Decision No. C96-0352

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 95R-558T

IN THE MATTER OF PROPOSED RULES REGARDING IMPLEMENTATION OF §§ 40-15-101 ET. SEQ. --REQUIREMENTS RELATING TO THE COLORADO HIGH COST FUND.

DECISION ADOPTING RULES

Mailed Date: April 1, 1996
Adopted Date: March 29, 1996

I. BY THE COMMISSION:

A. Background and Procedural Matters.

1. This matter is before the Commission for the adoption of new rules applicable to the administration of the Colorado High Cost Fund (often referred to herein by the acronym "CHCF"). Pursuant to House Bill No. 95-1335 ("HB 95-1335"), codified as Part 5 of Article 15 of Title 40, Colorado Revised Statutes, the Commission has been delegated the responsibility of establishing a system of support mechanisms to assist in the provision of universal basic service and universal access to advanced service in high-cost areas. *See* § 40-15-502(5), C.R.S. The CHCF is one of the mechanisms for achieving the above goals.

In enacting HB 95-1335, the General Assembly determined that competition in the market for basic local exchange service is in the public interest. *See* § 40-15-501, C.R.S. Consistent with that policy goal, HB 95-1335 directs the Commission to encourage competition in the basic local exchange market by the adoption and implementation of regulatory mechanisms to replace the existing regulatory framework. Specifically, the Commission has been directed to adopt rules governing:

1. cost-based, unbundled, nondiscriminatory carrier interconnection to essential facilities or functions;

2. cost-based number portability and the competitively neutral administration of telephone numbering plans;

3. cost-based, open network architecture;

4. terms and conditions for resale of services that enhance competition;

5. assessment, collection and distribution of contributions to the Colorado High Cost Fund created by § 40-15-208, C.R.S., and any other financial support

> mechanisms created pursuant to § 40-15-502(4), C.R.S. and
>
> 6. access to Emergency 911 service.

See § 40-15-503(2)(b), C.R.S.

2. The Commission has been given the responsibility to open local exchange telecommunications markets to competition and to structure telecommunications regulation in a manner that achieves a transition to a fully competitive telecommunications market. To that end, the Commission has been directed to establish the terms and conditions under which competition will occur,[1] including the process by which a potential provider of basic local exchange service applies for a certificate of public convenience and necessity ("CPCN"), as a precondition to providing service.[2]

3. HB 95-1335 contains an equally important, and somewhat counterbalancing, public policy directive which the Commission must implement: structure the transition to competition to protect basic service. "Basic service" is

> the availability of high quality, minimum elements of telecommunications service, as defined by the Commission, at just, reasonable, and affordable rates to all people of the state of Colorado.

Section 40-15-502(2), C.R.S.

4. To realize these public policy goals, the Commission may use a variety of mechanisms including, but not limited to, "more active regulation of one provider than another or the imposition of geographic limits or other conditions on the

[1] See §§ 40-15-502(1) and (3)(b), C.R.S.

[2] See § 40-15-503(2)(e), C.R.S.

authority granted to a provider." Section 40-15-503(2)(a), C.R.S. In addition, the Commission must consider the differences between the economic conditions of urban and rural areas of the state. *Id*. Furthermore, the Commission must adopt rules which allow simplified regulatory treatment for basic local exchange providers "that serve only rural exchanges of ten thousand or fewer access lines." Section 40-15-503(2)(d), C.R.S.

5. The Working Group established pursuant to §§ 40-15-503 and 40-15-504, C.R.S., has recommended proposed rules for consideration by the Commission to implement HB 95-1335. These proposals are contained in the Report of the HB 95-1335 Telecommunications Working Group to the Colorado Public Utilities Commission, dated November 30, 1995 (the "November report"), and in the Supplemental Report of the HB 95-1335 Telecommunications Working Group to the Colorado Public Utilities Commission, dated December 20, 1995 (the "December report").

6. Attached to the November report as Appendix E, the Working Group transmitted to the Commission proposed rules entitled "Colorado Universal Support Mechanisms." These proposed rules were attached to our notice of proposed rulemaking in this docket, Decision No. C95-1304, mailed December 22, 1995.

7. In accordance with our notice of proposed rulemaking, an oral hearing on the proposed rules was held on February 15 and 16, 1996, at which time oral comments were taken from the public and from persons representing associations, firms and corporations that had previously filed written comments and reply comments.

8. The following participants submitted written and oral comments on the proposed rules prior to the hearing: AT&T Communications of the Mountain States, Inc. ("AT&T"); AT&T Wireless Services ("AT&TW"); Colorado Independent Telephone Association ("CITA"); Colorado Office of Consumer Counsel ("OCC"); Competitive Telecommunications Association ("Comptel"); ICG Access Services, Inc., and Teleport Denver Ltd. ("ICG"); MCI Telecommunications Corporation ("MCI"); MFS Intelenet of Colorado, Inc. ("MFS"); Warren L. Wendling of the Staff of the Commission ("Staff"); TCI Communications, Inc., Teleport Communications Group, Inc., Sprint Telecommunications Venture, and Sprint Communications Company, L.P. ("TCI, *et al*"); University of Colorado and Colorado State University ("Universities"); and U S WEST Communications, Inc. ("USWC").

