

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

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<b>MILLENNIUM 2000 INC.</b>	:	
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<b>Application for Designation as a Wireless Eligible Telecommunications Carrier for Purposes of Receiving Federal Universal Service Support Pursuant to Section 214(e)(2) of the Telecommunications Act of 1996.</b>	:	<b>Docket No. 12-0375</b>

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**STAFF OF THE ILLINOIS COMMERCE COMMISSION  
RESPONSE TO MILLENIUM 2000 INC.’S MOTION TO STRIKE PORTIONS OF  
ICC STAFF TESTIMONY  
PUBLIC VERSION**

The Staff of the Illinois Commerce Commission (“Staff”), by and through its undersigned attorneys and pursuant to Sections 200.190 and 200.680 of the Commission’s Rules of Practice, 83 Ill. Adm. Code 200.190 and 200.680, and the Administrative Law Judge’s (“ALJs”) Ruling on June 28, 2013, hereby responds to Millennium 2000 Inc.’s (“Millennium”) motion to strike (“Motion”) portions of ICC Staff testimony.

**I. BACKGROUND**

On June 5, 2012, Millennium filed its application for designation as a Wireless Eligible Telecommunications Carrier (“ETC”) under Section 214(e)(2) of the Telecommunications Act of 1996 (“Application”). 47 USC §214(e)(2). Millennium amended its application on April 10, 2013 (“Amended Application”).

On June 11, 2013, Staff filed ICC Staff Exhibit 1.0, the Direct Testimony of Dr. James Zolnierek. On June 25, 2013, Millennium moved to strike portions of this testimony at lines 221-230, 544-574, 588-610, 396-436, 900-903, 935-937, 990-1023 and 1050-1052. Motion at 3. This Response follows.

## **II. ARGUMENT**

Millennium makes a number of significant errors of facts and law in its Motion. These mistakes are fundamental, and reflect an ignorance of applicable law, which carries a risk of deceiving the Commission. In fact, the Motion, on its face, is evidence of Millennium's apparently singular disregard of the FCC's rulings with respect to ETC designations, the Illinois Commerce Commission's role in designating ETCs, and also general legal principles.

### **A. The Motion Fails to Provide Any Rational Reason To Strike Staff Testimony**

What is fatal to the Motion is that the testimony it seeks to strike is not a proper subject for striking. The Commission's Rules of Procedure require that a Motion to Strike oppose "irrelevant, immaterial, scurrilous or unethical matter." 83 Ill. Adm. Code 200.190(a). Dr. Zolnierek's testimony is neither irrelevant, immaterial scurrilous or unethical, and Millennium's Motion does not even claim so. Further, the Illinois Appellate courts have applied the following factors, which are to be used in determining whether striking witness testimony and barring further testimony from the witness is an appropriate sanction: "(1) surprise to the adverse party; (2) the prejudicial effect of the witness' testimony; (3) the nature of the witness' testimony; (4) the diligence of the adverse party; (5) whether

objection to the witness' testimony was timely; and (6) the good faith of the party calling the witness.” *Clayton v. County of Cook*, 346 Ill.App.3d 367, 381 (1st Dist., 2003) (*quoting Boatmen's National Bank of Belleville v. Martin*, 155 Ill.2d 305, 314, (1993)). Again, the Motion does not claim Dr. Zolnierrek’s testimony should be stricken as a matter of law. Rather than present the Commission with a sound legal and factual basis for its Motion, Millennium puts itself in the position of the Commission and makes conclusions on issues of law that are at the heart of the ETC application process. For instance, Millennium concludes that Staff’s positions are beyond the Commission’s authority and then based upon its own conclusion states that “given that fact” or “given that it is beyond the legal purview of the case” Staff’s testimony should be stricken. See Motion at 3. Staff, moreover, as it makes clear in its pre-filed testimony, does not agree with Millennium’s limited view of the Commission’s authority. Thus, the scope of the Commission’s authority is at issue. This issue, like all other issues in this docket, should be determined by following the Commission’s rules and procedures which afford all parties an opportunity to present opinions, file testimony, briefs and participate in evidentiary hearings *prior* to substantive issues being decided.

