

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Federal-State Joint Board on	)	CC Docket No. 96-45
Universal Service	)	
	)	

**COMMENTS OF**

**MONTANA INDEPENDENT TELECOMMUNICATIONS SYSTEMS  
MITS**

By: Michael C. Strand  
CEO and General Counsel  
Montana Independent Telecommunications Systems

## **INTRODUCTION**

Montana Independent Telecommunications Systems (MITS)<sup>1</sup> hereby files its initial comments in response to the Federal Communications Commission's (Commission's or FCC's) June 8, 2004, Notice of Proposed Rulemaking seeking comment on the Recommended Decision of the Federal-State Joint Board on Universal Service (Joint Board) concerning the process for designation of eligible telecommunications carriers (ETCs) and the Commission's rules regarding high cost universal service support. The FCC seeks comments on whether the Joint Board's recommendations should be adopted, in whole or in part, in order to preserve and advance universal service, maintain competitive neutrality, and ensure long-term sustainability of the universal service fund. The FCC also seeks comments on several related proposals to streamline rules governing annual certifications and submission of data by competitive ETCs seeking high-cost support.

## **BACKGROUND**

MITS is a group of rural, independent and cooperative telecommunications carriers that provide a variety of services to customers residing and working in some very remote, often economically distressed parts of the United States. MITS member companies serve from 1,500 to nearly 14,000 access lines. MITS' members provide a full range of services, both wireline and wireless telecommunications, including basic and advanced local and long distance wireline services, cellular and PCS services, and

---

<sup>1</sup> MITS' members include Central Montana Communications, InterBel Telephone Cooperative, Nemont Telephone Cooperative, Northern Telephone Cooperative, Project Telephone Company, and Triangle Telephone Cooperative Association, all headquartered in Montana, as well as CC Communications, Inc., headquartered in Fallon, NV.

dial-up and dedicated Internet access (including DSL service to nearly 200 communities with populations under 2,000). The companies also provide interactive video conferencing via an ATM backbone to over a hundred facilities, the majority of which are located within educational and health care facilities. MITS and its member companies have been and continue to be strong advocates for all four Universal Service programs.

MITS' member companies have been providing high quality services across rural Montana and parts of Wyoming, North Dakota and Nevada since 1889. For over fifty years, our companies have provided quality telecommunications services in areas deemed economically unattractive by other telecommunications companies, given the low population densities and the large geographical areas. For many years, rural customers relied on our companies to provide services that are comparable in price and functionality to those enjoyed by subscribers in urban areas and, to this day, rural customers continue to rely upon us.

The demographics, including the low population and huge geographic areas, that gave rise to our companies' presence fifty years ago have not changed. For example, according to the 2000 U.S. Census information, while the percentage of population change for Montana increased by 12.9% from 1990 to 2000, the population change in Montana areas typically served by MITS companies, in most instances, actually declined. For example, Hill County (major town, Havre) declined by 5.6%, Roosevelt County (major town, Wolf Point) declined by 3.4%; and Valley County (major town, Glasgow) declined by 6.8%.<sup>2</sup>

---

<sup>2</sup> Source: U.S. Bureau of the Census; Census & Economic Information Center, Montana Department of Commerce, Helena MT 59620

Yet, in spite of difficult economic times, telephone subscribers who live and work in the primarily agricultural areas served by MITS companies have access to high quality, affordable telephone service that is comparable to that provided in urban areas. To provide that service, our companies, in turn, rely on support mechanisms such as the universal service fund and access charge revenues. Due to low customer densities and the high costs (often exceeding \$100/loop/month) associated with providing service in some of the most rugged, isolated parts of the United States, absent these revenue streams, telecommunications services, both basic and advanced, would certainly not be available at affordable rates to consumers in these areas. In many cases, the services would simply be unavailable.

Our companies work hard each and every day to build, operate and maintain robust networks capable of providing the evolving spectrum of services demanded by our customers. Our companies have invested universal service funds in their network infrastructure which may well hold the key to future economic growth for rural subscribers.

### **COMMENTS ON ETC DESIGNATION PROCESS**

MITS supports the adoption by the FCC of mandatory minimum federal guidelines for consideration by state commissions evaluating ETC designations and certifications, as well as by the FCC when it evaluates ETC designations in instances where state commissions lack jurisdiction. State commissions, however, must also have maximum flexibility to establish their own criteria and guidelines for both ETC designations and ETC annual certifications. State commissions should be encouraged to establish rigorous service quality standards for all ETC designations and certifications.

State commissions should be encouraged to establish uniform minimum threshold public interest criteria against which applications for ETC designation can be measured to determine whether an application is sufficiently within the public interest to warrant further investigation on a case-by-case basis. States should be encouraged to adopt rules for ETC designation and certification that include establishing the meaning of "public interest" for purposes of ETC designation.

