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June 26, 2003

Dale Hardy Roberts
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P.O. Box 360
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FILED²
JUN 26 2003
Missouri Public
Service Commission

Re: Case No. TO-2003-531

Dear Mr. Roberts:

Enclosed for filing on behalf of Alma Communications Company d/b/a Alma Telephone Company, Spectra Communications Group, LLC d/b/a CenturyTel, CenturyTel of Missouri, LLC and Citizens Telephone Company of Higginsville, Missouri, please find an original and eight (8) copies of Brief of Intervenors.

Would you please see that this filing is brought to the attention of the appropriate Commission personnel.

I thank you in advance for your cooperation in this matter.

Sincerely yours,

BRYDON, SWEARENGEN & ENGLAND P.C.

By:

Sondra B. Morgan

Sondra B. Morgan

SBM/lar

Enclosure

cc: Dan Joyce
Michael Dandino
Paul DeFord

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED²

JUN 26 2003

Missouri Public
Service Commission

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

Case No. TO-2003-0531

BRIEF OF INTERVENORS

INTRODUCTION

On June 2, 2003, Missouri RSA No. 7 Limited Partnership d/b/a Mid-Missouri Cellular (Mid-Missouri Cellular) filed its Application with the Missouri Public Service Commission (Commission) for designation as an Eligible Telecommunications Carrier with respect to federal universal service support. As Mid-Missouri Cellular states in its Application, "... no CMRS carrier has sought designation from the Commission as an Eligible Telecommunications Carrier ("ETC"). For that reason, the instant application represents a case of first impression for the Commission." (Application, p. 2).

On June 20, 2003, the Commission issued an *Order Granting Interventions, Setting Time for Responses, and Directing Filing* in this case in which it granted the applications to intervene filed by Alma Communications Company d/b/a Alma Telephone Company, Spectra Communications Group, LLC d/b/a CenturyTel, CenturyTel of Missouri, LLC and Citizens Telephone Company of Higginsville, Missouri. In its *Order*, the Commission: (1) noted that its Staff, Alma, Spectra, CenturyTel and Citizens each referred the Commission to various actions of its sister commissions regarding jurisdiction over wireless ETC applications and directed the parties to provide further information regarding those decisions; and (2) directed those parties to brief the

relevance of the recent federal court decision, *Voices for Choices, et al. v. Illinois Bell Telephone Co., et al.*, No. 03 C 3290 (N.D. Ill. June 9, 2003). The parties were directed to file these briefs by June 26, 2003. Because of the limited time allotted to file the briefs and the amount of material to be covered, Alma, Spectra, CenturyTel and Citizens (hereinafter "Intervenors") chose to work together and file one brief.

This brief is divided into two parts. Part I will address the relevance of the *Voices for Choices* decision and other federal court cases holding that Congress has unmistakably expressed an intent for state commissions to participate in the federal regulatory function through the Telecommunications Act of 1996 ("the Act") and has, therefore, delegated the necessary authority to the states regarding certain issues where states logically have more experience and expertise. Part II will discuss other state decisions where the state commission has asserted jurisdiction over applications for eligible telecommunications carrier ("ETC") designation by wireless carriers.

Part I: The Commission's authority over ETC applications and certifications arises from federal law.

Voices for Choices. The *Voices for Choices*¹ case recognized that the federal Telecommunications Act of 1996 ("the Act") delegated federal authority to state commissions to perform certain adjudicatory functions:

In Section 252 of the [Act], Congress delegated arbitral powers to state commissions, not the states themselves."²

Accordingly, the court explained that the Illinois Commission's authority "is derived from

¹ No. 03 C 3290 (N.D. Ill. June 9, 2003), 2003 U.S. Dist. LEXIS 9548.

² *Id.* (citing 47 U.S.C. § 152).

