

Decision No. C02-1250

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 02R-278T

IN THE MATTER OF PROPOSED AMENDMENTS TO RULES 7.2.1.2 AND 9.4 OF
THE RULES CONCERNING THE COLORADO HIGH COST SUPPORT MECHANISM,
4 CCR 723-41.

**DECISION GRANTING EXCEPTIONS
AND VACATING STAY**

Mailed Date: November 8, 2002
Adopted Date: October 16, 2002

I. BY THE COMMISSION

A. Statement

1. This matter comes before the Commission for consideration of Exceptions to Decision No. R02-988 (Recommended Decision). In that decision, the Administrative Law Judge (ALJ) recommended that we adopt certain amendments to the Rules Concerning the Colorado High Cost Support Mechanism, 4 *Code of Colorado Regulations* (CCR) 723-41 (CHSM Rules). Additionally, the ALJ recommended that certain proposed amendments to the CHSM Rules (discussion *infra*) be rejected. N.E. Colorado Cellular, Inc. (NECC), and Western Wireless Corporation (Western Wireless), pursuant to the provisions of § 40-6-109(2), C.R.S., filed Exceptions to the Recommended Decision. We also stayed the Recommended Decision on our own motion (Decision No. C02-

1041), to allow the Commission to consider the ALJ's recommendations regarding the proposed amendments to the rules. WorldCom, Inc. (WorldCom), and Qwest Corporation (Qwest) filed an untimely Response to Exceptions. That response was untimely, and WorldCom and Qwest failed to explain why we should accept their late filing. Therefore, on our own motion, we strike the Response to Exceptions by WorldCom and Qwest.

2. Now being duly advised in the premises, we grant NECC's and Western Wireless' Exceptions. We now adopt, subject to applications for rehearing, reargument, or reconsideration, the rules appended to this decision as Attachment 1. The adopted rules amend certain provisions in the CHSM Rules, 4 CCR 723-41, as stated below.

B. Discussion

1. By Decision No. C02-570, we issued the Notice of Proposed Rulemaking in this docket, and assigned this matter to the ALJ for hearing. The Notice proposed two general changes to the CHSM Rules: (1) clarification of the filing requirements for telecommunications providers falling within the *de minimis* exemption (for contributing to the Colorado High Cost Support Mechanism) for a given reporting year;¹ and (2) amendments to the

¹ The CHSM Rules provide that telecommunications providers whose calculated contribution to the High Cost Support Mechanism is *de minimis* (*i.e.*, less than \$10,000) need not contribute for that reporting year.

rules to provide high cost support for all residential and business access lines, instead of only Primary Residential and Single Line Business access lines.

2. The first proposal (filing requirements relating to the *de minimis* exemption) was uncontested before the ALJ. The Recommended Decision proposes various modifications to Rule 7 of the CHSM Rules clarifying the reporting requirements for telecommunications providers falling within the *de minimis* exemption. Those proposals require providers to submit a portion of the High Cost Support Mechanism Worksheet that certifies their *de minimis* status. Those providers will also be required to retain records supporting their claim to *de minimis* status. No party objected to these proposed amendments to the CHSM Rules before the ALJ, and no party objects to these proposals on Exceptions. We conclude that the amendments to Rule 7 are reasonable. They clarify the reporting and record-keeping requirements for providers that claim the *de minimis* exemption specified in the rules. Therefore, we affirm the ALJ's recommended modifications to Rule 7. Attachment 1 reflects those modifications.

