

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of)
)
Federal-State Joint Board on) CC Docket No. 96-45
Universal Service)
)
Initiation of a Proceeding to Consider)
a Petition to Redefine Certain Rural)
Telephone Company Service Areas)
in the State of Montana)

Comments of the Montana Telecommunications Association

The Montana Telecommunications Association (“MTA”) submits these comments in response to the Federal Communications Commission’s (“Commission” or “FCC”) Public Notice seeking comments on a petition filed by Triangle Communications System Inc. (“TCS”) to redefine the service area of certain rural telephone companies in Montana.¹ MTA believes the *Public Notice* raises important, novel policy issues related to distribution of federal universal service funds to competitive eligible telecommunications carriers. MTA appreciates the opportunity to comment on these issues and urges the FCC to examine these issues in the context of its larger, ongoing universal service reform proceedings.

I. Introduction

Pursuant to FCC rules, TCS filed a Petition for Redefinition on August 16, 2007, to redefine the study areas of two rural, incumbent local exchange carriers in Montana (the “*TCS Petition*”). The Commission sought comment on the *TCS*

¹ *In the Matter of Federal-State Joint Board on Universal Service; Initiation of a Proceeding to Consider a Petition to Redefine Certain Rural Telephone Company Service Areas in the State of Montana*; CC Docket No. 96-45; DA 07-4719 (rel. Nov. 26, 2007) (“*Public Notice*”).

Petition in a public notice released on August 28, 2007.² MTA filed comments on the *Initial Public Notice* on September 28, 2007 and filed reply comments on October 15, 2007. In its comments and reply comments, MTA urged the Commission to initiate a separate proceeding for a number of policy reasons. MTA appreciates the Commission having initiated the instant proceeding and respectfully requests that its comments and reply comments submitted in the *Initial Public Notice* be included in the record in this proceeding. MTA has attached to these comments the comments and reply comments it filed in the *Initial Public Notice*. MTA contends that the substantive issues discussed in its initial comments and reply comments apply equally to the extant proceeding.

MTA's position taken in its comments and reply comments are augmented as set forth below.

II. Clarification of MTA's Position Given TCS' Addition to the Record.

MTA previously advised the FCC that the "Montana Public Service Commission's Order granting TCS' Petition is on appeal to Montana District Court and there is no final state court action on TCS' Petition." On December 14, 2007, MTA filed in the First Judicial District Court of the State of Montana a Motion to Withdraw its Petition for Judicial Review.

MTA does not contest TCS' assertion that TCS does not hold 800 MHz and 1900 MHz licenses that would enable it to serve the entire study areas of the incumbent local telecommunications companies. Following the MPSC's public hearing on the TCS Petition for Designation as an ETC, TCS informed the MPSC that its 1900 MHz license does not cover the entire study areas of Triangle Telephone Cooperative Association ("TTCA") and Central Montana Communications ("CMC"), a subsidiary of TTCA. MTA acknowledges that TCS formally advised the MPSC "that the majority of the exchanges of Broadview,

² *In the Matter of Federal-State Joint Board on Universal Service; Triangle Communication System, Inc. Petition for FCC Agreement to Redefine the Study Areas of Certain Rural Incumbent Local Exchange Carriers in Montana*; CC Docket No. 96-45; DA 07-3791 (rel. Aug. 28, 2007) ("*Initial Public Notice*").

Rapelje, and Molt fall outside the 800 and the 1900 MHz licenses held by TCS.”³ MTA does not contest TCS’ clarification.

Second, in its comments to the FCC on the *Initial Public Notice*, MTA referenced TCS’ testimony at the MPSC’s public hearing on the TCS application for ETC designation and asserted that TCS testified that it owns no switches, transport facilities and other network operations. MTA acknowledges TCS’ assertion that it owns facilities used in the operation of its business. Further, as pointed out in the *TCS Reply Comments*, there is no requirement that TCS offer service exclusively over its own facilities.⁴ MTA concurs that ownership of facilities is not singularly determinative of ETC designation.

