

Service Date: November 3, 1999

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

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IN THE MATTER OF the Petition of)	UTILITY DIVISION
Ronan Telephone Company for Suspension of)	
Provisions of the 1996 Telecommunications Act,)	DOCKET NO. D99.4.111
pursuant to 47 U.S.C. § 251(f)(2) and 253(b))	ORDER NO. 6174c

ORDER

Appearances

For the Petitioner:

Ivan Charles Evilsizer, Esq., 2033 11th Avenue, Helena, Montana 59601, appeared on behalf of Ronan Telephone Company.

For the Intervenor:

Bill Squires, Esq., 208 N. Montana Avenue, Suite 205, Helena, Montana 59601, appeared on behalf of Montana Wireless, Inc.

Thomas S. Muri, Esq., 616 Helena Avenue, 3rd Floor, Helena, Montana 59601, appeared on behalf of the Montana Consumer Counsel.

For the Commission:

Robin A. McHugh, Staff Attorney
Mike Lee, Staff Economist
Scott Fabel, Staff Rate Analyst

Before:

Bob Rowe, Commissioner
Nancy McCaffree, Vice Chair
Gary Feland, Commissioner

Introduction and Background

On April 27, 1999 Ronan Telephone Company (RTC) filed a Petition pursuant to §§ 251(f)(2) and 253(b) of the Federal Telecommunications Act of 1996 (the Act). In the caption RTC designated itself as Petitioner and Blackfoot Telephone Cooperative, Inc. (Blackfoot) and Montana Wireless, Inc., dba Blackfoot Communications (MWI) as Respondents.¹

On May 24, 1999 the Montana Public Service Commission (Commission) issued a Notice of Petition, Notice of Opportunity to Intervene, and Notice of Opportunity to Comment, noting that RTC was the first rural carrier to petition the Commission pursuant to 47 U.S.C. § 251(f)(2), and setting June 4, 1999 as the deadline for requesting intervention in the Docket or indicating an intent to file comments. The Montana Consumer Counsel (MCC), MWI and U S WEST Communications, Inc. (U S West) timely responded and were granted intervention.² The Commission granted a request for late intervention from the Ronan Telephone Company Consumer Advisory Committee (RTCCAC).³

The Commission issued Procedural Order No. 6174 in this Docket on June 14, 1999. In addition to establishing procedural requirements and a procedural schedule, on its own motion in the Procedural Order the Commission modified the caption of this proceeding, eliminating the designation used by RTC in its petition⁴ and substituting the caption used in this Order. The Commission concluded that this proceeding should not have a caption similar to a complaint, and should not include as a "respondent" an entity (Blackfoot) that had not intervened in the Docket. The Commission found that this proceeding should use the caption typical of a contested case that is

¹ On April 28, 1999 Blackfoot and MWI each filed a Petition for Arbitration under 47 U.S.C. § 252(b) and § 69-3-837, MCA, requesting that the Commission arbitrate unresolved issues in interconnection negotiations with RTC. Both arbitrations, In the Matter of Petition of Blackfoot Telephone Cooperative, Inc. for Arbitration of Contract Negotiations with Ronan Telephone Company Pursuant to 47 U.S.C. § 252 (PSC Docket No. D99.4.112) and In the Matter of Petition of Montana Wireless, Inc. for Arbitration of Contract Negotiations with Ronan Telephone Company Pursuant to 47 U.S.C. § 252 (PSC Docket No. D99.4.113), were stayed on stipulation of the parties pending a final order or order on reconsideration in this Docket.

² Notice of Staff Action, June 14, 1999.

³ Notice of Commission Action, July 13, 1999. Of the intervenors, MCC and MWI participated fully. U S West did not participate. The RTCCAC submitted a letter (June 22, 1999) to the Commission as prefiled testimony and sponsored the letter as an exhibit through witness Bonnie Mueller. The letter was admitted as RTCCAC exhibit 1 (TR 142).

not a complaint, with the parties defined by the entity making the filing (usually an applicant or petitioner) and the entities contesting the filing, or otherwise participating as intervenors.⁵

On July 17, 1999 RTC filed a Motion to Compel responses to discovery it had served on Blackfoot and MWI on May 13, 1999. RTC argued that Blackfoot and MWI were obligated to respond pursuant to the Montana Rules of Civil Procedure. The Commission denied the Motion to Compel, explaining that discovery in Commission contested cases is controlled by Commission procedural orders. The discovery RTC sought to compel was served prior to the issuance of the Procedural Order. The Commission noted that RTC could conduct discovery pursuant to the Procedural Order.⁶

After proper notice the Commission held a hearing on the RTC petition on September 23, 1999. At the hearing the Commission made certain evidentiary rulings, and reserved others to this Order.

Evidentiary Rulings

At the hearing the following data responses were offered into evidence:
PSC 1-38, MCC 1-48, RTC 54, 57c, 75, 92, 95b, and MWI 15 and 18.

