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2004 MAR 12

March 11, 2004  
**FEDERAL EXPRESS**

Steve Vick  
Montana Public Service Commission  
1701 Prospect Avenue  
Helena, MT 59620-2601

RE: In the Matter of Cable and Communications Corporation's dba Mid-Rivers Cellular  
Petition for Designation as an Eligible Telecommunications Carrier  
Docket No.: D2003.8.105  
Our File No. 12540,010

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Dear Mr. Vick:

Enclosed herewith please find the original and ten (10) copies of Cable and Communications Corporation's, dba Mid-Rivers Cellular, Objection to Montana Independent Telecommunications Systems' Motion to Stay or Suspend Proceedings.

Thank you for your assistance. If you have any questions, please feel free to contact me.

Sincerely,

MOULTON, BELLINGHAM, LONGO  
& MATHER, P.C.

By   
THOMAS E. SMITH

TES/mt  
Enclosure  
cc. Gerry Anderson w/enc.

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 Cable & )  
Communications Corporation, dba ) Utility Division  
Mid-Rivers Cellular, Petition for )  
Designation as an Eligible ) Docket No. D2003.8.105  
Telecommunications Carrier )

**CABLE & COMMUNICATIONS CORPORATION’S, dba MID-RIVERS CELLULAR,  
OBJECTION TO MONTANA INDEPENDENT TELECOMMUNICATIONS SYSTEMS’  
MOTION TO STAY OR SUSPEND PROCEEDINGS**

**INTRODUCTION**

COMES NOW Cable & Communications Corporation, dba Mid-Rivers Cellular (hereinafter “Mid-Rivers Cellular”), hereby submits this Objection to Montana Independent Telecommunications Systems’ (hereinafter “MITS”) Motion to Stay or Suspend Proceedings dated February 13, 2004, in the above-entitled docket.

**SUMMARY OF CASE AND PROCEDURE**

On August 6, 2003, Mid-Rivers Cellular, a cellular or wireless service provider, filed a petition before the Montana Public Service Commission (hereinafter “Commission”) to be designated as an Eligible Telecommunications Carrier (hereinafter “ETC”) within Mid-Rivers Cellular’ service areas covering all or parts of local telephone exchange areas served by Mid-Rivers Telephone Cooperative, Inc. (i.e. Ekalaka, Baker, Carlyle, Richey, Lambert, Circle, Jordan, Lindsay, Fallon, Bloomfield, Plevna, Rock Springs, Musselshell, Melstone, South Wolf Point) and Range Telephone Cooperative, Inc. (i.e., Broadus, Ashland, including a portion of the Northern Cheyenne Indian Reservation). On September 11,

2003, the Commission issued the Notice of Application and Intervention Deadline. On October 8, 2003, the Commission granted intervention in the proceeding to Montana Telecommunications Association (hereinafter MTA) and MITS, as well as Montana Consumer Counsel, Range Telephone Company and Ronan Telephone Company. On October 24, 2003, the Commission issued the Procedural Order for this proceeding, which, among other things, provided for discovery between the parties through the use of data requests. (See Order No. 6518, Docket No. D2003.8.15)

Discovery through data requests has been conducted in the proceeding. The Public Service Commission Staff submitted Data Requests PSC-001 - PSC 0013. Mid-Rivers Cellular responded to each of the data requests without objection. MTA served 52 data requests and MITS served 46 data requests. Mid-Rivers Cellular provided responses, with objections, to both MTA and MITS.

