

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
The Definition of the Rural Service)	
Areas of Two Rural Telephone)	CC Docket No. 96-45
Companies in Colorado)	

REPLY COMMENTS OF N.E. COLORADO CELLULAR, INC.

N.E. Colorado Cellular, Inc. (“NECC”),¹ by counsel and pursuant to the Commission’s *Public Notice*,² hereby submits its Reply Comments in the above-captioned proceeding.

I. INTRODUCTION

Following a nearly two-year process, NECC obtained ETC status in portions of its licensed service area in 2002, with the remaining portions granted contingent upon obtaining incumbent local exchange carrier (“ILEC”) service area redefinition pursuant to 47 C.F.R. § 54.207(c)(3). In those rural areas where NECC has obtained ETC status, it has aggressively rolled out competitive local exchange service. It has used high-cost support to improve its network so as to provide customers with a high level of service that provides a true choice of local service provider. In less than one year, NECC has signed up over 400 new customers on its basic universal service plan, far exceeding its original expectations. NECC has every reason to

¹ NECC is a small, independent Commercial Mobile Radio Service (“CMRS”) provider serving primarily rural areas in the northeastern portion of Colorado and the counties of Lincoln, Elbert, Kiowa, Crowley, and Cheyenne in the southern part of the state under call signs KNKR307 and KNKR327. As such, it is very much like a wireline rural telephone company in that it serves no metropolitan areas and is heavily invested in its local communities, providing high quality service in many rural areas no other wireless carrier has sought to serve.

² Pleading Cycle Established for Comments on Proceeding Regarding the Definition of the Rural Service Areas of Two Rural Telephone Companies in the State of Colorado, *Public Notice*, DA 03-26 (WCB rel. Jan. 7, 2003) (“*Public Notice*”).

believe that persons living in areas where CenturyTel of Eagle, Inc. (“CenturyTel”) is the ILEC will likewise think that NECC provides a viable alternative to wireline telephone service.

The recent redefinition of CenturyTel’s service area is an essential step to remove artificial barriers to competitive entry. Without redefinition, competitive carriers cannot compete against ILECs in rural areas unless their service areas match study area boundaries that were created during the monopoly era. As the FCC and the Federal-State Joint Board on Universal Service (“Joint Board”) have emphasized, such a restriction particularly affects wireless carriers, whose service area boundaries are determined by FCC license.³

Consistent with the pro-competitive purposes of the 1996 Telecommunications Act (“1996 Act”)⁴ and the Congressional goal of rural/urban parity in competitive choice, the Colorado Public Utilities Commission (“CPUC”) has proposed to redefine rural ILEC service areas in a manner that allows rural consumers to begin to experience the benefits of facilities-based competition. Not surprisingly, the CPUC’s proposals elicited strong objections from rural ILECs opposed to the disruption of their longstanding monopoly on universal service support. However, these commenting parties have presented no valid reason to disturb the Commission’s concurrence with the CenturyTel redefinition or to delay or deny grant of the proposed Delta County redefinition.

In its Opposition (“NECC Opposition”) to CenturyTel’s Application for Review or, in the Alternative, Petition for Reconsideration (“CenturyTel Application”), NECC explained in detail why the FCC’s concurrence with the CenturyTel redefinition should be upheld. The NECC

³ See *Federal-State Joint Board on Universal Service, Report and Order*, 12 FCC Rcd 8776, 8879-80 (1997) (“*First Report and Order*”).

⁴ Pub. L. No. 104-104, 110 Stat. 56 (1996).

Opposition is incorporated herein by reference and is attached hereto as Exhibit 1. In these Reply Comments, NECC will focus on arguments raised in this comment cycle.

For the reasons set forth below, NECC urges the Commission to continue the march toward leveling the playing field among carriers by upholding its concurrence with the redefinition of CenturyTel's service area and by issuing a prompt concurrence with the redefinition of Delta County's service area as set forth in the CPUC's petition.