Exceptions by NECC and Western Wireless

(1) Before the ALJ, commenting parties (*i.e.*, Qwest, WorldCom, Verizon Wireless, LLC, and VoiceStream Wireless Corporation) did oppose the proposal to provide high

cost support to all access lines. The Recommended Decision agreed with these parties, and rejected the proposed amendments to Rule 9.2.3. As grounds for his recommendation, the ALJ first noted that the Commission had previously considered such a proposal in Docket No. 99R-028T. The Commission rejected the proposal. See Decision No. C99-747. In its prior decision, the Commission concluded that the Legislature had not indicated intent to support all access lines. The Commission reasoned that the purpose of the High Cost Support Mechanism was to promote universal access to the public switched network. Such access is accomplished by supporting a single line for eligible customers. The ALJ determined that there has been no material change in the statutes authorizing the High Cost Support Mechanism since the Commission's prior decision. Therefore, the ALJ recommended rejection of the proposed amendments to Rule 9.2.3.

(2) NECC and Western Wireless except to these conclusions and recommendations. Both parties argue that circumstances have changed since the Commission issued its decision in Docket No. 99R-028T. Specifically, the Exceptions point out that at the time the Commission issued Decision No. C99-747, no new entrants had been designated as Eligible

Providers (EPs).² At that time only incumbent local exchange carriers, such as Qwest, had received designation as EPs. Now, NECC and Western Wireless point out, competition in the local exchange market has developed, and other providers, including NECC and Western Wireless, have been designated as EPs. The Exceptions suggest that providing high cost support to all access lines, instead of only Primary Residential and Single Business Access Lines, would promote competition.

(3) NECC and Western Wireless further argue that high cost support must be distributed on a competitively neutral basis. Supporting only Primary Residential and Single Business Access Lines favors Qwest over competitive EPs. In particular, the parties note, in prior decisions designating competitive EPs the Commission has ruled that Qwest will receive high cost support, where Qwest and a competitive EP both provide service to a supported customer. NECC and Western Wireless contend that, in order to make the Colorado High Cost Support Mechanism competitively neutral, the rules should be amended to support all lines.

(4) The Exceptions note that support for all lines would make the Colorado High Cost Support Mechanism consistent with the federal universal service program. Indeed,

² A provider must be designated an EP in order to receive support under the CHSM Rules.

Western Wireless argues, the Telecommunications Act of 1996 (Act) requires state high cost funding to be consistent with federal universal service funding. Western Wireless suggests that the Act and Federal Communications Commission rules *mandate* that the Colorado High Cost Support Mechanism support all access lines. The proposed amendments to Rule 9.2.3 are necessary, Western Wireless contends, in order to remove an unlawful barrier to entry.

(5) We grant the Exceptions for the reasons stated here. We do note our disagreement with Western Wireless' suggestion that a state's high cost support program must support all access lines simply because all lines are supported under the federal universal service plan. Western Wireless cites no authority to this effect, and we are unaware of any such authority. Western Wireless essentially argues that the current rules, together with our decisions giving support to Qwest where both Qwest and a competitive EP serve a customer, are anti-competitive and constitute an unlawful barrier to entry. According to the argument, these rulings give Qwest an illegal competitive advantage.

(6) These arguments are incorrect inasmuch as they fail to recognize that a competitively neutral reason exists for our rulings. In decisions where we directed that Qwest, instead of a competitive EP, receive the high cost

support for an access line (see Decision Nos. C01-476 and C01-629), we reasoned that such action was appropriate in light of Qwest's status as a Provider of Last Resort (POLR). As a POLR, Qwest is obligated to serve all customers in its service territory including in high cost areas. Competitive EPs have no such obligation. This significant difference between Qwest and competitive EPs justified our rulings. Therefore, we disagree that we must amend Rule 9.2.3 as a matter of law.

(7) Nevertheless, we do agree with NECC and Western Wireless that we should exercise our discretion and adopt the proposed amendments to Rule 9.2.3. We agree that supporting all access lines would promote competition in high cost areas of the state. As NECC and Western Wireless point out, our prior decision to support only Primary Residential and Single Business Access Lines was made at a time when no competitive EPs existed in Qwest's service area. Now, the Commission has authorized telecommunications providers to operate as competitive EPs in Qwest's territory. Our prior rulings assigning all high cost support to Qwest were appropriate. However, the effect of those rulings and the current Rule 9.2.3 does result in a competitive disadvantage for competitors. Amending Rule 9.2.3 to support all access lines leaves Qwest unaffected with respect to its POLR obligations,

yet eliminates the competitive disadvantage previously faced by new EPs.

