Decision No. C05-0802

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 04A-411T

IN THE MATTER OF THE COMBINED APPLICATION OF QWEST CORPORATION FOR RECLASSIFICATION AND DEREGULATION OF CERTAIN PART 2 PRODUCTS AND SERVICES AND DEREGULATION OF CERTAIN PART 3 PRODUCTS AND SERVICES.

DOCKET NO. 04D-440T

STAFF OF THE COLORADO PUBLIC UTILITIES COMMISSION'S PETITION FOR A DECLARATORY ORDER CONCERNING THE RECLASSIFICATION AND DEREGULATION OF TELECOMMUNICATIONS SERVICES UNDER PARTS 2 AND 3, TITLE 40, ARTICLE 15 OF THE COLORADO REVISED STATUTES.

ORDER APPROVING SETTLEMENT WITH MODIFICATIONS

Mailed Date: June 28, 2005
Adopted Date: June 6, 2005

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I. BY THE COMMISSION

A. Introduction

1. This matter comes before the Commission for consideration of the Application for Reclassification of Certain Part 2 Services and Products, and Deregulation of Certain Part 3 Services and Products (Application) filed by Qwest Corporation (Qwest) on October 1, 2004,[1] and the related Stipulation and Settlement Agreement (Settlement Agreement) submitted by Qwest, Commission Staff (Staff) and the Colorado Office of Consumer Counsel (OCC) on April 22, 2005.[2]

2. Procedurally, Qwest requests reclassification of certain retail telecommunications services and products from Part 2 regulated telecommunications services (§ 40-15-201, C.R.S. *et seq.*) to Part 3 emerging competitive telecommunications services and products (§ 40-15-301, C.R.S. *et seq.*), pursuant to § 40-15-207, C.R.S. The Part 2 services and products for which Qwest seeks reclassification as Part 3 services and products include basic local exchange service, including residential and business, white page directory listings and operator services necessary for the provision of basic local exchange service. It was not clear at the time Qwest filed the

[1] We assigned Docket No. 04A-411T to this Application.

[2] The Signatories filed the original Stipulation and Settlement Agreement on April 22, 2005, and subsequently filed Corrected Stipulation and Settlement Agreement on May 3, 2005, a Second Corrected Stipulation and Settlement Agreement on May 6, 2005 and a Third Corrected Stipulation and Settlement Agreement on May 17, 2005.

Application whether Part 2 services and products subject to reclassification as Part 3 services and products would include additional residential and business local exchange access lines.

3. Qwest simultaneously seeks deregulation of certain Part 3 emerging competitive telecommunications services and products pursuant to § 40-15-305, C.R.S., which includes both existing Part 3 services and products, as well as those Part 2 products and services which Qwest seeks to reclassify as Part 3 services and products as part of this docket. Qwest also moves for a waiver from certain portions of Commission Rule 4 *Code of Colorado Regulations* (CCR) 723-38-8.2 pursuant to 4 CCR 723-1-59 and 723-38-13.

4. According to the Application, Qwest seeks deregulation of all retail services with the exception of N-1-1 services, emergency services and switched access services. Qwest seeks deregulation of all remaining services including primary lines, additional lines, intraLATA and interLATA interexchange services, bundled and packaged services, features, operator services necessary for the provision of basic local exchange service, tariffed and customer specific contracts, public access lines and analog private line with a capacity of less than 24 voice grade circuits. According to the Application, Lifeline service would be deregulated but applicable discounts would be tariffed.

5. The Application further provides that Qwest will maintain its Provider of Last Resort (POLR) designation with respect to primary residential and business access lines, but the terms and conditions would no longer be regulated.

6. Land Development Agreements (LDA) would no longer be regulated under the terms of the Application because, according to Qwest, those agreements are commercial agreements with developers and do not arise out of Qwest’s obligation to serve end users.

7. The Application proposes to continue the Colorado High Cost Support Mechanism (CHCSM) as currently structured from the Commission's treatment of Western Wireless.[3] However, Qwest represents that it does not propose to include aspects of the Western Wireless decisions other than providing the basic service offering priced under the requirements of the statutory rate cap. The Application provides that Qwest would continue to receive support on all residential and business local exchange access lines. Qwest represents in its Application that, although all basic local exchange access lines would no longer be regulated, it would commit to the continuation of offering an unpackaged basic local exchange offering as long as such lines remain supported by the CHCSM.

8. The Application further provides that, if granted, the Commission would retain jurisdiction over slamming pursuant to statute and Commission rules, as well as its enforcement under the Federal Communications Commission's (FCC) rules and regulations. If granted, Qwest's Application would eliminate all price and service quality regulation for those services no longer subject to Commission oversight.

II. PROCEDURAL HISTORY

A. July 21, 2004 Application

9. Qwest originally filed a nearly identical application on July 21, 2004, whereby it sought reclassification of its Part 2 products and services as Part 3 products and services, and deregulation of those reclassified Part 3 products and services, as well as its existing Part 3 products and service. As part of that original application, Qwest also sought waiver of Rule 4

[3] *Western Wireless Holding Co., Inc., Application for Designation as an Eligible Telecommunications Carrier and Western Wireless Holding Co., Inc., Application for Designation as an Eligible Telecommunications Provider*, Docket No. 00K-255T, *See* Decision Nos. R01-0019, C01-0476 and C01-0629; *In the Matter of the Application of Western Wireless Holding Co., Inc. for Designation as an Eligible Telecommunications Carrier,* Docket No. 03A-061T, Decision No. C04-0545.

CCR 723-38-8.2, the notice requirement for deregulation applications. Rather than provide notice in newspapers of general circulation throughout the state utilizing a legal format, Qwest sought permission to provide notice to its customers of its filing through a bill insert to be mailed during a regular billing cycle not later than 30 days after the Commission issued its notice deeming the application complete.

10. In response to Qwest's July 2004 application, we issued Decision No. C04-0858, which sought additional information from Qwest regarding Qwest's interpretation of the statutory timelines found at § 40-15-305(1)(c), C.R.S. That provision holds that the Commission must rule within 180 days (plus an additional 90 days if necessary) after filing of the application. Given the time required to print and send out bill inserts, we had reservations that we could render a decision within the statutory time requirements.

11. One of the questions presented was whether the Commission possesses the legal authority to waive the time limits of § 40-15-305(1)(c) for issuing a decision, even with Qwest's agreement to waive those time limits. Qwest responded that, since it was the only party with standing to demand that the Commission meet the statutory deadline, and since it agreed to waive such deadline, the Commission did indeed possess the ability to waive the statutory deadlines.

12. We disagreed with Qwest and found that substantial case law existed that precluded the Commission from exceeding the statutory deadlines. In Decision No. C04-0905, effective August 4, 2004, we held that the language of § 40-15-305(1)(c) affirmed a clear legislative intent that, should we fail to render a decision within 270 days, we would forfeit jurisdiction to issue a decision, and the application would be granted by operation of law. As a result, we found that the time limitations of § 40-15-305(1)(c) are jurisdictional, and we had no

option but to render a decision within 270 days after the filing date of the application. We also found that Qwest may not waive the statutory time limitations.

13. Because of our finding regarding § 40-15-305(1)(c)and given the tight time parameters under which we were operating, we denied Qwest's motion to waive Rule 38-8.2 and to waive the notice requirements of § 40-3-104(c)(c)(I)(B), C.R.S. However, we posed two options for Qwest to consider. We held that Qwest could conduct a direct mailing notice to all its customers as long as this was accomplished within 15 days of the effective date of our Decision (August 4, 2004). If Qwest chose this option, we would extend the intervention deadline to September 3, 2004 to allow customers an appropriate amount of time to intervene, protest, or otherwise comment on the application. Should Qwest choose not to expend the time and money to complete a direct mailing, we would dismiss the application without prejudice at the Commissioners' Weekly Meeting on August 11, 2004. Qwest could then file an application at its own discretion when it felt it could meet the required notification timelines.

14. On August 10, 2004, Qwest filed a response to Decision No. C04-0905 in which it indicated it was withdrawing its application and would refile at a future time, after issuing bill inserts notifying its customers of the new application to its customers. We granted that withdrawal by Decision No. C04-1022, effective August 30, 2004.

B. October 1, 2004 Application

15. As indicated *supra*, Qwest filed its Application, which is the subject of this docket, on October 1, 2004. The Application was identical to its July 21, 2004 application and sought regulatory relief of all Qwest's retail services with the exception of N-1-1 services, emergency services and switched access services, as did its previous application.

16. The Commission provided 30-days' notice of the Application to the public on October 8, 2004. The notice indicated that any person desiring to intervene or participate as a party in this docket must file a petition for leave to intervene or other appropriate pleading to intervene no later than November 10, 2004. The Commission also invited written comments from parties who did not wish to intervene or become a party to this matter.

17. Concomitantly with this docket, Staff filed a Petition for a Declaratory Order Concerning the Reclassification and Deregulation of Telecommunications Services (Petition),[4] raising certain questions relating to Qwest's deregulation Application. As a result of Staff's Petition, in Decision No. C04-1193, issued October 14, 2004, we ordered the Parties to submit legal briefs addressing the questions raised in the Petition. We ordered that, among other issues, the Parties should address: a) whether applications for deregulation or reclassification of telecommunications services under §§ 40-15-207 and 40-15-305, C.R.S. relate to services or specific providers (*i.e.*, whether the grant of Qwest's deregulation Application would apply only to Qwest or to all providers of the services subject to the application); b) if a ruling in such applications would apply to services instead of specific applicants, whether the Commission must initiate a rulemaking proceeding to consider any portion of Qwest's Application, or whether the Commission may proceed by application alone; and c) how an application under §§ 40-15-207 and 40-15-305, C.R.S., by Qwest could affect the incumbent rural local exchange providers. We ordered the Parties to submit briefs by October 22, 2004.

18. Additionally, because Staff's Petition requested that we rule on issues relating to reclassification and deregulation applications under §§ 40-15-207 and 40-15-305, C.R.S. and then apply those rulings to Qwest's specific Application, we found the two dockets contained

[4] We assigned Docket No. 04D-440T to this Petition.

similar legal and factual questions and therefore found that consolidating Docket Nos. 04A-411T and 04D-440T was proper.

19. Decision No. C04-1193 also acknowledged the entries of appearance and notices of intervention filed by Qwest, OCC, AT&T Communications of the Mountain States, Inc., and TCG Colorado (AT&T). The requests for intervention in Docket No. 04A-440T filed by the Colorado Telecommunications Association, Inc. (CTA), Time Warner Telecom of Colorado, LLC (Time Warner), and the American Association of Retired Persons (AARP) were granted. As a result of the consolidation of the two dockets, we also noted that any party to Docket No. 04A-440T was made a party to Docket No. 04A-411T without further request.

20. On October 15, 2004, we issued Decision No. C04-1203, which waived certain procedural rules and addressed Qwest's proposed notice of the Application to its customers statewide. We waived the procedural requirements of Rule 4 CCR 723-38-10, given the comprehensive nature of the Application. We also waived the 15-day customer notice requirement found in Rule 4 CCR 723-38-8.2, as well as the four columns wide by 11 inches high size requirement found in § 40-3-104(1)(c)(I)(A), C.R.S.

21. We waived these rules based on Qwest's representations that it had mailed bill insert notices to its customers, as well as published newspaper notices in every county in the state. However, in order to ensure the newspaper notice adequately covered all counties of the state, we required Qwest to publish the notice in a newspaper that has the largest circulation in each of the respective 64 Colorado counties as soon as possible. Qwest was also required to file attestations of those publications.

22. On November 5, 2004, we issued Decision No. C04-1296 which partially granted Staff's Petition for Declaratory Order that §§ 40-15-207 and 40-15-305, C.R.S. are applicable to

reclassification and deregulation of services for all providers in specific geographic markets. Staff, Qwest, Time Warner, CTA and OCC all submitted briefs. Based on the arguments advanced by the parties, we agreed with Staff albeit with one exception.

23. We agreed with Qwest that § 40-15-306, C.R.S. indicates that intraLATA toll service may be deregulated with respect to an "applicant" only.[5] We found that the plain language of § 40-15-306, C.R.S. indicates that Qwest's Application for deregulation should pertain to Qwest only with respect to intraLATA toll service. With respect to all other services, we agreed with the other parties that the application should apply to services. We found this to be clear from the plain language of §§ 40-15-207 and 40-15-305, C.R.S. We further held that to find otherwise could lead to asymmetric regulation. Consequently, we held that Qwest's application will apply to its service area for the services it offers. For those services that Qwest offers throughout Colorado, the application would apply statewide. For those services offered on a more limited basis, the Application would apply to that specific service area. We also defined the scope of Qwest's service territory as it existed on the date of filing the Application, or October 1, 2004.

24. The Parties also addressed whether a rulemaking was required as part of the Application. We found that the relevant statutes contemplate that consideration of deregulation take place in the context of an application, which in turn requires an adjudicatory process. However, we noted that a rulemaking may be necessary to implement the decision in this docket.

[5] Section 40-15-102(16), C.R.S. provides that intraLATA interexchange service "means long-distance service within a LATA." Section 40-15-102(31), C.R.S. defines toll service as "a type of telecommunications service, commonly known as long-distance service, that is provided on an intrastate basis between LATAs and within LATAs and that is (a) not included as a part of basic local exchange service; (b) provided between local calling areas; and (c) billed to the customer separately from basic local exchange service." Section 40-15-306 provides: "IntraLATA interexchange telecommunications services shall be regulated in accordance with the provisions of this part 3; except that such services shall not automatically be deregulated as part 4 services pursuant to section 40-15-305 except upon application of the provider of such services."

