

Service Date: March 8, 2005

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

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IN THE MATTER OF the Petition of	)	UTILITY DIVISION
3 Rivers Telephone Cooperative, Inc. for	)	
Designation as an Eligible Telecommunications	)	DOCKET NO. D2003.2.23
Carrier in the Shelby, Montana Exchange	)	ORDER NO. 6521b

**ORDER ON RECONSIDERATION**

A. Introduction

3 Rivers Telephone Cooperative, Inc. (3 Rivers), applicant in the above-entitled matter, has moved for reconsideration of the Montana Public Service Commission's (Commission or MPSC) December 29, 2004, order (*PSC Order No. 6521a*) granting 3 Rivers status as an eligible telecommunications carrier (ETC), with conditions. 3 River's status as an ETC applies to the non-rural service area of Qwest Communications, Inc. in Shelby, Montana.

B. 3 Rivers Motion for Reconsideration

1. 3 Rivers Argument -- General

a. Argument

3 Rivers urges the MPSC to reconsider and delete six of what 3 Rivers refers to as the "*ad hoc*" requirements (conditions) in its Final Order. In addition, 3 Rivers asks for reconsideration of the requirement that it serve requests for wireline service "by means of its own resources" in lieu of also allowing it the option to use unbundled network elements (UNEs) and resale. 3 Rivers holds that the MPSC's requirements are unlawful, unjust and unreasonable. 3 Rivers asserts that § 35-18-104(1), MCA (Montana Rural Electric and Telephone Cooperative Act) provides a broad exemption of cooperatives from MPSC jurisdiction. 3 Rivers asserts that the MPSC's attempt to circumvent this statute oversteps its statutory "parameters" and the requirements exceed Montana and

federal laws. 3 Rivers adds that the areas for which the MPSC imposes reporting conditions constitute the quintessential elements of regulatory control and the acceptance of such regulation would render §35-18-104, MCA virtually meaningless. 3 Rivers argues such regulation is not only unnecessary but is legally prohibited and would increase 3 Rivers costs. 3 Rivers concludes that there is no authority in federal or state law that allows the MPSC to impose “qualifications” for which 3 Rivers seeks reconsideration.

3 Rivers asserts that its designation as an ETC in the Shelby exchange is consistent with 47 U.S.C. § 214(e)(2), federal directives to the states and FCC (Federal Communications Commission) and the MTA (Montana Telecommunications Act). 3 Rivers lists the requirements imposed by §214(e) to only include: 1) that it is a common carrier; 2) that it offers the supported services; 3) that it advertises the availability of the “delineated services” and concludes that if these requirements are met, the MPSC must designate it as an ETC.

3 Rivers asserts that the Commission’s reliance on the FCC’s Virginia Cellular order is misplaced and misread. In this regard, 3 Rivers states that the FCC merely comments that “...it does not believe that showing that a carrier complies with 214(e) is enough in every instance.” 3 Rivers adds that when the FCC subsequently promulgates or administratively adjudicates it into law that then and only then can the designation be based on something other than §214(e).

#### b. PSC Determination

3 Rivers is confused regarding what comprises the basic criteria that a petitioning ETC must satisfy. 3 Rivers asserts to satisfy the three above criteria required by §214(e)(1); however, §214(e)(1) references the requirements of §214(e)(2) that require the MPSC to consider and perform a public interest analysis in any ETC designation. 3 Rivers must comply with the MPSC’s public interest requirements identified in the order.

So long as 3 Rivers chooses not to satisfy the public interest requirements in §214(e)(2), among the other requirements, then the MPSC will not certify 3-Rivers as an ETC. Because 3 Rivers has not satisfied § 214(e)(2), 3 Rivers cannot have satisfied § 214(e)(1). And, since §69-3-840, MCA, is anchored to § 214(e)(1), the PSC’s

determinations regarding the public interest requirements leads logically to a conclusion that, absent having met the conditions, 3 Rivers fails to satisfy § 69-3-840, MCA. To the extent the MPSC determines other clarification is necessary regarding PSC Order No. 6521a, the MPSC will do so in this order.

The MPSC will restate in this order the basis of its authority to establish public interest requirements pursuant to §69-3-840, MCA and §214(e). First, the 5th Circuit Court of Appeals vacated an FCC rule prohibiting the states from imposing additional eligibility criteria for ETC status. The Court stated: “Therefore, we reverse that portion of the Order prohibiting states from imposing any additional requirements when designating carriers as eligible for federal universal service support.” *Texas PUC v. FCC*, 183 F.3d 393 (5th Cir., 1999). The PSC again finds support in the above authority as it does in the FCC’s recent *Virginia Cellular* decision.<sup>1</sup> Both decisions make clear the authority that a state commission has under §214 to impose additional requirements that serve to promote the public interest. The MPSC has carried out its responsibility to determine whether 3 Rivers designation is in the public interest.