State commissions must use a higher level of scrutiny for ETC applicants seeking designation in areas served by rural carriers, consistent with 47 U.S.C. § 214(e)(2). On February 11, 2004, MITS and the Montana Telecommunications Association (MTA) jointly filed a petition with the Montana Public Service Commission (MPSC) requesting that it adopt rules pertaining to the designation and certification of eligible telecommunications carriers in areas served by rural telephone companies. The Petition is attached as Exhibit A to these comments.

MITS and MTA proposed the Montana Public Service Commission, by formal rule, clarify its ETC policy by stating that:

- (1) The value of increased competition, by itself, is not sufficient to satisfy the public interest test in rural areas.
- (2) In determining whether an ETC application should be granted, the Commission notes that mobility and competitive choice are not among the universal service goals enumerated in the federal Telecommunications Act of 1996.
- (3) In determining whether to designate multiple ETCs in rural areas, the Commission should strive to ensure that such designation is unlikely to result in a degradation of the quality of service to which subscribers have become accustomed from the incumbent provider.
- (4) Until such time as broadband services are added to the FCC's list of supported services, the Commission shall not require ETC applicants to provide broadband services as a prerequisite to ETC designation. However, in determining whether an application is in the public interest in rural areas, the Commission shall consider whether the applicant's technology platform is

compatible with broadband and other advanced service offerings as envisioned in §254 of the Telecommunications Act of 1996.

(5) The Commission shall analyze any ETC application to ensure that the applicant not be enabled to utilize its designation to “cream skim” (e.g., serve only low-cost or high-revenue customers or customers located primarily in the most populous areas of a rural telephone company’s service area). This analysis shall include a consideration of the extent to which an applicant is able to provide service to customers throughout the service area using its own network versus the extent to which the applicant intends to provide service via resale of another carrier’s services.

(6) In considering applications for designation for multiple ETCs, the Commission shall consider to the maximum practical extent the effect of such designation on the principles of universal service as provided in §254(b)(2) of the Telecommunications Act of 1996.

In their February 13, 2004, petition for rulemaking, MITS and MTA proposed that no ETC application shall be deemed in the public interest unless it at least meets minimum criteria establishing standards for:<sup>3</sup>

- Coverage
- Network congestion
- Supplemental proceedings for assurance that ETCs have satisfied PSC conditions imposed as part of ETC designation proceedings
- Universal service funding financial reports
- Customer service
- Equal access

Additionally, MITS has proposed that the MPSC restrict multiple ETC designations in rural areas that are characterized by a density of five access lines or less per mile.

ETC designation policies of state commissions should be calculated to promote the principles set forth by Congress. The public interest analysis should be absolutely consistent with the universal service principles and goals of the 1996 Telecommunications Act itself to ensure that service to rural subscribers is not compromised or degraded as a result of the ETC designation process.

---

<sup>3</sup> MITS and MTA Joint Petition for Rulemaking submitted to the Montana Public Service Commission on February 13, 2004. Attached as Exhibit A to these comments.

MITS does not concur with those who say that rigorous state reviews of ETC designations and certifications constitute a barrier to the principle of competitive neutrality. Nor does MITS concur with those who say that §332 prohibits states from establishing service quality standards and public interest criteria applicable to all ETC designations and certifications. Universal service is neither an entitlement nor a tool for research and development of new competitive technologies that may or may not be sustainable in rural markets. Universal service, the long-standing public policy, is a law. And the law requires comparable service and comparable rates for telecommunications subscribers in both urban and rural areas. Subsequently, telecommunications carriers who seek universal service funds must unilaterally be held to a higher standard than telecommunications carriers not assisted by universal service funds.

MITS supports the adoption of a specific cost-benefit test for the purpose of making public interest determinations under §254(b)(2) of the 1996 Telecommunications Act. This should include an analysis of the effects of granting competitive ETC designations on the continued ability (and in some instances viability) of existing ETCs to provide quality telecommunications services at affordable rates. It should also include an analysis of the burden that grants of additional ETCs may have on the Universal Service Fund itself. MITS is concerned that, absent a thorough analysis of the effects of ETC designations, the quality of universal service to telecommunications consumers in rural areas may be degraded and that financial demands may be made upon the federal Universal Service Fund that endanger the continued viability of that fund.

MITS further supports a rigorous process for annual state certifications of ETCs to ensure that federal universal service support is used to provide the supported services

and to recover associated infrastructure costs within each ETC study area in the state. State commissions, however, must be cautious not to substitute their own administrative judgments for management decisions appropriately left to individual telecommunications companies.

### **SCOPE OF SUPPORT**

The Joint Board recommended that the scope of high-cost support be limited to a single connection that provides access to the public telephone network. The rationale provided was that limiting support to a single connection would be more consistent with the goals of section 254 of the Act than the present system, would be necessary to preserve the sustainability of the universal service fund, would send more appropriate entry signals in rural and high-cost areas, and would be competitively neutral.

