

Decision No. C05-0984

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 GRANTING REHEARING, REARGUMENT,
AND RECONSIDERATION IN PART
AND CLARIFYING DECISION**

Mailed Date: August 12, 2005

Adopted Date: August 3, 2005

I. BY THE COMMISSION

A. Statement

1. This matter comes before the Commission for consideration of applications for rehearing, reargument, or reconsideration (RRR) of Commission Decision No. C05-0802 (Decision), filed jointly by Qwest Corporation (Qwest), Commission Staff (Staff), and the Colorado Office of Consumer Counsel (OCC) (together the Settling Parties); and the Colorado Association of Home Builders (CAHB). Although Qwest originally sought complete deregulation of nearly all of its retail services in an application filed on October 1, 2004, Decision No. C05-0802 approved with modifications a Settlement Agreement filed by the Settling Parties which established a new regulatory plan for telecommunications in Colorado.

The new plan provided for deregulation of toll service and for alternative forms of regulation for many other services, but at the same time maintained the current form of regulation for basic local exchange service.

2. Both the Settling Parties and CAHB filed their applications for RRR on July 18, 2005. For the most part, the applications for RRR seek clarification of Decision No. C05-0802 as opposed to a change in its provisions.

3. The Settling Parties seek the following:

- Clarification of ¶161 as it relates to the Commission's authority to obtain information necessary to enforce §§ 40-15-112 and 113, C.R.S., as well as clarification that the Decision does not eliminate the Commission's jurisdiction over non-optional operator services;
- Clarification and modification of procedural aspects of Decision No. C05-0802 relating to a Commission ordered competition study in ¶177;
- Clarification and modification of procedural aspects of Decision No. C05-0802 relating to reporting requirements with respect to the effectiveness of the stipulation and Commission Decision;
- Clarification of the timing of the opt-in rulemaking process ordered in ¶167; and
- Correction of the new local switching rate approved in the stipulation from \$.001764 to \$.011764.

4. CAHB asks the Commission to clarify that pursuant to the terms of the Settlement Agreement, the Commission retains jurisdiction over Land Development Agreements (LDAs). For the reasons set forth below, we partially grant the applications for RRR and clarify the issues as needed.

B. Discussion

5. We agree with the Settling Parties that the Commission still has the authority to collect information required to enforce §§ 40-15-112 and 113, C.R.S., which prohibit “slamming” and “cramming,” but only on an after-the-fact basis.

6. Under the Settlement Agreement, § 40-15-302.5, C.R.S., is no longer applicable to toll resellers. The plain language of § 40-15-402(1), C.R.S., provides that “[N]othing 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.” Thus, since the Commission found that effective competition exists for toll, and provided for its deregulation pursuant to Part 4 in Decision No. C05-0802, § 40-15-302.5, C.R.S., can no longer apply to toll service. Once the follow-on proceeding contemplated in Decision No. C05-0802 is complete, toll resellers will not be required to pre-file the information required by § 302.5.¹

7. We envision that, primarily, the Commission will undertake post-complaint enforcement of these statutory provisions, and that the Commission’s records and investigatory ability will enable it to collect information relevant to enforcement of those provisions.

8. Under § 40-15-107, C.R.S., the Commission has the duty and power to enforce all provisions of Part 1 of Article 15 as set forth below:

(1) The commission shall administer and enforce all provisions of this article, and, in addition to any other powers under articles 1 to 7 of this title, the commission has the right to inspect the books and documents of the local exchange provider. The local exchange provider shall supply additional relevant and material information to the commission as needed. In addition, the commission has the right to inspect the books and records of any affiliate which provides telecommunications service under part 2, 3, or 4 of this article, if, in the provisions of such service, the affiliate uses a plant or incurs costs that are joint

¹ It follows then that the Commission likewise cannot order facilities-based toll providers to pre-file information once they are deregulated.

and common to the provision of any basic local exchange service of the local exchanges provider regulated under part 2 of this article.

While not all carriers are covered by this statutory provision, it does provide the Commission access to a variety of sources of information. The Commission also has at its disposal its historical records, as well as information from other state commissions and information submitted in any complainants which it can use to obtain contact information for these deregulated providers.

9. This Commission has a duty to enforce §§ 40-15-112 and 113, C.R.S., and has the ability to collect the information required to do so. We reiterate that a legislative fix may be an appropriate way to deal with this conundrum in the future. We will pursue that course of action when appropriate.

10. The Settling Parties include in their discussion on slamming and cramming a request for clarification that the Commission has not deregulated non-optional operator services. We clarify that we have not. Paragraphs 97 and 98 of Decision No. C05-0802 clearly state that we approved Section IV of the Settlement except for the modifications outlined in the paragraphs that followed. Non-optional operator services were not discussed in those modification paragraphs and therefore are to be regulated pursuant to the Settlement Agreement under Market Regulation. In addition, we note that neither the Settlement nor the Decision adopting the Settlement with modifications does anything to alter the requirements of § 40-15-302(5), C.R.S.

11. Next, the Settling Parties request modification and clarification of the on-going reporting requirements on statewide competition and the effectiveness of the Settlement Agreement. The Settling Parties ask the Commission to clarify that these studies and reports are to be performed at the direction of the Commission. This would mean that, if carriers do not respond to the request for information, they would be in violation of a Commission order and the

Commission could take appropriate action. Further, the Settling Parties request the Commission clarify that the studies and reports would be performed in an investigatory docket to be opened by the Commission. Within this docket, the Settling Parties request that Staff be given the flexibility to work to establish the most efficient and effective methods for obtaining the desired information from carriers.

