

(Decision No. C88-117)

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

* * *

IN THE MATTER OF THE APPLICATION OF)	
THE MOUNTAIN STATES TELEPHONE AND)	APPLICATION NO. 37709
TELEGRAPH COMPANY FOR ENTRY OF AN)	
ORDER BY THE COMMISSION REFRAINING)	DECISION AND ORDER OF THE
FROM REGULATING CERTAIN CENTRAL)	COMMISSION UPON EXCEPTIONS
OFFICE-BASED SERVICES THAT ARE)	
SUBJECT TO COMPETITION.)	

February 3, 1988

STATEMENT, AND FINDINGS OF FACT

BY THE COMMISSION:

On December 14, 1987, Hearings Examiner John B. Stuelpnagel entered Recommended Decision No. R87-1665 in Application No. 37709. Application No. 37709 is an Application of The Mountain States Telephone and Telegraph Company (Mountain Bell) filed June 6, 1986, for entry of an order by the Commission to refrain from regulating certain central office-based services. The application, together with an amended application filed June 13, 1986, requested deregulation of the following services:

1. Touch-Tone;
2. Custom-Calling Feature including Speed Dialing, Three-Way Calling, Calling Forward, and Call Waiting;
3. Centron Services;
4. Remote Call-Forwarding;
5. Toll Restriction Services.

Notice of Application filed was issued July 2, 1986, and a Petition to Intervene, filed by the Office of Consumer Counsel on July 25, 1986, was granted August 8, 1986, by Executive Ruling No. 86-240. A Petition for Leave to Intervene filed July 18, 1986, by the Department of Defense and all other Federal Executive Agencies was granted August 8, 1986, by Executive Ruling No. 86-241.

On July 29, 1986, a Motion for Order Setting Procedural Dates was filed by applicant and by Decision No. C86-942 issued August 12, 1986, the Motion for Order Setting Procedural dates was denied and a

pre-hearing conference to establish procedural dates was set for September 11, 1986, at 9:00 a.m. at the Public Utilities Commission.

The pre-hearing conference was called as scheduled and by Decision No. R86-1363-I, issued October 15, 1986, procedural dates were established and Motion for Protective Order filed by Mountain Bell was granted with certain modifications. Further hearing in this matter was scheduled for January 13, 14, and 15, 1987, at 9:00 a.m. in the Commission Hearing Room. On October 22, 1986, a Motion to Vacate and Reset Hearing dates was filed by the Colorado Office of Consumer Counsel. This motion was granted on October 28, 1986, by Decision No. R86-1442-I and by Decision No. R86-1568-I issued November 18, 1986, the matter was reset for hearing on February 11, 12, and 13, 1987, at the same time and place as previously scheduled. A Motion to Dismiss filed November 20, 1986, by the Staff of the Colorado Public Utilities Commission was denied on December 12, 1986, by Decision No. R86-1661-I. Additionally, certain procedural orders were directed to Applicant in this proceeding.

On December 18, 1986, Mountain Bell filed a Motion for Continuance requesting that the hearing dates of February 11, 12, and 13, 1987, be vacated and this matter be continued until after the legislative session ended in June of 1987. No other party to this proceeding either objected to or supported this motion and it was granted on January 6, 1987, by Decision No. R87-2-I.

On July 2, 1987, House Bill 1336 took effect which reenacted Article 15 of Title 40, C.R.S., (1984). By Decision No. C87-930 issued July 2, 1987, the Commission ordered Mountain Bell to provide to the Commission and all parties in this proceeding a listing of all central office based services which, in its opinion, continued to be at issue in this proceeding. On July 31, 1987, a Petition for Intervention was filed by Eagle Telecommunications, Inc., and it was granted August 14, 1987, by Executive Ruling No. 87-162. On August 4, 1987, Mountain Bell submitted its Identification of Central Office Based Services which continue to be at issue in this proceeding. Mountain Bell identified the following services to be at issue, when offered or provided to non-residential customers with 5-lines or fewer or when offered to residential customers:

1. Speed Dialing;
2. Three-Way Calling;
3. Call Forwarding;
4. Call Waiting.

Mountain Bell withdrew its request for relief Touch-Tone Service.

