

Decision No. C10-0326

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 09A-107T

IN THE MATTER OF THE APPLICATION OF N.E. COLORADO CELLULAR, INC.
D/B/A VIAERO WIRELESS FOR INITIAL RECEIPT OF SUPPORT FROM COLORADO
HIGH COST SUPPORT MECHANISM FOR NEW TERRITORIES.

**ORDER DENYING EXCEPTIONS AND ADDRESSING
ROAMING EXPENSES AND REVENUES**

Mailed Date: April 7, 2010
Adopted Date: March 31, 2010

I. BY THE COMMISSION

A. Statement

1. This matter comes before the Commission for consideration of exceptions to Decision No. R10-0061 (Recommended Decision) filed by the Colorado Office of Consumer Counsel (OCC) on February 16, 2010. N.E. Colorado Cellular, Inc., doing business as Viaero Wireless (Viaero) filed a response to the exceptions on March 3, 2010. Being fully advised in this matter and consistent with the discussion below, we deny the exceptions filed by the OCC. In addition, we grant the Motion for leave to file response to the exceptions one day late, filed by Viaero on March 3, 2010.

B. Procedural History

2. Viaero filed an application for initial receipt of support from the Colorado High Cost Support Mechanism Fund (HCSM) on February 13, 2009. Viaero sought a Commission order confirming that it has satisfied the requirements of Rule 2847(f)(I) of the Rules Regulating Telecommunications Providers, Services, and Products, 4 *Code of Colorado Regulations* (CCR) 723-2, or that it is not receiving funds from the HCSM 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.

3. The OCC timely intervened in this matter on March 12, 2009. The OCC stated in its intervention that while Viaero applied for initial receipt of HCSM support pursuant to Rule 2847(f), it should have applied to reset HCSM support per access line pursuant to Rule 2847(g). In addition, the OCC took issue with the revenues and expenses reported by Viaero.

4. On January 26, 2010, Administrative Law Judge (ALJ) Paul C. Gomez issued the Recommended Decision, granting Viaero's application for initial receipt of HCSM support for new territories and for continued receipt of HCSM support for wire centers where Viaero was previously designated as an Eligible Provider in Docket No. 00A-491T. In its exceptions, the OCC disputes several of the findings made by the ALJ in the Recommended Decision.

5. As a preliminary matter, we grant the unopposed Motion for leave to file response to the exceptions one day late, filed by Viaero on March 3, 2010.

C. The Colorado High Cost Support Mechanism Rules

6. The Commission promulgated its current High Cost Support Mechanism and High Cost Administration Fund Rules, Rules 2840-2855, 4 CCR 723-2, in Docket No. 05R-529T. In that rulemaking, the Commission found that a carrier should not be required to file a rate case to demonstrate its eligibility for HCSM funding. The Commission noted that a rate case was a significant regulatory burden and that, pursuant to the previous HCSM rules, which required most carriers to file a rate case before receipt of HCSM funds, it was not uncommon for rate case expenses incurred by such carriers to amount to a significant portion of HCSM funding. This discouraged the carriers from applying for HCSM. Decision No. C06-1005, at ¶¶ 44-45.

Instead of a rate case, the Commission adopted a requirement wherein carriers would file a one-page form with their annual reports so that the Commission Staff and the OCC could monitor investments, revenues, and earnings. *Id.*, at ¶¶ 50-52. It is important to note that even though that rulemaking focused on rural local exchange carriers (RLECs), the intent was to treat all recipients, whether Qwest Corporation, wireless carriers such as Viaero, or RLECs, equitably. *Id.*, at ¶¶ 44-45.

7. In the subsequent petitions for HCSM funding, the Commission interpreted the rules promulgated in Docket No. 05R-529T as providing for a more mechanical and ministerial approach to determining whether a carrier is eligible for HCSM. The Commission clarified that the level of scrutiny involved in a petition for HCSM funding would be limited to whether the carrier provided the most current data required by Rule 2855 and whether the data submitted by a carrier is accurate, but that adjustments similar to those done in a revenue requirement or a rate case proceeding would not be performed. Decision Nos. C07-0919, at ¶¶57-58; C07-1098, at ¶ 16 (*In the Matter of the Petition of Nunn Telephone Company for High Cost Support Mechanism Funding*).

8. In its exceptions, the OCC argues that the ALJ erroneously relied on the previous Commission decisions made in the *Nunn* docket and that these decisions do not apply because, *inter alia*, Viaero is a wireless carrier versus a wire line RLEC and because it is the second largest recipient of HCSM funds by a large margin. We are not persuaded by these arguments. First, the intent of the Commission in promulgating the current HCSM rules was to treat all HCSM recipients equitably, in compliance with House Bill 05-1203. We therefore agree with the ALJ that even though the *Nunn* docket involved a RLEC, the level of scrutiny articulated in that docket applies to a wireless competitive local exchange provider like Viaero. Second, the

Commission previously found that the magnitude of the HCSM request, either on an absolute or a per access line basis, does not warrant a higher level of scrutiny and therefore an increase in the regulatory burden. We affirm that determination now.

