

**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. )

**POSTHEARING BRIEF OF THE  
SMALL TELEPHONE COMPANY GROUP**

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## I. INTRODUCTION AND SUMMARY

This is the first case involving an application by a wireless company for eligible telecommunications carrier (“ETC”) status to come before the Missouri Public Service Commission (“Commission” or “PSC”) after the Federal Communications Commission (“FCC”) released its March 17, 2005 *Report and Order* in CC Docket No. 96-45 establishing a rigorous set of “minimum requirements” for ETC designation (“the *ETC Designation Order*”). The FCC recognized the need for more stringent requirements to “improve the long-term sustainability of the federal universal service fund.”<sup>1</sup> Accordingly, the *ETC Designation Order* establishes “a more thorough ETC designation framework” and applies a “more thorough public interest analysis.”<sup>2</sup>

The Missouri Commission has already applied rigorous standards to applications for ETC status by wireless carriers. Last year, after examining a much more detailed ETC application filed by Mid-Missouri Cellular (“MMC”), the PSC concluded that “the grant of ETC status to MMC is not in the public interest because MMC had not provided competent and substantial evidence to show that the public will benefit from designating MMC an eligible telecommunications carrier for universal service fund purposes.”<sup>3</sup>

The Commission also made the following observations about MMC’s ETC application:

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<sup>1</sup> *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*”), ¶2.

<sup>2</sup> *Id.* at ¶14.

<sup>3</sup> *In the Matter of Missouri RSA No. 7 Limited Partnership d/b/a Mid-Missouri Cellular for ETC Designation*, Case No. TO-2003-0531, *Report and Order*, issued Aug. 5, 2004 (“*Mid-Missouri Cellular ETC Order*”).

1. MMC had not agreed to follow the same quality of service standards as landline companies;
2. MMC had not provided construction plans, financial information, or timelines to show how USF funds would be used to upgrade MMC's system;
3. MMC had not shown that customers in rural service areas would see any increased competition or benefits from the grant of ETC status to MMC; and
4. MMC had admitted it would upgrade certain aspects of its system regardless of whether it was granted ETC status.<sup>4</sup>

U.S. Cellular's application has the same (if not worse) deficiencies as the MMC application. Thus, U.S. Cellular does not pass the Commission's earlier standard of review for ETC designation in the MMC case, and it certainly does not meet the FCC's more rigorous standard of review in the *ETC Designation Order*.

One glaring deficiency in U.S. Cellular's ETC application is the failure to provide a five-year network improvement plan to demonstrate how it intends to spend roughly \$8 million per year (i.e. \$40 million over five years) in estimated federal Universal Service Fund ("USF") support. U.S. Cellular's application only offers information as to how it would spend a fraction of this amount (i.e. between \$4 and \$6 million over the next 18 months). In other words, U.S. Cellular has only demonstrated how it intends to spend between approximately one-third to one-half of the USF support it would receive in the first 18 months.

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<sup>4</sup> *Id.* at pp. 26-27.

When U.S. Cellular filed its direct testimony, it committed to file updated information in light of the fact that its estimated USF support had increased ten-fold (i.e. from “roughly \$200,000” per quarter, or \$800,000 per year, to “roughly \$2 million” per quarter, or \$8 million per year). But U.S. Cellular subsequently decided not to file any further information about what it would do with this extra \$7.2 million per year. U.S. Cellular has failed to give the Commission sufficient information about what U.S. Cellular plans to do with \$8 million in estimated USF support each year (or \$40 million over five years). The Commission must have more information before it can prepare appropriate findings of fact and conclusions of law, let alone issue the first grant of ETC status to a wireless carrier in Missouri.

U.S. Cellular’s application is also 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 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**.”<sup>5</sup> Moreover, 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 the St. Louis market or even in other states. This is troubling in light of the fact that U.S. Cellular’s recent advances have been in urban areas such as Chicago and St. Louis.

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<sup>5</sup> *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).

Granting U.S. Cellular's application is not in the public interest. U.S. Cellular has not agreed to adhere to the same billing standards and quality of service standards as landline telephone companies. Absent agreement or Commission order, U.S. Cellular is not required to comply with the Commission's billing and quality of service rules, and the Commission has no jurisdiction over the rates or service plans of U.S. Cellular. Granting U.S. Cellular's application will also contribute to what the Commission has recently described as the "alarming rate" of the USF's expansion.

The Commission should require more information before approving a wireless ETC application in Missouri, and the Commission denied MMC's earlier ETC application that offered far more information than U.S. Cellular has provided here. In short, if U.S. Cellular's application is granted in this case, then no wireless carrier can fail the test. CenturyTel aptly explained, "If US Cellular's Application passes muster in this case based on its woefully inadequate showing, then the Commission has not only opened wide the door, but in fact has removed it altogether, for future ETC applicants."<sup>6</sup> For these reasons, the Small Telephone Company Group ("STCG")<sup>7</sup> recommends that the Commission deny U.S. Cellular's application for ETC status.

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<sup>6</sup> *Initial Prehearing Brief of Intervenors Spectra Communications and CenturyTel of Missouri*, Oct. 14, 2005, p. 24.