(8) The Legislature has adopted a policy of promoting competition in the local exchange market. See § 40-15-501, C.R.S. (it is the policy of Colorado to encourage competition in local exchange market and to strive to ensure that all consumers benefit from such increased competition). The amendments to Rule 9.2.3 promote that policy. The Recommended Decision correctly notes that, in Decision No. C99-747, the Commission concluded that the Legislature had not indicated an intent that the High Cost Support Mechanism support all lines. Notably, the Commission did *not* conclude that the Legislature **had prohibited** support of all access lines. That is, our prior decision did not hold that the Commission lacks the discretion to amend Rule 9.2.3 as proposed here. We now find that circumstances in the market for local exchange service have changed, and those changes justify a change to the rule.³

(9) The primary objection to supporting all access lines is that this would increase the size of the high cost support fund, and, concomitantly, the size of the high cost support surcharge. The record here (footnote 8 of the

³ And obviously, the Commission today could not be bound by a prior decision even if it were directly inconsistent.

Recommended Decision) indicates that amending Rule 9.2.3 to support all access lines would increase the surcharge from approximately 2.8 percent to 3.3 percent. We are sensitive to actions that increase the high cost support rate. However, we find that the benefits to be gained by supporting all lines (e.g., promoting competition) justify the increase in rates. As such, we conclude that proposed Rule 9.2.3 is appropriate and should be adopted. Consistent with our decision amending Rule 9.2.3, we also modify other parts of the CHSM Rules by deleting references to "Primary" residential lines and "Single-Line" business lines (e.g., Rules 2.1.1 and 2.1.2). These changes are reflected on Attachment 1.

(10) For the foregoing reasons, we grant the Exceptions by NECC and Western Wireless.

II. ORDER

A. The Commission Orders That:

1. The Response to Exceptions untimely filed by WorldCom, Inc., and Qwest Corporation on October 15, 2002 are stricken.

2. The Exceptions to Decision No. R02-988 by N.E. Colorado Cellular, Inc., are granted consistent with the above discussion.

3. The Exceptions to Decision No. R02-988 by Western Wireless Corporation are granted consistent with the above discussion.

4. The Stay of Decision No. R02-988 entered by Decision No. C02-1041 is vacated.

5. The rules appended to this Decision as Attachment 1 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.

6. Within 20 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.

7. The 20-day period provided for in § 40-6-114, 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.

8. This Order is effective on its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
October 16, 2002.

(S E A L)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO



RAYMOND L. GIFFORD

POLLY PAGE

ATTEST: A TRUE COPY

Bruce N. Smith
Director

JIM DYER

Commissioners

BASIS, PURPOSE AND STATUTORY AUTHORITY.

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Adoption [LRP1] of the changes to 4 CCR 723-41-7.1, 4 CCR 723-41-7.2.1.2, 4 CCR 723-41-7.3 or 4 CCR 723-41-7.4 described herein are necessary to assist the Commission in identifying those telecommunications providers who are not required to contribute to the Colorado High Cost Administration Fund and, if necessary, to independently confirm a provider's entitlement to that exemption.

Adoption of the changes to Rules 4 CCR 723-41-2.1.1 and 2.1.2, 4 CCR 723-41-7.2.2.1 and 7.2.2.1.1, and 4 CCR 723-41-9.2.3 described herein are necessary to implement the policy of providing support to non-rural providers for all access lines served in high cost geographic support areas.

The statutory authority for the amendments to the above-stated rules is contained in §§ 40-2-108(2) C.R.S., § 40-3-102 C.R.S. and § 40-15-208 C.R.S.

