

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 08A-508T

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

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
MANA L. JENNINGS-FADER
GRANTING APPLICATION, SUBJECT TO
CONDITIONS; GRANTING ETC DESIGNATION,
SUBJECT TO CONDITIONS; GRANTING EP
DESIGNATION, SUBJECT TO CONDITIONS;
ADDRESSING MOTIONS; REOPENING
EVIDENTIARY RECORD FOR A LIMITED
PURPOSE; AND GRANTING VARIANCE**

Mailed Date: March 1, 2011

Appearances:

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NNTC Wireless, LLC;

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Colorado, for Intervenor Colorado Office of Consumer Counsel;
and

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Commission.

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I. STATEMENT

1. On November 14, 2008, NNTC Wireless, LLC (NNTC WL or Applicant), filed a verified Application for Designation as an Eligible Telecommunications Carrier and Eligible Provider in the State of Colorado (Application). That filing commenced this docket.

2. On November 18, 2008, the Commission gave public notice of the Application; established an intervention period; and established a procedural schedule. The procedural schedule was vacated by Decision No. R09-0013-I, mailed January 6, 2009.

3. The Colorado Office of Consumer Counsel (OCC) timely intervened of right.

4. Staff of the Commission (Staff) timely intervened of right.

5. The OCC and Staff, collectively, are the Intervenors. Applicant and Intervenors, collectively, are the Parties.

6. By Minute Order, the Commission assigned this matter to an Administrative Law Judge (ALJ).

7. By Minute Order, the Commission deemed the Application complete. Applicant waived the statutory provisions of § 40-6-109.5, C.R.S. Decision No. R09-0065-I, mailed January 22, 2009.

8. The ALJ issued Decision No. R09-0065-I, which established a procedural schedule; scheduled a final prehearing conference; and scheduled the evidentiary hearing in this matter. Upon motion, the ALJ subsequently modified the procedural schedule and rescheduled the evidentiary hearing to July 16 and 17, 2009. Decision No. R09-0392-I, mailed April 14, 2009.

9. Applicant filed direct and rebuttal testimony and exhibits.¹ Each intervenor filed answer testimony and exhibits.

10. Applicant filed a Motion to Strike Portions of Answer Testimony of Staff and Office of Consumer Counsel Witnesses on July 1, 2009. OCC and Staff each filed a response in opposition to this motion. The ALJ finds persuasive the argument presented by NNTC WL as to the following pages and lines of answer testimony: OCC witness Skluzak's answer testimony at 32:8-10 (support of only one access line); OCC witness Loube's answer testimony at 3:7-9, 6:3-12, and 15:1-19:13 (support of only one access line and the identical support rule); and Staff witness Travis's answer testimony at 25:1-23 (support received by Nucla-Naturita Telephone Company (Nucla-Naturita)). Accordingly, the ALJ will order stricken the referenced testimony, any exhibit that is discussed only in the stricken testimony, and any rebuttal testimony that responds to the stricken answer testimony.²

11. OCC and Staff filed a Joint Motion to Strike Portions of NNTC WL's Rebuttal Testimony and Related Exhibits. NNTC WL filed a response in opposition to this motion. The ALJ finds persuasive the argument presented by OCC and Staff as to the following pages and lines of rebuttal testimony: NNTC witness Kelly's rebuttal testimony at 5:12-22 (other states' actions). Accordingly, the ALJ will order stricken the referenced testimony and any exhibit that is discussed only in the stricken testimony.³

¹ NNTC WL filed a Motion to File Rebuttal Testimony and Exhibits One Day Out of Time on June 30, 2009. No party objected. The ALJ will grant the motion and permit the late filing of the rebuttal testimony and exhibits.

² By electronic mail sent in advance of the beginning of the evidentiary hearing, the ALJ informed the Parties of her ruling on the NNTC WL motion to strike. This Decision memorializes that ruling. The answer testimony and exhibits and the rebuttal testimony and exhibits admitted as Hearing Exhibits conform to this ruling.

³ By electronic mail sent in advance of the beginning of the evidentiary hearing, the ALJ informed the Parties of her ruling on the joint motion to strike. This Decision memorializes that ruling. The rebuttal testimony and exhibits admitted as Hearing Exhibit No. 4 conform to this ruling.

12. The ALJ held an evidentiary hearing in this matter as scheduled and heard the oral testimony of seven witnesses.⁴ NNTC WL presented the testimony of Messrs. Jon D. Loe,⁵ Kevin J. Kelly,⁶ Kent T. Tomlinson,⁷ and Terence Robinson,⁸ and of Ms. Kelly Y. Tomlinson.⁹ OCC presented the testimony of Mr. Cory W. Skluzak¹⁰ and Dr. Robert Loube.¹¹ Staff presented the testimony of Ms. Susan A. Travis.¹²

⁴ OCC witness Loube did not present oral testimony.

⁵ Mr. Loe is employed by Telecom Consulting Associates, Inc., as a Senior Regulatory Consultant. Mr. Loe's direct testimony is Hearing Exhibit No. 2, and his rebuttal testimony and exhibits are Hearing Exhibit No. 3. Mr. Loe made corrections to his prefiled testimony and exhibits during his oral testimony. His oral testimony is found at July 16 transcript (July 16 tr.) at 8-110.

⁶ Mr. Kelly is employed by Telecom Consulting Associates, Inc., as Director of Regulatory Services. Mr. Kelly's rebuttal testimony and exhibits are Hearing Exhibit No. 4. His oral testimony is found at July 16 tr. at 111-96.

⁷ Mr. Tomlinson is employed by Nucla-Naturita Telephone Company as Construction Supervisor. Mr. Tomlinson's direct testimony and exhibits are Hearing Exhibit No. 5, and his rebuttal testimony is Hearing Exhibit No. 6. Mr. Tomlinson made corrections to his prefiled testimony and exhibits during his oral testimony. His oral testimony is found at July 16 tr. at 196-228 and July 17 transcript (July 17 tr.) at 6-65.

⁸ Mr. Robinson is employed by Telecom Consulting Associates, Inc., as Manager - Business Valuation. Mr. Robinson's rebuttal testimony is Hearing Exhibit No. 10. His oral testimony is found at July 17 tr. 161-78.

⁹ Ms. Tomlinson is employed by Nucla-Naturita Telephone Company as Secretary Treasurer. Ms. Tomlinson's direct testimony and exhibits are Hearing Exhibit No. 7, her supplemental direct testimony and exhibits are Hearing Exhibit No. 8, and her second supplemental direct testimony and exhibits are Hearing Exhibit No. 9. Ms. Tomlinson made corrections to her prefiled testimony and exhibits during her oral testimony. Her oral testimony is found at the July 17 tr. at 65-161.

¹⁰ Mr. Skluzak is employed by the OCC as a Rate Analyst. Mr. Skluzak's answer testimony and exhibits are Hearing Exhibit No. 12. (Although portions of Mr. Skluzak's testimony and exhibits were filed under seal as confidential, at hearing the Parties agreed that none of the information contained in his testimony and exhibits is confidential.) In his written answer testimony at 49, note 64, Mr. Skluzak states that Exhibit CWS-40 contains NNTC WL's response to OCC Data Request No. 1-36(a); review of Exhibit CWS-40 reveals that the referenced data request response is not in Exhibit CWS-40. Mr. Skluzak made changes to his prefiled testimony and exhibits during his oral testimony. His oral testimony is found at July 22 transcript (July 22 tr.) at 13-141.

¹¹ Dr. Loube is Vice President of Rolka Loube Saltzer Associates, a consulting firm. Dr. Loube's answer testimony and exhibits are Hearing Exhibit No. 11. His written testimony was admitted by stipulation at July 17 tr. at 179.

¹² Ms. Travis is employed by the Commission as a Rate/Financial Analyst. Ms. Travis's answer testimony and exhibits are Hearing Exhibit No. 13. Ms. Travis made corrections to her prefiled testimony and exhibits during her oral testimony. Her oral testimony is found at July 22 tr. at 142-255.

Exhibit SAT-6 in Hearing Exhibit No. 13 was superseded by Hearing Exhibit No. 26 and, thus, is not relied upon in this Decision.

13. During the evidentiary hearing, 26 documents were marked as exhibits for identification. Hearing Exhibits No. 1 through No. 16,¹³ Hearing Exhibit No. 20,¹⁴ Confidential Hearing Exhibit No. 20A, and Hearing Exhibits No. 21 through No. 26¹⁵ were admitted into evidence. Hearing Exhibits No. 17 and No. 18 were identified, were offered, but were not admitted. Confidential Hearing Exhibit No. 12A and Hearing Exhibit No. 19 were identified and were withdrawn.

14. At the conclusion of the hearing, the evidentiary record was closed. The ALJ took the matter under advisement.

15. Each of the Parties filed a post-hearing Statement of Position. No response was permitted.

16. In accordance with, and pursuant to, § 40-6-109, C.R.S., the Administrative Law Judge transmits to the Commission the record and exhibits of the proceeding together with a written recommended decision.

II. RULINGS ON MOTIONS

17. On May 5, 2010, NNTC WL filed, in one document, a Request that Administrative Notice Be Taken of Recent Commission Decisions, Request for Order on

¹³ Hearing Exhibit No. 15 was admitted with the following restriction: discussion in the exhibit concerning opposition to the identical support rule is not evidence in this proceeding.

¹⁴ Hearing Exhibit No. 20 is the NNTC WL's management agreement with Nucla-Naturita.

Hearing Exhibit No. 20 at 4 references an Exhibit C (services beyond those specified in part 4 of the management agreement that NNTC WL is to provide to Nucla-Naturita). There is no Exhibit C appended to Hearing Exhibit No. 20.

Hearing Exhibit No. 20 contains an Exhibit B (joint use of Nucla-Naturita facilities), which references a diagram to be attached to the management agreement. The diagram is to "identify[] the space on each tower [to be used to connect NNTC WL's PCS equipment] and the price for such space as agreed upon[.]" Hearing Exhibit No. 20 at Exhibit B at 10. NNTC WL is responsible for compensating Nucla-Naturita, on a monthly basis, "in accordance with the attached diagrams[.]" *Id.* at 11. No diagrams are attached to Hearing Exhibit No. 20.

¹⁵ Hearing Exhibit No. 26 is a corrected version of, and replaces, SAT-6 in Hearing Exhibit No. 13.

Application Forthwith,¹⁶ and Request for Shortened Response Time¹⁷ (Applicant's Administrative Notice Motion). On May 11, 2010, OCC and Staff filed their Joint Response in Opposition to Applicant's Administrative Notice Motion.

18. NNTC WL requests that the Commission take administrative notice of three Commission decisions: Decisions No. R09-1351-I and No. C10-0315, entered in Docket No. 09V-676T; and Decision No. C10-0326, entered in Docket No. 09A-107T. In Applicant's Administrative Notice Motion, NNTC WL presented its arguments with respect to the decisions' relevance to this proceeding. In their Joint Response in Opposition to Applicant's Administrative Notice Motion, OCC and Staff presented their arguments with respect to their position that the decisions are neither relevant to, nor controlling in, this proceeding.

19. Rule4 *Code of Colorado Regulations* (CCR) 734-1-1501(c) governs administrative notice in Commission proceedings. As pertinent here, that Rule provides:

The Commission may take administrative notice of ... documents in its files[.] *Any fact to be so noticed shall be specified in the record*, and copies of all documents relating thereto shall be provided to all parties and the Commission, unless they are readily available from the parties, or they are voluminous. *Every party shall be afforded an opportunity to controvert the fact to be so noticed.*

(Emphasis supplied.) In addition, the Commission has considerable latitude with respect to admitting evidence. *See, e.g.*, § 40-6-101(4), C.R.S. (Commission not "bound by the technical rules of evidence"). These are the principles and standards that the ALJ considers and applies when deciding a motion to take administrative notice.

20. The ALJ will grant Applicant's Administrative Notice Motion. First, the motion is akin to the submission of additional legal authority and argument. OCC and Staff each had an

¹⁶ The Request for Order on Application Forthwith is moot.

¹⁷ The Request for Shortened Response Time is moot as the Intervenor filed their response on May 11, 2010, six days after the filing of Applicant's Administrative Notice Motion.

opportunity to present, and did present, arguments in response to the newly-cited legal authority and Applicant's arguments. Thus, no party is prejudiced by granting the motion because the Commission will take the arguments of all Parties into consideration. Second, the ALJ finds it administratively efficient to grant Applicant's Administrative Notice Motion and, thus, to allow the Parties' arguments with respect to recent Commission decisions to be considered as they have been presented in this case. Third and finally, after reading Decision No. C10-0326, one of the decisions of which administrative notice is taken, the ALJ has determined that Decision No. R10 0061, Docket No. 09A-107T, mailed January 26, 2010, will be admitted by administrative notice because full understanding of Decision No. C10-0326 depends on reading Decision No. R10 0061.

21. As the purpose of admitting these decisions is consideration of additional legal authority and argument, there are no facts to be noticed.

22. The ALJ notes that, in rendering a decision in this proceeding, neither the Commission nor the ALJ is limited to: (a) consideration of the Commission decisions of which administrative notice has been taken in this proceeding; or (b) consideration of the Commission rules that have been cited in this proceeding. In addition, the ALJ notes that the Commission and the ALJ may consider relevant rules and decisions of the Federal Communications Commission (FCC), irrespective of whether the FCC rules and decisions have been admitted or cited in this case.

23. On May 11, 2010, OCC and Staff filed their Request for Administrative Notice of a Recent NNTC Wireless Application for Refund Plan (Intervenors' Administrative Notice

Motion or May 11 filing).¹⁸ On May 14, 2010, NNTC WL filed its response (May 14 filing) and did not oppose Intervenor's Administrative Notice Motion.¹⁹ Each party has had an opportunity to address the facts contained in the Nucla-Naturita application and its attachments.

24. The ALJ will grant Intervenor's Administrative Notice Motion. The Intervenor's Administrative Notice Motion is unopposed, and no party will be prejudiced if the motion is granted. The *facts* sought to be admitted by administrative notice are in documents in the Commission's files and are contained in a verified application. *See* Affidavit of Kelly Tomlinson appended to the Application of Nucla-Naturita Telephone Company for Approval of Refund Plan Regarding TRS and CUSA Fees and Colorado USF Assessments (Hearing Exhibit No. 31) (refund application) (attesting that "the facts set forth [in the application] are true, accurate, complete and correct" to the best of affiant's knowledge). The refund application commenced Docket No. 10A-159T. The requirements of Rule 4 CCR 723-1-1501(c) are met.

25. Administrative notice will be taken of the *facts* contained in the refund application and its seven attachments.²⁰ The ALJ will consider the arguments presented in the Intervenor's Administrative Notice Motion and in Applicant's response with respect to the administratively-noticed facts. The ALJ will *not* consider, and will *not* take administrative notice of, any fact (or argument based on any fact) in the May 11 filing or in the May 14 filing *unless* the fact is

¹⁸ Intervenor's Administrative Notice Motion refers to *NNTC Wireless's* Application for Refund Plan. This is incorrect. *Nucla-Naturita Telephone Company* filed the Application for Refund Plan. This fact is made clear in the body of the filing. This Decision refers to Nucla-Naturita Telephone Company's refund application.

Intervenor's Administrative Notice Motion and their Joint Response in Opposition to Applicant's Administrative Notice Motion were contained in the same filing.

¹⁹ Applicant filed a correction to this filing on May 20, 2010.

²⁰ Five attachments are claimed to be confidential and are filed under seal with the Commission.

contained in the refund application or one of its attachments or the fact is contained in the record developed during the evidentiary hearing in the instant docket.²¹

26. The ALJ's practice is to admit as a hearing exhibit each document of which administrative notice is taken. In accordance with this practice, the ALJ will assign the following hearing exhibit numbers to the documents admitted by administrative notice: (a) *Decision No. R09-1351-I* will be Hearing Exhibit No. 27; (b) *Decision No. C10-0315* will be Hearing Exhibit No. 28; (c) *Decision No. R10-0061* will be Hearing Exhibit No. 29; (d) *Decision No. C10-0326* will be Hearing Exhibit No. 30; (e) *Application of Nucla-Naturita Telephone Company for Approval of Refund Plan Regarding TRS and CUSC Fees and Colorado USF Funds and Attachments F and G to that Application* (Docket No. 10A-159T) will be Hearing Exhibit No. 31; and (f) *Confidential Attachments A through E to the Application of Nucla-Naturita Telephone Company for Approval of Refund Plan Regarding TRS and CUSC Fees and Colorado USF Funds* (Docket No. 10A-159T) will be Confidential Hearing Exhibit No. 31A.

27. The ALJ will reopen the evidentiary record solely for the purpose of admitting these hearing exhibits, including one confidential hearing exhibit, by administrative notice. The ALJ will order each of these identified hearing exhibits to be filed in the evidentiary record.²²

²¹ The ALJ makes this determination based on the following. First, the facts in the refund application and its attachments are verified by two affidavits; and any other asserted facts in the May 11 filing or in the May 14 filing are simply arguments of counsel and are not verified by an affidavit. The ALJ finds it inappropriate for counsel to present testimony, which would be the effect of accepting as evidence the unverified factual assertions made for the first time in the May 11 filing or in the May 14 filing. Second, Nucla-Naturita Telephone Company (Nucla-Naturita) filed the refund application. Nucla-Naturita is not a party in this proceeding, and none of the counsel in the instant case represents Nucla-Naturita in this proceeding. Thus, the statements of counsel that are made in filings in this case and that purport to explain the refund application or to provide additional information concerning facts underlying or pertaining to that application are not factual statements of a party that are entitled to evidentiary weight or consideration.

²² The ALJ has had the referenced exhibits placed in the evidentiary record file.

28. On May 18, 2010, OCC and Staff filed a Joint Motion to Strike Portions of NNTC Wireless, LLC's Response to the Intervenor's Administrative Notice Motion (Joint Motion to Strike). In that filing, OCC and Staff ask that paragraphs 4 through 6 of Applicant's response be stricken because those paragraphs are an unauthorized reply to the Joint Response in Opposition to Applicant's Administrative Notice Motion. On May 20, 2010, NNTC WL filed its response to the Joint Motion to Strike. In that filing, Applicant states that it has no objection to striking paragraphs 4 through 6 of its Response to the Intervenor's Administrative Notice Motion.

29. The ALJ will grant the Joint Motion to Strike. The Joint Motion to Strike is unopposed, and no party will be prejudiced if the motion is granted. The ALJ will order stricken from the record paragraphs 4 through 6 of Applicant's response to Intervenor's Administrative Notice Motion.

III. FINDINGS OF FACT

30. Applicant NNTC WL is a limited liability company. Applicant is a commercial mobile radio service (CMRS) provider, as described in the definition of "mobile service" found in 47 U.S.C. § 153(27) and as defined in 47 *Code of Federal Regulations* (CFR) § 20.3. Applicant provides service pursuant to a license issued by the FCC.²³ Applicant is a telecommunications carrier, as that term is defined in 47 U.S.C. § 153(44) and in 47 CFR § 51.5. For purposes of 47 CFR § 54.1 *et seq.*, Applicant is a common carrier.

