Service Date: January 28, 2005

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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. D2003.8.105

REPLY BRIEF
OF THE
MONTANA TELECOMMUNICATIONS ASSOCIATION

The Montana Telecommunications Association ("MTA") respectfully submits this reply brief following hearing and receipt of post hearing briefs 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 to the Montana Public Service Commission ("PSC") for designation as an eligible telecommunications carrier ("ETC"). Designation as an ETC allows a telecommunications carrier to receive funding from the universal service fund ("USF"). The USF is sustained by contributions from certain telecommunications consumers, including incumbent local exchange carrier (ILEC) and wireless users. Throughout decades of telecommunications evolution in America, the USF has ensured that rates for telecommunications services in high cost rural and remote areas remained comparable to those in lower cost communities.

This particular application is for designation as an ETC in areas served by rural telephone companies. Applications for designation as an ETC in areas served by rural telephone companies are subject to strict scrutiny by state regulators. As the Federal-State Joint Board pointed out in its Recommended Decision regarding USF, "The characteristics of many rural carrier service areas also support a more rigorous standard of eligibility. Rural carrier service areas often have low customer densities and high per-customer costs...The Rural Task Force in White Paper #2 documented these effects and explained that rural carriers serve areas with lower population and line density and serve a smaller proportion of business customers. These circumstances support our belief that state commissions should apply a particularly rigorous standard to the minimum qualifications of applicants seeking ETC designation in rural carrier service areas."[1]

One reason for this additional scrutiny is because, upon designation of a second ETC in a service area, the existing ETC is then allowed to relinquish its ETC status and abandon its obligation to serve.[2] Were this to occur, the PSC would have to ensure that the newly designated ETC could serve all of the customers of the departing ETC. This is particularly important in rural areas where the economics necessary to support one provider may be difficult, and support for two providers may prove impossible.

For these reasons, the PSC must carefully evaluate three key questions before deciding whether to grant MRC's ETC application. MTA commends in advance the PSC for its efforts to evaluate and properly decide these important questions.

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[1] Federal Communications Commission, In the Matter of Federal State Joint Board on Universal Service, CC Docket No. 96-45, FCC-04J-1, Recommended Decision, Released 2/27/04, paragraph 18.
[2] 47 CFR 214 (4)(e)

First, the PSC must determine whether MRC meets the eligibility criteria for ETC designation established by federal statute and Montana law.

Second, the PSC must determine whether grant of MRC's application for designation as an ETC is in the public interest.

Third, the PSC must decide if it has the information and the public record necessary to permit a fully informed decision regarding MRC's application.

If the response to any of the above questions is "no," then the PSC must deny the application. In this case, the response to all three questions is a resounding "no." Therefore, MRC's application must be denied.

II. DISCUSSION

1. MRC Fails to Meet the Eligibility Criteria Necessary for ETC Designation

MRC claims that it provides all of the services necessary for ETC designation. Whether this is correct or not is unclear, given the record before us. Regardless, a common carrier designated as an ETC must offer the services supported by the federal universal service fund **throughout the designated service area.**[3] An ETC must offer such services using either its own facilities or a combination of its own facilities and resale of another carrier's services. However, an entity that offers the supported services exclusively through resale shall not be designated as an ETC. [4] Indeed, as the Joint Board stated in its Recommended Decision, "**A state commission is not authorized** to designate as an ETC a carrier that offers the supported

[3] 47 U.S.C. 214(e)(1)(A)
[4] 47 C.F.R. 54.201(i)

services solely through the resale of another carrier's services (emphasis added.)"[5]

The application originally filed was limited to MRC's cellular service areas. According to MRC, it now seeks ETC designation throughout the study areas of Mid-Rivers Telephone Cooperative, Inc. and Range Telephone Cooperative, Inc.[6]

As discussed in MTA's post hearing brief, MRC's service area is unlike other cellular licensees' service areas. MRC accurately describes its limitations as follows: "MRC'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."[7]

In other words, MRC is a secondary licensee. It provides wireless services only in areas that have been abandoned by the primary licensee. MRC is unable to expand its coverage area, or increase power for improved coverage, or modify antenna locations/direction without prior FCC permission and analysis of the effect of such modification on the primary licensee.

