Decision No. C04-0545

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 03A-061T

IN THE MATTER OF THE APPLICATION OF WESTERN WIRELESS HOLDING CO., INC. FOR DESIGNATION AS AN ELIGIBLE TELECOMMUNICATIONS CARRIER.

DECISION GRANTING APPLICATION SUBJECT TO CONDITIONS AND GRANTING MOTION FOR LEAVE TO SUPPLEMENT CLOSING STATEMENT OF POSITION

Mailed Date: May 26, 2004
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I. BY THE COMMISSION

A. Statement

1. This matter comes before the Commission for consideration of an Application for Designation as an Eligible Telecommunications Carrier (ETC) pursuant to Commission Rule 4 *Code of Colorado Regulations* (CCR) 723-42-7 and Request for Waiver of Requirements of Rule 4 CCR 723-42-7.2.2, filed by Western Wireless Holding Co, Inc., a wholly owned subsidiary of Applicant Western Wireless Corporation (Western Wireless or WW) on February 14, 2003. Western Wireless did not seek Eligible Provider status in this matter. Western Wireless seeks ETC status in order to receive federal universal service support within certain individual wire centers served by CenturyTel of Eagle, Inc. (CenturyTel), within Western Wireless' current signal coverage areas.

2. Intervenors in this application included Commission Staff (Staff), CenturyTel, the Colorado Telecommunications Association, Inc. (CTA), and N.E. Colorado Cellular, Inc. (NECC) (collectively with Western Wireless, the Parties). All intervenors participated through counsel in the application hearing and filed statements of position (SOPs).

3. At a prehearing conference held on May 13, 2003, we made several procedural determinations. First, we ordered the Parties to file their direct testimony, answer testimony, and rebuttal/cross-answer testimony in June and July 2003. In determining the proper scope for inquiry in this case, we held that all ETC requirements were at issue with respect to the nine[1] new wire centers included in Western Wireless' application for designation as an ETC. Hearings on the application were held on August 4 and 5, 2003. The Parties subsequently filed their individual SOPs.

4. As we begin our analysis, we point out that despite the limited geographic scope (five wire centers) of Western Wireless' ETC application, this docket contains a number of significant public policy issues for us to consider. We are cognizant that our decision in this docket will have important ramifications for rural Colorado's wireless consumers including the extent to which the market efficiently drives the development and growth of rural wireless services.[2] Indeed, we believe this is a classic case of determining what mix of imperfect regulation and imperfect markets best serves the public interest. Moreover, as detailed below, we are determining public interest standards in a regulatory and legal climate with unsettled guidelines. Consequently, we find this the ideal opportunity to clarify Colorado's position in a debate over the role public subsidies will play in the growth and development of rural wireless

[1] There was some initial confusion as to the number of wire centers in which Western Wireless sought ETC designation. However, the Parties resolved the discrepancy and it was determined that Western Wireless sought ETC designation in five wire centers identified more fully in this Order.

[2] At the August 4, 2003 hearing, in response to questions from Chairman Sopkin, Western Wireless witness Mr. Blundell indicated that if the Commission approved WW's Application, WW might ask the Commission to reconsider the terms and conditions of the stipulation approved in Docket No. 00K-255T (Tr. 8/4 p 97). The stipulation approved in that docket contains Commission approved standards for affordability and consumer protection. It is also reasonable to assume that Commission approval of WW's Application would result in other wireless providers (such as NECC) now operating under similar stipulations to petition the Commission to reconsider their stipulations. At the August 5, 2003 hearing, Staff witness Ms. Fischhaber indicated she expects the Commission will receive more wireless applications in the future (Tr. 8/5, p. 57).

markets. Central to that debate is the issue of whether public subsidies for the provision of wireless services to rural high cost consumers will be accompanied by any of the standards for affordability and consumer protection as delegated to the states by Congress pursuant to the Telecommunications Act of 1996 (Act or Telecom Act).

5. Now, being duly advised in the matter, we contingently grant Western Wireless' application consistent with the discussion below.

II. FINDINGS AND CONCLUSIONS

A. Procedural Background

6. In this docket, Western Wireless seeks an order from the Commission designating it as an ETC, qualified to receive federal universal service support within five of CenturyTel's wire centers: Branson, Campo, Cheyenne Wells, Holly, and Walsh. Western Wireless is applying for ETC status in these CenturyTel exchanges because our decision in the original Commission denial of these exchanges was based on the fact that Western Wireless did not intend to serve the entirety of the CenturyTel study area. *See* Commission Decision No. C01-629. That order further noted that a proceeding to disaggregate and target support and a proceeding to redefine the CenturyTel service area was required to be completed before such a designation could occur. Such proceedings have been completed. CenturyTel chose Path 3, targeting costs to a "low-cost" group and a "high cost" group. Of CenturyTel's 53 wire centers, 7 were included in the "low-cost" group and 46 were included in the "high-cost" group. Once CenturyTel filed its Path 3 filing with the Commission, the Commission filed a petition with the Federal Communications Commission (FCC) requesting redefinition of CenturyTel's current service area from equaling CenturyTel's study area to equaling 53 separate service areas.

7. On July 23, 2003, in Docket No. 00K-255T, Western Wireless filed a Motion for Clarification or, in the Alternative, a Motion to Reopen the Record and for Shortened Response Time. On September 2, 2003, in Decision No. C03-0975, we clarified that Western Wireless has in fact been granted ETC designation in the service areas of CenturyTel, effective upon redefinition of those wire centers on November 27, 2002.[3] The effect of granting the Motion for Clarification was to limit the instant application to five wire centers (Branson, Campo, Cheyenne Wells, Holly, and Walsh). These five wire centers were not included in Docket No. 00K-255T (commonly called WW1).

B. **Summary of Party's Positions**

8. The Parties have presented the Commission with three options. Western Wireless requests that the Commission designate it as a federal ETC without requiring it to comply with consumer protection rules or submit a Basic Universal Service (BUS) plan with accompanying assurances of affordability. Western Wireless referred to this approach as "regulation lite." This option is also supported by NECC. Staff, on the other hand, requests the Commission enter an order granting Western Wireless' application designating Western Wireless as a federal ETC so long as such designation is consistent in every respect with the obligations established in WW1. Those obligations include requiring Western Wireless to submit new pricing plans for Commission approval and a Commission Order stating that Western Wireless' ETC status shall be subject to the terms and conditions provided in the WW1 stipulation. CTA/CenturyTel requests that the Commission deny outright Western Wireless' application.

[3] The Commission found that the designation of Western Wireless as an ETC in the CenturyTel wire centers identified in Attachment 2 is subject to the stipulation and settlement agreement approved by the Commission in this docket in Decision No. C01-476. The Commission found that Western Wireless shall be bound by the rates, terms, and conditions contained within the stipulation and settlement agreement as approved by the Commission.

1. **Staff's Position**

9. As long as Western Wireless' ETC designation in the five CenturyTel wire centers is consistent in every respect with the competitively neutral obligations established in WW1, Staff supports Western Wireless' application. According to Staff, since an application for ETC status in rural or high cost geographic areas of Colorado is, in essence, an application for a public subsidy for offering basic universal telecommunications service, the Commission should exercise the authority delegated to it by Congress, and impose on Western Wireless the competitively neutral requirements established in the WW1 Docket so that Western Wireless is accountable to a defined set of standards in the provisioning of a subsidized service.

10. Staff maintains that should the Commission grant Western Wireless ETC status in the five wire centers, Western Wireless should be required to submit new pricing plans to the Commission for a determination that the plans are affordable, just, and reasonable. This requirement is consistent with obligations established in the WW1 Docket. Additionally, according to Staff, the Commission should enter an Order stating that Western Wireless' ETC status shall be subject to the terms and conditions provided in the WW1 Stipulation. Once these conditions are in place, Staff supports Western Wireless' application.

11. Staff argues that the Commission has legislative authority to impose the competitively neutral requirements established in the WW1 Docket upon applicants seeking ETC designation in Colorado. Staff maintains that it is abundantly clear Congress delegated to the Commission all the tools necessary to preserve and advance BUS, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers, so long as the Commission does so on a competitively neutral basis consistent with the universal service principles set forth in 47 U.S.C. § 254 of the Act.

12. Staff asserts that Congress has also charged the Commission with ensuring that BUS is available at rates that are just, reasonable, and affordable. Staff further claims that Western Wireless has not presented any evidence remotely suggesting the competitively neutral ETC requirements established in the WW1 Docket exceed the Commission's authority.

13. Staff argues that the Commission should pay no heed to Western Wireless' proposed "regulation lite" concept, which, according to Staff, essentially asserts that it is unnecessary to set forth in advance any obligations, including the competitively neutral obligations established in the WW1 Docket, in connection with granting its application for ETC designation in the five wire centers. Staff asserts that there is a problem embedded in Western Wireless' assertion that we have a "very heavy stick" in our authority to revoke its ETC designation should Western Wireless fail to meet the "regulation lite" criteria. That is, should the Commission later attempt to revoke Western Wireless' ETC status in a show cause proceeding because it failed to fulfill obligations that were not established at the time ETC status was granted, the Commission would be left with no standard to apply in such a proceeding.

14. In Staff's opinion, consumer protection issues are the most important issue for Commission consideration. According to Staff, without protection to consumers, the public interest test fails. Staff explains that Commission Rule 4 CCR 723-2 deals with various consumer protection issues including deposits, denial or discontinuance of service, complaints, billing requirements, directories for basic service, construction and maintenance of plant, provision of service during emergencies, adequacy of service, trouble report responses, retention of records, local calling area standards, and availability of service. According to Staff, the WW1 Stipulation alleviated Staff's concerns about consumer protection issues and concretely

tied these issues to Western Wireless maintaining its ETC designation, thus providing a favorable outcome of this public interest issue.

15. In her Answer Testimony, Staff witness Ms. Fischhaber testified that she believed a similar stipulation was necessary in this docket for a positive outcome to the public interest test. She maintained that, without it, customer protection does not exist. In addition, Ms. Fischhaber claimed that the absence of a stipulation creates an unfair competitive advantage for Western Wireless over CenturyTel and NECC, which are bound to such standards. She contended that a set of standards would clearly outline what is expected of Western Wireless in terms of performance and responsibilities to this Commission and concretely state what the Commission will require of Western Wireless to maintain its ETC designation. Ms. Fischhaber pointed out that Western Wireless is expected to follow the Commission's customer protection rules as written in order to be designated as an ETC. She argued that, under 47 U.S.C. § 332(c)(3), states may regulate other terms and conditions of commercial mobile radio service (CMRS) providers such as customer billing practices and consumer protection requirements. Additionally, states may impose on CMRS providers requirements related to universal service as long as these requirements do not constitute rate or entry regulation.

16. Staff maintains that the Commission must establish a firm and competitively neutral standard at the time it grants ETC status and be consistent in its use of that standard in all future proceedings relating to granting and revoking ETC status. According to Staff, if the Commission adopts Western Wireless' "regulation lite" approach, the Commission will be without standards, and therefore without parameters to successfully revoke Western Wireless' ETC status in a show cause proceeding, should it become necessary.

2. **Western Wireless' Position**

17. Western Wireless requests that the Commission enter an order finding that it is a common carrier and can provide the supported services in the affected wire centers upon designation. Western Wireless explains that, based on Commission action to redefine CenturyTel's ETC service area by wire center, each wire center has become its own ETC service area. Western Wireless maintains that it can provide service within each of the affected wire centers. Western Wireless claims it has the ability and has committed to offer and advertise the services throughout each affected wire center. It has determined that it could today serve at least 85 percent of the population in each area and maintains there is no requirement to provide ubiquitous service immediately. Western Wireless argues that its requested service areas do not raise cream skimming concerns and that Staff's concern that certain wire centers were being excluded by Western Wireless has now been rendered moot.

18. Western Wireless maintains that the Commission's role is to designate carriers, not approve offerings. According to Western Wireless, the FCC specifically rejected the notion that a carrier must present and obtain approval for offerings it will make as an ETC:

> Contrary to the arguments of the Alabama Rural LECs, (an ETC applicant) is not required to provide detailed description of its planned universal service offerings beyond its commitment to provide, or statement that it is now providing, all of the services supported by the universal service mechanism.[4]

Western Wireless contends that there is no mechanism for this Commission to evaluate service offerings and make funding decisions for either incumbent local exchange carriers (ILECs) or competitive carriers like Western Wireless.

[4] *In the Matter of the Federal State Joint Board on Universal Service, RCC Holdings, Inc. Petition for Designation as an Eligible Telecommunications Carrier throughout its Licensed Service Area in the State of Alabama*, CC Docket 96-45, DA 02-3181, Memorandum Opinion and Order (Nov. 26, 2002) (Alabama Order).

19. Western Wireless also maintains that its designation is in the public interest. According to Western Wireless, under 47 U.S.C. § 214(e) of the Act, an additional ETC shall be designated in an area served by a rural telephone company only if the public interest would be served. It claims that the FCC has established a public interest test that presumes increased competition in rural areas benefits rural consumers, and places the burden of demonstrating harm to consumers on opposing local exchange carriers (LECs).[5]

20. Western Wireless opines that designating it as an ETC in the affected wire centers will benefit rural consumers in those areas, because in the long run the only meaningful competition to landline companies will come from wireless networks. According to Western Wireless, Congress, the FCC, the Colorado Legislature, and the Commission support competition because basic economic theory provides that competition spurs efficiency and innovation, which benefits consumers.

21. Procedurally, Western Wireless contends that once customer benefits are demonstrated, the burden then shifts to opposing parties to show why consumers would be harmed by its designation as an ETC. Any assertions of customer harm made by intervenors and Staff are without support according to Western Wireless, and should be dismissed based on the record evidence. For example, Western Wireless contends that CenturyTel's concerns that its provision of services to consumers is threatened by designating Western Wireless as an ETC is a fear based on subsequent policy changes that might be made with regard to the federal fund.

