

# Montana Consumer Counsel

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April 18, 2005

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

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

Cc: Service list

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

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IN THE MATTER OF CABLE &	)	UTILITY DIVISION
COMMUNICATIONS CORPORATION, dba	)	
MID-RIVERS CELLULAR, Petition for	)	DOCKET NO. D2003.8.105
Designation as an Eligible	)	
Telecommunications Carrier	)	

**MOTION FOR RECONSIDERATION AND BRIEF OF  
THE MONTANA CONSUMER COUNSEL**

On April 7, 2005, the Montana Public Service Commission (Commission) issued Order No. 6518a in Docket No. D2003.8.105, the proceeding on the application of Mid-Rivers Cellular (MRC) to be designated an Eligible Telecommunications Carrier (ETC) for the purpose of receiving funds from the federal Universal Service Fund (USF). In accordance with section 38.2.4806, A.R.M., the Montana Consumer Counsel (MCC) files this motion for reconsideration and brief requesting that the Commission reconsider its order on the grounds that it is unlawful, unjust and unreasonable.

**I. BACKGROUND.**

On August 5, 2003, Mid-Rivers Cellular (MRC or applicant) filed its application for designation as an ETC. MCC filed a petition to intervene, and was granted intervention along with the Montana Telecommunications Association (MTA), the Montana Independent Telephone Systems, Inc. (MITS), Range Telephone Cooperative, Inc. (Range) and the Ronan Telephone Company. Range chose to participate in the docket through MTA, and Ronan Telephone Company did not participate. The only party in the case to file testimony was MCC.

**II. MOTION FOR RECONSIDERATION.**

MCC moves that the Commission reconsider Order No. 6518a. The order is not supported by reliable, substantial and probative evidence on the whole record of the

proceeding, as required by § 2-4-704(2), M.C.A. In addition, the applicant failed to sustain its burden of proof, and the procedure allowed by the Commission deprived MCC and the other intervenors their rights to due process.

### **III. BRIEF.**

#### **A. The Applicant Has Failed To Sustain Its Burden Of Proof.**

It is beyond dispute that the applicant in a case has the burden of proof. It is a requirement of state law (§§ 26-1-401 and 402) and federal law specifically pertaining to ETC applications (*In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Memorandum Opinion and Order, FCC 03-338 (Rel. January 22, 2004), ¶ 26). Nevertheless, the Commission allowed this docket to go forward without requiring MRC to file any testimony whatever in support of its application.

Even without a Commission rule or procedural order requiring applicant testimony, however, the applicant still has the burden of proof, and has clearly failed to sustain it. The Commission, in this case, has taken upon itself the burden of proving the applicant's case. It permitted live testimony and admitted data responses over the objections of the intervenors. The order is replete with instances where the Commission makes statements that are not supported by evidence in the record, in order to grant MRC's application.

At page 33 of the order, for example, the Commission states, "MRC can obviously acquire additional fill-in licenses or it would not have sought to amend its initial application to include the entire study areas for each of MRTC and RTC." There is not a shred of evidence in the record to support this conclusion. Also without record support is the statement, at page 33, that public witnesses "highly value study-area wide cellular service." It is true that the public witnesses favored MRC's application, but not a single one referred to "study-area wide" service. Tr. 98-111. It is unlikely that they would have known at the time of the hearing that MRC would change the geographical scope of its application.

It is not the job of the Commission to make the case for an applicant that has declined to do so on its own behalf. MCC regards this practice not only unlawful, but also as a dangerous precedent.

**B. The Commission Failed To Observe The Requirements Of Due Process To The Detriment Of The Intervenors.**

“It is well established that the requirements of due process apply to administrative agencies. . . .” *Williams Insulation Company, Inc. v. Department of Labor and Industry*, 314 Mont. 523, 529, 67 P.3d 262 (2003). The Commission’s violations of due process in this case are many. It permitted MRC to expand the geographic scope of its application through a data response. It permitted live direct testimony at the hearing after MRC had declined to prefile testimony. This live direct testimony was not authorized by the procedural order, and is in the nature of supplemental testimony, over objections, in violation of the intervenors’ rights to conduct discovery on that testimony. *In re Florida Power and Light Co.*, 156 PUR4th 333, 337 (FL PSC 1994) (“[W]here DCA made no request or motion to file supplemental testimony, it was entirely proper to exclude supplemental testimony. . . .”) The Commission permitted the *en masse* introduction of discovery, over objections, despite its legal counsel’s observation that there are technical hearsay problems with such introduction. Tr. 16. These defective procedural steps deprived the intervenors of an adequate opportunity to prepare for hearing. What happened in this case is a departure from the Commission’s more careful observance of due process requirements in the past.

