

**EXHIBIT A**

**2003 RECOMMENDED DECISION**

Decision No. R03-0568

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO**

DOCKET NO. 02A-444T

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IN THE MATTER OF THE APPLICATION OF N. E. COLORADO CELLULAR, INC., TO RE-DEFINE THE SERVICE AREA OF EASTERN SLOPE RURAL TELEPHONE ASSOCIATION, INC.; GREAT PLAINS COMMUNICATIONS, INC.; PLAINS COOPERATIVE TELEPHONE ASSOCIATION, INC.; AND SUNFLOWER TELEPHONE CO., INC.

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**RECOMMENDED DECISION OF  
ADMINISTRATIVE LAW JUDGE  
MANA L. JENNINGS-FADER  
GRANTING APPLICATION  
AND GRANTING MOTION TO STRIKE**

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Mailed Date: May 23, 2003

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Simon L. Lipstein, Esq., Assistant Attorney General, for Intervenor Colorado Office of Consumer Counsel; and

Michel J. Santisi, Esq., Assistant Attorney General, for Intervenor Staff of the Colorado Public Utilities Commission.

## I. STATEMENT

1. On August 21, 2002, N. E. Colorado Cellular, Inc. (Applicant or NECC), filed its Application to Redefine Local Exchange Carrier Service Areas (Application) which commenced the above-captioned docket. In this proceeding NECC seeks a Commission order which: (a) redefines each wire center of Eastern Slope Rural Telephone Association (Eastern Slope), Plains Co-op Telephone Association (Plains Co-op), and Sunflower Telephone Company, Inc. (Sunflower), as a separate service area; and (b) designates that portion of Great Plains Communications, Inc.'s (Great Plains) Venango Wire Center that lies within Colorado as a separate service area.

2. On August 6, 2002, the Commission issued a Notice of Application Filed in this proceeding. The Notice set a hearing date and established a procedural schedule.

3. The Colorado Office of Consumer Counsel (OCC); the Colorado Telecommunications Association, Inc. (CTA); the Staff of the Commission (Staff); and Western Wireless Corporation (Western Wireless) each filed timely interventions in this proceeding.

4. By Decision No. R02-1194-I, the undersigned Administrative Law Judge (ALJ) vacated the hearing date and the procedural schedule established in the Notice of Application Filed.

5. By Decision No. R02-1269-I, this matter was set for hearing on January 15, 2003, in a Commission hearing room.

6. On November 21, 2002, NECC filed a Motion for Admission *Pro Hac Vice* to permit David A. LaFuria, Esq., to represent Applicant. By Decision No. R03-0033-I, the ALJ granted that motion.

7. On November 27, 2002, CTA filed a Motion to Dismiss Great Plains Telecommunications from this proceeding. By Decision No. R03-0033-I, the ALJ denied that motion.

8. On December 20, 2002, NECC filed a Motion for Summary Judgment. By Decision No. R03-0035-I, the ALJ denied that motion.

9. The ALJ heard this matter at the scheduled date, time, and place. During the hearing four witnesses testified: Mr. Don J. Wood for the Applicant, Ms. Suzie Rao for Western Wireless, Mr. Kevin Kelly for CTA, and Ms. Pamela Fischhaber for Staff. Nine exhibits were marked, offered, and admitted into evidence. At the conclusion of the hearing, the evidentiary record was closed; and the ALJ took the matter under advisement.

10. Applicant, CTA, Staff, and Western Wireless filed post-hearing statements of position. Applicant, Staff, and Western Wireless urge the Commission to grant the Application. CTA urges the Commission to deny the Application.

11. On February 3, 2003, Applicant filed a Motion to Strike Portions of CTA's Closing Statement of Position. On February 18, 2003, CTA filed its response.

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

## II. FINDINGS OF FACT

13. As an authorized commercial mobile radio service provider, NECC is a common carrier as defined by 47 U.S.C. § 153(10) and 47 *Code of Federal Regulations* (CFR) § 20.9(a)(7). NECC holds a license, issued by the Federal Communications Commission (FCC), to serve a designated area within Colorado. NECC is a cellular telecommunications provider serving, within Colorado, principally rural areas.

14. Intervenor CTA is an association, the membership of which consists primarily of rural Incumbent Local Exchange Carriers (ILECs) in Colorado. Each of CTA's members is a rural telephone company, as defined in 47 U.S.C. § 153(37), and a rural ILEC, as defined in 47 CFR § 54.5. Each of CTA's members is also a rural telecommunications provider under Rule 4 *Code of Colorado Regulations* (CCR) 723-42-2.6. Each of CTA's members is a designated provider of last resort in Colorado and has been designated an Eligible Telecommunications Carrier (ETC).

15. Intervenor OCC is a state agency which participated in this matter pursuant to its statutory mandate.

16. Intervenor Staff is the litigation Staff of the Commission, as identified in the Rule 4 CCR 723-1-9(d) Notice filed in this proceeding.

17. Intervenor Western Wireless is a telecommunications carrier, as defined in 47 U.S.C. § 153(44), and is authorized by the FCC to provide commercial mobile radio services in several counties in Colorado. Western Wireless is a cellular telecommunications provider serving within rural areas in Colorado.

18. Eastern Slope is one of the rural ILECs whose service area Applicant seeks to redefine. Eastern Slope is a member of, and its interests are represented by, CTA. Eastern Slope's service area lies entirely within Colorado.

19. Plains Co-op is one of the rural ILECs whose service area Applicant seeks to redefine. Plains Co-op is a member of, and its interests are represented by, CTA. Plains Co-op's service area lies entirely within Colorado.

