

Decision No. R04-1015

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 04R-309T

RULES PRESCRIBING THE PROCEDURES FOR ADMINISTERING THE LOW-INCOME
TELEPHONE ASSISTANCE FUND.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
WILLIAM J. FRITZEL
THAT THE RULES NOT BE ADOPTED**

Mailed Date: August 26, 2004

I. STATEMENT

1. By Decision No. C04-0623, mailed on June 9, 2004, the Commission issued Notice of Proposed Rulemaking concerning Proposed Rules Prescribing the Procedures for Administering the Low-Income Telephone Assistance Fund (LITAP), 4 *Code of Colorado Regulations* (CCR) 723-13. The Commission stated in its notice and order that the proposed rulemaking will consider modifications to the LITAP Rules.

2. The Commission stated that the proposed repeal and reenactment of all the Commission's existing telecommunications rules currently pending before the Commission in Docket No. 03R-524T included the LITAP rules. However, the major proposals in the instant rulemaking docket such as requiring all local exchange carriers to collect the LITAP surcharge were not noticed in Docket No. 03R-524T. The Commission stated in its Order that it would consider revisions to the LITAP Rules in the instant docket rather than in Docket No. 03R-524T.

3. The Commission scheduled a hearing concerning the proposed revisions of the LITAP Rules for August 6, 2004, and assigned the docket to an Administrative Law Judge.

4. Notice of proposed rulemaking in this docket was filed with the Colorado Secretary of State on June 16, 2004. The Commission requested that the Secretary of State publish notice of the proposed rules in *The Colorado Register*.

5. On July 29, 2004, a Cost-Benefit Analysis requested by the Office of Economic Competitiveness and Regulatory Reform was filed with that Office.

6. On July 30, 2004, the Colorado Telecommunications Association, Inc. (CTA), filed written comments.

7. The hearing was held as scheduled. Appearances were entered by counsel on behalf of the Colorado Office of Consumer Counsel (OCC) and Qwest Corporation (Qwest). Ms. Ellie Friedman of Staff of the Commission (Staff) presented a summary of the proposed rules. OCC and Qwest presented oral comments.

8. Pursuant to § 40-6-109, C.R.S., the record of the hearing and a written recommended decision are transmitted to the Commission.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Summary of Proposed Changes

9. In 1990, the Colorado General Assembly through § 40-3.4, C.R.S., established LITAP also known as Lifeline. LITAP provides discounted basic telephone service to subscribers who are eligible under the provisions of § 40-3.4-105, C.R.S. Under the provisions of § 40-3.4-108, C.R.S., this Commission determines and orders a uniform change on each business and residential line of non-eligible subscribers of local exchange service. The Commission in Decision No. C04-0552 established the surcharge at 12 cents per access line.

10. The current LITAP Rules require only carriers who provide LITAP service to collect the surcharge from their customers. Because of this limitation and increasing costs of

funding LITAP service, the LITAP surcharge has increased. The Commission in its Order expressed a concern that the principles of competitive neutrality may be undermined under the present rules, since some carriers collect the LITAP surcharge from their customers, while an increasing number of carriers not required to collect the surcharge are not.

11. Under the proposed rules, the collection of the LITAP surcharge by all carriers is mandatory. Proposed Rule 4 CCR 723-13-1, Rules 1 through 5 extends the applicability of the rules to all providers of basic local telecommunications service. “Rules 1 through 10 are applicable to providers of basic local exchange telecommunications services who are eligible telecommunications carriers and certified to do business and to offer basic local exchange service within the state of Colorado.”

12. Proposed Rule 4 CCR 723-13-3 establishes the tariff requirements for participating telecommunications service providers. Proposed Rule 4 CCR 723-13-3.1 includes the proposed requirement that tariffs that are filed to implement the program shall include a description of the service offered to eligible subscribers and the monthly rate.

13. Proposed Rule 4 CCR 723-13-4.2 contains a new provision that requires providers of basic local exchange telecommunications services with more than 500,000 subscribers to report program administrative fees based on actual costs. Basic local exchange telecommunications service providers with less than 500,000 subscribers are required to report the administrative fee approved by the Commission based on average cost to administer the program.

