

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

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IN THE MATTER OF MTPCS, LLC,)	UTILITY DIVISION
dba CHINOOK WIRELESS, Application)	
for Designation as an Eligible)	DOCKET NO. D2007.2.18
Telecommunications Carrier)	

**POST HEARING RESPONSE BRIEF
OF THE MONTANA TELECOMMUNICATIONS ASSOCIATION**

COMES NOW the Montana Telecommunications Association (“MTA”), pursuant to the Montana Public Service Commission’s (“Commission”) schedule established at the hearing¹ in this matter, and submits its Post Hearing Brief.

I. INTRODUCTION.

Chinook² asks that the Commission designate it an eligible telecommunications carrier (“ETC”) so that it may be eligible to receive six million dollars in support from the federal universal service fund (“USF”).³ Chinook seeks this six million dollar subsidy to do that which it largely has already done. Chinook’s current network serves the major traffic routes in Montana: I-90, I-15,

¹ See Transcript of Hearing (hereinafter “TR”), page 184:1-6.

² MTPCS, LLC, d/b/a/ Chinook Wireless, referred to herein as “Chinook.”

³ Chinook seeks designation in the study areas of Blackfoot and 3 Rivers and Qwest’s entire Montana service area. The amount of support that Chinook stands to gain continually increases. Initially, the amount was approximately \$5 million. By the time of the hearing, the amount had grown, through no action of Chinook, to nearly \$6 million. (Compare \$5,812,887 in response to PSC-047, 10/16/07, to \$5,050,000 in response to 3RC-008, 6/26/7.) TR 94:1-4; Chinook response to PSC data request 47(b).

Highway 93 and Highway 2.⁴ Chinook's proposed build-out simply fills in some gaps along those routes, as it would do in the normal course of network deployment to meet customer demand.⁵

Chinook argues that six million dollars is an "infinitesimal" amount of money. To Chinook, the largesse of the universal service fund justifies this "miniscule" six million dollar subsidy, because essentially no one will notice; and if this Commission doesn't let Chinook take it, someone else will. In Chinook's view, Willie Horton was right: if the money's there, take it.

Chinook already serves very close to the required population in Qwest, Blackfoot and 3 Rivers study areas.⁶ Chinook argued in its brief (p. 16) that it started out in this docket serving 72% of the territory it seeks to serve as a CETC, if designated. If that's true, in less than a year, it has expanded its coverage by at least five percentage points. At that rate, it can accomplish a 98% penetration rate in five years, without the aid of a universal service subsidy.

Chinook provides no evidence showing what it will cost to build out to additional population not already served in the Blackfoot, 3 Rivers and Qwest areas. In other words, we have no idea if \$6 million constitutes a windfall for Chinook, or not. The Commission is asked simply to accept Chinook's promises that it will use the money "as it is intended" and to build out its network. No information is given however as to what it will cost Chinook to serve any purported additional populations, and no facts are before the Commission that justify granting Chinook six million dollars to add an undetermined number of

⁴ TR 58:5-11; see also Exhibits F1, F4 and F5 attached to Chinook's initial application.

⁵ *Id.* See also: Brief, p. 16.

⁶ TR 128-129; Exhibit E-2 attached to Chinook initial application.

handsets to its network. As MTA, Criterion Economics, and others point out, there is no relationship between universal service subsidy received and build out.⁷

Much of the un-served areas in Montana will remain un-served even with Chinook's build out. In addition, Chinook's network is not interoperable with other widely used carriers. Increased coverage for Chinook's customers will not benefit anyone other than Chinook's customers. A Verizon phone will still be useless on Chinook's network in the Seeley Swan and in the Yellowstone river valley.

Federal universal service support is not a reward based system. Chinook commendably has created a network with private funding, and it has demonstrated no need for subsidies for it to deliver service in Montana. The Montana Commission is the right place to draw the line, and to say no more, not here, not now.

Chinook's application should be rejected as not in the public interest.

II. FACTUAL BACKGROUND AND SUMMARY.

Contrary to Chinook's representations to the Commission that it is a Montana based company,⁸ it is owned by out of state businesses and individuals.⁹ Seventy percent of Chinook is owned by Alta, a private equity firm based in Boston that makes investments around the country.¹⁰ None of the

⁷ See www.criterioneconomics.com.

⁸ Initial Application page 3; Foxman direct testimony page 5, p. 9, p. 12; Peterson direct testimony page 2.

⁹ TR 108:10-12; Chinook supplemental response to MCC-003 Attachment 2.

¹⁰ TR 107:3-6; 106:20-24.

senior employees of Chinook lives in Montana.¹¹ This is in stark contrast to Chinook's effort to appear "home grown." Moreover, as MTA and the Consumer Counsel have argued, when a company is owned by experienced private equity investors, the company's motives to maximize profits quickly for the benefit of the company's investor/partners is a natural consequence that rises to the surface.

