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April 8, 2004

Michael C. Strand  
(406) 443-1940  
[mikestrand@mitstel.com](mailto:mikestrand@mitstel.com)

Mr. Steve Vick  
Montana Public Service Commission  
Utility Division  
P.O. Box 202601  
Helena, MT 59620-2601

Re: MITS' Reply Brief to Objections and Responses to MITS' Motions to Stay or Suspend Proceedings – D2003.8.105, D2003.10.156, D2004.1.5, D2004.1.6, D2004.1.7, D2004.1.8, D2000.5.64, D2003.1.14, D2003.2.23

Dear Mr. Vick:

Enclosed are an original and ten copies of MITS' Reply Brief to Objections and Responses to MITS' Motion to Stay or Suspend Proceedings. This Reply Brief is filed on behalf of the members of MITS - Montana Independent Telecommunications Systems. Copies have been served on all parties.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Michael C. Strand', is written over a horizontal line.

Michael C. Strand  
CEO & General Counsel  
MITS

Combined Service List: D2003.8.105, D2003.10.156, D2004.1.5, D2004.1.6, D2004.1.7, D2004.1.8, D2000.5.64, D2003.1.14, D2003.2.23

Enclosures

MITS, P.O. Box 5237, 2021 11th Avenue, Suite 12, Helena, MT 59604-5237  
Phone: 406-443-1940 / Fax: 406-443-2880  
E-Mail: [mits@mitstel.com](mailto:mits@mitstel.com) / Web Site: [www.mitstel.com](http://www.mitstel.com)

Service Date: April 9, 2004

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

\* \* \* \* \*

IN THE MATTER OF WWC HOLDING ) CO., Application for Designation as an ) Eligible Telecommunications Carrier in ) Montana Areas Served by Qwest ) Corporation )	UTILITY DIVISION  DOCKET NO. D2003.1.14
IN THE MATTER OF CABLE & ) COMMUNICATIONS CORPORATION ) DBA MID-RIVERS CELLULAR ) Application for Designation as an Eligible ) Telecommunications Carrier )	DOCKET NO. D2003.8.105 ✓
IN THE MATTER OF 3 RIVERS PCS, ) INC., dba 3 RIVERS WIRELESS, ) Application for Designation as an Eligible ) Telecommunications Carrier )	DOCKET NO. D2003.10.156
IN THE MATTER OF INTERBEL ) WIRELESS, INC. ) Application for Designation as an Eligible ) Telecommunications Carrier )	DOCKET NO. D2004.1.5
IN THE MATTER OF TRIANGLE ) COMMUNICATION SYSTEM, INC. ) Application for Designation as an Eligible ) Telecommunications Carrier )	DOCKET NO. D2004.1.6
IN THE MATTER OF SAGEBRUSH ) CELLULAR, INC. ) Application for Designation as an Eligible ) Telecommunications Carrier )	DOCKET NO. D2004.1.7
IN THE MATTER OF NORTHERN ) COMMUNICATIONS, INC. ) Application for Designation as an Eligible ) Telecommunications Carrier )	DOCKET NO. D2004.1.8

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 )

**REPLY BRIEF OF MONTANA INDEPENDENT TELECOMMUNICATIONS  
SYSTEMS (MITS) TO OBJECTIONS TO MOTIONS TO SUSPEND OR STAY  
ETC PROCEEDINGS**

MITS currently has two motions before the Montana Public Service Commission (Commission) with respect to staying current ETC applications in Montana. For the sake of efficiency, MITS will address both motions and the responses to those motions in this Reply Brief.

**I. Introduction**

In its first motion<sup>1</sup>, MITS requested that all current proceedings involving ETC applications in areas served by rural telephone companies be suspended pending the outcome of a Commission rulemaking jointly proposed by MITS and MTA. The motion dealt only with suspending applications in rural telephone company areas because the

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<sup>1</sup> See *Motion to Stay or Suspend Proceedings* in Docket Nos. D2003.8.105, D2003.10.156, D2003.4.1.5, D2004.1.6, D2004.1.7, D2004.1.8, and D2000.5.64 filed by MITS on February 13<sup>th</sup>, 2004.

proposed rules applied only to ETC applicants in areas served by rural telephone companies.

In its second motion<sup>2</sup>, MITS requested that all current proceedings involving ETC applications, regardless of whether those proceedings involved areas served by rural or non-rural telephone companies, be stayed or suspended pending FCC action on the recent recommended decision of the Federal-State Joint Board on Universal Service<sup>3</sup>.

