

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 15M-0158T

IN THE MATTER OF DISTRIBUTIONS FROM THE COLORADO HIGH COST SUPPORT MECHANISM TO ELIGIBLE PROVIDERS IN ACCORDANCE WITH § 40-15-502(5)(A), C.R.S., AS MODIFIED BY THE 2014 TELECOMMUNICATIONS REFORM LEGISLATION.

**INTERIM DECISION ALLOWING
FIRST QUARTER 2015 DISTRIBUTIONS**

Mailed Date: June 1, 2015
Adopted Date: April 29, 2015

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I. BY THE COMMISSION**A. Statement**

1. On March 17, 2015, by Decision No. C15-0243, the Commission opened this Proceeding to determine distributions from Colorado's high cost support mechanism (HCSM) consistent with the 2014 telecommunications reform legislation. We invited interested persons and eligible providers of basic services to submit comments on the application of § 40-15-502(5)(a), C.R.S., to the Commission's calculation of high cost distributions to eligible providers of basic services. We noted that, when Decision No. C15-0243 was issued, we had not received any proposals for the distribution of high cost funds in 2015. We also invited any person to submit proposals to the Commission for its review and approval.

2. Staff of the Colorado Public Utilities Commission (Staff); the Colorado Office of Consumer Counsel (OCC); Qwest Corporation, doing business as CenturyLink QC, CenturyTel of Eagle, Inc., CenturyTel of Colorado, Inc., and El Paso Telephone Company (collectively CenturyLink); NE Colorado Cellular, Inc., doing business as Viaero Wireless (Viaero); the Colorado Telecommunications Association, Inc. (CTA); and Bresnan Broadband of Colorado, LLC (Bresnan) each filed comments in response to Decision No. C15-0243.

3. On April 17, 2015, CenturyLink filed a Motion for Interim Determination of Support (CenturyLink Motion). CenturyLink requests that the Commission issue a decision requiring support for the first quarter of 2015 to be calculated using the same methods that were used to calculate support for the first quarter of 2014 but omitting any support for the 56 wire centers found to be effectively competitive.

4. By Decision No. C15-0410-I issued April 30, 2015, we established that the parties in this Proceeding are Staff; OCC; CenturyLink; AT&T Corp. and Teleport Communications America LLC (collectively AT&T); Comcast Phone of Colorado, LLC (Comcast); Viaero; Northern Colorado Communications, LLC (NCC); CTA; and Sprint Communications Company L.P. and Sprint Spectrum L/P, doing business as Sprint PCS (collectively Sprint).¹ We also waived the April 30, 2015, date for first quarter HCSM distributions under Rule 2848(e) of the Commission's Rules Regulating Telecommunications Providers, Services, and Products, 4 *Code of Colorado Regulations* 723-2.

5. By this Decision, we allow interim HCSM distributions for the first quarter of 2015 for all eligible providers, based upon the amounts of HCSM support provided on a per wire center, per access line basis in 2014. This Decision therefore grants, in part, the CenturyLink Motion, as discussed below.

B. Support Provided in Proceeding No. 04M-388T

6. The Commission opened Proceeding No. 04M-388T by Decision No. C04-0869, issued July 30, 2004, for the purpose of establishing a method for calculating HCSM support for the 2005 calendar year. Although the stated purpose of Proceeding No. 04M-388T was to establish only a method for determining high cost support such that actual funding would be determined in separate proceedings, a pattern emerged in which the parties filed stipulations and settlement agreements that addressed both the basis for calculated support and the amount of HCSM disbursements paid to Qwest Corporation. In general, each settlement proposed to the Commission agreed upon amounts that would apply to a single upcoming calendar year.

¹ As of the issuance of Decision No. C15-0410-I on April 30, 2015, Bresnan had not filed a notice or motion for intervention. We directed Bresnan to file a motion to intervene no later than May 8, 2015, if it seeks to participate in this Proceeding as a party.

