BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

APPLICATION FOR REHEARING

COME NOW Intervenors, Spectra Communications Group, LLC d/b/a CenturyTel and CenturyTel of Missouri, LLC (collectively "Intervenors"), pursuant to Section 386.500 RSMo 2000 and 4 CSR 240-2.160, and for their Application For Rehearing in the above-referenced case, respectfully state as follows:

INTRODUCTION

1. On May 3, 2007, the Commission issued its *Report and Order* in this case. In its *Report and Order* a majority of the Commission concluded, *inter alia*, that USCOC of Greater Missouri, LLC ("US Cellular") "has met all requirements of federal and state law and may be designated as an eligible telecommunications carrier ["ETC"] throughout its Missouri service area". The *Report and Order* in its ordered section then designated US Cellular as an eligible telecommunications carrier in each and every wire center requested by US Cellular in its ETC Application.

2. The *Report and Order* is unlawful, unjust, unreasonable, arbitrary, and unsupported by competent and substantial evidence on the evidentiary record before the Commission, in all material matters of fact and of law, individually or cumulatively, or both, for the reasons and on the grounds set forth herein.

3. The majority in the *Report and Order* has misinterpreted the applicable law, ignored the weight of the competent and substantial evidence contained in the evidentiary

record, and misapplied the law to the facts in this case by, among other things, erroneously concluding that:

a) US Cellular has met the requirements of 47 U.S.C. Section 214(e)(1) throughout the service area for which it seeks ETC designation, especially in light of 47 U.S.C. Section 254(b)(3) and the Commission's own ETC rule, 4 CSR 240-3.570;

b) granting US Cellular ETC status is consistent with the public interest standards set forth in 47 U.S.C. Section 214(e)(2) and 4 CSR 240-3.750(2)(A)(5);

c) US Cellular has sufficiently met and complied with the all the requirements of 4 CSR 240-3.570, specifically Section 2(A)1, Section 2(A)2, and Section 2(A)3; and

d) granting ETC status to US Cellular in those wire centers already being served by Commission-designated competitive, wireless ETCs and by incumbent ETCs, is in the public interest.

I. ERRONEOUS INTERPRETATION AND APPLICATION OF 4 CSR 240-3.570

4. Entities regulated by the Commission by law are required to comply with the Commission's rules. Likewise, after promulgating its rules, the Commission lawfully is required to apply and enforce its rules in a non-discriminatory fashion, unless an applicant applies for and is granted a waiver of the rules. In this proceeding, no waiver of any provision of 4 CSR 240-3.570 was sought or was granted. Therefore, if US Cellular has not fully complied with all the provisions of the ETC rule, the majority in the *Report and Order* has erred in designating US Cellular as an ETC in its requested ETC service

area. A review of the evidentiary record in light of the language of 4 CSR 240-3.570 shows that is exactly what has happened.

5. Contrary to the findings and conclusions set forth in the *Report and Order*, the evidentiary record shows that US Cellular at the close of the evidence has failed to fully comply with the following provisions of the rule, including but not limited to:

a.) **Section 2(A)(1)**—Intended use of the high-cost support including detailed descriptions of any construction plans with start and end dates, populations affected by construction plans, existing tower site locations for CMRS cell towers and estimated budget amounts.

b.) **Section 2(A)2**—A two year plan demonstrating, with specificity, that high-cost support shall only be used for the provision, maintenance and upgrading of facilities and services for which support is intended. The concept of "support is intended" is defined more specifically to mean:

* Quality services should be available at just, reasonable and affordable rates;

* Access to advanced telecommunications and information services should be provided in all regions of the state;

* Consumers in all regions of Missouri, including those in rural, insular and high-cost areas will have access to telecommunications and information services that are reasonably comparable to those services provided in urban areas.

c.) **Section 2(A)(3)**—The two-year plan shall include a demonstration that universal service support shall be used to improve coverage, service quality or

capacity on a wire center-by-wire center basis throughout the area where the carrier seeks ETC designation including:

* A detailed map of coverage before and after the improvements;
* A map identifying existing tower site locations, the specific geographic areas where improvements will be made, the projected start date and completion date for each improvement, the estimated amount of investment for each project that is funded by high-cost support, and the estimated population that will be served as a result of the improvements;
* Where the Applicant believes that improvements are not needed in a particular wire center, it must explain its basis for this determination and demonstrate how funding will otherwise be used to further the provision of supported services in that area; and
* A statement as to how the proposed plans would not otherwise occur absent the receipt of high-cost support and that such support will be used in addition to any expenses the ETC would normally incur.

