

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 02A-444T

IN THE MATTER OF THE APPLICATION OF N.E. COLORADO CELLULAR, INC.
TO RE-DEFINE THE SERVICE AREA OF EASTERN SLOPE RURAL TELEPHONE
ASSOCIATION, INC., GREAT PLAINS COMMUNICATIONS, INC., PLAINS COOP
TELEPHONE ASSOCIATION, INC. AND SUNFLOWER TELEPHONE CO. INC.

**DECISION DENYING EXCEPTIONS AND
MOTION TO REOPEN RECORD**

Mailed Date: October 2, 2003
Adopted Date: August 27, 2003

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

1. This matter comes before the Commission for consideration of the Combined Exceptions and Motion to Reopen the Record filed by the Colorado Telecommunications Association (CTA). CTA, pursuant to the provisions of § 40-6-109(2), C.R.S., excepts to Decision No. R03-0568 (Recommended Decision). In that decision, the Administrative Law Judge (ALJ) recommended approval of the Application by N.E. Colorado Cellular, Inc. (NECC). That Application requested a Commission order which: (a) redefines each wire center of Eastern Slope Rural Telephone Association (Eastern Slope), Plains Co-op Telephone Association (Plains Co-op), and Sunflower Telephone Company, Inc. (Sunflower), as a separate service area; and (b) designates that portion of Great Plains Communications, Inc.'s (Great Plains) Venango Wire Center that lies within Colorado as a separate service area. Eastern Slope, Plains Co-op, Sunflower, and Great Plains (collectively rural carriers) are rural incumbent local exchange carriers (ILECs) under the provisions of 47 U.S.C. § 214(e) and related rules of the Federal Communications Commission (FCC). NECC's Application also requested that the Commission seek an agreement from the FCC with the proposed redefinition of the above-referenced rural service areas.

2. As stated above, the ALJ recommended that we approve NECC's requests in their entirety. CTA filed its Exceptions and Motion to Reopen Record on behalf of the rural carriers. NECC, Commission Staff (Staff), and Western Wireless Corporation filed their Joint Response opposing the Exceptions and the Motion to Reopen Record. The Colorado Office of Consumer Counsel (OCC) also filed its Response opposing the Motion to Reopen Record. Additionally, in Decision No. C03-0816 (Mailed Date of July 24, 2003) we directed the parties to file

supplemental briefs addressing certain questions relevant to the Application here. *See* discussion *infra*. All of the parties submitted supplemental briefs on those questions.

3. Now being duly advised in the matter, we deny the Exceptions and the Motion to Reopen Record by CTA, and affirm the Recommended Decision. Specifically, we agree with NECC that the rural carriers' service areas should be redefined as requested in the Application. NECC is directed to file a petition with the FCC for its concurrence in redefining the rural carriers' service areas.

II. STATEMENT OF THE CASE

4. NECC is a cellular telecommunications provider and a common carrier as defined in 47 U.S.C. § 153(10). In Docket Nos. 00A-315T and 00A-491T, we designated NECC an Eligible Telecommunications Carrier (ETC) to enable it to receive support from the federal Universal Service Fund (USF), and an Eligible Provider (EP) to enable it to receive support from the Colorado High Cost Support Mechanism (HCSM). At the conclusion of those dockets, NECC became eligible to receive USF and HCSM funds for telecommunications service provided in certain non-rural wire centers and in rural study areas that NECC served in their entirety. In this docket, NECC requested that we redefine the service areas of the rural carriers that, if not redefined, NECC could not serve in their entirety. The purpose of the Application is for NECC to become eligible to receive USF and HCSM funds for the lines it serves in the redefined service areas. The OCC, CTA, Western Wireless, and Staff each filed timely interventions in this proceeding. NECC, Staff, and Western Wireless urged the Commission to grant the Application. CTA opposed the Application. After a hearing in the matter, the ALJ recommended that we approve the Application.

