

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

<b>Application of USCOC of Greater Missouri,</b>	)	
<b>LLC for Designation as an Eligible</b>	)	<b>Case No. TO-2005-0384</b>
<b>Telecommunications Carrier Pursuant to the</b>	)	
<b>Telecommunications Act of 1996</b>	)	

**SUPPLEMENTAL BRIEF OF USCOC OF GREATER MISSOURI, LLC**

Applicant USCOC of Greater Missouri, LLC (“U.S. Cellular” or “Company”), by counsel and pursuant to the Presiding Officer’s order at the recent hearing, hereby submits its Supplemental Brief in the above-captioned proceeding.

**I. INTRODUCTION AND SUMMARY OF PROCEEDING**

The central question for the Commission in this proceeding is whether U.S. Cellular’s submission in response to the Commission’s March 21, 2006 Order complies with the rules, and whether its proposed investments are consistent with the federal statute requiring ETCs to promote the twin goals of the 1996 Act – to help bring competition to, and to advance universal service in rural areas. The answer is, inescapably, yes.

U.S. Cellular’s submission fully complies with the new rules and sets forth an ambitious schedule of network upgrades using high-cost support that will greatly accelerate the company’s network construction in rural Missouri, leading to the conclusion that *consumers*, who are the real focus of this proceeding, will benefit from a grant of U.S. Cellular’s application. Moreover, the objections noted by Staff have been largely removed in U.S. Cellular’s second round of testimony.

As to the Intervenors, Commissioner Murray summed it up best: “You’re damned if you do, and you’re damned if you don’t.”<sup>1</sup> Given Intervenors’ conflicting and often misinformed advocacy, there is no set of facts an applicant could present to this Commission that would cause the Intervenors to agree that a designation should be made. As we will demonstrate below, the Intervenors have tried to create legal standards that do not exist and have attempted to argue both sides of more than one issue.

In Commissioner Murray’s example, U.S. Cellular’s proposal to spend all available support received in the first two years on new cell sites and improvements is insufficient for the Intervenors. Their response is that the two-year plan is not “complete,” even though the Commission’s rules do not require a network to be completed within two years.<sup>2</sup> Of course, if U.S. Cellular proposed to “complete” its network within 24 months (an economic and practical impossibility), the Intervenors’ response would be that U.S. Cellular does not need high-cost support.

As another example, AT&T has previously argued in this proceeding that U.S. Cellular must demonstrate how it will build out facilities to provide service to consumers in AT&T areas. A year later, after U.S. Cellular submitted a two-year plan detailing construction that would do exactly that, AT&T created a new and unsupported legal standard, arguing that U.S. Cellular should *not* be permitted to invest federal high-cost support in AT&T’s rural wire centers.

The bottom line is: U.S. Cellular has presented ample record evidence to this Commission that it will use all available support as required by law, and that it will comply with

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<sup>1</sup> Tr. 565.

<sup>2</sup> The Commission’s rules do not require a new ETC to set forth a plan that proposes to complete a facilities-based network throughout its ETC service area within 24 months. Having participated in the recent rulemaking, Intervenors were, or should have been, aware of that fact when they made their presentation in testimony and at the supplemental hearing.

the Commission's rules to be designated as an ETC and maintain its continuing eligibility. Intervenor's seek denial of the application on the theory that the promised benefits may not come. To deny U.S. Cellular's application, when the Commission has an opportunity to annually test U.S. Cellular's promises and its progress toward meeting rolling two-year construction plans, would essentially bar the door to *any* application for ETC status. This is especially so in view of the FCC's rules, which permit the Commission to refuse to recertify ETCs and cut off support until a carrier remedies any compliance deficiencies. If the Commission determines that the Company's submission is deficient in any way, the better course is to identify any deficiencies and direct U.S. Cellular to come into compliance, rather than denying U.S. Cellular's petition and requiring it to refile anew.

With this as prologue, U.S. Cellular asks the Commission to focus on rural consumers in 39 small communities that either will, or will not, receive new and improved wireless service depending on the outcome of this proceeding. Granting U.S. Cellular's application and ensuring that benefits accrue to consumers is a far superior alternative. Having been designated in six other states, and having passed through numerous annual recertification proceedings, U.S. Cellular is fully confident of its ability to keep the promises that it has made here, under oath, so that *consumers* will truly be the winners.

Based on the evidence taken in the hearing conducted in 2005, U.S. Cellular believes that the scope of this supplemental 2006 proceeding is properly limited to whether the Company's supplemental evidence is sufficient to comply with the Commission's new rules. The Intervenor's disagree. Accordingly, while focusing its discussion on whether U.S. Cellular's submission complies with the rules, we are obligated to respond to some of the extraneous or repetitive issues introduced by Intervenor's in this supplemental proceeding.

## II. U.S. CELLULAR HAS MET THE REQUIREMENTS OF 47 U.S.C. SECTION 214 AND THE COMMISSION'S RULES REQUIRING A CARRIER TO OFFER AND ADVERTISE SERVICE THROUGHOUT THE ETC SERVICE AREA

The federal statute states unambiguously that a carrier must offer and advertise the supported services throughout a proposed ETC service area, “*either using its own facilities or a combination of its own facilities and resale of another carrier's services.* [emphasis added]”.<sup>3</sup>

Ubiquitous facilities-based service is not, and has never been, required.

U.S. Cellular has repeatedly stated in its application, in its prefiled testimony, and in live witness testimony under oath, its *immediate* commitment to offer and advertise the supported services throughout the proposed ETC service area as required by law.<sup>4</sup> U.S. Cellular placed uncontroverted evidence into the record demonstrating that it will offer service throughout the service area immediately by using the six-step process contained in this Commission's rules.<sup>5</sup>

Committing to the six-step process enables a company to identify and respond to all reasonable requests for service, which is the federal carrier of last resort obligation contained in 47 U.S.C. Section 201. U.S. Cellular has roaming agreements in place with other carriers that enable consumers to access the supported services throughout the proposed ETC service area.<sup>6</sup>

U.S. Cellular demonstrated how its system provides the nine supported services required by law.<sup>7</sup>

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<sup>3</sup> 47 U.S.C. Section 214(e)(1).

<sup>4</sup> See, e.g., Application at pp. 4-9; Exh. 5 at pp. 5, 14; Exh. 25 at pp. 2, 7; Tr. 579.

<sup>5</sup> See Exh. 5 at pp. 7-8; Tr. 99, 129-31, 183-85, 190, 521-23, 542-43.

<sup>6</sup> Tr. 546, 579. Witness Wright testified that the company will extend its rate plans throughout the service area using roaming agreements with other carriers.

<sup>7</sup> See Exh. 4 at pp. 2-4.

U.S. Cellular's evidence was subject to the administrative process in the 2005 hearing, and reexamined at the supplemental hearing. No party introduced any evidence refuting U.S. Cellular's commitment to offer and advertise the supported services throughout the ETC service area immediately, or demonstrating that U.S. Cellular has not kept the same commitments it has made in six other states where it has been designated.

In sum, neither the federal statute nor this Commission's rules require a prospective ETC to build a facilities-based network throughout the proposed ETC service area as a condition of designation.<sup>8</sup> Indeed, a major purpose of designating new ETCs is to provide an opportunity to construct facilities as much as support will allow. Each ETC has the same carrier of last resort obligation, to respond to all reasonable requests for service throughout the area, using either facilities or resale.<sup>9</sup> U.S. Cellular has amply demonstrated its ability and commitment to offer and advertise its services throughout the proposed ETC service area in order to participate in this federal program.

### **III. U.S. CELLULAR'S TWO-YEAR PLAN SATISFIES EACH AND EVERY ONE OF THE COMMISSION'S NEW RULES**

Parties attempting to comply with new rules must necessarily interpret the rules, as well as an agency's intent as expressed in the rule's legislative history. U.S. Cellular and the Intervenor's diverge as to whether U.S. Cellular's submission complies with the Commission's

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<sup>8</sup> See *Federal-State Joint Board on Universal Service, Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission, Declaratory Ruling*, 15 FCC Rcd 15168, 15177-78 (2000) ("*South Dakota Preemption Order*") (footnote omitted).

<sup>9</sup> 47 U.S.C. Section 201; *Federal-State Joint Board on Universal Service, Report & Order*, 20 FCC Rcd 6371, 6380 (2005) ("*ETC Report and Order*") (establishing "a requirement that an ETC applicant demonstrate its capability and commitment to provide service throughout its designated service area to all customers who make a reasonable request for service."); *South Dakota Preemption Order*, 15 FCC Rcd at 15176 ("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.")

new rules governing the submission of rolling two-year network improvement plans.<sup>10</sup> As shown below, U.S. Cellular unquestionably complied with the rule, much of which tracks the FCC's rules for filing network improvement plans verbatim. Because the Commission's Order of Rulemaking in Docket TX-2006-0169<sup>11</sup> provides very little guidance on the new rules, U.S. Cellular in developing its two-year plan has appropriately relied on the agency's legislative history in Docket TX-2006-0169, as well as the FCC's *ETC Report and Order*, which provided guidance for states to follow in implementing network improvement plans.<sup>12</sup> A brief analysis of what 4 CSR 240-3.570 requires, and does not require, follows.

**A. The Commission's Rule is Consistent With Federal Law; Intervenors Offer No Interpretation That Would Be Consistent With the Federal Statute.**

The Commission's new rule requires a carrier to file a rolling two-year plan setting forth a plan for constructing facilities throughout the area within which the carrier is designated.<sup>13</sup> Having actively participated in Docket TX-2006-0169, which generated the new rules, U.S. Cellular is certain that neither Staff nor the Commission ever intended to require any ETC to construct an entire facilities-based telecommunications network within two years. Such a rule would be inconsistent with the federal statute and had the Order of Rulemaking or the text of the

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<sup>10</sup> 4 CSR 240-3.570.

<sup>11</sup> Order of Rulemaking, Docket TX-2006-0169 Apr. 6, 2006. The rules adopted in that Order became effective June 30, 2006.

<sup>12</sup> U.S. Cellular actively participated in workshops and filed comments in the rulemaking proceeding.

<sup>13</sup> 4 CSR 240-3.570(2)(A)(3).

rule contained such a requirement, U.S. Cellular would certainly have requested reconsideration or clarification.<sup>14</sup>

During the rulemaking proceeding, Staff was convinced that the FCC's rules, which require a five-year plan, would not provide the Commission with useful or accurate information beyond two years. Staff's comments in the proceeding could not be more clear in terms of their expectations for carriers:

Under Staff's proposal, competitive carriers would submit projections of expenses for the next two years. While not an 'apples to apples' comparison with the ILEC requirements, the time frame for data would be relatively consistent. Further, competitive carriers would be required under another provision of the rule to annually update the two year projection making it a constantly revolving plan, consistently covering the annual certification process.<sup>15</sup>

The Commission agreed, finding "a 2-year build-out plan is sufficient, provided that the carriers are required to submit an updated, rolling 2-year build-out plan with their annual certification filing."<sup>16</sup> Changing the FCC's five-year plan for use of support into a requirement that a carrier propose to build a facilities-based network within two years was never even considered. Moreover, if the Commission intended for ETCs to complete construction of networks within two years, surely its Order of Rulemaking would have included a discussion of such a radical departure from the Staff's recommendations and the FCC's guidance, so as to provide newcomers such as U.S. Cellular proper notice of what the rule requires.