II. THE REDEFINITION OF CENTURYTEL'S SERVICE AREA WILL REMOVE ARTIFICIAL BARRIERS TO COMPETITION

The 1996 Act was enacted with the goal of opening "all telecommunications markets" to competition⁵ and providing rural consumers with a choice among services comparable to those available to urban consumers.⁶ Consistent with these goals, Congress provided competitive carriers that commit to provide the supported services and reach out to eligible Lifeline subscribers the means to receive high-cost support and begin chipping away at the "almost insuperable competitive advantage"⁷ enjoyed by monopoly incumbent LECs.⁸ One of the most significant barriers to entry facing carriers who seek to compete with rural ILECs is the fact that

⁵ See Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. at 113.

⁶ See 47 U.S.C. § 254(b)(3) ("Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas").

⁷ See *Verizon Communications, Inc. v. FCC*, 122 S.Ct. 1646, 1662 (2002).

⁸ See 47 U.S.C. § 214(e)(2) (permitting the designation of competitive carriers as eligible telecommunications carriers both in areas served by rural telephone companies and in all other areas). See also *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, 11 FCC Rcd 15499, 15506-07 (1996), *subseq. hist. omitted* ("Local Competition Order") ("The present universal service system is incompatible with the statutory mandate to introduce efficient competition into local markets, because the current system distorts competition in those markets. For example, without universal service reform, facilities-based entrants would be forced to compete against monopoly providers that enjoy not only the technical, economic, and marketing advantages of incumbency, but also subsidies that are provided only to the incumbents.")

competitive carriers' service areas rarely match up with ILEC study areas, which constitute the default "service area" definition. Congress provided a means for removing this obstacle in Section 214(e)(5), which enables "the Commission and the States, after taking into account recommendations of a Federal-State Joint Board ... [to] establish a different definition of service area[.]"⁹

Recognizing that a competitive carrier may be disadvantaged if a mismatch of service areas forces it to compete against ILECs without the aid of high-cost support, the Commission sensibly devised a streamlined procedure to redefine rural service areas in a way that properly takes the Joint Board's recommendations into account and "minimize[s] administrative delay".¹⁰ By providing interested parties with an opportunity to comment on a state's proposed redefinition, this procedure ensures that any concerns, including those relating to the Joint Board's recommendations, are fully considered before the Commission concurs with the proposal.

Consistent with the plain language of Section 214(e)(5),¹¹ the FCC's redefinition rules do not require a full-blown proceeding or a written order. By allowing the redefinition to take effect automatically if no action is taken within 90 days, the procedure ensures that competition will not be unduly delayed by lengthy proceedings. On multiple occasions, the Commission has utilized this procedure to consider requests for concurrence with proposed rural ILEC service

⁹ 47 U.S.C. § 214(e)(5).

¹⁰ See 47 C.F.R. § 54.207(c)(3); *First Report and Order, supra*, 12 FCC Rcd at 8881.

¹¹ See NECC Opposition at pp. 12-14. Although Delta County asserts that concurrence with the CPUC's redefinition proposals would conflict with "the plain language of Section 214(e)" (p. 11), it focuses its discussion on the legislative history and fails to make any mention of the plain language contained in Section 214(e)(5) that permitted the FCC to adopt the procedural rules used to process service area redefinition requests.

area redefinitions, and in each case it has granted its concurrence and allowed the redefinition to take effect.¹²

The CPUC's proposal to redefine CenturyTel's service area presents a solution to precisely the sort of competitive disparity Section 214(e)(5) was designed to address. Specifically, the CPUC noted that "no company could receive designation as a competitive ETC unless it is able to provide service in 53 separate, non-contiguous wire centers located across the entirety of Colorado."¹³ Because a competitor could not compete fairly without receiving high-cost support as CenturyTel does, the CPUC concluded that these circumstances present a "significant barrier to entry."¹⁴ The redefinition of CenturyTel's service area will remove these obstacles for NECC and will encourage other carriers to come forward and compete with CenturyTel.

