

MEMO

February 18, 2005

To: Commissioners, Martin, Kate
From: Mike Lee
Re: Mid-Rivers Cellular ETC Petition: Docket No. 2003.8.105

Introduction and Procedural Background

Cable & Communications Corporation d/b/a Mid-Rivers Cellular (MRC) petitioned the Montana Commission (MPSC) on August 5, 2003 for designation throughout its service area as an eligible telecommunications carrier (ETC).¹

Intervention petitions were received on October 3, 2003 from the following parties: the Montana Consumer Counsel (MCC), the Montana Independent Telecommunications Systems (MITS), Montana Telecommunications Association (MTA), Range Telephone Co-op, (RTC) and Ronan Telephone Company.

A summary of the extensive procedural history for this docket follows. A procedural order was issued October 28, 2003 setting a February 11, 2004 hearing date. MRC filed on November 7, 2003 to both revise the hearing date and to hold public hearings at various sites throughout its service region. Pursuant to the procedural schedule, MITS, MTA and the MPSC staff served discovery upon MRC. Disputes then arose over non-responses to discovery, including MTA's November 20, 2003 motion to compel responses. MRC motioned on November 24, 2004 for an order from the MPSC that sets a briefing schedule and a hearing date to address MTA's motion to compel data responses. MITS filed on December 2, 2003 a motion to compel data responses. MRC filed on January 22, 2004 its response brief to the motions of MITS and MTA. MTA filed on February 13, 2004 for a 30-day suspension of the procedural deadlines. MITS also filed on February 13, 2004 its motion to stay or suspend this proceeding. MITS then

¹ MRC's cellular petition appeared to regard analog services. (DR MITS -008(a)) MRC explained later that its application was to provide digital PCS wireless service (DR PSC -016(c)). MCC asserts that there is no difference between cellular and PCS services, just differences in frequencies and federal licenses. (DR PSC -027(c)) MRC also responded that its current cellular service is analog. (DR PSC -021(a))

filed on February 17, 2004 its reply to MRC's response to MITS' earlier motion to compel. MRC filed on February 24, 2004 its objection to MTA's motion. MTA filed its reply brief in support of motions to compel data responses. MRC filed on March 12, 2004 its objection to MITS' motion to stay or suspend proceedings. On April 22, 2004 the MPSC noticed a May 18, 2004 oral argument on discovery disputes. In an April 28, 2004 Notice of Commission Action the MPSC denied motions to stay or suspend this ETC proceeding. MITS, MTA and MRC filed on May 19, 2004 a stipulation to vacate the May 18, 2004 oral argument on motions to compel data responses. In a July 21, 2004 Notice of Staff Action the MPSC amended the procedural schedule and established an October 27, 2004 hearing date. The MCC filed on September 15, 2004 both a motion to file testimony and the prefiled direct testimony of Mr. Allen Buckalew. A Notice of Public Hearing was issued on October 12, 2004 and a hearing was held October 27, 2004 in Miles City. Initial Briefs were filed on December 17, 2004 by MRC, the MCC, MITS and MTA. Post-hearing Reply Briefs were filed on January 28, 2005 by the same four parties.

Although most post-hearing Memos are limited to the evidentiary record, this proceeding calls for a different approach. As MRC opted, at hearing, to have the full Commission decide its case, I have included a summary of the briefs, in addition to the usual evidentiary record. As it is always advisable to review the source material, we can also route the application, testimony, discovery, transcript and the briefs if desired.

The below summarizes MRC's application and the MCC's testimony. MRC's responses to the data requests (e.g., DR PSC) of MTA, MITS and the MPSC are included along with cites to the transcript (TR). A summary of the briefs follows. I conclude the Memo with a discussion. There are four attachments to this Memo: 1) Section 214(e), 2) The FCC's ETC rules (54.201 through 54.207), 3) part of the MPSC's Final Order in Western Wireless D2003.1.14 and 4) a glossary of acronyms used in this Memo.

Applicant

MRC

MRC did not submit prefiled direct testimony. MRC's August 6, 2004 Petition contains the following assertions in support of its request to be designated an ETC. The

MRC licensed service area includes certain of Mid-Rivers Telephone Cooperative's (MRTC's) exchanges and certain of Range Telephone Cooperative's (RTC's) exchanges.² The 15 MRTC exchanges include: Ekalaka, Baker, Carlyle, Richey, Lambert, Circle, Jordan, Lindsay, Fallon, Bloomfield, Plevna, Rock Springs, Musselshell,

² MRC's services cover areas, and it has customers, that are located outside of the State of Montana. In its petition, MRC seeks designation for all of MRTC's study area but has insufficient information to determine whether it will serve RTC's entire study area. (DR MITS -003(a), (b)) MRC explained that it has only one study area in Montana which includes its traditional exchanges." (TR 80) MRC explained that it has almost doubled the service area proposal from its original application. (DR PSC -016(a)) MRC seeks, however, ETC designation throughout the entire study area of MRTC and the entire study area of RTC. (DR PSC -014(d)) MRC explained that its signal coverage does not cover the entire wireline exchange area for each exchange for which it seeks ETC designation. (DR MITS -001(a)) MRC explains that it clarified its application for ETC status, for the entire study areas of MRTC and RTC: 1) to avoid administrative costs associated with disaggregation and 2) to avoid having to reapply if and when MRC serves "unserved" areas. (TR 42) MRC asserts that it has no obligation to advise the Commission of any changes that it makes to its application that impact the physical service area. (TR 49) MRC clarified that its Application (Exhibit No. 1) does not just seek ETC designation in the circled areas (e.g., Sand Springs) but in the entire study areas of each of MRTC and RTC; however, the exhibit does not represent the entire study area of RTC. (TR 43, 44) Later, MRC also explained that the circles by and large represent the licensed "CGSA" areas that MRC will serve. (TR 54) MRC also explained that it may serve areas outside of the circled areas if there is no other "B side carrier" wireless provider; for example, Verizon is the "B side" carrier for Wibaux and MRC cannot provide service in Wibaux despite the fact that Verizon provides inadequate wireless service there (TR 57-58) Nor can another wireless carrier such as Sagebrush or Verizon compete in the areas that MRC serves. (TR 64-65) However, MRC was unclear if any of these restrictions apply to PCS service providers, what MRC labels "digital cellular." (TR 67)

At hearing MRC asserts to have clarified in data responses to its original application its intent to amend its initial application. If the MPSC decides that the original application is for the circled areas in its application, then there appears need to disaggregate MRTC's and RTC's areas, an outcome that caused MRC no apparent grief. (TR 89-90)

MRC asserts to not have interconnection agreements with service providers other than Mid-Rivers Telephone Cooperative. (DR PSC -009; see also MRC's response to DR MTA -042.) MRC explains what RSAs are in relation to C.F.R. 22.909(b) and 22.947. (DR PSC -014(e)) For calls that originate with MRC and terminate to a Mid-Rivers Co-op customer there will be a \$.04/minute reciprocal compensation rate, as there will be for traffic that flows in the reverse direction; MRC will not exchange local traffic with Qwest, Nemont, Western Wireless or Verizon. (DR PSC -017(c), (d), (e)) Later, MRC explained that it has an interconnection agreement with RTC. (TR 49)

Melstone and South Wolf Point.³ The 2 RTC exchanges include Broadus and Ashland. An exhibit illustrates MRC's service area.

MRC asserts to have met all of the statutory requirements to be designated an ETC. It asserts that its designation will serve the public interest (PI hereafter) as it provides customers a choice of providers and technologies by allowing MRC to upgrade and improve its service through the use of Universal Service Funds (USFs).⁴

As for the requirements that it must satisfy to be designated an ETC, MRC asserts that its coverage area accords with the licenses the FCC granted and that includes portions of Rural Service Areas (RSAs) 3, 4 and 10 and part of the Northern Cheyenne Indian Reservation.⁵

³ In hearing, MRC "revised" where it seeks designation "to exclude" the competitive areas of Glendive and Sydney. (TR 80-81) If feasible, and if approved by the FCC, MRC will serve unserved areas near or contiguous to its present service area (e.g., MRC recently expanded service to Broadus, Ashland and southern Carter County) (DR PSC - 006(b)) MRC explained that its build up (sic) plans for unserved areas are proprietary unless the Commission designates MRC as an ETC and imposes requirements on MRC to provide such information; MRC adds that providing digital service is its highest priority. (TR 50-51) MRC explains what the 1996 Act requires (allows) as for the use of federal universal service funds (FUSFs). (TR 51, 65) As for its obligation to serve the population that is unserved, MRC explained that it will provide service by means of its own facilities or by resale. (DR PSC -020(a)) In response to a question about its performance for advanced or broadband service offerings, MRC responded that its current cellular service is analog. DR PSC -021(a))

⁴ MRC did not clearly explain the FUSF support that it would receive in relation to the amount of support the incumbent receives (TR 44-46); see, however, footnote # 25 below. MRC agrees that State Commissions may impose ETC eligibility requirements including, but not limited to, the public interest criteria imposed by the FCC. (DR MITS - 038(b)) MRC has no opinion on the number of service providers that can be supported in the exchanges for which it seeks ETC designation. (DR MITS -039(a)) As for whether it is capable of providing advanced or high-speed services as a public interest condition of being designated an ETC, MRC lists the nine supported services that it will provide. (DR MITS -041(a)) MRC explained that to satisfy the public interest it is sufficient to provide competitive choice and promises of future service upgrades. (DR MITS -002(a)) Cellular One, who serves the Baker area, is the only known competition in the areas for which it seeks ETC designation. (DR MITS -019)

⁵ MRC does not intend to petition the FCC for ETC designation on the Northern Cheyenne Indian Reservation. (DR PSC -011) The only rural telephone company that serves the Northern Cheyenne Indian Reservation is RTC. (DR MITS -003(c))

In its petition, MRC adds that there are nine services that it must offer. The nine services include: voice-grade access to the public network,⁶ access to “free of charge ‘local usage’” defined as an amount of minutes of exchange service,⁷ dual tone multi-frequency (DTMF) signaling or an equivalent, single-party service, toll limitation⁸ for qualifying low-income consumers and access to emergency,⁹ operator, interexchange and directory services.¹⁰ MRC asserts that it will provide each of these services within its cellular service area through its own facilities and the facilities of others.¹¹ MRC adds

Although the MRC Service Area Map attached as Exhibit 1 to the application includes the circled areas associated with the exchanges listed in the application, note that the map does not include all of the RSAs that MRC asserts are included in the MRC service area. Nor does it include the Billings or Great Falls, areas for which MRC holds personal communications services (PCS) licenses. (DR PSC -014(d))

⁶ MRC asserts that the voice equivalent level of service that it offers is consistent with industry standards and includes: minimums of 400Hz at +1 to -3dB and 2800Hz at +1 to -4.5dB. (DR MTA -014) MRC explained, however, that its signal coverage does not cover the entire wireline exchange area for each exchange for which it seeks ETC designation. (DR MITS -001(a))

⁷ By free local calling MCC means unlimited local exchange service. (DR PSC -031(a))

⁸ MRC will offer toll blocking (DR PSC -005(c)). As a result of providing Lifeline and Link-up services MRC will receive \$10/month support for non-Tribal customers and \$18.95/month for Tribal customers, and \$2/month for toll blocking services. In addition MRC will receive \$7.50 and \$15 respectively to connect non-Tribal and Tribal customers (DR PSC -007(b), (c)) MRC listed the components of the receipts. (DR PSC -015(e)) MRC will not receive universal service funds and Lifeline and Link up funds for high cost lines located on any reservation if not designated an ETC. (DR PSC -016(d))

⁹ 911 calls are routed to a secondary emergency telephone number designated by the PSAP (public safety answering point) that serves the area where the cell site is located; E-911 is not offered by any PSAP. (DR PSC -003(a)) MRC customers may be charged for portions of incoming calls including the return of 911 calls. (DR PSC -003(d)) MRC only tracks the initiation of 911 calls to PSAPs. (DR MTA -020) MRC explained that without the infusion of universal service funds it is unable to provide Phase 2 E-911. (TR 48) MRC affirmed that 911 calls are routed to a secondary emergency telephone number designated by the PSAP, adding that MRC customers may be charged for portions of incoming calls including the return of a 911 call. (TR 122-124)

¹⁰ For directory assistance dial 411 or 1+NPA + 555 1212. (DR PSC -005(a))

¹¹ See, however, MRC’s response to PSC -021(c)) wherein MRC responds that it “does

that wireless is a competitive “complement” to landline service but a “necessity” in the areas for which it seeks ETC designation. (TR 55, 61-62, 66, 86) As an aside, MITS agrees that mobility is a complementary service. (TR 86) In addition, MRC will advertise and promote its universal service offerings to ensure that customers are fully informed of MRC’s offerings.¹²

MRC asserts that its designation as an ETC is in the PI because it provides customers a choice of providers and communication technologies. MRC adds that it serves “fill-in” cellular markets, areas that were abandoned by the original cellular licensee.¹³ MRC adds that, pursuant to the Act (Section § 254(b)(3)), customers in this most rural area of Montana must be able to avail themselves of telecommunications services that are comparable to those in urban areas and at rates that are comparable to those in urban areas.¹⁴ MRC also holds that its service is essential to public safety and that its designation will contribute to its ability to meet public safety needs.

