

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

IN THE MATTER OF THE COMPLAINT BY)
THE COLORADO TELECOMMUNICATIONS)
ASSOCIATION AGAINST THE WESTERN) Docket No.04F-474T
WIRELESS HOLDING COMPANY, INC.)

**OPENING STATEMENT OF POSITION OF THE COLORADO
TELECOMMUNICATIONS ASSOCIATION, INC. (“CTA”)**

The Colorado Telecommunications Association, Inc. (“CTA”), through its undersigned attorney, herewith submits its Opening Statement of Position and in support thereof state as follows:

INTRODUCTION AND PROCEDURAL BACKGROUND

1. This Complaint proceeding initiated by CTA is the fourth docket that has been before this Commission involving the ETC status of the Western Wireless Holding Company, Inc. (“WW”) in Colorado. The first of these dockets, 00K-255T, is referenced herein as “WW1”; the second proceeding, Docket No. 03A-061T, involving five CenturyTel exchanges not affected by WW1 is referred to as “WW2”; the third docket, 04A-018T, is referenced here as “WW3”; and this complaint proceeding is referred to herein as “WW4.” The WW1 application was settled between WW, Staff of the Commission (“Staff”) and the Office of Consumer Counsel (“OCC”) by Stipulation. That Stipulation was approved by the presiding ALJ and although subsequently modified

in part, was also approved by this Commission. The CTA Complaint, filed on September 17, 2004 generally alleges noncompliance by WW with the WW1 Stipulation.

2. Paragraph 6 of the Complaint provides:

WW secured its ETC and EP designations in WW1 by making certain promises and commitments concerning both the “affordability” of its proposed Basic Universal Service (“BUS”) offering and the “consumer protection” terms and conditions of that offering. These commitments were made in a Stipulation executed by WW, Staff of the COPUC, and the Office of Consumer Counsel.

Complaint paragraph 7 states:

Its Stipulation commitments were central to WW receiving both ETC and EP status. In Decision No.C04-0545 in Docket No. 03A-061T (“WW2”), appended as Attachment 5, the WW1 Decision is referenced. It is noted that the provision of an “affordable” BUS offering by the Applicant was the centerpiece of the agreements reached and the commitments made by the Applicant in the WW1 Stipulation and the foundation upon which the grant of WW’s ETC status was built. (See WW2, p. 46-47: “Western Wireless’ execution of the Stipulation in WW1 was essential to the Administrative Law Judge’s (ALJ) and the Commission’s determination that the public interest was satisfied. *** The ALJ went on to cite various benefits that would flow from granting the applications including an increase in customer choice and the fact that under the Stipulation Western Wireless’ proposed rate of \$14.99 per month was less than most ILEC rates for residential service.” Also see reference to the “initial price of the BUS offering” at a rate of \$14.99 per month at Para. 106, p. 49 of WW2.)

Complaint paragraph 8 states:

Despite the promises and commitments contained in the WW1 Stipulation, WW is not offering the “affordable” \$14.99 BUS offering in the Colorado marketplace. Based upon the findings of CTA witness Glenn Brown noted in his testimony filed contemporaneously with this Complaint, it appears that WW has never offered an “affordable” BUS service in this state in spite of having had both EP and ETC status in Colorado since September of 2001.

3. On October 12, 2004, Staff of the Colorado Public Utilities Commission (“Staff”) filed its Notice of Intervention and Petition for Leave to Intervene in this docket. While the CTA Complaint did not allege a failure on the part of WW to advertise its BUS service offering, the Staff Petition plainly provided notice that compliance with advertising requirements would be an issue in the docket. Paragraphs 8, 9, of the Staff

Petition identifies each of the public interest issues that motivated Staff to intervene in the CTA Complaint proceeding. Paragraph 12 of the Petition states: “Finally, Section 214(E)(1)(b) of the Telecommunications Act of 1996 requires that an ETC advertise the availability of and charges for such universal services using media of general distribution. The initial information provided in this docket indicates that WWHC is in violation of this section of the Act.”

