

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 08A-508T

IN THE MATTER OF THE APPLICATION OF NNTC WIRELESS COMPANY, LLC, FOR
DESIGNATION AS AN ELIGIBLE TELECOMMUNICATIONS CARRIER AND ELIGIBLE
PROVIDER IN THE STATE OF COLORADO.

ORDER ADDRESSING EXCEPTIONS

Mailed Date: May 23, 2011

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I. BY THE COMMISSION

A. Statement

1. This matter comes before the Commission for consideration of exceptions to Recommended Decision No. R11-0218 (Recommended Decision) filed by the Colorado Office of Consumer Counsel (OCC); Staff of the Colorado Public Utilities Commission (Staff); and NNTC Wireless, LLC (NNTC or Applicant) on March 21, 2011. On April 4, 2011, Staff, the OCC, and NNTC each filed responses to exceptions.

2. This matter also comes before the Commission for consideration of a Motion for leave to file reply to the OCC's and Staff's responses to NNTC's exceptions to Recommended Decision and request for waiver of response time (Motion), filed by NNTC on April 25, 2011. Staff filed a response to the Motion on April 27, 2011. The OCC filed a response on April 28, 2011.

3. Being fully advised in the matter and consistent with the discussion below, we grant NNTC's Motion, grant the exceptions filed by NNTC, deny the exceptions filed by Staff, and deny the exceptions filed by the OCC.

B. Background

4. On November 14, 2008, NNTC filed a Verified Application for designation as an Eligible Telecommunications Carrier (ETC) and as an Eligible Provider (EP) in Colorado. The Applicant is a wholly-owned subsidiary of Nucla-Naturita Telephone Company (Nucla-Naturita), which is a rural incumbent local exchange carrier (ILEC). Nucla-Naturita's service territory is located west of the San Miguel Basin and covers the communities of Arrowhead, Gateway, Naturita, Nucla, and Paradox, Colorado. Nucla-Naturita and NNTC share facilities, office space, employees, as well as other expenses.

5. The Commission previously designated Nucla-Naturita an ETC and an EP in its service territory. The ETC designation makes Nucla-Naturita eligible to draw money from the Federal Universal Service Fund (USF) and it currently draws money from the USF fund. The EP designation makes Nucla-Naturita eligible to draw money from the Colorado High Cost Support Mechanism Fund (CHCSM) and it currently draws money from the CHCSM Fund. NNTC filed its application in order to achieve the same.

6. NNTC had 338 customers and 662 lines in service at the time of the evidentiary hearing. These are total counts and include residential and business customers and lines. The service area for which NNTC seeks designation as an ETC and as an EP covers a portion of the Nucla-Naturita wire centers/exchanges and the Norwood wire center/exchange of CenturyTel of Eagle, Inc. (CenturyTel).

7. Staff and the OCC are the only intervenors in this case. The Commission referred this matter to Administrative Law Judge (ALJ) Mana L. Jennings-Fader, who held an evidentiary hearing. The ALJ issued the Recommended Decision on March 1, 2011, granting both the

ETC and the EP designations, subject to certain conditions. The OCC, Staff, and NNTC timely filed exceptions to the Recommended Decision.

C. Motion

8. In its Motion filed on April 25, 2011, NNTC requests leave to file a reply to the responses to NNTC's exceptions that were filed by Staff and the OCC. In general, NNTC claims that Staff and the OCC presented their arguments in favor of the disaggregation requirement for the first time in their responses to NNTC's exceptions. NNTC contends that neither Staff nor the OCC presented these arguments at the hearing, or in any of the testimony or pleadings filed with the ALJ, or presented any evidence as to why disaggregation is warranted in this case. NNTC urges the Commission to allow it to reply to these arguments.

9. In its response to the Motion, Staff argues that NNTC failed to show good cause for the Commission to allow it to file a response.

