

# Montana Consumer Counsel



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January 28, 2005

TO: Ms. Kate Whitney  
FROM: Mandi Shulund  
RE: Docket No. D2003.8.105 – Mid Rivers Cellular Petition for ETC Designation

Enclosed are the original and ten copies of the Response Brief of The Montana Consumer Counsel in the above matter.

Cc: Service list

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

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IN THE MATTER OF the Cable &	)	UTILITY DIVISION
Communications Corporation, dba Mid-	)	
Rivers Cellular, Petition for Designation	)	DOCKET NO. D2003.8.105
as an Eligible Telecommunications	)	
Carrier	)	

**RESPONSE BRIEF OF THE MONTANA CONSUMER COUNSEL**

In accordance with the briefing schedule established at the close of the hearing, as modified, the Montana Consumer Counsel (MCC) submits its response brief.

**I. INTRODUCTION.**

In order to be designated as an Eligible Telecommunications Carrier (ETC) in an area served by an incumbent rural carrier, a carrier must prove that it meets the requirements imposed by the federal Telecommunications Act of 1996 (the Act). These requirements fall into two basic categories: (1) whether the carrier petitioning for ETC status complies with the requirements of 47 U.S.C. § 214(e), and (2) whether granting the carrier ETC status is in the public interest. Under federal law, the decision whether or not to grant ETC status is delegated to state utility regulatory commissions, such as the Montana Public Service Commission (Commission). Under both state and federal law, the burden of proving compliance with the requirements of § 214(e) and the public interest is on the petitioning carrier.<sup>1</sup>

The purpose of receiving ETC status is to receive explicit subsidies from the Federal Universal Service Fund (USF), which by law are required to be used for certain purposes:

A carrier that receives [federal universal service support] shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. 47 U.S.C. § 254(e).

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<sup>1</sup> Initial brief of MCC in this docket, filed December 17, 2004, at pp. 8-9.

The source of the funds for this USF support is a surcharge (essentially a tax imposed by the FCC) on the telephone bill of every consumer of telecommunications services in the United States. In the first quarter of 2005, the FCC increased the surcharge from 8.9 percent to 10.7 percent.

In this docket, the petitioning carrier is Cable & Communications Corporation, which does business as Mid-Rivers Cellular (MRC). MRC is a for-profit subsidiary wholly owned by its parent company Mid-Rivers Telephone Cooperative, Inc. (MRCoop), and seeks designation within its licensed service areas within the service areas of both its parent MRCoop and Range Telephone Cooperative, Inc. (Range). The areas within which MRC is licensed by the Federal Communications Commission (FCC) to provide cellular telephone service are not coextensive with the service areas of the two cooperatives, but rather limited to 12 specific areas depicted on a map provided by MRC.<sup>2</sup>

MCC opposes the grant of ETC status to MRC. In the first place, MRC has not carried the burden of proving the various elements of its case. MRC has not clearly established the geographical area for which it seeks ETC designation. In particular, MRC has not proved that its ETC designation is in the public interest.<sup>3</sup> MRC failed to provide any prefiled testimony in this case. Rather, it relies on its original petition and its own responses to data requests propounded by the Commission staff, Montana Independent Telecommunications Systems, Inc., (MITS) and the Montana Telecommunications Association (MTA). It also relied on live testimony improperly permitted over the objections of MCC, MITS and MTA. The data responses were provisionally entered into the record over the objections of MCC, MITS and MTA, subject to consideration by the full Commission. MCC continues to object to the admission of live testimony and data responses on the grounds previously stated.<sup>4</sup>

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<sup>2</sup> Attachment 2 to the initial brief of MCC.

<sup>3</sup> MCC initial brief, pp. 9-13.

<sup>4</sup> MCC initial brief, pp. 3-4.

## **II. ARGUMENT.**

### **A. MRC Has Not Sustained Its Burden Of Proving That It Meets The Requirements of 47 U.S.C. § 214(e).**

In its post-hearing brief, pp. 6-17, MRC asserts that it meets all the requirements of 47 U.S.C. 214(e)(1), relying upon statements in its original petition, disputed live testimony and disputed data responses. To the extent MRC relies on its petition to support compliance with the statutory requirements, however, it is relying only upon statements made on behalf of the petitioning carrier signed by its counsel. Statements of counsel in a petition are simply not evidence. Neither are statements of counsel in a post-hearing brief. In order to formulate a sustainable order, the Commission must have reliable, probative and substantial evidence in the record before it. This the Commission does not have in this case. This is what caused MCC's witness Mr. Buckalew to testify at the hearing he could not tell the Commission whether or not MRC met the most basic requirements of 47 U.S.C. § 214(e), because there is no testimony in the record saying what MRC is willing to do and can do. Tr. 133:25-134:10. On this record, the Commission should deny MRC's petition that, if granted, would give MRC access to considerable USF support without any reliable, probative and substantial evidence that it meets the most basic legal prerequisites for such support, and would tend to put upward pressure on the current 10.7 percent tax on telephone service.

