

**Cellco Partnership, d/b/a Verizon Wireless and
Communications Workers of America, AFL-
CIO. Case 31-RC-8072**

March 26, 2004

DECISION ON REVIEW AND ORDER

BY MEMBERS SCHAUMBER, WALSH,
AND MEISBURG

On March 18, 2002, the Regional Director for Region 31 issued a Decision and Direction of Election in this proceeding, pertinent parts of which are attached as an appendix. The Regional Director found appropriate the petitioned-for multifacility unit of sales representatives and assistant-sales operations employees working at three of the Employer's retail facilities in Bakersfield, California. The Employer argues that a "systemwide unit" of all such employees in either its West area or its Northern California/Nevada region, is the only unit appropriate for bargaining because the Employer is a public utility.¹ The Regional Director found it unnecessary to determine whether the Employer qualifies as a public utility for purposes of the Board's systemwide unit presumption in that industry because, even assuming that it does, the petitioned-for unit is nevertheless an appropriate unit. The Regional Director found that the petitioned-for employees share a community of interest that is separate and apart from that shared with other employees and that they constitute an appropriate unit for bargaining.

Pursuant to Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Employer filed a timely request for review of the Regional Director's Decision and Direction of Election. On April 19, 2002, the Board granted the Employer's request for review. In granting review, the Board directed the parties to address three questions: (1) whether the Board's presumption in favor of systemwide units for public utilities applies to the cellular telephone industry; (2) if so, whether the presumption extends to units composed solely of sales employees employed in retail stores; and (3) irrespective of whether the presumption applies, is the petitioned-for unit of 29 retail sales representatives and assistant-sales operations employees at the Employer's 3 retail facilities in Bakersfield, California appropriate?

After careful consideration of the entire record, including the Employer's and the Petitioner's briefs on review,

¹ The Employer's argument to the Regional Director was that the unit must encompass at least the West area and for the first time in its request for review contends that the smallest appropriate unit would be the Northern California/Nevada region. We note that neither of these alternative units represents the Employer's entire "system" of retail sales outlets.

the Employer's supplemental brief on review, the Employer's Motion for Special Permission to Reopen the Record, and the Petitioner's Opposition thereto, we find that the petitioned-for unit is appropriate for bargaining and remand this matter to the Regional Director for further processing.

Facts

The Employer is one of the largest nationwide providers of wireless voice and data services. The Employer's physical wireless network comprises numerous cell towers and switching stations across the country that transmit voice and data communications. A centralized network operations department oversees the Employer's network from two separate locations. Apart from this vital engineering function ensuring the provision of wireless service to the public, the Employer also provides customer service, marketing and sales functions, and a chain of retail stores. Three of those retail facilities (two retail stores and a kiosk) are located in Bakersfield, California (Bakersfield facilities). The Bakersfield facilities comprise a small portion of the Employer's chain of retail outlets and are the subject of the instant petition.

The Employer consolidated its nationwide wireless operations into four separate "areas"—Northeast, Midwest, South, and West. These areas are divided into smaller "sales regions." These regions are further divided into districts. Accordingly, the West area, encompassing 12 states, is broken down into six regions, one of which is the Northern California/Nevada region. The Bakersfield facilities, along with eight other retail establishments, are organized into one district within the Northern California/Nevada region.

Two classifications of employees work at the Employer's retail stores—Retail Sales Representatives (RSRs) and Assistant-Sales Operations employees (ASOs). RSRs are responsible for selling the Employer's hardware and service, ensuring customer service, activating customers' newly purchased phones, and processing customer transactions. RSRs receive a base salary plus a commission for the service and equipment they sell. ASOs' duties include providing customer service, answering incoming calls, updating customer accounts, demonstrating equipment to customers, auditing and reconciling daily cash reports, maintaining customer accounts, maintaining inventory, and performing general office duties. Despite the myriad functions performed at the retail stores, the main objective of this arm of the Employer's operation is to sell its wireless telephones, equipment, and service to the public.

The Employer's chain of retail stores represents only one of the many channels through which the Employer sells its equipment and service. The Employer sells its

products and service through various direct and indirect sales channels. Direct sales channels are those directly owned by the Employer. They include the Employer's chain of retail stores, a toll-free number, and an internet site. In addition to these direct sales channels, the Employer sells its equipment and services through numerous indirect sales channels. These indirect sales channels are largely made up of third-party-owned retail stores such as Radio Shack and Best Buy.² The Employer's retail stores not only represent a fraction of the Employer's sales channels, the Bakersfield facilities and their complement of 29 RSRs and ASOs represent only a compact sliver of the Employer's retail stores and employees. The Northern California/Nevada region includes 69 stores and kiosks and employs 660 RSRs and ASOs and the West area contains 311 retail stores and kiosks and employs between 2500-3300 RSRs and ASOs.