7. By Decision No. C14-0353, issued on April 3, 2014, in Proceeding No. 04M-388T, the Commission approved the stipulation and settlement agreement reached by CenturyLink and Staff for HCSM support in 2014. For purposes of determining the HCSM disbursement to CenturyLink, CenturyLink and Staff agreed to use a proxy cost model that generates an average cost to provide basic service in each of CenturyLink's specific wire centers. Without endorsing the use of the model, the parties agreed to a variation of the model to produce an estimated annual distribution to CenturyLink in 2014 of approximately \$61 million. Because this projected amount exceeded the total annual cap of \$54 million for the HCSM fund under Rule 2843(c), the approved stipulation guaranteed an amount of distributions to rural providers and, using a proportional "sizing factor," adjusted the distributions to CenturyLink and Viaero to fit under the cap.²

C. "Unaffected Support" Under § 40-15-502(5)(a), C.R.S.

1. Commission Interpretation of § 40-15-502(5)(a), C.R.S.

8. As explained in Decision No. C15-0243 issued March 17, 2015, there are two primary purposes of the HCSM: (1) to support the provisioning of basic telephone service in rural, high cost areas; and, (2) to provide access to broadband service through broadband networks in unserved areas. §§ 40-15-208(2)(a)(I)(A) and (B), C.R.S. Legislation amending Article 15 to Title 40 addressing telecommunications services limits a carrier's eligibility to receive high cost support for basic services only in areas without effective competition for basic services. §§ 40-15-208(2)(a)(I)(A), and 502(5)(a), C.R.S. The Commission adjudicates

² By Decision No. C12-1442, issued December 17, 2012, in Proceeding No. 12R-862T the Commission adopted an annual cap of \$54 million on the HCSM fund. No party sought judicial review of the Commission's adoption of the rule imposing the \$54 million cap. As the Supreme Court has affirmed, the absence of a judicial review or a court order setting aside or modifying an adopted rule precludes a subsequent collateral attack upon the rule. *Mountain States Tel. and Tel. Co. v. Pub. Utils. Comm'n*, 527 P.2d 524, 528-29 (Colo. 1974).

effective competition cases applying the factors stated in section 207 of Article 15. § 40-15-502(5)(a), C.R.S.

9. Because not all geographic areas of Colorado have been subject to a Commission proceeding under section 207 to determine whether they are without effective competition for basic service, the reform legislation addresses high cost fund distributions during the interim period between passage of the legislation and completion of a section 207 proceeding.

The revised statute says:

In order to accomplish the goals of universal basic service ... the commission shall create a system of support mechanisms to assist in the provision of basic service in high-cost areas that are without effective competition for basic service, applying the factors stated in section 40-15-207; except that support provided in a particular geographic support area is not affected until the commission makes a finding applying the factors listed in section 40-15-207.

(emphasis added)

10. In Decision No. C15-0243 we stated that we interpret this language, the unaffected support clause, to mean that, until we have completed a section 207 determination of effective competition for a geographic area, the HCSM support for that area remains the same on a per access line basis as the support distributed in 2014.

2. Comments on Commission Interpretation

11. Comments on the application of the statute to the Commission's distribution of high cost support to eligible providers of basic service in 2015, and afterward, were received from Staff, CenturyLink, OCC, Viaero, CTA, and Bresnan.

a. Staff's Comments

12. Staff suggests that the General Assembly's intent with the unaffected support clause was simply to prohibit HCSM fund distributions in geographic areas that the Commission had determined to be effectively competitive. Staff suggests that the Commission can allow the

HCSM Administrator to calculate distributed funds in the same manner in which this has traditionally been done and in accordance with the process in place when the law was passed. Staff provides a legislative history of the statute, but concludes that the history “neither explicitly supports nor refutes” the Commission’s interpretation.