III. APPLICABLE STATUTES AND RULES

5. Section 254 of the federal Telecommunications Act of 1996 (the Act)¹ contains the prerequisites for a telecommunications provider's receipt of USF support. To receive such support, a provider must be designated an ETC pursuant to § 214(e) of the Act; and the funds provided can be used only "for the provision, maintenance, and upgrading of facilities and services for which the support is intended." In order to receive USF support, an ETC must offer supported services "throughout the service area" for which designation as an ETC is received. See § 214(e)(1). Notably, § 214(e)(5) provides:

The term "service area" means a geographic area established by a State commission (or the Commission under paragraph (6)) for the purpose of determining universal service obligations and support mechanisms. *In the case of an area served by a rural telephone company, "service area" means such company's "study area" unless and until the Commission and the States, after taking into account recommendations of a Federal-State Joint Board instituted under section 410(c) of this title, establish a different definition of service area for such company.*

(emphasis added)

6. Pursuant to these statutory directives, the Federal-State Joint Board on Universal Service (Joint Board) issued a decision on November 8, 1996. *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Recommended Decision, FCC 96J-3 (rel. Nov. 8, 1996). The Joint Board Decision established policies for the advancement and preservation of universal service and made recommendations concerning the definition of service areas for rural ILECs. The Joint Board recommended that the study areas of rural ILECs should be adopted as their service areas. *Id.* at ¶ 174. Furthermore, the Joint Board identified three specific principles that the FCC and state commissions should use when considering requests to

¹ All referenced sections of the Federal Telecommunications Act of 1996 are found in Title 47 of the United States Code.

redefine rural ILECs' service areas.² First, a service area designation should “minimize ‘cream skimming’ by potential competitors.” *Id.* at ¶ 172. Second, a service area designation should recognize the special status of the affected ILEC as a rural telephone carrier. *Id.* at ¶ 173. Third, a service area designation should take into account the administrative burden imposed when a rural telephone company must determine its embedded costs on a basis other than its entire study area. *Id.* at ¶ 174. The issue presented by this Application, therefore, is whether the proposed service area redefinitions meet the requirements of the Joint Board test.

IV. RECOMMENDED DECISION

7. The Recommended Decision would grant NECC's Application to redefine the rural carriers' service areas. The ALJ found that the evidence presented in this proceeding established that the proposed redefinition of the service areas of Eastern Slope, Plains Co-op, and Sunflower meets the Joint Board test (Recommended Decision, ¶71). In addition, after determining that the Commission has the authority to do so, the ALJ found that the evidence presented in this proceeding establishes that the proposed redefinition of the Colorado portion of Great Plains' service area also meets the Joint Board test (RD ¶73). She recommended that the Commission, pursuant to 47 CFR § 54.207, file petitions with the FCC to obtain its agreement with the service area redefinitions. Additionally, the ALJ granted NECC's Motion to Strike Portions of CTA's Closing Statement of Position.

8. As for the Joint Board test for redefining rural service areas, the ALJ found that minimization of the opportunity for “cream-skimming” was addressed adequately when the affected rural ILECs elected not to disaggregate and target their universal service support

² The Recommended Decision refers to these principles as the Joint Board test.

pursuant to Path 1 of FCC Rule 47 C.F.R. 54.315.³ She found that redefining the service areas of the affected ILECs here does not increase the opportunity for “cream-skimming” (RD ¶58). The ALJ concluded that redefining the service areas of the affected rural ILECs would not change or affect the special status accorded to these ILECs as rural telephone carriers (RD ¶61). Finally, the ALJ found that redefining the service areas of the affected rural ILECs will not impose an administrative burden on those carriers because they will continue to determine their embedded costs on a study area basis, as they do now.

9. The ALJ set forth a comprehensive response to what she characterized as the four principal arguments made by CTA in opposition to the Application. She found none of these arguments persuasive and found some contrary to federal and state statutes. Among the arguments rejected by the ALJ was CTA’s invitation that the Commission reassess its policy direction with respect to the facilitation of entry by competitive ETCs into the study areas of rural ILECs. According to the ALJ, the FCC’s long-standing policy has been and remains the promotion and advancement of universal service and the simultaneous encouragement of competition in rural areas. She stated that CTA’s suggestion runs counter to this federal policy.