9. During the hearing the Commission requested supplemental comments on certain questions posed by individual commissioners. Post-hearing supplemental comments and supplemental reply comments were filed by the following: AT&T, AT&TW, CITA, Commnet Cellular, Inc., MCI, MFS, OCC, Staff and USWC.

10. In adopting the attached rules the Commission has considered all written and oral comments that have been submitted in this docket, including the written comments that were filed after the date specified by the Commission for filing.

11. In addition to the written comments filed with the Commission and the oral comments made at the hearing, the Commission has taken administrative notice of, and has considered

and relied upon, the November report, the December report, and the Public Outreach Meetings Report ("Outreach Report") dated December 20, 1995[3]. These reports are filed in Docket No. 95M-560T, the repository docket regarding implementation of §§ 40-15-501, *et seq*., C.R.S.

II. DISCUSSION.

A. Structure of Rules.

1. At the outset we have decided to take the proposed "Colorado Universal Support Mechanisms" rules attached to the November report as Appendix E and to adopt them as two separate sets of rules. One set of rules will include rules applicable to Providers of last Resort ("POLR") and to Eligible Telecommunications Carriers ("ETC") under the Telecommunications Act of 1996, Pub. L. No. 104-104, Feb. 8, 1996, 110 Stat. 56. ("Federal Act"). The second set of rules will specifically address the operation of the CHCF.

2. Although the legislature has authorized the Commission to "create a **system of support mechanisms** to assist in the provision of such services [universal basic service, advance service and any future revisions to the definition of basic

[3] This report summarizes the comments (both oral and written) received during 16 public outreach meetings which the Commission held throughout the state in September and October, 1995, to solicit input on competition to provide local telephone service and on a proposed "Telecommunications Consumers Bill of Rights" drafted by the Commission. Meetings were held in Breckenridge, Steamboat Springs, Glenwood Springs, Colorado Springs, Trinidad, La Junta, Lamar, Pueblo, Grand Junction, Montrose, Cortez, Durango, Alamosa, Fort Collins, Denver, and Fort Morgan. Participants represented a diverse cross-section of the public.

service] in high cost areas" § 40-15-502(5), C.R.S. (emphasis added), the rules adopted at this time will be applicable only to the CHCF. The CHCF rules will be in two parts, preceded by definitions and general provisions: Part I (Rules 7 - 16) will be applicable to the CHCF and contains the new rules implementing HB 95-1335. It also takes into consideration the provisions of the Federal Act. Part II of the rules (Rules 17 and 18) will apply to small local exchange companies ("Small LECs"), effective July 1, 1996, either until July 1, 2003, or until another telecommunications provider holding authority from the Commission to provide basic service in the Small LEC'S service territory is declared eligible to draw CHCF support under Part I, or until a Small LEC elects to be subject to Part I, whichever of these three events occurs first. Part II essentially is a readoption of the existing CHCF rules found in the *Cost Allocation Rules for Telecommunication Service and Telephone Utilities Providers*, 4 CCR 723-27, Part 2, Rules 16, 17 and 19, with reference changes necessitated by their readoption in Part II of these rules. To avoid duplication, existing Rules 16, 17 and 19 will be repealed, effective July 1, 1996.

B. Colorado High Cost Fund Task Force.

1. We have decided also to separate out certain of the non-consensus issues for further consideration by an interim task force to be created by this decision. Specifically, in this decision we will create a Colorado High Cost Fund Task Force ("Task Force") to be chaired by the Commission's Staff. Parties, such as AT&T, AT&TW, CITA, OCC, MCI, TCI and USWC will be asked by

the Commission to participate as voting members of the Task Force. Other parties to this docket and other persons, firms and corporations interested in participating may petition the Commission for membership on the Task Force. Meetings of the Task Force shall be open to the public. The Task Force will be required to file with the Commission an interim report on the issues referred to it by this decision no later than October 31, 1996, and a final report no later than December 31, 1996. The Commission would urge the Task Force to forward to the Commission its recommendations as they are finalized, rather than waiting for the October 31 and December 31 deadlines. As ordered hereinafter, the Task Force should consider and make recommendations on the following issues:

1. a mechanism to determine whether a particular geographic support area is a high cost area;

2. the metes and bounds of geographic support areas in the state of Colorado;

3. a non-proprietary proxy cost model that approximates a reasonable level of investment per access line and that converts the estimated investment into a reasonable recurring cost;

4. a mechanism that reflects a decrease in the CHCF subsidy over time to reflect increases in technology, productivity, efficiency and depreciation in plant and equipment;

5. a mechanism to ensure portability of support;

6. a mechanism to account for the presence of, and removal of, internal subsidies;

