



MONTANA  
TELECOMMUNICATIONS  
ASSOCIATION

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Geoffrey A. Feiss, General Manager

(2)

December 17, 2004

Hand-Delivered

Ms. Kate Whitney  
Montana Public Service Commission  
1701 Prospect Avenue  
Helena, Montana 59601

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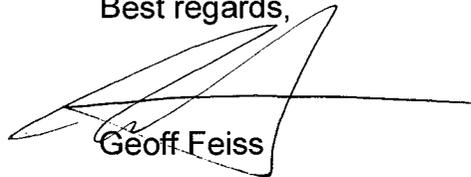
*RE: D2003.8.105. In the Matter of Cable & Communications Corporation,  
dba Mid-Rivers Cellular, Petition for Designation as an Eligible  
Telecommunications Carrier*

Dear Ms. Whitney,

Enclosed for filing in the above Docket No. D2003.8.105, please find an original and ten copies of the post-hearing brief of the Montana Telecommunications Association.

Thank you for your attention to this matter. Please feel free to call me if you have any questions.

Best regards,



Geoff Feiss

Enclosure

December 17, 2004

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

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IN THE MATTER OF CABLE & )  
COMMUNICATIONS CORPORATION, dba )  
MID-RIVERS CELLULAR, Petition for )  
Designation as an Eligible )  
Telecommunications Carrier )

UTILITY DIVISION  
DOCKET NO. 2003-8.105

PUBLIC SERVICE  
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**POST HEARING BRIEF  
OF THE  
MONTANA TELECOMMUNICATIONS ASSOCIATION**

The Montana Telecommunications Association ("MTA") respectfully submits this initial brief following hearing in the above captioned matter.

**I. INTRODUCTION**

Cable & Communications Corporation, d/b/a Mid-Rivers Cellular ("MRC"), a wholly owned subsidiary of Mid-Rivers Telephone Cooperative, submitted an application on August 5, 2003 to the Montana Public Service Commission ("PSC") for designation as an eligible telecommunications carrier ("ETC"). This application was for designation as an ETC in areas served by rural telephone companies. The application originally filed was limited to MRC's cellular service areas. The request was later modified, according to testimony, through data requests to include the entire study areas of Mid-Rivers Telephone Cooperative and Range Telephone Cooperative, both rural telephone companies.

Designation as an ETC allows a telecommunications carrier to receive funding from the universal service fund ("USF"). Thus, designation

as an ETC calls upon the PSC to evaluate a number of questions important not only in this proceeding, but also important to future proceedings. This is especially important since MRC's application is the first in Montana which seeks ETC designation in rural study area. Such rural designation applications are accorded a higher standard of review by the FCC and this Commission.

Several such matters are raised by this application. First, the PSC must address the question of whether the application submitted, without any information beyond responses to data requests, is sufficient to have allowed adequate cross-examination of witnesses and development of a thorough record on which to base its decision. Second, the PSC must determine whether to permit the modification of this application through responses to data requests and, if so, what impact this may have on future proceedings. Third, the PSC must decide if MRC has met the requirements of the public interest sufficiently to offset the harm to 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.

As discussed in earlier documents submitted by MTA to the PSC, projected annualized high cost support based on 1Q2004 for the state of Montana is \$72,218,887. The amount projected for rural companies in the state is approximately \$57 million. The total projected annualized nationwide high cost support as of 1Q2004 figures is \$3,557,807,618.<sup>1</sup> Obviously, disbursement of a fund of this size and scope requires significant scrutiny and MTA commends the PSC for its thoughtful evaluation of this request. MTA also supports the PSC's current rulemaking proceeding to determine appropriate conditions for ETC participation.

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<sup>1</sup> Universal Service Administrative Company, High Cost Support Projected by State, Appendix HC02, 1Q2004, 10/31/03

The impact on rural infrastructure and continued availability of carriers of last resort in high cost areas demand that applications for ETC designations in rural telephone company service areas receive the utmost scrutiny. MRC has made an inadequate submission, has attempted to modify this submission unlawfully and for questionable reasons, and has failed to show how receipt of USF funding would serve the public interest in Montana. The PSC, thus, should deny MRC's request for designation as an ETC.

