

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

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

Case No. TO-2006-0172

**POSTHEARING BRIEF OF
MARK TWAIN RURAL TELEPHONE COMPANY AND
NORTHEAST MISSOURI RURAL TELEPHONE COMPANY**

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I. INTRODUCTION AND SUMMARY

Missouri RSA No. 5 Partnership (“MO5”) has failed to provide competent and substantial evidence showing that granting it eligible telecommunications carrier (“ETC”) status is in the public interest. First, MO5 has failed to demonstrate that it can provide the required services as an ETC in the areas served by Mark Twain Rural Telephone Company and Northeast Missouri Rural Telephone Company, and MO5 admits that it does not currently have the necessary agreements in place with other companies to do so. Therefore, MO5 should not be granted ETC status in the areas served by Mark Twain and Northeast. Second, MO5 has failed to meet the standards imposed by the Commission’s ETC Designation Rule in that it has failed provide a sufficient two-year plan for how it intends to spend its estimated federal Universal Service Fund (“USF”) support. Third, MO5 has failed to meet the public interest test in that it has failed to show that the benefits of granting ETC status to additional carriers in high-cost rural areas will outweigh the heavy costs to the federal USF.

All of the other parties to this case agree that MO5 has failed to meet its heavy burden of proof in order to be granted ETC status. The Commission will need more information before it can grant ETC status to MO5 or prepare appropriate findings of fact and conclusions of law to support such a decision.

II. DISCUSSION

A. MO5 Does Not Meet the Requirements of Section 214(e)(1).

Issue 1. 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 MO5 meet the requirements of Section 214(e)(1) throughout the service area for which it seeks designation?

MO5 has not made a sufficient showing that it meets the requirements of Section 241(e)(1) throughout the service area for which it seeks ETC designation. It is MO5’s burden to demonstrate that it will provide the supported services throughout the service territory of each separate incumbent local exchange company (“ILEC”) study area. MO5 does not offer ubiquitous coverage, and Ms. Zentgraf readily acknowledges “the existence of ‘dead spots,’” which she defines as “small areas within a service area where the field strength is lower than the minimum level for reliable service.”¹ More importantly, portions of MO5’s requested ETC area fall outside of MO5’s licensed operating area, as shown in MO5’s own map. See Attachment A (HC). Specifically, MO5 admits that parts of the Mark Twain Rural Telephone Company (“Mark Twain”) Bethel wire center and Northeast Missouri Rural Telephone Company (“Northeast”) Winigan wire center do not lie within MO5’s licensed study area.² (Tr. 74-77)

For example, MO5’s own map and the testimony of Mr. Schoonmaker demonstrate that MO5’s license area only encompasses 16.8% of the potential

¹ Ex. 1, Zentgraf Direct, p. 22.

customers in the Winigan exchange and less than 22% of the land area. First, MO5 admits that it has no agreements in place that would allow it to serve those areas:

Q. ...Would you agree with me that not only do you need a roaming agreement to reach some of those customers in the northern part of the Winigan exchange, but you're also going to need to contract with that provider to make sure they provide all of the ETC-required services?

A. Yes.

Q. And to date, that agreement hasn't been signed or executed with anyone?

A. **There is no such agreement today.**

(Tr. 145-46)(emphasis added).

Second, MO5's own "before and after" coverage maps indicate that the ***

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² Application, p. 11 and Appendix C;

Third, Mark Twain and Northeast both provide toll-free calling between all of their exchanges, but MO5 does not have agreements in place to provide any of MO5's customers in those exchanges with the same calling scope.³ (See Tr. 147-48) Thus, it appears that MO5 has the cart before the horse. MO5 should be required to demonstrate that it has the ability to provide the required supported services before it is designated as an ETC in the Mark Twain and Northeast service areas. Instead, MO5 has failed to show that it has the necessary agreements in place to offer the required services in these areas.

