Service Date: January 19, 2018

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

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IN THE MATTER OF the Investigation into Improving Transparency, Fostering Accountability, and Maintaining Quality Services for High Cost Support and Lifeline Services in Montana.	)	REGULATORY DIVISION DOCKET NO. N2017.10.82

COMMENTS OF HOT SPRINGS TELEPHONE COMPANY AND RONAN TELEPHONE COMPANY

Hot Springs Telephone Company (HSTC) and Ronan Telephone Company (RTC) respectfully submit the following Comments in response to the Montana PSC Notice of Investigation issued in Docket No. N2017.10.82 on November 9, 2017. The Comments are organized by the issues identified in the Notice, as follows:

Issue 1. WHAT OPPORTUNITIES EXIST FOR THE COMMISSION TO MORE APPROPRIATELY OVERSEE ETC SERVICE IN MONTANA, AS ALLOWED BY 45 U.S.C. §254(f)?

Should additional procedures be required for the annual re-certification of existing ETCs or certification of new ETCs, in addition to those that already exist in ARM 38.5.3230? Do the minimum additional requirements in ARM 38.5.3209 ensure ETC Program funding is appropriately spent?

The Commission's rules provide that a public interest standard will apply to ETC proceedings, citing to a wide number of factors that should be considered. ARM 38.5.3210. Are all of these factors appropriate to consider? Should any be eliminated or clarified? Should any be added?

Comments:

RTC believes that the current PSC procedures for ETC re-certification are appropriate and should not be changed for incumbent LECs. The existing PSC rules (ARM 38.5.3209 and 38.5.3218) provide a simple, straightforward process for annual re-certification of ETCs in Montana, which is consistent with the applicable Montana and Federal statutes (§69-3-840, MCA and 47 U.S.C. §214(e)). The PSC rule contains basic filing requirements, which are set forth in a "Staff Advisory Letter" served each year before the filing deadline. The ETCs satisfy these filing requirements, which include an Affidavit sworn under oath, verifying compliance with the PSC rules. This includes a sworn statement that all ETC funds were/will be used "only for the provision, maintenance, and upgrading of facilities and services for which the support is intended" in accordance with Federal law and the Form provided by the Commission. This process has worked well for many years (the current PSC rules were adopted 12 years ago), and there has been no instances or proof of fraud, abuse or waste in Montana. No changes are needed to the existing process. PSC ETC approval is legally a "ministerial act" if the filing is complete; that is, approval is automatic without any discretion, and required by law.

The Commission may want to consider more extensive scrutiny when a new entity seeks certification as a "competitive ETC" for the first time in Montana. Since the Commission may have no prior knowledge or experience with a new applicant, more filing information, and perhaps a meeting or hearing, would be helpful to prevent possible abuse of the program, and to assure the Commission that the entity is dependable, stable and financially viable (similar to an analysis of a motor carrier for issuance of a Certificate of Public Convenience and Necessity, §69-12-323, MCA) and otherwise qualifies to receive program funding.

No hearing should be required as a routine matter for re-certification; but the Commission might consider a periodic or annual informal meeting, for the existing ETCs to present their progress under the program and plans for the following year, and to answer any questions. No staff advocacy is necessary or appropriate in these cases. The PSC staff, acting in its traditional advisory role, can conduct discovery, audits or collect other information as appropriate. The Montana Consumer Counsel remains free to represent consumer interests as provided in the Montana Constitution; Mont. Const., Article XIII, Section 2.

The Commission could also gauge any potential need for greater scrutiny on an "as needed" basis, if it acquires any information that might provide a reasonable basis for conducting an investigation. Note that there are many reports which are regularly filed by ETCs with USAC, the FCC and PSC containing a plethora of information concerning ETCs' operations, investments, and services in accordance with the universal service programs. These various reports and controls establish an extensive degree of accountability under the existing rules and procedures, including:

(1) multiple extensive reports, filings and certifications to assure compliance with statutes and regulations governing the programs, and providing extensive details of the ETCs operations, investments and services;
(2) a capped overall USF support budget;
(3) a separate, annually declining cap for USF support under the High-Cost Loop Support program;
(4) capital investment limits;
(5) overall operating expense limits;
(6) separate corporate operations expense limits;
(7) network buildout obligations;
(8) buildout reporting requirements that include geocoding of locations to which certain levels of broadband are deployed;
(9) reduction or elimination of USF support in areas served by an "unsubsidized competitor";
(10) preparation of studies justifying and documenting incurrence of costs for recovery;
(11) multiple layers of review and/or audit by the NECA and USAC; and
(12) annual re-certification filings with the state Commission.