By Decision No. R87-834-I, issued June 18, 1987, hearing in this matter was scheduled for September 21, 22, 23, and 24, 1987, at 9:00 a.m., in the Commission Hearing Room. Additionally, this decision established procedural filing dates for parties to this proceeding. These procedural dates were amended on July 2, 1987, by Decision No. R87-914-I.

On September 15, 1987, a Stipulation and Motion to Approve Stipulation was filed by Mountain Bell and the Staff of the Public Utilities Commission. This stipulation included a withdrawal by Mountain Bell of any request for relief for Touch-Tone Service, Centron Services, Remote Call-Forwarding, and Toll-Restriction Services. At the beginning of hearing in this matter, the Motion to Approve Stipulation was granted. Therefore, no determination shall be made regarding those services deleted pursuant to the Stipulation.

Hearing began as rescheduled and Exhibits 1 through 34 were marked for identification and admitted into evidence. At the conclusion of hearing, a briefing schedule was established and the subject matter was taken under advisement. Statements of position were filed October 13, 1987, by Mountain Bell, Staff of the Public Utilities Commission, and the Colorado Office of Consumer Counsel. Responses were filed October 27, 1987, by Mountain Bell and the Colorado Office of Consumer Counsel.

On December 14, 1987, Hearing Examiner John B. Stuelpnagel entered Recommended Decision No. R87-1665. The Hearing Examiner recommended that the speed calling or speed dialing services be deregulated for all customers, that is both single-line customers and multi-line customers. The Examiner further recommended that the portion of Mountain Bell's application requesting deregulation pursuant to Part 4 of Article 15 for call-management services including call forwarding, three-way calling and call waiting for single-line customers be denied, but that the same call management services for multi-line customers be deregulated pursuant to Part 4 of Article 15.

On January 4, 1988, the Colorado Office of Consumer Counsel (OCC) filed exceptions to the Hearing Examiner's Recommended Decision No. R87-1665. On January 19, 1988, Mountain Bell filed a response to those exceptions.

The Commission has reviewed the Recommended Decision of the Hearings Examiner, the exceptions filed to that Decision and the response to the exceptions, together with the record of proceedings in Application No. 37709. We agree with the Hearings Examiner's Recommended Decision that all speed calling or speed dialing services should be deregulated pursuant to Part 4 of Article 15. We also agree with the Hearings Examiner's Recommended Decision that call-management services including call forwarding, three-way calling, and call waiting for single-line customers should not be deregulated. However, we do not agree with the Hearing Examiner's Recommended Decision that the same call-management services should be deregulated for multi-line customers. Accordingly, the Commission will enter its own decision in lieu of the Recommended Decision of the Examiner and will grant, in part, the exceptions filed by the OCC.

FINDINGS OF FACT AND CONCLUSIONS THEREON

Based upon all the evidence of record, the following facts are found and conclusions thereon drawn:

1. Mountain Bell is a public utility engaged in the business of providing telephone utility service within the State of Colorado pursuant to the provisions of § 40-1-103, C.R.S. The Company's intrastate telephone business within the State of Colorado is subject to the jurisdiction of this Commission, and the Commission has jurisdiction over this matter.

2. By this application, Mountain Bell requests deregulation of a portion of its business services pursuant to § 40-15-305, C.R.S., (House Bill 1336). Services at issue in this proceeding are referred to as Advanced Features and are defined in § 40-15-102(2), C.R.S., as custom-calling features known as speed-calling (speed dialing), three-way calling, call-forwarding, and call-waiting. Speed-calling is a service which permits a customer to dial telephone numbers automatically. Call forwarding, three-way calling and call-waiting may collectively be referred to call-management services. Call forwarding transfers calls to a designated number, insuring that important calls are not missed. Three-way calling allows a customer to add a third party to a conversation. Call-waiting allows a customer to leave one call and answer a second call.