7. whether a benchmark price is appropriate and, if so, what the benchmark price should be;

8. a mechanism for funding unserved customer;

9. a mechanism to monitor progress toward the goal of universal service;

10. an implementation process for the post 1997 CHCF with a corresponding time line containing milestone dates. The implementation process should consider the timing needed to allow for:

    a. finalizing the designation of geographic support areas;

    b. finalizing the runs of the proxy cost model;

    c. publishing the amount of support per access line in each support area;

    d. establishing reporting forms for providers to report their retail revenues;

    e. the transition from the existing source of CHCF funding to the new source of CHCF funding; and

    f. the transition to the new CHCF disbursal mechanism to new recipients; and

11. a mechanism for determining the level of contribution into the CHCF which does not rely solely on revenues, e.g., other perspectives on market share, such as minutes of use.

2. As guidance we neither endorse nor reject the use of census block groups as the "reasonably compact, competitively neutral geographic support areas" referred to in § 40-15-502(5), C.R.S. The Task Force, however, may start with the census block group concept in its deliberations.

3. Also, we reject using either the proprietary Benchmark Cost Model or the Hatfield Model as a proxy model for Colorado. Instead, the Task Force should consider a nonproprietary cost model which approximates a reasonable level of investment per access line in a geographic support area and which converts that reasonable level of investment into a reasonable recurring charge.

C. **Consensus and "substantial deference."** The rules proposed by the Working Group were not totally "consensus" rules. Subsection 40-15-503(1) and paragraph 40-15-503(2)(a), C.R.S., require that we give "substantial deference" to the proposed rules submitted by the Working Group with respect to issues on which the Working Group reported that it has reached consensus prior to January 1, 1996.

1. The statute does not define "substantial deference." Thus, in the course of this HB 95-1335 rulemaking proceeding, we have developed and applied our understanding of "substantial deference." To do so, we have examined the concept of "substantial deference" within the context of the public policies articulated by the General Assembly, as well as in the context of the Commission's constitutional and statutory authorities and responsibilities.

2. In implementing our understanding of "substantial deference," we have taken the following into consideration:[4] our constitutional and statutory obligation to protect the public interest, even as we shepherd the transition into a fully competitive telecommunications marketplace; the consistency of the proposed consensus rules with all provisions of §§ 40-15-501 *et seq*., C.R.S., and other applicable statutes; the consistency of the proposed consensus rules with existing Commission rules; the ability of the public and of regulated entities to understand the proposed consensus rules and the processes described therein; the

[4] This listing is not a definitive statement of the considerations relied upon by the Commission.

ability of the Commission to enforce the proposed consensus rules; the ability of the proposed consensus rules to accomplish or to assist in the transition to a fully competitive telecommunications environment while assuring the availability of basic service at just, reasonable, and affordable rates to all people of Colorado; and the fairness of the proposed consensus rules to all telecommunications service providers, existing and prospective. We examined each proposed consensus rule in light of these considerations.

3. We are of the opinion that we may make changes to a proposed consensus rule where, after full consideration of the record and the factors outlined above, we deem it necessary and in the public interest. The intervening federal Act also forces us to deviate from some consensus proposals. Because the General Assembly has required us to attach significant weight to the opinions of the Working Group, the rationale supporting any decision by this Commission to reject a consensus rule will be clearly articulated.

D. **Comments of the Universities.** The Universities filed comments in this docket incorporating by reference the comments filed by the Universities in Docket Nos. 95R-553T, 95R-554T and 95R-555T. In those dockets, the Universities argued that the requirements of the rules mandated to be adopted pursuant to HB 95-1335 should not apply to institutions of higher education[5] which own or lease and operate their own telecommunications

[5] Section 24-113-102(2), C.R.S. (1988), defines an "institution of higher education" as "a state-supported college, university, or community college."

systems for the purpose of providing communications within their systems and local exchange access services to administration, faculty, staff, government and/or university-affiliated non-profit corporation employees at their work locations, and to students residing in institution-affiliated housing.

1. The Universities rely on this Commission's April 11, 1984, Decision No. R84-428, in support of their position. In that decision, the Commission determined that Colorado State University's ("CSU") telephone system did not constitute public utility service.[6]

2. In the discussion section of Decision No. R84-428, the administrative law judge wrote:

> CSU will not serve non-university entities such as the three private businesses located on campus or the Federal government agencies. Mountain Bell will continue to serve these businesses and agencies. CSU, by providing private service as above described, is not a public utility since it is not offering service to the general public indiscriminately.
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> * * *
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> The next question presented in this case is whether CSU, by its proposed telephone system, is a reseller of telephone service.
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> * * *
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> The Commission has ... in Decisions No. C82-1928 and C82-1925 defined "resale" as an entity charging more or less than the certificated supplier of utility service. The proposed CSU service does not constitute resale under the above definitions since CSU will not increase or reduce the cost of service. Consequently, CSU will not be a reseller of intrastate telecommunications services.