³ Both the FCC and this Commission have recognized that the cost of serving customers is not the same throughout a study area, thus, disaggregation of support to reflect that varying cost is necessary to create the proper entry incentives. When costs vary, the averaging of support creates artificial barriers to entry in high cost areas and artificial entry incentives in low cost areas. Disaggregation of support is necessary to prevent inappropriate practices that could seriously affect the existing rural ILECs, such as “cream skimming” of customers, especially where a new entrant will not serve the entire study area. Under the embedded cost mechanism, federal USF support for rural carriers was averaged across all lines served by a carrier within its study area. Thus, the support on a per-line basis was the same throughout a study area even though costs of service to customers in that study area were likely to vary. Pursuant to 47 C.F.R. 54.315 (*see* FCC Decision 01-157 (CC Docket No. 96-45 and CC Docket No. 00-256)), on or before May 15, 2002, all rural ILECs were required to consider disaggregation of their USF support under one of three Paths. The rural ILEC could choose: not to disaggregate support (Path 1); file with a state commission for review and approval of a disaggregation plan (Path 2); or self-certify a method of disaggregation of support to a wire center level with no more than two zones per wire center (Path 3). Each of the rural ILEC’s in this docket chose Path 1. That is, they chose not to disaggregate support.

Also, based on the Commission's consistent statements in the area of telecommunications policy, she discerned no Commission interest in changing the pro-competition policy which the Commission has followed since the Colorado Telecommunications Act of 1995 (§ 40-15-501 *et seq.*, C.R.S.) was enacted (Recommended Decision, ¶¶ 79, 81).

V. COMBINED EXCEPTIONS AND MOTION TO REOPEN RECORD

A. Motion to Reopen Record

10. CTA requests that, prior to acting upon the Exceptions, the Commission reopen the record to take additional evidence. First, according to CTA, important policy developments at the federal level have taken place subsequent to the January hearing and the February filing of Closing Statements of Position that bear directly on issues in this docket. CTA claims that a number of comments filed in a proceeding pending at the FCC⁴ have urged action on the part of the Federal-State Joint Board and the FCC to protect the integrity of the USF, to limit future wireless ETC designations by state commissions, and to impose a moratorium on new ETC applications while assessing and evaluating the FCC's policy direction. CTA notes that the National Association of State Utility Consumer Advocates (NASUCA) submitted comments at the FCC raising policy issues relevant to the instant docket. CTA argues that the implications both of the pending FCC Federal-State Board decisions on the furtherance of CETC access to USF support, and the policy positions outlined in the NASUCA filing should be examined in this docket.

⁴ *Federal-State Joint Board on Universal Service Seeks Comment on Certain of the Commission's Rules Relating to High-Cost Universal Service Support and ETC Designation Process* (CC Docket No. 96-45; FCC 03J-1).

11. CTA claims that the Commission in its role in certifying ETCs and balancing the interests of competition against the interests of maintenance and preservation of universal service fulfills a fiduciary or trustee-like responsibility which requires that we assure ourselves that evolving policy positions are well understood before reaching a decision that will have an impact on the USF. CTA argues that a continued “business as usual” approach to ETC certification and rural ILEC service area redefinitions puts added strain on an already strained USF. According to CTA, interested parties, including CTA itself, should have an opportunity to provide comment on whether consumers have realized the promised benefits of increased competition as a result of new ETC certifications. CTA contends that a “huge amount” of information on the USF policy debate is readily available in the public record (*e.g.*, the OPASTCO white paper).

12. The Joint Response and the Response by the OCC oppose the Motion to Reopen the Record. The Joint Response suggests: CTA’s claim that there are new developments warranting a reopening of the record is incorrect. There are no new rules implemented by the FCC that would affect this proceeding. Indeed, there are no new rules even proposed by the FCC relevant to this proceeding. CTA cites no authority in support of the proposition that this proceeding must halt simply because something may happen in the future. The Joint Response contends that continuing delay in redefining rural service areas harms Colorado’s rural consumers. Therefore, CTA’s Motion to Reopen the Record should be rejected and the additional “extra-judicial” evidence CTA presented in its exceptions should be disregarded.

13. The OCC responds: The issues CTA suggests that we reopen the record to consider are beyond the scope of this docket. The relevant issues here include only those necessary to determine whether NECC’s Application met the three-part test articulated by the Joint Board for redefinition of service areas. In contrast, CTA suggests that we reopen the record

to consider issues much broader than these discrete issues. According to the OCC, CTA is essentially requesting that we undertake a Colorado parallel to the pending Joint Board docket. While such an inquiry could be appropriate at some time in the future--perhaps after the FCC has completed its inquiry--it is not appropriate here. In short, CTA misperceives the purpose of this docket. Therefore, the OCC recommends, the Commission should deny the Motion to Reopen the Record.