Jonathan Foxman is the President and CEO of Chinook.¹² Mr. Foxman has led Chinook's consolidation of "disparate, smaller wireless networks."¹³ Chinook is Mr. Foxman's third wireless venture in the last ten years.¹⁴ Mr. Foxman's two previous ventures were acquired by other carriers and Mr. Foxman moved on to the next investment venture.¹⁵ Chinook has identified selling to a larger company as one of several possible exit strategies.¹⁶ Chinook has recently acquired from AT&T former Dobson Communications licenses, assets and subscribers in one Oklahoma and one Texas RSA. Dobson acquired a former Foxman-company, Highland Cellular.¹⁷

In this proceeding, Mr. Foxman has indicated that one of his goals is to develop a viable exit strategy.¹⁸ MTA does not take issue here with a business plan with a viable exit strategy. The issue for the Commission, however, is

¹¹ TR 106:8-10.

¹² Direct testimony of Foxman page 1; Chinook supplemental response to MCC-003.

¹³ Foxman direct testimony page 2.

¹⁴ Foxman direct testimony page 1.

¹⁵ Foxman direct testimony page 1-2; TR 108:22-25.

¹⁶ Chinook opening post hearing brief page 53; TR 130-131.

¹⁷ TR 108:20-25; Foxman direct testimony pages 1-2; Chinook's Attachment 4 to response to data request 11(d) from MCC. See also, Stifel Nicolaus Investment Bankers, "AT&T and Verizon Wireless to Swap Assets," 12/4/7; and The [Oklahoma City] Journal Record, "OKC-Based Dobson Communications unit to buy Highland Cellular for \$95 million," May 12, 2006.

¹⁸ TR 130:16 to 131:7.

whether it is an appropriate use of universal service (i.e., is it in the public interest) to facilitate equity partners' exit strategy to flip the company.

Chinook's network is based upon GSM/EDGE technology.¹⁹ Chinook is the only carrier in Montana using this technology.²⁰ Chinook's network will not work with other networks; customers of Verizon or Alltel, for example, cannot roam on Chinook's network. Only Chinook customers can use Chinook's network.²¹ Verizon and Alltel customers (and any non-GSM customers) will not be able to call 911 in the areas where Chinook is building out, despite Chinook's assertion that Chinook's build out will expand consumers' access emergency and other services where it deploys its network.²²

Chinook states that it cannot continue to build its network without universal service support.²³ However, Chinook to date has invested forty million dollars in Montana and added ten new towers in just the first two months of 2007.²⁴ They provide service to 77% of the state, and are planning further build out investment—without universal service support.²⁵

The requirements to be designated an ETC in Montana are population based.²⁶ Chinook currently provides service to the substantial majority of the

¹⁹ Foxman direct testimony page 5.

²⁰ TR 61:15-16.

²¹ As one blogger stated: "Again - why pay Chinook \$59.99 for 900 nationwide minutes (with 7pm nights included) that die at Columbia Falls when Alltel offers up 1000 for \$56.99 (most comparable plan - 7pm nights addon) and they go up into West Glacier?" See <http://forums.wirelessadvisor.com/western-us-wireless-forum/53922-chinook-wireless-replace-cdma-w-gsm-3.html#post393359>.

²² TR 62:5-12; see also <http://www.missoulian.com/articles/2006/08/22/news/local/news04.txt> (Chinook Wireless users vent frustration. By TYLER CHRISTENSEN of the Missoulian.)

²³ Peterson direct testimony page 3.

²⁴ Foxman direct testimony page 5

²⁵ TR 30:14-20; 46:11 to 47:12; 75:7-12; Chinook response to MCC-010.

²⁶ ARM 38.5.3213(1); TR 92:10-19.

population of the areas for which it seeks ETC status.²⁷ The receipt of universal service support by Chinook, if designated a CETC, not only has nothing to do with its costs, there is no demonstration that it will result in providing service where it currently does not provide service. As noted earlier, there is no relationship between the amount of universal service Chinook may receive, and availability of service. The services Chinook provides already meet the law's comparability standards, without the use of universal service support. Chinook's services are comparable in quality and price to those offered by other wireless carriers in urban markets.

Chinook filed its application seeking designation as an ETC on February 27, 2007. The MTA sought and was granted intervenor status. Discovery was taken, and a hearing held. MTA asks that the Commission reject Chinook's application.

