

Decision No. R04-1446

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 04A-018T

IN THE MATTER OF THE APPLICATION OF WWC HOLDING CO., INC. FOR
DESIGNATION AS AN ELIGIBLE TELECOMMUNICATIONS CARRIER AND
REDEFINITION OF RURAL TELEPHONE COMPANY SERVICE AREA REQUIREMENT.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
DALE E. ISLEY
CONDITIONALLY GRANTING APPLICATION**

Mailed Date: December 8, 2004

TABLE OF CONTENTS

I. <u>STATEMENT</u>	2
II. <u>FINDINGS OF FACT</u>	4
III. <u>SUMMARY OF APPLICABLE LAW</u>	9
IV. <u>SUMMARY OF PARTY POSITIONS</u>	14
V. <u>DISCUSSION</u>	19
VI. <u>CONCLUSIONS OF LAW</u>	22
VII. <u>ORDER</u>	23
A. The Commission Orders That:	23

Appearances:

Philip R. Schenkenberg, Esq., Briggs and Morgan, P.A., Saint
Paul, Minnesota, and Andrew R. Newell, Esq., Gorsuch Kirgis,
LLP, Denver, Colorado, for Applicant, WWC Holding Co., Inc.;

Barry L. Hjort, Esq., Glendale, Colorado, for Intervenor, Colorado
Telecommunications Association, Inc.;

Simon L. Lipstein, Esq., Assistant Attorney General, for
Intervenor, Colorado Office of Consumer Counsel; and

Michael J. Santisi, Esq., Assistant Attorney General, for Intervenor
Staff of the Colorado Public Utilities Commission.

I. STATEMENT

1. The captioned proceeding was initiated on January 8, 2004, when WWC Holding Co., Inc., doing business as Cellular One (Western Wireless), filed a Verified Application for Designation as an Eligible Telecommunications Provider Pursuant to 4 *Code of Colorado Regulations* (CCR) 723-42-7, for Redefinition of Rural Telephone Company Service Area Requirement, and Request for Waiver of Requirements in 4 CCR 723-42-7.2.2 with the Colorado Public Utilities Commission (Commission).

2. The Commission gave public notice of this application on January 12, 2004, when it issued its Notice of Application Filed.

3. By this application, Western Wireless seeks designation as an eligible telecommunications carrier (ETC) within certain Colorado rural telephone company study areas and/or wire centers for the purpose of obtaining support from federal universal service funds (USFs). It also seeks redefinition of the service area requirement for one of the involved rural telephone companies as a separate service area pursuant to 47 *Code of Federal Regulations* (CFR) § 54.207. Western Wireless does not request in its application that it be designated an eligible provider under 4 CCR 723-41-8 for the purpose of receiving support from the Colorado High Cost Fund.

4. Timely interventions were submitted in this matter by the Colorado Office of Consumer Counsel (OCC) and the Staff of the Commission (Staff). A Late Filed Entry of

Appearance and Motion to Intervene submitted by the Colorado Telecommunications Association, Inc. (CTA), was granted on March 11, 2004. *See*, Decision No. R04-0256-I.

5. A pre-hearing conference was held on March 10, 2004. *See*, Decision No. R04-0210-I. All parties appeared through their respective legal counsel. The Motion for Admission *Pro Hac Vice* requesting that Philip R. Schenkenberg, Esq. be permitted to represent Western Wireless in this proceeding was granted. Procedures and a procedural schedule agreed to by the parties were discussed and approved and the matter was scheduled for hearing on May 18 and 19, 2004. *See*, Decision No. R04-0256-I.

6. Western Wireless submitted its direct testimony and exhibits on March 15, 2004. Answer testimony and exhibits were submitted by the OCC, Staff, and CTA on April 15, 2004. On April 29, 2004, Western Wireless filed its rebuttal testimony and exhibits and the Staff and CTA filed their cross-answer testimony and exhibits.

7. The undersigned administrative law judge (ALJ) called the matter for hearing at the assigned time and place. All parties appeared through their respective legal counsel. During the course of the hearing testimony was received from five witnesses: Mr. James H. Blundell, Executive Director of External Affairs for Western Wireless on behalf of that entity; Mr. Kevin J. Kelly, Managing Regulatory Consultant for TCA, Inc., on behalf of CTA; Mr. Douglas Duncan Meredith, Director of Economics and Policy for John Staurulakis, Inc., on behalf of CTA and one of its members, The Rye Telephone Company Ms. Patricia A. Parker, a Rate and Financial Analyst on behalf of the OCC; and Ms. Pamela M. Fischhaber, a Professional Engineer on behalf of the Staff. Exhibit Nos. 1 through 3, 5, and 7 through 12 were marked, offered, and admitted

into evidence.¹ Administrative Notice was taken of Exhibit No. 4. Exhibit No. 6 was marked but then withdrawn. At the conclusion of the hearing, the evidentiary record was closed and the ALJ took the matter under advisement.

