

Service Date: February 27, 2002

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

RONAN TELEPHONE COMPANY,)	UTILITY DIVISION
)	
Complainant,)	DOCKET NO. D2000.5.63
)	ORDER NO. 6404
v.)	
)	
BLACKFOOT TELEPHONE COOPERATIVE,)	
INC., BTC HOLDINGS, INC., CLARK FORK)	
TELECOMMUNICATIONS, INC., MONTANA)	
WIRELESS, INC., BLACKFOOT TEL-COM,)	
INC., and BLACKFOOT FIBER SYSTEMS, INC.,)	
)	
Respondents.)	

RONAN TELEPHONE COMPANY,)	UTILITY DIVISION
)	
Complainant,)	DOCKET NO. D2000.2.27
)	ORDER NO. 6235a
v.)	
)	
CLARK FORK TELECOMMUNICATIONS, INC.,)	
)	
Respondent.)	

ORDER ON MOTION TO DISMISS AND CONSOLIDATE DOCKETS

Introduction and Procedural Background

On May 1, 2000, Ronan Telephone Company filed a Complaint, Docket No. 2000.5.63, against Blackfoot Telephone Cooperative, BTC Holdings, Clark Fork Telecommunications, Inc., Montana Wireless, Inc., Blackfoot Tel-Com, and Blackfoot Fiber Systems (“Respondents”). The Respondents allege, among other things, that these carriers are using universal service funds to provide services other than those authorized by law, in service areas outside those designated for these carriers.

On February 25, 2000, Ronan filed a Complaint, Docket No. D2000.2.27 alleging that Blackfoot was improperly offering internet services to St. Ignatius school below cost, as a

function of Blackfoot's receipt of universal service funds. On March 15, 2000, Blackfoot filed its answer to the complaint. On July 18, 2000, Ronan filed a motion for consolidation with D2000.5.63.

In D2000.5.63, Ronan's asserts that Respondents would be operating at a net annual loss each year were it not for the infusion of universal service funds. Ronan argues that universal service funds may only be used to provide the specific services set forth in the Federal Telecommunications Act of 1996 ("the Act"), in the specific geographic areas for which a carrier receives eligible telecommunications carrier status.

On June 2, 2000, Respondents filed a joint answer to the complaint, although BTC Holdings, Montana Wireless, Blackfoot Tel-Com and Blackfoot Fiber Systems appeared only for purposes of answering the complaint, stating that they are not subject to the Commission's jurisdiction.

On July 18, 2001, Ronan filed a motion for a protective order and a motion for discovery and audit of BTC and its subsidiary companies.

On August 11, 2001, Respondents filed a joint motion to dismiss the complaint.

Conclusions of Law and Commission Decision

1. **Blackfoot's Motion to Dismiss the Complaint for Lack of Standing Is Denied.**

The Montana Supreme Court established a two-part test to determine whether a party has standing to bring a certain claim. The complaining party must (1) "clearly allege past, present or threatened injury to a property or civil right; and (2) the alleged injury must be distinguishable from the injury to the public generally, but the injury need not be exclusive to the complaining party." Montana Environmental Information Center et al v. Department of Environmental Quality et al, 296 Mont. 207, 219, 988 P.2d 1236, 1242 (1999). If a party can demonstrate that the threatened injury will cause that party potential economic injury, then the first prong of the test will be satisfied. Id., citing Missoula City-County Air Pollution Control Board v. Board of Environmental Review, 282 Mont. 255, 937 P.2d 463 (1997). In order to satisfy the second prong, the litigant must show that the injury is distinct from that the general public might suffer,

although it is not necessary that the injury be exclusive to the litigant. Id., 296 Mont. at 219, 988 P.2d at 1242.

Ronan argues that the receipt of universal service funds allows the Respondents to provide services in an area in which Ronan could provide such services and bill for them were it not for the Respondents presence. If Ronan is correct, and the sole mechanism by which the Respondents are able to provide services that inhibit Ronan's ability to compete in a specific service area is the Respondents receipt of universal service fund monies, then Ronan is suffering economic harm. Consequently, the economic injury test has been met, and under the first prong of the standing test, Ronan is a proper litigant. Any injury Ronan suffers is distinct from the general public. The second prong of the test is met by virtue of the fact that Ronan is a competitor of the Respondents. Ronan's injury arises specifically as a result of not being able to sell services it could provide were it not for the Respondents alleged actions, therefore Ronan has demonstrated that the injury of which it complains is distinct from injury to the general public. Consequently, the facts alleged, if true, establish that Ronan has standing.

2. The Motion to Dismiss with Respect to BTC Holdings, Montana Wireless, Blackfoot Tel-Com and Blackfoot Fiber Systems is Granted.

BTC Holdings, Montana Wireless, Blackfoot Tel-Com and Blackfoot Fiber Systems are not eligible telecommunications carriers, nor are they regulated businesses. Jurisdiction does not lie in this case simply by virtue of their status as wholly owned subsidiaries and affiliates of Blackfoot Telecommunications Cooperation. The proper defendants are Blackfoot Telephone Cooperative, and Clark Fork Telecommunications.

