BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Missouri RSA No. 5 Partnership for Designation as a telecommunications Company Carrier Eligible for Federal Universal Service Support Pursuant to Section 254 of the Telecommunications Act of 1996.	)))))))	Case No. TO-2006-0172

APPLICATION FOR REHEARING

COME NOW Intervenors, Spectra Communications Group, LLC d/b/a CenturyTel and CenturyTel of Missouri, LLC (collectively "Intervenors"), pursuant to Section 386.500 RSMo 2000 and 4 CSR 240-2.160, and for their Application For Rehearing, respectfully state as follows:

1. On September 21, 2006, the Commission issued its Report and Order in thiscase. The Report and Order conditionally granted eligible telecommunications carrier (ETC) status to Applicant Missouri RSA No. 5 Partnership ("MO-5"). The primary condition was that MO-5 was required to file, no later than September 26, 2006, a revised budget and build-out plan which complied with the Commission's new ETC rule, 4 CSR 240-3.570.

2. The Report and Order is unlawful, unjust, unreasonable, arbitrary, capricious, and unsupported by competent and substantial evidence on the evidentiary record before the Commission, all in material matters of fact and of law, individually or cumulatively, or both, as herein indicated. It also fails to make adequate and sufficient findings of fact and conclusions of law.

THE EVIDENTIARY RECORD

3. Despite the Commission's apparent desire to push ahead and designate new ETCs in Missouri, the Commission's decision to grant or to reject MO-5's ETC Application in this case nevertheless must be based on competent and substantial evidence on the whole record. *State ex rel. Chicago, Rock Island & Pacific R.R. Co. v. Public Service Commission*, 312 S.W.2d 791, 794 (Mo. banc 1958). A cursory review of the evidentiary record in this case, as well as the contradictory factual findings in the Commission's Report and Order itself, does not support the Commission's decision to grant MO-5 ETC status, conditionally or otherwise.

4. The parties, and the Commission itself on page 6 of its Report and Order, agree and acknowledge that compliance with the Commission's ETC rule is required for an applicant to receive ETC designation. However, the evidence in this case is uncontested, and the Commission at various places in its Report and Order clearly acknowledges, that MO-5's Application did not comply with several portions of the Commission's ETC rule. As more specifically set forth in Intervenor's Post Hearing Brief, incorporated herein in all respects by reference, even MO-5's own evidence shows that MO-5 has not complied with Section (2) (A) (1)-(3) of the ETC rule.[1] Therefore, in addition to contradicting the Commission's own stated standard for ETC designation, the Commission's decision to grant MO-5 ETC status is unsupported by and contradicts the record evidence--even MO-5's own evidence--in this case.

5. Moreover, in its Report and Order the Commission, without any explanation or discussion, wholly and wrongfully ignored the expert testimony of Intervenor's witness,

[1] *See, e.g.*, pages 5-8, 11-17 of Intervenor's Post Hearing Brief.

Glenn H. Brown, who along with providing a detailed analysis of the public interest standard (which was apparently ignored), pointed out numerous and serious deficiencies with MO-5's Application--including how MO-5's Application specifically failed to comply with certain provisions of the Commission's ETC rule.[2] MO-5 did not file surrebuttal testimony to address the issues raised by Mr. Brown in his rebuttal testimony. No party, including MO-5, objected at the hearing to the receipt into the evidentiary record of Mr. Brown's rebuttal testimony on the basis of relevance or any other grounds. No party, including MO-5, cross-examined Mr. Brown at the hearing. Mr. Brown's credibility as an expert was not challenged at the hearing by any party nor was his credibility in any way questioned or discounted by the Commission in its Report and Order. Accordingly, Mr. Brown's expert testimony stands wholly uncontested in the evidentiary record of this case. The same generally holds true, albeit perhaps to a lesser extent, for the testimony offered by the Commission Staff, the Office of the Public Counsel, and the other intervenors.

