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 for	)	Case No. TO-2006-0172
Federal Universal Service Support	)	
Pursuant to Section 254 of the	)	
Telecommunications Act of 1996.	)	

PREHEARING BRIEF OF MARK TWAIN RURAL TELEPHONE COMPANY AND NORTHEAST MISSOURI RURAL TELEPHONE COMPANY

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TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY

Missouri RSA No. 5 Partnership ("MO5") has failed to provide competent and substantial evidence showing that granting it eligible telecommunications carrier ("ETC") status is in the public interest. Specifically, MO5 has failed to provide a sufficient two-year plan for how it intends to spend nearly ** __________ ** per year in estimated federal Universal Service Fund ("USF") support. First, MO5's application only offers information as to how it would spend part of this amount. Second, MO5's plan fails to demonstrate that the support will only be used for the intended purposes. Third, MO5 has failed to demonstrate that its anticipated USF support will be used "<u>**in addition**</u> to any expenses that the ETC would normally incur", as required by the Missouri Public Service Commission's ("Commission") newly-promulgated ETC Rule, 4 CSR 240-3.570 (emphasis added). Thus, MO5 has failed to give the Commission sufficient information regarding MO5's use of the estimated USF support, and MO5's plan does not comport with either the Commission's Rule or the guidelines found in the Federal Communications Commission's ("FCC") March 17, 2005 *ETC Report and Order.*

All of the other parties to this case agree that MO5 has failed to meet its heavy burden of proof. The Commission will need more information before it can grant ETC status to MO5 or prepare appropriate findings of fact and conclusions of law to support such a decision.

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II. DISCUSSION

A. MO5 Does Not Meet the Requirements of Section 214(e)(1).

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 MO5 meet the requirements of Section 214(e)(1) throughout the service area for which it seeks designation?

No. It is MO5's burden to demonstrate that it will provide the supported services throughout the service territory of each separate incumbent LEC ("ILEC") study area. MO5 does not appear to offer ubiquitous coverage, and Ms. Zentgraf readily acknowledges "the existence of 'dead spots,'" which she defines as "small areas within a service area where the field strength is lower than the minimum level for reliable service."[1] Moreover, portions of MO5's requested ETC area fall outside of MO5's licensed operating area. Specifically, MO5 admits that parts of the Mark Twain Rural Telephone Company ("Mark Twain") Bethel wire center and Northeast Missouri Rural Telephone Company ("Northeast") Winigan wire center do not lie within MO5's licensed study area.[2] For example, MO5's license area only encompasses 16.8% of the potential customers in the Winigan exchange and less than 22% of the land area. Thus, it is more appropriate to exclude the Winigan exchange from MO5's proposed ETC area than to redefine the service area to include it.[3]

[1] Zentgraf Direct, p. 22.
[2] Application, p. 11 and Appendix C.
[3] Schoonmaker Rebuttal, p. 63.

B. Granting MO5 ETC Status Is Not Consistent with the Public Interest, Convenience, or Necessity.

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 Communication Commission's ("FCC") *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 MO5 consistent with the public interest, convenience and necessity throughout the service area for which MO5 seeks ETC designation?

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). MO5 has failed to meet its burden of proof by failing to provide the Commission with competent and substantial evidence to support a finding that granting ETC status to MO5 is in the public interest.

The FCC has established a rigorous set of minimum public interest requirements to apply in ETC cases.[4] The FCC stated that it 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."[5] MO5 has failed to meet the FCC's minimum public interest requirements in order to be designated as an ETC, so its application should be denied.

The FCC's *ETC Order* identifies a number of public interest concerns that a state commission should consider in reviewing ETC designation requests. These concerns include an examination of: (1) the benefits of increased consumer choice; (2) the unique

[4] *In the Matter of the Federal-State Joint Board on Universal Service,* CC Docket No. 96-45, *Report and Order,* released March 17, 2005 ("the *ETC Order*").

[5] *Id.* at ¶2. The Missouri Commission promulgated its own ETC rule based on these

advantages and disadvantages of the ETC applicant's service offerings; and (3) the impact on the federal USF.[6] The FCC also urged state commissions to use the FCC's framework in a manner consistent with universal service principles – preserving and advancing universal service and competitive neutrality – with an eye towards improving the long-term sustainability of the USF.[7] To this end, the FCC has suggested that state commissions may consider limiting the number of ETCs due to the strain on the USF by examining per-line USF support received by the individual LEC on a case-by-case basis.[8]

The characteristics of many rural carrier service areas also support a more rigorous standard of eligibility because rural carriers' service areas have low customer densities and high per-customer costs. These circumstances indicate that state commissions should apply a particularly rigorous standard to applicants seeking ETC designation in rural carrier service areas. Indeed, numerous statements by the FCC and individual commissioners indicate serious doubts about funding more than one ETC in rural areas. For example, in its *Virginia Cellular Order*, the FCC stated, "We conclude that the value of increased competition, by itself, is not sufficient to satisfy the public interest test in rural areas."[9]

FCC guidelines that will be addressed under Issue No. 3.

