

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 13A-1374T

IN THE MATTER OF THE APPLICATION OF TEMPO TELECOM, 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.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
MANA L. JENNINGS-FADER
GRANTING JOINT MOTION, SUBJECT TO
CONDITIONS; 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 MOTION FOR WAIVER; AND
GRANTING WAIVERS AND VARIANCE**

Mailed Date: October 17, 2014

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I. STATEMENT

1. On December 24, 2013, Tempo Telecom, LLC (Tempo, Company, or Applicant), filed a verified Application for Designation as a Wireless Eligible Telecommunications Carrier in the State of Colorado and [for] Waiver of Certain Commission Rules (Application). That filing commenced this Proceeding.

2. On December 26, 2013, the Commission issued its Notice of Application Filed (Notice). That Notice established both an intervention period and a procedural schedule. On February 4, 2014, Decision No. R14-0127-I vacated that procedural schedule.

3. The Colorado Office of Consumer Counsel (OCC) and Trial Staff of the Commission (Staff) timely intervened. Both OCC and Staff contested the Application.

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

5. On January 29, 2014, by Minute Order, the Commission deemed the Application to be complete within the meaning of § 40-6-109.5, C.R.S. On June 20, 2014, Decision

No. R14-0671-I extended, to and including November 25, 2014, the date by which the Commission should issue its decision in this Proceeding.

6. On January 29, 2014, by Minute Order, the Commission referred this matter to an Administrative Law Judge (ALJ).

7. On January 6, 2014, Tempo filed the Verified Motion of Angela F. Collins to Appear *Pro Hac Vice* as Attorney for Tempo Telecom, LLC. By Decision No. R14-0127-I, the ALJ granted that motion and admitted Ms. Collins as counsel for Applicant *pro hac vice*.

8. On February 18, 2014, by Decision No. R14-0182-I, the ALJ scheduled the evidentiary hearing and established the procedural schedule for this Proceeding. Subsequently, on May 30, 2014, by Decision No. R14-0585-I, the ALJ vacated the evidentiary hearing and procedural schedule.

9. On February 27, 2014, Tempo filed the Direct Testimony and Exhibits of Gregory Corwin in Support of Application. Mr. Corwin is employed by Tempo and serves as Director of Marketing for the Company. An affidavit filed on February 27, 2014 verifies this testimony.

10. On April 14, 2014, the Parties filed a Joint Motion to Approve Stipulation and Settlement Agreement and for Waiver of Response Time (Joint Motion). The Stipulation and Settlement Agreement (Stipulation) accompanied the Joint Motion.¹ Appended to the Stipulation are five attachments, none of which is confidential.

11. On April 14, 2014, Tempo also filed an Unopposed Motion for Waiver of Certain Commission Rules (Waiver Motion). In that filing, Applicant requests waiver of specified

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

subsections of Rule 4 *Code of Colorado Regulations* (CCR) 723-2-2187.² This motion is discussed below.

12. By Decision No. R14-0585-I, the ALJ posed questions pertaining to the Stipulation and the Waiver Motion and directed the Parties to respond to the questions.

13. On June 20, 2014, the Parties filed their Joint Responses to Administrative Law Judge's Questions in Decision No. R14-0585-I (Joint Responses).³ The Joint Responses clarify and modify the Stipulation language and discuss the Waiver Motion.

14. The ALJ has reviewed the Stipulation, the Joint Responses, the verified Corwin testimony, and the verified Application. In addition, The ALJ is satisfied that the Joint Responses are sufficient to clarify and to modify the Stipulation and to explain the Waiver Motion. The ALJ requires no additional clarification or explanation of the Stipulation's terms or of the Waiver Motion's terms. As a result, the ALJ is able to address the Stipulation, the Waiver Motion, and the Application (as modified) without an evidentiary hearing.

15. As a result of the Stipulation, neither the Application nor the Waiver Motion is contested or opposed.

16. Pursuant to § 40-6-109(5), C.R.S., and Rule 4 CCR 723-1-1403,⁴ 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 Application can be,

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

³ The Joint Responses are attached to this Decision as Appendix B and are incorporated into this Decision by reference as if fully set out.

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

and should be, considered under the Commission's modified procedure and without an evidentiary hearing.

17. 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

18. In the Application, Tempo requests that the Commission designate it an Eligible Telecommunications Carrier (ETC), pursuant to § 214(e) of the Federal Telecommunications Act of 1996⁵ (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 individuals. In the Application and the Waiver Motion, Tempo requests that the Commission grant it a variance from, and a waiver of, portions of Rule 4 CCR 723-2-2187(d) and a waiver of portions of Rule 4 CCR 723-2-2187(f)(II).

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

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

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

A. Parties.

22. Applicant is a privately-held Georgia limited liability company that is owned and operated by its sole member Birch Equity Partners, LLC. Applicant provides resold wireless voice and data services and is registered as a wireless provider in Colorado. Applicant is a

⁵ The Act is codified in numerous sections of title 47 of the United States Code (U.S.C.).

commercial mobile radio service (CMRS) carrier as defined in 47 CFR § 20.9 and a telecommunications carrier as defined in 47 U.S.C. § 153. Tempo does not hold any Federal Communications Commission (FCC) licenses; does not own any wireless facilities; and filed a Wireless Utility Designee Form with the Commission on July 26, 2013. In Colorado, Sprint will provide Applicant with the wireless network infrastructure and wireless transmission facilities necessary for Applicant to offer service as a Mobile Virtual Network Operator.

23. 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.

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

B. Relevant Federal Law.

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

1. General Background.

26. 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).⁶

27. The 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*),⁷ subsequent history omitted.

28. Section 214(e)(1) of the Act requires an ETC to offer the supported services “either using its own facilities or a combination of its own facilities and resale of another carrier’s services.”⁸ This is referred to as the “own facilities” requirement. As discussed below, the FCC has determined not to enforce the “own facilities” requirement against a Lifeline-only ETC that meets specified conditions.

