

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

* * *

IN THE MATTER OF THE)
PROPOSED RULES REGARDING)
IMPLEMENTA-TION OF 40-15-) DOCKET NO. 95R-557
101, *et seq.*-RESALE OF)
REGULATED TELECOM-)
MUNICATIONS SERVICES.)

**COMMISSION DECISION GRANTING, IN PART, AND
DENYING, IN PART, APPLICATION FOR
RECONSIDERATION, REARGUMENT, OR REHEARING
AND ADOPTING RULES**

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Mailed Date: April 26, 1996
Adopted Date: April 25, 1996
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I. BY THE COMMISSION:

A. Procedural Background

1. This matter is before the Commission to consider the Applications for Rehearing, Reargument, or Reconsideration ("Applications for RRR") of Decision No. C96-351, timely filed on April 22, 1996, by AT&T Communications of the Mountain States, Inc. ("AT&T"); MCI Telecommunications Corporation ("MCI"); MFS Intelenet of Colorado, Inc. ("MFS"); TCI Communications, Inc., Teleport Communications Group Inc., and Sprint Communications Company L.P. (collectively "TCI *et al.*"); and US WEST Communications, Inc. ("USWC").

2. Decision No. C96-351 was mailed on April 1, 1996. In the decision, the Commission adopted Rules for the Resale of Telecommunications Exchange Services, 4 CCR 723-40. The rules were attached to the decision.

3. The Applications for RRR take issue with our adoption of Rules 2.2, 3.6, 6, 7.1, 8.1, 8.3 and 8.4. Based on our discussion below, we will grant in part and deny in part these Applications for RRR.

B. Discussion

1. Rule 2.2. MCI, MFS, TCI *et al.*, and USWC all took issue with Rule 2.2 as adopted. Specifically, all four of these applicants for RRR objected to the provision of Rule 2.2 which imposes incumbent status on new entrants after three years have passed post-certification. According to Rule 2.2, if the new entrant believes, after three years, that it should not be treated as an incumbent, the new entrant may apply with the Commission for continuation of new entrant status.

a. MCI and MFS argue that the three year test improperly places the burden on a new entrant to prove that it should not be treated as an incumbent after three years. We are of the opinion that this burden is not so significant as to constitute a barrier to entry. Further, we do not believe that it impairs our ability to consider on a case-by-case basis whether a new entrant should be treated as an incumbent.

It merely creates a rebuttable presumption that after three years post-certification, a new entrant will be sufficiently established to be treated as an incumbent.

b. MFS also argues that the three year test impermissibly imposes the additional burden on new entrants of

charging the now-existing incumbent LECs' wholesale prices. MFS misconstrues the rule. There is no requirement that the wholesale rates to be charged by a new entrant reclassified as an incumbent will be the same as the wholesale rates charged by now-existing LECs. There is no necessity to modify Rule 2.2 to correct this misapprehension.

c. TCI *et al.* also assert that the three year test imposes improper burdens on new entrants. Specifically, TCI *et al.* claim that the three year test would arbitrarily impose on new entrants the obligation to charge wholesale prices for services to be resold. As discussed above, we do not believe that the burdens imposed by the three year test are unreasonable.

d. USWC takes an entirely different approach--it argues that new entrant status should expire on July 1, 1999, without regard to certification date for the new entrants. We believe that such a limitation would arbitrarily abolish the competitive toe-hold created by the Telecommunications Act of 1996 ("the Act") by differentiating between the regulatory schemes applicable to new entrants and to incumbents. Under USWC's proposal, a new entrant obtaining certification late in the set three-year period would be reclassified as an incumbent regardless of its inability to establish itself through operation over time. We will reject USWC's argument.

e. In addition, TCI *et al.* argue that the

definition contained in Rule 2.2 improperly uses the disjunctive "or" instead of the conjunctive "and" when it refers to the factors which will be considered in determining whether a new entrant will be treated comparably to an incumbent. As we stated in Decision No. C96-351, our intent was to enumerate the factors to be considered as they are set forth in 252(h)(2) of the Act. Decision No. C96-351 at 12.

Subsection 252(h)(2) of the Act uses "and." Since our intent was to be consistent with the Act, we will modify Rule 2.2 to substitute "and" for "or" in that portion of the rule which enumerates the factors which will be considered in the determination of whether to treat a new entrant as an incumbent. This change is consistent with our decision today to modify the same definition in the rules adopted in Docket No. 95R-556T.