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<sup>14</sup> Since ILECs never had any such deadline during the decades they were constructing wireline networks, all the while receiving universal service funds, applying such a deadline to competitors could not possibly be competitively neutral as required by 47 U.S.C. Section 253(b).

<sup>15</sup> Staff Comments at p. 4 in Docket No. TX-2006-0169 (Jan. 3, 2006). Indeed, were Intervenor's position adopted, there would be no purpose in having rolling two-year build plans, since in their view, network construction would be completed.

<sup>16</sup> See Order of Rulemaking, *supra*, at p. 1. The rolling two-year plan requirement is embodied at 4 CSR 240-3.570(4)(B).

Plainly, the purpose of a rolling two-year plan is to permit the Commission to determine at the outset what a carrier will do with its first two years of support, to be updated with each annual certification filing, so that the Commission can determine whether to recertify the carrier to the FCC as eligible to receive continuing support. In looking at the rule and the legislative history, no other interpretation can be reasonably arrived at. Unable to refute U.S. Cellular's commitment and demonstration, Intervenors have attempted to construct a legal standard that does not exist, namely that a prospective ETC must implement a plan to provide facilities-based services throughout the proposed ETC service area within two years after designation.

Intervenors ignore the obvious fact that ILECs do not have, and have never had, any deadline to build their networks. Indeed, wireline carriers received decades of support while building their networks.<sup>17</sup> With respect to wireless, the FCC has ruled that “mandatory completion dates established by the Commission would not account for unique circumstances that may affect build-out, *including the amount of universal service support* or customer demand **[emphasis added]**.”<sup>18</sup> U.S. Cellular has always anticipated having to file rolling two-year plans with its annual requests for recertification, in which the Company will be required to detail how support is being used to construct facilities throughout its proposed ETC service area.<sup>19</sup> Indeed, this is what it does in several other states where it has been designated.<sup>20</sup>

The filing of a rolling two-year plan dovetails with the federal statute, which requires an ETC to commit to offer and advertise the supported services throughout its proposed ETC

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<sup>17</sup> See Exh. 27 at p. 18.

<sup>18</sup> *ETC Report and Order* at para. 24.

<sup>19</sup> See, Exh. 24 at p. 5 (“When it reviews our performance each year, the Commission will have the opportunity to determine whether Missouri is getting the benefits that it deserves from the federal universal service program because we will demonstrate each year those investments being made with high-cost support.”)

<sup>20</sup> Exh. 25 at p. 4.

service area, using its own facilities, or a combination of its own facilities and resale: 47 C.F.R.

Section 214(e)(1) states:

A common carrier designated as an eligible telecommunications carrier under paragraph (2), (3), or (6) shall be eligible to receive universal service support in accordance with section 254 of this title 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) of this title, **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. (emphasis added).

Here, U.S. Cellular has repeatedly stated under oath that its commitment to offer and advertise its services throughout the ETC service area, as required by Section 214, is *immediate*. Intervenors' interpretation of the rule to require the provision of ubiquitous facilities-based service undermines the federal statute cited above, which does not require *any* ETC, including an ILEC, to construct facilities throughout 100% of its ETC service area.<sup>21</sup> Plainly a carrier may fulfill its obligation as an ETC in a service area by providing service "*either using its own facilities or a combination of its own facilities and resale of another carrier's services.*"<sup>22</sup> Since the federal statute permits some requests for service to be fulfilled through resale, there's no room for Intervenors' interpretation that a network has to be fully constructed within two years.

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<sup>21</sup> Moreover, AT&T's interpretation of the rule also does not square with the Commission's recent ruling that construction of a new cell site in response to any request for service is not mandated. See Order Denying Rehearing and Clarification, Case No. TX-2006-0169 (effective date, April 14, 2006).

<sup>22</sup> *See* 47 U.S.C. Section 214(e)(1), quoted above.

Intervenors offer not a single citation to the FCC's rules or to a single other state that has ever adopted their view. Nor have they offered anything that might contradict or even distinguish the cases U.S. Cellular has previously cited in which state commissions granted ETC status to wireless carriers whose network facilities only covered a small portion of the requested area.<sup>23</sup> U.S. Cellular is unaware of any regulator *ever* adopting the proposition that a telecommunications network must be fully constructed throughout a rural area the size of Missouri within two years. Intervenors' novel advocacy here seeks rulings that are inconsistent with those rendered by every other agency of which the Company is aware.

The Intervenors' position also has significant practical limitations that border on the absurd. As U.S. Cellular's testimony and maps illustrate in obvious fashion, it will take far more than \$22 million in support to enable U.S. Cellular to construct facilities throughout its licensed service area.<sup>24</sup> How then could U.S. Cellular, or any carrier, be expected to propose construction throughout a service area in its *initial* two-year plan if the funds needed to do so are not available, for example, until year four, or year eight? Intervenors' insistence that designation be given only to carriers who can demonstrate construction throughout an area within two years flies in the face of the FCC's rulings that mandatory completion dates are not appropriate, in part because the pace of construction depends on the amount of available support.

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<sup>23</sup> See Post-Hearing Brief of U.S. Cellular at pp.8-9, *citing* RCC Minnesota, Inc., Docket No. 04-RCCT-338-ETC (Kan. Corp. Comm'n, Sept. 30, 2004) ("RCC Kansas Order") at p. 12; United States Cellular Corp., Docket No. UM 1084 (Oregon Public Utility Comm'n, June 24, 2004) ("U.S. Cellular Oregon Order"); Alaska DigiTel, Docket U-02-39, Order No. 10, Order Granting Eligible Telecommunications Carrier Status and Requiring Filings (Aug. 28, 2003) at p. 8 ("ADT Alaska Order"); RCC Minnesota, Inc. and Wireless Alliance, L.L.C. d/b/a UniceL, TC03-193 (S.D. PUC, June 6, 2005) ("RCC South Dakota Order") at pp. 8-9. For the Commission's reference, U.S. Cellular attached these and other state ETC orders as Appendix A to its Post-Hearing Brief.

<sup>24</sup> See Exh. 34 (Johnson Proprietary Exhibit B); Exh. 25 at p. 2.

Adopting Intervenors' misinterpretation of the Commission's rules in such a way as to directly contravene the federal statute will likely lead this Commission down the path to U.S. District Court just taken by the Nebraska Commission in the NPCR case.<sup>25</sup> Such an appeal will lead to more delay and will deny U.S. Cellular the ability to invest millions of dollars of support in Missouri while expensive legal proceedings grind along.

**B. Designating U.S. Cellular in a Portion of its Requested ETC Service Area is Not an Option.**

U.S. Cellular has requested ETC designation throughout the greatest possible area where it is licensed to serve by the FCC. Wherever possible, it has requested designation for complete rural ILEC study areas so as to avoid the delay involved in redefining service areas of affected rural ILECs.<sup>26</sup>

Intervenors now attempt to further delay U.S. Cellular's competitive entry by arguing that U.S. Cellular be designated only in that portion of its ETC service area that can be fully constructed within two years.<sup>27</sup> That is a non-starter because doing so will require U.S. Cellular to revise its entire Missouri construction plan to conform to the areas where designation was made – an enormous burden and a setback for consumers. It may also require the Commission to redefine rural ILEC service areas and engage in yet another cream skimming analysis, a supplemental proceeding that the Intervenors will drag out as long as possible.<sup>28</sup> Moreover, requiring U.S. Cellular to repeatedly apply for ETC status as the company increases the reach of

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<sup>25</sup> NPCR, Inc. d/b/a Nextel Partners v. Boyle, et al., Case No. 4:04-cv-03236-JFB-TDT, Memorandum Opinion (D. Ct., NE (Dec. 12, 2006).

<sup>26</sup> See 47 C.F.R. Section 54.207. The redefinition process under the FCC's rules involves a notice period of three months, after which FCC concurrence takes effect automatically unless it opens a proceeding.

<sup>27</sup> See, STG Prehearing Brief at p. 4.

<sup>28</sup> See 47 C.F.R. Section 54.315.

its facilities-based coverage would waste valuable Commission resources.<sup>29</sup> Just as important, rural ILEC study areas are scattered across the state, which makes extremely difficult the task of re-mapping the state and targeting supported investments throughout an area that is “pock marked” with areas where investment would not be permitted because a carrier is not designated. The administrative problem for this Commission multiplies exponentially when subsequent carriers request designation in the state.

Based on recent history, there is little doubt that the Intervenor would make every effort to consume more time and administrative resources by fighting each additional designation. Most troubling of all, such an outcome would directly contravene the goals of universal service by cutting off support now to areas that need it the most. Depriving consumers of improved wireless service in broad portions of the requested service area, which appears to be Intervenor’s desired outcome, cannot be in the public interest.

Intervenor has cited two cases that are worthy of discussion. The *Missouri RSA No. 5* case is inapposite.<sup>30</sup> The ILEC-controlled entity in that case holds an FCC license in a very small area compared to that of U.S. Cellular. It could conceivably demonstrate the construction of facilities that provide some network signal in every ILEC wire center within two years. U.S. Cellular is licensed for a much greater geographical area in rural Missouri and that is precisely why the Commission adopted a rolling two-year plan rather than a single two-year or five-year plan. The rules are written to allow this flexibility and Intervenor’s insistence that the rule is rigid must be rejected.

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<sup>29</sup> Staff Witness McKinnie stated three reasons why it does not recommend conducting successive ETC designation proceedings: (1) USCC’s ability to serve via resale, (2) the availability of Lifeline to low-income consumers, and (3) the waste of administrative resources as a result of relitigating these issues again in another year. Tr.783-84.

<sup>30</sup> Tr. 780-1.

