

it is seeking ETC designation for the purpose of receiving federal universal service support for the low-income Lifeline and Linkup programs only; it is not seeking high-cost support.¹ The federal low-income program provides a discount up to \$9.25 for Lifeline customers in non-rural areas. iSmart's Petition included the pre-filed testimony of iSmart's Chief Operating Officer, Richard Stupansky, Jr., and a Coverage of Market Areas study conducted by 4G Unwired. The intervenors in this docket submitted discovery questions to iSmart but elected not to file testimony.

4. On October 12, 2010, iSmart filed its initial Petition to be designated an ETC throughout the state of Montana.

5. On December 10, 2010, the Commission issued a Notice of Application and Intervention Deadline.

6. On April 25, 2011, iSmart filed an amended Petition, which included the pre-filed testimony of Richard Stupansky. The amended Petition limited iSmart's request for ETC designation to the following wire centers served by one of Montana's price-capped incumbent local exchange carriers: Bozeman, Butte, Livingston, Belgrade, Manhattan, and Gallatin Gateway.

7. On June 6, 2011, the Commission issued an Amended Notice of Application and Intervention Deadline.

8. On July 8, 2011, the Commission granted intervention to Montana Independent Telephone Systems (MITS) and Montana Telecommunications Association (MTA).

9. On July 15, 2011, the Commission issued Procedural Order No. 7160.

10. On September 26, 2011, iSmart filed a Motion for Extension of Time for filing objections to data requests.

11. On January 26, 2012, a Notice of Commission action was issued granting iSmart's Request to Suspend the Procedural Schedule and Extension of Time.

12. On March 5, 2012, iSmart filed a Motion for Protective Order pertaining to its roaming agreements.

¹ Subsequent to the submittal of iSmart's petition, and prior to this Commission Order, the FCC has removed the Linkup program as a supported service from the federal universal service fund on non-tribal lands. iSmart seeks ETC designation only in non-rural exchanges; therefore, the Linkup program should not apply to iSmart's ETC designation request.

13. On April 10, 2012, a Notice of Staff Action was issued granting iSmart's request for additional time to file roaming agreements.

14. On July 5, 2012, the Commission issued Procedural Order No. 7160b.

15. On January 25, 2013, the Commission held a Public Hearing on the matter in Bozeman, Montana.

16. On March 29, 2013, iSmart filed its final Post-Hearing Brief which closed the evidentiary record in the docket.

17. All parties and the Commission engaged in discovery throughout the proceeding. The intervenors elected not to file testimony in this docket.

DISCUSSION AND FINDINGS OF FACT

Testimony of Richard Stupansky

18. Mr. Richard Stupansky, Chief Operating Officer (COO) of iSmart, provided testimony on behalf of iSmart in this proceeding. Stupansky stated iSmart is not seeking ETC designation in order to receive high-cost federal support. He stated iSmart is only seeking low-income support because its target market consists mostly of people with low or variable incomes, in primarily the state's larger and mid-sized communities. Stupansky said iSmart's service is unique in that it more directly targets individuals with low incomes compared to the services provided by other telecom service providers in Montana. He said iSmart's phone service will benefit people of limited means, who often cannot afford up-front costs like initiation fees, and are cautious of signing long-term, multi-year contracts when the person may be uncertain about his/her financial condition in the future. Stupansky stated the iSmart business model allows low-income persons to enjoy the advantages of a mobile telecom connection with a much lower up-front investment of cash and more affordable ongoing expenditures.

19. Stupansky stated iSmart's calling plans will offer customers unlimited calling at flat rates without requiring a fixed-term contract or credit check. iSmart will offer a local plan for \$24.99/month, a statewide plan for \$44.99/month, and a nationwide plan for \$54.99/month. (Hrg. Tr. 10:7-25.) Each plan includes unlimited calling minutes and SMS messaging capability, but does not currently include an option for data. Stupansky testified iSmart will provide data to its customers once it can provide a reliable data service. (Hrg. Tr. 16:18-21.) iSmart will reduce

each of those monthly rates by \$9.25 for its Lifeline customers as a result of the federal Lifeline subsidy. (Tr. 15:9-17.) iSmart will also contribute \$3.50 in addition to the federal subsidy, resulting in a basic plan that costs \$12.24 per month. (Tr. 53:11-18). iSmart does not currently, nor does it intend to, charge for roaming fees; instead, roaming will be turned off outside of the calling area identified in the calling plan. (Tr. 12:17-24.) Stupansky stated each calling plan is month-to-month, with no contracts, and no activation or termination fees.

