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D2003.8.105

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March 9, 2004

Mr. Steve Vick
Montana Public Service Commission
1701 Prospect Avenue
PO Box 202601
Helena MT 59620-2601

Re: Motion to Continue the Public Hearing in Docket D2003.1.14 and to Stay all
Current ETC Application Proceedings Pending FCC Action on the
Recommendations of the Federal-State Joint Board on Universal Service

Dear Steve:

I am enclosing an original and ten copies of the above captioned Motions for
Commission consideration.

Copies have been served on all parties.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael C. Strand", written in a cursive style.

Michael C. Strand
CEO and General Counsel

Cc: Montana PSC
Montana Consumer Counsel
Parties of Record

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

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PUBLIC SERVICE
COMMISSION

* * * * *

IN THE MATTER OF WWC HOLDING)
CO., Application for Designation as an) UTILITY DIVISION
Eligible Telecommunications Carrier in)
Montana Areas Served by Qwest) DOCKET NO. D2003.1.14
Corporation)

IN THE MATTER OF CABLE &)
COMMUNICATIONS CORPORATION)
DBA MID-RIVERS CELLULAR)
Application for Designation as an Eligible) DOCKET NO. D2003.8.105
Telecommunications Carrier)

IN THE MATTER OF 3 RIVERS PCS,)
INC., dba 3 RIVERS WIRELESS,)
Application for Designation as an Eligible) DOCKET NO. D2003.10.156
Telecommunications Carrier)

IN THE MATTER OF INTERBEL)
WIRELESS, INC.)
Application for Designation as an Eligible) DOCKET NO. D2004.1.5
Telecommunications Carrier)

IN THE MATTER OF TRIANGLE)
COMMUNICATION SYSTEM, INC.)
Application for Designation as an Eligible) DOCKET NO. D2004.1.6
Telecommunications Carrier)

IN THE MATTER OF SAGEBRUSH)
CELLULAR, INC.)
Application for Designation as an Eligible) DOCKET NO. D2004.1.7
Telecommunications Carrier)

IN THE MATTER OF NORTHERN)
COMMUNICATIONS, INC.)
Application for Designation as an Eligible) DOCKET NO. D2004.1.8
Telecommunications Carrier)

IN THE MATTER OF INTERBEL)
 TELEPHONE COOPERATIVE, INC.)
 Application for Designation as an Eligible) DOCKET NO. D2000.5.64
 Telecommunications Carrier)

IN THE MATTER OF 3 RIVERS)
 TELEPHONE COOPERATIVE, INC.)
 Application for Designation as an Eligible) DOCKET NO. D2003.2.23
 Telecommunications Carrier in the Shelby,)
 Montana exchange)

MONTANA INDEPENDENT TELECOMMUNICATIONS SYSTEMS

**MOTIONS TO CONTINUE THE PUBLIC HEARING IN DOCKET D2004.1.14 AND TO
 STAY ALL CURRENT ETC APPLICATION PROCEEDINGS PENDING FCC ACTION
 ON THE RECOMMENDATIONS OF THE FEDERAL-STATE JOINT BOARD ON
 UNIVERSAL SERVICE**

Motion to Continue the Public Hearing in Docket D2003.1.14

Montana Independent Telecommunications Systems (MITS), an intervener, herein files a Motion to Continue the Public Hearing in Docket D2003.1.14, the application by WWC Holding Co. (WWC), for designation as an eligible telecommunications carrier (ETC) in Montana areas served by Qwest Corporation. MITS moves for a Continuation of the previously scheduled March 17, 2004 public hearing for the following reasons: 1) Sufficient time does not exist between the procedural deadlines for Applicant's response to rebuttal discovery, the submission of the required pre-hearing memorandum, and the public hearing. 2) The PSC on March 4, 2004, unanimously voted to grant the Joint MITS and Montana Telecommunications Association

(MTA) Petition for Rulemaking seeking the adoption of rules pertaining to ETC designation and to issue a Notice of Inquiry asking for comments on proposed ETC rules, including whether the Notice of Proposed Rule-Making should apply to ETC designations in areas served by non-rural telecommunications carriers; and 3) The February 27, 2004 Federal-State Joint Board on Universal Service *Recommended Decision* on ETC issues is a significant intervening event in the PSC's consideration of all pending ETC applications.