At the hearing, Intervenors also mischaracterized the Commission's *Ex-Op* case, TA-2001-251, incorrectly claiming that it stands for the proposition that a carrier cannot be designated unless it proposes to "serve" throughout a proposed ETC service area. They wrongly equate the word "serve" with the concept of "serve with facilities."<sup>31</sup> In fact, the *Ex-Op* applicant refused to *offer and advertise* its services throughout the proposed ETC service area, which formed a valid basis for the Commission to deny its application. On the stand, Staff witness Adam McKinnie read directly from page 5 of the case: "Therefore, Ex-Op may be designated only for the Kearney exchange, for Ex-Op *has not shown that it will both offer and advertise the services* in question in a larger area upon designation<sup>32</sup> [**emphasis added**]." As shown above, U.S. Cellular has repeatedly committed under oath to *immediately* offer and advertise the supported services throughout its ETC service area.<sup>33</sup>

U.S. Cellular has agreed to provide this Commission with a plan to construct facilities that provide network coverage in every wire center where it requests ETC service (or to explain why such construction is not needed).<sup>34</sup> At this early stage, U.S. Cellular believes that every rural wire center in Missouri requires facilities improvement,<sup>35</sup> although such a plan is not

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<sup>31</sup> See Intervenors' examination at Tr. 781-2.

<sup>32</sup> Tr. 782.

<sup>33</sup> See Tr. 643: "Q. And in the meantime, those areas in which you are not being -- not doing improvements, how will they benefit from your ETC designation? A. We -- we have roaming agreements in all of those other areas with other carriers. And we have the ability to resell in those areas for customers who would want U.S. Cellular service. Q. So that if you get a request, you have a means to provide the service? A. Yes."

<sup>34</sup> See Mr. Johnson's testimony at Tr. 643: "As far as if we look past the two years -- and, again, as I mentioned earlier, that planning for that is -- is fuzzier, but we expect to and intend to improve all areas in the ETC area that -- that qualify for high cost support."

<sup>35</sup> See Exh. 26 at p. 4.

capable of execution within two years.<sup>36</sup> Even urban wire centers require improvement, although support would not be used in such areas.<sup>37</sup>

It is completely unnecessary to engage in a series of successive ETC designations for the same carrier, as the Intervenors would have the Commission do. The Commission can see on USAC's web site how much support is made available to ETCs. It can annually review what the carriers do with funds to ensure investments are being made to improve networks in eligible areas. And, the Commission is able to look forward with each rolling two-year plan being submitted and observe a carrier's network advancing.

In sum, there is no value to the Commission in opening multiple additional proceedings to redefine ILEC service areas and litigate multiple ETC designation requests filed by the same carrier. The Commission has every tool at its disposal to ensure that funds are used properly. If a carrier meets its obligation under Section 214(e)(1) of the federal statute to offer and advertise the service throughout the area, and invests all of the support it receives appropriately, it is unclear how a state commission could deny ETC status to a carrier for failing to complete network construction within two years without contravening federal law.

**C. U.S. Cellular Complies With The Rule Requiring a Rolling Two-Year Plan to Demonstrate That Support Will Be Used Throughout the Proposed ETC Service Area.**

In its initial two-year plan, U.S. Cellular detailed every single wire center that would receive facilities-based service with available high-cost support funds.<sup>38</sup> The company also

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<sup>36</sup> See Mr. Wright's testimony at Tr. 574 concerning likely construction by year five: "There would be a heck of a lot more green on that map, which would include the boot heel area. Obviously, Springfield would be now covered. And those areas of high cost support we're talking with the green areas as it is today would continue to widen in that five-year process, yes."

<sup>37</sup> See Tr. 563: "Q. Do you think that USF support can be used for non-high cost wire centers? A. . . . No, we cannot. Just in the high cost areas."

committed to immediately offer service via resale in the remaining wire centers, until such time as network facilities are constructed.<sup>39</sup> U.S. Cellular's two-year plan demonstrates a commitment to build facilities throughout the ETC service area, sets forth specific projects that use all support received within the first two years to expand its network, commits to expand its network as additional support is received, and commits to offer and advertise the services as required by the federal statute *immediately*.<sup>40</sup> That showing complies with 4 CSR 240-3.570.

In its supplemental filing, U.S. Cellular tracked the language contained in the Commission's March 21 Order in this proceeding, providing information on each of the required elements, including:

- A detailed description of construction plans, start/end dates, population affected, existing tower locations, and estimated budget amounts. All of these items are set forth in U.S. Cellular's Compliance Filing and attachments.
- A two-year plan demonstrating, with specificity, that high-cost universal service support shall only be used for the provision, maintenance and upgrading of facilities and services for which the support is intended in the Missouri ETC service area in which ETC designation was granted. U.S. Cellular submitted a two-year plan which designated almost all of its support to new cell site construction, which information was provided with specificity as to where and when new projects would be constructed.
- The plan shall include:
  - A detailed map of coverage area before and after improvements and identifying tower site locations. *See* Compliance Filing, Appendices 4 and 5.
  - The specific geographic areas where improvements will be made. *See* Compliance Filing at Appendix 5.
  - The projected start and completion dates for each project. *See* Compliance Filing at Appendix 1.
  - The estimated amount of investment for each project that is funded by high-cost support. *See* Compliance Filing at Appendix 3.

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<sup>38</sup> *See* Compliance Filing at Appendix 2. *See also*, Tr. 637.

<sup>39</sup> In this case, U.S. Cellular has roaming agreements with other in place so as to fulfill its commitment. Section 214 of the federal statute also permits a carrier to resell the services of another ETC, such as the ILEC.

<sup>40</sup> We also note that supplemental Exhibit 34 sets forth what U.S. Cellular plans to build in Missouri with internally generated capital.

- The estimated population that will be served as a result of the improvements. *See* Compliance Filing at 3.
- If the applicant believes improvements in a wire center are not needed, an explanation of the basis of this determination and a demonstration of how funds will otherwise be used to further the provisions of supported services in that area. *See* Compliance Filing at 3-4; Exh. 26 at 3-4.
- 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. *See* Compliance Filing at 5.

With respect to potentially open items, U.S. Cellular provides the following:

4 CSR 240-3.570 (2)(A)(3)(F) allows carriers to state where they believe facilities do not need to be constructed. That rule can have only one reasonable interpretation, consistent with the federal statute: If a carrier cannot provide facilities-based services in an area, it can explain to the Commission why and how customers in the area can receive its services through resale.

U.S. Cellular did exactly that, stating:

The fact that a given wire center does not appear in our 2-year plan does not mean that additional coverage or capacity are not needed there; it means that our ability to make those improvements is limited by available funding as well as our need to build out in an orderly fashion in a manner that follows sound wireless engineering principles. We believe every wire center in our Missouri ETC service area has at least some areas that are in need of improved coverage and capacity. Every year we will use available high-cost support to make improvements in additional areas, and we have committed to report our progress annually to the Commission. Should we identify any wire center where no improvements are needed, we will identify them for the Commission. As of this date, we believe all wire centers need some improvement.<sup>41</sup>

If the Commission adopts AT&T's interpretation that facilities must be constructed to cover an entire area (something the ILECs' technology cannot do), the entire resale option for all ETCs, including ILECs, would be written out of existence. This is a result never contemplated in Case No. TX-2006-0169, nor by Section 214 of the federal statute.

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<sup>41</sup> Exh. 25 at pp. 3-4.

Staff took issue with U.S. Cellular's use of estimates in its submission, however the rule specifically requires estimates. See, 4 CSR 240-3.570 (2)(A)(1); (2)(A)(3)(D); and (2)(A)(3)(E). Mr. Johnson explained that U.S. Cellular's estimates were well founded in that they are based on historical data from previously executed build plans.<sup>42</sup> Moreover, when U.S. Cellular submits its annual report describing how it used support, it will provide exact numbers for each investment category.<sup>43</sup>

In sum: the Commission should: (1) Accept U.S. Cellular's initial rolling two-year plan, (2) Require U.S. Cellular to follow the rules just adopted, and (3) Require U.S. Cellular to explain annually how support is being used and how support will be used going forward, pursuant to a rolling two-year plan. As structured, the Commission's rules collect data that is timely and requires annual updates to ensure that each carriers' plans stay on track so that the Commission can confidently recertify carriers with the FCC each October.

#### **IV. A GRANT OF U.S. CELLULAR'S APPLICATION WILL SERVE THE PUBLIC INTEREST**

In its brief following the 2005 hearing, U.S. Cellular set forth a detailed explanation why consumers would be well served by its designation. Nothing has changed since then, except that U.S. Cellular has been asked to update the record to demonstrate how it would satisfy the network improvement plan requirement under rules adopted in early 2006. U.S. Cellular has submitted a plan that fully satisfies this requirement and further demonstrates that its designation will result in substantial and measurable benefits to consumers throughout its Missouri ETC service area.

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<sup>42</sup> Tr. 648-49.

<sup>43</sup> Tr. 649.

**A. The Construction Of 39 New Cell Sites Will Dramatically Improve Service To Missouri’s Rural Areas And Is Consistent With Sound Engineering Practices.**

Whether 39 new cell sites will improve coverage, capacity and service quality to roughly a quarter million rural Missouri citizens is hardly subject to debate.<sup>44</sup> U.S. Cellular submitted maps showing new coverage being provided in areas that are either completely unserved or in areas where U.S. Cellular currently has poor coverage.<sup>45</sup> U.S. Cellular witness Alan Johnson, a radiofrequency (“RF”) engineer who designs wireless networks, testified to the sound engineering design of U.S. Cellular’s proposed two year expansion plan.<sup>46</sup> U.S. Cellular also foreshadowed its plan to reach the state’s boot heel within the first five years after it is designated – which expansion will accelerate with support available in years 3-5.<sup>47</sup>

Mr. Johnson explained how even large size maps have limited utility in depicting the real world coverage that users experience.<sup>48</sup> To that end, U.S. Cellular submitted “drive test results” demonstrating how real world coverage can differ significantly from predicted coverage shown on a relatively small-scale map. For example, Mr. Johnson highlighted U.S. Cellular’s drive test at Exhibit F, showing significant “dead” areas within the Livonia community, which appears to be fairly well covered in U.S. Cellular’s predicted coverage map in Exhibit 34.<sup>49</sup> Mr. Johnson also testified that construction of new network facilities outward from the existing network is

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<sup>44</sup> See Compliance Filing at p. 3.

<sup>45</sup> See Compliance Filing at Appendices 4 and 5.

<sup>46</sup> See generally Exh. 25. See also Tr. 627-30.

<sup>47</sup> See Tr. 546-47, 574.

<sup>48</sup> Tr. 614.