<sup>7</sup> BPS Telephone Company, Choctaw Telephone Company, Craw-Kan Telephone Cooperative, Inc., Ellington Telephone Company, Farber Telephone Company, Fidelity Telephone Company, Goodman Telephone Company, Granby Telephone Company, Grand River Mutual Telephone Company, Holway Telephone Company, IAMO Telephone Corporation, Kingdom Telephone Company, Le-Ru Telephone Company, Mark Twain Rural Telephone Company, Mid-Missouri Telephone Company, Miller Telephone Company, New Florence Telephone Company, New London Telephone Company, Northeast Missouri Rural Telephone Company, Orchard Farm Telephone Company, Peace Valley Telephone Company, Inc., Seneca Telephone Company, Steelville Telephone Exchange, Inc., and Stoutland Telephone Company.

## II. DISCUSSION

### A. Legal Requirements For ETC Status

#### 1. The Telecommunications Act

Section 214(e) of the Telecommunications Act (“the Act”) provides state commissions with the primary responsibility for designating ETCs.<sup>8</sup> 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.**

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.

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<sup>8</sup> 47 U.S.C. §214(e).

## 2. The FCC's *ETC Designation Order*

On March 17, 2005, the FCC issued its *ETC Designation Order* establishing an additional and more rigorous set of “minimum requirements” for examining ETC applications. The FCC recognized the need for these stringent new requirements to “improve the long-term sustainability of the federal universal service fund.”<sup>9</sup> As a part of this more rigorous review, the FCC set out the following minimum standards that require ETC applicants to:

- (1) “provide a **five-year plan** demonstrating how high-cost universal service support will be used to improve its coverage, service quality or capacity **in every wire center for which it seeks designation and expects to receive universal service support**”
- (2) demonstrate its ability to remain functional in emergencies
- (3) “demonstrate that it will satisfy **consumer protection and service quality standards**”
- (4) “offer local usage plans comparable to those offered by the incumbent local exchange carrier (ILEC) in the areas for which it seeks designation”
- (5) “acknowledge that it may be required to provide equal access if all other ETCs in the designated service area relinquish their designations pursuant to section 214(e)(2) of the Act.”<sup>10</sup>

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<sup>9</sup> *ETC Designation Order*, ¶2.

<sup>10</sup> *Id.* (emphasis added).



In order to preserve federal USF support, these requirements establish “a more thorough ETC designation framework” and apply a “more thorough public interest analysis”<sup>11</sup> than the more relaxed ETC standards applied in the past.

The *ETC Designation Order* also referenced state commission authority to impose additional requirements and encouraged them to do so. The FCC stated that “state commissions, as the entities most familiar with the service area for which ETC designation is sought, are particularly well-equipped to determine their own ETC eligibility requirements.”<sup>12</sup> The FCC added that “nothing in section 214(e) of the Act prohibits the states from imposing their own eligibility requirements in addition to those described in section 214(e)(1).”<sup>13</sup> Accordingly, a number of state commissions have established additional requirements for ETC applicants, and the Missouri Commission published its own proposed ETC Designation Rules last week in the Missouri Register.<sup>14</sup>

### **3. Competent and Substantial Evidence**

Missouri law requires Commission orders to be supported by sufficient findings of fact and conclusions of law, and this requirement has been consistently enforced by Missouri courts over the last twenty years.<sup>15</sup>

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<sup>11</sup> *Id.* at ¶14.

<sup>12</sup> *Id.* at ¶61.

<sup>13</sup> *Id.*, citing *TOPUC v. FCC*, 183 F.3d at 393, 418 (5<sup>th</sup> Cir. 1999).

<sup>14</sup> Missouri Register, Vol. 30, No. 23, Dec. 1, 2005, proposed rule 4 CSR 240-3.570, pp. 2479-85.

<sup>15</sup> 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).

## B. Failure To Provide Competent and Substantial Evidence

In this case, U.S. Cellular has failed to provide the Commission with sufficient evidence upon which to base findings of fact and conclusions of law that would support an order granting ETC status. For example, U.S. Cellular has failed to provide information about what it would do with an estimated \$8 million per year in USF support,<sup>16</sup> and it has declined to provide a five-year network improvement plan.<sup>17</sup> Likewise, U.S. Cellular has failed to either demonstrate that it provides service in a number of the areas for which it has requested ETC status or provide the Commission with any kind of plan to serve those areas.<sup>18</sup> Instead, U.S. Cellular simply offers a skeletal 18-month plan supplemented with vague generalities about “commitments” to “fill in” its service territory map.

U.S. Cellular had plenty of time to amend its application and testimony in order to comply with the new requirements in the FCC’s *ETC Designation Order*. In fact, on July 12, 2005, U.S. Cellular expressly stated its “intent” to provide “additional commitments” to reflect a tenfold increase in estimated USF support:

We intend to amend the Application to include **additional construction commitments to demonstrate to the Commission that U.S. Cellular intends to use all available support as required by law to improve its facilities and services in the proposed ETC service area.**<sup>19</sup>

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<sup>16</sup> Compare Ex. 5, Wright Direct, p. 14 (“We intend to amend the Application to include additional construction commitments...”); Ex. 6, Wright Surrebuttal, p. 1 (“We have decided not to do that...”).

<sup>17</sup> Ex. 9, McKinnie Rebuttal, p. 9; Tr. 258, 273.

<sup>18</sup> See Ex. 9, McKinnie Rebuttal, p. 8.

<sup>19</sup> Ex. 5, Wright Direct, p. 14 (emphasis added).

Curiously, U.S. Cellular later decided not to provide any “additional construction commitments” to account for over \$7 million in additional estimated USF support each year. This leaves the Commission and the parties to only guess where these additional millions in USF support will go. U.S. Cellular has not provided the Commission with enough information to prepare adequate findings of fact and conclusions of law, so the Application must be denied.