20. Sunflower Telephone Company, Inc. (Sunflower), is one of the rural ILECs whose service area Applicant seeks to redefine. Sunflower is a member of, and its interests are represented by, CTA. Sunflower's service area lies entirely within Colorado.

21. Great Plains is one of the rural ILECs whose service area Applicant seeks to redefine. Great Plains is a rural telephone company, as defined in 47 U.S.C. § 153(37); is a rural ILEC, as defined in 47 CFR § 54.5; and is a rural telecommunications provider under Rule 4 CCR 723-42-2.6. Great Plains plans to become a member of CTA and has consented to have its interests represented by CTA in this proceeding. The only portion of the Great Plains service area affected by, or within the ambit of, the Application is that portion of the Venango Wire Center which lies within Colorado.<sup>1</sup>

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<sup>1</sup> Eastern Slope, Great Plains, Plains Co-op, and Sunflower are referred to as the "affected rural ILECs" or the "affected ILECs."

22. Section 254 of the federal Telecommunications Act of 1996 (the Act),<sup>2</sup> *inter alia*, contains the prerequisites for a telecommunications provider's receiving monies from the federal Universal Service Fund. To receive Universal Service Fund monies, a provider must be designated as an ETC pursuant to § 214(e) of the Act; and the funds provided can be used only "for the provision, maintenance, and upgrading of facilities and services for which the support is intended." Section 254(e) of the Act.

23. Consistent with the overall pro-competition and rapid deployment of telecommunications technologies purposes of the Act, § 254 places no limit on the number of ETCs that may be designated within the same geographic area. In addition, this section places no limit on the number of ETCs that may receive Universal Service Fund monies.

24. Section 214(e)(1) of the Act requires that, to be designated an ETC, a telecommunications carrier must do the following "throughout the service area for which the [ETC] designation is received": (a) offer all services supported by universal telephone service funds; (b) offer the supported services using either entirely its own facilities or a combination of its own facilities and resale of another carrier's services; and (c) advertise the availability of, and the charges for, the supported services.

25. As pertinent here, it is the responsibility of a state commission to designate ETCs. Section 214(e)(2) of the Act contains the criteria which a state commission must use in making that designation: the telecommunications carrier must meet the requirements of § 214(e)(1) of

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<sup>2</sup> All referenced sections of the federal Telecommunications Act of 1996 are found in title 47 of the United States Code.

the Act; and, if ETC designation in a rural ILEC's service area is sought by a competitive carrier, there must be a finding that the requested designation is in the public interest.

26. Section 214(e)(5) of the Act, in relevant part, states:

In the case of an area served by a rural telephone company, "service area" means such company's "study area" unless and until the [Federal Communications] Commission and the States, after taking into account recommendations of the [Federal-State Joint Board on Universal Service] ..., establish a different definition of service area for such company.

27. The "study area" to which § 214(e)(5) refers is the area used for purposes of Parts 36 and 69 of the FCC's regulations and used in the calculation of Universal Service Fund support. Absent action by the carrier, the state commission, or the FCC, the study area boundaries are fixed as of November 15, 1984. *See, e.g.*, Appendix Glossary to 47 CFR Part 36; *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, FCC 97-157 (rel. May 8, 1997) (*First Report and Order*), at 97 & n. 434. The service area of a given rural telephone company may differ from its study area. *First Report and Order* at 106 & n. 485; *see also* 47 CFR § 54.207(c) (establishing procedures by which the FCC will consider a state commission's proposal to define a rural telephone company's service area in a manner other than the company's study area).

28. The Application now before this Commission does not address, and thus granting this Application would not affect, the *study area* boundaries of any of the affected rural ILECS.

29. Unless a carrier provides supported services throughout the entirety of a *service area*, the carrier cannot be designated an ETC in the service area and, thus, cannot obtain universal support funds for supported telecommunications services it may provide in the area.

30. When the FCC licenses wireless carriers, it does not use the same service area boundaries as those of the ILECs which serve in the same geographic area. It is possible, even likely, that a FCC-licensed carrier will not be able to provide service across the entirety of a rural ILEC's service area if that rural ILEC's service area is defined as its study area.<sup>3</sup>

31. Section 254 of the Act directed the Federal-State Joint Board on Universal Service (Joint Board) and the FCC to undertake specific actions to preserve and to advance universal service in light of the guiding principles set out in § 254(b) of the Act.

32. Pursuant to that statutory directive, the Joint Board issued a Recommended Decision on November 8, 1996. *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Recommended Decision, FCC 96J-3 (rel. Nov. 8, 1996). The Recommended Decision, as relevant here, addressed the principles which should be used to guide the FCC and the Joint Board in establishing policies for the advancement and preservation of universal service and made recommendations concerning the definition of service areas.

33. The Joint Board recommended that, in addition to the universal service principles found in § 254(b) of the Act, the FCC "establish 'competitive neutrality' as an additional principle upon which it shall base policies for the preservation and advancement of universal service[.]" *Id.* at ¶ 23. The Joint Board stated, *at id.*, that

the principle of competitive neutrality encompasses the concept of technological neutrality by allowing the marketplace to direct the development and growth of technology and avoiding endorsement of potentially obsolete services. In recognizing the concept of technological neutrality, we are not guaranteeing the

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<sup>3</sup> This is certainly true for NECC, which cannot serve the entirety of the present service areas (*i.e.*, study areas) of Eastern Slope, Plains Co-op, and Sunflower. *See* Hearing Exhibit 6 at Exhibit PMF-1 (map which compares NECC's coverage area with the service areas of the affected ILECs, among others). Although redefinition of the affected rural ILECs' service areas, and not the service area of NECC *per se*, is the focus of this proceeding, the map shows the existence of the identified problem in Colorado.

success of any technology for all purposes supported through universal service support mechanisms but merely stating that universal service support should not be biased toward any particular technology. We further believe that the principle of competitive neutrality should be applied to each and every recipient and contributor to the universal service support mechanisms, regardless of size, status, or geographic location. We find that the competitively neutral collection and distribution of funds and determination of eligibility in the universal service support mechanism is consistent with congressional intent “to provide for a pro-competitive, de-regulatory national policy framework.”

