Decision No. C97-1204

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO**

DOCKET NO. 97R-177T

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IN THE MATTER OF MODIFICATIONS TO THE PUBLIC UTILITIES COMMISSION'S RULES TO REFLECT A COMPETITIVE TELECOMMUNICATIONS ENVIRONMENT, INCLUDING THOSE CURRENTLY DESCRIBED IN 4 CODE OF COLORADO REGULATIONS, REGULATING TELECOMMUNICATIONS ACCOUNTING AND REPORTING METHODS (723-1-25), TARIFF REQUIREMENTS (723-1-40 AND 41), RELAXED REGULATION (723-24), COST ALLOCATION (723-27), E-911 (723-29), COSTING AND PRICING (723-30), PRICE REGULATION (723-38), INTERCONNECTION AND UNBUNDLING (723-39), AND ELIGIBLE TELECOMMUNICATIONS CARRIER (723-42) AUTHORITY TO OFFER LOCAL TELECOMMUNICATIONS SERVICES (723-35), AND AUTHORITY TO OFFER LOCAL TELECOMMUNICATIONS SERVICES (723-35).

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**ORDER ADOPTING RULES**

Mailed Date: November 19, 1997

Adopted Date: September 18, 1997

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## I. BY THE COMMISSION

### BACKGROUND AND PROCEDURAL MATTERS

1. This matter is before the Commission for the adoption of modified rules to reflect Colorado's new competitive telecommunications environment. Pursuant to House Bill No. 95-1335 ("HB 95-1335"), codified at §§ 40-15-501 *et seq.* C.R.S., the Commission adopted several new rules in 1996 and 1997 necessary to implement competition in Colorado's local telecommunications markets. The purpose of this docket is to review existing Commission rules to lessen the regulatory burdens on telecommunications providers, thereby promoting competition, to the extent consistent with the public interest.

2. 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 directed 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.

3. Specifically, the Commission was 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 was directed to establish the terms and conditions under which competition will occur. (*See* §§ 40-15-502(1) and (3)(b), C.R.S.)

4. 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.

5. To realize the stated 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 authority granted to a provider." Section 40-15-503(2)(a), C.R.S. In prior rules, the Commission considered the differences between the economic conditions associated with the large incumbent local exchange carriers (ILECs) and the new entrant competitive local exchange carriers (CLECs) in the State. The Commission therefore adopted rules which allow simplified regulatory treatment for the CLECs.

6. The Commission initiated work on updating its rules in Decision No. C97-286, mailed March 19, 1997 (Docket No. 97M-117T). In that docket, we received comments and proposals for modification to rules that would promote competition consistent with the intent of HB 95-1335.

7. Several parties submitted comments in Docket No. 97M-117T including: AT&T Communications of the Mountain States, Inc. (“AT&T”), Colorado Telecommunications Association (“CTA”), ICG Telecom Group, Inc. (“ICG”), MCI Telecommunications Corporation and

MCIMetro Access Transmission Services, Inc. ("MCI"), the Colorado Office of Consumer Counsel ("OCC"), Eagle Telecommunications, Inc. of Colorado d/b/a PTI Communications ("PTIC"), the Staff of the Commission ("Staff"), Teleport Communications Group, Inc. ("TCG"), the Telecommunications Resellers Association ("TRA"), the United States Department of Defense ("DOD") on behalf of all Federal Executive Agencies ("FEA"), U S WEST Communications, Inc. ("USWC"), and WorldCom, Inc. ("WorldCom").

8. Issues raised in the comments in Docket No. 97M-117T included:

a. When should price caps be imposed? On whom? (ILECs, CLECs, large/small carriers?), On which services (none, basic, advanced, toll, private line, operator services, etc.)?

b. When should price floors be imposed? On whom? On which services?

c. If no statutory cap existed, should basic service have a price ceiling?

d. For facilities-based carriers, should the requirement to provide basic service be continued?

e. Must CLECs file tariffs? Must ILECs?

f. If CLECs and/or ILECs should file tariffs, what cost support should be required?

g. Should individual contracts be allowed?

h. Should price lists be sufficient for CLECs? For ILECs?

i. If price bands are used for CLECs and/or ILECs, what support (e.g. cost studies) should be required?

j. Should items such as customer deposits, promotional offerings, volume discounts, and line extension policies be included in the tariffs of CLECs and/or ILECs?

k. What is the process by which the CLECs' and/or ILECs' tariffs should be changed?

l. What, if any, tests should be imposed for cross-subsidization for CLECs? For ILECs?

m. How should cost allocation between regulated and deregulated services be handled for CLECs? For ILECs.?

n. How should shared and overhead costs be treated for CLECs? For ILECs?

o. How should the answers to any of these question be affected by the market power of the firm? By the size of the firm? How should market power and size be measured?

p. Should the Uniform System of Accounts ("USOA") be required for CLECs? For ILECs?

q. Should CLECs/ILECs be required to provide state-specific data?

r. What should the annual reports of CLECs contain? Of ILECs?

9. The Notice of Proposed Rulemaking in this docket, Decision No. C97-434, mailed April 25, 1997, requested comment on these issues and related matters. In particular, the Notice requested comment regarding potential modifications to a number of rules including: Accounting and Reporting Methods (4 CCR 723-1-25), Tariff Requirements (4 CCR 723-1-40 and 41), Relaxed Regulation (4 CCR 723-24), Cost Allocation (4 CCR 723-27), E-911 (4 CCR 723-29), Costing and Pricing (4 CCR 723-30), Price Regulation (4 CCR 723-38), Interconnection and Unbundling (4 CCR 723-39), Eligible Telecommunications Carrier (4 CCR 723-42) and Authority to Offer Local Telecommunications Services (4 CCR 723-35).

10. Thirteen participants submitted written and oral comments on the proposed rules including: AT&T (with MCI and as part of the "CLEC Joint Commentors"); CTA; OCC; ICG (as part of the "CLEC Joint Commentors"); MCI (with AT&T and as part of the "CLEC Joint Commentors"); Mountain Solutions, Ltd., Inc.; the Staff of the Commission; TCG (as part of the "CLEC Joint Commentors"); Sprint Communications Company, L.P. ("Sprint") individually and as part of the "CLEC Joint Commentors"); TRA; the United States Department of Defense ("DOD") on behalf of all Federal Executive Agencies ("FEA"); USWC; and WorldCom, Inc. ("WorldCom") as part of the "CLEC Joint Commentors"). The Commission also took administrative notice of the comments in Docket No. 97M-117T.

11. A prehearing conference was held on July 7, 1997 to establish the schedule for the remainder of the docket. The adopted schedule included two public workshops to discuss the issues held on July 25, 1997 and August 8, 1997.

12. During the public workshops, the participants agreed to remove the issues concerning E-911 and basic service to other dockets already discussing these matters. In

addition, 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 that the concept of "basic service" is an evolving concept that will change with time, 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."

13. In accordance with our Notice of Proposed Rulemaking, oral hearings on the proposed rules were held on August 18 and 19, 1997, 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.

14. Now being duly advised in the premises, we now adopt the rules set forth below for the reasons discussed in this decision.

## II. DISCUSSION.

### OVERALL PUBLIC POLICY ISSUE: ASYMMETRICAL REGULATION

#### 1. Issue

a. Colorado's telecommunications law (*i.e*. Article 15 of Title 40 C.R.S.) is divided into five parts. Part 1 provides general introductory material, Part 2 addresses fully regulated services; Part 3 addresses emerging competitive services which may be accorded relaxed regulation; Part 4 addresses fully deregulated or competitive services; and Part 5

outlines the requirements for the new competitive local exchange environment. The shorthand description of specific service providers have therefore become known as Part 2, 3 or 4 providers. Section 40-15-503(2)(f), C.R.S. states that all new providers of telecommunications services or CLECs will be treated as Part 3 providers.

b. One goal of the Legislature, as set forth in § 40-15-501, C.R.S., is to replace the current Part 2 fully regulated environment with a fully competitive telecommunications market statewide. This would eventually allow the marketplace to regulate services and prices, effectively making all providers Part 4 providers. Since this will be an evolutionary process, the Commission recognizes that this change requires the reconstruction of the default regulatory scheme for Part 3 services, currently embodied in Rule 38-3.2.2. A threshold objective for the Commission is how to encourage the entry of new competitors into the local exchange telecommunications market to initiate competition.

c. One obstacle to this objective is that carriers with significant market power can keep firms without significant market power out of the market by implementing anti-competitive practices. One such practice is "predatory pricing", or the pricing of products under cost to drive new competitors out of the market.

d. Therefore, the first issue the Commission addresses in this docket is the public policy question: Should the Commission regulate telecommunications carriers differently based on whether they have significant market power in the current telecommunications market? This manner of regulating the two classes of carriers differently is known as "asymmetrical regulation."

e. The goal of asymmetrical regulation is to encourage the development of a competitive telecommunications market. It is an interim regulatory tool used to restrain the potential anti-competitive actions of the dominant firm until the new entrant carriers are able to become effective competitors. Once sufficient competition exists, market forces should be capable of constraining the dominant firm's market power, and the asymmetrical regulation of the dominant firm can be relaxed.

f. Asymmetrical regulation requires that the Commission first distinguish between "dominant" or "non-dominant" carriers in the current telecommunications market. The Commission must then determine the specific form of the "asymmetrical regulation."

g. We note that the Legislature, in authorizing competition in the local exchange market, specifically contemplated that some providers may be more actively regulated than other providers. *See* § 40-15-503(2)(a) (rules adopted by the Commission shall foster and encourage emergence of a competitive telecommunications marketplace and may include more active regulation of one provider than another). Moreover, the Legislature specifically directed that CLECs, but not ILECs, shall be regulated as Part 3 providers (as opposed to Part 2 carriers). 30 § 40-15-503(2)(f).