Staff and U.S. Cellular concede that the application fails to provide vital information such as a five-year network improvement plan, yet both Staff and U.S. Cellular suggest that this failure to provide the necessary information can be cured by submitting information at a later time.<sup>20</sup> Missouri law suggests otherwise. For example, in *AG Processing v. PSC*, 120 S.W.3d 732 (Mo. banc 2003), the court explained:

The fact that the acquisition premium recoupment issue could be addressed in a subsequent ratemaking case did not relieve the PSC of the duty of deciding it as a relevant and critical issue when ruling on the proposed merger. . . . **The PSC erred when determining whether or not to approve the merger because it failed to consider and decide all the necessary and essential issues**, primarily the issue of UtiliCorp’s being allowed to recoup the [\$92 million] acquisition premium.

*Id.* at 734 (emphasis added). Thus, in determining whether or not to approve U.S. Cellular’s application for ETC status, the Commission must consider and decide all necessary and essential issues in this case (and not at some later

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<sup>20</sup> Ex. 9, McKinnie Rebuttal, pp. 11-12; Ex. 6, Wright Surrebuttal, pp. 3-4.

date) such as what U.S. Cellular will do with the estimated \$8 million per year (or \$40 million over five years) of USF support. Because U.S. Cellular has not provided the Commission with sufficient information to do so, its Application must be denied.

**C. U.S. Cellular’s Application Fails to Meet the Standards Set Forth in The Telecommunications Act and the FCC’s *ETC Designation Order*.**

The Telecommunications Act requires an ETC applicant to offer and advertise the services in question throughout its designated service area upon designation, and U.S. Cellular clearly fails to meet this standard. U.S. Cellular also fails to satisfy the rigorous public interest standard established in the *ETC Designation Order*. Therefore, U.S. Cellular’s application must be denied.

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

U.S. Cellular seeks ETC status in a number of areas where it does not currently provide service or have any immediate plans to provide service. 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.**<sup>21</sup>

As in the *ExOp* case, 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 service territory of each separate incumbent local exchange carrier (ILEC) study area. U.S. Cellular has failed to meet this burden of proof.

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."<sup>22</sup> 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.

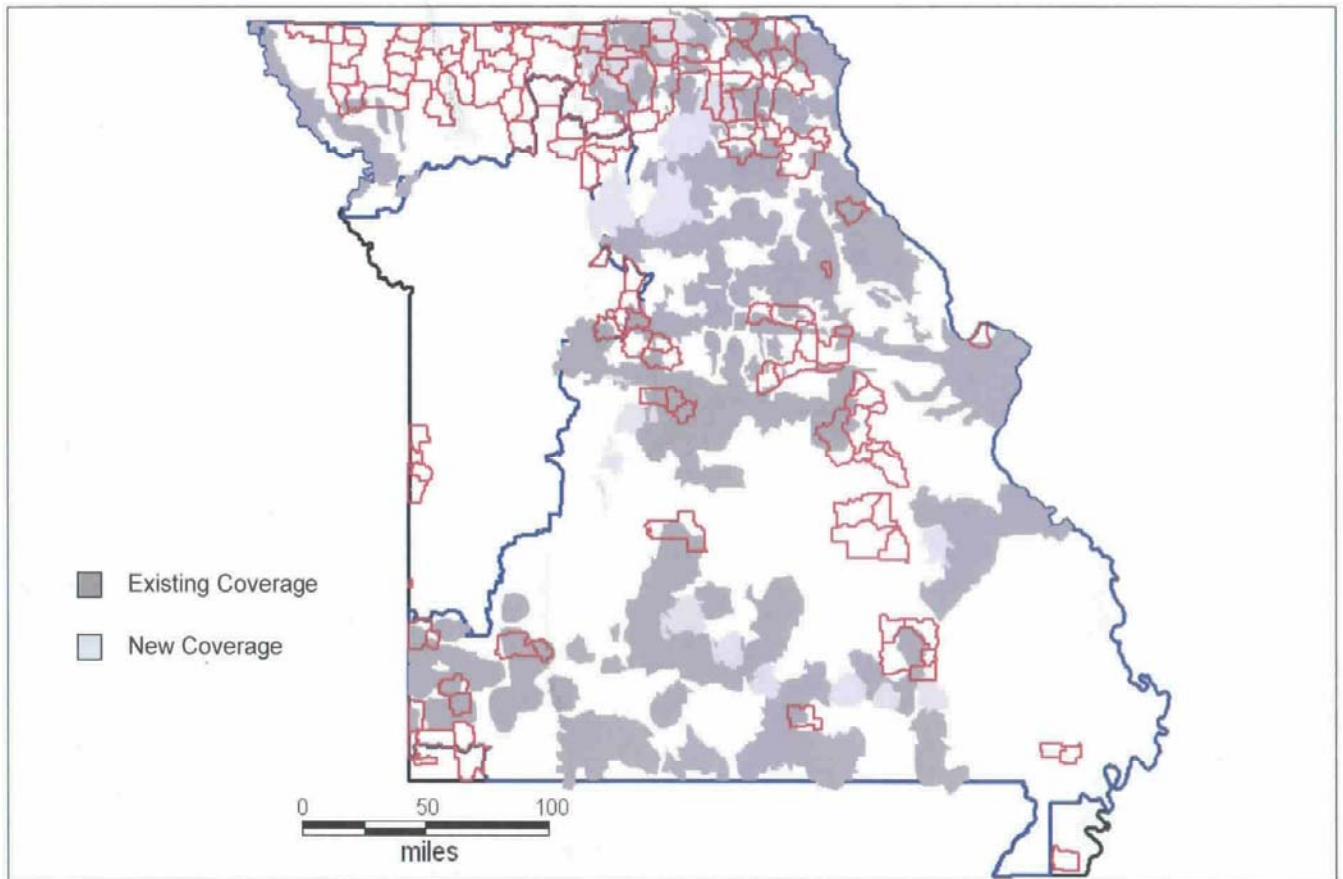
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<sup>21</sup> *In the Matter of the Application of ExOp of Missouri, Inc., for Designation as a Telecommunications Company Carrier Eligible for Federal Universal Service Support Pursuant to Section 254 of the Telecommunications Act of 1996*, Case No. TA-2001-251, *Order Granting Designation*, issued May 16, 2001 (emphasis added).

