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January 28, 2005

Kate Whitney, Administrator
Utility Division
Montana Public Service Commission
PO Box 202601
Helena MT 59620-2601

Re: D2003.8.105 - Mid-Rivers Cellular, Petition for Designation as an Eligible
Telecommunications Carrier

Dear Kate:

Enclosed for filing are an original and ten (10) copies of MITS' Reply Brief in the Matter
of Cable & Communications Corporation, dba Mid-Rivers Cellular, Petition for
Designation as an Eligible Telecommunications Carrier.

Respectfully submitted,

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

Michael C. Strand
CEO and General Counsel
MITS

cc:
Parties of Record

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Service Date: January 28, 2004

 ORIGINAL

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

* * * * *

IN THE MATTER OF CABLE &) UTILITY DIVISION
CORPORATION, d/b/a MID-RIVERS)
CELLULAR, Petition for Designation) DOCKET NO.
as an Eligible Telecommunications Carrier) D2003.8.105

**REPLY BRIEF
OF
MONTANA INDEPENDENT TELECOMMUNICATIONS SYSTEMS
(MITS)**

MITS respectfully submits this reply brief following the hearing and initial post-hearing briefs in the above-captioned matter.

I. INTRODUCTION

As an initial matter, MITS has reviewed the reply briefs of the Montana Telecommunications Association and the Montana Consumer Counsel and fully supports their arguments. Further, counsel for MITS would like to state at the outset that he understands the fact that the Mid-Rivers Cellular's petition for ETC designation was in some ways unlike any of the ETC applications the Commission had seen before. Staff therefore may be excused for getting off on somewhat of the wrong foot from a procedural perspective, such as failing to require Mid-Rivers Cellular to immediately file pre-filed testimony following the filing of their petition. However, those initial missteps should have been remedied long before this matter came to hearing.

In 12 years of practice before the Montana Public Service Commission, counsel for MITS has never been forced to advocate in a contested case proceeding in which there was no pre-filed testimony by the moving party, no advance identification of which witnesses would be sponsoring which portions of such testimony, no opportunity to request data with regard to that testimony, and therefore no opportunity to challenge the data provided in advance of the hearing. As a result of these procedural deficiencies, the opponents to Mid-Rivers Cellular's petition have at a minimum been denied the due process safeguards that have long been built into the Commission's long-standing manner of conducting contested cases. For these reasons, the procedural motions made by the opponents at the beginning and throughout the hearing of this matter should be granted and the contested evidence should be thrown out.

However, in the event that the Commission is disinclined to rule in favor of MITS and the other opponents to Mid-Rivers Cellular's petition, the Commission should nonetheless deny the petition on the grounds that it does not meet the requirements of state and federal law. The Montana Telecommunications Association and the Montana Consumer Counsel make numerous excellent points in their briefs to show why Mid-Rivers' application should be denied. While some redundancy may be unavoidable, MITS will focus only on the public interest requirement of state and federal law and why Mid-Rivers Cellular has failed to show that its petition is in the public interest.

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II. Mid-Rivers Cellular's Petition Should be Denied Because Mid-Rivers has not Provided Anything Close to Amount of Evidence Required to Show that Granting its Petition would be in the Public Interest under State and Federal Law.

The statutory language requiring the Commission to determine whether Mid-Rivers Cellular's petition is in the public interest is identical under state and federal law. In §69-3-840(3) Mont. Code Ann. (Montana Statute) and in 47 U.S.C. §214(e)(2) (Federal Statute), the laws state that State Public Utility Commissions are not required to designate additional ETCs beyond the incumbent telephone company and that "[b]efore 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.

For this reason, the central issue before this Commission is whether Mid-Rivers Cellular has proven that designating it as an ETC is in the public interest. MITS will now review a number of recent decisions and show that the evidence produced by Mid-Rivers Cellular doesn't even come close to showing that designating it to be an ETC is in the public interest.

A recent decision by the Public Service Commission of South Carolina¹ is helpful insofar as it nicely describes the history of the evolution in the FCC's view of the public interest standard over the past several years. The South Carolina Commission (hereafter "S.C. Commission") noted that in the period immediately following the passage of the Telecommunications Act of 1996, the FCC applied a public interest analysis of its own in cases where, for example, the state commission lacked jurisdiction. As the S.C. Commission stated "Initially, the FCC's standard was very lenient, and the FCC granted

¹ Public Service Commission of South Carolina, Docket No. 2003-158-C, Order No. 2005-5, entered January 7, 2005

applications for ETC status based solely on a generalized statement by the applicant that doing so would bring the benefits of competition to the designated area.” The application of this standard by the FCC in a number of cases “... led to a general concern about exponential growth in the size of the federal USF, as well as a specific concern that the FCC’s policy was not consistent with the intended use of universal service funding in high cost areas. As FCC Commissioner Martin has stated:

I have some concerns with the [FCC’s] policy ... of using universal service support as a means of creating “competition” in high cost areas. I am hesitant to subsidize multiple competitors to serve areas in which costs are prohibitively expensive for even one carrier. This policy may make it difficult for any one carrier to achieve the economies of scale necessary to serve all of the customers in a rural area, leading to inefficient and/or stranded investment and a ballooning universal service fund.²

However, as the S.C. Commission noted in its decision, “More recently, the FCC has developed and applied a more stringent public interest analysis. In two 2004 cases³ the FCC established the following policies:

1. The burden of proof in ETC applications is on the applicant to demonstrate that the public interest would be served by granting the application.
2. The value of competition alone is not sufficient to satisfy the public interest test in rural areas. [emphasis added]

² Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, CC Docket No. 00-256, Second Report and Order and Further Notice of Proposed Rulemaking, Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Fifteenth Report and Order, Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation, CC Docket No. 98-77, Report and Order, Prescribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, CC Docket No. 98-166, Report and Order, Separate Statement of Commissioner Kevin J. Martin, 16 FCC Rcd 19613, 19770 (2001).

