

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.

**RECOMMENDED DECISION OF
HEARING COMMISSIONER
JOSHUA B. EPEL
DEEMING 56 WIRE CENTERS
EFFECTIVE COMPETITION AREAS**

Mailed Date: February 21, 2014

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I. STATEMENT

1. The Commission opened this proceeding through Decision No. C13-0522, mailed on May 6, 2013, pursuant to recently revised Rules Regulating Telecommunications Providers, Services, and Products, 4 *Code of Colorado Regulations*, 723-2, approved in Proceeding No. 12R-862T (Basic Service Competition Rules). These rules provide the basis to determine whether certain wire center serving areas¹ are effectively competitive for basic service pursuant to § 40-15-207, C.R.S. (Section 207).² Areas found to satisfy the criteria of Section 207 and the Basic Service Competition Rules are designated Effective Competitive Areas (ECAs). The Commission limited its initial review of Colorado’s wire centers to the 56 wire center serving areas identified in Attachment A to this Decision.³

2. By this Decision and its findings, the Hearing Commissioner recommends that the 56 wire center serving areas identified in Attachment A are determined to have effective competition for basic service. In addition, the reclassification of basic service to regulation under part 3 will promote the public interest and the provisioning of adequate and reliable basic service at just and reasonable rates. Therefore, based on these findings, the 56 wire centers are deemed ECAs.

¹ “Wire center serving area” and “wire center” are used interchangeably for purposes of this Decision.

² Reference to subsections is similarly abbreviated herein; *e.g.*, § 40-15-207(1)(a), C.R.S., is abbreviated as Section 207(1)(a).

³ *See*, Decision No. C13-1279-I issued October 10, 2013.

A. Statutory and Other Considerations for Review

3. Under Section 207(a)(1), the Commission may reclassify services, including basic service,⁴ as part 3 services upon a finding that there is effective competition in the relevant market and that such reclassification will “promote the public interest and the provision of adequate and reliable service at just and reasonable rates.” In making the determination of whether effective competition exists, the statute requires that the Commission consider factors set forth in Section 207(1)(b).

4. Section 207(1)(b) provides:

In determining whether effective competition for a specific telecommunications service exists, the commission shall make findings, after notice and opportunity for hearing, and shall issue an order based upon consideration of the following factors:

- (I) The extent of economic, technological, or other barriers to market entry and exit;
- (II) The number of other providers offering similar services in the relevant geographic area;
- (III) The ability of consumers in the relevant geographic area to obtain the service from other providers at reasonable and comparable rates, on comparable terms, and under comparable conditions;
- (IV) The ability of any provider of such telecommunications service to affect prices or deter competition; and
- (V) Such other factors as the commission deems appropriate.⁵

5. Rule 2213(d)(I) further implements and explains these considerations:

The Commission shall consider basic services and similar services offered by multiple, non-affiliated, facilities-based providers, carriers, or other entities through traditional wireline, cable-based, interconnected voice over internet protocol, and wireless technologies.

⁴ Basic service is currently regulated pursuant to part 2 of Title 40, Article 15, C.R.S.

⁵ § 40-15-207(1)(b)(I) - (V), C.R.S.

6. Therefore, pursuant to Rule 2213(d)(I), when considering whether effective competition exists for each relevant area under review, the Commission considers: (1) basic services and similar services offered; (2) the presence of multiple, non-affiliated, facilities-based providers, carriers, or other entities offering such services; and (3) service offerings⁶ through traditional wireline, cable-based, interconnected Voice over Internet protocol (VoIP), and wireless technologies.

7. The Commission limited review in this proceeding to areas where the incumbent provider, CenturyLink, and at least three other facilities-based providers are offering basic and similar services.⁷ In addition, the Commission stated an expectation that “at least a majority of residential customers within the area [shall] have access to multiple providers or carriers offering basic service or similar services....”⁸

B. Procedural Background and Party Position Summary

8. The Commission referred the proceeding to an Administrative Law Judge (ALJ), for determination as to whether any of the 70 wire center serving areas listed in Attachment A to that Decision could be classified as ECAs, pursuant to Section 207 and the Basic Service Competition Rules.⁹ The ALJ ruled upon interventions, confidentiality issues, the scope of the proceeding, and the burden of proof.¹⁰ Additionally, the ALJ set a pre-hearing conference for September 30, 2013.

⁶ As used in this Decision, “service offerings” or “offerings” indicate services that evidence presented in the record indicates are available and offered to customers.

⁷ Decision No. C13-0522, ¶¶ 10, 12. The list of wire centers under review is based on information collected by Commission Staff during our recent rulemaking proceeding.

⁸ *Id.*, at ¶ 24.

⁹ Decision No. C13-0522.

¹⁰ Decision Nos. R13-1091-I, issued September 4, 2013, and R13-1156-I, issued September 17, 2013,

9. The ALJ directed the parties to file, no later than September 16, 2013, their positions as to whether each wire center listed on Attachment A to Decision No. C13-0522 is an ECA under the standards provided in Section 207 and the Commission's rules.¹¹ With the exception of AARP, parties generally took the position that the majority of wire center serving areas under review in this proceeding have effective competition and could be classified as ECAs.¹²

10. On September 30, 2013, the ALJ held a pre-hearing conference to prioritize wire centers for ECA review and set a procedural schedule. On October 10, 2013, the Commission issued a decision rescinding the referral to the ALJ to institute a different schedule and wire center priorities than those ordered by the ALJ.¹³ Chairman Joshua Epel was assigned as the Hearing Commissioner.

