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 eligible telecommunications carrier pursuant to the Telecommunications Act of 1996.	))))	Case No. TO-2005-0384

POSTHEARING BRIEF OF THE SMALL TELEPHONE COMPANY GROUP

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I. INTRODUCTION AND SUMMARY

The Missouri Public Service Commission ("Commission" or "PSC") should deny U.S. Cellular's application for Eligible Telecommunications Carrier (ETC) status. First, U.S. Cellular has not demonstrated that it can provide service throughout the area for which it seeks ETC designation. Even if U.S. Cellular completes its proposed two-year build-out plan, U.S. Cellular will offer either no coverage or insufficient coverage in many parts of rural Missouri. In the event that the Commission does grant ETC status to U.S. Cellular in some parts of Missouri, then the Commission should specifically exclude those rural areas where U.S. Cellular does not offer adequate service and has provided no plans to do so in the next two years. Excluding these areas is consistent with prior Commission precedent in the *Chariton Valley Wireless*[1] and *ExOp*[2] ETC cases.

Second, U.S. Cellular's two-year plan does not comply with the PSC's ETC designation rules. U.S. Cellular has not proven that its proposed plans would not otherwise occur without high cost funds. On the contrary, this case demonstrates that U.S. Cellular has completed parts of its previously proposed ETC build-out plan absent high cost support. Also, U.S. Cellular's two-year plan does not offer baseline budget and expense information that would allow the PSC to determine whether U.S. Cellular's anticipated federal Universal Service Fund (USF) support will be spent "in addition to any expenses [U.S. Cellular]

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[1] *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 (excluding the Winigan wire center from the Chariton Valley Wireless designated ETC area).

[2] *In the Matter ExOp of Missouri, Inc., Application for ETC Designation*, Case No. TA-2001-251, *Order Granting Designation*, May 16, 2001 (holding that an ETC applicant must "both offer and advertise the services in question throughout its designated service area upon designation.").

would normally incur," as required by the PSC's ETC rule. On the contrary, **U.S. Cellular has refused to supply such information and expressly declined to make such a commitment**. (*See* Tr. 757-58.) Likewise, U.S. Cellular has provided no information about accounting or financial safeguards to ensure that USF support is being spent in rural Missouri as opposed to St. Louis or even in other states, so the ETC application must be denied.

Third, U.S. Cellular has failed to show that granting its application is in the public interest. Instead, U.S. Cellular has provided a two-year plan that will simply shore up its wireless service in areas that are already served by U.S. Cellular (and other wireless carriers). The two-year plan proposes no significant improvements in many of the rural areas where it does not presently offer service. Thus, the costs and disadvantages outweigh any incremental benefits offered by U.S. Cellular's plan, and the rates proposed by U.S. Cellular do not compare favorably with the ILEC's basic and lifeline service rates.

Fourth, U.S. Cellular seeks ETC designation in two parts of Missouri that are already served by wireless ETCs. Specifically, the areas currently served by Chariton Valley Wireless and Northwest Missouri Cellular already have access to wireless service, including Lifeline discounts for customers that qualify. Thus, competition has already been enhanced by a grant of ETC designation to these two wireless carriers, and there is little or no incremental benefit in designating a second wireless ETC in these areas. On the other hand, the incremental costs associated with granting ETC designations to multiple wireless carriers in high cost areas is quite high and has been recognized by the Federal

Communications Commission (FCC) as a growing problem. In this case, the costs outweigh the benefits, so the Commission should exclude those areas already served by Chariton Valley Wireless and Northwest Missouri Cellular.

II. DISCUSSION

A. Legal Requirements for ETC Status

The legal standards for examining U.S. Cellular's ETC Application are found in three places: (1) the federal Act and related FCC rules; (2) the Missouri PSC's ETC Designation Rules; and (3) Missouri law which requires PSC orders to be supported by competent and substantial evidence.

1. The Telecommunications Act

Section 214(e) of the Telecommunications Act ("the Act") provides state commissions with the primary responsibility for designating ETCs.[3] Section 214(e)(1) states that for an ETC applicant to receive designation and support in a rural telephone company's service area, it must provide services for which it might receive support "**throughout the service area for which the designation is received**." Section 214(e)(2) of the Act states, in relevant part:

> 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**.

[3] 47 U.S.C. §214(e).

Consequently, in rural areas, the PSC may designate more than one carrier as an ETC only if the PSC finds that the designation meets the public interest test. The Telecommunications Act sets a higher standard for the service areas of small rural telephone companies. In this case, there are twenty-four (24) small company study areas, so the Commission must carefully examine U.S. Cellular's request and make a determination for each of those 24 study areas.

2. The Missouri PSC's ETC Designation Rules

The Commission's ETC designation rules became effective on June 30, 2006. Among other things, the Commission's rules require a determination that the grant of ETC designation is in the public interest and 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.

