

Decision No. C05-0315

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 04R-510T

RULES RELATING TO THE REGULATION OF OPERATOR SERVICES FOR
TELECOMMUNICATIONS SERVICE PROVIDERS AND TELEPHONE UTILITIES.

ORDER ON EXCEPTIONS

Mailed Date: March 18, 2005

Adopted Date: March 16, 2005

I. BY THE COMMISSION

A. Statement

1. This matter comes before the Commission for consideration of exceptions to Recommended Decision No. R04-1543 (Recommended Decision) filed individually by Eschelon Telecom, Inc. (Eschelon) and MCI, Inc. (MCI) on January 18, 2005. This docket concerns the proposed amendments to the Rules Regulating Operator Services for Telecommunications Services Providers and Telephone Utilities, 4 *Code of Colorado Regulations* (CCR) 723-18 (Operator Services Rules).

2. This rulemaking was initiated by the Commission pursuant to a notice of proposed rulemaking (NOPR) by Decision No. C04-1184. The purpose of the rulemaking is to amend Appendix A to the Operator Service Rules to modify the Benchmark Maximum Operator Services Rates by increasing the benchmark rate for the Pay Telephone Charge which was originally set in the permanent rules at \$.26 per call. Because the Federal Communications Commission (FCC) recently modified the default rate of payphone compensation for dial-around

calls, which increased the rate from \$.24 to \$.494 per call,¹ the Commission now proposes to adopt a permanent rule to increase its benchmark Pay Telephone Charge to \$.50. The authority for the Commission to set these benchmark rates is provided pursuant to § 40-15-302(5), C.R.S.

3. This rulemaking involves the compensation for dial around calls from payphones where a caller makes a coinless call using a carrier other than the payphone's pre-subscribed long distance carrier. These dial-around calls include access to a caller's preferred long distance carrier to complete the call, or toll free calling.

4. MCI, Eschelon, the Colorado Payphone Association (CPA) and Qwest Corporation (Qwest) submitted written comments to the proposed rules. At a hearing on this matter held on December 10, 2004, only Qwest submitted additional oral comment.

5. After considering the written comments of the parties and Qwest's oral comments at hearing, the ALJ recommended amending Appendix A to the Operator Service Rules by increasing the benchmark rate for the Pay Telephone Charge to \$.52 per call.

6. The ALJ agreed with MCI and Eschelon that the Commission is not setting the actual dial-around charge, which is the compensation to be paid to payphone service providers (PSP) for dial around calls. That compensation is set by the FCC via Section 276 of the Telecommunications Act of 1996. Here, the ALJ correctly pointed out that the Commission is merely setting the end-user charge to permit IXC's to recover the costs of dial around compensation paid to PSPs from end-users.

7. Prior to this rule-making, the ALJ noted that the benchmark Pay Telephone Charge was \$.26 per call. This rate allowed IXC's \$.02 per call for recovery of their costs for

¹ See, *In the Matter of Request to Update Default Compensation Rate for Dial-Around Calls from Payphones*, Report and Order, FCC 04-182 (rel. August 12, 2004).

administering the dial-around compensation program – costs above the per call compensation paid to the PSP.

8. Based on the limited information received from the parties through their written and oral comments regarding individual administrative costs, the ALJ set the benchmark rate at \$.52 per call. The ALJ noted that if an individual carrier's costs do exceed this rate, that carrier may recover those costs by providing credible evidence to the Commission to prove those costs. The ALJ further pointed out that Commission Rule 4 CCR 723-18-5.4.4 of the Operator Service Rules permit individual carriers to charge rates above the benchmark if they prove, with cost studies, that those rates are just and reasonable. According to the ALJ, the \$.02 amount was based on Commission precedent in setting the \$.26 rate, as well as rounding up the resulting \$.514 per call to \$.52.

9. The ALJ rejected MCI's argument that by virtue of § 276 of the Telecom Act, the Commission has no authority to set a charge intended to allow for recovery of dial-around calls. The ALJ points out that MCI provides no legal authority to support its claim other than citation to § 276(b)(1)(A). However, the ALJ found that section speaks only to the FCC's power to establish dial-around compensation, the payment to be made by IXC's to PSP's. The statute does not relate to the charge to be assessed by IXC's upon end-users to recover the costs of dial-around compensation. The ALJ indicated that he could not discern any federal intent to preempt state authority here, much less a clear intent of preemption over end-user charges for intrastate calls.

