

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

In the Matter of the Application of Missouri)
RSA No. 5 Partnership for Designation as a)
Telecommunications Company Carrier Eligible) Case TO-2006-0172
For Federal Universal Service Support Pursuant to)
§ 254 of the Telecommunications Act of 1996)

SMALL COMPANY INTERVENORS' MOTION TO COMPEL

COME NOW Mark Twain Rural Telephone Company and Northeast Missouri Rural Telephone Company ("Intervenors" or "Small Company Intervenors") and for their Motion to Compel pursuant to 4 CSR 240-2.090, state to the Commission as follows:

PROCEDURAL HISTORY AND THE DATA REQUESTS

1. On February 1, 2006, Intervenors served their first set of Data Requests to Missouri RSA No. 5 Partnership ("Chariton Valley Wireless"). The first set of Data Requests included the following Data Requests:

- 1.12 Please provide Chariton Valley Wireless's actual capital expenditures for its Missouri Operations for the years 2003, 2004 and 2005, together with any supporting papers identifying each capital expenditure item or project and the physical location of the network improvement impacted by the expenditure.
- 1.15 Please provide copies of Chariton Valley Wireless's audited Financial Statements for its last two fiscal years. If Chariton Valley Wireless does not have audited Financial Statements for the last two fiscal years, please provide Chariton Valley Wireless's unaudited Financial Statements for the last two fiscal years.

2. On February 13, 2006, Chariton Valley Wireless served its objections to these two data requests.

3. On February 14, the Intervenor served their response to the Chariton Valley Wireless objections.

4. After subsequent e-mail correspondence and telephone contact, Chariton Valley Wireless and the Intervenor were not able to resolve the discovery dispute and scheduled a conference call with Judge Reed on March 14, 2006 pursuant to Commission Rule 4 CSR 240-2.090.

5. The parties were not able to resolve the discovery dispute during the March 14, 2006 conference call.

DATA REQUEST OBJECTIONS AND RESPONSES TO OBJECTIONS

6. Chariton Valley Wireless objects to the relevance of the data requests and also appears to raise concerns regarding the confidential nature of the information:

- 1.12** Please provide Chariton Valley Wireless's actual capital expenditures for its Missouri Operations for the years 2003, 2004 and 2005, together with any supporting papers identifying each capital expenditure item or project and the physical location of the network improvement impacted by the expenditure.

Chariton Valley's objection to Data Request 1.12 states as follows:

*MO5 objects to the relevance of this question. Supporting documents are proprietary and subject to confidentiality agreements with third parties. The costs are not tracked on a specific location basis, as many of the costs are associated with equipment placed at one location but used by the entire network. Without waiving its objection, over the subject years specified, MO5 has cumulatively spent
*** HIGHLY CONFIDENTIAL ***.*

- 1.15** Please provide copies of Chariton Valley Wireless's audited Financial Statements for its last two fiscal years. If Chariton Valley Wireless does not have audited Financial Statements for the last two fiscal years, please provide Chariton Valley Wireless's unaudited Financial Statements for the last two fiscal years.

Chariton Valley Wireless's objection to this data request states as follows:

MO5 objects to the relevance of this question. The information requested is proprietary, subject to confidentiality agreements and bears no relevance on MO5's eligibility for designation as an ETC.

As explained below, the information sought by the Intervenors is relevant, and any concerns about confidentiality are addressed by the Commission's Protective Order.

A. The Protective Order Addresses Confidentiality Concerns.

7. As a threshold matter, information in this case is protected by the Commission's standard-issue October 20, 2006 *Order Adopting Protective Order*. Therefore, to the extent that Chariton Valley Wireless has concerns about confidentiality, the Commission's standard Protective Order should resolve those concerns. As a matter of course, the Intervenors will maintain the confidentiality of any highly confidential or proprietary information in accordance with the Commission's Protective Order issued in this case.

B. The Data Requests Seek Relevant Information.

8. Discovery is available in cases before the Commission on the same basis as civil cases in the circuit court. 4 CSR 240-2.090(1). “Relevant” evidence is that which tends to prove or disprove a fact of consequence to the pending matter.¹ “In Commission proceedings, evidentiary relevance is determined by references to the Commission’s statutory mandate as well as the pleadings and testimony filed by the parties.”²

9. **The Commission’s Statutory Mandate.** The Commission’s statutory mandate requires it to find that a grant of ETC status is “in the public interest” before designating an additional carrier as an ETC in an area served by a rural carrier. 47 U.S.C. §214(e)(2). Moreover, the FCC’s *March 2005 Order* states that “an applicant should be designated as an ETC only where such designation serves the public interest, regardless of whether the area where designation is sought is served by a rural or non-rural carrier.”³ Thus, the question before the Commission in this proceeding is whether granting Chariton Valley Wireless ETC status is in the public interest.

10. **The Public Interest.** In order to examine the question of public interest, the Commission must have information about whether the benefits of granting Chariton Valley Wireless ETC status outweigh the costs. Because

¹ *In the Matter of Missouri-American Water Company’s Tariff to Revise Water and Sewer Rate Schedules*, Case No. WR-2003-0500, *Order Concerning Motion to Compel*, Dec. 2, 2003.

