

Decision No. C03-0788

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 00A-315T

IN THE MATTER OF THE APPLICATION OF N.E. COLORADO CELLULAR, INC. FOR DESIGNATION AS AN ELIGIBLE TELECOMMUNICATIONS CARRIER PURSUANT TO 4 CCR 723-42-7.

DOCKET NO. 00A-491T

DESIGNATION AS AN ELIGIBLE PROVIDER PURSUANT TO 4 CCR 723-41 IN ORDER TO RECEIVE AVAILABLE SUPPORT FROM THE COLORADO HIGH COST SUPPORT MECHANISM FOR SUPPORT TO RURAL, INSULAR AND HIGH COST AREAS.

ORDER GRANTING MOTION FOR CLARIFICATION

Mailed Date: July 17, 2003
Adopted Date: July 16, 2003

I. BY THE COMMISSION

A. Statement

1. This matter comes before the Commission for consideration of a Motion for Clarification or in the Alternative, Motion to Reopen the Record filed by N.E. Colorado Cellular, Inc. (NECC), on June 16, 2003. NECC requests clarification of Commission Decision No. R01-1298 that NECC was granted status as an Eligible Telecommunications Carrier (ETC) in the service area of CenturyTel of Eagle, Inc. (CenturyTel), and that status was effective as of November 27, 2002. In the alternative, NECC requests that the Commission reopen the record of these proceedings and confirm that NECC is an ETC in the CenturyTel service area.

2. Commission Staff (Staff) generally opposes the arguments raised in NECC's motion, but nonetheless indicates that it does not object to reopening the record and granting

NECC ETC status. Nor does it object to granting that status retroactively to November 27, 2002. However, Staff does request that we order NECC to file updated maps indicating its ETC status in CenturyTel's service area.

3. The Colorado Office of Consumer Counsel (OCC) also filed a response to NECC's motion. The OCC's main concern is that NECC be granted ETC status as of November 27, 2002 so that no end users are affected, but is ambivalent as to how that result is reached.

4. Now, being duly advised in the matter, we grant NECC's motion for clarification consistent with the discussion below.

B. Background

5. NECC, OCC, and Staff entered into a Stipulation and Settlement Agreement (Settlement) on October 19, 2001 that resolved all the outstanding issues between the parties regarding NECC's petition for ETC status. The relevant section of the Settlement here is Section 10, which provides:

10. **ETC Designation.** In full settlement of differences raised in the course of this proceeding, the Parties stipulate and agree that immediately designating NECC as ETC in the study areas and wire centers set forth on Attachments 1-2 to this Stipulation, as provided below, serves the public interest, convenience and necessity, as defined in 47 U.S.C. § 214(e)(2) and § § 40-15-101, 40-15-501, and 40-15-502, C.R.S., and 4 CCR 723-42-7, and recommend that the Commission grant NECC's Application for ETC designation in accordance with this Stipulation as follows:

A. NECC should be designated as an ETC in the wire centers set forth in Attachments 1 and 2, effective immediately.

B. With respect to the wire centers set forth in Attachment 3, it is the position of Staff, OCC and NECC that NECC has satisfied all legal criteria for immediate designation as an ETC and should be granted such status immediately

by the Commission, pending the resolution of the Commission's proceeding on disaggregation described below and pending any necessary FCC approval of initial disaggregation of service areas for those wire centers set forth on Attachment 3 as described in Paragraph 11 below.

6. On December 21, 2001, an Administrative Law Judge (ALJ) adopted the Settlement in its entirety. In Recommended Decision No. R01-1298, the ALJ found that NECC met all the criteria pursuant to federal law to be designated as an ETC, and thus was eligible to receive federal universal service support. As such, the ALJ found that NECC should be designated as an ETC pursuant to our rules at 4 *Code of Colorado Regulations* (CCR) 723-41 and eligible to receive support from the Colorado High Cost Fund. The ALJ also determined that NECC met all the requirements for designation as an Eligible Provider under 4 CCR 723-41. No exceptions were filed, so the Recommended Decision became a final decision of the Commission on January 11, 2003.

7. Paragraph 10 of the Settlement provided that NECC would be designated as an ETC pending the resolution of the Commission's proceeding on disaggregation, and pending any necessary Federal Communications Commission (FCC) approval of initial disaggregation of CenturyTel service areas. The FCC concurred with this Commission's proposed CenturyTel service area redefinition, and this decision became final by operation of law on November 27, 2002.

8. On May 6, 2003, Staff, through the Colorado Office of the Attorney General, sent a letter to the FCC to provide additional information about the companies that had applied for ETC status in Colorado, in CenturyTel service areas. In relevant part, the letter indicated that it was this Commission's past practice (as demonstrated in the San Isabel and Western Wireless applications) to require a formal order specifically designating a carrier an ETC, "even after

initial proceedings (*i.e.* the proceedings in which the Stipulations were approved) have determined that a carrier is eligible to be an ETC. To date, COPUC has not issued a formal decision granting ETC designation to NECC."

