(Decision No. C89-1154)

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

* * *

RE: THE APPLICATION OF THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY FOR ENTRY OF AN ORDER BY THE COMMISSION REFRAINING FROM REGULATING POINT-TO-POINT AND POINT-TO-MULTI-POINT DEDICATED TELECOMMUNICATIONS SERVICES; OR IN THE ALTERNATIVE, FOR A DECLARATION OF CONTINUED APPLICABILITY OF THE PUBLIC UTILITY LAW OF COLORADO TO OPERATING RIGHTS FOR THOSE SERVICES.	APPLICATION NO. 37367-Reopened (1988) COMMISSION DECISION

September 13, 1989

STATEMENT

BY THE COMMISSION:

On September 28, 1987, the Commission entered Decision No. C88-1347 in the consolidated docket consisting of Case No. 6633 and Application No. 37367. Decision No. C87-1347 was modified in Decision No. C87-1526, issued November 4, 1987. Application No. 37367 had been filed by The Mountain States Telephone and Telegraph Company, doing business as U S WEST Communications, Inc. (Mountain Bell or USWC), on November 26, 1985. In that application USWC requested the Commission to enter an order refraining from regulating point-to-point and point-to-multi-point dedicated telecommunications services (generically known as private-line services). Case No. 6633 had its genesis by the issuance of notice on July 2, 1987, as a result of the passage and signing into law by Governor Roy Romer of House Bill 1336 (H.B. 1336) on July 2, 1987. H.B. 1336 is codified as Article 15, Title 40, C.R.S., and repealed H.B. 1264 which had been enacted in 1984.

Decision No. C87-1347 provided in ordering paragraph 8 that Case No. 6633 in Application No. 37367 would remain open both for the purpose of Phase II, segregation of investments and expenses associated with the provision of private-line services in Colorado and for further hearings in approximately one year for the further evaluation of the status of the private-line markets and the impact of the flexible regulatory treatments provided for in Decision No. C87-1347, as modified by Decision No. C87-1526.

On July 29, 1988, the Commission entered Decision No. C88-976 which, among other things, set further hearings in Application No. 37367 to evaluate the status of the private-line markets and the impact of the flexible regulatory treatments provided for in Decision No. C87-1347, as modified by Decision No. C87-1526. The hearings were originally scheduled for January 9 and 10, 1989, but those dates were vacated and hearings ultimately were held on May 30, 1989. On that date, three witnesses testified and were cross-examined. Larry Christensen testified on behalf of USWC. In connection with Mr. Christensen's testimony, the following exhibits were admitted: Exhibit A, Exhibit A1, Exhibit A2, Exhibit B (proprietary), Exhibit B1, Exhibit C (proprietary), Exhibit D, and Exhibit E (proprietary). Mr. Terry Parrish testified pro se. In connection with his testimony the following exhibits were admitted: Exhibit G, Exhibit G-1, and Exhibit H. Dr. Neil Langland testified on behalf of the Commission Staff. In connection with his testimony the following exhibits were admitted: Exhibit I, Exhibit I-1, and Exhibit J (proprietary). Administrative notice was taken of the following cases and decisions listed on page 3 of Dr. Langland's direct testimony, to wit:

1. Application No. 37367/Case No. 6633; Decision Nos. C87-1347, C87-1526, C87-1585, C88-528;

2. Case No. 6666; Decision Nos. C88-501, C88-710, C88-757, Application No. 37367-Reopened; Decision No. C88-770, C88-969, C88-976, C88-1228;

3. Application No. 38755; Decision Nos. C88-1302 and C89-5;

4. Application No. 39020; Decision No. C88-1467;

5. Application No. 39225, Decision Nos. C89-126; C89-404, C89-626.

At the conclusion of the hearings, it was decided by the Commission that parties could file statements of position on or before June 30, 1989. Statements of position were filed on that date by Denver Burglar and Fire Alarm Company, MCI Telecommunications Corporation (MCI), AT&T Communications of the Mountain States, Inc. (AT&T), USWC, and the Staff of the Commission.