³ SEE 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. Memorandum Opinion and Order, FCC 04-37, CC Docket No.96-45 (rel. April 12, 2004) (“*Virginia Cellular*”) and In the Matter of Federal State Joint Board on Universal Service, Highland Cellular, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia. Memorandum Opinion and Order, FCC 04-37, CC Docket No. 96-45 (rel. April 12, 2004) (“*Highland Cellular*”).

3. The determination of public interest requires a fact-specific balancing of the benefits and costs.

4. Factors that should be considered include: the benefits of increased competitive choice; the impact of multiple ETC designations on the universal service fund; whether the benefits of an additional ETC outweigh the potential harms; any commitments regarding quality of service; and the competitive ETC's ability to provide the supported services throughout the designated service area within a reasonable time frame. [emphasis added]

In addition to this shift in policy by the FCC, the Federal-State Joint Board on Universal Service has also made a series of recommendations with respect to reviewing ETC applications:⁴

1. States were encouraged to conduct rigorous reviews of ETC applications, including fact-intensive analysis. [emphasis added]

2. The Joint Board recommended adopting a core set of minimum qualifications for ETCs, to include existing minimum qualifications and at a minimum the following additional eligibility requirements:

- A. Adequate financial resources;
- B. Commitment and ability to provide the supported services
- C. Ability to remain functional in emergencies
- D. Consumer protection
- E. Local Usage

⁴ SEE In the Matter of Federal-State Joint Board on Universal Service. Recommended Decision, FCC 04J, CC Docket 96-45 (rel. February 27, 2004) (“*Recommended Decision*”)

Of equal importance is that while the FCC and the Federal-State Joint Board have clearly delineated a sea change in the direction of much more stringent ETC application review, states are free to establish their own eligibility requirements, above and beyond those established by the FCC or recommended by the Federal-State Joint Board.⁵ And in this regard, the Montana Public Service Commission has been far from inactive. During the 2003 Legislative Session MITS proposed a set of stringent technical and service quality standards that included network congestion standards, strict construction requirements, equal access to long distance carriers other than the ETC itself, and so forth. The Montana Public Service Commission voted overwhelmingly to support the legislation and in fact testified in support of the proposed statute before the State Senate. While the statute did not pass, it was re-written into rules that were jointly submitted to the Commission by MITS and the Montana Telecommunications Association. With only a few edits, those rules are about to be published by the Montana Commission for public comment. So clearly there is an interest at the Montana Commission in establishing rigorous review of specific technical and service quality standards to prove public interest.

As MITS has established above, there is a growing mountain of precedent, both at the federal level and at the state level that the finding of public interest that must be made by the Montana Commission in order to approve an ETC application can only occur after rigorous review. The federal entities are establishing increasingly strict requirements as a minimum set of requirements. States are free to go as far beyond those requirements as they wish, and the Montana Commission has indicated a clear preference for setting the bar fairly high in terms of specific service quality and technical standards that must be

⁵ Texas Office of Public Utility Counsel v. FCC, 183 F.3d (5th Cir. 1999) (“TOPUC”)

met, including network congestion, strict commitments to building out the designated area, consumer protections such as truth-in-billing, equal access, financial reporting requirements, etc., etc. In other words, in Montana, at least as MITS sees the current state of Commission policy, an ETC applicant needs to show the telecommunications equivalent of the commitment of a marine when it comes to an applicant's commitment to universal service. **The bottom line is that the Commission is not going to just hand over millions of dollars in universal service funding unless the applicant is prepared to meet or exceed a broad array of strict service quality, reporting and technical public interest standards and expectations.**

So. Given this context, the issue becomes whether Mid-Rivers has submitted adequate evidence that it is prepared to meet these standards and expectations. Here are the reasons Mid-Rivers Cellular has put on the record in this docket as to why they meet the public interest requirement:

1. Mid-Rivers Cellular's service is essential to public safety because their mobile phones can be used when the customer is away from home. (True. You can't drag your wireline behind your car.)

2. Designating Mid-Rivers Cellular as an ETC gives customers a "choice" in provider and technology (although since most of the area for which they seek designation is served by its wireline parent, Mid-Rivers Telephone Cooperative, it is somewhat difficult to see how there is really a choice of provider).

3. Designating Mid-Rivers will promote competition. (But we already know what the FCC says about whether Competition proves that the public interest has been met.)

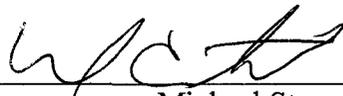
4. Mid-Rivers Cellular can broadcast its signal over a broader area than a wireline carrier. (We're not exactly sure what this means, but from the maps Mid-Rivers provided, we know for certain that its wireless company serves a tiny subset of the area its parent wireline company serves).

5. No consumers would be harmed by Mid-Rivers Cellular's designation (Seriously. They actually said this.)

That's it. These are Mid-Rivers Cellular's stated reasons as to why they meet the public interest requirement. You will find nothing about whether they will guarantee that calls will be able to traverse their network with reasonable reliability, consumer protections, build-out commitments, etc. etc.

This Petition doesn't even come close to meeting any reasonable public interest standard. For these reasons, MITS respectfully requests that the Commission deny Mid-Rivers Cellular's application for ETC designation.

RESPECTFULLY SUBMITTED This 28th day of January, 2005.



Michael Strand
CEO and General Counsel
MITS