8. On June 3, 2004, the unopposed request of Western Wireless to extend the deadline for filing post-hearing statements of position in this matter from June 4 to 11, 2004 was granted. *See*, Decision No. R04-0593-I. All parties filed statements of position on that date.

9. In accordance with § 40-6-109, C.R.S., the undersigned ALJ now transmits to the Commission the record in this proceeding along with a written recommended decision.

II. FINDINGS OF FACT

10. Western Wireless is licensed by the Federal Communications Commission (FCC) to provide commercial mobile radio services (CMRS) in the Western United States. It currently provides CMRS within the rural areas encompassed by this application as described below (Designated Area).

11. CTA is an association, the membership of which consists primarily of rural Incumbent Local Exchange Carriers (ILECs) in Colorado. Each of CTA's members is a rural telephone company, as defined in 47 U.S.C. § 153(37), and a rural ILEC, as defined in 47 CFR § 54.5. Each of CTA's members are also rural telecommunications providers under Rule 4 CCR 723-42-2.6, have been designated providers of last resort in Colorado, and have been designated as ETCs.

¹ Most of the exhibits containing the pre-filed testimony of the hearing witnesses also contain attachments. The attachments are identified by the witnesses' initials and are numbered consecutively. For example, Mr. Blundell's direct testimony, Exhibit No. 2, contains two attachments, JHB-1 and JHB-2.

12. Columbine Acquisition Corp., doing business as Columbine Teleco (Columbine), and Rye Telephone Company, Inc. (Rye) are rural ILECs and their study areas are included in the Designated Area. Both are members of, and their interests are represented by, CTA.

13. Plains Cooperative Telephone Association (Plains) is a rural ILEC. A portion of its study area, the Vona-Siebert wire center, is included in the Designated Area. Plains is a member of, and its interests are represented by, CTA. Plains has elected not to disaggregate and target the universal service support it receives within its study area. As a result, its study area remains coextensive with its service area; and its per-line cost is averaged across its entire study area.

14. By this application, Western Wireless seeks ETC designation in the Columbine and Rye study areas.² It also seeks ETC designation in the Vona-Siebert wire center of the Plains study area. Because it does not serve the entire Plains study area, its request for ETC designation there is subject to redefinition of the Vona-Siebert wire center as a separate service area. *See*, Exhibit 2, JHB-1.³ The population density of the Vona-Siebert wire center is 0.7 persons per square mile. It has the lowest population density of any of the wire centers located within the Plains study area. *See*, Exhibit 2, JHB-2.

15. Western Wireless is a common carrier for purposes of obtaining ETC designation under 47 U.S.C. § 214(e)(1). *See*, 47 U.S.C. § 153(10) and 47 CFR. § 20.9(a)(7). It currently

² There is some confusion regarding the number of wire centers located within the Columbine study area. Western Wireless can locate only one such wire center, Mosca. The Staff indicates that one additional wire center, Crestone, is also located in that study area. Since Western Wireless can serve the entire Columbine study area, it seeks ETC designation in the entirety of that area regardless of whether it consists of one or two wire centers.

³ As originally filed, the application also sought ETC status in the Hugo wire center of the Eastern Slope Rural Telephone Association, Inc., study area and the Sheridan Lake wire center of Sunflower Telephone Company, Inc., study area. *See*, Exhibit 1, Attachment 1. However, Western Wireless has withdrawn its request for ETC designation in these areas.

offers and, with the exception of portions of the Kim wire center in the Rye study area, is able to provide the following services and functionalities within the Designated Area: (a) voice grade access to the public switched network; (b) local usage; (c) DTMF signaling or its functional equivalent; (d) single-party service or its functional equivalent; (e) access to emergency services; (f) access to operator services; (g) access to interexchange service; (h) access to directory assistance; and (i) toll limitation for qualifying low-income consumers. It proposes to provide these services within the Designated Area through the use of its own facilities. Such services are provided with wireless handset or fixed wireless local loop technology. Western Wireless is not proposing a single "BUS offering" that would be distinguished from other deregulated offerings. Rather, it is proposes that it be designated as an ETC authorized to provide the services described above with its CMRS offerings.

16. Voice grade access to the public switched network is provided by Western Wireless through interconnection agreements with local telephone companies. All its service offerings include local usage, and one of its service offerings will provide for unlimited local usage. Western Wireless currently uses out-of-band digital signaling and in-band multi-frequency signaling that is functionally equivalent to DTMF signaling. Single-party service is accomplished by dedicating a message path for the length of all customer calls. Western Wireless provides customers with universal access to the 911 system and with access to operator services provided either by itself or other entities (*e.g.*, local exchange carriers (LECs) or interexchange carriers). Its customers have the ability to make and receive interexchange or toll calls through direct interconnection arrangements Western Wireless has with interexchange carriers (IXCs). In addition, customers can reach their IXC of choice by dialing the appropriate access code. Access to directory service can be obtained by dialing '411' or "555-1212."