## **II. DISCUSSION**

### **1. MRC's Application was Inadequate to Permit Thorough Cross Examination by Intervenors and, thus, Failed to Create a Sufficient Record for this Proceeding.**

MRC's application for ETC designation was a mere five pages. It recited the barest of facts regarding MRC and its intentions as an ETC. MRC did not file pre-filed or rebuttal testimony. MRC submitted responses to data requests submitted to it by the PSC and Intervenors. Responses to the PSC data requests identified Mr. Gerry Anderson, Bill Wade and Vern Stickel as witnesses. Responses to other data requests did not identify any witnesses. MRC objected to numerous data requests, including many intended to clarify MRC's intentions as an ETC. Indeed, MRC objected 36 times in its response to MITS-001 – MITS-046.

Considerable discussion occurred at the hearing regarding the question of whether MRC should be permitted to present direct testimony regarding its application. Over the objections of MCC, MITS and MTA, MRC presented direct testimony at the hearing. With only data requests as reference, however, it became clear that there were glaring gaps in the information provided by MRC and available to the parties. This lack of information presented formidable challenges to the cross-examining

parties that resulted in an inadequate record on which to base a decision granting MRC's application.

Information regarding MRC's application, its unique status as a CGSA licensee, its affiliated businesses, and the impact of disaggregation on Mid Rivers Telephone and Range Telephone remained lacking even after several hours of hearing. For example, MRC testified that it has PCS licenses. Nonetheless, witnesses could not verify whether MRC was the PCS licensee for Wibaux, MT, for example, a city in MRC's study area in which MRC seeks ETC designation. Indeed, Mr. Anderson stated that he was "not sure of where our PCS licenses go."<sup>2</sup> That being the case, it is difficult to discern how he could fully document his intent for use of these licenses in the service areas for which MRC seeks ETC designation.

Mr. Anderson also testified that MRC owns 700 MHz licenses. Yet the only discussion of the relevance of the 700 MHz licenses in this proceeding came from Montana Consumer Counsel witness Alan Buckalew. Mr. Buckalew testified that it would be possible for MRC to declare lines served by its PCS licenses or its 700 MHz licenses and receive universal service funding for these customers.<sup>3</sup> Yet, we still do not have information regarding MRC's PCS customers, 700 MHz customers, or its plans for these services as a possible USF recipient.

Perhaps most confounding in this proceeding has been the lack of information regarding MRC's unique status as a CGSA licensee. CGSA licensees or "fill in" licensees are limited licensees under the FCC's rules. Indeed, these carriers could be considered "secondary licensees" since they operate subordinately to the incumbent. They do not have unfettered access to cellular spectrum for a particular license area. These licensees are limited to generally small coverage areas, specific cell tower heights, and in certain instances, power limitations. All of these

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<sup>2</sup> Testimony of Gerry Anderson 37:25

<sup>3</sup> Testimony of Alan Buckalew 150:8-17

requirements are designed to ensure that no interference is visited on the primary licensee. The license itself states:

"This authorization does not vest in the licensee any right to operate a station nor any right in the use of the electromagnetic spectrum designated herein beyond the term thereof nor in any other manner than authorized herein....This authorization does not convey to the licensee the right to receive protection from the capture of subscriber traffic, co-channel interference or first-adjacent-channel interference in any area outside of the authorized cellular geographic service area ("CGSA") of the system. Moreover, any facility authorized herein with a service area boundary ("SAB") extending in the CGSA of any other operating cellular system on the same channel block, regardless of when such other cellular system was authorized, is subject to the following condition: In the event that the licensee of the other cellular system requests that the SAB of the facilities authorized herein be removed from its CGSA, the licensee herein must reduce transmitting power or antenna height (or both) as necessary to remove the SAB from the CGSA, unless written consent from the licensee of the other cellular system, allowing the SAB extension to remain, is obtained."

Mr. Anderson confirmed that MRC "can only provide service where we can demonstrate that there is no present service being provided by the holder of the A and the B license. Our licenses are very specific in that regard."<sup>4</sup> Despite these strict limitations, testimony repeatedly suggested that MRC would use universal service funding to expand its geographic coverage.<sup>5</sup> For any other type of licensee, this suggestion might make sense; for a "fill-in licensee", this claim is unreasonable.