<sup>49</sup> Tr. 657.

sound engineering practice.<sup>50</sup> He advised that constructing a single cell in a remote area would result in consumer dissatisfaction because expectations for a wide area mobile network would not be met.<sup>51</sup> He explained that the better course is to construct multiple sites in a rural area so that consumers have the benefit of a high-quality wireless network immediately upon system activation.<sup>52</sup>

In response to Commissioner Gaw's questions at the hearing, U.S. Cellular submitted supplemental Exhibit 34, depicting U.S. Cellular's (1) existing network as of June 30, 2006, (2) its cell site construction for the remainder of 2006, and (3) its planned cell site construction for 2007 without support. This map vividly illustrates the benefits that high-cost support will bring to rural Missouri. The sites constructed in 2006 and those planned for 2007 without support are overwhelmingly located in the urban areas of St. Louis and Springfield, and along major highways. The cell sites included in its proposed first year construction plan *with support* are overwhelmingly located in more rural areas of the state. This is also borne out by Witness Johnson's testimony, which showed that the average household population density for areas to be covered with high-cost support is approximately 26 persons per square mile, while the average population density for all wire centers throughout the entire state is 70 persons per square mile.<sup>53</sup> Mr. Johnson's testimony also demonstrated that 41 of the 48 wire centers that will receive

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<sup>50</sup> See Exh. 26 at pp. 4-5, 8, 9-10.

<sup>51</sup> See *id.* at pp. 4-5.

<sup>52</sup> See *id.*

<sup>53</sup> See Exhibit 26-HC at p. 7 and Exh. D.

improved service as a result of the proposed build-out are sparsely populated in relation to the corresponding ILEC study area.<sup>54</sup>

Intervenors offered no witness who is an RF engineer. Other than Mr. Brown's attaching an antenna to his home, neither he nor Mr. Schoonmaker have ever designed a wireless system, nor are they experts who are trained RF engineers, qualified to provide testimony on system design.<sup>55</sup> Moreover, it is unclear what Mr. Brown was attempting to prove with his maps, other than to concoct a "damned if you do, damned if you don't" scenario. For example, Mr. Brown argued at one point that his maps demonstrate that U.S. Cellular is not proposing to construct throughout its ETC service area within two years.<sup>56</sup> He has also argued, to the contrary, that U.S. Cellular is already competing with ILECs in rural areas and does not need support.<sup>57</sup>

Having no experience designing systems, Mr. Brown is not qualified to prepare an accurate map of U.S. Cellular's system, much less advise the Commission as to whether U.S. Cellular's system design comports with established wireless industry standards.<sup>58</sup> Mr. Schoonmaker based his testimony and conclusions on Mr. Brown's work. He made no attempt to demonstrate to the Commission how a wireless network operates and lists his expertise in the area of accountancy.<sup>59</sup> Mr. Schoonmaker also conceded that his qualifications as a non-engineer

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<sup>54</sup> *See id.*

<sup>55</sup> Tr. 804, 811.

<sup>56</sup> *See* Exhibit 30-HC at p. 13. Again, as discussed above, this "requirement" cited by Mr. Brown does not exist.

<sup>57</sup> *See* Exhibit 11-HC at p. 25 ("[T]o read US Cellular's statements you would think that US Cellular currently does not compete in these markets, and only if they are granted ETC designation will there be competition in rural areas in the state of Missouri. Nothing could be further from the truth. Wireless carriers, including US Cellular, have built facilities throughout rural America, including rural areas in Missouri.")

<sup>58</sup> At the 2005 hearing, Mr. Brown could not answer even rudimentary questions concerning basic engineering practices and terminology. Tr. 311-14.

<sup>59</sup> Tr. 811.

“may have” been questioned before, stating that it was probably in “the first round of this proceeding.”<sup>60</sup> Notably, his qualification to testify on wireless matters had been challenged 18 months earlier when he testified on behalf of ILECs during their unsuccessful opposition of Illinois Valley Cellular’s petition for designation as an ETC in southern Illinois.<sup>61</sup> Additionally, while Witness Brown stated his belief that his qualifications had never been challenged in other ETC proceedings in which he had testified, it is telling that the five prior proceedings he referred to on the stand all resulted in a grant of ETC status to a wireless carrier.<sup>62</sup>

The lack of RF engineering expertise by Intervenor witnesses led to several inaccurate statements. Despite U.S. Cellular’s effort to clarify questions concerning wireless technology, Intervenors ignored those explanations and repeated the same misinformed arguments.

For example, in response to a CenturyTel data request regarding the appearance of greater coverage for a given cell site in the maps attached to the two-year plan than in the maps submitted a year earlier, U.S. Cellular explained that the change in appearance was due to a

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<sup>60</sup> Tr. 818.

<sup>61</sup> See Illinois Valley Cellular RSA 2-I, 2-II and 2-III Partnerships, ICC Docket Nos. 04-0454-0456, Pre-Filed Rebuttal Testimony of Michael K. Kurtis (June 17, 2005) at pp. 20-21 (“I note that the Intervenors utilized the services of an engineering firm to prepare certain coverage maps. Yet for some reason, they do not utilize an engineer to either introduce these maps into evidence or to discuss engineering issues with respect to IVC’s network. While Mr. Schoonmaker indicates that maps were prepared under his ‘supervision and direction’, the fact that Mr. Schoonmaker does not hold a degree in electrical engineering or provide any foundation for any other technical expertise, it is surprising that the engineering firm that prepared the maps upon which the ‘engineering issues’ are based, does not provide expert testimony in support of the conclusions and assertions made by Mr. Schoonmaker. However, just as Mr. Schoonmaker in providing his ‘legal analysis’ was not hindered by the need to accurately characterize the law when precedent was at odds with the position he wanted to advance, by not being an engineer, he appears to feel quite free to make assertions that are neither technically correct nor based in sound engineering practice.”)

<sup>62</sup> Tr. 308-09 (Minnesota, South Dakota, Oregon); Tr. 807 (Missouri RSA No. 5, Northwest Missouri Cellular). While Mr. Brown claimed that the grant in Oregon was made “in an earlier era” (Tr. 309), it is worth pointing out that the grant in that case was made after the commission re-opened the record so it could take additional evidence and considered the application in light of the more rigorous standards adopted by the FCC in the *Virginia Cellular* and *Highland Cellular* decisions.

number of factors, including the replacement of the software propagation tool and the re-tuning of the propagation model – both of which are commonly done in the wireless industry and both of which can cause significant changes in how signal strength is shown on a map.<sup>63</sup> When CenturyTel Witness Brown ignored U.S. Cellular’s explanation in his subsequent rebuttal testimony, Witness Johnson reiterated and elaborated on that explanation in his surrebuttal testimony.<sup>64</sup>

The attempt by Intervenors to portray U.S. Cellular’s proposed construction as centered in areas “already covered” is at odds with U.S. Cellular’s testimony, its maps, and its drive tests. It presumes a carrier would overbuild an area that it already covers. Moreover, it completely ignores the careful work that U.S. Cellular undertakes before constructing a new cell site – work that is essential to ensure the new facilities will deliver significant consumer benefits. For example, when asked on cross-examination how U.S. Cellular could know in advance whether a cell site will deliver the promised benefits, Mr. Johnson explained that the company often goes so far as to put a transmitter on a crane to test a proposed cell site’s performance characteristics before committing to build a tower in a particular spot.<sup>65</sup>

Company witness Nick Wright also testified how U.S. Cellular has multiple tools at its disposal to measure system performance and the customer’s experience, all of which are continually reviewed and form an integral part of the annual budgeting process, to determine where cell site construction can deliver the most consumer benefits.<sup>66</sup> Mr. Wright explained that

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<sup>63</sup> See Exh. 31 at Schedule 19.

<sup>64</sup> See Ex. 26 at p. 12.

<sup>65</sup> Tr. 627-28.

<sup>66</sup> Tr. 572-73.

these tools generate a list of cell sites the Company wishes to build, which are ranked in priority.<sup>67</sup>

Universal service support will enable U.S. Cellular to construct “below the line” sites that would not otherwise be constructed in the absence of support.<sup>68</sup> Mr. Wright has repeatedly testified under oath that all such support will be used lawfully and will be incremental to the company’s capital and operating expense budgets each year.<sup>69</sup> Most recently he stated:

Our commitment, as I said under oath then and I'll say it again today, we understand that this -- this support is incremental in dollar for dollar over what we will build in a particular build plan in mid Missouri, and we understand that.

And that I'm prepared each review process to come and stand before this Commission and tell this Commission where that money went, why it went where it went and justify the program itself. And we're committed to do that. We've done that in six other states, and we are fully prepared to do that in this state.<sup>70</sup>

U.S. Cellular’s proposed construction will provide enormous benefits for rural Missouri citizens. The placement of new cell sites was dictated by sound engineering practices, overseen by professional RF engineers who explained U.S. Cellular’s build plan under oath. Because neither Mr. Brown nor Mr. Schoonmaker are experts on the subject of radio frequency engineering, they are simply not qualified to testify on the extent to which planned wireless network construction will benefit consumers. Accordingly, their testimony must be discounted.

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<sup>67</sup> Tr. 573.

<sup>68</sup> *Id.*

<sup>69</sup> Tr. 119-20, 124-25, 141-42, 160-61.

<sup>70</sup> Tr. 570.

In sum, U.S. Cellular has presented uncontroverted record evidence that that it will construct the facilities contained in its two-year plan, and that it has performed as promised in the other states where it has been designated. The areas to be served with high-cost support are rural in character, unserved, or poorly served. Roughly a quarter million rural residents will directly benefit greatly from the additional investment.<sup>71</sup>

**B. The Construction Of 39 New Cell Sites Will Serve The Public Interest By Providing Health, Safety And Economic Development Benefits To Rural Missouri.**

It scarcely bears mention that a wireless phone is among the most powerful safety devices any consumer can use. In addition to basic 911 service, wireless consumers benefit from E-911 service, which allows Public Safety Answering Points to locate a calling party. However, basic 911 and E-911 are useless if a customer is in an area that does not have coverage. This is perhaps the most compelling reason why high-cost support is crucial for rural wireless consumers. Every time a new cell site is constructed, a very large area receives new capability to complete a call, and dead spots are increasingly filled in. Accordingly, it is the construction of new cell sites which drives the bulk of health and safety benefits to consumers.

U.S. Cellular's CDMA<sup>72</sup> network provides E-911 accuracy that is superior to that of carriers using other technology. CDMA telephones employed by U.S. Cellular have a global positioning satellite ("GPS") chip in the handset that can be pinpointed within roughly 100 yards of where a call can be completed.<sup>73</sup> The system does not depend on the presence of multiple towers to "triangulate" a person's position, as a GSM network does. Witness Johnson illustrated

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<sup>71</sup> Compliance Filing at p. 3.

<sup>72</sup> Code Division Multiple Access (DCMA) is a digital, spread spectrum, packet-based access technique generally used in RF radio systems that was perfected and commercialized by Qualcomm.