Western Wireless will offer toll-blocking to Lifeline customers, at no charge, in the Designated Area.

17. Except for the Kim exchange in the Rye study area, 85 percent of the population located within the Designated Area can currently be served by Western Wireless through its existing cellular network. Its current network covers only approximately 38 percent of the population located in the Kim wire center of the Rye study area. However, in the event this application is granted, Western Wireless has indicated that it will construct a new cell tower in that wire center. This will enable it to serve 100 percent of the Rye study area population.

18. Western Wireless has represented that it will respond to reasonable requests for service throughout the Designated Area. When a customer cannot be served by existing network facilities, it proposes to follow a five-step approach to service extension. First, it will ensure that the customer's equipment is working properly and that it is the appropriate equipment for the customer's location and usage. Second, it will seek to enhance the customer's signal at his premises by the use of high-powered antenna or the reconfiguration of the customer's equipment. Third, it will explore the use of new technology to boost the customer's signal. Fourth, it will attempt to enhance the wireless network in the customer's area by adjusting power levels, signal strength and directional transmission of cell sites, and by deploying network signal boosting technology. After exploring these options and evaluating the cost, it will consider the need to expand its network by constructing cell site expanders and additional cell sites. If the customer still cannot be served after these steps are taken, Western Wireless will notify the customer and provide the Commission with an annual report of the number of service requests that could not be filled.

19. Western Wireless promises to advertise its service offerings throughout the Designated Area through newspaper, television, radio, and billboard advertising. It proposes to target such advertising to the general residential market. It has adopted the CTIA Consumer Code of Wireless Service (CTIA Code). Among other things, the CTIA Code allows customers a 15-day period to terminate service if they are not satisfied with it. If its application is granted, Western Wireless has agreed to provide the Commission with the number of consumer complaints it receives per 1,000 handsets within the Designated Area on an annual basis.

20. Western Wireless has not presented the details (rates, terms, and conditions) of its proposed service offerings within the Designated Area. However, it represents that when the entire package of services and their value are compared side-by-side, the rates will be comparable to or less than the local service rates charged by ILECs. It also represents that its service plans are offered to rural customers at the same rates offered in urban areas.

21. The Commission has previously granted Western Wireless ETC status in various rural Colorado wire centers and exchanges pursuant to a Stipulation and Settlement Agreement (WWI Stipulation) entered into in Docket No. 00K-255T. *See*, Exhibit PMF-2. The specific wire centers and exchanges for which ETC status has been granted are set forth in Attachments 1, 2, and 3 of the WWI Stipulation (WWI Service Areas). *See*, Exhibit PAP-3 (Decision Nos. R01-19 and C01-476) and Exhibit 4 (Decision No. C01-629).⁴ Western Wireless has received USF support in connection with the service it provides in these areas for the past two years.

⁴ Collectively, Decision Nos. R01-19, C01-476, and C01-629 granted Western Wireless ETC status in those areas described in Attachments 1 and 3 of the WWI Stipulation. Subsequently, Decision No. C03-0975 clarified that, as of November 27, 2002, Western Wireless also had ETC status in the wire centers listed in Attachment 2 of the WWI Stipulation.

22. Among other things, the WWI Stipulation obligates Western Wireless to provide a basic universal service (BUS) offering within these areas at the rate of \$14.99 per month and to advertise the availability of that offering using media of general circulation. *See*, Attachment 7 of the WWI Stipulation. It also obligates Western Wireless to comply with certain “consumer protection” requirements as more particularly set forth in Attachments 5 (Universal Service Offering Terms and Conditions) and 6 (Operating Procedures) of the WWI Stipulation. These requirements are patterned after Commission rules governing ILECs. *See*, 4 CCR 723-2. A comparison of these requirements with these rules is set forth in Exhibit PMF-3.

23. An investigation conducted by the OCC suggests that Western Wireless is not advertising or providing the \$14.99 BUS offering required by the WWI Stipulation. In this regard, an OCC representative reviewed Western Wireless’ service offerings listed in its Web site for the Pueblo, Colorado area (zip code 81003) and found no reference to the subject BUS offering. *See*, Exhibit PAP-7. Similarly, several telephonic inquiries by the OCC representative to Western Wireless sales associates concerning the availability and terms of such an offering were unsuccessful. Western Wireless sales associates located in Canon City, Salida, Alamosa, Westcliffe, and Monte Vista, Colorado, indicated that the least expensive available plans were \$20.00 or \$30.00 per month. Sales associates responding to calls to Western Wireless’ toll-free number stated either that the \$14.99 BUS plan was not available or that the cheapest available plan was \$30.00 per month.

