

Decision No. R13-0157

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 11V-594T

IN THE MATTER OF THE PETITION OF WIGGINS TELEPHONE ASSOCIATION FOR
HIGH COST SUPPORT MECHANISM FUNDING.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
MANA L. JENNINGS-FADER
DENYING PETITION AND GRANTING MOTIONS**

Mailed Date: February 4, 2013

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I. STATEMENT

1. On July 1, 2011, Wiggins Telephone Association (Wiggins, WTA, the Company, or Petitioner) filed its Petition for High Cost Support Mechanism Funding (Petition).¹ The Petition is verified; is filed pursuant to Rules 4 *Code of Colorado Regulations* (CCR) 723-1-1304,² 723-2-2003,³ 723-2-2847(f), and 723-2-2855; and requests authorization for Wiggins to obtain initial funding from the Colorado High Cost Support Mechanism. That filing commenced this docket.

2. The Commission gave public notice of the Petition on July 8, 2011.

3. On July 27, 2011, the Colorado Office of Consumer Counsel (OCC) intervened by right. OCC is a party in this proceeding.

4. On August 9, 2011, Trial Staff of the Commission (Staff) intervened by right. Staff is a party in this proceeding.

5. OCC and Staff, collectively, are the Intervenors. Petitioner and Intervenors, collectively, are the Parties.

¹ Appended to that filing are a number of attachments. The Petition is not a hearing exhibit and, thus, is not in the evidentiary record.

² This Rule is found in the Rules of Practice and Procedure, Part 1 of 4 *Code of Colorado Regulations* (CCR) 723.

³ This Rule is found in the Rules Regulating Telecommunications Providers, Services, and Products, Part 2 of 4 CCR 723.

In December 2011, after the Petition was filed, the Commission amended its Rules pertaining to the High Cost Support Mechanism and High Cost Administration Fund, Rules 4 CCR 723-2-2840 through 723-2-2869 (CHCSM Rules). The Petition was filed pursuant to the CHCSM Rules in effect on July 1, 2011, and those are the substantive CHCSM Rules applicable to this proceeding.

In this proceeding, the Parties also discussed or relied on the Commission's Cost Allocation Rules (Cost Allocation Rules). These Rules are found in the Rules Regulating Telecommunications Providers, Services, and Products, Part 2 of 4 CCR 723. The Cost Allocation Rules are Rules 4 CCR 723-2-2400 through 723-2-2459 and have been in effect since 2007.

Unless the context indicates otherwise, reference to Rules in this Decision are to the Rules in effect on July 1, 2011, the date on which the Petition was filed.

6. On August 17, 2011, by Minute Order, the Commission referred this matter to an Administrative Law Judge (ALJ).

7. On August 9, 2011, Wiggins filed a Motion to Narrow Scope of [OCC's] Intervention. OCC opposed that motion. On August 15, 2011, Wiggins filed a Motion to Narrow Scope of [Staff's] Intervention. Staff opposed that motion. On October 24, 2011, by Decision No. R11-1124-I, the ALJ granted, in part, Wiggins's two motions; established the scope of this proceeding; certified that interim order as immediately appealable to the Commission; and established the briefing schedule for exceptions to Decision No. R11-1124-I.

8. On November 4, 2011, Wiggins filed exceptions to Decision No. R11-1124-I. On November 18, 2011, OCC and Staff responded in opposition to those exceptions. On January 10, 2012, by Decision No. C12-0020, the Commission denied Wiggins's exceptions and, at ¶¶ 19, 20, and 24, affirmed in their entirety the ALJ's rulings with respect to the scope of this proceeding.

9. On January 23, 2012, by Decision No. R12-0076-I, the ALJ identified an issue to be addressed at hearing;⁴ established a procedural schedule and scheduled the evidentiary hearing for May 1, 2012; and addressed other issues.

10. Between January and May 2012, the ALJ issued a number of procedural orders.

11. On unopposed motion, the ALJ vacated the May 1, 2012 hearing. On May 9, 2012, by Decision No. R12-0501-I, the ALJ scheduled the evidentiary hearing for July 9 and 10, 2012 and modified the procedural schedule.⁵

⁴ The identified issue was: assuming that the Petition is granted and Wiggins is authorized to receive Colorado High Cost Support Mechanism (CHCSM) funds, the date from which Wiggins should receive that support.

⁵ On July 19, 2012, by Decision No. R12-0833-I, the ALJ further modified the procedural schedule.

12. On April 13, 2012, Petitioner filed a Motion for Summary Judgment. On April 27, 2012, OCC and Staff filed a Joint Response in Opposition to the Motion for Summary Judgment. On June 7, 2012, for the reasons stated in Decision No. R12-0624-I, the ALJ denied the motion.

13. On June 18, 2012, by Decision No. R12-0666-I and after briefing by the Parties, the ALJ determined that testimony and exhibits were not required in this proceeding to address the Federal Communications Commission's (FCC) *Lifeline Reform Order*⁶ or *USF/ICC Transformation Order*.⁷

14. On June 27, 2012, Wiggins filed a Motion for Approval of Filing Out of Time (Wiggins Motion). The Corrected Rebuttal Testimony and Exhibits of Wiggins's witnesses accompanied that filing. The Wiggins Motion requests that Wiggins be permitted to file its corrected rebuttal testimony and exhibits two days late and represents that there is no objection

⁶ The *Lifeline Reform Order* is *Lifeline and Link Up Reform and Modernization, Lifeline and Link Up, Federal-State Joint Board on Universal Service, Advancing Broadband Availability Through Digital Literacy Training*, WC Docket No. 11-42, WC Docket No. 03-109, CC Docket No. 96-45, WC Docket No. 12-23, Report and Order and Further Order of Proposed Rulemaking, FCC 12-11 (rel. Feb. 6, 2012).

⁷ The *USF/ICC Transformation Order* is *Connect America Fund, A National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers, High-Cost Universal Services Support, Developing an Unified Intercarrier Compensation Regime, Federal-State Joint Board on Universal Service, Lifeline and Link Up, Universal Service Reform - Mobility Fund*, WC Docket No. 10-90, GN Docket No. 09-51, WC Docket No. 07-135, WC Docket No. 05-337, CC Docket No. 01-92, CC Docket No. 96-45, WC Docket No. 03-109, WT Docket No. 10-208, Report and Order and Further Order of Proposed Rulemaking, FCC 11-161, 26 FCC Rcd. 17663 (2011), *petitions for review pending sub nom. In re: FCC*, No. 11-9581 and No. 11-9900 (10th Cir. filed Dec. 8, 2011). The FCC clarified the *USF/ICC Transformation Order* in the *Order on Reconsideration* is *Connect America Fund, A National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers, High-Cost Universal Services Support, Developing an Unified Intercarrier Compensation Regime, Federal-State Joint Board on Universal Service, Lifeline and Link Up, Universal Service Reform - Mobility Fund*, WC Docket No. 10-90, GN Docket No. 09-51, WC Docket No. 07-135, WC Docket No. 05-337, CC Docket No. 01-92, CC Docket No. 96-45, WC Docket No. 03-109, WT Docket No. 10-208, Order on Reconsideration, FCC 11-189 (rel. Dec. 23, 2011).

to granting the relief sought. The ALJ finds that the Wiggins Motion states good cause and that granting the requested relief will not prejudice any party. The ALJ will grant the Wiggins Motion and will permit the late filing of Wiggins's corrected rebuttal testimony and exhibits.⁸

15. On July 5, 2012, Staff filed a Motion for Leave to File Notice of Corrected Testimony and Corrected Exhibit (Staff Motion). The Corrected Answer Testimony and Exhibits of Staff witness John T. Scott accompanied that filing. The Staff Motion requests that Staff be permitted to file its corrected answer testimony and exhibit late and represents that there is no objection to granting the relief sought. The ALJ finds that the Staff Motion states good cause and that granting the requested relief will not prejudice any party. The ALJ will grant the Staff Motion and will permit the late filing of the corrected answer testimony and exhibit.⁹

16. At the date, time, and place scheduled, the ALJ called the evidentiary hearing to order. The Parties were present, were represented, and participated.

17. The evidentiary record consists of testimony and exhibits from the hearing on the Petition. The ALJ heard testimony on July 9 and 10, 2012. A transcript of each day of hearing has been filed in this docket.¹⁰

⁸ On July 9, 2012, the ALJ orally granted the Wiggins Motion. This Decision memorializes that ruling.

⁹ On July 9, 2012, the ALJ orally granted the Staff Motion. This Decision memorializes that ruling.

¹⁰ In this Decision, citation to the page number and line number of the transcripts is: transcript date at page:line. For example, citation to page 100 at line 10 of the July 9, 2012 transcript is: July 9 tr. at 100:10. The same page number and line number convention is used in citations to Hearing Exhibits.

18. During the hearing, the ALJ heard the testimony of six witnesses. Wiggins presented three witnesses: Messrs. Terry Hendrickson,¹¹ Jon D. Loe,¹² and Ms. April Simmons.¹³ OCC presented one witness: Mr. Thomas F. Dixon.¹⁴ Staff presented two witnesses: Ms. Patricia A. Parker¹⁵ and Mr. John T. Scott.¹⁶

¹¹ Mr. Hendrickson is the General Manager/Chief Executive Officer of, and is employed by, Wiggins. Mr. Hendrickson's direct testimony and exhibits are Hearing Exhibit No. 3, and his rebuttal testimony and exhibits are Hearing Exhibit No. 4. His oral testimony is found in the July 9 tr. at 142-87 and the July 10 tr. at 5-66.

The exhibits appended to Mr. Hendrickson's direct and rebuttal testimonies are numbered. Each lacks "TH" to identify it as Mr. Hendrickson's exhibit. To avoid possible confusion with Hearing Exhibit numbers, the ALJ refers, in this Decision, to Mr. Hendrickson's exhibits as Exhibit TH-number.

Exhibit TH-4 appended to Hearing Exhibit No. 3 is admitted for the limited purpose stated in Hearing Exhibit No. 3 at 9:27-28 (*i.e.*, "description from the FTTH Council of the advantages of the [Fiber to the Home (FTTH)] medium.").

¹² Mr. Loe is a Senior Regulatory Consultant employed by Telecom Consulting Associates, Inc. Wiggins retained Mr. Loe's services for this case. Mr. Loe's direct testimony and exhibits are Hearing Exhibit No. 1, and his rebuttal testimony and exhibits are Hearing Exhibit No. 2. His oral testimony is found in the July 9 tr. at 21-142.

With respect to Hearing Exhibit No. 1, there are six appended documents: Attachment A, which contains Mr. Loe's educational background and work experience, and five exhibits. During his oral testimony, Mr. Loe changed the numbers of his exhibits in Hearing Exhibit No. 1 as follows: the second Attachment A is Exhibit JDL-1; Attachment B is Exhibit JDL-2; Attachment C is Exhibit JDL-3; Attachment D is Exhibit JDL-4; and Attachment E is Exhibit JDL-5. When reading Mr. Loe's direct testimony in Hearing Exhibit No. 1, one must read it with the changed exhibit references in mind.

With respect to Hearing Exhibit No. 2, there are three appended documents, each of which is an exhibit. During his oral testimony, Mr. Loe changed the numbers of his exhibits in Hearing Exhibit No. 2 as follows: Attachment F is Exhibit JDL-6; Exhibit JDL-7 remains Exhibit JDL-7; and Attachment G is Exhibit JDL-8. When reading Mr. Loe's rebuttal testimony in Hearing Exhibit No. 2, one must read it with the changed exhibit references in mind.

Mr. Loe testified that Exhibit JDL-8 is not relevant to this proceeding because it has been superseded by Exhibit JDL-7. July 9 tr. at 125:19-126:2. For this reason, the ALJ neither relied on nor considered Exhibit JDL-8 in arriving at her decision in this proceeding.

In this Decision, the ALJ refers to each of Mr. Loe's exhibits by its JDL number.

¹³ Ms. Simmons is the Office Manager of, and is employed by, Wiggins. Ms. Simmons's direct testimony and exhibits are Hearing Exhibit No. 5, and her rebuttal testimony is Hearing Exhibit No. 6 and Confidential Hearing Exhibit No. 6A. Her oral testimony is found in the July 10 tr. at 67-117.

¹⁴ Mr. Dixon is a Financial Analyst employed by the OCC. Mr. Dixon's answer testimony and exhibits are Hearing Exhibit No. 7. His oral testimony is found in the July 10 tr. at 118-60.

¹⁵ Ms. Parker is a Rate/Financial Analyst employed by the Commission. Ms. Parker's answer testimony and exhibits are Hearing Exhibit No. 9 and Confidential Hearing Exhibit No. 9A. Her oral testimony is found in the July 10 tr. at 201-56.

¹⁶ Mr. Scott is a Rate/Financial Analyst employed by the Commission. Mr. Scott's answer testimony and exhibits are Hearing Exhibit No. 8. His oral testimony is found in the July 10 tr. at 161-201.

19. Including written testimonies, 18 documents were marked for identification; were offered; and were admitted into evidence. Hearing Exhibits No. 6A, No. 9A, and No. 14A are Confidential Hearing Exhibits.¹⁷

20. At the conclusion of the hearing, the ALJ closed the evidentiary record in this proceeding.

21. Each party filed a Statement of Position (SOP). Although provided an opportunity to do so, the Parties elected not to file responses to the SOPs.

22. In accordance with § 40-6-109, C.R.S., the ALJ now transmits to the Commission the record in this proceeding along with a written recommended decision.

II. FINDINGS OF FACT

23. Petitioner Wiggins is a certificated provider of basic local exchange telecommunications service¹⁸ and of other jurisdictional and non-jurisdictional services and products.¹⁹ Wiggins is a rural telecommunications provider,²⁰ is an Incumbent Local Exchange Carrier (ILEC),²¹ and is a provider of last resort in Colorado.²²

¹⁷ In *Confidential Exhibit No. 6A*, the confidential data are found at 3:12-13. *Confidential Exhibit No. 9A* consists of five confidential exhibits to the answer testimony of Staff witness Parker. In *Confidential Hearing Exhibit No. 14A*, the customer count data are confidential; the remainder of the exhibit is not confidential.

