

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.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
ANTHONY M. MARQUEZ
ADOPTING RULE**

Mailed Date: May 31, 2005

I. STATEMENT

1. This docket concerns a proposed amendment to the Rules Regulating Operator Services for Telecommunication Services Providers and Telephone Utilities, 4 *Code of Colorado Regulations* 723-18 (Operator Services Rules). The Commission initiated this rulemaking proceeding by Decision No. C04-1184 (Mailed Date of October 14, 2004), the Notice of Proposed Rulemaking (Notice), and assigned this matter to an Administrative Law Judge (ALJ). As described in the Notice, the Commission, in this case, proposes to amend Appendix A to the Operator Service Rules to increase the benchmark rate for the Pay Telephone Charge (*see* discussion below), which was, at the time the Notice was issued, \$.26 per call. The Commission proposes to increase that rate to account for the decision by the Federal Communications Commission (FCC) increasing the default rate of payphone compensation for dial-around calls from \$.24 to \$.494 per call.

2. Pursuant to the Notice, the ALJ conducted the public comment hearing in this matter on December 10, 2004. The ALJ, after that hearing, issued Decision No. R04-1543

(Mailed Date of December 28, 2004). Decision No. R04-1543 recommended that the benchmark Pay Telephone Charge be increased from \$.26 to \$.52 per call. In part, the ALJ determined that the parties to this case failed to present cost information justifying a higher rate (than \$.52).

3. Interested parties filed exceptions to Decision No. R04-1543 in accordance with § 40-6-109(1), C.R.S. In its Order on Exceptions,¹ the Commission granted those exceptions, in part, and remanded this case to the ALJ to conduct further proceedings. The Commission also issued its Supplemental Notice of Proposed Rulemaking² setting a hearing before the ALJ on May 3, 2005 for the specific purpose of receiving additional evidence, and providing interested parties an additional opportunity to submit written and oral comment on the proposed rule.

4. Qwest Corporation (Qwest) and MCI, Inc. (MCI) each submitted additional written comment regarding the proposed change to the Pay Telephone Charge. Qwest submitted its Supplemental Comments, Errata to Supplemental Comments, and Cost Study regarding the appropriate benchmark rate for the Pay Telephone Charge. The Cost Study was filed with the Commission under seal as a confidential document. MCI submitted testimony by Robert Munoz, both a redacted public version and a confidential version filed under seal. That testimony sets forth MCI's cost study regarding its proposed Pay Telephone Charge.

5. As directed in the Supplemental Notice, the ALJ convened the hearing in this case on May 3, 2005. Both Qwest and MCI presented additional oral comment on the proposed rule.

6. In accordance with § 40-6-109, C.R.S., the ALJ now transmits to the Commission the record in this proceeding along with this recommended decision. For the reasons explained

¹ Decision No. C05-0315 (Mailed Date of March 18, 2005).

² Decision No. C05-0316 (Mailed Date of March 18, 2005).

below, the ALJ recommends that the Commission amend the Operator Service Rules by increasing the benchmark rate for the Pay Telephone Charge to \$.55 per call.

II. FINDINGS AND CONCLUSIONS

7. As explained in the Order on Exceptions and Decision No. R04-1543, this rulemaking proceeding concerns compensation for dial-around calls made from payphones. “Dial-around calls” are telephone calls from a payphone in which a caller makes a coinless call using a carrier other than the payphone’s presubscribed long distance carrier. “Dial-around compensation” is a payment (per call) made by an interexchange carrier (IXC) to a payphone service provider (PSP)—that is, the owner of the payphone—for each completed dial-around call. In this case, the Commission is setting the benchmark end-user charge (*i.e.*, the Pay Telephone Charge) to permit IXCs to recover from end-users the costs of dial-around compensation paid to PSPs. *See* Decision No. R04-1543, ¶¶ 7-8.

8. In its Order on Exceptions (pages 6 and 7) the Commission specified the purpose of this remanded proceeding:

[T]he 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....(I)n 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-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....

In short, the Commission, by setting further proceedings in this case, intended that the parties submit cost information and, specifically, cost studies supporting their proposed Pay Telephone Charge.

9. In the comments on remand, Qwest requests that the Commission set the benchmark Pay Telephone Charge at \$.55 per call; MCI suggests a rate of \$.57 per call. As noted above, both Qwest and MCI submitted additional comments intended to respond to the Commission's request for cost information and studies.

