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2004 DEC 17

December 16, 2004
FEDERAL EXPRESS

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

RE: Post-Hearing Brief of Cable & Communications Corporation dba Mid-Rivers Cellular
Docket No.: D2003.8.105
Our File No. 12540,010

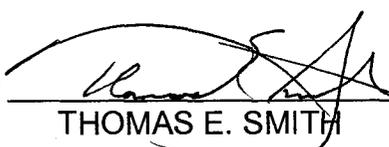
Dear Mr. Vick:

Enclosed herewith please find the original and ten (10) copies of Post-Hearing Brief of Cable & Communications Corporation dba Mid-Rivers Cellular. I have also enclosed a disk with a copy of the same in Pdf format (Adobe Acrobat).

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

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

* * * * *

In the Matter of the of Cable &)	UTILITY DIVISION
Communications Corporation, dba Mid-)	
Rivers Cellular, Petition for Designation)	DOCKET NO. D2003.8.105
as an Eligible Telecommunications)	
Carrier)	

POST-HEARING BRIEF OF CABLE & COMMUNICATIONS CORPORATION,
dba MID-RIVERS CELLULAR

Filing Date: December 17, 2004

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	STATEMENT OF THE CASE.....	3
III.	MID-RIVERS CELLULAR MEETS THE ELIGIBILITY CRITERIA OF 47 U.S.C. § 214(E) AND MONTANA LAW.....	6
	A. <u>Mid-Rivers Cellular Is A Common Carrier</u>	6
	B. <u>Mid-Rivers Cellular Will Offer The Supported Services Throughout Its Requested ETC Service Areas</u>	7
	1. Voice-grade access to the public switched telephone network.....	8
	2. Local usage	8
	3. Dual-tone, multi-frequency (“DTMF”) signaling, or its functional equivalent.....	9
	4. Single-party service or its functional equivalent.....	9
	5. Access to emergency services	10
	6. Access to operator services.....	10
	7. Access to interexchange service	11
	8. Access to directory assistance	12
	9. Toll limitation for qualifying low income consumers	12
	C. <u>Mid-Rivers Cellular Will Offer And Advertise The Availability Of The Supported Services</u>	13
	D. Mid-Rivers Cellular Will Provide The Supported Services Using A Combination of Its Own Facilities and Resale	13
	E. Mid-Rivers Cellular Has Identified And Requested Appropriate ETC Service Areas	14
	F. Public Interest Finding.....	17
	1. Designation of Mid-Rivers Cellular as an ETC in areas served by rural telephone companies is in the public interest.....	18
	2. No Party Has Demonstrated That Montana Consumers Would Be Harmed By Mid-Rivers Cellular’s ETC Designation	24
	3. Proper Scope of Public Interest Inquiry	25
IV.	CONCLUSION	29

I. **INTRODUCTION**

The fundamental question presented in this proceeding is whether the Public Service Commission of the State of Montana (“Commission”) will effectuate the requirements of the Communications Act of 1934, as amended, 47 U.S.C. § 151, *et seq.* (the “Act”), and establish additional eligible telecommunications carriers in areas served by rural telephone companies, and thereby allow new telecommunication carriers, including commercial mobile radio services (“CMRS”) providers, to become eligible to receive universal service support (“USF”) to meet the telecommunications needs of Montana consumers.

Consistent with federal and state law, the Commission should designate Cable & Communications Corporation, dba Mid-Rivers Cellular (“Mid-Rivers Cellular”) an additional eligible telecommunications carrier (“ETC”) in the requested area, which consists of Mid-Rivers Telephone Cooperative, Inc.’s study area and Range Telephone Cooperative, Inc.’s study area. (TR pp. 29 – 30 and 41 - 44.) Mid-Rivers Cellular currently provides cellular service within portions of these study areas, and anticipates expanding its cellular service territory. Mid-Rivers Cellular seeks current designation throughout these study areas to provide an avenue for an expanding service without necessitating duplicative ETC designation proceedings. This approach also avoids the necessity of disaggregating the telephone companies' study areas, a disruptive process which interferes with the business decisions of the two effected telephone companies.

The wireless service area of Mid-Rivers Cellular is defined by fill-in licenses (Cellular Geographic Service Area (“CGSA”) licenses) granted by the

Federal Communications Commission ("FCC"). These licenses are not granted on a "market" basis, but confine a wireless carrier to providing service to the specific geographic area defined by the engineering calculations derived from the height of the tower, the location of the tower, and the power transmitted by the antenna. (TR pp. 29 – 30.) By definition, therefore, Mid-Rivers Cellular is fully built-out in its wireless service area and fully provides the FCC mandated wireless service in these areas. (TR p. 28, 29 and 52; C&CC Exhibit 1.) The only additional cellular build-out by Mid-Rivers Cellular will occur if it is granted additional cellular fill-in licenses by the FCC for additional service areas or CGSA's because that area was not being served by other cellular carriers who had authority to serve an entire Rural Service Area ("RSA") pursuant to an RSA license from the FCC. (TR pp. 27 – 31, and 51.) If Mid-Rivers Cellular is designated an ETC, it will utilize USF funds for the provision, maintenance and upgrading of facilities. (TR pp. 36 and 51.) The use of USF funds for these purposes is entirely appropriate and compliant with the Telecommunications Act of 1996. 47 U.S.C. § 254(e).