¹⁸ Basic local exchange service is defined in Rule 4 CCR 723-2-2001(g).

¹⁹ Jurisdictional service is defined in Rule 4 CCR 723-2-2001(ww), and deregulated telecommunications service is defined in Rule 4 CCR 723-2-2001(bb). Deregulated services are non-jurisdictional.

²⁰ Rural telephone company is defined in 47 U.S.C. § 153(44), and the parallel definition of rural telecommunications provider is found in Rule 4 CCR 723-2-2001(gggg).

²¹ Incumbent Local Exchange Carrier is defined in Rule 4 CCR 723-2-2001(ss).

²² Provider of last resort is defined in Rule 4 CCR 723-2-2001(aaaa).

24. The Commission has designated Wiggins as an Eligible Provider (EP).²³ As an EP, Wiggins is eligible to receive, but at present does not receive, Colorado High Cost Support Mechanism (CHCSM) support. In this docket, Wiggins seeks approval of its request for an annual CHCSM draw of \$ 137,610. Wiggins bases its request on its 2010 financial data.

25. Intervenor OCC is a Colorado state agency established pursuant to § 40-6.5-102, C.R.S. Its charge is as set out in § 40-6.5-104, C.R.S.

26. Intervenor Staff is litigation Staff of the Commission as identified in the Rule 4 CCR 723-1-1007(a) notices filed in this docket.

27. Wiggins is a cooperative telephone company with its headquarters in Wiggins, Colorado. Its study area (*i.e.*, service territory) covers approximately 2,150 square miles, all of which is in Colorado. Wiggins provides telecommunications service to retail ratepayers in five exchanges (*i.e.*, Briggsdale, Grover, Hoyt, New Raymer, and Wiggins).

28. In 2010, over the year on average, Wiggins provided telecommunications service to 1,551 residential and business access lines (or loops).²⁴ As of year-end 2010, Wiggins provided telecommunications service to 1,473 residential and business access lines.²⁵ As of February 2012, the Company provided telecommunications service to 1,484 residential and business access lines.²⁶ As of July 2012, Wiggins provided telecommunications service to approximately 1,469 through 1,474 residential and business access lines.²⁷

²³ Eligible Provider is defined in Rule 4 CCR 723-2-2001(ii).

²⁴ Hearing Exhibit No. 1 at Exhibit JDL-3.

²⁵ Hearing Exhibit No. 7 at Exhibit TFD-3.

²⁶ Hearing Exhibit No. 3 at 1:30-31.

²⁷ Tr. July 9 at 146:14-21.

29. In 2008, the copper plant infrastructure over which Wiggins provides telecommunications service was 30 years old. In many instances, Wiggins could obtain replacement parts and equipment only on the secondary market.

30. In 2008 when Wiggins's Board of Directors (Board) considered the options (*i.e.*, copper or fiber) available to replace the then-existing copper plant infrastructure, the Board determined that Fiber to the Home (FTTH) was the preferred option because (in no particular order): (a) copper prices were high, and fiber was less expensive to purchase and to place; (b) the Rural Utilities Service (RUS), which is Wiggins's principal lender for infrastructure investment, would lend only for purchase and deployment of fiber; and (c) the FTTH network infrastructure was, or was becoming, the industry standard. In addition, from a technical standpoint, Wiggins found FTTH to be preferable to copper because: (a) FTTH has the capacity simultaneously to deliver, with a minimum of degradation in performance and capacity, multiple services (*e.g.*, basic local exchange service, features, data, video) using a single delivery platform (*i.e.*, fiber) and, when multiple services are using the facility at the same time, to allocate capacity to services on a prescribed individual service basis; (b) FTTH is a more protected network in rural areas and, compared to copper, is less susceptible to environmental influences and weather-related outages; (c) copper has high signal loss characteristics that make loop treatment necessary to provide quality voice service, and FTTH does not have those signal loss issues; and (d) without the need for additional special electronics at either the Central Office or the customer premises, FTTH can deliver almost every type of special access circuits that copper can deliver. Finally, Wiggins determined that FTTH was capable of provisioning the full suite of voice and data services sought by its customers.

31. In 2008, Wiggins began to replace its copper plant infrastructure with FTTH. This process was underway, but not completed, by the end of 2010. As of the date of the hearing in 2012, Wiggins had completed deployment of FTTH in its service territory with the exception of the New Raymer exchange.

32. Irrespective of the transport medium (*i.e.*, copper alone, copper/fiber, or fiber alone), the Wiggins network delivery system is capable of delivering similar services (*e.g.*, voice; data; an application, a product, or a service that is developed in the future).

33. The Commission has designated Wiggins as an Eligible Telecommunications Carrier (ETC).²⁸ As an ETC, Wiggins is eligible to receive, and does receive, federal Universal Service Fund (USF) support.

34. As pertinent here, Hearing Exhibit No. 13 shows the USF high cost support monies that the Universal Service Administrative Company (USAC) disbursed to Wiggins in 2010 and in 2011. Each year, based on a Part 36 cost study submitted by Wiggins, USAC disburses USF funds to Wiggins. Although minor adjustments were made in later periods, the amounts shown on Hearing Exhibit No. 13 are accurate representations of USF funding received by Wiggins.²⁹

35. In support of the Petition, Wiggins presented 2010 financial data to establish its need for CHCSM funding. The data include average investment, revenues, operating expenses, and net income as reported in Wiggins's 2010 annual report to the Commission.

²⁸ Eligible Telecommunications Carrier is defined in Rule 4 CCR 723-2-2001(hh).

²⁹ From the record, it is unclear whether the USF payments are the total USF funds disbursed to Wiggins each month in each category or are the USF funds disbursed to Wiggins each month in each category only for FTTH-related investment and expenses. If Exhibit No. 13 shows disbursements only for Wiggins's FTTH-related investment and expenditures, then the magnitude of the matching issue is greater than set out in the discussion *infra*.

The data also show three rates of return calculated from the 2010 financial data.³⁰ These financial data are presented in Hearing Exhibit No. 1 at Exhibit JDL-1³¹ and at Exhibit JDL-2.³²

36. Hearing Exhibit No. 1 at Exhibit JDL-1 at lines 9 and 10 and at Exhibit JDL-2 at lines 9 and 10 shows that, in 2010, Wiggins received \$ 674,629 in USF loop support and \$ 43,500 in USF safety net support, for a total of \$ 718,129. For purposes of determining its revenue requirement and its requested CHCSM draw, Wiggins treated these funds as intrastate revenues.³³

37. Hearing Exhibit No. 1 at Exhibit JDL-1 at lines 13 and 14 and at Exhibit JDL-2 at lines 13 and 14 shows that, in 2010, Wiggins received \$ 21,864 in USF local switching support and \$ 914,058 in USF interstate common line support, for a total of \$ 935,922.³⁴

³⁰ The rates of return are for: (a) basic local exchange service supported by CHCSM; (b) state regulated access; and (c) total intrastate.

³¹ Exhibit JDL-1 is Wiggins's presentation of its 2010 financials as filed in the Wiggins annual report for 2010.

³² Exhibit JDL-2 is Wiggins's presentation of its 2010 financials as filed in the Wiggins annual report for 2010 with the addition, at line 8, of the \$ 137,610 in CHCSM funding that Wiggins seeks in the instant proceeding. The purpose of Exhibit JDL-2 is to demonstrate, all else being equal, what the impact on Wiggins's financials, principally its rate of return for local exchange service supported by CHCSM and for total intrastate, would have been if Wiggins had received \$ 137,610 in CHCSM funds in 2010.

³³ Hearing Exhibit No. 13 shows that the USAC calculated that, in 2010, Wiggins was eligible to receive \$ 675,784 in USF loop support and \$ 43,500 in USF safety net support, for a total of \$ 719,284.

If one totals the monthly figures for 2010 shown on Hearing Exhibit No. 13 for USF loop support and compares that total to the number shown in Hearing Exhibit No. 1 at Exhibit JDL-1 at line 9 and Exhibit JDL-2 at line 9, the numbers should be within \$ 2,000 of each other. July 10 tr. at 105:9-106:4. (The discrepancy is the result of prior period adjustments that are made to the USAC figures in Hearing Exhibit No. 13.) The same is true for USF safety net support (Hearing Exhibit No. 1 at Exhibit JDL-1 at line 10 and Exhibit JDL-2 at line 10). The 2010 USF loop support numbers and the 2010 USF safety net support numbers are within the \$ 2,000 tolerance.

³⁴ Hearing Exhibit No. 13 shows that USAC calculated that, in 2010, Wiggins was eligible to receive \$ 68,604 in USF local switching support and \$ 864,954 in interstate common line support, for a total of \$ 933,558.

If one totals the monthly figures for 2010 shown on Hearing Exhibit No. 13 for USF local switching support and compares that total to the number shown in Hearing Exhibit No. 1 at Exhibit JDL-1 at line 13 and Exhibit JDL-2 at line 13, the numbers should be within \$ 2,000 of each other. July 10 tr. at 105:9-106:4. (The discrepancy is the result of prior period adjustments that are made to the USAC figures in Hearing Exhibit No. 13.) The same is true for USF interstate common line support (Hearing Exhibit No. 1 at Exhibit JDL-1 at line 14 and Exhibit JDL-2 at line 14). Neither the 2010 USF local switching support numbers (a discrepancy of \$ 46,740) nor the 2010 USF interstate common line support numbers (a discrepancy of \$ 39,104) are within the \$ 2,000 tolerance.

For purposes of determining its revenue requirement and its requested CHCSM draw, Wiggins treated these funds as interstate revenues.

38. Due to the timing of reporting to USAC, there is a lag between the point in time at which Wiggins makes an investment or incurs an expense for which it may receive USF payment and the point in time at which Wiggins receives that USF payment.³⁵ As a result of this lag, the USF payments that Wiggins received in 2010 were payments based on 2008 through 2009 investments and expenses.

39. There is no dispute that: (a) the USF funds (*i.e.*, revenues to Wiggins) shown in Hearing Exhibit No. 1 at Exhibit JDL-1 and Exhibit JDL-2 are disbursements for expenses that Wiggins incurred before 2010; (b) the investments and expenses shown on Exhibit JDL-1 and Exhibit JDL-2 were incurred by Wiggins in 2010; and (c) neither Exhibit JDL-1 nor Exhibit JDL-2 includes the USF funds (*i.e.*, revenues) Wiggins received in 2011, although those USF funds were disbursed to Wiggins for 2010 investment and expenses.

40. To its retail customers, Wiggins provides these Commission jurisdictional services: basic local exchange service³⁶ and local calling features. For each service, Wiggins charges the tariff rate on file with the Commission.

41. To interexchange carriers, Wiggins provides access service and special access service. Wiggins offers these services pursuant to its federal tariff *and* pursuant to its

³⁵ The lag may be one year or more depending on when an ETC applies for USF funds and when USAC disburses the USF funds. July 9 tr. at 95:14-96:12; July 10 tr. at 103:5-104:11. For Wiggins, the lag depends, at least in part, on when the investment or expense is reported in quarterly updates, which are based on a rolling 12-month period, that Wiggins files.

³⁶ The Company's recurring charge for residential basic local exchange service is \$ 19.84 per month. The Company's recurring charge for business basic local exchange service is \$ 23.84 per month. Neither rate has changed since 1998.

Colorado intrastate tariffs. Wiggins also offers broadband DSL transmission service that is available to all Internet Service Providers (ISPs) pursuant to a federal tariff.³⁷

42. Wiggins has one wholly-owned subsidiary: Northern Colorado Communications, Inc. (NCCI). NCCI was formed in 1992; NCCI's headquarters are Wiggins's offices; the same individuals are officers and employees of, and perform the same duties and have the same responsibilities for, both Wiggins and NCCI; and Wiggins and NCCI share general purpose assets (*e.g.*, vehicles, computers, and office furniture and equipment).

43. From the Central Office facilities to, depending on the technology, the Network Interface or Optical Network Terminal to the Customer Premises Equipment, NCCI uses Wiggins's network to provide NCCI's services in Wiggins's service territory.³⁸

44. The Commission has designated NCCI as a Competitive Local Exchange Carrier (CLEC) in the Weldona exchange of Qwest Corporation, doing business as CenturyLink QC (CenturyLink). At present, however, NCCI does not provide service as a CLEC because it lacks the necessary facilities.

45. To construct the infrastructure necessary for NCCI to provide competitive broadband service and competitive telecommunications services in CenturyLink's Weldona exchange, Wiggins obtained approximately \$4.3 million in American Recovery and

³⁷ This is the National Exchange Carrier Association, Inc., Tariff No. 5, which is discussed below. In addition to ISPs, there may be other entities that are able to take service under the federal tariff. For ease of reference and for consistency with the testimony, in this Decision the ALJ refers to those who can take service under the National Exchange Carrier Association, Inc., Tariff No. 5 as ISPs.

³⁸ Hearing Exhibit No. 3 at Exhibit TH-5a is a depiction of the Wiggins and NCCI networks in the exchanges in which Wiggins uses copper (or a combination of copper and fiber) from the Central Office to the customer premises. Hearing Exhibit No. 3 at Exhibit TH-5b is a depiction of the Wiggins and NCCI networks in the exchanges in which Wiggins uses only FTTH from the Central Office to the customer premises.

Reinvestment Act of 2009 (ARRA) funds in the form of a grant and a loan.³⁹ The RUS administers the ARRA loans and grants. Although the ARRA funds will be used to construct infrastructure for NCCI, Wiggins submitted the funding application and incurred pre-application costs, engineering costs, and staking costs related to that application. The ARRA funding was approved in 2010; and the first funds, which Wiggins applied to the pre-application, engineering, and staking costs it has incurred, were released to Wiggins in January 2011.

46. Although the funding was available to construct the broadband infrastructure for NCCI, as of the hearing, Wiggins had not made a final decision on whether to undertake that construction. The ARRA funds were awarded for a specific purpose: to construct broadband infrastructure to permit NCCI to provide competitive broadband service and competitive telecommunications services in CenturyLink's Weldona exchange. If that purpose is not achieved, Wiggins must return the ARRA monies.

