

Service Date: April 7, 2005

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

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IN THE MATTER OF CABLE &	)	UTILITY DIVISION
COMMUNICATIONS CORPORATION, dba	)	
MID-RIVERS CELLULAR, Petition for	)	DOCKET NO. D2003.8.105
Designation as an Eligible	)	
Telecommunications Carrier	)	Order No. 6518a

**FINAL ORDER**

**Introduction, Procedural Background and Order Organization**

Cable & Communications Corporation d/b/a Mid-Rivers Cellular (MRC hereafter) petitioned the Montana Commission (MPSC) on August 5, 2003 for designation throughout its licensed service area as an eligible telecommunications carrier (ETC).<sup>1</sup>

Intervention petitions were received on October 3, 2003 from the following parties: the Montana Consumer Counsel (MCC), the Montana Independent Telecommunications Systems (MITS), Montana Telecommunications Association (MTA), Range Telephone Co-op, (RTC) and Ronan Telephone Company.

A summary of the evidentiary record will follow a brief review of this docket's procedural history. A procedural order was issued October 28, 2003 setting a February 11, 2004 hearing date. MRC filed on November 7, 2003 to both revise the hearing date and to hold public hearings at various sites throughout its service region. Pursuant to the procedural schedule, MITS, MTA and the MPSC staff served discovery upon MRC. Disputes then arose over non-responses to discovery, including MTA's November 20,

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<sup>1</sup> MRC's cellular petition appeared to regard analog services. (DR MITS -008(a)) MRC explained later that its application was to provide digital PCS wireless service (DR PSC -016(c)). MCC asserts that there is no difference between cellular and PCS services, just differences in frequencies and federal licenses. (DR PSC -027(c)) MRC also responded that its current cellular service is analog. (DR PSC -021(a))

2003 motion to compel responses. MRC motioned on November 24, 2004 for an order from the MPSC that sets a briefing schedule and a hearing date to address MTA's motion to compel data responses. MITS filed on December 2, 2003 a motion to compel data responses. MRC filed on January 22, 2004 its response brief to the motions of MITS and MTA. MTA filed on February 13, 2004 for a 30-day suspension of the procedural deadlines. MITS also filed on February 13, 2004 its motion to stay or suspend seven ETC petition proceedings, including D2003.8.105.<sup>2</sup> MITS then filed on February 17, 2004 its reply to MRC's response to MITS' earlier motion to compel. MRC filed on February 24, 2004 its objection to MTA's motion. MTA filed its reply brief in support of motions to compel data responses. MRC filed on March 12, 2004 its objection to MITS' motion to stay or suspend proceedings. On April 22, 2004 the MPSC noticed a May 18, 2004 oral argument on discovery disputes. In an April 28, 2004 Notice of Commission Action (NCA) the MPSC denied motions to stay or suspend this ETC proceeding. In its NCA the MPSC simply stated that there is no compelling reason to stay some but not all of the pending ETC proceedings. MITS, MTA and MRC filed on May 19, 2004 a stipulation to vacate the May 18, 2004 oral argument on motions to compel data responses. In a July 21, 2004 Notice of Staff Action the MPSC amended the procedural schedule and established an October 27, 2004 hearing date. The MCC filed on September 15, 2004 both a motion to file testimony and the prefiled direct testimony of Mr. Allen Buckalew. A Notice of Public Hearing was issued on October 12, 2004 and a hearing was held October 27, 2004 in Miles City. Initial Briefs were filed on December 17, 2003 by MRC, the MCC, MITS and MTA. Post-hearing Reply Briefs were filed on January 28, 2005 by the same four parties.

As for the evidentiary record, the MRC's application, the MCC's testimony, public testimony and the hearing (transcript) are summarized in turn. A summary of the briefs, both initial and reply, follows. Certain of MRC's responses to the data requests of MTA, MITS and the MPSC (e.g., DR PSC) are included along with cites to the transcript (TR). The Commission's findings of fact and decisions will conclude this Final Order.

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<sup>2</sup> The other six dockets included in the MITS Motion include: D2003.10.156, D2004.1.5, D2004.1.6, D2004.1.7, D2004.1.8 and D2000.5.64.

### **Applicant MRC**

MRC did not submit prefiled direct testimony. MRC's August 6, 2004 Petition contains the following assertions in support of its request to be designated an ETC. The MRC licensed service area includes certain of Mid-Rivers Telephone Cooperative's (MRTC's) exchanges and certain of Range Telephone Cooperative's (RTC's) exchanges.<sup>3</sup> The 15 MRTC exchanges include: Ekalaka, Baker, Carlyle, Richey,

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<sup>3</sup> MRC's services cover areas, and it has customers, that are located outside of the State of Montana. In its petition, MRC seeks designation for all of MRTC's study area but has insufficient information to determine whether it will serve RTC's entire study area. (DR MITS -003(a), (b)) MRC explained that it has only one study area in Montana which includes its traditional exchanges." (TR 80) MRC explained that it has almost doubled the service area proposal from its original application. (DR PSC -016(a)) MRC seeks, however, ETC designation throughout the entire study area of MRTC and the entire study area of RTC. (DR PSC -014(d)) MRC explained that its signal coverage does not cover the entire wireline exchange area for each exchange for which it seeks ETC designation. (DR MITS -001(a)) MRC explains that it clarified its application for ETC status, for the entire study areas of MRTC and RTC: 1) to avoid administrative costs associated with disaggregation and 2) to avoid having to reapply if and when MRC serves "unserved" areas. (TR 42) MRC asserts that it has no obligation to advise the Commission of any changes that it makes to its application that impact the physical service area. (TR 49) MRC clarified that its Application (Exhibit No. 1) does not just seek ETC designation in the circled areas (e.g., Sand Springs) but in the entire study areas of each of MRTC and RTC; however, the exhibit does not represent the entire study area of RTC. (TR 43, 44) Later, MRC also explained that the circles by and large represent the licensed "CGSA" areas that MRC will serve. (TR 54) MRC also explained that it may serve areas outside of the circled areas if there is no other "B side carrier" wireless provider; for example, Verizon is the "B side" carrier for Wibaux and MRC cannot provide service in Wibaux despite the fact that Verizon provides inadequate wireless service there (TR 57-58) Nor can another wireless carrier such as Sagebrush or Verizon compete in the areas that MRC serves. (TR 64-65) However, MRC was unclear if any of these restrictions apply to PCS service providers, what MRC labels "digital cellular." (TR 67)

At hearing MRC asserts to have clarified in data responses to its original application its intent to amend its initial application. If the MPSC decides that the original application is for the circled areas in its application, then there appears need to disaggregate MRTC's and RTC's areas, an outcome that caused MRC no apparent grief. (TR 89-90)

MRC asserts to not have interconnection agreements with service providers other than Mid-Rivers Telephone Cooperative. (DR PSC -009; see also MRC's response to DR MTA -042.) MRC explains what RSAs are in relation to C.F.R. 22.909(b) and 22.947. (DR PSC -014(e)) For calls that originate with MRC and terminate to a Mid-Rivers Co-op customer there will be a \$.04/minute reciprocal compensation rate, as there will be for

Lambert, Circle, Jordan, Lindsay, Fallon, Bloomfield, Plevna, Rock Springs, Musselshell, Melstone and South Wolf Point.<sup>4</sup> The 2 RTC exchanges include Broadus and Ashland. An exhibit to MRC's August 6, 2003 petition illustrates MRC's service area.

MRC asserts to have met all of the statutory requirements to be designated an ETC. It asserts that its designation will serve the public interest (PI hereafter) as it provides customers a choice of providers and technologies by allowing MRC to upgrade and improve its service through the use of Universal Service Funds (USFs).<sup>5</sup>

As for the requirements that it must satisfy to be designated an ETC, MRC asserts that its coverage area accords with the licenses that were granted by the FCC and that

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traffic that flows in the reverse direction; MRC will not exchange local traffic with Qwest, Nemont, Western Wireless or Verizon. (DR PSC -017(c), (d), (e)) Later, MRC explained that it has an interconnection agreement with RTC. (TR 49)

<sup>4</sup> In hearing, MRC "revised" where it seeks designation "to exclude" the competitive areas of Glendive and Sydney. (TR 80-81) If feasible, and if approved by the FCC, MRC will serve unserved areas near or contiguous to its present service area (e.g., MRC recently expanded service to Broadus, Ashland and southern Carter County) (DR PSC -006(b)) MRC explained that its build up (sic) plans for unserved areas are proprietary unless the Commission designates MRC as an ETC and imposes requirements on MRC to provide such information; MRC adds that providing digital service is its highest priority. (TR 50-51) MRC explains what the 1996 Act requires (allows) as for the use of federal universal service funds (FUSFs). (TR 51, 65) As for its obligation to serve the population that is unserved, MRC explained that it will provide service by means of its own facilities or by resale. (DR PSC -020(a)) In response to a question about its performance for advanced or broadband service offerings, MRC responded that its current cellular service is analog. (DR PSC -021(a))

<sup>5</sup> MRC did not clearly explain the FUSF support that it would receive in relation to the amount of support the incumbent receives (TR 44-46); see, however, footnote # 25 below. MRC agrees that State Commissions may impose ETC eligibility requirements including, but not limited to, the public interest criteria imposed by the FCC. (DR MITS -038(b)) MRC has no opinion on the number of service providers that can be supported in the exchanges for which it seeks ETC designation. (DR MITS -039(a)) As for whether it is capable of providing advanced or high-speed services as a public interest condition of being designated an ETC, MRC lists the nine supported services that it will provide. (DR MITS -041(a)) MRC explained that to satisfy the public interest it is sufficient to provide competitive choice and promises of future service upgrades. (DR MITS -002(a)) Cellular One, who serves the Baker area, is the only known competition in the areas for which it seeks ETC designation. (DR MITS -019)

include portions of three Rural Service Areas (RSAs 3, 4 and 10) and part of the Northern Cheyenne Indian Reservation.<sup>6</sup>

In its petition, MRC adds that there are nine services that it must offer. The nine services include: voice-grade access to the public network,<sup>7</sup> access to “free of charge ‘local usage’” defined as an amount of minutes of exchange service,<sup>8</sup> dual tone multi-frequency (DTMF) signaling or an equivalent, single-party service, toll limitation<sup>9</sup> for qualifying low-income consumers and access to emergency,<sup>10</sup> operator, interexchange