Objections were made to the admission of several of these responses. The Commission instructed the parties to argue their objections in posthearing briefs, and rulings would be made in the final order. The objections and rulings are as follows:

PSC 2(a) – Objection (MWI): Irrelevant and assumes facts not in evidence.

Ruling: Sustained. Also, this response addresses a subject not within the scope of this proceeding pursuant to the Commission ruling on the MWI Motion in Limine.⁷

⁴ Ronan Telephone Company, Petitioner v. Blackfoot Telephone Cooperative, Inc. and Montana Wireless, Inc. dba Blackfoot Communications, Respondents.

⁵ RTC asked for reconsideration of paragraphs 2 and 4 of Order No. 6174, wherein the Commission modified the caption and indicated how persons could become parties to the Docket. The Commission denied reconsideration. Notice of Commission Action, July 15, 1999. RTC also filed a Motion Requesting Joinder of Blackfoot as a party. The Commission denied this motion referring to its Notice of Commission Action of July 15, 1999. Notice of Commission Action, July 19, 1999.

⁶ Notice of Commission Action, July 15, 1999.

⁷ At hearing the Commission granted a Motion in Limine filed by MWI to prohibit RTC from "introducing any testimony, exhibits or references as to the financial structure, including revenues, expenses, taxes, capitalization, universal service support, and the like, of MWI, Blackfoot Telephone Cooperative, or Clark Fork Telecommunications" (TR 19). This ruling was consistent

PSC 3(a) – Objection (MWI): Assumes facts not in evidence and calls for a legal conclusion.

Ruling: Sustained. Also, see ruling on objection to PSC 2(a).

PSC 3(c) – Objection (MWI): Blackfoot financial information is irrelevant and within the scope of MWI's Motion in Limine.

Ruling: Sustained.

PSC 3(e) – Objection (MWI): Calls for a legal conclusion and assumes facts not in evidence.

Ruling: Sustained. This response is primarily argument most appropriate for briefing.

PSC 6(e) – Objection (MWI): Assumes facts not in evidence and calls for speculation.

Ruling: Overruled. This is a straightforward explanation of an RTC exhibit.

PSC 13(a, b & c) – Objection (MWI): Calls for legal conclusions and assumes facts not in evidence.

Ruling: Sustained. This is discussion appropriate for briefing. The Commission can benefit from it without it being admitted into evidence.

PSC 13(e) – Objection (MWI): Calls for a legal conclusion and violates MWI's rights of due process.

Ruling: Sustained. The basis of the stated objection is without merit; however, the documents supplied in response to this question are not appropriately admitted into the record. The Commission may benefit from them despite their absence from the formal record.

PSC 21(a) – Objection (RTC): Irrelevant and beyond the scope of the docket.

Ruling: Overruled. The response addresses technical feasibility.

PSC 21(d) – Objection (RTC): Irrelevant and beyond the scope of the docket.

Ruling: Overruled. The response addresses technical feasibility.

PSC 22(c) – Objection (RTC): Asks for legal analysis and conclusions.

Ruling: Sustained. This is discussion appropriate for briefing. The Commission can benefit from it despite its absence from the evidentiary record.

PSC 23(d) – Objection (RTC): Irrelevant and beyond the scope of the docket.

with previous evidentiary rulings and resulted in certain portions of the RTC prefiled testimony not being admitted into the record. Notice of Commission Action, October 8, 1999.

Ruling: Sustained. This response does not constitute evidence that needs to be formally admitted. The Commission may nevertheless benefit from the response.

PSC 24(b) – Objection (RTC): Irrelevant and beyond the scope of the docket.

Ruling: Sustained. See ruling on PSC 23(d).

PSC 24(c) – Objection (RTC): Asks for legal analysis and conclusions.

Ruling: Sustained. See ruling on PSC 22(c).

PSC 24(d) – Objection (RTC): Asks for legal analysis and conclusions.

Ruling: Sustained. See ruling on PSC 23(d).

MCC 18 – Objection (MWI): Irrelevant and lacks proper foundation.

Ruling: Overruled. This objection was not made at hearing. TR, p. 7, ll. 2-5.

MCC 21 – Objection (MWI): Regarding reciprocal compensation rates proposed by MWI, the response assumes facts not in evidence; marketing strategy of MWI is not relevant.

Ruling: Sustained as to the narrow objection.

MCC 22 – Objection (MWI): "Subsidy" information not relevant, assumes facts not in evidence, and is within the scope of MWI's Motion in Limine.

Ruling: Sustained as to the narrow objection.

MCC 24 – Objection (MWI): Blackfoot finances and profitability are not relevant; assumes facts not in evidence and is within the scope of MWI's Motion in Limine.

Ruling: Sustained as to the narrow objection.

MCC 36 – Objection (MWI): Study of lost revenues to Blackfoot is speculative, and assumes facts not in evidence. Proper foundation was not laid for introduction of the study.