III. SUMMARY OF APPLICABLE LAW

24. Section 254 of the federal Telecommunications Act of 1996 (the Act), *inter alia*, contains the prerequisites for a telecommunications provider’s receiving monies from the federal USF. To receive USF support, a provider must be designated as an ETC pursuant to § 214(e) of

the Act and the funds provided can be used only “for the provision, maintenance, and upgrading of facilities and services for which the support is intended.” *See*, § 254(e) of the Act. The Act places no limit on the number of ETCs that may be designated within the same geographic area or any limit on the number of ETCs that may receive USF support.

25. Section 245(b) sets forth the principles upon which policies for the preservation and enhancement of universal service are to be based. These include, among others, the principle that quality services should be available at “just, reasonable, and affordable rates” and that consumers in rural and high cost areas should have access to telecommunications services that are reasonably comparable to those available in urban areas and at rates reasonably comparable to those assessed in urban areas. *See*, §§ 254(b)(1), (b)(3) and (i) of the Act and § 40-15-502(3)(a), C.R.S.

26. Section 214(e)(1) of the Act requires that, to be designated an ETC, a telecommunications carrier must be a common carrier and must do the following throughout the service area for which the ETC designation is received:⁵ (a) offer all services supported by universal telephone service funds (Supported Services);⁶ (b) offer the Supported Services using either entirely its own facilities or a combination of its own facilities and resale of another

⁵ The FCC has determined that a competitive carrier need not offer ubiquitous service throughout the service area prior to designation as an ETC, only that it be willing to serve all customers at the time of designation. However, something more than vague assertions of intent are required to demonstrate a carrier’s capability and willingness to provide service upon designation. *See, in the Matter of the Federal-State Joint Board on universal Service, Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, CC Docket No. 96-45, FEE 00-248, Declaratory Ruling Paragraph 12 (July 11, 2000).

⁶ The FCC has identified the following as Supported Services: (1) voice grade access to the public switched network; (2) local usage; (3) dual tone multi-frequency signaling or its functional equivalent; (4) single-party service or its functional equivalent; (5) access to emergency services; (6) access to operator services; (7) access to interexchange services; (8) access to directory assistance; and (9) toll limitation for qualifying low-income consumers. *See*, 47 CFR § 54.101(a)(1)-(9).

carrier's services; and (c) advertise the availability of, and the charges for, the Supported Services.

27. It is the responsibility of state commissions to designate ETCs. Section 214(e)(2) of the Act identifies the following criteria to be used in making that designation: the telecommunications carrier must meet the above-described requirements of § 214(e)(1); and, if ETC designation in a rural ILEC's service area is sought by a competitive carrier, there must be a finding that the requested designation is in the public interest. The Commission has adopted these standards as those that apply to ETC designation petitions filed in Colorado. *See*, 4 CCR 723-42-7.

28. The FCC's analysis of the public interest factors surrounding ETC designation in a rural ILEC's service area generally considers whether the customers to be served are likely to benefit from increased competition, whether the designation would provide benefits not available from ILEC's, and whether customers would be harmed if the ILEC decided to relinquish its ETC designation; *i.e.*, whether the benefits of an additional ETC designation in the areas in which such designation is sought outweigh any potential harms. *See, In the Matter of the Federal State Joint Board on Universal Service, RCC Holdings, Ind. Petition for Designation as an Eligible Telecommunications Carrier Throughout its Licensed Service Area in the State of Alabama*, CC Docket 96-45, DA 02-318, Memorandum Opinion and Order (November 26, 2002). This involves a fact-specific balancing of the benefits of increased competitive choice, the unique advantages and disadvantages of the competitor's service offering, any commitments made regarding quality of telephone service, the competitive ETC's ability to satisfy its obligation to serve the designated service areas within a reasonable time frame, and voluntary commitments made by carriers seeking ETC designation regarding customer service, reporting, and extension

of facilities. *See, Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, CC Docket No. 96-45, Memorandum Opinion and Order, FCC 03-338, (rel. January 22, 2004.)

29. Notwithstanding these federal guidelines, states may fashion their own public interest standards if they are imposed on a competitively neutral basis and are consistent with § 254 of the Act. *See*, §§ 253(b) and 254(f) of the Act. In Colorado, the Commission, by a 2 to 1 majority, has determined that ETC designations in rural ILEC service areas are in the public interest only when conditioned on affordability and consumer protection standards. *See*, Decision Nos. C04-0545 and C04-0787 (WWII Decisions).⁷

30. Regarding affordability, the Commission determined in the WWII Decisions that the core public policy rationale supporting the provision of public subsidies via the USF for rural and high cost telecommunications customers is to assure those customers affordable service at rates reasonably comparable to rates charged for similar services in urban areas. Accordingly, it found that the public interest requires an ETC applicant in a rural ILEC service area to tender an affordable BUS offering as a condition to its receipt of ETC status and the attendant USF subsidy. This requires an ETC applicant to submit its pricing plans for Commission approval as a condition to its receipt of such a designation. In so holding, the Commission found that such an affordability determination does not constitute the regulation of rates of CMRS providers and, therefore, is not prohibited by § 332(c)(3)(A) of the Act.