11. The order rescinding the referral also directed the Hearing Commissioner to review 56 wire centers.¹⁴ The majority of the 56 wire centers are in densely populated urban areas located along Interstate 25 from the Colorado-Wyoming border to Pueblo.¹⁵

12. The Commission vacated previously scheduled deadlines and any deadlines scheduled at the September 30, 2013, pre-hearing conference. The procedural schedule was revised to require the filing of: Staff Direct Testimony by November 8, 2013; Answer Testimony by December 6, 2013; and Staff Rebuttal by December 18, 2013.

¹¹ Decision No. R13-1091-I.

¹² In its September 16, 2013 filing, intervenor AARP stated that it did not have sufficient information at that time to conclude whether there is effective competition in any of the wire centers that are subject to this proceeding.

¹³ Decision No. C13-1279-I.

¹⁴ Decision No. C13-1279-I

¹⁵ Staff Witness Swinnerton Direct Testimony at Exhibit JVS-10.

13. In its direct testimony, Commission Staff (Staff) recommended that all 56 wire center serving areas be classified as ECAs. This recommendation was supported through answer testimony by Qwest Corporation, doing business as Century Link QC, El Paso County Telephone Company, doing business as CenturyLink, CenturyTel of Colorado, Inc., and CenturyTel of Eagle, Inc. (collectively CenturyLink); the Office of Consumer Counsel (OCC); Bresnan Broadband of Colorado LLC (Bresnan); N.E. Colorado Cellular, Inc., doing business as Viaero Wireless (Viaero); and Verizon affiliates¹⁶ (Verizon).

14. Sprint Communications Company L.P. and Sprint Spectrum L.P. (Sprint) through written testimony stated that the Commission should not deem the 56 wire centers competitive without considering CenturyLink's rates for wholesale Internet Protocol (IP) interconnection, state and federal distribution of high cost funding to CenturyLink, and CenturyLink's wholesale rates for special access services to enterprise customers.¹⁷

15. AARP testified that the Commission should not find the 56 wire center serving areas to be ECAs. AARP argued that there are not sufficient affordable and reliable basic service alternatives for consumers aged 65 and older in the wire centers at question. AARP claims no substitutes for basic local exchange service exist for senior citizens.

16. Upon review of the testimony, the Hearing Commissioner identified the following as issues in dispute and for examination during an evidentiary hearing: (1) whether wireless services are substitutes for basic telephone service; and (2) considerations related to bundled,

¹⁶ For purposes of filings in this proceeding, Verizon affiliates include the following: MCImetro Access Transmission Services LLC, doing business as Verizon Access Transmission Services; MCI Communications Services, Inc., doing business as Verizon Business Services; TTI National, Inc.; Teleconnect Long Distance Services and System Company, doing business as Telecom*USA; Bell Atlantic Communications, Inc., doing business as Verizon Long Distance LLC; NYNEX Long Distance Company, doing business as Verizon Enterprise Solutions; and Verizon Select Services, Inc.

¹⁷ Sprint Testimony, Farrar, at 4-5.

packaged, and stand-alone service offerings.¹⁸ The following witnesses testified at the evidentiary hearing on January 7, 2014: Staff witnesses, Judith Swinnerton, Fiona Sigalla, and Gerald Enright; AARP witness Susan Baldwin; Viaero witness Michael Felicissimo; Sprint witness Jim Appleby; OCC witness Ron Fernandez; and CenturyLink witness Robert Brigham.

17. On cross-examination, Sprint witness Appleby clarified that the 56 wire centers could be classified as competitive under the statutory criteria and Commission rule definition of effective competitive areas,¹⁹ but that the wire centers could be more competitive if CenturyLink's market position in the wholesale market was subject to conditions. AARP Witness Susan Baldwin clarified upon examination that AARP does not oppose designation of the 56 wire centers as ECAs as long as consumer protections are in place, including provider of last resort (POLR) obligations and oversight of consumer complaints.²⁰

18. Statements of Position were filed January 24, 2014, by Sprint, Viaero, CenturyLink, AARP, OCC, Bresnan, Verizon, and Staff. With the exception of AARP, parties generally continue to support classification of the 56 wire center serving areas at issue as ECAs. If the 56 wire center serving areas are reclassified as ECAs, OCC, Bresnan, Sprint, AARP, and Viaero request imposition of certain conditions as identified below.

¹⁸ Decision No. R13-1572-I, ¶ 6.

¹⁹ Hearing Transcript, at 170-171.

²⁰ Hearing Transcript, at 137: 7-20 and 145: 16-20 (by way of example, AARP Witness Baldwin suggests POLR and service quality protections should be considered).

C. ECA Factor Findings and Conclusions

19. After consideration of the criteria set forth in Section 207 and the Basic Service Competition Rules, the Hearing Commissioner recommends a finding of effective competition for each of the 56 wire center serving areas at issue and also recommends that these areas be deemed ECAs.

1. Section 207(1)(b)(I) Consideration: There are no significant economic, technological, or other barriers to market entry and exit in the 56 wire center serving areas.

