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March 23, 2001

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

Re: Case No. TA-2001-251

FILED³
MAR 23 2001 *rw*
Missouri Public
Service Commission

Dear Mr. Roberts:

Enclosed for filing on behalf of Small Telephone Company Group, please find an original and eight (8) copies of an Initial 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:

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SBM/lar
Enclosure

cc: Michael Dandino
Marc Poston
Kristine Becker
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BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED³

MAR 23 2001 *mh*

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.)

Missouri Public
Service Commission

Case No. TA-2001-251

**INITIAL BRIEF OF THE
SMALL TELEPHONE COMPANY GROUP**

Introduction

On October 17, 2000, ExOp of Missouri, Inc., ("ExOP") filed an Application with the Missouri Public Service Commission ("Commission") requesting that the Commission designate it as a telecommunications carrier eligible under the provisions of 47 C.F.R. 54.201(d) to receive federal universal service support. ExOp sought eligible telecommunications carrier ("ETC") designation for its entire Missouri certificated area. On November 13, 2000, the Small Telephone Company Group ("STCG") filed an Application to Intervene, and on December 6, 2000, the Commission granted intervention.

After discussion and negotiation, the parties to this case agreed that the case should be submitted to the Commission for determination based upon an agreed to Stipulation of Facts and briefs of the legal issues involved. A statement of issues and proposed procedural schedule was filed with the Commission on March 2, 2001, and a Stipulation of Facts was filed March 7, 2001. On March 6, 2001, the Commission issued its Order Adopting Procedural Schedule in which it set dates for filing briefs. Accordingly, the STCG now files its Initial Brief.

Statement of Facts

ExOp is a fully facilities-based competitive local exchange company ("CLEC") certificated by the Commission to provide basic local telecommunications service in the exchanges served by Sprint Missouri, Inc., ("Sprint") and GTE Midwest Incorporated, now known as Verizon, in Case No. TA-97-193. Some of the Verizon exchanges included in ExOp's certificated area were purchased by Spectra Communications Group, LLC, ("Spectra") effective August 1, 2000. ExOp provides basic local telecommunications service exclusively through the use of its own facilities throughout the Kearney, Missouri, Sprint exchange. At this time, ExOp only provides service in the Kearney exchange. (Stipulation of Facts, para. 4-6)

ExOp provides, through the use of its own facilities, the following services throughout the Kearney, Missouri, exchange:

- a. Voice grade access to the public switched network;
- b. Local usage;
- c. Dual tone multi-frequency signaling or its functional equivalent;
- d. Single-party service or its functional equivalent;
- e. Access to emergency services;
- f. Access to operator services;
- g. Access to interexchange service; and
- h. Access to directory assistance.

(Stipulation of Facts, para. 8) ExOp advertises the availability of and charges for its telecommunications services in media of general distribution throughout the Kearney, Missouri, exchange. (Stipulation of Facts, para. 7)

ExOp has asserted that upon designation as an ETC it will, to the extent that it does not already do so, provide toll limitation, Lifeline and LinkUp service and advertise the availability of those services. (Stipulation of Facts, para. 12) ExOp has also asserted that it will provide all of the services supported by universal service support mechanisms throughout its service area before seeking universal service support from the universal service fund administrator.

(Stipulation of Facts, para. 13)

Spectra has filed a letter of self-certification with the Federal Communications Commission ("FCC") stating that it qualifies as a rural telecommunications carrier for purposes of receiving federal universal service fund support. (Stipulation of Facts, para. 10)

Argument

A. ExOp has not sufficiently identified and defined the geographic area for which it seeks ETC status because in its Application ExOp states that it is seeking the designation for its entire certificated area yet in the Stipulation of Facts it admits that it only offers and advertises the required services in one exchange. Thus, the company's "service area" for purposes of the designation is not clearly delineated for purposes of allowing the Commission to determine if ExOp qualifies for the designation.

ExOp states in its Application and again in the Stipulation of Facts that it is seeking ETC status for all of its certificated exchanges in Missouri. (Stipulation of Facts, para. 11) Yet, ExOp also states that it is only providing service in one Missouri exchange. (Stipulation of Facts, para. 6)

Section 254(e) of the Telecommunications Act of 1996 ("the Act") provides that, after the effective date of the FCC's regulations implementing section 254, "only an eligible telecommunications carrier designated under section 214(e) shall be eligible to receive specific Federal universal service support." 47 U.S.C. § 254(e). Section 214(e)(1) provides that:

A common carrier designated as an eligible telecommunications carrier under [subsection 214(e)(2)] or [subsection 214(e)(3)] shall be eligible to receive universal service support in accordance with section 254 and shall, *throughout the service area for which the designation is received* -

(A) offer the services that are supported by Federal universal service support mechanisms under section 254(c), either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and

(B) advertise the availability of such services and the charges therefor using media of general distribution.

