

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE 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)	
Company Carrier Eligible for Federal Universal)	<u>Case No. TO-2003-0531</u>
Service Support Pursuant to Section 254 of the)	
Telecommunications Act of 1996.)	

**PETITION FOR RECONSIDERATION AND
APPLICATION FOR REHEARING
OF
MID-MISSOURI CELLULAR**

Comes now Missouri RSA No. 7 Limited Partnership d/b/a/ Mid-Missouri Cellular (“MMC”) and requests that the Missouri Public Service Commission (“PSC”) reconsider its August 5, 2004 Report and Order (“Order”) in the above-captioned proceeding or grant a rehearing with respect to the issue of whether the designation of MMC as an eligible telecommunications carrier (“ETC”) is in the public interest. The conclusions and findings in the Order are inconsistent with the record evidence in this matter and rely upon serious errors of law. In support of this application, the following is respectfully shown:

Overview

The Federal Communications Commission (“FCC”) has recognized that the principle of competitive neutrality controls in the designation of competitive eligible telecommunications carriers (“CETC”), 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.¹

Congress, through the Telecommunications Act of 1996, established the procedure whereby *competitive* ETCs should be designated. Yet, throughout the *Order*, the PSC appears to be applying a standard of requiring a new market entrant to demonstrate that the existing ETC is not providing adequate service or is somehow unable to provide service throughout its designated service area. By definition, the designation of a *competitive* ETC, acknowledges that there would be *more than one* such ETC designated. There is no requirement that an applicant seeking ETC designation demonstrate that there is not currently service available nor is that position supported by the Communications Act of 1934, as amended, to include the provisions of the Telecommunications Act of 1996 (“Act”), or any precedent. To the contrary, until just recently, the FCC had uniformly held that the introduction of competition alone was sufficient to find public interest in designating CETCs even in areas served by rural telephone companies. The ability or inability of the incumbent ETC to provide service is not a criterion for judging the entry of a CETC into the marketplace and represents a clear favor for the incumbent local exchange carrier (“ILEC”) over any new market entrant. The PSC did not apply this “lack of LEC service” test when it designated a CLEC as an ETC in an existing rural telephone company service area.²

The PSC found that MMC provides all services required to qualify for designation as an ETC. Yet, having made that finding, the PSC denied MMC’s application for ETC designation in areas served by both rural and non-rural local exchange carriers (“LECs”).

¹ Report and Order, CC Docket No. 96-45, FCC 97-157 (May 8, 1997) (¶ 47).

² See, *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*”).

The basis for the denial was that MMC had failed to “prove” that grant of its application would be in the public interest. The PSC admits that MMC’s application is wholly consistent with the evidentiary requirements that it applied in granting ETC designation in the *Green Hills Order* (which designation is governed by the exact statutory provisions applicable to the MMC designation), but attempts to distinguish this case because of further guidance that was issued by the FCC in two cases. The first such case³ was released by the FCC months after the filing of the MMC application, after the filing of direct, rebuttal and surrebuttal testimony, and literally days before the oral testimony in late January. The second case⁴ was not released by the FCC until April 12, 2004; after the close of the record, the filing of briefs, reply briefs and proposed findings of fact and conclusions of law in the instant case. Neither of these two cases added as a condition of ETC designation the requirement that there be a demonstration that the existing LEC could not provide service throughout its existing service area.

The PSC finds that MMC offered oral testimony at hearing that it would comply with each and every obligation and commitment set forth in the FCC’s *Virginia Cellular Order*. MMC submits that the record is replete with specific, detailed explanations of exactly how MMC would use ETC funds and demonstrating that the grant of its application would serve the public interest.

³ *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*”).

⁴ *In the Matter of Federal-State Joint Board on Universal Service, Highland Cellular, Inc. Petition for Designation as an Eligible Telecommunications Carrier In the Commonwealth of Virginia, Memorandum Opinion and Order*, CC Docket No. 96-45, FCC 04-37 (rel. April 12, 2004), (“*Highland Cellular Order*”).

