

**BEFORE THE  
MISSOURI PUBLIC SERVICE COMMISSION**

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

**PREHEARING BRIEF OF  
MISSOURI RSA NO. 5 PARTNERSHIP**

COMES NOW Missouri RSA No. 5 Partnership (“MO 5”) and submits the following Prehearing Brief.

**I. Issue One**

**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 a carrier 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 therefore using media of general distribution. Does MO 5 meet the requirements of Section 214(e)(1) throughout the service area for which it seeks designation?**

MO 5 meets the requirements of Section 214(e)(1) because, as described more fully below, the company will offer and advertise the required services throughout the service area for which it seeks designation.

**A. MO 5 provides the core services required to qualify for universal service support.**

The core services and functions required to be offered by an ETC are specified in Section 54.101(a) of the FCC’s rules:

- Voice grade access to the public switched network;

- Local usage;
- Dual tone multi-frequency signaling or its functional equivalent;
- Single-party service or its functional equivalent;
- Access to emergency services;
- Access to operator services;
- Access to interexchange service;
- Access to directory assistance; and
- Toll limitation for qualifying low-income consumers.<sup>1</sup>

1. **Voice-Grade Access to the Public Switched Network.** The FCC has concluded that voice-grade access means the ability to make and receive phone calls, within a bandwidth of approximately 2700 Hertz, within the 300 to 3000 Hertz frequency range.<sup>2</sup> The testimony of James A. Simon, the General Manager of MO 5,<sup>3</sup> demonstrates that MO 5 provides voice-grade access to the public switched network. Specifically, Simon testified as follows:

As an existing cellular service provider in Missouri, MO 5 provides voice-grade access to the public switched network;

Through interconnection with incumbent local exchange carriers, MO 5 is able to originate and terminate telephone service for all of its subscribers; and

All customers of MO 5 are able to make and receive calls on the public switched network within the specified bandwidth.<sup>4</sup>

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<sup>1</sup> On December 30, 1997, the FCC changed its definition of toll-limitation services in its Fourth Order on Reconsideration of the Universal Service Report and Order, CC Docket Nos. 96-45, *et al.* The FCC stated, “We define toll-limitation services as either toll blocking or toll control and require telecommunications carriers to offer only one, and not necessarily both, of those services at this time in order to be designated as eligible telecommunications carriers.” *Id.* at 210.

<sup>2</sup> See Federal-State Board on Universal Service (First Report and Order in CC Docket No. 96-45), 12 FCC Rcd 8776, 8810-11 (1997) (“First Report and Order”).

<sup>3</sup> Direct Testimony of James Simon (“Simon Direct”) 1:9-12.

<sup>4</sup> Simon Direct 3:1-8.

2. **Local Usage.** To date, the FCC has not quantified any minimum amount of local usage required to be included in a universal service offering, but has initiated a separate proceeding to address this issue.<sup>5</sup> Simon’s testimony demonstrates that regardless of the outcome of this separate proceeding, MO 5 satisfies the local usage criterion for ETC designation. Specifically, Simon testified that:

MO 5’s service includes local usage that allows customers to originate and terminate calls within the local calling area without incurring toll charges;

MO 5’s service allows for a bundle of local calling minutes for a flat-rated monthly charge;

MO 5 currently offers several service options that include varying amounts of local usage in monthly service plans; and

MO 5 will comply with any and all minimum local usage requirements adopted by the FCC.<sup>6</sup>

3. **Functional Equivalent of Touch-Tone (“DTMF”) Signaling.** DTMF is a method of signaling that facilitates the transportation of call set-up and call detail information. Consistent with the principles of competitive and technological neutrality, the FCC permits carriers to provide signaling that is functionally equivalent to DTMF in satisfaction of this service requirement.<sup>7</sup> Simon testified that MO 5 currently meets the DTMF signaling requirement by using out-of-band digital signaling and in-band multi-frequency signaling that is functionally equivalent to DTMF.<sup>8</sup>

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<sup>5</sup> See Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 21252 (1998).

<sup>6</sup> Simon Direct 3:9-16.

<sup>7</sup> 47 C.F.R. § 54.101(a)(3).

<sup>8</sup> Simon Direct 3:17-19; see First Report and Order, 12 FCC Rcd at 8815, & 71 (1997).

4. **Single Party Service.** “Single-party service” means that only one party will be served by a subscriber loop or access line, in contrast to a multi-party line.<sup>9</sup> The FCC has concluded that a wireless provider offers the equivalent of single-party service when it offers a dedicated message path for the length of a user’s particular transmission. Simon testified that MO 5 provides a dedicated message path for the length of all customer calls.<sup>10</sup>

5. **Access to Emergency Service.** The ability to reach a public emergency service provider through dialing “911” is a required universal service offering. Enhanced 911 (“E911”), which includes the capability of providing both automatic numbering information (“ANI”) and automatic location information (“ALI”), is required only if a public emergency service provider makes arrangements with the local provider for delivery of such information. A wireless carrier such as MO 5 is not required to provide E911 services until a local emergency provider has made arrangements for delivery of ALI and ANI from carriers.<sup>11</sup> In the wireless context, provision of location information is broken down into two phases: Phase I involves providing the public safety answering point (“PSAP”) with the location of the cell from which the 911 call originated and Phase II provides the location of the originating subscriber phone to within an FCC-specified accuracy.

With regard to MO 5, Simon demonstrated that MO 5 provides its subscribers with access to emergency services by dialing “911.” Specifically, Simon testified that:

MO 5 customers can reach an emergency dispatch, or a public safety answering point (“PSAP”), by dialing “911,” which will route the call to the appropriate PSAP;

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<sup>9</sup> See, 12 FCC Rcd at 8810.

<sup>10</sup> Simon Direct 3:20-21.

<sup>11</sup> See 12 FCC Rcd at 8815-8817.

MO 5's network is capable of providing Phase I E911 and currently does so to the following PSAPs: Shelby County, Macon County, Randolph County, Chariton County, Linn County; and

MO 5 is currently working with Macon County, Shelby County, and Chariton County to implement E911 Phase II services.<sup>12</sup>

**6. Access to Operator Services.** Access to operator services is defined as any automatic or live assistance provided to a consumer to arrange for the billing or completion, or both, of a telephone call. Simon testified that MO 5 does not currently offer Operator Services but that MO 5 will offer such services when it is granted ETC status.<sup>13</sup>

**7. Access to Interexchange Service.** An ETC providing universal service must offer consumers access to interexchange service to make or receive toll or interexchange calls. Interexchange service access entails access to live or automatic operator assistance for the placement and billing of telephone calls, including collect calls, calling card calls, credit card calls, person-to-person calls, and third party calls, as well as obtaining related information. Simon demonstrated that MO 5 meets the interexchange requirement through interconnection arrangements with IXCs. Specifically, Simon testified that:

MO 5 has direct interconnection to multiple access tandems for delivering traffic to all offices subtending those tandems as well as direct interconnection to local exchange carrier end offices where traffic levels so justify; and

MO 5 provides indirect access to one or more interexchange carriers ("IXC") for access to any other exchanges.<sup>14</sup>

**8. Access to Directory Assistance.** The ability to place a call to directory assistance is a required service offering of an ETC. Simon testified that MO 5 meets this

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<sup>12</sup> Simon Direct 3:22 – 4:13.

