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

THE SMALL TELEPHONE COMPANY GROUP'S PREHEARING BRIEF

I. INTRODUCTION AND SUMMARY

U.S. Cellular has failed to provide competent and substantial evidence that granting it eligible telecommunications carrier ("ETC") status will be in the public interest. Specifically, U.S. Cellular has failed to provide a plan for how it intends to spend roughly $8 million per year 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. $4 million over the next 18 months). U.S. Cellular initially committed to update its plan to reflect this difference of more than $8 million in USF support over 18 months, but then U.S. Cellular decided not to do so. By failing to provide a five-year plan, U.S. Cellular has failed to give the Missouri Public Service Commission ("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). In essence, U.S. Cellular says, "Give us the $8 million per year now, and we will tell you what we did with it later." The Commission must have more information before it grants ETC status to a wireless carrier in Missouri or prepares appropriate findings of fact and conclusions of law.

U.S. Cellular has also failed to show that it provides service to the entire study areas (or even any part of some study areas) for which it seeks ETC designation in Missouri. U.S. Cellular has not agreed to adhere to the same billing standards and quality of service standards as landline telephone companies. And although U.S. Cellular estimates that it will receive $8 million per year if granted ETC status, U.S. Cellular has not agreed to: (1) offer any calling plans with lower rates to rural Missouri customers other than the Lifeline service required by law, or (2) offer any calling plans with unlimited local calling comparable to the basic local service of landline local exchange companies (LECs). 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.

The Commission should require more information before approving a wireless ETC application in Missouri, and the Commission has already denied an earlier ETC application by Mid-Missouri Cellular that offered far more information than U.S. Cellular has provided in this case. In sum, U.S. Cellular has failed to meet its burden by showing that granting its ETC Application (and allowing it to receive an estimated $8 million per year in USF support) is in the public interest. Therefore, the Small Telephone Company Group ("STCG")[1] recommends that the Commission deny U.S. Cellular's application for ETC status.

[1] 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

II. DISCUSSION

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

No. 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 LEC (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."[2]

The information on service coverage and service quality 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 companies, and U.S. Cellular

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.

[2] McKinnie Rebuttal, p. 8.

provides no service at all in many of the study areas for which it has requested ETC status.[3]

For example, U.S. Cellular has either no coverage or very 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.[4] Because U.S. Cellular does not provide service at all or only offers service to a limited extent in these areas, the Commission should deny ETC status in these study areas.

There also are a number of other study areas where the adequacy of 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.[5] Because U.S. Cellular does not provide sufficiently adequate service in these areas, the Commission should deny ETC status in these study areas.

---

[3] Schoonmaker Rebuttal, p. 62.
[4] *Id*. at p. 65.
[5] Schoonmaker, pp. 66-73.

Issue 2. *ETC designations by a state commission must be consistent with the public interest, convenience and necessity pursuant to Section 214(e)(2). All parties agree that ETC designations must be consistent with the public interest, convenience and necessity for areas served by rural carriers, and all parties but U.S. Cellular agree that ETC designations in areas served by non-rural carriers must also be consistent with the public interest, convenience and necessity. The Federal Communications Commission's ("FCC's") ETC Report and Order determined that this public interest standard applies regardless of whether the area is served by a rural or non-rural carrier. Is granting ETC status to U.S. Cellular in areas served by rural carriers consistent with the public interest, convenience and necessity?*

No. 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." 47 U.S.C. § 214(e)(2) (emphasis added). 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 Federal Communications Commission ("FCC") established a rigorous set of minimum public interest requirements that it will apply in ETC cases.[6] 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."[7] 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.

[6] *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*").
[7] *Id*. at ¶2.

A. U.S. Cellular has failed to provide a five-year network improvement plan as recommended by the FCC.

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 it seeks designation and expects to receive universal service support."[8] U.S Cellular has failed to provide the Commission with a five-year network improvement plan.[9]

U.S. Cellular estimates that it will receive $8 million per year ($40 million over five years) in USF support,[10] but U.S. Cellular's Application only commits to spending approximately $4 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 $4 million (or 1/3 of the support).[11] U.S. Cellular initially committed to amend its Application to include additional information about where the rest of these millions of dollars would be spent, but U.S. Cellular subsequently declined to do so.[12] U.S. Cellular has provided "incomplete information on its planned offerings and future expansion plans for Missouri."[13] Indeed, "OPC, Staff, and every Intervenor in this case has found U.S. Cellular's network improvement plan deficient in material respects."[14] Therefore, the Commission should deny U.S. Cellular's Application.