## II. Argument

### **A. MITS' First Motion Does Not Discriminate Against ETC Applicants in Non-Rural Areas.**

In their response briefs, the responding parties argue that granting MITS' first motion (requesting suspension of proceedings involving rural areas only) would be impermissible insofar as it would discriminate against applicants in rural telephone company service areas and in favor of applicants in non-rural telephone company areas. MITS reply is that the two different kinds of applicants may be treated differently because Congress and the Montana Legislature treat them differently in the statutory framework for ETC designation. Under both the federal and state statutes, the Commission must designate more than one ETC in areas served by non-rural telephone companies, where the applicant meets the ETC criteria set forth by Congress, the FCC

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<sup>2</sup> See *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* filed by MITS on March 9, 2004.

<sup>3</sup> *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket 96-45, Recommended Decision, FCC 04J1 (Rel., February 27, 2004).

and the Commission. However the Commission may designate more than one ETC in areas served by rural telephone companies (emphasis added).<sup>4</sup>

This discretionary language indicates that Congress specifically recognized that there may be cases where no additional ETCs should be designated in the areas served by rural telephone companies, even where they otherwise meet the criteria for ETC designation. MITS does not believe that its motion to suspend rural proceedings is discriminatory because Congress allows Commissions to discriminate in their treatment of applicants for areas served by rural telephone companies versus applicants for areas served by non-rural companies. That said, MITS would have no objection to its proposed rules being applied to applicants for areas served by non-rural telephone companies, if the Commission deems such application to be appropriate.

**B. MITS' Motions do not Constitute a Request for an Ex Post Facto Law.**

The parties responding to both of MITS' motions also object on the grounds that the granting of such motions would constitute an impermissible ex post facto action by the Commission. Black's Law Dictionary defines an ex post facto law as a law passed after the occurrence of a fact or commission of an act, which retrospectively changes the legal consequences or relations of such fact or deed.<sup>5</sup> The most common application of ex post facto arguments is in the context of criminal proceedings in which the prosecution attempts to charge a defendant with respect to a particular act by the defendant which was either not defined by the legislature as a crime at the time the act was committed or was

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<sup>4</sup> 47 U.S.C. § 214(e)(2) and 69-3-840(3) M.C.A.

<sup>5</sup> Black's Law Dictionary, Fifth Edition, page 520

defined by the legislature as a different crime than the crime with which the defendant is now being charged.

In any event the argument does not apply in this case. The only “act” committed by those responding to MITS’ motions was the act of filing an application at the Commission. The services provided by the responding parties have certain attributes, and the Commission has not yet determined the public interest criteria against which those attributes will be measured, and the Commission is free to determine those criteria in any fashion it wishes: whether that be via the criteria set forth in the rules proposed by MITS and MTA, the guidelines proposed by the Federal State Joint Board on Universal Service, or some combination or permutation of the two.

In other words, the state and federal laws on ETC designation exist today, and neither the MITS/MTA proposed rulemaking nor the Federal State Joint Board on Universal Service is proposing to change those laws. Both efforts are simply seeking to clarify the ways those laws should be interpreted or implemented by the Commission, particularly in determining whether a particular ETC application is in the public interest.

**C. MITS and MTA Have Exercised Due Diligence, Just as the FCC and the Federal State Joint Board on Universal Service have Exercised Due Diligence in this Area.**

The parties opposing MITS’ motions also argue that MITS and MTA were insufficiently diligent in proposing ETC rules. Presumably, they would also argue that the FCC and the Federal State Joint Board were also insufficiently diligent, since the FCC’s referral and the Joint Board’s recommended decision deal with many if not most of the same issues as the MITS/MTA proposed rules.

The fact is that there was no way of knowing seven years ago how state Commissions in general and the Montana Commission in particular were going to interpret federal and state law dealing with ETC designation and the public interest. As far as other states are concerned, we now have a very mixed bag of interpretations in which some states treat rural and non-rural areas differently and some don't. Some states impose strict requirements on CETCs, such as build-out requirements and strict certification procedures. Other states do not. Montana was rather late to the table on these issues simply because there have been few ETC applications in this state, most are very recent, and only recently have some of those applications become controversial because of concerns from both state telecommunications associations and their members as to whether the designation of recent applicants is in the public interest.

In short, MITS, MTA, the FCC, and the Federal State Joint Board on Universal Service have all been reasonably diligent in this area and all have recognized flaws and inconsistencies in the way state and federal law in this area have been interpreted and applied. All of these entities are now attempting to deal with these flaws and inconsistencies. MITS' position is that there is no better time than the present and that, rather than establishing bad precedent, the Commission should temporarily suspend these proceedings until they can be assessed with greater clarity provided by new Commission and/or Federal rules or guidelines.