C. NECC's Motion

9. According to NECC, nothing in the Stipulation states that a grant of NECC's ETC status was to be conditional or otherwise subject to a requirement that NECC return to the Commission for further action, following the FCC's approval of this Commission's decision regarding disaggregation. NECC argues that because the two conditions precedent articulated in Paragraph 10 of the Stipulation were met (the Commission decision on disaggregation, and the FCC's approval of the Commission decision by operation of law on November 27, 2002), its designation as an ETC is effective on November 27, 2002. NECC contends that the language contained in the Stipulation, the Commission's Decision, and our rules all lead to the conclusion that NECC's ETC designation in CenturyTel's service areas became effective immediately upon conclusion of the FCC's service area redefinition proceeding.

10. Regarding the May 6, 2003, letter, NECC maintains that the letter indicates a Commission practice that would require NECC to return to the Commission to file a pleading for ETC designation. To the extent the letter requires NECC to conform to procedures the Commission followed in the San Isabel and Western Wireless matters, NECC argues that this is tantamount to illegal rule-making by the Commission. NECC continues to maintain the position that nothing in the other cases mentioned in the letter, or in the Stipulation would have placed it on any notice of the need to return to the Commission for any further proceedings.

11. In its initial motion, NECC points out that the FCC has now indicated uncertainty regarding whether NECC is an ETC in CenturyTel's areas and consequently, the FCC is uncertain whether NECC is properly receiving high cost support in the CenturyTel areas. We note here that we granted NECC leave to file a supplement to its motion and a response to Staff's pleading in this matter. According to NECC's supplement, the FCC has now cut off NECC's receipt of universal service funding for the CenturyTel areas at issue in its Motion for Clarification.

12. NECC asserts that it in good faith planned and budgeted system upgrades for 2003 in reliance upon receipt of high cost monies. It also represents that it is doing everything required of an ETC and everything the Commission encourages ETCs to do. Therefore, NECC seeks clarification that its grant of ETC status became effective immediately as of the completion of the FCC re-definition proceeding on November 27, 2002. In the alternative, NECC requests that, should the Commission determine that NECC has not finalized its ETC status, we reopen the record in these dockets to enter an order confirming that NECC is an ETC in the CenturyTel service areas.

D. Staff's Response

13. Staff initially takes exception to NECC's characterization of the May 6, 2003 letter to the FCC as an "Attorney General Letter" or "AG Letter." Staff points out that the letter was submitted by the Commission's attorney of record in response to oral discussions between FCC staff and Commission staff concerning this Commission's petition to disaggregate CenturyTel's service areas, and memorializes oral discussions between the FCC and Commission staff members, reflecting Staff's position.

14. Staff also takes exception to NECC's representation that it only learned of Staff's position that NECC was not yet designated an ETC from the May 6, 2003 letter. Staff maintains that NECC representatives were orally informed of this position on January 15, 2003 and those representatives were further informed that NECC was required to file a pleading with the Commission confirming that all conditions outlined in the Stipulation approved in this docket for obtaining ETC status were met, allowing the Commission to issue an affirmative decision in this matter. In its response, NECC neither disputes nor confirms this representation, but states that it would have immediately applied to the Commission for clarification if it had understood Staff's position in January 2003.

15. Further, Staff represents that in its Response in Opposition to NECC's Petition to Redefine Local Exchange Carrier Service Areas, Staff expressly stated that NECC would not be granted ETC status in CenturyTel's service areas until a favorable outcome of a disaggregation proceeding, and after that occurred, Staff believed NECC was required to file a new application with the Commission for ETC status. Consequently, Staff represents that NECC was aware of Staff's position 11 months prior to NECC's filing of the motion for clarification.

16. As for Paragraph 10 of the Stipulation, it is Staff's position that the plain language of that provision indicates that NECC's ETC status was conditional pending the outcome of the Commission's decision on disaggregation and the FCC's approval of the disaggregated service areas. Because the language of the provision indicates that NECC *should* be granted ETC status upon the satisfaction of the two conditions precedent, Staff argues that there could have been no immediate, automatic, or unconditional grant of ETC status without further order of the Commission.

17. Staff also takes exception with NECC's position that the May 6, 2003 letter's reference to the Commission's actions in the San Isabel and Western Wireless cases establish a new precedent or new rule that is being retroactively applied to NECC. Rather, Staff opines that the letter simply provided guidance to NECC as to how it should proceed.

18. Staff also expresses concern that should we agree with NECC here, the result will be discriminatory treatment of other competitive ETCs required to file a new application for designation as an ETC, most notably, Western Wireless.

19. However, Staff, while disagreeing with NECC's interpretation of the Stipulation, nonetheless recommends that we grant NECC's motion to reopen the record and grant NECC ETC status on a going forward basis. Staff also does not object to a grant of ETC status to NECC retroactive to November 25, 2002.

