

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

In the Matter of Cable &)	UTILITY DIVISION
Communications Corporation, dba Mid-)	
Rivers Cellular, Petition for Designation)	DOCKET NO. D2003.8.105
as an Eligible Telecommunications)	
Carrier)	

**CABLE & COMMUNICATIONS CORPORATION'S RESPONSE BRIEF
TO MOTIONS FOR RECONSIDERATION OF MONTANA CONSUMER COUNSEL
AND MONTANA TELECOMMUNICATIONS ASSOCIATION**

Filing Date: April 27, 2005

I. INTRODUCTION

On April 7, 2005, the Montana Public Service Commission ("Commission") issued Final Order No. 6518a in Docket No. D2003.8.105, and granted the application of Cable & Communications Corporation, dba Mid-Rivers Cellular ("Mid-Rivers Cellular") for designation as an eligible telecommunications carrier ("ETC") in the study areas of Mid-Rivers Telephone Cooperative, Inc. and Range Telephone Cooperative, Inc. On April 18, 2005, Montana Consumer Counsel ("MCC") and Montana Telecommunications Association ("MTA") each filed Motions for Reconsideration with supporting briefs with the Commission. No other Motions for Reconsideration have been filed with the Commission and the time to do so has now expired. (ARM 38.2.4806(1).) Mid-Rivers

Cellular files this Response Brief in opposition to the Motions for Reconsideration submitted by MCC and MTA.

MCC and MTA's Motions for Reconsideration reassert or resubmit arguments and contentions previously argued, fully briefed, duly considered, and subsequently denied by the Commission. (See Final Order No. 6518a in Docket No. D2003.8.105.) As a result of MCC and MTA's repetitive arguments or contentions, Mid-Rivers Cellular is again required to reiterate its previous arguments in response to preserve the record in this docket. As noted below, the Commission's Final Order in this docket is lawful, just and reasonable, and therefore MCC and MTA's Motions for Reconsideration must be denied.

II. **MID-RIVERS CELLULAR MET ITS BURDEN OF PROOF AND THE COMMISSION'S FINAL ORDER IS NOT PROCEDURALLY DEFICIENT DUE TO LACK OF PREFILED TESTIMONY**

MCC and MTA (cumulatively referred to herein as "intervenors"), contend that Mid-Rivers Cellular failed to establish a sufficient record before the Commission. The crux of the intervenors' arguments is the assertion that Mid-Rivers Cellular did not submit any prefiled testimony, and as a result the intervenors did not have an adequate opportunity to prepare. However, in Montana there was no statute, administrative rule or precedent which required an ETC applicant to submit prefiled testimony to the Commission. The intervenors are aware of this fact and their continuing attempts to persuade the Commission otherwise are disingenuous. The issues raised by the intervenors were thoroughly discussed and argued at the time of the hearing. After considerable debate, MCC's counsel admitted "I would agree that there is no particular

– there was no particular requirement in this case that the applicant pre-file direct testimony.” (TR p. 21.) MCC reiterated this statement in MCC’s initial posthearing brief, at page 2, which stated “[T]he procedural order did not require prefiled direct testimony from MRC.” (“MRC” is the acronym utilized by MCC for Mid-Rivers Cellular throughout MCC’s initial brief.) Additionally, at the time of hearing, Montana Independent Telecommunication Systems’ (“MITS”) counsel admitted that there is no legal requirement that an ETC application be accompanied by pre-filed testimony. (TR p. 17.) During the hearing, the following exchange occurred between Mr. Jacobson of the Commission Staff and Mr. Strand, counsel for MITS:

Mr. Jacobson: Mr. Chairman, the procedural order to which that rule refers isn’t issued until after the application is filed. So can you cite to a rule or legal requirement of Commission that an application be accompanied by pre-filed testimony?

Mr. Strand: No.

(TR p. 20.) The intervenors’ contentions are contradicted by their own statements on the record at the time of the hearing. Finally, the intervenors’ posthearing briefs and their briefs in support of the Motions for Reconsideration are devoid of any citation to any Montana statute, administrative rule, procedural rule, or case law which supports their positions. As a result, the Commission sustained the Chairman’s ruling at the hearing and denied the intervenors’ arguments regarding prefiled testimony.

