BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Proposed New Rule 4 CSR 240-3.570 Regarding Eligible Telecommunications Carrier Designations For Receipt of Federal Universal Service Fund Support.	)))))	Case No. TX-2006-0169

ADDITIONAL COMMENTS OF THE
SMALL TELEPHONE COMPANY GROUP
AND RESPONSE TO ORDER DIRECTING FILING

Comes now the Small Telephone Company Group ('STCG") and offers the following additional comments regarding proposed rule 4 CSR 240-3.570, Requirements for Carrier Designation as Eligible Telecommunications Carriers, as authorized by the Commission.

In its original Comments filed on December 29, 2005, the STCG stated that it supported the proposed rule as published in the Missouri Register on December 1, 2005, and commended the Missouri Public Service Commission ("Commission") in its efforts to develop a more rigorous process for designating applicants for eligible telecommunications carrier ("ETC") status. The original rule as published only applied to new applicants for ETC designation.

The STCG continues to support the ETC rule as published and believes that it is needed in order to put competitive and commercial mobile radio service ("CMRS") carriers on an equal footing with the incumbent local exchange companies ("ILECs") that have already been designated as ETCs and receive federal Universal Service Fund ("USF") support based on costs incurred to provide service in high-cost rural areas.

If, however, the Commission is inclined to consider the extensive and substantive

changes suggested by its Staff in their Comments filed in this case including making the previously designated ETC ILECs subject to the rule as well as new entrants, the STCG believes there is a problem with notice of the proposed rule to those companies as well as the fiscal note filed with the rule as published.

Statutory concerns

On January 3, 2006, the Staff of the Commission filed Comments in which they suggested substantial changes be made to the proposed rule, and, for the first time, suggested that certain provisions of the rule apply to ILECs previously designated as ETCs as well as new applicants for ETC designation. At the rulemaking hearings before the Commission, counsel for the STCG stated that the member companies had not had an opportunity to review these changes or compare them with current requirements and therefore had reservations regarding such extensive changes to the rule being made at such a late date. The STCG stated that it believed that these changes were too substantial to be considered by the Commission at this point in the process and would be in violation of § 536.021, RSMo Supp. 2004, and deprive the STCG of proper notice of the proposed rule and a meaningful opportunity to comment on the rule as proposed.

Promulgation of a rule requires compliance with the rulemaking procedures specified in § 536.021, RSMo Supp. 2004. Section 536.021.1 states in pertinent part:

> 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 order of rulemaking . . . .

Rules are void unless made in accordance with the provisions of this section. *NME Hospitals v. Department of Social Services,* 850 S.W.2d 71, 75 (Mo. banc 1993). The requirement that the

agency provide notice of a proposed rule is to allow interested parties an opportunity to comment on the rule as proposed and to provide information to the agency through the statements of those in support of or in opposition to the proposed rule. *Id.* At 74. To accept Staff's proposed changes to the rule would deprive parties of notice of the rule through publication in the Missouri Register and a meaningful opportunity to comment on the changed rule.

There is also a problem with the Commission accepting the changes proposed by Staff because of the requirement in § 536.205, RSMo 2000, that a fiscal note showing the economic impact of the proposed rule on the private sector be published with the proposed rule. The fiscal note that the Commission attached to the rule as published stated that there would be no fiscal impact on Class A or Class B telephone companies in the State. Class A companies are those incumbent companies with more than $100,000,000 annual revenues, and Class B companies are those incumbent companies with annual revenues less than $100,000,000. If Staff's proposed changes are accepted by the Commission, there will likely be an economic impact on both Class A and Class B companies, as those companies will have additional compliance costs associated with complying with the rule.

The fiscal note required by the statute must contain as estimate, by class, of the number of persons, firms, etc. that would likely be affected by the proposed rule as well as a classification by type of business entity so as to give reasonable notice of the number and kind of businesses which would likely be affected. The fiscal note must also contain an estimate of the aggregate cost of compliance for affected entities, and must be published contemporaneously with the notice of proposed rulemaking. If the agency fails to publish the fiscal note, "any rule promulgated thereunder [is] void and of no force and effect." *Missouri Hospital Association v.*

Air Conservation Commission, 874 S.W.2d 380, 387 (Mo. App. W.D. 1994). Accepting the substantial changes proposed by the Staff and making the incumbent companies subject to the rule without publishing a revised fiscal note showing the economic impact on those companies would render the rule void.

Comparison of Staff's suggested changes to the rule as published

In its Comments filed January 3, 2006, the Staff attached a red-lined version of the proposed rule with changes. After the hearing held on January 6, 2006, the Staff filed further changes to the proposed rule. Although it is confusing to try and determine exactly what is being proposed at this time, the STCG will attempt to identify and respond to the changes that would affect incumbent local exchange companies that have already been granted ETC designation by the Commission that were not included in the original rule as published.

The first substantial change already referenced above, is the change in the definition of eligible telecommunication carrier subject to the rule in 4 CSR 240-3.570(1). The Staff suggests adding a new provision (B) that states, "Carrier refers to alternative local exchange telecommunications carriers, commercial mobile radio service providers and incumbent local exchange telecommunications carriers." An additional sentence would also be included in (E) stating that, "Unless otherwise specified, eligible telecommunications carrier (ETC) shall refer to alternative local exchange carriers, commercial mobile radio service providers and incumbent local exchange carriers." As originally published, the rule only applied to competitive carriers which included both alternative local exchange telecommunications companies and CMRS providers.

