

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 09A-771T

IN THE MATTER OF THE APPLICATION OF UNION TELEPHONE COMPANY,
DOING BUSINESS AS UNION WIRELESS, FOR DESIGNATION AS AN ELIGIBLE
TELECOMMUNICATIONS CARRIER IN COLORADO.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
KEITH J. KIRCHUBEL
GRANTING MOTION TO AMEND APPLICATION;
APPROVING STIPULATION
AND SETTLEMENT AGREEMENT;
GRANTING DESIGNATION AS ELIGIBLE
TELECOMMUNICATIONS CARRIER;
AND CLOSING DOCKET**

Mailed Date: September 28, 2012

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I. STATEMENT

1. This Docket has an extensive procedural history. Given that the parties have proposed to resolve the issues raised by the subject application through the filing of a Stipulation and Settlement Agreement (Stipulation), this Recommended Decision need not recapitulate that entire history.

2. The captioned application was filed with the Colorado Public Utilities Commission (Commission) by Union Telephone Company, doing business as Union Wireless (Union), on October 27, 2009. Union requests an order of the Commission granting Union Eligible Telecommunications Carrier (ETC) status in selected areas of Colorado.

3. The Commission gave notice of the application on November 2, 2009.

4. Timely interventions were filed in this matter by the Staff of the Colorado Public Utilities Commission (Staff) and the Colorado Office of Consumer Counsel (OCC).

5. On December 9, 2009, the Commission deemed the application complete and referred it to an Administrative Law Judge (ALJ) for disposition.¹

6. On June 28, 2010, ALJ Isley convened an evidentiary hearing after which the parties submitted written statements of position.

7. Pursuant to Decision No. R10-1264, issued on November 23, 2010, Union was conditionally granted ETC status in certain listed telephone exchanges comprising part of the overall geographic area for which Union sought such designation.

8. Staff and the OCC both filed Exceptions to Decision No. R10-1264 pursuant to Commission Rule 1505. *4 Code of Colorado Regulations (CCR) 723-1-1505.*

9. Pursuant to Decision No. C11-0441, issued on April 26, 2011 (Remand Order), the Commission granted Exceptions in part and remanded the Docket for further proceedings. The Remand Order did not vacate or otherwise modify any of ALJ Isley's factual findings. However, the Commission determined that the language of Rule 2187(a) and of 47 U.S.C. § 214(e) and 47 Code of Federal Regulations (CFR) 54.201(c) creates a distinction regarding the

¹ In early 2012, the Docket was reassigned from ALJ Dale E. Isley to the undersigned ALJ.

analysis for ETC designations: while such designations are generally mandatory if consistent with the public interest, convenience and necessity, they are discretionary for areas served by a rural telecommunications provider that already has an ETC.² The Commission directed the ALJ to determine those areas within Union's proposed service territory that fell under the "discretionary" analysis and to grant the application for those areas in which ETC designation is not discretionary. Further, with regard to the discretionary areas, the Commission remanded the issue of whether granting ETC status would be consistent with the public interest considering, *inter alia*, the impact of what has been termed the *Interim Cap Order*³ of the Federal Communications Commission (FCC). Lastly, the Commission conditioned any grant of ETC status to Union on the establishment of a separate wireless subsidiary in order to address concerns of cross-subsidization or comingling of accounts among Union's various regulated, deregulated and unregulated services in four states.⁴

10. Union and the OCC both filed requests for Rehearing, Reargument, or Reconsideration of Decision No. C11-0441 pursuant to 4 CCR 723-1-1506.

11. Pursuant to Decision No. C11-0729, issued on July 5, 2011, the Commission denied both requests for reconsideration.

12. Through subsequent interim orders, the ALJ sought to clarify and confirm the scope of the proceedings on remand. These orders generated further comment and motion filings from the parties.

² Decision No. C11-0441 at page 8, Paragraph No. 18.

³ *In the Matter of High Cost Universal Service Support*, 2008 WL 1930572, 23 F.C.C.R. 8834, (F.C.C. May 1, 2008).

⁴ Decision No. C11-0441 at page 13, Paragraph No. 30.

13. In Decision No. R11-1015-I, the ALJ defined those areas of the application that fell under the “mandatory” classification and those that fell under the “discretionary” classification using the criteria spelled out in the Remand Order. The Revised Appendix I to Decision No. R11-1015-I is incorporated as Attachment A to the Stipulation for the same purpose: to establish where the parties agree that Union should be designated as an ETC.