---

[8] *Id*.
[9] *See* McKinnie Rebuttal, pp. 9.
[10] Wright Direct, p. 14.
[11] See Schoonmaker Rebuttal, pp. 36-38.
[12] *Compare* Wright Direct, p. 14 ("We intend to amend the Application to include additional construction commitments . . ."); Wright Surrebuttal, p. 1 ("We have decided not to do that . . .")
[13] Meisenheimer Rebuttal, p. 3.
[14] Stidham Surrebuttal, p. 3; *see also* Brown Surrebuttal, p. 4; Schoonmaker Surrebuttal, p. 2.

U.S. Cellular's 18-month plan is also 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. This is important because U.S. Cellular does not presently offer service in these areas, and U.S. Cellular has offered no commitment through a network improvement plan to serve these areas in the future.[15]

B. U.S. Cellular's local usage plans are not comparable to ILEC local usage plans.

The FCC recommends that the Commission consider whether the local usage plans offered by a wireless carrier are comparable to those offered by the ILEC in the areas for which they seek ETC designation. The basic local service plans of Missouri ILECs offer unlimited local calling within a Commission-defined local calling scope. None of U.S. Cellular's plans appear to 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.[16] In order to be truly comparable with the ILEC rate plans, "any offering for which U.S. Cellular seeks to receive high cost support must likewise offer unlimited calling."[17] Thus, U.S. Cellular's local usage plans are not comparable to the ILEC service offerings.

FCC Rules require ETCs to offer Lifeline service.[18] U.S. Cellular's basic Lifeline plan only includes 125 minutes of calling for $25 per month ($16.75 after

[15] *See* Brown Surrebuttal, p. 6; Schoonmaker Surrebuttal, p. 2; Stidham Surrebuttal, p. 7.
[16] Schoonmaker Rebuttal, p. 29.
[17] Brown Surrebuttal, p. 5.
[18] 47 C.F.R. §54.405.

Lifeline discounts) with additional usage costing **$0.40 per minute**.[19] Thus, if a customer exceeds the 125 minute allowance of incoming and outgoing calls, then the cost of service escalates very quickly. For example, an additional ten minutes would increase the Lifeline customer's bill by $4.00, and an additional 100 minutes would increase the bill by $40, brining the total bill to $57.75 for less than four (4) hours of usage per month. If a U.S. Cellular Lifeline customer makes and/or receives more than 125 minutes of calls, barely over two (2) hours per month, then the bill will increase rapidly at **$24 for every additional hour of usage**. The Commission should consider whether two hours per month of calling is truly comparable service to the ILEC Lifeline service offerings.

C. Competition

U.S. Cellular claims that ETC designation and "competitive entry" will bring the benefits of competition to end users in Missouri.[20] 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.[21] For example, the FCC found that counties with 100 residents per square mile or less have an average of 3.7 mobile competitors.[22] Thus, many of the areas where U.S. Cellular serves already have

[19] Schoonmaker Rebuttal, p. 24; Wright Direct, p. 6 and Surrebuttal, p. 11.
[20] Wood Direct, pp. 7-9.
[21] *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.
[22] *Id*. at ¶94.

wireless competition. It is unclear how granting ETC status to U.S. Cellular will increase competition when U.S. Cellular is 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."[23] 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.

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."[24] 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

[23] U.S. Cellular Application, p. 20.
[24] Schoonmaker Rebuttal, p. 54.

area, leading to inefficient and/or stranded investment and a ballooning universal service fund.[25]

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.

D. U.S. Cellular has failed to provide sufficient information.

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 ten years. 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).

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. 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. 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.

[25] 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.*

E. The Commission cannot grant conditional ETC approval.

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 believe that this failure to provide the necessary information can be cured by submitting information at a later time.[26] 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 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.