Application No. 37367-Reopened was discussed by the Commission at its open meeting on August 2, 1989.

FINDINGS OF FACT

A. Reporting

The Commission finds that USWC is approaching compliance with ordering paragraph 9 in Decision No. C87-1347, which required USWC to work with the Staff of the Commission to develop a monthly report concerning lost revenues associated with the provision of private-line services as a result of competitive activities.

On June 15, 1988, the Commission entered Decision No. C88-770 which, in ordering paragraph 3 thereof, ordered USWC to comply, on or before July 18, 1988, with ordering paragraph 9 in Decision No. C87-1347 (the reporting requirement). On July 18, 1988, USWC filed a pleading entitled a response to ordering paragraph 3 of Decision No. C88-770. Then, on August 16, 1988, USWC filed a Motion for Clarification of Decision No. C88-976 in which it requested that the Commission enter an order confirming that the information described in Mountain Bell's response to ordering paragraph 3 of Decision No. C88-770, which it filed on July 18, 1988, constituted a satisfactory response to the directives contained in Decision No. C88-770, dated June 15, 1988, and ordering paragraph 9 or Decision No. C87-1347, dated September 28, 1987.

On September 14, 1988, the Commission entered Decision No. C88-1228 which declined USWC's request that the Commission clarify in Decision No. C88-976 by confirming that the information provided by USWC on July 18, 1988, constituted an acceptable response to ordering paragraph 3 of Decision No. C88-970 and ordering paragraph 9 of Decision No. C87-1347. However, the Commission also changed the timeframes within which USWC was to comply with those ordering paragraphs and also ordered USWC to confer with the Staff concerning the formulation of an acceptable format to comply with them.

The Commission acknowledges that considerable progress has been made in getting to a satisfactory solution to the reporting requirement directives of the Commission, previously issued, and referenced above. The task, however, is not yet complete.

We agree with the Staff and find as fact that USWC should not be required to construct a stranded investment tracking mechanism with respect to plant previously devoted to private-line services which is no longer used. If USWC makes claims in future cases for stranded plant, USWC shall develop some means, either unilaterally or in cooperation with the Staff, of quantifying the stranded investment across product lines. The Staff has requested the Commission reiterate its dedication to the necessity that USWC develop a private-line drop-off survey reporting mechanism. We do so, and we expect USWC to complete this aspect of its reporting mechanisms without delay in accordance with the order to follow.

The Staff has indicated that the generation of a comparison of forecasting to actual is possible for the high-end private-line market, but that such capability does not presently exist for all sub-markets. Accordingly, Staff believes that an overall market forecast and comparison should be the initial phase with possible extension to sub-markets reserved as a possibility for future refinement. The Staff also has suggested that such reports be submitted according to a specified schedule and be made available to the Staff both in hard copy and in spread sheet-compatable electronic format. We agree with the Staff in this regard, and also agree that USWC should maintain its data tapes in such a fashion as will allow the recomputation of certain reports should reporting formats change.

The Staff is of the opinion that USWC should find its reports, as above described, useful and productive. However, if USWC does not agree that such reports are useful and productive, USWC shall submit, within 30 days, a detailed and time-lined proposal to develop the modifications and new reports which USWC believes are useful and productive. We find Staff's suggestion to be reasonable, and it will be adopted.

B. Regulatory Treatment of Low-End Private-Line Services

The major component of Decision No. C87-1347 is the regulatory treatment to be accorded private-line services. Decision No. C87-1347 provided, in Finding of Fact No. 21, that high-end or high-speed private-line service, defined as providing to a single customer the capacity of 24 or more circuits over a single path, point-to-point, for analog transmission, or the use of T-1, DS-1, or above, or its data-service equivalent at or in excess of 1.44 megabits per second for digital transmission by a single customer over a single path, point-to-point, should be accorded maximum reduced regulation or maximum flexible treatment. Accordingly, with respect to those services, Decision No. C87-1347 provided that the Commission would only retain complaint jurisdiction and its audit powers to monitor the high-end sub-market unless unexpected problems were to arise. As a result, USWC is not required to file any price lists with the Commission for high-end private-line services. Decision No. C87-1526 modified Decision No. C87-1347, by requiring USWC to price these services at a rate no lower than long-run incremental cost (LRIC).

