

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO**

DOCKET NO. 12A-954T

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IN THE MATTER OF THE APPLICATION OF BOOMERANG WIRELESS, LLC, FOR DESIGNATION AS AN ELIGIBLE TELECOMMUNICATIONS CARRIER IN THE STATE OF COLORADO FOR THE LIMITED PURPOSE OF OFFERING WIRELESS LIFELINE SERVICE TO QUALIFIED HOUSEHOLDS (LOW INCOME ONLY) AND FOR WAIVER OF CERTAIN COMMISSION RULES.

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**RECOMMENDED DECISION OF  
ADMINISTRATIVE LAW JUDGE  
MANA L. JENNINGS-FADER  
APPROVING STIPULATION AND SETTLEMENT  
AGREEMENT, UNDER MODIFIED PROCEDURES  
AND SUBJECT TO CONDITIONS; DESIGNATING  
APPLICANT AS AN ELIGIBLE TELECOMMUNICATIONS  
CARRIER FOR THE LIMITED PURPOSE OF  
OFFERING WIRELESS LIFELINE SERVICE,  
SUBJECT TO CONDITIONS; GRANTING WAIVERS  
AND VARIANCE; AND VACATING HEARING  
AND PROCEDURAL SCHEDULE**

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Mailed Date: April 17, 2013

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**I. STATEMENT**

1. On August 29, 2012, Boomerang Wireless, LLC (Boomerang or Applicant), filed a verified Application for Designation as an Eligible Telecommunications Carrier in the State of Colorado for the Limited Purpose of Offering Wireless Lifeline Service to Qualified Households (Low Income Only) and for Waiver of Certain Commission Rules. That filing commenced this docket.

2. On August 30, 2012, the Commission issued its Notice of Application Filed in this proceeding.

3. On September 6, 2012, the Colorado Office of Consumer Counsel (OCC) timely intervened by right and is a party in this proceeding.

4. On September 12, 2012, the Trial Staff of the Commission (Staff) timely intervened by right and is a party in this proceeding.

5. OCC and Staff, collectively, are the Intervenors. Applicant and Intervenors, collectively, are the Parties.

6. On October 3, 2012, by Minute Order, the Commission deemed the August 29, 2012 filing to be complete within the meaning of § 40-6-109.5, C.R.S.

7. On October 3, 2012, by Minute Order, the Commission referred this matter to an Administrative Law Judge (ALJ).<sup>1</sup>

8. On October 29, 2012, ALJ Kirchubel issued Decision No. R12-1242-I. In that Order, as pertinent here, he scheduled the evidentiary hearing in this matter for January 15, 2013 and established the procedural schedule for this case.

9. On November 7, 2012, by Decision No. R12-1286-I, the ALJ scheduled a final prehearing conference in this matter for January 9, 2013.

10. On November 16, 2012, pursuant to the procedural schedule and in support of the August 29, 2012 filing, Applicant filed the Direct Testimony and Exhibits of James T. Balvanz.<sup>2</sup>

11. On December 4, 2012, Boomerang filed a verified Amended Application for Designation as an Eligible Telecommunications Carrier in the State of Colorado for the Limited Purpose of Offering Wireless Lifeline Service to Qualified Households (Low Income Only) and for Waiver of Certain Commission Rules (Application).<sup>3</sup> That filing supersedes the August 29, 2012 filing and, generally: (a) modifies the Lifeline Service plans that Applicant proposes to offer in Colorado; (b) requests additional permanent waivers of subsections of Rule 4 *Code of Colorado Regulations* (CCR) 723-2-2187;<sup>4</sup> and (c) clarifies Applicant's position with respect to

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<sup>1</sup> Originally, this docket was assigned to ALJ Keith Kirchubel. On November 2, 2012, this docket was transferred to the undersigned ALJ.

<sup>2</sup> Appended to that testimony are seven exhibits, one of which (Confidential Exhibit JBT-3) was filed with the Commission under seal as that exhibit contains information that the Applicant claims is confidential.

<sup>3</sup> Appended to the Application are nine exhibits, one of which (Confidential Exhibit 5) was filed with the Commission under seal as that exhibit contains information that the Applicant claims is confidential.

<sup>4</sup> This Rule is found in the Rules Regulating Telecommunications Providers, Services, and Products, Part 2 of 4 *Code of Colorado Regulations* 723.

its being a Provider of Last Resort in Colorado. The Direct Testimony and Exhibits of James T. Balvanz support the Application.

12. On December 14, 2012, by Decision No. R12-1438-I, the ALJ ordered a re-notice of the Application. In that Order, the ALJ also deemed the Application to be complete as of December 14, 2012. Pursuant to § 40-6-109.5, C.R.S., the Commission should issue its decision in this matter no later than July 12, 2013.

13. In that Order, the ALJ scheduled the evidentiary hearing in this matter for February 27, 2013 and established the procedural schedule for this docket. On motions of the Parties, the ALJ modified and then suspended the procedural schedule.

14. On December 14, 2012, the Commission issued its Re-Notice of Application Filed in this proceeding. That re-notice established an intervention period. No one intervened by right, and no one sought leave to intervene, as a result of the re-notice.

15. On January 28, 2013, the Parties filed a Stipulation and Settlement Agreement (Stipulation).<sup>5</sup> Appended to that filing are four attachments.

16. On February 4, 2013, by Decision No. R13-0163-I, the ALJ posed questions concerning the Stipulation and directed the Parties to respond to those questions.

17. On February 20, 2013, the Parties filed their Joint Responses to Administrative Law Judge's Questions in Decision No. R13-0163-I (Joint Responses).<sup>6</sup>

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<sup>5</sup> The Stipulation is attached to this Decision as Appendix A.

<sup>6</sup> The Joint Responses are attached to this Decision as Appendix B.

18. The ALJ has reviewed the Joint Responses and finds them satisfactory. As a result, the ALJ can address the Stipulation and the Application without an evidentiary hearing. By this Decision, the ALJ will vacate the evidentiary hearing and the procedural schedule.<sup>7</sup>

19. As a result of the Stipulation, the Application is neither contested nor opposed.

20. Pursuant to § 40-6-109(5), C.R.S., and Rule 4 CCR 723-1-1403,<sup>8</sup> the uncontested and unopposed Application may be considered under the Commission's modified procedure and without a formal hearing. The ALJ finds that the uncontested and unopposed verified Application can be, and should be, considered under the Commission's modified procedure and without a formal hearing.

21. In accordance with § 40-6-109, C.R.S., the ALJ now transmits to the Commission the record of the proceeding together with a written recommended decision.

## **II. FINDINGS OF FACT AND DISCUSSION**

22. Boomerang requests that the Commission designate it an Eligible Telecommunications Carrier (ETC), pursuant to § 214(e) of the Federal Telecommunications Act of 1996<sup>9</sup> (the Act) and as defined in 47 *Code of Federal Regulations* (CFR) § 54.5 and in Rule 4 CCR 723-2-2001(hh), for the limited purpose of providing wireless Lifeline service to eligible low-income individuals.

23. Boomerang also requests that, for purposes of this docket and the authority granted in this proceeding, the Commission grant it: (a) a full variance from Rule 4 CCR

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<sup>7</sup> By electronic mail sent February 21, 2013, the ALJ notified the Parties that the evidentiary hearing was vacated.

<sup>8</sup> This Rule is found in the Rules of Practice and Procedure, Part 1 of 4 *Code of Colorado Regulations* 723.

<sup>9</sup> The Act is codified in numerous sections of title 47 of the United States Code (U.S.C.). Of particular relevance in this proceeding are 47 U.S.C. §§ 214(e), 253, and 254.

723-2-2187(d)(III); (b) a partial but permanent waiver of Rule 4 CCR 723-2-2187(d)(VII); (c) a full waiver of Rule 4 CCR 723-2-2187(d)(XIII); (d) a full waiver Rules 4 CCR 723-2-2187(f)(II)(H), (K), (L), and (M) to expire when the first of three specified events occurs; and (e) a full and permanent waiver of Rule 4 CCR 723-2-2187(f)(II)(N).

24. The Joint Responses address the questions posed by the ALJ in Decision No. R13-0163-I. The ALJ finds that the record (including the Joint Responses, the testimony, and the Stipulation) contains the information necessary for the ALJ to rule on the Stipulation and on the Application.

25. The Stipulation (including attachments) is incorporated by reference. The Joint Responses provide additional information about, and are a gloss on, the Stipulation. The Joint Responses are incorporated by reference.

26. The facts are not disputed. Additional facts are found throughout this Decision.

27. The record establishes, and the ALJ finds, that the Commission has subject matter jurisdiction in this proceeding.

28. The record establishes, and the ALJ finds, that the Commission has personal jurisdiction over the Applicant and the Intervenors in this proceeding.