20. Staff asserts that the Stipulation required NECC to file with the Commission a map of each of its designated service areas within Colorado, and that each map show clearly the boundary lines of the area in which it has been designated an ETC/EP. Staff indicates that NECC's current map on file with the Commission fails to indicate that NECC is serving in CenturyTel wire centers. Therefore, Staff urges us to require NECC to update its service maps prior to it collecting Universal Service Fund support money.

E. OCC's Response

21. The OCC filed a response that is generally supportive of NECC's motion. OCC indicates that NECC (and Western Wireless), once eligible to receive support, can bring competitive choices to customers in the service areas of rural incumbent local exchange carriers.

The OCC urges us to grant NECC's motion so customers in CenturyTel's service area are not deprived of the competitive service and infrastructure investment NECC is providing.

22. OCC does not take a position with regard to whose position, Staff or NECC, is correct here. OCC's concern is that NECC has been in compliance with the requirements of the Stipulation, and if in fact NECC did violate any provision of the Stipulation by failing to file a compliance filing, that this be viewed as a mere technicality. OCC wishes to hold NECC's customers and potential customers harmless in this matter, which requires a finding that NECC's designation as an ETC became effective on November 25, 2002.

F. Analysis

23. We are persuaded by NECC's arguments here that its ETC status was self-executing upon completion of the conditions precedent outlined in the Stipulation. Our review of Paragraph 10 of the Stipulation finds that the plain meaning of that provision does not indicate that NECC was required to return to the Commission with a new application for ETC designation upon completion of the conditions precedent required in that paragraph. Had Staff wanted NECC to submit such a compliance filing with the Commission, it should have indicated so in the Stipulation.

24. A review of Commission Decision No. R01-1298 further persuades us that NECC had no notice of Staff's requirement for a new compliance filing before it could receive ETC status. In that decision, the ALJ specifically found in ordering paragraphs 1-3 the following:

1. The Stipulation and Settlement Agreement of N.E. Colorado Cellular, Inc., the Colorado Office of Consumer Counsel and Staff of the Colorado Public Utilities Commission, Exhibit 1 of the hearing record, attached to this Decision *is accepted*.

2. The applications of N.E. Colorado Cellular, Inc., for designation as an Eligible Telecommunications Carrier and Telecommunications Provider *are granted*.

3. 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.

(emphasis added)

We find nothing ambiguous in the ALJ's grant of ETC status to NECC. Nor do we find any requirement that NECC make any subsequent compliance filing upon completion of the conditions precedent enumerated in the Stipulation. Had Staff wanted NECC to return to file a new application for ETC designation upon completion of the conditions precedent, it should have specifically and unequivocally stated so in the Stipulation.

25. We find Staff's arguments unavailing here. Although Staff may have had the unexpressed thought that NECC was required to come back and file a compliance filing, Staff did not provide such guidance in written form anywhere in the Stipulation. It seems logical that had Staff deemed this as important an issue as it argues, it would have put that requirement in writing.

26. We agree with the OCC that to deny NECC ETC status now would cause significant harm and prejudice to its customers. NECC indicates, and OCC and Staff agree, that NECC has been in compliance with its requirements and expenditures of high cost support funds. We are further strongly persuaded by NECC's response to Staff's pleading indicating that the FCC has cut off its high cost funding and that a quick response to this matter is required. Therefore, we grant NECC's motion for clarification that the grant of ETC status was self-executing upon the FCC's decision concurring with this Commission's proposed service area redefinition for CenturyTel, which became final by operation of law on November 27, 2002.

27. We also take note of Staff's representation that NECC has not as of this date filed its updated maps reflecting the boundary lines of the area in which NECC has been designated an ETC/EP, and order NECC to file such updated maps as soon as is practicable.

II. ORDER

A. The Commission Orders That:

1. The Motion for Clarification or in the Alternative Motion to Reopen the Record filed by N.E. Colorado Cellular, Inc., on June 16, 2003 is granted consistent with the discussion above.

2. The Motion for Leave to File a Supplement to Motion for Clarification and Reply to Staff's Response to Motion for Clarification and Motion for Waiver of Response Time filed by N.E. Colorado Cellular, Inc., on July 10, 2003 is granted.

3. N.E. Colorado Cellular, Inc., is ordered to file updated maps indicating the boundary lines of the area in which N.E. Colorado Cellular, Inc., has been designated an ETC/EP, in CenturyTel of Eagle, Inc.'s service area as soon as is practicable.

4. The 20-day period provided for in § 40-6-114, C.R.S., within which to file applications for rehearing, reargument, or reconsideration begins on the first day following the Mailed Date of this Decision.

5. This Order is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
July 16, 2003.**

(S E A L)



ATTEST: A TRUE COPY

**Bruce N. Smith
Director**

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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Commissioners