10. The ALJ also noted that despite the allegations by the parties that \$.50 per call was insufficient to allow carriers to recover their cost of administering dial-around compensation, no party presented cost studies or other concrete evidence of what their costs for administering dial-around compensation are.

11. The ALJ also rejected MCI's argument that the Commission permit carriers to charge market-based rates to recover their costs for dial-around compensation. The ALJ pointed to § 40-15-302(5) which directs that rates for nonoptional operator services "be set at or below a single statewide benchmark rate as determined by the commission that is applicable to all providers, unless the commission approves a higher rate." The ALJ found MCI's suggestion in violation of this Legislative directive.

12. Eschelon requested that the Commission exclude payphone toll-free "800 number" dial-around calls from the benchmark Pay Telephone Charge. According to Eschelon, those toll-free calls from payphones are not operator services and should be eliminated from the list of nonoptional operator services.

13. The ALJ denied Eschelon's requests as being beyond the scope of the NOPR. Since the purpose of this docket was solely to consider the proposed amendment to the Pay Telephone Charge, Eschelon's request was not proper to be considered here.

B. Analysis

14. Eschelon argues that the ALJ erred in denying its argument that toll-free or 800 number payphone originated services are not included in the "operator services" in the Commission's rules and should not be subject to the rate cap under the rules. According to Eschelon, a Commission finding that payphone originated toll-free 800 number services are not included in the current rules would not require a rule amendment or clarification and would not be beyond the scope of the rulemaking.

15. We agree with the ALJ that this matter is beyond the scope of the present rulemaking. This matter was opened for the limited purpose of setting a benchmark rate for the Pay Telephone Charge in light of the FCC's order increasing the dial-around rate to \$.494 per

call. If Eschelon wishes to pursue its argument that toll- free payphone originated calls should not be included in the Commission's Operator Service Rules, the more appropriate venue would be the ongoing repeal and reenactment of the Commission's Telecommunications Rules.

16. Eschelon next argues that the ALJ erred in finding that dial-around calls are classified as operator services under the rules, based on his finding that the pay telephone charge is intended to allow IXC's to recover their costs for dial-around compensation. Eschelon maintains the rules are directed to end users, not to service providers, and therefore unreasonably do not allow IXC's to recover their costs.

17. We are not persuaded by Eschelon's arguments. We find nothing in the rules that prevents IXC's from recovering their costs. Indeed, the rules setting a benchmark rate for recovery of these costs from end-users provides the specific relief Eschelon claims is absent from our rules. As the ALJ noted, the rate set here is not a "cap" as Eschelon characterizes it, but rather is a benchmark rate. Should an IXC find that the benchmark rate is set too low for it to adequately recover its costs, it may request relief from the Commission in the form of a higher rate upon a supported showing (including cost studies) of such a need. We therefore deny Eschelon's exceptions in their entirety.

18. MCI offered four arguments it wished the Commission to consider. The first exception offered is that the ALJ was arbitrary and capricious in not considering a decline in payphone usage. (MCI Exceptions at 4). The second exception asserted that the ALJ wrongly found that only cost-based rates may be specified in the benchmark rates. (MCI exceptions at 5). Third, MCI asserts the ALJ erred in concluding that no cost information was provided at hearing. (MCI exceptions at 6). The fourth exception asserts the ALJ erred by asserting authority pre-

empted by section 276 of the Telecommunications Act of 1996. (MCI exceptions at 8). We shall take each of the exceptions in turn.