10. Qwest's cost study is a total service long run incremental cost (TSLRIC) study. That is, the study purports to estimate the *forward-looking* costs associated with providing the total quantity of a service (*e.g.*, dial-around compensation) in the long run. According to its comments, Qwest's forward-looking studies identify the costs that are likely to be incurred in the future, and consider the latest forward-looking technologies and methods of operation currently available. Qwest's TSLRIC study does not measure embedded or historical costs. Qwest points out that its TSLRIC studies estimate *long run* costs associated with providing a service: They reflect a time period over which all inputs (*e.g.*, including changes in the size of facilities and levels of investment) can be adjusted. Additionally, these studies identify the replacement cost for the total service—the studies consider the replacement cost of a network “built from scratch.”

11. Qwest claims that its cost study and the results of that study are confidential. Therefore, the study and the results—that is, Qwest's estimate of its costs for administering dial-around compensation—were filed under seal.

12. Qwest's written comments stated, “Qwest's cost study supports its proposal that the Commission set the rate cap, at the very least, at \$.55 (for the Pay Telephone Charge). . . .” At

the hearing on May 3, 2005, Qwest clarified that, in fact, it is recommending \$.55 as the benchmark rate in this case.

13. MCI's study, which is set forth in Mr. Munoz's testimony, is an embedded cost study. Mr. Munoz describes 11 separate cost categories for MCI's administration of dial-around compensation. The ALJ understands that, in his cost study, Mr. Munoz identified MCI's cost for administering dial-around compensation *on a national level*. That is, the cost study is not a study of MCI's Colorado-specific costs for dial-around compensation.

14. As part of the study, Mr. Munoz used some of the same assumptions as the FCC when it calculated the appropriate dial-around compensation for PSPs. *See FCC's Report and Order*.³ Specifically, as part of his cost study Mr. Munoz assumed an 11.25 percent rate of return on invested capital, a depreciation life of ten years for "payphone-related equipment," and a combined rate of 39.25 percent for local, state, and federal taxes. Mr. Munoz used each one of these cost assumptions because the FCC used them in calculating dial-around compensation *for PSPs*. According to Mr. Munoz (page 5 of testimony), it is appropriate to use these same cost assumptions for calculating the Pay Telephone Charge *for IXCs*, because the IXCs are managing payphone compensation on behalf of the PSPs.

15. Based upon his cost study, Mr. Munoz (page 3 of testimony) concludes that, "...MCI must recover \$.57 per completed payphone call in order to break even." At hearing, MCI stated that it recommends \$.57 as the benchmark rate for the Pay Telephone Charge.

16. The ALJ has questions regarding both cost studies presented in this case. As to Qwest's "study" the ALJ observes: What Qwest presented to the Commission in this docket is

³ *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).

not actually a study. Rather, Qwest filed the results (or the output) of its study, not the study itself. Qwest's cost model, which incorporates the numerous assumptions used in calculating the costs for administering dial-around compensation, was not filed in this docket, and neither were the underlying data used in the model (from Qwest's books and records). For that reason, the Commission cannot now verify the reasonableness of Qwest's cost study. The Commission cannot, for example, decide the reasonableness of Qwest's estimate of *future* Network Support Costs, or the allocation of those Network Support Costs to dial-around compensation.

17. As for MCI's study, the ALJ first notes that the study appears to be at the national level. That is, the study appears to be based upon MCI's total, national costs for administering dial-around compensation; it is not a study of MCI's costs for administering dial-around compensation *in Colorado*.

18. Also, the ALJ disagrees with Mr. Munoz's assertion that it is reasonable to use, in a study of MCI's costs, assumptions used by the FCC in estimating PSPs' costs for dial-around calling. The FCC, in its *Report and Order*, was calculating *PSPs' costs* associated with dial-around calling from their phones. The FCC did not examine the IXCs' cost for administering dial-around compensation. And in setting the rate that IXCs should charge end-users for dial-around calls in this docket, the Commission is already accounting for that \$.494 compensation paid to PSPs pursuant to the FCC's order. The Commission, in this docket, is determining what costs, *over-and-above that \$.494 compensation*, IXCs incur in administering dial-around compensation. It seems clear that IXCs and PSPs perform different functions as related to dial-around calling—the PSP provides the payphone to an end-user making a dial-around call, and the IXC bills and collects from end-users for that call. Therefore, it seems likely that an IXC's costs for administering dial-around compensation are different than a PSP's cost for providing dial-

around calling; and, thus, applying assumptions about PSPs' costs to IXC's, without demonstrating that their circumstances are comparable, is improper. MCI, in any event, presented no information suggesting that IXC's and PSP's have similar costs for dial-around calls such that any of the FCC's cost assumptions are appropriate for this docket.