10. For its part, the OCC argues that NNTC failed to demonstrate that sufficient facts and circumstances exist to support its extraordinary request for a waiver of Rule 1308(a), which does not permit replies. The OCC further argues that NNTC does not dispute that the ALJ had the authority to impose the disaggregation requirement, even if no party advocated for this at the hearing. The OCC contends that NNTC has made the disaggregation requirement an issue by challenging it in its exceptions, thus responses by Staff and the OCC were proper. Finally, the OCC argues that NNTC's reply will not assist the Commission in reaching a just and reasonable decision in this case, because it merely repeats the arguments made by NNTC in its exceptions. The OCC urges the Commission to deny the Motion.

11. We agree with NNTC that neither Staff nor the OCC presented any arguments or evidence on the issue of disaggregation (as opposed to redefinition) before filing their responses

to NNTC's exceptions. It is true that NNTC had an opportunity to challenge the disaggregation requirement imposed by the ALJ in its exceptions. However, the arguments given by the ALJ in support of disaggregation in the Recommended Decision differ from the arguments made by Staff and the OCC in their responses to NNTC's exceptions, even if all three sets of arguments address disaggregation generally. Finally, the arguments made by NNTC in its reply may assist the Commission in reaching a just and reasonable decision in this case. We therefore grant the Motion and permit NNTC's reply.

D. NNTC Exceptions

12. NNTC filed its exceptions on only one issue, namely whether the grant of the EP and ETC designations should be conditioned on both the redefinition and disaggregation of the underlying ILEC's study area to the wire center level. NNTC agrees that the redefinition (not the disaggregation) of the study areas served by Nucla-Naturita is required. NNTC maintains no redefinition of the Norwood wire center/exchange, which is served by CenturyTel, is necessary.

13. Nucla-Naturita and other rural ILECs receive USF support based on their actual, embedded costs averaged across all lines within its study area (service territory). Because of this averaging, and even though the per-line cost to provide service may vary widely within the study area, the same per-line support is available throughout the study area. Competitive ETCs serving a rural area receive the same per-line support as the underlying ILECs, as opposed to their actual costs. Depending on the circumstances of a particular study area, averaging of costs may create an artificial incentive for a competitive carrier to enter a relatively low-cost portion of a study area served by a rural ILEC, or cream-skimming. Recommended Decision, at ¶ 116.

14. Redefinition and disaggregation are remedies designed to address these artificial incentives. Redefinition of a rural ILEC's study area to the wire center level simply makes each wire center/exchange a separate study area. Disaggregation, on the other hand, involves splitting a single study area into five separate study areas, and conducting expensive and time-consuming studies to determine the actual costs of each wire center.

15. NNTC argues that disaggregation is not required in the circumstances of this case. Specifically, since Nucla-Naturita chose Path 1, *i.e.*, not to disaggregate its study area, the cream-skimming rationale for disaggregation does not apply, since Nucla-Naturita assumed the risk of cream-skimming by NNTC and other competitive carriers. In addition, NNTC contends that no evidence of cream-skimming concerns was presented in this case and that neither Staff nor the OCC listed cream-skimming as a reason to deny NNTC the ETC or EP designations.

16. Further, NNTC argues that the Commission does not need to decide the issue of disaggregation at the ETC/EP designation stage. Rather, NNTC argues that the Commission can address this issue when NNTC files its application for actual receipt of funds and for redefinition of Nucla-Naturita's study area to the wire center level. NNTC argues this deferral is appropriate because neither Staff nor the OCC presented any arguments or evidence that disaggregation is warranted in this case, and thus NNTC had no opportunity to address this issue. Finally, NNTC states that the Commission should designate NNTC as an EP and an ETC in the Norwood wire center/exchange without a further redefinition or disaggregation, since it serves that entire wire center.

17. In response, Staff maintains that disaggregation is necessary as a condition of the ETC and EP designations. First, Staff argues that only Nucla-Naturita has standing to argue on the merits of redefinition versus disaggregation. Further, disaggregation and/or redefinition

must be done using a methodology designed by Nucla-Naturita. Nucla-Naturita, as the ALJ noted, is not a party to this docket. Staff concludes that the Commission should deny the exceptions filed by NNTC for lack of standing.