By way of contrast, Finding of Fact 22 in Decision No. C87-1347 provided that with respect to all other intraLATA private-line services, banded pricing with packaging flexibility was the appropriate form of flexible regulation. Packaging flexibility allows USWC to package its services and products to give customers additional choices; however, it must make components of its packages available to competitors and must unbundle its prices so that its competitors may offer similar packages using USWC components. Finding of Fact No. 23 provided that LRIC-based prices would be used as a floor and tariffed rates would be used as a ceiling for the banded rates. The Commission found that this would allow USWC flexibility to meet expected competition in the intraLATA market but would protect the general body of ratepayers as well as users of private-line services. The Commission also provided, in Finding of Fact No. 24, that it would use its audit powers to evaluate the rates derived from using LRIC.

In this docket, USWC has advocated that its low-end private-line services be accorded the same maximum flexible regulatory treatment as is currently accorded to its high-end private-line services. This request was opposed by the Staff of the Commission, Denver Burglar Alarm, and MCI. AT&T did not take a position with respect to USWC's request. The Commission finds that USWC has not sustained a case under § 40-15-302, C.R.S., or under the Commission's rules formerly found at 4 CCR 723-24, effective January 1, 1988, for according to low-end private-line services

the same maximum regulatory flexibility accorded to its high-end private-line services.

The Commission has already recognized in Decision No. C87-1347, that there is a different competitive situation between high-end and low-end private-line services offered by USWC. The degree and type of competitive activity varies with product type, market density, and urban versus rural location. In addition, the Commission has recognized that USWC controls bottleneck facilities and the public switched network, and on this additional basis has provided USWC with a different relaxed regulatory scheme for low-end private-line services than for all other providers.

USWC did not make a showing that the current regulatory treatment was in any way inadequate, either for the entire low-end intraLATA market, nor for any of the sub-markets just mentioned.

USWC witness Christensen testified that during 1988 6 companies were certificated by the Commission to provide private-line services on an intraLATA basis, including AT&T, MCI, Colorado Network, Inc. (CNI), Conti-Comm, U.S. Sprint (Sprint), and Wiltel. Actually, only five were certificated to provide intraLATA services inasmuch as Wiltel was certificated only for interLATA service. USWC contends that since these other carriers were accorded maximum reduced regulation both as to high-end and low-end intraLATA private-line services, the same regulatory treatment should now be accorded to it. A mere listing of other providers is a thin reed upon which to make a finding of competition, and we decline to do so. Thus there was no showing by USWC that these other providers are facilities-based carriers who have replicated the facilities of USWC rather than having to obtain access from USWC in order to provide their own intraLATA services. Nor did USWC address the issue of how a firm such as itself which, because it controls bottleneck facilities and the public switched network, has the ability to affect prices or deter competition, would nevertheless be adversely affected by the mere presence of other providers who do not have a similar ability to affect prices or deter competition, since they do not control bottleneck facilities or the public switched network.

USWC witness Christensen also submitted a proprietary exhibit which was a compilation of microwave permits issued between January 1987 and 1988. The compilation was done by an outside entity known as Comsearch at USWC's request. Mr. Christensen acknowledged that he did not know exactly how the exhibit was put together and he did not know what the various terms meant, nor could he say whether the capacity shown on the exhibit was in use. He was unable to explain the GAP date of 00/00/00 and he was unable to provide the calculation that provided him with certain figures in his testimony. Mr. Christensen did not delineate which of the microwave circuits in the study were intraLATA or interLATA nor could he say whether the paths were high-end or low-end. Further, he could not distinguish between existing capacity and new capacity, did not know how the permit process works, and could not explain what possible good the exhibit would do for the Commission without knowing the answers to the foregoing questions. Mr. Christensen apparently did not know that

microwave licenses must be renewed at least every five years and that license modification is necessary for the following changes in an authorized station:

1. frequencies change;

2. antenna azimuth change;

3. change in antenna beamwidth;

4. change in antenna polarization;

5. change in antenna or repeater of one second or with requirement of special aeronautical study;

6. any change in antenna height;

7. any change in size of passive reflectors or repeators;

8. any increase in emission bandwidth beyond that authorized;

9. any change in type of emission;

10. any change in authorized effective power in excess of 3dB;

11. substitution of equipment having different frequency tolerance.