**A. Parties.**

29. Applicant is an Iowa limited liability company and is one of three wholly-owned subsidiaries of HH Ventures LLC, an Iowa company. Its corporate headquarters are located in Hiawatha, Iowa. Applicant has registered with the Colorado Secretary of State as a foreign limited liability company and is in good standing in Colorado. If the Application is granted, Applicant will provide Lifeline service in Colorado as “enTouch Wireless powered by Boomerang Wireless.”

30. Applicant is a reseller of commercial mobile radio service (CMRS) and is a common carrier as defined in § 153(10) of the Act and 47 CFR § 20.9(a)(7). Boomerang resells the services that Boomerang obtains from underlying wireless providers in Colorado. Boomerang certifies that, by using this approach, Boomerang will provide ubiquitous service throughout the service territory identified in Attachment 1 to the Stipulation.

31. Intervenor OCC is a Colorado state agency established pursuant to § 40-6.5-102, C.R.S. Its charge is set out in § 40-6.5-104, C.R.S.

32. Intervenor Staff is Litigation Staff of the Commission as identified in the Rule 4 CCR 723-1-1007(a) notice filed in this docket.

**B. Relevant Federal Law.**

33. Federal law governs designation as an ETC. The Commission is the state regulatory agency that designates ETCs in Colorado.

**1. General Background.**

34. Section 214(e) of the Act contains the criteria for designation as an ETC. As pertinent here, § 214(e)(1) of the Act provides that, throughout its service territory, an ETC shall

(A) offer the services that are supported by Federal universal service support mechanisms under [§ 254(c) of the Act], either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and

(B) advertise the availability of such services and the charges [for those services] using media of general distribution.

*See also* 47 CFR § 54.201(d) (same).<sup>10</sup>

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<sup>10</sup> Rule 4 CCR 723-2-2187(a) incorporates these criteria.

35. The Federal Communications Commission (FCC) has interpreted § 214(e)(1) of the Act to require an applicant for ETC designation to demonstrate: (a) an intent and ability to provide the supported services listed in 47 CFR § 54.101(a) throughout its designated service areas; and (b) an intent and ability to advertise its universal service offerings and the charges for those service offerings using media of general distribution. *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, FCC 97-157, 12 FCC Rcd. 8776 (1997) (*Universal Service Order*),<sup>11</sup> subsequent history omitted.

36. In addition, § 214(e)(1) of the Act requires an ETC to offer the supported services (*i.e.*, services supported by federal universal service mechanisms) “either using its own facilities or a combination of its own facilities and resale of another carrier’s services.” The FCC interpreted this language to mean that a carrier “must use its own facilities to provide at least one of the supported services” (*Universal Service Order*, FCC 97-157, at ¶ 169), but the FCC did not define or specify the amount of its own facilities that a carrier must use. The FCC also determined that “a carrier that serves customers by reselling wholesale service [of another carrier] may not receive universal service support for those customers that it serves through resale alone.” *Id.*, FCC 97-157, at ¶ 174. In 47 CFR § 54.201(e), the FCC interpreted the term “facilities” to mean “any physical component of the telecommunications network ... used in the transmission or routing of the [supported] services[.]” As the FCC interpreted the statute in the *Universal Service Order*, a carrier’s facilities do not qualify as “facilities” to meet the ETC requirements in § 214(e)(1)(A) of the Act unless the facilities are used to route or to transmit supported services.

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<sup>11</sup> Citations in this Decision to the *Universal Service Order* are to FCC 97-157 (rel. May 8, 1997). There are no parallel citations to 12 FCC Rcd. 8776 (1997).



37. In 2005, the FCC provided guidance to state commissions to assist them in making their ETC designation decisions. *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, FCC 05-46, 20 FCC Rcd. 6371 (2005) (*ETC Designation Framework Order*).<sup>12</sup> In that Order, the FCC “encourage[d] state commissions to require all ETC applicants over which they have jurisdiction to meet the same conditions and [encouraged state commissions] to conduct the same public interest analysis outlined in” the *ETC Designation Framework Order*. *ETC Designation Framework Order*, FCC 05-46, at ¶ 58. The FCC also encouraged “states ... [to] apply these requirements in a manner that will best promote the universal service goals found in section 254(b) [of the Act].” *Id.*, FCC 05-46, at ¶ 60. It found that “these guidelines are designed to ensure designation of [ETCs] that are financially viable, [are] likely to remain in the market, [are] willing and able to provide the supported services throughout the designated service area, and [are] able to provide consumers an evolving level of universal service.” *Id.*

## 2. Lifeline Service.

38. In 2011, the FCC began reforming and modernizing Lifeline service and Link Up service. *In the Matter of Lifeline and Link Up Reform and Modernization, Federal-State Joint Board on Universal Service, Lifeline and Link Up*, WC Docket No. 11-42, CC Docket No. 96-45, WC Docket No. 03-109, Report and Order, FCC 11-97, 26 FCC Rcd. 9022 (2011) (*Duplicative Program Payments Order*).<sup>13</sup> In that Order, the FCC: (a) amended its rules “to codify the limitation that an eligible consumer may receive only one Lifeline-supported service” (*id.*,

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<sup>12</sup> Citations in this Decision to the *ETC Designation Framework Order* are to FCC 05-46 (rel. March 17, 2005). There are no parallel citations to 20 FCC Rcd. 6371 (2005).

<sup>13</sup> Citations in this Decision to the *Duplicative Program Payments Order* are to FCC 11-97 (rel. June 21, 2011). There are no parallel citations to 26 FCC Rcd. 9022 (2011).

FCC 11-97, at ¶ 8 (footnote omitted)); (b) amended its rules “to require ETCs to offer Lifeline service only to those qualifying low-income consumers who are not currently receiving another Lifeline service from that ETC or another ETC” (*id.*); (c) directed the FCC staff “to work with the [Universal Service Administrative Company (USAC)] to implement a process to resolve duplicative claims that is consistent with the ETCs’ Industry Duplicate Resolution Process and also includes outreach to the subscribers identified by USAC as receiving duplicative support” (*id.*, FCC 11-97, at ¶ 13 (footnote omitted)); and (d) amended its rules to establish procedures to detect and to de-enroll subscribers with duplicate Lifeline-supported services (*id.*, FCC 11-97, at ¶¶ 15-16). These reforms became effective in 2011.

39. On November 18, 2011, as pertinent here, the FCC transformed the Universal Service Fund and promulgated ETC-related rules that affect Lifeline service. *Connect America Fund, A National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers, High-Cost Universal Services Support, Developing an Unified Intercarrier Compensation Regime, Federal-State Joint Board on Universal Service, Lifeline and Link Up, Universal Service Reform - Mobility Fund*, WC Docket No. 10-90, GN Docket No. 09-51, WC Docket No. 07-135, WC Docket No. 05-337, CC Docket No. 01-92, CC Docket No. 96-45, WC Docket No. 03-109, WT Docket No. 10-208, Report and Order and Further Order of Proposed Rulemaking, FCC 11-161, 26 FCC Rcd. 17663 (2011) (*USF/ICC Transformation Order*),<sup>14</sup> petitions for review pending sub nom. *In re: FCC*, No. 11-9581 and No. 11-9900 (10th Cir. filed Dec. 8, 2011). By subsequent Orders, the FCC clarified the *USF-ICC Transformation Order*.

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<sup>14</sup> Citations in this Decision to the *USF/ICC Transformation Order* are to FCC 11-161 (rel. Nov. 18, 2011). There are no parallel citations to 26 FCC Rcd. 17663 (2011).

40. In the *USF/ICC Transformation Order*, the FCC eliminated the list of nine supported services and amended 47 CFR § 54.101 to specify that voice telephony service is supported by federal universal service support mechanisms. Section 54.101(a) of 47 CFR requires an ETC to offer voice telephone services that must provide “voice grade access to the public switched network or its functional equivalent; minutes of use for local service provided at no additional charge to end users; access to the emergency services provided by local government or other public safety organizations, such as 911 or enhanced 911, to the extent the local government in an [ETC’s] service area has implemented 911 or enhanced 911 systems; and toll limitation service to qualifying low-income consumers as provided in subpart E of” 47 CFR Part 54.

41. The *USF/ICC Transformation Order* also changed the annual reporting requirements for all ETCs that receive high-cost support (including Connect America Fund monies), moved the reporting requirements to 47 CFR § 54.313, and stated that those ETCs would no longer report pursuant to 47 CFR § 54.209.<sup>15</sup> *Id.*, FCC 11-161, at ¶ 580. Lifeline-only ETCs remained subject to 47 CFR § 54.209. *Id.*, FCC 11-161, at ¶ 580 & n.955.