13. Staff goes on to caution that, by employing the Commission’s interpretation of the law, “the Commission will encounter difficulties complying with statutory and practical aspects of administering the [HCSM].”³ According to Staff, by setting payments at 2014 levels the Commission will run counter to the Legislative requirement of considering reasonable costs, a benchmark rate, and receipt of federal price support funds when setting HCSM disbursements. Furthermore, the 2014 support level might not reflect that true compensation a carrier should receive in 2015 and in subsequent years, putting the Commission in conflict with § 40-15-208(2)(a)(II), C.R.S., which states, “The commission shall ensure that no local exchange provider is receiving funds from [the HCSM] or any other source that, together with local exchange service revenues, exceeds the cost of providing local exchange service to the provider’s customers.” Additionally, Staff raises the concern that the Commission’s interpretation does not allow for new eligible providers to request support after 2014.

14. Staff suggests that the manner in which to address its view of the ambiguities raised by the “unaffected support” clause is to continue administering the HCSM as it has traditionally done. That is, to rely on stipulations by the parties and to ensure that HCSM funds are not distributed in geographic service areas that have been determined to be effectively competitive.

³ Staff Comments, p. 6

15. Staff argues that application of the Commission's interpretation of the unaffected support clause may mean that the current 2.6 percent surcharge set to support the HCSM fund will be insufficient to provide support through 2015. Staff maintains that, if the Commission were instead to interpret the clause as simply prohibiting HCSM distributions in areas found to have effective competition under section 207 but allowing the Administrator to use annual stipulations to determine support in eligible service areas, Staff and CenturyLink could propose an arrangement that would allow for the surcharge to remain at 2.6 percent.

16. Finally, Staff requests that the Commission order an interim first quarter HCSM payment to comply with Rule 2848(e).

b. OCC Comments

17. The OCC disagrees with the Commission's interpretation of the unaffected support clause. The OCC construes that clause to require only the continuation of the current procedures for determining support. The OCC contends that the Commission's interpretation of the unaffected support clause is inconsistent with § 40-15-208(2)(a)(I), C.R.S., which authorizes the Commission to reimburse providers for the difference between reasonable costs and a reasonable benchmark for basic service. The OCC also expresses concern that the Commission's interpretation of the clause could preclude new applicants from seeking HCSM support in areas without effective competition.

c. CenturyLink's Comments

18. CenturyLink, a "non-rural eligible provider" receiving HCSM support in 2014, states that the interpretation of the unaffected support clause requires consideration of legal and policy principles not included in the Commission's analysis and interpretation. Therefore, CenturyLink suggests that the Commission should not establish an interpretation of the

unaffected support clause without first looking more broadly at statutory requirements, including the reimbursement language of § 40-15-208(a)(I)(A), C.R.S., and potential consequences, such as increases to the HCSM surcharge. CenturyLink recommends that the Commission not establish an interpretation of the unaffected support clause at this time.

19. Specifically, CenturyLink maintains that the Commission cannot invoke an interpretation of the unaffected support clause that conflicts with the “fully reimbursed” principle of § 40-15-208(a)(I)(A), C.R.S. This principle, CenturyLink argues, has been maintained for more than a decade through the methods employed for determining HCSM distributions, which are rooted in a proxy cost model. CenturyLink expresses concern that the Commission’s interpretation improperly affects support by changing the manner in which distribution amounts are calculated and by disregarding the effect of access line counts on distribution for a geographic support area. Since the Commission has relied on a methodology rooted in a proxy cost model for more than a decade, CenturyLink takes the position that the Commission should continue providing support using the proxy cost model.

20. CenturyLink also expresses confusion as to what the Commission intended in its statement that HCSM support would continue “in the same amount as distributed on a per support areas and per line basis in 2014.”⁴ CenturyLink maintains that “per support area” and “per line basis” are two separate calculations, unless the 2014 line counts are applied in 2015.

⁴ CenturyLink comments at p. 2.

21. The 2.6 percent surcharge is also a concern of CenturyLink. CenturyLink notes that the expected 2015 collections at the 2.6 percent rate will not meet fund distribution calculations. CenturyLink argues that, regardless of how the Commission interprets the unaffected support clause, the surcharge will need to be increased to fund basic service.

d. Viaero Comments

22. Viaero, a “competitive eligible provider” which received HCSM support in 2014 through the provisions in the Commission’s HCSM rules providing “identical support,” generally agrees with the Commission’s interpretation of the unaffected support clause, noting that it reads the Commission’s interpretation to allow variation in line counts within a geographic area, but not in the support amount per line.