18. For its part, the OCC argues that the ALJ was authorized by both federal law and Commission Rules to condition the grant of the ETC and EP designation on redefinition and/or disaggregation, to ensure these designations will serve the public interest. The OCC also points out that the ALJ addressed the fact that NNTC will be a competitor of its parent Nucla-Naturita and CenturyTel. The OCC argues that the potential for cream-skimming in the Nucla study area must be addressed. The OCC points out that the Arrowhead exchange, which is served by Nucla-Naturita, is non-contiguous to other Nucla-Naturita exchanges, has a large geographic area, and a low customer base. The OCC assumes this exchange has a higher cost per customer than other Nucla-Naturita exchanges. The OCC contends that, without disaggregation, NNTC may receive a windfall benefit of the high cost of exchange it does not serve (Arrowhead) via the high cost support. The OCC concludes that disaggregation is critical to prevent cream-skimming and that the Commission should deny the exceptions filed by NNTC.

19. We agree with NNTC that a disaggregation condition would not be appropriate in this docket. It is true that no party presented evidence or arguments on this issue. Regardless of whether NNTC, as the applicant, should have done so, there is little, if any, record in this case on whether disaggregation or redefinition is appropriate. Regardless of whether, in the abstract, this issue is better addressed at the ETC/EP designation stage or in a subsequent proceeding, we will defer resolution of this issue until a subsequent proceeding because of the state of the record in this docket. We therefore grant the exceptions filed by NNTC. We also grant NNTC's request for clarification regarding the Norwood exchange/wire center.

20. We note that, when NNTC applies for actual receipt of high cost support, NNTC and/or Nucla-Naturita should file supporting testimony and exhibits addressing both redefinition and disaggregation options. We express no opinion, at this time, on whether either or both are warranted. Rather, the Commission will comprehensively examine this issue when NNTC files for actual receipt of support. The Commission will consider the unique circumstances of this case, specifically the parent-subsidiary relationship between the competitive wireless carrier and the underlying ILEC, in rendering its decision.

E. Staff Exceptions

1. Compliance with Rule 2847(a)

21. In its exceptions, Staff contends that NNTC is not in substantial compliance with Rule 2847(a) and challenges the findings made by the ALJ to the contrary. Staff argues that the Commission should deny the EP designation for failure to comply with this rule.

22. Rule 2847(a) states that, as a prerequisite to EP designation, a provider shall be in substantial compliance with the rules applicable to the provision of basic local exchange service. In this docket, Staff pointed out that for the past two years NNTC has been improperly collecting and retaining Telecommunications Relay Service (TRS) surcharges on its wireless accounts and the Colorado universal surcharge, in violation of § 40-15-502(5)(c), C.R.S. Staff argued NNTC was not in substantial compliance with Rule 2847(a) because it had been improperly collecting and retaining these surcharges when it filed its application on November 14, 2008.

23. The ALJ noted that NNTC was aware of these violations and was taking steps to remedy them. Recommended Decision, at ¶¶ 153-154. She found that the Commission could consider whether an applicant came into compliance with Rule 2847(a) after filing of the application, based on the evidentiary record developed, and was not limited to considering only

whether an applicant was in compliance at the time of the application (as Staff argued). The ALJ determined that NNTC came into substantial compliance with Rule 2847(a) after it filed the application.

24. In exceptions, Staff contends that the ALJ, in an effort to revise what she believes is a better reading of Rule 2847(a), misapplied the rule as written. Staff asserts that the focus in this docket, where NNTC is the applicant seeking EP designation, should be on whether NNTC substantially complied with Rule 2847(a) at the time of its application, not any corrective actions undertaken since that time. Staff argues that the evidence in this docket demonstrates NNTC is not in substantial compliance with Rule 2847(a) and, thus, the Commission should not designate NNTC as an EP.

25. In response, NNTC does not dispute that it improperly collected and retained TRS and universal surcharges in the past. NNTC states that, since discovery of these billing errors, it worked out an arrangement with Staff to resolve the issues. By the time of the hearing, NNTC was no longer collecting TRS fees on wireless services or universal surcharges on non-regulated accounts. NNTC further states that it has filed a refund plan with the Commission. NNTC urges the Commission to deny Staff's exceptions and uphold the ALJ's ruling on this issue.

