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January 27, 2005

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

RE: Posthearing Reply 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 Posthearing Reply 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

TES/mt  
Enclosure

**DISK RCVD**

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

\* \* \* \* \*

In the Matter of Cable &  
Communications Corporation, dba Mid-  
Rivers Cellular, Petition for Designation  
as an Eligible Telecommunications  
Carrier

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UTILITY DIVISION  
DOCKET NO. D2003.8.105

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PUBLIC SERVICE COMMISSION

POSTHEARING REPLY BRIEF OF CABLE & COMMUNICATIONS CORPORATION,  
dba MID-RIVERS CELLULAR

Filing Date: January 28, 2005

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## I. INTRODUCTION

Consistent with federal and state law, the Commission should designate Cable & Communications Corporation, dba Mid-Rivers Cellular (“Mid-Rivers Cellular”) as a competitive eligible telecommunications carrier (“ETC”) throughout the requested area, which consists of Mid-Rivers Telephone Cooperative, Inc.’s study area and Range Telephone Cooperative, Inc.’s study area. Mid-Rivers Cellular currently provides cellular service within portions of these study areas, and anticipates improving existing service and expanding its cellular service territory. If designated as an additional ETC in these two study areas, Mid-Rivers Cellular will provide service to those portions of the study areas not presently within its cellular service territory by resale of wireline services as allowed by 47 U.S.C. § 214(e)(1)(A). Mid-Rivers Cellular seeks current designation throughout these study areas to provide an avenue for improving and 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 affected telephone companies. Mid-Rivers Cellular has demonstrated that it fully meets the ETC requirements set forth in 47 U.S.C. § 214(e)(1) and MCA § 69-3-840. Indeed, none of the intervenors has argued in their initial posthearing briefs that Mid-Rivers Cellular does not satisfy each of the basic criteria for designation as a competitive federal ETC – *i.e.*, that Mid-Rivers Cellular is a common carrier, that it provides the nine supported services and that it will offer and advertise the supported service throughout its designated ETC service areas.

The only real dispute is whether Mid-Rivers Cellular's designation as an additional ETC in the two study areas is in the public interest as required by 47 U.S.C. § 214(e)(2) and MCA § 69-3-840(3). However, Mid-Rivers Cellular asserts that despite the intervenors' best efforts to confuse the issue of public interest, there cannot be any real dispute regarding the fact that designation of Mid-Rivers Cellular as an additional ETC will result in tangible benefits to Montana consumers or subscribers who live and work in this most rural area of Montana. As discussed in greater detail below, the record before the Commission reflects that the economic development and public safety and welfare of the residents of Eastern Montana will be enhanced and improved by the designation of Mid-Rivers Cellular as an additional ETC. Common sense dictates that the advantages of wireless service and the ability to communicate from remote areas to emergency services and personnel are obviously in the public interest. Therefore, the Commission should not hesitate to act to benefit Montana consumers by designating Mid-Rivers Cellular as an additional ETC throughout the requested service area.

II. **THE INTERVENORS' ARGUMENT THAT MID-RIVERS FAILED TO MEET ITS BURDEN OF PROOF BY NOT SUBMITTING OR PROVIDING AN ADEQUATE PETITION OR SUFFICIENT RECORD IS MERITLESS**

The intervenors in this proceeding, Montana Consumer Counsel ("MCC"), Montana Telecommunications Association ("MTA") and Montana Independent Telecommunications Systems ("MITS") (cumulatively referred to herein as "intervenors"), contend that Mid-Rivers Cellular's Petition for ETC status should be

denied because Mid-Rivers Cellular failed to establish a sufficient record before the Commission. MCC contends that Mid-Rivers Cellular failed to sustain its burden of proof. MTA contends that Mid-Rivers Cellular failed to provide a sufficient Petition to permit thorough cross-examination by intervenors. MITS simply adopted MCC's brief, and then proceeded to provide a sarcastic and speculative attack against Mid-Rivers Cellular. Mid-Rivers Cellular will not waste the Commission's time responding to MITS ad hominem attacks, but will herein respond to the sufficiency of the Petition and record before the Commission.

The controversy over the adequacy of the evidence before the Commission apparently arises because Mid-Rivers Cellular did not submit any prefiled testimony. However, in Montana there is no statute, administrative rule or precedent which requires an ETC applicant to submit prefiled testimony to the Commission. The intervenors are aware of this fact and their attempt to persuade the Commission otherwise is disingenuous. The issues raised by the intervenors were thoroughly discussed and argued at the time of the hearing. After considerable debate, MCC's counsel admitted "I would agree that there is no particular – there was no particular requirement in this case that the applicant pre-file direct testimony." (TR p. 21.) MCC reiterated this statement in MCC's initial brief, at page 2, which stated "[T]he procedural order did not require prefiled direct testimony from MRC." ("MRC" is the acronym utilized by MCC for Mid-Rivers Cellular throughout MCC's initial brief.) Additionally, at the time of hearing, MITS counsel admitted that there is no legal requirement that an application be accompanied by pre-filed testimony. (TR p. 17.) During the hearing, the following exchange occurred between Mr. Jacobson of the Commission Staff and Mr. Strand, counsel for MITS:

Mr. Jacobson: Mr. Chairman, the procedural order to which that rule refers isn't issued until after the application is filed. So can you cite to a rule or legal requirement of Commission that an application be accompanied by pre-filed testimony?