3. Pursuant to § 40-15-301, C.R.S., advanced features offered and provided to residential customers and non-residential customers with no more than 5 lines are declared to be initially subject to regulation pursuant to Article 15, Part 3 - Emerging Competitive Telecommunications Services. Additionally, these services are subject to potential deregulation under § 40-15-305 which provides that the Commission shall deregulate, pursuant to Part 4 of this Article specific telecommunication services subject to this Part 3 upon a finding that there is effective competition in the relative market for the service and that such deregulation will promote the public interest and the provision of adequate and reliable service at just and reasonable rates. In order to determine whether or not there is effective competition for a specific telecommunication service, the Commission is directed to make findings and issue an order based upon consideration of the following factors as the Commission deems applicable in particular cases:

- I. The extent of economic, technological, or other barriers to market entry or exit;
- II. The number of other providers offering similar services;
- III. The ability of customers to obtain 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 the prices or deter competition;
- V. Such other relevant and necessary factors, including but not limited to relevant geographic areas, as the Commission deems appropriate.

4. Speed dialing or speed calling permits a customer to dial frequently used telephone numbers by dialing only one or two digits instead of the entire telephone number. Seven-to-15 digit telephone numbers can be programmed into the memory bank of Mountain Bell's central office equipment. Speed calling is used both by residential and business customers to complete calls to frequently contacted parties. Terminal equipment with automatic dialing capabilities equivalent to speed calling is widely available to both business and residential customers. Mountain Bell asserted that a summary of research it conducted identified 43 types of terminal equipment that provide speed calling capability. Dr. Mark Correll, testifying on behalf of the OCC, stated that competition is effective for speed calling because of the availability of low-cost memory telephone sets. These competitive alternatives are comparably priced. Bruce Mitchell of the Staff of the Public Utilities Commission established by his testimony that the speed-calling service of Mountain Bell is very similar or functionally equivalent to the speed-dialing feature of the electronic telephone, and service is available at a comparable price.

5. Dr. Neil Langland of the Staff of the Commission and Dr. Mark Correll on behalf of the OCC recommend that speed dialing not be exempt from regulation under Part 4 of Article 15 but remain subject to flexible regulation as determined in a separate proceeding under Part 3. Dr. Langland states that since asset segregation has not yet occurred, the cost of providing that service may fall. This might increase Mountain Bell's market power. Dr. Correll recommends a policy which sets a price ceiling equal to the current tariff and allows Mountain Bell to discount from that price in order to meet competition. Dr. Correll stated that a mixture of competition and market power invites a utility to engage in undue price discrimination between types of customers, and that, therefore, the Commission should retain jurisdiction.

6. The evidence in this proceeding is sufficient to establish that effective competition at reasonable and comparable costs exists for the speed dialing service provided by Mountain Bell. There is sufficient statutory protection to customers regarding any cross-subsidization of service and this advanced feature should be deregulated pursuant to Part 4 of Article 15.

7. The remaining advanced features, call forwarding, three-way calling, and call waiting have been collectively referred to as call-management services. Mountain Bell has not demonstrated that effective competition for these services exists in accordance with the

criteria set forth in § 40-15-305, C.R.S., (See Finding of Fact No. 3 above). When the five factors are found to be strong across an entire market, effective competition exists in that market. If a factor is not strong or is not pervasive, then competition may exist, but it is not effective. It should also be recognized that § 40-15-102(9), C.R.S., defines the phrase "functionally equivalent" as referring to services or products which perform the same or similar tasks or functions to obtain substantially the same result at reasonably comparable prices.

