

**BEFORE THE PUBLIC SERVICE COMMISSION
OF STATE OF MISSOURI**

Application of USCOC of Greater Missouri,)
LLC for Designation as an Eligible) **Case No. TO-2005-0384**
Telecommunications Carrier Pursuant to the)
Telecommunications Act of 1996)

PREHEARING BRIEF OF USCOC OF GREATER MISSOURI, LLC

Applicant USCOC of Greater Missouri, LLC d/b/a U.S. Cellular (“U.S. Cellular” or “Company”) submits this Prehearing Brief in accord with the Commission’s Order of June 15, 2005. Pursuant to that Order, U.S. Cellular provides an explanation of its position on each disputed issue, as well as the facts and legal theory supporting that position.

Issue I: Telecommunications companies seeking eligible telecommunications carrier (“ETC”) status must meet the requirements of Section 214(e)(1) throughout the service area for which designation is received. Section 214(e)(1) requires carriers to offer the services that are supported by Federal universal service support mechanisms 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 to advertise the availability of such services and the charges therefor using media of general distribution. Does U.S. Cellular meet the requirements of Section 214(e)(1) throughout the service area for which U.S. Cellular seeks ETC designation?

U.S. Cellular meets the requirements of Section 214(e)(1) throughout the service area for which it seeks ETC designation. If designated, U.S. Cellular has committed to immediately offer and advertise the nine supported service functionalities as described in the testimony of U.S. Cellular witnesses Lowell and Wright. Kevin Lowell, U.S. Cellular’s Senior Director of Network Operations and Engineering, describes U.S. Cellular’s Missouri network, and certifies that U.S. Cellular provides the nine supported service functionalities: (1) voice grade access to the public switched network; (2) local usage; (3) dual tone multi-frequency signaling or its functional equivalent; (4) single party service or its functional equivalent; (5) access to

emergency services; (6) access to operator services; (7) access to interexchange service; (8) access to directory assistance and (9) toll limitation for qualifying low-income customers.

Nick Wright, Vice President-West Operations for U.S. Cellular, commits the Company to offering the supported services and advertising the availability of the supported services in media of general circulation (newspapers, radio, and flyers) throughout the proposed service area. The Company will also include notices of the availability of Lifeline and Link-up discounts to eligible consumers.

U.S. Cellular has also described how it will provision service to requesting customers. Mr. Wright describes U.S. Cellular's commitment to provide service upon reasonable request as required under federal law. In those instances where a request comes from a potential customer within U.S. Cellular's ETC service area but outside its existing network coverage, U.S. Cellular will provide service within a reasonable period of time if service can be provided at reasonable cost by: (1) modifying or replacing the requesting customer's equipment; (2) deploying a roof-mounted antenna or other equipment; (3) adjusting the nearest cell tower; (4) adjusting network or customer facilities; (5) reselling services from another carrier's facilities to provide service; or (6) employing, leasing, or constructing an additional cell site, cell extender, repeater, or other similar equipment. As discussed by Mr. Wright, U.S. Cellular will report to the Commission those cases where it cannot serve a consumer.

U.S. Cellular has already been designated an ETC by the Oklahoma Corporation Commission, Oregon Public Utility Commission, the Iowa Utilities Board, the Washington Utilities and Transportation Commission, the Maine Public Utilities Commission, and the Wisconsin Public Service Commission, and has demonstrated its capability to offer and advertise the supported services in those states.

Federal law states that a carrier “designated” as an ETC shall offer and advertise the supported services, and the FCC rules contain a similar provision. See 47 U.S.C. § 214(e)(1); 47 C.F.R. § 54.201(d). In its case law, the FCC has ruled that a carrier need not provide the supported services as a condition of ETC designation, but must credibly demonstrate that it **will** offer and advertise the services if designated. See Federal-State Joint Board on Universal Service, Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission, Declaratory Ruling, 15 FCC Rcd 15168, 15177-78 (2000) (“South Dakota Preemption Order”).