[5] *In Re Federal-State Joint Board on Universal Service; Western Wireless Petition for Designation as an Eligible Telecommunications Carrier in the State of Wyoming*, CC Docket No. 96-45, Memorandum Opinion and Order, (CCBB 2000).

Western Wireless maintains that the FCC has repeatedly rejected generalized claims of harm like those made by CenturyTel/CTA.

22. Additionally, Western Wireless maintains that the Commission should reject the intervenors' claim that consumers will be harmed because of increases to the federal universal service funds (USFs). According to Western Wireless, it is not the job of this Commission to decide those funding mechanisms do not work. Western Wireless maintains the FCC has specifically rejected the notion that issues of high-cost funding are relevant to an ETC designation proceeding.

23. According to Western Wireless, CTA made a convoluted argument that it would not be in the public interest to designate Western Wireless as eligible to receive support for its conventional wireless customers. This assertion was based on CTA's claim that conventional customers are "low cost" customers in "high support" areas. Western Wireless maintains that this argument is contrary to law, facts, and common sense and would be a violation of FCC Rule 47 C.F.R. § 54.201(h), which requires a state commission to designate a common carrier "that meets the requirements of this section as an eligible telecommunications carrier irrespective of the technology used by such carrier." Western Wireless goes on to argue that CenturyTel was in control of how it disaggregated its support, and cannot now seek to deny competition based on how its support is disaggregated.

24. Regarding Staff's claims, Western Wireless asserts that the public interest does not require the imposition of consumer protection rules that do not otherwise apply. It contends that without such evidence (beneficial or harmful), Staff is proposing to regulate a competitive market already subject to FCC oversight, without a reason to do so. Western Wireless concludes

that Staff has presented no compelling case for the Commission to second-guess the FCC's decisions about how to best regulate wireless markets.

25. Western Wireless requests that the Commission break from its prior cases and experiment with a hands-off approach to federal ETC designation that allows carriers to respond to competitive pressures. According to Western Wireless, the Commission will continue to have the ability to monitor its provision of service and evaluate the approach over time. Therefore, Western Wireless requests that the Commission designate it as a federal ETC without requiring it to comply with consumer protection or affordability rules as recommended by Staff.

3. **CenturyTel/CTA's Position**

26. According to CenturyTel/CTA, this proceeding differs from the prior WW1 proceeding in several material ways. First, Western Wireless acknowledges here that it seeks ETC status for delivery of its BUS offering via cellular handsets and not exclusively via its wireless local loop (Telular unit) that was the sole BUS delivery mechanism identified by Applicant in the first proceeding. Second, Western Wireless has offered no proposed BUS service offering plan or plans with associated pricing and terms and conditions for review here. Western Wireless seeks ETC status for a BUS offering or offerings that have not been disclosed.

27. CenturyTel/CTA argue that Western Wireless' evidence is essentially that it is a common carrier, that as a CMRS carrier it meets the nine-supported services test, that competition suffices as an adequate basis for meeting the public interest test, and that it should receive ETC status and USF support without any imposition by this Commission of conditions or accountability. CenturyTel/CTA point out that, while the prior Western Wireless ETC proceeding was settled between the noted parties by Stipulation, Western Wireless has not agreed to accept

and apply the terms and conditions of that prior Stipulation to any BUS offerings it will offer in the Colorado market in the event this ETC application is approved.

28. CenturyTel/CTA also point out that while Staff supported the approval of the first Western Wireless ETC application and the associated Stipulation, Staff opposes the approval of the application here. Further, CenturyTel/CTA argue that there is a significant issue in this docket as to Western Wireless' ability to meet the Act's requirement to be able to serve throughout the CenturyTel wire centers for which it has sought ETC status.

29. CenturyTel/CTA oppose the grant of ETC status to Western Wireless in the five affected CenturyTel wire centers. They assert that the application should be denied for the following reasons: 1) Western Wireless has failed to carry its procedural burden of providing sufficient evidence to support its application; 2) the Applicant's failure to provide the pricing and terms and conditions of its proposed BUS offering(s) for review disqualify it under applicable federal law for designation as an ETC recipient; and 3) Western Wireless failed to establish that it will provide the nine required supported services throughout the service areas for which it seeks ETC designation.

30. According to CenturyTel/CTA, the approval by this Commission of the current application would result in potentially discriminatory service offerings by Western Wireless between and among its own customer base depending upon whether such customers are located in the CenturyTel or single exchange rural company wire centers subject to the WW1 Stipulation, or in the wire centers subject to this application. They maintain the approval of this application would also result in a clearly discriminatory impact upon other ETC providers – in that all have secured ETC status in exchange for acceptance of the terms of a Stipulation containing

substantially the same terms and conditions as that entered into by Western Wireless in WW1, and rejected by Western Wireless here. Finally, CenturyTel/CTA argues that the evidence in the record fails to support Western Wireless' claim that the grant of ETC status would be in the "public interest." They contend that the application must be rejected.

31. With respect to the issue of Commission jurisdiction, CenturyTel/CTA submit that there are multiple grounds upon which this Commission may assert its jurisdiction, not only to determine whether WW should qualify for ETC status, but also to decide the terms and conditions under which it will qualify if it does. According to CenturyTel/CTA there is both a federal and a state law basis for Commission jurisdiction in this case. They claim that under the provisions of 47 U.S.C. § 332(c)(3)(A), states are authorized to regulate certain terms and conditions of CMRS providers including customer billing practices and consumer protection requirements.

32. Additionally, CenturyTel/CTA contend that 47 U.S.C. § 254(b) provides that nothing in the Act affects the ability of a state to impose, on a competitively neutral basis and consistent with § 254, any requirements that are necessary to preserve and advance universal service, protect the public interest and welfare, ensure the continued quality of telecommunications services, and safeguard the right of consumers. CenturyTel/CTA claim that the requirements of 47 U.S.C. § 214(e)(2) are mandatory, not optional, that "the state shall find that the designation is in the public interest." *Id*.

33. CenturyTel/CTA represent that the provisions of § 40-15-401(a), C.R.S., indicate that cellular telecommunications services are exempt from regulation under both Article 15 and the Public Utilities Law of the state. Notwithstanding this provision, the Commission is

separately charged with the special responsibilities concerning the oversight of universal service. Section 40-15-502(3)(a), C.R.S., provides:

> 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. . . . The commission shall have the authority to regulate providers of telecommunications services to the extent necessary to assure that universal basic service is provided to all consumers in the state at fair, just, and reasonable rates. (Emphasis added)

They argue that this statutory charge concerning the specific power to regulate not just basic local exchange service providers, but "providers of telecommunications service" is a specific mandate that confers jurisdiction, power, and authority upon the Commission in ETC proceedings.

34. In summary, CenturyTel/CTA maintain that Western Wireless has failed to carry its burden of proof. It offered no evidence of the pricing or nature of the BUS plan it will offer. It has not accepted the terms and conditions of the WW1 Stipulation which was founded in public interest considerations and which has been established by this Commission's prior decisions as the standard measure for the approval of ETC applications. CenturyTel/CTA contend that approval of the WW application would result in discrimination between and among Western Wireless' own customers and between and among competitive ETCs. CenturyTel/CTA conclude that the application and associated proof fail to meet the public interest test. They argue that any benefits of certification of Western Wireless to Colorado consumers do not outweigh the costs. Therefore, CenturyTel/CTA request that the Commission deny the Western Wireless application.

4. NECC's Position

35. NECC contends that the Commission should reject Staff's proposed conditions. According to NECC, ILEC-style regulations are inappropriate for competitive ETCs. NECC

argues that regulatory parity does not equate to competitive neutrality. NECC contends that the FCC rejected claims that competitive neutrality requires the application of the same requirements to all carriers. According to NECC, imposing ILEC-style service quality regulations in a "flash cut" manner on a young network that has never been subsidized would constitute a barrier to entry. The imposition of ILEC-style service quality standards on CMRS carriers is not an appropriate *quid pro quo* for obtaining ETC designation, according to NECC. Service quality standards were not imposed on ILECs in exchange for ETC designation; rather, NECC argues, they were imposed because ILECs are monopolies and service quality standards are necessary to protect consumers who have no choice of service provider.

36. NECC maintains that neither Staff nor CTA has provided any persuasive legal authority for the argument that ILEC-style service quality standards should be imposed on Western Wireless. According to NECC, competitive ETCs have every incentive to provide high-quality service, without the need for service quality standards or other ILEC-oriented regulations. NECC argues that, not only is a competitive ETC required by law to use all available funds to improve infrastructure, the use of such funds in this manner will improve its competitive position. Moreover, according to NECC, a competitive ETC has every incentive to maintain and improve reliability and to lower its prices over time because it can only receive high-cost support when it has a customer.

37. NECC argues that the FCC has preempted many of the ILEC-style regulations sought by CTA and which are present in the WW1 Stipulation. This is because, unlike ILECs, CMRS carriers operate in a vigorously competitive marketplace, according to NECC. Thus the imposition of significant regulation on CMRS carriers would create significant cost burdens without any corresponding benefit.

38. NECC also makes the point that rate and entry regulation cannot be imposed on CMRS providers. The FCC affirmed that rate regulation of CMRS carriers by states is preempted, even if a carrier seeks ETC status.[6] NECC contends that CMRS carriers are not monopolies, do not have pricing power, and operate in one of the most price-competitive industries in this country.

39. NECC also disagrees with Staff's assessment that the Commission is between "a rock and a hard place." NECC suggests that the Commission take this opportunity to clarify that the practice of requiring CMRS ETCs to submit individual rate plans to the Commission for approval amounts to unlawful regulation of CMRS carrier rates.

40. According to NECC, provider of last resort (POLR) requirements should not be imposed on competitive ETCs. NECC claims that the FCC has declined to impose POLR obligations on competitive ETCs, finding that consumers are adequately protected by the ETC requirements found in the Act – namely, the requirements to provide service upon reasonable request throughout the designated service area. NECC maintains that Staff's witness misstated applicable law in stating that competitive ETCs face an absolute requirement "to serve all customers," which requirement has been imposed on "all wireless carrier ETC applicants to date."

41. NECC argues that imposition of POLR obligations on competitive ETCs would also pose an unlawful barrier to entry in violation of 47 U.S.C. § 253 of the Act. According to NECC, while ILECs are permitted to recover the costs they incur in providing service through

[6] *In the Matter of the State Independent Alliance and the Independent Telecommunications Group for a Declaratory Ruling that the Basic Universal Offering Provided by Western Wireless in Kansas is Subject to Regulation of a Local Exchange Service.* WT Docket No. 00-239, FCC 02-164, Memorandum Opinion Order, August 2, 2002. (*Kansas Order*).

the high-cost support mechanism, competitive ETCs must take ILEC support as they find it, whether it covers the cost of new facilities or not. NECC maintains that, without a mechanism for a carrier to recover its costs of extending service, imposition of a POLR requirement makes no sense. NECC is not aware of, nor does Staff identify, any state commission that has imposed POLR or similar requirements on wireless ETCs.

42. NECC asserts that CTA's "cream skimming" concerns are baseless. CenturyTel's support is now disaggregated to the wire-center level. As a result, according to NECC, there is no longer any possibility that a competitor can enter into portions of the study area and selectively receive disproportionately high (or low) levels of support based on costs calculated at the study-area level. Therefore, NECC concludes that CTA's complaint that Western Wireless can cream skim within a wire center is groundless. According to NECC, CTA presented no data showing that densely settled areas are less costly for Western Wireless to serve. Indeed, CTA's witness admitted that Western Wireless' costs are identical in all portions of its footprint, whether in densely settled areas or well outside them. NECC maintains that, if the Commission believes a problem still exists, CenturyTel's high-cost support may be disaggregated further.

43. NECC also contends that the Commission should reject CTA's unlawful request to limit eligible lines. CTA's position ignores the recent statements of this Commission in the Wiggins Telephone Association redefinition proceeding before the FCC, in which the Commission refuted the suggestion that ETC designations may exclude "handset" service.[7]

[7] "CTA also argues that traditional wireless service plans should not be eligible for universal service support. COPUC disagrees with this assertion. Nowhere in the FCC's rules regarding ETC designation is there a statement that wireless providers and traditional cellular service plans are ineligible for designation as ETCs and the resulting universal service support. If the traditional cellular service plans meet the required criteria, the plans are eligible to receive support under existing rules." *See* COPUC Reply Comments, CC Docket No. 96-45, at pp. 7-8 (filed July 14, 2003).

44. In conclusion, NECC argues that designation of a competitive ETC must be done in a competitively-neutral manner that provides appropriate incentives to all affected carriers. According to NECC, competitive ETCs, particularly wireless carriers, already subject to the discipline imposed by a fiercely competitive market, should not be saddled with regulations that were intended to protect consumers from monopoly behavior. The solution is not more regulation but less.

45. NECC claims that, through properly targeted per-line support, appropriate incentives are already in place to encourage competitive ETCs to build and upgrade infrastructure in areas that are most in need of quality competitive service. This proceeding provides the Commission with an ideal opportunity to revisit whether CMRS carriers should be subject to rate plan filing requirements, service quality standards, and other regulations that provide little or no public benefit and only serve to stifle innovation and investment.