Ruling: Overruled. The response elaborates on prefiled testimony and may legitimately be in the record as support for RTC's argument. The Commission can consider the weight, persuasiveness and relevance of the evidence.

MCC 38 – Objection (MWI): Assumes facts not in evidence. Not relevant and within the scope of MWI's Motion in Limine.

Ruling: Sustained as to assuming facts not in evidence. The argument is not appropriate for admission to the evidentiary record. The Commission may nevertheless benefit from the argument.

MCC 45 – Objection (MWI): Seeks universal service funding information. Not relevant and within the scope of MWI's Motion in Limine.

Ruling: Sustained.

MCC 47 – Objection (MWI): Corporate structure and capitalization of MWI is not relevant.

Ruling: Sustained.

MCC 48 – Objection (RTC): Not relevant and beyond the scope of the docket.

Ruling: Overruled. The response is relevant to technical feasibility.

MWI 23 – Objection (MWI): Response not responsive to the question and draws legal conclusions for which no foundation has been provided.

Ruling: Sustained.

RTC 57(c) – Objection (RTC): Not relevant and beyond the scope of the docket. Not responsive to the question.

Ruling: Overruled. Response relevant to issue of technical feasibility.

The Commission correspondence file, including electronic messages, pertaining to matters at issue in this docket is part of the administrative record, not the evidentiary record. The Commission can properly refer to communications in this file to ascertain the attitudes and sentiments of the public relating to issues in the docket. The petition presented by public witness Norma Granley, TR 169, is similarly part of the administrative record.

Description of the Evidentiary Record

The following are part of the evidentiary record:

1. Testimony and exhibits of Daniel Runyon;
2. Testimony and exhibits of Allen Buckalew;
3. Testimony and exhibits of Bonnie Mueller;
4. Testimony and exhibits of Jay Wilson Preston, except those parts not admitted as a result of the Commission decision on MWI's Motion in Limine. Notice of Commission Action, October 8, 1999;
5. Testimony and exhibits of Jan Reimers, except those parts subject to the Motion in Limine. Notice of Commission Action, October 8, 1999;
6. Data responses offered, subject to the evidentiary rulings described above; and
7. Transcript of Hearing, September 23, 1999.

Summary of Testimony

Ronan Telephone Company

RTC stated that its system is rural in nature but has varying concentrations of population. The service territory is spread over about 122 square miles, roughly from Pablo to Ronan. RTC has

3,000 customers that subscribe to about 3,638 access lines and 1,367 dial-up (Internet) accounts. However, 63.7 percent of the access lines (2,317) are concentrated in 6.3 percent of RTC's service territory. In 1999, RTC's total regulated and unregulated revenues amounted to about \$3.077 million dollars. Carrier access charge revenues account for about \$.60 of every dollar in revenue that RTC collects.

The source of revenues combined with the distribution of customers within RTC's service territory makes RTC vulnerable to "cherry picking" by competitive entrants. For example, if RTC lost its three largest customers RTC would lose 10.2 percent of its revenues; loss of its six largest customers would result in a 14.5 percent revenue loss; loss of the 100 largest customers would result in a 28.2 percent revenue loss. RTC also estimates the increase in basic rates that it predicts would follow from the loss of three, six and finally its 100 largest customers.

RTC's testimony raises concerns with Blackfoot's request for local interconnection.⁸ One concern stems from the extremely low reciprocal compensation rate Blackfoot wants in combination with, what appears, a request by Blackfoot for one or more direct physical connects between RTC and Blackfoot's (or MWI's) switching. RTC argues, however, that such a request would require the "rural exemption" in . 251(f)(1) to be lifted, a request that Blackfoot did not make. Since traffic between RTC and Blackfoot flows over U S West's and other networks, these existing trunks are "indirect" connections over which RTC does not believe it is technically feasible to accurately account for any negotiated reciprocal compensation. The uncertain nature of Blackfoot's request raises either a legal impediment or the likelihood that accounting for traffic is technically infeasible.

RTC describes the consequences of Blackfoot's entry into its market as a "death spiral." This "death spiral" will occur because as RTC loses its large customers to competitors it will have to make up the lost revenue from remaining customers, resulting in loss of additional customers. RTC posits a scenario involving Blackfoot reselling RTC's local services, with the consequent loss of local and access revenues. RTC identifies Blackfoot's management as the only beneficiary of this outcome.

RTC argues that paying reciprocal compensation is inconsistent with RTC's access tariffs which require RTC to assess access charges to carriers for origination, transport and termination of

interexchange calls. RTC describes MWI's demand that it be paid reciprocal compensation for calls that may potentially originate or terminate any place within the Spokane Major Trading Area.⁹ RTC asserts that by placing it into a reciprocal compensation arrangement with Blackfoot, RTC is in the position of discriminating against its other access service customers in violation of RTC's statutory obligations under §§ 201 and 202 of the Act. RTC further asserts that by paying reciprocal compensation rather than assessing access charges in compliance with its tariff, RTC will be subsidizing Blackfoot's operations to the detriment of other carriers competing with Blackfoot in RTC's service territory.