[6] *ETC Order*, ¶¶44, 54.

[7] *ETC Order*, ¶¶18-19; Schoonmaker Rebuttal, pp. 40-41.

[8] *ETC Order*, ¶¶55-56.

[9] *Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia,* CC Docket No. 96-45, FCC 03-338 (rel. January 22, 2004), ¶4 (*"Virginia Cellular Order")*.

Separate statements of FCC Commissioners Kathleen Q. Abernathy and Michael J. Copps as well as the remarks of Jonathan S. Adelstein offer further insight on this issue. Commissioner Abernathy stated:

> While promoting competition is undoubtedly a core goal under the Telecommunications Act of 1996, the use of universal funding to engender competition where market forces alone cannot support it presents a more complex question. **Particularly in rural study areas where the cost of providing service typically far exceeds retail rates, regulators must carefully consider whether subsidizing the operations of an additional ETC promotes the public interest**.[10]

Commissioner Copps stated, "We must give serious consideration to the consequences that flow from using the [universal service] fund to support multiple competitors in truly rural areas."[11] Commissioner Adelstein stated:

> This ETC process has raised a lot of questions from those who are concerned that many States and the FCC began using universal service to "create" competition in areas that could barely support just one provider, let alone multiple providers. They question if this is what Congress intended. It may come down to a choice Congress never envisioned between financing competition or financing network deployment that will give Rural America access to advanced services like broadband.[12]

Finally, FCC Chairman 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.[13]

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[10] *Virginia Cellular Order*, Separate Statement of Commissioner Abernathy (emphasis added).
[11] *Virginia Cellular Order*, Separate Statement of Commissioner Copps.
[12] *Virginia Cellular Order*, Separate Statement of Commissioner Adelstein.
[13] 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.*

These statements highlight the problems associated with providing USF support to multiple carriers in high-cost/low-population areas.

The granting of ETC status to wireless carriers is causing a dramatic growth in the size of the federal USF.[14] In order to address this problem, the FCC has suggested that state commissions may consider limiting the number of ETCs due to the strain on the USF by examining per-line USF support received by the individual LEC.[15] Thus, if per-line support is high enough, then the state may be justified in limiting the area to one ETC because funding multiple ETCs could impose strains on an already burdened federal USF.[16] This is especially true where the proposed ETC area already benefits from a competitive wireless market environment. Therefore, the Commission should carefully consider whether the public interest will truly benefit from granting ETC status and providing USF support where the competitive wireless market and customer demand are already prompting MO5 to lower prices, improve features, and build out its network.[17]

CenturyTel witness Mr. Brown provides a cost/benefit analysis to assist the Commission in its decision whether to approve additional ETCs in the rural areas where MO5 is seeking ETC designation. Mr. Brown explains that "the Commission should approve additional ETCs in rural areas only where the increased public benefits that will come from supporting multiple carriers can be shown to clearly exceed the costs that are created by supporting multiple networks."[18] In very sparsely populated areas, Mr.

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[14] Schoonmaker Rebuttal, p. 58.
[15] *ETC Order*, ¶55; Schoonmaker Rebuttal, p. 41.
[16] *ETC Order*, ¶55; Schoonmaker Rebuttal, p. 55.
[17] Schoonmaker Rebuttal, p. 43.
[18] Brown Rebuttal, p. 18.

Brown observes that there could be increased public costs due to the loss in network efficiency caused by multiple providers serving in high-cost/low-density areas.[19] MO5 has failed to show that the benefits of granting it ETC status outweigh the concerns expressed by the FCC and the costs identified by Mr. Brown.

C. MO5 Does Not Meet the Requirements of the PSC's ETC Rules.

Issue 3. In addition to the standards set out in the FCC's *ETC Designation Order*, the Missouri Public Service Commission ("MoPSC") has promulgated ETC 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 MO5 meet the requirements of the MoPSC's ETC rules?

No, MO5 does not meet all of the requirements of the Commission's ETC rule as explained below.

1. MO5's network improvement plan does not comply with the requirements of Commission rule 4 CSR 240-3.570.

The FCC requires that an applicant for ETC status "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."[20] The Commission's ETC rule reduces the requirement to a two-year plan.[21] As stated by Commissioner Abernathy, a formal build-out plan is critical because universal service support is provided to fund investments in networks, and "it should not be used to pad the bottom line."[22]

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[19] Brown Rebuttal, pp. 22-24.
[20] *ETC Order*, ¶2.
[21] 4 CSR 240-3.570 (2)(A)1.
[22] *See* Schoonmaker Rebuttal, p. 34.