Analysis

Since the early days of the Act, the Board has held that in the public utility industry a systemwide unit is the optimal unit for bargaining. See *PECO Energy Co.*, 322 NLRB 1074, 1079 (1997); *New England Telephone & Telegraph Co.*, 242 NLRB 793 (1979); *Colorado Interstate Gas Co.*, 202 NLRB 847, 848 (1973); *Tennessee Electric Power Co.*, 7 NLRB 24 (1938). However, this systemwide preference is merely a presumption and does not foreclose the possibility of less sweeping units. See *Deposit Telephone Co.*, 328 NLRB 1029, 1030 (1999). Thus, the Board has found less than systemwide units appropriate where the petitioned-for employees (1) work in an administrative subdivision or a distinct geographic service area of the utility; (2) enjoy a substantial community of interest sufficient to make less than systemwide bargaining feasible; and (3) have no history of bargaining on a broader basis. *Colorado Interstate Gas Co.*, 202 NLRB at 848-849.

Whether it requires a systemwide unit or a smaller unit corresponding to an administrative subdivision or geographic service area, the preference for comprehensive units springs primarily from the public's "immediate and direct interest in the uninterrupted maintenance of the essential services that [the public utility] industry alone can adequately provide." *Baltimore Gas & Electric Co.*, 206 NLRB 199, 201 (1973). Public utilities are, by their very nature, typified by highly integrated and interdependent operations. See *id.* Thus, if the Board did not require comprehensive units, labor disputes or stoppages at any one facility could have a domino effect across the

entire utility system, halting the provision of essential services to the public in places likely far removed from the situs of the dispute.

The Employer urges that the Board apply its systemwide public utility presumption and find the petitioned-for three-store unit inappropriate. Whether a wireless telephone company is properly considered a "public utility" for the purposes of the systemwide presumption is an issue of first impression for the Board. At first blush, the Employer's operations appear to possess some of the hallmarks of a public utility, viz. an integrated and interdependent network and the provision of an essential service to the public. However, while we recognize that wireless telephone service has risen in importance in today's technology driven society, we are not certain that it has become a true "essential service that the industry alone can adequately provide," such as electricity, gas, or wire-line based telephone services that have been historically considered public utilities. The issue is further complicated by the fact that the Employer is not the historical monopoly supplier of its service. If for some reason the Employer were unable to provide its service, there are several other wireless telephone service providers standing by to step in and fill the breach. Further, the Employer's sister company's wire-based telephone service serves as a reliable provider of vital telephone service in the unlikely event of an interruption of wireless service. However, we need not resolve this novel issue in this case because we find that, assuming arguendo the Employer is a public utility, the systemwide presumption does not apply to the retail store employees at issue here.

In creating the systemwide presumption, the Board essentially balanced employees' Section 7 right to bargain collectively through representatives of their own choosing against the public's interest in the unbroken provision of necessary services. This balance makes the most sense when the petitioned-for employees are an integral part of the provision of the utility service such that a labor stoppage or dispute at one part threatens the ability of the whole to serve the public good. However, where there is no such danger, we find no basis for limiting the organizational rights of employees by requiring them to organize only in comprehensive units.

Despite the Employer's arguments to the contrary, the Board has never squarely addressed the issue of whether retail employees of a public utility fall within the policy considerations behind the systemwide presumption. The Employer relies heavily on a quintet of cases involving various unit determinations at New England Telephone & Telegraph Company. See *New England Telephone & Telegraph Co.*, 242 NLRB 793 (1979) (New England Telephone I); *New England Telephone & Telegraph Co.*,

² In addition to these large electronic stores, the Employer's service and equipment are available, on a more limited basis, through prepaid cellular telephone service and equipment sold in convenience stores.

242 NLRB 940 (1979) (*New England Telephone II*); *New England Telephone & Telegraph Co.*, 247 NLRB 1277 (1980) (*New England Telephone III*); *New England Telephone & Telegraph Co.*, 258 NLRB 1284 (1981) (*New England Telephone IV*); *New England Telephone & Telegraph Co.*, 280 NLRB 162 (1986) (*New England Telephone V*). In each case, the Board applied the systemwide presumption to employees who handled some combination of servicing customer accounts, selling new service, or billing the employer's telephone service. However, none of those employees worked in retail stores separate from the employers' other facilities. In this sense, those employees were not akin to the retail employees at issue here who all work in retail stores apart from the Employer's nonretail employees.

Further, the current state of the law on this particular issue is not as clear as the Employer would have us believe. In cases involving similar types of service/retail employees as in the *New England Telephone* cases, the Board has found the systemwide presumption not dispositive in approving more discrete units. See *Mountain States Telephone & Telegraph Co.*, 220 NLRB 516 (1975) (finding petitioned-for unit of a single commercial office appropriate and rejecting suggestion of a companywide unit); *Michigan Bell Telephone Co.*, 192 NLRB 1212 (1971) (finding petitioned-for unit of a single commercial office appropriate, analogizing it to a retail unit).