42. In 2012, the FCC continued the process of reforming Lifeline service and Link Up service and significantly changed the regulatory landscape for the ETCs that provide those services. *In the Matter of Lifeline and Link Up Reform and Modernization, Lifeline and Link Up, Federal-State Joint Board on Universal Service, Advancing Broadband Availability Through Digital Literacy Training*, WC Docket No. 11-42, WC Docket No. 03-109, CC Docket

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<sup>15</sup> That section contained reporting and certification requirements for entities designated as ETCs by the FCC.

No. 96-45, WC Docket No. 12-23, Report and Order and Further Notice of Proposed Rulemaking, FCC 12-11, 27 FCC Rcd. 6656 (2012) (*Lifeline Reform Order*).<sup>16</sup>

43. The FCC summarized the principal reforms, and its rationale for those reforms, as follows:

To make the program more accountable, the Order establishes clear goals and measures and establishes national eligibility criteria to allow low-income consumers to qualify for Lifeline based on either income or participation in certain government benefit programs. The Order adopts rules for Lifeline enrollment, including enhanced initial and annual certification requirements, and confirms the program's one-per-household requirement. The Order simplifies Lifeline reimbursement and makes it more transparent. [By this Order, the FCC] adopts a number of reforms to eliminate waste, fraud and abuse in the program, including creating a National Lifeline Accountability Database to prevent multiple carriers from receiving support for the same subscribers; phasing out toll limitation service ... support; eliminating Link Up support except for recipients on Tribal lands that are served by [ETCs] that participate in both Lifeline and the high-cost program; reducing the number of ineligible subscribers in the program; and imposing independent audit requirements on carriers receiving more than \$5 million in annual support. These reforms are estimated to save the [Universal Service] Fund up to \$2 billion over the next three years. As part of these reforms[,] we establish a savings target of \$200 million in 2012 versus the program's status quo path in the absence of reform, create a mechanism for ensuring that target is met, and put the [FCC] in a position to determine the appropriate budget for Lifeline in early 2013 after monitoring the impact of today's fundamental overhaul of the program and addressing key issues in the Further Notice of Proposed Rulemaking ..., including the appropriate monthly support amount for the program. Using savings from the reforms, [by the Order, the FCC] establishes a Broadband Adoption Pilot Program to test and [to] determine how Lifeline can best be used to increase broadband adoption among Lifeline-eligible consumers. We also establish an interim base of uniform support amount of \$9.25 per month for non-Tribal subscribers to simplify program administration.

*Lifeline Reform Order*, FCC 12-11, at ¶ 4 (footnote omitted). To implement the changes, the FCC amended its rules and provided guidance.

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<sup>16</sup> Citations in this Decision to the *Lifeline Reform Order* are to FCC 12-11 (rel. Feb. 6, 2012). There are no parallel citations to 27 FCC Rcd. 6656 (2012).

44. Of particular relevance to this proceeding, the FCC did the following:

amend[ed 47 CFR §] 54.202 to clarify that a common carrier seeking designation as a Lifeline-only ETC is not required to submit a five-year network improvement plan as part of its application for designation as an ETC. In the [*USF/ICC Transformation Order*], the [FCC] included a new requirement in [47 CFR §] 54.202, requiring a common carrier seeking to be designated as an eligible telecommunications carrier by the [FCC] to submit a five-year plan describing proposed network improvements and upgrades. Given that Lifeline-only ETCs are not receiving funds to improve or extend their networks, [the FCC saw] little purpose in requiring such plans as part of the ETC designation process.

amend[ed 47 CFR §§] 54.201 and 54.202 ..., which govern ETC designations by states and [the FCC], respectively, to require a carrier seeking designation as a Lifeline-only ETC to demonstrate that it is financially and technically capable of providing the supported Lifeline service in compliance with all of the low-income program rules.

conclude[d] that it is appropriate to update [its] rules for federally-designated ETCs and [to] extend the requirement to all ETCs to ensure that Lifeline-only ETCs have the financial and technical ability to offer Lifeline-supported services. Therefore, in order to ensure Lifeline-only ETCs, whether designated by the [FCC] or the states, are financially and technically capable of providing Lifeline services, [the FCC included] an explicit requirement in both [47 CFR §§] 54.202 and 54.203 that a common carrier seeking to be designated as a Lifeline-only ETC demonstrate its technical and financial capacity to provide the supported service. Among the relevant considerations for such a showing would be whether the applicant previously offered services to non-Lifeline consumers, how long it has been in business, whether the applicant intends to rely exclusively on USF disbursements to operate, whether the applicant receives or will receive revenue from other sources, and whether it has been subject to enforcement action or ETC revocation proceedings in any state.

delete[d 47 CFR §] 54.209 ... [and moved] those reporting requirements relevant to [federally-designated] ETCs providing Lifeline services to subpart E [of 47 CFR], which governs universal service support provided to low-income consumers. ... [The FCC moved] the relevant portions of [47 CFR §] 54.209, as they related to [federally-designated] ETCs offering Lifeline services, to new [47 CFR § 54.422(b)]. In particular, in order to receive support under subpart E [of 47 CFR], [a federally-designated] ETC must provide the following information ...: information regarding service outages, the number of complaints received per 1,000 connections, certification of compliance with applicable service quality standards and consumer protection rules, and certification that the carrier is able to function in emergency situations. In doing so, [the FCC] streamline[d] annual reporting by eliminating reporting requirements that no

longer make sense in today's marketplace for federally-designated Lifeline providers.

[established] targeted reporting requirements in [new 47 CFR § 54.422(a)] that ... apply to all ETCs receiving Lifeline. First, ... an ETC receiving low-income support must annually report the names and identifiers used by the ETC, its holding company, operating companies and affiliates, which will assist ... in the Lifeline audit program. Second, ... every ETC receiving low-income support [must] provide to the [FCC] and USAC general information regarding the terms and conditions of the Lifeline plans for voice telephony service offered specifically for low income consumers through the program [the ETC] offered during the previous year, including the number of minutes provided, and whether there are additional charges to the consumer for service, including minutes of use and/or toll calls, which will enable [the FCC] to monitor service levels provided to low-income consumers.<sup>[Note 1017]</sup>

Note 1017 states: "In the event ETCs choose to offer, as an additional option to low income consumers, the Lifeline discount to other retail service offerings, including bundles, that are available to the general public as described in section IX.A [of the *Lifeline Reform Order*], ETCs are not required to submit the terms and conditions of such retail service offerings to the [FCC] or USAC."

*Lifeline Reform Order*, FCC 12-11, at ¶¶ 386-90 (footnotes, except Note 1017, omitted).

45. The rule changes promulgated in the *Lifeline Reform Order* were in effect when Boomerang filed the Application.

46. Section 40-3.4-105, C.R.S., contains eligibility criteria for low-income telephone assistance. Sections 54.409(a) and (b) of 47 CFR establish uniform eligibility criteria for the Lifeline program that are not wholly consistent with the eligibility criteria for the Colorado Low-Income Telephone Assistance Program (LITAP), § 40-3.4-101 *et seq.*, C.R.S.

47. To address this inconsistency, on April 6, 2012, the Commission filed with the FCC a petition for a temporary waiver of 47 CFR §§ 54.409(a) and (b) that would allow Lifeline eligibility to be determined under the LITAP criteria through July 1, 2013. On May 31, 2012, the FCC granted the requested waiver through April 1, 2013. *In the Matter of Lifeline and Link Up Reform and Modernization, Lifeline and Link Up, Federal-State Joint Board on Universal*

*Service, Advancing Broadband Availability Through Digital Literacy Training*, WC Docket No. 11-42, WC Docket No. 03-109, CC Docket No. 96-45, WC Docket No. 12-23, Waiver Order, DA 12-863 (rel. May 31, 2012) at ¶ 16 (*Waiver Order*). The Commission may seek an extension of this waiver. *Waiver Order*, DA 12-863, at ¶ 16 & n.45.

48. On April 1, 2013, Colorado Senate Bill 13-194 was enacted. This legislation repeals LITAP. To implement Senate Bill 13-194, the Commission issued Decision No. C13-0395<sup>17</sup> in which the Commission directed providers to take designated steps no later than July 1, 2013. To allow time to complete the conclusion of the LITAP program, the Commission filed with the FCC a request for an extension of the waiver of 47 CFR §§ 54.409(a) and (b) through July 1, 2013.

49. Sections 54.407(d), 54.410(b)(2), and 54.402(c)(2) of 47 CFR require an ETC to obtain from the state a signed certification from a subscriber prior to seeking reimbursement for that subscriber. On April 25, 2012, the United States Telecommunications Association (USTelecom) filed with the FCC, a petition for temporary waiver of those rules. USTelecom filed the petition on behalf of ETCs that provide Lifeline service in a number of states, including Colorado. The FCC granted that petition, in part.