C. Analysis

1. Legal Threshold Standards

46. High cost universal service support is intended to provide access to telecommunications service in areas where the cost of such service may otherwise be prohibitively expensive. That level of access has been historically achieved through explicit subsidies as well as implicit support flows. This explicit and implicit support has allowed

carriers to serve high-cost areas at below-cost rates.[8] Rural rates traditionally have been subsidized explicitly by payments from federal USFs.[9]

47. The Telecom Act provides for the continuing support of universal service goals by making federal USF funds available to carriers designated as ETCs. Section 214(e) of the Act gives state commissions the primary responsibility for designating carriers as ETCs. Applications for ETC status are governed by federal and state law. Section 214 of the Act requires an ETC to offer certain designated services throughout its ETC-designated service area, offer the designated services using its own facilities or at least part of its own facilities combined with resale of another carrier's services, and advertise the availability and price of these services.[10]

48. In order to be designated an ETC, a carrier shall "use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. Any such support should be explicit and sufficient to achieve the purposes of this section."[11] The FCC (pursuant to 47 C.F.R. § 54.01(a)) has defined the services that are to be supported by the federal universal service support mechanisms to include the following:

1) Voice grade access to the public switched network.
2) Local usage.
3) Dual Tone Multifrequency (DTMF) signaling or its functional equivalent.
4) Single-party service or its functional equivalent.

[8] *In the Matter of Federal-State Joint Board on Universal Service, Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket Nos. 96-45, 00-256 Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking, ¶ 13 (May 10, 2001) (*Fourteenth Report and Order*).

[9] *Id*. at ¶ 15.

[10] 47 U.S.C. § 214(e)(1).

[11] 47 U.S.C. § 254(e)(2).

5) Access to emergency services, including 911 and enhanced 911.

6) Access to operator services.

7) Access to interexchange services.

8) Access to directory assistance.

9) Toll limitation for qualifying low-income customers.

The FCC also has adopted the principle that federal support mechanisms should be "competitively neutral," meaning they should not unfairly advantage or disadvantage particular service providers or technologies.[12] Section 214(e)(2) of the Act provides that, in the case of an area served by a rural ILEC, the state commission may designate more than one ETC so long as the additional ETC's designation is in the "public interest."

49. Congress has provided clear direction for the FCC and states to follow when considering the provision of universal service and in designating ETCs. Section 254(a) identifies the principles to be followed by the Joint Board and the FCC for the preservation and advancement of universal service. This includes (among other things) the principle that quality services should be made available at just, reasonable, and affordable rates.[13] Another critical principle that any policy advancing universal service must be based upon is to provide consumers in all regions of the country, including those in rural, insular, and high cost areas, with access to all levels of telecommunications services that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.[14] Separate from and beyond the principles

[12] *First Report and Order*, 12 FCC Rcd at 8801-03 ¶¶ 46-51; *See also*, 47 U.S.C. § 254(b)(7).
[13] 47 U.S.C. § 254(b)(1).
[14] 47 U.S.C. § 254(b)(3).

articulated in § 254(b), Congress has specifically charged that the FCC and the states should ensure that universal service is available at rates that are just, reasonable, and affordable.[15]

50. In designating ETC status, the FCC has determined that a competitive carrier need not offer ubiquitous service throughout the service area **prior** to designation as an ETC. The FCC's rules do not require a carrier to have the capability to serve all customers at the time of designation, only that the carrier be willing to service all customers.[16] The FCC concluded that a new entrant faces a substantial barrier to entry if the incumbent LEC is receiving universal service support that is not available to the new entrant for serving customers in high cost areas.[17]

51. In order to meet its obligations to reasonably demonstrate to a state commission its ability and willingness to provide service upon designation, a new entrant may rely on: (1) appropriately supported descriptions of the proposed service technology; (2) a demonstration of the extent to which the carrier may otherwise be providing telecommunications services within the state; (3) a description of the extent to which the carrier has entered into interconnection and resale agreements; or (4) a sworn affidavit signed by a representative of the carrier to ensure compliance with the obligation to offer and advertise the supported services.[18] However, something more than vague assertions of intent are required to demonstrate a carrier's capability and willingness to provide service upon designation.[19]

[15] 47 U.S.C. § 254(i).

[16] *In the Matter of the Federal-State Joint Board on Universal Service, Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, CC Docket No. 96-45, FCC 00-248, Declaratory Ruling ¶ 12 (July 11, 2000) (*South Dakota Order*); 47 U.S.C. § 253(b).

[17] *Id.*

[18] *Id.* at ¶ 21 and n. 39.

[19] *Id.* at ¶ 24.

52. The FCC has also determined that a wireless carrier is not required to provide service where there are no prospective customers. The FCC has determined that an ETC must only provide service upon "reasonable request" and should be treated similarly to the incumbent on this matter.[20]

53. We therefore find that this Commission has the jurisdiction and responsibility to determine Western Wireless' application. Section 214(e) of the Act makes clear our role in designating a carrier (even a CMRS) as ETC eligible. However, in making the determination whether to confer ETC status upon Western Wireless, because it seeks ETC status in a service area where the incumbent LEC is a rural carrier, we must also make a determination whether this grant is in the "public interest."[21]

D. Public Interest

1. Legal Standard

54. As indicated above, when a carrier is seeking designation as an ETC in exchanges where the incumbent LEC is a rural carrier, state commissions are charged with determining whether an additional designation is in the public interest pursuant to 47 U.S.C. § 214(e)(2). The areas in which Western Wireless seeks designation are served by an incumbent that is a rural carrier, and therefore a public interest finding is necessary before Western Wireless may be designated an ETC.

55. When the FCC considered public interest factors in cases involving rural carriers, it analyzed: (1) whether the customers are likely to benefit from increased competition; (2) whether designation of an ETC would provide benefits not available from ILECs; and

[20] *Id.* at ¶ 17.

[21] 47 U.S.C. § 214(e); *see also* 47 C.F.R. § 54.201.

(3) whether customers would be harmed if the ILEC decided to relinquish its ETC designation.[22] States, however, may add their own standards, as long as they are imposed on a competitively neutral basis and consistent with § 254.[23]

56. Generally, the FCC seems to presume that competition will benefit consumers by increasing customer choice and providing new and different technologies and services. It has also ventured that competition will benefit rural consumers by allowing them to choose service based on pricing, service quality, and customer service. Additionally, the FCC has stated that competitive service will facilitate universal service to the benefit of rural consumers by creating incentives to ensure that quality services are available at just, reasonable, and affordable rates.[24] It should be noted that in determining the public interest, the FCC determined that the financial impact on the federal fund of designating a carrier as an ETC is irrelevant to whether a carrier should be so designated.[25]

57. As described above, Western Wireless maintains its designation is in the public interest. Staff and CenturyTel/CTA disagree. For the reasons discussed below, we agree with Staff and previous Commission findings[26] that designating Western Wireless as an ETC is in the public interest only when conditioned with important Commission standards including affordability and customer protection.

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[22] *In the Matter of the Federal State Joint Board on Universal Service, RCC Holdings, Inc. Petition for Designation as an Eligible Telecommunications Carrier throughout its Licensed Service Area in the State of Alabama*, CC Docket 96-45, DA 02-3181, Memorandum Opinion and Order (Nov. 26, 2002) (*Alabama Order*).

[23] 47 U.S.C. §§ 253(b) and 254(f).

[24] *Alabama Order* at ¶¶ 22-25.

[25] *Id.* at ¶3.

[26] Decision No. R01-19 Docket No. 00K-255T Recommended Decision of Administrative Law Judge Ken F. Kirkpatrick Accepting Stipulation and Granting Applications. Decision No. C01-476 Docket No. 00K-255T Decision on Exceptions. Decision No. C01-629 Docket No. 00K-255T Decision Denying Applications for Rehearing, Reargument, or Reconsideration.

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58. Central to this proceeding is a dispute regarding what constitutes the public interest test. The Applicant construes the public interest test narrowly, describing it as a comparison of the benefits of competition, versus the harms to consumers. Western Wireless claims that the FCC has established a public interest test that presumes increased competition in rural areas benefits rural consumers, and places the burden of demonstrating harm to consumers on opposing LECs.[27] Staff interprets the public interest test on broader terms. In her Answer Testimony, Staff witness Ms. Fischhaber states that, while Staff acknowledges that competition and the proposed benefits of competition should be included as one aspect of the public interest test, Staff asserts there is far more to the public interest test than just this one issue. According to Staff, other issues are examination of potential harm to the underlying ILEC and consumer protection issues.[28]

59. According to CTA/CenturyTel, the public interest test should compare the public benefits versus the public costs of supporting multiple networks. CenturyTel witness Mr. Martinez argued that every new entrant can make the claim that its presence increases competition. He maintained that if the Commission adopted Western Wireless' public interest standard, all new entrants would qualify and there would be no need for state commissions to make a public interest determination. Consequently, § 214(e)(2) would be rendered meaningless.

60. We agree with Staff that the public interest test should include more than a narrow determination that increased competition satisfies this criteria, regardless of the type of

[27] Western Wireless maintains the Commission should reject the intervenors' claim that consumers will be harmed because of increases to the federal USFs. According to Western Wireless, it is not the job of this Commission to decide those funding mechanisms do not work. Western Wireless maintains the FCC has specifically rejected the notion that issues of high-cost funding are relevant to an ETC designation proceeding.

[28] Staff examined the potential harm to the underlying ILEC and found competition is having little or no effect on the rural ILECs. Staff concluded that this aspect of the public interest issue was met. Exhibit 11 pages 13-15.

application for ETC status sought. As we pointed out *supra*, when determining whether to grant ETC status, the FCC has set out three broad categories that encompass a great deal more consideration than Western Wireless would suggest is necessary to determine whether an application is in the public interest. Adopting Western Wireless' public interest standard would place this Commission at a distinct disadvantage in determining whether the Applicant was indeed providing services at just, affordable, and reasonable rates, and that it was complying with reasonable customer service expectations in exchange for receiving explicit public subsidies. We agree with CenturyTel that to adopt Western Wireless' standard would allow all ETC applicants into the market without limitation, rendering § 214(e)(2) meaningless. It is with this public interest standard in mind that we analyze Western Wireless' application.

2. Affordability

61. The core public policy rationale supporting the provision of public subsidies via USF for rural and high cost telecommunications customers is to assure those customers affordable service at rates reasonably comparable to rates charged for similar services in urban areas.[29] In exchange for USF funds, rural wireline ILECs are required to offer their BUS at an affordable rate. Similarly, we find that Western Wireless should be required to tender an affordable BUS offering as a condition of receiving ETC status and the attendant public subsidy.

62. Western Wireless is requesting a public subsidy for its basic universal telecommunications service offering in rural or high cost areas of Colorado. We agree that a relevant question is whether additional benefits accrue to Colorado rural consumers as a result of

[29] For examples *see* Title 47 ~~Section~~§ ~~-~~254 of the Act, 47 C.F.R. 54.101, and ~~Section~~ § 40-15-208(2)(a), C.R.S.

this public subsidy.[30] This is especially true given that Western Wireless is already offering service in these areas. Without a commitment from Western Wireless to offer an affordable BUS plan, the Commission cannot be assured Western Wireless will offer a BUS plan that is compliant with the provisions of the Act and state law.[31]

63. Both the Applicant and NECC have argued that the existence of competitive markets in the Western Wireless service areas means the state should have no interest in the rates of rural wireless providers even in the context of public subsidies.[32] In addition, at the August 5, 2003 hearing, Chairman Sopkin posed a number of questions to Staff witness Ms. Fischhaber (Tr. Pages 78-80) concerning why the Commission should be concerned with the rates of Western Wireless. He asked why the Commission should not allow the market to work because there is an ILEC available for these customers and if they do not like Western Wireless' prices or service quality they have an alternative. Ms. Fischhaber replied that, in reviewing an ETC application, § 254(i) of the Act and § 40-15-502(3)(a), C.R.S., require the Commission to determine the rates are just, reasonable, and affordable. Consequently, in her view the Commission must be concerned with Western Wireless' rates and service quality. She explained that part of the premise of encouraging competition is to make sure there are choices available and contended high priced wireless plans may not be an affordable choice for all consumers. As

[30] This public subsidy is potentially substantial. CTA witness Mr. Brown says the USAC HC01 Report for the third quarter of 2003 shows WW currently receiving $22,665 per month of high cost support for serving 163 lines in study areas where WW gained ETC status in WW 1 (Brown Cross Answer, p. 5). In his Exhibit 8 he estimated that the total amount of support to wireless carriers, if all carriers in these 29 wire centers were to receive ETC designation would be approximately $12.9 million per year.

[31] A Commission requirement that Western Wireless offer an affordable BUS plan does not limit its ability to offer a variety of the other plans. In fact according to testimony in this docket Western Wireless' BUS plan in other CenturyTel areas is only one of approximately 16 other plans offered by WW.

[32] *See for example* the Closing Statement of NECC, p. 5. "CMRS carriers are not monopolies, do not have pricing power, and operate in one of the most price-competitive industries in the country. There is simply no state interest in regulating the rates of a carrier that has absolutely no ability to raise prices without facing competitive consequences."

we discuss in more detail below, in the context of a request for a public subsidy, we believe there are a number of additional reasons the Commission should be concerned with the affordability and service quality of Western Wireless' BUS offering. These include competitive neutrality and the incremental benefits that accrue to Colorado's rural customers from subsidizing WW's network with public funds. However, we first take up why the Commission is troubled with relying solely on the market to address the affordability and service quality of WW's BUS offering.

64. First, we find the idea that the existence of a regulated rural ILEC with a BUS offering at the statutory rate cap will assure a comparable[33] BUS offering from Western Wireless in Colorado's rural areas is speculative. It is unsupported by the record in this docket[34] and is debatable from an economic point of view. Economic theory suggests price competition will exist under certain conditions. Those conditions include the existence of many firms, selling undifferentiated products, with few entry barriers.[35] Wireless carriers clearly have the ability and motivation to differentiate their product from the product offered by wireline carriers. Such product differentiation may confer market power that allows wireless carriers to offer products at prices different from wireline carriers without losing a proportionate number of customers.

[33] Similar in terms of affordability, service quality, and consumer protection.