14. Ultimately, the scope of the remanded hearing and a procedural schedule were defined in Decision No. R12-0373-I, issued on April, 11, 2012.

15. Union prefiled the Direct Testimony and Exhibits of Christopher Reno⁵ and James H. Woody⁶ on April 23, 2012. The OCC prefiled the Answer Testimony of Cory Skluzak⁷ on May 16, 2012. Staff prefiled the Answer Testimony and Exhibits of Susan A. Travis on May 30, 2012.⁸ Union prefiled Rebuttal Testimony of Mr. Reno on June 8, 2012.

16. On June 11, 2012, the OCC filed a Motion to Strike Rebuttal Testimony. This Motion was withdrawn by counsel for the OCC on July 19, 2012.

17. On June 14, 2012, the ALJ received an email communication from counsel for Union stating that the parties had reached an agreement in principle on the issues slated for hearing. With the consent of Staff and the OCC, counsel requested that the evidentiary hearing scheduled for June 18, 2012, be vacated. That request was granted pursuant to Decision No. R12-0651-I, issued on June 15, 2012.

⁵ Mr. Reno is the Director of Accounting for Union.

⁶ Mr. Woody is the Treasurer and Chief Financial Officer of Union.

⁷ Mr. Skluzak is a Rate Analyst employed by the OCC.

⁸ Ms. Travis is a Rate/Financial Analyst employed by Staff. She filed Corrected and Second Corrected Answer Testimony in this Docket on May 31, 2012. The filing deadline for Ms. Travis’ testimony was the subject of an Unopposed Motion to Modify Procedural Schedule filed by counsel for Staff on May 22, 2012. The ALJ had not issued a ruling on that Motion prior to learning that a settlement in this Docket was imminent. Ms. Travis’ Second Corrected Answer Testimony was admitted without objection at the hearing on July 19, 2012.

18. After consulting with counsel for the parties regarding their respective schedules the ALJ scheduled a hearing on the impending settlement on July 19, 2012. Decision No. R12-0773-I, issued on July 10, 2012.

19. On July 12, 2012, the parties filed the Stipulation and a Motion to Approve the Stipulation.

20. Also on July 12, 2012, Union filed a Motion to Amend its Application and Substitute a Party (Motion to Amend). In the Motion to Amend Union requests that any ETC status approved in this proceeding be conferred upon a new wholly-owned subsidiary of Union denominated Union Wireless-Colorado, Inc., doing business as Union Wireless (UW-CO). In addition, the subject application would be restrictively amended by removing all discretionary areas identified in the Stipulation, except for the McCoy exchange in Grand and Routt Counties, from Union's request for ETC status. The Motion to Amend is unopposed.

21. On July 19, 2012, the ALJ convened a hearing on the Stipulation in the offices of the Commission. Counsel for Union appeared by telephone while counsel for Staff and the OCC appeared in person. Hearing Exhibits No. 1 through No. 9 were offered and admitted by stipulation. At the conclusion of the hearing, counsel for the parties each made an oral statement in support of Commission approval of the Stipulation. The ALJ then took the matter under submission.

22. 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. FINDINGS OF FACT

23. With consideration for the procedural history recited above, including the treatment of this Docket on exceptions to the Commission, the ALJ will adopt and incorporate the findings of fact set forth in Decision No. R10-1264 as these pertain to the technological details of Union's network and the terms and conditions of its Basic Universal Service (BUS) offering. These findings were not modified or superseded by subsequent Commission action or by the passage of time. Witnesses Woody and Reno make numerous references to the finding in their Direct Testimony in the remanded proceedings, Hearing Exhibits No. 5 and No. 6.

24. The parties stipulate that Union's BUS plan, as described in Attachment B to the Stipulation, meet the requirements of such service described in Decision No. R10-1264. Within 30 days of a Commission decision conferring ETC status, a qualified officer of Union will certify compliance with the terms of the BUS plan by verified affidavit.

25. In addition to the exchanges where the Commission's "mandatory" criterion applies, Union seeks ETC status for the McCoy exchange covering areas of Eagle, Garfield, Grand, and Routt counties. The McCoy exchange is classified "discretionary" because it is rural and already served by an ETC.⁹

26. Witnesses Reno and Woody provide the factual bases for a determination that designating Union as an ETC serves the public interest in discretionary areas like the McCoy exchange.

