

Decision No. C05-1458

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 03R-524T

IN THE MATTER OF PROPOSED REPEAL AND RE-ENACTMENT OF RULES
REGULATING TELEPHONE UTILITIES AND PROVIDERS AS FOUND IN 4 CCR 723-2, 4
CCR 723-7, 4 CCR 723-12, 4 CCR 723-13, 4 CCR 723-18, 4 CCR 723-22, 4 CCR 723-24, 4
CCR 723-25, 4 CCR 723-27, 4 CCR 723-28, 4 CCR 723-29, 4 CCR 723-30, 4 CCR 723-34, 4
CCR 723-38, 4 CCR 723-39, 4 CCR 723-40, 4 CCR 723-41, 4 CCR 723-42, 4 CCR 723-43, 4
CCR 723-44, 4 CCR 723-45, 4 CCR 723-46, 4 CCR 723-48, 4 CCR 723-49, 4 CCR 723-52,
AND 4 CCR 723-53.

**ORDER DISMISSING APPLICATION FOR REHEARING
REARGUMENT OR RECONSIDERATION**

Mailed Date: December 13, 2005

Adopted Date: December 7, 2005

I. BY THE COMMISSION

A. Statement

1. Before the Commission for consideration are an Application for Rehearing, Reargument or Reconsideration (RRR) of Commission Decision No. C05-1269, filed by the Colorado Office of Consumer Counsel (OCC) on November 14, 2005, a Motion to Dismiss that application for RRR filed by Qwest Corporation (Qwest) on November 16, 2005, and the OCC's Response to that motion, filed on November 30, 2005. Decision No. C05-1269 partially granted applications for RRR filed by various parties to Decision No. C05-1064, which partially granted exceptions to Decision No. R05-0497. Because we believe that the Commission has fully had an opportunity to consider and reconsider its position on proposed rules 2108 and 2308, we grant Qwest Corporation's Motion to Dismiss the OCC's Application for RRR.

B. History

2. By Decision No. C03-1393 (mailed December 18, 2003), the Commission issued a Notice of Proposed Rulemaking (NOPR) which proposed to repeal and reenact all the rules regulating telecommunications in Colorado. The proposed repeal and reenactment of the rules is part of a comprehensive effort by the Commission to revise and recodify all of the Commission's current rules.

3. A hearing on the proposed rules was held on September 20-23, 2004. Final hearings were held March 14, 2005 and Chairman Sopkin issued Recommended Decision No. R05-0497 on April 29, 2005. Various parties filed exceptions to that decision, and in Decision No. C05-1064, the Commission granted certain exceptions in part, but did not change the recommended decision with respect to not including a requirement for automatic transfer of service to a default provider, and not including a requirement that all providers offer stand-alone basic local service. Qwest, the regulated subsidiaries of MCI, Inc., and the OCC filed Applications for RRR to that decision which were fully discussed and granted in part at a deliberations meeting held on October 17, 2005. The Commission decision granting RRR in part was memorialized in Decision No. C05-1269, issued on October 24, 2005. The Commission as a whole again did not change its reasoning with respect to its decision on proposed rules 2108 and 2308 (a) (XIV), or the rules themselves. Commissioner Page did issue a dissent in Decision No. C05-1269 with respect to Rule 2308, indicating a change in her position, but that did not change the reasoning behind maintaining the Commission's decision. The OCC then filed a second application for RRR, and Qwest filed a motion to dismiss.

C. Discussion

4. We believe that Qwest is correct that the OCC's second Application for RRR is procedurally inappropriate, and grant the motion. Qwest argues that the Commission did not

reverse, change or modify its decision on the matters to which the OCC has filed its second Application for RRR and that, procedurally, if the Commission allows the Application to be heard, a party's ability to file applications for RRR would be endless.

5. The OCC argues several points: that there need be only a change on any issue before a second application for RRR is allowed on an unrelated issue that the Commission has maintained its position on; that because there is new factual information from a different docket, a second round of RRR is permitted; and that a new dissent which does not change the Commission's decision may allow a second round of RRR.

6. The OCC also argues that it must file a second application for RRR in order to preserve its appellate rights by exhausting its administrative remedies. For this proposition, the OCC cites *Colorado Office of Consumer Counsel v. Public Utilities Commission*, 752 P.2d 1049 (Colo. 1988). While it is true that, in that case, the court stated that "a plain reading of [§ 40-6-114(3) requires] the party to file a second application for rehearing of a decision reversing, changing or modifying the original decision . . . ,” the OCC fails to note the court's explanation for requiring a second application. The Supreme Court stated “. . . that an application for rehearing following reversal, change or modification of a decision is required follows from the presence of the word 'shall' in subsection (3).” *Id.* at 1052. Worse, in our opinion, the OCC fails to recognize that the plain language of § 40-6-114 (3) is as follows:

(3) Any decision made after rehearing, reargument, or reconsideration, reversing, changing or modifying the original decision may be subject to the same provisions with respect to rehearing, reargument, or reconsideration as an original decision or any such decision may be subject to judicial review as provided in section 40-6-115, at the option of the party seeking review.

7. The "shall" was removed from the statute in 1992, and replaced by "may" The plain language of the statute clearly allows a party to file an appeal in court without requiring a second application for RRR.