III. LEGAL STANDARD.

Designation of a telecommunications carrier as an eligible telecommunications carrier is governed by 47 U.S.C. §214(e) and §69-3-840(3), M.C.A. Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the state commission is required to make a finding that the designation is in the public interest. *Id.*

A carrier must meet the Commission's rules as set forth in Administrative Rule of Montana 38.5.3209. In assessing the public interest, the Commission will consider

²⁷ Peterson direct testimony page 3; TR page 128.

all known factors regarding the designation of an eligible telecommunications carrier and the maintenance of status as an eligible telecommunications carrier that clearly demonstrate a public benefit or a public detriment, including, but not limited to:

- (a) the ability of the eligible telecommunications carrier to provide the supported services in the manner required;
- (b) the ability and willingness of the eligible telecommunications carrier to comply will all laws governing eligible telecommunications carriers;
- (c) the ability of a service area to support or continue to support an additional eligible telecommunications carrier;
- (d) the effect designation of an additional eligible telecommunications carrier will have on an existing eligible telecommunications carrier, primarily in regard to the provision of services and cost as relates to density, terrain, service, and so forth;
- (e) whether the eligible telecommunications carrier technology platform is compatible with broadband and other advanced service offerings and facilitates availability of advanced telecommunications and information services in the areas served;
- (f) the ability of the eligible telecommunications carrier to provide equal access to interexchange carriers in the event no other eligible telecommunications carrier is providing equal access in the service area;
- (g) the extent to which the eligible telecommunications carrier is able to provide service to customers throughout the service area using the eligible telecommunications carrier's own network;
- (h) the effect that designation or maintenance of status will have on the availability of universal service funds;
- (i) the effect that designation or maintenance of status will have on the principles of universal service;
- (j) the public convenience, including things such as mobility, quality of service, availability of competition, and market choices; and
- (k) public necessity, including factors such as public safety, reliability of service, ability to operate in emergencies.²⁸

Chinook has the burden of proof in this proceeding.²⁹

²⁸ ARM 3210(3).

²⁹ ARM 38.5.3203; See also, *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 05-46, 20 FCC Rcd 6371, released March 17, 2005 ¶¶ 44 (2005 ETC Order); *In the Matter of Federal-State Joint Board on Universal Service, Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, CC Docket No. 96-45, Memorandum opinion and Order, FCC 03-338, Released January 22, 2004, ¶ 26 (*Virginia Cellular*); *In the Matter of Federal-State Joint Board on Universal Service, Highland Cellular, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of*

IV. ARGUMENT.

A. Burden of proof and evidence.

Chinook repeatedly suggests that MTA is obligated to persuade the Commission that Chinook hasn't satisfied the legal standard for granting its application.³⁰ Intervenors are not required to present any evidence. As the applicant, Chinook bears the burden of showing that it has satisfied the statutory and regulatory standards. ARM 38.5.3203. In addition Section 26-1-402, M.C.A., states:

Who has the burden of persuasion. Except as otherwise provided by law, a party has the burden of persuasion as to each fact the existence or nonexistence of which is essential to the claim for relief or defense he is asserting.

MTA has pointed out where Chinook's application is deficient, but MTA bears no burden of persuasion in this proceeding. Chinook doesn't begin with a presumption that its application should be granted. Therefore, the Commission must keep in mind the burden of persuasion rests with Chinook, and where the evidence does not support the application it must be rejected.

The commission may consider only competent evidence. Chinook cites its responses to data requests as "evidence." However Montana law compels Chinook to present adequate evidence, which is something other than its own assertions that facts are true. Section 26-1-401, M.C.A., states:

Who has the burden of producing evidence. This initial burden of producing evidence as to a particular fact is on the party who would be defeated if no

Virginia, CC Docket No. 96-45, Memorandum Opinion and Order, FCC 04-37, released April 12, 2004, ¶ 20 (*Highland Cellular*).

³⁰ TR 12:1-5; Chinook opening brief pages 1-5.

evidence were given on either side. Thereafter, the burden of producing evidence is on the party who would suffer a finding against him in the absence of further evidence.

Because Chinook said something multiple times, that does not turn those assertions into evidentiary “facts.” The Commission should not consider Chinook’s statements and arguments in its brief that rest on allegations that have not been admitted as evidence and are not fact based (e.g., the number of tourists who may use Chinook’s network).

B. “Everyone else is doing it” does not satisfy regulatory or statutory standards of public interest.

Chinook argues that its application should be granted because rejection of the application will not have any effect on decisions by other public utility commissions and would only deprive Montana consumers of hypothetical benefits (notwithstanding the fact that Chinook already provides the vast majority of customers in its proposed CETC service areas with these purported benefits, and it proposes to continue expanding its coverage—all this without universal service support).³¹ Chinook urges this Commission to continue feeding at the trough of public subsidies because everyone else is doing it. This “no harm, no foul” argument must end.