2. Rule 3.6. Rule 3.6 provides that incumbent facilities-based telecommunications providers charge a wholesale price for services sold for resale, determined according to the standard set forth in 252(d)(3) of the Act.

USWC supported Option 1 for a proposed Rule 4.4, which we considered during our rulemaking proceedings. USWC argues that we should abandon the federally-imposed standard and adopt this proposed Rule 4.4 containing a new definition, that of "relevant cost," as the floor for the determination of the wholesale rate to be charged. We do not believe that USWC has

provided either a new argument in support of its proposal or an adequate basis to justify our departure from the requirements of the Act. We will reject USWC's argument.

3. Rule 6. USWC plows old ground when it reiterates its argument that the Commission may not require tariff filings under Rule 6. We have addressed USWC's arguments in Decisions No. C96-291, C96-347 and C96-351. We will not repeat our reasoning here. We will reject, again, USWC's argument.

4. Rule 7.

a. USWC maintains that if the Commission retains its tariff-filing requirement, Rule 7.1 must be modified to remove the requirement that negotiated agreements may not conflict with effective rates, terms or conditions contained in the tariff of the telecommunications service provider. As we discussed in Decision No. C96-347, at 28, a tariff and a negotiation process may coexist where generally available terms and conditions are set forth in tariffs, and other items are left for private negotiations. We note that one of the purposes of a tariff is to ensure that listed terms and conditions ... are publicly known and generally available to all customers on a uniform, nondiscriminatory basis.

We believe that tariff and contract provisions may be construed harmoniously. It is conceivable that we may find that a term in a contract that we review for approval pursuant to 252 of the Act is inconsistent with the carrier's tariff rates, terms or conditions, but is nonetheless more

advantageous to the public than the tariff provisions. At that time, we will be able, on a case-by-case basis, to require that the carrier amend its tariff to reflect the more advantageous contract term in its tariff. We therefore reject USWC's argument.

b. We note that Rule 7.1 as adopted contains language that would require the Commission to process approvals of negotiated contracts under the Commission's Rules of Practice and Procedure. Since the adoption of Decision No. C96-351, we have adopted emergency rules concerning processing negotiated contracts for Commission approval. These emergency rules are not part of the Rules of Practice and Procedure. Therefore, we will delete the phrase in Rule 7.1 referring to the Commission Rules of Practice and Procedure.

5. Rule 8.1.

a. AT&T argues in its Application for RRR that Rule 8.1 improperly requires resellers to comply with the provisions of 40-15-502(3), C.R.S. Section 40-15-502(3) provides that rates for basic local exchange service may not rise above certain statutorily-prescribed levels. AT&T is concerned that such a rate limitation could preclude a reseller from recovering its costs to provide basic local exchange service. Rule 8.1, which is simply a requirement that resellers comply with an existing Colorado statute, was proposed as a consensus rule, and we have adopted it verbatim.

AT&T has neither explained its departure from consensus nor justified our deviation from the consensus rule as adopted. We will reject AT&T's argument.

b. AT&T also contends that Rule 8.1 may conflict with the Commission's Costing and Pricing Rules. AT&T's concern may be allayed by our opinion that the Costing and Pricing Rules serve as a guide for methodologies to use in pricing telecommunications services. However, if and when the situation arises where there is a fact-specific conflict between the application of Rule 8.1 and of the Costing and Pricing Rules, we will make a determination at that time as to the proper way of resolving the issue. We will reject AT&T's argument.

6. Rule 8.3. AT&T and MCI object to the Rule 8.3 restriction on resale of services to the same category of customers to whom the service is available from the wholesaler. As we noted in Decision No. C96-351 at 21, the language in Rule 8.3 is taken directly from 251(c)(4)(B) of the Act. The extent to which we limit resale of services to the same category of customers to whom the wholesaler offers the services may not be a perfect solution to making the transition from monopoly regulation to a competitive market. However, we believe that there are many uncertainties associated with implementation of competition. As we stated in Decision No. C96-351, this restriction is designed to limit

arbitrage in the provision of resold services. Future events may show that this restriction is overly broad; however, we do not know that will be the case. Therefore, we intend that we will revisit this issue, at least as soon as we address the issue of revising the definition of basic service as required by 40-15-502(2), C.R.S. Therefore, we will decline to modify Rule 8.3 as requested by AT&T and MCI.