See 4 CSR 240-3.570(2)(A).3.G. In order to examine the question of public interest, the Commission must have information about whether the benefits of granting US Cellular ETC status outweigh the costs. Because US Cellular is already providing service without any USF support, the Commission must consider whether granting ETC status (and thereby USF support) will result in any additional competition or increased benefits for customers in rural Missouri. US Cellular must also prove that: (1) it will use USF support to fund capital expenditures that it would not have funded anyway; and (2) that USF support will be used <u>in addition</u> to expenses that U.S. Cellular would normally incur.

3. Competent and Substantial Evidence

Missouri law requires Commission decisions to be supported by sufficient findings of fact and conclusions of law.[4]

B. Contested Issues

1. U.S. Cellular Does Not Serve the Entire ETC Area as Required by Section 214(e)(1). (*Issue 1*)

U.S. Cellular does not meet the requirements of Section 214 of the Act throughout the service area for which it seeks ETC designation. It is U.S. Cellular's burden to demonstrate that it will provide the supported services throughout the individual incumbent local exchange company (ILEC) study areas that comprise the service territory of each separate ILEC. U.S. Cellular has failed to meet this burden of proof. In this case, there are wire centers where there will be no signal coverage both before and after a potential U.S. Cellular ETC designation, even with the addition of the new cellular towers proposed in U.S. Cellular's two-year plan.[5]

a. U.S. Cellular Offers No Service In Many Study Areas.

Mr. Brown and Mr. Schoonmaker have both provided information on service coverage and service quality, and their testimony shows that U.S. Cellular's actual coverage area is much smaller than the area for which it is requesting ETC status. Clearly, U.S. Cellular does not provide service to the

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[4] See *State ex rel. Monsanto v. PSC*, 716 S.W.2d 791 (Mo. banc 1986); *State ex rel. Coffman v. PSC*, 150 S.W.3d 92 (Mo. App. 2004); *State ex rel. Coffman v. PSC*, 121 S.W.3d 534 (Mo. App. 2003); *State ex rel. Laclede Gas v. PSC*, 103 S.W.3d 813 (Mo. App. 2003); *AT&T Communications v. PSC*, 62 S.W.3d 545 (Mo. App. 2001); *State ex rel. Noranda Aluminum v. PSC*, 24 S.W.3d 243 (Mo. App. 2001).

[5] Ex. 9, McKinnie Rebuttal, p. 8; Tr. 780.

entire service territory (i.e. "throughout the study area") of many companies, and U.S. Cellular provides no service at all in many of the study areas for which it has requested ETC status.[6]

Specifically, U.S. Cellular has either no coverage or insufficient service in the study areas of:

BPS Telephone Company
Ellington Telephone Company
Fidelity Telephone Company
Goodman Telephone Company
Grand River Mutual Telephone Corporation
Holway Telephone Company
IAMO Telephone Company
Mid-Missouri Telephone Company
Orchard Farm Telephone Company
Seneca Telephone Company
Steelville Telephone Company.[7]

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 should deny or exclude ETC status in these study areas.

b. U.S. Cellular Offers Questionable Service In Many Study Areas.

There also are a number of other study areas where the adequacy of service is questionable, so the study areas served by the following companies should be carefully reviewed by the Commission:

Kingdom Telephone Company
Le-Ru Telephone Company
Mark Twain Rural Telephone Company
Northeast Missouri Rural Telephone Company
Peace Valley Telephone Company, Inc.
Stoutland Telephone.[8]

[6] Ex. 31, Schoonmaker Supplemental Rebuttal, pp. 18-21, 30.
[7] *Id*.
[8] *Id*.

The Commission must perform its public interest analysis and make its ETC determinations for each individual company's study area, so the Commission must decide whether or not U.S. Cellular's coverage in these company study areas is sufficient to satisfy the "throughout the service area" test.

c. The Commission Should Exclude Those Areas Where U.S. Cellular Offers No Service or Questionable Service.

U.S. Cellular's application is deficient because it seeks ETC status for a number of areas where U.S. Cellular does not presently provide service or have any immediate plans to provide service. This violates Section 214(e) of the Act and the Commission's holding in the *ExOp ETC Order* that requires an ETC applicant to "both offer and advertise the services in question throughout its designated service area **upon designation**."[9]

Staff observes that "there will be wire centers where there will be no signal coverage before or after a potential U.S. Cellular ETC designation, even with the addition of the new cellular towers proposed in the application."[10] The service coverage and service quality information discussed in the testimonies of Mr. Brown and Mr. Schoonmaker show that U.S. Cellular's actual coverage area is much smaller than the area for which it is requesting ETC status. Clearly, U.S. Cellular does not provide service to the entire service territory (i.e. "throughout the study area") of many small rural companies, and U.S. Cellular provides no

[9] *In the Matter of the Application of ExOp of Missouri, Inc., for Designation as a Telecommunications Company Carrier Eligible for Federal Universal Service Support Pursuant to Section 254 of the Telecommunications Act of 1996*, Case No. TA-2001-251, *Order Granting Designation*, issued May 16, 2001 (emphasis added).
[10] Ex. 9, McKinnie Rebuttal, p. 8; Tr. 780.

service at all in many of the study areas for which it has requested ETC status.[11] As a result, the PSC should expressly exclude from ETC designation those areas where U.S. Cellular offers no service (*see* "a" above) or questionable service (*see* "b" above") and has offered no plans to do so within the next two years.

