

Service Date: February 26, 2017

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

IN THE MATTER OF THE Petition of)
Commnet Wireless, LLC for Designation as) DOCKET NO. D2017.6.50
an Eligible Telecommunications Carrier)
)
)

COMMNET WIRELESS LLC'S PREHEARING MEMORANDUM

Commnet Wireless LLC ("Commnet"), through its undersigned counsel, submits this Prehearing Memorandum, pursuant to paragraph 10 of Procedural Order No. 7566a.

INTRODUCTION

This docket is a petition by Commnet to the Public Service Commission ("Commission") for designation as an Eligible Telecommunications Carrier ("ETC") for the limited purpose of providing Lifeline services throughout the Northern Cheyenne Reservation ("Reservation"). Lifeline services provide a discount to eligible low-income residents for wireless telephone and broadband services. Through this docket, Commnet seeks to eliminate disparate treatment among residents living in different areas of the Reservation and the administrative difficulties of providing Lifeline services to some, but not all, residents.

The Commission previously granted Commnet conditional ETC status for the area at issue here. In Docket No. D2013.11.80, the Commission granted conditional ETC status for the two areas, the portions of Big Horn County and Rosebud County located in the Reservation. There, the Commission determined Commnet met all state and federal requirements for ETC designation. D2013.11.80, Final Order No. 7319, ¶¶ 42-45, 52-55. The designation was conditioned on Commnet's successful bid in the Tribal Mobility Fund.

Commnet was successful in its bid for census tract located within the Rosebud County portion of the Reservation but not for the tract located in Big Horn County. As a result, Commnet is able to offer Lifeline services to residents of the Reservation in Rosebud County but not Big Horn County. Through this application Commnet seeks to remove the condition on its prior designation by the Commission, for purposes of providing Lifeline services, which is creating this dichotomy. It results in some members of the same Tribe or family receiving Lifeline assistance, while others cannot, based simply on which side of the County line they reside. Commnet seeks the Commission's help to eliminate this issue and offer Lifeline services equitably to all qualifying members of the Reservation.

Commnet does not seek High Cost, Tribal Mobility, or any other public funding to construct additional infrastructure. In cooperation with the Northern Cheyenne Tribe, Commnet has used its private capital to construct a cell site in Big Horn County, without public funding. In this docket, Commnet seeks only to make Lifeline services equally available to all eligible residents of the Reservation it serves.

SCOPE OF PROCEEDINGS

This scope of this hearing is limited. The Commission must determine whether Commnet qualifies for ETC designation to offer Lifeline services throughout the Reservation. Notice of Public Hr'g (Feb. 7, 2018). The Commission has not raised, or provided notice of, any other issue. *See* ARM 38.2.1802(1). No other party has intervened, as of the filing of this Memorandum. This proceeding does not concern the High Cost program or Tribal Mobility programs. It does not concern the constitutionality of the federal Universal Service Fund program. These issues are not relevant to this hearing, and the Commission should not consider them.

The sole issue before the Commission is whether Commnet meets the ETC criteria under State and Federal law. The Commission is required to evaluate Commnet's satisfaction of the requirements of 47 USC § 214(e)(1). § 69-3-840, MCA.

The Commission must not consider irrelevant factors or information in its analysis. As an administrative agency, the Commission is limited to the authority specifically provided by statute. *See* § 2-4-704(2), MCA; *Bick v. Dep't of Justice*, 224 Mont. 455, 458, 730 P.2d 418, 420 (1986) (“Administrative agencies enjoy only those powers specifically conferred upon them by the legislature.” (citations omitted)); *Clark Fork Coal. v. Dep't of Env'tl. Quality*, 2012 MT 240, ¶ 20, 366 Mont. 427, 288 P.3d 183 (review to determine whether “agency has stayed within statutory bounds”). It is well-established in Montana law that an agency is invalid if it is based on irrelevant factors or information. *See, e.g., Clark Fork Coal.*, ¶ 20 (“[W]e consider whether the decision was ‘based on a consideration of the relevant factors and whether there has been a clear error of judgment.’” (citations omitted)); *Core-Mark Intern., Inc. v. Mont. Bd. of Livestock*, 2014 MT 197, ¶ 38, 376 Mont. 25, 329 P.3d 1278 (stating the “reviewing court must determine whether the agency considered the relevant information” (citations omitted)). The Commission must correctly apply the law. *Bitterroot River Protective Ass'n, Inc. v. Bitterroot Conservation Dist.*, 2008 MT 377, ¶ 18, 346 Mont. 507, 198 P.3d 219 (stating “no discretion is involved when a tribunal arrives at a conclusion of law—the tribunal either correctly or incorrectly applies the law”).

ISSUES

The only determination in this matter is whether Commnet meets state and federal requirements for a Lifeline-only designation throughout the Reservation. There are no contested issues regarding this determination. The Commission has already held Commnet satisfies the

ETC requirements for tracts in both Rosebud County and Big Horn County. It has also granted Lifeline-only ETC designation for at least one other carrier under very similar circumstances. No party has intervened to raise other issues. The Commission has not raised, nor provided notice of, any contested issue in the Notice of Public Hearing, Procedural Order, or any other document. Accordingly, the Commission should follow its precedent and grant Commnet's Petition in this docket.