I. Sufficient time does not exist between the procedural deadlines for Applicant's response to rebuttal discovery, the submission of the required pre-hearing memorandum, and the public hearing resulting in legitimate due process concerns.

On December 18, 2003, the Commission issued a Notice of Action Amending the Schedule in Docket D2003.1.14. The PSC approved the request of the Montana Consumer Counsel to extend the due date for submission of intervenor testimony, adjusted some subsequent deadlines, but retained the hearing date of March 17, 2004. The amended schedule establishes March 11, 2004 as the deadline for WWC to respond to intervenor discovery on the WWC rebuttal testimony; March 12, 2004 as the deadline for parties to submit the required pre-hearing memoranda; and March 17, 2004 as the hearing date. There are only three business days separating the data response deadline and the date of the hearing.

Order No. 6492, issued June 10, 2003, established procedures for Docket D2003.1.14, including discovery requirements.

“Any requesting party dissatisfied with the response to any written discovery or data

request and desiring PSC action to compel, must, within 7 days after receipt of such response, file before the PSC and serve all parties, the objection or motion and identify the relief requested. The PSC may dispose of such objection by prompt ruling or may schedule argument. The PSC will act to either sustain or overrule the objections. If an objection is sustained, a time period will be set within which a satisfactory response must be made.”

Six calendar days (and three business days) separate the due dates for data responses from the applicant and the public hearing on the merits of the case. There is simply not enough time for intervenors to determine whether grounds exist for objecting to the responses and for the Commission to rule on those objections.

Order No. 6492 also established the requirements for the Prehearing Memorandum:

“The Prehearing Memorandum shall be from each party unless the parties agree to file jointly. It shall contain a list of all issues determined to be uncontested, all issues determined to be contested, witnesses intended to be called to testify or stand cross-examination, exhibits intended to be introduced, and discovery, to date, intended to be introduced at hearing. ...”

Further, one day separates the rebuttal testimony data response deadline and the deadline for filing the Prehearing Memorandum. One day does not provide adequate time for intervenors to determine what, if any, issues are uncontested or contested based on WWC’s responses to the data requests. One day provides inadequate time to determine what discovery will be introduced at hearing when a significant portion of that discovery will have been received only the day before and may be subject to objection.

In short, while MITS recognizes that the current procedural order has been in place for some time, MITS was unable to determine in advance the extent of WWC’s rebuttal testimony and therefore the nature of its data requests regarding that testimony. The tight time frames that were established in an attempt to preserve WWC’s desired hearing date now threaten MITS’ right

to appropriate due process.

II. The PSC has unanimously agreed to issue a Notice of Proposed Rule-Making preceded by a Notice of Inquiry seeking comments on proposed ETC rules.

On February 13, 2004, on behalf of itself and its members, MITS filed Motions to Stay or Suspend Proceedings for ETC designations in areas served by Montana's rural telecommunications carriers. Among MITS' enumerated interests in seeking a stay or suspension of those proceedings was the precedent that may be established with respect to Commission determinations of whether and in what manner the petitioning companies offer the requisite supported services established by the Federal Communications Commission (FCC) for ETC designation, as well as any public interest analysis the Commission deems appropriate in the course of the proceedings. Such determinations are likely to affect the pending applications for ETC designation in the rural areas served by MITS' members, as well as future applications for ETC designations. All of MITS' Montana members have been designated as ETCs and are interested in the potential impact of ETC designations on the size and continued viability of the federal universal service funding mechanisms as well as any possible state universal service funding mechanism. MITS' members are further concerned that the lack of clearly defined minimal public interest standards and quality of service expectations for ETC designation may have the unintended consequence of actually reducing service quality and service offerings for Montana telephone consumers.