In prior cases, the Commission has only granted applications for ETC status in those areas where the applicant is actually providing services. For example, in a 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**.[12]

This case is similar to the *ExOp* case because U.S. Cellular does not meet the requirements of Section 214 throughout the service area for which it seeks ETC designation. It is U.S. Cellular's burden to demonstrate that it will provide the supported services throughout the service territory of each separate incumbent local exchange carrier (ILEC) study area. U.S. Cellular has failed to meet this burden of proof.

[11] Ex. 14, Schoonmaker Rebuttal, p. 62; Ex. 31, Schoonmaker Supplemental Surrebuttal, p. 17.
[12] *In the Matter of the Application of ExOp of Missouri, Inc., for Designation as a Telecommunications Company Carrier Eligible for Federal Universal Service Support Pursuant to Section 254 of the Telecommunications Act of 1996*, Case No. TA-2001-251, *Order Granting Designation*, issued May 16, 2001 (emphasis added).

Excluding certain small company rural service areas from U.S. Cellular's proposed ETC area would also be consistent 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**.[13]

The Commission should reach the same conclusion in this case and exclude those areas where U.S. Cellular does not presently offer service.

d. Resale Is Not an Option.

U.S. Cellular's offer to "resell" service 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**.[14]

[13] *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).
[14] 47 C.F.R. §54.201(i)(emphasis added).

For example, U.S. Cellular has absolutely no facilities in place that would allow it to serve 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. (Tr. 540-43, 546-47) Thus, for BPS Telephone Company and many of the other small company service areas at issue in this case, U.S. Cellular would be offering service **exclusively through the resale of another carrier's service**. This is contrary to the FCC's ETC eligibility rules, which prohibit carriers from providing service exclusively through resale. U.S. Cellular cannot be designated as an ETC in those small company areas identified above where U.S. Cellular only intends to offer service through resale and has not offered plans to build its own facilities.

The FCC's rule makes sense on a practical level. First of all, U.S. Cellular admits that it cannot receive USF high cost support for reselling another carrier's service. (Tr. 675-76) Second, under U.S. Cellular's two-year plan, customers in many parts of rural Missouri would simply receive "resold" wireless service from other wireless carriers already operating in those rural areas. As a result, any customers that switched to U.S. Cellular would not receive better coverage than they already have from existing providers, and it is unlikely that U.S. Cellular could resell the service at lower prices without losing money. (*See* Tr. 546.) Simply put, resale will not change the existing affordability or comparability of rates and services throughout rural Missouri, nor will it bring any new investment or services.

2. Granting ETC Status to U.S. Cellular Is Not In The Public Interest. (*Issue 2*)

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 the public interest."[15] Likewise, the Missouri PSC's rule requires a demonstration that the grant of ETC designation is consistent with the public interest, convenience, and necessity.[16] U.S. Cellular has failed to meet its burden of proof to show that granting ETC status to U.S. Cellular is in the public interest, convenience, and necessity.

The FCC has established a rigorous set of minimum public interest requirements that it will apply in ETC cases.[17] The FCC believes that "because these requirements create a more rigorous ETC designation process, their application by the [FCC] and state commissions will improve the long-term sustainability of the universal service fund."[18] The FCC's *ETC Order* identifies a number of public interest concerns that a state commission should consider in reviewing ETC designation requests. These concerns include an examination of: (1) the benefits of increased consumer choice; (2) the unique advantages and disadvantages of the ETC applicant's service offerings; and (3) the impact on the federal USF.[19]

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[15] 47 U.S.C. § 214(e)(2) (emphasis added).
[16] 4 CSR 240-3.570(2)(A)(5).
[17] *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Report and Order*, released March 17, 2005 ("the *ETC Order*").
[18] *Id*. at ¶2.
[19] *ETC Order*, ¶¶44, 54.

The characteristics of many rural carrier service areas also support a more rigorous standard of eligibility because rural carriers' service areas have low customer densities and high per-customer costs. These circumstances indicate that state commissions should apply a particularly rigorous standard to applicants seeking ETC designation in rural carrier service areas. Indeed, numerous statements by the FCC and individual commissioners indicate serious doubts about funding more than one ETC in rural areas.

a. Competitive Choice

U.S. Cellular claims that ETC designation and "competitive entry" will bring the benefits of competition to end users in Missouri.[20] However, in its *Virginia Cellular Order*, the FCC stated, "We conclude that the value of increased competition, by itself, is not sufficient to satisfy the public interest test in rural areas."[21] Thus, under the more rigorous public interest analysis in 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. U.S. Cellular's reliance on competition as a rationale for granting its ETC status is flawed for a number of reasons.

First, the FCC has already found that there is "effective" competition in the wireless market in rural areas.[22] For example, the FCC recently examined rural counties with 100 residents per square mile or less and found that "less densely

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[20] Ex. 7, Wood Direct, pp. 7-9, Ex. 27, Wood Supplemental Surrebuttal, p. 27.