### **B. MRC Has Not Shown That ETC Designation Is In The Public Interest.**

MRC claims in its post-hearing brief that its petition and responses to data requests demonstrate clearly that its petition for ETC designation is in the public interest. In this regard, MRC claims at p. 24 of its brief that no party has demonstrated that consumers would be harmed by its designation as an ETC. As shown below, MRC has refused to provide any of the information that would be needed to make such a showing.

Its petition, of course, is not evidence, and data responses are still subject to objection. As with MRC's compliance with 47 U.S.C. § 214(e), there is not enough of the right kind of evidence in this record to support a finding that MRC's petition is in the

public interest. In the following sections, MCC responds to various of MRC's public interest claims.

### **1. Choice of Providers.**

At page 19 of its post-hearing brief, MRC quotes from its petition and states that ETC designation would provide customers in the MRC service area a choice of providers and technologies. As to choice of service providers, MRC claims that it already serves 100 percent of the area for which it is licensed by the FCC. Tr: 22-24. All the customers within MRC's licensed areas therefore already have a choice of providers without federal subsidies. In addition, to the extent customers are within MRC's license area in MRCoop's area, the choice of providers is limited to two affiliated companies under the same general manager and the same board of directors. MRCoop already receives some \$600 per customer per year to compensate it for serving high-cost areas. For any customer choosing to supplement its MRCoop landline service with cellular service, MRC, the affiliated company, would receive support in the same amount. As MCC asked in its initial brief, how is the public interest served by paying USF support twice for the same customer, overcharging customers throughout the U.S., especially when a fair portion of the support (between \$3.5 million and \$4 million a year) goes to pay patronage credits to customers as high as \$20,000 a year for a single customer.<sup>5,6</sup>

### **2. Competition.**

A further argument advanced by MRC in support of its petition is the notion that granting ETC status, and access to federal subsidies, would advance competition, thus furthering one of the goals of the Act. Competition between affiliated companies is false competition. A subsidiary company does not have the economic incentive truly to compete with its parent, but rather to act in such a way as to enhance the parent's economic success. As MRC acknowledges at p. 22 of its brief, competition is supposed to result in lower prices for customers. There is no evidence in the record that MRC will

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<sup>5</sup> Testimony of Vern Stickel, Tr. 116:4-117:1.

<sup>6</sup> MCC initial brief, p. 12.

give its parent corporation any price competition at all. It would not be in its economic self-interest to do so.

### **3. Incumbent Protection.**

MRC goes on at length in its brief about how the public interest emphasizes consumer benefits, not incumbent protection. It goes so far as to accuse MCC and its witness Mr. Buckalew of advocating a *de facto* retention of the *status quo*, that is, maintaining a single ETC, the incumbent company, in the service area of a rural telephone company.<sup>7</sup> This is a strawman argument responding to an argument not advanced by any party, much less MCC.

In support, MRC refers to Mr. Buckalew's testimony at Tr. 131, 143-144, as "the mistaken impression that ETC funding received by a competitive ETC comes directly out of the pocket of the incumbent ETC," undermining the viability of the incumbent. In characterizing Mr. Buckalew's testimony in this way, MRC has completely missed the point of Mr. Buckalew's testimony. In the passage at Tr. 131, Mr. Buckalew was clearly describing how the system would work if the existing rules were followed, referring to 47 C.F.R. § 307(a), which provides for USF support for lines captured from the incumbent or new lines not formerly served by the incumbent (growth lines). Mr. Buckalew has not testified, and MCC has not advocated, that ETCs should not be designated in the service areas of rural telephone companies.

### **4. Impact of Designation on the USF.**

MCC has consistently advocated that 47 C.F.R. § 307(a) should be enforced. If it were, current concerns about the explosive growth of the USF would not exist, because potential ETCs like MRC and Western Wireless would not be seeking USF support for every single customer they serve. In the case of Western Wireless, it is seeking per line USF support for over 90,000 customers in a portion of Qwest's service area. Apparently, MRC is also seeking support for all its wireless customers in its area. There is clearly a disconnect between the goal of advancing and maintaining universal service – bringing

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<sup>7</sup> MRC post-hearing brief, pp. 22, 26-7.

service to all Americans who want it – and subsidizing any and all cellular service through the current 10.7 percent tax on telecommunications consumers.

Continuing its criticism of MCC's testimony, based on its misreading of that testimony, MRC infers at page 26 of its post-hearing brief that Mr. Buckalew is promoting the "primary line" concept proposed last year by the Federal-State Joint Board on Universal Service as a means of limiting the growth of the USF. MRC, citing P.L. No. 108-417, Title VI, Section 634 of the Consolidated Appropriations Act of 2005, states:

... Congress has specifically prohibited the application of the "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.