MTA is not the little boy crying wolf. Thoughtful and deliberate policy makers have stated that “without immediate action to restrain growth in competitive ETC funding, the federal universal service fund is in dire jeopardy of

³¹ Brief pages 4-5.

becoming unsustainable.”³² Chinook argues that it is not for state commissions to initiate change in the system by denying ETC applications.³³ To the contrary, federal and state law direct state commissions to make ETC designations and to determine whether such designations are in the public interest. 47 U.S.C. 214(e); §69-3-840(3) M.C.A. Among the public interest considerations the Commission itself has adopted is the effect of designation on the universal service fund. ARM 38.5.3209(h). In addition the FCC repeatedly has directed state commissions to take a leading role in determining whether designations of ETCs is in the public interest.³⁴ In one of its first orders implementing the 1996 Act, the Commission stated:

Recognizing that, as circumstances change, further Commission action may be needed to ensure that we create sustainable and harmonious federal and state methods of continuously fulfilling universal service goals, the Commission also committed itself to work in close partnership with the states to create complimentary federal and state universal service support mechanisms. These efforts are ongoing.³⁵

Chinook argues that a six million dollar impact on the fund is “miniscule,” and that such an “infinitesimal” amount of money should not be considered by this Commission as a negative impact on the fund.³⁶ Anyway, Chinook argues, universal service funds received in Montana are contributed by consumers in other states.³⁷ Few if any Montanans or Montana companies would consider six

³² *In the Matter of High-Cost Universal Service Support*, WC Docket No. 05-337, *Federal State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 07J-1, Recommended Decision, released May 1, 2007, paragraph 4, pages 2-3.

³³ Chinook Brief page 38.

³⁴ 2005 ETC order; *Virginia Cellular*.

³⁵ May 8, 1997, *Universal Service Report and Order*, implementing section 254 of the Act and establishing a universal service support system effective on January 1, 1998.

³⁶ Brief pages 32 – 38.

³⁷ Brief page 32. Chinook also argues that since wireless carriers contribute to the universal service fund, they (e.g., Chinook) somehow are entitled to receive a like amount in the form of

million dollars a “miniscule” amount of money. While each individual straw may not be enough to break the proverbial camel’s back, it is short sighted and poor policy to ignore the cumulative effect of designating wireless ETCs in Montana when there is no demonstrated offsetting benefit.³⁸

The FCC specifically held:³⁹

We decline to adopt a specific test to use when considering if the designation of an ETC will affect the size and sustainability of the high-cost fund. As the Commission has found in the past, analyzing the impact of one ETC on the overall fund may be inconclusive. *Indeed, given the size of the total high-cost fund — approximately \$3.8 billion a year — it is unlikely that any individual ETC designation would have a substantial impact on the overall size of the fund. [. . .]*

We find that per-line support received by the incumbent LEC should be one of many considerations in our ETC designation analysis. We believe that states making public interest determinations may properly consider the level of federal high-cost per-line support to be received by ETCs. High-cost support is an explicit subsidy that flows to areas with demonstrated levels of costs above various national averages. *Thus, one relevant factor in considering whether or not it is in the public interest to have additional ETCs designated in any area may be the level of per-line support provided to the area. **If the per-line support level is high enough, the state may be justified in limiting the number of ETCs in that study area, because funding multiple ETCs in such areas could impose strains on the universal service fund.***

Clearly the FCC states that while the effect of any single CETC designation on the universal service fund may be “inconclusive,” states nevertheless must

distribution. Brief page 34, 54. Both of these arguments fail to recognize the nature of universal service. If contributions were intended to entitle contributors to identical distributions, there would be no high cost support program.

³⁸ In attempting to justify its minimal effect on the universal service fund, Chinook argues, “since 1999, the growth in the high-cost fund has been caused by an increase of almost \$1.5 billion going to ILECs... Brief page 33. This assertion masks the fact that this “growth” was a revenue-neutral regulatory shift of costs from implicit support to explicit support as a result of access reform—a fact that Chinook later acknowledges: “The FCC noted that increasing costs of the incumbent LECs and **access charge reform have also caused an increase in the Fund.** Brief page 37 (emphasis added.) As FCC Chairman Kevin Martin, the Joint Board, and others point out, support to LECs has actually diminished, while support to CETCs has ballooned from \$15 million in 2003 to \$1.2 billion by the end of 2007.

³⁹ 2005 ETC Order, CC Docket No. 96-45, *In the Matter of Federal-State Joint Board on Universal Service*, Report and Order released March 17, 2005, emphasis added, footnotes omitted.

engage in a determination as to the effect of individual ETC applications on the fund. Because of the size of the fund, each individual ETC application will almost always be a small percentage of the total fund. That analysis alone is inadequate, as the FCC noted. In rural areas, such as Montana, the state commission is justified in limiting the number of ETCs, because multiple ETCs will, in the aggregate, threaten the sustainability of the fund.

