

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service Commission held at its office in Jefferson City on the 30th day of March, 2006.

In the Matter of the Application of Missouri RSA)
No. 5 Partnership for Designation as a)
Telecommunications Company Carrier Eligible for) **Case No. TO-2006-0172**
Federal Universal Service Support Pursuant to)
Section 254 of the Telecommunications Act of 1996)

ORDER GRANTING MOTION TO COMPEL

Issue Date: March 30, 2006

Effective Date: March 30, 2006

Syllabus: This order grants the Motion to Compel filed by the Small Company Intervenors (Small ILECs) and directs Missouri RSA No. 5 Partnership (RSA #5 or Chariton Valley Wireless) to provide the information sought in data requests 1.12 and 1.15.

On October 18, 2005, the Applicant, RSA #5, filed an Application for designation as an ETC carrier, eligible for federal universal service support under Section 254 of the Telecommunications Act of 1996. Several parties sought and were allowed intervention on November 22, 2005: Southwestern Bell Telephone, LP, d/b/a AT&T Missouri; Spectra Communications Group, LLC, d/b/a CenturyTel; CenturyTel of Missouri, LLC; and a group known collectively as the Small ILECs, consisting of Mark Twain Rural Telephone Company and Northeast Missouri Rural Telephone Company.

On March 9, 2006, counsel for the Small ILECs contacted the Commission with regard to a discovery dispute between itself and the Applicant, RSA #5. The procedural history of the dispute is set forth in the parties' pleadings: On February 1, 2006, the Small

ILECs served their first set of data requests, including requests 1.12 and 1.15, which are the subject of controversy. On February 13, 2006, RSA #5 served its objections to the data requests. On February 14, 2006, the Small ILECs served their response to RSA #5's objections. The parties communicated by e-mail and by telephone in an effort to resolve the dispute. On March 14, 2006, the presiding judge held a conference call involving RSA #5 and the Small ILECs pursuant to Commission Rule 4 CSR 240-2.090(8). The parties were unable to resolve their dispute during the conference call.

The dispute between RSA #5 and the Small ILECs concerns two data requests promulgated by the Small ILECs. Data request 1.12 is as follows:

1.12 Please provide Chariton Valley Wireless's actual capital expenditures for its Missouri Operations for the years 2003, 2004 and 2005, together with any supporting papers identifying each capital expenditure item or project and the physical location of the network improvement impacted by the expenditure.

MO RSA responded to the data request by objecting to the relevance of the request and stating that the information is proprietary.

Data request 1.15 promulgated by the Small ILECs to the RSA #5 is as follows:

1.15 Please provide copies of Chariton Valley Wireless's audited Financial Statements for its last two fiscal years. If Chariton Valley Wireless does not have audited Financial Statements for the last two years, please provide Chariton Valley Wireless's unaudited Financial Statements for the last two fiscal years.

MO RSA responded to the data request by objecting to the relevance of the request and arguing that the information is proprietary.

On March 16, 2006, the Small ILECs filed a Motion to Compel answers to the two outstanding data requests submitted to RSA #5. On March 27, 2006, RSA #5 filed a response to the Motion to Compel.

In its Motion to Compel, the Small ILECs assert that, as a threshold matter, information in this case is protected by the Commission's standard protective order of October 20, 2005. Therefore, to the extent that RSA #5 has concerns about confidentiality, the protective order should resolve those concerns.