19. One of the cost assumptions used by MCI from the FCC's *Report and Order* was a depreciation life of ten years for "payphone-related equipment." However, there is no reason to believe, at least not based upon information in this record, that MCI, in its administration of dial-around compensation, uses equipment similar to payphones. For example, MCI did not suggest that the equipment it uses to track dial-around calls, and to bill and collect from end-users is similar to payphones. Therefore, there is no reason to believe that the depreciation rate used by the FCC in the *Report and Order* is appropriate for use in a study measuring MCI's costs. In addition, there was no evidence presented that the depreciation life assumption used by MCI is consistent with the depreciation lives assumptions prescribed by the Commission for the Colorado jurisdiction.

20. With another FCC-related assumption, regarding cost of capital (11.25 percent), MCI asserts that it faces similar costs in obtaining financing, such as loans and equity investment, as PSP's generally do—again without any information suggesting that its business is similar to PSP's in general. The ALJ notes that an 11.25 percent rate of return on invested capital—this appears to be equivalent to rate of return on rate base for a regulated public utility—today appears somewhat generous.⁴ That assumed cost of capital is, for example, significantly greater than the one used by Qwest in its study.

⁴ Alternatively, this 11.25 percent factor could be construed as a "cost of money."

21. Finally, the ALJ remarks upon Mr. Munoz's comment that MCI needs \$.57 per dial-around call "in order to break even." Mr. Munoz did not explain the reference to breaking even. Notably, however, MCI's cost study included the 11.25 percent factor for "return on invested capital" in deriving its \$.57 recommendation. Therefore, according to MCI's study, a Pay Telephone Charge of \$.57 would provide it earnings that include an 11.25 percent return on its investment associated with dial-around compensation. Nothing more would be appropriate (assuming the cost study itself were acceptable).

22. The ALJ notes that the purpose of this docket is to adopt a benchmark rate that will apply to the entire IXC industry absent proof by a specific company that its costs exceed the benchmark rate. The ALJ further points out that Qwest's and MCI's recommendations for the Pay Telephone Charge are similar, \$.55 and \$.57 respectively. Given those recommendations, the information presented in this docket, and the purpose of this rulemaking proceeding, the ALJ accepts Qwest's recommendation for a \$.55 charge. A rate of \$.55 will nearly triple the amount allowed the IXCs for recovery of their costs for administering dial-around compensation, as compared to the prior Commission-approved rate.⁵ Of course, IXCs can choose to charge less than \$.55. In any event, the ALJ concludes that this rate should be adequate for most IXCs to recover their own dial-around costs, including a reasonable return on investment associated with the program. Those IXCs with costs greater than allowed for in the benchmark rate can still request Commission approval of a higher rate.

⁵ As explained in Decision No. R04-1543, when setting the prior Pay Telephone Charge (\$.26) the Commission, in effect, allowed IXCs \$.02 per call to recover their costs for dial-around compensation over-and-above the FCC-mandated payment to PSPs (\$.24 per call). A benchmark rate of \$.55 allows IXCs \$.056 per call (the difference between \$.55 and the new FCC-mandated payment to PSPs of \$.494) to recover their non-FCC mandated costs. Therefore, \$.55 nearly triples the rate allowance for recovery of IXCs' cost for administering the program.

23. In accordance with § 40-6-109, C.R.S., the ALJ recommends that the Commission enter the following Order.

III. ORDER

A. The Commission Orders That:

1. The amendment to the Rules Regulating Telecommunications Service Providers and Telephone Utilities, 4 *Code of Colorado Regulations* 723-18, attached to this Order is adopted.

2. The rule shall be effective 20 days after publication by the Secretary of State.

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

4. A copy of the rule adopted by this Order shall be filed with the Office of the Secretary of State for publication in *The Colorado Register*. The rule shall be submitted to the appropriate committee of reference 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.

5. 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.

6. 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.

7. 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.

(S E A L)



ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

ANTHONY M. MARQUEZ

Administrative Law Judge

4 CCR 723-18-APPENDIX A

BENCHMARK MAXIMUM OPERATOR SERVICES RATES

<u>No.</u>	<u>Operator Service</u>	<u>Rate</u>
	Usage Rates	
1.	Flat (Message) Rate per call	.11
	Flat (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.	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.	Pay Telephone Charge	<u>.2655</u>
	(Facilities based providers only)	