14. Rule 4 CCR 723-13-5.3, Uniform Charge, requires that a provider of basic local exchange telecommunications service may collect the uniform charge by a specific line item on a subscriber’s bill if this is provided for in its tariff. The proposed rule adds an alternative

provision where the uniform charge can be included in a subscriber's bill as part of the subscriber's basic exchange service rate. The provider's tariff shall indicate through a footnote or other notation that the basic exchange service rate contains the uniform charge. If the provider selects this alternative, it must include information in the bill once a year informing its customers that the basic exchange service rate contains a monthly charge for the LITAP program.

15. Proposed Rule 4 CCR 723-13-11 is new. The Commission may waive or permit a variance of any of the rules for good cause shown upon the finding that compliance is impossible, impracticable, or unreasonable and not otherwise contrary to law.

B. Comments of Interested Parties

16. Qwest generally supports the rules. It is however, concerned with the provision that requires all local exchange providers to collect the LITAP surcharge, particularly those with less than 500,000 access lines. Qwest believes that extending it to all local exchange carriers is contrary to § 40-3.4-110, C.R.S., notwithstanding a later enacted statute, § 40-15-501 *et seq.*, C.R.S., directing the Commission to promote competition in the local exchange market. Qwest comments that a specific statute, *i.e.*, § 40-3.4-110, C.R.S., overrides the general Statute, § 40-15-501 *et seq.*, C.R.S.

17. OCC supports the Commission's proposed rules. It believes that the Commission should by rule expand the LITAP program to those local exchange carriers with fewer than 500,000 access lines. OCC comments that it is important for all low-income customers to have access to the LITAP program.

18. Staff supports the proposed rules. It believes that the LITAP surcharge should be collected from all local exchange providers. It points out that although there are 79 competitive

local exchange carriers eligible and certified to do business in the State of Colorado, only a fraction of these providers have opted to offer LITAP's program and collect the surcharge.

19. CTA, in its written comments filed on July 30, 2004, supports the stated goal of the proposed rules, that is to ensure fair, competitively neutral, and non-discriminatory treatment by the Commission of all providers in Colorado who offer basic local exchange service.

20. CTA, however, is concerned that the Commission's proposal to have the LITAP program applied to all Colorado providers offering basic local exchange is not in accord with § 40-3.4-110, C.R.S., which provides as follows:

This article shall apply to all providers of basic local exchange telecommunications services with more than 500,000 subscribers and certified to do business in the state; except that any such certified company with fewer subscribers may petition the commission for discounted rates for their subscribers eligible to receive low-income telephone assistance.

CTA comments that the Commission's proposed rules remove the "opt-in" option for those providers who have less than 500,000 access lines.

C. Discussion and Conclusion

21. The proposed revisions to the Rules Prescribing the Procedures for Administering the Low-Income Telephone Assistance Fund should not be adopted. The proposal to make the collection of the LITAP surcharge mandatory for all providers of basic local exchange telecommunications services is in conflict with Section 40-3.4-110, C.R.S. The Colorado General Assembly clearly provided that Article 3.4 applies to all providers of basic local exchange telecommunications services with more than 500,000 subscribers certified to do business in Colorado, with the provisions for carriers with less subscribers could voluntarily "opt-in" the program. CTA and Qwest correctly state that the proposed rules would contravene existing law. Section 24-4-103 (4) (b) (IV), C.R.S. requires that any proposed rule or regulation

not conflict with other provisions of the law. The proposed rules conflict with the provisions of Section 40-3.4 –110, C.R.S. that makes mandatory LITAP participation only for providers with more than 500,00 subscribers. Any change in the applicability of LITAP participation should be addressed at the General Assembly. The existing Rules Prescribing the Procedures for Administering the Low-Income Telephone Assistance Fund should be retained.

22. Pursuant to § 40-6-109, C.R.S., it is recommended that the Commission enter the following order.

II. ORDER

A. The Commission Orders That:

1. The proposed Rules for Administering the Low-Income Telephone Assistance Fund should not be adopted.

2. This rule-making proceeding should be terminated by publication of a notice of termination in the *Colorado Register*.

3. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

4. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

a) If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission upon its own motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

b) If a party seeks to amend, modify, annul, or reverse basic findings of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

5. If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Administrative Law Judge