27. Consideration of public interest on remand is affected by the issuance of Order No. 11-161 by the Federal Communications Commission on November 18, 2011 (FCC 11-161). FCC 11-161 eliminated the "identical support rule" found in the *Interim Cap Order* and

⁹ Wireline carriers CenturyTel of Eagle and San Isabel. Revised Appendix I to Decision No. R11-1015-I.

established the Connect America Fund (CAF). Carriers with ETC status may now participate in reverse auctions conducted by the FCC to obtain financial support from the CAF.

28. The principal purpose behind the issuance of FCC 11-161 was to modernize the universal service and intercarrier compensation system to ensure that a robust, affordable voice and broadband system is available throughout the country.¹⁰ CAF monies are intended to be used to deploy and expand telecommunications and broadband data services in previously underserved, mostly rural areas.¹¹

29. Increasing numbers of telecommunications customers are migrating from wireline to wireless services because of the increased mobility, flexibility and quality of wireless technology. The marketplace is flooded with devices that facilitate connectivity using wireless technology. The FCC has noted that both fixed and mobile broadband connectivity have become crucial to the nation's economic growth, global competitiveness and civic life. *Id.*

30. As noted, the McCoy exchange is a rural area currently served by two wireline telecommunications carriers. The public interest in this community will be well served by additional voice, support, and data systems that increase customers' choices as well as the reliability and flexibility of the technology they need to connect to the rest of the country.

31. Union and UW-CO seek ETC status to be able to compete in auctions for CAF monies that, in turn, will allow expansion and improvement of facilities in the designated areas. These enhancements will inure to the benefit of customers connecting for commercial, educational, or purely personal communication.

¹⁰ FCC 11-161 at Paragraph No. 1.

¹¹ *Id.* at Paragraph No. 3.

32. A condition of UW-CO being eligible for CAF disbursement is the deployment of a 3G-speed network (minimum) in those areas where funding is sought. Union has already installed technology to facilitate this level of service in certain areas and it recognizes that additional improvements will be necessary to conform to this FCC requirement.

33. The Remand Order specified that Union would be required to create a separate Colorado wireless subsidiary within ninety days of a Commission decision conferring ETC designation. Union has established UW-CO as a separate corporate entity organized under the laws of the State of Colorado.

34. Union has established specific subaccounts to track expenses, investments and revenues including but not limited to Federal subsidies connected with any ETC designation. Union has also cooperated with Staff and the OCC to establish specific subaccounts and procedures to track the Colorado-specific operations of UW-CO. At the July 19, 2012 hearing, Ms. Patricia Parker¹² testified that Staff has reviewed and approved the subaccounts, income statement, balance sheet, and property records of Union and UW-CO. The parties will continue to work together to ensure that the systems put in place at Union and UW-CO comply with Commission rules requiring the careful tracking and segregation of interstate and intrastate accounts.

35. The parties stipulate that designating UW-CO as an ETC, pursuant to the terms and conditions of the proposed service, as modified by the amended application, the Stipulation, and the attachments thereto, serves the public interest, convenience and necessity as required by 47 U.S.C. §214(e)(2), and §§ 40-15-101, 40-15-501, and 40-15-502, C.R.S.

¹² Ms. Parker is a Rate/Financial Analyst employed by Staff.

III. DISCUSSION AND CONCLUSIONS

A. Motion to Amend

36. Union's Motion to Amend seeks to replace Union with UW-CO as the prospective ETC designee. The creation of UW-CO was mandated by the Commission as a condition of Union being granted ETC status.

37. Although under the terms of Decision No. C11-0441, Union was afforded ninety days after the final Commission decision to set up a separate wireless subsidiary to serve as the ETC designee, Union chose to go forward with the formation of UW-CO in order to satisfy Staff and the OCC regarding the proper accounting and segregation of the activities of Union and UW-CO.

38. As noted above, the Motion to Amend is unopposed. For good cause shown and in the absence of any opposition from the intervenor parties, the Motion to Amend will be granted. Accordingly, all subsequent references to the applicant in this proceeding will be to UW-CO.

B. Stipulation

39. The legal requirements of ETC designation have been thoroughly discussed in Decision No. R10-1264 and the Remand Order. The Commission has already concluded that Union is entitled to ETC status in the areas subject to the "mandatory" criterion. This, together with the terms of the Stipulation, validate that UW-CO's offering satisfies the requirements of BUS.¹³

¹³ See Finding of Fact No. 35.

