

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

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

STAFF’S PRETRIAL BRIEF

Introduction

Missouri RSA No. 5 Partnership (MO5) is licensed by the Federal Communications Commission to provide Commercial Mobile Radio Service to the public as a wireless cellular service provider. MO5’s service area includes some or all of Linn, Macon, Shelby, Chariton, Randolph and Knox Counties. MO5 filed an application requesting the Missouri Public Service Commission to designate MO5 as a telecommunications carrier eligible to receive Federal universal support under 47 U.S.C. Section 214.

The parties agreed upon a list of three issues to be determined by the Commission. The Staff’s brief provides the Staff’s positions on those issues and provides citations to prefiled testimony in support of those positions.

An applicant for ETC designation must satisfy *all* of several federal and state requirements. Because MO5 does not satisfy all of the requirements, the Staff recommends that the Commission deny MO5’s application for ETC designation. Specifically, MO5 has not made all of the commitments necessary to satisfy the requirements of the Commission’s ETC rule, nor has MO5 satisfied the federal and state requirement to demonstrate that granting it ETC designation would be consistent with the public interest, convenience and necessity.

Argument

Issue 1. Telecommunications companies seeking eligible telecommunications carrier (“ETC”) status must meet the requirements of Section 214(e)(1) throughout the service area for which designation is received. Section 214(e)(1) requires a carrier to offer the services that are supported by Federal universal service support mechanisms either using its own facilities or a combination of its own facilities and resale of another carrier’s services (including the services offered by another eligible telecommunications carrier); and to advertise the availability of such services and the charges therefore using media of general distribution. Does MO5 meet the requirements of Section 214(e)(1) throughout the service area for which it seeks ETC designation?

Staff Response: Yes, MO5 meets these requirements. The Direct Testimony of MO5 witness Simon states, at pages 3-5, that MO5 does, or will if granted ETC designation, provide the supported services. Mr. Simon also testifies, at pages 4-5, that MO5 will, upon the grant of its application, advertise such services and the charges for those services. The supported services are listed in FCC Rule 47 CFR § 54.101 and are repeated in the Direct Testimony of MO5 witness Zentgraf at pages 7-9.

Issue 2. ETC designations by a state commission must be consistent with the public interest, convenience and necessity pursuant to Section 214(e)(2). The Federal Communication Commission’s (“FCC’s”) *ETC Designation Order* determined that this public interest standard applies regardless of whether the area is served by a rural or non-rural carrier. Is granting ETC status to MO5 consistent with the public interest, convenience and necessity throughout the service area for which MO5 seeks ETC designation?

Staff Response: No, MO5 does not meet this requirement. The Staff's public interest analysis is addressed under Issue 3.

Issue 3. In addition to the standards set out in the FCC's *ETC Designation Order*, the Commission has promulgated rules to be used in evaluating ETC applications. Commission Rule 4 CSR 240-3.570, Requirements for Carrier Designation as Eligible Telecommunication Carriers, becomes effective June 30, 2006. Does MO5 meet the requirements of the Commission's ETC rules?

Staff Response: No. As the Supplemental Rebuttal Testimony of Staff witness, McKinnie explains, MO5's application fails to meet all the requirements of the Commission's ETC rule. Therefore, MO5's application should be denied.

Paragraph (2)(A)8 of the Commission's ETC rule requires a statement that the carrier will satisfy the federal consumer privacy protection standards. MO5 does not make this commitment. (McKinnie Supplemental Rebuttal, pages 6-7).

Paragraph (2)(A)10 requires the carrier's commitment to offer a local usage plan comparable to those offered by the incumbent local exchange carrier. MO5 offers a comparable plan, MO5's "ILEC-Equivalent" plan, but MO5 has not committed to continue offering a comparable plan. (McKinnie Supp. Rebuttal, pages 7-8).

Paragraph (2)(A)2 requires a two-year plan demonstrating, with specificity, that high-cost universal support shall only be used for the facilities and services for which the support is intended. Staff cannot state with certainty that all funds MO5 expects to receive in years one and two of the plan will be spent on supported services. (McKinnie Supp. Rebuttal, pages 8-11). Documentation provided by MO5 does not demonstrate a commitment to spend all estimated

USF monies on supported services in year one and year two of the plan. (HC Appendix M to Supplemental Direct Testimony of MO5 witness Simon).

Paragraph (2)(A)5 requires a demonstration that the Commission's grant of the applicant's request for ETC designation would be consistent with the public interest, convenience and necessity.

On March 17, 2005, the FCC released a decision¹ regarding how the FCC would evaluate applications before the FCC when applying for ETC status, and recommending that the states use similar guidelines. The MO ETC Rule largely, but not entirely, follows the Report and Order.

Paragraph 41 of the Report and Order states:

41. In instances where the Commission has jurisdiction over an ETC applicant, the Commission in this Report and Order adopts the fact-specific public interest analysis it has developed in prior orders. First, the Commission will consider a variety of factors in the overall ETC determination, including the benefits of increased consumer choice, and the unique advantages and disadvantages of the competitor's service offering. Second, in areas where an ETC applicant seeks designation below the study area level of a rural telephone company, the Commission also will conduct a creamskimming analysis that compares the population density of each wire center in which the ETC applicant seeks designation against that of the wire centers in the study area in which the ETC applicant does not seek designation. Based on this analysis, the Commission will deny designation if it concludes that the potential for creamskimming is contrary to the public interest. The Commission plans to use this analysis to review future ETC applications and strongly encourages state commissions to consider the same factors in their public interest reviews. (footnotes omitted)

The footnote to the "prior orders" the FCC references in the above paragraph refers to both the *Virginia Cellular ETC Designation Order* (FCC 03-338, CC Docket 96-45, Released January 22, 2004) and the *Highland Cellular ETC Designation Order* (FCC 04-37, CC Docket 96-45, Released April 12, 2004).