⁷ In Decision No. C04-0545 the Commission emphasized that the holdings contained therein were to be construed as a statement of its policy concerning applications for ETC designation in rural areas and were to govern future applications of this type. *See*, paragraph 4 at page 3 (“...this docket contains a number of significant public policy issues for us to consider” and provides “...the ideal opportunity to clarify Colorado’s position in a debate over the role public subsidies will play in the growth and development of rural wireless markets.”). *See also*, paragraph 116 at page 63 (“...we believe this decision provides sufficient guidance to future ETC applicants regarding the standards we expect in return for a grant of ETC status.”).

31. The Commission also determined in the WWII Decisions that imposing the type of consumer protection provisions on rural ETC applicants that it has previously approved in connection with other ETC applications is consistent with its concept of competitive neutrality. In this regard, it held that the absence of a competitively neutral set of standards for all competitive ETC and wireline carriers might negatively impact the goal of market driven development and growth by creating a regulatory induced cost advantage for ETCs that are not required to comply with those standards. It additionally held that the failure to impose affordability and consumer protection provisions on newly designated ETCs would have a discriminatory impact upon other ETC providers. Accordingly, it found that the public interest requires that a grant of ETC status in a rural ILEC service area be conditioned on the requirement that ETC applicants adhere to Commission standards regarding affordability and consumer protection.

32. In order to receive USF support, an ETC must offer the Supported Services “throughout the service area” for which designation as an ETC is received. *See*, § 214(e)(1) of the Act. Section 214(e)(5) of the Act defines the term “service area” as a geographical area established by a state commission for the purpose of determining universal service obligations and support mechanisms. For an area served by a rural telephone company, the term “service area” means its “study area” unless and until the FCC and the states establish a different definition under applicable FCC procedures. *See*, 47 CFR § 54.207.⁸

33. By a decision issued on November 8, 1996, the Federal-State Joint Board on Universal Service (Joint Board) identified three principles for the FCC and state commissions to

⁸ Rule 4 CCR 723-42-11.1 provides that, as necessary, the Commission will file a petition with the FCC to obtain its agreement with the Commission’s redefinition of a service area.

apply when considering requests to redefine service areas (the Joint Board test). *See, In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Recommended Decision, FCC 96J-3 (rel. November 8, 1996). First, a service area designation should “minimize ‘cream skimming’ by potential competitors.” Second, a service area designation should recognize the special status of the affected ILEC as a rural telephone carrier. Third, a service area designation should take into account the administrative burden imposed when a rural telephone company must determine its embedded costs on a basis other than its entire study area.

34. The Commission has adopted the Joint Board test. *See, In the Matter of the Application of N.E. Colorado Cellular, Inc.*, Decision No. C03-1122. It has also adopted the principle that disaggregating and targeting USF support obviates “cream skimming” concerns in connection with service area redefinition proceedings. *See*, Decision No. C04-0545, paragraph 93.⁹

IV. SUMMARY OF PARTY POSITIONS

35. Western Wireless contends that it should be designated an ETC in the Designated Area since it has complied with all state and federal rules that apply to such designations under § 214(e) of the Act; *i.e.*, it is a common carrier, it provides the Supported Services, and it meets all service and advertising standards of an ETC. It contends that it has satisfied the conditions

⁹ In addition to receiving USF support on an “average” basis (*i.e.*, on the basis of a carrier’s embedded costs averaged across all lines served within its study area), the FCC has provided rural ILECs an opportunity to disaggregate and target the USF support they receive (*i.e.*, receiving more support per line served in higher cost areas and less support in lower cost areas). *See, In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, and *In the Matter of Multi-Association Group (MAG) Plan for Regulations of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket No. 00-256, Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking in CC Docket No. 96-45 and Report and Order in CC Docket No. 00-256, FCC 01-157 (rel. May 23, 2001) (Fourteenth Report and Order). The Commission’s rules incorporate the disaggregation and targeting of support concepts found in the Fourteenth Report and Order. *See*, 4 CCR 723-42-10. *See also*, Decision No. R03-0568, paragraph nos. 34 through 51, for a comprehensive review and discussion of the alternate plans available to rural ILECs for calculating USF support.

discussed in the FCC's *Virginia Cellular* decision for determining whether ETC designation in a rural area is in the public interest and it encourages the Commission to adopt those conditions in making its public interest determination. In this regard, it submits that its designation as an ETC will further the public interest and the goals of universal service by providing consumers in the Designated Area with greater mobility, a choice of providers, and the benefits of larger local calling areas. It also points to voluntary commitments it has made regarding customer service, reporting, and the extension of facilities within the Designated Area; all factors it contends the FCC has deemed controlling in making the public interest determination. These include its commitment to adopt the CTIA Consumer Code, to provide the Commission with annual reports of the number of consumer complaints it receives within its Colorado service areas, to adopt and formalize a specific procedure for responding to reasonable requests for service, and to provide the Commission with annual reports concerning the status of its facilities build-out plans in the Designated Area.

