

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO**

DOCKET NO. 98S-363T

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RE: THE INVESTIGATION AND SUSPENSION OF TARIFF SHEETS FILED BY NOW COMMUNICATIONS, INC., WITH ADVICE LETTER NO. 3 AND ITS AMENDMENT, TO IMPLEMENT INITIAL TARIFF.

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**DECISION ON REMAND**

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Mailed Date: January 22, 2003  
Adopted Date: December 18, 2002

**I. BY THE COMMISSION**

**A. Statement**

1. This matter concerns the rates for residential basic local exchange service charged by NOW Communications, Inc. (NOW), as part of its NOW Plan, and NOW's rates for related offerings. The NOW Plan comprises basic local exchange service, a toll restriction feature, and customer access to payment centers where they can pay their service bills and make changes to their service. NOW also purports to offer stand-alone basic local exchange service to residential customers and related optional telephone services such as custom calling and toll restriction.

2. In its Advice Letter No. 3, filed on July 22, 1998, NOW proposed to offer its residential NOW Plan to customers at a recurring rate of \$36.50 per month, and a non-recurring rate of \$45. In comparison, for stand-alone residential local exchange service NOW charges a recurring rate of \$14.91, and a non-recurring rate of \$35; for stand-alone toll restriction NOW charges \$2 per month. We set Advice Letter No. 3 for hearing before an Administrative Law Judge, and, eventually, in Decision Nos. C99-310 (Mailed Date of March 22, 1999) and C99-474 (Mailed Date of May 11, 1999) approved the proposed rates for the NOW Plan. In those

decisions, we rejected arguments by the Colorado Office of Consumer Counsel (OCC) that the NOW Plan rates violated the rate cap for residential local service set forth in § 40-15-502(3)(b)(I), C.R.S.

3. The OCC, pursuant to the provisions of § 40-6-115, C.R.S., appealed the Commission's decisions first to the Denver District Court, and then to the Colorado Supreme Court (Court). And in *Colorado Office of Consumer Counsel v. Public Utilities Commission*, 42 P. 3d 23 (Colo. 2002), the Court reversed the Commission's approval of the NOW Plan rates, holding that those rates violated the statutory rate cap for residential local service. The Court did not rule on all issues presented by the OCC, but instead remanded this case to the Commission for further proceedings consistent with its decision.

4. We requested that the parties submit comments on how the Commission should proceed on remand. NOW submitted a letter (addressed to the Director of the Commission and dated June 18, 2002); the OCC and Commission Staff (Staff) submitted Joint Comments (dated October 15, 2002) and Supplemental Joint Comments (dated October 30, 2002). None of the parties requested additional hearings on remand. Rather, those comments suggest that the Commission rule upon outstanding issues based upon the written comment and the existing record, and, in light of the Court's decision, direct that NOW make certain refunds to customers. Being duly advised in the premises, we enter the rulings set forth below. In light of those rulings, NOW is directed to submit a report detailing its plans for making necessary refunds to customers.

### **B. Rulings on Remand**

5. The comments point out that the Commission must address three issues in light of the Court's order of remand: (1) whether one of the statutory exceptions to the rate cap applies to

the NOW Plan; (2) whether the rate cap also applies to the non-recurring charge in the NOW Plan; and (3) whether the rates for optional features in the NOW Plan are unduly discriminatory in comparison to the rates for those services outside of the plan. We address each of these issues in the discussion below.

6. As to the first issue: the rate cap statute (§ 40-15-502(3)(b), C.R.S.) establishes certain exceptions to the cap. These relate to rate changes in residential local service to account for increases in the U.S. gross domestic product price index (§ 40-15-502(3)(b)(I), C.R.S.), to reimburse a provider for the costs of network upgrades (§ 40-15-502(3)(b)(III), C.R.S.), and to account for the costs of additional elements added to the definition of residential "basic service" by the Commission (§ 40-15-502(3)(b)(V), C.R.S.). Theoretically, it would be permissible for NOW to charge rates in excess of the rate cap if one of these exceptions applied. We determine that none of these exceptions to the rate cap applies to the NOW Plan.

7. NOW never contended that any of these exceptions justified rates in excess of the cap. Instead, NOW argued that the NOW Plan was exempt from the rate cap as a bundle of services that merely includes residential local service as one of its elements. The court rejected this argument in its decision and concluded that the NOW Plan is subject to the rate cap. Given its prior contention, there is no evidence, or even argument, in this record that one of the exceptions listed above applies to the NOW Plan. Therefore, we determine that no statutory exception justifies NOW Plan rates in excess of the rate cap. As stated below, the rates for the NOW Plan are permanently suspended, and NOW will be required to make refunds to customers who were charged the NOW Plan rates for residential local service.

