

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

In the Matter of the Application of)	
Missouri RSA No. 7 Limited Partnership)	
d/b/a Mid-Missouri Cellular for)	
Designation as a Telecommunications)	Case No. TO-2003-0531
Company Carrier Eligible for Federal)	
Universal Service Support Pursuant to)	
Section 254 of the Telecommunications)	
Act of 1996.)	

**PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW
OF MID-MISSOURI CELLULAR**

Missouri RSA No. 7 Limited Partnership d/b/a/ Mid-Missouri Cellular (“MMC”), in accordance with the procedural schedule adopted in the above-captioned proceeding, hereby submits its Proposed Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. MMC is licensed by the Federal Communications Commission (“FCC”) to provide Commercial Mobile Radio Service (“CMRS”) to seven rural counties wholly within the state of Missouri, under FCC Call Signs KNKN595 and KNKR207. (Application p. 1 and Appendix D).

2. On June 2, 2003, MMC filed an application for ETC designation. In that filing, MMC sought ETC designation throughout its FCC-licensed service area with respect to all local exchange carrier (“LEC”) wire centers where MMC’s FCC-licensed service area encompasses at least one complete wire center of that LEC (Kurtis Tr. p. 134).

3. MMC operates solely within rural areas, wholly within the state of Missouri. MMC provides service to not only the lower cost portions of its licensed

coverage area like the nationwide wireless carriers (such as the interstate highways and larger population centers) but also to the more rural areas including population centers like Miami, Gilliam and Pilot Grove, Missouri. MMC seeks ETC support to enable it to enhance its service offering throughout its FCC-licensed service area. Failure to designate MMC as an ETC will result in a further denial of enhanced wireless digital services in the more rural communities and, eventually, the reduction in the level of wireless services available in these areas; a result contrary to the public interest. (MMC Application and Kurtis Tr. *generally*); (Kurtis HC Tr. pp. 173-175).

4. MMC sought ETC designation in the portions of the wire centers of two non-rural telephone companies, SBC Communications (“SBC”) and CenturyTel of Missouri, LLC (“CenturyTel”), with respect to their wire centers that lie wholly or partially within MMC’s FCC licensed service area. MMC also sought ETC designation in the study areas served by the following rural telephone Companies: Sprint of Missouri, Inc. (“Sprint”), Alma Telephone Company (“Alma”), Citizens Telephone Company (“Citizens”), Mid-Missouri Telephone Company (“MMTC”) and Spectra Communications Group LLC d/b/a CenturyTel (“Spectra”) (Application at pp. 8-10 and Appendices D and E).

5. With respect to the areas served by rural telephone companies, the proposed MMC ETC service area includes the entire study area for Alma and Citizens, and a portion of the study areas of MMTC, Spectra and Sprint (Application at pp. 12-13, Appendices D and E).

6. Sprint intervened in this proceeding in support of MMC’s request for ETC designation. Sprint did not participate in the hearing. Alma, Citizens, CenturyTel and

Spectra intervened in opposition to MMC's request for ETC designation (MMC Initial Brief at p. 3).

7. Section 214(e)(2)¹ of the Communications Act of 1934, as amended (the "Act") as well as the Federal Communications Commission ("FCC") regulations found at Section 54.201, *et seq.*, of the FCC Rules² govern the designation of ETC status. (MMC Initial Brief pp. 1-2).

8. Section 214(e)(2) of the Act states, in relevant part:

Upon request and consistent with the public interest, convenience and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.

The requirements of paragraph 1, of that part of the Act are as follows:

(e) PROVISION OF UNIVERSAL SERVICE –

(1) ELIGIBLE TELECOMMUNICATIONS CARRIERS.–
A common carrier designated as an eligible telecommunications carrier under paragraph (2) or (3) shall be eligible to receive universal service support in accordance with section 254 and shall, throughout the service area for which the designation is received –

(A) offer the services that are supported by Federal universal service support mechanisms under section 254(c), either using its own facilities or a combination of its own facilities and resale of another carrier's services (including services offered by another eligible telecommunications carrier); and

¹ 47 U.S.C. § 214(e)(2).

² 47 C.F.R. § 54.201 *et seq.*

(B) advertise the availability of such services and the charges therefore using media of general distribution.

9. This case represents a case of first impression before the Commission with respect to the designation of a wireless ETC. (Application pp. 1-2).

10. This is ***not*** a case of first impression with respect to this Commission's grant of ETC status to non-LEC carriers in areas served by rural telephone companies, under the cited provisions of the Act. *See, e.g., Application of Green Hills Area Cellular Telephone, Inc. d/b/a Green Hills Telecommunications Services*, Case No. CO-2003-0162, Order Approving Stipulation and Agreement (adopted March 4, 2003) ("*Green Hills Order*"). (MMC Initial Brief p. 5).

11. At the time the MMC application was originally filed, and during the period of time that direct, rebuttal and surrebuttal testimony was prepared and filed, the FCC had consistently held that the public interest benefits related to the introduction of competition in rural areas satisfied the public interest mandate of Section 214. As of that point in time, the FCC had never denied or conditioned a wireless ETC application (Kurtis Amended Surrebuttal, Ex. 5 p. 2).