20. Staff testified that no significant economic, technological, or other barriers to market entry and exit appear to exist in any of the 56 wire center serving areas under consideration.²¹ CenturyLink and others agree with Staff's testimony.²² The Parties emphasize the presence of multiple alternative providers deploying their own plant and facilities, plus CenturyLink's significant loss of market share to unsubsidized wireless, VoIP, and cable providers.²³ These facts demonstrate that alternative providers are not encountering significant barriers preventing them from entering the market and competing with CenturyLink's landline offerings.²⁴

²¹ Staff Statement of Position, at 9 (citing Staff Witness Swinnerton Direct Testimony, at 10:7-11, 13:1-21, 15:6-20:19, Exhibit JVS-04; Staff Witness Enright Direct Testimony, at 25:20-26:5, Exhibit GE-08; Staff Witness Sigalla Direct Testimony, at 16:14-17:23).

²² See, e.g., CenturyLink Witness Brigham Testimony, at p. 32 (stating that CenturyLink's current, declining market share is evidence that no barriers to entry exist); OCC Witness Fernandez, p. 16 (stating that the number of competitors, available technologies, and market share all support the conclusion that there are no barriers to entry).

²³ Sprint contends that wholesale market considerations should be addressed. As discussed below regarding consideration of Section 207(1)(b)(IV) and other concerns raised by parties, Sprint's wholesale market arguments are rejected for the reasons set forth herein, including that facilities-based providers must be present and offering service in the relevant wire center serving area and that an ECA determination does not affect CenturyLink's wholesale obligations.

²⁴ See Staff Witness Sigalla Direct Testimony, at 8:1-15:16; CenturyLink Witness Brigham Testimony, at 7-24.

21. The 56 wire centers listed for review are located primarily along the economic and population corridor of Interstate 25 from Fort Collins through Longmont, Boulder, the metropolitan areas of Denver and Colorado Springs, to Pueblo.²⁵ These are areas of high residential and business density. The economic and physical characteristics of these wire center serving areas, including, but not limited to, geographic characteristics and dense, urban populations,²⁶ promote the entry of facilities-based providers and competitors, and demonstrate the absence of significant barriers to entry.

22. Considering this evidence, the Hearing Commissioner finds that there are no significant economic, technological, or other barriers to market entry for the provisioning of basic services within these areas.

2. Section 207(1)(b)(II) and Commission Rule 2213(d)(I) Consideration: Basic service or similar services are offered by multiple providers in each of the 56 wire center serving areas.

23. Section 207(1)(b)(II) and Rule 2213(d)(I) both require consideration of the number of providers offering “similar services” in the geographic area.²⁷ The Hearing Commissioner agrees with Staff that a “similar service” must perform “at least the same thing as that required of a basic local exchange service provider.”²⁸ “Basic service” is a telecommunications service which “provides a local dial tone line and local usage necessary to

²⁵ See, Staff Witness Swinnerton Direct Testimony at Exhibit JVS-10.

²⁶ No party represents that these 56 areas are rural or remote.

²⁷ Section 207(1)(b)(II) requires consideration of “[t]he number of other providers offering *similar services* in the relevant geographic area.” Rule 2213(d)(I) states that “[t]he Commission shall consider basic services and *similar services* offered by multiple, non-affiliated, facilities-based providers, carriers, or other entities through traditional wireline, cable-based, interconnected voice over internet protocol, and wireless technologies.” (Emphasis added.)

²⁸ Staff Statement of Position, at 9. Pursuant to § 40-15-102(3), “basic service” is a telecommunications service which “provides a local dial tone line and local usage necessary to place or receive a call within an exchange area and any other services or features that may be added by the commission under section 40-15-502 (2).”

place or receive a call within an exchange area and any other services or features that may be added by the commission under section 40-15-502 (2).”²⁹ Therefore, “similar services” provide *at least* a local dial tone and local usage necessary to place or receive a voice call within an exchange area.

24. Staff presented evidence that basic service and similar services, which offer at least local voice calling functionality, are provided by means of traditional wireline, cable, VoIP, or wireless technologies in each of the 56 wire center serving areas.³⁰ Staff’s analysis of the availability of similar services showed that, across the 56 wire center serving areas, numerous competitive local exchange carriers (CLECs)³¹ and wireless service providers³² offer packages at rates comparable to CenturyLink’s service. Staff also argued that, based on Centris market data³³ and CenturyLink access line declines,³⁴ a significant percentage of customers choose alternative services, including wireless services, in lieu of basic service provided by CenturyLink.³⁵

25. Rule 2213(d)(I), requires consideration of multiple, *facilities-based* providers within the relevant wire center serving area. In its decision opening this proceeding, the Commission stated the condition that it expected “at least a majority of residential customers within the area have access to multiple providers or carriers offering basic service or similar services....”³⁶ Staff presented evidence, which no party contested, that service is offered in each

²⁹ Section 40-15-102(3), C.R.S.

³⁰ Staff Witness Swinnerton Direct Testimony at Exhibit JVS-01 and JVS-02.

³¹ Staff Witness Swinnerton, Direct Testimony at First Corrected Exhibit JVS-03

³² *Id.*, at Exhibit JVS-07

³³ Staff Witness Sigalla, Direct Testimony at Confidential Exhibit FDS-2

³⁴ *Id.*, at Confidential Exhibit FDS-3.

³⁵ *Id.*, at 19-20 (Evidence supporting this characterization is derived from data submitted by parties requesting confidential treatment.)