It is reasonable for state commissions to take action in addressing the explosive growth of the fund by limiting high cost support to competitive ETCs. Chinook acknowledges the state's role.⁴⁰ For Chinook to argue later that the states have no place in addressing the important policy issues related to the size of the fund⁴¹ denies the very role that Chinook acknowledges belongs to the state commission.

Denial of Chinook's application is consistent with the recommendations currently being reviewed by the FCC to address the issues of the growth of the fund. The Joint Board recommended to the FCC "that the Commission immediately impose an interim high-cost support cap, but one that is limited to high-cost support provided to competitive ETCs."⁴² It is time that states consider the effect of additional CETC designations on the sustainability of the universal service fund a priority in their determinations. "Everyone else does it" is the basis of neither sound legal nor public policy.

⁴⁰ Brief page 9 ("the Act provides state commissions with the primary responsibility for performing ETC designations.").

⁴¹ Chinook Brief page 38.

⁴² Recommended decision, FCC 07J-1 p. 4 ¶ 5.

The Commission must consider the “effect that designation or maintenance of status will have on the availability of universal service funds” and “the effect that designation or maintenance of status will have on the principles of universal service” in making its determination as to whether designation of any one carrier is in the public interest.⁴³ Chinook urges the Commission simply to grant its application and to let the FCC sort out the real problems with universal service principles. The Commission’s own rules do not allow it to put on the blindfold offered by Chinook.

Chinook has built out its network and is currently serving the majority of the populations in the areas for which it seeks universal service. Chinook has made no showing that it needs universal service to fill in a few patches along its highway route network or that the denial of universal service subsidies would affect its build-out investment plans. On the contrary, Chinook repeatedly revealed that its investment strategy is driven by consumer demands, not by universal service.⁴⁴ Chinook has already invested forty million dollars in Montana.⁴⁵ It is highly unlikely that it will simply pack up and leave if it is denied access to the public subsidies of universal service.⁴⁶

⁴³ ARM 38.5.3210(3)(h) and (i).

⁴⁴ Chinook Exhibits F-1 through F-8; Peterson direct testimony page 4; TR 60:3-7. Brief page 18.

⁴⁵ Direct testimony of Foxman page 5.

⁴⁶ TR 57 – 60. Chinook argues that consumers would be denied service if Chinook’s application were not granted. Chinook brief pages 16-17. First, the vast majority of consumers in the service areas Chinook proposes to serve as a CETC, if designated, would be denied nothing, since they already are served. Moreover, if they’re not served by Chinook, “other carriers may provide service in these areas,” according to Chinook. Brief page 17. Second, Chinook’s current build out plans would deny none of the areas/consumers thus affected. Chinook is careful to establish plausible deniability in its service denial comments by stating for example that universal service provides an “opportunity” to build out its network. Brief page 44, for example. And third, it is inconceivable that Chinook’s investment partners would abandon their \$40 million-plus investment in Montana.

Federal and state law and the Commission's own rules require this Commission to consider the effect that each individual ETC application will have on the universal service fund. Chinook's application should be rejected, because no reason has been given to indicate that Chinook isn't simply seeking gravy to spread on its already-existing network.

C. Chinook's technology platform does not work with other Montana carriers' networks but makes it a lucrative purchase.

Chinook is the only wireless provider in Montana offering service over a GSM platform.⁴⁷ Chinook's towers will do nothing to make emergency services available to non-Chinook customers.⁴⁸ Chinook testified that the benefit from Chinook's service in Montana will flow to out of state carriers whose customers will come in to Montana and roam on the Chinook network.⁴⁹ In assessing whether Chinook's application is in the public interest, the Commission must assess:

whether the eligible telecommunications carrier technology platform is compatible with broadband and other advanced service offerings and facilitates availability of advanced telecommunications and information services in the areas served;

and

the public convenience, including things such as mobility, quality of service, availability of competition, and market choices.⁵⁰

Chinook testified that its technology platform is incompatible with other networks in Montana.⁵¹ Chinook also testified that its network would not increase access to emergency services in Montana for non-Chinook customers.⁵²

⁴⁷ TR 65:12-19.

⁴⁸ TR 62:5-12.

⁴⁹ TR 65:20-23.

⁵⁰ ARM 38.5.3210(3)(e) and (j).

Montanans with Verizon or Alltel service will not see any increased coverage with Chinook's provision of service. There is no increased safety or 911 access for any non-Chinook customer.

