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April 6, 2001

Dale Hardy Roberts
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

Re: Case No. TA-2001-251

FILED²
APR 6 2001
Missouri Public
Service Commission

Dear Mr. Roberts:

Enclosed for filing on behalf of the Small Telephone Company Group, please find an original and eight (8) copies of a Reply Brief of the Small Telephone Company Group.

Would you please see that this filing is brought to the attention of the appropriate Commission personnel.

I thank you in advance for your cooperation in this matter.

Sincerely yours,

BRYDON, SWEARENGEN & ENGLAND P.C.

By:



Sondra B. Morgan

SBM/lar

Enclosure

cc: Michael Dandino
Marc Poston
Kristine Becker
Bob Schoonmaker

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED²

APR 6 2001

Missouri Public
Service Commission

In the Matter of the Application)
of ExOp of Missouri, Inc. for Designation)
as a Telecommunications Company)
Carrier Eligible for Federal)
Universal Service Support Pursuant)
to Section 254 of the Telecommunications)
Act of 1996.)

Case No. TA-2001-251

REPLY BRIEF
of
THE SMALL TELEPHONE COMPANY GROUP

The Small Telephone Company Group ("STCG") files its Reply Brief in response to the initial briefs filed by Applicant ExOp of Missouri, Inc. ("ExOP") and the Staff of the Missouri Public Service Commission ("Staff").

A. Public Policy

Initially, the STCG believes that it is important to address the policy issues advanced by both ExOp and the Staff as support for their position that the Missouri Public Service Commission ("Commission") should grant eligible telecommunications carrier ("ETC") status to ExOp for its entire certificated area prior to ExOp actually providing the supported services and advertising the availability of those services throughout the service area. Both ExOp and the Staff advance the position that the Commission should grant the ETC status before ExOp actually offers and advertises the supported services throughout its requested service area because the granting of ETC status will promote competition, and the purpose of the Telecommunications Act of 1996 ("the Act") is to open all telecommunications markets to competition and to eliminate barriers to competition. (Staff brief at 7-9; ExOp brief at 4, 13)

Staff even goes so far as to say that, "The Congressional intent is that every provision in Sections 254 and 214 is designed to implement these goals [of promoting competition and reducing regulation] and that ambiguities should err on the interpretation that best promotes competition."
(Staff brief at 8)

While one of the purposes of the Act was to promote competition, another equally important part of the Act was to establish support mechanisms to ensure the delivery of affordable telecommunications service to all Americans. 47 U.S.C. § 254(h). Congress emphasized that the preservation and advancement of universal service was to be the result of both state and federal action, stating that "[t]here should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service." 47 U.S.C. § 254(b)(5). The Federal Communications Commission ("FCC") stated that the policy on universal service should be "a fair and reasonable balance" of all of the principles identified in section 254(b) and an additional principle of competitive neutrality. *Universal Service Order*, FCC 97-157, ¶ 43. Together, Section 254(b) and 214(c) of the Act provide the statutory framework for a system that encourages competition while preserving and advancing universal service.¹ Thus, the preservation and advancement of universal service support is also an integral part of the Act, and when the Commission considers whether a carrier should be eligible for ETC status, it must balance the goal of preserving and advancing universal service with the goal of promoting competition.

¹Rural Task Force White Paper 5 (September 2000) page 8; "The FCC must see to it that both universal service and local competition are realized; one cannot be sacrificed in favor of the other." *Alenco Communications, Inc. v. FCC*, 201 3d 608, 615 (5th Cir. 2000).

In order to achieve the goal of affordable telecommunications service to all Americans, the Act established procedures for preserving and advancing universal service support. One of these procedures was the designation of eligible telecommunications carriers by state commissions. State commissions were given authority under the Act to determine service areas of applicants for ETC status and to determine whether the applicant offered the services supported by the Act and advertised the availability of these services using media of general distribution throughout that service area. Thus, the determination by the state commission of a carrier's eligibility falls under the primary goal of preserving and advancing affordable telecommunications service to all Americans rather than that of promoting competition. The Missouri Public Service Commission should give equal, if not primary, weight to the consideration of this goal in making its determination and not just consider the effect that the determination might have on competition in the state.

