BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Petition of VCI Company for Designation as an Eligible Telecommunications Carrier	)))	Case No. CO-2006-0464

STAFF'S BRIEF

Introduction.

To determine whether to designate VCI Company as an eligible telecommunications carrier (ETC) to receive universal service support, this Commission has been directed by Congress and the Federal Communications Commission to consider certain factors. The Commission has also promulgated its own rules to establish criteria for companies that apply for ETC status to supplement or supplant the federal requirements. Whether a company not currently in business in Missouri will comply with these rules can be a speculative matter, as the Commission must rely on the representations of the carrier that it will comply with the relevant requirements in the future, when it commences its operations.

In VCI's case, the company has committed to comply with the applicable requirements the Commission has established for a carrier to receive certification. Certain requirements do not apply to VCI because the company seeks ETC designation for low income support only.[1] VCI demonstrated that it meets the applicable state and federal requirements for designation as an ETC. Certain obligations cannot be fulfilled until VCI actually provides service or receives ETC designation, so VCI has committed to meet these requirements. As the company has met the obligations it can meet at this time and has committed to meet all other mandatory obligations as outlined in Mr. Cecil's testimony, Staff supports VCI's petition. Staff recommends the

[1] Exh. 3, Rebuttal Testimony of Walt Cecil, at 5, ll. 20-32.

Commission grant ETC designation only for low income support, conditioned upon VCI's adherence to all required obligations.

The parties have not disputed that VCI will fulfill the two core responsibilities of an ETC required by Congress: that it provide service in whole or in part through its own facilities (47 U.S.C. 214(e)(1))[2] and that it advertise its services and charges through media of general distribution (47 U.S.C. 214(e)(2)). However, AT&T has disputed whether VCI should receive ETC status because its rates, terms and conditions are not comparable to those of AT&T (the incumbent local exchange carrier), as required by the Commission's rule at 4 CSR 240-3.570(2)(A)(10); because VCI has sought Universal Service Fund support, and, accordingly, ETC status, only for low income support rather than for both low income and high-cost support; and because a grant of VCI's application is not in the public interest. Staff addresses each of these legal issues in turn. The Commission has also specifically directed a response to the question of whether it has the authority to waive federal requirements for ETC designation, and Staff's response comprises the final section of this Brief.

1. AT&T and VCI rates are comparable.

AT&T has raised the issue of whether VCI's rates, terms and conditions are "comparable" to those of AT&T, the incumbent local carrier, as required by the Commission's rule at 4 CSR 240-3.570(2)(A)(10).[3] All parties agree that VCI's rates are not identical to

[2] Tr. at 54, l.12 through 55, l.2; 118, ll. 9-11.

[3] The Commission's rule at 4 CSR 240-3.570(2)(A), which has not been judicially interpreted, provides: "Each request for ETC designation shall include … (10) A commitment to offer a local usage plan comparable to those offered by the incumbent local exchange carrier in the areas for which the carrier seeks designation. Such commitment shall include a commitment to provide Lifeline and Link Up discounts and Missouri Universal Service Fund (MoUSF) discounts pursuant to 4 CSR 240-31, if applicable, at rates, terms and conditions comparable to the Lifeline and Link Up offerings and MoUSF offerings of the incumbent local exchange carrier providing service in the ETC service area."

AT&T's rates, although the terms and conditions are identical.[4] The question turns on the meaning of "comparable." The American Heritage Dictionary provides two definitions of the word: "1. Admitting of comparison with another or others: *"The satellite revolution is comparable to Gutenberg's invention of movable type."* … 2. Similar or equivalent: *pianists of comparable ability."*[5] The concept of comparability appears frequently in Missouri law: for example, studying the performance of "comparable" groups of students between charter schools (Section 160.410.4); establishing the reasonable cost of a "comparable" replacement dwelling in determining acquisition costs to be paid by displacing agencies (e.g., Sections 30.606.1.(1) and 305.612.3(2) RSMo. (2000)); ensuring consumers are made whole through receiving "comparable" new devices for refunds (Section 407.961.1.1 RSMo. (2000)); directing that reinstated employees be returned to positions of "comparable" status (Section 105.1105 RSMo. (2000)). These examples demonstrate that the general legislative usage of the word "comparable" is not as another word for identical – rather, it is used in the sense that the alternative be within a degree or scope of similarity such that it is a reasonable substitute.