[26] McKinnie Rebuttal, pp. 11-12; Wright Surrebuttal, pp. 3-4.

Issue 3. *The FCC's ETC Report and Order determined that carriers seeking ETC designation from the FCC must meet certain requirements. The FCC encouraged state commissions to apply these requirements. Should the Commission apply the guidelines included in the FCC's ETC Report and Order in its evaluation of the application filed by U.S. Cellular?*

The Commission should apply the guidelines included in the FCC's *ETC Report and Order*. As explained in more detail above, U.S. Cellular has failed to meet these guidelines, so its application for ETC status should be denied.

A. The Commission's ETC Designation Standards

The Missouri Commission may adopt additional standards, as specifically allowed by law, regarding billing standards and quality of service standards.[27] The Act authorizes state commissions to "adopt regulations not inconsistent with the [FCC's] rules to **preserve** and advance universal service."[28] The FCC's recent *ETC Order* repeatedly states that state commissions can impose additional requirements,[29] and it appears to encourage the states to do so.[30] 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,[31] and the FCC encouraged state commissions to consider consumer protection in the wireless context as a prerequisite for obtaining ETC designation.[32] Earlier this month, the Commission began this process with its proposed ETC Designation Rule 4 CSR 240-3.570, and the Commission should apply the same requirements here.

[27] See Schoonmaker Rebuttal, pp. 10, 14.
[28] 47 U.S.C. §254(f)(emphasis added).
[29] *ETC Order*, ¶¶25, 30, and 34.
[30] *Id.*at ¶61.
[31] *ETC Order*, ¶ 31.
[32] *Id.* at ¶ 30.

B. Competitive Neutrality

The FCC has held that universal service 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." [33] 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.[34] 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.[35]

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. Therefore, 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. As mentioned above, the Commission has already initiated a proposed rulemaking to do so in Case No. TX-2006-0169.

---

[33] *Report and Order*, CC Docket No. 96045, FCC 97-157, issued May 8, 1997, ¶47.
[34] Schoonmaker Rebuttal, p. 40.
[35] *Id*. at p. 42.

III. CONCLUSION

U.S. Cellular has failed to show that granting its ETC Application (and allowing it to receive an estimated $40 million over five years in USF support) is in the public interest. U.S. Cellular does not offer service in many of the areas where it seeks ETC status, and it has offered no plans or commitment to do so in the future. U.S. Cellular has also failed to provide a five-year plan to explain how it intends to spend the estimated $40 million in federal USF support. Thus, U.S. Cellular has failed to provide the Commission with enough evidence to prepare appropriate findings of fact and conclusions of law or issue a decision granting ETC status. Therefore, the Commission should deny the application.

RESPECTFULLY SUMBITTED,

/s/ Brian T. McCartney

W.R. England, III Mo. #23975
Brian T. McCartney Mo. #47788
BRYDON, SWEARENGEN & ENGLAND P.C.
312 East Capitol Avenue, P.O. Box 456
Jefferson City, MO 65102-0456
trip@brydonlaw.com
bmccartney@brydonlaw.com
(573) 635-7166
(573) 634-7431 (FAX)
Attorneys for the STCG

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 14th day of October, 2005, to the following parties:

General Counsel
Missouri Public Service Commission
P.O. Box 360
Jefferson City, Missouri 65102

Michael F. Dandino
Office of the Public Counsel
P.O. Box 7800
Jefferson City, Missouri 65102

Karl Zobrist
Sonnenschein, Nath & Rosenthal, LLP
4520 Main Street, Suite 1110
Kansas City, Missouri 64114

Anne Bos
Blackwell Sanders Peper Martin
4801 Main Street, Suite 1000
Kansas City, Missouri 64112

David A. Lafuria
Steven M. Chernoff
Lukas, Nace, Guitierrez & Sachs, CHTD
McLean, Virginia 22102

Brent Stewart
Stewart & Keevil, L.L.C.
4603 John Garry Drive
Suite 11
Columbia, Missouri 65203

/s/ Brian T. McCartney
Brian T. McCartney