BEFORE THE PUBLIC SERVICE COMMISSION
OF STATE OF MISSOURI

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

COMMENTS OF U.S. CELLULAR

USCOC of Greater Missouri, LLC d/b/a U.S. Cellular ("U.S. Cellular" or "Company") hereby submits its Comments at the January 6, 2006 public hearing, in accordance with the schedule set forth in the publication of proposed rule 4 CSR 240-3.570 (the "Proposed Rule") in the Missouri Register on December 1, 2005.[1]

I. INTRODUCTION

U.S. Cellular supports the Commission's efforts to examine rules and oversight procedures that will ensure transparency and accountability among all eligible telecommunications carriers ("ETCs") in Missouri. As an ETC in six states, U.S. Cellular has extensive experience accounting for and reporting the use of federal high-cost support and working with state commissions to ensure that they are able to certify to the FCC that support is being used for the intended purposes. As a current applicant for ETC status before this Commission, U.S. Cellular is acutely interested in how this Commission evaluates the use of universal service support by all carriers so that consumers see the benefits that the program was intended to deliver. Particularly in light of the events surrounding the recent decertification of certain Missouri telephone companies, U.S. Cellular believes the Commission is justified in

[1] Missouri Register, Vol. 30, No. 23 at 2482-83 (Dec. 1, 2005).

opening a proceeding to ensure that all carriers are held accountable for all of the high-cost support they receive.

At the same time, great care should be taken to ensure that all universal service rules are competitively neutral[2] and are no more intrusive than they need to be in order to preserve and advance universal service.[3] Unfortunately, the Proposed Rule falls short in both regards. Rather than re-examining and improving upon the certification procedures established in Case No. TO-2002-347, In re Investigation into Certification for Federal Universal Service Funds (July 9, 2002), the Commission has proposed *additional* layers of regulation – many of which are unrelated to universal service – while retaining the existing procedures. The result is a confusing array of procedures and requirements, many of which are duplicative or inconsistent.

Carriers will have great difficulty navigating the twists and turns of the Proposed Rule as currently drafted. The primary problem is that much of the Proposed Rule consists of wireline regulations being imposed on wireless carriers with no adjustment for technology and, more critically, without apparent consideration of whether rules adopted for a regulated monopoly are necessary in the intensely competitive wireless market. For these reasons, after Staff invited informal comments from all interested parties during the summer, U.S. Cellular wrote to the Commission about the need to separate regulations related to universal service from regulations designed to protect consumers from monopoly business practices, and to focus on improving ETC filing requirements and oversight.

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[2] *See* 47 U.S.C. § 253(b). *See also Federal-State Joint Board on Universal Service, Report and Order*, 12 FCC Rcd 8776, 8801-02 (1997) ("*First Report and Order*") (adopting the universal service principle of competitive neutrality, defined as follows: "competitive neutrality means universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another").

[3] The FCC recently cautioned that "states should not require regulatory parity for parity's sake." *Federal-State Joint Board on Universal Service, Report and Order*, 20 FCC Rcd 6371, 6384 (2005) ("*ETC Report and Order*"). Rather, the FCC encouraged states considering adopting new requirements for ETCs "to do so only to the extent necessary to further universal service goals." *Id.*

While the current Proposed Rule has some helpful changes from the initial drafts circulated last year, U.S. Cellular believes that many fundamental problems have not been addressed. Specifically, U.S. Cellular recommends that the Commission use as a foundation the requirements established in its Order in Case No. TO-2002-347, and consider incorporating some or all of the permissive guidelines recently adopted by the FCC. This would help avoid the many inconsistencies and redundancies in the Proposed Rule that have resulted from fitting together divergent regulatory regimes created for different technological platforms and business models. Such a change in approach could also help ensure that the level of regulation for any class of carrier is increased no more than is necessary to preserve and advance universal service.

The major issues are explained below.

