

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

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

**INITIAL PREHEARING BRIEF OF INTERVENORS
SPECTRA COMMUNICATIONS GROUP, LLC d/b/a CENTURYTEL
AND CENTURYTEL OF MISSOURI, LLC**

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COME NOW Intervenors, Spectra Communications Group, LLC d/b/a CenturyTel (“Spectra”) and CenturyTel of Missouri, LLC (“CenturyTel”) and submit the following prehearing brief pursuant to the Commission’s *Order Adopting Procedural Schedule* issued in the above-captioned case.

INTRODUCTION

This case, initiated by wireless carrier USCOC of Greater Missouri, LLC (“US Cellular”), is the second in a series of recent cases wherein this Commission has been asked to grant eligible telecommunications carrier (“ETC”) status to a wireless or non-incumbent wireline company in areas already being served by an incumbent ETC local exchange carrier. On November 30, 2004 the Commission denied the ETC application of Missouri RSA No. 7 Limited Partnership, d/b/a Mid-Missouri Cellular (“MMC”). In denying MMC’s Application, the Commission unanimously concluded that Applicant MMC, which had the burden of proof, had not met its burden to show by competent and substantial evidence that a grant of ETC status to an additional carrier in the areas already being served by the rural incumbent carriers would be in the public interest. A majority of the Commission also concluded that MMC had not met its burden to show, in those areas served by non-rural incumbent carriers, that MMC’s request was “consistent with

the public interest, convenience and necessity” as required under 47 U.S.C. Section 214(e)(2) of the Telecommunications Act of 1996 (“the Act”).¹ US Cellular’s ETC request by far involves a much larger geographic ETC service area and amount of federal Universal Service Fund (“USF”) support at stake than that at issue in the MMC case or in the other ETC cases now pending. The instant US Cellular case involves potential annual USF receipts of over \$8 million per year. The prior MMC case involved annual universal service support of \$1.8 million.

Several important things have happened since the Commission issued its decision in the MMC case. First, the Federal Communications Commission (“FCC”) on March 17, 2005 released its most comprehensive decision to date dealing with the ETC designation process. This March 17, 2005 Report and Order (“ETC Designation Order”)² was issued in response to earlier recommendations made by the Federal-State Joint Board on Universal Service (“Joint Board”) and confirms and supports the basic two step approach this Commission took earlier in analyzing and deciding the MMC case; namely, first looking to see if the ETC applicant met the threshold requirements of Section 214(e)(1), and if so, next proceeding to apply a cost/benefit test and public interest analysis under Section 214(e)(2). The FCC also has confirmed that Congress under “Section 214(e)(2) of the Act provides *state* commissions with the *primary* responsibility

¹ *In the Matter of the Application of Missouri RSA No. 7 Limited Partnership, d/b/a Mid-Missouri Cellular*, Case No. TO-2003-0531, *Amended Report and Order* Issued November 30, 2004. MMC’s circuit court challenge to the Commission’s decision was ultimately withdrawn and MMC has since filed a new ETC application which is now pending before the Commission in Case No. TO-2005-0325.

² *In the Matter of Federal-State Joint Board on Universal Service*, Report and Order, CC Docket No. 96-45, FCC Rcd 6371 (2005). Other parties in the instant proceeding also refer to this Report and Order as the “ETC Report and Order”, the “2005 USF Order”, and simply as the “Report and Order” but to remain consistent with its prefiled testimony Spectra and CenturyTel will continue to refer to it as the “ETC Designation Order”.

for performing ETC designations”³ (emphasis supplied), that Congress intended for states to evaluate local situations and exercise discretion in making public interest determinations, and that state regulators are free to impose their own state-specific ETC eligibility requirements in addition to those contained in Section 214(e) of the Act.⁴

In marked departure from the earlier federal and state precedent relied upon by US Cellular in its Application, the FCC also has now adopted *mandatory minimum* eligibility requirements⁵ and public interest tests, designed to “create a more rigorous ETC designation process”⁶ and “improve the long-term sustainability of the universal service fund”⁷ for all ETC requests filed before the FCC. The FCC strongly encouraged state regulators to apply these same minimum, threshold requirements and public interest tests in state ETC proceedings,⁸ and has clarified, consistent with this Commission’s earlier decision in the MMC case, that a public interest showing--above and beyond the mere offering and advertising the nine supported services as outlined in Section 214(e) of the Act--is required regardless of whether the ETC applicant seeks designation in an area served by a rural or non-rural carrier,⁹ with a rigorous cost/benefit and public interest test especially being required for areas served by rural ETCs.¹⁰

The second significant thing that has happened since this Commission decided the MMC case is that US Cellular and several other carriers have now filed applications with

³ ETC Designation Order, para. 8, further citing, *Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved Areas, Including Tribal and Insular Areas*, CC Docket No. 96-45, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12208, 12255, para. 93 (2000) (Twelfth Report and Order); *see also*, *Id.*, at para. 61.