47. As part of its federal special access tariff, Wiggins offers a broadband DSL transmission service that is available to all ISPs. To provide this wholesale service, Wiggins uses the National Exchange Carrier Association, Inc. (NECA) Tariff No. 5 (NECA Tariff) filed with the FCC.⁴⁰ NCCI is the only ISP to purchase this broadband DSL transmission service from Wiggins.

48. The NECA Tariff contains the per-access line non-recurring (*i.e.*, one time) and recurring (*i.e.*, monthly) charges for Asynchronous Digital Subscriber Line (ADSL) access

³⁹ The grant is \$ 2.159 million, and the loan is \$ 2.168 million. The loan appears on Wiggins's books as a standard loan.

⁴⁰ Hearing Exhibit No. 10 is a copy of the NECA Tariff that became effective on April 30, 2011. The NECA Tariff is filed annually with the FCC. Changes from one tariff to the next must be shown on the tariff. There are two new ADSL speeds and line charges, as evidenced by (N), in the April 2011 tariff. Other than these two new ADSL speeds and line charges, the ADSL speeds and line charges shown in the NECA Tariff (Hearing Exhibit No. 10) were in effect in 2010. July 10 tr. at 72:1-5.

services at various transmission speeds⁴¹ and for Synchronous Digital Subscriber Line (SDSL) access services at various transmission speeds.⁴² The transmission speeds in the NECA Tariff are available irrespective of whether the broadband transmission service is provided using copper/fiber or FTTH.

49. In 2010, Wiggins provided neither switched access service nor broadband DSL transmission service to NCCI for the provisioning of broadband or telecommunications services in CenturyLink's Weldona exchange.

50. Since 1992, NCCI has provided, and continues to provide, Commission non-jurisdictional services to Wiggins's retail ratepayers. These services include at least: conference bridge services, voice mail, Customer Premises Equipment repair and maintenance, satellite internet service (through Wildblue), and internet access service. In addition, NCCI sells features to Wiggins's Colorado retail ratepayers. Further, NCCI is a toll reseller.

51. To provide its services to Wiggins's retail customers within Wiggins's service territory, NCCI purchases ADSL transmission service from Wiggins pursuant to the NECA Tariff. In 2010, NCCI offered four DSL options to Wiggins's retail customers in each Wiggins exchange;⁴³ each option offers a different downstream DSL transmission speed.⁴⁴

52. The downstream DSL speeds offered by NCCI do not appear in, and are considerably slower than, the downstream ADSL speeds contained in the NECA Tariff.⁴⁵

⁴¹ In ADSL, the upstream and downstream speeds are not the same. As seen in the NECA Tariff, the downstream speeds are faster.

⁴² In SDSL, the upstream and downstream speeds are the same.

⁴³ Hearing Exhibit No. 14 shows the DSL options available in each Wiggins exchange. In that Hearing Exhibit, the Hoyt Exchange is included in the Wiggins Exchange; thus, there are four exchanges shown although Wiggins serves five exchanges.

⁴⁴ The transmission speeds shown on Hearing Exhibit No. 14 are the downstream speeds.

⁴⁵ Compare the downstream DSL speeds offered by NCCI in 2010 (Hearing Exhibit No. 14) with the downstream ADSL speeds in the NECA Tariff (Hearing Exhibit No. 10).

The record contains no explanation for the discrepancy between the downstream DSL speeds provided by NCCI in its DSL service offerings and the downstream ADSL speeds available through the NECA Tariff.

53. NCCI did not slow down the downstream transmission speeds it received from Wiggins; in other words, NCCI provided to its customers DSL service at the broadband DSL transmission service speeds that Wiggins provided to NCCI. The record contains no explanation for Wiggins's providing to NCCI downstream DSL speeds that do not appear in the NECA Tariff.⁴⁶

54. In light of the unexplained discrepancies, the record does not support Wiggins's testimony that, in 2010, Wiggins provided broadband DSL transmission service to its affiliate NCCI pursuant to the NECA Tariff.

55. Rule 4 CCR 723-2-2855 both addresses the calculation of CHCSM support for a rural ILEC/EP,⁴⁷ such as Wiggins, and explains the process by which a rural ILEC/EP seeks CHCSM funding.⁴⁸

56. The calculation of CHCSM support presumes that the requesting rural ILEC/EP (here, Wiggins) maintains its accounting records in accordance with Commission requirements. In addition, in determining the amount of CHCSM funding that it requests, the rural ILEC/EP is

⁴⁶ The fact that the DSL speeds offered by NCCI do not match the ADSL speeds in the NECA Tariff raises these questions: (a) given that the NECA Tariff does not contain recurring and non-recurring charges for the DSL speeds offered by NCCI to Wiggins's retail customers, what per-access line recurring and non-recurring ADSL line charges did Wiggins charge NCCI in 2010; (b) in what document are those charges found; and (c) did Wiggins provide DSL speeds to its subsidiary NCCI that Wiggins did not offer or make available to ISPs who are not affiliated with Wiggins?

⁴⁷ Pursuant to Rules 4 CCR 723-2-2855(a) through 2855(c) and on a proper showing, rural ILECs are eligible for CHCSM support in three areas: high cost loops, high local switching costs, and high exchange trunk costs. Rules 4 CCR 723-2-2855(a) through 2855(c) are Hearing Exhibit No. 18.

⁴⁸ The process is found in Rule 4 CCR 723-2-2855(f)(I)(A).

presumed to have complied with the Cost Allocation Rules, including the incorporated federal rules.

57. Like all Colorado ILECs, Wiggins must follow applicable FCC regulations that are incorporated by reference, and made applicable in Colorado, by Rule 4 CCR 723-2-2008(b). This Rule requires compliance with 47 *Code of Federal Regulations* (CFR) Parts 32, 36, 54, 68, 69, and Part 64 Subparts I⁴⁹ and K (as published October 1, 2006).⁵⁰ Rule 4 CCR 723-2-2008(c) sets out specific 47 CFR Part 64 requirements that must be followed.

58. Rule 4 CCR 723-2-2005(d)(III) requires ILECs such as Wiggins to use the 47 CFR Part 32 Uniform System of Accounts (USOA).

59. Section 2000 of 47 CFR Part 32 contains the instructions for telecommunications plant accounts. As pertinent here, Wiggins must keep Continuing Property Records (CPRs) in compliance with the requirements of 47 CFR § 32.2000(e), which defines and concerns basic property records, and 47 CFR § 32.2000(f), which establishes standard practices for maintaining CPRs.⁵¹

60. Complete and current accounts maintained in accordance with USOA accounting practices are conditions precedent to meeting federal and state regulatory requirements. Recognizing this, the FCC found, in 47 CFR § 32.11, that

[t]he financial data contained in the [USOA] accounts, together with the detailed information contained in the underlying financial and other subsidiary records required by [the FCC], will *provide the information necessary to separations, cost*

⁴⁹ Subpart I is entitled Allocation of Costs and consists of §§ 64.901 through 64.905.

⁵⁰ Pursuant to Rule 4 CCR 723-2-2008(b), the Commission has incorporated by reference this version of the FCC rules. The Commission has incorporated by reference no later amendments to, or editions of, the cited FCC rules. Thus, the federal accounting rules that apply in this proceeding were those in effect on October 1, 2006, a date long before the filing of the Petition.

⁵¹ These two federal accounting rules are set out in full in Hearing Exhibit No. 9 at 8:14-13:39.

of service, and management reporting requirements. The basic account structure has been designed to remain stable as reporting requirements change.

(Emphasis supplied.) Thus, Wiggins must have up-to-date CPRs, among other purposes, to perform cost allocations to support a determination of cost of service.

61. Determination of Wiggins's eligibility for CHCSM funds is predicated on the Company's compliance with the USOA and with the FCC accounting rules, including 47 CFR § 32.2000(e) and § 32.2000(f). Wiggins did not comply with the requirement that it maintain current (or up-to-date) CPRs and, thus, did not comply with 47 CFR § 32.2000(f). This is important because, as of the hearing, Wiggins had not included in its CPRs the basic wire and cable property that it owned and used as part of its FTTH network.⁵²

62. Wiggins has equipment or facilities used by its retail customers and by ISPs. Rule 4 CCR 723-2-2405(a) requires Wiggins to apply the federal cost allocation principles found at 47 CFR Part 64 and the federal separations principles found at 47 CFR Part 36; this is the state-interstate separation of costs. The results of this process are found in the Part 36 Study (Hearing Exhibit No. 1 at Exhibit JDL-5).

63. The Part 36 Study (Hearing Exhibit No. 1 at Exhibit JDL-5 at)1 shows these 2010 state-interstate allocation and separations process results: (a) approximately 62.7 percent of Wiggins's total account 32.2001 rate base (investment) is assigned or allocated to basic local exchange service; and (b) approximately 58 percent of Wiggins's total net revenue requirement is assigned or allocated to basic local exchange service. These are the figures used by Wiggins to support its request for CHCSM funds.

⁵² Wiggin witness Simmons testified that the actual property and facilities that make up Wiggins's FTTH network are not in the CPRs and that updating the CPRs to include the FTTH network facilities would not be completed until the end of 2012. Hearing Exhibit No. 6 at 1:23-2:6.

64. The state-interstate separations process, however, does not end the segregation process in Colorado.

65. If a carrier in Colorado provides both Commission-jurisdictional and Commission-non-jurisdictional services and products, the Commission must assure compliance with §§ 40-15-106 and 40-15-108(2), C.R.S. To accomplish this, the Cost Allocation Rules require the following: after costs⁵³ are separated between *interstate* and *intrastate* services in the Part 36 Study, the carrier must segregate and allocate the *intrastate* costs identified in the Part 36 Study between intrastate jurisdictional services and products and intrastate non-jurisdictional services and products. With respect to a carrier's request for CHCSM funding, the focus is on the investments and expenses for basic local exchange service as determined as a result of the *intrastate* segregation and allocation process.

66. In 2010, Wiggins provided in Colorado Commission-jurisdictional and Commission-non-jurisdictional telecommunications services and products. In 2010, Wiggins provided Commission-regulated services in addition to basic local exchange service. Wiggins did not perform the required *intrastate* segregation and allocation study.

67. In addition, Rule 4 CCR 723-2-2400 provides: (a) Rule 4 CCR 723-2-2415 applies to rural local exchange carriers (LECs), such as Wiggins, that are not average schedule companies and have access charges in their Colorado tariffs; and (b) Rule 4 CCR 723-2-2416 applies to all rural LECs.⁵⁴ Rule 4 CCR 723-2-2415 requires that the rural LEC separate its investments and expenses associated with Colorado *intrastate* access based on segregation and

⁵³ Costs include investments and expenses.

⁵⁴ Rule 4 CCR 723-2-2416 establishes the process by which the rural LEC establishes its rate elements for *intrastate* access charges.

allocation of its intrastate investments and expenses done in accordance with the Cost Allocation Rules. Wiggins did not perform the required *intrastate* segregation and allocation study.

68. In 2010, Wiggins did not have a cost assignment and allocation manual.

69. The record establishes, and the ALJ finds, that the Commission has jurisdiction over the subject matter of this proceeding.

70. The record establishes, and the ALJ finds, that the Commission has jurisdiction over the Parties to this proceeding.

71. Additional findings of fact are found in the remainder of this Decision.

III. DISCUSSION AND CONCLUSION

A. Burden of Proof and Related Principles.

72. Wiggins requests that the Commission authorize it to receive \$ 137,610 annually in CHCSM funding.

73. As the party seeking Commission authorization, Wiggins bears the burden of proof with respect to the relief sought; and the burden of proof is preponderance of the evidence. Section 24-4-105(7), C.R.S.; § 13-25-127(1), C.R.S.; Rule 4 CCR 723-1-1500. The evidence must be “substantial evidence,” which the Colorado Supreme Court describes as

such relevant evidence as a reasonable person’s mind might accept as adequate to support a conclusion ... it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.

City of Boulder v. Colorado Public Utilities Commission, 996 P.2d 1270, 1278 (Colo. 2000) (quoting *CF&I Steel, L.P. v. Public Utilities Commission*, 949 P.2d 577, 585 (Colo. 1997)).

The preponderance standard requires the finder of fact to determine whether the existence of a contested fact is more probable than its non-existence. *Swain v. Colorado Department of*

Revenue, 717 P.2d 507 (Colo. App. 1985). A party has met the preponderance of the evidence burden of proof when the evidence, on the whole and however slightly, tips in favor of that party.

74. If an intervenor advocates that the Commission adopt its position (for example, if an intervenor requests that a condition be placed on the authority granted), that intervenor must meet the same preponderance of the evidence burden of proof with respect to its advocated position.

75. Petitioner's request for CHCSM funding is a matter of the public interest. The Commission has an independent duty to determine matters that are within the public interest. *Caldwell v. Public Utilities Commission*, 692 P.2d 1085, 1089 (Colo. 1984). As a result, the Commission is not required to reach the same conclusions based on the evidence, or to draw the same inferences from the evidence, as those reached, or drawn, by one or more of the Parties. In addition, the Commission is not bound by the proposals made by, or the advocacy of, one or more of the Parties.

76. The Commission reaches its decisions independently. Irrespective of the Parties' positions and advocacy, the Commission may grant or deny the relief sought -- and, if relief is granted, may establish conditions that the Commission deems necessary to assure that the final result is just, is reasonable, and is in the public interest -- so long as the evidentiary record supports the result and provided the reasons for the choices made are stated.

77. The ALJ was mindful of, and applied, these principles in reaching her decision in this case.

B. Relevant Colorado Statutes, Rules, and Decisions.

78. As pertinent here, § 40-15-208(2)(a)(I), C.R.S., authorizes the Commission to establish the CHCSM, the primary purpose of which

is to provide financial assistance as a support mechanism to local exchange providers to help make *basic local exchange service* affordable and [to] allow such providers to be fully reimbursed for the difference between the reasonable costs incurred in making *basic service* available to their customers within a rural, high cost geographic support area and the price charged for such service, after taking into account any amounts received by such providers under price support mechanisms established by the federal government and by this state. ...

(Emphasis supplied.) *See also* Rule 4 CCR 723-2-2841(f) (same).