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<sup>6</sup> MRC does not intend to petition the FCC for ETC designation on the Northern Cheyenne Indian Reservation. (DR PSC -011) The only rural telephone company that serves the Northern Cheyenne Indian Reservation is RTC. (DR MITS -003(c)) Although the MRC Service Area Map attached as Exhibit 1 to the application includes the circled areas associated with the exchanges listed in the application, note that the map does not include all of the RSAs that MRC asserts are included in the MRC service area. Nor does it include the Billings or Great Falls, areas for which MRC holds personal communications services (PCS) licenses. (DR PSC -014(d))

<sup>7</sup> MRC asserts that the voice equivalent level of service that it offers is consistent with industry standards and includes: minimums of 400Hz at +1 to -3dB and 2800Hz at +1 to -4.5dB. (DR MTA -014) MRC explained, however, that its signal coverage does not cover the entire wireline exchange area for each exchange for which it seeks ETC designation. (DR MITS -001(a))

<sup>8</sup> By free local calling MCC means unlimited local exchange service. (DR PSC -031(a))

<sup>9</sup> MRC will offer toll blocking (DR PSC -005(c)). As a result of providing Lifeline and Link-up services MRC will receive \$10/month support for non-Tribal customers and \$18.95/month for Tribal customers, and \$2/month for toll blocking services. In addition MRC will receive \$7.50 and \$15 respectively to connect non-Tribal and Tribal customers (DR PSC -007(b), (c)) MRC listed the components of the receipts. (DR PSC -015(e)) MRC will not receive universal service funds and Lifeline and Link up funds for high cost lines located on any reservation if not designated an ETC. (DR PSC -016(d))

<sup>10</sup> 911 calls are routed to a secondary emergency telephone number designated by the PSAP (public safety answering point) that serves the area where the cell site is located; E-911 is not offered by any PSAP. (DR PSC -003(a)) MRC customers may be charged for portions of incoming calls including the return of 911 calls. (DR PSC -003(d)) MRC only tracks the initiation of 911 calls to PSAPs. (DR MTA -020) MRC explained that without the infusion of universal service funds it is unable to provide Phase 2 E-911. (TR 48) MRC affirmed that 911 calls are routed to a secondary emergency telephone number designated by the PSAP, adding that MRC customers may be charged for portions of incoming calls including the return of a 911 call. (TR 122-124)

and directory services.<sup>11</sup> MRC asserts that it will provide each of these services within its cellular service area through its own facilities and the facilities of others.<sup>12</sup> MRC adds that wireless is a “complement” to landline service but a “necessity” in the areas for which it seeks ETC designation. (TR 55, 61-62, 66, 86) As an aside, MITS agrees that mobility is a complementary service; the MCC agrees that cellular is an adjunct to wireline service. (TR 86, 143) In addition, MRC will advertise and promote its universal service offerings to ensure that customers are fully informed of MRC’s offerings.<sup>13</sup>

MRC asserts that its designation as an ETC is in the PI because it provides customers a choice of providers and communication technologies. MRC adds that it serves “fill-in” cellular markets, areas that were abandoned by the original cellular licensee.<sup>14</sup> MRC adds that, pursuant to the Act (Section § 254(b)(3)), customers in this most rural area of Montana must be able to avail themselves of telecommunications services that are comparable to those in urban areas and at rates that are comparable to those in urban areas.<sup>15</sup> MRC also holds that its service is essential to public safety and that its designation will contribute to its ability to meet public safety needs.

MRC asserts to have demonstrated its ability to meet the statutory requirements to be designated an ETC and that therefore its designation is in the PI. MRC adds that: “[d]esignation of it as an ETC complies with a specific principle that the preservation and advancement of Universal Service is based upon, i.e., “competitive neutrality,” which in

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<sup>11</sup> For directory assistance dial 411 or 1+ NPA + 555 1212. (DR PSC -005(a))

<sup>12</sup> See, however, MRC’s response to PSC -021(c) wherein MRC responds that it “does not provide free service” just as wireline companies do not offer “free” local service. Staff would note that because MRC had two responses numbered PSC -021(c), it is the first of these two responses that is referenced.

<sup>13</sup> MRC describes the calling plans that it will offer. (DR PSC -003(d)) MRC will provide information on Lifeline and Link-Up via print advertising, to county courthouses and to Action for Eastern Montana (AEM). (DR PSC -004(a))

<sup>14</sup> If after an allowed 5 year period the original licensee fails to serve the entire market, other entities can petition to “fill-in” those unserved market areas. (DR PSC -001(a))

<sup>15</sup> MRC offers the same rates to residential and business customers. (DR PSC -010)

the context of this petition would mean that neither cellular (wireless) or wireline technology would be unfairly advantaged or disadvantaged.”

As for the potential competitors have to fracture the market such that no competitor would have adequate revenue to pay for the operations, maintenance and the capitalization of infrastructure, MRC’s witness Anderson responded that any rules that establish the number of competitors based upon population density treads on “dangerous territory.”<sup>16</sup> (TR 68-70) Anderson emphasized that wireless service is a complementary service to landline: people do not disconnect wireline service when they take cellular service.

MRC was asked about its “patronage credits.” (TR 77-79, 114-121) If MRTC’s financial health allows, MRTC will distribute annually such credits. The patronage credits that were “allocated” and that are for “retirement,” in 2003, although not “typical,” were respectively about \$3.75 and \$1.35 million, or about \$200 per subscriber per year. MRTC receives about \$600 per customer per year in federal USF (FUSF) support. MRC was also asked about the relevance of rules to assure that those companies that are designated as ETCs are committed to provide universal service. (TR 85-87)

### **Prefiled Testimony of the MCC**

#### Montana Consumer Counsel: Mr. Allen Buckalew

Mr. Buckalew’s September 15, 2004 testimony serves to analyze MRC’s request to be designated an ETC. He testifies that his analysis and recommendations apply to any wireline or wireless carrier that seeks ETC designation. He adds that the purpose of ETCs is to increase subscribership (pp. 4-5). He adds that with only one carrier there may be no competition in an area or for high-cost customers, which results in no market forces to drive down costs.<sup>17</sup> (p. 6) He also adds that in order for competition to work for

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<sup>16</sup> In response to a question from Commissioner Jergeson, the MCC’s witness Buckalew testified that it is going to be hard for the MPSC to deny other wireless carriers their designation petitions. (TR 161) MRC identifies Cellular One (in the Baker area) as the only known competition in the areas for which MRC seeks ETC designation. (DR MITS -019)

<sup>17</sup> MCC’s interest in increased competition is to lower rates for consumers and to reduce costs. (PSC -025(c))

all Montanans alternatives to the LEC need to exist in each exchange area. ETCs must also know the rules.

Buckalew testifies that ETCs are needed in order to provide to customers the nine services that they would not otherwise receive. (p. 5) He recites the nine supported services that ETCs must provide and the requirements in Section § 214(e) to designate ETCs in rural and in non-rural areas. He testifies that the MPSC has examined the possible “public benefits” derived from designating multiple ETCs and adds that multiple carriers will improve the competitiveness of local exchange markets.<sup>18</sup> (p. 5) He emphasizes that the purpose of universal service, which dates to the Communications Act, is to provide service to all consumers. (TR 137, 142) If MRC shows that its application is in the PI and if it agrees to the conditions that are imposed on the existing ETC, then he would designate MRC as an ETC. He notes that the FCC has found that wireless carriers must be considered for ETC status. The MCC adds, however, that while it does not want universal service funding to cease it should serve the purpose for which it was intended: mobility is not a PI criterion but if it were, it is one that a wireline company could not satisfy. (TR 153) Pursuant to the FCC’s May 8, 1997 Universal Service Report and Order, a state PSC must designate a common carrier that complies with Section § 214(e)(1) as an ETC. State PSCs shall permit an ETC to relinquish its designation in an area that is served by more than one ETC.

As there are no Montana rules for ETCs, Buckalew recites the MCC’s prior recommendation to include in rules an annual “check-up” to ensure that ETCs undertake the MPSC’s universal service policy goals.<sup>19</sup> Existing ETCs should be assured continued ETC status if the check-up demonstrates that they are undertaking these policy goals. He lists five criteria that ETCs should initially, and on an annual basis, demonstrate to have met:

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<sup>18</sup> MRC has not demonstrated to the MCC that its application is in the PI. (DR PSC - 024(d)) MCC holds that in Montana the same PI test should apply to rural and non-rural carriers. (DR PSC -025(d)) Previously designated ETCs should have their designations reversed if they fail to satisfy the requirements that MCC proposes. (DR PSC -026(d))

<sup>19</sup> By “annual check-up” the MCC means that all ETCs and competitive ETCs (CETCs) must ensure that they are following all of the PSC’s ETC rules. (DR PSC -026(b))

1. An ETC must be willing and able, and must certify its commitment, to provide to any requesting customer's location within the designated service area the defined services supported by universal service;<sup>20</sup>
2. Each ETC must show that it advertises the availability of such services and the charges;
3. An ETC must provide the services at not more than the MPSC authorized maximum stand-alone rates<sup>21</sup> for the defined basic local exchange telecommunications service, and must meet all service quality and provision rules established by the MPSC for universal services;
4. Each ETC may satisfy its obligation to provide the defined services over a combination of its own facilities and resale (just not resale), and an ETC may provide the defined services, in part, by leasing of unbundled network elements (UNEs). The MPSC may want to also define the qualifying minimum percentage of owned facilities and, or, leased UNEs.
5. Each ETC must also show that its provision of service satisfies the PI by meeting the following six requirements (pp. 8-10):
  - a. Every requirement, including the above five criteria that is placed on ILEC ETCs, should be placed on new ETCs.<sup>22</sup>
  - b. Each ETC must designate the specific service areas it wishes to serve; however, MRC has not made clear the specific areas for which it seeks ETC status.
  - c. An ETC must document that each line for which it seeks compensation the customer is a "new" (not served by the existing ETC) or a "former" ETC customer (not using ETC services). Customers that add wireless services to existing wireline services should not be compensated.<sup>23</sup>

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<sup>20</sup> MCC adds that the obligation to serve "any" customer is without aid of construction and the Commission decides if deposits are required. (TR 126-128)