9. In conclusion, we agree with the ALJ that although some of the cost and revenue analyses advocated by the OCC may be meritorious in the abstract, the current HCSM rules adopted in Decision No. C06-1005 and as interpreted in the *Nunn* case, do not contemplate that level of scrutiny.^{1,2} We therefore deny the exceptions filed by the OCC on this issue. Further, to the extent not specifically discussed below, we deny all arguments raised by the OCC based on the premise that the ALJ erroneously relied on the *Nunn* order, such as arguments related to basic local exchange costs, Basic Universal Service (BUS) revenue, interest expenses, depreciation and amortization expenses, customer premise equipment expenses, and wireless spectrum acquisition costs.

D. Classification of USF Support

10. In its exceptions, the OCC argues that, in determining whether Viaero is receiving funds from HCSM or any other source that together with revenues exceed the reasonable cost of providing basic local exchange service to customers, certain federal USF subsidies received by Viaero, *i.e.*, Intestate Common Line Support (ICLS) and Interstate Access Support (IAS) should be included as “revenues and funds.” The OCC points out that § 40-15-208(a)(II), C.R.S., does not distinguish between interstate and intrastate revenues and funds.

¹ For the reasons previously articulated in Decision No. C06-1005 and subsequent Commission decisions, we also disagree with the OCC that the ministerial and mechanical approach that followed results in a violation of §§ 40-15-208(2)(a)(I) and (II), C.R.S.

² However, our conclusion that the ministerial and mechanical approach adopted in Decision No. C06-1005 and further articulated in the *Nunn* case applies to Viaero and this adjudicatory docket does not mean that the Commission will continue to follow this approach in a future rulemaking.

11. The ALJ found that although one could read the plain language of the statute as requiring absolutely any revenues to be included in the determination as to whether costs exceed revenues, the statute must be interpreted within the context of its intent, which is to provide state support for intrastate local exchange service. The ALJ agreed with Viaero that exclusion of ICLS and IAS subsidies, the purpose of which is to offset interstate access charges, was proper. For its part, Viaero urges the Commission to affirm the Recommended Decision on this point. It argues that including IAS and ICLS subsidies as reportable local revenues for purposes of determining eligibility for HCSM, but without a corresponding reporting of the matching costs incurred in providing interstate services on which this interstate support is based, would be improper.

12. We agree with the ALJ and Viaero. It is well-settled that a statutory interpretation that defeats the statutory intent or leads to an absurd result will not be followed. *See AviComm v. Pub. Utils. Comm'n*, 955 P.2d 1023, 1031 (Colo. 1998). We find that the exclusion of ICLS and IAS subsidies from the revenues to be included in the determination of HCSM eligibility was proper. In addition, we agree with the ALJ that inclusion of the full amounts of ICLS and IAS subsidies as intrastate revenues would be incongruous in light of the fact that Viaero used the wireless safe harbor percentages developed by the Federal Communications Commission to allocate revenues and expenses associated with interstate and intrastate services. We therefore deny the exceptions filed by the OCC on this issue.

E. Roaming Expenses and Revenues

13. Viaero included roaming expenses and revenues in its application at the insistence of Commission Staff. The OCC, on the other hand, argued that these expenses and revenues should not be considered to be a part of the reasonable cost of providing basic local exchange

services to customers because they are used for facilities outside of the basic local calling area. Subsequently, Viaero agreed to remove roaming expenses and revenues (both in-collect and out-collect). The ALJ also agreed, finding these expenses and revenues were not related to providing basic local exchange services.

14. Even though the exclusion or inclusion of roaming expenses and revenues will not affect the ultimate outcome in this case, we believe it is important to clarify our position on this issue. We note that in *Rural Iowa Independent Tel. Ass'n v. Iowa Utils. Bd.*, 476 F.3d 572, 574 (8th Cir. 2007), the court found that wireless phone calls originating and terminating in the same major trading area (MTA), or intra-MTA wireless calls, should be considered local in nature rather than long-distance and therefore be subject to reciprocal compensation, not access charges. *Id.*, citing *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Interconnection between Local Carriers and Commercial Mobile Radio Service Providers, First Report and Order*, 11 F.C.C.R. 15499, ¶¶ 1036, 1043 (1996). We therefore conclude that roaming revenues and expenses associated with intra-MTA wireless calls should be included in the calculation for eligibility for HCSM funding.

II. ORDER

A. The Commission Orders That:

1. The exceptions to Recommended Decision No. R10-0061 filed by the Colorado Office of Consumer Counsel on February 16, 2010 are denied, consistent with the discussion above.

2. We clarify that roaming revenues and expenses associated with wireless telephone calls originating and terminating in the same major trading area are local in nature and therefore

should be included in the calculation for eligibility for Colorado High Cost Support Mechanism funding.

3. The Motion for leave to file response to the exceptions one day late, filed by N.E. Colorado Cellular, Inc., doing business as Viaero Wireless, on March 3, 2010 is granted.

4. The 20-day time period provided by § 40-6-114-(1), 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.

5. This Order is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
March 31, 2010.**

(S E A L)



ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

RONALD J. BINZ

JAMES K. TARPEY

MATT BAKER

Commissioners