Public interest factors to be considered include:

public necessity, including factors such as public safety, reliability of service, ability to operate in emergencies.⁵³

Chinook has not provided evidence that its network satisfies the public interest criteria that it will increase public safety and reliability of service, because its service is unique and will not increase coverage in large areas of Montana for customers who are not on its network.

Therefore, the commission should consider whether it is in the public interest to authorize the use of federal universal service funds to subsidize Chinook's provision of services that are not universally available to consumers in the areas Chinook proposes to serve.

D. The "white areas" will remain white.

Chinook currently provides coverage that is available to 77 percent of the population of Montana.⁵⁴ Chinook argues that it will use universal service money it receives to build out its network in Montana.⁵⁵ Chinook's current network lies largely along the major traffic routes in Montana: I-90, I-15, Highway 93 and

⁵¹ TR 65:2-5.

⁵² *Id.*

⁵³ ARM 38.5.3210(3)(k).

⁵⁴ TR 47:5-12; Chinook response to MCC-010.

⁵⁵ Brief pages 16-17. Chinook states "it's important to note that the 'white areas' may not be unserved areas" since other carriers may provide serve in these areas and it further equivocates by noting that universal service support provides Chinook with the "opportunity" to expand its network. Brief page 44.

Highway 2.⁵⁶ Chinook's proposed build-out simply fills in some gaps along those routes.⁵⁷ Chinook already serves almost the entire Qwest territory; and significant majorities of Blackfoot's study area and 3 Rivers service area.⁵⁸ The white areas on the maps of Montana attached to Chinook's initial application will remain white, even after Chinook completes its proposed build out.⁵⁹ If the Commission grants Chinook's request to be designated an ETC, distributions from the universal service fund will be increased by six million dollars, yet white spaces may remain white, and build out will remain focused on CW's current plans to meet customer demand where the customers are.⁶⁰

Chinook testified at hearing that it will build out to reach the 98 percent population requirement of the Commission's rules⁶¹ in the aggregate; that is, Chinook will meet that population requirement by measuring all of Qwest's, Blackfoot's, and 3 Rivers' territories.⁶² Chinook looked at the study areas of 3 Rivers, Blackfoot and Qwest in the aggregate to reach the 98 percent population requirement; Chinook did not conduct a study area level analysis for its application.⁶³ Given the concentration of population in Montana in the larger cities and towns, Chinook can reach the 98 percent population requirement without any obligation to build out to rural areas such as Glendive, Wibaux and

⁵⁶ TR 58:5-11; see also Exhibits F1, F4 and F5 attached to Chinook's initial application.

⁵⁷ *Id.*

⁵⁸ TR 128:2-25; Exhibit E-2 attached to Chinook's initial application.

⁵⁹ TR 61:1-6. fn. 55.

⁶⁰ The Commission's rules appropriately provide for build out to 98% of the *population*, not geography, in an ETC's service area. The point here is that Chinook infers that one of the benefits of its service is ubiquitous coverage, where in fact it should be clarified that such is not the case.

⁶¹ ARM 38.5.3213(1).

⁶² TR 72:9 to 73:8.

⁶³ TR 97:1-7.

Sidney.⁶⁴ In fact, Chinook already practically meets its coverage requirement in Qwest's service area.⁶⁵ Chinook does not plan to build out to serve the rural areas of Qwest's service area.⁶⁶ Chinook agrees however that the purpose of the fund is to make service available to rural areas "equivalent economically or costwise to the service that's provided in urban areas."⁶⁷

In spite of the fact that Chinook will not be serving the most rural areas of Montana, 90 percent of the universal service fund support it will receive will be derived from the 3 Rivers service area.⁶⁸ If Chinook's application is approved it will receive \$1,500 of support per customer, per year in the 3 Rivers area.⁶⁹ Chinook will receive that money for every handset that it sells. By selling a family of four each one cell phone, Chinook would receive \$6,000 in federal universal service support.⁷⁰

Chinook has approximately 192 towers in Montana.⁷¹ Chinook estimates that it needs, using a high level estimate, an additional 60 towers to reach 98 percent build out in Montana.⁷² Chinook owns less than ten of the towers it uses to provide service.⁷³ When Chinook began as a start up company it acquired 131 sites.⁷⁴ Chinook later sold the vast majority of these towers and presumably received a considerable capital infusion as a result of the sale. Chinook does not

⁶⁴ TR 73:20 to 74:17.

⁶⁵ TR 128:2-12; Chinook Exhibit E-2 page 2 attached to initial application.

⁶⁶ Chinook Exhibits F1 through F8 attached to initial application; TR 74:12-20.

⁶⁷ TR 79:9-13.

⁶⁸ TR 95:4-8.