Mr. Christensen apparently was unaware that license renewal required inclusion of the entire capacity. Finally, Mr. Christensen embraced the testimony of Mary K. Sharpe filed in the first phase of this docket which the Commission has previously determined was entitled to little if any weight. With regard to USWC's desire to obtain maximum reduced regulation for the low-end private-line market, no evidence was presented which verified the assertion that T-T rates have fallen as a result of relaxed regulation or of competitive activity.

Lastly, USWC contends that the declining costs of customer premises equipment (CPE) is a significant source of competition for USWC's private-line services which exerts pressure on USWC to keep private-line prices from rising too high. In all of the foregoing, however, USWC failed to demonstrate how the existence of other certificated providers, the existence of a microwave study (about which USWC's witness knew comparatively little) or the existence of CPE has redounded to the competitive peril or disadvantage of USWC in actual terms.

In short, on what hard facts could the Commission premise a finding that real competition exists in the low-end private-line markets

which will result in price disciplines which make it unneccessary for the Commission to do anything more than retain its complaint and audit power jurisdiction? If such facts exist, they were not presented in the hearing. Accordingly, in the presence of a failed case for according low-end private-line services maximum reduced regulation that is currently afforded to high-end private-line services, the Commission finds that the treatment prescribed by Decision No. C87-1347, as modified by Decision No. C87-1526 should be continued without modification.

The Commission will comment briefly upon the testimony provided by USWC witness Christensen that a significant practical reason for granting USWC additional regulatory relief in a low-end market is that customers have stated a preference for smaller, more frequent rate increases rather than infrequent, larger changes. Mr. Christensen went on to say that detariffing low-end private-line services would allow such pricing by USWC whereas, in contrast, by requiring low-end services to be tariffed, rates are changed only when there is a rate case where rate restructure, both of which occur infrequently. To borrow a phrase used by Mr. Justice Scalia in a recent United States Supreme Court case, "these arguments cannot be taken seriously."

As USWC knows or should know, there is nothing in the Public Utilities Law which mandates that tariffed rate changes can only be accomplished through the mechanism of a rate case or a rate restructure. USWC must know from its own experience that many tariff changes are made on a routine basis without the necessity of any Commission action at all. And USWC cannot be unaware of the fact that less than statutory notice procedures are available to effectuate rate changes on less than 30 days notice. Finally, for low-end private-line services, USWC has been authorized to use banded rates, where the floor is based on LRIC, which should allow USWC plently of pricing flexibility to meet competition. USWC can also enter into special contracts for these services and has been granted packaging flexibility. The "tariff" argument advanced by USWC to justify maximum reduced regulation for low-end private-line is made of whole cloth.

It is appropriate to review the regulatory scheme imposed by the Commission for private-line services, which was initially established in this application and Case No. 6633 in Decision No. C87-1347, as modified by C87-1526, and as it has been affected by the Case No. 6685 cost-allocation rules under § 40-15-108, C.R.S. USWC (for the high-end private-line services) and all other providers (for all private-line services) are authorized maximum flexible regulation, which has been defined to be:

a. Price lists or tariffs for private-line services need not be filed with the Commission;

b. Prices for private-line services shall not be less than LRIC;

c. Providers shall develop monthly data which will reflect revenues, expenses, and investments associated with

private-line services, such as, but not limited to price lists, quantities of services and products sold, income statements and balance sheets specific to private-line services. These reports should be made available on a semi-annual basis beginning December 31, 1987;

d. In the event a rate case was filed, the provider had the burden of proving that its rates were reasonable for private-line services;

e. The Commission will only exercise its complaint and audit jurisdiction over private-line services unless circumstances require a change in this policy;

f. Providers are authorized to operate as if private-line services were virtually deregulated; and

g. Providers may maintain books and records for private-line services in accordance with the Uniform System of Accounts (USOA), Generally Accepted Accounting Principles (GAAP), or under any other method approved by the Federal Communications Commission (FCC).

