STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

MILLENNIUM 2000 INC. **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.**	: : : : : : : : :	**Docket No. 12-0375**

BRIEF ON EXCEPTIONS OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION

(PUBLIC VERSION)

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The Staff of the Illinois Commerce Commission ("Staff"), by and through its undersigned attorneys and pursuant to Section 200.830 of the Commission's Rules of Practice, 83 Ill. Adm. Code 200.830, respectfully submit their Brief on Exceptions in the above-noted proceeding.

I. INTRODUCTION

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" or "Petition"). 47 USC Section 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 September 20, 2013, Millennium submitted the Response Testimony of Donna Harrison and August H. Ankum, PhD. On December 19, 2013 an evidentiary hearing was conducted and a briefing schedule set. On January 22, 2014, Staff and Millennium filed Initial Briefs ("IBs"). On February 19, 2014, the parties filed Reply Briefs ("RBs"). The Administrative Law Judge issued a Proposed Order ("ALJPO") on August 5, 2014. This Brief on Exceptions follows.

II. EXCEPTIONS

Staff disagrees with the findings in the ALJPO, however, Staff will not respond to every finding and conclusion made therein. Staff rests on the positions previously taken in testimony and in its briefs. Staff provides replacement language in Att. A.

Staff's recommendation to deny Millennium's ETC application was based on the Applicant's inability to demonstrate that it had sufficient financial and managerial competence under the FCC rules and guidelines. Staff is not charged with the burden of proving the Applicant's incompetence. Rather, the Applicant must affirmatively prove by a preponderance of the evidence that it has sufficient financial and managerial competence under the FCC rules and guidelines.

Where a statute does not specifically assign the burden of proof, courts have uniformly imposed on administrative agencies the common-law rule that the party seeking relief has the burden of proof. *Scott v. Dept. of Commerce and Community Affairs*, 84 Ill. 2d 42, 53 (1981). The term "burden of proof" includes the burden of going forward with the evidence, and the burden of persuading the trier of fact. *People v. Ziltz*, 98 Ill. 2d 38, 43 (1983). The burden of persuading the trier of fact does not shift throughout the proceeding, but remains with the party seeking relief. *Ambrose v. Thornton Twp. School Trustees*, 274 Ill. App. 3d 676, 680; (1st Dist 1995), *app. den.*, 164 Ill. 2d 557 (1995). Accordingly, Millennium has the burden of proof. Moreover, since this is a contested proceeding, the standard of proof is the preponderance of the evidence standard. *See* section 10-15 of the Illinois Administrative Procedure Act (5 ILCS 100/10-15).

While the ALJPO initially finds that Millennium bears the burden of proof in this proceeding, the ALJPO turns this notion on its head by repeatedly accepting Millennium's unsubstantiated assertions as proofs of its qualifications as an ETC, while discounting or ignoring actual evidence in the record that Millennium has not, cannot, and will not fulfill its ETC obligations. As noted above, the burden of proof does not and cannot shift to Staff. It remains with the Applicant. Instead of assessing whether Millennium has provided positive evidence sufficient, a preponderance of evidence, to carry its burden of proof, the ALJPO chooses to merely criticize Staff's evidence, much of which was and is in the control of Millennium. Rather than applying a negative inference (s*ee e.g., Schaffner v. Chicago & North Western Transportation Co.,* 129 Ill. 2d 1, 22 (1989)) to Millennium's lack of evidence, which only it could control, the PO again inappropriately switches the burden to Staff and finds that the evidence Staff was able to proffer was insufficient.

A. Technical and Financial Capability

Exemplifying the conclusions in the ALJPO is the statement that "Staff's fears [that Millennium's current operations imply that the Applicant will not properly manage its wireless ETC Lifeline business] appear to be the result of speculation rather than of any concrete evidence." ALJPO at 42. This conclusion utterly ignores the repeated and uncontroverted evidence in this proceeding that Millennium has either grossly mismanaged its wireline ETC business or, alternatively, ignored its requirements as a wireline ETC.