On Feb. 13, 2004, MITS and the Montana Telecommunications Association (MTA)

jointly filed with the PSC a Petition for Rulemaking seeking the adoption of rules pertaining to ETC designation. The Petition asks the Commission to establish the meaning of “public interest” for the purposes of ETC designation. The petition proposes specific uniform minimum standards for determination of “public interest” for ETC designation in areas served by rural telephone companies.

The PSC on March 4, 2004, unanimously voted to grant the Joint MITS and the Montana Telecommunications Association (MTA) Petition for Rulemaking seeking the adoption of rules pertaining to ETC designation. The Commission unanimously voted to issue a Notice of Inquiry (NOI) asking for comments and suggestions for modifications on proposed ETC rules *including whether the Notice of Proposed Rule-Making should apply to ETC designations in areas served by non-rural telecommunications carriers*. Comments will be likely be due on March 19 or 22. Since these dates are only a few days after the currently scheduled date of the hearing in Docket D2003.1.14, a short delay in holding that hearing will allow the Commission to consider whether the proposed ETC rules should apply to applications for ETC status in areas served by non-rural telecommunications carriers.

Discussion among PSC staff and Commissioners at the March 4, 2004 work session indicated significant interest in an ETC rule making proceeding to determine the extent the Commission will establish public interest criteria and minimum service standards for ETC designations and certifications. Those very same issues lie at the center of the WWC petition for ETC designation in Docket D2003.1.14.

III. The February 27, 2004 Federal-State Joint Board on Universal Service Recommended Decision on ETC issues is a significant intervening event in the PSC's consideration of all pending ETC applications.

On February 27, 2004, the Federal-State Joint Board on Universal Service finally released its long-anticipated *Recommended Decision* on ETC issues. In that Decision, The Joint Board encourages the FCC to adopt permissive federal guidelines for states to use during ETC designation proceedings including a core set of minimum qualifications against which ETC applicants would be evaluated. The Decision recommended that review of ETC applications by state Commissions be "rigorous". The Decision also recommends the adoption of a plan that restricts Universal Service Fund (USF) support to primary lines only. The Joint Board further recommends that once an additional ETC is designated in a rural area, the support in that area be capped on a per-line basis. A summary of major issues addressed in the Recommended Decision is attached.

At its March 4, 2004 work session, The Commission recognized not only the significance of the Joint Board's Recommended Decision but also the potential impacts on Montana telephone subscribers and companies if the FCC adopts the recommendations of the Joint Board. At that meeting, Chairman Rowe suggested, and the Commissioners agreed, that the Notice of Inquiry on ETC Rule Making include a request for comments on whether the PSC should consider freezing all competitive ETC applications until a final FCC decision on these issues which are tremendously important to Montana. It is MITS position that given the direction the Joint Board is recommending to the FCC, it is premature for the Montana Public Service Commission to consider any competitive ETC designations, including WWC, at this time. At a minimum, the

hearing should be delayed for a short period of time while the Commission further considers this issue.

Summary

Montana Independent Telecommunications Systems (MITS) is an intervener in Docket D2003.1.14. With this Motion, MITS seeks a continuation of the March 17, 2004 public hearing so that intervenors have adequate time to review thoroughly WWC's discovery responses and to pursue remedial options as contemplated by the Commission's initial procedural order in this docket.

Motion to Stay All Current ETC Application Proceedings Pending FCC Action on the Recommendations of the Federal-State Joint Board on Universal Service

As noted in Section II of the foregoing Motion, MITS has already requested a stay of all ETC applications pending in areas served by rural telephone companies on the grounds that the proposed rules should apply uniformly to all such applications. In its last work session, the Commission discussed the possibility of staying pending non-rural ETC applications on the same grounds. MITS has no objections to this proposal and agrees that such a proposal would be appropriate for the purposes of uniformity.