RTC states that it currently provides interconnection with other carriers, including Blackfoot, pursuant to § 251(a) of the Act. Various Interexchange Carriers (IXCs) provide this physical connection from the RTC switching facilities in Ronan over subscribed trunk groups. These indirect connections fully satisfy the interconnection requirement of Section 251(a) of the Act and RTC does not seek any exemption from this requirement. When Blackfoot constructs wireless PCS facilities in Ronan, such service can be provided with existing facilities, without the need for any additional interconnection.

RTC argues that, under both federal and state law, the preservation of universal service takes priority over the encouragement of competition. Therefore, the Commission's primary concern should be the protection and preservation of universal service for all consumers, specifically the assurance of adequate service at reasonable rates for rural consumers.

RTC predicts that mandating reciprocal compensation would critically impact the existing universal service mechanism of access charge support for rural Ronan consumers. RTC's access tariffs allow equal and non-discriminatory access to all carriers while supporting rural high cost consumers. RTC contends that the net effect of interconnecting pursuant to the requests of Blackfoot and MWI would require RTC to supply access at less than 2 percent of the current tariffed access rates of 8.52 cents per minute plus transportation mileage. The type of competition sought through reciprocal compensation would drastically reduce access revenue, which supports adequate service at reasonable rates for outlying and high cost rural customers. The existing competition in RTC's territory is full facilities-based competition completely independent of RTC's

⁸ RTC generally does not distinguish between Blackfoot Telephone Cooperative, Inc. and Montana Wireless, inc., usually referring to them both as "Blackfoot."

⁹ This is an area covering all of Montana and portions of Washington, Idaho, Wyoming and Oregon.

facilities and does not rely on the receipt of reciprocal compensation from RTC in order to be competitive with RTC's service offerings. RTC asserts Blackfoot should pay RTC for the use of its network in the same manner as other carriers. Doing this will not disturb the universal support RTC receives through the application of tariffed access charges. RTC contends that competition that recognizes the importance of access support should be encouraged by the Commission, not the type of competition proposed by Blackfoot that distorts the market by creating discriminatory rates and subsidizes competition by placing the low access rates on the shoulders of rural consumers who will continue to have no choice for basic service.

RTC claims that its rural wireline network can evolve to deliver broadband service with relatively minor infrastructure investment, but it can not evolve if RTC is simultaneously required to provide access at a low rate. RTC contends that lack of resources due to a low access rate will result in a neglected rural wireline network, and the investment needed to provide rural people with advanced wireline service would not be made. RTC asserts that rural economies will be hurt by lack of advanced telecommunications.

According to RTC the value of wireless networks would be much less if wireline networks did not exist. The real value of wireless network is in enhancing the value of wireline service. If regulators undermine the wireline network by forcing unreasonably low compensation rates for wireless use of the wireline network, ultimately both the value of the wireline and wireless networks will be degraded, and the public interest will suffer.

RTC says it is willing and eager to provide access service to any entity that orders it from tariffs, and contends that Blackfoot's portrayal of RTC as seeking to prevent or prohibit interconnection or competition attempts to divert the Commission's attention from the critical issue: the rate level at which the interconnection will be provided and whether universal service mechanisms for RTC's rural subscribers will continue to be adequate to assure continued universal service to all Ronan customers at a reasonable rate. RTC states that its existing tariffs provide the terms, conditions and rates for the interconnection requested by Blackfoot, or any other potential carriers. Contrary to the statements by Blackfoot's witness, it is not physical interconnection which is sought, rather Blackfoot seeks very low reciprocal compensation rates which, according to RTC, would circumvent RTC's access charges that other carriers pay in accord with RTC's tariffs. RTC asserts that RTC and its customers cannot afford to subsidize Blackfoot and/or any other carrier by supplying access at less than 2 percent of tariffed access rates.

RTC favors billing any calls originating and terminating in its local exchange territory as local calls. However, RTC does not support Blackfoot's definition of local traffic.¹⁰ If Blackfoot's definition of local traffic is mandated Blackfoot would obtain reciprocal compensation rates to provide local service in most of Western Montana and potentially in a five-state region. RTC argues that it must not be required to discriminate between wireless and wireline carriers, which it thinks will occur if Blackfoot is able to obtain reciprocal compensation rates for local calls, while IXCs pay access charges for calls of the same distance and do not receive reciprocal compensation.

The critical question RTC believes the Commission needs to answer is whether it is in the public interest for low reciprocal compensation rates to benefit an unregulated wireless carrier to the detriment of rural subscribers and basic local service rates. RTC rebuttal testimony states, "Clearly, the priority for universal service policy goals must be to avoid the increase in basic local rates for Ronan's rural subscribers that would result if Ronan was forced to both: 1) charge Blackfoot for the use of Ronan's facilities at approximately 5% of Ronan's tariffed rates; and 2) collect from those Ronan subscribers the amount that Blackfoot seeks in this proceeding to bill Ronan for reciprocal compensation." Jay Wilson Preston, Rebuttal Testimony, p. 18.