50. The FCC granted

a waiver from [47 CFR §§] 54.410(b)(2)(ii) and 54.410(c)(2)(ii) and portions of [47 CFR §] 54.407(d) with respect to ETCs in those states in which the state Lifeline administrator or other state agency manages subscriber eligibility and is unable to modify, in the short term, its processes for ETCs to come into compliance with these rules.<sup>[Note 21]</sup> We also grant, on our own motion, a waiver from the corresponding [47 CFR §] 54.410(e) requirement for these same states to provide a copy of certification forms to ETCs.<sup>[Note 22]</sup> For the duration of this waiver, the ETCs in these states may seek reimbursement without having received certification forms from the state.<sup>[Note 23]</sup>

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<sup>17</sup> This Decision was issued on April 5, 2013 in Docket No. 91M-314T, *Rules Prescribing the Standard Procedures for Administering the Colorado Low-Income Telephone Assistance Fund*, 4 CCR 723-2-2800.

Note 21 states: “We waive only the portion of [47 CFR §] 54.407(d) that requires the ETC to have obtained a valid certification form from each of its subscribers for whom it is receiving reimbursement in those instances where the state makes the initial eligibility determination. ETCs in the waiver states must remain in compliance with all of our other rules, including the obligation to obtain subscriber certifications from consumers prior to seeking reimbursement in those instances not covered by the scope of our waiver. *See* 47 C.F.R § 54.407(d).”

Note 22 is omitted.

Note 23 states: “We clarify that, as narrowed by USTelecom, these waivers do not apply to states or the ETCs in those states in those instances where the state does not make the initial determination of subscriber eligibility for income or a qualifying program. ... For example, in Florida, the state only makes eligibility determinations with respect to income, SNAP, TANF and Medicaid, but not other programs such as Federal Public Housing assistance. ... Therefore, this waiver is only applicable to Florida when subscribers qualify based on income, SNAP, TANF and Medicaid.”

*Waiver Order*, DA 12-863, at ¶ 3. The FCC granted the waivers through December 1, 2012. *Id.*, DA 12-863, at ¶ 4. On December 21, 2012, the FCC granted an extension of the waiver through June 1, 2013. *In the Matter of Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42, *Waiver Order*, DA 12-2062 (rel. Dec. 21, 2012) at ¶ 6. Notification and recordkeeping requirements continue in effect. *Id.*, DA 12-2062, at ¶ 7.

51. As a general rule, a state regulatory commission may impose requirements or conditions on the granting of an ETC designation that go beyond the FCC’s recommendations. *ETC Designation Framework Order*, FCC 05-46, at ¶ 30. The safe harbor of § 253(b) of the Act preserves a state’s ability to impose requirements necessary to preserve and to advance universal service, provided three criteria are met: (a) the requirement must be competitively neutral; (b) the requirement must be consistent with § 254 of the Act; and (c) the requirement must be necessary to preserve and to advance universal service. *In the Matter of Federal-State Joint Board on Universal Service, In the Matter of Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, CC Docket No. 96-45, *Declaratory Ruling*, FCC 00-248, 15 FCC Rcd. 15168 (2000) (*Western Wireless Declaratory*



*Order*);<sup>18</sup> *see also WWC Holding Company, Inc. v. Sopkin*, 488 F.3d 1262 (10th Cir. 2007) (same). A state’s statute, regulation, or legal requirement<sup>19</sup> runs afoul of § 253(b) of the Act if that requirement “may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” Section 253(a) of the Act.

52. In the *Lifeline Reform Order*, the FCC did not address this general rule governing designation of an ETC. The ALJ finds that, in this proceeding, it is appropriate to follow the FCC’s guidance in the *ETC Designation Framework Order* and in the *Western Wireless Declaratory Order*.

### 3. “Own Facilities” Forbearance.

53. On December 23, 2011, the FCC affirmed that, to meet the requirements of § 214(e)(1) of the Act, a carrier must use its own facilities to provide voice telephony as defined in 47 CFR § 54.101(a). *Order on Reconsideration*, FCC 11-189, at ¶ 4. As a result, a Lifeline-only ETC did not meet the “own facilities” requirement of § 214(e)(1) of the Act if that ETC’s only facilities were those used to provide functions that are not supported by voice telephony service as defined in 47 CFR § 54.101(a). The FCC noted that a Lifeline-only ETC could file a petition for forbearance from the “own facilities” requirement.

54. Forbearance refers to ¶ 10 of the Act, 47 U.S.C. § 160. That statutory provision requires the FCC to forbear from applying any provision of the Act or any regulation to a telecommunications service or class of telecommunications services, or to a telecommunications

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<sup>18</sup> Citation in this Decision to the *Western Wireless Declaratory Order* is to FCC 00-248 (rel. Aug. 10, 2000). There are no parallel citations to 15 FCC Rcd. 15168 (2000).

<sup>19</sup> The term legal requirement includes a state commission order or condition that is binding on the carrier seeking ETC designation. *Western Wireless Declaratory Order*, FCC 00-248, at ¶ 11.

carrier or to a class of telecommunications carriers, in some or any of its or their geographic markets if the FCC determines that the three conditions stated in § 10(a) of the Act are satisfied.

55. On its own motion, in the *Lifeline Reform Order*, the FCC made the “own facilities” forbearance decision. *See generally id.*, FCC 12-11, at ¶¶ 361-83 (discussion of “own facilities” forbearance). The FCC determined that it would

forbear ... from applying the ... facilities requirement of [§ 214(e)(1)(A) of the Act] to ... carriers that are, or [that] seek to become, Lifeline-only ETCs, subject to the following conditions: (1) the carrier must comply with ... 911 requirements [as specified in the *Lifeline Reform Order*] ...; and (2) the carrier must file, and the [Wireline Competition Bureau (Bureau)] must approve, a compliance plan providing specific information regarding the carrier’s service offerings and outlining the measures the carrier will take to implement the obligations contained in [the *Lifeline Reform Order*] as well as further safeguards against waste, fraud and abuse the Bureau may deem necessary. The review and approval of all compliance plans is a critical element of [the FCC’s *Lifeline Reform Order*]. These conditions will give the states and the [FCC] the ability to evaluate the Lifeline providers’ offerings to low-income consumers and adherence with program rules before such companies may receive any Lifeline funds.

*Lifeline Reform Order*, FCC 12-11, at ¶ 368 (footnotes omitted). The FCC described the 911 requirements and the compliance plan to be submitted to the Bureau for approval.

56. With respect to the 911 requirements, the FCC stated:

Given the importance of public safety, we condition this grant of forbearance on each carrier’s compliance with certain obligations as an ETC. Specifically, our forbearance from the facilities requirement of [§ 214(e) of the Act] is conditioned on each carrier: (a) providing its Lifeline subscribers with 911 and E911 access, regardless of activation status and availability of minutes; (b) providing its Lifeline subscribers with E911-compliant handsets and replacing, at no additional charge to the subscriber, noncompliant handsets of Lifeline-eligible subscribers who obtain Lifeline-supported services; and (c) complying with conditions (a) and (b) starting on the effective date of this Order.

*Lifeline Reform Order*, FCC 12-11, at ¶ 373 (footnotes omitted).

57. With respect to the compliance plan requirement, the FCC stated:

[I]n addition to the requirements currently imposed on all ETCs that participate in the Lifeline program, including those [adopted in the *Lifeline Reform Order*], we condition this grant of forbearance from the “own facilities” requirement by requiring each carrier to submit to the Bureau for approval a compliance plan that (a) outlines the measures the carrier will take to implement the obligations contained in [the *Lifeline Reform Order*], including but not limited to the procedures the ETC follows in enrolling a subscriber in Lifeline and submitting for reimbursement for that subscriber from the Fund, materials related to initial and ongoing certifications and sample marketing materials, as well as further safeguards against waste, fraud and abuse the Bureau may deem necessary; and (b) provides a detailed description of how the carrier offers service, the geographic areas in which it offers service, and a description of the carrier’s various Lifeline service plan offerings, including subscriber rates, number of minutes included and types of plans available.

*Lifeline Reform Order*, FCC 12-11, at ¶ 379. Notably, the FCC stated: “No designations shall be granted for any pending or new Lifeline-only ETC applications filed with the states ... after December 29, 2011, and carriers shall not receive reimbursement from the program, until the Bureau approves their compliance plans.” *Id.*, FCC 12-11, at ¶ 380.

**C. ETC Designation for the Limited Purpose of Offering Lifeline.**

58. Boomerang requests that the Commission designate it as an ETC, pursuant to § 214(e) of the Act and as defined in 47 CFR § 54.5 and in Rule 4 CCR 723-2-2001(hh), for the limited purpose of providing wireless Lifeline service to eligible low-income individuals.