8. With respect to whether the statutory rate cap also applies to the non-recurring charge in the NOW Plan, we agree with the joint comments by the OCC and Staff. Section 40-

15-502(3)(b)(I), C.R.S., establishes a rate cap for "*prices* for residential basic local exchange service" generally (emphasis added). The statute does not indicate that it was intended to apply to recurring charges only. We note that a NOW Plan customer is required to pay the recurring charge *and the non-recurring charge* as a condition for obtaining local service. This indicates that the non-recurring charge is a "price" for residential local exchange service covered by the statute. Moreover, construing the statute as also applying to the non-recurring charge is consistent with the legislature's intent to limit the rates for residential local service. For these reasons, we construe § 40-15-502(3)(b)(I), C.R.S., as establishing a cap for non-recurring as well as recurring rates. This determination means that NOW will be required to refund to residential customers any non-recurring charges in excess of \$35.

9. As for the third outstanding issue, the OCC and Staff point out that NOW Plan customers were charged rates for optional custom calling features that were greater than the rates for such services outside the NOW Plan. The OCC and Staff contend that these different rates are unduly discriminatory in violation of § 40-3-106(1)(a), C.R.S. (public utility shall not establish or maintain any unreasonable difference as to rates, charges, services, or facilities). According to the OCC and Staff, in all instances, whether as part of the NOW Plan or otherwise, NOW provides these optional features to end-users through resale of Qwest Corporation's (Qwest) services. Therefore, there is no difference in cost for these offerings however provided, and any difference in rates is unlawfully discriminatory.

10. We agree. Whether provided as part of the NOW Plan or outside of the plan, the optional services are identical. And NOW has not pointed to any differences in providing services to residential (or business) customers under the NOW Plan as compared to providing service outside the Plan. Staff and OCC point out that NOW's costs to provide these features

(i.e., the wholesale price paid to Qwest) are also identical whether provided within or outside the plan. Therefore, the present record contains no evidence justifying the greater rates for these optional features for NOW Plan customers. Consistent with the order below NOW is directed to make refunds to customers who paid for custom calling features as part of the NOW Plan. The refund shall be based upon the difference between NOW Plan rates and non-NOW Plan rates.

### **C. Conclusion**

11. In light of the Court's decision rejecting the rationale upon which the Commission approved the NOW Plan rates, we conclude that NOW Plan customers paid unlawfully excessive charges, both recurring and non-recurring, for service. We conclude that rates for residential basic local exchange service under the NOW Plan should not have exceeded \$14.91 for the recurring charge, \$2 for any toll restriction feature, and \$35 for the non-recurring charge. Charges in excess of these amounts are to be refunded to customers. Additionally, any difference in custom calling charges to NOW Plan customers, both residential and business, were and are unlawfully discriminatory. NOW is directed to make appropriate refunds to NOW Plan customers based upon the difference between the custom calling rates for the NOW Plan and such rates outside of the plan.

12. The NOW Plan tariffs will be permanently suspended, and NOW is directed to file new tariffs consistent with the above discussion, on not less than one day's notice to the Commission.

## **II. ORDER**

### **A. The Commission Orders That:**

1. The tariff sheets attached to Advice Letter No. 3 and Amended Advice Letter No. 3 by NOW Communications, Inc., are permanently suspended. Within ten days of a final

Commission order in this docket, NOW Communications, Inc., shall file revised tariff sheets, on not less than one day's notice to the Commission, consistent with the above discussion.<sup>1</sup>

2. Within 30 days of a final Commission order in this docket, NOW Communications, Inc., shall file a report with the Commission setting forth NOW Communications, Inc.'s proposed plan for refunding overcharges to customers consistent with the above discussion. This report shall address NOW Communications, Inc.'s proposed methods for identifying the specific customers entitled to refunds (*e.g.*, whether NOW Communications, Inc.'s billing records enable NOW Communications, Inc., to identify the individuals entitled to refunds), and NOW Communications, Inc.'s proposals for disposition of unrefunded amounts due to its inability to locate individuals entitled to refunds.

3. 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.

4. This Order is effective on its Mailed Date.

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<sup>1</sup> NOW Communications, Inc., should consult with Commission Staff and the Office of Consumer Counsel regarding these new tariff sheets prior to filing with the Commission.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING  
December 18, 2002.**

(S E A L)



**ATTEST: A TRUE COPY**

**Bruce N. Smith  
Director**

THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF COLORADO

**RAYMOND L. GIFFORD**

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**POLLY PAGE**

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**JIM DYER**

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Commissioners

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