(Decision No. C91-1293)

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

* * *

IN THE MATTER OF THE APPLICATION OF THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, D/B/A U S WEST COMMUNICATIONS, INC., FOR APPROVAL OF A FIVE-YEAR PLAN FOR RATE AND SERVICE REGULATION AND FOR A SHARED EARNINGS PROGRAM.	DOCKET NO. 90A-665T FURTHER COMMISSION ORDER DENYING MOTIONS TO DISMISS

Mailed Date: September 20, 1991
Adopted Date: August 21, 1991

STATEMENT

BY THE COMMISSION:

This opinion is entered pursuant to Decision No. C91-1139 which was adopted in open meeting August 21, 1991.

On October 22, 1990, U S WEST Communications, Inc. (USWC), filed an application for approval of a rate and service regulation plan. The Staff of the Public Utilities Commission; the Office of Consumer Counsel; and the Colorado Municipal League and the Colorado Cable Television Association (hereinafter "opponents") filed motions to dismiss the application on the grounds that USWC has failed to state a claim (request for approval of application) upon which relief can be granted. For the reasons stated herein, the motions to dismiss are denied.

SUBJECT MATTER JURISDICTION

The motions to dismiss can be granted if the movants demonstrate, as they argue, that the Commission may not, within its constitutionally

and statutorily prescribed authority, approve USWC's application (or a portion thereof) under any statement of facts which may be proven by USWC in support of its application. We hold that movants have not met this test.

Subject matter jurisdiction relates to the power of a court, or an agency acting in a quasi-judicial capacity, to address and decide the subject matter presented to it. People in Interest of Clinton, 762 P.2d 1381, 1387 (Colo. 1988); Mountain States Telephone and Telegraph Co. v. Public Utilities Commission, 763 P.2d 1020, 1025 (Colo. 1988); Geriatrics, Inc. v. Colorado State Department of Health, 650 P.2d 1288, 1290 (Colo. App. 1982), aff'd in part, rvsd. in part, 699 P.2d 952 (Colo. 1985). Subject matter jurisdiction is determined in light of the governing statutory provisions. People in Interest of Lynch, 783 P.2d 848, 851 (Colo. 1989); Peoples Natural Gas Division of Northern Natural Gas v. Public Utilities Commission, 626 P.2d 159, 161-162 (Colo. 1981); Wilson v. Hill, 782 P.2d 874, 875 (Colo. 1989).

The Commission's statutory authority is not narrowly confined but extends to incidental powers which are necessary to enable it to regulate public utilities. Mountain States Telephone and Telegraph Co. v. Public Utilities Commission, 763 P.2d at 1025 (Colo. 1988). The standards for interpreting statutory provisions were established recently by the State Supreme Court:

> [T]he primary task in statutory construction is to ascertain and give effect to the legislative purpose underlying a statutory enactment. (Citation omitted.) To discern legislative purpose we look first to the

> statutory language, giving words and phrases their plain and ordinary meaning. (Citations omitted.) Where a statutory provision is ambiguous, with the result that the provision might reasonably be construed in more than one way, a court should construe the statute in accordance with the objective sought to be achieved by the legislature. (Citations omitted.) In attempting to effectuate the ends for which the statute was enacted, a court may properly consider the consequences of particular construction. (Citations omitted.) Moreover, a statute should be interpreted so as to give consistent, harmonious and sensible effect to all of its parts. (Citations omitted.)

Colorado Common Cause v. Meyer, 758 P.2d 153, 160 (Colo. 1988)

Section 40-15-101, C.R.S. (1990 Supp.), provides an overall framework for telecommunications regulation in Colorado. It states:

> The general assembly hereby finds, determines, and declares that it is the policy of the state of Colorado to promote a competitive telecommunications marketplace while protecting the wide availability of high-quality telecommunications services. Such goals are best achieved by legislation that brings telecommunications regulation into the modern era by guaranteeing the affordability of basic telephone service while fostering free market competition within the telecommunications industry. The general assembly further finds that the technological advancements and increased customer choices for telecommunications services generated by such market competition will enhance Colorado's economic development and play a critical role in Colorado's economic future. However, the general assembly recognizes that the strength of competitive force varies widely between markets and products and services. Therefore, to foster, encourage and accelerate the continuing emergence of a competitive telecommunications environment, the general assembly declares that flexible regulatory treatments are appropriate for different telecommunications services.

The legislative declaration recognizes that the telecommunications industry is in a state of flux. One segment of the industry is

noncompetitive and requires extensive regulation. A second segment of the industry is indisputably competitive and requires no regulation. A third segment falls between these two extremes. The General Assembly declared that the Commission is to be flexible in its application of regulatory treatments--by applying different regulatory treatments to the different market conditions existing for each service and product.