**1. Description of LBUS Offering.**

59. Boomerang will offer one Lifeline Basic Universal Service (LBUS) Plan to qualified customers. The LBUS Plan provides to each qualified customer 250 free minutes of use and a free handset and includes the services and functionalities that are required by 47 CFR § 54.101(a) and Rule 4 CCR 723-2-2308(a). In addition, the LBUS Plan includes, at no charge: voice mail, call waiting, caller ID, call forwarding, three-way calling, customer service calls, and domestic long-distance calls. Further, Boomerang will make services available for the hearing

impaired. Moreover, under the LBUS Plan, roaming is blocked. Finally, the LBUS Plan automatically renews each month so long as the customer remains eligible and is not deactivated. An LBUS Plan customer can purchase an additional 1,000 voice minutes to supplement the LBUS Plan's minutes of use, for a total of 1,250 minutes. Attachment 3 to the Stipulation contains the description of the LBUS Plan.

60. Boomerang will continue to provide E911 emergency service to an LBUS Plan customer in the event the customer exhausts the available minutes of use and in the event the LBUS Plan service is deactivated for non-usage. Boomerang will meet the additional requirements contained in the *Lifeline Reform Order*, FCC 12-11, at ¶ 373 (quoted above).

61. Boomerang will provide access to its customer service representatives, through its website and through its customer care number, in the event the customer exhausts available minutes of use and in the event the LBUS Plan service is disconnected.

62. The LBUS Plan is subject to Boomerang's Operating Procedures, which are found in Attachment 2 to the Stipulation. A description of the Colorado LBUS Plan and the Boomerang Operating Procedures are found on Boomerang's website.

63. "Boomerang will not charge an activation fee for any of its Lifeline customers." Stipulation at Attachment 3 at 3. With respect to fees for reconnection, miscellaneous fees, and separate surcharges, Applicant states:

There are no initial fees whatsoever assessed or charged to Lifeline customers who select the basic 250 minutes.

As detailed in the Terms and Conditions provided as Exhibit 8 to Boomerang's amended application ..., Boomerang may in limited circumstances request one of two potential fees in response to customer requests: a reactivation fee or a replacement fee. Each is \$25. ... Boomerang does not charge customers both fees for the same event. ... Customers are also responsible for shipping charges when they send in a phone for replacement, but those are paid to the appropriate parcel service, rather than to Boomerang.

Like all telecommunications carriers, Boomerang will also charge all taxes and fees required to comply with the laws of the State of Colorado for anything above the 250 free minutes. For example, if a customer purchases the top-up minutes available through the LBUS Plan, Colorado taxes and fees such as E911 charges, Colorado state high cost fund assessments, and sales taxes would be assessed on the additional purchase.

Joint Responses at 13 (underlining in original). In addition, should Boomerang decide in the future to assess a fee to Lifeline customers that is not identified in the Joint Responses, that would be a Modification of the LBUS (as defined in the Stipulation) and would trigger the provisions of ¶ 11.A found in the Stipulation at 11.

## **2. Terms of the Stipulation.**

64. The Stipulation, including attachments, is attached to this Decision as Appendix A and is incorporated by reference. The ALJ does not restate every provision of the Stipulation.

65. In the Stipulation at 5 and 13, Boomerang states that it will provide service throughout its designated service area to all customers on a timely basis and that it will comply with the applicable service requirements.

66. In the Stipulation at 9, Boomerang states that it will work with the Colorado Department of Human Services with respect to certification of, and verification of, the eligibility of LBUS Plan customers. In compliance with the *Lifeline Reform Order*, Boomerang will obtain and will retain the last four digits of the social security number of each Lifeline customer. Attachment 4 to the Stipulation is the Applicant's Lifeline application form for use in Colorado.

67. The Stipulation at 11 at ¶ 11.A requires Boomerang to offer both its LBUS Plan and any future Lifeline plans<sup>20</sup> pursuant to the Stipulation and its attachments. In addition, the Stipulation at 11 requires Boomerang to provide 30 days' notice to the Parties before implementing a proposed Modification, as defined in the Stipulation. The Stipulation states that, on expiration of the notice period, a proposed Modification will go into effect unless one or more Parties object. In the event of an objection, Boomerang must file an application with the Commission and must obtain Commission authorization before implementing the Modification.

68. With respect to ¶ 11.A, the Parties state that they

believe [the provision that permits implementation if there is no objection] enhances administrative efficiency by providing Boomerang the ability to make some changes -- *e.g.*, those favorable to consumers, such as offering more free minutes -- without requiring a full-fledged application process for each such change. At the same time, if necessary, the application requirement will ensure that low-income customers in Colorado are protected from detrimental changes. For anything that would decrease customer rights or minutes, the parties anticipate that the process contained in ¶ 11.A will ensure that Boomerang will have to apply for Commission approval.

Joint Response at 5.

69. In addition, the Stipulation contains provisions addressing: (a) investigation of proposed changes to an existing LBUS Plan and of proposed future Lifeline plans; (b) audit; and (c) processes that may be used in the event of disagreement. Moreover, the Stipulation at 12-13 contains provisions addressing: (a) notification of Public Safety Answering Points;

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<sup>20</sup> As stated in the Stipulation at 11, future Lifeline plans include both new expanded service plans offered to eligible customers and bundled service plans that permit eligible customers to apply their Lifeline discount to bundled service plans or plans that contain optional calling features.

- (b) Boomerang's calculation and payment of the prepaid wireless E-911 charge;<sup>21</sup> and
- (c) Boomerang's calculation and payment of the Colorado High Cost Support charge.

70. Attachment 2 to the Stipulation contains Boomerang's operating procedures that apply to the LBUS Plan. Among other things, the operating procedures include:

- (a) Commission access to Boomerang's records;
- (b) Boomerang's retention of records;
- (c) Boomerang's records of, treatment of, and reporting of complaints about service;
- (d) Boomerang's records of, treatment of, and reporting of held service applications;
- (e) service interruptions, reestablishing service, notice to LBUS Plan customers about service interruptions, and recordkeeping and reporting with respect to service interruptions;
- (f) Boomerang's compliance with Rule 4 CCR 723-2-2304(b)(IV) in the event of a qualifying service outage;
- (g) Boomerang's compliance with NANP dialing pattern requirements;
- (h) the reports that Boomerang is to file with the Commission;
- (i) the process for determining a potential subscriber's eligibility for, and a subscriber's continued eligibility for, the LBUS Plan and related customer notice;
- (j) Boomerang's LBUS Plan non-usage policy and customer notice;
- (k) Boomerang's commitment to abide by the Cellular Telecommunications and Internet Association Consumer (CTIA) Consumer Code for Wireless Service; and
- (l) Boomerang's process for disconnection of an LBUS Plan customer's service.

### **3. Boomerang Wireless and ETC Requirements.**

71. At present, Boomerang does not provide service in Colorado.

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<sup>21</sup> The provision concerning the prepaid wireless E-911 charge addresses these situations: (a) the 250 free minutes in the LBUS Plan; (b) the prepaid and/or replenishment minutes of use sold to Lifeline customers; (c) the prepaid and/or replenishment voice minutes sold independently of the LBUS Plan; and (d) the prepaid minutes bundled with text messages or other services sold directly through Boomerang.

72. Boomerang is a CMRS provider. Applicant is a telecommunications carrier, as that term is defined in 47 U.S.C. § 153(51) and in 47 CFR § 51.5. Boomerang is a common carrier as defined in 47 U.S.C. § 153(10) and 47 CFR § 20.9(a)(7). For purposes of 47 CFR § 54.1 *et seq.*, Boomerang is a common carrier and is subject to regulatory treatment as provided in 47 U.S.C. § 332.

73. Pursuant to § 40-15-401(1), C.R.S., as a provider of cellular telecommunications service, Boomerang is exempt from regulation under either the Public Utilities Law (*i.e.*, articles 1 through 7 of title 40, C.R.S.) or article 15 of title 40, C.R.S. Pursuant to § 40-15-402(2), C.R.S., Applicant is not required to hold a Certificate of Public Convenience and Necessity in order to provide cellular telecommunications service in Colorado.

74. Boomerang provides the supported services set forth in 47 CFR § 54.101(a) and has demonstrated its intent and its ability to offer those services following its designation as an ETC in Colorado. Boomerang will provide the supported services throughout the service area described in Attachment 1 to the Stipulation.

75. Using media of general distribution, Boomerang will advertise the availability of supported services throughout its service area. In a manner designed to reach those likely to qualify for Lifeline service, Boomerang will use a variety of media resources, including (without limitation): point of sale materials; on-site merchandising; customer brochures; and television, radio, and print media.

76. Boomerang has been granted ETC status to offer Lifeline wireless services in Iowa, Louisiana, Maryland, Michigan, Oklahoma, South Carolina, West Virginia, and Wisconsin.

77. Boomerang offers both Lifeline service and non-Lifeline service in numerous state jurisdictions. Its officers have the necessary expertise to oversee provision of wireless



Lifeline service. Boomerang has the necessary operational expertise and qualifications to provide wireless Lifeline service.