[6] Decision No. R84-428 is expressly limited in its applicability to the telephone system of CSU as described in that decision.

Decision No. R84-428 at 5.

3. With the advent of HB 95-1335, the local exchange telecommunications service market in Colorado will be changed radically. For example, in Docket No. 95R-557T, *In the Matter of Proposed Rules Regarding Implementation of §§ 40-15-101, et seq. -- Resale of Regulated Telecommunications Services*, there are proposals to change the definition of "resale" adopted by the Commission in 1982. Further, HB 95-1335 speaks in terms of "multiple providers of local exchange service"[7] and contemplates that all local exchange service providers need not be designated by the Commission as providers of last resort.[8] The obligation of a local exchange service provider to serve all members of the public indiscriminately, and thus its status as a public utility as defined in Decision No. R84-428, has been affected by the enactment of HB 95-1335.

4. For the purpose of this rulemaking proceeding, we reject the argument of the Universities that institutions of higher learning should be exempted from the application of these rules. In light of the evolving responsibilities of local exchange service providers under HB 95-1335,[9] the broad statutory

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[7] Section 40-15-501(3)(c), C.R.S.

[8] Section 40-15-502(6), C.R.S.

[9] "Wise public policy relating to the telecommunications industry and the other crucial services it provides is in the interest of Colorado and its citizens[.]" Section 40-15-501(2)(a), C.R.S.

"A provider that offers basic local exchange service through use of its own facilities or on a resale basis may be qualified as a provider of last resort, ... Resale shall be made available on a nondiscriminatory basis[.]" Section 40-15-502(5)(b), C.R.S.

definition of "public utility" (*see* § 40-1-103, C.R.S.)[10], and the inclusive definition of "person" (*see* § 40-1-102(5), C.R.S.)[11], we find that the record in this proceeding does not support the adoption of the Universities' proposed language.

5. We also find that the Universities' proposed language may create an exemption from the application of these rules that is overly broad. We believe that the issues raised by the Universities are more appropriately considered in an adjudicatory proceeding where the specific facts pertaining to those entities can be addressed, and so decline to exempt the Universities by rule.

E. **Funding for Access Lines.**

1. There was not consensus on the issue of funding for access lines in the CHCF rules attached to the November report. Some of the parties urged the Commission to limit Colorado High Cost funding to a single residential line. Other parties urged the Commission to maintain the current practice of funding all access lines of a high cost provider.

2. The Commission's existing rules applicable to the CHCF, 4 CCR 723-27, Part II, provides CHCF funding for all access lines to both businesses and residences in a high cost area. This

[10] As relevant here, this section defines a "public utility" as "every common carrier, ... telephone corporation, telegraph corporation, ... person, or municipality operating for the purpose of supplying the public for domestic, mechanical, or public uses and every corporation, or person declared by law to be affected with a public interest[.]" This definition is subject to exemptions found in § 40-1-103(1)(b).

[11] This section defines "person" as "any individual, firm, partnership, corporation, company, association, joint stock association, and other legal entity."

has been the practice since the Commission first created the CHCF by rule. *See* Decision No. C90-932, dated July 11, 1990, in Docket No. 89R-608T. Subsequent to the creation of the CHCF by the Commission, the General Assembly added § 40-15-208, to Part 2 of Article 15 of Tile 40, Colorado Revised Statutes in 1992. *See* 1992 Colo. Sess. Laws at 2126. By § 40-15-208, C.R.S, the General Assembly created, by statute, the current Colorado High Cost Fund. In § 40-15-208, the General Assembly specifically ratified the CHCF previously created by rule by the Commission:

> Any fund created prior to April 16, 1992 [the effective date of § 40-15-208], for a similar purpose by the commission pursuant to rule is hereby validated.

In HB 95-1335, the General Assembly amended § 40-15-208, C.R.S. to take into consideration provisions of the newly enacted § 40-15-502, C.R.S.

3. There is nothing in the amendments to § 40-15-208, C.R.S., or in the newly enacted § 40-15-502, C.R.S. that would lead the Commission to conclude the General Assembly intended to modify or reject the current practice of applying Colorado High Cost funding to all access lines in a high cost area. Restricting funding to only one residential access line at this time would be a drastic change from the Commission's current practice. The Commission is concerned that some of the small companies currently receiving support under the current rules for investments in plant would be at serious risk if future funding were restricted to only a single residential access line. Also, the Commission does not have sufficient information in this docket to make a determination as to how restricting funding to a single residential line would

affect rates to customers in high cost areas. The Commission is mindful of the legislature's directive to adopt rules that further universal basic service at rates that are just, reasonable and affordable and that are reasonably comparable between urban and rural areas. *See* Section 40-15-502, C.R.S.