Article 15 establishes three basic categories of telecommunications services. Part 2 provides for full regulation of specified services and products which are declared to be affected with a public interest. Section 40-15-201(1) and (2), C.R.S. (1990 Supp.). The entities which provide these services are subject to traditional regulation by the Commission, "including the regulation of all rates and charges pertaining to local exchange companies." Section 40-15-201(1), C.R.S. (1990 Supp.). Rates must be just and reasonable. Section 40-3-101, C.R.S. (19__). "Just and reasonable" is defined as a rate which properly balances the investor's interest in avoiding confiscation and the consumer's interest in prevention of exorbitant rates. Colorado Municipal League v. Public Utilities Commission, 687 P.2d 416, 419 (Colo. 1984); Public Service Company v. Public Utilities Commission, 644 P.2d 933, 939 (Colo. 1982). The Commission must set fixed rates of return which protect both the right of the public utility and its investors to earn a return reasonably sufficient to maintain the financial integrity of the utility, and the right of the consumer to pay a rate which accurately reflects the cost of service. Revenues must be sufficient to assure confidence in the financial integrity of the utility by maintaining the utility's ability to create and attract sufficient

capital. Public Utilities Commission v. District Court, 186 Colo. 278, 527 P.2d 233 (1974).

Part 3 acknowledges that certain specified services and products are subject to more competition in the marketplace than those services and products enumerated in Part 2. Therefore, the Legislature mandated that the Commission:

> . . . shall consider such alternatives to traditional rate of return regulations as flexible pricing, detariffing, and other such manner and methods of regulation that are deemed consistent with the general assembly's expression of intent pursuant to section 40-15-101. It is the intent of the general assembly that traditional rate base or rate of return regulations may be considered but shall not be the sole factor considered by the Commission.

Section 40-15-302(1), C.R.S. (1990 Supp.).

This provision is significant for two reasons. First, it acknowledges that market forces affecting the specified products and services may be sufficient to protect the consumer and to ensure that the rates will not be confiscatory. Second, it acknowledges and confirms the distinction between traditional rate of return methodologies for "monopoly" services and products, and alternatives such as a flexible pricing and detariffing for those services and products which are subject to greater competition.

Services in a third category clearly are subject to competitive market forces. Section 40-15-401, et seq., C.R.S. (1990 Supp). These services are unregulated.

The movants argue that the Commission cannot review or consider a plan which intermingles Part 2 and Part 3 services. The underlying flaw in this argument is the assumption that an impenetrable legal wall stands between regulation of Part 2 and Part 3 services. The demarcation between Part 2 and Part 3 services is not absolute. "Regulated telecommunications services" include both Part 2 and Part 3 services. "Regulated telecommunications services" is defined as "telecommunications services treated as public utility services subject to the jurisdiction of the Commission." § 40-15-105(24), C.R.S. (1990 Supp.). Both Part 2 and Part 3 services are subject to traditional methodologies. § 40-15-302, C.R.S. Most importantly, the General Assembly has declared that the Commission has authority to review novel plans which heretofore may not have been considered by the Commission. The General Assembly stated:

> The general assembly hereby declares that it is the policy of the state of Colorado to promote a competitive telecommunications marketplace while protecting and maintaining the wide availability of high quality telecommunications services. Such goals are best achieved by guaranteeing the affordability of basic telephone service while fostering free market competition within the telecommunications industry. . . .

(Emphasis added.)

The instruction from the General Assembly is unequivocal. The Commission must explore innovative rate structures which both protect the consumer and expose the telecommunications industry to free market competition, to the extent feasible. While it is fair to assume that the General Assembly anticipated that Part 2 services generally would be subject to traditional rate base or rate of return concepts, the General

Assembly has not precluded the Commission from investigating variances from traditional methodologies as long as the variances do not significantly alter the fundamental purposes of the traditional methodologies.

USWC proposes that its plan will apply to all of the telecommunications products and services which it offers pursuant to Parts 2 and 3. Cost allocations will not be made between products and services under Parts 2 and 3. The adjusted authorized return on investment will be increased by 1 percent to determine the sharing threshold. If the rate of return is above the sharing threshold, 50 percent of the amount above sharing threshold will be retained by USWC and the remaining 50 percent will be shared with the ratepayers by investing the remaining 50 percent.

The opponents correctly note that the plan presents a new, unique integrated approach to the regulation of telecommunications. Contrary to the arguments of the movants, the General Assembly has authorized the Commission to review, assess and, if appropriate, implement the plan or a modification thereof.

RULEMAKING

The opponents of USWC's Plan argue that the Commission must pass rules to implement the Plan. The Commission finds that additional rulemaking is not required at this time.