¹ Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, FCC-05-46. Rel. March 17, 2005. ("*Report and Order*").

The FCC, in paragraph 28 of the *Virginia Cellular* Order, wrote:

In considering whether designation of Virginia Cellular as an ETC will serve the public interest, we have considered whether the benefits of an additional ETC in the wire centers for which Virginia Cellular seeks designation outweigh any potential harms. We note that this balancing of benefits and costs is a fact-specific exercise. *In determining whether designation of a competitive ETC in a rural telephone company's service area is in the public interest, we weigh the benefits of increased competitive choice, the impact of the designation on the universal service fund, the unique advantages and disadvantages of the competitor's service offering, any commitments made regarding quality of telephone service, and the competitive ETC's ability to satisfy its obligation to serve the designated service areas within a reasonable time frame.* (italics added)

The same italicized phrase is contained in paragraph 22 of the *Highland Cellular* Order.

The items in the italicized phrase above were used in Staff's determination of whether or not MO5's application is in the public interest. (McKinnie Supp. Rebuttal, pages 12-13)

1. "the benefits of increased competitive choice"

Consumers will benefit from having an additional choice of telecommunications providers in locations where MO5 does not currently offer service but would offer service after the implementation of its 5-year plan. Areas where MO5 currently does not offer GSM service are identified as white spaces in Highly Confidential Appendix N attached to NWMC witness Reeves' Supplemental Direct Testimony. Those areas that will receive service after implementation of the 5 year plan are changed to green spaces in Highly Confidential Appendix I attached to the original MO5 Application. Consumers who currently are able to receive MO5's GSM service will receive no additional benefit.

While MO5 provides information on this aspect of the public interest standard, the FCC noted that increased competition in of itself is not sufficient to meet the public interest standard.

Paragraph 4 of the *Virginia Cellular* Order states:

We conclude that the value of increased competition, by itself, is not sufficient to satisfy the public interest test in rural areas.

2. “the impact of the designation on the universal service fund”

According to MO5 witness Zentgraf’s Direct Testimony, on page 16, lines 10-11, MO5 expects to receive \$1,534,230 annual in total USF support. NWMC witness Zentgraf states that NWMC’s expected portion of the fund is .0358% of the total high cost USF support.

Based on the later-filed Highly Confidential Appendix M attached to MO5 witness Simon’s Supplemental Direct Testimony, MO5 now expects to receive higher amounts of support in years one and two. No analysis is provided regarding the potential impact of those figures.

As Ms. Zentgraf cites in her Direct Testimony, the FCC discussed the impact of each ETC designation in paragraph 54 of the *Report and Order*:

Indeed, given the size of the total high-cost fund — approximately \$3.8 billion a year — it is unlikely that any individual ETC designation would have a substantial impact on the overall size of the fund. (footnote omitted)

3. “the unique advantages and disadvantages of the competitor’s service offering”

MO5 cites the ability to make E-911 calls resulting from enhanced GSM coverage as a public interest benefit of its application, as well as the ability to better pinpoint the physical location of a caller using MO5’s GSM technology. Staff agrees that the ability to call 911 from a wireless telephone is a very important public interest and public safety consideration, and that the benefits from having an enhanced 911 (or “E-911”) system are significant. However, if a wireless carrier other than MO5 provides wireless coverage, especially GSM, in areas where MO5 does not currently provide GSM coverage, residents already reap the benefits of calling 911. If the area already has a wireless carrier providing E-911 service, the benefits of granting ETC designation to MO5 are further reduced. Unfortunately, it is difficult to determine the benefit of an additional wireless network. As wireless networks are prone to “dead spots” and

coverage gaps, it is possible that a redundant network would improve E-911 or 911 coverage to areas within MO5's proposed ETC designation areas. There are certainly public interest benefits in improving 911 and E-911 coverage in this manner. However, MO5 has provided no evidence about the current status of 911 or E-911 wireless coverage in its requested ETC designation areas. Without this information, it is difficult to fully evaluate the increased benefits from MO5's proposed network expansion.

4. "any commitments made regarding quality of telephone service"

The MO ETC Rule itself has several areas regarding quality of service. For example, subsection (2)(B) requires prospective CMRS ETC applicants to commit to the consumer code of the Cellular Telecommunications and Internet Association (CTIA code). MO5 has committed to abiding by the CTIA code.

5. "the competitive ETC's ability to satisfy its obligation to serve the designated service areas within a reasonable time frame"

MO5 is already serving much of its designated service area so this portion of analysis is somewhat moot. However, MO5 has submitted a five-year plan to indicate where network improvements will be made throughout their service area. While it does not appear there are large coverage gaps in the proposed ETC area, MO5 certainly works towards filling those gaps. As MO5 has not committed to using all of its monies it expects to receive for service enhancements for the first two years of its proposed build out plan, MO5 is not moving towards "serving the designated service areas" as fast as it possibly could.

In summary, MO5 has not made the necessary public interest demonstration. First and foremost, MO5 has not committed to spending all the monies it estimates to receive on supported services in year one and year two of its proposed build out plan. There are also still important

considerations regarding commitments not made in the Commission's ETC Rule. Because of these concerns, Staff cannot say that MO5 has demonstrated their application is in the public interest. (McKinnie Supp. Rebuttal, pages 17-20)

Conclusion

WHEREFORE, the Staff recommends that the Commission deny MO5's application for ETC designation.

Respectfully submitted,

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 14th day of June 2006.

/s/ William K. Haas
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