³⁶ Decision No. C13-0522, at ¶ 24.

of the 56 wire centers by the incumbent CenturyLink and at least three other facilities-based providers to no less than 75 percent of the residential population for each wire center serving area.³⁷

26. The parties also submitted evidence of basic and similar service offerings by providers using other carriers' facilities, such as non-facilities-based CLECs³⁸ and "over-the-top" providers.³⁹ When promulgating Rule 2213(d)(I), the Commission's decisions in the rulemaking required the presence of "multiple facilities-based providers" offering basic services in the geographic area under review.⁴⁰ The Commission premised this ruling upon criteria under Section 207 examining the barriers to entry and exit and the adequacy of service.⁴¹ By previous decision, the Commission denied CenturyLink's request to eliminate the "multiple, facilities-based" condition and, instead, include all CLECs and "over-the-top" VoIP providers in Rule 2213, even if these providers used only the facilities owned by the incumbent.⁴² The Commission found consideration of multiple, facilities-based providers necessary, because their presence and offerings indicate low barriers to entry, ensure continued availability of competitive offerings if the incumbent exits the market, and demonstrate the providers' investment and commitment to offering service for the long-term.⁴³

³⁷ See Staff Witness Swinnerton, Direct Testimony at 37:12-13.

³⁸ See, Staff Witness Swinnerton Direct Testimony at 21: 3-7; Exhibit JVS-07; Staff Witness Swinnerton Rebuttal Testimony, at 8.

³⁹ Additional services, including text, email, and social networking are also available to consumers. See CenturyLink Witness Brigham Testimony, at 6-7.

⁴⁰ See Decision Nos. C12-1442 issued December 17, 2012 and C13-0203 issued February 12, 2013, Proceeding No. 12R-862T.

⁴¹ Decision No. C12-1442, Proceeding No. 12R-862T, ¶¶ 28-29.

⁴² Decision No. C13-0203, Proceeding No. 12R-862T.

⁴³ Decision No. C13-0203, Proceeding No. 12R-862T, ¶¶ 19-21.

27. When considering providers in the 56 wire center serving areas where multiple facilities-based providers exist, a different question than that decided in the rulemaking is raised: whether the Commission may include in its examination of effective competition service offerings provided through facilities owned by other providers. The Hearing Commissioner interprets and applies Rule 2213(d)(I) to require the presence of multiple, facilities-based providers as a threshold condition to a finding of effective competition; however, this Rule does not foreclose the Commission from also considering basic and similar service offered by a provider that does not own the facilities used to deliver those services.

28. For these 56 wire center serving areas, multiple facilities-based providers offer basic and similar service. The Hearing Commissioner finds that basic service is being offered by CenturyLink and at least three other facilities-based providers to no less than 75 percent of the residential population for each of the 56 wire center serving areas. In addition, evidence of services offered from both facilities-based and non-facilities providers in the 56 wire center serving areas shows the availability of a great variety of choices. In this instance, the evidence presented by Staff and other parties of non-facilities based providers provides further support for the finding that competition exists within the 56 wire center serving areas.

3. Section 207(1)(b)(III) Consideration: Consumers have the ability to obtain service from other providers at reasonable and comparable rates, on comparable terms, and under comparable conditions.

29. The next statutory consideration is whether basic and similar services can be obtained by customers through comparable service offerings.⁴⁴ Parties, with the exception of AARP, agree with Staff that consumer purchasing preferences within the 56 wire center serving

⁴⁴ Section 207(1)(b)(III).

areas indicate that wireless and other services are used as *substitutes* for traditional wireline basic service provided by the incumbent, CenturyLink.⁴⁵ Data from the Center for Disease Control Report on Wireless Substitution support this contention; consumers⁴⁶ are choosing wireless alternatives in lieu of wireline basic service; also known as “cutting the cord.”⁴⁷

30. AARP contends customers over 65 are more likely to *supplement*, as opposed to *substitute*, their standalone, wireline basic service with wireless or other similar services. The salient question under Section 207(1)(b)(III) is whether alternative, competitive services provide comparable options to standalone basic service for consumers in the relevant wire center serving areas. While AARP makes an unsubstantiated assumption that a segment of the population may be more or less likely to make certain purchasing choices, the preference of any demographic group is not evidence that the market lacks the availability of comparable functionality, rates, terms, and conditions offered from numerous providers.

31. Staff presented evidence that standalone basic service is available in all 56 wire center serving areas and offered by CenturyLink at a cost of \$24.43 per month.⁴⁸ Staff compares service offerings within the 56 wire center serving areas to this basic service offering and demonstrates that options are available to consumers, including additional features, bundles, and packages, from CenturyLink, CLECs, and wireless providers.⁴⁹

⁴⁵ See Staff Witness Swinnerton Direct Testimony, at 19-20 (concluding that wireless service quality provides greater than adequate value and that customers are willing to accept uneven wireless reception in exchange for mobility).

⁴⁶ Exhibit 15, Center for Disease Control Wireless Substitution Report. Table 1, showing a consistent annual trend of an increasing percentage of households choosing to use only wireless phones. Between January to June 2013, 39.4 percent of households nationally used wireless phones exclusively.

⁴⁷ See, Exhibits 15-16 (Center for Disease Control Wireless Substitution Reports).

⁴⁸ Hearing Transcript, at 183:9-17 (CenturyLink witness, Brigham, correcting “\$23.50 per month” provided in CenturyLink Witness Brigham Testimony, at 27 n. 40).

⁴⁹ See Staff Witness Swinnerton Testimony, at 25; Staff Statement of Position, Exhibit 1 (demonstrating options available that are comparable to both the \$24.43 standalone basic service offering, and offerings available for additional feature additions, bundles, and packages).