VCI's rates are not identical to those of AT&T. However, they are within a degree or scope of similarity such that they are a reasonable substitute, given all the circumstances. VCI's president, Mr. Johnson, testified that VCI and AT&T were not the same type of company, so provision must be made for the difference between the underlying ILEC who sells the line and the reseller who resells the line.[6] Taking such fundamental differences into account, which

[4] Tr. at 60, ll.22-23 ("I think the product and everything else, the plans are exactly the same. I just think the rates are different.").
[5] American Heritage Dictionary of the English Language (3rd Ed. 1996), at 384.
[6] Tr. at 67, ll. 5-21; 72, ll. 3-9 ("The ILEC owns the facility. It's the underlying carrier. I have to buy my product from the ILEC. The ILEC owns the facility. Does not have the cost to pursue (sic). It only has operational expenses.").

appears to be contemplated by the rule's use of the word "comparable" rather than "identical" or "similar," VCI has complied with the Commission's regulation.

2. The Commission may grant ETC status to an application solely for low income services.

FCC precedent does not preclude this Commission from granting VCI ETC status solely for Lifeline/Linkup services. The FCC has only considered one case where a telecommunications company requested ETC status limited to Lifeline/Linkup services, rather than for both high-cost and low income services.[7] The FCC granted forbearance of its requirement that a company provide service in whole or in part through its own facilities. AT&T has suggested that the FCC's consideration and ruling in that case requires that VCI should have requested forbearance from the FCC as well because it, like the applicant in that case, TracFone, only seeks certification pertaining to low income services. In its *TracFone* decision, the FCC did not suggest, much less require, that ETC status be granted on a unified, high cost and low income basis. Indeed, TracFone did not even request ETC status pertaining to the Linkup program. The FCC did not grant a waiver or forbear to apply a requirement that an ETC applicant receive ETC status for both high-cost and low income services. Rather, the FCC was completely silent in expressing any concern or taking any special notice that TracFone did not request high-cost status.

TracFone simply requested the FCC forbear application of its requirement that ETC recipients provide a network build-out plan, along other requirements pertaining to companies that offer facility-based services. The distinction between high-cost and low income services in an ETC application was not the dispositive issue. VCI's application does not now raise the issues TracFone raised, as VCI has indicated that it will provide service through a combination

[7] *In the Matter of Petition of TracFone Wireless, Inc., for Forbearance from 47 U.S.C. § 214 (e)(1)(A) and 47 C.F.R. § 54.201(i)*, FCC 05-165, CC Docket No. 96-45 (Released Sept. 8, 2005).

of resale and unbundled network elements to meet the requirement that services be facilities-based.[8] The pertinent section of the FCC's rules, 47 C.F.R. §54.201(f), states "[f]or the purposes of this section, the term 'own facilities' includes, but is not limited to, facilities obtained as unbundled network elements pursuant to Part 51 of this chapter, provided that such facilities meet the definition of the term 'facilities' under this subpart. The FCC has defined the term "facilities" as "any physical components of the telecommunications network that are used in the transmission or routing of the services that are designated for support pursuant to subpart B of this part."[9] VCI's proposed use of unbundled network elements fulfills this facilities requirement and VCI is entitled to receive support for customers served via those unbundled network elements.

Thus, the only case that offers any sort of precedent, albeit non-binding, supports VCI's application before this Commission. The FCC did not suggest that a company that only sought that status for low income services may not receive ETC status in a setting where, should the FCC have deemed it impermissible, it had the opportunity to so rule.

3. Granting VCI ETC status is in the public interest.

Federal rules require that state commissions granting ETC status shall find the designation is in the public interest.[10] VCI and the Staff agree that adding another entity to the choice available to low income customers is in the public interest. Mr. Cecil, testifying for the

[8] Tr. at 54, l.12 through 55, l.2; 118, ll. 9-11.

[9] 47 C.F.R. §54.201(e). See also, Report and Order, *In the Matter of Federal-State Joint Board on Universal Service,* CC Docket 96-45, FCC 97-157 (adopted May 7, 1997), at para. 151 ("We interpret the term "facilities," for purposes of section 214(e), to mean any physical components of the telecommunications network that are used in the transmission or routing of the services designated for support under section 254(c)(1)." The footnote to this sentence states "For example, we would include within this definition: local loops, switches, transmission systems, and network control systems."