The Small ILECs also claim the information sought in both data requests is relevant because RSA #5:

must prove that it will use USF support to fund capital expenditures that it would not have funded anyway, and the intervenors must be allowed to examine this issue. Without the 'baseline' financial information that the intervenors seek, neither the intervenors nor the Commission will have any way of determining that the proposed plans would not otherwise occur absent the receipt of high-cost support and that such support will be used in addition to any expenses the ETC would normally incur.¹

The Small ILECs argue that "it is not sufficient for Chariton Valley Wireless to commit to make capital expenditures and incur expenses in the future to offset its anticipated USF support; rather, Chariton Valley Wireless must show that those expenditures/expenses are in addition to those that would otherwise have been made absent receipt of USF monies."²

The Small ILECs cite the Missouri Commission's ETC designation rules in proposed rule 4 CSR 240-3.570(2)(A)3.G as supportive of their position. The proposed rule provides that an applicant for ETC status explain "how the proposed plans would not otherwise occur absent the receipt of high-cost support and that such support will be used in addition to any expenses the ETC would normally incur."

RSA #5 answers the Motion to Compel by arguing that the Small ILECs' attempt to establish a "base line" of expenditures for prior years is irrelevant and potentially

¹ Small Company Intervenors' Motion to Compel, p. 5, citing proposed rule 4 CSR 240-3.570(2)(A)3.G.

² Motion to Compel at 6.

misleading. It argues that the premise that a base line can be established for capital expenditures is false. RSA #5's capital expenditures are driven by a variety of factors that change over time. Changes in law, technology and intercarrier relationships have a dramatic effect on what must be spent or can be economically justified for capital expenditures in a given year. Regulatory decisions such as requirements for compliance with E911 have caused significant expenditures that may not otherwise have occurred. A change in roaming agreements between carriers may dramatically affect revenues and the ability to make capital expenditures.

RSA #5 argues that to be granted ETC status, it is required to demonstrate that USF monies will be spent for network enhancements in the ETC service area. It submitted sworn testimony regarding where USF monies would be spent, what would be built, and that none of the expenditures would be made in the absence of USF monies. It argues that the historic data requested by the Small ILECs would not enhance the record or establish material facts and is therefore not relevant. The critical information is how USF monies will be spent in the future.

The Commission finds that discovery motions like this one before it are governed by 4 CSR 240-2.090(8). The parties have complied with the rule and this dispute is ripe for Commission decision. The Commission also notes that, under rule 4 CSR 240-2.090(1), discovery before the Commission is available on the same basis as in civil cases in the Circuit Court. Rule 56.01 of the Missouri Supreme Court Rules provides that "parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action." Relevant evidence is "evidence that tends to prove or

disprove a fact of consequence to the pending matter.”³ Rule 56.01 also provides that information sought in discovery need not be admissible at the hearing, only that it appear reasonably calculated to lead to the discovery of admissible evidence. Further, the party seeking discovery shall bear the burden of establishing relevance.

The Commission finds that the Small ILECs have established that the information sought from RSA #5 is relevant and should be provided. The Commission finds that privileged or confidential information can be so designated by RSA #5 and protected from public disclosure under the Commission’s protective order entered October 20, 2005. The Commission finds that information concerning RSA #5’s capital expenditures for the years 2003, 2004 and 2005, as well as the financial statements for the last two fiscal years, would tend to establish a “base line” of capital expenditures, which will be important in analyzing RSA #5’s anticipated expenditures should it receive USF monies. The information concerning capital expenditures and financial statements may offer a benchmark from which the parties may challenge RSA #5’s plans for, and use of, USF monies.

IT IS ORDERED THAT:

1. The Small Company Intervenors’ Motion to Compel is granted.
2. Missouri RSA No. 5 Partnership is directed to provide the information requested in data requests 1.12 and 1.15 within ten (10) days of the effective date of this order.

³ *In the Matter of Missouri-American Water Company’s Tariff to Revise Water and Sewer Rate Schedules*, Case No. WR-2003-0500, Order Concerning Motion to Compel, Dec. 2, 2003.

3. This order shall become effective on March 30, 2006.

BY THE COMMISSION

A handwritten signature in black ink, appearing to read 'Colleen M. Dale', written in a cursive style.

Colleen M. Dale
Secretary

(S E A L)

Davis, Chm., Murray, Gaw, Clayton and Appling, CC., concur

Reed, Regulatory Law Judge