Decision No. C01-278

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 00R-480T

IN THE MATTER OF PROPOSED AMENDMENTS TO TELECOMMUNICATIONS RULES, 4 CCR 723-18, 723-24, 723-35, 723-36, 723-37, 723-38, 723-51; AND THE RULES OF PRACTICE AND PROCEDURE, 4 CCR 723-1-22, 24, 42, 55, 57, AND 70.

DECISION ADOPTING RULES

Mailed Date: March 23, 2001
Adopted Date: March 7, 2001

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I. BY THE COMMISSION

A. Statement

1. This matter is before the Commission for consideration of proposed amendments to the telecommunications rules regulating certification, registration, asset transfer,

mergers, and abandonment of services: Rules 22, 24, 42, 55, 57 and 70 of the Commission's Rules of Practice and Procedure, 4 *Code of Colorado Regulations* ("CCR") 723-1; the Commission's Rules Regulating Operator Services For Telecommunications Service Providers and Telephone Utilities, 4 CCR 723-18; the Commission's Rules Regulating Emerging Competitive Telecommunications Service, 4 CCR 723-24; the Commission's Rules Regulating the Authority to Offer Local Exchange Telecommunications Services, 4 CCR 723-35; the Commission's Rules Regulating Proposals By Local Exchange Telecommunications Providers To Abandon, To Discontinue, or to Curtail any Service, 4 CCR 723-36; the Commission's Rules Regulating Applications By Local Exchange Telecommunications Providers To Execute A Transfer, 4 CCR 723-37; the Commission's Rules Regulating Applications By Local Exchange Telecommunications Providers For Specific Forms of Price Regulation, 4 CCR 723-38; and, the Commission's Rules Regulating Registration Of Toll Resellers, 4 CCR 723-51 (collectively, "NTR" or "New Telecommunications Rules"). The Commission gave formal notice of proposed rulemaking through Decision No. C00-922, mailed on August 25, 2000. We convened a rulemaking hearing on October 13, 2000, which continued to December 21, 2000. Representatives of Qwest Corporation ("Qwest"), AT&T Communications of the Mountain States, Inc. ("AT&T"), the Colorado Telecommunications

Association, Inc. (“CTA”), the Office of Consumer Counsel (“OCC”), ICG Telecom Group, Inc. (“ICG”), and certain small local exchange carriers attended the hearing. Qwest, CTA, the OCC, ICG, AT&T, and Teligent Services, Inc. provided written comments.

2. Now being duly advised in the matter, we adopt the rules appended to this decision as Attachment A.

B. Discussion

1. Introduction

The present rules regulating certification, registration, asset transfers, mergers, and abandonment of services by regulated telecommunications providers are contained in various sections of the Commission’s rules. These proposed rules are intended to simplify and streamline the Commission’s present rules and processes, and collect all necessary rules in a single section. The participants supported the basic concepts of restructuring and simplifying, and none objected to the many references deleted and replaced in associated rules. For example, the present Rule 18, 4 CCR 723-18, refers an applicant for a letter of registration for non-optional operator services to 4 CCR 723-24. The reference has been changed to refer the applicant to the NTR. Overall, the participants support these proposed rules. The contested areas are discussed below.

2. Text change issues.

a. Many of the participants suggested basic text changes. Many of the changes were stylistic or grammatical, while others were more substantive. For example, the OCC suggested substituting the words "applying for" a certificate rather than "requesting" a certificate. We incorporate that change into these rules. Qwest suggested eliminating the definition of "controlled telecommunications service" because it is not a standard industry term. The concept is useful as a definition in these rules and is thus maintained, but modified, as "*regulated* telecommunications service."

b. Qwest contends that the definition of Local Exchange Telecommunications Services should exclude "switched access." Qwest argues that switched access is not a local exchange service and the definition conflicts with state and federal statutes. We disagree. First, Local Exchange Telecommunications Services as defined in the present and the proposed rules is not the same as basic service as defined by the Colorado Revised Statutes. § 40-15-102(3), C.R.S. Local exchange services are, generally, non-toll services, or basic plus those options generally provided by competitive local exchange carriers ("CLEC"). The Colorado Revised Statutes include switched access as "services or facilities furnished by

a local exchange company to interexchange providers which allow them to use the basic exchange network. . . " Section 40-15-102 (28), C.R.S. We will maintain switched access within the definition of Local Exchange Telecommunications Services.

c. The proposed rules provide for statewide authority for any certificate of public convenience and necessity ("CPCN") issued. Presently, while most providers request and receive statewide authority, a provider can obtain a more geographically limited CPCN. Thus, there are now providers with limited CPCNs. AT&T suggests adding language allowing a limited CPCN holder to convert to statewide authority via simple notice to the Commission. We will decline the suggestion. Those providers wishing to extend their limited CPCNs need simply apply. Under the proposed rules, the application process is simple and short.