[10] 47 C.F.R. § 201(c) ("Upon request and consistent with the public interest, convenience, and necessity, the state commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas [such as in VCI's case], designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the state commission, so long as each additional requesting carrier meets the requirements of paragraph (d) of this section.").

Staff, stated that Staff supports VCI's application based on an analysis "to enhance choice as well as to insure that the benefits of the program can reach as many people as possible. And while we were doing that, we also look at the impact on the fund would be. And we wanted to try to do the best we could to insure that the advantages of telecommunications were provided to all the residents in the State."[11]

Additional testimony from Mr. Johnson on behalf of VCI also supports the necessary public interest standard. He indicated that VCI educates its customers in the need to constrain their use of ancillary services such as voicemail;[12] offers customers the valuable option of having a predictable bill;[13] and gives consumers who think that they have no reasonable, alternative method to get telephone service another choice at a rate lower than prepaid providers.[14] Importantly, Mr. Johnson testified that under the plan VCI offers, customers remain on the network and maintain their service:

> What we have seen is that once we – once a consumer gets their bill at the same time they get their money from the State or Federal or wherever they get their money the first of the month, and the bill is predictable, it is the same amount every single month, we've seen that rate increase, customers stay on our platform longer than most prepaid carriers.[15]

Some concern has been expressed regarding the impact of VCI's draw upon the Universal Service Fund, should the Commission grant its application. Mr. Johnson has testified

[11] Tr. at 166, l. 22 through 167, l. 4. See also Tr. at 149, l. 21 through 150, l. 4 ("Many customers will not choose to go with AT&T for whatever reason … the customers have their own emotional reasons as well as simply failed to do their homework. But that doesn't negate the existence of the plan or I believe the State's obligation to extend those benefits to those customers.").
[12] Tr. at 35, ll. 15-23.
[13] Tr. at 39, l. 17 through 40, l. 7 ("…most of our customers want basic service, phones in their homes if something happens to their children. They want a predictable bill. Most of them have been through the mill already. They have had the ILEC service. The 15-cent line basic service and the $200 worth of other long distance calls and all the features and everything else th[ey] bought that they couldn't pay it all… When they buy our services, they understand the whole focus is you can predic[t] your bill, you will have phone service in your home… .").
[14] Tr. at 119, l. 20 through 120, l. 4.
[15] Tr. at 184, ll. 6-12.

that the impact will be minimal.[16] Moreover, although Missouri's overall telephone penetration rate is at or above the national average, the penetration rate among low income groups is only approximately 83 percent.[17] Any customers that VCI provides service who are not currently receiving service will enhance Missouri's overall telephone subscribership rate.

4. COMMISSION DIRECTIVE: Does the Commission have the authority to waive Federal requirements for ETC designation?

Under the doctrine of preemption, state agencies directed to act under federal statutes or regulations may not waive them unless Congress or the rule-issuing federal regulatory agency so permit; and in the absence of a grant of authority to waive its regulations, a state is constrained by the normal rule as given in Supreme Court of the United States:

> The Supremacy Clause of Art. VI of the Constitution provides Congress with the power to pre-empt state law. Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, *Jones v. Rath Packing Co*., 430 U.S. 519, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977), when there is outright or actual conflict between federal and state law, e.g., *Free v. Bland*, 369 U.S. 663, 82 S.Ct. 1089, 8 L.Ed.2d 180 (1962), where compliance with both federal and state law is in effect physically impossible, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963), where there is implicit in federal law a barrier to state regulation, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983), where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947), or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. *Hines v. Davidowitz*, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941). **Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation.** *Fidelity Federal Savings & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 104 S.Ct. 2694, 81 L.Ed.2d 580 (1984). (emphasis supplied.)[18]

[16] Tr. at 131, ll. 9-10.
[17] Tr. at 86, ll. 10-16.
[18] *Louisiana Public Service Comm'n v. Federal Comm. Comm'n,* et al., 476 U.S. 355, 368-69 (1986).

A. Relevant federal statutes governing grants of ETC status.

In prescribing the requirements for designation as an ETC, Congress' statute at 47 U.S.C. §214(e)(2) does not expressly grant the ability to waive federal requirements to a state regulatory commission. Thus, this Commission cannot waive that statute. This section states that a state commission shall, either upon its own motion or request, grant such designation to common carriers meeting the requirements stated in the previous paragraph of the section. 47 U.S.C. §214(e)(1) includes two requirements:

> (A) offer the services that are supported by Federal universal service support mechanisms under section 254(c) of this title, either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and
>
> (B) advertise the availability of such services and the charges therefor using media of general distribution.

