

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 04A-380T

IN THE MATTER OF THE COMBINED APPLICATION OF QWEST CORPORATION FOR
RECLASSIFICATION AND DEREGULATION OF CERTAIN PART 2 PRODUCTS AND
SERVICES AND DEREGULATION OF CERTAIN PART 3 PRODUCTS AND SERVICES.

ORDER REQUESTING INFORMATION

Mailed Date: August 4, 2004
Adopted Date: August 3, 2004

I. BY THE COMMISSION

A. Statement

1. On July 21, 2004, Qwest Corporation (Qwest) filed an Application for Reclassification of Certain Part 2 Services and Products, Deregulation of Certain Part 3 Services and Products, Motion for Waiver and for Waiver of Response Time. In the Application, Qwest requested a waiver of Rule 4 *Code of Colorado Regulations* (CCR) 723-38-8.2, the notice requirement for deregulation applications.

2. On July 23, 2004, Qwest filed an Amended Motion for Waiver and for Waiver of Response Time. In this Amended Motion, Qwest again sought a waiver of Rule 8.2 in part, as well as waiver of the notice requirements of § 40-3-104(1)(c)(I)(B), C.R.S. Qwest states that it seeks permission to give its customers notice of the filing of the underlying application through a bill insert to be mailed during a regular billing cycle not later than 30 days after the Commission issues its notice deeming the underlying application complete. Qwest proposes to consider the 180-day statutory time clock to begin 30 days after the Commission issues its notice deeming the application to be complete, as opposed to on the day the application was filed.

3. Because we found certain ambiguities in its motion, by Decision No. C04-0858, we ordered Qwest to respond to questions regarding its motion by close of business, July 30, 2004.

4. On July 30, 2004, Qwest filed its Answers to the Questions Posed in our decision. On August 2, 2004, the Colorado Office of Consumer Counsel (OCC) filed a Response to Qwest Corporation's Amended Motion for Waiver. Also, on August 3, 2004, Staff of the Public Utilities Commission (Staff) filed its Response to Qwest Corporation's Filing Pursuant to Commission Decision No. C04-0858.

5. One of the questions we propounded to Qwest was whether the Commission possesses the legal authority to waive the time limits of § 40-15-305(1)(c), C.R.S., for issuing a decision, even with Qwest's agreement to waive those time lines. Qwest responded that we do possess such legal authority. According to Qwest, it is the only party with standing to demand that we meet the statutory deadlines, and has agreed to waive such deadline. Additionally, Qwest cites previous administrative law judge decisions for the proposition that we have previously waived a statutory deadline upon agreement of the parties.¹ Based on its representation that it will waive the statutory deadline, as well as the decisions it cites, Qwest maintains that the Commission possesses the legal authority to waive the time lines for a decision pursuant to § 40-15-305(1)(c), C.R.S.

6. The OCC states in its Response that it is "not convinced that the Commission has authority to waive the [§ 40-15-] 305 timeline." The OCC points out that § 40-15-305, C.R.S.,

¹ *ICG Telecom Group, Inc. Petition for Arbitration of an Interconnection Agreement with US West Communications, Inc. Pursuant to § 252(B) of the Telecommunications Act of 1996*, Docket No. 00B-103T, Decision No. R00-487-I (May 10, 2000); *see also, In the Matter of Petition of Qwest Corporation for Arbitration of an Interconnection Agreement with Covad Communications Company Pursuant to 47 U.S.C. § 252(B)*, Docket No. 04B-160T, Decision No. R04-0456-I.

contains specific language holding that failure to act within 180 days (plus 90) results in approval of the application. Nothing in that section provides an applicant the option of waiving its provisions as other statutes do, such as § 40-6-109.5(3), C.R.S., according to the OCC. Consequently, the OCC concludes that should § 40-15-305, C.R.S., apply, and if the timeline contained therein cannot be waived, the Commission should not waive the individual notice requirements of the rules.

7. However, the OCC goes on to argue that § 40-15-305, C.R.S., timelines do not apply to the totality of Qwest's filing and may not apply at all. The OCC maintains that because Qwest seeks reclassification of some Part 2 services to Part 3, § 40-15-207, C.R.S., governs this portion of the application. The OCC argues that because § 40-15-207, C.R.S., does not have a timeline within its provisions, applications brought under this section are governed by the timelines found at § 40-6-109.5(1), C.R.S., which provides that the Commission could, under extraordinary circumstances, extend the 210-day limit by an additional 90 days. Trial Staff did not offer a position on this issue.

8. Statutory provisions that govern time for actions to be taken by state agencies or public officials are generally classified as directory or jurisdictional. Typically, such statutory provisions are not jurisdictional "unless a contrary legislative intent is clearly expressed." *Wilson v. Hill*, 782 P.2d 874, 875 (Colo. App. 1989), citing *People ex rel. Johnson v. Earl*, 42 Colo. 238, 94 P. 294 (1908). If the duty articulated in the statute is one of a public nature and for a public benefit, the time limits are considered directory, "unless ... from the language employed in the [s]tatute, it plainly appears that the designation of time was intended as a limitation of power..." *Id.* (citation omitted).