20. Stupansky claimed iSmart has engaged in various advertising, including the local newspaper, local radio station ads, local television commercials, and a billboard on Interstate-90. iSmart has also advertised in local events such as Catapalooza and the Gallatin Valley Fair. He asserted iSmart will continue to advertise in this manner and promote its Lifeline offer specifically, upon ETC designation.

21. Stupansky testified iSmart's owned-network consists of five cell sites in Bozeman, two in Belgrade, one in Livingston, one in Butte, as well as one additional site in Butte that is currently in progress, but not complete. (Tr. 27:10-15.) iSmart owns the tower at two of the cell sites. At the others, iSmart owns equipment such as radios, control servers, cabling, generators, batteries, and the back-up system, but leases space on the cell tower from the tower owner. iSmart's owned-network currently supports 2G for its customers, and 3G technology has recently become available on two of its towers. (Tr. 36:4-6.) Stupansky stated iSmart plans on offering 3G technology on all of its cell sites at some point in the future. (Tr. 38:16-17.)

22. iSmart provides coverage to its customers outside of its network mainly through roaming agreements with AT&T and T-Mobile. In addition to providing coverage for its customers, the roaming agreements provide iSmart with additional revenues from the in-bound traffic of the roaming partner. Stupansky testified in-bound roaming traffic makes up approximately 40% of iSmart's revenue.(Tr. 39:17-19.)

23. Stupansky testified iSmart also generates revenues through its d/b/a Switch-X, which integrates rural carriers into iSmart's CORE network. (Tr. 32:10-16.) Stupansky stated integrating a rural carrier into iSmart's hosted carrier CORE network provides the rural carrier with the infrastructure needed to enter into a roaming agreement with a larger carrier such as AT&T, saving the rural provider a substantial capital and transaction cost.

24. Stupansky testified iSmart will comply with all applicable FCC rules for certification of its Lifeline customers, and will re-certify Lifeline subscribers for eligibility on an annual basis. iSmart provided its Lifeline eligibility form in response to PSC-012(c). Stupansky asserted iSmart's Lifeline customers would be required to appear in-person with the certification form to prove eligibility. He stated iSmart will utilize a national database that would prevent duplicate Lifeline certifications as soon as the FCC makes it available. (Tr. 45:13-20.)

25. Stupansky testified designating iSmart as an ETC is in the public interest. He believes the service iSmart provides is a comparable but less expensive alternative to other wireless carriers, and an adequate replacement to wireline service with the added benefits of text messaging and mobility at a lower cost. Stupansky stated iSmart aims to achieve 5% market penetration, equaling approximately 7,500 customers. (Tr. 28:16-19.)

26. Stupansky asserted iSmart meets or exceeds the standards set forth to determine public interest for an ETC in at ARM 38.5.3210. He described iSmart's compliance with each requirement in ARM 38.5.3210(3) (Ex. iSmart-1, pp. 13-17.):

- *ARM 38.5.3210(3)(a) – the ability of the ETC to provide the supported services in the matter required:* iSmart's network is fully functional for the provision of voice grade access service, as well as directory and 911 services. Stupansky stated iSmart's capabilities are the same as any other facilities-based landline or wireless telecom carrier.

- *ARM 38.5.3210(3)(b) – the ability and willingness of the ETC to comply with all laws governing ETCs:* Stupansky stated he fully expects iSmart to comply with any and all legal requirements imposed at both the state and federal level on ETCs.

- *ARM 38.5.3210(3)(c) – the ability of a service area to support an additional ETC:* Stupansky stated the support iSmart is seeking applies only to the relatively small number of persons who qualify, and he believes iSmart's ETC designation would have a relatively tiny affect in comparison to the size of the fund.

- *ARM 38.5.3210(3)(d) – the effect of an additional ETC designation would have on existing ETCs in the service area:* Stupansky believes iSmart's target market is a fairly small number of customers who are relatively low on the priority list for most telecom service providers, and there would not be much, if any, impact on existing ETCs.