[21] *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")*.

[22] *In the Matter of the 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.

populated" rural counties have an average of 3.6 mobile competitors, while "more densely populated" rural counties have an average of mobile 4.9 competitors.[23] Accordingly, the FCC concluded that wireless carriers were "competing effectively" in rural areas.[24] In Missouri, the areas in U.S. Cellular's proposed ETC designation area already have robust wireless competition.[25] 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.

Second, the introduction of a competitor in a rural environment does not necessarily lead to lower costs or higher quality of service. A high-cost market, by definition, is still a high-cost market even after the introduction of competition, and U.S. Cellular observes that without federal high-cost support "it is doubtful that many rural areas would have wireline telephone service even today."[26] U.S. Cellular appears to concede that it is not economical to provide wireline telephone service to many rural areas, yet U.S. Cellular proposes to introduce another subsidized competitor in these same areas.

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. Since costs of a telecommunications network are relatively fixed, the splitting of a rural market

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[23] *Id*. at ¶86.
[24] *Id*. at ¶88.
[25] 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).
[26] U.S. Cellular Application, p. 20.

between two or more providers generally causes the cost of service to increase for each of the providers on a per customer basis.[27]

Fourth, wireless service in rural areas is often seen as an additional service rather than a replacement for the traditional land line service:

> In the business sector, wireless service is an inadequate substitute for wireline service because of quality of service concerns as well as the need for business customers to have a directory listing as well as to be included in directory assistance. In the residential sector, wireless acts as a poor substitute because of ongoing E-911 concerns, inadequate wireless coverage, inability to use wireless for dial-up internet access, and exclusion from directories and directory assistance. For all these reasons, while customers have demonstrated a desire for the convenience of wireless service, they have also demonstrated an unwillingness to eliminate their wireline connection. . . . As such, wireless service today generally acts as an addition to, not a substitute for, wireline service.[28]

Thus, U.S. Cellular overstates the benefits of head-to-head competition in rural Missouri.

b. The Disadvantages Outweigh The Advantages.

U.S. Cellular cites advantages such as mobility and "toll-free" calling,[29] but these advantages are not unique to U.S. Cellular. Rather, they are offered by all of the many wireless carriers already operating in Missouri in the same areas where U.S. Cellular seeks ETC Designation. The disadvantages of U.S. Cellular's ETC Designation outweigh any limited advantages its two-year plan may provide.

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[27] Ex. 14, Schoonmaker Rebuttal, p. 54.
[28] *In the Matter of Southwestern Bell Telephone, L.P. d/b/a SBC Missouri, for competitive classification Pursuant to 392.245.6 RSMo*., Case No. TO-2006-0102, *Dissenting Opinion of Commissioners Steve Gaw and Robert M. Clayton III*, issued Nov. 10, 2005.
[29] *See e.g.* Ex. 25, Wright, Supplemental Surrebuttal, p. 10.

First, U.S. Cellular's two-year plan simply shores up coverage in its existing service area, and there are relatively few improvements that would increase coverage where it does not already exist.

Second, vast areas of U.S. Cellular's proposed ETC designation area in Missouri would only be offered service on a "resale" or roaming basis (if at all). As a result, there will be no real "choice" in coverage in these areas since U.S. Cellular will simply be reselling the service of another company already in the market, and it is unlikely that U.S. Cellular could resell service in those areas below the prices of the current provider without losing money. (*See* Tr. 545-46.)

Third, U.S. Cellular's proposed two-year plan does not allow the Commission to determine: (a) whether those projects would be completed without high-cost support, or (b) whether the USF support will be spent <u>in addition</u> to what U.S. Cellular would have spent otherwise. For example, US Cellular has already built a number of the cell sites that it previously claimed would not be completed without high cost support.[30] Moreover, the lack of information about financial safeguards and accounting mechanisms make it difficult for the Commission to ensure that the USF support will all be spent in rural areas of Missouri as opposed to urban areas.[31] In other words, there is insufficient evidence in this record to support the allegations that ETC designation will bring any <u>increased</u> investment in rural markets beyond that which U.S. Cellular is already providing.

[30] Ex. 29, McKinnie Supplemental Rebuttal, pp. 12-13; Tr. 786.
[31] Ex. 31, Schoonmaker Supplemental Surrebuttal, p. 27.

c. Impact on Federal USF

The FCC has urged state commissions to use the FCC's framework in a manner consistent with universal service principles and with an eye towards improving the long-term sustainability of the USF.[32] To this end, the FCC has suggested that state commissions may consider limiting the number of ETCs due to the strain on the USF by examining per-line USF support received by the individual LEC on a case-by-case basis.[33]

FCC Chairman Kevin Martin has 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**.[34]

Likewise, in its September 30, 2005 comments to the FCC, the Missouri PSC stated:

> As previously discussed, the majority of the MoPSC recognizes that **as additional carriers receive support from the federal fund, the fund will continue to expand at an alarming rate**.[35]

[32] *ETC Order*, ¶¶18-19; Ex. 13.
[33] *ETC Order*, ¶¶55-56.
[34] 2nd *Report and Order and FNPRM* in CC Docket No. 00-256, 15th *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).
[35] *In the Matter of the Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Comments of the Public Service Commission of the State of Missouri*, Sept. 30, 2005, pp. 15-16 (emphasis added).

