

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

* * *

IN THE MATTER OF PROPOSED RULES)
REGARDING CERTIFICATION OF)
PROVIDERS OF LOCAL EXCHANGE) DOCKET NO. 95R-555T
TELECOMMUNICATIONS SERVICES.)

DECISION ADOPTING RULES

Mailed Date: March 15, 1996
Adopted Date: March 7, 1996

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I. **BY THE COMMISSION:**

A. **Background and Procedural Matters**

1. This matter is before the Commission to consider adoption of rules regulating applications by local exchange telecommunications providers to transfer a certificate of public convenience and necessity, a certificate to provide local exchange telecommunications services, or an operating authority; to obtain controlling interest in a local exchange telecommunications provider, whether by transfer of assets or transfer of

shares; to transfer assets not in the ordinary course of business; to execute a merger; or to do any combination of the foregoing. These rules implement the requirements of House Bill No. 95-1335 ("HB 1335"), codified at 40-15-501 *et seq.*, C.R.S.

B. In enacting HB 1335, the General Assembly determined that competition in the market for basic local exchange service is in the public interest. See 40-15-501, C.R.S. Consistent with that policy goal, HB 1335 directs the Commission to encourage competition in the basic local exchange market by adoption and implementation of appropriate regulatory mechanisms to replace, eventually, the existing regulatory framework. Specifically, the Commission must:

1. establish standards for basic telephone service;
2. establish mechanisms to advance the goal of universal service, *i.e.*, provision of basic telephone service to all at just and reasonable rates;
3. consider the necessity for specific mechanisms to advance goals relating to universal access to advanced telecommunications services; and
4. resolve other issues relating to implementation of competition in the local exchange market.

C. The Commission has the responsibility to open local exchange telecommunications markets to competition and to structure telecommunications regulation in a manner that achieves a transition to a fully competitive telecommunications market. To that end, the Commission must establish the terms and conditions under which competition will occur.¹ Logically, this includes the process by which a transfer is considered by the Commission.

¹ See 40-15-502(1) and 40-15-502(3)(b), C.R.S.

D. HB 1335 contains an equally important, and somewhat counter-balancing, public policy directive which the Commission must implement: structure the transition to competition to protect basic service, which is

the availability of high quality, minimum elements of telecommunications service, as defined by the Commission, at just, reasonable, and affordable rates to all people of the state of Colorado.

Section 40-15-502(2), C.R.S.

E. To realize these public policy goals, the Commission may use a variety of mechanisms including, but not limited to, "more active regulation of one provider than another or the imposition of geographic limits or other conditions on the authority granted to a provider." Section 40-15-503(2)(a), C.R.S. In addition, the Commission must consider the differences between the economic conditions of urban and rural areas of the state. *Id.* Further, the Commission must adopt rules which allow simplified regulatory treatment for basic local exchange providers "that serve only rural exchanges of ten thousand or fewer access lines." Section 40-15-503(2)(d), C.R.S.

F. The Working Group established pursuant to 40-15-503 and 40-15-504, C.R.S., has recommended proposed rules for consideration by the Commission to implement HB 1335. These proposals are found in the Report of the HB 1335 Telecommunications Working Group to the Colorado Public Utilities Commission, dated November 30, 1995 (the "November report"), and in the Supplemental Report of the HB 1335 Telecommunications Working Group to the Colorado Public Utilities Commission, dated December 20, 1995 (the "December report").

G. As part of the November report, the Working Group transmitted to the Commission proposed rules regulating applications by local exchange telecommunications providers to execute a transfer.² The proposed rules governed a wide range of transfers. These proposed rules were attached to our notice of proposed rulemaking in this docket, Decision No. C95-1172, dated November 29, 1995.

