

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

**Application of USCOC of Greater Missouri,            )**  
**LLC for Designation as an Eligible                    )**           **Case No. TO-2005-0384**  
**Telecommunications Carrier Pursuant to the        )**  
**Telecommunications Act of 1996                    )**

**APPLICATION FOR REHEARING OR, IN THE ALTERNATIVE,  
REQUEST FOR CLARIFICATION**

Applicant USCOC of Greater Missouri, LLC d/b/a U.S. Cellular (“U.S. Cellular” or “Company”) submits this Application for Rehearing or, in the Alternative, Request for Clarification of the Commission’s Report and Order issued May 3, 2007 (“Order”), pursuant to Section 386.500, Mo. Rev. Stat. (2000), and 4 CSR 240-2.160.

The Commission’s Order is consistent with the vast majority of ETC designation orders handed down across the country by state utility commissions and by the FCC. U.S. Cellular is pleased to be designated as an ETC and looks forward to demonstrating to the Commission and the citizens of Missouri how federal universal service support will accelerate the construction, maintenance and operation of a high-quality wireless network throughout the areas where U.S. Cellular has been designated. These improvements will provide rural and small-town Missouri consumers with numerous benefits that urban citizens now take for granted.

The value of designating wireless carriers and requiring investment in Missouri’s rural areas could not be more starkly illustrated than by the harm caused by recent tornadoes, thunderstorms and floods that hit the Midwestern United States. We understand that the network of at least one wireless carrier designated as an ETC in Kansas survived the recent storms and expect that damaged areas will be depending on wireless service to communicate during the many weeks or months it will take to restore the wireline network throughout Kansas.

Missouri's rural consumers deserve the benefits of a high-quality network that are today available in surrounding states and U.S. Cellular intends to deliver it as fast as the combination of available internal capital and federal universal service support will allow.

The Order's reasoning on virtually every issue it decided is consistent with the federal scheme for designating competitive ETCs ("CETCs"). U.S. Cellular, therefore, urges the Commission to reaffirm its judgments in these many areas should reconsideration be requested by other parties in this proceeding.

The only aspect of the Commission's Order that bears rehearing or clarification is the matter of imposing a "base line" spending requirement upon U.S. Cellular. Specifically, the Commission's Order stated:

[T]he Commission will establish a two-year average base line of \$15 million per year, which is the amount that U.S. Cellular currently invests for construction of cell sites in its Missouri market, excluding St. Louis and the Joplin area, without wireless support. If U.S. Cellular fails to comply with the base line investment requirement, the Commission will refuse to recertify U.S. Cellular to receive further USF funding and may seek the return of funds previously paid. In addition, the Commission may seek penalties against U.S. Cellular under Section 386.570, RSMo 2000, for violation of the Commission's order. Order at p. 21.

Ordering Paragraph No. 4 states that a grant of ETC status to U.S. Cellular:

... is conditioned upon it meeting a base line investment requirement of a two-year average of \$15 million per year in capital expenditures for construction of cell sites in its Missouri market, excluding St. Louis and the Joplin area, in addition to any funding it receives from the federal Universal Service Fund. *Id.* at pp. 38-39.

## **I. APPLICATION FOR REHEARING**

U.S. Cellular hereby applies for rehearing on the following points, all relating to the condition for base line spending set forth above. The Order is unjust, unreasonable, arbitrary, capricious and unlawful for the following reasons:

