

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

In the Matter of the Application of )  
Northwest Missouri Cellular Limited )  
Partnership for Designation as a )  
Telecommunications Company Carrier ) Case No. TO-2005-0466  
Eligible for Federal Universal Service )  
Support Pursuant to Section 254 of the )  
Telecommunications Act of 1996. )

**POST-HEARING BRIEF OF INTERVENORS  
SPECTRA COMMUNICATIONS GROUP, LLC d/b/a CENTURYTEL  
AND CENTURYTEL OF MISSOURI, LLC**

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July 10, 2006

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COME NOW Intervenors, Spectra Communications Group, LLC d/b/a CenturyTel and CenturyTel of Missouri, LLC (collectively “CenturyTel”) and submit the following post-hearing brief pursuant to the Commission’s *Order Regarding Date For Filing of Briefs* issued on June 19, 2006 in the above-captioned cause.

**INTRODUCTION**

Applicant Northwest Missouri Cellular Limited Partnership’s (“NW’s”) overall approach in this case is puzzling on the most fundamental and elementary level. The Commission’s decision to grant or reject the Application in this case necessarily must be based on competent and substantial evidence on the whole record. *State ex rel. Chicago, Rock Island & Pac. R.R. Co. v. Public Service Commission*, 312 S.W.2d 791, 794 (Mo. Banc 1958). Here, CenturyTel presented the expert rebuttal testimony of Mr. Glenn H. Brown (Exhibit 9). Despite being given ample opportunity to file surrebuttal testimony to address the issues raised by Mr. Brown, NW inexplicably elected not to do so. Moreover, at hearing NW did not object to the receipt into the evidentiary record of Mr. Brown’s rebuttal testimony on the basis of relevance (or on any other grounds) nor did NW (or any other party) elect to cross-examine Mr. Brown at hearing. Accordingly,

CenturyTel's evidence stands wholly uncontested, and either standing alone or taken in conjunction with the testimony of the other parties, can and should be relied upon by the Commission to deny NW's Application. To now do otherwise would have the Commission wrongfully ignore the uncontested evidentiary record.

Beyond the fact that CenturyTel's evidence pointing out the deficiencies of NW's Application is uncontested, NW as the applicant in this case bears the burden of proof<sup>1</sup> to show that: 1) it has fully complied with all the provisions of the Commission's new ETC rule;<sup>2</sup> and 2) that granting NW's ETC request otherwise would be in the public interest. The evidence offered by NW reflects that it has done neither.

With respect to the former, this case will be the Commission's very first opportunity to apply its new ETC rule. The manner in which the Commission chooses to apply this new rule in this case, and the level of rigor that it applies in its analysis of the required data submissions and public interest showings, no doubt will significantly impact all future ETC applications. The language of the Commission's rule appears clear enough, especially with respect to Section (2) (A) (1)-(3) and the fundamental principles that: 1) all USF dollars should only be spent for USF-supported services; 2) NW's proposed expansion plans would not otherwise occur absent the receipt of high-cost support; 3) such support will be used for expenses that NW would not otherwise incur; and 4) the use of USF support should further urban/rural parity.

According to NW witness Bundridge at hearing, HC Appendix M (Exhibit 2, Bundridge Direct) and HC Appendix P (Exhibit 4, Bundridge Surrebuttal) are intended to

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<sup>1</sup> *In the Matter of Federal-State Joint Board on Universal Service*, Report and Order, CC Docket No. 96-45, 20 FCC Rcd 6371 (March 17, 2005) ("ETC Designation Order").

<sup>2</sup> 4 CSR 240-3.570. The text of this rule can be found in Schedule ACM – 1-1, attached to the pre-filed Rebuttal Testimony of Staff witness McKinnie (Exhibit 8).

show that NW has complied with Section (2) (A) (1)-(3) of the Commission's ETC rule (Tr. 112-113, 140-141).<sup>3</sup> As discussed under Issue 3 below, the evidentiary record, however, shows that NW not only has not fully complied with the Commission's ETC rule, but also that NW's *own evidence* shows that it intends to spend USF dollars for non-USF supported services, that major portions of its proposed expansion plans would occur regardless of USF support, and that it intends to use USF support for expenses it would incur regardless of ETC designation (Tr. 126-139).

NW's "commitment" at hearing to subsequently modify its filed plan to bring it into compliance with the rule later but in time for annual review wholly misses the point; the Commission never allows the other companies it regulates to demonstrate Commission rule compliance in this manner. This is especially troublesome in that wireless carriers are not otherwise subject to the Commission's ongoing general regulatory jurisdiction, and therefore, should be realistically expected to resist or perhaps even challenge attempts by the Commission to exercise further regulatory oversight after ETC status is granted and USF dollars have been transferred.