25. Finally, we found that all Colorado telecommunications providers were indispensable parties to this docket, because a decision deregulating services could potentially alter the nature of competition between providers with respect to those services.

26. Given our Decision regarding Staff's Petition, we ordered Qwest in Decision No. C04-1331 to publish an additional notice in the form of an advertisement in the *Denver Post* and *Rocky Mountain News*. We edited the ordered advertisement to delete the intervention date and emphasize that comments could be filed at any point up to the hearing dates. Further, any interventions filed after the November 10, 2004 date would be determined on a case-by-case basis.

27. Having previously waived the procedural requirements of Rule 4 CCR 723-38-10, we set new procedural requirements by Decision No. C04-1402 issued November 29, 2004. That Decision set specific dates for legal briefs, reply to legal briefs, and answer testimony. Hearings were set for April 18-29, 2005. Statements of Position were due on May 16, 2005 and per statutory requirements, a Commission decision is due on or before June 28, 2005.

28. We sought input from the parties via legal briefs on two issues. The first issue involved the Commission's authority to reclassify services within Article 15 of Title 40 of the Colorado Statutes in one application from Part 2 to Part 3 and subsequently directly to Part 4 without a transition period. In essence, we would decide whether to shift services from regulation under Part 2 directly to deregulation under Part 4.[6] Since this is what Qwest sought in the Application, we requested input from the parties as to whether this could be legally

[6] Section 40-15-207(1)(a), C.R.S. states: "Notwithstanding any other provision of this title, upon its own motion or upon application by any person, the commission shall regulate pursuant to part 3 of this article, specific telecommunications services regulated under this part 2 upon a finding that there is effective competition in the relevant market for such service and that such regulation under part 3 of this article will promote the public interest and the provision of adequate and reliable service at just and reasonable rates."

accomplished. We also sought input from the parties as to what statutory provisions would apply to a service deregulated pursuant to this application. We directed the parties to consider several questions in that vein.[7] Because the analyses provided by the parties on these two issues could significantly narrow the scope of the proceedings, we requested that legal briefs be submitted on January 7, 2005, with reply briefs due on January 24, 2005. The filing of such briefs was discretionary.

29. In Decision No. C05-0094, issued January 25, 2005, we set seven public hearings throughout the state on the Application. Hearings were scheduled for and conducted February 15, 2005 through April 18, 2005 in Grand Junction, Durango, Colorado Springs, Leadville, Steamboat Springs, Fort Collins and Denver. We received testimony from the public regarding the Application, which became part of the record in this matter.

30. On February 10, 2005, we issued Decision No. C05-0178, an Interim Order in which we considered the threshold legal issues we found determinative regarding the procedural tenor of Qwest's Application to deregulate its retail services. As indicated *supra*, in Decision No. C04-1402 we asked the parties to submit legal briefs on the question of whether services currently regulated under § 40-15-201, *et seq.,* C.R.S., can be completely deregulated without first being regulated under Part 3 of Article 15. In Decision No. C05-0178, we determined,

[7] The questions we posed were as follows: If a service is deregulated pursuant to Qwest's Application, what portions of Title 40 would still apply to that service? For example, § 40-15-402(1), C.R.S., provides: "Nothing in articles 1 to 7 of this title or parts 2 and 3 of this article shall apply to deregulated services and products pursuant to this part 4." Does it follow that §§ 40-15-101 through 113, C.R.S., would apply? What about §§ 40-15-501 *et seq.*, C.R.S.? Would this be at the discretion of the Commission? If a service is deregulated, will there be any resulting inconsistencies with respect to statutory treatment of that service? Generally, what authority would remain with the Commission, if any, to administer Title 40 C.R.S.?

based on the filed briefs,[8] that services must be reclassified first to Part 3 before they may be completely deregulated under Part 4 of Article 15.

31. Qwest argued that Article 15 allows for complete deregulation of services currently regulated under Part 2.[9] Qwest based its argument on a legislative amendment it attached to its legal brief. According to Qwest, had the amendment passed, it would have required a service to spend 18 months regulated under Part 3 before being deregulated. Because the final bill did not contain the 18-month provision, Qwest suggested that the General Assembly did not intend that services spend any time under Part 3 before being deregulated. Qwest argued that requiring a service to be regulated under Part 3 for a period of time before deregulation of that service reads into the statute, language that does not exist.

32. Staff argued that the statutory language neither specifically allows nor prohibits a service regulated under Part 2 from being deregulated. As a result, the Commission may allow a product to move from Part 2 to Part 4, but only if the evidence presented at hearing clearly and convincingly meets the criteria of both §§ 40-15-207 and 40-15-305, C.R.S. Staff contended that such a reading of the statutes fulfills the Commission's obligations with respect to

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[8] Briefs were filed by Qwest, Staff, OCC, DIECA Communications, Inc., doing business as Covad Communications Company (Covad), and jointly by Cbeyond Communications, LLC. Time Warner, XO Colorado, LLC and Xpedius Communications, LLC. (collectively, CLECs).

[9] Section 40-15-207, C.R.S., provides: (1)(a) Notwithstanding any other provision of this title, upon its own motion or upon application by any person, the commission shall regulate, pursuant to part 3 of this article, specific telecommunications services regulated under this part 2 upon a finding that there is effective competition in the relevant market for such service and that such regulation under part 3 of this article will promote the public interest and the provision of adequate and reliable service at just and reasonable rates.

Section 40-15-305, C.R.S., provides: (1)(a) Notwithstanding any other provision of this title, upon its own motion or upon application by any person, the commission shall deregulate, pursuant to part 4 of this article, specific telecommunications services subject to this part 3 upon a finding that there is effective competition in the relevant market for such service and that such deregulation will promote the public interest and the provision of adequate and reliable service at just and reasonable rates.

statutory interpretation because it takes into account "all of the language in Title 40, including, most importantly, the statement of legislative intent" set forth in § 40-15-101, C.R.S.

33. OCC and the CLECs maintained that services must be regulated under Part 3 before they may be deregulated. They pointed to the plain language of the statute, and the intent of Article 15. The OCC argued that reclassifying Part 2 services as Part 3, and then regulating them during a transition period before considering whether to reclassify them as Part 4 services, is consistent with the plain language of the statute and the legislative intent to promote the public interest. The OCC noted that § 40-15-201(2), C.R.S., states: "The following products, services and providers are declared to be subject to regulation pursuant to this part 2 and subject to potential reclassification under section 40-15-207." The OCC interpreted this to mean that services must be regulated under Part 3 before complete deregulation.

34. Covad argued that the statutes set forth exclusive lists as to what may be moved from Part 2 to Part 3 and from Part 3 to Part 4. Specifically, Covad asserted that § 40-15-201(2), C.R.S., sets forth the only products that may be moved from Part 2 to Part 3, and § 40-15-301(2), C.R.S., sets forth the only items that may be deregulated. Covad argued that the explicit terms of §§ 40-15-207 and 40-15-305 prohibit the General Assembly from moving services from Part 2 to Part 4, regardless of whether they are regulated at any time under § 40-15-305. Covad concluded that because the list of services in § 40-15-305 is specific and finite, and does not include Part 2 services, the only legally permissible conclusion is that only the services listed in § 40-15-301(2) are eligible for deregulation under Part 4.

35. After a thorough review of the filed briefs, and our own analysis, we concluded that, based on extensive case law regarding statutory interpretation and the plain language of § 40-15-207(1), C.R.S., the Commission *shall regulate* services under Part 3 that are currently

regulated under Part 2 upon a finding of effective competition in the relevant market. We found nothing in § 40-15-207 that provides for complete deregulation of services currently under Part 2. Based on the clear and unambiguous statutory language, we found that we must regulate under Part 3 those Part 2 services for which there is a showing of effective competition in the relevant market.

36. Similarly, we found nothing in the language of § 40-15-305 that would allow us to consider deregulation of Part 2 services pursuant to Part 4. Rather, we found the language quite clear: "[T]he commission shall deregulate, pursuant to part 4 of this article, specific telecommunications services subject to this part 3 …" § 40-15-305(1)(a), C.R.S. We found no mention of Part 2 services in this statute.

37. Further, we found that the relevant statutes are silent on the issue of movement from Part 2 to Part 4. We held, however, that § 40-15-207(1) is easily interpreted and we could therefore implement the statue by regulating services under Part 3 according to the Commission's rules and orders. We agreed with the OCC that, had the General Assembly intended for the Commission to have the authority to deregulate Part 2 services, it would have included the ability to reclassify services from Part 2 to Part 4 in the statute. We found that our reading of the law fulfills the legislative intent to transition to a free market.[10]

38. These findings were set forth in an Interim Order in Decision No. C05-0178, to which Qwest filed an application for rehearing, reargument or reconsideration (RRR) on March 2, 2005.

[10] Chairman Sopkin filed a Special Concurrence to the Commission's Decision. While agreeing with the Commission's findings, Chairman Sopkin pointed out his concern that the Commission was elevating form over substance and unnecessarily hampering the Commission's flexibility by requiring Part 2 service be regulated under Part 3 as a "weigh station" even if the § 40-15-305 criteria as applied to the service are shown to be satisfied.

39. On March 25, 2005, we issued Decision No. C05-0352 in which we denied Qwest's application for RRR as improper procedurally because we did not yet have a final Commission decision. We reasoned that Decision No. C05-0178 is an Interim Order of the Commission, more appropriately handled under Commission Rule 4 CCR 723-1-86(b)(2) which requires that Qwest file a motion to reconsider the Interim Order. We declined to construe Qwest's application for RRR as a motion under Rule 86(b) because we presumed that Qwest understands the Commission's rules and had reasons for filing an application for RRR in this matter. Qwest did then file a motion for reconsideration of an interim order, but subsequently withdrew that motion when it filed the Settlement Agreement with the Commission.

40. In Decision No. C05-0197, we took administrative notice of all matters in the Commission's files concerning Docket No. 04M-435T. That docket, which required that Colorado telecommunications providers respond to a survey on competition in Colorado, was created with this deregulatory docket in mind. The information was provided to the Commission with the understanding that it would be used to help the Commission determine the merits of Qwest's deregulation Application. Therefore, we found it appropriate to take administrative notice of all information contained in Docket No. 04M-435T.

41. On April 12, 2005, Qwest, OCC and Staff filed a Joint Motion to Continue Hearing, and Extend Procedural Deadlines. The parties represented that they were engaged in extensive settlement discussions and had made significant progress towards narrowing and resolving the disputed issues in this docket. The parties requested we vacate the first week of hearings scheduled in this matter and that hearings begin on April 25, 2005 to determine any remaining issues. The parties also requested a one-week extension for all procedural deadlines. In Decision No. C05-0442, issued April 13, 2005, we granted the motion in part.

We ordered the parties to file the settlement agreement on April 19, 2005. We further ordered that should a settlement agreement be filed, hearings on the terms of that settlement would begin on April 25, 2005.

42. On April 14, 2005, the parties filed another joint motion requesting we set aside or modify Decision No. C05-0442. The parties requested we reconsider the procedural timeline set out in that decision because they believed it impossible to file a settlement agreement by April 19, 2005. Instead, the parties suggested a status conference be held to provide additional information to the Commission. In Decision No. C05-0443, issued April 14, 2005, we ordered that a status conference be held the next day (April 15, 2005) in order to ascertain the progress of the settlement agreement. We also ordered the parties to be prepared to answer specific questions regarding the scope and status of settlement negotiations.

43. A status conference was convened as ordered at 9:00 a.m. on April 15, 2005. Appearances were entered by Qwest, Staff, OCC, ICG, AT&T, Colorado Payphone Association, Covad Communications, XO Communications, Time-Warner, Cbeyond, Eschelon, MCI and AARP. The parties, led by Qwest, responded to the questions we provided in Decision No. C05-0443. Counsel for Qwest indicated AARP, SECOM, Home Builders Association, CTA and Century-Tel were not actively involved in negotiations, but were monitoring the docket. Parties in agreement with, or not opposed to, the resolved issues as of the date of the status conference included Qwest, Staff, OCC, MCI, AT&T, ICG, XO, Cbeyond, Time Warner and Eschelon. Counsel for Qwest also indicated that the terms of the settlement could be reduced to writing and filed with the Commission by close of business on April 22, 2005.

44. Notably, at the status conference, counsel for Qwest indicated that should a settlement agreement be filed, Qwest would then consider the settlement agreement its "case in

chief." Counsel for Qwest further represented that, once the Commission renders a decision on any settlement agreement, Qwest would consider the Commission to have fulfilled its statutory obligation to render a decision within 270 days or no later than June 28, 2005. However, Qwest's counsel clarified that Qwest could ask for hearing on its original Application should the Commission deny a settlement agreement.

45. Based on the representations made at the status conference, we provided two possible procedural schedules based on whether a settlement agreement was filed. Should the parties file a settlement agreement we scheduled hearings on the settlement to begin on May 2, 2005. Statements of Position would be due on May 16, 2005.

46. Additionally, we found Qwest's representation that a proposed stipulation and settlement agreement shall be substituted for its Application and become its case in chief important procedurally. We interpreted Qwest's representation to mean that Qwest, with the submission of a stipulation and settlement agreement, shall have modified its request for relief from the specific relief requested in the Application to the specific relief presented in the stipulation and settlement agreement. Additionally, in order to avoid any subsequent confusion or misunderstanding regarding statutory time requirements or due process concerns, we required Qwest to indicate in writing in its motion for approval of any stipulation or settlement agreement in this matter, that the filing of a settlement agreement or stipulation shall substitute for its Application and become its "case in chief," and a final Commission decision regarding such stipulation and settlement agreement would satisfy the Commission's statutory obligation to render such a decision no later than June 28, 2005.