31. Intervenor OCC is an agency of the State of Colorado established pursuant to § 40-6.5-102, C.R.S.

²³ Nucla-Naturita owns the spectrum license used by NNTC WL to provide wireless service.

32. Intervenor Staff is Litigation Staff of the Commission as identified in the Rule 4 CCR 723-1-1007(a) filings made in this proceeding.

33. Applicant is a wholly-owned subsidiary of Nucla-Naturita. Nucla-Naturita is a Rural Incumbent Local Exchange Carrier (rural ILEC), as defined in 47 CFR § 54.5; is an ILEC as defined in Rule 4 CCR 723-2-2001(ss), Rules Regulating Telecommunications Providers, Services, and Products; and is a Rural Telecommunications Provider, as defined in Rule 4 CCR 723-2-2001(gggg). Nucla-Naturita provides telecommunications and other services within its service area. Its service area is located in the San Miguel Basin, which is located west of the Continental Divide, and includes the communities of Arrowhead, Gateway, Naturita, Nucla, and Paradox, Colorado.

34. In 2006, Nucla-Naturita began providing cellular telecommunications service, following its decision to move from a BETRS network²⁴ to the spectrum it had acquired.

35. On April 26, 2007, Nucla-Naturita formed NNTC WL as a separate legal entity to provide cellular telecommunications service.

36. On May 1, 2007, NNTC WL began operation. NNTC WL provides cellular mobile telecommunications service and Personal Communications Service (PCS) in the same Colorado geographic area that it seeks to provide service as an Eligible Telecommunications Carrier (ETC) and as an Eligible Provider (EP). In addition to wireless telephone service (which includes, pursuant to agreements with other wireless carriers, roaming nationwide), NNTC WL provides long-distance toll service both on a pre-subscription basis and on a dial-around basis.

²⁴ The BETRS technology allowed Nucla-Naturita to provide local landline service using fixed wireless local loops. Following the creation of NNTC WL, Nucla-Naturita continued to provide a portion of its telecommunications service using the BETRS fixed wireless technology.

NNTC WL also sells internet access, security services, customer premises equipment, and cellular telephones and accessories.

37. At the time of the hearing, NNTC WL had 338 customers and 662 lines in service.²⁵ The number of customers and the number of access lines have fluctuated slightly since NNTC WL's creation.

38. NNTC WL has no employees. Pursuant to a management agreement (Hearing Exhibit No. 20 and Confidential Hearing Exhibit No. 20A), Nucla-Naturita employees provide managerial, technical, and support functions to NNTC WL.

39. NNTC WL has no office space, office equipment, or office supplies and has no vehicles. Pursuant to a management agreement (Hearing Exhibit No. 20 and Confidential Hearing Exhibit No. 20A), Nucla-Naturita provides these to NNTC WL.

40. To provide service, NNTC WL uses eight cell sites (or towers), three of which are owned and operated by NNTC WL and five of which are owned by Nucla-Naturita and leased and operated by NNTC WL.

The base station equipment [located at each cell tower] is connected to [NNTC WL's] wireless switching vendor, RINA [Rural Independent Network Alliance, LLC], via local T-1 facilities owned and operated by [Nucla-Naturita]. The local private lines (T-1s) are provided to [NNTC WL] under contract. The local T-1 facilities are aggregated at the [Nucla-Naturita] Central Office at which point they are combined onto three interstate T-1s operating between Nucla, CO and the RINA switch in Utah.

Hearing Exhibit No. 11 at Exhibit RL-6. By a management agreement (Hearing Exhibit No. 20 and Confidential Hearing Exhibit No. 20A), Nucla-Naturita and NNTC WL arranged their joint use of Nucla-Naturita's facilities.

²⁵ These are total counts and include both residential and business customers and lines.

41. NNTC WL's two-year investment plan

includes the construction of 7 new tower sites spread throughout [NNTC WL's] PCS licensed area, as well as the addition of a new sector to two existing sites. ... The proposed investments will improve coverage throughout the area. Coverage will improve in all towns, ... to in-building coverage, improved signal strength to residential areas and coverage along the main highways, and ... improved signal strength to the more remote areas. All of the new sites will be capable of handing off to at least one site, that is, none of the new sites will be isolated. [In addition, the plan] include[s] adding EVDO advanced services capability to all base stations existing and proposed. ... One additional backhaul circuit is projected

in the plan. Hearing Exhibit No. 3 at Exhibit JDL-2. The total cost of these seven new cell sites is estimated to be approximately \$ 666,000. Four of the new cell sites will provide service in the area that, at present, NNTC WL does not serve with its own facilities. The cost of these four cell sites is estimated to be approximately \$ 333,000 and is included in the total estimate of \$ 666,000. NNTC WL planned to construct these towers even if it did not receive federal Universal Service Fund (USF) funding or Colorado High Cost Support Mechanism (CHCSM or HCSM) funding.²⁶

42. Nucla-Naturita and NNTC WL share facilities, office space, and employees. They have other joint and common expenses. Consequently, it is necessary to determine the entity that owns assets, should receive revenues, and is responsible for liabilities and expenses. Nucla-Naturita makes those determinations and, as necessary, allocates investments and expenses between Nucla-Naturita and NNTC WL. To accomplish these tasks, depending

²⁶ NNTC WL testified that the pace of tower construction likely would be faster than planned if NNTC WL were eligible to receive USF funding or CHCSM funding or both.

on the item, Nucla-Naturita uses various methods, including employee daily time sheets that report the time spent on work for each entity.²⁷

43. Pursuant to § 40-15-401(1), C.R.S., as a provider of cellular telecommunications service, NNTC WL is exempt from regulation under either the Public Utilities Law (*i.e.*, articles 1 through 7 of title 40, C.R.S.) or article 15 of title 40, C.R.S. Pursuant to § 40-15-402(2), C.R.S., Applicant is not required to hold a Certificate of Public Convenience and Necessity (CPCN) in order to provide cellular telecommunications service in Colorado.

44. The service area for which NNTC WL 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).²⁸

45. The Commission has designated Nucla-Naturita as an ETC and an EP within its service area. As an ETC, Nucla-Naturita is eligible to draw, and does draw, money from the federal USF. As an EP, Nucla-Naturita is eligible to draw, and does draw, money from the CHCSM fund.²⁹

46. Nucla-Naturita did not intervene in this proceeding.

²⁷ The methods used by Nucla-Naturita to separate Nucla-Naturita's assets, revenues, liabilities, and expenses from those of NNTC WL are found in Hearing Exhibit No. 11 at Exhibit RL-5. *See also* Hearing Exhibit No. 20 at Exhibit A (methods of monthly cost assignment and allocation to NNTC WL). Nucla-Naturita uses its Cost Allocation Manual (CAM) filed with the Commission. (Although discussed in written and oral testimony, Nucla-Naturita's CAM is not in the evidentiary record.) Staff offered several criticisms of the CAM, stated that the CAM must be corrected, but acknowledged that correction of the CAM cannot occur in this proceeding.

²⁸ A map showing NNTC WL's proposed ETC and EP service area is Exhibit A to the Application (Hearing Exhibit No. 1).

²⁹ Nucla-Naturita received money in 2007 and 2008 from the USF, received money in 2008 from the CHCSM, and was projected to receive money from both the USF and the CHCSM in 2009. 2008 Annual Report of the Colorado High Cost Support Mechanism (2008 CHCSM Report) (Hearing Exhibit No. 21) at 14, 15, 19, 23, 24.

47. CenturyTel³⁰ is a rural ILEC, as defined in 47 CFR § 54.5; is an ILEC as defined in Rule 4 CCR 723-2-2001(ss); and is a Rural Telecommunications Provider, as defined in Rule 4 CCR 723-2-2001(gggg). The Commission has designated CenturyTel as an ETC and an EP within its service area. As an ETC, CenturyTel is eligible to draw money from the USF. As an EP, CenturyTel is eligible to draw money from the CHCSM fund.³¹

48. CenturyTel did not intervene in this proceeding.

49. No competitive ETC intervened in this proceeding.

50. Additional facts are found and are set out in the following discussion.

IV. DISCUSSION

51. NNTC WL requests that the Commission issue an Order that: (a) designates it as an ETC, pursuant to § 214(e) of the Federal Telecommunications Act of 1996³² (the Act) and as defined in 47 CFR § 54.5 and Rule 4 CCR 723-2-2002(hh); and (b) designates it as an EP, as defined in Rule 4 CCR 723-2-2001(ii). Designation as an ETC will permit NNTC WL to receive monies from the USF to provide certain telecommunications services.³³ Designation as an EP is the first step in the process by which NNTC WL may receive monies from the CHCSM to provide basic local exchange service. Both the USF and the CHCSM are intended to promote and to preserve universal telecommunications service (*i.e.*, basic local service) in high-cost areas.

³⁰ CenturyTel now does business in Colorado as CenturyLink. In this proceeding CenturyTel was referred to as CenturyTel. To avoid confusion, this Decision refers to the company as CenturyTel and not as CenturyLink.

³¹ CenturyTel received money in 2007 from the USF, received no money in 2007 and 2008 from the CHCSM, and was projected to receive no money from the CHCSM in 2009. 2008 CHCSM Report (Hearing Exhibit No. 21) at 14, 15, 19, 23, 24, 25.

³² The Act is codified in numerous sections of title 47 of the United States Code (U.S.C.). Of particular relevance in this proceeding are 47 U.S.C. §§ 214(e), 253, and 254.

³³ The USF supports services in addition to universal telecommunications service.

52. Different statutes, regulations, and criteria govern designation as an ETC and designation as an EP. Consequently, this Decision separately addresses each designation request.

A. Burden of Proof and Related Principles.

53. As the applicant, NNTC WL bears the burden of proof by a preponderance of the evidence. Section 24-4-105(7), C.R.S.; § 13-25-127(1), C.R.S.; Rule 4 CCR 723-1-1500. The evidence must be substantial evidence, which the Colorado Supreme Court has defined as

adequate to support a reasonable conclusion. Substantial evidence is more than a scintilla . . . it must do more than create a suspicion of the fact to be established. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion . . . it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.

City of Boulder v. Colorado Public Utilities Commission, 996 P.2d 1270, 1278 (Colo. 2000) (quoting *CF&I Steel, L.P. v. Public Utilities Commission*, 949 P.2d 577, 585 (Colo. 1997)). The preponderance standard requires the finder of fact to determine whether the existence of a contested fact is more probable than its non-existence. *Swain v. Colorado Department of Revenue*, 717 P.2d 507 (Colo. App. 1985). A party has met this burden of proof when the evidence, on the whole and however slightly, tips in favor of that party.

54. If an intervenor advocates that the Commission adopt a position that requires action by the applicant utility (*e.g.*, if an intervenor requests that a condition be imposed), then that intervenor is the proponent of a Commission order with respect to its advocated position. As the proponent of a Commission order, the intervenor must meet the preponderance of the evidence burden of proof with respect to its advocated position.

55. The Commission has an independent duty to determine matters that are within the public interest. *Caldwell v. Public Utilities Commission*, 692 P.2d 1085, 1089 (Colo. 1984). Designation as an ETC and designation as an EP are matters that are within the public interest.

The Commission is not bound by the proposals made by the parties before it; and the Commission may order the conditions that the Commission deems necessary to assure that the final result is just, reasonable, and in the public interest *provided* the evidentiary record supports the result *and provided* the reasons for the choices made (*e.g.*, policy decisions) are stated.

56. In reaching her decision in this matter, the ALJ is mindful of these principles and of the Commission's duty.

B. Designation as an Eligible Telecommunications Carrier.

1. Statutory and Rule Provisions, Standards, and Principles.

a. Federal.

57. Federal law governs designation as an ETC, and the Commission is the state regulatory agency that designates ETCs in Colorado. Section 214(e) of the Act contains the criteria for designation as an ETC. Both the FCC and this Commission have promulgated regulations pertaining to designation as an ETC.³⁴

58. Section 254(e) of the Act provides that “only an eligible telecommunications carrier designated under [§ 214(e) of the Act] shall be eligible to receive” USF support. As pertinent here, § 214(e)(1) of the Act provides that, throughout its service territory, a designated ETC shall

(A) offer the services that are supported by Federal universal service support mechanisms under [§ 254(c) of the Act], either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and

(B) advertise the availability of such services and the charges [for those services] using media of general distribution.

³⁴ The federal regulations are 47 CFR §§ 54.201 and 54.202. The Colorado regulation is Rule 4 CCR 723-2-2187.

See also 47 CFR § 54.201(d) (same).³⁵ The FCC has interpreted this statute to require an ETC designation applicant to demonstrate: (a) an intent and ability to provide the supported services listed in 47 CFR § 54.101(a) throughout its designated service areas; and (b) an intent and ability to advertise its universal service offerings and the charges for those service offerings using media of general distribution. *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, FCC 97-157, 12 FCC Rcd. 8776 (1997) (*Universal Service Order*).³⁶

59. As pertinent here, § 214(e)(2) of the Act permits the Commission to designate more than one ETC in the service area of a rural ILEC provided the additional ETC applicant meets the requirements of § 214(e)(1) of the Act and provided “the [Commission] ... find[s] that the designation is in the public interest.”³⁷

60. Nucla-Naturita is a rural ETC in its service area. CenturyTel is a rural ETC in its service area. NNTC WL seeks designation as a competitive ETC in areas served by these rural carriers. Consequently, to designate NNTC WL as a competitive ETC, the Commission must find that NNTC WL meets the requirements of § 214(e) of the Act and that NNTC WL’s designation as an ETC is in the public interest. In its discretion and provided the conditions fall within the safe harbor provided by § 253(b) of the Act (discussed below), the Commission may place conditions on the ETC designation.

61. The FCC has provided guidance to state commissions to assist them in making their ETC designation decisions. *In the Matter of Federal-State Joint Board on Universal*

³⁵ Rule 4 CCR 723-2-2187(a) incorporates these criteria.

³⁶ Citations in this Decision to the *Universal Service Order* are to FCC 97-157 (rel. May 8, 1997). There are no parallel citations to 12 FCC Rcd. 887 (1997).

³⁷ Rule 4 CCR 723-2-2187(b) mirrors this statutory provision.

Service, CC Docket No. 96-45, Report and Order, FCC 05-46, 20 FCC Rcd. 6371 (2005) (*ETC Designation Framework Order*).³⁸ In that Order, the FCC “encourage[d] state commissions to require all ETC applicants over which they have jurisdiction to meet the same conditions and to conduct the same public interest analysis outlined in” the *ETC Designation Framework Order*. *ETC Designation Framework Order*, FCC 05-46, at ¶ 58. The FCC also encouraged “states ... [to] apply these requirements in a manner that will best promote the universal service goals found in section 254(b) [of the Act].” *Id.*, FCC 05-46, at ¶ 60. It found that “these guidelines are designed to ensure designation of [ETCs] that are financially viable, [are] likely to remain in the market, [are] willing and able to provide the supported services throughout the designated service area, and [are] able to provide consumers an evolving level of universal service.” *Id.*

62. The FCC did not mandate that states use the FCC’s principles when considering an application for ETC designation because it believed

that section 214(e)(2) [of the Act] demonstrates Congress’s intent that state commissions [should] evaluate local factual situations in ETC cases and [should] exercise discretion in reaching their conclusions regarding the public interest, convenience and necessity, as long as such determinations are consistent with federal and other state law. ... Furthermore, state commissions, as the entities most familiar with the service area for which ETC designation is sought, are particularly well-equipped to determine their own ETC eligibility requirements. ... Consistent with our adoption of permissive federal guidelines for ETC designation, state commissions will continue to maintain the flexibility to impose additional eligibility requirements in state ETC proceedings, if they so choose.

ETC Designation Framework Order, FCC 05-46, at ¶ 61 (footnotes omitted).

³⁸ Citations in this Decision to the *ETC Designation Framework Order* are to FCC 05-46 (rel. March 17, 2005). There are no parallel citations to 20 FCC Rcd. 6371 (2005).

63. When the Application was filed, the Commission had not promulgated a rule that adopts the *ETC Designation Framework Order* principles with respect to ETC designation.³⁹ Thus, the ALJ must determine whether, in this proceeding, the FCC-identified principles should be considered. For the reasons discussed below, the ALJ finds it appropriate to consider some, but not all, of those principles in this case.

64. The *ETC Designation Framework Order* contains reporting obligations for entities that have been designated as ETCs. As explained in Docket No. 05R-537T: Decisions No. C06-1108, No. C06-0917, and No. C06-0600, the Commission promulgated Rule 4 CCR 723-2-2187(f), among other things, to incorporate many, although not all, of those reporting obligations. This is an indication that, to some extent, the Commission found that the guidance provided in the *ETC Designation Framework Order* is useful and is to be considered.

65. The ALJ's research has found no Commission decision that explicitly applies, in the context of a litigated proceeding, the *ETC Designation Framework Order* principles concerning initial designation of an ETC.⁴⁰ The Parties have not cited a litigated case that explicitly applies these FCC principles.

³⁹ In Docket No. 05R-537T, the OCC requested that the Commission open a docket to address initial ETC/EP designation, including consideration of the FCC's guidance in the *ETC Designation Framework Order*. The Commission declined to do so. Decision No. C06-0917, mailed August 4, 2006, at ¶4. The Commission subsequently opened a rulemaking proceeding (Docket No. 10R-191T) to consider, *inter alia*, changes to the rules pertaining to initial designation of ETCs and EPs.

⁴⁰ In Decision No. R10-1264, Docket No. 09A-771T, mailed November 23, 2010, at ¶¶ 33-34, Chief ALJ Isley discusses the guidance provided in the *ETC Designation Framework Order*. Based on a review of that decision, it does not appear that Chief ALJ Isley explicitly applied the FCC principles.

66. The fact that the Commission has neither promulgated a rule nor explicitly applied the *ETC Designation Framework Order* principles in the context of a litigated proceeding is not determinative of whether the Commission may consider those principles in this proceeding. As the Commission has held,

well settled case law ... recognizes that an agency may make policy through either adjudication or rule-making. Agencies are not precluded from asserting new principles in an adjudicative proceeding. Adjudicated cases may and do ... serve as vehicles for the formulation of agency policies[.]

Decision No. C06-1487, ¶ 20 (internal quotation marks and citations omitted).⁴¹

67. The Commission has accepted at least one stipulation that considers, albeit implicitly, the *ETC Designation Framework Order* principles in the context of an initial ETC designation: Decision No. R08-0523, Docket No. 07A-153T, mailed May 23, 2008, and its attachment (Hearing Exhibit No. 14). This indicates that the Commission finds it acceptable to consider these principles. In addition, the FCC's explanation of its ETC designation principles and of their underlying rationales is persuasive. *ETC Designation Framework Order*, FCC 05-46, at ¶¶ 20-57. Finally, the Parties in this docket presented their cases relying, in part, on the FCC principles enunciated in the *ETC Designation Framework Order*.⁴²

⁴¹ As discussed in Decision No. C06-1487 at ¶¶ 16-18, the Commission recognizes that the factors identified and weighed in *Home Builders Association of Metropolitan Denver v. Public Utilities Commission*, 720 P.2d 552 (Colo. 1986) (*Home Builders*), must be considered to determine whether, in any particular case, adjudication, or rulemaking is the appropriate vehicle for the Commission to use to establish policy. In this case, the *Home Builders* factors do not apply, principally because the decision reached in this proceeding is limited to this proceeding and, thus, will not have general applicability.