The Commission should reject the attempts of local exchange carriers ("LECs") and the Montana Consumer Counsel to create a barrier to entry for wireless service providers and to unfairly restrict and deny ETC designation to wireless service providers or commercial mobile carriers generally, and to Mid-River's ETC designation in particular. Denial of Mid-Rivers Cellular's Petition for ETC designation would only be to the detriment of Eastern Montana consumers. Montanans would be denied the benefits that USF funding supports: the

provision and improvement of wireless services in remote rural areas where such services are necessary for public health and safety. Designating Mid-Rivers Cellular as an ETC is in the public interest and is consistent with the statutory mandates of Section 214(e) of the Act, the directives of the FCC and Montana law.

Mid-Rivers Cellular hereby submits this Post-Hearing Brief in support of its request for designation as an additional ETC in areas served by rural telephone companies in accordance with 47 U.S.C. § 214(e) and MCA § 69-3-840. Based on the evidence presented in this proceeding, Mid-Rivers Cellular has demonstrated that it meets the ETC requirements in Section 214(e) and MCA § 69-3-840, and that such action serves the public interest. The Commission should therefore designate Mid-Rivers Cellular as an ETC in the area consisting of Mid-Rivers Telephone Cooperative, Inc.'s study area and Range Telephone Cooperative, Inc.'s study area.

II. **STATEMENT OF THE CASE**

This proceeding was commenced on August 6, 2003, when Mid-Rivers Cellular filed its Petition for Designation as an Eligible Telecommunications Carrier Throughout Its Service Area ("Petition"). (C&CC Exhibit 1.) The Petition describes in detail how Mid-Rivers Cellular meets the federal ETC criteria and thoroughly describes its intent and ability to meet the obligations of an additional ETC throughout its service area. (*Id.*)

On October 8, 2003, the Commission granted intervention in the proceeding to Montana Telecommunications Association ("MTA") and Montana

Independent Telecommunications Systems (“MITS”), as well as the Montana Consumer Counsel (“MCC”), Range Telephone Company, Inc. (“Range”) and Ronan Telephone Company (“Ronan”).

The Commission ordered a public hearing on the Petition, and an evidentiary hearing was held on October 27, 2004, in Miles City, Montana. (TR pp. 3 and 4.) At hearing, Mid-Rivers Cellular’s General Manager, Gerry Anderson, authenticated, verified and affirmed on behalf of Mid-Rivers Cellular the following: Mid-Rivers Cellular’s Petition herein (C&CC Exhibit 1.); Cable & Communications Corporation’s dba Mid-Rivers Cellular Response to Public Service Commission Staff Data Requests PSC-001 – PSC-013 (C&CC Exhibit 2.); Cable & Communications Corporation’s dba Mid-Rivers Cellular Responses and Objections to Montana Telecommunications Association’s Data Requests MTA-001 – MTA-052 (C&CC Exhibit 3.); Cable & Communications Corporation’s dba Mid-Rivers Cellular Responses and Objections to Montana Independent Telecommunications System’s Data Requests MITS-001 – MITS-046 (C&CC Exhibit 4.); and Cable & Communications Corporation’s dba Mid-Rivers Cellular Response to Public Service Commission Staff Data Requests PSC-014 – PSC-023 (C&CC Exhibit 5.). (TR pp. 9 – 13, and 25 – 26.) Further, in accord with its Prehearing Memorandum, Mid-Rivers Cellular offered Gerry Anderson -- C&CC General Manager, Bill Wade -- C&CC Assistant Manager, and Vern Stickel -- C&CC Accounting Manager, for cross examination by MITS, MTA, MCC and PSC staff. (TR p. 96.) Each of these representatives of Mid-Rivers Cellular was cross-examined. (TR pp. 26 – 97, 113 – 122, and 122 – 124.) MCC offered the

testimony of Alan Buckalew. (TR pp.125 – 170.) MTA and MITS failed to sponsor any witness testimony or exhibits. Range and Ronan did not appear at the hearing. (TR p. 5.)

Additionally, public comment, testimony, and exhibits were taken at the hearing. Milton Markuson, Carter County Commissioner, appeared and testified in favor of Mid-Rivers Cellular's ETC designation and submitted a Resolution from the Carter County Commissioners supporting Mid-Rivers Cellular's Petition. (TR pp. 98-100; Public Exhibit 1.) Don Rieger, Fallon County Commissioner, appeared and testified in favor of Mid-Rivers Cellular's ETC designation and submitted a Resolution from the Fallon County Commissioners, a letter from the Fallon County Disaster and Emergency Services, and a letter from the Fallon County Dispatch Center, all supporting Mid-Rivers Cellular's Petition. (TR pp. 100 – 103; Public Exhibit 2, 3 and 4.) Kent Larson, McCone County Commissioner, appeared and testified in favor of Mid-Rivers Cellular's ETC designation and submitted a Resolution from the McCone County Commissioners and McCone County Disaster and Emergency Coordinator supporting Mid-Rivers Cellular's Petition. (TR pp. 103 – 104; Public Exhibit 5 and 6.) Nancy Espy (incorrectly identified in the Transcript as "Angie Estby"), Powder River County Commissioner and District 4 Highway Commissioner with the Montana Transportation Commission, appeared and testified in favor of Mid-Rivers Cellular's ETC designation and submitted a letter from the Powder River County Commissioners supporting Mid-Rivers Cellular's Petition. (TR pp. 104 – 107; Public Exhibit 7.) Julie Jordan, Garfield County Commissioner, appeared

and testified in favor of Mid-Rivers Cellular's ETC designation and submitted a Resolution from the Garfield County Commissioners supporting Mid-Rivers Cellular's Petition. (TR p. 108; Public Exhibit 8.) Janet Kelly, Chairman of the Custer County Commissioners, appeared and testified in favor of Mid-Rivers Cellular's ETC designation and submitted a Resolution from the Custer County Commissioners supporting Mid-Rivers Cellular's Petition. (TR pp. 109 - 111; Public Exhibit 9.) No public comment was received opposing Mid-Rivers Cellular's Petition.