14. We agree with the Joint Response and the Response by the OCC. There are no new rules adopted by the FCC that would affect this proceeding since the Recommended Decision was issued. As the Responses point out, there are no new rules even proposed by the FCC relevant to this case. We concur with the responses that the only relevant issues here are those related to whether NECC's Application meets the three-part test articulated by the Joint Board and adopted by the FCC for redefinition of service areas. The issues CTA suggests the Commission should reopen the record to consider are beyond the scope of this docket. We also agree that continuing delay in redefining rural service areas will harm Colorado's rural consumers. For these reasons, we deny CTA's Motion to Reopen the Record.

VI. EXCEPTIONS

15. CTA first excepts to the ALJ's decision to grant NECC's Motion to Strike CTA's references to the OPASTCO "White Paper." According to CTA, the Recommended Decision confuses the judicial role of the ALJ with the policy role of the Commission. CTA contends that the Commission, as part of its authority to determine "policy" on these matters, has the discretion to consider the OPASTCO "White Paper" even after the close of hearings in this case. Therefore, the White Paper should remain as part of the record in these proceedings and be given due consideration in our final decision.

16. The Joint Response opposes these suggestions. The parties contend that CTA improperly continues to attempt to introduce “extrajudicial” evidence into the record. According to the Joint Response, following the close of the hearing CTA attempted to introduce opinions into the record in the form of the White Paper, a document published by a lobbying organization. The ALJ properly noted that, if that document were admitted, NECC and other parties to the proceeding would be denied an opportunity to cross-examine the author(s) of the paper and present evidence to rebut the opinions expressed therein. The Joint Response also objects to CTA’s further attempt to introduce new evidence into the record within the text of its Exceptions. They contend that by quoting extensively and exclusively from one out of dozens of comments filed in the pending Joint Board proceeding, CTA is attempting to influence our decision here, without giving any other party the opportunity for cross-examination or rebuttal in the course of this adjudicative proceeding.

17. We agree with the ALJ’s decision to grant NECC’s Motion to Strike CTA’s references to the OPASTCO “White Paper,” and deny the Exceptions on this point. As NECC stated in its motion, CTA’s post-hearing references to the White Paper were an improper attempt to introduce opinion testimony from a person who did not testify. Further, it was done after the close of the evidentiary record. As the ALJ noted, CTA never explained why the White Paper was not offered as evidence during the hearing when cross-examination could have occurred and possible rebuttal evidence offered. We also agree with the ALJ’s analysis of the evidentiary value of the White Paper even if it were considered on the merits of this case. Namely, it contains no information specific to Colorado, nor specific to the affected rural ILEC in this proceeding. In addition, it addresses issues beyond the scope of this proceeding (*i.e.*, whether the Application meets the Joint Board test).

18. The Exceptions then argue that the Recommended Decision lacks critical findings. According to CTA, while evidence was presented in this docket concerning impacts on universal service that would result from the service area redefinitions (*see* Cross Answer Testimony of Kevin Kelly, p.4, line 11), no findings were made by the ALJ. Therefore, CTA contends, there is no factual underpinning in the Recommended Decision for the conclusion that redefining the service areas of the affected rural ILECs will advance universal service.

19. The Joint Response suggests that a specific finding on advancement of universal service is not necessary in this proceeding. The parties argue that CTA overlooks the fact that advancement of universal service is inherent in the three-part test set forth by the Joint Board, as noted in the Recommended Decision. Thus the ALJ did not err in declining to repeat factual findings that were not essential to this proceeding, but were well developed in NECC's petition for ETC status which was granted by the Commission in a prior case. Moreover, the Joint Response suggests, there is ample record evidence on which to base a finding that universal service will be advanced should the Commission wish to include this finding in a final decision.

20. We agree with the Joint Response that a specific finding regarding advancement of universal service is not necessary in order to approve the Application. Specifically, such a finding is not necessary to conclude that the Joint Board test is met, or to approve the Application. In addition, we agree with the Joint Response that a finding of advancement of universal service is inherent in the three-part test set forth by the Joint Board, as properly noted

by the ALJ in footnote 9⁵ of the Decision.⁶ Thus the ALJ did not err in declining to repeat factual findings that were not essential to this proceeding.