34. The Joint Board recommended that the study areas of rural ILECs should be adopted as their service areas. *Id.* at ¶ 174. The Joint Board identified three specific principles which underpinned its recommendation and which the FCC and the state commissions should use when considering requests to redefine service areas.<sup>4</sup> First, a service area designation should “minimize ‘cream skimming’ by potential competitors.” *Id.* at ¶ 172. Second, a service area designation should recognize the special status of the affected ILEC as a rural telephone carrier. *Id.* at ¶ 173. Third, a service area designation should take into account the administrative burden imposed when a rural telephone company must determine its embedded costs on a basis other than its entire study area. *Id.* at ¶ 174.

35. In the *First Report and Order* the FCC reviewed, and in large part adopted, the Joint Board’s Recommended Decision.

36. The FCC adopted the concept of competitive neutrality as a principle upon which to base its policies for the advancement and preservation of universal telephone service. The FCC determined, *First Report and Order* at ¶ 48, that its

decisions here are intended to minimize departures from competitive neutrality, so as to facilitate a market-based process whereby each user comes to be served by the most efficient technology and carrier. We conclude that competitively neutral rules will ensure that such disparities are minimized so that no entity receives an

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<sup>4</sup> This Decision refers to these principles as the Joint Board test.

unfair competitive advantage that may skew the marketplace or inhibit competition by limiting the available quantity of services or restricting the entry of potential service providers.

37. The FCC determined that competition and the advancement of universal service could be, and should be, promoted simultaneously. The FCC stated, *id.* at ¶ 50, its belief that those who object to promoting both concepts:

present a false choice between competition and universal service. A principal purpose of section 254 [of the Act] is to create mechanisms that will sustain universal service as competition emerges. We expect that applying the policy of competitive neutrality will promote emerging technologies that, over time, may provide competitive alternatives in rural, insular, and high cost areas and thereby benefit rural consumers. For this reason, we reject assertions that competitive neutrality has no application in rural areas or is otherwise inconsistent with section 254.

38. The FCC embraced the concept of technology neutrality within the ambit of competitive neutrality. It determined that the “universal service support should not be biased toward any particular technologies.” *Id.* at ¶ 49.

39. On the issue of study area designation, the FCC adopted the Joint Board test regarding definition of service areas.<sup>5</sup> The FCC also adopted the Joint Board’s underlying rationales. *First Report and Order* at ¶ 189.

40. The FCC addressed the impact of *service area* designations on wireless entrants. Noting the statutory requirement that a carrier must provide service across an entire service area to be eligible for ETC designation, the FCC found that “imposing additional burdens on wireless entrants would be particularly harmful to competition in rural areas, where wireless carriers could potentially offer service at much lower costs than traditional wireline service.” *Id.* This

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<sup>5</sup> As discussed above, the Joint Board stated its recommendations in terms of service area designations, not study areas.

discussion addressed a state's defining a rural service area so that it consisted only of the contiguous portion of a rural carrier's study area. The ALJ finds that this principle applies as well to redefining service areas as wire centers.

41. The Act does not prohibit the calculation of universal service support over a geographic area different from a state-defined service area. So long as an ETC receives universal service support only for customers within its state-designated service area, the requirements of § 214(e)(5) of the Act have been met. *Id.* at ¶ 193.

42. Finally, in the *First Report and Order* the FCC adopted regulations governing universal service. *See* 47 CFR Part 54. Those regulations establish the process by which a state commission submits its redefinition of a service area to the FCC for its agreement. *See* 47 CFR § 54.207.

43. Even as it reached the conclusions discussed above and issued its first universal service regulations, the FCC recognized that, “[o]ver time, it will be necessary to adjust the universal service support system to respond to competitive pressures and state decisions so that the support mechanisms are sustainable, efficient, explicit, and promote competitive entry.” *First Report and Order* at ¶ 19.

44. In 2001, upon the recommendation of the Joint Board,<sup>6</sup> the FCC instituted an interim plan, to be in effect for five years. The interim plan offered rural ILECs alternative methods for calculating universal service support. The interim plan gave the FCC time to develop a “long-term [universal service] plan that better targets support to carriers serving the

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<sup>6</sup> This recommendation was based on the work of the Rural Task Force of the Joint Board.

high-areas, while at the same time recognizing the significant differences among rural carriers, and between rural and non-rural carriers.” *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, and *In the Matter of Multi-Association Group (MAG) Plan for Regulations of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket No. 00-256, Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking in CC Docket No. 96-45 and Report and Order in CC Docket No. 00-256, FCC 01-157 (rel. May 23, 2001) (*Fourteenth Report and Order*), at ¶¶ 7-8.

45. At the time of the *Fourteenth Report and Order*, rural carriers received universal service high-cost support based on embedded cost averaged across all lines served by the carrier within its study area; and the study area was coextensive with the carrier’s service area. As a result of this averaging, the same per-line support was available throughout a study area even though the per-line cost to provide service might vary widely within the study area. Averaging created “artificial barriers to competitive entry in the highest-cost areas and artificial entry incentives in relatively low-cost portions of a rural carrier’s study area[.]” *Id.* at ¶ 145. A competitive carrier taking advantage of these artificial entry incentives is said to be “cream-skimming.”

