Decision No. C04-0787

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.

ORDER ON APPLICATION FOR REHEARING REARGUMENT OR RECONSIDERATION

Mailed Date: July 15, 2004
Adopted Date: July 9, 2004

I. BY THE COMMISSION

A. Statement

1. This matter comes before the Commission for consideration of an Application for Rehearing, Reargument or Reconsideration (RRR) of Commission Decision No. C04-0545 filed by Western Wireless Holding Co., Inc., a wholly owned subsidiary of Western Wireless Corporation (WW) on June 15, 2004. Generally, WW asserts that the Commission exceeded its authority under state and federal law by imposing what it terms "rate regulation" and other ILEC-based restrictions on WW as a condition of granting its application. WW also indicates that it pledges to commit to certain customer service standards as outlined in a document it attaches to its RRR filing. As such, WW requests that the Commission reconsider its decision and grant WW's application for ETC status unconditionally.

2. This matter was deliberated by Chairman Sopkin and Commissioner Page at the Commissioners' Weekly Meeting of July 9, 2004. Commissioner Miller did not participate. Commissioner Page voted to deny the RRR in its entirety. Chairman Sopkin voted to grant the RRR regarding WW's arguments that the Commission did not have authority to require a

showing of affordability or impose quality of service terms and conditions as a condition to the grant of ETC status. However, Chairman Sopkin voted to deny the RRR with regard to WW's argument that Decision No. C04-0545 constituted an illegal rulemaking.

3. Without a majority decision approving any of WW's RRR, it is denied in its entirety. The Commissioners' individual statements follow this Decision.

B. Background

4. WW filed an Application for Designation as an Eligible Telecommunications Carrier (ETC) before this Commission pursuant to 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 on February 14, 2003 (Application). WW sought ETC status in order to receive federal universal service support within certain individual wire centers served by CenturyTel of Eagle, Inc. (CenturyTel), within WW's current signal coverage areas. WW did not include designation as an Eligible Provider (EP) in its Application.

5. The Commission determined that WW could be granted ETC status conditioned on two factors. First, the Commission determined that WW must show that its rates are affordable to the rural customers it serves. Second, the Commission required WW to adhere to a set of quality of service conditions similar to what it had agreed to in a previous ETC application wherein WW agreed to be bound by certain quality of service conditions.[1] Although the Commission determined unanimously to require a quality of service standard, Chairman Sopkin dissented from the requirement that WW provide assurances that its rates were affordable as a condition of granting it ETC status.

[1] Decision No. C01-476 in Docket No. 00K-255T.

6. In its RRR, WW asserts that the Commission committed several points of error in conditioning ETC status on a showing of quality of service and affordability. WW first argues that imposing an affordability requirement is prohibited rate regulation. WW reasons that since requiring a showing of affordability is tantamount to rate regulation, it is therefore precluded pursuant to preemption provisions of §332(c)(3)(A) of the Telecommunications Act of 1996 (Act).

7. WW goes on to maintain that the majority opinion suggests that a showing of affordability is within its jurisdiction because §254 of the Act "overrides" §332(c)(3)(A). According to WW, we may only require a showing of affordability if we first demonstrate to the Federal Communications Commission (FCC) that the service is "substitutable" for landline service.

8. According to WW, Decision No. C04-0545 undermines FCC decisions regarding the appropriate regulation of wireless carriers. WW interprets FCC decisions as finding that competitive market forces are sufficient to ensure affordable rates and quality of service.

9. WW contends that this Commission has no authority whatsoever to regulate commercial mobile radio service providers (CMRS) under either federal or state law. Rather, it determines that the only grant of authority provided to the Commission in designating ETCs is contained within §254(f) of the Act. WW reads the terms of §254(i) which indicates that the states and the FCC should ensure that universal services are provided at just, reasonable and affordable rates as nothing more than a guide to states "in the regulation of services otherwise within their jurisdiction." Because we are to be guided solely by §254(f), WW makes the argument that we have failed to follow statutory mandates by not adopting regulations to create

our own universal service policies and standards. Nor have we provided funding for any additional universal service standards.

