

ANDERECK, EVANS, MILNE, PEACE & JOHNSON, L.L.C.

ATTORNEYS AT LAW

EUGENE E. ANDERECK

TERRY M. EVANS

ERWIN L. MILNE

JACK PEACE

CRAIG S. JOHNSON

RODRIC A. WIDGER

GEORGE M. JOHNSON

BEVERLY J. FIGG

WILLIAM S. LEWIS

VICTOR S. SCOTT

COREY K. HERRON

700 EAST CAPITOL AVENUE

COL. DARWIN MARMADUKE HOUSE

P.O. BOX 1438

JEFFERSON CITY, MISSOURI 65102-1438

TELEPHONE 573-634-3422

FAX 573-634-7822

MATTHEW M. KROHN

LANETTE R. GOOCH

SHAWN BATTAGLER

ROB TROWBRIDGE

JOSEPH M. PAGE

LISA C. CHASE

JUDITH E. KOEHLER

ANDREW J. SPORLEDER

REBECCA L. SELLERS

OF COUNSEL

MARVIN J. SHARP

PATRICK A. BAUMHOER

GREGORY C. STOCKARD (1904-1993)

PHIL HAUCK (1924-1991)

June 18, 2003

Mr. Dale Hardy Roberts
Secretary/Chief Administrative Law Judge
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102

FILED²

JUN 18 2003

**Missouri Public
Service Commission**

Re: TO-2003-0531

Dear Secretary Roberts:

Enclosed for filing please find an original and five (5) copies of Alma Telephone Company's Response in Opposition to Staff's Motion to Dismiss in the above-referenced matter.

If you have any questions or concerns, please do not hesitate to contact me. Thank you for seeing this filed.

Sincerely,


Lisa Cole Chase

LCC:sw

Enc.

cc: Judge Nancy Dippell
Office of Public Counsel
Marc Poston, General Counsel
W. R. England, III/Sondra Morgan
James M. Fischer/Larry Dority
Paul DeFord

Trenton Office
9th And Washington
Trenton, Missouri 64683
660-359-2244
Fax 660-359-2116

Springfield Office
1111 S. Glenstone
P.O. Box 4929
Springfield, Missouri 65808
417-864-6401
Fax 417-864-4967

Princeton Office
207 North Washington
Princeton, Missouri 64673
660-748-2244
Fax 660-748-4405

Smithville Office
119 E. Main Street
P.O. Box. 654
Smithville, Missouri 64089
816-532-3895
Fax 816-532-3899

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

FILED²
JUN 18 2003

In the Matter of the Application of)
Missouri RSA No. 7 Limited Partnership)
d/b/a Mid-Missouri Cellular for Designation)
as a Telecommunications Carrier Eligible for)
Federal Universal Service Support pursuant)
to Section 254 of the Telecommunications)
Act of 1996.)

Case No. TO-2003-0531

Missouri Public
Service Commission

**RESPONSE IN OPPOSITION
TO STAFF'S MOTION TO DISMISS**

COMES NOW Alma Telephone Company (Alma) and for its Response in Opposition to Staff's Motion to Dismiss, states to the Commission as follows:

I. INTRODUCTION AND SUMMARY

1. On June 2, 2003, Missouri RSA No. 7 Limited Partnership, d/b/a Mid-Missouri Cellular ("MMC") filed its *Application for Designation as an Eligible Telecommunications Carrier Pursuant to §254 of the Telecommunications Act of 1996*.

2. On June 5, 2003, the Commission issued an *Order Directing Filing* which provided that any party wishing to intervene in this matter must file an application no later than June, 25, 2003, ...". This Order became effective on June 15, 2003. Also on June 5, 2003, MMC filed its *Motion for Expedited Treatment*.

3. On June 6, 2003, Alma Communications Company, d/b/a Alma Telephone Company ("Alma") filed its *Application to Intervene* pursuant to 4 CSR 240-2.075 and the Commission's June 5, 2003 *Order Directing Filing*.