7. Rule 8.4. Rule 8.4 as adopted is identical with the proposed consensus rule. AT&T argues, however, that this rule may be ambiguous. In order to clarify our intentions, and to remove any ambiguity, we will grant AT&T's Application for RRR in this respect; we will add the word "reseller's" to modify the term "Commission-approved price." Thus, it should be abundantly clear that the reseller's own Commission-approved price for basic local exchange service must be disclosed on the end-user's bill.

8. With the changes enumerated above, and reflected in the attached Rules for the Resale of Telecommunications Exchange Services, we believe that the rules are consistent with federal and state law. They will assist the Commission in achieving the goal of competition in the local exchange telecommunications market in an appropriate way through the regulation of resale of services. The changes enumerated above should be adopted, and the Applications for RRR should be granted in part and denied in part consistent with the

above discussion.

II. ORDER

A. **The Commission Orders That**

1. The above-enumerated changes to the Rules for the Resale of Telecommunications Exchange Services are adopted, and are reflected in the rules attached as Attachment A.

2. The Applications for Rehearing, Reargument or Reconsideration of MCI Telecommunications Corporation, MFS Intelenet of Colorado, Inc., and US WEST Communications, Inc. are denied.

3. The Applications for Rehearing, Reargument or Reconsideration of AT&T Communications of the Mountain States, Inc. and of TCI Communications, Inc., Teleport Communications Group Inc., and Sprint Communications Company L.P. are denied in part and granted in part.

4. This order shall become effective 20 days following the Mailed Date of this decision in the absence of filing of an application for reconsideration, reargument, or rehearing. In the event an application for reconsideration, reargument, or rehearing 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.

B. Within 20 days of final Commission action, 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.

1. 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.

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

3. This Order is effective on its Mailed Date.

C. ADOPTED IN OPEN MEETING April 25, 1996.

COMMISSION

THE PUBLIC UTILITIES
OF THE STATE OF COLORADO

Commissioners

COMMISSIONER CHRISTINE E. M. ALVAREZ RESIGNED
EFFECTIVE APRIL 5, 1996.

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THE
PUBLIC UTILITIES COMMISSION
OF THE
STATE OF COLORADO

RULES FOR THE RESALE
OF TELECOMMUNICATIONS EXCHANGE SERVICES

4 CCR 723-40

BASIS, PURPOSE, AND STATUTORY AUTHORITY.

The basis and purpose of these rules is to establish regulations regarding the resale of telecommunications exchange services. These rules ensure the non-discriminatory availability of services for resale in a manner that allows resellers to provide service to their end-users in a way that enhances competition.

The rules are clear and simple and can be understood by persons expected to comply with them. They do not conflict with any other provision of law and there are no duplicating or overlapping rules.

These rules are issued pursuant to Sections 40-2-108, 40-15-108, 40-15-502 (5) (b), and 40-15-503 (2) (b) (IV) C.R.S.

RULE 4 CCR 723-40-1. APPLICABILITY.

These rules are applicable to all certified telecommunications providers that provide telecommunications exchange service in the state of Colorado.

RULE 4 CCR 723-40-2. DEFINITIONS.

The meaning of terms used within these rules shall be consistent with their general usage in the telecommunications industry unless specifically defined by Colorado statute or this rule. As used in these rules, unless

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the context indicates otherwise, the following definitions shall apply:

723-40-2.1 Facilities-based telecommunications provider: A certified provider of telecommunications exchange service who owns facilities.

723-40-2.2 Incumbent facilities-based telecommunications provider: A facilities-based telecommunications provider that, on February 8, 1996, provided telephone exchange service in Colorado and either (a) on such date was a member of the exchange carrier association or (b) is a person or entity that became a successor or assign of a member described in clause (a). If a provider has held a Certificate of Public Convenience and Necessity to offer local exchange service in Colorado for three years, such provider shall be considered an incumbent unless the Commission determines that such designation is not in the public interest. A facilities-based telecommunications provider which has not held a Certificate of Public Convenience and Necessity to offer local exchange service in Colorado for three years may also be considered an incumbent telecommunication provider if: (a) such provider occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a provider described above; (b) such provider has substantially replaced an incumbent facilities-based telecommunication provider described above; or, (c) the Commission has otherwise determined that such designation is in the public interest.