<sup>21</sup> By "stand alone," the MCC means basic local usage and access, and not vertical services. (DR PSC -031(b))

<sup>22</sup> MRC states that it will adhere to quality of service guidelines or other PSC rules that apply to wireline carriers if these guidelines and rules are properly enacted and apply to all similarly situated carriers. (DR MTA -046) MRC asserts to analyze monthly traffic reports, to monitor the entire network on a 24 hour a day basis and to review each consumer complaint on a case-by-case basis. (DR MITS -016(a), (b)) MRC also produces weekly trouble ticket and repeat trouble ticket reports. (DR MITS -017(c)) By "every requirement" MCC did not mean that the requirements must be identical; thus, the rules in sub-chapters 33, 34 and 37 need to be applied equally with appropriate changes to reflect technology. (DR PSC -028(a), (b))

<sup>23</sup> MCC asserts that there is no good public policy reason to support with USF multiple telephones to the same household. (DR PSC -031(e)) MCC asks "Why have an ETC that serves anything less than the entire population." (DR PSC -033(c)) MCC adds that

- d. Each ETC must file with the PSC, and advertise after approval, the exact ETC rates it offers for the service included in universal service in the ETC areas. This requirement continues so long as the market is less than “workably competitive.”
- e. Until the MPSC determines the ETC area “competitive” all ETCs must submit rates to the MPSC for approval. All rates must be less than or equal to the MPSC established rate for unlimited local exchange service and Lifeline service.<sup>24</sup>
- f. The MPSC needs to investigate and determine in a cost proceeding the appropriate single-party residential and single-line business rates. The MPSC should consider establishing statewide rates for the purpose of determining universal service support levels or area-specific rates. An incumbent’s existing rates should be used in this proceeding. An appropriate transitional period should be established that allows a reasonable time period for end user rates for the supported services to be adjusted to these maximum rates. (p. 9)
- g. ETCs must have “Lifeline” and “Link Up” programs for low-income subscribers and rates must be on file in advance of its designation in order to satisfy the PI test. Regarding low income consumers, ETCs should adhere to the following (pp. 9-10):
  - i. Lifeline and Link Up programs must be offered that are not inconsistent with federal guidelines;
  - ii. the MPSC should determine a consumer’s qualification for support;
  - iii. qualifying consumers should be able to select any ETC; and,
  - iv. Lifeline subscribers must not be allowed service from more than one ETC.<sup>25</sup>

As a continuing PI requirement, Buckalew would require all ETCs to submit information to the MPSC on fund use that shows the amount of funds received and that explains how those funds were used to support specific universal services. (pp. 10-11) Fund use information would include: 1) total funds received,<sup>26</sup> 2) revenue received from benefited (basic and Lifeline) customers, 3) costs and expenses for specific universal

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the FCC fails to follow its own established rules in this regard. (DR PSC -032(a))

<sup>24</sup> The same rates for the same local exchange service would apply; the ability to draw USF should come with the agreement by the cooperative wireline or wireless carrier to the Commission ETC rules, which should include setting a cap on USF service rates. (DR PSC -029(c))

<sup>25</sup> The MCC asserts that as a matter of “common sense” there is not more than one “lifeline.” (DR PSC -030(a))

<sup>26</sup> MRC will receive \$50.35 and \$31.77 per line respectively for Mid-Rivers Telephone Cooperative and Range Telephone Cooperative. (DR PSC -018(a))

services and 4) how the funds were applied. To demonstrate that its application is in the PI, an ETC must also designate a specific service area or areas that it wishes to serve; MCC adds that the specific areas for which MRC seeks ETC designation is unclear. (p. 8)

Consistent with federal rules, Buckalew's summary recommendations include: (1) that every requirement placed on other ETCs should be placed on MRC. (pp. 12-13) However, the same "general waivers," such as the toll limitation waiver, if needed, should apply to MRC. The same quality of service standards and reports need to be filed by any designated ETC; (2) an ETC must designate the specific local service areas it wishes to serve with any necessary details on why complete coverage is not offered; (3) the ETC must provide the number of lines it captured from the ILEC and must demonstrate, upon request, whether each customer is a "former" ILEC customer or a "new" customer; (4) until competition exists in an area each ETC must submit its rates to the MPSC as well as its plans to advertise service; he adds that this case presents the MPSC with multiple ETCs (under the same umbrella) that have "never" undergone rate review by the MPSC. The MPSC therefore has no way to know if MRC's or MRTC's rates are higher than its costs; and (5) Lifeline and Link Up programs must be established for low-income subscribers and the rates must be filed with the MPSC prior to an ETC designation. The rates must be lower or equal to the existing "ETCs" (emphasis added) rates.

Buckalew concludes that his suggestions do not differ from the current federal rules and adds that these rules should apply on a state basis in the case that the MPSC determines that a state universal service fund is needed.<sup>27</sup> (p. 14) He concludes that since MRC has not demonstrated that its application is in the PI, MRC should not be designated an ETC. MRC is not an independent and competitive alternative to MRTC because it is 100 % owned by its affiliate MRTC. In effect, this application asks the

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<sup>27</sup> The MCC asserts that the MPSC must be concerned about adding a CETC that simply increases the fund size without increasing universal service. (DR PSC -024(e)) MCC estimates that the fund size could rise from \$3.8 to almost \$6 billion dollars in subsidies. (TR 144) MCC adds "Why have an ETC that serves anything less than the entire population." (DR PSC -033(c)) MCC also adds that an inflow of revenues to the State of Montana should not be considered as beneficial as the inflow results from carriers manipulating the system; the MPSC should instead be concerned about the sustainability of a larger than necessary fund. (DR PSC -025(a))

MPSC to give ETC authority to the same company, albeit an affiliate.<sup>28</sup> Buckalew does not believe that this result is what Congress contemplated when it considered ETCs.

### **Public Comments and Public Witnesses**

Prior to the public hearing the MPSC received public comments from McCone County's Local Emergency Planning Committee (LEPC), the Fallon County Dispatch Center (FCDC) and Richland Economic Development (RED). LEPC wrote on October 12, 2004 in support of the MRC petition. As LEPC notes, the sparsely populated area was abandoned by the original cellular license. And since 9/11/01 there is a heightened awareness of the need for cellular coverage not only for the residents but for visitors to the region. Without wireless service LEPC asserts that all the preparation for disasters by the counties of McCone, Carter, Custer, Fallon, Dawson, Richland Garfield, Prairie and Powder River would be for naught. The FCDC wrote on October 20, 2004 requesting that MRC be designated a CETC. FCDC holds that MRC's designation is vital to MRC's complying with the Federal requirements in order to implement "Phase II Wireless." The RED comments were filed (circa) October 26, 2004 by Leslie Messer. RED comments that MRC's designation will improve cellular services for the farmers, ranchers, and business people, as well as local law enforcement in remote rural Eastern Montana.

In addition, public witnesses appeared at the October 27<sup>th</sup> hearing and submitted resolutions in support of MRC's petition. (TR 98-111) The six public witnesses included the following people:

- 1) Mr. Markuson, Carter County Commission,
- 2) Mr. Rieger, Fallon County Commission,
- 3) Mr. Kent Larson, McCone County Commission,
- 4) Ms. Estby, Powder River County Commission,
- 5) Ms. Jordan, Garfield County Commission and,
- 6) Ms. Kelly, Custer County Commission.

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<sup>28</sup> Given that MRC and MRTC are affiliated, the MCC sees no benefit in designating MRC as an ETC. (DR PSC -024(b))

These public witnesses all point to the PI benefits of designating MRC as and ETC. The PI benefits mentioned by these public witnesses included public safety, health care, 911 and fire fighter benefits for residents, hunters and truckers.

### **Public Hearing: Transcript Summary**

The public hearing in this docket having been properly noticed was conducted October 27, 2004 in Miles City. Commissioner Greg Jergeson presided as hearings officer. Appearances were made by MRC, MCC, MITS and MTA. MRC and the MCC sponsored witnesses. In addition, numerous public witnesses appeared. Other intervenors (RTC and Ronan Telephone) did not appear at the hearing.

Upon MRC calling Mr. Gerry Anderson as its first public witness opposition was expressed by the MCC, with MITS and MTA joining the MCC's opposition. The MCC held that MRC waived its right to present direct testimony. These objections were, however, overruled. MITS, MTA and MCC objected next to allowing Mr. Anderson to verify and allow into the record MRC's Petition and data responses provided by MRC. These objections were also overruled and Exhibits 1, 2, 3, 4, and 5 were allowed into evidence. Commissioner Jergeson also overruled objections as to the qualifications of witness Anderson. (TR 91-96)

Subsequently, MRC's witness Anderson testified in response to numerous cross examination questions about the nature of both MRC's petition and its operations. Although these points may appear elsewhere in this Final Order a few points from Anderson's (MRC's) testimony are noteworthy in this hearing summary. First, in noting that MRC is not licensed to serve and cannot serve Wibaux Anderson emphasized that MRC's licenses are "fill-in" licenses. As Anderson explained, each of the circled areas roughly corresponds to a cellular geographic study area (CGSA) that is defined by the location, height and power transmission of a tower. He also explained that MRC cannot provide service outside those circled areas. Anderson was unsure of whether MRC had a PCS license for the city of Wibaux, but he did explain that MRC has 700 megahertz PCS licenses that might overlap with the circled CGSA areas; MRC explained that it does not intend to serve the Northern Cheyenne Indian Reservation due primarily to license restrictions. (TR 28-35, 51, 81-82) In response to cross examination by Commissioner

Jergeson, MRC identified areas served by Sagebrush, Verizon and Western Wireless and added that unserved areas are south of Miles City including along highway 212 from Broadus to Alzada. Anderson also testified to provide bandwidth in the range of 400 to 2800 Hertz, a bandwidth contained in its FCC license. (TR 37)

As for why MRC amended its initial application, Anderson responded to have done so to avoid disaggregation and cream skimming concerns and to avoid having to reapply as it expands to serve the unserved areas of the co-op's study areas. (TR 40-42) MRC agreed to provide its plans to expand service coverage if it is designated an ETC and commits to use the FUSFs it receives for the purposes for which they are intended which is principally to maintain the existing wireless service and to upgrade to digital. (TR 51-56)

Anderson testified that the MPSC's rules are a barrier to wireless ETC status. (TR 73) In this regard, he was unwilling to concede that the number of ETCs (e.g., one to four) should depend upon the number of access lines or concerns about fracturing the market with too many competitors. (TR 68-69)

Anderson also responded to questions about "patronage credits" (TR 77-79), as did MRC's witness Mr. Vern Stickel. (TR 113-122) Mr. Stickel testified that the amount of the patronage credits will vary. Some customers with lots of services may receive \$20,000 while others may only receive \$50. He expected that the average amount to be about \$200 annually.