4. On September 29, 2004 the Office of Consumer Counsel (“OCC”) filed its Notice of Intervention of Right in the docket. Paragraph 1 of the Notice states that the OCC was a party to the Stipulation addressed by the CTA Complaint and that: “CTA’s complaint is premised, in part, on the testimony of OCC Analyst Patricia A. Parker in Docket No. 04A-018T, that she was unable to confirm the availability of the \$14.99 BUS offering.” At paragraph 4, the Notice indicates that “...enforcement of the stipulation previously approved by the Commission will affect the constituency the OCC is statutorily mandated to represent.”

5. On September 30, 2004, WW filed its Motion to Dismiss Complaint. On October 15, 2004 CTA, OCC and Staff filed their Joint Response to the WW Motion to Dismiss. In Decision No. R05-0042-I with a mailed date of January 11, 2005, ALJ Fritzel issued his Interim Order Denying Motion to Dismiss.

6. On January 20, 2005, WW filed its Response to the CTA Complaint. Notably, at paragraph 8 of the Response, WW indicated: “WW admits that the Commission’s *Decision* (in WW1) required it to make a basic universal service offering available at the rates, and on the terms and conditions, contained in the Stipulation.” Paragraph 9 of the Response provides in pertinent part that: “WW states affirmatively that WW is now

offering, and has made available to the public, the BUS offering described in the Stipulation.”

7. On February 1, 2005 CTA filed its Certification to the Commission Director of its Intent to Proceed and advised that the WW Response did not satisfy the CTA Complaint and that CTA wished to proceed to hearing.

8. CTA, Staff and the OCC filed their Joint List of Witnesses and Exhibits on January 31, 2005.

9. On February 2, 2005 WW filed its Motion to Exclude Hearsay Evidence and on February 4, 2005 it filed its Motion to Compel Disclosure of Correspondence and other Communications Between CTA and Glenn Brown. CTA filed its timely Combined Response to the two WW Motions on February 18, 2005. On February 28, 2005, ALJ Fritzel issued his Interim Order (Decision No. R05-0239-I) Granting Motion of WW to Exclude Hearsay Evidence and Granting Motion to Compel Disclosure of Correspondence and Other Communications Between CTA and Glenn Brown. CTA subsequently filed its Notice of Compliance with Interim Order concerning the disclosure of communications required by the ALJ’s Interim Order. Hearings were subsequently conducted before ALJ Fritzel on March 7 and 8, 2005.

CTA POSITION

10. CTA asserts that it has met its burden of proving the allegations of its complaint by the evidence presented at hearing by the Joint Parties (CTA, Staff and OCC). CTA’s recommendations concerning remedies to be ordered by the Commission are set forth in

the testimony of Glenn Brown (Joint Exhibit One). These recommendations are generally consistent with the remedial recommendations both of Staff and the OCC.

“Q. What action should the Commission take in response to Western Wireless’ failure to keep the promises and commitments that it made in the Stipulation, and its violation of the Commission’s Order in Docket No. 00K-255T?”

A. The portion of the ALJ’s decision that I cited previously makes it quite clear that “The ultimate sanction that the Commission would utilize for enforcement purposes would be revocation of the ETC and EP status.” Given the serious nature of the violation, and Western Wireless’ continuing efforts to mislead the Commission regarding its willingness and ability to offer the affordable \$14.99 BUS offering, CTA respectfully suggests that the Commission adopt the “ultimate sanction” and revoke Western Wireless’ ETP and EP status in the areas where it is currently so designated. The Complaint that is being filed contemporaneously with this testimony requests the following specific remedial actions:

- a. Revocation of Western Wireless’ EP and ETC status for failure to meet the commitments in the Stipulation;
- b. An accounting and restitution by Western Wireless of all EP and ETC support funds received by it during the entire period during which it had EP and ETC status pursuant to the Commission’s WWI Order.
- c. A review by this Commission of and initiation of appropriate action concerning any annual certification(s) provided by Western Wireless to

this Commission or to the Federal Communications Commission (FCC) regarding use of ETC and EP support funds.”