6. The record reflects that even at the close of the evidence US Cellular provided very few details about its construction plans. It provided only aggregate cost amounts for all towers, with no specific description of equipment or services that the budget amounts purport to represent. The level of detail provided by US Cellular has not allowed the Commission to conduct a sufficiently specific review of US Cellular's build-out plans to assure that the funds will only be used for their intended purposes, let alone allow the majority to conclude that US Cellular's plan fully complies with the ETC rule. Even a cursory review of US Cellular's evidence, as well as admissions by US Cellular itself,

shows that numerous wire centers within the CenturyTel/Spectra study areas will receive no improvement in coverage, service quality or capacity under US Cellular's proposed plan. US Cellular's maps also lack sufficient detail for the Commission to conduct a meaningful review, are contradictory in terms of signal coverage, and show that virtually all "improvements" occur within areas where US Cellular currently has facilities with little expansion of signal coverage into currently un-served high-cost rural areas. US Cellular's evidence failed to demonstrate that its ETC investments would not be made absent the receipt of high-cost support. In fact, the record clearly shows that US Cellular added a significant number of new towers without the benefit of high-cost support when it had previously told the Commission that these towers could not be constructed unless it received USF funds. The majority has either wholly ignored or simply has dismissed all this evidence.

7. To the extent that such evidence supporting the rejection of US Cellular's Application was considered, the majority has misinterpreted and misapplied the Commission's own ETC rule to US Cellular's Application. That the majority found it necessary to craft, *sua sponte*, a heretofore unheard of special "base line investment requirement" for portions of US Cellular Missouri markets—a requirement otherwise totally absent in the ETC rule itself or imposed on any other applicant in any other prior ETC application proceeding—on its face shows that: a) even the majority found that US Cellular failed to demonstrate full up-front compliance with the Commission's ETC rule; and b) that the majority in its *Report and Order* has not applied nor enforced the rule in a non-discriminatory fashion as it is lawfully required to do, absent a request and grant of a waiver or waivers.

8. The majority's decision in its *Report and Order* to permit US Cellular to first demonstrate and show compliance with the rule after the fact upon annual recertification review—again, a procedure not set forth in the rules—rather than up-front at the time of filing its initial ETC Application or at least at the close of the evidence, is clearly contrary to the letter and spirit of the Commission's ETC rule as well as the requirement that the Commission's initial designation of an ETC be in the public interest. This newly created procedure has wholly and erroneously removed the fundamental legal requirement that an ETC applicant carry its burden of proof prior to, rather than after, receiving ETC designation. In practical effect, this shift improperly and unlawfully has rendered the Commission's ETC rule a meaningless and a virtual nullity.

9. The Commission certainly can rescind, change or modify its rules whenever it so chooses, provided that it to go through the formal statutory process of a rule rescission or modification proceeding, which statutorily requires prior notice to all interested parties and a meaningful opportunity to participate. Likewise, an applicant may apply up-front for waivers of all or portions of any Commission rule and the Commission has the authority to grant such waivers if proper procedures are followed, which also include prior notice to interested parties and a meaningful opportunity to participate. Here, no rule rescission or modification procedure has been instituted by the Commission nor has US Cellular requested a waiver of any portion of the Commission's ETC rule. The majority has in this case bypassed such established procedures here and the *Report and Order* is in this respect, therefore, improper and unlawful.