23. However, Viaero raises a concern about the HCSM \$54 million cap and how the cap can be reconciled with the unaffected support interpretation that will maintain support at 2014 levels, as well as the statutory requirement that providers be fully reimbursed for providing service in high cost areas. § 40-15-208(a)(I)(A), C.R.S. Noting that intrastate revenues continue to fall, Viaero questions whether the Commission’s ability to apply a sizing factor to HCSM distributions will be compromised by its interpretation of the unaffected support clause. In a scenario in which reductions would be necessary to stay within the cap, Viaero expresses its concern that the Commission would have to reduce support in areas that had not been found effectively competitive in a section 207 adjudication; this could lead to underfunding in those areas and would be in violation of § 40-15-208(a)(I)(A), C.R.S. Viaero acknowledges that this discussion could be beyond the scope of the instant proceeding, but suggests that the Commission address the interplay of its interpretation of the unaffected support clause, section 208, and declining HCSM collections.

e. CTA Comments

24. CTA, which represents the rural carriers in Colorado including those that received HCSM support in 2014, states that the Commission's decision to interpret § 40-15-502(5)(a), C.R.S., is premature and unnecessary because "not affected" means that "unless and until the Commission makes effective competition findings, the [HCSM] is not impacted by the reform legislation."⁵

25. CTA states that the Commission should continue to administer the fund as it currently does until the HCSM rules are modified. CTA advocates comprehensive reform of the HCSM in order to meet the mandates of § 40-15-208, C.R.S., rather than freezing the funding levels of the HCSM recipients, an act which CTA maintains is unfair to fund recipients and their customers.

f. Bresnan Comments

26. Bresnan focuses its comments on the statutory prohibition on a carrier receiving HCSM support that is greater than the cost of providing basic service in a geographic area. § 40-15-208(2)(a)(II), C.R.S. Bresnan suggests that the Commission's interpretation of the unaffected support clause could result in unintended subsidization of local exchange carriers. In order to avoid this, Bresnan recommends interpreting § 40-15-502(5)(a), C.R.S., so that any geographic area previously determined eligible for HCSM funds remains eligible, but that support is recalculated every year until the area has been subject to an effective competition determination by the Commission.

⁵ CTA Comments, p. 3

3. CenturyLink Motion

27. In a motion filed on April 17, 2015, CenturyLink requests that the Commission issue a decision providing first quarter 2015 HCSM distributions based on a tentative calculation subject to true-up “depending on a more final and comprehensive evaluation.” Specifically, support to eligible providers for the first quarter of 2015 would be calculated using the same methods as were used under the 2014 Stipulation and Settlement Agreement approved in Proceeding No. 04M-388T, but omitting any support for the 56 wire centers found to be effectively competitive.

D. First Quarter 2015 HCSM Distributions

28. As described above, the pattern for putting forward proposed HCSM distributions for Commission consideration had been the filing of stipulation and settlement agreements in Proceeding No. 04M-388T. Such filings had been submitted in October or November for the upcoming year beginning in 2005, with the exception of HCSM distributions for 2014, which were addressed in a Stipulation and Settlement Agreement filed on March 14, 2014.

29. The Commission opened this proceeding by Decision No. C15-0243 because no proposals for distribution of high cost funds in 2015 had been submitted for Commission review prior to March 11, 2015.⁶ Despite the absence of any proposal filed as of March 11, 2015, the Commission encouraged and allowed for the submission or proposals or stipulations addressing high cost distribution in 2015 in this Proceeding.⁷ No proposals or stipulations addressing high cost distribution in 2015 were filed in this Proceeding prior to the Commissioners’ Weekly Meeting on April 29, 2015.