**C. The Commission Erred In Finding MRC’s Application To Be In The Public Interest.**

The Commission found, at page 31 of the order, that MRC had sufficiently satisfied the requirements for ETC designation, including the public interest standard. There is no evidentiary basis for this conclusion, and the order itself in many places provides arguments against the Commission’s own public interest finding. The Commission concluded that in order to provide study-area wide service, MRC could do so in part by reselling the services of other wireless providers. Order, p. 33. There is no evidence to support this conclusion. There is no federal requirement that cellular providers permit other companies to resell their services, and no evidence that MRC has any commercial agreements with other providers to resell cellular service. And the Commission, of course, has no jurisdiction to order a cellular provider to do anything.

The Commission also found, at page 33, that MRC would have to acquire additional fill-in licenses. There is simply no evidence in the record that any such licenses are available, and no evidence that MRC can lawfully expand its service area beyond its current licensed areas.

The Commission acknowledges in the context of requiring build-out plans, at page 34, that a more “rigorous” public interest evaluation is called for in ETC designations in rural areas. Yet it has not conducted that rigorous evaluation, but rather confused that notion with imposing rigorous post-designation requirements.

Further revealing the flaws in its public interest finding, the order admits that the Commission has insufficient information in some areas. For example, the order states that there is no information on the percent of the population in each study area that MRC can serve (the information is “anecdotal and spotty at best”). Order, p. 34. MRC provided only “some” information on unserved areas. At page 35, the Commission finds that the federal bandwidth requirement is “unclearly satisfied.” There is no evidence in this proceeding that the rates that MRC will charge are “at all comparable” to those in urban areas. Order, p. 39. The Commission noted MRC’s claims that if designated, competition will be enhanced, but expressed doubt as to the veracity of these claims. It also stated that it is unlikely that MRC will enhance competition in its affiliate’s study area, and, “Thus, if competition is at all relevant, MRC certainly would not appear to provide any such PI benefits when it is designated an ETC in MRTC’s study area.” Order, pp. 39-40.

With all of these self-confessed shortcomings in the state of the record and specific public interest flaws in MRC’s case, the Commission should see the wisdom in reconsidering this flawed order.

**D. Other.**

At page 33 of the order, the Commission states:

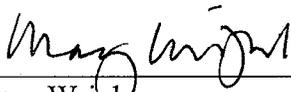
The MPSC expects that of the six additional areas in which MRTC is designated an ETC and for which it may receive federal USFs that MRC will not use its designation in this docket to expand its service coverage into those Qwest exchanges, with one possible exception.

This statement seems to suggest that although the order grants MRC's designation for the entire study area of the two cooperatives, the Commission has something less than the entire study area of its affiliate cooperative's study area in mind. The reference to Qwest exchanges is perplexing, as there are by definition no Qwest exchanges in the cooperative's study area. The reference to the six additional areas where the cooperative is designated is also perplexing, and is certainly not explained by anything in the record of this proceeding. In any event, this provision seems to be in conflict with the statement at page 32 of the order that MRC should be designated an ETC in the "entire service areas of each of MRTC's and RTC's study areas."

#### IV. CONCLUSION.

For the foregoing reasons, the Commission should grant MCC's motion to reconsider Order No. 6518a and reverse its determination the MRC's application should be approved. The order is not based on reliable, substantial and probative evidence on the whole record. The procedure allowed by the Commission was flawed and denied the intervenors' rights to due process, and the applicant failed to sustain its burden of proof.

Respectfully submitted April 18, 2005.

  
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