46. To minimize the opportunity to “cream-skim,” the Joint Board recommended that the FCC adopt a different and more flexible plan for determining support within a study area. The proposed plan offered rural carriers the opportunity to disaggregate and to target the universal service support they receive. By disaggregating and targeting support, rural ILECs could assure that they, and any competitive ETC, would receive more support per-line in

relatively higher cost areas and less support per-line in relatively lower cost areas. Thus, the impetus to “cream-skin” would be reduced substantially, if not eliminated.

47. The FCC agreed with the Joint Board, finding that, “as a general matter, support should be disaggregated and targeted below the study area level so that support will be distributed in a manner that ensures that the per-line level of support is more closely associated with the cost of providing service.” *Id.* at ¶ 144. As adopted, the plan allowed a rural carrier to match “the disaggregation and targeting methodology to its costs and geographic characteristics and the competitive and regulatory environment in the state in which it operates.” *Id.* at ¶ 146.

48. The disaggregation and targeting of support plan provided each rural ILEC with the opportunity to assess for itself the degree to which averaging its costs across its study area provided -- or did not provide -- an opportunity for “cream-skimming” to occur. If a rural ILEC found that averaging across its entire study areas did present an opportunity for “cream-skimming,” that rural ILEC could take action to minimize “cream-skimming.” The plan offered each rural carrier a choice among three options or paths.

49. As relevant here, Path One allows the carrier not to disaggregate its embedded costs to provide service.<sup>7</sup> Use of this path is appropriate if a carrier determines that disaggregation of its study area is not economically rational for it because the cost characteristics, demographics, and location of its service territory and the lack of a realistic prospect of competition make “cream-skimming” unlikely to occur *even if embedded costs continue to be averaged across its entire study area*. Once it makes the Path One election not to

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<sup>7</sup> Path Two and Path Three are discussed in the *Fourteenth Report and Order* at ¶¶ 150-53. See also 47 CFR §§ 54.315(c), 54.315(d), and 54.315(e).

disaggregate, a carrier cannot change to another path within four years of that election without regulatory approval. *Id.* at ¶¶ 148-49; *see also* 47 CFR § 54.315(b). The FCC imposed this restriction to prevent a rural ILEC from selecting Path One for anti-competitive purposes and to provide both the rural carrier and a competitive ETC with certainty as to the level of available per-line support. *Fourteenth Report and Order* at ¶¶ 149, 154.

50. The Colorado Commission also has regulations concerning designation as an ETC. *See* 4 CCR 723-42. The Commission amended those regulations to incorporate the disaggregation and targeting of support concepts found in the *Fourteenth Report and Order*. *See* Decisions No. C02-319 and No. C02-530. Rule 4 CCR 723-42-11.1 provides that, as necessary, the Commission will file a petition with the FCC to obtain its agreement with the Commission's redefinition of a service area.

51. Rural ILECs were required to make their disaggregation election on or before May 15, 2002. Each of the affected rural ILECs made its decision as required.

52. Eastern Slope, Plains Co-op, and Sunflower each elected Path One (*i.e.*, not to disaggregate). As a result, the study area of each remains coextensive with its service area; and its per-line cost is averaged across its entire study area.

53. Great Plains also elected Path One (*i.e.*, not to disaggregate). Most of the geographic area served by the Venango Wire Center is located in Nebraska. Great Plains' study area remains coextensive with its service area; and its per-line cost is averaged across its entire study area, which includes both Nebraska and Colorado.

54. The Joint Board test is the test to be applied when a state commission or the FCC determines whether or not to redefine a rural ILEC's service area.

55. The first part of the Joint Board test is: the service area redefinition should minimize the opportunity for “cream-skimming.” At the time the affected rural ILECs elected Path One in 2002, each knew or should have known that at least one competitor (*i.e.*, NECC) was attempting to enter its service/study area. *See* Dockets No. 00A-315T and No. 00A-491T.<sup>8</sup> The existence of a possible (or probable) competitor is one of the factors the affected rural ILECs should have taken into consideration in making its election. Based on the election of Path One, each affected rural ILEC determined that, should a competitive ETC serve in its territory, the rural ILEC would not be disadvantaged by continuing to base its universal service support on its average embedded costs calculated across its entire study area. By electing Path One, each of the affected rural ILECs indicated that it was satisfied that its universal service support was already targeted in a manner which minimized “cream-skimming.”

56. In addition, both § 254 of the Act and the implementing regulations require an ETC, in order to be eligible for universal support funds, to provide supported telecommunications services throughout a service area. This also reduces the possibility that “cream-skimming” will occur in a redefined, and smaller, service area.

57. Although it had ample opportunity to do so, CTA presented, at most, general statements and conclusions about concerns of “cream-skimming.” These were not persuasive. In addition, no evidence specific to the situation of each affected rural ILEC was presented on the issue of “cream-skimming.” Finally, no credible evidence was presented that redefining the service areas of the affected rural ILECs would increase the opportunity for “cream-skimming” in the service areas of those ILECs.

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<sup>8</sup> CTA intervened in, and actively participated in, those dockets.

58. In sum, minimization of the opportunity for “cream-skimming” was addressed adequately when the affected rural ILECs made their Path One disaggregation and targeting election. Redefinition of the service areas of the affected ILECs does not increase the opportunity for “cream-skimming.” There is no persuasive evidence to the contrary.