An ETC petitioner is not required to provide the supported services throughout its proposed ETC service area at the time it submits its petition. The FCC has ruled that a carrier’s certification as to its capability and commitment to provide the supported services is sufficient. See South Dakota Preemption Order, 15 FCC Rcd at 15177-78; Virginia Cellular, LLC, 19 FCC Rcd 1563, 1571 (2004) (“Virginia Cellular”). Other states have followed the FCC on this issue. Here, U.S. Cellular’s demonstration of its capability and commitment to offer and advertise the supported services throughout its proposed ETC service area is more than sufficient. Moreover, U.S. Cellular already has thousands of customers in Missouri. That has been found to be an ample demonstration of a company’s capability and commitment to offer and advertise the supported services. See United States Cellular Corp., Docket No. 1083 (Ore. P.U.C., June 24, 2004) (“USCC Oregon Order”); East Kentucky Network, LLC d/b/a Appalachian Wireless, Case No. 2005-00045 (Ky. P.S.C., Aug. 11, 2005).

Section 214(e)(5) provides that “service area” means the underlying ILEC’s “study area” unless and until the FCC and the state commission agree to establish a different definition of service area for such company. Because U.S. Cellular’s proposed ETC service area only

partially covers several rural ILECs' study areas, U.S. Cellular has presented evidence demonstrating why the service areas of those rural ILECs should be redefined pursuant to 47 C.F.R. Section 54.207(c). This evidence includes a population density analysis demonstrating that U.S. Cellular is not seeking designation solely in the more densely populated, lower-cost portions of the affected ILECs' study areas. As described in the testimony of Don J. Wood, a nationally recognized independent expert, redefinition of rural ILEC service areas facilitates competition and thus serves the universal service policy objectives of the 1996 Telecommunications Act. Moreover, as discussed by Mr. Wood, the requested redefinition fully satisfies the Joint Board's recommendations and will not affect the manner in which the affected ILECs receive support or calculate their costs.

Issue II: ETC designations by a state commission must be consistent with the public interest, convenience and necessity pursuant to Section 214(e)(2). All parties agree that ETC designations must be consistent with the public interest, convenience and necessity for areas served by rural carriers, and all parties but U.S. Cellular agree that ETC designations in areas served by non-rural carriers must also be consistent with the public interest, convenience and necessity. The FCC's ETC Report and Order¹ determined that this public interest standard applies regardless of whether the area is served by a rural or non-rural carrier.

A. Is granting ETC status to U.S. Cellular in areas served by rural carriers consistent with the public interest, convenience and necessity?

B. Must ETC designations in areas served by non-rural carriers be consistent with the public interest, convenience and necessity?

C. If the answer to B is "no," should the Commission nonetheless ensure that all ETC designations in areas served by non-rural carriers are consistent with the public interest, convenience and necessity?

D. If the answer to either B or C is "yes," is granting ETC status to U.S. Cellular consistent with the public interest, convenience and necessity in areas served by non-rural carriers?

¹ In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, 20 FCC Rcd 6371 (Mar. 17, 2005), reconsid. pending, appeal pending (Virginia Cellular and Highland Cellular v. FCC, No. 05-1807 (4th Cir.)). This is also referred to as the ETC Designation Order.

Based on U.S. Cellular's reliable network, superior customer service, its track record as an ETC in other states, and the commitments it has made before the Commission, granting ETC designation to U.S. Cellular throughout its proposed service area (rural and non-rural) is consistent with the public interest, convenience and necessity. U.S. Cellular's Nick Wright details the Company's investments in its Missouri network and its implementation of enhanced wireless 911 (E-911). Mr. Wright also describes U.S. Cellular's commitment to improve its network architecture by constructing 16 new cell sites during its first 18 months as an ETC in Missouri. These are sites that would not be built in the absence of federal Universal Service Fund ("USF") high cost support. The communities affected by this proposed construction will receive improved health, safety, economic development and competitive benefits as a result. U.S. Cellular has committed, under oath and without qualification, to report to the Commission each year how it has used support and how it intends to use future support to improve its network to the benefit of rural Missouri consumers.

U.S. Cellular has also demonstrated its capability to comply with the majority of the proposed conditions requested by the Office of the Public Counsel (OPC). However, U.S. Cellular believes some of the conditions (1) are not necessary to deliver the benefits promised by high-cost support, (2) are not competitively neutral, or (3) are applicable to either wireline technology or a regulated monopoly structure. The conditions proposed by OPC should be examined in a rulemaking of general applicability so as to give all carriers in Missouri the opportunity to provide their views on how a proper regulatory structure should be implemented.