79. Section 40-15-208(2)(a)(II), C.R.S., addresses contributions to, and draws from, the CHCSM and requires the Commission to

ensure that no local exchange provider is receiving funds from this or any other source that, together with local exchange service revenues, exceed[] the cost of providing local exchange service to customers of such provider. The [CHCSM] shall be supported and distributed equitably and on a nondiscriminatory, competitively neutral basis through a neutral assessment on all telecommunications service providers in Colorado.

(Emphasis supplied.)

80. Section 40-15-102(6.5), C.R.S., defines “distributed equitably” to mean distribution of CHCSM funding to EPs

using regulatory principles [1] that are neutral in their effect, [2] that do not favor one class of providers over another, and [3] that do not cause any [EP] to experience a reduction in its high cost support mechanism support revenue requirement based upon commission rules that are not applicable to other telecommunications providers.

81. Section 40-15-102(19.3), C.R.S., states that “Nondiscriminatory and competitively neutral basis” means that the Commission shall make decisions about distribution of CHCSM funds to EPs

using regulatory principles [1] that are neutral in their effect, [2] that do not favor one class of providers over another, and [3] that do not result in the imposition of regulatory requirements or costs on one class of eligible providers that are not imposed on others.

82. In a rulemaking setting, the Commission interpreted §§ 40-15-102(6.5) and 40-12-102(19.3), C.R.S., to require the Commission

[to] determine levels of [CHCSM] support using *regulatory principles that are neutral in their effect, and that do not cause a reduction in [CHCSM] dollars due to rules not applicable to other carriers*. We do not believe that adopting Staff and OCC’s preferred rules by including a rate case requirement [that is applicable only to rural Incumbent Local Exchange Carriers] would be legal under the new definition of distributed equitably, even if the rate case were filed every three years, as Staff and the OCC suggest. A rate case is a significant regulatory burden, a burden that is not required of carriers that are not rate-regulated under the proposed [CHCSM] rules. ...

Decision No. C06-1005, Docket No. 05R-529T issued August 25, 2006, at ¶ 44 (emphasis supplied).

83. In addition to its § 40-15-208(2)(a)(II), C.R.S., responsibility, the Commission must assure that § 40-15-108, C.R.S., is met. Section 40-15-108, C.R.S., provides:

(1) Any local exchange provider which provides facilities or equipment for use by interstate users or providers of telecommunications services shall separate all investments and expenses associated therewith according to applicable federal separations procedures and agreements.

(2) Any provider of telecommunications service which offers both regulated and deregulated telecommunications service shall segregate its intrastate investments and expenses in accordance with allocation methodologies

as prescribed by the commission to ensure that deregulated telecommunications services are not subsidized by regulated telecommunications services.

(Emphasis supplied.) See also § 40-15-106, C.R.S. (“The price of [non-jurisdictional] telecommunications services or products ... shall not be priced below cost by use of subsidization from customers of [jurisdictional] services and products ... and any such cross-subsidization is deemed to be an illegal restraint of trade subject to the provisions of article 4 of title 6, C.R.S.”).

84. The primary purpose of the CHCSM is to provide financial assistance to LECs that serve high cost areas in order to help make basic local exchange service affordable, provided the stated offsets are considered.

85. Section 40-15-102(3), C.R.S., defines basic local exchange service or basic service as

the telecommunications service which provides a local dial tone line and local usage necessary to place or [to] receive a call within an exchange area and any other services or features that may be added by the commission under

§ 40-15-102(3), C.R.S. See also Rule 4 CCR 723-2-2001(g) (definition of basic service includes provision of “a local access line, and local usage necessary to place or receive a call within a local calling area and any other services or features that may be added by the Commission under § 40-15-502(2), C.R.S.”).

86. Rule 4 CCR 723-2-2308(a)⁵⁵ specifies the services, features, and capabilities that constitute basic local exchange service. That Rule provides:

As part of its obligation to provide adequate basic local exchange service, each LEC shall construct and maintain its telecommunications network so that the instrumentalities, equipment, and facilities within the network shall be adequate, efficient, just, and reasonable in all respects in order to provide the [13 listed] services or capabilities to each of its customers within its service area[.]

⁵⁵ This Rule is Hearing Exhibit No. 15.

In Rule 4 CCR 723-2-2337,⁵⁶ the Commission specifies the parameters and performance characteristics that LECs must meet for basic local exchange service.

87. The services, features, and capabilities that constitute basic service, as defined by the Commission, and the related performance characteristics and parameters do not include access to broadband service, access to information service, or access to video service.

88. Section 40-15-401, C.R.S., delineates the services, products, and providers that are exempt from regulation in Colorado. Among them are: (a) new products and services other than those that are included in the definition of basic service; (b) information services; and (c) special access. Pursuant to this statutory provision, and irrespective of whether the service is regulated at the federal level, the Commission does not have jurisdiction over new products and services unless included in the definition of basic local service, over broadband service, over information services, and over video services.

89. Pursuant to § 40-15-208(2)(a)(I), C.R.S., in 2006, the Commission promulgated the High Cost Support Mechanism and High Cost Administration Fund Rules, found at Rules 4 CCR 723-2-2840 through 723-2-2855 (CHCSM Rules).⁵⁷

90. Rule 4 CCR 723-2-2848(d) governs the calculation of CHCSM support for areas served by rural ILECs. Rule 4 CCR 723-2-2848(d)(I) provides, in pertinent part:

The Commission shall ensure that the [CHCSM] operates such that the supported basic local exchange service bears no more than its reasonable share of the joint and common costs of facilities used to provide those services.

⁵⁶ This Rule is Hearing Exhibit No. 16.

⁵⁷ The proceeding was Docket No. 05R-529T, *In the Matter of the Proposed Rules Regarding the High Cost Support Mechanism and Prescribing the Procedures for the Colorado High Cost Administration Fund*.

91. Wiggins filed its Petition pursuant to Rule 4 CCR 723-2-2003(b), which sets out the general content of petitions, and Rule 4 CCR 723-2-2855(f), which pertains specifically to a petition for initial receipt of CHCSM funding. Wiggins seeks CHCSM support for high loop costs, high local switching costs, and high exchange trunk costs.

92. Rule 4 CCR 723-2-2854 contains the calculations of the costs, including investments, that a rural EP must use to compute the loop costs, the local switching costs, and the exchange trunk costs that are used to calculate the EP's CHCSM support.

93. Rule 4 CCR 723-2-2855 contains the calculation of per-access line CHCSM support for a rural EP.⁵⁸ That Rule sets out the process for determining costs for a rural EP that, like Wiggins, is not an average schedule rural provider. Rule 4 CCR 723-2-2855(a) establishes the process for determining the revenue requirement for high loop cost support. Rule 4 CCR 723-2-2855(b) establishes the process for determining the revenue requirement for high local switching cost support. Rule 4 CCR 723-2-2855(c) establishes the process for determining the revenue requirement for high exchange trunk cost support.

94. Subsequent to promulgation of the CHCSM Rules, the Commission issued a series of decisions that, taken together, articulate the Commission's policy with respect to, and discussed the process that the Commission will use in the ordinary course to review, a rural ILEC/EP's petition for CHCSM funding under the CHCSM Rules. The Commission enunciated its policy in four proceedings: (a) *In the Matter of the Petition of Nunn Telephone Company for High Cost Support Mechanism Funding*, Docket No. 07M-124T (Decisions No. C07-0650, issued August 1, 2007; No. C07-0919, issued November 9, 2007; and No. C07-1098, issued

⁵⁸ Rules 4 CCR 723-2-2855(a) through 2855(c) are Hearing Exhibit No. 18.

December 28, 2007) (*Nunn*); (b) *In the Matter of the Petition of Roggen Telephone Cooperative Company for High Cost Support Mechanism Funding*, Docket No. 07M-510T (Decisions No. C08-0335, issued May 29, 2008; No. C08-0752, issued July 18, 2008; and No. C08-0901, issued September 3, 2008) (*Roggen*); (c) *In the Matter of the Petition of Phillips County Telephone Company of Phillips County, Colorado for High Cost Support Mechanism Funding*, Docket No. 08V-510T (Decision No. C09-0038, issued January 14, 2008) (*Phillips County*); and (d) *In the Matter of the Petition of Pine Drive Telephone Company to Reset its High Cost Support Mechanism Funding*, Docket No. 09V-676T (Decisions No. R09-1351-I, issued December 2, 2009 and No. C10-0315, issued April 6, 2010) (*Pine Drive*). In each of these proceedings, the Commission discussed its policy that, under the CHCSM Rules, the Commission generally would use a ministerial and mechanical approach to determine, first, whether a rural EP has a revenue deficiency with respect to its provisioning of basic local exchange service and, second and assuming a revenue deficiency, the appropriate level of CHCSM funding for that rural EP.

95. For the reasons discussed in Decision No. R11-1124-I, the ALJ found that the policy-based ministerial and mechanical approach “does not lend itself to accommodation of new issues or issues of first impression” (*id.* at ¶ 46) and that the

ARRA-related issues and the FTTH-related issues identified by Intervenors are issues of first impression (or present novel circumstances) that the Commission must examine in detail in order to assure that: (a) after application of the § 40-15-208(2)(a)(II), C.R.S., standard, Wiggins has a [revenue] deficiency; and (b) assuming a deficiency is established, the amount of CHCSM support that Wiggins seeks is appropriate. In addition, FTTH is able simultaneously to provision basic local exchange service, other regulated telecommunications services and products, and still other services and products that are not Commission-regulated. Given the nature of FTTH facilities, the Commission must be mindful of § 40-15-108(2), C.R.S., and must assure that Wiggins properly accounted for, and relies in the Petition on, only basic local exchange service-related FTTH-related sources (*e.g.*, loans or grants, or both) (in addition to

revenues derived from basic local exchange service and monies from the federal Universal Service Fund) and only basic local exchange service-related FTTH-related costs.

Id. at ¶ 47 (footnote omitted). The ALJ made these findings notwithstanding the fact that

a detailed examination of the identified issues resembles, or incorporates components of, a revenue requirement-type examination or a rate case-type examination and [the fact] that the Commission seeks to avoid these types of examinations in a CHCSM support proceeding. The nature of the issues of first impression (or the novel circumstances) presented in this case, in the ALJ's view, call[ed] for a detailed examination in order to comply with the Commission's § 40-15-208(2)(a)(II), C.R.S., obligation. *See also* §§ 40-15-106 and 40-15-108, C.R.S. (regulated product subsidizing non-regulated products prohibited).

Id. at ¶ 50.

96. In Decision No. C12-0020, the Commission denied Wiggins's exceptions to Decision No. R11-1124-I. In that Order, the Commission separately discussed the ARRA-related issues and the FTTH-related issues.

97. As to the ARRA-related issues, the Commission agreed with the

ALJ's determination that the scope of this proceeding should allow the examination of the impact (if any) on Wiggins' need for CHCSM support created by Wiggin's receipt of ARRA funds (whether loan or grant, or both) and, other loan proceeds. To do otherwise may amount to a violation of § 40-15-208(2)(a)(II), C.R.S. The examination of this issue necessarily will include some examination of revenue requirement-like and rate case-like issues. However, the principles set forth in the *Nunn* decision should be observed to the extent applicable.

Id. at ¶ 20 (Emphasis in Original).

98. As to the FTTH-related issues, the Commission agreed with

the ALJ that FTTH-related issues are issues of first impression or present novel circumstances that the Commission must examine to ensure that: (a) Wiggins has a deficiency and, assuming a deficiency is established; (b) the amount of CHCSM support that Wiggins seeks is appropriate. We also find that, given the nature of the FTTH technology, the Commission must ensure that Wiggins properly accounted for its regulated and unregulated services, to ensure CHCSM funds will not support unregulated services, in violation of § 40-15-108(2), C.R.S. Section 40-15-108(2), C.R.S., requires providers of telecommunications services that

offer both regulated and deregulated services, such as Wiggins, to segregate its intrastate investments and expenses to ensure that deregulated telecommunications services are not subsidized by regulated telecommunications services. Section 40-15-106, C.R.S., prohibits cross-subsidization of these two categories of services.

Id. at ¶ 24. Notably, in affirming the ALJ’s determination with respect to the FTTH-related issues, the Commission did not refer to, or use as guidance, the principles enunciated in the *Nunn* decision and its progeny.

99. For the reasons discussed in Decision No. R12-0624-I at ¶¶ 23-26, the ALJ found that Decision No. C12-0020 and Decision No. R11-1124-I constitute the law of the case in this docket and, thus, bind the ALJ and the Parties. Specifically, the ALJ found:

The law of the case doctrine is a complete response to Petitioner’s argument that the *Nunn*, *Roggen*, *Phillips County*, and *Pine Drive* precedent (and other decisions) preclude rate case-like examination and allocations [in this docket]. Petitioner’s argument in support of the [Motion for Summary Judgment] is another presentation of the same arguments that the ALJ and the Commission previously found to be unavailing. The ALJ and the Commission have determined that examination of the FTTH issues in this proceeding is warranted and includes, without limitation, detailed rate case-like examination. Unless and until reversed, that determination binds the ALJ and the Parties.

Id. at ¶ 26. Wiggins raised this issue in its statement of position; this is discussed below.

100. Rule 4 CCR 723-2-2847(a) provides: “As a prerequisite for designation and eligibility to receive support from the HCSM, a provider shall be in compliance with the Commission’s rules applicable to the provision of basic local exchange service.”

101. Pertinent to addressing the issues presented in this docket are the Commission’s Cost Allocation Rules, principally the standards and principles found in Rules 4 CCR 723-2-2406 and 723-2-2407.

102. “For purposes of [the Cost Allocation Rules] and in order to comply with §§ 40-15-106 and 40-15-108(2), C.R.S.,” *Rule 4 CCR 723-2-2406* establishes the general

standards and principles that providers are to apply in the cost segregation process. *Rule 4 CCR 723-2-2406(c)* provides: “Any investments or expenses that are used jointly by two or more different services or that are used in common by services shall be segregated among all of those services using allocators that, to the maximum extent practicable, track how those costs are incurred.” As pertinent here, *Rule 4 CCR 723-2-2406(e)* provides: “The method for segregating investments and associated expenses which are common or jointly used shall ensure that all services that use those investments and expenses are allocated a portion of the joint investments and expenses.”