59. The second part of the Joint Board test is: the service area redefinition should recognize the special status of the rural ILEC. Redefining the service areas of the affected rural ILECs will not affect the ILECs’ right to a rural exemption pursuant to § 251 of the Act. The present status of each will remain unchanged. Redefining the service areas of the affected rural ILECs will not change or affect the way in which each calculates its per-line costs. Each will continue to calculate its costs averaged across its entire study area. Redefining the service areas of the affected rural ILECs will not change or affect their reporting of data to the Universal Service Administrative Company. Redefining the service areas of the affected rural ILECs will not change or affect their study areas.

60. Although it had ample opportunity to do so, CTA presented, at most, passing references and conclusory statements concerning the impact of redefining the service areas on the status of the affected rural ILECs as rural telephone carriers. These were not persuasive. In addition, no credible evidence was presented to establish that, in fact, redefining the service areas of the affected ILECs would change or impair their special status as rural telephone carriers.

61. In sum, redefining the service areas of the affected rural ILECs will not change or affect the special status accorded to these ILECs as rural telephone carriers. There is no persuasive evidence to the contrary.

62. The third part of the Joint Board test is: the service area redefinition should take into account the administrative burden imposed on a rural ILEC when it must determine its costs on a basis other than its study area. Redefining the service areas of the affected rural ILECs will not change or affect the way in which each calculates its per-line costs; each will continue to calculate its costs averaged across its study area. Redefining the service areas of the affected ILECs will not change or affect their study areas.

63. Although it had ample opportunity to do so, CTA presented no more than general statements concerning the administrative burden which redefining their service areas might impose on the affected rural ILECs. These general statements were not persuasive. In addition, no credible evidence specific to the affected rural ILECs was presented on the issue of the administrative burden which might be imposed on them by redefining the service areas. Finally, no credible evidence was presented to support the proposition that redefining the service areas would change the method used by the affected carriers to determine their embedded costs.

64. In sum, redefining the service areas of the affected rural ILECs will not impose an administrative burden on those carriers because they will continue to determine their embedded costs on a study area basis, as they do now. There is no persuasive evidence to the contrary.

65. Redefining the service areas of the affected rural ILECs will advance the goals of universal service, will promote competition, and will implement the principle of competitive neutrality, including technology neutrality.<sup>9</sup> Competitive entry, or the possibility of competitive entry, will bring benefits to consumers. Consumers may see a lower cost for services. Carriers

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<sup>9</sup> Although not a specific consideration under the Joint Board test, these areas are nonetheless important under both federal and Colorado telecommunications law.

will be more likely to make additional services, innovative service offerings and packages, and advanced services available to customers within the redefined service areas. Carriers, both incumbents and new entrants, will be more likely to make investment in infrastructure and to deploy new technologies. The affected rural ILECs will have an incentive to improve their existing networks which, in turn, will improve service to consumers. The proposed redefinitions will provide the opportunity for entry by facilities-based competitors. In sum, redefining the service areas will create incentives for competitive entry and, thus, will help to ensure that quality telecommunications services will be available to consumers within the service areas of the affected rural ILECs at reasonable, affordable, and just rates.

66. At present, the study areas of the affected rural ILECs are coextensive with the service areas of the affected rural ILECs. A competitor cannot obtain universal service support unless it can provide supported services throughout the relevant service area. Potential competitors may be unable to provide supported services throughout the rural ILECs' service areas as now defined; those potential competitors cannot receive universal support funds. Without access to universal service support, a competitive carrier which may wish to provide service in a high-cost area is disadvantaged *vis-à-vis* the incumbent carrier because the competitive carrier must recover the full cost of providing its services through its rates whereas the incumbent carrier's costs are, at least partially, off-set by universal service support. This is an artificial barrier to competitive entry into high-cost areas. Redefining the service areas will eliminate this artificial barrier.

### **III. DISCUSSION**

67. This Application seeks a Commission order that redefines the service area of each of the affected rural ILECs and, further, requests that the Commission seek FCC agreement with

any Commission-ordered redefinition. The issue presented by this Application, therefore, is whether the proposed redefinitions meet the requirements of the Joint Board test. To a very limited degree, subsumed within the principal issue is the question of whether, incidentally, the redefinitions may promote other important federal and state telecommunications goals.

68. Insofar as the ALJ can determine, this proceeding is a case of first impression. The Commission has not previously redefined a rural ILEC's service area over the objection of the affected rural ILEC.

69. To focus the discussion and for clarity, it is important to identify what will not be decided in this docket. First, the outcome of this proceeding will *not* change the existing *study area* boundaries of the affected rural ILECs. Second, the outcome of this proceeding will *not* change the method used by the affected ILECs to calculate Universal Service Fund support.<sup>10</sup> Third, the outcome of this proceeding will *not* change the Path One election made by the affected rural ILECs and, in and of itself, will *not* require those ILECs to make new disaggregation elections. *See* 47 CFR § 54.315; Rule 4 CCR 723-42-10.<sup>11</sup> Fourth, the outcome of this proceeding will *not* determine whether a specific competitive carrier may receive an ETC designation in the redefined service areas of the affected rural ILECs.<sup>12</sup> Fifth, the outcome of this proceeding will *not* determine the relative merits of different technologies used to provide telecommunications services in rural areas of Colorado and will *not* determine whether different technologies require or deserve different levels of support based on their relative costs. Each of

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<sup>10</sup> That calculation will continue to be based on average embedded costs across the ILEC's entire *study area*.

<sup>11</sup> The affected rural ILECs made their elections in 2002 as required by FCC rule and filed notice of the election with the Commission as required by Commission rule; those elections will stand.