32. As described in Staff's public filing of Exhibit 1 to its Statement of Position,⁵⁰ eight CLEC providers in addition to CenturyLink offer standalone basic voice service without additional features or long distance with prices ranging from \$12.95 to \$34.60.⁵¹ CenturyLink, CLECs, including cable operators,⁵² and wireless providers offer packages, which include various service offerings, such as local calling packaged with caller ID, call waiting, voice mail, no solicitation, and three-way calling; and bundled services, such as basic service bundled with long distance, broadband, video and data services. While wireless offerings do not include standalone, local service, other options are available to wireless customers, including service plans that allow customers to pay: per minute of use; for set minutes per month; for unlimited domestic minutes (which may include call features, texting, and voicemail); and for additional options, including customer services that have data plans from 250-minute plans to unlimited data usage.

33. No party disputes the evidence of these various bundles, packages, and service offerings presented by Staff. However, AARP argues that data presented do not reflect the demands of the elderly⁵³ and that, because wireless companies do not offer a Single Line Flat Residential (1FR) offering to customers, bundled wireless offerings are not comparable to

⁵⁰ Staff's Exhibit 1 to its Statement of Position is designated as Confidential. Specific information referenced and cited to in this Decision is included on the public version of Exhibit 1 filed by Staff with confidential information redacted in accordance with Rule 1101.

⁵¹ Staff Statement of Position, Exhibit 1. The exhibit further indicates that CenturyLink prices are available in all of its Colorado service areas; the wireless and CLEC offerings represented are available in Colorado but were not identified down to the wire center level.

⁵² Staff's Statement of Position, Exhibit 1, does not differentiate between CLEC offerings; however, Staff has previously indicated through testimony that two CLECs offering service in the 56 wire center serving areas are cable companies. *See, e.g.*, Swinnerton Direct Testimony, at 33: 8-17 and JVS-02.

⁵³ AARP Witness Baldwin Testimony, at 16:6-8.

standalone basic service provided over wireline.⁵⁴ AARP contends that a significant percentage of households rely on standalone basic service.⁵⁵

34. Staff disagrees with AARP and argues that, while AARP is correct that wireless companies do not offer 1FR services in the 56 wire center serving areas, AARP is mistaken in its assumption that comparable alternative services must be a “carbon copy” of CenturyLink’s wireline offering.⁵⁶ Exhibit 1 to Staff’s Statement of Position illustrates that consumers can find wireless offerings with comparable rates. Staff further notes that wireless offerings, while not identical to 1FR wireline service, provide consumers the choice of mobility and additional communication services.⁵⁷

35. Staff provides evidence of the increasing number of Colorado consumers that have substituted wireless service as comparable to wireline service. For example, Staff and CenturyLink presented evidence showing at least 38.2 percent of U.S. households have “cut the cord” to wireline basic service and 15.9 percent of remaining households are “wireless mostly.”⁵⁸ In 2012, 42.9 percent of all Colorado households, and 35.2 percent of households in the Denver metropolitan Counties of Adams, Arapahoe, Denver, and Douglas, used only wireless technology to provide their voice service needs.⁵⁹ CenturyLink also presented evidence that, between 2001 and 2011, it lost two-thirds of its access lines while Colorado’s population increased 16 percent, further indicating the increase in customers’ preference to use services other than CenturyLink’s

⁵⁴ *Id.*, at 13-14, 24.

⁵⁵ *Id.*, at 30.

⁵⁶ Staff Statement of Position, at 14.

⁵⁷ *Id.* n. 30 (stating that AARP “repeatedly invokes [the] argument, with little supporting evidence, that consumers are supplementing their landline service as opposed to cutting off their landline in favor of wireless.”)

⁵⁸ *See, e.g.*, Exhibits 15-16 (Center for Disease Control wireless substitution reports); CenturyLink Witness Brigham Testimony, at 2-3.

⁵⁹ Exhibit 16, Center for Disease Control Wireless Substitution Report, page 5, Table 1.

wireline basic service.⁶⁰ Even 22 percent of AARP customers say they primarily use their mobile phone.⁶¹

36. By the plain meaning of the language in Section 207(1)(b)(III), the ability of consumers in the 56 wire center serving areas to obtain basic or similar service from other providers at “reasonable and *comparable* rates, on *comparable* terms, and under *comparable* conditions”⁶² does not require that *identical* rates, terms, and conditions be offered.

37. In the rulemaking proceeding, the Commission included wireless services as part of its evaluation of similar services and of comparable rates, terms, and conditions:

[t]he extent that wireless service is available, reliable, and thus a substitute for basic service in a given wire center serving area in Colorado will be reviewed when the Commission makes findings regarding effective competition, including whether it is within the public interest to reclassify basic service to a part 3 service in that area per § 40-15-207, C.R.S.”⁶³

38. In this proceeding, the Commission also indicated that competitive services for basic service may include standalone basic service and services bundled or packaged with other communications services, and that these service offerings within a given wire center would be considered in determining if reclassification would promote the public interest.⁶⁴

39. Staff’s Exhibit 1 to its Statement of Position, in addition to party testimony and evidence in the record, indicates that customers in the 56 wire center serving areas have the ability to obtain services *comparable* to that offered by CenturyLink for \$24.43. Further still, it is apparent that a customer has the choice of adding ancillary voice, internet access, video, and

⁶⁰ CenturyLink Witness Brigham Testimony, at 9-10.

⁶¹ Exhibit 21.

⁶² Section 207(1)(b)(III) (emphasis added).