Any issue as to the sufficiency of the record before the Commission or the ability of intervenors’ counsel to adequately examine the evidence or cross-examine witnesses is quickly dismissed by a brief review of the record in this docket. The relevant issues and facts in this proceeding have been briefed and re-briefed by the

parties and appear in the docket. The assertion by MTA that it was somehow surprised that Mid-Rivers Cellular was not seeking disaggregation, or designation as an ETC throughout the two study areas, is less than credible upon review of the pleadings, briefs and data request responses and objections contained in the docket. Prior to the hearing, on October 20, 2004, Mid-Rivers Cellular did file its Prehearing Memorandum with the Commission and served copies thereof upon all the intervenors as required by the procedural order, as amended, in this docket. (*Order No. 6518, as amended by Notice of Staff Action Amending Procedural Order with Service Date of July 21, 2004.*)

Mid-Rivers Cellular's Prehearing Memorandum specifically stated the following:

I. CONTESTED ISSUES

Whether the Montana Public Service Commission should designate Cable & Communications Corporation, dba Mid-Rivers Cellular, as an eligible telecommunications carrier ("ETC") for the entire study area of Mid-Rivers Telephone Cooperative, Inc. and the entire study area of Range Telephone Cooperative, Inc.?

II. WITNESSES

C&CC intends to call the following witnesses:

Gerry Anderson, C&CC's General Manager
Bill Wade, C&CC Assistant Manager
Vern Stichel, C&CC Accounting Manager

III. EXHIBITS

Petition of Cable & Communications Corporation, dba Mid-Rivers Cellular, for Designation as an Eligible Telecommunications Carrier filed in Docket No. D2003.8.105

Cable & Communications Corporation's, dba Mid-Rivers Cellular, Response to Public Service Commission Staff Data Requests PSC-001 through PSC-013 filed in Docket No. D2003.8.105.

Cable & Communications Corporation's, dba Mid-Rivers Cellular, Responses and Objections to Montana Telecommunications Association's Data Requests MTA-001 – MTA-052 filed in Docket No. D2003.8.105.

Cable & Communications Corporation's, dba Mid-Rivers Cellular, Responses and Objections to Montana Independent Telecommunications Systems' Data Requests MITS-001 through MITS-046 filed in Docket No. D2003.8.105.

Responses of Cable & Communications Corporation, dba Mid-Rivers Cellular, to Public Service Commission's Staff Data Requests PSC-014 through PSC 023 filed in Docket No. D2003.8.105.

The documents contained in the docket fully disclosed all of the relevant facts and details relating to Mid-Rivers Cellular's Petition prior to the hearing.

Additionally, at the hearing, Gerry Anderson, General Manager of Mid-Rivers Cellular, testified and verified the contents of the Petition and the Responses set forth above. (TR pp. 7 and 8.) Both the Commission Staff and Mid-Rivers Cellular separately moved the admission of all four sets of Mid-Rivers Cellular's Responses to data requests specified in Mid-Rivers Cellular's Prehearing Memorandum. (TR pp. 24 and 25.) Chairman Jergeson admitted the four sets of Mid-Rivers Cellular's responses to data requests specified in Mid-Rivers Cellular's Prehearing Memorandum and took the objections under advisement. (TR pp. 25 and 26.) As a result, Mid-Rivers Cellular's Petition and four sets of responses to data requests, and the facts alleged and contained therein, became evidence in this proceeding. (C&CC Exhibits 1, 2, 3, 4 and 5.) These Exhibits, as verified documents, clearly establish that Mid-Rivers Cellular presented a prima facie showing that it is entitled to the requested ETC designation in the study areas of Mid-Rivers Telephone Cooperative, Inc. and Range Telephone Cooperative, Inc., and therefore satisfied its burden of proof.