<sup>13</sup> Simon Direct 4:14-16.

<sup>14</sup> Simon Direct 4:17-22.

requirement by providing all of its customers with access to information contained in directory listings by dialing “411” or “555-1212.”<sup>15</sup>

**9. Toll Limitation for Qualifying Low-Income Customers (Lifeline and Link-Up Services).** Under Section 54.101(a)(9) of the FCC’s rules,<sup>16</sup> ETCs must offer “Toll Limitation,” a term that denotes either “Toll Control” or “Toll Blocking” for carriers incapable of providing both services<sup>17</sup> to qualifying Lifeline and Link-Up universal service customers at no charge. Toll Blocking allows customers to block the completion of outgoing toll calls. Toll Control allows the customer to limit the dollar amount of toll charges a subscriber can incur during a billing period. Once designated as an ETC, an MO 5 customer enrolled in the Federal Lifeline or Link-Up programs could choose to have MO 5 block all attempted toll calls originating from the customer’s telephone.

Simon testified that MO 5 will offer toll limitation as follows:

MO 5 is capable of providing Toll Blocking services and currently provides Toll Blocking services for international calls; and

MO 5 will utilize the same Toll Blocking technology to provide toll limitation for qualifying low-income customers, at no charge, as part of its universal service offerings for Lifeline and Link Up customers.<sup>18</sup>

**B. MO 5 will advertise the core universal services.**

Pursuant to § 254(c) of the Act, an ETC must advertise, using media of general distribution, the availability of and charges for the core services required to qualify for

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<sup>15</sup> Simon Direct 4:23 – 5:2.

<sup>16</sup> See Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Fourth Order on Reconsideration, CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, Report and Order, 13 FCC Rcd 5318 (1997).

<sup>17</sup> 47 C.F.R. § 54.400(d). For ETCs capable of providing both services, the term “Toll Limitation” includes “Toll Blocking” *and* “Toll Control.”

<sup>18</sup> Simon Direct 5:3-8.

universal service support. Simon testified that MO 5 does this required advertising and will expand its advertising upon grant of its application. Specifically, Simon testified that:

MO 5 currently advertises its rates and services in media of general distribution within its FCC-licensed service area;

Upon grant of its application, MO 5 will advertise to the public in its ETC designated area that its is offering the core universal support services and the charges for those services throughout its ETC service area;<sup>19</sup> and

Upon grant of its application, MO 5 will advertise the availability of Lifeline and Linkup services to qualifying customers and take whatever steps are necessary to comply with the FCC Rule implementing the advertising requirement of § 254(c).<sup>20</sup>

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<sup>19</sup> Simon Direct 5:9-15.

<sup>20</sup> Simon Direct 5:16 – 6:4.

## II. Issue Two

**ETC designations by a state commission must be consistent with the public interest, convenience and necessity pursuant to Section 214(e)(2). The Federal Communication Commission's ("FCC's") *ETC Designation Order* determined that this public interest standard applies regardless of whether the area is served by a rural or non-rural carrier. Is granting ETC status to MO 5 consistent with the public interest, convenience and necessity throughout the service area for which MO 5 seeks ETC designation?**

Granting ETC status to MO 5 is consistent with the public interest, convenience, and necessity because, as described more fully below, it will enable MO 5 to bring wireless service, including E911 and enhanced GSM, to many remote and difficult-to-reach locales and because it will increase competition for primary telephone service in remote areas.

### **A. USF support will result in increased competition in rural areas.**

The FCC has long recognized that promoting competition in specific telecommunications service markets has multiple public interest benefits (*e.g.*, cost-based pricing, higher quality and more innovative services, increased consumer choice and a decreased need for regulatory oversight). As a result, stimulating competition, whenever possible, is a paramount FCC policy objective.<sup>21</sup>

In the present case, as Simon testified, designation of the competitive ETC will allow MO 5 to compete in providing primary telephone service in remote areas.<sup>22</sup> These areas are currently served by rural telephone companies. The FCC has ruled that designating competitive ETCs in areas served by rural telephone companies is consistent with its pro-competitive policies and has numerous public interest benefits.<sup>23</sup> The marketplace rivalry that follows designation of a competitive ETC “will result not only in the deployment of new

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<sup>21</sup> *See, e.g., Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band* (First Report And Order, Eighth Report And Order, and Second Further Notice Of Proposed Rule Making) 1 CR 1017, 11 FCC Rcd 1463 (1995).

<sup>22</sup> Simon Direct 13:20 – 14:9.

<sup>23</sup> Western Wireless Corporation, 16 FCC Rcd 48, 55 (2000).



facilities and technologies, but will also provide an incentive to the incumbent rural telephone companies to improve their existing network[s] to remain competitive... .”<sup>24</sup>

Those opposing designation of CETCs claim that rural telephone companies are incapable of competing with CMRS providers in the universal service market, and that the advent of additional ETCs in rural LEC areas will induce the incumbent to reduce investment, raise service rates or reduce service quality. The FCC, however, has flatly rejected these assertions holding that, to the contrary, competition may prod existing carriers to increase operating efficiency, lower prices and offer better service.<sup>25</sup>

Based on the foregoing considerations, the FCC designated Western Wireless Corporation an ETC in the State of Wyoming. More recently, the FCC designated Guam Cellular and Paging, Inc. (“Guamcell”) as an ETC in a service area also served by the Guam Telephone Authority (“GTA”), the rural telephone company in Guam.<sup>26</sup> According to the FCC, Guamcell’s ETC operations in GTA’s service area will promote “competition and the provision of new technologies to consumers in high-cost and rural areas of Guam.”<sup>27</sup> Granting MO 5 ETC status in present case will have the same beneficial effect.

**B. USF support will maximize consumer welfare.**

Section 214(e)(2) of the Act is concerned with maximizing consumer welfare, not protecting incumbent rural LECs from the rigors attending a competitive market. As Simon testified, affording USF support to MO 5 will advance consumer welfare in numerous ways:

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*, 16 FCC Rcd at 57.

<sup>26</sup> Guam Cellular and Paging, Inc., 17 FCC Rcd at 1502-03.

<sup>27</sup> *Id.*

USF support will allow MO 5 to continue to bring wireless service to rural parts of its FCC-licensed service area despite the high costs of providing service in this market.<sup>28</sup>

USF support will allow MO 5 to provide E911 services that are critical to public safety, particularly in the rural-most portions of the service area.<sup>29</sup>

USF support will allow MO 5 to provide enhanced GSM coverage to significant portions of its FCC-licensed service area (some of the most rural portions of the market) that still do not have such coverage.<sup>30</sup>

USF support will allow MO 5 to provide additional cell sites and improved coverage in its service area through new cell site construction; in addition to providing service, this will bring wireless E911 services to rural areas that currently lack E911.<sup>31</sup>

USF support will allow MO 5 to provide wireless E911 service to any compatible handset in MO 5's coverage area, whether or not the user is a MO 5 customer.<sup>32</sup>

Additionally, as Simon testified, upon designation MO 5 will make available several service offerings and rate plans that will immediately benefit the consumer:

The local calling area that MO 5 will offer to subscribers will equal or exceed in size the calling area offered by the local LECs, which will reduce intra-LATA toll charges associated with the service offered by these wireline carriers;

Customers of these LECs placing calls to destinations beyond their local calling areas incur toll charges, while MO 5 customers making similar calls within MO 5's service area will avoid such charges;

Many of MO 5's calling plans include bundles of minutes which can be used for placing calls, whether local or domestic toll, without the caller incurring any additional per minute charges or toll charges;

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<sup>28</sup> Simon Direct 9:15 – 10:6.