10. WW also claims that the requirements of our Decision are not competitively neutral as required by §253(b) of the Act, nor are the requirements consistent with §254. WW insists that there is no evidence on the record that suggests the conditions to a grant of ETC status we imposed are necessary to preserve and advance universal service. In addition, WW argues that the Commission is asserting jurisdiction over service plans that include interstate service.

11. WW contends that Decision No. C04-0545 constitutes unlawful rulemaking because we failed to undertake the necessary procedures mandated by the Colorado Administrative Procedures Act, because the Decision established standards and policies applicable to telecommunications service of all public utilities. WW also cites *Home Builders Assoc. of Metro Denver v. Public Utilities Commission of Colo*., 720 P.2d 552 (Colo.1986) and *Colorado Office of Consumer Counsel v. Mountain States Telephone & Telegraph*, 816 P.2d 278 (Colo.1991) to support its argument. However, a careful reading of those cases and a careful review of the procedures followed in this case find that WW's argument is misplaced. This matter was a full adjudicatory hearing where the Commission heard very fact specific testimony regarding WW's application. The Commission Decision was based upon findings made after review of the substantive issues as specifically related to WW's unique application.

12. Finally, WW urges the Commission to accept several commitments to service quality it enumerates in its application for RRR. WW, apparently relying on a FCC decision regarding Virginia Cellular, assures us that it will adhere to the same standards that Virginian Cellular agreed to be bound by in that FCC matter.

II. ORDER

A. The Commission Orders That:

1. Because the Commission did not arrive at a majority decision, the Application for Rehearing, Reargument or Reconsideration of Commission Decision No. C04-0545 filed by Western Wireless Holding Co., Inc., a wholly-owned subsidiary of Western Wireless Corporation is denied in its entirety.

2. This Order is effective upon its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING July 9, 2004.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

_____

_____
Commissioners

COMMISSIONER CARL MILLER
NOT PARTICIPATING.

SEPARATE STATEMENTS OF POSTION
BY CHAIRMAN GREGORY E. SOPKIN
AND COMMISSIONER POLLY PAGE

G:\yellow\03A-061T_070904_pg.doc:LP

III. CHAIRMAN GREGORY E. SOPKIN STATEMENT OF POSITION:

1. I would grant all of Western Wireless' RRR, save the portion on rulemaking.

2. The *sine qua non* of the Commission's Decision No. C04-0545 is that it is not "rate regulation" to require that Western Wireless demonstrate its rate as "just, reasonable, and affordable." That the Commission entertains this notion shows how far policy has trumped law in this case.

3. For about the first five minutes of deliberations in this matter, no one could answer the simple question: "Under the Commission's decision in this case, can the Commission reject a rate proposed by Western Wireless?" The intransigent effort to not answer this question illustrates an understanding that to admit the obvious answer is to give away the game. That is, the law is clear that we cannot regulate wireless rates. Admitting we can reject a rate[2] is to admit we are regulating rates.

4. This is not opinion. My colleague attempts to distinguish the cases cited by Western Wireless as inapplicable because they deal with complaint issues, contractual obligations and deceptive billing practices, not an "affordability" requirement. It is exactly because these case deal with requirements *lesser than* that of affordability that they are on point. If courts have construed rate regulation to include, *inter alia*, requirements of good cellular connections[3] and claims of inadequate service[4] or unreasonable fees,[5] then, *a fortiari*, a state commission's ability to reject "unaffordable" rates is rate regulation. As noted by the Court in

[2] Our advisory attorney did eventually admit that "theoretically" the Commission could reject a proposed rate offered by Western Wireless.

[3] *Bastien v. AT&T Wireless Services, Inc.*, 205 F.3d 983, 989 (7th Cir.2000).

[4] *Bryceland v. AT&T Corp*., 122 F.Supp. 2d 703, 709 (N.D. Tex.2000); *Naevus International, Inc. v. AT&T Corp*., 713 N.Y.S.2d 642, 645 (N.Y.2000).

[5] *Gilmore v. Southwestern Bell Mobile Systems*, 156 F. Supp. 2d 916, 924-925 (N.D. Ill. 2001).

Franczyk v. Cingular Wireless, LLC, No. 03-C-6473, 2004 U.S. Dist. LEXIS 643, *6 (E.D. Ill. Jan.21, 2004):

> federal preemption of wireless telephone service provider's "rates" encompasses a much broader area of conduct than simply how much money a provider charges for services.