Mr. Strand: No.

(TR p. 20.) The intervenors' contentions are contradicted by their own statements on the record at the time of the hearing. Finally, the intervenors' initial posthearing briefs are devoid of any citation to any statute, administrative rule, procedural rule, or case law which supports their positions. As a result, the Commission should sustain the Chairman's ruling at the hearing and dismiss the intervenors' arguments as unsupported by the facts and the law.

Any issue as to the sufficiency of the record before the Commission or the ability of intervenors' counsel to adequately examine the evidence or cross-examine witnesses is quickly dismissed by a brief review of the record in this docket. The relevant issues and facts in this proceeding have been briefed and re-briefed by the parties and appear in the docket. The assertion by MTA that it was somehow surprised that Mid-Rivers Cellular was not seeking disaggregation, or designation as an ETC throughout the two study areas, is less than credible upon review of the pleadings, briefs and data request responses and objections contained in the docket. Prior to the hearing, on October 20, 2004, Mid-Rivers Cellular did file its Prehearing Memorandum with the Commission and served copies thereof upon all the intervenors as required by the procedural order, as amended, in this docket. (*Order No. 6518, as amended by Notice of Staff Action Amending Procedural Order with Service Date of July 21, 2004.*) Mid-Rivers Cellular's Prehearing Memorandum specifically stated the following:

## **I. CONTESTED ISSUES**

Whether the Montana Public Service Commission should designate Cable & Communications Corporation, dba Mid-Rivers Cellular, as an eligible telecommunications carrier ("ETC") for the entire study area of Mid-Rivers Telephone Cooperative, Inc. and the entire study area of Range Telephone Cooperative, Inc.?

## **II. WITNESSES**

C&CC intends to call the following witnesses:

Gerry Anderson, C&CC's General Manager  
Bill Wade, C&CC Assistant Manager  
Vern Stickel, C&CC Accounting Manager

## **III. EXHIBITS**

Petition of Cable & Communications Corporation, dba Mid-Rivers Cellular, for Designation as an Eligible Telecommunications Carrier filed in Docket No. D2003.8.105

Cable & Communications Corporation's, dba Mid-Rivers Cellular, Response to Public Service Commission Staff Data Requests PSC-001 through PSC-013 filed in Docket No. D2003.8.105.

Cable & Communications Corporation's, dba Mid-Rivers Cellular, Responses and Objections to Montana Telecommunications Association's Data Requests MTA-001 – MTA-052 filed in Docket No. D2003.8.105.

Cable & Communications Corporation's, dba Mid-Rivers Cellular, Responses and Objections to Montana Independent Telecommunications Systems' Data Requests MITS-001 through MITS-046 filed in Docket No. D2003.8.105.

Responses of Cable & Communications Corporation, dba Mid-Rivers Cellular, to Public Service Commission's Staff Data Requests PSC-014 through PSC 023 filed in Docket No. D2003.8.105.

The documents contained in the docket fully disclosed all of the relevant facts and details relating to Mid-Rivers Cellular's Petition.

Additionally, at the hearing, Gerry Anderson, General Manager of Mid-Rivers Cellular, testified and verified the contents of the Petition and the Responses set forth

above. (TR pp. 7 and 8.) Both the Commission Staff and Mid-Rivers Cellular separately moved the admission of all four sets of Mid-Rivers Cellular's Responses to data requests specified in Mid-Rivers Cellular's Prehearing Memorandum. (TR pp. 24 and 25.) Chairman Jergeson admitted the four sets of Mid-Rivers Cellular's responses to data requests specified in Mid-Rivers Cellular's Prehearing Memorandum and took the objections under advisement. (TR pp. 25 and 26.) As a result, Mid-Rivers Cellular's Petition and four sets of responses to data requests, and the facts alleged and contained therein, became evidence in this proceeding. (C&CC Exhibits 1, 2, 3, 4 and 5.) These Exhibits, as verified documents, clearly establish that Mid-Rivers Cellular presented a prima facie showing that it is entitled to the requested ETC designation, and therefore satisfied its burden of proof.

Further, during the hearing, sufficient testimony and evidence was received from the cross-examination of witnesses and the public to create a more than adequate record in this docket. The witnesses designated in Mid-Rivers Cellular's Prehearing Memorandum, Gerry Anderson – C&CC's General Manager, Bill Wade – C&CC's Assistant Manager, and Vern Stichel – C&CC's Accounting Manager, were extensively examined by the Commission Staff and all intervenors. (TR pp. 26 – 91, 113 – 123.) The public testified in support of Mid-Rivers Cellular's Petition for designation as an additional ETC and multiple documents were received into evidence as Exhibits. (TR pp. 98 -112, Public Exhibits 1, 2, 3, 4, 5, 6, 7, 8 and 9.) As a result, the record is replete with facts and law to support the Commissions' designation of Mid-Rivers Cellular as an additional ETC.