THE WW1 STIPULATION

11. The WW1 Stipulation and Settlement Agreement (“Stipulation”), together with its attachments, is in evidence in this proceeding as an attachment to Joint Exhibit 3(C). WW has admitted in its Response that it is required to abide by the terms and conditions of that Stipulation. The Stipulation provides, *inter alia*, as follows. Concerning its application for Federal ETC status at paragraph 3: “WW will offer its universal service offering as a wireless application based on its existing mobile cellular service in Colorado.” At paragraph 4: “WW will advertise the availability of such services and charges using media of general distribution in accordance with federal and State requirements.” Concerning its application for state EP designation at paragraph 11: “WW will offer its universal service offering as a wireless application based on its existing mobile cellular service in Colorado.” Concerning both its ETC and EP applications at paragraph 18: “...WW shall provide its ETC and EP universal service offerings in Colorado pursuant to this Stipulation (including attachments) and in accordance with a written Customer Service Agreement which shall contain Terms and Conditions in the form contained in Attachment 5. In addition, the Operating Procedures applicable to Western Wireless’ universal service offering in Colorado are contained in Attachment 6 and its Service Description is set forth in Attachment 7 to this Stipulation.” It is provided in Attachment 6, referenced as “Operating Procedures” in paragraph M concerning advertising that “The carrier shall submit, on a confidential basis, proposed customer advertising materials to the Commission Staff and the Office of Consumer

Counsel (“OCC”) for information purposes seven days prior to its use. The carrier shall submit periodic reports describing advertising materials in use in Colorado to the Commission Staff and the OCC.” A description of the terms, conditions and pricing of the WW BUS offering is contained in Attachment 7. “The Company’s BUS offering is available to customers within the exchanges in which Western Wireless has been designated as an ETC and EP.”

THE EVIDENCE PRESENTED

12. The evidence presented in this case by the Joint Parties demonstrates that the WW BUS offering promised in the WW1 Stipulation is neither “available”, “offered” nor “advertised” by WW in Colorado. That evidence supports the allegations of the CTA Complaint and warrants the imposition of remedies suggested by the Joint Parties. (For ease of reference citations herein to the testimony of witnesses at hearing will cite to “TR1” for the first day of proceedings held on March 7, 2005 and “TR2” to the second day of hearing held on March 8, 2005.)

13. It is undisputed that WW has never had a BUS customer in this state. Joint Exhibit 7 – WW Response to Staff Request 1-1. In contrast, wireless ETC NE Colorado Cellular (“NECC”), a company that advertises the existence of its BUS offering on its Website and in customer promotional materials, has a BUS penetration level or “take rate” of 4-6% of its “supported lines” customer base. TR1, Fischhaber at 133. There is no dispute that WW did not have the BUS plan “available” by including the same in its ordering system until March 23, 2004, in spite of the fact that it stated that the offering was available to customers as of November 8, 2002. TR1, Fischhaber, p. 100 and Joint Exhibit 7 – WW Response to Staff Request 1-6. The November 8, 2002 date is the date

of the compliance filing by WW in response to the Commission's ETC designation order. See, TR1, Fischhaber at 104 and Exhibit 30. Additionally, it is the opinion of Staff that the BUS offering has not been "available" from and after March 23, 2004 because of the absence of any WW advertising of the service. TR1, Fischhaber at 105. In spite of not having made its BUS offering available to Colorado consumers, WW has been collecting USF support for the provision of its supported services in Colorado since October of 2002 and has received multiple millions of dollars in such support. See Confidential Joint Exhibit 14. Although qualified to receive state High Cost Mechanism Support ("HCSM") as an Eligible Provider ("EP"), WW concedes that it has not drawn any such state support. WW's witness James Blundell testified on cross examination that there is an administrative process associated with filing the necessary forms with the Universal Service Administration Company ("USAC") to secure the flow of USF support monies after WW was designated as an ETC by the Colorado Commission. He indicated that those administrative steps are a "lengthy and involved process." He estimated that representatives of his company spent 45 days on the paperwork requirements prior to securing the flow of USF support that commenced in October of 2002. TR2, Blundell at 129-130. In contrast, he also testified that about a "one-day process" was involved in the administrative steps required to put the BUS offering into the WW internal ordering system, referred to throughout the proceedings as "Einstein." Yet in spite of the differing levels of effort involved in the two processes – the Colorado BUS offering was not entered into the Einstein system by WW employees until March 23 of 2004 – nearly two and one half years after USF support began to flow to WW from USAC. TR2, Blundell at 130. See also WW Response to Staff Request 1-4 in evidence as Joint Exhibit 7.