26. We find that NNTC has taken the necessary actions to remedy violations of Rule 2847(a) and has put into place safeguards to prevent a future occurrence. We also agree with the ALJ that the Commission may consider whether an applicant came into substantial compliance after filing of the application and is not limited to considering only whether an applicant was in substantial compliance at the time of the application. We agree with the ALJ that a reading to the contrary would create a disincentive for an EP designation application to

take action to come into compliance and would create administrative inefficiency. We deny the exceptions filed by Staff on this issue.

2. Clarification of Paragraph 129

27. In its exceptions, Staff argues the Commission should clarify paragraph 129 of the Recommended Decision and state that the Nucla-Naturita study area consists of the following five exchanges: Naturita, Nucla, Paradox, Arrowhead, and Gateway; not the Dove Creek and Norwood exchanges. We agree with the requested clarification substantively, but find that the clarification should be made to paragraph 120 instead of paragraph 129. We therefore grant Staff's request for clarification.

F. The OCC Exceptions

1. The Argument that the Recommended Decision Improperly Uses an FCC Decision to Undercut the OCC's Cord-Cutting Argument while Ignoring the Decision's Context

28. During the hearing, the OCC has argued that services offered by a wireless carrier applying for an ETC designation must be a complete substitute for the wireline services instead of complementary or additional to the wireline services (in other words, the customer must "cut cord" or go completely wireless). Otherwise, a wireless carrier cannot establish that its receipt of USF funds would result in increased customer choice and therefore will be in the public interest. In this case, OCC asserts that NNTC would need to establish that the Nucla-Naturita or CenturyTel customers who become NNTC customers would discontinue their Nucla-Naturita or Century-Tel wireline services.

29. The ALJ relied on the *Interim Cap Order*,¹ FCC 08-122, to address this argument. In the *Interim Cap Order*, at ¶¶ 19-20, the Federal Communications Commission (FCC) stated that, at the time the telecommunications market was first opened up to competition, it envisioned that wireless competitive ETCs would compete directly with wireline ILECs and try to take existing customers from them. The FCC then noted that this did not turn out to be the case. Instead, wireless competitive ETCs largely provide services that are not viewed by consumers as substitutes for wireline services, but as additional or complementary services. In the *Interim Cap Order*, the FCC expressed a concern with this development and its impact on the USF, but found no fault with it.

30. The ALJ found that the above-cited language in the *Interim Cap Order* undercut the OCC's cord-cutting argument. The ALJ found that wireless competitive services should not be viewed, in evaluating the public interest implications of an ETC application, as substitutes for the wireline services of the underlying ILEC, but it is sufficient if the wireless competitive ETC service would supplement the customer's wireline service. Recommended Decision, at ¶¶ 111-112.

31. In its exceptions, the OCC disputes the ALJ's statement that the FCC found no fault with the fact that wireless services are more likely to be a supplement, not a full substitute for wireline services. The OCC argues that the FCC was actually troubled by that development and imposed the interim cap because of it. The OCC argues the purpose of an ETC designation and the USF funds is not to subsidize additional telephone service technology, but to determine if the principle of sufficiency has been met. The OCC argues that the designation of an additional

¹ *In the Matter of High Cost Universal Service Support*, 2008 WL 1930572, 23 F.C.C.R. 8834, (F.C.C. May 1, 2008).

ETC that is a complement rather than a substitute for basic service would violate that principle.

32. The OCC further argues that the Recommended Decision basically establishes a policy that ratepayers shall fund dual telephone service providers to the same customers. The OCC points out that, at ¶ 204 of the Recommended Decision, the ALJ found it was appropriate to designate NNTC as an EP even if there are no unserved customers in the Nucla-Naturita area at present. This is because the service area is a rural and difficult to serve area. The ALJ further noted that other important factors and benefits are not negated or lessened just because there are no customers unserved by Nucla-Naturita. The OCC argues that the Recommended Decision has removed from this, or any future EP application, the inquiry as to whether there are any unserved customers. The OCC argues this is an unwise policy decision that will have the effect of binding this Commission in all future EP dockets.