**A. The Base Line Investment Condition is a Rule which Was Not Adopted Pursuant to the State’s Rulemaking Procedures.**

There is little doubt that the condition placed upon U.S. Cellular’s grant to spend an average base line amount over a two-year period is a rule. Section 536.010(4) defines a rule as an “agency statement of general applicability that implements, interprets, or prescribes law or policy, or that describes the organization, procedure, or practice requirements of any agency.” The Commission’s base line investment requirement appears to be a statement of general applicability, unless the Commission intends for U.S. Cellular to be the only carrier of many within the state that is subject such a requirement. Absent the Commission placing this requirement solely on U.S. Cellular (which is unlawful for reasons discussed below), then this statement of general applicability that implements a new law or policy must apply to all other carriers of all technologies receiving high-cost support. Presumably, all will be required to establish a base line investment level for Commission review. Moreover, the base line investment requirement cannot be cloaked in terms of mere “interpretation” of existing rules because the requirement departs materially from the generally applicable ETC requirements adopted in June 2006. As such, the Commission has adopted “a new position inconsistent with any ... existing regulation.” Shalala v. Guernsey Memorial Hospital, 514 U.S. 87, 100 (1995).

The detailed requirements contained in Section 536.021 and 4 CSR 240-2.180 for establishing a new rule were not followed.<sup>1</sup> None of the parties to this proceeding, nor any other parties within the state who would be affected by this new rule, were given notice that such a

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<sup>1</sup> See § 536.021.1 (“No rule shall hereafter be proposed, adopted, amended or rescinded by any state agency unless such agency shall first file with the secretary of state a notice of proposed rulemaking and a subsequent final order of rulemaking, both of which shall be published in the Missouri Register.”); 4 CSR 240-2.180 (2) (“Promulgation, amendment, or rescission of rules may be instituted by the commission through an internally-generated rulemaking case, or pursuant to a rulemaking petition filed with the commission.”)

rule was contemplated or an opportunity to participate in the normal process that precedes the adoption of the rule.

None of the exceptions which permit the adoption of rules without notice and comment proceedings apply here. Should the Commission wish to establish a base line spending amount for all ETCs, it may do so, but only in the course of a rulemaking proceeding, conducted pursuant to its rules.<sup>2</sup>

The Commission has also failed to comply with Section 536.016, which requires state agencies to adopt rules based upon substantial evidence on the record and a finding that the rule is necessary to carry out the purposes of the statute that granted such rulemaking authority. Moreover, the rule must be based upon reasonably available empirical data and shall include an assessment of the effectiveness and the cost of rules both to the state, as well as to any private or public person or entity affected by such rules. See § 536.106.2.

Here, there is no record evidence demonstrating either the effectiveness or cost of the rule requiring a base line spending amount. The record in this case does not contain sufficient facts regarding the development of wireless networks and the need to invest in 911 and E-911 upgrades, system redundancies, capacity and switching upgrades, and many other factors. Indeed, base line spending amounts do not exist in the Commission's current rules and were never even part of the deliberations leading up to the adoption of those rules which were established on June 30, 2006. See 4 CSR 240-3.570. None of the Commission's procedural

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<sup>2</sup> Nor can the Commission escape the requirements of Section 536.021 by characterizing its action as an adjudication. See Greenbriar Hills Country Club v. Director of Revenue, 47 S.W.3d 346, 357 n.32 (Mo. 2001)(“Agencies . . . cannot promulgate, or repeal, a rule by an adjudicated order. That must be accomplished by the notice, publication and public comment method prescribed by section 536.021. The promulgation of a policy of general applicability is a legislative function and outside the competence of a court or a quasi-court.”) See also NLRB v. Wyman-Gordon Co., 394 U.S. 759, 764, 89 S.Ct. 1426 (1969)(rejecting an attempt to “promulgate new rules in adjudicatory proceedings, without complying with the requirements of the Administrative Procedure Act.”); Alabama Power Co. v. FERC, 160 F.3d 7, 11 n.5 (D.C. Cir. 1998)(“The APA does not contemplate the use of adjudication to develop rules.”)

orders gave notice that a base line spending amount was an issue in this case until Commissioner Gaw's cross-examination of U.S. Cellular's witnesses in the closing portion of its case in chief.

From a practical standpoint, the Commission just finished a year-long proceeding to adopt new rules which set forth standards under which carriers may be designated and retain designation as CETCs.<sup>3</sup> U.S. Cellular participated in those proceedings and upon adoption of the new rules, explained how its application did comply with those rules and agreed to comply with the annual recertification requirements. Now, after this case has been heard, briefed, and submitted, the Commission has imposed a new rule which U.S. Cellular could not have known would be applied to it. It is unfair and a denial of due process to impose such a rule at the end of an adjudicatory proceeding.