⁴² The Parties presented testimony concerning whether Applicant met the FCC rules pertaining to ETC designation. Although the FCC rules governing designation of ETCs are not applicable to this proceeding, the rules were promulgated in, rest on, and incorporate the principles in the *ETC Designation Framework Order*.

68. For these reasons, the ALJ finds that, in addition to the statutory and rule requirements and this Commission's previous ETC decisions, the *ETC Designation Framework Order* principles should be considered in this proceeding. The five principles are:

an ETC applicant must demonstrate: (1) a commitment and ability to provide services, including providing service to all customers within its proposed service area; (2) how it will remain functional in emergency situations; (3) that it will satisfy consumer protection and service quality standards; (4) that it offers local usage comparable to that offered by the incumbent LEC; and (5) an understanding that it may be required to provide equal access if all other ETCs in the designated service area relinquish their designations pursuant to section 214(e)(4) of the Act.

ETC Designation Framework Order, FCC 05-46, at ¶ 20 (footnote omitted). In addition to these five principles, the FCC discussed and defined the requirement that, pursuant to § 214(e)(2) of the Act, the state commission must determine that designating a competitive ETC in the service area of a rural ILEC is in the public interest.

69. This Commission may impose requirements or conditions on the granting of ETC designation that go beyond the FCC's recommendations. *ETC Designation Framework Order*, FCC 05-46, at ¶ 30. The safe harbor of § 253(b) of the Act preserves a state's ability to impose requirements necessary to preserve and to advance universal service, provided three criteria are met: (a) the requirement must be competitively neutral; (b) the requirement must be consistent with § 254 of the Act; and (c) the requirement must be necessary to preserve and to advance universal service. *In the Matter of Federal-State Joint Board on Universal Service* and *In the Matter of Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, CC Docket No. 96-45, Declaratory Ruling, FCC 00-248, 15 FCC Rcd. 15168 (2000) (*Western Wireless Declaratory Order*).⁴³ A state's statute, regulation, or legal

⁴³ Citation in this Decision to the *Western Wireless Declaratory Order* is to FCC 00-248 (rel. Aug. 10, 2000). There are no parallel citations to 15 FCC Rcd. 15168 (2000).

requirement⁴⁴ runs afoul of § 253(b) of the Act if that requirement “may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” Section 253(a) of the Act.

70. In its *Western Wireless Declaratory Order*, the FCC addressed a number of issues that are pertinent to the instant proceeding. The FCC held that a state

interpretation of section 214(e) [that requires] carriers to provide the supported services throughout the service area *prior to designation as an ETC* has the effect of prohibiting the ability of prospective entrants from providing telecommunications service ... [and] has the effect of prohibiting competitive entry in those areas where universal service support is essential to the provision of affordable telecommunications service and is available to the incumbent LEC. Such a requirement would deprive consumers in high-cost areas of the benefits of competition by insulating the incumbent LEC from competition.

Western Wireless Declaratory Order, FCC 00-248, at ¶ 12 (footnotes omitted) (emphasis supplied). Thus, such a state-imposed requirement is not within the safe harbor created in § 253(b) of the Act. The FCC also found that such a state requirement is contrary to the language and meaning of § 214(e) of the Act. *Id.* at ¶ 14.

71. In addition, the FCC found that a

requirement that a carrier provide service to every potential customer throughout the service area *before receiving ETC designation* has the effect of prohibiting the provision of service in high-cost areas. As an ETC, the incumbent LEC is required to make service available to all consumers upon request, but the incumbent LEC may not have facilities to every possible consumer. We believe the ETC requirements should be no different for carriers that are not incumbent LECs. A new entrant, once designated as an ETC, is required, as the incumbent is required, to extend its network to serve new customers upon reasonable request. We find, therefore, that new entrants must be allowed the same reasonable opportunity to provide service to requesting customers as the incumbent LEC, once designated as an ETC. Thus, we find that a telecommunications carrier’s inability to demonstrate that it can provide ubiquitous service at the time of its request for designation as an ETC should not preclude its designation as an ETC.

⁴⁴ The term legal requirement includes a state commission order or condition that is binding on the carrier seeking ETC designation. *Western Wireless Declaratory Order*, FCC 00-248, at ¶ 11.

Western Wireless Declaratory Ruling, FCC 00-248 at ¶ 17 (footnotes omitted) (emphasis supplied).⁴⁵

72. Finally, the FCC found that denial of an ETC designation “must be based on the application of competitively neutral criteria that are not so onerous as to effectively preclude a prospective entrant from providing service.” *Western Wireless Declaratory Ruling*, FCC 00-248, at ¶ 18 (footnotes omitted). Competitive neutrality means that the universal support mechanisms, rules, and requirements do not advantage or disadvantage one provider *vis-à-vis* another and do not advantage or disadvantage one technology *vis-à-vis* another.⁴⁶ *Id.* at ¶ 21.

73. The FCC concluded that a competitive carrier can receive an ETC designation if it “can make a reasonable demonstration to the state commission of its capability and commitment to provide universal service without the actual provision of the proposed service [so long as it] reasonably demonstrate[s] to the state commission its ability and willingness to provide service upon designation.” *Western Wireless Declaratory Ruling*, FCC 00-248, at ¶ 24.

74. The “designation as an ETC does not automatically entitle a carrier to receive [federal] universal service support.” *In the Matter of High-Cost Universal Service Support, In the Matter of Federal-State Joint Board on Universal Service, In the Matter of Alltel Communications, Inc., et al., Petitions for Designation as Eligible Telecommunications Carriers and In the Matter of RCC Minnesota, Inc., and RCC Atlantic Inc., New Hampshire ETC Designation Amendment*, WC Docket No. 05-337 and CC Docket No. 96-45,

⁴⁵ The FCC considered whether the safe harbor provision in § 253(b) of the Act would protect a state requirement that, before receiving ETC designation, a carrier provide service to every potential customer throughout the service area. The FCC determined that the safe harbor provision did not apply because the effect of the requirement would not be competitively neutral as it would favor the ILEC. *Western Wireless Declaratory Ruling*, FCC 00-248, at ¶¶ 21-22. The FCC concluded that such a requirement “has the effect of prohibiting the provision of service in high-cost areas.” *Western Wireless Declaratory Ruling*, FCC 00-248, at ¶ 23.

⁴⁶ This Commission uses the same definition. *See, e.g.*, Decisions No. C96-0161 and No. R00-1292-I.

Order, FCC 08 122, 23 FCC Rcd. 8834 (2008) (*CETC Interim Cap Order*), *aff'd*, *Rural Cellular Association v. Federal Communications Commission*, 588 F.3d 1095 (D.C. Cir. 2009), at ¶ 29.⁴⁷

The FCC has found that, irrespective of whether a carrier receives high-cost support, benefits accrue to the carrier from designation as an ETC.⁴⁸ *Id.* at ¶ 30. In addition, “designation as an ETC and the receipt of USF support constitute two separate functions. Rule [4 CCR 723-2-2187(f)] contains no requirement that an applicant for ETC designation make an initial showing that it will actually use any USF support it receives for the intended purpose in Colorado.” Decision No. R10-0264-I at ¶ 17.

b. State.

75. When considering whether to grant an ETC designation, this Commission has discussed these factors in its public interest analysis:

- (a) That both federal and state statutes establish a policy of promoting competition in telecommunications markets;
- (b) That designating carriers as ETCs may bring the benefits of competition to rural areas by [1] increasing consumer choice, [2] promoting product and service innovation, [3] promoting efficiency, [4] creating incentives to ensure that quality services are available at just, reasonable, and affordable rates, [5] enabling unserved or underserved customers to obtain a broader range of services, [6] improving service quality, [7] ensuring access to services comparable to those provided in urban areas, and [8] providing alternatives to wireline service;
- (c) That the impact on existing rural telecommunications carriers resulting from the designation of a carrier as an ETC may be a factor to be considered in the public interest analysis;
- (d) That designating an ETC is in the public interest only when conditioned on the requirement that the carrier so designated adhere to Commission standards regarding affordability and customer protection;

⁴⁷ Citation in this Decision to the *CETC Interim Cap Order* is to FCC 08-122 (rel. May 1, 2008). There are no parallel citations to 23 FCC Rcd. 8834 (2008).

⁴⁸ The benefits include, for example, eligibility to receive low-income universal service Lifeline support and eligibility to receive universal service support from state funds.

- (e) That the public interest test should include more than a narrow determination that increased competition is in the public interest; and
- (f) That the FCC's imposition of an interim cap on the amount of high-cost support that competitive ETCs may receive through its [*CETC Interim Cap Order*] does not affect a carrier's eligibility to be designated an ETC.

Decision No. R10-1264, Docket No. 09A-771T, mailed November 23, 2010 at ¶ 37 (footnotes omitted). The Commission has not enumerated a comprehensive or definitive list of the factors it will use in its public interest analysis. In addition, the Commission has provided no definitive guidance with respect to the relative weight to be given to these factors. Thus, these are factors that the ALJ may, but need not, consider; and, if considered, the ALJ may assign the weight that she deems appropriate under the facts of this case.

2. NNTC WL Meets ETC Requirements.

76. For the reasons discussed below and subject to conditions, the ALJ finds that NNTC WL meets the requirements for designation as an ETC.

a. Common Carrier.

77. Applicant is a CMRS provider and is a telecommunications carrier. No party disputed that Applicant is a common carrier, as defined in federal law. Based on the record, the ALJ finds that Applicant is a common carrier.

b. Intent and Ability to Provide Supported Services and to Offer Supported Services throughout Service Area.

78. With respect to the principle that an ETC applicant demonstrate its capability and commitment to provide the supported services throughout its designated service area to all customers who make a reasonable request for service, the FCC required that the

applicant make specific commitments to provide service to requesting customers in the service areas for which it is designated as an ETC. If the ETC's network already passes or covers the potential customer's premises, the ETC should provide service immediately. In those instances where a request comes from a

potential customer within the applicant's licensed service area but outside its existing network coverage, the ETC applicant should provide service within a reasonable period of time if service can be provided at reasonable cost by: (1) modifying or replacing the requesting customer's equipment; (2) deploying a roof-mounted antenna or other equipment; (3) adjusting the nearest cell tower; (4) adjusting network or customer facilities; (5) reselling services from another carrier's facilities to provide service; or (6) employing, leasing, or constructing an additional cell site, cell extender, repeater, or other similar equipment.

ETC Designation Framework Order, FCC 05-46, at ¶ 22 (footnotes omitted).⁴⁹ In Rule 4 CCR 723-2-2187(f), there are several provisions pertaining to an ETC's providing service to existing or potential customers. The ALJ finds that the process by which an ETC designation applicant proposes to provide service is an important consideration.

79. At the time of the hearing, NNTC WL provided the supported services listed in 47 CFR § 54.101(a).⁵⁰ Applicant represents that, if designated as an ETC, it will provide the supported services listed in 47 CFR § 54.101(a). Applicant proposes to provide these services by using a combination of its own facilities (including both those that it owns and those that it leases) and roaming arrangements with other carriers.⁵¹ No party disputed this.

80. At the time of the hearing, NNTC WL offered the supported services in its service territory (*i.e.*, in CenturyTel's Norwood exchange and the Nucla-Naturita exchanges that NNTC WL seeks to serve as an ETC) using a combination of its own facilities (including both

⁴⁹ This process for provisioning service is referred to as the seven-step process.

⁵⁰ The supported services are: (a) voice grade access to the public switched telephone network; (b) local usage; (c) dual tone multi-frequency signaling or its functional equivalent; (d) single-party service or its functional equivalent; (e) access to emergency services; (f) access to operator services; (g) access to interexchange service; (h) access to directory assistance; and (i) toll limitation for qualifying low-income consumers. Pursuant to 47 CFR § 54.101(a)(5), access to emergency services includes access to 911 service and access to enhanced 911 service, to the extent that the local government in the ETC's service area has implemented 911 service or enhanced 911 service.

⁵¹ A roaming agreement permits the customers of a wireless carrier to use the facilities of another wireless carrier to complete or to receive a call. NNTC WL has a multi-carrier roaming agreement to which Verizon Wireless, Spring PCS, Alltel Wireless, and Commnet Wireless are parties.

those that it owned and those that it leased) and roaming arrangements with other carriers. No party disputed this.

81. Applicant represents that, if designated as an ETC, it will offer the supported services throughout its designated service area using a combination of its own facilities (including both those that it owned and those that it leased) and roaming arrangements with other carriers. In addition, Applicant represents that it will use the seven-step process described in the *ETC Designation Framework Order*, FCC 05-46, at ¶ 22.

82. Finally, there are areas in CenturyTel's Norwood exchange and in the Nucla-Naturita's Nucla exchange that are outside of the FCC-licensed spectrum area that NNTC WL may serve or that are outside its network's coverage.

83. To provide service within these areas of the Norwood exchange, NNTC WL states that it will provide service through a wholesale/resale agreement with CenturyTel (the underlying rural ILEC) or through roaming agreements, or both. No party opposed this.

84. To provide service in the northeast corner of the Nucla exchange, an area that lies outside the licensed spectrum area or outside its network's coverage, NNTC WL states that it will provide service (as it does at present) through the existing roaming agreement under which NNTC WL customers can use the facilities of two other wireless carriers. In support of its plan, NNTC WL states: (a) the area is small; (b) there are no residences or businesses in the area; (c) the area is national forest land; (d) step five of the seven-step process permits a carrier to provide service by reselling services from another carrier's facilities; and (e) there is wireless signal coverage in the area provided by other wireless carriers with which NNTC WL has a roaming agreement. In addition, NNTC WL as a two-year investment plan to construct additional cell towers to improve its coverage throughout its service area.

85. Staff asserts that ETC designation should be denied for the Nucla exchange because Applicant has not demonstrated its willingness and commitment to offer service throughout that exchange. In support, Staff argues: (a) because the FCC-licensed spectrum area does not cover the entire Nucla exchange, Staff questions NNTC WL's ability to serve the entire support area; (b) NNTC WL has not made a specific and reliable commitment to use the seven-step process; and (c) NNTC WL has not established that it will satisfy service quality standards outside its existing network coverage in the Nucla exchange. With respect to its concern about NNTC WL's ability to meet service quality standards, Staff argues that NNTC WL's proposal to use roaming to provide coverage is unacceptable because: (a) the area contains or may contain areas with weak wireless signal strength so that service could be unreliable and may not meet either the FCC's or this Commission's service quality standards; and (b) allowing NNTC WL to

offer service using a scant roaming service in connection with granting it ETC and EP designation ... would set a precedent that would allow ETC and EP applicants to have sole discretion in determining the quality of resale service instead of providing service in accordance with the FCC and this Commission's standards.

Staff Statement of Position (Staff SOP) at 5.

86. The ALJ finds Staff's arguments to be unpersuasive. For the following reasons, the ALJ will not adopt Staff's recommendation that the Commission deny ETC designation to NNTC WL in the Nucla exchange.⁵²

87. First, Staff argues that NNTC WL did not make a specific commitment to use the seven-step process. The ALJ finds that this assertion is contrary to the evidence. Staff also

⁵² Staff makes the same arguments with respect to the requested EP designation. For the reasons stated here, the ALJ finds Staff's arguments to be unpersuasive with respect to EP designation. Consequently, the ALJ will not adopt Staff's recommendation that the Commission deny EP designation to NNTC WL in the Nucla exchange.

asserts that NNTC WL's commitment to using the seven-step process is questionable or unreliable because it intends to rely on roaming (with the possibility of a weak signal) when it

should exhaust each and every possible solution to try to get coverage to a requesting customer. [NNTC WL] must offer the [supported] services ... throughout the entire designated service area either using its own facilities or resale of another carrier's services ... to be in compliance with the FCC and this Commission's requirements for ETC status.

Answer Testimony of Staff witness Travis (Hearing Exhibit No. 13) at 20:19-21:2.

The ALJ finds that this argument is not persuasive because it rests on the assumption that, *at the time of the ETC application*, NNTC WL is obligated to provide the supported services throughout its proposed service area. As discussed above, the *Western Wireless Declaratory Order* makes it clear that this is not the case. In addition, that order is clear that imposing such a requirement would not be competitively neutral and, in effect, would "prohibit[] competitive entry in those areas where universal service support is essential to the provision of affordable telecommunications service." *Western Wireless Declaratory Order*, FCC 00-248, at ¶ 12.

88. Second, Staff argues that, because areas in the northeast corner of the Nucla exchange have or may have weak wireless signal strength,⁵³ service in those areas would be unreliable. The ALJ finds that this argument is speculative. Staff also argues that weak signal strength means that the service would not meet either the FCC's or this Commission's service quality standards or that the service would be no more than mediocre.⁵⁴ Staff did not identify the FCC or the Commission service quality standards that it believed NNTC WL would not meet due to weak signal strength. Staff did not explain why, or the way(s) in which, weak signal strength

⁵³ Although the Parties discussed weak wireless signal strength, the record is unclear with respect to whether the Parties had a common understanding when they used the term. Staff did not provide a definition for weak wireless signal strength in its testimony.

⁵⁴ Staff provided no definition of mediocre.

would, or might, result in NNTC WL's failure to meet FCC or Commission service quality standards. Staff did not explain why, or in what way(s), whether service might be no more than mediocre is relevant to this proceeding. Staff asserts that, as a result of weak wireless signal strength, the northeast corner of the Nucla exchange would be without service on an intermittent basis. Staff did not offer information concerning the frequency or duration of possible service interruption due to weak wireless signal strength. Staff did not cite or point to any FCC or Commission rule or decision that requires an applicant for ETC designation to establish that it will offer or provide uninterrupted service. Consequently, the ALJ finds that this argument has little or no support in the record. In addition, the ALJ notes that the practical effect of adopting Staff's argument would be to require NNTC WL to establish that it will offer or provide uninterrupted service in the northeast corner of the Nucla exchange; this is an unrealistic and unattainable standard.

89. Staff argues that the Commission would establish a precedent if it were to designate NNTC WL as an ETC in the Nucla exchange based on NNTC WL's plan to use roaming when NNTC WL knows that the wireless signal strength in the northeast corner of the Nucla exchange is weak. The ALJ finds that this argument is not persuasive. There will be no precedential effect because each ETC designation application is considered on a case-by-case basis and is fact-dependent. Thus, an appropriate consideration or an appropriate outcome in one ETC applicant's situation may not be an appropriate consideration or an appropriate outcome in another ETC applicant's situation. In addition, when deciding cases, the Commission is not bound by the doctrine of *stare decisis*.

90. Based on the record, the ALJ finds that, if designated as an ETC, Applicant will provide and will offer throughout its service territory the supported services listed in 47 CFR

§ 54.101(a) using a combination of its own facilities (including both those that it owns and those that it leases) and roaming arrangements with other carriers. In addition, the ALJ finds that NNTC WL will use the seven-step process to provide the supported services.

c. Remaining Functional in Emergency Situations.

91. With respect to the principle that an ETC designation applicant demonstrate its ability to remain functional in emergency situations, the FCC required that the

applicant ... demonstrate [that] it has a reasonable amount of back-up power to ensure functionality without an external power source, is able to reroute traffic around damaged facilities, and is capable of managing traffic spikes resulting from emergency situations.