<sup>29</sup> Simon Direct 10:7-10.

<sup>30</sup> Simon Direct 10:11 – 11:8.

<sup>31</sup> Simon Direct 11:9 – 12:5.

<sup>32</sup> Simon Direct 12:6-7.

MO 5's plans also offer mobility including, in most cases roaming in other markets; and

MO 5 will make available multiple local usage plans that prospective customers can select from as part of its universal service offering.<sup>33</sup>

**C. MO 5 is committed to providing quality service to requesting customers throughout its designated service area.**

MO 5 will provide service to any requesting customer in the service area where it is designated as an ETC. As Simon testified:

When a potential customer requests service within an area presently served by MO 5's existing network, MO 5 will immediately provide service using its existing network.

If a potential customer requests service within the area in which MO 5 is designated as an ETC, but where the existing service area does not immediately allow MO 5 to provide service, MO 5 will take reasonable steps to provide service, including: (1) modify or replace the requesting customer's equipment to provide service; (2) install a roof-mounted antenna or other equipment to provide service; (3) adjust the nearest cell site to provide service; (4) identify and make any other adjustments that can reasonably be made to the network or customer facilities to provide service; and (5) determine the feasibility of installing an additional cell site, cell extender, or repeater to provide service where all other options fail.<sup>34</sup>

Furthermore, as Simon testified, MO 5 has adopted the Cellular Telecommunications and Internet Association ("CTIA") Consumer Code for Wireless Service.<sup>35</sup> Adoption of this

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<sup>33</sup> Simon Direct 8:21 – 9:8.

<sup>34</sup> Simon Direct 14:10 – 15:4.

<sup>35</sup> Simon Direct 17:21 – 18:8. Under the CTIA Consumer Code, wireless carriers agree to: (1) disclose rates and terms of service to customers; (2) make available maps showing where service is generally available; (3) provide contract terms to customers and confirm changes in service; (4) allow a trial period for new service; (5) provide specific disclosures in advertising; (6) separately identify carrier charges from taxes on billing statements; (7) provide customers the right to terminate service for changes to contract terms; (8) provide ready access to customer service; (9) promptly respond to consumer inquiries and complaints received from government agencies; and (10) abide by policies for protection of consumer privacy. See *CTIA Consumer Code for Wireless Service*, available at [http://www.wow-com.com/pdf/The\\_Code.pdf](http://www.wow-com.com/pdf/The_Code.pdf).

code should alleviate any concerns that might otherwise arise with respect to its commitment to meet quality of service standards.<sup>36</sup>

**D. MO 5 will advertise supported services throughout its designated service area.**

As Simon testified, MO 5 will advertise the availability of the supported services and the availability of Lifeline and Linkup services to qualifying customers.<sup>37</sup> Consistent with the additional commitments made by *Virginia Cellular*,<sup>38</sup> MO 5 will also make available additional consumer information regarding Lifeline and Linkup service in locations where qualified, unserved consumers are likely to find such information useful, including unemployment and welfare offices within its service area.<sup>39</sup>

**E. ETC designation for MO 5 will greatly enhance lifeline and link-up service available in rural Missouri.**

As Simon testified, upon designation, MO 5 will offer deep discounts to Linkup subscribers:

MO 5 will offer discounts of 50% off of the \$50 activation fee to Link Up eligible subscribers; and

MO 5 will offer Link Up eligible subscribers a deferred schedule for payment of the charges assessed for commencing service, for which the consumer will not pay interest, and which would include the reduced activation fee as well as the cost of the subscriber handset.<sup>40</sup>

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<sup>36</sup> The FCC has found that compliance with the CTIA code is sufficient to meet quality of service obligations. *Virginia Cellular* at ¶ 30.

<sup>37</sup> Simon Direct 5:16 – 6:1.

<sup>38</sup> *Virginia Cellular* at ¶ 22.

<sup>39</sup> Simon Direct 6:1-4.

<sup>40</sup> Simon Direct 8:6-13.

Moreover, as Simon further testified, upon designation, MO 5 will offer Lifeline plans:

If MO 5 were designated as an ETC, then Lifeline plans would be available at rates comparable with those paid for current LEC-based service;<sup>41</sup>

Lifeline services would be available to qualifying low-income consumers in MO 5's service area;

Lifeline-eligible customers would be able to pick any existing MO 5 service plan and deduct the local exchange service discount of \$1.75 per month as well as the federal line charge discount of \$6.50 per month from MO 5's standard monthly rates; and

Two additional Lifeline-only plans will be offered as an "ILEC-equivalent" plan available to any MO 5 subscriber.<sup>42</sup>

**F. USF policy arguments relating to ETC designation for wireless carriers are not at issue in this application.**

MO 5 is aware that the telecommunication industry has been involved in an ongoing policy argument underlying whether universal service support should be extended to wireless carriers in general. There has been ongoing speculation and argument that grant of ETC status to wireless carriers in general will jeopardize the stability of the universal service fund ("USF"). This speculation centers around the current practice that does not reduce the level or amount of ILEC USF support in connection with the addition of a CETC in the carriers service area unless a LEC subscriber actually disconnects its landline phone when subscribing to the wireless service provider. Instead, the wireless CETC subscriber is viewed the same as an additional line is viewed in the context of USF with additional USF support being available for that additional line.

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<sup>41</sup> Simon Direct 6:16 – 8:5.

<sup>42</sup> Simon Direct 6:5-15.

These policy arguments have little to do with the MO 5 Application. The current federal statutory requirements and regulatory processes allow CMRS carriers to obtain universal service support. Without taking any position as to merits of the arguments advanced in the ongoing policy debate, MO 5 respectfully submits that it is not relevant to the consideration of MO 5's Application and that grant of the MO 5 Application will neither prejudice those arguments when they are considered in the proper forum nor insulate MO 5 from any subsequent changes in the rules regarding access to USF.

Without prejudice to the foregoing, there is ample evidence to suggest that wireless ETC designations have not had an adverse impact on the USF. While wireless ETC designations have been increasing, over the last two years, the level of carrier contribution to the USF (calculated as the percent of revenues needed to support the fund) has actually been decreasing.<sup>43</sup> Indeed, there is no reasonable basis upon which to conclude that designation of MO 5 as an ETC will have any adverse impact on the USF. The FCC recently dealt with these general policy arguments in its *Virginia Cellular* Order. While acknowledging that these issues are significant to the underlying USF policy, the Commission made it abundantly clear that any changes resulting from the current Federal-State Joint Board on Universal Service ("Joint Board") review would apply to all ETCs, even those granted ETC status before that review is complete.<sup>44</sup> Indeed, the FCC has recently considered recommendations

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<sup>43</sup> Wireless carriers contribute to the USF and the FCC has modified its "safe harbor" rules to increase the percentage of wireless calls that are subject to USF. As a result, the actual level of carrier contribution to the USF actually declined during 2003. Specifically, the contribution factor has declined from 9.5% (third quarter 2003), to 9.2% (fourth quarter 2003) to 8.7% (first quarter 2004). Second quarter 2004 USF factor remained at 8.7%, the same factor as for the first quarter of 2004. The third and fourth quarter 2004 contribution factor was 8.9%, still well below the contribution factors for the prior year. While the contribution factors have increased for 2005 (10.7% for first quarter and 11.1% for the second quarter), the majority of those increases relate to increased projected support for the Schools and Library Program and the Rural Health Care Program which portions of the fund are not at issue here.