47. Further, because Qwest represented that a settlement agreement would serve as its case in chief in substitute of its Application, we required all Parties to enter into the record at

hearing all the pre-filed testimony they determine is in support of or relates to the settlement agreement.

48. On April 22, 2005, Qwest, Staff and the OCC (collectively, Settlement Parties) filed a Stipulation and Settlement Agreement purporting to resolve all issues necessary regarding Qwest's Application for Reclassification and Deregulation of Certain Part 2 Products and Services and Deregulation of Certain Part 3 Products and Services.

49. In Decision No. C05-0504, we acknowledged the filing of the Settlement Agreement and ruled on Qwest's subsequent Motion on Pre-filed Testimony. Qwest requested that we admit all pre-filed direct, answer, cross-answer, rebuttal and supplemental testimony into the record without the need for parties sponsoring such testimony to present the witnesses for direct or cross-examination on the pre-filed testimony. We found it reasonable and expeditious to admit the pre-filed testimony into the record without requiring the sponsoring witness at hearing. However, we granted the motion with the proviso that MCI witness Don Price and Staff witness John Trogonoski appear at the hearing in addition to the witnesses identified by the Parties.

50. We also set a Public Hearing in Denver on the terms of the Settlement Agreement for Thursday May 5, 2005. Additionally, we held that individuals unable to appear at the Public Hearing could submit written comments on the Settlement Agreement by the close of business on May 16, 2005.

51. Because we granted AARP's Motion to Substitute Counsel, filed on April 27, 2005, we found it reasonable and prudent to amend the procedural schedule by beginning the

hearing on the Settlement Agreement on May 3, 2005.[11] This allowed AARP's substituted counsel additional time to prepare its case.

52. Hearings on the Agreement were held May 3 – 6, 9 and 10, 2005. Parties entering appearances included Qwest, Staff, OCC, MCI, AT&T, ICG Telecom Group and ICG Communications, AARP, CenturyTel of Eagle/CenturyTel of Colorado, Inc., Colorado Telephone Association, and Colorado Payphone Association.

III. PROPOSED SETTLEMENT

A. Background

53. The Settlement Parties represent that through the Settlement Agreement, the parties propose an Alternative Regulation Plan that consists of two parts. The first part is referred to as "Market Regulation." The second part is referred to as "Modified Existing Regulation." The Settlement Agreement is comprised of several sub-parts that include: Market Regulation; Services Subject to Market Regulation; Modified Existing Regulation; Services Subject to Modified Existing Regulation; Quality of Service; and Parity of Regulation and the Ability of Competitive Local Exchange Carriers to Opt-Into the Plan. According to the Settlement Parties, the Settlement Agreement is consistent with state and federal laws and is an appropriate mechanism for Commission regulation of Qwest and any CLEC that desires to opt-into the Settlement Agreement in its entirety.

54. The Settlement Parties further represent that the Settlement Agreement is in the public interest, is supported by the record and is consistent with state and federal statutes and Commission rules. The Settlement Parties specifically reference House Bill 1336, enacted in 1987, codified at § 40-15-101, C.R.S., *et seq*., which promotes competition in the local

[11] *See* Decision No. C05-0509, issued April 29, 2005.

telecommunications market. According to the Settlement Parties, House Bill 1336 created the statutory framework by which the Commission, consumers and carriers operate, that includes the division of services among Part 2 regulated services, Part 3 emerging competitive services, and Part 4 deregulated services.

55. The Settlement Parties cite what they consider to be the relevant provisions enacted as part of House Bill 1336 and applicable here. For example, § 40-15-207, C.R.S. authorizes the Commission to reclassify a Part 2 regulated service as a Part 3 emerging competitive service upon a finding of a) effective competition in the relevant market; and b) that regulation under Part 3 will promote the public interest and the provision of adequate and reliable service at just and reasonable rates. *Id.* To make such a determination, the statute requires the Commission to consider several factors, including: (I) the extent of economic, technological, or other barriers to market entry and exit; (II) the number of other providers offering similar services in the relevant geographic area; (III) the ability of consumers in the relevant geographic area to obtain the service from other providers at reasonable and comparable rates, on comparable terms, and under comparable conditions; (IV) the ability of any provider of such telecommunications service to affect prices or deter competition; and (V) other factors the commission deems appropriate. *Id.*

56. The Settlement Parties also cite § 40-15-203(6)-(8), C.R.S., that authorizes the Commission upon application of a telecommunications provider regulated under Part 2, or upon its own motion, to refrain from regulation for competitive need for specific services otherwise subject to Commission jurisdiction in lieu of reclassification of a service under § 40-15-207.

57. Section 40-15-305, C.R.S. is cited as support for the Settlement Agreement because it authorizes the Commission to deregulate a service upon a finding that there is

effective competition in the relevant market for the service based on similar criteria as enumerated in § 40-15-207.

58. In addition, the Settlement Parties refer to House Bill 1335, enacted in 1995 and codified at § 40-15-501, C.R.S. *et seq*. The Settlement Parties refer specifically to § 40-15-501(1), C.R.S. to note the polices the legislature sought to advance by House Bill 1335, namely to "encourage competition in [the market for basic local exchange service] and strive to ensure that all consumers benefit from such increased competition." *Id*. That statute goes on to provide that "[t]he commission is encouraged, where competition is not immediately possible, to utilize other interim marketplace mechanisms wherever possible, with the ultimate goal of replacing the regulatory framework established in part 2 of this Article [15] with a fully competitive telecommunications marketplace statewide as contemplated in this Part 5." *Id*.

59. Reference is also made to § 40-15-502, C.R.S., which directs the Commission to "require the furtherance of universal basic service, toward the ultimate goal that basic service be available and affordable to all citizens of the state of Colorado." § 40-15-502(2)-(3). The Settlement Parties additionally cite § 40-15-503(2)(c), C.R.S. as directing the Commission to consider changing to forms of price regulation other than rate-of-return regulation for any provider of telecommunications services regulated under Part 2 or 3 of Article 40.

60. Finally, the Settlement Parties offer that the purpose of the federal Telecommunications Act of 1996 (Act) is to "provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced

telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."[12]

61. We shall address each component of the Settlement Agreement in turn, providing a summary of each term and condition, followed by our analysis and decision regarding each discrete issue when appropriate. For ease of reference, our analysis will address each term in the order as presented in the Settlement Agreement.

B. Effective Competition

62. Prior to reclassifying services and products from Part 2 to Part 3 of Article 15 C.R.S., the Commission is compelled to find, among other things, "that there is effective competition in the relevant market for such service …" § 40-15-207(1)(a), C.R.S. Likewise, when considering the deregulation of emerging competitive telecommunications services under Part 3, the Commission is charged with "finding that there is effective competition in the relevant market for such service …" § 40-15-305(1)(a), C.R.S.

63. As the Settlement Parties correctly point out in Section II of the Settlement Agreement, while Qwest asserted that the accommodative competitive entry provisions of the Act render the retail local telephone service market "contestable" and therefore, effectively competitive, Staff, OCC and several other intervenors vigorously argued that effective competition does not exist in Colorado. Those intervenors further argued that Qwest failed to meet the standards required under §§ 40-15-207 and 40-15-305, and that Qwest failed to demonstrate actual competition exists in the Colorado markets as required by statutes. As such, Staff, OCC and other intervenors recommended that the Commission deny Qwest's Application.

[12] *Citing, Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1* (1996).

Other intervenors suggested merely a relaxed form of regulation rather than full deregulation of Qwest's services.

64. According to the Settlement Parties, the Settlement Agreement strikes a balance between Qwest's aspiration to have its retail services deregulated and the advocacy of some parties to retain Commission jurisdiction over the retail services subject to Qwest's Application here. The Settlement Parties do not present a representation in the Settlement Agreement whether the record reflects that effective competition exists in much of the Colorado marketplace today. The Settlement Parties, however, agree that effective competition exists in the intraLATA and interLATA toll market in Colorado, and state that Qwest's intraLATA toll offering will be the only service deregulated in this proceeding. The Settlement Agreement indicates, however, that all Colorado intraLATA and interLATA services should be deregulated for all providers who choose to have such services deregulated.

65. Under the Settlement Agreement, no existing Part 2 retail services will be reclassified as Part 3 retail services, nor will existing Part 2 retail services or Part 3 retail services, other than toll be deregulated. The Settlement Agreement proposes that all retail services other than intraLATA toll for Qwest will remain subject to Commission jurisdiction under "Market Regulation" as to some retail services, and "Modified Existing Regulation" as to other services. These regulatory proposals will be explored in more depth below.

66. It is important to note that the Settlement Parties represent that they cannot reach resolution as to the classification of certain Part 2 and Part 3 retail services. The Settlement Parties further indicate that they *do not* seek Commission resolution of this issue, but reserve the right to assert their respective positions in any future proceeding. Nonetheless, the Settlement Parties indicate they agree on a regulatory treatment for these services and maintain that the

proposed regulatory treatment contains an adequate basis in statute, regardless of the classification of the specific services.

67. As a result, the Settlement Parties take the unified position that, for purposes of this Settlement Agreement, if any of the services are Part 2 services then, pursuant to § 40-15-203(6)-(8), the Commission may forbear from regulation of such services for competitive need. The Settlement Parties also agree that for purposes of this Settlement Agreement, if any of the services are Part 3 services, then pursuant to §§ 40-15-503 and 40-15-302, the Commission may regulate such services by utilizing other marketplace mechanisms and alternative forms of regulation.

68. The Settlement Parties indicate that should the Commission agree to the terms of the Settlement Agreement, the changed regulatory status of certain local exchange services would raise policy questions regarding the operation of the CHCSM. Because the Settlement Parties were unable to reach a resolution to questions such as which services should be supported by the CHCSM and the appropriate level of support, they agree to request that the Commission initiate an investigatory docket concerning these and other related issues concerning the CHCSM.

C. Commission Authority To Approve Stipulation

69. As a threshold matter, we must determine whether this Commission possesses the authority to approve the Settlement Agreement given the terms contained therein. After careful consideration of the relevant statutory scheme found in Article 15, we find that § 40-15-503(2)(c), C.R.S. provides authority for this Commission to regulate telecommunications providers as proposed under the terms of the Settlement Agreement. Section 40-15-503(2)(c)(I) as follows:

> The commission shall consider changing to forms of price regulation other than rate-of-return regulation for any telecommunications provider that provides services regulated under part 2 or 3 of this article and shall consider the conditions under which such a change may take place to ensure that telecommunications services continue to be available to all consumers in the state at a fair, just, and reasonable rates.

Section 40-15-503(c) (II), C.R.S. provides:

> As used in this paragraph (c), 'price regulation' means a form of regulation that may contain, without limitation, any of the following elements:
>
> (A) Regulation of the price and quality of services;
>
> (B) Price floors and price ceilings:
>
> (C) Flexibility in pricing between price floors and price ceilings;
>
> (D) Modified tariff requirements;
>
> (E) Incentives for increased efficiency, productivity, and quality of service.

70. Given the plain meaning of these statutory provisions, we find it reasonable to include all terms of the Settlement Agreement under the statutory umbrella of price and quality of service regulation. We note that this Settlement Agreement, as did the one that settled Docket 97A-540T, allows a form of price regulation that is not rate-of-return regulation. It is an alternative form of regulation that provides for modified tariff requirements for some services, maintains current tariff requirements for some services, and allows market competition to provide incentives for increased efficiency, productivity and quality of service. This new form of regulation is implemented under the terms of the Settlement Agreement without complete deregulation of any service except for toll.

71. During the hearing, several witnesses testified to the changing nature of the telecommunications market, as well as potential changes that should cause the Commission concern with respect to the proposed form of regulation proposed in the Settlement Agreement.

We are cognizant of such concerns and emphasize that, should we believe it necessary, we may at any time alter or amend any portion of the proposed regulatory scheme except for toll.

D. Market Regulation

72. Sections III and IV of the Settlement Agreement outline a new regulatory regime the Settlement Parties identify as "Market Regulation" for the treatment of certain products and services provided by Qwest. According to the Settlement Parties, the general underlying goal of Market Regulation is that, to the greatest extent possible, market forces will govern prices, terms and conditions for specified services while at the same time retaining Commission jurisdiction over them.

73. Section III of the Settlement Agreement sets the terms and defines the operation of Market Regulation. Under this new regulatory scheme, no tariffs will be filed for services, although these services will remain in their current statutory classifications. Additionally, general tariff provisions will not apply to these services and Qwest may geographically deaverage its prices. Further, Qwest will post on its website the rates, terms and conditions associated with the services under Market Regulation in a timely and easily accessible manner and update such information regularly. Qwest will maintain and archive this information for a period of not less than two years. Changes in rates, terms and conditions will go into effect without any initial Commission review or approval.

74. Qwest will also be permitted to introduce and withdraw products and services under Market Regulation without Commission approval. The Settlement Agreement defines "withdraw" to mean cease offering a product to new customers. We interpret this to mean that services provided to existing customers will be grandfathered under the terms of the Settlement Agreement. Qwest must also continue to abide by the Commission's rules and statutes for the

discontinuance of any product or service. Discontinuance is defined as ceasing to offer a product or service to all customers (new and existing).

