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July 2, 2003

**FILED<sup>2</sup>**  
JUL 02 2003  
Missouri Public  
Service Commission

Secretary  
Missouri Public Service Commission  
P.O. Box 360  
Jefferson City, Missouri 65102

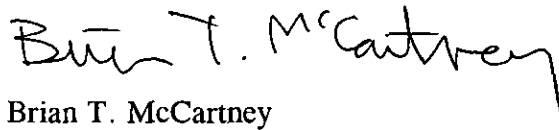
**Re: Case No. TO-2003-0531**

Dear Mr. Roberts:

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

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,

  
Brian T. McCartney

BTM/lar

Enclosure

cc: Michael Dandino  
Marc Poston  
Paul DeFord  
Lisa Credighton-Hendricks

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI

**FILED<sup>2</sup>**  
JUL 02 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

**REPLY BRIEF OF INTERVENORS**

**INTRODUCTION**

This case involves the first wireless carrier in Missouri to apply for status as an eligible telecommunications carrier (ETC) for receipt of federal universal service fund (USF) support. The Telecommunications Act of 1996 (the Act) granted state commissions such as the Missouri Public Service Commission (Commission) the primary responsibility for designating common carriers as ETCs. Because the application by Mid-Missouri Cellular involves areas of Missouri served by rural incumbent local exchange companies (ILECs), ETC designation must be supported by a finding that ETC status is in the public interest. The Act states, "Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest." 47 U.S.C. § 214(e)(2) (emphasis added). Many other state commissions have used their authority under the Act to examine ETC applications by wireless carriers -- even when their jurisdiction over wireless carriers is otherwise limited under state law.

## REPLY TO STAFF

### I. *Voices for Choices*.

Staff claims that the *Voices for Choices*<sup>1</sup> case “has no relevancy to the present case,” and Staff argues that the Missouri legislature “limited the jurisdiction of the Commission without preempting federal authority.” (Staff Response, pp. 8-9) However, Staff concedes that the *Voices for Choices* court “found that ***Congress delegated arbitration power to state commissions, and not to the states themselves.***” (*Id.* at p. 8)(emphasis added). Thus, Congress clearly authorized state commissions to perform various roles in implementing the Act, and this authority arises from Congress, not state legislatures. As explained in Intervenor’s initial brief, *Voices for Choices* is part of a line of cases that view state commissions as “deputized federal regulators” authorized to exercise federal regulatory power under the system of “cooperative federalism” established by the Act.<sup>2</sup>

### II. Other state commissions directly address their jurisdiction and cite Section 214 of the Act as their authority over wireless ETC applications.

Staff argues that the state commissions assuming jurisdiction over wireless ETC applications “made little if any attempt to explain their jurisdiction aside from a mention to the federal Act . . .” (Staff Response, p. 9) However, Staff also concedes that many state commissions “assume jurisdiction under 214(e)(2) of the Act despite a statute

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<sup>1</sup> *Voices for Choices v. Illinois Bell Tel. Co.*, No. 03 C 3290 (N.D. Ill. June 9, 2003).

<sup>2</sup> *BellSouth Telecommunications, Inc. v. MCI Metro Access Transmission Services, Inc.*, 317 F.3d 1270, 1277-78 (11<sup>th</sup> Cir. 2003); *Michigan Bell Tel. Co. v. MCI Metro*, 323 F.3d 348, 352 (6<sup>th</sup> Cir. 2003); *MCI Telecoms. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 344 (7<sup>th</sup> Cir. 2000).

**excluding cellular providers from their authority.**" (*Id.*) Indeed, Staff's Response appears to recognize that the state commissions find their authority over wireless ETC applications under Section 214 of the Act. For example, Staff states, "It appears that Section 214(e)(2) of the Act is the only authority cited by the [Alaska Commission]." (*Id.* at p. 4)

Staff attempts to distinguish the many cases where state commissions have taken jurisdiction over wireless ETC applications by arguing that those commissions: (a) failed to address the issue of jurisdiction over wireless carriers, and (b) failed to cite authority for their decisions. But this is simply not the case. Rather, the state commissions that have ruled on wireless ETC applications specifically cited Section 214 of the Act as their authority. For example, the Alaska Commission explained that its jurisdiction over a wireless carrier's application for designation as an ETC arises from the Act:

**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.**<sup>3</sup>

Likewise, the Idaho Public Utilities Commission is presently examining two applications for ETC status in rural areas that were filed by wireless carriers.<sup>4</sup> The Idaho

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<sup>3</sup> *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, Order Granting and Inviting Intervention, Denying Request to Dismiss Application, Scheduling Prehearing Conference, and Appointing Hearing Examiner, (August 29, 2002).* (emphasis added).