21. Next, CTA excepts to the determination in the Recommended Decision (paragraphs 88 and 89) that the Colorado portion of Great Plains' Venango Wire Center should be redefined as a separate service area. According to CTA, the Commission has not previously sanctioned "sub-wire-center" service areas. CTA argues that the Commission's own rules concerning disaggregation and targeting of support for rural ILECs (4 *Code of Colorado Regulations* (CCR) 723-42-10 and 4 CCR 723-42-11) require that a carrier's choice in disaggregating universal service support – in this case Path 1, or no disaggregation of support – be followed for purposes of disaggregating service areas. CTA contends that our rules do not contemplate or sanction redefined service areas to the sub-wire center level. In addition, CTA argues that, contrary to the view expressed in the Recommended Decision, there is no mandatory obligation imposed by either state or federal law that requires rural ILEC service area redefinition to accommodate the provision of USF support for competitive ETCs, in order to meet the Act's twin mandates of competition and the preservation of universal service.

⁵ In Paragraph 65 of the Recommended Decision the ALJ makes the following statement: "Redefining the service areas of the affected rural ILECs will advance the goals of universal service, will promote competition, and will implement the principle of competitive neutrality, including technological neutrality." She then inserts footnote 9 that states, "Although not a specific consideration under the Joint Board test, these areas are nonetheless important under both federal and Colorado telecommunications law."

⁶ We agree with the statement contained in Paragraph 37 of the Recommended Decision: "The FCC determined that competition and the advancement of universal service could be, and should be, promoted simultaneously. The FCC stated, *id.* at ¶ 50, its belief that those who object to promoting both concepts:

present a false choice between competition and universal service. A principal purpose of section 254 [of the Act] is to create mechanisms that will sustain universal service as competition emerges. We expect that applying the policy of competitive neutrality will promote emerging technologies that, over time, may provide competitive alternatives in rural, insular, and high cost areas and thereby benefit rural consumers. For this reason, we reject assertions that competitive neutrality has no application in rural areas or is otherwise inconsistent with section 254."

22. The Joint Response maintains that redefining the Colorado portion of the Venango exchange as a separate service area is consistent with decisions relating to other states. The Joint Response points out: NECC requests that the Commission exercise jurisdiction over Colorado territory, consistent with decisions rendered for other states. For example, the FCC designated RCC Holdings, Inc., as an ETC in Alabama within portions of wire centers that straddled another state's boundaries. The FCC also designated Western Wireless as an ETC in Wyoming within portions of wire centers that straddled Wyoming's boundaries and those of Nebraska, Montana, and South Dakota. NECC claims it is not asking for novel relief. Moreover, CTA presented no evidence at hearing to demonstrate how Great Plains would be harmed by this action. According to the Joint Response, CTA did not address the central issue in this case, which is: Why should the customers living in the Venango Wire Center be denied the benefits that NECC would bring if the Application is granted? The Joint Response suggests that we grant the same relief afforded by the FCC in other instances where a wire center straddles more than one state's boundaries.

23. We agree with the Joint Response. Redefining the portion of the Venango exchange located in Colorado is consistent with prior FCC decisions in similar circumstances. As noted by the ALJ in her interim order (Decision No. R03-0033-I), the Commission has the authority to grant NECC's Application as it relates to the portion of the Venango exchange located in Colorado. This ruling is consistent with FCC decisions involving other carriers whose exchanges were located in more than one state (*e.g.*, the case concerning RCC Holdings, Inc.,⁷ and Western Wireless⁸). Therefore, we deny CTA's exception to the Recommended Decision with respect to the Venango Wire Center and affirm the ALJ's decision that the proposed

⁷ CC Docket No. 96-45, DA 02-3181 (rel. Nov. 27, 2002).

⁸ DA 00-2896 (CCB rel. Dec 26, 2000).

redefinition of the Colorado portion of the service area of Great Plains passes the Joint Board test.

24. In summary, we agree with the Joint Response that redefining the rural carriers' service areas along the wire center boundaries recommended by the ALJ is fully consistent with the pro-competitive mandates of federal and Colorado universal service policies. We also agree that the requested redefinition of service areas is clearly warranted under the three-part test advocated by the Joint Board. Therefore, we deny CTA'S Exceptions and affirm the Recommended Decision.

