Decision No. R21-0184

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 21A-0029T

IN THE MATTER OF THE APPLICATION OF CONEXON CONNECT LLC FOR ELIGIBLE TELECOMMUNICATIONS CARRIER DESIGNATION FOR PURPOSES OF RECEIVING RURAL DIGITAL OPPORTUNITY FUND PHASE I AND LIFELINE SUPPORT.

RECOMMENDED DECISION OF ADMINISTRATIVE LAW JUDGE STEVEN H. DENMAN ON INTERVENTIONS AND PENDING MOTIONS AND GRANTING REQUEST FOR VOLUNTARY DISMISSAL

Mailed Date: March 26, 2021

TABLE OF CONTENTS

I. STATEMENT

A. Summary.

1. This Decision addresses the Application for Eligible Telecommunications Carrier Designation for Purposes of Receiving Rural Digital Opportunity Fund Phase I and Lifeline

Support (Application), filed by Conexon Connect LLC (Applicant or Conexon Connect) on January 6, 2021. For the reasons discussed below, the Application is dismissed voluntarily and without prejudice, pursuant to Conexon Connect's request.

B. Procedural History.

2. In its Application, Conexon Connect requests that the Colorado Public Utilities Commission (Commission) grant it a designation as an Eligible Telecommunications Carrier (ETC) in the State of Colorado. Conexon Connect seeks the ETC designation in all areas where Conexon Connect, through its participation in the Rural Electric Cooperative Consortium (REC Consortium), has been allocated Rural Digital Opportunity Fund (RDOF) Phase I support by the Federal Communications Commission (FCC) as a winner in the RDOF Phase I auction.[1] The Application was verified by Teresa Hannay, Vice President of Telecommunications Services for Conexon Connect.[2]

3. Conexon Connect explains that, as a participant in the REC Consortium, it was a winning bidder for universal service support in the FCC's RDOF Phase I auction (Auction 904), which concluded on November 25, 2020. Through Auction 904, the FCC will provide billions of dollars of funding to deploy high-speed broadband networks in underserved, rural America. On December 7, 2020, the FCC announced the winning bidders of Auction 904, which included the REC Consortium and Conexon Connect in designated census blocks in Colorado. To be awarded the RDOF Phase I support, Conexon Connect states that it is obligated by the FCC to obtain the

[1] Conexon Connect Application, p. 1. *See Rural Digital Opportunity Fund Phase I Auction (Auction 904) Closes, Winning Bidders Announced, FCC Form 683 Due January 29, 2021*, AU Docket No. 20-34, WC Docket No. 19-126, WC Docket No. 10-90, FCC Public Notice, DA 20-1422 (Dec. 7, 2020). The REC Consortium submitted a short-form application in the RDOF Phase I auction that included Conexon Connect as a consortium member.

[2] Application, Exhibit C.

ETC designation status from the Commission by June 7, 2021, which is 180 days after the FCC's December 7, 2020 announcement. Because of the June 7, 2021 deadline, Conexon Connect seeks expedited action on the Application.[3]

4. Exhibit A to the Application identifies the census blocks comprising Conexon Connect's proposed Colorado ETC Designation Area. Exhibit B to the Application is a map of Conexon Connect's proposed Colorado ETC Designation Area.

5. On January 8, 2021, the Commission issued a Notice of Application Filed, giving notice of the filing of the Application and setting a period of 30 days, or to and including February 8, 2021, for interested persons to intervene.[4] Since Applicant did not file testimony with the Application, the Commission determined that Applicant was seeking a Commission decision within 210 days, pursuant to § 40-6-109.5(2), C.R.S. (2019). The 210-day statutory deadline ends on September 21, 2021.

6. On January 6, 202,1 Conexon Connect also filed a Motion for Waiver of Certain Commission Rules (Motion for Waiver) of three of the Commission's Rules Regulating Telecommunications Services and Providers of Telecommunications Services, 4 *Code of Colorado Regulations* (CCR) 723-2 (2018) (Telecommunications Rules): Rule 2187(d)(II), Rule 2187(d)(III), and Rule 2187(d)(XI) (the requirements of these rules are described later in this Decision). Conexon Connect requests that the waivers of these rules be full and permanent.

[3] Application, pp. 2, 3, and 4. *See Rural Digital Opportunity Fund*, *et al*., WC Docket No. 19-126, *et al*., Report and Order, 35 FCC Rcd 686, 727 (¶ 92) (2020) ("*RDOF Order*") (establishing the 180-day deadline).