In the introductory comments included in its Motion, Millennium argues that the ICC Staff’s testimony is “without legal foundation in the Public Utilities Act (“PUA”) or in the Federal Communications Commission (“FCC’s”) rules. Motion at 1. This assertion reveals and underscores Millennium’s complete misunderstanding of how ETC designation occurs pursuant to federal and Illinois’ statutes and rules. Staff will attempt to directly address the morass of misleading

and unsupported statements that comprise the Millennium Motion. However, Staff recommends the Motion be denied in whole because Millennium has failed to provide a rational reason to strike the testimony.

**B. FCC ETC Evolution On ETC Designations**

The Motion makes many unfounded allegations, often on specific points the FCC has addressed and decided. Perhaps what is most striking is Millennium's insistence that because the FCC approved its compliance plan it should be designated as a wireless ETC here in Illinois. Millennium, thus, relies on an intervening change of federal law (which has required it to file and obtain approval from the FCC for an ETC related compliance plan) which changes how ETC designations are to be evaluated in a motion contending that any change in how ETC requirements are evaluated is discriminatory and in violation of due process and equal protection.

The Motion, moreover, fails to note applicable FCC law, and in fact is generally void of any reference to controlling case law. For the ALJ's convenience, Staff will provide a summary of the FCC's evolution, which is still ongoing, in addressing certain relevant ETC designation issues. For example, the Motion states that Staff's testimony has no foundation in FCC rules. Motion at 1. This is simply wrong and inconsistent with a plain reading of applicable FCC Orders.

In the first USF proceeding, not long after the Telecommunications Act of 1996 became effective, the FCC concluded that neither the FCC nor a State Commission may impose additional eligibility requirements beyond what is stated

in Section 214(e)(1). See Report and Order, *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 97-157 (May 8, 1997), at ¶ 135 (“We conclude that section 214(e)(2) does not permit the Commission or the states to adopt additional criteria for designation as an eligible telecommunications carrier.”).

This conclusion, however, did not survive its initial review by the federal courts. In *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 419 (5<sup>th</sup> Cir. 1999), the Appellate Court concluded that “the FCC erred in prohibiting the states from imposing additional eligibility requirements on carriers otherwise eligible to receive federal universal service support.”

Accordingly, since *Texas Office of Public Utility Counsel v. FCC* the FCC has allowed state to impose additional requirements for ETC designation beyond that specifically stated in Section 214(e)(1) of the Telecommunications Act of 1996. See for example *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 05-46 (March 17, 2005) (“ETC Order”) where the FCC prescribed an analytical framework for the public interest evaluations for designation in rural and non-rural areas. In short, the FCC has, in rulemaking (as well as adjudication), abandoned the notion that satisfying Section 214(e)(1) per se meets the public interest standards for ETC designation. In other words, the FCC (and similarly State Commissions) may impose additional requirements for ETC designation beyond what is specifically prescribed in Section 214(e)(1) of the 1996 Act. This is made perfectly clear by the FCC, which stated:

In this Report and Order, we also set forth the analytical framework the Commission will use to determine whether the public interest would be served by an applicant's designation as an ETC. We find that, under the statute, an applicant should be designated as an ETC only where such designation serves the public interest, regardless of whether the area where designation is sought is served by a rural or non-rural carrier.

ETC Order, at ¶ 3 (emphasis in original).

Moreover *In the Matter of Federal-State Joint Board on Universal Service Petitions for Reconsideration of Virginia Cellular, LLC and Highland Cellular, Inc. Designations as Eligible Telecommunications Carriers In the Commonwealth of Virginia*, CC Docket No. 96-45, FCC 12-141, (November 26, 2012), at ¶¶ 10-12 ("Reconsideration Order"), the FCC made clear that its requirements for ETC designation evolved over time, through adjudication and rulemaking. Of course, like the FCC, Staff's requirements have also evolved over time, as they should. The FCC also again addressed the public interest standard in the Reconsideration Order and again emphasized that because the statute is vague on how to conduct the public interest analysis the FCC, and thus this Commission, have the discretion to determine the specific factors (*i.e.*, beyond those prescribed in Section 214(e)(1)) to consider for its public interest determination. See Reconsideration Order, at ¶¶ 11-16.