19. At page 7, MCI requests ‘ . . . [t]hat the Commission reopen the record in this proceeding and allow MCI and other carriers to file “cost studies”.’ (quotation marks in original). We note that the parties were on notice that the benchmark rate was to be reset. Further, we note that previous rulemakings regarding benchmark rates had included analysis of cost information, including cost studies relating to non-optional operator services. Thus, at the time the Notice was issued in this docket, the parties were aware, or should have been aware, that cost information was useful, if not necessary, to the determination of the proper benchmark rates.² In particular, if the parties believed that the rate currently in effect was incorrect, it was the parties’ burden to propose and support properly a new rate. The Commission agrees with the ALJ that the parties did not submit appropriate cost information. However, the Commission will grant the parties another opportunity to justify new rates. In particular, the Commission wishes to gather additional evidence, as appropriate to our rate setting function under §40-15-302(5), upon which to determine the appropriate cost and return on investment, if any, associated with administration of dial-around compensation payments to payphone owners. The Commission deems further hearing on this narrow issue is appropriate and directs the ALJ to hold further hearing on this narrow, particular issue. In this limited sense, MCI’s exception is granted. Accordingly, we shall remand this specific issue to the ALJ for additional hearing and evidence gathering. Further, we shall issue a Supplemental Notice of Proposed Rulemaking in this docket. Specifically, in order to determine the appropriate cost and return on investment, if any, associated with administering dial-around compensation payments, and, therefore, the corresponding supplement to the FCC-

² See, for example Commission Docket No. 02R-285T wherein several parties submitted cost information.

mandated dial-around payment, if any, and, therefore, the dial-around charge to be included in the Commission's benchmark rates, the ALJ shall receive additional evidence in the form of appropriate cost studies which comply with 4 CCR 723-30, from the parties.³

20. MCI's second exception argues that the market should determine the rates by which carriers should recover administrative costs. The Commission finds that specific statutory direction to the contrary can be found at § 40-15-302(5). Simply, the Commission must issue a benchmark rate that is certain and which complies with the usual just and reasonable standard. Consequently, a purely market-based rate will not comply with this standard. While § 40-15-302(5) provides that a carrier may earn a return on its investment associated with dial around calls, and this affords the Commission the discretion to allow profit on its investment, the Commission rejects this argument and denies this exception. We must set a specific rate.

21. MCI's third exception states that cost data was submitted at hearing, which the ALJ failed to consider in his Recommended Decision. It is true that the record contains assertions regarding administration costs. However, it is unclear how these numbers were derived. The numbers were not supported in a manner consistent with Commission practice and do not provide an adequate basis upon which the Commission can set appropriate benchmark rates. We agree with the ALJ that such assertions were entitled to no weight and we affirm the ALJ's findings on this point and deny this exception.

22. MCI's fourth exception is that the ALJ has asserted authority that the Commission does not possess. We disagree. The FCC has the authority to order and to set an amount for dial-around compensation to be paid an eligible payphone provider by an IXC or OSP.

³ These studies needn't be costly or otherwise burdensome and should be done in the ordinary course of business by a firm in a competitive environment.

This authority extends to interstate and intrastate calls. However, under §40-15-302(5), this Commission has authority to set retail benchmark rates for non-optional operator services. Those rates, in turn, must be just and reasonable and be based on the cost of the services involved while allowing providers an opportunity to recover costs and to earn a reasonable profit. We additionally agree with the ALJ that there is no evidence the FCC intended to preempt the states' authority in this matter. Thus, we find we have authority to set benchmark rates which incorporate service costs as a component of the retail price. Consequently, we deny MCI's exception on this point.

23. In sum, we shall grant MCI's exception and limit further proceedings to gathering additional cost studies. Otherwise, MCI's exceptions are denied.

II. ORDER

A. The Commission Orders That:

1. The exceptions filed by Eschelon are denied.
2. The exceptions filed by MCI are granted, consistent with and limited to the discussion above, and otherwise are denied. Specifically, the Commission shall reopen the record in this matter for the specific and limited purpose of receiving additional evidence pertaining to the administrative costs and return on investment associated with dial around compensation and how those costs and return may affect the benchmark rates for non-optional operator service calls where dial around compensation is appropriate.
3. In order to receive this evidence, the Commission remands this matter to the Administrative Law Judge for further hearing. The time, place, and other pertinent information regarding that hearing is contained in the Supplemental Notice of Proposed Rulemaking, subsequently issued in this docket.

4. This Order is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
March 16, 2005.**

(S E A L)



ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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Commissioners