723-40-2.3 Operational support: Mechanisms used to facilitate the resale of telecommunications services including, but not limited to, the taking of service and repair orders, and the exchange of billing data and end-user account data in a manner consistent with Federal and Colorado law, through the mutual exchange of information between facilities-based telecommunications providers and resellers. This information may be exchanged in a variety of ways which may include, but is not limited to, electronic interfaces, technical interfaces, or access to databases.

723-40-2.4 Reseller: A certified provider of telecommunications services who purchases, pursuant to Commission-approved contract or

effective tariff, telecommunications services from a facilities-based telecommunications provider and then offers the services, either by themselves as separate tariff offerings or in combination with other services, to an end-user.

723-40-2.5 Rural telecommunications provider: A telecommunications provider which:

(1) serves only rural exchanges of ten thousand or fewer access lines;

(2) provides common carrier service to any local exchange carrier study area that does not include either (a) any incorporated place of 10,000 inhabitants or more, or any part thereof, based on the most recently available population statistics of the Bureau of the Census; or (b) any territory, incorporated or unincorporated, included in an urbanized area, as defined by the Bureau of the Census as of August 10, 1993;

(3) provides telephone exchange service, including exchange access, to fewer than 50,000 access lines;

(4) provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or,

(5) had less than 15 percent of its access lines in communities of more than 50,000 on February 8, 1996.

723-40-2.6 Telecommunications: The transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

723-40-2.7 Telecommunications exchange service: Service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area, operated to furnish subscribers with intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge.

723-40-2.8 Telecommunications provider: Any provider of telecommunications exchange services.

723-40-2.9 Telecommunications service: The offering of

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telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

RULE 4 CCR 723-40-3. REGULATION OF FACILITIES-BASED TELECOMMUNICATIONS PROVIDERS.

723-40-3.1 To encourage the development of balanced competition, all facilities-based telecommunications providers shall neither prohibit nor impose unreasonable or discriminatory conditions or limitations on, the resale of their regulated telecommunications services.

723-40-3.2 Facilities-based telecommunications providers shall not be required to modify their Commission-established local calling areas for the purpose of accommodating a reseller.

723-40-3.3 Operational Support

723-40-3.3.1 Each facilities-based telecommunications provider shall offer, in a non-discriminatory manner, pursuant to contract or tariff, the operational support necessary to enable each reseller, certified within the facilities-based telecommunications provider's service territory, the opportunity to provide the reseller's end-users the same quality of service, consistent with 4 CCR 723-2, as is available to the facilities-based telecommunications provider's end-users.

723-40-3.3.2 Such contracts shall be approved by the Commission and available for review pursuant to Commission order.

723-40-3.4 A facilities-based telecommunications provider may require a deposit from a reseller, pursuant to a Commission approved tariff filing,. The tariff shall specify, at a minimum, the amount of the deposit, the circumstances under which the deposit shall be required, when the deposit shall be returned, and the terms and conditions of the forfeiture of the deposit. Such deposit shall be in an amount sufficient to recover the reasonable costs borne by the facilities-based telecommunications provider in the event the reseller (1) abandons, discontinues, or curtails telecommunications exchange service without

Commission approval or (2) fails to pay the facilities-based telecommunications provider for services rendered.

723-40-3.5 In the event a reseller abandons, discontinues, or curtails telecommunications exchange service without Commission approval, the facilities-based telecommunications provider shall (1) notify each customer of the reseller's abandonment, discontinuance, or curtailment of service and of the customer's option to receive services directly from the facilities-based telecommunications provider or switch to another provider, and, (2) provide, at a minimum, exchange telecommunications service to each of the reseller's former customers pursuant to the facilities-based telecommunications provider's rates, terms, and conditions, unless the customer requests service from another provider.

723-40-3.6 Subject to Commission approval, an incumbent facilities-based telecommunications provider shall charge resellers a price equal to the retail price the provider charges end-users adjusted for any marketing, billing, collection, and other costs that will be avoided by the incumbent facilities-based telecommunications provider. For purposes of this rule, the price charged to resellers shall also reflect any package discounts the incumbent facilities-based telecommunications provider offers to its end-users for a combination of products if the resold combination of products purchased is identical.