8. The OCC also asserts that Commissioner Page's dissent creates a modification of the original decision that allows for a second application for RRR. However, in *OCC v. PUC*, the Supreme Court noted that, contrary "to the claims of the Office [OCC] section 40-6-114(3) does not require a subsequent decision to be a substantial modification of the original decision." In that case, the Commission modified its initial decision by setting forth additional reasoning in its second decision, specifically its thoughts behind adopting new tariffs. The addition of the new reasoning was enough to trigger the requirement of a second round of RRR, according to the Supreme Court, because the statute indicates that a decision on RRR could reverse, change, or modify the reasoning of the first, without changing its result. *Id.*, fn. 3 at 1053.

9. In *OCC v. CPUC*, the Court indicates that the spirit of the statute, "which is its underlying purpose, requires applicants to offer the Commission a full opportunity to pass upon the matter and to correct whatever errors might have ensued." *Id.*, fn3 at 1053. The parties had not afforded the Commission a full opportunity to correct any mistakes in the additional reasoning it set forth. We do not believe the addition of a dissent to be a sufficient modification to permit another round of RRR. The Commission has had a full opportunity to examine the matter, during exceptions and the first round of RRR, and correct whatever errors there might have been in the previous decisions. Commissioner Page has done so by modifying her position on stand-alone service. The OCC is not asking Commissioner Page to reconsider her decision. The other two commissioners have had an opportunity to reverse their position on stand-alone

and default provider service and have declined to change their minds, even after considering Commissioner Page's comments during deliberations on October 17, 2005.

10. Were we to adopt the OCC's reasoning, a party could file for RRR on one issue where there has been a consistent Commission decision from the recommended decision through multiple rounds of RRR simply because the Commission changed its opinion on another unrelated matter or one Commissioner dissents on a related issue. This seems to us to be far from the intent of the Legislature as discussed by the Supreme Court, and would be a waste of the Commission's time and resources.

11. We also do not believe that the OCC's arguments concerning new information on default providers are persuasive. The new information arose in Docket No. 05A-107AT, Premier Communications of Colorado, Inc.'s discontinuance of service docket. None of that information is in the record in this docket. It would be improper and unfair for us to allow new information into this docket at this late date. Qwest and the other parties have not had a chance to comment on that proceeding and its results in the context of this rulemaking. Were we to allow new information here, any party would be able to introduce new information at any time in a manner prejudicial to other parties. We also note that the Commission does not allow for replies to applications for RRR, except for extraordinary circumstances.

D. Conclusion

12. Because we believe that the OCC's second application for RRR is procedurally improper, we grant Qwest's motion to dismiss and emphasize that we do not address the merits of the OCC's arguments.

13. On our own motion, we do make one minor change to the proposed rules. In Docket No. 04R-510T we changed the rate charged to end-users for dial-around compensation to

payphone providers from \$.52 to \$.55. This change was never incorporated into these recodified rules. We make that change to rule 2164(f) now.

II. ORDER

A. The Commission Orders That:

1. Qwest Corporation's Motion to Dismiss the Colorado Office of Consumer Counsel's Application for Rehearing, Reargument or Reconsideration is granted.

2. The OCC's Application for Rehearing, Reargument or Reconsideration filed on November 14, 2005, is dismissed with prejudice.

3. Rule 2164(f) shall be as follows:

(f) In the absence of a specific order by the Commission, rates for non-optional operator services shall not exceed the benchmark maximum rates in the table below:

BENCHMARK MAXIMUM RATES FOR NON-OPTIONAL OPERATOR SERVICES		
No.	Operator Service	Rate
1	1. MESSAGE RATE PER CALL	\$.11
	Measured rate per minute:	
2	Day	\$.20
3	Evening/Night/Weekend	\$.11
	Calling Card Station Rates — Customer Dialed:	
4	Automated (Mechanized)	\$.30
5	Operator-assisted	\$.58
6	Calling Card Station Rates — Operator Dialed	\$1.13
7	Operator Assistance	\$.75
	Operator Assisted:	
8	Station-to-Station	\$1.25
9	Collect	\$1.85
10	Billed to Third-party	\$1.51
11	Person-to-Person	\$3.00
	Busy Line:	
12	Verification	\$1.25
13	Interrupt	\$2.00
14	[RESERVED FOR FUTURE USE]	
15	Payphone Charge (facilities based providers only)	\$.55

4. The rules attached to Decision No. C05-1269 with the above change to Rule 2164(f) are adopted.

5. The rules shall be effective on April 1, 2006.

6. The opinion of the Attorney General of the State of Colorado shall be obtained regarding the constitutionality and legality of the rules.

7. A copy of the rules adopted by this order shall be filed with the Office of the Secretary of State for publication in *The Colorado Register*. The rules shall be submitted to the appropriate committee of the Colorado General Assembly if the General Assembly is in session at the time this Order becomes effective, or to the committee on legal services, if the General Assembly is not in session, for an opinion as to whether the adopted rules conform with § 24-4-103, C.R.S.

8. This Order is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
December 7, 2005.**

(S E A L)



ATTEST: A TRUE COPY

A handwritten signature in black ink that reads 'Doug Dean'.

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

GREGORY E. SOPKIN

POLLY PAGE

CARL MILLER

Commissioners