6. Rather than deciding this case on this clear, uncontested record evidence offered by Mr. Brown and the other parties opposed to MO-5's Application, the Commission erroneously ignored this evidence, and in lieu thereof, granted MO-5's Application based on what the Commission apparently found to be MO-5's "credible" verbal assurances, and as discussed below, certain "supplemental" submissions made outside the evidentiary record *after* the issuance of the Commission's Report and Order.

7. To the extent the Commission somehow was not persuaded by Mr. Brown's uncontested evidence, it at least should have attempted to explain in its Report and Order

[2] The one exception was on page 13 of the Report and Order, where the Commission apparently agreed with Mr. Brown's testimony by stating that "[t]he coverage maps could have been provided in more detail as demonstrated by the Rebuttal Testimony of Glenn H. Brown."

why it wholly dismissed such evidence in reaching its decision. Simply characterizing and limiting on page 33 of the Report and Order the position of the ILECs to concerns about the impact on the universal service fund mischaracterizes and ignores a very significant amount of Mr. Brown's other evidence. The Commission's consideration of all the evidence before it, and its stated findings of fact, as a matter of law must enable a reviewing court to ascertain if the facts found by the Commission afford a reasonable basis for the Order without the court having to itself delve into the underlying evidentiary record. *State ex rel. Laclede Gas v. PSC*, 103 S.W.3d 813, 816 (Mo. App. 2003). Aside from the reference cited noted in footnote 2, the only place in the Commission's Report and Order that Mr. Brown's uncontested evidence is addressed, and there without any explanation or elaboration, is in the "boilerplate" general language found at page 6 of the Report and Order. As such, the Report and Order fails to make legally sufficient findings of fact and conclusions of law based on those facts.

8. The Report and Order also erroneously fails to sufficiently explain its ultimate findings, and in many places, makes findings of fact which contradict its ultimate findings and conclusions of law.

UNLAWFUL PROCEDURE

9. In its Report and Order, the Commission granted MO-5 ETC status conditioned upon MO-5 subsequently filing a substitute budget and build-out plan that supposedly would meet the requirements of the Commission's ETC rule. By so doing, the Commission has itself acknowledged that MO-5's Application and evidence, as submitted, failed to comply with the rule. The opportunity given to MO-5 to file supplemental direct testimony prior to the hearing did not remedy this deficiency.

10. MO-5's failure to provide, up front, sufficient information to show compliance with the Commission's ETC rule cannot lawfully be cured by MO-5 submitting additional, revised information after the case has been submitted for decision. First, the language of the rule itself makes compliance with the rule a *condition precedent* for the Commission to grant ETC status and makes no provision for the type of after-the-fact compliance procedure allowed by the Commission in its Report and Order. Second, this "after-the-fact" procedure denies the other parties in this case their due process rights to review and to test MO-5's revised budget and build-out plan at an open hearing with MO-5's witnesses and "new evidence" being subject to cross-examination. Third, it allows the Commission to wrongfully and erroneously make a decision without considering and deciding all necessary and essential issues, in contravention of the legal standard set forth in *AG Processing v. PSC*, 120 S.W.3d 732, 734 (Mo. Banc 2003) ("[t]he PSC erred when determining whether or not to approve the merger because it failed to consider and decide all the necessary and essential issues"). The Commission should have based its decision to grant or deny MO-5 ETC status on all necessary and essential issues presented in the case *at the time the case was submitted,* not upon late-filed documents filed five days after the Commission issued its Report and Order granting MO-5 ETC status.

11. Through its Report and Order the Commission erroneously has concluded that MO-5 is deserving of ETC designation under its rule, prior to actually receiving a budget and build-out plan which may or may not be in compliance with the rule. This approach wrongfully places the cart before the horse. According to the Missouri Supreme Court:

> An agency's determination of findings is not a separate function from its decision in a case. The agency's findings of fact and conclusions of law are an essential part and are the basis for its decision. **The two cannot be separated, nor can the agency put the cart before the horse, as was done in this case, by making a decision and then later making findings of fact and conclusions of law which will support that decision**.