Section 40-15-302(1), C.R.S., requires regulations "as may be appropriate to regulate services and products provided pursuant to this Part 3." The Commission has promulgated the rules which it believes are necessary to implement Part 3. See 4 CCR 723-24 (8-89). The Colorado Supreme Court has recently established the standard to determine whether rulemaking is required:

> Agency proceedings often require application of both rule-making and adjudicatory authority because of the nature of the subject matter, the issues to be resolved, or the interests of the parties or intervenors. In general, agency proceedings that seek to or in effect determine policies and standards or general applicability are deemed rule-making proceedings. (Citations omitted.) Agency proceedings which affect a specific party and resolve particular issues of disputed fact by applying previously determined rules and policies are deemed adjudicatory proceedings. (Citations omitted.) The determination of whether a particular proceeding constitutes rule-making requires careful analysis of the actual conduct of the proceedings as well as a determination of the purposes for which it was formally instituted. (Citations omitted.)

Colorado Office of Consumer Counsel v. Mountain States Telephone and Telegraph, p. 14 (89 SA 400 July 15, 1991.) In holding that rulemaking was required, the Court stated:

> [The case] was not initiated primarily to resolve disputes over historic facts. The basic disagreements explored in the pleadings and at the hearing were disagreements concerning descriptions of services, the meaning of terms contained in the Act, and the General Assembly's intent or rationale for adopting various statutory provisions. [The case] could not have been fully and fairly resolved in the absence of the development of administrative standards to remedy the Act's lack of precise definitions. Those standards and the administrative standards compelling their adoption would necessarily inform future Commission decisions. Thus, while the decision appears in form as a classification of a single public utilities service, it in effect establishes standards and policies applicable to telecommunications service of all public utilities.

Id. at 17.

At this time, it does not appear that rulemaking is required. By its application USWC has asked the Commission to approve, pursuant to the statutory provisions set forth at §§ 40-15-101, et seq., C.R.S. (1990 Supp.) and applicable regulations at 4 CCR 723-24 (8-89), a comprehensive rate structure for its existing Part 2 and Part 3 services. The proceedings relate to the application of existing standards adopted by the Legislature and interpreted by the Commission, to an existing group of services. Particular issues of disputed facts will be resolved by applying previously determined rules and policies to the proposed plan.

MISCELLANEOUS

In order to assist the parties in their presentations, two additional issues must be addressed. The Commission cannot indicate its statutorily mandated duty to conduct hearings or hear complaints between the time that the plan is adopted and the time when it terminates. Simply put, an agency cannot waive a function which it is statutorily required to perform. Estate Smith v. Heckler, 747 F.2d 583, 589-591 (10th Cir. 1984). Officials in whom the law vests a duty involving discretion must exercise that discretion. Lamm v. Barber, 192 Colo. 511, 565 P.2d 538 (1977).

The Commission statutes are clear. Both the Commission and affected parties are entitled to review or challenge an existing rate or plan upon a finding that the rates "demanded, observed, charged or collected" are "unjust, unreasonable, discriminatory or preferential."

Section 40-3-111(1), C.R.S. (1984). Moreover, the Commission has the power to investigate rates and practices of the utility and to establish new rates, if appropriate. Section 40-3-111(2), C.R.S. (1984). Pursuant to § 40-6-112(1), C.R.S. (1984), the Commission "at any time" after notice and hearing may rescind, alter, or amend any decision made by it. Pursuant to these provisions, the Commission must consider challenges, either upon its own motion or upon challenge by a consumer, to the efficacy of rates and plans which it approves, even though circumstances have not changed.

USWC contends that the opponents of the plan do not have standing to challenge retroactive application of rates. The Commission concludes that opponents have standing to challenge rates. Standing before the Commission is governed by O'Bryant v. PUC, 778 P.2d 648 (Colo. 1989), and Ram Broadcasting v. PUC, 702 P.2d 746 (Colo. 1985). In Ram, the Colorado Supreme Court held that a party properly before the Commission has a right "to protest all portions of [an] application and to participate in the entire hearing." Id, 702 P.2d at 750. Moreover, members of the public and public utility users have a right to require the public utility to ensure that the Commission enforces its rules against public utilities in a manner consistent with the Commission's responsibilities. Failure to enforce the law constitutes an impairment of the citizens' interest. O'Bryant, supra, at 653. Members of the public have a legally protected and cognizable interest in ensuring that the Commission acts in accordance with governing laws. Id. at 654. Thus, the public has a right prospectively to challenge retroactive rates.

THEREFORE THE COMMISSION ORDERS THAT:

The motions to dismiss filed by the Staff of the Public Utilities Commission; by the Office of Consumer Counsel; and by the Colorado Municipal League and the Colorado Cable Television Association hereby are denied.

This order is effective on the date it is mailed.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Commissioners

MK:srs:4477J