4. Those parties urging that funding be limited to only a single residential line expressed concern that the new CHCF under HB 95-1335 would be substantially larger than the current CHCF. At this time, the Commission is of the opinion that the CHCF under HB 95-1335 will be larger than the current CHCF, mainly because USWC, which currently does not draw from the CHCF, will be eligible to draw from the new CHCF. However, the Commission does not have sufficient information in this docket to make a reasonable assessment of the size of the new CHCF. If the size of the fund becomes a burden to customers of telecommunications providers making payments into the fund, there is nothing to prevent the Commission from reconsidering this issue. However, without hard evidence, the Commission is unwilling to make such a drastic change in the application of the CHCF.

F. **"Basic Service."**

1. There was not consensus by the Working Group on the definition of "basic service" to which Colorado High Cost funding should be applied. Most parties filing comments proposed that the basic service standards expressed in Rule 17.1 of the Commission's *Rules Regulating Telecommunications Service Providers and Telephone Utilities*, 4 CCR 723-2, plus access to 911 service, should be used as the definition of "basic service" for purposes

of this rule. A few parties took the position that Rule 17.1 and access to 911 service do not include all of the requirements comprising basic service currently found in the Commission's rules. These parties recommended a definition of "basic services" that contained a laundry list of features, services and customer rights.

2. In HB 95-1335 the General Assembly defined "basic service" in very general terms:

> Basic service is the availability of high quality, minimum elements of telecommunications services, as defined by the commission, at just, reasonable, and affordable rates to all people of the state of Colorado.

Section 40-15-502(2), C.R.S. As can be seen from the above definition, the General Assembly has delegated to the Commission the responsibility of defining what are "high quality, minimum elements of telecommunications services."

Throughout the Commission's current rules applicable to telecommunications services there are numerous functions, services and features that a basic local exchange service provider must provide and certain technical standards that it must meet in providing basic local exchange service. While Rule 17.1 contains some of these functions, services, features, and standards, it does not contain all of them. Thus, it would not be consistent with what the Commission currently considers "basic service" to limit basic service to Rule 17.1, plus 911 service. We also are rejecting the recommendation to include a laundry list of functions, services, features, and standards in the standards for "basic service".

3. We have not included a definition of "basic service" in the rules we adopt today. Instead, we have included a description of the standards encompassed in the concept of "basic service." Any description of the standards encompassed in the concept of "basic service" should include language indicating clearly that the concept of "basic service" is an evolving concept that will change with time. The description of the standards encompassed in the concept of "basic service" we fashion in the rules adopted by this decision emphasizes that "basic service" is an evolving concept to be updated periodically, taking into consideration advances in telecommunications and information technologies and services. It recognizes that Rule 17.1 and 911 service, together with other elements, functions, services, and standards for quality service prescribed by the legislature by statute, or by this Commission by rule or order, comprise "basic service."

G. **Payments into the Colorado High Cost Fund.**

There also was not consensus on the issue of which providers should make payments into the CHCF. In § 40-15-502(3)(a), C.R.S., the General Assembly wrote with respect to universal basic service:

> The Commission shall require the furtherance of universal basic service, toward the ultimate goal that basic service be available and affordable to all citizens of the state of Colorado.

The General Assembly concluded paragraph 40-15-502(3)(a) with the following empowerment to the Commission:

> The commission shall have the authority to regulate providers of telecommunications services

> to the extent necessary to assure that universal basic service is provided to all consumers in the state at fair, just, and reasonable rates.

Again in § 40-15-502(5)(a), C.R.S., on universal service support mechanisms, the General Assembly wrote:

> In order to accomplish the goals of universal basic service, universal access to advanced service, and any revision of the definition of basic service under subsection (2) of this section, the commission shall create a system of support mechanisms to assist in the provision of such services in high-cost areas.

In order to accomplish the above goals, the General Assembly wrote in § 40-15-502(5)(a):

> These support mechanisms shall be funded equitably and on a nondiscriminatory, competitively neutral basis **through assessments on all telecommunications service providers in Colorado** . . . .

(Emphasis added.) The Commission views the above as a legislative mandate that **all** companies in Colorado providing intrastate telecommunications services must pay into the CHCF and as empowering the Commission to regulate such providers to the extent necessary to assure that all such providers pay into the fund on an equitable, nondiscriminatory, and competitively neutral basis. In light of the fact that the General Assembly used the word "all," we do not have discretion to exempt individual telecommunications providers or classes of telecommunications providers from paying into the CHCF.

1. Prior to the enactment of HB 95-1335, the Congress of the United States preempted states from regulating commercial mobile service and private mobile service in the two areas of entry and rates. *See* 47 U.S.C. § 332(c)(3). The Commission must

look to federal law to determine whether wireless telecommunications providers utilizing the public switched network to provide intrastate telecommunications service would be exempt from HB 95-1335's mandate to pay into the CHCF. In 47 U.S.C. § 254(b), titled "Universal Service," Congress listed a number of universal service principles that the Federal-state Joint Board and the FCC are required to consider in designing policies for the preservation and advancement of universal service in the United States. One such principle is that: "**All providers of telecommunications services** should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service." (Emphasis added.) 47 U.S.C. § 254(b). That Congress meant to include all providers of telecommunications services, both interstate providers and intrastate providers, can be seen later in subsection 254(d), applicable to interstate providers, and subsection 254(f), applicable to intrastate providers. In subsection 254(d), Congress wrote:

> Every telecommunications carrier that provides **interstate** telecommunications service shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission [FCC] to preserve and advance universal service.