4. On June 13, 2003, the Staff of the Missouri Public Service Commission filed a Motion to Dismiss which argues that the Commission lacks subject matter jurisdiction in this case. This Motion was filed prior to the effective date of the Commission's Order granting intervention, twelve days prior to the date parties are required to intervene, and prior to any party being granted intervention. Pursuant to 4 CSR 2.080(15), "[p]arties shall be allowed not more

than ten (10) days from the date of filing in which to respond to any pleading unless otherwise ordered by the commission.” Alma has some concern, procedurally, about the timing of Staff’s Motion to Dismiss. Parties who are interested in this proceeding, and who have or intend to intervene within the period granted by the Commission, have not been served with the Motion to Dismiss to which to respond within the prescribed ten-day period. In fact, parties are not required to apply to intervene until two days after the ten-day period to respond has run. Alma is concerned that such timing not only deprives interested parties from fully considering and responding to Staff’s Motion to Dismiss, but it deprives the Commission from the benefit of having the issues raised in the Motion fully briefed by all interested parties, and basing its decision with respect to the Motion on a fully developed record.

5. The Commission does have jurisdiction to examine MMC’s application for ETC status. The Telecommunications Act of 1996 (the Act) provides the Missouri Public Service Commission with authority over MMC’s application for ETC status. 47 U.S.C. § 214(e)(2). The Missouri Legislature has granted the Missouri Commission the authority to “act as an agent or licensee for the United States of America, or any official, agency or instrumentality thereof, ...”. Section 386.210 RSMo. Thus the Commission is authorized to accept the responsibilities granted it by the United States Congress and the FCC pursuant to the 1996 Act and the regulations promulgated pursuant thereto. Other state Commissions are presently addressing this issue, and other state supreme court decisions hold that state commissions have the authority to consider wireless carriers’ applications for ETC status in rural areas.

6. This case is one of first impression in Missouri. Because of the important public policy considerations, the Commission should assert its jurisdiction. The Commission is best situated to make the public interest determination required by the Act.

II. THE TELECOMMUNICATIONS ACT OF 1996

7. The Act grants state commissions primary responsibility for designating carriers as Eligible Telecommunications Carriers (ETCs) qualified to receive federal universal service funding. Section 214(e)(2) of the Act provides:

Designation of eligible telecommunications carriers. A State commission **shall upon its own motion or upon request** designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the State commission. 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.**¹

Thus, the Missouri Commission has been granted the authority by the United States Congress and FCC under the 1996 Act and regulations promulgated pursuant thereto, and by the Missouri Legislature pursuant to Section 386.210 RSMo to examine, “upon its own motion or upon request,” the question of whether MMC should be granted ETC status. In this case, MMC has specifically requested relief from the Missouri Commission.

8. **The mandatory public interest finding.** Section 214(e)(2) of the Act **mandates** a finding that designating MMC as an ETC is in the public interest because MMC is applying for ETC status in an area served by a rural telephone company. (“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.”²) The Missouri Commission is best situated to make the public interest determination.

¹ 47 U.S.C. § 214(e)(2)(emphasis added); *see also* 47 CFR § 54.201(b) (“A state commission **shall upon its own motion or upon request** designate a common carrier that meets the requirements of paragraph (d) of this section as an eligible telecommunications carrier for a service area designated by the state commission.”) (emphasis added)

² 47 U.S.C. § 214(e)(2); *see also* 47 CFR § 54.201(c) (“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 (d) of this section. **Before designating an additional eligible telecommunications**

III. OTHER STATE COMMISSIONS ARE PRESENTLY EXAMINING THIS ISSUE

9. Staff correctly points out that some state Commissions have declined to examine ETC cases involving wireless carriers. However, Staff fails to inform the Commission that other state Commissions have taken jurisdiction over wireless ETC application cases, even when those Commissions do not generally regulate wireless carriers. For example, the Alaska and West Virginia Commissions are presently examining the question of whether wireless carriers should be granted ETC status in areas served by rural companies:

(A) **Alaska**. The Regulatory Commission of Alaska is presently examining an application for ETC status by Alaska DigiTel, a personal communications service (PCS) provider. Alaska DigiTel filed its application with the Alaska Commission, and the Alaska Commission took jurisdiction under 47 U.S.C. § 214 and stated:

ETC status, if granted, would allow Ak DigiTel to receive federal universal service funds for eligible telecommunications services that it provides in the designated service area. **Under 47 U.S.C. 214, we have discretion on whether to grant AK DigiTel ETC status since it seeks ETC status in an area currently served by MTA, a rural telephone company. Thus, we will further explore this area at hearing.**³

The Alaska Commission recently issued an order governing discovery in Alaska DigiTel's Application for ETC case.⁴

carrier for an area served by a rural telephone company, the state commission shall find that the designation is in the public interest.") (emphasis added)

³ *In the Matter of the Request by Alaska DigiTel, LLC for Designation as a Carrier Eligible to Receive Federal Universal Service Support under the Telecommunications Act of 1996*, U-02-39; Order No. 1, *Order Granting and Inviting Intervention*, dated August 29, 2002.