2. 3 Rivers Argument -- Unsatisfied Wireline Service Requests.

a. Argument

3 Rivers Motion does not contain any specific arguments beyond its general contention that this requirement is unnecessary.<sup>2</sup>

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<sup>1</sup> The FCC states in its Virginia Cellular Order (para 27, emphasis added): *“We do not believe that designation of an additional ETC in a non-rural telephone company’s study area based merely upon a showing that the requesting carrier complies with section 214(e)(1) of the Act will necessarily be consistent with the public interest in every instance... We further note that the Joint Board is reviewing whether to modify the public interest analysis used to designate ETCs in both rural and on-rural carrier study areas under section 214(e) of the Act. The outcome of that proceeding could impact the Commission’s public interest analysis for future ETC designations in non-rural telephone company service areas.”*

<sup>2</sup> The MPSC’s Final Order No. 6521a states: *The Commission will monitor 3 Rivers ability to provide service. 3 Rivers must report to the Commission requests for wireline service that it is unable to satisfy. 3 Rivers must report the number of unsatisfied requests regardless of how those requests were communicated to 3 Rivers (e.g., voice, email, or letter). The Commission requires that these reports detail by location in the Shelby wire center 3 Rivers ability (and inability) to serve customers. The reports must provide a detailed description of why customer requests for service could not be satisfied. 3 Rivers must file such reports on a quarterly basis for as long as 3 Rivers is designated an ETC in the Shelby wire center.*

b. PSC Determination

The Commission denies 3 Rivers argument.

3. 3 Rivers Argument -- Customer Complaints

a. Argument

3 Rivers Motion does not contain any specific arguments beyond its general contention that this requirement is unnecessary.<sup>3</sup>

b. PSC Determination

The Commission denies 3 Rivers argument.

4. 3 Rivers Argument -- Federal Universal Service Funds

a. Argument

3 Rivers asserts that the MPSC's requirement that it provide quarterly reports on the FUSFs that it receives is a clear example of an administrative agency seeking to regulate for the sake of regulating. 3 Rivers adds that the information is reported on the USAC (Universal Service Administration Company) website and is therefore easily available.<sup>4</sup>

b. PSC Determination

As 3 Rivers is aware the USAC reports are projections of universal service funds that a company might receive. The MPSC Final Order asks for the actual amounts that 3

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<sup>3</sup> The MPSC's Final Order No. 6521a states: *3 Rivers must also document and report to the Commission on the customer complaints that it receives. For the Shelby wire center, 3 Rivers must record the complaints that it receives from customers, identify the nature of the complaint (e.g., poor transmission, dropped calls, busy signals) and identify the remedy employed to address each complaint. Based upon these records it must be possible to map the complaints to addresses within each wire center. If repeat complaints are received, then a record of such repeat complaints must be maintained. The results of the complaint records must be supplied to the Commission on a quarterly basis.*

<sup>4</sup> The MPSC's Final Order No. 6521a states: *The Commission finds that in conjunction with being designated an ETC, 3 Rivers must report to the Commission the federal universal service funds including Lifeline and Link Up credits that it receives. The reports must be filed quarterly for the Shelby wire center.* (Footnote excluded)

Rivers receives, not projections of estimated receipts. If 3 Rivers objects to providing this data, then the Commission is obliged to withdraw its intent to designate 3 Rivers an ETC for Qwest's Shelby wire center. Unless 3 Rivers files the requested information, the Commission will not certify 3 Rivers as an ETC.

5. 3 Rivers Argument -- Rate Plans

a. Argument

3 Rivers Motion does not contain any specific arguments beyond its general contention that this requirement is unnecessary.<sup>5</sup>

b. PSC Determination

Since one of the 214(e)(1) requirements is to advertise the availability of such services using media of general distribution, it puzzles the Commission that 3 Rivers would refuse to file with the MPSC the service offerings, presumably the "delineated" service offerings for which it seeks FUSFs and that it otherwise commits to advertise. As long as 3 Rivers refuses to file the requested information, the Commission will not certify 3 Rivers as an ETC.

