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April 5, 2001

Via Federal Express

The Honorable Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
Governor's Office Building
200 Madison Street
Jefferson City, MO 65102

FILED³
APR 06 2001
Missouri Public
Service Commission

Re: Case No. TA-2001-251

Dear Judge Roberts:

I have enclosed for filing an original and eight copies of ExOp of Missouri, Inc.'s Reply Brief in Case No. TA-2001-251. A copy of this pleading has been served on the Office of the Public Counsel. I have also enclosed an extra copy of this filing for the Commission to file-stamp and return to me in the enclosed self-addressed, postage prepaid envelope. Thank you for bringing this filing to the Commission's attention.

Yours truly,

Kristine Becker

Kristine M. Becker

KMB:drh
Enclosures

cc: Mr. Dennis Devoy

WA 585823.1

**BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI**

FILED³
APR 06 2001

In the Matter of the Application of)	
ExOp of Missouri, Inc. for Designation as)	Case No. TA-2001-251
a Telecommunications Company Carrier)	
Eligible for Federal Universal Service)	
Support Pursuant to § 254 of the)	
Telecommunications Act of 1996)	

*Missouri Public
Service Commission*

REPLY BRIEF OF EXOP OF MISSOURI, INC.

COMES NOW ExOp of Missouri, Inc. ("ExOp") and for its Reply Brief states as follows:

I. Introduction

The two issues before for the Missouri Public Service Commission (the "Commission") in this proceeding involve (1) defining ExOp's "service area" for purposes of designation as an eligible telecommunications carrier ("ETC"), and (2) determining whether federal law requires a competitive local exchange carrier (a "CLEC") to presently offer the enumerated services supported by universal service throughout the service area prior to being designated as an ETC. ExOp seeks designation as an ETC throughout all of its certificated exchanges in Missouri or, if the Commission finds against ExOp on the second issue, in the Kearney exchange, where ExOp presently provides service. Resolution of the second issue requires the Commission to interpret 47 U.S.C. § 214(e)(1) for the first time in Missouri. ExOp, the Commission's Staff, the FCC, the 1997 Order re-establishing the universal service fund, and the only state court that has addressed this issue all agree that a CLEC is not required to offer the supported services in all the exchanges in its service area prior to being granted ETC designation. This position is consistent with the express language and the underlying purposes of the Telecommunications Act of 1996 (the "Act") and, if adopted by the Commission,

would increase the likelihood that CLECs would expand facilities-based services into exchanges outside the major metropolitan areas.

II. Analysis of Issues

A. ExOp has Sufficiently Identified Its Requested Service Area

ExOp has sufficiently identified its requested service area for purposes of ETC designation. ExOp has requested designation as an ETC throughout its certificated exchanges. Section 214(e)(5) of the Act grants the Commission discretion to define an applicant's service area. If the Commission limits ExOp's service area to the Kearney exchange, ExOp will accept the Commission's designation. That decision would, however, have the undesirable effect of forcing ExOp to re-apply for ETC status each time it expands its service into new exchanges. Applying for ETC status one exchange at a time will place ExOp at a competitive disadvantage because of the significant time delay and court costs involved in ETC proceedings. ExOp would be unable to forecast its revenues before expanding into new communities and thus would lose much of the benefit of ETC designation.

STCG's reliance on the procedural rules requiring a detailed description of the geographic scope of an applicant's service area found in *Procedures for FCC Designation of Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act*, Public Notice, FCC 97-419 (rel. Dec. 29, 1997), is misplaced. These procedures apply only in cases where the ETC application is made to the FCC because the relevant state commission lacks jurisdiction. Moreover, in Western Wireless Corporation's federal petition for ETC designation, Western Wireless merely listed the specific exchanges for which it was seeking designation, and the FCC granted its application. See *In re Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier in the State of Wyoming*, Docket No. 96-45, DA 00-2896, ¶ 5 n.13.(rel.

Dec. 26, 2000). Even in the *Cellco* Order, which the STCG cites as authority for the proposition that an applicant must specifically describe its requested geographic service area, the applicant simply requested ETC designation (and was granted ETC status) for the entire state of Delaware. *In re Cellco Partnership d/b/a Bell Atlantic Mobile Petition for Designation as an Eligible Telecommunications Carrier*, Docket No. 96-46, DA 00-2895 (re. Dec. 26, 2000) (the "*Cellco* Order"). Thus, ExOp has sufficiently identified and defined the service area for which it is requesting ETC designation.