29. 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*).⁹ In that Order, the FCC “encourage[d] state

⁶ Rule 4 CCR 723-2-2187(a) incorporates these criteria.

⁷ 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).

⁸ In 47 CFR § 54.201(e), the FCC interpreted the term “facilities” to mean “any physical components of the telecommunications network ... used in the transmission or routing of the [supported] services[.]”

⁹ 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).

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.

30. In 2011, the FCC began to reform 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*).¹⁰ 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.*, 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

¹⁰ 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).

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.

31. On November 18, 2011, as pertinent here, the FCC transformed the Federal 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*),¹¹ *aff'd*, *In Re: FCC*, 753 F.3d 1015 (10th Cir. 2014). In subsequent Orders, the FCC clarified the *USF-ICC Transformation Order*.

32. In the *USF/ICC Transformation Order*, as pertinent here, 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

¹¹ 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).

47 CFR requires an ETC to offer voice telephone services that must provide or include these components:

- [1] voice grade access to the public switched network or its functional equivalent;
- [2] minutes of use for local service provided at no additional charge to end users;
- [3] 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
- [4] toll limitation services to qualifying low-income consumers as provided in subpart E of

47 CFR Part 54.

33. In 2012, the FCC continued to reform Lifeline service and Link Up service. *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) (*Lifeline Reform Order*).¹² In that Order, among other things, the FCC: (a) established national eligibility criteria for the program; (b) adopted rules for Lifeline enrollment, including initial and annual certification requirements; (c) confirmed the only-one-supported-line-per-household requirement; (d) adopted a number of reforms to eliminate abuse, waste, and fraud in the program (*e.g.*, created a National Lifeline Accountability Database); (e) phased out toll limitation service support; (f) eliminated Link Up support on non-Tribal lands; and (g) established a Broadband Adoption Pilot Program to investigate the use of Lifeline support to increase broadband adoption among Lifeline-eligible consumers.

¹² 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).

34. To implement the changes, the FCC amended its Lifeline-related rules and provided guidance. Of particular relevance here and as discussed in the *Lifeline Reform Order*, FCC 12-11, at ¶¶ 386-90, the FCC:

a. amended 47 CFR § 54.202 to make it clear that, because a Lifeline-only ETC does not receive federal funds to extend or to improve its network, 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;

b. amended 47 CFR § 54.201¹³ 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. Among the factors relevant to such a showing are: (1) whether the applicant previously offered services to non-Lifeline consumers; (2) how long the applicant has been in business; (3) whether the applicant intends to rely exclusively on [Universal Service Fund] disbursements to operate; (4) whether the applicant receives or will receive revenue from other sources; and (5) whether the applicant has been subject to enforcement action or ETC revocation proceedings in any state;

c. required a federally-designated ETC, as a condition on its receipt of federal support, to provide: (1) information on service outages and the number of complaints received per 1,000 connections, (2) certification of compliance with applicable service quality standards and consumer protection rules, and (3) certification that the carrier has the ability to function in emergency situations; and

¹³ This FCC rule governs ETC designations by the states.

d. in 47 CFR § 54.422(a), established annual reporting requirements that apply to all ETCs receiving Lifeline: (1) the ETC must report the names and identifiers used by the ETC, its holding company, operating companies and affiliates to assist in the Lifeline audit program; and (2) the ETC must provide to the FCC and to USAC general information (e.g., number of minutes provided, whether there are additional charges to the consumer for service, minutes of use and/or toll calls) about the terms and conditions of the Lifeline plans for voice telephony service offered during the previous year to assist the FCC in monitoring service levels provided to low-income consumers.

35. Lastly, in that Order, the FCC established “an interim base of uniform support amount of \$9.25 per month for non-Tribal subscribers[.]” *Lifeline Reform Order*, FCC 12-11, at ¶ 4.

36. The rule changes promulgated in the *Lifeline Reform Order* were in effect on the date Tempo filed the Application.

37. 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);¹⁴ see also *WWC Holding Company, Inc. v. Sopkin*, 488 F.3d 1262 (10th Cir. 2007) (same). A state’s statute, regulation, or legal requirement¹⁵ 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.

38. 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.

39. 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). *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, Order on Reconsideration, FCC 11-189 (rel. Dec. 23, 2011) 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 service as defined in

¹⁴ 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).

¹⁵ 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.

47 CFR § 54.101(a). The FCC noted that a Lifeline-only ETC could file a petition for forbearance¹⁶ from the “own facilities” requirement.

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

forbear ... from applying the ... [“own facilities” requirement] 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.

41. 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 [“own facilities” requirement] 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

¹⁶ 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 carrier or to 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.

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).

42. 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 ... 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.

43. Tempo 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 individuals.

1. Description of LBUS Offering.

44. Tempo will offer to qualified customers¹⁷ two Lifeline Basic Universal Service (LBUS) Plan options: (a) Lifeline 250 (with 250 nationwide minutes); and (b) Lifeline 900 (with

¹⁷ In this Proceeding, Tempo does seek authority to provide Lifeline service in Tribal lands.

900 minutes).¹⁸ Attachment 3 to the Stipulation contains the full description of the LBUS Plan options. Because the two options are the same except for the additional cost for the additional minutes offered with the Lifeline 900 option, the ALJ discusses only the Lifeline 250 option in this Decision.¹⁹ The ALJ does not restate here every aspect to the LBUS Plan options.

45. The LBUS Plan provides to each qualified customer 250 free minutes of use²⁰ and a free 911- and E911-compliant handset and includes at least the services and functionalities that are required by 47 CFR § 54.101(a) and Rule 4 CCR 723-2-2308(a). The LBUS Plan includes, at no charge: voice mail, call waiting, caller ID, customer service calls, calls to 911 emergency services, domestic long-distance calls, national texting, and web/internet usage. Roaming is provided under the LBUS Plan.²¹ The LBUS Plan automatically renews each month so long as the subscribed customer remains eligible and is not deactivated. An LBUS Plan customer can purchase additional minutes of use at any time during the month; the additional minutes are available for use for 30 days following the date of purchase and carry over into the next month.