Additionally, the entry of the BUS offering into the internal ordering system did not take place volitionally – it only happened after WW representatives met with representatives of the Staff and OCC at a meeting on March 10, 2004 at which Staff and the OCC voiced concern about the lack of availability of the offering in the Colorado market. TR1, Fischhaber at 102.

14. As to advertising the BUS offering, WW claims that it has no specific obligation under federal law to advertise specific offerings such as the BUS service. That argument is unavailing because of the commitment WW made in the WW1 Stipulation to undertake such advertising pursuant to both federal and state law requirements. As noted above, the Stipulation provides at paragraph 4: “WW will advertise the availability of such services and charges using media of general distribution in accordance with federal and State requirements.” It is undisputed that WW has never submitted advertising materials either to Staff or the OCC in compliance with paragraph M of the company’s Operating Procedures appended to the Stipulation. See WW Response to Staff Request 1-8 in evidence as Joint Exhibit 7. Additionally, even after entering the BUS service offering in the WW “Einstein” ordering system WW representatives continued their practice of concealing from the general consuming public the existence of the BUS service offering. See the email message of Director of Sales Margaret Petix of May 24, 2004 appended as a non-confidential exhibit to the WW Response to Staff Request 1-9 in evidence as Joint Exhibit 7: “Your retail stores should have the Colorado Basic Universal Service Rate Cards. They should not be on display, but rather available on customer request.” Petix also conceded in an email message of May 26, 2004 concerning the lack of information on the BUS service provided in response to Pat Parker’s inquiries that: “The initial Basic

Universal Service offer was not rolled out to the dealers and that would explain their responses.” Ibid. Finally, even if an informed customer learned of the service offering and sought to purchase it from a retail CellularOne store – the offering could not be sold to a customer. Again the instructions from Petix were: “Customers calling our distribution inquiring about the plan need to be directed to Inside Sales 1 (800) CELLONE and instructed to request a new line of service or offer code 299.” It is the conclusion of Staff that WW is neither advertising the availability of the BUS offering nor of the charges therefore as required by law. TR1, Fischhaber at 118. But the Stipulation provides at paragraph 4: “WW will advertise the availability of such services and charges using media of general distribution in accordance with federal and State requirements.” Finally, although the applicable Commission rule concerning ETC advertising specifies that basic service offerings will be advertised to the general residential market by utilizing the “guide pages” in White Page Directories – neither has WW complied with that requirement. TR1, Fischhaber at 155.

15. Securing knowledge about the existence of the WW Colorado BUS offering is a huge consumer challenge. Information about the service offering is not available on the company’s Website, through its normal retail distribution channels, in brochures at company retail outlet centers, nor from its sales personnel. Even if an informed consumer were, by some means, able to secure information about the existence of the offering, it is clear that no Colorado consumer would ever be likely to be successful in navigating the process steps necessary to actually secure the BUS service offering from WW. See the explanation of Staff Witness Pamela Fischhaber at TR1, pp. 109-117. (This intentionally Byzantine process for purchasing the BUS offering would certainly

explain the absence of a single BUS customer.) For the reasons noted the Joint Parties have referred to the WW BUS offering as a “stealth” service offering which requires knowledge of a “secret code” to even gain information about the existence of the service offering. (See paragraph 14 above.)