MRC's witness Mr. Bill Wade testified on the routing of 911 calls. Wade testified that 911 calls are routed to a secondary emergency telephone number designated by the PSAP that serves the area in which a cell site is located. He adds that many PSAPs route their cellular calls to a non-emergency phone line rather than to the 911 primary lines. This is so that they can recognize the call as a cellular call and gather any needed information. MRC tracks the initiation of 911 calls, not how many are completed at the end of the call. (TR 122-124)

The MCC's witness Mr. Allen Buckalew also testified on a variety of topics. (TR 126 -171) Buckalew testified that there is no exception to the obligations that ETCs have

to serve any customer that asks for service and without aid of construction.<sup>29</sup> He testified that the MPSC's rules that are out for comment are good rules and should be adopted with enforcement by the MPSC. Buckalew would not agree that MRC has met all the criteria that it must meet to be designated an ETC. He would not agree because MRC did not submit prefiled testimony. He testified that it is not good public policy to have both MRTC and MRC designated as ETCs. And, he also would not have recommended designating an unaffiliated ETC if it also sought designation in the way that MRC sought to be designated -- in small (the circled) areas. (TR 136-137) Buckalew would not agree with MRC's witness that MRC is the only wireless provider in the circled areas; he would not agree as MRC stated there also is the "A carrier." (TR 138) Buckalew testified that it would not be competitively neutral to designate MRC an ETC and not designate other wireless providers as ETCs for the same areas. (TR 152) Although Buckalew would not agree that "public safety" is a requirement, he agreed that to the extent someone did not previously have service that public safety increases when they get service. (TR 142) Buckalew held that wireless service is an "adjunct" to landline service. (TR 143)

Public witnesses also testified at the hearing. (TR 98-112) The testimony of these witnesses was previously summarized in this Final Order.

### **Initial Briefs**

The initial briefs filed by MRC, MCC, MITS and MTA will be reviewed in that order. A review of the reply briefs will follow.

MRC MRC's initial brief explains in six sections how it has met the eligibility criteria of federal and state laws: 1) it is a common carrier; 2) it will offer the supported services; 3) it will advertise the supported services; 4) it will provide supported services via its own facilities and resale; 5) MRC identified and requested appropriate service areas, and 6) its filing is in the PI.

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<sup>29</sup> In response to Commissioner Stovall's questions regarding large dead areas on ranches that are 20 miles out, Buckalew explained that a carrier may need to use a wireless local loop to reach one or two customers but that "dead spots" are not unique to Montana and also exist in, for example, Washington D.C. He also testified that a wireless company is not needed to provide wireless local loop service. (TR 155-159)

MRC first explains that its wireless service area is defined by “fill-in” (CGSA) licenses.<sup>30</sup> These licenses are not granted on a “market” basis but rather confine the wireless carrier to providing service to the specific geographic areas defined by engineering studies. Thus, and although MRC is fully built out, MRC commits to build out further only if it is granted additional “fill-in” licenses for “service areas or CGSAs.” It can only do so if an area was not being served by other cellular carriers who had authority to serve an entire Rural Service Area (RSA). As for Section 214 requirements, MRC asserts to be a common carrier, to provide the nine supported services and to advertise those services. Although MRC is licensed in the 400 to 2800 Hz range, it commits to operate within the 300 to 3000 Hz range, if required. MRC commits to provide E-911 once a PSAP submits a bona fide request. MRC will not provide equal access as it is not required. Once designated an ETC, MRC commits to advertise its “universal service offerings” through media of general distribution. MRC will provide the supported services using both its wireless network and by the resale of landline carriers’ services.

MRC comments to have identified and requested appropriate ETC service areas. MRC adds that the Act defines “service area” as an area that a state Commission defines and that is a rural company’s study area. MRC’s licenses are not granted on a “market basis” but are confined to the specific geographic areas defined by engineering calculations (based upon the height, location and transmitted power of towers). MRC intends to expand its cellular service territory by way of requesting additional licenses from the FCC. In anticipation of further expansion, MRC seeks “today” (December 17, 2004) to be designated within a territory that is defined with sufficient flexibility so as to accommodate plans for future expansion; this, MRC asserts, will conserve both public and private resources. The (apparent) alternative is “study area disaggregation,” a process not chosen by either of MRTC or RTC. Thus, MRC identifies as its ETC service areas the study areas of both MRTC and RTC. MRC adds that an applicant need not prove that it can provide ubiquitous service prior to designation and must be afforded the

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<sup>30</sup> Although not explained in MRC’s application, Newton’s Telecom Dictionary defines CGSA to be a “cellular geographic service area.”

same reasonable opportunity to develop its network as was allowed the incumbent. (See MRC Exh 5 and DR PSC -014(d))

MRC devotes the balance of its initial brief to the PI, the second of the “two prong test” for ETC designations in an area served by a rural telephone company. (§ 69-3-840 M.C.A and § 214(e)(2)) MRC holds that challenges to its designation reflect disapproval of federal rules. This hesitancy, however, will result in Montanan’s being denied the benefits -- access to wireline and wireless service -- that other consumers across the nation enjoy. In addition, MRC has held:

*Mid-Rivers Cellular provides cellular service to a vast and remote area of Eastern Montana. As residents of this area conduct their every day affairs they at many times throughout the day do not have landline telephone service available. At these times cellular service is essential to meet safety needs, both personal and public. These needs could be of a medical or law enforcement nature. An example could be the recent fires for which cellular service was available for the firefighters and residents. (DR PSC -002(c))*

In this regard, MRC cites to certain of the public comments received in hearing and then ties the relevance of emphasized public safety, health etc., to the company’s assertion that wireless services are “complementary” services to landline service.

MRC next comments that the designation of wireless carriers will promote competition, a goal of the Act. The FCC recognized that wireless carriers bring “advantages” to the universal service program as they may offer service at much lower costs than for wireline service. MRC asserts that § 214(e)(2) emphasizes competition and consumer benefits and not incumbent protection. MRC asserts that no party has demonstrated that consumers or ILECs would be harmed by MRC’s designation. In quoting Senator Dorgan and in citing to the Fifth Circuit Court of Appeals’ Alenco Communications, Inc v FCC decision, MRC holds that the Act “requires” universal service goals to be accomplished through competition.

MRC’s initial brief mentions other PI benefits. It adds that it can offer consumers the benefits of mobility and greater access to 911. Second, MRC asserts that it will sign the Cellular Telecommunications and Internet Association (CTIA) Consumer Code for Wireless Service. As a signatory, MRC will provide to consumers: disclosure of rates etc.; service area maps; a 14-day trial period and contract terms with the right to terminate

service for changes in contract terms; disclosure of advertising; ready access to customer service and prompt responses to inquiries and complaints and protect consumer privacy. MRC asserts that the FCC has recognized that the CTIA Consumer Code mitigates “any” concerns regarding service quality regulation.

As for the proper scope of a PI inquiry, MRC agrees that the MPSC has authority under federal law and state law to conduct a PI inquiry, but that the authority is limited and disallows the imposition of barriers that are discriminatory. In addition, “due process” precludes inequitable standards if they interfere with federal goals and standards (47 C.F.R. § 254(f)). In this regard, MRC generally opposes the MCC’s proposed standards and specially objects to the application of the “primary line” concept. MRC comments that “many” of the standards the MCC proposed are inconsistent with state law are preempted by federal law and their adoption will invite litigation.

MRC recommends adoption of FCC guidelines. In so doing, and in reference to the “Federal-State Joint Board on Universal Service, Virginia Cellular” (sic) petition for designation as an ETC, MRC recommends that the MPSC weigh the benefits of increased competitive choice, the impact of the designation on the universal service fund, the unique advantages and disadvantages of the competitor’s service offering, service quality commitments and the ability to satisfy the obligation to serve the designated areas within a reasonable time frame. MRC asserts that in the Virginia Cellular case the FCC considered as PI guidelines the benefit of access to otherwise unavailable communications facilities, mobility, cream skimming, impact on the federal universal service fund, access to emergency services and the size of local calling scope. Except for the federal fund size, MRC holds that these guidelines should be the basis of an initial PI inquiry.

MCC The MCC recommends that the MPSC not approve the ETC designation for MRC as it is not in the PI. The MCC recommends denial although “choice of providers” is in the PI. Because MRC is a wholly-owned cellular affiliate of MRTC, it is not an independent and competitive alternative.<sup>31</sup> The MCC’s initial brief reviews the

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<sup>31</sup> MRC’s designation is not in the PI because: MRC has not filed Lifeline rates; MRC offered no method to determine that Lifeline customers of MRTC will not receive cellular service at the same time; MRC did not explain how it will advertise; MRC’s

MCC's prefiled testimony and then presents its comments. First, the MCC holds that this case is not normal because the applicant was not required by the MPSC's procedural order to submit prefiled direct testimony and its "live" testimony was in the form of supplemental testimony for which the intervenors had no notice, no opportunity to do discovery and is therefore a violation of due process rights. The disputed record in this case, that should in turn be excluded, includes MRC's responses and the objections to discovery by MTA, MITS and the MPSC and all live testimony of MRC's witnesses.

As for the statutory framework, the MCC reviews the requirements with which a petitioning ETC must comply. In citing the Fifth Circuit (*TOPUC v. FCC*), the FCC's Virginia Cellular order and the Federal-State Joint Board's Recommended Decision on ETC designations the MCC also explains why the MPSC has the authority to impose eligibility standards beyond those specified in Section § 214(e).

