

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

In the matter of the application of USCOC of )  
Greater Missouri, LLC for designation as an ) Case No. TO-2005-0384  
eligible telecommunications carrier pursuant to )  
the Telecommunications Act of 1996. )

**APPLICATION FOR REHEARING**

Comes now the Missouri Small Telephone Company Group (“STCG”) pursuant to §386.500 RSMo. and 4 CSR 240.2-160, and for its Application for Rehearing in the above-referenced case respectfully states to the Missouri Public Service Commission (“Commission” or “PSC”) as follows:

**INTRODUCTION AND SUMMARY**

1. On May 3, 2007, the Commission issued its *Report and Order* regarding U.S. Cellular’s Application seeking Eligible Telecommunications Carrier (“ETC”) designation for federal universal service purposes. The *Report and Order* is unlawful, unjust, unreasonable, arbitrary, and unsupported by competent and substantial evidence, in all material matters of fact and law, individually or cumulatively, or both, as indicated below.

2. In summary, the *Report and Order* erroneously interprets and applies federal law by purporting to grant ETC status to U.S. Cellular in high-cost rural service areas where U.S. Cellular has no facilities today and will have no facilities even after the completion of its proposed two-year build-out plan. In other words, U.S. Cellular proposes to offer service exclusively through roaming agreements in these areas. The *Order* also errs by failing to apply the current

public interest test to determine whether granting ETC status to U.S. Cellular will offer any additional or incremental benefits in those areas where the PSC has already designated a wireless ETC. The *Report and Order* also fails to make sufficient findings of fact and conclusions of law.

### **ERRONEOUS INTERPRETATION AND APPLICATION OF FEDERAL LAW**

3. The *Order* is unjust, unlawful and unreasonable because it misinterprets and misapplies federal law by granting ETC status in areas where U.S. Cellular proposes to provide service exclusively through a roaming arrangement. Specifically, 47 U.S.C. §214(e)(1) states that for an applicant to receive ETC designation and federal universal service fund (USF) support, it must provide services for which it might receive support “throughout the service area for which the designation is received.”

4. **No coverage or insufficient coverage.** The uncontested evidence in this case demonstrates that there are large parts of U.S. Cellular’s proposed ETC designation area that currently have no signal coverage or insufficient signal coverage from U.S. Cellular. Moreover, there will still be large areas with either no coverage or insufficient coverage even after the addition of the new cellular towers proposed in U.S. Cellular’s two-year plan. The *Order* acknowledges that U.S. Cellular provides no service at all in many of the study areas for which it has requested ETC status.<sup>1</sup> Because U.S. Cellular does not provide service at all, or only offers service to a limited and insufficient extent in these areas, the Commission erred by granting ETC status to U.S. Cellular in these rural study areas.

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<sup>1</sup> *Report and Order*, pp. 7-8.

5. **Exclusive Use of Resale in Rural Areas.** U.S. Cellular's offer to "resell" service through "roaming" agreements in areas where it has no facilities is contrary to the FCC's ETC eligibility rules, which prohibit carriers from providing service exclusively through resale:

A state commission **shall not designate** as an eligible telecommunications carrier a telecommunications carrier that offers the services supported by federal universal service support mechanisms **exclusively through the resale of another carrier's services.**<sup>2</sup>

For example, U.S. Cellular has absolutely no facilities in place that would allow it to serve customers of BPS Telephone Company in southeast Missouri today, and U.S. Cellular has offered no plans to place such facilities in service over the next two years.<sup>3</sup> Thus, in the area served by BPS Telephone Company and many of the other rural company service areas at issue in this case, U.S. Cellular would be offering service exclusively through another carrier's "roaming" service. This is contrary to the FCC's ETC eligibility rules, which prohibit carriers from providing service exclusively through resale of another carrier's service. U.S. Cellular cannot be designated as an ETC in those rural areas where U.S. Cellular only intends to offer service through "roaming" arrangements and has not offered plans to build its own facilities.

6. Under the *Order's* reasoning, U.S. Cellular could have only one tower in the entire state of Missouri, yet U.S. Cellular could be designated as an ETC in the entire state if it has resale or "roaming" agreements. This is clearly

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<sup>2</sup> 47 C.F.R. §54.201(i)(emphasis added).

<sup>3</sup> Tr. 540-43, 546-47.

not what Congress or the FCC intended. The *Report and Order* violates federal law and the FCC's rules by granting U.S. Cellular ETC status in rural company service areas where U.S. Cellular offers no service and has provided no plans to offer service within the next two years.