In sum, the base line spending requirement is a rule which must be made applicable to all other ETCs. U.S. Cellular respectfully requests the Commission to reverse its decision to impose the rule, until such time as a rulemaking proceeding is conducted in accordance with the relevant Missouri statutes and rules cited above.

**B. The Commission's Base Line Spending Requirement is Not Competitively Neutral and Violates 47 U.S.C. Section 253.**

Section 253 of the Communications Act of 1934, as amended, 47 U.S.C. Section 253(b), states in pertinent part:

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

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<sup>3</sup> 4 CSR 240-3.570.

The base line investment rule contained in the Commission's Order was clearly intended to advance universal service, and, therefore, comes within the purview of Section 253(b). If the Order remains unmodified, U.S. Cellular will be the only carrier in Missouri to have a base line spending requirement attached to its ETC status. It therefore runs contrary to the Congressional mandate that all state universal service rules be competitively neutral.

The FCC has defined competitive neutrality to mean 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>4</sup> U.S. Cellular cannot envision how the base line investment requirement, applied only to U.S. Cellular, could ever be construed as competitively neutral, given that none of the 52 other ETCs in the state are required to meet a similar requirement. Moreover, this rule imposes a significant financial commitment that will have a material effect on any company to which it is applied.

Accordingly, U.S. Cellular respectfully requests the Commission to reverse its decision to impose a base line spending requirement because, as adopted, it is inconsistent with federal law, which requires all state universal service support mechanisms and rules to be competitively neutral.

**C. Imposition of a Base Line Investing Requirement for New Cell Site Construction is Entry and Rate Regulation that is Preempted by Federal Law.**

Under 47 U.S.C. Section 332(c)(3)(a):

[N]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services....

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<sup>4</sup> *Federal-State Joint Board on Universal Service, Report and Order*, 12 FCC Rcd 8776, 8801 (1997) ("First Report and Order").

Under federal law states cannot regulate rates or entry of commercial mobile radio service (“CMRS”) carriers, even if the CMRS carrier is an ETC.<sup>5</sup> Additionally, the Fifth Circuit has confirmed that Section 254(f) of the Act — which allows a state to “adopt regulations not inconsistent with the Commission’s rules to preserve and advance universal service” — cannot be read to supersede the preemptive effect of Section 332(c)(3).<sup>6</sup> Texas Office of Public Utility Counsel v. FCC, 183 F.3d 393, 431 (5<sup>th</sup> Cir. 1999). In sum, Congress made no “universal service exception” to its preemption of CMRS rate regulation.

The Commission’s base line investment requirement would obligate U.S. Cellular to invest at least \$15 million per year of internally-generated capital in cell site construction. As such, the base line requirement would have the effect of regulating the *quantity* of service offered by U.S. Cellular. Regulation of quantity is inextricably intertwined with the regulation of rates.<sup>7</sup> Any requirement mandating the number of towers to be constructed or the amount of money to be invested in new tower construction is undoubtedly rate regulation under Bastien.<sup>8</sup>

The Bastien court also found regulation of quantity to be equivalent to entry and rate regulation:

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<sup>5</sup> See 47 U.S.C. Section 332(c)(3); *Petition of the State Independent Alliance and the Independent Telecommunications Group for a Declaratory Ruling that the Basic Universal Service Offering Provided by Western Wireless in Kansas is Subject to Regulation as Local Exchange Service*, 17 FCC Rcd 14802, 14820 (2002) (“*State Independent Alliance*”) (“Kansas is precluded and preempted from imposing rate and entry regulations on Western Wireless’ BUS [Basic Universal Service] offering, but Kansas may regulate other terms and conditions, and Kansas may impose universal service regulations that are not inconsistent with section 332(c)(3)(A), other provisions of the Act, and the Commission’s regulations.”).