VII. SUPPLEMENTAL BRIEFING

25. In Decision No. C03-0816 we directed the parties to submit supplemental briefs on the questions listed in that order. Generally, Decision No. C03-0816 raised the issue whether the redefinition of the rural service areas proposed by NECC in this case minimized the opportunity for cream-skimming on the part of competitive ETCs. This is the first part of the Joint Board test. We observed, in Decision No. C03-0816, that each of the rural carriers subject to this case had selected Path 1 under 47 C.F.R. § 54.315; that is, each of the carriers had chosen not to disaggregate their universal service support across their study areas. The Recommended Decision concluded that, by choosing Path 1, each rural ILEC "indicated that it was satisfied that its universal service support was already targeted in a manner which minimized 'cream-skimming'." Recommended Decision, paragraph 55.

26. The Exceptions by CTA did not challenge the Recommended Decision's findings and conclusions regarding the possibility of cream-skimming. Nevertheless, the Commission on its own motion directed the parties to submit supplemental briefs on the following questions:

- Is the Joint Board's concern with cream-skimming (when considering redefinition of a rural ILEC's study area) adequately addressed for the rural ILECs here purely and simply by the rural ILECs' selection of Path 1; alternatively stated, does each rural ILEC's selection of Path 1 by itself justify a finding that the possibility of cream-skimming is minimized under the redefined service areas proposed by NECC;
- Does the evidence in this case adequately address the possibility of cream-skimming by competitive ETCs if we redefine the rural ILECs' service areas as requested by NECC;
- Should the Commission require the rural ILECs to disaggregate universal service support under Paths 2 or 3; and
- In the event the Commission determines that universal service support for the rural ILECs should be disaggregated prior to any redefinition of service areas, how should the Commission proceed to disaggregate support (*e.g.*, through show-cause proceedings)?⁹

Staff, NECC, Western Wireless, and CTA submitted supplemental briefs on these questions.

27. According to Staff, the FCC adopted Paths 1-3 to determine universal service support for rural study areas in order to minimize the opportunity for cream-skimming. *See In the Matter of Federal-Joint Board on Universal Service, Multi-association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers for Interexchange Carriers, Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking*, CC Docket No. 96-45, 16 FCC Rcd. 11244 WL 547795 (rel. May 23, 2001) (MAG Order). These Paths afforded rural ILECs the flexibility to disaggregate and target support according to the costs and geographic

⁹ Under 47 C.F.R. § 54.315(b)(4), a state commission may direct a rural ILEC to disaggregate support under Paths 2 or 3, notwithstanding that carrier's initial selection of Path 1.

characteristics of their study areas, and the competitive and regulatory environment in the states in which they operate. The FCC, according to Staff, stated that ILECs which choose Path 1--that is, not to disaggregate support--are presumed to have “determined that, given the demographics, cost characteristics, and location of its service territory, and the lack of a realistic prospect for competition, disaggregation is not economically rationale.” MAG Order, paragraph 148.

28. Staff believes that the FCC’s concern with respect to cream-skimming was adequately addressed when the rural carriers chose Path 1. The fact that competition in the service areas exists should not change this result, nor does the MAG Order suggest that it does. Staff argues that at the time the rural carriers here made a Path 1 filing, they were aware of at least one competitor seeking status as an ETC in their service territories. Accordingly, it is reasonable to conclude that the rural carriers considered the impact of competition in their service territories at the time the decisions were made not to disaggregate and target support.

29. Staff asserts that, in granting NECC’s application to redefine the rural carriers’ service areas, the Commission need not be concerned with the possibility of cream-skimming because no such evidence had been presented. Staff believes the rural carriers chose Path 1 disaggregation because they themselves had no evidence to show the possibility of cream-skimming by competitive ETCs. According to Staff, because cream-skimming concerns have been adequately addressed in this docket, the Commission should grant NECC’s Application.

30. According to Western Wireless, the Commission should consider the rural carriers’ Path 1 elections a waiver of their cream-skimming concerns as a matter of law. Alternatively, the Path 1 elections made by the rural carriers should be considered presumptive, if not conclusive, evidence that cream-skimming concerns have been minimized, and that the

first element of the Joint Board's test has been satisfied. Western Wireless maintains that the FCC adopted rules for the disaggregation and targeting of high cost support in order to eliminate the need for a case-by-case analysis of cream-skimming concerns. A Path 1 election, according to Western Wireless, was intended for use only by incumbents that did not believe the targeting of support was necessary, even after competitive entry.