7. **Inconsistent with Prior ETC Designation Cases.** The *Order* grants ETC status to U.S. Cellular in a number of areas where U.S. Cellular does not presently provide service or have any immediate plans to provide service. In prior cases, the PSC has only granted applications for ETC status in those areas where the applicant is actually providing services. For example, in the case involving ExOp of Missouri, Inc. the Commission concluded:

Section 214(e)(1) of the Act requires that a designated carrier both offer and advertise the eligible services **throughout the designated service area. . . . The Commission, like the Public Counsel, concludes that the statutory language is not a meaningless formality.** The facts show that ExOp offers and advertises these services only in the Kearney exchange; ExOp has made no showing as to its plans to provide service in additional exchanges. **The Act clearly requires that a carrier both offer and advertise the services in question throughout its designated service area upon designation. Therefore, ExOp may be designated only for the Kearney exchange, for ExOp has not shown that it will both offer and advertise the services in question in a larger area upon designation.**<sup>4</sup>

The *ExOp* case is directly on point here. U.S. Cellular does not meet the requirements of Section 214 throughout the service area for which it seeks ETC designation. Thus, the *Report and Order* contradicts the Commission's prior holding in the *ExOp ETC Order* that requires an ETC applicant to "both offer and

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<sup>4</sup> *In the Matter of the Application of ExOp of Missouri, Inc., for ETC Designation*, Case No. TA-2001-251, *Order Granting Designation*, issued May 16, 2001 (emphasis added).

advertise the services in question throughout its designated service area **upon designation.**”

8. The *Report and Order* is also inconsistent with the Commission’s recent decision to exclude the rural Winigan exchange in the Chariton Valley Wireless ETC case:

The ETC rule provides what the company must do to provide service if requested in an area where coverage does not exist. With regard to the Winigan exchange, MO5 admitted that it would most likely have to report to the Commission that it could not serve those customers outside of its service area if they requested service. The Commission concludes that because of the number of customers served relative to the number outside the service area, the fact that MO5 will not be able to serve those customers outside its service area, and that this is the only wire center of Northeast for which service is requested, **it must exclude the Winigan wire center from MO5’s designated ETC area.**<sup>5</sup>

The *Report and Order* fails to adequately explain or distinguish its prior ETC cases. Thus, the *Report and Order* is inconsistent with prior PSC precedent and erred by granting U.S. Cellular ETC status in those areas where U.S. Cellular does not currently offer service.

**FAILURE TO CORRECTLY APPLY THE PUBLIC INTEREST STANDARD AND  
CONSIDER THE IMPACTS OF MULTIPLE COMPETITIVE ETCs**

9. The Telecommunications 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

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<sup>5</sup> *In the Matter of the Application of Missouri RSA No. 5 Partnership for ETC Designation, Case No. TO-2006-0172, Report and Order, pp. 34-35 (emphasis added).*

the public interest.”<sup>6</sup> Likewise, the Missouri PSC’s rule requires a demonstration that the grant of ETC designation is consistent with the public interest, convenience, and necessity.<sup>7</sup>

10. The *Report and Order* notes the problems raised by granting multiple ETCs in the same area. Specifically, “the federal universal service fund would be required to support multiple ETCs in a fixed cost market, causing the cost of service to increase for each of the providers on a per customer basis.”<sup>8</sup> Also last week, FCC Chairman Kevin Martin again identified this same problem in the Federal-State Joint Board’s recommended decision to cap competitive ETC (“CETC”) support from the USF:

A large and rapidly growing portion of the high cost support program is now devoted to supporting multiple competitors to serve areas in which costs are prohibitively expensive for even one carrier. These additional networks don’t receive support based on their own costs, but rather on the costs of the incumbent provider, even if their cost of providing service is lower.<sup>9</sup>

The Joint Board has found the problem of multiple wireless ETCs seeking high-cost support for serving the same high-cost area to be so serious that it recommend an immediate emergency cap on competitive ETC support from the federal USF. Yet two days later Missouri PSC found that the problem of multiple wireless ETCs operating in the same area was “not persuasive.” The PSC’s findings simply cannot be reconciled with the Joint Board’s recommendation.

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<sup>6</sup> 47 U.S.C. § 214(e)(2) (emphasis added).

<sup>7</sup> 4 CSR 240-3.570(2)(A)(5).

<sup>8</sup> *Report and Order*, p. 13.

<sup>9</sup> *In the Matter of High-Cost Universal Service Support*, Docket No. 05-337, *Federal State Joint Board Recommended Decision*, rel. May 1, 2007, Statement of FCC Chairman Kevin Martin.