Issue: Executive Compensation Information Confidentiality

Comments:

The Montana Supreme Court vacated the PSC Order requiring public disclosure of Executive Compensation information in certain circumstances. *Southern Montana Tel. V. MT Public Service Commission*, 207 MT 123, 387 Mont. 415, 395 P.3d 473. The underlying constitutional privacy issue was not addressed by the Court and remains contentious.

RTC and HSTC believe that Executive Compensation information should be protected in accordance with Montana's constitutional privacy protections. Further, we do not believe that disclosure of this information would benefit the regulatory process or serve the public interest in any tangible or measurable way.

Issue: Are there any other administrative regulations in ARM 38.5.3201 to 3230 that should be eliminated or modified because they are antiquated?

Comments:

There is a flaw in one of the PSC's existing rules: ARM 38.5.3210 is inconsistent with Federal and State statutes, and should be corrected by an amendment. Specifically, this PSC rule contains "public interest" criteria for all ETC applications. However, this is inconsistent with the law with respect to rural incumbent ETCs. A public interest standard may only be applied to consideration of an additional (second/competitive) ETC in a rural area: "Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest." 47 U.S.C. §214(2) (emphasis added). However, no public interest criteria is allowed for certification of rural incumbent ETCs:

> Designation of eligible telecommunications carriers. A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the State commission. Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission . . .
> 47 U.S.C. §214(1) (emphasis added)

Paragraph (1) of Section 214 contains only two permitted criteria; the ETC applicant must:

a. Offer the services that are supported by the USF fund either using its own facilities or resale; and,

b. Advertise the availability of such services and the charges therefor using media of general circulation.

The statutory language in Section 214(2) is repeated in Montana law, §69-3-840(3), MCA.

Therefore, ARM 38.5.3210, by broadening the scope to a public interest analysis, is directly contrary to the explicit requirements of both Federal and State law. In other words, if the two requirements of Section 214(1) are satisfied (a. and b. above), the PSC is legally required to certify a rural incumbent ETC. There is no legal discretion for the Commission in such filings. ARM 38.5.3210 should be amended accordingly.

Issue 2. WHAT OPPORTUNITIES EXIST FOR REFORMS TO MONTANA LAW TO IMPROVE ETC SERVICES IN MONTANA, AS ALLOWED BY 45 U.S.C. §254(f)?

Comments:

The governance and regulation of ETC programs and funds are largely dictated by Federal law, and FCC orders and regulations. This oversight and regulation is performed by NECA, the FCC and USAC. Under existing law, there is very little discretion left to the PSC or other state commissions. However, verification of the proper/legal use of the funds is a function that could be performed by the PSC, through audits or other methods. The "policing" of the funds, to limit waste, fraud and abuse is of course also within the authority of the FCC, USAC and NECA.

The Commission should not seek to waive its legal duty to designate and re-certify ETCs each year. This Commission's duty is delegated and circumscribed in both Federal and State law. As a matter of law and sound state public policy, the Commission should not seek to abrogate this duty.

Existing Montana law allows for the formation of a state support fund, Section 69-3-842 through 69-3-845, MCA. RTC and HSTC would oppose repeal of this law, but believes it could be amended and improved.

The PSC should avoid "micro-management" of RLECs investment and build-out decisions to best serve customers. This is a basic tenet of public utility regulation, and is unnecessary in light of the extensive regulations, oversight, certifications and reports imposed by NECA, USAC and the FCC (on a monthly, quarterly and annual basis). HSTC and RTC file at least 75 reports, certifications, and other regulatory filings each year.

3. WHAT OPPORTUNITIES EXIST FOR REFORMING FEDERAL POLICY, EITHER BY STATUTE OR REGULATIONS, TO IMPROVE ETC SERVICES IN MONTANA?