**2. Positions of the Parties**

All of the parties, except USWC and CTA (representing the small ILECs), recommended that the Commission recognize the current dominance of the ILECs and apply an asymmetrical regulatory scheme to facilitate the transition to effective competition in the local exchange market.

**a. CTA**

According to CTA, "allowing the new entrants to enjoy a host of competitive freedoms while shackling the small LECs in Colorado to historic rate of return regulation is both anathema to HB 95-1335, unfair to the small LECs and poor public policy."[1] CTA maintained that, should any scheme of lessened regulation be extended to the new entrants, HB 95-1335 requires that regulation over the small LECs be even less. CTA points out that when competitive entry takes place in a small local exchange carrier's (LEC's) territory, either through a bona fide request which is approved by the Commission, or by virtue of the small LEC filing interconnection tariffs, thereby opening up its markets of its own volition, this Commission must assure that a level playing field exists between the new entrants and the small LEC.

**b. DOD/FEA**

(1) On page 4 of their joint Answer Comments of July 28, 1997, the Department of Defense and all other Federal Executive Agencies point out that, "the distinguishing characteristic of ILECs, whether US WEST or the small members of CTA, is that they control the local loop facilities that provide access between all end-use subscribers and the public switched network within specified serving territories. Except in a few locations where there are dense concentrations of business subscribers, no other entity is in a position to duplicate these facilities. As a consequence, the ILECs have the capability to charge rates for subscriber access that are well above their own costs." DOD/FEA contended that the ILECs maintain strong market power and can set prices at levels well above their own costs with no

[1] Comments of the Colorado Telecommunications Association, Filed April 9, 1997, Docket 97M-117T, p 17.

fear of market loss. DOD/FEA further argued that, conversely, the absence of market power is the reason it is unnecessary to regulate the CLECs. According to DOD/FEA, none of these carriers control any function that cannot be duplicated by another carrier. Consequently, DOD/FEA suggested that regulation of CLECs in any form is not only unnecessary, but probably destructive to economic efficiency and a waste of government resources.

(2) DOD/FEA asserted that this critical difference in the ability of the ILECs and the CLECs to exert market power virtually mandates the asymmetrical regulation described by the CLEC parties. However, DOD/FEA claimed it is inappropriate to conclude, as CTA does, that small carriers require no regulation. DOD/FEA maintained that within their service territories these carriers are as much monopoly providers of subscriber access service as is USWC in its territory. DOD/FEA recommended that regulatory burdens should be reduced for the small carriers but regulation should not be eliminated altogether.

(3) DOD/FEA concluded that as the largest user of telecommunications services in the State of Colorado, DOD/FEA will be heavily impacted by any decision of the Commission in this proceeding. DOD/FEA urged the Commission to adopt the asymmetrical regulatory scheme recommended in their Answer Comments and in the Comments of the CLECs. They claimed that such a scheme would promote competition for local exchange services while still protecting the public from abuse due to the lingering market power of the ILECs.

**c. Joint Commentors:**

(1) The Joint Commentors (TCG, AT&T, MCI, WorldCom, and ICG) recommended that, "the Commission regulate carriers consistent with their ability to

exercise market power. Asymmetrical market power should be addressed through asymmetrical regulation. Currently, only ILECs are able to influence the local exchange market and its prices through the exercise of their market power. As a result, the Joint Commentors suggest that the Commission focus its attention on constraining ILEC market power, and streamlining the local entry by new competitors so that a competitive local exchange market can develop."[2]

(2) The Joint Commentors maintained that ILECs already have nearly 100% of the current local telecommunications market share. According to the Joint Commentors, "ILECs are not just viable players, they are the only players until CLECs can attract some market share and create real local competition. Creating competition requires that the ILECs open their markets and, as a result, lose some of their market share. An asymmetric regulatory framework is the key to accomplishing this."[3] The Joint Commentors also argued that USWC should not also be given the same pricing flexibility as the CLECs. "Allowing the ILECs the same pricing flexibility as CLECs on a default basis would insure that competition in the local exchange market never gets off the ground. The ILECs, particularly US WEST, are in a position to engage in anti-competitive predatory pricing."[4] The Joint Commentors contended that USWC is free, under Commission rules, to pursue relaxed regulation or pricing flexibility in a separate proceeding.

(3) The Joint Commentors contended that the both the Telecommunications Act of 1996 and HB 95-1335 adopt legislative mandates that recognize the

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[2] Joint Comments Filed by the Competitive Local Exchange Carriers, Docket No. 97R-177T, June 11, 1997, p 2.

[3] Joint Reply Comments of the Competitive Local Exchange Carriers, Docket 97R-177T, August 1, 1997, p 3.

[4] Joint Reply Comments of the Competitive Local Exchange Carriers, Docket 97R-177T, August 1, 1997, p 4.

inherent differences between incumbent providers and new entrants and the corresponding need to regulate them differently during the transition to competition. The Joint Commentors point to § 40-15-502(1), C.R.S. that states that Commission rules, ". . . shall be designed to foster and encourage the emergence of a competitive telecommunications marketplace and may include more active regulation of one provider than another..."[5]

**d. OCC**

On page two of its comments in Docket No. 97M-117T, the OCC stated that, "Although C.R.S. 40-15-501 *et. seq*. became effective May 24, 1995, the current local exchange telecommunications market remains a virtual monopoly. At present incumbent providers have nearly a 100% share of the market for residential and business local exchange customers in their service territories in Colorado." In this statement, the OCC argues that it is clear that USWC and the independent telephone companies continue to have market power in the local telecommunications market at the present time The concern of the OCC and others is that a company with market power has the power to increase or lower prices to thwart competition. The OCC asserted that such dominance and its potential for marketplace abuses must be constrained by continued regulatory oversight, and that as the Commission oversees the transition to a competitive environment, it must remain cognizant of this overwhelmingly dominant market position of the incumbent providers. The OCC pointed out that in order for effective competition to develop, the Commission must adopt policies that promote entry by multiple new firms, including, perhaps, one set of regulatory rules for the incumbents and

[5] Joint Comments Filed by the Competitive Local Exchange Carriers, Docket No. 97R-177T, June 11, 1997, p 2,3.

another, more relaxed set of regulatory rules for the new firms seeking to enter the market to compete with the incumbents.

**e. Sprint**

On page 2 of its May 30, 1997 comments, Sprint examined the need for ILEC price ceilings. They stated, "In an emerging competitive market where one provider has a monopoly market share and the competitors must rely on the monopoly provider for wholesale services and unbundled elements, another danger would be from the ILEC pricing its retail services and wholesale offerings in a manner that precludes CLECs from effectively competing with the ILEC. This would in effect eliminate the number of competitors in the market and deny end users a choice of providers, counter to one of the fundamental goals of the Telecommunications Act of 1996."

**f. Staff**

At the August 18, 1997 hearing, the Staff of the Public Utilities Commission pointed out that, pursuant to .§ 40-15-503(2)(f), C.R.S., CLECs new entrants are defined as **Part 3** providers, whereas USWC, in providing basic service, is defined as a Part 2 provider. Staff stated that, while relaxed regulation is automatically given to CLECs under the default scheme in Rule 4 CCR 723-38-3.2, USWC could avail itself of the same pricing flexibility by filing an application under § 40-15-207, C.R.S. Staff further explained that its proposal for default regulation was restricted to the CLECs because US West still has significant market power. (*See* Transcript V. 1, pp. 115, lns. 3-7.)

**g. TRA**

According to the Telecommunications Resellers Association (TRA), "The incumbent local exchange carriers (ILECs), as dominant carriers, will for the foreseeable future retain tremendous market power and the ability to drive the market accordingly. Despite the ILECs' assertions to the contrary, their market dominance warrants far greater regulatory scrutiny than do new entrants who face formidable challengers in the ILECs. Regulatory symmetry between ILECs and competitive local exchange carriers (CLECs) would result in asymmetrical results, precipitously tilted in favor of the incumbents. This would have a chilling effect on the development of competition in Colorado."[6] TRA recommended that the Commission maintain its current regulation of the ILECs as dominant carriers, while streamlining its approach for non-dominant CLECs.

**h. PTIC**

PTIC stated that it did not believe that a generic rulemaking proceeding to rewrite the telecommunications rules was appropriate at this time and therefore did not offer any suggested rule language. Instead, it recommended that the Commission move forward on alternative forms of regulation (AFOR) which recognize that the characteristics of each telecommunications provider, and the markets they serve, are different and often unique.

**i. USWC**

(1) In several rounds of comments, USWC has maintained that, "In amending its rules to reflect a competitive telecommunications environment in

6 Comments Telephone Resellers Association, 97M-117T, Filed April 9. 1997, p 2.

Colorado, the Commission must establish competitively neutral ground rules so that one competitor is not placed at an economic disadvantage relative to other competitors"[7]

(2) USWC takes issue with the Joint Commentors reliance on § 40-15-503(2)(a) C.R.S. as the basis for the contention that ILECs be treated differently than CLECs. According to USWC, the language of that section states that the regulation of ILECs "may include more active regulation of one provider than another" but does not mandate that ILECs be more actively regulated.[8] USWC also disagrees with the Joint Commentors reliance on § 4-15-503(2)(f) C.R.S. as a basis for stricter regulation of the ILECs. According to USWC, this section does not suggest that USWC should not be a competitive market participant.