Further, during the hearing, sufficient testimony and evidence was received from the cross-examination of witnesses and the public to create a more than adequate record in this docket. The witnesses designated in Mid-Rivers Cellular's Prehearing Memorandum, Gerry Anderson – C&CC's General Manager, Bill Wade – C&CC's Assistant Manager, and Vern Stickel – C&CC's Accounting Manager, were extensively examined by the Commission Staff and all intervenors. (TR pp. 26 – 91, 113 – 123.) The public testified in support of Mid-Rivers Cellular's Petition for designation as an additional ETC and multiple documents were received into evidence as Exhibits. (TR pp. 98 -112, Public Exhibits 1, 2, 3, 4, 5, 6, 7, 8 and 9.) As a result, the record is replete with facts and law to support the Commissions' Final Order designating Mid-Rivers Cellular as an ETC in the study areas of Mid-Rivers Telephone Cooperative, Inc. and Range Telephone Cooperative, Inc.

The evidence before the Commission is more than sufficient to demonstrate that Mid-Rivers Cellular fully meets the ETC requirements set forth in 47 U.S.C. § 214(e)(1) and MCA § 69-3-840, and that such ETC designation is in the public interest as set forth in 47 U.S.C. § 214(e)(2) and MCA § 69-3-840(3). Mid-Rivers Cellular clearly met its burden of proof and the lack of prefiled testimony did not deny the intervenors an opportunity to prepare or create any procedural deficiency. The intervenors' arguments concerning burden of proof and procedural deficiency due to lack of prefiled testimony from Mid-Rivers Cellular are without merit and were properly denied by the Commission.

III. THE COMMISSION OBSERVED THE REQUIREMENTS OF DUE PROCESS AND THE FINAL ORDER WAS NOT PROCEDURALLY DEFICIENT BY GRANTING MID-RIVERS CELLULAR ETC DESIGNATION IN THE STUDY AREAS OF MID-RIVERS TELEPHONE COOPERATIVE, INC. AND RANGE TELEPHONE COOPERATIVE, INC.

MCC and MTA contend that the Commission failed to observe procedural due process requirements when it approved Mid-Rivers Cellular's ETC designation in the study areas of Mid-Rivers Telephone Cooperative, Inc. and Range Telephone Cooperative, Inc. The intervenors once again allege that they did not have an adequate opportunity to prepare for the hearing. However, a review of filings in this docket rebuts the intervenors' contention. The Petition in this docket clearly requests that Mid-Rivers Cellular be designated an ETC throughout its licensed service area as shown on Exhibit 1 to the Petition. (C&CC Exhibit 1, p. 1.) The Petition further states that Mid-Rivers Cellular seeks to be designated as an ETC in an area served by rural telephone companies, i.e. Mid-Rivers Telephone Cooperative, Inc. and Range Telephone Cooperative, Inc. (C&CC Exhibit 1, p. 4.) In response to data requests concerning the area sought for ETC designation, Mid-Rivers Cellular clarified it was not seeking disaggregation of the existing study areas, and therefore, its ETC service area consists of the study areas of Mid-Rivers Telephone Cooperative, Inc. and Range Telephone Cooperative, Inc. (C&CC Exhibit 5 [PSC-014d].)

As noted above, the implication by MTA that it was somehow surprised that Mid-Rivers Cellular was not seeking disaggregation, or designation as an ETC throughout the two study areas, is less than credible upon review of the pleadings, briefs and data request responses and objections contained in the docket. As set forth above, prior to the hearing, on October 20, 2004, Mid-Rivers Cellular did file its Prehearing

Memorandum with the Commission and served copies thereof upon all the intervenors as required by the procedural order, as amended, in this docket. (*Order No. 6518, as amended by Notice of Staff Action Amending Procedural Order with Service Date of July 21, 2004.*) Mid-Rivers Cellular's Prehearing Memorandum specifically stated the following:

I. CONTESTED ISSUES

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The intervenors have never contended or represented that they did not receive Mid-Rivers Cellular's Prehearing Memorandum. Nor have the intervenors ever contended or represented that they did not receive Mid-Rivers Cellular's responses to the PSC Data Requests. The allegation that the intervenors were unaware that Mid-Rivers Cellular was seeking ETC designation "for the entire study area of Mid-Rivers Telephone Cooperative, Inc. and the entire study area of Range Telephone Cooperative, Inc." is not supported by the record in this docket. Additionally, the intervenors have failed to prove any prejudice resulted from the alleged procedural deficiency. The intervenors' arguments concerning procedural deficiency resulting from Mid-Rivers Cellular's designation as an ETC for the entire study area of Mid-Rivers Telephone Cooperative, Inc. and the entire study area of Range Telephone Cooperative, Inc. is without merit and were properly denied by the Commission.