Congress, not the Illinois legislature.”³ The Court stated:

The ICC’s rate-making authority with respect to the rates an incumbent LEC may charge competing LECs for use of UNEs, is derived from Congress, not the Illinois legislature; **the ICC’s task is to accomplish Congress’ objective in enacting the FTA.**⁴

The *Voices for Choices* court also noted that state commissions have professional staffs and expertise, so state commissions are “the logical unit of state government” to play a role in implementing the provisions of the Act.

Voices for Choices represents the line of cases that view state commissions as “deputized federal regulators” authorized to exercise regulatory power granted by the Act. In *BellSouth Telecommunications, Inc. v. MCI Metro Access Transmission Services, Inc.*, 317 F.3d 1270, 1277-78 (11th Cir. 2003), the Eleventh Circuit addressed the question of state commission jurisdiction at length and observed:

At least one circuit has described state commissions as ‘deputized federal regulator[s]’ authorized to exercise regulatory power and ensure compliance with federal law as set out in the [Act].

(quoting *MCI Telecoms. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 344 (7th Cir. 2000). Therefore, the *BellSouth* court concluded that the Georgia Public Service Commission has the authority **under federal law** to interpret and enforce interconnection agreements. *Id.* at 1279.

Other courts have described this system as “cooperative federalism” where states are directed by provisions of the Act and FCC regulations to make certain decisions. In *Michigan Bell Tel. Co. v. MCI Metro*, 323 F.3d 348, 352 (6th Cir. 2003), the Sixth Circuit observed that much of the Act’s complexity “resulted from the Act’s incorporation of ‘cooperative federalism.’” *Id.* The Sixth Circuit explained, “In this

³ *Id.*

⁴ *Id.*

regulatory regime state commissions are directed by provisions of the Act and FCC regulations in making decisions . . . At the same time, the Act gives state commissions latitude to exercise their expertise in telecommunications and needs of the local market." *Id.*

Section 214 Authority. The Missouri Commission's authority to determine whether "common carriers" should be designated as ETCs and become eligible for universal service support derives from Congress and the Act itself, not state law. Specifically, Section 214(e)(2) of the Act provides:

Designation of eligible telecommunications carriers. A State commission **shall upon its own motion or upon request** designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the State commission. 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.**⁵

Thus, the Missouri Commission shall examine, "upon its own motion or upon request," the question of whether Mid-Missouri should be granted ETC status. In this case, Mid-Missouri has specifically requested relief from the Missouri Commission.

⁵ 47 U.S.C. § 214(e)(2)(emphasis added).

Section 254 Authority. Under Section 254(e) of the Act, carriers that receive federal universal service support must use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. 47. U.S.C. § 254(e). The Federal Communications Commission (FCC) has determined that state commissions must file annual certifications with the FCC to ensure that federal Universal Service Fund (USF) support is used in a manner that is consistent with Section 254(e) of the Act.⁶ Indeed, the Missouri Commission's Staff has recently begun working on a new rulemaking to "help the Commission verify that the high-cost funds are being used for the purpose intended by the Act."⁷

The FCC's § 254(e) certification requirements and Staff's proposed USF certification rule demonstrate the problem with Staff's position in this case. Under the Intervenor's view, the Act grants the Missouri Commission authority to make the ETC public interest determination in the first instance, and gives the Commission continuing authority to ensure that federal USF support is used properly. Under Staff's view, the Commission has no jurisdiction over a wireless carrier's ETC application, and it is unclear how the Commission could issue an order that it lacks jurisdiction over a wireless carrier's ETC application but then later assert jurisdiction over that wireless carrier under its §254(e) certification rule. In other words, if the Commission finds that it lacks jurisdiction over wireless carriers under §214, then how can it later assert jurisdiction over wireless carriers under §254?

⁶ *Ninth Report and Order and Eighteenth Order on Reconsideration*, CC Docket No. 96-45 (October 21, 1999); *Fourteenth Report and Order*, CC Docket No. 96-45 (May 10, 2001).

⁷ *In the Matter of a Proposed Rulemaking Regarding the Annual Federal Universal Service Fund Certification*, Case No. TX-2003-0381, *Order Finding Necessity for Rulemaking*, April 29, 2003.