ETC Designation Framework Order, FCC 05-46, at ¶ 25 (footnotes omitted).

By Rule 4 CCR 723-2-2187(f)(II)(E), this Commission requires an ETC annually to certify that it is “able to function in emergency situations as set forth in 47 C.F.R. § 54.202(a)(2).” The ALJ finds that whether an ETC designation applicant has a plan to remain functional in an emergency situation is an important consideration.

92. Applicant described its back-up power sources and its plans to remain functional in emergency situations. NNTC WL uses these at present to provide service. No party disputed this.

93. Based on the record, the ALJ finds that Applicant has demonstrated its ability to remain functional in emergency situations.

d. Provide Lifeline and Linkup Services.

94. At the time of the hearing, NNTC WL provided neither LifeLine service nor Linkup service. Applicant represents that, if designated as an ETC, it will offer and will provide one or both of these services throughout its designated service area. No party disputed this or opposed this proposal.

95. Based on the record, the ALJ finds that, if designated as an ETC, Applicant will provide either LifeLine service or Linkup service, or both, throughout its designated service area. The ALJ will condition the ETC designation on NNTC WL's providing either LifeLine service or Linkup service, or both, throughout its designated service area.

e. Advertising Availability of Services and the Charges.

96. Applicant states that, if designated as an ETC, it will advertise throughout its service territory the availability of each supported service and the charges for those services. Applicant states that it will advertise in media of general distribution and will use at least these methods: newspaper, direct mail, bill inserts, and telephone directory advertising. No party disputed this.

97. Based on the record, the ALJ finds that, if designated as an ETC, Applicant will advertise, in media of general distribution and throughout its service territory, the availability of each supported service and the charges for those services.

f. Consumer Protection.

98. With respect to the principle that an ETC designation applicant demonstrate its commitment to meeting consumer protection and service quality standards, the FCC stated that the

applicant must make a specific commitment to objective measures to protect consumers. [A] commitment to comply with the Cellular Telecommunications and Internet Association's Consumer Code for Wireless Service will satisfy this requirement for a wireless ETC applicant seeking designation before the [FCC].^[note 71] ...

Note 71 states, in pertinent part:

Under the CTIA Consumer Code, wireless carriers agree to: (1) disclose rates and terms of service to customers; (2) make available maps showing where service is generally available; (3) provide contract terms to customers and confirm changes in service; (4) allow a trial period for new service; (5) provide specific disclosures

in advertising; (6) separately identify carrier charges from taxes on billing statements; (7) provide customers the right to terminate service for changes to contract terms; (8) provide ready access to customer service; (9) promptly respond to consumer inquiries and complaints received from government agencies; and (10) abide by policies for protection of consumer privacy.

ETC Designation Framework Order, FCC 05-46, at ¶ 28 (some footnotes omitted). By Rule 4 CCR 723-2-2187(f)(II)(D), this Commission requires an ETC annually to certify that it “is complying with applicable service quality standards and consumer protection rules, e.g., the CTIA Consumer Code for Wireless Service.” The ALJ finds that whether an ETC designation applicant has a plan for consumer protection and service quality is an important consideration.

99. Applicant states that, if designated as an ETC, it will follow the seven-step process established in the *ETC Designation Framework Order* in order to determine, after receipt of a request for service, whether it can provide service. In addition, Applicant states that, if designated as an ETC, it will abide by the CTIA Consumer Code for Wireless Service. No party presented contrary information.

100. Based on the record, the ALJ finds that, if designated as an ETC, Applicant will follow and will use the seven-step process established in the *ETC Designation Framework Order*. Based on the record, the ALJ finds that, if designated as an ETC, Applicant will abide by the CTIA Consumer Code for Wireless Service. The ALJ finds that Applicant has demonstrated its commitment to meeting service quality and consumer protection standards.⁵⁵ To assure that NNTC WL will meet its commitment, the ALJ will condition NNTC WL’s ETC designation on its following and using the seven-step process and on its abiding by the CTIA Consumer Code for Wireless Service.

⁵⁵ The Commission has suggested that designating a competitive ETC is in the public interest if this condition is imposed: the designated carrier must adhere to Commission standards regarding customer protection. The ALJ considered this factor and finds that following the seven-step process and abiding by the CTIA Consumer Code for Wireless Service are sufficient to address this factor.

g. Comparable Local Usage.

101. With respect to the local usage plan principle, the FCC required that an ETC designation “applicant ... demonstrate that it offers a local usage plan comparable to the one offered by the incumbent LEC in the service areas for which the applicant seeks designation.” *ETC Designation Framework Order*, FCC 05-46, at ¶ 32. By Rule 4 CCR 723-2-2187(f)(II)(J), this Commission requires an ETC annually to certify that it “is offering a local usage plan comparable to that offered by the incumbent LEC in the relevant service areas.” The Commission has determined that it will compare service plans,⁵⁶ not rates, when assessing comparability. Decision No. C06-0917 at ¶ 16; Decision No. C06-0600 at ¶ 13. The ALJ finds that whether an ETC designation applicant will offer a local usage plan that is comparable to that of the ILEC serving the same area is an important consideration.

102. NNTC WL’s local coverage includes the rural ILECs’ exchanges and the associated extended local calling areas. In addition, NNTC WL’s local calling area is Major Trading Area 22 (MTA 22), associated with NNTC WL’s spectrum;⁵⁷ and, as a wireless carrier, NNTC WL considers calls made within MTA 22 to be local calls. Thus, NNTC WL’s local calling area is at least as large as the local calling areas of the underlying rural ILECs.

103. At present, NNTC WL does not offer a stand-alone Basic Universal Service (BUS) because its local calling plans are in bundled service offerings. During the hearing in this matter (July 17 tr. at 45), Applicant stated that it would offer a BUS plan with unlimited calling that is comparable to, and at a rate comparable to, the basic local plan offered by the rural ILEC

⁵⁶ The ALJ notes that, despite requests that it do so, the Commission has declined to define a Basic Universal Service offering and has declined to require carriers to offer a stand-alone BUS offering. Decision No. C06-0917 at ¶ 15 & n. 1.

⁵⁷ MTA 22 covers the majority of Colorado and of Wyoming, portions of western South Dakota and Nebraska, and areas in Kansas.

in whose territory Applicant was offering service. This may mean offering two BUS plans: one in the Nucla-Naturita exchanges and one in the CenturyTel exchange. No party disputed this or opposed the proposal.

104. Based on the record, the ALJ finds that Applicant's ETC designation should be conditioned on its providing one or more BUS plans as it offered to do. The ALJ will condition Applicant's designation as an ETC on Applicant's offering and advertising, both in media of general circulation and on its website: (a) a month-to-month wireless BUS plan with unlimited calling that is comparable to, and at a rate comparable to, the basic local plan offered by Nucla-Naturita for customers within the Nucla-Naturita wire centers (or exchanges) within which NNTC WL will provide service; and (b) a month-to-month wireless BUS plan with unlimited calling that is comparable to, and at a rate comparable to, the basic local plan offered by CenturyTel for customers within the CenturyTel wire center (or exchange) within which NNTC WL will provide service.⁵⁸

h. Equal Access.

105. With respect to the principle that an ETC designation applicant demonstrate an understanding that it may be required to provide equal access if all other ETCs in the designated service area relinquish their designations, the FCC offered little comment. *ETC Designation Framework Order*, FCC 05-46, at ¶ 20. By Rule 4 CCR 723-2-2187(f)(II)(F), this Commission requires each ETC annually to certify its understanding that "the FCC may require it to provide customers with equal access to long distance carriers in the event that no other ETC is providing

⁵⁸ The Commission has suggested that designating a competitive ETC is in the public interest if this condition is imposed: the designated carrier must adhere to Commission standards regarding affordability. The ALJ considered this factor and finds that the condition that NNTC WL must offer a stand-alone BUS comparable to, and at rates that are comparable to, the BUS of the underlying rural ILEC is sufficient to address this factor.

equal access within the service area.” The ALJ finds that whether an ETC designation applicant understands its obligations should all other ETCs relinquish their designations is an important consideration.

106. Applicant states that it understands its possible equal access obligation. No party disputed this. Based on the record, the ALJ finds that Applicant has demonstrated its understanding of its possible future equal access obligation.

i. Public Interest.

107. In the *ETC Designation Framework Order*, the FCC discussed and defined the requirement that, pursuant to § 214(e)(2) of the Act, the designation of an additional ETC in a rural ILEC’s service territory must be in the public interest. The FCC encouraged state commissions to do the following in their public interest analysis:

First, ... consider ... factors [such as] the benefits of increased consumer choice and the unique advantages and disadvantages of the competitor’s service offering. Second, in areas where an ETC applicant seeks designation below the study area level of a rural telephone company, ... conduct a creamskimming analysis that compares the population density of each wire center in which the ETC applicant seeks designation against that of the wire centers in the study area in which the ETC applicant does not seek designation.

ETC Designation Framework Order, FCC 05-46, at ¶ 41 (footnotes omitted). The FCC observed that, in performing its public interest analysis, each state commission

may conduct the analysis differently, or reach a different outcome, depending upon the area served. For example, ... the same or similar factors could result in divergent public interest determinations, depending on the specific characteristics of the proposed service area[.]

Id. at ¶ 43. The FCC was clear that the “specific determination, and the relative weight of the relevant considerations, must be evaluated on a case-by-case basis.” *Id.* at ¶ 46.

108. *Customer Choice.* The Commission has stated that designating a wireless competitive ETC in the service area of a rural ILEC may bring the following benefits to that

area: increased consumer choice; product and service innovation; increased efficiency; incentives to ensure that quality services are available at just, reasonable, and affordable rates; increased ability of underserved or un-served customers to obtain both basic service and a broader range of services; improved service quality, greater access to services that are comparable to those available in urban areas; and an alternative to wireline service. At present, there is no requirement that, in order to be designated a competitive ETC in a rural ILEC's service territory, the ETC designation applicant (in this case NNTC WL) must demonstrate that its designation will result, or is likely to result, in all (or even most) of the listed benefits.

109. Based on the record, the ALJ finds that designating NNTC WL as a competitive ETC will increase customer choice by providing an increased number of service plans and services from which to choose, an increased number of carriers from which to choose, and an increased choice of technologies. In addition, the ALJ finds that the designation also may encourage NNTC WL (and any carrier that provides service in the NNTC WL service area) to develop new or differentiated services, products, and pricing plans in order to entice customers to use its service.

110. One of the Commission-identified benefits is: the wireless competitive ETC may provide an *alternative* to wireline service. Intervenors argue that, in the context of the public interest analysis, the wireless carrier's service must be a complete substitute for the wireline carrier. In this case, they assert, this means that NNTC WL must establish that Nucla-Naturita or CenturyTel customers who become NNTC WL wireless customers then discontinue their Nucla-Naturita or CenturyTel wireline service (*i.e.*, cord cut or go exclusively wireless).

111. The FCC has addressed this argument. When the telecommunications market first was opened to competitive entry, the FCC "envisioned that competitive ETCs would compete

directly with incumbent LECs and try to take existing customers from them.” *CETC Interim Cap Order*, FCC 08-122, at ¶ 19 (footnote omitted). As the telecommunications market has developed, however, this has proven not to be the case. As the FCC noted,

wireless competitive ETCs do not capture lines from the incumbent LEC to become a customer’s sole service provider, except in a small portion of households. Thus, *rather than providing a complete substitute for traditional wireline service, these wireless competitive ETCs largely provide mobile wireless telephony services in addition to a customer’s existing wireline service.*

Id. at ¶ 20 (footnotes omitted) (emphasis supplied). Although it expressed concern about the impact of this development on the federal USF,⁵⁹ the FCC found no fault with this market-driven development. This significantly undercuts Intervenor’s cord-cutting argument.

112. From the FCC’s discussion, it is clear that customer choice and the benefit of having an alternative to wireline service mean that the customer has the option of having wireline service only, of having wireless service only, or of having both. Wireless competitive ETC service is not, and should not be viewed in the public interest analysis as, a substitute for the wireline service of the underlying ILEC; it is sufficient if the wireless competitive ETC service supplements the customer’s wireline service. Based on the foregoing, the ALJ determines that: (a) the extent to which NNTC WL, the wireless competitive ETC applicant, has captured or may capture customers from Nucla-Naturita or from CenturyTel, the underlying ILECs (*i.e.*, the extent of cord-cutting); and (b) whether the wireless competitive ETC views the underlying rural ILECs as competitors⁶⁰ are neither controlling factors in nor factors to be

⁵⁹ This concern, in part, led to the interim cap on the level of USF support available to each state for competitive ETCs.

⁶⁰ Intervenor’s rely heavily on NNTC WL’s testimony that NNTC WL does not view Nucla-Naturita as a competitor. The record contains no credible evidence with respect to NNTC WL’s view of CenturyTel.

The ALJ notes that, in this proceeding, Intervenor’s focus was on *NNTC WL’s* perspective concerning the carriers it views as its competitors. In a competitive marketplace, however, the *customers’* perspective also is important and likely should be considered, particularly when (as here) the carriers have very different capabilities and provide very different products and services.

heavily-weighted in the public interest analysis. In addition, as discussed above, NNTC WL is not required to demonstrate that designating it as an ETC will result, or is likely to result, in all (or even most) of the Commission-identified benefits. For these reasons, Intervenor's arguments based on cord-cutting and on NNTC WL view of Nucla-Naturita are unpersuasive.⁶¹

113. *Advantages and Disadvantages of Service Offerings.* With respect to the advantages and disadvantages of service offerings, the FCC has identified factors that it weighs and that it urges state commissions to weigh:

the benefits of mobility that wireless carriers provide in geographically isolated areas, the possibility that an ETC designation will allow customers to be subject to fewer toll charges, and the potential for customers to obtain services comparable to those provided in urban areas, such as voicemail, numeric paging, call forwarding, three-way calling, call waiting, and other premium services. The [FCC] also examines disadvantages such as dropped call rates and poor coverage.

ETC Designation Framework Order, FCC 05-46, at ¶ 44(2) (footnotes omitted). There is overlap with the benefits of competition (discussed above) that the Commission has identified.

114. Based on the record, the ALJ finds that, subject to the conditions discussed in this Decision, designating NNTC WL as an ETC will provide a variety of benefits to consumers in NNTC WL's service area.⁶² These include (but are not limited to) the increased customer choices discussed above; a larger local calling area (*i.e.*, MTA 22) than the extended local calling areas of the underlying rural ILECs; the benefits of increased mobility as compared to wireline service;⁶³ the customers in this rural area having access to services comparable to those available in urban areas; an improved service quality and high-quality service offerings; the creation of incentives

⁶¹ Intervenor's make the same arguments with respect to whether the requested EP designation is in the public interest. For the reasons stated here, the ALJ finds Intervenor's arguments to be unpersuasive with respect to EP designation.

⁶² A number of these benefits inure to the benefit of the general public and not just to customers of NNTC WL.

⁶³ This includes the ability to place and to receive calls when in transit or when not at home or at work. This increases the reach of, and benefits all users of, the Public Switched Telephone Network.

to ensure that quality services are available at just, reasonable, and affordable rates; the improvement to public safety by providing telecommunications services to areas that have no or insufficient service and by providing access to 9-1-1 emergency service for individuals who are traveling in NNTC WL's service area.⁶⁴ In addition, designating NNTC WL as an ETC will make it eligible for USF support and will enable it to construct additional telecommunications facilities or to accelerate planned construction within its service area.

115. As discussed above, Staff argued that NNTC WL might not be able to offer or to provide service throughout its service area due to weak wireless signal strength. For the reasons discussed, the ALJ finds that, on balance, the advantages of NNTC WL's service offerings outweigh any disadvantages.

116. *Creamskimming.* In the absence of disaggregation and redefinition, a rural carrier receives universal service high-cost support based on its actual, embedded costs averaged across all lines served by the carrier within its study area.⁶⁵ As a result of this averaging, and although 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. The FCC has determined that, depending on the circumstances in a particular study area, averaging of costs creates, or may create, artificial incentives to enter relatively low-cost portions of a rural ILEC's study area. A competitive carrier taking advantage of these artificial incentives is said to be creamskimming.

⁶⁴ In some areas, rural ILECs cannot provide service without the installation of new facilities; this requires the person requesting service to incur line extension charges. Another possible benefit of designating NNTC WL as an ETC is that, as a wireless carrier, NNTC WL may be able to provide service, without the need for line extension charges, to persons who do not have service (*e.g.*, persons who move into the area or who move into new buildings) and who request service.

⁶⁵ Section 54.207(b) of 47 CFR defines a rural ILEC's service area as the rural ILEC's study area unless and until the state commission and the FCC establish a different service area definition for that rural ILEC.

117. Generally speaking, the potential for creamskimming does not exist, or is lessened considerably, when a rural ILEC has disaggregated and redefined its study area to the wire center level, which makes each wire center a separate service area. As a result, if the underlying rural ILEC has disaggregated and redefined its study area to the wire center level and an ETC designation applicant proposes to serve an entire wire center, the state commission may designate that applicant as an ETC without further consideration of creamskimming.

118. Creamskimming becomes an issue when the underlying rural ILEC has not disaggregated and redefined its study area to the wire center level and an ETC designation applicant proposes to serve an area that does not cover the underlying rural ILEC's entire study area. To reduce the possibility of creamskimming, the state commission may designate the applicant as an ETC subject to a condition that the underlying rural ILEC's study area is disaggregated and redefined.

119. CenturyTel is a rural ILEC. The Commission has redefined, and the FCC has concurred in the redefinition of, the CenturyTel study area to the wire center level. NNTC WL proposes to serve CenturyTel's entire Norwood wire center. This renders moot any creamskimming issue in the CenturyTel study or service area. There is no dispute on this point.

120. Nucla-Naturita is a rural ILEC, and its study area consists of five exchanges: Dove Creek, Naturita, Norwood, Nucla, and Paradox. NNTC WL is authorized to serve within a Cellular Geographic Service Area that covers the Naturita and Paradox exchanges entirely but that covers only a portion of the Dove Creek, Norwood, and Nucla exchanges. As a result, NNTC WL seeks to serve only a portion of the Nucla-Naturita study area. Because Nucla-Naturita has not disaggregated and redefined its study area to the wire center (or exchange) level, the potential for NNTC WL to creamskim exists or may exist.

121. There is no dispute that the potential for creamskimming in the Nucla-Naturita study area must be addressed. There is no dispute that, to address that creamskimming issue, the Commission must redefine, and the FCC must concur in the redefinition of, Nucla-Naturita's study area to the wire center (or exchange) level.

122. For the reasons discussed below, the ALJ will condition NNTC WL's ETC designation on the Commission's disaggregation and redefinition of Nucla-Naturita's study area to the wire center (or exchange) and the FCC's concurrence in that redefinition. The ALJ also will condition that designation on NNTC WL's providing, as a compliance filing, a copy of the FCC's decision that concurs in the Commission's redefinition of Nucla-Naturita's service area. Assuming the other conditions set out in this Decision have been met and that Nucla-Naturita's study area is disaggregated and redefined to the wire center level, NNTC WL's ETC designation in the redefined Nucla-Naturita service areas will become effective immediately upon the filing of the required compliance filing.

