

MF

03/03/2005 2003.8.105

MASTER FILE

Lee, Mike (PSC)

From: Jergeson, Greg
Sent: Wednesday, March 02, 2005 1:04 PM
To: PSC_Comm'nrs
Cc: Lee, Mike (PSC); Jacobson, Martin; Whitney, Kate
Subject: Notes and Observations on Mid-Rivers ETC

Prompted by Mike Lee's fine memo, dated February 18, on the Mid-Rivers Cellular ETC petition, Docket 2003.8.105, I authored the attached document which includes some additional points, clarifications and tentative recommendations in the matter. A good portion of the affected territory covered in the application exists within my PSC district, most of the balance in Commissioner Molar's district, with Musselshell county in Commissioner Raney's district completing the map. I ended up serving as the hearings officer during the hearing in this case in Miles City. This case has proven to be very complicated and contentious, both procedurally and substantively. I am not so bold as to suggest that my recommendations and observations are sufficient for other Commissioners to be comfortable in making a substantive decision at tomorrow's work session, but they may be a place to start.

Greg

Greg Jergeson
PSC District #1
PO Box 202601
Helena, MT 59620-2601
gjergeson@state.mt.us
406-444-6166
fax: 406-444-7618

3/3/2005

**Notes on Mike Lee memo related to Mid-Rivers Cellular,
Docket 2003.8.105
From Greg Jergeson
February 21, 2005**

Introduction and Procedural Background

I appreciate this section in light of the frequent suggestions (see LC 2230) that the time frame in which these kinds of proceedings need to be completed needs to be tightly proscribed by law. The implications of those suggestions is that the MPSC is somehow responsible for regulatory lag in these kinds of proceedings. The itemization of events in this docket indicate otherwise. I found it helpful to put the narrative in Mike's memo related to the schedule in somewhat tabular form in order to picture the events:

- August 5, 2003 MRC files application
- October 3, 2003 MCC, MITS, MTA, Range and Ronan file as interveners
- October 28, 2003 Procedural order issued, hearing date set for February 11, 2004
- Post Oct. 28, 2003 MITS, MTA, MPSC staff issue discovery on MRC
- November 7, 2003 MRC files motion to revise hearing date and hold hearings in various sites.
- November 20, 2003 MTA motion to compel response from MRC to discovery issued by MTA
- November 24, 2003 MRC motion for order from MPSC to set briefing schedule and hearing date on MTA's November 20 motion.
- December 2, 2003 MITS motion to compel data responses
- January 22, 2004 MRC files response to MITS and MTA motions
- February 13, 2004 MTA motion for 30-day suspension of procedural deadline
MITS motion to stay or suspend proceeding
- February 24, 2004 MRC files objection to MTA motion (which one)
- February 24, 2004? MTA brief in support of motions to compel data response
- March 12, 2004 MRC files objections to MITS motion to stay or suspend proceedings
- April 22, 2004 MPSC notices May 18 oral arguments on discovery disputes
- April 28, 2004 MPSC denies motions to stay or suspend
- May 19, 2004 MITS, MTA and MRC file stipulation to vacate May 18 oral arguments
- July 21, 2004 MPSC staff issues amended procedural schedule and hearing set for October 27
- September 15, 2004 MCC motion to file testimony and profile Bucklew testimony
- October 12, 2004 Notice of Public Hearing issued, scheduled for October 27
- October 27, 2004 Hearing held in Miles City

- December 17, 2004 MRC, MCC, MITS, and MTA file post-hearing Initial Briefs
- January 28, 2005 MRC, MCC, MITS, and MTA file post-hearing Reply Briefs

Questions?

- Since Range and Ronan are not mentioned after their intervention, did they file motions to withdraw or did they simply not participate? Is this material?
- Did MCC file motions or participate in proceedings before the Commission between their intervention and their September 15 filings? Is this material?