9. Time limitations are usually characterized as directory unless time is of the essence or unless the statute contains negative language which denies the exercise of agency authority beyond the time period prescribed for action. *Id.* See also, *Shaball v. State Compensation Insurance Authority*, 799 P.2d 399, 402 (Colo. App. 1990). The key difference between statutes characterized as directory and those that are mandatory or jurisdictional is the consequence for noncompliance. Failure to follow directory language in a statute does not terminate the authority of the administrative body to decide an issue, while the failure to follow mandatory or jurisdictional statutory language may terminate the agency's power or jurisdiction. *Shaball* at 402. (citation omitted).

10. Where, for example, a statute that contained the term "shall" that limited the time by which a parole or probation hearing was to be held was obligatory, it was nonetheless merely directory because failure to meet the statute's time requirements did not warrant dismissal of the action. *Id.* at 402-403, citing *People v. Clark*, 654 P.2d 847 (Colo. 1982); *Turman v. Buckallew*, 784 P.2d 774 (Colo. 1989); *People in Interest of Lynch*, 783 P.2d 848 (Colo. 1989).

11. Section 40-15-305(c), C.R.S., states in relevant part, "[i]f the commission has not acted on [an application for deregulation under this section] within the appropriate time period permitted, the application shall be deemed granted." The language of this provision affirms a clear legislative intent that, should we fail to render a decision within 270 days, the Commission will forfeit jurisdiction to issue a decision, and a mandatory grant of the application shall be the result. Consequently, we find that the time limitations of § 40-15-305(c), C.R.S., are jurisdictional, and thus the Commission has no option but to render a decision within 270 days after the filing date of the application here. As a result, we find that Qwest may not waive the statutory time limitations.

12. The procedural effect of our legal finding above is that we are already approximately two weeks into the 180-day or 270-day time period. Qwest's proposal to provide notice to end-user customers via bill inserts during the September bill cycle will preclude any further procedural action on our part until the end of the intervention period, or October 12. We note that time is of the essence for a proceeding of this magnitude. It is critical to allow parties the optimum amount of time for discovery, writing of testimony, and preparing their cases. As a result, we deny Qwest's motion for waiver of Rule 4 CCR 723-38-8.2 and for waiver of § 40-3-104(1)(c)(I)(B), C.R.S. However, we present Qwest with two options on how best to proceed.

13. In its response to our questions in Decision No. C04-0858, Qwest indicates that it needs two weeks in order to prepare a direct mailing notice to its end-user customers. Qwest estimates that this direct mailing would cost the company approximately \$700,000. Qwest, if it chooses this option, shall send a notice of its application by direct mail to all its end-user customers. This shall be accomplished within 15 days of the mailed date of this decision. If Qwest chooses this option, we will extend the intervention deadline until September 3, 2004 to allow customers an appropriate amount of time to intervene, protest, or otherwise comment on this application.

14. Attached to this decision is the customer notice we intend Qwest to use if it chooses to complete its notice by direct mailing. We attach this notice to avoid the time that would otherwise be necessary to have Qwest draft and submit a notice for our approval.

15. We require Qwest to inform the Commission, of its decision to complete the direct mailing by close of business on August 10, 2004. If Qwest informs us that it chooses not to expend the money and time to complete a direct mailing within the next 15 days, we will dismiss the Application without prejudice at our weekly meeting on August 11, 2004. Qwest can then

plan to refile its Application at its own discretion when it feels it can meet the required notification timelines.²

16. We urge Qwest to work with Staff to work through the notice issue as well as any potential deficiencies in the application prior to refiling. This proactive work will tremendously aid in the efficiency of this docket.

II. ORDER

A. The Commission Orders That:

1. Qwest Corporation shall inform the Commission by August 10, 2004 whether it intends to notify its end-user customers of its application via direct mailing.

2. Should Qwest Corporation choose to provide notice to its customers of its application via direct mailing, such mailing shall be concluded no later than 15 days from the effective date of this Order.

3. If Qwest Corporation intends to notify its end-user customers of its application by direct mailing, it is ordered to use the customer notice attached to this Decision.

4. Qwest Corporation's Amended Motion for Waiver and for Waiver of Response Time, filed on July 23, 2004, is denied.

5. This Order is effective on its Mailed Date.

² We note that this second option can largely accomplish the purpose of Qwest's Amended Motion for Waiver. If Qwest chooses this option, the company can refile its Application at an appropriate date in September, and accomplish notice through its billing insert. The only difference is that the timeline for the docket would begin anew on the filing date, and the Commission would proceed as expeditiously as possible in evaluating the Application.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
August 3, 2004.**

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Commissioners