B. ExOp's Interpretation of § 214(e)(1) is Consistent with Existing Authority.

Resolving the issue of whether § 214(e)(1) requires a carrier to be currently serving every exchange in its service area prior to receiving ETC designation requires the Commission to interpret § 214(e)(1). ExOp's position is that § 214(e)(1) does not require a provider to offer the supported services in every exchange in its service area prior to receiving ETC designation. This interpretation has been adopted by the FCC and the only state supreme court that has addressed this issue. In August 2000, the FCC essentially stated ExOp's position, as follows: "No competitor would ever reasonably be expected to enter a high-cost market and compete against an incumbent carrier that is receiving support without first knowing whether it is also eligible to receive such support. We believe that it is unreasonable to expect an unsupported carrier to enter a high-cost market and provide a service that its competitor already provides at a substantially supported price." *In re Western Wireless Corporation Petition for Preemption of an Order of South Dakota Public Utilities Commission*, Docket No. 96-45, FCC 00-248, par. 13 (rel. Aug. 10, 2000) (the "Declaratory Ruling"). This position was followed by the South Dakota Supreme Court in a decision released in

March 2001. See *The Filing by GCC License Corporation for Designation as an Eligible Telecommunications Carrier*, 2001 S.D. 32, 2001 WL 256382 (March 14, 2001).

The plain language of § 214(e)(1) may be read either to support ExOp's position or to mean that in order to receive ETC designation, a carrier must presently offer the supported services. While ExOp and the South Dakota Supreme Court disagree with the latter interpretation (see *id.* at 11-15), the possibility of such divergent interpretations reveal that § 214(e)(1) is ambiguous on its face. Statutory ambiguities must be resolved in the way which best complies with the Congressional intent underlying the statute. Congress' intent in enacting the 1996 Act was to increase access to telecommunications services and to promote competition between telecommunications carriers. If carriers are required to presently provide the supported services at the time they seek ETC designation, applicants would necessarily be required to construct telecommunications infrastructure at substantial investment costs before they knew if they were even eligible for Federal universal service support. Such a requirement would deter competition. Thus, the only interpretation of § 214(e)(1) which is consistent with the purposes of the Act is an interpretation which provides that a carrier need not presently provide the supported services in order to receive ETC designation.

Recognizing the need for clarification on the proper interpretation of § 214(e)(1), the FCC issued the Declaratory Ruling. The FCC has been given the authority by Congress to issue declaratory rulings "to terminate a controversy or remove uncertainty." 5 U.S.C. § 554; 47 C.F.R. § 1.2. While a declaratory ruling may not bind non-parties, the Declaratory Ruling provides guidance on the proper interpretation of a federal Act by the very agency which administers the Act.

The Commission's authority does not exist unchecked. Declaratory Ruling at ¶¶ 18, 29. “While state commissions clearly have the authority to deny requests for ETC designation,” section 253 of the Act requires that, “the denials must be based on the application of competitively neutral criteria that are not so onerous as to effectively preclude a prospective entrant from providing service.” Declaratory Ruling at ¶ 18. In the Declaratory Ruling, Western Wireless petitioned the FCC for preemption, arguing that the South Dakota Public Utilities Commission’s (“PUC”) interpretation of § 214(e)(1) was inconsistent with federal law. If the Missouri Public Service Commission fails to adopt ExOp’s interpretation of § 214(e)(1), the Commission would be making a finding and in effect creating a prospective rule which provides that a carrier may not receive ETC designation until it presently provides the supported services throughout the service area. ExOp would then be in a position to raise the argument that the Commission’s rule should be preempted in the same way as the rule created by the South Dakota PUC. Despite STCG’s contention that the Declaratory Ruling is not relevant to the issues in the present proceeding because it only concerns preemption, the Declaratory Ruling provides direct insight as to how the FCC would rule if a CLEC challenged a state commission’s ruling regarding the proper interpretation of § 214(e)(1). The Declaratory Ruling speaks to the very issues around which this proceeding centers.