The MCC's Buckalew testimony made five general recommendations: (1) place every requirement on MRC that is placed on other ETCs (e.g., service quality standards, same toll limitation waiver); (2) an ETC must designate a "specific local service area or areas"; (3) an ETC must report on the lines it captures from the incumbent ETC and the ETC must demonstrate that the customer is a "former" customer of the incumbent or a "new" customer; (4) an ETC must submit its rates to the MPSC for approval unless the ETC area is competitive; and, the ETC should submit its advertising plans; (5) the ETC must establish Lifeline and Link-Up programs and file such rates before designation as an ETC – the rates cannot exceed the incumbent's rates.

In its brief, the MCC makes three general arguments. First, MRC's petition should be denied because it has not sustained its burden of proof. The MCC holds that both state and federal law place the burden of proof on the applicant and because MRC filed so little information there is no evidentiary basis upon which the MPSC can issue a sustainable order approving MRC's petition. Buckalew characterized this case as unlike any he has seen in 30 years. Whereas MRC and MRTC argue that the burden of proof is satisfied by its initial application and that "contested case" would undermine efficient decision-making and overburdens the process, the MCC holds that this position ignores

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proposal does not include free local calling; MRC's residential rates are significantly higher than landline service rates.

the requirements of Montana law and fairness. The MCC also holds that this position ignores the MPSC's obligation to accord all parties the right of due process. In view of the legal requirements applicable to contested cases, burden of proof and due process the MPSC should "reject" MRC's ETC petition.

Second, the MCC argues that MRC has not clearly established the area for which it seeks ETC status. MRC's petition requests ETC status "throughout its licensed service area" within the service areas of its parent and RTC and it illustrated its application with an exhibit showing 12 "circles." Over the objection of intervenors in hearing MRC "clarified" that in a data response to a MPSC data request (DR PSC -014) it sought to amend its application to obtain ETC status throughout the MRTC and RTC areas. The MCC finds MRC's attempt to "amend" its original application through a data response to not be supported by the evidentiary record. In addition, there is no record to show that MRC even knows the extent of the area for which it seeks ETC designation. And, MRC may not lawfully provide cellular service outside the "circles." The MCC concludes that it is not in the PI to allow MRC to "double dip" into the FUSF.

Finally, the MCC argues to reject MRC's petition as it is not in the PI. The MCC argues that MRC has failed to respond to the MCC's five general recommendations and MRC is unwilling to comply with consumer protection requirements that the MPSC may impose. Because of MRC's and MRTC's affiliate relationship each company would receive about \$600/customer/year in subsidies, a result that does not further universal service objectives. In addition, MRTC pays "patronage credits" to its member-customers. The MCC also recommends denying the MRC's petition within the "circles" as it already provides service to 100% of such licensed areas. The MCC mentioned that Nebraska's PSC denied an ETC application due to the failure to prove that the designation is in the PI.

MITS MITS endorses the MCC's initial brief and submits additional comments. First, MITS holds that up until the hearing MRC was in danger of being subjected to a successful motion for summary judgment given the absence of any supporting testimony. However, although the MPSC helped MRC to create a record, MRC presented too little information and there is simply no evidence on which the MPSC can base a sustainable order that approves of ETC status for MRC. Second, MRC's attempt to expand its ETC

area is inappropriate both procedurally and substantively (having used a data response to do so) and must be denied. Third, the fact that MRC places so little importance on the PI should justify a denial of its petition for ETC designation. For these reasons the MRC petition should be denied.

MTA In its initial brief the MTA submits three comments. The first is whether the MRC application is sufficient to permit a thorough record upon which a decision can be based. Second, is whether to permit MRC to amend its application by means of data responses and the implications of so doing on future proceedings. MTA asserts that MRC's original application was limited to MRC's cellular service areas. Third, whether MRC has sufficiently met the PI requirements so as to offset any harm to the rural infrastructure that will result if rural telephone companies must compete with federally funded wireless entities offering competing, but lesser regulated, services in their high cost territories. MTA asserts that MRC's application is important since it is the first such application in Montana for a rural study area. MTA adds that based upon documents it had submitted and that estimate the annualized high cost support impacts for the nation and for the state of Montana, that the MPSC should carefully scrutinize applications for ETC designations. MTA concludes that MRC's application was inadequate and should be denied. The following expands on these comments contained in MTA's initial brief.

First, as for MTA's point that MRC's application failed to provide a sufficient record, MTA recites the procedural mechanism that lead to a hearing without any prefiled testimony from MRC. This resulted in both formidable challenges for the cross-examining parties and in an inadequate record. Witnesses could not verify if MRC's PCS licenses extended to Wibaux. Although MRC testified to own 700 MHz licenses, the only relevance of that ownership emerged from the MCC's witness who held that MRC could receive USFs for such service. As confirmed by MRC, the CGSA license, can be considered a "secondary" license, is limited to small coverage areas and is designed to limit interference with the primary licensees (an apparent reference to the "A and the B" licensees). Despite these limits MRC repeated its intent to use USFs to expand its coverage. MTA doubts that MRC can serve territories underserved by the "A or B" licensee. MTA also holds that MRC inadequately addressed "disaggregation," a question with enormous ramifications. MTA holds that since "none of the cross examining parties

were aware of MRC's intention to avoid disaggregation by modifying its application through data responses, they were unable to effectively pursue this avenue of questioning at hearing." An inadequate record was the result.

Second, whereas MRC's original application sought designation for its CGSA license areas, the application was expanded in response to data requests to include the entire study areas of MRTC and RTC, exclusive of any of the MRTC competitive areas such as Glendive or Sydney.

Third, and finally, MRC has not shown how its designation would promote the PI (citing Section § 214(e)(2)). As the FCC states in its Virginia Cellular decision the designation of an ETC based upon a Section § 214(e)(1) showing of compliance will not necessarily be consistent with the PI. MTA adds that allowing MRC's parent MRTC and MRC to each collect \$600 per household for unproven promises of service expansion is contrary to the PI.

### **Reply Briefs**

The reply briefs filed by MRC, MCC, MITS and MTA are summarized in that order.

MRC MRC's reply brief responds, after a brief introduction, to the numerous issues that intervenors have raised. MRC finds no merit in those intervenor comments that MRC has failed to meet its burden of proof. Those arguments are without merit as there is no legal obligation to submit prefiled testimony. MRC asserts that the record before the MPSC is sufficient as the record's documents fully disclose all of the relevant facts relating to MRC's petition. In addition, MRC's data responses were admitted into evidence. In hearing, sufficient testimony was received by cross examination to create a more than adequate record. The public testimony also supported MRC's petition.

Second, MRC asserts to have identified the appropriate ETC designation areas. MRC explains that while its service area is confined by FCC licenses, in the past it has expanded its cellular service territory by requesting additional licenses. MRC labels as "completely false" MTA's suggestion that fill-in licenses are secondary as its operations are entitled to the "same level of protection" as are other cellular licensees. MRC has "repeatedly explained" that it is the licensing process, not its operations, that is the

subject of prior licensing rights. The geographic area included in any cellular carrier's CGSA is entitled to "protection from co-channel and first-adjacent channel interference and from capture of subscriber traffic by adjacent systems on the same channel block." And whereas MTA holds that MRC's cellular coverage cannot be expanded, MRC responds that it can and the record (see DR PSC -016) demonstrates that it has expanded its service area in this proceeding. MRC intends to provide "supported services" throughout its cellular service area, in any new expansion territory and it seeks to do so by the most efficient means possible: MRC "today seeks ETC designation within a territory defined with sufficient flexibility to accommodate plans for future service expansion, conserving both public and private resources." (emphasis added)

MRC adds that its approach avoids the disruptive and time-consuming process of study area disaggregation. It does so because the FCC's rules define an ETC's service area as the study area of rural telephone companies which, in turn, requires federal and state action to "...disaggregate' the study area of a rural company when an ETC is designated for an area less comprehensive than the entirety of the specific study area." Thus, MRC identifies its ETC service area as consisting of the study areas of MRTC and RTC (citing DR PSC -014(d)). MRC notes that FCC policies preempt the MPSC from prohibiting MRC from relying on resold services and from requiring MRC to provide ubiquitous service prior to its designation as an ETC. MRC adds that the FCC only obligates an ETC to extend its network to serve new customers upon reasonable request. In concluding this second issue, MRC asserts that while it "has not amended or modified its original Petition for ETC designation" (emphasis added) it has clarified that it does not seek disaggregation of the existing study areas.

Third, MRC comments to have demonstrated that its designation as an ETC is in the PI. MRC restates that the public health and safety elements of the PI inquiry are well served by its designation (e.g., see DR PSC -002(c)). MRC asserts that the MPSC should give "additional" weight to the public testimony on the PI holding that wireless services result in increased economic development, competition, choice, public safety and welfare. MRC restates that wireless services are complements to landline services, in the two study areas. Areas of eastern Montana which at present do not have telecommunications services may at long last be able to obtain them. MRC holds that

both Congress and the FCC believe that competition is in the PI and the MCC acknowledged that increased choice is in the PI. In this regard, MRC holds that Section § 214(e)(2) emphasizes competition, not incumbent protection. The Act requires that universal service goals be achieved through competition as they are dual mandates. The Fifth Circuit Court called the “primary purpose” of the Act to herald and realize a new era of competition in the market for local telephone service. (*Alenco Communications, Inc. v. FCC*). MRC asserts that it offers the “benefits of mobility”, which the FCC recognized, in its Virginia Cellular Order, as benefiting consumers. Thus, the record requires the MPSC to designate MRC as an ETC.

Fourth, the MPSC must reject arguments that because MRC already provides service that its petition be denied. MCC’s contention that the sole purpose of universal service support is to increase subscriber penetration must also be rejected. MRC cites to an FCC order on the subject of competitive neutrality:

*“...in certain rural areas, competition may not always serve the public interest and that promoting competition in these areas must be considered, if at all, secondary to the advancement of universal service. A principal purpose of section 254 is to create mechanisms that will sustain universal service as competition emerges....For this reason, we reject assertions that competitive neutrality has no application in rural areas or is otherwise inconsistent with section 254.”*

Fifth, MRC asserts that the MPSC cannot discriminatorily adopt ad hoc rules or conditions in this proceeding. Efforts to make this docket a quasi-rulemaking should be rejected and the MPSC must apply legal standards found at Section § 214(e) and in § 69-3-840(3).

Sixth, MCC’s recommended ETC rules are improperly included in this proceeding.