⁴ *In the Matter of the Request by Alaska DigiTel, LLC for Designation as a Carrier Eligible to Receive Federal Universal Service Support under the Telecommunications Act of 1996*, U-02-39; Order No. 7, *Order Governing Discovery*, dated March 5, 2003.

(B) **West Virginia.** The West Virginia Commission is also examining an application for ETC status by a wireless carrier. On September 18, 2002, Highland Cellular petitioned the West Virginia Public Service Commission to be designated as an ETC in areas served by rural telephone companies. On January 16, 2003, Highland, the rural carrier, the Commission's Staff, and the consumer advocate jointly moved for a hearing before the West Virginia Commission, arguing:

[T]his case is the first time that the Commission will consider the application of a wireless carrier seeking ETC status in the service area of a rural telephone company, and accordingly would result in the establishment of Commission policy.⁵

The West Virginia Commission's Staff and the Consumer Advocate Division both oppose Highland Cellular's Petition.⁶

IV. OTHER STATE SUPREME COURTS HAVE RULED ON THE ISSUE

10. Other state commissions have already denied or granted applications for ETC status, and these commission decisions have been affirmed by the supreme courts in those states.

(A) **Nebraska.** In August of 1998, Western Wireless applied for ETC status in a number of Nebraska service areas, including areas served by incumbent rural carriers. In November of 2000, the Nebraska Public Service Commission granted the application for ETC designation. "In its order, the PSC stated that **it must be shown by clear and convincing evidence that designation of a second ETC in a rural area is in the public interest.**"⁷ On

⁵ *Petition for Consent and Approval for Highland Cellular to be Designated as an Eligible Telecommunications Carrier in Areas Served by Citizens Telecommunications Company of West Virginia*, Case No. 02-1453-T-PC, Order, issued Jan. 22, 2003.

⁶ *See Petition for Consent and Approval for Highland Cellular to be Designated as an Eligible Telecommunications Carrier in Areas Served by Citizens Telecommunications Company of West Virginia*, Case No. 02-1453-T-PC, *Procedural Order*, issued March 7, 2003.

⁷ *In re Application No. C-1889 of GCC Licence Corp.*, 647 N.W.2d 45, 50 (Neb. 2002)(emphasis added).

appeal, the Supreme Court of Nebraska noted that the Nebraska PSC “was required to determine the meaning of ‘public interest’ as used in 47 U.S.C. § 214(6).”⁸ The court affirmed the Nebraska PSC’s decision and held that the PSC did not err in the manner in which it defined “public interest” and in determining that Western Wireless met its burden of proof to show that it should be designated as an ETC.⁹

(B) **Utah.** The Public Service Commission of Utah denied an application by a wireless carrier for ETC status in rural areas. In that case, the Utah PSC “found that a designation of [a wireless carrier] as an ETC in rural areas already served would not be in the public interest.”¹⁰ The Utah Supreme Court affirmed the Utah PSC’s decision and noted that “state commissions have been given authority to designate common carriers as ETCs.” In that case, the Utah Supreme Court examined “the federal requirement that a state commission must find that designating an additional ETC in a rural area is in the public interest.” The Court explained, “**The statutory language that ‘the State commission shall find that the designation is in the public interest,’ 47 U.S.C. § 214 (e)(2), gives the PSC authority and thereby discretion to determine what is in the public interest.**”¹¹

(C) **Washington.** The Washington Utilities and Transportation Commission also found that it has jurisdiction to address an application for ETC status in rural areas. The Washington Commission explained its jurisdiction under the Act:

The Telecommunications Act of 1996 requires state utility commissions to make a number of decisions related to opening local telecommunications markets to competition and preserving and advancing universal service. **One of**

⁸ *Id.* at 52.

⁹ *Id.* at 56.

¹⁰ *WWC Holding Co. v. Public Service Comm’n of Utah*, 44 P.3d 714 (Utah 2002) (citing 47 U.S.C. § 214).

