

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 20A-0213T

IN THE MATTER OF THE APPLICATION OF LIVEWIRE NETWORKS, INC. FOR
DESIGNATION AS AN ELIGIBLE TELECOMMUNICATIONS CARRIER IN THE STATE
OF COLORADO FOR THE LIMITED PURPOSE OF OFFERING LIFELIFE SERVICE TO
QUALIFIED HOUSEHOLDS.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
MELODY MIRBABA
GRANTING AMENDED APPLICATION**

Mailed Date: September 24, 2020

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I. STATEMENT AND BACKGROUND

A. Summary.

1. This Decision grants LiveWire Networks, Inc.'s (LiveWire) Unopposed Motion to Amend Application and to Waive Response Time to the Motion, acknowledges Commission Staff's withdrawal of its intervention, and grants the unopposed Amended Application for Designation as an Eligible Telecommunications Carrier (ETC) in the State of Colorado for the Limited Purpose of Offering Lifeline Service to Qualified Households (Amended Application).

B. Background.

2. Only the procedural history necessary to understand this Decision is included. On May 22, 2020, LiveWire initiated this matter by filing the above-captioned Application (Application) with the Public Utilities Commission (Commission).

3. Commission Trial Staff (Staff) properly intervened in this matter on June 25, 2020. Staff and LiveWire are the only parties to this proceeding.

4. In anticipation of the evidentiary hearing on the Application, the Administrative Law Judge (ALJ) scheduled a remote prehearing conference for July 29, 2020, per Rule 1409(a), 4 *Code of Colorado Regulations* (CCR) 723-1, of the Commission's Rules of Practice and Procedure. Decision No. R20-0517-I issued July 15, 2020. On July 28, 2020, the day before the prehearing conference, LiveWire filed an Unopposed Motion to Vacate Prehearing Conference and Waive Response Time to the Motion (Motion to Vacate). The Motion to Vacate requests that the prehearing conference be vacated to allow the parties additional time to continue their fruitful discussions aimed at resolving the issues in this proceeding. The Motion to Vacate also states that LiveWire waives the statutory deadline for a final Commission decision to issue under § 40-6-109.5(2), C.R.S.

5. On July 28, 2020, the ALJ vacated the prehearing conference, acknowledged LiveWire's waiver of the statutory deadline, and ordered the parties to file a settlement agreement and accompanying motion, or a joint status report with an update on the parties' settlement discussions, and an agreed-upon procedural schedule by August 31, 2020. Decision No. R20-0544-I.

6. On August 31, 2020, LiveWire filed an Unopposed Motion to Amend Application and to Waive Response Time to the Motion (Motion), an Amended Application with redlines and one in clean form, and multiple exhibits in support of the Amended Application. The Motion states that LiveWire worked with Staff collaboratively to resolve the issues raised in Staff's Intervention, and that the Amended Application represents a complete resolution of these issues. Motion at 1. The Motion walks through each issue raised in Staff's Intervention, and discusses how those issues have been addressed.

7. The Motion also states that Staff supports the amendments to the Application, and that counsel for Staff authorized LiveWire's counsel to "represent that if the Commission grants LiveWire leave to amend its application, then Staff withdraws its intervention and request for hearing." *Id.* at 3. Staff made no filing in response to LiveWire's Motion, and the time to file a response has elapsed. See Rule 1400(b), 4 CCR 723-1. This confirms that Staff confesses or does not otherwise object to the Motion, including the representation that Staff withdraws its intervention so long as LiveWire is permitted to amend the Application. See Rule 1400(d), 4 CCR 723-1.

II. FINDINGS, RELEVANT LAW, ANALYSIS, DISCUSSION, AND CONCLUSIONS.**A. Motion to Amend Application and Staff's Withdrawal.**

8. Because the Motion to Amend the Application is uncontested, the ALJ will grant the Motion. As such, the original Application is amended and replaced by the Amended Application filed on August 31, 2020. Since the ALJ has granted LiveWire's Motion to Amend, Staff's withdrawal of its Intervention is effective. Staff's Intervention is deemed withdrawn and it is no longer a party to this proceeding.