III. **MID-RIVERS CELLULAR MEETS THE ELIGIBILITY CRITERIA OF 47 U.S.C. § 214(E) AND MONTANA LAW**

Mid-Rivers Cellular has demonstrated that it satisfies each of the basic criteria for designation as a federal ETC contained in Section 214(e)(1), the FCC's rules and MCA § 69-3-840, and, that the requested designation is in the public interest. Each of the requirements is addressed below with reference to the record evidence demonstrating Mid-Rivers Cellular's compliance.

A. **Mid-Rivers Cellular Is A Common Carrier**

The first requirement for ETC designation is status as a "common carrier" under federal law. 47 U.S.C. § 214(e)(1). Mid-Rivers Cellular has demonstrated that it is a "telecommunications carrier," as defined in 47 U.S.C. § 153(49), and authorized by the FCC to provide CMRS within the area defined by its wireless licenses. The services provided by Mid-Rivers Cellular in Montana include mobile telephony, 911, voice mail and other features and services. (C&CC Exhibit 1.)

A common carrier is generally defined by 47 U.S.C. § 153(10) as a person engaged as a common carrier on a for-hire basis in interstate communications utilizing either wire or radio technology. The FCC's regulations specifically provide that a CMRS carrier, such as Mid-Rivers Cellular, is a common carrier. See 47 C.F.R. § 20.9(a)(7). Mid-Rivers Cellular is therefore a "common carrier" for purposes of qualifying for ETC designation under 47 U.S.C. § 214(e)(1). (C&CC Exhibit 1.) No party offered any contrary evidence. The Commission must therefore find that Mid-Rivers Cellular meets this requirement.

B. **Mid-Rivers Cellular Will Offer The Supported Services Throughout Its Requested ETC Service Areas**

The second requirement for ETC designation is that the applicant provide the services and functionalities set forth in 47 C.F.R. § 54.101(a)(1)-(9) (the "Supported Services") throughout its requested ETC service areas. 47 U.S.C. § 214(e)(1)(A). No party has specifically disputed that Mid-Rivers Cellular provides the Supported Services. To the extent, however, that Mid-Rivers Cellular's ability or commitment were in dispute, the record below demonstrates that Mid-Rivers Cellular has the present intent and ability to provide the Supported Services throughout its requested designation area consistent with the federal ETC requirements.

1. **Voice-grade access to the public switched telephone network**

Voice-grade access means the ability to make and receive phone calls within a minimum voice frequency range of between 300 and 3000 Hertz.¹ Through its interconnection arrangements with local telephone companies, each of Mid-Rivers Cellular's customers is able to make and receive calls on the public switched network within the prescribed frequency range. (C&CC Exhibit 1 and 3 [MTA-014 and 042B].) Mid-Rivers Cellular provided information regarding operating characteristics using a voice frequency band of 400 to 2800 Hertz. (TR p. 37.) However, Mid-Rivers Cellular represents herein it will operate with a minimum voice frequency range of 300 to 3,000 Hertz if required in its ETC designation. Accordingly, the Commission should find that Mid-Rivers Cellular fully satisfies this requirement.

2. **Local usage**

Local usage means an amount of minutes of use of exchange service provided free of charge to end users. 47 C.F.R. § 54.101(a)(2). Mid-Rivers Cellular provides its customers with an amount of local usage, free of charge, as required by 47 C.F.R. § 54.101(a)(2). Mid-Rivers Cellular will include local usage in all of its universal service offerings. In addition, Mid-Rivers Cellular will comply with any and all specific local usage requirements adopted by the FCC in the future and required of federal ETCs. (C&CC Exhibit 1 and 4 [MITS-042b].) Mid-Rivers Cellular therefore does, and will continue to, meet this requirement by

¹ 47 C.F.R. § 54.101(a)(1); see also *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Fourth Report and Order on Reconsideration*, FCC 97-420 (rel. Dec. 30, 1997) ("*Fourth Report and Order*").

providing a defined amount of local usage in each of its qualifying service offerings.

3. Dual-tone, multi-frequency (“DTMF”) signaling, or its functional equivalent

DTMF is a method of signaling that facilitates the transportation of call set-up and call detail information. 47 C.F.R. § 54.101(a)(3). The FCC has recognized that wireless carriers use out-of-band signaling mechanisms. “[I]t is appropriate to support out-of-band signaling mechanisms as an alternative to DTMF signaling.”² Mid-Rivers Cellular currently uses out-of-band signaling and in-band multi-frequency signaling that is functionally equivalent to DTMF signaling and, therefore, meets this requirement. (C&CC Exhibit 1.) Mid-Rivers Cellular currently provides this service to its customers and will provide this service to its universal service customers once designated. Accordingly, Mid-Rivers Cellular meets this standard and the Commission should so find.

4. Single-party service or its functional equivalent

“Single party service” means that only one party will be served by each subscriber loop or access line, in contrast to a multi-party line. Under the FCC’s rules, a CMRS provider meets the requirement of offering single party service when it offers a dedicated message path for the length of a user’s particular transmission. 47 C.F.R. §54.101(a)(4). Mid-Rivers Cellular meets the requirement of single-party service by providing a dedicated message path for the length of all customer calls. (C&CC Exhibit 1.) No party disputes that Mid-Rivers Cellular currently provides this service to its customers and will continue

² *Universal Service Order*, ¶ 71; *July 2003 Order*, ¶ 7.

to provide this service once designated. A finding of this fact is therefore required.

