

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

DOCKET NO. 02A-444T

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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 COOPERATIVE TELEPHONE ASSOCIATION, INC.; AND SUNFLOWER TELEPHONE CO., INC.

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**INTERIM ORDER OF  
ADMINISTRATIVE LAW JUDGE  
MANA L. JENNINGS-FADER  
DENYING MOTION TO DISMISS,  
GRANTING MOTION FOR ADMISSION *PRO  
HAC VICE*, GRANTING MOTION FOR  
ENLARGEMENT OF TIME,  
AND WAIVING RESPONSE TIME**

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Mailed Date: January 8, 2003

**I. STATEMENT**

1. On August 21, 2002, Applicant N.E. Colorado Cellular, Inc. (NECC or Applicant), filed the Application which commenced this docket (Application). The Applicant seeks a redefinition of the service areas for four rural Incumbent Local Exchange Carriers (ILECs), one of which is Great Plains Communications, Inc. (Great Plains).

2. On November 27, 2002, the Colorado Telecommunications Association, Inc. (CTA), filed a Motion to Dismiss Great Plains Telecommunications (sic), Inc. (motion), from this docket. The Affidavit of S. Michael Jensen (Jensen Aff.), Chief Executive Officer of Great Plains, supports the motion.

3. CTA argues that Great Plains should be dismissed from this docket for three reasons. First, this Commission has no jurisdiction to redefine Great Plains' service area as requested in the Application because NECC asks this Commission to disaggregate the Venango wire center, which is located in Nebraska (Motion to Dismiss at ¶¶ 2-4). Second, this Commission cannot grant Colorado-only disaggregation because "any 'redefinition' to include only the [Venango] wire center's Colorado customers would be an impermissible 'sub-wire center disaggregation' plan not authorized or permitted by law" (*id.* at ¶ 5). Third and finally, no pro-competitive policy objective would be served by establishing a service area in which the rural ILEC serves only nine access lines (*id.* at ¶ 6).

4. The Applicant filed a Brief in Response to CTA's Motion to Dismiss. NECC opposed the motion on procedural and substantive grounds, arguing that CTA had not met its burden with respect to the motion.

5. Staff of the Commission (Staff) filed a Response to CTA's Motion to Dismiss Great Plains. Like the Applicant, Staff opposes the motion.

6. The Motion to Dismiss applied to Great Plains only and is based on two theories: The Commission has no jurisdiction, and the application fails to state a claim upon which relief can be granted. For the reasons discussed below, CTA has not met its burden under either basis. The Motion to Dismiss will be denied.

7. When considering a motion to dismiss based on lack of subject matter jurisdiction, the following principles apply: Once the question of subject matter jurisdiction is at issue, an applicant bears the burden of proving the existence of the Commission's jurisdiction to hear the case. *Pfenninger v. Exempla, Inc.*, 12 P.3d 830, 833 (Colo. App. 2000). An applicant

may meet this burden by a *prima facie* showing of threshold jurisdiction. *Pioneer Astro Industries, Inc. v. District Court*, 566 P.2d 1067, 1068 (Colo. 1977). If necessary to resolve the motion, the Commission may consider evidence outside the application. *Smith v. Town of Snowmass Village*, 919 P.2d 868, 871 (Colo. App. 1996). Finally, if an applicant fails to establish that the Commission has subject matter jurisdiction, the Commission must dismiss the application.<sup>1</sup> *City of Boulder v. Public Service Company of Colorado*, 996 P.2d 198, 203 (Colo. App. 1997).

8. On the question of this Commission's subject matter jurisdiction to decide the Application insofar as it pertains to Great Plains, the undersigned Administrative Law Judge (ALJ) agrees with Applicant and Staff that only the Colorado Public Utilities Commission has jurisdiction over the Colorado portion of the geographical area served by Great Plains.

9. This is consistent with the determination of the Federal Communications Commission (FCC) on this point. *See, e.g., Federal-State Joint Board on Universal Service, RCC Holdings, Inc., Petition for Designation as an Eligible Telecommunications Carrier Throughout its Licensed Service Area in the State of Alabama*,<sup>2</sup> CC Docket No. 96-45, Memorandum Opinion and Order, DA 02-3181 (rel. Nov. 27, 2002) (*RCC Holdings Alabama ETC Order*), ¶ 36 (FCC's "authority to perform the designation is no greater than that of the state that would have otherwise made the designation"; thus, FCC is limited to state's boundaries when determining a study area), *citing Federal-State Joint Board on Universal Service, Petitions for Reconsideration of Western Wireless Corporation's Designation as an Eligible*

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<sup>1</sup> In this case, only a portion of the application would be dismissed if the Motion to Dismiss were granted.

<sup>2</sup> One of the rural incumbent carriers in this case served both Florida and Alabama from one wire center.