78. Boomerang receives revenue from the sale of non-Lifeline-supported sources: (a) replenishment minutes of use packages; and (b) non-Lifeline pre-paid wireless plans. In addition, Boomerang has access to capital from investors. Boomerang's financial statements, which are Confidential Exhibit 5 to the Application, demonstrate that Boomerang has the financial qualifications to provide wireless Lifeline service.

79. Boomerang offers prepaid wireless telecommunications services to retail consumers by using the Sprint Nextel (Sprint) network and the Verizon Wireless (Verizon) network on a wholesale basis.<sup>22</sup> By using the Sprint and Verizon infrastructure and facilities, Boomerang is able to provide ubiquitous wireless coverage in its service territory and can continue to provide service and coverage in the event that one network is unavailable.

80. No Boomerang application for ETC designation to provide wireless Lifeline service has been denied.

81. Boomerang has not been the subject of an enforcement sanction in any state. Boomerang has not been the subject of an ETC revocation proceeding in any state.

82. In the Application at 17 and in the Stipulation at 13, Boomerang certifies that it will provide universal service on a timely basis to all eligible customers who make a reasonable request for service. Boomerang certifies that it will follow the FCC's six-step process defined in 47 CFR § 54.202(a)(1)(i).

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<sup>22</sup> In the Application at 15, Boomerang states that it will resell services that it obtains from "Sprint, Verizon and other GSM carriers." There is no additional information provided about the other GSM carriers.

83. In the Application at 18, Boomerang certifies that it will comply with all of the FCC-established consumer protection standards. Boomerang states that it will protect Customer Proprietary Network Information (47 CFR Part 64, Subpart U, as applicable) and, as required by 47 CFR § 54.202(a)(3), will comply with the CTIA Consumer Code for Wireless Service.

84. Boomerang has demonstrated its technical, operational, and financial capacity to provide wireless Lifeline-supported service in Colorado.

85. The LBUS Plan is not offered on a distance-sensitive basis, there is no additional charge for toll minutes of use, the plan contains a limited number of minutes of use, and the LBUS Plan is prepaid. In addition, the LBUS Plan does not permit roaming. Consequently, the requirement for toll limitation is addressed and is satisfied.

86. The *Lifeline Reform Order* requires each applicant seeking ETC designation to submit to the FCC for approval a compliance plan that contains the information as outlined and discussed in that FCC Order. On July 26, 2012, Boomerang filed with the FCC the revised compliance plan appended to the Application as Exhibit 3. On August 8, 2012, the FCC issued a Public Notice of its approval of the Boomerang revised compliance plan. Application at Exhibit 4.

87. Rule 4 CCR 723-2-2187(d)(XII) provides that an application for ETC designation must contain an

affirmative statement that the applicant will offer local usage plans comparable to those offered by the incumbent local exchange carrier (LEC). A local usage plan offered must include:

- (A) Unlimited calling or a plan with not less than 900 minutes of use per month;
- (B) A month-to-month term; and

(C) A rate comparable to the underlying [Local Exchange Carrier's (LEC)] basic residential local exchange rate.

88. The ALJ finds that the Boomerang LBUS Plan complies with Rule 4 CCR 723-2-2187(d)(XII). The LBUS Plan is month-to-month and meets the Rule requirements as a result of the availability and the cost of replenishment minutes of use packages. In addition, the Rule does not require that the applicant's plan be identical to the underlying LEC's local usage plan; comparability is sufficient. The ALJ finds that the LBUS Plan meets the Rule's comparability standard.

89. The ALJ finds that, with incorporation of the terms and conditions in the Stipulation and its attachments, with incorporation of the Service Agreement found on Boomerang's website, and with incorporation of the Joint Responses, Boomerang meets the requirements for designation as an ETC for the limited purpose of providing wireless Lifeline service in the study area (*i.e.*, wire centers) identified in Attachment 1 to the Stipulation.

90. The ALJ finds that, subject to the conditions discussed below, with incorporation of the Stipulation and its attachments, with incorporation of the Service Agreement found on Boomerang's website, and with incorporation of the Joint Responses, designating Boomerang as an ETC for the limited purpose of providing wireless Lifeline service in the study area (*i.e.*, wire centers) identified in Attachment 1 to the Stipulation serves the public interest, convenience, and necessity, as required by § 214(e)(2) of the Act and §§ 40-15-101, 40-15-501, and 40-15-502, C.R.S.

91. The ALJ finds that, subject to the conditions stated below, the Stipulation should be approved.

92. The ALJ finds that, subject to the conditions stated below, Boomerang should be designated an ETC for the limited purpose of providing wireless Lifeline service in the service area identified in Attachment 1 to the Stipulation.

**4. Conditions on Designation of Boomerang Wireles as an ETC for the Limited Purpose of Offering Wireless Lifeline Service.**

93. The ALJ finds that each of the following conditions is lawful, is reasonable, and is necessary to assure that designating Boomerang as an ETC for the limited purpose of providing wireless Lifeline service serves the public interest, convenience, and necessity. Consequently, the ETC designation granted by this Decision will be subject to the following conditions.

94. **First**, absent authorization from the Commission, Boomerang cannot serve eligible Lifeline service customers in any wire center, or any portion of any wire center, that is not listed in Attachment 1 to the Stipulation. Boomerang will be ordered to file with the Commission an appropriate application to expand its designated ETC service area in the event Boomerang wishes to change its service area.

95. **Second**, Boomerang must comply with the Stipulation (including attachments); with the Joint Responses; and with this Decision.

**D. Variance and Waivers.**

96. Boomerang requests that the Commission grant it a variance of Rule 4 CCR 723-2-2187(d)(III) with respect to this docket only. In addition, Boomerang requests that the Commission grant it a permanent partial waiver of Rule 4 CCR 723-2-2187(d)(VII); a permanent total waiver of Rule 4 CCR 723-2-2187(d)(XIII); a total waiver of Rules 4 CCR 723-2-2187(f)(II)(H), (K), (L), and (M) until such time as one of three specified events occurs;

and a permanent full waiver of Rule 4 CCR 723-2-2187(f)(II)(N). The ALJ separately discusses each request.

97. Rule 4 CCR 723-1-1003 governs variance and waivers. Rule 4 CCR 723-1-1003(a) provides, in relevant part:

The Commission may grant waivers [of] or variances from ... Commission rules ... for good cause. In making its determination[,] the Commission may take into account, but is not limited to, considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. The Commission may subject any waiver or variance granted to such terms and conditions as [the Commission] may deem appropriate. The Commission will not grant a waiver or variance if the grant would be contrary to statute.

98. One seeking a variance or a waiver bears the burden of proof as to the requested variance or waiver. The burden of proof is preponderance of the evidence. Section 24-4-105(7), C.R.S.; § 13-25-127(1), C.R.S.; Rule 4 CCR 723-1-1500.

99. Rule 4 CCR 723-1-1003(c) describes the content of a request for a waiver or a variance. The Stipulation at 6-7 meets the Rule 4 CCR 723-1-1003(c) content requirements.

**1. Variance from Rule 4 CCR 723-2-2187(d)(III).**

100. Boomerang seeks a variance from Rule 4 CCR 723-2-2187(d)(III). That Rule states:

(d) Contents. The application for designation as an ETC shall include, ... , the following information, either in the application or in appropriately identified attached exhibits:

\* \* \*

(III) A description of the service area for which the applicant seeks designation as an ETC. The application *shall include* either a description of such service area by metes and bounds or the underlying carrier’s exchange area map displaying the applicant’s service area.

(Emphasis supplied.) Boomerang seeks the following variance for the pending Application only: in lieu of the metes and bounds description or the underlying carrier’s exchange area maps,

permit Boomerang to describe its service area by means of the list of exchanges appended as Attachment 1 to the Stipulation.

101. The Parties support this request and state as good cause for granting the requested variance: (a) to provide its wireless Lifeline service, Boomerang will use the Sprint and Verizon networks; (b) those physical networks do not correlate precisely within the requirements of Rule 4 CCR 723-2-2187(d)(III); and (c) the list of exchanges appended as Attachment 1 to the Stipulation provides sufficient information to describe Boomerang's service area. Stipulation at 7.

102. Based on the record, the ALJ finds that Boomerang has met its burden of proof with respect to the requested variance from Rule 4 CCR 723-2-2187(d)(III) for this Application only. The ALJ finds that the list of exchanges appended as Attachment 1 to the Stipulation will satisfy the Rule 4 CCR 723-2-2187(d)(III) filing requirement.

## **2. Waivers of Portions of Rule 4 CCR 723-2-2187(d).**

103. Boomerang requests: (a) a partial but permanent waiver of Rule 4 CCR 723-2-2187(d)(VII); and (b) a full and permanent waiver of Rule 4 CCR 723-2-2187(d)(XIII). Each request is discussed separately.