46. Tempo will continue to provide 911 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. Tempo will meet the additional requirements contained in the *Lifeline Reform Order*, FCC 12-11, at ¶ 373 (quoted above).

¹⁸ Lifeline 900 will cost \$ 32.95 per month and includes the 250 free minutes.

¹⁹ Unless the context indicates otherwise, reference in this Decision to the LBUS Plan is to the Lifeline 250 option.

²⁰ The unused minutes do not carry over into the next month.

²¹ Roaming is explained in the Joint Responses at 8.

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

48. The LBUS Plans are subject to Tempo's Operating Procedures, which are found in Attachment 2 to the Stipulation. *See also* the Joint Responses. A description of the Colorado LBUS Plan and the Tempo Operating Procedures will be on Tempo's website before Tempo offers Lifeline service in Colorado.

2. Terms of the Stipulation.

49. The Stipulation, including attachments, is attached to this Decision as Appendix A. The Joint Responses, which are attached to this Decision as Appendix B, amend and clarify the Stipulation. The ALJ does not restate here every provision of the Stipulation.²²

50. Tempo will provide service throughout its designated service area to all customers on a timely basis and will comply with the applicable service requirements.

51. Tempo will work with the Colorado Department of Human Services or will use the National Lifeline Accountability Database with respect to certification of, and verification of, the eligibility of LBUS Plan customers. In compliance with *Lifeline Reform Order*, Tempo will obtain and will retain the last four digits of the social security number of each Lifeline customer. Attachment 5 to the Stipulation is the Applicant's Lifeline application form for use in Colorado.

²² Unless the context indicates otherwise, reference in the remainder of this Decision to the Stipulation is to the Stipulation as amended and clarified by the Joint Responses.

52. Tempo will offer both its LBUS Plan and any future Lifeline plans²³ pursuant to the Stipulation and its attachments. In addition, Tempo will provide 30 days' notice to the Parties before implementing a proposed Modification, as defined in the Stipulation.²⁴ 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, Tempo must file an application with the Commission and must obtain Commission authorization before implementing the Modification.

53. The Stipulation contains provisions addressing: (a) investigation of proposed changes to an existing LBUS Plan and of Lifeline plans; (b) audit; and (c) processes that may be used in the event of disagreement. The Stipulation also contains provisions addressing: (a) notification of Public Safety Answering Points; (b) Tempo's calculation and payment of the prepaid wireless E911 charge;²⁵ and (c) Tempo's calculation and payment of the Colorado High Cost Support Mechanism (CHCSM) charge.

54. Attachment 2 to the Stipulation contains Tempo's operating procedures that apply to the LBUS Plan. Among other things, the operating procedures include: (a) Commission access to Tempo's records; (b) Tempo's retention of records; (c) Tempo's records of, treatment of, and reporting of complaints about service; (d) Tempo's records of, treatment of, and reporting of held service applications; (e) service interruptions, reestablishing service, notice to LBUS Plan

²³ As provided in the Stipulation at 11, 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.

²⁴ The Stipulation at 12 defines Modification as any one of the following: (a) modification of Tempo's existing Lifeline plans; (b) addition of a new Lifeline plan; (c) modification of a Lifeline plan; (d) modification of the Lifeline Plan's terms and conditions; or (e) modification of Tempo's Operating Procedures.

²⁵ The provision concerning of the prepaid wireless E911 charge addresses these situations: (a) the free minutes in the LBUS Plan; (b) the additional minutes or data plans 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 Tempo.

customers about service interruptions, and recordkeeping and reporting with respect to service interruptions; (f) Tempo's compliance with Rule 4 CCR 723-2-2304(b)(IV) in the event of a qualifying service outage; (g) Tempo's compliance with NANP dialing pattern requirements; (h) the reports that Tempo must file with the Commission; (i) the process for determination of a potential subscriber's eligibility for, and a subscriber's continued eligibility for, the LBUS Plan and customer notice; (j) Tempo's LBUS Plan non-usage policy and customer notice; (k) Tempo's statement that it abides by the Cellular Telecommunications and Internet Association Consumer (CTIA) Consumer Code for Wireless Service; and (l) Tempo's process for disconnection of an LBUS Plan customer's service.

3. Tempo and ETC Requirements.

55. At present, Tempo does not provide Lifeline or ETC service in Colorado.

56. Tempo 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. Tempo 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.*, Tempo is a common carrier and is subject to regulatory treatment as provided in 47 U.S.C. § 332.

57. Pursuant to § 40-15-401(1), C.R.S., as a provider of cellular telecommunications service, Tempo 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.

58. Tempo will provide 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. Tempo will provide the supported services throughout the service area described in Attachment 1 to the Stipulation.

59. As discussed in detail in the Stipulation at Attachment 4 at 19-21, Tempo will publicize the availability of the LBUS Plan throughout its service area. In a manner designed to reach persons most likely to qualify for Lifeline service, Tempo will use a variety of approaches, including (without limitation): targeted direct mail; retail marketing using point-of-sale promotional materials located in retail establishments (both those owned by Tempo and those owned by third parties); Internet advertising; and radio and print media. Tempo will comply with applicable FCC rules (for example, 47 CFR § 54.405(c)) with respect to the information that must be included in Lifeline advertising. Exhibit 9 to the Application is an example of Tempo's marketing materials.

60. Tempo has been granted ETC status to offer Lifeline wireless services in Georgia, Indiana, Iowa, Kansas, Kentucky, Maryland, Missouri, Nevada, Ohio, Rhode Island, South Carolina, Utah, Wisconsin, and Wyoming.

61. Tempo has operated in the United States since 1996.²⁶ It offers both Lifeline service and non-Lifeline service in numerous jurisdictions. As discussed in the Application, Tempo has the necessary operational and technical expertise and qualifications to provide wireless Lifeline service.