For all of these reasons, it is more appropriate to exclude the Winigan exchange from MO5's proposed ETC area than to redefine the service area to include it.⁴ Likewise, MO5's license area encompasses only a fraction of the customers and land area served by Mark Twain Rural Telephone Company, and MO5 has no agreements in place that would allow it to provide the required services in Mark Twain's service area. Therefore, it is more appropriate to exclude Mark Twain's service area than to include it.

³ Q. Now, do you understand that both Northeast and Mark Twain have local calling along all of their exchanges?

A. I knew that Mark Twain did. I did not know that Northeast did until right now.

* * *

Q. So that would mean, assuming that Mark Twain has expanded local calling or toll-free calling among all 14 of its exchanges, that you would have to make provisions to terminate traffic to Mark Twain exchanges outside your licensed service area, outside your ETC area, on a toll-free basis for your customer, right?

A. That's correct.

Q. How would you do that?

A. Our first choice would be to go to Mark Twain and negotiate an agreement. And if that's not possible, we would have to use other methods which would more than likely be the interexchange network.

Q. And again, that would be something that has to be negotiated in the future; it's not something that's currently in place?

A. That is correct.

(Tr. 147-48)

B. Granting MO5 ETC Status Is Not Consistent with the Public Interest, Convenience, or Necessity.

Issue 2. 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") *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 MO5 consistent with the public interest, convenience and necessity throughout the service area for which MO5 seeks ETC designation?

Granting ETC Status to MO5 is not consistent with the public interest. The Telecommunications Act states, "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." 47 U.S.C. §214(e)(2) (emphasis added). Likewise, the Missouri Commission's ETC rule requires an ETC applicant to demonstrate that "the Commission's grant of the applicant's request for ETC designation would be consistent with the public interest, convenience, and necessity." 4 CSR 240-3.570(2)5. MO5 has failed to meet its burden of proof by failing to provide the Commission with competent and substantial evidence to support a finding that granting ETC status to MO5 is in the public interest.

The FCC has established a rigorous set of minimum public interest requirements to apply in ETC cases.⁵ The FCC stated that it believes that "because these requirements create a more rigorous ETC designation process, their application by the [FCC] and state commissions will improve the long-term sustainability of the universal

⁴ Ex. 13, Schoonmaker Rebuttal, p. 63.

⁵ *In the Matter of the Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Report and Order*, released March 17, 2005 ("the *ETC Order*").

service fund.”⁶ MO5 has failed to meet the FCC’s minimum public interest requirements in order to be designated as an ETC, so its application should be denied.

The FCC’s *ETC Order* identifies a number of public interest concerns that a state commission should consider in reviewing ETC designation requests. These concerns include an examination of: (1) the benefits of increased consumer choice; (2) the unique advantages and disadvantages of the ETC applicant’s service offerings; and (3) the impact on the federal USF.⁷ The FCC also urged state commissions to use the FCC’s framework in a manner consistent with universal service principles – preserving and advancing universal service and competitive neutrality – with an eye towards improving the long-term sustainability of the USF.⁸ To this end, the FCC has suggested that state commissions may consider limiting the number of ETCs due to the strain on the USF by examining per-line USF support received by the individual LEC on a case-by-case basis.⁹

The characteristics of many rural carrier service areas also support a more rigorous standard of eligibility because rural carriers’ service areas have low customer densities and high per-customer costs. These circumstances indicate that state commissions should apply a particularly rigorous standard to applicants seeking ETC designation in rural carrier service areas. Indeed, numerous statements by the FCC and individual commissioners indicate serious doubts about funding more than one ETC in rural areas. For example, in its *Virginia Cellular Order*, the FCC stated, “We conclude

⁶ *Id.* at ¶¶2. The Missouri Commission promulgated its own ETC rule based on these FCC guidelines that will be addressed under Issue No. 3.

⁷ *ETC Order*, ¶¶44, 54.