⁴ ETC Designation Order, para. 61, *citing*, *Texas Office of Public Utility Council v. FCC*, 183 F.3d at 418, 393 at 418 (5th Cir. 1999).

⁵ *Id.*, at para 20.

⁶ ETC Designation Order, para. 2.

⁷ *Id.*

⁸ ETC Designation Order, para. 1, 58-61.

⁹ 47 U.S.C. Section 214(e)(2)(6); ETC Designation Order, para. 3, 40, 42, and 61.

¹⁰ ETC Designation Order, para. 59.

this Commission seeking ETC status, all of which are now currently pending, with US Cellular being thus far the largest as well as the first case scheduled for evidentiary hearing. The third significant thing is that the Commission and its Staff have been working toward the promulgation of a new Missouri-specific ETC rule¹¹, based in large part on the requirements set forth in the ETC Designation Order, which eventually will set forth this Commission's requirements and standards applicable to all ETC applicants.

US Cellular's instant application is, therefore, this Commission's first opportunity to address an ETC application in light of all these new and important developments; in this particular case, an application by a non-regulated wireless carrier seeking ETC status in a very large geographic area already being served by both rural and non-rural ETC incumbents. Of particular significance in this case is US Cellular's ETC commitment (or lack thereof) with respect to its ability and plans to bringing high-quality, urban-like service to the more rural, high-cost, insular areas of its requested ETC service area, as required by the new guidelines.

The analysis that the Commission employs and the decision the Commission makes in this case clearly will affect the other pending cases, the Commission's upcoming rulemaking proceeding, and all future ETC application requests. Accordingly, the Commission at the outset should reject US Cellular's argument that the minimum guidelines and public interest analysis set forth in the ETC Designation Order are not applicable to US Cellular in this case and that the Commission, therefore, should limit its inquiry to simply whether US Cellular has committed to offer and advertise the nine

¹¹ Proposed new rule 4 CSR 240-3.570 "*Requirements for Carrier Designation as Eligible Telecommunications Carriers*", last informal draft circulated on or about October 4, 2005.

supported services and base its public interest determination under Section 214(e)(2) solely on clearly less rigorous and much earlier state and federal precedent.

The Commission also should reject outright US Cellular's suggestion that it would somehow be appropriate for the Commission to *first* grant US Cellular ETC status and then somehow *later* attempt to enforce whatever minimum eligibility requirements and public interest protections the Commission might deem necessary for all ETC applicants. Unconditional or even "conditional" approval of an ETC submission based on outdated precedent and vague and unenforceable promises, as suggested by some, would not be sound regulatory policy and would not be in the public interest.

Instead, the Commission should take whatever time might be necessary to carefully review and weigh US Cellular's application and pre-filed testimony in light of US Cellular's fundamental burden of proof, the most recent and still evolving ETC designation landscape, and the Commission's clear broad powers and duties to inquire into and seek to ensure the public interest is served in the state of Missouri when granting multiple ETC designations.

I. SPECTRA/CENTURYTEL OVERVIEW POSITION

Spectra and CenturyTel share the FCC's stated concerns about the long term sustainability of the universal service fund ("USF") and the negative impact that increasing demands placed on the fund will have on the availability of universal, high quality service in high-cost, low-density rural areas. This Commission's basic approach taken in the MMC case, and the FCC's recent decisions in the case of Virginia Cellular¹² and in the 2005 ETC Designation Order, hopefully have signaled the beginning of a new

¹² *Federal-State Joint Board on Universal Service; Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier for the Commonwealth of Virginia*, Memorandum Opinion and Order, CC Docket No. 96-45, 19 FCC Rcd 1563 ("Virginia Cellular").

era with respect to a more careful and thoughtful approach to the eligibility requirements and designation of multiple ETCs. An important goal of the Act, found in Section 254(b)(3), is to encourage high-quality urban-like service and rates in high-cost, rural areas.¹³ To the extent the Commission is faced with the task of deciding how to award finite USF resources to multiple requesting carriers, as a matter of policy, preference should be granted only to those carriers who--in the case of wireless providers--can demonstrate they can serve throughout their requested rural service areas with a signal strength, type and quality of service, and rates comparable to the service and rates offered in urban areas.