The commitment to construct additional cell sites made possible by USF support will deliver critical health and safety benefits, and will help improve service to rural Missouri consumers. As described in the testimony of Mr. Wright and Mr. Wood, residents and businesses will be able to choose the technology (wireless or wireline) that meets their individual

needs. U.S. Cellular offers mobility, wide local calling areas, and a large array of rate plans that are priced comparably to service available in urban areas and offer comparable or superior value to rural ILEC rate plans. End users will be able to choose calling plans and other features that will more closely match their calling patterns and frequency. Finally, with every new cell site constructed with high-cost support, more consumers will have improved access to the personal and public safety benefits of wireless service. All of these benefits are taken for granted in urban areas but are not available in many rural areas, and will not be available without high-cost support.

Further, as discussed by Mr. Wood, competition from wireless ETCs will provide an incentive for incumbent rural companies to improve their existing network and offer lower prices and improved service. Mr. Wood also testified that neither ILECs nor consumers will be harmed by U.S. Cellular's designation, and explained why U.S. Cellular's application is fully consistent with the FCC's application of the public interest standard in its Virginia Cellular order. In support of its public interest showing, U.S. Cellular attaches as Exhibit A Mr. Wood's white paper entitled "Effective Long Term Management of the High-Cost Universal Service Support Mechanism." This paper was submitted to the Federal-State Joint Board on Universal Service in FCC Docket 96-45 on behalf of the Rural Cellular Association and the Alliance of Rural CMRS Carriers on September 21, 2004, in response to the FCC's Public Notice FCC 04-127 (June 8, 2004), requesting comment on the Joint Board's Recommended Decision proposing changes to the Universal Service Fund. It is referenced on page 18 of Schedule DJW-1 to Mr. Wood's Direct Testimony.

Despite the FCC's recent shift of position, which has been appealed, a showing of public interest, convenience and necessity is not required in the areas of U.S. Cellular's proposed

service area that are served by non-rural carriers.² The FCC has previously held numerous times that designating a competitor as an ETC in non-rural areas is per se in the public interest. See Cellco Partnership d/b/a Bell Atlantic Mobile, 16 FCC Rcd 39, 45 (2000).³ The FCC's recent interpretation, (apparently applying a lower public interest standard in non-rural areas) flatly contradicts the statute, which could scarcely be more clear in commanding that states "shall" designate carriers in non-rural areas if they meet the showings required in Section 214(e)(1):

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*, 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 (1). *Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.*

See Section 214(e)(2) [emphasis added].

Congress made a finding that it is consistent with the public interest to designate additional ETCs, and then set forth two separate standards for applicants in rural and non-rural areas. In non-rural areas, the Commission "shall" designate additional ETCs that meet the requirements of 214(e)(1) and in rural areas the state commission shall designate upon a finding that the designation is in the public interest. There is no separate public interest finding to be made in non-rural areas. Several states have continued to follow the statutory distinction between rural and non-rural areas, even after the FCC changed course in Virginia Cellular.⁴ This

² See N.E. Colorado Cellular, et al., CC Docket No. 96-45, Petition for Reconsideration (filed Feb. 23, 2004).

³ See also Farmers Telephone, Inc., 18 FCC Rcd 3848, 3853 (2003); Corr Wireless Communications, LLC, 17 FCC Rcd 21435, 21440 (2002); Pine Belt Cellular, Inc. and Pine Belt PCS, Inc., 17 FCC Rcd 9589, 9594 (2002).

⁴ See USCC Oregon Order, supra, at p. 6; RCC Minnesota, Inc. and Wireless Alliance, L.L.C. d/b/a Unicel, TC03-193 at p. 6 (S.D. P.U.C., June 6, 2005) ("RCC South Dakota Order") at p. 4; Sprint Corp. d/b/a Sprint PCS et al., Docket No. UT-043120 (Wash. Util. & Transp. Comm'n, Jan. 13, 2005) at pp. 3-4.

Commission is free to do the same because state commissions are vested with ETC designation authority in the first instance, and the FCC's interpretation is not binding on this Commission.

Even if the Commission follows the FCC's recent view that a public interest, convenience and necessity showing is applicable in non-rural areas, U.S. Cellular meets this standard because the FCC has ruled that where a company meets the public interest standard in rural areas, that is sufficient to support a public interest finding in non-rural areas. See Virginia Cellular, 19 FCC Rcd at 1575.

Issue III: The FCC's ETC Report and Order determined that carriers seeking ETC designation from the FCC must meet certain requirements. The FCC encouraged state commissions to apply these requirements. Should the Commission apply the guidelines included in the FCC's ETC Report and Order in its evaluation of the application filed by U.S. Cellular?