Finally, any allegation by the intervenors that Range Telephone Cooperative, Inc. ("Range") may have somehow been prejudiced or surprised by the inclusion of its entire

study area in Mid-Rivers Cellular's ETC designation is completely without merit. Range filed a Petition to Intervene in this docket on October 2, 2003, and was represented by attorney Edward A. Amestoy. On October 8, 2003, the Commission granted intervention to Range. From that time forward, Range has received each and every document filed with or by the Commission. Both MCC and MTA represent in their briefs in support of the Motions for Reconsideration that Range elected to participate in the hearing through MTA. This statement is not accurate and does not reflect the record in this case. As noted at the beginning of the hearing, Martin Jacobson asked all in attendance at the hearing "... is Range present today and represented by counsel?" (TR p. 5.) There was no response to Mr. Jacobson's question, and he stated: "For the record please reflect that Range and Ronan did not appear at hearing." (TR p. 5.) Furthermore, the docket does not reflect that Mr. Amestoy withdrew as counsel for Range in this matter or that any other attorney filed an appearance on behalf of Range. Contrary to the representations of MCC and MTA, Range did opt "to participate in this matter." Any references by MCC or MTA to actions which Range may or may not have taken is nothing more than mere speculation and must be wholly discarded by the Commission. The simple fact is Range was an intervenor and elected not to participate at the hearing or at any other time. Further, Range has elected not to file a Motion for Reconsideration to protest the designation of Mid-Rivers Cellular as an ETC in its study area.

IV. THE COMMISSION WAS CORRECT IN FINDING MID-RIVERS CELLULAR'S DESIGNATION AS AN ETC IS IN THE PUBLIC INTEREST

MCC contends that the Commission erred in finding that Mid-Rivers Cellular's ETC application was in the public interest. According to MCC, the Commission's finding is not supported by the record. Mid-Rivers Cellular asserts the record in this docket wholly supports the Commission's finding.

The Petition filed herein and Mid-Rivers Cellular's responses to data requests presented in this proceeding demonstrate clearly that Mid-Rivers Cellular's Petition for ETC designation is in the public interest. Mid-Rivers Cellular's Petition sets forth its reasoning that an additional ETC designation in an area served by rural telephone companies would be in the public interest. At pages 4 and 5 of the Petition, Mid-Rivers Cellular stated:

Mid-Rivers Cellular seeks to be designated as an ETC in an area served by rural telephone companies, i.e. Mid-Rivers Telephone Cooperative, Inc. and Range Telephone Cooperative, Inc. As such, in addition to providing the statutorily mandated services noted above, an additional ETC designation must be in the public interest.

The Commission's designation of Mid-Rivers Cellular as an ETC will clearly serve the public interest by providing the customers in the Mid-Rivers Cellular service area a choice of communications providers and communication technologies. Mid-Rivers Cellular serves "fill-in" cellular markets, i.e. areas abandoned by the original cellular licenses, presumably for economic reasons. The customers in this most rural area of Montana must be able to avail themselves of telecommunications services comparable to those in urban areas at rates also comparable to those in urban areas as prescribed by the Act. The designation of Mid-Rivers Cellular as an ETC would afford Mid-Rivers Cellular the financial ability to continue to provide universal service offerings to these customers. Mid-Rivers Cellular service is essential to public safety in the area it serves. Designation of Mid-Rivers Cellular as an ETC would enhance Mid-Rivers Cellular's ability to contribute to public safety needs in further satisfaction of the public interest standard. [Footnotes deleted]

(C&CC Exhibit 1.) Furthermore, Mid-Rivers Cellular's response to data requests consistently demonstrated that the public health and safety elements of the public interest inquiry are well served by its designation as an additional ETC in the two study areas served by rural telephone companies. One such example was Mid-Rivers Cellular's response to PSC-002c, which was as follows:

In what manner is Mid-Rivers Cellular service "essential to public safety in the area in which it serves?"