[34] The record contains many assertions of "vibrant competition" but no empirical evidence regarding market structure, substitutability of products, or entry barriers. Moreover, we agree there is likely "vibrant competition" among wireless carriers especially in densely populated areas capable of supporting many wireless carriers. However, the issue we are addressing here is the "vibrancy" of competition between a rural wireless and incumbent wireline provider.

[35] As an example of why this is a debatable proposal, many years of economic research have suggested that the minimum criteria for effective price competition are at least five reasonably comparable competitors (so as to avoid collusion among competitors), an absence of a single firm dominance and reasonably free entry to all segments of the market, so that numerous new firms can enter, survive, and acquire significant market shares.

Under these circumstances economic theory suggests wireless carriers may be able to maximize profits without providing an equivalent BUS offering.[36]

65. Further, the fact that only a few firms are likely to compete in these rural areas increases the possibility of noncompetitive market structures that could result in very little price competition.[37] Therefore, neither the record nor economic theory provide sufficient support for the idea that the Commission can rely solely on the market to assure Western Wireless will make an affordable BUS offering with consumer protections equivalent to those required of the rural wireline incumbents.

66. The issue of whether our requirement that Western Wireless offer a plan with an affordable BUS offering as a condition for ETC status constitutes rate regulation is more fully addressed in the paragraphs below. As to the narrower issue of pricing power, we would agree in principle to the concept that, all other things equal, a showing of affordability or rate regulation may be unnecessary when there is a check on pricing power. Of course, the issue in any particular situation is whether such a check on pricing power exists. This depends on the particular characteristics of any given market, including such things as the number of firms, product differentiation, and freedom of entry. The point we make is that the record in this case does not provide sufficient support that such a pricing check exists, and that whether such a price check exists here is debatable from the point of economic theory and research.

[36] Including equivalent price, quality of service, and consumer protections.

[37] In the absence of a Commission requirement to provide a BUS offering at rates approximately equal to the statutory rate cap it will be very difficult to ever know if competition has resulted in wireless carriers offering BUS at a rate equivalent to the one required of the rural ILECs. This is because wireless carriers offer complex bundles of services.

67. We disagree with the dissent's contention that our analysis regarding price competition referenced in footnote 35 is not on point because it did not involve an ILEC that could not charge more than the statutorily fixed price of about $15 for basic exchange service. We also take issue with the suggestion that if Western Wireless sought to collude with the ILEC, it could only do so at $15; or that if Western Wireless sought to charge above that price, it would not obtain any customers unless its service is in someway superior to the ILEC's. Rather, we find the argument that the existence of a regulated ILEC with a BUS offering at the statutory rate cap will assure a comparable BUS offering from Western Wireless is speculative because economic theory and research suggest price competition will exist only under certain conditions. As the dissent correctly suggests, in this case, Western Wireless is in a market with an ILEC charging a price at the statutory cap of $15.[38] Thus, in this particular market, it is unlikely the minimal criteria for effective price competition[39] enumerated in the footnote will be met. For these reasons, as well the other reasons we articulate in this Order, including Western Wireless' ability to differentiate its product, we continue to argue that it is at the very least debatable

[38] The price is not fixed at $15, rather, the ILEC may not charge more than $15.

[39] Effective price competition will drive price levels to cost levels. Thus, if wireless carriers' costs were less than wireline carriers, an effectively competitive market would drive prices to those costs. On the other hand, if one believes the statutory rate cap is set below cost (basic residential service is subsidized), it is difficult to argue that wireless carriers will make a BUS offering equivalent to the ILEC''s' offerings, absent an order from the Commission. If, in the low cost areas, the regulated BUS rate is below the cost of providing this service, neither wireline nor wireless carriers will offer this service unless required to by the Commission. Further, even in high cost areas, carriers will have no incentive to offer this service absent a regulatory requirement. This is because even in high cost areas, a a carrier''s' costs will not be covered if the BUS offering rates are is is set below costs. In a situation where the statutory rate cap is set below costs, the only reason the ILECs would make an offering at the rate cap is because the legislature and the Commission have required them to do so. Similarly, wireless carriers will not make a BUS offering at the rate cap unless ordered by the Commission.

whether a decision by Western Wireless to charge a price above $15 would even lead to a decline in revenues much less the loss of all its customers.[40]

68. A second policy consideration is the cost of being wrong. If the market is such that a competitive outcome is likely, the imposition of Commission standards for affordability, consumer protection, and service quality will be largely superfluous because the competitive market will presumably assure approximately the same outcomes.[41] However, if the market is not sufficiently competitive the failure to impose these standards risks measurable consumer harm or at the very least the expenditure of substantial public funds without corresponding benefit.[42]

69. For all these reasons but most notably because the core public policy rationale supporting the provision of public subsidies via USF for rural and high cost telecommunications customers is to assure those customers affordable service at rates reasonably comparable to rates charged for similar services in urban areas, the Commission finds that the public interest requires the Commission's grant of ETC status be conditioned with a requirement that Western Wireless offer an affordable BUS plan.

[40] If product differentiation is sufficient, a firm may be able to raise its price without losing a proportionate number of customers. For example a 10~~%~~ percent price increase may result in only a 5~~%~~ percent decline in the quantity of sales; therefore revenues increase. In such a case, demand is said to be inelastic. Further, such an outcome is not dependent on the product being superior to or even different from a competitor's so long as customers believe for whatever reason it is differentiable. As a general example, Bayer aspirin is chemically identical to the product of other aspirin producers. However, to the extent Bayer is able to convince customers its product is sufficiently differentiable from its competitors, it is able to charge a price greater than its competitors without losing a proportionate number of customers.

[41] Further, it could be argued that the imposition of these standards will not add significantly to the costs of wireless providers if Western Wireless' and NECC's claims of vibrant competition are correct. Such vibrant competition would automatically result in wireless firms incurring presumably similar costs as they are forced by the competitive market to provide approximately the same consumer protections and quality of service.

[42] Among other things, the terms and conditions of the Stipulation governing WW1 contain safeguards against slamming, against arbitrary termination of service, a customer complaint process, credits for interrupted service, and provisions for service during maintenance or emergencies. The Stipulation also contains an affordable BUS offering.

70. One of the issues that divide the majority and the dissent on the issue of affordability is whether 47 U.S.C. § 332(c)(3)(A) of the Act precludes the Commission from exercising its jurisdiction under § 254(i). Section 332(c)(3)(A) of the Act in relevant part states:

> (3) STATE PREEMPTION. -- (A) Notwithstanding sections 152(b) and 221(b), no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates.[43]

71. The sequence of enactment of § 332(c)(3)(A) and § 254(i) may offer some insight into how those two statutes are to be read. Section 332 was amended and enacted on August 10, 1993, except that the amended § 332(c)(3)(A) did not take effect until one year after the date of such enactment (therefore § 332(c)(3)(A) took effect on August 10, 1994). Section 254(i) was enacted as part of the Act on January 3, 1996. Section 332(c)(3)(A) preempts states from regulating the market entry or rates of CMRS providers. At the time of the 1993 amendment and its 1994 effective date (almost a year and a half before the passage of the Act), arguably one purpose of the Congressional action then was to foster the national deployment and wider availability of wireless telecommunications services while precluding states from tinkering in that arena. It is reasonable, therefore, to conclude then that in 1993, Congress could not have contemplated, much less thoroughly dealt with, the subsequent complexities and intricacies embodied in the Act. It is also reasonable to conclude that the provisions of §§ 332(c)(3)(A)(i)

[43] 47 U.S.C. § 332(c)(3)(A).

and 332(c)(3)(A)(ii) were designed to prospectively deal with the circumstance where the provision of wireless services proliferate to an extent that they widely replace wire line services.

72. With regard to market entry, addressed in § 253 of the Act, Congress specifically directed in § 253(e) that "[n]othing in this section [253] shall affect the application of section 332(c)(3) to commercial mobile service providers." In the very next section of the Act, § 254 dealing with universal service and rates attendant thereto, a provision similar to § 253(e) is notably absent. This despite two specific provisions (§§ 254(b)(1) and 254(i)) directed at just, reasonable, and affordable rates for universal service. If Congress had intended to specifically exempt CMRS providers from the provisions of §§ 254(b)(1) and 254(i) with regard to universal service rates, it would have included a provision similar to § 253(e) in § 254. Congress did not. Therefore, we conclude that § 332(c)(3)(A) does not preclude the Commission from exercising its jurisdiction under §§ 254(i) and 214(e) of the Act. Further, we conclude that the absence of a provision similar to § 253(e) in § 254 is a clear demonstration that it was not the intent of Congress that § 332(c)(3)(A) should trump the universal service affordable rate provisions of § 254(i).

73. There have been various cases from several courts interpreting the provisions of § 332(c)(3)(A) of the Act regarding rate regulation of a CMRS in various scenarios.[44] However, none of these cases directly address the specific point at issue here (the interaction of § 254(i) and § 332(c)(3)(A) with respect to a state commission's authority to require a CMRS provider to make available an affordable universal service offering as a condition of being designated as an ETC in order to be eligible to receive universal service support). Absent a case directly on point, or more specific direction from the courts or the FCC to the contrary, we conclude that this Commission can lawfully require an affordable and available universal service offering by a CMRS provider as a condition of ETC designation, and we do so in this case.

74. We find that Congress has provided explicit direction by virtue of the principles articulated in § 254 of the Act that we are to ensure universal service at just, reasonable, and affordable rates. Additionally, the Colorado General Assembly, echoing Congress' concerns, has found affordability an essential principle as well. In relevant part, § 40-6-502(3)(a), C.R.S., provides that:

> [t]he 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. The commission shall have the authority to regulate providers of telecommunications services to the extent necessary to assure that

[44] *See, Sprint Spectrum, L.P. v. State Corporation Comm'n of Kansas*, 149 F.3d 1058 (10th Cir. 1998) (addressing § 332(c)(3)(a) in the context of whether a state could require a CMRS to contribute to USF); *Cellular Telecommunications Industry Association v. FCC*, 168 F.3d 1332 (D.C. Cir. 1999) (court found that § 332(c)(3)(A) did not preempt Texas law requiring CMRS providers in state to contribute to two state-run universal service programs); *Digital Communications Network, Inc. v. AT&T Wireless Services*, 63 F.Supp.2d 1194 (C.D. Cal. 1999) (where court determined that § 332(c)(3)(A) prevented state commission from asserting jurisdiction over a dispute between telecommunications providers regarding whether one provider was required to make its "one rate" plan available to reseller at wholesale rates); *Bastien v. AT&T Wireless*, 205 F.3d 983 (7th Cir. 2000) (involves a suit alleging *AT&T* misled plaintiff about his cellular telephone service and an analysis of § 332(c)(3)(A) and the Savings Clause); *Texas Office of PUC v. FCC*, 265 F.3d 313 (5th Cir. 2001) (in addressing whether a subscriber line charge price cap violated §§ 254(b)(1) and 254(i), the court held that the FCC's interpretation that §§ 254(b)(1) and 254(i) are merely aspirational is permissible under the *Chevron* analysis); *Texas Office of Public Utility Counsel, et al.v. Federal Communications Commission*, 183, F.3d 393 (5th Cir. 1999) (addressing CMRS contributions to the Federal USF and ETC designations).

universal basic service is provided to all consumers in the state at fair, just, and reasonable rates.

75. We deem affordability to be a critical principal in designating a provider for ETC status. Indeed, we have required a showing of affordability from a CMRS provider seeking ETC designation before.[45] These affordability requirements were met by the CMRS providers pursuant to stipulations and settlement agreements, without the authority from Congress and the Colorado Legislature to address the issue of affordability, it would have been beyond our jurisdiction to consider affordability in those two dockets.

76. We further note that requiring a CMRS provider to make a showing of affordability in conjunction with its ETC application is not the regular detailed, rate-making function this Commission oversees, or rate-making as contemplated in § 332(c)(3)(A) of the Act. Rather, a showing of affordability merely entails providing sufficient information to the Commission to demonstrate that the rates the CMRS provider intends to charge for its BUS offering are just, reasonable, and affordable, given the subsidies it will receive, should it obtain ETC status.

77. The dissent characterizes our affordability requirement as rate regulation; however, we disagree with that characterization. Rate regulation is typically defined as the process of requiring a utility (in this case, a telecommunications provider) to provide extensive cost and pricing data to file an advice letter and proceed through an extensive hearing process (if the Commission or intervenors determine that the rates could be unjust or unreasonable), and ultimately require a tariff which lists all the pricing requirements of the telecommunications

[45] *In The Matter of The Application of Western Wireless Holding, Co., Inc. For Designation As An Eligible Telecommunications Carrier Pursuant to 4 CCR 723-42-7*, Docket No. 00K-255T, 00A-174T; *In the Matter of the Application of N.E. Colorado Cellular, Inc. for Designation as an Eligible Telecommunications Carrier Pursuant to 4 CCR 723-42-7,* Docket No. 00A-315T; 00A-491T.

provider. Rate regulation additionally requires that the utility update its tariff on a regular basis, which could require the same extensive procedure each time the utility proposed changes to its filed tariffs. Further, and of critical note, rate regulation requires these obligations even against the wishes of the provider.

78. However, such is not the case here. We are not subjecting Western Wireless to ILEC-style rate regulation, and all that such regulation normally entails by any stretch of the imagination. We simply require Western Wireless, if it chooses to accept ETC designation in these exchanges, to make a showing of affordability of the rates it proposes to charge here, as it was required to provide to the Commission as a result of a stipulation and settlement agreement in its previous ETC application. We do not require Western Wireless to conduct detailed cost studies, nor do we require a full hearing on the merits of its proposed rates. We do not require that Western Wireless comply with the requirements of § 40-3-101 *et seq*., § 40-15-101 *et seq*., C.R.S., or 4 CCR 723-30 as those statutes and rules apply to rate regulation. Rather, we merely require, as the Telecom Act provides, that Western Wireless show, since it is requesting subsidies to provide rural wireless service, that its rates are affordable.[46]

79. The universal service provisions of the Telecom Act are designed to keep competition from driving rates to unaffordable levels for low income consumers and those in rural, insular, and high cost areas by subsidizing those rates.[47] It is reasonable to assume that Congress required service quality and affordability requirements, as specified in the Telecom Act, in order to ensure that carriers (whether wireline or wireless) provide services in rural,

[46] It is important to note that the ~~a~~Applicant, Western Wireless did not raise the preemption issue before the Commission. Rather, this issue was raised by one of the intervenors, NECC.