36. Western Wireless contends that the above-described standards are the only ones permitted under federal and state law for designating ETCs and that attempts by Staff and the OCC to impose additional consumer protection and affordability standards are not legally permissible and should be rejected. It contends that attempts to impose ILEC-based consumer protection measures as a condition to the receipt of ETC designation constitutes "regulation for regulation's sake" and attempts to solve problems that either do not exist or that will be resolved in a competitive market. It argues that the affordability standards advanced by Staff and the OCC constitute regulation of its wireless carrier rates, something the Commission is prohibited from doing by § 332(c)(3)(A) of the Act.

37. Staff and the OCC contend that the evidence adduced at the hearing establishes that Western Wireless is not advertising or providing the \$14.99 BUS offering within the WWI Service Area and, therefore, is not complying with the WWI Stipulation. As a result, the OCC contends that designating Western Wireless an ETC would be contrary to the public interest thereby warranting denial of this application. Staff recommends that the Commission require Western Wireless to establish that it is complying with §§ 214(e)(1)(A) and (B) of the Act and with the WWI Stipulation before designating it an ETC in this proceeding.¹⁰

38. In the event the Commission does not adopt either of these recommendations, both Staff and the OCC contend that any ETC designation be subject to the affordability and consumer protection conditions imposed upon Western Wireless by the WWI Stipulation; *i.e.*, that Western Wireless be required to offer its BUS service at a Commission approved affordable price and that it be subject to various service quality standards.¹¹ They argue that the WWII Decisions confirm that ETC designations will only be authorized if conditioned in this manner and that the Commission's failure to impose such conditions would have a discriminatory effect on Western Wireless' customers and other wireless ETCs.

39. Staff submits that Western Wireless' request for ETC designation in a portion of the Designated Area (the Mosca, Vona-Siebert, Colorado City, and Rye wire centers) is moot based on its interpretation of prior Commission decisions issued in connection with the WWI proceeding. In this regard, Staff contends that the Commission's initial denial of ETC status to

¹⁰ This constitutes a change in the positions taken by Staff and the OCC both of whom initially recommended approval of Western Wireless' request for ETC designation subject to the conditions previously imposed by the WWI Stipulation.

¹¹ Regarding affordability, OCC and Staff contend that the "rate cap" for residential basic service established by the Commission pursuant to § 40-40-15-502(3), C.R.S., for regulated LECs provides a "presumptively affordable" price for the BUS offering proposed by Western Wireless.

Western Wireless in these areas was based on its inability to serve the entirety of the applicable study areas and, as a result, the Commission effectively “deferred” granting it ETC designation until redefinition of the subject areas was completed. *See*, Decision Nos. C01-476, C01-629, and C03-0975.¹² Therefore, Staff submits that Western Wireless has already been granted ETC status in these wire centers (subject to the terms of the WWI Stipulation) conditioned only upon the completion of redefinition proceedings.¹³

40. CTA opposes granting ETC status to Western Wireless and requests denial of this application. It contends that Western Wireless has failed to sustain the burden of proof for ETC designation established by the Commission in the WWII Decisions by failing to provide the pricing and terms and conditions of its proposed BUS offerings and by refusing to agree to the consumer protections standards adopted by the Commission as pre-conditions to such a designation.

41. CTA also contends that Western Wireless has failed to establish that it will offer the Supported Services throughout the Designated Area. In this regard, it argues that Western

¹² *See also*, Decision No. C04-0545 at pages 5 and 44 wherein the Commission discusses its clarification of Western Wireless designation as an ETC in the CenturyTel of Colorado, Inc., service areas effective upon the redefinition of those wire centers on November 27, 2002. Western Wireless takes issue with Staff’s position and requests that the Commission designate it as an ETC in the entire Designated Area in this docket. It points out that its request for ETC designation in the WWI proceeding with regard to the Rye study area was limited to the Colorado City and Rye wire centers. Therefore, any “deferred” ETC designation in that proceeding would not have included the Kim wire center, an area included in this application.

¹³ Regarding redefinition, Western Wireless recognizes that the Commission has already redefined the ETC service areas in certain exchanges of the Plains and Eastern Slope study areas. *See, In the Matter of the Application of N.E. Colorado Cellular, Inc. (NECC) to Re-define the Service Area of Eastern Slope Rural Tel. Assoc., Inc., et al.*, Docket No. 02A-444T, Decision No. C03-1122. However, it requests a specific finding in this docket that the Vona-Siebert wire center of the Plains exchange be redefined since it does not believe that NECC has filed a request to have the FCC concur with the Commission’s redefinition decision and, further, it questions whether it can file an FCC petition for such a concurrence on the basis of an order issued in another proceeding. It also contends that it has met the new standard for evaluating service in redefined areas established by the FCC in the *Virginia Cellular* decision. It believes the Commission should make findings in this proceeding that are consistent with that decision so that a similar record need not be made by the FCC. CTA also takes issue with Staff’s argument, especially with regard to the Colorado City and Rye wire centers of the Rye study area. In this regard, it contends that the ordering portions of the Commission’s WWI decisions (Decision Nos. C01-476 and C01-629) clearly deny Western Wireless request for ETC status in these areas.

