

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 13M-0422T

IN THE MATTER OF COMMISSION CONSIDERATION OF EFFECTIVE COMPETITION
AREAS AND THE CLASSIFICATION OF BASIC LOCAL EXCHANGE SERVICE
PURSUANT TO 4 CCR 723-1-2213.

**DECISION DENYING APPLICATIONS FOR REHEARING,
REARGUMENT, OR RECONSIDERATION**

Mailed Date: August 4, 2014

Adopted Date: July 23, 2014

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I. BY THE COMMISSION

A. Statement

1. By Decision No. C14-0642 (Decision), issued June 11, 2014, the Commission applied recently enacted statutes to the 56 wire center serving areas found to have effective competition for basic service pursuant to § 40-15-207, C.R.S. (Section 207).¹ The Decision's application of the statutes resulted in the termination of high cost funding distributions to providers in the 56 wire centers. The Commission also vacated certain determinations in this proceeding, which were inconsistent with the statutes.

¹ See, Decision Nos. R14-0190, issued February 21, 2014, and C14-0434, issued April 28, 2014.

2. On July 3, 2014, Viaero Wireless (Viaero) and Qwest Corporation, doing business as CenturyLink QC; El Paso County Telephone Company, doing business as CenturyLink; CenturyTel of Colorado, Inc.; and CenturyTel of Eagle, Inc. (collectively, CenturyLink), each filed an application for rehearing, reargument, or reconsideration (RRR) concerning the Decision.

3. We deny both applications for RRR.

B. Procedural History and HB 14-1331

4. By Decision No. R14-0190, Hearing Commissioner Joshua Epel issued his Recommended Decision in this proceeding. Hearing Commissioner Epel applied the standards under Section 207 to the 56 wire center serving areas and found them to have effective competition for basic service. By Decision No. C14-0434, issued April 28, 2014, the full Commission adopted the Recommended Decision and denied exceptions filed by AARP. No party filed an application for RRR concerning Decision No. C14-0434.

5. CenturyLink argued in favor of the conclusion that the 56 wire centers are subject to effective competition for basic service under Section 207. Neither CenturyLink nor Viaero filed exceptions to the Recommended Decision or filed for RRR to the decision issued by the full Commission.

6. In determining whether effective competition exists, the Commission makes findings based on consideration of factors set forth in Section 207(1)(b). In this proceeding the Commission considered the factors set forth in Sections 207(1)(b)(I) through (IV), in addition to other factors it “deemed appropriate” pursuant to Section 207(1)(b)(V). The Recommended Decision includes the following findings based on the record evidence in determining that the 56 wire centers have effective competition:

- a) There are no significant economic, technological, or other barriers to market entry and exit in the 56 wire center serving areas;²
- b) Basic service or similar services are offered by multiple providers in each of the 56 wire center serving areas;³
- c) Consumers have the ability to obtain service from other providers at reasonable and comparable rates, on comparable terms, and under comparable conditions;⁴ and
- d) Evidence indicates that no one provider has the ability to affect prices or deter competition.⁵

7. Through the Recommended Decision, the Commission therefore found effective competition exists throughout the 56 wire centers. The Recommended Decision made the determinations that, in addition to effective competition existing pursuant to the consideration of factors in Section 207(1)(b), regulation of basic service under Part 3 in each of the 56 wire centers would promote the provision of adequate and reliable service at just and reasonable rates, and would promote the public interest.⁶ Services were therefore reclassified under Part 3 regulation, as opposed to Part 2 regulation, consistent with Rule 2214, 4 *Code of Colorado Regulation* (CCR) 723-2 of the Commission's Rules Regulating Telecommunications Providers, Services, and Products.⁷

8. House Bill (HB) 14-1331, signed into law May 9, 2014, revises § 40-15-208, C.R.S. (Section 208), to limit distributions from the high cost support mechanism (HCSM) to local exchange providers "in areas without effective competition...." Consistent with this revision in Section 208, HB 14-1331 modifies § 40-15-502(5)(a), C.R.S., as follows:

² Recommended Decision, ¶¶ 20-22 (discussing consideration of Section 207(1)(b)(I)).

³ *Id.*, ¶¶ 23-28 (discussing consideration of Section 207(1)(b)(II)).

⁴ *Id.*, ¶¶ 29-41 (discussing consideration of Section 207(1)(b)(III)).