(*Citing Alport v. Sprint Corp*., 2003 WL 22872134 at *3 (N.D. Ill. 2003) (claim involving validity and legitimacy of the Federal E911 surcharge was preempted by federal law)).

5. The FCC also has weighed in on this, twice. As noted *In The Matter of Southwestern Bell Mobile Systems, Inc*., 1999 WL 1062835, 14 F.C.C.R. 19,898, 14 FCC Rcd. 19,898 at 19,907 (Nov 24, 1999) (NO. FCC 99-356),

> the term "rates charged" in Section 332(c)(3)(A) may include both rate levels and rate structures for CMRS and that the states are precluded from regulating either of these. Accordingly, states not only may not prescribe how much may be charged for these services, but also may not prescribe the rate elements for CMRS or specify which among the CMRS services provided can be subject to charges by CMRS providers.

6. Later, the FCC made clear that, even in the ETC context, a state commission may not impose any rate regulation as a condition of granting an ETC application. *In the Matter of Petition of the State Independent Alliance and the Independent Telecommunications Group for a Declaratory Ruling that the Basic Universal Service Offering Provided by Western Wireless in Kansas is Subject to Regulation as Local Exchange Service*, WT Docket No. 00-239, FCC 02-164 at ¶ 31 (rel. Aug. 2, 2002) ("[U]nless 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").

7. Yes, there are a few cases that held that something much lesser than an affordability requirement – e.g., claims involving late fees and undisclosed or deceptive billing practices – did not constitute rate regulation. To say that means the direct control of rates (i.e., the ability to reject them as unaffordable, unjust, or unreasonable) is *not* rate regulation is a denial of not just an unambiguous statute, but common sense itself. There is no legal authority whatever to support the suggestion made during deliberations that "rate regulation" demands the minimum prerequisites of a tariff filing, the ability of parties to protest, and application of the filed rate doctrine. This three-pronged test is made up out of whole cloth as an *ex ante* attempt to justify what is unambiguously preempted.

8. My colleague cites four cases as authority that the preemptive effect of § 332 is narrow. The first, *DeCastro*,[6] relates to removal of a state action to federal court based on preemption. In order for removal to happen, the petitioner would have to show Congress intended that the Telecommunications Act preempt "all claims within the telecommunications area."[7] Of course, under this standard, the Court found that Congress did not intend by § 332 such a wide swath of preemption. Instead, the Court stated, § 332 "permits state regulation of cellular telephone service providers in all areas *other than* the providers' entry into the market and the *rates charged to their customers*."[8] This is exactly what I stated in my dissent.[9] The issue for this Commission in this docket is not whether § 332 preempts *all* state regulation in the "telecommunications area," but whether it preempts regulation of rates.

[6] *DeCastro v. AWACS*, 935 F.Supp. 541 (D.N.J. 1996)

[7] *See id.* at 551.

[8] *Id.* at 552.

[9] *See* Commission Decision No. C04-0545, Footnote 104 ("Contrary to the majority's assertion, I do not claim that preemption removes "all jurisdiction" of this Commission over this matter. … 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.").

9. Two other cases cited by my colleague, *Sanderson* and *Smith*,[10] also involve removal of an action from state to federal court under the complete preemption doctrine, and are thus irrelevant. Indeed, the Eleventh Circuit in *Smith* underscores this point:

> Although the complete preemption doctrine does not apply in this case, we recognize that use of the term "preemption" in this context has caused "a substantial amount of confusion between the complete preemption doctrine and the broader and more familiar doctrine of ordinary preemption." (citation omitted) For that reason, it is worth pointing out that: complete preemption functions as a narrowly drawn means of assessing federal removal jurisdiction, while ordinary preemption operates to dismiss state claims on the merits and may be invoked in either federal or state court. (citation omitted) In other words, our conclusion that the complete preemption doctrine does not provide a basis for federal jurisdiction in this action does not preclude the parties from litigating about the preemptive effect, if any, of the FCC's orders or the Communications Act in any subsequent state court action.[11]

Since the litigants were free to assert in state court that § 332 preempts the claims at issue to the extent they involve rate regulation, it is hard to see why these cases have been cited at all.[12]

10. The last case cited, *Brown*,[13] only bolsters the conclusion that what the Commission attempts to do here is forbidden. There, the court stated: "Congress did not preempt all claims that would influence rates, but only those that involve the reasonableness or lawfulness of the rates themselves."[14] I quote the majority's decision:

> [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 …."[15]

---

[10] *Sanderson, Thompson, Ratledge & Zimny v. AWACS, Inc.*, 958 F.Supp. 947 (D. Del. 1997); *Smith v. GTE Corp*., 236 F.3d 1292, 1298, 1313 (11th Cir. 2001).