123. Rule 4 CCR 723-2-2190 establishes the process by which a rural ILEC disaggregates its study area and targets high-cost universal service support. Rule 4 CCR 723-2-2191(b) provides for the Commission's filing a petition with the FCC to redefine a rural ILEC's service area when a rural ILEC has chosen to disaggregate its study area.

124. Section 54.207 of 47 CFR governs petitions to obtain the FCC's concurrence in a state commission's redefinition of a rural ILEC's study area. That rule permits either a state commission or another person to file the petition and, as pertinent here, requires that the petition contain both the state commission's proposed definition and the state commission's

ruling or other official statement presenting the state commission's reasons for adopting its proposed definition, including an analysis that takes into account the recommendations of any Federal-State Joint Board convened to provide

recommendations with respect to the definition of a service area served by a rural telephone company.

Thus, a critical element of a redefinition petition to the FCC is the state commission's explanation of its reasons for adopting the proposed redefinition.

125. To address the possibility of creamskimming, Nucla-Naturita must disaggregate and redefine its study area in order for NNTC WL to provide service to fewer than all of Nucla-Naturita's wire centers.⁶⁶ As the affected rural ILEC, Nucla-Naturita must make a verified filing with this Commission. The filing is necessary: (a) to obtain Commission permission to disaggregate and to target federal high-cost support (Rule 4 CCR 723-2-2190(d)); and (b) to obtain a Commission decision that provides the evidentiary basis to support the redefinition and to address, *inter alia*, any Federal-State Joint Board recommendations concerning redefinition of a rural ILEC's service area (47 CFR § 54.207(c)(1)(ii)). Nucla-Naturita may make its filing under Rule 4 CCR 723-2-2190(b) (Path 2) or Rule 4 CCR 723-2-2190(c) (Path 3). The filing must include information that provides an evidentiary basis for a Commission decision or explanation that satisfies the requirements of 47 CFR § 54.207(c)(1),

126. Nucla-Naturita is not a party to this proceeding. Thus, notwithstanding that redefinition of Nucla-Naturita's study area is a condition on NNTC WL's ETC designation in Nucla-Naturita's service area, the Commission cannot order, in this proceeding, Nucla-Naturita to make a filing to disaggregate and to redefine its study area. Despite this fact, NNTC WL's designation as an ETC in Nucla-Naturita's wire centers will be subject to the condition that

⁶⁶ In Docket No. 02M-199T, Nucla-Naturita chose not to disaggregate its study area (*i.e.*, it selected Path 1).

Nucla-Naturita's study area must be disaggregated pursuant to Path 2 or Path 3 and must be redefined pursuant to 47 CFR § 54.207.⁶⁷

127. *Impact on USF.* Originally, the FCC included, and encouraged state commissions to include, as part of the public interest analysis the following factor: whether designation of a competitive ETC would affect the size and sustainability of the USF. *ETC Designation Framework Order*, FCC 05-46, at ¶ 55. Subsequently, the FCC imposed an interim cap that sets the upper limit on the amount of USF support available to each state for competitive ETCs and that requires "newly-designated competitive ETCs to share [USF] funding with other competitive ETCs within the State." *CETC Interim Cap Order*, FCC 08-122, at ¶ 26. The interim cap was in effect at the time of the hearing in this matter.

128. In general, the purpose of the interim cap is to prevent the level of high-cost support available to competitive ETCs in Colorado from growing beyond the level of support that competitive ETCs in Colorado were eligible to receive during March 2008 on an annualized

⁶⁷ This condition is identical in effect to that placed on WWC Holding Co.'s (Western Wireless) designation as an ETC and an EP in consolidated Dockets No. 00A-174T (*In the Matter of the Application of WWC Holding Inc., for Designation as an Eligible Telecommunications Carrier Pursuant to 4 CCR 723-42-7*) and No. 00A-171T (*In the Matter of the Application of WWC Holding Inc., for Designation as an Eligible Telecommunications Provider Pursuant to 4 CCR 723-42-7.8*) (Western Wireless proceeding). As pertinent here, Western Wireless sought ETC and EP designation in the service area of CenturyTel, a rural ILEC. At the time, CenturyTel had not disaggregated and redefined its study area; and Western Wireless could not provide service to CenturyTel's entire study area. CenturyTel did not intervene in the Western Wireless proceeding.

Western Wireless, OCC, and Staff entered into a stipulation in which they proposed that Western Wireless be granted ETC designation pending FCC approval of the disaggregation and redefinition of CenturyTel's study area. The ALJ approved the stipulation in Decision No. R01-0019, Docket No. 00K-255T, mailed January 8, 2001. On exceptions, the Commission agreed that the redefinition of CenturyTel's study area was a necessary precondition to designating Western Wireless as an EP. The Commission did not approve the referenced portion of the stipulation, however, because the Commission found that the record in the Western Wireless proceeding contained insufficient evidence to permit the Commission to take the steps (*i.e.*, to make the findings) required by 47 CFR § 54.207. Decision No. C01-0476 at 25; Decision No. C01-0629 at 3-4. The Commission deferred Western Wireless's ETC and EP designations until the CenturyTel study areas were redefined by the Commission and the FCC concurred in the redefinition. Decision No. C03-0975, Docket No. 00K-255T, mailed September 2, 2003.

Given the factual similarities between the Western Wireless proceeding and the instant proceeding, the ALJ finds persuasive the Commission discussion of this issue and the bases on which it deferred Western Wireless's designations. In addition, the ALJ finds that the Commission's Western Wireless decisions provide support for the condition the ALJ imposes on NNTC WL in the instant proceeding.

basis.⁶⁸ Thus, the addition of NNTC WL (or any other new competitive ETC in Colorado) may decrease USF support for existing competitive ETCs;⁶⁹ but the addition of NNTC WL (or any other new competitive ETC in Colorado) will not affect adversely the overall size and sustainability of the USF. As a result of the *CETC Interim Cap Order*, the ALJ finds that the impact on the USF of designating a new competitive ETC is not a factor to be considered in the public interest analysis.⁷⁰

129. There is another possible USF funding-related consideration: given the interim cap, the impact that designating NNTC WL as a competitive ETC may have on the amount of USF money available to existing competitive ETCs in Colorado. No competitive ETC, even those that may provide service in NNTC WL's proposed service area, intervened in this proceeding. Based on the lack of interventions, there is no evidentiary basis on which to determine or to evaluate the impact that designating NNTC WL as a competitive ETC may have on an individual existing ETC's draw from the USF. Based on the record, NNTC WL's estimated annual USF support would be no more than \$ 180,000. Given the size of Colorado's USF draw for competitive ETCs, this estimated level of support is immaterial. For these reasons, the ALJ finds that, to the extent this factor may be relevant to the public interest analysis,

⁶⁸ The original capped USF amount for Colorado was \$ 10.07 million. Over a period of five years (beginning December 31, 2008), that will be reduced as WWC Holding Co.'s high cost support is phased out as a result of its merger with Verizon Wireless. The record does not contain the amount of this reduction. The capped amount in Colorado is less than \$ 10.07 million; but the exact amount is not in the record.

⁶⁹ When a new competitive ETC is designated and subsequently seeks USF funds, USF funds available under the interim cap are distributed to a larger number of competitive ETCs. Thus, a competitive ETC receiving USF funds at the time the new competitive ETC seeks USF funds, irrespective of where in Colorado that existing competitive ETC provides service, may see its USF support decrease if the newly-designated competitive ETC receives USF monies.

⁷⁰ This is consistent with the Commission's statement that the interim cap established in the *CETC Interim Cap Order* does not affect a carrier's eligibility to be designated an ETC and with the conclusion in Decision No. R10-0264-I at ¶ 18, Docket No. 09A-771T, mailed March 22, 2010, that "the issues relating to [the ETC designation applicant's] entitlement to [USF] support (and in what amount) are independent of the issues involved in its application for ETC designation." (Footnote omitted.)

designating NNTC WL as a competitive ETC will have little impact on the amount of USF money available to existing competitive ETCs in Colorado.

130. *Additional factor identified by the Commission.* The Commission has suggested that the following factor be considered in the public interest analysis: the impact on the existing rural ILEC that may result from the designation of an additional ETC in its territory. Neither Nucla-Naturita nor CenturyTel intervened in this proceeding. There is no credible information in the record with respect to the potential impact on Nucla-Naturita or on CenturyTel if NNTC WL is designated as an ETC. Consequently, there is insufficient evidence in the record to make a finding with respect to this factor.

3. Conditions on Designation as ETC.

131. The conditions discussed throughout this Decision are found to be in the public interest. For the convenience of the Parties and for ease of reference, the conditions are listed here. The Parties are advised, however, that this list may not be a complete list of the conditions and that the Parties should review this Decision to identify all conditions placed on NNTC WL's ETC designation.

132. The ALJ will condition the ETC designation on NNTC WL's providing either LifeLine service or Linkup service, or both, throughout its service area.

133. The ALJ will condition the ETC designation on NNTC WL's following and using the seven-step process and on its abiding by the CTIA Consumer Code for Wireless Service.

134. The ALJ will condition Applicant's designation as an ETC on Applicant's offering and advertising, both in media of general circulation and on its website: (a) a month-to-month wireless BUS plan with unlimited calling that is comparable to, and at a rate comparable to, the basic local plan offered by Nucla-Naturita for customers within the Nucla-Naturita wire centers

(or exchanges) within which NNTC WL will provide service; and (b) a month-to-month wireless BUS plan with unlimited calling that is comparable to, and at a rate comparable to, the basic local plan offered by CenturyTel for customers within the CenturyTel wire center (or exchange) within which NNTC WL will provide service.

135. The ALJ will condition NNTC WL's ETC designation on its following and using the seven-step process established in the *ETC Designation Framework Order* and on its abiding by the CTIA Consumer Code for Wireless Service.

136. The ALJ will condition NNTC WL's ETC designation as on the Commission's disaggregation and redefinition of Nucla-Naturita's study area to the wire center (or exchange) and the FCC's concurrence in that redefinition. The ALJ also will condition that designation on NNTC WL's providing, as a compliance filing, a copy of the FCC's decision that concurs in the Commission's redefinition of Nucla-Naturita's service area. Assuming the other conditions set out in this Decision have been met and that Nucla-Naturita's study area is disaggregated and redefined to the wire center level, NNTC WL's ETC designation in the redefined Nucla-Naturita service areas will become effective immediately upon the filing of the compliance filing.

137. The Nucla-Naturita management agreement with NNTC WL references an Exhibit C. Hearing Exhibit No. 20 at 4. That exhibit is to list the services that NNTC WL will provide to Nucla-Naturita in addition to, or beyond, those services specified in part 4 of the management agreement. There is no Exhibit C appended to Hearing Exhibit No. 20, and the absence of an Exhibit C is not explained.⁷¹ To complete the record and to establish whether

⁷¹ In the absence of Exhibit C, one cannot determine whether NNTC WL is to provide any services to Nucla-Naturita beyond those specified in part 4 of the management agreement and, if it is to provide additional services, what those services are and the rates for those services. To determine NNTC WL's revenues, one must know this information.

NNTC WL provides Nucla-Naturita services beyond those specified in part 4 of the management agreement, the ALJ will condition the grant of ETC designation to NNTC WL on NNTC WL's filing a copy of Exhibit C to the management agreement *or* filing a statement that it does not provide to Nucla-Naturita services beyond those specified in part 4 of the management agreement. This will be a compliance filing.

138. The Nucla-Naturita management agreement with NNTC WL (Hearing Exhibit No. 20) contains an Exhibit B (joint use of Nucla-Naturita facilities) that references a diagram to be attached to the management agreement. The diagram is to “identify[] the space on each tower [to be used to connect NNTC WL's PCS equipment] *and* the price for such space as agreed upon[.]” Hearing Exhibit No. 20 at Exhibit B at 10 (emphasis supplied). NNTC WL is responsible for compensating Nucla-Naturita, on a monthly basis, “in accordance with the attached diagrams[.]” *Id.* at 11. Although it is undisputed that NNTC WL uses Nucla-Naturita's towers, no diagrams are attached to Hearing Exhibit No. 20; and no prices for the tower space are provided. To complete the record, to assure the existence of the required diagram, and to know the prices NNTC WL pays for the use of Nucla-Naturita's towers, the ALJ will condition the grant of ETC designation to NNTC WL on NNTC WL's filing a diagram that meets the requirements stated in Hearing Exhibit No. 20 at Exhibit B at 10 and quoted in this paragraph. This will be a compliance filing.

C. Designation as an Eligible Provider.

1. Statutory and Rule Provisions.

139. Since 1987, the Colorado General Assembly has enacted several statutes that are relevant to the designation of an EP.

140. In 1987, § 40-15-101, C.R.S., was enacted. As pertinent here, that statutory provision

declares that it is the policy of the state of Colorado to *promote a competitive telecommunications marketplace while protecting and maintaining the wide availability of high-quality telecommunications services*. Such goals are best achieved by legislation that brings telecommunications regulation into the modern era by *guaranteeing the affordability of basic telephone service while fostering free market competition* within the telecommunications industry. The general assembly further finds that the *technological advancements and increased customer choices for telecommunications services generated by such market competition will enhance Colorado's economic development and play a critical role in Colorado's economic future*. However, the general assembly recognizes that *the strength of competitive force varies widely between markets and products and services*.

(Emphasis supplied.)

141. Section 40-15-501, C.R.S., was enacted in 1995. As pertinent here, that statutory provision states:

(1) The general assembly hereby finds, determines, and declares that *competition in the market for basic local exchange service will increase the choices available to customers and reduce the costs of such service*. Accordingly, it is the *policy of the state of Colorado* to encourage competition in this market and *[to] strive to ensure that all consumers benefit from such increased competition*. ...

(2) The general assembly further finds, determines, and declares that:

* * *

(b) Sound and well-informed decisions need to be made on a continuing basis to *ensure that the benefits of existing and new telecommunications services continue to be available to the greatest number of Colorado citizens*;

* * *

(d) The rural nature of Colorado requires that special rules and support mechanisms be adopted to achieve the goal of ensuring that universal basic local exchange service be available to all residents of the state at reasonable rates. Rules adopted by the commission under this part 5 shall be designed to achieve this goal.

(3) This part 5 [of article 15] is enacted for the following purposes:

* * *

(c) To adapt the regulatory structure of parts 2, 3, and 4 of [article 40] to *accommodate multiple providers of local exchange service* and to permit alternate forms of regulation for providers of local exchange service.

(Emphasis supplied.)

142. Section 40-15-502, C.R.S., was enacted in 1995 and amended in 1998.

The section contains statements of state telecommunications policy.⁷²

⁷² As pertinent here, the section provides (emphasis supplied):

(1) Local exchange telecommunications markets shall be open to competition, ..., on or before July 1, 1996.

* * *

(3) (a) The commission shall require the furtherance of universal basic service, toward the ultimate goal that basic service be available and affordable to all citizens of the state of Colorado.

(4) *The general assembly acknowledges the goal of universal access to advanced services to all telecommunications consumers in this state.* The commission shall consider the impact of opening entry to the local exchange market and shall determine whether additional support mechanisms may be necessary to promote this goal if competition for local exchange services fails to deliver advanced services in all areas of the state.

(5) (a) In order to accomplish the goals of universal basic service, universal access to advanced service, and any revision of the definition of basic service under [§ 40-15-502(2), C.R.S.], the commission shall create a system of support mechanisms to assist in the provision of such services in high-cost areas. *These support mechanisms* shall be funded equitably and on a nondiscriminatory, competitively neutral basis through assessments, which may include a rate element, on all telecommunications service providers in Colorado and *shall be distributed equitably and on a nondiscriminatory, competitively neutral basis.* ... A provider's eligibility to receive support under the support mechanisms shall be conditioned upon the provider's offering basic service throughout an entire support area.

* * *

(b) A provider that offers basic local exchange service throughout an entire support area through use of its own facilities or on a resale basis ... may be eligible to receive universal service support, as determined by the commission. Resale shall be made available on a nondiscriminatory basis, as determined by the commission.

* * *

(7) It is the policy of this state that *all barriers to entry into the provision of telecommunications services in Colorado be removed as soon as is practicable*, subject to the commission's authority to ensure quality of service and other matters as provided in this article.

143. The statutory basis for the CHCSM is § 40-15-208, C.R.S. The purpose of the CHCSM is

to provide financial assistance as a support mechanism to local exchange providers to help make basic local exchange service affordable and [to] allow such providers to be fully reimbursed for the difference between the reasonable costs incurred in making basic service available to their customers within a rural, high cost geographic support area and the price charged for such service, after taking into account any amounts received by such providers under price support mechanisms established by the federal government and by this state.

Section 40-15-208(2)(a)(I), C.R.S.

144. Section 40-15-208(2)(a), C.R.S., requires the Commission to “ensure that no local exchange provider is receiving funds from [the CHCSM] or any other source that, together with local exchange service revenues, exceed[] the cost of providing local exchange service to” that provider’s customers. That provision also states that the CHSCM is to “be supported and distributed equitably and on a nondiscriminatory, competitively neutral basis through a rate element assessed on all telecommunications service providers in Colorado.”

145. To implement § 40-15-208, C.R.S., the Commission promulgated the High Cost Support Mechanism and High Cost Administration Fund Rules found at Rules 4 CCR 723-2-2840 through 2855. Rules 4 CCR 723-2-2847(a) and 723-2-2847(b)(I) contain the criteria that NNTC WL must meet to be designated as an EP.⁷³

146. Rule 4 CCR 723-2-2847(b)(I) does not specify the information that an applicant must provide, or that the Commission may rely on, to support a finding that the applicant meets the requirement of Rule 4 CCR 723-2-2847(b)(I)(E) (*i.e.*, applicant “is not receiving funds from [any] 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”).

⁷³ Each criterion is discussed below.

Rule 4 CCR 723-2-2847(b)(I) also does not specify the information that an applicant must provide, or that the Commission may rely on, to support a Rule 4 CCR 723-2-2847(b)(I)(F) finding that granting the application for EP designation serves the public convenience and necessity as defined by the enumerated statutes.

147. Rule 723-2-2847 “establish[es] a multi-phased process that a telecommunications carrier must go through to obtain CHCSM support.” Decision No. C09-0881, Docket No. 09A-107T, mailed August 12, 2009, at ¶ 11. As pertinent to this proceeding, in the first phase, a provider (such as NNTC WL) is designated as an EP and, in that process, demonstrates 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.” Rule 4 CCR 723-2-2847(b)(I)(E). In the second phase, which follows designation as an EP but precedes receipt of CHCSM support, the provider files an application and must meet the same test again, pursuant to Rule 4 CCR 723-2-2847(f)(I).⁷⁴ In Decision No. C09-0881 at ¶ 11, the Commission has stated that the

actual calculation of [the] 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 Commission rules provide that the calculation and disbursement of support ... occur administratively rather than as an adjudicated proceeding. *See* Rule [4 CCR 723-2-]2848(e).