[4] Since the 30-day deadline for filing intervention pleadings fell on Sunday, February 7, 2021, the deadline was extended by operation of law until Monday, February 8, 2021. Section 40-6-121, C.R.S.

7. On January 20, 2021, Commission Telecommunications Staff sent a Deficiency Letter to Conexon Connect, asking whether Applicant was also seeking a waiver of Rule 2187(e) of the Rules Regulating Telecommunications Services and Providers of Telecommunications Services, 4 CCR 723-2, and that Applicant answer six questions. Rule 2187(e) provides that, "Within one year of the effective date of the Commission's decision approving an application for ETC designation, the ETC shall offer the supported services. If the ETC does not offer the supported services within one year, its ETC designation shall be cancelled and deemed null and void." Conexon Connect's response to the Deficiency Letter was due by January 29, 2021.

8. On January 29, 2021, Conexon Connect filed a Motion for Additional Waiver of Commission Rules (Motion for Additional Waiver), seeking a full and permanent waiver of Rule 2187(e).

9. On February 1, 2021, Conexon Connect filed a Notice of Correction to Application, stating that:

> At page 11 of the Application, in response to the requirements of Rule 2187(d)(III) …, and specifically in demonstrating compliance with the requirements of 47 CFR § 54.202, Conexon Connect erroneously stated, "Conexon Connect does not seek ETC designation on any Tribal lands." In fact, the census blocks for which Conexon Connect has been awarded RDOF Phase I support include portions of two Tribal Nations: the Southern Ute Indian Tribe and the Ute Mountain Ute Tribe. Both tribes have been served copies of the Application and all exhibits, as well as the Notice of Application.

10. On February 5, 2021, the Southern Ute Indian Tribe (Southern Ute), through counsel, filed a Notice of Intervention as of Right or, in the Alternative, Motion for Permissive Intervention (Southern Ute Intervention).

11. On February 16, 2021, Southern Ute filed Objections to Conexon's Requests for Waivers of Certain Commission Rules (Objections to Waivers).

12. Commission Staff determined that the verified Application was automatically deemed complete on February 23, 2021.[5] During the Commission's weekly meeting held on February 24, 2021, the matter was referred to an Administrative Law Judge (ALJ) for disposition. This proceeding was subsequently assigned to the undersigned ALJ.

13. On March 1, 2021, the Ute Mountain Ute Tribe (Ute Mountain), through counsel, filed a Notice of Intervention as of Right or, in the Alternative, Motion for Permissive Intervention (Ute Mountain Intervention).

14. On March 1, 2021, Conexon Connect filed a Motion for Leave to Reply to Southern Ute Indian Tribe's Objections to Requests for Waivers (Motion for Leave to Reply), along with a Reply to Southern Ute Indian Tribe's Objections to Requests for Waivers (Reply).

15. On March 8, 2021, Southern Ute filed a Response to Conexon's Motion for Leave to Reply (Response).

C. Interventions.

16. On February 5, 2021, Southern Ute, through counsel, filed a Notice of Intervention as of Right or, in the Alternative, Motion for Permissive Intervention (Southern Ute Intervention). Southern Ute contests Conexon Connect's eligibility to obtain ETC status with respect to the Tribal land census blocks within the Southern Ute Indian Reservation (Southern Ute Reservation), "as well as the Commission's jurisdiction to grant [ETC] status in the absence of the consent of the Tribe's governing body, the Southern Ute Indian Tribal Council."[6] Southern Ute does not request an evidentiary hearing on the Application.

[5] *See* Rule 1309(a) of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1 is not (2020).

[6] Southern Ute Intervention, pp. 1 and 2.

17. Significantly, Rule 1401(b) of the Rules of Practice and Procedure, 4 CCR 723-1 (2020), requires that, "A notice of intervention as of right, unless filed by Commission staff, shall state the basis for the claimed legally protected right that may be affected by the proceeding." Southern Ute cites no legal authority that would permit it to intervene as of right in this Commission proceeding.[7] Southern Ute is not an intervenor as of right in this proceeding.