12. In the *Green Hills Order*, applying the exact same statutory provisions at issue in the instant case, the Commission Staff entered into a stipulation which found, ***without testimony or further support***, that grant of the requested ETC status in an area served by a rural telephone company, was in the public interest. (MMC Initial Brief p. 8).

13. Staff noted that Green Hills' application states that it offers all of the services supported by federal universal service support and advertises the availability and charges for these services using media of general distribution, thus meeting the

requirements of 47 U.S.C. 214(e)(1). Staff further stated that it opposed Public Counsel's motion for an evidentiary hearing, noting that Public Counsel's motion did not identify any potential concerns with the application.³

14. On the eve of the hearing in this proceeding, the FCC issued an order setting forth additional guidance to be used in conjunction with a public interest finding for competitive ETC ("CETC") designations in areas served by rural telephone companies. *In the Matter of Federal-State Joint Board on Universal Service, Virginia Cellular, LLC Application for Designation as an Eligible Telecommunications Carrier In the Commonwealth of Virginia, Memorandum Opinion and Order*, CC Docket No. 96-45, FCC 03-338 (rel. January 22, 2004), (Exhibit No. 10), ("*Virginia Cellular Order*").

15. During the hearing, MMC provided expert testimony on the *Virginia Cellular Order*, both providing this Commission with a detailed analysis of the impact of that holding and making it absolutely clear that MMC was ready, willing and able to meet the requirements set forth in the *Virginia Cellular Order*. (See generally Kurtis Tr).

16. The rural areas of Missouri will benefit from increased competition. The FCC has held that designation of qualified ETCs promotes competition and benefits consumers by increasing consumer choice, encouraging innovative services, and introducing new technologies.⁴ The MMC Application makes comparable demonstrations. (MMC Initial Brief p. 11). ETC designation is essential to ensure

³ *Green Hills Order* p. 2.

⁴ *In re Federal State Joint Board on Universal Service; RCC Holdings, Inc. Petition for Designation as an Eligible Telecommunications Carrier Throughout its Licensed Service Area in the State of Alabama*, Memorandum Opinion and Order, CC Docket 96-45 (rel. Nov. 27, 2002) at ¶23.

continued availability of competitive offerings in the rural areas served by MMC. (MMC Reply Brief pp. 8-10).

17. MMC's universal service offering will provide unique services to consumers in rural Missouri. MMC will offer the "core" of designated services that are supported by Federal universal service support mechanisms.⁵ In addition, designating MMC as an ETC will allow customers in the subject part of rural Missouri to choose service based on pricing, service quality, customer service, and service availability. MMC offers mobility (Dawson Amended Surrebuttal, Ex. 2 p.3); (Kurtis Amended Surrebuttal, Ex. 5 p. 17), access to 911 (Dawson Amended Surrebuttal, Ex. 2 p.3); (Kurtis HC Tr. p. 171-176), expanded calling scopes (Dawson Tr. p. 59); (Kurtis Direct, Ex. 4 p. 11); (Kurtis Amended Surrebuttal p.5) and several calling plans to allow customers to purchase plans that best fit their telecommunications needs (Dawson Direct, Ex. 1 p. 2 and Attachments). Unlike traditional LEC services, the availability of mobility affords access to emergency calling wherever the customer is in need and not merely at the nearest location where the fixed landline telephone is located. (Kurtis Amended Surrebuttal, Ex. 5 p. 7, 17).

18. MMC is committed to providing quality service to requesting customers throughout its designated service area. Consistent with the commitments made by Virginia Cellular, MMC has committed to provide service to any requesting customer in

⁵ See 47 U.S.C. § 254(c); 47 C.F.R. § 54.101. MMC will provide voice grade access to the public switched network, an amount of local usage free of (additional) charge, Dual Tone Multi-Frequency signaling or its functional equivalent, single party service, access to emergency services, access to operator services, access to interexchange service, access to directory assistance, and toll limitation services for qualifying low-income consumers on at least one calling plan. (Application p. 3-11).

the service area where it is designated as an ETC. When a potential customer requests service within an area presently served by MMC's existing network, MMC will immediately provide service using its existing network. If a potential customer requests service within the area in which MMC is designated as an ETC, but where the existing service area does not immediately allow MMC to provide service, MMC will take the following steps to provide service: (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. If, after following these steps, MMC still cannot provide the requested service, it will notify the requesting party and include that information in an annual report filed with the Commission detailing how many requests for service were unfulfilled for the past year. (Kurtis Tr. p. 142-143).

19. As required by the Act,⁶ MMC will use its Federal universal service support for the purposes for which such support is intended (*i.e.*, the construction, maintenance and upgrading of facilities serving rural areas). (Application at p. 16).

20. MMC is a member of the Cellular Telecommunications and Internet Association ("CTIA") and will comply with CTIA's current Consumer Code for Wireless Service.⁷ (Kurtis Tr. p.128-9).