47 U.S.C. § 214(e)(1) (emphasis added).

Under the plain language of the statute, it is obvious that a telecommunications carrier seeking ETC designation from its state commission must define and delineate the service area for which it seeks the designation. Further, the applicant must offer the services supported by Federal universal support, as well as advertise the availability of those services, *throughout the service area.*¹ ExOp clearly cannot define its service area as its entire certificated area and receive the designation for its entire certificated area based solely upon its assertion that it provides the supported services and advertises the supported services in only one exchange of its entire certificated area.

While the FCC recognizes that states have the responsibility for designating service areas of non-rural carriers, it has also stated that state commissions should not designate service areas that are unreasonably large, because an unreasonably large service area could greatly increase the

¹In the 1997 Order, the FCC concluded that regulations were not necessary to define the term "throughout." The FCC stated, "The dictionary definition - - 'in or through all parts; everywhere' - - requires no further clarification. *Universal Service Order*, FCC 97-157, para 148.

scale of operations required of new entrants. *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, (Report and Order May 1997) FCC 97-157, para 129. This language shows that the FCC contemplates that the applicant must provide the supported services for the entire service area, and points out the problems associated with the Commission designating an unreasonably large service area such as the applicant's entire certificated area.

Thus, ExOp must decide whether to limit its request for ETC designation to the one exchange where it actually provides and advertises the supported services, or withdraw its application. The FCC has stated that the terms of § 214(e) do not allow the FCC to alter an eligible carrier's duty to serve an entire service area, even for carriers whose technology limits their ability to provide service throughout a state-defined service area. *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, ¶ 141 (May 1997) citing 12 FCC Rcd at 140-41.

In a recent decision involving a request that the FCC designate a wireless carrier as an ETC because the state commission did not have jurisdiction to designate a commercial mobile radio service ("CMRS") provider as an ETC, the FCC listed the information that must be set forth in a petition. The FCC stated, "[I]f the petitioner meets the definition of a 'rural telephone company' pursuant to section 3(37) of the Act, the petitioner must identify its study area. If the petitioner is not a rural telephone company, the petitioner must include a detailed description of the geographic service area for which it requests a designation for eligibility from the Commission." *In the Matter of Federal-State Joint Board on Universal Service; Cellco Partnership d/b/a Bell Atlantic Mobile Petition for Designation as an Eligible Telecommunications Carrier*, CC Docket No. 96-45 (Memorandum Opinion and Order

December 22, 2000), 2000 FCC Lexus 6744, at page 4. The FCC granted the designation to Cellco finding that Cellco had demonstrated that it was offering and advertising the services supported by the federal universal service support mechanism throughout the designated service areas using its own facilities. *Cellco Partnership*, 2000 Lexus 6744 at page 7. The FCC found that Cellco should be granted the status because it advertised the availability of its services throughout its service area. *Id.* at page 16. As is clear from the FCC's language in this decision, ExOp cannot be designated as an ETC in its entire certificated area because it does not provide the required services throughout its certificated area nor does it advertise the availability of those services throughout its entire certificated area.

(B) Assuming that ExOp's certificated area defines its service area, ExOp cannot be designated as an eligible telecommunications carrier throughout each exchange in its service area because it does not provide all of the services required by Section 254(c) of the Act and advertise the availability of those services using media of general distribution throughout each exchange in its service area, and the Commission should not grant the designation to ExOp for all of its certificated area prior to the actual provisioning and advertising of services throughout each exchange in its certificated area.

Assuming that ExOp's service area for purposes of the ETC designation is considered to be its entire certificated area, ExOp has not met the requirements of the Act for ETC designation because it does not offer all of the services throughout its entire service area nor does it advertise the availability of the services using media of general distribution throughout its service area. These are the clear requirements of Section 254(c) as set out in Section A above. It cannot be enough for ExOp to stipulate that it provides the necessary services in one exchange currently, and that it will provide the services before it actually seeks universal service fund support. The statute does not state that the designation will be granted based upon assurances of future action. Section 214(e) states that the state commission may designate an additional carrier "so long as

each additional requesting carrier meets the requirements" of subsection 214(e)(1). The requesting carrier must actually provide the supported services and advertise their availability before the Commission may designate it as an ETC.

Contrary to ExOp's assertions, the FCC's declaratory ruling in *In the Matter of Federal-State Joint Board on Universal Service; Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, FCC Docket No. 96-45 (Declaratory Ruling August 10, 2000), 2000 FCC Lexus 4204, does not provide support for its position that the designation should be made based merely on future assurances to provide service. First, the declaratory ruling is just that, a declaratory ruling. And the case where the ruling was made involved a request by Western Wireless for FCC preemption of the state commission's authority to make the designation. Although the FCC did not act on the preemption request because the appeal of the South Dakota Public Utilities Commission decision was still pending, in its declaratory ruling the FCC was careful to state that state commissions are primarily responsible for making ETC designations, and "[n]othing in this Declaratory Ruling is intended to undermine that responsibility." Clearly, in this case the Missouri Commission has authority to make the designation and preemption is not an issue.