33. The OCC states that the *de facto* policy that ratepayers should fund dual telephone providers to the same customers is contrary to the purpose behind CHCSM, which is to ensure the availability of universal *basic* service, not universal secondary, additional, or complementary service (emphasis by the OCC).

34. In response, NNTC argues that the OCC's claim that only one provider should be designated in a given geographic area and that customers should not have a choice between more than one telephone carrier receiving high cost support has never been adopted by either the FCC or the Commission. NNTC also argues that, if the FCC believed that cord-cutting was required for wireless carriers to be designated as an ETC, it could have implemented such a restriction. It did not. In fact, in the *Interim Cap Order*, the FCC specifically stated that the interim cap does not restrict the number of competitive ETCs that may receive USF support, *i.e.*, that it is possible to have more than one ETC in a given geographic area.

35. We agree with NNTC that a wireless carrier seeking an ETC designation need not show that its customers will cut cord from the ILEC's wireline services to prove that its receipt of USF funds would be in the public interest. We also agree with NNTC that the FCC rejected the argument that no more than one provider should receive USF support in a given area. If the FCC believed cord-cutting was required for wireless carriers to be designated as an ETC, it could have implemented this restriction in the *Interim Cap Order*. It did not, despite being troubled by the fact that a consumer is more likely to view wireless services as complementary rather than a substitute to wireline services. In fact, the FCC stated that the interim cap does not restrict the number of competitive ETCs that may receive support. Further, the FCC rules, federal statutes, and Commission rules contemplate that a state utility commission may designate more than one ETC in a given area. 47 U.S.C. § 214(e), 47 *Code of Federal Regulations* 54.201(c), Rule 2187 of the Rules Regulating Telecommunications Providers, Services, and Products, 4 *Code of Colorado Regulations* 723-2.

36. Finally, we find that the Recommended Decision does not establish any policy or precedent that ratepayers shall fund dual telephone providers to the same customers and thus do not agree with the OCC's argument to the contrary. The ALJ merely found that, *in this case*, it was appropriate to designate NNTC as an EP even though there are no unserved customers in the Nucla-Naturita area, because the service area is a rural and difficult to serve area. It does not mean that, in a case with different circumstances, in an area that is not rural or is not difficult to serve, the Commission must reach the same result. In other words, the ALJ limited her holding to the facts and circumstances of NNTC's application. We deny the exceptions filed by the OCC on this ground.

2. The Argument that the ALJ Improperly Dismissed the Public Interest Arguments Due to Prematurity

37. During the hearing, the OCC and Staff argued that, due to the parent-subsidary relationship between NNTC and Nucla-Naturita, providing CHCSM funding to NNTC would give it a competitive advantage over other wireless competitive carriers in the Nucla-Naturita service area. The OCC also argued that NNTC does not need high cost support because it has already been successful in building its network and capturing customers without such support.

38. In the Recommended Decision, the ALJ found both arguments to be premature, on the grounds the issue of whether or not NNTC will actually receive CHCSM funding will be made in a later proceeding and this docket is only about whether NNTC should be designated as an EP.² Recommended Decision, at ¶¶ 205-206.

39. In its exceptions, the OCC argues that the above-mentioned arguments are public interest arguments and this proceeding is the only time it can raise these arguments. In response, NNTC argues that the ALJ gave several reasons for rejecting these arguments, each one of them persuasive on the merits. The ALJ found, among other things, the argument that the parent-subsidary relationship between the ILEC and the wireless carrier would provide NNTC with an advantage over other wireless carriers serving the area was speculative.