Indeed, the *Order* does not appear to truly turn on a lack of such demonstration in MMC's testimony, but rather the *Order* denies the MMC application because those commitments were not in *writing* and therefore lacked sufficient specificity. MMC submits that such a ruling is wholly inappropriate, where, as here, the PSC is seeking to decide a long-pending case on the basis of a new or modified standards announced after the close of all written testimony. However, to the extent that the PSC decides that it requires further written submissions on which to make a finding consistent with the newly-released FCC orders, the case for rehearing on this single issue is clear.

Particularly relevant here is the fact that PSC action denying the MMC application serves only to deny access to readily available federal funds for use to the benefit of the citizens of rural Missouri. Chairman Gaw and Commissioner Murray have written to the Chairmen of the United States Senate Committee on Commerce, Science and Transportation and the United States House Committee on Energy and Commerce expressing the urgent need for additional funding for rural telecommunications services and decrying the fundamental unfairness of funds being made available to only selected states, citing such disparities as evidence that "something is very wrong."⁵ Clearly, Commissioners Gaw and Murray believe there is a strong public need for access to additional funds for expanding telecommunications offerings in rural Missouri. Ironically, the *Order* denies MMC for failing to prove "in writing" that which the majority of the Commission at the time of the MMC hearing (and when the letter was written on February 25, 2004) already knew; that the access to funds to enhance rural Missouri telecommunications services *is* in the public interest. For the PSC to then take a position that only further exacerbates Missouri's lack of

⁵ See Mid-Missouri Reply Brief pages 3-4 and Attachment A thereto.

access to readily available federal funds for the sole benefit of the citizens of rural Missouri is most ironic. Rehearing on the limited issue of allowing MMC to submit written documentation to further support and add greater “specificity” to the oral testimony submitted at hearing would clearly be the most expedient means of resolving this matter, should the PSC continue to maintain that such written documentation is required. This is without prejudice to MMC’s position that there is ample evidence in the record, as it presently stands, that clearly demonstrates that designation of MMC as an ETC would be in the public interest.

Summary of Errors

1. The PSC Erred in Not Designating MMC as an ETC in the Areas Served by Non-Rural Carriers.
2. The PSC Erred in Not Designating MMC as an ETC in the Areas Served by Rural Carriers.
3. The PSC Erred in Finding That Redefinition of the Spectra Service Area Could Result in Cream-Skimming.
4. The PSC Erred in Finding That Grant of the MMC ETC Designation Would Unduly Burden the USF.
5. The PSC Erred in Finding MMC’s Commitments to Quality of Service Inadequate.

Argument

I. The PSC Erred in Not Designating MMC as an ETC in the Areas Served by Non-Rural Carriers.

The PSC expressly found that MMC provides all of the services required for ETC designation and that MMC advertises such services. Section 214(e)(2) of the Communications Act of 1934, as amended (“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). (emphasis added).

The *Order* is silent as to the statutory requirement to designate MMC as an ETC in the areas served by the non-rural carriers but the Dissenting Opinion of Commissioner Connie Murray acknowledges this statutory provision and its applicability where, as here, the PSC has found that the requesting carrier has been found to have met these statutory requirements. The public interest finding upon which the *Order* denies the MMC application is only applicable with respect to areas served by rural telephone companies.⁶ Accordingly, the PSC erred in not designating MMC as an ETC in the areas served by Southwestern Bell and CenturyTel of Missouri, LLC.

Without prejudice to the foregoing clear, unambiguous statutory language, the *Order* references a portion of the *Virginia Cellular Order* holding, inferring that some unspecified additional public interest considerations *might* apply in non-rural areas but since the more stringent finding of public interest in the rural service areas was met, any less stringent requirement applicable in the non-rural areas had, by necessity, also been met. However, the PSC *Order* misstates that in both the *Virginia Cellular Order* and *Highland Cellular Order* “...the FCC said that an additional ETC *was not* in the public interest in every instance even in non-rural areas.” (Order at pp. 21-22). Neither FCC case made such a holding. Rather, in both cases, the FCC allowed for the possibility that even in an area served by a non-rural LEC, designation might not “necessarily be consistent with the public interest in every

⁶ “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.” Act at Section 214(e)(2).