However, as an additional motion, MITS hereby further moves that all pending ETC applications in areas served either by rural or non-rural telephone companies be stayed on the separate grounds that the determination of the merits of such applications should await FCC

action on the recent Recommendations of the Federal-State Joint Board on Universal Service. The rationale for this motion is set forth in Section III of the foregoing Motion but should also include the advantages of conserving scarce Commission and party resources engaging in hearings, testimony, data requests and responses, etc. that may be rendered moot by FCC adoption of the Joint Board recommendations.

RESPECTFULLY SUBMITTED this 9th day of March, 2004.

A handwritten signature in black ink, appearing to read "M. Strand", is written over a solid horizontal line.

Michael C. Strand
CEO and General Counsel
Montana Independent Telecommunications Systems
MITS

Appendix A

Summary of the Major Issues Addressed in the Recommended Decision: Federal Guidelines for ETC Designations

- Recommends that the Commission adopt permissive federal guidelines for states to use when determining whether applicants are qualified to be designated as ETCs under section 214.
- Guidelines are appropriate because the ETC application and designation process should be one that is rigorous. A rigorous ETC designation process should ensure that only fully qualified applicants receive designation as ETCs and that ETC designees are prepared to serve all customers within the designated service area. Additionally, a core set of minimum qualifications would allow for a more predictable application process among the states.
- Recommended guidelines would assist states in determining whether or not the public interest would be served by a carrier's designation as an ETC.
- Guidelines should improve the long-term sustainability of the fund, as only fully qualified carriers that are capable of, and committed to, providing universal service would be able to receive support.
- Federal guidelines concerning ETC qualifications should be flexible and non-binding on the states. State commissions would retain their rights to determine eligibility requirements for designating ETCs. Each state commission will be uniquely qualified to determine its own ETC eligibility requirements as the entity most familiar with the service area for which ETC designation is sought.
- Even with the advent of permissive federal guidelines for ETC designations, states will continue to have the flexibility to impose additional eligibility requirements.
- A specific, fact-intensive inquiry is the appropriate way to analyze the public interest when evaluating an ETC application for a rural area.
- Adopting a core set of minimum qualifications will promote a predictable application process across states and provide certainty for states in terms of what guidelines may be appropriate to consider in the public interest analysis.
- Guidelines should apply in areas served by both rural carriers and non-rural carriers, states and the Commission should apply a higher level of scrutiny when evaluating ETC applications for designations in areas served by rural carriers. Rigorous review of ETC applications assumes added importance in areas served by rural carriers.

Specific Proposals

- Adequate Financial Resources - to evaluate whether ETC applicants have the financial resources and ability to provide quality services throughout the designated service area.
- Commitment and Ability to Provide the Supported Services - States should require a demonstration of capability and commitment because this will help them ensure that an ETC applicant is willing and able to provide the supported services throughout the designated service area and to be the sole ETC in a service area if the incumbent LEC relinquishes its designation.
- Equal Access - the Commission should adopt guidelines encouraging states, as a condition of ETC designation, to require competitive ETCs to be prepared to provide equal access if all other ETCs in that service area exercise their rights to relinquish their designations pursuant to section 214(e)(4).”
- Ability to Remain Functional in Emergencies - the Commission should adopt a guideline encouraging states to require ETC applicants to demonstrate the ability to remain functional in emergency situations.
- Consumer Protection - the Commission should adopt a guideline indicating that state commissions may properly impose consumer protection requirements as part of the ETC designation process. Even if some ETCs, including CMRS carriers, otherwise would not be subject to state consumer protection requirements, states may extend generally applicable requirements to all ETCs to ensure that universal service goals are met.
- Local Usage - Local usage is one of the supported services that ETCs are required to provide in order to receive federal universal service support. Although the Commission has not set a minimum local usage requirement, there is nothing in the Act, Commission’s rules, or orders that would limit state commissions from prescribing some amount of local usage as a condition of ETC status.
- Public Interest Determinations - section 214(e)(2) provides the state commissions with the obligation and statutory duty to perform an in-depth public interest analysis concerning ETC applications in rural carrier study areas.
- States should not be required to adopt a specific cost-benefit test for the purpose of making public interest determinations.
- States making public interest determinations may properly consider the level of federal high-cost per-line support to be received by ETCs. If the per-line support level is high enough, the state may be justified in limiting the number of ETCs in that study area, because funding

multiple ETCs in such areas could impose strains on the universal service fund. Moreover, if the Commission were to cap per-line support upon entry of a competitive ETC and impose a primary-connection restriction, designating an excessive number of ETCs could dilute the amount of support available to each ETC to the point that each carrier's ability to provide universal service might be jeopardized.