As summarized in the Surrebuttal Testimony (pp. 2-3) of Mr. Glenn H. Brown, Spectra and CenturyTel believe that this Commission should establish and enforce *high* standards for ETC designations, with the requirements and public interest tests set forth by the FCC in its ETC Designation Order being the *minimum* required by sound public policy, and that whatever standards the Commission ultimately adopts should be fair, competitively neutral, and rigorously and uniformly applied to all ETC applicants. With the exception of intentionally (or even unintentionally) encouraging the use of and reliance upon resale arrangements to meet the statutory requirement of an ETC providing service throughout its designated service area (discussed below), Spectra and CenturyTel generally support the additional public interest protection criteria set forth in this case by Office of the Public Counsel witness Meisenheimer. (*See*, Brown Surrebuttal, at pp. 9-11).

¹³ 47 U.S.C. 254(b)(3) provides: “Consumers in all regions of the Nation, including low-income consumers and those in *rural, insular, and high cost areas*, should have access to telecommunications and information services...that *are reasonably comparable* to those services provided in *urban areas* and that are available at rates charged for similar services in urban areas”.

More specifically with respect to US Cellular's particular request, it is Spectra and CenturyTel's overview position that:

1. US Cellular has not in its Application nor in its prefiled testimony carried its burden of proof to demonstrate that it complies with the minimum statutory requirements of Section 214(e)(1) of the Act nor has it therein made a showing that can qualify as competent and substantial evidence to demonstrate that granting it ETC status in its requested ETC service area is in the public interest under Section 214(e)(2).

2. Designation of US Cellular as an additional ETC in its requested ETC service area will create significant new public costs and deliver relatively few incremental public benefits, and as such, US Cellular's request does not pass the cost/benefit test outlined in *Virginia Cellular* nor the minimum public interest tests of the ETC Designation Order.

3. US Cellular has failed (and in fact has refused) to provide the necessary "fact specific" data specified in the ETC Designation Order and in 47 C.F.R. Section 54.202, which the FCC has specifically encouraged the states to review as part of the state Commission's public interest analysis, and has thus made any finding the Commission might make in favor of US Cellular contrary to the minimum public interest criteria set forth by the FCC.

4. US Cellular's Application fails to meet the minimum statutory and FCC requirements in that US Cellular makes no firm commitment or demonstration that it will add new facilities or improve its existing facilities to provide high quality wireless signal coverage *throughout* its requested ETC service area in order to receive ETC status. In order to receive ETC status, US Cellular should clearly demonstrate that it will use public

USF support to provide or at least improve its signal quality in every exchange in which it has requested ETC designation.

5. Designation of US Cellular as an additional ETC in its requested rural telephone service areas will cause significant harm to the existing rural ETC carriers and the rural customers they serve.

6. US Cellular is seeking to avoid public accountability for its use of scarce public support funds; US Cellular's purported offer to comply with any future Commission requirements—provided it receives ETC designation and funding first—is unsound regulatory policy and does not even meet the *lower* legal standard traditionally used by this Commission in a variety of other types of Commission cases, that of being “*not detrimental to the public interest*”.¹⁴

II. ISSUE LIST STATEMENT OF POSITIONS

Pursuant to the Commission's *Order Adopting Procedural Schedule*, Spectra and CenturyTel offer the following positions on each disputed issue as set forth in the Staff's Proposed List of Issues filed on October 5, 2005.

Issue 1. Telecommunications companies seeking eligible telecommunications

(“ETC”) status must meet the requirements of Section 214(e)(1) throughout the service area for which designation is received. Section 214(e)(1) requires carriers to offer the services that are supported by Federal universal support mechanisms 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 to advertise the availability of such services and

¹⁴ See, e.g., *State ex rel. City of St. Louis v. PSC*, 73 S.W.2d 393 (Mo. Banc 1934); *In the Matter of the Joint Application of Missouri Gas Energy et al.*, 3 Mo.P.S.C. 3d 216 (1994).

the charges therefor using media of general distribution. Does US Cellular meet the requirements of Section 214(e)(1) throughout the service area for which US Cellular seeks ETC designation?