H. In accordance with our notice of proposed rulemaking, hearing on these proposed rules was held on January 12, 1996.³ The following parties submitted written and oral comments for our consideration: AT&T Communications of the Mountain States, Inc. ("AT&T"); AT&T Wireless Services ("AT&T Wireless"); Colorado Independent Telephone Association ("CITA"); Farmers Telephone Company, *et al.*; ICG Access Services, Inc., and Teleport Denver Ltd. ("ICG"); MCI Telecommunications Corporation ("MCI"); MFS Intelenet of Colorado, Inc. ("MFS"); Office of Consumer Counsel ("OCC"); staff of the Commission ("Staff"); TCI Communications, Inc., *et al.* ("TCI"); University of Colorado and Colorado State University ("Universities"); U S WEST Communications, Inc. ("USWC"); and Charles Wimber.

I. In addition to the written comments filed with the Commission and the oral comments made at the hearing, the Commission took administrative notice of, and has considered and relied upon, the November report, the December report, and the Public Outreach Meetings Report ("Outreach Report")

² November report at Appendix G, discussed in the November report at pp. 76-86.

³ All oral presentations were made at the public hearing held on January 12, 1996. In accordance with the notice of proposed rulemaking, the Commission was available to receive public comment on January 25 and 26, 1996. However, no member of the public appeared on either of those dates to present comment.

dated December 20, 1995.⁴ These reports are filed in Docket No. 95M-560T, the repository docket regarding implementation of 40-15-105 *et seq.*, C.R.S.

II. **DISCUSSION.**

A. **Consensus and "Substantial Deference."**

1. The rules proposed by the Working Group were not wholly "consensus" rules. Subsections 40-15-503(1) and (2)(a), C.R.S., require that we give "substantial deference" to the proposals submitted by the Working Group with respect to issues on which the Working Group reports that it has reached consensus on or before January 1, 1996.

2. The statute does not define "substantial deference." Thus, in the course of the HB 1335-related rulemakings, we must develop and apply our understanding of "substantial deference." To do so, we have examined the concept of "substantial deference" within the context of the public policies articulated by the General Assembly, as well as in the context of the Commission's constitutional and statutory authorities and responsibilities.

⁴ This report summarizes the comments (both oral and written) received during 16 public outings which the Commission held throughout the state in September and October, 1995, to solicit input on competition to provide local telephone service and on a proposed "Telecommunications Bill of Rights" drafted by the Commission. Meetings were held in Breckenridge, Steamboat Springs, Glenwood Springs, Colorado Springs, Trinidad, La Junta, Lamar, Pueblo, Grand Junction, Cortez, Durango, Alamosa, Fort Collins, Denver, and Fort Morgan. Participants represented a diverse cross-section of the public.

As stated in the report,

An overriding concern expressed at the meetings was the question of whether statewide competition in the local telephone market is a realistic expectation, how long will it take competition to reach less densely-populated areas of the state, and how will the PUC manage the transition period?

reach Report at 4.

3. In implementing our understanding of "substantial deference," we take the following into consideration:⁵ our overarching obligation to protect the public interest, even as we shepherd the transition into a fully competitive telecommunications marketplace; the consistency of the proposed consensus rule with all provisions of 40-15-501 *et seq.*, C.R.S., and other applicable statutes; the consistency of the proposed consensus rule with existing Commission rules; the ability of the public and of regulated entities to understand the proposed consensus rule and the processes described therein; the ability of the Commission to enforce the proposed consensus rule; the ability of the proposed consensus rule to accomplish or to assist in the transition to a fully competitive telecommunications environment while assuring the availability of basic service at just, reasonable, and affordable rates to all people of Colorado; and the fairness of the proposed consensus rule to all telecommunications service providers, existing and prospective. We examine each proposed consensus rule in light of these considerations.

4. We are of the opinion that we may make changes to a proposed consensus rule where, after full consideration of the record and the factors outlined above, we deem it necessary. Because the General Assembly has required us to attach significant weight to the opinions of the Working Group, the rationale supporting any decision by this Commission to reject a consensus rule must be clearly articulated.

B. Need for Rules Regulating Applications by Local Exchange Telecommunications Providers to Execute a Transfer. No party in this

⁵ This listing is not a definitive statement of the considerations relied upon by the Commission.

proceeding questioned the need for these rules. We agree. The inability of the parties to reach consensus on some of the rules does not negate this agreement. Rather, the disagreements were the result of differences of opinion on specific points.