case.”⁷ Assuming that to be a proper interpretation of law,⁸ neither case went on to establish any criteria whereby such a grant would not be consistent with the public interest holding, instead, no such analysis or determination was necessary in either case because the FCC found that the grant, being in the public interest in the rural areas by necessity had to be in the public interest in the non-rural areas where, if there was a public interest requirement, it had to be far less stringent. Accordingly, neither FCC order reaches the question as to whether any other criteria is applicable in the case of non-rural LEC service areas and, if so, what such standard should be.⁹

The PSC *Order* attempted to follow the FCC thought process in these cases. Indeed, the PSC expressly states that it “...will *first* examine whether MMC has shown that it is in the public interest for it to be designated as an ETC in the rural areas” (Order at p. 22). Presumably, had the PSC found that MMC had met the requirements for demonstrating public interest in the rural LEC service areas, it would have obviated the need to reach what it acknowledges as a lower standard in areas served by non-rural LECs. However, failing to find that MMC satisfied the PSC’s rural requirements, the PSC must then make a finding in the non-rural LEC areas both as to what the appropriate lower standard should be, (assuming, *arguendo*, that the expressed, unambiguous statutory language would actually allow the denial of an ETC designation in the area served by a non-rural LEC after finding that the

⁷ *Highland Cellular Order* at ¶ 21, *Virginia Cellular Order* at ¶ 27.

⁸ Both orders acknowledge that prior to these cases, the Commission had consistently found grants to be per se in the public interest in the areas served by non-rural telephone companies. *Id.*

⁹ It should be noted that while these FCC orders are helpful in providing guidance as to the types of showing that would demonstrate that an ETC designation would be in the public interest, these cases, which expressly acknowledge that they are at odds with previous FCC precedent, are both under reconsideration and neither has become a final order of the FCC.

expressed statutory requirements for such designation had been met), and then whether MMC had met that lower standard. The *Order* does neither. Even assuming that the PSC could legally implement a lower, non-specified public interest standard applicable in non-rural LEC service areas, the PSC erred in providing no analysis or making any such finding but still denying the requested ETC designation in the non-rural areas, a fact that Commissioner Murray acknowledges in her dissent.

II. The PSC Erred in Not Designating MMC as an ETC in the Areas Served by Rural Carriers.

The *Order* holds that MMC failed to demonstrate that its designation as an ETC would be in the public interest. This determination is clearly not supported by the record and is inconsistent with the law. There is no issue that MMC met all requirements as established under the only-applicable PSC precedent, the *Green Hills Order*. The PSC seeks to distinguish that case because of the *Virginia Cellular Order*. However, the PSC correctly finds that MMC has made all of the commitments and agreed to all conditions placed on the ETC applicant in the *Virginia Cellular Order*. Having held that the commitments and conditions of the *Virginia Cellular Order* should control in the finding of whether the grant of an ETC application in rural LEC service areas is in the public interest, and having found that MMC has made the same commitments as the ETC applicant did in that case, the PSC cannot support a determination that MMC had failed to demonstrate that its grant would be in the public interest. To do so, the PSC fails to consider and/or misinterprets ample evidence in the record, at odds with the factual findings in the *Order*, and uses those findings to reach inappropriate conclusions of law to find MMC's showings inadequate because they are not in "writing."

A. **The PSC Erred in Finding that There is no Evidence that MMC was Currently Unable to serve areas where ETC Designation is Requested.**

The Commission, when looking to downplay the significance of low income citizens in rural Missouri being able to obtain mobility at a rate comparable to the current limited LEC service, finds that there are areas within the MMC coverage area where there are “dead spots and dropped calls”. Indeed, the PSC finds these to be “disadvantages” of MMC. (*Order* at pp. 8, 24). Yet, the *Order* then turns around and finds that there is “no evidence” that MMC cannot provide coverage throughout its entire proposed ETC service area. (*Order* at pp. 8, 24-25). The PSC cannot rely on contradictory findings when they are needed to make each point.