3. Applications to discontinue or curtail service.

a. The OCC, Qwest, and AT&T commented about discontinuance or curtailment of services. The OCC suggests that applications by providers of last resort ("POLR") to discontinue or curtail service should be filed 45 days in advance of the proposed discontinuance or curtailment of service rather than the proposed 30 days. The OCC contends that stakeholders could need the additional time to respond with concerns and government entities might need the time to take

action. On the other hand, throughout the docket, commenters advocated consistent notice periods. Qwest argued at hearing that 30 days was ample time in advance of any discontinuance or curtailment. We will maintain the proposed 30-day period between filing and discontinuance or curtailment. There is no clear need for a longer period.

b. Qwest has concerns about the discontinuance of services in merger cases. While there generally is no disruption of services in a merger, services could be seen as being discontinued by one party and picked up by another. We agree that there should be a clarification. Unnecessary regulation is not the intent of the discontinuance rules. Consequently, the proposed rules include a clarifying exemption for such situations.

c. As originally written, these proposed rules include a plan for transferring customers in the event of a discontinuance. AT&T and Qwest attacked the plan and some of the language as anticompetitive and conducive to abuses. The biggest concern was the original idea that the provider would give its customers a list of possible sources for continued service. The commenters argued that the exiting carrier could, for example, simply send everyone to a specific carrier, thus preventing all other available carriers from competing. We agree.

d. There remains a need for a transfer plan to protect consumers, but certain facets must be changed. The provider will not be responsible for developing a list of current providers for its customers, but will be responsible for providing customers with the jurisdictional list maintained by the Commission. While this may provide the customer with too much information, it will avoid the more serious problems noted by AT&T and Qwest.

e. Finally, AT&T wants to delete the requirement that the provider notify county and municipal officials of discontinuances of services. We disagree. Telephone services to a community are significant concerns for the community leaders. They should have notice of such discontinuances. Carriers could argue that only major discontinuances would be of concern to community leaders, and they might be correct. But, it is difficult, if not impossible, to define. We will maintain the notice requirement.

4. Applications to transfer.

a. As originally drafted, the proposed transfer rules differentiated between CLECs and incumbent local exchange carriers ("ILEC"). The rules required an application from ILECs but only notice from CLECs with the possibility of an application after Staff review of the notice. CLECs and ILECs objected.

b. Qwest, an ILEC, argues that all carriers should be treated the same. It also argues that allowing Staff review of CLEC notices improperly delegates Commission authority to the Staff and imports a substantive standard into a simple procedure. ICG wants more certainty in the timing of approvals of transfers for the CLECs; the possibility of the Staff requiring an application leaves the timing of final approval uncertain. AT&T asks for changes on the sections regarding emerging competitive services carriers. All comments are well taken.

c. From the outset, these rules were meant to streamline and simplify regulation. Attempts to make small distinctions often lead to further complications. And so it is here with transfers. To meet the objections of all parties, these proposed rules will not differentiate between ILECs and CLECs. All carriers will be required to apply to transfer assets. As noted above, the application process is simple and short.

d. The proposed rules appended to this decision as Attachment A will be adopted.

II. ORDER

A. The Commission Orders That:

1. The rules appended to this decision as Attachment A are adopted. This order adopting the attached rules shall become final 20 days following the mailed date of this decision in the absence of the filing of any applications for rehearing, reargument, or reconsideration. In the event any application for rehearing, reargument, or reconsideration to this decision is timely filed, this order of adoption shall become final upon a Commission ruling on any such application, in the absence of further order of the Commission.

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

3. The finally adopted rules shall also be filed with the Office of Legislative Legal Services within twenty days following issuance of the above-referenced opinion by the Attorney General.

4. The twenty-day period provided for in § 40-6-114(1), C.R.S., within which to file applications for rehearing, reargument, or reconsideration begins on the first day following the Mailed Date of this decision.

5. This Order is effective upon its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING March 7, 2001.

(S E A L)

ATTEST: A TRUE COPY

Bruce N. Smith
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

ROBERT J. HIX

POLLY PAGE

Commissioners

CHAIRMAN RAYMOND L. GIFFORD
SPECIALLY CONCURRING.

III. CHAIRMAN RAYMOND L. GIFFORD SPECIALLY CONCURRING:

A. I concur in adopting these "New Telecommunications Rules," but would urge to the Commission on reconsideration to go one step further. I would change the rules governing transfer from the current application to a notice. The change from application to notice would, in effect, abrogate the Commission's merger and transfer review. This would be a positive step for three reasons.