B. Geographic area

Both Staff and ExOp state in their initial briefs that the question of the appropriate service area is not an issue in this proceeding as it is clear that ExOp has requested, and should receive, ETC designation for its entire certificated area. (Staff brief at 3-4; ExOp brief at 2) They also believe that the record in this case is sufficient for the Commission to determine that the certificated area is the appropriate service area. The STCG does not believe that the determination of this issue is quite so clear, however, as several factors need to be considered before the Commission determines the appropriate service area for ExOp.

Under the statute, state commissions are given the primary responsibility for designating service areas served by non-rural carriers. And, because states must exercise this authority in a

manner that promotes the pro-competitive goals of the Act as well as the universal service principles of Section 254, states should not designate service areas that are unreasonably large so as to discourage competitive entry by increasing the expenses associated with entry. *Universal Service Order*, FCC 97-157 ¶ 25. In the case of a rural telephone company, Section 214(e)(5) requires its service area to be its existing study area unless the state and/or the FCC establish a different definition. Since all of the member companies of the STCG are rural telephone companies and Spectra is a member of the group for purposes of this proceeding as well as a rural telephone company, its service area is its study area, and, although it is not possible to determine from the record before the Commission, the STCG does not believe that ExOp is certificated to serve in Spectra's entire study area. Thus, the STCG does not believe that the Commission has sufficient information to determine what should constitute ExOp's service area in this proceeding. The STCG also believes that this is an issue separate and apart from that of whether ExOp has met the other requirements in order to be designated as an ETC.

C. Must ExOp provide all of the supported services and advertise the availability of those services throughout its service area before receiving ETC designation?

Since the list of issues was prepared in this case, the focus of this, the second issue submitted, has changed somewhat. ExOp admits that it does not offer the supported services throughout its requested service area, and that it does not advertise the availability of these services throughout the entire service area. But, ExOp contends that the statute does not require a carrier to presently offer and advertise the services throughout its service area before it can be granted ETC status. Instead, ExOp contends that it is enough for the company to state to the Commission that it *will* offer these services before it seeks universal service support. (ExOp

brief at 10) ExOp and the Staff cite FCC and state court decisions which they believe support this position.

Although the STCG continues to believe that the plain language of the statute requires that a carrier *offer* and *advertise* the supported services before it can be designated as an ETC, the STCG realizes that the cases cited could be read as supporting the opposite finding. The STCG believes that there are several ways in which these cases can be distinguished from the present situation, however, and that ExOp's and the Staff's reading and interpretation of these cases has extended their holdings to an illogical extreme.

The most recent of these cases is the decision of the South Dakota Supreme Court in *The Filing by GCC License Corp.*, 2001 SD 32, 2001 S.C. Lexis 31, Opinion filed March 14, 2001. In this decision, the Court affirmed the circuit court's interpretation of § 214(e) finding that a carrier need not be presently offering the required services to qualify as an eligible carrier. *GCC License Corp.*, ¶ 19. What the Staff and ExOp do not say, however, is that the Court also found that the record in *GCC License Corp.* demonstrated that GCC would, within a reasonable time, meet each of the requirements of § 214(e) and that the record also sufficiently demonstrated GCC's *intent and ability* to provide the enumerated services *throughout South Dakota* upon designation. *GCC License Corp.*, ¶ 20 (emphasis added.).

The facts of the *GCC License Corp.* case were that GCC was a subsidiary of Western Wireless Corporation and provided cellular service under the tradename Cellular One. GCC was licensed to provide cellular service throughout South Dakota and had existing signal coverage in 98% of the state. In its application for ETC status, GCC asserted that it currently provided or was capable of providing all of the federally required services within its current mobile cellular

offering. *GCC License Corp.*, ¶ 4. In finding that GCC should be granted ETC status, the Court found that a carrier need not be presently offering the required services before qualifying as an eligible carrier, but it went on to state that, "New carriers, like incumbent carriers, are required to serve new customers on reasonable request." *GCC License Corp.*, ¶ 19.

In contrast, in the current case, ExOp only offers the supported services in one exchange in its certificated area and only asserts in its application and the statement of facts that it will offer the supported services before it applies for Universal Service Fund funds. (Statement of Facts, ¶ 13) ExOp has refused to say where it plans to offer service, but it does plan to remain strictly a facilities-based carrier and will not offer service through resale of another carrier's services. This is very different from the situation where the applicant has the intent and capability to provide service throughout a service area and just needs more time in order to provide that service.