⁶³ Decision No. C13-0203, ¶ 23, Proceeding No. 12R-862T.

⁶⁴ Decision No. C13-0522, ¶ 25, Proceeding No. 13M-0422T.

data services and products, including packages and bundles, offered by providers within the relevant areas.

40. The Hearing Commissioner finds evidence and testimony presented by AARP is unconvincing and is often unsupported or based on assumptions that are not supported. It is reasonable under the evidence offered in this proceeding to conclude that customers can, and do, choose to purchase wireless and other services in lieu of CenturyLink's basic service offering within these 56 wire center serving areas. In addition, nothing presented in this proceeding indicates that a reclassification of basic service in these 56 wire center serving areas reduces the ability of customers to continue to obtain standalone basic service.

41. For these 56 wire center serving areas, the Hearing Commissioner finds that customers have the ability to obtain basic service and other similar services from providers other than CenturyLink at reasonable and comparable rates, on comparable terms, and under comparable conditions.

4. Section 207(1)(b)(IV) Consideration: Evidence indicates that no one provider has the ability to affect prices or deter competition.

42. In its direct testimony, Staff contends that the presence of multiple providers is evidence that CenturyLink does not have the ability to deter competition.⁶⁵ Staff argues that CenturyLink's inability to affect prices or deter competition is evidenced by CenturyLink's market share data⁶⁶; the decision of consumers to use a provider other than CenturyLink; and the presence of at least four facilities-based providers offering service to 75 percent or more of the residential customers in each of the 56 wire center serving areas. With the exception of AARP⁶⁷

⁶⁵ Staff Witness Swinnerton Testimony, at 26:13-15.

⁶⁶ Staff Witness Sigalla Confidential Direct Testimony, at Confidential Exhibit FDS-03.

⁶⁷ As indicated above, AARP argues that the relevant market is standalone basic service only.

and Sprint, the parties agree with Staff's conclusion that CenturyLink is unable to affect prices or deter competition within the 56 wire center serving areas. Sprint contends that CenturyLink's market power in the wholesale market can influence competition in the retail market.⁶⁸

43. The relevant consideration for review is whether the evidence in this proceeding indicates that CenturyLink is able to affect prices or deter competition for basic service. By its rules, the Commission included consideration of multiple, facilities-based providers within each wire center serving area. In Decision No. C13-0203, Proceeding No. 12R-862T, the Commission determined that the presence of carriers providing basic services over a substantial portion of their own last-mile or loop facilities, without regard to technology, demonstrates that the carrier has cleared the requisite barriers to entry and is not subject to the risk of its wholesale carrier exiting the market.⁶⁹ By including consideration of multiple, facilities-based providers, the Commission has addressed much of Sprint's contention that any one provider has wholesale market control in a wire center serving area.

44. In the present matter, the Hearing Commissioner determines that multiple, facilities-based providers are offering basic service or similar services in the 56 wire center serving areas under review. Their presence diminishes the risk of the loss of competitive service offerings and the unavailability of basic service associated with the exit of one, dominant facilities-based carrier from the market.

45. Further, designation of a wire center as an ECA will not affect CenturyLink's wholesale obligations. Since the passage of the Telecommunications Act of 1996,

⁶⁸ Bresnan does not oppose reclassification, and thus does not contest that this factor favors a finding of effective competition, but it requests, similar to Sprint, that the Commission ensure that competitors retain the right to appear before the Commission for §§ 251 and 252, *Code of Federal Regulations*, issues and other wholesale disputes. Bresnan Statement of Position, at 1, 4-5.

⁶⁹ Decision No. C13-0203, Proceeding No. 12R-862T, ¶ 19.

this Commission and the Federal Communications Commission (FCC), pursuant to 47 U.S.C. §§ 251 and 252, have engaged in comprehensive regulation of CenturyLink's and other incumbents' wholesale services and networks to promote and preserve local service competition. The Hearing Commissioner agrees with Staff that an ECA designation would not modify or eliminate CenturyLink's wholesale obligations under governing state and federal law.⁷⁰

46. Therefore, the Hearing Commissioner finds unconvincing Sprint's argument that CenturyLink can manipulate the basic service market in these 56 wire center serving areas through its wholesale market power.

47. The evidence of CenturyLink's line loss statistics, the substitution of wireless for wireline services, and that numerous, comparable options are available to customers, demonstrates CenturyLink's inability to deter competition or affect prices for basic services through its wholesale services in the 56 wire center serving areas. The Hearing Commissioner agrees with Staff that the evidence in the record, including the presence of multiple, facilities-based providers, is compelling. Based on this evidence, for the provision of basic service in the 56 wire center serving areas at issue, there is no ability of any one provider to affect prices or deter competition.

⁷⁰ Staff Witness Notarianni Rebuttal Testimony, at 7.

5. Section 207(1)(a) Consideration: Regulation of basic service under part 3 in each of the 56 wire center serving areas will promote the provision of adequate and reliable services at just and reasonable rates.

48. In addition to a finding of effective competition by applying the factors set forth in Section 207(1)(b), the Commission must consider whether reclassifying services to part 3 “will promote the public interest and the provision of adequate and reliable service at just and reasonable rates.”