MRC asserts to have demonstrated its ability to meet the statutory requirements to be designated an ETC and that therefore its designation is in the PI. MRC adds that: “[d]esignation of it as an ETC complies with a specific principle that the preservation and advancement of Universal Service is based upon, i.e., “competitive neutrality,” which in the context of this petition would mean that neither cellular (wireless) or wireline technology would be unfairly advantaged or disadvantaged.”

As for the potential competitors have to fracture the market such that no competitor would have adequate revenue to pay for the operations, maintenance and the capitalization of infrastructure, MRC’s witness Anderson responded that any rules that

not provide free service” just as wireline companies do not offer “free” local service. Staff would note that because MRC had two responses numbered PSC -021(c), it is the first of these two responses that is referenced.

¹² MRC describes the calling plans that it will offer. (DR PSC -003(d) MRC will provide information on Lifeline and Link-Up via print advertising, to county courthouses and to Action for Eastern Montana (AEM). (DR PSC -004(a))

¹³ If after an allowed 5 year period the original licensee fails to serve the entire market, other entities can petition to “fill-in” those unserved market areas. (DR PSC -001(a))

¹⁴ MRC offers the same rates to residential and business customers. (DR PSC -010)

establish the number of competitors based upon population density trends on “dangerous territory.”¹⁵ (TR 68-70) Anderson emphasized that wireless service is a complementary service to landline: people do not disconnect wireline service when they take cellular service.

MRC was asked about its “patronage credits.” (TR 77-79, 114-121) If MRTC’s financial health allows, MRC will distribute annually such credits. The patronage credits that were “allocated” and that are for “retirement,” in 2003, although not “typical,” were respectively about \$3.75 and \$1.35 million, or about \$200 per subscriber per year. MRTC receives about \$600 per customer per year in federal USF (FUSF) support. MRC was also asked about the relevance of rules to assure that those companies that are designated as ETCs are committed to provide universal service. (TR 85-87).

Prefiled Testimony

The MCC submitted the only prefiled testimony in this docket.

Montana Consumer Counsel: Mr. Allen Buckalew

Mr. Buckalew’s September 15, 2004 testimony serves to analyze MRC’s request to be designated an ETC. He testifies that his analysis and recommendations apply to any wireline or wireless carrier that seeks ETC designation. He adds that the purpose of ETCs is to increase subscribership (pp. 4-5). He adds that with only one carrier there may be no competition in an area or for high-cost customers, which results in no market forces to drive down costs.¹⁶ (p. 6) He also adds that in order for competition to work for all Montanans alternatives to the LEC need to exist in each exchange area. ETCs must also know the rules.

Buckalew testifies that ETCs are needed in order to provide to customers the nine services that they would not otherwise receive. (p. 5) He recites the nine supported services that ETCs must provide and the requirements in Section § 214(e) to designate ETCs in rural and in non-rural areas. He testifies that the MPSC has examined the

¹⁵ Again, MRC identifies Cellular One (in the Baker area) as the only known competition in the areas for which MRC seeks ETC designation. (DR MITS -019)

¹⁶ MCC’s interest in increased competition is to lower rates for consumers and to reduce costs. (PSC -025(c))

possible “public benefits” derived from designating multiple ETCs and adds that multiple carriers will improve the competitiveness of local exchange markets.¹⁷ (p. 5) He emphasizes that the purpose of universal service, which dates to the Communications Act, is to get service to all consumers. (TR 137, 142) If MRC shows that its application is in the PI and if it agrees to the conditions that are imposed on the existing ETC, then he would designate MRC as an ETC. He notes that the FCC has found that wireless carriers must be considered for ETC status. The MCC adds, however, that while it does not want universal service funding to cease it should serve the purpose for which it was intended: mobility is not a PI criterion but if it were, it is one that the wireline company could not satisfy. (TR 153) Pursuant to the FCC’s May 8, 1997 Universal Service Report and Order, a state PSC must designate a common carrier that complies with Section § 214(e)(1) as an ETC. State PSCs shall permit an ETC to relinquish its designation in an area that is served by more than one ETC.

As there are no Montana rules for ETCs, Buckalew recites the MCC’s prior recommendation to include in rules an annual “check-up” to ensure that ETCs undertake the MPSC’s universal service policy goals.¹⁸ Existing ETCs should be assured continued ETC status if the check-up demonstrates that they are undertaking these policy goals. He lists five criteria that ETCs should initially, and on an annual basis, demonstrate to have met:

1. An ETC must be willing and able, and must certify its commitment, to provide to any requesting customer’s location within the designated service area the defined services supported by universal service;¹⁹
2. Each ETC must show that it advertises the availability of such services and the charges;

¹⁷ MRC has not demonstrated to the MCC that its application is in the PI. (DR PSC - 024(d)) MCC holds that in Montana the same PI test should apply to rural and non-rural carriers. (DR PSC -025(d)) Previously designated ETCs should have their designations reversed if they fail to satisfy the requirements that MCC proposes. (DR PSC -026(d))

¹⁸ By “annual check-up” the MCC means that all ETCs and competitive ETCs (CETCs) must ensure that they are following all of the PSC’s ETC rules. (DR PSC -026(b))

¹⁹ MCC adds that the obligation to serve “any” customer is without aid of construction and the Commission decides if deposits are required. (TR 126-128)

3. An ETC must provide the services at not more than the MPSC authorized maximum stand-alone rates²⁰ for the defined basic local exchange telecommunications service, and must meet all service quality and provision rules established by the MPSC for universal services;
4. Each ETC may satisfy its obligation to provide the defined services over a combination of its own facilities and resale (just not resale), and an ETC may provide the defined services, in part, by leasing of unbundled network elements (UNEs). The MPSC may want to also define the qualifying minimum percentage of owned facilities and, or, leased UNEs.
5. Each ETC must also show that its provision of service satisfies the PI by meeting the following six requirements (pp. 8-10):
 - a. Every requirement, including the above five criteria that is placed on ILEC ETCs, should be placed on new ETCs.²¹
 - b. Each ETC must designate the specific service areas it wishes to serve; however, MRC has not made clear the specific areas for which it seeks ETC status.
 - c. An ETC must document that each line for which it seeks compensation the customer is a "new" (not served by the existing ETC) or a "former" ETC customer (not using ETC services). Customers that add wireless services to existing wireline services should not be compensated.²²
 - d. Each ETC must file with the PSC, and advertise after approval, the exact ETC rates it offers for the service included in universal service in the ETC areas. This requirement continues so long as the market is less than "workably competitive."
 - e. Until the MPSC determines the ETC area "competitive" all ETCs must submit rates to the MPSC for approval. All rates must be less than or equal to

²⁰ By "stand alone," the MCC means basic local usage and access, and not vertical services. (DR PSC -031(b))

²¹ MRC states that it will adhere to quality of service guidelines or other PSC rules that apply to wireline carriers if these guidelines and rules are properly enacted and apply to all similarly situated carriers. (DR MTA -046) MRC asserts to analyze monthly traffic reports, to monitor the entire network on a 24 hour a day basis and to review each consumer complaint on a case-by-case basis. (DR MITS -016(a), (b)) MRC also produces weekly trouble ticket and repeat trouble ticket reports. (DR MITS -017(c)) By "every requirement" MRC did not mean that the requirements must be identical; thus, the rules in sub-chapters 33, 34 and 37 need to be applied equally with appropriate changes to reflect technology. (DR PSC -028(a), (b))

²² MCC asserts that there is no good public policy reason to support with USF multiple telephones to the same household. (DR PSC -031(e)) MCC adds "Why have an ETC that serves anything less than the entire population." (DR PSC -033(c)) MCC adds that the FCC fails to follow its own established rules in this regard. (DR PSC -032(a))

the MPSC established rate for unlimited local exchange service and Lifeline service.²³

- f. The MPSC needs to investigate and determine in a cost proceeding the appropriate single-party residential and single-line business rates. The MPSC should consider establishing statewide rates for the purpose of determining universal service support levels or area-specific rates. An incumbent's existing rates should be used in this proceeding. An appropriate transitional period should be established that allows a reasonable time period for end user rates for the supported services to be adjusted to these maximum rates. (p. 9)
- g. ETCs must have "Lifeline" and "Link Up" programs for low-income subscribers and rates must be on file in advance of its designation in order to satisfy the PI test. Regarding low income consumers, ETCs should adhere to the following (pp. 9-10):
 - i. Lifeline and Link Up programs must be offered that are not inconsistent with federal guidelines;
 - ii. the MPSC should determine a consumer's qualification for support;
 - iii. qualifying consumers should be able to select any ETC; and,
 - iv. Lifeline subscribers must not be allowed service from more than one ETC.²⁴

As a continuing PI requirement, Buckalew would require all ETCs to submit information to the MPSC on fund use that shows the amount of funds received and that explains how those funds were used to support specific universal services. (pp. 10-11) Fund use information would include: 1) total funds received,²⁵ 2) revenue received from benefited (basic and Lifeline) customers, 3) costs and expenses for specific universal services and 4) how the funds were applied. To demonstrate that its application is in the PI, an ETC must also designate a specific service area or areas that it wishes to serve; MCC adds that the specific areas for which MRC seeks ETC designation is unclear. (p. 8)

Consistent with federal rules, Buckalew's summary recommendations include: (1) that every requirement placed on other ETCs should be placed on MRC. (pp. 12-13)

²³ The same rates for the same local exchange service would apply; the ability to draw USF should come with the agreement by the cooperative wireline or wireless carrier to the Commission ETC rules, which should include setting a cap on USF service rates. (DR PSC -029(c))

²⁴ The MCC asserts that as a matter of "common sense" there is not more than one "lifeline." (DR PSC -030(a))

²⁵ MRC will receive \$50.35 and \$31.77 per line respectively for Mid-Rivers Telephone Cooperative and Range Telephone Cooperative. (DR PSC -018(a))

However, the same “general waivers,” such as the toll limitation waiver, if needed, should apply to MRC. The same quality of service standards and reports need to be filed by any designated ETC; (2) an ETC must designate the specific local service areas it wishes to serve with any necessary details on why complete coverage is not offered; (3) the ETC must provide the number of lines it captured from the ILEC and, upon request, must demonstrate whether each customer is a “former” ILEC customer or a “new” customer; (4) until competition exists in an area each ETC must submit its rates to the MPSC as well as its plans to advertise service; he adds that this case presents the MPSC with multiple ETCs (under the same umbrella) that have “never” undergone rate review by the MPSC. The MPSC therefore has no way to know if MRC’s or MRTC’s rates are higher than its costs; and (5) Lifeline and Link Up programs must be established for low-income subscribers and the rates must be filed with the MPSC prior to an ETC designation. The rates must be lower or equal to the existing “ETCs” (emphasis added) rates.