1. First, the Commission has an obligation to assure provision of basic service to all residents of Colorado at just, reasonable, and fair rates. To meet this obligation the Commission must be informed and must have a reasonable opportunity to take appropriate action. This is particularly true when the action which a provider proposes to take affects the ownership of Commission-granted authorities or of the telecommunications provider itself.

2. Second, the Commission must have sufficient information to support a finding that, if a transfer is approved, the transferee: is willing and able to provide service consistent with applicable statutes and rules, including the quality of service rules; will provide the service as promised so that end-users and other providers are protected; and will enhance the universal availability of basic local exchange service.

3. Third, each transferor and transferee must have adequate notice and sufficient information regarding its obligations (*e.g.*, what information must be supplied as part of an application and the obligations and responsibilities assumed if the transfer is approved).

4. Fourth, and certainly not less important, the process must be clearly articulated, competitively neutral (*e.g.*, favor neither large nor small providers, favor neither incumbent providers nor new providers), and must not act as a barrier to competition. These rules meet these criteria.

C. Content of Rules⁶

1. The Working Group was able to reach consensus regarding the majority of issues set forth in the rules. The Working Group failed to reach consensus on this point: statements to be made by a provider as part of the application (proposed Rule 4.2.10 and proposed Rule 4.3).

2. Consistent with our discussion above concerning "substantial deference," we will make modifications, corrections, and conforming and other changes to the consensus rules which we deem necessary. In addition, where no Working Group consensus was reported, we adopt rules which are, in our opinion, necessary and appropriate to carry out our constitutional and statutory responsibilities.

3. Proposal of the Universities

a. The Universities proposed a new option for Rule 1: Applicability. The Universities argued that the requirements of these rules should not apply to institutions of higher education⁷ which own or lease and operate telecommunications systems for the purpose of providing intercommunications within those systems and local exchange access services to administration, faculty, staff, government and/or university-affiliated non-profit corporation employees at their work locations, and to students resident in institution-affiliated housing.

⁶ We have determined that proposed Rule 1: basis, purpose, and statutory authority, is not e. Thus, although we retain the statement, it is not numbered as a rule. As a result, the ru promulgate have been renumbered from the proposed rules. We use the final rule numbers in cussion, making reference to the proposed rule numbers where necessary for clarity.

⁷ Section 24-113-102(2), C.R.S. (1988), defines an "institution of higher education" as te-supported college, university, or community college."

b. The Universities rely on this Commission's April 11, 1984, Decision No. R84-428, in support of their position. In that decision, the Commission determined that the Colorado State University ("CSU") telephone system did not constitute public utility service.⁸

c. In the discussion section of Decision No. C84-428, the administrative law judge stated:

CSU will not serve non-university entities such as the three private businesses located on campus or the Federal government agencies. Mountain Bell will continue to serve these businesses and agencies. CSU, by providing private service as above described, is not a public utility since it is not offering service to the general public indiscriminately.

* * *

The next question presented in this case is whether CSU, by its proposed telephone system, is a reseller of telephone service.

* * *

The Commission has . . . in Decisions No. C82-1928 and C82-1925 defined "resale" as an entity charging more or less than the certificated supplier of utility service. The proposed CSU service does not constitute resale under the above definitions since CSU will not increase or reduce the cost of service. Consequently, CSU will not be a reseller of intrastate telecommunications services.

Decision No. R84-428 at 5.

d. Clearly, with the advent of HB 1335, the local exchange telecommunications service market in Colorado has changed radically. For example, in Docket No. 95R-557T, *In the Matter of Proposed Rules Regarding Implementation of 40-15-101, et seq. -- Resale of Regulated*

⁸ Decision No. R84-428 is expressly limited in its applicability to the telephone system of described in that decision.