The maps submitted with MRC's responses to data requests showed clearly that MRC's existing wireless coverage areas were small portions of the two study areas in question. MRC has, based on the current record, no applications pending to expand its license areas. Thus, for the foreseeable future, MRC's operations are limited to those small circles indicated on the original maps. Nonetheless, MRC has elected to pursue ETC status for the entire study areas of its parent company and Range Telephone Cooperative, Inc.

[5] Joint Board Recommended Decision, para. 26
[6] Post Hearing Brief of MRC, December 17, 2004, page 1.
[7] Id, page 14.

Since MRC will provide service outside of its existing coverage areas exclusively through resale of another carrier's services, MRC simply cannot be designated an ETC for these study areas.

MRC argues that designation throughout the study area is necessary to establish its ETC status by the most efficient means possible and to avoid the disruptive and time-consuming process of study area disaggregations. Neither of these arguments has merit. First, allowing MRC to avoid explicit statutory requirements for ETC designation simply because it is more efficient scoffs at the underlying rationale for the requirement. This requirement was enacted to ensure that, if the incumbent ETC relinquished its ETC status, these areas could still be successfully served. Since MRC is totally reliant on Range Telephone Cooperative and its own parent company for services outside its limited cellular circles, this objective cannot be met if the incumbent ETC relinquished its status.

Second, MRC's argument that a study area-wide designation is necessary to avoid disaggregation is, at best, misguided. At its worst, it is a disingenuous failure of candor before this PSC. As discussed in our post-hearing brief, the question of disaggregation and its consequences has not been fully considered in this proceeding, due to the changing nature of the applicant's ETC request. As a result, little is known about the consequences disaggregation would have to Range Telephone Cooperative, Inc. or MRC's parent company, Mid-Rivers Telephone Cooperative, Inc. What we do know is that MRC's parent company could certainly have sought to disaggregate its study area. Why it did not was explained simply as "contrary to its business decisions".[8] Whether this means that the process would have taken an unacceptable amount of time, or resulted in reduced money for MRC's parent company, or

[8] Id, page 15.

resulted in reduced money for MRC is unclear and has never been addressed by MRC. It is clear, however, that MRC should not be permitted to gloss over this question simply because it is contrary to the business decisions of MRC's parent company to disaggregate and contrary to the business decisions of MRC to comply with the service area coverage requirements of the law.

MRC has failed to show that it will offer service throughout the service areas for which it has requested ETC designation without relying exclusively on resale for those service areas outside its limited cellular license areas. For this reason, MRC cannot be designated an ETC for the requested study areas.

2. MRC has Failed to Show how Designation as an ETC would Promote the Public Interest.

In the early phases 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 FCC 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.) [9]

[9] 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.

As time has passed, the adverse consequences of the earlier approach have become even clearer. FCC Commissioner Kathleen Abernathy stated almost a year ago, "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." [10]

The South Carolina PSC recently affirmed this perspective in its recent Order denying ETC designation for FTC Wireless. Therein, the South Carolina PSC stated:

> "FTC has not demonstrated that its designation as an ETC in areas served by rural telephone companies would serve the public interest. Even if FTE could demonstrate additional benefits, these may well be temporary, because FTE has not addressed the very real risks that spreading finite universal service resources too thin will create to critical "carrier of last resort" principles...Explosive growth in the size of the federal USF could threaten the long-term viability of the fund, thereby jeopardizing the continued provision of affordable basic local exchange service to rural subscribers...If the Commission grants FTC's application, other wireless service providers will be compelled to seek ETC designation as well in order to remain competitive with each other. [11]

MRC acknowledges that it is "fully built-out in its wireless service area and fully provides the FCC mandated wireless service in these areas. The only additional cellular build-out by MRC will occur if it is granted additional cellular fill-in licenses by the FCC for additional service areas or CGSA's..."[12] Based on the record, there is no evidence that MRC has any applications pending for additional cellular fill-in licenses at this time.