5. Access to emergency services

An ETC must also provide customers the ability to reach an appropriate public service answering point (“PSAP”) for emergency services by dialing “911.” 47 C.F.R. § 54.101(a)(5). The FCC also requires that a carrier provide access to enhanced 911, or “E-911,” which includes the capability of providing both automatic numbering information (“ANI”) and automatic location information (“ALI”), when the PSAP submits a bona fide request to the carrier and is capable of processing the data. Mid-Rivers Cellular currently provides all of its customers with access to emergency services by dialing 911 and stands ready to provide E-911 service to its customers once a PSAP submits a bona fide request for E-911 service. (C&CC Exhibit 1 and 2 [PSC-003].) Mid-Rivers Cellular is in full compliance with federal 911 obligations and it can provide access to emergency services to its universal service customers once designated (C&CC Exhibit 1), and therefore the Commission should find that this requirement is satisfied.

6. Access to operator services

Access to operator services means any automatic or live assistance provided to a consumer to arrange for the billing or completion, or both, of a telephone call. 47 C.F.R. § 54.101(a)(6). Mid-Rivers Cellular meets this requirement by providing all of its customers with access to either its own operator services or the operator services of other carriers. (C&CC Exhibit 1, 2 [PSC-005a] and 4 [MITS-022, 023, 024, and 025].) Mid-Rivers Cellular currently provides this service to its customers and will provide this service to its universal

service customers once designated an ETC. The Commission should find this requirement is satisfied.

7. **Access to interexchange service**

An ETC must offer consumers access to interexchange service for the purposes of making and receiving toll or interexchange calls. 47 C.F.R. § 54.101(a)(7). Equal access to interexchange service, *i.e.*, the ability of a customer to access a presubscribed long distance carrier by dialing 1+number, is not required.³ Moreover, Congress has preempted states from requiring a CMRS provider to offer equal access in any context. 47 U.S.C. § 332(c)(8). As a result, the FCC determined it would be discriminatory to designate equal access as a supported service.⁴ Later, the FCC specifically preempted state commissions from requiring a CMRS provider to offer equal access to obtain universal service support.⁵ This past July, the FCC reiterated that equal access is not a supported service.⁶ Mid-Rivers Cellular presently meets the requirement to provide access to interexchange service by providing all of its customers with the ability to make and receive interexchange or toll calls through direct interconnection arrangements with interexchange carriers (“IXCs”). (C&CC Exhibit 1 and 3

³ *Universal Service Order*, ¶ 78; *July 2003 Order*, ¶ 7.

⁴ *Universal Service Order*, ¶ 79 (finding that in light of CMRS providers’ exemption from providing equal access, “supporting equal access would undercut local competition and reduce consumer choice and, thus, would undermine one of Congress’ overriding goals in adopting the 1996 Act”).

⁵ *In the Matter of Petition of the State Independent Alliance and the Independent Telecommunications Group for a Declaratory Ruling that the Basic Universal Service Offering Provided by Western Wireless in Kansas is Subject to Regulation as Local Exchange Service*, WT-Docket No. 00-239, *Memorandum Opinion and Order*, FCC 02-164, ¶ 15 (rel. Aug. 2, 2002).

⁶ *July 2003 Order*, ¶ 7.

[MTA-042 and 050].) The Commission should therefore find that Mid-Rivers Cellular meets this requirement and will provide access to interexchange service upon designation.

8. Access to directory assistance

The ability to place a call directly to directory assistance is a required service offering. 47 C.F.R. § 54.101(a)(8). Mid-Rivers Cellular provides all of its customers with access to directory assistance by dialing “411” or “555-1212.” (C&CC Exhibit 1, 2 [PSC-005] and 4 [MITS-025].) The Commission should therefore find that Mid-Rivers Cellular can and will provide access to directory assistance upon designation.

9. Toll limitation for qualifying low income consumers

An ETC must offer “toll limitation” service to requesting Lifeline customers.⁷ The FCC has defined “toll limitation” as either “toll blocking” or “toll control” if a carrier is incapable of providing both, but as both “toll blocking” and “toll control” if a carrier can provide both. 47 C.F.R. § 54.400(d). Toll blocking allows consumers to elect not to allow the completion of outgoing toll calls. Toll control allows consumers to specify a certain amount of toll usage that may be incurred per month. Mid-Rivers Cellular is not currently capable of providing toll control. Mid-Rivers Cellular offers toll-blocking services. Mid-Rivers Cellular will

⁷ The obligation of a federal ETC to provide Lifeline and Link-Up service to eligible, low-income consumers is addressed in Part 54, Subpart E of the FCC’s rules. 47 C.F.R. §§ 54.401-415. Mid-Rivers Cellular has committed to complying with all federal and State Lifeline and Link-Up obligations imposed on competitive federal ETCs. (C&CC Exhibit 2 [PSC-0046].)

utilize its existing technology to offer toll blocking to Lifeline customers in Montana. (C&CC Exhibit 1 and 2 [PSC-004].)

Accordingly, as set forth above, the uncontroverted record evidence demonstrates that Mid-Rivers Cellular currently offers each of the nine Supported Services, and that Mid-Rivers Cellular can and will offer those services to its universal service customers over its own facilities or the facilities of other carriers once designated as an ETC. (C&CC Exhibit 1.) The Commission should find that Mid-Rivers Cellular meets this requirement.