<sup>22</sup> Ex. 9, McKinnie Rebuttal, p. 8.

For example, Mr. Schoonmaker's Rebuttal Testimony, Schedule RCS 7, p. 4 shows that U.S. Cellular will not serve many of the small companies' rural service areas even after the addition of 16 new towers under U.S. Cellular's 18-month plan. In Mr. Schoonmaker's map (reproduced on the next page) the small company exchange service areas are outlined with dark lines. U.S. Cellular's existing coverage is identified with dark shading, and its proposed new coverage after the addition of the sixteen new towers is identified with light shading. The map demonstrates that even after the addition of sixteen new towers, U.S. Cellular will provide no service at all in many of the small company exchange areas where U.S. Cellular seeks ETC designation.

# USC Propagation Study



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 service at all in many of the study areas for which it has requested ETC status.<sup>23</sup>

Simply put, U.S. Cellular’s application and testimony fail to meet the burden of proof for the study-area-specific analysis required by the Act and the

<sup>23</sup> Ex. 14, Schoonmaker Rebuttal, p. 62.

*ETC Designation Order*. Specifically, U.S. Cellular has failed to show that it will impact or improve service to customers in each of the following small rural study areas even after the completion of its 18-month plan.

**a. No Service and No Plans to Serve**

U.S. Cellular has either no coverage or extremely limited coverage in the study areas of the BPS Telephone Company, Goodman Telephone Company, Holway Telephone Company, IAMO Telephone Company, Le-Ru Telephone Company, and Steelville Telephone Company.<sup>24</sup> Because U.S. Cellular does not provide service at all or only offers service to a very limited extent in these areas, the Commission must deny ETC status in these study areas.

**b. Inadequate and/or Incomplete Service**

U.S. Cellular seeks ETC designation in a number of study areas where the adequacy of U.S. Cellular's service is insufficient to support a grant of ETC status. These include the study areas of Craw-Kan Telephone Cooperative, Inc., Ellington Telephone Company, Fidelity Telephone Company, Grand River Mutual Telephone Corporation, Kingdom Telephone Company, Mark Twain Rural Telephone Company, Mid-Missouri Telephone Company, Northeast Missouri Rural Telephone Co., Orchard Farm Telephone, Peace Valley Telephone Company, Inc., Seneca Telephone Company, and Stoutland Telephone.<sup>25</sup> Because U.S. Cellular does not provide sufficiently adequate service in these areas, the Commission must deny ETC status in these study areas.

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<sup>24</sup> Ex. 14, Schoonmaker Rebuttal p. 65.

<sup>25</sup> *Id.*, pp. 66-73.



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

The 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.”<sup>26</sup> U.S. Cellular has failed to meet its burden of proof by providing the Commission with competent and substantial evidence to support a finding that granting ETC status to U.S. Cellular is in the public interest, convenience, and necessity.

Earlier this year, the FCC established a rigorous set of minimum public interest requirements that it will apply in ETC cases.<sup>27</sup> 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.”<sup>28</sup> As explained below, U.S. Cellular has failed to meet the FCC’s minimum public interest requirements in order to be designated as an ETC, so the Commission should deny U.S. Cellular’s Application.

### a. U.S. Cellular Failed To Provide a Five-Year Plan.

The FCC requires that an applicant for ETC status must “provide a five-year plan demonstrating how high-cost universal service support will be used to improve its coverage, service quality or capacity **in every wire center for which**

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<sup>26</sup> 47 U.S.C. § 214(e)(2) (emphasis added).

<sup>27</sup> *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 Designation Order*”).

<sup>28</sup> *Id.* at ¶2.

**it seeks designation and expects to receive universal service support.**<sup>29</sup>

U.S Cellular has failed to provide the Commission with such a five-year network improvement plan.<sup>30</sup>

U.S. Cellular estimates that it will receive \$8 million per year (\$40 million over five years) in USF support,<sup>31</sup> but U.S. Cellular's Application only commits to spending between \$4 and \$6 million over the next 18 months to build new cell sites. In other words, U.S. Cellular estimates that it will receive \$12 million over eighteen months but has only provided plans to use between \$4 and \$6 million during that time period (or between 1/3 and 1/2 of the USF support it receives).<sup>32</sup> U.S. Cellular initially committed to amend its Application to include further information about where the rest of the additional \$6-8 million dollars would be spent, but U.S. Cellular subsequently declined to do so.<sup>33</sup> U.S. Cellular admitted during the hearing that nothing prevented it from preparing a five-year plan.<sup>34</sup>

U.S. Cellular has provided "incomplete information on its planned offerings and future expansion plans for Missouri."<sup>35</sup> Indeed, "OPC, Staff, and every Intervenor in this case has found U.S. Cellular's network improvement plan deficient in material respects."<sup>36</sup> Therefore, the Commission should deny U.S. Cellular's ETC application.