First, we disagree that limiting support to a single connection would be more consistent with the goals of section 254. Section 254(b)(3) of the Telecommunications Act of 1996 clearly identifies one of the principles of universal service to be that **access** to telecommunications and information services in rural and high-cost areas should be “reasonably comparable” to urban areas.<sup>4</sup> Second lines are commonplace in urban areas and such lines are generally tariffed and/or priced at the same rates as primary lines. A policy of not supporting second lines would most certainly create upward pressure on the rates for such lines in rural areas endangering the comparability of rates for such lines to rates in urban areas. Like urban businesses, rural businesses often have multiple lines.

---

<sup>4</sup> 47 U.S.C. § 254(b)(3).

Therefore a policy that results in higher prices for second lines in rural areas would disadvantage rural businesses in comparison to urban businesses.

Second, we also disagree that supporting only a single connection would fulfill the statutory principle of sufficiency.<sup>5</sup> As explained above supporting only primary lines would lead to support at levels that are inadequate for achieving the goals of Section 254. The Joint Board erroneously stated that supporting second lines in rural areas has caused excessive fund growth and threatens the sustainability of the fund. As many parties have pointed out over the past few years, the increase in the size of the fund can be explained by several factors such as the creation of the schools and libraries fund, the creation of enhanced Lifeline and Link UP and the movement of significant cost recovery from access charges to universal service support. In our view, all else remaining the same, the most significant growth of the size of the fund will result from the continuing wholesale designation of additional ETCs, especially wireless ETCs, in rural areas.

Finally, the MITS companies are relatively small and serve extremely rural, remote and rugged areas which have generally been bypassed by the larger telecommunications carriers. These small companies have built robust networks that provide excellent platforms over which both basic and advanced services are made available to rural consumers (in fact, in most areas, the rural ILECs are the only source for advanced services such as high-speed Internet access).<sup>6</sup> Continuing sufficient and predictable universal service support is necessary to maintain these networks. Reductions

---

<sup>5</sup> 47 U.S.C. § 254 (b)(5).

<sup>6</sup> In addition, the MITS companies take their “carrier-of-last-resort” obligations very seriously. High quality, reliable service is absolutely essential, especially in the remote areas served by these companies. The MITS companies’ networks have been built and are maintained according to stringent standards. It is unlikely that any potential competitive ETCs such as wireless carriers are willing or even capable to take on carrier-of-last-resort obligations in these rural areas.

in this support resulting from limiting such support to primary lines would jeopardize the ability of rural ILECs to maintain these networks which have become vital to the economic viability of many rural areas.

While we concur with the Joint Board's concern over the explosive growth in the size of the fund and the resulting impacts on rates used to support the fund, the Joint Board's focus on reducing funding for second lines is misguided and contrary to the goals of the Act. Furthermore, we believe the concerns over the growth of the fund would largely be mitigated by more careful considerations and analyses during ETC designation proceedings.

**Maintaining Sufficient Support for Rural Areas** - MITS applauds the Joint Board's recognition that limiting the scope of support to a single connection would significantly erode rural incumbent LECs' ability to maintain their networks and thus would harm rural consumers who could find themselves in a situation where access to services available to urban consumers was unavailable or where the rates for those services were unaffordable. These concerns only serve to strengthen our position that it does not make sense to provide universal service support to multiple providers in areas where meeting the goals of universal service is cost prohibitive for even a single provider. Universal service support simply should not be used to create artificial competition. Using universal support for this purpose has created significant upward pressure on the size of the fund and threatens to jeopardize the fund's viability. We do not believe that adoption of the Joint Board's primary line recommendation is a reasonable means to control the growth of the fund. A more effective and appropriate response would be to require a more robust public interest analysis in situations where a

second carrier is seeking ETC status in rural, high-cost study areas. Nonetheless, we provide the following comments on the Joint Board's primary line alternatives.

**Restatement proposal** - The restatement proposal is aimed at mitigating reductions in support flowing to rural areas by restating total current support paid to rural carriers in terms of first lines (i.e., dividing the total amount of support currently received for all lines by the number of "first lines"). Adoption of this proposal would result in a higher amount of support/line and would create an increased incentive for competitive carriers to attempt to gain ETC status simply to capture the universal service support.

For example, in areas served by MITS companies, cellular carriers have attempted (and in some cases have been successful) to gain ETC status even at the existing per line support levels. These carriers receive the same per line support as the rural ILECs, even though the wireless carriers are generally not able to provide coverage to the entire study areas, do not offer the same level of service quality as the rural ILECs, and cannot provide the same suite of services including advanced services over their wireless networks. Because these wireless carriers' networks are not built to the same standards as the rural ILECs' networks, the wireless carriers' costs are lower than the rural ILECs. This situation creates a perverse incentive for the wireless carriers to capture the universal support at the levels designed to support the more robust rural ILECs' networks.