C. **Mid-Rivers Cellular Will Offer And Advertise The Availability Of The Supported Services**

The third requirement for ETC designation is that the applicant advertise the availability of and charges for the Supported Services using media of general distribution. 47 U.S.C. § 214(e)(1)(B). Mid-Rivers Cellular currently advertises its service offerings through several different media, including newspaper, television, radio, and numerous public meetings. (C&CC Exhibit 1 and 2 [PSC-004].) Once designated as an ETC in Montana, Mid-Rivers Cellular will advertise the availability of and charges for its universal service offerings through these media of general distribution. (*Id.*) Mid-Rivers Cellular has also committed to complying with all form and content requirements, if any, adopted by the FCC or this Commission in the future and required of all ETCs. (*Id.*)

D. **Mid-Rivers Cellular Will Provide The Supported Services Using A Combination of Its Own Facilities and Resale**

Under 47 U.S.C. § 214(e)(1)(A), an ETC must offer the Supported Services using its own facilities, or a combination of its own facilities and resale of another carrier's services. Mid-Rivers Cellular will provide the Supported

Services as an ETC using a combination of its existing, facilities-based network infrastructure and licensed CMRS spectrum in Montana and resale of other landline carrier's services. (C&CC Exhibit 1 and 5 [PSC-014d].) The Commission should therefore find that Mid-Rivers Cellular satisfies the requirement to provide service through its own facilities and resale of other carrier's services.

E. **Mid-Rivers Cellular Has Identified And Requested Appropriate ETC Service Areas**

The final prerequisite for ETC designation is that the applicant identify an appropriate service area throughout which it will offer and advertise the Supported Services. 47 U.S.C. § 214(e)(1). Section 214(e)(5) of the Act defines the term "service area" as a geographic area established by a state commission for the purpose of determining universal service obligations and support mechanisms. 47 U.S.C. § 214(e)(5); *see also* MCA § 69-3-840(2). In the case of a service area served by a rural telephone company, service area means such company's study area. 47 C.F.R. § 54.207(b).

Mid-Rivers Cellular's cellular service area is confined by its FCC licenses which specify that it may serve only within the actual radio service contours which result from the deployment of a specific antenna, radiating at a specific power level, at a specific height, at a specific location. In the past, Mid-Rivers Cellular has expanded its cellular service territory by requesting additional licenses to service additional specific geographic areas from the FCC. To the extent that further expansion does not interfere with the established systems and

licenses of other carriers, and if economically feasible, Mid-Rivers Cellular will continue to expand its cellular service territory.

Because it fully intends to provide supported services throughout its cellular service area, including new expansion territory, Mid-Rivers Cellular seeks to establish its ETC status by the most efficient means possible. If it were to confine its request for ETC designation to the specific geographic areas it serves today, it would have to repeat the ETC designation process with each geographic expansion. The added time and expense involved in this activity complicates the economic feasibility analysis which must precede the business decision to expand service. Anticipating this further expansion, Mid-Rivers Cellular today seeks ETC designation within a territory defined with sufficient flexibility to accommodate plans for future service expansion, conserving both public and private resources.

The Mid-Rivers Cellular approach has the additional advantage of avoiding the disruptive and time-consuming process of study area disaggregation which would otherwise result. Because the FCC's rules define an ETC's "service area" as the study area of rural telephone companies, state and federal action is required to modify, or "disaggregate" the study area of a rural telephone company when an ETC is designated for an area less comprehensive than the entirety of the specific study area. Neither Mid-Rivers Telephone Cooperative, Inc. nor Range Telephone Cooperative, Inc. chose to disaggregate their respective study areas when afforded the opportunity to do so. Initiation of such a process would, therefore, be contrary to the business decisions of these

companies. Accordingly, Mid-Rivers Cellular has identified its ETC service area as consisting of the study areas of Mid-Rivers Telephone Cooperative, Inc. and Range Telephone Cooperative, Inc. (C&CC Exhibit 5 [PSC-014d]) and will, consistent with federal requirements, provide and advertise the Supported Services throughout the entirety of the specified service area by reselling the service of other carriers where it does not have the current capability of providing service through its cellular facilities.

It is important to note that an applicant for ETC designation is not required to prove it can provide ubiquitous service throughout its requested service areas prior to designation. As stated by the FCC:

A telecommunications carrier's inability to demonstrate that it can provide ubiquitous service at the time of its request for designation as an ETC does not preclude its designation as an ETC. To do so would have the effect of prohibiting new entrants from providing telecommunications service.⁸

Rather, the FCC has determined that an applicant for ETC designation must be given the same reasonable opportunity to develop its network as that afforded an incumbent and is only obligated to extend its network to serve new customers upon "reasonable request:"

We find the requirement that a carrier provide service to every potential customer throughout the service area before receiving ETC designation has the effect of prohibiting the provision of service in high-cost areas. As an ETC, the incumbent LEC is required to make service available to all consumers upon

⁸ *In the Matter of Federal-State Joint Board on Universal Service Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, CC Docket 96-45, *Declaratory Ruling*, FCC 00-248, ¶ 17 (rel. Aug. 10, 2000).

request, but the incumbent LEC may not have facilities to every possible consumer. We believe the ETC requirements should be no different for carriers that are not incumbent LECs. A new entrant, once designated as an ETC, is required, as the incumbent is required, to extend its network to serve new customers upon reasonable request. We find, therefore, that new entrants must be allowed the same reasonable opportunity to provide service to requesting customers as the incumbent LEC, once designated as an ETC. Thus, we find that a telecommunications carrier's inability to demonstrate that it can provide ubiquitous service at the time of its request for designation as an ETC should not preclude its designation as an ETC.⁹

Mid-Rivers Cellular is committed to meeting its obligation to provide service to the remaining potential customers throughout two study areas.