Buckalew concludes that his suggestions do not differ from the current federal rules and adds that these rules should apply on a state basis in the case that the MPSC determines that a state universal service fund is needed.²⁶ (p. 14) He concludes that since MRC has not demonstrated that its application is in the PI, MRC should not be designated an ETC. MRC is not an independent and competitive alternative to MRTC because it is an affiliate of MRTC and is 100 % owned. In effect, this application asks the MPSC to give ETC authority to the same company, albeit an affiliate.²⁷ He does not believe that this result is what Congress contemplated when it considered ETCs.

²⁶ The MCC asserts that the MPSC must be concerned about adding a CETC that simply increases the fund size without increasing universal service. (DR PSC -024(e)) MCC estimates that the fund size could rise from \$3.8 to almost \$6 billion dollars in subsidies. (TR 144) MCC adds “Why have an ETC that serves anything less than the entire population.” (DR PSC -033(c)) MCC also adds that an inflow of revenues to the State of Montana should not be considered as beneficial as the inflow results from carriers manipulating the system; the MPSC should instead be concerned about the sustainability of a larger than necessary fund. (DR PSC -025(a))

²⁷ Given that MRC and MRTC are affiliated, the MCC sees no benefit in designating MRC as an ETC. (DR PSC -024(b))

Public Witnesses

Numerous public witnesses appeared and submitted resolutions in support of MRC's petition. The public witnesses included: 1) Mr. Markuson, Carter County Commission, 2) Mr. Rieger, Fallon County Commission, 3) Mr. Kent Larson, McCone County Commission, 4) Ms. Estby, Powder River County Commission, 5) Ms. Jordan, Garfield County Commission and 6) Ms. Kelly, Custer County Commission.

Initial Briefs

The initial briefs filed by MRC, MCC, MITS and MTA will be reviewed in that order. A review of the reply briefs will follow.

MRC

MRC's initial brief includes six sections to explain how it has met the eligibility criteria of federal and state laws: 1) it is a common carrier; 2) it will offer the supported services; 3) it will advertise the supported services; 4) it will provide supported services via its own facilities and resale; 5) MRC identified and requested appropriate service areas, and 6) its filing is in the PI.

MRC's comments explain that its wireless service area is defined by "fill-in" (CGSA) licenses.²⁸ These licenses are not granted on a "market" basis but rather confine the wireless carrier to providing service to the specific geographic areas defined by engineering studies. Thus, MRC is fully built out. MRC adds that it will only build out further if it is granted additional "fill-in" licenses for "service areas or CGSAs" if an area was not being served by other cellular carriers who had authority to serve an entire Rural Service Area (RSA). As for Section 214 requirements, MRC asserts to be a common carrier, to provide the nine supported services and to advertise those services. Although MRC is licensed in the 400 to 2800 Hz range, it commits to operate within the 300 to 3000 Hz range, if required. MRC commits to provide E-911 once a PSAP submits a bona fide request. MRC will not provide equal access as it is not required. Once designated an ETC, MRC commits to advertise its "universal service offerings" through

²⁸ Although not included with MRC's petition, Newton's Telecom Dictionary defines CGSA to be a "cellular geographic service area."

media of general distribution. MRC will provide the supported services using both its wireless network and by the resale of landline carriers' services.

MRC comments to have identified and requested appropriate ETC service areas. MRC adds that the Act defines "service area" as an area that a state Commission defines and that is a rural company's study area. MRC's licenses are not granted on a "market basis" but are confined to the specific geographic areas defined by engineering calculations (height, location and transmitted power of towers). MRC intends to expand its cellular service territory by way of requesting additional licenses from the FCC. In anticipation of further expansion, MRC seeks "today" (December 17, 2004) designation within a territory defined with sufficient flexibility to accommodate plans for future expansion, conserving both public and private resources. The (apparent) alternative is "study area disaggregation," a process not chosen by either of MRTC or RTC. Thus, MRC identifies its ETC service area as the study areas of MRTC and RTC. MRC adds that an applicant need not prove that it can provide ubiquitous service prior to designation and must be afforded the same reasonable opportunity to develop its network as was allowed the incumbent. (citing MRC Exh 5 and DR PSC -014(d))

MRC devotes the balance of its opening brief to the PI, the second of the "two prong test" for ETC designations in an area served by a rural telephone company. (§ 69-3-840 M.C.A and 214(e)(2)) MRC holds that challenges to its designation reflect disapproval of federal rules. This hesitancy, however, will result in Montanan's being denied the benefits – access to wireline and wireless service -- that other consumers across the nation enjoy. In addition, MRC has held:

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. (DR PSC -002(c))

In this regard, MRC cites to certain of the public comments received in hearing and then ties the relevance of emphasized public safety, health etc., to the company's assertion that wireless services are "complementary" to landline services.

MRC next comments that the designation of wireless carriers will promote competition, a goal of the Act. The FCC recognized that wireless carriers bring “advantages” to the universal service program as they may offer service at much lower costs than for wireline service. MRC asserts that 214(e)(2) emphasizes competition and consumer benefits and not incumbent protection. MRC asserts that no party has demonstrated that consumers or ILECs would be harmed by MRC’s designation. In quoting Senator Dorgan and in citing the Fifth Circuit Court of Appeals’ *Alenco Communications, Inc v FCC* decision, MRC holds that the Act “requires” universal service goals to be accomplished through competition.

MRC’s initial brief mentions other PI benefits. It adds that it can offer consumers the benefits of mobility and greater access to 911. Second, MRC asserts that it will sign the Cellular Telecommunications and Internet Association (CTIA) Consumer Code for Wireless Service. As a signatory, MRC will provide to consumers: disclosure of rates etc.; service area maps; a 14-day trial period and contract terms with the right to terminate service for changes in contract terms; disclosure of advertising; ready access to customer service and prompt responses to inquiries and complaints and protect consumer privacy. MRC asserts that the FCC has recognized that the Consumer Code mitigates “any” concerns regarding service quality regulation.

As for the proper scope of a PI inquiry, MRC agrees that the MPSC has authority under federal law and state law to conduct a PI inquiry, but that the authority is limited and disallows the imposition of barriers that are discriminatory. In addition, “due process” precludes inequitable standards if they interfere with federal goals and standards (47 C.F.R. § 254(f)). In this regard, MRC generally opposes the MCC’s proposed standards and specially objects to the application of the “primary line” concept. MRC comments that “many” of the standards the MCC proposed are inconsistent with state law are preempted by federal law and their adoption will invite litigation.

MRC recommends adoption of FCC guidelines. In so doing, and in reference to the “Federal-State Joint Board on Universal Service, Virginia Cellular” (sic) petition for designation as an ETC, MRC recommends that the MPSC weigh the benefits of increased competitive choice, the impact of the designation on the universal service fund, the unique advantages and disadvantages of the competitor’s service offering, service quality

commitments and the ability to satisfy the obligation to serve the designated areas within a reasonable time frame. MRC asserts that in the Virginia Cellular case the FCC considered as PI guidelines the benefit of access to otherwise unavailable communications facilities, mobility, cream skimming, impact on the federal universal service fund, access to emergency services and the size of local calling scope. Except for the federal fund size, MRC holds that these guidelines should be the basis of an initial PI inquiry.

MCC

The MCC recommends that the MPSC not approve the ETC designation for MRC as it is not in the PI. The MCC recommends denial although “choice of providers” is in the PI. Because MRC is a wholly-owned cellular affiliate of MRTC, it is not an independent and competitive alternative.²⁹ The MCC’s initial brief reviews the MCC’s prefiled testimony and then presents its comments. First, the MCC holds that this case is not normal because the applicant was not required by the MPSC’s procedural order to prefile direct testimony and its “live” testimony was in the form of supplemental testimony for which the intervenors had no notice, no opportunity to do discovery and is therefore a violation of due process rights. The disputed record in this case, that should in turn be excluded, includes MRC’s responses and the objections to discovery by MTA, MITS and the MPSC and all live testimony of MRC’s witnesses.

As for the statutory framework, the MCC reviews the requirements with which a petitioning ETC must comply. In citing the Fifth Circuit (*TOPUC v. FCC*), the FCC’s Virginia Cellular order and the Federal-State Joint Board’s Recommended Decision on ETC designations the MCC also explains why the MPSC has the authority to impose eligibility standards beyond those specified in Section § 214(e).

The MCC’s Buckalew testimony made five general recommendations: (1) place every requirement on MRC that is placed on other ETCs (e.g., service quality standards, same toll limitation waiver); (2) an ETC must designate a “specific local service area or

²⁹ MRC’s designation is not in the PI because: MRC has not filed Lifeline rates; MRC offered no method to determine that Lifeline customers of MRTC will not receive cellular service at the same time; MRC did not explain how it will advertise; MRC’s proposal does not include free local calling; MRC’s residential rates are significantly higher than landline service rates.

areas”; (3) an ETC must report on the lines it captures from the incumbent ETC and the ETC must demonstrate that the customer is a “former” customer of the incumbent or a “new” customer; (4) an ETC must submit its rates to the MPSC for approval unless the ETC area is competitive; and, the ETC should submit its advertising plans; (5) the ETC must establish Lifeline and Link-Up programs and file such rates before designation as an ETC – the rates cannot exceed the incumbent’s rates.

In its brief, the MCC makes three general arguments. First, MRC’s petition should be denied because it has not sustained its burden of proof. The MCC holds that both state and federal law place the burden of proof on the applicant and because MRC filed so little information there is no evidentiary basis upon which the MPSC can issue a sustainable order approving MRC’s petition. Buckalew characterized this case as unlike any he has seen in 30 years. Whereas MRC and MRTC argue that the burden of proof is satisfied by its initial application and that “contested case” would undermine efficient decision-making and overburdens the process, the MCC holds that this position ignores the requirements of Montana law and fairness. The MCC also holds that this position ignores the MPSC’s obligation to accord all parties the right of due process. In view of the legal requirements applicable to contested cases, burden of proof and due process the MPSC should “reject” MRC’s ETC petition.

Second, the MCC argues that MRC has not clearly established the area for which it seeks ETC status. MRC’s petition requests ETC status “throughout its licensed service area” within the service areas of its parent and RTC and it illustrated its application with an exhibit showing 12 “circles.” Over the objection of intervenors in hearing MRC “clarified” that in a data response to the MPSC (DR PSC -014) it sought to obtain ETC status throughout the MRTC and RTC areas. The MCC finds MRC’s attempt to “amend” its original application through a data response to not be supported by the evidentiary record. In addition, there is no record to show that MRC even knows the extent of the area for which it seeks ETC designation. And, MRC may not lawfully provide cellular service outside the “circles.” The MCC concludes that it is not in the PI to allow MRC to double dip into the FUSF.

Finally, the MCC argues to reject MRC’s petition as it is not in the PI. The MCC argues that MRC has failed to respond to the MCC’s five general recommendations and

MRC is unwilling to comply with consumer protection requirements that the MPSC may impose. Because of MRC's and MRTC's affiliate relationship each company would receive about \$600/customer/year in subsidies, a result that does not further universal service objectives. In addition, MRTC pays "patronage credits" to its member-customers. The MCC also recommends denying the MRC's petition within the "circles" as it already provides service to 100% of such licensed areas. The MCC mentioned that Nebraska's PSC denied an ETC application due to the failure to prove that the designation is in the PI.

MITTS

MITTS endorses the MCC's Initial Brief and adds a few comments. First, MITTS holds that until the hearing MRC was in danger of being subjected to a successful motion for summary judgment given the absence of any supporting testimony. However, although the MPSC helped MRC to create a record, MRC presented too little information and there is simply no evidence on which the MPSC can base a sustainable order that approves of ETC status for MRC. Second, MRC's attempt to expand its ETC area is inappropriate both procedurally and substantively (having used a data response to do so) and must be denied. Third, the fact that MRC places so little importance on the PI should justify denial of its petition for ETC designation. For these reasons the MRC petition should be denied.