8. The call-forwarding service offered by Mountain Bell does not have alternatives which are functionally equivalent. The alleged competition for call forwarding is from telephone answering machines, paging services, and answering services. Answering machines are not functionally equivalent to call forwarding since any caller who does not want to talk to a machine hangs up or leaves a message. But whether the caller hangs up or leaves a message, neither is an equivalent to receiving the call. While paging and answering services involve human intervention, they still require leaving messages rather than completing the call. Even Mountain Bell's instruction booklet stresses the functional differences of call-forwarding:

CALL FORWARDING

"Lets you transfer your calls to another number when you plan to be away from home. With it, you won't miss any important calls or tip off 'unwanted callers' that no one's home".

9. A call diverter physically is nearly a functionally "equivalent substitute" for call forwarding since a call diverter receives calls on one line and transfers them to a second line which is used to call a programmed number. However, a call diverter alone is not the equivalent of call forwarding because call forwarding forwards incoming calls and allows outgoing calls, even if they are simultaneous, while a call diverter ties up two lines. Additionally, because a call diverter transfers the call at a customer's premise (rather than at the central office), the call travels through two additional loops compared to call forwarding, and results in some deterioration of quality. It should also be recognized that a call diverter costs from about \$94.00 to \$150.00. The cost of a call diverter is far greater than the \$8.50 non-recurring charge plus the \$3.00 monthly cost to a residential customer or the \$8.50 non-recurring charge plus the \$4.00 monthly cost to a business customer that Mountain Bell currently charges for the call forwarding feature. A customer who uses a call diverter, rather than call forwarding, would also have to obtain an additional line from Mountain Bell at \$11.22 per month (dial tone line and flat local usage in rate group 3), and pay the non-recurring change of \$53.00 for the second line. Clearly, at \$11.22 per month, this alternative is far more expensive than residential call forwarding at \$3.00 per month or business call forwarding at \$5.00 per month. This may explain why it is rather difficult to find retailers that sell call diverters.

10. Answering services and paging services are similarly noncompetitive to call forwarding. Typically, answering and paging services offer two types of services. One requires the customer to obtain call forwarding from Mountain Bell, so the customer can forward his or her calls to the answering service. The other requires the customer to obtain an off premises extension from Mountain Bell, so that the customer's phone rings at both the customer's location and at the answering service. Again, Mountain Bell's charges for these services boost them well beyond the \$3.00 and \$5.00 per month for residential and business call forwarding, respectively. For example, the off premises extension includes channel connection and transmission charges at \$7.00 per month per premise, non-recurring charges at more than \$200.00, and transport facilities charges may also apply. Furthermore, we find that the discounting analysis (that is, analyzing the pay back if certain answering machines are purchased) performed by OCC witness Correll indicates that at current prices, Mountain Bell's residential call forwarding is superior to most of the alternatives, both for business call forwarding as well as residential call forwarding. Mountain Bell's competition to call-forwarding is limited both by physically functional and price differences.

11. With regard to three-way calling and the alternatives to three-way calling, it is true that multi-line telephones and operating conferencing services appeared to be functionally equivalent, except that making the junction at the customer's premise requires an additional loop, resulting in some deterioration of quality. Although multi-line telephones are nearly a functionally equivalent, there is a significant difference in price. Thus three-way calling for Mountain Bell is \$3.25 per month for residential and \$3.75 for business customers, plus a non-recurring charge of \$8.50. The principle competition for three-way calling is a multi-line telephone set. Not only is this equipment more expensive, but the customer would be required to purchase an additional line from Mountain Bell. In rate group 3, the charge for an additional residential line is \$11.22 per month plus a non-recurring charge of \$53.00. For businesses the charge is \$31.99 per month, plus a non-recurring charge of \$76.50. Thus it is clear that since the customer must purchase an additional line, multi-line telephone sets are not priced comparably to three-way calling and are not functionally equivalent.