III. MTA Continues to Question the Need for Redefinition of TTCA and CMC Study Areas.

Notwithstanding the aforementioned clarifications, the *TCS Petition* raises significant and novel issues with regard to the distribution and use of federal universal service support. MTA highlights each of its concerns below, and encourages the Commission to fully address these concerns in determining whether to approve the *TCS Petition*.

A. The Act Calls for Separate State Commission and FCC Review of the Merits of the TCS Petition.

The Telecommunications Act of 1996 (the “Act”) specifically calls for separate federal and state review of petitions to redefine rural telephone company study areas.

In the case of an area served by a rural telephone company, “service area” means such company’s “study area” unless and until the Commission and the States, after taking into account

³ DOCKET NO. 2004.1.6, ORDER NO. 6723B AT p. 8. See also Letter to Marlene R. Dortch dated November 16, 2007, from Rebecca L. Murphy and Michael R. Bennet at p. 3 (“*Murphy Letter*”). MTA finds these statements still ambiguous, as a “majority of Broadview, Rapelje, and Molt exchanges” fails accurately to describe how much, either on a geographic or population basis, of those exchanges the 1900 MHz licenses actually cover.

⁴ *TCS Reply Comments* at p. 6.

recommendations of a Federal-State Joint Board instituted under section 410(c), establish a different definition of service area for such company.⁵ (Emphasis added.)

Section 54.207(c) of the Commission's rules further acknowledges the statutory requirement to conduct a separate review and analysis of petitions for redefinition of telephone company study areas.

Notwithstanding any state proceedings, the FCC appropriately has initiated a separate proceeding, as envisioned by the Act, to examine the novel and important policy issues raised by the *TCS Petition*. In short, the Commission correctly has reserved its rights, and obligation, to review the *TCS Petition* separately and to determine its merits.

B. The Corporate Relationship Between TCS, TTCA and CMC Raises Important Policy Questions.

As MTA pointed out in its comments on the *Initial Public Notice*, TTCA is the parent company of both CMC and TCS. MTA recognizes that many CETCs are wireless subsidiaries of corporate parent, landline companies serving effectively the same geographic service areas—and indeed the same customers—as their parent companies. As MTA noted in its comments in the *Initial Public Notice*, Chairman Martin has stated on more than one occasion:

the subsidies generated by the Commission's universal service rules now support multiple wireless networks providing services that for many consumers are effectively a complement, not a substitute, to the service already offered by the subsidized wireline incumbent local exchange carrier.⁶

If designation of competitive ETCs is at least in part intended to promote competition, one might question whether a corporate subsidiary offering

⁵ 47 U.S.C. § 214(e)(5). Similarly, Montana law states "'service area' means the company's 'study area' for federal universal service support unless the federal communications commission and the commission...establish a different definition." Mont. Code Ann. § 69-3-840(2).

⁶ See, e.g. Comments of the Montana Telecommunications Association, Docket No. 96-45; DA 07-3791 (filed Sept. 28, 2007) at p. 15, citing a letter from FCC Chairman Kevin Martin to Congressman Ed Markey dated May 14, 2007.

complementary services to those of its corporate parent's services and in its parent's service area meets the standard of competition. In this regard, MTA questions whether a corporate subsidiary's provision of complementary service in its parent's study area is consistent with the statutory objectives of Section 254 of the Act and whether it is truly in the public interest.

The question of public interest is amplified, in MTA's opinion, when the parent/subsidiary relationship is used for purposes of seeking redefinition of the parent's study area. It seems at least an apparent conflict of interest if the parent company and one of its subsidiaries "jointly" determine that redefinition of their respective study areas is appropriate for the purpose of obtaining federal universal service support for the benefit of yet another related subsidiary's operations. In the first instance, there's the issue of designation of a "competitive" ETC. In the second instance, there's the additional issue of "carving out" a propitious service area from the interrelated companies' study areas.

C. TCS Has Licenses That Cover the Entire Study Areas of TTCA and CMC.

MTA has pointed out that TCS has chosen to serve only those portions of TTCA's and CMC's study areas that coincide with its 800 MHz licenses, despite the fact that TCS owns licenses in the 1900 MHz and 700 MHz bands that cover the entire TTCA/CMC study areas.