[11] *Id.* at 1313.

[12] To the extent *DeCastro* has any meaning in this case, I would note that numerous courts have disagreed with or distinguished that decision. *See, e.g., Gilmore, supra; In re Comcast Cellular Telecommunications Litigation*, 949 F.Supp. 1193 (E.D.Pa. 1996); *Ball v. GTE Mobilnet of California*, 96 Cal.Rptr.2d 801 (Cal. App. 2000).

[13] *Brown v. Washington/Baltimore Cellular, Inc.*, 109 F.Supp.2d 421 (D. Md. 2000).

[14] *Id.* at 423.

[15] Decision No. C04-0545, p.35, ¶76 (emphasis added).

11. At the policy level, it is unclear to me why the Commission wants to regulate the rates and service quality[16] of a wireless company that has no market power and can only induce customers to sign up (and thereby receive federal universal service funds) through price, advanced service offerings, and service quality. By making it burdensome[17] to offer service, we are discouraging entry of competitive wireless carriers in high cost areas. That means less choice for rural consumers. Colorado customers are paying into the universal service fund; they should be entitled to its full benefits.

12. Western Wireless has now offered to abide by the CTIA Consumer Code as a condition of its ETC designation. The Code was adopted on September 9, 2003. Our hearing in this matter was held August 4 and 5, 2003. My colleague dismisses the adoption of the Code as "new evidence" that cannot be subjected to cross-examination, and as "disingenuous" to now make such a commitment. Western Wireless could not have made such a commitment prior to its adoption, thus it is unfair to say now that we will not consider it. The Commission has the discretion to take administrative notice of the Code, and agree that it is enough for purposes of regulation.

13. It was enough for the FCC. In the *Virginia Cellular*[18] decision, the FCC did not impose the ILEC-type rate and service quality regulations required by this Commission. Instead, the FCC found that its concerns were answered by Virginia Cellular's commitments to comply

[16] I agree with Western Wireless' arguments that it is both improper and unwise to regulate the service quality of its offerings. This is a departure from my original opinion on service quality, which was largely offered as an (unrequited) policy compromise.

[17] It is unquestionably burdensome to require Western Wireless to demonstrate that its BUS rate is just and reasonable, and to operate under wireline service quality obligations. This is command and control regulation, requiring a carrier to (1) ask permission to make price changes, (2) demonstrate (based on an unknown standard) its rate is reasonable, (3) demonstrate and keep records on service quality metrics, and (4) potentially pay reparations for failure to meet these obligations.

with the CTIA Code, and report annually to the FCC the number of consumer complaints per 1,000 handsets.[19] My colleague references separate statements by Chairman Powell and Commissioner Abernathy that ETCs must offer high-quality services at affordable rates. However, in the actual decision,[20] neither Commissioner actually imposed or sought to impose any rate or service quality obligations (beyond the commitments discussed above) on the wireless ETC applicant; that is, they did not dissent from the opinion that did not impose such obligations. In short, we should impose no greater requirements than that imposed by the FCC.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

_____
Commissioner

[18] *In the Matter of Federal-State Joint Board on Universal Service, Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, CC Docket No. 96-45, FCC 03-338 (rel. January 22, 2004) ("*Virginia Cellular*").

[19] *See id.* at ¶ 30.

[20] Separate statements of two commissioners in a five-commissioner body have no force of law.

IV. COMMISISONER POLLY PAGE STATEMENT OF POSITION:

1. WW raises for the first time in this matter, the argument that this Commission is without authority to require a showing of affordability or quality of service. At no time during the entire hearing process did WW's witnesses or legal counsel raise these issues. It should be noted that this issue was raised by one of the intervenors to WW's Application for ETC status.