The evidence before the Commission is more than sufficient to demonstrate that Mid-Rivers Cellular fully meets the ETC requirements set forth in 47 U.S.C. § 214(e)(1) and MCA § 69-3-840, and that such designation is in the public interest by providing additional competition, complementary services and improving public safety and welfare as set forth in 47 U.S.C. § 214(e)(2) and MCA § 69-3-840(3). The failure of the Commission to do so would only result in unnecessary delay and expense at the cost of the residents of Eastern Montana. The intervenors' arguments lack any legal merit and should be denied as such.

**III. MID-RIVERS CELLULAR HAS IDENTIFIED AND REQUESTED THE APPROPRIATE ETC DESIGNATION AREAS**

As noted in Mid-Rivers Cellular's initial posthearing brief, a 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 from the FCC to service additional specific geographic areas. 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.

MTA inaccurately suggests that fill-in licenses, such as those under which Mid-Rivers Cellular operates, should be considered "secondary licensees since they operate subordinately to the incumbent." This statement is completely false. Mid-Rivers Cellular's operations are not in any way "subordinate" to the operations of any other licensee, including the "incumbent" (which Mid-Rivers Cellular must presume MTA to mean as the original wireline or B-block licensee). Mid-Rivers Cellular's operations are entitled to the same level of protection within its licensed areas as are any other cellular licensee. MTA's suggestion to the contrary demonstrates its profound misunderstanding of the FCC's cellular licensing processes.

As Mid-Rivers Cellular has repeatedly explained, it is the licensing process, and not its operations, which is the subject of the prior licensing rights of those cellular carriers who originally held a license for the entire market. The geographic area included within any cellular carrier's Cellular Geographic Service Area ("CGSA"), including that of the original licensee and that of Mid-Rivers Cellular, is entitled to "protection from co-channel and first-adjacent channel interference and from capture of subscriber traffic by adjacent systems on the same channel block." 47 C.F.R. § 22.911(d). The limitations of Mid-Rivers Cellular's license cited by MTA (MTA Initial Posthearing Brief, p. 5) are, in fact, the limitations applicable to all cellular licenses. *Id.* While Mid-Rivers Cellular's licensed service area may be smaller than the licensed service area of other licensees, it is subject to the same rights and restrictions as any

other licensee. In short, the "incumbent" licensee must also ensure that "no interference is visited" on Mid-Rivers Cellular operations.

Mid-Rivers Cellular also notes that the suggestion that the "incumbent" is entitled to expand its service area within a geographic market area is also inaccurate. After the expiration of the five-year fill-in, the "incumbent" is also confined to its established CGSA absent the grant of an application to expand its service area.

MTA also inaccurately suggests that Mid-Rivers Cellular's cellular geographic coverage cannot be expanded. Without any support, MTA makes the bald statement that "[t]he possibility that MRC could bring services to territories underserved by the A or B licensee is . . . without merit." (MTA Initial Posthearing Brief, p. 6.) Not only can Mid-Rivers Cellular expand its service area, but the record in this proceeding (*see, e.g.,* C&CC Exhibit 5 [PSC-016].) demonstrates that it already has expanded its initial service area. No change in FCC rules is necessary for Mid-Rivers Cellular to expand its service area to unserved areas, because such areas still exist in portions of the geographic area here at issue, the study areas of Mid-Rivers Telephone Cooperative, Inc. and Range Telephone Cooperative.

Because it fully intends to provide supported services throughout its cellular service area, including any 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, advertise the Supported Services throughout the entirety of the specified service area (the two study areas), and if requested provide service by reselling the service of other carriers where it does not have the current capability of providing service through its cellular facilities. Resale is a proper means for an additional ETC to provide its services and is specifically allowed and provided for pursuant to 47 U.S.C. § 214(e)(1)(A). As such, the Commission is preempted from prohibiting Mid-Rivers Cellular from utilizing resale to provide the Supported Services.

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.<sup>2</sup>

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 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.<sup>3</sup>

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<sup>2</sup> *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).

<sup>3</sup> *Id.* (emphasis added).

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

Finally, Mid-Rivers Cellular has not amended or modified its original Petition for ETC designation. The Petition in this docket clearly requests that it be designated an ETC throughout its licensed service area as shown on Exhibit 1 to the Petition. (C&CC Exhibit 1, p. 1.) The Petition further states that Mid-Rivers 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. (C&CC Exhibit 1, p. 4.) In response to data requests concerning the area sought for ETC designation, Mid-Rivers Cellular clarified it was not seeking disaggregation of the existing study areas, and therefore, its ETC service area consists of the study areas of Mid-Rivers Telephone Cooperative, Inc. and Range Telephone Cooperative, Inc. (C&CC Exhibit 5 [PSC-014d].)

**IV. MID-RIVERS CELLULAR HAS DEMONSTRATED THAT ITS DESIGNATION AS AN ETC IS IN THE PUBLIC INTEREST**

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 asserts that the Commission should give additional weight and consideration to the testimony of the public when determining public interest. These public witnesses are the individuals whose lives will be directly impacted by the Commission's decision to grant or deny ETC designation. It is noteworthy that all of the public witnesses supported the ETC designation and the testimony given under oath stated that the provision of wireless telecommunications services in Eastern Montana was in the public interest and would result in increased economic development, competition and choice, and public safety and welfare.