In response to MTA's comments, TCS argued that

MTA has failed to cite any legal precedent, either in its comments to the FCC or in the MPSC proceeding, that would indicate TCS' request for study area redefinition should be denied simply because it owns other spectrum that it has determined would be unsuitable for universal service offerings.⁷

⁷ TCS Reply Comments at p. 5.

MTA noted in its comments on the *Initial Public Notice* that creamskimming can occur where redefinition results in a carrier serving higher profit, lower cost areas, even where that is not the intent of the incoming carrier.⁸

MTA did not assert that the *TCS Petition* should be denied simply because it owns licenses in other bands. Rather, MTA's assertion is that TCS' ownership of spectrum covering the entire study areas it seeks to redefine is relevant in determining whether such redefinition should be considered creamskimming, or whether it meets the public interest standard which the FCC would want other carriers to recognize in this or future redefinition proceedings.

Moreover, MTA does not agree with TCS' assertion that other spectrum would be unsuitable for universal service offerings. Indeed, several wireless carriers, including companies operating in Montana, some of which are seeking or already may have obtained CETC designation, provide service using the 1900 MHz band.

MTA notes that while there may be no legal precedent requiring TCS to use all three of its licenses in the 700 MHz, 800 MHz and 1900 MHz bands in some combination to provide supported services throughout the ILECs' service areas, there similarly is no legal precedent *precluding* its use of all available spectrum licenses in meeting its obligations to serve the study areas of TTCA and CMC.

More importantly, this issue is not narrowly about whether *legal* requirements exist for a CETC to utilize all of its licenses to provide supported services. It is about this Commission setting *policy* that is consistent with the intent of Section 254 of the Act and sending the proper signals to CETCs that are seeking federal universal service support. The policy question for the Commission, in short, is whether a carrier that *is able* to serve an entire study area with wireless licenses it owns should be allowed to carve out selected portions of the study area to suit its business interests by choosing to utilize only one or a limited subset of its wireless licenses.

⁸ *Comments of the Montana Telecommunications Association*; CC Docket No. 96-45; DA 07-3791 (filed Sept. 28, 2007) ("*MTA Comments*") at pp. 8-10.

In response to MTA's arguments, TCS simply asserts "it is not feasible for TCS to serve additional area utilizing its 700 MHz and 1900 MHz licenses."⁹ However, the Commission should not cut corners on policy decisions simply because the industry represents that it would be difficult to provide mobile voice service over the 700 MHz and 1900 MHz bands. Moreover, as mentioned above, several wireless carriers operating in Montana already provide mobile voice service utilizing the 1900 MHz band.

In sum, MTA suggests that the Commission consider the extent to which ownership of licenses covering an entire study area is relevant to the question of whether to redefine a study area. The Commission should craft sound policy based on the statutory objectives of Section 254 and the public interest. A policy decision by the Commission in this regard could have far-reaching effects on its current, on-going re-examination of its federal universal service rules.

D. The Commission Must Consider to What Extent Disparities in Population Density Are Relevant.

MTA reiterates that the areas to be served in the proposed, redefined service area, if granted, are rural by any standard. According to TCS, "the most densely populated wire center in TCS' proposed ETC service area has a population density of 8.34 persons per square mile."¹⁰ As MTA noted in its Reply Comments to the *Initial Public Notice*, TCS' data establish that with respect to CMC's study area, TCS would serve a redefined area with a population density of 6.12 persons per square mile, as opposed to a study area-wide density of 2.36.¹¹ "In TTCA's study area, TCS proposes to serve a redefined area with a density of 1.02 compared to the study area-wide density of 1.47."¹²

MTA notes that TCS argued that the proposed redefined study area has substantially greater population density than the wire centers TCS seeks to

⁹ *Murphy Letter* at p. 2. See also *TCS Reply Comments* at pp. 4-5.

¹⁰ *TCS Reply Comments* at p. 4.

¹¹ *Reply Comments of the Montana Telecommunications Association*; CC Docket No. 96-45; DA 07-3791 (filed Oct. 15, 2007) ("*MTA Reply Comments*") at p. 2.