**D. The Commission Has Complete Authority with Respect to the Timing of Pending Proceedings.**

For those of us who have practiced before the Commission for some time, the Commission's discretion to suspend procedural orders or postpone aspects of a

proceeding is well known and commonly used. The authority to do so arises from the Commission's own rules: "In the discretion of the commissioners or a hearing examiner, for good cause shown, any time limit prescribed by commission ruling or by these rules may be extended."<sup>6</sup>

MIT'S motions and the MITS/MTA rulemaking show good cause why current proceedings should be suspended. The establishment of technical and service quality standards as well as standards for certification will greatly reduce the possibility of inconsistent rulings on individual applications and will do much to ensure that applicants are truly qualified and committed to providing universal service.

Additionally, suspending current and future proceedings pending greater certainty as to public interest and certification criteria helps conserve the limited resources of the PSC by creating benchmarks that the PSC does not have to reinvent on a case-by-case basis. A suspension would therefore create administrative efficiencies for an agency that is currently laboring under an immense workload while dealing with recent unanticipated staff vacancies and all of the issues surrounding the Northwestern Energy bankruptcy proceedings.

**E. MIT'S is not Seeking Injunctive Relief.**

Those responding to MIT'S motions have stated that MIT'S is "essentially seeking injunctive relief" and then go on to explain the legal requirements for obtaining an injunction.<sup>7</sup> While MIT'S certainly appreciates the assistance of opposing counsel in determining what MIT'S is really asking for, MIT'S maintains that it is not requesting

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<sup>6</sup> 38.2.312 A.R.M. (Extensions of Time)

<sup>7</sup> Cable & Communications Corporation's d/b/a Mid-Rivers Cellular, Objection to Montana Independent Telecommunications Systems' Motion to Stay or Suspend Proceedings, Page 4

injunctive relief. MITS is requesting exactly what is stated in its motion: a stay or suspension of current ETC proceedings. As noted above, this Commission suspends proceedings and procedural orders on a regular basis when good cause is shown. MITS and MTA have shown good cause (also noted above) and therefore the proceedings should be suspended. Injunctive relief is not being sought.

**F. The C. Loney Concrete Case does not Apply under the Facts Underlying MITS' Motions.**

One of the parties opposing MITS' motions cites the case of C. Loney Concrete v. Employment Rel. Div., 291 Mont. 41, 964 P.2<sup>nd</sup> 777. In that case, the 1995 legislature modified the definition of a temporary worker. The Montana Supreme Court held that such modification could not be applied retroactively.

That case is distinguishable from this case. Here, there are no existing rules to modify, retroactively or otherwise. This Commission has not yet firmly decided what criteria should be used to determine whether the public interest exists, either in the case of ETC applications for areas served by rural telephone companies or by non-rural telephone companies. Therefore, there is no issue of retroactivity present in this case. Had this Commission adopted rules and was now seeking to modify those rules and apply the new rules to a pending application, perhaps a C. Loney analysis might be pertinent. Those facts are not present in this case, however, so C. Loney is inapplicable.

**E. The Facts upon which the Order of the Idaho Commission are Distinguishable from the Facts Currently Before this Commission and the Idaho Order is not Binding Precedent for the Montana Commission.**

Western Wireless' sole response to MITS' motions is to cite an order from the Idaho Public Utilities Commission (Idaho PUC) in which Citizens and the Idaho Telephone Association (ITA) requested a stay of proceedings involving the ETC applications of two wireless providers.<sup>8</sup> The request for stay was based on the fact that a ruling was anticipated from the FCC on the issue of ETC designation at some point in the future. The Idaho PUC denied the request for stay on the grounds that the Federal State Joint Board's recommended decision had not yet been rendered and there was too much uncertainty as to what might be included in the FCC's ultimate Order in this area.<sup>9</sup>

The facts (and for that matter the law) at this time is different than the facts and law that existed at the time of the Idaho PUC decision. First, the Federal State Joint Board on Universal Service has now rendered its recommended decision.<sup>10</sup> That decision recommends a number of public interest guidelines and rigorous review of ETC applications. In the past, the FCC has given great deference to decisions recommended by the Joint Board.

Further, the FCC has spoken further on the issue of ETC designation itself in the Virginia Cellular decision.<sup>11</sup> In that case, the FCC expressly found that a public interest analysis must be performed for applicants in areas served by non-rural telephone companies as well as in areas served by rural telephone companies.<sup>12</sup>

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<sup>8</sup> Order No. 29292, Idaho Public Utilities Commission, issued July 21, 2003

<sup>9</sup> *Id.* at page 6

<sup>10</sup> *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket 96-45, Recommended Decision, FCC 04J1 (Rel., February 27, 2004).