Mid-Rivers Cellular believes the wireless services it provides are complementary to the landline services provided in the two study areas. The geographic area for which Mid-Rivers Cellular is seeking ETC designation is among the most rural area or lowest population density per square mile area in Montana. In fact, the United States Census Bureau defines the area as "frontier." 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 – exists. The wireless services offered by Mid-Rivers Cellular will also promote economic development in this region of Montana by better allowing the businesses, governmental entities and people to communicate within the region, as well as allowing better communication between Eastern Montana and other regions of the state and nation. Quite simply, areas of Eastern Montana which presently have no telecommunications services may at long last be able to obtain telecommunications services. The designation of Mid-Rivers Cellular as an ETC will enhance its ability to continue, improve and expand its telecommunications service to Eastern Montana. Clearly, those members of the public who spoke at the hearing and the various county governments and agencies which submitted Exhibits acknowledged that wireless telecommunications service is in the public interest. Common sense dictates that the Commission determines that the designation of Mid-Rivers Cellular as an additional ETC is in the public interest.

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. MCC's expert witness, Mr. Buckalew, acknowledged that increased choice is in the public interest. (MCC Exhibit 1, p. 11) 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 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 emergency services, 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. . . .<sup>4</sup>

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.

**V. THE COMMISSION MUST REJECT THE INTERVENORS' ARGUMENT THAT MID-RIVERS CELLULAR BE DENIED DESIGNATION AS A COMPETITIVE ETC BECAUSE IT ALREADY PROVIDES SERVICE**

The Commission should summarily reject the arguments of MCC that Mid-Rivers Cellular be denied ETC designation where it is already providing service. (See MCC Initial Posthearing Brief, p. 12.) In order to promote competition and consumer benefits, the Commission must designate Mid-Rivers Cellular as an additional ETC. Moreover, the Commission must reject MCC's contention that the sole purpose of the universal service support mechanisms is to increase subscriber penetration to the exclusion of promoting competition, customer choice and improved services. (MCC Initial Posthearing Brief, p. 5; MTA Initial Posthearing Brief, pp. 6-8.) This "false choice" is

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<sup>4</sup> *Virginia Cellular Order*, ¶ 29.

plainly incorrect and directly contrary to the FCC's articulated policy of "competitive neutrality":

Commentors who express concern about the principle of competitive neutrality contend that Congress recognized that, in certain rural areas, competition may not always serve the public interest and that promoting competition in these areas must be considered, if at all, secondary to the advancement of universal service. We believe these commentors present a false choice between competition and universal service. A principal purpose of section 254 is to create mechanisms that will sustain universal service as competition emerges. We expect that applying the policy of competitive neutrality will promote emerging technologies that, over time, may provide competitive alternatives in rural, insular, and high cost areas and thereby benefit rural consumers. For this reason, we reject assertions that competitive neutrality has no application in rural areas or is otherwise inconsistent with section 254.<sup>5</sup>

Consequently, the Commission should reject MCC's argument as the FCC has done.

**VI. THE COMMISSION CANNOT DISCRIMINATORILY ADOPT AD HOC RULES OR CONDITIONS IN THIS PROCEEDING**

The Commission should reject the intervenors' efforts to convert this docket into a quasi-rulemaking proceeding. MCC's proposed conditions and requirements as opined by Mr. Buckalew for all ETCs belong in the current rulemaking proceeding before the Commission, rather than in this individual ETC petition proceeding. MCC's suggestion that the Commission may make up and impose conditions upon an ETC applicant violates existing law. To the contrary, the Commission must apply the existing legal standards under 47 U.S.C. § 214(e) and MCA § 69-3-840(3) to designate Mid-Rivers Cellular as an ETC.

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<sup>5</sup> *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Report and Order*, FCC 97-157 ¶ 50 (rel. May 8, 1997) ("*Universal Service Order*") (emphasis added).

**A. MCC's Recommended ETC Rules Are Admittedly Intended to Have General Application and Are, Therefore, Improperly Before the Commission in This Proceeding**

MCC's testimony in this proceeding sets forth recommended ETC rules intended to have general application to all ETCs in the State of Montana. (MCC Exhibit 1.)<sup>6</sup> Any consideration to be given to the adoption of MCC's proposed ETC rules should, therefore, be deferred and addressed in the formal rulemaking proceeding currently before the Commission. See MCA § 2-4-320 (requiring published notice and hearing prior to the adoption of any rule by a state agency). MCC's proposed ETC rules are improperly before the Commission in this docket, and cannot be considered in the context of designating Mid-Rivers Cellular an ETC in this proceeding.

**B. Nothing in TOPUC, Virginia Cellular or the Joint Board Recommendations Authorizes the Commission to Circumvent State Law**

MCC's reliance on *TOPUC*,<sup>7</sup> *Virginia Cellular* and the recent *Joint Board Recommendations*<sup>8</sup> to suggest that the Commission can somehow adopt and apply new ETC rules or conditions to Mid-Rivers Cellular's Petition is contrary to law. (See MCC's Initial Posthearing Brief, pp. 5-7.) First, the Fifth Circuit's holding in *TOPUC* simply does not support MCC's position that the Commission may adopt its own ETC eligibility criteria for wireless carriers who are not otherwise subject to its regulatory jurisdiction.