40. With the creation of UW-CO, applicant has satisfied the condition stated in the Remand Order of the designee being a separate wireless subsidiary with appropriate subaccounts to permit tracking of the Colorado-specific operation.

41. What remains for consideration is whether ETC designation should be conferred in the sole discretionary exchange, McCoy. Here, under the terms of the Remand Order, the ALJ is required to take into account the extent to which the *Interim Cap Order* impacts the public interest of any such designation, as well as the objections expressed on exceptions by the OCC.

42. Taking the last point first, the OCC is a party to the Stipulation and agrees that UW-CO should be granted ETC status in those areas covered in the Motion to Amend and the Stipulation. This specifically includes McCoy. Therefore, the ALJ finds that the objections previously raised by the OCC on exceptions to Decision No. R10-1264 have been waived.

43. As for the Interim Cap Order, the ALJ has accepted the briefing of the parties and previously ruled that FCC 11-161 superseded those aspects of the Interim Cap Order raised in the Remand Order.¹⁴ With the elimination of the identical support rule and the creation of the CAF, the dynamics of Federal subsidies for ETCs has changed dramatically.

44. FCC 11-161 did not eliminate the public interest analysis related to applications for ETC status. It did, however, mandate that ETCs offer broadband data services in addition to voice services, and direct that the public interest analysis include consideration of broadband offerings.

¹⁴ Decision No. R12-0373-I, issued on April 11, 2012.

45. Based on the factual findings set forth above, the ALJ finds that UW-CO's offering serves the public interest in the McCoy exchange. McCoy is rural and presently served by two wireline carriers. The deployment of reliable, high speed wireless broadband service in this area, together with wireless voice and support services, will benefit potential customers by providing them with more choice, flexibility, and mobility with regard to telecommunications. In addition, ETC designation will permit UW-CO to compete for CAF subsidies, permitting Federal support for increased connectivity to reach Colorado consumers.

46. The conclusion that including the McCoy exchange in UW-CO's ETC designation serves the public interest, convenience and necessity is supported by the Stipulation of Staff and the OCC.

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

IV. ORDER

A. The Commission Orders That:

1. The Motion of Union Telephone Company to Amend its Application for Designation as an Eligible Telecommunications Carrier and Substitute a Party, filed on July 12, 2012, is granted.

2. Union Wireless-Colorado, Inc., doing business as Union Wireless, is substituted in place of Union Telephone Company as the applicant in this Docket.

3. The Motion of the Parties for Approval of Stipulation and Agreement filed on July 12, 2012, is granted. A copy of the Stipulation and Settlement Agreement, also filed on July 12, 2012, is attached hereto as Appendix A.

4. The Stipulation and Settlement Agreement (Appendix A), including Attachment A and Attachment B thereto, is incorporated by reference and made an order of the Commission as if fully set forth herein. All Parties shall comply with all terms thereof.

5. The Amended Application of Union Wireless-Colorado, Inc., doing business as Union Wireless, for designation as an Eligible Telecommunications Carrier is granted subject to the terms of the Stipulation and Settlement Agreement (Appendix A). Specifically, Union Wireless-Colorado, Inc., doing business as Union Wireless, is designated an Eligible Telecommunications Carrier in the McCoy exchange as well as those exchanges denominated "Mandatory" in Attachment A to Appendix A.

6. The grant of Eligible Telecommunications Carrier status to Union Wireless-Colorado, Inc., doing business as Union Wireless, is conditioned upon it offering and advertising (in media of general circulation and on its website) a month-to-month wireless basic universal service plan with unlimited calling at rates comparable to those assessed by the incumbent local exchange carriers in each Colorado telephone exchange listed in Attachment A to Appendix A.

7. Union Wireless-Colorado, Inc., doing business as Union Wireless, shall, within 30 days of the effective date of this Order, file with the Commission, evidence of its compliance with the condition described in Ordering Paragraph No. 6, above. Such filing shall include a verified affidavit signed by an officer of Union Wireless-Colorado, Inc., doing business as Union Wireless, attesting to its compliance with this condition.

8. The Commission shall retain jurisdiction of this proceeding for the purpose of taking such action and entering such orders as may be necessary to effectuate this Order.

9. Docket No. 09A-771T is now closed and all proceedings are vacated.

10. 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.

11. 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.

12. If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

KEITH J. KIRCHUBEL

Administrative Law Judge

ATTEST: A TRUE COPY

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

Doug Dean,
Director