Now, having the issue squarely presented, we hold that the systemwide presumption does not apply to the type of retail employees at issue in this case. We can envision no scenario in which a work stoppage at the Bakersfield facilities would halt the provision of the Employer's wireless telephone service to the public, even assuming that service is a public utility, because the retail employees at issue here are so divorced from the operation of the Employer's wireless network. Even if we were to examine only the Employer's retail arm, the fact remains that the Employer operates other stores in the general area and it sells its equipment and service through numerous channels not owned by the Employer, all of which would remain open to the public in the unlikely event of a strike at the Bakersfield facilities. Balancing the negligible potential for an interruption in the provision of the services of a public utility against the employees' right to freely organize, we find that the systemwide presumption does not apply to retail store employees. Simply stated, the minimal risk of harm to the public does not justify the restrictions on employees' rights to organize imposed by the systemwide presumption.

Having found the systemwide presumption inapplicable, we apply our general community-of-interest stan-

dards to determine the appropriateness of the petitioned-for unit. Under Section 9(b) of the Act, the Board must "decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . ." [T]he selection of an appropriate bargaining unit lies largely within the discretion of the Board whose decision, "if not final, is rarely to be disturbed. [Internal citations omitted.]" *South Prairie Construction Co. v. Operating Engineers Local 627*, 425 U.S. 800, 805 (1976).

There is nothing in the Act that requires that the unit for bargaining be the only appropriate unit or the most appropriate unit; the Act only requires that the unit for bargaining be appropriate so as to assure employees the fullest freedom in exercising the rights guaranteed by the Act. *Overnite Transportation Co.*, 322 NLRB 723 (1996); *Brand Precision Services*, 313 NLRB 657 (1994); *Phoenix Resort Corp.*, 308 NLRB 826 (1992). In defining the appropriate bargaining unit, the key question is whether the employees share a sufficient community of interest. *Alois Box Co.*, 326 NLRB 1177 (1998); *Washington Palm, Inc.*, 314 NLRB 1122, 1127 (1994). When examining a petitioned-for multifacility unit, the Board considers (1) similarity in skills, duties, and working conditions, (2) functional integration, (3) employee contact and interchange, (4) centralized control of management and supervision, (5) geographic proximity, and (6) bargaining history.

While three separate single-facility units or a multifacility unit including the eight remaining stores in the district may, indeed, be appropriate units, we agree with the Regional Director's reasoned decision that the Bakersfield facilities represent *an* appropriate retail store unit based on the geographic proximity of the stores, the substantial autonomy invested in each store manager, the regular contact between the employees at the Bakersfield facilities, the common terms and conditions of employment, the shared overflow inventory, and the evidence of permanent transfers. See *Weis Markets, Inc.*, 142 NLRB 708, 710 (1963) (finding petitioned-for two retail store unit appropriate).

In sum, we find that the Board's standards with respect to units in the public utility industry do not apply to the type of retail employees at issue in this case. As such, the petitioned-for multifacility unit meets the Board's traditional standards of appropriateness. Accordingly,

we remand this case to the Regional Director for further processing consistent herewith.³

APPENDIX

The Employer, Cellco Partnership, d/b/a Verizon Wireless, was formed in April 2000. The Employer has taken over the assets of various other wireless companies that are referred to in the record as “legacy companies.” The Employer sells wireless telephones and accessories and provides wireless communication services in every state except Alaska. The Employer has approximately 40,000 employees throughout the country and has about 29.4 million customers. It operates about 1220 company stores and kiosks throughout the United States. Kiosks are stores without four walls located within the confines of a shopping mall.

The Petitioner seeks to represent retail sales representatives and assistant sales operations employees (ASOs) at the Employer’s three retail facilities in Bakersfield: a store on Oak Street; a store on Coffee Road; and a kiosk in the Bakersfield Valley Plaza. There are approximately 29 employees in the unit sought by the Petitioner: 12 retail sales representatives and 7 ASOs at the Oak Street store; 3 retail sales representatives and 2 ASOs at the Coffee Road store; and 5 retail sales representatives at the Valley Plaza kiosk. The retail sales representatives sell products and services to new and existing customers. The ASOs assist existing customers with questions they have about bills, rate plans, and handset performance. They also assist the store managers in administering the store. For example, they may assist in opening and closing the store, controlling the inventory and maintaining the facility. Although the Employer agrees that the unit should be comprised of retail sales representatives and ASOs, the Employer asserts that petitioned-for unit is not appropriate because the smallest appropriate unit would include employees at all stores in the Employer’s West area.

Prior to March 2001, the Employer divided its operations into seven administrative areas. In March 2001, the Employer consolidated its operations into four separate areas. The Bakersfield facilities are located in the West area, which encompasses all, or parts of, the States of Montana, Idaho, Oregon, Washington, Wyoming, Utah, Colorado, New Mexico, Arizona, Nevada, California, and Hawaii. The headquarters for the West area is in Irvine, California. Within the West area, the Employer operates various types of facilities, including the West area office; regional sales offices; cell sites (technical tower facilities); switching centers; 7 call centers (handling inbound calls from customers); technical offices; and 311 retail stores and kiosks. There are 10,000 employees in the West area, 2500–3300 of whom work at stores or kiosks.