[47] *See*, 47 C.F.R. § 54.201(a)(1).

insular, and high cost areas at levels comparable to high density, urban areas at similar costs. As we have pointed out *supra*, the record has not provided any evidence that without a showing of affordability, the public interest in that regard will be met.

80. The dissent also cites the Fifth Circuit case[48] and characterizes it as upholding the FCC's interpretation of §§ 254(b)(1) and 254(i) that address affordability as "merely aspirational." Although the Fifth Circuit does hold that the FCC's reading of the language of § 254(i) as aspirational is a permissible construction of the statute, the court, in the next paragraph, also held that the "FCC *cannot flatly ignore or contravene the goal of affordability;* Congress gave [the FCC] the latitude to formulate a policy that considers affordability, along with other policy goals of the [Telecom] Act. (Emphasis added)."[49] It is clear that affordability is an important component of ETC designation in the Telecom Act that must not be ignored. We will not do so here.

81. The dissent points out that one of the basic tenets of statutory interpretation is that statutes should be read harmoniously - one statute may not be read to contravene another unless they are irreconcilable.[50] Despite this admonition, the dissent nonetheless goes on to find § 332(c)(3)(A) provides express guidance regarding preemption, while dismissing the affordability requirement of § 254(i) as merely aspirational and vague, and therefore, it would seem, not worthy of harmonious consideration with the preemption language of the Act. However, one cannot pick and choose which statutes to read in harmony with each other. Rather,

[48] *Texas Office of Public Utility Counsel, v. Federal Communications Commission*, 265 F.3d 313, 322 (5th Cir. 2001)

[49] *Id.* at 322.

[50] *Citing, University of Colorado v. Booth*, 78 P.3d 1098, 1101 (Colo. 2003); *People v. Hampton*, 876 P.2d 1236, 1240 (Colo. 1994).

utilizing the basic tenet of statutory interpretation provided by the dissent, and, reading the statutes in question in harmony, we suggest that the correct procedural approach, as the Fifth Circuit points out, is that although § 332(c)(3)(A) preempts states from regulation of wireless carriers' rates, affordability must nonetheless be considered in an ETC application.

82. The dissent cites the cases we acknowledged earlier to support the argument that state public utilities commissions are preempted from requiring a showing of affordability when a wireless carrier seeks ETC status. (*See, Bastien v. AT&T Wireless Services, Inc.*, 205 F.3d 983, (7th Cir. 2000); *Sprint Spectrum, L.P. v. state Corporation Com'n of Kansas*, 149 F.3d 1058, (10th Cir. 1998); *Digital Communications Network, Inc. v. AT&T Wireless Services*, 63 F.Supp.2d 1194, (C.D. Cal. 1999); and *Texas Office of Public Utility Counsel v. Federal Communications Commission*, 183 F.3d 393, (5th Cir. 1999)). We reiterate that although these cases address § 332(c)(3)(A) of the Act, they address such issues as whether a CMRS can be compelled to contribute to the USF, and are not on point to the matter at hand.

83. In response to our statement above that we are not convinced we cannot require a showing of affordability without a case directly on point, or more specific direction from the FCC, the dissent cites the *Texas Office of Public Utility Counsel v. Federal Communications Commission*, 183 F.3d 393 (5th Cir. 1999) case, and portrays it as a "federal appellate case that addresses both § 332(c)(3)(A) and an ETC application …" However, the dissent mischaracterizes the passage it cites. Although the 5th Circuit did address the criteria that state commissions may consider when assessing a carrier's eligibility; the passage the dissent cites at page 432 of the court's opinion has nothing to do with ETC designation of a wireless carrier. Rather, that section of the court's opinion addresses a challenge of the "FCC's decision to permit

states to impose universal service contribution requirements on CMRS providers,"[51] and the relation of § 254(f) of the Telecom Act (which requires that every telecommunications carrier contribute to the USF) with § 332(c)(3)(A) of the Act. We point out that nothing in the court's opinion regarding ETC designation addresses the ability of a state commission to require a showing of affordability when considering a CMRS application.

84. The dissent also cites a FCC order[52] which held that "unless the requirements imposed by the Kansas Commission are entry, rate, or equal access regulations, the Kansas Commission was not prevented from applying such requirements to CMRS ETCs consistent with the Act and the Commission's universal service regulations."[53] Two points are important to note regarding the FCC holding. First, although instructional to the matter at hand, the Commission is not bound by precedent to that FCC ruling. Second, nothing in the FCC ruling directly addresses whether a state may require a showing of affordability as a condition of approving ETC status. Notably, the majority is not compelling Western Wireless to make a tariff filing, subject to approval of the Commission prior to entry into the market. Rather, the majority has consistently emphasized that Western Wireless is free to pursue this market without federal subsidies, in

[51] *Texas Office of Public Utility Counsel v. F.C.C.*, 183 F.3d 393, 430 (5th Cir. 1999).

[52] *Petition of the State Independent Alliance and the Independent Telecommunications Group*, WT Docket No. 00-239, FCC 02-164 (rel. Aug. 2, 2002) at ¶ 31.

[53] *Id.*

which case it could proceed without Commission approval. It is important to note again that the 5th Circuit has admonished that affordability cannot be ignored.[54]

85. Western Wireless (as well as NECC) previously agreed to a showing of affordability and the Commission accepted the stipulation and settlement agreement the parties entered into in their ETC application matters. The dissent ignores the logical conclusion of its position: if the Commission were completely preempted from any authority to oversee the affordability of rates charged by a wireless provider for a BUS offering, it could not have accepted the stipulation and settlement agreements submitted by Western Wireless and NECC in prior cases. How could the Commission have heard such matters if it has no jurisdiction as the dissent suggests? The dissent does not argue this - in fact the dissent appears to concede that the Commission's prior actions (accepting wireless carriers' agreements to charge affordable BUS rates) were legal and appropriate. The dissent goes on to dismiss this fact as having no bearing on whether such regulation may be *imposed* by the state commission. It should be pointed out however, that if a state agency has no jurisdiction in the matter, it cannot hear the matter whether the parties voluntarily agree to submit to agency regulation or not. Preemption, as the dissent points out, removes all jurisdiction from an agency to regulate. Further, if indeed the Commission has no authority or jurisdiction in this matter, then it follows that Western Wireless'

[54] *See In the Matter of the Petition of Midwest Wireless Communications, LLC, for Designation as an Eligible Telecommunications Carrier (ETC) Under 47 U.S.C. § 214(e)(2).* Docket No. PT-6153/AM-02-686, Issued March 19, 2003. Additionally, approximately one year after the FCC's holding above, the Minnesota Public Utilities Commission, in granting ETC designation to Midwest Wireless Communications, LLC[54], ordered the company to file a tariff with terms and rates for the BUS, with Lifeline and Link-Up and other services which may be added to a universal service offering. This tariff filing was in addition to the requirement that the company file its customer service agreement with customer service and dispute resolution polices, network maintenance policies with procedures for resolving service interruptions and any customer remedies; billing and payment policies; deposit policies; and a statement from the company of its understanding of its federal obligations regarding service in the area it intended to serve. According to the Minnesota PUC, with this information, it would "be better able to resolve any doubts about whether granting the Company's petition is in the public interest."

application for ETC status should not even be before the Commission. Rather, the matter should be before the FCC. We find the more reasonable approach to be that the Commission may in fact make determinations regarding affordability, as articulated in the Act, when wireless carriers apply for ETC status.

86. Finally, we take exception to the dissent's characterization of our decision requiring a showing of affordability as "imposing rate regulation." Western Wireless has the option to accept the majority's conditions, which we find to be necessary as part of the public interest analysis. If it chooses not to accept our conditions, it may still provide service in the wire centers at issue, however, without ETC status.

3. Consumer Protection

87. Differing interpretations of the meaning of competitive neutrality underlie the parties' dispute about conditioning Western Wireless' ETC status on adherence to Commission standards regarding consumer protection and affordability. In his Rebuttal Testimony, Western Wireless witness Mr. Blundell accuses Staff of confusing competitive neutrality with regulatory parity:

> Ms. Fischhaber describes the concept of regulatory parity, which is directly contrary to the FCC's notion of competitive neutrality. Competitive neutrality means that a wireless carrier can be an ETC even though it is regulated differently than an ILEC. Regulatory parity means that a wireless carrier can be an ETC only if it is regulated like an ILEC. The FCC made quite clear that its universal service rules allow a carrier "not subject to the full panoply of state regulation" to be designated as an ETC. Universal Service Order, ¶ 147. Ms. Fischhaber appears to have a fundamental disagreement with this FCC mandate.[55]

88. We believe Western Wireless makes a distinction that does not accurately represent either Staff's recommendation in this docket or the Commission's findings in WW1.

[55] Rebuttal Testimony of James Blundell, p 5., ll. 7-13.

Staff is not recommending that ETC status be granted only if Western Wireless is subject to the "full panoply" of state regulation. The Commission's decisions in Docket No. 00K-255T made clear distinctions between the standards imposed by the Stipulation and the Commission's regulation of the rural ILECs.

89. We agree with the Staff's argument and our previous ETC decisions that competitive neutrality is consistent with subjecting Western Wireless' ETC status to Commission standards for consumer protection and affordability. In fact, the absence of such standards could violate competitive neutrality by creating a regulatorily induced cost advantage for wireless providers.[56] Such a cost advantage could result in price signals that do not properly reflect the underlying efficiency of different technologies and carriers.[57] This would contradict the principle that the marketplace should direct the development, growth, and success of these providers.

90. The FCC adopted the concept of competitive neutrality as a principle upon which to base its policies for the advancement and preservation of universal telephone service.

91. The FCC determined in the *First Report and Order* at ¶ 48, that its:

> [d]ecisions here are intended to minimize departures from competitive neutrality, so as to facilitate a market-based process whereby each user comes to be served by the most efficient technology and carrier. We conclude that competitively

[56] The fact that currently the USF subsidies provided to wireless carriers are based on the cost of rural wireline providers may already have the effect of creating regulatorily induced advantages for the wireless providers. Not subjecting wireless carriers receiving public subsidies to similar consumer protection and affordability standards would further increase the regulatorily induced advantages of the wireless carriers.

[57] One principle of efficient markets is that in order for the market to result in a socially desirable outcome the price of products must accurately reflect all costs and benefits. As an example of an undesirable regulatorily induced advantage, suppose the government allowed some automobile producers not to install pollution control devices. These producers would be thus able to avoid this cost and offer their cars for sale for a lower price not because they were more efficient producers but because they were allowed a regulatory advantage. This would result in consumers making buying decisions based on inaccurate information about the underlying cost differences (*i.e.*, the price signals are wrong).

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> neutral rules will ensure that such disparities are minimized so that no entity receives an unfair competitive advantage that may skew the marketplace or inhibit competition by limiting the available quantity of services or restricting the entry of potential service providers.

We also note that, on the one hand, presumably when Western Wireless signed the stipulation in WW1 it believed it could profit and thrive in CenturyTel's marketplace even with the conditions imposed. On the other hand, nothing requires wireless carriers to request public support for their network via an ETC application. They are free to compete without public subsidy and can thereby avoid public interest requirements.[58]

~~91.~~92. For all these reasons the Commission finds that the public interest requires the Commission's grant of ETC status be conditioned upon a requirement that Western Wireless adhere to Commission standards regarding consumer protection.

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4. Cream Skimming

~~92.~~93. The issue of cream skimming was approached from several different angles in this proceeding. Generally Western Wireless, NECC, and Staff took the position that cream skimming issues were addressed by the proceedings that targeted support and redefined CenturyTel's service areas.[59] The Commission adopted this principle in approving the application of NECC to redefine certain rural study areas.[60] We agree with the principle that targeting support and redefining service areas obviates cream skimming concerns.[61] We also

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[58] In fact, Western Wireless is currently offering service in these exchanges without public support.

[59] CenturyTel chose Path 3 and targets costs to a "low-cost" group and a "high cost" group. Of the 53 wire centers, 7 were included in the "low-cost" group and 46 were included in the "high-cost" group.

[60] In Docket No. 02A-444T (Decision No. R03-0568), the Administrative Law Judge found that minimization of the opportunity for cream skimming was addressed adequately when the affected rural ILEC elected not to disaggregate and target their universal service support pursuant to Path 1. The Commission affirmed the recommended decision in Commission Decision No. C03-1122.

[61] As the Commission pointed out in its Decision Denying Exceptions and Motion to Reopen Record (Docket No. 02A-444T, Decision No. C03-1122), should cream skimming concerns arise in the future, the affected ILEC may petition the Commission to further target support under Path 2.

agree that if the traditional cellular service plans meet the required criteria, the plans are eligible to receive support under existing rules.[62]

94. Staff did raise another cream skimming concern based on three wire centers that Western Wireless included in its first application which were not included in the instant application: Gardner, San Luis, and Weston. This matter was resolved in Decision No. C03-0975 wherein the Commission granted the Motion for Clarification clarifying that Western Wireless has in fact been granted ETC designation in the service areas of CenturyTel effective upon redefinition of those wire centers on November 27, 2002. The Commission found that the designation of Western Wireless as an ETC in the CenturyTel wire centers identified in Attachment 2, is subject to the Stipulation and Settlement Agreement approved by the Commission in Docket Nos. 00K-255T and 00A-174T (Decision No. C01-476). Attachment 2 to the Stipulation includes the wire centers of Gardner, San Luis, and Weston.