31. Western Wireless contends that by electing Path 1, the rural carriers represented to the Commission that it was unnecessary to disaggregate and target their high cost support, and no evidence has been presented to contradict this representation. According to Western Wireless, there is only one appropriate basis upon which the rural carriers involved in this docket could have made a Path 1 election: they believed that the disaggregation and targeting of high cost support was unnecessary, even after the redefinition of their service areas. These rural carriers were aware of the MAG Order. They were also aware that NECC was seeking ETC status within their study areas. They understood their responsibility to make a disaggregation election, and understood that a Path 1 election was a waiver of any cream-skimming concerns related to competitive entry. Western Wireless claims this is most likely why CTA chose not to raise cream-skimming arguments in its Exceptions. CTA realized that the rural carriers' Path 1 elections foreclosed any cream-skimming argument. As such, the Path 1 elections should be given the weight the FCC intended to afford them, and they should resolve the cream-skimming concerns in this docket as a matter of law.

32. NECC argues that competitors have absolutely no control over how a rural ILEC disaggregates its costs, nor do they have information available that would permit intentional cream-skimming. Accordingly, any possibility of a competitor receiving uneconomic support in a given area is entirely within the control of the rural ILEC. NECC maintains that this

Commission and other states have found that a rural ILEC's choice of disaggregation Paths offers meaningful insight into whether opportunities for uneconomic support levels exist. NECC contends the rural carriers face no obstacles in taking appropriate measures if they believe study-area-wide support creates cream-skimming opportunities for competitors. Accordingly, NECC contends that the rural carriers' choice of disaggregation Paths may be considered an accurate reflection of the cost characteristics of their service areas.

33. NECC argues that if there were any possibility of cream-skimming, the rural ILECs themselves, who would be disadvantaged if competitive ETCs received uneconomic levels of support, would have the greatest incentive to speak up, and the rules provide them with a relatively simple way to address their concerns. NECC maintains that, given the options available to the rural carriers here, it can be presumed that a Path 1 filing reflects an appropriate business choice that took NECC's pending competitive entry into consideration. NECC argues that the evidence in this case supports a finding that cream-skimming opportunities are minimized. Furthermore, even if the current method of calculating study-area-wide support provided cream-skimming opportunities or the possibility of uneconomic support levels in any given area, the FCC's rules provide an adequate remedy: the Commission may open a proceeding at any time to modify the rural carriers' disaggregation plans in a way that forecloses such opportunities.

34. CTA maintains that cream-skimming concerns are not adequately addressed by a rural ILEC's selection of a Path 1 disaggregation plan. In this docket, CTA argues, the ALJ improperly put the onus of proving cream-skimming on the rural carriers based simply on their selection of Path 1 disaggregation plans. CTA notes that the rural carriers are not the applicants in this case, and it is the applicant that has the burden of going forward and proving that its

application should be granted. In this case, CTA contends, the rural carriers did not have the burden of proving that cream-skimming would occur if NECC's Application were granted.

35. CTA contends that the Commission cannot conclude, based upon the present record, that opportunities for cream-skimming are minimized if the rural carriers' service areas are redefined. Rather, the Commission should require specific and reliable factual evidence, produced by the Applicant, before we determine that the study areas of the affected ILECs should be "redefined," and that to do so will not result in prohibited "cream skimming."

36. In response to the specific questions in Decision No. C03-0816, CTA points to issues that should be considered before compelling the rural carriers here to submit different disaggregation plans (other than the Path 1 plans already selected.). First, CTA points to the "overarching policy question" whether it is prudent to compel rural ILECs to expend their scarce resources to achieve the "competitive goal of putting USF support money in the pockets of wireless competitors." CTA Supplemental Brief, page 7. CTA urges the Commission not to impose an "unfunded mandate" on the rural carriers. If the Commission elects to require disaggregation, CTA requests that a funding mechanism be identified for rural ILECs to offset on a dollar-for-dollar basis the costs rural ILECs will incur to disaggregate their universal service support. CTA notes that of the 27 rural ILECs in Colorado, 24 filed Path 1 plans.