The West area is divided into six regions: Desert Mountain; Hawaii; Mountain; Northern California/Nevada; Pacific Northwest and Southern California. The Bakersfield facilities are located in the Northern California/Nevada region. The

headquarters for the Northern California/Nevada region is located in San Ramon, California. Within California, the stores in the Northern California/Nevada region extend over an area as far south as Santa Barbara and as far north as Redding. The Northern California/Nevada region also includes three stores in Nevada. There are 69 stores and kiosks and about 660 retail sales representatives and ASOs in the Northern California/Nevada region.

There is a retail director of stores for the Northern California/Nevada region, who reports to the regional president. In the Northern California/Nevada region, there are 7 district managers who report to the retail director of stores. The district managers assist the retail director of stores in overseeing the operations of the retail stores and kiosks in a district. The district manager who is responsible for the Bakersfield stores also is responsible for eight other stores that are located as far north as Merced, which is about 200 miles from Bakersfield. Within the Northern California/Nevada region, the closest store to Bakersfield is in Visalia, which is about 65 miles from Bakersfield. The three stores in Bakersfield are within proximity of each other. The kiosk at the Bakersfield Valley Plaza is about 3 to 4 miles from the Oak Street store and the Coffee Road store is about 8 to 9 miles from the Oak Street store.

There is a store manager for each of the Bakersfield stores and the kiosk. In addition, the two stores also have an assistant store manager. The store managers directly supervise the day-to-day operations of the stores. There has been some interchange and overlap between the store managers and assistant store managers at the Bakersfield facilities. When the Coffee Road store opened, the assistant manager from the Oak Street store was assigned to manage that new store. The manager of the Valley Plaza kiosk also served as an acting manager for the Oak Street store when the Oak Street manager went on an extended medical leave. In fact, although the Employer recently assigned somebody else to the store manager position at Oak Street, the store manager of the kiosk continues to maintain an office at the Oak Street store. The Employer expects that when the prior store manager for the Oak Street store returns from his medical leave, he will become the store manager for the Coffee Road store and the Coffee Road manager will become an assistant manager at Oak Street.

The Act does not require that a bargaining unit be the *most* appropriate unit, only that it be *an* appropriate unit. Moreover, in representation proceedings, the unit sought by the union-petitioner is always a relevant consideration. *Lundy Packing Co.*, 314 NLRB 1042, 1043 (1994). However, in the public utility industry, the Board has long considered systemwide units to be optimal, notwithstanding the fact that the union seeks to represent employees in a smaller unit. *New England Telephone & Telegraph Co.*, 280 NLRB 162, 164 (1986); citing *New England Telephone & Telegraph Co.*, 90 NLRB 639 (1950); *Baltimore Gas & Electric Co.*, 206 NLRB 199 (1973); and *Gulf States Telephone Co.*, 118 NLRB 1039 (1957). The basis for the conclusion that systemwide units are optimal in the public utility industry was explained as follows by the Board in *Baltimore Gas & Electric*,

³ Because we find it unnecessary to address whether the Employer qualifies as a public utility, we deny as moot the Employer’s Motion for Permission to Reopen the Record, to Take Administrative Notice of Official Documents, and to File Supplemental Brief.

That judgment has plainly been impelled by the economic reality that the public utility industry is characterized by a high degree of interdependence of its various segments and that the public has an immediate and direct interest in the maintenance of the essential services that [t]his industry alone can adequately provide. The Board has therefore been reluctant to fragmentize a utility's operations . . .

206 NLRB at 201.

Nevertheless, the Board's preference for systemwide units at public utilities is not an absolute prohibition of smaller units. *PECO Energy Co.*, 322 NLRB 1074, 1079-1080 (1997). The Board does not hesitate to find a less than systemwide unit to be appropriate when there is no history of bargaining on a broader basis for the requested employees, the employees work in a distinct administrative or geographic subdivision, and the employees enjoy a community of interest sufficient to make separate bargaining for them a feasible undertaking. *Southern California Water Co.*, 228 NLRB 1296 (1977). In making this determination, the Board considers whether a less than systemwide unit would disturb the employer's ability to perform its necessary functions. *Arizona Public Service Co.*, 256 NLRB 400, 401 (1981).

The Employer asserts that the Board's systemwide presumption with respect to bargaining units for public utilities should be applied to the unit herein since the wireless industry is highly regulated and is considered to be a public utility under California law and considered to be a common carrier under Federal law. At the hearing, the Employer presented James McTarnaghan as a witness and asked that the hearing officer find him to be an expert witness. The hearing officer deferred that question to me. McTarnaghan is a partner in a law firm specializing in public utilities law. He represents wireless carriers, including the Employer, in regulatory proceedings and he is the regulatory counsel for an association of wireless carriers with respect to regulatory proceedings.