Section 252 Authority. Section 252 of the Act grants state commissions the authority to approve or reject agreements between two telecommunications carriers. This grant of power to state commissions necessarily includes the power to enforce such agreements. *Southwestern Bell Tel. Co. v. Connect Commun. Corp.*, 225 F.3d 942, 946 (8th Cir. 2000). In practice, the Commission regularly asserts jurisdiction over wireless carriers under Section 252 of the Act. For example, the Commission has issued numerous orders making wireless carriers parties to cases involving negotiated agreements under the Act. See e.g. *Application of Citizens Telephone for Approval of a Traffic Termination Agreement under the Telecommunications Act of 1996*, Case No. TK-2003-0533, *Order Directing Notice and Making Sprint PCS a Party*, issued June 4, 2003.

Like proceedings under Section 252, a Section 214 determination of ETC status in a rural carrier's service area requires a public interest determination and, by necessity, involves the rural local exchange company ("LEC") in whose territory the wireless carrier seeks ETC status. Therefore, this Section 214 proceeding essentially involves a wireless carrier and the Intervenor LECs as "necessary parties" just like the Section 252 proceedings over which the Commission has repeatedly exercised jurisdiction. Staff cannot reconcile the fact that the Commission can assert jurisdiction over interconnection agreements pursuant to Section 252 and ETCs pursuant to Section 254 with Staff's position that the Commission lacks jurisdiction under Section 214 to determine ETC status.

Part II. Other states assert jurisdiction over wireless carrier ETC applications.

In its Order Granting Interventions, Setting Time for Responses, and Directing Filing, the Commission directed the parties to brief the actions of the various states cited in their pleadings in more detail. The Commission stated:

The parties should specifically address whether those states ruled on the issue of subject matter jurisdiction and what authority the state cited in determining that it did or did not have jurisdiction. Of particular interest is whether those state commissions found that their jurisdiction was limited in the same manner that Staff argues Section 386.020 limits this Commission's jurisdiction.

In their responses to Staff's Motion to Dismiss in this proceeding as well as their responses in the prior Mid-Missouri Cellular application case, Case No. TO-2003-0288, Intervenor argued that this Commission has jurisdiction to consider and rule on Mid-Missouri Cellular's application for designation as an ETC pursuant to 47 U.S.C. § 214(e)(2) of the Act even though the offering of radio communications services is exempted from the definition of "telecommunications service" in § 386.020 (53)(c) of the Missouri Revised Statutes. As support for this position, Intervenor cited several examples from other states where state commissions have considered and ruled on applications for ETC status from wireless carriers even where the state commissions did not otherwise regulate wireless carriers.

In response to the Commission's directive requesting additional information regarding these decisions from other states, Intervenor will attempt to provide that information. However, in the limited time allotted for this response it has not been possible to do an exhaustive survey of cases from other jurisdictions or to locate all state statutes that may be pertinent to this issue. Nevertheless, Intervenor believe that the discussion of several of these decisions below will assist the Commission in determining that it can and should assert jurisdiction over wireless carriers for the limited purpose of determining ETC status pursuant to the Act.

A. Other state commissions have asserted jurisdiction pursuant to the Act and have denied or granted applications for ETC status.

Despite specific state statutes excluding wireless carriers from state regulation, a number of state commissions have used their jurisdiction under the Act to deny or affirm wireless carrier applications for ETC status.

(1) **Nebraska.** In August of 1998, Western Wireless applied for ETC status in a number of Nebraska service areas, including areas served by incumbent rural carriers. Nebraska Revised Statute § 86-124 states that, "The commission shall not regulate the following: . . . (2) Mobile radio services, radio paging services, and wireless telecommunications service." Nevertheless, in November of 2000, the Nebraska Public Service Commission granted the application for ETC designation. In its order, the PSC stated that **"it must be shown by clear and convincing evidence that designation of a second ETC in a rural area is in the public interest."**⁸ On appeal, the Supreme Court of Nebraska noted that the Nebraska PSC was required to determine the meaning of 'public interest' as used in 47 U.S.C. § 214.⁹ The court affirmed the Nebraska PSC's decision and held that the PSC did not err in the manner in which it defined "public interest" and in determining that Western Wireless met its burden of proof to show that it should be designated as an ETC.¹⁰