10. Additionally, while the Commission's ETC rule clearly and rightfully contemplates that interested parties will be given the opportunity to review and

participate in an ETC application up-front, as has been the case in this as well as all prior ETC proceedings, the *Report and Order* is silent as to exactly what procedures are now to be followed to insure the procedural due process rights of these other interested parties in this new, after-the-fact ETC review process and is, therefore, legally inadequate.

11. The majority in its *Report and Order* justifies its actions by asserting that the public interest nevertheless will be protected by this new procedure because "[i]f 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".[1] Ignoring for the moment all of the other infirmities of this novel approach, the Commission's practical ability to successfully obtain after-the-fact the return of improperly spent USF funds is little more than wishful thinking. The Commission's lawful (as well as practical) ability to compel the return of USF funds misspent by a carrier otherwise not regulated by the Commission is at best questionable under the legal powers currently granted the Commission under current state or federal law. The Office of the Public Counsel strongly raised this concern and Staff witness McKinnie admitted as much on cross examination at the second hearing. The Commission should at minimum grant rehearing, reconsider, and better address this important issue *before* US Cellular begins receiving any scarce USF funds.

II. ERRONEOUS INTERPRETATION AND APPLICATION OF THE LAW

12. Applicants for ETC status must meet the requirements of 47 U.S.C. Section 214(e)(1) *throughout* the service area for which the designation is received. The Commission itself previously interpreted this section and found that this specific

[1] *Report and Order*, at 21.

"statutory language is not a meaningless formality" and that "[t]he Act clearly requires that a carrier both offer and advertise the services in question throughout it designated service area upon designation".[2] The record evidence is uncontested that customers in large parts of US Cellular's proposed rural ETC service area currently have either no signal coverage or inadequate signal coverage due to lack of US Cellular infrastructure. The record evidence also is uncontested that even with the addition of the new facilities proposed in US Cellular's two-year plan, there will still be large rural areas within US Cellular's requested ETC service area with either no or inadequate signal coverage. US Cellular and the majority in its *Report and Order* both acknowledge this.[3] In addition, 47 U.S.C. Section 214(e)(1) necessarily must be interpreted in the context of 47 U.S.C. 254(b)(3) and 4 CSR 240-3.570(2), which clearly state that the purpose of high-cost support is to provide consumers in rural, insular and high-cost areas with telecommunications services and prices reasonably comparable to those in urban areas. The evidentiary record shows that US Cellular currently provides high-quality wireless signal coverage predominantly in the more densely populated and low-cost portions of their service area, and not in the sparsely populated, high-cost areas. The record reflects that this does not change even with the new facilities promised under US Cellular's two-year plan. The majority nevertheless erroneously concludes that US Cellular somehow has sufficiently met the requirements of 47 U.S.C. Section 214(e)(1) and 4 CSR 240-3.570(2). In so doing, the *Report and Order* wrongly has made these statutory and rule provisions a "meaningless formality" as applied to US Cellular, if not having simply

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[2] *In the Matter of the Application of ExOp of Missouri, Inc., for ETC Designation*, Case No. TA-2001-0251, *Order Granting Designation*, issued May 16, 2001.

[3] *See* pages 7-8.

unlawfully abandoned them in their entirety. The majority erred by interpreting and applying applicable law and its own rules to permit US Cellular to obtain ETC designation prior to serving, or even having meaningful future plans to serve, large portions of its requested ETC service area.

13. To partially justify this new-found, lesser standard, the majority in its *Report and Order* relies on US Cellular's use of resale to meet its ETC obligations in those areas where US Cellular has no facilities. While it is true that 47 U.S.C. Section 214(e)(1) authorizes an ETC's use of resale, 47 C.F.R. Section 54.201(i) specifically prohibits a state commission from designating an ETC which offers USF-supported services *exclusively* through resale. The evidentiary record is clear that in large parts of its requested ETC rural service area US Cellular intends to and can offer service only through resale for the foreseeable future. As testified by witness Glenn H. Brown, to grant ETC status to a carrier who *excessively* relies on resale arrangements to provide service in its rural areas, as opposed to making new infrastructure investment, is contrary to the purposes and goals of the Universal Service Fund, and at minimum, is a negative factor which must be considered as part of the Commission's public interest analysis, especially when it comes to designation of multiple competitive carriers in rural areas.[4] The *Report and Order* nevertheless erroneously concludes that US Cellular's heavy reliance on resale in large portions of its requested ETC service area is acceptable as a matter of law and is otherwise in the public interest. The *Report and Order* erroneously ignores, without explanation, the anti-competitive and other negative public policy aspects of allowing US Cellular to meet its ETC obligations through resale in those rural