POSITION: No.

A. Ubiquitous Coverage

Section 214(e) (1) requires that an ETC applicant offer (and advertise) the services supported by universal service support mechanisms “*throughout* the service area for which the designation is received”. The FCC has interpreted this to require the ETC applicant to show how high-cost universal service support will be used to improve its coverage, service quality or capacity in every wire center for which it seeks designation and expects to receive universal service support.¹⁵ While a competitive carrier is not necessarily required to be providing the supported services throughout its requested ETC area before obtaining ETC status, a clear plan and enforceable commitment to do so is required and US Cellular’s Application and prefiled testimony, as discussed below, is woefully deficient in this important regard.

In order to analyze whether US Cellular has met this fundamental threshold requirement, witness Glenn H. Brown conducted a “propagation analysis” of US Cellular’s existing and projected wireless signal coverage in its requested ETC service area (Brown Rebuttal HC, pp. 25-41 and attached schedules; *see also*, Schoonmaker Rebuttal HC). Mr. Brown’s analysis and ultimate conclusion that US Cellular has failed to meet this requirement is based on data and information deemed by US Cellular to be Highly Confidential and is therefore summarized on pages 38-41 of the Highly Confidential version of Mr. Brown’s Rebuttal Testimony.

¹⁵ ETC Designation Order, para. 2.

Although not conducting its own independent propagation analysis, and while suggesting that the requirement to serve or improve service in every wire center should be ignored in the interest of “administrative simplicity”, the Staff at least has concurred with Mr. Brown that:

1) “US Cellular does not break down how high cost universal support will be used to ‘improve its coverage, service quality, or capacity in every wire center’ where US Cellular requests ETC designation” (McKinney Rebuttal, p. 6);

2) “[i]nformation is also not provided for areas in US Cellular’s proposed ETC area that will have no cellular service from US Cellular either before or after the potential approval of the instant ETC application” (*Id.*);

3) “...there is no information provided in the maps, the Application, or in the testimony of the three US Cellular witnesses on how these [16 proposed] additional cell towers would improve coverage, service quality or capacity in every wire center where US Cellular requests designation” (*Id.*); and finally

4) “...it does appear that there will be wire centers where there will be no signal coverage before or after a potential US Cellular designation, even with the addition of the new cellular towers proposed in the application” (McKinney Rebuttal, p. 8).

Office of the Public Counsel witness Meisenheimer also agrees that US Cellular “should provide more evidence that it can reasonably serve ubiquitously and on a timely basis throughout the requested designated areas including areas currently subject to ‘spotty’ service” (Meisenheimer Rebuttal, p. 4). Under the Commission’s long established Chapter 2 procedural rules, US Cellular is required to provide such information in its prefiled testimony, not at or after hearing. Any attempt to supplement

its submission now not only would violate the Commission's own rules but also would be fundamentally unfair to the other parties.

The uncontested signal coverage analysis submitted by witnesses Brown and Schoonmaker shows that there are substantial portions of the requested ETC service area (including significant portions of major highways) where US Cellular does not currently provide service. US Cellular furthermore has offered no firm commitment that it will serve throughout the service area requested in any reasonable time frame and has specifically resisted complying with the most recent FCC requirements that it provide a five-year plan indicating how it intends to use USF support to do so.

Section 254(b)(3) of the Act speaks of parity between rural and urban customers in terms of services offered, quality of service and rates. Most urban wireless customers use conventional handheld cellular phones. To the extent US Cellular intends to utilize rooftop antennas and high-power customer equipment to attempt to meet its signal coverage requirements, this at the very least should be considered to be a disadvantage in the required public interest and cost/benefit analysis under Section 214(e)(2).

B. Reliance on Resale

While Section 214(e)(1) technically permits an ETC to offer USF supported services thru resale, rather than thru investment in its own facilities, an excessive reliance on resale to meet its ubiquitous service requirement should at least be considered as a negative factor in the required public interest analysis for the designation of multiple ETCs in rural areas. One of the primary goals of public universal service funding is to incent investment in rural telecommunications infrastructure.¹⁶ Particularly as multiple

¹⁶ *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket 96-45, Rural Task Force Recommendations to the Federal-State Joint Board on Universal Service, Released September 29, 2000, at

carriers (including multiple wireless carriers) compete for a limited pool of high-cost support funds, preference should be given to those carriers who meet their ETC obligations through investment in rural telecommunications infrastructure. (Brown Surrebuttal, pp. 9-11). This policy is consistent with the FCC’s statement that “[a]n entity that offers the supported services exclusively through resale shall not be designated as an ETC”.¹⁷ The Commission should keep this in mind when US Cellular purports to rely on yet-to-be-established “resale arrangements” with other carriers to attempt to respond to concerns about sparse or nonexistent network coverage throughout major portions of the rural exchanges of US Cellular’s rather large requested ETC service area.