⁶⁹ TR 95:9-15.

⁷⁰ TR 95:16 to 96:2.

⁷¹ TR 30:7-8.

⁷² TR 40:5-15.

⁷³ TR 48:2-6; 38:20-24; 46:8-10.

⁷⁴ TR 114:3-4.

have the capital expense of building the towers it does not own.⁷⁵ Chinook counts its leased properties toward the FCC's build-out requirement for licensed spectrum holders.⁷⁶

Chinook has represented to the Commission that "once it is designated as an ETC, it will construct new facilities to expand its network."⁷⁷ However, Chinook did not put on any evidence as to what it will cost to construct such facilities, or what they will be, and why universal service support is necessary to do that. Similarly, Chinook did not indicate that any of the build out it proposes would not occur if it were denied a universal service support subsidy.⁷⁸ Chinook testified that it would be able to report the costs associated with new deployment of facilities and services, if requested or required to do so.⁷⁹ Because it would be "costly and time consuming"⁸⁰ for Chinook to gather this evidence, it does not wish to do so, because it can receive the same amount of money as the incumbents without providing any cost justification or accountability.

Chinook's assertions that it will deploy more cell sites with universal service money than it would without it are not based on evidence, but only on Chinook's own inferences, and even then Chinook is careful to cover itself with plausible deniability.⁸¹ In fact, Chinook testified that it will build out and serve

⁷⁵ TR 48:18-20.

⁷⁶ TR 98:3-12.

⁷⁷ Brief page 15.

⁷⁸ Chinook noted that there is "no requirement that a prospective ETC show that it would not have made particular investments without universal service support." (Brief page 16.) However, wireline ETCs receive universal service support as the direct result of identifying qualifying investment in supported service.

⁷⁹ TR 114:14 to 115:8.

⁸⁰ TR 115:14-17; Chinook response to PSC data request 16C.

⁸¹ Brief page 17, 44.

areas in Montana for which it is not seeking designation as an ETC.⁸² Chinook is clearly capable of and intends to build out its network in Montana without universal service support. Chinook's vague representations that funds are necessary for some of its proposed build out are not substantiated and therefore cannot stand as a justification for granting Chinook's application. Chinook is already reaching most of the population in Montana; there is no rationale for giving it a six million dollar subsidy to construct some indeterminate facilities to reach a few more people along the highways where Chinook already offers or plans to offer service.⁸³

Chinook's application is not in the public interest because there is no evidence that universal service support is necessary to enable Chinook to continue building its network. The weight of the evidence is to the contrary: Chinook will continue to build out in some areas of Montana without universal service support, and Chinook will receive a windfall of money simply by selling additional handsets in the 3 Rivers area. This is not what universal service is designed for.

E. Chinook offers a complementary service.

Chinook testified at hearing that wireless service is a complementary service to wireline service, and not a competitor to the wireline carriers.⁸⁴ Chinook argues that its application should be granted even though wireless service is a complementary service to landline service.⁸⁵ Chinook however

⁸² TR 98:13-18.

⁸³ TR 60:3-7.

⁸⁴ TR 99 16-19; 100:1-4; Chinook response to PSC data request 8D.

⁸⁵ Brief page 5.

maintains that such a claim, when made by the intervenors, is “factually incorrect.”⁸⁶ Chinook cannot have it both ways. Wireless service, as Chinook acknowledges and testified to, is a complementary service to landline service.

There is no requirement that universal service support should fund multiple providers particularly where the providers are providing complementary, not competitive, service. Chinook testified and represented throughout the proceeding that it is providing a complementary service.⁸⁷

Consumers in the Qwest, Blackfoot and 3 Rivers areas that Chinook proposes to serve already receive affordable, comparable, quality service from these ETCs, and often from one or more other providers. Chinook’s proposed service not only is complementary, but often is redundant. The Act specifically requires state commissions to apply a higher public interest standard in considering designations of additional ETCs in rural areas. In this case, there is no public interest demand for granting Chinook’s application.

Chinook’s attempt to characterize its service as competitive and thereby justify its application under the strictures of the 1996 Telecom Act is inconsistent with its admission that it offers a complementary service, and misconstrues the purpose of the Act.⁸⁸

The benefits of competition are a mechanism under the Act to promote high quality telecommunications service to everyone in America. The Act specifically promotes competition in market-opening provisions in Sections 251,

⁸⁶ Brief page 53.

⁸⁷ *Id.*, notes 82-84.

⁸⁸ Brief pages 46-49.

252 and 271, for example.⁸⁹ Nowhere in Sections 254 or 214, pertaining to universal service and eligible telecommunications carriers, is there a provision stating that universal service support is intended to subsidize the provision of intermodal service in rural areas. Congress recognized the need to limit artificial competition in passing 47 U.S.C. § 214(e), which provides that it may not always be in the "public interest" of areas served by rural telephone companies to designate multiple ETCs.

