

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

COMPLETE TITLE OF CASE:

STATE OF MISSOURI, EX REL BPS TELEPHONE COMPANY, ET AL.; Respondents,

USCOC OF GREATER MISSOURI, LLC D/B/A US CELLULAR, Appellant,

v.

MISSOURI PUBLIC SERVICE COMMISSION, Respondent.

DOCKET NUMBER **WD69976**

DATE: May 26, 2009

Appeal From:

Circuit Court of Cole County, MO
The Honorable Jon Edward Beetem, Judge

Appellate Judges:

Division Two
Thomas H. Newton, C.J., James M. Smart, Jr., and Victor C. Howard, JJ.

Attorneys:

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**MISSOURI APPELLATE COURT OPINION SUMMARY
MISSOURI COURT OF APPEALS, WESTERN DISTRICT**

STATE OF MISSOURI, EX REL BPS TELEPHONE COMPANY, ET AL.;
Respondents, USCOC OF GREATER MISSOURI, LLC D/B/A US CELLULAR,
Appellant, v. MISSOURI PUBLIC SERVICE COMMISSION, Respondent.

WD69976

Cole County

Before Division Two Judges: Newton, C.J., Smart, and Howard, JJ.

The federal Universal Service Fund (USF) subsidizes telecommunications providers offering universal service in high-cost areas. In order to receive these subsidies, a carrier must be designated as an Eligible Telecommunications Carrier (ETC) and must comply with statutory and regulatory requirements. Under federal law, state public utility commissions are responsible for in-state ETC designations. In Missouri, the Public Service Commission (the Commission) performs the ETC designation. US Cellular applied to the Commission for ETC status. The Commission found US Cellular had not demonstrated how it would use universal service support to enhance universal service. After additional evidence and hearing, the Commission was still concerned that US Cellular had not demonstrated how it would use the support to further universal service rather than replace its own investments. The Commission's order designated US Cellular as an ETC, but imposed a condition requiring the company to invest a two-year average baseline of \$15 million on cell site development in its rural Missouri markets. U.S. Cellular appeals.

AFFIRMED.

Division Two Holds:

In its first three points on appeal, U.S. Cellular disputes the legality of the Commission's baseline investment condition. In its fourth point, the company contests the evidentiary basis for the baseline condition.

U.S. Cellular first asserts that the investment requirement is a rule and, as such, is invalid because it was not adopted according to rule-making procedures. An agency's announcement of policy or interpretation of law that has future effect and acts on unnamed and unspecified facts is a rule. Here, the Commission's decision was not a statement of general applicability, nor did it act on unnamed and unspecified facts. Rather, the Commission applied existing statutes and rules to the submission made by U.S. Cellular. Therefore, its decision was not invalid rulemaking and U.S. Cellular's first point is denied.

U.S. Cellular next contends that the Commission's order violates 47 U.S.C. section 253 because the condition is not competitively neutral. The record reflects that the Commission imposed the baseline investment condition because U.S. Cellular was otherwise unqualified for the ETC designation: the company did not show high-cost support would be used to expand universal service rather than replace its own spending. Were the Commission to designate U.S. Cellular as an ETC *without* the baseline requirement, such an action would give U.S. Cellular an unfair advantage by allowing it to receive high-cost support without meeting the statutory and regulatory requirements. Consequently, U.S. Cellular's second point is denied.

In its third point, U.S. Cellular argues that the condition is “rate or entry regulation” and, as such, is preempted under 47 U.S.C. section 332. However, the baseline investment requirement is not a regulation. Further, even assuming *arguendo* that imposing a condition came within the statute’s meaning of “regulate,” given Congress’ subsequent express and specific delegation of responsibility to state commissions to ensure that the ETC eligibility requirements are met, we do not find the Commission’s act preempted under section 332.

In its fourth point, U.S. Cellular argues that there was insufficient evidence to support either that the condition was needed, or its amount. The record reflects that the Commission’s decision was based on U.S. Cellular’s own testimony as to its past and projected spending in its rural Missouri markets. Consequently, we find there is substantial and competent evidence in the record to support the Commission’s decision. U.S. Cellular’s fourth point is denied.

We conclude the Commission’s decision was both lawful and reasonable. Therefore, we affirm.

Opinion by Newton, C. J.

May 26, 2009

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