62. Tempo's core business is the provision of wireless voice and data services to non-Lifeline customers. Tempo receives the majority of its revenue from the sale of non-Lifeline-supported products and services, such as replenishment minutes of use packages

²⁶ This includes the period of time during which Birch Communications, Inc., Tempo's predecessor entity, provided service.

and non-Lifeline pre-paid voice and data services. Tempo does not rely exclusively on federal Universal Service Fund support to provide its LBUS Plan service. With respect to its LBUS Plan service, Tempo will not seek CHCSM funds.

63. Tempo offers prepaid wireless telecommunications services to retail consumers by using the Sprint network on a wholesale basis. By using the Sprint network, Tempo is able to provide coverage over the entirety of its service territory. Tempo has taken steps to assure that it will remain functional in an emergency situation.

64. Tempo has not been the subject of an enforcement action brought by the FCC or by any state regulatory agency. Tempo has not had its ETC designation terminated, rescinded, or revoked by the FCC or by any state regulatory agency.

65. Tempo will provide universal service on a timely basis to all eligible persons who make a reasonable request for service. In accordance with 47 CFR § 54.202(a)(1)(i), Tempo will comply with service requirements applicable to the support that it receives.

66. Tempo will comply with all FCC-established consumer protection standards and with all applicable Colorado consumer protection rules. *See, e.g.,* Application at 14-15 (discussion of compliance with applicable standards). This includes, among other things, protection of Customer Proprietary Network Information (47 CFR Part 64, Subpart U, as applicable) and, as required by 47 CFR § 54.202(a)(3), compliance with the CTIA Consumer Code for Wireless Service.

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

68. The LBUS Plan is not offered on a distance-sensitive basis, there is no additional charge for toll minutes of use, the LBUS Plan contains a limited number of minutes of use, and the LBUS Plan is prepaid. Consequently, the requirement for toll limitation is satisfied.

69. Tempo will make the required annual filings with the FCC, will provide the required documentation to the FCC, and will make the required reports to the FCC.

70. The *Lifeline Reform Order* requires each applicant seeking ETC designation to submit to the FCC for approval a compliance plan that contains the information discussed in that FCC Order. Tempo has fulfilled this requirement: (a) in August 2012, Birch Communications, Inc. (Birch), received FCC approval of Birch's Compliance Plan for provision of prepaid Lifeline wireless service; (b) in December 2012, Birch notified the FCC that Now Communications, LLC (Now), a separate legal entity, would provide the prepaid Lifeline wireless service that was the subject of the FCC-approved Birch Compliance Plan; (c) Now changed its name to Tempo Telecom, LLC (the Applicant here); (d) in May 2013, Tempo updated and amended the Birch Compliance Plan, which the FCC approved; and (e) Tempo formally adopted the FCC-approved Birch Compliance Plan in September 2013, and the FCC approved/acknowledged the adoption. Application at 3-5 and Exhibits 3-6; Stipulation at Attachment 4.

71. 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 LEC's basic residential local exchange rate.

72. The ALJ finds that the LBUS Plan complies with Rule 4 CCR 723-2-2187(d)(XII). The Tempo LBUS Plan is month-to-month and meets the Rule requirements as a result of the availability and cost of: (a) the Lifeline 900 option; and (b) the additional minutes of use that may be purchased at any time. Rule 4 CCR 723-2-2187(d)(XII) does not require that an 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 comparability standard.

73. The ALJ finds that, with incorporation of the terms and conditions in the Stipulation and its attachments, Tempo meets the requirements for designation as an ETC for the limited purpose of providing wireless Lifeline service in the service area identified in Attachment 1 to the Stipulation.

74. The ALJ finds that, subject to the conditions discussed below and with incorporation of the Stipulation and its attachments, designating Tempo as an ETC for the limited purpose of providing wireless Lifeline service in the service area 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.

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

76. The ALJ finds that, subject to the conditions stated below, Tempo 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 Tempo as ETC for the Limited Purpose of Offering Wireless Lifeline Service.

77. The ALJ finds that each of the following conditions is lawful, is reasonable, and is necessary to assure that designating Tempo 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.

78. First, absent authorization from the Commission, Tempo 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. Tempo will be ordered to file with the Commission an appropriate application in the event Tempo wishes to change its designated service area from that contained in the Stipulation at Attachment 1.

79. Second, Tempo must comply with the Stipulation (including attachments) and with this Decision.

D. Waiver Motion.

80. On April 14, 2014, Tempo filed the Waiver Motion. In this Proceeding, Tempo requests that the Commission grant it a variance from Rule 4 CCR 723-2-2187(d)(III); a full waiver of Rule 4 CCR 723-2-2187(d)(VII); a full waiver of Rule 4 CCR 723-2-2187(d)(XIII); a full waiver of Rule 4 CCR 723-2-2187(f)(II)(A); a full waiver of Rule 4 CCR 723-2-2187(f)(II)(F); a full waiver of Rules 4 CCR 723-2-2187(f)(II)(H), (K), (L), (M), and (N); and a partial waiver of Rule 4 CCR 723-2-2187(f)(II)(O). The ALJ discusses each request.

81. Rule 4 CCR 723-1-1003 governs variances and waivers. Rule 4 CCR 723-1-1003(a) provides, in relevant part, that the

Commission may, for good cause shown, grant waivers or variances from ... Commission rules[.] ... 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.

82. The person 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. Whether to grant a requested variance or waiver lies in the Commission's sound discretion.

83. Rule 4 CCR 723-1-1003(c) describes the content of a request for a waiver or a variance. The Waiver Motion and the Stipulation at 5-8 meet the content requirements.

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

84. In the Waiver Motion, Tempo sought a permanent and full waiver of Rule 4 CCR 723-2-2187(d)(III) for purposes of the Application only. Rule 4 CCR 723-2-2187(d)(III) 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.)

85. Tempo refers to its request as a permanent waiver. The ALJ finds that Tempo seeks a variance for this Proceeding only: in lieu of the metes and bounds description or the underlying carrier's exchange area maps, permit Tempo to describe its service area by means of the list of exchanges appended as Attachment 1 to the Stipulation.