⁵ *Id.*, ¶¶ 42-47 (discussing consideration of Section 207(1)(b)(IV)).

⁶ *See, Id.*, ¶¶ 48-55.

⁷ *Id.*, Ordering Paragraph No. 3.

In order to accomplish the goals of universal basic service... the commission shall create a system of support mechanisms to assist in the provision of basic service in high-cost areas *that are without effective competition for basic service, applying the factors stated in Section 40-15-207; except that support provided in a particular geographic support area is not affected until the commission makes a finding applying the factors listed in Section 40-15-207.*⁸

9. On June 11, 2014, the Commission issued the Decision at issue here (Decision No. C14-0642) and applied HB 14-1331 to the Commission's findings of effective competition in the 56 wire centers. The Commission noted HB 14-1331 did not change any of the criteria listed in Section 207 to determine whether effective competition exists in a given area.⁹ The Commission found that, because valid determinations were made of effective competition in the 56 wire center areas pursuant to the unchanged standards in Section 207, HB 14-1331 precludes the continued distribution of HCSM in those areas.

10. Accordingly, the Commission ordered HCSM funding to be eliminated in the 56 areas as of May 9, 2014, the date HB 14-1331 was signed into law. Further, the Commission vacated the applicability of rules inconsistent with the recently enacted statutes, including Rule 2215,4 CCR 723-2, that previously permitted a provider to apply for continued HCSM funding in areas found to have effective competition, and Rule 2214, 4 CCR 723-2, that reclassified services found to be subject to effective competition from Part 2 to Part 3 regulation.¹⁰

C. Rehearing, Reargument, or Reconsideration

11. In its application for RRR, CenturyLink argues: (a) HB 14-1331 requires the Commission to make "fresh" prospective determinations that a high cost area is subject to

⁸ Section 40-15-502(5)(a)(May 9, 2014), C.R.S. (emphasis added).

⁹ Decision No. C14-0642, ¶ 7.

¹⁰ *See, Id.*, ¶¶ 9-12.

effective competition;¹¹ (b) the Commission has not determined the relevant geographic support area that should be evaluated for effective competition under the new statute, including whether a wire center serving area has the “appropriate granularity”;¹² and (c) the Commission incorrectly vacated Rule 2215 for the 56 wire centers.¹³

12. CenturyLink requests the Commission affirm the continued effectiveness of Rule 2215. CenturyLink’s RRR seeks clarification that carriers providing basic service in areas found to be subject to effective competition may file applications pursuant to Rule 2215 and demonstrate that “specified areas or access lines” are “without effective competition for basic service.”¹⁴ Further, CenturyLink asks the Commission to abandon “the implicit decision” to adopt the wire center serving area as the relevant area for determining effective competition and for targeting HCSM support.

13. Viaero similarly seeks clarification that the Decision does not establish unalterable precedent that whole wire center serving areas must be the “geographic areas” for purposes of determining effective competition. Viaero also supports continued application of Commission Rule 2215 permitting an opportunity for providers to apply for HCSM support based on a cost analysis and further review of whether an area is subject to effective competition: “Rule 2215 had the effect of providing a means for the Commission and interested parties to adjudicate on a more granular level which specific areas were effectively competitive.”¹⁵

¹¹ CenturyLink RRR, at 3-4.

¹² *Id.*, at 7-8.

¹³ *Id.*, at 11-12.

¹⁴ CenturyLink RRR, at 14.

¹⁵ Viaero RRR, at 2.

D. Conclusions and Findings

14. HB 14-1331 and the other recently enacted telecom legislation do not invalidate the Commission's findings of effective competition in the 56 wire centers. The Commission correctly considered and applied the Section 207 factors, which were unaltered by the changed statutes. The Commission also correctly determined the relevant geographic area under Section 207 and our rules. Our June 11, 2014, Decision applied the mandates of HB 14-1331, given that the Commission found effective competition throughout 56 wire centers based on the facts and evidence presented.¹⁶

15. CenturyLink's position in its application for RRR is contrary to its prior position in this proceeding, in which it argued market competition exists in the 56 wire centers pursuant to Section 207.¹⁷ In their RRR, neither CenturyLink nor Viaero contends the Commission misapplied Section 207 when it determined the relevant geographic areas or considered the criteria for effective competition for the 56 wire centers. There is no indication that the circumstances have changed in these 56 wire centers since the April 28, 2014, Decision of the full Commission that otherwise may require a reconsideration of the market analysis under the Section 207 factors.