MO5 has submitted a five-year plan in Highly Confidential Appendix M, but MO5's plan is deficient under both the requirements of the FCC *ETC Order* and the Missouri ETC rule. Specifically, MO5's plan fails to show that all of the funds will be used for the intended purposes, and the plans do not demonstrate how the high-cost universal service support will be used to improve coverage, service quality, or capacity in each wire center for which MO5 seeks designation. Staff witness Mr. McKinnie explains, "[T]he documentation MO5 has provided regarding its intended use of high-cost support does not demonstrate a commitment to spend all estimated USF monies on supported services in year one and year two of the plan."[23] Likewise, CenturyTel witness Mr. Brown notes that "**<u>in the first two years of the plan outlined on Appendix M, the planned expenditures appear to be significantly less than the amount of high-cost support that will be received</u>**."[24]

MO5's plan is also deficient because Appendix M does not indicate the level of investment and expense that MO5 would incur if it were not granted ETC status, so the Commission cannot determine how the proposed plans would not occur absent the receipt of high-cost support as required by 4 CSR 240-3.570(2)(A)3.G.

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. [25] MO5 has failed to provide the Commission with sufficient evidence

[23] McKinnie, Supplemental Rebuttal, pp. 21; *see also* chart at pp. 9-10(HC).
[24] Brown Supplemental Rebuttal, pp. 7-8 (emphasis added).
[25] 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).

upon which to base findings of fact and conclusions of law that would support an order granting ETC status. Therefore, MO5's Application must be denied.

2. MO5 has not satisfactorily demonstrated that it will satisfy consumer protection and service quality standards.

4 CSR 240-3.570(2)(A)(8) states that an Application shall include, "A statement that the carrier will satisfy consumer privacy protection standards as provided in 47 CFR 64 Subpart U and service quality standards as applicable." MO5 does not comply with this provision of the rule as it does not commit to follow the consumer privacy protection standards referenced in the federal rule. Missouri's ILECs are subject to strict standards regarding the use of Customer Proprietary Network Information ("CPNI"). As the Commission's ETC rule indicates, wireless carriers who are designated as ETCs should be subject to the same CPNI standards as the ILECs. MO5 has not demonstrated to the Commission that it intends to comply with the rule.[26]

MO5 is not currently subject to the same service quality standards as ILECs. In its application and testimony in this case, MO5 has stated that it agrees to comply with the Cellular Telecommunications and Internet Association ("CTIA") Consumer Code for wireless service. The requirements of the CTIA Code are not service quality standards, however, and MO5 will not be subject to the same rigorous regulations as other Missouri ILECs. This is not "competitively neutral," and unfairly discriminates against

[26] *See* McKinnie Supplemental Rebuttal, pp. 6-7.

the wireline ILEC when the wireless ETC is not required to incur the same costs and follow the same standards as the ILEC.[27]

3. MO5 has not demonstrated that the grant of ETC designation to an additional carrier in a rural, high-cost area is in the public interest.

MO5 has not sufficiently demonstrated that the grant of the application is consistent with the public interest, convenience and necessity as required by 4 CSR 240-3.570(2)(A)(5). MO5 has not shown that the benefits to rural consumers in the form of improvements to coverage, service quality, or capacity will exceed the costs that will be created by its designation as an ETC.

One of the principles of universal service is to provide just, reasonable and affordable rates for basic local telephone service comparable to the services and rates offered in urban areas. In this case, the public interest will not be served by granting ETC status to MO5 because there is already a high degree of wireless competition and service offerings in MO5's proposed ETC designation area, so there is no necessity to provide USF support.[28] On the other hand, ETC designation will create negative impacts because each approval of an ETC designation will encourage every other wireless carrier to submit an ETC application and become eligible for USF support, thus causing the size of the USF to further escalate.

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[27] Schoonmaker Rebuttal, p. 37.
[28] Schoonmaker Rebuttal, p. 47.

III. CONCLUSION

MO5 has not demonstrated that it meets all of the federal and Missouri standards in order to qualify for ETC designation. MO5 has not met all of the criteria established by the Commission's ETC rule, nor has it demonstrated that the grant of ETC designation for multiple providers in high-cost areas is in the public interest. Significantly, MO5 has failed to show how it will spend all of the anticipated USF support that it would receive in the first two years. Therefore, the Commission should deny MO5's application for ETC status.

Respectfully submitted,

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Certificate of Service

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