McTarnaghan testified that it is his opinion that the wireless industry is comprehensively regulated because it is essential to modern life and public safety. I do not find it necessary to rely upon this opinion testimony or to determine whether or not he should be considered to be an expert witness. However, consistent with his testimony, the record establishes and I find that pursuant to the California Public Utilities Code, wireless companies are considered to be public utilities and that Federal, State and local Governments extensively regulate the wireless industry. I also find that governmental entities are recognizing the increasing importance of wireless communications to public safety, especially in light of the role it played in recent disasters, including the terrorist activities on September 11, 2001. In response to the terrorist acts of September 11, 2001, the Federal Government issued a request that wireless communications providers afford law enforcement and public safety officials a priority access service in emergency situations and a plan is being developed to assure wireless service in connection with a National Security/Emergency Preparedness program.

For the reasons set forth below, I conclude that even if I were to apply the public utility presumption that systemwide units are optimal to this employer, who provides wireless services, I still would conclude that the petitioned-for unit of the three

Bakersfield facilities would be an appropriate unit. Therefore, it is not necessary for me to determine whether or not the public utility presumption should be extended to employers in the wireless industry.

The Employer sells its product by various means that it refers to as "channels." The channels include direct sales (including business to business), retail sales, telemarketing sales and indirect sales (through stores not owned by the Employer, such as Radio Shack and Best Buy). All of the Employer's retail stores and kiosks have similar layouts to the Employer's retail stores and kiosks in other areas. They carry the same products, including handsets (wireless telephones) and accessories (such as carrying cases, hands-free sets, rechargers, and extra batteries) and offer the same promotions and calling plans. Although the prices are established at a national level, the store managers have the authority to authorize a discount on hardware or a credit on a bill, or to waive an activation fee.

The employees in the West area retail stores and kiosks all work pursuant to the same West area retail sales operations manual. These employees are trained to use the same 5-step selling process. After a customer selects a calling plan, a handset, and accessories, the sales representative obtains credit information and uses a centralized computer system to determine whether a deposit will be required. The sales representative can activate the wireless telephone by manually programming the telephone or by using an automated program.

The Employer has a centralized administrative structure. The employment-related policies and procedures are determined on a national level and are applied uniformly to all of the Employer's employees throughout the country. These policies include the following: attendance; family and medical leave; illness, absence, and short term disability; job abandonment; leaves of absence and other time off; vacation, personal days and holidays; drug and alcohol; standards of conduct; workplace violence; overtime; relationships at work; open communications; equal employment and affirmative action; harassment and discrimination; alternative work schedules; business appearance; performance appraisals; personnel records and company property.

The Employer maintains a uniform benefit program, which includes a savings and retirement plan; disability insurance; life insurance; accidental death and dismemberment insurance; business travel accident insurance; medical/prescription drug/dental/vision insurance; tuition assistance; and adoption assistance. The benefits for the employees represented by a labor organization differ in certain respects. Also, there are some differences in certain benefits, such as pension plans, due to the transition period from employment with legacy employers.

At the West area level, there is an area executive director of human resources, Dina Keefer. She reports to the Employer's vice president for human resources at its corporate headquarters. Ms. Keefer is responsible for staffing, employee relations and training and development for employees in the West area. She also ensures that the Employer's national human resources policies and procedures are consistently practiced and implemented throughout the West area. There are seven associate directors of human resources who report to Keefer, one of

whom is responsible for the employees in the Northern California/Nevada region.

The wages and other compensation packages are determined on a national level. There are different salary bands for various jobs and there is a salary range associated with each salary band. Within a region, there are different zones and the base pay rates for zones within a region varies based upon the cost of living in the zone. Therefore, although stores in the San Francisco Bay area are in the same region as the Bakersfield stores, employees in the Bakersfield stores, which are in zone 3, earn a different basic pay rate than employees in the San Francisco Bay area, which is in zone 4.

The ASOs receive an hourly wage and a short-term incentive bonus, which is based on the employee's salary band, individual performance, and company performance. They do not receive a commission. The compensation for the retail sales representatives is comprised of a base hourly wage and a commission. They also receive additional payment based on a management by objective (MBO) program. The MBO program rewards retail sales representatives who meet certain objectives established by the West area finance office. The commission for retail sales representatives is based upon their ability to meet quotas relating to the number of activations, upgrades and renewals and the sale of accessories and enhancement services. Both retail sales representatives and ASOs can receive merit increases to their base pay.