The Joint Board's restatement proposal would only increase this perverse incentive for competitive ETCs to attempt to gain ETC status in rural areas. If additional carriers are granted ETC status in rural areas, not only would these carriers potentially receive what could be characterized as a "windfall", the erosion of support to the ILECs

would be accelerated because each “primary line” they capture would accelerate the erosion of the ILECs’ abilities to maintain their entire networks compared to the existing mechanism where the per line support is spread over all lines, not just primary lines.

**Lump Sum Payment Proposal** - This proposal attempts to mitigate the reductions in support flowing to rural areas by maintaining the same per line support as is currently provided, but limiting that support to primary lines only for both the competitive ETC and the incumbent rural carrier. Lump sum payments would then be provided to the incumbent rural carrier that would compensate the carrier for the loss of support associated with the existing second lines.

While this proposal seems to be a slight improvement over the restatement proposal, it could still potentially result in an erosion of the ability of rural ILECs to maintain their networks. Although losses of support to competitive ETCs would be limited to loss of support to primary lines only, the losses could still be extremely detrimental to rural ILECs.

**Hold Harmless Proposal** - This proposal seeks to mitigate reductions in support flowing to rural areas by freezing per line support available to competitive ETCs upon designation of a competitive ETC. The rural incumbent’s per-line support would not be capped, thus “hold harmless” these incumbents from the loss of support resulting from adoption of a primary line restriction.

This proposal is obviously the least objectionable to the MITS companies, and if a primary line limit is adopted, we would prefer it to the other proposals.

## OTHER ISSUES

The FCC has requested comment on whether to amend its rules to allow newly designated ETCs to begin receiving high-cost support as of their ETC designation date. MITS' response is that the rules should not be modified in this manner because doing so would not be competitively neutral. Incumbent local exchange carriers must wait two years after reporting their costs to receive reimbursement of those costs. CETCs should not be getting support today based on what the ILECs costs were two years ago. This is just one of the many reasons why the identical support rule defies logic.

CETC support should be based on the CETC's own costs and those costs should be reported and audited. Handing out hundreds of millions of dollars of the public's money without such safeguards is extremely irresponsible. It is also contrary to the principles of universal service set forth in the Telecommunications Act. Once designated, a CETC's financial incentive is to spend as little as possible on service. In this way, the CETC maximizes the financial windfall between its own cost of providing service and the payments the CETC receives from the USF – which is, of course, based on the generally much higher costs incurred by the incumbent ETC. If the low-cost CETC, relying on its windfalls, can put the incumbent CETC out of business, the rural customers in that area are left with the inferior service offered by the CETC. This is contrary to the “comparable service” mandate of the Telecommunications Act.

Certainly there are exceptions to this mode of doing business, particularly among the wireline CETCs that are competing with the Bell companies. But the conduct described above is what we at MITS have observed to be the rule rather than the exception among wireless CETCs. USAC is already experiencing difficulties associated

with malfeasance among entities involved with the schools and libraries program. It is time high-cost support to CETCs is “tightened up” to ensure that funding is truly based on a CETC’s need for support. Further it is far better that accounting safeguards be put in place now, rather than after an investigation occurs which finds that consumers are funding unnecessary and counterproductive windfalls to wireless CETCs to the tune of hundreds of millions of dollars.

### **CONCLUSION**

MITS strongly supports the direction that the FCC has begun to take in the *Virginia Cellular* decision to finally put some teeth into ETC designation requirements. Adoption of many of the Federal-State Joint Board recommendations would reinforce and advance the momentum initiated by the FCC. The early philosophy of minimal review of CETC applications was simply irresponsible, given the fact that consumer funds were involved, the continued viability of the Universal Service Fund is at stake, and such practice is inconsistent with a number of the universal service principles set forth in the Act.

The review of such applications needs to be rigorous. The public interest should be determined in accordance with strict guidelines so the CETC can demonstrate to the satisfaction of the state Commission that it is truly committed to the provision of universal service and is not simply looking for a way to pad its bottom line and please its shareholders.

While these measures at the “front end” of the process will be quite helpful, work still needs to be done on the “back end.” In other words, CETCs should accept the fact

that financial reporting and auditing requirements are a small trade-off for millions of dollars in universal service support. Any unwillingness on their part to engage in these kinds of financial safeguards is, in our view, *prima facie* evidence that they are far less concerned about providing universal service than they are in boosting their stock price.

RESPECTUFULLY SUBMITTED this 6<sup>th</sup> day of August, 2004.