2. NNTC WL’s Eligibility to be Designated as an EP.

148. Section 40-15-208(2)(a), C.R.S., authorizes the Commission to establish the CHCSM. Pursuant to that statute, an entity certificated as a local exchange provider is eligible to

⁷⁴ There is a third phase: resetting CHCSM support per access line. If a designated EP seeks to reset its CHCSM support per access line, then that EP files an application and must meet the same test again, pursuant to Rule 4 CCR 723-2- 2847(g)(I).

receive CHCSM funds. As a wireless provider, NNTC WL is not required to be certificated (*i.e.*, hold a CPCN as a local exchange carrier); is not certified; and does not intend to become certificated. The Commission has determined that a wireless carrier that does not hold a CPCN may be designated as an EP. Decision No. C01-0476.

3. NNTC WL Meets Eligible Provider Requirements.

149. For the reasons discussed below and subject to conditions, the ALJ finds that NNTC WL meets the requirements for designation as an EP.

a. Rule 4 CCR 723-2-2847(a)

150. Rule 4 CCR 723-2-2847(a) states: “As a prerequisite for eligibility to receive support from the HCSM, a provider shall be in substantial compliance with the Commission’s rules applicable to the provision of basic local exchange service.” NNTC WL, as an EP designation applicant, must establish that it meets this criterion.

151. In 2007 through 2009, NNTC WL: (a) collected a CHCSM fee (or surcharge) from its wireless accounts but failed to remit the collected monies to the CHCSM fund; and (b) collected a Telecommunications Relay Services (TRS) fee (or surcharge) from its wireless accounts but failed to remit the collected monies to the TRS fund. This is not disputed. At the hearing in this matter, NNTC WL represented that it was aware of these failures to remit the collected fees or surcharges and was taking steps to remedy them. This is not disputed.

152. Based on NNTC WL’s failure to remit the collected funds as required, Staff argues that, *at the time the Application was filed*, NNTC WL was not “in substantial compliance with the Commission’s rules applicable to the provision of basic local exchange service[,]” as required by Rule 4 CCR 723-2-2847(a). Staff asserts that, as a result of the noncompliance, NNTC WL may not receive EP designation in this proceeding.

153. The ALJ finds this argument unpersuasive.

154. Staff reads Rule 4 CCR 723-2-2847(a) as requiring an EP designation applicant to be in substantial compliance on the date its application is filed. This is too restrictive a reading of the Rule's plain language that, as "a prerequisite for eligibility to receive support from the HCSM," a provider must be in substantial compliance. Rule 4 CCR 723-2-2847(a) does not limit the information that the Commission may consider in assessing whether a provider is "in substantial compliance with the Commission's rules applicable to the provision of basic local exchange service." The Rule does not establish the filing of the application as the point in time to be used by the Commission when making its determination. The better approach (or reading) is: the Commission determines whether an EP applicant meets the Rule requirement based on the evidentiary record developed. This approach is consistent with the approach taken with respect to the Rule 4 CCR 723-2-2847(b)(I) criteria discussed below.

155. In addition, Staff's reading does not permit the Commission to consider events that occur after the application is filed and, if adopted, would require the Commission to deny an application for EP designation even if the applicant could establish that it came into compliance after the application was filed.⁷⁵ By limiting what the Commission may consider, Staff's reading of the Rule would result in administrative inefficiency; would increase the administrative burden on providers, interested persons, and the Commission; and could have the unintended consequence of creating a disincentive for an EP designation applicant to take action to come

⁷⁵ In Staff's view, apparently NNTC WL would file another application for EP designation after NNTC WL corrects the admitted violations and the issue of whether NNTC WL meets the Rule 4 CCR 723-2-2847(a) requirement would be determined as of the date that the subsequent application is filed.

into compliance.⁷⁶ To avoid these results, the ALJ finds it appropriate to consider in this proceeding what, if any, corrective action NNTC WL may have taken after the Application was filed and to assess NNTC WL's substantial compliance based on the evidence in this proceeding.

156. The verified refund application filed by Nucla-Naturita (Hearing Exhibit No. 31 and Confidential Hearing Exhibit No. 31A) establishes that these actions have been taken to address the issues: (a) Nucla-Naturita established separate accounts to assure that fees or surcharges collected by Nucla-Naturita and by NNTC WL are not commingled in the future; (b) NNTC WL determined the amount of money that it should have remitted to the CHCSM fund and deposited that amount into the fund; and (c) there is a plan to address TRS surcharge collections. This is undisputed in this proceeding.

157. The record establishes that NNTC WL has taken action to remedy its issues with collecting and remitting CHSCM and TRS fees (or surcharges). In addition, the record establishes that NNTC WL has taken action to prevent future recurrence of issues with collecting and remitting CHSCM and TRS fees (or surcharges). No party questioned or presented evidence on NNTC WL's compliance with any other Commission rule. On the facts in this record, the ALJ finds that NNTC WL meets the requirements of Rule 4 CCR 723-2-2847(a).⁷⁷

⁷⁶ There are other difficulties with Staff's evidence with respect to Rule 4 CCR 723-2-2847(a). Staff did not offer a definition of "substantial compliance with the Commission's rules applicable to the provision of basic local exchange service"; did not identify the Commission rule or rules with which NNTC WL did not comply; and did not explain why NNTC WL's failure over the course of two years to remit collected fees (or surcharges) was tantamount to its not being in "substantial compliance with the Commission's rules applicable to the provision of basic local exchange service." Staff simply references the failure to remit and asserts that this failure establishes that NNTC WL does not meet the Rule 4 CCR 723-2-2847(a) requirement. Even under Staff's reading of the Rule, the ALJ finds this insufficient to establish that NNTC WL does not meet the Rule requirement.

⁷⁷ The refund application is pending before the Commission in Docket No. 10A-159T. No finding made in the instant proceeding can, or will, affect Docket No. 10A-159T. First, Nucla-Naturita (the applicant in Docket No. 10A-159T) is not a party in the instant docket. Second, the findings in the instant proceeding are based on the record developed in this proceeding, which focuses on NNTC WL's application and whether NNTC WL has met its burden of proof with respect to the Application.

b. Rule 4 CCR 723-2-2847(b)(I)(A)

158. Rule 4 CCR 723-2-2847(b)(I)(A) requires NNTC WL, as an EP designation applicant, to establish that it has applied for ETC designation. NNTC WL has met the requirement of the Rule by filing its application for ETC designation. No party disputes this. On the facts in this record, the ALJ finds that NNTC WL meets the requirements of Rule 4 CCR 723-2-2847(b)(I)(A).

c. Rules 4 CCR 723-2-2847(b)(I)(B) and 2847(b)(I)(C)

159. Rule 4 CCR 723-2-2847(b)(I)(B) requires NNTC WL, as an EP designation applicant, to establish that it *agrees to provide* the “basic local exchange service as described in Sections 214(e) and 254 of the” Act. In substance, this is similar to the ETC criterion that an applicant establish its intent and ability to provide the supported services throughout its service area. As discussed above, NNTC WL represents that it will provide the supported services throughout its service area using a combination of its own facilities, roaming agreements with other wireless carriers, and perhaps a written agreement with CenturyTel.

160. Rule 4 CCR 723-2-2847(b)(I)(C) requires NNTC WL, as an EP designation applicant, to establish that it “*will offer* basic local exchange service throughout the entire geographic support area” (emphasis supplied). In substance, this is similar to the ETC criterion that an applicant establish its intent and ability to offer the supported services throughout its service area. As discussed above, NNTC WL represents that it will offer the supported services throughout its service area using a combination of its own facilities, roaming agreements with other wireless carriers, and perhaps a written agreement with CenturyTel.

161. Relying on its arguments (discussed above) with respect to NNTC WL’s intent and ability to provide and to offer supported services throughout its service area, Staff asserts

that NNTC WL has not met its burden of proof with respect to Rule 4 CCR 723-2-2847(b)(I)(C) and, thus, should be denied EP designation. For the reasons discussed above with respect to NNTC WL's intent and ability to provide and to offer the supported services throughout its service area (the ETC criteria), the ALJ finds Staff's arguments unpersuasive.

162. NNTC WL's present provision of service and its plans to provide and to offer service throughout its service area are discussed above. On the facts in this record, the ALJ finds that NNTC WL meets the requirements of Rule 4 CCR 723-2-2847(b)(I)(B) and of Rule 4 CCR 723-2-2847(b)(I)(C).

d. Rule 4 CCR 723-2-2847(b)(I)(D)

163. Rule 4 CCR 723-2-2847(b)(I)(D) requires NNTC WL, as an EP designation applicant, to establish that it "has the managerial qualifications, financial resources, and technical competence to provide basic local exchange service throughout the specified support area regardless of the availability of facilities or the presence of other providers in the area[.]"

164. The record establishes that the individuals who manage NNTC WL have extensive experience in telecommunications and in providing wireless service. No party disputes this.

165. The record establishes that the individuals who supervise the planning, construction, and maintenance of NNTC WL's system have extensive experience in planning, constructing, and maintaining the facilities necessary to provide NNTC WL's wireless service. No party disputes this.

166. The record establishes that NNTC WL has the requisite financial resources. No party disputes this.

167. Relying on its arguments (discussed above) with respect to NNTC WL's intent and ability to provide and to offer supported services throughout its service area (an ETC criterion), Staff asserts that NNTC WL does not have the "technical competence to provide basic local exchange service throughout the specified support area regardless of the availability of facilities or the presence of other providers in the area[,]" as required by Rule 4 CCR 723-2-2847 (b)(I)(D). The ALJ finds that the same facts that support a finding that NNTC WL meets the requirements for ETC designation support a finding that NNTC WL has met its burden with respect to Rule 4 CCR 723-2-2847(b)(I)(D). The ALJ finds NNTC WL's representations that it will use the seven-step process to provide service to be persuasive evidence on this point.

168. On the facts in this record, the ALJ finds that NNTC WL meets the requirements of Rule 4 CCR 723-2-2847(b)(I)(D).

e. Rule 4 CCR 723-2-2847(b)(I)(E)

169. Rule 4 CCR 723-2-2847(b)(I)(E) requires NNTC WL, as an EP designation applicant, to establish 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" of NNTC WL. Whether NNTC WL meets this requirement is one of the principle areas of contention in this proceeding. There are two issues: the level of financial analysis (or showing) necessary under the Rule and whether NNTC WL satisfies the Rule requirement.

170. The ALJ first addresses the level of financial analysis (or showing) necessary under Rule 4 CCR 723-2-2847(b)(I)(E).

171. NNTC WL takes the position that the Rule requires a preliminary showing that is significantly less rigorous than a full revenue and cost analysis. It argues: (a) the focus of

§ 40 15-208(2)(a), C.R.S., is on the point in time at which a EP applies to receive CHCSM funds, which is the next step in the process and is commenced by a separate application (citing Decision No. R08-0523 (Hearing Exhibit No. 14)⁷⁸); (b) a preliminary showing is sufficient at the EP designation stage because designating a provider as an EP involves neither a determination that the EP may receive CHCSM funds nor a determination of the level of CHCSM support that the provider may receive; and (c) in the *Viaero Decision*, the Commission applied a preliminary showing standard to Viaero, a wireless provider, when Viaero applied for and received EP designation, and the Commission should apply that same standard to NNTC WL to avoid impermissible disparate treatment of two similarly-situated providers.

172. OCC disagrees with NNTC WL and asserts that the Rule requires a revenue and cost analysis similar to that which occurs in a rate case proceeding. OCC argues: (a) the same language appears in three separate portions of Rule 4 CCR 723-2-2847,⁷⁹ and there is no indication that a less-than-rigorous showing is required of an EP designation applicant; (b) NNTC WL's reliance on the *Viaero Decision* is misplaced because, when the ALJ in that case found that Viaero met the Rule 4 CCR 723-2-2847(b)(I)(E) requirement, the ALJ relied on evidence in addition to the revenue and cost analysis presented in that proceeding; (c) the *Viaero Decision* did not establish a precise or preferred method of calculation and is clear that whether an applicant meets the requirements of Rule 4 CCR 723-2-2847(b)(I)(E) is a case-by-case

⁷⁸ This Recommended Decision was issued on May 23, 2008 in *In the Matter of the Combined Application of N.E. Colorado Cellular, Inc., for Designation as an Eligible Telecommunications Carrier and Eligible Provider in Additional Areas of Colorado* (Docket No. 07A-153T). This Recommended Decision became a Commission Decision by operation of law. N.E. Colorado Cellular, Inc., does business as Viaero.

In the instant proceeding, the Parties refer to N.E. Colorado Cellular, Inc., as Viaero and to Decision No. R08-0523 as the *Viaero Decision*. The ALJ uses this convention in this Decision.

⁷⁹ The portions are: Rule 4 CCR 723-2-2847(b)(I)(E) (showing necessary for EP designation), Rule 4 CCR 723-2-2847(f)(I) (showing necessary for initial receipt of CHCSM funds), and Rule 4 CCR 723-2-2847(g)(I) (showing necessary for resetting CHCSM support).

determination; and (d) the Commission need not give the same treatment to NNTC WL and Viaero because they are not similarly-situated providers.

173. In order to apply Rule 4 CCR 723-2-2847(b)(I)(E) in the context of the instant proceeding, one must determine the level of financial analysis (or showing) that will satisfy the Rule. The ALJ finds the discussion of ALJ Adams on this point to be instructive and persuasive:

The foundational principle in § 40-15-208(2)(a), C.R.S., provides: “The commission shall ensure that no local exchange provider is receiving funds from [the CHCSM] or any other source that, together with local exchange service revenues, exceeds the cost of providing local exchange service to customers of such provider.” Notably, this foundational principle is not a one-time test, but is ongoing in nature. The phrase “is receiving funds” is temporal with the receipt of funding (*i.e.*, the statute specifically requires that the condition be met at receipt of funds, not at designation for eligibility to request funding). *As no funds are received upon designation, the statute does not require strict application for designation.*

... Rule 2847 sets forth the procedures for designation as a provider eligible to apply for support through the HCSM. Designation alone does not result in receipt of funds; rather, the [EP designation applicant] demonstrates awareness and agreement as to the terms of high cost support funding and [makes] a *preliminary showing of eligibility to receive funds*. However, beyond designation, Rule 2847 contemplates a further proceeding for EPs (*i.e.*, designated providers) prior to the initial receipt of support from the HCSM. Viaero is not subject to rate regulation. Therefore, [to receive HCSM support,] it will have to establish that it is not receiving funds, from the HCSM or any other source together with a Commission-adopted revenue benchmark, that exceed its reasonable cost of providing basic local exchange service to customers. Rule 2847(f)(I), 4 CCR 723-2.

It is noteworthy that Commission rules specifically contemplate applications for EP designation being filed contemporaneously with an application for a Certificate of Public Convenience and Necessity (CPCN), Letter of Registration, or an alternative form of regulation. Because a provider applying for a CPCN to serve, by definition, cannot be serving any local exchange customers in the proposed territory, it would be impossible for such a provider to demonstrate the provision of service across the proposed territory or that it has any cost of providing local exchange service to its customers in the proposed territory. Thus, *it is reasonable that the Commission contemplated an initial showing to obtain designation apart from the showing statutorily required when [an EP] is receiving support funding*. It is not the function of this docket to decide whether funds that [the EP applicant] has not yet received, indeed, is not

yet eligible to receive, together with other revenues exceed the costs of providing service.

Despite the title of Rule 2847, its scope is broader than designation alone. It also addresses eligibility to receive support. ... Some portions of the rule only apply to providers already designated as an EP. ... Therefore, designation alone (the only relief sought by Viaero) requires compliance only with Rules 2847(a) and (b). Such interpretation is reasonable in light of the rule and the arguments of counsel. All parties agree that prior to initial receipt of support, [the EP applicant] will be required to demonstrate compliance with Rule 2847(f)(I).

Decision No. R08-0523 (Hearing Exhibit No. 14) at ¶¶ 24-27 (emphasis supplied). The ALJ adopts and applies this approach in the instant proceeding with respect to Rule 4 CCR 723-2-2847(b)(I)(E). The ALJ finds that NNTC WL may satisfy the Rule requirement with a showing that is less rigorous than a full revenue and cost analysis, such as that undertaken in a rate case.

174. To meet Rule 4 CCR 723-2-2847(b)(I)(E), NNTC WL must make an initial, preliminary showing (*i.e.*, something less rigorous than a rate case-type financial analysis) that it is not receiving funds from any 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. The ALJ now turns to this issue.

175. Nucla-Naturita began its wireless operations in May 2006. NNTC WL began operation in May 2007. NNTC WL's first full calendar year of operation was 2008.

176. At no time has NNTC WL received either USF support or CHSCM funds.

177. NNTC WL plans to invest in facilities. Hearing Exhibit No. 3 at Exhibit JDL-2. The total cost of the seven new cell sites that NNTC WL planned to construct is estimated to be approximately \$ 666,000.

178. NNTC WL provided revenue and expense information for its wireless service (financial data) for various periods and forms. As most pertinent here, NNTC WL submitted

financial data in Hearing Exhibit No. 9 at Exhibit KYT-3.⁸⁰ Exhibit KYT-3 contains financial data for calendar year (CY) 2006 (Nucla-Naturita only),⁸¹ for CY 2007 (Nucla-Naturita from January until April and NNTC WL from May through December),⁸² and for CY 2008 (Nucla-Naturita only).

179. The Parties agree that, in determining whether NNTC WL meets Rule 4 CCR 723-2-2847(b)(I)(E), the primary focus should be on Hearing Exhibit No. 9 at Exhibit KYT-3 at 3-5 (*i.e.*, the CY 2008 financial data). NNTC WL states that “the Commission should focus its assessment of [Rule 4 CCR 723-2-2847(b)(I)(E)] compliance using audited financial records as that information provides the most accurate depiction of [NNTC WL’s] financial health.” NNTC WL Statement of Position (NNTC WL SOP) at 21 & n. 21. *See also id.* at 24 & n. 26 (reasons audited data are preferred). In addition, the OCC states that only Hearing Exhibit No. 9 at Exhibit KYT-3 “include[s] both the financial audit and cost allocation adjustments made

⁸⁰ In addition, NNTC WL submitted a financial showing of revenues and expenses for its wireless service operation. Hearing Exhibit No. 4 at Exhibit KJK-1. This Exhibit, according to NNTC WL, is the same financial showing as that made by Viaero in Docket No. 07A-153T. This Exhibit shows that NNTC WL’s expense (as defined in the Exhibit) exceeds its gross local service revenue (as defined in the Exhibit) by approximately \$259,000. The time period covered by this Exhibit is unclear, and the financial showing appears to be unaudited. For these reasons and for the reasons discussed below, the ALJ does not rely on this Exhibit.

NNTC WL also submitted actual financial data for CY 2006 (Nucla-Naturita only) and for CY 2007 (Nucla-Naturita and NNTC WL) and projected financial data for CY 2008 (NNTC WL only). Hearing Exhibit No. 8 at Exhibit KYT-2. As pertinent here, this Exhibit shows that Nucla-Naturita’s expense (as defined in the Exhibit) exceeded its revenue (as defined in the Exhibit) in CY 2006; that, on a combined basis, Nucla-Naturita’s and NNTC WL’s expense (as defined in the Exhibit) exceeded their revenue (as defined in the Exhibit) in CY 2007; and that NNTC WL’s expense (as defined in the Exhibit) was projected to exceed its revenue (as defined in the Exhibit) in CY 2008. For the reasons discussed below, the ALJ does not rely on this Exhibit.