⁶ 47 U.S.C. §254.

21. MMC will advertise the availability of the supported services and the availability of Lifeline and Linkup services to qualifying customers. MMC has provided the Commission with details of two Lifeline-only plans that it will offer throughout its designated ETC service area. The first plan is intended to provide a low-cost service option comparable in price to that offered by the ILEC but with the added advantage of limited mobility. (Dawson Tr. 59, Kurtis Tr. 157) This Plan offers unlimited calling and mobility in the area served by the subscriber's home cell site at a fixed monthly price of \$6.25. (Dawson Tr. 59). The subscriber's outbound local calling area would correspond to its traditional LEC calling area for that subscriber's address. With the advantage of limited mobility, calls could be originated by the MMC Lifeline subscriber to any numbers within that LEC exchange from any location within the subscriber's home cell site serving area, not just the subscriber's home. Similarly, the Lifeline customer would receive inbound calls, wherever they originate from, so long as the customer remains within the geographic area served by its Home cell site. The area served by a home cell site typically extends to a 10 to 18 mile radius of the home cell site. (Dawson Tr. p. 59).

The second MMC Lifeline Plan would allow for local calling and mobility throughout the entire service area for which MMC is designated as an ETC, for a flat

⁷ Under the CTIA Consumer Code, which was introduced as Exhibit 12 in this proceeding, 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. (Ex. 12).

\$10.00 per month charge. (Kurtis Tr. 157).⁸ Since this would be the MMC subscriber's local calling area, even toll restricted Lifeline subscribers would enjoy a seven county mobility and local calling area, assuming grant of the MMC ETC Application as filed. As shown in the MMC Application, this would afford Lifeline customers a local calling scope extending to a geographic area encompassing multiple telephone exchanges served by 7 LECs. (Application pp. 8-12 and Appendices D and E). While these Lifeline plans would not allow roaming into other cellular networks to place and receive routine calls, both plans would allow ubiquitous access to 911 for the MMC Lifeline subscriber even in a roaming situation. (Kurtis Amended Surrebuttal, Ex. 5 p. 7). Designation of MMC as an ETC will, for the first time, allow the low income members of the community access to the lower cost, higher featured, wider calling areas, mobility and ubiquitous access to emergency services under a Lifeline-supported cost structure. (MMC Initial Brief pp. 14-15).

22. Wireless Lifeline services will not be available in subject rural areas without designation of MMC as an ETC. (MMC Initial Brief pp 15-16); (OPC Tr. p. 21-22); (Dawson Tr. p. 35); (Kurtis Tr. p 156).

23. Grant of ETC status to MMC will not adversely affect the Universal Service Fund. 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

⁸ In addition, MMC has committed to offer all of its service plans to Lifeline subscribers with a \$1.75 discount. (Dawson Tr. 90).

needed to support the fund) has actually been decreasing.⁹ (Kurtis Amended Surrebuttal, Ex. 5 p. 11).

24. Designation of MMC as an ETC would *not* place an unsustainable burden on the USF. The projected level of USF support MMC will receive if designated as an ETC throughout the area requested would be \$1,751,721.00 per year. (Schoonmaker Rebuttal Ex. 8 at p.17, line 7). This represents less than 0.20% of the \$857,903,276 high-cost portion of the USF.¹⁰ Accordingly, MMC's ETC request will have minimal impact on the USF.¹¹

25. The use of its wireless facilities by rural LECs to meet their carrier of last resort obligations has, in the past, actually lessened the burden on the USF. MMTC, with Commission Staff approval, purchased wireless service from MMC to enable MMTC to provide basic exchange service to a requesting customer in an area where LEC service was not available. By so doing, MMTC saved thousands of dollars in construction costs that otherwise would have been needed to provide basic exchange service to that cite; costs which otherwise would have gone into MMTC's cost basis upon which its USF is calculated. (See, Jones Amended Surrebuttal, Ex. 3). This is a concrete example of how

⁹ On March 5, 2004, the FCC issued a Public Notice proposing a Second Quarter 2004 Universal Service Contribution Factor of 8.7 percent, the same factor as for the first quarter, indicative of current fund stability. *Proposed Second Quarter 2004 Universal Service Contribution Factor*, DA 04-621 (CC Docket No. 96-45)(Rel. March 5, 2004).

¹⁰ See Universal Service Administration Company ("USAC") Federal Universal Service Support Mechanisms Fund Size Projections for the Fourth Quarter of 2003, Appendix HC 1 (Universal Service Administrative Company, August 1, 2003) demonstrating that the total amount of high-cost universal service support is \$857,903,276 in the Fourth Quarter of 2003.

¹¹ See *Virginia Cellular Order* at ¶ 31 (holding that a carrier related cost of a fraction of a percent of total the high-cost support does not dramatically burden the USF).

MMC's wireless facilities have actually been used to reduce the burden on the USF. The designation of ETC status for wireless carriers could therefore have the result of ultimately reducing the burden on the Universal Service Fund. (Jones Tr. p. 116-117).