Likewise, the FCC noted that the public interest standard for each ETC Application was to be treated on its own merits, which may require tougher standards for some applicants relevant to the public interest standard set for other applicants. In this regard, the FCC explained that:

Consistent with its statutory authority, in the *Virginia Cellular Order* and *Highland Cellular Order*, the Commission concluded that a

rigorous public interest analysis was appropriate. This decision was based on the Commission's experience with the ETC process at that time. The Commission determined that each request merited a thoughtful analysis of how a particular ETC designation would affect service in the relevant area. The Commission engaged in a fact-specific public interest analysis. It concluded that "the value of increased competition, by itself, is not sufficient to satisfy the public interest test in rural areas." The Commission evaluated the merits of designating Virginia Cellular and Highland Cellular based on the information before it. We therefore disagree with Petitioners and find that the Commission did in fact explain its reasons for adopting a more rigorous public interest standard.

Reconsideration Order, at ¶ 12.

Thus, all of Millennium's charges about Staff discrimination; Staff's violations of due process and equal protection; and Staff's unfair "selected" testimony are entirely unfounded as Staff's position is in fact deeply grounded in, and consistent with, controlling law. These accusations should be summarily rejected.

Likewise, included in the unfounded and carelessly made allegations in its Motion is Millennium's contention that Staff may not apply its public interest standard on Millennium without first promulgating rules under the Administrative Procedures Act. The FCC, again, had already specifically addressed and rejected this position. The FCC explained that:

We disagree with Petitioners that the Commission violated the Administrative Procedure Act. Under the APA, an administrative agency's decisions may be issued as "rules" adopted through rulemaking, which requires notice and comment, or as "orders" adopted through adjudication, which does not require notice and comment. The designation of an ETC is an adjudication. As such, there is no requirement for the Commission to propose rules or invite comment on those proposals before determining whether to designate an entity as an ETC, as would be required in the context of a rulemaking. Indeed, until the Commission adopted rules for federal ETC designations in 2005 in the *ETC Designation Order*,

standards for evaluating ETC designations evolved through the adjudicative process.

Reconsideration Order, at ¶ 10, notes omitted.

Another example of unwarranted allegations carelessly directed at Staff is that Staff is somehow trying to regulate wireless carriers unlawfully in violation of Section 13-804 of the PUA (and also 47 USC § 332). Motion at 14. Again, Millennium is wrong as the FCC has already addressed and rejected this very same argument. In the original ETC Order, the FCC concluded that:

We also reject commenters' arguments that consumer protection requirements imposed on wireless carriers as a condition for ETC designation are necessarily inconsistent with section 332 of the Act. While Section 332(c)(3) of the Act preempts states from regulating the rates and entry of CMRS providers, it specifically allows states to regulate the other terms and conditions of commercial mobile radio services. Therefore, states may extend generally applicable, competitively neutral requirements that do not regulate rates or entry and that are consistent with sections 214 and 254 of the Act to all ETCs in order to preserve and advance universal service.

ETC Order at ¶ 31.

In sum, had Millennium engaged in even some cursory research it could have saved everyone's scarce resources by not arguing positions that have already been settled.

### **C. Specific Millennium Arguments**

Section 214(e)(2) of the Communications Act of 1934 ("Federal Act") assigns state commissions the task of designating common carriers subject to their jurisdiction as eligible telecommunications carriers. Section 13-804(B) of the PUA specifically, for the explicit purpose of performing ETC designations, places providers of wireless services under the jurisdiction of the Commission.

Thus, the Commission's authority to decide whether Millennium should be designated as an ETC is unambiguous.