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[4] *See*, CenturyTel's Brief, December 6, 2005, pp. 21-23.

exchanges already being served by existing competitive wireless ETCs who, unlike US Cellular, are making wireless infrastructure investments.[5]

14. 47 U.S.C. Section 214(e)(2) and 4 CSR 240-3.570(2)(A)(5) require that the Commission find that granting ETC status to a particular ETC applicant in a particular requested ETC service area is in the public interest, with the burden of proof clearly resting upon the ETC applicant. While not determinative, one of many factors to be considered in the public interest analysis is the issue of competition. The majority's analysis and conclusions with respect to this issue are legally inadequate, contradictory, ignore applicable precedent, and wholly misconstrue the expert testimony. Witness Glenn H. Brown offered substantial testimony on the issue of competition as a public interest factor in ETC designations generally, and in the context of ETC designations in rural, high-cost areas, especially with respect to the economics of granting ETC status to multiple wireless competitive carriers in the same wire centers. The *Report and Order* erroneously either ignores or misconstrues Mr. Brown's expert testimony; he never testified that the Commission should "block competition in rural areas" by excluding wireless carriers from ETC designation.[6] The majority in its *Report and Order* correctly found that the evidence showed that U.S. Cellular "currently faces wireless competition in all areas that it serves in Missouri"[7] (with US Cellular currently not receiving USF support) but it then contradicts itself by claiming that a rejection of US Cellular's ETC Application would somehow stifle that competition.[8] The *Report and Order* ignores,

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[5] *E.g.*, Chariton Valley Wireless (MO-5) and Northwest Missouri Cellular.

[6] *Id.*, page 13.

[7] *Report and Order*, page 13.

misconstrues, and misstates the entire evidentiary record on this issue. The majority fails to properly analyze the issue as a critical part of its overall public interest analysis, and instead, simply concludes that "[i]ncreased competition is generally a good thing"[9] and then without basis assumes that granting US Cellular ETC status will serve to promote and encourage competition. A careful review of the evidence shows that such is not necessarily the case. Accordingly, the majority in its *Report and Order* erred as a matter of law and of fact with respect to the issue of competition as part of its overall public interest analysis.

15. Likewise, the majority in its *Report and Order* wrongfully ignored or dismissed Mr. Brown's expert testimony with respect to the increasing and serious financial pressure that the continuing, inappropriate designations of competitive carriers in rural areas are having on the USF, which is without question another important factor required to be considered in the Commission's overall public interest analysis. That Mr. Brown's testimony was in fact both credible and correct on this issue is supported by the Federal State Joint Board, which on May 1, 2007 concluded that the increasing financial pressure on the fund caused by increasing competitive ETC designations in rural areas generally had become so severe that it recommended an immediate emergency cap on competitive ETC support.[10] The majority in its Report and Order erred in failing to fully consider and give substantial weight to Mr. Brown's testimony on this important factor as part of the Commission's public interest analysis. In addition, should the Joint Board's

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[8] *Id*., page 14.

[9] *Id*., page 32

[10] *In the Matter of High-Cost Universal Service Support*, WC Docket No. 05-337, CC Docket No. 96-45, *Federal State Joint Board Recommended Decision*, released May 1, 2007.