26. MMC has not been involved in the practice of terminating traffic to rural ILECs without paying terminating compensation. (Jones Tr. pp. 119-120). MMC has implemented a series of direct trunks to various rural ILECs and delivers traffic to those ILECs under the terms and conditions of interconnection agreements with those ILECs. All other MMC traffic is delivered by MMC directly to an IXC. The IXC is then obligated to compensate the terminating ILEC for that traffic. (Jones Tr. pp. 120-121).

27. MMC committed to follow the annual reporting obligations specified in the *Virginia Cellular Order* to ensure that MMC satisfies its obligations under Section 214 of the Act.¹² Specifically, MMC has committed that upon grant of ETC status, it will: (1) annually submit information regarding its progress toward meeting its build-out plans in areas where it is designated as an ETC; (2) annually provide information to the Commission with respect to the number of consumer complaints it receives per 1,000 mobile handsets; and (3) annually submit information regarding how many requests for service from potential customers in its designated area were unfulfilled for the past year. (Kurtis Tr. 142-3) These commitments comport fully with the reporting obligations set forth in the *Virginia Cellular Order*.¹³

28. MMC has served local number portability requests on Alma, Citizens, CenturyTel, MMTC and Spectra. (Kurtis Amended Surrebuttal, Ex. 5 p. 18).

¹² *Virginia Cellular Order* at ¶ 46.

¹³ *Id.*

29. MMC's proposed ETC service area includes the entire study areas for both Alma and Citizens. (Application at p. 12-13).

30. With respect to the area served by MMTC, MMC's affiliate, MMTC's study area is comprised of three (3) noncontiguous geographic areas. Two of those non-contiguous areas (encompassing nine of the twelve MMTC wire centers), lie wholly within the MMC FCC-licensed CMRS service area and were therefore included in the proposed MMC ETC service area.¹⁴ (Application at p. 13 and Appendix D). The remainder of the study area (comprised of the Fortuna, Latham and High Point wire centers) is a non-contiguous geographic area that lies wholly beyond the MMC licensed CMRS service area (Application at Appendix D). MMC requests re-definition of MMTC's service area to include the nine wire centers wholly contained within the MMC licensed CMRS service area for which ETC designation has been sought. MMTC has interposed no objection to this redefinition. (MMC Initial Brief p. 22).

31. The nine MMTC wire centers which MMC seeks to include in its ETC designation are Gilliam, Bunceton, Speed, Pilot Grove, Marshall Junction, Nelson, Blackwater, Arrowrock, and Miami. (Application at Appendices D and E).

32. With respect to Spectra's wire centers, the MMC FCC-licensed CMRS area encompasses the entire Concordia rate center which is a non-contiguous portion of a larger study area. (Kurtis Tr. 134). The MMC FCC-licensed CMRS service area also

¹⁴ The Gilliam, Bunceton, Speed, Pilot Grove, Marshall Junction, Nelson, Blackwater Arrow Rock and Miami wire centers lie totally within the MMC proposed ETC service area (Application at Appendix D).

encompasses portions of three other Spectra wire centers.¹⁵ MMC had proposed including these partial wire centers so that MMC would be proposing to serve all of the Spectra geographic area that is within MMC's licensed CMRS service area. MMC originally sought redefinition of Spectra's service area to correspond with the MMC FCC-licensed service boundaries. (MMC Initial Brief p. 22-24).

33. Spectra has disaggregated its study area down to the wire center level.¹⁶

34. MMC is willing to limit its proposed ETC service area with respect to the area served by Spectra to an area coterminous with the Concordia wire center. By doing so, MMC would eliminate Spectra's purported concern and eliminate any issue with respect to "cream-skimming" since the redefinition of the service area coterminous with the Concordia wire center boundaries would correspond to the level of disaggregation currently reported by Spectra. With this deletion of these partial wire centers from its proposed ETC service area, MMC would be serving the entire contiguous portion of the study area within the MMC FCC-licensed service area. (MMC Brief pp. 23-24).

35. With respect to the Sprint study area, MMC requests that the Commission redefine the service area along the FCC-license boundaries for MMC's CMRS system. Sprint has interposed no objection to the redefinition of its service area as proposed by MMC. (MMC Initial Brief p. 24-25).

¹⁵ A portion of the Braymer, Kingston and Lawson wire centers lie within the proposed MMC ETC service area (Application at Appendix D).

¹⁶ (Martinez Rebuttal, Ex. 9. at p. 13). "Also, because Spectra already has competition, the company submits line counts by wire center on a quarterly basis to USAC based on its federal disaggregation plan."

36. MMC has sought ETC designation coterminous with the following Sprint wire center boundaries: Blackburn, Centerview, Green Ridge, Henrietta, Holden, Houstonia, Lexington, Malta Bend, Odessa, Otterville, Smithton, Sweet Springs, and Warrensburg. (Application at Appendix E)

37. MMC has sought ETC designation for those portions of the following Sprint wire center boundaries that lie within MMC's FCC-licensed service area: Blairstown, Calhoun, California, Chilhowee, Clarksburg, Cole Camp, Hardin, Ionia, Kingsville, Leeton, Lone Jack, Norborne, Oak Grove, Strasburg, Syracuse, Tipton, Ulrich, Waiverly, Wellington and Winsor. (Application at Appendix E).