<sup>44</sup> *Id.* at ¶ 3. "The outcome of that proceeding could potentially impact, among other things, the support which *Virginia Cellular* and other competitive ETCs *may receive in the future* and the criteria used *for continued eligibility* to receive universal support." (Emphasis added).

by the Joint Board which, as adopted, will apply on an ongoing basis to any and all previously designated ETCs.<sup>45</sup>

The FCC has long followed the holding in *Puerto Rico Sun Oil Co.*, which dictates that applications for ETC status must be evaluated based on the rules as they currently exist.<sup>46</sup> This Commission cannot base its ETC designation decisions on uncertainty with respect to possible future universal service harm based on possible rule changes. Instead, MO 5's ETC application must be evaluated based on the rules as they exist today.<sup>47</sup>

The MO 5 Application is before this Commission under an established set of rules and statutory requirements. Denial of MO 5's Application will not affect the ability of wireless carriers in other states to draw upon the USF; it will only affect the ability of the citizens of rural Missouri to benefit from those federal funds. As demonstrated above, the grant of the MO 5 Application will, in and of itself, place an insignificant burden on the USF. Accordingly, the Commission should avoid consideration of generalized policy issues which are presently being fully considered by the Joint Board, Congress and the FCC. Those ongoing deliberations have no bearing on the designation of MO 5 as an ETC nor should this Commission weigh those arguments at all in ruling on the MO 5 Application; knowing full well that any ETC designation will be subject to any changes ultimately adopted in those proceedings.

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<sup>45</sup> The FCC has recently issued a Report and Order considering recommendations advanced by the Federal-State Joint Board on Universal Service in February of 2004. *In the Matter of Federal-State Joint Board on Universal Service*, FCC 05-46 (CC Docket No. 96-45) (Rel. March 17, 2005) ("*FCC Guidelines Order*"). To the extent that rule changes have been adopted as a result of that or any future proceeding, the FCC has made it abundantly clear that those changes apply to all FCC-designated ETCs, including those that had been previously designated.

<sup>46</sup> *Puerto Rico Sun Oil Co. v. EPA*, 8 F.3d 73, 79 (1st Cir. 1993) (citing *SEC v. Cheery Corp.*, 332 U.S. 194, 196 (1947)) (An agency's decision cannot be supported based upon rules that the agency has not yet adopted.)

<sup>47</sup> *Id.*

### III. Issue Three

**In addition to the standards set out in the FCC's *ETC Designation Order*, the Commission has promulgated rules to be used in evaluating ETC applications. A final Order of Rulemaking for these rules, designated as 4 CSR 240-3.570, was published in the Missouri Register on May 15, 2006. Does MO 5 meet the requirements of the Commission's ETC rules?**

MO 5 is already in substantial compliance with the Commission's new rules regarding ETC applications, as described more fully below.

**4 CSR 240-3.570(2)(A)1.** This rule requires a statement of intended use of the high-cost support, including detailed descriptions of any construction plans with start and end dates, populations affected by construction plans, existing tower site locations for CMRS cell towers, and estimated budget amounts. This information was submitted as Highly Confidential Appendix M.

**4 CSR 240-3.570(2)(A)2.** This rule requires submission of a two (2)-year plan demonstrating, with specificity, that high-cost universal service support shall only be used for the provision, maintenance and upgrading of facilities and services for which the support is intended in the Missouri service area in which ETC designation was granted. Simon testified that MO 5 agrees to use its high-cost universal support specifically for this purpose.<sup>48</sup> This information was submitted as Highly Confidential Appendix M.

**4 CSR 240-3.570(2)(A)3.A.** This rule requires submission of a detailed map of coverage area before and after improvements and in the case of CMRS providers, a map identifying existing tower site locations for CMRS cell towers. This information was submitted as Highly Confidential Appendix H, Highly Confidential Appendix I, and Highly Confidential Appendix N.

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<sup>48</sup> Supplemental Direct Testimony of James A. Simon ("Simon Supp.") 2:21-3:7.



**4 CSR 240-3.570(2)(A)3.B.** This rule requires submission of the specific geographic areas where improvements will be made. This information was submitted as Highly Confidential Appendix H and Highly Confidential Appendix M.

**4 CSR 240-3.570(2)(A)3.C.** This rule requires submission of the projected start date and completion date for each improvement. This information was submitted as Highly Confidential Appendix F and Highly Confidential Appendix M.

**4 CSR 240-3.570(2)(A)3.D.** This rule requires submission of the estimated amount of investment for each project that is funded by high-cost support. This information was submitted as Highly Confidential Appendix M.

**4 CSR 240-3.570(2)(A)3.E.** This rule requires submission of the estimated population that will be served as a result of the improvements. This information was submitted as Highly Confidential Appendix F and Highly Confidential Appendix M.

**4 CSR 240-3.570(2)(A)3.F.** This rule provides that if an applicant believes that service improvements in a particular wire center are not needed, it must explain its basis for this determination and demonstrate how funding will otherwise be used to further the provision of supported services in that area. Simon testified that at this time, there are no wire centers that have been determined not to need improvement.<sup>49</sup>

**4 CSR 240-3.570(2)(A)3.G.** This rule requires a statement as to how the proposed plans would not otherwise occur absent the receipt of high-cost support and that such support will be used in addition to any expenses the ETC would normally incur. Simon testified that additional cell sites that are not financially viable to construct can be constructed only if USF support is provided to MO 5.<sup>50</sup>

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<sup>49</sup> Simon Supp. 4:18 – 5:4.

<sup>50</sup> Simon Supp. 5:5-21.

**4 CSR 240-3.570(2)(A)4.** This rule requires a demonstration of the carrier's ability to remain functional in emergency situations, including a demonstration that the carrier has a reasonable amount of back-up power to ensure functionality without an external power source, is able to reroute traffic around damaged facilities and is capable of managing traffic spikes resulting from emergency situations. Simon testified in detail that MO 5's network is fully redundant, with extensive battery backup and emergency generator support, the ability to automatically reroute around damaged facilities, and significant overhead for emergency traffic spikes.<sup>51</sup>

**4 CSR 240-3.570(2)(A)5.** This rule requires a demonstration that the commission's grant of the applicant's request for ETC designation would be consistent with the public interest, convenience and necessity. This point is addressed as Issue Two, above.

**4 CSR 240-3.570(2)(A)6.** This rule requires a commitment to advertise the availability of services and charges therefore using media of general distribution throughout the ETC service area. Simon testified that MO 5 commits to continue the advertising distribution submitted as Appendix J.<sup>52</sup>

**4 CSR 240-3.570(2)(A)7.** This rule requires a commitment to provide Lifeline and Link Up discounts consistent with 47 CFR 54.401 and 47 CFR 54.411 to publicize the availability of Lifeline service in a manner reasonably designed to reach those likely to qualify for the service consistent with 47 CFR 54.405. Simon testified that MO 5 will utilize the same advertising and distribution channels as it does today, and additionally, will distribute literature in areas such as unemployment and welfare offices and notify the Office

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<sup>51</sup> Simon Supp. 5:22 – 6:20.