And, it can be shown that the Declaratory Ruling does not stand for the proposition endorsed by ExOp. Instead, the ruling addresses a situation where the FCC found that it was unfair to hold the applicant wireless carrier to a higher standard regarding penetration of service than that to which the incumbent local exchange company was held. The FCC found that the wireless carrier could not be forced to provide service to all areas of a designated service area prior to ETC designation, but that the wireless company would have to provide service to any

new customer requesting service within that area, just as the ILEC would have to provide service to a new customer upon reasonable request. *Western Wireless*, 2000 Lexus 4204 at page 17.

Thus, the new entrant would have to provide the services to any customer requesting service just as the incumbent LEC would be obligated to provide service; it just would not have to extend that service throughout the designated service area before it received a request for service and before there was a need to provide service in a particular area. This is a very different situation from the case under consideration here where ExOp is requesting the designation for areas where it does not currently provide service, has no plans to provide service and would not be able to provide service to a customer who reasonably required service.

This argument is further supported by the fact that an additional condition of eligibility is that the applicant be a "common carrier." Section 214(e) prevents eligible carriers from attracting only the most desirable customers by limiting eligibility to common carriers and by requiring eligible carriers to offer the supported services and advertise the availability of these services "throughout the service area." *Universal Service Order*, FCC 97-157 para. 143. The Act requires common carriers to furnish "communications service upon reasonable request therefore," and states that "[i]t shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classification, regulations, facilities, or services" 47 U.S.C. § 201(a) and 47 U.S.C. § 202(a). In the 1997 Universal Service Fund Report and Order, the FCC rejected a contention that it was necessary to adopt eligibility criteria beyond those set forth in section 214(e), because that section prevents eligible carriers from attracting only the most desirable customers by limiting eligibility to "common carriers" and by requiring eligible carriers to offer and advertise the supported services "throughout the service

area." *Cellco Partnership*, 2000 Lexus 6744 at page 11, citing *Universal Service Order*, 12 FCC Rcd 8855-56, paras. 142-43. Thus, as a common carrier, the applicant for ETC designation must be prepared to offer the supported services throughout its service area in order to receive the designation. The STCG does not believe that ExOp has shown that it is prepared to offer the supported services throughout its service area, and so should not be granted ETC status.

An additional reason for denying ExOp ETC designation throughout its certificated area is the fact that Spectra is a rural telephone company, and, at least where the designation is sought for the Spectra exchanges, the Commission must determine that the designation is in the public interest before it can designate ExOp as an additional eligible telecommunications carrier for these exchanges. 47 U.S.C. § 214(e)(2). Section 214(e)(2) states that "[a] state commission *shall* . . . designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier . . .", and that "the State commission *may*, in the case of an area served by rural telephone company, and *shall*, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, *so long as each additional requesting carrier meets the requirements of paragraph (1).*" 47 U.S.C. § 214(e)(2) (emphasis added).

Part 54 of Title 47 of the Code of Federal Regulations provides additional support for this proposition as § 54.201(c) states:

Upon request and consistent with the public interest, convenience, and necessity, the state commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the state commission, so long as each additional requesting carrier meets the requirements of paragraph (d) of this section. Before designating an additional eligible telecommunications carrier for an area

served by a rural telephone company, the state commission shall find that the designation is in the public interest.

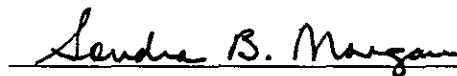
These sections make it clear that there must be an additional showing of public interest by the applicant who seeks ETC designation in an area served by a rural telephone company, and the discretion afforded a state commission under § 214(e) is the discretion to decline to designate more than one eligible carrier in an area that is served by a rural telephone company unless the state commission determines that the designation of an additional carrier is in the public interest. *Universal Service Order*, FCC 97-157 para. 135. Until ExOp identifies the exchanges where it intends to provide service, such a determination cannot be made. Spectra has self-certified to the FCC that it is a rural telephone company based on the fact that it does not provide service in any study area that includes an incorporated place of more than 10,000 inhabitants and the fact that it has less than 15 percent of its access lines in communities of more than 50,000. ExOp has not made any assertion, either in its Application to the Commission nor in the Stipulation of Facts, that the Commission's granting of ETC status would be in the public interest.²

²The STCG is concerned about the possible precedent which would be created in this case if the Commission grants "blanket" ETC status to ExOp for its entire certificated area, which includes rural exchanges, without addressing the public interest standard.

Conclusion

For all of the reasons stated above, 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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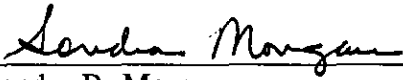
Certificate of Service

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 23rd day of March, 2001, to:

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