86. The Parties support Tempo's request and state as good cause for granting the requested variance: (a) to provide its wireless Lifeline service, Tempo will use the Sprint

network; (b) the physical network does 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 Tempo's service area. Stipulation at 7.

87. The ALJ finds that Tempo has met its burden of proof with respect to granting the requested variance for purposes of this Proceeding only. In addition, granting the Rule 4 CCR 723-2-2187(d)(III) variance is consistent with similar variances granted to other applicants for designation as ETCs to provide Lifeline service.²⁷ The ALJ finds that the list of exchanges appended as Attachment 1 to the Stipulation satisfies the Rule 4 CCR 723-2-2187(d)(III) filing requirement as to the Application. This ALJ will grant the requested limited variance.

2. Waiver of Rule 4 CCR 723-2-2187(d)(VII) (Portion) and Rule 4 CCR 723-2-2187(d)(XIII).

88. Tempo requests: (a) a full waiver of Rule 4 CCR 723-2-2187(d)(VII); and (b) a full waiver of Rule 4 CCR 723-2-2187(d)(XIII).

89. Tempo seeks a 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. Tempo does not seek waiver of this portion of the Rule.

²⁷ See, e.g., Decision No. R13-0484, issued April 26, 2013 in Proceeding No. 12A-1168T, *In the Matter of the Application of Total Call Mobile, Inc., for Limited Designation as an Eligible Telecommunications Carrier (Total Call Mobile Decision)*; Decision No. R13-0480, issued April 25, 2013 in Proceeding No. 12A-1088T, *In the Matter of the Application of Nexus Communications, Inc., for Designation as an Eligible Telecommunications Carrier for Low-Income Support Only (Nexus Decision)*.

90. As pertinent to the waiver request, Rule 4 CCR 723-2-2187(d)(VII) provides, with respect to the affirmative statement that the applicant for ETC designation will advertise the availability of service and charges, the

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.

Tempo seeks a waiver of this portion of the Rule until such time as Tempo publishes a White Pages directory for its Colorado service area. Waiver Motion at 2.

91. The Parties support this request and state as good cause for granting the requested waiver: (a) Tempo will advertise the availability of its LBUS Plan in media of general distribution; (b) the LBUS Plan is available only to persons who are certified as eligible to receive the service; and (c) Tempo neither maintains nor produces a White Pages directory. Stipulation at 5.

92. The ALJ finds that Tempo 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 content of the Application and Tempo’s assurances made in the Application. The ALJ finds that, under the circumstances of this case, requiring Tempo to place customer guide pages in the White Pages of each telecommunications carrier within Tempo’s service area is unnecessary. Tempo will use a variety of specifically-targeted techniques to advertise the availability of its Lifeline service to the eligible population. In addition, requiring Tempo to place customer guide pages in the White Pages of each telecommunications carrier within Tempo’s service area may cause customer confusion because: (a) Tempo seeks to provide its Lifeline LBUS Plan service within a limited area and not throughout the entire service territory of each carrier; and (b) the Tempo LBUS Plan service will be available only to a subset of persons within the designated service area.

93. The Application and the Stipulation together provide a clear picture of the methods Tempo will use to advertise the availability of its wireless Lifeline service. There is no information, however, with respect to any other service or concerning any other advertising. As a result, the ALJ limits the waiver of Rule 4 CCR 723-2-2187(d)(VII) to the wireless Lifeline service authorized in this Proceeding.

94. The ALJ finds that the following condition is reasonable and appropriate: the waiver automatically will terminate if and when Tempo publishes a White Pages directory in its Colorado service area. This condition relates directly to the stated basis for the waiver. It is appropriate for the waiver to terminate automatically when the circumstances that support the waiver change or no longer exist.

95. For these reasons, the ALJ will grant the requested waiver of Rule 4 CCR 723-2-2187(d)(VII), but the grant is conditioned and limited as set out above.

96. Tempo seeks a full 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.

97. The Parties support this waiver request and state as good cause for granting the requested waiver: (a) Tempo seeks to provide local basic universal service (*i.e.*, Lifeline) to eligible individuals and will use the network facilities of Sprint to provide that service; (b) Tempo seeks neither federal universal service support nor CHCSM support in its Colorado service area; and (c) granting the waiver would be consistent with the treatment of FCC-designated Lifeline-only ETCs. Stipulation at 6.

98. The ALJ agrees that waiving Rule 4 CCR 723-2-2187(d)(XIII) as to Tempo is consistent with the treatment of FCC-designated Lifeline-only ETCs following the *Lifeline Reform Order* and is consistent with this Commission's treatment of other applicants for designation as ETCs to provide Lifeline service.²⁸ For the reasons articulated by the FCC in the *Lifeline Reform Order*, the ALJ finds that the requested waiver should be granted.

99. In addition, the ALJ finds that the requested waiver should be granted because the Rule assumes that an applicant for ETC designation will seek and will expect to receive universal service support. That assumption does not apply to Tempo because, in this Proceeding, Tempo does not seek and thus does not expect to receive universal service support.

100. Finally, the ALJ finds that the requested waiver should be granted because the Rule assumes that the applicant for ETC designation will provide telecommunications service in high-cost areas using its own facilities. That assumption does not apply to Tempo because, at present, it neither owns nor plans to build its own network facilities in Colorado.

101. Because each application has the potential to address different services and each application presents different circumstances, the ALJ will limit the permanent waiver of Rule 4 CCR 723-2-2187(d)(XIII) granted in this Proceeding to the Application.

102. The ALJ finds that Tempo has met its burden of proof with respect to the requested waiver of Rule 4 CCR 723-2-2187(d)(XIII). The ALJ will grant the requested waiver of Rule 4 CCR 723-2-2187(d)(XIII), but the grant is conditioned and limited as set out above.

²⁸ See, e.g., the *Total Call Mobile Decision* and the *Nexus Decision* (each granting a similar waiver).