B. First, § 40-5-105, C.R.S., the authority under which we review mergers provides no meaningful standard of review.

This invites mischief by the Commission, on the one hand, and violates the nondelegation doctrine, on the other. The nondelegation doctrine requires the legislature to set "sufficient standards and safeguards, in combination, to protect against unnecessary and uncontrolled exercise of discretionary power." *Cottrell v. City and County of Denver,* 636 P.2nd 703, 709 (Colo. 1981). The doctrine exists not only to preserve the proper distribution of powers among governmental departments, but also to protect the public from irrational rules created by unelected officials. *People v. Lowrie,* 761 P.2d 778, 781 (Colo. 1988).

C. To be sure, even the broadest statutory direction has been held not to violate nondelegation. Thus, protection of public safety, *Elizondo v. State,* 194 Colo. 113, 570 P.2d 518 (Colo. 1977), charging reasonable fees for services, *Krupp v. Breckenridge Sanitation District,* 1 P.3d 178, 183 (Colo. App. 1999) *aff'd.,* 2001 WL 185035 (Colo. 2001), reasonableness in exercise of a police power, *State Farm Mutual Automobile Insurance Company,* 788 P.2d 808, 816 (Colo. 1990), standards of cleanliness, orderliness and decency, *Lowrie, supra. at 783,* and health and safety of the public, *Mountain View Electric Association v. Public Utilities Commission,* 686 P.2d 1336, 1341 (Colo. 1984), have been adequate standards to survive nondelegation challenges. Indeed, courts will even imply a

reasonableness standard where the statute fails to specify one. *Elizondo, supra., Krupp, supra.*

D. Nevertheless, if the nondelegation doctrine has any life left to it, it would need to apply to § 40-5-105, C.R.S.[1] In contrast to statutes that give broad and general standards, *see Cottrell,* 636 P.2d at 709, this statute contains no standards. Indeed, § 40-5-105, C.R.S. is the ultimate invitation for an agency to exercise unnecessary and uncontrolled discretionary power. It is all the more tempting for this Commission to exercise unnecessary and uncontrolled power in the context of a telecommunications merger. With a telecommunication merger, the parties' desire to consummate the transaction will inevitably override their ability to make a principled legal objection to capricious and arbitrary commission power. In the end, the merging companies will pay ransom to free their merger, in lieu of challenging the basis of commission authority.

E. Because there is no intelligible statutory standard for the Commission to apply, it should decide up front, by rule,

[1] *Mountain States Tel. and Tel. Co. v. Public Utilities Commission,* 763 P.2d 1020, 1029 (Colo. 1988), presents the biggest challenge to my argument here. There, the Supreme Court, citing *Elizondo,* cited articles 3 and 4 of title 40, along with the "public interest" standard as providing adequate standards and guidance for review of an asset transfer. There is, however, no public interest standard in this rule. Neither does the statute direct the Commission to articles 3 and 4 in its standards search. And things have changed. Merger review under the vague "public interest" standard is objectionable and lawless in the regulated monopoly context; it is potentially destructive and pernicious when a competitive environment is involved.

that the terms and conditions it will prescribe are: none. This will avoid any nondelegation peril.

F. A second reason to adopt notice over an application is that our role is redundant. Any conceivable legitimate focus of this Commission's merger review is already being done by other agencies. The U.S. Department of Justice reviews mergers for antitrust compliance under the Hart-Scott-Rodino Act, 15 U.S.C. § 18(a) . The Federal Trade Commission reviews mergers under section 7 of the Clayton Act, 15 U.S.C. § 18. Other than these legitimate antitrust concerns, I cannot see a legitimate role for state commission merger review in a competitive telecommunications marketplace. Because other agencies with greater expertise will analyze mergers for antitrust harms, this agency ought just to forebear.

G. Third, adoption of a notice rule will be more consistent with the purpose and scope of the Commission's role in the telecommunications marketplace. The legislature has instructed us "to encourage competition," "foster[] free market competition," and extend "flexible regulatory treatments. . . ." §§ 40-15-101, 501, C.R.S. § 40-5-105 invites rentseeking and regulatory game-playing. This is antithetical to the notion of a free, competitive market. It would be better to eliminate the regulatory burden altogether, and just require a notice.

H. I believe that the Commission can adopt a notice, as opposed to application, rule without falling short of the job § 40-5-105 asks us to do. The language reads that any public utilities' assets can be transferred "only upon authorization by the commission and upon such terms and conditions as the commission may prescribe." There is no command from the legislature that this has to be done by application. By adopting a notice rule, the Commission would authorize all transfers for certificated telecommunications carriers, deciding that no terms and conditions for the merger will be prescribed. This would be better policy, avoid duplicative regulatory analyses and remove temptations for lawless mischief.

I. If the opportunity arises to reconsider these rules, I would urge the Commission to take the next step and retreat from the lawless and standardless world of merger review.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

CHAIRMAN RAYMOND L. GIFFORD

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Commissioner

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