In any event, NW has had ample opportunity prior to hearing to craft its build-out plans and submit the required information according to the rule's requirements. For the Commission to somehow conclude that NW's current evidentiary showing somehow complies with the new ETC rule not only is contrary to the weight of the record evidence, it also would render the clear language of the ETC rule meaningless in this and in other ETC cases. Requiring upfront and full compliance with the Commission's rule is the

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<sup>3</sup> While perhaps not as directly stated by NW, the same holds true regarding NW witness Reeves' testimony, specifically his wireless signal coverage maps contained in HC Appendices G (Revised) and H (Exhibit 5, Reeves Direct) and HC Appendix O (Exhibit 6, Reeves Supplemental Direct). NW reclassified these Appendices as Proprietary at hearing

Commission's only real and meaningful regulatory opportunity to affect how otherwise unregulated carriers will use scarce USF dollars for appropriate USF purposes in the interest of Missouri consumers.

With respect to the public interest, Congress and the FCC have made it clear that *state* commissions have *primary* authority over ETC designations and the FCC has strongly encouraged the states to exercise that authority through a "rigorous" or "stringent" ETC designation process.<sup>4</sup> The Commission under both federal<sup>5</sup> and state law has broad inherent powers, discretion and authority in making its public interest determinations. Technical compliance (or lack thereof) with the Commission's ETC rule is just one aspect of the overall public interest analysis. Two related public interest factors, cited by the Office of the Public Counsel at the hearing, are found in Section 392.185 (1) and (7) RSMo 2000 (promoting universally available and widely affordable telecommunications services and promoting parity of urban and rural telecommunications services) (Tr. 15-17). As more fully discussed by Mr. Brown (Exhibit 9, background pp. 6-12; specifically with respect to NW's Application, pp. 12-28, 32-39), additional public interest factors to be considered are found in the FCC's *ETC Designation Order* and the *Virginia Cellular*<sup>6</sup> and *Highland Cellular*<sup>7</sup> orders.

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<sup>4</sup> ETC Designation Order, para. 8. *See also*, *Virginia Cellular*, para. 4, fully cited in footnote 4 below.

<sup>5</sup> 47 U.S.C. Section 214(e)(2).

<sup>6</sup> *In the Matter of Federal-State Joint Board on Universal Service; Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier for the Commonwealth of Virginia*, Memorandum Opinion and Order, CC Docket No. 96-45, 19 FCC Rcd 1563 (January 2004).

<sup>7</sup> *In the Matter of Federal-State Joint Board on Universal Service; Highland Cellular, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, Memorandum Opinion and Order, CC Docket No. 96-45, 19 FCC Rcd 6422 (April 12, 2004).

In weighing all the various public interest factors, the Commission fundamentally must assure in this and future ETC cases that *the incremental public benefits from designating an additional wireless ETC (or multiple wireless ETCs) outweighs the incremental public costs of designating additional ETC USF recipients in insular, high cost rural areas of the state.* This is especially important in the context of the use of scarce public funds, the level of public accountability obtained from the applicant who will be otherwise unregulated by the Commission, and the applicant's enforceable commitment to USF principles. Even if the Commission were to somehow conclude contrary to the weight of the record evidence that NW had fully complied with the Commission's ETC rule, NW's Application still should be denied because NW has failed to meet its evidentiary burden to show that granting NW's Application would be in the public interest.

## **II. ISSUE LIST EVIDENCE**

**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 a carrier 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 NWMC meet the requirements of Section 214(e)(1) throughout the service area for which it seeks designation?

The evidence offered by CenturyTel (Exhibit 9) shows that it does not. The list of services referenced in Section 214(e)(1) of the Federal Telecommunications Act of 1996 (“the Act”) is not just a “checklist”, which once completed, automatically entitles an ETC Applicant to ETC designation. Section 214(e) must also be read in the context of Section 254(b)(3), which states that the purpose of high-cost support is to provide consumers in rural, insular and high-cost areas with telecommunications services and prices reasonably comparable to those in urban areas. The Commission’s new ETC rule echoes this same fundamental principle in Section (2) (A) 2 A (III) as does Section 392.185(7) RSMo 2000.