18. Alternatively, Southern Ute seeks permissive intervention. Rule 1401(c) of the Rules of Practice and Procedure, 4 CCR 723-1, defines the minimum criteria for motions requesting permissive intervention in Commission proceedings and, as relevant to this proceeding, requires that:

> A motion to permissively intervene shall state the specific grounds relied upon for intervention; the claim or defense within the scope of the Commission's jurisdiction on which the requested intervention is based, including the specific interest that justifies intervention; and why the filer is positioned to represent that interest in a manner that will advance the just resolution of the proceeding. The motion must demonstrate that the subject proceeding may substantially affect the pecuniary or tangible interests of the movant (or those it may represent) and that the movant's interests would not otherwise be adequately represented. … The Commission will consider these factors in determining whether permissive intervention should be granted. Subjective, policy, or academic interest in a proceeding is not a sufficient basis to intervene. Anyone desiring to respond to the motion for permissive intervention shall have seven days after service of the motion, or such lesser or greater time as the Commission may allow, in which to file a response. …

19. Through statute, rule, and sound judicial discretion, the Commission entrusts its ALJs to manage cases independently. Under Rule 1401, an ALJ addresses requests for permissive intervention in his or her sound discretion.[8]

[7] *Compare e.g.,* §§ 40-6.5-106(1)(b) and 40-6.5-106 (2), C.R.S. (Colorado Office of Consumer Counsel) and § 40-6-108(2)(b), C.R.S. (Colorado Energy Office).

[8] *See* Decision No. R19-0943-I in Proceeding No. 19A-0409E (issued on November 20, 2019), ¶ 57 at pages 24 and 25.

20. In its Intervention, Southern Ute contests Conexon Connect's eligibility to obtain an ETC designation with respect to the Tribal land census blocks within the Southern Ute Reservation, as well as this Commission's jurisdiction, under Section 214(e)(2) of the Communications Act of 1934, to grant an ETC designation on Tribal lands to Conexon Connect. Southern Ute states that 913 of the census blocks in the ETC Designation Area are located within the boundaries of Southern Ute Reservation.[9] On October 21, 2020, the FCC granted Southern Ute's application for the unassigned 2.5 GHz spectrum on the Southern Ute Reservation to provide educational broadband service. Southern Ute argues that to grant Conexon Connect the ETC designation to serve the Tribal land census blocks would have a substantial adverse impact on Southern Ute's ability to obtain federal financing and funding for deploying broadband on the Southern Ute Reservation using the newly-acquired license for the 2.5 GHz spectrum.[10] Hence, Southern Ute opposes this Application.

21. After conferral with counsel for Applicant, Southern Ute reports that Conexon Connect does not oppose their request to intervene. However, Conexon Connect does not agree that the Commission lacks jurisdiction to award ETC designation in Tribal land census blocks and reserves its rights to oppose Southern Ute's positions.[11] Conexon Connect did not file a response opposing Southern Ute's Alternative Motion for Permissive Intervention.

22. The ALJ finds that Southern Ute has stated the specific grounds relied upon for its permissive intervention, including sufficient information required by Rule 1401(c) of the Rules

[9] Southern Ute Intervention, pp. 1-4.

[10] Southern Ute Intervention, pp. 3 – 5.

[11] *Id.*, p. 1. Pursuant to Rule 1400(a) of the Rules of Practice and Procedure, 4 CCR 723-1, before filing a motion to intervene, "moving counsel shall make a reasonable good faith effort to confer with all parties about the motion and report when the requested relief is unopposed. If no conference has occurred, the reason why shall be stated."

of Practice and Procedure, which demonstrates that this proceeding may substantially affect its pecuniary or tangible interests and that Southern Ute's interests would not otherwise be adequately represented. Southern Ute's request for permissive intervention will be granted, and Southern Ute is a party to this proceeding.

23. On March 1, 2021, Ute Mountain, through counsel, filed the Ute Mountain Intervention. The Ute Mountain Intervention was served on counsel for Applicant through the Commission's E-Filing System and via email.[12] Since the deadline for interventions set by the Commission's Notice of Application Filed was February 8, 2021, the Ute Mountain Intervention was untimely. Ute Mountain admits that it received notice of the Application before the deadline, but claims it was not able to file for intervention until after it received Applicant's Notice of Correction on February 26, 2021.[13] Ute Mountain fails to explain why it could not file a timely intervention pleading, when Southern Ute, which possessed the same notice and information as Ute Mountain, was able to file its Intervention before the February 8, 2021 deadline.

24. After conferral with counsel for Applicant and for Southern Ute, counsel for Ute Mountain reports that he is unaware of whether either party intends to object.[14]

25. Significantly, Rule 1401(b) of the Rules of Practice and Procedure, 4 CCR 723-1, provides that, "A notice of intervention as of right, unless filed by Commission staff, shall state the basis for the claimed legally protected right that may be affected by the proceeding."

[12] Ute Mountain Intervention, p. 6.
[13] *Id.*, ¶¶ 2 and 12, at pp. 1 and 4.
[14] *Id.*, ¶ 1, at p. 1.