II. DISCUSSION

A. There is No Demonstrated Need for the Level of Regulation Proposed.

The Commission should proceed cautiously when considering the adoption of sweeping new requirements such as those set forth in the Proposed Rule. The FCC has counseled states that an ETC need not be an Incumbent Local Exchange Carrier (ILEC), nor should it be regulated as an ILEC.[4] Indeed, there are important reasons favoring less regulation of Competitive ETCs ("CETCs"), first and foremost being that competition is a very effective driver of high-quality service, more so than regulations aimed at protecting consumers from

[4] *See First Report and Order*, *supra*, 12 FCC Rcd at 8857-58 ("Several ILECs assert that the Joint Board's recommendation not to impose additional criteria is in conflict with its recommended principle of competitive neutrality because some carriers, such as those subject to COLR obligations or service quality regulation, perform more burdensome and costly functions than other carriers that are eligible for the same amount of compensation. The statute itself. . . imposes obligations on ILECs that are greater than those imposed on other carriers, yet section 254 does not limit [ETC] designation only to those carriers that assume the responsibilities of ILECs.").

monopoly business practices.[5] If the Commission nonetheless has concerns about emergency capabilities, customer service, or other aspects of wireless service, the appropriate step would be to enact regulations applicable to all carriers, not just ETCs, so that all consumers benefit from the regulations.

To U.S. Cellular's knowledge, no party has submitted any evidence to support such concerns. The Proposed Rule greatly extends the reach of the Commission's oversight of competitive carriers – CMRS carriers in particular – when no record has been developed to demonstrate that: (1) the existing certification requirements are not adequate for purposes of determining whether a wireless ETC uses its support properly; or (2) competitive pressures and federal requirements (e.g., truth-in-billing rules) are not sufficient to ensure that wireless ETCs will provide high-quality service to Missouri consumers.[6] Without such a demonstration, the rule should not be adopted.[7]

Moreover, the Commission remains subject to limits on its rulemaking authority prescribed by federal statute, including the pre-emptive provisions of 332(c)(3) of the

[5] *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.").

[6] Indeed, a complete factual record would reveal the opposite. For example, the FCC's most recent survey of CMRS competition reported that consumer satisfaction with wireless service has increased since 2003 by as much as 5 percent, and cited a J.D. Power & Associates study showing a 50% drop in the average number of initial connection problems compared to 2004, despite an increase in calling volume. *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Tenth Report*, WT Docket No. 05-71 (rel. Sept. 30, 2005) at ¶¶ 178-80. In March 2005, the FCC released a report of informal consumer complaints showing that, even though America now has more wireless subscribers than wireline subscribers, wireless service generated fewer than half the number of complaints as wireline service. *Report on Informal Consumer Inquiries and Complaints, Fourth Quarter Calendar Year 2004* (March 4, 2005) at 9.

[7] Section 536.016 of the Missouri Revised Statutes provides: "Any state agency shall propose rules based upon substantial evidence on the record and a finding by the agency that the rule is necessary to carry out the purposes of the statute that granted such rulemaking authority."

Communications Act.[8] The FCC has "vigorously implemented" these preemption provisions "to ensure that state rate regulation of CMRS providers will be established only in the case of demonstrated market conditions in which competitive forces are not adequately protecting the interests of CMRS subscribers."[9] Absent a compelling need, the preference should be for less regulation, not more. Therefore, U.S. Cellular urges the Commission to proceed with caution in deciding whether any additional regulation is appropriate for Missouri carriers and their subscribers.

Most ETCs that are wireless carriers operate in multiple states. The FCC has recognized the desirability of achieving consistency among states, noting that "[w]hile Congress delegated to individual states the right to make ETC decisions, collectively these decisions have national implications that affect the dynamics of competition, the national strategies of new entrants, and the overall size of the [fund]."[10] The cost of complying with regulations is significant. By taking care not to adopt more intrusive regulation than the FCC's general framework, the Commission will encourage efficiencies, thus lowering carriers' cost of operation, to the benefit of consumers. Conversely, maintaining different regulatory structures from state to state