Recommended Decision ultimately be adopted, ***and*** *US Cellular is designated as an ETC in Missouri*, existing smaller rural Missouri-based competitive wireless ETCs (such as Chariton Valley Wireless and Northwest Missouri Cellular who are making infrastructure investments in their networks) will no doubt significantly suffer as US Cellular then becomes entitled to the scarce funds heretofore going to these other smaller, rural, wireless ETC carriers. This is yet another factor the Commission should reconsider as part of its public interest analysis.

III. THE EVIDENTIARY RECORD

16. The majority in the *Report and Order* erroneously dismisses with little or no comment or explanation the uncontested competent and substantial evidence offered by witness Glenn H. Brown (Exhibits 11, 12, and 30) in contravention of state law. Even if somehow Mr. Brown's testimony is not to be believed or was otherwise "not persuasive", the *Report and Order* makes no findings of any perceived lack of expertise or credibility of Mr. Brown nor does it discuss or explain in sufficient detail any reason why the majority chose to reject Mr. Brown's virtually uncontested evidence. Even if the Commission feels strongly that a particular result is desirable in a particular case, all Commission decisions nevertheless must be based on competent and substantial evidence on the whole record. Article V, Section 18, Missouri Constitution; *State ex rel. Chicago, Rock Island & Pacific R.R. Co. v. Public Service Commission*, 312 S.W.2d 791, 794 (Mo. banc 1958). The requirement that Commission decisions be based solely on competent and substantial evidence, and not simply upon some desired end result, is well established in Missouri law:

> An agency's determination of findings is not a separate function from its decision in a case. The agency's findings of fact and conclusions of law are an essential part and are the basis for its decision. **The two cannot be separated, nor can the agency put the cart before the horse, as was done in this case, by making a decision and then later making findings of fact and conclusions of law which will support that decision**.

Stephen and Stephen Properties, Inc. v. State Tax Comm'n, 499 S.W.2d 798, 804[9] (Mo 1973) (emphasis supplied).

Here, neither the weight of the record evidence nor the majority's interpretation, findings, and conclusions with respect to that evidence supports the decision to grant US Cellular ETC status throughout its requested ETC service area, conditionally or otherwise.

17. The *Report and Order* also fails to make adequate and sufficient findings of fact and conclusions of law as required by Section 386.420 RSMo 2000, *State ex rel. Monsanto v. PSC*, 716 S.W.2d 791 (Mo. Banc 1986), and *State ex. rel Laclede Gas v. PSC, 103 S.W.3d 813*, 816 (Mo. App. 2003).

IV. EFFECTIVE DATE OF THE *REPORT AND ORDER*

18. By issuing its *Report and Order* on May 3, 2007 and making it effective on May 13, 2007, the Commission *appears* to be following its long standing, traditional practice of making its decisions effective, at least in significant cases, ten days after the issuance of its decision. Whether done intentionally or not, in reality the Commission in this case has in effect allowed the parties and their respective counsel only five business days within which to prepare and file applications for rehearing, with the fifth day being

the actual date of filing.[11] Under the particular circumstances of this case, this is at best inappropriate, and at worst, arbitrary, unreasonable and unlawful.

19. There is no question that this is a significant case. Its geographic scope, the increasingly scarce USF dollars at issue, and its potential impact and ramifications are far larger than any ETC case that has gone before it. It has been unusually long in duration, its evidentiary record is voluminous, and it has included not one, but two, evidentiary hearings. This is not the type of Commission case or decision that reasonably lends itself to a shorter, rather than longer time between the date of issuance and the effective date of the decision.

20. Section 386.500(2) RSMo allows parties to pursue their rights under Article V, Section 18 of the Missouri Constitution to seek judicial review of Commission decisions, but only if an application for rehearing is filed prior to the effective date of the Commission's order. It also requires that such applications "set forth specifically" <u>all</u> the grounds upon which rehearing is sought, with a failure to do so precluding a party from raising the issue before the reviewing court. Here, the Commission required over three months from the time the case was briefed on January 31, 2007 for it to review the extensive record, deliberate, discuss and issue its *Report and Order*. It then, however, inexplicably has given the parties' respective counsel only five business days to: 1) review the *Report and Order* in light of the extensive evidentiary record; 2) prepare draft rehearing applications which must be sufficient in content to fully preserve the judicial review rights of their clients; 3) have those drafts at numerous levels internally reviewed,