The Commission's Staff also remains concerned about the impact of wireless ETC designations on the size of the fund.[36] Thus, it is questionable whether the subsidizing multiple competitors in high-cost rural areas will bring all of the benefits that U.S. Cellular cites, and it is clear that subsidizing multiple competitors comes with a substantial downside.

3. U.S. Cellular Does Not Meet The Requirements of The Commission's ETC Designation Rules. (*Issue 3*)

The Commission has promulgated rules to be used in evaluating ETC applications, and these rules became effective on June 30, 2006. Aside from U.S. Cellular, all of the parties in this case agree that U.S. Cellular does not meet the requirements of the Commission's ETC designation rules.

a. U.S. Cellular's Application Does Not Comply With Commission Rule 4 CSR 240-3.570(2)(A).3.G.

The Commission's rules require an applicant for ETC status to demonstrate 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.

See 4 CSR 240-3.570(2)(A).3.G. In other words, US Cellular must prove that: (1) it will use USF support to fund capital expenditures that it would not have funded anyway; and (2) that USF support will be used in addition to expenses that U.S. Cellular would normally incur. U.S. Cellular has failed to satisfy either of these

[36] Tr. 274 (2005 hearing) and Tr. 789 (2006 hearing).

PSC Rule requirements and declined to commit to providing necessary assurances or information during the hearing.

First, the rule requires U.S. Cellular to demonstrate that its proposed plans would not otherwise occur without the USF high-cost support. The record in this case demonstrates just the opposite. Specifically, U.S. Cellular's first build-out plan identified sixteen cell sites that would not otherwise be built absent high-cost, but U.S. Cellular went ahead and built four of those sixteen sites (25%) without high cost support.[37] The Commission's Staff concludes, "It is not in the public interest to grant ETC designation for U.S. Cellular to receive high-cost support, given that U.S. Cellular does not need that support to construct cell sites in its proposed plan."[38] U.S. Cellular has failed to comply with the Commission's rules and demonstrate that its proposed plans would not otherwise occur without high cost support. Therefore, the Commission should deny U.S. Cellular's application.

Second, U.S. Cellular has failed to demonstrate that support will be used "in addition to any expenses the ETC would normally incur." The PSC's rules require U.S. Cellular's ETC application to outline with specificity how USF support would be spent over and above what the applicant would otherwise spend in Missouri. In this case, U.S. Cellular has not provided sufficient baseline budget or historical expense information that would allow the Commission or the parties to determine whether the proposals in U.S. Cellular's revised two-year plan are in addition to U.S. Cellular's "normally incurred" investments in rural

[37] Ex. 29, McKinnie Supplemental Rebuttal, pp. 12-13; Tr. 786.
[38] Staff Statement of Position, pp. 2-3.

Missouri.[39] Moreover, U.S. Cellular declined to make such a commitment during the hearing.

U.S. Cellular expects to receive approximately $11 million per year in USF support if it is designated as an ETC in Missouri, but U.S. Cellular has not shown the Commission what it normally spends on projects in Missouri. This is a fatal flaw in U.S. Cellular's application. For example, assume that U.S. Cellular has historically spent $10 million per year on network improvements in rural Missouri over the last five years without the aid of USF high-cost support. Under this hypothetical, the PSC's rule requires U.S. Cellular to demonstrate how it will spend **<u>$21 million</u>** per year in rural Missouri (i.e. $11 million in USF support <u>plus</u> the $10 million in expenses that U.S. Cellular "would normally incur"). This is important because if U.S. Cellular does not spend $21 million in rural Missouri, then some of the money that was earmarked for rural Missouri was spent in an urban Missouri market, such as St. Louis, or in another state, or worse yet, not spent at all and sent to U.S. Cellular's shareholders.

During the hearing, Commissioner Gaw questioned U.S. Cellular's witnesses about the company's commitment to demonstrate that USF high cost support would be used "in addition to any expenses the ETC would normally incur" as required by the PSC's rule, and U.S. Cellular declined to offer any commitments:

[39] Ex. 31, Schoonmaker Supplemental Rebuttal, pp. 25-26, and Schedules RCS-21(HC), 22(HC), and 23(HC).

Q. All right. Now, in regard to the expenditures that could be made in '08, is there any – first of all, **is there anything that the – that U.S. Cellular would – would give to the Commission in regard to assurance or guarantees in – as to expenditure – minimum expenditures for that year as they relate to the expenditures that have historically been made since '03?**

A. Commissioner Gaw, I don't want to dance around your question. But I will tell you, sir, is that our – our investment – ETC investment will be incremental to what we will build within our internal plant. That is our commitment to you. As far as your minimum question –

Q. Yes.

A. -- I – **I'm not comfortable committing to that right now because that decision really would be above – probably my boss or above at this particular point, so I'd hate to commit to that**. I just – I know this.