VCI meets these requirements, so the Commission need not even consider waiving them.

The services described at 47 U.S.C. §254(c) consist of those services that are "essential to education, public health, or public safety; have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers; are being deployed in public telecommunications networks by telecommunications carriers; and are consistent with the public interest, convenience, and necessity." 47 U.S.C. §254(c)(3) also grants the FCC the authority to designate additional services for such support mechanisms for schools, libraries, and health care providers for the purposes defined elsewhere in the section. *See* 47 U.S.C. §254(h). This list of services is set forth at 47 C.F.R. §54.101. As discussed above, VCI meets the requirement that it offer these services using its own facilities or a combination of its own facilities and resale of another carrier's services, so the Commission need not consider waiver.

An additional requirement for state designation of ETC status is that the carrier adequately advertise the services required under 47 U.S.C. §254. VCI meets this requirement; therefore there is no need to waive it. Further, under 47 U.S.C. §214(e)(2), in the case of an area already served by a rural telephone company, the state commission must also make a finding that the ETC designation is in the public interest. As discussed above, VCI's designation is in the public interest, and thus this section need not be waived. 47 U.S.C. §214(e)(3), which addresses ETC designations for unserved areas, also requires applicants to meet the requirements of paragraph (e)(1), but this section clearly does not apply in this case as VCI does not seek to serve an unserved area, and need not be waived.

B. Relevant federal rules governing grants of ETC status.

Similarly, the federal rules promulgated under this statute do not give states authority to waive federal requirements. 47 C.F.R. §54.201(b) states that "[a] state commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (d) of this section as an eligible telecommunications carrier for a service area designated by the state commission." 47 C.F.R. §54.201(d) reiterates the requirements of the federal statute at 47 U.S.C. §214(e)(1), with the addition that the services offered must also comply with subpart B (47 C.F.R. §54.101). Again, VCI meets these requirements and they need not be waived.

The provisions of 47 C.F.R. §54.201(d)(1) indicate that carriers designated as ETC carriers must comply with the provisions of 47 C.F.R. §54.101 (promulgated June 19, 1998), captioned "Supported services for rural, insular and high cost areas." Those provisions are:

> (a) *Services designated for support.* The following services or functionalities shall be supported by federal universal service support mechanisms:
>
> (1) *Voice grade access to the public switched network.* "Voice grade access" is defined as a functionality that enables a user of telecommunications services to

transmit voice communications, including signaling the network that the caller wishes to place a call, and to receive voice communications, including receiving a signal indicating there is an incoming call. For the purposes of this part, bandwidth for voice grade access should be, at a minimum, 300 to 3,000 Hertz;

(2) *Local usage*. "Local usage" means an amount of minutes of use of exchange service, prescribed by the Commission, provided free of charge to end users;

(3) *Dual tone multi-frequency signaling or its functional equivalent*. "Dual tone multi-frequency" (DTMF) is a method of signaling that facilitates the transportation of signaling through the network, shortening call set-up time;

(4) *Single-party service or its functional equivalent*. "Single-party service" is telecommunications service that permits users to have exclusive use of a wireline subscriber loop or access line for each call placed, or, in the case of wireless telecommunications carriers, which use spectrum shared among users to provide service, a dedicated message path for the length of a user's particular transmission;

(5) *Access to emergency services*. "Access to emergency services" includes access to services, such as 911 and enhanced 911, provided by local governments or other public safety organizations. 911 is defined as a service that permits a telecommunications user, by dialing the three-digit code "911," to call emergency services through a Public Service Access Point (PSAP) operated by the local government. "Enhanced 911" is defined as 911 service that includes the ability to provide automatic numbering information (ANI), which enables the PSAP to call back if the call is disconnected, and automatic location information (ALI), which permits emergency service providers to identify the geographic location of the calling party. "Access to emergency services" includes access to 911 and enhanced 911 services to the extent the local government in an eligible carrier's service area has implemented 911 or enhanced 911 systems;

(6) *Access to operator services*. "Access to operator services" is defined as access to any automatic or live assistance to a consumer to arrange for billing or completion, or both, of a telephone call;

(7) *Access to inter-exchange service*. "Access to inter-exchange service" is defined as the use of the loop, as well as that portion of the switch that is paid for by the end user, or the functional equivalent of these network elements in the case of a wireless carrier, necessary to access an inter-exchange carrier's network;

(8) *Access to directory assistance*. "Access to directory assistance" is defined as access to a service that includes, but is not limited to, making available to customers, upon request, information contained in directory listings; and

(9) *Toll limitation for qualifying low-income consumers*. Toll limitation for qualifying low-income consumers is described in subpart E of this part.