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<sup>29</sup> *Id.* (emphasis supplied).

<sup>30</sup> See Ex. 9, McKinnie Rebuttal, p. 9.

<sup>31</sup> Ex. 5, Wright Direct, p. 14.

<sup>32</sup> See Ex. 14, Schoonmaker Rebuttal, pp. 36-38; see also Tr. 271-72.

<sup>33</sup> Compare Ex. 5, Wright Direct, p. 14 ("We intend to amend the Application to include additional construction commitments..."); Ex. 6, Wright Surrebuttal, p. 1 ("We have decided not to do that...")

<sup>34</sup> Tr. 174.

<sup>35</sup> Ex. 10, Meisenheimer Rebuttal, p. 3.

<sup>36</sup> Ex. 17, Stidham Surrebuttal, p. 3; see also Ex. 12, Brown Surrebuttal, p. 4; Ex. 16, Schoonmaker Surrebuttal, p. 2.

U.S. Cellular's 18-month plan is deficient. Specifically, the 16 sites proposed in U.S. Cellular's plan will only serve to shore up its wireless service in areas where U.S. Cellular already serves, not in the other rural areas where it seeks ETC status. Staff witness Mr. McKinnie explains:

[I]nformation is not provided as to how these 16 new cellular towers will assist customers currently receiving service from U.S. Cellular. Information is also not provided for areas in U.S. Cellular's proposed ETC area that will have no cellular service from U.S. Cellular either before or after the potential approval of the instant ETC application. . . . **[T]here is no information provided in the maps, the Application, or the testimony of the three U.S. Cellular witnesses on how these additional cell towers would improve coverage, service quality or capacity in every wire center where U.S. Cellular requests designation.**<sup>37</sup>

This is important because U.S. Cellular does not presently offer service in many of the areas for which it seeks ETC designation, and U.S. Cellular has offered no commitment through a network improvement plan to serve these areas in the future.<sup>38</sup>

U.S. Cellular's decision not to file a five-year plan fails the first prong of the FCC's *ETC Designation Order* and prevents the Commission from making an informed decision about granting ETC status in this case. Accordingly, the Commission must deny the application.

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<sup>37</sup> Ex. 9, McKinnie Rebuttal, p. 6 (emphasis added); see also Tr. 270.

<sup>38</sup> See Ex. 12, Brown Surrebuttal, p. 6; Ex. 16, Schoonmaker Surrebuttal, p. 2; Ex. 18, Stidham Surrebuttal, p. 7.

**b. The PSC’s ETC Designation Standards and Consumer Protection  
Rules for Billing Standards and Quality of Service.**

The Missouri PSC may adopt additional requirements, as specifically allowed by law, regarding billing standards and quality of service standards.<sup>39</sup> The Act authorizes state commissions to “adopt regulations not inconsistent with the [FCC’s] rules to **preserve** and advance universal service.”<sup>40</sup> The FCC’s recent *ETC Designation Order* repeatedly states that state commissions can impose additional requirements,<sup>41</sup> and it appears to encourage the states to do so.<sup>42</sup> Indeed, the FCC stated that Section 332(c)(3) of the Act specifically allows States to regulate wireless terms and conditions of service, not dealing with rates and entry, in order to preserve and advance universal service,<sup>43</sup> and the FCC encouraged state commissions to consider consumer protection in the wireless context as a prerequisite for obtaining ETC designation.<sup>44</sup>

Earlier this month, the Commission began this process with its proposed ETC Designation Rules, 4 CSR 240-3.570. U.S. Cellular does not meet the requirements and standards in the Commission’s proposed ETC Designation Rules, which were published by the Secretary of State’s Office in the Missouri Register on December 1, 2005. U.S. Cellular’s testimony at the hearing was that it would only comply with the Commission’s consumer protection and quality of service standards if ordered to do so by the Commission.<sup>45</sup> This should come as

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<sup>39</sup> See Ex. 14, Schoonmaker Rebuttal, pp. 10, 14.

<sup>40</sup> 47 U.S.C. §254(f)(emphasis added).

<sup>41</sup> *ETC Order*, ¶¶25, 30, and 34.

<sup>42</sup> *Id.* at ¶61.

<sup>43</sup> *ETC Order*, ¶ 31.

<sup>44</sup> *Id.* at ¶ 30.

<sup>45</sup> Tr. 114-15.

no surprise. Clearly, U.S. Cellular would prefer to receive the benefits of ETC status while remaining subject to little or no Commission oversight or regulation.

Other states have already imposed customer protection and quality of service rules on wireless carriers as a condition of granting ETC status. For example, the Oklahoma Corporation Commission granted U.S. Cellular ETC status on the condition that U.S. Cellular would adhere to the Oklahoma Commission's Telecommunications Service Rules. U.S. Cellular accepted this condition on September 29, 2004 and was subsequently granted ETC status. Less than five months later, U.S. Cellular sought a waiver from these rules.