We would – we would invest dollar to dollar ETC money over and above what we've been spending, what we would spend in '07 and '08 and beyond.

Q. **Would U.S. Cellular object to a requirement that they maintain a certain minimum level of expenditure over and above the amount that would be available through USF monies if this Commission made such a requirement as a condition to USF status?**

A. **Again, that may be my boss's. I hate to defer**.

Q. That's all right.

A. **But I hate to commit at this particular point**. I guess, again, what I could commit to is that this money would be over and above our spend. And on average, as Mr. Johnson has said, we've been spending about 15, $16 million a year in Missouri. Right as of this moment, that's still our plan. We have a lot of white space to build in Missouri, so I cannot see why we couldn't – why we would not maintain that sort of spend. **But I'd hate to commit to a minimum at this point, at least without talking to my boss in Chicago, the CEO of the company**.

Q. **<u>But he's not here to testify, correct?</u>**

A. That's right. He is not.

(Tr. 757-59)(emphasis added).

In the Commission's other recent ETC cases, Chariton Valley Wireless and Northwest Missouri Cellular both provided Missouri-specific data that allowed the parties and the Commission to evaluate what those companies had "normally" spent <u>and</u> budgeted in their high-cost service areas. U.S. Cellular, on the other hand, has repeatedly refused to do so, and U.S. Cellular's eleventh-hour attempts to provide the necessary information at the hearing should be carefully scrutinized.

First, the testimony offered by Mr. Johnson contradicts U.S. Cellular's earlier testimony that it does not compile or maintain historical capital expenditure or budget data for its Missouri operations on a state or wire-center basis. (*Compare* Tr. 733-35 with Tr. 162-63 and Tr. 750-53.) Second, it contradicts U.S. Cellular's data request responses which also indicated that U.S. Cellular does not have Missouri-specific capital expenditure or budget information. (Tr. 753) Third, the testimony offered by Mr. Johnson in response to Commissioner Gaw's questions excluded Joplin, which U.S Cellular considers part of its Oklahoma market. (Tr. 164, 749) Throughout this proceeding, U.S. Cellular has said, "Trust us," but U.S. Cellular has consistently failed to provide necessary information to the Commission and the other parties. Instead, U.S. Cellular played hide-the-ball up until the hearing, and when it finally chose (or was forced) to reveal this information, it was vague and unsubstantiated.

Because U.S. Cellular has refused to supply the necessary information and expressly declined to make the necessary commitment, its ETC application must be denied.

b. U.S. Cellular's Application Does Not Comply With Commission Rule 4 CSR 240-3.570(2)(A)(5).

In order to examine the question of public interest, the Commission must have information about whether the benefits of granting US Cellular ETC status outweigh the costs. Because US Cellular is already providing service without any USF support, the Commission must consider whether granting ETC status (and thereby USF support) will result in any <u>additional</u> competition or <u>increased</u> benefits for customers in rural Missouri.

c. U.S. Cellular's Two-Year Network Improvement Plan Is Deficient.

U.S. Cellular's proposed two-year plan will only serve to prop up its wireless service in areas where U.S. Cellular already serves, not in the other rural areas where it seeks ETC status. This is important because U.S. Cellular does not presently offer service in these areas, and U.S. Cellular has offered no plans to serve these areas in its two-year network improvement proposal.[40]

d. No Accounting or Financial Safeguards

In the Northwest Missouri Cellular and Chariton Valley Cellular ETC cases, both companies operated wholly within Missouri and wholly within the area for which they requested ETC designation. Moreover, the areas they serve are solely rural areas where USF funds are intended to offset the high cost of providing service. Thus, those two wireless carriers serve <u>only</u> in Missouri and

[40] *See* Brown Surrebuttal, p. 6; Schoonmaker Surrebuttal, p. 2; Stidham Surrebuttal, p. 7.

only in rural areas. In this case, the circumstances are different. U.S. Cellular operates in a number of states, and in urban areas of Missouri such as St. Louis in addition to rural areas. Because of the concerns regarding U.S. Cellular financial reporting capabilities, it will be much more difficult and perhaps impossible for the Commission to identify whether USF funds: (1) are used within Missouri, (2) are used within the rural areas that receive ETC designation as opposed to urban areas such as St. Louis; and (3) would not have been spent absent USF support.[41] Indeed, it will be impossible for the Commission to make such findings because U.S. Cellular does not account for the capital expenditures it makes on a state-by-state basis or a rural-versus-urban basis.[42]

e. U.S. Cellular's Application Does Not Comply with Commission Rule 4 CSR 240-3.570(2)(A)(10) Because U.S. Cellular's Local Usage Plans Are Not Comparable to ILEC Local Usage Plans.