2. WW first characterizes our requirement that it make a showing of affordability as rate regulation, then proceeds to argue that we are without authority to regulate its rates. WW's characterization of a showing of affordability as rate regulation is critical to its analysis, otherwise its entire argument is moot. It is important to note that WW states that the "…Commission[] clearly engages in rate regulation" but it does not offer a clear reason as to why that is so. It proffers the statement that this is rate regulation, but offers no legal support for its claim.

3. WW then goes on to cite several cases for the proposition that §332 preempts rate regulation of wireless telephone service providers.[21] As the majority indicated in Decision No. C04-0545, and I reiterate here, the cases cited by WW deal with consumer complaint issues, contractual obligations and deceptive billing practices. Further, these very fact specific cases were brought as tort claims and generally dealt with the interplay between §332 and §414 of the Act. Although they provide general guidance on the proper court (federal court v. state court) to hear such matters, they are not instructive to the matter at hand. These cases do not refer to the

[21] *Bastien v. AT&T Wireless Services, Inc*., 205 F.3d 983 (7th Cir.2000); *Franczyk v. Cingular Wireless, LLC*, No. 03-C-6473, 2004 U.S. Dist. LEXIS 643, *6 (E.D. Ill. Jan.21, 2004); *Bryceland v. AT&T Corp*., 122 F.Supp. 2d 703, 709 (N.D. Tex.2000); *Gilmore v. Southwestern Bell Mobile Systems*, 156 F. Supp. 2d 916, 924-925 (N.D. Ill. 2001); *Naevus International, Inc. v. AT&T Corp*., 713 N.Y.S.2d 642, 645 (N.Y.2000).

interplay between §332(c)(3)(A) and §§214 and 254 of the Act as related to this application. It is impossible to determine whether the courts in those cited cases intended the respective analyses to apply to a matter where a CMRS applies to a state commission for ETC status. Those cases simply do not support such a nexus or that those courts intended for such a nexus to exist. Without this critical link, I decline to accept their application to the matter at hand.

4. Although I find the cases cited by WW of no relevance to this matter, I nonetheless briefly address their substance. The cases cited in footnote 2 all found that §332 cast a broad preemption net regarding CMRS rate regulation. However, for each case cited which finds such a broad preemption, there are a substantial number of other cases that find that such preemption is much narrower. For example, in DeCastro v. AWACS, 935 F.Supp. 541 (D.N.J. 1996) and Sanderson, Thompson, Ratledge & Zimny v. AWACS, Inc., 958 F.Supp. 947 (D.Del.1997) those courts considered claims of deceptive and undisclosed billing practices from the wireless' practice of charging for noncommunication time and rounding up minutes for billing purposes. These courts (unlike the court cases cited by WW) held that these claims were not preempted by §332(c)(3)(A) since the claims challenge a billing practice, not a rate or market entry. In addressing the interplay between §2(b) and §332(c)(3)(A), that creates a federal regulatory framework for CMRS, the DeCastro court held that a general framework does not rise to the level of an affirmative and clear congressional intent to make causes of action challenging a provider's billing practices removable to federal court. Id. As emphasized repeatedly by the courts, to find complete preemption, there must be an affirmative and clear indication of Congress' intent that the Telecom Act provides an exclusive federal remedy for the plaintiffs' claims.

5. In Brown v. Washington/Baltimore Cellular, Inc., 109 F.Supp. 2d 421 (D.Md.2000) the court rejected complete preemption and found that the challenge to the validity of late fee charges was not precluded by the §332 ban on rate regulation. Interpreting the "other terms and conditions" provision of §332, the court determined, required a case-specific factual inquiry. The court further reasoned that "any legal claim that results in an increased obligation … could theoretically increase rates … Congress did not preempt all claims that would influence rates." Id. at 423.