(3) USWC maintained that it is already regulated differently than the new entrants in that USWC is required to allow others to use its space via collocation, to provide unbundled elements, to resell telecommunications services at a discount, and to be the provider of last resort (POLR). According to USWC, any further regulation should be minimized to promote a competitive market. USWC encouraged the Commission not to adopt the recommendations of the Joint Commentors, stating that: "The exclusion of the ILECs from meaningful participation in the competitive process reduces the choices and options available to all customers in Colorado. USWC needs the same pricing and contracting flexibility as the

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7 Initial Comments of US WEST Communications, Inc., Filed June 20, 1997, p 1.

8 Answer Comments of US WEST Communications, Inc., Filed July 3, 1997. p 1.

CLECs to ensure that these benefits accrue to the users of telecommunications services in Colorado."[9].

(4) USWC took issue with the CLECs' contention that their lack of market power justifies a different regulatory treatment. According to USWC, most CLECs have significant brand-name recognition in local telecommunications markets, recognized presence in other segments of the national telecommunications market and financial strength to readily participate in a market. Therefore, argued USWC, the Commission does not need to skew any rule to the benefit of any CLEC under any circumstance.

(5) USWC maintained that the Commission already has tools such as price ceilings to prevent anti-competitive actions. USWC points out that CLECs and any provider harmed by anti-competitive practices can already seek relief with the Commission or in the Courts.

**3. Commission Decision**

a. The Commission finds that the ILECs are dominant carriers and asymmetrical regulation should be applied to facilitate the transition to an effectively competitive local telecommunications market in Colorado. Clearly, at present, ILECs have significant market power in the local telecommunications market and the CLECs do not. That market power creates the potential for the ILECs to curb the entry of new providers and to set prices above costs. Consequently, the traditional regulatory tools remain relevant for the ILECs.

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[9] Answer Comments of US WEST Communications, Inc., Filed July 3, 1997. p 3.

Those tools include price regulation, cost support, cost allocation, and quality of service standards.

b. The Commission recognizes that USWC is already regulated differently than the new entrants in the sense that USWC is required to allow others to use its space via collocation, provide unbundled elements, resell telecommunications services at a discount, and be the provider of last resort. However, in the Commission's judgment these requirements alone are not sufficient to prevent USWC from exercising its market power to set prices above or below cost and to limit the entry of new providers. Consequently, at this time, the traditional regulatory tools remain relevant for USWC.

c. The Commission is also aware that at least some of the CLECs have name recognition and sizable financial resources. Nevertheless, the fact remains, as many parties point out, that presently the ILECs control the local loop facilities that provide access between all end-use subscribers and the public switched network within their serving territories. Except in a few locations where there are dense concentrations of business subscribers, no other carrier is in a position to duplicate these facilities. This is the essence of the ILECs' market power. Conversely, the new providers, even those with significant resources and name recognition currently have virtually a zero share of the local telecommunications market.

d. The Commission realizes that various legal and regulatory remedies already exist for any provider harmed by anti-competitive practices. As USWC points out, the CLECs or any provider harmed by anti-competitive practices can already seek relief from the Commission or the courts. However, in the Commission's judgment such after-the-fact

remedies are insufficient to promote the timely transition to effective competition mandated by the Legislature.

e. The Commission is sensitive to the concerns of the small independent and rural telephone companies represented by CTA. Nevertheless, the Commission agrees with those parties who point out that currently, within their service territories, these carriers are as much monopoly providers of subscriber access service as is USWC in its territory. The Commission intends to continue its efforts to reduce the regulatory burdens of the small and independent ILECs. However, the Commission will not grant CTA's request that they be afforded the same relaxed regulation as the CLECs until competitive entry takes place in a small LEC territory and the Commission determines that the market is capable of checking the ILECs' market power. That entry may come either through a bona fide request which is approved by the Commission, or by virtue of the small LEC filing interconnection tariffs and thereby opening up its markets.

f. The Commission is keenly aware that the ultimate goal is an effectively competitive local telecommunications market statewide. Such an effectively competitive market will allow the application of a symmetrical relaxed regulatory environment for all providers. Asymmetrical regulation is simply an interim step that is in concert with current market conditions within the local telecommunications market. The Commission envisions a step-by-step movement toward symmetrical regulation as the CLECs become effective competitors, and, thereby, are gradually able to check the market power of the ILECs. As a first step the ILECs are, of course, free to apply for relaxed regulation under the current rules.

g. Having decided the broader policy question, we now consider each of the separate proposed rules in order of their complexity and impact on other decisions. Specifically, we will address the rules in the following order: Rule 38, 24, 1-40, 1-41, 27, 30, 1-22, 1-25, 39, 40, and 2.

## III. RULE 4 CCR 723-38 - RULES REGULATING APPLICATIONS BY LOCAL EXCHANGE TELECOMMUNICATIONS PROVIDERS FOR SPECIFIC FORMS OF PRICE REGULATION.

### A. THE DEFAULT REGULATORY SCHEME -(Rule 723-38-3.2.2)

#### 1. RECONSTRUCTION OF THE DEFAULT REGULATORY SCHEME

##### a. Issue

The primary decision the Commission must make in Rule 38 is whether to reconstruct the default regulatory scheme for Part 3 services currently embodied in Rule 38-3.2.2. If so, the secondary decision is how to structure that reconstruction. The essence of this decision is: "Should the default mechanism apply only to the CLECs, or equally to both the CLECs and the ILECs?"

##### b. Positions of the Parties

The parties presented the Commission with three possible default schemes. Each implies its own set of changes to Rule 38 and other Commission rules. The three proposed default schemes were:

###### (1) Joint Commentors

The Joint Commentors suggested that the Commission's Part 3 default scheme be changed to declare that the CLECs are eligible for default relaxed regulation in the form of price lists that are unconstrained by price ceilings or floors.

**(2) Staff/OCC**

The OCC and Staff suggested that the Commission's default scheme be changed to declare that CLECs are eligible for relaxed regulation in the form of banded prices that are constrained by Commission approved price ceilings and floors.

**(3) USWC**

USWC contended that it and other ILECs must be included in the default relaxed regulatory scheme for basic exchange services and the intraLATA telecommunications markets. USWC argued that all providers should have pricing flexibility. In addition, USWC proposed a new rule (38-3.1.5) entitled "Competitively Neutral Price Regulation" which stated that if one provider is given some form of price flexibility, all others in the same market or geographic area could get the same price flexibility on an expedited basis.[10]

**c. Commission Decision**

Consistent with the earlier decision in this order to apply an asymmetrical regulatory scheme, the Commission finds that the default rule for Part 3 services at 38-3.2.2 shall apply only to the CLECs.

**2. PRICING FLEXIBILITY - (Rule 4 CCR 723-38)**

**a. Issue**

Should CLEC pricing flexibility be constrained by Commission-determined price floors and price ceilings?

**b. Positions of the Parties**

[10] CTA, on behalf of the small ILECs, did not offer specific rule 38 language. CTA did contend that the small ILECs should be subject to regulation at least as advantageous as the CLECs.

**(1) Joint Commentors.**

(a) According to the Joint Commentors, price floors and ceilings should be determined by a carriers' market power. The Joint Commentors contended that CLECs do not have market power, and, therefore, CLECs do not need price ceilings and floors.

(b) Second, the Joint Commentors argued that price ceilings are unnecessary for new entrants because it is not in the self-interest of the new entrants to set prices above the ILECs' prices. The Joint Commentors maintained that since the ILECs currently have virtually 100 percent of the local exchange market, the CLECs will have to price below the ILEC tariff in order to attract and retain customers. They concluded that price ceilings are necessary only for ILECs with market power.

(c) Third, the Joint Commentors argued that price floors are unnecessary for the new entrants because CLECs do not earn monopoly rents or profits, and, therefore, do not have the ability to price below cost. The Joint Commentors claimed that the CLECs will need to spend substantial resources for start up costs and are unlikely to have the necessary resources to price below cost. The Joint Commentors maintained that only the large ILECs, namely USWC in Colorado, have the ability and incentive to price a service below its cost**.** They claimed that USWC has the ability, through its monopoly rents, and the incentive to price below cost so it can maintain its market share. For these reasons, the Joint Commentors concluded that, "it is critical to set a price floor for all U S WEST's services."[11]

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[11] Joint Comments Filed by the Competitive Local Exchange Carriers, Docket No. 97R-177T, June 11, 1997, p 12.

(d) Fourth, the Joint Commentors argued that State and Federal antitrust laws already prevent predatory pricing by the CLECs and therefore Commission-set price floors are unnecessary and burdensome for CLECs.

(e) Fifth, at the August 18, 1997 hearing, the Joint Commentors argued that price ceilings and floors may stifle the introduction of new services by the CLECs. They expressed concern that the imposition of Commission-approved price ceilings and floors could imply a requirement to appear before the Commission to argue the issue of whether the proposed new service is simply a repackaging of existing Part 3 services or a legitimately new Part 4 service not subject to the Commission-approved ceilings and floors. The Joint Commentors contended that such a requirement would also obligate them to present costs and information about the new service that would then become available to their competitors. (*See* Transcript, V 1, pp. 145 & 146.)