- *ARM 38.5.3210(3)(e) – whether the ETC’s technology platform is compatible with broadband and other advanced service offerings and facilitates availability of advanced telecommunications and information services in the areas served:* In his direct testimony, Stupansky stated iSmart is planning to launch 3G HSPA+ Broadband Cellular service within 2 years and will also be supporting LTE on its CORE network. He added if iSmart can acquire 700MHz or AWS spectrum it will launch 4G LTE Broadband services. At the Hearing on this matter, Stupansky stated he is currently testing 3G service on two of iSmart’s towers which should be available for in-bound roaming customers very soon. He asserted iSmart plans to eventually launch 3G on all of its owned-towers.
- *ARM 38.5.3210(3)(f) – the ability of the ETC to provide equal access to long-distance carriers in the event no other ETC is providing such access:* Stupansky acknowledged iSmart would be able to provide equal access should it be ordered to by the FCC.
- *ARM 38.5.3210(3)(g) – the extent to which the ETC is able to provide service using its own network:* In his direct testimony, Stupansky stated iSmart currently only offers service in areas that it covers within the iSmart-owned network, and said its customers can roam to other cellular networks with which iSmart has agreements; however, roaming accounts for less than 5% of its traffic. At the Hearing, Stupansky stated iSmart had entered into roaming agreements with AT&T and T-Mobile, which allows iSmart customers nationwide coverage.
- *ARM 38.5.3210(3)(h) – the effect of ETC designation on the availability of universal service funds:* Stupansky asserted iSmart’s target market is relatively small and should have a very tiny effect on the ability of other ETCs to obtain support.
- *ARM 38.5.3210(3)(i) – the extent to which ETC designation is consistent with the principles of universal service:* Stupansky stated iSmart will target those who cannot afford telephone service and thus iSmart’s ETC designation would be particularly consistent with the principles of universal service.
- *ARM 38.5.3210(3)(j) – whether ETC designation would advance public convenience:* Stupansky believes people deserve more choices than are currently

available; and iSmart can offer a replacement to wireline service at a lower cost, with the added benefit of mobility and text messaging.

- *ARM 38.5.3210(3)(k) – how ETC designation would affect public safety in terms of reliability of its network and the ability to remain functional in an emergency situation:* Stupansky stated most of its sites have propane generators along with batteries to ensure that no loss of service occurs. He added iSmart exceeds the FCC regulation for power backup requirements.

27. Stupansky asserted iSmart meets all of the requirements in ARM 38.5.3210(3); however, a carrier need not necessarily meet all of those requirements to receive ETC designation. Stupansky referenced ARM 38.5.3210(4), which states “any one public interest factor...is unlikely to be determinative in and of itself, regarding the designation of an eligible telecommunications carrier...A determination of public interest will generally include a consideration and balancing of all relevant factors.”

iSmart Petition and Compliance with Federal Requirements for ETC Designation

28. iSmart asserted it complies with the federal statutory requirements for designation as an ETC as set forth in Section 214(e)(1) which states the carrier must: (A) offer the services that are supported by federal universal 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 ETC); and (B) advertise the availability of such services and the charges therefore using the media of general distribution.

iSmart Compliance with Section 214(e)(1)(A) of the Act

29. At the time iSmart submitted its Petition to the Commission, the FCC had defined nine services supported by federal universal support mechanisms in the FCC rules at 47 C.F.R. §54.101.² In its petition iSmart maintained it would be able to provide each of those nine services, using either its own facilities, or a combination of its own facilities and resale of another carrier’s services. iSmart attested it would provide the following nine services:

² In the FCC’s *Connect America Fund; USF/ICC Transformation Order*, released on November 18, 2011, the FCC eliminated its former list of nine supported services and amended section 54.101 of the FCC’s rules to specify that “voice telephony service” is supported by federal universal service support mechanisms.

- ***Voice Grade Access*** – iSmart’s customers will be able to make and receive calls on the public switched telephone network with a minimum bandwidth of 300 to 3000 Hertz.
- ***Local Usage*** – iSmart will offer unlimited local and long-distance minutes in the defined calling area. iSmart’s plans will incorporate features such as caller ID; unlimited text and picture messaging; unlimited texts to Mexico; premium extended coverage providing unlimited service without additional roaming fees in over 4,600 domestic cities and towns; and call waiting, three-way calling, and voicemail.
- ***Dual Tone Multi-Frequency Signaling or its Functional Equivalent*** – iSmart noted that the FCC has recognized, with respect to wireless carriers, it “is appropriate to support out-of-band signaling mechanisms as an alternative to DTMF signaling.”³ iSmart customers will have access to out-of-band signaling and in-band multi-frequency signaling that is equivalent to wireline dual tone multi-frequency signaling.
- ***Single-Party Service or its Functional Equivalent*** – Single party service affords wireless users a dedicated message path for the length of a user’s transmission. iSmart stated it meets this requirement with respect to each of its service offerings.
- ***Access to Emergency Services*** – iSmart asserted it provides its voice customers with access to emergency services, such as 911 and enhanced 911 (E-911). iSmart reported it is capable of delivering automatic numbering information (ANI) and, upon request by the local Public Service Answering Points (PSAPs) for the particular area at issue, automatic location information (ALI) over its existing network.
- ***Access to Operator Services*** – iSmart stated it meets this requirement by providing access to operator services to customers dialing “611.”
- ***Access to Interexchange Service*** – iSmart provides all of its subscribers with the ability to make and receive interexchange or toll calls through iSmart’s mobile network.
- ***Directory Assistance*** – iSmart provides access to directory assistance to customers dialing “411.”
- ***Toll Limitation*** – Toll limitation includes the offering of services as a means of limiting or blocking the completion of outgoing toll calls. iSmart stated its calling plans offer unlimited local and domestic long distance calls with no incremental fees for additional

³ *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Red 8776, at ¶ 71 (1997).

toll calls, so toll blocking does not apply under its calling plan structure. iSmart added that it offers International Long Distance toll blocking at no extra charge.