The requirements in paragraphs a, d, e, and f were found in Decision No. C87-1347. Decision No. C87-1526, added the requirements in paragraphs b and c. Paragraph g is derived from the Case No. 6685 cost allocation rules found at 4 CCR 723-27.

USWC has been authorized a different regulatory scheme for low-end private-line services; namely, that it will offer those services through banded rates where the cap is the tariffed rate in effect when Decision No. C87-1347 was issued and where the floor is based upon LRIC. In addition, USWC is authorized to provide low-end private-line services on a contract basis where the price floor is, once again, based on LRIC. USWC was also granted packaging flexibility for private-line services in general. However, where it offered a package containing Part 2, private-line services, or Part 4 services, it was required to unbundle the prices for each component by stating the prices separately so competitors, who were dependent upon USWC control of bottleneck facilities and the public switched network, could obtain the same price for the components needed to assemble their own package offerings using some of USWC facilities where necessary to assemble the package. This control was imposed so that USWC could not deter competition and is similar to Open Network Architecture concepts endorsed by USWC.

Upon reconsideration, in Decision No. C87-1526, the Commission removed a requirement in Decision No. C87-1347, that USWC make LRIC prices available to all parties in the proceedings after they had signed nondisclosure agreements, on the basis that the LRIC prices were extra-proprietary. The Commission also imposed the LRIC floor on all providers including USWC for all private-line services, whether low-end or high-end. Finally, the Commission extended the deadline for

developing certain reports to be made available for Staff audit from March 1, 1988, to May 31, 1988, upon USWC's request.

USWC continues to request the Commission treat it the same as all other providers of private-line services for all levels of private-line services. In reality, USWC's treatment is not significantly different from that authorized all providers in the private-line market. Other than trying to encourage USWC to quantify losses it claims it has sustained in the private-line market to competitors, the Commission has only exercised its complaint and audit jurisdiction over USWC in the private-line market. Because USWC controls bottleneck facilities and the public switched network, with which it provides basic local exchange telephone service as well as other regulated part 2 services, it is subject to both a price cap and floor. This protection exists because it has the greatest opportunity to improperly cross-subsidize deregulated services and products by use of improper assignment of costs and revenue to and from regulated services and products.

C. Regulatory Treatment for Other Providers

Again USWC has requested the Commission to clarify the type of regulatory treatment which is accorded to other interexchange carriers entering the intraLATA private-line market. AT&T strenuously objects to the suggestion that the Commission "clarify" or "revise" its decision in Case No. 6633 concerning the regulatory treatment accorded to interLATA private-line telecommunications providers, such as AT&T, MCI, and U.S. Sprint (Sprint). On May 4, 1988, the Commission entered Decision No. C88-528 which dismissed a Motion for Clarification of Commission Decision Nos. C87-1347 and C87-1526 which had been filed by USWC on April 8, 1988. In Decision No. C88-528, the Commission said:

> Application No. 37367 pertains to Mountain Bell, and any directives issued in that docket are applicable to Mountain Bell. The proper regulatory treatment to be accorded to other carriers, will be determined in dockets which pertain to those other carriers in accordance with Article 15, of Title 40 (House Bill 1336) and the Commission's rules issued in accordance with the statutory mandate contained in that legislation.

AT&T points out that Case No. 6633 is closed, that all decisions in that docket are final, and that the suggestion by USWC in Application No. 37367-Reopened (1988) to clarify Decision No. C87-1347 in Case No. 6633 represents nothing more than a second attempt by USWC to collaterally attack that decision which USWC did not appeal to district court.