**(2) OCC**

(a) The OCC contended that price floors should be set at the Total Service Long-Run Incremental Cost (TSLRIC) for all providers for all services until the market is fully competitive in order to avoid anti-competitive pricing. The OCC added that it advocated price floors because predatory pricing is injurious to the long term health of a competitive market and could even harm other CLECs.

(b) At the August 18, 1997 hearing, the OCC further advocated price ceilings for the CLECs because it was concerned about isolated rates above the ceiling such as, directory assistance, toll blocking, and other less critical services that consumers

are not aware of. The OCC pointed out that its proposal would allow a CLEC to price above the price ceiling if a CLEC could justify a higher price ceiling with the appropriate cost support.

(c) Also at the August 18, 1997 hearing, the OCC addressed the issue as to whether the imposition of price ceilings and floors on the Part 3 services of new entrants would suppress innovation. The OCC opined that the majority of the new services introduced are likely to be repackaged Part 3 services, rather than completely new Part 4 services. According to the OCC, in the case of a CLEC offering a genuinely brand new service, there would not be a great need for a price ceiling. (*See* Transcript. V 1 p 143,144.)

**(3) Staff**

(a) At the August 18, 1997 hearing, Staff advocated price bands for CLEC Part 3 services as a means of protecting basic service which Staff claimed has aspects of a public good. According to Staff, basic service is critical for the health and safety of all Colorado citizens. Staff claimed that during the transition to a fully competitive telecommunications market, constraining CLEC pricing flexibility within price bands would strike the proper balance between encouraging the entry of new providers for Part 3 services and ensuring that all consumers in the State benefit.

(b) Staff maintained that CLEC price floors are necessary because some CLECs have market power in some local markets. As an example, Staff pointed to AT&T's presence in the toll market. Staff claimed that CLECs could possibly engage in predatory pricing geographically or by service. Staff contended that price ceilings for CLECs, based on ILEC rates judged just and reasonable, will ensure that customers are not overcharged for specific services and will provide a safety net for consumers.

(c) With respect to the criticism that price ceilings and floors may stifle innovation, Staff reminded the Commission that these bands apply only to Part 3 services. Staff contended that basic service is known and defined and nothing is slowing innovation by CLECs. Further, Staff pointed out that new services introduced by the CLECs would be, by definition, Part 4 services and would not be constrained by the Staff recommended price bands which would apply only to Part 3 services.

(d) In the Staff/OCC joint post-hearing statement, at page 3, they contended that their proposal, "...provides flexibility for the companies while retaining in the Commission a level of control commensurate with the Commission's, the providers', and the consumers level of experience." Staff/OCC also pointed out that in the MCIMetro stipulation and settlement approved by the Commission (Decision No. R97-491) MCIMetro agreed to price bands. Staff/OCC concluded, "Thus, it appears that at least one new entrant thinks it can operate successfully under a price band scheme virtually identical to the default scheme proposed by the OCC and Staff."[12]

**(4) USWC**

(a) USWC contended that ILECs must be included in the default relaxed regulatory scheme for the basic exchange services and intraLATA telecommunications markets. USWC argued that all providers should have pricing flexibility. Consistent with that position, USWC proposed a new rule (38-3.1.5) entitled "Competitively Neutral Price Regulation" which states that if one provider is given some form of price flexibility, all others in the same market or geographic area would be eligible for the same price flexibility

on an expedited basis. According to USWC, "The proposed regulatory process of the Joint Commentors is simply a method to ensure that as new entrants attempt to garner market share from US WEST that there can be no competitive response and no real choice for consumers."[13]

(b) USWC recommended that price ceilings should be used where retail customers do not have effective choice among providers. USWC proposed that "effective choice" be defined as those geographic markets where there is more than one facilities-based provider. Under that definition, USWC notes, price ceilings would not apply to the new entrants since they would almost always face competition from at least one facilities-based provider.

(c) USWC further maintained that during the transition to competition price floors are necessary for all providers to protect against anti-competitive behavior and predatory pricing. At the August 18, 1997 hearing, USWC stated that it was less concerned by no price ceilings for CLECs and more concerned that CLECs have price floors. USWC claimed that the focus of the Joint Commentors on market share as the determinant of market power is incomplete, contending that other factors such as name recognition, financial backing and the size of the corporation should be considered.

(d) With regard to the potential interactions between price ceilings and innovation, USWC contended that price ceilings should not concern the Commission. According to USWC, if the price of repackaged services was too high other

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12 Attachment 1 to the Post-Hearing Statement of Staff and OCC, Docket No. 97R-177T, filed August 29, 1997, p 4

13 Answer Comments of US West Communications, Inc., Docket 97R-177T, filed July 3, 1997, p 4.

providers would be very quick to match the service and bring the price down. (*See* Transcript. p. 146, 147.)

**c. Commission Decision**

(1) The Commission finds that CLEC price flexibility should not be constrained by Commission-approved price ceilings and floors. We agree that the market effectively will regulate the behavior of the CLECs. This is based on the fact that USWC's current market share is near 100 percent and the CLEC's current market share is near zero. Therefore, in order for the CLECs to acquire market share from USWC, they must offer a package of local telecommunications services that is at least as appealing as USWC's in terms of price, quality, and reliability. USWC's prices will serve as the effective price ceiling on CLEC services, and there is no need to apply a Commission-approved price ceiling to the CLECs. Such a ceiling would be a needless and burdensome supplement to existing market incentives.

(2) The Commission also agrees with the argument that price floors are unnecessary for the CLECs. We accept the suggestion that, generally, price floors are unnecessary for firms with insignificant market power. In addition, as several parties pointed out, State and Federal antitrust laws already prevent predatory pricing by the CLECs. We note that the TSLRIC price floors proposed by OCC and Staff are based on measures of direct cost only. As a practical matter, such price floors would have been minimal and, therefore, not a meaningful constraint on CLEC pricing behavior. We also agree that CLECs will doubtlessly need to spend substantial resources for start-up costs and will have the same requirement and incentive of any competitor to recover those costs in the sale of their product offerings. We

conclude that based on the present structure of market incentives and existing legal constraints price floors are unnecessary for the CLECs.

(3) The Commission agrees that one of the primary benefits of competition is an increased incentive for innovation. In our judgment, it is likely that the imposition of Commission-approved ceilings and floors on the CLECs would increase the costs of innovation since such ceilings and floors would almost certainly result in considerable disagreement among various interest groups concerning how to apply such ceiling and floors to new services. As the debate about this issue at the hearings demonstrated, even such threshold issues as whether a new service is definable as a Part 3 or Part 4 service could result in significant litigation under a price band scheme. Therefore, in balancing the costs and benefits of applying price ceilings and floors to CLECs, we conclude that their potential negative impact on incentives outweighs their potential benefits.

(4) The Commission is sensitive to the concerns regarding consumer awareness and the protection of basic service raised by Staff, the OCC and others. As we make the transition to a more competitive local telecommunications market the Commission believes issues of consumer education and the need to maintain affordable basic service are paramount issues of public interest. In this regard, our decision not to impose price ceilings and floors on CLECs is certainly not a signal that the Commission will be less vigilant with regard to these issues. Rather, our decision is based on judgments about the present state of market incentives and the benefits of encouraging the development of an effectively competitive local telecommunications market for Colorado consumers.

(5) The Commission recognizes that, during this transition period, competition in the local telecommunications market has and will develop at different speeds for particular services and regions. The Commission is looking forward to the chance to analyze these specific markets and to consider the opportunities for the relaxed regulation of ILEC services in upcoming dockets.

**3. DEFAULT FORM OF RELAXED REGULATION - (Rule 4 CCR 723-38-3.2.2)**

**a. Issue**

Should the default form of relaxed regulation, granted the CLECs, be applicable to all local exchange services or should some exceptions be specified?

**b. Positions of the Parties**

**Staff/OCC**

Staff and the OCC recommended that certain exceptions apply, including: the rates, terms and conditions for interconnection, switched access, and 911 call delivery to a basic emergency service provider. The Staff and OCC argued that these services represent potential bottleneck services, even for new providers. For example, they maintained that there will be no other way for other carriers to terminate calls to the customers of each provider.

**c. Commission Decision**

We find that the rates, terms, and conditions for 911 calls should be regulated separately. Such calls are governed by separate rules, 4 CCR 723-29, which are not superseded by the default form of regulation we grant the CLECs in this docket. The Commission finds that the default form of relaxed regulation should, however, extend to switched access or

interconnection. Separate regulation of these services might make sense in a hypothetical scorched node scenario. However, as a matter of reality, we are starting with the ILECs' facilities-based network already in place. Therefore, for virtually all customers there will be at least one facilities-based option as we move forward. Other options including wireless, cable and satellite will undoubtedly follow. If significant bottleneck problems develop, we stand ready to address them in the future.

**4. FILING OF INITIAL TARIFFS and PRICE LISTS - (Rules 4 CCR 723-38-3.2.2.2 and 4 CCR 723-38-3.2.2.3)**

**a. Issue**

Should CLECs be required to file tariffs and/or price lists for their services?

**b. Positions of the Parties**

**(1) CTA**

According to CTA, the tariff filing requirements for CLECs and ILECs should be identical, in order to maintain competitive neutrality. CTA recommended the Commission take this opportunity to clarify standard descriptions, terms and conditions to eliminate customer confusion.

**(2) DOD/FEA**

DOD/FEA contended that CLECs should not be required to file tariffs for competitive services.