Michael Strand, CEO and General Counsel  
Montana Independent Telecommunications Systems

On Behalf Of:

CC Communications  
Central Montana Communications  
InterBel Telephone Cooperative  
Nemont Telephone Cooperative  
Northern Telephone Cooperative  
Project Telephone Company  
Triangle Telephone Cooperative Association

**EXHIBIT A**

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

\* \* \* \* \*

IN THE MATTER OF the Petition of Montana )  
Independent Telecommunications Systems and the )  
Montana Telecommunications Association for the )  
Adoption of Rules Pertaining to the Designation )  
Of Eligible Telecommunications Carriers )

**PETITION FOR RULEMAKING**

**TO: All Concerned Persons**

**1. Identification of Petitioners**

Petitioners' names and addresses are:

Montana Independent Telecommunications Systems, LLC  
Attn: Mike Strand, CEO and General Counsel  
P.O. Box 5237  
Helena, MT 59604-5237

Montana Telecommunications Association, Inc.  
Attn: Geoff Feiss, General Manager  
208 North Montana Avenue, Suite 207  
Helena, MT 59601

**2. Petitioners' Interest in the Adoption of New Rules**

Petitioners are trade associations representing rural telecommunications service providers as members of their respective organizations. These providers in turn provide to end users both the services identified by the FCC as supported by the Universal Service Fund as well as a wide variety of other local and long-distance voice services, as well as data and video services. All of these providers are currently Eligible

Telecommunications Carriers (ETCs) and receive funding from the federal Universal Service Fund.

Petitioners and their members are confident that the designation of Montana's current ETCs was and continues to be in the "public interest" as required by state and federal law (see below). However, there is great concern that the designation of additional ETCs in rural areas that are barely able to support a single provider may not be in the "public interest."

The term "public interest" is currently not defined in statute or by rule for the purposes of ETC designation. However, this circumstance provides the Montana Public Service Commission the opportunity to establish some uniform minimum threshold public interest criteria against which applications can be measured to determine whether an application is sufficiently within the public interest to warrant further investigation on a case-by-case basis.

Absent some minimum standards for evaluating whether new applications for ETC designation are in the public interest, petitioners and their members are concerned that the quality of universal service to telecommunications consumers in Montana may be degraded and that financial demands may be made upon the federal Universal Service Fund that endanger the continued viability of that fund.

Petitioners and their members therefore request that the PSC adopt rules that would establish the meaning of "public interest" for the purposes of ETC designation. Petitioners further request that all ETC application proceedings for service areas of rural telephone companies be temporarily stayed or suspended pending the outcome of this rulemaking. Such an approach would establish minimum uniform standards on the ETC

prerequisite issue of public interest criteria in one comprehensive proceeding as opposed to a piecemeal case-by-case basis.

### **3. New Rules Proposed by Petitioners**

**NEW RULE: Statement of Commission Policy.** (1) The value of increased competition, by itself, is not sufficient to satisfy the public interest test in rural areas. (2) In determining whether an ETC application should be granted, the Commission notes that mobility and competitive choice are not among the universal service goals enumerated in the federal Telecommunications Act of 1996. (3) In determining whether to designate multiple ETCs in rural areas, the Commission should strive to ensure that such designation is unlikely to result in a degradation of the quality of service to which subscribers have become accustomed from the incumbent provider. (4) Until such time as broadband services are added to the FCC's list of supported services, the Commission shall not require ETC applicants to provide broadband services as a prerequisite to ETC designation. However, in determining whether an application is in the public interest in rural areas, the Commission shall consider whether the applicant's technology platform is compatible with broadband and other advanced service offerings as envisioned in §254 of the Telecommunications Act of 1996. (5) The Commission shall analyze any ETC application to ensure that the applicant not be enabled to utilize its designation to "cream skim" (e.g., serve only low-cost or high-revenue customers or customers located primarily in the most populous areas of a rural telephone company's service area). This analysis shall include a consideration of the extent to which an applicant is able to provide service to customers throughout the service area using its own network versus the extent to which the applicant intends to provide service via resale of another carrier's

services. (6) in considering applications for designation for multiple ETCs, the Commission shall consider to the maximum practical extent the effect of such designation on the principles of universal service as provided in §254(b)(2) of the Telecommunications Act of 1996.

**Rationale:** Congress set forth a number of fundamental universal service principles regarding the ubiquitous provision of comparable services at comparable rates and the promotion of advanced services in all areas of the country. Nowhere in the universal service provisions of the Telecommunications Act of 1996 does Congress state that competition is a goal of universal service. Moreover, §214 of the Telecommunications Act, which sets forth a State Commission's responsibilities for designating ETCs, specifically provides that such designation must be in accordance with §254. Therefore, the Commission's ETC designation policies should be calculated to promote the principles set forth by Congress and ensure that services to rural subscribers are not degraded as a result of the ETC designation process.

**NEW RULE: Eligible Telecommunications Carrier (ETC) Designation.** The commission shall determine on a case-by-case basis whether an application for ETC designation in a rural service area for which an ETC has already been designated is in the public interest. No application shall be deemed in the public interest unless it at least meets the following minimum criteria:

**(1) Coverage.** Carriers applying for ETC designation in areas served by rural telephone companies must provide a plan, acceptable to the Commission, showing the manner in which the entire service area for which designation is sought will be served no later than two (2) years from the date of ETC designation. This showing shall include at a minimum a commitment by the applicant to provide to the Commission, at the applicant's expense, an engineering study by an independent engineering firm at the end

of each year following the date of the Commission's order designating the applicant as an ETC for the study area(s) at issue. To retain designation, the Commission must find that the ETC's voice communications service is accessible by 80% of the homes and businesses across the entire service area of the incumbent rural telephone company at the end of year one and 98% at the end of year two. By "accessible," this rule means that the indicated percentage of homes and businesses must be able to utilize the designated carrier's services from their home or business locations at a level of service quality commensurate with the level of service quality and standards set forth herein.<sup>7</sup> In the case of a wireless carrier, "accessible" further means that the subscriber must not be required to purchase any equipment beyond a typical handheld mobile phone that may be required to enhance the ability to transmit or receive the wireless carrier's communications service. The Commission shall withdraw the designation of an ETC that fails to meet these criteria.