Ute Mountain cites no legal authority that would permit it to intervene as of right in this Commission proceeding.[15] Ute Mountain is not an intervenor as of right in this proceeding.

26. Moreover, Rule 1401(a) requires that an attempted intervention as of right must be timely filed within 30 days after the Notice. The Ute Mountain Intervention was untimely. Alternatively, Ute Mountain seeks permissive intervention. Rule 1401(a) allows that: "The Commission may, for good cause shown, allow late intervention, subject to reasonable procedural requirements." The ALJ will consider Ute Mountain's alternative Motion for Permissive Intervention.

27. Ute Mountain states that Conexon Connect is applying for ETC designation over portions of the Ute Mountain Ute Reservation and that on October 21, 2021, the FCC granted to Ute Mountain the 2.5 GHz spectrum over its Reservation. Ute Mountain contends that, if Applicant obtains designation as an ETC in its Tribal lands, Ute Mountain may be prohibited from pursuing funding for its own telecommunications projects.[16]

28. Rule 1401(a) of the Rules of Practice and Procedure, 4 CCR 723-1, requires that intervention – whether as of right or by permission – must state that the application is opposed, must give reasons why the application is opposed, and must explicitly request a hearing. Ute Mountain does not request an evidentiary hearing on the Application.

29. Pursuant to Rule 1401(c) of the Rules of Practice and Procedure, 4 CCR 723-1, Applicant's response to the alternative motion for permissive intervention was due seven days after service of the pleading, or no later than March 8, 2021. Commission records reveal that Applicant did not file any response to the Ute Mountain Intervention.

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[15] *See,* Paragraph No. 17 and Footnote 7 *supra*, at p. 6.

[16] *Id.,* ¶¶ 8 – 11, at pp. 3 and 4.

30. The ALJ finds that Ute Mountain has stated the specific grounds relied upon for its permissive intervention, including sufficient information, required by Rule 1401(c) of the Rules of Practice and Procedure, to demonstrate that this proceeding may substantially affect its pecuniary or tangible interests and that Ute Mountain's specific interests would not otherwise be adequately represented. Ute Mountain has shown good cause and its late request for permissive intervention will be granted. Ute Mountain is now a party to this proceeding.

31. The Parties to this proceeding are Conexon Connect, Southern Ute, and Ute Mountain.

II. FINDINGS, DISCUSSION, AND CONCLUSIONS.

A. The Motions for Waivers and Ruling on Motion for Leave to Reply.

32. On January 6, 2021, Conexon Connect filed the Motion for Waiver, seeking full and permanent waivers of three of the Commission's Telecommunications Rules, 4 CCR 723-2 (2018). First, Applicant seeks a waiver of Rule 2187(d)(II), which requires that the application must include a description of the service area for which Applicant seeks designation as an ETC either by metes and bounds or the underlying carrier's exchange area map. Second, Applicant seeks a waiver of Rule 2187(d)(III), which requires a demonstration that an applicant for ETC designation complies with 47 *Code of Federal Regulations* (CFR) § 54.202(a)(1)(ii), which requires submission of a five-year plan that describes proposed improvements or upgrades to an applicant's network throughout its proposed service area. Third, Applicant seeks waiver of Rule 2187(d)(XI), which requires an applicant to submit "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.…"

33. On January 29, 2021, Conexon Connect filed the Motion for Additional Waiver, seeking a full and permanent waiver of Rule 2187(e). Rule 2187(e) requires that: "Within one year of the effective date of the Commission's decision approving an application for ETC designation, the ETC shall offer the supported services. If the ETC does not offer the supported services within one year, its ETC designation shall be cancelled and deemed null and void."

34. On February 16, 2021, Southern Ute filed its Objections to Waivers. On March 1, 2021, Conexon Connect filed a Motion for Leave to Reply, along with its proposed Reply. On March 8, 2021, Southern Ute filed its Response.

35. Regarding the Motion for Leave to Reply, Rule 1400(e) of the Rules of Practice and Procedure, 4 CCR 723-1, provides that:

> (e) A movant may not file a reply to a response unless the Commission orders otherwise. Any motion for leave to file a reply must demonstrate:
>
> (I) a material misrepresentation of a fact;
>
> (II) accident or surprise, which ordinary prudence could not have guarded against;
>
> (III) newly discovered facts or issues, material for the moving party which that party could not, with reasonable diligence, have discovered at the time the motion was filed; or
>
> (IV) an incorrect statement or error of law.