**(3) Joint Commentors**

The Joint Commentors maintained that CLECs should only be required to file price lists disclosing the terms, conditions and rates for services. They contended these price lists should become effective on 14 days notice to the Commission.

**(4) OCC/Staff**

In their combined post-hearing statement, the OCC and Staff recommended that each CLEC file an initial tariff containing the standards, terms and conditions governing its services and products. Each provider would also file a price list reflecting the current price to be charged for each service or product. Staff/OCC argued that such tariffs will assist consumers in comparing the services offered by the various parties. They further contended that tariffs will assist the Commission in reviewing the terms and conditions of service for purposes of assuring that Commission requirements are met.

**(5) Sprint**

Sprint stated that it does not object to filing tariffs for informational purposes. However, Sprint questioned whether tariffs should be required for CLECs. Sprint did maintain that ILECs should be required to file tariffs as long as they have market power.

**(6) TRA**

TRA contended that CLEC tariffs may continue to serve as a source of information but should not be subject to formal Commission approval. More importantly, according to TRA, CLEC tariffs or price lists should be presumed just and reasonable. TRA contended the market will assure the CLECs offer services at just and reasonable rates.

**(7) USWC**

USWC contended that both CLECs and ILECs should file tariffs stating the terms and conditions for the provision of service until the market for the service is determined to be competitive by the Commission. Further, USWC maintained that both CLECs and ILECs should be allowed to file price lists during the transition to a competitive market

**c. Commission Decision**

The Commission agrees with the Staff/OCC recommendation and will require the CLECs to file an initial tariff that contains the standard terms and conditions governing its services and products, as directed in Rule 4 CCR 723-38-3.2.2.2. Each CLEC will also be required to file a price list that contains the current price to be charged for each service or product, as directed in Rule 4 CCR 723-38-3.2.2.3. This decision is consistent with the Commission's desire to assure that consumers are fully informed as they compare the services offered by the various providers.

**5. PRICE LIST CHANGES - (Rule 4 CCR 723-38-3.2.2.3.1)**

**a. Issue**

How should price changes be made?

**b. Positions of the Parties**

**(1) CTA**

CTA recommended that changes to price lists, with cost support, be applied consistently across the industry.

**(2) DOD/FEA**

DOD/FEA recommended that CLECs should not be required to file tariffs and should be allowed to change any posted price at will.

**(3) Joint Commentors**

The Joint Commentors recommended that CLECs' price changes be filed by transmittal letter to become effective after 14 days.

**(4) OCC/Staff**

In their joint post-hearing statement, the OCC and Staff recommended that CLECs' price changes be filed by transmittal letter 14 days prior to the effective date. They also recommended customer notice not be required because current price changes are noticed to the Commission, but not to customers.

**(5) TRA**

According to TRA, a CLEC's tariffs or price lists should be allowed to become effective on one day's notice. TRA contended that CLECs should have the regulatory flexibility to adjust quickly to competitive situations by introducing new services, or revising existing services, without the time lag associated with a mandatory 30-day notice period.

**(6) USWC**

USWC recommended that, during the transition to a competitive market, prices be changed according to the 14-day notice period specified in 4 CCR 723-38 for flexible price regulation.

**c. Commission Decision**

We adopt the Staff's/OCC's recommendation. Therefore, providers will file with the Commission, by transmittal letter, a price list that describes each proposed price change on or before 14 days prior to the effective date. **Customer notice will not be required.**

**6. CUSTOMER SPECIFIC CONTRACTS - (Rule 4 CCR 723-38-3.2.2.4)**

**a. Issue**

How should customer specific contracts be handled?

**b. Positions of the Parties**

**(1) CTA**

CTA recommended that competitively neutral individual contracts be allowed with a nominal amount of Commission scrutiny.

**(2) DOD/FEA**

DOD/FEA recommended that individual contracts be allowed. DOD/FEA maintained that since few CLECs are in the financial position to offer ubiquitous, area wide services, this will be the most likely medium through which CLECs will build market share. Furthermore, DOD/FEA contended that ILECs should be able to bid against the CLECs for these individual contracts because, absent this opportunity, ILECs will lose many of their large commercial, institutional and government accounts. DOD/FEA claimed that the loss of these accounts and the contributions they make to the ILECs' joint and common costs will ultimately harm basic service customers.

**(3) Joint Commentors**

The Joint Commentors contended that CLEC contracts need not be filed with the Commission, but that ILEC contracts would need to filed and approved by the Commission.

**(4) Staff/OCC**

In comments file May 30, 1997, the OCC maintained that CLECs or ILECs that are granted relaxed regulation should be required to file contracts with the Commission. The OCC also argued that the revenue shortfall from special contracts should not be allowed to be passed on to remaining customers. In their joint post-hearing statement, the OCC and Staff recommended rule language that allows CLECs to negotiate and enter into customer specific contracts, but requires the provider to give notice of the contract, under seal, within 14 days after the contract is executed. Staff/OCC recommended that if the Commission does not set the contract for hearing, the contract becomes effective according to its terms.

**(5) USWC**

USWC recommended that, pursuant to Rule 4 CCR 723-38-3.1.2.2, all telecommunications providers should be provided this pricing flexibility during the transition to a competitive market.

**c. Commission Decision**

We adopt the OCC/Staff recommendation. However, since the Commission is not requiring the CLECs to price within Commission-approved bands, that part of the OCC/Staff recommended rule language will not be adopted. CLECs will be allowed to negotiate and enter into customer specific contracts, but will be required to provide notice of

the contract within 14 days after the contract is executed. If the Commission does not set the contract for hearing, the contract will become effective according to its terms.

**7. PROMOTIONAL OFFERINGS - (Rules 4 CCR 723-38-3.2.2.5)**

**a. Issue**

How should the Commission deal with promotional offerings under this specific form of regulation?

**b. Positions of the Parties**

**(1) CTA**

CTA urged the Commission to adopt competitively neutral terms and conditions of service.

**(2) DOD/FEA**

DOD/FEA maintained that to the extent a competitively bid contract might be considered a "promotional offering" and included volume discounts, it should not be tariffed.

**(3) Joint Commentors**

The Joint Commentors maintained that the filing of promotional offering and volume discounts in a CLEC's price list should be at the CLEC's option.

**(4) Sprint**

Sprint maintained that, until the ILEC loses market power, it should continue to include promotional offering provisions in its tariffs as it does today.

**(5) Staff/OCC**

In their joint post-hearing statement, the OCC/Staff recommended language for three rules: Rule 38-3.2.2.8 (routine promotional offerings); Rule 38-3.2.2.9 (promotionals of 90 days or less); and Rule 38-3.2.2.10 (promotional offerings of greater than 90 days). The recommended language for Rule 38-3.2.2.8 allows a CLEC to make routine promotional offerings without filing cost support, consistent with a certain set of conditions. For Rule 38-3.2.2.9, OCC/Staff offered rule language stating that promotional offerings of 90 days or less could be filed with only a transmittal letter and no cost support. The Commission would be given 14 days to evaluate these short-term promotionals. Finally, under proposed Rule 38-3.2.2.10, promotional offerings of greater than 90 days would be filed through an advice letter with corresponding changes to the provider's tariff. No cost support would be necessary unless it was required by the Commission.

**(6) USWC**

According to USWC, promotional offering for recurring rates and volume discounts should be filed pursuant to the rules for flexible pricing, 4 CCR 723-38. Nonrecurring promotional offerings would continue to be noticed pursuant to the letter notification process currently used.

**c. Commission Decision**

We will require the CLECs to file promotional offerings and volume discounts in their price lists. No cost data or other support will be required.

**8. INVESTIGATION OF TARIFFS OR PRICES - (Rule 4 CCR 723-38-3.2.2.6)**

**a. Issue**

Should the Commission have the right to suspend, investigate and set for hearing any tariff, tariff rate, price, price list or customer specific contract?

**b. Positions of the Parties**

**(1) CTA**

CTA did not comment directly on the issue, but urged the Commission to treat ILECs and CLECs equally in all tariff and price list matters in order to maintain competitive equality among providers.

**(2) DOD/FEA**

DOD/FEA contended that the CLECs should not be required to file tariffs and should be able to change prices at will.

**(3) Joint Commentors**

The Joint Commentors recommended that prices and price lists should simply become effective on 14 days notice to the Commission. The Joint Commentors also recommended that CLECs need not file customer specific contracts with the Commission.

**(4) Staff/OCC**

In their joint post-hearing statement, the OCC and Staff recommended rule language that allows the Commission to suspend, investigate and set for hearing any tariff, tariff rate, price, or price list filed; and provides that the Commission may set any customer-specific contract for hearing.

**(5) TRA**

TRA maintained tariffs should not require formal Commission approval.

**(6) USWC**

USWC maintained that during the transition to a competitive market, price changes for promotional offerings should be filed just as a price change for any other service, that is "allowed on fourteen days notice pursuant to 4 CCR 723-38, the rules for flexible pricing".

**c. Commission Decision**

We adopt the language suggested by the OCC and Staff for Rule 4 CCR 723-38-3.2.2.6 This language specifies that the Commission retain full discretion to suspend and investigate any tariff, tariff rate, price, or price list filed, and provides that the Commission may set any customer-specific contract for hearing.

**9. BURDEN OF PROOF - (Rule 4 CCR 723-38-3.2.2.7)**

**a. Issue**

Which party should carry the burden of proof in any proceeding?