Finally RTC states that unless the suspension is granted: 1) the Commission will impose a billing and accounting requirement that is technically infeasible with current facilities and billing systems; 2) Ronan's rural consumer will lose crucial universal service support currently provided by switched access charges; 3) the loss of a small percentage of RTC's large customers will result in drastic revenue shortfalls that will be unduly economically burdensome to RTC and its remaining customers; 4) this burden will eviscerate RTC's incentive to continue to invest in the Ronan community wireline infrastructure; 5) the juxtaposition of switched access rates from some carriers and reciprocal compensation for others will result in RTC being mandated to discriminate between competing carriers; and 6) the combination of these factors is not in the public interest, and not in the interest of telecommunications ratepayers generally.

Montana Wireless, Inc.

As a commercial mobile radio service (CMRS) provider in western Montana MWI has requested a physical interconnection with RTC to exchange "local traffic". MWI clarifies that it did

¹⁰ The Blackfoot wireless market includes most of Western Montana, including the Highway 93 corridor from Hamilton to Whitefish, the I-90 corridor from Deer Lodge to the Idaho border and the Highway 200 corridor from Ovando to Noxon.

not request unbundled network elements, collocation or local number portability from RTC. As for its request, local traffic is traffic that originates/terminates in the same "major trading area" (MTA) (the MTA is defined with respect to each party's location at the start of a call). MWI asserts that such traffic is not subject to access charges. MWI adds that just as the Commission recognized in the Western Wireless/U S West arbitration, MWI's request is not unusual given MWI's agreements with U S West (actual) and Century Tel (pending).

MWI requests a physical interconnect, one that would typically require MWI to build or lease a facility to a connection point on RTC's network. The connection point could be at or outside RTC's central office, or some other mutually agreeable place such as a "POP room" or another "point of connection". MWI agrees to build to an interconnection point if reasonably near the existing fiber or RTC's central office facilities.

MWI contends that granting the RTC petition would result in never allowing other providers entry into the RTC service area. If RTC's request is granted, one impact would be that RTC's customers could not call MWI wireless phones on a local basis, except by means of a long distance call. In MWI's opinion, RTC's proposal harms its own customers.

MWI notes that "adverse economic impacts," per § 251(f)(2), are measured at the customer, not the company level. Thus, customers must experience adverse impacts; carrier impacts are irrelevant unless they require rate/service changes for the "general body" of telecommunications users. In this regard, the Federal Communications Commission (FCC) holds that a local exchange carrier must offer evidence that § 251(b) and (c) requirements would likely cause undue economic burdens beyond the economic burden typically associated with efficient competitive entry. MWI contends that RTC has not satisfied this requirement; RTC has not shown that users will suffer significant adverse impacts; nor has RTC shown that granting the petition is in the public interest

Montana Consumer Counsel

MCC refers to federal and state legislation and FCC rules implementing federal legislation. MCC points out that unless competition gives rise to either of three outcomes contained in § 251(f)(2), competition must be permitted. Competition is the rule not the exception. MCC argues that the FCC rule addressing § 251(f)(2) places a heavy burden on small LECs like RTC. That rule, 47 C.F.R. § 51.405, requires a LEC to show that the economic harm is "beyond the economic

burden that is typically associated with efficient competitive entry." MCC doubts a LEC, under the FCC rule, can make a persuasive case that harm will occur following competitive entry.¹¹

MCC testifies that Congress and the Montana Legislature have determined that competition is in the public interest. Whether competition in RTC's area derives from Blackfoot or others, it is in the public interest. MCC adds that Blackfoot and RTC clearly qualify as important potential competitors under any competitive doctrine. As the intent of deregulation is to establish competitive conditions that temper each of Blackfoot's and RTC's "monopolistic conduct", the continued exemption from . 251 of the Act subverts the new "regulatory liberalization" by eliminating actual or potential competition.

MCC is especially concerned about the role of facilities-based competition in local exchange markets. Referring to the success of MCI and Sprint, relative to that of resellers, in the long distance markets, MCC underscores the importance of facilities based competition. Facilities-based competition enables resale competition. In this regard, Blackfoot is a potentially important competitor.

MCC concludes that RTC has not demonstrated that competition will harm its customers. MCC criticizes RTC's testimony for focusing on anticipated revenue impacts RTC will experience from competition. MCC asserts that RTC fails to show how Blackfoot's request is economically burdensome, technically infeasible or that universal service is jeopardized. In this regard, MCC adds that if a showing of lost revenue, which occurs when a competitor captures large customers, is evidence of "significant adverse economic impact", then competition would be disallowed anywhere in the United States.