⁸ *ETC Order*, ¶¶18-19; Ex. 13, Schoonmaker Rebuttal, pp. 40-41.

⁹ *ETC Order*, ¶¶55-56.

that the value of increased competition, by itself, is not sufficient to satisfy the public interest test in rural areas.”¹⁰

Separate statements of FCC Commissioners Kathleen Q. Abernathy and Michael J. Copps as well as the remarks of Jonathan S. Adelstein offer further insight on this issue. Commissioner Abernathy stated:

While promoting competition is undoubtedly a core goal under the Telecommunications Act of 1996, the use of universal funding to engender competition where market forces alone cannot support it presents a more complex question. **Particularly in rural study areas where the cost of providing service typically far exceeds retail rates, regulators must carefully consider whether subsidizing the operations of an additional ETC promotes the public interest.**¹¹

Commissioner Copps stated, “We must give serious consideration to the consequences that flow from using the [universal service] fund to support multiple competitors in truly rural areas.”¹² Commissioner Adelstein stated:

This ETC process has raised a lot of questions from those who are concerned that many States and the FCC began using universal service to “create” competition in areas that could barely support just one provider, let alone multiple providers. They question if this is what Congress intended. It may come down to a choice Congress never envisioned between financing competition or financing network deployment that will give Rural America access to advanced services like broadband.¹³

Finally, FCC Chairman Martin has expressed concerns with using federal USF support to create “competition” in rural high-cost areas:

I am hesitant to subsidize multiple competitors to serve areas in which costs are prohibitively expensive for even one carrier. This policy may

¹⁰ *Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, CC Docket No. 96-45, FCC 03-338 (rel. January 22, 2004), ¶4 (“*Virginia Cellular Order*”).

¹¹ *Virginia Cellular Order*, Separate Statement of Commissioner Abernathy (emphasis added).

¹² *Virginia Cellular Order*, Separate Statement of Commissioner Copps.

¹³ *Virginia Cellular Order*, Separate Statement of Commissioner Adelstein.

make it difficult for any one carrier to achieve the economies of scale necessary to serve all customers in a rural area, leading to inefficient and/or stranded investment and a ballooning universal service fund.¹⁴

These statements highlight the problems associated with providing USF support to multiple carriers in high-cost/low-population areas.

The granting of ETC status to wireless carriers is causing dramatic growth in the size of the federal USF.¹⁵ In order to address this problem, the FCC has suggested that state commissions may consider limiting the number of ETCs due to the strain on the USF by examining per-line USF support received by the individual LEC.¹⁶ Thus, if per-line support is high enough, then the state may be justified in limiting the area to one ETC because funding multiple ETCs could impose strains on an already burdened federal USF.¹⁷ This is especially true where the proposed ETC area already benefits from a competitive wireless market environment. Therefore, the Commission should carefully consider whether the public interest will truly benefit from granting ETC status and providing USF support where the competitive wireless market and customer demand are already prompting MO5 to lower prices, improve features, and build out its network.¹⁸

In this case, the evidence shows that there are at least five (5) other wireless carriers that currently provide service in the areas where MO5 seeks ETC designation. (Tr. 84) Thus, there is no evidence that granting MO5 ETC status will increase choice

¹⁴ 2nd *Report and Order and FNPRM* in CC Docket No. 00-256, 15th *Report and Order* in CC Docket No. 96-45, and *Report and Order* in CC Docket Nos 98-77 and 98-166, rel. Nov. 8, 2001, *Separate Statement of Commissioner Kevin J. Martin*.

¹⁵ Ex. 13, Schoonmaker Rebuttal, p. 58.

¹⁶ *ETC Order*, ¶55; Schoonmaker Rebuttal, p. 41.

¹⁷ *ETC Order*, ¶55; Schoonmaker Rebuttal, p. 55.