In September of 2005, the Oklahoma Commission found that its previously imposed conditions, "including the obligations of the rules for which USCC seeks a waiver, were specific responsibilities that USCC was required to accept in order to be designated an ETC."<sup>46</sup> The Oklahoma Commission expressly found that it would not have been in the public interest to grant ETC status to U.S. Cellular unless U.S. Cellular agreed to comply with the Oklahoma Commission's conditions and newly adopted wireless ETC rules. The Oklahoma Commission stated:

[I]t is disingenuous at this point for USCC to seek to go around the requirements of this Commission by requesting a waiver of the rules. Whether you consider it an attack on the prior Commission order, or a waiver of the Commission rules, the cold hard facts are that this Commission found that it was not in the public interest to

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<sup>46</sup> *Application of US Cellular for Waiver of Certain Wireless ETC Rules*, Oklahoma Corp. Comm'n Case No. PUD 200500055, Order No. 510743; 2005 Okla. PUC LEXIS 180, *Final Order Adopting Report of ALJ and Dismissing Case*, 2005 Okla PUC LEXIS 180, done Sept. 2, 2005, \*\*14.

grant USCC ETC status in a service area of a rural telephone company unless they agreed to meet all the conditions set forth in Order No. 495563, including the rules for which USCC now seeks a waiver.

The ALJ further finds that USCC, although protesting the applicability of the conditions from the beginning of their quest to obtain ETC designation, had the choice to voluntarily accept the conditions as set forth in Order No. 495563 in order to be designated an ETC within the service areas of each of the 12 rural telephone companies it was seeking ETC designation for, or to continue to protest those conditions in some other form or fashion. Instead USCC filed a voluntary acceptance on September 29, 2004, indicating that they would in fact agree to be bound by the specific requirements of the Commission's order that only granted ETC designation to USCC in the rural telephone company's service areas if it filed a document "accepting" the conditions set forth the Order No. 495563. USCC knew what obligations were imposed by OAC 165:55-23-1 *et seq.* because the rules became effective after the initial hearing on USCC's application for designation as an ETC and prior to the time USCC filed its voluntary acceptance of the conditions required to be an ETC.<sup>47</sup>

The Oklahoma Commission concluded that U.S. Cellular was really seeking more than just a waiver of Oklahoma Commission rules:

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<sup>47</sup> *Id.* at \*\*15-16.

USCC's Application is not, in fact, requesting only a waiver of the rules at this point. **USCC's request is essentially another attempt to tell the Commission, "don't make us play by the same rules that other wireless ETCs must comply with."** The rules USCC seeks a waiver of are a part of the very same conditions that were established by the Commission for designating USCC as an ETC carrier in the rural telephone companies service areas. They were not simply suggestions but conditions to be met in order to reach the determination that it was in the public interest for USCC to be an ETC. **If USCC had not agreed to be bound by the conditions of the Commission, USCC would not have been granted ETC status in the rural telephone companies' service areas, because the public interest test would not have been met.**<sup>48</sup>

Accordingly, the Oklahoma Commission denied U.S. Cellular's request for waiver. (See Attachment A.)

In light of U.S. Cellular's reluctance to comply with the Oklahoma Commission's rules after being required to do so, the Missouri Commission should consider carefully consider U.S. Cellular's "commitment" to comply with Commission's ETC Designation Rules in Case No. TX-2006-0169 if ordered to do so.

Also, if U.S. Cellular does not comply with the consumer protection and quality of service rules, then another problem may arise with the Act's requirements for competitive neutrality. The FCC has held that universal service

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<sup>48</sup> *Id.* at \*\*17-18 (emphasis added).

support mechanisms and rules should be competitively neutral, which means that “universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another.”<sup>49</sup> In Missouri, ILECs are required to adhere to the Commission’s billing rules and quality of service rules, and the ILECs are also required to file various reports with the Commission on quality of service.<sup>50</sup> These requirements, such as providing directory listing and directories; complying with specific deposit and disconnection procedures; service installation criteria, and call completion standards; and following other service level measures, all create specific additional costs on ILECs.<sup>51</sup>

U.S. Cellular has offered no commitment to comply with Commission billing or quality of service rules. It is not competitively neutral to provide wireless providers the benefits of USF when they are not required to meet the same service standards as the ILECs, nor incur the same costs to meet these service standards. In order to maintain competitive neutrality, the Commission should require that any wireless ETC comply with the Commission’s billing and quality of service rules, if the wireless carrier expects to receive the same amount of federal USF support as the ILECs. The Commission has already initiated a proposed rulemaking to do so in Case No. TX-2006-0169.

**c. Lack of Accounting Safeguards and Financial Information**

In its October 18, 2005 Comments to the FCC, the Commission recognizes that “without additional restraints and control over the disbursement

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<sup>49</sup> *Report and Order*, CC Docket No. 96045, FCC 97-157, issued May 8, 1997, ¶47.

<sup>50</sup> Ex. 14, Schoonmaker Rebuttal, p. 40.

<sup>51</sup> *Id.* at p. 42.



of funds to eligible telecommunications carriers, the potential for waste, fraud and abuse continue to exist.”<sup>52</sup> In this case, U.S. Cellular has provided no accounting safeguards or financial information to assure the Commission that USF high-cost support will be used in rural areas rather than for U.S. Cellular’s expansion plans in St. Louis (or even other states). And the testimony of U.S. Cellular’s witnesses at the hearing created more questions than answers.