In designation proceedings, the Commission must ensure that potential ETC's adhere to all applicable federal statutory requirements in Section 214(e) of the Federal Act and federal rules. It is the Commission, and not the FCC, that evaluates compliance. In doing so, the Commission has an obligation, pursuant to Section 214(e)(2) of the Federal Act, to make sure designation is consistent with the public interest, convenience, and necessity. As noted repeatedly by the FCC, these terms are not defined in the Federal Act and the Commission has the discretion to determine the specific factors to consider under the public interest, convenience, and necessity standards in the Federal Act. ETC Order at ¶¶ 40 and 61 and Reconsideration Order at ¶ 11. Nothing in federal law or the FCC's rules preempts the Commission's obligation to meet, and determine the specific factors to consider under, the public interest, convenience, and necessity standards in Section 214(e)(2) of the Federal Act.

Millennium does not and cannot point to anything that circumscribes or otherwise limits the Commission's ability to evaluate whether Millennium's designation is consistent with the public interest, convenience, and necessity. By its very nature, this requirement is broad so as to ensure that evidence that Millennium's designation will not be consistent with the public interest, convenience, and necessity is not overlooked simply because such evidence has not surfaced with respect to previous applicants or in previous proceedings.

Millennium's assertions to the contrary should be rejected and its Motion should, for this reason alone, be denied.

In its introductory comments, Millennium asserts that Staff's proposals go "beyond ICC ETC rules that have been in place for many years." Motion at 1. The Commission, however, does not have rules that govern ETC *designations*. The Commission does have rules with which certain ETCs must comply once designated (e.g., Code Parts 736 and 757), but these rules do not implement the designation requirements of Section 214(e) of the Federal Act or the FCC rules. The Commission implements ETC designations through its ETC designation orders. The Commission does not have ETC designation rules in place, nor has it ever. Millennium's assertion to the contrary is false, as are its assertions that Staff's testimony goes beyond these phantom rules.

In the Introduction of its Motion, Millennium references the approval by the FCC of its Compliance Plan. Motion at 2. Millennium explains the types of information that it provided in its Compliance Plan. *Id.* Millennium does not, however, specifically explain what bearing approval of its Compliance Plan has on this proceeding. Millennium presumably would like the Commission to conclude that the FCC's approval of Millennium's Compliance Plan substitutes for decisions the Commission is tasked with in this proceeding. In approving Millennium's Compliance Plan the FCC does not, and cannot, stand in place of the Commission with respect to designating Millennium as an ETC.

Obtaining approval of a Compliance Plan is necessary for a prospective ETC to avail themselves of the FCC's conditional grant of forbearance from the

facilities requirement of Section 214(e)(1)(A) of the Communications Act of 1934. The facilities requirement of Section 214(e)(1) is only one of several statutory requirements that must be met in order for the Commission to designate a carrier as an ETC under the 1996 Act. While mandatory for ETC designation, it is not sufficient for such designation.

Furthermore, pursuant to Section 214(e)(2) of the Federal Act and Section 13-804(B) of the PUA, it is the Commission - not the FCC - that is empowered under the 1996 Act to determine a carrier's fitness for designation as a Lifeline ETC in Illinois. The FCC's approval of a blanket forbearance-related compliance plan does not override the Commission's authority over that determination. In the Public Notice approving Millennium's Compliance Plan, which Millennium submitted into evidence in this proceeding, the FCC states:

The Commission has not acted on any pending ETC petitions filed by these carriers, and this Public Notice only approves the compliance plans of the carriers listed above. While these compliance plans contain information on each carrier's Lifeline offering, *we leave it to the designating authority to determine whether or not the carrier's Lifeline offerings are sufficient to serve consumers.*

Amended Petition, Exhibit 1B, Footnote 7, emphasis added, notes omitted.