F. **Public Interest Finding**

Pursuant to Montana law, the Commission is authorized to designate telecommunication carriers as eligible for federal universal service support in accordance with 47 U.S.C. 214(e)(1) and 47 U.S.C. 254. (See Section 69-3-840, MCA.) Section 69-3-840(2), MCA, provides:

(2) Upon the petition of a telecommunications carrier or upon its own motion, the **commission shall designate a telecommunications carrier that meets the requirements of 47 U.S.C. 214(e)(1) as an eligible telecommunications carrier** for a service area designated by the commission....

(Emphasis added.) Section 69-3-840(3), MCA, continues by stating:

(3) **Upon receiving a petition from a telecommunications carrier and consistent with the public interest, convenience, necessity, the commission may, in the case of an area served by a rural telephone company,** and shall, in the case of

⁹ *Id.* (emphasis added).

all other areas, designate more than one telecommunications carrier for a service area, so long as each additional requesting telecommunications carrier meets the requirements of 47 U.S.C. 214(e)(1)....

(Emphasis added.) Therefore, there is a two prong test for ETC designation in an area served by a rural telephone company. The first test is whether the telecommunications carrier meets the statutorily mandated services. (See 47 C.F.R. 54.101.) The second test is whether an additional ETC designation is consistent with public interest, convenience or necessity.

1. Designation of Mid-Rivers Cellular as an ETC in areas served by rural telephone companies is in the public interest.

A discussion of public interest is necessary in determining whether the criteria have been met for designating Mid-Rivers Cellular as an ETC in an area served by rural telephone companies. 47 U.S.C. § 214(e)(2). As noted above, this Commission is specifically authorized to designate a wireless carrier as an ETC pursuant to Section 69-3-840(2), MCA, and may designate an additional ETC in the service area of a rural telephone company pursuant to Section 69-3-840(3), MCA. With respect to designating additional ETCs in the service areas of rural telephone companies, Montana law is consistent with federal law. Pursuant to federal provisions under 47 U.S.C. § 214(e)(2), the Commission must make a finding of public interest before designating an additional ETC in an area served by a rural telephone company.

The Petition filed herein and Mid-Rivers Cellular's responses to data requests presented in this proceeding demonstrate clearly that Mid-Rivers Cellular's Petition for ETC designation is in the public interest. Mid-Rivers

Cellular's Petition sets forth its reasoning that an additional ETC designation in an area served by rural telephone companies would be in the public interest. At pages 4 and 5 of the Petition, Mid-Rivers Cellular stated:

Mid-Rivers Cellular seeks to be designated as an ETC in an area served by rural telephone companies, i.e. Mid-Rivers Telephone Cooperative, Inc. and Range Telephone Cooperative, Inc. As such, in addition to providing the statutorily mandated services noted above, an additional ETC designation must be in the public interest.

The Commission's designation of Mid-Rivers Cellular as an ETC will clearly serve the public interest by providing the customers in the Mid-Rivers Cellular service area a choice of communications providers and communication technologies. Mid-Rivers Cellular serves "fill-in" cellular markets, i.e. areas abandoned by the original cellular licenses, presumably for economic reasons. The customers in this most rural area of Montana must be able to avail themselves of telecommunications services comparable to those in urban areas at rates also comparable to those in urban areas as prescribed by the Act. The designation of Mid-Rivers Cellular as an ETC would afford Mid-Rivers Cellular the financial ability to continue to provide universal service offerings to these customers. Mid-Rivers Cellular service is essential to public safety in the area it serves. Designation of Mid-Rivers Cellular as an ETC would enhance Mid-Rivers Cellular's ability to contribute to public safety needs in further satisfaction of the public interest standard. [Footnotes deleted]

(C&CC Exhibit 1.) Furthermore, Mid-Rivers Cellular's response to data requests consistently demonstrated that the public health and safety elements of the public interest inquiry are well served by its designation as an additional ETC in the two study areas served by rural telephone companies. One such example was Mid-Rivers Cellular's response to PSC-002c, which was as follows:

In what manner is Mid-Rivers Cellular service “essential to public safety in the area in which it serves?”

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.

(C&CC Exhibit 2 [PSC-002c].)

Each of the people who testified and submitted public comments at the hearing stressed the importance of wireless telecommunication services in rural Montana. Commissioner Markuson of Carter County emphasized the public necessity of rural health care and public safety and stated, “I can name any number of cases where cellular telephone in our area has saved lives.” (TR pp. 99 -100.) Commissioner Rieger of Fallon County spoke of the importance of emergency services and stated, “The communication of radios, such as the fire department use and ambulance, sometimes does not reach into these areas, and the cell phone is the last viable source of communication.” (TR p. 101.) Commissioner Espy (incorrectly identified in the Transcript as “Angie Estby”) of Powder River County stated that the Powder River Commissioner felt “the safety factor is most important.” (TR p. 106.) Commissioner Jordan of Garfield County emphasized the fact that the nearest doctors to her area of Garfield County were approximately 53 miles away in Miles City and when emergency situations arise, residents’ cell phones provide them with a confidential and secure method to

seek medical advice. (TR p. 108.) Commissioner Kelly addressed the benefit of cellular services in providing for needed communications during emergencies and stated, "Cellular services in rural areas is our lifeline in times of emergency and disasters." (TR pp. 109 – 111.)

Mid-Rivers Cellular believes the wireless services it provides are complementary to the landline services provided in the two study areas. The complementary nature of wireless services provides enhanced choices to consumers and an essential public safety net across the vast expanses of Mid-Rivers Cellular's service area where no other service – wireline or wireless – exist. The designation of Mid-Rivers Cellular as an ETC will enhance its ability to continue and improve this service. Clearly, the public interest favors promotion of this goal.