C. Local Usage

As interpreted by the FCC, Section 214(e)(1) of the Act also requires the additional ETC to provide “local usage”, which if not identical to, must at least be comparable to the local usage provided by incumbent provider.¹⁸ Spectra and CenturyTel offer unlimited local calling for both originating and terminating local calls; US Cellular does not (Brown Rebuttal, p. 44; Brown Surrebuttal p. 5). Local usage also contemplates high quality, two-way communications. As part of its “case by case” analysis of the local usage comparability issue, this Commission clearly has the authority to prescribe a minimum amount of local usage¹⁹ *and* quality of service standards²⁰ as a prerequisite condition to granting ETC status and Spectra and CenturyTel would respectfully suggest that it would be in the public interest to do so.

p. 14. “The Task Force reached agreement that a primary purpose of universal service support is to promote investment by both ILECs and CLECs in rural America’s telecommunications infrastructure”.

¹⁷ ETC Designation Order, footnote 40, *citing*, 47 C.F.R. Section 54.101(a)(5).

¹⁸ ETC Designation Order, para. 32, 34.

¹⁹ *Id.*, para. 34 (“there is nothing in the Act, Commission rules, or orders that would limit state commissions from prescribing some amount of local usage as a condition of ETC status”).

²⁰ *Id.*, para. 30-31.

Even if the Commission decides that US Cellular meets the statutory minimum requirement with respect to “comparable” local usage and declines to impose minimum local usage and quality of service requirements similar to those currently imposed on incumbent ETCs, the Commission can and should at least consider--as part of its cost/benefit and public interest analysis under Section 214(e)(2)--whether US Cellular’s “comparable” local service offering, on balance, provides the same public benefits and quality of service already being provided by the incumbent ETC carrier under carrier of last resort obligations and this Commission’s quality of service rules. (Schoonmaker Rebuttal, pp. 28-29).

Issue 2. ETC designations by a state commission must be consistent with the public interest, convenience and necessity pursuant to Section 214(e)(2). All parties agree that ETC designations must be consistent with the public interest, convenience and necessity for areas served by rural carriers, and all parties but US Cellular agree that ETC designations in areas served by non-rural carriers must also be consistent with the public interest convenience and necessity. The Federal Communications Commission (“FCC’s”) ETC Report and Order determined that this public interest standard applies regardless of whether the area is served by a rural or non-rural carrier.

A. Is granting ETC status to US Cellular in areas served by rural carriers consistent with the public interest, convenience and necessity?

B. Must ETC designations in areas served by non-rural carriers be consistent with the public interest, convenience and necessity?

C. If the answer to B is “no”, should the Commission nonetheless ensure that all ETC designations in areas served by non-rural carriers are consistent with the public interest, convenience and necessity?

D. If the answer to either B or C is “yes”, is granting ETC status to US Cellular consistent with the public interest, convenience and necessity in areas served by non-rural carriers?

POSITION: Granting ETC status to US Cellular in this case in the areas served by rural carriers is not consistent with the public interest, convenience and necessity. ETC designations in areas served by non-rural carriers must be consistent with the public interest, convenience and necessity. Granting ETC status to US Cellular in this case is not consistent with the public interest, convenience and necessity in areas served by non-rural carriers.

A. Burden of Proof

It should be uncontested that the burden of proof in this case clearly rests upon US Cellular.²¹ That US Cellular has failed to meet its burden in its Application, direct and surrebuttal testimony is discussed above with respect to the requirements of Section 214(e)(1), and below with respect to the public interest test of Section 214(e)(2).