MTA submitted to the Commission a Motion to Compel Responses to Data Requests dated November 19, 2003. Mid-Rivers Cellular filed a Motion to Set Procedural Schedule for Briefing and Hearing on the Motion to Compel on November 21, 2003. Subsequently, MITS submitted to the Commission a Motion to Compel Responses to Data Requests dated December 3, 2003. In response to Mid-Rivers Cellular's Motion, a telephone conference was held with the pertinent counsel of record and Commission staff and a briefing schedule was set and a hearing date set for March 2, 2004. The briefing schedule was extended when MTA's original counsel withdrew and filed a request for additional time to obtain new counsel and to file MTA's Reply Brief. Over Mid-Rivers Cellular's Objection, the Commission granted an extension to MTA to file its Reply Brief on or before March 3, 2004, and vacated the hearing date. MTA has now filed its Reply Brief, but the hearing has not yet been rescheduled. The issue presented by the Motions to Compel, and any ruling

upon the adequacy of Mid-Rivers Cellular's objections and responses, is the permissible scope of the entire ETC petition and approval process by the Commission. (See Mid-River Cellular's Response Brief to Motions to Compel of MTA and MITS.) In brief, the issue centers on whether the "public interest" inquiry subjects a party seeking ETC designation in an area served by a rural telephone company to unlimited discovery regarding the petitioner's proprietary business, commercial and development information, finances, employees, etc. Mid-Rivers Cellular contends in its Response Brief that under the applicable state and federal law, the discovery requests seeking such information is outside the scope of the proceeding and, as such, irrelevant. (See Mid-River Cellular's Response Brief to Motions to Compel of MTA and MITS.)

On or about February 13, 2004, MITS and MTA filed a Petition For Rulemaking with the Commission. MITS and MTA's Petition requests: "...the PSC adopt rules that would establish the meaning of 'public interest' for the purposes of ETC designation. Petitioners further request that all ETC application proceedings for service areas of rural telephone companies be temporarily stayed or suspended pending the outcome of this rulemaking." (Petition for Rulemaking, p. 2) Additionally, on or about February 13, 2004, MITS (but not MTA) filed a Motion to Stay or Suspend Proceedings in this docket and six other pending dockets. MITS' Petition for Rulemaking appears to be an admission that Mid-Rivers Cellular's arguments presented in its Response Brief to Motions to Compel of MTA and MITS are well taken. MITS' Petition proposes new rules which would define "public interest" to specifically include all of those areas objected to by Mid-Rivers Cellular.

## ARGUMENT

MITS Motion to Stay or Suspend Proceedings is wholly improper and without merit. MITS fails to cite any authority, statutory or otherwise, which allows either MITS to file a Motion for Stay or Suspend Proceedings, or for this Commission to stay or suspend all proceedings in multiple dockets. In essence, MITS is seeking injunctive relief whereby the Commission would enjoin or prohibit any further action in multiple dockets involving ETC designations in areas served by rural telephone companies.

An injunction is an order requiring a person to refrain from a particular act. Section 27-19-101, MCA. MITS is attempting to obtain injunctive relief without complying with Montana law. MITS requests that the Commission in its quasi-judicial capacity grant a “stay” which would simply be an order prohibiting Mid-Rivers Cellular (as well as any other party seeking ETC designation in an area served by a rural telephone company) from proceeding with the ETC designation process. MITS has failed to comply with the proper procedure to obtain this extraordinary relief. MITS has also failed to submit any evidence, or even argument, that it is entitled to such relief under Montana law. Clearly, under Montana law, Mid-Rivers Cellular’s ETC proceeding should not be stayed, enjoined or prevented from proceeding to hearing and an ultimate decision by the Commission.

Under Montana law, in order for a party to be entitled to final injunctive relief to prevent a breach of an obligation, the party must show the following:

1. pecuniary compensation would not afford adequate relief;
2. it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief;
3. the restraint is necessary to prevent a multiplicity of judicial proceedings; or
4. the obligation arises from a trust.