<u>Comments:</u>

Generally, it is important to realize that federal policy has harmed rural telecommunications services in Montana, for a variety of reasons. The support amounts are not sufficient to provide capital investments for the services demanded by customers and required by the FCC. With the limits and restrictions on the federal USF-CAF-

ACAM funding and capped or reduced funding levels for programs; and the FCC's preemption of access charges which have drastically reduced cost recovery revenues, rural companies do not have adequate capital to maintain and upgrade services and facilities to keep pace with customers' requests and the needs of the rural economy.

Changes to Federal regulations that would improve rural service include:

A. Reversing the preemption of state access charges,[1] which previously provided essential revenues <u>that recovered actual costs and reduced reliance on subsidy programs</u>. The RLECs have invested millions of dollars in rural telecommunications infrastructure, but the FCC's "bill-and-keep" policy has and will require RLECs to provide local and long distance access services to carriers without any compensation whatsoever. Access revenues previously provided funding that allowed RLECs to establish credit requirements for its capital investment requirements. Ironically, by preempting RLECs ability to recover costs through reasonable charges on carrier-customers, the FCC has required rural companies to rely even more on subsidies and put a trend in motion that is causing rural residents and businesses to be required to pay more for services than their urban and suburban peers while receiving services that do not, and progressively will not, meet the needs of rural residents to fully participate in the modern data-intensive economy (the often cited "digital divide"). For example, in 2010, 48% of RTC's revenue

[1] A legal challenge to the FCC's "bill-and-keep" policy could be mounted by either a direct challenge, or within the confines of the 1996 Telecommunications Act, specifically, 47 U.S.C. §251(f)(2).

was derived from intercarrier compensation, in 2017, intercarrier compensation had been reduced by Federal mandate to only 12% of RTC's revenues.[2] HSTC and RTC would prefer to be able to charge a reasonable rate for access services, and receive lower levels of ETC funding, but the FCC has preempted this option.

B. Fully funding the A-CAM model program (the original funding levels needed for a full build-out were reduced by the FCC).

C. Removing the cap (maximum budget) on USF/CAF funding.

D. Reducing regulatory burdens on small companies: reporting, certifications, other filings, etc. The high costs of preparing these certifications and reports reduce the available funds for services to customers.[3]

Issue 3.a. Do ETC program subsidies, by reducing incentives to innovate and economize, actually inhibit effective buildout of rural insular or high cost areas, in contrast to the stated ETC principles in 47 USC §254(b)?

Comments:

ETC subsidies do not inhibit investment in rural areas. The funds provide recovery of a portion of the company's costs. A significant portion of revenues are still received from local customers, therefore, if an ETC operated inefficiently, it would

[2] RTC's total intercarrier compensation (switched access charges and local interconnection fees) totaled $2.08 million in 2010, which was 48% of the company's total $4.3 million total revenue that year.

[3] See Senate Bill 875, recently introduced in the U.S. Senate; https://www.congress.gov/bill/115th-congress/senate-bill/875 (Investigation into regulatory burdens of ETC telephone companies).

require increases to local rates, which would be untenable in areas with competition, and unacceptable for low and middle income consumers. Rate increases would result in loss of customers, therefore, there is still a strong incentive to be cost effective. In fact, even in the case of some rate and cost decreases, many local subscribers have abandoned core services provided by RTC and HSTC.

To elaborate further, the PSC question suggests a bias that must be addressed. The USF program facilitates investments in rural communities and areas that would not occur if the program did not exist. The unstated assumption behind the question hints that there are innovative technological methods available to serve rural insular and high cost areas that are not utilized because of the subsidized infrastructure that is provided by incumbent RLECs in rural areas. The subsidies are technologically neutral, thus, any method that can meet the service standards of the program can be used by the ETC. The larger question is whether the rural standards established by the FCC meet the mandate of the universal service policy embodied in both Federal and State law. Under this policy, rural areas should be assured that services will be provided that their local economies require for rural areas to be economically competitive with urban and suburban areas. The ongoing controversy over various “digital divides” speaks to the reality that the universal service mandate in the law is not being adequately funded. This is a particularly thorny issue in Montana, one of the most sparsely populated rural states in the nation, whose primary economic driver remains agriculture. It is disappointing that some policymakers appear to ignore such basic realities of the rural life in our great state.

It is questionable whether the level of support will in fact be adequate to meet the build-out requirements of the FCC programs utilizing the most effective long-term infrastructure, which is fiber optic distribution to all premises. Such infrastructure is only available sporadically in Montana, both in urban and rural areas. If Montana wishes to fully participate in the modern, data intensive, economy that is evolving, the infrastructure investments needed to bring this infrastructure into being must be made. Short of this, Montana will fall further and further behind areas and communities where such infrastructure is available.