An ETC must offer Lifeline services throughout its designated ETC service area. The evidence is clear and concrete that Millennium has failed as a wireline ETC to meet this statutorily mandated ETC requirement. While Millennium has been designated as a wireline ETC in Illinois in the service areas of Illinois Bell Telephone Company and Verizon North since 2008, Staff presented evidence that Millennium has no ability to and does not provide wireline ETC service anywhere in the Verizon North service area. Staff IB at 25. Additionally, Staff presented evidence that Millennium does not provide wireline ETC service in all of the Illinois Bell Telephone Company service area. Id. There is uncontested evidence in the record that Millennium does not offer wireline ETC service in a substantial portion of its designated wireline ETC service area – a requirement directly included in the Federal ETC statutes. The ALJPO does not address Millennium's failure to comply with this fundamental requirement imposed upon it as a condition of its wireline ETC designation.

An ETC must offer to advertise its Lifeline services throughout its designated ETC service area. In designating Millennium as a wireline ETC, the Commission imposed upon Millennium a requirement to advertise its service in local circulation newspapers. Staff provided evidence that Millennium has not advertised its wireline ETC service in local circulation newspapers. Staff IB at 26. The ALJPO does not address Millennium's failure to comply with this requirement imposed upon it as a condition of its wireline ETC designation.

In addressing Staff's concerns regarding Millennium's pass-through of Lifeline subsidies to customers, the ALJPO cites to evidence that Millennium charged rates that differed from those in its tariffs with the Commission. ALJPO at 40. This is true; there is uncontested evidence in the record that Millennium charged rates inconsistent with its tariffs. While the ALJPO does recognize this failure by Millennium, it concludes that this failure was nothing more than "an error on Applicant's part, due to its occasionally deficient management practices." Id.

Staff provided evidence based on a sample of Millennium customer Statements of Service" entered into the record by Millennium demonstrating that Millennium inflated customer charges on these Statements of Service to the benefit of Millennium and provided Statements of Service with incorrect billing periods. Staff IB at 38. There is uncontested evidence in the record that Millennium has not accurately calculated its customer charges. The ALJPO ignores this record evidence.

An ETC must file reports with the Commission, pursuant to Code Part 757, that allows Staff and the Commission to monitor certain of the ETC's service provisioning statistics. The ALJPO alludes to Millenniums failure to file or late-filing of these reports, but unaccountably dismisses this evidence. ALJPO at 39. The ALJPO inexplicably concludes that it "is difficult, if not actually impossible, to ascertain what point, if any, Staff attempts to make with this evidence." Id. In making this statement the ALJPO fails to recognize that Millennium's failure to file timely (or at all) is, first and foremost, clear evidence of its failure to comply with the requirements imposed upon it by the Commission's ETC rules. Millennium's failure to comply with Commission ETC rules is a point, in and of itself, that suggests Millennium is unable to adequately manage is Lifeline program.

Additionally, and more pointedly, Staff presented evidence based directly upon the Code Part 757 filings regarding deficiencies in Millennium's provision of wireline

ETC service and, in particular, Millennium's extraordinary customer turnover rates. Staff IB at 32-33; Staff Ex. 1 at 46 -47; and Staff Ex. 2 at 15. The service provisioning evidence presented by Staff clearly demonstrates why Code Part 757s filings are a necessary tool for the Commission to assess ETC performance. Millennium's failure to file any or to do so in a timely manner impedes the Staff's and Commission's ability to assess Millennium's performance as an ETC. Ironically, the ALJPO criticizes Staff for failing to present comprehensive evidence of the companies turnover rates (ALJPO at 41), evidence that is not comprehensively available, in part, because of Millennium's own failure to file all of its reports. Thus, the ALJPO uses Millennium's deficiency that Staff notes, and turns it against Staff. The Commission should not endorse Millennium's failure to provide timely compliance filings and should especially not reward Millennium by ignoring evidence of poor performance on the basis that such information is not comprehensive, in part, because Millennium failed to file it or to do so in a timely manner.