In the first place, it is not correct that MCC advocates the primary line concept. MCC's advocacy is based on the existing FCC regulation contained in 47 C.F.R. § 307(a), which has nothing to do with primary line. It is also not correct to say that Congress has prohibited the application of the primary line concept. The section of the Appropriations Act referred to by MRC actually states:

*Sec. 634. None of the funds appropriated by the Act may be used by the Federal Communications Commission to modify, amend, or change its rules or regulations for universal service support payments to implement the February 27, 2004 recommendation of the Federal-State Joint Board on Universal Service regarding single connection or primary line restrictions on universal service support payments.*

The import of Section 634 is that the FCC cannot spend any money to implement the *recommendation* of the Joint Board regarding primary line, and that existing law is not modified, amended or changed. Existing law includes 47 C.F.R. § 307(a), limiting USF support to captured and growth lines. Existing law is not changed, and MCC's advocacy is in no way affected by the appropriations language cited above.

MRC goes on to say that the "shorthand term" "portability," as well as the term "capture" define the calculation of support available to competitive ETCs, not to limit support. MRC does not say what the terms are shorthand for, and these comments are not

helpful. Section 307(a) says what it says, and clearly limits USF support to new and captured lines.

MRC itself says in its brief at p. 27 that as part of the public interest determination, this Commission should adopt the FCC's guidelines, including an inquiry into the impact of the designation on the USF. MCC agrees. But if in making this inquiry the Commission decides to consider MRC's responses to data requests, it will see that MRC has refused to say how MRC will determine which lines will qualify for USF support.<sup>8</sup> MRC has even refused to tell the Commission how many customers it serves, though asked in MITS-020(d) and MITS-029(a). MRC also refused to answer a data request asking for estimated USF revenues if granted ETC status.<sup>9</sup> Thus, even though MRC itself says that the Commission should inquire into the impact of the designation on the USF, it has refused to provide for the record the very data essential to that inquiry. MRC claims that the potential impact of its designation on the USF is minimal. It has not provided any information in support of this claim, however, and the Commission is unable on the record to verify it.

All the Commission knows is that if designated, MRC will receive support based on its parent corporation's per-line costs (about \$600 per customer per year). It does not know, because MRC has refused to provide the information, how many customers are involved. There is no way on the record before it that the Commission can evaluate the effect of a designation on the USF in this case, and no way it could find designation of MRC as an ETC would be in the public interest.

##### **5. MCC's Proposed Public Interest Standards.**

MRC asserts at p. 26 of its brief that standards proposed by Mr. Buckalew in connection with satisfying the public interest are inconsistent with state law and preempted by federal law. This assertion is not accompanied by any explanation or analysis and is not persuasive. In addition, MCC's recommendations are criticized because they "will invite litigation." MCC submits that simply avoiding litigation is not in itself in the public interest where important public policy issues, including the

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<sup>8</sup>Response to data request MITS-029(c).

<sup>9</sup>Responses to data requests MITS-037 and -042(a).

appropriateness of federal subsidies without a corresponding public benefit, are at stake. MCC stands by its recommendations.

#### **6. Mobility and Unserved/Underserved Areas.**

MRC states at p. 22 of its brief that it can offer service in unserved or underserved areas and signal coverage over a much broader area than a wireline provider. It also states that it can offer consumers the benefits of mobility. MRC has stated, as noted above, that it already serves 100 percent of the areas for which it holds licenses (*infra*, p. 3). As it cannot provide mobile, that is, cellular, service outside its licensed areas, it stands to reason that it cannot provide any customers in unserved or underserved areas with any benefits of mobility. All it can offer in unserved or underserved areas is service by means of either MRCoop's or Range's landline facilities. If the areas in question are unserved or underserved by MRCoop or Range, that must mean that those providers do not in fact have facilities (or adequate facilities) there. How then can MRC provide either mobility or landline service in those areas? It obviously cannot. Therefore this argument does nothing to further MRC's claim that its ETC designation would be in the public interest.

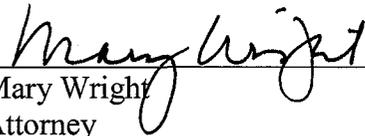
#### **7. CTIA Consumer Code.**

MRC represents in its brief that it will become a signatory to the Cellular Telecommunications and Internet Association Consumer Code for Wireless Service, at pp. 23-4, and states that the FCC has recognized that adoption of this Code signals a carrier's commitment to high-quality service and mitigates concerns regarding the absence of service quality regulation of a wireless carrier. As previously argued, representations by a carrier's counsel in briefs are not evidence. In addition, the Code in question is entirely voluntary and carries with it no penalty or other consequence for non-compliance. The Commission should give no weight to this argument in its public interest determination.

### III. CONCLUSION.

MRC has failed to carry the burden of proving by reliable, probative and substantial evidence that it complies with the requirements of 47 U.S.C. § 214(e) or that its designation as an ETC is in the public interest. Designation of MRC as an ETC would provide few, if any, additional benefits to the public, while adding to the costs that the American public must bear, which at present amount to a tax of 10.7 percent on all telecommunications services. For these reasons, the Commission should deny MRC's petition.

Respectfully submitted January 28, 2005.

  
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