3. The Motion to Dismiss for Lack of Jurisdiction is Denied. The Commission has Jurisdiction to Hear the Merits of this Complaint.

Both sides concede that the Commission has jurisdiction to *designate* a non-regulated carrier as an eligible communications carrier, both under the Federal Telecommunications Act of 1996 and under the Montana Telecommunications Act of 1997. The issue in this proceeding is the *scope* of the Commission's jurisdiction once ETC status is conferred on a carrier.

The 1996 Act did not address the designation of non-regulated carriers as ETCs by State Commissions. In 1997 the Act was amended to add a provision authorizing the FCC to designate a carrier with ETC status in the event that a State Commission had not so provided. 47 U.S.C. 214(e) (1997 amendment). Montana, in § 69-3-840(1), MCA, authorizes the Commission to designate a carrier with ETC status, regardless of its jurisdiction over the carrier for other purposes.

A State Commission's authority to designate a carrier as an ETC necessarily implies its jurisdiction to monitor that carrier's use of universal service funds; the statute makes explicit the requirement that universal service fund monies must be used only for the purposes for which the support is intended. 47 U.S.C. § 254(e).

A State can impose additional eligibility requirements upon a carrier to qualify for ETC status beyond those requirements specifically set out in the statute. *See, e.g., Texas Office of Public Utility Counsel et al. v. FCC*, 183 F.3d 393 (5th Cir. 1999). In Texas Office of PUC, the Court addressed, among other issues, FCC Orders interpreting section 214(e) as prohibiting states from imposing additional service quality obligations on local carriers simply by virtue of their receipt of universal service fund monies. 18 F.3d at 417. The state parties to the case challenged the FCC's interpretation, arguing that section 214(e) does not support a blanket prohibition on state imposition of eligibility standards, even if they go above and beyond those set forth in the Act. The Fifth Circuit agreed with the states, and held that "nothing in the subsection prohibits the states from imposing their own eligibility requirements." *Id.*, 183 F.3d at 418. The court noted that this interpretation is consistent with the "states' historical role in ensuring service quality standards for local service." *Id.* In a footnote, the Court indicated that imposition of too many obligations above those required by statute would probably run afoul of section 214's requirement that states designate carriers eligible for universal service funds. *Id.*, 183 F.3d at 418 n.31.

Nothing in 214(e)(2) confines the jurisdiction of either the FCC or the relevant State Commission to mere designation of ETC status. The State Commission has jurisdiction not

merely to designate a carrier as an ETC, but to set standards with which the carrier must comply in order to retain that status, and those standards may exceed the standards imposed nationally.

In its Fourteenth Report and Order, FCC 01-157 (May 23, 2001), the FCC delegated to states the responsibility for oversight of section 254(e) with respect to rural carriers, similar to the Ninth Report and Order's requirements for non-rural carriers. FCC 01-157, paragraph 186. Also in the Fourteenth Report and Order, the FCC set out the mechanism by which States are to certify carriers as eligible for receipt of universal service fund monies. The FCC stated that "the state certification process provides the most reliable means of determining whether carriers are using support in a manner consistent with section 254(e). Accordingly, we will require states that wish to receive federal universal service high-cost support for rural carriers within their boundaries to file a certification with the Commission and USAC stating that all federal high-cost funds flowing to rural carriers in that state will be used in a manner consistent with section 254(e). Absent such certification, carriers will not receive such support." Paragraph 187, FCC 14th Report and Order, 01-157, May 23, 2001. The FCC provides that "challenges to the propriety of the certifications, or revocation of the certifications, should be brought at the state level." Paragraph 191.

This approach to certification indicates that in the case of a carrier that is only regulated by a state commission for purposes of universal fund ETC status, the state, because it submits the carrier's certification to the Commission, is the appropriate forum for any challenge to the propriety of that certification. Paragraph 190. Consequently, the state is also the proper forum for a challenge to a carrier's use of universal service funds.

Order

THEREFORE, based upon the foregoing, it is ORDERED that:

1. Blackfoot's motion to dismiss Ronan's complaint is granted in part and denied in part: The motion to dismiss is **granted** with respect to BTC Holdings, Montana Wireless, Blackfoot Tel-Com and Blackfoot Fiber Systems; the motion to dismiss is **denied** with respect to Blackfoot Telephone Cooperative, and Clark Fork Telecommunications; and the motion to

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dismiss for lack of standing and for failure to state a claim upon which relief can be granted is **denied.**

2. Ronan's motion to consolidated Docket No. D2000.2.27 with D2000.5.63 is granted. Docket No. D2000.2.27 is hereby closed.

DONE AND DATED this 21st day of February, 2002, by a vote of 5 to 0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

GARY FELAND, Chairman

JAY STOVALL, Vice Chairman

BOB ANDERSON, Commissioner

MATT BRAINARD, Commissioner

BOB ROWE, Commissioner

ATTEST:

Rhonda J. Simmons
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision.
A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.