Mid-Rivers Cellular provides cellular service to a vast and remote area of Eastern Montana. As residents of this area conduct their every day affairs they at many times throughout the day do not have landline telephone service available. At these times cellular service is essential to meet safety needs, both personal and public. These needs could be of a medical or law enforcement nature. An example could be the recent fires for which cellular service was available for the firefighters and residents.

(C&CC Exhibit 2 [PSC-002c].)

Each of the people who testified and submitted public comments at the hearing stressed the importance of wireless telecommunication services in rural Montana. Commissioner Markuson of Carter County emphasized the public necessity of rural health care and public safety and stated, "I can name any number of cases where cellular telephone in our area has saved lives." (TR pp. 99 -100.) Commissioner Rieger of Fallon County spoke of the importance of emergency services and stated, "The communication of radios, such as the fire department use and ambulance, sometimes does not reach into these areas, and the cell phone is the last viable source of communication." (TR p. 101.) Commissioner Espy (incorrectly identified in the Transcript as "Angie Estby") of Powder River County stated that the Powder River Commissioner felt "the safety factor is most important." (TR p. 106.) Commissioner Jordan of Garfield County emphasized the fact that the nearest doctors to her area of

Garfield County were approximately 53 miles away in Miles City and when emergency situations arise, residents' cell phones provide them with a confidential and secure method to seek medical advice. (TR p. 108.) Commissioner Kelly addressed the benefit of cellular services in providing for needed communications during emergencies and stated, "Cellular services in rural areas is our lifeline in times of emergency and disasters." (TR pp. 109 – 111.)

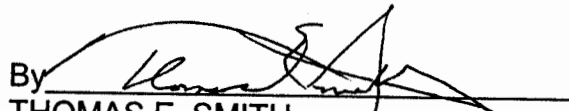
The public witnesses are the individuals whose lives will be directly impacted by the Commission's decision to grant ETC designation. It is noteworthy that all of the public witnesses supported the ETC designation and the testimony given under oath stated that the provision of wireless telecommunications services in Eastern Montana was in the public interest and would result in increased economic development, competition and choice, and public safety and welfare. Accordingly, the record evidence in this proceeding required the Commission to conclude that Mid-Rivers Cellular's designation as an additional ETC in the two study areas served by rural telephone companies will serve the public interest.

V. CONCLUSION

The Commission's Final Order No. 6518a in Docket No. D2003.8.105 properly granted the application of Mid-Rivers Cellular for designation as an eligible telecommunications carrier ("ETC") in the study areas of Mid-Rivers Telephone Cooperative, Inc. and Range Telephone Cooperative, Inc. The Commission has jurisdiction of Mid-Rivers Cellular's Petition for designation as an eligible telecommunications carrier ("ETC") in the study areas of Mid-Rivers Telephone

Cooperative, Inc. and Range Telephone Cooperative, Inc., and the Commission properly determined to grant the Petition. MCC and MTA's Motions for Reconsideration are without merit and should be denied in their entirety.

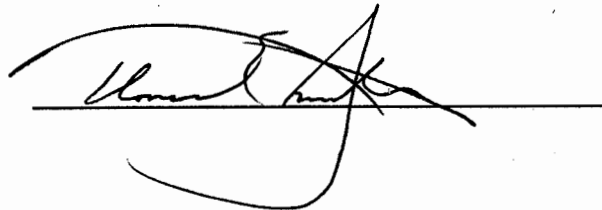
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the attached **CABLE & COMMUNICATIONS CORPORATION'S RESPONSE BRIEF TO MOTIONS FOR RECONSIDERATION OF MONTANA CONSUMER COUNSEL AND MONTANA TELECOMMUNICATIONS ASSOCIATION**, has today been served on all parties entitled to receive the same, by sending the original and required copies to the Public Service Commission by Federal Express overnight mail at the address listed on the attached PSC Service List, and by mailing a copy thereof to each additional listed interested party on the attached PSC Service List, by first class mail, postage prepaid this 26th day of April, 2005:



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