**b. Positions of the Parties**

**(1) Staff/OCC**

In their joint post-hearing statement, the Staff and the OCC recommended language for Rule 38-3.2.2.5 stating that, in any proceeding before the Commission, the provider shall have the burden of proof.

**(2) USWC**

In its initial comments on Rule 723-38, USWC recommended that Rule 38-3.1.1.1.4 be revised. Presently, when a party seeks to change an "in band" price and another party objects to that change, Rule 38-3.1.1.1.4 permits the Commission to set the challenged price change for hearing, thus precluding the price change from becoming effective until Commission ruling. USWC contended that this can result in a delay of as long as eight months, which defeats the purpose of allowing in-band pricing flexibility under Rule 38-3.1.1. USWC recommended that the suspension provision be eliminated and that a rebuttable presumption be established that price changes within an approved price band or price list are just and reasonable. This would shift the burden of demonstrating that such price changes are not reasonable to the party objecting to the "in band" price change.

**c. Commission Decision**

The Commission adopts, in part, the OCC/Staff recommended language for Rule 38-3.2.2.7, that states that in any proceeding before the Commission the CLEC shall have the burden of proof. Since the Commission is not requiring the CLECs to price within Commission-approved bands, that part of the OCC/Staff recommended rule language which refers to the price floor will not be adopted.

**10. CONTENTS OF ANNUAL REPORTS - (Rule 4 CCR 723-38-3.2.2.8.1)**

**a. Issue**

What information should be contained in the annual report of providers operating under this specific form of price regulation?

**b. Positions of the Parties**

Rule 4 CCR 723-38-3.2.2.8.1 refers to 4 CCR 723-1-25 concerning annual reporting requirements. Staff proposed that the Commission retain this reference with the exception of filing only one copy, instead of three, of the stockholder or certified public accountant report.

**c. Commission Decision**

We will adopt Staff's proposal.

**11. FURTHER REPORTING REQUIREMENTS - (Rule 4 CCR 723-38-3.2.2.8.2)**

**a. Issue**

What other reports are, or should be required, from the local exchange carriers operating in Colorado to permit the Commission to monitor the intrastate market and to track the progress of competition in this State?

**b. Position of the Parties**

**(1) CTA**

CTA contended that the number of reports and information provided to the Commission should be reduced for everyone. CTA argued that competitive neutrality requires that the reporting standards be identical for CLECs and ILECs.

**(2) DOD/FEA**

DOD/FEA contended that the Commission will need to monitor the local exchange market to determine the extent to which effective competition is developing within the state. Consequently, DOD/FEA recommended that the Commission require the CLECs to submit annual reports that would identify the number and general

characteristics (e.g. residential, business, single-line, multi-line) of their subscribers in the respective counties and major cities in Colorado. DOD/FEA further suggested that these reports describe the range and nature of the CLECs facilities, thus permitting the Commission to determine the extent to which true, facilities-based competition is developing within the State.

**(3) Joint Commentors**

The Joint Commentors suggested that the Commission limit its information collection to the following types of proprietary information, under seal, and subject to confidentiality agreements: minutes of use, revenues, number of access lines, number of customers, annual reports to stockholders and any SEC Forms 10-K. The Joint Commentors noted that if the Commission later determines that it needs additional information from the CLECs it could utilize its authority under § 40-3-110, C.R.S., and 4 CCR 723-1-25(a)(1) to require special reports.

**(4) Sprint**

Sprint contended that CLECs should be required to file only a minimal number of reports with the Commission. Sprint maintained it would be an ineffective use of its resources to file detailed reports when its business is subject to competition.

**(5) Staff/OCC**

In their joint post-hearing statement, the OCC/Staff recommended language for Rules 38-3.2.2.7 and 38-3.2.2.14 directing the CLECs to file any requested periodic informational reports that allow the Commission and Staff to monitor the intrastate telecommunications market in Colorado, the progress of competition, and the delivery of advanced services to all areas in the State. Staff recommended that this become a

requirement of this new form of relaxed regulation, that the format of the reports be developed in consultation with Staff, and the final format be prescribed by the Commission.

**(6) TRA**

TRA recommended that the Commission maintain flexibility when applying reporting requirements to the CLECs.

**(7) USWC**

USWC suggested that reporting requirements be uniform and nondiscriminatory for all telecommunications providers. In particular, USWC recommended that the rules specify that the following reports be filed with the Commission: annual Automated Reporting Management Information System ("ARMIS") or similar report, Quarterly Lifeline Report, Outage Report as needed, status/deployment reports as needed, monthly list of FCC filings, Quarterly Held Order Report, Quarterly Service Quality Report, Semi-Annual Payment Agency List, and monthly Colorado High Cost Fund Report. USWC also suggested that we require CLECs to provide the Commission with basic, specific information on their competitive presence in Colorado for purposes of the Commission's obligations under section 271 of the Telecommunications Act of 1996.

**c. Commission Decision**

We will adopt the language recommended by Staff/OCC directing the CLECs to file periodic informational reports as a requirement of this form of relaxed regulation. We find that such information is necessary to enable the Commission to track the progress of competition in Colorado and to monitor the delivery of basic and advanced services

to all areas of the State. The format of the reports should be developed in consultation with Staff and filed in the format prescribed by the Commission..

**12. FORM OF FINANCIAL RECORDS - (Rule 4 CCR 723-38-3.2.2.9)**

**a. Issue**

In what form should financial records be kept under this specific form of regulation? How will Rule 4 CCR 723-38-3.2.2.9 and Rule 4 CCR 723-1-25 be made consistent?

**b. Positions of the Parties**

**Staff**

Currently, Rule 4 CCR 723-1-25 addresses the manner in which financial records of all entities over which the Commission has jurisdiction, except transportation utilities, regulated pursuant to Title 40, Articles 10, 11, 13 and 16, shall be maintained.

**c. Commission Decision**

The Commission finds that Rule 38 does not need to be changed each time the language in Rule 1 is changed. Instead, the rules in this section shall simply refer to the Rules of Practice and Procedure.

**13. LOCATION OF RECORDS - (Rule 4 CCR 723-38-3.2.2.10)**

**a. Issue**

Where shall the records be maintained?

**b. Positions of the Parties**

**Several Parties**

Several parties, including Staff, proposed language that would allow records to be maintained wherever was convenient for the party so long as they were both accessible and accumulated in a manner that makes information accurately and readily available to Staff. This includes locations outside of Colorado.

**c. Commission Decision**

The Commission will adopt the rule language as recommended by Staff which allows records to be maintained outside of Colorado so long as they are accessible by Staff.

**14. COST ALLOCATION MANUALS (CAMs) - (Rule 4 CCR 723-38-3.2.2.11)**

**a. Issue**

Should the CLECs, as identified in Rule 4 CCR 723-38-2, be exempt from the requirement in Rule 4 CCR 723-27 that they file a Cost Allocation Manual (CAM)?

**b. Position of the Parties**

**(1) Staff/OCC/USWC**

The Staff, OCC and USWC argue that, while CAMs are no longer necessary, the maintenance of standards for cost allocation continues to be important. USWC further contends that, if the CAM requirement is not eliminated, the CLECs may succeed in obtaining waivers anyway, and the rule would, therefore, be applied in an unbalanced manner.

**(2) DOD/FEA**

Only the DOD/FEA makes any contrary observation, noting that since USWC still must file an interstate CAM, little is gained by its not having to file an intrastate CAM.

**c. Commission Decision**

Upon review of Rule 27, we find that the Cost Allocation Manuals (CAMs) are no longer necessary and therefore will no longer be required from any telecommunications provider. However, § 40-15-108(2) C.R.S. requires that all providers of both regulated and deregulated telecommunications services must be able to segregate costs when called upon by the Commission to do so. This includes the CLECs to the extent that they provide both regulated and deregulated services. Therefore, the CLECs, while no longer required to file CAMs, must continue to be able to provide adequately segregated cost information to the Commission.

**15. PROVIDERS PREVIOUSLY GRANTED RELAXED REGULATION - (Rule 4 CCR 723-38-3.2.2.12**

**a. Issue**

How should providers, who have previously been granted a form of price or relaxed regulation, be treated in these revised rules?

**b. Positions of the Parties**

**Staff/OCC**

In their joint post-hearing statement, the Staff and OCC recommended language for Rule 723-38-3.2.2.15. This language allows any provider previously

granted a form of price regulation or relaxed regulation for basic local exchange service by the Commission, to have the relaxed regulation provided for in the rules adopted here.

**c. Commission Decision**

There was little disagreement among the parties regarding how providers, who have previously been granted a form of price or relaxed regulation, should be treated. We will adopt, in part, the language for Rule 38-3.2.2.12 suggested by the Staff and OCC in their joint post-hearing statement. Our adopted rule will permit providers electing the form of relaxed regulation specified in these rules to make that election upon notice to the Commission.[14]

**16. OTHER CHANGES TO RULE 4 CCR 723-38**

**Overall Statement**

The Commission has decided to use the Staff/OCC method of adopting completely new language for Rule 38-3.2.2 to provide a default regulatory scheme for the CLECS. Consequently the rest of Rule 38 remains applicable to telecommunications providers other than CLECS. Since the Commission chooses not to alter the methods of regulation for other telecommunications providers at this time, it finds, in general, that there is no need to change those portions of Rule 38 other than Rule 38-3.2.2. The exceptions to this generalization follow here.