MTA

In its initial post-hearing brief the MTA submits three comments. The first is whether the MRC application is sufficient to permit a thorough record upon which a decision can be based. Second, whether to permit MRC to amend its application by means of data responses and the implications for future proceedings. MTA asserts that MRC's original application was limited to MRC's cellular service areas. Third, whether MRC has sufficiently met the PI requirements so as to offset any harm to the rural infrastructure that will result if rural telephone companies must compete with federally funded wireless entities offering competing, but lesser regulated, services in their high cost territories. MTA asserts that MRC's application is important since it is the first such application in Montana for a rural study area. MTA adds that based upon documents it had submitted and that estimate the annualized high cost support impacts for the nation

and for the state of Montana, that the MPSC should carefully scrutinize applications for ETC designations. MTA concludes that MRC's application was inadequate and should be denied. The following expands on these comments.

First, as for MTA's point that MRC's application failed to provide a sufficient record, MTA recites the procedural mechanism that lead to a hearing without any prefiled testimony from MRC. This resulted in both formidable challenges for the cross-examining parties and in an inadequate record. Witnesses could not verify if MRC's PCS licenses extended to Wibaux. Although MRC testified to own 700 MHz licenses, the only relevance of that ownership emerged from the MCC's witness who held that MRC could receive USFs for such service. As confirmed by MRC, the CGSA license, can be considered a "secondary" license, is limited to small coverage areas and is designed to limit interference with the primary licensees (an apparent reference to the "A and the B" licensees). Despite these limits MRC repeated its intent to use USFs to expand its coverage. MTA doubts that MRC can serve territories underserved by the "A or B" licensee. MTA also holds that MRC inadequately addressed "disaggregation," a question with enormous ramifications. MTA holds that since "none of the cross examining parties were aware of MRC's intention to avoid disaggregation by modifying its application through data responses, they were unable to effectively pursue this avenue of questioning at hearing." An inadequate record was the result.

Second, whereas MRC's original application sought designation for its CGSA license areas, the application was expanded in response to data requests to include the entire study areas of MRTC and RTC, exclusive of any of the MRTC competitive areas such as Glendive or Sydney.

Third, and finally, MRC has not shown how its designation would promote the PI (citing Section 214(e)(2)). As the FCC states in its Virginia Cellular decision the designation of an ETC based upon a Section 214(e)(1) showing of compliance will not necessarily be consistent with the PI. MTA adds that allowing MRC's parent MRTC and MRC to each collect \$600 per household for unproven promises of service expansion is contrary to the PI.

Reply Briefs

The reply briefs filed by MRC, MCC, MITS and MTA are next reviewed.

MRC

MRC's reply brief responds, after a brief introduction, to the numerous issues that intervenors have raised. All are reviewed in turn. First, MRC finds no merit in those intervenor comments that MRC has failed to meet its burden of proof. Those arguments are without merit, in part, because there is no legal obligation to submit prefiled testimony. MRC asserts that the record before the MPSC is sufficient as the record's documents fully disclose all of the relevant facts relating to MRC's petition. MRC's four sets of data responses were admitted into evidence. In hearing, sufficient testimony was received by cross examination to create a more than adequate record. The public testimony also supported MRC's petition.

Second, MRC asserts to have identified the appropriate ETC designation areas. MRC explains that while its service area is confined by FCC licenses, in the past it has expanded its cellular service territory by requesting additional licenses. MRC labels as "completely false" MTA's suggestion that fill-in licenses are secondary as its operations are entitled to the "same level of protection" as are other cellular licensees. MRC has "repeatedly explained" that it is the licensing process, not its operations, which is the subject of prior licensing rights. The geographic area included in any cellular carrier's CGSA 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." Continuing, whereas MTA holds that MRC's cellular coverage cannot be expanded, MRC responds that it can and the record (see DR PSC -016) demonstrates that it has expanded its service area in this proceeding. MRC fully intends to provide "supported services" throughout its cellular service area and in any new expansion territory and, it seeks to do so by the most efficient means possible: MRC "today seeks ETC designation within a territory defined with sufficient flexibility to accommodate plans for future service expansion, conserving both public and private resources." (emphasis added)

MRC adds that its approach avoids the disruptive and time-consuming process of study area disaggregation. It does so because the FCC's rules define an ETC's service area as the study area of rural telephone companies which, in turn, requires federal and

state action to "...disaggregate" the study area of a rural company when an ETC is designated for an area less comprehensive than the entirety of the specific study area." Thus, MRC identifies its ETC service area as consisting of the study areas of MRTC and RTC (citing DR PSC -014(d)). MRC notes that FCC policies preempt the MPSC from prohibiting MRC from relying on resold services and from requiring MRC to provide ubiquitous service prior to its designation as an ETC. MRC adds that the FCC only obligates an ETC to extend its network to serve new customers upon reasonable request. In concluding this second issue, MRC asserts that while it "has not amended or modified its original Petition for ETC designation" (emphasis added) it has clarified that it does not seek disaggregation of the existing study areas (DR PSC -014(d)).

Third, MRC comments assert to have demonstrated that its designation as an ETC is in the PI. MRC restates that the public health and safety elements of the PI inquiry are well served by its designation (e.g., see DR PSC -002(c)). MRC asserts that the MPSC should give "additional" weight to the public testimony on the PI holding that wireless services result in increased economic development, competition, choice, public safety and welfare. MRC restates that wireless services are complements to landline services, in the two study areas. Areas of eastern Montana which at present do not have telecommunications services may at long last be able to obtain them. MRC holds that both Congress and the FCC believe that competition is in the PI and that the MCC acknowledged that increased choice is in the PI. In this regard, MRC holds that Section 214(e)(2) emphasizes competition, not incumbent protection and the Act requires that universal service goals be achieved through competition, as they are dual mandates. The Fifth Circuit Court called the "primary purpose" of the Act to herald and realize a new era of competition in the market for local telephone service. (*Alenco Communications, Inc. v. FCC*). MRC asserts that it offers the "benefits of mobility", which the FCC recognized, in its Virginia Cellular Order, as benefiting consumers. Thus, the record requires the MPSC to designate MRC as an additional ETC.

Fourth, the MPSC must summarily reject arguments that because it already provides service that its petition be denied. MCC's contention that the sole purpose of universal service support is to increase subscriber penetration must also be rejected. MRC cites to an FCC order on the subject of competitive neutrality:

“...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. A principal purpose of section 254 is to create mechanisms that will sustain universal service as competition emerges....For this reason, we reject assertions that competitive neutrality has no application in rural areas or is otherwise inconsistent with section 254.”

Fifth, MRC asserts that the MPSC cannot discriminatorily adopt ad hoc rules or conditions in this proceeding. Efforts to make this docket a quasi-rulemaking should be rejected and the MPSC must apply legal standards found at Section 214(e) and 69-3-840(3).

Sixth, MCC's recommended ETC rules are improperly in this proceeding

Seventh, MRC asserts that there is nothing in TOPUC v. FCC, the FCC's Virginia Cellular order or in the Federal State Joint Board's Recommended Decision that allows the MPSC to circumvent state law. Nothing in the TOPUC discussion addressed wireless carriers. The FCC's Virginia Cellular order acknowledged that "it" was not prohibited under the Act from incorporating an applicant's voluntary commitments into its order as conditions of ETC designation. The Joint-Board's recommendations are only advisory.

Eighth, MRC's use of universal service support is regulated by federal law and the MPSC must therefore reject intervenor recommendations to deny it ETC status based upon a lack of an affirmative showing of how MRC will invest the support received. The controlling statute is Section 254(e). The ownership of MRC is entirely irrelevant and may not be considered by the MPSC. Thus, intervenor concerns about "double-dipping" should be rejected by the MPSC. As for those intervenor comments that USF's MRC receives will be forwarded to MRTC and paid out as "patronage credits" MRC cites to Section 254(e)'s requirements and then asserts that MRC's "profitability" has no impact on credits paid to MRTC's patrons. As for allegations of "cream-skimming," MRC responds that there is no area, city or town in the two study areas which by definition allows for "cream-skimming." Therefore any such contentions should be dismissed. As for intervenor concerns over the adverse impact upon the FUSF, MRC explains that the amount that Montana will draw is less than 2% of the USAC's projected amount for first quarter 2005; if MRC were to "capture" each MRTC customer, the impact would only

amount to .217% of the USAC estimate. Thus, arguments that express concern about the adverse impact on the FUSF should be rejected.

Ninth, as for the MCC's contention that the MPSC can limit a CETCs receipt of USFs to "growth lines" MRC responds that the MCC is plainly mistaken. The FCC has unambiguously confirmed that FUSF support is for every working loop, whether it be a captured or a second line. In its order designating Western Wireless as a competitive ETC on the Pine Ridge Reservation the FCC wrote:

...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 the lines it continues to serve.

The FCC reached a similar decision in its recent order on Virginia Cellular's petition.

MCC

The MCC first recites the circumstances surrounding MRC's petition and then makes two main arguments, that MRC has not satisfied its burden of proving that it meets the 214(e) requirements and that its designation is in the PI. First, and as for background, the MCC holds that the areas within which MRC is licensed by the FCC to provide cellular service do not have the same spatial boundaries as the service areas of the two cooperatives but is limited to the 12 specific areas MRC depicted on a map. The MCC continues to object to the admission of live testimony and data responses on the grounds mentioned in the MCC's initial brief.

Second, as for MRC's burden of proof, the MCC holds that the statements of MRC's counsel in its petition and in a post-hearing brief do not constitute evidence. The MPSC must have reliable and substantive evidence in its record. But, it does not have such evidence in this case. If MRC's petition is granted, MRC would have access to considerable FUSF support and without any probative evidence that it meets the most basic legal prerequisites.

Third, the MCC asserts again that MRC has not shown that its petition is in the PI, and in this regard makes the following arguments. As for MRC's comment (initial brief) that its designation will provide a choice of providers and technologies, the MCC

responds that MRC already serves 100 % of the area in which it is licensed. Furthermore, the choice of providers is limited to two affiliated companies in the MRTC area. The MCC doubts that MRC will give its parent corporation any competition. As for incumbent protection, the MCC holds that the MRC's brief mischaracterizes the MCC's testimony. The MCC asserts to have not advocated the *de facto* retention of a single ETC, the incumbent, and that CETCs should not be designated. As for the impact of the designation of CETCs on the FUSF, the MCC has consistently advocated that 47 C.F.R. 307(a) should be enforced. In addition, MRC wrongly construes the MCC's testimony as supporting a "primary line" concept. The MCC finds MRC's argument that Congress has prohibited a primary line concept to be incorrect.³⁰

The MCC agrees with MRC that as part of the PI the MPSC should adopt the FCC's guidelines, including an inquiry into the impact of the designation on the FUSF. This is of import to the MCC because MRC has so far refused to provide information on how many more customers would receive its parent corporation's support of about \$600/year/customer. As for PI standards that the MCC recommends, that MRC opposed as being inconsistent with state and federal laws, the MCC notes that MRC's comment are not backed by any analysis. As for the ability of MRC's wireless service to, by means of mobility, serve unserved or underserved areas, the MCC only observes that MRC can serve customers in unserved or underserved areas by means of either MRTC's or RTC's landline facilities. If, however, the areas are unserved or underserved by MRTC or RTC, then they do not have facilities and the MCC, in turn, questions how MRC can provide either mobility or landline service. As for MRC's intent to become a signatory to the CTIA Consumer Code, the MCC observes that the Code is entirely voluntary and noncompliance carries no penalty. The MCC concludes that designation of MRC as an ETC would provide few public benefits while it would add costs that must be borne by the American public. Therefore, the petition should be denied.