38. In the alternative, MMC requests that the Commission designate it as an ETC for the entire wire center where MMC's FCC-licensed service area partially encompasses the Sprint wire centers. The partial wire centers are listed in the MMC Application (Application at Appendix E). Where MMC would be designated for a portion of the wire center that lies beyond its CMRS licensed service area, as allowed in the *Virginia Cellular Order*, MMC would provide supported services throughout the portions of each wire center that lie beyond the MMC licensed CMRS service area through existing contractual arrangements (such as roaming agreements) with other CMRS providers or by negotiating and executing additional contracts with other telecommunications carriers serving those portions of the exchanges that lie beyond the CMRS licensed service area, to allow for the resale of service in those areas.¹⁷

¹⁷ *Virginia Cellular Order* at ¶ 44.

39. Denial of MMC'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. (MMC Initial Brief p. 28).

40. The MMC cellular network presently contains the requisite capabilities to support Equal Access. However, to date no MMC subscriber has ever requested the ability to select and directly compensate an inter-exchange carrier ("IXC") of its choosing. Unlike LEC service, wireless calling plans include varying levels of toll calls at no additional charge where the customer allows the carrier, such as MMC, to select the toll provider. Accordingly, there is no incentive for an MMC subscriber to select its own IXC where it means that the customer would be paying toll charges instead of receiving toll minutes bundled in its calling plan at no additional charge. Nevertheless, MMC stands ready, willing and able to offer 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 MMC network. (Kurtis Amended Surrebuttal, Ex. 5 p. 8-9).

41. The MMC price plans compare favorably with those of Alma, Citizens, and Spectra. While the MMC rates cited by the Opposing Intervenors appear to be costlier than those charged by Citizens, Alma and Spectra¹⁸ the subject level of services are not comparable. Each of the MMC plans include voice mail, call waiting, call forwarding, three way calling and caller ID. Adding the tariff rates for those features to the rates charged by the Opposing Intervenors results in monthly rates of \$29.85 for

¹⁸ Citizens and Alma compare their local service offerings (\$14.90 and \$13.00) respectively with the MMC price plans ranging from \$19.95 to \$64.95 per month. (Alma/Citizens Brief pp. 10-11) The Spectra rates in its Concordia exchange are \$15.11 per month.

Citizens, \$21.95 for Alma and \$39.06 for Spectra.¹⁹ The “free” local calling area for those LEC subscribers is limited to the subscriber’s local exchange. All calls beyond that limited local calling area result in additional per minute toll charges. In sharp contrast, the MMC local calling area includes all of the exchanges of not only the Opposing Intervenor but also all other LECs in a near seven county area as well as a number of “bundled” minutes which an MMC subscriber can use to place toll calls without incurring toll charges. (MMC Reply Brief pp. 10-11).

42. The MMC network was deployed utilizing then state-of-the-art time division multiple access (“TDMA”) technology. However, that technology is no longer being supported and MMC needs to overlay its entire network with a code division multiple access (“CDMA”) technology. The specifics regarding the costs associated with that overbuild were provided in highly confidential testimony at hearing. (Kurtis HC Tr. pp. 186-187).

43. The CDMA overbuild, while not only allowing for enhanced voice and data services throughout MMC’s market, is also essential for enabling MMC to meet the FCC accuracy requirements with respect to E911 Phase II locational services. (MMC Reply Brief p. 8).

44. MMC offered confidential testimony demonstrating that ETC designation was essential to ensure the ongoing availability of competitive and state of the art services in its proposed ETC service area and how denial of ETC status would be contrary to the public interest. (MMC Reply Brief p. 8-10).

¹⁹ Alma, Citizens and Spectra rates for each of these additional services are tariffed items and a matter of public record.

45. Office of Public Counsel (“OPC”) began the hearing advising that it was withholding judgment on the MMC application until after all evidence was in. OPC has now concluded that MMC, having made the same commitments as those in the *Virginia Cellular Order*, has clearly demonstrated that its designation as an ETC would serve the public interest. As OPC concluded

The evidence in the record provides ample compliance with the requirements for ETC designation. The concerns raised by Public Counsel for the PSC to consider in weighing the issue of whether or not the grant of the application was in the public interest were adequately addressed in the record. The FCC sanctioned guidelines for making the public interest finding by the FCC in the Virginia FCC Order and, based upon these guidelines, the applicant committed to operate in accordance with conditions imposed by the PSC for the grant of the ETC status based upon those guidelines. Therefore, Public Counsel is satisfied that the public interest standard as best reflected in the provisions of Section 392.185, RSMo has been met. The application, subject to those conditions, should be approved.²⁰

CONCLUSIONS OF LAW

1. The Application demonstrates MMC’s compliance with the statutory obligation to offer all services required under the Act for an ETC to receive Federal universal service support. (Application at p. 3-16).