The only matter now before us is Application No. 37367-Reopened (1988) which deals exclusively with the regulatory treatment for private-line services to be accorded USWC. The regulatory treatment accorded to other providers is not at issue in this docket except insofar

as it may impinge upon the regulatory treatment accorded to USWC. That is, in this docket, the Commission cannot establish regulatory treatments for other providers since this docket pertains only to USWC. The Commission has made its determinations with respect to the reporting requirements of USWC regarding its private-line services, and it has made its determination with respect to the request that USWC be accorded the same regulatory treatment for its low-end services as it now has for its high-end services. This reopened docket is not the proper vehicle for USWC to obtain a modification of what the Commission decided in Case No. 6633 which is long closed.

However, the Commission is in the process of investigating the possibility of opening a rulemaking docket for the regulation of private-line services which may supercede the regulatory scheme presently in effect.

D. Motion to Strike

On August 14, 1989, USWC sent a letter with an attached news article to all Commissioners. On August 16, 1989, the Staff moved to strike the letter as an ex parte communication directed to the Commissioners. Obviously, the news article is available to the public. However, USWC and all parties are reminded that Rule 7 of the Commission's Rules of Practice and Procedure provides that all correspondence with the Commission shall be addressed to the Executive Secretary and not to individual Commissioners unless otherwise specifically ordered. No such order was entered in this case. The Commission, nonetheless, will not strike the letter and its attached news article. It may be a part of the record; however, it has not been used by the Commission to decide this matter.

THEREFORE THE COMMISSION ORDERS THAT:

1. The Mountain States Telephone and Telegraph Company, doing business as U S WEST Communications, Inc., shall comply with the directives set forth in the above findings of fact regarding reports to the Commission concerning its private-line services, including, but not limited to, a drop-off survey reporting mechanism, a comparison of forecasting and actual for the overall private-line market. Such reports shall be submitted on a quarterly basis, commencing on November 30, 1989, for the third quarter of 1989, and each quarter thereafter, in hard copy and spread sheet-compatible electronic format (floppy disk).

2. The Mountain States Telephone and Telegraph Company, doing business as U S WEST Communications, Inc., shall maintain its data tapes for a period of two years from the due date of each quarterly report in such fashion as will allow the recomputation of certain reports relating to private-line services should reporting formats subsequently be changed by the Commission.

3. To the extent that The Mountain States Telephone and Telegraph Company, doing business as U S WEST Communications, Inc., does not agree that the foregoing reports are useful and productive, it shall

advise the Commission, in writing, within 30 days of the effective date of this Decision and Order of that fact and shall submit a detailed and time-lined proposal to develop the modifications and new reports which it believes will be satisfactory to the Commission and to itself.

4. The request by The Mountain States Telephone and Telegraph Company, doing business as U S WEST Communications, Inc., that it be accorded the same regulatory treatment of maximum reduced regulation for its low-end private-line services, defined in the above findings of fact, as is presently accorded to its high-end private-line services is denied provided, however, that this denial is without prejudice to future modifications based upon changed circumstances occurring after the effective date of this Decision.

5. The Motion to Strike filed by the Staff of the Commission on August 16, 1989, is denied. In addition, all other requests, made by parties to this reopened docket, not specifically granted by the preceding ordering paragraphs are denied.

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

This Decision and Order shall be effective 30 days from this date, unless otherwise ordered by the Commission.

DONE IN OPEN MEETING September 13, 1989.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

ARNOLD H. COOK

RONALD L. LEHR

Commissioners

COMMISSIONER GARY L. NAKARADO CONCURS IN THE RESULT.

COMMISSIONER GARY L. NAKARADO CONCURS IN THE RESULT:

Concurring Opinion to follow.