<sup>73</sup> Tr. 659.

the power of CDMA when he described the recent tragedy on Mt. Hood in Oregon, where technicians using a GSM network were able to locate a cell user within a search area of approximately 26 square miles.<sup>74</sup> Had the victim been on a CDMA network like U.S. Cellular's (and within range of *any* cell site of *any* CDMA carrier), authorities would have had an initial search radius of approximately one football field.<sup>75</sup>

In 2006, U.S. Cellular achieved the FCC's requirement that 95% of its handsets have a GPS chip, so that E-911 benefits are fully available.<sup>76</sup> Moreover, the company is E-911 Phase II compliant in every place where a Public Safety Answering Point ("PSAP") has requested Phase II capability.<sup>77</sup> Yet, there remain people in rural areas who refuse to relinquish their analog phones, which transmit back to the cell site with 3.0 watts of power, primarily because cell coverage is inadequate to permit a modern handset, which transmits back to the cell site at only 0.6 watts, to operate reliably.<sup>78</sup> For people who refuse to convert, they have made a choice that the ability to complete a call is more valuable from a safety perspective than the ability to receive E-911 functionality. As U.S. Cellular builds new cell sites, the number of people who can reliably use GPS-capable handsets will increase, as will the area within which such handsets will

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<sup>74</sup> Tr. 659-660.

<sup>75</sup> *Id.*

<sup>76</sup> U.S. Cellular has certified to the FCC that, on or before December 31, 2006, it fully complied with the requirement that 95% of handsets in service are E-911 capable. *See* Letter from Thomas P. Van Wazer to Marlene H. Dortch, CC Docket No. 94-102 (Jan. 19, 2007).

<sup>77</sup> *See* Exh. 26 at p. 18.

<sup>78</sup> This was the primary reason why U.S. Cellular requested an extension of the FCC's December 31, 2005 deadline to convert 95% of its handsets to GPS-capable units. The FCC recently denied U.S. Cellular's request, some 13 months after the deadline, and several months after U.S. Cellular met the 95% standard. Although U.S. Cellular has certified as to its compliance, the company may still request reconsideration of the FCC's decision. *See* Request for a Limited Waiver of United States Cellular Corp., CC Docket No. 94-102, FCC 06-66 (rel. Jan. 5, 2007).

deliver the location/tracking functions. Accordingly, by granting this application, the Commission will greatly improve the health and safety of rural Missourians.

**C. The Federal Statute Does Not Require This Commission to Apply A Separate Public Interest Test for Areas Served by Non-Rural Telephone Companies.**

As U.S. Cellular noted in its Position Statement, the Federal Telecommunications Act sets forth different standards for ETC designations depending on whether the proposed ETC service area is served by non-rural ILECs or rural ILECs. Specifically, the statute provides that a state commission “shall” designate an additional ETC in areas served by non-rural ILECs consistent with the public interest, convenience and necessity and provided the carrier satisfies the requirement under Section 214(e)(1) to offer and advertise the supported services. For areas served by rural ILECs, the statute provides that a state commission “may” designate an additional ETC in such areas but that it must first make the additional finding that the designation would serve the public interest. The latter provision, particularly in conjunction with the contrasting language – “may” vs. “shall” – places beyond dispute the notion that a separate public interest finding is not envisioned for non-rural areas.

Undaunted by clear statutory language to the contrary, AT&T makes much of the need for a public interest showing to be made by a carrier applying for ETC status in an area served by a non-rural ILEC. The FCC has made two different and diametrically opposed rulings on the matter: (1) its holding in *Virginia Cellular* that a public interest showing is required for areas served by a non-rural carrier, albeit a lower standard,<sup>79</sup> and (2) its prior holding in *Cellco* that competitive ETC designations in non-rural areas are per se in the public interest.<sup>80</sup> The *Virginia*

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<sup>79</sup> See *Virginia Cellular LLC*, 19 FCC Rcd 1563, 1575 (2004) (“*Virginia Cellular*”).

<sup>80</sup> See *Cellco Partnership d/b/a Bell Atlantic Mobile*, 16 FCC Rcd 39 (Com. Car. Bur. 2000).

*Cellular* case is on appeal and is not expected to be resolved for some time.<sup>81</sup> The *Cellco* case, by contrast, has the force of a final Commission decision, as it was not subjected to reconsideration or appeal. 47 U.S.C. Section 155(c)(3).

U.S. Cellular's position is that the FCC's prior reading of the statute was correct and its current reading is not. The FCC's pronouncement, which applies to petitions filed with the FCC under Section 214(e)(6), is not binding on states which designate carriers pursuant to Section 214(e)(2). Section 214(e)(2) authorizes states to decide whether the statutory distinction between "may" and "shall" must be respected, or whether a separate public interest test – something less stringent than that required in rural ILEC areas – is required.

Should the Commission require a separate public interest test for AT&T areas, U.S. Cellular believes the FCC's approach to be reasonable, i.e., if a carrier demonstrates that it is in the public interest to designate it in areas served by rural telephone companies, then surely the public interest in areas served by non-rural telephone companies will be served.<sup>82</sup>

Here, U.S. Cellular has made identical showings in every area, irrespective whether it is served by a rural telephone company or a non-rural company. Accordingly, should the Commission find that U.S. Cellular's application should be granted in rural areas, then the public interest will be served in AT&T areas.

#### **D. Consumers Will Receive Affordable Telephone Service From U.S. Cellular.**

As an initial matter, the FCC has properly ruled that affordability is presumed in a competitive marketplace. That is, no market participant in a competitive market has the power to

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<sup>81</sup> Petition for Reconsideration of N.E. Colorado Cellular, Inc., Midwest Wireless Holdings, L.L.C., Rural Cellular Corp., and U.S. Cellular Corp. (filed Feb. 23, 2004) at p. 18.

<sup>82</sup> See *RCC Minnesota, Inc. and RCC Atlantic, Inc.*, 20 FCC Rcd 15833, 15939 (2005); *Virginia Cellular, supra*, 19 FCC Rcd at 1575.

over- or under-price its services to drive out its competition. If there are competitive services in a market, then it is, by definition, affordable since consumers have choices and can make choices among carriers competing for their dollars.<sup>83</sup> Because a competitive ETC is only eligible to receive support if it gets a customer, it is incapable of pricing its services to a level that would not be affordable. If U.S. Cellular's prices are too high, it will lose customers and support. Moreover, a competitive ETC has a strong incentive to market to the many low-income consumers who are eligible to receive Lifeline benefits.

These concepts are important because neither the federal statute, the state statute, nor this Commission's rules require any single carrier to offer a specific affordable service. The federal statute sets forth the universal service goal that services should be available at affordable rates,<sup>84</sup> and affordability is promoted when competitors are active in a market. Thus, the Commission can conclude that the designation of U.S. Cellular to be an ETC will promote affordability for Missouri consumers without regulating U.S. Cellular's rates, which is prohibited under 47 U.S.C. Section 332.

If the Commission determines that an "affordability test" should be applied to ensure that Missouri's low-income consumers have an affordable option, U.S. Cellular has committed under oath to offer its Lifeline Rate Plan of \$25, which includes 400 minutes of calling with a local calling area that encompasses the contiguous U.S.<sup>85</sup> As Mr. Wright testified, U.S. Cellular's

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<sup>83</sup> *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, First Report and Order*, 85 FCC 2d 1, 31 (1980) ("[F]irms lacking market power simply cannot rationally price their services [or impose terms] in ways which [are unjust, unreasonable or discriminatory.] [A] non-dominant competitive firm . . . will be incapable of violating the just and reasonable standard. . . . If it charges unreasonably high rates or imposes unreasonable terms or conditions in conjunction with the offering, it would lose its market share as its customers sought out competitors whose prices and terms are more reasonable.")

<sup>84</sup> 47 U.S.C. Section 254(b)(1).

<sup>85</sup> See Exh. 25 at p. 8; Tr. 103-04, 532-34.

experience in other states is that low-income consumers prefer the company's \$39.99 plan because it can represent a significant savings over wireline rates.<sup>86</sup> In any event, U.S. Cellular will allow Lifeline customers to choose other rate plans in Missouri so they can choose the rate plan that is most affordable for them.<sup>87</sup>

Some Intervenors have posited that the Commission must make a separate public interest determination for every single ILEC where U.S. Cellular applies to be an ETC.<sup>88</sup> U.S. Cellular is unaware of the FCC or any other state having ever conducted such an analysis. To the extent that one is conducted, the requirement that a newcomer demonstrate that it offers one rate plan that is comparable to that of the ILECs where it proposes to be designated is the only analysis that appears to be ILEC-specific.<sup>89</sup> All other public interest factors, such as whether designation will benefit consumers, or whether there will be health, safety and economic development benefits, are evident throughout a newcomers' proposed ETC service area and are not ILEC-specific.

U.S. Cellular's Lifeline Rate Plan is comparable to that offered by every other ILEC in its proposed ETC service area. As shown in Exhibit 27, Exhibit A, ILEC "base rates" range from \$5.00 to \$20.33.<sup>90</sup> Of course, the analysis does not end there. As the FCC has made clear, a carrier is not required to offer a rate plan with "unlimited" local calling within a small local

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<sup>86</sup> See Exh. 25 at p. 9, 11.

<sup>87</sup> Tr. 109.

<sup>88</sup> See SCTG Post-hearing Brief at pp. 11-14.

<sup>89</sup> Although we note that the FCC and most other states have never conducted such an analysis.

<sup>90</sup> See also Exhibit 31, Schedule 17. A base rate of \$5.00 is, on its face, evidence of a carrier that is over-subsidized and keeping rates artificially low.

calling area to demonstrate comparability; rather, one must examine the total value of the service offering, including the size of the local calling area.<sup>91</sup>

The following chart demonstrates how U.S. Cellular’s Lifeline Rate Plan is comparable to that of every ILEC.<sup>92</sup>

U.S. Cellular	ILECs
Rate: \$25.00	Rate: Ranges from \$5.00 to \$20.33
Local calling scope: Calls can be placed from anywhere within U.S. Cellular’s 25-state service area without additional charge.	Calls can be placed from the premises where service is ordered. Calls placed from all other locations require a separate charge (e.g., calling card, pay phone, hotel charges).
Local calling area: Contiguous U.S. – roughly 400 million phones.	Local calling area: One exchange, or a few exchanges. Some carriers offer extended area calling for additional fees.
Mobility: Phone may be used any place that CDMA technology is employed, including networks of Sprint, Verizon Wireless, and Alltel.	Mobility: None.
Discounted phone available with rate plan: Yes, and Lifeline-eligible consumers can get a phone for one cent (\$0.01).	Discounted phone available with rate plan: No. Customers must purchase phone from a third party.
Included features: Call waiting, caller ID, call forwarding, conference calling, voice mail	Included features: Varies by carrier, but most features at left require additional charge.
Requirement to enter into contract: None, unless consumer wishes to obtain discounted phone. Lifeline customers may terminate without contract penalty. <sup>93</sup>	Requirement to enter into contract: None.

<sup>91</sup> *ETC Report and Order, supra*, 20 FCC Rcd at 6385. Indeed, U.S. Cellular notes that NW Missouri Cellular, an ILEC-owned company, offers unlimited local calling to a very small local calling area, perpetuating high-prices intra-LATA toll. It may be best described as a cordless phone with a slightly longer range.