<sup>12</sup> This issue will be decided in a subsequent proceeding if and when a competitive carrier applies for ETC status to serve in the redefined service areas.

these issues is clearly beyond the scope of this proceeding which, as stated above, is limited to a determination of whether the proposed redefinitions pass the Joint Board test.

70. As found above, the Joint Board test remains the touchstone by which a state regulatory authority assesses a request to redefine a service area. As the state regulatory authority charged with defining and redefining service areas, the Commission must use this test in deciding this matter. Redefinition of a service area is a fact-intensive and rural ILEC-specific determination. The Commission must examine the specific situation of each affected rural ILEC and, based on the facts presented, determine whether the Joint Board test has been met for the service area of that specific rural ILEC.

71. The ALJ finds that the essentially undisputed evidence presented in this proceeding establishes that the proposed redefinition of the service areas of Eastern Slope, Plains Co-op, and Sunflower passes the Joint Board test.

72. The proposed redefinition of Great Plains' service area involves only the Colorado portion of the Venango Wire Center. As found above, that wire center serves customers in two states. This proposed redefinition, then, presents a question which must be considered before one addresses the Joint Board test. That question is: does the Commission have the authority to order redefinition of a service area below the wire center level. For the reasons stated in Decision No. R03-0033-I, which are incorporated here by reference, the ALJ finds that the Commission has the authority necessary to order redefinition of a service area below the wire center level.

73. Having determined that the Commission has the authority, the ALJ finds that, based on the facts as found above, the essentially undisputed evidence presented in this

proceeding establishes that the proposed redefinition of the Colorado portion of the service area of Great Plains passes the Joint Board test.

74. In its Statement of Position CTA urges a contrary result and presents its arguments in opposition to the granting of the Application.

75. CTA makes four principal arguments addressing redefinition of the service areas of the affected rural ILECs: (a) the Commission should “reassess its policy direction with respect to the facilitation of entry” by competitive ETCs into the study areas of small rural ILECs (CTA Statement of Position at ¶ 3); (b) section 40-15-101, C.R.S., provides support for a Commission determination “that the interest in preservation of the provision of universal service to rural ILEC wireline customers outweighs the competitive interest of a wireless [competitive ETC] in receiving ETC designation or federal universal service support in redefined, small rural ILEC service areas” (*id.* at ¶ 5); (c) there are important policy reasons for the FCC’s determinations that there should be limited disaggregation of rural study areas and that “a rural ILEC’s service territory should equal its study area” (*id.* at ¶ 6); and (d) the Commission should exercise caution in accepting the decision in *In the Matter of Federal State Joint Board on Universal Service and RCC Holdings, Inc., Petition for Designation as an Eligible Telecommunications Carrier Throughout its Licensed Service Area in the State of Alabama*, CC Docket No. 96-45, Memorandum Report and Order, DA 02-3181 (rel. Nov. 27, 2002) (*RCC Holdings, Inc.*)<sup>13</sup> (CTA Statement of Position at ¶ 7).

76. CTA makes an additional argument with respect to the proposed redefinition of the service areas of Great Plains. CTA argues that it would behoove the Commission “to defer

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<sup>13</sup> This decision is Hearing Exhibit 2.

service area redefinition for the Venango Wire Center until such time as similar action is taken ... by the Nebraska” state commission. *Id.* at ¶ 8.

77. For the reasons discussed below, the ALJ finds that none of these arguments is persuasive. In addition, at least some of the arguments and suggested approaches are contrary to federal and state statute.

78. The ALJ will not accept CTA’s invitation to have the Commission “reassess its policy direction with respect to the facilitation of entry” by competitive ETCs into the study areas of small rural ILECs (CTA Statement of Position at ¶ 3).

79. First, this proceeding is governed by federal telecommunications law and principles. As the findings of fact -- and the decisions cited there -- make clear, the FCC’s long-standing policy has been, and remains, the promotion and advancement of universal service and the simultaneous encouragement of competition in rural areas. CTA’s suggestion runs counter to this federal policy.

80. Second, the proposed service area redefinitions meet the Joint Board test. The ALJ finds no reason to deny the Application on the basis of the CTA-proposed change in Commission policy direction.

81. Third, based on the Commission’s consistent statements in the area of telecommunications policy, the ALJ discerns no Commission interest in changing the pro-competition policy which the Commission has followed since the Colorado Telecommunications Act of 1995. This includes a policy to encourage competition in rural areas. *See, e.g.*, Decision No. C01-476 at ¶ I.B.5.h (“as a general matter, telephone competition in all rural areas is likely to be in the public interest”).

82. Fourth, even if the Commission were inclined to adopt the new policy direction recommended by CTA (which it is not), such a policy change would be contrary to Colorado statute. *See, e.g.*, §§ 40-15-101, 40-15-501, 40-15-502(1), 40-15-502(7), C.R.S.

83. Fifth and finally, in part CTA's argument rests on its attempted differentiation between the circumstances of the affected rural ILECs and the circumstances of two other Colorado rural carriers (*i.e.*, CenturyTel of Eagle, Inc. (CenturyTel), and Delta County Tele-Comm, Inc. (Delta)) whose service areas have been redefined by the Commission. There is nothing in the record concerning the operational characteristics or the number of customers per mile of either CenturyTel or Delta. In addition, there is precious little in the record on the operational characteristics and number of customers per mile of the affected rural ILECs. As a result, the attempted differentiation is not persuasive because it rests on facts not in the record.<sup>14</sup>

84. CTA next argues that § 40-15-101, C.R.S., provides support for a Commission determination "that the interest in preservation of the provision of universal service to rural ILEC wireline customers *outweighs* the competitive interest of a wireless [competitive ETC] in receiving ETC designation or federal universal service support in redefined, small rural ILEC service areas" (*id.* at ¶ 5; emphasis supplied). In essence, this is a restatement of the argument discussed above; and, for the reasons discussed above, the ALJ finds this argument unpersuasive.