Thus, Millennium is fully aware that while the FCC seeks information from prospective ETCs in their Compliance Plans, the FCC relies on the state commissions to use this information to make the actual ETC designations. Millennium's attempts to convince the Commission that it need not undertake the review and analyses necessary to determine whether Millennium meets the requirements of the law are misleading and deceptive. The Commission cannot

abdicate its ETC designation obligations simply to appease Millennium's self-serving and misguided arguments. Millennium's assertion that it "demonstrated to the FCC its technical and financial capacity to provide Lifeline only ETC services" provides an example of why the Commission should not rely on approval of Millennium's Compliance Plan as a substitute for its own ETC designation obligations. Motion at 2. First, it is clear that Millennium must demonstrate to this Commission that it is financially and technically capable of providing the supported Lifeline service in order for this Commission to designate it as an ETC. Section 54.201(h) of the FCC rules states:

A state commission shall not designate a common carrier as an eligible telecommunications carrier for purposes of receiving support only under subpart E of this part unless the carrier seeking such designation has demonstrated that it is financially and technically capable of providing the supported Lifeline service in compliance with subpart E of this part.

47 CFR §54.201(h).

Second, the FCC has nowhere stated that it has found that Millennium is financially and technically capable of providing the supported Lifeline service. Thus, there is no basis for the Commission to rely on the FCC's approval of Millennium's compliance plan as a substitute for the Commission's own review of Millennium's financial and technical ability.

Finally, while it is not clear what, if any steps, the FCC took to verify the financial and technical information provided to them, it is clear that information that Millennium offered to the FCC was false and/or misleading. In particular, in support of its assertion that "Millennium 2000 does not and will not rely exclusively on USF disbursements to operate," it states "Millennium 2000 has



What Millennium seeks in this proceeding is not the ability to offer wireless service (which it already has), but rather the right to provide federal USF subsidies to its customers -- subsidies which are to be passed through dollar for dollar to Lifeline Customers to the benefit of its customers and not Millennium. In order to designate Millennium as an ETC, the Commission is required to ensure that Millennium provides Lifeline service in a manner consistent with all applicable ETC related rules and laws and in a manner that is consistent with the public interest, convenience, and necessity. Millennium offers no rationale for why Section 13-804 prohibits the Commission from carrying out this duty. The implication that the Commission should designate Millennium as an ETC without properly ensuring that it meets state and federal requirements to be an ETC would be a clear unlawful abdication of Commission authority. .

Millennium next argues that this proceeding is about “determining whether Millennium 2000 meets the Commission’s existing standards for certification as a wireless ETC.” Motion at 2. Staff agrees, to the extent “existing standards” refer to standards that exist at the time the Commission evaluates Millennium’s ETC petition. The FCC has imposed certain new requirements that the Commission must ensure are met by carriers in order for their designation as an ETC. See *i.e.*, 47 CFR §54.201(h). These new requirements, however, were imposed by the FCC pursuant to the same federal statutes that have governed ETC designation in the past. To the extent Staff’s review differs from previous efforts, this is a response to concerns regarding waste, fraud, and abuse by ETCs and, in particular, Millennium’s own performance history in Illinois. See Staff Exhibit

1.0 at lines 776-975 and lines 991-1023. This review, while responding to the specific circumstances surrounding Millennium's petition, remain within the parameters of federal and state statutes and rules. The evidence Dr. Zolnierek has provided regarding Millennium's management of its wireline Lifeline service provides strong evidence that Millennium's service has not benefited the Lifeline consumers it was intended to benefit. To suggest that it is inappropriate for Staff to pursue these concerns is not only without merit, but precisely the opposite of the truth. Staff would be remiss in its duties if it did not investigate further in the face of such circumstances.

Millennium asserts that "[i]t is the Commission and not individual technical personnel that sets Illinois telecommunications policy." Motion at 2. Millennium is correct that Staff is not the final arbiter of the matters in this proceeding. As is typical in all Commission proceedings, Staff has offered testimony that includes evidence, summary of its expert analysis, and recommendations to the Commission. Nothing Staff has recommended establishes policy or in any way decides the issues in this proceeding unless the Commission itself accepts the recommendations of Staff. If the Commission does not agree with Staff, nothing precludes it from rejecting Staff's recommendations. The Commission should not, as noted above, prohibit Staff from making recommendations to it as Millennium's Motion requests.