(2) **Utah.** Despite a specific statute stating that the definition of "telephone corporation" in that state did not mean "intrastate telephone service offered by a provider of cellular, personal communication systems (PCS), or other commercial mobile radio service as defined in 47 U.S.C. Sec. 332 that has been issued a covering

⁸ *In re Application No. C-1889 of GCC Licence Corp.*, 647 N.W.2d 45, 50 (Neb. 2002)(emphasis added).

⁹ *Id.* at 52.

¹⁰ *Id.* at 56.

license by the Federal Communications Commission,”¹¹ the Public Service Commission of Utah considered and denied an application by a wireless carrier for ETC status in rural areas. In that case, the Utah PSC “found that a designation of [a wireless carrier] as an ETC in rural areas already served would not be in the public interest.”¹² The Utah Supreme Court affirmed the Utah PSC’s decision and noted that “state commissions have been given authority to designate common carriers as ETCs.”¹³ The Utah Supreme Court examined the federal requirement that a state commission must find that designating an additional ETC in a rural area is in the public interest. The Court explained, “**The statutory language that ‘the State commission shall find that the designation is in the public interest,’ 47 U.S.C. § 214 (e)(2), gives the PSC authority and thereby discretion to determine what is in the public interest.**”¹⁴

(3) **Washington.** The Washington Utilities and Transportation Commission also found that it had jurisdiction to address an application for ETC status in rural areas despite a state statute directing that the commission shall not regulate “[r]adio communications services provided by a regulated telecommunications company, except when those services are the only voice grade, local exchange telecommunications service available to a customer of the company. . . .”¹⁵ The Washington Commission stated, “The Commission has jurisdiction over the subject matter of this petition and over Inland Cellular with respect to its designation as an ETC.”¹⁶ The Washington

¹¹ Utah Code Ann. § 54-2-1(23)(b)(i).

¹² *WWC Holding Co. v. Public Service Comm’n of Utah*, 44 P.3d 714 (Utah 2002) (citing 47 U.S.C. § 214).

¹³ *Id.* at 717.

¹⁴ *Id.* at 719 (emphasis added).

¹⁵ Wash. Rev. Code §80.36.370(6).

¹⁶ *In the Matter of the Petition of Inland Cellular Telephone Company for Designation as an Eligible Telecommunications Carrier*, Docket No. UT-023040, *Order Granting Petition*, dated August 30, 2002.

Commission explained its jurisdiction under the Act:

The Telecommunications Act of 1996 requires state utility commissions to make a number of decisions related to opening local telecommunications markets to competition and preserving and advancing universal service. **One of those decisions is the designation of qualified common carriers as eligible telecommunications carriers (ETCs).**¹⁷

The Washington Supreme Court affirmed the Washington Commission's determination that United States Cellular had satisfied the statutory requirements for ETC status.¹⁸

(4) **Colorado.** The Colorado Public Utilities Commission considered and ruled on the application of Western Wireless Holding Co., Inc. for designation as an ETC.¹⁹ Parties to that case entered into a stipulation that stated that while the Colorado commission had no authority over Western Wireless as a CMRS provider, the Commission would have authority to enforce the terms of the stipulation. The Commission stated, however, that "the jurisdiction to grant and revoke ETC . . . designations is unquestioned." The Commission proceeded to find that the designation of Western Wireless as an ETC was in the public interest. The Colorado Commission is currently considering the application of NTCH-Colorado d/b/a Clear Talk for designation as an ETC in the state.²⁰

(5) **Maine.** The Maine Public Utilities Commission recently examined the application of a rural wireless carrier for ETC status pursuant to the Act.²¹ The Maine

¹⁷ *Id.* (emphasis added).