~~94.~~95. CTA/CenturyTel maintains that, by seeking support for conventional cellular handsets, Western Wireless is seeking high cost support for serving predominately low-cost customers. According to CTA/CenturyTel, this represents prohibited cream skimming. This argument was advanced by CTA witness Glenn Brown in his Answer Testimony (Exhibit 8). During the hearing, Chairman Sopkin inquired whether cream skimming is an issue after disaggregation has occurred (8/4 Tr. p 195). Mr. Brown replied that cream skimming was still a concern for two reasons. First, according to Mr. Brown, only Western Wireless' fixed wireless product is capable of serving the entire service area. He testified that his Answer Testimony

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[62] On page 13 of its Statement of Position, NECC quoted the Commission's Reply Comments in Wiggins Telephone Association's redefinition proceeding before the FCC (CC Docket No. 96-45 at pp. 7-8): "If the traditional cellular service plans meet the required criteria, the plans are eligible to receive support under the existing rules."

demonstrates that only a small portion of the service area can be served by handheld sets. Second, Mr. Brown contended that the current disaggregation of CenturyTel service areas does not match support payments with the cost of serving these areas at a sufficiently granular level. He explained that CenturyTel disaggregated its 53 service areas into two groupings and set the support for each at average cost of each group. The average cost of the seven low-cost wire centers was $7. The average of the cost of the 46 high cost wire centers was $45. He then asked the Commission to suppose those 46 high cost wire centers ranged from needing $8 of support to needing $100 of support and that Burlington needed $12 of support. He concluded that in this situation cream skimming could exist because a provider could serve relatively low cost areas like Burlington and qualify for the averaged support of $45 per handset.

~~95.~~96. As indicated *supra*, we agree with the principle that targeting support and redefining service areas obviates cream skimming concerns. We also agree that if the traditional cellular service plans meet the required criteria, the plans are eligible to receive support under existing rules. However, Mr. Brown's testimony raises some concerns regarding the provision of USF support for handheld sets. The issue of USF service for handheld products is another of the issues of first impression we are dealing with in this docket.[63]

~~96.~~97. As we detail below, the Commission does not support Staff's request for an investigatory docket designed to acquire better information about what areas can and cannot be served by these devices. However, we believe Mr. Brown's testimony creates further support for conditioning the approval of Western Wireless' application on affordability and consumer protection requirements. His testimony suggests the strong likelihood that Commission approval

[63] One way this proceeding differs from the prior proceeding is that WW seeks ETC status for the delivery of its BUS offering via cellular handsets and not exclusively via its wireless local loop.

of $45 of USF support per handset in the high cost service areas will be a very generous one. We believe this adds weight to the question of what additional benefits Western Wireless rural customers will receive for such a sizeable public subsidy. However, despite these concerns, we find that the targeting of support and the redefinition of service areas here obviates any cream skimming concerns.

5. Previous Commission Decisions and the Public Interest

~~97.~~98. Because Western Wireless agreed in WW1 to be bound by the standards laid out in the Stipulation and Settlement Agreement there, and because we determine that similar standards should be employed here, we provide a brief outline of the Stipulation agreed to by the parties in WW1 as guidance in reaching our public interest determinations here.

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~~98.~~99. Western Wireless' execution of the Stipulation in WW1 was essential to the Administrative Law Judge's (ALJ) and the Commission's determination that the public interest was satisfied. Both regarded the Stipulation as an appropriate regulatory response to Western Wireless' receipt of a public subsidy for the provision of BUS in the high cost and rural areas of Colorado. In Decision No. R01-019 (Docket No. 00K-255T), the ALJ based his public interest findings in part on the conditions contained in the Stipulation. In making his public interest determination the ALJ referred to provisions of the Colorado statutes that state in his words, "[t]he policy of the State is one of promoting the competitive telecommunications marketplace and fostering free market competition within the telecommunications industry while guaranteeing the affordability of basic telephone service."[64] The ALJ went on to cite various benefits that would flow from granting the applications including an increase in customer choice

[64] Exhibit 14. Decision No. R01-19 at ¶ B page 19.

and the fact that under the Stipulation Western Wireless' proposed rate of $14.99 per month was less than most ILEC rates for residential service.

~~99.~~100. In our Decision on Exceptions (Decision No. C01-476 in Docket No. 00K-255T), we invoked the terms and conditions of the Stipulation to rebut Qwest Corporation's and CTA's arguments that the Stipulation was discriminatory since Western Wireless would not be required to comply with identical regulatory requirements. We noted that both federal and state statutes recognize it is appropriate to regulate incumbent LECs differently than competitive LECs. Secondly, we observed that the requirements applicable to Western Wireless in its provision of its BUS offering, as specified in the Stipulation, were substantially similar to those applicable to regulated LECs.[65] We concluded that the different regulatory oversight of Western Wireless, as compared to existing LECs, entailed in the Stipulation was appropriate. We found that the Stipulation properly recognized that not all existing regulatory standards that are applicable to wireline carriers should apply to a wireless provider.[66]

~~100.~~101. We also invoked various components of the Stipulation to rebut CTA arguments that the Commission oversight of Western Wireless was inadequate in certain ways. We found that the complaint authority over the BUS offering contained in the Stipulation was appropriate and adequate,[67] and concluded that the potential remedies contained in the Stipulation were adequate to ensure that Western Wireless provides acceptable service to consumers.[68]

[65] Exhibit 15. Commission Decision No. C01-476, at pages 10, 11.
[66] *Ibid*, at ¶ m. page 14.
[67] *Ibid*, at ¶ b. page 19.
[68] *Ibid*, at ¶ c. pages 19,20.

~~101.~~102. We also disagreed with CTA's assertions that the Stipulation gives the Commission no authority to address "rate abuses" or "rate discrimination." Rather, we found that the Stipulation empowered the Commission to investigate proposed changes to rates and concluded the Stipulation gave the Commission ample authority to oversee Western Wireless' BUS service.[69] Finally, we found that the Stipulation's requirements regarding Western Wireless' establishment of local calling areas were appropriate as well.[70]

~~102.~~103. In the Stipulation,[71] Western Wireless agreed to a set of terms and conditions under which it will provide its BUS offering.[72] The terms and conditions are analogous to this Commission's quality of service rules for LECs in many respects. Key provisions of the terms and conditions include the customer service policies, which require customer care personnel to be available 24 hours per day, 7 days per week. The customer care service personnel attempt to resolve complaints, but refer persons to Staff to resolve their complaints.

~~103.~~104. It was clarified at the WW1 hearing that, should the informal mechanism prove insufficient, a customer of Western Wireless' BUS offering would have the right to file a formal complaint with this Commission concerning service problems. The terms and conditions required Western Wireless to grant certain credits for interrupted services. Western Wireless was also required to maintain certain records and make these records available to the Commission.

[69] *Ibid*, at ¶ d. page 20.

[70] *Ibid*, at ¶ e. pages 20,21.

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[71] Exhibit 13.

[72] In his Rebuttal Testimony, WW witness Mr. Blundell explains that Western Wireless entered into the Stipulation in the first ETC docket in an effort to compromise, and all parties agreed the ~~s~~Stipulation did not have effect outside that docket. He says Western Wireless did not, and still does not believe that the Commission has the authority to directly impose the restrictions contained in the Stipulation. He contends this is a different proceeding,

~~104.~~105. The timeframes for the provision of service are contained in the Stipulation, with temporary alternatives to be provided in the event that the service cannot be provided within 150 working days. The terms and conditions also contain safeguards against slamming, against arbitrary termination of service, and ensure that payments from customers will be applied to universal service offerings. They also contain a section on rates and charges. The provision also contains many protections for customers such as in the case of contested charges.

~~105.~~106. Under the Stipulation, Western Wireless initially planned to offer the core supported services for a fixed monthly charge with unlimited local usage, a local calling area at least as large as the ILEC, and a per-minute charge for long distance calls. It also offered optional features and services such as voice mail, caller ID, call waiting, call forwarding, and conference calling. The initial price of the BUS offering was $14.99 per month.

~~106.~~107. We find the standards spelled out in the WW1 Stipulation to be reasonable. Nothing contained therein constitutes a barrier to entry. Therefore, requiring similar requirements of Western Wireless here would do nothing more than ensure that service among the CenturyTel service areas is consistent and within the spirit of the Telecom Act and Colorado law.

6. Discrimination and Western Wireless' Application

~~107.~~108. Staff and CTA argue that the approval by this Commission of the current application would result in potentially discriminatory service offerings by Western Wireless between and among its own customer base depending upon whether such customers are located in the CenturyTel or single exchange rural company wire centers subject to the WW1 Stipulation,

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the law has been better developed, and the issues are much more limited. He claims the prior S~~s~~tipulation is simply not before the Commission in this docket. We note that the Commission approved the Stipulation in WW1.

or in the wire centers subject to this application. The parties claim that approval of the current application would also result in a clearly discriminatory impact upon other ETC providers. That is, all have secured ETC status in exchange for acceptance of the terms of a Stipulation containing substantially the same terms and conditions as that entered into by Western Wireless in WW1, and rejected by Western Wireless here.

~~108.~~109. We pointed out *supra*, that the absence of a competitively neutral set of standards for all competitive ETC and wireline carriers may negatively impact the goal of market driven development and growth by creating a regulatory induced cost advantage for Western Wireless. It may also result in customers paying a different price for similar services depending on whether they reside inside or outside the five affected exchanges. That is, customers in exchanges controlled by the Stipulation in WW1 will be offered BUS at approximately the residential rate cap with various Commission determined standards for quality of service and consumer protections, while consumers residing in the five exchanges subject to this application would have no such assurances.[73]

~~109.~~110. We find that the absence of competitively neutral standards would result in potentially discriminatory service offerings and have a discriminatory impact upon other ETC providers. It is for this reason (among others stated previously) we have conditioned the approval of Western Wireless' ETC application based upon consumer protection and affordability standards.

[73] Tr. 8/4 p 97 WW witness Mr. Blundell in response to questions from Chairman Sopkin, indicated that if the Commission approved WW's Application WW might ask the Commission to reconsider the terms and conditions of the stipulation.

E. Summary and Conclusion of Public Interest and Legal Analysis

~~110.~~111. During the hearing Chairman Sopkin asked Western Wireless witness Mr. Blundell a number of questions related to issue of the public interest (Tr. 8/4/03 pages 100-

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116). Chairman Sopkin inquired why, if Western Wireless is requesting the playing field be leveled between it and the rural ILECs, in terms of high cost support dollars, should the Commission not also consider leveling the playing field in terms of Commission ordered standards. Mr. Blundell's response was that federal law prohibits it, that consumer protection is addressed adequately by federal regulations, and that in the absence of market failures, competitive markets are the best regulators. We find none of these arguments persuasive. Rather, we find that we indeed have the authority and responsibility to impose conditions assuring affordability and consumer protection.

112. Leveling the playing field between the rural ILECs and Western Wireless requires establishing a nexus between the Commission's grant of a public subsidy to Western Wireless for the provision of telecommunications services in Colorado's rural and high cost area with the requirement that WW adhere to approximately the same affordability and consumer protection standards. In the absence of such standards the incremental public interest benefits Colorado rural consumers receive in return for this public subsidy are not apparent.[74] Further, Mr. Blundell's argument that the Commission retains a "heavy stick" via its authority to revoke ETC designation is not convincing. If the Commission does not condition Western Wireless'

[74] Moreover, as we argued above, the absence of such standards is likely to result in a regulatory-induced cost advantage for Western Wireless that violates competitive neutrality and contradicts the principle that the market should direct the development, growth, and success of these providers.

ETC status with Commission standards, our responsibility and capacity to protect the public interests of Colorado's rural wireless consumers will be virtually non-existent.[75]

~~112.~~113. Therefore, based on the above findings regarding our legal authority and the public interest requirements of CMRS, ETC providers, and in concert with our previous decisions granting ETC status to rural wireless providers, we find that designating Western Wireless as an ETC is in the public interest. However, this is only when conditioned with important Commission standards including affordability and customer protection. Specifically, we will grant Western Wireless' application and designate Western Wireless a federal ETC subject to the requirement that it submit the pricing plans it intends to offer in the five wire centers for Commission approval. We further determine that Western Wireless grant of ETC status will be subject to the terms and conditions provided in the WW1 Stipulation regarding customer protection.[76]

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III. OTHER ISSUES

A. Rulemaking

~~113.~~114. As more and more wireless providers attempt to enter into the rural markets and access USF through ETC designation, Staff believes that there should be a standard set of customer protection and universal service provision rules that these providers must follow to gain designation from the Commission. In her Answer Testimony (Exhibit 11, p. 44), Staff

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[75] The Commission finds it problematic to adopt Western Wireless' proposed "regulation lite" suggestion under the assumption that conditions can be enforced on the backend. The burden of a show cause is a substantial one. Western Wireless witness Blundell's suggestion the Commission has a big stick in that it can revoke Western Wireless' ETC designation raises the issue pointed out by Staff and Chairman Sopkin in his questioning of Mr. Blundell at the hearing (Tr. 8/4 p 109). Namely, what standard would the Commission apply in such a proceeding. The Commission is in effect granting Western Wireless a licensed property right. It is proper to state the conditions up front.

[76] Exhibit 13.

witness Ms. Fischhaber recommended the Commission initiate a rulemaking proceeding to establish the responsibilities that are regulated and required by this Commission for wireless carriers that may seek ETC status in the future. The goal of such a rulemaking would be to provide a level playing field for all competitors.