103. *Rule 4 CCR 723-2-2407* establishes, in descending order of preferred application, the factors to be applied when segregating costs. As relevant here, *Rule 4 CCR 723-2-2407(c)(I)* provides: “Where more than one service uses an investment or causes a cost to be incurred, direct assignment is inappropriate.” As relevant here, *Rule 4 CCR 723-2-2407(c)(III)* provides: “Common or joint costs that do not vary in direct proportion to the relevant amounts of use of the service shall be segregated by a surrogate measure that has a logical or observable correlation to the use of the service (this employs the Capacity Required principle in [Rule 4 CCR 723-2406(b)(IV)]).”⁵⁹ *Rule 4 CCR 723-2-2407(f)* provides: “It is inappropriate to allocate investments or expenses associated with the newly developed services exclusively to existing services. As new services begin to use joint and common investments and expenses are incurred, the methods of segregation shall be modified to track the usage and expenses.”

104. Additional relevant Colorado statutes and Commission rules are discussed elsewhere in this Decision.

⁵⁹ *Rule 4 CCR 723-2-2406(b)(IV)* provides: “Capacity Required: Costs of capacity are assigned according to whether they are necessary for the performance of the service.”

C. Matters Not at Issue.

105. The Parties agree (July 9 tr. at 5:9-6:14) that the following are no longer at issue in this proceeding: (a) Wiggins's accounting treatment of the ARRA grant and RUS loan; (b) the date from which, if the Petition is granted, Wiggins is eligible to receive CHCSM funds;⁶⁰ and (c) the applicability of Rule 4 CCR 723-2-2847(f)(II).⁶¹

106. In addition, there was testimony about the cap on the CHCSM fund that the Commission adopted on February 12, 2012.⁶² The Parties agree that the CHCSM fund cap does not apply to Wiggins's eligibility for the CHCSM support sought in this proceeding. They also agree that, assuming Wiggins is found to be eligible to receive CHCSM funds, the cap on the CHCSM fund may result in one or more adjustments to Wiggins's CHCSM draw in the future, as is the case for all EPs that draw CHCSM funds. *See generally* July 9 tr. at 6:14-9:15 (discussion of these issues).

107. As a result of the Parties' agreements, this proceeding focused principally on the determination of, and the appropriate treatment of, the FTTH-related investment and expenses that Wiggins uses to provide basic local exchange service to Wiggins's Colorado retail customers. This includes consideration of issues, such as (but not limited to) the process by which Wiggins allocated and assigned those investments and expenses to basic local exchange

⁶⁰ The Parties agree that, if the Petition is granted, Wiggins is eligible to receive CHCSM funding as of the date on which Wiggins filed the Petition (*i.e.*, July 1, 2011). This treatment is consistent with previous Commission Decisions on this point.

⁶¹ By Decision No. R11-1124-I at ¶ 26, the ALJ has determined that Rule 4 CCR 723-2-2847(f)(II) does not apply in this proceeding if Wiggins establishes a basic local exchange service-related revenue deficiency. The Parties do not take issue with this ruling.

⁶² The Commission adopted the cap in Decision No. C12-0179 issued in Docket No. 12R-148T, *In the Matter of the Emergency Telecommunications Rules Implementing Caps for Switched Access Rates and the High Cost Support Mechanism Fund Beginning in 2012*, 4 Code of Colorado Regulations 723-2.

service and whether the percentage of the investments and expenses allocated and assigned to basic local exchange service is supported by the evidence and is reasonable.

D. Positions of the Parties.

108. Wiggins asserts that, based on the 2010 financial data presented, it has met its burden of proof to establish the existence of a revenue deficiency associated with its provisioning of basic local exchange service and to support an annual CHCSM funding level of \$ 137,610.

109. Wiggins states that, in 2008, its Board of Directors decided to deploy a FTTH network to replace the existing copper network because: (a) Wiggins's lender of choice (*i.e.*, RUS) would only lend funds for FTTH deployment; (b) the cost of copper was prohibitive; (c) compared to other delivery technologies, FTTH was "a robust means of delivering services to subscribers with the capacity to integrate multiple services over a single delivery platform with minimal degradation of performance and capacity" (Wiggins SOP at 11); and (d) in a rural setting, FTTH is not significantly more expensive to deploy than other types of network infrastructure upgrades. Wiggins points out that no intervenor questioned the deployment of the FTTH, the FTTH-related benefits described in Wiggins's testimony, or the fact that deploying FTTH meets the objectives stated in § 40-15-203.5, C.R.S. (*i.e.*, encouraging "the cost effective deployment and use of modern telecommunications technology").⁶³

110. Wiggins states that, "in 2010 and today WTA offers only fully regulated, tariffed services via its FTTH network and its remaining copper plant."⁶⁴ Wiggins SOP at 12.

⁶³ Section 40-15-203.5, C.R.S., provides, in relevant part: "The commission shall issue *policy statements and rules and regulations* that maintain reasonable regulatory oversight [over rural ILECs] and that consider the cost of regulation in relation to the benefit derived from such regulation. *These rules and regulations* shall encourage the cost effective deployment and use of modern telecommunications technology." (Emphasis supplied.)

⁶⁴ The reference is to the remaining copper network used to provide copper-based DSL service in a small area of the New Raymer exchange.

Those services are: basic local exchange service, features, and other telecommunications services that are regulated by the Commission and broadband transmission service that is regulated by the FCC.

111. Wiggins asserts that it does not provide Internet access service or other broadband service on a retail basis. Wiggins states that it provides, on a wholesale basis and pursuant to federal tariff, broadband transmission service to its wholly-owned subsidiary NCCI and that NCCI then provides retail Internet access service and retail broadband service to Wiggins's customers. Wiggins asserts that this Commission does not regulate retail Internet access service and does not regulate either wholesale or retail broadband service. Wiggins SOP at 12.

112. Citing Hearing Exhibit No. 1 and Exhibit JDL-1 through and including Exhibit JDL-5, Wiggins asserts that it complied fully with the requisite rule requirements and, using the 2010 data, has established its basic local exchange service-based revenue shortfall and its need for \$ 137,610 in total annual CHCSM support.⁶⁵ In this regard, Wiggins observes that Staff witness Parker, the only intervenor witness to perform an analysis, supports the request for \$ 56,574 in annual CHCSM support for high cost switching and exchange trunking.

113. Wiggins concludes that it has complied with the FCC Part 32, Part 36, and Part 64 rules; that it has complied with the Commission rules; and that no intervenor challenged Wiggins's compliance. Wiggins states that the record establishes that the Commission should grant Wiggins's request for \$ 137,610 in annual CHCSM support.

⁶⁵ Wiggins seeks \$ 81,036 in annual loop support (Rule 4 CCR 723-2-2855(a)(III)) and a total of \$56,574 in annual support for high cost Central Office Equipment switching (Rule 4 CCR 723-2-2855(b)) and exchange trunking (Rule 4 CCR 723-2-2855(c)).

114. Both OCC and Staff urge the Commission to deny the Petition in its entirety because Wiggins failed to meet its burden to establish, as required by § 40-15-208, C.R.S., and Rule 4 CCR 723-2-2848(d), that its FTTH investments and costs result in a revenue deficiency that exceeds the costs incurred to provide basic local exchange service to its customers. There are several bases for their position; each basis and Wiggins's response are discussed below.

115. Intervenors begin with the proposition that Wiggins must perform an *intrastate* segregation and allocation of infrastructure (including FTTH) investments and costs between and among the intrastate jurisdictional services and the intrastate non-jurisdictional services. As support for this proposition, they cite §§ 40-15-108(2) and 40-15-208(2)(a)(II), C.R.S., and Rules 4 CCR 723-2-2405(a), 723-2-2406, 723-2-2407, and 723-2-2848(d).

116. Intervenors state that Rule 4 CCR 723-2-2855 contains the process for determining CHCSM fund support and assert that, inherent in that process, is the requirement that a carrier seeking CHCSM support (here Wiggins) demonstrate its compliance with the Cost Allocation Rules, which in turn requires segregation and cost allocation pursuant to FCC rules, Colorado statutes, and Commission rules. They argue that Wiggins must make this showing in order to establish that it has a revenue deficiency with respect to provisioning basic local exchange service and that it seeks the appropriate amount of CHCSM funding. They point to the undisputed fact that Wiggins did not perform the required *intrastate* cost segregation study.

117. OCC observes that the Commission does not regulate broadband DSL transmission service; thus, for purposes of § 40-15-108(2), C.R.S., broadband DSL transmission service is a deregulated service in Colorado as defined in § 40-15-102(6), C.R.S., and is Commission non-jurisdictional. OCC asserts that the Commission recognized this fact in

Decision No. C12-0020 at ¶ 24, where it stated that, “given the nature of the FTTH technology, the Commission must ensure that Wiggins properly accounted for its regulated and unregulated services, to ensure CHCSM funds will not support unregulated services, in violation of § 40-15-108(2), C.R.S.”

118. OCC and Staff assert that the regulated telecommunications carrier Wiggins failed to complete the *intrastate* segregation and allocation process and failed to comply with the Cost Allocation Rules, the purpose of which

is to: prescribe methodologies that prevent the price of deregulated services from being set below cost by use of subsidization from customers of regulated services; and prescribe cost-allocation methodologies for the segregation of intrastate investments and expenses for providers that offer both regulated and deregulated telecommunications services.

Hearing Exhibit No. 12; Rule 4 CCR 723-2-2400(a).

119. Intervenors conclude that, in the absence of an *intrastate* segregation and allocation study, Wiggins did not meet its burden of proof to show that the FTTH investments and costs used to support the CHCSM funding request include only investments and costs for basic local exchange service and do not include investments and costs for other services and products, both regulated and non-regulated. In addition, without an intrastate segregation and allocations study, according to Intervenors, Wiggins cannot establish that it has met the requirements of §§ 40-15-106 and 40-15-108, C.R.S., with respect to FTTH.⁶⁶

120. Intervenors also assert that Wiggins failed to establish that basic local exchange service bears only a reasonable share of the joint and common costs⁶⁷ associated with the FTTH

⁶⁶ Intervenors assert that the evidence establishes that, in 2010 and, in violation of §§ 40-15-106 and 40-15-108, C.R.S., basic local exchange service subsidized the non-regulated products and services provisioned using FTTH. Wiggins disagrees. Given the absence of an *intrastate* segregation and allocation study, the ALJ does not reach this issue.

⁶⁷ Costs include investments and expenses.

network. In support of their position, Intervenors address costs, revenues, and services provided over the FTTH infrastructure.

121. *With respect to joint and common costs*, assuming for argument only that the Part 36 Study is sufficient basis for determining a revenue deficiency (a proposition with which they disagree), Intervenors argue that Wiggins did not establish that the FTTH costs assigned to basic local exchange service are a reasonable share of the joint and common costs of the FTTH network. Intervenors assert that the evidence shows: (a) over its combination fiber and copper/fiber network, in 2010 Wiggins provisioned regulated and non-regulated services and products; (b) Wiggins deployed FTTH principally so that Wiggins could supply, through NCCI, broadband services to Wiggins's retail customers; (c) in the Part 36 Study, Wiggins assigned or allocated to basic local exchange service almost 67 percent of the costs of the FTTH network;⁶⁸ (d) the Wiggins Part 36 Study neither assigned nor allocated FTTH network costs to the broadband DSL transmission service that Wiggins provided to NCCI; in fact, no cost category identified as "Broadband DSL Transmission Service" is in the Part 36 Study; (e) although Wiggins takes the position that, under the NECA Tariff, broadband DSL transmission service is a special access service, the Wiggins Part 36 Study assigned or allocated no FTTH investment and none of its FTTH expenses to a category identified as "Special Access Services", in fact, no cost category identified as "Special Access Services" is in the Part 36 Study; and (f) in the Part 36 Study, the only assignment of costs that Wiggins made to the *interstate* jurisdiction is to message toll service and private line service. As a result, Intervenors conclude that Wiggins failed to demonstrate that costs it assigned to basic local exchange service in its Part 36 Study are

⁶⁸ OCC calculates the percentage from Hearing Exhibit No. 1 at Exhibit JDL-5 at 1, Cable and Wire Facilities, Column O (Local Exchange) divided by Column D (Total) [$\$ 9,423,996/\$ 14,094,184 = 66.864$ percent]. OCC also cites to the July 9 tr. at 54:17-55:1.

a reasonable share of the joint and common costs of the Wiggins infrastructure (including FTTH), which is used to provision basic local exchange service, other Commission-jurisdictional services and products, FCC-jurisdictional broadband DSL transmission service, and products and services that are not regulated by the FCC or by the Commission.

122. *With respect to revenues*, Intervenors assert that the evidence shows: (a) Wiggins assigned or allocated the revenues received from NCCI for the purchase of the broadband DSL transmission service only to “Special Access” as *interstate* revenues (Hearing Exhibit No. 1 at Exhibit JDL-1 at line 15 and Exhibit JDL-2 at line 15; Hearing Exhibit No. 6 at 5:8-17); and (b) Wiggins assigned or allocated none of the revenues that it received from NCCI for the purchase of broadband DSL transmission service to basic local exchange service, the *intrastate* service that the CHCSM supports (*id.*). Based on this evidence, Intervenors argue that Wiggins failed properly to assign or allocate revenues and that, as a result, basic local exchange service did not receive credit for any broadband DSL transmission-related revenue notwithstanding that basic local exchange service was paying for the network over which Wiggins provided broadband DSL transmission service to NCCI.

123. *With respect to services provided over FTTH*, OCC and Staff take issue with the Wiggins argument that: (a) it provides regulated broadband transmission service under the NECA Tariff and thus recovers its interstate-related investment and costs; and (b) it should include the majority of the cost of the FTTH network in the cost of basic local exchange service in the calculation of the need for, and the amount of, CHCSM funds. Intervenors assert that this argument is flawed because: (a) the Commission does not regulate broadband service; and (b) new services are not included in the definition of basic local exchange service and must be considered.