B. Modified Procedure

9. Because Staff's Intervention is withdrawn, the Amended Application is unopposed. Given that the Amended Application is unopposed, verified, is supported by sufficient facts, and no hearing is requested or required, the ALJ will decide whether to approve the Amended Application under a modified procedure, without a hearing. § 40-6-109(5), C.R.S.; Rule 1403(a), 4 CCR 723-1.

C. Relevant Law.**1. Burden of Proof.**

10. As the proponent of an order, LiveWire bears the burden of proof by a preponderance of the evidence to establish that the relief sought should be granted. Rule 1500, 4 CCR 723-1. The preponderance standard requires the fact finder to determine whether the existence of a contested fact is more probable than its non-existence. *Swain v. Colorado Dep't of Revenue*, 717 P.2d 507, 508 (Colo. App. 1985). A party has met this burden of proof when the evidence, on the whole, tips in favor of that party. *Schocke v. State, Dep't of Revenue*, 719 P.2d 361, 363 (Colo. App. 1986).

2. Federal Requirements for ETC Designation.

11. The Federal Telecommunications Act of 1996 changed the federal approach to ensuring that the nation's population has access to landline telephone service, known as "universal service." 47 U.S.C. § 214(e); *WWC Holding Co. v. Sopkin*, 488 F.3d 1262, 1267 (10th Cir. 2007). To develop infrastructure necessary to provide universal service, Congress created a federal fund to which telecommunications carriers contribute (47 U.S.C. § 254(d)). *WWC Holding Co.*, at 1267. Carriers who are designated as an ETC may receive funding from this source as a public subsidy, (known as federal universal service support). The Federal Communications Commission (FCC) distributes universal service support to eligible carriers designated as ETCs; it has also established requirements to receive ETC designation. *See generally*, 47 *Code of Federal Regulations* (C.F.R.) § 54.101 *et seq.* In 2011, the FCC expanded the definition of "universal service" to include broadband service, thereby redirecting federal support to "networks capable of providing voice and broadband services." *In re Connect Am. Fund*, 31 FCC Rcd 5949, 5952, 2016 FCC LEXIS 1807, **7 (F.C.C. May 26, 2016); *see also*, 47 C.F.R. 54.400(n). To receive universal support funds, regulated telecommunications carriers must receive an ETC designation from the public utilities commission in the state in which the provider seeks to provide universal service. 47 U.S.C. § 214(e)(2).

12. In deciding whether to designate a carrier as an ETC, the Commission must find that the provider meets the federal requirements for such a designation. 47 U.S.C. § 214(e)(2). To be designated as an ETC, a provider must: (a) deliver the supported services throughout its designated service areas "either using its own facilities or a combination of its own facilities and resale of another carrier's services" per 47 U.S.C. § 214(e)(1)(A) and 47 C.F.R. § 54.201(d)(1); (b) advertise its universal service offerings and the charges thereof, using media of general

distribution per 47 U.S.C. § 214(e)(1)(B) and 47 C.F.R. § 54.201(d)(2); (c) certify that it will comply with the service requirements applicable to the support that it receives, per 47 C.F.R. § 54.202(a)(1)(i); (d) submit a five-year build-out plan describing proposed improvements or upgrades to its network except for carriers seeking Lifeline-only ETC designation, per 47 C.F.R. § 54.202(a)(1)(ii); and (e) demonstrate that it will comply with applicable consumer protection and service quality standards per 47 C.F.R. § 54.202(a)(3).

13. In addition, a provider must also establish that it is able to remain functional during emergency situations, by demonstrating that it: (a) has a reasonable amount of back-up power to ensure functionality without an external power source; (b) is able to reroute traffic around damaged facilities; and (c) is capable of managing traffic spikes resulting from emergency situations, per 47 C.F.R. § 54.202(a)(2).