The designation of wireless telecommunications carriers as ETC's in areas served by rural telephone companies will also advance competition. One of the principal goals of the Act is to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." 100 Stat. 56 (1996). The FCC has also recognized the advantages that wireless carriers bring to the universal service program and found that imposing additional burdens on wireless entrants would be particularly harmful to competition in rural areas where wireless carriers could potentially offer service at much lower costs than traditional wireline service. (See Universal Service First Report and Order, pages 8881-8882.) In short,

Congress and the FCC believe competition to be in the public interest. This is a reasonable conclusion given that competition expands consumers' choices and generally results in lower prices and advanced technologies.

The public interest standard under Section 214(e)(2) emphasizes competition and consumer benefits, not incumbent protection. As explained by Senator Dorgan, who offered the amendment to the Senate bill inserting the public interest requirement in Section 214(e)(2), "The best interests of rural consumers are paramount." 141 Cong. Rec. S7951 (June 8, 1995). Indeed, the Act requires that universal service goals be accomplished through competition. The Fifth Circuit Court of Appeals has confirmed this when it called a "primary purpose" of the Act "to herald and realize a new era of competition in the market for local telephone service while continuing to pursue the goal of universal service." *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 625 (5th Cir. 2000). The *Alenco* Court confirmed that the Act must be implemented in a way that accommodates the "dual mandates" of competition and universal service. *Id.* at 615.

Mid-Rivers Cellular can offer service in unserved or underserved areas and signal coverage over a much broader area than a wireline provider. Mid-Rivers Cellular can offer consumers the benefits of mobility, including greater access to 911 and E-911 (*id.*), which the FCC has recognized as being especially beneficial to consumers:

Also, the mobility of Virginia Cellular's wireless service will provide other benefits to consumers. For example, the mobility of telecommunications assists consumers in rural areas who often must drive

significant distances to places of employment, stores, schools, and other critical community locations. In addition, the availability of a wireless universal service offering provides access to emergency services that can mitigate the unique risks of geographic isolation associated with living in rural communities. . . .¹⁰

Accordingly, the record evidence in this proceeding requires the Commission to conclude that Mid-Rivers Cellular's designation as an additional ETC in the two study areas served by rural telephone companies will serve the public interest.

Furthermore, Mid-Rivers Cellular represents herein that it will become a signatory to the Cellular Telecommunications and Internet Association Consumer Code for Wireless Service ("CTIA Consumer Code") if it is requested as a condition for ETC designation. Under the CTIA Consumer Code, Mid-Rivers Cellular would agree to: (1) disclose rates and terms of service to customers; (2) make available maps showing where service is generally available; (3) provide contract terms to customers and confirm changes in service; (4) allow a 14-day trial period for new service; (5) provide specific disclosures in advertising; (6) separately identify carrier charges from taxes on billing statements; (7) provide customers the right to terminate service for changes to contract terms; (8) provide ready access to customer service; (9) promptly respond to consumer inquiries and complaints received from government agencies; and (10) abide by policies for protection of consumer privacy. (The FCC has specifically recognized the adoption of the CTIA Consumer Code demonstrates a carrier's commitment to high-quality service and mitigates any concerns regarding the

¹⁰ *Virginia Cellular Order*, ¶ 29.

absence of service quality regulation of a wireless carrier. *Virginia Cellular Order*, ¶ 30 & n. 94.)

2. No Party Has Demonstrated That Montana Consumers Would Be Harmed By Mid-Rivers Cellular's ETC Designation

Based on the record evidence, the Commission should determine that Montana consumers cannot be adversely affected by Mid-Rivers Cellular's designation as an additional ETC in the two study areas. The focus of this factor is properly on consumers, rather than on the rural LECs themselves. As the Fifth Circuit noted, the Act does not guarantee that all carriers will profit in a competitive market:

The Act does *not* guarantee all local telephone service providers a sufficient return on investment; quite to the contrary, it is intended to introduce competition into the market. Competition necessarily brings the risk that some telephone service providers will be unable to compete. The Act only promises universal service, and that is a goal that requires sufficient funding of *customers*, not *providers*. So long as there is sufficient and competitively-neutral funding to enable all customers to receive basic telecommunications services, the FCC has satisfied the Act and is not further required to ensure sufficient funding of every local telephone provider as well.¹¹

But even if the Commission were to consider the affect that Mid-Rivers Cellular's ETC designation would have on the ILEC's, the record is devoid of any evidence to suggest the ILEC's are measurably harmed, much less rendered unable to compete with Mid-Rivers Cellular. No party introduced any evidence to claim that the study areas at issue in this proceeding would be unable to support

¹¹ *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 620 (5th Cir. 2000) (emphasis in original); see also WW Ex. 3, pp. 9-10.

more than one ETC. Range itself has essentially acknowledged it would not be harmed by Mid-Rivers Cellular's ETC designation by failing to appear at the hearing or participate in this contested case. (TR p. 5.)

The challenges to Mid-Rivers Cellular's ETC designation reflected in the record of this proceeding are not based in fact, but rather reflect a tenor of disapproval and discomfort with the federal rules related to ETC designation. This hesitancy results in Montana consumers being denied the benefits that other consumers across the nation enjoy – access to the services supported by universal service funding provided by wireline and wireless carriers alike.