As noted above, MRC's opportunity to expand is dependent on a number of criteria. First, it must find an area abandoned by the primary licensee. Second, it must show that it can serve that area in a manner that does not interfere with the operations of the primary licensee. Finally, it must apply to the FCC for the CGSA, successfully respond to any

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<sup>4</sup> Testimony of Anderson 31:10-14

<sup>5</sup> Testimony of Kelly 109:6-21

opposition, and then engineer and build the system as limited by the FCC's license.

The possibility that MRC could bring service to territories underserved by the A or B licensee is also without merit. The service area must be fully abandoned; dead spots do not count. Attempts by MRC to "supplement" the service of the A or B side licensee would require changes to the FCC's rules. While such a change might be desirable, it is not currently under consideration. As the rules stand today, MRC is restricted to offering service only in those limited geographic areas fully unserved by the incumbent licensees.

MRC also glossed over the question of disaggregation and the potential impact it would have on the rural telephone company service areas for which it seeks designation. Mr. Anderson stated in testimony that MRC had "clarified" that it was seeking ETC status throughout the study areas of Mid-Rivers Telephone Cooperative and Range Telephone Cooperative rather than just the service areas of MRC. He stated that one of the reasons for this was disaggregation. He explained that disaggregation is normally undertaken because of the possibility of cream-skimming, where a competitive carrier would come in and serve only the low cost service area of the incumbent telephone company.<sup>6</sup>

Mr. Anderson is correct, but he neglected to tell the entire story. When disaggregation occurs, the low cost service area of the incumbent telephone company is separated from its higher cost territories. This results in a decrease in per-line support for the lower cost territory. Since none of the cross examining parties were aware of MRC's intention to avoid disaggregation by modifying its application through data responses, we were unable to effectively pursue this avenue of questioning at hearing.

Obviously, this question has enormous ramifications for future

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<sup>6</sup> Testimony of Anderson 42:1-7

applicants and for ETC designation generally. This question also underscores the enforcement challenges presented by the corporate interrelationships present in this matter (another area still relatively unexplored in this proceeding.) Is MRC seeking to avoid disaggregation solely for the good of its parent company? Is it seeking to maintain current high cost receipts for the incumbent? If so, then hypothetically, can Western Wireless, for example, apply for entire study areas even if portions remain unserved, in order to maximize its USF receipts? These are questions that were unaddressed at the hearing but must be addressed before an adequate record exists to support this decision.

The hearing clearly provided useful and productive information regarding MRC's application. Unfortunately, the failure of MRC to submit written information beyond responses to only selected data requests and its five page application, made a thorough understanding of MRC's intentions impossible to discern and, thus, prepare for, prior to the actual hearing. Responses to data requests only tell a part of the story. Information regarding MRC's realistic opportunities for expansion, its interrelationship with its parent company, a full understanding of the effects of disaggregation on MRC or the incumbent rural telephone companies – these are all areas that should have been explained by MRC to the PSC, the parties, and ultimately, the public. Areas such as these are too complicated to evaluate through piecemeal analysis of data responses. These are not de minimus questions; they are fundamental to the analysis of this application. In this proceeding, MRC simply failed to inform the PSC and the parties of information crucial to the decision at hand. For this reason, the PSC should deny MRC's application as well as any others that do not submit sufficient information to permit a fully informed decision.

## 2. MRC's Attempt to Modify its Application Through Responses to Data Requests is Flawed and Must be Rejected.

MRC's original application sought ETC designation for its CGSA license areas. The original application included maps depicting the areas requested for ETC designation. These areas were indicated by circles showing MRC's service territories. The application was, according to MRC's testimony, expanded by MRC to include the entire study areas of Mid-Rivers Telephone Cooperative and Range Cooperative. During cross examination, however, Mr. Anderson clarified that the requested areas did not include any of Mid-Rivers Telephone Cooperative's competitive areas, such as Glendive or Sidney.<sup>7</sup> Mr. Anderson also clarified that no map was available that showed precisely where MRC was seeking ETC designation.<sup>8</sup> According to Mr. Anderson, "The original petition certainly was for ETC status within our licensed service area. Subsequently we clarified that, as to whether or not you consider that an amendment to a petition or that we needed another petition, I don't know."<sup>9</sup> Clearly something more than responses to data requests with no supporting documentation and no explanation of the consequences is required to modify an application of this scope. As discussed earlier, this "modification" presented issues of disaggregation, corporate interrelationships, and future behavior.