Telecommunications Services, there are proposals to change the definition of "resale" that the Commission adopted in 1982. Further, HB 1335 speaks in terms of "multiple providers of local exchange service"⁹ and clearly contemplates that all local exchange service providers need not be designated by the Commission as providers of last resort.¹⁰ The obligation of a local exchange service provider to serve all members of the public indiscriminately, and thus its status as a public utility as defined in Decision No. R84-428, has clearly been affected by the enactment of HB 1335.

e. For the purpose of this rulemaking proceeding, we reject the argument of the Universities that institutions of higher learning should be exempted from the application of these rules. In light of the evolving responsibilities of local exchange service providers under HB 1335,¹¹ the broad statutory definition of "public utility" found at 40-1-103, C.R.S.,¹² and the inclusive definition of "person" found at 40-1-102(5), C.R.S.,¹³ we find that the record in this proceeding does not support the

⁹ Section 40-15-501(3)(c), C.R.S.

¹⁰ Section 40-15-502(6), C.R.S.

¹¹ "Wise public policy relating to the telecommunications industry and the other crucial services provides is in the interest of Colorado and its citizens[.]" Section 40-15-501(2)(a), C.R.S.

"A provider that offers basic local exchange service through use of its own facilities or on a non-discriminatory basis may be qualified as a provider of last resort. . . Resale shall be made available on a non-discriminatory basis[.]" Section 40-15-502(5)(b), C.R.S.

¹² As relevant here, this section defines a "public utility" as "every common carrier, telephone corporation, telegraph corporation, . . . person, or municipality operating for the purpose of providing service to the public for domestic, mechanical, or public uses and every corporation, or partnership, or other legal entity, authorized by law to be affected with a public interest[.]" This definition is subject to exemptions found in 40-1-103(1)(b), C.R.S.

¹³ This section defines "person" as "any individual, firm, partnership, corporation, company, association, joint stock association, and other legal entity."

adoption of the Universities' proposed language.

f. We also find that the Universities' proposed language may create an exemption from the application of these rules that is overly broad. We believe that the issue raised by the Universities is more appropriately considered in an adjudicatory proceeding where the specific facts pertaining to those entities can be addressed.

4. Rule 2

a. This rule contains the definitions applicable to this set of rules. The Commission has modified the consensus rule to add a statement that the statutory definitions are applicable and controlling. The addition of this language places interested persons on notice that they must refer to the statute to be sure that they understand the definitions of words and phrases used in the rules. This is the same procedure that any utility or interested person should follow in any situation involving Commission rules.

b. By Rule 2.3, the Commission added a definition of "certificate of public convenience and necessity." The term "certificate of public convenience and necessity," although used in the consensus rule, was not defined. The Commission added this definition for clarity.

c. The Commission has determined not to adopt two definitions contained in the consensus rule: "form tariff or form price list" (proposed Rule 3.5) and "local calling area" (proposed Rule 3.6). Neither of these terms appears in these rules. The definitions were, therefore, unnecessary.

5. Rule 3

a. This rule describes the required contents of an application to transfer. At a minimum, this rule serves the following important functions: informs applicants of the data they must provide; informs transferees of the responsibilities which they will assume upon approval of the transfer; provides notice to applicants of the possible consequences of submitting an application which contains false information or misrepresentations; and informs applicants of the process under which their applications will be handled.

b. The Commission clarified and modified consensus language by adding the first paragraph of Rule 3 (proposed Rule 4.1). As changed, the rule informs the transferor and the transferee that an application must be filed and that they may file a joint application.

c. The Commission further clarified and modified consensus language in Rule 3 by adding a new Rule 3.1 to inform a transferor or transferee which has been designated as a provider of last resort that it must supplement its application in accordance with Commission rules relating to universal service and the Colorado High Cost Fund. We believe this makes the application process easier to understand. In addition, it notifies a transferor or transferee about supplemental data it must provide if it has been designated as a provider of last resort.

d. The Commission added a new Rule 3.2.1, which requires that the application contain the applicant's name, address, and other identifying information. Although the consensus rule contained no such provision, it is obviously information which the Commission and those

potentially affected by the proposed transfer need to know. In addition, providing this identifying information will not be burdensome on an applicant while the absence of such information could prove to be harmful to the public interest.