In finding that MMC’s ETC designation would not serve the public interest, the PSC attempts to distinguish MMC from the *Virginia Cellular Order* and *Highland Cellular Order* because those carriers offered plans to fill-on dead spots and to provide service where landline service was lacking. As the *Order* recognizes, MMC made the same commitments as those by the carrier in the *Virginia Cellular Order*. The testimony is clear that MMC intends to use Universal Service Fund (“USF”) support to fill in dead spots and enhance its coverage within its proposed ETC-designated service area.¹⁰ While the applicant in the *Virginia Cellular Order* did indicate that it intended to expand service into areas where the existing LEC did not provide service, the lack of service by the existing LEC was not determinate as to whether or not the grant of the *competitive* ETC application was in the

¹⁰ [Mr. Dawson] “We would continue to look at opportunities to -- to build out additional sites to provide even better coverage than we currently do.

Q. [Commissioner Clayton] When you say build out sites, is that within that –

A. [Mr. Dawson] Correct. The seven-county area, yes, sir.

Q. [Commissioner Clayton] Would that be to eliminate dead spots?

A. [Mr. Dawson] Correct. Correct.” Tr. p. 70.

public interest. Indeed, not only was this fact not dispositive in the *Virginia Cellular Order*, the FCC expressly acknowledged that the alleged unavailability of LEC service was disputed.¹¹ The *Order* states that MMC has not shown that it would serve any areas not served by LECs and, while not relevant to any finding that grant of a *competitive* (i.e. more than one) ETC would be in the public interest, it should be noted that the testimony in the record acknowledges that which the PSC is well aware of, that LECs continue to build out their networks to provide new service¹²; a fact absolutely indicative that, to the extent the PSC finds it relevant, the ILECs are not offering ubiquitous service.

While MMC has committed to use USF support to assist in filling in dead spots, the PSC has improperly used the existence of “dead spots” as an argument against granting the requested ETC designation. However, the FCC has made it clear that, contrary to the finding of the PSC, the existence of dead spots are not a basis upon which ETC designation should be denied.

The Commission has already determined that a telecommunications carrier’s inability to demonstrate that it can provide ubiquitous service at the time of its request for designation as an ETC should not preclude its designation as an ETC. [footnote omitted]. Moreover, as stated above, Virginia Cellular has committed to improve its network [footnote omitted]. In addition, the Commission’s rules acknowledge the existence of dead spots [footnote omitted]. “Dead spots” are defined as “[s]mall areas within a service area where the field strength is lower than the minimum level for reliable service.” [footnote omitted]. Section 22.99 of the Commission’s rules states that “[s]ervice within dead spots is presumed” [footnote omitted]. Additionally,

¹¹ “According to Virginia Cellular, 11 out of 12 of its proposed cell sites contain some area that is unserved by Virginia Cellular’s facilities and/or wireline networks. [citation omitted] *but see* Virginia Rural telephone Companies Comments at 3 (stating that there is an incumbent ETC in all the areas where Virginia Cellular seeks ETC designation).” Virginia Cellular Order at footnote 88. (emphasis original).

¹² See Tr. at p. 402-403 where Mr. Martinez testified that there are indeed areas where CenturyTel (collectively referring to CenturyTel and Spectra Communications) was not providing service within its ETC designated service areas.

the Commission's rules provide that "cellular service is considered to be provided in all areas, including dead spots... [footnote omitted]" Because "dead spots" are acknowledged by the Commission's rules, we are not persuaded by the Virginia Rural LECs that the possibility of dead spots demonstrates that Virginia Cellular is not willing or capable of providing acceptable levels of service throughout its service area."¹³

Indeed, analogizing MMC's service offering to the ILEC, the ILEC service offering is limited to those areas within the reach of the telephone cord to the phone jack. All other areas in the ILEC service are "dead spots." Clearly, unless and until such time as there are ubiquitous phone jacks throughout the ILEC service territory, by definition, a wireless carrier is affording service to an area where the ILEC currently is not. The benefits of this mobility, with "dead spots" far less than those created by the tether to the ILEC phone jack, are clearly of significant public benefit, especially in the context of emergency communications given that, as the PSC is aware, in many of the most rural portions of MMC's proposed ETC service area the landline customer does not even have access to true basic 911 service (see *infra* at p. 16).