36. In its Objections, Southern Ute argues that, absent consent of the Southern Ute Indian Tribal Council, its governing body, the Commission lacks jurisdiction to designate Conexon Connect as an ETC on Tribal lands within the Southern Ute Reservation. Southern Ute also argues several reasons it believes the requested waivers of Commission rules should not be granted.

37. In its Motion for Leave to Reply, Conexon Connect argues that it has been surprised by Southern Ute's objections to the requested waivers and by its arguments that this Commission lacks jurisdiction over ETC designation on Tribal lands and that the requested waivers would be disadvantageous to Southern Ute in light of its own attempts to build out its own broadband infrastructure. Conexon Connect also asserts that Southern Ute's objections and arguments raise newly discovered facts or issues which Conexon Connect could not have discovered with reasonable diligence at the time its waiver requests were filed. Finally, Conexon Connect argues that certain assertions in the Objections, including the alleged bar to this Commission's jurisdiction, are legally erroneous.[17]

38. In its Response, while Southern Ute objects to Conexon Connect addressing the jurisdictional issue in the Reply, it nonetheless presents legal argument on its allegation that the Commission lacks jurisdiction. Southern Ute also argues that none of the reasons asserted by Conexon Connect support granting the Motion for Leave to Reply. Southern Ute asserts that Applicant's failure to know it would object to the requested waivers was not a surprise, although Southern Ute concedes that in its conferral with counsel for Applicant about the intervention, Southern Ute failed to advise that it would object to the requested waivers. Finally, Southern Ute denies that its jurisdictional argument and concern about the adverse impacts of Conexon Connect's RDOF award are not newly discovered facts or issues.[18]

39. The ALJ finds that Southern Ute made the tactical decision to argue, in its Objections to the Motions for Waivers, that this Commission lacks jurisdiction to designate Conexon Connect as an ETC on Tribal lands. Southern Ute apparently made the tactical

[17] Motion for Leave to Reply at pp. 2 and 3.

[18] Response to Motion for Leave to Reply at pp. 3 through 7

decision not to file a motion to dismiss the Application as to the requested ETC designation on Tribal lands, which would have given all parties a full opportunity to brief their legal arguments on the jurisdictional issue. At the times Conexon Connect filed the Motion for Waivers (January 6, 2021) and the Motion for Additional Waiver (January 29, 2021), Southern Ute had not yet filed its objections to the requested waivers and arguments that the requested waivers would be disadvantageous to Southern Ute and its members.

40. The ALJ finds credible Conexon Connect's arguments that it was surprised by Southern Ute's objections to the requested rule waivers, by its arguments that this Commission lacks jurisdiction over ETC designation on Tribal lands, and by its arguments that the requested waivers would be disadvantageous to Southern Ute. As for the requested waivers of rules, the ALJ finds that Southern Ute's objections and arguments raised newly discovered facts or issues for which Conexon Connect could not have discovered with reasonable diligence at the time its waiver requests were filed.

41. Therefore, the ALJ finds that Conexon Connect has satisfied the requirements of Rule 1400(e) of the Rules of Practice and Procedure, 4 CCR 723-1. The ALJ will grant the Motion for Leave to Reply and will consider Conexon Connect's Reply.

B. This Commission's Jurisdiction.

42. After a challenge to subject-matter jurisdiction, the plaintiff has the burden of establishing that the court or tribunal has jurisdiction and should be prepared, when arguing his or her position, to establish the jurisdiction of the court.[19] This principle applies when the question of subject-matter jurisdiction is raised before the court or tribunal when no motion to

[19] *Clark v. Kendrick*, 670 P.2d 32, 34 (Colo. App. 19g83).

dismiss was filed[20] and when a motion to dismiss for lack of subject-matter jurisdiction has been filed.[21]

43. Applying these legal principles to the instant proceeding, when the issue of subject-matter jurisdiction was raised, Conexon Connect had the burden of proof to establish that this Commission has subject-matter jurisdiction to designate ETCs on the Tribal lands of Southern Ute and Ute Mountain.

44. When Conexon Connect filed the Application on January 6, 2021, it stated, "47 CFR § 54.202(c)—This FCC rule is not applicable to this Application because Conexon Connect does not seek ETC designation on any Tribal lands."[22] After learning that Southern Ute intended to intervene and raise the issue of this Commission's jurisdiction, Conexon Connect filed the Notice of Correction to Application on February 1, 2021. There Conexon Connect corrected the previous erroneous statement, "In fact, the census blocks for which Conexon Connect has been awarded RDOF Phase I support include portions of two Tribal Nations: the Southern Ute Indian Tribe and the Ute Mountain Ute Tribe."[23] However, the Notice of Correction to Application failed to address this Commission's subject-matter jurisdiction to grant to Conexon Connect ETC designations on Tribal lands in Colorado.