30. On November 18, 2011, the FCC released the *Connect America Fund; USF/ICC Transformation Order* (Order).⁴ In the Order, the FCC eliminated its former list of nine supported services and amended section 54.101 of the FCC's rules to specify that "voice telephony service" is supported by federal universal service support mechanisms.⁵ The FCC recognized that many of the services enumerated in the previous rule are universal today and the importance of operator services and directory assistance, in particular, has declined with changes in the marketplace.

31. In adopting the new definition of "voice telephony" in section 54.101, the FCC eliminated certain services and functionalities from the list of supported services. Section 54.101 has been amended to read: "*Services designated for support. Voice telephony services shall be supported by federal universal service support mechanisms. Eligible voice telephony services must provide voice grade access to the public switched network or its functional equivalent; minutes of use for local service provided at no additional charge to end users; access to the emergency services provided by local government or other public safety organizations, such as 911 and enhanced 911, to the extent the local government in an eligible carrier's service area has implemented 911 or enhanced 911 systems; and toll limitation for qualifying low-income consumers (as described in subpart E of this part).*"

32. iSmart confirmed in response to data response PSC-012(b) it would provide voice telephony service, pursuant to the updated language, using a combination of its own facilities as well as facilities owned by AT&T.

iSmart compliance with Section 214(e)(1)(B) of the Act

33. iSmart asserted it would advertise the availability of and rates for the supported services listed above pursuant to FCC and Commission rules upon designation as an ETC. In its petition, iSmart said the advertising would occur through some combination of media channels, such as television and radio, newspaper, magazine and other print advertisements, outdoor

⁴ FCC 11-161.

⁵ *Id.* At para. 78; *see also id. App. A* at 536 (revising section 54.101(a) of the Commission's rules); *see* 76 FR 73830, 73870 (Nov. 29, 2011) (revising 47 C.F.R. §54.101(a) with an effective date of December 29, 2011).

advertising, direct marketing, and the internet. iSmart assured it would advise prospective customers of the availability of Lifeline service. In its petition, iSmart stated it intended on signing an agreement with the Montana Department of Public Health and Human Services (DPHHS) to implement real-time verification of customer eligibility for Lifeline. Since that time, the FCC expanded the eligibility requirements for Lifeline customers and, as a result, DPHHS may not have the capability to provide real-time verification of eligibility. In light of the expanded eligibility, staff issued data request PSC-012(b) to inquire about eligibility verification. iSmart indicated it would query new Lifeline customers to determine whether those customers are eligible for any of the programs set forth as prerequisites for Lifeline eligibility. It also provided a copy of the Lifeline application form it will provide to customers. Finally, iSmart stated it will contact each of its Lifeline customers annually to determine whether they continue to be eligible for any of the programs that are prerequisites for Lifeline eligibility.

Additional requirements for designation of ETCs

34. Section §54.202(a) of Title 47 C.F.R. sets forth additional requirements for ETC designation. iSmart described how it would meet the additional requirements as the requirements were written at the time of iSmart's application:

- *Commitment to provide service upon a reasonable request [47 C.F.R. §54.202(a)(1)]* – iSmart will immediately provide service to a customer who requests service within its existing network coverage. If a customer requests service within one of iSmart's designated ETC areas, but is outside of its network coverage, iSmart will follow the six-step process specified in 47 C.F.R. §54.202(a)(1)(i).
- *Ability to remain functional in an emergency [47 C.F.R. §54.202(a)(2)]* – iSmart stated it maintains a reasonable amount of backup and is committed to providing and maintaining essential telecommunications services in times of an emergency.
- *Satisfaction of applicable consumer protection and service quality standards [47 C.F.R. §54.202(a)(3)]* – iSmart will comply with all applicable state and federal consumer protection and service quality standards, as well as abide by the Cellular Telecommunications and Internet Association's Consumer Code for Wireless Service (CTIA Code). iSmart declared it will designate a contact person to work with the Commission for any necessary complaint resolution.