Having already determined that NECC's designation throughout its service area in Colorado is in the public interest, the CPUC sought FCC concurrence to allow its designation to take effect in CenturyTel's service area. Plainly, therefore, the FCC's decision to allow the proposed redefinition to take effect served to advance the pro-competitive goals established by Congress in 1996 by removing barriers to competitive entry.¹⁵ Commenters have raised

¹² See, e.g., *Smith Bagley, Inc. Petitions for Agreement to Redefine the Service Areas of Navajo Communications Company, Citizens Communications Company of the White Mountains, and CenturyTel of the Southwest, Inc. on Tribal Lands within the State of Arizona*, DA 01-409 (WCB rel. Feb. 15, 2001); *Smith Bagley, Inc. Petitions to Redefine the Service Area of Table Top Telephone Company on Tribal Lands within the State of Arizona*, DA 01-814 (WCB rel. April 2, 2001); *Smith Bagley, Inc. Petitions to Redefine the Service Area of CenturyTel of the Southwest, Inc. in the State of New Mexico*, DA 02-602 (WCB rel. March 13, 2002).

¹³ Petition by the Public Utilities Commission of the State of Colorado to Redefine the Service Area of CenturyTel of Eagle, Inc., Pursuant to 47 CFR § 207(c) at p. 4 (filed Aug. 1, 2002) ("CPUC CenturyTel Petition").

¹⁴ *Id.* ILEC statements that CETCs are "already competing" are false. Rural ILECs maintain near 100% share in the local exchange marketplace, even after over a decade of wireless "competition", due primarily to their lock on high-cost support in rural areas.

¹⁵ See Western Wireless Comments at p. 3.

absolutely nothing in this or any of the prior redefinition proceedings that properly qualify as novel issues of fact or law. Opposing parties have simply rehashed the same arguments that have failed time and again in state proceedings, seek to change FCC rules passed long ago, and reargue the well considered decisions made in the 2001 MAG proceeding. Nothing in their presentations warrants departing from the proper course set by the Wireline Competition Bureau regarding service area redefinition.

III. THE CPUC AND THIS COMMISSION PROPERLY REDEFINED CENTURYTEL'S SERVICE AREA "AFTER TAKING INTO ACCOUNT" THE JOINT BOARD'S RECOMMENDATIONS

Although the ILECs attempt to obscure the waters, the requirements for redefining a rural ILEC service area are straightforward. Specifically, under Section 214(e)(5), a service area may be redefined as something other than an ILEC's study area if "the Commission and the States, after taking into account recommendations of a Federal-State Joint Board ... establish a different definition of service area for such company."¹⁶

Consistent with this requirement, the CPUC provided an analysis of the proposed redefinition under the framework provided in the Joint Board's recommendations, which were largely adopted in the FCC's *First Report and Order*. In the ensuing notice-and-comment period, several commenters presented arguments for and against the proposed redefinition, and much of the discussion was properly focused on the Joint Board's recommendations. There is no evidence that the Commission ignored the comments and *ex parte* presentations made during the 90-day period.

The FCC's thoroughgoing consideration of the Joint Board's recommendations is also evident from the fact that the CPUC's proposed redefinition is fully consistent with those

¹⁶ 47 U.S.C. § 214(e)(5).

recommendations. The CPUC's proposals did not threaten to encourage "cream skimming", that is, the uneconomic targeting of competitive entry to obtain high-cost support in relatively low-cost portions of a service area. As the CPUC noted, such concerns are fully addressed by the fact that CenturyTel and Delta County have disaggregated their high-cost support to the wire-center level.¹⁷ Thus, it should not matter to CenturyTel and Delta where a competitor enters, because the competitor will receive the proper amount of support in each wire center. Even if CenturyTel's support were currently disaggregated into two large cost zones, either CenturyTel or the CPUC on its own motion could amend the plan of disaggregation to more accurately target support and prevent the possibility of a competitor gaining uneconomic support.¹⁸

The CPUC's proposals will not impose any undue administrative burden on rural ILECs, who already have the ability to calculate support down to the wire-center level (and in fact have already done so).¹⁹ Finally, the CPUC's proposals recognized the carriers' special status as a rural telephone company and did not in any way propose to alter the benefits or exemptions accorded by that status.²⁰

ILEC commenters fail to provide any valid basis for their assertion that the CPUC and the FCC did not take the Joint Board's recommendations into account. For example, no party