[20] *Clark v. Kendrick*, 670 P.2d 32 *supra* (In a petition for child custody, the court was concerned whether it had jurisdiction, heard arguments from counsel on jurisdiction, found that it lacked jurisdiction, and dismissed the petition.) *Trinity Broadcasting of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 930 (Colo. 1993) (Court treated a motion for summary judgment as a motion to dismiss, and held that, "When a question is raised as to whether a particular court has subject-matter jurisdiction over an action, it is the party asserting jurisdiction that bears the burden of establishing that jurisdiction exists.")

[21] *See City of Boulder v. Public Service Co. of Colo.*, 420 P.3d 289, 293 (Colo. 2018) (Plaintiff bears the burden of proving subject-matter jurisdiction); *Dicocco v. Nat'l. Gen. Ins. Co.*, 140 P.3d 314, 316 (Colo. App. 2006) ("When a court's subject-matter jurisdiction is challenged in a motion to dismiss pursuant to C.R.C.P 12(b)(1), the plaintiff has the burden to prove jurisdiction.")

[22] Application at p. 11 (emphasis in the original).

[23] Notice of Correction to Application at page 1. Applicant also stated that, "Both tribes have been served copies of the Application and all exhibits, as well as the Notice of Application." *Id.*

45. Southern Ute first raised the issue of this Commission's subject-matter jurisdiction to designate ETCs on its Tribal lands in its conferral with counsel for Conexon Connect and then in its Notice of Intervention filed on February 5, 2021. Southern Ute argued that this Commission lacks jurisdiction, under Section 214(e)(2) of the Communications Act of 1934, to grant ETC designation on tribal lands to Conexon Connect.[24] However, Conexon Connect failed to file a response to Southern Ute's Intervention addressing this Commission's subject-matter jurisdiction to grant its Application for the ETC designation on Tribal lands. In Southern Ute's Objections to the requests for waivers of rules, filed on February 16, 2021, it argued that, absent consent of the Southern Ute Indian Tribal Council (its governing body), this Commission lacks jurisdiction to designate Conexon Connect as an ETC on Tribal lands within the Southern Ute Reservation.[25]

46. In its Reply, which the ALJ has considered, Conexon Connect argues that Section 254(e) of the Communications Act of 1934 provides that "only an eligible telecommunications carrier designated under section 214(e) of [Title 47] shall be eligible to receive specific Federal universal service support."[26] Section 214(e)(2) of the Act provides that state commissions "shall . . . designate" common carriers that meet the statutory requirements as ETCs. Applicant argues further that the FCC has ruled that Section 214(e)(2) of the Act "provides state commissions with the primary responsibility for designating ETCs."[27] Conexon Connect argues that, pursuant to this authority, this Commission on multiple occasions has

[24] Southern Ute Intervention at pp. 2-4.

[25] Objections at pp. 1-2. In its Intervention, filed on March 1, 2021, Ute Mountain also argued that this Commission lacks authority over ETC designations for services to Tribal members on its Reservation. Ute Mountain Intervention at p. 3.

[26] 47 U.S.C. § 254(e).

[27] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 20 FCC Rcd. 6371, 6372 (¶ 1, n.2) (2005), interpreting 47 U.S.C. § 254(e)(2). Reply at pp. 1-2.

granted ETC designations to requesting applicants in areas that include federally-recognized Tribal lands in Colorado.[28] In fact, Applicant argues, two of the carriers that were recently granted ETC designation by this Commission were granted ETC status on the Southern Ute Reservation, and one of these carriers was also granted ETC designations in areas located within the Ute Mountain Reservation, following the FCC's 2018 Connect America Fund Phase II auction.[29] Finally, Conexon Connect argues that its proposed ETC Designation Area in Colorado not only encompasses federally-recognized Tribal lands; but most of its Application requests ETC designation on non-Tribal Lands in the territories of six Colorado rural electric cooperatives.