<sup>92</sup> For the Commission’s reference, U.S. Cellular’s Exhibit 27, Exh. A provides an individual analysis of each ILEC rate plan. U.S. Cellular will not repeat that analysis here, other than to present this comparative chart which is applicable to each ILEC affected by U.S. Cellular’s application.

<sup>93</sup> Tr. 576-78.

U.S. Cellular has roughly a quarter of a million customers in Missouri.<sup>94</sup> It cannot be reasonably argued that U.S. Cellular is failing to offer rate plans that are comparable or affordable, since consumers who live in areas where U.S. Cellular has service are clearly choosing them. Moreover, as shown above in the chart, U.S. Cellular's basic Lifeline Plan clearly provides consumers a comparable offering to that of every single ILEC in its service territory. Some consumers may choose wireline service because they find it more useful, but if they don't choose U.S. Cellular's offerings in sufficient numbers, U.S. Cellular will have to improve its offerings if it expects to gain any substantial level of universal service support. Unlike ILECs, U.S. Cellular is not guaranteed a certain level of support even when customers choose another carrier.

Intervenors' objections on affordability and comparability are simply incorrect. Mr. Schoonmaker posited, without any foundation or support, that because U.S. Cellular's Lifeline Rate was several dollars higher than the average wireline "base rate," consumers would not be "financially better off" with U.S. Cellular's service.<sup>95</sup> Aside from the fact Section 332 of the federal act preempts states from setting rates for wireless carriers, Mr. Schoonmaker's argument seeks to hide the major problem that the overwhelming majority of low-income consumers have with wireline rate structures in rural areas: a local calling area that oftentimes provides "free" calling to only a few hundred or a few thousand access lines, very high intra-LATA toll charges, *and no other choices*.

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<sup>94</sup> Tr. 531.

<sup>95</sup> Exhibit 31 at p. 12 .

Here in Missouri, U.S. Cellular introduced evidence showing that many rural ILECs offer a low base rate that limits consumers to just a few “free” calls.<sup>96</sup> All other calls incur intra-lata toll charges, running up bills for even low-income users. For example, residential customers of Choctaw Telephone Company pay a base rate of \$9.90 for a local calling area consisting of the Halltown Exchange, which has 559 residential and 72 business customers. For an additional \$11.45, they can expand their local calling area to include the Springfield metropolitan area. Residential customers of Holway Telephone Company pay a base rate of \$13.00 for a local calling area consisting of two exchanges, with the ability to reach 495 residential and 54 business numbers. Residential customers of Orchard Farm Telephone Company pay \$12.25 for the ability to reach 572 residential and 277 business numbers in the Orchard Farm Exchange; for an extra \$12.35, they can expand their local calling area to include the St. Louis metropolitan area. For these carriers, all other calls incur toll charges.

For many rural consumers, wireless service presents a meaningful alternative that provides significant savings each month. Low-income consumers who live in areas where there is no wireless ETC don’t have a choice. They are stuck with the wireline network and can’t shift away from subsidized service. In sum, U.S. Cellular has demonstrated with uncontroverted evidence that its ability to construct new cell sites will promote affordable telephone service to consumers who live within the areas where service quality is new or improved.

**E. U.S. Cellular’s Designation Will Advance Lifeline Service in Missouri.**

As a general matter, the number of low-income households participating in the federal Lifeline program in areas served by rural ILECs is very low. According to the U.S. Census Bureau, household poverty rates nationwide are roughly 12% and many rural areas in Missouri

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<sup>96</sup> See Exhibit 27 at Exh. A.

are at or above the national average.<sup>97</sup> Yet, according to information publicly available on USAC's web site, with respect to a number of rural ILECs in U.S. Cellular's proposed ETC service area, only a handful of households have signed up for Lifeline benefits.<sup>98</sup> One company has *no* Lifeline customers.<sup>99</sup>

Plainly, there is an ongoing and acute failure to deliver Lifeline benefits in rural Missouri's low-income households that Mr. Schoonmaker refused to acknowledge. When confronted, he speculated that low Lifeline penetration was likely because "these are people that live in rural areas. They're independent. They don't necessarily like to be on a government dole, if you will, and they choose not to -- not to do that."<sup>100</sup>

However, a recent report by the Missouri Department of Social Services shows that in rural Missouri a substantial percentage of households *already* participate in one or more of the federal income-based programs which is a prerequisite to eligibility for Lifeline and Linkup benefits.<sup>101</sup> For example, the following percentages of households participate in the food stamp

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<sup>97</sup> See Income, Poverty, and Health Insurance Coverage in the United States: 2005 at <http://www.census.gov/prod/2006pubs/p60-231.pdf> ; Estimates for Missouri Counties, All Ages in Poverty, 2004 (most recent year available), at <http://www.census.gov/cgi-bin/saipe/saipe.cgi#SA11> . U.S. Cellular requests the Commission to take official notice of the Census Bureau statistics.

<sup>98</sup> See Quarterly Low-Income Support Disbursement Amounts by Company – 3Q06, at <http://www.usac.org/about/governance/fcc-filings/2007/quarter-1.aspx>, Table LI04. U.S. Cellular requests the Commission to take official notice of USAC's published data.

<sup>99</sup> *Id.*

<sup>100</sup> Tr. 816. Mr. Schoonmaker's speculative reasoning, that U.S. Cellular's success at Lifeline penetration may be because "a large part of [U.S. Cellular's] customers are from the St. Louis area" (Tr. 817) ignored the fact that low-income consumers who participate in the federal government's qualifying low-income programs are entitled to participate in the Lifeline program. Additionally, in both urban and rural areas, all ETCs are obligated to publicize the availability of Lifeline discounts in a manner reasonably designed to reach potentially qualifying consumers. 47 C.F.R. Section 54.405(b).

<sup>101</sup> Monthly Management Report - Family Support Division, Division of Medical Services (MDSS, October 2006). U.S. Cellular requests the Commission to take official notice of the Department's statistics, which are available at <http://www.dss.mo.gov/re/fsmsmr.htm>.

program in the following rural counties in Missouri: Cooper: 23.2%; Crawford: 24.2%; Lawrence: 23.5%; Moniteau: 23.2%; Newton: 22.8%. Comparing these figures to low Lifeline penetration rates, the Commission may conclude that there are a lot of households in rural Missouri that are currently participating in a qualifying federal low-income program who either cannot afford wireline service, even with Lifeline subsidies, or who have not been informed that federal Lifeline benefits exist.

Witness Wright attested to U.S. Cellular's successful rollout of Lifeline in other states, achieving as much as 60% penetration on Native American tribal lands in some areas.<sup>102</sup> Here in Missouri, U.S. Cellular has applied for ETC status in the greatest area possible, including the St. Louis metropolitan area because participation in the Lifeline program will improve U.S. Cellular's competitiveness. For the Commission, designating U.S. Cellular gives low-income consumers in such areas an opportunity to have a choice in telecommunications service either because they find U.S. Cellular's offerings more affordable or because they are today unaware of the availability of the Lifeline program.

U.S. Cellular is ready to reach out to low-income consumers. The Company's commitment to do so will foster affordable telephone service and offer choices that are not today available to many low-income residents in its proposed ETC service area. Combined with an increasing area within which high-quality service will be available, this is another powerful public interest reason to grant U.S. Cellular's application.

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<sup>102</sup> Tr. 580.

**V. U.S. CELLULAR’S PROPOSED USE OF FEDERAL SUPPORT WITHIN AT&T’S RURAL MISSOURI WIRE CENTERS IS COMPLIES WITH THE FEDERAL STATUTE AND THE FEDERAL RULES FOR USE OF SUPPORT**

As discussed above, U.S. Cellular proposes to use federal high-cost support to extend its facilities throughout every rural wire center it proposes to serve in its application, to the greatest extent possible. There are a number of very rural areas that U.S. Cellular proposes to invest in that are served by AT&T – such as the Downing and Armstrong wire centers, with 9.04 and 10.77 persons per square mile, respectively.<sup>103</sup> Because AT&T receives no high-cost universal service support in those areas, U.S. Cellular will also receive no support when it constructs facilities and acquires customers in those areas, despite the fact that they are very rural in character. This is a quirk of the federal program for non-rural carriers such as AT&T in that the appropriate incentive to encourage telecommunications carriers to invest in those specific high-cost areas does not exist.<sup>104</sup>

U.S. Cellular understands its obligation to serve throughout the ETC service area and has chosen to expand its network in accordance with sound engineering design, without regard to the fact that it will not receive an appropriate “reward” for investing in AT&T’s rural wire centers. There is no federal law or rule which prohibits a competitive ETC from investing high-cost support in a rural wire center in which the ILEC gets no support.<sup>105</sup> Indeed, such a prohibition would be nonsensical as it would deny rural consumers, who pay into the fund, the benefits of high-cost support that the federal program was intended to deliver.

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<sup>103</sup> Exh. 26-HC at Exh. D. Both Mr. Wood and Mr. Stidham testified that AT&T serves very rural areas. *See* Tr. 681-2; 690; 720-21.

<sup>104</sup> In fact, even AT&T’s incentive to invest in its rural wire centers is reduced, since its ability to subsidize rural areas internally is under attack because competition in urban areas such as St. Louis is forcing AT&T to lower prices in urban areas.

<sup>105</sup> Mr. Wood noted that although a carrier may legally be permitted to invest in a low-cost wire center, the Commission’s oversight authority permits it to ensure support is directed to high-cost areas. Tr. 692-94.

Moreover, it would not be competitively neutral for a state commission to permit AT&T to invest in its rural areas for decades using implicit subsidies while denying a newcomer the opportunity to invest there with explicit subsidies.<sup>106</sup> U.S. Cellular recognizes that some of AT&T's wire centers are urban in character and it is up to the Commission to see that no carrier uses high-cost support in urban areas that do not require support to build a viable business.<sup>107</sup>

No party has presented any persuasive arguments or cited any precedents for the proposition that a CETC's investments should be limited as suggested by AT&T. For its part, AT&T has argued both sides of the issue. When U.S. Cellular submitted its initial 18-month plan in 2005, AT&T voiced a concern that "most consumers situated within the areas served by the almost 150 SBC Missouri wire centers for which U.S. Cellular seeks designation will not see any tangible benefits from the designation of U.S. Cellular as an ETC in these wire center areas. . . . None of the 16 towers are planned to be built in communities served by SBC Missouri's wire centers."<sup>108</sup>

But AT&T has decided that recent events in Kansas warrant a change of position. In November of 2006, the Kansas Commission opened a proceeding to determine whether there should be any restrictions on competitive ETC investment in AT&T's rural areas in Kansas.<sup>109</sup> AT&T now argues that this Commission should, in the course of a proceeding to determine whether a carrier should be designated as an ETC, make rules concerning how universal service

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<sup>106</sup> 47 U.S.C. Section 253(b) requires all state universal service rules to be competitively neutral, which means that the rules cannot favor one class of carrier or technology.