² *Id.*

³ *In the Matter of the Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Report and Order*, rel. March 17, 2005, ¶13 (“FCC March 17, 2005 *Report and Order*”).

Chariton Valley Wireless is already providing service without any USF support, the Commission must consider whether granting ETC status (and thereby USF support) will result in any additional competition or increased benefits for customers in rural Missouri. In other words, Chariton Valley must prove that it will use USF support to fund capital expenditures that it would not have funded anyway, and the Intervenor must be allowed to examine this issue. Without the “base line” financial information that the Intervenor seek, neither the Intervenor nor the Commission will have any way of determining that:

the proposed plans would not otherwise occur absent the receipt of high-cost support and that such support will be used in addition to any expenses the ETC would normally incur.

ETC Designation Requirements, 4 CSR 240-3.570(2)(A).3.G, *Order of Rulemaking*, issued March 7, 2006 (emphasis added). Additionally, and as discussed below, the issue of whether USF support is necessary for the proposed five-year network improvement plan has already been raised by Chariton Valley Wireless.

Data Request 1.12

11. **Data Request 1.12** seeks information about Chariton Valley Wireless’s actual capital expenditures for the years 2003, 2004 and 2005, together with any supporting papers identifying each capital expenditure item or project and the physical location of the network improvement impacted by the expenditure. The Intervenor are not asking Chariton Valley Wireless to create any new information. At the very least, Chariton Valley Wireless should have

total dollars spent by year and by broad category of plant (e.g. switching, buildings, equipment, etc...).

12. **Relevance**. The requested information is highly relevant in this case and necessary in order to determine the “base line” of capital expenditures which Chariton Valley Wireless has made in its facilities and infrastructure. Any federal Universal Service Fund (USF) support that Chariton Valley Wireless would receive in the future as a result of obtaining ETC status should be used for capital expenditures and expenses that are above and beyond current base line expenditures. In other words, it is not sufficient for Chariton Valley Wireless to commit to make capital expenditures and incur expenses in the future to offset its anticipated USF support; rather, Chariton Valley Wireless must show that those expenditures/expenses are in addition to those that would otherwise have been made absent receipt of USF monies.⁴

13. The FCC’s rules require an ETC applicant to demonstrate “how high cost 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.”⁵ Specifically, the FCC requires an ETC applicant to show “how signal quality, coverage, or capacity will improve **due to the receipt of high-cost support** throughout the area for which the ETC seeks

⁴ The cumulative HC number provided by Chariton Valley Wireless does not allow Intervenors to determine a base line capital expenditure amount.

⁵ FCC March 17, 2005 *Report and Order*, ¶12.

designation.”⁶ Similarly, the Missouri Commission’s ETC designation rules require Chariton Valley to explain:

how the proposed plans would not otherwise occur absent the receipt of high-cost support and that such support will be used in addition to any expenses the ETC would normally incur.

ETC Designation Requirements, 4 CSR 240-3.570(2)(A).3.G, *Order of Rulemaking*, issued March 7, 2006 (emphasis added).

14. Thus, it is not enough for the ETC applicant to simply show that it will spend the funds to offset its anticipated USF support. Rather, the ETC applicant must demonstrate that the proposed improvements will be made “due to the receipt of high-cost support” and not just in the normal course of business. Indeed, Chariton Valley Wireless itself alludes to this requirement in both its application and its prefiled testimony by stating that some towers will not be built absent the funds.

As I previously testified, there are areas within the proposed ETC service area where MO 5 cannot expect to be able to recover the cost of construction and operation of an additional cell sites [sic] without USF support. Potential cell sites that could be constructed only if USF support is made available to MO 5 are graphically depicted in Appendix G of the Application.⁷

⁶ *Id.* at ¶23 (emphasis added).

⁷ See Simon Direct, p. 15, lines 19-23.

The requested information is necessary and relevant to confirm and, if necessary, test this assertion.

Data Request 1.15

15. **Data Request 1.15** seeks copies of Chariton Valley Wireless's audited Financial Statements for its last two fiscal years. If Chariton Valley Wireless does not have audited Financial Statements for the last two fiscal years, then the Data Request asks for Chariton Valley Wireless's unaudited Financial Statements for the last two fiscal years. Intervenors seek existing financial statements and are not asking Chariton Valley Wireless to create any new information.

16. **Relevance**. The requested information is highly relevant in this case and necessary in order to determine the "base line" of capital expenditures and expenses incurred by Chariton Valley Wireless in the provision of wireless services. Data Request 1.15 seeks audited (or unaudited) financial statements for the last two fiscal years which would include income statement and balance sheet information. These financial statements are necessary to determine the base line level of capital expenditures and expenses incurred by Chariton Valley Wireless in the provision of its wireless services. As discussed above, the FCC and Missouri PSC rules require Chariton Valley Wireless to demonstrate how its proposed plans "would not otherwise occur absent the receipt of high-cost support and that **such support will be used in addition to any expenses the ETC would normally incur.**" The information requested by the Intervenors is necessary to make this determination.

WHEREFORE, Intervenor respectfully request that the Commission grant this motion to compel and such other relief as is appropriate in the circumstances.

RESPECTFULLY SUBMITTED,

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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 15th day of March, 2006, to the following parties:

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