⁶ Decision No. C15-0243, Proceeding No. 15M-0158T, ¶ 6.

⁷ Decision No. C15-0243, Proceeding No. 15M-0158T, ¶ 9.

30. Nevertheless, we find that the continued provision of high cost support in 2015 is required by the legislation enacted in 2014 in areas where the Commission has yet to make findings on effective competition under section 207. We therefore instruct the HCSM Administrator to provide interim first quarter 2015 payments to the eligible providers in accordance with the distributions paid in 2014, excluding the 56 wire centers with effective competition. Notwithstanding our preference for a per line distribution, meaning that an eligible provider must be delivering service over a line to receive a distribution for that line, thus resulting in less total distributions if a provider's line count decreases, for efficiency sake, the amounts for the interim distributions shall be one-fourth of the annual distributions per wire center as set forth in Confidential Attachments A through C to this Decision.⁸ The interim first quarter 2015 payments shall be subject to true up in accordance with future decisions regarding high cost support in 2015. Consistent with Decision No. C15-0410-I, the HCSM Administrator will arrange for payments as soon as practical and make routine adjustments for net recipients and reconciliations.

31. We also grant, in part, the CenturyLink Motion. We authorize the HCSM Administrator to arrange for an interim first quarter 2015 payment to CenturyLink based on the amounts distributed on a per support area basis in 2014 as set forth in Confidential Attachment A. We do not adopt CenturyLink's proposed calculation of interim support, because

⁸ Because data contained in Attachments A, B, and C could be used to derive information considered proprietary by providers, we designate and treat these attachments as confidential exhibits to this Decision. Pursuant to rule 1100(f), the information in the attachments is derived from prior proceedings and filings in which information was provided as confidential. The attachments shall be maintained as confidential, subject to rule 1100, unless and until further determinations are made by the commission.

the continued application of the methods in the 2014 Stipulation and Settlement Agreement is incompatible with the potential for transfers from the HCSM fund to the Broadband Development Board under § 40-15-509.5, C.R.S. The payment of quarterly distributions determined “as if the fund were not capped” also is improper, because later reconciliation in the fourth quarter has been shown to hamper the allocation of funds to the Broadband Development Board. The quarterly payment approach per the 2014 Stipulation and Settlement also applies unneeded pressure on quarterly HCSM Fund balances due to the inflated “un-sized” payments made in the first three quarters.

32. On our own motion, we also provide interim disbursements to the rural and wireless carriers (Viaero and NNTC Wireless) for the first quarter of 2015. The amounts for the interim distributions for the rural carriers are set forth in Confidential Attachment B to this Decision. The amounts for the interim distributions to the wireless carriers are set forth in Confidential Attachment C to this Decision.

33. Our decision to provide interim high cost distribution for the first quarter of 2015 is not intended to foreclose the submission of proposals for Commission approval. We will address high cost distribution for the second quarter of 2015 by separate decision. Proposals or stipulations addressing the remaining high cost distribution in 2015 must be filed in this Proceeding no later than June 30, 2015. Such proposals shall address any necessary reconciliation of the interim first quarter payments made by the HCSM Administration pursuant to this Decision.

II. ORDER

A. It Is Ordered That:

1. The Administrator of the Colorado high cost support mechanism shall calculate and distribute interim first quarter 2015 payments of high cost distributions to eligible providers, consistent with the discussion above.

2. The Motion for Interim Determination of Support filed on April 17, 2015, by Qwest Corporation, doing business as CenturyLink QC, CenturyTel of Eagle, Inc., CenturyTel of Colorado, Inc., and El Paso Telephone Company is granted, in part, and denied, in part, consistent with the discussion above.

3. Attachments A, B, and C, which identify support by wire center and could be used to derive information designated by providers as proprietary, shall be designated and treated as confidential exhibits.

4. This Decision is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
April 29, 2015.**

(S E A L)



ATTEST: A TRUE COPY

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

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JOSHUA B. EPEL

PAMELA J. PATTON

GLENN A. VAAD

Commissioners