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<sup>6</sup> See MCA § 2-4-102(11)(a) ("Rule' means each agency regulation, standard, or statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice requirements of an agency.").

<sup>7</sup> *Texas Office of Public Utility Counsel v. Federal Communications Commission*, 183 F.3d 393, 419-20 (5th Cir. 1999) ("*TOPUC*").

<sup>8</sup> *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket 96-45, *Recommended Decision*, FCC 04J-1 (Feb. 27, 2004) ("*Joint Board Recommendation*").

Rather, *TOPUC* merely recognized a State commission's ability to supplement the ETC criteria "in light of the states' historical role" of regulating intrastate services. (*Topuc* at 418.) This authorized additional state regulation of ILEC and CLEC ETCs. However, nothing in the *TOPUC* discussion addressed wireless carriers who historically operated outside of the regulatory jurisdiction of a State commission. In fact, the Court's opinion makes clear that the Act must not be read to impair or supersede federal preemption of state regulation of wireless providers under 47 U.S.C. § 332(c)(3)(A). (*Id.* at 433.)

The FCC in *Virginia Cellular* did not determine that *TOPUC* granted a State commission unfettered discretion to adopt new ETC eligibility rules on a case-by-case basis. Rather, the FCC simply acknowledged that it was not prohibited under the Act from incorporating an applicant's voluntary commitments into its order as conditions of the ETC designation. Finally, the *Joint Board Recommendations* are purely advisory and have no legal or precedential value unless and until they are adopted or rejected by the FCC. The Commission must reject the intervenors' efforts to further delay this proceeding or to impose new ETC rules or conditions on Mid-Rivers Cellular which do not yet exist under federal or state law. Mid-Rivers Cellular is entitled to immediate ETC designation pursuant to the existing legal standards under 47 U.S.C. § 214(e) and MCA § 69-3-840(3).

**VII. MID-RIVERS CELLULAR'S USE OF UNIVERSAL SERVICE SUPPORT IS REGULATED BY FEDERAL LAW**

The Commission must also reject the intervenors' position that Mid-Rivers Cellular be denied ETC status because it has allegedly failed to make an affirmative showing of exactly how it will invest the universal service support it receives and/or that Mid-Rivers Cellular has not committed to accounting for its use of those funds. (MTA

Initial Posthearing Brief, pp. 10 and 11.) The intervenors are simply wrong. If designated as an ETC, Mid-Rivers Cellular – like every other ETC in Montana – is required by federal law to use the universal service support it receives for the “provision, maintenance, and upgrading of facilities and services for which the support is intended.” 47 U.S.C. § 254(e); 47 C.F.R. § 54.7. Mid-Rivers Cellular plainly acknowledged this obligation at the hearing. (TR pp. 36 and 51.) Moreover, if designated as a competitive ETC, Mid-Rivers Cellular will, and must, be subject to the same annual certification requirements as any other ETC.

The comments and allegations contained in MCC and MTA’s initial posthearing briefs regarding the ownership of Mid-Rivers Cellular is entirely irrelevant to this proceeding. (MCC Initial Posthearing Brief, pp.12 and 13; MTA Initial Posthearing Brief, pp. 10 and 11.) Ownership of an ETC applicant may not properly be considered by the Commission, and none of the intervenors has presented any legal authority or citation which remotely supports the contention that such an inquiry is appropriate. Mid-Rivers Cellular is a for-profit corporation duly organized, existing and operating under the laws of the state of Montana. Mid-Rivers Cellular is a Montana corporation in goodstanding, and under Montana statutory law is considered to be a separate and distinct legal entity or individual. MCA § 35-1-115. Whether an ETC applicant is an individual, publicly traded company or privately held company is outside the Commissions’ proper scope of review as defined by and set forth in 47 U.S.C. § 214(e) and MCA § 69-3-840. The only criteria for designation as an additional ETC in an area served by a rural telephone company is: the applicant provides the nine supported services; the applicant will offer and advertise the supported service throughout its designated ETC service areas; and

the designation is in the public interest. As noted above, the intervenors have not presented any legal authority that provides the public interest review may even consider the business structure or ownership of the applicant. The ownership of any ETC applicant is wholly irrelevant and outside the Commission's proper scope of review, and therefore the unsupported arguments of the intervenors should be rejected in their entirety.