³⁰ MRC had cited P.L. No. 108-417, Title VI, Section 634 of the Consolidated Appropriations Act of 2005 that 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." The MCC asserts that the section of the Appropriations Act actually limits the FCC's use of funds and that 47 C.F.R. 307(a) remains intact.

MIT S

MIT S' reply brief asserts to fully support the arguments contained in each of the MCC and MTA reply briefs. MIT S characterizes the procedural mechanism by which MRC's filing was processed to be unique although the "missteps" needed a remedy prior to the hearing. Because of the absence of pre-filed testimony by MRC, the opponents of MRC's petition have been denied due process safeguards that are normally in MPSC contested case proceedings. MIT S recommends granting the motions made by the opponents in the hearing. If the MPSC is not inclined to rule in favor of MIT S and other opponents, then the MPSC should deny the MRC petition on the grounds that it does not satisfy state and federal law.

The balance of MIT S' reply brief explains why MRC's petition should be denied. MIT S' main argument is that MRC has not provided sufficient evidence to show that granting its ETC petition is in the PI under state and federal law (69-3-840 and 214(e)(2)). MIT S cites to a recent South Carolina PSC decision that describes the historical evolution of FCC's view of the PI standard. After the passage of the 1996 Act the FCC applied its own lenient PI standard where a state commission lacked jurisdiction. The application of such standard led, however, to concerns about the exponential growth in the FUSF. As Commissioner Martin stated "*...I am hesitant to subsidize multiple competitors to serve areas in which costs are prohibitively expensive for even one carrier...*" Recently, the FCC has developed and applied a more stringent PI analysis (citing to its orders in the Virginia Cellular and Highland Cellular petitions). The FCC's PI determinations also require a "fact-specific balancing of the benefits and costs" including such factors as: 1) increased competitive choice, 2) impact on the FUSF, 3) whether the benefits outweigh the harms, 4) quality of service commitments and 5) the CETC's ability to provide the supported services within a reasonable time frame.

MIT S also cites to the shift in policy by the Federal-State Joint Board on Universal Service (FSJB). The FSJB recommendations: 1) encourage a rigorous review of ETC applications by states; 2) include a core set of minimum qualifications including: a) adequate financial resources; b) commitment and ability to provide the supported services; c) ability to remain functional in emergencies; d) consumer protection and e) local usage. MIT S notes that states are "free to establish their own eligibility

requirements” besides those set by the FCC or recommended by the FSJB. MITS notes the MPSC’s support of a bill in the 2003 legislative session wherein MITS proposed a stringent set of technical and service quality standards. MITS interprets the MPSC’s draft ETC rules as favoring a rigorous review of specific technical and service quality standards.

MRC asserts to have satisfied the PI because: 1) MRC’s service is essential to public safety because “mobile phones” can be used when the customer is not at home; 2) designating MRC gives customers a “choice”; 3) MRC’s designation will promote competition; 4) MRC can broadcast its signal over a broader area than a wireline carrier; and 5) no consumers will be harmed by MRC’s designation. MITS responded that MRC’s petition does not come close to meeting any reasonable PI standard and, there is no guarantee that calls will traverse its network with reasonable reliability etc.

MTA

The introduction to MTA’s reply brief notes that because MRC’s application involves a rural company it is subject to strict regulatory scrutiny that includes a rigorous review of MRC’s minimum qualifications. One reason for such strict scrutiny is that a second ETC may relinquish its ETC status, abandoning its obligation to serve, which is of particular importance in rural areas where the economics necessary to support one provide may be difficult and support for two providers may prove impossible. Therefore, MTA identifies three questions that the MPSC must carefully evaluate.

First, the MPSC must determine whether designating MRC as an ETC is in the PI. MTA believes it is indeterminate, given the record, whether MRC has provided the services necessary to be designated an ETC. MTA asserts that whereas MRC’s original application was limited to MRC’s cellular service areas, it now seeks ETC designation throughout the MRTC and RTC study areas. MTA comments that MRC is a secondary licensee, providing service only where the primary licensee has abandoned areas and therefore MRC cannot expand its coverage without first receiving FCC permission. MTA notes the maps that MRC submitted show MRC’s existing coverage areas are small parts of the two study areas in question. MTA adds that MRC has pending no application to expand its license areas. Since MRC seeks ETC designation for the entire study areas

of MRTC and RTC and will provide service outside the existing coverage areas exclusively through resale, MRC cannot be designated an ETC for these study areas. MTA finds no merit in MRC's arguments that its designation by the most efficient means possible and throughout the study area is necessary to avoid the disruptive and time-consuming process of "study area disaggregations." MTA finds no merit because, in part, MRC is totally reliant upon RTC and MRTC for services outside of its limited cellular circles and the objective cannot be met if the incumbent ETC relinquished its status. In addition, MTA finds MRC's argument, that a study area-wide designation is needed to avoid disaggregation, to be misguided as the question of "disaggregation" and its consequences has not been fully considered due to the changing nature of MRC's ETC request. MTA adds that while MRC's parent chose not to disaggregate its study area, it is not known why MRC's parent chose not to disaggregate, an issue that should not be glossed over. Thus, because MRC cannot serve the entire areas for which it requests ETC designation without relying exclusively on resale for those areas outside its "limited cellular license areas" it cannot be designated an ETC.

Second, MTA holds that MRC fails to show why its designation would promote the PI. Whereas early on in its deliberations of ETC petitions the FCC found that designations were "**per se**" in the PI, the FCC's current policy, as expressed in its Virginia Cellular decision, expressed concern that compliance with 214(e)(1) would not necessarily be consistent with the PI. In this regard, MTA cites to FCC Commissioner Abernathy's express concern with the sustainability of the FUSF. MTA then cites to a recent January 7, 2005 South Carolina PSC (SCPSC) order that denied the petition of "FTC," a wireless carrier, to be designated an ETC. SCPSC's denial was based on concern over growth of the FUSF. MTA also holds that because MRC is "fully built out" no additional build-out is planned. (p. 7) MTA agrees with the MCC's comment that it is inconsistent with the PI to subsidize MRC for providing service in the entire licensed service area given MRC already provides the service. MTA also concurs with the MCC comment that the petitioner is after subsidies to compete with a provider that is its "sole owner." MTA finds unpersuasive MRC's argument that its designation is necessary for public health and safety. MRC's argument is unpersuasive because MRC has already built out its coverage and USFs cannot improve the situation. As for the testimony of

(public) witnesses, MTA comments that the testimony is irrelevant because MRC already provides the services they value and MRC is not proposing to expand or improve upon its service.

Third, MTA comments that MRC has failed to develop a record on which its designation can be justified. MTA holds that MRC failed to initially file sufficient information due to the need for clarity on the following matters:

1. Service Area: Whereas MRC seeks designation for the MRTC and RTC study areas, at hearing the MPSC indicated that MRC's original application had not been amended to request designation throughout these study areas.
2. Rates: The rates MRC may charge could vary by service territory.
3. Customers MRC Serves and USF: As MRC objected to discovery, there is no specific data, other than a \$600/year/customer estimate, on the total amount of USF in question.
4. Disaggregation Effects: MRC must at least have information on the effect of disaggregating MRTC.
5. USF Receipts: As MRC's parent company MRTC provides service to the same customer that MRC may serve, the total "take" for the two companies could be \$1,200/customer/year. There is no record to support MRC's claim that it will use these funds to expand or improve service.
6. Role of Affiliates: "The role of MRC's affiliated businesses, including its parent company, its PCS licenses and its 700 MHz licenses.

For the above reasons and other concerns MTA requests that the MPSC deny MRC's request to be designated an ETC.

Staff Discussion

First, I have attached to this memo 1) Section 214(e) of the Telecommunications Act of 1996; 2) part of the FCC's rules regarding carrier eligibility for FUSFs; 3) a section of the MPSC's recent Final Order in the Western Wireless (D2003.1.14) case and 4) a glossary to demystify the acronyms that plague this subject. These attachments

provide relevant background for decisions in this MRC docket and may be cited in any work session.

There are issues that should be discussed and considered for inclusion in the Commission's Final Order. For starters, we should discuss the issues in the Western Wireless (WW) Final Order (attached). While the evidentiary records are quite different, the WW Final Order contains requirements that the Commission indicated would be imposed on other ETCs. Abbreviated, the requirements from the WW Final Order that should be discussed include: 1) coverage obligations; 2) service quality monitoring; 3) Federal Universal Service Fund; 4) service package; 5) fund size; 6) fund size and funded lines and 7) network requirements and service quality standards. The intervening parties to this docket raised other issues, some of which overlap with the above issues that were addressed in the Commission's WW order. Although there may be others that are raised during the work session, the issues that these intervenors raised in this docket that should also be discussed include:

1. Public interest standard: The Commission has found (WW Final Order, p. 23) that ETC designations in rural areas call for a more rigorous PI evaluation.
2. Coverage:
 - a. MRC's amended petition: MRC's initial filing was amended in hearing by way of reference to a data response.
 - b. MRC's build out plans: MRC asserts that there is no geographic area in "the service area" that is not covered by its wireless signal (see DR PSC -020(a)), an assertion that has at least two interpretations (MRTC's and RTC's study areas, or the circled areas that were the point of MRC's initial application). However, elsewhere, MRC explained that its signal coverage does not cover the entire wireline exchange area for each exchange for which it seeks ETC designation. (DR MITS -001(a))
 - c. Intervenor arguments that since MRC's build out is complete, there is no need for more USFs (contrast 254(e)).

d. Northern Cheyenne Reservation coverage?³¹

e. Resale:

MRC may need to resell either MRTC's or RTC's retail services in areas not covered by its wireless signal. UNEs (unbundled network elements) may also substitute. The response to DR PSC -020(b) (also see TR 49-50) suggests that resale can be accomplished by means of purchasing reselling retail service without an interconnection agreement.

Second, MCC's reply brief poses the possibility of MRC having to resell in areas that MRTC and RTC do not serve.

f. The MCC argues that MRC cannot serve outside the circled areas as it has no license. (TR 157, lines 4-9 and TR 162)

g. Cream skimming: MRC's petition(s) involve cream skimming.

h. -104dBm: No evidence of having met this standard.

3. Competition: Relevance and implications. As an aside, MRC asserts that the only competition is in Baker (see footnote number 4).
4. Mobility: Discussion points include benefits/costs, necessity, complement, source of competitive supply, scope economies, and the comparable service argument. There is the public safety argument. It should not be an essential requirement for ETC designations.
5. Patronage credits: The MCC suggests it is wrong to have a \$600 rebate when \$ 200 is USFs (TR 169).
6. Rulemaking: Efforts to make this docket a quasi-rulemaking should be rejected.
7. Comparable services: MRC adds that customers in this most rural area of Montana must be able to avail themselves of telecommunications services that are comparable to those in urban areas and at rates that are comparable to those in urban areas.³²

³¹ MRC does not intend to petition the FCC for ETC designation on the Northern Cheyenne Indian Reservation. (DR PSC -011) RTC only serves the Northern Cheyenne Indian Reservation. (DR MITS -003(c))

³² MRC offers the same rates to residential and business customers. (DR PSC -010)

8. Supported service compliance: the offered bandwidth must be in the 300 to 3000Hz range; MRC must offer a certain amount of local usage free of charge.

The above issues may not be inclusive of all issues that will need to be discussed, but they should be adequate to get initial direction on drafting a Final Order.

the Commission, within such may order, any information mission may by order require, reports of engineers, and other ant to all agents of the Com- and its accounts, records, and requested by any such duly ith and aid the Commission in ion of finding in such manner n may require and direct, and e Commission for the purpose ave the full force and effect of Commission, with the reasons Commission shall be open to ie public. The Commission, in free to adopt any method of impair or diminish the powers

LINES.
 he construction of a new line ll acquire or operate any line, e in transmission over or by d line, unless and until there rthe Commission a certificate venience and necessity require operation, or construction and ended line: *Provided*, That no nder this section for the con- of (1) a line within a single part of an interstate line, (2) exceeding ten miles in length, r 221 of this Act: *Provided fur* on appropriate request being emergency service, or the without regard to the provi- discontinue, reduce, or impair a community, unless and until from the Commission a certifi- ure public convenience and ne- reby; except that the Commis- t being made, authorize tem- reduction, or impairment of duction, or impairment of serv- of this section. As used in this nnel of communication estab- upment, other than a channel interconnection of two or more r. That nothing in this section tificate or other authorization illation, replacement, or other upment, other than new con-

struction, which will not impair the adequacy or quality of service provided.