Seventh, MRC asserts that there is nothing in *TOPUC v. FCC*, the FCC’s Virginia Cellular order or in the Federal State Joint Board’s Recommended Decision that allows the MPSC to circumvent state law. Nothing in the TOPUC discussion addressed wireless carriers. The FCC’s Virginia Cellular order acknowledged that “it” was not prohibited under the Act from incorporating an applicant’s voluntary commitments into its order as conditions of ETC designation. The Joint-Board’s recommendations are only advisory.

Eighth, as MRC's use of universal service support is regulated by federal law the MPSC must reject intervenor recommendations to deny it ETC status based upon a lack of an affirmative showing of how MRC will invest the support it receives. (re Section § 254(e)) The ownership of MRC is entirely irrelevant and may not be considered by the MPSC. Thus, intervenor concerns about "double-dipping" should be rejected by the MPSC. As for those intervenor comments that the USFs that MRC receives will be forwarded to MRTC and paid out as "patronage credits," MRC cites to the requirements in Section § 254(e) and asserts that MRC's "profitability" has no impact on credits paid to MRTC's patrons. As for allegations of "cream-skimming," MRC responds that there is no area, city or town in the two study areas that by definition allows for "cream-skimming." Thus, any such contention should be dismissed. As for intervenor concerns over the adverse impact upon the FUSF, MRC explains that the amount that Montana will draw is less than 2% of the USAC's projected amount for first quarter 2005. If MRC were to "capture" each MRTC customer, the impact would only amount to .217% of the USAC estimate. Thus, arguments that express concern about the adverse impact on the FUSF should be rejected.

Ninth, as for the MCC's contention that the MPSC can limit a CETCs receipt of USFs to "growth lines" MRC responds that the MCC is plainly mistaken. The FCC has unambiguously confirmed that FUSF support is for every working loop, whether it be a captured or a second line. In its order designating Western Wireless as a competitive ETC on the Pine Ridge Reservation the FCC wrote:

*...the federal universal service mechanisms support all lines served by ETCs in high-cost areas. Therefore, to the extent that Western Wireless provides new lines to currently unserved consumers or second lines to existing wireline subscribers, it will have no impact on the amount of universal service support available to the incumbent rural telephone company for the lines it continues to serve.*

The FCC reached a similar decision in its recent order on the Virginia Cellular petition.

MCC The MCC reply brief first recites the circumstances surrounding MRC's petition and then argues that MRC has not satisfied its burden of proving that it meets the §214(e) requirements and that its designation is not in the PI. First, and as for background, the MCC holds that the areas within which MRC is licensed by the FCC to

provide cellular service do not have the same spatial boundaries as the service areas of the two cooperatives but is limited to the 12 specific areas that MRC depicted on a map. The MCC continues to object to the admission of live testimony and data responses on the grounds mentioned in the MCC's initial brief.

Second, as for MRC's burden of proof, the MCC holds that the statements of MRC's counsel in its petition and in a post-hearing brief do not constitute evidence. The MPSC must have reliable and substantive evidence in its record and it does not have such evidence in this case. If MRC's petition is granted, MRC would have access to considerable FUSF support and without any probative evidence that it meets the most basic legal prerequisites.

Third, the MCC asserts again that MRC has not shown that its petition is in the PI. As for MRC's comment (initial brief) that its designation will provide a choice of providers and technologies, the MCC responds that MRC already serves 100% of the area in which it is licensed. Further, the choice of providers is limited to two affiliated companies in the MRTC area. The MCC doubts that MRC will give its parent corporation any competition. As for incumbent protection, the MCC holds that the MRC's brief mischaracterizes the MCC's testimony. The MCC asserts to have not advocated the *de facto* retention of a single ETC, the incumbent, and that CETCs should not be designated. As for the impact of the designation of CETCs on the FUSF, the MCC has consistently advocated that 47 C.F.R. 54.307(a) should be enforced. In addition, MRC wrongly construes the MCC's testimony as supporting a "primary line" concept. The MCC finds MRC's argument that Congress has prohibited a primary line concept to be incorrect.<sup>32</sup>

The MCC agrees with MRC that, as part of the PI, the MPSC should adopt the FCC's guidelines, including an inquiry into the impact of the designation on the FUSF. This is of import to the MCC because MRC has so far refused to provide information on

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<sup>32</sup> MRC had cited P.L. No. 108-417, Title VI, Section 634 of the Consolidated Appropriations Act of 2005 that states "...Congress has specifically prohibited the application of the 'primary line' concept, the application of which would have resulted in funding limited to the carrier that "captures" the single primary line as designated by each customer." The MCC asserts that the section of the Appropriations Act actually limits the FCC's use of funds and that 47 C.F.R. 307(a) remains intact.

how many more customers would receive its parent corporation's support of about \$600/year/customer. As for PI standards that the MCC recommends, that MRC opposed as being inconsistent with state and federal laws, the MCC notes that MRC's comment are not backed by any analysis. As for the ability of MRC's wireless service to, by means of mobility, serve unserved or underserved areas, the MCC only observes that MRC can serve customers in unserved or underserved areas by means of either MRTC's or RTC's landline facilities. If, however, the areas are unserved or underserved by MRTC or RTC, then they do not have facilities and the MCC, in turn, questions how MRC can provide either mobility or landline service. As for MRC's intent to become a signatory to the CTIA Consumer Code, the MCC observes that the Code is entirely voluntary and noncompliance carries no penalty. The MCC concludes that designation of MRC as an ETC would provide few public benefits while it would add costs that must be borne by the American public. Therefore, MRC's ETC petition should be denied.

MIT The MIT reply brief asserts to fully support the arguments contained in each of the MCC and MTA reply briefs. MIT characterizes the procedural mechanism by which MRC's filing was processed to be unique although the "missteps" needed a remedy prior to the hearing. Because of the absence of pre-filed testimony by MRC, the opponents of MRC's petition have been denied due process safeguards that are normally in MPSC contested case proceedings. MIT recommends granting the motions made by the opponents in the hearing. If the MPSC is not inclined to rule in favor of MIT and other opponents, then the MPSC should deny the MRC petition on the grounds that it does not satisfy state and federal law.

The balance of MIT's reply brief explains why MRC's petition should be denied. MIT's main argument is that MRC has not provided sufficient evidence to show that granting its ETC petition is in the PI under state and federal law (§ 69-3-840 and 214(e)(2)). MIT cites to a recent South Carolina PSC decision that describes the historical evolution of FCC's view of the PI standard. After the passage of the 1996 Act, the FCC applied its own lenient PI standard where a state commission lacked jurisdiction. The application of such standard led, however, to concerns about the exponential growth in the FUSF. As Commissioner Martin stated "*...I am hesitant to subsidize multiple*

*competitors to serve areas in which costs are prohibitively expensive for even one carrier...*” Recently, the FCC has developed and applied a more stringent PI analysis (citing to its orders in the Virginia Cellular and Highland Cellular petitions). The FCC’s PI determinations also require a “fact-specific balancing of the benefits and costs” including such factors as: 1) increased competitive choice, 2) impact on the FUSF, 3) whether the benefits outweigh the harms, 4) quality of service commitments and 5) the CETC’s ability to provide the supported services within a reasonable time frame.

MITS also cites to the shift in policy by the Federal-State Joint Board on Universal Service (FSJB). The FSJB recommendations: 1) encourage a rigorous review of ETC applications by states; 2) include a core set of minimum qualifications including: a) adequate financial resources; b) commitment and ability to provide the supported services; c) ability to remain functional in emergencies; d) consumer protection and e) local usage. MITS notes that states are “free to establish their own eligibility requirements” besides those set by the FCC or recommended by the FSJB. MITS notes the MPSC’s support of a bill in the 2003 legislative session wherein MITS proposed a stringent set of technical and service quality standards. MITS interprets the MPSC’s draft ETC rules as favoring a rigorous review of specific technical and service quality standards.

Whereas MRC asserts to have satisfied the PI because: 1) MRC’s service is essential to public safety as “mobile phones” can be used when the customer is not at home; 2) designating MRC gives customers a “choice”; 3) MRC’s designation will promote competition; 4) MRC can broadcast its signal over a broader area than a wireline carrier; and 5) no consumers will be harmed by MRC’s designation, MITS responded that MRC’s petition does not come close to meeting any reasonable PI standard. Nor is there any guarantee that calls will traverse its network with reasonable reliability etc.

MTA The introduction to MTA’s reply brief notes that because MRC’s application involves a rural company it is subject to strict regulatory scrutiny that includes a rigorous review of MRC’s minimum qualifications. One reason for such strict scrutiny is that a second ETC may relinquish its ETC status, abandoning its obligation to serve, which is of particular importance in rural areas where the economics necessary to

support one provide may be difficult and support for two providers may prove impossible. Therefore, MTA identifies three questions that the MPSC must carefully evaluate.

First, the MPSC must determine whether designating MRC as an ETC is in the PI. MTA believes it is indeterminate, given the record, whether MRC has provided the services necessary to be designated an ETC. MTA asserts that whereas MRC's original application was limited to MRC's cellular service areas, it now seeks ETC designation throughout the MRTC and RTC study areas. MTA comments that MRC is a secondary licensee, providing service only where the primary licensee has abandoned areas and therefore MRC cannot expand its coverage without first receiving FCC permission. MTA notes the maps that MRC submitted show MRC's existing coverage areas are small parts of the two study areas in question. MTA adds that MRC has pending no application to expand its license areas. Since MRC seeks ETC designation for the entire study areas of MRTC and RTC and will provide service outside the existing coverage areas exclusively through resale, MRC cannot be designated an ETC for these study areas. MTA finds no merit in MRC's arguments that its designation by the most efficient means possible and throughout the study area is necessary to avoid the disruptive and time-consuming process of study area disaggregation. MTA finds no merit as MRC is totally reliant upon RTC and MRTC for services outside of its limited cellular circles and the objective cannot be met if the incumbent ETC relinquished its status. In addition, MTA finds misguided MRC's argument that a study area-wide designation is needed to avoid disaggregation. It is misguided as the question of disaggregation and its consequences has not been fully considered due to the changing nature of MRC's ETC request. MTA adds that while MRC's parent chose not to disaggregate its study area, it is not known why its parent chose not to disaggregate, an issue that should not be glossed over. Thus, because MRC cannot serve the entire areas for which it requests ETC designation without relying exclusively on resale for those areas outside its "limited cellular license areas" it cannot be designated an ETC.