VIII. COMMISSION DECISION

37. As we pointed out in Decision No. C03-0816, even though the Exceptions did not challenge the Recommended Decision's findings and conclusions regarding the possibility of cream-skimming, the Commission has an independent responsibility to ensure that sufficient grounds exist to redefine the rural carriers' service areas before granting NECC's application. We

note that this is a case of first impression, since in previous redefinition dockets universal service support had been targeted prior to the redefinition proceeding. That is, in prior dockets the affected rural ILEC had chosen to target support under either Path 2 or Path 3. This is the first proceeding in which redefinition of a rural study area has been sought for rural ILECs that have chosen Path 1 (non-disaggregation).

38. We agree with the parties that the FCC provided to rural ILECs flexibility in the methods for disaggregating and targeting of support in order to minimize opportunities for cream-skimming and to address the diversity of circumstances among rural carriers. MAG Order, paragraph 147. As Staff points out, a rural ILEC who chose Path 1 should be presumed to have considered "the demographics, cost characteristics, and location of its service territory," and the "prospect for competition" when they chose that path. MAG Order, paragraph 148. And, as the ALJ noted in the Recommended Decision, the fact that the rural ILECs here knew that at least one competitor (NECC) was attempting to enter their service/study area can also be presumed to have been a factor the affected ILECs took into consideration in making their Path 1 selection. Recommended Decision, paragraph 55. Therefore, we conclude that the election of Path 1 by each of the rural carriers here is probative evidence of the carriers' lack of concern with cream-skimming even if NECC's Application is granted.

39. We also note that, in this case there is no evidence that NECC is attempting to cream-skim; indeed, NECC seeks ETC and EP designation for the entirety of the areas it serves.

40. Moreover, should cream-skimming concerns arise in the future, the affected rural ILEC may petition the Commission to target support under one of the other two Paths (besides Path 1). The Commission on its own motion may choose to target support for any of the rural

carriers if cream-skimming concerns arise in the future. Furthermore, we note that the Commission must approve the ETC application of any new provider and could, at that time, reject such an application based on consideration of the public interest, including the possibility that a new ETC intends to cream-skim in the rural carriers' redefined service areas.

41. Granting NECC's Application to redefine the carriers' service areas will promote competition and its attendant benefits. CTA, on behalf of the rural carriers, has not expressed any concern with cream-skimming that persuades us to ignore those potential benefits. We observe that CTA failed to raise any concern with cream-skimming in its Exceptions from the Recommended Decision. Even in its Supplemental Brief, after the Commission directly raised the question whether the rural carriers' universal service support should be disaggregated in some manner other than Path 1, CTA still did not express an unequivocal desire to target the rural carriers' support below the study-area level.¹⁰ For all these reasons, we conclude that redefining the rural carriers' service areas as requested by NECC meets the Joint Board requirement to minimize cream-skimming by potential competitors.

IX. CONCLUSION

42. For the foregoing reasons, we deny the Exceptions and affirm the ALJ's recommendation to grant NECC's Application. Section 214(e)(5) of the Act requires that the FCC concur with our decision to redefine the rural carriers' service area in order for this redefinition to become effective. FCC Rule 47 C.F.R. 54.207(c)(1) provides that a state commission "or other party" seeking FCC agreement in redefining a rural service area shall

¹⁰ Rather, CTA likened a disaggregation requirement to an unfounded mandate, and demanded remuneration from the High Cost Fund for any expenses incurred by the rural ILECs if disaggregation were ordered.

submit a petition with the FCC. We direct NECC to submit such a petition to the FCC citing this order as evidence of the Commission's decision to redefine the rural carriers' service areas.

X. ORDER

A. The Commission Orders That:

1. The Combined Exceptions and Motion to Reopen the Record filed by the Colorado Telecommunications Association are denied. Decision No. R03-0568 is affirmed.

2. The Application by N.E. Colorado Cellular to: (a) redefine each wire center of Eastern Slope Rural Telephone Association, Plains Co-op Telephone Association, and Sunflower Telephone Company, Inc., as a separate service area; and (b) designate that portion of Great Plains Communications, Inc.'s Venango Wire Center that lies within Colorado as a separate service area, is granted.

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

4. This Order is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
August 27, 2003.**

(S E A L)



ATTEST: A TRUE COPY

Bruce N. Smith
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

GREGORY E. SOPKIN

POLLY PAGE

JIM DYER

Commissioners