14. Common carriers seeking ETC designation for Lifeline-only universal service support must also: (a) demonstrate they are financially and technically capable of providing Lifeline service; (b) submit information describing the terms and conditions of telephony service plans, including minutes provided, additional charges if any for toll calls, and plan rates; and (c) submit information describing the terms and conditions of broadband internet access service plans, including speeds offered, data usage allotments, any additional charges and plan rates. 47 C.F.R. § 54.202(a)(4) to (6).

15. Additional requirements apply to carriers seeking an ETC designation for any part of Tribal Lands. 47 C.F.R. § 54.202(c).

16. As to voice telephony services, the provider must also show that it will provide: (a) voice services as a common carrier; (b) voice grade access to the public switched telephone network or its functional equivalent; (c) local usage at no additional charge; (d) access to

emergency services such as 911 and enhanced 911 (E911); and (e) toll-limitation services for qualifying low-income consumers. 47 U.S.C. § 214(e)(1); 47 C.F.R. § 54.400(l) and (m).

17. Carriers must also must establish that their broadband internet access services are capable of transmitting and receiving data, excluding dial-up service. 47 C.F.R. § 54.101(a)(2).

18. Finally, in determining whether to designate a carrier as an ETC, the relevant public utilities commission must find that the designation is in the public interest. 47 U.S.C. § 214(e)(2). The FCC encourages state commissions to conduct a public interest analysis that includes examination of: (a) the benefits of increased consumer choice; (b) the impact of the designation on the universal service fund; and (c) the unique advantages and disadvantages of the competitor's service offering, provided guidance on factors to consider in determining whether granting an ETC designation is in the public interest. *In the Matter of Federal-State Joint Board on Universal Service*, 20 FCC Rcd. 6371, 6379 (2005).

3. Colorado Requirements for ETC Designation

19. Rule 2187 of the Commission's Rules Regulating Telecommunications Services and Providers of Telecommunications Services sets out requirements for ETC designation; many of those mirror the federal requirements. 4 CCR 723-2. Specifically, ETC applicants must: (a) describe the ETC service area by metes and bounds or by providing the carrier's exchange area map; (b) establish that it meets the requirements of 47 C.F.R. §§ 54.201(d) and 54.202; (c) affirm that it is a common carrier, will advertise the services and associated charges, make Lifeline services available in all locations where it has been awarded support to qualifying low-income customers, and that it is in compliance with applicable Commission rules; (d) establish that it will remain functional in emergency situations; (e) satisfy consumer protection and service quality standards; and provide a two-year build-out plan demonstrating

how high-cost universal service support will be used to improve coverage, service quality, or capacity. Rule 2187(d)(II) to (XI), 4 CCR 723-2.

20. ETC applicants must also provide information required by Rule 2002(b), 4 CCR 723-2. Rule 2187(d)(I), 4 CCR 723-2.

21. Carriers who are granted an ETC designation must offer the supported services within one year of the Commission's decision approving the application for ETC designation. Rule 2187(e), 4 CCR 723-2.

D. Findings, Analysis, Discussion, and Conclusions.

22. LiveWire is incorporated in Nevada, and is in good standing with the Colorado Department of State to do business in Colorado. Amended Application at 2; Exhibit 1. LiveWire is a fixed wireless provider of broadband internet and interconnected voice over internet protocol (VoIP) phone service to businesses and homes. It is also a registered local competitive local exchange carrier (CLEC) with the Commission as a facilities based service provider. *Id.* at 2. LiveWire states that as a Colorado CLEC, it is regulated as a common carrier, subject to Title II of the Communications Act of 1934 (as amended), and all relevant regulations. *Id.* at 9.

23. LiveWire seeks a designation as a Lifeline-only ETC and does not seek designation to receive support from the federal or Colorado High-Cost Support programs. *Id.* at 1 and 20. LiveWire plans to offer supported Lifeline services, that is, broadband internet access and VoIP services to qualifying low-income customers, in the areas identified in Exhibit 3. *Id.* at 6 and 9. It explicitly excludes federally-recognized Tribal Lands, and any service areas of rural incumbent local exchange carriers from its proposed service area. *Id.* at 6.