In addressing this issue, the ALJPO again concludes that this failure was nothing more than "an error on Applicant's part, due to its occasionally deficient management practices." Id. The Commission should not condone the failure of Millennium to charge rates consistent with its tariffs even if, as allegedly occurred in this instance, the practice ultimately worked to the favor of some portion of Millennium's Lifeline customers. Furthermore, such a repeated acknowledgment of the Company's "deficient management practices" highlights the rationale for denying the Company's petition.

As the above examples show, it is unmistakable that there is, and the Commission should find that there is, concrete evidence in this proceeding that

Millennium's management practices are far beyond occasionally deficient. The ALJPO fails to consider or unaccountably discounts the wealth of evidence that Millennium has not, cannot, and will not fulfill its ETC obligations.

Unaccountably, when it comes to the burden of proof imposed upon Millennium to demonstrate its qualifications, the ALJPO imposes few requirements on Millennium to present concrete evidence of its ability and, inconsistent with its treatment of Staff's record evidence, accepts the sparsest of information.

For example, in addressing Staff's concerns regarding Millennium's pass-through of Lifeline subsidies to customers, the ALJPO cites to two Millennium Exhibits (Exhibits 11 and 12), which it accepts as evidence that Millennium passed through amounts that exceeded the amount required by federal regulation. ALJPO at 40. In Exhibit 11, Millennium presented five bills out of the thousands (according to JZ 5.04, Millennium reported ***Begin Conf XXXXX End Conf*** cumulative monthly Lifeline subscribers in 2011) that Millennium has issued to its wireline ETC customers in Illinois. Exhibit 12 contains 5 sample service statements created for Millenium's prepaid customers, statements that were not bills and were not issued to customers (according to JZ 5.04, Millennium reported ***Begin Conf XXXXX End Conf*** cumulative monthly Lifeline subscribers in 2012). Thus, out of ***Begin Conf XXXXX End Conf*** cumulative monthly Lifeline subsribers Millennium provided only five alleged actual bills as evidence that it passed through correct Lifeline subsidies to its customers. Thus, even including the five billing statements not issued to customers, Millennium provided evidence of providing a Goodwill Discount for approximately ***Begin Conf XXXX End Conf*** of the 2011 and 2012 monthly Lifeline subscribers. This leaves several thousand instances where there is no evidence that Millennium charged rates consistent with Lifeline pass through requirements – rates that if charged by Millennium were, as noted above, inconsistent with its tariffs. This acceptance is wholly and inexplicably inconsistent with the ALJPO rejection as noted above, for lack of comprehensiveness, of customer retention evidence in the record. ALJPO at 41. As will be shown below, not only did Staff highlight evidence for two of 12 months in 2011 and three of 12 months in 2012, but, in contrast to Millennium's provision of its Goodwill Discount, there is also evidence in the record to demonstrate that Millennium's poor customer retention rate was systematic across time periods not highlighted by Staff.

Similarly, as proof of Millennium's financial capability, the ALJPO cities to Millennium's submission of its Balance Sheet and Statement of Cash Flows for 2010 and 2011. ALJPO at 38. Unaccountably, while the Proposed Order deems the mere submission of these statements as evidence in Millennium's favor, it fails to address the substance of the information. The financial information presented by Millennium shows that that Millennium has been and will be critically dependent on its Lifeline revenues to remain profitable in Illinois – a circumstance that the FCC has found to be evidence inconsistent with the financial ability of a potential ETC. Staff IB at 30-31. The Commission should not give weight to the procedural filing of the information and discount completely the substance of the information in the filing.