<sup>52</sup> Simon Supp. 8:3-8

of Public Counsel and Public Service Commission of all new or changed plans and discounts.<sup>53</sup>

**4 CSR 240-3.570(2)(A)8.** This rule requires a statement that the carrier will satisfy consumer privacy protection standards as provided in 47 CFR 64 subpart U and service quality standards as applicable. As Simon explained in detail in his testimony, as a non-monopoly wireless provider, MO 5 is not subject to the same quality of service standards as traditional LECs. Simon testified that MO 5 customers are afforded a trial period to “test drive” the MO 5 network and that if a customer is dissatisfied, the customer may cancel the MO 5 contract without penalty, keep its telephone number, and port the number to a different provider (subject to availability).<sup>54</sup>

**4 CSR 240-3.570(2)(A)9.** This rule requires a statement that the requesting carrier acknowledges it shall provide equal access pursuant to 4 CSR 240-32.100(3) and (4) if all other ETCs in that service area relinquish their designations pursuant to section 214(e) of the telecommunications Act of 1996. Simon testified that MO 5 would commit to allow any customer the option to pre-select and pay its toll carrier of choice for any and all toll calls placed by the customer on the MO 5 network in any area where the underlying LEC relinquishes its ETC designation.<sup>55</sup>

**4 CSR 240-3.570(2)(A)10.** This rule requires 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, including a commitment to provide Lifeline and Link Up discounts and Missouri Universal Service Fund (MoUSF) discounts pursuant to 4 CSR 240-

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<sup>53</sup> Simon Supp. 8:9-18.

<sup>54</sup> Simon Supp. 8:19 – 10:10.

<sup>55</sup> Simon Supp. 10:11-17.

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. Simon testified that MO 5 will offer a local calling area equal to or larger than the calling areas of the local LECs, thereby reducing intra-LATA toll charges; that MO 5 customers will avoid toll charges incurred by LEC customers placing calls outside their local calling areas; that many of MO 5's calling plans include bundles of minutes that can be used to place local or domestic toll calls without incurring any additional per minutes charges or toll charges; and that MO 5 will make available multiple local usage plans as a part of its universal service offering.<sup>56</sup> Simon further testified that proposed MO 5 rates would be comparable to those offered by the LECs and that MO 5 Lifeline rates include vertical features not included in the ILEC Lifeline rate.<sup>57</sup> Information demonstrating the overall superiority of MO 5 Lifeline was submitted as Appendix K. Furthermore, Simon testified that MO 5 will offer 50% discounts on the activation fee and interest-free deferred payment schedules for Link Up eligible subscribers.<sup>58</sup>

**4 CSR 240-3.570(2)(B)** This rule requires a commitment to abide by the consumer code for wireless service recognized by the Cellular Telecommunications and Internet Association (CTIA) at the time of the ETC designation request and submission of a copy of the consumer code for wireless service currently recognized by CTIA to which it commits to abide. Simon testified that MO 5 has already adopted the CTIA Consumer Code for Wireless Service, as set forth in Appendix L.<sup>59</sup>

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<sup>56</sup> Simon Supp. 10:18 – 11:13.

<sup>57</sup> Simon Supp. 11:14-18.

<sup>58</sup> Simon Supp. 11:19 – 12:2.

<sup>59</sup> Simon Supp. 12:16-17.

**4 CSR 240-3.570(2)(C)** This rule requires submission of a plan outlining the method for handling unusual construction or installation charges. Simon testified that if a potential customer within the MO 5 ETC area requests service where the existing service area does not immediately allow MO 5 to provide service, MO 5 will (1) modify or replace the requesting customer's equipment to provide service; (2) install a rooftop antenna or other equipment to provide service; (3) adjust the nearest cell site to provide service; (4) identify and make any other reasonable adjustments that can be made to the network or customer facilities to provide service; (5) where all other options fail, determine the feasibility of installing an additional cell site, cell extender, or repeater to provide service; and (6) where service cannot be provided, notify the requesting party and include this information in an annual report to the Commission detailing unfulfilled service requests.<sup>60</sup>

**4 CSR 240-3.570(3)(A)** This rule requires ETCs to develop a bill design that can be easily interpreted by their customers and clearly sets forth charges in compliance with state and federal billing requirements. Simon testified that MO 5 currently complies with all state and federal billing requirements.<sup>61</sup>

**4 CSR 240-3.570(3)(B)** This rule requires that ETCs provide customer service contact information online and on billing statements. Simon testified that MO 5 provides a local and 800 number customer service contact on its billing statements and website.<sup>62</sup>

**4 CSR 240-3.570(3)(C)1.A.** This rule requires that an ETC make available dual tone multi-frequency signaling or its functional equivalent. Simon testified that MO 5 currently

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<sup>60</sup> Simon Supp. 13:6-20.

<sup>61</sup> Simon Supp. 13:21 - 14:1.

<sup>62</sup> Simon Supp. 14:2-6.

uses out-of-band and in-band multi-frequency signaling that is functionally equivalent to DTMF signaling.<sup>63</sup>

**4 CSR 240-3.570(3)(C)1.B.** This rule requires that an ETC make available single-party service or its functional equivalent. Simon testified that MO 5 provides a dedicated message path for the length of all customer calls.<sup>64</sup>

**4 CSR 240-3.570(3)(C)1.C.** This rule requires that an ETC make available access to emergency services. Simon testified that MO 5 customers can reach an emergency dispatch or public safety answering point by dialing “911.”<sup>65</sup>

**4 CSR 240-3.570(3)(C)1.D.** This rule requires that an ETC make available emergency telephone number services capable of automatic number identification, automatic location identification and call routing facilities to facilitate public safety response; e.g., enhanced 911 service, where the local government agency serving the end-user has implemented enhanced 911 systems. Simon testified that MO 5’s network is capable of providing Phase I E911 services; currently does so to public safety answering points in Shelby County, Macon County, Randolph County, Chariton County, and Linn County; and is working to provide E911 Phase II service to Phase II in Macon County, Shelby County, and Chariton County.<sup>66</sup>

**4 CSR 240-3.570(3)(C)1.E.** This rule requires that an ETC make available access to interexchange service. Simon testified that MO 5 has direct interconnection to multiple access tandems for delivering traffic to all offices subtending those tandems; direct

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<sup>63</sup> Simon Supp. 14:7-12.

<sup>64</sup> Simon Supp. 14:13-14.

<sup>65</sup> Simon Supp. 14:15-17.