<sup>7</sup> AT&T v. Central Office Telephone, Inc., 524 U.S. 214, 223 (1998) (“Rates ... do not exist in isolation. They have meaning only when one knows the services to which they are attached.”).

<sup>8</sup> See Bastien v. AT&T Wireless Service, Inc., 205 F.3d 983, 989 (7<sup>th</sup> Cir. 2000) (“We merely need to look at the face of the complaint and ask what the nature of the claims are and what the effect of granting the relief requested would be. This shows that . . . Bastien’s complaint would directly alter the federal regulation of tower construction, location and coverage, quality of service and hence rates for service.”)

These claims tread directly on the very areas reserved to the FCC: the modes and conditions under which AT&T Wireless may begin offering service in the Chicago market. The statute makes the FCC is responsible for determining the number, placement and operation of the cellular towers and other infrastructure, as well as the rates and conditions that can be offered for the new service. Should the state court vindicate Bastien's claim, the relief granted would necessarily force AT&T Wireless to do more than required by the FCC: to provide more towers, clearer signals or lower rates. The statute specifically insulates these FCC decisions from state court review.<sup>9</sup>

While 47 U.S.C. Section 253 does permit states to adopt regulations preserving and advancing universal service, Subsection 253(e) specifically provides for the preemption of rules which amount to rate or entry regulation for CMRS carriers such as U.S. Cellular, even if it is an ETC: “Nothing in this section shall affect the application of section 332(c)(3) of this title to commercial mobile service providers.” That is, a state cannot find a safe harbor in claiming that such a rule is “only regulating universal service.”

Accordingly, U.S. Cellular respectfully requests the Commission to reverse its decision to impose a base line spending requirement because, as adopted, it is inconsistent with federal law, which preempts state regulation of the rates charged by a commercial mobile radio service provider.

**D. The Commission’s Base Line Investment Requirement Violates Numerous Procedural Requirements of Missouri Law**

The Order is unjust, unlawful and unreasonable because the Commission has failed to provide adequate findings of fact relating to the record with regard to establishing a base line investment requirement for U.S. Cellular. It is therefore impossible for U.S. Cellular to specify with particularity the factual errors that are contained in the Order. Similarly, the Order is unlawful, unjust and unreasonable in that it fails to specify conclusions of law that are drawn

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<sup>9</sup> Id., 205 F.3d at 989.



from any findings of fact. Additionally, the Order is unlawful, unjust and unreasonable because it is not supported by competent and substantial evidence upon the record as a whole, and is contrary to the substantial and competent evidence which is contained in the record.

The Order is additionally unlawful, unjust and unreasonable, not based upon competent and substantial evidence or upon adequate finding of fact, and abuse of discretion in that the Commission failed to make any specific findings of the appropriate amounts for any base line investment requirement, and instead appears to have imposed its own requirements without an adequate factual or evidentiary basis. See State ex rel. Coffman v. PSC, 121 S.W. 3d 534, 542 (Mo. App. 2003); State ex rel. Noranda Aluminum, Inc. v. PSC, 24 S.W.3d 243, j246-47 (Mo. App. 200).

## **II. REQUEST FOR CLARIFICATION**

In the alternative, U.S. Cellular requests the Commission to reconsider and clarify that its Order intended to establish a base line investment amount for U.S. Cellular in its Missouri market (exclusive of the St. Louis and the Joplin areas) to all appropriate investment objectives under federal law, and not limit such investment only to the construction of new cell sites.