- *Local usage plan* [47 C.F.R. §54.202(a)(4) – iSmart offers local usage plans comparable to those offered by ILECs in the service areas for which it is requesting ETC designation.
- *Equal access* [47 C.F.R. §54.202(a)(5) – iSmart is prepared to offer equal access to long distance carriers in the event it is ordered to do so by the FCC.
- *Lifeline certification and verification* [47 C.F.R. §54.410] – iSmart will certify and verify consumer eligibility to participate in the Lifeline and Linkup programs in accordance with the rules of the PSC and FCC.
- *Regulatory Fees* – iSmart will pay all applicable federal, state, and local regulatory fees, including but not limited to universal service and E-911 fees, in a timely manner.

35. Following the time iSmart’s petition was submitted to the PSC, the FCC amended Section §54.202(a) of Title 47 C.F.R. The parts of that section which changed are:

- 47 C.F.R. § 54.202(a)(1)(i): ETC should certify it will comply with the service requirements applicable to the support it receives.
- 47 C.F.R. § 54.202(a)(1)(ii): Submit a 5-year plan that describes with specificity improvements or upgrades to the applicant’s network. Carriers seeking ETC designation in order to receive only low-income support need not submit a 5 year plan.⁶
- 47 C.F.R. § 54.202(a)(4): Carriers seeking ETC designation for the purpose of receiving only low-income support must demonstrate it is financially and technically capable of providing Lifeline service in compliance with subpart E.
- 47 C.F.R. § 54.202(a)(5): Carriers seeking ETC designation for low-income support only must submit detailed information describing the terms and conditions of any plan offered to Lifeline subscribers, including details on the number of minutes provided as part of the plan, additional charges, if any, for toll calls, and rates for each such plan. It may also provide summary information regarding the terms and conditions of any plans offered to the general public.

⁶ iSmart provided a 5-year build-out plan in its response to data request PSC-002(c).

36. In its response to data request PSC-013, iSmart indicated it would comply with all current requirements in Section §54.202(a) of Title 47 C.F.R.

37. iSmart confirmed it would comply with all applicable federal laws related to the Lifeline program, including the rules and regulations set forth by the FCC in the *Lifeline Reform Order* released on February 6, 2012.

Post-Hearing Briefs

38. MITS/MTA, the sole intervenor in this case, elected not to provide testimony during this proceeding, but reserved its right to file a post-hearing brief. iSmart filed its initial post-hearing brief on February 22, 2013. MITS/MTA filed its post-hearing brief on March 14, 2013. In response, iSmart filed a reply post-hearing brief on March 29, 2013.

iSmart Initial Post-Hearing Brief

39. In its initial Post-Hearing Brief, iSmart reiterated it has satisfied all state and federal statutory and regulatory requirements for designation as an ETC. iSmart insinuated its designation should essentially be automatic if it meets all necessary requirements, citing 47 U.S.C. §214(e)(2), which states, in pertinent part: "...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....so long as each additional requesting carrier meets the requirements in [47 U.S.C. §214(e)(1)] and *shall* be designated as an eligible telecommunications carrier for that community or portion thereof."

MITS/MTA Initial Post-Hearing Brief

40. MITS/MTA oppose the designation of iSmart as an ETC, stating iSmart scores poorly on the Commission's public interest metrics, and another carrier drawing on the federal universal support funds will jeopardize the long term viability of those funds and the critical support they provide for rural and non-rural carriers.

41. MITS/MTA strongly disagreed with the assertion that the designation of iSmart should be "automatic," as was stated in iSmart's initial post-hearing brief. MITS/MTA pointed to ARM 38.5.3210(2):

(2) The commission is not required to designate additional eligible telecommunications carriers in any service area, non-rural or rural. The commission may determine designation of an eligible

telecommunications carrier in any service area, rural or non-rural, is not in the public interest.

42. MITS/MTA said the public interest standard exists in both the federal and state law, and it is the Commission's responsibility to decide what is and what is not in the public interest at the state level. MITS/MTA asserted that although the Commission set out eleven relevant factors in determining public interest in ARM 38.5.3210(3), the list is not determinative in deciding public interest and the Commission reserves the right to reject any petition for ETC status, regardless of showing.

43. MITS/MTA pointed to two decisions made by the FCC that indicated an affirmative determination of public interest must be made by the carrier applying for ETC designation; regardless of whether the carrier is applying in a rural or non-rural study area, and whether or not the carrier meets the requirements set forth in §214(3)(1) of the Act.⁷

44. MITS/MTA asserted iSmart does not score well under the Commission's standards set out in ARM 38.5.3210(3). While MITS/MTA acknowledged iSmart may eventually meet the metrics specified in ARM 38.5.3210(3)(a)-(d), it does not believe iSmart has proven it meets the remaining seven metrics specified in subsections (e) through (k) of the rule. MITS/MTA described why it believes iSmart has not met each of the criteria specified in subsections (e) through (k).