16. CenturyLink's argument that HB 14-1331 requires the Commission to engage in a "fresh" look of the extent of competition in an area subject to high cost funding is incorrect.¹⁸ The General Assembly made no changes to the factors or considerations for the determination of effective competition as set forth in Section 207. The Colorado Legislature issued no directives

¹⁶ See, Decision No. R14-0190, ¶¶ 19, 28, 51, 63.

¹⁷ See, CenturyLink Statement of Position, at 1.

¹⁸ CenturyLink's argument that the phrase "until the Commission makes a finding" refers exclusively to a future finding is unavailing. "Until" is commonly used in the present and past tenses to mark a specified time, and in this proceeding, funding to the 56 wire center service areas was "affected" pursuant to the Commission's Section 207 findings, issued April 28, 2014.

to the Commission to abandon its findings regarding the 56 wire center service areas, which were known during the 2014 legislative session.¹⁹

17. CenturyLink's argument that the new statutes require a "fresh" look and that there may be "pockets" within the 56 wire centers "without effective competition"²⁰ is inconsistent with CenturyLink's statements in this proceeding. CenturyLink agrees that, based on the Section 207 analysis, the 56 wire center serving areas have effective competition and states "[t]he evidence in this case is clear: each of the 56 wire centers at issue in this phase of the proceedings is effectively competitive under Commission rules and Colorado law ... even without considering competition from most voice over internet protocol ("VoIP") providers or competitive local exchange carriers ("CLECs")...."²¹ Re-litigation of these areas to consider identical Section 207 factors and market analysis under these circumstances as suggested by CenturyLink would be unnecessary and inconsistent with legislative intent.

18. In addition, the findings in this proceeding apply to the 56 wire centers only. Future proceedings to determine the existence of effective competition in other areas will be based on the facts and evidence presented, including determinations on the relevant geographic area for review.²²

19. Previously, Rule 2215 permitted a carrier providing basic service in areas found to be subject to effective competition to show that the cost of provisioning basic service to certain access lines in those areas were greater than revenue, and thus were eligible for high cost

¹⁹ *Sandoval v. Heckers*, 499 P.2d 1169, 1171 (Colo. 1972) (stating a presumption that legislation is passed with deliberation and with full knowledge of all existing law dealing with the same subject).

²⁰ CenturyLink RRR, at 3.

²¹ CenturyLink Statement of Position, Proceeding No. 13M-0422T, at 1.

²² See Recommended Decision, ¶¶ 56-57.

funding under Section 208 prior to the enactment of HB 14-1331.²³ Thus, while a carrier under Rule 2215 could have invoked a cost analysis pursuant to Section 208 *even though* an area has effective competition, HB 14-1331 prohibits the process contemplated in Rule 2215 by allowing funding only in areas found to be “without effective competition” after consideration of the Section 207 factors.

20. Finally, we note that CenturyLink is incorrect that application of the new statutes as of the date of enactment is “retroactive.” The Commission’s Decision discontinues HCSM funding in the 56 areas prospectively after the effective date of HB 14-1331. The Commission is not requiring CenturyLink or providers to return HCSM mechanism funds previously distributed.

21. For all of the foregoing reasons, we deny the applications for RRR.

II. ORDER

A. The Commission Orders That:

1. The Application for Rehearing, Reargument, or Reconsideration filed July 3, 2014 by Qwest Corporation, doing business as CenturyLink QC; El Paso County Telephone Company, doing business as CenturyLink; CenturyTel of Colorado, Inc.; and CenturyTel of Eagle, Inc., is denied, consistent with the discussion above.

2. The Application for Rehearing, Reargument, or Reconsideration filed July 3, 2014 by Viaero Wireless is denied, consistent with the discussion above.

3. This Decision is effective upon its Mailed Date.

²³ Decision No. C12-1442, Proceeding No. 12R-862T, ¶¶ 74-77 (stating that “[t]he adjudication of the application must examine the evidentiary basis upon which the applicant alleges that its costs of providing basic service exceed revenues” pursuant to Section 208(2)(a)(I)).

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
July 23, 2014.**

(S E A L)



ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JOSHUA B. EPEL

PAMELA J. PATTON

GLENN A. VAAD

Commissioners