75. Under the terms of Market Regulation, Qwest will only be required to send notice to the Commission of changes to rates, terms and conditions on one-day's notice, for information purposes only. The Settlement Agreement provides that Qwest will not represent to customers that the Commission has reviewed or approved these changes. Qwest will, however, send an e-mail notification of changes to rates, terms and conditions to a designated Staff person as well as a designated person from the OCC. The details of these notifications and e-mails are still to be determined by Qwest, Staff and the OCC.

76. Customers will receive a 14-days' notice of any price increase or price-affecting changes to terms and conditions.[13] The customer notices will be accomplished through either direct mail, postcards, bill inserts and/or bill messages. Under the proposed Settlement Agreement, Qwest is neither required to provide, nor prohibited from providing, notice to customers of price decreases.

77. Qwest will no longer be required to file notices of promotions nor customer specific contracts. However, Qwest will be required to maintain a log of the customer specific contracts. Upon "reasonable request," Staff and the OCC can also access the actual contracts after signing non-disclosure agreements.[14]

[13] Given Qwest's 30-day billing cycle, some customers will actually receive over 40-days' notice of such changes if Qwest communicates with customers through a bill insert. (Transcript Vol. 4 at p. 33)

[14] Neither the Settlement Agreement, nor the Settlement Parties at hearing, have offered a definition of what constitutes a "reasonable request."

78. After considering the terms of the Settlement Agreement, we find it in the public interest to approve the language in Section III of the Settlement Agreement, with the following modifications:

1. Commission Notice

79. As a threshold issue, we must determine whether implementation of the notice provisions of the Sections III.B. and III.C. of the Settlement Agreement violate existing statutory notice requirements. We find that they do not. Section 40-15-501(1), C.R.S. states that it is the policy of the State to encourage competition. In this context, the statute goes on to provide:

> The commission is encouraged, where competition is not immediately possible, to utilize other interim marketplace mechanisms wherever possible, with the ultimate goal of replacing the regulatory framework established in part 2 of this article with a fully competitive telecommunications marketplace statewide as contemplated in this part 5.

In § 40-15-502(b)(I), C.R.S., the legislature directed that "the commission *shall structure telecommunications regulation* to achieve a transition to a fully competitive telecommunications market." (Emphasis added). Additionally, § 40-3-104(1)(a), C.R.S. states in relevant part:

> Notwithstanding the provisions of this paragraph (a), changes in intrastate telecommunications services which have been determined by the commission to be competitive in nature, pursuant to the provisions of article 15 of this title, shall not be subject to any notice requirement, including, but not limited to, any requirement in this section whether or not denoted as a notice requirement.

We find that the provisions of this section leave the entirety of Article 15 within which to arrive at a determination regarding competitiveness. Especially where, as here, we are restructuring the regulatory environment, it appears to us that the legislature has left it to the discretion of the Commission to establish the level and extent of notice necessary and appropriate for the specific regulatory approach we choose to take. We therefore find that pursuant to the above referenced statutes, we possess the discretion in this docket to establish the appropriate notice requirements.

80. The Settlement Agreement provides that the Commission will receive one-day's notice of any changes to the rates, terms and conditions for services or products under Market Regulation for information purposes only. On the other hand, end-user customers will receive notice of such changes at least 14 days prior to the change becoming effective. This gap in time between the customer notice and the Commission notice causes us concern. The Commission is statutorily and constitutionally charged to be the agency most knowledgeable about utility matters in Colorado. If one-day's notice to the Commission is permitted, we find that the External Affairs section of the Commission will not be able to effectively assist a customer who contacts the Commission during the gap period with questions concerning a particular customer notice.

81. The Settlement Parties maintain in their Joint Statement of Position that this should not be a meaningful concern. They indicate that Commission Staff's audit authority allows it to request information from Qwest in regard to customer notices. The Settlement Parties contend that Commission can always obtain the relevant information from the customer or the company, if requested. It is the Settlement Parties' contention that Qwest wants to react to customers first and attend to regulations later.

82. We understand the Settlement Parties' position that services and products under Market Regulation are to be free of any Commission approval of rates, terms or conditions prior to the changes becoming effective. While we agree with this regulatory change, we remain concerned that the Commission retain the ability to respond to customer questions and concerns when contacting the External Affairs section.

83. Therefore, to strike a reasonable balance between the need for Commission knowledge and Qwest's concern that the Commission process will somehow allow for approval

or denial of changes, we order Qwest to e-mail a copy of all customer notices for services under Market Regulation to the supervisor of the External Affairs section at the same time the notice is initially sent to customers. Such a process will ensure that the informational notice will not be reviewed by a Staff person, but will provide the External Affairs staff with the information it needs to respond effectively to customer calls. In addition, Qwest is still required to send the one-day's notice of changes to the Commission's designated Staff person as per the language of the Settlement Agreement.

2. Geographic Deaveraging of Prices

84. Under current practice, prices for regulated telecommunications services are averaged statewide even if costs vary between regions of the state. In other words, Qwest charges the same price for a residential line in Denver, Ft. Collins, Grand Junction, and Durango. Likewise, Qwest's prices for regulated toll and similar services are the same throughout Qwest's service territory, also without regard to cost variations that may occur across the state. There have been exceptions to this general practice, such as the implementation of zone charges for basic local service within a wire center. However, zone charges in Qwest's service territory recently were eliminated even though the cost of service within a wire center may vary greatly.

85. In the Settlement Agreement, the Settlement Parties propose to allow Qwest to geographically deaverage prices. Under this proposal, Qwest would have the authority to vary prices as it deems appropriate between customers, both within and between wire centers throughout Qwest's service territory. Qwest witness Taylor described the benefits that will inure from such flexibility (*Tr. Vol. 2. at pp. 147-153, and pp. 218-221*). Qwest witness McDaniel also offered support for this flexibility (*Tr. Vol. 2 at pp. 122-125*). On the other hand, AARP witness Roycroft expressed concern about "undue discrimination" in the context of rate deaveraging.

In its Statement of Position, AARP suggests modifications to the Settlement Agreement to limit deaveraging flexibility. AARP also objects to the absence of prior approval by the Commission and states that insufficient safeguards exist for residential and rural customers under the deaveraging proposal.

86. In our view, the regulatory reform requested by the Settlement Parties is somewhat of an experiment but with certain safeguards – namely the Commission ability to rescind portions of the Settlement Agreement should we deem such action necessary. Therefore, we believe we can be more aggressive in terms of relaxing regulatory requirements, knowing the regulatory scheme proposed here can be rescinded. Consequently, we find the request for price deaveraging, as cited above, is appropriate and we approve this term of the Settlement Agreement. However, we will monitor the progress of the plan and will analyze data on a continual basis.

3. No Maximum or Minimum Prices

87. The Settlement Agreement provides that, under Market Regulation, the Commission will not actively monitor maximum or minimum prices. Rather, rates will be allowed to go into effect without initial Commission review or approval. The Settlement Agreement does provide a "safety valve" in that any person or entity with standing (including a competitor of the same or similar product, service, package or bundle) may file a complaint with the Commission alleging that a provider has violated either § 40-3-101 or § 40-3-102, C.R.S. The burden of proof will lie with the provider offering the service that is the subject of the complaint to demonstrate that its rates, terms or conditions for the service are just, reasonable and not unduly discriminatory.

88. AARP opposes the ceiling provisions, especially for residential additional lines, state residential features and residential line extensions. It also opposes price increases without prior Commission review. We are sensitive to AARP's concerns. However, we believe the terms of the Settlement Agreement, especially the provision that allows for complaints alleging violations of the "just and reasonable" standard for rates as provided for in §§ 40-3-101 and 102, provide for a reasonable method of ensuring any suspect rates will be brought to the Commission's attention in a timely manner. We obtain further comfort from the fact that the provider offering service that is the subject of such a complaint bears the burden of proof to demonstrate that its rates are in fact just and reasonable under a complaint brought under these two statutory provisions. We also note that a person or entity is not precluded from bringing an action under any other statutory provision or Commission rule relating to rate regulation. In such a case, the general requirements of a complaint case proceeding will apply.

89. While concerns were expressed regarding "predatory pricing" by Qwest (that is lowering prices to a level that would drive out competition and then raising rates above their initial level) we note that, to the extent such a practice would be unlawful under Colorado statute, the same procedural safeguards would apply. Further, we would expect the appropriate federal authorities to take note of any antitrust issues that would be implicated from such a practice.

90. We find that an experiment utilizing this approach is warranted at this point in an attempt to affect transition from a monopoly market structure to one with multiple providers, hopefully one with vigorous competition. Colorado statute encourages us to foster competition, but with proper safeguards against the failure of competition to materialize. Therefore, we must find an appropriate balance between lightening of regulation and the encouragement of competition. As such, our general approach is to lessen regulation carefully and selectively, and

also to monitor the market and evaluate the workings of the new regulatory format requested by the Settlement Parties as modified. Therefore, we find it in the public interest to approve the Settlement Agreement language regarding the monitoring of maximum or minimum prices.

4. Complaints for Alleged Violations of §§ 40-3-101 or 40-3-102, C.R.S.

91. Section III. F. of the Settlement Agreement states in pertinent part: "Any person or entity with standing (including a competitor of the same or similar product, service, package or bundle) may file a complaint with the Commission alleging that a provider has violated either § 40-3-101 or § 40-3-102, C.R.S. The provider offering the service that is the subject of the complaint will carry the burden of proof to demonstrate that its rates, terms, or conditions for the service are just, reasonable and not unduly discriminatory."

92. We understand this provision to require Qwest to retain the burden of proof should a complaint be filed in which either the reasonableness of Qwest's charges or the adequacy of its service is at issue. We find this provision to be appropriate and we approve this portion of the Settlement Agreement, pursuant to a more detailed discussion below regarding the applicability of the Commission's Costing and Pricing Rules.

5. Costing and Pricing Rules Applicability

93. The Settlement Agreement provides that

> [a]s authorized by and pursuant to § 40-15-203(6) through (8) C.R.S., and §§ 40-15-501 and 40-15-302 C.R.S., and 4 CCR 723-30-5.2(d), the Parties agree that there is no presumption that the Commission's existing costing and pricing rules (4 CCR 723-30) apply to a complaint alleging that a provider has violated either § 40-3-101 or § 40-3-102, C.R.S. The Parties also agree, that in any future complaint under § 40-3-101 or 40-3-102, C.R.S. any party may advocate any standard it believes should apply to the particular facts of a certain situation.

94. The Settlement Parties request that the Costing and Pricing Rules should not necessarily apply to a complaint proceeding. The Settlement Parties suggest that the absence of

a fixed standard will allow parties to offer another standard that may be the most suitable to a particular set of facts. The absence of a fixed standard allows more flexibility for Qwest. While we understand the Settlement Parties' position on this issue, we nonetheless disagree with the Settlement Agreement language on this issue.

95. Parties in any pricing or costing complaint case may assert that particular Commission rules should be waived or not apply to a particular set of facts. On the other hand, elimination of a cost standard, as in 4 CCR-723-30, would unnecessarily complicate complaint (and other) proceedings. Rather, having a cost standard streamlines such hearings and allows parties reasonable, equitable, and efficient access to complaint processes. Further, such a cost standard provides the foundation for the Commission to render a reasonable judgment.

96. We note that our rules allow a party to a complaint to seek an alternative costing method as particular circumstances warrant. Consequently, the rules applicable here already allow significant flexibility to tailor particular methods to particular circumstances. We believe that Qwest's flexibility will not be impacted in any manner by continuing the applicability of these rules. We find that Qwest is not harmed by continuation of the status quo. We note that an equitable balance exists here: Qwest is allowed to proceed under a "file-and-use" approach, while the Commission is able to expeditiously fulfill its obligations to efficiently and fairly deal with complaints, if any. If complaint volumes are low, then this limited constraint imposes little or no cost on any party. Further, these studies would probably be done in the ordinary course of business anyway by a diligent telecommunications service provider.

E. Services Subject to Market Regulation

97. The services subject to Market Regulation are contained in Section IV of the Agreement. These generally include: additional residential lines inside the zones of competition;

residential features with the exception of the defined public interest features; four and above business access lines;[15] advance features or services provided on business lines; all other business services; premium services; all packages and bundles of access lines and features; land development agreements for services under Market Regulation; line extensions for lines subject to Market Regulation; non-optional operator services; and private line services with a capacity of less than 24 voice-grade circuits.

98. Based on the evidence and testimony presented in this matter, we find it in the public interest to approve the language in Section IV of the Agreement with the clarification and modifications discussed below.

1. Additional Residential Lines in the Zones of Competition

99. At hearing, a significant amount of testimony focused on the zones of competition and how the zones were established by the Settlement Parties. According to the Settlement Parties' Joint Statement of Position and oral testimony presented during hearing, the zones were selected based on the existence of at least one facilities-based provider of either loops (Denver Metro zone) or broadband service (Colorado Springs zone). The providers that specifically fit this definition are Comcast in the Denver Metro zone and Adelphia in the Colorado Springs zone.

100. The Settlement Parties assert that this method of defining zones of competition for additional lines is appropriate because Qwest is experiencing substantial loss of additional lines especially in these geographic areas. According to the Ciruli Survey, of the respondents who had disconnected additional lines, one-third had replaced those lines with wireless service and two-thirds had replaced the lines with broadband service. *See Hearing Exhibit 39 at p. 18.*

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[15] Modified to six and above business access lines. *See* discussion to follow.