¹¹ *Id.* at 719 (emphasis added).

those decisions is the designation of qualified common carriers as eligible telecommunications carriers (ETCs).¹²

Earlier this month, the Washington Supreme Court affirmed the Washington Commission's determination that United States Cellular had satisfied the statutory requirements for ETC status.¹³

11. **The Missouri Commission is best situated to address this case.** Before ETC status can be granted to MMC in areas served by rural telephone companies, there must be a finding that the granting of the status is in the public interest.¹⁴ Alma does not believe that the granting of ETC status to a second carrier is in the public interest, but, more importantly, Alma believes it should be able to present its reasons why the designation is not in the public interest to the Missouri Commission. Alma is a Missouri local exchange company subject to the authority of the Missouri Commission. As a Missouri regulated company, Alma prefers that the necessary public interest determination be made by a regulatory body that understands the challenges and problems faced by local exchange companies providing service within the state.

12. **Public Interest Determination.** Alma will present evidence to the Commission showing that the grant of ETC status to MMC is not in the public interest. Alma believes that the grant will adversely affect the federal USF fund and increase the dollar amount of customer assessments. Alma will show that the grant of ETC status will not provide customers any benefits that they do not already have. Furthermore, the grant of ETC status to MMC will not

¹² *In the Matter of the Petition of Inland Cellular Telephone Company for Designation as an Eligible Telecommunications Carrier*, Docket No. UT-023040, *Order Granting Petition*, dated August 30, 2002.

¹³ *Washington Independent Telephone Ass'n v. Washington Utilities and Transportation Comm'n*, 2003 Wash. LEXIS 208 (Washington Supreme Court 2003)

¹⁴ 47 CFR § 54.201(c).

increase competition in the requested area as that area is already served by at least three local exchange companies and up to as many as five wireless providers. These are matters that must be considered by the regulatory body making the decision on whether to grant ETC status to an additional carrier in a rural service area. Alma believes that the Missouri Commission is in the best position to make those determinations.

13. **Study Area Determination.** Further, whereas MMC appears to seek designation as an ETC in an area that deviates from Alma's and Mid-Missouri Telephone Company's study areas, federal law requires at 47 U.S.C. § 214(e)(5) that, "In the case of an area served by a rural telephone company, 'service area' means such company's 'study area' unless and until the Commission [FCC] and the States, after taking into account recommendations of a Federal-State Joint Board instituted under section 410(c) of this title, establish a different definition of service area for such company." (emphasis added.) Indeed, MMC submits that the requisite determinations to be made pursuant to the Act, should be made by this Commission.¹⁵

Conclusion

Alma respectfully submits that this Commission is best situated to consider the substantial and competent evidence that will be presented in this proceeding, and to make findings and conclusions based upon that evidence.

WHEREFORE Alma respectfully requests that the Commission deny Staff's Motion to Dismiss and issue such other orders as are reasonable in the circumstances.

¹⁵ "It may be argued that MMC must obtain a determination from the FCC pursuant to Section 54.207 of the FCC's Rules authorizing MMC to be designated an ETC in an area that deviates from MMTC's study area. MMC respectfully submits, however, that the requisite determination may be made by this Commission pursuant to §214 (e)(2) of the act, which states: . . ."

ANDERECK, EVANS, MILNE,
PEACE & JOHNSON, L.L.C.

By 

Craig S. Johnson MO Bar No. 28179
Lisa Cole Chase MO Bar No. 51502
The Col. Darwin Marmaduke House
700 East Capitol
Post Office Box 1438
Jefferson City, Missouri 65102
Telephone: (573) 634-3422
Facsimile: (573) 634-7822

ATTORNEYS FOR ALMA

Application For Designation As An Eligible Telecommunications Carrier Pursuant to § 254 Of
The Telecommunications Act of 1996, page 10.

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been hand-delivered, transmitted by e-mail or mailed, First Class, postage prepaid, this 31st day of March, 2003, to:


Office of the Public Counsel
P.O. Box 7800
Jefferson City MO 65102

Dana K. Joyce
General Counsel
Missouri Public Service Commission
P.O. Box 360
Jefferson City MO 65102

James Fischer
Larry Dority
Fischer & Dority, PC
101 W. Madison, Suite 400
Jefferson City, MO 65101

Paul DeFord, Esq.
Lathrop & Gage, L.C.
2345 Grand Boulevard, Suite 2800
Kansas City, MO 64108-2684

W.R. England, III
Sondra B. Morgan
Brydon, Swearengen & England P.C.
P.O. Box 456
Jefferson City, MO 65102



Lisa Cole Chase