<sup>66</sup> Simon Supp. 14:18 – 15:13.

interconnection to local exchange carrier end offices where traffic levels so justify and indirect access to one or more interexchange carriers for access to other exchanges.<sup>67</sup>

**4 CSR 240-3.570(3)(C)1.F.** This rule requires that an ETC make available access to telecommunications relay services by dialing 711. Simon testified that MO 5 does so.<sup>68</sup>

**4 CSR 240-3.570(3)(C)1.G.** This rule requires that an ETC make available access to Directory Assistance service. Simon testified that MO 5 provides access to information contained in directory listings by calling “411” or “555-1515.”<sup>69</sup>

**4 CSR 240-3.570(3)(C)1.H.** This rule requires that an ETC make available access to operator services. Simon testified that MO 5 does not currently offer Operator Services but will offer such services when it is granted ETC status.<sup>70</sup>

**4 CSR 240-3.570(3)(C)1.I.** This rule requires that an ETC make available toll limitation and/or blocking for qualifying low-income consumers. Simon testified that MO 5 is capable of providing Toll Blocking services, currently provides toll blocking services for international calls, and will utilize this same technology to provide toll imitation for qualifying low-income customers at no charge as a part of its universal service offerings for Lifeline and Link Up customers.<sup>71</sup>

**4 CSR 240-3.570(3)(C)2.** This rule requires that ETCs shall publicize the construction of all new facilities that will enhance services in unserved or underserved areas so that consumers are aware of the improved service in the area. Simon testified that MO 5

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<sup>67</sup> Simon Supp. 15:14-19.

<sup>68</sup> Simon Supp. 15:20–21.

<sup>69</sup> Simon Supp. 15:22 - 16:2.

<sup>70</sup> Simon Supp. 16:3-5.

<sup>71</sup> Simon Supp. 16:6-12.

commits to continue the same form of advertising as demonstrated in Appendix J to publicize the availability of service in areas where service is improved.<sup>72</sup>

**4 CSR 240-3.570(3)(C)3.** This rule requires that ETCs extend their networks to serve new customers upon a reasonable request and take the following steps, as applicable, to respond to all such reasonable requests for service within its ETC service area: (A) If a request comes from a customer residing within the ETC service area where the ETC already provides service, the ETC shall immediately provide service using its standard customer equipment; (B) If a request comes from a customer residing within the ETC service area where the ETC does not already provide service, the ETC shall take reasonable steps to provide acceptable service at no cost to the customer, including: modifying or replacing customer equipment; deploying a roof-mounted antenna or other network equipment at the premises; making adjustments at the nearest cell site or to other network or customer facilities; employing, leasing or constructing an additional cell site, a cell-extender, repeater or other similar equipment; or offering resold service of other carriers that have facilities available to that premises; (C) Where special conditions or special requirements of the customer involve unusual construction or installation costs, the customer may be required to pay a reasonable portion of such costs in accordance with the plan outlining the method for handling unusual construction or installation charges approved by the commission at the time of designation as an ETC; and (D) If there is no possibility of providing service to the requesting customer, the ETC shall notify the customer and include such information in its annual certification documentation to the commission. Simon testified that MO 5 agrees to follow these steps to respond to a request for service.<sup>73</sup>

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<sup>72</sup> Simon Supp. 16:13-18.

<sup>73</sup> Simon Supp. 16:19 – 17:23.



**4 CSR 240-3.570(3)(D)** This rule requires that within thirty (30) days of receiving ETC status, each CMRS carrier designated as an ETC shall make an informational filing with the commission consisting of a complete description of all of its service offerings. Such informational filings will be amended as service offerings are introduced or modified. Simon testified that MO 5 agrees to provide the Commission within 30 days of receiving ETC status, then current information brochures on service plans offered and to update these as required by the rule.<sup>74</sup>

**4 CSR 240-3.570(3)(E)** This rule requires that ETCs shall maintain a record of customer complaints that have been received by the company in a manner that includes, at a minimum: the end-user name; the account number; a description of the complaint; the date the complaint was filed; the resolution; and the amount of refund or credit, if any; and a record of complaints from consumers in the Missouri service area in which ETC designation was granted that have been submitted to or filed with the Federal Communications Commission for which the company has knowledge in a manner that includes, at a minimum: a description of the complaint; the date the complaint was filed; the date the complaint was resolved; the resolution of the complaint and the amount of refund or credit, if any. Simon testified that MO 5 agrees to maintain a record of customer complaints that complies with this rule.<sup>75</sup>

**4 CSR 240-3.570(3)(F)** This rule requires that ETCs shall, within ten (10) days of a change in the company designated contacts, either notify the manager of the Telecommunications Department, in writing or by electronic mail, or shall update the commission's electronic filing system (EFIS); the notification or update shall include the

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<sup>74</sup> Simon Supp. 18:1-8.

<sup>75</sup> Simon Supp. 18:9 – 19:5.

name(s), address(es) and/or telephone number(s) of the designated individual(s). The contact name(s) provided pursuant to this section shall be the individual(s) primarily responsible for: customer service; repair and maintenance; answering complaints; authorizing and/or furnishing refunds to customers; and informational or tariff filing issues. Simon testified that MO 5 agrees to supply company-designated contacts as required by this rule.<sup>76</sup>

**4 CSR 240-3.570(4)(A)** This rule requires that all ETCs, by August 15 of each year, submit an affidavit executed by an officer of the company attesting that federal high-cost support is used consistent with the commission's rules and the Telecommunications Act of 1996 together with documentation of support received and costs incurred. Simon testified that MO 5 agrees to comply with this reporting requirement.<sup>77</sup>

**4 CSR 240-3.570(4)(B)** This rule requires that ETCs seeking certification by October 1 of each year shall, no later than June 15 of each year, set up a meeting with the Telecommunications Department staff and the Office of the Public Counsel to review and discuss the ETC's proposal for the two (2)-year improvement plan to discuss the proposed plan and any changes to the plan that would improve coverage, service quality or capacity in unserved or underserved areas in the Missouri service area in which ETC designation was granted. Simon testified that MO 5 commits to meeting with the Commission as required by this rule.<sup>78</sup>

**4 CSR 240-3.570(4)(B)1.** This rule requires a two (2)-year improvement plan that includes progress updates on any previously submitted plan and proposed improvements or upgrades to the carrier's network on a wire center-by-wire center basis throughout its

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<sup>76</sup> Simon Supp. 19:6-15.

<sup>77</sup> Simon Supp. 19:16 – 20:6.

<sup>78</sup> Simon Supp. 20:7-16.

proposed designated service area and address all of the separate components addressed in the initial plan, set forth in Rule (2)(A)2. Simon testified that MO 5 agrees to update its 2-year plan as required by this rule.<sup>79</sup>

**4 CSR 240-3.570(4)(B)2.** This rule requires reports on unfilled service requests and customer complaints for the previous year and how the two (2)-year improvement plan may address such requests and complaints. Simon testified that MO 5 agrees to make reports in compliance with this rule.<sup>80</sup>

**4 CSR 240-3.570(4)(C)** This rule requires that ETCs submit a demonstration that the receipt of high-cost support was used only for the provision, maintenance and upgrading of facilities and services for which the support is intended in the Missouri service area in which ETC designation was granted. Simon testified that MO 5 agrees to submit a demonstration in compliance with this rule.<sup>81</sup>

**4 CSR 240-3.570(4)(D)** This rule requires that an ETC submit a demonstration that high-cost support was used to improve coverage, service quality or capacity in the Missouri service area in which ETC designation was granted and that such support was used in addition to any expenses the ETC would normally incur. Simon testified that MO 5 agrees to submit a demonstration in compliance with this rule.<sup>82</sup>

**4 CSR 240-3.570(4)(E)** This rule requires that ETCs submit an affidavit signed by an officer of the company certifying that the ETC continues to comply with the approved consumer code for wireless service recognized by the Cellular Telecommunications and Internet Association (CTIA) and/or applicable service quality standards and consumer

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<sup>79</sup> Simon Supp. 20:17 – 21:4.