<sup>107</sup> Mr. Wood confirmed the Commission's authority to direct investments away from low-cost areas.

<sup>108</sup> Exhibit 18 at p. 7, lines 3-10. *See also* SBC Post-Hearing Brief at pp. 14-15.

<sup>109</sup> *See* Exhibit 33.

support may be invested.<sup>110</sup> Of course, AT&T would prefer to see its competition make no investments in its rural wire centers.

The question raised by AT&T has no place in this proceeding. It is premature and entirely inappropriate for this Commission to undertake a rulemaking proceeding in the course of an ETC designation proceeding, which decisions would necessarily affect other carriers not participating here. A quick review of the Kansas proceeding reveals why. The Kansas Commission must first deal with the question whether it even has the authority to restrict a carrier's investment of federal funds in a federal program in wire centers that are demonstrably high-cost. U.S. Cellular notes that it is using federal high-cost support to invest in "non-rural" areas of Verizon, Qwest, and AT&T in other states, just as it proposes to do here.<sup>111</sup> For AT&T to suggest that this Commission restrict investment in its areas could not be more self-serving, nor could it be worse for the consumers in these rural areas who could see the benefits of U.S. Cellular's planned construction as a result of the commitments made to this Commission in this proceeding.

AT&T's new advocacy not only contradicts its earlier testimony in this proceeding, but is inconsistent with its conduct in other states. For example, in Mississippi, AT&T's Cingular Wireless unit took in roughly \$60 million in federal high-cost support funds in 2006 for serving AT&T's wireline territories (formerly BellSouth), and is expected to draw a similar amount in 2007.<sup>112</sup>

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<sup>110</sup> See Exhibit 32 at pp. 5-6.

<sup>111</sup> See <http://www.usac.org/about/governance/fcc-filings/2007/quarter-1.aspx>

<sup>112</sup> Source: USAC Web Site, <http://www.usac.org/about/governance/fcc-filings/2006/>. We request that the Commission take official notice of USAC's published data.

AT&T's reference to the Kansas docket further illustrates the hypocrisy of its position. In Kansas, AT&T has had the benefit of nearly a *quarter of a billion* dollars in state universal service subsidies over the past 10 years.<sup>113</sup> AT&T has built its network infrastructure in Kansas and Missouri with the help of extensive subsidies over the decades – subsidies that were not available to competitors. To suggest that competitors must now be shut out from the same opportunity to build their networks in these areas on the theory that they are “low-cost” is truly preposterous.

AT&T's unsupported and incorrect assertion that U.S. Cellular is somehow “cross-subsidizing” its rural operations in Missouri from revenues earned in its St. Louis market must also be rejected. On cross-examination, AT&T's witness relented, claiming only that “depending on finances, which I haven't looked at for your company, if your costs of providing service in St. Louis are below the revenue you receive, then you have the opportunity and can and possibly do subsidize the service in Marcel.”<sup>114</sup> Although AT&T's witness avoided the issue, it is well settled that AT&T's historical ability to run its rural operations in Missouri and elsewhere was made possible by various sources of implicit subsidies unavailable to competitors, including its position as a monopoly carrier in metropolitan areas such as St. Louis.<sup>115</sup> As a monopoly, it was able to hold prices above market rates in urban areas. AT&T's ability to cross-

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<sup>113</sup> Source: Kansas Universal Service Fund (KUSF) Support Paid to Carriers (3/1/1997 to 2/28/2007), available at <http://www.kcc.state.ks.us/telecom/kusfsupport.pdf>. We request that the Commission take official notice of this document.

<sup>114</sup> Tr. 830.

<sup>115</sup> See *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Low Volume Long Distance Users, Federal-State Joint Board on Universal Service, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1 Report and Order in CC Docket No. 99-249 Eleventh Report and Order in CC Docket No. 96-45*, 15 FCC Rcd 12962, 12971-72 (2000) (“CALLS Order”).

subsidize today is now being compromised by the onset of competition in St. Louis, which has been forcing prices down for years.

For a competitive carrier such as U.S. Cellular, especially one that is a newcomer, having only launched its St. Louis market efforts less than two years ago, a cross-subsidy is *impossible*. U.S. Cellular has no monopoly position in St. Louis and little ability to price its services in St. Louis above market rates so as to create a subsidy. Any competitive carrier's ability to invest in rural parts of the state is restricted by its ability to earn a return on those investments, standing alone. That is precisely why rural Missouri generally has much poorer wireless service quality than do urban areas, even though there are at least eight wireless licenses authorized to serve throughout the state. If a cross-subsidy were possible, surely rural Missouri would have had much better wireless service by now. AT&T's suggestion that a carrier in a competitive urban market can subsidize its rural areas is unsupported by any rational economic theory.

No party introduced any evidence showing that AT&T's high-cost rural wire centers are different in character than the high-cost next door served by rural ILECs. Indeed, AT&T itself is currently advocating before the FCC that it needs high-cost support in the rural areas it serves.<sup>116</sup> AT&T's view that its own ability to cross-subsidize is limited is irrelevant to the question whether federal law permits a CETC to invest in a wire center of a non-rural carrier like AT&T that gets no support. The answer is absolutely yes. There is no such restriction in federal law and no federal or state case supporting such a proposition.

The Commission has ample authority to ensure that support is used to expand service throughout the ETC service area and to restrict support from being invested in high-value wire

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<sup>116</sup> Reply Comments of AT&T in CC Docket No. 96-45 (April 3, 2006) at p. 3 (“[A]lthough AT&T serves almost *four* times as many rural lines as any ‘rural’ carrier, it receives no federal high-cost support because it has been classified as a ‘non-rural’ carrier. This approach not only is patently arbitrary, but also inconsistent with the objectives of the Act [**emphasis in original**].”)

centers such as downtown St. Louis. But that is a far cry from restricting support to rural communities that need improved services, just so AT&T can forestall competition. AT&T's position should be rejected.

**VI. GRANTING ETC STATUS TO U.S. CELLULAR IN AREAS WHERE AN ETC HAS ALREADY BEEN DESIGNATED WILL SERVE THE PUBLIC INTEREST**

While this proceeding has been pending, wireless carriers controlled by ILECs obtained ETC status in a small portion of the area sought to be served by U.S. Cellular. Both of those carriers' applications were pending at the time evidence was taken in this case over the course of 2005. Because the overlaps in the requested ETC service areas were a matter of public record, any concerns about overlapping ETC designations might properly have been aired during 2005 in prefiled testimony, in position statements, in live testimony at the first hearing, or in post-hearing briefs. Yet the Intervenors chose not to raise the issue until they could safely do so – that is, after the ILEC-affiliated carriers received their designations.

While remaining silent on the issue during the previous phase of the proceeding may have been expedient for the ILECs with ownership in the companies whose applications were then pending, the Commission and the other parties in this case should not be expected to entertain that argument at this late date simply because it is convenient for the Intervenors. This proceeding concerns U.S. Cellular's evidence in response to the Commission's March 21 Order. It was never intended as an invitation for stale issues that could have been raised by the ILECs two years ago.

If the Commission considers the issue, it is not a close call. The Commission need look no further than USAC's web site to see how many ETCs have been designated in various

states.<sup>117</sup> In every state where U.S. Cellular is designated, ETC designations have been made to wireless carriers with overlapping service areas.<sup>118</sup> The FCC has designated multiple overlapping ETCs in states where it has jurisdiction, such as Alabama and Virginia.

The Intervenors ignore how the federal program for competitive ETCs works. Support to competitors is portable on a per-line basis, that is, a CETC receives support only if it wins and keeps a customer. When a competitive carrier gets a customer, it gets support. When it loses a customer, it loses support. Thus, in any given area the amount of support available to competitors is fixed by the number of customers there. It matters little how many CETCs are designated in a particular area. This is not how it works for ILECs, who receive the same level of support, even when they lose customers.<sup>119</sup>

When the Nebraska Commission denied ETC status to NPCR for the same reasons cited by the ILECs here, the decision was overturned in federal court.<sup>120</sup> The federal statute and applicable precedents do not support limiting competition in rural areas by denying otherwise eligible carriers ETC status, especially when the underlying program provides support only after facilities are built and a customer is captured. As the Court stated:

There is nothing in the Act that gives state public service commissions unfettered discretion with respect to Universal Service Fund Designations. Words in a regulatory statute take their meaning from the purpose of the regulatory legislation. *NAACP v. Federal Power Comm'n.*, 425 U.S. 662, 669 ((1976) (stating “the use of the words ‘public interest’ in a regulatory statute is not a broad license to promote general public welfare”). The statute sets out standards to be

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<sup>117</sup> See <http://www.usac.org/about/governance/fcc-filings/2007/quarter-1.aspx>.

<sup>118</sup> Washington, Oregon, Oklahoma, Kansas, Iowa, Maine, and Wisconsin.

<sup>119</sup> Mr. Wood illustrated why it would be inefficient to support multiple ILECs on their embedded costs but it would not be inefficient to support multiple competitors. See Tr. 725.

<sup>120</sup> *NPCR, Inc. d/b/a Nextel Partners v. Boyle*, 2006 U.S. Dist. LEXIS 88113 (D. Neb., Dec. 5, 2006) at 7-8 (“NPCR”).

applied in making ETC designations. One of those standards is “the public interest,” and though the term may be vague, *state commissions are not free to ignore legislative intent and judicial precedent in interpreting the phrase. Compliance with such precedent ensures that the standards will be consistently applied.*<sup>121</sup>

Neither the FCC nor any other state has imposed a restriction such as that advocated by the ILECs here.

In making this decision, the focus must be on whether consumers would benefit by the construction of 39 new cell sites within the first two years following designation, and the continuing investment in years following, in rural areas that lag far behind Missouri’s urban centers in wireless network development. U.S. Cellular’s ability to compete with previously designated ETCs actually benefits consumers because each carrier is under pressure either to satisfy a consumer or risk losing both consumer dollars *and* federal support. This is why Intervenor do not want U.S. Cellular to enter their areas.

In sum, Intervenor have presented no reason, legal or equitable, to deny ETC status to U.S. Cellular on the basis of there being small overlaps with the ILECs’ affiliated wireless networks. The *Alenco* court might as well have been referring to the Intervenor in this case when it concluded: “What [they] seek is not merely predictable funding mechanisms, but predictable market outcomes. Indeed, what they wish is protection from competition, the very antithesis of the Act.”<sup>122</sup>

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<sup>121</sup> *Id.* at 19. (emphasis added.)