Probably the most problematic proposed change to the rule for incumbent ETCs is

(12)(C), Service Provisioning Commitment. As now proposed by Staff, this rule would apply equally to incumbent ETCs as well as new entrants. This provision states that, "Once designated as an ETC, a carrier shall extend its network to serve new customers upon a reasonable request." It then sets out several steps that the carrier must follow in responding to "reasonable" requests for service. It really makes no sense to apply this provision to ILECs that have been designated as ETCs, because those companies are carriers of last resort ("COLR") within their service areas. Subsection 3 states that the carrier may "evaluate the costs and benefits of using high-cost universal service support to serve the number of customers requesting service." The incumbent LEC with COLR obligations cannot "evaluate the costs and benefits," but must provide the service requested.

The proposed rule also sets out parameters for consideration of special conditions or requirements for extending service. Making this rule applicable to incumbent companies is redundant, as those companies have provisions in their tariffs to cover special construction costs. In many cases, the rule will be inconsistent with the ILEC's tariff, thus requiring changes to the tariffs and increasing those companies's compliance costs. As a practical matter, as pointed out by the supplemental filing of Ms. Meisenheimer for the Office of Public Counsel ("Public Counsel"), these companies seldom, if ever, charge the customer for unusual construction or installation costs. In its subsequent filing made on January 9, 2006, the Staff has added an additional sentence to this section stating that, "In the case of special construction or special conditions for CMRS construction or installation costs, the customer shall not contribute more than that customer would contribute to the special construction or installation for comparable wireline service to the same location." While obviously an attempt to make sure that CMRS

providers are not able to charge customers more for extension of service than the wireline provider would charge, this provision will be difficult to enforce as it will involve first determining what, if any, costs there would be to extend wireline service by the incumbent within that service area and then determining if the wireless provider is requesting more in the way of contribution. This will be very difficult and burdensome to administer.

Staff also suggests that the incumbent ETCs be required to file a two-year plan and an additional annual report in order to verify the extent to which ILECs use the USF support "to improve coverage, service quality or capacity." The STCG does not believe that this it is appropriate to require the ILECs to apply rules only suited for competitive companies. It would not be appropriate for ILECs to submit build-out plans or statements of intended use of high-cost support. The ILECs only receive support for monies already spent as well as the costs of providing service. This support is based on costs submitted to the Universal Service Administration Corporation ("USAC") and the National Exchange Carriers Association ("NECA") according to formulas developed by those agencies. Requiring these companies to prepare and file a forward-looking plan the same as the competitive or CMRS carriers does not make sense as it has already been determined that these funds were spent to "improve coverage, service quality or capacity" before the funds were received. But because the competitive or CMRS providers receive the same level of support as the incumbent without any justification of their costs, it is appropriate to require that those companies file forward-looking plans and provide periodic reports to the Commission on the progress of the plans in order to insure that the support is being spent appropriately.

The Federal Communications Commission ("FCC") stated in its ETC Order that it was appropriate to require previously designated ETCs to comply with the mandatory statutory requirements for ETC designation, but the FCC stated that these previously designated ETCs would be required to make these showings when they submit their annual certification filing on October 1, 2006.[1] As explained above, there is no need for the ILECs to submit a forward-looking build-out plan or an additional report to the Commission demonstrating compliance with that report. The STCG believes that the rule as originally proposed applying the build-out plan requirement and the progress reports only to competitive and CMRS providers is sufficient to advance the goals of USF.

Staff realizes that there may be discrepancies between this rule and other Commission rules that the incumbent ETCs are already subject to, so it suggests that language be included to the effect that where there may be inconsistencies, the prior rules control. The STCG suggests that it may be a better plan to withdraw the current rule and hold industry workshops where these inconsistencies and discrepancies can be identified and harmonized rather than creating unnecessary uncertainty in the rule. The FCC has stated that state commissions should conform any requirements with any similar conditions imposed on previously designated ETCs in order to avoid duplicative or inapplicable reporting requirements.[2]

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[1] *In the Matter of Federal-State Joint Board on Universal Service,* CC Docket No. 96-45, *Report and Order*, released March 17, 2005 ("the *ETC Order*") at ¶¶ 2 and 20.

[2] *ETC Order* at ¶ 71.

Dual-party relay system

On January 13, 2006, the Commission issued an Order Directing Filing in which it directed the parties to the case to respond to the question, "Should a CMRS provider, as a condition of ETC status, be required to reimburse the Deaf Relay Fund for costs associated with implementing and maintaining the statewide dual-party relay system?" The STCG has not been able to research this issue and prepare a response on such short notice, but after review of Staff's Response filed earlier today in response to this directive, the STCG concurs in Staff's recommendation. The STCG believes that CMRS providers who utilize the deaf relay system should be required to contribute to the Missouri Relay Fund.

Conclusion

The STCG urges the Commission to issue an Order of Rulemaking approving the ETC rule as originally published in the Missouri Register. If, however, the Commission is inclined to make substantial changes to the rule as proposed by its Staff, the STCG believes the Commission should withdraw the proposed rule and hold technical workshops in order to arrive at a rule that is fair to all parties, or, alternatively, it should approve the proposed rule as published and then hold workshops to consider Staff's proposed changes.

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Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was sent by electronic submission, hand-delivered or sent by U.S. Mail, postage prepaid, this 17th day of January, 2006 to:

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