104. Boomerang seeks a partial but permanent waiver of a portion of *Rule 4 CCR 723-2-2187(d)(VII)*. That Rule requires, among other things, that an applicant for ETC designation make an affirmative statement that it will advertise the availability of service and charges using media of general distribution. Boomerang does not seek a waiver of this portion of the Rule.

105. Rule 4 CCR 723-2-2187(d)(VII) also provides:

[T]he Commission establishes as guidelines that an ETC ... shall place customer guide pages in the “White Pages” directory within the ETC’s service area. Such customer guide pages shall indicate that the ETC offers the supported services identified by federal law within its ETC service area to all who request such service within that area.

Boomerang seeks a permanent waiver of this portion of the Rule.

106. The Parties support this request and state as good cause for granting the requested waiver: (a) Boomerang will advertise the availability of its LBUS Plan in media of general distribution; (b) the LBUS Plan is available only to low-income persons who are certified as eligible to receive the service; and (c) Boomerang neither maintains nor produces a White Pages directory. Stipulation at 6.

107. Based on the record, the ALJ finds that Boomerang has met its burden of proof with respect to the requested waiver of Rule 4 CCR 723-2-2187(d)(VII) with respect to the authorization to provide the wireless Lifeline service sought by the Application. Boomerang will use a variety of specifically-targeted techniques to advertise the availability of its Lifeline service to the eligible low-income population. The ALJ finds that, under the circumstances of this case, requiring Boomerang to place customer guide pages in the White Pages of each telecommunications carrier within Boomerang’s service area is unnecessary. In addition, requiring Boomerang to place customer guide pages in the White Pages of each telecommunications carrier within Boomerang’s service area may cause customer confusion because Boomerang seeks to provide its Lifeline LBUS Plan service within a limited area and not throughout the entire service territory of each carrier.

108. The Application, the Stipulation, and the Joint Responses together provide a clear picture of the methods Boomerang will use to advertise the availability of its wireless Lifeline

service. There is no information with respect to any other service or any other advertising. As a result, the ALJ finds that the permanent waiver of Rule 4 CCR 723-2187(d)(VII) should be limited to the wireless Lifeline service authorized in this docket because Boomerang has not met its burden of proof with respect to a more encompassing permanent waiver.

109. Boomerang seeks a full and permanent waiver of *Rule 4 CCR 723-2-2187(d)(XIII)*, which provides, as pertinent here, that an application for ETC designation must include a

two-year build-out plan demonstrating how high-cost universal service support will be used to improve the applicant's coverage, service quality or capacity in every wire center for which it seeks designation and expects to receive universal service support.

110. The Parties support this waiver request and state as good cause for granting the requested waiver: (a) Boomerang seeks to provide local basic universal service (*i.e.*, Lifeline) to eligible low-income households using the network facilities of Sprint and Verizon; (b) Boomerang seeks neither federal universal service support nor Colorado High Cost Support Mechanism (CHCSM) support in its Colorado service area; and (c) granting the waiver would be consistent with the FCC's treatment of federally-designated Lifeline-only ETCs.

111. The ALJ agrees with the Parties that waiving Rule 4 CCR 723-2-2187(d)(XIII) as to Boomerang would be consistent with the treatment of FCC-designated Lifeline-only ETCs following the *Lifeline Reform Order*. For the reasons articulated by the FCC in the *Lifeline Reform Order*, waiving the Rule would be in the public interest.

112. In addition, the Rule presumes that the applying ETC will provide telecommunications service in high-cost areas using its own facilities. That presumption does not apply to Boomerang because, at present, it neither owns nor plans to build its own network facilities in Colorado.



113. Because each application has the potential to address different services and presents different circumstances, the ALJ finds that the permanent waiver of Rule 4 CCR 723-2-2187(d)(XIII) granted here should be limited to the Application in this docket.

**3. Waivers of Portions of Rule 4 CCR 723-2-2187(f)(II).**

114. Boomerang requests: (a) a full waiver of Rules 4 CCR 723-2-2187(f)(II)(H), (K), (L), and (M), which waiver will expire when the first of three specified events occurs; and (b) a full and permanent waiver of Rule 4 CCR 723-2-2187(f)(II)(N). Each request is discussed separately.

115. Boomerang seeks a full waiver of the annual reporting requirements in *Rules 4 CCR 723-2-2187(f)(II)(H), (K), (L), and (M)* until such time as one of three events occurs. If granted, the waiver would terminate automatically on the occurrence of the earliest of the following events: (a) Boomerang provides services solely on its own network; (b) the Commission modifies Rules 4 CCR 723-2-2187(f)(II)(H), (K), (L), and (M); or (c) the FCC modifies its “own facilities” forbearance.

116. As relevant here, Rules 4 CCR 723-2-2187(f)(II)(H), (K), (L), and (M) provide:

(f) Annual Reporting Requirements for Eligible Telecommunication Carriers.

\* \* \*

(II) Every ETC shall submit the following information in its [annual] report:

\* \* \*

(H) For the previous two calendar years, a detailed schedule/exhibit showing the actual dollar amounts expended by the carrier in the provision, maintenance, upgrading, plant additions and associated infrastructure costs for local exchange service within the service areas in Colorado where the carrier has been designated an ETC. An explanation [shall be provided] regarding any network improvement targets that have not been fulfilled. This information shall be submitted at the wire center level or at the authorized service area [level].

If service improvements in a particular wire center are not needed, [the ETC shall provide] an explanation of why improvement is not needed and how funding will otherwise be used to further the provision of supported services in that area.

\* \* \*

(K) A map of the service areas where the carrier has ETC designation showing the locations of facilities or for wireless providers, maps showing the location of all cellular towers and the coverage area of these towers. Maps shall be submitted in 2007 and at least once every three years thereafter.

(L) Through June 30 of the current calendar year, a detailed schedule/exhibit showing the actual dollar amounts expended by the carrier in the provision, maintenance, upgrading, plant additions and associated infrastructure costs for any local exchange service within the service areas in Colorado where the carrier has been designated an ETC. This shall include the carrier's build-out plans and budgets for projects, upgrades or installations planned but not yet completed during the current calendar year applicable to local exchange service. This information shall be submitted at the wire center level or at the authorized service area [level].

(M) A copy of cost study filing made on July 31<sup>st</sup> to NECA for current year. If an ETC is not required to file cost study to NECA, then a copy of the line count filing made to the FCC and USAC Administrator shall be submitted.

117. The Parties support this waiver request and state as good cause for granting the requested waiver: (a) Boomerang seeks to provide local basic universal service (*i.e.*, Lifeline) to eligible low-income households using the network facilities of Sprint and Verizon; (b) Boomerang seeks neither federal universal service support nor CHCSM support in its Colorado service area; (c) granting the waiver would be consistent with the *Lifeline Reform Order's* treatment of federally-designated Lifeline-only ETCs; and (d) granting the waiver would be in the public interest because, as to Boomerang, the waiver would remove unnecessary reporting obligations.

118. The ALJ agrees with the Parties that waiving Rules 4 CCR 723-2-2187(f)(II)(H), (K), (L), and (M) as to Boomerang would be consistent with the treatment of FCC-designated

Lifeline-only ETCs following the *Lifeline Reform Order* and would be consistent with the FCC's "own facilities" forbearance. It also would be consistent with this Commission's treatment of other ETCs that provide wireless Lifeline-only service in Colorado using resold services. For the reasons articulated by the FCC in the *Lifeline Reform Order*, waiving the cited Rules is in the public interest.

119. In addition, the cited Rules presume that the reporting ETC provides telecommunications service in high-cost areas using its own facilities. That presumption does not apply to Boomerang because, at present, it does not own network facilities in Colorado. Given that Boomerang, as a Lifeline-only ETC that provides service through resale, will not receive funds to construct, to improve, or to extend a network, the ALJ sees little value in requiring Boomerang to make annual reports concerning its existing infrastructure and future infrastructure plans. Reducing the reporting burden on Boomerang and lessening the administrative burden on Commission Staff are in the public interest.

120. Moreover, Boomerang will provide its Lifeline service in areas directly served by the Sprint and Verizon networks. It is unreasonable to expect Boomerang to file the Rule 4 CCR 723-2-2187(f)(II)(K)-required maps showing the location, and coverage area, of all cellular towers owned by the underlying carriers. To the extent an underlying carrier is an ETC in Colorado, the carrier will file the location maps required by Rule 4 CCR 723-2-2187(f)(II)(K) or other information from which its coverage area can be determined; thus, the Commission will have that information available to it.

121. Finally, the ALJ finds that it is reasonable to terminate the waiver automatically if one of the three listed events occurs. Each of the listed events relates directly to at least one

basis underpinning the waiver. It is appropriate, therefore, for the waiver to terminate automatically when the circumstances that support the waiver change.