[11] May 5 and 6 2007 fell on a weekend. May 8, 2007 was an official state holiday. Because the *Report and Order's* effective date is Sunday, May 13, 2007, in order to be timely filed applications for rehearing arguably needed to be filed by close of business on Friday, May 11, 2007—thereby also eliminating May 12 and 13, the second weekend in the 10-day period.

discussed, modified, and finally approved; and 4) finalized and filed by the statutory deadline. While it may not be uncommon (albeit unreasonable) for attorneys to be required to work overtime on weekends and official state holidays (e.g. May 8, 2007), it is certainly unreasonable, problematic, unnecessarily burdensome, and costly to expect non-attorney client personnel (and, as here, outside consultants residing out of state) to do so.

21. There is no compelling or even reasonable reason for the Commission in this proceeding to limit the parties to five business days within which to prepare and file applications for rehearing. There is no operation of law date, no legal requirement, and no other readily apparent internal Commission consideration which might require such expedited action here. Moreover, US Cellular would suffer no material harm if, for example, the Commission made its Report and Order effective on Monday May 14, 2007 or even a few days later.[12]

22. The May 13, 2007 effective date of the *Report and Order*, standing alone, admittedly might not result in a reversal and remand by a reviewing court. However, when viewed in light of the totality of this case, one could easily perceive (rightly or wrongly) another indication of an arbitrary desire and pattern of arbitrariness[13] by the

[12] Given the Commission's decision to impose an annual "baseline investment" requirement on US Cellular as a condition of annual recertification, which US Cellular certainly did not advocate nor heretofore clearly agree to, US Cellular itself may have found more time within which to apply for rehearing beneficial.

[13] The Commission concluded in March 2006, after the first evidentiary hearing, that US Cellular had not met its burden of proof. Instead of simply denying US Cellular ETC status, the Commission instead gave US Cellular an open-ended second bite of the apple by allowing US Cellular to supplement its evidence—an opportunity that US Cellular waited to take until almost five months later in August 2006. The Commission subsequently attempted, over the protests of the other parties, to expedite a second hearing. This expedited second hearing would have taken place if US Cellular had not itself later requested a change in hearing dates due to a scheduling conflict.

majority to do whatever it takes to insure that additional federal USF dollars flow into the state, regardless of the specific terms of the Commission's own ETC rule, despite US Cellular's continued failure to carry its burden of proof after being given more than adequate opportunity to do so, and despite the opposition of all of the other parties to the case to US Cellular's ETC Application, including the Office of the Public Counsel and even the Commission's own Staff.

23. Because of the short time permitted for the filing of this Application For Rehearing, and in order to attempt to preserve all possible grounds for which CenturyTel might wish to seek judicial review under Sections 386.500 and 386.510 RSMo 2000, to the extent lawfully permitted CenturyTel hereby incorporates herein, as if more fully set out verbatim, each of its legal briefs which have been previously filed in this proceeding and the arguments and grounds contained therein, which make more specific reference to the hearing transcript and the evidentiary record. In addition, CenturyTel concurs in the arguments set forth in the Application For Rehearing also filed this day by the Small Telephone Company Group.

CONCLUSION

WHEREFORE, CenturyTel respectfully requests that the Commission grant this Application For Rehearing of the Commission's May 3, 2007 *Report and Order*, and upon rehearing and reconsideration of the issues herein raised, for the reasons herein stated either issue a revised *Report and Order* that denies US Cellular ETC designation, or in the alternative, schedule further proceedings within which these matters may be more fully addressed by the parties.

Respectfully submitted,

/s/ Charles Brent Stewart

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Application For Rehearing was sent to counsel for all parties of record in Case No. TO-2005-0384 by electronic transmission this 11th day of May, 2007.

/s/ Charles Brent Stewart