[8] In the oft-cited *TOPUC* decision, the Fifth Circuit held that nothing in Section 214(e)(2) of the Act prohibits a state from enacting ETC designation requirements in addition to those adopted by the FCC. *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 418 (5th Cir. 1999) ("*TOPUC*"). However, states are still subject to the limitations found elsewhere in the Act, including Section 253 (requiring that any universal service rules adopted by states be done "on a competitively neutral basis"), 332(c)(3) (prohibiting state regulation of wireless rates or entry), and 332(c)(8) (providing that no commercial mobile service provider shall be required to provide equal access, except by the FCC under certain prescribed circumstances). Even within the confines of Section 214(e)(2), the Fifth Circuit noted, "if a state commission imposed such onerous eligibility requirements that no otherwise eligible carrier could receive designation, that state commission would probably run afoul of § 214(e)(2)'s mandate to 'designate' a carrier or 'designate more than one carrier.' " *Id.* at 418 n.31.

[9] *Implementation of Section 3(n) and 332 of the Communications Act, Regulatory Treatment of Commercial Mobile Services, Second Report and Order,* 9 FCC Rcd 1411, 1419 (1994) ("*CMRS Second Report and Order*"). *See also id.* at 1421 ("While we recognize that states have a legitimate interest in protecting the interests of telecommunications users in their jurisdictions, we also believe that competition is a strong protector of these interests and that state regulation in this context could inadvertently become as a burden to the development of this competition.").

[10] *FCC ETC Order, supra,* 20 FCC Rcd at 6397.

significantly increases costs, which are passed along to consumers. Moreover, using Universal Service Fund amounts to comply with regulations represents a lost opportunity to use such funds to construct and upgrade facilities that could provide coverage to unserved or underserved areas.

Some have argued that there should be a "level playing field" for all ETCs. U.S. Cellular could not agree more. However, a level playing field does not mean that all ETCs should be regulated as ILECs. Competitive neutrality and regulatory parity are two entirely different concepts that must not be confused. The 1996 Act and the FCC have refrained from imposing ILEC regulation, or regulatory parity, on CETCs for a very important reason: ILECs are regulated monopolies and CETCs are not. Universal service rules may be competitively neutral, while the overall regulatory burden may not be. If one class of carrier is a regulated monopoly, it appropriately bears a greater regulatory burden to protect consumers from business practices which cannot exist in a competitive marketplace. It makes no sense to impose those same monopoly regulations on a different class of carrier that is not a monopoly, but is subject to the rigors of a competitive market.

Today rural ILECs have nearly 100% penetration in the local exchange marketplace, and yet they continue to receive Universal Service Fund (USF) subsidies. Rural consumers have been denied the full range of service choices because it is virtually impossible for a competitor to build a facilities-based network to compete with an ILEC without similar support. It is only with USF support that competitors can construct networks of sufficient quality to offer consumers a real choice.[11]

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[11] *Western Wireless Corporation Petition For Preemption of Statutes And Rules Regarding The Kansas State Universal Service Fund Pursuant to Section 253 of the Communications Act of 1934, Memorandum Opinion and Order*, 15 FCC Rcd 16227, 16231 (2000) ("A new entrant faces a substantial barrier to entry if its main competitor is receiving substantial support from the state government that is not available to the new entrant. A mechanism that makes only ILECs eligible for explicit support would effectively lower the price of ILEC-provided service relative to competitor-provided service by an amount equivalent to the amount of the support provided to ILECs that was not

If competitive markets can be encouraged, then the level of regulation on all carriers, including ILECs, can be lowered. All carriers should have the minimum amount of regulation needed to achieve the goal of ensuring that consumers throughout the state receive high-quality universal service and competitive choices. The playing field today is not level because competitors like U.S. Cellular have not historically had the access to the low- or no-cost Rural Utilities Service financing and federal USF subsidies that ILECs have enjoyed for years, and therefore do not have extensive networks to compete in much of rural Missouri. The FCC has found these conditions to be one of the biggest reasons for distributing support to CETCs:

> The present universal service system is incompatible with the statutory mandate to introduce efficient competition into local markets, because the current system distorts competition in those markets. For example, without universal service reform, facilities-based entrants would be forced to compete against monopoly providers that enjoy not only the technical, economic, and marketing advantages of incumbency, but also subsidies that are provided only to the incumbents.[12]

Rather than imposing cumbersome new regulations on competitive carriers, U.S. Cellular urges the Commission to retain the certification procedures established in Case No. TO-2002-347, and to consider incorporating some or all of the permissive guidelines set forth in the FCC's *ETC Report and Order*.