¹⁸ *Wash. Indep. Tel. Ass'n v. Wash. Utils. and Transp. Comm'n*, 65 P.3d 319 (Wash. banc 2003).

¹⁹ *Re Western Wireless Holding Co, Inc.*, Docket Nos. OOK-255T, OOA-174T, and OOA-171T, (January 8, 2001).

²⁰ *In the Matter of the Application of NTCH-Colorado, Inc. d/b/a Clear Talk, for Designation as an Eligible Telecommunications Carrier*, Docket No. 03A-095T.

²¹ *RCC Minnesota, Inc. SRCL Holding Co., Saco River Comms. Corp. Request for*

PUC recognized that wireless carriers are not considered providers of basic service, so they are “not subject to the Commission’s general jurisdiction.”²² Nevertheless, the Maine PUC cited the federal Act as its authority to review ETC applications:

Section 214(e) of the TelAct gives state commissions the primary responsibility for designating carriers as ETCs. . . . Further, as a condition for receipt of federal USF support, each year a carrier must certify to the state commission and the FCC that the funds it receives are being used in a manner consistent with the requirements of 47 U.S.C. § 254(e).²³

Thus, state Commission jurisdiction over § 214 ETC applications and § 254 USF support certification comes from the federal Act.

B. Other state commissions are presently examining wireless applications for ETC status.

A number of other state commissions are presently reviewing applications for ETC status filed by wireless carriers. Many of the state commissions that have asserted jurisdiction over wireless ETC cases view § 214(e)(2) as a grant of primary jurisdiction to the state commission whether or not the commission regulates wireless carriers.

(1) **Alaska.** The web page of the Regulatory Commission of Alaska states that wireless phone service is not regulated by the Alaska Commission,²⁴ but the Alaska Commission is currently considering the request of Alaska DigiTel, LLC for designation

Designation as Eligible Telecommunications Carrier, Docket No. 2002-344; 2003 Me. PUC LEXIS 208, *Order*, May 13, 2003.

²² *Id.* (citing 35-A Maine Revised Statutes Annotated §102(13)).

²³ *Id.* (emphasis added).

²⁴ <http://www.state.ak.us/rca/about.htm> (“The rates, services, and practices of many utilities are economically regulated by the Commission. Other utilities are not economically regulated. These include city-owned utilities, very small utilities, cable TV and cellular phone service, and cooperatives whose members have voted to de-

as an ETC.²⁵ In an Interim order, the RCA stated:

ETC status, if granted, would allow AK DigiTel to receive federal universal service funds for eligible telecommunications services that it provides in the designated service area. **Under 47 U.S.C. 214, we have discretion on whether to grant Ak DigiTel ETC status since it seeks ETC status in an area currently served by MTA, a rural telephone Company.**²⁶

(2) **West Virginia**. The West Virginia Commission is also examining an application for ETC status by a wireless carrier. On September 18, 2002, Highland Cellular petitioned the West Virginia Public Service Commission to be designated as an ETC in an area served by rural telephone companies. On January 16, 2003, Highland, the rural carrier, the Commission's Staff, and the consumer advocate jointly moved for a hearing before the West Virginia Commission arguing:

[T]his case is the first time that the Commission will consider the application of a wireless carrier seeking ETC status in the service area of a rural telephone company, and accordingly would result in the establishment of Commission policy.²⁷

The West Virginia Commission's Staff and the Consumer Advocate Division both oppose Highland Cellular's Petition.²⁸

regulate. ")

²⁵*In the Matter of the Request by Alaska DigiTel, LLC for Designation as a Carrier Eligible to Receive Federal Universal Service Support Under the Telecommunications Act of 1996*, U-02-39, Regulatory Commission of Alaska, 2002 Alas. PUC LEXIS 396.

²⁶*Id.*, *Order Granting and Inviting Intervention, Denying Request to Dismiss Application, Scheduling Prehearing Conference, and Appointing Hearing Examiner*, (August 29, 2002). (emphasis added).