2. In orders applying the statute to requests by wireless carriers for designation as CETCs in rural areas, the FCC applied a competitively neutral approach, considering whether consumers: (1) will benefit from competition, and (2) would be harmed by the designation of an additional ETC, rejecting general arguments that rural

²⁰ OPC Initial Brief pp5-6.

areas are not capable of sustaining competition for universal service support. (MMC Initial Brief p. 7).

3. When designating carriers in rural areas as ETCs, the FCC has made it abundantly clear that those parties objecting to the designation bear the burden of presenting evidence that designation of an additional ETC in areas served by rural telephone companies will reduce investment infrastructure, raise rates, or reduce service quality to consumers in rural areas. (MMC Initial Brief at p. 7).

4. The Staff's statutory interpretation in the MMC case is inconsistent with the Commission's prior disposition of similar applications. This Commission has previously granted ETC status to CETCs in areas served by rural telephone companies.²¹ In the *Green Hills Order*, applying the exact same statutory provisions at issue in the instant case, the Commission Staff entered into a stipulation which found, ***without testimony or further support***, that grant of the requested ETC status in an area served by a rural telephone company, was in the public interest. Indeed, as the Commission observed in the *Green Hills Order*:

Staff noted that Green Hills' application states that it offers all of the services supported by federal universal service support and advertises the availability and charges for these services using media of general distribution, thus meeting the requirements of 47 U.S.C. 214(e)(1). Staff further stated that it opposes Public Counsel's motion for an evidentiary hearing, noting that Public Counsel's motion did not identify any potential concerns with the application.²²

²¹ See *Green Hills Order*, *supra*. Case No, CO-2003-0162.

²² *Id.* at p. 2.

5. In the Green Hills case, Commission Staff correctly recognized that once an applicant had made the requisite statutory showings, the “burden” of showing specific harm shifts to the opposing party. (MMC Initial Brief p. 7-8).

6. The Staff has offered no legal basis on which this Commission could support a decision in the MMC case inconsistent with this Commission’s precedent in applying the exact same statutory provisions - provisions which must be applied with “competitive neutrality” with respect to any CETC designation. There are no statutory differentiations between the standard or the “burden” to be carried by CLECs as opposed to wireless carriers. Indeed, as documented above, the FCC has made it absolutely clear that the statutory provisions must be applied in a competitively neutral manner with respect to all competing technologies. (MMC Initial Brief p. 8).

7. MMC’s application must be evaluated by using the same standards as those applied to similarly situated applicants that have already been granted ETC status. (MMC Initial Brief p. 8).²³

8. In the *Green Hills Case*, Commission Staff correctly recognized that once an applicant had made the requisite statutory showings, the “burden” of showing specific harm shifts to the opposing party. The Staff offered no legal basis on which this Commission could support a decision in the present case at odds with this Commission’s precedent in applying the exact same statutory provisions - provisions which must be applied with “competitive neutrality” with respect to any CETC designation. There are

²³ See, e.g., *Chadmoore Communications, Inc. v. FCC*, 113 F.3d 235 (D.C. Cir. 1997) (“Chadmoore”); *Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir.1994); *New Orleans Channel 20, Inc. v. FCC*, 830 F.2d 361, 366 (D.C. Cir.1987); *Public Media Center v. FCC*, 587 F.2d 1322, 1331 (D.C. Cir.1978); *Melody Music, Inc. v. FCC*, 345 F.2d 730, 733 (D.C. Cir.1965).

no statutory differentiations between the standard or the “burden” to be carried by CLECs as opposed to wireless carriers. The FCC has made it absolutely clear that the applicable statutory provisions must be applied in a competitively neutral manner with respect to all competing technologies.²⁴ MMC’s application must be evaluated by using the same standards as those applied to similarly situated applicants that have already been granted ETC status by this Commission.²⁵

9. In the *Virginia Cellular Order*, the FCC clarified the framework for evaluating the public interest when designating CETCs in both rural and non-rural ILEC service areas.²⁶

10. The FCC found that a wireless carrier’s commitment to the CTIA voluntary guidelines satisfies quality of service concerns.²⁷

11. Should the Joint Board, in conjunction with the FCC ultimately determine that the present mechanism of calculating USF support for wireless carriers is no longer appropriate or jeopardizes the long-term stability of the fund, changes will be made to those mechanisms; and those changes will apply to MMC as well. Grant of the MMC

²⁴ Even witnesses for the opposing intervenors acknowledge that the same considerations must be applied in the context of CLEC and CMRS CETC applicants. In response to specific questions from Chairman Gaw, Mr. Schoonmaker, while also not an attorney, concurred that the analysis applied between CLEC and CMRS ETC applicants “...ought to be fairly similar.” (Schoonmaker Tr. at p 385-386).