Wireless cannot serve throughout the Rye study area because its current facilities and FCC licensure authorize it to serve only a small area of the Kim wire center. In the event the Commission does not agree that this warrants a complete denial of the application as to Rye, CTA argues that any “conditional” grant of the application should be further conditioned on requiring Western Wireless to secure “service area definition” approval from the Commission and the FCC or, in the alternative, requiring it to construct its proposed tower in the Kim wire center.¹⁴

42. CTA next argues that approval of this application without imposition of the conditions imposed by the WWI Stipulation and/or the WWII Decisions will result in potentially discriminatory service offerings by Western Wireless among its customers depending on where they are located. Finally, CTA contends that Western Wireless has failed to establish that designating it as an ETC is in the public interest. In this regard, CTA argues strenuously that Western Wireless cannot meet the public interest test as a result of its failure to comply with the WWI Stipulation; *i.e.*, that the promises made by Western Wireless in this proceeding to advertise and offer its BUS offering in the Designated Area cannot be trusted in light of its failure to do so in the WWI Service Areas.¹⁵

¹⁴ Western Wireless takes issue with this claim. It contends that applicable law does not require it to demonstrate that it can provide ubiquitous service within the Designated Area at the time it requests ETC designation. It contends that its network will reach virtually the entire population of the Rye study area once the cell tower it plans to construct in the Kim wire center is completed.

¹⁵ CTA suggests that the Commission initiate an inquiry to determine whether its designation of Western Wireless as an ETC in the WWI proceeding should be revoked for non-compliance with the WWI Stipulation and whether restitution should be sought from Western Wireless for USF and High Cost support Mechanism Funds paid to it for universal service offerings that it alleges have not been provided. It is noted that CTA recently initiated such a formal complaint proceeding requesting such relief. *See*, Docket No. 04F-474T.

V. DISCUSSION

43. The evidence of record establishes that Western Wireless' request to be designated an ETC in the Designated Area should be granted subject to the affordability and consumer protection conditions described by the Commission in the WWII Decisions.¹⁶ The evidence also warrants a grant of Western Wireless' request to redefine the Vona-Siebert wire center as a separate service area.

44. There is no serious question that Western Wireless is a common carrier and that it will offer the Supported Services in the Designated Area using its own facilities as required by § 214(e)(1) of the Act. CTA's contention that Western Wireless' current inability to offer service to every location in the Kim wire center of the Rye study area does not support a finding that it will not offer service "throughout" the Designated Area. First, with the exception of the Kim wire center, Western Wireless currently provides the Supported Services within the Designated Area. Also, as indicated above, a carrier's inability to demonstrate that it can provide ubiquitous service at the time it requests designation as an ETC does not preclude it from being so designated. Rather, it is sufficient that an ETC applicant demonstrate its capability and commitment to do so. *See, Virginia Cellular, supra*, at paragraph 17. Western Wireless has made such a showing by, among other things, agreeing to respond to reasonable requests for service and by adopting a comprehensive plan for doing so, committing to the construction of an

¹⁶ The ALJ rejects Staff's argument that Western Wireless' request for ETC designation in portions of the Designated Area is moot as a result of prior Commission decisions entered in connection with the WWI proceeding. Decision Nos. C01-476 and C01-629 clearly denied Western Wireless' request for ETC status in the exchanges listed in Attachment 4 of the WWI Stipulation. Attachment 4 includes four of the five wire centers contained within the Designated Area. That portion of Decision No. C03-0975 which suggests that ETC designation has been granted but was delayed pending redefinition decisions appears to refer only to those areas contained in Attachment 2 of the WWI Stipulation.

additional cell tower in the Kim wire center upon its designation as an ETC, and agreeing to provide the Commission with annual reports of the number of service requests it is unable to fill.

45. Notwithstanding evidence suggesting that Western Wireless may not be satisfactorily complying with the advertising requirements imposed by the WWI Stipulation, the ALJ concludes that its certification that it will advertise the availability of the Supported Services within the Designated Area is sufficient to comply with § 214(e)(1)(B) of the Act. In this regard, Western Wireless states affirmatively that it will specifically target the general residential market through newspaper, television, radio, and billboard advertising.

46. The ALJ is also satisfied that granting Western Wireless designation as an ETC in the Designated Area will further a number of public interest factors including increased competitive choice to consumers of telecommunications services and the provision of benefits to such consumers not otherwise available from the ILECs currently serving the Designated Area. These benefits include expanded local calling areas, mobility, and increased choice in telecommunications services and service providers. As indicated previously, Western Wireless has demonstrated its capability and commitment to provide service throughout the Designated Area. In sum, the benefits to be gained by granting Western Wireless designation as an ETC in the Designated Area will outweigh any potential harm that may result from such a designation.