<sup>11</sup> CC Docket No. 96-45, Order No. FCC 03-338, issued January 22, 2004

<sup>12</sup> *Id.* at paragraph 27

The FCC went on to state:

In determining whether designation ... is in the public interest we 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, any commitments made regarding quality of telephone service, and the competitive ETC's ability to satisfy its obligation to serve the designated service areas within a reasonable time frame.<sup>13</sup>

Therefore, in an FCC order six months after the Idaho PUC order, the FCC establishes public interest criteria that did not exist at the time of the Idaho PUC order, thereby creating a degree of certainty that did not exist in the Idaho PUC case. Further, the FCC goes on in the *Virginia Cellular* case to say: "This Order does not prejudge the Joint Board's deliberations ... and any other public interest framework that the Commission might ultimately adopt."<sup>14</sup>

In fact, since the Idaho PUC Order, the Joint Board has completed its recommendations. In its decision, the Joint Board recommends the establishment of minimum public interest guidelines and rigorous scrutiny of ETC applications.<sup>15</sup> We now await FCC action on those recommendations.

Thus we have a different factual and legal situation before us today than existed at the time of the Idaho PUC order. The FCC has now established that the public interest analysis applies to both rural and non-rural ETC applications. The FCC has now established at least some public interest criteria and a balancing test as part of the analysis of ETC applications. The FCC expressly references the fact that it will be considering

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<sup>13</sup> Id. at paragraph 28

<sup>14</sup> Id.

<sup>15</sup> *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket 96-45, Recommended Decision, FCC 04J1, Paragraphs 9-48, (Rel., February 27, 2004).

the Joint Board's recommendations, and those recommendations have now been issued and are being considered by the FCC.

Therefore, the Idaho PUC's reasons for denying the stay requested in its case have been rendered moot with respect to MITS' motion for stay or suspension before the Montana Commission. Finally, a decision by the Idaho PUC does not constitute legally binding precedent for the Montana Commission and therefore the Montana Commission would not be bound to come to the same conclusion as the Idaho Commission, even if the Montana Commission were faced with the same facts and law.

### III. CONCLUSION

The issues that caused MITS to bring its motions for stay or suspension are not merely important here in Montana but are recognized as important on a national basis, as evidenced by the recent recommended decision by the Federal State Joint Board on Universal Service, which recommends many of the same kinds of public interest criteria as are contained in the MITS/MTA Petition for Rulemaking. Rather than deciding pending applications on an ad hoc, case-by-case basis, or making decisions that potentially would be inconsistent with decisions made after conclusion of the rulemaking process, the Commission should grant MITS' motions and establish certainty and uniformity in this area. The purpose of the rulemaking is specifically to establish, in a systematic manner that allows for a rigorous debate and input by all parties, criteria that can be uniformly applied to all pending and future ETC applications, thereby significantly reducing the risk of inconsistent approvals or denials of applications. For example, if certain congestion standards are applied to deny a particular ETC application

next year but those standards are not considered in approving a currently pending application, the denied applicant could justifiably feel that he or she was unfairly treated, even though he or she would likely have no avenue for redress.

Delaying decisions on the pending ETC applications until rules are adopted that establish the appropriate criteria for evaluating such applications is the not only within the Commission's legal discretion, it is the most appropriate means to ensure that comprehensive, sound public policy considerations are included in the decisions. Given that many millions of dollars are at stake as well as the potential for significant detrimental impacts to the quality of telecommunications services across Montana and that the viability of the entire set of universal service funding mechanisms is at stake nationwide, MITS' firmly believes that the Commission would be well served to step back a pace to allow greater certainty to develop in this area before proceeding to the conclusion of any pending ETC application dockets.<sup>16</sup>

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<sup>16</sup> In referring to detrimental impacts, MITS is particularly concerned about the ability of some applicants to provide universal service and their commitment to universal service. There are examples from the hearing held recently in WWC Holding Co.'s (Western Wireless) application for ETC designation in some of Qwest's wire centers. For example, on page 107 of the transcript, Witness Blundell states: "I think that a Commission is precluded from denying ETC designation for an additional ETC in an area served by a nonrural telephone company on the grounds that it does not meet a public interest test." On page 122 of the transcript, Commissioner Rowe asks 'Do you agree or disagree that a state commission could grant ETC status, and as part of that grant say, "To the extent our requirements in this jurisdiction change over time, you will be expected to conform with those changes?"' Witness Blundell responded, "I don't think that's appropriate, no. I don't think that's proper." On page 273 of the transcript, after it had been established on pages 266 and 267 that Western Wireless was not subject to fines for violating the CTIA Consumer Code, Commissioner Rowe asked whether Western Wireless would be willing to report on compliance with the Code within the areas from which ETC status is granted in Montana. Witness Blundell replies: "... I'm not sure my willingness - and I'm not sure I have the authority to speak on behalf of the company."

RESPECTFULLY SUBMITTED This 9<sup>th</sup> day of April, 2004.

A handwritten signature in black ink, appearing to read "MCS", is positioned above a horizontal line.

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