

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)	

**THE MONTANA TELECOMMUNICATIONS ASSOCIATION
RESPONSE TO CHINOOK’S MOTION TO STRIKE**

COMES NOW the Montana Telecommunications Association (“MTA”), and in accordance with the time set by the Montana Public Service Commission (“Commission”), submits this response to Chinook’s motion to strike certain portions of the MTA’s post hearing response brief.

Chinook takes issue with certain MTA arguments about Chinook’s acquisition strategies; references to statements by a Chinook customer-blogger and an article in the Missoulian; and references to the Criterion Economics study.

1. References to Chinook’s acquisition strategy.

Q (COMMISSIONER MOOD). I do have just one brief question. You were asked the question: *What are MTPCS's motives for ETC status? You decided the motive was to try and make the company attractive to a seller. Are you comfortable making that assertion?*

A (MCC WITNESS BUCKALEW). *After seeing the business plan, yeah.*
You heard an explanation here from the company. I still think it's not a
bad motive. *They're trying to make it more attractive to sell it.* That's what
businessmen do. There's nothing wrong with that.

TR page 182:25 to 183:9 (emphasis added).

Record evidence establishes that Chinook's motive in pursuing universal
service is to make the company more attractive for acquisition. The MTA agrees,
and argued in its Brief:

There's nothing wrong with building an enterprise with a viable exit
strategy. The issue for the Commission, however, is 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.

MTA Brief page 5.

The fact that Jonathan Foxman has engaged in a strategy of acquiring
and selling assets is also evidence that is in the record.¹ Chinook takes issue
with the MTA's assertion that Chinook acquired a former Dobson company,
which had acquired a former Foxman company, Highland Cellular. The record
contains evidence to support this argument.

Q. (BY MS. TRANEL) Mr. Foxman, can you tell me who American
Cellular is?

A (BY MR. FOXMAN). American Cellular I believe is a subsidiary of
Dobson Communications.

¹ Direct Testimony of Foxman page 1-2; Chinook supplemental response to MCC-003; TR 108:22-25.

Q. Was that purchased by Highland Cellular?

A. That entity purchased Highland Cellular.

Q. When did you acquire Highland?

A. I didn't, I was an employee there.

TR page 108:20 to 109:2. Chinook does not dispute that Dobson acquired Highland Cellular. Chinook denies that it acquired former Dobson properties. *Chinook Motion to Strike page 2.* If additional evidence is required then Chinook should request an opportunity to open the record for purposes of providing “a complete and accurate description of the nature and status of the transaction.” *Id.* Such information would assist the Commission in reaching a fully informed decision.

Even absent such additional information regarding Foxman’s circular deals involving Highland Cellular, Dobson and Chinook, the fact that Mr. Foxman is in the business of buying and selling communications companies is evidence in the record. MTA properly argued that evidence in its Brief. Chinook’s motion should be denied.

2. References to statements by a blogger and an article in the Missoulian.

The MTA argued in its Brief:

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.² Verizon and Alltel

² 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

customers (and any non-GSM customers) will not be able to call 911 in the areas where Chinook is building out, despite Chinook's inference that Chinook's build out will expand consumers' access emergency and other services where it deploys its network.³

Chinook objects to the information contained in the footnotes to that argument. The arguments are supported by evidence in the record. The footnotes contain inferences that can reasonably and fairly be drawn from the record evidence, and as such are proper argument. See, *Clausell v. State*, 2005 MT 33 ¶ 39, 326 Mont. 63 ¶ 39, 106 P.3d 1175 ¶ 39, citing ABA Standards § 3-5.8(a) Commentary (argument must be confined to record evidence and the inferences that can reasonably and fairly be drawn from it) (emphasis added).

Chinook has made much of its network and the ability it has to "save lives." *Chinook reply brief page 3*. The Commission should fairly consider the fact that Chinook's network is incompatible with any other network in Montana and no lives will be saved if the people in need of rescue don't own a Chinook telephone. The footnotes MTA provided of Chinook's customers' experiences are fair and reasonable inferences that may properly be drawn from the record evidence. Chinook's motion to strike these footnotes should be denied.

3. References to the Criterion Economics study.

The Criterion study referenced at pages 21-22 of MTA's brief is part of the record.

<http://forums.wirelessadvisor.com/western-us-wireless-forum/53922-chinook-wireless-replace-cdma-w-gsm-3.html#post393359>.

³ TR 62:5-12; see also <http://www.missoulain.com/articles/2006/08/22/news/local/news04.txt> (*Chinook Wireless users vent frustration*. By TYLER CHRISTENSEN of the *Missoulain*.)

The direct testimony of Mr. Feiss contains the following statement:

There is no evidence that designation of multiple ETCs enhances phone service or penetration. Two recent studies by Criterion Economics (www.criterioneconomics.com) show that most CETCs were already successfully providing service to the large majority of their rural customers prior to designation as CETCs.

Direct testimony page 5.

MTA's answers to Chinook's data requests contained references to the study. For example, MTA quoted the study's finding that "there are good reasons to believe that the relationship between subsidies and coverage, if it exists at all, is likely to be weak." See e.g., MTA response to Chinook data request 004, citing Caves, Kevin W., and Eisenach, Jeffrey A., "The Effects of Providing Universal Service Subsidies to Wireless Carriers." Criterion Economics. June 13, 2007.

Both the direct testimony of Feiss and MTA's data responses were moved into the record without objection. *TR page 26; 149.* While the Commission did not receive the paper copy of the Criterion study at the hearing, which was offered for the Commission's convenience, the study itself is part of the record, and all references to it in MTA's Brief are proper argument based upon record evidence. *TR page 141.*

Finally, Chinook's assertion that the Commission cannot take administrative notice of the information because it is "from unofficial, non-

governmental sources” is an inaccurate statement of Montana law. Section 2-4-612(6), M.C.A., provides in salient part:

Notice may be taken of judicially cognizable facts. *In addition, notice may be taken of generally recognized technical or scientific facts within the agency's specialized knowledge.*

Id., emphasis added. However, administrative notice is not at issue because the Criterion study is part of the record. Regarding the other arguments at issue, they are admissible as set forth above.

CONCLUSION

The information MTA presented in its Brief is based upon record evidence, and inferences that can reasonably and fairly be drawn from the record, and is therefore proper argument. Chinook’s Motion to Strike serves little more than to distract the Commission from the substantive issues inherent in this docket. Chinook’s motion should therefore be denied.

Respectfully submitted January 25, 2008.

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