MCC testifies that RTC may have to lower rates to avoid losing customers to competitors and that RTC should continue efforts to win customers outside its territory. According to MCC, competition should not result in a LEC raising rates to recover lost revenue from departing customers; stockholders, not ratepayers, should assume such losses, just as they reap any benefits of competition. MCC also testifies that either competition or regulatory intervention may be needed to reduce RTC's reported 15 percent regulated return on equity to the range of 11 to 12 percent.

¹¹ In response to DR PSC -17, MCC asserts that RTC must demonstrate competitive loss, its response to that loss (pricing and terms) and also demonstrate that by reducing costs and rates it cannot meet the loss.

MCC says less competitive pricing and less innovation will result if Blackfoot is not allowed to compete with RTC. As for pricing MCC asserts that there is no evidence that continuing the status quo will lead to lower local exchange rates for any of RTC's customers. MCC adds that most LECs acknowledge that competition will cause market share losses and that even a small amount of competition can impact the prices consumers pay. However, MCC reasons that the greatest anticompetitive consequence of RTC's proposal is the termination of the competition Blackfoot, or any other competitive carrier, could bring to RTC's local exchange service area. MCC finds that the local market is key to competition and deregulation throughout the industry and to developing competitive intra-LATA toll and unbundled service markets; RTC's monopoly control over access and access prices undermines the development of competition in these markets. The loss in the "prospective rivalry" between RTC and Blackfoot will likely mean a loss in price competition and innovation.

In response to RTC's concern that reciprocal compensation could devastate the revenues it collects MCC states that if Blackfoot does not have facilities (switch, loop, transmission) in RTC's territory, there is no reason to assume such compensation is appropriate.¹² This statement is apparently because Blackfoot would need to use RTC's facilities on a wholesale or UNE basis. If RTC and Blackfoot cannot reach an agreement, the Commission should arbitrate a "reasonable agreement", not eliminate competition as RTC requests.¹³ If the Commission allows competition in RTC's territory, the focus should be appropriate charges for the competitive use of RTC's facilities.

Public Testimony

The following members of the public testified concerning the RTC petition:

Jim Ereaux, Director of Computer Systems and Telecommunications, Salish-Kootenai College, representing himself,

Louise Schlegel, Ronan/Pablo Education Association,

Nathan Cantlon,

Gordon Granley, Ronan Area Chamber of Commerce,

Bob Gauthier, Salish-Kootenai Housing Authority,

¹² MCC adds that unless the CLEC has facilities in the same service area and is providing services in the same area as Ronan, the rules of reciprocal compensation do not apply (DR PSC 19(d)).

¹³ In response to DR PSC-15, MCC asserts that compensation issues should not be factored into the determination of whether competition should be stopped.

Margie Cantlon, Mission Valley YMCA,
Mitch Waylett,
Norm Granley,
Ed Maughan,
Ralph Salomon, and
Christopher Chavasse.

With the exception of Mr. Ereaux and Mr. Chavasse, all public witnesses testified strongly in support of the RTC petition. RTC was praised for its service, low rates and extensive contributions to the Ronan community. A great deal of concern was expressed about the economic consequences of denying the RTC petition. Mr. Ereaux stated that competition should be allowed to develop in the Ronan market. Mr. Chavasse said that the Telecommunications Act should be allowed to work in the Mission Valley, and opined that if the petition is granted it should be for a limited period of time.

Discussion

RTC is a telecommunications carrier pursuant to state and federal law. § 69-3-804(10), MCA; 47 U.S.C. § 153(49). With certain exceptions all telecommunications carriers have a duty "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers[.]" 47 U.S.C. § 251(a)(1). Corresponding to this duty, local exchange carriers, a subset of telecommunications carriers, have certain specific obligations, one of which is to "establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5); 47 U.S.C. § 251(b) and (c). RTC is a local exchange carrier.

Federal and state law allows for the exemption of certain rural carriers from the requirements of interconnection:

SUSPENSIONS AND MODIFICATIONS FOR RURAL CARRIERS. -- A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification –

"(A) is necessary –

"(i) to avoid a significant adverse economic impact on users of telecommunications services generally;

"(ii) to avoid imposing a requirement that is unduly economically burdensome; or

"(iii) to avoid imposing a requirement that is technically infeasible;

and

"(B) is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers.

47 U.S.C. § 251(f)(2). It is not disputed that RTC is a rural local exchange carrier "with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide" and may petition the Commission pursuant to this section.

In the absence of controlling case law, and a scarcity of written opinions generally, the Commission is left to apply this section nearly from scratch, using ordinary English usage and principles of statutory construction. We note first that § 251(f)(2) allows us to approve an exemption from the primary purpose of the Act. The preamble to the Act states its purpose as, "To promote competition and reduce regulation in order to secure lower prices and higher quality service for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Thus, it was the fundamental objective of Congress in passing the Act to create competition in all telecommunications markets, for the benefit of all telecommunications consumers, urban and rural. Given this overarching legislative purpose, we find that requests to be exempt from competition should not be granted lightly. Indeed, the language of § 251(f)(2) creates a heavy burden for those who petition under it.