16. Mr. Glenn Brown testified for CTA. He conducted an investigation to determine the availability of the WW BUS offering. The steps he took and the conclusions he reached are set out in Joint Exhibit One at 5-6.

- On July 28, 2004 I personally made calls to a number of Western Wireless retail outlets in areas in Colorado where Western Wireless has ETC and EP status, and from which it is receiving high-cost support. Despite repeated attempts and questioning, I was unable to find any evidence that the \$14.99 BUS offering was available. Indeed, in each of the cases I was told that the lowest priced local service offering available was \$30 per month, and included 400 minutes of local service.
- On September 2, 2004, in an investigation undertaken at my request and under my direction and control, a representative of CTA made personal visits to several CellularOne stores in Colorado to determine if the sales representatives were familiar with the BUS offering, or if any materials were available in the stores describing the offering. In two of the four stores no brochures were available, and sales personnel were not familiar with the offering. In the other two stores (Alamosa and Canon City) after repeated questioning regarding the BUS offering, brochures were produced from a concealed location. The sales representatives

said that the product could not be ordered at that store, and that it could only be ordered by calling the 800 number.

- On September 7, 2004, armed with the “Offer Code” from the Brochure, I was finally able to talk with a representative from CellularOne who knew about the BUS service plan.
- From all of the above, and as described in the remainder of my testimony, I have concluded that while the BUS service may technically exist, it is not actively “offered” by Western Wireless, as required by the Commission’s Order. For all practical purposes, the BUS offering is unavailable to the average Colorado consumer. In my opinion, this indicates that Western Wireless is not in compliance with the referenced Commission Orders.

17. Michelle Anderson conducted several WW retail store “on-site” visits on September 1, 2004 at the request of Mr. Brown. These included stops at the CellularOne stores in Alamosa, Canon City, Salida and Pueblo. As Ms. Anderson testified – her first visit was to the Alamosa store where she persistently sought information about a calling plan with unlimited local calling and a \$14.99 rate. After an effort to sell her a \$30 plan and under her persistent questioning, the sales representative opened a closed cabinet and produced a BUS brochure. Joint Exhibit 10 and TR1, Anderson at 58. Her next stop was the Salida store. No one there knew of the existence of a BUS service offering. There were no brochures. The sales representative called a service support number and gave Ms. Anderson the phone. The representative on the phone could not help with the purchase of the BUS – but did advise that she should refer to “residential wireless” rather than BUS in her efforts to purchase. Ibid. and TR1, Anderson at 59-61. Next up was a

visit to the Canon City CellularOne store. After initial efforts to sell Ms. Anderson a \$40 calling plan and her inquiry about a \$14.99 offering she was referred to the store manager who produced BUS brochures from his back office after unsealing a sealed pack of brochures. Upon her further inquiry concerning advertising – she was told: "Oh, this plan won't be advertised." People will need to come in and ask about it if they want it." Ibid. and TR1, Anderson at 61-63. Last, Ms. Anderson visited the Pueblo northside CellularOne store. Two sales representatives at that location did not know of the existence of a calling plan with unlimited local calling and a \$14.99 monthly rate – but a third did. He could not find any BUS brochure materials. Ibid. and TR1, Anderson at 65. On the morning of September 2, 2004 Ms. Anderson followed up her store visits by calling the recommended 800 number in a further effort to secure information about the BUS offering. After being transferred three times by customer service reps who knew nothing of the BUS offering, she was finally referred to a fourth representative who advised that the BUS plan was not yet available in Colorado – but could be purchased in six other states. The rep did not know when the offering would be available in Colorado. Ibid. and TR1 at 66.

18. The CTA investigation and complaint were initiated because of information provided in the WW3 docket by Ms. Patricia Parker of the OCC concerning the lack of availability of the WW BUS service. Both Staff and the OCC are providing separate Opening Statements of Position in this matter and will separately identify the evidence each has presented in support of the CTA Complaint – thus the Parker testimony from WW3 will not be set out here. That testimony is in evidence as Joint Exhibit 6.