12. As to the timing of the reports, the Settling Parties request that the Commission allow the combination of the two reports (the report on competition and the report on the effectiveness of the Settlement Agreement) and allow for the reports to be initially filed on September 30, 2007. The combination of the reports and September due date will allow the Parties to include information from the annual reports filed by carriers in April of each year.

13. Finally, the Settling Parties ask that the Commission modify the Decision to have additional reports and studies, due after the September 2007 reports, be conducted as needed by future Commission order rather than automatically on an annual basis.

14. We agree with the Settling Parties' requests with respect to the follow-on reports and with their requests for modification. When the Staff is ready to begin its investigation on competition, we expect Staff to bring an item to our weekly agenda to open the necessary investigatory docket. In this docket, by our order, carriers will be required to submit the requested information similar to our exercise in Docket No. 04M-435T. Staff will have the flexibility to collect the information they believe is appropriate to demonstrate the state of competition in Colorado, and the flexibility to collect that information in the manner they believe is most efficient. This report and the report on the effectiveness of the Settlement Agreement may be combined and filed initially by September 30, 2007. Any additional annual, or other

periodic, reports may be required by future Commission order.² Commissioner Page dissents on this last point in a separate statement.

15. With respect to paragraph 177 of the Decision, the Settling Parties request that the Commission clarify what reports (similar to the reports required to be filed in Docket No. 97A-540T) the Commission believes would be useful to include in the 2007 report on the effectiveness of the Settlement Agreement. We will not undertake this task. We believe that Staff, Qwest, and the OCC are much more familiar with what information is contained in the reports and that they are in the best position to determine what is useful for the Commission's on-going knowledge of Qwest's position in the market and its business practices. We decline to modify this part of our decision. Rather, the Settling Parties are still required to submit a draft format of this report to us for approval within 90 days of the effective date of the Settlement Agreement.

16. The Settling Parties also ask us to clarify the timeline for the follow-on rulemaking to examine and modify our default rules for the regulation of competitive local exchange carriers (CLECs) set forth in paragraph 167 of our Decision. We acknowledge that the language we used in our Decision regarding this timeline was confusing. We clarify that we intend for the CLEC default rulemaking to be completed contemporaneously with the effective date of the last of Qwest's required tariff changes which, according to the terms of the Settlement Agreement, will be approximately 120 days after the effective date of the Settlement Agreement. The effective date of the Settlement Agreement, in turn, will be five days after the date of a final Commission decision.

² In response to the dissent, the majority believes that the Commission will be better informed after receiving the September 2007 reports as to whether any further reports would be useful.

17. Finally, the Settling Parties ask the Commission to change a typographical error in the Third Corrected Stipulation and Settlement Agreement regarding the lowered local switching rate. The Settling Parties stated that this rate should be \$.011764 instead of the \$.001764 rate contained in the Settlement Agreement.

18. The Commission construed this request as a Motion by Decision No. C05-0923 and allowed interested parties to respond. On July 28, 2005, AT&T Communications of the Mountain States, Inc. (AT&T) and MCI, Inc. (MCI) jointly responded to this Motion. In the response, AT&T and MCI stated that they agree with the proposed correction by the Settling Parties.

19. We will grant this request for correction. The final sentence in Section VII of the Settlement Agreement should read, "The balance will be used to reduce the current local switching rate to \$.011764." We attach the corrected page of the Settlement Agreement to this Decision as Attachment A.

20. In its application for RRR, CAHB seeks modification or clarification on the Commission's decision regarding the treatment of LDAs. CAHB states that the Commission's Order can be read to suggest the LDAs are not subject to regulation by the Commission. CAHB contends that under the terms of the Settlement Agreement, current LDA tariffs will be eliminated, Qwest will post the rates, terms, and conditions associated with LDAs on its website, and LDAs will continue to be subject to the jurisdiction of this Commission, under either Market Regulation or Modified Existing Regulation depending upon the specific LDA element at issue.

21. CAHB states that the Commission's Decision at paragraphs 41 and 42 appears to suggest that LDAs will now be totally deregulated. CAHB requests that the Commission either

modify its order by approving the LDA portion of the Settlement Agreement in its entirety, or, at a minimum, clarify that LDAs remain subject to regulation and the Commission's jurisdiction.

22. We confirm for CAHB that our Decision did not deregulate LDAs. We approved the Settlement Agreement with respect to LDAs with one slight modification. The modification was that LDAs will not be regulated depending on the facilities at issue, under either Market Regulation or Modified Existing Regulation. Rather, as stated in paragraph 114 of the Decision, Qwest will be required to post the agreements to its website and the Commission will retain jurisdiction over the agreements and their terms, but the terms will not be differentiated by facility type.

II. ORDER

A. The Commission Orders That:

1. The application for rehearing, reargument, or reconsideration filed by Qwest Corporation, the Staff of the Commission, and the Colorado Office of Consumer Counsel is granted in part consistent with the clarifications and the discussion above.

2. The Colorado Association of Homebuilder's application for rehearing, reargument, or reconsideration is partially granted consistent with the clarifications discussed above.

3. This Order is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS WEEKLY MEETING
August 3, 2005.**



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Commissioners

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

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

1. I disagree with the majority's decision to modify our directive contained in paragraphs 176 and 177 of the Decision requiring Commission Staff, Qwest Corporation (Qwest), and the Colorado Office of Consumer Counsel to report annual information beginning in 2007 on competition in the State of Colorado and the effectiveness of the Settlement Agreement. I believe that having the information filed on an annual basis would assist both the Commission and Qwest in the analysis of trends that could help facilitate further deregulation.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Commissioner