101. We are somewhat concerned with the manner in which these zones of competition were defined. We have additional concerns regarding why some wire centers were included and why some were not. We would have preferred to have seen information in the record regarding wireless penetration in the state and more specifically in these geographic areas, as well as information on competition from other broadband providers. We are also concerned that Adelphia's bankruptcy might affect its broadband service offering in the Colorado Springs' zone of competition. However, as reiterated in the Settlement Parties' Joint Statement of Position, Staff and the OCC have retained the ability to recommend additions to or subtractions from the zones of competition if circumstances change enough to warrant such a recommendation. With this assurance, we will approve the zones of competition for additional residential lines as defined in the Agreement.[16]

102. At hearing, AARP witness Roycroft expressed a concern about the treatment of additional lines in the zones of competition, stating his belief that the rates for these additional lines should be subject to the same rate cap as small business lines, the Consumer Price Index – Urban Area (CPI-U) minus one percent cap outlined in Section VI.4. of the Settlement Agreement. Dr. Roycroft argued that small business customers are actually afforded more protection than residential customers according to the terms of the Settlement Agreement, even though more competition in the telecommunications market is evident for small businesses.

[16] There was some confusion in the record as to which wire centers are included in the zones of competition. It is our understanding that the Denver Metro zone includes the wire centers of: the Denver Metro Exchange: Aberdeen, Arvada, Aurora Main, Capitol Hill, Columbine, Curtis Park, Denver International Airport, Dry Creek, Denver East, Denver Main, Denver North, Denver Northeast, Denver South, Denver Southeast, Denver Southwest, Denver West, Englewood, Golden, Highland Ranch, Lakewood, Littleton, Monaghan, Montbello, Smoky Hill, Sullivan and Westminster; the Boulder Exchange: Boulder Main, Table Mesa and Gun Barrel; the Longmont Exchange: Longmont and Niwot; the Lafayette/Louisville Exchange: Cottonwood; the Broomfield Exchange: Broomfield and Northglenn; Erie; and Parker. The Colorado Springs zone includes the wire centers of: Air Force Academy, Colorado Springs East, Colorado Springs Main, Gatehouse, Fountain, Monument, Pikeview, Security and Stratmoor.

AARP believes that the application of the indexed rate cap is appropriate to prevent Qwest from raising rates for these additional lines in an unrestrained manner.

103. In the Joint Statement of Position, the Settlement Parties state that AARP's recommendation is inappropriate and would likely constitute a material modification to the Stipulation for Qwest. According to the Settlement Parties, the record establishes that Qwest faces substantial competition for residential additional lines within the zones of competition. The Settlement Parties maintain that AARP's Hearing Exhibit No. 48B demonstrates Qwest's substantial additional line loss in these areas. OCC witness Binz also testified that the OCC believes competitive pressures in these areas will likely prevent Qwest from raising residential additional line rates significantly within the zones.

104. Although Dr. Roycroft's proposal to impose the CPI-U minus one percent rate cap on additional residential lines within the zones of competition may prevent Qwest from raising these rates significantly, we decline to impose the cap in this decision. We agree that the record has established that competition exists for additional residential lines from wireline and broadband providers. It is our expectation (similar to Mr. Binz) that pressure from competition should keep the rates for additional lines similar to where they are now, or perhaps even lower. If, in the future, the Commission is concerned that Qwest is instead raising these rates without any justification, we have the discretion to revisit the need for a price cap.

2. Four and Above Flat, Measured or Message Business Lines

105. The Settlement Agreement provides that four or more business access lines will be regulated according to the terms of Market Regulation. Apparently, the threshold of four lines was a matter of compromise during the settlement discussions by the Settlement Parties and was not further justified or supported at hearing or in the Joint Statement of Position.

106. While there is no support for the use of the four-line threshold in the testimony presented, we rely on information contained both in statute and in the record here to support a threshold of six lines. Specifically, § 40-15-401(k), C.R.S. lists the deregulation of advanced features offered and provided to non-residential customer with more than five lines. Similarly, in the Competition Report provided by Staff in this record, Staff used a definition for small business customers of one to five lines. This is the only market share information by wire center in this record. *See Hearing Exhibit 36 at p. 4*.

107. In their Joint Statement of Position, the Settlement Parties state that any suggestion that the Settlement Agreement defines a small business, or that the threshold line count should be changed to six lines should be rejected. They assert that the four-line threshold was a matter of compromise and is a fair designation. The Settlement Parties argue that Dr. Roycroft admitted that there is no magical cutoff number.

108. We disagree with the terms of the Settlement Agreement on this matter and order the Parties to amend the threshold line count for business access line regulation under Market Regulation to six or more lines. We have no information in the record to support a four-line threshold, but do have both a historical perspective, as well as competition market share information, to support a six-line threshold. If the Settlement Parties wish to present support for their choice of four of more lines, they can provide that information in an application for rehearing, reargument or reconsideration.

3. Payphone Service Offerings

109. The Settlement Agreement provides that payphone service offering will remain under standard regulation and continue to be within the Commission's jurisdiction. Such offerings include PAL, SmartPAL, and Outgoing Fraud Protection, which are currently

contained in Qwest's Colorado Exchange and Network Services Tariff, COLO. P.U.C. NO. 20, at section 5.5.7, and any other payphone related services that may in the future be determined by the FCC to be subject to the pricing standards of the New Services Test as articulated by the FCC in the *Wisconsin Order*, FCC 02-25.

110. We find it in the public interest to approve this provision of the Settlement Agreement.

4. Land Development Agreements

111. A land development agreement (LDA) is an agreement that Qwest enters into with a developer of residential or business properties. The LDA provides the terms and conditions for the placement of facilities to provide telecommunications services to end user customers. The Settlement Agreement provides that if it is approved, Qwest will withdraw its LDA tariffs found in sections 4.4 and 4.6 of its Exchange and Network Services Tariff COLO. P.U.C. No. 20, and will abide by the terms of the Qwest/Colorado Association of Home Builders (CAHB) agreement for seven years. This agreement is attached to the Settlement Agreement as Attachment 5. According to the Settlement Agreement, for customers who purchase or request to purchase services that use facilities constructed pursuant to a LDA, the form of regulation that applies to the customer's services shall depend upon the services the customer purchases.

112. Qwest committed at hearing that it will offer the same LDA terms to any homebuilder regardless of whether the homebuilder is a member of CAHB.[17] Qwest further stated that CAHB has informed homebuilders of the issues in this docket.

[17] *See* Transcript, Vol. 2 at pp. 10-12.

113. We find the language in the Settlement Agreement to be somewhat confusing. The LDA contains the terms and conditions that Qwest and developers agree should govern Qwest's placement of facilities for new residential and business developments. This LDA is to be regulated under Market Regulation, that is, the agreement will be posted to the Qwest website, and the Commission will have only after-the-fact complaint jurisdiction. However, the Settlement Agreement also states that for customers who purchase services constructed pursuant to an LDA, the regulation of those services depends on the type of service the customers purchase.

114. Mr. McDaniel, Qwest's witness, explained this paragraph during hearing:

> . . .most developers use land development agreements to install the distribution facilities in a neighborhood. That service, LDA service, if you will, will be provided under market regulation. However, ultimately if you move into that neighborhood, you probably will purchase a 1FR, and what this statement is making clear, that even though the original facilities were placed under a service that was under market regulation, if you purchase a 1FR you're still under the regulation for 1FR which would be the modified existing regulation. So that's what the purpose of this paragraph is.[18]

Relying on that statement, it is our understanding that the presence of an LDA has nothing to do with the way an end user customer's telecommunications services are regulated. The end user customer's services fall under Market Regulation or Modified Existing Regulation regardless of the terms under which the original facilities were placed. With that clarification, we order a modification of the Settlement Agreement. We do not believe that it is appropriate for the LDA to be under either Market Regulation or Modified Existing Regulation. The LDA is a separate agreement with one discreet purpose, to standardize the terms and conditions for new facilities placement. Developers are sophisticated customers who regularly enter into agreements to have

[18] *Ibid.*

utilities placed in their developments. While we agree that Qwest should be required to post this agreement to its website, it should not be considered to be part of Market Regulation *per se*.

F. Modified Existing Regulation

115. Sections V and VI of the Settlement Agreement outline a form of regulation referred to by the Settlement Parties as "Modified Existing Regulation." Under this regulatory regime, services and products will be regulated in much the same way as they are today under current statute and rule, with some exceptions. Tariffs will continue to be filed for these services and products and they will remain in their current statutory classifications. Neither banded pricing, with floors and ceilings, nor rate of return regulation will apply; however, the approval of this Settlement Agreement will terminate the Pricing and Service Quality Plan established in Docket No. 97A-540T.[19]

116. Except as discussed below, we have no concerns with the regulatory regime in Modified Existing Regulation and find it in the public interest to approve the language in Section V of the Settlement Agreement.

117. The services subject to Modified Existing Regulation are contained in Section VI of the Settlement Agreement. These generally include: residential primary access lines, additional residential access lines outside the zones of competition, public interest features, one to three business access lines with hunting, payphone service offerings, and 9-1-1, E9-1-1 and N-1-1.

118. We find it in the public interest to approve the language in Section VI of the Agreement with modifications as follows:

[19] In Docket No. 97A-540T, the Commission approved an Alternative Form of Regulation (AFOR), for U S West Communications, now known as Qwest. This AFOR plan is identified as the "Price and Service Quality Plan."

1. One to Three Flat Rate, Message or Measured Business Access Lines with Hunting

119. As discussed *supra* regarding Market Regulation, we order the Stipulating Parties to treat one to five business access lines with hunting under Modified Existing Regulation. Our reasoning for this modification here is consistent with our discussion above.

2. Price Ceiling Adjustment 1-5 Business Lines by CPI-U

120. The Settlement Agreement provides that the price ceiling will initially be set at the current rate plus the CPI-U for Denver/Boulder minus one percent. The price ceiling will be adjusted upwards annually by the following rate: CPI-U minus one percent. If the CPI-U index is less than one percent, Qwest need not reduce prices, nor will the ceiling be reduced. The index is cumulative so that if the price for a service stays below the ceiling in one year, the difference will be rolled-over and added to the following year's ceiling.

121. The Settlement Parties agree that the CPI-U was chosen as part of the compromise and negotiation to formulate the Settlement Agreement. Unless a provision is flatly unlawful or so imprudent as to render the stipulation contrary to the public interest, the Settlement Parties ask the Commission not to engage in a granular review.

122. We are familiar with price cap methods such as the mechanism proposed here. We recognize the potential efficiencies of ceiling and capping methods, including but not limited to avoidance of cost computations for rate setting purposes. The proposed method utilizes a retail price index particular to the relevant geographic area and a one percent offset. According to this formula, prices may rise in accordance with the formula, but cannot decline as a result of the application of the cap formula.

123. We have found, consistent with our approach to this Settlement Agreement, that we will not set prices and will not impose ceiling prices or floors. Consequently, we will approve this aspect of the Settlement Agreement, but will monitor prices after the fact in order to evaluate our decision. However, we will require this treatment to apply to the first five lines, not the first three lines of a particular business customer.

3. Line Extensions

124. In its Statement of Position and at hearing, AARP proposed that the Commission reject the language in the Settlement Agreement concerning line extensions and regulate all line extensions regardless of the underlying lines, under Modified Existing Regulation. AARP stated that all of these extensions are very important and potentially cost prohibitive in rural areas and should be granted a modest increase in the level of attention and scrutiny accorded them over and above the level proposed in the Settlement Agreement. Further, AARP stated that confusing and often contradictory testimony was presented at hearing by the Settlement Parties on this issue. AARP asserts that the Settlement Agreement has inadequate regulatory treatment of line extensions for residential customers. As a result, AARP argues that this service should be moved into the Modified Existing Regulation to treat rural customers fairly.

125. The Settlement Parties respond to AARP's proposal by stating they have agreed to a modification that provides that the only residential lines extensions that could fall under Market Regulation would be line extensions necessary for additional lines in the zones of competition. Line extensions are most often necessary in rural areas, and are rarely if ever necessary for additional lines. Further, the Settlement Parties clarify that if a residential customer orders a primary and additional line in a zone of competition, the line extension would be subject to Modified Existing Regulation.

126. We disagree with AARP's proposal, and approve the language in the Settlement Agreement regarding line extensions. We agree with the statements on the record that line extensions for additional residential lines in the zones of competition are rare. All other residential line extensions remain under Modified Existing Regulation and are tariffed and regulated as they are today. Similarly, we find that if a business customer orders one to five lines at a particular location and that order requires a line extension, the extension is also regulated pursuant to Modified Existing Regulation. As with all aspects of Market Regulation, if there is an unforeseen problem in the future, the Commission can re-examine this issue.

127. Commissioner Page dissents separately on this issue.

G. Intrastate Switched Access

1. Elimination of CHCSM Surcharge

128. The Settlement Parties agree that the existing credits for the CHCSM, including the existing $0.46 per month credit on residential access lines and $1.08 credit on business access lines, will be eliminated. Under the terms of the Settlement Agreement, the CHCSM credit is eliminated, but every dollar of the eliminated credit is dedicated to uses that serve other publicly beneficial purposes, as opposed to becoming part of Qwest's revenue stream. In the Joint Statement of Position, the Settlement Parties contend that this surcharge credit was a part of the 97A-540T Plan that was going to expire anyway. The Settlement Parties argue that, in addressing the status of the credit, the choice was not whether the reduction went to switched access rates or to retention of the CHCSM credit, but rather whether Qwest would retain the money or reduce switched access rates.[20] The Settlement Parties contend that elimination of the credit (approximately $13 million) is strictly revenue neutral to Qwest.