47. The ALJ finds that Conexon Connect has failed to sustain its burden of proof to establish that this Commission has subject-matter jurisdiction to grant ETC designations on federally-recognized Tribal lands in Colorado. After Conexon Connect realized that its Application did include census blocks on Tribal lands, it amended its Application to state that the ETC designation sought included census blocks on Tribal lands in the Southern Ute and Ute Mountain Reservations. In its Notice of Correction to Application, Conexon Connect did not attempt to counter Southern Ute's jurisdictional arguments. In its Reply, Conexon Connect did not persuasively overcome Southern Ute's arguments that this Commission lacks jurisdiction,

[28] Reply at p. 2. *See e.g., In the Matter of the Application of Commnet Four Corners, LLC for Expansion of its Eligible Telecommunications Carrier Designation for Purposes of Receiving CAF Phase II Support*, Proceeding No. 18A-0665T, Decision No. C18-1094 (Issued Dec. 10, 2018) (designated as an ETC in the Southern Ute Indian Reservation); *In the Matter of the application of Viasat Carrier Services, Inc. for Limited Designation as an Eligible Telecommunications Carrier in the State of Colorado to Receive Connect American Phase II Auction (Auction 903) Support for Voice and Broadband Services and Request for Expedited Consideration*, Proceeding No. 18A-0666T, Decision No. R19-0033 (Issued Jan. 11, 2019) (designated as an ETC in both the Ute Mountain Ute Tribal Reservation and the Southern Ute Indian Reservation); *In the Matter of the Application of Virgin Mobile USA, L.P. for Limited Designation as an Eligible Telecommunications Carrier in the State of Colorado*, Docket No. 11A- 657T, Decision No. R12-0246 (Issued Mar. 6, 2012) (designated as a Lifeline-only ETC in both the Ute Mountain Ute Tribal Reservation and the Southern Ute Indian Reservation).

[29] Reply at pp. 1-2. However, Conexon Connect does not identify which carriers were awarded ETC designations of which Tribal lands.

under Section 214(e)(2) of the Communications Act of 1934, to grant ETC designation on Tribal lands. As support for its position that this Commission has subject-matter jurisdiction, Conexon Connect cited three ETC applications in which this Commission apparently granted ETC designations in areas that include Tribal lands. However, in none of those proceedings was the Commission's jurisdiction challenged, nor did any of those decisions find that this Commission has jurisdiction, under Section 214(e)(2) of the Communications Act of 1934, to grant ETC designations on Tribal lands.

48. The ALJ declines to exercise this Commission's jurisdiction, under Section 214(e)(2) of the Communications Act of 1934, over Conexon Connect's Application to grant ETC designations in census blocks on Tribal lands in Colorado.

49. The FCC has established a framework for determining whether a state commission or the FCC itself has jurisdiction to designate ETCs on Tribal lands.[30] First, a carrier seeking ETC designation to receive federal universal service support for telecommunications service provided on Tribal lands must petition the FCC for a determination on whether the state commission has jurisdiction over the carrier.[31] The FCC then determines whether the carrier is subject to the jurisdiction of a state commission or whether it is subject to a Tribal authority given the Tribal interests involved. In the latter case, the FCC has jurisdiction to designate the

[30] *See Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Under]served Areas, Including Tribal and Insular Areas; Smith Bagley, Inc., Cheyenne River Sioux Tribe Telephone Authority, Western Wireless Corporation, Wyoming, Cellco Partnership d/b/a/ Bell Atlantic Mobile, Inc., Petitions for Designation as an Eligible Telecommunications Carrier and for Related Waivers to Provide Universal Service*, CC Docket No. 96-45, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12208, 12265–69, paras. 115–27 (2000) (*Twelfth Report and Order*), *recon. by Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas*, CC Docket No. 96-45, Twenty-Fifth Order on Reconsideration, Report and Order, Order, and Further Notice of Proposed Rulemaking, 18 FCC Rcd 10958, 10964 n.28 (2003) (*Tribal Recon. Order*).

[31] *Twelfth Report and Order*, 15 FCC Rcd at 12265–69, paras. 115–27.

carrier as an ETC,[32] and the FCC will consider the merits of the carrier's petition for ETC designation.[33] The FCC has delegated authority to the Chief of the Wireline Competition Bureau to act on requests for ETC designations.[34]

50. Conexon Connect did not address whether it has complied with any of the FCC's framework for determining whether this Commission or the FCC has jurisdiction to designate the ETCs on Tribal lands in this Application. In none of Conexon Connect's pleadings filed in this proceeding is there is any indication that Conexon Connect has consented to Southern Ute's or Ute Mountain's tribal regulatory authorities.