¹⁷ See CPUC CenturyTel Petition at pp. 9-10; NECC Opposition at pp. 3, 6; Delta County Comments at p. 3 (filed Oct. 15, 2002). CenturyTel's Path 3 filing disaggregated support to 53 separate cost zones, but then impermissibly attempted to "reaggregate" support into two broad cost zones. Because the state and FCC rules allow Path 3 filings for disaggregation to the wire center level or to no more than two zones within a wire center (see 47 C.F.R. § 54.315(d)(1); 4 CCR 723-42-10.3.1), the CPUC properly overruled CenturyTel's attempt to "reaggregate" support. See CPUC Reply Comments at pp. 3-4 (filed Sept. 27, 2002).

¹⁸ See 47 C.F.R. §§ 54.315(b)(4), (c)(5), (d)(5); 4 CCR 723-42-10.1.3, 10.2.5, 10.3.5.

¹⁹ See CPUC CenturyTel Petition at p. 11.

²⁰ Delta County's assertion that "the authors of the law on designating additional carriers were focused exclusively on preventing harm for existing providers in rural areas and their customers" (p. 12) is misplaced, since it is entirely up to the state, not the FCC, to determine whether the designation of an additional ETC in a particular rural area is in the public interest. The CPUC's public interest determination under Section 214(e)(2) has already

even attempted to demonstrate that CenturyTel or Delta County would be subjected to undue administrative burdens as a result — indeed, CenturyTel conceded as much.²¹ NTCA and USTA attempt to complicate the picture by asserting that the CPUC’s Rule 11 — which ties service area redefinition to the level of disaggregation of support — is somehow invalid.²² The legal posture of a state rule of general applicability is irrelevant in this proceeding, which only concerns FCC concurrence with the redefinition of a particular company’s service area.

Moreover, in declining to mandate automatic service area redefinition upon disaggregation of support, the FCC merely acted to ensure that redefinition for any particular carrier would occur only upon agreement by the FCC and the states.²³ It did *not* prohibit states from devising their own disaggregation and redefinition rules in carrying out their statutory duties. Clearly, a state’s request for FCC concurrence may be granted summarily if the FCC agrees that the state’s proposal takes the Joint Board’s recommendations into account.

Recently, the Minnesota Public Utilities Commission (“MPUC”) concluded that the rural ILEC service areas of Citizens Telecommunications Company (“Citizens/Frontier”) should be redefined to permit a wireless ETC to provide competitive service throughout its licensed service area. The MPUC rejected Citizens/Frontier’s attempt to block a competitor from using federal high-cost support to serve a portion of two Citizens/Frontier wire centers, despite the fact that the

been made and cannot be appealed to the FCC. *See* NECC Opposition at pp. 7-8. Delta County’s assertion is also wrong as a matter of federal policy. *See supra* nn. 4-6 and accompanying text.

²¹ *See* CenturyTel Comments at p. 4 (filed Sept. 13, 2002).

²² *See* NTCA Comments at p. 4; USTA Comments at pp. 4-5.

²³ *See Federal-State Joint Board on Universal Service, Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, Order on Reconsideration*, CC Docket No. 96-45, FCC 02-171 at ¶ 17 (rel. June 13, 2002).

competitor proposed to serve its entire FCC-licensed service area.²⁴ A copy of the Recommended Decision (adopted by the MPUC on February 13, 2003) is attached hereto as Exhibit 2.

IV. THERE IS NO BASIS FOR SUSPENSION OF THE FCC'S REDEFINITION PROCEDURES PENDING THE JOINT BOARD REFERRAL

The rural ILECs, faced with universal service rules that promise to level the competitive playing field in rural areas, have been increasingly vocal in demanding the suspension of those rules. In particular, the ILECs have used the FCC's referral to the Joint Board²⁵ argue, in effect, that all pro-competitive policies must be suspended until the Commission develops rules that are more ILEC-friendly.²⁶ These attempts to prevent the application of validly adopted FCC rules must be rejected.