(b) Upon receipt of an application for any such certificate, the Commission shall cause notice thereof to be given to, and shall cause a copy of such application to be filed with, the Secretary of Defense, the Secretary of State (with respect to such applications involving service to foreign points), and the Governor of each State in which such line is proposed to be constructed, extended, acquired, or operated, or in which such discontinuance, reduction, or impairment of service is proposed, with the right to those notified to be heard; and the Commission may require such published notice as it shall determine.

(c) The Commission shall have power to issue such certificate as applied for, to refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof, or discontinuance, reduction, or impairment of service, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. After issuance of such certificate, and not before, the carrier may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, extension, acquisition, operation, or discontinuance, reduction, or impairment of service covered thereby. Any construction, extension, acquisition, operation, discontinuance, reduction, or impairment of service contrary to the provisions of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, the State commission, any State affected, or any party in interest.

(d) The Commission may, after full opportunity for hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier, party to such proceeding, to provide itself with adequate facilities for the expeditious and efficient performance of its service as a common carrier and to extend its line or to establish a public office; but no such authorization or order shall be made unless the Commission finds, as to such provision of facilities, as to such establishment of public offices, or as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall forfeit to the United States \$1,200 for each day during which such refusal or neglect continues.

(e) PROVISION OF UNIVERSAL SERVICE.—

(1) ELIGIBLE TELECOMMUNICATIONS CARRIERS.—A common carrier designated as an eligible telecommunications carrier under paragraph (2), (3), or (6) shall be eligible to receive universal service support in accordance with section 254 and shall, throughout the service area for which the designation is received—

Begin
 214(e)

214

(A) offer the services that are supported by Federal universal service support mechanisms under section 254(c), either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and

(B) advertise the availability of such services and the charges therefor using media of general distribution.

(2) DESIGNATION OF ELIGIBLE TELECOMMUNICATIONS CARRIERS.—A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the State commission. Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.

(3) DESIGNATION OF ELIGIBLE TELECOMMUNICATIONS CARRIERS FOR UNSERVED AREAS.—If no common carrier will provide the services that are supported by Federal universal service support mechanisms under section 254(c) to an unserved community or any portion thereof that requests such service, the Commission, with respect to interstate services or an area served by a common carrier to which paragraph (6) applies, or a State commission, with respect to intrastate services, shall determine which common carrier or carriers are best able to provide such service to the requesting unserved community or portion thereof and shall order such carrier or carriers to provide such service for that unserved community or portion thereof. Any carrier or carriers ordered to provide such service under this paragraph shall meet the requirements of paragraph (1) and shall be designated as an eligible telecommunications carrier for that community or portion thereof.

(4) RELINQUISHMENT OF UNIVERSAL SERVICE.—A State commission (or the Commission in the case of a common carrier designated under paragraph (6)) shall permit an eligible telecommunications carrier to relinquish its designation as such a carrier in any area served by more than one eligible telecommunications carrier. An eligible telecommunications carrier that seeks to relinquish its eligible telecommunications carrier designation for an area served by more than one eligible telecommunications carrier shall give advance notice to the State commission (or the Commission in the case of a common carrier designated under paragraph (6)) of such relinquishment. Prior to permitting a telecommunications carrier designated as an eligible telecommunications carrier to cease providing universal service in an area served by more than one eligible tele-

communications carrier, the State commission in the case of a common carrier (paragraph (6)) shall require the telecommunications carrier or carriers to ensure by the relinquishing carrier will shall require sufficient notice to construction of adequate facilities by telecommunications carrier. The State commission in the case of a common carrier (paragraph (6)) shall establish a time, the State commission (or the Commission) shall permit a common carrier designated under paragraph (6) to relinquish under this paragraph. Relinquishment under this paragraph shall be complete only if the purchase or construction shall be complete.

(5) SERVICE AREA DEFINED.—The Commission under paragraph (6) shall determine the geographic area established by the Commission under paragraph (6) for the purpose of determining universal service obligations. In the case of an area served by a common carrier, "service area" means such company as determined by the Commission until the Commission and the State commission, upon the recommendations of a Federal commission under section 410(c), establish a service area for such company.

(6) COMMON CARRIERS NOT SUBJECT TO FEDERAL JURISDICTION.—In the case of a common carrier providing a telephone exchange service and exchange service, the State commission upon request designate such a common carrier for a service area consistent with applicable Federal law and consistent with the public interest, the Commission may, with a rural telephone company, and in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area under this paragraph, so long as each additional eligible telecommunications carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.

SEC. 215. [47 U.S.C. 215] TRANSACTIONAL EQUIPMENT, AND SO FORTH

(a) The Commission shall examine into by any common carrier which requires investment, supplies, research, services, financing, and/or which may affect such carrier and/or the services rendered or provided, in wire or radio communications, report to the Congress whether any such carrier or carriers are likely to affect adversely the ability to provide adequate service to the public, or make a reasonable increase in charges or in

local government in an eligible service area has implemented 911 or enhanced 911 systems;

Access to operator services. "Access to operator services" is defined as access to any automatic or live assistance to a consumer to arrange for bill completion, or both, of a telecall;

Access to interexchange service. "Access to interexchange service" is defined as the use of the loop, as well as the portion of the switch that is controlled by the end user, or the functionally equivalent of these network elements, in the case of a wireless carrier, to access an interexchange carrier's network;

Access to directory assistance. "Access to directory assistance" is defined as access to a service that includes, but is not limited to, making available to consumers, upon request, information contained in directory listings; and

Toll limitation for qualifying low-income consumers. Toll limitation for qualifying low-income consumers is defined in subpart E of this part.

Requirement to offer all designated services. An eligible telecommunications carrier must offer each of the services set forth in paragraph (a) of this section in order to receive federal universal service support.

Additional time to complete network upgrades. A state commission may, at the petition of a telecommunications carrier that is otherwise eligible to receive universal service support

§ 54.201 requesting additional time to complete the network upgrades needed to provide single-party service, access to enhanced 911 service, or toll limitation. If such petition is granted, an otherwise eligible telecommunications carrier will be permitted to receive universal service support for the duration of the period designated by the state commission.

State commission. State commissions should grant such a request only upon a finding that exceptional circumstances prevent an otherwise eligible telecommunications carrier from providing single-party service, access to enhanced 911 service, or toll limitation. The period should extend only as long as the relevant state commission finds that exceptional circumstances exist and should not extend beyond the

time that the state commission deems necessary for that eligible telecommunications carrier to complete network upgrades. An otherwise eligible telecommunications carrier that is incapable of offering one or more of these three specific universal services must demonstrate to the state commission that exceptional circumstances exist with respect to each service for which the carrier desires a grant of additional time to complete network upgrades.

[62 FR 32948, June 17, 1997, as amended at 63 FR 2125, Jan. 13, 1998; 63 FR 33585, June 19, 1998]

Subpart C—Carriers Eligible for Universal Service Support

§ 54.201 Definition of eligible telecommunications carriers, generally.

(a) Carriers eligible to receive support.

(1) Beginning January 1, 1998, only eligible telecommunications carriers designated under paragraphs (b) through (d) of this section shall receive universal service support distributed pursuant to part 36 and part 69 of this chapter, and subparts D and E of this part.

(2) A state commission that is unable to designate as an eligible telecommunications carrier, by January 1, 1998, a carrier that sought such designation before January 1, 1998, may, once it has designated such carrier, file with the Commission a petition for waiver of paragraph (a)(1) of this section requesting that the carrier receive universal service support retroactive to January 1, 1998. The state commission must explain why it did not designate such carrier as eligible by January 1, 1998, and provide a justification for why providing support retroactive to January 1, 1998, serves the public interest.

(3) This paragraph does not apply to offset or reimbursement support distributed pursuant to subpart G of this part.

(4) This paragraph does not apply to support distributed pursuant to subpart F of this part.

(b) A state commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (d) of this section

as an eligible telecommunications carrier for a service area designated by the state commission.

(c) Upon request and consistent with the public interest, convenience, and necessity, the state commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the state commission, so long as each additional requesting carrier meets the requirements of paragraph (d) of this section. Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the state commission shall find that the designation is in the public interest.

(d) A common carrier designated as an eligible telecommunications carrier under this section shall be eligible to receive universal service support in accordance with section 254 of the Act and shall, throughout the service area for which the designation is received:

(1) Offer the services that are supported by federal universal service support mechanisms under subpart B of this part and section 254(c) of the Act, either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and

(2) Advertise the availability of such services and the charges therefore using media of general distribution.

(e) For the purposes of this section, the term facilities means any physical components of the telecommunications network that are used in the transmission or routing of the services that are designated for support pursuant to subpart B of this part.

(f) For the purposes of this section, the term "own facilities" includes, but is not limited to, facilities obtained as unbundled network elements pursuant to part 51 of this chapter, provided that such facilities meet the definition of the term "facilities" under this subpart.

(g) A state commission shall not require a common carrier, in order to satisfy the requirements of paragraph (d)(1) of this section, to use facilities

that are located within the relevant service area, as long as the carrier uses facilities to provide the services designated for support pursuant to subpart B of this part within the service area.

(h) A state commission shall designate a common carrier that meets the requirements of this section as an eligible telecommunications carrier irrespective of the technology used by such carrier.

(i) A state commission shall not designate as an eligible telecommunications carrier a telecommunications carrier that offers the services supported by federal universal service support mechanisms exclusively through the resale of another carrier's services.

[62 FR 32948, June 17, 1997, as amended at 63 FR 2125, Jan. 13, 1998; 64 FR 62123, Nov. 16, 1999]

§ 54.203 Designation of eligible telecommunications carriers for unserved areas.

(a) If no common carrier will provide the services that are supported by federal universal service support mechanisms under section 254(c) of the Act and subpart B of this part to an unserved community or any portion thereof that requests such service, the Commission, with respect to interstate services, or a state commission, with respect to intrastate services, shall determine which common carrier or carriers are best able to provide such service to the requesting unserved community or portion thereof and shall order such carrier or carriers to provide such service for that unserved community or portion thereof.

(b) Any carrier or carriers ordered to provide such service under this section shall meet the requirements of section 54.201(d) and shall be designated as an eligible telecommunications carrier for that community or portion thereof.

§ 54.205 Relinquishment of universal service.

(a) A state commission shall permit an eligible telecommunications carrier to relinquish its designation as such a carrier in any area served by more than one eligible telecommunications carrier. An eligible telecommunications carrier that seeks to relinquish its eligible telecommunications carrier

designation for an area served by more than one eligible telecommunications carrier shall give advance notice to the state commission of such relinquishment.

(b) Prior to permitting a telecommunications carrier designated as an eligible telecommunications carrier to cease providing universal service in an area served by more than one eligible telecommunications carrier, the state commission shall require the remaining eligible telecommunications carrier or carriers to ensure that all customers served by the relinquishing carrier will continue to be served, and shall require sufficient notice to permit the purchase or construction of adequate facilities by any remaining eligible telecommunications carrier. The state commission shall establish a time, not to exceed one year after the state commission approves such relinquishment under this section, within which such purchase or construction shall be completed.

§ 54.207 Service areas.

(a) The term *service area* means a geographic area established by a state commission for the purpose of determining universal service obligations and support mechanisms. A service area defines the overall area for which the carrier shall receive support from federal universal service support mechanisms.