[14] Similarly, we are revising 4 CCR 723-24-5.3.9.1 to allow providers of emerging competitive services who were previously granted relaxed regulation to elect the new default relaxed regulation.

## B. DEFINITIONS - (Rule 4 CCR 723-38-2)

**Issue**

Should new definitions be created for the following terms?

### a. INCUMBENT LOCAL EXCHANGE CARRIER

#### (1) Positions of the Parties

Both Staff and the Joint Commentors suggested new language for the definition of "incumbent telecommunications providers"

#### (2) Commission Decision

We will adopt the definition for Incumbent Local Exchange Carrier (ILEC) consistent with the definition appearing in the federal Telecommunications Act of 1996.

### b. COMPETITIVE LOCAL EXCHANGE CARRIER

#### (1) Positions of the Parties

Both Staff and the Joint Commentors suggested essentially the same language for a new definition of a CLEC.

#### (2) Commission Decision

The Commission finds that a definition for competitive local exchange carrier (CLEC) for Rule 38 should be included.

### c. COST SUPPORT

#### (1) Positions of the Parties

Staff offered a new definition of cost support at 723-38-3.2.xx.

**(2) Commission Decision**

The Commission will adopt staff's proposed language for a new definition of cost support. This language simply clarifies, at a practical location for the reader of rule 38, the nature of cost support within the Commission's rules.

**d. REGULATED TELECOMMUNICATION SERVICES**

**(1) Positions of the Parties**

USWC offered a new definition for regulated telecommunications service to be inserted at 723-38-2.16. USWC suggested regulated telecommunication service means "services treated as public utility services subject to the jurisdiction of the Commission."

**(2) Commission Decision**

The Commission will not adopt USWC's suggestion. The provisions contained in the applicable Colorado statutes (e.g. HB 95-1335) are sufficient without further explication in rules. With the exception of new definitions for "incumbent local exchange carrier" and "cost support", no other definitions are necessary for Rule 38.[15]

[15] As discussed above, we are adopting the Staff/OCC method of providing an entirely new set of rule language at 38.2.2 to grant a new default regulatory procedure for providers granted CPCNs after February 8, 1996. Consequently, the balance of Rule 38 remains relevant for the ILECs under the Commission's asymmetrical design.

### C. DEFAULT SCHEME FOR PART 2 SERVICE PROVIDERS - (Rule 4 CCR 723-38-3.2.1)

#### 1. Issue

Should the default scheme for Part 2 service providers be restricted to ILECs?

#### 2. Positions of the Parties

**Staff**

Staff recommended that the language for this rule be rewritten to reflect Staff's contention that the default regulatory scheme for Part 2 service should apply only to incumbent local exchange carriers (ILECs).

#### 3. Commission Decision

The Commission will adopt Staff's recommendation in part. We order that Staff's reference in Rule 723-38-3.2.1 to "a Part 2 of Title 40, Article 15, C.R.S., local exchange telecommunications service provider" be stricken and replaced with the phrase "an incumbent local exchange carrier." With this change, the remainder of Staff's recommendation is consistent with the Commission's decision to apply asymmetrical regulation and makes this rule language compatible with the separate treatment of the CLECs in the new Part 3 default scheme.

## IV. RULE 4 CCR 723-24: RULES REGULATING EMERGING COMPETITIVE TELECOMMUNICATIONS SERVICE.

All issues raised by the parties in Rule 4 CCR 723-24 already have been discussed and decided above.

## V. RULE 4 CCR 723-1-40 - RULES OF PRACTICE AND PROCEDURE - TARIFFS AND PRICE LISTS

### A. NUMBER OF COPIES: TARIFF SHEETS - (Rule 4 CCR 723-1-40.1.4)

#### 1. Issue

How many copies of supporting information should be provided to the Commission with each tariff sheet?

#### 2. Positions of the Parties

**Staff/OCC**

The Staff/OCC proposed that the number of copies of a price list required be an original plus three copies.

#### 3. Commission Decision

The Commission will adopt Staff's proposal for a new Rule 1-40.1.4, specifying an original plus three copies of supporting information.

### B. EXEMPTION FROM TARIFF FILING - (Rule 4 CCR 723-1-40.1.6)

#### 1. Issue

Should an exemption be added to Rule 4 CCR 723-1-40 to allow providers of local exchange service who have been granted relaxed regulation or who are operating under the default relaxed regulatory scheme, to state their rates, tolls, rentals, charges, and classifications collected or enforced in price lists to complement their initial tariff, required in Rule 4 CCR 38-3.2.2.2, that establishes the terms and conditions under which the carriers will provide services to their customers?

**2. Positions of the Parties**

All parties agreed that an exemption should be added to Rule 1-40 to make it consistent with the default regulation granted at Rule 38.2.2. The Joint Commentors, OCC/Staff and USWC suggested rule language to achieve this consistency.

**3. Commission Decision**

The Commission will adopt the Staff's/OCC's proposal for Rule 1-40.1.6. Following the filing of an initial tariff setting out the terms and conditions under which the carriers will provide services to customers, providers of basic local exchange service who have been granted a specific form of relaxed regulation, or who are providing service pursuant to the Part 3 default regulatory scheme, shall be permitted to use price lists to state or change their rates and charges. The exemption is consistent with our decision in Rule 38.

**C. PRICE LISTS - TRANSMITTAL LETTERS - (Rule 4 CCR 723-1-40.2)**

**1. Issue**

Should new language be added which specifies the content and form of price lists and transmittal letters?

**2. Positions of the Parties**

Staff proposed language for Rule 1-40.2 specifying the rule's applicability; the content and form of both price lists and transmittal letters; and the number of copies required.

### 3. Commission Decision

The Commission will adopt Staff's recommendations for rule 1-40.2 and its subsections. This language clarifies the content and form of price lists and transmittal letters and should expedite their FILING.

## VI. RULE 4 CCR 723-1-41. TARIFFS-APPLICATIONS TO CHANGE TARIFFS BY FIXED UTILITIES - HEARING AND SUSPENSION-NOTICE.

### A. Applicability - (Rule 4 CCR 723-1-41.1)

#### 1. Issue

Should this rule be modified to provide an exception for CLECs?

#### 2. Positions of the Parties

**Staff**

Staff recommended that, if the Commission adopts an asymmetrical regulatory scheme, including new language at Rule 723-38-3.2.2 to provide a default regulatory procedure for the CLECs, there is no need to provide an additional exception for the CLECs in this rule.

#### 3. Commission Decision

Since we adopted new language at 723-38-3.2.2 to render a default regulatory procedure for the CLECs, the Commission agrees with Staff that there is no need to provide an exception for CLECs in Rule 723-1-41.

### B. CHANGES TO TARIFFS - (Rule 4 CCR 723-1-41.5.2)

#### 1. Issue

Should changes to tariffs s be permitted upon less than 30 days notice?

#### 2. Positions of the Parties

Staff suggested striking the phrase "for a proposed tariff change" and replacing it with the phrase "to change a tariff upon less than 30 days notice".

#### 3. Commission Decision

We adopt Staff's recommendation and permit changes to tariffs on less than 30 days notice by the application from the utility. This change in the rule's language makes Rule 1-41.5.2 consistent with the rest of Rule 1-41.5.

## VII. RULE 4 CCR 723-27 - COST ALLOCATION RULES FOR TELECOMMUNICATION SERVICE PROVIDERS AND TELEPHONE UTILITIES.

### A. APPLICABILITY - (Rule 4 CCR 723-27)

#### 1. Issue

Rule 27 primarily specifies the methods by which telecommunications providers are to allocate their intrastate investments and expenses between regulated and deregulated services to insure that no cross-subsidization occurs between the two groups of services. Should CLECs, and providers of emerging telecommunications services which have already been granted some form of relaxed regulation, be exempt from Rule 27?

#### 2. Positions of the Parties

##### a. Joint Commentors

The Joint Commentors argue that Rule 27 should not apply to either CLECs or providers of emerging telecommunications services which have already been granted some form of relaxed regulation. They note that CLECs should be exempt because they have no market power, offer no monopoly services, and have no captive customers. Instead, the services they offer will compete with services offered by the incumbents, and therefore, CLECs will be disciplined by the market. Similarly, providers of emerging telecommunications services which have already been granted some form of relaxed regulation should be exempt because their services are also subject to competition and the providers have no power to cross-subsidize.

**b. DOD/FEA**

The DOD/FEA agree that the CLECs should not be required to engage in cost allocation procedures because their prices should not be regulated.

**c. CTA**

CTA argued that cost allocation should be done in the same way by ILECs and CLECs.

**d. Staff/OCC/USWC**

The Staff, OCC and USWC, all argue that § 40-15-108(2), C.R.S., requires cost allocation by all telecommunications firms which provide both regulated and deregulated services. The Staff and the OCC, however, suggest that any provider may apply for a waiver from this rule on a case-by-case basis.

**3. Commission Decision**

The Commission agrees with the Staff, the OCC and USWC that Colorado law clearly requires cost allocation to be done by any provider of both regulated and deregulated telecommunications services. Therefore, we deny the Joint Commentors' request that CLECs and providers of emerging telecommunications services which have already been granted some form of relaxed regulation be exempt from the rule.

**B. COST ALLOCATION MANUALS - (Rule 4 CCR 723-27).**

As determined above in Rule 38, we find that that CAMs are no longer necessary and order that all references to CAMs shall be deleted from this Rule 27. What is important is that a firm be able to provide the information described in the rule whenever called upon to do so.