<sup>80</sup> Simon Supp. 21:5 – 21:9.

<sup>81</sup> Simon Supp. 21:10 – 22:7.

<sup>82</sup> Simon Supp. 22:8-15.

protection rules, certifying that the ETC continues to be able to function in emergency situations, continues to offer a local usage plan comparable to that offered by the incumbent local exchange telecommunications carrier in the relevant service areas (if applicable), and continues to acknowledge that it shall provide equal access pursuant to 4 CSR 240-32.100(3) and (4) if all other ETCs in that service area relinquish their designations pursuant to section 214(e)(3) of the Telecommunications Act of 1996. Simon testified that MO 5 will provide an affidavit certifying the information required by this rule.<sup>83</sup>

**4 CSR 240-3.570(4)(F)** This rule requires that ETCs submit a report of complaints from consumers in the Missouri service area in which ETC designation was granted that have been submitted to or filed with the Federal Communications Commission in the previous twelve (12) months for which the company has knowledge, including, at a minimum: a description of the complaint; the date the complaint was filed; the date the complaint was resolved; the resolution of the complaint and the amount of refund or credit, if any. If the commission finds the ETC's resolution of complaints is not satisfactory or if a particular type of complaint is recurring without being satisfactorily addressed, then the commission may decline to certify the ETC during the annual certification process. Simon testified that MO 5 agrees to provide the Commission with reports as required by this rule.<sup>84</sup>

**4 CSR 240-3.570(4)(G)** This rule requires an application for ETC designation shall be deemed to be acceptance of Missouri Public Service Commission jurisdiction over any issues related to ETC designation and status and USF funding and acceptance of additional

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<sup>83</sup> Simon Supp. 22:16 – 23:5.

<sup>84</sup> Simon Supp. 23:6-17.

rules made applicable to that ETC. Simon testified that MO 5 acknowledges the Commission's jurisdiction related to ETC designation.<sup>85</sup>

**4 CSR 240-3.570(4)(H)** This rule requires all ETCs in non-rural areas of Missouri to, in conjunction with the annual high-cost certification process, assist the commission staff in comparing residential rates in rural areas served by non-rural incumbent local exchange carriers to urban rates nationwide. Simon testified that MO 5 will provide appropriate assistance to staff.<sup>86</sup>

**4 CSR 240-3.570(4)(I)** This rule mandates that all reports required to be submitted to the commission shall be attested to by an officer or authorized agent of the ETC or incumbent local exchange telecommunications carrier. Simon testified that MO 5 agrees to comply with the attestation requirement of this rule.<sup>87</sup>

**4 CSR 240-3.570(4)(J)** This rule requires that except as otherwise provided in commission rules, ETCs keep all books and records associated with its ETC designation and/or the commission's annual certification process in accordance with good business practices, and at such place as they are normally kept in the usual course of business. The ETC shall make its books and records associated with its ETC designation and/or the commission's annual certification process available to the commission at reasonable times for examination and inspection at a location designated by the commission. Simon testified that MO 5 agrees to keep its books in accordance with this rule.<sup>88</sup>

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<sup>85</sup> Simon Supp. 23:18 – 24:3.

<sup>86</sup> Simon Supp. 24:4-9.

<sup>87</sup> Simon Supp. 24:10-14.

<sup>88</sup> Simon Supp. 24:15 – 25:3.

**4 CSR 240-3.570(4)(K)** This rule requires all records required by 4 CSR 240-3.570 to be preserved for at least two (2) years. Simon testified that MO 5 agrees to preserve records in accordance with this rule.<sup>89</sup>

**4 CSR 240-3.570(4)(L)** This rule requires ETCs, or a carrier requesting ETC designation, to promptly furnish requested information, including financial information, related to its designation as an ETC to the commission, its staff or the Office of the Public Counsel. Simon testified that MO 5 agrees to provide all requested information in accordance with this rule.<sup>90</sup>

**4 CSR 240-3.570(5)(A)** This rule requires that each CMRS provider submit to the commission a letter reflecting a change to the name and/or change, deletion or addition of a trade name under which the ETC will be doing business in the state of Missouri, attaching, as applicable, an amended Certificate of Incorporation, Fictitious Name registration or an amendment thereof. The CMRS provider shall modify its current informational filing, as required in subsection (3)(D) to reflect the new name and shall attest that no revisions are being made, except for the name change. Simon testified that MO 5 agrees to notify the Commission of name changes as required by this rule.<sup>91</sup>

**4 CSR 240-3.570(5)(B)** This rule requires ETCs to not self-certify to the Universal Service Administrative Company for receipt of federal universal service funds. Simon testified that MO 5 agrees not to self-certify in violation of this rule.<sup>92</sup>

**4 CSR 240-3.570(5)(C)** This rule requires ETCs, including incumbent local exchange telecommunications carriers, to not willfully make any false entry in any business

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<sup>89</sup> Simon Supp. 25:4-6.

<sup>90</sup> Simon Supp. 25:7-12.

<sup>91</sup> Simon Supp. 25:13-22.

<sup>92</sup> Simon Supp. 26:1-4.

record of any kind kept by it, nor shall it willfully destroy, mutilate, alter or by any method falsify any such record, nor shall it willfully neglect or fail to make full, true and correct entries in such records of all facts and transactions appertaining to its business, nor shall it falsify any statement to the commission. Simon testified that MO 5 agrees not to make any false statements, false record entries, or falsify any record or entries in violation of this rule.<sup>93</sup>

**4 CSR 240-3.570(5)(D)** This rule requires allegations of failure to comply with 4 CSR 240-3.570 to be filed with the commission in the form of a formal complaint pursuant to 4 CSR 240-2.070. Simon testified that MO 5 understands that failure to comply with 4 CSR 240-3.570 may result in the filing of a formal complaint.<sup>94</sup>

**4 CSR 240-3.570(5)(E)** This rule requires the commission to not certify, by October 1 of each year, any ETC that fails to comply with 4 CSR 240-3.570. Simon testified that MO 5 understands the possible consequences of a failure to comply with the ETC rules, as set forth in this rule.<sup>95</sup>

**4 CSR 240-3.570(5)(F)** This rule requires ETCs to submit to the commission staff, by August 15, 2006, a statement of compliance with 4 CSR 240-3.570 and all carriers with requests for ETC designation pending as of the effective date of this rule to submit, within thirty (30) days of the effective date of the rule, any missing information required by 4 CSR 240-3.570 or a statement that all required information was previously submitted as part of the request for ETC designation. Simon testified that MO 5 agrees to submit a statement of

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<sup>93</sup> Simon Supp. 26:5-13.

<sup>94</sup> Simon Supp. 26:14-19.

<sup>95</sup> Simon Supp. 26:20 – 27:2.

compliance by August 15, 2006 and all missing information within 30 days of the effective date of this rule.<sup>96</sup>

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<sup>96</sup> Simon Supp. 27:3-11.