**Rationale:** The FCC's South Dakota Declaratory Ruling<sup>8</sup> clearly stated that the provision of service throughout 100% of a rural telephone company's service area is not a prerequisite to ETC designation. However, the Ruling did require the applicant to manifest an appropriate degree of intent to provide service throughout the service area. The rationale for not requiring full coverage prior to designation was that investors would need to know whether their venture would receive ETC designation before they could be expected to make the necessary investments to provide such coverage.

Considering that designation for a single service area in many cases represents millions of dollars in revenues to the applicant, once designation has occurred, the Commission should expect that the competitive provider will not dally in meeting the clear mandate of the '96 Act that a provider of universal service actually provide service that is universal. A strict build-out requirement is necessary to show the Commission that the investors are truly committed to providing universal service and are not simply seeking designation to take advantage of a financial windfall by either "cherry picking"

---

<sup>7</sup> This does not mean that the homes and businesses must subscribe to the carrier's services, only that the services are available at the homes and businesses.

<sup>8</sup> CC Docket 96-45, FCCC 00-248 Declaratory Ruling released August 10, 2000, In the Matter of the Federal-State Joint Board on Universal Service, Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission.

or by reporting customers that exist at the time of designation with no intent to make the investments necessary to reach the remainder of the customers in the service area. An open-ended build-out requirement frustrates Congress' clear intent as expressed in the '96 Act that ETCs provide service throughout the entire rural service area.

Further, in a competitive environment, the incumbent may become insolvent or may choose to withdraw as the carrier of last resort. The Commission must have confidence that in such an event significant percentages of subscribers are not left without quality phone service, reasonably comparable to phone service in urban areas, simply because the competitor chose not to use USF funding to invest in the infrastructure necessary to provide ubiquitous service.

**(2) Network Congestion.** Subject to subsection (3), below, the commission must find, based on evidence provided by the carrier applying for ETC designation, including but not limited to engineering studies, facilities diagrams, equipment specifications, and expert testimony, that the applying carrier's network capacity is capable of providing communications services to customers without blocking or dropping calls due to network congestion or inadequate facilities below a certain threshold. For the purposes of these rules, that threshold shall be an average of no more than 1 blocked or dropped call in 100 during the average busy hour of the 10 highest calling traffic days of the 4 highest calling traffic weeks of the 4 highest calling traffic months of the year for the 12 months immediately preceding the application for ETC designation.

**(3) Supplemental Proceedings.** The commission may grant ETC designation to an applicant notwithstanding such applicant's inability to show that it meets the provisions of subsection (2), or other stipulations or assurances given by the applicant at the time of the application. However, in such cases a supplemental proceeding must be commenced one year following designation, and the Commission shall withdraw the applicant's ETC designation if the carrier is unable to prove to the Commission's satisfaction that it meets the criteria set forth in subsection (2) or satisfies adequately other assurances provided to the Commission at the time of the commencement of the supplemental proceeding.

**Rationale for subsections (2) and (3):** A communications network is of little if any value if a communication across that network from point A to point B cannot be

reliably accomplished. The network congestion standard set forth in subsection (2) of this New Rule, above, is the standard to which the vast majority of rural ILECs are held by the terms of Rural Utility Service (RUS) requirements<sup>9</sup>. It is therefore the standard to which a substantial majority of rural subscribers have become accustomed. Rural subscribers should be able to expect that all of their calls (and especially those of an urgent or emergency nature) will be able to traverse the network with the same degree of reliability to which they have long been accustomed, regardless of which ETC is providing the service.

If a carrier is seeking to receive potentially millions of dollars in support for a particular service area, the state commission should be able to expect calls to be completed without unreasonable blockage due to network congestion. If a particular provider intends to market a service that does not meet these congestion standards, the provider should be free to do so as a competitive service offering. That provider should not, however, be eligible for potentially millions of dollars in universal service support for such an offering.

The Supplemental Proceedings requirement recognizes that some prospective ETCs may not have been measuring network congestion prior to their application for ETC designation. This rule allows for a transitional period of time for such ETCs to revise internal procedures and records as necessary for them to meet the Network Congestion rule.

**NEW RULE: Cost Reporting and Certification.** The National Exchange Carriers Association (NECA) requires its members to file a universal service fund report (Data Collection Form), an example of which is attached to this filing as Exhibit A. The report allows NECA to track the expenditure of universal service funds and to ensure those expenditures are consistent with the purpose of the fund.

