

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

**INTERIM ORDER OF
ADMINISTRATIVE LAW JUDGE
MANA L. JENNINGS-FADER
DENYING MOTION FOR
SUMMARY JUDGMENT, GRANTING
MOTION FOR LEAVE TO FILE
RESPONSE, AND WAIVING
RESPONSE TIME**

Mailed Date: January 9, 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).

2. On December 20, 2002, NECC filed a Motion for Summary Judgment (motion). The motion is not supported by affidavits, although Applicant asks the Commission to consider direct and answer testimony prefiled in this docket. Motion at 4.

3. On January 6, 2003, the Colorado Telecommunications Association, Inc. (CTA), filed its Motion for Leave to File Response to NECC's Motion for Summary Judgment and

Response.¹ In its Response to NECC's Motion for Summary Judgment (CTA response), CTA opposes the motion. It argues that genuine issues of material fact exist and that summary judgment is, therefore, inappropriate.

4. On January 7, 2003, Staff of the Commission (Staff) filed its Response to NECC's Motion for Summary Judgment. Staff opposes the motion insofar as it appears to expand the scope of the Application.

5. The standard for summary judgment is found in Colo.R.Civ.P. 56(c): "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Because the Administrative Law Judge (ALJ) finds that there are genuine issues of material fact remaining in this proceeding, the motion will be denied.

6. NECC seeks a Commission order "redefining each wire center of Eastern Slope Rural Telephone Association, Plains Co-op Telephone Association, and Sunflower Telephone Company, Inc., as a separate service area for purposes of universal service and state high cost support. In addition, NECC seeks a Commission Order designating that portion of Great Plains Communications, Inc.'s Venango Wire Center that lies within Colorado as a separate service area." Motion at ¶ 9. Paragraph 23 of the motion, however, after restating the requested redefinitions, adds the prayer that the Commission issue an order "designating NECC as an ETC and EP in those portions of wire centers it is able to serve." Thus, the first issue of material fact is the scope of this Application.

¹ The Motion for Leave to File Response to NECC's Motion for Summary Judgment states good cause and will be granted. Response time will be waived.

7. Rule 4 *Code of Colorado Regulations* (CCR) 723-42-10.3.2 sets out the requirements that any disaggregation plan submitted to the Commission must meet. The second issue of material fact is whether, in fact, NECC's proposed disaggregation plan satisfies these requirements and should be granted.²

8. This is intertwined with the third issue of material fact: the record to support a Commission petition to the Federal Communications Commission (FCC) pursuant to 47 *Code of Federal Regulations* § 54.207(c), assuming the Commission decides to redefine the rural ILECs' study areas. Rule 54.207(c)(1) outlines the content areas of a state commission's petition to redefine a service area served by a rural ILEC. This Commission has previously held that it must have a factual record on which to base its redefinition decision and its petition to the FCC. *In the Matter of Western Wireless Holding Co., Inc.'s Application for Designation as an Eligible Telecommunications Provider pursuant to 4 CCR 723-41-8*, Docket No. 00A-174T, Decision No. C01-476, ¶ I.B.5.f. As the Commission stated, a petition asking the FCC to agree to new service areas established by the Commission "must explain [the Commission's] reasons for suggesting the specific service areas ... and must provide an analysis taking into account the recommendations of the Joint [Federal-State] Board [on Universal Service]." *Id.*³ Evidentiary support for the Commission decision and for the petition to the FCC is necessary. *Id.*

² The Commission's prior action deeming NECC's Application complete does not address the substance of, and the evidence underlying, the Application. That is the function of the evidentiary hearing.

³ As stated by NECC, the Joint Board recommends that, when reviewing a request to redefine a rural ILEC's service area, a state commission consider: "(1) whether the competitive carrier is attempting to 'cream skim' by targeting low-cost areas; (2) the special status of the affected ILEC as a rural telephone carrier; and (3) whether the proposed redefinition would impose undue administrative burden on the affected rural ILEC." NECC's Brief in Response to CTA's Motion to Dismiss at 5 & n. 9. These are fact-intensive and case-specific inquiries.

9. In this case NECC provided neither affidavits nor other sworn evidence in support of its motion.⁴ The parties did not submit a stipulation of facts. Thus, there is no evidence upon which the Commission can make the determinations it must make before it petitions the FCC.

10. There appear to be other issues of material fact. *See, e.g.*, CTA's Response at ¶ 6, especially as pertains to Ms. Fischhaber's testimony; Decision No. R03-0033-I, entered in this docket, at ¶¶ 19 and 21.

11. The material facts identified and discussed in this Order are not, and are not intended to be, an exhaustive list. They are provided to identify *some* of the issues of material fact which remain to be resolved. Undoubtedly, others exist.

12. In any event, suffice it to say that genuine issues of material fact remain. Summary judgment may not be granted, and the motion will be denied.

II. ORDER

A. It Is Ordered That:

1. The Motion for Summary Judgment filed by N.E. Colorado Cellular, Inc., is denied.

2. The Motion for Leave to File Response to NECC's Motion for Summary Judgment filed by the Colorado Telecommunications Association, Inc., is granted.

⁴ As noted above, NECC asks the Commission to consider the direct and answer testimony prefiled in this docket as if it were in the record. Review of the prefiled direct and answer testimony reveals that only the answer testimony of Staff witness Pamela Fischhaber is sworn. Thus, the *evidence* available to support the motion is that presented in Ms. Fischhaber's answer testimony. She does not address some critical factual issues; and, thus, her testimony alone does not provide the required evidentiary record in support of the Application. To the extent NECC relies upon the unsworn testimony of NECC witness Don J. Wood to address the recommendations of the Joint Board (motion at ¶ 20), the ALJ finds that *unsworn* testimony insufficient evidentiary basis to support the required analysis.

3. Response time to the Motion for Leave to File Response to NECC's Motion for Summary Judgment filed by the Colorado Telecommunications Association, Inc., is waived.

4. This Order shall be effective immediately.

(S E A L)



ATTEST: A TRUE COPY

A handwritten signature in cursive script, appearing to read "Bruce N. Smith".

Bruce N. Smith
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

MANA L. JENNINGS-FADER

Administrative Law Judge

G:\order\444T.doc:MLJ