In making its decision, the South Dakota Supreme Court relied on the Declaratory Ruling of the FCC in *Western Wireless Corporation Petition for Preemption*, CC Docket No. 96-45 (August 2000). In that case, the FCC issued its declaratory ruling to provide guidance to assist state commissions in fulfilling their obligations to designate competitive carriers as eligible for federal universal service support. *Declaratory Ruling*, ¶ 1. The underlying facts in this FCC decision were the same as those above, and the FCC considered the decision of the South Dakota Public Utilities Commission denying ETC designation when issuing its ruling. While the FCC found that the statute does not require a finding that the carrier can provide ubiquitous service at the time of designation and that a requirement that the entrant be providing services to 100% of the service area would be so onerous as to prevent carriers from receiving ETC designation, it

also stated that it believed that the ETC requirements for competitive carriers should be no different from those for LECs, and that "[a] new entrant, once designated as an ETC, is required, as the incumbent is required, to extend its network to serve new customers upon reasonable request. We find, therefore, that new entrants must be allowed the same reasonable opportunity to provide service to requesting customers as the incumbent LEC, once designated as an ETC."

Declaratory Ruling, ¶ 17. When considered in light of this language, it is clear that the declaratory ruling of the FCC was meant to allow CLECs to obtain ETC designation in situations where the entrant did not yet provide service to all of the service area and needed additional time to be able to provide that service. The ruling does not extend to the current situation, however, where the designation is sought for the entire certificated area when there are no plans to provide or advertise the service or extend the service area. In fact, the FCC specifically stated a new entrant must make a reasonable demonstration to the state commission of its capability and commitment to provide universal service. The FCC stated, "We caution that a demonstration of capability and commitment to provide service must encompass something more than a vague assertion of intent on the part of a carrier to provide service. The carrier must reasonably demonstrate to the state commission its ability and willingness to provide service upon designation." *Declaratory Ruling*, CC Docket 96-45, ¶24. The STCG does not believe that ExOp has demonstrated its ability and willingness to provide service upon designation.

Likewise, the FCC's decision in *In the Matter of Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier in the State of Wyoming*, CC Docket No. 96-45, Memorandum Opinion and Order released December 26, 2000, can be distinguished. In that case the FCC granted the petition of Western Wireless for ETC designation because it

found that Western Wireless had demonstrated that it would offer and advertise the supported services throughout the designated service areas. *Western Wireless*, ¶ 1. Western Wireless' petition contained a list of the specific rural telephone company study areas and non-rural incumbent local exchange carrier exchanges for which it sought designation. *Western Wireless*, ¶ 5, fn13. Western Wireless stated in its petition that it currently offered each of the supported services throughout its existing cellular service area. *Western Wireless*, ¶ 9. Western Wireless further stated that it "intends (and commits) to make available a universal service offering that includes all of the supported services, for consumers in the designated services areas in Wyoming." Western Wireless also committed to provide services to any requesting customer within the designated service areas, and if necessary, to deploy additional facilities to do so. *Western Wireless*, ¶ 9. Western Wireless also certified to the FCC that it intended to advertise the availability of its universal service offering to ensure that consumers within its designated service area would be fully informed of the offering. *Western Wireless*, ¶ 15. Therefore, the FCC concluded that Western Wireless had demonstrated that it would offer and advertise each of the supported services upon designation as an ETC in the requested service areas.

Thus, Western Wireless demonstrated to the FCC that it committed to offer all of the supported services throughout the services areas for which it was requesting designation, and based on this commitment, the FCC granted the designation. In this case, however, ExOp has made no such commitment to offer all of the supported services throughout its certificated area. It has only stated that it will not seek universal service support until such time as it does provide the services. ExOp's interpretation of these cases extends their holdings to an illogical extreme. Both the South Dakota Supreme Court and the FCC found that carriers could be granted ETC

status without demonstrating that they provided all of the supported services and advertised the availability of those services throughout their respective service area, but in both cases the Court and the FCC found that there was a present intent and capability to both offer and advertise the supported services immediately after being granted the status. Both GCC and Western Wireless demonstrated an intent and capability to provide service throughout the designated service areas, and indeed the FCC stated that "Western Wireless, as an ETC, has a statutory duty to offer service to every customer within the designated service area." *Western Wireless*, CC Docket No. 96-45, ¶ 20. ExOp has no present ability or intent to provide service throughout its certificated area. As a fully facilities-based carrier, it cannot possibly be in a position to offer services throughout its certificated area immediately after it is designated as an ETC. ExOp only wants the designation so it will not have to return to the Commission each time it is ready to expand into another exchange. This is a very different situation from the cases cited where the applicants demonstrated intent and capability to serve the entire service area, if not immediately after designation, when there was a reasonable request for service.