(S E A L)

ATTEST: A TRUE COPY

James P. Spier
Executive Secretary

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

GARY L. NAKARADO

Commissioner

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(Decision No. C89-1154)
Concurrence of
Gary L. Nakarado

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

* * *

RE: THE APPLICATION OF THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY FOR ENTRY OF AN ORDER BY THE COMMISSION REFRAINING FROM REGULATING POINT-TO-POINT AND MULTI-POINT DEDICATED TELECOMMUNICATIONS SERVICES; OR IN THE ALTERNATIVE, FOR A DECLARATION OF CONTINUED APPLICABILITY OF THE PUBLIC UTILITY LAW OF COLORADO TO OPERATING RIGHTS FOR THOSE SERVICES.	APPLICATION NO. 37367 CONCURRING OPINION OF COMMISSIONER GARY L. NAKARADO

Decision No. C89-1154
(Issued September 13, 1989)

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November 14, 1989

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The majority opinion finds on page 5 that The Mountain States Telephone and Telegraph Company d/b/a US WEST Communications, Inc., (USWC) did not make a showing that the current regulatory treatment was in any way inadequate, either for the low-end intraLATA market, nor for any of the submarkets just mentioned.

I agree with this conclusion and based on the record of this case concur in the result. However, I wish to make certain observations on the law and the facts in this case and this area in general.

(1) <u>It is everyone's burden to promote competition</u>. I agree that the majority is correct in stating: "USWC did not make a showing that the current regulatory treatment was in any way inadequate, either for the entire low-end intraLATA market, nor for any of the sub-markets just mentioned." However, this is not the whole story -- we too have an obligation to lead and take action which will make the markets more competitive. The Commission's tasks and authority are stated in § 40-15-101, C.R.S. and this includes:

> Legislative declaration. The general assembly hereby finds, determines, and declares that it is the policy of the state of Colorado <u>to promote a competitive telecommunications marketplace</u> while protecting and maintaining the wide availability of high-quality telecommunications services. . . .The general assembly further finds that the <u>technological advancements and increased customer choices for telecommunications</u>

> services generated by such market competition will enhance Colorado's economic development and play a critical role in Colorado's economic future. However, the general assembly recognizes that the strength of competitive force varies widely between markets and products and services. Therefore, to foster, encourage, and accelerate the continuing emergence of a competitive telecommunications environment, the general assembly declares that flexible regulatory treatments are appropriate for different telecommunications services. (Emphasis added.)

The assumption of the majority that the burden is on USWC to demonstrate a competitive market ignores our statutory mandate and could lead to a "Briar Patch" monopoly where market conditions, in conjunction with the existing regulatory treatment, combine to effectively prevent entry. It must be noted that:

a) There are effectively no competitors today in the low end private line area.

b) USWC has the authority to lower rates and has not exercised such right. Therefore, presumably they wish to raise rates. It is conceivable that that would promote competition, but we simply do not know this based on the record before us.

c) While we have ordered that rates not be set below long run incremental costs (LRIC), it is my understanding that at the present time we don't know what LRIC is and, therefore, LRIC may be greater than the present tariffed rate. If so, I would encourage USWC to so demonstrate and presumably receive at least an immediate increase, if not a higher range.

(2) Labeling Is Not Analysis. On page 5 the majority opinion notes:

> Nor did USWC address the issue of how a firm such as itself which because it controls bottleneck facilities and the public switched network, has the ability to affect prices or deter competition, would nevertheless be adversely affected by the mere presence of other providers who do not have a similar ability to affect prices or deter competition, since they do not control bottleneck facilities or the public switched network. (emphasis added)

Just as chanting "competition, competition. . ." does not substitute for the analysis required by the statute and our essential mission, neither does solemnly intoning "bottleneck facilities, bottleneck monopoly. . ." justify on its own, disparate treatment. Surely, the best case -- all things being equal, (which they may well not be) -- is similar treatment for all. Further, disparate treatment requires specific analysis and

policy outcomes. It is simply slight of mouth for the majority to claim that "In reality, USWC's treatment is not significantly different from that authorized all providers in the private-line market." The other providers don't have the same price constraints which seems significant to me.

(3) Need for rulemaking. The summary of the existing "law" by the majority is troublesome both for the strain to which the summary is put to conclude that "there is no real difference" in treatment and because of the perilously close resemblance that the discussion bears to rules. I continue to believe that the current private line "regulatory scheme" is open to serious question under Home Builders Ass'n v. PUC, 720 P.2d 552 (Colo. 1986).