e. We have added a new Rule 3.2.8. Pursuant to this rule and as part of its application, an applicant must provide a statement that, by filing the application, it agrees: first, to answer all questions propounded by the Commission or authorized members of its staff concerning the application, the subject matter of the application, or any information supplied in support of the application; and, second, to permit the Commission or authorized members of its staff to inspect the applicant's books and records as part of the investigation into the application, the subject matter of the application, or any information supplied in support of the application.

f. This area was not addressed in the consensus rule submitted by the Working Group. The issue did, however, receive considerable attention during rulemaking hearings held with respect to related rules. The participants at the hearings acknowledged that the Commission must be able to investigate applications and applicants, to obtain information from applicants, and to satisfy itself that it has the information which the Commission considers necessary to make a decision on the application. The parties felt that the Commission should be able to obtain this information from any applicant, whether or not it is a "public utility" as defined in 40-1-103, C.R.S.

g. The parties also expressed the preference for prompt

Commission action on applications. To this end, they preferred rules which require an applicant to supply, in its application, data sufficient to permit the Commission and interested parties to understand the authority sought and to evaluate the application without the necessity of setting the application for hearing and engaging in discovery to obtain information. It was their expressed hope that full disclosure in the application would lessen the chances of an application's being opposed or contested. Assuming the required information is provided with an application and is complete, the parties hoped that the Commission would be able to reach a decision on an uncontested application without setting the application for hearing. The parties stated that, again assuming an application was unopposed, prompt Commission action on an application would be beneficial to the applicant and to the public.

h. Aware that information submitted with the application might need to be clarified and that the Commission might need to investigate an application to satisfy itself, the parties suggested that the Commission could use its authority pursuant to 40-3-110 and 40-6-106, C.R.S., to obtain information from applicants. Some went so far as to state that submission of an application renders an applicant subject to our jurisdiction as a "public utility." We are not convinced that the cited statutory provisions allow us to obtain data from all applicants.

i. The Commission needs sufficient data (a) to assure itself of a transferee's ability to provide local exchange telecommunications service and to serve the public interest and (b) to support a Commission finding that a transferee is able and willing to provide service consistent with applicable statutes and Commission rules, will provide the service as

promised so that end-users and other providers are protected, and will enhance the universal availability of basic local exchange service. We can obtain this information several ways: through our authority found in 40-3-110 and 40-6-106, through discovery in administrative proceedings, and through the cooperation of the person from whom the information is requested.

j. A prerequisite found in the cited statutes is: the person from whom the Commission seeks information, or to whose books and records the Commission seeks access, must be a "public utility" (see definition of public utility in footnote 12, above). Applicants who are not certificated in Colorado, and therefore are not public utilities, may seek authority to offer local exchange telecommunications services. Sections 40-3-110 and 40-6-106 appear not to apply to those applicants.¹⁴

k. As a result, absent an agreement such as that found in Rule 3.2.8, it seems possible that the Commission could not obtain information from applicants who are not public utilities without setting the application for hearing and conducting discovery (see, e.g., Rule 77 of the Rules of Practice and Procedure, 4 CCR 723-1). Conducting discovery could prove to be cumbersome, costly to the Commission and all parties, and time-consuming. In addition, this approach would delay consideration of the application. Such a result runs counter to both our wishes and the expressed preferences of the rulemaking participants.

l. The most expeditious way for the Commission to obtain

¹⁴ As relevant to this decision, these sections would apply to a person who holds a certificate of public convenience and necessity, a certificate to provide local exchange telecommunications services, an operating authority, or any combination of these.

the information we need is that contained in Rule 3.2.8. In addition, it is not unreasonable for the Commission to require an applicant to cooperate with the Commission in its investigation of the application. Indeed, an applicant should welcome the opportunity to provide information to, and to clarify any points for, the Commission, the more so because the alternative is the possibility of lengthy delay.

m. We view Rule 3.2.8 as a reasonable approach which satisfies our needs and those of the applicants. For these reasons, among others, we adopt the rule.

n. Rule 3.2.11 (proposed Rule 4.2.10) was not a consensus rule. The parties agreed that a transferee should be aware that the transfer is conditional upon transferee's meeting certain prerequisites (*e.g.*, having effective and applicable tariffs or price lists and complying with statutes, rules, and orders). Nonetheless, the parties could not agree about the degree of compliance with statutes and Commission rules and orders required of a transferee. Some parties requested that the Commission demand only "substantial" compliance; at least one party argued that the limitation was unnecessary and too restrictive. We agree that the limitation is not warranted.

