

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of)	
Missouri RSA No. 7 Limited Partnership)	
d/b/a Mid-Missouri Cellular for Designation)	
as a Telecommunications Carrier Eligible for)	Case No. TO-2003-0531
Federal Universal Service Support pursuant)	
to Section 254 of the Telecommunications)	
Act of 1996.)	

REPLY BRIEF OF INTERVENORS
ALMA COMMUNICATIONS COMPANY d/b/a ALMA TELEPHONE COMPANY
AND CITIZENS TELEPHONE COMPANY OF HIGGINSVILLE, MISSOURI

Alma Communications Company d/b/a Alma Telephone Company ("Alma") and Citizens Telephone Company of Higginsville, Missouri ("Citizens") file their Reply Brief in order to reply to certain issues raised in the Initial Briefs of Mid-Missouri Cellular ("MMC") and the Office of Public Counsel ("Public Counsel"). Failure to address an issue raised in those briefs or other briefs filed in this case should not be considered as acquiescence in those positions, only that Alma and Citizens believe those issues were sufficiently addressed in their Initial Brief.

A. Reply to MMC.

1. Case of first impression.

First, MMC attempts to liken the Missouri Public Service Commission's ("Commission") grant of eligible telecommunications carrier ("ETC") status to competitive local exchange carrier Green Hills Telecommunications Services ("Green Hills") in Case No. CO-2003-0162¹ to the requested grant of ETC status to a Commercial Mobile Radio Service ("CMRS") carrier such as

¹*Application of Green Hills Area Cellular Telephone, Inc. d/b/a Green Hills Telecommunications Services*, MoPSC Case No. CO-2003-0162 (2003).

MMC. There are several differences, however, that demonstrate that the Commission's consideration and grant of the ETC status to Green Hills was a very different proceeding. At the time of its application to the Commission, Green Hills was a certificated competitive local exchange company ("CLEC") subject to the jurisdiction of the Commission. In its application for a certificate of service authority, Green Hills agreed to abide by all Commission rules and regulations regarding quality of service, service and billing practices and E-911 requirements. Green Hills filed a tariff setting out the terms and conditions of its service as well as the rates it would charge for those services. That tariff was reviewed and approved by the Commission as are all CLEC tariffs. In its application for ETC designation, Green Hills only requested ETC designation in one Sprint Missouri, Inc., exchange where it provided facilities-based service. Green Hills is required to file an Annual Report with the Commission each year, and it is required to make the same annual ETC filings to the Commission as the incumbent local exchange companies with cost support showing that the funds it receives from the Universal Service Fund ("USF") have been used for the required purposes.

To state that this first application to the Commission by a wireless carrier is similar to the Green Hills application and therefore not totally a case of first impression is a misrepresentation. MMC is a wireless carrier not otherwise subject to Commission jurisdiction. MMC does not hold a certificate of authority from the Commission, nor is it subject to Commission regulation as to rates and services. MMC's application for ETC status is filed under a totally different set of circumstances and facts. While it was appropriate for the Commission to approve a Stipulation and Agreement between Green Hills and Staff in that case where there were no intervenors, the Commission is required to make a specific finding that the grant of the additional ETC status to

a wireless carrier in a rural area is in the public interest.² The Commission must carefully consider the evidence from the filed testimony in this case and the evidence that was adduced at the hearing to determine whether it is in the best interests of the customers of the rural LECs for MMC to be designated as an additional ETC. MMC's application cannot be evaluated using the same standards as those applied to Green Hills because it is not similarly situated.

2. MMC's evidentiary showing.

The parties to this case seem to be in agreement, at least informally, that the guidelines for determination of the public interest standard in applications for ETC designation set out in the Federal Communications Commission's ("FCC") decision involving Virginia Cellular³ should be followed by the Commission in making this decision. In its decision, the FCC said that "the value of increased competition, by itself, is not sufficient to satisfy the public interest test in rural areas."⁴ Instead the FCC acknowledged "the need for a more stringent public interest analysis for ETC designations in rural telephone company service areas."⁵ According to the FCC:

In determining whether designation of a competitive ETC in a rural telephone company's service area is in the public interest, we weigh the benefits of increased competitive choice, the impact of the designation on the universal service fund, the unique advantages and disadvantages of the competitor's service offering, any commitments made regarding quality of telephone service, and the competitive ETC's ability to satisfy its obligation to serve the designated service areas within a reasonable time frame. Further, in this Order,

²Section 214(e)(2), Telecommunications Act of 1996 ("the Act").