(a) The Commission should require all ETCs to submit reports modeled after the NECA report (Data Collection Form), regardless of whether the ETC is a NECA member, so that the Commission can ensure funds are being properly expended. (b) Any

---

<sup>9</sup> See, for example: [http://www.usda.gov/rus/telecom/publications/word\\_files/1753e001.doc](http://www.usda.gov/rus/telecom/publications/word_files/1753e001.doc); and [http://www.usda.gov/rus/telecom/publications/word\\_files/397g.doc](http://www.usda.gov/rus/telecom/publications/word_files/397g.doc)

ETC failing to submit such a report should be denied certification by the Commission to continue to receive universal service funds. (c) Further, upon reviewing and investigating the contents of these reports, the Commission should determine that universal service funds received by an ETC are directed in reasonable proportion to investments and expenditures associated with the specific geographic service area or study area for which the funds are received. The Commission should not certify an ETC to continue to receive universal service funding absent such a finding.

**Rationale:** It is not fair from either a cost perspective or a competitive neutrality perspective to impose cost reporting requirements on incumbent ETCs but not on competitive ETCs. Further, the Commission should have some reliable evidence that universal service funds are being expended by CETCs for appropriate purposes as part of their annual certification process. A reasonable proportion of the funding should be dedicated to the service area for which the funding is received in order to ensure that the funds are being utilized to advance the principles set forth in the '96 Act.

**NEW RULE: Customer Service** (1) In addition to the requirements set forth in the preceding new rules, as a prerequisite for ETC designation, applicants must agree to be bound by the Commission's Telecommunications Service Standards as set forth in Section 38.5.3300 of the Administrative Rules of Montana, except to the extent such standards are less stringent than the standards set forth in the preceding new rules, particularly including the network call completion requirements set forth in 38.5.3371(5) A.R.M. (2) Carriers not otherwise required to file tariffs shall not be required to file any tariffs referenced in the Commission's Telecommunications Service Standards and references to tariffs or tariff elements shall not apply to such carriers. (3) Wireless carriers shall have the same obligations as "exchange carriers" for the purposes of the Commission's Telecommunications Service Standards, with the following exceptions:

i) For the purposes of 38.5.3320 A.R.M. and 38.5.3333 A.R.M., rather than filing exchange maps, wireless carriers must file maps and other supporting documentation sufficient to demonstrate that the strength and coverage of applicant's transmission signal meets the following criteria:

Minimum Geographic Coverage	Signal Coverage
50%	- 85 dBm
75%	-92 dBm
95%	-100 dBm

Such maps must also identify tower locations and the locations of any “dead zones” or “dead spots” within the carrier’s coverage area. Maps must be of sufficient scale to adequately reveal areas with weak or non-existent signal strength.

ii) For the purposes of 38.5.3351 A.R.M. the battery reserve, auxiliary power unit and mobile power unit shall apply to all wireless carriers’ tower locations and the communications equipment associated with such towers.

iii) 38.5.3353 A.R.M. shall not apply to wireless carriers.

iv) For the purposes of 38.5.3361 A.R.M., wireless carriers shall be subject to the periodic noise tests set forth in rule regardless of the fact that they do not provide service to physical “loops.”

(v) For the purposes of 38.5.3371(6) A.R.M., the transmission and noise requirements for wireless carriers should mirror the quality standards for wireline ETCs but be expressed in engineering terms appropriate to wireless technology.

(vi) For the purposes of 38.5.3371(7) A.R.M., the reference to access lines shall refer instead for wireless carriers to customers and shall apply to each service area for which the wireless carrier has been designated as an ETC rather than to each exchange.

**Rationale:** When faced with competition, the incumbent ETC may well be able to continue to operate successfully. However, it is also possible that the incumbent (a) may be forced from the market; (b) may voluntarily withdraw from the market; or (c) may withdraw from its ETC obligations. The Commission must then be confident that telephone subscribers continue to receive telecommunications service of a quality at least comparable to that they received from the incumbent.

This Rule does not constitute a barrier to entry for competitive carriers because competitive carriers are not precluded from providing service that falls short of ETC

service quality standards. Such service should simply not be eligible for universal service funding. Neither incumbent nor competitive carriers should receive universal service funds if they fail to meet minimum ETC service quality standards.

**NEW RULE: Equal Access. As a prerequisite to ETC designation, an applicant must provide equal access to interexchange carriers.**

**Rationale:** All incumbent ETCs are currently required by law to provide equal access to interexchange carriers. Rural subscribers should be allowed to seek better pricing for interexchange services than the pricing offered by a particular ETCs own interexchange service.

**NEW RULE: Burden of Proof. In determining in a fact-specific manner whether the public interest is served, the Commission shall place the burden of proof upon the ETC applicant.**

**Rationale:** The applicant is the moving party and is in possession of the evidence of the nature of its own service offerings and prices. Fairness would not be served by forcing other parties to prove that a particular application was not in the public interest.

