fisk@state.nm.us ;

DATED this 31st day of May, 2019.

NEW MEXICO PUBLIC REGULATION COMMISSION


Ana C. Kippenbrock, Law Clerk