6. 3 Rivers Argument -- Service Quality Standards

a. Argument

3 Rivers Motion does not contain any specific arguments beyond its general contention that this requirement is unnecessary.<sup>6</sup>

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<sup>5</sup> The MPSC's Final Order No. 6521a states: *As long as 3 Rivers is designated an ETC in the Shelby wire center it must have on file with the Commission a copy of each rate plan that it offers and for which it may receive federal universal service support. Each plan must include the rates, terms and conditions of service.* (Footnote excluded)

<sup>6</sup> The MPSC's Final Order No. 6521a states: *The Commission has statutory authority to require 3 Rivers as a condition of receiving ETC designation to comply with the requirements that the Commission imposes in this order and in rules. The Commission's ETC rules will address in addition to those requirements and standards established in this order other standards that will apply to ETCs. The Commission finds that all ETCs must comply with the Commission's ETC rules, once adopted. The Federal-State Joint Board's Recommended Decision (FCC 04J-1, CC Docket No. 96.45, Released February 27, 2004) also provides guidelines for additional ETC eligibility requirements. These guidelines include the following five items (Recommended Decision, pp. 10-16): 1) adequate financial resources; 2) commitment and ability to provide the*

b. PSC Determination

The Commission denies 3 Rivers argument.

7. 3 Rivers Argument -- Serving Requests By Means of Its Own Resources

a. Argument

3 Rivers asserts that the MPSC order requiring it to serve requests for wire line service by means of its own resources is in violation of federal law. It is a violation as 214(e)(1)(A) allows a common carrier designated as an ETC to offer the services that are supported by federal universal service mechanisms under section 254(c), either using its own facilities or a combination of its own facilities and resale of another carrier's services, including the services of another ETC.<sup>7</sup>

b. PSC Determination

The MPSC finds necessary a clarification. It is certainly permissible for 3 Rivers to use either resale (e.g., by means of reselling Qwest's 1FR and 1FB services) and, or, unbundled network elements, in addition to its own facilities to serve customers' demands for 3 Rivers services. However the point of the MPSC requirement is that 3

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*supported services; 3) ability to remain functional in emergencies; 4) consumer protection; and 5) minimum local usage. The Commission intends to fully consider these guidelines in its ongoing ETC rulemaking proceeding.*

<sup>7</sup> The MPSC's Final Order No. 6521a states: *In its petition, 3 Rivers seeks to be designated an ETC for Qwest's Shelby exchange. Qwest's Shelby exchange includes the base rate area and, any abutting zonal areas and the suburban and locality rate areas that surround the base rate area of the Shelby wire center. As 3 Rivers has the means to serve customers in the Shelby wire center, either on a facility basis, by means of UNEs or via resell, there appears no concern about 3 Rivers apparent ability to serve any or all lines in the Shelby wire center. Therefore, the Commission is not concerned with 3 Rivers' ability to serve all customers in the entire Shelby wire center with the services that are supported and required to be provided. If 3 Rivers were to change the means by which it intends to serve customers to, for example, internet telephony, and in turn seek federal universal service funding, then 3 Rivers must first advise the Commission of such intent.*

*The Commission finds that 3 Rivers must by means of its own resources serve all reasonable requests for wireline service at residences and businesses in each wire center. 3 Rivers may choose the means by which it fulfills this obligation but it shall be, in the first instance, 3 Rivers responsibility. The Commission also understands that 3 Rivers customers will be able to exchange local traffic with other local exchange providers in the Shelby wire center.* (Excluding Footnotes, emphasis added)

Rivers meet the reasonable requests for wireline services by means of its own resources and not by means of customer contributions to extend its network. In some circumstances, those assumably limited unreasonable requests, 3 Rivers may require of a customer some form of contribution.

### **Conclusion**

The Commission has jurisdiction over applications for designation as an eligible telecommunications carrier in Montana. *47 U.S.C. § 214(e)(2); § 69-8-840, MCA.*

Consideration of the public interest applies in all applications for designation as an eligible telecommunications carrier. *47 U.S.C. § 214(e)(2), ("[u]pon request and consistent with the public interest, convenience, and necessity" a state commission may designate additional eligible telecommunications carriers).* The Commission has considered the public interest in this proceeding.

The Commission has proposed, and is considering the adoption of, rules governing the designation of eligible telecommunications carriers and the maintenance of status as an eligible telecommunications carrier. *See PSC Docket No. L-04.07.5-RUL (hearing on these proposed rules has been held).* The rules, as adopted, will apply to all eligible telecommunications carriers in Montana, including 3 Rivers. The rules may modify or replace one or more of the terms and conditions in this order.

All pending motions, objections, and arguments not specifically acted upon in this Final Order are denied, to the extent denial is consistent with this Final Order.

### **ORDER**

**3 Rivers motion for reconsideration is denied and the MPSC affirms its Final Order with the clarifications above.**

Done and dated this 3<sup>rd</sup> day March, 2005, by a vote of 5-0.

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BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

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GREG JERGESON, Chairman

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BRAD MOLNAR, Vice-Chairman

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DOUG MOOD, Commissioner

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BOB RANEY, Commissioner

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THOMAS J. SCHNEIDER, Commissioner

ATTEST:

Connie Jones  
Commission Secretary

(SEAL)