(Emphasis added.) In subsection 254(f) Congress wrote the same language with respect to telecommunications carriers providing intrastate telecommunications services:

> Every telecommunications carrier that provides **intrastate** telecommunications services shall contribute, on and equitable and nondiscriminatory basis, in a manner determined by the State, to the preservation and advancement of universal service

in that State.

(Emphasis added.) Earlier in Section 3 of the Federal Act, Congress defined the terms: "Telecommunications," "Telecommunications carrier" and "Telecommunications service." In defining "Telecommunications carrier" Congress exempted only aggregators of telecommunications services defined in 47 U.S.C. § 226, and delegated to the FCC discretion to determine whether the provision of fixed and mobile satellite services should be treated as common carriage. All other telecommunications carriers were included in the definition. Congress defined the term "Telecommunications service" in the following language:

> The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available to the public, **regardless of the facilities used**.

(Emphasis added.) It is clear to this Commission that all telecommunications carriers providing intrastate telecommunications service may be required by a state to pay into that state's fund for the advancement and promotion of universal service, so long as payments into the fund are "on an equitable and nondiscriminatory basis."

2. There also was not consensus on the issue of whether a service provider's payment into the CHCF should be calculated based on that service provider's intrastate retail revenues or based on both its intrastate retail revenues and interstate retail revenues if it also provided interstate telecommunications services. Congress, in subsection 254(f) of the Federal Act, wrote:

> Every telecommunications carrier that provides intrastate telecommunications services shall contribute, **on an equitable and nondiscriminatory basis**, in a manner determined by the State to the preservation and advancement of universal service in that State.

(Emphasis added.) Under the Federal Act, every carrier providing interstate telecommunications service is required to pay into the Federal Universal Service Fund. *See* 47 U.S.C. § 254(d). It would not be equitable for the interstate revenues of telecommunications carriers to support the Federal Universal Service Fund and also support, in part, this state's CHCF. Only intrastate retail revenues will be used as the basis for calculating payments into the CHCF. Until the new mechanism for making payments into the CHCF is ordered by this Commission, the current mechanism will remain in effect. The rules we adopt today comply with the federal requirements of equity and nondiscrimination.

3. In the rules we adopt today, only the revenues associated with the sale of cable services identified in § 40-15-401(1)(a), C.R.S., will be exempt from assessment for the support of the CHCF. However, we have included in the CHCF rules a provision whereby a telecommunications service provider of other exempt services identified in Part 4 of Article 15 of Title 40, Colorado Revised Statutes, may petition for an alternate method of calculating revenues upon which payments may be calculated.

H. **Provider of Last Resort.**

1. Proposed Rule 5 recommended by the Working Group was consensus, except for Rule 5.4.2 concerning notice to customers when a POLR applies to discontinue providing basic local

exchange service and/or its designation as a POLR. *See* Attachment A to Decision No. C95-1304 in this docket or Appendix E to the November report of the Working Group for the rules on Provider of Last Resort. As we stated above, the proposed rules applicable to POLRs have been severed from the proposed rules applicable to the CHCF and will be adopted as a separate set of rules. *See* Attachment B to this decision. Inasmuch as Congress has placed the burden on states to designate common carriers as "Eligible Telecommunications Carriers" ("ETC") for purposes of the federal Universal Service Fund, we have incorporated corresponding designation provisions applicable to ETCs in the POLR rules.

2. With respect to the Working Group's Rule 5.4.2, there was consensus on part of Rule 5.4.2 and nonconsensus on part. All participants agreed that written notice should be mailed or delivered at least 30 days before the effective date of discontinuance to all presently served customers or subscribers, all interconnecting telecommunications providers, all boards of county commissioners of affected counties and all mayors of affected cities, towns and municipalities. Disagreement centered on the additional notice desired by certain participants. These participants recommended that additional notice should be given by publication for four consecutive weeks in a publication or publications distributed in the area certificated to the POLR.

3. We have elected to require a POLR which desires to relinquish its designation as a POLR and/or its basic local exchange service to give the additional notice recommended by certain participants of the Working Group.

4. The Commission, also, has added to the consensus rules on discontinuance of basic local exchange service and/or its designation as a POLR separate rules on relinquishment of universal service by ETCs under 47 U.S.C. § 214(e)(4). Notice to relinquish designation as an ETC will be the same as for POLRs.

I. **Eligibility to Receive CHCF Support.**

1. There also was not consensus on the issue of which service providers should be eligible to receive Colorado High Cost funding.