Moreover, while Virginia Cellular committed, on a prospective basis, to provide service to residents "to the extent that they do not have access to the public switched network,"¹⁴ MMC, in addition to making that very commitment, submitted detailed specific testimony of where it has already used its network to do so. The *Order*, while finding the prospective-only promise of Virginia Cellular compelling, finds the very same commitment

¹³ *Virginia Cellular Order* at ¶ 23.

¹⁴ *Virginia Cellular Order* at ¶ 29.

by MMC, *coupled with actual testimony of where MMC had already done so*, unconvincing.¹⁵

B. The PSC Erred in Finding that the Availability of Competitive and Emergency Services Would Not be Materially Adversely Affected by the Denial of MMC's ETC Designation.

Pivotal to the PSC's holding is the conclusion that MMC already provides service throughout its proposed ETC service area, that MMC will proceed with the upgrade to its network to CDMA regardless of whether or not it was designated as an ETC, and that MMC was obligated to provide E911 service with or without ETC designation so that there was no public benefit from an emergency standpoint from affording MMC the requested designation. These findings are contrary to the record evidence.

MMC expressly represented that it would use the USF funds for the construction and operation of its network only as allowed. As previously shown, MMC expressly stated that it would use USF funds to fill in dead spots and enhance its service offerings in its ETC designated area. MMC provided detailed testimony on how the funds would be used to upgrade its network to CDMA and, in highly confidential testimony, provided specific information as to the number of cell sites that would be upgraded to CDMA and a detailed cost estimate breakdown for that upgrade. The financial cost information provided showed that the proposed CDMA upgrade alone would greatly exceed the amount of support MMC would receive. What MMC did not testify to was that the conversion to CDMA would proceed throughout its network without USF support.

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¹⁵ While acknowledging the testimony, the *Order* merely mentions the fact, minimizes it as a single incident, and then disregards it in its holding. (*Order* at p. 24).

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C. The PSC Erred in its Findings and Conclusions That MMC's Lifeline and Link-up Services Were Not of Public Benefit.

The *Order* acknowledges that MMC proposes to offer two special calling plans to Lifeline subscribers at rates comparable to their existing LEC Lifeline rate (*Order* at p. 6-7). The *Order* then continues to discuss the fact that all of MMC's existing price plans would also be subject to a Lifeline discount. MMC expects that virtually all Lifeline subscribers would opt for one of the two Lifeline-only plans; plans tailored to the needs of the Lifeline subscriber as opposed to its more standard wireless service plans.

While the MMC Lifeline-only plans are comparable to the LEC offerings in price, the *Order* acknowledges that the MMC Lifeline plans include in their pricing vertical features not included in the LEC pricing. (*Order* at p. 7-8). However, having made these findings, the *Order* then goes on to focus only on the discount off of the regular MMC price plans and not the special Lifeline-only plans. The *Order* also incorrectly compares the MMC regular pricing plans and their bundled minutes with the LEC "unlimited local calling plans" (*Order* at p. 8). However, as MMC made clear, both of its Lifeline-only plans offer unlimited local calling (Tr. at pp. 59, 157). The \$6.95 Lifeline plan offers the same local calling area as the LEC service area while the \$10.00 plan offers a local calling area throughout MMC's entire proposed ETC-designated service area. The PSC did acknowledge that the MMC calling plans (including the lifeline-only plans that are priced comparable to the LEC plans), are actually significantly cheaper when you factor in the tariff price for features such as voicemail, call waiting, call forwarding, three way calling and caller ID. (*Order* at pp. 7-8).

Attached hereto as Exhibit 4 is a detailed comparison of the relative costs and features of the MMC Lifeline plans as compared to the Intervenor Lifeline offerings. Instead of focusing on the vastly expanded local calling area, the additional benefits of mobility and enhanced 911 calling, the *Order* summarily dismisses these significant public interest benefits by finding that “...for low-income customers, the cost of initiating service will erase any benefit that a Lifeline customer would receive through a \$1.75 discount.” (*Order* at p. 16). This holding ignores the substantial further discounts and savings associated with the two MMC Lifeline-only plans and the fact that these low-income subscribers can, for the first time, have a local calling area encompassing nearly all of seven counties.