Second, MTA holds that MRC fails to show why its designation would promote the PI. Whereas early on in its deliberations of ETC petitions the FCC found that designations were "**per se**" in the PI, the FCC's current policy, as expressed in its

Virginia Cellular decision, expressed concern that compliance with 214(e)(1) would not necessarily be consistent with the PI. In this regard, MTA cites to FCC Commissioner Abernathy's express concern with the sustainability of the FUSF. MTA then cites to a recent January 7, 2005 South Carolina PSC (SCPSC) order that denied the petition of "FTC," a wireless carrier, to be designated an ETC. SCPSC's denial was based on concern over growth of the FUSF. MTA also holds that because MRC is fully built out no additional build-out is planned. (p. 7) MTA agrees with the MCC's comment that it is inconsistent with the PI to subsidize MRC's provision of service in the entire licensed service area given MRC already provides the service. MTA also concurs with the MCC comment that MRC is after subsidies to compete with a provider that is its "sole owner." MTA finds unpersuasive MRC's argument that its designation is necessary for public health and safety. MRC's argument is unpersuasive because MRC has already built out its coverage and USFs cannot improve the situation. MTA finds irrelevant the testimony of (public) witnesses as MRC already provides the services they value and MRC is not proposing to expand or improve upon its service.

Third, MTA comments that MRC has failed to develop a record on which its designation can be justified. MTA holds that MRC failed to initially file sufficient information due to the need for clarity on the following matters:

1. Service Area: Whereas MRC seeks designation for the MRTC and RTC study areas the MPSC at hearing indicated that MRC's original application had not been amended to request designation throughout these study areas.
2. Rates: The rates MRC may charge could vary by service territory.
3. Customers MRC Serves and USF: As MRC objected to discovery, there is no specific data, other than a \$600/year/customer estimate, on the total amount of USF in question.
4. Disaggregation Effects: MRC must at least have information on the effect of disaggregating MRTC.
5. USF Receipts: As MRC's parent company MRTC provides service to the same customer that MRC may serve, the total "take" for the two companies could be \$1,200/customer/year. There is no record to support MRC's claim that it will use these funds to expand or improve service.

6. Role of Affiliates: The role of MRC's affiliated businesses, including its parent company, and its licenses, both PCS and its 700 MHz licenses.

For the above reasons and other concerns MTA requests that the MPSC deny MRC's request to be designated an ETC.

### **Findings of Fact and Commission Decision**

The MPSC finds that MRC has sufficiently satisfied the requirements set forth in Section § 214, including the PI standard, to be designated an ETC in the study areas of each of MRTC and RTC. Whether MRC satisfies all relevant requirements will depend, in part, on MRC's ongoing compliance with the additional conditions set forth in this order. The MPSC's ongoing rulemaking proceeding will establish additional public interest standards and requirements with which all ETCs must comply. In this regard, consideration of whether MRC complies with those rules will not differ from how the MPSC evaluates the ongoing compliance of other previously designated and prospectively designated ETCs. The ETC rulemaking is underway and the MPSC is hopeful that it will be completed this year. The MPSC finds that, while aspects of its decisions are consistent with prior MPSC ETC designation Final Orders, there are unique aspects to each ETC petition and this MRC docket is no exception.

Public Interest The PI requires of the MPSC a thorough review of whether MRC complies with both the requirements set forth in Section 214 of the 1996 Act and with any additional requirements that the Commission establishes either in this order or later in its rules. The MPSC has authority to establish such requirements and it chooses to exercise that authority.<sup>33</sup> These additional requirements have now been applied to ETC

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<sup>33</sup> In its Virginia Cellular Order (FCC 03-338, CC Docket No. 96-45, Released January 22, 2004) the FCC asserts: "*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." (para 27, emphasis added)

designation petitions and are obligations with which ETC's must comply on a going forward basis. The MPSC sets forth those requirements with which MRC must comply as a condition of receiving ETC status and will defer until the completion of the on-going ETC rulemaking any other obligations that will also apply. After making its initial findings on the threshold designated study area issue the MPSC will turn to other matters including certain prior findings contained in the MPSC's final order on the Western Wireless ETC petition. The FCC's recent March 17, 2005 Report and Order (Released in FCC 05-46 in CC 96-45) adopts mandatory minimum requirements for ETC designations that are subject to Section § 214(e)(6) proceedings. These requirements are, however, optional recommendations that states may adopt. The MPSC findings in support of this decision are as follows.

Designated Study Areas As for the scope of the geographic service areas in which MRC will be designated an ETC, the MPSC is acutely aware of the difference between MRC's initial petition and MRC's amendment in hearing to revise the initial petition. (TR 41) As MRC explained, it amended its petition to avoid disaggregating to, in turn, avoid the possibility of "cream skimming." (TR 42, 88-90) While there is a difference between the initial and the amended petition, the MPSC finds merit in designating MRC an ETC consistent with the amended application and thus for the entire service areas of each of MRTC's and RTC's study areas.

That being the MPSC's decision, the geographic areas will still have limits. Even though the geographic scope of the designation bounds all twelve of the circled areas (17 exchanges) illustrated on the attachment to MRC's initial petition, the scope of the MPSC's designation is strictly limited to the physical bounds of each of these two co-op's study areas: no more, no less. For example, the extent to which MRC provides service in rural study areas that are not within either co-op's study area, the designation approved in this docket excludes those areas.

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As evident from the FCC's February 28, 2005 News release (in CC 96-45), the FCC has adopted mandatory requirements for ETC designations in its own 214(e)(6) proceedings and it recommends adoption of the same requirements by states.

The MPSC's reasons for designating MRC an ETC within the two co-op's study areas are threefold. One reason is similar to why the MPSC designated Western Wireless an ETC in Qwest's non-rural areas. Just as Western Wireless was not required to meet 98% population coverage upon designation nor should MRC have any such similar obligation: there is no reason to impose an obligation on MRC to serve, upon designation, most or all of either co-op's study areas. MRC will have to acquire additional, fill-in or otherwise, licenses to expand service outside the existing CGSAs (12 circled areas) for which it has received fill-in licenses. MRC can obviously acquire additional fill-in licenses or it would not have sought to amend its initial application to include the entire study areas for each of MRTC and RTC.

The second reason is FUSF support related. Since the FUSFs that will port to MRC from each of MRTC and RTC are based upon each co-op's own costs for each co-op's entire study area, MRC should have support that is in relation to those ultimate coverage areas. And as discussed below, MRC is expected to build out into those areas.

A third reason stems from the comments received by the public witnesses. Those witnesses highly value study-area wide cellular service and supported MRC's petition so that they may receive such service. The MPSC is also aware that MRC will not be the only provider of wireless service throughout each co-op's study area. MRC will not be the only provider as previously existing licenses are held by other carriers that have apparently fulfilled their due diligence obligations to retain their licenses. Thus, in order to provide study-area wide service MRC may do so by means of its own resources and licenses and by means of reselling the services of other wireless providers.

The MPSC expects that of the six additional areas in which MRTC is designated an ETC and for which it may receive federal USFs that MRC will not use its designation in this docket to expand its service coverage into those Qwest exchanges, with one possible exception. If and when the FCC designates MRTC as an incumbent in the Terry exchange, the geographic study area for which the MPSC designates MRC in the case of MRTC is expected to expand to include Terry.<sup>34</sup>

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<sup>34</sup> See in the matter of the Petition of Mid-Rivers Telephone Cooperative, Inc. for Order Declaring it to Be an incumbent Local Exchange Carrier in Terry, Montana pursuant to 47 U.S.C. §251(h)(2) in FCC WC Docket No. 02-78.

Build out Plans The MPSC expects MRC to file within 60 days of issuance of this order its build out plans to serve areas in each of MRTC's and RTC's study areas. (TR 50-56) Periodic updates on MRC's progress on achieving its goals must also be filed. This is, in part, consistent with the MPSC's earlier stated expectation (Western Wireless Order 6492a) that ETC designations in rural areas call for a more rigorous PI evaluation.

As noted above, it is both the expectation of the MPSC and the public witnesses in this docket that more extensive wireless coverage will result from designating MRC an ETC in the study areas of each of MRTC and RTC. However, there is no information in this docket on the percent of the population in each study area that MRC can presently serve. Any such information in this docket is anecdotal and spotty at best. The absence of such information need not, however, be an obstacle to designating MRC as an ETC for each study area so long as MRC complies with the reporting requirements set forth herein.

Although MRC provided some information on unserved areas in response to cross examination by Commissioner Jergeson, MRC must identify for each of the two co-op's study areas the candidate areas in which MRC can, if it chooses, expand its wireless coverage.<sup>35</sup> The MPSC requires MRC to file information that explains its build out plans for the next five years. An initial report of those plans must be filed within 60 days of the issuance of this Final Order. At 6 month intervals MRC is to file reports on its progress in expanding its wireless coverage. The MPSC finds that while 5 years seems a long time to achieve build out plans, that amount of time appears consistent with the FCC's recently released establishing minimum requirements for carriers to be designated as ETCs (March 17, 2005, FCC 05-46, in CC 96-45). While five years exceeds the amount of time that the MPSC allowed Western Wireless to complete 98% coverage but the circumstances are also different. MRTC's and RTC's study areas are most likely two of

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<sup>35</sup> MRC identified large pockets of unserved areas that exist south of Miles City along Highway 212 from Broadus to Alzada. (TR 60) MRC also testified that Sagebrush already serves the Circle, Jordan and Glasgow areas; Verizon and Western Wireless serve Winnett and Grass Range but not apparently without customer complaints. (id)

the least densely populated cooperative study areas in the continental United States. MRC's build out plans must also include expanded coverage on the Northern Cheyenne Reservation coverage unless there are conflicting licensees in which case an explanation of those conflicts must be provided to the MPSC.<sup>36</sup>

The plan that MRC files within 60 days must indicate the timing of its build out plans, the location of those build outs and the population that will then receive coverage that does not currently receive wireless service coverage. MRTC must provide an indication, even if only an estimate, of the percent of the population that it serves now and that it will serve in each of MRTC's and RTC's study areas. The indication must be of its coverage based upon the existing CGSA fill in licenses and the population coverage for each additional year extending out five years. MRC should indicate how it plans to achieve greater study area coverage including whether and to what extent it will rely upon the use of "cell extenders," new towers, wireless access units and, or, resale, wireless local loop service. The MPSC finds that MRC must by means of its own resources serve all reasonable requests for wireless service at residences and businesses in each of MRTC's and RTC's study areas so long as there is no conflict with other licensed wireless carriers.