The intervenors' argument concerning possible "double-dipping" is a "red-herring" and should be disregarded and rejected by the Commission. As stated above, an ETC applicant's ownership is not relevant and may not be taken into consideration by the Commission. Intervenors, however, encourage the Commission to completely ignore Montana law and consider Mid-Rivers Cellular and Mid-Rivers Telephone Cooperative, Inc. ("MRTC") to be one and the same. This would be fully improper and reversible error by the Commission. Although Mid-Rivers Cellular is a wholly-owned subsidiary of MRTC, the two companies are separate and distinct Montana corporations. The act of one of these corporations is not the act of the other. Therefore, the fact that MRTC has been designated by the Commission as an ETC in the MRTC study area does not in any way affect Mid-Rivers Cellular. MRTC does not provide cellular service in the study area. Each separate legal entity, MRTC and Mid-Rivers Cellular, is entitled to ETC designation under the applicable law. 47 U.S.C. § 214(e) and MCA § 69-3-840. As such, the Commission must consider and approve Mid-Rivers Cellular's ETC application as if the application was from a totally unrelated third party. If Mid-Rivers Cellular is denied ETC designation because MRTC is designated a wireline ETC in the study area, then the Commission would be denying

Mid-Rivers Cellular equal protection under the law. Once analyzed, it becomes clear that intervenors' "double-dipping" argument is a fictitious argument which attempts to evoke an emotional response from the Commission to the prejudice of Mid-Rivers Cellular.

Mid-Rivers Cellular must also briefly comment on intervenors' allegations that any USF funds received by Mid-Rivers Cellular will be forwarded to MRTC and then paid out by MRTC as patronage credits. Initially, Mid-Rivers Cellular is required by federal law to use the universal service support it receives for the "provision, maintenance, and upgrading of facilities and services for which the support is intended." 47 U.S.C. § 254(e); 47 C.F.R. § 54.7. Vern Stickel, Mid-Rivers Cellular's Accounting Manager, testified at the hearing that Mid-Rivers Cellular's profitability has no impact on the [MRTC] co-op patronage credit. (TR p. 114.) There is no other evidence in this docket which shows that MRTC patronage credits are related to Mid-Rivers Cellular's profitability or Mid-Rivers Cellular's receipt of USF funds, or the lack thereof. The intervenors are thoroughly aware that Montana law in conjunction with cooperative bylaws dictates the procedures utilized by telephone cooperatives for the allocation and retirement of capital credits or patronage credits, and that allocation and payment are separate and distinct functions. MCA § 35-18-316. It is clear that intervenors' arguments are without legal merit and are submitted to merely to confuse and obscure the facts, and therefore should be summarily dismissed by the Commission.

The intervenors also contend that granting Mid-Rivers Cellular ETC designation will result in "cream-skimming." The FCC considered the issue of cream-skimming in *Virginia Cellular*. Cream-skimming is defined as providing service to only low-cost, high

revenue consumers in a rural telephone company study area. *Virginia Cellular* at ¶ 32. Mid-Rivers Cellular asserts that there is no area, city or town in the two subject study areas which would by definition allow for “cream-skimming.” Additionally, the areas served by Mid-Rivers Cellular are among the most sparsely populated in the state. Cream-skimming is not a legitimate contention in this proceeding and should be dismissed by the Commission.

The intervenors’ arguments that Mid-Rivers Cellular’s ETC status should be denied due to adverse impact upon the federal universal service fund should be rejected by the Commission as well. Recently, the Universal Service Administrative Company (“USAC”) estimated that total annual high cost funding available to the entire state of Montana for fiscal year 2005 would be \$77.877 million, or \$19.469 million per quarter. Universal Service Administrative Company, Federal Universal Service Mechanisms Fund Size Projections for the First Quarter 2005 (Nov. 2, 2004) (“*USAC 1<sup>st</sup> Quarter 2005 Projections*”), Appendix HC02, High Cost Support Projected by State. This constitutes less than 2% of the \$976.907 million projected for nationwide support for the first quarter of 2005 (*USAC 1<sup>st</sup> Quarter 2005 Projections*, Fund Size Projection Summary at p. 11.) In *Virginia Cellular* terms, if Mid-Rivers Cellular were to capture each and every customer located in the Mid-Rivers Telephone Cooperative, Inc. and Range Telephone Cooperative, Inc. study areas, the \$2.125 million high-cost funding associated with those companies is only 0.217% of total First Quarter 2005 funding estimates. Simply put, under current rules, any ETC designation in Montana has a diminimus effect on the entirety of high cost support mechanisms and the federal universal service fund.

Accordingly, there is absolutely no basis to support the contention that Mid-Rivers Cellular be denied ETC status for failing to make some undefined affirmative showing. To the contrary, Mid-Rivers Cellular has committed to fulfill its obligations as an ETC, including its obligations with respect to the use of any universal service support it receives. The Commission must therefore reject all of intervenors' unsupported arguments.

**VIII. THE COMMISSION CANNOT LIMIT A COMPETITIVE ETC'S RECEIPT OF UNIVERSAL SERVICE SUPPORT TO "GROWTH LINES"**

MCC and Mr. Buckalew have a faulty understanding of the effect of federal universal service funding "portability" rules. MCC is plainly mistaken in arguing that an additional ETC may only receive support for "captured lines" – a term that appears defined by the intervenors to include only customer lines taken away from an incumbent, or lines "previously unserved by any telecommunications provider." (See MCC Initial Posthearing Brief, pp. 6 and 7.) This argument is a red herring, and contrary to federal law which provides:

A competitive eligible telecommunications carrier shall receive universal service support to the extent that the competitive eligible telecommunications carrier captures the subscriber lines of an incumbent local exchange carrier (LEC) or serves new subscriber lines in the incumbent LEC's service area.