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

103. Tempo requests: (a) a full waiver of Rule 4 CCR 723-2-2187(f)(II)(A); (b) a full waiver of Rules 4 CCR 723-2-2187(f)(II)(F), (G), (H), (K), (L), (M), and (N); and (c) a partial waiver of Rule 4 CCR 723-2-2187(f)(II)(O). Each request is discussed separately.

104. **Rule 4 CCR 723-2-2187(f)(II)(A).** Tempo seeks a full and permanent waiver of Rule 4 CCR 723-2-2187(f)(II)(A). That Rule provides that an ETC's annual report must contain the

number of requests for service from potential customers within the ETC's service areas that were unfulfilled during the past year and a written explanation detailing how the ETC attempted to provide service to those potential customers, as set forth in 47 C.F.R. § 54.202(a)(1)(i).

105. The Parties support this waiver request. As good cause for granting the requested waiver, the Parties state that, in the *Lifeline Reform Order*, the FCC amended 47 CFR § 54.202(a)(1)(i), which now requires an ETC to "[c]ertify that it will comply with the service requirements applicable to the support that it receives." Tempo asserts that, as amended, 47 CFR § 54.202(a)(1)(i) no longer requires an ETC to report unfulfilled requests for service. Waiver Motion at 6.

106. The ALJ finds that granting Tempo the requested waiver of Rule 4 CCR 723-2-2187(f)(II)(A) is consistent with the federal rule change made in the *Lifeline Reform Order*. In addition, the Stipulation at Attachment 2 at § F requires Tempo to maintain records of held service applications and to report to the Commission, under specified conditions, when it has held service applications. The Stipulation contains procedures that allow the Commission and its Staff to monitor Tempo with respect to held service applications (if any).

107. The ALJ finds that, because each application has the potential to address different services and presents different circumstances, the waiver of Rule 4 CCR 723-2-2187(f)(II)(A) will be limited to the Lifeline service authorized by this Decision.

108. **Rule 4 CCR 723-2-2187(f)(II)(F).** Tempo seeks a full waiver of Rule 4 CCR 723-2-2187(f)(II)(F). That Rule provides that an ETC's annual report must contain a

[c]ertification that the ETC acknowledges the FCC may require it to provide customers with equal access to long distance carriers in the event that no other ETC is providing equal access within the service area.

109. As good cause for granting the requested waiver, Tempo states that, in the *USF/ICC Transformation Order* (FCC 11-161 (rel. Nov. 18, 2011)) at ¶¶ 3, 78 and in amended 47 CFR § 54.101(a), the FCC eliminated the requirement that an ETC grant equal access to interexchange carriers. *See also Lifeline Reform Order* (FCC 12-11 (rel. Feb. 6, 2012)) at note 977 (FCC "no longer mandates that ETCs provide those services that were eliminated from the definition of USF-supported services under section 54.101, but encourages carriers to continue to offer them to customers"). Tempo requests that the waiver be granted permanently or until either the FCC reinstates the equal access requirement for ETCs or the Commission modified Rule 4 CCR 723-2-2187(f)(I)(F). In the Stipulation at 6, the Intervenors support granting this waiver as requested by Applicant.

110. The ALJ finds that, under the circumstances of this Proceeding and in view of the amendment to 47 CFR § 54.101(a), the waiver of Rule 4 CCR 723-2-2187(f)(II)(F) should be granted. The ALJ also finds that it is reasonable to terminate the waiver automatically on the occurrence of the earlier of the following two events: (a) the FCC reinstates the requirement that an ETC must provide equal access to long distance carriers; or (b) the Commission modifies

Rule 4 CCR 723-2-2187(f)(II)(F).²⁹ Each of these events relates directly to the basis underpinning the waiver. It is appropriate for the waiver to terminate automatically when the circumstances that support the waiver change or no longer exist.

111. Because each application has the potential to address different services and presents different circumstances, the waiver of Rule 4 CCR 723-2-2187(f)(II)(F) will be limited to the Lifeline service authorized by this Decision.

112. The ALJ finds that Tempo has met its burden of proof with respect to the requested waiver of Rule 4 CCR 723-2-2187(f)(II)(F). The ALJ will grant the requested waiver of Rule 4 CCR 723-2-2187(f)(II)(F), but the grant is conditioned and limited as set out above.

113. **Rules 4 CCR 723-2-2187(f)(II)(G), (H), (K), (L), (M), and (N).** Tempo seeks a full and permanent waiver of Rules 4 CCR 723-2-2187(f)(II)(G), (H), (K), (L), (M), and (N).

114. Rules 4 CCR 723-2-2187(f)(II)(G), (H), (K), (L), (M), and (N) provide:

(f) Annual Reporting Requirements for Eligible Telecommunication Carriers.

* * *

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

* * *

(G) The total amount of all federal high cost support received in the previous calendar year and year-to-date through June 30 for the current calendar year.

(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 regarding any network improvement targets that have not been fulfilled. This information shall be

²⁹ As to the waiver of Rule 4 CCR 723-2-2187(f)(II)(F), the ALJ does not accept the conditions stated in the Stipulation at 6.

submitted at the wire center level or at the authorized service area [level]. If service improvements in a particular wire center are not needed, 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 31st 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.

(N) A copy of the company's Colorado-specific trial balance for previous year.

115. The Intervenors support this waiver request because the waiver is consistent with the *Lifeline Reform Order*. In the Stipulation at 6, the Parties state that, if granted, the waiver of Rules 4 CCR 723-2-2187(f)(II)(G), (H), (K), (L), and (M) should terminate automatically on the occurrence of the earliest of the following events: (a) Tempo provides services solely on its own network; (b) the Commission modifies Rules 4 CCR 723-2-2187(f)(II)(G), (H), (K), (L), and (M); or (c) the FCC modifies its "own facilities" forbearance. In the Stipulation at 6, the Parties state that the waiver of Rule 4 CCR 723-2-2187(f)(II)(N) should be permanent.

116. The ALJ agrees with the Parties that granting Tempo a waiver of Rules 4 CCR 723-2-2187(f)(II)(G), (H), (K), (L), (M), and (N) 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. Granting the waiver also would be consistent with the 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*, the ALJ finds that the requested waiver of the Rules should be granted.