³*In the Matter of Federal-State Joint Board on Universal Service, Virginia Cellular, LLC Application for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia, Memorandum Opinion and Order*, CC Docket No. 96-45, FCC 03-338 (rel. January 22, 2004) (Exhibit No. 10 at hearing) hereafter "Virginia Cellular."

⁴*Virginia Cellular*, FCC 03-338, para. 27.

⁵*Virginia Cellular*, FCC 03-338, para. 4.

we impose as ongoing conditions the commitments Virginia Cellular has made on the record in this proceeding. These conditions will ensure that Virginia Cellular satisfies its obligations under section 214 of the Act. We conclude that these steps are appropriate in light of the increased frequency of petitions for competitive ETC designations and the potential impact of such designations on consumers in rural areas.⁶

Thus, in addition to the guidelines set out above, the FCC imposed as ongoing conditions the commitments Virginia Cellular made during the proceeding. In determining whether the public interest was served, the FCC placed the burden of proof upon the ETC applicant.⁷ The FCC in *Virginia Cellular* stated that the framework enunciated in that order "shall apply to all ETC designations for rural areas pending further action by the Commission."⁸

Further action by the Commission was found in the Federal-State Joint Board Recommended Decision issued on February 27, 2004.⁹ This decision affirmed the need for a more detailed and stringent public interest analysis of ETC designations. Although the Recommended Decision was quoted at length in the Initial Brief filed by Alma and Citizens, for purposes of comparing MMC's evidentiary showing in this case to what the FCC and the Joint Board believe is necessary for analysis of the public interest standard, we repeat those factors as set out in the CenturyTel companies Initial Brief at pages 9-11.

According to The Federal-State Joint Board, the minimum ETC eligibility requirements and public interest factors should include, but are not limited to:

1. That an ETC applicant must offer the services supported by the federal universal

⁶*Virginia Cellular*, FCC 03-338, para.4.

⁷*Virginia Cellular*, FCC 03-339, para. 26.

⁸*Virginia Cellular*, FCC 03-338, para. 4.

⁹*In the Matter of Federal-State Board on Universal Service*, Recommended Decision, CC Docket No. 96-45 (February 27, 2004).

service mechanisms *throughout the designated service area*, using either its own facilities or a combination of its own facilities and *resale* of another carrier's services.¹⁰

2. That the ETC applicant demonstrate that it has adequate financial resources.¹¹

3. That the ETC applicant demonstrate its capability and commitment to provide service *throughout* the designated service area to all customers who make a reasonable request for service by requiring the submission of formal build-out plans where facilities are not yet built, including cost information relating to installation and customer premises equipment.¹² States are to determine what constitutes a "reasonable request" for service and build-out plans are to be harmonized with any existing policies regarding line extensions and carrier-of-last-resort obligations.¹³

4. That state commissions be encouraged to require competitive ETCs to provide equal access if all other ETCs in that service area relinquish their designations pursuant to Section 214(e)(4) of the Act.¹⁴

5. That states require ETC applicants to demonstrate the ability to remain functional in emergency situations.¹⁵

6. That states impose consumer protection requirements as a condition of ETC designation, including rules relating to disconnections, treatment of customer deposits, and submission of consumer complaints.¹⁶ The Federal-State Joint

¹⁰*Id.*, at paragraphs 19, 26. MMC does not propose to offer service throughout Spectra and CenturyTel's service areas and apparently has no plans to offer service through resale.

¹¹*Id.*, at paragraph 22. While Intervenors do not necessarily dispute MMC's financial resources, MMC has not provided the Commission with specific financial documentation as part of its Application.

¹²*Id.*, at paragraphs 23, 24, 25, 27, MMC has provided no written build-out plans or cost documentation for the parties or for the Commission to review.

¹³*Id.*, at 27. Whether MMC is willing to assume carrier-of-last-resort obligations is unclear.

¹⁴*Id.*, at paragraph 28. MMC currently does not provide equal access as is required of the incumbent LECs. There is no record evidence as to MMC's plans should Spectra and CenturyTel withdraw as carriers of last resort and relinquish their respective ETC designations.