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~~723-41-2.1.1 Primary Residential Access Line. The first Access Line installed at a residential address. There can be only one Primary Residential Access Line per residence address. Any additional Access Line(s) installed at the same residence address (whether in a different name or not) shall not be considered Primary Residential Access Lines for purposes of HCSM support.~~

~~723 41 2.1.2 Single Line Business Access Line. The first Access Line installed at a business address. There~~

~~can be only one Single-Line Business Access Line per business address. Any additional Access Line(s) installed at the same business address (whether in a different name or not) shall not be considered as Single-Line Business Access Lines for purposes of HCSM support.~~

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723-41-7.1 Contributors. Every provider of intrastate telecommunications service to the public, or to such classes of users as to be effectively available to the public, every provider of intrastate telecommunications that offers telecommunications for a fee on a non-common carrier basis, and payphone providers that are aggregators not falling within the de minimis exemption of Rule 7.2.1.2 must contribute to the HCSM.

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723-41-7.2.1.2 De Minimis Exemption. If a ~~contributor's~~ telecommunication service provider's contribution to the HCSM in any given year is calculated to be less than \$10,000, that contributor will not be required to submit a contribution. Telecommunications service providers falling within this de minimis exemption are required to file with the Administrator or the only that portion of the HCSM Worksheet for that period that certifies their de minimis status. Such ~~de minimis~~ certification shall be accompanied by an affidavit of an officer of the telecommunication service provider attesting to the veracity of its self-certification.

However, each telecommunications service provider exempt from contributing because of its *de minimis* revenues shall retain complete documentation (including, but not limited to the information required in the HCSM Worksheet) and shall make such documentation available to the Administrator upon request. Notwithstanding the *de minimis* exemption of this Rule 7.2.1.2, all Eligible Providers are required to remit contributions and to file the entire HCSM Worksheet.

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723-41-7.2.2.1 Each Eligible Provider receiving support pursuant to Rule 9.2 shall provide to the Administrator a verified accounting of: 1) the actual number of ~~Primary~~ Residential and ~~Single Line~~ Business Access Lines served by such provider in each Geographic Area as of the last day of each month; and 2) the actual amount of contributions collected in the month. An appropriate form is to be completed and returned to the Administrator by the 15th day of the subsequent month.

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~~723 41 7.2.2.1.1 In completing the form Eligible Providers shall be guided by the following: An Eligible Provider that is the provider of last resort ("POLR") and is providing service will always receive HCSM support. If a competitive Eligible Provider, wireless or wireline, commences primary line service such that the POLR is no longer providing service, then the support is ported to the Competitive Eligible Provider. If an Eligible Provider that~~

~~is the POLR, subsequently regains the customer and begins providing service, then only the Eligible Provider that is the POLR will receive the HCSM support.~~

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723-41-7.3 Application of the Rate Element to Customer Billings. The HCSM rate element shall be applied to the Retail Revenues of each telecommunications service provider's end-user and shall appear as a line item on the monthly bill of each such end-user, except that telecommunications service providers falling within the *de minimis* exemption of Rule 7.2.1.2 shall not apply the HCSM rate element, nor collect such contribution from ~~their~~ end-users. Where an end-user service location receiving the bill and an end-user service location receiving the service differ, the location of the telecommunication service delivery shall be used to determine whether the HCSM rate element applies.

723-41-7.4 Remittance of Contributions. All telecommunications service providers not falling within the *de minimis* exemption of Rule 7.2.1.2 shall be responsible for collecting and remitting quarterly the HCSM rate element receipts according to the following procedure:

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723-41-9.2.3 Amount of Support: Each Eligible Provider shall receive support from the HCSM based on the number of ~~Primary~~-Residential and ~~Single Line~~-Business Access Lines it serves in the non-rural high cost Geographic Support

Areas, as designated by the Commission, multiplied by the difference between the per line Intrastate Proxy Cost in such Geographic Support Area and the applicable per Access Line Revenue Benchmark as determined by the Commission. The amount of support shall be reduced by any other amount of support received by such provider or for which such provider is eligible under support mechanisms established by the federal government and/or this State.