47. Notwithstanding these benefits, and consistent with the policy of the Commission as described in the WWII Decisions, designating Western Wireless as an ETC is in the public interest only when conditioned on its compliance with certain affordability and consumer

protection standards.¹⁷ Accordingly, as a condition to obtaining ETC status in the Designated Area, Western Wireless will be required to offer an affordable BUS plan. In this regard, Western Wireless will be required to submit the pricing plans it intends to offer in the Designated Area to the Commission for a prior determination of affordability. Therefore, a grant of ETC status to Western Wireless will be subject to the terms and conditions of Attachments 5 and 6 (consumer protection provisions) and Attachment 7 (affordability provisions) of the WWI Stipulation.

48. Application of the Joint Board test discussed above warrants granting Western Wireless' request to redefine the Vona-Siebert wire center as a separate service area. As indicated above, the Commission has adopted the principle that disaggregating and targeting USF support obviates "cream skimming" concerns. Plains has elected not to disaggregate and target the USF support it receives within its study area. Based on that election, it has effectively determined that it would not be disadvantaged by continuing to base its USF support on its average embedded costs calculated across its entire study area should a competitive ETC such as Western Wireless serve in its territory. Stated another way, the election made by Plains indicates that it is satisfied that its USF support is already targeted in a manner designed to minimize "cream-skimming." Plains did not present persuasive evidence rebutting this conclusion. Accordingly, redefinition of the Vona-Siebert wire center as a separate service area will not increase the opportunity for "cream-skimming."

¹⁷ The ALJ rejects the argument advanced by Staff and the OCC that Western Wireless' alleged failure to comply with the WWI Stipulation would be contrary to the public interest thereby warranting denial of its application. The ALJ is unaware of the Commission ever having considered a carrier's failure to comply with a stipulation entered in another proceeding as constituting part of the public interest test in an ETC designation application. Such alleged non-compliance may be addressed through a show cause, complaint, or similar proceeding.

49. No credible evidence was presented to establish that redefining the Vona-Siebert wire center as a separate service area would change or impair Plains' special status as a rural telephone carrier. Similarly, no credible evidence was presented on the issue of the administrative burdens that might be imposed on Plains by redefining the subject service area or to support the proposition that redefining the service area would change the method used to determine its embedded costs. Therefore, the second and third components of the Joint Board test have been met.

50. Redefining the Vona-Siebert wire center as a separate service area will advance the goals of universal service, will promote competition, and will implement the principle of competitive neutrality, including technology neutrality. Competitive entry, or the possibility of competitive entry, will bring benefits to consumers such as lower costs, additional services, innovative service offerings and packages, and advanced services. As a result, Plains will be more likely to make investments in infrastructure and to deploy new technologies and, in general, to improve its existing networks. This, in turn, will improve service to consumers. The proposed redefinition will also provide the opportunity for entry by facilities-based competitors. In sum, redefining the Vona-Siebert wire center as a separate service area will create incentives for competitive entry and, thus, will help to ensure that quality telecommunications services will be available to consumers within that wire center at reasonable, affordable, and just rates.

VI. CONCLUSIONS OF LAW

51. Subject to the affordability and consumer protection conditions discussed above, Western Wireless has sustained its burden of establishing its entitlement to designation as an ETC in the Columbine and Rye study areas and the Vona-Siebert wire center of the Plains study area.

52. Western Wireless' redefinition request meets the Joint Board test and, as a result, the Vona-Siebert wire center of the Plains study area should be redefined as a separate service area. Pursuant to 47 CFR § 54.207, the Commission should file, as necessary, a petition with the FCC to obtain its agreement with such redefinition.

VII. ORDER

A. The Commission Orders That:

1. The Verified Application for Designation as an Eligible Telecommunications Provider Pursuant to 4 *Code of Colorado Regulations* (CCR) 723-42-7 filed by WWC Holding Co., Inc., doing business as Cellular One, is granted, subject to the affordability and consumer protection conditions discussed above.

2. The Verified Application for Redefinition of Rural Telephone Company Service Area Requirement, and Request for Waiver of Requirements in 4 CCR 723-42-7.2.2 filed by WWC Holding Co., Inc., doing business as Cellular One, is granted

3. The portion of the service area of the Plains Cooperative Telephone Association served by the Vona-Siebert wire center located within the State of Colorado is defined as a separate service area.

4. Pursuant to 47 *Code of Federal Regulations* § 54.207, the Commission will file, as necessary, a petition with the Federal Communications Commission to obtain its agreement with the above-ordered redefinition. Such petition shall be filed as soon as practicable after a final Commission decision is entered in this docket.

5. 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.

6. As provided by § 40-6-106, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

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

b) If a party seeks to amend, modify, annul, or reverse a basic finding 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.

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

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Administrative Law Judge