In addition, in considering the MMC “start-up costs”, the PSC ignores the fact that all of the LEC tariffs include activation fees and require the purchase of a LEC telephone that is limited in use to the length of the telephone wire attached to it. No such comparison of LEC and MMC costs was included in the PSC’s summarial dismissal of these benefits. Any meaningful analysis of the benefit of MMC’s Lifeline plans could only conclude that designation of MMC as an ETC would be of substantial benefit to the lower income members of the rural communities where MMC seeks ETC designation.

Finally, the PSC ignored the fact that MMC, as an ETC, would also comply with the FCC’s Link-up requirements. The Link Up program offers substantial relief from the burden associated with the service start-up costs, in addition to the lower activation cost.²²

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47 CFR 54.411 (b)(2) provides Link Up subscribers with the following option:

“A deferred schedule for payment of the charges assessed for commencing service, for which the consumer does not pay interest. The interest charges not assessed to the consumer shall be for connection charges of up to \$200.00 that are deferred for a period not to exceed one year. Charges assessed for commencing service include any charges that the carrier customarily assesses to connect subscribers to the network. These charges do not include any permissible security deposit requirements.”

Accordingly, the PSC erred in this finding and that the MMC Lifeline and Link Up programs would not be of substantial public benefit.

D. The PSC Erred in Ignoring the Fact that Denial of MMC's ETC Designation Would Preclude Low Income Subscribers From Participating in Local Number Portability.

The PSC also chose to totally ignore the impact of denying ETC status would have on a low income Lifeline eligible subscriber's ability to participate in local number portability. On November 10, 2003, the FCC issued a *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking* in the matter of Telephone Number Portability, CC Docket No. 95-116 (Released November 10, 2003) ("*Intermodal Porting Order*"). In that Order, the FCC recognized that each type of service (wireless and wireline) offers advantages and disadvantages. In recognizing that the wireless carrier might have greater opportunities to port wireline customers than vice versa, the FCC made it abundantly clear that competitive neutrality did not require identical regulatory schemes. In fact, the FCC expressly recognized the greater state regulatory burdens placed on LECs and found that that was not a basis upon which to alleviate a wireline porting obligation.

"In our view, it would not be appropriate to prevent wireline customers from taking advantage of the mobility or the larger local calling areas associated with wireless service simply because wireline carriers cannot currently accommodate all potential requests from customers with wireless service to port their numbers to wireline service providers...To the extent that wireline carriers may have fewer opportunities to win customers through porting, this disparity results from the wireline network architecture and state regulatory requirements, rather than Commission rules." (*Intermodal Porting Order* at ¶12).

The *Intermodal Porting Order* stands for the proposition that absent a technical engineering reason, there can be no artificial barriers established to block the ability of a wireline customer to port their number to a wireless carrier.

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

In light of the foregoing, it is clear that the PSC erred in failing to find significant public interest benefits accruing to low-income rural subscribers by designating MMC as an ETC.

III. The PSC Erred in Finding That Redefinition of the Spectra Service Area Could Result in Cream-Skimming.

The level of support received by an ETC is based upon the level of support received by the ILEC in each part of the designated ETC service area. Where the rural carrier ILEC

study areas used in determining the level of high cost support and the proposed ETC service area is not wholly encompassed within the proposed ETC designated service area, a potential “cream skimming” issue arises. Cream skimming occurs when a CETC serves only the lower cost portions of the LEC study area but receives support based upon costs that have been averaged and include those associated with providing service to the higher-cost portions of the LEC study area. In the *Virginia Cellular Order*, the FCC used a comparison of relative population densities of the portion of the ILEC study area that was within the proposed ETC designated service area as compared to the population density of the ILEC study area that was outside of the proposed ETC service area. In its *Order*, the PSC holds that the record is silent with respect to “... specifics of Spectra’s disaggregation plan, and the population density in Spectra’s exchanges...[leaving the PSC] unable to find that no cream skimming would occur with respect to Spectra’s Concordia exchange...” (*Order* at pp. 13-14). The PSC conclusion is inconsistent with its finding of fact and in err.