49. First, most parties agree that, within the 56 wire center serving areas, reclassification of services under part 3 will promote the provision of adequate and reliable services. AARP raises concerns with the reliability of wireless, VoIP, and other nontraditional services, particularly in emergency situations.⁷¹ However, as AARP admits in its hearing testimony, and as Staff points out in its Statement of Position, concerns with the reliability, including advantages and disadvantages of different telecommunications technologies, vary depending on the specific emergency situation.⁷² Further, CenturyLink’s POLR obligation would not be eliminated,⁷³ and basic emergency service shall continue to be regulated pursuant to part 2.⁷⁴

50. Considering this evidence, including the continuation of POLR obligations, the Hearing Commissioner rejects AARP’s contention that the adequacy and reliability of basic service will be jeopardized. Decreasing regulation will promote competition further within the 56 wire center serving areas, which will in turn promote consumer choice in service offerings

⁷¹ AARP Witness Baldwin Testimony, at 16:2-5; 35:10-12.

⁷² Hearing Transcript, at 128:22-130:14; Staff Statement of Position, at 21.

⁷³ See Rule 2186 (requiring separate application to consider relinquishment of POLR).

⁷⁴ See Rule 2213(e) (excluding basic emergency service and white page directory listings from reclassification in areas deemed ECAs); See also Rule 2214(b).

that are “adequate and reliable.” The Hearing Commissioner agrees with Staff that reclassification of services by this Decision will promote the provision of adequate and reliable services within the 56 wire center serving areas.

51. Additionally, the Hearing Commissioner also agrees with Staff and other parties that reclassification will promote the provision of services at just and reasonable rates. Within these 56 wire center serving areas, evidence in this proceeding indicates that consumers have a choice of services, including service offerings priced at or around \$24.43, in addition to offerings that provide additional services to standalone basic service.⁷⁵ Where multiple providers are present and competition exists, customers benefit from a variety of pricing and service options. For qualifying customers who need financial assistance, the FCC’s lifeline program is available.⁷⁶ If effective competition exists pursuant to the considerations in Section 207(1)(b), as it does here, decreasing the costs of regulation through reclassification will better enable competitive providers to meet consumer needs, including the promotion of just and reasonable rates.

6. Section 207(1)(a) Consideration: Regulation of basic service under part 3 in each of the 56 wire center serving areas will promote the public interest.

52. Based on the evidence provided, the Hearing Commissioner finds that reclassification of basic service and related services from part 2 to part 3 will promote the public interest. Reduced Commission regulation over basic service will result in additional pricing flexibility and reduced regulatory costs, therefore promoting increased competition to the benefit of consumers.

⁷⁵ See, e.g., Staff Statement of Position, Exhibit 1.

⁷⁶ Exhibit 17, at 1.

53. The Commission will continue to maintain important safeguards, regardless of reclassification. Deeming the 56 wire center serving areas ECAs shall not impact regulation of basic emergency service.⁷⁷ POLR obligations shall also remain unchanged, unless the Commission makes a separate finding that relinquishment of these obligations is warranted. The Commission also retains the ability to audit books and records of all regulated telecommunications providers, even in areas deemed ECAs, enabling review of pricing and service offerings. If the Commission finds that circumstances have changed in any given ECA, it may consider whether regulation pursuant to part 2 is in the public interest, which proceeding can be initiated by application or upon the Commission's own motion.⁷⁸

54. Finally, while regulatory burdens are lessened in ECAs, part 3 regulation of basic service within these areas continues to include important consumer protections. Pursuant to Rule 2214(a), while tariff provisions are no longer required, each provider of part 3 services in an ECA shall make its retail service rates, terms, and condition available on its website. Rule 2214(c) further states that all providers offering service in ECAs shall continue to be regulated pursuant to all rules applicable to part 3 services and, including without limitation, the following substantive rules: Reports (Rule 2006(a), (b), (f), (g), (h), (i), and (j)), Application for LOR (Rule 2103), Numbering Administration (Rules 2700 through 2741), Programs (Rules 2800 through 2895), Provider Obligations to Other Providers (Rules 2500 through 2588), and Collection and Disclosure of Personal Information (Rules 2360 through 2362).

⁷⁷ OCC requests that, in ECAs the Commission retain "911 emergency services jurisdiction over all wire centers whether they have been determined to be, or not to be, ECAs." OCC Witness Fernandez Testimony, at 2, 18. The Commission has addressed this concern in its Basic Service Competition Rules by retaining basic emergency service in part 2, even in areas deemed ECAs.

⁷⁸ Rule 2213(c).

55. With these important protections in place, in addition to the decrease in regulatory burden and likelihood of consumer benefit from increased competition in areas with lightened regulation, the Hearing Commissioner finds that reclassification of basic service to part 3 will promote the public interest.

D. Future Proceedings

56. Parties raise concerns that may affect future proceedings in which the Commission considers reclassification of basic service pursuant to Rule 2213, but that are not at issue in this proceeding. The determinations in this proceeding are based on the facts and evidence presented as they relate to the 56 wire center serving areas. The Hearing Commissioner agrees with parties, including Staff and Viaero, who caution against designating the 75 percent coverage criterion applied by Staff, or that the expectation that “at least a majority of residential customers within the area have access to multiple providers or carriers offering basic service or similar services” as stated in Decision No. C13-0522, as a binding standard for future ECA determinations.⁷⁹ Similarly, in future proceedings, the specific number of providers considered here is not binding precedent in any future proceeding.⁸⁰

57. In addition, Viaero points out that self-reported carrier coverage maps and signal strength information may be insufficient for ECA analysis in future Commission proceedings, but it does not contest the reliability of these data in the instant proceeding.⁸¹ The Hearing Commissioner reiterates that the record being reviewed here is applicable to the

⁷⁹ See Decision No. C13-0522, ¶ 24.