117. In addition, the ALJ finds that the requested waiver of the Rules should be granted because the cited Rules assume that the reporting ETC provides telecommunications service in high-cost areas using its own facilities. That assumption does not apply to Tempo because, at present, it does not own network facilities in Colorado. Tempo, as a Lifeline-only ETC that provides service through resale, will not receive funds to construct, to improve, or to extend a network. As a result, the ALJ sees little value in requiring Tempo to make annual reports concerning infrastructure. Reducing the reporting burden on Tempo and lessening the administrative burden on Staff are in the public interest.

118. Further, Tempo will provide its Lifeline service in areas directly served by Sprint. Rule 4 CCR 723-2-2187(f)(II)(K) requires an ETC to file maps containing specific information about facilities and coverage. It is unreasonable to expect Tempo to file maps showing the location, and coverage area, of all cellular towers owned by the underlying carrier Sprint. To the extent that it is an ETC in Colorado, Sprint 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.

119. Moreover, 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 for the waiver to terminate automatically when the circumstances that support the waiver change or no longer exist.

120. Finally, the ALJ finds that the Parties have provided no reasonable basis for the not-subject-to-termination-conditions permanent waiver of Rule 4 CCR 723-2-2187(f)(II)(N), which treatment differs from the treatment of the waiver of Rules 4 CCR 723-2-2187(f)(II)(G), (H), (K), (L), and (M). Given that Rules 4 CCR 723-2-2187(f)(II)(G), (H), (K), (L), (M), and (N) all appear to pertain to infrastructure and infrastructure expansion paid for by federal high cost support funds, the ALJ finds no basis for a different treatment of the waiver of Rule 4 CCR 723-2-2187(f)(II)(N). The waiver of Rule 4 CCR 723-2-2187(f)(II)(N) will be subject to the same termination conditions as those that apply to the waiver of Rules 4 CCR 723-2-2187(f)(II)(G), (H), (K), (L), and (M).

121. Because each application has the potential to address different services and presents different circumstances, the waiver of Rules 4 CCR 723-2-2187(f)(II)(G), (H), (K), (L), (M), and (N) will be limited to the Lifeline service authorized by this Decision.

122. The ALJ finds that Tempo has met its burden of proof with respect to the requested waiver of Rules 4 CCR 723-2-2187(f)(II)(G), (H), (K), (L), (M), and (N). The ALJ will grant the requested waiver of Rules 4 CCR 723-2-2187(f)(II)(G), (H), (K), (L), (M), and (N); but the grant is conditioned and limited as set out above.

123. **Rule 4 CCR 723-2-2187(f)(II)(O).** Tempo seeks a partial waiver of Rule 4 CCR 723-2-2187(f)(II)(O). That Rule provides that an ETC's annual report must contain an

affidavit attesting to the fact that the information reported on the annual report and information submitted under [Rule 4 CCR 723-2-2187(f)] is true and correct. The affidavit must also state that the ETC is aware of the purpose of the support for the federal high-cost support and it is complying with the requirement set forth

by the FCC in 47 U.S.C. § 254(e). An officer, director, partner, or owner of the company must sign the affidavit.

124. Tempo seeks a partial and permanent waiver of this Rule so that its affidavit need not contain the statements concerning federal high cost support and compliance with § 254(e) of the Act. If the waiver is granted, Tempo's affidavit will comply with the remainder of the Rule.

125. In support of this request and as good cause for granting the waiver, the Parties state: (a) Tempo is not seeking federal or Colorado high cost support; and (b) granting the waiver is consistent with the *Lifeline Reform Order* reporting requirements. Stipulation at 7.

126. The ALJ agrees with the Parties. In addition, requiring an affidavit to contain an attestation about high cost support when the carrier is not receiving such support appears to serve no purpose. The ALJ finds that the requested waiver of Rule 4 CCR 723-2-2187(f)(II)(O) should be granted.

127. The ALJ also finds that it is reasonable to terminate the waiver automatically if and when Tempo receives high cost support for service in Colorado. This event relates directly to the principal basis for granting the waiver. It is appropriate for the waiver to terminate automatically when the circumstances that support the waiver change or no longer exist.

128. Because each application has the potential to address different services and presents different circumstances, the ALJ finds that the partial waiver of Rule 4 CCR 723-2-2187(f)(II)(O) will be limited to the Lifeline service authorized by this Decision.

129. The ALJ finds that Tempo has met its burden of proof with respect to the requested waiver of Rule 4 CCR 723-2-2187(f)(II)(O). The ALJ will grant the requested waiver of Rule 4 CCR 723-2-2187(f)(II)(O), but the grant is conditioned and limited as set out above.

III. CONCLUSIONS

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

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

132. Consistent with the discussion above, the Joint Responses, which are attached to this Decision as Appendix B and are incorporated by reference, clarify and modify the Stipulation.

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

134. Consistent with the discussion above and consistent with the Stipulation as modified and clarified by the Joint Responses, and subject to the conditions identified above, the Application should be granted.

135. Consistent with the discussion above and consistent with the Stipulation as modified and clarified by the Joint Responses, and subject to the conditions identified above, Tempo should be designated as an ETC for the limited purpose of providing wireless Lifeline service to qualified low-income individuals in the exchanges listed in Attachment 1 to the Stipulation.

136. Consistent with the discussion above and subject to conditions, the Waiver Motion should be granted.

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

138. Consistent with the discussion above and with respect to the Lifeline service authorized by this Decision only, Tempo should be granted a waiver of the Rule 4 CCR 723-2-2187(d)(VII) requirement to place customer guide pages in the White Pages directory within Tempo's service area. This waiver should terminate automatically if and when Tempo publishes a White Pages directory for its Colorado service area.

139. Consistent with the discussion above and as to the Application in this Proceeding only, Tempo should be granted a waiver of Rule 4 CCR 723-2-2187(d)(XIII).