No. The ETC Report and Order contains a new set of requirements in paragraphs 68-72 that the FCC intends to apply to ETC applicants that file at the FCC after the effective date of the rules. See 47 C.F.R. Section 54.202(b) ("Any common carrier that has been designated under section 214(e)(6) as an eligible telecommunications carrier or that has submitted its application for designation under section 214(e)(6) before the effective date of these rules must submit the information required by paragraph (a) of this section no later than October 1, 2006, as part of its annual reporting requirements under section 54.209."). The rules contained in the ETC Report and Order, which the FCC recommended that states consider adopting, have not been adopted by this Commission. That is, there are no rules implementing the FCC's guidelines in place here in Missouri to apply to ETC petitions. We also note that the FCC has not applied those guidelines, which it is presently reviewing, to any pending ETC case. For example, in designating RCC as

an ETC in New Hampshire earlier this week, the FCC did not apply its newly adopted standards from the ETC Report and Order.⁵

It is a fundamental legal principle that an administrative agency has an obligation to decide an adjudicated matter under the law applicable at the time an application is submitted. See AT&T Co. v. FCC, 978 F.2d 727, 732 (D.C. Cir. 1992). While agencies may issue guidelines or interpretive rules without engaging in a notice-and-comment rulemaking, the Administrative Procedures Act requires a rulemaking proceeding if the agency action adopts a “new position inconsistent with . . . existing regulations.” Shalala v. Guernsey Memorial Hosp., 514 U.S. 87,88 (1985). Where an agency “changes the rules of the game . . . more than a clarification has occurred.” Sprint Corp. v. FCC, 315 F.3d 369, 374 (D.C. Cir. 2003). Without question, U.S. Cellular’s Application should be decided under this Commission’s rules in effect at the time U.S. Cellular’s Application was filed. Nothing in the FCC’s ETC Report and Order is binding on this Commission.

If the Commission wishes to adopt its own requirements, whether different from or consistent with the ETC Report and Order, it should do so in a formal rulemaking proceeding, rather than in a contested case. After the completion of the rulemaking, new rules can be applied to all ETCs after affording them a reasonable period for compliance, just as the FCC has done.

Should the Commission desire to apply any or all of the ETC Report and Order guidelines in this proceeding as an interim measure while it considers new rules of general

⁵ RCC Minnesota, Inc. and RCC Atlantic, Inc., DA 05-2673 (Wireline Comp. Bur., rel. Oct. 7, 2005) at para. 9 (“Carriers that had ETC petitions pending before the ETC Designation Order took effect, such as RCC, will also be required to make such showings, should they be designated as ETCs, when they submit their annual certification filing no later than October 1, 2006”). See Virginia PCS Alliance, L.C. and Richmond 20 MHz LLC d/b/a NTELOS, DA 05-1663 (Wireline Comp. Bur., rel. June 14, 2005).

applicability, U.S. Cellular has demonstrated that it can satisfy them. Moreover, U.S. Cellular's Nick Wright has stated that the Company will comply with the FCC's proposed guidelines if required by the Commission. If the Commission requires information beyond what was submitted in the Application, the Commission should permit U.S. Cellular to submit this information within a reasonable period of time following certification.

In any event, the ETC Report and Order guidelines, which are not final and are not binding on this Commission, should not be used to deny U.S. Cellular's Application which meets the standards of Sections 214(e)(1) and (e)(2).

/s/ Karl Zobrist
Karl Zobrist, MBN 28325
kzobrist@sonnenschein.com
Roger W. Steiner, MBN 39586
rsteiner@sonnenschein.com
Sonnenschein Nath & Rosenthal LLP
4520 Main Street, Suite 1100
Kansas City, MO 64111
Telephone: (816) 460-2545
Facsimile: (816) 531-7545

David A. LaFuria
Steven M. Chernoff
dlafuria@fcclaw.com
schernoff@fcclaw.com
Lukas, Nace, Gutierrez & Sachs, Chtd.
1650 Tysons Boulevard
Suite 1500
McLean, Virginia 22102
Telephone: (703) 584-8678
Facsimile: (703) 584-8694

**Attorneys for Applicant USCOC of Greater
Missouri, LLC**

Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or e-mailed to all counsel of record this 14th day of October, 2005.

/s/ Karl Zobrist

**Attorney for Applicant USCOC of Greater
Missouri, LLC**