Applicant

I think Mike's memo captures the applicant's case pretty well. However, I believe there may be an error in the final paragraph related to the "patronage credits." MRC is not a cooperative; therefore it cannot distribute patronage dividends to its members. As a wholly owned subsidiary of MRTC, the board of MRTC could cause a distribution of assets, probably cash, from MRC to MRTC which might generate the cash by which MRTC distributes patronage dividends to its members. Therefore, I suspect the \$3.75 million and \$1.75 million both relate to MRTC, either in different fiscal years or as two different kinds of distribution. Please review the examination of this subject in the hearing transcript.

Prefiled Testimony

I think Mike's memo captures Mr. Buckalew's pre-filed testimony fairly well.

Party motions, Commission decisions prior to Hearing

Though it is not in the memo, I think the order will need a discussion of the motions by MITS and MTA to suspend the proceedings and the Commission denial of those motions. I believe the Commission decision, at that point was substantive, especially since the Hearings Officer's decisions regarding similar motions made at hearing were consistent with the Commission decision earlier on this subject.

The Hearing

The memo does not include a specific section discussing the examinations and deliberations during the hearing in Miles City, though hearing proceedings are included in some of the discussions above. MPSC decisions are supposed to be based upon the completeness of the evidentiary record, and the hearing is a critical proceeding for compiling that record. This hearing was not confined to the procedural conflicts between the parties, but did examine matters of considerable substance. Therefore, the final order must contain a summary of the hearing proceedings. To do otherwise, would be to render the hearings meaningless, something I am unwilling to do.

Public Witnesses

I think the final order needs more discussion of the contribution from the public witnesses than just the fact that they appeared. The “public witness” process is not a valid determination of public sentiment nor has it ever been meant to be. At this hearing, each public witness did more than state their name, affiliation and support for the application. They offered written comments, which I, as hearings officer, included in the record. Those comments contained a common thread about the public need and necessity which they believed would be satisfied by approval of the ETC designations in this case. For reasons of public health and safety, these witnesses argued that this most sparsely populated and isolated region of the state, indeed the country, needed a telecommunications system flexible and transportable enough to assure people access to emergency and other services in locations outside of wireline phone availability.

Initial Briefs

I believe Mike’s summary fairly captures the arguments made in the post-hearing Initial Briefs. I will refer to some of the arguments in my subsequent recommendations.

Final Briefs

I believe Mike’s summary fairly captures the arguments made in the post-hearing Final Briefs. I will refer to some of the arguments in my subsequent recommendations.

Staff Discussion

I believe Mike’s discussion in this section includes questions and issues that we must include in our deliberations.

Jergeson Recommendations (as the accidental hearings officer in the case)

Sufficiency of Application

If I understand the MITS and MTA motions to suspend or stay the proceedings, I believe they were arguing that the application was so insufficient, especially since no pre-filed testimony was offered by the applicant, that the MPSC could not continue to consider the application for decision. MCC made those same arguments at hearing, perhaps also in their September 15 filing as well. It appears to me that the MPSC determined the answer to that question when on April 28, 2004, by a 4-1 vote, the MPSC denied the motions to stay or suspend the proceedings. In a subsequent motion on reconsideration, by a 3-2 vote, the MPSC confirmed that earlier decision. At hearing, I, as hearings officer, denied interveners motions that made the same argument.

Recommendation: The MPSC finds that the application, and subsequent evidence acquired during the course of the proceedings, are sufficient for the MPSC to make a decision in the case.

Public Interest Standard

The applicant argued that the Commission need only make a decision to grant ETC designation based on the nine supported services, that we are not required to adopt a more rigorous PI evaluation and determination. The applicant then went on, employing public witnesses to augment their public interest arguments. The interveners argued that a more rigorous PI evaluation for ETC designation in rural areas and then went on to describe a number of additional PI standards that they believe the applicant does not meet. As the gatekeeper for the distribution of public funds derived from the power of the state to tax, in this case the federal government USF tax, I believe it is necessary for the MPSC to assure that the distribution of those funds is in the public interest.

Recommendation: Consistent with the Commission decision in the WW case, the MPSC finds that ETC designations in rural areas call for a more rigorous PI evaluation.