2. The Working Group forwarded three different recommendations relative to when a telecommunications service provider would be eligible to receive CHCF support in a geographic high cost support area. One recommendation would require that a service provider be willing to provide basic service in a geographic support area **and** be designated a POLR in that area as a condition of receiving CHCF support. The second recommendation would require only that the service provider be willing to offer basic local exchange service in the geographic support area to all who request it. The third recommendation linked CHCF support to high cost customers, as opposed to high cost areas.

3. The rules adopted by this decision will require only that a telecommunications service provider (referred to in the rules as an "Eligible Provider") be certificated to provide basic local exchange service to all residential and business customers in a geographic support area in order to be eligible to receive Colorado High Cost funding. The service provider need not be, but also may be, designated a POLR. We read paragraph 40-15-

502(5)(b), C.R.S. as delegating to the Commission discretion to require either that a service provider be certificated to provide basic service in a geographic support area or be certificated to provide basic service in a geographic support area and be designated a POLR in that same support area. We think our approach better advances HB 95-1335's goal of promoting competition in the provision of basic service--there may be service providers which may wish to be certificated to provide basic local exchange service in a geographic support area, but may not wish to be designated a POLR.

4. We have rejected, also, the third recommendation referred to above, i.e., that Colorado High Cost funding be targeted to high cost customers, as opposed to high cost areas. HB 95-1335 speaks of promoting and advancing universal basic service in high cost areas. See, for example, § 40-15-502(5)(a), C.R.S., which provides in part:

> In order to accomplish the goals of universal basic service, universal access to advanced service, and any revision of the definition of basic service under subsection (2) of this section, the commission shall create a system of support mechanisms to assist in the provision of such services in **high cost areas**. . . . For purposes of administering such support mechanisms, the commission shall divide the state into reasonably compact, competitively neutral **geographic support areas**. A provider's eligibility to receive support under the support mechanisms shall be conditioned upon the provider's offering basic service throughout an **entire support area**.

(Emphasis added.)

5. All of the parties agreed that the CHCF rules should be designed to prevent double recovery by Eligible

Providers. However, some parties recommended that a provider should be required to demonstrate that it had removed all support, both explicit and implicit, for basic service from its prices for other services before it would be eligible to receive Colorado High Cost funding. We agree with the parties that the rules should be designed to prevent, to the extent possible, double recovery by Eligible Providers.

6. We have decided to address this issue in two ways: first, in the rules we adopt today an Eligible Provider will be required to present, in its application to be designated as an eligible provider, evidence that the funds to be received from the CHCF and other sources, together with local exchange service revenues will not exceed the **reasonable cost of providing local exchange service**. Second, one of the issues referred to the Task Force for consideration and recommendation is a mechanism to account for the presence of, and removal of, internal subsidies. Together with the rules we adopt today, a properly designed mechanism should go a long way toward insuring against double recovery by Eligible Providers.

7. On the issue of resellers of basic service, the Commission has conformed its rules to the requirement in 47 U.S.C. § 214(e)(1)(E). That is, in order for a telecommunications carrier to be eligible to receive Federal Universal Service support, it must offer services under 47 U.S.C. § 254(c) either using its own facilities or a combination of its own facilities and resale of another carrier's services. Under the rules we adopt today, a pure reseller will not be eligible to

receive either Colorado High Cost funding or Federal Universal Service funding. The facilities-based provider, reseller could be eligible to receive both.

J. **Disclosure of Colorado High Cost Assessments and Funding on Customers Bills.**

1. There also was not consensus on the issue of whether the CHCF assessment should be disclosed on the bills of customers of service providers making payments into the CHCF and on the bills of customers of service providers receiving payments from the CHCF.

2. A number of the Working Group participants recommended that the CHCF subsidy should be disclosed to both paying and receiving customers. Not unexpectedly, those participants receiving or anticipating receiving funds from the CHCF opposed this recommendation, while those participants anticipating paying into the fund for the first time supported the recommendation. Strong arguments can be made supporting both points of view.

3. In support of disclosure it can be argued that customers have a right to know and should be informed of the various charges included in their bills, especially when those charges are the result of government action--such charges should not be hidden in a customer's overall total bill. Customers have a right to know when government action increases their cost for the benefit of other customers. Also, disclosure of the CHCF

payment on customers' bills may act as a limitation of, or control against, ever increasing assessments.[12]

4. Equally persuasive arguments can be made supporting a decision not to disclose CHCF assessments and receipts. Arguments supporting not disclosing CHCF payments or subsidies on customers' bills are that the CHCF is simply a cost of doing business for service providers paying into the fund similar to other costs that are not itemized on customers' bills, such as wages, salaries, benefits, rents, insurance, income taxes, property taxes, etc.