45. MITS/MTA explained the federal Lifeline fund has increased from an average of between \$600 million and \$800 million per year from 1996 through 2004 to approximately \$2.2 billion in 2012. MITS/MTA asserted the increase in the fund has been due almost entirely to entry into the "Lifeline market" from wireless competitive ETCs. MITS/MTA stated the number of competitive ETCs receiving federal Lifeline support has increased from 41 carriers in 2004 to approximately 670 carriers in 2012. MITS/MTA argued that granting additional carriers as ETCs that intend to receive federal Lifeline support and provide service to low-income consumers will undercut the financial viability of the universal service fund. MITS/MTA provided additional graphs and charts displaying the growth of the Lifeline fund and distribution of the funds over the past decade.

⁷ See MITS/MTA Initial Post-Hearing Brief, Page 3 reference: *In the Matter of Federal-State Joint Board on Universal Service. Virginia Cellular LLC, Petition for Designation as an ETC in the Commonwealth of Virginia*, CC Docket No. 96-45, FCC 03-338, ¶27; AND *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 05-46, ¶42.

46. MITS/MTA asserted iSmart has not made a persuasive showing that designation of iSmart as an ETC is in the public interest, and recommended the Commission deny the iSmart petition.

iSmart Post-Hearing Reply Brief

47. iSmart rebutted MITS/MTA's assertion that iSmart designation would undercut the financial viability of the Lifeline fund. iSmart stated moving eligible Lifeline customers from one provider to another would have no effect on the fund. To the extent additional eligible Lifeline customers begin utilizing Lifeline phone service, iSmart stated this is the exact purpose of the fund, and any incremental pressure on the fund would be the same, whether it is an existing carrier providing that service or iSmart. iSmart reiterated it will enforce the one-per-household requirement for Lifeline service set out by the FCC.

48. iSmart stated there is no such scoring system that exists for establishing public interest as MITS/MTA suggested, and even if one did exist, there is no reason to believe iSmart would score low on that scoring scale. iSmart asserted it has met all criteria set forth in the Commission's rules, including that of public interest.

49. iSmart dismissed the MITS/MTA notion that a new Lifeline provider should not be designated where the service already exists as anti-competitive, and asserted the claims MITS/MTA makes regarding a failure by iSmart to meet Commission rules for designation are exceptionally weak.

50. iSmart stated MITS/MTA offered no evidence or pre-filed testimony in this docket that would allow for cross-examination or data requests to be issued upon. It noted MITS/MTA did not participate in this proceeding or hearing in any way other than issuing data requests to iSmart, which were admitted into evidence only because Commission staff moved for their inclusion. iSmart "vigorously objected" to MITS/MTA attempts to introduce additional evidence in its post-hearing brief, calling it an intolerable attempt to use the legal tool of "judicial notice." iSmart argued since MITS/MTA failed to pre-file testimony on which iSmart could have filed data requests, and because MITS/MTA failed to participate in the hearing of this matter to answer questions in this regard, iSmart can only conclude that iSmart's Lifeline products are virtually the same as those offered by the MITS/MTA members.

51. iSmart contended MITS/MTA attempt to introduce additional evidence in its post-hearing brief is, at best, unseemly, and effectively cuts iSmart's counsel out of the due process of law. iSmart stated the Commission should deny MITS/MTA's request to take judicial notice of the attachments included with its post-hearing brief, and the documents should be stricken from the record.

52. iSmart again reiterated it meets all federal and state requirements to be designated an ETC as requested. iSmart contended the allegations made by MITS/MTA in its post-hearing brief are simply an attempt to protect its members from competition in the Lifeline services market.

53. iSmart argued its designation as an ETC will not jeopardize the Lifeline fund because its designation will not increase the number of customers eligible to receive the service; instead, it will only increase competition which was a fundamental theme of the FCC's 1996 Telecommunications Act.

54. Finally, iSmart stated the Commission's role is adjudicative in nature. It stated the Commission is not to advocate on behalf of either party, and not on behalf of consumers. iSmart asserted that under Montana's State Constitution, the representation of consumers is to be left up to the Montana Consumer Counsel (MCC). iSmart contended the MCC did not intervene or participate in this docket in any way, and therefore saw nothing in iSmart's application that jeopardized consumer interests to the degree where representation of consumers in this docket was necessary or appropriate.

55. iSmart stated it sincerely believes it has provided sufficient evidence to meet its burden of proof for designation as an ETC, including that of meeting the public interest, and the Commission should grant its application.

Commission Analysis and Discussion

56. The Commission finds that iSmart is a telecommunications carrier in the state of Montana that is registered with the PSC.

57. iSmart is applying for ETC designation in the following wire centers served by one of Montana's price-capped incumbent local exchange carriers: Bozeman, Butte Main, Butte South, Livingston, Belgrade, Manhattan, and Gallatin Gateway.