CenturyTel witness Brown provides the Commission with a basic definition of “urban-quality” wireless signal coverage (HC Exhibit 9, pp. 25-26, Appendix GHB-4HC) and explains the importance of wireless ETC’s providing high-quality, urban-like wireless signal coverage in rural areas. Only when a strong, two-way, high-quality wireless signal is ubiquitously available can the claimed benefits of wireless service for consumers be obtained. He also points out that NW has only shown the Commission a low level or minimum wireless signal coverage for its proposed ETC service area, thus *at best* not providing the Commission with sufficient information to determine whether NW meets the requirements of Section 254(b)(3) or Section (2) (A) 2 A (III) of the Commission’s ETC rule (HC Exhibit 9, pp. 24-28, Appendix GHB-4HC).

NW witness Reeves claims to have read the Commission’s ETC rule in preparing his supplemental direct testimony (Tr. 193, lines 6-13) but claims he was not familiar with the rule’s rural/urban parity language (Tr. 193, lines 6-20). Mr. Reeves also was unable or unwilling to define an “urban” quality wireless signal nor apparently could see

its relevance (Tr. 194, 204-208). Instead, Mr. Reeves felt obligated to provide the Commission only with two-color “before and after” wireless coverage maps which merely show a “minimal” or low quality baseline wireless signal strength across NW’s service area (Tr. 42, 192, 195).<sup>8</sup> When asked why he didn’t feel the need to provide the Commission with more detailed signal coverage maps, such as the one attached to Mr. Brown’s testimony so that the Commission might have the opportunity to *analyze the level of improvement in signal quality upon implementation of NW’s plan*, Mr. Reeves stated that to do so would be confusing to the Commission, and in his opinion, in any event apparently unnecessary (Tr. 203-205).

NW’s failure and unwillingness to provide the Commission with this information is very significant. Regardless of the many and various arguments that the current overall USF system requires modifications, it is uncontested that incumbent ETCs in high-cost rural areas receive the support they do today because they have made the infrastructure investment in high-cost facilities necessary to provide urban-quality service ubiquitously throughout their ETC service areas. Under current USF support mechanisms, incumbent ETCs receive support some two years *after* they have made rural high-cost infrastructure investment, while under current FCC rules new wireless ETCs receive USF dollars *prior* to actually making their high-cost infrastructure investment (Exhibit 15, Warinner Rebuttal). Once an unregulated ETC such as NW receives USF support, the Commission has no way to compel the return of the dollars if they are not appropriately used. The Commission’s only remedy is to try to stop *future* payments. It is for this reason that a

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<sup>8</sup> HC Appendix G (Revised) and HC Appendix H, Exhibit 5, Reeves Direct; HC Appendix O, Exhibit 6, Reeves Supplemental Rebuttal. The actual low level signal strength measurement used by NW has been deemed Proprietary by NW but was significantly less than the urban quality signal strength measurement used by Mr. Brown.



detailed network build-out plan is an essential part of the Commission's ETC rule, and a careful upfront review of this plan must be an essential component of the Commission's overall public interest analysis.

The evidentiary record shows that NW has failed to provide adequate information showing the actual extent and quality of its current signal strength and coverage--and any improvements in its signal coverage--which will result from its proposed ETC rural infrastructure investment commitments. CenturyTel witness Brown suggests that if NW is to receive high-cost support at the same per-line level of the incumbent, NW must make a meaningful demonstration to the Commission up-front that they will use high-cost USF dollars to provide high quality service throughout their requested ETC service area within a reasonable time frame. The evidence shows that NW has failed to make such a demonstration (Exhibit 9, pp. 24-28).

**Issue 2.** ETC designations by a state commission must be consistent with the public interest, convenience and necessity pursuant to Section 214(e)(2). The Federal Communications Commission's ("FCC's") *ETC Designation 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 NWMC consistent with the public interest, convenience and necessity throughout the service area for which NWMC seeks ETC designation?

That NW does not fully comply with the Commission's ETC rule (discussed under Issue 3 below) is evidence in and of itself that granting NW ETC status is not in the public interest. Beyond that, NW cannot and does not meet its burden of proof to show granting it ETC status will be in the public interest by mere claims of increased

competition in the proposed rural ETC service area.<sup>9</sup> In fact, while the record is unclear as to the number of wireless competitors already serving in NW's service area, NW admits that wireless competition already exists (Tr. 45, 48-49, 67) and no one has claimed that any Missouri consumer in NW's requested service area currently cannot receive USF-supported services. In any event, purportedly promoting competition is only one, and certainly not the determining factor, in the Commission's overall public interest analysis.<sup>10</sup>