² The existing Commission rules establish a multi-phased process that a telecommunications carrier must go through to obtain CHCSM support. First, a carrier must be designated an EP. In an application to be designated an EP, the carrier must demonstrate that it is not receiving funds from the CHCSM or any other source that together with revenues as defined by the Commission-adopted revenue benchmark exceed the reasonable cost of providing basic local exchange service to customers of such provider. *See* Rule 2847(b)(I)(E). Second, after being designated an EP and prior to actual receipt of support, the telecommunications carrier must meet the same test again in a later application. *See* Rule 2847(f)(I). Third, the actual calculation of amount of support that the carrier is entitled to and the disbursement of funds occur after the Commission rules on the merits of these two applications. The CHCSM rules provide that the calculation and disbursement of support (which is where the identical support rule comes into play) occur administratively rather than as an adjudicated proceeding. *See* Rule 2848(e). *See generally*, Decision No. C09-0881, issued August 12, 2009 in Docket No. 09A-107T.

The ALJ also stated that the argument that NNTC does not need support because it has been successful without it, taken to its logical conclusion, would create a bias in favor of designating as ETCs carriers that have no network and no demonstrated ability to provide service. It would create a perverse incentive that will discourage carriers from taking initiatives to build networks before they are designated ETCs and could undercut the public interest goal of providing basic local service to unserved and underserved areas as quickly and as widely as possible, according to the ALJ.

40. We note that the OCC's public interest arguments are not necessarily premature. However, we agree with NNTC that these arguments should be rejected on substantive grounds. There is no record evidence of any commingling between Nucla-Naturita and therefore the claim that the parent-subsidiary relationship will unduly benefit NNTC vis-à-vis other wireless carriers, at this time, is speculative. The OCC has not argued there is a high risk of commingling in this case. We also agree with the ALJ that carriers that take the initiative to build networks before being designated EPs or ETCs should not be penalized and that the USF money should not go only to carriers that have no demonstrated ability to perform. We deny the exceptions filed by the OCC on these grounds.

3. The Argument that the Recommended Decision Failed to Note Evidence Presented by the OCC

41. In its exceptions, the OCC contends that the ALJ failed to note record evidence presented by the OCC with respect to NNTC's alleged failure to demonstrate a need for high-cost support. The OCC argues that the ALJ failed to make any findings on this argument. The OCC also argues that the ALJ ignored its argument that NNTC will use CHCSM subsidies for advanced services.

42. In response, NNTC argues that the ALJ and the Commission are not required to recite to every possible evidentiary submission when making findings of fact. NNTC also argues that the ALJ adequately addressed the above-mentioned arguments.

43. We agree with NNTC that the ALJ was not required to recite to every possible evidentiary submission when making findings of fact. We also agree with NNTC that the ALJ adequately addressed the OCC's arguments. The ALJ addressed the need argument by stating that this argument, if taken to its logical conclusion, would create a bias and perverse incentives against carriers that have shown initiative and demonstrated the ability to build a network. In addition, the ALJ addressed the OCC's argument that NNTC will use CHCSM subsidies to offer advanced services by finding that argument to be speculative. We agree with the ALJ's conclusions with respect to both arguments. We also agree with NNTC that it can be audited if, after NNTC begins receiving high cost funds, there are concerns it is using funds for advanced services or for another improper purpose. We deny the exceptions filed by the OCC on these grounds.

4. The Argument that the Public Interest Analysis for an ETC Designation Requires Consideration of the Impact of USF and that the ALJ Failed to Consider this Impact

a. Interim Cap Order

44. By the *Interim Cap Order*, the FCC established an interim cap on the amount of high cost support that competitive ETCs may receive. Basically, the FCC capped the total annual competitive ETC support for each state at the level of support that competitive ETCs in that state were eligible to receive during March 2008 on an annualized basis. The number of competitive ETCs from each state eligible to receive support does not affect the total amount of support for

that state, only the amount that each ETC may receive. For Colorado, this amount is slightly over \$10 million.

45. Further, the *Interim Cap Order* specifically stated that the cap will allow a state the flexibility to direct competitive ETC support to the areas within the state that it determines are most in need of such support, at ¶ 26. The *Interim Cap Order* also stated that the cap only applies to the amount of support available to competitive ETCs, but does not restrict the number of competitive ETCs that may receive support, at ¶ 39.