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

141. Consistent with the discussion above and with respect to the Lifeline service authorized by this Decision only, Tempo should be granted a waiver of Rule 4 CCR 723-2-2187(f)(II)(F). This waiver should terminate automatically on the occurrence of the earlier of these two events: (a) the FCC reinstates the requirement that an ETC must provide equal access to long distance carriers; or (b) the Commission modifies Rule 4 CCR 723-2-2187(f)(II)(F).

142. Consistent with the discussion above and with respect to the Lifeline service authorized by this Decision only, Tempo should be granted a waiver of Rules 4 CCR 723-2-2187(f)(II)(G), (H), (K), (L), (M), and (N). This waiver should terminate automatically on the occurrence of the earliest of the following events: (a) Tempo provides service on its own network; (b) the Commission modifies Rules 4 CCR 723-2-2187(f)(II)(G), (H), (K), (L), (M), and (N); or (c) the FCC modifies its blanket forbearance of the "own facilities" requirement.

143. Consistent with the discussion above and with respect to the Lifeline service authorized by this Decision only, Tempo should be granted a partial waiver of Rule 4 CCR 723-2-2187(f)(II)(O). This waiver should terminate automatically if and when Tempo receives federal high cost support for service in Colorado.

144. 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 five attachments) is attached to this Decision as Appendix A and is incorporated by reference into this Decision as if fully set out.

2. The Joint Responses to Administrative Law Judge's Questions in Decision No. R14-0585-I (Joint Responses), which responses were filed on June 20, 2014, are attached to this Decision as Appendix B and are incorporated by reference into this Decision as if fully set out. The Joint Responses modify and clarify the Stipulation and Settlement Agreement filed on April 14, 2014.

3. Consistent with the discussion above and subject to the conditions set out below, the Stipulation and Settlement Agreement, as modified and clarified, is approved.

4. Consistent with the discussion above and subject to conditions, the Joint Motion to Approve Stipulation and Settlement Agreement is granted.

5. Consistent with the discussion above and subject to the conditions set out below, the Application for Designation as an Eligible Telecommunications Carrier for Low Income Support Only filed by Tempo Telecom LLC is granted.

6. Consistent with the discussion above and subject to the conditions set out below, Tempo Telecom LLC is designated an Eligible Telecommunications Carrier (ETC) for the limited purpose of providing Lifeline service to qualified low-income individuals in the Colorado service area described in Attachment 1 to the Stipulation and Settlement Agreement.

7. Consistent with the discussion above, Tempo Telecom, LLC's designation as an ETC in Ordering Paragraph No. 6 is subject to this condition: Tempo Telecom LLC shall comply with the terms of the Stipulation and Settlement Agreement and with the terms of this Decision.

8. Consistent with the discussion above, Tempo Telecom, LLC's designation as an ETC in Ordering Paragraph No. 6 is subject to this condition: Tempo Telecom, 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, Tempo Telecom LLC cannot serve eligible Lifeline service customers in any wire center, or in any portion of any wire center, that is not listed in Attachment 1 to the Stipulation and Settlement Agreement. To change its service area, Tempo Telecom LLC must file an appropriate application with the Commission.

9. Consistent with the discussion above, the Motion for Waiver of Certain Commission Rules filed by Tempo Telecom LLC is granted.

10. Consistent with the discussion above and with respect to the application filed in this Proceeding only, Tempo Telecom LLC is granted a variance from Rule 4 *Code of Colorado Regulations* 723-2-2187(d)(III) to permit Tempo Telecom LLC to describe its service area using the list of exchanges appended as Attachment 1 to the Stipulation and Settlement Agreement.

11. Consistent with the discussion above and with respect to the Lifeline service authorization granted by this Decision only, Tempo Telecom LLC is granted a partial waiver of

the Rule 4 *Code of Colorado Regulations* 723-2-2187(d)(VII) requirement to place customer guide pages in the White Pages directory within Tempo Telecom, LLC's service area. This waiver shall terminate automatically if and when Tempo Telecom LLC publishes a White Pages directory for its Colorado service area.

12. Consistent with the discussion above and with respect to the application filed in this Proceeding only, Tempo Telecom LLC is granted a full and permanent waiver of Rule 4 *Code of Colorado Regulations* 723-2-2187(d)(XIII).

13. Consistent with the discussion above and with respect to the Lifeline service authorization granted by this Decision only, Tempo Telecom LLC is granted a full and permanent waiver of Rule 4 *Code of Colorado Regulations* 723-2-2187(f)(II)(A).

14. Consistent with the discussion above and with respect to the Lifeline service authorization granted by this Decision only, Tempo Telecom LLC is granted a full waiver of Rule 4 *Code of Colorado Regulations* 723-2-2187(f)(II)(F). This waiver shall terminate automatically on the occurrence of the earlier of these two events: (a) the Federal Communications Commission reinstates the requirement that an ETC must provide equal access to long distance carriers; or (b) the Commission modifies Rule 4 *Code of Colorado Regulations* 723-2-2187(f)(II)(F).

15. Consistent with the discussion above and with respect to the Lifeline service authorization granted by this Decision only, Tempo Telecom LLC is granted full a waiver of Rules 4 *Code of Colorado Regulations* 723-2-2187(f)(II)(G), (H), (K), (L), (M), and (N). This waiver shall terminate automatically on occurrence of the earliest of the following events: (a) Tempo Telecom LLC provides service solely on its own network; (b) the Commission modifies Rules 4 *Code of Colorado Regulations* 723-2-2187(f)(II)(G), (H), (K), (L), (M), and

(N); 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).

16. Consistent with the discussion above and with respect to the Lifeline service authorization granted by this Decision only, Tempo Telecom LLC is granted a partial waiver of Rule 4 *Code of Colorado Regulations* 723-2-2187(f)(II)(O). This waiver shall terminate automatically if and when Tempo Telecom LLC receives federal high cost support for service offered in Colorado.

17. 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.

18. 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.

19. 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

Administrative Law Judge

ATTEST: A TRUE COPY

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

Doug Dean,
Director