Section 251(f)(2) begins by giving us considerable latitude when addressing a petition. We can suspend or modify one or all of the requirements of § 251(b) and (c), but we can do so only "to the extent that, and for such duration as" it is necessary "to avoid" certain specified conditions. The word "duration" is important, because it implies that any exemption granted from the requirements of § 251(b) and (c) should be finite and limited, not indefinite. A petitioner asking for an unlimited exemption from the requirements of the Act would have an extremely difficult, if not impossible, burden before this Commission.

A petitioner under § 251(f)(2) is entitled to an exemption if it can show that the absence of an exemption will 1) create "a significant adverse economic impact on users of telecommunications services generally" (§ 251(f)(2)(A)(i); 2) will impose "a requirement that is unduly economically burdensome (§ 251(f)(2)(A)(ii); or 3) will impose "a requirement that is technically infeasible." (§ 251(f)(2)(A)(iii). If a petitioner can show one of these elements, it must also demonstrate that exemption "is consistent with the public interest, convenience, and necessity." § 251(f)(2)(B).

With respect to § 251(f)(2)(A)(i) we interpret "users of telecommunications services generally" as all users of telecommunications services, from whatever source, who reside in the service area of the petitioner. It would make little sense to us to interpret "generally" as implying a geographic dimension beyond the service territory of the petitioner; and, if Congress intended to consider impacts on only the telecommunications customers of the petitioner, it would have said so. Also, we ascribe to "significant" the usual meaning of "important" or "considerable." Demonstrating only "some" impact would not, in our view, meet this standard.

Regarding § 251(f)(2)(A)(ii) we conclude that Congress meant to describe a burden on the rural carrier seeking the exemption. Therefore, in this case the evidence would have to show that an exemption is necessary to avoid an unduly economically burdensome requirement on RTC. Additionally, the FCC has stated:

In order to justify a suspension or modification under section 251(f)(2) of the Act, a LEC must offer evidence that the application of section 251(b) or section 251(c) of the Act would be likely to cause undue economic burden beyond the economic burden that is typically associated with efficient competitive entry.

47 C.F.R. §51.405(d) (emphasis added). This language is not directed specifically at § 251(f)(2)(A)(ii), but we think it is apparent that it is most applicable to that section. Therefore, we must ask whether the evidence demonstrates an economic burden on RTC beyond that which is normal when competitors enter a market.

We interpret "technically infeasible," as used in § 251(f)(2)(A)(iii), as meaning basically unworkable at the present time as a matter of telecommunications engineering. We also interpret the term as applying specifically to a petitioner under § 251(f)(2). We believe Congress intended to recognize that what might be technically feasible for an

RBOC, might not at the same time be "workable" or "practical" for a small rural carrier. But while a petitioner might be able to demonstrate technical infeasibility, we believe the intent was to allow such a carrier a period to catch up technically. We don't believe "technically infeasible" could support more than a temporary exemption.

We find that each of these elements, § 251(f)(2)(i), (ii) and (iii), imposes on a petitioner a requirement of presenting evidence to support a plausible prediction of the future. We cannot read the verb "to avoid," as used in these sections, as other than a reference to a future occurrence. RTC is entitled to a suspension if it can make a convincing showing that interconnection and competition will cause certain harms. We have said that making such a case is difficult, but it cannot be impossible, or else § 251(f)(2) is meaningless; a conclusion we are generally not entitled to reach.

Further, we cannot interpret § 251(f)(2) to require that a successful petitioner must present evidence of actual harm. It may be that evidence of actual harm from competition or interconnection could result in certain remedies being imposed by this Commission. But such remedies, in our view, would have to be based on other sections of the law, not § 251(f)(2).

Finally, even if a petitioner successfully carries the burden of one of the elements under § 251(f)(2)(A), it still needs to demonstrate that an exemption "is consistent with the public interest, convenience, and necessity." § 251(f)(2)(B). Thus, even if a petitioner meets its burden under § 251(f)(2)(A), a state commission may nonetheless deny exemption if it finds such is not in the public interest.

RTC also petitions pursuant to § 253(b)¹⁴ of the Act, but provides little if any guidance on the application of that section or its relation to § 251(f)(2). Given the lack of discussion from RTC, we address § 253(b) only to find that its application in this case would not require us to change our decision in this Order.

¹⁴ "STATE REGULATORY AUTHORITY. – Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." 47 U.S.C. § 253(b).

Decision

RTC's petition asks us to exempt it from all requirements of § 251(b) and (c) for an unlimited period. The evidence and argument on this record does not support a grant of such a sweeping exemption. In fact, almost all of RTC's evidence and argument is directed at being relieved of the obligation under § 251(b)(5) of having to enter into reciprocal obligation arrangements with MWI and Blackfoot. Even so narrowed, RTC does not carry its burden under § 251(f)(2).