B. This Commission’s Broad Public Interest Powers

State law grants this Commission broad powers, discretion and authority in making public interest determinations over a wide variety of issues respecting public utilities; in some instances setting the lower legal standard as something being “not detrimental to the public interest” and in others setting the higher legal standard as

²¹ ETC Designation Order, para. 44. This Commission in the MMC case likewise previously has recognized that the ETC applicant bears the burden of proof.

something being “in the public interest”. Current state law still gives this Commission broad public interest discretion and authority (e.g. among other things, quality of service issues, certification of new entrants) in inquiring into and making public interest determinations with respect to telecommunications. As noted above, this Commission properly exercised its broad public interest authority in the previous MMC ETC case, where the higher legal standard of “in the public interest” was required, and is here again called upon to do the same.

Nothing in the Act or actions by the FCC with respect to ETC designations changes this Commission’s broad public interest authority. In fact, not only has Congress and the FCC made it clear that *state* commissions have *primary* authority over ETC designations²², the FCC has strongly encouraged the states to exercise that authority through a “rigorous” ETC designation process. To that end, the FCC in its ETC Designation Order has provided the states with a suggested public interest analytical framework, one which sets forth *minimum* requirements and considerations, and which clearly allows the states to consider additional public interest factors and impose additional public interest/consumer protection requirements as part of the state-specific ETC designation process.²³

D. Public Interest Analytical Framework

To assist the states in exercising their broad latitude and discretion in determining what constitutes a multiple ETC designation being in the public interest, the FCC has provided the states with an evolving set of minimum guidelines.²⁴ The 2004 *Virginia Cellular* order makes it clear that “competition, by itself, is not sufficient to satisfy the

²² ETC Designation Order, para. 8.

²³ *Id.*, para 19.

²⁴ *Id.*, para. 40-41, 44, 45.

public interest test in rural areas”.²⁵ In that case, the FCC concluded that “the balancing of benefits and costs is a fact-specific exercise”²⁶, that the analysis must focus on “the benefits of increased competitive choice and the impact of multiple designations on the universal service fund”²⁷, that the ETC applicant has an “obligation to serve the designated service area within a reasonable time frame”²⁸, and the competitive ETC must “submit records and documentation on an annual basis detailing its progress towards meeting its build-out plans in the service areas it is designated as an ETC.”²⁹

Earlier decisions, such as the ones relied upon by US Cellular, tended to focus on the issue of competition alone as the primary consideration in the public interest analysis. Today, the FCC has made it clear the “value of increased competition, by itself, is unlikely to satisfy the public interest test”.³⁰ Beginning in 2003, and certainly after *Virginia Cellular*, regulators began looking beyond mere technical compliance with Section 214(e) to determine how the ETC applicant intends to use high-cost support and how the grant of ETC status will sufficiently improve the availability and quality of the services that the public receives to offset the public costs that it will create. (Brown Rebuttal, p. 15-16, citing examples of recent state decisions).

1. *Virginia Cellular’s* Cost/Benefit Analysis

Spectra and CenturyTel witness Brown has applied the fact-specific, cost/benefit analysis of *Virginia Cellular* to US Cellular’s Application and concludes the public costs of granting ETC status to US Cellular in its requested rural areas significantly outweigh

²⁵ *Virginia Cellular*, at para. 4.

²⁶ *Id.*, at para. 28.

²⁷ *Id.*, at para. 4.

²⁸ *Id.*, at para. 28.

²⁹ *Id.*, at para. 46.

³⁰ *Id.*, at para. 4; see, also, ETC Designation Order, para. 40-45.

the purported public benefits. (Brown Rebuttal, pp. 18-29). His analysis looks at how much will the choice of service offerings to rural Missouri customers be increased by US Cellular's ETC designation; the advantages and disadvantages of particular US Cellular service offerings, including the possible benefits of mobility and larger calling areas weighed against dropped calls and poor or non-existent signal coverage; and the impact on the USF fund. All of this in the context of the need for rural/urban parity in terms of availability and quality of service under Section 254(b)(3), the fact that there has been no showing that any rural Missouri customer cannot currently obtain ETC supported services from existing ETC providers, and that other wireless carriers, without ETC status, are currently operating and providing competitive services in significant portions of US Cellular's requested ETC service area.