Chinook's application is not in the public interest, because it does not promote competition and offers only a complementary service to that already available in the study areas for which Chinook seeks designation.

F. Policy of universal service.

The universal service system is not designed to ensure financial profitability for private equity partnerships. Chinook will receive support simply for selling additional handsets; it does not need universal service to build its network and sell its service, because it has already largely done that.

There is no evidence that designation of multiple ETCs enhances phone service or penetration. A recent study by Criterion Economics⁹⁰ shows that most CETCs were already successfully providing service to the large majority of their rural customers prior to designation as CETCs. This would be the case in this instance, too, given that 3 Rivers, Blackfoot, Verizon Wireless and Alltel—not to mention Chinook—already provide service to most if not all of the customer

⁸⁹ Even in the competition-promotion sections 251 and 252 of the Act, Congress acknowledged the unique economic circumstances of rural telecom markets and provides for certain modifications, suspensions and waivers.

⁹⁰ See www.criterioneconomics.com.

areas for which Chinook now proposes to receive federal universal service support. The Criterion study also demonstrates no statistical correlation between the amount of support provided to wireless carriers and the proportion of the population or land area that has wireless coverage. “To the extent subsidies to wireless CETCs are intended to increase the availability of wireless service in high-cost areas, the vast majority of funds are simply wasted.”⁹¹

Absent some concrete showing, and not merely statements of intent by Chinook that it will increase penetration solely as a result of receiving universal service money, its application should be denied.

G. The Commission may deny Chinook’s application.

Chinook argues that its application must be granted because all previous ETC applications have been granted by the Commission.⁹² If this argument has merit then the Commission should simply do away with its rules and the application process altogether. In fact, there would be no need to have U.S.C. § 214, or § 69-3-840 M.C.A., since any state that previously may have designated a CETC must thereafter automatically designate any future ETC application on the basis of having already approved CETC(s). This logic is similar to the aforementioned rationale, “everyone else does it, so why can’t we.” It is completely devoid of legal and public policy merit.

⁹¹ *Id.* See also “The Effects of Providing Universal Service Subsidies to Wireless Carriers,” by Kevin Caves and Jeffrey A. Eisenach, June 13, 2007, At hearing, Cmr. Toole noted that Verizon funded the Criterion study. The fact that the study may have been funded by the owner of one of the largest wireless providers in the nation, in MTA’s opinion, should enhance the credibility of its findings. TR 158:19-25.

⁹² Brief pages 5, 14.

To the contrary, the Commission's rules require that each application is a fact specific determination and turns on its own merits.⁹³ The Commission's own rules provide that the

commission is not required to designate additional eligible telecommunications carriers in any service area, nonrural or rural. The commission may determine designation of an eligible telecommunications carrier in any service area, rural or nonrural, is not in the public interest.⁹⁴

The FCC concurs.⁹⁵ State and federal law require state commission designation of each and every ETC application. Designation is not automatic, as Chinook argues.

Each individual application must be assessed based upon the facts that are specific to that application. Chinook's assertion that because previous applications have been granted, this one must also be granted, would eviscerate the role of the Commission and the meaning of federal and state law. Applying the facts presented by Chinook to the law, as opposed to its mere assertions, the Commission must reach the conclusion to deny Chinook's application.

V. CONCLUSION.

MTA appreciates the time, resources, and thoughtful deliberation that the Commission and staff have dedicated to this docket. As noted during the hearing and in testimony, MTA does not dispute the assertion that wireless service offers public benefits. That wireless service provides social and economic benefits to Montana is not the issue, however. The issue is whether Chinook has

⁹³ ARM 38.5.3203; see also *In the Matter of Triangle Communications, Application for Designation as an Eligible Telecommunications Carrier*, Docket No. D2004.1.6, Order 6723a, page 33.

⁹⁴ ARM 38.5.3210(2).

⁹⁵ 2005 ETC Order.

demonstrated that it needs federal universal service subsidies to provide the service it already provides, or plans to provide; and that the Commission must therefore designate an additional ETC in the areas for which Chinook requests designation. On this question, Chinook has failed to offer credible evidence.

Chinook has not carried its burden of proof. Chinook did not present facts and evidence that establish that its request for designation is in the public interest. The Commission is under no mandate to designate additional ETCs, especially in rural areas, and especially when there is no evidence that the universal service support subsidy is either needed or will result in deployment of services or facilities that otherwise would not have occurred without such universal service support. Therefore, Chinook's application should be denied.

Respectfully submitted January 8, 2008.

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