Additionally, ExOp has misinterpreted the language of these cases in their use of the word "will," as in "will provide services." ExOp argues that it should be granted ETC status because it has stated that it *will* offer the supported services before seeking universal service support. ExOp states that this is all that is required, because the FCC has granted a CLEC petition for ETC designation where the CLEC simply demonstrated that "it will offer the services supported by the Federal universal support mechanism upon designation as an ETC." (Brief at

10). There are two uses and/or meanings of the work "will," however.² "Will" can be used to express futurity, as in ExOp *will* provide the services at some unspecified date in the future, but it can also be used to express capability or sufficiency, as in Western Wireless *will* offer the services upon designation as an ETC, i.e. Western Wireless is capable of offering the services. The South Dakota Supreme Court's decision can also be read as holding that the applicant must demonstrate capability as well. In affirming the circuit court, the Court stated, "we affirm the circuit court's ruling that GCC can within a reasonable time meet each of the requirements of § 214(e). Along with the court we too conclude that the record sufficiently demonstrates GCC's *intent and ability* to provide the required enumerated services throughout South Dakota upon designation." *GCC License Corp.*, 2001 SD 32, ¶ 20 (emphasis added). Thus, the Court's decision was premised upon its belief that GCC was capable of providing the required services throughout its service area within a reasonable time. The STCG believes that the South Dakota Supreme Court's and the FCC's use of the word *will* should be read as meaning that the applicant for ETC status has demonstrated that it is capable of providing the services within a reasonable time of its receipt of the ETC designation, and the same standard should be applied to ExOp in this case, i.e. does ExOp intend to offer, and is ExOp capable of offering, the supported services throughout the area for which it seeks designation within a reasonable time after the Commission's grant of the status? As ExOp states in its brief, the FCC recognized that the carrier's demonstration of its capability and commitment to provide service must involve more than a vague assertion of intent on the part of the carrier. (Brief at p. 15) The STCG submits that

²Merriam-Webster's Collegiate Dictionary, 1354 (10th ed. 1999).

a vague assertion of intent is all that has been shown in this case with the exception of the Kearney exchange.³

As in the case of the word "will" as used in these cases, a review of the definition of the word "offer" may prove instructive. The verb "offer" is defined variously as "to present for acceptance or rejection;" "to declare one's readiness or willingness;" or "to make available."⁴ Both the FCC and the South Dakota Supreme Court have found that the use of the word *offer* in the statute does not mean presently providing in this context, but they do agree that *offer* means capable of providing. Otherwise, how could you offer something you have no present ability to provide? And, likewise, how can you advertise the availability of services that you have no present ability to provide? And, if you did advertise services you could not provide, would that not be false advertising which would subject a company to a claim under the Merchandising Practices Act? To accept ExOp and Staff's reading of these cases leads to an illogical result which was never intended by the FCC or the Court.

Further, if ExOp's and Staff's interpretation of the statutes is accepted, the Commission really has no discretion in granting or withholding the ETC designation. Under § 214(e)(2), the primary authority to make ETC designations is granted to state commissions. Section 214(e)(2) further states that state commissions must designate a common carrier that meets the requirements of Section 214(e)(1) for a service area designated by the state commission. Under

³ExOp states that, in addition to the supported services, it also offers high-tech services, such as DSL and Internet access, to its Kearney customers. (Brief at 15) These facts are not a part of the record in this proceeding and are not relevant to the issue before the Commission.

⁴Merriam-Webster's Collegiate Dictionary, 806-07 (10th ed. 1999).

the statute, the state commission's duty is twofold - it must determine if the applicant has met the requirements of § 214(e)(1), and it must determine the scope of the designation through designation of the service area of the applicant.