<sup>4</sup> *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.*

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."**<sup>5</sup>

The Maine Public Utilities Commission recently examined the application of a wireless carrier for ETC status pursuant to the Act, and the Maine Commission recognized that wireless carriers are "not subject to the Commission's general jurisdiction."<sup>6</sup> Nevertheless, the Maine Commission cited the 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.**<sup>7</sup>

The Nebraska Commission does not regulate wireless carriers either, but the Nebraska Commission used its authority under Section 214 of the Act to determine whether the designation of a wireless ETC in a rural area was in the public interest.<sup>8</sup> The Utah Commission's jurisdiction also arises from the Act: **"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."**<sup>9</sup> Staff admits that the Utah Commission "simply applied the requirements of the Telecommunications Act." (Staff's Response, p. 6).

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<sup>5</sup> *Id.* (emphasis added).

<sup>6</sup> *RCC Minnesota, Inc. SRCL Holding Co., Saco River Comms. Corp. Request for Designation as Eligible Telecommunications Carrier*, Docket No. 2002-344; 2003 Me. PUC LEXIS 208, Order, May 13, 2003 (citing 35-A Maine Revised Statutes Annotated §102(13)).

<sup>7</sup> *Id.* (emphasis added).

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

<sup>9</sup> *WWC Holding Co. v. Public Service Comm'n of Utah*, 44 P.3d 714, 719 (Utah 2002) (emphasis added).

Contrary to Staff's Response, these decisions demonstrate that many state commissions exercise their authority over wireless carrier ETC applications even when those commissions do not have general authority over wireless carriers under state law. At least ten state commissions that have addressed wireless ETC applications specifically cite Section 214 of the Act as their authority. Staff claims that the West Virginia wireless ETC proceeding cited by the Intervenor "offers little if any assistance to the Commission at this time" because it is a case of first impression. (Staff's Response, p. 7) But the West Virginia case is only the first application for wireless ETC status in an area served by a rural carrier. Staff's argument fails because West Virginia has already issued a decision on an ETC Application in Verizon's service area.<sup>10</sup>

The Alabama and Wyoming cases cited by Staff do not address the line of federal cases which outline state jurisdiction under the Act. Moreover, the Alabama case involves a section of the Alabama Code that was effectuated in June of 1999 and was thus enacted after the Act. Because Missouri's definitions predate the 1996 Act, they cannot be read to limit the powers granted by the Act. Rather, Missouri's statute predates the Act and the "cooperative federalism" regulatory regime the Act put in place.

Staff states that " federal law does not expressly require state action with regard to ETC designation." (Staff Response, p. 8) However, Section 214 of the Act expressly authorizes state action with regard to ETC designation over all common carriers. Staff argues that Section 214(e)(6) establishes a procedure for wireless carrier ETC applications in states that lack general jurisdiction over wireless carriers, but Congress enacted Section 214(e)(6) to address concerns regarding telecommunications on tribal

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<sup>10</sup> *Highland Cellular, Inc.*, Case No. 01-1604-T-PC, *Final Decision*, issued May 30, 2002.

property, an area where states have no authority and where Congress cannot delegate authority to the states.<sup>11</sup> Although some state commissions have interpreted state statutes to preclude jurisdiction over wireless carrier ETC applications, recent federal cases explain that state commission jurisdiction over "common carriers" arises from the Act, not state law.

## CONCLUSION

The Act provides state commissions the jurisdiction to consider applications for ETC status by wireless carriers. Therefore, Intervenor 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.

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<sup>11</sup> "Section 214(e)(2) directs state commissions to designate as eligible telecommunications carriers those common carriers that meet the requirements of section 214(e)(1) for a service area designated by the state commission. When first passed into law in 1996, however, section 214(e) did not include a provision for designating carriers that were not subject to the jurisdiction of a state commission. Thus, common carriers not subject to state commission jurisdiction, 'most notably, some carriers owned or controlled by native Americans,' were unable to be designated as eligible telecommunications carriers. As a result, these carriers would have become ineligible for universal service support as of January 1, 1998, when the eligibility requirements of the Act became effective. In 1997, Congress amended the Act with the addition of section 214(e)(6) to correct this 'oversight.'" *Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas*, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, CC Docket No. 96-45, 15 FCC Rcd 12208, ¶ 98 (rel. June 30, 2000).

Respectfully submitted,

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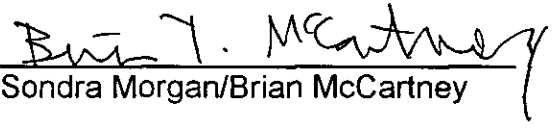
I hereby certify that a true and correct copy of the above and foregoing document was hand-delivered or mailed, United States Mail, postage prepaid, this 2<sup>nd</sup> day of July, 2003 to:

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