85. In addition, the ALJ finds that CTA's reading of § 40-15-101, C.R.S., is strained and does not comport with the section's plain language. The express purpose of the flexible

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<sup>14</sup> CTA also raises a number of questions in its Statement of Position at ¶ 4. Some of the questions are irrelevant. For those questions which are relevant, CTA did not present evidence to establish the facts necessary to answer the questions. Finally, as established in the findings of fact and discussion *supra*, one question (*i.e.*, "Will uneconomic competition actually be incented by" redefining the service areas) has been answered in the negative by the FCC, by this Commission, and by the ALJ.

regulatory treatment for *services* (not, as CTA would have it, *providers*) referenced in § 40-15-101, C.R.S., is “to foster, encourage and accelerate the continuing emergence of a competitive telecommunications environment” in Colorado. Moreover, contrary to CTA’s assertions, the Colorado General Assembly has determined that, as relevant here, there are two *equally important* telecommunications policies in Colorado: promotion of a competitive local exchange marketplace *and* universal service. Sections 40-15-501 and 40-15-502, C.R.S. Neither is elevated above the other, and neither is subordinated to the other. Contrary to CTA’s argument, redefining the service areas as proposed is consistent with, and advances, both of these important telecommunications policies.

86. CTA’s next argument is that there are important policy reasons for the FCC’s determinations that there should be limited disaggregation of rural study areas and that “a rural ILEC’s service territory should equal its study area” (*id.* at ¶ 6). To the extent CTA’s argument is based on the FCC’s policy regarding *disaggregation of a study area*, they are not relevant to this *redefinition of service areas* proceeding. To the extent the argument may be relevant, the ALJ finds that it ignores the evolution of universal service policy embodied in the *Fourteenth Report and Order*. Because CTA’s argument is founded on superseded FCC policies, the ALJ finds it unpersuasive.

87. CTA also urges the Commission to exercise caution in accepting the decision in *RCC Holdings, Inc.* (CTA Statement of Position at ¶ 7). The ALJ agrees with CTA that the referenced decision is not binding on the Commission. Even if not binding authority, however, the decision may be persuasive. The Commission will consider and use the decision as it may.

88. CTA argues that the Commission should “defer service area redefinition for the Venango wire center until such time as similar action is taken ... by the Nebraska” state commission. *Id.* at ¶ 8. In support of this argument CTA states that there are nine customers in Colorado served by the Venango Wire Center and thousands of customers in Nebraska served by that wire center. From this fact CTA concludes, and asks the Commission to agree, that it would not be “in the larger public interest to create two classes of Great Plains’ customers:” those in Colorado and those in Nebraska. *Id.*

89. The “wait-and-see” argument is neither persuasive nor particularly relevant. There is no evidence that the Nebraska state commission will take up the redefinition of Great Plains’ service area in the foreseeable future. Even if it were poised to consider redefinition, a the Nebraska state commission decision would have no impact in Colorado because only this Commission has jurisdiction to redefine the Colorado portion of the Great Plains’ service area. *See* Decision No. R03-0033-I. In addition, waiting to redefine the Colorado portion of Great Plains’ service area until some unspecified and unknowable time in the future is contrary to statute and the pro-competition and universal service policy direction of the FCC and this Commission. *See, e.g.*, 47 U.S.C. § 214(e);<sup>15</sup> §§ 40-15-501 and 40-15-502, C.R.S. The evidence in this case establishes that the redefinition of Great Plains’ service area meets the Joint Board test. There is no reason to delay that redefinition.

90. For these reasons, the ALJ finds that the arguments raised by CTA do not warrant delay in the redefinition of the service areas of the four affected rural ILECs.

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<sup>15</sup> One purpose of 47 U.S.C. § 214(e) is to bring the benefits of competition to rural and high-cost areas. *Federal-State Joint Board on Universal Service, Petitions for Reconsideration of Western Wireless Corporation’s Designation as an Eligible Telecommunications Carrier in the State of Wyoming*, CC Docket No. 96-45, Order on Reconsideration, FCC 01-311 (rel. Oct. 19, 2001), ¶ 19. This should be accomplished sooner rather than later.

91. Applicant requests that, pursuant to Rule 4 CCR 723-42-11.1, the Commission petition the FCC to obtain its agreement in the Commission-ordered redefinitions of the Colorado service areas of Eastern Slope, Great Plains, Plains Co-op, and Sunflower. *See* 47 CFR § 54.207(c). The ALJ find that the Commission should so petition.

92. NECC moved to strike paragraph 4 of CTA's Statement of Position and Exhibit 1 to that Statement of Position.<sup>16</sup> NECC states that CTA's attempted use of the White Paper is improper because the White Paper is an attempt to introduce, after the close of the evidentiary record, opinion testimony from a person who did not testify. NECC states that the White Paper is also irrelevant to this proceeding because it addresses broad policy issues concerning the funding of universal service that are beyond the scope of the present proceeding.

93. CTA responds that the Commission has a policy-making role and that, "[i]n reaching appropriate policy decisions in particular cases, the [Commission] is not restricted to the 'evidence in the record' before it." Response to NECC's Motion to Strike (Response) at ¶ 5. In addition, CTA argues that the Commission is not bound by the strict rules of evidence, that the White Paper was never intended to be considered evidence in the proceeding, and that the debate now occurring before the FCC on Universal Service Fund portability (a topic which the White Paper addresses) will impact this proceeding. Finally, CTA asserts that "neither the public interest nor the interests of the several parties in these proceedings [sic] will be advanced by restricting the decision-maker's knowledge to the 'evidentiary record' here." *Id.* at ¶ 8.