MRC must also provide maps of its actual signal coverage capability. It must begin providing such information within 60 days of the issuance of a Final Order in this docket and at one-year intervals thereafter for the duration of its 5 year build out. On each wire center map MRC must overlay maps of its coverage capability based upon the MPSC's -dBm standard.

214(e)(1) supported Services: bandwidth Of the nine supported services that MRC asserts to provide, the one involving a minimal 300 to 3000 Hertz bandwidth for voice grade access (FCC rule 54.101(a)(1)) is unclearly satisfied. (see TR 35-37 and DR MTA -014)) And, whereas in the prior Western Wireless ETC designation approval (Order No. 6492a) the noted -dBm transmission quality standard was -104dBm (decibels

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<sup>36</sup> MRC asserts that it does not intend to petition the FCC for ETC designation on the Northern Cheyenne Indian Reservation and adds that RTC only serves the Northern Cheyenne Indian Reservation. (DR PSC -011 and DR MITS -003(c))

per milliWatt), in this MRC petition docket the range appears as +1 to -4dB. (id) The MPSC expects, as the FCC's rules require, that MRC will serve the CGSA (circled) areas in its petition with at least 300 to 3000Hertz bandwidth and that the service quality for transmission will at least be -104dBm. To the extent that MRC does not have such capability, it has 60 days to satisfy this requirement and to report to the MPSC of having attained the FCC's minimum bandwidth standard. The MPSC will not agree that because the FCC licensed MRC in a narrower bandwidth than that required by the FCC's own rules in order to be designated an ETC that MRC received some sort of implicit grant of variance to the bandwidth requirement set forth in the FCC's rules.

Use of Federal Universal Service Funds: Patronage credits MRC witnesses Mr. Gerry Anderson and Mr. Vern Stickel testified on the subject of "patronage credits." (TR 77-79, TR 113-122) Based on their testimony the MPSC understands that whereas MRTC pays out patronage credits MRC does not. Although the MPSC does not generally regulate MRC or MRTC, how each company uses FUSFs is controlled by statute, principally Section § 254(e) and the annual certification process that does involve the MPSC.<sup>37</sup> Whereas the MPSC has previously employed a self certification paper filing mechanism, if and when this approach appears inadequate for a specific carrier, the MPSC will then consider a more in depth review. The MPSC notes, however, that bill credits are a permitted use of FUSFs. That credits are a permitted use is evidenced by other state Commissions that allow credits on bills as an appropriate use of FUSFs.

Fund Size, Funded Lines and Double Dipping The MPSC is concerned about the size of the FUSF. The FCC has also expressed heightened concern about the size and growth of the FUSF.<sup>38</sup> The heightened concern of the FCC's is shared by the MPSC.

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<sup>37</sup> Section 254(e) in relevant part reads as follows: "A carrier that receives such support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. Any such support should be explicit and sufficient to achieve the purposes of this section."

<sup>38</sup> In its Virginia Cellular Order (FCC 03-338, CC Docket No. 96-45, Released January 22, 2004) the FCC asserts: "Although we find that grant of this ETC designation will not

There is a real risk that if the FUSF size continues along its recent growth path that legislation could be enacted to limit the fund's size. Any such legislation could damage the ability of carriers to operate, maintain and expand networks that serve to achieve the universal service principles set forth in §254(b). These concerns are, however, being addressed at the Federal level by both the FCC and the Federal-State Joint Board. For that reason, the MPSC finds that the MCC's testimony on how to interpret what "new" and "former" subscribers (FCC Rules, Section 54.307) is an issue that is more appropriately resolved by the FCC. Therefore, it appears to the MPSC unnecessary for it in this docket to address how to interpret the FCC's rules on new and captured customers.

The MPSC finds concerns about double dipping into the FUSF to relate to the above matter involving "new" and "former" subscribers. MRC will receive FUSFs where each of MRTC and RTC already receives FUSFs. MRC will receive such FUSFs as it is serving either new or captured (former) subscriber lines in these two co-op's study areas. Although the fact that two carriers receive FUSFs in the same area raises concerns about the accelerating growth in the FUSFs it is not otherwise unique except for the fact that in one case MRC is affiliated with its parent MRTC. The facts surrounding such circumstances, while not well developed in this docket, do not appear unique in Montana.<sup>39</sup> The MPSC understands that such circumstances exist in other states. In addition, there are other pending ETC designation applications in Montana that will involve similar circumstances (e.g., D2003.10.156 involving 3 Rivers PCS, Inc.)

The MPSC does have a concern with MRC receiving FUSFs for either of the two co-op's entire study areas given that its licenses are limited to the CGSAs. However, that is the extent to which the MPSC has a concern that relates to the double dipping issue. And, while this concern could be addressed by disaggregation, the MPSC believes the

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*dramatically burden the universal service fund, we are increasingly concerned about the impact on the universal service fund due to the rapid growth in high-cost support distributed to competitive ETCs... We note that the outcome of the Commission's pending proceeding examining the rules relating to high-cost support in competitive areas could potentially impact, among other things, the support that Virginia Cellular and other competitive ETCs may receive in the future."* (para. 31, emphasis added)

<sup>39</sup> The circumstance may not be unique in Montana given MRC's witness Stickel's testimony that other subsidiaries of Montana co-ops receive USFs. (TR 121)

concern is sufficiently addressed by requiring MRC to detail its build out plans and then by requiring MRC to meet those plans within five years.

The MPSC would also note that the market structure for the provision of telecommunications services continues to be in a state of flux. However, as the MCC's witness Buckalew testified now is not the time to shift from supporting wireline carriers to supporting wireless carriers. (TR 169-170) The MPSC finds this testimony wise counsel as it is not just legally infeasible, due to license limitations, but it is unlikely to be economically infeasible for MRC to serve the entire study areas of its parent MRTC and of RTC.

Service Quality Monitoring The MPSC will monitor MRC's ability to provide service. MRC must report to the MPSC the requests for wireless service in the two study areas that it is unable to satisfy. MRC must report the number of unsatisfied requests regardless of how those requests were communicated to MRC (e.g., voice, email, or letter). The MPSC requires these reports to detail unsatisfied service requests by location in each of the two study areas, ideally by CGSA. The reports must provide a detailed description of why customer requests for service could not be satisfied. MRC must file such reports for each study area on a quarterly basis for as long as MRC is designated an ETC.

MRC must also document and report to the MPSC on the customer complaints that it receives.<sup>40</sup> For each of the two study areas for which MRC is designated an ETC MRC 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 study area. Ideally, MRC's reports will be by CGSA. If repeat complaints are received, then a record of such repeat complaints must be maintained. The customer complaints reporting requirement pertains to MRC's provision of service only at the addresses of both residential and business

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<sup>40</sup> As background, Virginia Cellular agreed to provide the FCC on an annual basis the number of consumer complaints (FCC 03-338, CC Docket 96-45, Released January 22, 2004).

subscribers in study areas, ideally CGSAs, for which MRC is designated an ETC. The reports must be supplied to the MPSC on a quarterly basis.

Federal Universal Service Fund The MPSC finds that in conjunction with being designated an ETC, MRC must report to the MPSC the FUSFs including Lifeline and Link Up funds that it receives. The reports must be filed quarterly for each study area in which MRC is designated an ETC. As MRC's petition is strictly for Cellular service, prior to MRC's seeking FUSF support for customers served by means of other than cellular technology (e.g., PCS) MRC must file with the Commission a statement of such intent.

Service Package As long as MRC is designated an ETC it must have on file with the MPSC a copy of each rate plan that it offers for which it may receive FUSF support. Each plan must include the rates, terms and conditions of service. The MPSC shall establish in rules any necessary rate caps and terms for unlimited service (minutes of use). MRC will have to comply with those rules once codified.

Comparable Services In its petition, MRC has held that pursuant to the Act (Section § 254(b)(3)), customers in this most rural area of Montana must be able to avail themselves of telecommunications services that are comparable to those in urban areas and at rates that are comparable to those in urban areas. The MPSC's decision to grant MRC's petition is, in part, premised on achieving comparable services and rates in rural areas as are available in urban areas. There is not, however, any evidence in this proceeding that the rates that MRC will charge are at all comparable to those in urban areas.

Competition MRC has argued, albeit in briefs, that encouraging competition is essential and that by designating MRC as an ETC competition will be enhanced. The MPSC is doubtful of the veracity of these arguments. As the MCC has testified, because MRC and MRTC have the same general manager, and even if they did not they are

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affiliates, it is unlikely that MRC will enhance competition in the MRTC study area. In addition, as MRC testified wireless service is not a substitute for but rather is a complement to landline service. Thus, if competition is at all relevant, MRC certainly would not appear to provide any such PI benefits when it is designated an ETC in MRTC's study area. MRC might provide some competitive pressure in RTC's study area but only if MRC is wrong about wireless being a complement to landline service. And, the MPSC does not disagree with MRC's testimony that wireless service is a complement to landline service. To the extent that there are other wireless carriers offering service where MRC provides wireless service, wireless-on-wireless competition may result that is beneficial. Still, and as the MCC notes, there may be a competitive disadvantage to the wireless provider that competes with MRC unless it receives FUSFs similar to what MRC receives.

Other Matters Other proposals raised by interveners that were not addressed here appear ones that the MPSC can and will address in its ETC rulemaking proceeding.

### **Conclusions of Law**

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 (formal publication of notice of hearing on the proposed rules is expected in the Montana Administrative Register on or about November 4, 2004).* The rules, as adopted, will apply to all eligible telecommunications carriers in Montana, including MRC. 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**

It is hereby ordered that the application of MRC for designation as an eligible telecommunications carrier is granted, subject to the terms and conditions included in this order.

DONE AND DATED this 29th day of March, 2005, by a vote of 4 to 1.

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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ROBERT H. RANEY, Commissioner

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THOMAS J. SCHNEIDER, Commissioner  
Voting to Dissent

ATTEST:

Connie Jones  
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.