(b) *Requirement to offer all designated services*. An eligible telecommunications carrier must offer each of the services set forth in paragraph (a) of this section in order to receive federal universal service support.

(c) *Additional time to complete network upgrades*. A state commission may grant the petition of a telecommunications carrier that is otherwise eligible to receive universal service support under §54.201 requesting additional time to complete the network upgrades needed to provide single-party service, access to enhanced 911 service, or toll

limitation. If such petition is granted, the otherwise eligible telecommunications carrier will be permitted to receive universal service support for the duration of the period designated by the state commission. State commissions should grant such a request only upon a finding that exceptional circumstances prevent an otherwise eligible telecommunications carrier from providing single-party service, access to enhanced 911 service, or toll limitation. The period should extend only as long as the relevant state commission finds that exceptional circumstances exist and should not extend beyond the time that the state commission deems necessary for that eligible telecommunications carrier to complete network upgrades. An otherwise eligible telecommunications carrier that is incapable of offering one or more of these three specific universal services must demonstrate to the state commission that exceptional circumstances exist with respect to each service for which the carrier desires a grant of additional time to complete network upgrades.
[62 FR 32948, June 17, 1997, as amended at 63 FR 2125, Jan. 13, 1998; 63 FR 33585, June 19, 1998]

VCI has indicated it will provide these services throughout the relevant service area (Direct Testimony of Stanley Johnson at p.8, l.9), and its assertion is undisputed; so again, no waiver is necessary.

C. Law governing waivers and forbearance of Universal Service Fund rules and statutes.

The FCC has established a "good cause" standard for waiver of its rules.[19] To the extent that a state promulgates rules parallel to federal rule counterparts to comply with federal requirements, a state has the choice to waive its own rules, and the Commission's rule at 4 CSR 240-3.015 provides the procedure to seek waiver of the Commission's own rules. A state could also continue to impose more stringent requirements upon those carriers who fall under its jurisdiction, and would not ordinarily be compelled to reduce its own standards to that of the federal regulations. Also, under the FCC's waiver rule, the FCC can waive FCC-imposed carrier requirements at the request of state commissions, as it frequently does.[20]

[19] 47 C.F.R. § 1.3 provides, "The provisions of this chapter may be suspended, revoked, amended, or waived for good cause shown, in whole or in part, at any time by the Commission, subject to the provisions of the Administrative Procedure Act and the provisions of this chapter. Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown."
[20] See, e.g., *In the Matter of Federal-State Joint Board on Universal Service Kansas Corporation Commission Petition for Waiver of §§ 54.13 & 54.314 of the Commissions Rules*, 22 F.C.C.R. 960, January 26, 2007.

States are given less flexibility in the decision whether to waive or enforce their own statutes and rules when the FCC has expressly granted a forbearance request of the federal rule underlying those requirements. In 47 U.S.C. §160, "[c]ompetition in provision of telecommunications service," the FCC is granted "regulatory flexibility" in the application of not only its own rules, but also in the application of the provisions of the federal statutes in Title 47, Chapter 5 ("Wire or Radio Communication").[21] In fact, the FCC is directed to forbear from applying its regulations and the statutes when:

> (a)(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
> (a)(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
> (a)(3) forbearance from applying such provision or regulation is consistent with the public interest.

Such principles are in keeping with the general policy that waiver processes are a permissible device for "fine tuning regulations, particularly where … the Commission must enact policies based on 'informed prediction'. As long as the underlying rules and regulations are rational … waiver is an appropriate method of curtailing the inevitable excesses of the agency's general rule." [22] Further, the FCC has promulgated a rule that restricts state commission action in cases where the FCC has already determined to forbear application of its own provisions.[23]

[21] 47 U.S.C. §160(a).
[22] *Nat'l Rural Telecom Assn v. F.C.C.*, 988 F.2d 174, 181 (D.C.Cir. 1993).
[23] 47 U.S.C. §160(e) provides: "State enforcement after Commission forbearance. A State commission may not continue to apply or enforce any provision of this chapter that the Commission has determined to forbear from applying under subsection (a) of this section."