Coverage

The interveners, as part of their argument that the application was not sufficient, observed that it could be inferred from the application that MRC was only making application for ETC status in the areas where they currently have FCC licenses (the circles) and therefore, the application was deficient since the circled areas do not cover the entire study area for either MRTC or RTC. They argued that MRC would need to have applied for and received approval from both the MPSC and the FCC for disaggregation. MRC amended its application in hearing by way of reference to a data response.

Despite the original MRC application description of its service areas represented by the circles, without a proceeding providing for and approving disaggregation, the application would, of necessity, have been for the entire rural study areas of MRTC and RTC. The basis for calculating USF receipts to MRC in the event of ETC designation would have been based on the cost factors calculated for each MRTC and RTC throughout the entirety of their study areas.

Recommendation: The MPSC finds that the application submitted by MRC was for the entirety of each study area of MRTC and RTC. ETC designation and receipt of USF would require the designee to meet ETC obligations throughout the entire study area for which designation is approved.

One application – Two designations

Though there was only one application in this case, ETC designation would be for each of the two study areas in which the incumbent ETCs are distinctly different

organizations with distinctly different cost calculations for the receipt of USF funds. Obviously, annual certification would need to document information and data applicable to each designation. During hearing, I asked questions of the applicant related to designation being approved for one study area and not the other. Therefore, the issue was opened for Commission decision.

Recommendation: The MPSC finds that the single application is for two distinct designations. The MPSC may designate both, neither, or one or the other. Designation for both would permit the applicant to proceed with implementation in both, neither, or one of the other.

Build Out

When MRC amended its application by reference to include the entire study area of MRTC and RTC, they acknowledged that their existing licenses, represented by the circles, do not cover the entire wireline exchange area for each study area. Public witness testimony in favor of the ETC designations was predicated on providing wireless service in areas where that service is not now available, since the health and public safety criteria are already being met in the licensed areas. It would be illogical for the public witnesses to favor no additional service in unserved areas.

Recommendation: The MPSC finds that designation would require a build out to provide service to those areas in each study area not now covered by MRC's existing licenses.

Resale

While it may be necessary for MRC to resell other providers' services as they implement any designation, it would be illogical for MRC to resell wireline services of another provider, since the purpose of the designation would be for customer access to wireless services throughout the study areas for public health and safety reasons. FCC rules permit resale, though they do not describe a ratio that would be either acceptable or unacceptable.

Recommendation: The PSC finds that resale of other providers' services would be permitted though that should not constitute the preponderant means of meeting ETC obligations, but should more appropriately be an interim measure employed while build out is completed.

Cream Skimming

The ETC/USF regime never contemplated that ETC designation would constitute little more than capturing the corralled customers. While the areas represented by MRC's current licenses would not be considered cream in the context of more urban areas of the state, they may be in the context of the study areas of MRTC and RTC. Indeed, the purpose of ETC designation and the distribution of USF funds is to enable rural

customers to have access to telecommunications services comparable to those in urban areas and at rates that are comparable to those in urban areas.

Recommendation: The Montana PSC finds that the MRTC and RTC study areas constitute the very kinds of locations for which ETC designations, along with USF funding, would be in the public interest.

Competition

MCC's witness Bucklew argued that since MRC is an affiliate of MRTC, by definition, it could not be considered a competitive provider. Mr. Bucklew further argued that this non-competitive environment would not be in the public interest. MRC acknowledged that they are not a competitive provider in the MRTC study area, but are an alternative provider of complementary services. This concern of Mr. Bucklew would obviously not apply to a designation in the RTC study area since neither MRC nor MRTC are in any way affiliated with RTC.

MRC cites an FCC order on competitive neutrality (Mike's memo, page 21) that would indicate the concerns of Mr. Bucklew with respect to competition in this case are, at best, secondary, and may, in fact, be irrelevant.