As Western Wireless correctly points out, the service area redefinition procedure embodied in the FCC's rules were adopted after being duly subjected to notice and comment in a full rulemaking proceeding and withstood a challenge in federal court.²⁷ Whatever changes are wrought by the Joint Board's deliberations and subsequent FCC proceedings will apply to all ETCs, including those designated since the issuance of the *Referral Order*. Existing rules must be applied as written, until such time as they are changed through appropriate rulemaking procedures.

It is highly doubtful that the *Referral Order* will yield any changes that are relevant to this proceeding, which concerns only the redefinition of a particular carrier's service area. As the

²⁴ See Midwest Wireless LLC, Findings of Fact, Conclusions of Law, and Recommendation, OAH Docket No. 3-2500-14980-2, PUC Docket No. PT6153/AM-02-686 at pp. 15-16 (rel. Dec. 31, 2002) ("Recommendation").

²⁵ See *Federal-State Joint Board on Universal Service, Order*, CC Docket No. 96-45, FCC 02-307 (rel. Nov. 8, 2002) ("*Referral Order*").

²⁶ See, e.g., Delta County Comments at pp. 17-25; NTCA Comments at p. 7; CenturyTel Application at pp. 5-6.

²⁷ See Western Wireless Comments at pp. 6-7.

CPUC observes,²⁸ the redefinition issue constitutes only a small part of the referral, in the form of a question — posed at the very end of the *Referral Order* — as to whether the FCC should provide additional “guidance” regarding the manner in which disaggregation of support should be considered in redefining service areas.²⁹

Given the fact that CenturyTel’s and Delta County’s disaggregation to the wire-center level removes any concern about uneconomic support being paid, it is difficult to imagine what kind of “guidance” would compel the rejection of the redefinition of their service areas to the same level. Accordingly, the only practical effect of suspending the FCC’s concurrence with the CenturyTel and Delta County redefinitions would be to forestall competitive entry and protect incumbents, contrary to the goals of the 1996 Act.³⁰

²⁸ See CPUC Supplemental Comments at p. 5.

²⁹ See *Referral Order, supra*, at ¶ 10.

³⁰ Delta County’s casual assertion that the FCC “has routinely taken such measures” (p. 20) finds no support in the cited authority. The interim SPF freeze, high-cost loop support cap, interim freeze on allocation factors, and interim USF contribution methodology were all adopted only after rulemaking proceedings of general applicability in which the FCC and the Joint Board announced the intended rule changes, sought and received comments and replies, and, in some cases, issued further notices to solicit further comments. See, e.g., *Amendment of Part 67 of the Commission’s Rules and Establishment of a Joint Board, Decision and Order*, 89 FCC 2d 1, 10-11 (1982) (“...since the Joint Board’s June, 1981 order and the filing of comments in response to that order, all parties have been plainly aware that an interim SPF freeze may be considered in this proceeding ... At its ... open meeting, the Joint Board explicitly requested that the Joint Board Staff prepare a recommendation for a SPF freeze that could be voted on ... [and] the parties were given official notice of the exact wording of the proposed rule change and an opportunity to comment in the Commission’s *Further Notice of Proposed Rulemaking*”). Moreover, the fact that the Commission has “conditioned certain actions taken while a rulemaking proceeding is pending” stands for exactly the opposite of Delta County’s assertion. Indeed, in the cited case, the Commission did not withhold grant of the requested action, as Delta County would have the Commission do here, but instead granted an authorization subject to possible revocation or modification as a result of future rule changes. See *Application of RCA American Communications, Inc.; Alascom, Inc.; For Authority to Jointly Construct and Operate Domestic Satellite Space Stations and Earth Stations in Connection with the Provision of Alaskan Communications Services*, 78 FCC 2d 359 (1980). Obviously, NECC, Western Wireless, CenturyTel, Delta County and other recipients of high-cost support will similarly be subject to future rule changes of general applicability.

V. THE COMMISSION MUST REJECT COLLATERAL ISSUES RAISED BY COMMENTERS

CenturyTel, Delta County, and TCA raise a host of issues that are completely irrelevant to a service area redefinition proceeding. NECC is constrained to provide brief response to a few of the more egregious assertions.