Missouri PSC Rule 4 CSR 240-3.570(2)(A)(10) requires an ETC applicant to commit to offer a local usage plan comparable to the plan offered by the ILEC in the requested area. The basic local service plans of Missouri ILECs offer unlimited local calling within a Commission-defined local calling scope.[43] None of U.S. Cellular's plans offer unlimited local usage, both originating and terminating, for a flat monthly rate. Instead, U.S. Cellular's rate plans offer a certain number of "minutes" after which per minute charges apply.[44] In order to be truly comparable

[41] Ex. 31, Schoonmaker Supplemental Rebuttal, pp. 27-29.
[42] Ex. 31, Schoonmaker Supplemental Rebuttal, pp. 25-26, and Schedules RCS-21(HC), 22(HC), and 23(HC); Tr. 162-63; 750-53.
[43] Ex. 14, Schoonmaker Rebuttal, pp. 20-21, Schedule RCS-2, Ex. 31, Schoonmaker Supplemental Rebuttal, pp. 9-10, and Schedule RCS-17.
[44] Ex. 14, Schoonmaker Rebuttal, p. 29.

with the ILEC rate plans, "any offering for which U.S. Cellular seeks to receive high cost support must likewise offer unlimited calling."[45] Indeed, both Chariton Valley Wireless and Northwest Missouri Cellular committed to offer plans comparable to ILEC calling plans with unlimited local calling in their ETC application cases.[46] Thus, U.S. Cellular's local usage plans are not comparable to the ILEC service offerings.[47]

FCC Rules require ETCs to offer Lifeline service.[48] Mr. Schoonmaker's testimony demonstrates that U.S. Cellular's Lifeline rate is already much higher than the Lifeline rates of Missouri's small rural telephone companies.[49] To make matters worse, U.S. Cellular's basic Lifeline plan only includes 400 minutes of calling for $25 per month ($16.75 after Lifeline discounts) with additional usage costing **<u>$0.40 per minute</u>**.[50] Thus, if a customer exceeds the 400 minute allowance of incoming and outgoing calls, then the cost of service escalates very quickly.

U.S. Cellular's proposed $25 Lifeline plan would be a Missouri-specific plan that differs from the Lifeline plan in all other states where it has been designated an ETC, and U.S. Cellular has made no commitment as to how long it will offer the $25 plan:

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[45] Brown Surrebuttal, p. 5.
[46] Ex. 31, Schoonmaker Supplemental Rebuttal, p. 10.
[47] *Id*.
[48] 47 C.F.R. §54.405.
[49] Ex. 31, Schoonmaker Supplemental Surrebuttal, Schedule RCS-17 and Tr. 818.
[50] See Ex. 14, Schoonmaker Rebuttal, p. 24; Wright Direct, p. 6, Surrebuttal, p. 11, and Supplemental Surrebuttal, p. 8 and Ex. A.

> Q: How long would you intend to offer the Missouri-specific life line plan if you're designated ETC status?
>
> A: We have no plans in not offering it beyond a certain period of time. We're going to advertise it. We're going to put it out there, and we're going to offer it. **As far as I know – I mean, never say ever, right?** The fact of the matter is they have no plans of pulling that rate plan off.[51]

The Commission has little or no regulatory authority to review U.S. Cellular's rates or service offerings outside of this case. As a result, U.S. Cellular could cease offering the $25 Lifeline plan at any time, so the Commission should be especially cautious about U.S. Cellular's refusal to provide any kind of assurances or commitments to offer the $25 Lifeline service for any specific period of time.

4. Granting ETC Status to Multiple Wireless Carriers In Wire Centers That Are Also Currently Served By Incumbent ILECs Is Not In The Public Interest. (*Issue 5*)

On September 21, 2006, the Commission approved ETC applications from Northwest Missouri Cellular and Chariton Valley Cellular in their requested 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 public policy question that the Commission faces for the first time with U.S. Cellular's application is the question of whether it is an appropriate use of universal service funds to support multiple wireless carriers in the same service area. The Commission must now answer the question as to whether it serves the public good to support

[51] Tr. 537-38 (emphasis added).

competition by multiple carriers in the same high cost area for "universal service" purposes.

In applying the public interest test in the Northwest Missouri Cellular ETC case, the Commission found that:

> Granting NWMC an ETC designation will benefit the public by enabling NWMC to bring wireless service, including E911 (specifically in Worth County) and CDMA, to many remote locales and by increasing competition for primary telephone service in remote areas. In addition, Lifeline and Link-up customers will have access to service that would otherwise be unavailable to them. The Commission concludes that the benefits to the public in rural Missouri of granting NWMC ETC status will outweigh the potential detriments to the USF."[52]

The Commission made similar findings in the Chariton Valley Cellular case.[53]

In the instant case, the Commission must determine if there is any <u>incremental</u> benefit to granting an ETC designation to U.S. Cellular in those areas where it has previously granted ETC designations to Northwest Missouri Cellular and Chariton Valley Wireless.