Millennium argues that the Commission should strike Staff's testimony because "the limited time available for this proceeding makes it crucial to take steps now to confine this case to its lawful scope." Motion at 3. Millennium

presents no explanation for why there is “limited time available in this proceeding.” There are no statutory deadlines associated with ETC applications. Ironically, one of the passages of Staff testimony Millennium asks the Commission to delete, is a passage in which Staff expresses concern that Millennium’s Lifeline offering has not been shown to be any different than Lifeline offers already available to consumers. Thus, Millennium is presumably citing the urgency of getting its Lifeline product to its consumers as an argument for striking Staff testimony to the effect that Millennium’s Lifeline product will not meet consumer needs – let alone urgent consumer needs. In fact, in defense of its Motion Millennium asserts “Millennium 2000 will offer customers a choice and it will enhance the public good by providing emergency services to customers who do not have it.” Motion at 8. It is hypocritical to argue that Staff has no right to request it to provide evidence backing its unsupported claims and then support this argument with those exact unsupported claims.

Staff has presented evidence that designating Millennium as an ETC would not be consistent with the public interest, convenience, and necessity. Staff Ex. 1.0 at lines 1033 – 1052. The likely explanation for Millennium’s claim that expeditious approval is crucial is that the urgency is not with respect to customers, but with respect to Millennium’s own business plan. Again, this should give the Commission pause because, as noted in Millennium’s Motion itself, exclusive reliance on USF disbursements to operate is one of the very items that the FCC recommended for consideration with respect to a carrier’s financial capability. Motion at 11. Notably, Millennium later states that:



propose any deviation here. *Id.* Staff does not disagree. Staff's recommendations, despite Millennium's implications to the contrary, as demonstrated above in detail are firmly grounded in the federal ETC statutes as well as the FCC's ETC Designation Order and Lifeline Reform Order and Dr. Zolnierек provides cites to these orders throughout his testimony. See generally, Staff Ex. 1.0.

Millennium also attempts to insert a constitutional argument that Staff is discriminating against it and denying the equal protection of the law. Motion at 5. Millennium does not explain what constitutional right it has to the federal USF funds. Obviously, Millennium cannot identify a right to these funds, but instead merely a desire to receive them. In fact, as a matter of law, Staff cannot be found to be discriminating against Millennium or denying it equal protection without Millennium first identifying a protected right to the funds.

What the whole of Millennium's Motion reveals is that it would prefer that Staff and the Commission ignore the ETC Designation Order and Lifeline Reform Order or, at least, make no effort to investigate Millennium's claims of compliance with those Orders. For example, Millennium states "[i]t appears that justification for imposing new technical and financial requirements for new ETC applications is the statement in paragraph 388 of the Lifeline Order ...", which includes five considerations that Millennium lists. Motion at 10 - 11. Then Millennium indicates that "...these five considerations are not a checklist that must be met." This criticism exemplifies the specious nature of Millennium's argument. It is not that Staff's recommendation is not grounded in the ETC Designation Order and

Lifeline Reform Order, but rather that Millennium does not believe the Commission should place much weight on the guidance in these orders. Millennium's argument that Staff has not grounded its argument in ETC Designation Order and Lifeline Reform Order is deceiving. As this example illustrates, what Millennium takes issue with is Staff's interpretation and weighting of the FCC's guidance when making its recommendations to the Commission.