Stephen and Stephen Properties, Inc. v. State Tax Comm'n, 499 S.W.2d 798, 804[9] (Mo 1973) (emphasis supplied). This in effect is what has occurred in this case. To be consistent with the Commission's own ETC rule and standard regulatory practice, the Commission here should have required MO-5 to comply with the Commission's rule before the Commission acted favorably on MO-5's Application and made its findings of fact and conclusions of law based on the evidence as submitted prior to the issuance of the Report and Order, not base its decision to grant MO-5 ETC status on post-decision submissions.

12. The Commission's procedural approach in this case of ignoring MO-5's clear non-compliance with the rule, and yet granting MO-5's requested relief based on MO-5's verbal assurances that it will in the future comply with the rule, is unprecedented. Aside from practical problem of the Commission not being able to require a refund of ETC money if inappropriately spent, the Commission did not utilize this approach in any prior ETC application proceeding, even prior the effective date of the rule. The Commission traditionally never has used this novel approach with respect to the Commission's historical treatment of regulated companies—which traditionally are held to a much higher degree of compliance with more extensive regulatory requirements and much higher level of scrutiny. The Commission's procedural treatment of MO-5 in this case, therefore, not only is unwise, it is unlawfully discriminatory, arbitrary, and capricious.

13. This procedural approach is made even more egregious in that the Commission Staff, in its Highly Confidential response to MO-5's post-decision supplemental filing of September 26, 2006, noted continued "apparent discrepancies" with respect to MO-5's proposed ETC budget and build-out plan although Staff nevertheless concluded that MO-5's filing was in compliance with the Commission's Order granting MO-5 ETC designation. Even at the eleventh hour MO-5 once again has failed to meet the rule's minimum conditions precedent for being designated an ETC, with the Staff now using the Commission's Report and Order, rather than the rule itself, as a new standard. As noted above, the Commission's Report and Order unlawfully did not allow for or provide an opportunity for the other parties to review and test through cross-examination MO-5's post-decision, so-called "compliance filing" or otherwise comment on this "new standard".

APPLICATION OF THE ETC RULE

14. The Commission engaged in a comprehensive and somewhat lengthy process in promulgating its new ETC rule. The resulting rule contained specific and clear language as to the *minimum* requirements that an ETC applicant must meet in order to obtain ETC status and thereby receive a significant amount of federal universal service funds. Sections (2) (A) (1)-(3) of the rule require that an ETC applicant demonstrate that: 1) all USF dollars will be spent only for USF-supported services; 2) an applicant's proposed expansion plans would not otherwise occur absent the receipt of high-cost support; 3) such support will be used only for expenses that the applicant would not otherwise incur; and 4) the applicant's use of USF support should further urban/rural parity.

15. The record evidence, and even several of the Commission's own findings in its Report and Order, clearly shows that MO-5 has not met these fundamental minimum requirements. The Commission's extremely broad and liberal reading and application of these otherwise clear requirements with respect to MO-5's Application, in practical effect, has rendered the language of Sections (2) (A) (1)-(3) a nullity for purposes of precedent in future ETC cases. If for no other reason than the establishment of sound regulatory policy, and parity of regulatory treatment as between regulated carriers and unregulated wireless carriers, the Commission should reconsider its decision in this case with respect to the meaning of the language and application of these sections of the rule.

WHEREFORE, Intervenors respectfully request that the Commission rehear and reconsider this matter and grant such other relief as is appropriate under the circumstances.

Respectfully submitted,

/s/ Charles Brent Stewart

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Application For Rehearing was sent to counsel for all parties of record in Case No. TO-2006-0172 by electronic transmission this 29th day of September, 2006.

/s/ Charles Brent Stewart