11. **Granting ETC Status to Multiple Wireless Carriers In Rural High Cost Areas Is Not In The Public Interest.** On September 21, 2006, the PSC approved ETC applications from Northwest Missouri Cellular and Chariton Valley Cellular in their respective rural Missouri service areas. U.S. Cellular's application requests ETC designation in overlapping study areas where Northwest Missouri Cellular and Chariton Valley Cellular have previously received that designation. The *Report and Order* fails to identify any incremental benefit to granting an ETC designation to U.S. Cellular in those areas where the PSC has already granted ETC designations to Northwest Missouri Cellular and Chariton Valley Wireless. Instead, the *Report and Order* only offers platitudes about the general benefits of competition. In applying a public interest test to areas where the Commission has already granted an additional ETC designation to a wireless carrier, the *Report and Order* fails to weigh the substantial costs and detriments against the minimal (if any) incremental benefits of granting ETC designation to U.S. Cellular. As a result, the *Order* erred by granting U.S. Cellular ETC status in those areas where it has previously granted ETC designation to other wireless carriers.

12. **Competition Is Not Sufficient to Satisfy The Public Interest Test in Rural Areas.** The *Report and Order* concludes, "Designating more than one wireless carrier as an ETC in a market will enhance competition and therefore is in the public interest."<sup>10</sup> However, in its 2004 *Virginia Cellular Order*, the FCC stated, "**We conclude that the value of increased competition, by**

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<sup>10</sup> *Report and Order*, p. 32.

**itself, is not sufficient to satisfy the public interest test in rural areas.**<sup>11</sup>

Thus, under the more rigorous public interest analysis required by the FCC's *ETC Designation Order*, the benefits of "competition" are now simply one minor factor for the Commission to consider in determining whether granting ETC designation is in the public interest. The *Report and Order's* reliance upon "increased competition" as its primary and overriding rationale for granting its ETC status is unlawful and unreasonable for a number of reasons.

13. First, the *Report and Order* found that U.S. Cellular "currently faces wireless competition in all areas that it serves in Missouri."<sup>12</sup> Likewise, the FCC has already found that there is "effective" competition in the wireless market in rural areas.<sup>13</sup> In Missouri, the areas in U.S. Cellular's proposed ETC designation area already have robust wireless competition.<sup>14</sup> Therefore, it is unclear how granting ETC status to U.S. Cellular will increase competition when U.S. Cellular and at least three (3) other wireless carriers are already providing service.

14. Second, the introduction of a competitor in a rural high-cost environment does not necessarily lead to what are traditionally cited as the benefits of competition: lower costs and/or higher quality of service. On the

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<sup>11</sup> *Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, CC Docket No. 96-45, FCC 03-338 (rel. January 22, 2004), ¶4 ("*Virginia Cellular Order*").

<sup>12</sup> *Report and Order*, p. 13.

<sup>13</sup> *Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, WT Docket No. 06-17, *Eleventh Report*, released Sept. 29, 2006, ¶88. For example, the FCC recently examined rural counties with 100 residents per square mile or less and found that "less densely populated" rural counties have an average of 3.6 mobile competitors, while "more densely populated" rural counties have an average of 4.9 mobile competitors. *Id.* at ¶86. Accordingly, the FCC concluded that wireless carriers were "competing effectively" in rural areas. *Id.* at ¶88.

<sup>14</sup> *Tr.* at 747 (identifying ALLTEL, Cingular, Sprint, Verizon Wireless, Chariton Valley, and Northwest Missouri Cellular as competitors); see also Ex. 14, *Schoonmaker Rebuttal*, p. 52 (identifying those carriers plus Dobson Cellular).



contrary, a high-cost market, by definition, is still a high-cost market even after the introduction of competition, and the Joint Board has recognized that the introduction of multiple subsidized competitors in high-cost areas has led to rapid and unsustainable growth in the federal USF.

15. Third, in Missouri, the introduction of subsidized competition could actually increase the cost for each carrier because the federal USF would then support multiple entrants with limited financial resources. FCC Chairman Kevin Martin has repeatedly expressed concerns with using federal USF support to create “competition” in rural high-cost areas:

I am hesitant to subsidize multiple competitors to serve areas in which costs are prohibitively expensive for even one carrier. This policy may make it difficult for any one carrier to achieve the economies of scale necessary to serve all customers in a rural area, **leading to inefficient and/or stranded investment and a ballooning universal service fund.**<sup>15</sup>

Since costs of a telecommunications network are relatively fixed, the splitting of a rural market between two or more providers generally causes the cost of service to increase for each of the providers on a per customer basis.

16. In short, the *Report and Order* errs by finding that subsidizing multiple competitors in high-cost rural areas is in the public interest and outweighs the substantial detriments identified by the FCC and the Joint Board.