124. Intervenors begin with § 40-15-401(e), C.R.S., which provides that “[n]ew products and services other than those included in the definition of basic local exchange service” are exempt from Commission regulation. They state that: (a) Wiggins admits that FTTH will be capable of delivering additional services that Wiggins witness Hendrickson described as “future services that are currently nothing more than a gleam in the eye of engineers, inventors, researchers and developers” (Hearing Exhibit No. 4 at 4:9-25); and (b) Wiggins admits that broadband service is non-jurisdictional to this Commission. From this, Intervenors conclude that Wiggins’s inclusion of FTTH, a broadband technology cost, in the calculation of the need for CHCSM funds does not take into account the available non-regulated services and future non-regulated services provided on the FTTH network and ignores the definition of basic local exchange service, which does not include either broadband service or new services.

125. In this proceeding, OCC and Staff assert, the Commission must consider the regulatory status of the FTTH-provisioned current and future non-Commission jurisdictional services and must consider the revenue and cost effects of provisioning those current and future services. They argue that Wiggins: (a) has not assigned or allocated its FTTH investment and expenses in a way that recognizes all of the services that now are provisioned using FTTH; (b) has not assigned or allocated its FTTH investment and expenses in a way that recognizes future services that can be provisioned using FTTH; (c) failed accurately to reflect the FTTH investments and costs necessary to provision basic local exchange service, which is the pertinent regulated service for purposes of the CHCSM; and (d) ignored the CHCSM’s statutory purpose of providing support only for the reasonable costs of providing basic local exchange service.

126. After the Commission establishes the amount of CHCSM funding that Wiggins will receive (assuming the Petition is granted), Wiggins will receive that funding annually

absent a Commission Order that modifies the CHSCM draw. It is important, according to Intervenor, that Wiggins be required in this proceeding properly to assign or to allocate the FTTH investments and costs between basic local exchange service and other regulated and non-regulated services because, without a proper assignment or allocation in this docket, the citizens of Colorado will bear, for the foreseeable future, an inappropriately high percentage of the investments and costs of the FTTH network and, through the CHCSM assessment on their telephone bills, will support other regulated and non-regulated services, both those now available and those that may be provided in the future. OCC and Staff assert that this result is contrary to the purpose of the CHCSM, which is to support only basic local exchange service, and is contrary to the public interest.

127. In addition to the similar arguments made and discussed above, OCC and Staff make separate arguments in opposition to the Petition. OCC and Staff also respond to Wiggins's arguments in support of its CHCSM funding request. These are discussed below.

128. OCC states that Wiggins takes the position that: (a) broadband DSL transmission service is a service regulated at the federal level; as a result, the Part 36 Study is sufficient, and Wiggins did not need to perform an intrastate cost allocation; (b) the purpose of cost allocation is to ensure that regulated operations are reasonably compensated; (c) Wiggins's charging NCCI the FCC tariffed rates eliminated the need to develop cost allocation formulae or other forms of cost allocation; and (d) in any event, it is impossible to perform cost allocation for plant that supports integrated operations, and Wiggins could not separate the FTTH network into the distinct physical or investment and cost components that support the provisioning of individual services.

129. OCC disagrees. In addition to the assertion that intrastate segregation of FTTH investments and costs is required (discussed above), OCC points out that Wiggins assigned to interstate special access all *revenue* received from NCCI for wholesale broadband DSL transmission service on the basis that the wholesale broadband DSL transmission service is a special access service. OCC argues that, if the Commission accepts Wiggins's assertion that a substantial majority of *investments and costs* associated with the provision of broadband DSL transmission service properly are assigned or allocated to basic local exchange service, then the Commission must find that the Part 36 Study is unreliable because Wiggins incorrectly applied the cost allocation principles in 47 CFR § 64.901. OCC asserts that it is unfair to Wiggins's retail ratepayers and violates the fundamental regulatory principle of matching revenues, investments, and expenses for Wiggins to assign or to allocate to the *interstate* side all *revenue* received from provisioning broadband DSL transmission service without assigning or allocating to the *interstate* side the *investments and costs* necessary for provisioning broadband DSL transmission service.

130. In support of the argument that Wiggins failed to prove that basic local exchange service bears only a reasonable share of the joint and common costs associated with the FTTH network, OCC begins with Rule 4 CCR 723-2-2848(d)(I), which establishes how CHCSM support must be calculated for Wiggins.

131. Rule 4 CCR 723-2- 2848(d)(I) states that Wiggins's revenue requirement must be calculated on a per access line basis pursuant to Rules 4 CCR 723-2-2400 and 723-2-2855. It also requires that basic local exchange service bears only a reasonable share of the joint and common costs used to provide basic service. Wiggins's FTTH network is used to provide all of Wiggins's services including basic and related voice-grade services, access service, and

broadband DSL transmission services and is capable of providing additional services that Wiggins does not provide at present to its customers. OCC argues that the FTTH network is a joint and common cost and that, for the reasons discussed above, the allocation and assignment methods used by Wiggins result in basic local exchange service bearing an unreasonable share of the FTTH network investment and expenses.

132. In addition, OCC states that Wiggins witness Simmons testified that all FTTH-related investment is assigned to cable and wire facilities, specifically Accounts 32.2232 and 32.2423. Hearing Exhibit No. 5 at 3:10-12. OCC asserts that, by allocating or assigning nearly 67 percent of the cable and wire facilities, approximately 63 percent of the Account 32.2001 Rate Base (Investment),⁶⁹ and approximately 67 percent of the plant-specific expenses to basic local exchange service, Wiggins assigned or allocated to basic service an unreasonable share of the joint and common costs that it incurred in constructing its multi-use FTTH network.

133. OCC concludes that it is contrary to the “just and reasonable” mandate found in the Colorado statutes to assign or to allocate the overwhelming majority of the multi-use FTTH network investment and expenses to basic local exchange service, particularly when provisioning voice grade service requires so little of the FTTH network’s capacity.

134. Staff makes two recommendations with respect to the Petition. Staff’s principal recommendation is: deny the Petition because Wiggins failed to meet its burden of proof to establish that it is entitled to \$ 137,610 in CHCSM funds. Staff’s secondary and alternative recommendation is: authorize Wiggins to receive approximately \$ 56,000 in CHCSM funds.

⁶⁹ OCC calculates the percentage from the line Total 2001 Rate Base in Hearing Exhibit No. 1 at Exhibit JDL-5 at 1: \$ 12,191,101 in Column O (Local Exchange) divided by \$ 19,452,122 in Column D (Total) = 62.67 percent of Total 2001 Rate Base (Investment). OCC also cites to July 9 tr. at 54:17-55:11.

135. In support of its principal recommendation (in addition to the arguments also made by OCC) and in response to Wiggins's arguments, Staff asserts that Wiggins failed to allocate its costs in accordance with the FCC Part 32 accounting rules and the FCC Part 64 allocation rules. As a result, according to Staff, Wiggins failed to meet its burden to establish, as required by § 40-15-208, C.R.S., and Rule 4 CCR 723-2-2848(d), that its FTTH investments and costs result in a revenue deficiency that exceeds the reasonable costs incurred to provide basic local exchange service to its customers.

136. *First*, as found above, Wiggins is required to keep CPRs in compliance with 47 CFR §§ 32.2000(e) and 32.2000(f); and up-to-date CPRs are used, among other purposes, for cost allocations to support the determination of cost of service. In addition, it is undisputed that: (a) in 2010, Wiggins did not comply with the FCC requirement that it maintain its CPRs in an up-to-date fashion; (b) in 2010, Wiggins had not included in its CPRs the actual property that comprised the FTTH network; and (c) Wiggins planned to update the CPRs to include the FTTH network facilities by year end 2012.

137. Staff asserts that determination of Wiggins's eligibility for CHCSM funds is predicated on the Company's compliance with the USOA and 47 CFR §§ 32.2000(e) and 32.2000(f), the FCC rules pertaining to CPRs. Staff asserts that, notwithstanding the promised future compliance, as of the hearing, the FTTH investments and costs that Wiggins included as plant in service in its CHCSM funding request were not justified and were not verified as required by the FCC Part 32 Rules. Staff argues that the dollar figures for the investment and expenses in FTTH that purport to support the CHCSM funding request are unreliable -- and may be flawed -- because those dollar figures are not based on up-to-date CPRs that contain the FTTH investments.

138. On this same basis, Staff argues: (a) because the CPRs are not up-to-date, no independent means exist by which the Commission can determine the accuracy of the actual plant items included in the plant in service accounts; and (b) the record of plant investment, which cannot be verified, underlies the dollar amounts in the Part 32 accounting records that are used in the Part 36 Study and the CHCSM funding request, thus calling into question the FTTH investments and expenses used in the Part 36 Study, which Wiggins offers as the only support for its CHSCM request.

139. Staff concludes that Wiggins did not meet its burden of proof with respect to the FTTH investments and expenses and, thus, did not meet its burden of proof with respect to its CHCSM funding request.

140. *Second*, Staff takes issue with Wiggins's compliance with the FCC Part 64 Rules. Staff states that, pursuant to 47 CFR §§ 94.901 through 94.905, Wiggins must allocate its costs, either directly or indirectly, between regulated and non-regulated services by use of three stated methods. Wiggins argues that it is in compliance with the FCC cost allocation rules because its FTTH network is the same as, or similar to, broadband and, thus, is a regulated service pursuant to FCC rules. Staff disagrees and notes that Wiggins admits that the FTTH network provides many non-regulated services (*e.g.*, video service) in addition to the broadband services regulated by the FCC. Staff asserts that Wiggins failed to comply with the FCC cost allocation rules when it did not allocate its FTTH-related investments and costs between the federally-regulated broadband transmission service and the non-federally regulated services provided using the FTTH network.

141. *Third*, Wiggins argues that the Commission should approve its CHCSM request because approval would encourage Wiggins to make future changes in the telecommunications

services it offers. Staff asserts that this argument ignores these facts, which argue against approval: (a) the Commission likely will not regulate those future new telecommunications services; (b) there must be proper assignment, allocation, and segregation of costs in order to arrive at the cost of service (as required by 47 CFR § 64.901 *et. seq.* and the Cost Allocation Rules) as part of the determination of the amount of CHCSM funding; and (c) the necessary 47 CFR Part 32 accounting records, for example current CPRs, must be in place as a precondition to determining the level of CHCSM funding.

142. *Fourth*, Wiggins claims that it has assigned and allocated its investments and costs pursuant to applicable FCC rules and that any other method of assignment or allocation forces Wiggins to present rate case-type cost of service allocations that, pursuant to *Nunn* and later decisions, are not required in CHCSM proceedings. Staff responds: (a) for the reasons detailed above, Wiggins has not assigned and allocated its investments and costs appropriately; and (b) the argument that *Nunn* and its progeny preclude a detailed examination of FTTH issues in this docket is unpersuasive because it disregards the fact that the Commission and the ALJ have determined that such a detailed examination should occur in this docket notwithstanding that it may resemble or incorporate “components of a revenue requirement-type examination or a rate case type examination” (Decision No. R12-0624-I at ¶ 25) and disregards the fact that the ALJ has found the previous decisions to be binding as law of the case.

143. *Fifth*, Wiggins asserts that, by disputing its CHCSM funding request, Staff is penalizing Wiggins because other rural LEC CHCSM petitioners received funding at or near their requested funding levels and are providing broadband services in a manner similar to the way in which Wiggins provides those services. In support of this argument, Wiggins points to

Hearing Exhibit No. 4 at Exhibit TH-6. In that exhibit, Wiggins witness Hendrickson presented a chart that listed the nine CHCSM petitions approved by the Commission since 2007.⁷⁰

144. Staff responds: (a) Wiggins witness Hendrickson testified that, to his personal knowledge, many of the companies listed on Hearing Exhibit No. 3 at Exhibit TH-6 are providing broadband service today (July 10 tr. at 58:22-59:21); (b) Wiggins witness Hendrickson admitted that he had no personal knowledge as to whether any of those CHCSM petitioners included broadband or FTTH networks as investments and costs in their petitions for CHCSM funding (July 9 tr. at 174:20-176:2); and (c) Wiggins witness Hendrickson testified that, subject to either a new petition or a complaint proceeding, a recipient receives the same amount of CHCSM funds year after year (July 10 tr. at 53:18-23). Based on that testimony, Staff asserts that, even if the companies listed in Hearing Exhibit No. 3 at Exhibit TH-6 may be provisioning basic local exchange service by a broadband (including FTTH) network today, that fact standing alone does not establish that, at the time the Commission approved the CHCSM funding, broadband or FTTH investment was used to provision basic local exchange service. In addition, assuming the existence of broadband networks used to provide basic local exchange service at the time the Commission authorized the companies to receive CHCSM funding (which, Staff states, is not established), Staff argues there is no credible record evidence that any of the companies listed in Hearing Exhibit No. 3 at Exhibit TH-6 allocated its broadband network

⁷⁰ As pertinent here, that exhibit contains: the company name; the docket number; the decision number; the amount of funding sought; the amount of funding approved; and the amount of time that elapsed between the funding request and the funding approval.

investments and costs in a manner that is the same as or similar to the method that Wiggins used in this proceeding.⁷¹

145. *Sixth*, Staff argues that Wiggins improperly calculated its asserted revenue deficiency as Wiggins violated the matching principle because, due to the lag in receipt of USF payments, the USF monies (revenue) received in 2010 did not correspond to the investments and expenses incurred in 2010. Staff asserts that Wiggins should have included in Hearing Exhibit No. 1 at Exhibit JDL-1 and Exhibit JDL-2 the USF payments received in 2011 because those funds were based on 2010 investments and expenses. Wiggins did not include the \$ 1.26 million in USF payments it received in 2011 for its investment and expenses incurred in 2010; if it had included the correct USF payments, according to Staff, Wiggins would have had no revenue deficiency associated with its provisioning of basic local exchange service. As a result of the mismatch and the magnitude of the error, Staff asserts, the revenue deficiency calculated by Wiggins, and upon which it bases its request for CHCSM funding, is flawed and overstated.

146. For the foregoing reasons, Intervenors ask the Commission to deny the Petition because Wiggins did not meet its burden of proof.

147. Staff's alternative and secondary recommendation is: if the Commission determines that Wiggins is entitled to CHCSM funding (which Staff disputes), the Commission should adopt Staff witness Parker's method that allocates the FTTH investments and costs to provision basic local exchange service using an allocation factor based on the bandwidth used by basic local exchange service. In support of its alternative and secondary recommendation,

⁷¹ Based on the record, the ALJ agrees with Staff and, for the reasons stated by Staff, finds that Hearing Exhibit No. 4 at Exhibit TH-6 is not relevant to this docket; is not reliable evidence in this docket; and is not persuasive evidence in this docket. The ALJ did not rely on Hearing Exhibit No. 4 at Exhibit TH-6 in arriving at her decision in this proceeding.

Staff: (a) acknowledges that the proposed allocation method has not been presented to, or adopted by, the Commission⁷² or any other state commission; (b) asserts that using the bandwidth allocation method is consistent with the requirements of §§ 40-15-106, 40-15-108, and 40-15-208, C.R.S., and the Cost Allocation Rules; (c) asserts that using the bandwidth allocation method complies with the federal Part 32, Part 36, and Part 64 allocation process; and (d) concludes that using the bandwidth allocation method assures compliance with the statutory requirement that CHSCM funds support only basic local exchange service.

148. Staff concludes that the proposed allocation method specifically allocates FTTH investment and costs to basic local exchange service. The result of the Commission adopting the proposed allocation method is shown on Hearing Exhibit No. 9 at Exhibit PAP-7: Wiggins will not receive CHCSM support for its high cost loops but will receive CHCSM funds for its Cat 3, Cat 4.12, and Cat 2 costs.

149. To Intervenors' recommendations and arguments, Wiggins responds that the Commission should not adopt the Intervenors' recommendations; that the Commission should approve the Petition; and that the Commission should authorize Wiggins to receive the requested \$ 137,610 in annual CHCSM support.⁷³

150. *First*, Wiggins asserts that the Intervenors' recommendation that, because it deployed a FTTH network, Wiggins should be subject to an allocation calculation beyond the

⁷² Staff states that the reason this allocation method has not been presented in Colorado is that the Wiggins petition is the first CHCSM funding request to include FTTH investment and expenses.

⁷³ In addition to the arguments discussed here, Wiggins addressed Staff's proposal in Hearing Exhibit No. 8 that Wiggins increase its rates for business basic local exchange service and for features in order to offset the CHCSM funds that Wiggins seeks. Staff did not include this rate increase proposal in its SOP. Based on that omission, it is unclear to the ALJ whether Staff relies on that proposal; as a result, the ALJ does not address that Staff proposal and does not address the Wiggins response.

high cost loop calculation specified in Rule 4 CCR 723-2-2855(a) is inappropriate and constitutes a new Commission rule.

151. Wiggins states that the process for determining CHCSM high cost loop support is: first, under the federal USF rules, a rural ILEC's unseparated loop costs⁷⁴ are compared to the national average cost per loop to determine USF high cost loop support; second, Rule 4 CCR 723-2-2855(a) provides for CHCSM support for an amount that is excluded in the federal USF rules; and, third, the Commission and the ILEC apply the Rule 4 CCR 723-2-2855(a) algorithms to perform the allocations of unseparated loop support. Wiggins states that Intervenors advocate that Wiggins perform a second allocation of expenses between the interstate and the intrastate jurisdictions⁷⁵ and asserts that this is inappropriate because intervenors propose "a second allocation in the intrastate jurisdiction to allocations already made in both [the interstate and the intrastate] jurisdictions through Part 36." Wiggins SOP at 16.

152. In addition, Wiggins asserts that Intervenors provided no rationale for requiring an *intrastate* allocation of the investments and costs to provision broadband DSL transmission service, a service that is not regulated by the Commission.

153. Moreover, Wiggins argues that it is inappropriate for Intervenors to suggest that the loop investments and costs that are allocated away from basic local exchange service can be allocated to another existing service. Wiggins notes that, at present, the broadband DSL transmission service is the only service to which Wiggins can allocate the loop investments and

⁷⁴ Wiggins defines unseparated costs as a carrier's total regulated costs that have not yet been allocated pursuant to FCC Part 36 allocation rules.

⁷⁵ Wiggins notes that Staff witness Parker's second allocation calculation method used a bandwidth metric, which allocated 97.5 percent of unseparated loop costs away from basic local exchange service, and that OCC witness Dixon did not specify the second allocation calculation method to be used but did advocate an unspecified but significant reduction in the unseparated loop costs to be allocated to basic local exchange service.

costs and that this service is subject to the NECA Tariff, which is a federal tariff. Wiggins asserts that the Commission lacks jurisdiction over both the wholesale price charged by Wiggins for the broadband DSL transmission service pursuant to the NECA Tariff and the prices charged by NCCI for the retail services it provides using the broadband DSL transmission service. Wiggins also notes that Intervenors suggest that loop investments and costs that are allocated away from basic local exchange service can be allocated to non-existing, speculative services and products that in the future may be provisioned over FTTH. If the Commission adopts the Intervenors' arguments, Wiggins argues that it will have no way to recover the FTTH investments and costs that are allocated away from basic local exchange service.

154. *Second*, Wiggins argues that Intervenors' approach is "a return to the old days of rate-case-like proceedings that involve allocations or disallowances in rural ILEC [CHCSM] eligibility" proceedings. Wiggins SOP at 17. Wiggins urges the Commission to reject this approach "for all the same reasons that the arguments have been historically rejected." *Id.*

155. *Third*, as to Staff's proposed allocation method based on bandwidth, Wiggins asserts that the method is unique to this case; that it has not been applied to loop costs in any previous proceeding in Colorado or any other state; and that its use in the federal jurisdiction has been for purposes other than determining high cost support.

156. Wiggins began FTTH infrastructure construction in 2008. Wiggins asserts that Hearing Exhibit No. 1 at Exhibit JDL-7 shows that, in 2007, before Wiggins began FTTH construction, Wiggins would have been eligible for \$ 70,347 in annual CHCSM support for high cost loops.⁷⁶ The difference between what Wiggins seeks in annual CHCSM support for high

⁷⁶ Wiggins did not seek CHCSM support in 2007. The instant proceeding is the first proceeding in which Wiggins seeks to obtain CHCSM support.

cost loops with FTTH (based on 2010 financial data) and what Wiggins could have sought in annual CHCSM support for high cost loops without FTTH (based on 2007 financial data) is \$ 10,689 per year. Based on these numbers, Wiggins argues that the purpose of Staff's allocation proposal is to penalize Wiggins for upgrading its facilities using FTTH.

157. Wiggins also argues that Staff's proposed allocation method is improper because it does not follow traditional allocation processes. Staff responds that the fact that the proposed method does not follow traditional processes does not make the proposed method improper.

158. *Fourth* and finally, Wiggins asserts that a rulemaking docket is the better forum in which to address Intervenors' allocation-related proposals. According to Wiggins, the issue of the impact, if any, that deployment of FTTH should have on a rural ILEC's eligibility for CHCSM support "is at the four-way intersection of policy, law, rulemaking and Commission discretion" (Wiggins SOP at 20) and should be addressed in a rulemaking. Wiggins argues that, as the result of a rulemaking: (a) all Eligible Providers will be held to the same requirements and standards; and (b) the Commission can take into account the effect of the FCC's decision to support deployment of broadband services through a portion of the Connect America Fund. Resolving the policy questions in this docket, according to Wiggins, will have these negative consequences, which are wholly avoidable if there is a rulemaking: (a) Wiggins will be treated differently than similarly-situated rural ILECs that provide service over multi-use fiber networks; and (b) the CHCSM rules will be amended in this docket without the appropriate process. Wiggins asserts that, most importantly, a Commission decision supporting Intervenors' arguments

would also have the effect of sending a pointedly counter-intuitive policy message: ... Colorado's Public Utilities Commission will interpret its existing rules to restrict, limit, or eliminate altogether [CHCSM] support for a rural provider that makes the necessary [infrastructure] investment to achieve both the

federal and [the] state policy objectives [encouraging rural deployment of broadband] set out in applicable FCC rules and Colorado statute.

Wiggins SOP at 21.

E. Discussion and Conclusion.

159. Based on the evidentiary record, the ALJ finds that Wiggins has not met its burden of proof with respect to the request for \$137,610 in annual CHCSM funding. Specifically, Wiggins failed to establish by credible and persuasive evidence that, after taking into consideration its basic local exchange service revenues, the appropriate USF monies, and any other funding source,⁷⁷ Wiggins requires CHCSM funding in order to recover the difference between its revenues and the reasonable costs it incurred in making basic local exchange service available to its customers. For the reasons discussed below, the Petition should be denied.

160. *First*, the Wiggins Part 36 Study (Hearing Exhibit No. 1 at Exhibit JDL-5) contains the cost assignments and allocations of FTTH that result in the FTTH investments and costs that are allocated to basic local exchange service and are used to support the CHCSM funding request. Because the inputs are unreliable, the Part 36 Study results are unreliable and provide insufficient evidentiary basis to support the Petition.

161. A Part 36 Study rests on the information contained in 47 CFR Part 32 accounts, which must be maintained in compliance with standards established in 47 CFR Part 32. Section 32.2000(f) of 47 CFR requires maintenance of up-to-date CPRs. Here, it is undisputed that, when the Part 36 Study was performed, the Wiggins CPRs were not up-to-date and, of particular importance, the then-existing CPRs contained no FTTH investments. Consequently,

⁷⁷ For ease of reference and to be consistent with the terms used during the hearing, unless the context indicates otherwise, the terms revenue and revenues include basic local exchange service revenues, USF funds, and any other funding source for monies for basic local exchange service.

Wiggins's accounting records did not comply with the Part 32 standards; and the results of the Part 36 Study are unreliable at best and are fatally flawed at worst.

162. Wiggins argues that the absence of up-to-date CPRs does not affect the reliability of the Part 36 Study because, at the time it provided the cost data to its consultant so the consultant could perform the Part 36 Study, Wiggins used invoices and other financial records -- assertedly, the same documents that Wiggins would use to up-date CPRs -- as the source of the cost data provided and a Wiggins employee assigned or allocated the FTTH investments and costs to the appropriate category, just as it would have been done in up-dating CPRs. Wiggins concludes that the Part 36 Study is based on the same FTTH investment and financial data as those that would have been contained in up-to-date CPRs.

163. The ALJ finds this argument unpersuasive. At the time the Part 36 Study was performed, Wiggins had no cost assignment and allocation manual; thus, there is no assurance that the assignment and allocation of FTTH costs were done appropriately and consistently. In addition, in 47 CFR § 32.11, the FCC states that the financial data in the USOA accounts, *in conjunction with* other financial records that are required to be maintained, "provide the information necessary to separations [and] cost of service ... reporting requirements." The FCC does not permit underlying financial records and other subsidiary records, *standing alone and in lieu of the financial data in USOA accounts* (including up-to-date CPRs), to provide the necessary financial information. Wiggins must present a Part 36 study performed in accordance with the FCC's standards, including maintaining financial records in accordance with the USOA. The Commission cannot rely on the Part 36 Study presented here because, in performing the Part 36 Study, Wiggins deviated from the FCC's standards. Further, in the absence of up-to-date CPRs and a cost assignment and allocation manual, there was no way to

assure by independent document review (for example, by audit or discovery) that the cost assignments and cost allocations were done appropriately and consistently.

164. In addition, in 2010, Wiggins and NCCI shared employees, general purpose assets, office space, and other investments and costs. To assure compliance with §§ 40-15-106 and 40-15-108, C.R.S., one must allocate common and joint costs appropriately between Wiggins and NCCI to assure that Wiggins does not bear too much of those costs and, thus, subsidize NCCI and its products and services. Wiggins had no cost assignment and allocation manual when the Part 36 Study was performed; as a result, there was no document that described the direct assignment process and the allocation factors and process to be used with respect to the Wiggins/NCCI joint and common costs. The evidence supporting Wiggins's assertion that it appropriately performed the requisite cost assignments and cost allocations and that the Part 36 Study contains only Wiggins's costs is the testimony of Wiggins witness Loe and Wiggins witness Simmons. The ALJ finds that this testimony, standing alone, is unpersuasive because it is self-serving. This is an additional basis for the ALJ's determination that the Part 36 Study lacks sufficient reliability to support the Petition.

165. Finally, in light of the facts found above, the Part 36 Study results are questionable because of the discrepancy between the NECA Tariff and the broadband DSL transmission service that Wiggins provided to NCCI. This discrepancy calls into question the accuracy of inputs with respect to the broadband DSL transmission service because Wiggins did not provide broadband DSL transmission service to NCCI pursuant to the NECA Tariff. Although insufficient standing alone to call the Part 36 Study into question, the discrepancy is worrisome when considered in conjunction with the other Part 36 Study-related input issues.

166. *Second*, the issue here is whether, based on the 2010 financial data presented in this case, Wiggins has established a need for CHCSM funding. Wiggins presents its 2010 financial data (*i.e.*, investments, expenses, and revenues) in Hearing Exhibit No. 1 at Exhibit JDL-1 and at Exhibit JDL-2.

167. There is a long-established and well-recognized regulatory principle that, to the extent possible, one matches (that is, synchronizes to the same time period) a company's investments, expenses, and revenues in order to analyze the company's financial situation and to determine the company's need for additional revenue. The Intervenor argues that, to implement properly this matching principle in order to adjust for the recognized and acknowledged lag in USF payments, Wiggins should have included in Hearing Exhibit No. 1 at Exhibit JDL-1 and at Exhibit JDL-2 the 2011 USF funds it received because those funds were based, in large part, on investments and expenses, including FTTH, that Wiggins incurred in 2010. The ALJ agrees. Although the 2011 USF funds likely included some reimbursement for Wiggins's investments and expenses from years prior to 2010, the USF funds (*i.e.*, revenue) received by Wiggins in 2011 are a better match to the investments and expenses made by Wiggins in 2010 than are the USF funds received by Wiggins in 2010.

168. Hearing Exhibit No. 13 shows that, in 2011, USAC disbursed to Wiggins \$ 1,265,110 in USF high cost loop support. In 2010, Wiggins received \$ 674,629 in USF high cost loop support, as shown on line 9 of Exhibit JDL-1 and on line 9 of Exhibit JDL-2 to

Hearing Exhibit No. 1. The USF high cost loop support payments made to Wiggins in 2011 are \$ 590,471 *higher* than the USF high cost loop support payments made to Wiggins in 2010.⁷⁸ Including these additional USF funds, which are treated as revenue to Wiggins for purposes of determining need for CHCSM funding, would have made a significant change in Exhibit JDL-1 and in Exhibit JDL-2 to Hearing Exhibit No. 1 and, thus, to Wiggins's showing of need for CHCSM funds.⁷⁹

169. Wiggins did not include the USF high cost support funds it received in 2011; as a result, the matching principle was not followed. Thus, Exhibit JDL-1 and Exhibit JDL-2 to Hearing Exhibit No. 1 lack sufficient reliability to be used as a basis on which to determine, based on 2010 financial data, Wiggins's need for CHCSM support.

170. *Third*, Wiggins failed to prepare an *intrastate* cost segregation study as required by the Cost Allocation Rules. The record establishes that, using its network (which was principally FTTH), in 2010 Wiggins provided in Colorado both Commission-jurisdictional services (*e.g.*, basic local exchange service and features) and non-Commission jurisdictional services (*e.g.*, broadband DSL transmission service). In that circumstance, the Cost Allocation

⁷⁸ Hearing Exhibit No. 13 also shows that, in 2011, USAC disbursed to Wiggins \$ 96,120 in USF Safety Net Additive support; this compares to the \$ 43,500 in USF Safety Net Additive support shown on line 10 of Exhibit JDL-1 and line 10 of Exhibit JDL-2 to Hearing Exhibit No. 1. The total USF Safety Net Additive support payments made to Wiggins in 2011 are \$ 52,620 higher than the total USF Safety Net Additive support payments made to Wiggins in 2010. The ALJ finds that the issues with the USF high cost loop support are sufficient basis on which to determine that the Commission should not rely on Exhibit JDL-1 and Exhibit JDL-2 to Hearing Exhibit No. 1. As a result, in reaching her decision in this case, the ALJ accorded little weight to the difference in the USF Safety Net Additive support figures. Nonetheless, the ALJ notes without deciding that, to the extent Wiggins showed USF Safety Net Additive support as revenue in 2010, that figure may be underreported.

⁷⁹ For example, the change would have eliminated the negative revenue balance shown on Hearing Exhibit No. 1 at Exhibit JDL-1 at line 28 column A and at Exhibit JDL-1 at line 28 column A.

Rules require both a Part 36 study and an *intrastate* cost segregation study to assure that the requirements of §§ 40-15-106 and 40-15-108, C.R.S., are met.⁸⁰

171. In addition, the record establishes that, using its network (which was principally FTTH) and pursuant to Colorado tariffs, in 2010 Wiggins provided basic local exchange service; other Commission jurisdictional products and services; and access service. In that circumstance, Rule 4 CCR 723-2-2415 requires an *intrastate* cost segregation and allocation study.

172. Further, in 2010, Wiggins and NCCI shared employees, general purpose assets, office space, and other investments and costs. To assure compliance with §§ 40-15-106 and 40-15-108, C.R.S., one must allocate common and joint costs appropriately between Wiggins and NCCI to assure that Wiggins does not bear too much of those costs and, thus, subsidize NCCI and its products and services. Whether the Part 36 Study addressed this issue (and, if it did, whether it fully addressed this issue) is unclear from the record. To the extent the Part 36 Study did not fully address this issue, Wiggins was required to perform an *intrastate* cost segregation study to meet this allocation obligation.

173. For the reasons discussed above and based on the record, the ALJ finds that, without an *intrastate* cost segregation study, Wiggins failed to present the evidence necessary for the Commission to meet its Rule 4 CCR 723-2-2848(d)(I) responsibility to “ensure ... that the [CHCSM-]supported basic local exchange service bears no more than its reasonable share of the joint and common costs of facilities used to provide” that service.

⁸⁰ To that end, for example, Rule 4 CCR 723-2-2406(e) requires that the cost segregation method must ensure “that all services that use [investments and associated expenses that are common or jointly used] are allocated a portion of the joint investments and expenses.”

174. In the main, the ALJ finds persuasive the Intervenors' arguments concerning the need for an *intrastate* segregation study. There is one argument, however, that the ALJ finds unpersuasive.

175. Intervenors recommend that, in this proceeding, the Commission take into account the fact that, given the capacity of FTTH, Wiggins will be able *in the future* to add new services and products provisioned using the FTTH infrastructure. The Intervenors suggest that the Commission allocate in some way the FTTH infrastructure to take into account those future services and products. Intervenors make the recommendation because this is the only proceeding in which these concerns can be considered and because, once established, CHCSM funding continues year-to-year until changed by Commission order. Intervenors assert that, unless addressed here, the addition of new services and products will not affect Wiggins's CHCSM funding even though: (a) the new services and products will use the FTTH infrastructure; (b) as a result of that use, a portion of the FTTH investment and expenses should be allocated to the new services and products, thus reducing the allocation to basic local exchange service; and (c) for CHCSM purposes, revenues from those new services and products may increase the revenues that offset the CHCSM draw. Intervenors urge the Commission, when determining Wiggins's eligibility for CHCSM funding in this proceeding, to take into account the ability of Wiggins to add new services and products that will use the FTTH infrastructure.

176. Wiggins opposes this recommendation. Wiggins argues that it is inappropriate for Intervenors to suggest that the loop investments and costs can be allocated away from basic local exchange service by allocation to unspecified, future, and speculative services and products.

177. The ALJ finds Intervenors' argument unpersuasive and will not adopt Intervenors' recommendation. Intervenors ask the Commission to make a CHCSM funding

decision based on speculation about future services and products. Because the services and products are speculative, the record contains no persuasive evidence on which the Commission could base an allocation determination. In addition, Rule 4 CCR 723-2-2408(f) addresses new services and products. That Rule provides that new services that use joint and common investments or that incur joint and common expenses, or both, must be included in cost segregation studies and tracked as they begin to use the infrastructure and to incur expenses. Because the Cost Allocation Rules apply to CHCSM funding proceedings, Rule 4 CCR 723-2-2408(f) calls into question consideration in this docket of future services and products as proposed by Intervenors. Finally, assuming Rule 4 CCR 723-2-2408(f) permits consideration in this docket of future services and products, there is no record evidence in this docket to support assignment or allocation of any portion of the FTTH investments or expenses to one or more services and products that do not exist at present.

178. *Fourth*, Wiggins argues that denying the Petition would ignore the federal mandate to bring broadband service to rural and high-cost areas and would ignore the Colorado statutory mandate found in § 40-15-203.5, C.R.S., to encourage the cost-effective deployment of, and the use of, modern telecommunications technology. According to Wiggins, a decision denying the Petition would send the wrong message to rural EPs because it would discourage them from deploying broadband. The ALJ finds this argument unpersuasive.

179. To the extent there is a federal mandate to deploy broadband, the FCC is responsible for the funding mechanism to implement that federal mandate. The CHCSM is a state funding mechanism for investments and expenses for provisioning basic local exchange service *irrespective of the technology used*.

180. In addition, the Wiggins argument disregards that limited purpose of the CHCSM established in § 40-15-208(2)(a), C.R.S. The argument presumes that the CHCSM is used to provide financial support for modern telecommunications technology *qua* modern telecommunications technology and without regard to: (a) whether that technology is used to provision basic local exchange service; and (b) if it is so used, the reasonable portion of that technology that is used to provide basic local exchange service.

181. Moreover, contrary to the Wiggins argument, the Commission's requiring an EP to prove that it meets the standards for obtaining CHCSM funding (which is the focus of this proceeding) does not disregard § 40-15-203.5, C.R.S., and will not discourage EPs from deploying modern telecommunications technology because, irrespective of the technology used to provision basic local exchange service (including fiber), an EP may obtain CHCSM funding by meeting its burden of proof. Requiring an EP to establish that it meets the CHCSM funding standards is necessary, among other things, (a) in order for the Commission to fulfill its §§ 40-15-106 and 40-15-108(2), C.R.S., obligations; and (b) in order to assure that CHCSM funds, which are contributed by Colorado telecommunications customers for a specific and well-defined purpose, are distributed only to EPs that meet the statutory requirements.

182. Finally, § 40-15-203.5, C.R.S., provides, as pertinent here:

The commission shall issue *policy statements and rules and regulations* that maintain reasonable regulatory oversight [over rural ILECs] and that consider the cost of regulation in relation to the benefit derived from such regulation. *These rules and regulations* shall encourage the cost effective deployment and use of modern telecommunications technology.

(Emphasis supplied.) In this case, given that FTTH deployment presents issues not previously decided by the Commission, the Commission has maintained reasonable regulatory oversight over Wiggins by requiring Wiggins to meet its burden of proof concerning CHCSM funding in

the context of the new issues and circumstances and has considered the cost of regulation (*i.e.*, the one-time cost incurred by Wiggins to litigate the new issues in this proceeding) *vis-à-vis* the recurring benefit to Wiggins if it is awarded CHCSM funding.

183. *Fifth*, Wiggins argues that a rulemaking is the better forum in which to address FTTH-related issues. It suggests that policies adopted in this proceeding may amend the existing CHCSM Rules and that this result would be improper because the appropriate procedure (*i.e.*, rulemaking) was not followed.

184. The Commission has addressed, and found unpersuasive, the argument that the Commission cannot develop policy in the course of an adjudication in which new or complex matters are presented. The Commission found that

a rulemaking is not necessary to evaluate the impact of [new circumstances or intervening changes] on the public interest; the Commission can do so in this adjudicatory docket. The Colorado Supreme Court has found that:

Policymaking in the adjudicatory setting serves principally to provide a guide to the agency's position in future adjudicatory proceedings. Establishment of policymaking through adjudication is justified in circumstances where an agency must treat matters neither anticipated nor dealt with previously by the agency or matters that are extremely complex and incapable of being reduced to a formalized statement of policy. Policymaking is done through adjudication when it is doubtful whether any generalized standard could be framed which would have more than marginal utility.

Charnes v. Robinson, 772 P.2d 62, 66 (Colo. 1989) (internal citations and quotations omitted) [*Charnes*]. We find that public interest, in the context of applications for ETC designations can be affected by a variety of factors, including the interim cap and, potentially, the other reasons why the OCC argued a grant of Union's application is not in the public interest. It would be difficult to frame a generalized standard that would have more than a marginal utility in such applications. *See also*, Decision No. R10-1245, Docket No. 09A-324E mailed

November 19, 2010 *citing Charnes*, and Decision No. C10-1053, Docket No. 09F-505E, mailed September 28, 2010.

Decision No. C11-0441 at ¶ 23.⁸¹ In the cited Decision No. C10-1053 at ¶ 20, the Commission determined that it can grant relief in a formal complaint proceeding in the absence of a statute or a rule because “[r]atepayers are entitled to safe and reliable service, even in unique circumstances not fully contemplated by ... existing rules.”

185. The instant proceeding presents the new circumstance of a request for CHCSM funding for FTTH used to provision basic local exchange service and other services and products, and the new circumstance presents novel issues for Commission decision. For the reasons stated in *Charnes* and Decision No. C11-0441, the ALJ finds unpersuasive the Wiggins argument that rulemaking is the better forum in which to address the FTTH-related issues presented in this docket. In addition, the decision in this docket will affect only Wiggins; will not be binding on other EPs; and will not amend the CHCSM Rules. Finally, Decisions No. C12-0020, No. R11-1124-I, and No. R12-0624-I have all determined that the FTTH-related issues will be addressed in this docket.

186. *Sixth*, Wiggins asserts that adoption of Intervenors’ position would discriminate against Wiggins *vis-à-vis* other rural EPs that have obtained CHCSM funding. The argument rests on *Nunn* and its progeny to support the proposition that the Commission cannot examine closely Wiggins’s request for CHCSM funding. Decisions No. C12-0020, No. R11-1124-I, and No. R12-0624-I decided the *Nunn* issue against Wiggins and are a complete response to this Wiggins assertion. The argument also rests on Hearing Exhibit No. 4 at Exhibit TH-6.

⁸¹ The Commission mailed this Decision on April 26, 2011 in Docket No. 09A-771T, *In the Matter of the Application of Union Telephone Company, dba Union Wireless, for Designation as an Eligible Telecommunications Carrier in Colorado*.

For the reasons discussed above, that exhibit is not relevant to this docket; is not reliable evidence in this docket; and is not persuasive evidence in this docket. For these reasons, Wiggins has not established its claim that adoption of Intervenors' position would be discriminatory as to Wiggins.

187. For the foregoing reasons, the ALJ finds that Wiggins did not meet its burden of proof in this case. As a result, the ALJ does not reach, and makes no ruling with respect to, Staff's alternative and secondary recommendation.

188. There are arguments and recommendations made by one or more parties that are not addressed in this Decision. As to those arguments and recommendations, the ALJ considered them but found them unpersuasive or unsupported.

189. In accordance with § 40-6-109(2), C.R.S., the Administrative Law Judge recommends that the Commission enter the following order.

IV. ORDER

A. The Commission Orders That:

1. Consistent with the discussion above, the Petition for High Cost Support Mechanism Funding filed by Wiggins Telephone Association is denied.

2. The Motion for Approval of Filing Out of Time filed on June 27, 2012 is granted.

3. Wiggins Telephone Association may file its corrected rebuttal testimony and exhibits out-of-time.

4. The Motion for Leave to File Notice of Corrected Testimony and Corrected Exhibit filed on July 5, 2012 is granted.

5. Staff of the Commission may file its corrected answer testimony and exhibit out-of-time.

6. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

7. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

a) If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the recommended decision is stayed by the Commission upon its own motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

b) If a party seeks to amend, modify, annul, or reverse a basic finding of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge; and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

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

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

MANA L. JENNINGS-FADER

Administrative Law Judge

ATTEST: A TRUE COPY

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

Doug Dean,
Director