RULE 4 CCR 723-40-4. SERVICE QUALITY.

723-40-4.1 For purposes of compliance with the Commission's Rules Regulating Telecommunications Service Providers and Telephone Utilities (4 CCR 723-2), the reseller is a customer of the facilities-based telecommunications provider.

723-40-4.2 All providers of local exchange services, including resellers, shall comply with all Commission rules applicable to local exchange service providers.

723-40-4.3 The provider of local exchange services that directly interfaces with the end-user is obligated to serve that end-user according

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to the Commission's rules.

723-40-4.4 Services offered for resale by the facilities-based telecommunications provider must be provisioned at the same standard of quality as the services offered to its end-users.

RULE 4 CCR 723-40-5. CONFIDENTIALITY.

723-40-5.1 Each facilities-based telecommunications provider shall establish procedures to ensure that its personnel, including but not limited to those personnel who are involved in the provision of resold service and operational support to resellers, (1) hold as confidential all information about the reseller and its end-users obtained solely from providing services to a reseller and, (2) not utilize that information to compete against the reseller.

723-40-5.2 Each facilities-based telecommunications provider shall establish procedures to ensure that specific or summarized information about a reseller or its end-users obtained solely from providing services to the reseller is not used by the provider to (1) develop marketing strategy to compete with the reseller or, (2) develop, market or sell services that compete with the reseller.

723-40-5.3 Each facilities-based telecommunications provider and each reseller of its services shall develop mutually agreeable and reciprocal arrangements for the protection of their respective customer proprietary network information.

RULE 4 CCR 723-40-6. TARIFF FILINGS.

723-40-6.1 Except for those providers addressed in Rule 6.2, each facilities-based telecommunications provider shall file tariffs with the Commission implementing the resale of services according to these rules within 30 days of the effective date of these rules, or within 30 days of the date the facilities-based telecommunications provider receives operating authority.

723-40-6.2 Rural facilities-based telecommunications providers shall

file tariffs with the Commission implementing the resale of requested services according to these rules within 30 days after such company has received a *bona fide* request by a reseller that has been granted operating authority within the facilities-based telecommunications provider's service territory and the Commission has determined that such request is not unduly economically burdensome and is technically feasible.

RULE 4 CCR 723-40-7. NEGOTIATION, MEDIATION, AND ARBITRATION.

723-40-7.1 Nothing in Rule 6 shall be construed to limit a telecommunications provider's ability to reach a negotiated, mediated, or arbitrated agreement with respect to the rates, terms, and conditions associated with the resale of telecommunications services. Such agreements shall not be inconsistent with the rates, terms, or conditions contained in a telecommunications provider's currently effective tariff~~_, and will be processed according to the applicable Commission Rules of Practice and Procedure.~~

723-40-7.2 All agreements for resale of telecommunications services shall be submitted to the Commission for approval.

RULE 4 CCR 723-40-8. REGULATION OF RESELLERS.

723-40-8.1 All providers of residential basic local exchange services shall price such services to comply with statutory provisions of 40-15-502(3).

723-40-8.2 Until U S WEST Communications, Inc., is authorized to provide interLATA services in Colorado, or until February 8, 1999, whichever is earlier, a telecommunications provider that serves greater than 5 percent of the nation's presubscribed access lines may not jointly market, in Colorado, telecommunications exchange service obtained from U S WEST Communications, Inc., pursuant to 47 U.S.C. 251 (c)(4) with interLATA services offered by that telecommunications provider.

723-40-8.3 A reseller that obtains a telecommunications service at wholesale that, at retail is available only to a category of subscribers,

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is prohibited from offering such service to a different category of subscribers.

723-40-8.4 If the reseller is reselling basic local exchange service to a particular end-user, the end-user's bill must separately identify the reseller's Commission-approved price for basic local exchange service.

RULE 4 CCR 723-40-9. DISPUTE RESOLUTION. The Commission shall resolve disputes arising out of any provision of resold telecommunications services pursuant to these rules.

RULE 4 CCR 723-40-10. VARIANCE AND WAIVER. The Commission may permit a variance or waiver from these rules, if not contrary to law, for good cause shown and if it finds that compliance is impossible, impracticable or unreasonable.