In substance, the Declaratory Ruling addressed the issue of *when* a carrier must offer the supported services throughout the designated service area in order to receive ETC designation. After considering all of the relevant factors, the FCC concluded that a state commission may not require that a new entrant provide service throughout the service area *prior* to ETC designation because such a requirement has the effect of prohibiting the ability of prospective entrants from providing telecommunications service. STCG interprets the FCC’s conclusion to mean that in order to receive

ETC designation, a CLEC must be presently providing service in parts of the service area, but need not be achieving 100% penetration of service in the service area (i.e., a CLEC is not required to serve every potential customer throughout the service area) prior to ETC designation. The Declaratory Ruling is not so limited. The Declaratory Ruling actually holds that a CLEC is entitled to receive ETC designation (upon a showing of capability and commitment) prior to providing any supported services in the service area. Declaratory Ruling at ¶ 28 (noting that “[t]he statute does not require a carrier to provide service prior to designation.”). In its Declaratory Ruling, the FCC discusses the importance of a carrier knowing its ETC status before *entering* a market. Declaratory Ruling at ¶ 13. Discussions about receiving ETC designation prior to entering a market imply that a carrier is not required to offer any of the supported services prior to ETC designation. The FCC recognized that assurances of eligibility are important to carriers before they commit substantial investment to telecommunications infrastructure. Declaratory Ruling at ¶ 20. The FCC specifically stated in its Declaratory Ruling that “the language of § 214(e)(1) does not require the actual provision of service prior to designation.” Declaratory Ruling at ¶ 14. The FCC discussed penetration of service issues only as additional and tangential support for its conclusion that a new entrant is not required to offer the supported services throughout the service area prior to ETC designation.

STCG’s interpretation of the substance of the Declaratory Ruling is also inconsistent with the FCC’s language requiring only a demonstration of capability and commitment in order to receive ETC designation. Declaratory Ruling at ¶ 24 (stating that “[a] new entrant can make a reasonable demonstration to the state commission of its capability and commitment to provide universal service *without the actual provision of the proposed service.*” (emphasis added)). Had the FCC been concerned solely with penetration of service issues in its Declaratory Ruling, the Commission would

have required a carrier to go beyond demonstrating its capability and commitment, and to demonstrate that it currently offers the supported services

Even if the Declaratory Ruling is limited to penetration of service issues, and the FCC only intended to state that 100% penetration of service is not required prior to ETC designation but that some provision of services is required, the Declaratory Ruling still supports ExOp's position because ExOp is already providing the supported services in part of its service area, i.e., in the Kearney, Missouri exchange. If the Commission designates ExOp's service area as its entire certificated area in Missouri, it can be stated that ExOp is already providing services in part of its service area, just as Western Wireless was currently providing service in parts of South Dakota.

STCG also contends that the Declaratory Ruling holding is limited to situations in which a carrier was "prepared to" or would be offering the supported services throughout the service area immediately after ETC designation. In order for STCG's narrow reading of the Declaratory Ruling to be meaningful, STCG would have to contend that the time delay between the time ETC designation is granted and the time the carrier actually offers the supported services throughout the service area is significant enough to deny ETC status to ExOp. ExOp fails to see what difference it would make to STCG if ExOp is designated as an ETC today, but is not actually offering the supported services throughout a given exchange in its service area, perhaps not until this time next year. As long as ExOp is not receiving Federal universal service funding while it is constructing its network, STCG cannot claim that it has been harmed during the interim time period.

Consistent with its holding that § 214(e)(1) does not require the present provision of the supported services prior to ETC designation, the FCC stated that a carrier's assertions of its capability and commitment to provide the services supported by Federal universal service were sufficient as