[20] *See* Joint Statement of Position at pp. 53-55.

129. MCI, in its Statement of Position, argues that the elimination of the $0.46 CHCSM credit for residential customers does not violate the statutory rate cap for residential service because the elimination restores the rate to one that is set at or below the residential rate cap.[21] MCI contends that there is no evidence in the record to require Qwest to use this CHCSM credit to support any services other than switched access including local rates for residential and business customers. Nor is there any evidence to support an ongoing "overearnings" credit from any source going forward for residential and business customers as there was in Docket No. 97A-540T. MCI maintains that Qwest is under no legal obligation to extend the CHCSM credit further.

130. AARP, in its Statement of Position, argues that the proposed $12-13 million per-year increase in consumer bills should be deleted from the Settlement Agreement.[22] According to AARP, this in effect is a rate increase, which is procedurally unlawful because of the failure to provide public notice. Additionally, AARP contends that the proposal amounts to an unwise "make whole" payment to Qwest at the time it otherwise is seeking deregulation.

131. We disagree with AARP's contention that adequate public notice was not provided to allow elimination of the CHCSM credits. We conclude that adequate notice was provided because Qwest's Supplement to its Application indicates by the shading of the relevant tariff provisions, as required by Decision No. C04-1178, that changes will indeed occur to the CHCSM credits.[23] That Supplement was served on Sue Weinstock, AARP and Thor Nelson, Holland & Hart, LLP, attorney for AARP, when it was filed on October 15, 2004. Additionally, we held a public hearing and allowed for written public comment on the Settlement Agreement.

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[21] *See* MCI Statement of Position at pp. 7-9.

[22] *See* AARP Statement of Position at pp. 2-3.

[23] *See* Preface Sheet, Second Revised Sheet 7 and Third Revised Sheet 7.1.

The notice for that public hearing and comment specifically stated that the $0.46 and $1.08 credits were being eliminated.[24]

132. We also recognize OCC witness Mr. Binz's testimony that the public was adequately apprised that, as a result of the Application, rates could be increased or decreased.

133. We therefore find it in the public interest to approve the Settlement Agreement language as proposed here, with respect to the elimination of the CHCSM. We will now examine the use of those credits.

2. $1.8 Million to Offset the Northern Colorado Local Calling Area Expansion

134. The Parties agree that $1,841,544 of the revenues generated from the elimination of the CHCSM credits will be used to offset the impact of the Northern Colorado Local Calling Area Expansion ordered in Commission Docket No. 03A-496T, Decision No. R05-0143. In the Joint Statement of Position, the Settlement Parties state that Qwest will use this $1.8 million from the elimination of the CHCSM credit to offset the costs of the Northern Colorado Local Calling Area Expansion, and that Qwest will forego other rate increases that were authorized when the Commission approved the settlement in Docket No. 03A-496T.[25]

135. We approve the Settlement Agreement language as proposed here. No other party in this proceeding opposes this proposal. We find the offset of the costs of the expansion using $1.8 million of the revenues generated from the elimination of the CHCSM credit an acceptable use of those revenues. We also clarify, based on Qwest witness McDaniel's oral testimony, that

[24] We note the additional argument that the Application's reference to the expiration (or supplanting) of the 540T Plan could also serve as adequate public notice. The Commission makes no finding on this issue, because it is unclear whether the expiration of the 540T Plan necessarily would mean the elimination of the CHCSM credit.

[25] *See* Joint Statement of Position at pp. 54-55.

Qwest may not seek any other rate increases to recover costs associated with the Northern Colorado Local Area Expansion.[26]

3. $11.2 Million To Reduce Switched Access Charges

136. The Settlement Parties propose that the remainder of the revenues generated from the elimination of the credits will be used to reduce intrastate switched access rates. The total value of the intrastate switched access rate reduction shall be $11,249,164.

137. In the Joint Statement of Position, the Settlement Parties contend that a reduction of intrastate switched access rates to the level of interstate switched access rates would have lowered Qwest's revenues by approximately $50 million per year.[27] According to the Settlement Parties, there appears to be little disagreement about the overall need to reduce intrastate switched access rates. Therefore, as a matter of compromise, the Settlement Parties agree to an $11.2 million reduction in switched access rates, to be implemented by September 1, 2005, as a meaningful step in the right direction.

138. In its Statement of Position, MCI contends that the current intrastate access rates are based on rates set in 1990, when Qwest had its last general rate case.[28] MCI asserts that no one disputes that intrastate switched access rates substantially exceed their costs and no one truly opposes the proposed switched access reductions. MCI further asserts that it clearly supports these reductions. MCI argues that the issue is not whether to reduce switched access rates, but how fast and how much.

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[26] *See* Transcript Vol. 1 at pp. 98-100, 167-168; Vol. 2 at pp. 48, 60-61.
[27] *See* Joint Statement of position at p. 52 and pp. 55-57.
[28] *See* MCI Statement of position at pp. 5-9.

139. AT&T, in its Statement of Position, supports the proposed switched access rate reduction and views such reduction as absolutely necessary in light of the Settlement Parties' desire to move the toll market into deregulation.[29] According to AT&T, Qwest more than fully recovers its cost to provide the service. AT&T asserts that Qwest's charges for intrastate switched access are nothing other than a carry-over subsidy of rate-of-return regulation.

140. We approve the Settlement Agreement language as proposed for this portion of the provision. The parties, including AARP (which disagrees with elimination of the CHCSM credit),[30] agree that intrastate switched access charges should be reduced. We agree that reductions in switched access rates are reasonable. We find that the revenue offset from the elimination of the CHCSM credit is acceptable.

141. Commissioner Page dissents in a separate statement, in part, with the decision on this provision.

4. An Increase in Qwest's CHCSM as of April 1, 2006, Will be Used to Further Reduce Switched Access

142. Qwest witness McDaniel testified that the meaning of Settlement Agreement language to the effect that, "any increase in Qwest's CHCSM beginning in April 1, 2006 will be used to further reduce switched access" is limited only to a single increase that would become effective starting April 1, 2006, and does not include all future increases.[31]

143. We find it in the public interest to approve the language as proposed for this portion of the Settlement Agreement. We clarify that this provision only requires Qwest to apply

[29] *See* AT&T Statement of position at pp. 2-3.
[30] *See* AARP Statement of position at p. 3.
[31] *See* Transcript Vol. 2 at pp. 57-59.

an increase in the amount it receives from the CHCSM that would become effective starting April 1, 2006 to reduce switched access rates.

H. Quality of Service

144. Section VIII of the Settlement Agreement, as well as Attachment 6 outline the quality of service provisions. The Settlement Parties have agreed to continue certain metrics, self-executing financial remedies, and reporting requirements from the Price and Service Quality Plan implemented as a result of Docket No. 97A-540T, as amended (540T Plan).

145. The Settlement Parties, in the Settlement Agreement as well as in the Joint Statement of Position, state their belief that although the Commission's service quality rules (4 CCR 723-1) apply generally to other telecommunications carriers, Qwest has been subjected to a more intensive set of quality metrics under the 540T Plan. It is the Settlement Parties' position that while the 540T Plan is ending, Qwest has agreed through the Settlement Agreement to carry forward the metrics set out in the 540T Plan (*Ex. 6, at p. 20; Att.6*). Additionally, Qwest will continue to make self-executing payments under two metrics: the Percent Out-of-Service Reports Cleared in 24 Hours and the Repair Office Access Report. To highlight the significance of retaining these metrics, OCC witness Binz testified that out of an estimated $883,000 paid by Qwest in 2004 in self-executing service quality payments, approximately half stemmed from these two metrics. (*Tr. Vol. 3 at p. 193 (Binz)).*

146. AARP, through testimony as well as in its Statement of Position, opposed Section VIII of the Stipulation. AARP contends that all of the service quality penalties contained in the 540T Plan should remain in place. (*Ex. 51; Tr. Vol.3 at pp. 59 and 88 (Roycroft*)). AARP contends that Qwest's service quality is poor and in need of heightened scrutiny. (*Ex. 50; Tr. Vol. 3 at p. 55 (Roycroft*)). AARP further contends that the quality of service provision in its current

form is needlessly risky. According to AARP, the Settlement Agreement commits the Commission to largely after-the-fact oversight of much of Qwest's business. AARP agues that while the risk is perhaps reasonable in some instances to "prune" un-needed regulation, the same is not true with regard to maintaining reasonable safeguards for residential and rural customers who lack competitive alternatives, and with regard to quality of service enforcement.

147. On the other hand, the Settlement Parties argue that the quality of service provision reflects a balanced approach and provides protections for Colorado consumers, even in light of the termination of the 540T Plan. Additionally, the Settlement Parties argue that the elimination of certain self-executing penalties does not mean, as AARP might suggest, that Qwest will lose incentive to meet its service quality requirements. The Settlement Parties point out that the Commission will retain (under the Settlement Agreement) complaint and show cause jurisdiction, including the imposition of reparation remedies against Qwest. Consequently, the Settlement Parties maintain that, in balance, the service quality protections set forth in the Settlement Agreement are appropriate and are in the public interest.

148. We find that this portion of the Settlement Agreement is a sensible, modest step toward less regulation. This service quality plan retains some of the automatic remedies for service quality failures, including the customer specific credit equal to the monthly rate if the company fails to repair service within 24 hours of an outage. While AARP raises concerns the Commission will retain its after-the-fact authority to address complaints as well as authority to reimpose regulation if unforeseen consequences arise subsequent to implementing the new regulatory plan. Therefore, we find it in the public interest to approve section VIII and Attachment 6 of the Stipulation in their entirety.

I. Deregulation of Intralata Toll and Interlata Toll for All Providers

149. The Settlement Agreement provides:

> [t]he Parties agree that Qwest's intraLATA toll services should be reclassified as a Part 4 service and deregulated in this proceeding. The Parties also believe that intraLATA toll service and interLATA toll service should be deregulated for all providers in the state of Colorado.

150. The standard for deregulation is the statutory requirement of effective competition found in §§ 40-15-305 and 40-15-306, C.R.S. The statute provides for consideration of several factors in determining the existence or absence of effective competition.

151. Evidence offered regarding toll market conditions is contained in the Substitute Supplemental Testimony of Staff Witness Hunt and the Answer Testimony of AARP witness Roycroft. Both used a similar technique to examine the level of competition in the intrastate toll market, namely the Herfindahl-Hirschman Index (HHI). The HHI is a widely used economic factor employed for various purposes by many governmental agencies. As applied here, the index is used to determine whether the Colorado toll markets are effectively competitive. We find this application appropriate for the purpose of considering toll market conditions in the state.[32] We are satisfied that the calculation of HHI in this case is consistent with academic and practical literature on this issue in this case. For purposes of this case, we consider an HHI value of 1800 to be a reasonable point, below which the need for regulation is obviated and deregulation of a service likely is consistent with the public interest.

[32] This is not to say that the HHI is *per se* determinative by itself, in considering whether there is effective competition with respect to a particular service. In this case, we reason that an HHI value of below 1800 (with wireless data) is sufficient to make a finding of effective competition in the toll market. That does not mean, as applied to a different service, an HHI value of above 1800 necessarily means there is not effective competition. The U.S. Department of Justice, among others, recognizes that use of HHI is only one factor in the analysis of market power. It is possible that effective competition may exist for a service having an above-1800 HHI value based on a comprehensive analysis of market conditions. On the other hand, a service having a below-1800 HHI value is almost certainly effectively competitive – hence our finding that the toll market is so.

152. While we consider the HHI evidence in support of deregulation to be credible we find it has certain flaws. For example, there was not unanimity among the economic experts that HHI either was appropriate or that the HHI methods or calculations in this record were properly executed. (*Tr. Vol. 2 at pp. 117-119; 159-161; 223-225*). However, all economic experts either supported or did not oppose toll deregulation.

153. The question of effective competition in the toll market hinges on an HHI calculation of market concentration for the toll market on a statewide basis. The HHI calculation uses market share data, in this case based on revenues. Staff Witness Dr. Hunt performed two HHI calculations, one without wireless data and one with wireless data. The HHI calculations without wireless data are slightly above the 1800 threshold, while the calculations with wireless data are well below the 1800 threshold. Inclusion of wireless data requires a data conversion to determine a proportion of total wireless traffic that is devoted to intrastate toll. Using this conversion, total intrastate toll minutes are derived. We find the calculations offered by Dr. Hunt to be reasonably formulated and executed and we rely on those calculations as a basis for our decision to deregulate intrastate toll services. That is, we extend these findings to all subdivisions of the intrastate toll market. For purposes of this docket, we will apply this finding to intraLATA as well as interLATA toll in Colorado. This finding will be applied in other ways also, as described below.

154. As a general proposition, AARP does not object to deregulation of intrastate toll. AARP recommends some protection for low volume users (*Tr. Vol. 3 at p. 115*), but says little regarding implementation of this proposal. For example, Dr. Roycroft suggested a safe harbor provision consisting of a number of minutes of toll usage, but did not offer explicit options for implementation. Staff witness Santos-Rach indicated that one alternative for low-volume users

might be the purchase of low-priced pre-paid cards, which provide considerable flexibility to customers and yet offer sufficient protection for consumers. We believe that Ms. Santos-Rach's alternative adequately addresses Dr. Roycroft's concern.