51. In its Reply, Conexon Connect states that, pursuant to the Notice and Filing Requirements and Other Procedures for Auction 904, the FCC stated:

> Petitioners seeking an ETC to serve Tribal lands may also petition the [FCC] directly so long as they have not initiated an ETC designation proceeding before the relevant state commission. Petitioners taking this approach should verify that the intended service area is completely on Tribal lands. If not, the petitioner must petition the relevant state commission for waiver of the state's jurisdiction over the non-Tribal areas.[35]

52. Conexon Connect concludes its Reply with this request:

> Should the Commission elect not to assert jurisdiction over the entirety of Conexon Connect's ETC Application, Conexon Connect respectfully requests that the Commission defer jurisdiction over its entire ETC Application to the FCC, consistent with the guidance provided by the FCC in its

[32] *Id*. at 12266–67, paras. 120–22. *See also* 47 U.S.C. § 214(e)(6); and *In the Matter of* Petition of AT&T Mobility LLC for *Designation as an Eligible Telecommunications Carrier* Pursuant to Section 214(e)(6) of the *Communications Act and Transfer of the Alltel Pine Ridge Reservation Eligible Telecommunications Carrier Designation,* WC Docket No. 09-197, FCC 03-115, DA-11-859, 16 FCC Red. 18145 at para.5 (May 11, 2011).

[33] *Id*. at 12265, para. 115.

[34] *See Section 214(e)(6) Public Notic*e, 12 FCC Rcd at 22948. The Wireline Competition Bureau previously was known as the Common Carrier Bureau.

[35] Reply at p. 3. *See Rural Digital Opportunity Fund Phase I Auction Scheduled for October 29, 2020, Notice and Filing Requirements and Other Procedures for Auction 904*, Public Notice, 35 FCC Rcd. 6077, 6127-6128 (para. 136) (2020) (internal citations omitted) (*RDOF Phase I Auction Procedures Public Notice*).

> *RDOF Phase I Auction Procedures Public Notice*, and to do so at its earliest opportunity to avoid further delay.[36]

The ALJ construes this request by Conexon Connect as a motion for voluntary dismissal of the instant Application, pursuant to Rule 41(a)(1), *Colo. Rules of Civil Procedure*. Time is of the essences in ruling on this request. Therefore, response time to the motion for voluntary dismissal will be waived, pursuant to Rule 1308(c) of the Rules of Practice and Procedure, 4 CCR 723-1.

53. Being fully advised of the premises and positions of the Parties, the ALJ will grant Conexon Connect's request to defer to jurisdiction over its entire ETC Application to the FCC, consistent with the guidance provided by the FCC in its *RDOF Phase I Auction Procedures Public Notice*. Conexon Connect's request for voluntary dismissal of this Application will be granted. The voluntary dismissal shall be without prejudice.

54. Conexon Connect may choose to file its entire ETC application, including Tribal lands and non-Tribal lands, with the FCC. Alternatively, Conexon Connect may choose to file with this Commission a new ETC application that includes only non-Tribal lands, which will ensure that this Commission will retain jurisdiction over the ETC designation on non-Tribal lands in the territories of the six Colorado rural electric cooperatives.

55. The ALJ transmits the record of this proceeding, this recommended decision containing findings of fact and conclusions thereon, and a recommended order to the Commission as provided under § 40-6-109, C.R.S.

[36] Reply at p. 4. (emphasis in original)

III. ORDER

A. The Commission Orders That:

1. The alternative Motion for Permissive Intervention filed by the Southern Ute Indian Tribe (Southern Ute) on February 5, 2021 is granted.

2. The untimely alternative Motion for Permissive Intervention filed by the Ute Mountain Ute Tribe on March 1, 2021 is granted.

3. The Motion for Leave to Reply to Southern Ute Indian Tribe's Objections to Requests for Waivers, filed by Conexon Connect LLC (Conexon Connect) on March 1, 2021, is granted.

4. Conexon Connect's request that the Commission defer jurisdiction to the Federal Communications Commission over its entire Application for Eligible Telecommunications Carrier Designation for Purposes of Receiving Rural Digital Opportunity Fund Phase I and Lifeline Support (ETC Application), construed as a motion for voluntary dismissal, is granted.

5. Since time is of the essence, response time to the motion for voluntary dismissal is waived.

6. The ETC Application filed by Conexon Connect on January 6, 2021 is dismissed, voluntarily and without prejudice, consistent with the findings, discussion, and conclusions in this Decision.

7. The Motion for Waiver of Certain Commission Rules filed by Conexon Connect on January 6, 2021 and the Motion for Additional Waiver of Commission Rules filed by Conexon Connect on January 29, 2021 are denied as moot.

8. 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.

9. 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 within 20 days after service, 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.

10. 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)

ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

STEVEN H. DENMAN

Administrative Law Judge