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available to their competitors. Thus, non-ILECs would be left with two choices -- match the ILEC's price charged to the customer, even if it means serving the customer at a loss, or offer the service to the customer at a less attractive price based on the unsubsidized cost of providing such service. A mechanism that provides support to ILECs while denying funds to eligible prospective competitors thus may give customers a strong incentive to choose service from ILECs rather than competitors. Further, we believe that it is unreasonable to expect an unsupported carrier to enter a high-cost market and provide a service that its competitor already provides at a substantially supported price. In fact, such a carrier may be unable to secure financing or finalize business plans due to uncertainty surrounding its state government- imposed competitive disadvantage. Consequently, such a program may well have the effect of prohibiting such competitors from providing telecommunications service, in violation of section 253(a).").

[12] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, 11 FCC Rcd 15499, 15506-07 (1996).

B. Duplicative and Inconsistent Provisions Must Be Reconciled.

In its informal comments, U.S. Cellular noted that the proposed rule contained a burdensome number of overlapping reports due for filing on scattered dates throughout the year. For example, Section (18) would require wireless ETCs to submit quarterly reports detailing the number of consumer complaints and the number of requests for service that could not be satisfied, even though the same information would required in the annual filing required by Section (24). It is unclear why the Commission would need quarterly reports of the same information, particularly given that it re-certifies carriers on an annual, not quarterly, basis. At the very least, the Commission should clarify that any requirements under this Proposed Rule would supplant the requirements adopted in Case No. TO-2002-347.

Although U.S. Cellular brought these concerns to Staff's attention in written comments, these overlapping requirements continue in the Proposed Rule. Therefore, U.S. Cellular urges the Commission to revise the Proposed Rule and eliminate these duplicative and inconsistent filing requirements.

C. Failure to Define Key Terms.

The Proposed Rule contains several requirements that would be difficult or impossible to follow without knowing how certain critical terms are defined. For example, Section (20) would require CMRS ETCs to "submit an annual report to the commission on or before April 15 of each year, except as otherwise provided in this rule." The term "annual report" is not specifically defined in the Proposed Rule, nor is there a reference to a definition elsewhere. Section (20) would also require the use of "official commission forms with appropriate cross-references," but does not indicate whether such forms exist or are still to be developed. As a result, the rule might be a repetitive reference to the annual filing requirements found elsewhere

in the Proposed Rule, a requirement to transcribe annual stockholder report information onto official commission forms, or something else entirely.

Another example is the difference in terms used in Section (13), which requires wireless ETCs to record and report customer "complaints," and Section (11), which would subject wireless ETCs to the obligation under 4 CSR 240-32.070 to maintain records of customer "trouble reports." It is unclear whether these two terms have the same meaning or, if they are different, whether it would be necessary to comply with both requirements. Moreover, "complaints" should be clearly defined, instead of serving as a catch-all term that might result in the Commission being inundated with reports of all manner of customer inquiries. U.S. Cellular suggests the use of an administratively simple definition that requires reporting of formal or informal complaints made to state or federal regulatory agencies, or the Better Business Bureau, and how such complaints were resolved.

D. Comments on Specific Provisions.

Required Uses of Support. Section (2) would require CETCs to certify that they spend support "only . . . to improve coverage, service quality or capacity in the Missouri service area in which ETC designation is requested …." Section (24) contains a virtually identical requirement. Such restrictions on spending are inconsistent with federal law, which requires all ETCs using any technology to spend high-cost support on the "provision, maintenance and upgrading" of supported services and facilities. See 47 U.S.C. § 254(e). Federal law permits this Commission to require the use of support for new build-out and improvements, as well as for the necessary operation and maintenance of new and upgraded facilities. However, it would not be competitively neutral to impose such a requirement on competitive companies without imposing

a similar rule on ILECs to demonstrate that they are using USF support only for the improvement of their service and not merely for maintaining existing plant or artificially low rates.