For example, U.S. Cellular commits to spend USF support in rural Missouri, but it only offers to demonstrate this after the fact. This is troubling in light of U.S. Cellular’s testimony that it does not budget or track expenditures by state or wire center. U.S. Cellular Witness Mr. Lowell testified as follows:

Q. Do you also have a state-specific budget?

A. No, I don’t have a state-specific budget.

Q. Do you have state-specific financial information regarding historical expenditures of plant in Missouri?

A. I do not.

Q. Do you know if the company does?

A. I do not.

Q. Have you seen any?

A. I have not.

Q. Do you know if there are state-specific income statements for U.S. Cellular’s operations in Missouri showing that?

A. I don’t know.

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<sup>52</sup> *In the Matter of Comprehensive Review of Universal Service Fund Management, Administration, and Oversight*, WC Docket No. 05-195, *Comments of the Missouri Public Service Commission*, Oct. 18, 2005.

\* \* \*

Q. Would that also be true for further stratification within the state between rural and non-rural areas?

A. Would that be true?

Q. In other words, if you don't have state-specific information regarding capital investments, budgets –

A. Right

Q. -- revenues and expenses, I'm assuming you don't have it broken down between rural and non-rural areas within the state of Missouri?

A. I don't have data broken down between rural versus non-rural.<sup>53</sup>

Similarly, U.S. Cellular Witness Mr. Wright testified that U.S. Cellular makes its investments on a regional basis rather than a state-specific basis:

Q. Did I understand Mr. Lowell to say that – and maybe you can clarify this – U.S. Cellular does not prepare or utilize state-specific financial information?

A. That's correct.

Q. So I would assume by that United States Cellular's investment decisions are made on a region-wide rather than a statewide basis?

A. That is correct.<sup>54</sup>

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<sup>53</sup> Tr. 82-83.

<sup>54</sup> Tr. 127.

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Q. Would you agree with, I believe it was Mr. Lowell's testimony that U.S. Cellular does not compile or maintain historical capital expenditures by state?

A. That's correct.

Q. And is it fair to say that U.S. Cellular does not compile or maintain that historical data by wire center within the state?

A. To my knowledge, no. No.

Q. That is a correct statement, or is that an incorrect statement?

A. We do not have those numbers by wire center.

Q. And with respect to capital budgeting, is it also my understand – is it also your understanding that U.S. Cellular does not compile and maintain capital budgets for its Missouri operations?

A. Not – no, we do not.

Q. And that would be the same for wire centers within Missouri?

A. That's correct.<sup>55</sup>

Other parts of U.S. Cellular's testimony about accounting safeguards, budget planning, and financial investments raise additional concerns. First, U.S. Cellular does not budget or forecast by state or by wire center, yet U.S. Cellular claims it can prepare a five-year plan within 30 days.<sup>56</sup> Second, U.S. Cellular's data request responses indicated that U.S. Cellular does not keep historical investments and expenses by state or by wire center, but U.S. Cellular's

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<sup>55</sup> Tr. 162-64.

<sup>56</sup> Tr. 122, 174.

witnesses testified at hearing that they have spent \$160 million in Missouri.<sup>57</sup> And finally, U.S. Cellular's testimony indicates that it has plans to build new cell sites and towers in Missouri even if it does not receive federal USF support.<sup>58</sup> Without the five-year plan and appropriate financial safeguards, there is no way to tell whether USF support will be used to fund these projects that had already been planned or in addition to these preexisting projects.

**d. USF Support Is For Rural Areas.**

U.S. Cellular has failed to provide financial information or documentation of accounting methods to separate money received from USF to support rural high-cost areas from money being spent in St. Louis. Although U.S. Cellular claims to be a rural provider "focused" on rural areas, its recent advances and "focus" have been in large metropolitan areas such as Chicago and St. Louis and other non-rural service areas such as: (1) Lincoln, Nebraska, (2) Oklahoma City, Oklahoma, and (3) Portland, Maine.<sup>59</sup> For example, U.S. Cellular recently invested approximately \$90 million to build a new cellular network with nearly 300 wireless towers in the greater St. Louis area.<sup>60</sup>

U.S. Cellular's expansion into Missouri's largest urban market raises questions about how U.S. Cellular plans to ensure that no USF support for rural, high-cost areas ends up funding its expansion into St. Louis. U.S. Cellular's answers have not been convincing:

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<sup>57</sup> Tr. 163-64.

<sup>58</sup> Tr. 80-82; 121-22..

<sup>59</sup> Tr. 137.

<sup>60</sup> Tr. 165-68; Exhibit 20.

Q. How do we know that some of that money won't end up in this big green spot here in St. Louis?

A. That's up to our teams in Chicago to make sure that we are actually holding true. In fact, money we're getting, we will prove to you on an annual basis where we're putting the money, what exact cell site went up dollar for dollar.

Q. And those would be filed after you receive the money?

A. I'm not sure when it would be filed.

Q. How do we know . . . the money wouldn't be going off into your five plus Texas state region?

A. I guess I what I would reference is the relationships and the credibility that we have with the other three states within our region.<sup>61</sup>

During the hearing, U.S. Cellular's witness was unable to testify that all rural high cost USF support would be used in rural areas:

Q. Do you know if you receive USF support from a rural wire center, whether you will spend that in a non-rural wire center in Missouri?

A. I do not know the answer to that question. Our focus is on the rural area where they currently do not have coverage today.

Q. How then can you make the commitment, sir, in your testimony, as you have done extensively today and through

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<sup>61</sup> Tr. 143-44.

your prepared written testimony, that you will spend these dollars that you get in the rural high-cost area back in the rural high-cost area?