CenturyTel witness Brown has submitted uncontested testimony that the public interest is only served when an ETC applicant *clearly shows* that the incremental public benefits created by supporting multiple ETC carriers exceed the increased costs that will be created by supporting multiple networks and infrastructure in high-cost, insular rural areas. After conducting his own cost/benefit analysis based on NW's direct case, Mr. Brown concludes that NW at best has failed to provide the Commission with a sufficient factual basis upon which the Commission could conclude that NW's Application passes this fundamental cost/benefit test. Simply submitting a two or even a five year plan and a few "signal coverage maps" does not mean the requested ETC designation necessarily is in the public interest, let alone show compliance with the Commission's ETC rule. What is critically important, and where the NW application falls significantly short, is the enforceable commitment that the applicant makes to new rural infrastructure investment, and its demonstration of the specific improvements that it will make in the delivery of urban quality wireless services to rural Missouri consumers.<sup>11</sup> Mr. Brown has without challenge shown that as multiple carriers seek to serve the same high-cost rural areas the

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<sup>9</sup> *Virginia Cellular*, para 4.

<sup>10</sup> *Id.*, at para. 28.

<sup>11</sup> Section 392.185 (7) RSMo 2000.

cost for each carrier to ubiquitously serve the area increases geometrically. To the extent that the Commission approves multiple ETCs without considering the ultimate economic impacts, it becomes increasingly likely that no wireless carrier will be able to provide high quality service throughout the territory and also serve as the Carrier of Last Resort, which in turn would be in direct contradiction of the purposes of the Federal Act and the policy behind the Commission's own ETC rule (Exhibit 9, pp. 12-23).

**Issue 3.** In addition to the standards set out in the FCC's ETC Designation Order, the Commission has promulgated rules to be used in evaluating ETC applications. A final Order of Rulemaking for these rules, designated as 4 CSR 240-3.570, was published in the Missouri Register on May 15, 2006. Does NWMC meet the requirements of the Commission's ETC rules?

The Staff, Office of the Public Counsel, and other intervenors each have criticized NW's lack of compliance, in some form or another, with the Commission's ETC rule. These parties can speak for themselves in their respective briefs. CenturyTel has focused specifically on NW's lack of compliance with Section (2) (A) (1)-(3) and the fundamental principles that: 1) all USF dollars should only be spent for USF-supported services; 2) NW's proposed expansion plans would not otherwise occur absent the receipt of high-support; 3) such support will be used for expenses that NW would not otherwise incur; and 4) the use of USF support should further urban/rural parity.

As already discussed under Issue 2 above, the signal coverage maps provided by NW witness Reeves in purported compliance with Section (2) (A) (3) do not show sufficient detail regarding signal coverage and improvements to such coverage to allow the Commission to determine that USF support will be used only for its intended purpose,

which as the Commission's new rule makes clear, is to provide rural consumers telecommunications services reasonably comparable to that available in urban areas. This is a significant deficiency with NW's Application and the Commission should not allow NW's demonstration of purported signal coverage improvement to become the standard in this or in future cases.

Of additional and significant concern is what exactly NW's *own evidence* shows for its proposed USF expenditures in light of the USF dollars NW expects to receive if granted ETC status. As noted by the Staff, NW's build-out plan show a significant mismatch between USF dollars it expects to receive and the subsequent USF-supported service infrastructure investments it agrees to make (Tr. 107). The Commission already has found this to be a serious problem with U.S. Cellular's Application in Case No. TO-2005-0384 and once again should do so in this proceeding.

NW witness Zentgraf testified that NW expects to receive USF support in the amount of \$1.469 million annually if NW's ETC Application is approved (Exhibit 1, p. 15; Tr. 47-48). This means that over the first two years, NW would expect to receive \$2.938 million in USF support (Tr. 115).<sup>12</sup>

NW has told the Commission that its HC Appendices M and P, containing HC financial and budgetary expenditure figures, are intended to show how NW has complied with Section (2) (A) (1)-(3) of the Commission's ETC rule with respect to its proposed infrastructure improvement plan (Tr. 112-113, 140-141). The Commission, therefore, should carefully examine exactly what NW's HC Appendices actually reveal.

At the outset, a cursory review and comparison of these Appendices shows significant unexplained discrepancies (Tr. 130-131, 143-144) and that at least some of the

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<sup>12</sup> The expected amount of USF support to be received was not deemed HC by NW.

numbers contained on HC Appendix M likely are “just plain wrong” (Tr. 131). Even if these discrepancies can be somehow explained away by having Appendix P supersede Appendix M—which begs the question of what would happen if a regulated carrier submitted financial information with similar deficiencies--significant problems nevertheless remain.