Under the interpretation advocated by ExOp and Staff in this proceeding, there would be no role for the state commission. First ExOp contends that its service area should be its entire certificated area. Thus, there is no additional determination for the Commission to make regarding service area. Next, ExOp contends that the Commission should grant it ETC status despite the fact that it does not yet offer and advertise the supported services throughout its service area. ExOp states that the Commission should grant its application based on assurances that it will not seek universal fund support until such time as it does offer and advertise the services in an exchange. So, again, there is no role for the Commission. According to ExOp's interpretation, the Commission should just automatically grant ETC status to each CLEC at the time it receives its Missouri certificate of service authority.⁵

The STCG does not believe that this is the correct interpretation of the statute. The STCG believes that the state commissions were intended to play an integral role in determining whether the CLEC met the statutory requirements for ETC designation as well as in determining the scope of that applicant's designation.⁶ Under ExOp's construction, the only determination of

⁵Such a "self-certification" provision is clearly at odds with the intent of § 214(e). See, Commissioner Furchgott-Roth's dissent, *Declaratory Ruling*, CC Docket No. 96-45.

⁶47 U.S.C. § 254(b) states that "[n]othing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, 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."

whether the applicant actually met the statutory criteria and offered and advertised the supported services would be made by Universal Service Administration Company ("USAC") at the time the CLEC applied for funds. The STCG believes that Congress intended that these determinations be made by state commissions who are better able to verify that the assertions made by applicants as to the offering and advertising of services are true and who could better determine the applicant's service area.

ExOp and the Staff complain that requiring the company to request ETC designation for each area as it expands would create extra work for the company and the Commission as well as delay the company's expansion. Under the STCG's scenario, however, ExOp could request ETC designation from the Commission as soon as its plans for expansion into an area were formulated, and it could receive the designation based on its presentation to the Commission of its intent and capability to provide service within a certain area. ExOp could receive the designation for the expanded area before it actually provided service, but the Commission could base its decision on actual plans for service in a definite geographic area rather than vague promises of service somewhere sometime in the future.

D. Public Interest Standard for exchanges served by rural telcos.

Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, a state commission must find that the designation is in the public interest. 47 U.S.C. § 214(e)(2). Spectra Communications Group LLC is a member of the STCG for purposes of this proceeding, and Spectra has self-certified to the FCC that it is a rural telephone company because it does not provide service in any study area that includes an incorporated place of more than 10,000 inhabitants and it has less than 15 percent of its access

lines in communities of more than 50,000. Although an exact determination of the Spectra exchanges where ExOp is seeking ETC designation is not part of this record, the parties agree that there are some such exchanges involved in this request. (Statement of Facts, ¶ 3)

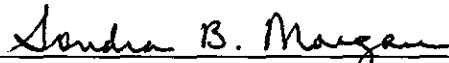
Section 214(e)(2) is mandatory in that it states that the state commission *shall* find that the designation of the second carrier is in the public interest. So, before the Commission can grant ETC eligibility to ExOp for its entire certificated area, it must determine that the granting of this status is in the public interest. ExOp states in its brief that its designation would serve the public interest and bolsters this argument by describing the services it provides in the Kearney exchange. Whether or not ExOp provides these services is not part of the agreed to Stipulation of Facts in this case, however, and ExOp has not shown that the provision of these services in one exchange, which is not one of the exchanges served by a rural telephone company, is sufficient for the Commission to determine that the grant of ETC status is in the public interest. ExOp cites the *Western Wireless* case where the FCC concluded that Western Wireless had made the necessary threshold demonstration because its service offering fulfilled several of the underlying federal policies favoring competition. The STCG submits that even if such a finding could be made based merely on the abstract benefits of competition, the public interest standard cannot be met by making a preliminary threshold finding of competitive benefits. Such a finding mixes apples and oranges, because, as was stated above, the ETC designation falls under the equally important goal of preserving and advancing universal service. The public interest must be determined based on whether a new entrant will serve customers not currently receiving service at a reasonable price as well as whether a new entrant will cause harm to the service the customers currently receive by taking away necessary support from the incumbent carrier. *See,*

Western Wireless, CC Docket No. 96-45, ¶ 18. The STCG submits that this public interest determination can only be made on an exchange-specific basis, as the circumstances in each exchange and community will differ as to whether an additional carrier will promote the public interest, and the determination will differ based on the services to be provided by the new entrant and the cost of those services.

Conclusion

For all of the reasons stated above as well as those set out in its Initial Brief, the STCG respectfully requests that the Commission deny ExOp's application for eligible telecommunications carrier designation or, in the alternative, limit the designation to the one exchange where ExOp is actually providing service.

Respectfully submitted,



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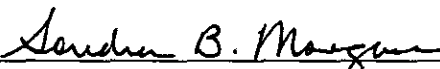
Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was hand-delivered or mailed, United States Mail, postage prepaid, this 6th day of April, 2001, to:

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