~~114.~~115. In his Rebuttal Testimony, Mr. Blundell responded that such a proceeding may or may not be necessary for policy reasons. He maintained it is not, however, necessary in order for the Commission to reach a policy decision on the merits in this case and designate Western Wireless as an ETC (Exhibit 4, p. 13).

~~115.~~116. We agree that more and more wireless providers are likely to attempt to enter into the rural markets and access public subsidies through ETC designations and that up to this point a series of stipulations have controlled these standards. However, we believe this decision provides sufficient guidance to future ETC applicants regarding the standards we expect in return for a grant of ETC status. Therefore, we deny Staff's request that we initiate a rulemaking proceeding in this regard.

B. Investigatory Docket

~~116.~~117. Staff recommends the Commission open an investigatory docket into the approved ETC universal service plans utilizing a traditional mobile phone to determine if these units are available to all customers in ETC approved service areas in Colorado. Staff explains that this recommendation is made in response to CTA witness Mr. Brown's Answer Testimony (Exhibit 8, beginning on page 19, line 12) that discusses Western Wireless' coverage of the proposed ETC service areas. According to Staff, Mr. Brown's testimony brings up an important point about the difference between a typical cell phone and the wireless local loop. That is, the power difference between a wireless local loop and a handheld cell phone may mean there are

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areas within the ETC service area that cannot be served by a handheld cell phone. The question that arises is if cell phones are being offered to provide BUS, but there are areas that cannot be served by cell phones, are these plans meeting all the criteria to be eligible to receive support? As such, the purpose of the investigatory docket is to analyze the areas that can and cannot be served by cell phones so the Commission can be sure that the plans receiving high cost support are meeting all criteria to be eligible to receive support.

~~117.~~118. We deny Staff's request to open an investigatory docket regarding this issue. It appears such an investigatory docket would be a substantial undertaking requiring a sizeable commitment of scarce Commission resources. Additionally, technological change and infrastructure improvements could quickly render the outcome of such an investigation obsolete. We believe such concerns are more efficiently addressed on a case-by-case basis.

~~118.~~119. Finally, NECC filed a Motion for Leave to Supplement Closing Statement of Position with One Additional Authority on September 10, 2003. Attached to the motion was an order from the Alaska Public Utilities Commission addressing similar issues as addressed here. Since no party objected to the filing, we find that no other party to this matter will be prejudiced by the filing and grant NECC's motion for leave to supplement its Closing Statement.

IV. ORDER

A. The Commission Orders That:

1. The Application for Designation as an Eligible Telecommunications Carrier pursuant to Commission Rule 4 *Code of Colorado Regulations* 723-42-7, by Western Wireless Holding Co, Inc., a wholly owned subsidiary of Western Wireless Corporation, is granted subject to the conditions discussed above.

2. The Motion for Leave to Supplement Closing Statement of Position with One Additional Authority filed on September 10, 2003, by N.E. Colorado Cellular, Inc., is granted.

3. The 20-day period provided for in § 40-6-114, C.R.S., within which to file applications for rehearing, reargument, or reconsideration begins on the first day following the Mailed Date of this Decision.

4. This Order is effective upon its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING May 26, 2004.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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_____
Commissioners

CHAIRMAN GREGORY E. SOPKIN
CONCURRING, IN PART, AND
DISSENTING, IN PART.

V. CHAIRMAN GREGORY E. SOPKIN CONCURRING, IN PART, AND DISSENTING, IN PART:

1. I concur with the majority's ruling that Western Wireless Corporation's (Western Wireless) Application for Designation as an Eligible Telecommunications Carrier (ETC) is within the public interest, subject to service quality regulation, and the majority's denial of Commission Staff's (Staff) requests for a rulemaking and investigatory docket.[77] I dissent from the requirement that Western Wireless' rates be regulated, and from much of the reasoning employed in the majority's decision.

2. There are but two constraints on the regulator: policy and law. The latter is constraining only when it provides unambiguous prohibitory language. It does on the question of whether state commissions may regulate rates of wireless companies: they cannot. That the Commission has held otherwise represents a reversal of the proper order of inquiry. It is fitting that the majority discusses policy first, then law, because policy has trumped law in this case. For the purpose of symmetry, I will follow the same order.

3. Policy does not act as a constraint unless it is grounded in a limiting regulatory philosophy. A philosophy that merely speaks of "consumer protection" as the meaning of "public policy" is not limiting at all; it is reflexively pro-regulation. It is my sincere hope that this Commission move away from this approach, and toward restrictive economic principles.

[77] I also concur with the majority's "cream-skimming" analysis.

These would include refraining from command and control rate regulation[78] when there is a check on pricing power.

4. The argument is advanced by the majority that "years of [unidentified] economic research" suggest that there must be a minimum of five reasonably comparable competitors so as to avoid collusion among competitors for effective price competition to exist. I surmise that none of that research involved an incumbent local exchange carrier (ILEC) that could not charge more than the statutorily fixed price of about $15 for basic local exchange service. If Western Wireless seeks to collude with the ILEC, it could only do so at $15. If Western Wireless seeks to charge above that price, it will not obtain any customers (and therefore federal subsidies) unless its service is somehow superior to the ILEC's. If its service is superior, consumers who pay more are not harmed.

5. I understand the argument that Western Wireless is free to enter any market without federal subsidies. I believe receipt of those subsidies attach the strings of service quality protection, because of the requirement that the subsidies be invested in the provision, maintenance, and upgrading of certain facilities and services, including local usage and DMTF signaling, as well as access to voice grade, 911, operator, directory assistance, and interexchange

[78] The majority seeks to distance themselves from the notion that imposing the statutory rate cap might amount to rate regulation, much less command and control rate regulation. Yet command and control principles pervade the majority's decision. The majority assumes that wireless carriers will not make a BUS offering equivalent to an ILEC's offering unless ordered to do so by the Commission. The majority is concerned that Western Wireless (like Bayer, with aspirin) may be able to differentiate its product, allowing it to charge a customer more than $15; that customers may not be sufficiently informed to know whether the product is actually superior to that of the ILEC; that, in the absence of a BUS offering at the statutory rate cap, "it will be very difficult to know if competition has resulted in wireless carriers offering BUS at a rate equivalent to the one required of the rural ILEC's." Of course, these arguments apply with equal force to any bundled product, be they wireless phone offerings, cable TV, or extra-value meals. Thankfully, the Colorado Legislature had the wisdom to preclude Commission regulation of all three. And aspirin as well.

services.[79] The federally expressed intent is to subsidize the provision of high quality services in high cost areas – so conditioning receipt of those monies on such high quality is rational. But there is no federal indication that states should regulate rates. Just the opposite: while there is platitudinal language in the federal statute that supports affordable universal service, more exacting language prohibits states from touching wireless rates.

6. Notably, the Federal Communications Commission (FCC) did not impose eligibility requirements (such as rate regulation) beyond those set forth in 47 U.S.C. § 214(e) when it granted Western Wireless' ETC application in the State of Wyoming, stating:

> We find that these statutory provisions are sufficient to ensure that competitive carriers use universal service funds to make the supported services available to all requesting customers throughout the service area. We also believe that the forces of competition will provide an incentive to maintain affordable rates and quality service to customers. Competitive ETCs will receive universal service support only to the extent that they acquire customers. In order to do so, it is reasonable to assume that competitive ETCs must offer a service package comparable in price and quality to the incumbent carrier.[80]

[79] *See* 47 U.S.C. § 254(e)(2) and 47 C.F.R. § 54.01(a).

[80] *In re Federal-State Joint Bd. on Universal Service; Western Wireless Petition for Designation as an ETC in the State of Wyoming*, CC Docket No. 96-45, Memorandum Opinion and Order, DA 00-2896 ¶¶ 12-13 (rel. Dec. 26, 2000).

Further, to my knowledge, no other state commission has ever attempted to impose rate regulation on an ETC applicant.[81, 82, 83]

7. Service quality regulation is qualitatively different from price regulation. The former involves an after-the-fact inquiry into whether the carrier's performance met certain objective metrics. Price regulation, on the other hand, is up-front command and control: the company must pre-submit its proposed rates, and, if asked to do so, justify them. The Commission may simply veto the proposed rates until they are considered "affordable," an undefined term subject to Staff whim.[84] The company cannot begin to compete unless it receives pre-approval of its service offerings.

8. As a matter of policy, then, I believe it is a mistake to impose command and control rate regulation on ETC carriers. In any case, even if it were economically justified, federal law expressly preempts any state attempt to do so.

[81] Surely this is because federal law forbidding such regulation is so evident, given that some state commissions have shown a desire to impose other regulation on cellular providers.

[82] As pointed out by N.E. Colorado Cellular, Inc., numerous state commissions have declined to impose pricing or "unlimited minutes" requirements on ETC applicants. *See, e.g.*, In the Matter of the Request by Alaska Digitel, LLC, Docket No. U-02-39 (Reg. Com'n of Alaska Au. 28, 2003); Smith Bagley, Inc., Docket No. T-02556A-99-0207 (Ariz. Corp. Com'n Dec. 15, 2000); GCC License Corp., Docket No. 99-GCCZ-156-ETC at p.4 (Kansas Corp. Com'n Oct. 15, 2001); Midwest Wireless Iowa, L.L.C., Docket No. 199 IAC 39.2(4)(Iowa Util. Bd. July 12, 2002); RCC Minnesota, Inc. *et al.*, Docket No. 2002-344 (Maine PUC May 13, 2002); RFB Cellular, Inc., Case No. U-13145 (Mich. PSC Nov. 20, 2001); Smith Bagley, Inc., Utility Case No. 3026, Recommended Decision of the Hearing Examiner and Certification of Stipulation (N.M. Pub. Reg. Com'n Aug. 14, 2001) at p.7, adopted by Final Order (Feb. 19, 2002); WWC Texas RSA L.P., PUC Docket Nos. 22289, 22295, SOAH Docket Nos. 473-00-1167, 473-00-1168 at pp. 23-24 (Tex. P.U.C. Oct. 30, 2000); United States Cellular Corp., Docket No. 8225-TI-102 (Wisc. P.S.C. Dec. 20, 2002); RCC Minnesota, Inc., Docket No. UT-023033 at p. 16 (Wash. Util. & Transp. Com'n Aug. 14, 2002).

[83] Since writing these words, the majority found a decision by the Minnesota Public Utilities Commission that imposed a tariff filing requirement for terms and rates of the BUS (*see* footnote ~~67~~54). Since the MPUC decision neither cites nor discusses preemption of rate regulation pursuant to § 332(c)(3)(A), it is impossible to discern whether the MPUC even considered the effect of the statute.

[84] I say "staff" purposefully, because the practical reality is that the Commission (*i.e.*, commissioners) will have no say as to what is "affordable." To the uninitiated, the process is that proposed rates are filed, and Staff decides whether to question the rates. If rates are disputed, the Commission likely holds a hearing, at which the carrier has the burden of proof. In order to avoid this expensive hassle, companies generally try to procure Staff acquiescence before the Commission ever sees the rates.

9. The majority in paragraphs 68 through 71 of their decision admits this preemption. The decision acknowledges § 332(c)(3)(A), which is entitled "STATE PREEMPTION" and begins, "… [N]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service …." The statute goes on to allow state commissions to impose requirements necessary to ensure affordable universal service, but only "where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State." There is no question that this Commission has not made any such substitutability finding, nor would that finding be possible as part of this docket.

10. Against the backdrop of what is clearly rate regulation that is plainly prohibited by federal statute, what legal argument is made to nonetheless plunge forward? The majority cites 47 U.S.C. §§ 253(b), 254(b)(1) and (3), and 254(f) and (i) of the Telecommunications Act of 1996 (Act) for the proposition that universal service should be at just, reasonable, and affordable rates. Yet the majority also acknowledges that § 253(e) of the Act states: "Nothing in this section shall affect the application of section 332(c)(3) of this title to commercial mobile service providers." Section 254(b) relates to universal service policies to be carried out by the FCC and Joint-Board, not states. *See* § 254(b) ("The Joint Board and the Commission shall base policies for the preservation and advancement of universal service on the following principles …"). While § 254(i) does relate to states, the Fifth Circuit upheld the FCC's interpretation of both §§ 254(b)(1) and 254(i) as "merely aspirational."[85] In an earlier case, the Fifth Circuit held

[85] *Texas Office of Public Utility Counsel v. Federal Communications Commission*, 265 F.3d 313, 321-22 (5th Cir. 2001) (§ 254(b) uses "vague, general language"; since § 254(i) uses the word "should" instead of "shall," "at best, the meaning of § 254(i) is unclear").

that § 254(f) of the Act cannot be read to supersede the preemptive effect of § 332(c)(3)(A).[86] Moreover, there is nothing in any of the cited sections that abrogate or render inapplicable the explicit preemption language of § 332(c)(3)(A).

11. One of the basic tenets of statutory interpretation is that statutes should be read harmoniously; one statute may not be read to contravene another unless they are irreconcilable.[87] Indeed, this principle is codified in the Act: "This Act and the amendments made by this Act shall not be construed to modify, impair or supersede Federal, State, or local law unless expressly provided in such Act or Amendments."[88] On the one hand, we have § 332(c)(3)(A), which expressly preempts state law; on the other, we have vague or aspirational language in certain universal service statutory subsections that either do not mention § 332(c)(3)(A) or explicitly reaffirm its continued validity. The Commission's holding today that these universal service subsections somehow supersede § 332(c)(3)(A) is an act of political will, not law.

12. The majority now divines that the sequence of enactment of § 332(c)(3)(A) (1994) and § 254(i) (1996) means that Congress, at the time of enacting § 332, "could not have contemplated … the subsequent intricacies embodied in the Telecommunications Act of 1996." Also, the fact that § 254 (dealing with universal service) does not contain the statement in § 253(e) – that "[n]othing in this section shall effect the application of section 332(c)(3) to

[86] *Texas Office of Public Utility Counsel v. Federal Communications Commission*, 183 F.3d 393, 431-33 (5th Cir. 1999) (allowing the FCC to give effect to § 254(f) in a way that does not violate the federal law directive to not supersede § 332(c)(3)(A)).