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<sup>16</sup> Exhibit 1 to the Statement of Position is a paper, dated January 2003, entitled "Universal Service in Rural America: A Congressional Mandate at Risk" (White Paper). It was written by the Director of Government Relations, Organization for the Promotion and Advancement of Small Telecommunications Companies, apparently under the auspices of that organization. The Organization for the Promotion and Advancement of Small Telecommunications Companies "is a national trade association representing approximately 500 small incumbent local exchange carriers serving primarily rural areas throughout the United States." White Paper at cover sheet.

94. The ALJ finds and concludes that, for the reasons stated in the Motion and set out above, NECC's Motion to Strike should be granted. In addition, the date of the White Paper is January 2003. CTA has not explained why neither the White Paper nor its author was offered during the hearing when cross-examination could have occurred and the appropriate procedures could have been followed.

95. Paragraph 4 of CTA's Statement of Position and Exhibit 1 to the Statement of Position will be stricken from the record in their entirety.<sup>17</sup>

96. The ALJ finds it necessary to comment on statements made in the Response concerning the record on which the Commission can base a decision in an adjudicated proceeding.<sup>18</sup> The Response states that the Commission is not limited to the evidentiary record when it makes policy decisions in adjudicated proceedings. The Response states that it "is the sheerest sophistry to suggest ... that Commission decisions should rest solely on the evidence in the record before it. This approach ignores the historical legal requirements concerning the [Commission's] decision-making and the practical day-to-day protocols under which the Commission operates." Response at ¶ 1. The ALJ observes that, whether making evidentiary findings or policy decisions, there are well-recognized limits on what the Commission may consider in an adjudicatory proceeding; it is not the "free for all" portrayed in the Response. See § 40-6-113(6), C.R.S.; see also §§ 24-4-105(8) and 24-4-105(14)(a), C.R.S. Cf. *Colorado Energy Advocacy Office v. Public Service Company of Colorado*, 704 P.2d 298, 304-05

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<sup>17</sup> Even had the ALJ considered the White Paper in reaching her decision (which she did not), the result in this proceeding would have been the same. The White Paper contains data which are neither Colorado-specific nor affected rural ILEC-specific. Thus, the White Paper suffers from the same infirmity as the general statements and assertions made by CTA's witness during the hearing. See discussion *supra* at ¶¶ 55-64. The ALJ finds the White Paper similarly unpersuasive. Further, the issues addressed in the White Paper are not relevant in this proceeding which, as stated above, is limited to consideration of whether the proposed redefinitions meet the Joint Board test.

<sup>18</sup> The ALJ recognizes that different standards apply in rulemaking proceedings.

(Colo. 1985) (Commission must give parties notice of, and an opportunity to comment on, facts determined by the Commission as a result of its own investigation).

#### IV. CONCLUSIONS OF LAW

97. Applicant has sustained its burden of proof in this docket. Redefining the service area of each of the affected rural ILECs, as requested, meets the Joint Board test. The Application should be granted.

98. The Colorado service area of Eastern Slope should be redefined. Each wire center should be a separate service area.

99. The service area of Great Plains should be redefined. That portion of the area served by the Venango Wire Center which is located within the State of Colorado should be a separate service area.

100. The Colorado service area of Plains Co-op should be redefined. Each wire center should be a separate service area.

101. The Colorado service area of Sunflower should be redefined. Each wire center should be a separate service area.

102. Pursuant to 47 CFR § 54.207, the Commission should file (as necessary) one or more petitions with the FCC to obtain its agreement with the above redefinitions of the service areas of Eastern Slope, Great Plains, Plains Co-op, and Sunflower.

103. NECC's Motion to Strike Portions of CTA's Closing Statement of Position should be granted.

**V. ORDER****A. The Commission Orders That:**

1. The Application to Redefine Local Exchange Carrier Service Areas is granted.
2. The Colorado service area of Eastern Slope Rural Telephone Association, Inc., is redefined. Each wire center of Eastern Slope Rural Telephone Association, Inc., is a separate service area.
3. The portion of the service area of Great Plains Communications, Inc., served by the Venango Wire Center and located within the State of Colorado is defined as a separate service area.
4. The Colorado service area of Plains Cooperative Telephone Association, Inc., is redefined. Each wire center of Plains Cooperative Telephone Association, Inc., is a separate service area.
5. The Colorado service area of Sunflower Telephone Co., Inc., is redefined. Each wire center of Sunflower Telephone Co., Inc., is a separate service area.
6. Pursuant to *47 Code of Federal Regulations* § 54.207, the Commission will file (as necessary) one or more petitions with the Federal Communications Commission to obtain Federal Communications Commission agreement with the above-ordered redefinitions of the service areas of Eastern Slope Rural Telephone Association, Inc.; Great Plains Communications, Inc.; Plains Cooperative Telephone Association, Inc.; and Sunflower Telephone Co., Inc. The Commission will file its petition(s) as soon as practicable after a final Commission decision is entered in this docket.

7. N. E. Colorado Cellular, Inc.'s Motion to Strike Portions of CTA's Closing Statement of Position is granted.

8. 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.

9. As provided by § 40-6-106, 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.

10. 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

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Administrative Law Judge

ATTEST: A TRUE COPY

A handwritten signature in cursive script, appearing to read "Bruce N. Smith".

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Bruce N. Smith  
Director