¹² *Id.*

serve, notwithstanding the fact that the data demonstrate otherwise.¹³ At the same time, TCS has argued that the disparity in the population density of the CMC study area (i.e. 6.12 to 2.63) is irrelevant and should not be considered. But TCS cannot have it both ways. Either the disparity is relevant or it is not. In the CMC area, the difference in population density between the proposed redefined service area and the incumbent study area is 6.12 and 2.36, respectively. The area proposed for redefinition is 2.59 times more densely populated than the incumbent's study area.

Again, these are not densely populated areas. The important policy question for the Commission, however, is whether and to what extent disparities in the population density of study areas versus proposed, redefined service areas are relevant to the determination as to whether to grant a petition to redefine a service area. As aforementioned, a policy decision by the Commission in this regard will have far-reaching effects on the FCC's ongoing re-examination of its universal service rules.

E. The Commission Should Consider the Extent to which Disaggregation of the Incumbent's Study Area in This Situation May Alleviate Concerns of Cream Skimming.

The Commission has considered the extent to which a carrier has disaggregated its study area in determining whether a potential competitive ETC designation is in the public interest. In *Virginia Cellular*, the Commission noted that:

there are fewer issues regarding inequitable universal service support and potential harm to concerns regarding the incumbent's ability to serve its entire study area when there is in place a disaggregation plan in which the per-line support available to a competitive ETC in the wire centers located in "low-cost" zones is less than the amount a

¹³ See Letter to Marlene R. Dortch dated September 28, 2007, from Rebecca L. Murphy and Michael R. Bennet at p. 3 ("*Murphy Letter II*").

competitive ETC could receive if it served in one of the wire centers located in the “high-cost” zones.¹⁴

The FCC has also found that “creamskimming concerns may be lessened when a rural incumbent LEC has disaggregated support to the higher-cost portions of the incumbent's service area.”¹⁵ As *TCS' Petition* indicated, neither TTCA nor CMC has disaggregated its respective study area.

In the *TCS Reply Comments*, TCS asserted that the “MPSC determined that the lack of disaggregation had no bearing on the existence or nonexistence of cream skimming.”¹⁶ Given the fact that both state commissions and the FCC must review and approve petitions for study area redefinition, determining the effect of disaggregation on redefinition is a function of both state and federal analysis. Accordingly, MTA recommends that the Commission consider the extent to which disaggregation of TTCA's and CMC's study areas may affect the outcome of the *TCS Petition*.

IV. Conclusion

As the Federal-State Joint Board on Universal Service recently noted, “we believe it is no longer in the public interest to use federal universal service support to subsidize competition and build duplicate networks in high cost areas.”¹⁷ In MTA's opinion, redefining an ILEC's study area emphasizes the Joint Board's concerns regarding the proper targeting of federal universal service support to unserved areas.

MTA believes that the *TCS Petition* raises questions and concerns that the Commission should consider regarding the appropriate use of universal service

¹⁴ *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, 19 FCCR 1563, 1579-1580, fn. 112.

¹⁵ *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, 20 FCCR 6371, 6393.

¹⁶ *TCS Reply Comments* at p. 5.

¹⁷ *In the Matter of High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, WC Docket No. 05-337; CC Docket 96-45, Recommended Decision (rel. Nov. 20, 2007) at ¶35.

support. Specifically, MTA questions whether it is appropriate for redefinition of study areas to be granted to a subsidiary of the company whose study area is proposed to be redefined. MTA questions whether it is appropriate for redefinition of a study area to be granted if the petitioning carrier could potentially serve the ILEC's entire study area with alternative licenses or technologies that are nonetheless demonstrably viable in the marketplace. MTA also questions the extent to which discrepancies in population density matter when determining whether to grant a petition for redefinition of a study area. Finally, MTA questions the extent to which disaggregation may mitigate other concerns related to redefinition of a study area.

MTA believes the best approach is for the Commission to analyze these issues in the context of its larger, ongoing universal service reform, and then act accordingly on the *TCS Petition*.

Respectfully submitted this 26th day of December, 2007.

Geoffrey A. Feiss, General Manager
Montana Telecommunications Association
208 North Montana Avenue, Suite 105
Helena, Montana 59601
406.442.4316
gfeiss@telecomassn.org