Issue 3.b. What objective evidence exists that subsidies, as opposed to paying the true marginal cost of services, are actually necessary for consumers to subscribe in high cost areas? On average, what would the additional customer cost amount to?

<u>Comments:</u>

The ETC subsidies are essential in high cost areas. These funds are even more important since 2011 when the FCC began a nine-year transition of interstate and intrastate access charges to zero (which were legitimate cost-based unsubsidized revenues of rural companies). If the FCC had not preempted access revenues, the amount of subsidies to serve rural customers would be significantly lower. The FCC's preemption decision, essentially, required the rural LECs to rely more heavily on subsidies, since a major source of revenues was drastically reduced (and will be completely eliminated next year).[4] In 2013 alone, HSTC lost $197,000 in revenues as a result of FCC actions. Because of these FCC actions, HSTC has been forced to implement a variety of cost-cutting and efficiency reforms.

HSTC received $509,000 in ETC support in 2016 (some of this amount is not a "subsidy" since it is based on rate-of-return cost recovery pursuant to basic utility rate-making principles). This ETC support accounted for 42% of HSTC's total regulated revenues in 2016. With the election of the A-CAM model support in 2017, this percentage will probably increase.

Without ETC support, HSTC's cost consultants estimate that local voice rates would have to increase to at least $63 per month for one basic residential landline (an increase of 175%). Broadband rates would probably have to increase by at least a similar percentage (although a specific study of this has not been done).

Many customers in rural areas would be without any affordable service, for both basic voice service and internet, without the ETC funding. Some customers may be able to afford the high rates necessary without the subsidy funding, but rates would be much higher than in towns and urban areas; and would disadvantage low and middle income consumers. It is important to note that there is no viable cell service in many rural areas, and even where cell service exists, the internet speeds are limited.

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[4] Access charges were paid primarily by large national long distance companies. Local customers did not pay these charges since long distance rates are averaged nationwide.

Issue 3.d. Are there market-based alternatives, or technologies other than fiber-based broadband, that more effectively accomplish the goals of ETC Programs as stated in 47 U.S.C. § 254(b)?

Comments:

Fiber-based broadband is capable of effectively meeting the goals of ETC service standards, if funding also allows the necessary equipment and technology to be purchased. We believe it is unlikely that other unsubsidized "market-based alternatives" would provide adequate (or any) voice and internet service in many isolated rural areas of Montana.

Fiber has some advantages over wireless technology, in terms of reliability and speed. Many areas of Montana are obviously mountainous, including canyons, forests and other rough terrain that block or weaken wireless signals. Even when wireless "5G" is deployed and offers greater speed capability, it still will not be able to overcome the topographic and terrain challenges in many Montana areas. Thus, in many rural areas of our state, fiber provides the most reliable and highest quality service to customers. Notably, this includes many farms and ranches that are an important part of our state economy. Within most townsites of Montana, cell companies are providing marginally "adequate" speeds by current standards (depending on customer needs) but wireless reliability is significantly less than fiber. Cell phones also cannot provide the large data/internet capacity that is needed for many businesses and institutions (e.g. banks, schools, retail operations, government offices, etc.).

Issue 3.e. Should ETC Program funds be expended based on a priority of higher cost areas over lower cost areas?

Comments:

Yes. Lower cost areas have higher population densities and higher revenues, which lower their need for subsidies. The initial policy basis for universal service funding in the 1934 Telecommunications Act, was to promote basic telecommunications development and construction in rural areas (along with other "New Deal" electrification and rural development initiatives).[5] These rural needs continue, as technology progresses and rural economies need growth opportunities.

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Respectfully Submitted,

/s/

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[5] *See generally,* Brock and Corbett, "The Universal Service Program: A Regulatory Subsidy Case Study" (March 28, 2012); and, Rowley and Porterfield, "Can Telecommunications Help Rural Areas Overcome Obstacles to Development?", Rural Development Perspectives, Vol. 8, No. 2.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served a copy of the foregoing document upon the following, by mailing a true and correct copy, via First Class mail, on the 19th day of January, 2018, addressed as follows:

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