58. iSmart is applying for ETC designation for the purpose of providing Lifeline service to its customers and to receive federal low-income support. iSmart is not seeking ETC designation in order to receive high-cost support.

59. iSmart's phone plans, even after the federal Lifeline subsidy and the company's own contribution to buying down the cost of a consumer's phone service, will require remittance of some payment from the customer himself. iSmart therefore avoids some of the contentious public policy issues surrounding other offerings under the federal Lifeline program.

60. iSmart has built out its own network in the state. To provide service outside of its network, iSmart relies on roaming agreements with other carriers, mainly AT&T and T-Mobile. Customers of other providers roaming on iSmart's system have access to data coverage. Although iSmart does not offer it presently to its subscribers, its long-term business plan contemplates expanded data services to its customers.

61. iSmart has been providing service in Montana since 2009. The Commission has no complaints on record from any iSmart customer.

62. iSmart has other sources of revenue beyond the Lifeline telecommunications services it intends to provide to its customers upon ETC designation. These sources include inbound roaming traffic from T-Mobile customers, as well as its dba Switch-Ex, which integrates other carriers into iSmart's CORE network, thus providing those carriers with the infrastructure needed to enter into roaming agreements with larger providers such as AT&T.

63. While the Commission considers the introduction of increased competition from reliable and ethical telecommunication carriers to be generally in the public interest, it is becoming increasingly concerned at the alarming rate of growth of the Lifeline fund over recent years.

64. iSmart committed during the hearing and throughout its testimony that it would implement safeguards to ensure only qualified customers receive Lifeline discounts. Stupansky asserted that iSmart's Lifeline customers would be required to appear in-person with the certification form to prove eligibility. He stated iSmart will utilize a national database that would prevent duplicate Lifeline certifications as soon as the FCC makes it available. (Tr. 45:13-20.) Finally, iSmart reiterated it will enforce the one-per-household requirement for Lifeline service set out by the FCC. The Commission finds that iSmart shall implement these safeguards to ensure that only qualified customers receive the Lifeline discount as the

Commission has concerns about both the growth of the program and possible abuse of the program resources nationwide.

65. The Commission finds that iSmart meets the requirements for ETC designation as set forth in ARM 38.5.3210. *Supra* ¶¶ 26-27.

66. iSmart meets the requirements for ETC designation as set forth in Section 214(e)(1) of the Act. *Supra* ¶ 29.

67. iSmart meets the requirements for ETC designation as set forth in Section 54.202(a) of Title 47 C.F.R. *Supra* ¶¶ 34-36.

68. The intervenor in this docket did not file testimony, did not participate in the hearing, and was involved throughout the case in a very limited manner; however, it did express its opposition to iSmart's designation as an ETC in a Post-Hearing Brief.

69. iSmart requested in its Reply Brief that the Commission strike the request to take judicial notice of the information attached to the intervenor's Response Brief. With respect to the information provided in the attachments to the intervenor's Post-Hearing Brief: while the Commission recognizes it may be valid information, there was not sufficient opportunity to scrutinize the information provided, and therefore the Commission did not rely upon that data when making this decision. The Commission determines that iSmart's request is moot. iSmart has committed to follow all state and federal requirements, as applicable, upon ETC designation.

CONCLUSIONS OF LAW

70. 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.*

71. The Commission is authorized to designate telecommunications carriers as eligible for federal universal service support, in accordance with *47 U.S.C. § 214(e)(1), 47 U.S.C. § 254, and § 69-8-840 (1), MCA.*

72. Consideration of the public interest applies in all applications for designation as an eligible telecommunications carrier. *47 U.S.C. § 214(e)(2); ARM 38.5.3210.* The Commission has considered the public interest in this proceeding and determines designation of iSmart as a Lifeline only eligible telecommunications carrier is in the public interest.

73. The Commission has adopted rules governing the designation of eligible telecommunications carriers and the maintenance of status as an eligible telecommunications

carrier. *See ARM 38.5.3201 through 38.5.3230; PSC Docket No. L-04.07.5-RUL.* The rules as adopted and amended will apply to all eligible telecommunications carriers in Montana, including iSmart. The rules as existing and as may be amended, may qualify, modify, or replace one or more of the terms and conditions in this Order.

74. The Commission determines that iSmart satisfies the requirements for eligible telecommunications carrier designation as set forth in *ARM 38.5.3210*.

75. iSmart satisfies the requirements for eligible telecommunications carrier designation as set forth in *Section 214(e)(1)* of the Act.