¹⁸ Ex. 13, Schoonmaker Rebuttal, p. 43.

or competition.¹⁹ Moreover, there is no evidence of any unique advantages of MO5's service offerings versus those offered by MO5's other wireless competitors or the ILECs that serve in those areas. Finally, if the Commission grants ETC status to MO5, then it is likely that the other wireless carriers will also seek ETC status as well. If all of the wireless carriers operating in Missouri were to receive ETC status, the overall draw of federal USF from Missouri wireless carriers could increase by tens of millions of dollars per year. This shows the potential adverse effect of multiple designations on the USF fund based on data from only one state, and it is an essential factor in the Commission's public interest analysis.

CenturyTel witness Mr. Brown also provides a cost/benefit analysis to assist the Commission in its decision whether to approve additional ETCs in the rural areas where MO5 is seeking ETC designation. Mr. Brown explains that "the Commission should approve additional ETCs in rural areas only where the increased public benefits that will come from supporting multiple carriers can be shown to clearly exceed the costs that are created by supporting multiple networks."²⁰ In very sparsely populated areas, Mr. Brown observes that there could be increased public costs due to the loss in network efficiency caused by multiple providers serving in high-cost/low-density areas.²¹ MO5 has failed to show that the benefits of granting it ETC status outweigh the concerns expressed by the FCC and the costs identified by Mr. Brown.

C. MO5 Does Not Meet the Requirements of the PSC's ETC Rules.

¹⁹ Furthermore, the FCC has stated that increased competition, by itself, is not sufficient to satisfy the public interest test in rural areas such as those served by Mark Twain and Northeast. See *Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier*, CC Docket No. 96-45, FCC 03-338, rel. Jan. 22, 2004, ¶14.

²⁰ Ex. 11, Brown Rebuttal, p. 18.

Issue 3. In addition to the standards set out in the FCC's *ETC Designation Order*, the Missouri Public Service Commission ("MoPSC") has promulgated ETC 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 MO5 meet the requirements of the MoPSC's ETC rules?

MO5 does not meet all of the requirements of the Commission's ETC rule. First, MO5's network improvement plan is deficient. Second, MO5 has not satisfactorily demonstrated that it will satisfy service quality standards. Third, and most importantly, MO5 has not shown that granting ETC status to an additional carrier in the rural, high-cost areas served by Mark Twain Rural Telephone and Northeast Missouri Rural Telephone is in the public interest. Therefore, the Commission should deny MO5's application or, in the alternative, require MO5 to amend its application before further considering MO5's request for ETC status.

1. MO5's network improvement plan is deficient.

The FCC requires that an applicant for ETC status "provide a five-year plan demonstrating how high-cost universal service support will be used to improve its coverage, service quality or capacity in every wire center for which it seeks designation and expects to receive universal service support."²² The Commission's ETC rule reduces the requirement to a two-year plan.²³ As stated by Commissioner Abernathy, a formal build-out plan is critical because universal service support is provided to fund investments in networks, and "it should not be used to pad the bottom line."²⁴

²¹ Ex. 11, Brown Rebuttal, pp. 22-24.

²² *ETC Order*, ¶2.

²³ 4 CSR 240-3.570 (2)(A)1.

²⁴ See Ex. 13, Schoonmaker Rebuttal, p. 34.

MO5 has submitted a five-year plan in Highly Confidential Appendix M, but MO5's plan is deficient under the requirements of the FCC *ETC Order* and the Missouri ETC rule. Specifically, MO5's plan fails to show that all of the funds will be used for the intended purposes, and the plans do not demonstrate how the high-cost universal service support will be used to improve coverage, service quality, or capacity in each wire center for which MO5 seeks designation. Staff witness Mr. McKinnie explains, "[T]he documentation MO5 has provided regarding its intended use of high-cost support does not demonstrate a commitment to spend all estimated USF monies on supported services in year one and year two of the plan."²⁵ MO5's plan is also deficient because Appendix M does not indicate the level of investment and expense that MO5 would incur if it were not granted ETC status, so the Commission cannot determine how the proposed plans would not occur absent the receipt of high-cost support as required by 4 CSR 240-3.570(2)(A)3.G.