The Uniform Law Commissioners' Model State Administrative Procedure Act (1981) provides a suggested provision which I believe we could usefully adopt in Section 2-104:

> Section 2-104. (Required Rule Making)
>
> In addition to other rule-making requirements imposed by law, each agency shall:
>
> * * *
>
> (3) as soon as feasible and to the extent practicable, adopt rules, in addition to those otherwise required by this Act, embodying appropriate standards, principles, and procedural safeguards that the agency will apply to the law it administers; and
>
> (4) as soon as feasible and to the extent practicable, adopt rules to supersede principles of law or policy lawfully declared by the agency as the basis for its decisions in particular cases. (emphasis added)

In the Commissioner's Comment to Section 2-104 the need for such language is discussed in pertinent part as follows:

> COMMISSIONERS' COMMENT
>
> A number of reasons favor a requirement that agencies displace or supersede law and policy made in the course of adjudications with rules, "as soon as feasible and to the extend practicable." As noted above law and policy expressed in rules is more readily available to affected members of the public than case precedent and is known in advance to affected parties; therefore, law and policy expressed in rules gives them fairer notice than case precedent. In addition, the general public has an opportunity to participate in law or policy made by rule, while its opportunity to do so

with respect to policy made on a case-by-case basis is much more limited. Law or policy expressed in rules is also frequently more easily understandable to laymen than case precedent, and is almost always more highly visible to those who monitor the performance of agencies. That is, neither the legislative committee charged with oversight of agency rules nor the governor may effectively monitor policy made by an agency on a case-by-case basis because the documents in which such policy is declared are much less easily accessible than are rules which are published and widely distributed; nor may the legislative committee use its objection power created in Section 3-204(d) or the governor his veto power created in Section 3-202(a) on agency policy created wholly on a case-by-case basis. When agencies realize that creation of policy on a precedential case-by-case basis can enable them to avoid the publicity and public participatory hurdles of the rule-making requirements, and the possibility of effective legislative and gubernatorial review of that policy, they are likely to increase policy making in that manner to the extent their enabling acts permit them to do so. Only by the enactment of a statutory provision of the type recommended here, therefore, can agencies be forced to codify in rules principles of law or policy they may lawfully declare in decisions in particular cases, and may lawfully rely on as precedent. Without such a provision they will be free, in many situations, to make their most controversial policies on a case-by-case basis in adjudications, and thereby avoid on a permanent basis rule-making procedures and legislative and gubernatorial review.

Consequently, insofar as "feasible," and to the extent "practicable," agencies should be required to embody in rules specified principles of law or policy developed in their case precedent that in practice and in effect have become of general applicability. Of course, the rules an agency makes to satisfy its paragraph (4) obligation need not be wholly congruent with the displaced or superseded principles of law or policy lawfully declared by the agency in particular cases as the basis for those decisions. So long as they are both substantively and procedurally within the authority delegated to the agency, paragraph (4) rules may codify, or be broader or narrower than, the case law they displace. The validity of a rule adopted pursuant to paragraph (4), therefore, will not depend upon whether it is an accurate codification in all respects of the replaced preexisting agency case law.

If an agency breaches, in particular

circumstances, its duty which is based on a rule of reason -- "as soon as feasible and to the extent practicable"-- to issue such a rule displacing a line of its precedent, the agency may not subsequently rely on that line of precedent. Instead, it would have to readjudicate wholly de novo, and free of prior precedent, whatever principles of law might apply to those circumstances. Of course, this remedy may not be particularly effective since even in such wholly de novo adjudication the agency would probably readjudicate the same principle of law embedded in the prior precedent upon which it could not longer lawfully rely because its paragraph (4) duty had been breached. See e.g. the result in N.L.R.B. v. Wyman-Gordon Co, 394 U.S. 759 (1969), on slightly different facts. (emphasis added)

With these comments, I concur in the result.

(S E A L)

ATTEST: A TRUE COPY

James P. Spiers
Executive Secretary

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

GARY L. NAKARADO

Commissioner

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