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[10] *Ensuring That ETC Designations Serve the Public Interest,* Remarks by Commissioner Kathleen Q. Abernathy, NARUC Winter Meeting, Washington, DC, March 10, 2004, p. 3.
[11] South Carolina Public Service Commission, Docket No. 2003-158-C – Order No. 2005-5, January 7, 2005, page 31, copy attached.
[12] MRC Post Hearing Brief, page 2

As correctly pointed out by MCC in its Post Hearing Brief, ETC status is not consistent with the public interest even in the limited areas where MRC currently provides wireless service. "(MRC) is providing service to its entire licensed service area without ratepayer-funded USF subsidies...There are no potential benefits to outweigh the cost to consumers of subsidizing the same service that MRC now provides." MCC further points out that this is "all the more persuasive in the present case, where the petitioner is after subsidies to 'compete' with a provider that is its sole owner, is managed by the same general manager and is overseen by the same board of directors."[13]

According to MRC, denial of MRC's Petition would deny Eastern Montanans the benefits that USF funding supports, namely the provision and improvement of wireless services in remote rural areas where such services are necessary for public health and safety. This argument is unpersuasive. MRC acknowledges that it is fully built out in its coverage areas, thus provisioning has already occurred. Improvement will depend primarily on FCC licensing requirements and opportunities, not funding from the USF.

MRC cites at length the testimony of witnesses that stressed the importance of wireless services in rural Montana. These witnesses spoke of the life saving and emergency needs answered by wireless services in rural areas. The witnesses were credible and sincere in their testimony. Nonetheless, their observations are irrelevant to the present case. MRC already provides services in its licensed areas. It is not realistically proposing to expand or improve those services. Perhaps, if MRC were proposing expansion or improvements to its service areas, these arguments would be valid. Based on the existing record, however, no

[13] MCC Post Hearing Brief, page 12 - 13.

such improvements or expansion will result from MRC's receipt of universal service funding.

3. MRC has Failed to Develop a Record on which to Justify Grant of its ETC Application

As MTA discussed at length in its Post-Hearing Brief, 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. Indeed, even now, after hours of public testimony and pages of post-hearing briefs, the record is still unclear as to the following:

* *The service area for which MRC seeks designation as an ETC.* MRC states, in its most recent filing, that it is requesting designation for the study areas of Mid-Rivers Telephone Cooperative, Inc. and Range Telephone Cooperative, Inc. At the hearing, however, the PSC indicated that MRC's original application had never been amended to request designation in throughout these study areas.
* *The rates MRC proposes to charge for its universal service package.* These rates presumably could vary, depending on the service territories in question.
* *The number of wireless customers served by MRC and the amount of USF under consideration.* MRC objected to this inquiry in data requests. Thus, while the record indicates that MRC anticipates receipt of approximately $600 annually per customer, we do not have specific data as to the total amount of USF in question.

*   *The effect of disaggregation on Range Telephone Cooperative, Inc. or Mid-Rivers Telephone Cooperative, Inc.* While this data may be unavailable to MRC for Range Telephone Cooperative, Inc., MRC would certainly have access to this information for its parent company.

*   *Specific plans for MRC's expansion or improvement.* As discussed above, MRC anticipates receipt of approximately $600 annually per customer. If MRC's parent company also provides service to that customer, the total "take" for the two companies could be $1200 per customer annually. No record exists to support MRC's claim that it will utilize these funds for expansion or service improvement.

*   *The role of MRC's affiliated businesses, including its parent company, its PCS licenses, and its 700 MHz licenses.*

Numerous other questions also remain unaddressed in this case. MRC clearly bears the burden of establishing adequate public record in a proceeding of this magnitude. It has failed to do so. MRC's cavalier approach to this proceeding, including last minute modifications to its application, unreasonable objections to data requests, and unwillingness to provide information regarding its corporate relationships have left the public record inadequate to enable this Commission to grant the requested application.

Potential receipt of universal service support involves public monies. This directly implicates the public trust. The record in this case is insufficient to permit grant of the requested designation without abusing that 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 28th day of January, 2005.

MORRISON & FRAMPTON, PLLP

Diane Smith, Attorney for
Montana Telecommunications Association
341 Central Avenue
Whitefish, Montana 59937