There is an inconsistency that arises when the language contained in the text of the Order is compared with the relevant ordering paragraph. In the text, the Commission discussed the issue as one of attempting to ensure that U.S. Cellular's annual investment spending meets an established benchmark:

*In recognition of the variability of U.S. Cellular's investment spending, the Commission will establish a two-year average base line of \$15 million per year, which is the amount that U.S. Cellular currently invests for construction of cell sites in the*

Missouri market, excluding St. Louis and the Joplin area, without wireless support.<sup>10</sup>

However, in the relevant ordering paragraph, the language is narrower:

USCOC of Greater Missouri, LLC, d/b/a U.S. Cellular's designation is conditioned upon it meeting a base line investment requirement of a two-year average of \$15 million per year in capital expenditures *for construction of cell sites* in its Missouri market, excluding St. Louis and the Joplin area, in addition to any funding it receives from the federal Universal Service Fund.<sup>11</sup>

The language used in the text of the Order is more consistent with testimony that U.S. Cellular witnesses Alan Johnson and Nick Wright provided on the stand in response to questions from Commissioner Gaw. Mr. Johnson testified at Tr. 738:

Q. Can you tell this Commission whether you would be -- whether U.S. Cellular would be in a position to spend at a minimum the \$16 million, which is about the average of what's been expended in '08?

A. I would expect that it would look similar. But as I mentioned, the average can be misleading because, from year to year, depending on many factors, the capital budget can change.

It depends on -- on the -- the market growth that's -- that's -- the individual market competitive issues. Even -- even just literally a plant opening in -- in, you know, Rolla, for example, could -- could literally change our plan in terms of how much investment we might make there.

So it's really difficult to tell you what 2008 would like look. But based on an extrapolation, it would be a reasonable extrapolation.

Mr. Wright testified at Tr. 757-59:

Q. ... Now, in regard to the expenditures that could be made in '08, is there any -- first of all, is there anything that the -- that U.S. Cellular would -- would

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<sup>10</sup> Order at 21(emphasis added).

<sup>11</sup> Order at 38-39(emphasis added).

give to the Commission in regard to assurance or guarantees in -- as to expenditure -- minimum expenditures for that year as they relate to the expenditures that have historically been made since '03?

A Commissioner Gaw, I don't want to dance around your question. But I will tell you, sir, is that our -- our investment -- ETC investment will be incremental to what we will build within our internal plant. That is our commitment to you. As far as your minimum question --

Q. Yes.

A. -- I -- I'm not comfortable committing to that right now because that decision really would be above -- probably my boss or above at this particular point, so I'd hate to commit to that. I just -- I know this. We would -- we would invest dollar to dollar ETC money over and above what we've been spending, what we would spend in '07 and '08 and beyond.

Q. Would U.S. Cellular object to a requirement that they maintain a certain minimum level of expenditure over and above the amount that would be available through USF monies if this Commission made such a requirement as a condition to USF status?

A. Again, that may be my boss's. I hate to defer.

Q. That's all right.

A. But I hate to commit at this particular point. I guess, again, what I could commit to is that this money would be over and above our spend. And on average, as Mr. Johnson has said, we've been spending about \$15, \$16 million a year in Missouri. Right as of this moment, that's still our plan. We have a lot of white space to build in Missouri, so I cannot see why we couldn't -- why we would not maintain that sort of spend. But I'd hate to commit to a minimum at this point, at least without talking to my boss in Chicago, the CEO of the company.

U.S. Cellular’s reluctance to commit to a specific benchmark stems from the fact that, like all other telecommunications carriers, capital and operating expenditures on a network vary greatly from year to year. Moreover, as a network matures, more capital is spent on upgrades, maintenance, storm recovery, redundancies, and recurring charges such as site rental, leased back-haul facilities and operating expenditures. A cell site constructed with support in an area so sparsely populated that it remains in the red every year must be supported, or removed from service.

Thus, requiring any carrier to promise that it will expend \$15 million per year on “new cell site construction” every year for the indefinite future ignores how networks are developed and operated, and constrains beneficial upgrades, such as broadband, which do not require new cell site construction and for which federal high-cost support cannot be used. When constructing its network, U.S. Cellular must tie the cell sites together with T-1, microwave, switching and trunking facilities.<sup>12</sup>

In addition, there are many ways for a wireless carrier to improve coverage, service quality or capacity that are unrelated to the construction of cell sites. A wireless carrier may invest in new switching facilities that will increase the quality of service provided in a given area, for example, or it might increase network capacity by investing in the transmission facilities used to connect cell sites to those switching facilities. Even an effort to “improve coverage” is not necessarily related to tower construction; new transmission equipment can be placed on structures owned by other entities (thereby obviating the need to construct a new tower) or more robust transmission equipment can be placed on existing towers.<sup>13</sup>

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<sup>12</sup> Wright Direct, Ex. 5, p.12, ln. 6-8.