#### **INSUFFICIENT FINDINGS OF FACT AND CONCLUSIONS OF LAW**

17. The *Report and Order* fails to make sufficient findings of fact and conclusions of law. Commission orders must be supported by sufficient findings

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<sup>15</sup> 2<sup>nd</sup> *Report and Order and FNPRM* in CC Docket No. 00-256, 15<sup>th</sup> *Report and Order* in CC Docket No. 96-45, and *Report and Order* in CC Docket Nos. 98-77 and 98-166, rel. Nov. 8, 2001, *Separate Statement of Commissioner Kevin J. Martin* (emphasis added).

of fact and conclusions of law.<sup>16</sup> Findings of fact must enable a court to review the Commission's decision and ascertain if the facts afford a reasonable decision for the *Order* without resorting to the evidence.<sup>17</sup> The *Report and Order* fails to make sufficient findings of fact and conclusions of law.

18. **Conclusory Findings and Lack of Evidence.** The *Order* simply recites U.S. Cellular's general claims about public interest benefits<sup>18</sup> but fails to make any specific findings about these claims or cite appropriate record evidence to support them. Thus, there is a lack of findings and lack of evidence.

19. **Roaming.** There is no sufficient evidence or findings of fact to support the *Report and Order's* conclusion that U.S. Cellular can resell another carrier's service through a "roaming" arrangement in order to satisfy its obligation to serve. First, U.S. Cellular offered no evidence of which carriers it has entered into roaming agreements with or where those carriers serve in the state of Missouri. Second, U.S. Cellular offered no evidence that these underlying wireless carriers offer all of the specific services required for ETC status. Thus, there are insufficient findings (and no evidence) to support the *Order's* conclusion that U.S. Cellular can resell service in rural Missouri.

20. The *Report and Order* also lacks sufficient conclusions of law to support its conclusion that a "roaming" agreement reached with another wireless carrier is sufficient to satisfy federal law's requirement that resale of service be offered in conjunction with facilities-based services. Similarly, the *Report and Order* fails to analyze or explain how U.S. Cellular's proposal to offer service in

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<sup>16</sup> See §386.420 RSMo. 2000; *State ex rel. Monsanto v. PSC*, 716 S.W.2d 791 (Mo. banc 1986).

<sup>17</sup> *State ex rel. Laclede Gas v. PSC*, 103 S.W.3d 813, 816 (Mo. App. 2003).

<sup>18</sup> For example, see *Report and Order*, p. 12.

many small rural service areas solely through a “roaming” arrangement complies with the requirements of 47 C.F.R. §54.201(d)(1) and 47 C.F.R. §54.201(i) that U.S. Cellular have at least some of its own facilities “in the service area for which the designation is received.”

21. **Administrative Burden.** The *Report and Order* fails to provide sufficient findings of fact and conclusions of law to support the claim that it would be an “administrative burden” on the Commission and its Staff to restrict U.S. Cellular’s ETC designation to those areas where U.S. Cellular is actually serving or has plans to serve.<sup>19</sup> In other words, the *Report and Order* claims that it would be a hassle to review U.S. Cellular’s subsequent plans to expand coverage into new areas. As a practical matter, however, the PSC’s ETC designation rules already require the Commission to examine U.S. Cellular’s expansion proposals each year. And as a legal matter, the courts have consistently rejected the Commission’s complaints about the “administrative burdens” of its duties:

However difficult may be the ascertainment of relevant and material factors in the establishment of just and reasonable rates, **neither impulse nor expediency can be substituted for the requirement that rates be "authorized by law" and "supported by competent and substantial evidence upon the whole record."**

Article V, §22, Constitution of Missouri; *State ex rel. Mo. Water Co. v. PSC*, 308 S.W.2d 704, 720 (Mo. 1957); *State ex rel. Sprint Spectrum v. PSC*, 112 S.W.3d 20, 28 (Mo. App. 2003). Thus, the *Report and Order* is unlawful and unreasonable because Missouri law requires Commission decisions to be supported by sufficient findings of fact and conclusions of law.

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<sup>19</sup> *Report and Order*, p. 11.

## CONCLUSION

WHEREFORE, the STCG respectfully requests that the Missouri Public Service Commission grant its application for rehearing of the May 3, 2007 *Report and Order* as requested herein, and upon rehearing and reconsideration of the issues raised herein, issue a new *Report and Order* consistent with this pleading.

RESPECTFULLY SUBMITTED,

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was sent by U.S. Mail, postage prepaid, or via electronic mail, or hand-delivered on this 11<sup>th</sup> day of May, 2007, to the following parties:

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