(b) In the case of a service area served by a rural telephone company, *service area* means such company's "study area" unless and until the Commission and the states, after taking into account recommendations of a Federal-State Joint Board instituted under section 410(c) of the Act, establish a different definition of service area for such company.

(c) If a state commission proposes to define a service area served by a rural telephone company to be other than such company's study area, the Commission will consider that proposed definition in accordance with the procedures set forth in this paragraph.

(1) A state commission or other party seeking the Commission's agreement in redefining a service area served by a rural telephone company shall submit

a petition to the Commission. The petition shall contain:

(i) The definition proposed by the state commission; and

(ii) The state commission's ruling and other official statement presenting the state commission's reasons for adopting its proposed definition, including an analysis that takes into account the recommendations of any Federal-State Joint Board convened to provide recommendations with respect to the definition of a service area served by a rural telephone company.

(2) The Commission shall issue a Public Notice of any such petition within fourteen (14) days of its receipt.

(3) The Commission may initiate a proceeding to consider the petition within ninety (90) days of the release date of the Public Notice.

(i) If the Commission initiates a proceeding to consider the petition, the proposed definition shall not take effect until both the state commission and the Commission agree upon a definition of a rural service area, in accordance with paragraph (b) of this section and section 214(e)(5) of the Act.

(ii) If the Commission does not act on the petition within ninety (90) days of the release date of the Public Notice, the definition proposed by the state commission will be deemed approved by the Commission and shall take effect in accordance with state procedures.

(d) The Commission may, on its own motion, initiate a proceeding to consider a definition of a service area served by a rural telephone company that is different from that company's study area. If it proposes such a different definition, the Commission shall seek the agreement of the state commission according to this paragraph.

(1) The Commission shall submit a petition to the state commission according to that state commission's procedures. The petition submitted to the relevant state commission shall contain:

(i) The definition proposed by the state commission; and

(ii) The Commission's decision presenting its reasons for adopting the proposed definition, including an analysis that takes into account the recommendations of any Federal-State

↓ Continued

for an area served by more eligible telecommunications carriers shall give advance notice to the Commission of such relinquishment.

to permitting a telecommunications carrier designated as a telecommunications carrier providing universal service in an area served by more than one eligible telecommunications carrier, the Commission shall require the relinquishing telecommunications carriers to ensure that all service areas served by the relinquishing carrier will continue to be served and will receive sufficient notice to permit purchase or construction of facilities by any remaining telecommunications carrier. The Commission shall establish a procedure to exceed one year after the Commission approves such relinquishment under this section, within which purchase or construction is completed.

Service areas. The term *service area* means a geographic area established by a state commission for the purpose of determining universal service obligations and support mechanisms. A service area is the overall area for which a carrier shall receive support from universal service support mechanisms.

In the case of a service area served by a rural telephone company, the term *service area* means such company's service area, unless and until the Commission and the states, after taking into account recommendations of a State Joint Board instituted under section 410(c) of the Act, establish a different definition of service area for such company.

If a state commission proposes to change a service area served by a rural telephone company to be other than the company's study area, the Commission will consider that proposed change in accordance with the procedure set forth in this paragraph.

A state commission or other party to the Commission's agreement regarding a service area served by a rural telephone company shall submit

Federal Communications Commission

§ 54.301

a petition to the Commission. The petition shall contain:

(i) The definition proposed by the state commission; and

(ii) The state commission's ruling or other official statement presenting the state commission's reasons for adopting its proposed definition, including an analysis that takes into account the recommendations of any Federal-State Joint Board convened to provide recommendations with respect to the definition of a service area served by a rural telephone company.

(2) The Commission shall issue a Public Notice of any such petition within fourteen (14) days of its receipt.

(3) The Commission may initiate a proceeding to consider the petition within ninety (90) days of the release date of the Public Notice.

(i) If the Commission initiates a proceeding to consider the petition, the proposed definition shall not take effect until both the state commission and the Commission agree upon the definition of a rural service area, in accordance with paragraph (b) of this section and section 214(e)(5) of the Act.

(ii) If the Commission does not act on the petition within ninety (90) days of the release date of the Public Notice, the definition proposed by the state commission will be deemed approved by the Commission and shall take effect in accordance with state procedures.

(d) The Commission may, on its own motion, initiate a proceeding to consider a definition of a service area served by a rural telephone company that is different from that company's study area. If it proposes such different definition, the Commission shall seek the agreement of the state commission according to this paragraph.

(1) The Commission shall submit a petition to the state commission according to that state commission's procedures. The petition submitted to the relevant state commission shall contain:

(i) The definition proposed by the Commission; and

(ii) The Commission's decision presenting its reasons for adopting the proposed definition, including an analysis that takes into account the recommendations of any Federal-State

Joint Board convened to provide recommendations with respect to the definition of a service area served by a rural telephone company.

(2) The Commission's proposed definition shall not take effect until both the state commission and the Commission agree upon the definition of a rural service area, in accordance with paragraph (b) of this section and section 214(e)(5) of the Act.

(e) The Commission delegates its authority under paragraphs (c) and (d) of this section to the Chief, Wireline Competition Bureau.

[62 FR 32948, June 17, 1997, as amended at 67 FR 13226, Mar. 21, 2002]

Subpart D—Universal Service Support for High Cost Areas

§ 54.301 Local switching support

(a) *Calculation of local switching support.* (1) Beginning January 1, 1998, an incumbent local exchange carrier that has been designated an eligible telecommunications carrier and that serves a study area with 50,000 or fewer access lines shall receive support for local switching costs using the following formula: the carrier's projected annual unseparated local switching revenue requirement, calculated pursuant to paragraph (d) of this section, shall be multiplied by the local switching support factor. For purposes of this section, local switching costs shall be defined as Category 3 local switching costs under part 36 of this chapter.

(2) *Local switching support factor.* (i) The local switching support factor shall be defined as the difference between the 1996 weighted interstate DEM factor, calculated pursuant to § 36.125(f) of this chapter, and the 1996 unweighted interstate DEM factor.

(ii) If the number of a study area's access lines increases such that, under § 36.125(f) of this chapter, the weighted interstate DEM factor for 1997 or any successive year would be reduced, that lower weighted interstate DEM factor shall be applied to the carrier's 1996 unweighted interstate DEM factor to derive a new local switching support factor.

(3) Beginning January 1, 1998, the sum of the unweighted interstate DEM

Service Date: October 22, 2004

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

* * * * *

IN THE MATTER OF WWC HOLDING CO.,)	UTILITY DIVISION
Application for Designation as an Eligible)	
Telecommunications Carrier in Montana)	DOCKET NO. D2003.1.14
Areas Served by Qwest Corporation)	ORDER NO. 6492a

FINAL ORDER

Introduction and Procedural Background

WWC Holding Co., Inc., d/b/a CellularOne (Western Wireless or WW) filed on January 29, 2003 its application for designation as an eligible telecommunications carrier (ETC). WW's filing was noticed on March 3, 2003 for intervention. Intervention was granted on April 2, 2003 to the Montana Consumer Counsel (MCC), Montana Telecommunications Association (MTA), Qwest and the Ronan Telephone Company (RTC). Intervention was granted on April 7, 2003 to Montana Independent Telecommunications Systems, Inc. (MITS). A Procedural Order (No. 6492) was issued on June 10, 2003. WW filed on July 24, 2003 a Motion to Dismiss MITS, MTA and RTC. WW also filed on July 24, 2003 an objection to a staff data request.¹ The PSC denied WW's Motion to Dismiss. The Procedural Schedule was amended on both November 25, 2003 and December 18, 2003. Qwest submitted on February 11, 2004 its Notice of Withdrawal from this proceeding. Pursuant to the February 27, 2004 Notice of Public Hearing, a hearing in this docket commenced on March 17, 2004.

WW and MCC were the only parties to file testimony in this docket. WW filed the initial testimony of Mr. Blundell after which the MCC filed Mr. Buckalew's testimony. WW's rebuttal includes the testimony of Mr. Blundell and Mr. Wood.

¹ WW objected to PSC -029(c) requesting a copy of WW's most recent FCC 499 report. This report contains the percentage interstate total revenue that is subject to a 28 percent safe harbor. (DR PSC -014(a))

Findings of Fact and Commission Decision

The parties have polarized views on whether the Commission should grant, and under what conditions it should grant, WW's ETC petition. WW would limit the Commission's public interest review to whether WW satisfies the Section 214(e) requirements. MCC, MITS and MTA all opposed WW's ETC designation petition. Prior to designation they would impose upon WW additional requirements.

The Commission has previously granted the petitions of other carriers for designation as an ETC in Qwest's non-rural service areas. Those prior decisions do not impose constraints and are not a precedent for this WW decision; and, no party opposed any of those prior ETC designations. The Commission's decision in this docket shall not necessarily set a precedent for how the Commission may decide any future ETC petition. Each ETC petition for designation will be determined on its own merits. As explained in detail later once the Commission's rulemaking on ETC standards is complete those rules will largely guide the decision making process involving both past and prospective ETC designations and annual certifications. In the following the Commission will explain both why it grants WW's ETC designation petition and the conditions by which the petition is granted

The Commission finds merit in granting WW's petition for a combination of reasons. First, WW appears to have satisfied the minimal Federal requirements that are set forth in Section 214 of the 1996 Act. Whether WW satisfies all relevant requirements will depend, in part, on WW's ongoing compliance with the additional conditions set forth in this order. Second, the rulemaking proceeding will establish additional public interest standards and requirements with which all ETCs must comply. WW will have an opportunity, once those rules are established, to demonstrate its compliance. In this regard, consideration of whether WW complies with those rules will not differ from how the Commission evaluates the ongoing compliance of other previously designated and prospectively designated ETCs. The ETC rulemaking is underway and the Commission is hopeful that it will be completed later this year. Third, the public interest standard appears, by construction of Section 214 of the 1996 Act, less stringent for non-rural

carriers than it is for rural carriers. The Commission also finds that a more rigorous evaluation is called for in the case of ETC petitions in the areas served by rural carriers. The Commission's rules will establish appropriate additional requirements for rural and non-rural carriers. Last, the Commission finds that Qwest's apparent lack of concern in this docket, manifested by its intervention and subsequent withdrawal, suggests that WW's designation will not jeopardize Qwest's financial well-being. For these reasons the Commission finds that WW may be designated an ETC for those wire centers contained in its petition. WW must, however, satisfy certain other requirements as discussed in the following findings.

Public Interest The public interest requires of the Commission a thorough review of whether WW complies with both the requirements set forth in Section 214 of the 1996 Act and with any additional requirements that the Commission establishes either in this order and later in its rules. The Commission has authority to establish such requirements, and it chooses to exercise that authority beginning with this docket.⁶¹ While these additional requirements were not applied previously to ETC designation petitions they are obligations with which ETC's must comply on a going forward basis. The ETC issues have been fully fleshed out in this highly contested case. The Commission sets forth those requirements with which WW must comply as a condition of receiving ETC status and will defer until the completion of the on-going ETC rulemaking any other obligations that will apply to all ETCs.

Coverage Obligation In its petition, WW seeks to be designated an ETC for a majority of Qwest's wire centers. WW lists those Qwest wire centers for which it seeks and does not seek ETC designation (Late Filed Exhibits No. 6 and 7). WW's apparent

⁶¹ See generally the MCC's Initial April 30, 2004 Brief (at page 7) citing TOPUC v. FCC. In its Virginia Cellular Order (FCC 03-338, CC Docket No. 96-45, Released January 22, 2004) the FCC asserts: "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... We further note that the Joint Board is reviewing whether to modify the public interest analysis used to designate ETCs in both rural and on-rural carrier study areas under section 214(e) of the Act. The outcome of that proceeding could impact the Commission's public interest analysis for future ETC designations in non-rural telephone company service areas." (para 27, emphasis added)

threshold for seeking ETC designation in Qwest wire centers stems from its ability to offer service to at least 85 percent of a wire center's population.⁶² In granting WW's petition, WW must improve upon its minimal 85 percent coverage.⁶³

Qwest's wire centers include the base rate area and the abutting three zonal areas, including suburban and locality rate areas, that surround the base rate area of each wire center. For each Qwest wire center for which WW is designated an ETC, WW must achieve the capability to serve 98 percent of Qwest's customers in each wire center.⁶⁴ Whereas the Commission's rules will also address the time allowed for designated ETC's to achieve the capability to serve 98 percent of Qwest's customers in each wire center, WW shall have one year from the time it begins receiving Federal universal service funds pursuant to this order to complete its network upgrades. At the end of the year WW must document its ability to offer services to 98 percent of each wire center's customer base.