#### IV. Cream Skimming

Although not specifically included within any of the disputed issues in this case, there is a potential—but not actual—issue of “cream skimming” due to MO 5’s request to redefine the Alltel,<sup>97</sup> Grand River,<sup>98</sup> Mark Twain,<sup>99</sup> NEMO<sup>100</sup> and Spectra<sup>101</sup> service areas for the purpose of designating a Competitive ETC (“CETC”).<sup>102</sup> Cream skimming occurs when a CETC serves only the lower cost portions of an LEC study area but receives support calculated in relation to unserved, higher-cost portions of the study area. In its *Virginia Cellular* and *Highland Cellular* orders, the FCC held that where the population densities of the entire ILEC study area are significantly lower than the population density within the ETC service area, cream skimming has occurred.

In the present case, telecommunications expert Jonathan Reeves established that there is no cream skimming issue. Specifically, Reeves testified that:

In the case of the proposed redefinition of the Alltel service area in Zone 1, the population density in the proposed MO 5 service area is 9.56 people per mile as compared to Alltel’s Zone 1 study-wide average population density of 28.89 people per square mile;

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<sup>97</sup> MO 5 proposes to redefine the Alltel service area to allow MO 5 to be designated as an ETC in only the Laclede, Mendon, Rothville, and Sumner wire centers. Application ¶11.

<sup>98</sup> MO 5 proposes to redefine the Grand River service area to allow MO 5 to be designated as an ETC in the Linneus, Meadville, Purdin, and Browning wire centers. Application ¶12.

<sup>99</sup> MO 5 proposes to include the Mark Twain Bethel and Leonard wire centers within its proposed ETC service area. Application ¶13.

<sup>100</sup> MO 5 proposes to include the NEMO Winigan wire center within its proposed ETC service area. Application ¶13.

<sup>101</sup> MO 5 proposes to include the following Spectra center within its proposed ETC service area: Brunswick, Hunnewell, Keytesville, LaPlata, Macon, Shelbina, and Shelbyville. Application ¶13.

<sup>102</sup> As explained in detail in the Application, MO 5 is not seeking to redefine the study area for any rural LEC; MO 5 is merely seeking to redefine several LEC service areas for the limited purpose of designating a CETC. Application ¶13.

The two wirecenters proposed for inclusion in MO 5's service area from Alltel's Zone 2 study area are the two most rural wire centers in that entire study area, having population densities of 6.98 and 7.14 persons per square mile as compared to the population density of 20.2 persons per square mile for the entire Zone 2 study area;

The average population density for the wirecenters proposed for inclusion in MO 5's service area from Grand River's zone 2 is 8.83 persons per square mile, nearly identical to the overall population density of Grand River's Zone 2 which is 8.48 persons per square mile;

The Mark Twain wire centers included within the proposed MO 5 ETC service area have an average population density of 7.64 persons per square mile as compared to an overall study area population density of 9.57 persons per square mile;

The NEMO wire center included within the proposed MO 5 ETC service area has an average population density of 3.57 persons per square mile as compared to an overall study area population density of 4.48 persons per square mile for NEMO's Group 1, Zone 1 in which it is located;

The Spectra wire centers included within the proposed MO 5 ETC service area have an average population density of 50.83 persons per square mile in Zone 1, which is nearly identical to the composite population density of 49.50 persons per square mile in Zone 1, and an average population density of 13.37 persons per square mile in Zone 2, as compared to a composite population density of 16.23 persons per square mile in Zone 2; and

In each and every instance where MO 5 seeks redefinition of the ILEC service area, the population densities within the portions of those study areas sought to be included in the MO 5 ETC service area either fall below or are virtually identical with the overall population densities upon which the LEC level of support has been based.<sup>103</sup>

Under the *Virginia Cellular* and *Highland Cellular* orders, Reeves' testimony is sufficient to establish that there is no cream skimming.

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<sup>103</sup> Direct Testimony of Jonathan D. Reeves ("Reeves Direct") 4:12 – 7:2.

Even if this were not the case, the FCC has formulated a procedure to virtually eliminate the concern of cream skimming, even where the population density might not be as it is in the present case:

[A]s the Commission concluded in Universal Service Order, the primary objective in retaining the rural telephone company's study area as the designated service area of a competitive ETC is to ensure that competitors will not be able to target only the customers that are the least expensive to serve and thus undercut the incumbent carrier's ability to provide service to the high-cost customers. Rural telephone companies now have the option of disaggregating and targeting high-cost support below the study area level so that support will be distributed in a manner that ensures that the per-line level of support is more closely associated with the cost of providing service. ***Therefore, any concern regarding "cream-skimming" of customers that may arise in designating a service area that does not encompass the entire study area of the rural telephone company has been substantially eliminated.***<sup>104</sup>

Consequently, even if MO 5 were not able to demonstrate that cream skimming is not an issue based on population density, there would be no basis to raise the issue.

Finally, while there is clearly no cream skimming issue involved in the proposed redefinition, we note that the Commission has also recognized the principle of competitive neutrality controls in the designation of CETCs, holding that

Universal service support mechanisms and rules should be competitively neutral. In this context, competitive neutrality means that universal service support mechanism rules neither unfairly advantage nor disadvantage one provider over another and neither unfairly favor nor disfavor one technology over another.<sup>105</sup>

In the case of Spectra and Alltel, the various wire centers comprising their study areas are scattered in non-contiguous geographic clusters throughout the state. In cases such as

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<sup>104</sup> *Petitions for Reconsideration of Western Wireless Corporation's Petition for Designation as an Eligible Telecommunications Carrier in the State of Wyoming*, 16 FCC Rcd 19144, 19149 (2001) (emphasis added, footnotes omitted). See also *Pine Ridge, supra*, 16 FCC Rcd at 18141, where the FCC used identical language in designating Western Wireless as an ETC for an area that is less than the ILEC's entire study area.

<sup>105</sup> Report and Order, CC Docket No. 96-45, FCC 97-157 (May 8, 1997) (¶ 47).

MO 5's, which is a Missouri-only regional CMRS carrier, the situation where the ILEC study area is scattered statewide warrants additional consideration. A CMRS ETC cannot effectively provide service to geographic areas far removed from its FCC-licensed service area. Accordingly, where, as here, the study area is comprised of numerous non-contiguous regions scattered throughout an expansive geographic area, the Commission should not apply a standard that would allow only one class of CMRS licensee (large nationwide licensees) to qualify for ETC status by being the only carriers that can cover an entire LEC study area.

As shown herein, the proposed MO 5 ETC service area does not result in any possible cream skimming and would not impose any increased reporting obligation on any ILEC. Moreover, even looking beyond the FCC's population density standard, a denial of the proposed redefinition would be contrary to established FCC principals of competitive neutrality and ensuring that regulations are not applied in a manner that can act as a barrier to market entry.

## V. Conclusion

For the foregoing reasons, the Commission should: (1) designate MO 5 as a telecommunications carrier eligible under the provisions of Section 54.201(d) of the FCC's rules to receive federal universal service support; and (2) issue such other orders as are deemed necessary or convenient in this matter.

Respectfully submitted,

LATHROP & GAGE L.C.

Dated: June 14, 2006

*/s/ Paul S. DeFord*

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**CERTIFICATE OF SERVICE**

I do hereby certify that a true and correct copy of the foregoing Prehearing Brief has been hand-delivered, transmitted by e-mail or mailed, First Class, postage prepaid, this 14th day of June, 2006, to:

\* **Case No.** TO-2006-0172

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*/s/ Paul S. DeFord*

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