47 C.F.R. §54.307(a) (emphasis supplied).

The FCC has unambiguously confirmed that the federal universal service mechanisms support every working loop served by a competitive ETC, whether the line is “captured” from the incumbent, provided to a previously unserved customer or is a second line provided to a customer who continues to receive service from the incumbent. In its first *Universal Service Order*, the FCC rejected a Joint Board proposal to limit universal service support to a single primary line and determined that it was appropriate to fund all business and residential lines:

We do not adopt, at this time, a rule stating that a wireless carrier may receive support only if the wireless carrier is a customer's primary carrier and the customer pays unsubsidized rates for its wireline service . . . In addition, in light of our decision above that, under the modified existing high cost mechanism all business and residential connections will be supported, we conclude that such a rule is not necessary at this time. . . .<sup>14</sup>

Likewise, in designating Western Wireless as a competitive ETC for the Pine Ridge Reservation in South Dakota, the FCC wrote:

Moreover, the federal universal service mechanisms support all lines served by ETCs in high-cost areas. Therefore, to the extent that Western Wireless provides new lines to currently unserved consumers or second lines to existing wireline subscribers, it will have no impact on the amount of universal service support available to the incumbent rural telephone company for those lines it continues to serve.<sup>15</sup>

And as recently as January of this year, the FCC wrote:

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<sup>14</sup> *Universal Service Order*, ¶ 146 (emphasis added).

<sup>15</sup> *In the Matter of the Federal-State Board on Universal Service, Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota*, Docket 96-45, *Memorandum Opinion and Order*, FCC 01-283, ¶ 15 (rel. Oct. 5, 2001) (emphasis added). See also *In the Matter of the Federal-State Board on Universal Service, Petitions for Reconsideration of Western Wireless Corporation's Designation as an Eligible Telecommunications Carrier in the State of Wyoming*, Docket 96-45, *Order on Reconsideration*, FCC 01-311, ¶ 20 (rel. Oct. 19, 2001) (“[T]he federal universal service mechanisms support all lines served by eligible carriers in high-cost and rural areas. Thus, to the extent that the competitive ETC provides new lines to customers that are currently unserved or second lines to customers that have service, there will be no reduction in support to the incumbent carrier.”) (emphasis added).

The high-cost universal service mechanisms support all lines served by ETCs in rural areas. Under the Commission's rules, receipt of high-cost support by Virginia Cellular will not affect the total amount of high-cost support that the incumbent rural telephone company receives. Therefore, to the extent that Virginia Cellular or any future competitive ETC captures incumbent rural telephone company lines, provides new lines to currently unserved customers, or provides second lines to existing wireline subscribers, it will have no impact on the amount of universal service support available to the incumbent rural telephone companies for those lines they continue to serve.<sup>16</sup>

Thus, there is no question that a competitive ETC is entitled to receive federal universal service support for all lines that it serves within its designated ETC service areas, including second lines provided to customers of the incumbent, and as noted in Mid-Rivers Cellular's Post-Hearing Brief, Congress has spoken to preclude adoption of any "primary line" concept (P.L.No. 108-407, Title VI, Section 634 of the Consolidated Appropriations Act of 2005).

## **IX. CONCLUSION**

The Act and the Commission's existing rules establish clear, consistent and competitively fair mechanisms for allowing wireless carriers 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 aids in the economic development of the region and enhances public safety and welfare. Designation of Mid-Rivers Cellular as an additional ETC is clearly in the public interest. Mid-Rivers Cellular therefore respectfully requests the Commission to follow

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<sup>16</sup> *Virginia Cellular Order*, ¶ 43 (emphasis added).

the directives and principles of the Act and state law and grant its Application for designation as a additional ETC without restrictions or conditions.

Respectfully submitted for filing on the 28<sup>th</sup> day of January, 2005.

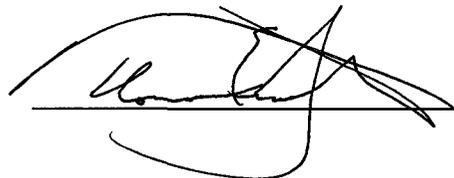
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#### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the attached POSTHEARING REPLY 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 27<sup>th</sup> day of January, 2005:



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

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In the Matter of the Proposed Adoption of ) LEGAL DIVISION  
New Rules I through XIX, Pertaining to )  
Eligible Telecommunications Carriers ) Docket No. L-04.07.5-RUL

**JOINT COMMENTS OF MID-RIVERS TELEPHONE COOPERATIVE AND CABLE  
AND COMMUNICATIONS CORPORATION ON PROPOSED ADOPTION OF NEW  
RULES I THROUGH XIX, PERTAINING TO ELIGIBLE TELECOMMUNICATIONS  
CARRIERS**

COME NOW, Mid-Rivers Telephone Cooperative, Inc., a Montana corporation ("Mid-Rivers"), and Cable & Communications Corporation, a Montana corporation ("C&CC"), and jointly submit the following comments on the proposed adoption by the Montana Public Service Commission ("PSC" or "commission") of new rules I through XIX pertaining to Eligible Telecommunications Carriers ("ETCs"):

**GENERAL COMMENTS**

Mid-Rivers and C&CC (together, the "Companies") recognize the public benefits to be gained by the establishment of clear standards to govern the designation and continuing certification of carriers as Eligible Telecommunications Carriers ("ETCs"). Uniform standards, consistently applied in efficient designation and recertification processes, ensure that both carriers and their subscribers enjoy the fair treatment guaranteed by law, a result which promotes the public interest.