Similarly, again as proof of Millennium's financial capability, the ALJPO cites to Millennium's alleged provision of CMRS service in Illinois and Wisconsin. ALJPO at 38. Ironically, the citations the Proposed Order relies on with respect to Millennium's provision of CMRS service are to Staff's IB and Millennium's RB wherein Staff provided evidence that Millennium had falsely asserted the dates that it had commenced providing services in Illinois and Wisconsin and wherein Millennium acknowledged the inaccuracies. Staff IB at 42 and Millennium RB at 41, respectively. There is no evidence in this proceeding that Millennium has successfully provided CMRS service in either Illinois or Wisconsin and it is inexplicable why the ALJPO relies upon evidence that Millennium admitted was inaccurate as positive support for Millennium's financial capability.

The remaining evidence the ALJPO cites in support of Millennium's financial wherewithal is Millennium's track record of providing other telecommunications services in Illinois. ALJPO at 38. As noted above, these services have, based upon Millennium's financial information, been almost entirely wireline Lifeline services and such exclusive reliance is exactly what the FCC has indicated is an indication of the lack of financial capability.

Millennium has provided the sparsest information regarding its financial capability and the evidence is clear and the Commission should find that Millennium has not only failed to demonstrate its financial capability, but in fact, that the evidence clearly indicates Millennium does not have the financial capability to provide wireless ETC service. With respect to its technical capability, there is substantial, concrete, and overwhelming evidence that Millennium, based upon its provisioning of wireline ETC service, is incapable of appropriately managing its ETC program.

B. Service Quality and Customer Protection

The most troubling aspect of Millennium's provisioning of its wireline ETC service is its extraordinary customer turnover rates. The ALJPO rejects the customer turnover evidence in this proceeding on the basis that "there is no comprehensive study or other data to show that these high turnover rates have occurred consistently, or even intermittently, since the Applicant began providing service." ALJPO at 41. This conclusion is wholly inconsistent with evidence in this proceeding.

First, Millennium is required by 47 C.F.R. § 54.416 to file an Annual Lifeline Eligibility Telecommunications Carrier Certification Form (FCC Form 555). Staff Ex. 1.0 at 46. This is an annual check on eligibility. To date, there have been two such annual filings. In the first, Millennium reported a wireline ETC customer retention rate of 1.4%, a rate that was the lowest among any reporting ETC in Illinois. Id. The second such annual filing was not due to the Commission prior to the close of the evidentiary record in this proceeding. Thus, Staff presented evidence from the one and only Form 555 filed by Millennium with the Commission prior to the close of the record in this proceeding.

Second, Staff provided evidence from several months' worth of information included in Millennium's Code Part 757 quarterly reports with the Commission. In particular, Staff presented information containing levels of turnover for three months in 2012, and Staff further testified that in two addition months in 2011, July and August, Millennium had turnover rates in excess of 100%. Staff Ex. 1.0 at 46-47. The ALJPO is correct, that Staff did not present quarterly report information from every month Millennium provided service, but the ALJPO is incorrect in concluding that evidence of Millennium's consistent and systematically extraordinary turnover rates are not of record. ICC Staff Exhibit 1.01, filed in June of 2013, contains precisely this information for all periods between and including January 2011 and March 2012. This information shows, based upon FCC Form 497 filings by Millennium, Millennium Link-Up discounts provided each month to new Lifeline customers (until April of 2012) and Lifeline discounts provided to Lifeline customers. Link-Up subsidies were discontinued in April of 2012 and, therefore, filings starting in April 2012 fail to include new Lifeline customer additions. As this record information shows, Millennium's extraordinary turnover rates are consistent and systematic.