*Telecommunications Carrier in the State of Wyoming*,<sup>3</sup> CC Docket No. 96-45, Order on Reconsideration, FCC 01-311 (rel. Oct. 19, 2001) (*Western Wireless ETC Reconsideration Order*), ¶ 8.

10. In addition, in its response at 2 & n. 3, NECC states that the “Application does not ask the Commission to redefine any portion of Great Plains’ study area other than the small portion of the Venango wire center that lies within the eastern parts of Phillips and Sedgwick Counties, Colorado.” This statement obviates any possible confusion about the geographical scope of the Application: Only the area within the boundaries of Colorado is at issue. To the extent that CTA’s jurisdiction argument is based on its belief that the Application seeks to affect Nebraska, NECC’s statement is a complete answer.

11. Finally, as CTA admits, the Commission has jurisdiction over the “regulated aspects of the provision by Great Plains of basic local exchange service to its Colorado customers.” Motion at ¶ 4. The ability to obtain universal service funds, which includes determination of Great Plains’ Colorado service area, is one such regulated aspect. *See 47 Code of Federal Regulations (CFR) §§ 54.314(c), 54.315.* Great Plains obviously thought this was a regulated aspect of its provision of basic local exchange service because it filed in Colorado a Path 1 disaggregation plan (*i.e.*, it chose not to disaggregate its universal service support). *See Jensen Aff.* at ¶ 5. Great Plains -- and, by extension, CTA (which appears in this proceeding in a representative capacity) -- cannot take a contrary or different position in this proceeding.

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<sup>3</sup> In this case the rural incumbent carriers served Wyoming and South Dakota from one wire center, Wyoming and Montana from another wire center, and Wyoming and Nebraska from yet another wire center.

12. Thus, the ALJ finds and concludes that the Colorado Commission has the subject matter jurisdiction to decide the issue of disaggregation of the Colorado portion of Great Plains' service area.

13. Having determined that the Commission has jurisdiction, it is necessary to consider CTA's argument that there is no statutory or rule authority permitting a service area to be disaggregated below the wire center level. The ALJ finds that this argument is most similar to a motion to dismiss for failure to state a claim upon which relief can be granted.

14. A motion to dismiss for failure to state a claim upon which relief can be granted is a vehicle "to test the formal sufficiency of the [application]." *Dorman v. Petrol Aspen, Inc.*, 914 P.2d 909, 911 (Colo. 1996). In ruling on a motion to dismiss based on a failure to state a claim, the following principles apply: Allegations in the application must be viewed in the light most favorable to the applicant; all assertions of material fact must be accepted as true; and the motion must be denied "unless it appears beyond doubt that the [applicant] cannot prove facts in support of the claim that would entitle [applicant] to relief." *Id.*; *see also Schoen v. Morris*, 15 P.3d 1094, 1096 (Colo. 2000) (same). Judged by these standards, the Motion to Dismiss, to the extent it is based on an asserted failure to state a claim, must be denied.<sup>4</sup>

15. In relevant part, the controlling statute, 47 U.S.C. § 214(e)(5), defines a "service area" as "a geographical area established by a State commission ... for the purpose of determining universal service obligations and support mechanisms." The plain language of the statute does not support the CTA-proposed no-smaller-than-a-wire-center limitation on the Commission's authority to determine a service area.

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<sup>4</sup> To the extent that this argument is seen as subject matter jurisdiction-based, the ALJ, applying the appropriate test (*see discussion supra*), finds that this argument fails for the reasons discussed *infra*.

16. In addition, both the FCC's rules and this Commission's rules state that a carrier may disaggregate the support it receives "into no more than two cost zones per wire center." 4 CFR § 54.315(d)(1)(ii); 4 *Code of Colorado Regulations* (CCR) 723-42-10.3.1.2. This is unambiguous support for the proposition that one may disaggregate below the wire center level.

17. Further, the FCC addressed this point in the *RCC Holdings Alabama ETC Order* at ¶ 34. There, the FCC determined that it would designate RCC Holdings as an Eligible Telecommunications Carrier (ETC) for those *portions* of three wire centers located in Alabama. Thus, the FCC found that disaggregation below the wire center level was permissible. The FCC reached a similar result in *Federal-State Joint Board on Universal Service, Western Wireless Corporation, Petition for Designation as an Eligible Telecommunications Carrier in the State of Wyoming*, CC Docket No. 96-45, Memorandum Opinion and Order, DA 00-2896 (rel. Dec. 26, 2000), ¶ 24, *aff'd.*, *Western Wireless ETC Reconsideration Order*.