6. In Smith v. GTE Corp, 263 F.3d 1292, 1298, 1313 (11th Cir.2001) the Eleventh Circuit noted that the Telecom Act savings clause contemplates the application of state law and the exercise of state-court jurisdiction. If there is state-court jurisdiction, the jurisdiction cannot be exclusively federal. The savings clause also applies to §332. The Eleventh Circuit found that the savings clause evidences Congress' intent to save state-law actions and therefore precludes complete preemption.[22]

7. In addition, courts have generally held that total preemption is extraordinary and exists in very limited circumstances. In fact, total preemption over an entire area has only been upheld regarding federal labor relations, ERISA and several Native American land rights matters.[23]

[22] I point out that these cases are cited for illustrative purposes only. I do not cite these cases to support the majority decision, but to merely point out that they are representative of another body of case law that finds the preemption scope of § 332(c)(3)(A) to be limited and to illustrate that this issue is far from settled. I accord these cases the same deference as those cited by WW.

[23] See *Heimann v. National Elevator Industry Pension Fund*, 187 F.3d 493, 500 (5th Cir.1999) and *Johnson v. Baylor University*, 214 F.3d 630, 632 (5th Cir.2000).

8. As the majority decision emphasized, a showing of affordability is not rate regulation. We do not require WW to file its rates or terms and conditions of service in a tariff filing. To do so would implicate the filed rate doctrine and require WW to abide by the rates and terms in its filed tariffs. If it wanted to change those rates or terms, it could only do so by filing an amended advice letter. We again emphasize that we do not require this of WW. We merely require it to provide us with its initial rates to determine whether it is offering basic universal service at just and affordable rates as §254(i) instructs us. It is also important to note that WW has a choice in this matter. It is already providing service in the areas in which it seeks ETC designation. Qwest, MCI and other LECs do not have a choice. They are required to file tariffs regarding their rates and terms and conditions of their service offerings. No such requirement exists for WW.

9. WW construes Decision No. C04-0545 as holding that §254 overrides §332(c)(3)(A). However, WW misreads the intent of the Decision. Rather, we found that §254 should be read in harmony with §332 to give meaning to both sections. So while it is apparent that §332 preempts states from regulating rates and entry of CMRS providers, when they seek ETC status, §254 allows the FCC and states to ensure that universal service is provided at just and reasonable rates. Since we are not regulating WW's rates, it is not necessary for us to implicate the substitutability exception of §332 as WW urges.

10. WW also provides somewhat of a treatise on the importance of competition. According to WW, competition alleviates the need for any regulation of a CMRS because competition leads to reasonable prices. Although I agree that competition is necessary to ensure healthy markets and consumer choice, I point out that the FCC has concluded that "the value of increased competition, by itself, is not sufficient to satisfy the public interest test in rural areas."

In the Matter of Federal-State Joint Board on Universal Service, Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia, CC Docket No. 96-45, FCC 03-338 (rel. January 22, 2004) (Virginia Cellular) at ¶ 4. Instead, the FCC found that in determining whether designation of a competitive ETC in a rural telephone company's service area is in the public interest, numerous factors must be weighed. These include the benefits of increased competitive choice, the impact of multiple designations on the universal service fund, the unique advantages and disadvantages of the competitor's service offering, any commitments made regarding quality of the service offered, and the ability of the ETC to provide the supported services throughout the designated service area within a reasonable time frame. Id.

11. WW also maintains that the Commission exceeded its authority by imposing customer service and service quality conditions on granting its ETC status. I find this argument unavailing. Our decision to impose customer service and service quality conditions closely parallels the FCC's holdings in Virginia Cellular. In that decision, the FCC found that Virginia Cellular's ETC application was in the public interest because it had made firm commitments regarding the quality of telephone service and its ability to satisfy its obligations to serve the designated service areas within a reasonable time frame. Because Virginia Cellular made specific and firm commitments to ensure that it would provide high quality service throughout the proposed rural service areas, the FCC found that it was in the public interest to grant its application. Virginia Cellular at ¶¶ 27, 28. In addition, Virginia Cellular committed to submit records and documentation on an annual basis detailing its progress towards meeting its build-out plans in the service areas in which it is designated as an ETC. It also committed to become a signatory to the Cellular Telecommunications Industry Association's Consumer Code for

Wireless Service and provide the number of consumer complaints per 1,000 mobile handsets on an annual basis. Virginia Cellular also committed to submit annually information detailing how many requests for service from potential customers in the designated service areas were unfulfilled for the past year. Id. at ¶ 46. WW made no such commitments in its application with this Commission. Rather, it sought a hands-off "regulation light" approach to its designation as an ETC in order to receive federal subsidies to provide service in an area it was already serving. Although WW made an attempt to commit to certain quality of service standards in its RRR application, I find this inadequate at best. Such a statement by WW constitutes new evidence which cannot be subject to cross-examination by the intervenors to this docket. It must therefore be rejected. Notwithstanding that fact, it appears disingenuous of WW to now make a commitment to such quality of service standards when it made no such commitment at hearing. It is also muddles WW's argument of the financial burden the Commission's requirement of quality of service standards would place on it. It is not clear how a quality of service standard we require could place any more of a burden on WW than what it proposes in its RRR.