The Commission has already determined Commnet meets all state and federal standards for ETC designation in both Big Horn and Rosebud Counties. In Docket No. D2013.11.80, Commnet requested conditional ETC designation for these Counties. This request included providing Lifeline services. In Final Order No. 7319 ("Order"), the Commission determined Commnet met the requirements for ETC designation under state and federal law in both its "Analysis and Discussion" as well as its "Conclusions of Law":

42. Commnet satisfies the requirements for ETC designation as set forth in § 69-3-840, MCA.
43. Commnet satisfies the requirements for ETC designation as set forth in ARM 38.5.3201 *et seq.*
44. Commnet satisfies the requirements for ETC designation as set forth in Section 214(3)(2)[] of the [Federal Telecommunications Act].
45. Commnet satisfies the requirements for ETC designation as set forth in 47 C.F.R. 254.
- ...
52. The Commission determines that Commnet satisfies the requirements for eligible telecommunications carrier as set forth in ARM 38.5.3210.
53. Commnet satisfies the requirements for eligible telecommunications carrier designation as set forth in Title 47, Section 214 of the United States Code.
54. Commnet satisfies the requirements for eligible telecommunications carrier designation as set forth in Title 47, Section 54 of the Code of Federal Regulations.
55. The Commission has considered all laws, federal and state, applicable to state designation of eligible telecommunications carriers for receipt of federal universal service funding. The Commission determines that Commnet has met the legal requirements for conditional designation.

Id. ¶¶ 42-45, 52-55.

The Commission also determined expanding access to wireless services on the same tract at issue in this matter is in the public interest. “The Commission believes there is public interest consideration in facilitating the expansion of wireless telephony to places where none exists . . .” *Id.* ¶ 36; *see also id.* ¶¶ 42-45, 52-55. The Commission “recognize[d] that unserved Tribal Lands which are eligible for Auction 902 are among the most difficult and burdensome areas to serve.” *Id.* ¶ 37.

The Commission has also recertified Commnet as an ETC annually for the Rosebud County portion of the Reservation. Most recently, the Commission recertified Commnet’s ETC designation in Docket N2017.4.34 after a thorough review and public meetings

It is also important to note the Commission unanimously approved a very similar request for Lifeline-only designation for iSmart Mobile, LLC (“iSmart”) for the Bozeman, Butte Main, Butte South, Livingston, Belgrade, Manhattan, and Gallatin Gateway wire centers. Docket No. D2010.10.99, Final Order No. 7160c, ¶ 57 (May 23, 2013). The Commission noted several considerations in its analysis. iSmart had built its own network in Montana and offered roaming services to customers of other networks as a means of revenue beyond the Lifeline services it would offer. *Id.* ¶¶ 60-62. It had been providing service in Montana before the decision was issued, and the Commission had received no complaints. *Id.* ¶ 61. iSmart committed to implement safeguards to ensure only qualified customers received Lifeline discounts to address the Commission’s concerns about the possible waste, fraud, and abuse. *Id.* ¶ 64. Ultimately, the Commission held iSmart met all state and federal requirements for Lifeline ETC designation. *Id.* ¶¶ 65-67, 74-77.

Commnet also meets these requirements. Like iSmart, Commnet seeks Lifeline-only ETC designation for the requested areas in the Reservation. *See generally*, Pet. Commnet has built its own infrastructure in Big Horn County with private capital. *Id.* at 3. It offers wholesale services to other wireless companies as a means of revenue beyond the Lifeline services it offers. *See* Suppl. Resp. to PSC-003; Pet. at 8-10. Commnet has provided service in Montana without a complaint to the Commission. Commnet has implemented, and continues to enforce, Lifeline qualification standards to eliminate waste, fraud, and abuse. *See* Resps. to PSC-010(a)-(c). Commnet also meets all state and federal requirements for ETC designation. *See generally*, Pet. The Commission should grant ETC designation to Commnet to serve the residents of the Reservation, as it did for iSmart.

The Commission should follow its precedent. Under Montana law, “it is a well-established principle of agency law that an agency has a duty to either follow its own precedent or provide a reasoned analysis explaining its departure.” *Waste Mgmt. Partners of Bozeman, Ltd. v. Montana Dep't of Pub. Serv. Regulation*, 284 Mont. 245, 257, 944 P.2d 210, 217 (1997). Commnet has established that it continues to meet all relevant criteria in its Petition and supporting direct testimony of Rohan Ranaraja. There are no grounds to justify a departure from this precedent. The Commission should grant Commnet’s Petition and certify it as an ETC for Lifeline purposes.

WITNESSES

Commnet will present its case through the pre-filed and live testimony of Rohan Ranaraja, Director of Regulatory Compliance at Commnet.

EXHIBITS

Commnet will pre-mark and introduce into evidence the following exhibits:

COM-01 Petition for Designation as an Eligible Telecommunications Carrier

COM-02 Direct Testimony of Rohan Ranaraja

Commnet reserves the right to introduce additional exhibits during the live testimony of its witness.

DATA RESPONSES

Commnet will introduce Data Responses into evidence, if necessary, during the testimony of its witness.

If introduced into the administrative record, Commnet requests the Commission maintain the confidentiality of the following data responses, and accompanying materials, pursuant to Protective Order No. 7566: PSC-004(d) and PSC-005(e).

Dated February 26, 2017.

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