Recommendation: The MPSC finds that considerations of competitive outcomes in this case are clearly secondary to the issue of providing universal service, though questions of competition may be relevant in the event of applications for ETC status that would constitute a second or higher number of alternative ETCs in these very sparsely populated, isolated study areas.

Mobility

It has been argued that mobility is not its own PI justification. In urban or densely populated areas, convenience and customer preference are predominant reasons for mobile telecommunications services. MRC and the public witnesses argued that mobile telecommunications services are necessary for public health and safety reasons.

Recommendation: The MPSC finds that, in large, sparsely populated and isolated rural areas, mobile telecommunications services do serve the public interest.

Patronage credits

MCC argues that distribution of USF receipts in the form of patronage dividends to subscribers is an inappropriate expenditure of those funds. In the case of MRC, that argument may be moot in that MRC is not a cooperative and, therefore, would not be remitting patronage credits or dividends to its subscribers who are solely subscribers, not member/owners. This concern would, however, come into play if MRC distributed USF funds to its owner, MRTC, and those funds had created a distributable surplus because they had not been expended for their intended purpose, the capital and operational

expenses necessary to deliver telecommunications services contemplated in the designation.

Recommendation: The MPSC finds that distribution of USF receipts as patronage credits, either directly or indirectly, is an impermissible expenditure of those funds.

Rule-making

MRC argues that the MPSC is not permitted to utilize these proceedings as de facto rule-making. MCC outlined the dimensions of rules they believe would provide the MPSC with a clear and consistent basis for assessing whether an application for ETC designation, in this case, the MRC application, is in the public interest.

Recommendation: The MPSC finds that a decision in this case does not constitute de facto rule-making.

Designation in the MRTC study area

Recommendation: The MPSC approves the application of MRC for designation as an ETC in the MRTC study area consistent with the provisions and conditions in the WW approval subject to the following exceptions:

- Due to the sparse and isolated population characteristics in this study area, MRC will have five years to accomplish the build out to the 98% standard throughout the entire MRTC study area.
- Within 60 days of this order, MRC shall file with the MPSC a plan to accomplish this build out describing the elements of that plan including capital construction, alternative mobile technologies, additional, different or expanded licenses or reasonable levels of resale of other provider services, detailing by year which elements are to be accomplished.
- Should MRC discover that they are unable to serve customers in the Wibaux-Verizon area due to FCC restrictions even while employing other mobile technologies, other licenses, etc, they may apply to the MPSC for a waiver from the 98% requirement to the extent of the number of MRTC customers in that exchange and only for those customers.
- MRC may not claim USF support for customers residing in the exchanges in which a non-rural company is an Incumbent ETC. MRC shall maintain a file documenting residence of each customer for which USF support is claimed. This restriction shall not preclude MRC from filing an application to be an ETC in those exchanges.
- MRC shall maintain an accounting system that documents that expenditure of USF funds are for their intended purpose only, and that USF funds are not expended as capital credits or dividends, either directly or indirectly.

Designation in the RTC study area

Recommendation: The MPSC approves the application of MRC for designation as an ETC in the RTC study area consistent with the provisions and conditions in the WW approval subject to the following exceptions:

- Due to the sparse and isolated population characteristics in this study area, MRC will have five years to accomplish the build out to the 98% standard throughout the entire RTC study area.
- Within 60 days of this order, MRC shall file with the MPSC a plan to accomplish this build out describing the elements of that plan including capital construction, alternative mobile technologies, additional, different or expanded licenses or reasonable levels of resale of other provider services, detailing by year which elements are to be accomplished.
- Each year of the build out plan shall include a proportional build out for those portions of the RTC study area on the Northern Cheyenne Reservation.
- MRC may not claim USF support for customers residing in the exchanges in which a non-rural company is an Incumbent ETC. MRC shall maintain a file documenting residence of each customer for which USF support is claimed. This restriction shall not preclude MRC from filing an application to be an ETC in those exchanges.
- MRC shall maintain an accounting system that documents that expenditure of USF funds are for their intended purpose only, and that USF funds are not expended as capital credits or dividends, either directly or indirectly.