US Cellular stands to receive approximately eight million dollars (\$8 million) per year in USF support if designated as an ETC in Missouri. It is difficult, if not impossible, to see how Missouri consumers will receive incremental public benefits anywhere near this level. US Cellular commits use this funding to construct sixteen (16) new towers, predominantly in the lower-cost areas of its requested ETC service area where US Cellular currently serves rather than expanding its coverage into the high-cost, low-density rural exchanges where it currently does not serve. These new towers will result in a negligible increase in US Cellular network coverage and will still leave significant portions of major highways in the requested ETC service area without any wireless signal coverage (Brown Rebuttal, pp. 33-34; HC pp. 38-41, and Schedule GHB 8HC). On balance, therefore, Missouri customers would experience significant additional cost with negligible incremental benefits from US Cellular's designation as an additional ETC in

its requested ETC service area. Moreover, granting US Cellular’s ETC Application could result in additional harm to Missouri customers given the economics of multiple ETCs in high-cost, low-density rural areas (Brown Rebuttal, pp. 20-24, 46-49).

Thus, even if the Commission agrees with US Cellular that the more stringent public interest requirements contained in the more recent ETC Designation Order should be ignored, US Cellular has failed to pass the earlier cost/benefit test of *Virginia Cellular*.

2. ETC Designation Order Criteria

The ETC Designation Order builds upon the cost/benefit test of *Virginia Cellular* and then beyond that adopts minimum, but mandatory, requirements for an applicant to be designated as an ETC by the FCC.³¹ The notion that the ETC Designation Order and the rules promulgated thereunder may *not* have been be “technically” binding on US Cellular if this request had been filed with the FCC, does not in any way preclude this Commission from considering and applying these minimum (or for that matter additional) requirements in this case. US Cellular certainly was at least aware or should have been aware of the ETC Designation Order, and this Commission’s decision in the MMC case, prior to the time it filed its ETC request in Missouri. Indeed, its Application acknowledges the ETC Designation Order and addresses the FCC’s analysis in the event this Commission applies part or all of it to US Cellular’s Application.³² The reasons that this Commission *should* apply the ETC Designation Order criteria in this case are discussed below under Issue 3. It should be undisputed that these new criteria “create a more rigorous ETC designation process” and that their application by both the FCC and

³¹ ETC Designation Order, at para. 1, 20, 47.

³² US Cellular’s Application, p. 11.

state regulators are intended to “improve the long term sustainability of the universal service fund”³³ while still promoting the goals, policies and mandates of the Act.

There is no dispute by any party to this case that pursuant to the ETC Designation Order, in considering whether a common carrier has satisfied its burden of proof necessary to obtain ETC designation, the applicant must:

1. Provide a five-year plan “describing with specificity” and demonstrating how high-cost universal service support will be used to improve its coverage, service quality or capacity in every wire center for which it seeks designation and expects to receive universal service support;³⁴
2. Demonstrate its ability to remain functional in emergency situations;³⁵
3. Demonstrate that it will satisfy consumer protection and service quality standards;³⁶
4. Offer local usage plans comparable to those offered by incumbent local exchange carriers in the areas for which it seeks ETC designation;³⁷ and
5. Acknowledge that it may be required to provide equal access if all other ETC’s in the designated service area relinquish their designations pursuant to Section 214(e)(4) of the Act.³⁸

Not only has US Cellular failed (and in fact refused) to submit a five-year plan, it has failed to provide any of the fact-specific data required to demonstrate how it will “provide service throughout the ETC service area in a reasonable period of time” or that

³³ ETC Designation Order, at para. 2.

³⁴ *Id.*, at para 23 (“[t]he five-year plan must demonstrate in detail how high-cost support will be used for service improvements that would not occur absent receipt of such support”).

³⁵ *Id.*, at para. 25-27.

³⁶ *Id.*, at para 28-31.

³⁷ *Id.*, at para. 32-34.

³⁸ *Id.*, at para. 35-36.

it will “improve its coverage, service quality or capacity in every wire center for which it seeks designation and expects to receive universal service support”. **This critical data is necessary to properly conduct the cost/benefit analysis of whether the projected expenditure will provide increased public benefits commensurate with the increased public costs** (Brown Rebuttal, p. 42). Even the Staff, which for purposes of “administrative simplicity” supports the granting of US Cellular’s Application, agrees that US Cellular had failed to meet the first test set forth in the ETC Designation Order. Spectra and CenturyTel further believes that US Cellular has failed to demonstrate that it offers “comparable local usage plans” to those offered by the incumbent (Brown Rebuttal, p. 44).

With respect to the remaining criteria, the Commission will need to address whether US Cellular’s level of commitment provided in its ETC submission is sufficient to meet the specified criteria, especially with respect to the extent of its reliance on “resale arrangements” to meet its service requirements and the “comparability” of its “local usage” plans (see discussion under Issue 1 above).