The record clearly indicates that Spectra has disaggregated its cost down to the wire center level (*Order* at p. 13). Accordingly, any level of USF received by Spectra with respect to the Concordia wire center, would be based upon the costs expressly limited to that wire center. This fact obviates any possibility of cream-skimming since MMC’s level of support in that wire center would be tied directly to the level of support Spectra receives *for that wire center alone* based upon its costs of service in that wire center alone.

The PSC therefore erred in concluding that there was any potential for cream-skimming or in concluding that absent population density information, it could not make the requisite finding. Since the level of support is based solely upon the costs of that wire center,

and that wire center only, it is irrelevant that population density comparisons are not in the record. The FCC has made this abundantly clear.

[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.***²³

Finally, the PSC found that by proposing to serve the Concordia wire center, MMC had committed to serve that entire non-contiguous portion of the Spectra study area which is geographically separated from the balance of the Spectra study area scattered throughout the state. The FCC has found that these facts, in and of themselves, provide an additional basis supporting service area redefinition.

In the *Universal Service Order*, the [FCC] 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 [FCC] 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.²⁴

²³ *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 18136, 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.

²⁴ *Virginia Cellular Order* at ¶ 38.

In light of the foregoing, the PSC clearly erred in not finding that MMC's designation as an ETC for the Spectra Concordia wire center would not result in cream skimming.

IV. The PSC Erred in Finding That Grant of the MMC ETC Designation Would Unduly Burden the USF.

The PSC found that the total USF support for MMC would be \$1.75 million annually (*Order* at p. 5) which amounts to *one twentieth of one percent* (0.20%) of the high-cost universal support. (*Order* at p. 23). To put this in perspective, the total amount of USF support which MMC would receive is *less* than the amount of USF support that one of the Intervenors receives. Specifically, Citizens *alone* receives annual USF high-cost support in excess of \$1.96 million or nearly 0.23% of the high cost fund.²⁵

The FCC made it clear in the *Virginia Cellular Order* and *Highland Cellular Order*, that

As discussed above, the Commission has asked the Joint Board to examine, among other things, the Commission's rules relating to high-cost universal service support in service areas in which a competitive ETC is providing service, as well as the Commission's rules regarding support for second lines. [footnote omitted] We note that the outcome of the Commission's pending proceeding examining the rules relating to high-cost support in competitive areas could potentially impact, among other things, the support that Highland Cellular and other competitive ETCs may receive in the future. It is our hope that the Commission's pending rulemaking proceeding also will provide a framework for assessing the overall impact of competitive ETC designations on the universal service mechanisms.²⁶

Accordingly, while there is concern as to the long-term sustainability of the USF, the context of the MMC application is clearly not the forum for that issue to be decided. The broad

²⁵ See First quarter 2004 support numbers by carrier, Universal Service Administrative Company, at: <http://www.universalservice.org/overview/filings/2004/Q1/HC01-%20High%20Cost%20Support%20Projected%20by%20State%20by%20Study%20Area%201Q04.xls>

²⁶ *Highland Cellular Order* at ¶ 25.

underlying issue is before the FCC in the context of a pending rulemaking which will ultimately dictate the appropriate level of support for all ETCs.

The impact on the USF by designating MMC as an ETC would be *de minimis*, at best, and well below the level of support received by just one of the Intervenors. The FCC and other states continue to designate wireless carriers as ETCs and PSC action denying the designation to MMC does nothing to restrict the access of wireless carriers to ETC funds *in virtually all other states* where the issue has been decided. Instead, PSC action denying the MMC application merely ensures that the citizens of rural Missouri are denied access to the readily available federal funds for enhancing telecommunications service in the rural areas. Accordingly, since the designation of MMC as an ETC will, in and of itself place no significant burden on the USF, the PSC erred in denying MMC's application on that basis.