²⁵ See, e.g., *Chadmoore Communications, Inc. v. FCC*, 113 F.3d 235 (D.C. Cir. 1997) (“Chadmoore”); *Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir.1994); *New Orleans Channel 20, Inc. v. FCC*, 830 F.2d 361, 366 (D.C. Cir.1987); *Public Media Center v. FCC*, 587 F.2d 1322, 1331 (D.C. Cir.1978); *Melody Music, Inc. v. FCC*, 345 F.2d 730, 733 (D.C. Cir.1965).

²⁶ See generally *Virginia Cellular Order*.

²⁷ *Virginia Cellular Order* at ¶ 30.

Application will not insulate MMC from the application of any FCC rule changes that might result.²⁸

12. Denial of ETC status to MMC would deny the LEC Lifeline customer the right to port its number and still qualify for Lifeline support; in effect establishing a minimum income level which a wireline subscriber must have in order to be able to port its LEC number since only an ETC provides Lifeline and Link-up support services. If MMC were granted ETC status, existing ILEC Lifeline and Link-up customers could port their numbers to MMC and still be eligible for such support. Denial of the MMC ETC Application categorizes the Lifeline and Link-up customer in MMC's service area as a separate class of citizen that would be artificially precluded from porting its number to a wireless service provider. Aside from being violative of the FCC porting rules and *Intermodal Porting Order*, any Commission action on the MMC ETC Application that has the effect of discriminating against the rights of low-income ILEC customers is contrary to public policy. These customers have the right to port their numbers to a wireless service provider and enjoy the benefits of mobility, expanded local calling area and unlimited access to 911 services. The Commission must avoid taking action on the MMC Application that has the effect of disenfranchising an entire class of citizens based solely on the level of their income. (Kurtis Amended Surrebuttal Ex. 5 p.19, lines 2-14).

13. It would be inappropriate to deny MMC ETC status where it has proposed to serve all contiguous portions of the ILEC service area located within its FCC-licensed

²⁸ *Virginia Cellular Order* at ¶ 12. ("...the outcome of the [FCC's] pending proceeding before the Joint Board examining the rules relating to high-cost universal support in competitive areas could potentially impact the support that Virginia Cellular and other ETCs may receive in the future [footnote omitted] This Order is not intended to prejudice the outcome of that proceeding.").

service area but would not serve non-contiguous areas that lie outside of its FCC-licensed service area. This is applicable to the Spectra, MMTC and Sprint service areas.

In the *Universal Service Order*, the Commission concluded that requiring a carrier to serve non-contiguous service area as a prerequisite of eligibility might impose a serious barrier to entry, particularly to wireless carriers [footnote omitted]. The Commission further concluded that ‘imposing additional burdens on wireless entrants would be particularly harmful in rural areas...’ [footnote omitted]. Accordingly, we find that denying Virginia Cellular ETC status for the [relevant portion of the study area that lies within its CMRS license area] simply because Virginia Cellular is not licensed to serve the eight remaining [noncontiguous wire centers that lie outside of its CMRS licensed service area] would be inappropriate.²⁹

14. By including the entire study area for Alma and Citizens, and the entire disaggregated study area for Spectra, in its proposed ETC service area, there is no issue of cream skimming as the area MMC proposes to include in its ETC service area is entirely rural and does not include areas of high population densities. (MMC Initial Brief pp. 22-25).

15. Since Spectra has disaggregated its costs to the wire center level, there can be no issue of cream-skimming.

[A]s the [FCC] 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***

²⁹ *Virginia Cellular Order* at ¶ 38.

*encompass the entire study area of the rural telephone company has been substantially eliminated.*³⁰

While there has been no allegation whatsoever that MMC has engaged in any sort of cream-skimming, a LEC would remain free to disaggregate its costs, even after MMC's ETC designation, so as to ensure that the level of support received by MMC was tied to the area in which it provided service as an ETC.

16. As the FCC fully explained in the *Virginia Cellular Order*, the proposed service area redefinition would have no impact on the rural LEC reporting or administrative obligations.³¹ Specifically, the FCC found that redefining the rural telephone company service areas would not require rural telephone companies to determine their costs on any basis other than the study area level. The redefinition, therefore, only enables MMC, as an ETC, to serve an area that is smaller than the entire ILEC study area.

17. General policy arguments against designation of wireless carriers as ETCs are not relevant to the consideration of MMC's Application. Grant of the MMC Application will neither prejudice those arguments when they are considered in the proper forum nor insulate MMC from any subsequent changes in the rules regarding access to USF. The FCC recently dealt with near identical arguments filed by opposing intervenors in its *Virginia Cellular Order*. While acknowledging that these issues are

³⁰ *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 *Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota*, 16 FCC Rcd 18130, 18141 (2001), 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.

³¹ *Id.* at ¶ 42.