The Employer's chief financial officer identifies the Employer's business targets for net additional new customers and that target is divided amongst the four areas. The West area president disperses that target amongst the six regions in the Area. The regional target is divided into different amounts for different sales channels, including the retail stores channel. The director of stores and the regional president then divide the retail stores target amongst the different stores in the region, based upon the location, performance, size, and amount of customer traffic. The sales targets for stores are different from the sales targets for kiosks. The quota for each store or kiosk is divided equally amongst each retail sales representative at that store or kiosk, with part-time employees being assigned a proportionate target. All part-time employees are expected to meet the same target quotas, regardless of how many hours they actually work. There is an incentive review board for the West area that reviews individual situations and can award quota relief.

When the Employer first took over legacy companies, the Employer honored certain bonus, pension, and compensation programs of the legacy companies. During this transitional period, employees who came from certain legacy companies did not receive the same salary increases as other employees of the Employer. Employees at the Bakersfield stores who formerly had been employed by GTE Wireless have been subject to a different commission plan than other employees and have received an equity adjustment to their base pay that was given to the employees who previously worked for GTE. In addition, the former GTE Wireless employees at the Employer's Bakersfield stores receive different pension benefits than other employees.

The compensation for retail sales representatives and ASOs is affected by their appraisal ratings. The store managers evaluate employees in the retail stores and kiosks and prepare their appraisal forms. They rate the employees with respect to their contribution (the extent to which the employees accomplish objectives) and to core values (the extent to which the employees demonstrate core values, such as respect and innovation, while accomplishing objectives) and they provide an overall assessment rating. The store managers also make comments concerning the overall assessment and other assessment areas. After the store managers review the appraisals with the employees, the store managers sign the appraisals in the area marked for supervisor's signature. With respect to the appraisal section concerning the employees' compliance with the Employer's code of business conduct, the store managers primarily base their ratings upon their personal observation of the employees, as well as upon input and, at times, upon decisions by other managers responsible for ensuring compliance with that code. The district manager also signs the appraisal.

The regional director of stores testified that from time to time the district managers make changes in the overall assessment rating on appraisals. However, he could not recall any instance where the district manager changed an appraisal rating for any employee at any of the Bakersfield facilities. The district manager for the district including the Bakersfield facilities testified that if he disagrees with the ratings or comments by a store manager, he would discuss the appraisal with the store manager to understand why the store manager made certain comments or certain ratings. If after the discussion he still believed that the appraisal was not appropriate, he might instruct the store manager to change a rating or to change some language. According to the district manager, there were 92 employees in his district who were appraised during the past year and he directed store managers to change comments or ratings on only 3 or 4 of those appraisals. The record does not reveal whether any of those changes involved the Bakersfield facilities. The general practice is that the district manager reviews the appraisals before they are shown to the employees. However, the district manager does not actually sign the form until after the store manager reviews the appraisal with the employee.

The ratings given by store managers affects the short-term incentive bonuses given to ASOs as well as the amount of the merit increase given to both retail sales representatives and ASOs. As noted above, the short-term incentive bonus is based on the employee's salary band, individual performance, and company performance. The store manager determines the amount of the individual performance modifier that is used to calculate the short-term bonus. For example, the performance modifier for employees who are rated as "meets expectations" is a range between .8 to 1.1. The store manager not only determines the range for the modifier by the rating he assigns to the employee, but also determines which amount within the range will be applied to determine that employee's bonus.

With respect to merit increases, the store managers are given an amount of money that they may distribute amongst the employees, consistent with their appraisal ratings. The new store manager for the Oak Street store recently explained to employ-

ees that he is given a budget for merit increases and it is within his discretion how to allocate the merit increases between the employees. The district manager reviews the store manager's determination with respect to the granting of merit increases. The district manager for the district including the Bakersfield facilities testified that of the 31 ASOs who received merit increases last year, he overruled the recommendations by store managers on only three or four occasions. He does not recall the circumstances of these occasions. He believes that they may have involved inconsistencies between the ratings and what was said on the appraisal. Other higher-level executives also review merit increases to be sure they are within the budgetary allotments. They do not focus on individual increases, but rather confirm that the overall increases comply with the budgetary constraints. There is no evidence that any of the determinations by any of the Bakersfield store managers concerning merit increases have been overruled.

The store managers prepare the schedules for employees. Since part-time employees have the same quotas, regardless of the number of hours they work, the more hours the store manager permits them to work, the better chance they have to earn a higher commission. Also, since there are peak periods of sale activities, the particular days and hours that employees are assigned to work affects their ability to meet their quotas. The store managers approve requests for leaves of absences, including vacation requests. In addition, store managers can authorize overtime work if it is consistent with budgetary constraints.

The staffing levels for stores within a region are determined by the director of stores in conjunction with the regional president and the area finance office. If an employee will be absent for a short period of time, the store manager can determine whether he can meet the staffing need by having part-time employees work more or by covering for the absent employee himself. He also may decide to ask for assistance from the regional operations office. If an employee will be absent on a longer-term basis, the store manager, the district manager and the area human resources department would decide whether to bring in temporary help from a store in the same general area. If this situation occurred at one of the Bakersfield facilities, the additional employee(s) would be brought in from another Bakersfield facility.