¹⁵*Id.*, at paragraph 30. There apparently is no record evidence on this point.

¹⁶*Id.*, at paragraphs 31, 32. It is unclear as to exactly what consumer protection requirements MMC is willing to agree to and what requirements would be enforceable by the

Board specifically acknowledged that states are free to impose their own unique eligibility requirements and that such power is not limited with respect to wireless carriers which otherwise may not be subject to state consumer protection requirements.¹⁷

7. That states should be free to consider how much (or set some minimum amount of) local usage an ETC should offer as a condition of federal universal support, including comparisons with plans offered by incumbent LECs.¹⁸

Additional factors were cited with approval, including potential benefits customers might receive from designation of an additional ETC in a particular area, new customer choices, affordability, quality of service, service to unserved customers, comparison of benefits to public cost, considerations of material harm, whether customers are likely to benefit from increased competition as a result of ETC designation, whether the new ETC will provide benefits not otherwise available from incumbent carriers, whether consumers might be harmed if the incumbent withdraws from the service area, harm to a rural incumbent LEC, and the level of federal high-cost per line support to be received by the ETC.¹⁹

While MMC states that it is willing to make the same commitments that Virginia Cellular made in order to be designated as an ETC, it has made no *written* commitments, and the oral commitments it has made are unclear and confusing. Again, as stated in CenturyTel's Initial Brief:

MMC's prefiled testimony contained only general statements, and its supposed plans to overbuild its existing network in exchange for ETC status and supposed service commitments, came out *for the first time* at hearing - - and then, only in the *in camera* non-public portion of the hearing. (HC Tr. 171-173). MMC's proposed planned conversion to new technology, which should have been part of MMC's case-in-chief, clearly was not mentioned in MMC's direct testimony (Tr. 205), was not addressed in

Commission.

¹⁷*Id.*, at paragraphs 32, 33.

¹⁸*Id.*, at paragraphs 35, 36. Local usage was addressed by witness Schoonmaker in his rebuttal testimony, Exhibit 8. The Joint Board's Recommended Decision clearly implies that this Commission can condition ETC designation on minimum local usage criteria if it so chooses.

¹⁹*Id.*, at paragraphs 40, 43. Initial Brief of Intervenors Spectra Communications Group, LLC d/b/a CenturyTel and CenturyTel of Missouri, LLC, pp. 9-11.

response to parties' legitimate data requests (Tr. 206, Exhibit 13), was not directly addressed in its surrebuttal testimony, and no business plans or cost analysis has been provided either to parties or to the Commission on the record (Tr. 208, 210-211, Exhibit 14).²⁰

Again, CenturyTel states the obvious:

MMC has failed to provide the parties with sufficient detail of its proposals in prefiled testimony (Exhibit 9, page 11, lines 15-20) and even as of the last day of hearing it was unclear exactly what lifeline plan (or plans) MMC intends to offer (Tr. 373-374) or what firm customer protection commitments or proposals MMC had agreed to make (Tr. 354-355). The commitments made by Virginia Cellular in writing on the record in CC Docket No. 96-45 are absent in this case. (Tr. 143-145, Exhibit 11).²¹

MMC has not given the Commission any specific written plans for use of the support as was the case in the Virginia Cellular case, nor has it committed, as Virginia Cellular did, to submit to the Commission "records and documentation on an annual basis detailing its progress towards meeting its build-out plans in the service areas" ²² MMC has committed to become a signatory to the Cellular Telecommunications Industry Association's Consumer Code for Wireless Service and to provide the number of consumer complaints per 1,000 mobile handsets on an annual basis. However, the Missouri Commission will have no jurisdiction to resolve consumer complaints, nor will it have authority to enforce any violations of the CTIA consumer code. The commitments made by MMC are not similar to the commitments made by Virginia Cellular, and MMC has not presented sufficient evidence for the Commission to find that the grant of ETC designation is in the public interest.

²⁰CenturyTel Brief, p.13.

²¹CenturyTel Brief, p. 14.

²²*Virginia Cellular*. FCC 03-338, para. 46.