[87] *See University of Colorado v. Booth*, 78 P.3d 1098, 1101 (Colo. 2003) (courts should harmonize, if possible, apparent conflicts in statutory provisions); *People v. Hampton*, 876 P.2d 1236, 1240 (Colo. 1994) ("If a statute potentially conflicts with another statute, a court must attempt to harmonize them to effectuate their purposes"); C.R.S. § 2-4-206.

[88] 47 U.S.C. § 152 (Addendum A-1).

[cellular] providers" – is a "clear demonstration that it was not the intent of congress that § 332(c)(3)(A) should trump … § 254(i)." These arguments are unavailing.

13. First, § 253(b) ("State regulatory authority") states that "[n]othing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with § 254 of this title, requirements necessary to preserve and advance universal service …." Yet, in the same § 253 (specifically, § 253(e)), the statute clarifies that § 332(c)(3)(A) still applies to cellular providers. Section 253 thus addresses *both* § 254 (universal service) and § 332(c)(3)(A) (preemption of state rate and entry regulation of cellular providers). Hence, Congress made clear that, notwithstanding the states' regulatory authority to impose universal service requirements *under section 254* (including § 254(i)), § 332(c)(3)(A) still preempts state rate regulation of cellular providers. For this reason, it was unnecessary for § 254 to reaffirm the application of § 332(c)(3)(A).

14. Second, the lack of mention of an explicit preemptory statute hardly voids its effect. How such a transgression "clearly demonstrates" Congress' intent to void the statute the majority does not say, other than the suggestion that Congress *could have* reaffirmed its effect if it so wanted. The question, *why would Congress do so if the preemptory statute is unambiguous and has not been repealed?*, is not explored. As long as we are divining the intent of Congress by its silence, the majority's argument may easily be turned on its head: The fact that Congress did *not* explicitly repeal the effect of § 332(c)(3)(A) concerning wireless ETC applications "clearly demonstrates" that Congress intended it to remain applicable. As between the two choices – (1) Congress did not *reaffirm* the applicability of a statute that explicitly forbids state rate regulation of wireless carriers, and therefore states may regulate wireless rates, versus (2) Congress did not *repeal* the statute and therefore states may *not* regulate wireless rates – I tend to

think the latter is the better jurisprudence. But, rather than taking my word for it, let's consult the Act (which includes the now-talismanic § 254(i)): "This Act and the amendments made by this Act shall not be construed to modify, impair or supersede Federal, State, or local law unless expressly provided in such Act or Amendments."[89] Likewise, Colorado law provides that, "for general legislation to work a repeal of an existing special provision the intent to do so must be clear and unmistakable," and "there is a presumption that all laws are passed with knowledge of those already existing and that the legislative body does not intend to repeal a statute without so declaring."[90] In other words, § 332(c)(3)(A) still controls.

15. The majority concludes: "Without a case directly on point, or more specific direction from the courts or the FCC, we are not convinced that we cannot address affordability …." Beyond the rejoinder that there is an applicable *statute* directly on point, **the FCC has itself affirmed that rate regulation of wireless carriers by states is preempted, even when the carrier seeks ETC status**.[91] In addition, there is a federal appellate case that addresses both § 332(c)(3)(A) and an ETC application, and it does provide very specific direction.

[89] 47 U.S.C. § 152 (Addendum A-1).

[90] *City and County of Denver v. Rinker*, 366 P.2d 548, 500 (Colo. 1961). Federal cases are in accord with these principles, as summarized in *Watts v. Hadden*, 651 F.2d 1354, 1381-82 (10th Cir. 1981):

> A cardinal rule of statutory interpretation is that repeals of legislation by implication are disfavored. … "The intention of the legislature to repeal must be 'clear and manifest.'" "We must read the statutes to give effect to each if we can do so while preserving their sense and purpose." ... "In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." [Numerous Supreme Court citations omitted throughout quote]

[91] *See Petition of the State Independent Alliance and the Independent Telecommunications Group*, WT Docket No. 00-239, FCC 02-164 (rel. Aug. 2, 2002) at ¶ 31 ("Independents argue that Western Wireless should be subject to the same universal service requirements as CLECs in Kansas. **Unless the requirements imposed by the Kansas Commission are entry, rate, or equal access regulations**, the Kansas Commission is not prevented from applying such requirements to CMRS ETCs consistent with the Act and the Commission's universal service regulations.") (Emphasis added)

In *Texas Office of Public Utility Counsel v. Federal Communications Commission*, 183 F.3d 393, 432 (5th Cir. 1999), the Fifth Circuit summarized the relevant federal statutes as follows:

> States (1) in general can never regulate rates and entry requirements for CMRS providers; (2) are free to regulate all other terms and conditions of CMRS service; (3) may regulate CMRS rates and entry requirements when they have made a substitutability finding in connection with universal service programs; and (4) may also regulate CMRS rates if they petition the FCC and meet certain statutory requirements, including either substitutability or unjust market rates.[92]

Again, it is undisputed that the Colorado Commission has neither made a substitutability finding nor petitioned the FCC regarding substitutability or market rates. Thus, the only federal appellate court case discussing state authority in the ETC context held that states can *never* regulate rates except pursuant to two exceptions that are indisputably inapplicable here,[93] and yet the Commission has opted to do anyway.

16. Now, if there were any case law that indicated that states are permitted to regulate wireless rates, the majority's decision would be defendable. But there is none. Indeed, there is a plethora of authority that holds to the contrary. *See, e.g., Bastien v. AT&T Wireless Services, Inc.*, 205 F.3d 983, 986-88 (7th Cir. 2000) ("There can be no doubt that Congress intended complete preemption" of state authority to regulate rates under § 332(c)(3), and this clause allowed removal to federal court in a consumer complaint case, because most of such cases involve

[92] Earlier in the decision the Fifth Circuit discussed whether state commissions could impose service quality requirements on an ETC applicant, and held that they can. 183 F.3d at 418. While the court states that nothing in *subsection 214(e)(1)* prohibits states from imposing their own eligibility requirements on ETC applicants, later in the decision the court makes clear that a *different* statute, § 332(c)(3)(A), means states can *never* regulate rates except under the two exceptions described in the quote above.

[93] The majority contends that I mischaracterize the court's decision (above quote in text) because it is part of the court's discussion on the authority of states to collect a universal service assessment from cellular applicants, not the part discussing ETC applications. In my view, the majority reads the quote too narrowly. For example, the majority does not explain how the broad words "States … in general can never regulate rates and entry requirements of CMRS providers" (except under two defined circumstances) might be interpreted to apply only to state assessment of universal service fees, but does not apply to ETC applications. The broad words speak for themselves, and are entirely consistent with federal statute.

rates); *Sprint Spectrum, L.P. v. State Corporation Com'n of Kansas*, 149 F.3d 1058, 1062 (10th Cir. 1998) ("[A] state must show that wireless services are a substitute for land line service" when a state wants to regulate rates); *Digital Communications Network, Inc. v. AT&T Wireless Services*, 63 F.Supp.2d 1194, 1198 (C.D. Cal. 1999) ("[T]he court finds that the [California Public Utilities Commission] lacks subject matter jurisdiction over this dispute because it arguably involves ratemaking, an activity from which the Commission has been preempted").

17. The majority seeks to avoid the uncontroverted legal authority forbidding rate regulation by concluding that a spade is not, in fact, a spade: the rate regulation imposed here is not rate regulation at all.[94] Yet during the deliberation meeting in this case, the advisors admitted that we were talking about the regulation of rates.[95] How could they not? By the majority's own words, the regulation being imposed requires "affordability," meaning that Western Wireless must "provide a BUS offering at rates approximately equal to the statutory rate cap."[96] The ability to reject a rate offering is, of course, rate regulation, even if a wireless carrier voluntarily "chooses" to apply for ETC designation.[97]

[94] Majority decision, ¶¶ 76-78.

[95] An example was posed: if Western Wireless wanted to charge a $25 basic service rate, the Commission could find that rate unreasonable and reject it. The advisors acknowledged the correctness of the example.

[96] Majority decision, footnote 37 and ¶¶ 75-77.

[97] The majority states that, to constitute "rate regulation," it is "critical" that the regulation be imposed "against the wishes of the provider." Since Western Wireless has voluntarily chosen to apply for ETC designation, the circular argument goes, there can be no rate regulation. Under this reasoning, since taxes are involuntary, we are not taxed for purchases, because we voluntarily make the purchase.

18. The majority also claims that the rate regulation they impose is not "rate-making as contemplated in § 332(c)(3)(A) of the Act."[98] Here the Commission is interposing its own interpretation of the intent of Congress when it unambiguously declared that "no State … shall have *any* authority to regulate … the rates charged" by a cellular provider.[99] Such interpretation is inappropriate not only because the statute is unambiguous,[100] but also because the statute on its face does not narrow the prohibition to "rate-making." Moreover, courts have struck down as unlawful state attempts at wireless regulation that have a much more tenuous relation to rates than what is ordered here. *See, e.g., Digital Communications Network, supra*; *Gilmore v. Southwestern Bell Mobile Systems, Inc.*, 156 F.Supp.2d 916, 924 (N.D. Ill. 2001) ("Cellular telephone service customer's claim that customer was charged a corporate account administrative fee in violation of its contract with the cellular service provider challenged cellular service provider's rates, rather than stated a contract claim, and thus contract claim was preempted by [§ 332 (c)(3)(A)]").

19. The majority cites state law relating to affordable basic universal service as a justification to impose rate regulation.[101] The majority also alleges that, since Western Wireless

[98] This statement is breathtaking given its complete lack of support. Another unsupported statement is that "[r]ate regulation is typically defined as the process of requiring a utility. . . to provide extensive cost and pricing data [and] to file an advice letter and proceed through an extensive hearing process …, and ultimately require a tariff …." I am not aware of any definition setting forth such minimums to meet the "rate regulation" threshold (it's not in Newton's Telecom Dictionary) and, I suspect, for all its typicality, the majority can't find any either. As an aside, use of the cryptic term "extensive" to describe what the nature of future proceedings will *not* be gives pause, or should. Does this mean Western Wireless cannot prove the justness and reasonableness of a rate by making full use of data and the hearing process? Or just that it won't bother given the cost of the attempt and the obvious predisposition that a BUS offering must "approximate" the statutory rate cap? Neither possibility suggests much concern over due process.

[99] Emphasis added.

[100] *Husson v. Meeker*, 812 P.2d 731, 732 (Colo. App. 1991) ("A statute free from ambiguity leaves no room for interpretation or construction").

[101] State law also prohibits this Commission from regulating wireless companies. *See* § 40-15-401(1)(b), C.R.S. While federal law relating to ETC applications opens the door for this Commission to consider imposing conditions other than rate or entry regulation, state policy nevertheless remains: hands off wireless.

previously agreed to be regulated in other service areas,[102] it would be unlawfully discriminatory not to do so here. Since state law – including that related to discrimination – is expressly preempted by § 332(c)(3)(A), these arguments are unavailing. Also, the argument that ETC applicants must be treated the same as ILECs as a matter of "competitive neutrality" has been rejected by the FCC.[103] Finally, the fact that Western Wireless once agreed to be rate-regulated and the Commission accepted that stipulation simply has no bearing on whether such regulation may be *imposed* by a state commission.[104]

20. The majority indicates that the issue of affordability is "critical" in designating a provider for ETC status. I hope that this does not mean that, even if a provider meets all of the § 214(e) checklist and can offer more choice and better service to rural customers, the Commission will still deny the application if federal law preempts rate regulation. Since federal law *does* preempt state regulation of wireless rates, such a view would constitute state rejection of federal law. Beyond the fact that this is highly questionable as a matter of law, this is a denial of benefits to rural customers because of the fear that some consumer may be charged "too much" for services that are not presently available.

[102] Since the issue is outside the scope of this docket, I take no position as to whether the Commission had authority to accept or approve a previous stipulation (in Docket No. 00K-255T) in which Western Wireless agreed to charge a certain rate for a BUS offering. In any case, based on the decisions issued in Docket No. 00K-255T, it appears that the Commission did not address the preemption issue.

[103] *Federal-State Joint Bd. on Universal Service, Report and Order*, 12 FCC Rcd 8776, 8857-58, ¶ 144 (CCB 1997) ("[S]ection 254 does not limit eligible telecommunications carrier designation only to those carriers that assume the responsibilities of ILECs").

[104] Contrary to the majority's assertion, I do not claim that preemption removes "all jurisdiction" of this Commission over this matter. (*See* footnote 101.) To the extent there is any confusion, let me clarify: this Commission is preempted from imposing entry or rate regulation on wireless carriers. Preemption is not an all-or-nothing doctrine *per se*, and I have not suggested otherwise.

21. It would be a better outcome, in my view, to allow rural customers to have a choice of high-quality service providers, even if one of those providers is not rate-regulated. As noted by the FCC:

> [T]he designation of a qualified ETC promotes competition and benefits consumers in rural and high-cost areas by increasing customer choice, innovative services, and new technologies. We find unpersuasive the evidence now provided by the petitioners, such as the number of customers and size of the geographic areas that the rural telephone companies serve, to support the contention that designation of competitive ETCs in rural areas will necessarily result in increased rates or reduced investment in rural areas.[105]

Consumers are quite able to decide whether any particular BUS offering is worth their money without having the Commission decide that for them.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

_____
Chairman

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[105] *In re Federal-State Joint Bd. on Universal Service; Western Wireless Petition for Designation as an ETC in the State of Wyoming*, CC Docket No. 96-45, Order on Reconsideration, FCC 01-311 ¶ 19 (rel. Oct. 19, 2001).