46. The FCC issued Decision No. 10-205 on December 30, 2010, which went into effect on the same date. In that decision, the FCC adopted a proposal to *amend* the interim cap, so that the money relinquished by an ETC carrier in a given state will *not* be distributed back to other ETC carriers in that state.

47. In the Recommended Decision, at ¶¶ 128-129, the ALJ stated that “the impact on the USF of designating a new competitive ETC is not a factor to be considered in the public interest analysis.” The ALJ further stated that “to the extent this factor [the interim cap] may be relevant to the public interest analysis, designating NNTC WL as a competitive ETC will have little impact on the amount of USF money available to existing competitive ETCs in Colorado.”

b. The Arguments by the Parties

48. The OCC argues that the ALJ’s findings are in error. The OCC also argues that the amount of the total USF support available in Colorado will be reduced due to the Western Wireless relinquishment. The OCC argues that the interim cap is an integral part of the public interest analysis. The OCC argues that the *Interim Cap Order* introduced a new and significant factor for the Commission’s public interest analysis and that it is a “game changer” regarding competitive ETC applications.

49. In response, NNTC contends that Mr. Cory Skluzak, testifying for the OCC, acknowledged that NNTC's estimated draw will not materially affect the total amount of USF support available to competitive ETCs in Colorado. NNTC argues that \$180,000, the estimated amount that NNTC may receive, is less than 2 percent of \$10 million, the total amount of USF support available to competitive ETCs in Colorado. NNTC concludes that the ALJ did in fact consider the effect of NNTC's estimated draw on the total amount. NNTC also points out that the OCC supported other applications for ETC designation, which have resulted in much larger draws than NNTC. Finally, NNTC argues that only \$53,976 of the \$10 million in USF moneys available to competitive ETCs in Colorado currently go to the Western Slope.

c. Findings and Conclusions

50. We agree with the OCC that the interim cap is one of the factors in determining whether an ETC designation in these areas is in the public interest and therefore the impact of NNTC's estimated draw on the total moneys available to competitive ETCs in Colorado must be considered in this docket. However, the ALJ *has* considered this impact and determined that it was immaterial. We agree with that assessment. The ALJ noted, in ¶ 129 of the Recommended Decision, that NNTC's estimated annual USF support would be no more than \$180,000 against the capped \$10.07 million annual Competitive ETC USF fund for Colorado.

51. In addition, we disagree with the OCC regarding the impact of FCC Decision No. 10-205. We find that the USF moneys relinquished by Western Wireless will be distributed back to other competitive ETCs in Colorado. FCC Decision No. 10-205 is prospective only and it became effective on December 30, 2010. Western Wireless, however, filed its application to relinquish its ETC designation on July 30, 2010. The Commission granted that application by Decision No. C10-1084, mailed October 4, 2010 in Docket No. 10A-540T. Therefore, the ETC

money relinquished by Western Wireless *will* be distributed back to other competitive ETCs in Colorado. The total amount of competitive ETC support in Colorado will stay at approximately \$10 million rather than \$7 million (Western Wireless received about \$3 million in support).

52. Because the ALJ did consider the interim cap in her public interest analysis and because her ruling that the impact of NNTC's estimated draw on the total amount of competitive ETC support in Colorado is immaterial is supported by the record, we deny the exceptions filed by the OCC on these grounds.

5. The Argument that the ALJ Failed to State Findings Regarding Required Statutory Public Interest Analysis for EP Designation

53. In its exceptions, the OCC argues that the ALJ failed to discuss or state findings demonstrating that a public interest analysis utilizing §§ 40-15-101, -501, and -502, C.R.S., took place with respect to NNTC's EP designation. The OCC also argues that NNTC failed to present sufficient evidence to establish that its EP application is in the public interest, as defined in these three statutes. The OCC also states that the public interest analyses for ETC and EP designations require consideration of different public interest factors, yet the ALJ did not discuss these factors in the Recommended Decision.