<sup>13</sup> Wood Supplemental Surrebuttal, Ex 27, pp. 23-24, ln 16-23;1-5.

However, the \$15 million baseline requirement through 2008 is not problematic because U.S. Cellular has much work to accomplish on its network in order to fill in the “white areas” Commissioner Gaw referred to in his questioning of Mr. Johnson.<sup>14</sup>

As U.S. Cellular has stressed in its Application for Rehearing and in its legal briefing, any requirement to meet or exceed a certain base line of non-ETC spending would have numerous legal infirmities, and no such requirement has been adopted by the FCC or, upon information and belief, any other state. See U.S. Cellular Supplemental Brief at pp. 47-48. Nonetheless, U.S. Cellular could meet a base line spending condition for two years which affords the company flexibility to include all capital and operating expenditures within the \$15 million base line. That is, U.S. Cellular can commit to invest \$15 million of internally-generated capital annually for two years to, for example, construct new cell sites, upgrade existing networks, improve 911 and E-911 functionality, to pay for cell site rentals and leased T-1 facilities, to purchase battery backups, to repair facilities damaged by weather, and to invest in ongoing improvement projects, including wireless broadband, which is very important to rural Americans.

U.S. Cellular commits to return to the Commission annually to describe how it is investing the support that it received from the federal fund and to demonstrate that it invested an additional \$15 million (two-year average) of internally-generated capital within the designated ETC service area, for the construction, upgrading, maintenance, and operation of network facilities, including, but not limited to, cell site construction.

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<sup>14</sup> See Tr. 759-60; Appendix 4.

The clarification requested by U.S. Cellular will provide the Commission with assurance that capital is being invested in the appropriate Missouri markets, while providing U.S. Cellular with the flexibility to develop its business consistent with federal law and the needs of its customers. Strictly limiting such investment to “constructing new cell sties” will impede U.S. Cellular’s ability to respond to consumer needs and undermine otherwise sound network planning and development, which the Commission found to be an important consideration for granting the Company ETC status in the Order.<sup>15</sup>

Accordingly, to conform the Order to federal law and to avoid unnecessary appellate litigation, U.S. Cellular respectfully requests the Commission to modify Ordering Paragraph 4 on page 38 to read as follows:

USCOC of Greater Missouri, LLC, d/b/a U.S. Cellular’s designation as an Eligible Telecommunications Carrier for the wire centers listed in Exhibits C, D and F attached to its Application is conditioned upon it meeting a base line investment requirement of a two-year average of \$15 million per year in internally generated capital for the construction, upgrading, maintenance, and operation of facilities in its Missouri market, excluding St. Louis and the Joplin area.

In addition, the open-ended investment requirement of a two-year average of \$15 million per year of capital expenditures in Missouri should be reconsidered. U.S. Cellular requests that the Commission clarify that this base-line requirement will be reexamined after the initial two-year period. It makes little sense to lock in U.S. Cellular to a two-year average of \$15 million per year in perpetuity, particularly since future events relating to market conditions, technological advancements and a variety of other factors may cause such spending to increase or decrease.

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<sup>15</sup> See Order at 14.

WHEREFORE, U.S. Cellular respectfully requests the Commission grant rehearing of its Report and Order or, in the alternative, reconsider and clarify its May 3, 2007 Report and Order.

Respectfully submitted,

/s/ Karl Zobrist

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**Certificate of Service**

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or e-mailed to all counsel of record this 11<sup>th</sup> day of May, 2007.

/s/ Karl Zobrist  
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