24. LiveWire attests that it will: (a) use a combination of its own facilities and leased facilities to provide its Lifeline service; (b) advertise its Lifeline service and associated charges

using media of general distribution, such as advertisements on its website, social media and other internet sites, and direct mail campaigns; (c) comply with service requirements applicable to the support it receives, including offering local usage plans that meet minimum service standards; (d) comply with applicable consumer protection and service quality standards; and (e) can remain functional in emergency service situations because it has a reasonable amount of back-up power without an external power source, can reroute traffic around damaged facilities, and can manage traffic spikes resulting from emergencies. *Id.* at 7-8, 10-11, and 13-14.

25. LiveWire also certifies that it fully complies with the FCC Consumer Proprietary Network Information safeguard process and that it does not market or sell any consumer information. *Id.* at 8. LiveWire also affirms that it will satisfy customer eligibility determination and certification requirements under 47 C.F.R. §54.400. *Id.* at 13.

26. LiveWire states that it is in compliance with all applicable Commission rules. *Id.* at 9. LiveWire recognizes that it must comply with the FCC's and the Commission's Lifeline program rules, and must register Colorado Lifeline subscribers through the National Verifier. *Id.* at 14. It has developed policies and procedures to ensure compliance, and reviews these regularly to incorporate amendments to the FCC's rules, orders, and notices. LiveWire commits to paying the E911 surcharge on a per connection basis for all its customers. *Id.*

27. LiveWire states that it has successfully provided service for local communities in the Front Range area for almost 20 years without depending upon state or federal universal service funds. LiveWire submits that this track record establishes that it is financially and technically capable of providing Lifeline service. *Id.* at 8. For the same reasons, LiveWire asserts that it will be able to provide Lifeline service soon after receiving an ETC designation.

28. LiveWire will offer all of the services and functionalities required by the FCC and the Commission throughout the service area for which ETC designation is received. Specifically, LiveWire states that its broadband internet access service is capable of transmitting and receiving data and will meet the FCC's functionalities and minimum service standard for speed and data usage with speeds of at least 35 Mbps downstream and 5 Mbps upstream. *Id.* at 11 and 13.

29. In addition, LiveWire submits that its voice and data plans comply with FCC rules because the broadband data portion meets the FCC's minimum service standards for speed and broadband data usage allowance. *Id.* at 11. LiveWire certifies that: (a) it provides voice grade access so customers are able to transmit and receive voice communications over the public switched telephone network; (b) customers can send and receive local calls at no additional charge; (c) it provides universal access to the 911 calling system for its customers regardless of activation status; and (d) its E911 services are consistent with the FCC's rules and orders applicable to fixed wireless providers. *Id.* at 11-12.

30. LiveWire's proposed pricing and service agreement for its Lifeline packages and are included as Exhibit 4 to the Amended Application. LiveWire's Lifeline service will provide customers with unlimited minutes per month for national U.S. long distance calling at no additional charge and treats long distance minutes the same as other usage. *Id.* at 12-13. As a result, customers do not incur toll charges. *Id.* at 13. For these reasons, LiveWire submits that the toll-limitation services requirement in 47 C.F.R. § 54.400(m) does not apply here. *Id.* at 13. Because LiveWire's customers do not incur toll charges, the ALJ agrees that the toll-limitation service requirement does not apply.

31. Based on the foregoing, the ALJ finds that LiveWire has established by a preponderance of the evidence that it is a common carrier subject to the Commission's

jurisdiction and that it meets the requirements of 47 U.S.C. § 214(e)(1), 47 C.F.R. §§ 54.101(a)(2), 54.201(d)(2) and (3), 54.202(a)(1)(i), 54.202(a) (2) through (6), and 54.400(l) and (m), except as to the toll-limitation service requirement. Because LiveWire is seeking ETC designation for Lifeline-only services, the requirement in 47 C.F.R. § 54.202(a)(1)(ii) to submit a five-year build-out plan does not apply. In addition, because LiveWire does not seek ETC designation for any part of Tribal Lands, the ALJ concludes that LiveWire is not required to meet 47 C.F.R. § 54.202(c).