⁸¹ The ALJ does not rely on these data (Exhibit KYT-3 at 1) and similar data in other Exhibits in Hearing Exhibit No. 9 because they predate the creation of NNTC WL.

⁸² These data (Exhibit KYT-3 at 2) show that, in every month between April and December of CY 2007, NNTC WL’s expense (as defined in the Exhibit) exceeded its revenue (as defined in the Exhibit). Although she could rely on the NNTC WL’s financial data from May through December, the ALJ does not rely on these financial data and similar data in other Exhibits in Hearing Exhibit No. 9 because financial data are available in this proceeding that are more recent; that are audited; that include assignments and allocations made in accordance with Nucla-Naturita’s CAM; and that reflect only NNTC WL’s operation.

pursuant to [Nucla-Naturita's] cost adjustment manual formalized ... in 2009.” OCC Statement of Position (OCC SOP) at 11 & n.28. The ALJ agrees. The primary, but not exclusive, focus with respect to whether NNTC WL meets Rule 4 CCR 723-2-2847(b)(I)(E) is on the CY 2008 financial data in Hearing Exhibit No. 9 at Exhibit KYT-3 at 3-5.

180. NNTC WL's CY 2008 financial data (Hearing Exhibit No. 9 at Exhibit KYT-3 at 3-5) reflect both the Adjusting Journal Entries (AJEs) made as a result of the independent audit of Nucla-Naturita's Consolidated Financial Statements (*id.* at Exhibit KYT-4) and the assignments and allocations of expenses between Nucla-Naturita and NNTC WL made pursuant to Nucla-Naturita's Cost Allocation Manual (CAM). Exhibit KYT-3 at 3-5 shows that, in CY 2008, NNTC WL's expense (as defined in the Exhibit)⁸³ exceeded its revenues (as defined in the Exhibit) by approximately \$ 42,000. Relying on Exhibit KYT-3 at 3-5, NNTC WL states that it has established that it meets the Rule requirement.

181. OCC asserts that the financial data in Hearing Exhibit No. 9 at Exhibit KYT-3 at 3 contain revenues and costs that are not related to the provisioning of basic local exchange service. Specifically, OCC points to the inclusion of: (a) the PCS LD Terminating⁸⁴ expense of approximately \$ 45,600 and the associated PCS Long Distance Revenues of \$ 1,729; and (b) the

⁸³ Exhibit KYT-3 at 3 includes under expenses (or expense) the following: cost of services, gross margin, and operating costs. Unless the context indicates otherwise, reference in this Decision to expenses (or expense) is to the included categories.

⁸⁴ OCC states that the PCS LD Terminating expense “represents the dollar amount to terminate inter-MTA long-distance calls for access charges associated with calls crossing MTA boundaries, and that inter-MTA calls clearly are not calls with[in] a ‘Local Calling Area’” OCC SOP at 14.

Roam Fees expense of approximately \$ 56,600.⁸⁵ OCC argues that Exhibit KYT-3 at 3 must be adjusted by removing entirely these inappropriately-included revenues and expenses. OCC asserts that, after these adjustments are made, in CY 2008, NNTC WL had revenues that exceeded its expenses by approximately \$ 58,500. Hearing Exhibit No. 12 at 26. OCC also endorses and relies on the Staff adjustments discussed below. Based on Staff's analysis and on its own analysis, OCC concludes that, because NNTC WL's CY 2008 revenues exceeded its expenses, NNTC WL has not met its burden of proof to establish that it meets Rule 4 CCR 723-2-2847(b)(I)(E).

182. NNTC WL takes issue with the method that OCC used with respect to PCS Long Distance revenues and PCS LD Terminating expense.⁸⁶ NNTC WL also objects to OCC's removing all Roam Fee expense without also removing all PCS Roaming Revenue.⁸⁷ NNTC WL

⁸⁵ OCC states that NNTC WL's inclusion of Roaming Fees expense rests on NNTC WL's position that, as a wireless provider, its local calling area is the entire MTA 22 area. OCC argues that, as demonstrated by the inclusion of the PSC LD Terminating expense, NNTC WL has roaming beyond the boundaries of MTA 22; that NNTC WL failed to exclude from the Roam Fees expense the portion that results from roaming beyond MTA 22 (*i.e.*, beyond NNTC WL's definition of local calling); and that this failure inflates the Roam Fees expense. OCC notes that NNTC WL's position that its local calling area is the entire MTA 22 area is contrary to the Commission's definition of basic local exchange service and of local calling area.

⁸⁶ NNTC WL argues that the OCC method (which removes the PCS Long Distance Revenues (\$1,729) and the PCS LD Terminating expense (approximately \$45,600)) fails to remove all long distance revenues, which creates a mismatch that distorts NNTC WL's CY 2008 revenues. NNTC WL states that, because its service offerings bundle local calling and long distance calling, an unknown portion of the PCS Plan Revenue shown on Hearing Exhibit No. 9 at Exhibit KYT-3 at 3 is from long distance calling that is bundled in its calling plans. The PCS Long Distance revenue line item, according to NNTC WL, includes only revenue from the sale of a \$2 add-on feature that NNTC WL makes available to customers whose calling plan does not include long distance calling. NNTC WL states that the PCS LD Terminating expense line item includes expenses for terminating all long distance calls, whether the customer pays for long distance calling in a bundled service or by the \$2 add-on. NNTC WL asserts that, because OCC did not calculate the long distance revenue generated by the bundled calling plans and remove that amount from the PCS Plan Revenue line item, this portion of the OCC analysis over-states NNTC WL's CY 2008 revenues and is flawed and that the Commission should not rely on it.

⁸⁷ NNTC WL argues that OCC's analysis creates a mismatch between roaming revenues and expenses. According to NNTC WL, when OCC removed the Roam Fee expense (approximately \$ 56,600), it should also have removed at least the PCS Roaming Revenue (approximately \$ 80,700). NNTC WL asserts that, because OCC did not remove all roaming revenues when it removed all roaming expenses, this portion of the OCC analysis over-states NNTC WL's CY 2008 revenues and is flawed and that the Commission should not rely on it.

concludes that the OCC analysis is flawed because it overstates CY 2008 revenues, and NNTC WL urges the Commission not to rely on the analysis.

183. Staff performed the revenue and expense analysis that is presented in Hearing Exhibit No. 13 at Exhibit SAT-7. Staff accepted and began with the audited and AJE- and CAM-adjusted numbers in Hearing Exhibit No. 9 at Exhibit KYT-3 at 3. Staff then: (a) made adjustments to 11 expense line items using a revenue-based allocation factor;⁸⁸ (b) made one adjustment to PCS Local Terminating expense based on bill-and-keep;⁸⁹ and (c) made one adjustment to PCS Contract Phone Sales revenues. Under Staff's analysis, NNTC WL's CY 2008 revenue exceeded its expense by approximately \$ 106,700. Staff asserts that, because NNTC WL's CY 2008 revenue exceeded its expense, NNTC WL has not met its burden of proof to establish that it meets Rule 4 CCR 723-2-2847(b)(I)(E).

184. NNTC WL agrees with the Staff adjustment that removes revenues and expenses associated with PCS telephones and accessories.⁹⁰

⁸⁸ Staff argues that NNTC WL's CY 2008 financial data in Hearing Exhibit No. 9 at Exhibit KYT-3 at 3 include: (a) wireless local service, wireless long distance service, and wireless broadband revenues, expenses, and operating costs; and (b) an over-allocation or over-assignment of expenses of Nucla-Naturita's expenses (as defined in the Exhibit) to NNTC. To determine (*i.e.*, to isolate) the wireless local service financial data, Staff developed a revenue-based allocation factor that it applied to the AJE-adjusted and CAM-adjusted expenses stated in Exhibit KYT-3 at 3. The Staff calculated an adjustment factor of 65.86 percent to apply in order determine wireless local service expenses. As seen in Hearing Exhibit No. 13 at Exhibit SAT-7, application of Staff's adjustment factor resulted in a 34.14 percent (or over one-third) reduction of each of the 11 expense line items in Exhibit KYT-3 at 3 that Staff adjusted using that allocation factor.

⁸⁹ Staff adjusted PCS Local Terminating (*i.e.*, entirely removed the approximately \$ 36,200 expense) because the current management agreement between Nucla-Naturita and NNTC WL (Hearing Exhibit No. 20) does not address termination of local traffic and because, in 2008, there was no interconnection agreement between Nucla-Naturita and NNTC WL on file with the Commission. As a result, Staff argues, the CY 2008 PCS Local Terminating expense shown in Hearing Exhibit No. 9 at Exhibit KYT-3 at 3 should be zeroed out.

⁹⁰ Hearing Exhibit No. 26 (which supersedes Hearing Exhibit No. 13 at Exhibit ST-6) shows the effect on NNTC WL's unaudited CY 2008 Trial Balance financial data of removing revenues and expenses associated with PCS telephones and accessories. In the third column from the left, that Hearing Exhibit shows that, by removing those revenues and expenses, NNTC WL's revenues decrease by approximately \$ 52,800, and its expenses decrease by approximately \$ 71,700.

185. NNTC WL asserts that the Staff adjustments made to 11 expense line items are inaccurate and inappropriate.⁹¹ NNTC WL concludes that the Staff analysis is flawed and misstates NNTC WL's CY 2008 financial data, and NNTC WL urges the Commission not to rely on the analysis.

186. As a preliminary matter, the ALJ addresses the type of revenue data presented in this case. The revenues pertinent under Rule 4 CCR 723-2-2847(b)(I)(E) are "revenues, as defined by the Commission-adopted revenue benchmark[.]" Rule 4 CCR 723-2-2841(k) defines "revenue benchmark" as "a calculated amount of intrastate revenues per access line." There is a separate revenue benchmark for residential service and for business service, and the benchmarks are calculated using formulae in that Rule.

187. The Parties presented and relied on NNTC WL revenues that were not separated into residential service and business service and to which no formula was applied. Thus, they

⁹¹ NNTC WL argues that, in Hearing Exhibit No. 13 at Exhibit SAT-7, Staff inappropriately applied an allocation factor to NNTC WL's CY 2008 expenses in Hearing Exhibit No. 9 at Exhibit KYT-3 at 3. First, NNTC WL states that UBET-Qwest Transport expense, Rental Expense, Testing Expense, Plant Operations expense, and Depreciation Expense, all of which were adjusted by Staff, are directly incurred by NNTC WL or are directly assigned to NNTC WL expense accounts. In addition, these accounts are not joint and common. As a result, NNTC WL argues that it is inappropriate to allocate the costs of these accounts and that the allocation resulted in a significant understatement of its CY 2008 expenses. Second, NNTC WL asserts that Staff knew that Exhibit KYT-3 at 3 contained no expenses associated with broadband services and nonetheless used an allocation factor to remove broadband expenses (as well as long distance expenses) from expense line items. Use of the inappropriate allocation factor, according to NNTC WL, resulted in a substantial understatement of its CY 2008 expenses. Third, NNTC WL asserts that Staff's adjustment to PCS Local Terminating expense is inappropriate because that expense includes the expense associated with compensating local exchange carriers in addition to, and other than, Nucla-Naturita. In addition, NNTC WL asserts that, in 2008, it was required to compensate Nucla-Naturita for Local Terminating. Thus, NNTC WL argues that using bill-and-keep to adjust (*i.e.*, to zero out) PCS Local Terminating expense, as Staff did, is inappropriate.

According to NNTC WL, reversing Staff's inappropriate adjustments to UBET-Qwest Transport expense, Rental Expense, PCS Local Terminating expense, Testing Expense, Plant Operations expense, and Depreciation Expense results in NNTC WL's CY 2008 expense exceeding revenue by approximately \$ 15,200. Staff's allocation factor was applied to four expense items in addition to the seven listed here. NNTC WL did not discuss reversing these additional adjustments, although it objected to them, because reversing the seven expense line items discussed was sufficient to demonstrate that its expenses exceeded its revenue.

presented revenue data that do not conform to the requirements of Rule 4 CCR 723-2-2847(b)(I)(E).⁹²

188. The ALJ finds that the Parties' use of NNTC WL revenue data that do not conform to the requirements of Rule 4 CCR 723-2-2847(b)(I)(E) should not, and does not, prevent consideration of whether NNTC WL meets the Rule requirement. First, as discussed above, an EP designation applicant needs to make is a preliminary showing that is apart from, and less stringent than, the showing required by § 40-15-208(2)(a), C.R.S. Second, the Rule 4 CCR 723-2-2841(k) formulae appears to reduce by 50 percent the revenues from vertical, discretionary, or non-basic services that are included in the revenue benchmark. To the extent 100 percent of the revenues from those types of services are included in NNTC WL's revenues, NNTC WL's revenues are greater than they would be under the revenue benchmark, which arguably makes it more difficult for NNTC WL to show that its revenues do not exceed its reasonable costs to provide local service. Third, the Parties used the same NNTC WL revenues (*i.e.*, Hearing Exhibit No. 9 at Exhibit KYT-3 at 3) as the starting point for their analyses so no party will be prejudiced by the use of those data in this case. For these reasons, the ALJ finds that the requirements of Rule 4 CCR 723-1-1003 have been met and that a variance from the Rule 4 CCR 723-2-2847(b)(I)(E) requirement that revenues be "defined by the Commission-adopted revenue benchmark" should be granted. The ALJ *sua sponte* will grant a variance that permits the use of NNTC WL's revenues as presented in the evidentiary record in lieu of "revenues, as defined by the Commission-adopted revenue benchmark," when determining whether NNTC WL meets the requirements of Rule 4 CCR 723-2-2847(b)(I)(E).

⁹² NNTC WL did not seek a waiver of or variance from this Rule.

189. Based on the record, the ALJ finds that NNTC WL meets the requirements of Rule 4 CCR 723-2-2847(b)(I)(E). Hearing Exhibit No. 9 at Exhibit No. KYT-3 at 3-5 support this finding. Additional support for this finding is the independent audit that concluded that, in CY 2008, NNTC WL's expenses exceeded its revenue by approximately \$ 71,200. Hearing Exhibit No. 26; Hearing Exhibit No. 9 at Exhibit KYT-4. The size of NNTC WL's two-year investment plan (\$ 666,000 through 2010 or 2011), particularly as compared to the number of access lines that NNTC WL serves (662), provides some support for this finding.

190. As to the OCC adjustments to long distance revenues and expenses, the ALJ finds NNTC WL's argument to be persuasive. OCC did not go far enough when it adjusted NNTC WL's expenses by removing 100 percent of the PCS LD Terminating expense (approximately \$ 45,600) and 100 percent of the PCS Long Distance Revenues (\$ 1,729). To achieve an appropriate matching of revenues and expenses, OCC also should have calculated (or at least estimated) the long distance revenue generated by NNTC WL's bundled calling plans and removed that amount from the PCS Plan Revenue line item. Because this did not occur, the OCC method overstates NNTC WL's revenue by an unknown amount. The ALJ will not use these OCC-recommended adjustments.

191. As to the OCC Roam Fees expense adjustment, the ALJ finds NNTCC WL's argument to be persuasive. When OCC adjusted NNTC WL's expenses by removing 100 percent of the PCS LD Terminating expense, OCC should have made an adjustment to remove 100 percent of the PCS Roaming Revenue (approximately \$ 80,700) so as to achieve an appropriate match of revenues and expenses. Because this did not occur, the OCC analysis overstates NNTC WL's revenue by at least the \$ 80,700 figure. The ALJ will not use this OCC-recommended adjustment.

192. NNTC WL agrees with Staff's adjustments to remove revenues and expenses related to telephones and accessories. Although there are some discrepancies with respect to these revenues and expenses (discussed below), the ALJ finds that removing the referenced revenues and expenses is appropriate because they are not related to the provisioning of basic local exchange service.

193. As to Staff's allocation-based adjustments, the ALJ finds the arguments of NNTC WL to be persuasive. The Staff's calculation of its allocation factor inappropriately included Internet (*i.e.*, broadband) revenue; removing that revenue from the allocation factor leaves the long distance percentage of 5.89 percent⁹³ and the wireless percentage of 94.11 percent. In addition, as discussed above, Staff inappropriately applied its allocation factor to line item expenses that were directly assigned expenses. The result was an inappropriate reduction of NNTC WL's expenses.

194. Hearing Exhibit No. 13 at Exhibit SAT-7 is the exhibit that contains and explains Staff's adjustments to NNTC WL's CY 2008 revenues and expenses. In Hearing Exhibit No. 13 at Exhibit SAT-6 (and Hearing Exhibit No. 26), Staff makes adjustments that reduce three revenue line items⁹⁴ and two expense line items,⁹⁵ all five of which are related to PCS telephones and accessories. For reasons that are not explained, the adjustments to PCS Sale of Accessory Revenue, PCS Handset Replacement revenue, PCS Cost of Phone expense, and PCS Cost of

⁹³ The ALJ need not reach, and does not reach, the issue of whether it was appropriate to calculate the allocation factor using long distance revenues (5.89 percent of NNTC WL's CY 2008 revenues in Staff's calculation). The impact of long distance on the allocation factor is *de minimis*. In addition, the allocation factor was applied to 11 expense line items. A reduction of less than 6 percent in those 11 expense line items would have no appreciable impact on NNTC WL's total CY 2008 expenses.

⁹⁴ The revenue line items are: PCS Sale of Phone Revenue, PCS Sale of Accessory Revenue, and PCS Handset Replacement revenue.

⁹⁵ The expense line items are: PCS Cost of Phone expense and PCS Cost of Accessories expense.

Accessories expense are not carried over to Exhibit SAT-7. In addition and for reasons that are not explained, PCS Sale of Phone Revenue of approximately \$ 46,000 in Exhibit SAT-6 (and Hearing Exhibit No. 26) appears to become PCS Contract Phone Sales revenue of approximately \$ 4,100 in Exhibit SAT-7. These unexplained discrepancies raise further questions about the accuracy of Hearing Exhibit No. 13 at Exhibit SAT-7. For these reasons, the ALJ does not rely on Staff's analysis.

195. On the facts in this record, the ALJ finds that NNTC WL meets the requirements of Rule 4 CCR 723-2-2847(b)(I)(E). This finding goes solely to the determination that, for purposes of EP designation only, NNTC WL has made a sufficient showing that its expenses exceed revenues. NNTC WL may not rely on any determination made with respect to Rule 4 CCR 723-2-2847(b)(I)(E) in this proceeding to establish the need for, or a level of, CHSCM support. If and when NNTC WL files to receive CHSCM support, the Commission will determine in that subsequent proceeding whether NNTC WL meets the requirements of Rule 4 CCR 723-2-2847(f)(I).

f. Rule 4 CCR 723-2-2847(b)(I)(F)

196. Rule 4 CCR 723-2-2847(b)(I)(F) requires NNTC WL, as an EP designation applicant, to establish that granting its EP designation application “serves the public convenience and necessity, as defined in §§ 40-15-101, 40-15-501, and 40-15-502, C.R.S.”⁹⁶ The Parties agree that the FCC public interest factors (discussed above) may be considered, but are not controlling, in evaluating the public interest under this Rule.