Although the Commission will not at this time require WW to provide coverage to 98 percent of Qwest's Montana study area WW's unwillingness to do so reflects upon its apparent self interest in cream skimming lucrative wire centers (WW's minimal coverage of 85 percent of wire centers also appears a case of cream skimming). It also reflects upon WW's inability, as wireless technology carrier, to assume the obligations that Qwest assumes and fulfills as the ILEC. This is a concern to the Commission given

⁶² WW asserts to need universal service funds (USF) to build out its network. WW adds that it will extend its network to serve "new customers upon reasonable request." (Initial Brief, p. 16; TR 48, 50) WW would not commit to expanding service to communities for which it has not petitioned for ETC designation. (TR 96-96) WW will use universal service fund receipts to expand its network to serve the remaining yet to be served 15 percent. (TR 283)

⁶³ Because WW chose the wire centers for which it seeks ETC designation based upon its ability to serve 85 percent or more of a wire center's population, it was asked to provide wire center maps that used to determine whether it met the 85 percent threshold. WW responded that no wire center level maps exist. (TR 141) WW adds that it superimposes data of its coverage on wire center boundaries and the population in its analysis, what it labels geocoding. (TR 142, 143, 151) The wire centers for which WW is designated an ETC include all "zone" areas outside the base rate area. (TR 280) If, a customer cannot receive WW's service (signal) despite the fact that it is located within a wire center (e.g., the other 15 percent), the customer can always get wireless local loop service. (TR 288)

⁶⁴ The MCC's first criteria requires an ETC to certify its commitment to provide to any

the dynamics of telecommunications markets and the yet-to-be scrutinized financial resources and commitment and ability of carriers that have or that seek ETC status. Therefore, the Commission requires that WW file status reports at six month intervals that review WW's progress in serving the entire population of each wire center for which it is an ETC. These reports must provide the capital budget for prospective buildout plans and describe the buildout that WW actually achieved (deployed) in the prior six months. Failure to provide these reports or to achieve the goal of serving 98 percent of each wire center's population, for which WW is designated an ETC, will result in measures taken to decertify WW as an ETC.

WW explained how it may expand its coverage and enhance service quality. These options include use of the Tellular, wireless access, unit. (TR 252-253) Alternative means by which WW may expand its coverage and enhance its quality include adding towers and by enhancements to the transmission capability of its existing towers.

The Commission finds that WW must by means of its own resources serve all reasonable requests for wireless service at residences and businesses in each wire center. WW may choose the means by which it fulfills this obligation but it shall be, in the first instance, WW's responsibility, not that of its customers, to provide coverage of each wire center at the minimal -104dBm (decibels per milliWatt) service standard.

WW must provide maps of its actual signal coverage capability. It must begin providing such information within 30 days of the issuance of a final order in this docket and at 90 day intervals thereafter until it achieves 100 percent coverage. On each wire center map WW must overlay maps of its coverage capability based upon the -dBm standard.

Service Quality Monitoring The Commission will monitor WW's ability to provide service. WW must report to the Commission requests for wireless service that it was unable to satisfy. WW must report the number of unsatisfied requests regardless of how those requests were communicated to WW (e.g., voice, email, or letter). The Commission requires these reports to detail by location in each wire center for which WW is designated an ETC its inability to serve customers. The reports must provide a detailed description of why customer requests for service could not be satisfied. WW

requesting "customer's location within the designated service area the defined services."

must file such reports on a quarterly basis for as long as WW is designated an ETC.

WW must also document and report to the Commission on the customer complaints that it receives.⁶⁵ For each wire center for which WW is designated an ETC WW must record the complaints that it receives from customers, identify the nature of the complaint (e.g., poor transmission, dropped calls, busy signals) and identify the remedy employed to address each complaint. Based upon these records it must be possible to map the complaints to addresses within each wire center. If repeat complaints are received, then a record of such repeat complaints must be maintained. The results of the complaint records must be supplied to the Commission on a quarterly basis. The customer complaints reporting requirement pertains to WW's provision of service only at the addresses of both residential and business subscribers in exchanges for which WW is designated an ETC. This requirement is limited to addresses as the quality of WW's mobile service is irrelevant to its petition for ETC designation.

Federal Universal Service Fund The Commission finds that in conjunction with being designated an ETC, WW must report to the Commission the Federal universal service funds including Lifeline and Link Up credits that it receives. The reports must be filed quarterly for each wire center in which WW is designated an ETC. As WW's petition is strictly for Cellular service, prior to WW's seeking Federal universal service support for customers served by means of other than Cellular technology (e.g., PCS) WW must file with the Commission a statement of such intent.

Service Package As long as WW is designated an ETC it must have on file with the Commission a copy of each rate plan that it offers and for which it may receive Federal universal service support. Each plan must include the rates, terms and conditions of service. The Commission shall establish in rules any necessary rate caps and terms for unlimited service (minutes of use). WW will have to comply with those and other rules once codified.

Lifeline Upon compliance with the requirements in this order WW must file with the USAC (Universal Service Administration Company) its demonstration that its

⁶⁵ Although WW did not previously keep records of complaints Virginia Cellular agreed to provide the FCC on an annual basis the number of consumer complaints (FCC 03-338, CC Docket 96-45, Released January 22, 2004).

Lifeline plan complies with the FCC's rules. Once the USAC certifies that WW's plan is compliant with the FCC's rules Lifeline assistance will be available to qualifying low-income consumers served by WW.

Fund Size and Funded Lines The Commission is concerned about the size of the Federal universal service fund. The FCC expressed heightened concern about the size of the Federal fund.⁶⁶ The heightened concern of the FCC's is shared by this Commission. There is a real risk that if the Federal fund's size continues along its recent growth path, legislation could be enacted to limit the fund's size. Any such legislation could damage the ability of carriers to operate, maintain and expand networks that serve to achieve the universal service principles set forth in §254(b). These concerns are, however, being addressed at the Federal level by both the FCC and the Federal-State Joint Board. For that reason, the Commission also finds the MCC's testimony on how to interpret what "new" and "former" subscribers are (FCC Rules, Section 54.307) is an issue that is more appropriately resolved by the FCC. The FCC's recent NPRM (CC 96-45, Released June 8, 2004)⁶⁷ has as one issue the concern raised here by the MCC. Therefore, it appears to the Commission unnecessary to address how to interpret the FCC's rules on new and captured customers in this docket.

A related issue regards the merit of basing support on primary lines. The Commission opposes policies that limit support to primary lines, which is essentially a "voucher" system. The Commission filed comments with the FCC in opposition to the primary line policy.⁶⁸ In its comments, the Commission expressed concern with how a

⁶⁶ In its Virginia Cellular Order (FCC 03-338, CC Docket No. 96-45, Released January 22, 2004) the FCC asserts: "Although we find that grant of this ETC designation will not dramatically burden the universal service fund, we are increasingly concerned about the impact on the universal service fund due to the rapid growth in high-cost support distributed to competitive ETCs... We note that the outcome of the Commission's pending proceeding examining the rules relating to high-cost support in competitive areas could potentially impact, among other things, the support that Virginia Cellular and other competitive ETCs may receive in the future." (para. 31, emphasis added)

⁶⁷ The NPRM responds to the February 29, 2004 Recommended Decision of the Federal-State Joint Board (CC No. 96. 45, Released February 27, 2004).

⁶⁸ See Reply Comments, CC Docket No. 96-45, filed electronically on September 22,

primary-line funding mechanism will likely harm ILECs. A primary-line funding mechanism will be harmful because dilutes the network support received by ILECs.

Network Requirements and Service Quality Standards Several interveners raised issues involving service quality standards. MITS held that in the event the Commission designates WW as an ETC it should only do so if the designation is conditioned upon WW's meeting "pricing, service quality and technical standards." (TR 16) MTA also opposed designating WW as an ETC, in part, until WW meets the service quality requirements imposed on Qwest. The MCC also proposed service quality requirements upon which any designation should be conditioned. The Commission's rules will address in addition to those requirements and standards established in this order other standards that will apply to ETCs.

The Commission finds that all ETCs must comply with the Commission's ETC rules. The Commission has statutory authority to require WW as a condition of receiving ETC designation to comply with the requirements that the Commission imposes in this order and that it imposes in rules. The Federal-State Joint Board's Recommended Decision (FCC 04J-1, CC Docket No. 96.45, Released February 27, 2004) also provides guidelines for additional ETC eligibility requirements. These guidelines include the following five items (Recommended Decision, pp. 10-16): 1) adequate financial resources; 2) commitment and ability to provide the supported services; 3) ability to remain functional in emergencies; 4) consumer protection and 5) minimum local usage. The Commission intends to fully consider these guidelines in its ongoing ETC rulemaking proceeding.

Other Matters Other proposals raised by interveners that were not addressed here appear ones that the Commission can defer to its ETC rulemaking proceeding.

Conclusions of Law

The Commission has jurisdiction over applications for designation as an eligible telecommunications carrier in Montana. *47 U.S.C. § 214(e)(2); § 69-8-840, MCA.*

Consideration of the public interest applies in all applications for designation as an eligible telecommunications carrier. *47 U.S.C. § 214(e)(2), ("[u]pon request and*

consistent with the public interest, convenience, and necessity" a state commission may designate additional eligible telecommunications carriers). The Commission has considered the public interest in this proceeding.

The Commission has proposed, and is considering the adoption of, rules governing the designation of eligible telecommunications carriers and the maintenance of status as an eligible telecommunications carrier. *See PSC Docket No. L-04.07.5-RUL (formal publication of notice of hearing on the proposed rules is expected in the Montana Administrative Register on or about November 4, 2004).* The rules, as adopted, will apply to all eligible telecommunications carriers in Montana, including WWC Holding Co. The rules may modify or replace one or more of the terms and conditions in this order.

All pending motions, objections, and arguments not specifically acted upon in this Final Order are denied; to the extent denial is consistent with this Final Order.

ORDER

It is hereby ordered that the application of WWC Holding Co. for designation as an eligible telecommunications carrier is granted, subject to the terms and conditions included in this order.

Done and dated this 14th day of October, 2004, by a vote of 5-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

BOB ROWE, Chairman

THOMAS J. SCHNEIDER, Vice-Chairman

MATT BRAINARD, Commissioner

GREG JERGSON, Commissioner

JAY STOVALL, Commissioner

ATTEST:

Connie Jones
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See 38.2.4806, ARM.

Glossary of Acronyms for Mid Rivers D2003.8.105 Post-hearing Memo

CGSA: cellular geographic service area

CTIA: cellular telecommunications internet assoc.

DR: data request

DTMF: dual tone multi-frequency

ETC: eligible telecommunications carrier

FCC: Federal Communications Commission

FUSF: federal USF

Hz: Hertz, a measure of bandwidth (also MHz for MegaHz)

MCC: Montana Consumer Counsel

MITS: Montana Independent Telecommunications Systems

MRC: Mid Rivers Cellular

MRTC: Mid Rivers Telephone Co-op

MTA: Montana Telecommunications Assoc.

PCS: personal communications service

PI: public interest

RSA: rural service area

RTC: Range Telephone Co-op

TR: transcript

UNE: unbundled network elements

USAC: Universal Service Administrative Company

USF: universal service fund (funds)