32. As to whether designating LiveWire as a Lifeline-only ETC serves the public interest, LiveWire argues that it meets each of the FCC's public interest criteria. Amended Application, at 15. First, it argues that the additional market competition will give consumers more choices and alternatives that are convenient and affordable, thereby offering consumers greater value. *Id.* at 15. LiveWire asserts that it will offer a valuable alternative to existing Lifeline services in Colorado for low-income customers, who are particularly vulnerable during the health and economic crises caused by the COVID-19 pandemic. *Id.* at 17. Adding LiveWire as an ETC will increase low-income households' access to telehealth, telework, remote learning, and will enable them to stay connected with friends and family, search for employment, and apply for government services while maintaining social distancing to slow the spread of the COVID-19 virus. *Id.* It also posits that designating LiveWire as an ETC will incentivize other providers to improve their Lifeline programs to remain competitive, which will also result in higher quality service to customers. *Id.* at 15.

33. Second, LiveWire points to the unique advantages of its service offerings. *Id.* at 16. For example, LiveWire takes a high-touch approach to service, allowing it to quickly resolve customers' technical issues. It provides personalized technical customer support both during and

after business hours. *Id.* LiveWire's states that its network is built for maximum efficiency, and its delivery system is very reliable and stable. This reliability creates savings because there is less system downtime, resulting in lower labor and operational costs. LiveWire passes on the resulting savings to customers, resulting in highly competitive rates. *Id.* LiveWire asserts it provides the best value for customers by using the latest technology. This includes a combination of traditional trunk interconnections with VoIP technology, resulting in a highly flexible and cost effective service. *Id.* LiveWire explains that its small cell fixed wireless distribution methodology creates a fast and reliable delivery platform that is deployed quickly without the cost and time associated with conventional underground facilities. *Id.*

34. Third, LiveWire states that it will only increase universal service funding for customers who are not currently enrolled with another Colorado ETC as a Lifeline customer. If it acquires customers who are already Lifeline customers with other Colorado ETCs, it will receive the universal service funding now being given to the other Colorado ETCs, which does not increase the amount of funding distributed.

35. For the reasons that LiveWire provides, (discussed above), the ALJ concludes that granting LiveWire Lifeline-only ETC designation is in the public interest, as required by 47 U.S.C. § 214(e)(2) and 47 C.F.R. § 54.202(b).

36. Consistent with the above discussion, the ALJ concludes that LiveWire has met its burden to establish that it meets the referenced federal requirements for Lifeline-only ETC designation.

37. As to Colorado's requirements, as noted above, LiveWire's Amended Application establishes that it will: (a) provide its VoIP services as a common carrier; (b) offer Lifeline services in all locations where it is awarded support to qualifying low-income customers;

(c) offer local usage plans meeting the FCC's minimum service standards; (d) advertise its service and associated charges using media of general distribution; (e) remain functional during emergency situations; (f) comply with consumer protection and service quality standards; (g) satisfy the requirements for determining customers' eligibility and certification under 47 C.F.R. §54.400; and (h) comply with all applicable Commission rules. And, as discussed, LiveWire has established that it is financially and technically capable of providing the Lifeline service. LiveWire also affirms that it will satisfy the requirements for determining customers' eligibility and certification under 47 C.F.R. §54.400. As such, the ALJ concludes that LiveWire meets the requirements of Rule 2187(c) and (d)(IV), (V), (VI), (VII), (VIII), (IX), (X), and (XII), 4 CCR 723-2.

38. The ALJ finds that Amended Application provides the information required by Rule 2002(b), and thus, complies with Rule 2187(d)(I), 4 CCR 723-2. Amended Application, at 4-6. LiveWire has satisfied Rule 2187(d)(II) by providing maps of the exchange service area. Exhibit 3.