NW’s expenditure numbers do not show that all of the USF dollars will be used for intended USF purposes; indeed they show just the opposite. Without getting into the actual numbers here, one significant line item is EVDO. When asked on cross examination if EVDO or broadband is included in Rule 54 101(a) of the FCC’s rules or in Section 254(c) of the Act as one of the USF-supported services, NW admitted that it was not (Tr. 50, 117-118, 139, 145). NW’s proposed expenditures for EVDO, which are a significant part of its overall proposed plan but which do not qualify for USF-support, therefore must be deducted from the amount of expenditures NW claims will be used for legitimate USF purposes.

Additional significant expenditure items which should be deducted are the amounts proposed to be expended for some of the planned new cell towers and for capacity additions at current sites that would have been made anyway. Section (2) (A) (3) (G) of the Commission’s ETC rule limits USF expenditures to those that “would not otherwise occur absent the receipt of high cost support” and requires that “such support will be used in addition to any expenses the ETC would normally incur”. NW witness Bundridge testified that NW has basically built as far out as it can economically, and that without USF support, it cannot build out any further (Exhibit 2, Bundridge Direct, p. 16; Exhibit 3, Bundridge Supplemental Direct, p. 5; Tr. 133). However, Mr. Bundridge

admitted at hearing that NW would likely construct at least several of the new towers NW has identified in its plan (Tr. 127-129) and also need to make capacity investments anyway and regardless of ETC designation (Tr. 134-135). While Mr. Bundridge suggested that additional cell towers might be constructed beyond those contained in NW's plan as a substitution for the identified non-USF supported expenditures if NW were to receive USF support, none of these cell sites were included in NW's filing nor ever specifically identified (Tr. 138). HC Appendix M also inexplicably includes costs for capacity increases on a brand new tower (Tr. 132).

In looking at NW's evidence and Mr. Bundridge's testimony at hearing, it is extremely difficult to determine exactly what level of investment NW would make anyway without USF support. This is information required by the Commission's ETC rule; if NW itself cannot quantify it is difficult to see how the Commission can. What is clear, however, is that NW's own evidence shows that there is a extremely large mismatch between the total dollars NW expects to receive as an ETC and the total amount NW plans to spend for legitimate USF purposes under its plan as submitted (Tr. 129, 145-150). In an attempt to quantify and summarize this mismatch for the Commission without filing a highly confidential version of this brief, CenturyTel has examined NW's HC evidence upon conclusion of the hearing and is attaching hereto a **HIGHLY CONFIDENTIAL ATTACHMENT** showing these calculations.

NW has had sufficient time to prepare and present its case through pre-filed and supplemental testimony consistent with the Commission's pre-filed testimony rules prior to hearing. NW, unlike ETC applicants coming before it, has had the benefit of being allowed to supplement its pre-filed case to bring its request into compliance with the

Commission's new ETC rule. NW, for whatever reason, apparently is unable or has elected not to do so. In either case, to approve NW's Application, based on NW's evidentiary showing, will dilute and for all practical regulatory purposes render impotent the Commission's new ETC rule for future ETC application cases.

## **CONCLUSION**

Despite its criticisms of NW's Application, CenturyTel is not trying to in any way suggest that NW is a "bad" company, somehow inherently undeserving of ETC status. In fact, Mr. Brown has acknowledged that, on a purely comparative basis, NW's Application is in many ways superior to that of U.S. Cellular.

That, however, is not the point. The Commission has the right and the duty to insist on certain minimal evidentiary showings and commitments before authorizing the release of scarce USF dollars, regardless of who the ETC applicant might be. Only after multiple and competing ETC applicants first have made the required minimal evidentiary showings should the Commission then consider the ETC applicants' comparative strengths and weaknesses in deciding whether it is appropriate to grant ETC status to multiple carriers for the same wire centers.

The Commission should keep in mind in this and all future ETC application cases that the incremental public benefits of granting ETC status must outweigh the public costs of granting such ETC status in high-cost, insular rural areas of the state so that all consumers in those areas continue to have access to at least one Carrier of Last Resort which provides access to high-quality and affordable basic and advanced telecommunications services. The burden of proof rightfully lies with the new ETC applicant who, as part of showing that the benefits outweigh the costs and that granting it

ETC status would be in the public interest, also must demonstrate that it fully has complied with the Commission's new ETC rule and its required evidentiary showings. Based on the record evidence presented in this case, NW's Application should be denied.

Respectfully submitted,

**/s/ Charles Brent Stewart**

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### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing document was sent to counsel for all parties of record in Case No. TO-2005-0466 by electronic transmission this 10<sup>th</sup> day of July, 2006.

**/s/ Charles Brent Stewart**

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