²⁷ *Petition for Consent and Approval for Highland Cellular to be Designated as an Eligible Telecommunications Carrier in Areas Served by Citizens Telecommunications Company of West Virginia*, Case No. 02-1453-T-PC, Order, issued Jan. 22, 2003.

²⁸ See *Petition for Consent and Approval for Highland Cellular to be Designated as an Eligible Telecommunications Carrier in Areas Served by Citizens Telecommunications Company of West Virginia*, Case No. 02-1453-T-PC, *Procedural Order*, issued March 7, 2003.

(3) **Idaho**. The Idaho Public Utilities Commission does not have general jurisdiction over wireless providers,²⁹ yet the Idaho PUC is presently examining two applications for ETC status in rural areas that were filed by wireless carriers.³⁰ The Idaho Commission explained, "Through the Act state commissions are given authority to designate common carriers as ETCs [pursuant to] 47 U.S.C. §§ 214(e)(2) and 254."³¹

(4) **Kansas**. Likewise, wireless carriers are not subject to the Kansas Corporation Commission's jurisdiction,³² but the Kansas Commission has granted ETC status to two wireless carriers.³³ The Kansas Commission has recently established a procedural schedule to examine another wireless carrier's application for ETC status.³⁴

(5) **Oklahoma**. Although "the provision of wireless telephone service" is specifically excluded from Oklahoma's definition of "regulated telecommunications service,"³⁵ an application by a wireless carrier for ETC status is presently before the Oklahoma Corporation Commission.³⁶ In that case, the Oklahoma Commission ordered

²⁹ Idaho Code § 61-121.

³⁰ *In the Matter of the Petition of IAT Communs. d/b/a NTCH-Idaho d/b/a Clear Talk for Designation as an ETC; In the Matter of the Application of NPCR, Inc. d/b/a Nextel Partners seeking designation as an ETC*, Case Nos. GNR-T-03-8 and GNR-T-03-16, Joint Notice of Application, Intervenor Deadline, Modified Procedure, Protest/Hearing Request, and Comment Deadline, Order No. 29240, 2003 Ida. PUC LEXIS 65, May 27, 2003.

³¹ *Id.*

³² Kansas Statutes Annotated, § 66-104a.

³³ *In the Matter of GCC License Corporation's Petition for Designation as an Eligible Telecommunications Carrier*, Docket No. 99-GCCZ-156-ETC; 2001 Kan. PUC LEXIS 1234, Order on Petition of Western Wireless for Designation as an Eligible Telecommunications Carrier, Oct. 12, 2001.

³⁴ *In the Matter of the Petition of RCC Minnesota, Inc. for Designation as an Eligible Telecommunications Carrier under 47 U.S.C. § 214(e)(2)*, Docket No. 03-RCCT-293-ETC; 2003 Kan. PUC LEXIS 600, Order Establishing Procedural Schedule, May 27, 2003.

³⁵ Oklahoma Statutes, § 139.102(23).

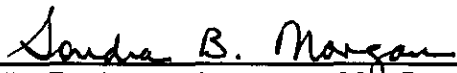
³⁶ *Application of United States Cellular Corporation for Designation as an Eligible*

US Cellular to provide notice of its ETC application to Oklahoma's Attorney General and "all ILECs in the exchanges located in the geographic areas in which US Cellular seeks to be designated as an ETC."³⁷

CONCLUSION

As can be seen from these state commission cases and the discussion of the federal cases above, the Act confers jurisdiction on state commissions to consider applications for ETC status by wireless carriers. Therefore, Intervenor's urge the Commission to assert jurisdiction over this first request by a wireless carrier for ETC designation in order that the very important public interest determination required under § 214(e)(2) may be made by this Commission.

Respectfully submitted,



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³⁷ *Id.*

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Certificate of Service

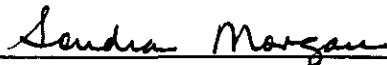
I hereby certify that a true and correct copy of the above and foregoing document was hand-delivered or mailed, United States Mail, postage prepaid, this 26th day of June, 2003 to:

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