18. Finally, NECC asserts that it chose to file a Path 1 disaggregation plan and that its choice is conclusive. Motion at ¶ 5. This argument cannot prevail in the face of 47 CFR § 54.315(b)(4) and Rule 4 CCR 723-42-10.1.3, each of which provides that the Commission may order Path 2 or Path 3 disaggregation of support notwithstanding a rural ILEC's selection of a Path 1 disaggregation plan.

19. For these reasons, the ALJ determines that the Commission *has the authority* to order disaggregation below the wire center level. The issue of whether the Commission *should* order disaggregation below the wire center level is a factual determination to be made on a case-by-case basis and will depend, in this case, on the evidence adduced in this proceeding.

20. The third and final argument made by CTA in support of the motion is that no pro-competitive policy objective would be served by establishing a service area in which the rural ILEC serves only nine access lines (*id.* at ¶ 6). The ALJ interprets this as an argument based on failure to state a claim upon which relief can be granted.

21. The ALJ is not persuaded by this argument. First, the argument confuses the number of access lines which Great Plains serves at present with the geographical scope of the service area. The fact that Great Plains serves nine access lines is irrelevant here; only the geographical area is relevant. Second, the argument is contrary to statute. *See, e.g.*, 47 U.S.C. § 214(e);<sup>5</sup> §§ 40-15-501 and 40-15-502, C.R.S. Third, the argument is contrary to determinations of the FCC and of this Commission. *See, e.g., Western Wireless ETC Reconsideration Order* at ¶ 19; *RCC Holdings Alabama ETC Order* at ¶ 23; Decision No. C01-476 at ¶ I.B.5.h (PUC “agrees with Western Wireless that, as a general matter, telephone competition in all rural areas is likely to be in the public interest.”). Fourth and finally, whether a pro-competitive purpose is met in this case clearly raises a factual question to be determined by the evidence presented in this case. Applying the principles discussed *supra*, the fact that the Application states, at 10, that a pro-competitive purpose will be served by the granting of the Application is sufficient to defeat the motion on this point.

22. For these reasons, the motion to dismiss will be denied.

23. On November 21, 2002, NECC filed a Motion for Admission *Pro Hac Vice*. By that motion, NECC seeks the admission of David A. LaFuria, Esquire, of the Washington, D.C.,

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<sup>5</sup> One purpose of 47 U.S.C. § 214(e) is to bring the benefits of competition to rural and high-cost areas. *Western Wireless ETC Reconsideration Order* at ¶ 19. The number of persons who might be benefited is not relevant or controlling.

law firm of Lucas, Nace, Gutierrez & Sachs, Chartered. The motion is unopposed. Good cause having been shown, the motion will be granted. Mr. LaFuria will be admitted to practice before the Commission *pro hac vice*.

24. On January 3, 2003, Staff filed an Unopposed Motion for Three Additional Business Days to File a Response to NECC's Motion for Summary Judgment and Request for Waiver of Response Time. The motion states good cause and will be granted. As the motion is unopposed, response time will be waived.

25. Parties are reminded that Rule 4 CCR 723-1-22(d)(3) states: "If a pleading refers to new court cases or other authorities not readily available to the Commission, six copies of each case or other authority shall be filed with the pleading." NECC's response to the Motion to Dismiss contained references to, and relied upon, recommendations of the Federal-State Joint Board on Universal Service and decisions of the Arizona Corporation Commission, the Public Utility Commission of Texas, the Iowa Utilities Board, and the Washington Utilities and Transportation Commission. NECC provided neither copies of these materials nor the website addresses at which these materials could be found. As a result, the ALJ could not, and did not, read or consider these cited materials in reaching this decision. Parties should provide copies or website addresses if they wish the ALJ to consider materials other than, or in addition to, opinions of the United States Supreme Court, reported Colorado state court opinions, and Commission decisions.

## **II. ORDER**

### **A. It Is Ordered That:**

1. The Motion to Dismiss Great Plains Telecommunications (sic), Inc., filed by the Colorado Telecommunications Association, Inc., is denied.



2. The Motion for Admission *Pro Hac Vice* filed by N.E. Cellular, Inc., is granted.
3. David A. LaFuria, Esquire, of the Washington, D.C. firm Lukas, Nace, Gutierrez & Sachs, Chartered, is admitted to practice before the Commission *pro hac vice*.
4. The Unopposed Motion for Three Additional Business Days to File a Response to NECC's Motion for Summary Judgment and Request for Waiver of Response Time filed by Staff of the Commission is granted.
5. Response time to the Unopposed Motion for Three Additional Business Days to File a Response to NECC's Motion for Summary Judgment filed by Staff of the Commission is waived.
6. This Order shall be effective immediately.

(SEAL)



ATTEST: A TRUE COPY

Bruce N. Smith  
Director

THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF COLORADO

MANA L. JENNINGS-FADER

Administrative Law Judge