Regarding § 251(f)(2)(A)(i) and (ii), RTC estimates the impacts of losing customers as a result of a reciprocal compensation arrangement. MCC properly characterizes the RTC analysis as a worst case scenario. The analysis excludes the actual reciprocal compensation rate(s) that will result from an arbitration proceeding or a negotiation; obviously, if the rate(s) exceed the worst case scenario that RTC assumes, the impacts will differ. Also, the RTC impact analysis fails to model the likely flow of local traffic between RTC and either Blackfoot or MWI. Further, the "death spiral" prediction that flows from RTC's impact analysis is unconvincing; it lacks any cause and effect relation that could link the loss of a customer to the ultimate loss of the 100 largest customers. We presume, along with MCC, that RTC will compete in response to competitive pressures. RTC will not accept competitive pressure docilely, but will apply competitive pressure of its own.¹⁵ The net result will likely be far different from the scenario that RTC predicts. Finally, RTC makes little attempt to distinguish the consequences of efficient competitive entry from the entry of MWI and Blackfoot. The bases for RTC's predictions that economic harm will occur are not persuasive, and fall far short of meeting the statutory requirements.

With respect to RTC's contention that unlawful discriminatory rates will result if the petition is denied, we note that avoiding discriminatory rates is not a basis for granting a § 251(f)(2) petition. We are uncertain of the rates that will emerge from competition in RTC's service territory. We are certain that discriminatory rates are necessarily treated differently in a competitive environment than in a regulated environment.

Regarding § 251(f)(2)(A)(iii), we find ample evidence that interconnection between RTC and MWI or Blackfoot is technically feasible. MWI indicates it has reciprocal

compensation arrangements with U S West that segregate wireless and wireline traffic. It could be that what is technically feasible for U S West is not feasible for RTC, but RTC did not convincingly make this case. Moreover, the record indicates that RTC is willing to interconnect and account for the traffic if the price is right. This leads us to the conclusion that RTC is using the "technically infeasible" argument as a shield to fend off competition, not as a vehicle to temporarily delay interconnection in order to make technical improvements.

Since RTC has failed to convince us that we should grant the petition based on either § 251(f)(2)(A)(i), (ii) or (iii), it is not necessary that we consider whether a grant would be consistent with the public interest pursuant to § 251(f)(2)(B). We note only that if RTC had met one of the standards, it would nonetheless have to demonstrate that the harm that would be inflicted by competition would outweigh the benefits created.

Conditional Denial

Finally, the strong interest in this Docket expressed by members of the public convinces us that an outright denial of the RTC petition would not be appropriate. Even though we find that RTC has not met its burden under § 251(f)(2), and the law does not allow us to grant the petition based on a general fear of competition expressed by most members of the public, it is important that we leave open the opportunity for some specific additional argument and evidence before making a final decision. Therefore, we hold this record open and direct staff to issue a supplemental procedural order that will specify additional issues to be addressed. We contemplate also that the arbitration proceedings, stayed by this petition, will commence immediately and the reciprocal compensation rate(s) and other information learned from those proceedings will be available to the Commission as we consider the additional issues and decide how finally to dispose of the RTC petition.

Conclusions of Law

1. Ronan Telephone Company is a "local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide. . . ." 47 U.S.C. § 251(f)(2); § 69-3-834(5)(A), MCA.

¹⁵ It is not our job to advise RTC on how to compete. But we note that there are a variety of lawful ways that RTC can use to counter competitive thrusts into its service territory.

2. Ronan Telephone Company may petition the Montana Public Service Commission "for a suspension or modification of the application of a requirement or requirements of [47 U.S.C. § 251(b) and (c)] to telephone exchange service facilities specified in such petition." 47 U.S.C. § 251(f)(2); § 69-3-834-(5)(a), MCA.

3. When considering a petition filed pursuant to 47 U.S.C. § 251(f)(2) and § 69-3-834(5), MCA, the Montana Public Service Commission is bound by the standards specified at 47 U.S.C § 251(f)(2) and § 69-3-834(5), MCA.

4. Ronan Telephone Company has failed to demonstrate on this record that it should be exempt from the requirements of 47 U.S.C. § 251(b) and (c), because it has failed to demonstrate that exemption is necessary 1) "to avoid a significant adverse economic impact on users of telecommunications services generally"; 2) "to avoid imposing a requirement that is unduly economically burdensome"; or 3) "to avoid imposing a requirement that is technically infeasible[.]"

Order

The petition of RTC is denied, conditioned upon the further development of the record pursuant to direction in a supplemental procedural order to be issued within seven days of the service date of this Order. The denial is conditioned also on the development of specific reciprocal compensation rate(s) information in arbitration proceedings between RTC and MWI and RTC and Blackfoot.

DONE AND DATED this 2nd day of November, 1999 by a vote of 2 - 1.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

BOB ROWE, Commissioner

NANCY MCCAFFREE, Vice Chair

GARY FELAND, Commissioner, Dissenting

ATTEST:

Kathlene M. Anderson
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 ARM 38.2.4806.