In addition to meeting these five mandatory minimum criteria, the ETC Designation Order requires the Commission to “determine that an ETC designation is consistent with the public interest, convenience and necessity.”³⁹ Included in this public interest analysis is the cost/benefit analysis as described above.

Spectra and CenturyTel witness Brown has submitted extensive testimony and analysis on what is and is not in the public interest in this case. In his Rebuttal testimony, he also referenced a White Paper he authored in March 2005 entitled “*Universal Service, Rural Infrastructure at Risk*”, which provides additional background and support with

³⁹ ETC Designation Order, at para. 40.

respect to the current universal service situation faced in high-cost, low-density rural areas across the nation and which is attached hereto by reference. Also attached hereto by reference, since US Cellular cited it in Surrebuttal Testimony out of context⁴⁰, is a complete copy of Mr. Brown's June 2002 paper entitled "USF Portability—Getting it Right".

Issue 3. The FCC's ETC Report and Order determined that carriers seeking ETC designation from the FCC must meet certain requirements. The FCC encouraged state commissions to apply these requirements. Should the Commission apply the guidelines included in the FCC's ETC Report and Order in its evaluation of the application filed by US Cellular?

POSITION: Yes, absolutely. The Commission in this case should apply, as *minimum* requirements, the ETC Designation Order guidelines and further consider applying the additional public protection criteria offered by the Office of the Public Counsel in this case as well as any additional or similar criteria contemplated in the Commission's proposed ETC rulemaking.

Spectra and CenturyTel agree with SBC witness Stidham in his Rebuttal testimony where he states that the Commission should apply the ETC Designation Order guidelines in this case because: 1) "Missouri's use of these guidelines will contribute to a rational, comprehensive, national policy to promote the advancement and preservation of universal service"; 2) "[t]he guidelines are fully consistent with the requirements of the federal Telecommunications Act of 1996 ('the Act') and the recommendations of the Joint Board on Universal Service, which spent considerable time analyzing the issue"; 3) use of the "requirements embodied in the Guidelines will result in a 'more rigorous ETC

⁴⁰ Wood Rebuttal Testimony at p. 16.

designation process’, ‘will allow for a more predictable ETC designation process’, “and will” ‘ensure designation of carriers that are financially viable, likely to remain in the market, willing and able to provide the supported services throughout the designated service area, and able to provide consumers an evolving level of universal service’”. (Stidham Rebuttal, p. 6, footnotes omitted).⁴¹

As noted above, the ETC Designation Order criteria are *minimum* requirements⁴² and thus far appear to be echoed in the Commission’s proposed upcoming ETC rulemaking. The FCC has encouraged state commissions to use these criteria and analytical guidelines⁴³ as a baseline in analyzing what does and does not meet the overall public interest based on the unique circumstance in each state and this Commission certainly should do so. The Office of the Public Counsel has suggested additional requirements, with which Spectra and CenturyTel concur (with the one exception noted above regarding the resale issue).

However, as already recognized in the earlier MMC case, and confirmed by US Cellular’s positions taken in this case, this Commission by Missouri law has little, if any, real regulatory authority, discovery, or enforcement powers over wireless carriers. (“While MMC has verbally made general system improvement and customer service commitments the record is unclear as to the extent of the Commission’s legal authority and practical ability to enforce such commitments if MMC’s request is granted”).⁴⁴ For this reason the Commission therefore should be careful and cautious in conditioning ETC designations on an applicant’s commitments (or even Commission rules) which may well

⁴¹ See, also, ETC Designation Order, at para. 5.

⁴² *Id.*, at para 1.

⁴³ *Id.*, at para. 1, 41, 58-61.

⁴⁴ *In re: Mid-Missouri Cellular*, at p. 17.

prove difficult to enforce, if not outright unenforceable, after ETC status is granted and USF funds are expended.

CONCLUSION

The Commission in its overall public interest analysis needs to keep in mind that goals of universal service have been, and must continue to be, that all consumers, particularly those in rural, insular and high-cost areas, have access to at least one Carrier of Last Resort providing access to high-quality and affordable basic and advanced telecommunications services. If US Cellular's Application passes muster in this case based on its woefully inadequate showing, then the Commission has not only opened wide the door, but in fact has removed it all together, for future ETC applicants.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was sent to counsel for all parties of record in Case No. TO-2005-0384 by electronic transmission this 14th day of October, 2005.

/s/ Charles Brent Stewart