Missouri law requires Commission orders to be supported by sufficient findings of fact and conclusions of law, and this requirement has been consistently enforced by Missouri courts.²⁶ MO5 has failed to provide the Commission with sufficient evidence upon which to base findings of fact and conclusions of law that would support an order granting ETC status. Therefore, MO5's Application must be denied.

²⁵ Ex. 10, McKinnie, Supplemental Rebuttal, pp. 21; see also chart at pp. 9-10(HC).

²⁶ See *State ex rel. Monsanto v. PSC*, 716 S.W.2d 791 (Mo. banc 1986); *State ex rel. Coffman v. PSC*, 150 S.W.3d 92 (Mo. App. 2004); *State ex rel. Coffman v. PSC*, 121 S.W.3d 534 (Mo. App. 2003); *State ex rel. Laclede Gas v. PSC*, 103 S.W.3d 813 (Mo. App. 2003); *AT&T Communications v. PSC*, 62 S.W.3d 545 (Mo. App. 2001); *State ex rel. Noranda Aluminum v. PSC*, 24 S.W.3d 243 (Mo. App. 2001).

2. MO5 has not satisfactorily demonstrated that it will satisfy service quality standards.

MO5 is not currently subject to the same service quality standards as ILECs. In its application and testimony in this case, MO5 has stated that it agrees to comply with the Cellular Telecommunications and Internet Association (“CTIA”) Consumer Code for wireless service. (Tr. 66, 88) However, the requirements of the CTIA Code are not service quality standards, and MO5 will not be subject to the same rigorous regulations as other Missouri ILECs. This is not “competitively neutral,” and unfairly discriminates against the wireline ILEC when the wireless ETC is not required to incur the same costs and follow the same standards as the ILEC.²⁷

3. MO5 has not demonstrated that the grant of ETC designation to an additional carrier in a rural, high-cost area is in the public interest.

MO5 has not sufficiently demonstrated that the grant of the application is consistent with the public interest, convenience and necessity as required by 4 CSR 240-3.570(2)(A)(5). MO5 has not shown that the benefits to rural consumers in the form of improvements to coverage, service quality, or capacity will exceed the costs that will be created by its designation as an ETC. Also, MO5 has failed to demonstrate that it can offer a local usage plan that is comparable to the local usage plan offered by the ILECs Mark Twain and Northeast (which both offer toll-free calling between all of their exchanges) because MO5 does not have the necessary agreements in place with other carriers to offer such a plan. (Tr. 147-48) Therefore, MO5 has failed to comply with 4 CSR 240-3.570(10), and its Application must be denied.

²⁷ Ex. 13, Schoonmaker Rebuttal, p. 37.

One of the principles of universal service is to provide just, reasonable and affordable rates for basic local telephone service comparable to the services and rates offered in urban areas. In this case, the public interest will not be served by granting ETC status to MO5 because there is already a high degree of wireless competition and service offerings in MO5's proposed ETC designation area, so there is no necessity to provide USF support to an additional carrier.²⁸ On the other hand, ETC designation will create negative impacts because each approval of an ETC designation will encourage every other wireless carrier to submit an ETC application and become eligible for USF support, thus causing the size of the USF to further escalate.

III. CONCLUSION

MO5 has not demonstrated that it meets all of the federal and Missouri standards in order to qualify for ETC designation. MO5 has not met all of the criteria established by the Commission's ETC rule, nor has it demonstrated that the grant of ETC designation for an additional provider in high-cost areas is in the public interest. Therefore, the Commission should deny MO5's Application for ETC status.

²⁸ Ex. 13, Schoonmaker Rebuttal, p. 47.

Respectfully submitted,

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Certificate of Service

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