155. We will treat the toll market in this state - both interLATA and intraLATA toll - as a single entity for analytical purposes. However, implementation of toll deregulation in this docket is problematic, mainly due to procedural and statutory constraints. InterLATA toll is not at issue in this docket. Only intraLATA toll is addressed in this docket since the Application is by Qwest Corporation, a provider of intraLATA toll. Section 40-15-306 C. R. S., requires each provider of intraLATA toll to apply for deregulation, thus as a result of this docket, only Qwest Corporation's intraLATA toll is subject to deregulation.

156. With regard to implementation, Section IX of the Settlement Agreement states:

> The Parties request that the Commission open a docket for the acceptance and adjudication of applications from intrastate toll providers to deregulate their intraLATA and interLATA toll services. The Parties request that once the docket is open, the Commission take administrative notice of the evidence in this proceeding concerning intraLATA and interLATA toll services and agree that this evidence supports a finding of effective competition for intraLATA and interLATA toll as required by § 40-15-305 C.R.S.

We recognize the inherent sensibility of extending toll deregulation to all providers at roughly the same time. As discussed *supra*, the toll market in this state is not significantly different within and between LATAs. It seems reasonable then that overall market characteristics in the intrastate toll market apply equally to inter- and intraLATA toll. As a result, a finding for the entire market is likely applicable to any subset of the market, and *vice versa*.

157. We find that the toll *market* should be deregulated, not just single providers in a piecemeal fashion. This goal can be accomplished by rule, or by a general docket to receive applications from every provider. In either of these alternatives, taking notice of the evidence on

deregulation in this docket is reasonable. Further, if Qwest's relief is effective before other providers' services have been deregulated, such a situation could result in asymmetrical regulation. Qwest and its affiliates would have a lighter regulatory scheme than that of smaller competitors. Consistent with the notion that services, not providers are deregulated, we find that a simultaneous grant of regulatory relief is appropriate.

158. The Settlement Agreement at Section IX, states: "The Staff will prepare a short form application that intraLATA and interLATA toll providers may use to seek a Commission order deregulating their toll services." The Commission understands the Settlement Parties desire that toll deregulation should be extended to all providers as quickly as possible and that the Settlement Parties have made a suggestion for implementation.

159. We find it in the public interest to approve this provision of the Settlement Agreement. However, we will implement Qwest's intraLATA toll relief at the same time all other providers' intraLATA toll services are deregulated, at the conclusion of the follow-on application docket.

160. Since Qwest Corporation's interLATA affiliate is not a party to this docket, we have no jurisdiction in this docket to order deregulation of interLATA toll. We will adjudicate the deregulation of interLATA toll by our own motion in a docket to follow.

161. Toll deregulation has other implications for toll providers in the Settlement Agreement. The Settlement Agreement provides that: "The Parties also request that the Commission direct all toll providers to continue to provide the information required under § 40-15-302.5, C.R.S. to facilitate continued Commission oversight under §§ 40-15-112 and 40-15-113, C.R.S." Yet after deregulation, we find the Commission has no authority to require toll service providers to continue to provide information. Section 40-15-302.5, C.R.S. is specific

to toll resellers and is otherwise silent with regard to other toll providers. Further, § 40-15-402(1), C.R.S. prohibits the Commission from applying Articles 1-7 of Title 40 or Parts 2 and 3 of Article 15, Title 40. Therefore, we reject this portion of the Settlement Agreement, but note that a legislative fix is probably warranted.

J. Parity of Regulation and The Ability of Competitive Local Exchange Carriers To Opt-Into the Plan

1. Opt-in Plan

162. The Settlement Agreement allows any CLEC to "opt-into" the terms of the Settlement Agreement, provided that the Settlement Agreement is accepted by the CLEC in its entirety. The proposed form of regulation could thus affect several or all providers in the state and as a result we believe the stipulation as proposed would constitute a proceeding of general applicability. We believe it to be inappropriate for the Commission to issue generally applicable policy statements in this adjudicatory setting; such actions should be undertaken only in the context of a rulemaking. In order to determine whether a particular proceeding constitutes a rulemaking, courts look to "the actual conduct and effect of the particular proceeding, as well as to the purposes for which the proceeding was brought." *Avicomm v. Public Util. Comm'n* 955 P. 2d 1023, 1030 (Colo. 1998).

163. In this docket, the proceeding was brought to deregulate services, which would have been applicable to all providers. The Settlement Agreement proposes an alternative form of regulation which again could be applicable to all providers and is in essence a rulemaking docket in the guise of an adjudicatory docket. Agencies do have discretion as to whether to use rulemaking or an adjudicatory docket to fix policy, but this discretion is limited.

> Establishment of policy making through adjudication is justified in circumstances where an agency must treat matters neither anticipated nor dealt with previously by the agency or matters that are extremely complex and incapable of being

> reduced to a formalized statement of policy. *Citations Omitted.* Policymaking is done through adjudication when it is doubtful whether any generalized standard could be framed which would have more than marginal utility. *Citations Omitted Charnes v. Robinson* 772 P.2d 62, 66 (Colo. 1989).

164. Clearly, the form of regulation proposed in the Settlement Agreement can be reduced to generalized rules, and to a standard that would have far more than marginal utility. This adjudicatory docket is therefore not an appropriate forum in which to make policy applicable to more than one provider. In this matter, given the opt-in provisions, it is clear that the provisions of the Settlement Agreement are intended to apply to the industry as a whole, and not just one provider. Rulemaking would thus be required to enact the provisions of the Settlement Agreement as proposed.

165. The opt-in provision seems designed to avoid the requirement for rulemaking by making the Settlement Agreement applicable to Qwest only (similar to Docket No. 97A-540T). We find that this elevates form over substance. If the goal is to have a Settlement Agreement that is potentially applicable to everyone, then a rulemaking is required, and the Settlement Parties cite cases to this effect in their Joint Statement of Position. If the goal is to develop an alternative form of regulation for Qwest, then the opt-in provision is not needed, and should be deleted.

166. In MCI's and AT&T's Statements of Position, there is an indication that the opt-in provision will not be used, because some of the Settlement Agreement's provisions are potentially damaging to a CLEC. It seems possible, if not likely, that CLECs may generally choose not to opt-in given that portions of the stipulation will add to their regulatory burden. This would create a situation where Qwest has a lower regulatory burden than the CLECs with respect to at least portions of the Settlement Agreement.

167. Qwest argued during the hearing that rulemaking was not required with respect to the 540T Plan, and thus is not required in this docket. That previous stipulation, however, was applicable to Qwest only, whereas in this docket, the Settlement Parties contemplate that other carriers could be subject to the alternative form of regulation. In consideration of the requirement that we should make generally applicable policy in a rulemaking docket, and given the CLECs' arguments, we will delete the opt-in provision from the Settlement Agreement and, instead, by the terms of the order, open a rulemaking docket to develop new default regulations for CLECs pursuant to 4 CCR 723-38. By making the Settlement Agreement applicable only to Qwest, this instant docket becomes much closer in nature to Docket No. 97A-540T where the resulting stipulation was applicable to Qwest only. Rulemaking for the new default form of regulation for the CLECs will be complete before the effective date of the Settlement Agreement, and the rules will thus become effective at the same time as the Settlement Agreement. The Settlement Agreement shall form the basis of the Commission's proposed rules for CLECs.

2. Customer Disclosures

168. The Settlement Agreement proposes language that the Settlement Parties contend will result in the provision of timely and accurate information to customers in order to assist them in making informed choices concerning the telecommunications services available to them. The Settlement Parties state that this will assist in meeting customers needs.

169. We note that the proposed information disclosures and actions are currently contained in a Consent Decree regarding Qwest Corporation and Qwest Wireless as issued by the District Court, City and County of Denver, Case No. 02-CV-5961. The Consent Decree will expire by its terms in August 2005.

170. We generally agree with the Settlement Parties that the information disclosures and actions pursuant to the Settlement Agreement meet the needs of end users and are therefore in the public interest. However, we find it necessary to make the following modification.

171. We require Qwest to file a copy of all training and code of conduct materials that contain information regarding such customer disclosures, including all updates to such material, with the Commission. Qwest shall file a copy of the training manual and code of conduct materials within 90 days of the effective date of a final Commission Order in this matter. Qwest shall file all updates or changes to its training manual and code of conduct materials within 30 days of such an update. Commissioners Sopkin and Page agree with such a requirement. Commissioner Miller dissents without opinion.

172. The information disclosures and actions contained in Section XI of the Settlement Agreement shall be applicable to residential customers only. Commissioners Sopkin and Page agree with such a requirement. Commissioner Miller dissents without opinion.

K. Implementation

173. Section XIV of the Settlement Agreement provides the processes that Qwest, Staff and the OCC will utilize to implement the Plan as approved and modified by the Commission. Specifically, Section XIV outlines the following timelines:

1) Qwest shall file tariffs implementing the terms for its services subject to Modified Existing Regulation within 90 days from the effective date of the Settlement Agreement, unless otherwise agreed to by Staff and the OCC with notice to the Commission;

2) Qwest shall file to withdraw its tariffs for services subject to Market Regulation within 90 days from the effective date of the Agreement, unless otherwise agreed to by Staff and the OCC with notice to the Commission;

3) The Parties request that the Commission open a docket as quickly as possible to accept and adjudicate other toll providers' applications to deregulate their intraLATA toll (See discussion *supra*, regarding interLATA toll);

4) The Parties agree to request that the Commission open a docket within 60 days of the effective date of this Settlement Agreement to investigate the Colorado High Cost Support Mechanism; and

5) Qwest shall file an Advice Letter on not less than 30-days' notice to implement the change in switched access rates.

174. We approve the language as proposed for Section XIV for the Settlement Agreement. However, this section does not address the timing of any filing necessary to implement reductions in switched access rates if Qwest receives an increase to its CHCSM support on April 1, 2006. Therefore, we clarify, to the extent required, that Qwest shall file to reduce intrastate switched access rates to reflect increases to its CHCSM support that will go into effect on April 1, 2006, such that the rate reductions also take effect on April 1, 2006.

175. We therefore approve the language in Section XIV of the Settlement Agreement with the clarification discussed above. In addition, we require Qwest, Staff and the OCC to jointly file a status report with the Commission within 60 days of the effective date of the Settlement Agreement. This status report should include the resolutions of all of the administrative issues contained in the Agreement, including but not limited to, the designation of a Staff person to receive Commission notices, the implementation of the Qwest website, the meaning of a "timely" update of information to the website, and any other resolutions concerning the implementation and operation of the Settlement Agreement the Parties complete before the 60 days has expired.

176. Finally, we recognize that significant modifications to Qwest's existing regulatory scheme will flow from this docket. As with any important change in regulatory format, the effect of the change should be monitored by the Commission and evaluated after a reasonable interval has passed. In Docket 04M-435T, the Commission Staff conducted a study of intrastate telecommunications markets. We believe this is valuable information for the Commission to

have to monitor the Plan's effect in both positive and negative ways on telecommunications market in Colorado. Therefore, we order Staff to conduct this type of study on an annual basis and as part of the ordinary course of business of this Commission.

177. Further, we order Qwest, Staff and the OCC to work together to design a reporting format on the effectiveness of the Settlement Agreement as approved. This report should be similar to the reports currently filed by Qwest under the terms of the 540T Plan, but tailored as necessary for this new regime. Qwest, Staff and the OCC should submit this format for our review within 90 days after the effective date of the Settlement Agreement. However, the first actual report will not be due until two years from the effective date, and on an annual basis thereafter. These two reports will give us a view of the market both from Qwest's perspective as well as the competitors' perspective and will enable us to make changes to the way this Commission regulates telecommunications to meet market needs.

L. General Terms and Conditions

1. Case In Chief

178. Qwest and the other parties to the Settlement Agreement agree that the Agreement has become Qwest's case in chief. The Settlement Agreement states that, should the agreement be rejected or altered by the Commission such that a party withdraws, Qwest reserves the right to litigate its original Application. Qwest argues that parties settling matters before the Commission typically have the right to withdraw from a settlement and litigate the initial case. Qwest also argues that a Commission decision to reject the provision of the Settlement Agreement that reserves these rights would discourage settlement in the future.

179. Qwest is correct that parties who withdraw from a settlement are typically allowed to litigate their initial cases. However, this is not a typical case in that the Commission

is under a statutory deadline to complete the matter, and this is not a typical settlement agreement in that the form of regulation outlined in the Settlement Agreement is really an alternate form of regulation, not one contemplated by the original Application. We note that the Commission has a different set of rules for applications for alternate forms of regulation.[33]

180. Section 40-15-305, C.R.S. provides:

> The commission shall approve or deny any such application for deregulation within one hundred eighty days after the filing of the application except that the commission may by order defer the period within which it must act for one additional period of ninety days…If the commission has not acted on any such application within the appropriate time period permitted, the application shall be deemed granted.

The Settlement Parties have represented that a Commission action on the Settlement Agreement will fulfill its statutory obligation. However, given the statutory language, and given that Qwest has represented to the Commission that the Settlement Agreement has become its case in chief, it is not logical that Qwest should be permitted to return to its original Application.

181. Thus, we dismiss the original Application without prejudice, and emphasize that we do not rule on the merits of any of the arguments put forward by the Parties with respect to the original Application. The Settlement Agreement is substituted for the Qwest's case in chief. We do not believe that Qwest should be allowed to return to its original Application because it would be impossible to adhere to the statutory deadline. Removal of the statutory deadline means that the Commission would have a potentially infinite amount of time to consider Qwest's original Application, something not contemplated by statute. Therefore, because we cannot ascertain a regulatory scheme that would provide jurisdiction or authority for us to convene such

[33] We do not necessarily subscribe to the view that because the original Application contemplated complete deregulation, anything less is within the scope of the original Application.

a proceeding, we find that the Settlement Agreement is Qwest's case in chief and we dismiss the original Application without prejudice.