All of these questions raise important precedents for the PSC and must be carefully evaluated. The Joint Board has recommended that state commissions "conduct rigorous review of ETC applications, including fact-intensive analyses."<sup>10</sup> In this case, we have no map, no information on the consequences of disaggregation, no explanation of the effect on

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<sup>7</sup> Testimony of Anderson 80:1-25

<sup>8</sup> Testimony of Anderson 81:1-8

<sup>9</sup> Testimony of Anderson 89:16-21

<sup>10</sup> Federal Communications Commission, In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Recommendation Decision, paragraph 11.

the incumbent telephone companies, and no analysis of what effect a purported “future expansion” may have for the applicant or other carriers. MRC’s request for unsupported revision of its application is contrary to the public interest, and shows a searing lack of respect for the administrative process and the integrity of PSC proceedings.

3. MRC has failed to Meet the Public Interest Standard for Designation as an ETC.

Section 214(e)(2) of the Communications Act provides:

A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the State commission. Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, **the State commission shall find that the designation is in the public interest.** (Emphasis added.)

The application of the public interest standard referred to in that section has clearly evolved over time. In the preliminary phase of ETC applications, the mere promise of compliance with the obligations of section 214(e)(1) of the Act was often sufficient to permit designation as an ETC. Indeed as the Commission stated in the *Virginia Cellular Decision*,

“We note that the Bureau **previously** has found designation of additional ETCs in areas served by non-rural telephone companies to be **per se** in the public interest based upon a demonstration that the requesting carrier complies with the statutory eligibility obligations of section 214(e)(1) of the Act. 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." (Emphasis added.)<sup>11</sup>

As time has passed, the adverse consequences of the earlier approach have become clearer. FCC Commissioner Kathleen Abernathy stated recently, "While at one point the cost of granting ETC status to new entrants may have appeared minimal, the dramatic growth in the flow of funds to competitive ETCs compels us to consider the overall impact of new ETC designations on the stability and sustainability of universal service."<sup>12</sup>

Regardless of the standard applied, MRC has failed to show how its designation would promote the public interest or promote and advance universal service. MRC testified that ETC designation would result in its receipt of approximately \$600 per line per customer annually.<sup>13</sup> MRC objected to data requests inquiring as to how many customers it currently serves, so total calculations are impossible.<sup>14</sup> MRC's parent company also receives today approximately \$600 per line annually. In other words, customers served by both MRC's parent company and MRC would be worth \$1,200 annually to the holding company. MRC claims that it should receive these funds simply because of its alleged compliance with the nine supported services enumerated in the FCC's rules. This position is meritless. Quite simply, allowing MRC's holding company to collect \$1200 per household for undocumented, unproven promises of service expansion is contrary to the public interest and does not reflect the best interests of the consumers throughout the state. These consumers deserve

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<sup>11</sup> Federal Communications Commission, In the Matter of Federal-State Joint Board on Universal Service, Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia, CC Docket No. 96-45, Memorandum Opinion and Order, paragraph 27.

<sup>12</sup> *Ensuring That ETC Designations Serve the Public Interest*, Remarks by Commissioner Kathleen Q. Abernathy, NARUC Winter Meeting, Washington, DC, March 10, 2004, p. 3.

<sup>13</sup> Testimony of Stickel 118:16-25

<sup>14</sup> Response to MITS-029

to know that \$600 per line per year is being used responsibly, efficiently, and in their own best interests. MRC has made no such showing and, thus, has failed to show that its receipt of these funds would result in any improvements to universal service.

MRC has made no claim beyond its value as a mobile services provider to support its request that receipt of funding is in the public interest. There is no dispute that consumers are well-served by the mobility and nationwide or regional calling areas that wireless providers offer. Nevertheless, mobility is not a supported service. MRC has failed to show how its receipt of approximately \$50/month/customer is in the public interest. It has failed to show any realistic plans for expanding service or upgrading. In short, it has asked this PSC to trust that it will use the funds wisely and in the consumers' best interests. The PSC must have something more than mere trust.

### **III. Conclusion**

WHEREFORE, for the foregoing reasons, MTA respectfully requests that the Commission deny MRC's request for ETC designation in this proceeding.

Respectfully submitted this 17th day of December, 2004.

MORRISON & FRAMPTON, PLLP



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