(1) First, absent a definition of "substantial" (which the parties did not supply), use of that modifier could produce confusion and uncertainty on the part of a transferee. Similarly, use of the word "substantial" complicates enforcement of this rule and could prove to be fertile ground for litigation if the Commission and a transferee do not share a common understanding of the word "substantial" as used in this context. The

absence of the word "substantial" eliminates these potential difficulties.

(2) Second, and equally important, the absence of "substantial" from Rule 3.2.11 is beneficial. It puts a transferee clearly and unequivocally on notice that compliance with the statutes, rules, and orders is obligatory for those who wish to do business in this state. Obviously, this requirement does not limit the Commission's discretion to equitably evaluate each transferee's circumstances to reach a reasonable and balanced result.

(3) On balance, we determine that use of the word "substantial" is counter-productive. Accordingly, for the reasons stated among others, we issue Rule 3.2.11 without the word "substantial."

o. Rule 3.2.12 (proposed Rule 4.3) was not a consensus rule.

(1) The parties agreed that an applicant must be on notice that, upon Commission order, a transfer may be null and void if the information contained in the application is found to be false or to contain misrepresentations. The parties also agreed that an applicant should be on notice that the Commission might take action, but, in accordance with due process requirements, can do so only after notice and opportunity to be heard.

(2) We agree that Rule 3.2.12 is an important notice provision. We also agree that we can take action against a transferee or transferor only in accordance with the law, which necessarily includes notice and opportunity for the applicant to be heard. The applicant should be given the opportunity to be heard at least on the issues of (a) whether or not the information contained in the application is false or contains

misrepresentations and, if so, (b) the action, if any, which the Commission should take as a result. Rule 3.2.12 is consistent with, and furthers, these principles.

(3) The parties could not agree whether or not the misrepresentations should be "material." We determine that Rule 3.2.12 should not contain the word "material." We adopt the same reasons for rejecting "material" as those stated above with respect to use of the term "substantial" (see discussion concerning Rule 3.2.11, above). We find that the absence of the modifier "material" allows the Commission to retain its full authority to review the circumstances of each provider and to exercise its discretion and judgment on a case-by-case basis.

D. Adoption of Rules

We are convinced that these rules regulating applications by local exchange telecommunications providers to execute a transfer are essential to achieving the goals of HB 1335 in an orderly and timely fashion. The rules appended to this Decision as Attachment A are appropriate for adoption.

III. ORDER

A. The Commission Orders That:

1. The rules set forth in Attachment A are adopted.
2. This Order adopting the attached rules shall become effective 20 days following the Mailed Date of this Decision in the absence of filing of an application for rehearing, reargument, or reconsideration. In the event an application for rehearing, reargument, or reconsideration to this Decision is timely filed, and in the absence of further order of this Commission, this

Order of adoption shall become final upon a Commission ruling denying any such application.

3. Within 20 days of final Commission action on the attached rules, the adopted rules shall be filed with the Secretary of State for publication in the next issue of the *Colorado Register* along with the opinion of the Colorado Attorney General regarding the legality of the rules.

4. The adopted rules shall also be filed with the Office of Legislative Legal Services within 20 days following the above-referenced opinion of the Colorado Attorney General.

5. The 20-day period provided for in 40-6-114(1), C.R.S., with which to file applications for rehearing, reargument, or reconsideration begins on the first day following the effective date of this Order.

6. This Order is effective on its Mailed Date.

B. ADOPTED IN SPECIAL OPEN MEETING March 7, 1996.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Commissioners