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.³²

18. On February 27, 2004, the Federal-State Joint Board on Universal Service issued recommendations to the FCC for FCC consideration in possibly adopting future rules and criteria for the FCC and state commissions to consider in designating ETCs. *Federal-State Joint Board on Universal Service*, Recommended Decision (CC Docket No. 96-45) (rel. February 27, 2004) (“*Recommended Decision*”). The recommendations made by the Joint Board are just that – *recommendations* – and unless and until such recommendations are adopted by the FCC, this Commission is not required to apply such proposed criteria to any ETC designation request pending before it. Each additional criterion proposed by the Joint Board will need to be reviewed by the FCC to determine, among other things, whether it may lawfully be applied by a state commission. Section 332(c)(3) of the Act prohibits state or local governmental entities from regulating “the entry of or the rates charged by any commercial mobile service,” while Section 253(a) of the Act prohibits a state or local legal requirement from prohibiting or having the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service. In considering the Joint Board’s recommendations, the FCC will determine whether one or more of the proposed criteria

³² *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).

violate Section 332 and/or 253 of the Act.³³ For this Commission to attempt to make such legal determinations in advance of the expert federal agency charged with making such determinations is unnecessary and inefficient. (MMC Reply Brief pp. 13-17).

19. Equal Access is not a requirement for wireless ETC designation. The FCC made this abundantly clear in the *Virginia Cellular Order*. “Section 54.101(a)(7) of the rules states that one of the supported services is access to interexchange services, *not* equal access to those services. (footnote omitted)(emphasis added).”³⁴

20. While MMC has voluntarily agreed to provide annual reporting to the Commission, this case is somewhat unique in that the Commission is not required to consider the potential for the carrier to utilize funds from an ETC designated area to

³³ By way of example, the Joint Board has recommended that the FCC adopt a guideline indicating that state commissions may properly impose consumer protection requirements as part of the ETC designation process. *Recommended Decision* at par. 31. The Commission’s LEC regulatory requirements, currently applicable to wireline carriers, include the requirement that a carrier offer its service pursuant to tariff. Such requirement conflicts with the prohibition against rate regulation in Section 332 of the Act. Similarly, the Joint Board proposes that the FCC adopt guidelines encouraging states, as a condition of ETC designation, to require competitive ETCs to be prepared to provide equal access if all other ETCs in that service area exercise their rights to relinquish their ETC designations. *Recommended Decision* at par. 28. While MMC has committed to make subscriber-originated equal access available should any customer so request, it is significant to note that the Joint Board also notes that preemption based on rate and entry regulation is an issue, and that in order for the proposed equal access requirement to be lawfully adopted, the FCC must first clarify its *Western Wireless Kansas CMRS Order*, 17 FCC Rcd 14802 (2002), which the Joint Board believes may “be interpreted as precluding states from imposing equal access requirements on CMRS carriers under any conditions.” *Recommended Decision* at par. 29. In addition, the Joint Board recommends that state commissions be given discretion to require ETC applicants to incorporate resale in their plans to serve all customers upon reasonable request as a condition of ETC designation. *Id.* at par. 26. Requiring resale is inconsistent with Section 214(e)(1)(A) of the Act, which requires ETCs to offer supported services “either using its own facilities or a combination of its own facilities and resale of another carrier’s services.”

³⁴ *Id.* at ¶ 21.

subsidize services in urban areas within the state of Missouri or urban and/or rural areas outside of the state since MMC's FCC licensed service area is limited to seven rural counties wholly within the state of Missouri and the characteristic of this entire service area is rural in nature. Accordingly, while relevant to this Commission's finding of public interest in granting ETC designation to a wireless carrier, a detailed establishment of procedural safeguards for a carrier with multiple licensed services areas that include metropolitan areas and/or areas beyond the state of Missouri is not necessary in the context of the MMC Application. (MMC Initial Brief p. 19).

21. MMC has met its burden that grant of its application would serve the public interest in areas served by both non-rural and rural ILECs. This Commission has the authority to immediately designate MMC as an ETC in the portion of MMC's proposed ETC service area served by the non-rural carriers (SBC and CenturyTel) and in the areas served by the rural carriers where MMC proposes to serve the entire rural carrier study areas (the Alma and Citizens wire centers).

22. Grant of ETC status to MMC in the redefined service areas of Spectra, Sprint and MMTC is in the public interest, subject to FCC concurrence in those redefinitions.

23. Section 214(e)(2) of the Act requires the designation of a competitive ETC in areas served by nonrural LECS: "State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission..."

24. MMC has clearly satisfied all statutory and regulatory requirements for designation as an ETC in both the areas served by rural and nonrural LECs, and has demonstrated that grant of its Application would be in the public interest. Specifically, MMC has shown how it provides services and functionalities in Missouri supported by the federal universal service program, enumerated in Section 54.101(a) of the FCC's rules.³⁵ MMC also established that it satisfied each of the elements required for ETC designation by the FCC pursuant to Section 214(e)(6) of the Act.³⁶ Further, MMC demonstrated that it will meet additional conditions as established in the *Virginia Cellular Order*. Because MMC's proposed ETC offering in Missouri is in the public interest, the public interest dictates that the Commission act swiftly to grant MMC's Application.

Respectfully submitted,

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³⁵ 47 C.F.R. § 54.101(a).

³⁶ See 47 U.S.C. § 214(e)(6); see also, Application at 6-10.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been hand-delivered, transmitted by e-mail or mailed, First Class, postage prepaid, this 5th day of April, 2004, to:

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