long as those assertions amount to more than vague assertions of intent. Declaratory Ruling at ¶ 24. By providing the supported services in the Kearney, Missouri exchange for the past several years, in addition to ExOp's sworn verification stating that it will offer and advertise the supported services, ExOp has sufficiently demonstrated its capability and commitment to provide the supported services throughout the designated service area. The FCC noted in its Declaratory Ruling that the procedure for designating carriers as ETCs should be functionally equivalent for incumbents and new entrants. Declaratory Ruling at ¶ 21. The FCC stated that it would "be troubled by a process in which the incumbent LEC were able to self-certify that it meets the criteria for ETC designation, while new entrants were subject to a more rigorous, protracted state proceeding." *Id.* at n.39. The FCC's concerns have proven true in this proceeding. While several incumbent carriers made assertions of capability and commitment (remarkably similar to ExOp's assertions) in their applications for ETC designation in Missouri and were granted ETC designation in relatively short time periods,¹ ExOp's application has been subject to intervention by its competitors and delays in receiving ETC designation. Accordingly, the Commission should find that ExOp has sufficiently demonstrated its capability and commitment to provide the supported services, and hold that such a demonstration is all that is required of ExOp under federal law.

The STCG's narrow reading of the FCC's Declaratory Ruling is not consistent with the FCC's rulings on other carriers' petitions for ETC status. In a recent CLEC petition, the FCC granted ETC status based on the applicant's assertions that it "will offer" and "will advertise" the

¹ *E.g. In re Application of CenturyTel Northwest Arkansas, LLC for Designation as Telecommunications Company Carrier Eligible for Federal Universal Service Support pursuant to § 254 of the Telecommunication Act of 1996*, Case No. TA-2000-815, ¶¶ 4, 5, 6 (filed June 12, 2000; approved August 8, 2000); *In re Application of Spectra Communications Group, LLC for Designation as Telecommunications Company Carrier Eligible for Federal Universal Service Support pursuant to § 254 of the Telecommunication Act of 1996*, Case No. TA-2000-817 ¶¶ 4, 5, 6 (filed June 14, 2000; approved August 8, 2000).

supported services. *See In re Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier in the State of Wyoming*, Docket No. 96-45, DA 00-2896, ¶¶ 1, 7, 8, 10, 15 (rel. Dec. 26, 2000) (hereinafter the "*Western Wireless Order*"). STCG cites to the *Cellco Order*, which granted ETC status to Bell Atlantic Mobile, as authority for the position that the FCC will grant ETC designation only where an applicant demonstrates that it "was offering" and "advertising" the supported services. The *Western Wireless Order*, however, which granted ETC status to a CLEC based on its assertions that it "will offer" and "will advertise" the supported services was released on the very same day as the *Cellco Order*. The fact that the FCC issued these opinions on the same day indicates that the FCC does not typically *require* that a carrier demonstrate that it is presently offering the supported services in order to receive ETC designation. In the *Cellco Order*, the FCC was simply faced with a situation where the carrier happened to already be providing the supported services. Yet, in a situation where the applicant was not yet presently offering the supported services, the FCC held that the applicant's assertions of capability and commitment to offer the supported services in the future were sufficient to receive ETC designation.

The South Dakota Supreme Court's recent decision also supports ExOp's position that a carrier need not be presently offering the supported services in any part of the state prior to receiving ETC designation. *See The Filing by GCC License Corporation for Designation as an Eligible Telecommunications Carrier*, 2001 S.D. 32, 2001 WL 256382 (March 14, 2001). In the South Dakota case, the applicant, at the time of its application for ETC designation, was not providing a service package containing all of the federally required enumerated services to any customer in South Dakota. *Id.* at ¶ 5. Despite the fact that it was not presently providing the supported services, the

applicant asserted in its petition that it was capable of providing all of the federally supported services immediately upon ETC designation. Noting that the applicant had also applied for ETC status in thirteen other states, the South Dakota Public Utilities Commission (PUC) was unconvinced that the applicant could offer the supported services to customers throughout South Dakota immediately upon being granted ETC status, and denied ETC designation. The South Dakota Supreme Court, however, reversed the PUC's denial of ETC designation, holding that an "inability to provide service immediately upon designation is not a basis for denying ETC status." *Id.* at ¶ 19. Based on the South Dakota Supreme Court's holding that a carrier cannot be denied ETC status because it may not be able to provide the supported services immediately upon designation, the Commission should designate ExOp as an ETC based on its demonstration that it is capable and committed to providing the services supported by Federal universal service.