⁸⁰ Rule 2213(d)(I) specifies only that the Commission will consider “multiple” providers in making this determination. Section 207(1)(b)(II) asks that the Commission consider the “number of other providers offering similar services,” but does not designate any specific number in making a determination of effective competition.

⁸¹ Viaero Witness Felicissimo Testimony, at 2, 8-9, and Statement of Position, 3-4. As discussed herein, Viaero also states concern with using the “75% coverage” determination for future proceedings.

instant proceeding, which addresses only the potential reclassification of the 56 wire center serving areas at issue. Arguments and issues addressing effective competition in other wire center serving areas will be presented and considered in future proceedings. The Hearing Commissioner recognizes that parties will raise different facts and issues, particularly for rural and other geographic areas of the state, which are not applicable to the instant determinations and findings.

E. Additional Concerns Raised by Parties

58. In conjunction with the arguments set forth above, parties raise additional considerations. Many of these requests fall outside of the scope of the instant proceeding.

59. First, Sprint sets forth certain criteria that it believes must be addressed prior to making an ECA determination, including wholesale and IP interconnection issues. As stated above, not only did the Commission address wholesale market power concerns by evaluating the presence of facilities-based providers, but also wholesale and interconnection obligations are not affected by this reclassification. The Hearing Commissioner agrees with Staff: the issues raised by Sprint are beyond the scope of the instant proceeding and, as even Sprint recognizes, such matters should be addressed in future proceedings as necessary.⁸²

60. Second, OCC and AARP request the Commission retain complaint jurisdiction in the 56 wire center serving areas at issue.⁸³ The Commission recently determined in Proceeding No. 12R-862T not to retain complaint jurisdiction for basic service in areas deemed ECAs. The Hearing Commissioner finds no evidence presented here warrants an alternative determination for the 56 wire center serving areas at issue.

⁸² See generally, Staff Witness Notarianni Rebuttal Testimony.

⁸³ OCC Witness Fernandez, at 2, 17-18; AARP Witness Baldwin Testimony, at 45.

61. Finally, Sprint and Bresnan contend that the Commission should eliminate all high cost support mechanism (HCSM) funding in areas deemed ECAs. HCSM considerations are not at issue in this proceeding.⁸⁴ The Commission addressed review of HCSM funding in areas deemed ECAs within the Basic Service Competition Rules. Rule 2215(a) provides in relevant part that:

Distribution of HCSM funds will be eliminated in an ECA 180 days after the effective date of a Commission order designating the area as an ECA, unless within that 180 days after the effective date of the Commission order, the provider receiving funds from the HCSM files an application pursuant to paragraph 2215(b).

62. The process for determining HCSM distributions in ECAs shall be addressed in a separate proceeding pursuant to Rule 2215 and Commission order.⁸⁵

F. Conclusion

63. After consideration of the standards set forth in Section 207 and the Basic Service Competition Rules, and based on the record of this proceeding, the Hearing Commissioner finds that effective competition for basic service exists in the 56 wire center serving areas identified in Attachment A to this Decision. In addition, the Hearing Commissioner finds that regulation under part 3 will promote the public interest and the provision of adequate and reliable service at just and reasonable rates. All areas shall be deemed ECAs in accordance with the Basic Service Competition Rules.

⁸⁴ Sprint Statement of Position, at 2, 9-10 (also arguing that, by this proceeding, the Commission should declare a presumption against funding in areas deemed ECAs); Bresnan Statement of Position, at 1, 2-4.

⁸⁵ By Decision No. C13-0203, Proceeding No. 12R-862T, ¶ 47, the Commission clarified that applications would be due 180 days following a determination of effective competition in a given area, or 60 days following the completion of considerations to determine HCSM application policy. At present, Proceeding No. 13M-0877T, is opened and assigned to an ALJ by Decision No. C13-0958. The ALJ was instructed to initiate an expedited review of HCSM application processes pursuant to Rule 2215 for purposes of making recommendations on HCSM application policy and review. This consideration is in addition to the further consideration of the HCSM rules, generally, after making this initial recommendation.

II. ORDER

A. The Commission Orders That:

1. Basic services provided in all 56 wire center serving areas identified in Attachment A are reclassified to part 3 pursuant to § 40-15-207, C.R.S.

2. All 56 wire center serving areas identified in Attachment A are classified as effective competition areas, as defined in the Rules Regulating Telecommunications Providers, Services, and Products, 4 *Code of Colorado Regulations* (CCR), 723-2.

3. As stated in Rule 2214, 4 CCR 723-2, upon a Commission determination pursuant to § 40-15-207, C.R.S., that basic service shall be reclassified to part 3 regulation, regulation of other services listed in § 40-15-201(2), C.R.S., with the exception of basic emergency service and white page directories, within the 56 wire center serving areas shall be governed by part 3 of Article 15, Title 40, C.R.S., and by Rule 2214, 4 CCR 723-2.

4. Consistent with Rule 2215, 4 CCR 723-2, unless a provider files an application in a separate proceeding requesting high cost support mechanism funding within an area identified in Attachment A, high cost support mechanism funds distributed to the provider for that area will be eliminated.

5. 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.

6. 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 be 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 Hearing Commissioner and the parties cannot challenge these facts.

7. 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

JOSHUA B. EPEL

Hearing Commissioner

ATTEST: A TRUE COPY

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

Doug Dean,
Director