122. Boomerang seeks a full and permanent waiver of *Rule 4 CCR 723-2-2187(f)(II)(N)*, which provides that each ETC shall submit in its annual report a “copy of the company’s Colorado-specific trial balance for previous year.” The Parties support this waiver request and, as good cause for granting the requested waiver, rely on the reasons provided in support of the waiver of other portions of Rule 4 CCR 723-2-2187(f)(II).

123. The ALJ agrees with the Parties. In addition, this Rule has been waived for most, if not all, ETCs that provide wireless Lifeline-only service in Colorado using resold services. The ALJ finds that this waiver request should be granted.

124. Because each application has the potential to address different services and presents different circumstances, the ALJ finds that the permanent waiver of Rule 4 CCR 723-2-2187(f)(II)(N) granted in this Decision should be limited to the service authorized by this docket. Should Boomerang file an application to provide services other than, or in addition to, the Lifeline services discussed in this Decision, the waiver of Rule 4 CCR 723-2-2187(f)(II)(N) granted by this Decision will not apply.

125. Based on the record and for the foregoing reasons, the ALJ finds that Boomerang has met its burden of proof with respect to the requested waivers of Rules 4 CCR 723-2-2187(f)(II)(H), (K), (L), (M), and (N) and the duration of those waivers.

### **III. CONCLUSIONS**

126. The Commission has jurisdiction over the subject matter of this proceeding.

127. The Commission has jurisdiction over the Applicant in this proceeding.

128. Consistent with the discussion above, the Stipulation, which is attached to this Decision as Appendix A and is incorporated by reference, should be accepted.

129. Consistent with the discussion above, the Stipulation must be read in conjunction with the Joint Responses, which are attached to this Decision as Appendix B and are incorporated by reference.

130. Consistent with the discussion above and the Stipulation (including its attachments), and subject to the conditions set out above, the Application should be granted.

131. Consistent with the discussion above and the Stipulation (including its attachments), and subject to the conditions set out above, Boomerang should be designated as an ETC for the limited purpose of providing wireless Lifeline service to qualified low-income households in the exchanges listed in Attachment 1 to the Stipulation.

132. Consistent with the discussion above, Boomerang should be granted, for purposes of this docket only, a variance from Rule 4 CCR 723-2-2187(d)(III) to permit Boomerang to describe its service area by means of the list of exchanges appended as Attachment 1 to the Stipulation.

133. Consistent with the discussion above, Boomerang should be granted, as to the service authorized by this Decision only, a partial but permanent waiver of the Rule 4 CCR 723-2-2187(d)(VII) requirement to place customer guide pages in the “White Pages” directory within Boomerang’s service area.

134. Consistent with the discussion above, Boomerang should be granted, as to this docket only, a full and permanent waiver of the Rule 4 CCR 723-2-2187(d)(XIII) requirement for submission of a two-year build-out plan.

135. Consistent with the discussion above, Boomerang should be granted a waiver of Rules 4 CCR 723-2-2187(f)(II)(H), (K), (L), and (M). The waiver should terminate automatically on the occurrence of the earliest of the following events: (a) Boomerang provides service on its own network; (b) the Commission modifies Rules 4 CCR 723-2-2187(f)(II)(H), (K), (L), and (M); or (c) the FCC modifies its blanket forbearance of the “own facilities” requirement.

136. Consistent with the discussion above, Boomerang should be granted, with respect to the service authorized by this Decision only, a waiver of Rule 4 CCR 723-2-2187(f)(II)(N).

137. Pursuant to § 40-6-109(2), C.R.S., the Administrative Law Judge recommends that the Commission enter the following order.

#### **IV. ORDER**

##### **A. The Commission Orders That:**

1. The Stipulation and Settlement Agreement, including attachments, is attached to this Decision as Appendix A and is incorporated into this Decision by reference as if fully set out.

2. Consistent with the discussion above, the Stipulation and Settlement Agreement is accepted.

3. The Joint Responses to Administrative Law Judge’s Questions in Decision No. R13-0163-I, filed on February 20, 2013 by the Parties, are attached to this Decision as Appendix B and are incorporated into this Decision by reference as if fully set out.

4. Consistent with the discussion above, subject to the Stipulation and Settlement Agreement, as clarified by the Joint Responses to Administrative Law Judge’s Questions in Decision No. R13-0163-I, and subject to the conditions set out below, the Amended Application for Designation as an Eligible Telecommunications Carrier in the State of Colorado for the

Limited Purpose of Offering Wireless Lifeline Service to Qualified Households (Low Income Only) and for Waiver of Certain Commission Rules is granted.

5. Consistent with the discussion above, subject to the conditions contained in the Stipulation and Settlement Agreement, as clarified by the Joint Responses to Administrative Law Judge's Questions in Decision No. R13-0163-I, and subject to the conditions set out below, Boomerang Wireless, LLC, is designated an Eligible Telecommunications Carrier for the limited purpose of providing Lifeline service to qualified low-income households in the Colorado service area described in Attachment 1 to the Stipulation and Settlement Agreement.

6. Consistent with the discussion above, Boomerang Wireless, LLC's designation as an Eligible Telecommunications Carrier in Ordering Paragraph No. 5 is subject to this condition: Boomerang Wireless, LLC, shall comply with the terms of the Stipulation and Settlement Agreement, as clarified by the Joint Responses to Administrative Law Judge's Questions in Decision No. R13-0163-I, and with the terms of this Decision.

7. Consistent with the discussion above, Boomerang Wireless, LLC's designation as an Eligible Telecommunications Carrier in Ordering Paragraph No. 5 is subject to this condition: Boomerang Wireless, LLC's ETC service territory consists of the areas listed in Attachment 1 of the Stipulation and Settlement Agreement. Absent further Order of the Commission, Boomerang Wireless, LLC, cannot serve eligible Lifeline service customers in any wire center, or any portion of any wire center, that is not listed in Attachment 1 to the Stipulation and Settlement Agreement. Should Boomerang Wireless, LLC, wish to change its service area, Boomerang Wireless, LLC, shall file an appropriate application with the Commission.

8. For purposes of this docket only and consistent with the discussion above, Boomerang Wireless, LLC, is granted a variance from Rule 4 *Code of Colorado Regulations*

723-2-2187(d)(III) to permit Boomerang Wireless, LLC, to describe its service area using the list of exchanges appended as Attachment 1 to the Stipulation and Settlement Agreement.

9. Consistent with the discussion above, Boomerang Wireless, LLC, is granted, with respect to the service authorized by this Decision only, a partial but permanent waiver of the Rule 4 *Code of Colorado Regulations* 723-2-2187(d)(VII) requirement to place customer guide pages in the “White Pages” directories of the Local Exchange Carriers within Boomerang Wireless, LLC’s service area.

10. Consistent with the discussion above, Boomerang Wireless, LLC, is granted, for purposes of this docket only, a full and permanent waiver of the Rule 4 *Code of Colorado Regulations* 723-2-2187(d)(XIII) requirement for submission of a two-year build-out plan.

11. Consistent with the discussion above, Boomerang Wireless, LLC, is granted a waiver of Rules 4 *Code of Colorado Regulations* 723-2-2187(f)(II)(H), (K), (L), and (M). The waiver granted by this Decision shall terminate automatically on occurrence of the earliest of the following events: (a) Boomerang Wireless, LLC, provides service solely on its own network; (b) the Commission modifies Rules 4 *Code of Colorado Regulations* 723-2-2187(f)(II)(H), (K), (L), and (M); or (c) the Federal Communications Commission modifies its blanket forbearance of the “own facilities” requirement found in *In the Matter of Lifeline and Link Up Reform and Modernization, Lifeline and Link Up, Federal-State Joint Board on Universal Service, Advancing Broadband Availability Through Digital Literacy Training*, WC Docket No. 11-42, WC Docket No. 03-109, CC Docket No. 96-45, WC Docket No. 12-23, Report and Order and Further Notice of Proposed Rulemaking, FCC 12-11, 27 FCC Rcd. 6656 (2012).



12. Consistent with the discussion above, Boomerang Wireless, LLC, is granted, with respect to the service authorized by this Decision only, a waiver of Rule 4 *Code of Colorado Regulations* 723-2-2187(f)(II)(N).

13. The evidentiary hearing scheduled in this matter for February 27, 2013 is vacated.

14. The procedural schedule established in Decision No. R12-1438-I, as subsequently modified is vacated.

15. 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.

16. 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.

a) 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, 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 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.

17. 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)



THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF COLORADO

MANA L. JENNINGS-FADER

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Administrative Law Judge

ATTEST: A TRUE COPY

A handwritten signature in cursive script that reads "Doug Dean".

Doug Dean,  
Director