Due to GTE Midwest, Inc.'s (d/b/a/ Verizon) sale last fall of certain exchanges to Spectra Communications Group, LLC ("Spectra"), and Spectra's self-certification to the FCC in December 2000, some of the exchanges within ExOp's certificated area may now be classified as areas served by a "rural telephone company." As ExOp stated in its Initial Brief, in order to receive ETC designation for areas served by "rural telephone companies," the state Commission must find that the ETC designation serves the public interest. The Commission has before it the necessary information to make a determination that designating ExOp as an ETC in areas served by "rural telephone companies" is in the public interest. ExOp has brought advanced telecommunications services, such as Internet access and DSL lines, to consumers in the Kearney, Missouri area, and has been providing such services for nearly three years. ExOp is providing advanced

telecommunications services entirely over its own facilities. In providing advanced telecommunications services, ExOp is forcing incumbent providers to enhance their service to rural customers. ExOp is advancing the goals underlying the Act by introducing advanced services to customers in traditionally underserved rural areas, and is providing those services through its own facilities in order to retain the highest degree of control over its quality of service. Neither STCG nor the Office of Public Counsel has presented any empirical evidence that designating ExOp as an ETC would harm consumers in areas served by rural telephone companies. *See Western Wireless Order* at ¶ 16 (stating that "there is no empirical evidence on the record to support the contention that the designation of Western Wireless as an ETC in those designated service areas served by rural telephone companies in Wyoming will harm consumers."). Because Congress created the Federal universal service mechanism to be a system based on assertions and self-certifications, ExOp does not bear the burden of demonstrating that designating it as an ETC is not in the public interest, and in the absence of empirical evidence presented to the contrary, the Commission should grant ExOp ETC status in the designated service areas served by rural telephone companies.

Although STCG contends that ExOp should not be designated as an ETC because ExOp did not assert in its Application that granting ExOp ETC status would serve the public interest, such an assertion was not possible at the time ExOp submitted its Application because Spectra did not self-certify to the FCC that it was a "rural telephone company" until two months after ExOp filed its Application. Spectra cannot wait to self-certify its "rural telephone company" status until after ExOp applied for ETC designation and then argue that ExOp should be denied ETC designation because it failed to make public interest allegations in its Application. Since the time that the issue of its

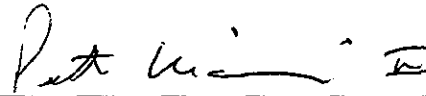
"rural telephone company" status was raised by Spectra, ExOp has made the appropriate allegations and showings in its Initial Brief filed on March 23, 2001. The Commission has before it sufficient information to make a determination that granting ExOp ETC status in its certificated exchanges which are served by rural telephone companies would be in the public interest.

III. Conclusion

Although the Commission is confronted with a novel legal question regarding the proper interpretation of § 214(e)(1) in this proceeding, ExOp's position that it is entitled to receive ETC designation for the non-rural and rural exchanges for which it is certificated in Missouri is solidly supported by existing legal authority, the most notable of which is a Declaratory Ruling by the FCC. By arguing that ExOp may not receive ETC designation until it is actually providing the supported services in all of its exchanges, STCG consistently confuses the Federal universal service requirements for *eligibility* with the requirements for *funding*. The universal service mechanism was intended to be a comprehensive system of self-assertions and self-certifications. STCG is one of the many carriers which has taken advantage (both in its ETC Application and its self-certification of "rural telephone company" status) of the relatively low threshold showings required under the Federal universal service program. STCG is trying to hold ExOp to a higher evidentiary standard than is required under federal law, and in the process is effectively impeding ExOp's competitive expansion into new exchanges. ExOp has made sufficient demonstrations that it is capable and committed to offering the supported services throughout its certificated area and, in addition, that designating it as an ETC would serve the public interest in the areas served by "rural telephone companies."

WHEREFORE, ExOp of Missouri, Inc. respectfully requests that the Commission accept the foregoing as ExOp's Reply Brief in this case, and designate ExOp as an eligible telecommunications carrier in ExOp's non-rural and rural certificated exchanges.


Respectfully submitted,



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Certificate of Service

I hereby certify that a true and correct copy of the above document was served upon each of the parties set forth below via United States Mail, postage prepaid, on this 5th day of April, 2001.


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