⁹⁶ In this proceeding the Parties referred to this as the public interest criterion. For ease of reference, unless the context indicates otherwise, reference in this Decision to the public interest in the context of the criteria for designation as an EP is to “the public convenience and necessity, as defined in §§ 40-15-101, 40-15-501, and 40-15-502, C.R.S.” (Rule 4 CCR 723-2-2847(b)(I)(F)).

197. Staff notes that the Commission has not established (*e.g.*, by rule) the specific criteria to be applied to determine whether an EP designation applicant has met this requirement. Thus, this determination is made on a case-by-case and fact-specific basis. There is no disagreement on this point.

198. NNTC WL states that designating it as an EP will result in the following benefits: (a) increased customer choice with respect to providers, calling plans, technologies, and services; (b) increased access to, and availability of, services in rural areas that are comparable to those available in urban areas; (c) increased safety through the increased availability of 9-1-1 emergency services;⁹⁷ (d) increased general availability of mobile telecommunications service;⁹⁸ (e) creation of a foundation network for the future provisioning of advanced wireless services;⁹⁹ and (f) potential efficiencies, with resulting cost reductions, that may result from sharing resources with Nucla-Naturita. In addition, NNTC WL relies on the benefits discussed above with respect to the ETC requirement that the designation of an additional ETC in a rural ILEC's service territory must be in the public interest.

199. OCC asserts that NNTC WL has not met its burden of proof to establish that designating it as an EP is in the public interest. OCC argues that the following considerations demonstrate that NNTC WL does not meet the public interest requirement: (a) free market competition is an important, even pivotal, factor in the public interest analysis, and competition

⁹⁷ NNTC WL states that, in Docket No. 07A-153T, Staff agreed that this is a benefit when testified: "If Viaero is granted ETC/EP status and receives high cost support, Viaero will be able to deploy additional infrastructure, including cell sites that will increase Viaero's coverage of emergency services. This additional wireless coverage is of great value to rural customers who often find themselves far from a landline phone." Hearing Exhibit No. 4 at Exhibit KJK-4 at 19:18-20:1.

⁹⁸ NNTC WL notes that, at the hearing in this proceeding, OCC witness Skluzak agreed that this is a benefit not only to NNTC WL's customers but to all Colorado wireless customers. NNTC WL SOP at 14-15.

⁹⁹ NNTC WL states that it is not seeking high-cost funds in order to provide advanced services.

should not be defined as alternative choice as NNTC WL proposes; (b) designating NNTC WL as an EP will not foster free market competition because there is and will be no competition between NNTC WL and Nucla-Naturita as NNTC WL will offer a complementary, and not a competitive, service to Nucla-Naturita;¹⁰⁰ (c) because there is, at most, one potential customer in the Nucla-Naturita serving area who does not have either wireline telephone service or fixed wireless telephone service provided by Nucla-Naturita, universal service has been achieved and designing NNTC WL as a wireless EP in that area is not necessary; (d) due to the parent-subsidiary relationship between Nucla-Naturita and NNTC WL (and the possibility of inappropriate assignment or allocation of expenses), providing CHCSM funding to NNTC WL would give NNTC WL a competitive advantage over other wireless competitive EPs in the Nucla-Naturita service area; (e) in evaluating the public interest, the Commission should not “ignore the cost of over-building [NNTC WL’s wireless] network, particularly when considering the significant cost and the relatively small number of potential customers who might opt to purchase such complementary wireless service” (OCC SOP at 25); and (f) NNTC WL does not offer a BUS.

200. NNTC WL takes issue with OCC’s focus on competition defined as cord-cutting;¹⁰¹ with OCC’s argument that universal service has been achieved because virtually all have ILEC-provided wireline or fixed wireless service;¹⁰² and with OCC’s argument that the parent-subsidiary relationship between Nucla-Naturita and NNTC WL would give NNTC WL a

¹⁰⁰ OCC defines competitive service as cord-cutting and defines evidence of competition as evidence of cord-cutting.

¹⁰¹ Relying on the arguments discussed above concerning the ETC public interest factors, NNTC WL asserts that cord-cutting is no longer a significant factor in the evaluation of the public interest.

¹⁰² NNTC WL argues that, if the Commission were to adopt this position, no additional EPs could be designated because: (a) all competitive EPs serve in areas already served by ILECs; and (b) as Providers of Last Resort, ILECs are required to provide service to all who request service.

competitive advantage over other wireless competitive ETCs in the Nucla-Naturita service area.¹⁰³

201. Staff asserts that, in this case, NNTC WL has not met its burden of proof to establish that designating it as an EP is in the public interest. Staff argues: (a) NNTC WL does not meet the public interest requirement, and does not further the goal of universal service, because it will be a supplemental or secondary source of telecommunications service in the Nucla-Naturita service area rather than a carrier that “compete[s] to be the primary source of universal service for a rural customer” (Staff SOP at 6 (quoting Hearing Exhibit No. 13 at 22:18)); (b) by its willingness to rely on a weak wireless signal to serve the northeast corner of the Nucla exchange, NNTC WL has not demonstrated a commitment and willingness to offer and to provide service throughout its proposed service area;¹⁰⁴ (c) “allowing [NNTC WL] to provide less than mediocre service in its proposed service area would be discriminatory to other ... EP applicants who must demonstrate an ability and commitment to provide service in accordance with FCC and Commission standards” (*id.* at 8);¹⁰⁵ and (d) NNTC WL has not demonstrated a need for high-cost support as it “has already been successful in building its network and capturing customers without universal service support” (*id.* at 7).

¹⁰³ NNTC WL asserts that the following address entirely, or lessen considerably, this concern: (a) as a regulated carrier, Nucla-Naturita must use the cost allocations in 47 CFR Part 64 and its Colorado CAM; (b) the existence of overseers (*e.g.*, Universal Service Administrative Company) that monitor cost allocations by regulated companies and that conduct audits; (c) Staff’s audit authority *vis-à-vis* Nucla-Naturita; (d) the formal complaint process available at the Commission; and (e) the Commission’s annual recertification of ETC/EPs.

¹⁰⁴ Relying on this same argument, Staff asserted that NNTC WL did not meet the requirements for designation as an ETC. For the reasons discussed above with respect to NNTC WL’s intent and ability to provide supported services and to offer supported services throughout the service area, the ALJ finds this argument to be unpersuasive.

¹⁰⁵ Relying on this same argument, Staff asserted that NNTC WL did not meet the requirements for designation as an ETC. For the reasons discussed above with respect to NNTC WL’s intent and ability to provide supported services and to offer supported services throughout the service area, the ALJ finds this argument to be unpersuasive.

202. Based on the record, and on balance, the ALJ finds that the advantages of designating NNTC WL as an EP outweigh the disadvantages identified by Intervenor. The designation will provide, or will lead to, at least the following: increased customer choice for basic local exchange service; increased public safety through increased access to 9-1-1 emergency services; increased mobility; product and service innovation by providers; increased product and service innovation by providers; reduction in the cost to obtain basic local service because, as a wireless carrier, NNTC WL may not need line extension charges to provide service in remote areas; in the rural area that NNTC WL proposed to service, access to services comparable to those available in urban areas; and providing the benefits of existing and new telecommunications services to the greatest number of Colorado citizens. In addition, NNTC WL will be able to provide a differentiated service based on its local calling area. The ALJ finds that NNTC WL has established that designating it as an EP is in the public interest.

203. For the reasons discussed above with respect to the ETC public interest criterion, the ALJ finds unpersuasive the argument based on cord-cutting and the argument based on the notion that, to be designated as an EP, a carrier must “compete to be the primary source of universal service for a rural customer.” Hearing Exhibit No. 13 at 22:18.

204. The ALJ finds unpersuasive OCC’s argument that, because there is, at most, one potential customer in the Nucla-Naturita serving area who does not have either wireline telephone service or fixed wireless telephone service provided by Nucla-Naturita, universal service has been achieved and designing NNTC WL as a wireless EP in that area is not necessary. First, the ALJ finds it is appropriate to designate NNTC WL as an EP even if there are, at present, no unserved customers because the service territory is a rural and difficult to

serve area. The ALJ finds that other important factors and benefits, such as access to emergency assistance and the ability to have service as one moves through NNTC WL's service territory, are not negated or lessened by there being no customers that are not served by Nucla-Naturita. Second, the ALJ finds persuasive NNTC WL's response to this OCC argument.

205. The ALJ finds unpersuasive the OCC argument that, due to the parent-subsidary relationship between Nucla-Naturita and NNTC WL, providing CHCSM funding to NNTC WL would give NNTC WL a competitive advantage over other wireless competitive EPs in the Nucla-Naturita service area.¹⁰⁶ First, this argument is speculative and finds no credible evidentiary support in the record. Second, the fact that no wireless competitive EP intervened in this proceeding calls this argument into question. Third, the argument is premature because it assumes that NNTC WL will receive CHSCM funding and that determination will be made in a subsequent proceeding. Fourth and finally, the ALJ finds persuasive NNTC WL's response to this OCC argument.

206. The ALJ finds unpersuasive Staff's argument that NNTC WL has not demonstrated a need for high-cost support as it "has already been successful in building its network and capturing customers without universal service support" (*id.* at 7). First, this argument is premature because it goes to the question of whether NNTC WL should receive CHCSM funding and that determination will be made in a subsequent proceeding. Second, adoption of Staff's position would have these impacts: (a) it would disadvantage competitive carriers who elect to build their networks, are successful in that endeavor, and then seek

¹⁰⁶ In Decision No. C01-0476 at 15-17, the Commission indicated that intervenors bear the burden of proof with respect to claims that designating additional competitive ETCs will result in harm to competitors.

universal service or high-cost support;¹⁰⁷ and (b) it would create a bias in favor of designating as EPs the carriers that have no network and no demonstrated ability to provide service. This would violate the principle of competitive neutrality. Third, adoption of Staff's position, by creating a perverse incentive that would discourage carriers from taking the initiative to build networks before they are designated as EPs, could undercut the public interest goal of providing basic local service to unserved and underserved areas of Colorado as quickly and as widely as possible.

207. The ALJ finds unpersuasive the OCC argument that, at present, NNTC WL does not offer a BUS. As discussed above, as a condition of its ETC designation, NNTC WL will provide: (a) a month-to-month wireless BUS plan with unlimited calling that is comparable to, and at a rate comparable to, the basic local plan offered by Nucla-Naturita for customers within the Nucla-Naturita wire centers (or exchanges) within which NNTC WL will provide service; and (b) a month-to-month wireless BUS plan with unlimited calling that is comparable to, and at a rate comparable to, the basic local plan offered by CenturyTel for customers within the CenturyTel wire center (or exchange) within which NNTC WL will provide service.

208. On the facts in this record, the ALJ finds that designating NNTC WL as an EP serves the public interest.

4. Conditions on Designation as an EP.

209. The conditions discussed throughout this Decision are found to be in the public interest.

¹⁰⁷ If these carriers find it more difficult to be designated as EPs or are denied EP designation as a result of adoption of Staff's position, expansion of the carriers' existing networks could be slowed or stalled entirely because they cannot obtain CHCSM funds.

210. The ALJ will condition the EP designation on NNTC WL's meeting the conditions placed on its ETC designation.

V. CONCLUSIONS

211. The Commission has jurisdiction over the subject matter of this proceeding and over the parties to this proceeding.

212. Subject to the conditions discussed above, the Application should be granted.

213. Subject to the conditions discussed above, NNTC WL should be designated as an ETC in the wire centers (or exchanges) of Nucla-Naturita and of CenturyTel identified in the Application.

214. Subject to the conditions discussed above, NNTC WL should be designated as an EP in the wire centers (or exchanges) of Nucla-Naturita and of CenturyTel identified in the Application.

215. To the extent that an argument made, or a position taken by, a party is not addressed in this Decision, the ALJ has considered the argument or position and has found it to be unpersuasive.

216. A variance, as described above, from Rule 4 CCR 723-2-2847(b)(I)(E) should be granted.

217. Pursuant to § 40-6-109(2), C.R.S., the Administrative Law Judge recommends that the Commission enter the following order.

VI. ORDER**A. The Commission Orders That:**

1. Consistent with the discussion above and subject to the conditions stated in this Decision, the Application filed by NNTC Wireless, LLC (NNTC WL), for designation as an Eligible Telecommunications Carrier and for designation as an Eligible Provider is granted.

2. Subject to the conditions stated in this Decision, NNTC WL, is designated as an Eligible Telecommunications Carrier.

3. The grant of Eligible Telecommunications Carrier status to NNTC WL, is conditioned upon NNTC WL's providing either LifeLine service or Linkup service, or both, throughout its service area.

4. The grant of Eligible Telecommunications Carrier status to NNTC WL, is conditioned upon NNTC WL's following and using the seven-step process established in the *ETC Designation Framework Order* (discussed above) and on its abiding by the CTIA Consumer Code for Wireless Service.

5. The grant of Eligible Telecommunications Carrier status to NNTC WL, is conditioned upon NNTC WL's offering and advertising, both in media of general circulation and on its website, (a) a month-to-month wireless Basic Universal Service (BUS) plan with unlimited calling that is comparable to, and at a rate comparable to, the basic local plan offered by Nucla-Naturita Telephone Company (Nucla-Naturita) for customers within the Nucla-Naturita wire centers (or exchanges) within which NNTC WL will provide service; and (b) a month-to-month wireless BUS plan with unlimited calling that is comparable to, and at a rate comparable to, the basic local plan offered by CenturyTel of Eagle, Inc. (CenturyTel), for customers within the CenturyTel wire center (or exchange) within which NNTC WL will provide service.

6. The grant of Eligible Telecommunications Carrier status to NNTC WL, is conditioned on the Commission's disaggregation and redefinition of Nucla-Naturita's study area to the wire center (or exchange) and the Federal Communications Commission's (FCC) concurrence in that redefinition.

7. The grant of Eligible Telecommunications Carrier status to NNTC WL, is conditioned upon NNTC WL's filing a copy of the FCC's decision that concurs in the Commission's redefinition of Nucla-Naturita's service area. This is a compliance filing.

8. The grant of Eligible Telecommunications Carrier status to NNTC WL, is conditioned upon NNTC WL's filing a copy of Exhibit C to the management agreement with Nucla-Naturita *or* its filing a statement that it does not provide to Nucla-Naturita services beyond those specified in part 4 of the management agreement. This is a compliance filing.

9. The grant of Eligible Telecommunications Carrier status to NNTC WL, is conditioned upon NNTC WL's filing a diagram that meets the requirements stated in Hearing Exhibit No. 20 at Exhibit B at 10. This is a compliance filing.

10. Subject to the conditions stated in this Decision, NNTC WL, is designated as an Eligible Provider.

11. The grant of Eligible Provider status to NNTC WL, is conditioned upon NNTC WL's meeting the conditions established for its Eligible Telecommunications Carrier designation.

12. Consistent with the discussion above, a variance from Rule 4 *Code of Colorado Regulations* (CCR) 723-2-2847(b)(I)(E) is granted to permit the use of NNTC WL's revenues as presented in the evidentiary record in lieu of "revenues, as defined by the Commission-adopted revenue benchmark" when determining whether NNTC Wireless, LLC, meets the requirements of Rule 4 CCR 723-2-2847(b)(I)(E).

13. NNTC WL's Motion to File Rebuttal Testimony and Exhibits One Day Out of Time is granted.

14. NNTC WL is granted permission to file its rebuttal testimony and exhibits one day out of time.

15. Consistent with the discussion above, NNTC WL's Motion to Strike Portions of Answer Testimony of Staff of the Commission (Staff) and the Office of Consumer Counsel (OCC) Witnesses is granted.

16. The portions of the answer testimony of Staff identified above are stricken from the record, as are any exhibits discussed only in the stricken testimony and any rebuttal testimony that responds to the stricken testimony.

17. The portions of the answer testimony of the OCC identified above are stricken from the record, as are any exhibits discussed only in the stricken testimony and any rebuttal testimony that responds to the stricken testimony.

18. Consistent with the discussion above, the Joint Motion of Staff and the OCC to Strike Portions of NNTC's Rebuttal Testimony and Related Exhibits is granted.

19. The portions of the rebuttal testimony of NNTC WL, identified above are stricken from the record, as are any exhibits discussed only in the stricken testimony.

20. Consistent with the discussion above, NNTC Wireless, LLC's Request that Administrative Notice be Taken of Recent Commission Decisions is granted.

21. Administrative notice is taken of Decisions No. R09-1351-I, No. C10-0315, and No. C10-0326.

22. Consistent with the discussion above, the Administrative Law Judge *sua sponte* takes administrative notice of Decision No. R10-0061.

23. Consistent with the discussion above, the OCC and Trial Staff's Request for Administrative Notice of a Recent Nucla-Naturita Telephone Company Application for Refund Plan is granted.

24. Administrative notice is taken of the facts contained in the March 23, 2010 Application of Nucla-Naturita Telephone Company for Approval of Refund Plan Regarding TRS and CUSC Fees and Colorado USF Assessments, including the seven attachments to the application.

25. Decision No. R09-1351-I is Hearing Exhibit No. 27.

26. Decision No. C10-0315 is Hearing Exhibit No. 28.

27. Decision No. R10-0061 is Hearing Exhibit No. 29.

28. Decision No. C10-0326 is Hearing Exhibit No. 30.

29. The Application of Nucla-Naturita Telephone Company for Approval of Refund Plan Regarding TRS and CUSC Fees and Colorado USF Funds and Attachments F and G to that Application (Docket No. 10A-159T) are Hearing Exhibit No. 31.

30. Confidential Attachments A through E to the Application of Nucla-Naturita Telephone Company for Approval of Refund Plan Regarding TRS and CUSC Fees and Colorado USF Funds (Docket No. 10A-159T) are Confidential Hearing Exhibit No. 31A.

31. The evidentiary record is reopened for the limited purpose of admitting into evidence Hearing Exhibits No. 27 through and including No. 31 and Confidential Hearing Exhibit No. 31A. Hearing Exhibits No. 27 through and including No. 31 and Confidential

Hearing Exhibit No. 31A shall be filed in the evidentiary record of this proceeding. With the admission of Hearing Exhibits No. 27 through and including No. 31 and Confidential Hearing Exhibit No. 31A, the evidentiary record is closed.

32. NNTC WL's Request for an Order on Application Forthwith is denied as moot.

33. NNTC WL's Request for Shortened Response Time is denied as moot.

34. Consistent with the discussion above, the Joint Motion of the Colorado Office of Consumer Counsel and Trial Staff to Strike Portions of NNTC Wireless, LLC's Response to the Colorado Office of Consumer Counsel and Trial Staff's Request for Administrative Notice of NNTC's Application for Refund Plan is granted.

35. Paragraphs 4 through 6 of NNTC Wireless, LLC's Response to the Colorado Office of Consumer Counsel and Trial Staff's Request for Administrative Notice of NNTC's Application for Refund Plan are stricken from the record.

36. 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.

37. 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, 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.

38. If exceptions to this Recommended 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)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

MANA L. JENNINGS-FADER

Administrative Law Judge

ATTEST: A TRUE COPY

A handwritten signature in cursive script that reads "Doug Dean".

Doug Dean,
Director