76. iSmart satisfies the requirements for eligible telecommunications carrier designation as set forth in *Section 54.202(a)* of *Title 47 C.F.R.*

77. The Commission has considered all laws, federal and state, applicable to state designation of eligible telecommunications carriers for receipt of federal Lifeline universal service funding. The Commission determines that iSmart has met the legal requirements for designation.

ORDER

IT IS HEREBY ORDERED THAT:

75. iSmart Mobile, LLC d/b/a Big Sky Mobile is designated as an eligible telecommunications carrier in the state of Montana within the study area for which it has applied in its amended petition, for the purpose of receiving only federal Lifeline Support.⁸ By accepting its designation, iSmart Mobile, LLC d/b/a Big Sky Mobile agrees to adhere to all applicable state and federal laws and this Commission's Order concerning eligible telecommunications carriers.

DONE AND DATED this 21st day of May 2013 by a vote of 5 to 0.

⁸ Study area includes the following Qwest Corporation dba CenturyLink QC wire centers: Bozeman, Butte Main, Butte South, Livingston, Belgrade, Manhattan, and Gallatin Gateway.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

W. A. GALLAGHER, Chairman

BOB LAKE, Vice Chairman

KIRK BUSHMAN, Commissioner

TRAVIS KAVULLA, Commissioner

ROGER KOOPMAN, Commissioner

ATTEST:

Aleisha Solem
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. Admin. R. Mont. 38.2.4806.

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

IN THE MATTER OF iSmart Mobile, LLC,) REGULATORY DIVISION
Application for Designation as an Eligible)
Telecommunications Carrier) DOCKET NO. D2010.10.99

CONCURRING OPINION OF COMMISSIONER TRAVIS KAVULLA

Regulatory agencies like the Montana Public Service Commission have a public-interest responsibility to examine the consequences of Eligible Telecommunications Carrier (ETC) designations. I agree with intervenors Montana Independent Telecommunications Systems (MITS) and the Montana Telecommunications Association (MTA) that it is up to this Commission at the state level to decide what is in the public interest, with an understanding that such a determination should be contextualized within the law and rules that govern the Lifeline program via the U.S. Congress and the Federal Communications Commission. This Commission’s judgment may differ from what the federal agency in its own circumstances has concluded. *See* Admin. R. Mont. 38.5.3210(2), quoted in MITS/MTA Post-Hearing Brief, p. 2.⁹

One aspect of that public-interest responsibility is to ensure that as the state-level gatekeeper of potentially generous federally sourced revenues, the Montana Commission exercises responsibly its power to open and close the flood-gates on this federal program, and to ensure that subsidies available to ETCs and their consumers do not have deleterious consequences. The provision of highly discounted or completely “free” phone services has given rise to a host of Lifeline controversies, and generated concern about the promotion of waste, fraud, and abuse of a well-intentioned federal program. It is reasonable that the Commission, in its first Lifeline ETC decision since the FCC issued its recent “transformation” order, take such a concern seriously. *See* In the Matter of Connect America Fund, etc. FCC 11-161 (adopted Oct. 27, 2011). In my view, and I trust my colleagues’ views, it is generally good public policy to

⁹ I believe that the incredible growth in the Lifeline fund is worthy of note, and I wish that MITS/MTA had sponsored testimony drawing attention to it, instead of presenting data about the trend only as an appendix to its post-hearing brief.

ensure that customers who are willing and able to pay with their own money for a telephone service should do that, absent a contribution made through other consumers' phone bills. In the wireless context, such subsidies could also undercut the high-fixed-cost wireline investments on which wireless telephony inevitably relies. Both of these considerations are properly at play in our consideration of ETC designations.¹⁰

That being said, I am willing to side with iSmart in its request for ETC designation for two important reasons.

First, unlike other recently designated ETCs elsewhere in the United States, iSmart has made a commitment in its testimony that it would not offer a device and phone plan that's simply given away to someone for "free." Hrg. Transcr. 60:17-61:7. iSmart is doing something—obtaining a Lifeline subsidy to discount its phone service—that other wireless providers in Montana already enjoy, and absent a meaningful distinction on which to rely, it would be inappropriate to deny iSmart an advantage that its competitors enjoy.

Second, while the FCC has chosen to abrogate the requirement, the Montana Administrative Rules still call upon this Commission to consider whether an ETC will have its own facilities. Admin. R. Mont. 38.5.3210(3)(g). This is for good reason. It is important that federal subsidies flow as directly as possible to the creation of new infrastructure that can sustain better telephony. iSmart has its own facilities in the wire centers for which it seeks ETC designation, and its business plan appears to be more than merely to act as a siphon for federal subsidies.

I therefor CONCUR with the Order.

Travis Kavulla, Commissioner (concurring)

¹⁰ For a colloquy about this public-policy dimension to ETC designations, *See* Hrg. Transcr. 57:19-63:17.