If an employee quits or is terminated, the store manager would confer with the district manager to confirm that the hiring of a replacement employee is consistent with the budget. Assuming that the position is budgeted, the store manager completes a job requisition form and forwards it to the West area human resources department. The human resources department posts the opening on the Employer's intranet and may also advertise to fill the position. A staffing person in the West area human resources department reviews the resumes to screen for minimum qualifications. The resumes of eligible candidates are forwarded to the store manager, who conducts interviews to select the person he would like to hire. The store manager must complete a log identifying who he interviewed and explaining why he selected the candidate he chose. A staff representative for the area human resources department checks the paperwork to ensure there will not be any issues concerning perceived discrimination and the human resources department must ap-

prove the selection and prepare the offer. After the offer is made, the store manager arranges a meeting with the prospective employee and reviews the offer and the terms of employment with the applicant. The regional director of stores testified that he is not aware of any instance when a store manager made a recommendation to hire somebody that was not hired. In fact, there is no evidence that any decision by a store manager to hire a particular individual has ever been reversed.

All new employees receive a similar orientation training that usually is held at the regional headquarters, but can be held in the field. The employees also receive other additional training administered by the West area operations office.

The Employer maintains a four-step progressive discipline program, consisting of verbal coaching or counseling, written warnings, a final written warning, and termination. The store managers have the authority to give verbal coaching and counseling. However, the store managers must obtain approval from the area human resources department before issuing a written warning, a final written warning or a termination. The human resources department evaluates the situation to determine whether the warning or termination is warranted based on past practices and other similarly situated circumstances.

The employees in the Bakersfield stores and kiosk regularly communicate with other Bakersfield employees to check whether another location has an item that a customer needs and that they do not have in stock. An employee from the Oak Street store testified that he speaks with employees at the Coffee Road store and the Valley Plaza kiosk on a daily basis and that he does not communicate with employees outside of the Bakersfield area. Employees from the Valley Plaza kiosk go to the Oak Street store to retrieve the overflow inventory that is stored there. The employees of the Bakersfield stores and kiosk also interact at joint meetings for employees of these Bakersfield facilities during which new promotions, new products, or performance goals are discussed. Before the store manager for the Oak Street store went on a medical leave, these joint Bakersfield meetings took place on a regular basis. Although these joint meetings now take place with less regularity, they do still occur. Recently, there was a meeting for all Bakersfield employees to introduce the new store manager of the Oak Street store and there was another joint meeting held at a Bakersfield hotel to discuss the Employer's open-door policy.

The record reveals that there were permanent transfers of employees from one Bakersfield store to another Bakersfield store. When the Coffee Street store in Bakersfield was opened, it was partially staffed by employees who permanently transferred from the Oak Street store to that location. An employee at the Valley Plaza kiosk trained for 3 to 4 weeks at the Oak Street store before transferring to the kiosk location. When temporary transfers are necessary, employees are transferred amongst clusters of stores and kiosks that are in geographic proximity to each other. For example, employees at stores in the San Francisco Bay area may be temporarily transferred to other stores in that area and employees at a hub of stores near Sacramento may be temporarily transferred to other stores in that same geographical hub. Apparently, there have not been many temporary transfers of employees at the Bakersfield stores because there is not a large amount of turnovers at those

facilities. However, if there were a need for temporary transfers, employees would be transferred between the three Bakersfield facilities.

There is no bargaining history with respect to the employees in the petitioned-for unit. In fact, none of the retail sales representatives or ASOs employed by the Employer throughout the United States are represented by a union. There is only one unit of the Employer's employees that is represented by a labor organization. It is a unit of technical employees in the New York area that is represented by Communications Workers of America. This is a unit of employees formerly employed by a legacy company.

Even in applying the presumption that systemwide units are optimal in the public utility industry to this case, I conclude that the rationale underlying this presumption does not require a finding that the petitioned-for unit herein is inappropriate. The record fails to establish that there is such a high degree of interdependence between the services provided by the employees at the Bakersfield stores and other segments of the Employer's operations, or between the operations of the Bakersfield and other retail store locations, to compel the inclusion of other employees in the unit. Nor does the record establish that the employees in the petitioned-for unit provide essential services. The public can purchase the Employer's products from indirect sales channels (such as other retail stores in Bakersfield) or can purchase wireless equipment and services from a competitor wireless company. Furthermore, individuals can connect their wireless phones to the Employer's network without going into one of the stores at issue herein.