Compounding the deficiencies in its case in this proceeding, Millennium continues to make claims that it does not, and likely cannot, support. For example, Millennium states "Millennium 2000 currently serves a subset of the population that has been historically neglected." Motion at 8. While Staff does not dispute that at some point in time there were populations that were neglected with respect to telephone service, Millennium provides no support for any assertion that it is filling a need that is not currently met or providing a benefit that is not already available in the marketplace. More than likely, it cannot. First, as documented in Dr. Zolnierek's testimony, Millennium has been unable to define precisely where it will offer service. Staff Ex. 1.0 at 29-34. Second, Millennium appears to base its arguments on one service area (inner-city Chicago), without reference to all the other parts of the state that it presumably seeks to serve. Third, there are several carriers designated as ETCs in Chicago (including the inner-city Chicago area referenced by Millennium). See, for example Commission Orders in Docket Nos. 09-0067, 09-0213, 09-0269, 09-0605, 10-0452, 10-0453, 10-0512, and 11-0073. Millennium's unsupported and misleading statements implying that it is the only company seeking to serve

these areas are precisely the type of evidence Staff believes the Commission should reject. Again, in what can only be considered a brazen move, Millennium 2000 asserts “Millennium 2000 is perfectly willing to show how its service would benefit the public” in support of its Motion to Strike Staff testimony requesting precisely such a showing. Motion at 9.

In support of its argument that it should be treated like Cricket, Millennium argues that since “Millennium 2000 has wireline revenues, it has the same incentives mentioned by the FCC to operate in a responsible manner.” Motion at 13. As Staff has explained, Millennium has failed to provide its wireline Lifeline service in a manner that is consistent with state and federal rules and has not operated it in a manner that benefits customers. Staff Ex. 1.0 at 36-47. Millennium’s arguments stand for the notion that despite the fact that the evidence suggests Millennium has not operated its wireline lifeline service in a manner consistent with the public interest, convenience, and necessity, it should be treated in the same fashion as a carrier for which no evidence exists of such Lifeline mismanagement. The Commission should disabuse Millennium of this incorrect notion.

What Millennium fails to understand is that, for the most part, the basic requirements imposed upon ETCs have not changed; Staff’s recommendations in this proceeding are firmly grounded in these requirements. Many of Staff’s efforts, as well as those reflected in the FCC’s Orders, are designed to measure and ensure compliance with state and federal requirements. In this case, there is no question that Staff took a deeper look at Millennium’s ability to comply with its

ETC requirements. In large part, this was necessitated by Millennium's own underperforming track record of providing wireline Lifeline service and the deficiencies in its Petition. Millennium's Motion is nothing other than an attempt to restrict Staff's inquiries and distract the Commission. The Commission should reject Millennium's Motion and should, as recommended by Staff, deny Millennium's Petition for designation as a Wireless ETC.

With respect to its request to strike Dr. Zolnierек's public interest testimony at lines 221-230 and lines 544-574, Millennium argues that "Dr. Zolnierек's requirement that a carrier must offer 'new and/or better service options or provide lower priced service,' is a novel test not codified in a Commission rule, not required in any previous ETC case and not consistent with any FCC rule or order." Motion at 7. As noted above, the Commission does not have ETC designation rules. Thus, the first basis of support fails. Second, despite Millennium's bald assertion to the contrary, the Commission has made decisions consistent with Dr. Zolnierек's recommendation in previous cases. For example, in Docket No. 09-0067, the Commission stated:

A public interest analysis in the context of ETC applications involves the balancing of a number of factors. One such factor is the benefit of increased customer choice, although that value alone is unlikely to satisfy the public interest test. In the instant proceeding, the designation of Nexus as an ETC will increase customer choice for low income consumers eligible for Lifeline and Link-Up support in the areas requested.

Another factor for consideration is the advantages and disadvantages of the particular service offering. In that regard, Nexus's offering is intended to provide additional rate plan options for low income customers and increased access to emergency services for the public overall, to the extent that additional low income customers are enabled to obtain service.

Order, Docket 09-0067, May 20, 2009 at 20.

Finally, the FCC has expressly provided guidance that:

(1) Consumer Choice: The Commission takes into account the benefits of increased consumer choice when conducting its public interest analysis. In particular, granting an ETC designation may serve the public interest by providing a choice of service offerings in rural and high-cost areas. The Commission has determined that, in light of the numerous factors it considers in its public interest analysis, the value of increased competition, by itself, is unlikely to satisfy the public interest test.

FCC ETC Order (FCC 05-46) at 44.