Section 27-19-102, MCA. MITS has failed to argue or document through evidence that it is entitled to the injunctive relief it seeks through its Motion to Stay. Clearly, MITS does not qualify for injunctive relief because there is no requisite underlying contract or obligation to which MITS is a party which may be breached. Additionally, under Montana law, injunctive relief cannot be granted to stay a judicial proceeding pending at the commencement of an action in which the injunction is demanded. Section 27-19-103(1), MCA. Mid-Rivers Cellular submits that this statute equally applies to a Public Service Commission quasi-judicial proceeding which is pending at the commencement of the petition for rulemaking. Also, Montana law specifically provides that an injunction may not be granted to prevent the exercise of a public or private office, in a lawful manner, by the person in possession. Section 27-19-103(6), MCA. This statute prohibits MITS from seeking a stay or injunctive relief which would prevent the Commissioners from exercising the lawful powers of their office, or in other words, preventing the Commission from proceeding with its routine business affairs, one of which is the designation of ETCs.

MITS Motion to Stay is wholly without merit. A Motion to Stay is not a recognized pleading under Montana's Rules of Civil Procedure or the Administrative Rules of Montana. The only possible procedure or pleading which may be applicable to MITS Motion to Stay is that of injunctive relief. However, as noted above, MITS does not qualify for injunctive relief under Montana law. Furthermore, MITS has not complied with the appropriate procedure dictated under Montana law to obtain injunctive relief. See Sections 27-19-104, 27-19-201, 27-19-203, 27-19-301, 27-19-303, and 27-19-306, MCA.

MITS Motion to Stay seeks to delay all pending ETC designation proceedings involving areas served by Montana's rural telecommunication carriers until such time as the Commission adopts new rules establishing the meaning of "public interest." (MITS Motion

to Stay, p. 3) Apparently, MITS believes that any revision or modification of the definition of “public interest” will be retroactively applied to the pending ETC designation dockets. However, under Montana law, it is inappropriate to retroactively apply modifications in the law to pending cases. Similarly, it would be inappropriate to retroactively apply a modification of the definition of “public interest” to pending ETC designation dockets. In *C. Loney Concrete v. Employment Rel. Div.*, 291 Mont.41, at 47, 964 P.2d 777, at 777 (1998), the Montana Supreme Court stated:

In *Porter*, we considered whether the Montana Legislature’s 1995 modification to the Scaffold Act should be applied retroactively in a case which involved an employer’s liability for an employee’s deadly fall from a ladder. At the time the case was decided by the district court, we held that a ladder was considered a scaffold. See *Porter*, 275 Mont. at 180, 911 P.2d at 1147. The 1995 modification, however, specifically excluded a ladder from the coverage of the Act. See *Porter*, 275 Mont. at 182, 911 P.2d at 1148. On appeal, we held that the ladder should be considered a scaffold despite the 1995 modification since a retroactive application of the modification would have caused a different legal effect from that which the accident had under the law when it occurred. See *Porter*, 275 Mont. at 183, 911 P.2d at 1149.

For the same reasons, we will not retroactively apply the Montana Legislature’s 1995 modification to the definition of temporary worker. Originally, the Workers’ Compensation Court limited temporary workers to a workload of, at most, a few months. Arguably, retroactive consideration by the Workers’ Compensation Court of the 1995 legislative amendment could certainly result in a different interpretation of the statute. Thus, the 1995 modification would cause a different legal effect from that which *Loney* had under the 1991 statute.

As in *Loney*, it would be inappropriate for the Commission to retroactively apply administrative rules or statutes to the pending ETC dockets. Such an application of any new definition of the meaning of “public interest” would result in a different legal effect on the ETC designation process. Therefore, any stay or suspense in the subject dockets

would result in prejudice to Mid-Rivers Cellular, as well as the other parties with pending ETC proceedings before the Commission. The application of any new definition of "public interest" to the pending dockets would most likely result in subsequent Constitutional challenges involving due process and equal protection claims.

**CONCLUSION**

For the reasons set forth above, Mid-Rivers Cellular respectfully requests that the Commission deny MITS Motion to Stay in the above-referenced docket.

DATED this 11th of March, 2004

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By 

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