A. Well, as I just said, our focus is going to be on these rural areas that currently do not have coverage . . .

Q. I understand your focus, sir. I want to know more about your commitment and how you can demonstrate that you can adhere to it.

A. All the support we get dollar for dollar will be invested in these areas, the rural areas that we currently do not have coverage today.

Q. Even though you don't know if you can take those dollars from the rural areas and spend them in non-rural areas? I believe that was your earlier –

A. Our focus will be rural and we're accountable for that.

Q. But you don't know if you can take rural dollars and spend them in non-rural areas?

A. I do not know that.<sup>62</sup>

Despite U.S. Cellular's conclusory testimony to the contrary, it is evident from the foregoing that U.S. Cellular cannot: (1) identify where high-cost USF support will be spent, or (2) demonstrate that the USF support spent will be in addition to amounts currently being spent (or budgeted for expenditure) in rural areas of Missouri. Not only does U.S. Cellular fail to meet the FCC's *ETC Designation*

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<sup>62</sup> Tr. 160-61.

*Order* guidelines, it also fails to satisfy the concerns raised in this Commission’s October 18, 2005 comments to the FCC recognizing the need for “additional restraints and control” over the disbursement of universal service funding to prevent “the potential for waste, fraud, and abuse” of USF support. Likewise, U.S. Cellular’s application and testimony fail to satisfy the requirements in 4 CSR 240-3.570(2) of the Commission’s proposed ETC Designation Rules.

**e. Competition**

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 claims that ETC designation and “competitive entry” will bring the benefits of competition to end users in Missouri.<sup>63</sup> 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 recently found that there is “effective” competition in the wireless market in rural areas.<sup>64</sup> For example, the FCC found that counties with 100 residents per square mile or less have an average of 3.7 mobile competitors.<sup>65</sup> Thus, many of the areas where U.S. Cellular serves already have wireless competition. It is unclear how granting ETC status to U.S. Cellular will increase competition in areas where U.S. Cellular and other wireless carriers are already providing service.

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<sup>63</sup> Ex. 7, Wood Direct, pp. 7-9.

<sup>64</sup> *In the Matter of the Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, WT Docket No. 05-71, *Tenth Report*, released Sept. 30, 2005, ¶95.

<sup>65</sup> *Id.* at ¶94.

Second, 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.<sup>66</sup>

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

Third, 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.”<sup>67</sup> U.S.

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<sup>66</sup> *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.

<sup>67</sup> U.S. Cellular Application, p. 20.



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.

To make matters worse, 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 between two or more providers generally causes the cost of service to increase for each of the providers on a per customer basis.”<sup>68</sup> 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.<sup>69</sup>

Therefore, it is questionable whether subsidizing multiple competitors in high-cost rural areas will bring any real benefits to rural Missouri.

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<sup>68</sup> Ex. 14, Schoonmaker Rebuttal, p. 54.

<sup>69</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*.

**3. The Commission Should Rigorously Apply the FCC's ETC Designation Guidelines (Issue 3).**

The Commission should rigorously apply the ETC designation guidelines established in the FCC's *ETC Designation Order*. These stringent guidelines were developed because of the FCC's concern with the long term sustainability of the federal universal service fund. The Commission and the Commission's Staff have both recently indicated similar concerns about rapid increases in the size of the federal USF. For example, in its September 30, 2005 comments to the FCC, the Commission 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.**<sup>70</sup>

The Commission's Staff also remains concerned about the impact of wireless ETC designations on the size of the fund.<sup>71</sup>

The *ETC Designation Order* was adopted on February 25, 2005 and released on March 17, 2005, more than one month before U.S. Cellular filed its ETC Application in this case (on April 19, 2005) and nearly four months before U.S. Cellular filed its direct testimony (on July 12, 2005). Nevertheless, U.S. Cellular failed to comply with the guidelines established in the *ETC Designation Order* and failed to supplement its application with a five-year network

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<sup>70</sup> *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).

<sup>71</sup> Tr. 274.

improvement plan. As explained in more detail above, U.S. Cellular has failed to meet the FCC's guidelines, so its application for ETC status should be denied.

### **III. CONCLUSION**

U.S. Cellular has completely failed to meet its burden of proof and provide the Commission with enough evidence to prepare appropriate findings of fact and conclusions of law or issue a decision granting ETC status. U.S. Cellular has also failed to meet the statutory requirements and public interest test necessary to be granted ETC status. First, U.S. Cellular has failed to demonstrate that it provides service throughout (and in some cases in any part of) the small ILEC service areas where it seeks ETC designation. Second, U.S. Cellular has failed to show that granting it ETC status is in the public interest because it has not shown that the benefits will exceed the costs. Specifically:

1. U.S. Cellular has not shown that customers in rural areas will see any increased competition or benefits if U.S. Cellular receives ETC status.
2. U.S. Cellular has not provided a five-year network improvement plan to demonstrate how U.S. Cellular will use an estimated \$40 million over five years in USF support.
3. U.S. Cellular has admitted that it will make upgrades to its Missouri network regardless of whether it receives ETC status.
4. U.S. Cellular has declined to comply with the Commission's customer billing and quality of service rules.

For these reasons, U.S. Cellular has failed to show that granting its ETC Application is in the public interest. Therefore, the Commission should deny U.S. Cellular's application.

RESPECTFULLY SUBMITTED,

**/s/ Brian T. McCartney**

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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 6<sup>th</sup> day of December, 2005, to the following parties:

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