Thus, the factual assertions made by Millennium are false and the argument for its motion to strike Dr. Zolnierek's public interest testimony at lines 221-230 and lines 544-574 baseless.

With respect to its request to strike Lines 588-610 of Dr. Zolnierek's testimony, Millennium requests to strike reporting requirements Dr. Zolnierek recommends because they are not in the Commission's rules and have not been approved by JCAR or the Commission. Once again, as noted above, the Commission doesn't have designation rules. Additionally, the fact that the Commission has not yet decided this case is not grounds for rejecting Staff's recommendations in this proceeding. Striking Staff's testimony for this reason would be self-evidentially procedurally defective and would preclude parties from filing testimony in any proceeding – an absurd result. Presumably, what Millennium is seeking is to prohibit Staff testimony in this proceeding if it includes recommendations not addressed in Commission Orders in other proceedings. However, there is no *res judicata* in Commission proceedings, and the

Commission can come to whatever conclusions it wishes based upon the individual facts before it in each case. *Mississippi River Fuel Corp. v. Illinois Commerce Comm'n*, 1 Ill. 2d 509, 513 (1953). Therefore, as noted above, evaluating whether Millennium's designation is consistent with the public interest, convenience, and necessity depends on the circumstances surrounding Millennium's request. There is no reason to believe, and Millennium has supplied no evidence to support, that its circumstances are comparable to those of previous ETC applicants. Dr. Zolnierек has provided evidence to the contrary. See for example Staff Ex. 1.0 at 46.

Millennium's only specific argument for its request to strike lines 990-1023 & 1050-1052 is that the Commission didn't address Cricket's customer retention rate in Cricket's ETC designation docket. Millennium provides no evidence that Cricket had retention rates giving rise to the concerns that Millennium's does. And, as noted by Zolnierек, recent evidence indicates that Millennium's retention rate was well below any other ETC's Illinois Lifeline customer retention rate, including Cricket's. *Id.*

In making its arguments to strike Dr. Zolnierек's testimony at Lines 396-436, Millennium again argues that the recommendations of Dr. Zolnierек are not in a Commission rule and were not applied to Cricket. Again the Commission has no ETC designation rules, making Millennium's first criticism immaterial. Further, Millennium again provides no evidence that Cricket's wireless service record was comparable to that of Millennium and even a cursory examination of its petition shows Cricket with experience differing from that of Millennium. See

Application of Cricket Communications, Inc. for Designation As An Eligible Telecommunications Carrier at 1. Millennium does not and has not operated like Cricket and Staff's recommendations reflect that. Again, the Commission is not required to follow the identical analysis it did in the Cricket matter. In fact, it must assess each ETC application on its own individual merits. Millennium's reliance on the Cricket Order is misplaced.

In defending its request to strike Dr. Zolnierrek's testimony at Lines 900-903 and Lines 935-937, Millennium seems to imply that the Commission should have no expectation that Millennium will meet quality of service requirements with respect to its wireless Lifeline services. This, ironically, is defined by Commission rules. The Commission has specifically prescribed quality of service rules in Code Part 736 that are applicable to wireless ETCs. The implication of Millennium's arguments appear to be that the Commission's rules are in contravention of Illinois law, cannot be applied to Millennium, and thus, Staff was out of bounds to request evidence of and otherwise address Millennium's compliance. There is no basis whatsoever for this implication.

Finally, Millennium also makes vague statements such as: "The staff testimony appears to ignore that it is selectively interfering with Millennium 2000's operations as a small Illinois grown business, while leaving alone the largest national ETC operators, many of whom are not from Illinois." Motion at 2. Likewise, Millennium also argues that it is a minority woman-owned business. Motion at 11. Millennium fails to explain these statements or tie them to any

issue. Neither point, however, relieves the Commission from its responsibilities to ensure that all ETC applicants meet all applicable requirements.

### III. CONCLUSION

For all of the reasons above, the Commission should reject Millennium's Motion to Strike and should, as recommended by Staff in its testimony, deny Millennium's Petition for designation as a Wireless ETC.

Respectfully submitted,

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