In suggesting that redefinition of service areas “will not incent true competitive entry,”³¹ TCA’s position appears to be that the availability of funding to support existing facilities provides no incentive for the competitive ETC “to actually construct facilities.”³² That is certainly not the case with NECC, which has stepped firmly on the accelerator in constructing new facilities with the high-cost support received to date, winning significant numbers of local exchange customers desiring basic universal service, and improving its service quality in ways that would not have been possible without support. In rural northeastern Colorado, consumers are already reaping the benefits of competitive entry.

TCA’s statement that “[u]nlike wireless carriers, rural LECs must actually invest in facilities **before** receiving high cost support”³³ is untrue. Competitive ETCs must construct facilities and get customers before they can submit line counts to obtain high-cost support, and they are not guaranteed that the support will be sufficient. ILECs, by contrast, are guaranteed support needed to cover their costs, even if they lose subscribers, because they simply reaverage their costs in each subsequent reporting period.

³¹ TCA Comments at p. 6.

³² *Id.*

³³ *Id.* at p. 5 (emphasis in original).

TCA's purported criticism of wireless "dead spots" and "quality of service"³⁴ are without merit for the same reason: if a competitive ETC loses a customer due to poor coverage or other service quality issues, it will lose both the customer revenue and available high-cost support. Presumably the ILEC benefits in such a situation because a disgruntled customer with a choice rarely gives any service provider a second chance. ILEC quality-of-service rules were developed long ago to protect consumers from monopolies lacking the competitive pressures needed to drive improvements in customer service. When true competition emerges in rural ILEC service areas, the affected ILECs may well have grounds to request the termination of quality-of-service rules. But TCA's self-serving attempt to saddle competitors with monopoly regulation flies directly in the face of the "pro-competitive, de-regulatory" purposes of the 1996 Act³⁵, and ignores the discipline that competitive markets mete out.

TCA's assertion that competitive ETCs may provide service throughout CenturyTel's service area by using resale borders is absurd.³⁶ TCA ignores the following facts: (1) carriers cannot receive high-cost support for services provided entirely by means of resale; (2) consumers presented with a "competitive" service offered through resale of the incumbent's network would not experience the benefits of facilities-based competition; (3) a competitive ETC would have no authority, let alone an obligation, to spend high-cost funds to build facilities out to customers requesting service in areas where it is not licensed to serve; (4) NECC has promised the CPUC a lengthy list of service commitments which it can only consistently deliver in areas where it controls network facilities — it could never control most aspects of service quality when reselling on a competitor's network; and (5) in Colorado, resale of an ILEC's service is only

³⁴ *See id.*

³⁵ *See* Preamble of 1996 Act.

permitted by certificated CLECs.³⁷ Resale is only properly used within an ETC service area to supplement a carrier's service offerings when facilities cannot be constructed to a requesting customer.

VI. CONCLUSION

Rural ILECs sued the government in federal court to remove caps on their high-cost support, lobbied for and gained more than \$1.26 billion in additional high-cost support in the 2001 MAG Order, and get no less support as a result of a CETC's entry. Confronted with these facts, a state commissioner properly asked ILEC representatives in a recent ETC designation proceeding, "Why are you here?" The answer is simple: fear of having to compete on a level playing field and being forced to become more operationally efficient. This narrow proceeding amply demonstrates the lengths that rural ILECs will go to forestall competitive entry.

NECC has diligently and patiently followed the rules and has attempted for nearly three years to obtain ETC status in its FCC-licensed areas. It has expended significant resources in following the FCC's directives to take on ETC obligations and bring universal service to rural America. Throughout the process it has faced incumbents wishing to protect their artificial monopolies, supported only by their lock on high-cost support.

³⁶ *See id.* at p. 7.

³⁷ The list is not exhaustive. *See* NECC Opposition at pp. 11-12.

For the reasons set forth above, NECC urges the FCC to uphold its concurrence with the redefinition of CenturyTel's service area and promptly grant its concurrence with the redefinition of Delta County's service area, as proposed by the CPUC.

Respectfully submitted,

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