- Other factors relevant to the public interest determination – such as topography, population density, line density, distance between wire centers, loop lengths and levels of investment – may all affect the level of high-cost support received in an individual study area.
- High-cost support is also a concrete, objective, transparent, and readily obtainable factor that may help state commissions avoid generalized or abstract arguments about the harms or benefits of additional ETCs.
- Annual Certification Requirement - the Commission should encourage states to use the annual certification process for all ETCs to ensure that federal universal service support is used to provide the supported services and for associated infrastructure costs.
- The Commission should limit the scope of high-cost support to a single connection that provides access to the public telephone network. To minimize the potential impact of restricting the scope of support in areas served by rural carriers, the Commission should seek comment on restating, or “rebasin,” the total high-cost support flowing to a rural carrier's study area on “primary” or single connections, and on other possible measures. Restating support would avoid any immediate effect on the total amount of high-cost support that a rural carrier receives: its support would be reduced in the future only to the extent that a competitive ETC captures primary connections.
- In conjunction with these measures, high-cost support in areas served by rural carriers should be capped on a per-line basis when a competitive carrier is designated as an ETC and be adjusted annually by an index factor.
- Recommendations to limit the scope of support, are conditioned on the Commission's ability to develop competitively neutral rules and procedures that do not create undue administrative burdens.
- Continued support of multiple connections for multiple networks in rural and high-cost areas threatens fund sustainability.
- Maintaining Sufficient Support for Rural Areas - the Commission should take steps to avoid or mitigate reductions in the amount of high-cost support flowing to rural areas as a result of implementing a primary-line restriction.

- **Cap on Per-Line Support - High-cost support in areas served by rural carriers should be capped on a per-primary line basis when a competitive ETC is present or when a competitive ETC enters the market and be adjusted annually by an index factor. The total support flowing to a rural carrier (including high-cost loop support, local switching support, long term support, and interstate common line support) would be capped on a per-primary line basis upon competitive entry. Thereafter, per-primary line support would be adjusted annually based on an index factor, rather than changes in the rural carrier's embedded costs.**

- **Administrative Issues - the Commission should further develop the record on proposals to allow consumers with more than one connection to designate an ETC's service as "primary." The Commission should also further develop the record on rate issues associated with supporting primary connections. The Commission should further develop the record on the appropriate treatment of businesses with multiple connections, particularly small businesses.**

- **More generally, the Commission should seek comment on the impact of the primary connection proposal on investment in rural areas.**

- **The Commission should consider whether it should adopt transitional measures for support in areas where competitive ETCs are operating as of the release date of the Recommended Decision.**

- **Basis of Support - The JB declined to recommend that the Commission modify the basis of support in areas with multiple ETCs at this time, but stated it would continue to consider possible modifications to the basis of support in this proceeding. For areas served by rural carriers, the JB is concerned that funding a competitive ETC based on the incumbent LEC's embedded costs may not be the most economically rational method for calculating support. However, the JB stated it did not yet have an adequate record to analyze and understand the consequences of recommending a change in the basis of support for areas served by rural carriers that face competition.**

Other Issues:

- **Identification of Wireless Customer Location - the Commission should further develop the record on defining mobile wireless customer location in terms of place of primary use for universal service purposes.**

- **Accurate, Legible, and Consistent Maps - the Commission should delegate authority to USAC to develop standards for the submission of any maps that ETCs are required to submit to USAC under the Commission's rules in a uniform, electronic format.**