<sup>122</sup> *Alenco, et al. v. FCC*, 201 F.3d 608, 622 (5<sup>th</sup> Cir. 2000).

## VII. ANCILLARY ISSUES RAISED AT THE SUPPLEMENTAL HEARING

### A. U.S. Cellular's Construction of Four Cell Sites in its Original Build Plan Demonstrates its Positive Commitment to Responding to Changes in Consumer Demand.

A year after its original 18 month build plan was filed in this case, U.S. Cellular made the decision to construct four cell sites that were shown to be on its build plan as “but for” construction projects. U.S. Cellular explained in detail the factors that caused the cell sites to move up on the company’s priority list.<sup>123</sup>

From the outset, U.S. Cellular has been candid with the Commission that its build plans are subject to change, depending on a host of business conditions.<sup>124</sup> As U.S. Cellular’s witnesses Alan Johnson testified, it is very difficult to envision exactly what network improvements will be made more than a year in advance.<sup>125</sup> Many factors, such as changes in customer demand, unexpected capacity constraints, and shifts in complaints or consumer feedback, can all affect the order in which limited capital expenditures are deployed.<sup>126</sup> At the hearing, Mr. Wright described to Commissioner Murray why the Company’s plans changed and reiterated that the decision to go forward with the sites came down to the Company’s need to improve service before ETC designation.<sup>127</sup>

Mr. Wood testified that U.S. Cellular’s decision to construct four cell sites that were not expected to be constructed within 18 months demonstrates responsiveness to its customers’

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<sup>123</sup> See Exhibit 29-HC at ACM-3 and ACM-4; Exhibit 26 at pp. 12-14; Tr. 503-04.

<sup>124</sup> See, e.g., Tr. 506-07; Application at p. 31; Exhibit 5 at p. 14; Exhibit 6 at p. 4; Exhibit 26 at pp. 12-14; Exhibit 29-HC at ACM-3 and ACM-4.

<sup>125</sup> See Exhibit 26 at pp. 13-14.

<sup>126</sup> See Exhibit 5 at p. 14; Exhibit 6 at p. 4; Exhibit 26 at pp. 14-15; Tr. 655-56.

<sup>127</sup> Tr. 566-67.

needs.<sup>128</sup> Moreover, *not* constructing those cell sites in the face of customer feedback would have shown a carrier's rigidity that ignores its customers. The key question is whether U.S. Cellular will use all available support as required by law. When it comes time for U.S. Cellular to ask for recertification each year, it must be able to explain what it did, why its plans changed, and how support continued to be used lawfully. U.S. Cellular has stated, under oath, that if, for example, a cell site drops off its list of 39 sites, it would be replaced by another below-the-line site so that the build plan would remain at 39 sites.<sup>129</sup>

Staff, which has otherwise generally supported U.S. Cellular's designation, has framed the issue as raising a question whether U.S. Cellular can be trusted to follow its build plan.<sup>130</sup> Yet, Staff offers no practical solution to its issue. If a carrier changes its plans, supported by valid reasons, the Commission should not be concerned, given its continuing oversight of ETCs as part of the annual review.<sup>131</sup>

When the FCC adopted its rules for filing a five-year plan, it gave carriers appropriate leeway to change their plans in response to fluctuations in available support, shifts in consumer demand, and other factors.<sup>132</sup> In adopting the rules for Missouri, the Commission gave no indication that it was moving away from the FCC's model. There is nothing in the Commission's rules requiring companies to freeze their network construction plans. Indeed,

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<sup>128</sup> Tr. 723-4.

<sup>129</sup> Exhibit 26 at p. 14; Tr. 651-2.

<sup>130</sup> See Exhibit 29 at p. 13.

<sup>131</sup> See 4 CSR 240-3.570(4).

<sup>132</sup> See *ETC Report and Order, supra*, at ¶ 24 (“[M]andatory completion dates established by the Commission would not account for unique circumstances that may affect build-out, including the amount of universal service support or customer demand.”); *Virginia Cellular, supra*, at ¶ 16 (rel. Jan. 22, 2004) (“Virginia Cellular notes that the parameters of its build-out plans may evolve over time as it responds to consumer demand.”)

Staff does not explain why consumers are not better served by U.S. Cellular's construction of four cell sites than they would be had U.S. Cellular never changed its plans during the pendency of this application.

U.S. Cellular believes the better course is the one it has taken: Do what's best for its customers, give the Commission an accurate explanation of any changes, and use all available support, to build its network in the most efficient manner possible.

**B. U.S. Cellular Has Committed to Use Support to Construct Facilities in “High-Cost” and “Low Value” Areas.**

U.S. Cellular has repeatedly stated under oath that it fully understands its obligation to invest high-cost support in Missouri's rural areas.<sup>133</sup> U.S. Cellular's proposed two-year plan is focused on high-cost and low-value areas.<sup>134</sup> At the hearing, Witness Wright testified that none of the 39 proposed cell sites are considered to be high value and low cost to build.<sup>135</sup> Witness Johnson's prefiled testimony demonstrates that the areas receiving supported investment are more sparsely populated than those receiving investment from internally generated funds.<sup>136</sup>

Despite this, Intervenors spent a great deal of time at the hearing probing whether U.S. Cellular will use support to construct facilities in St. Louis or other urban areas. To be clear, the federal rules permit a carrier to use support to construct facilities throughout an ETC designated area.<sup>137</sup> However, state commissions are authorized to ensure that support is being used to

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<sup>133</sup> See, e.g., Exh. 5 at pp. 15-18; Tr. 119; Exhibit 25 at p. 2; Tr. 571.

<sup>134</sup> See Exhibit 26-HC at Exh. D.

<sup>135</sup> Tr. 581.

<sup>136</sup> See Exhibit 26-HC at Exh. D.

<sup>137</sup> 47 C.F.R. Sections 54.7, 54.202(a)(ii).

further the goals of universal service in rural areas.<sup>138</sup> The Commission can easily determine that U.S. Cellular's first two-year plan will further the goals of universal service in rural areas, and it may do so again each year when U.S. Cellular returns to seek recertification.<sup>139</sup> The rolling two-year plan mechanism set up by the Commission enables it to watch a carrier's progress year over year and to ensure that support is used appropriately.<sup>140</sup>

U.S. Cellular values designation in urban areas because participation in the federal Lifeline program makes its offerings competitive with other ETCs serving those areas. That is clearly in the public interest.

**C. The Commission Can Easily Ensure That Support is Used Appropriately.**

The Intervenors have raised a concern about the Commission's ability to recover "misspent" funds. U.S. Cellular does not believe this is an issue for two reasons. First, as a publicly traded company with an investment grade credit rating, operating subject to rigorous securities regulation, and having been designated as an ETC in seven other states, U.S. Cellular fully understands its obligations to operate all of its businesses lawfully and, in particular, to use high-cost support properly.

Concerns about recovering "misspent" funds are limited to situations such as the Cass County Telephone Co. case referred to at hearing, where a carrier has defrauded government agencies. If a carrier "misspends" funds because it does not interpret the rules correctly, then the Commission will have no problem "recovering" funds. For example, if a carrier expends support

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<sup>138</sup> 47 C.F.R. Sections 54.313, 54.314; *Federal-State Joint Board on Universal Service, Report and Order*, 12 FCC Rcd 8776 (1997) ("First Report and Order").

<sup>139</sup> See Tr. 692-94.

<sup>140</sup> This review of expenditures is far more stringent than those applicable to wireline carriers, which undergo no scrutiny whether their investments are necessary or appropriate.

on a nonsupported service, the Commission can require a carrier to reallocate those funds to appropriate projects. The ability to deny recertification, which cuts off the flow of support, provides the Commission with ample leverage to ensure that expenditures are proper. Mr. McKinnie agreed that the Commission has this option.<sup>141</sup>

In sum, once the Commission determines that it is dealing with a reputable company, it will have no problem ensuring that funds are used appropriately.

**D. Establishing Investment Baselines is Beyond the Scope of the Current Rules and is Not Necessary to Determine Whether Support Has Been Invested Incrementally.**

There are several reasons to reject the adoption of investment baselines as a means to determine whether investments made by CETCs with support are “incremental” to investments made without support. First, the Commission has just adopted rules for designating CETCs and for recertifying them every year in Docket TX 2006-0169. Those new rules do not include any requirement that investment baselines be established. It would be unfair for the Commission to go beyond those rules as a condition of its designation. This is especially so because the Commission has not heard from all interested parties on the issue, and it has not developed rules and procedures to needed to implement such a requirement. If the Commission now believes that its recently adopted rules are insufficient, then it should amend those rules so they are applicable to all carriers.

Second, as a practical matter, baselines do not provide the kind of useful data that some would have the Commission believe.<sup>142</sup> For example, telecommunications investments are typically “lumpy,” meaning that large investments are made in one year, but not necessarily

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<sup>141</sup> Tr. 796.

<sup>142</sup> See also Witness Wood testimony at 726-8.

every year. Accordingly, it is not useful to average investments over time because no carrier can guarantee in any year that it will invest internally generated capital at a certain level. All any carrier can do is affirm under oath that whatever it receives in high-cost support will be invested over and above what would have been invested without support. This is precisely what this Commission's rules require and no more.<sup>143</sup> Whatever the investment of internally generated capital in any year, the presence of high-cost support does not act as replacement capital. It remains incremental capital investment.

Finally, neither the FCC nor any other state of which U.S. Cellular is aware has adopted investment baselines suggested by ILECs in this proceeding.<sup>144</sup>

The rules require U.S. Cellular to demonstrate to this Commission that all of its federal support will be spent on projects that would not have been constructed in the absence of support. U.S. Cellular has repeatedly committed to do that under oath. The federal system only provides support if the Company gets a customer, so inefficient investments are punished in the marketplace. Accordingly, if the Commission believes the recently adopted rule does not go far enough in requiring accountability for any class of carrier, it should address such concerns in a rulemaking proceeding, not request voluntary commitments from carriers on an ad hoc basis in the course of a designation proceeding.

## **VIII. CONCLUSION**

The health, safety and economic development benefits of having more powerful wireless networks in rural Missouri cannot be overstated. Consumers will benefit from having federal

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<sup>143</sup> 4 CSR 240-3.570(2)(A)(3)(G) (requiring a “statement” – i.e., not a demonstration using financial documentation – “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.”)

<sup>144</sup> Tr. 727-8.

funds flow into these areas – funds that rural consumers contribute every month. U.S. Cellular has made its case, and there is no question that the public interest will be served by a grant of this application.

U.S. Cellular respectfully requests the Commission to designate it as an ETC consistent with applicable federal and state law and precedent.

Respectfully submitted,

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**Certificate of Service**

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or e-mailed to all counsel of record this 31<sup>st</sup> day of January, 2007.

\_\_\_\_\_/s/ Karl Zobrist\_\_\_\_\_  
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