39. As to Rule 2187(a) and (d)(III), as already discussed, LiveWire has established that it meets the requirements of 47 C.F.R. §§ 54.201(d), 54.202(a)(1)(i) and (2) through (6) and 54.202(b). As noted, LiveWire is not required to meet the requirements of 47 C.F.R. § 54.202(a)(1)(ii) and (c). To the extent necessary, the ALJ waives the portion of Rule 2187(a) and (d)(III) requiring LiveWire to meet the requirements of 47 C.F.R. § 54.202(a)(1)(ii) and (c). As such, the ALJ concludes that LiveWire meets the applicable requirements of Rule 2187(a) and (d)(III), 4 CCR 723-2.

40. Because LiveWire is not seeking high-cost universal service support, it argues that Rule 2187(d)(XI)'s requirement to provide a two-year build-out plan describing how high-cost

universal service support will be used does not apply here. The ALJ agrees; to the extent necessary, the ALJ waives this requirement.

41. In addition, given that LiveWire has successfully provided service for local communities in the Front Range area for almost 20 years, and will use a combination of its own facilities and leased ones, the ALJ concludes that the record establishes that LiveWire is capable of issuing its Lifeline service offering within one year, per Rule 2187(e), 4 CCR 723-2. *See* Amended Application at 8.

42. For all these reasons, the ALJ concludes that LiveWire has met its burden to show by a preponderance of the evidence that it meets Rule 2187's requirements for ETC designation.

43. Consistent with the above discussion, because LiveWire established that it meets both the federal and Colorado's requirements for ETC designation, the ALJ concludes that LiveWire has met its burden of proof, and that the Amended Application should be granted, subject to the below conditions. The ALJ transmits the record of this proceeding, this recommended decision containing findings of fact and conclusions thereon, and a recommended order to the Commission as provided under § 40-6-109, C.R.S.

III. ORDER

A. The Commission Orders That:

1. LiveWire Networks, Inc.'s (LiveWire) Unopposed Motion to Amend Application and to Waive Response Time to the Motion filed August 31, 2020, is granted as set forth herein. Public Utilities Trial Staff's intervention is deemed withdrawn.

2. Consistent with the above discussion, LiveWire's Amended Application filed on August 31, 2020 requesting designation as an Eligible Telecommunications Carrier (ETC) in the

State of Colorado for the limited purpose of offering Lifeline service to qualified households is granted, subject to the following conditions:

a. LiveWire must comply with applicable consumer protection and service quality standards, except for the Cellular Telecommunications Industry Association's Consumer Code for Wireless Service;

b. LiveWire must calculate and remit Colorado Department of Revenue E9-1-1 surcharges on the sale of all Lifeline offerings in Colorado, based on the total monetary value of the service, including funds received from the Universal Service Administrative Company.

c. LiveWire is not authorized to provide Lifeline service on federally-recognized tribal reservations and any service areas of rural incumbent local exchange carriers located within its ETC service area in the State of Colorado.

d. LiveWire must comply with state and federal ETC reporting and certification obligations, and must provide copies of these federal reports to the Commission;

e. LiveWire must offer the Lifeline service authorized by this Decision within one year of the effective date of this Decision.

f. LiveWire must notify the Commission 20 days prior to its initial offering and offering any new services or making any changes in its service plans through an informational filing with the Director of the Commission; the filing must detail the rates and speeds, as well as the terms and conditions, associated with the initial plans and any new plans;

g. LiveWire must offer a variety of packages for its services with varying service terms and the early termination of a service agreement must result in an early termination fee that is less than the sum of the monthly fees for the remaining months of the term;

h. LiveWire must permit residential voice customers to terminate their service agreements with LiveWire without an early termination fee for material, ongoing degradation in service quality or service interruption of a significant length of time such that the customers are not able to use the service at all or to make reasonable use of the service; and

i. LiveWire must not subject its Lifeline customers who subscribe to standalone voice services to a minimum service term.

2. LiveWire is granted waivers of Commission rules as specifically discussed in this Decision.

3. Proceeding No. 20A-0213T is closed.

4. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

5. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

6. If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission upon its own motion within 20 days after service, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

7. If a party seeks to amend, modify, annul, or reverse basic findings of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may

stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

8. If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

(S E A L)



ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

MELODY MIRBABA

Administrative Law Judge