Tariffing Requirement. Section (12) of the proposed rule would require CETCs to file an informational tariff, and Section (11) would require CETCs to adhere to existing Commission rules that require wireline carriers to have an "approved tariff" on file with the Commission. See 4 CSR 240-32.050, -32.070. The reference to an "approved" tariff for wireless ETCs is particularly troublesome. Such a concept could easily and erroneously be interpreted to mean traditional Commission tariff review and approval, amounting to state wireless rate regulation. Clearly, such any such rate regulation is pre-empted under federal law. See 47 U.S.C. § 332(c)(3).

In addition to these legal concerns which must be addressed, a tariff requirement would not be in the best interests of consumers and would be burdensome for wireless carriers. Consumers would lose because wireless service overall would become less competitive, as carriers lose the incentive to introduce new services, given their ability to view competitors' rates and offerings through regulatory filings. Wireless carriers will bear significant new regulatory costs, and they will be less nimble in the marketplace as they attempt to compete with other wireless carriers that are not required to proceed through the tariff process.

U.S. Cellular has never been required to have an "approved" tariff on file with any state. In Oklahoma where an "informational" tariff has been required, the initial costs of compliance have approached $100,000.

From a practical standpoint, a tariff requirement for wireless service makes little sense. Wireless carriers frequently offer promotional rate plans and would continually need to file amendments with the Commission. Moreover, consumers are unlikely to go to the Commission

to examine tariffs, when rates and terms of service can be readily obtained from a company's web site, from customer service representatives over the phone, or at points of sale. To the extent the Commission requires easy access to a wireless carrier's rate plans, a requirement that rate plan information be delivered promptly upon request or posted on the company's web site can be easily complied with.

Aside from the legal problem of the Commission engaging in prohibited wireless rate regulation, the cost to carriers and consumers is why the FCC has declined to require or even accept tariff filings by wireless carriers.[13] Before departing from the FCC's approach, this Commission should develop an administrative record on the purported need for tariffing competitive services.

Equal Access. The Proposed Rule is unclear on when a CETC may be required to provide equal access to interexchange carriers, and it appears to be unlawful. While Section (7) states a CETC's obligation to provide equal access in the event every other ETC in the area withdraws, Section (11) would require CETCs to comply with 4 CSR 240-32.100(1) and (2), which require "[e]qual access in the sense of dialing parity and presubscription among interexchange telecommunications companies for calling within and between local access and transport areas (intraLATA and interLATA presubscription)." One section requires equal access in specific cases; the other requires it in all cases. These conflicting provisions need to be

[13] *Implementation of Sections 3(n) and 332 of the Communications Act, Second Report and Order*, 9 FCC Rcd 1411, 1479 (1994) ("In a competitive environment, requiring tariff filings can (1) take away carriers' ability to make rapid, efficient responses to changes in demand and cost, and remove incentives for carriers to introduce new offerings; (2) impede and remove incentives for competitive price discounting; and (3) impose costs on carriers that attempt to make new offerings. . . [T]ariff filings would enable carriers to ascertain competitors' prices and any changes to rates, which might encourage carriers to maintain rates at an artificially high level. Moreover . . . tariffing, with its attendant filing and reporting requirements, imposes administrative costs upon carriers. These costs could lead to increased rates for consumers and potential adverse effects on competition.").

reconciled. Moreover, in order to be designated as an ETC, a carrier must provide access to the interexchange network, not equal access.[14]

A separate issue is that the Section (7) obligation is inconsistent with federal requirements. As currently drafted, Section (7) implies that a CMRS carrier is automatically required to provide equal access in the event all other ETCs withdraw. However, the obligation to provide equal access is governed by federal law. Before a CMRS carrier can be required to provide equal access, Section 705 of the 1996 Act requires the FCC to make a finding that "subscribers ... are denied access to the provider of telephone toll services of the subscribers' choice, and that such denial is contrary to the public interest, convenience, and necessity …." See 47 U.S.C. § 332(c)(8).