***Begin Confidential

Month	Link-Up Discounts	Lifeline Subsidies
January 2011	XXXXX	XXXXX
February 2011	XXXXX	XXXXX
March 2011	XXXXX	XXXXX
April 2011	XXXXX	XXXXX
May 2011	XXXXX	XXXXX
June 2011	XXXXX	XXXXX
July 2011	XXXXX	XXXXX
August 2011	XXXXX	XXXXX
September 2011	XXXXX	XXXXX
October 2011	XXXXX	XXXXX
November 2011	XXXXX	XXXXX
December 2011	XXXXX	XXXXX
January 2012	XXXXX	XXXXX
February 2012	XXXXX	XXXXX

March 2012	XXXXX	XXXXX

End Confidential***

Putting aside the obvious fact that the burden of proof is on Millennium, not Staff, this information demonstrates concretely that Millennium's extraordinary customer turnover rates (it turns over nearly all of its customers on a monthly basis) is well beyond intermittent and is, in fact, systematic. The Commission should find that this information shows that Millennium has not provided wireline Lifeline service that its customers can depend upon and have available over time. As the ALJPO correctly notes, the Commission must make a public interest determination in this proceeding. ALJPO at 34. This Commission should find that the information in this proceeding regarding Millennium's wireline ETC service provisioning is inconsistent with a finding that extending Millennium's ETC designation to wireless ETC service is in the public interest.

C. Service Area Definition

In addressing Staff's concerns with regard to the definition of Millennium's proposed wireless ETC service area, the ALJPO states "Staff's concern is the possibility of an inadvertent 'spill-over' effect in rural service areas that may be part of the service areas of Sprint and Verizon, Applicant's underlying carriers." ALJPO at 35. This is an incorrect summary of Staff's concern. Staff's primary concern is explicitly stated in its Brief: "in order for Millennium to provide supported services throughout its designated service area, Millennium must have a clearly defined wireless ETC service area and the ability to provide its wireless services throughout such clearly defined ETC service area." Staff IB at 21. Staff's concerns regarding Millennium's inability to define its service area are that such inability will result in it failing to meet its core requirements to offer and advertise Lifeline service throughout this area.

Additionally, the ALJPO states that Staff "eventually conceded that Applicant has identified its service area as each and every exchange within Illinois Bell's ILEC study area." ALJPO at 35. First, it should be noted that the service area definition that Millennium ultimately settled on was a definition provided to it by Staff. App. Ex. 1.0R at 33. The fact that Millennium was unable to clearly define its own service area in its application and repeatedly provided conflicting and inconsistent evidence as to the definition of its service area including misidentifying what areas of the State Illinois Bell serves (Staff Ex. 1.0 at 29-30) raises the concern as to whether Millennium adequately understands where its proposed service area is and whether it is able to provide wireless ETC service throughout this area. Coupled with the fact that Millennium has throughout its wireline ETC tenure failed to provide Lifeline service throughout its wireline ETC service, the Commission should not find as the ALJPO does that Millennium has adequately defined its proposed wireless ETC service area and demonstrated the capability to provide ETC service in that area.

D. Recommendation

Inexplicably, the Proposed Order states that "Staff does not state or even suggest that the application should be denied, or that conditions should be imposed, or that the Applicant should be sanctioned otherwise." ALJPO at 39. Dr. Zolnierek stated in the conclusion to his testimony "I recommend that the Commission not designate Millennium as an ETC." Staff Ex. 1.0 at 48. Staff stated in the conclusion to its Initial

Brief that "Staff respectfully requests that the Commission's order in this proceeding deny Millennium's Petition for ETC status." Staff IB at 43. Again, Staff stated in the conclusion to its Reply Brief that "Staff respectfully requests that the Commission's order in this proceeding deny Millennium's Petition for ETC status." Staff RB at 29. Staff's recommendation with regard to this proceeding is unmistakable, and Millennium's Petition should be denied.

With respect to sanctions for its management of its wireline ETC program, that is arguably outside the scope of this proceeding which examines whether Millennium should be granted its request to provide wireless ETC service and, therefore, Staff did not make any recommendation in this regard. On this point, Staff reserves the right to seek such sanctions outside this proceeding and will certainly carefully review any and all filings that Millennium makes at the Commission, should Millennium be granted ETC designation.

III. CONCLUSION

WHEREFORE, for all of the following reasons, Staff respectfully requests that the Commission's order in this proceeding deny Millennium's Petition for ETC status.

Respectfully submitted,

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