5. Although the Commission has the discretion to require it, *City of Montrose v. Public Utilities Commission*, *supra* at 624-625, we have elected not to require telecommunications providers, both those providers making payments into the CHCF and those providers receiving payments from the CHCF, to disclose the subsidy amount on the bills of their customers. Since disclosure or non-disclosure has not been mandated in HB 95-1335, it is a matter within our discretion. *City of Montrose v. Public Utilities Commission*, *supra*. CHCF payments are assessed against the provider on the basis of intrastate retail revenues, and as such are simply a cost of doing business for the right to complete calls by interconnecting with the public switched network. The payments should not be itemized on a customer's bill any more than other costs of doing business are.

[12] This was the rationale of the Commission in requiring that municipal charges be disclosed on customers' bills. *See* City of Montrose v. Public Utilites Commission, 629 P.2d 619 (Colo. 1981).

6. We are aware that certain subsidies, charges and taxes currently are disclosed to customers on the bills they receive, while other subsidies, charges and taxes are not. These disclosures are required either by statute or required by prior decisions of this Commission. Of necessity, the decision we make today will be consistent with some of those decisions and inconsistent with others. However, this Commission is not bound by the judicial doctrine of *stare decisis*. *B & M Service , Inc., v. Public Utilities Commission* 163 Colo. 228, 429 P.2d 293 (1967). Also, when two equally reasonable courses of action are open to the Commission, it is within the Commission's discretion to select the appropriate alternative. *Colorado-Ute Electric Association v. Public Utilities Commission*, 760 P.2d 627, 641 (Colo. 1988). We are convinced that a decision either way would be legally defensible, but as a matter of policy we are of the opinion that not disclosing CHCF payments or receipts is the prudent course. This Commission should not do anything that may frustrate HB 95-1335's stated goal of promoting and advancing universal basic service to all people of the state.

III. ADOPTION OF RULES.

The *Rules Prescribing the Procedures for Administering the Colorado High Cost Fund*, attached to this decision as Attachment A and the *Rules Prescribing the Telecommunications Service Providers as Providers of Last Resort or as an Eligible Telecommunications Carrier*, attached to this decision as Attachment B, are consistent with the mandate of the General Assembly in HB 95-1335 that special rules and support mechanisms

be adopted by this Commission to achieve the goal of ensuring the availability of universal basic local exchange service to all residents of the state at reasonable rates. The rules appended to this Decision as Attachment A and Attachment B are appropriate for adoption.

IV. ORDER

A The Commission Orders That:

1. The *Rules Prescribing the Procedures for Administering the Colorado High Cost Fund*, attached hereto as Attachment A and the *Rules Prescribing the Procedures for Designating Telecommunications Service Providers as Providers of Last Resort or as an Eligible Telecommunications Carrier*, attached hereto as Attachment B are hereby adopted.

2. Rules 16, 17 and 19 of Part 2 of the *Cost Allocation Rules for Telecommunication Service and Telephone Utilities Providers*, 4 CCR 723-27, are hereby repealed.

3. There is hereby created the Colorado High Cost Fund Task Force discussed above in Part II.B of this decision. The Task Force shall consist of the following members, which shall be voting members: AT&T Communications of the Mountain States, AT&T Wireless Services, Colorado Independent Telephone Association, Colorado Office of Consumer Counsel, MCI Telecommunications Corporation, Staff of the Commission, TCI Communications, Inc., and US West Communications, Inc. The Staff of the Commission shall preside as the chair of the Task Force. Other persons, firms, corporations and associations may be granted membership in the Task Force upon petition to the

Commission. The Task Force shall consider and make recommendations to the Commission on the issues set forth in Part II.B of this decision. The Task Force shall file with the Commission an interim report containing its recommendations on the issues set forth in Part II.B on or before October 31, 1996, and a final report on or before December 31, 1996.

4. This order adopting the rules attached hereto as Attachments A and B and repealing Rules 16, 17 and 19 contained in Attachment C hereto shall become effective 20 days following the Mailed Date of this decision in the absence of the filing of an application for rehearing, reargument, or reconsideration. In the event an application for rehearing, reargument, or reconsideration of this decision is timely filed, and in the absence of further order of this Commission, this order of adoption shall become final upon a Commission ruling denying any such application.

5. Within 20 days after final action of the Commission adopting the rules attached hereto as Attachments A and B, and repealing Rules 16, 17 and 19 contained in Attachment C hereto, the adopted and repealed rules shall be filed with the Secretary of State for publication in the next issue of the *Colorado Register* along with the opinion of the Colorado Attorney General regarding the constitutionality and legality of the adoption and repeal of the rules.

6. Within 20 days following the issuance by the Colorado Attorney General of her opinion on the adoption of the rules attached hereto as Attachments A and B, and the repeal of

Rules 16, 17 and 19 contained in Attachment C hereto, the adopted and repealed rules shall be filed with the Office of Legislative Legal Services.

7. The 20-day period provided for in § 40-6-114(1), C.R.S., within which to file applications for rehearing, reargument, or reconsideration begins on the first day following the effective date of this order.

8. This Order is effective on its Mailed Date.

B. ADOPTED IN SPECIAL OPEN MEETING March 29, 1996.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Commissioners