M. Modifications to the Settlement Agreement

182. Based on the discussion and analysis above, we approve the Settlement Agreement with the following modifications:

1) Qwest will be required to send notice to the Commission of changes to rates, terms and conditions on the same 14-day notice it will provide to its customers. Such notice shall be via e-mail to the Commission's External Affairs' Supervisor.

2) The Costing and Pricing Rules will continue to apply to complaint proceedings brought against telecommunications providers. However, a telecommunications provider still retains the ability to argue on a case-by-case basis that another methodology is more appropriate for a particular proceeding.

3) One to five business access lines with hunting will be regulated according to the terms of Modified Existing Regulation. Six or more business access lines with hunting will be regulated pursuant to Market Regulation.

4) The Land Development Agreements will not be regulated under either Market Regulation or Modified Existing Regulation. The Land Development Agreement is a separate agreement, which will be posted to Qwest's website.

5) An interLATA toll deregulation proceeding shall be opened on the Commission's own motion. Administrative notice will be taken in that proceeding of the findings in this docket regarding effective competition.

6) The Settlement Parties' request of relief for Qwest for intraLATA toll deregulation will be delayed until all applications in a follow-on docket have been acted upon.

7) Because the Commission possesses no authority to require toll providers to provide information required under § 40-15-302.5, C.R.S., registration of toll providers will not be required.

8) We delete the CLEC opt-in provision of the Settlement Agreement and instead shall open a rulemaking docket to develop new default regulations for CLECs pursuant to 4 CCR 723-38.

9) Regarding the Customer Disclosure section of the Settlement Agreement, Qwest shall file a copy of its training manual and code of conduct materials containing such disclosure information within 90 days of the effective date of a final Commission Decision in this matter, and any updates to such documents, thereafter.

10) Qwest shall filed to reduce intrastate switched access rates to reflect increases to its CHCSM support that will go into effect on April 1, 2006, such that the rate reductions also take effect on April 1, 2006.

11) The effective date of the Settlement Agreement shall be five days after a final Commission Decision in this matter, which shall take into account any applications for rehearing, reargument or reconsideration filed.

12) The Settlement Parties shall provide monitoring reports to the Commission. The format of the reports shall be determined by the Settlement Parties, subject to Commission approval. Reporting shall begin two years from the effective date of our Decision here, and then shall be provided annually thereafter. Commission Staff shall continue to collect information regarding competition in the Colorado telecommunications market similar to the method employed in the 04M-435T docket on an annual basis.

13) A status report shall be filed by the Settlement Parties 60 days after the effective date of the new regulatory plan regarding resolution of all administrative and procedural matters of implementing the plan as contained in the Settlement Agreement.

14) Determination of approval of the Settlement Agreement is considered Qwest's case in chief. Qwest's original Application is therefore dismissed without prejudice.

IV. ATTACHMENT

A. Attachment A

183. Attachment A to this order is the Third Corrected Stipulation and Settlement Agreement without the modifications approved by the Commission.

V. ORDER

A. The Commission Orders That:

1. The Settlement Agreement entered into between Qwest Corporation, Commission Staff and the Colorado Office of Consumer Counsel as represented in the Third Corrected Stipulation and Settlement Agreement is approved with the modifications as ordered above.

2. The Joint Motion to Admit into the Record the Third Corrected Stipulation and Settlement Agreement is granted.

3. The Motion to Shorten Response Time to the Joint Motion to Admit into the Record the Third Corrected Stipulation and Settlement Agreement is denied as moot.

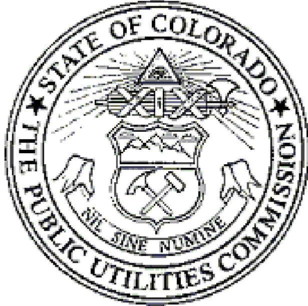
4. The Joint Motion to File a Statement of Position in Excess of 30 pages is granted.

5. The Motion to Shorten Response time to the Joint Motion to File A Statement of Position in Excess of 30 pages is denied as moot.

6. The 20-day time period provided by § 40-6-114(1), C.R.S., to file an application for rehearing, reargument, or reconsideration shall begin on the first day after the mailed date of this Order.

7. This Order is effective upon its Mailed Date.

B. ADOPTED IN COMMISSIONERS' DELIBERATIONS MEETING June 6, 2005.



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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Commissioners

CHAIRMAN GREGORY E. SOPKIN
SPECIALLY CONCURRING

COMMISSIONER POLLY PAGE
CONCURRING, IN PART,
DISSENTING, IN PART.

COMMISSIONER CARL MILLER
CONCURRING, IN PART,
DISSENTING, IN PART,
WITHOUT FURTHER COMMENT

VI. CHAIRMAN GREGORY E. SOPKIN SPECIALLY CONCURRING:

1. I agree with the above decision in all particulars.[1] I write separately to offer a broad view of the telecommunications marketplace in Colorado, and why Colorado statute compels the result we reach today.

2. Ten years ago, the Colorado Legislature enacted legislation providing that "it is the policy of the State of Colorado to encourage competition in this market and strive to ensure that all consumers benefit from such increased competition." § 40-15-101, C.R.S. The Legislature also "encouraged" the Commission, where competition is not immediately possible, to "utilize other interim marketplace mechanisms wherever possible, with the ultimate goal of replacing the regulatory framework established in part 2 of this article with a fully competitive telecommunications marketplace statewide as contemplated in this part 5." *Id.*

[1] I agree with the sentiment expressed in Commissioner Page's dissent that switched access rates are above cost and should be examined in the near future. I also agree that, as we move toward less regulation, the notion of being "made whole" makes less sense. However, I disagree that we should "require Qwest to file an application to rebalance its rates including intrastate switched access rates" in return for our approval of the Settlement Agreement. In my view, such a requirement would mean the Commission has decided, as part of *this* proceeding, that Qwest must rebalance its rates now and forego about $50 million annually. This raises due process concerns, as no evidentiary hearing was held to gauge Parties' reactions to this idea, or consider what ramifications there would be to the high cost fund and service to high cost areas. Moreover, this would be a substantial departure from the Parties' Agreement – which calls for a reduction in access rates of approximately $11 million annually. (My guess is that Qwest would walk away from the Settlement Agreement if this new condition were imposed.) The better route, as I suggested during deliberations, is to join the rate rebalancing and high cost fund issues as part of an investigatory docket. There, the issues of high cost recovery and rate rebalancing for *all* ILECs could be addressed. So long as ILECs must serve high cost areas, we must address the implicit and explicit subsidies that pay for that service. The record in this proceeding does not justify the *a priori* determination that a large implicit subsidy for one carrier should disappear, without also taking up how this might affect explicit subsidies and service to high cost areas, and whether implicit subsidies for all high cost carriers should be removed. I look forward to doing so, should my colleagues agree.

3. Today's decision takes a modest step in that direction, toward a regulatory framework that recognizes the reality of today's communications marketplace – that Qwest faces significant competition from intramodal providers, as well as wireless, cable and Internet Protocol telephony services. Evidence presented in this case includes:

- Qwest's access lines have decreased by 11 percent over 2.5 years.
- 50 intramodal competitive providers are actively providing service.
- Competitors have deployed 37 switches in Qwest's service territory.
- Comcast promises a broad rollout of cable telephony through Internet Protocol in Colorado in the near future.
- Broadband penetration in Colorado, enabling Voice over Internet Protocol (VoIP), has increased 23 percent over six months.
- According to the Ciruli survey, 71 percent of Colorado residents have a cellular phone; 37 percent of Colorado residents would consider cutting their wireline connection if wireline rates go up by more than $10 per month.

4. There are those who say intermodal competition should not be considered when assessing the marketplace because these services are not perfect substitutes for wireline. But Qwest's market power is not curtailed through only perfect substitutes; the issue is whether residential and business customers would consider switching to a different provider or different platform (*e.g.*, cable, wireless, VoIP) in response to a Qwest price increase, regardless of the "substitutability" of the product. Consumers are smart enough to discern the relative advantages and disadvantages of competing platforms. For example, the evidence shows that some Colorado consumers would switch to wireless as a result of a wireline price increase. Some will stay with wireline, of course, but it is not necessary for all consumers to leave a platform for there to be a constraint on pricing power.

5. Given the evidence cited above and elsewhere in the record, Colorado statute allows for, and even encourages, the Commission to transition to a regulatory framework from the rate of return structure of -Part 2 (§ 40-15-201, *et seq.*) to the less heavy handed, more flexible treatment of Part 5 (§ 40-15-501, *et seq.*). Indeed, § 40-15-503(2)(c)(I) requires us to "consider changing to forms of price regulation other than rate of return regulation," so long as "telecommunication services continue to be available to all consumers in the state at fair, just and reasonable rates."

6. The Settlement Agreement, as modified by the Commission's decision, accomplishes just that. With respect to telecommunications, the Commission now moves from before-the-fact command and control regulation to after-the-fact enforcement. This, in my view, is what is contemplated by Colorado statute.

7. While some have labeled this move "deregulation," it is far from that. Rates must be just, reasonable and not unduly discriminatory, which may be enforced by complaint. The Commission continues to have regulatory authority over all services except toll – which means the Commission can revisit and change any stipulated provision in the future. The price of basic local service continues to be capped by statute. "Stand-alone" service offerings and "least cost" options must be disclosed to residential consumers. Service quality must continue to be reported, and self-executing financial penalties are continued with two metrics. If, say, Microsoft or General Motors were subjected to these kinds of strictures, few would herald it as "deregulation."

8. In short, the Settlement Agreement affords Qwest (and, through a later rulemaking, its competitors) with much needed flexibility to respond to customer demands, as opposed to regulatory demands. Regulation should not exist for its own

sake. As competitive pressures emerge, the purposes of regulation – to police against monopoly power and protect consumers – gradually become fulfilled by the market. As in any market, some prices will rise, and some fall. Consumers will benefit through increased choices of service offerings and providers and, eventually, most prices should decrease. The Settlement Agreement recognizes that the transition to a fully competitive market is progressing, and maintains adequate consumer protections in the meanwhile. This is what Colorado statute calls for and why, in my opinion, approving the Settlement Agreement (with slight modification) is in the public interest.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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Chairman

VII. COMMISSIONER POLLY PAGE CONCURRING, IN PART, AND DISSENTING, IN PART

While I agree with Chairman Sopkin's Special Concurrence, I respectfully disagree with the majority decision on two issues.

A. § III. H. p. 16; § IV. 9. p. 17; and § VI. 7. p. 19 Line Extensions.

1. The first issue on which I disagree with the majority concerns the treatment of line extensions in the Settlement Agreement. The majority has chosen to approve Stipulation language that allows for line extensions to be treated either under Market Regulation or under Modified Existing Regulation depending on the type of regulation that applies to the line the customer requests. While I agree that ultimately this is the appropriate regulatory treatment of

this service, I believe that until the conclusion of the follow-on high cost fund docket, **all** line extensions should be under Modified Existing Regulation.

2. Pursuant to 4 *Colorado Code of Regulations* 723-2-4.5, any company receiving monies from the Colorado High Cost Support fund must offer credits to customers for line extensions which reflect the amount of the support the company receives. I believe it is prudent that the Commission monitor these credits on a tariffed basis to ensure that Qwest credits to its customers the same amounts that it receives. The follow-on high cost fund docket, in large part, is to examine which services should still be receiving support and the appropriate level of that support. Until those determinations are made, I disagree with the majority that the Commission should lessen its oversight on the manner in which Qwest credits customers for any line extensions.

B. § VII. p. 19 Intrastate Switched Access.

3. The second issue on which I dissent is the majority's decision not to require Qwest to file an application to rebalance its rates including intrastate switched access rates in return for our approval of the portion of the Stipulation that protects Qwest's revenue stream by allowing Qwest to offset reductions in intrastate switched access rates with $11.2 million in revenues from the elimination of the CHCSM credit (a credit to reimburse customers for Qwest's over earnings). Such a condition is eminently reasonable given our approval of relaxed regulatory treatment for Qwest and allowing elimination of the CHCSM credit. If we are to level the regulatory field as Qwest asks, it makes sense for this Commission to examine Qwest's rate structure.

4. This record is clear that Qwest's rates for intrastate switched access are greater than its rates for interstate switched access. Qwest represents that its revenues would be lowered

by $50 million if it reduces its intrastate switched access rates to the rates that Qwest charges for interstate switched access. Moreover, it does not appear appropriate to deregulate Qwest's retail toll service, while allowing Qwest to continue to collect above-cost access rates from its competitors.

5. This record suggests that many of Qwest's regulated rates are set well above costs. For some time now, this Commission has allowed Qwest, on a case-by-case basis, to be made whole anytime that it has reduced a rate or made additional investments in facilities. I am concerned that through this piecemeal approach revenues generated by Qwest's services regulated under Modified Existing Regulation may subsidize Qwest's services regulated under Market Regulation. In some respects, Qwest wants the Commission to lessen regulation to allow Qwest to compete more efficiently. However, in other respects, Qwest wants the Commission to allow it to continue to receive the benefits of monopoly regulation. It is my contention that Qwest should not be allowed to have it both ways.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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Commissioner

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