3. Consideration of growth of USF fund:

MMC states in its brief that the Commission Staff and intervenors have raised "speculative concerns" regarding the growth of the high-cost fund due to wireless carriers receiving ETC status.²³ Unfortunately, these are not speculative concerns. Mr. Schoonmaker included statistics showing the dramatic growth in the size of the federal USF.²⁴ The FCC is also obviously concerned regarding the alarming growth of the USF fund, as in both the Virginia Cellular decision and the Joint Board Recommended Decision the growth of the fund was listed as a factor which the state commission should use when deciding whether the public interest standard is met. In *Virginia Cellular*, the FCC stated that "the impact of the designation on the universal service fund" is a factor when determining whether designation of a competitive ETC in a rural telephone company's service area is in the public interest.²⁵ In its *Recommended Decision*, the Joint Board stated that it believed that "states making public interest determinations may properly consider the level of federal high-cost per-line support to be received by ETCs."²⁶ Thus, the Commission may consider the effect of the designation on the fund.

4. Conditions of ETC designation:

Since both the Virginia Cellular decision and the Recommended Decision state that the state Commissions can impose additional conditions on an applicant for ETC status, and the Universal Fund states that use of the USF funds must be according to "competitively neutral"

²³MMC Brief at p. 15.

²⁴Schoonmaker Testimony, Exh. 8, p. 26.

²⁵*Virginia Cellular*, FCC 03-338, para. 28.

²⁶*Recommended Decision*, p.18, para. 43.

principles, Alma and Citizens believe that if the Commission does decide to grant MMC's application, it should impose conditions on the grant which would make its service subject to the same rules and regulation as the ILECs and CLECs with whom it will compete for customers.

At a minimum, MMC should be required to:

1. Abide by all Missouri Commission rules re:
 - a. Quality of service (Chapter 32).
 - b. Service and Billing Practices (Chapter 33) including billing and payment standards for residential customers, deposits, discontinuance of service and customer disputes.
 - c. Emergency Telephone Service Standards (E-911 requirements)(Chapter 34).
2. Make all annual ETC filings required of local exchange carriers.
3. Ensure that all USF funds are spent in Missouri by submitting records and documentation to the Commission on an annual basis.
4. Present written "build-out" specifications to the Commission and plans for coverage of the ETC designated area.
5. Make a specific Lifeline/Linkup offering similar to the tariffed offerings of ILECs.
6. Abide by all other lawful requirements of the Commission such as paying terminating compensation for wireless originated traffic.

If the Commission grants ETC designation to MMC, Alma and Citizens believe these are the minimum requirements that should be imposed.

B. Reply to Public Counsel:

Public Counsel states that it supports the application for ETC designation filed by MMC because of MMC's "clear on the record statement that it will abide by PSC rules and standards . .

. ."²⁷ Public Counsel is much more optimistic about the statements made by MMC on the record than Alma and Citizens. MMC witnesses never said they would abide by the Commission's rules and regulations, or, if they did, those statements were later qualified. A sample of the testimony at hearing is offered below. In response to questions from Mr. England, MMC witness Dawson offered the following:

Q. Okay. I believe you indicate in your testimony that Mid-Missouri Cellular, as a CMRS provider, is not subject to regulation by the Missouri Public Service Commission. Correct?

A. Correct.

Q. Specifically, Mid-Missouri Cellular is free to offer whatever calling plans it wants and charge whatever the market will bear?

A. In a competitive environment, right.

Q. Thank you. And Mid-Missouri Cellular is also free to change those plans and rates on its own without any regulatory oversight in the future. Correct?

A. Yes.²⁸

* * *

Q. [I]t appears that MMC reserves the right to increase any and all rates upon 30 days notice to the customer, is that right?

A. That's correct.

Q. With respect to termination of service, if the customer is signed up for a long term, one-or two-year period of time, there is a penalty if they terminate service before the expiration of their term. Correct?

A. That is - - that is correct.²⁹

²⁷Initial Brief of the Office of Public Counsel, p.2.

²⁸Tr. 42-43.

²⁹Tr. 44.

In response to questions from Commission Clayton, Mr. Dawson stated as follows:

Q. [D]o we have any way of enforcing any level of quality of service or quantity of service or levels of availability of service?