19. CTA submits that the above-cited evidence that WW is not adhering to its WW1 Stipulation commitments to “offer”, “make available” and “advertise” its BUS offering support a favorable decision on its Complaint. Compliance with the requirements of the WW1 Stipulation should have occurred voluntarily. The failure of compliance is not the responsibility of any entity other than WW. (The effort on the part of WW Witness James Blundell to shift responsibility for noncompliance to Staff of the Commission is an untenable rationale that should be soundly rejected. Provider commitments to provide a BUS service supported by state and federal support funds are the responsibility of the provider. Clear, objective evidence of this obligation is set forth in the Petition for Certification and appended affidavit of Gene DeJordy on behalf of WW seeking 2003 certification by this Commission and similar documents filed for 2004 in evidence as Joint Exhibits 13(A) and 13(B). Thus the latter cover letter from WW providing the required Affidavit states: “The federal high-cost support WW will receive in 2004 will be used ‘only for the provision, maintenance and upgrading of facilities and services for which support is intended’ as outlined in 47 USC 254(e). The attached affidavit shows that WW self-certifies that it will only use the federal high-cost support it receives for the intended purposes.”) In all cases of noncompliance with its Orders – meaningful enforcement action must be taken by this Commission to ensure that there is accountability for the expenditure of public monies. As noted above, jurisdiction to take such enforcement action was expressly and specifically reserved by the Commission in its WW1 Orders. That jurisdiction should be exercised and the remedies requested by the Joint Parties granted.

THE APPLICABLE LAW

20. As noted above, WW committed to advertise the BUS service in the WW1 Stipulation in accordance with the requirements of both state and federal law. Commission rule 723-42-7.2.6 provides that an application for ETC status must contain, *inter alia*, the following: “An affirmative statement that the applicant will advertise the availability of such service and the charges therefore using media of general distribution pursuant to section 214 (e) (1) (b) of the Act. The Commission establishes as guidelines to meet the requirements of 214 (e) (1) (b), that an ETC should advertise in publications targeted to the general residential market, and an ETC should place customer guide pages in the ‘White Pages’ Directory within the ETC’s Service Area. Such customer guide pages should indicate that the provider will offer basic local exchange service to all who request such service within that area....” Joint Exhibit 11. Plainly the requirements of the Commission rule provide greater specificity and detail as to the advertising requirements that must be met for the advertising of basic local exchange service by an ETC provider than the less specific requirements of the Federal Act.

21. Section 214 (e) (1) (B) of the Federal Telecommunications Act provides that an ETC shall “...advertise the availability of such services and the charges therefore using media of general distribution.” Joint Exhibit 12.

SUMMARY

22. The evidence in this proceeding is overwhelming that WW has failed to meet the commitments it made in the WW1 Stipulation to make available and advertise its “affordable” \$14.99 BUS offering. The commitment to provide this “affordable” offering with its associated consumer protection provisions was the cornerstone of the ALJ and Commission decisions to designate WW as an ETC. CTA submits that the

remedies recommended by the Joint Parties in this proceeding should be adopted by the Commission. The relief requested in the CTA Complaint should be granted.

WHEREFORE, CTA has set forth its Opening Statement of Position and it respectfully requests that the Commission find that it has sustained its burden of proof in support of its Complaint and asks that it accordingly grant the remedies requested by the Joint Parties.

Respectfully submitted this _____ day of April, 2005.

Colorado Telecommunications Association, Inc.

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that the original and 8 copies of the foregoing **OPENING STATEMENT OF POSITION OF THE COLORADO TELECOMMUNICATIONS ASSOCIATION, INC. ("CTA")** was hand delivered, addressed to the following, on April 8, 2005:

Mr. Bruce N. Smith, Director
Colorado Public Utilities Commission
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and a copy was electronically served and placed in the United States Mail, this 8th day of April, 2005, to the following addressees:

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