3. Proper Scope of Public Interest Inquiry

Mid-Rivers Cellular agrees that the Commission is empowered, under both state and federal law, to conduct a public interest inquiry when considering the designation of an additional ETC in areas served by an incumbent rural telephone company. Section 69-3-840, MCA; 47 U.S.C. §214(e)(2). Mid-Rivers Cellular submits, however, that the Commission's discretion in this area is not unlimited. The state may not erect an obstacle to the execution of Congressionally-established federal objectives, nor may it erect barriers which unreasonably discriminate against specific technologies. In addition, fundamental due process precludes the adoption of standards which are inequitable or inequitably applied. Just as the states' authority to establish rules related to the establishment of state universal funding must not be "inconsistent with the [FCC's] rules to preserve and advance universal service," state-imposed standards establishing eligibility for federal funding may not interfere with federal goals and standards. 47 C.F.R. § 254(f).

Imposition of the standards as proposed by witness Buckalew are inappropriate and result from a misunderstanding or misapplication of federal law. It appears that Mr. Buckalew is under the mistaken impression that ETC funding received by a competitive ETC comes directly out of the pocket of the incumbent ETC. (TR pp. 131, 143-144.) This is not correct, and, in fact, Congress has specifically prohibited the application of a "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. PL No. 108-407 (Division B (Departments of Commerce, Justice, and State, the Judiciary and Related Agencies), Title VI, Section 634 of the Consolidated Appropriations Act of 2005).

Any rules imposed by the Commission must operate within an existing federal framework regarding ETC designation and the availability of universal service funding. Additional ETC designation currently has no effect on universal service funding received by rural incumbent telephone companies. The shorthand term "portability," as well as the term "capture," as utilized in the FCC's rules define the calculation of support available to competitive ETCs, and do not operate to deprive the incumbent local exchange carrier of any amount of support. 47 C.F.R. § 54.307(a).

Because many of the standards proposed by Mr. Buckalew are inconsistent with state law and preempted by federal law, their adoption will invite litigation. Continuing down Mr. Buckalew's path will, therefore, have the effect of prolonging the establishment of clear and concise standards applicable to Mid-

Rivers Cellular and other carriers seeking designation and continued certification as ETC's. This result is clearly contrary to the public interest because it robs the citizens of Montana of the benefits to be derived from this important governmental activity. The content and construct of Mr. Buckalew's argument clearly reveal that he advocates a *de facto* retention of the *status quo* (i.e., maintaining a single ETC, the incumbent telephone company, in the service area of a rural telephone company). His pre-determination of what constitutes the "public interest" undermines the integrity of public processes and should be rejected out of hand. Montana residents are entitled to a prompt, fair, efficient and sustainable process which identifies and evaluates public interest elements.

To accomplish this goal, Mid-Rivers Cellular recommends adoption of FCC guidelines. In considering the elements of public interest in the context of wireless ETC applications, the FCC has established guidelines for conducting a fact-specific inquiry, balancing the costs and benefits of designating an additional ETC operating in an area served by a rural telephone company. Specifically, Mid-Rivers Cellular submits that the PSC's inquiry into the public interest "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." *Federal-State Joint Board on Universal Service, Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier for the Commonwealth of*

Virginia, Memorandum Opinion and Order, CC Docket No. 96-45, 19 FCC Rcd 1563, ¶ 28 (2004) ("*Virginia Cellular*"). In determining that the applicant had established that its universal service offering would benefit consumers in areas served by rural telephone companies, the FCC considered the public interest benefits of access to communications facilities that are otherwise unavailable, mobility, access to emergency services, and the size of local calling scope. *Virginia Cellular* at ¶ 29. The FCC also considered the applicant's efforts and commitments to utilize universal service funding to improve service, its commitment to the CTIA Code for Wireless Service, and its commitment to make an annual complaint report. *Virginia Cellular* at ¶ 30. The FCC also considered whether grant of ETC status would result in "cream-skimming," or confining service to only low-cost, high revenue consumers in a rural telephone company study area. *Virginia Cellular* at ¶ 32. While the FCC also considered impact on the federal universal service fund, Mid-Rivers Cellular believes that such an inquiry is properly confined to the federal level under current federal rules because the potential impact of Montana's ETC designations on the fund is minimal. *Virginia Cellular* at ¶ 31.

These guidelines establish the parameters of the initial inquiry, while the existing self-certification procedure (augmented by Commission investigation, to the extent necessary) provides an adequate and reasonable method of ensuring continued provision of federally-mandated universal services and utilization of federal funds in a statutorily-appropriate manner. It is not in the public interest to

establish an expensive, duplicative or burdensome process which may operate to deny federal benefits to Montana consumers.

IV. **CONCLUSION**

The Act and the Commission's existing rules establish clear, consistent and competitively fair mechanisms for allowing carriers, including a CMRS provider, to be designated as an ETC for the purpose of federal universal service support. Mid-Rivers Cellular has demonstrated it provides the required services, satisfies all statutory requirements, and can and will meet the obligations of an ETC. Mid-Rivers Cellular's designation as a competitive ETC in the requested study areas will bring complementary service, competitive choices, new technologies and services, and better service, and therefore is clearly in the public interest. Mid-Rivers Cellular therefore respectfully requests the Commission to follow the directives and principles of the Act and state law and grant its Application for designation as a competitive ETC.

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Respectfully submitted for filing on the 17th day of December, 2004.

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

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the attached POST HEARING BRIEF OF CABLE & COMMUNICATIONS CORPORATION, dba MID-RIVERS CELLULAR, has today been served on all parties entitled to receive the same, by sending the original and required copies to the Public Service Commission by Federal Express overnight mail at the address listed on the attached PSC Service List, and by mailing a copy thereof to each additional listed interested party on the attached PSC Service List, by first class mail, postage prepaid this 16th day of December, 2004: