Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:	)	
	)	
Petition by the Colorado Public Utilities Commission, Pursuant to 47 C.F.R. § 54.207(c), for Commission Agreement in Redefining the Service Area of Delta County Tele-Comm, Inc., A Rural Telephone Company	)	CC Docket No. 96-45

REPLY COMMENTS BY THE COLORADO PUBLIC UTILITIES COMMISSION

The Colorado Public Utilities Commission (COPUC), by and through its attorneys, submits these comments in reply to the Comments of Delta County Tele-Comm, Inc. (Delta) and the Colorado Telecommunications Association (CTA), and the Comments of the United States Telecom Association (USTA). Delta/CTA and USTA, in their comments, oppose COPUC's petition to redefine Delta's service area to the wire center level. For the reasons stated here and in COPUC's Petition, COPUC affirms its request for Commission agreement to redefine Delta's service area, pursuant to the provisions of 47 CFR § 54.207(c).

Introduction

COPUC's Petition seeks Commission agreement to redefine Delta's service area to the wire center level. As explained in the Petition, Delta's current service area (*i.e.* its study area) comprises 6 separate wire centers. That service area is approximately 1,526 square miles, and includes geographically disparate areas, such as cities, towns, valleys, and mountainous regions of the state. *See* Petition Attachment 5. Under the Telecommunication Act of 1996 (specifically 47 U.S.C. § 214(e)(1)) and Commission Rule (47 CFR § 54.201(d)), a competitor seeking designation as an Eligible Telecommunications Carrier (ETC) in Delta's present service area, and the federal universal service support resulting from that designation, must provide supported services in all 6 wire centers at once. This requirement is excessively burdensome. Redefining Delta's service area would promote competitive entry. And, as explained in the Petition, concerns that competitors may engage in cream-skimming--choosing to serve only the lowest cost customers in Delta's service area--have already been addressed by Delta's

decision to disaggregate and target its universal service support to the wire center level (*i.e.* Path 3 under Rule 47 CFR § 54.315(d)).

Delta/CTA and USTA object to the request to disaggregate to the wire center level. Those objections are incorrect (*e.g.* the argument that rural carriers are exempt from the national preference for competition) or misplaced (*e.g.* the argument that the Commission must consider in this docket a host of issues relating to designation of competitive ETCs in Delta's service area).

A. The Act's Goal of Promoting Competition Applies Even to Rural Incumbent Local Exchange Carriers

A fundamental premise in the comments by Delta/CTA is that the Act's[1] preference for competition does not apply to rural areas of the country. For example, Delta/CTA state that the statute "deliberately buffers the Act's pro-competition policy for rural carriers" (page 8 of comments), and that the Act's requirements relating to designation of additional ETCs in rural areas reflect a deliberate "exception to the general national preference for competition" (page 9 of comments). This assertion--that the Act and Commission policies do not support competition in rural carrier areas--is plainly wrong.

In the Fourteenth Report and Order[2] (paragraph 144) the Commission adopted its disaggregation provisions (for support for rural carriers) after finding that they achieved "a reasonable balance between rural carriers' needs for flexibility and the Commission's goal of encouraging competitive entry" in rural areas. Throughout the Fourteenth Report and Order, the Commission expressed its goal of implementing disaggregation provisions

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[1] The Telecommunications Act of 1996.

for rural carriers that were "pro-competitive" (paragraph 153), limited the opportunity of rural carriers to act in an "anti-competitive" manner (paragraphs 154, 156), and preserved "competitive neutrality" (paragraphs 160, 161, and 164). Clearly, it is national policy to promote telecommunications competition even in rural areas. Delta/CTA are wrong when they suggest the contrary.

COPUC notes that 47 U.S.C. § 253 generally prohibits barriers to entry with respect to the provision of telecommunications services. (The statute does not proscribe barriers to entry except in rural areas, as Delta/CTA apparently suggest.) Furthermore, COPUC notes that the fundamental purpose of its Petition is to promote competition *by eliminating an unreasonable barrier to entry* in Delta's service area. The Petition points out: (1) It is highly unlikely that, without disaggregation, competitors will be able to serve as ETCs in Delta's service area due to the size and geographical features of that service area; and (2) Delta's election to target universal support under Path 3 (47 CFR § 54.315(d)) largely eliminates competitors opportunity to "cream-skim" in Delta's service area. COPUC affirms its conclusion that disaggregating Delta's service to the wire center level is in the public interest in light of the pro-competitive goals of the Act and Commission rules.

B. Redefining Delta's Service Area to the Wire Center Level is Consistent with the Joint Board's Recommendations

Delta/CTA (pages 13-17) contend that disaggregating Delta's service area is not consistent with the Joint Board's recommendations. The comments point out that the Joint Board has expressed concern with the potential for competitors to cream-skim in

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[2] *In the Matter of Federal-State Board on Universal Service, Fourteenth Report and Order*, 16 FCC Rcd. 11244 (May 23, 2001).

rural areas. According to Delta/CTA, even with disaggregation of universal service support the possibility for cream-skimming still exists in rural areas because local and access rates are still averaged throughout Delta's service area. COPUC disagrees with these contentions.

COPUC first notes that the comments, to the extent they discuss the Joint Board's recommendations, focus almost exclusively on the 1996 recommendations, *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 87 (1996). The comments ignore the Joint Board's subsequent and comprehensive recommendations which lead to the Fourteenth Report Order. In that Order, in response to the Joint Board's recommendations, the Commission directed rural carriers to disaggregate support pursuant to Rule 54.315. And, the whole point of disaggregating rural carrier support was to address concerns about cream-skimming. *See* Fourteenth Report and Order, paragraphs 136-137.

COPUC emphasizes that, when Delta elected to disaggregate high cost support under Path 3, it affirmed that its plan was reasonably related to the cost of providing service *for each disaggregation area* (*i.e.* for each wire center). *See* Rule 47 CFR § 54.315(d)(2)(ii). COPUC again points out that Delta's Path 3 method of disaggregation results in support of $11.36 per access line for its lowest-cost wire center, and $47.22 per line for its highest-cost wire center. Competitive ETCs that choose to serve only the lowest-cost area will receive substantially less support as compared to the support for serving the highest-cost wire center. Accordingly, COPUC maintains that concerns about cream-skimming in Delta's service areas have been resolved.

As for the existence of averaged retail rates and the possibility that those rates still result in the possibility of cream-skimming, COPUC responds: First, Delta's disaggregation of universal service support is far more significant in addressing this possibility than deaveraging rates. For example, in its highest cost exchange, Delta will receive support of $47.22 per access line; its current residential local rate (throughout its study area) is $14.07, and its current business local rate is $24.93. Clearly, disaggregating support is far more important in allowing Delta to charge rates closer to costs, and in minimizing the possibility of cream-skimming. Second, if Delta believes that rates should be deaveraged throughout its wire centers to address the potential for cream-skimming, it retains great discretion to propose rate changes to COPUC.[3] Finally, any competitive ETC authorized to compete in Delta's service areas will almost certainly charge averaged rates.[4] For these reasons, the fact that Delta charges averaged rates is no reason to conclude that cream-skimming is likely, given that it has disaggregated support under Path 3.

In summary, COPUC's proposed redefinition of Delta's service area does account for the Joint Board's recommendations and is consistent with those recommendations.

C. The Petition is Consistent with Commission Rule 47 CFR § 54.207

On page 13 of their comments, Delta/CTA argue that COPUC's request to redefine Delta's service area violates the provisions of Rule 54.207(a). The comments state:

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[3] Only residential local rates in Colorado are subject to a statutory rate cap. In addition, that rate cap is subject to various exceptions. *See* § 40-15-502(3)(b), Colorado Revised Statutes.

[4] Competitive ETCs operating in Colorado are also subject to the statutory rate cap referenced in footnote 3.

> [Section] 54.207(a) prevents adoption of service areas below Delta's study area level as long as that level is used to measure total support. Thus a change in Delta's service area would require this Commission to change or waive the rule so as to calculate support for each new service area separately and without regard to total support measured at the study area level. The bottom line is that the Petition could only be granted if it requested and stated a sufficient basis for a change to determine total support for Delta and other rural carriers at each individual wire center.

This argument is nonsense. In the first place, COPUC's Petition is properly filed under Rule 54.207(c) which explicitly allows a state commission to propose a redefinition of a rural carrier's service area. In the second place, *Delta itself modified the manner in which it receives universal service support* when it elected to disaggregate that support under Path 3 (Rule 54.315(d)). Rule 54.315 required all rural carriers to disaggregate universal service support under one of three specified paths; Delta elected Path 3. Pursuant to that election, Delta will now receive universal support on a wire center basis. The Petition proposes that Delta's service area be redefined on a wire center basis--*the identical manner in which Delta itself has chosen to receive universal service support*.[5]

Delta/CTA, in effect, object to maintaining Delta's overall level of support at the same level after it chose to target support to the wire center level under Path 3. However, COPUC points out that this argument amounts to a challenge to an existing Commission rule. Rule 54.315(e)(1) specifically states that a rural carrier's support under Path 3 shall "equal the total support available to the study area without disaggregation." As a challenge to an existing rule, the argument is improper.

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[5] Indeed, in this argument, Delta/CTA implicitly acknowledge the logical relationship between disaggregation of support and service areas.

D. The Validity of COPUC Rule 11 Is Not at Issue in this Proceeding

Delta/CTA and USTA argue that COPUC Rule 11 (pages 5-6 of Petition) is unlawful because it results in an "automatic" service area disaggregation for rural carriers. The comments suggest that disaggregation of a rural service area under Commission Rule 54.207 must be evaluated on a case-by-case basis. According to the comment, COPUC Rule 11 does not allow for such an evaluation, and is, therefore, invalid. The comments point out that the Commission refused to adopt a similar rule.

These arguments are improper to this proceeding. Obviously, the Commission has no authority to rule on the lawfulness of Rule 11, and need not do so in ruling on the Petition.[6] In compliance with Commission Rule 54.207, COPUC has filed a request to disaggregate Delta's service area specifically. The Petition sets forth the specific facts and reasons in support of its request to disaggregate Delta's service area. There is nothing "automatic" in the Commission's consideration and ruling on COPUC's request. The Commission need only consider the particular facts and arguments set forth in the comments and the Petition in deciding whether good reason exists to disaggregate Delta's service area. The Commission need not (and cannot) decide the underlying validity of Rule 11.[7]

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[6] COPUC observes that Delta and CTA, if they seriously believed Rule 11 was unlawful, could have pursued a judicial appeal from the docket in which the rule was adopted. The parties were undoubtedly aware of COPUC's actions in that docket. Notably, CTA was an active participant in the proceeding where COPUC adopted Rule 11. However, neither party challenged the rule by the legally specified methods.

[7] COPUC also observes that even though the Commission refused to adopt a rule similar to Rule 11, it discussion in the Fourteenth Report and Order does recognize the close and logical relationship between disaggregating support and service areas. *See* discussion in Petition, page 9.

E. Many of the Arguments by the Commenters Are Beyond the Scope of This Proceeding

Many of the arguments by Delta/CTA and USTA are beyond the scope of this proceeding. For example, Delta/CTA note the provision in 47 U.S.C. § 214(e)(2) that a state commission cannot designate an additional ETC to serve in a rural area unless it determines that such designation is in the public interest. Then, the parties suggest that it may not be in the public interest to designate additional ETCs for Delta's service area for various reasons: Splitting "thin markets" between two or more carriers may not be consistent with the public interest (page 16 and 18 of Delta/CTA comments); additional competition may cause the incumbent rural carrier to relinquish its ETC designation (page 19 of Delta/CTA comments); the public interest requires consideration of the effects of additional ETCs on consumers (page 20 of Delta/CTA comments); additional ETC designations may adversely affect an incumbent's provider-of-last-resort obligations (page 5 of USTA comments), etc. All of these (and similar) comments are out of place in this proceeding.

This case concerns COPUC's request to redefine Delta's service area; this is not a case *concerning designation of additional ETCs* for the Delta area. COPUC emphasizes that it has adopted rules (4 Code of Colorado Regulations 723-42, Rule 7) for designation of additional ETCs in the state, including in rural areas, and those rules comply with § 214(e)(2). Under those rules, a carrier seeking designation as a new ETC must file an application with COPUC, and COPUC must consider that application under its standard rules of procedure. Those procedures provide interested persons, such as an incumbent rural carrier, an opportunity to object to the application and an opportunity for hearing. Moreover, COPUC's rules specifically state that, "Before designating an additional

Eligible Telecommunications Carrier for an area served by a Rural Telecommunications Provider, (COPUC) shall find that the designation is in the public interest." The concerns raised by Delta/CTA and USTA regarding additional ETCs in Delta's service area can be raised in proceedings where a carrier seeks ETC designation in that area. Those concerns cannot be addressed here.

Similarly, the parties suggest that the Petition raises larger policy issues concerning rural carriers, and that the Commission should consider those issues in upcoming dockets. COPUC disagrees. The issues that might be addressed in future Commission proceedings are plainly beyond the scope of this docket. The Commission should consider the instant Petition based upon existing rules and policies. There is no reason for denying this Petition based upon rulings that might be made in the future.

CONCLUSION

For the reasons stated here and in the Petition, COPUC requests that the Commission concur with COPUC in redefining the service area for Delta County Tele-Comm, Inc.

Dated, this _____ day of _____, 2002.

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