12. WW argues that the FCC has held that states may not deny wireless carriers ETC status under §331(1)(3). I would point out that read in context with the entire paragraph from which it was extracted, it is clear that the FCC was referring to the prohibition of excluding an entire industry from seeking ETC status due to the technology it offers. Nothing on this record would indicate that it was the intent of the majority to exclude an entire industry based on our decision. However, when a CMRS seeks ETC status and the attendant government subsidies, it is prudent and within the provisions of the Act to require them to show that the rates they offer are affordable.

13. WW contends that our Decision exceeds our authority by requiring it to comply with ILEC-style regulation of its practices and operations. According to WW, since what we require is in essence adding our own universal service criteria, any action in that regard must be governed by §254(f). I am not persuaded by WW's argument. The majority's requirement for WW to show that its rates were just, reasonable and affordable, as well as the full Commission's requirement for WW to show the quality of its service is mandated by the Telecom Act. Clearly, §214(e) requires us to find that an ETC designation in an area served by a rural telephone company shall be in the public interest. Further §254(i) instructs us to ensure that universal service is available at rates that are just, reasonable, and affordable. We cannot ignore those mandates simply because WW requested we institute a self-described "regulatory light" methodology in determining its ETC status.

14. I also find no merit to WW's claim that our Decision takes regulatory authority over all of Western Wireless' service it would provide as an ETC, including its interstate long-distance service, multi-state local calling areas, and interstate roaming. Nothing on the record supports this claim. We merely required that WW make a showing of affordability for its local service, which is within our jurisdiction. To read more into this as WW does is erroneous.

15. To the extent WW argues that we imposed new factors required of an ETC applicant, we point out that the requirements we imposed here were no different than those WW agreed to previously in Decision No. C01-476, Docket No. 00K-255T.

16. I find nothing in WW's RRR to persuade me to change my position as articulated in the majority opinion of Decision No. C04-0545. Requiring a showing of affordability is not rate regulation. As such it is clear that states have the ability to impose such requirements, as well as quality of service standards. I am however, persuaded by recent FCC decisions, that the

majority was correct in its determinations. In separate statements to the Virginia Cellular decision, FCC Chairman Powell and Commissioner Abernathy both make compelling statements regarding CMRS applications for ETC status. While providing a nod to the value CMRS' provide to rural consumers, Chairman Powell states that at the same time, "[the FCC] reinforce[s] the requirement that wireless networks be ready, willing and able to serve as carriers of last resort to support our universal service goals." Chairman Powell goes on to find that the Virginia Cellular decision "remains true to the requirement that ETCs must be prepared to serve all customers upon reasonable request and requires them to offer high-quality telecommunications services at affordable rates throughout the designated service area." (emphasis added).

17. At the same time, FCC Commissioner Abernathy expressed her similar views and in the process, nicely summed up the majority's opinion in this matter. She stated that "an ETC must be prepared to serve all customers upon reasonable request, and it must offer high-quality services at affordable rates throughout the designated service area." (emphasis added). She went on to say that "[s]tate commissions exercising their authority under section 214(e)(2), and [the FCC] acting pursuant to section 214(e)(6), therefore should make certain that an applicant for ETC status is ready, willing, and able to serve as a carrier of last resort and is otherwise prepared to fulfill the goals set forth in section 254 of the Act.

18. I agree with Chairman Powell and Commissioner Abernathy. The majority decision here, did nothing more than require WW to fulfill the goals of §254 of the Act. We can take nothing for granted. Given the possibility that the incumbent could pull out of the proposed service areas at issue here, it is not only prudent, but our statutory duty to ensure that the

remaining telecommunications providers, provide quality service at just, reasonable and affordable rates.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

_____
Commissioner