Therefore, any equal access obligation should conform to the rule adopted in the FCC's *ETC Report and Order*, noting that "ETC applicants should acknowledge that [the FCC] may require them to provide equal access to long distance carriers in their designated service area in the event that no other ETC is providing equal access within the service area." See ETC Report and Order, 20 FCC Rcd 6371, Para. 35 (2005).

Billing Requirements. We propose that Section (9) be stricken as redundant since all carriers, including wireless providers, are subject to the FCC's truth-in-billing rules. These rules require that billing descriptions be "brief, clear, non-misleading and in plain language." They also contain, among other things, a prohibition against "stat[ing] or imply[ing] that a charge is required by the government when it is the carriers' business decision as to whether and how much of such costs they choose to recover directly from consumers through a separate line item charge." See *Truth-in-Billing and Billing Format*, CC Docket No. 98-170, FCC 05-55, *Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking* at

[14] *See ETC Report and Order, supra,* at para. 35.

para. 27 (rel. March 18, 2005). The FCC is also considering further modifications to its truth-in-billing rules. Should the Commission believe the FCC's framework is inadequate to protect consumers, the proper approach would be to hold a rulemaking proceeding to consider whether new billing rules should be adopted for all carriers, not just ETCs.

Quality of Service. U.S. Cellular is confident that it could meet any and all service quality and customer service requirements that are designed in a competitively and technologically neutral manner. The FCC and several other states have reasonably relied on a carrier's commitment to comply with the CTIA Code, and U.S. Cellular supports the incorporation of the Code into the rules. However, U.S. Cellular believes that it would be unreasonably burdensome for a carrier with operations in multiple states to modify its network, billing, and training systems to be able to track and report its compliance in accord with the comprehensive, wireline-style regulations contained in the Proposed Rule.

The Iowa Utilities Board reached a similar conclusion in a recent order adopting ETC reporting requirements,[15] and declined to require wireless ETCs to report certain information on a state-specific basis.[16]

The proposed regulation does not advance universal service. It was developed to regulate wireline incumbents because they were regulated monopolies, not because were ETCs. A CETC will have ample incentive to provide quality service because if customers are dissatisfied, they

[15] Quality of Service Reporting by Eligible Telecommunications Carriers [199 IAC 39], Docket no. RMU-05-4, Order Adopting Rules (Iowa Util. Bd., Oct. 21, 2005). Specifically, the Order required ETCs to report (1) the amount of local minutes included in each available rate plan; (2) a listing of each area where the ETC currently provides Phase I and Phase II E-911; (3) average answer time for customers calling an ETC's customer service center; and (4) the number, location, hours, and telephone number for each carrier-owned retail location in Iowa, as well as the ETC's web address and toll-free customer service number.

[16] *Id.* at p. 5 ("[W]ith respect to answer time reporting, the [wireless] Coalition asserts that it is impossible for wireless carriers to track answer-time data because call centers operate on a regional or national basis and there is no way to distinguish a call coming from Iowa or another state. The Coalition suggests revising the proposed rule to track average hold time for all callers, not just Iowa customers. The Board finds that this suggestion is a reasonable one and will amend the proposed rule to reflect the Coalition's suggestions.").

can choose another carrier's service. By contrast, ILEC customers generally have no such alternatives, and will not until high-quality networks are constructed that provide consumers with a viable substitute for ILEC service offerings. When an appropriate level of competition is achieved in the rural ILECs' service areas, the Commission may properly determine whether some or all of the regulations overseeing regulated monopoly practices are no longer necessary because consumers have viable choices and are exercising them.

Accordingly, U.S. Cellular recommends the deletion of the provisions of Section (11) requiring alternative local exchange carriers and CMRS ETCs to abide by selected provisions of Chapter 32 of the Commission's rules.

III. CONCLUSION

For the foregoing reasons, U.S. Cellular respectfully requests that the Commission re-examine its Proposed Rule regarding Requirements for Carrier Designation as Eligible Telecommunications Carriers.

Respectfully submitted,

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