The Companies agree that the PSC 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, Montana Code Annotated ("MCA"); 47 U.S.C. §214(e)(2). The Companies submit, however, that the PSC'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," (47 C.F.R. § 254(f)), state-imposed standards establishing eligibility for federal funding may not interfere with federal goals and standards.

law, particularly including upon demonstration that a change in applicable federal or Montana was not anticipated by these rules and upon demonstration that a particular rule does not properly reflect important distinguishing features between or among certain types (e.g., incumbent, competitive, rural, non-rural, wireline, fixed wireless, mobile wireless, satellite, voice over internet protocol, cable, power line, and so forth) of applicants or existing eligible telecommunications carriers.

AUTH: 69-3-822, MCA

IMP: 69-3-840, MCA

### COMMENTS:

While the establishment of state-specific standards certainly is permissible, these standards may not conflict with federal requirements. As discussed below, some of the proposed rules are directly contrary to federal law, and cannot be sustained under the doctrine of federal preemption where the state proposal "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 204 (1983). Nor can a state scheme prevail "where the federal scheme expressly authorizes an activity which the state scheme disallows." *Wells Fargo Bank of Texas NA v. James*, 321 F. 3d 488, 491 n. 3 (5<sup>th</sup> Cir. 2003).

The PSC correctly suggests that rules are necessary to provide an appropriate framework within which to assess the public interest impact of ETC designation. This inquiry will, of necessity, be fact specific, and fact intensive. The Companies cannot, however, endorse the PSC's suggestion that each specific case provides an opportunity for the PSC to adopt additional standards, as indicated in subparagraph (2) of Proposed New Rule I. Fairness mandates that standards be uniform and uniformly applied. Competitive neutrality is an established federal principle, and cannot be undermined by state action. See, e.g., *Section 214(e) Declaratory Ruling*, 15 FCC Rcd 15168, 15179-81 (2000). Contrary action would also violate fundamental due process and equal protection standards.

**NEW RULE II BURDEN IN PROCEEDINGS** (1) An applicant for designation as an eligible telecommunications carrier has the burden of demonstrating in fact and law that the requirements for designation as an eligible telecommunications carrier have been met. An eligible telecommunications carrier, in any annual or other process involving certification as an eligible telecommunications carrier or maintenance of status as an eligible telecommunications carrier, has the burden of demonstrating in fact and law that the requirements for certification or maintenance of status have been met. The complainant in any complaint pertaining to an eligible telecommunications carrier retaining status as an eligible telecommunications carrier has the burden to demonstrate in fact and law the status should be changed.

AUTH: 69-3-822, MCA

IMP: 69-3-103, 69-3-840, MCA

### COMMENTS:

The Companies submit that the initial application for ETC status should itself present a prima facie case for designation, and that comments solicited from interested parties would provide an adequate basis upon which to make the appropriate factual determination. In other words, the Companies believe if an applicant files an application for ETC status which sets forth that the applicant meets the statutory criteria to be designated an ETC, then the burden of demonstrating in fact and law that the applicant does not meet the requirements for designation as an ETC should be upon the party or parties opposing the application. The Companies respectfully submit that standards related to the "burden of demonstrating . . . maintenance" of ETC status are superfluous.

### NEW RULE III DESIGNATION AND MAINTENANCE -- PROCEDURAL RULES

(1) Commission procedural rules for contested cases, ARM 38.2.301 through 38.2.4807, apply in all eligible telecommunications carrier designation and complaint proceedings, unless the procedural order governing the proceeding provides otherwise.

(2) Applicants in designation proceedings shall include, with the application for designation, prefiled testimony establishing a prima facie case for designation.

AUTH: 69-3-822, MCA

IMP: 69-3-103, 69-3-840, MCA

### COMMENTS:

While the Companies agree that the public interest is served by the establishment of consistent procedural rules, it would appear that the assumption that ETC designation constitutes a contested case, requiring the adoption of formal and time-consuming procedures, undermines efficient decision-making, and overburdens the process. The Companies submit that the initial application for ETC status should itself present a prima facie case for designation, and that comments solicited from interested parties would provide an adequate basis upon which to make the appropriate factual determination.

### NEW RULE IV DESIGNATION AND MAINTENANCE -- SUPPLEMENTAL PROCEEDINGS

(1) For good cause demonstrated, the commission may grant eligible telecommunications status to an applicant or affirm an existing carrier's eligible telecommunications carrier status notwithstanding inability of the applicant or existing carrier to demonstrate that the provisions federal and Montana laws including these rules or the provisions of assurances given at the time of the application or review of status will be met. In such cases a supplemental proceeding will be commenced at a time designated by the commission, generally not to exceed one year from designation or review of status. The commission may revoke the applicant's or existing carrier's status if the applicant or existing carrier is then unable to establish that it meets the provisions of federal and Montana laws including these rules or the assurances that

# Mid-Rivers Cellular Service Area