Based on the Commission's analysis in the Northwest Missouri Cellular and Chariton Valley Cellular cases, it would appear that this is not the case. Competition for primary telephone service in remote areas has now been enhanced by a grant of ETC designation to Northwest Missouri Cellular and Chariton Valley Wireless. Lifeline and Like-up customers will now have access to wireless service that was previously unavailable to them. Thus, a grant of

[52] *In the Matter of Northwest Missouri Cellular's Application for ETC Designation*, Case No. TO-2005-0466, *Report & Order*, issued Sept. 21, 2006, pp. 30-31 (footnote omitted).
[53] *In the Matter of Chariton Valley Wireless (MO5) Application for ETC Designation*, Case No. TO-2006-0172, *Report & Order*, issued Sept. 21, 2006, pp. 33-34.

ETC designation to U.S. Cellular in areas where Northwest Missouri Cellular and Chariton Valley Wireless currently serve and have been designated as ETCs will not result in any additional benefits in these areas that have not already been achieved as a result of the Commission's decision to award ETC designation to Northwest Missouri Cellular and Chariton Valley Cellular.

On the other hand, incremental costs will be incurred as U.S. Cellular will be eligible for USF support in addition to that being received by the underlying ILECs, Northwest Missouri Cellular, and Chariton Valley Wireless. So, applying a public interest test to areas where the Commission has already granted an additional ETC designation to a wireless carrier, the incremental benefits of granting ETC designation to U.S. Cellular will not outweigh the incremental costs. The Commission should decline to grant U.S. Cellular ETC status in those areas where it has previously granted ETC designation to other wireless carriers.

U.S. Cellular is likely to cite the recent U.S. District Court for the District of Nebraska's reversal of a Nebraska Public Service Commission decision denying ETC status to Nextel Wireless.[54] The *Nextel* case is not on point here. First, the ETC designation standards were quite different "at the time"[55] (2003-2004) the Nebraska PSC applied them. The FCC (2005) and the Missouri PSC (2006) have both subsequently issued much more rigorous standards.[56] Second, no rural telephone companies opposed the application in the Nebraska case, but

[54] *Nextel Partners v. Nebraska PSC*, Case 04-CV3236. *Memorandum Opinion*, issued Dec. 15, 2006.
[55] *Id*. at p. 17.
[56] *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Report and Order*, rel. March 17, 2005 ("the *ETC Designation Order*"); Missouri PSC Rules 4 CSR 240-3.570.

virtually all of Missouri's small rural telephone companies oppose U.S. Cellular's Missouri application in this case.[57] Third, the Nebraska PSC found that "Nextel proposed to provide service **throughout the service area**,"[58] but U.S. Cellular will not provide service in vast parts of its proposed ETC designation area.

Finally, the *Nextel* opinion stressed that the Nebraska PSC must apply consistent standards when making ETC designations, and the court stated that the Nebraska PSC's interpretation of the Act and the FCC's rules "would result in the standardless and inconsistent application the law…."[59] In contrast, the Missouri PSC has established a set of clear and specific standards through its ETC Designation rule that must be applied evenly to **all** ETC applicants. Chariton Valley Wireless and Northwest Missouri Cellular met the standards in the Missouri PSC's rule, but U.S. Cellular has failed to meet those same standards. Therefore, a consistent and fair application of the Missouri PSC's ETC designation rules requires that U.S. Cellular's application must be denied.

III. CONCLUSION

U.S. Cellular has failed to meet its burden of proof and demonstrate that it meets the requirements of state and federal law throughout the areas for which it seeks ETC designation. First, U.S. Cellular does not offer service in many of the areas where it seeks ETC status, and its two-year build-out proposal offers no plans to offer service in many parts of rural Missouri. Provision of service exclusively via resale does not qualify U.S. Cellular for ETC status in those areas. Therefore, the Commission should deny the application or exclude those

[57] *Nextel Partners* Case No. 04-CV3236, p. 17.
[58] *Id*. at p. 18 (emphasis added).
[59] *Id*. at pp. 18-19.

areas where U.S. Cellular does not provide service and has offered no plan to do so within two years. Second, U.S. Cellular has also failed to comply with the PSC's ETC designation rule. Specifically:

1. U.S. Cellular has not proven that its proposed plans would not otherwise occur absent the receipt of high cost funds. On the contrary, this case has demonstrated that U.S. Cellular has completed proposed plans absent high cost support.
2. U.S. Cellular's two-year plan does not demonstrate that USF support will be spent on projects over and above what it would otherwise spend. On the contrary, U.S. Cellular has failed to provide such a commitment to the Commission and failed to provide any baseline budget information to the Commission or the parties that would allow them to make such a determination. In fact, U.S. Cellular has testified that it does not have the Missouri-specific information that would allow it to identify capital expenditures or budgets.
3. U.S. Cellular's rate plans are not comparable to those rate plans offered by the rural incumbent local exchange carriers.
4. U.S. Cellular's two-year plan does not demonstrate that a grant of ETC status is in the public interest, particularly in those areas that are already served by wireless ETCs.

U.S. Cellular has failed to provide the Commission with enough evidence to issue a decision granting ETC status, and U.S. Cellular has failed to meet the legal standards for ETC designation. Therefore, the Commission should deny the application.

RESPECTFULLY SUMBITTED,

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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 31st day of January, 2007, to the following parties:

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