D. The Commission need not consider federal statute or rule waiver in this case.

Issues of federal waiver and mandatory forbearance do not appear to apply to this case, as VCI does not seek high-cost support. In the *TracFone* Order discussed earlier, the FCC simply stated:

> TracFone requests that its eligibility for federal universal service support be limited to Lifeline only. Subject to the conditions that we describe below, we grant TracFone forbearance from the facilities requirement for ETC designation for Lifeline support only.[24]

The FCC has implied that low income only USF support may be granted in the *TracFone* decision, and has sent a message that forbearance from the statutes and rules compelling compliance with those requirements that go to the eligibility for receipt of high cost funds is appropriate. This gives substance to the FCC decision that such forbearance is in the public interest, consumers are protected, and enforcement of those provisions are unnecessary. In its *TracFone* order, the FCC concluded that such requirements are simply inapplicable to carriers seeking ETC designation for only low-income USF support. Although the FCC concluded that high-cost requirements did not apply to carriers only seeking ETC designation for low income USF support, Staff strongly recommends that the Commission not waive its rules that pertain to high cost support. Such a waiver could be misconstrued as a permanent waiver and in the future, should VCI return seeking high cost support, Staff would recommend that the Commission apply the high cost rules unless VCI provides an additional showing that they should be waived.

Moreover, the FCC has been quite clear that states that issue their own rules are not bound by the FCC's rules governing ETC designations. The FCC mentions this principle several times in its March 17, 2005 *Report and Order* addressing the minimum requirements for a

[24] *TracFone,* supra note 6, at 1.

telecommunications carrier to be designated as an ETC. For example, the FCC is quite explicit regarding state discretion when it states:

> 61. We decline to mandate that state commissions adopt our requirements for ETC designations. Section 214(e)(2) of the Act gives states the primary responsibility to designate ETCs and prescribes that all state designation decisions must be consistent with the public interest, convenience, and necessity. We believe that section 214(e)(2) demonstrates Congress's intent that state commissions evaluate local factual situations in ETC cases and exercise discretion in reaching their conclusions regarding the public interest, convenience and necessity, as long as such determinations are consistent with federal and other state law. States that exercise jurisdiction over ETCs should apply these requirements in a manner that is consistent with section 214(e)(2) of the Act. Furthermore, state commissions, as the entities most familiar with the service area for which ETC designation is sought, are particularly well-equipped to determine their own ETC eligibility requirements. **Because the guidelines we establish in this Report and Order are not binding upon the states,** we reject arguments suggesting that such guidelines would restrict the lawful rights of states to make ETC designations. We also find that federal guidelines are consistent with the holding of United States Court of Appeals for the Fifth Circuit that nothing in section 214(e) of the Act prohibits the states from imposing their own eligibility requirements in addition to those described in section 214(e)(1). Consistent with our adoption of permissive federal guidelines for ETC designation, state commissions will continue to maintain the flexibility to impose additional eligibility requirements in state ETC proceedings, if they so choose. (emphasis supplied.)[25]

The FCC has made it clear that states that adopt their own regulations may abide by those if they choose, rather than abiding by the FCC's rules. Accordingly, explicit waivers are not necessary.

Conclusion.

WHEREFORE, Staff recommends that the Commission grant VCI status as an ETC for low income purposes, because VCI has rates, terms and conditions comparable to those of AT&T; because nothing restricts the Commission from granting ETC status to an applicant that

[25] Report and Order, *In the Matter of Federal-State Joint Board on Universal Service,* CC Docket No. 96-45, FCC-05-46 (Released March 17, 2005), at 28-29.

does not seek high cost reimbursement; and because it is in the public interest. Moreover, the application fulfills all applicable state and federal requirements.

Respectfully submitted,

/s/ David A. Meyer
David A. Meyer
Senior Counsel
Missouri Bar No. 46620
(573) 751-8706 (Telephone)
david.meyer@psc.mo.gov

/s/ Sarah Kliethermes
Sarah L. Kliethermes
Pursuant to Rule 13
Supervised by Kevin A. Thompson
Missouri Bar No. 36288
(573) 751-6726 (Telephone)
sarah.kliethermes@psc.mo.gov

Attorneys for the Staff of the
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102
(573) 751-9285 (Fax)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 4th day of June 2007.

/s/ David A. Meyer