12. As with three-way calling, the alleged competition for call waiting is from multi-line telephones with hold buttons. In one sense, this may be functionally equivalent from the physical point of view. However, for multiple lines to substitute for call waiting, the customer would have to pay Mountain Bell an additional monthly charge for "companion dial tone line service" which causes the other line to ring if the called number is busy. As already discussed above with respect to three-way calling, the customer must purchase an additional line which renders the competition insignificant. In order to mirror call waiting, the customer would also have to pay an additional charge for companion

dial tone line service with a recurring charge of \$5.00 and a non-recurring charge for \$8.50 per month. Since call waiting is available from Mountain Bell for \$4.50 per month for residential customers and \$9.00 per month for business customers, plus a non-recurring charge of \$8.50, we find that the so called competition from a multi-line telephone service is not functionally equivalent in the statutory sense which includes comparability in price.

13. If a customer already has more than one line, in general, the degree of competition in call waiting, three-way calling, and call forwarding would increase, but not in all cases. For example, a family might have separate phone lines for the adults and the children. In that situation, the second line is not excess capacity available to substitute for Mountain Bell's advanced features. Similarly, a small business with multiple lines might not have an excess line to substitute for advance features. For example, a business with seven employees might have four telephone lines, based on a comparison of the cost of an additional line with the cost of an occasional congestion. In this case, the multi-line alternatives cited by Mountain Bell would increase the amount of congestion and tend to be uneconomic compared to call forwarding and three-way calling.

14. In its attempt to establish the existence of competition, Mountain Bell generally relied upon the number of firms in the market place by showing the number of firms who advertised in the yellow pages. However, the number of firms by itself means very little. Generally, more is better, but this is not necessarily so, nor is a large number of firms sufficient to guarantee an effectively competitive market or to satisfy an effective competition test. Thus, photo copied catalogs, photo copied telephone directories, and listings of products are one means of taking necessary first step in the market research process. However, by itself it is merely a started, poorly conceived research process. Much more can and should have been done. Failure to do so is to ignore much of received economic literature in practice. Merely counting and listing the firms ignores the very problem which should be examined, the nature of the interaction between firms and the market, and the interaction between firms, customers and suppliers. Mountain Bell's testimony was effectively silent on these important issues since it did very little more than present over-simplified (and therefore highly misleading) rhetoric based upon theoretical models of perfect competition and contestable markets. Finally, we find that confidential Exhibit No. 31 submitted by Staff witness Mitchell indicates that except for speed calling or speed dialing, Mountain Bell's own information clearly indicates the absence of effective competition for call management services.

15. Although we have found that effective competition does not exist for call forwarding, three-way calling, and call waiting, this does not mean that competition is totally absent. Accordingly, we find that a policy of flexible regulation is appropriate for these services both for

single-line and multi-line customers. Accordingly we shall permit flexible regulation of those services by allowing a price ceiling to be set at the current tariff for those advanced features with the option that Mountain Bell may price these services flexibly downward from that ceiling so long as the prices are above Mountain Bell's long run incremental costs for those services. The goal is economic discounting--that revenues should increase as a result of prices decreasing. This pricing flexibility will allow Mountain Bell to compete without allowing it to exploit customers over whom it has market power. For these services the promotion of competition, the public interest, and the provision of adequate and reliable service at just and reasonable rates will be better served by flexible regulation under Part 3 rather than deregulation under Part 4.

THEREFORE THE COMMISSION ORDERS THAT:

1. Application No. 37709, of The Mountain States Telephone and Telegraph Company for entry of an order by the Commission refraining from regulating certain central office-based services is granted to the extent that all speed calling or speed dialing services shall be deregulated pursuant to Part 4 of Article 15 of Title 40, C.R.S., and flexible regulation, as authorized by Ordering Paragraph 2 below, is implemented. In all other respects Application No. 37709 requesting deregulation of telephone-call management services, including call forwarding, three-way calling, and call waiting, is denied.

2. The Mountain States Telephone and Telegraph Company is authorized to flexibly price its telephone-call management services in accordance with finding of fact in Paragraph No. 15 above.

3. 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.

4. This Decision shall become effective 30 days from this date, unless extended by further order of this Commission.

DONE IN OPEN MEETING the 3rd day of February 1988.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Arnold H. Cooby
André Schmitt

Ronald L. Lehn
Commissioners