V. The PSC Erred in Finding MMC's Commitments to Quality of Service Inadequate.

Where the PSC can interpret the *Virginia Cellular Order* as supporting denial of the MMC application, the *Order* freely cites that case. Indeed, as previously discussed, the PSC uses the *Virginia Cellular Order* as the reason for departing from its own *Green Hills Order*. Yet, consistently, where the *Virginia Cellular Order* makes it clear that MMC's showing is sufficient to satisfy the public interest requirement, the PSC ignores the *Virginia Cellular Order*.

In both the *Virginia Cellular Order* and the *Highland Cellular Order*, the FCC expressly found that adoption of the Cellular Telecommunications and Internet Association's ("CTIA") Consumer Code for Wireless Service, coupled with the reporting of consumer complaints per 1,000 handsets on an annual basis, and the other commitments made by those

carriers and MMC alike, adequately addressed “...any concerns about the quality of its wireless service.”²⁷

MMC made expressed, specific commitments in its application and sworn testimony; commitments that mirrored each and every commitment which the FCC found in the *Virginia Cellular Order* to be sufficient to make the public interest showing required for designation of an ETC in an area served by a rural LEC, including adoption of the reporting requirements and the CTIA Consumer Code. Accordingly, the PSC erred in finding that MMC had not met its obligations with respect to quality of service.

CONCLUSION

The citizens of rural Missouri are entitled to the same wireless telecommunications service as rural citizens in other states. MMC has presented a detailed application for ETC designation that would allow ready access to federal USF funds. The use of those funds is restricted, by law, to the construction and operation of qualified services in the designated ETC service area. MMC has shown how its designation would be in the public interest. Accordingly the PSC should reconsider its order denying the MMC application. In the alternative, should the PSC feel that additional written public interest documentation is required, the PSC should re-open the record and accept such additional written evidence on this issue.

²⁷ *Virginia Cellular Order* at ¶ 30; *See also, Highland Cellular Order* at ¶ 24.

Respectfully submitted,

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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 13th day of August, 2004, to:

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EXHIBIT I: Mid-Missouri Cellular Phase II CDMA Coverage

**EXHIBIT II: MID-MISSOURI CELLULAR AREAS REQUIRING CDMA ENHANCEMENT AFTER
PHASE I AND II - 10 ADDITIONAL PROPOSED SITES ARE IDENTIFIED**

**EXHIBIT III: AREAS THAT WOULD BENEFIT FROM ENHANCED CDMA COVERAGE
OVER CURRENT MID-MISSOURI CELLULAR CDMA SERVICE AND
UNDERLYING WIRE CENTER BOUNDARIES**

Exhibit 4

RATE COMPARISON FOR LIFELINE CUSTOMERS

Basic Cost	Citizens	Alma	Spectra Concordia	Mid-Missouri Telephone	Mid-Missouri Cellular Option 1	Mid-Missouri Cellular Option 2
Basic Local Service	\$ 6.65	\$ 4.75	\$ 6.76	\$ 6.75	\$ 6.95	\$ 10.00
Relay Missouri Surcharge	\$ 0.10	\$ 0.10	\$ 0.10	\$ 0.10	\$ -	\$ -
FCC Line Charge	\$ 6.50	\$ 1.50	\$ 6.50	\$ -	\$ -	\$ -
E911 Service Tax	\$ 0.82	\$ 0.97	\$ -	\$ -	\$ -	\$ -
Total Single Line Monthly Charge	<u>\$ 14.07</u>	<u>\$ 7.32</u>	<u>\$ 13.36</u>	<u>\$ 6.85</u>	<u>\$ 6.95</u>	<u>\$ 10.00</u>

Included Features

Local Calling Area in the MMC Seven County Service Area	No	No	No	No	No	Yes
Mobility within Calling Area	No	No	No	No	Yes	Yes
Voice Mail ⁽¹⁾	No	No	No	No	Yes	Yes
Call Waiting ⁽¹⁾	No	No	No	No	Yes	Yes
Call Forwarding ⁽¹⁾	No	No	No	No	Yes	Yes
Three Way Calling ⁽¹⁾	No	No	No	No	Yes	Yes
Caller ID ⁽¹⁾	No	No	No	No	Yes	Yes

(1) These features are offered by each LEC for additional charges. (see Order at pp. 7-9).