A. Yes. And I think Mr. Kurtis will address that also

When Mr. Kurtis was asked by Mr. England about the Commission's ability to impose different quality of service standards, the following exchange took place:

Q. Would they [the Commission] be perfectly within their rights to impose different quality of service standards than those implemented by the FCC in the Virginia Cellular case?

A. I don't know that they - - that they would or would not. I think the test would have to look and see what those specific requirements were and whether or not they were in conjunction with the use of the USF funds that were being put out as a result of the ETC.³⁰

And in response to Commissioner Clayton, Mr. Kurtis stated:

Q. Do we have the legal authority to place a condition on the awarding of ETC designation?

A. I believe that's what the January 22nd order makes clear.

Q. The FCC order?

A. Yes, sir.

Q. Okay. And do you believe that conditioning can be related to any subject or any topic involving the services that your company provides?

A. I read the January 22nd order as referring to the USF support and any items that are reasonably required to ensure compliance that the money is used for those intended purposes.

Q. Okay. So that would be a no?

³⁰Tr.191-192.

A. That's correct.³¹

And, in response to a question from Commissioner Gaw, Mr. Kurtis stated:

Q. You don't believe that there would be a problem in imposing conditions in regard to quality of service that actually would reflect or be similar to the quality of service requirements on landline carriers that the Commission has in its rules?

A. There may be a problem going that route.³²

So, the qualified "yes" from Mr. Dawson became a decidedly unqualified "no" from Mr. Kurtis. In response to other Commission questions, MMC witnesses Dawson and Kurtis said that the Commission could not regulate rates (Tr. 249, 270), come up with a plan that the Commission thought MMC should offer to its customers (Tr. 249), mandate that the Commission have jurisdiction to consider and enforce consumer complaints (Tr. 251), or impose quality of service conditions that were not previously agreed to by MMC. (Tr. 271) Alma and Citizens read the record as showing that the Commission will have very limited jurisdiction over the service and the quality of the service provided by MMC.

MMC states in its brief that it will: "(1) annually submit information regarding its progress toward meeting its build-out plans in areas where it is designated as an ETC; (2) annually provide information to the Commission with respect to the number of consumer complaints it receives per 1,000 mobile handsets; and (3) annually submit information regarding how many requests for service from potential customers in its designated area were unfulfilled for the past year."³³ MMC has agreed to voluntarily abide by the CTIA Consumer Code for

³¹Tr. 245-246.

³²Tr. 271.

³³MMC Brief at pp. 18-19; Tr. 142-143.

Wireless Service, but the Commission will have no enforcement options if MMC does not meet its voluntary commitments. MMC has not agreed to abide by the same quality of service standards as landline companies which raises the question of whether one technology is being favored over another in violation of the competitive neutrality principle found in § 254(b)(7). The Commission will have no jurisdiction over rates or service plans of MMC, and MMC has not agreed to provide plans with lower rates if it is allowed to become an ETC except for the Lifeline service required under the law. MMC has told the Commission that the funds will be used for an upgrade of its system, but it has no written construction or financial plans for these upgrades. It has not agreed to allow the Commission to audit the progress of the upgrades in any manner. The FCC granted ETC status to Virginia Cellular based on specific commitments from the company. Although MMC states in its brief that it is making the same commitments to the Commission in this case as Virginia Cellular made to the FCC (Brief at p.4), the evidence in the case simply does not show that to be true.

Additionally, MMC has not shown that the customers in the rural service areas will see any increased benefits from the grant of ETC status to MMC. MMC's service will not be expanded as it already covers its entire licensed area and is able to offer service to any customer who requests it. MMC does not intend to reduce its rates or expand its service offerings if it is granted ETC designation. Although cellular service does offer mobility that the landline carriers cannot provide, that service is already available throughout MMC's service area to those customers who have a need for that service. MMC states that it intends to update its TDMA platform to a CDMA with the funds, but it also admits that the upgrade will have to be made whether or not it is granted ETC status. (Tr. 55, 64) This upgrade is necessary because of

federal law requiring 911 service to its customers.

Conclusion

For all the reasons stated above as well as those set out in their Initial Brief, Alma and Citizens respectfully request that the Commission deny the application of Mid-Missouri Cellular.

Respectfully submitted,

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CERTIFICATE OF SERVICE

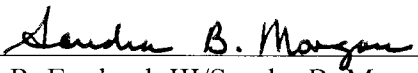
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