#### **4. Facts and Propositions of Law Supporting the Adoption of New Rules**

Section 69-3-840 of the Montana Telecommunications Act authorizes the commission "...to designate telecommunications carriers as eligible for federal universal service support in accordance with 47 U.S.C. 214(e)(1) and 47 U.S.C. 254...This authorization applies to all telecommunications carriers notwithstanding the carrier's exemption from further regulation by the commission."

Section 69-3-840(3) of the Montana Telecommunications Act provides that "... consistent with the public interest ... the 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 telecommunications carrier [as an ETC] ...” *parenthetical added*. Thus, a public interest inquiry is required for designation of an additional ETC in rural areas.

The fact that the public interest inquiry is required in areas served by rural telephone companies is further emphasized later in the same subsection: “Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the commission shall find that the designation is in the public interest.” *Id.*

The Commission is granted rulemaking authority to implement the ETC designation provisions of the Montana Telecommunications Act pursuant to Section 69-3-822 Mont. Code Ann.

Unfortunately, neither the Montana Telecommunications Act, nor the Federal Telecommunications Act of 1996 that served as the basis for the Montana Act provides any explicit guidance as to the definition of “public interest.” Instructively, however, the FCC stated at one point in the debate that the mere provision of the nine “supported services” was sufficient to show that designation of the providing carrier was in the public interest.<sup>10</sup> The Fifth Circuit Court of Appeals disagreed, holding that states were free to impose requirements beyond the nine supported services as a prerequisite to ETC designation.<sup>11</sup>

Perhaps more importantly, the Federal Telecommunications Act identifies a number of universal service principles, including the directive that rates and services in

---

<sup>10</sup> FCC’s First Universal Service Report and Order No. FCC 97-157, dated May 8, 1997, paragraphs 135 & 136.

<sup>11</sup> Texas PUC v. FCC, 183 F.3d 393 (5<sup>th</sup> Cir. 1999).

urban and rural areas should be reasonably comparable.<sup>12</sup> In the view of Petitioners, this directive is jeopardized by the lack of minimal public interest standards for the designation of multiple ETCs. This is particularly true where new ETCs utilize technology platforms that may add only one service attribute (mobility) but be unable to offer numerous other service attributes to which rural subscribers have become accustomed and without which they cannot hope to have service at a quality that is comparable with services in urban areas. Such attributes include geographic coverage, network congestion, customer service standards, network reliability and compatibility of the underlying network platform with broadband capabilities.

The identical support rules established by the FCC ensure that ETCs are supported at the same per line amount, regardless of the differences in the capabilities of their networks. In the view of Petitioners, this will inevitably result in a race to the “lowest common denominator” of service quality as wireline providers are forced to reduce service quality to get their cost structures down to the level of wireless competitors whose networks provide less, cost less to maintain, and thus can be priced significantly lower than the services provided by wireline networks. Absent public interest standards, the ultimate losers are rural subscribers.

## **5. Procedure**

Pursuant to 1.3.205(3) of the Attorney General of Montana’s Model rules, as adopted by ARM 38.2.101 of the Commission’ rules, Petitioners’ understanding is that the Commission may (but is not required to) hold a hearing or oral presentation of the Petitioners’ views to assist in developing the record.

---

<sup>12</sup> 47 U.S.C. §254(b)(3).

Our further understanding is that the Commission shall, within 60 days of the submission of this petition, either issue an order denying the petition or initiate rulemaking proceedings in accordance with the Administrative Procedure Act. Predictably, we advocate the latter course of action.

Additionally, we respectfully request a stay or suspension of all existing ETC application proceedings for rural telephone company service areas currently before the Commission, pending a resolution of this Petition for Rulemaking. Such a stay or suspension should also apply to any applications filed after the filing of this Petition. Proceeding with those applications requires a determination of the very public interest standard that is the subject of this proposed rule-making. In light of the gravity of ETC designations and the consequences of ETC designation on both incumbent and competitive local exchange carriers, it is appropriate that the Commission establish minimum public interest criteria in a single rulemaking proceeding and then apply that minimum public interest standard uniformly and consistently to all ETC applications including those currently pending. Further, in light of the existing workload of the Commission, its staff, and the parties to the seven pending ETC applications, establishing minimum public interest criteria in a single expedited rulemaking proceeding, with the criteria then being applicable to all ETC proceedings, is much more efficient than using Commission, staff and parties' resources to review the same or similar issues in multiple case-by-case proceedings without any clear standards for public interest determinations. The threshold minimum public interest standard advocated here should be applied uniformly to all pending and future ETC applications.

RESPECTFULLY SUBMITTED, This 13th day of February, 2004

---

Mike Strand, CEO and General Counsel  
Montana Independent Telecommunications Systems

---

Geoff Feiss, General Manager  
Montana Telecommunications Association