54. In response, NNTC states that the OCC fails to acknowledge evidence presented in written and oral testimony that relates to all three statutes. NNTC cites to this evidence in its response. NNTC also states that the OCC focuses on prefiled direct testimony of NNTC witness Mr. John Loe and excludes other evidence. NNTC argues that it presented sufficient evidence in the form of direct, rebuttal, and oral testimony that it seeks to expand its wireless coverage and improve the quality of wireless services in the San Miguel Basin. NNTC argues it has presented evidence that improved and expanded wireless coverage that will serve the public policy

interests in the form of increased customer choice, competition among carriers, better quality of service, and the benefits of wireless service where little or no wireless coverage is presently available.

55. NNTC further argues that the ALJ made findings regarding the EP public interest factors in ¶¶ 198 and 202 of the Recommended Decision, which findings relate to the EP public interest factors listed in the three statutes.

56. We agree with NNTC that the ALJ has discussed and made findings regarding public interest analyses pursuant to §§ 40-15-101, -501, and -502, C.R.S., with respect to the EP designation. Further, we agree with the substance of these findings. We deny the exceptions filed by the OCC on these grounds.

6. The Argument that the Recommended Decision Improperly Removed the Burden of Proof on the Public Interest Analysis for Both ETC and EP Applications from NNTC

57. The OCC argues that the ALJ improperly relieved NNTC of its burdens of proof with respect to both EP and ETC designations when she ruled that NNTC is not required to show that designating it as an ETC and as an EP will result or is likely to result in all (or even most) of the Commission-identified benefits. The OCC argues that a lack of an established set of factors that are relevant to public interest analysis should not be used to relieve a carrier of its burden of proof. Further, the OCC argues that the ALJ liberally construed NNTC's very sparse proffer and thus inappropriately assisted NNTC. The OCC points out that the ALJ found that NNTC listed all kinds of benefits for its EP public interest analysis, when NNTC devoted only ten lines in its direct testimony to the topic and certainly did not list all the benefits found by the ALJ in ¶ 198 of the Recommended Decision.

58. In response, NNTC argues that the ALJ correctly found that an applicant did not have to meet every possible factor to be granted ETC or EP status (which is why the FCC uses the term “factor” rather than “prerequisite”). NNTC argues that the OCC attempts to conflate the burden of proof with the notion that each and every possible factor must be proven before ETC or EP status may be granted and that such a notion is not the law. NNTC contends that the ALJ properly applied a variety of public interest factors as suggested by the FCC and found that the advantages of NNTC’s service offerings will outweigh the disadvantages with respect to both the ETC and EP status.

59. We agree with NNTC and the ALJ that an applicant does not need to prove every possible public interest factor before being designated an EP or an ETC. This is consistent with the FCC’s finding that public interest must be evaluated on a case-by-case basis. Recommended Decision, at ¶¶ 61-62, citing FCC’s *ETC Designation Framework Order*. We find that the ALJ did not inappropriately relieve NNTC of its burden of proof in this case. We deny exceptions filed by the OCC on these grounds.

II. ORDER

A. The Commission Orders That:

1. The exceptions to Recommended Decision No. R11-0218 filed by the Colorado Office of Consumer Counsel (OCC) on March 21, 2011 are denied.
2. The exceptions to the Recommended Decision filed on March 21, 2011 by Staff of the Colorado Public Utilities Commission (Staff) are denied.
3. The exceptions to the Recommended Decision filed on March 21, 2011 by NNTC Wireless, LLC (NNTC) are granted.

4. The Motion for leave to file reply to the OCC's and Staff's responses to NNTC's exceptions to the Recommended Decision and request for waiver of response time, filed by NNTC on April 25, 2011 is granted.

5. The 20-day time period provided by § 40-6-114, C.R.S., to file an application for rehearing, reargument, or reconsideration shall begin on the first day after the effective date of this Order.

6. This Order is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
May 4, 2011.**

(S E A L)



ATTEST: A TRUE COPY

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JAMES K. TARPEY

MATT BAKER

Commissioners

Doug Dean,
Director