As the Board noted in *Texas Electric Service Co.*, 261 NLRB 1455, 1458 fn. 13 (1982), although, in general, the Board will find a systemwide unit of public utility employees to be optimal, the Board does find less than systemwide units to be appropriate where 1) there is no recent history of bargaining on a systemwide basis; 2) the proposed unit encompasses a distinct administrative or geographical subdivision; 3) the employer invests substantial autonomy in supervisors at the unit level; and 4) no union seeks to represent employees in a larger unit. In the public utility industry, the Board regularly has found petitioned-for units of employees in a location or locations servicing a defined geographical area to be appropriate, even where the employer has centralized employment policies and procedures and provides uniform wage rates, benefits, and other working conditions. *Texas Electric Service*, supra; *Michigan Bell Telephone*, 192 NLRB 1212 (1971); *Monongahela Power Co.*, 176 NLRB 915 (1969); *Mountain States Telephone*, 220 NLRB 516 (1975); *New England & Telegraph Co.*, 249 NLRB 1166 (1980). In fact, in *New England Telephone & Telegraph*, 242 NLRB 940, 943 (1979), the Board specifically noted that centralized control of policies is common to public utilities and does not by itself "constitute grounds for finding less than systemwide units in public utilities inappropriate."

In its post-hearing brief, the Employer states that the Board has consistently applied the public utility presumption to employees who work in retail stores. The cases cited by the Employer in support of this statement are distinguishable from the situation herein. In *New England Telephone*, 258 NLRB 1284 (1981), the petitioner sought to represent a unit of employees in

a residential segment of the employer's Springfield District. The residential segment includes residence service centers as well as retail phone centers. Moreover, in that case, unlike the situation herein, the Board specifically notes the evidence of significant interchange between employees in the Springfield District with employees in other districts. The other cases cited by the Employer, *New England Telephone & Telegraph Co.*, 242 NLRB 940 (1979); and *New England Telephone & Telegraph Co.*, 247 NLRB 1277 (1980), also did not involve units that were limited to retail phone centers. Moreover, in *New England Telephone & Telegraph Co.*, 249 NLRB 1166 (1980), the Board distinguished prior *New England Telephone and Telegraph* cases and found that a unit comprised of two business service centers was appropriate. In that case, in rejecting the employer's contention that only a systemwide unit of business center employees would be appropriate, the Board noted that the unit requested is comprised of employees located in and servicing a geographically distinct area. The Board found the requested unit appropriate notwithstanding the fact that the employer maintains a highly integrated and centrally controlled operation.

In *Mountain States Telephone & Telegraph*, 220 NLRB 516 (1975); and in *Michigan Bell Telephone Co.*, 192 NLRB 1212 (1971), petitioners sought to represent employees at a particular commercial office of each employer. The Board in those cases recognized that the Board has long held that the optimum unit in public utilities is systemwide in scope, but the Board noted that the commercial office, at which employees solicit and service telephone subscriptions in a well-defined geographic area, is comparable to an outlet or territory in a selling operation. The Board in each of these cases stated that viewed in this light, the requested unit limited to commercial department employees in a particular location is "presumptively appropriate." Therefore, even if the Board were to conclude that systemwide units generally are optimal in the wireless industry, similar to the Board's decisions in *Mountain States* and *Michigan Bell Telephone*, I would not find that policy to be determinative here, where the unit requested involves employees at three retail stores in a geographically distinct area.

In concluding that the petitioned-for unit is appropriate, I particularly note the following facts. The employees in the petitioned-for unit work in a defined geographic area, servicing customers in the Bakersfield area. The manager of the Bakersfield stores have substantial autonomy in controlling the day-to-day activities of the employees sought. They interview and recommend employees for hire, schedule the hours of employees, grant vacations and other leaves of absences, evaluate employees and rate them in a manner that affects their compensation, and they discipline employees subject to approval from the area human resources department with respect to written warnings and terminations. Moreover, the employees at the different Bakersfield stores have contact with each other and they do not have any significant contact with other employees in the West area. There is evidence of permanent transfers of employees between the Bakersfield stores and to the extent temporary transfers may be necessary they would occur between employees at those three Bakersfield locations. I also note the great distance between the Bakersfield stores and the

other stores in the West area. In addition, I note the lack of a bargaining history for the requested employees.

Furthermore, I conclude that a work stoppage at the Bakersfield stores would not impair the operations of the other stores in the West area. Nor would such a work stoppage impair the ability of the public to purchase the Employer's products and services from indirect sales channels or to purchase wireless products and services from other wireless companies. I do not find that the existence of a unit limited to the Bakersfield retail stores would hinder the Employer's ability to perform any necessary functions. In these circumstances, particularly where the requested unit is comprised of employees in a geographically distinct area, the fact that the requested unit is not coextensive

with an administrative subdivision of the Employer is not controlling. *New England Telephone & Telegraph*, 249 NLRB 1166, 1168 (1980).

I conclude that the employees at the Employer's three retail locations in Bakersfield share a community of interest that is separate and distinguishable from that which they share with other employees of the Employer and that is sufficient to make separate bargaining a feasible undertaking. Noting that no union seeks to represent the retail sales representatives and ASOs in a more inclusive unit, I find that the unit requested by the Petitioner is appropriate.

There are approximately 29 employees in the unit.