**C. OUTSIDE AUDIT REPORTS - (Rules 4 CCR 723-27-8.8.2; 723-27-11; and 723-27-12.1).**

**1. Issue**

Should an outside audit report continue to be required as part of a general rate case?

**2. Positions of the Parties**

**a. USWC**

USWC proposes that this requirement be deleted. It argues that the Staff does not rely heavily upon the external audit, but rather on its own evaluation of USWC's books of accounts and records, and that USWC primarily uses its own internal auditing.

**b. Staff/OCC**

Staff and the OCC, on the other hand, feel that the rule should be retained because: 1) the regulatory process cannot necessarily rely on the Staff always having its current level of expertise with respect to USWC's books of accounts; and 2) rate cases may occur in the future with other firms where no comparable Staff expertise exists.

**3. Commission Decision**

The Commission finds that the requirement for an outside audit report in a general rate case will remain as part of the rule.

**D. AFFILIATE TRANSACTIONS - (Rule 4 CCR 723-27-13.1 through 723-27-13.4).**

**1. Issue**

The FCC changed its Part 32 Uniform System of Accounts with regard to affiliate transactions in CC Docket No. 96-150, Those changes are codified at 47 CFR 32.27. Should Rules 27-13.1 through 13.4 be changed to correspond to these changes at the federal level?

**2. Positions of the Parties**

**OCC/Staff/USWC**

OCC, Staff and USWC recommend that language concerning affiliate transactions in Rule 27-13 be altered to correspond to the changes at the federal level.

**3. Commission Decision**

We agree that such conformity is desirable and will adopt the OCC/Staff proposed language in particular, because it more closely mirrors the FCC language.

### E. MISCELLANEOUS CHANGES - (Rules 4 CCR 723-27-4.2; 723-27-4.3; and 723-27-10.3).

#### 1. Issue

Should typographical errors and obsolete provisions in existing rules be modified?

#### 2. Positions of the Parties

The Staff/OCC proposes that references to "USDA" in Rules 27-4.2 and 27-4.3 be changed to "USOA" and that Rule 27-10.3, which refers to the handling of Appendix B in the years 1990-1993, be deleted.

#### 3. Commission Decision

The Commission adopts these changes.

## VIII. RULE 4 CCR 723-30 - RULES PRESCRIBING PRINCIPLES FOR COSTING AND PRICING OF REGULATED SERVICES OF TELECOMMUNICATIONS SERVICE PROVIDERS.

Rule 30 provides specifications concerning costing and pricing methodologies to be applied to the regulated services of telecommunications providers. A number of changes to this rule were proposed by various parties in this docket.

### A. APPLICABILITY - (Basis, Purpose, and Statutory Authority and Rule 4 CCR 723-30-1).

#### 1. Issue

Should CLECs and providers of emerging telecommunications services, which have already been granted some form of relaxed regulation, be exempt from Rule 30?

**2. Positions of the Parties**

**Joint Commentors**

The Joint Commentors argue that this rule should not apply either to CLECs or to providers of emerging telecommunications services which have already been granted some form of relaxed regulation. They contend that the market should be the sole influence on the pricing decision of the CLECs, and that the CLECs must be able to respond quickly to competition and continue to provide new technologies and services.

**3. Commission Decision**

With respect to the CLECs, we realize that their treatment in this rule needs to be consistent with that in Rule 38. Since the Commission has decided to allow the CLECs simply to file price lists with no cost support, it does not find that the CLECs should be subject to the costing and pricing rules. Therefore, language explicitly exempting the CLECs should be included in both the Basis, Purpose, and Statutory Authority section and Rule 30-1. With respect to providers of emerging telecommunications services which have already been granted some form of relaxed regulation, the Commission rejects a blanket exemption. We see no reason for changing the way in which these Part 3 services are regulated at this time. Moreover, any such provider continues to have the opportunity to apply for a waiver from these rules under Rule 30-7.

## B. EMERGING COMPETITIVE SERVICES SUBJECT TO RELAXED REGULATORY TREATMENT - (Rule 4 CCR 723-30-5).

### 1. Issue

Should Rule 723-30-5, concerning emerging competitive services subject to relaxed regulatory treatment, be eliminated?

### 2. Positions of the Parties

**Joint Commentors**

The Joint Commentors recommend that Rule 30-5 be deleted in its entirety.

### 3. Commission Decision

The Commission rejects this suggestion because the rule continues, in effect, to regulate the services to which the rule refers, as provided by entities other than CLECs.

## C. DEFINITIONS - (Rule 4 CCR 723-30-2).

### 1. Issue

Should certain new definitions be included, and existing ones deleted, to conform to other changes in Rule 30?

### 2. Positions of the Parties

**Joint Commentors**

The Joint Commentors propose that new definitions for CLECs and incumbents be included and that the existing definition of a local exchange carrier (LEC) be deleted.

**3. Commission Decision**

Since they are explicitly singled out for exemption from this rule, the Commission believes that a definition of CLECs should be included. Incumbents, on the other hand, are never referenced in the rule so such a definition is unnecessary. Finally, the existing definition of a LEC limits it to providers of Part 2 services. Since this limitation is no longer accurate, we will delete this definition.

**D. PRICE BANDS FOR CLECS - (Rules 4 CCR 723-30-3 and 723-30-5).**

1. **Issue**

Should methods for determining price floors and ceilings for CLECs be included in this Rule 30?

**2. Positions of the Parties**

**OCC/Staff**

OCC and the Staff propose language for Rule 30-5 which is consistent with their recommended regulatory treatment of CLECs in Rule 38, namely, that a price charged by a CLEC must be equal to or greater than the service's total service long run incremental cost (TSLRIC), that cost studies must be provided if the price exceeds the incumbent's price, and that the pricing of CLEC services subject to relaxed regulatory treatment should conform to the existing Rule 30-5(2).

**3. Commission Decision**

Since we have rejected the Staff/OCC proposal concerning the regulation of CLECs, it would be inconsistent to include any of this language here. Therefore, the Commission denies the Staff/OCC request.

## E. ACCESS LOOP - (Rule 4 CCR 723-30-4(2)(a)(iii))

### 1. Issue

How should the access loop be addressed in this rule?

### 2. Positions of the Parties

#### a. AT&T/MCI/Sprint

AT&T, MCI, and Sprint propose that the discussion of loop allocation found in Rule 30-4(2)(a)(iii) be deleted. They argue that the loop should be treated as an independent network function and that its costs should be recovered in the basic exchange rate. Furthermore, they observe that the Telecommunications Act of 1996 defines the loop as a stand-alone service when it designates it as an unbundled network element. According to these parties, allocating the loop, as the rule currently requires, distorts both local and long distance competition.

#### b. Staff/OCC

The Staff/OCC propose that the loop allocation discussion be placed in a separately numbered paragraph within Rule 30-4(2)(a) to indicate explicitly that it represents one of the conditions which prices must meet under these rules.

#### c. USWC

USWC argues that the loop allocation language is vague and that it does not know how to comply with this provision. Consequently, USWC proposes some language which clarifies that the Commission will, under Rule 30-4(2), either allow prices to become effective by operation of law or, through the hearing process, determine whether the price floor and ceiling constraints are satisfied.

**3. Commission Decision**

We continue to view the loop as an input into the production of many services, so that for present purposes, its cost should be allocated among all of them to some extent. Therefore, we reject the AT&T/MCI/Sprint suggestion that this language be deleted. The Commission also finds the USWC proposed language unnecessary. It simply articulates the normal procedure at the Commission, so there is no reason for its inclusion here. We will adopt the Staff/OCC recommendation as a way of clarifying the intent of the rule.

## F. FULLY DISTRIBUTED COST (FDC) STUDIES ON AN ANNUAL BASIS - (Rules 4 CCR 723-30-4(1)(a) and 4 CCR 723-30-6(1)(a)).

1. **Issue**

Should FDC studies, as referenced in Rules 4 CCR 723-30.4(1)(a) and 723-30.6(1)(a), continue to be required with every rate proposal?

**2. Positions of the Parties**

**USWC**

USWC observes that its FDC studies are only conducted annually so that, when it submits various rate proposals within the year, the accompanying FDC study results, as required by Rule 30-4(1)(a), are always the same. In order to avoid the unnecessary, repeated provision of identical results, USWC proposes that an annual filing of its FDC study be deemed sufficient.

### 3. Commission Decision

The Commission agrees with the USWC proposal. USWC has already been operating under a waiver from this specific provision. No problems have surfaced so we will take this opportunity to make this change permanent.

## G. FULLY ALLOCATED COSTS - (Rules 4 CCR 723-30-4(1)(b) and 723-30-4(1)(c)).

### 1. Issue

Should fully allocated costs be used as a surrogate for FDCs for both single services and new services?

### 2. Positions of the Parties

#### a. USWC

USWC's FDC study does not produce historical costs for individual services but, rather, for various categories of services. Consequently, some surrogate is needed as an estimate of FDC for single services. USWC proposes that this surrogate be what it terms "fully allocated cost", defined as TSLRIC plus some appropriate allocations of shared and common costs. USWC claims that the sum of fully allocated costs for all services in a given category will approximately equal the FDC for that category, and, hence, be an adequate surrogate.

#### b. Staff

The Staff, however, observes that USWC has yet to demonstrate this approximate equality. Therefore, Staff argues, the rule should not be changed until such a demonstration is forthcoming.

**c. DOD/FEA**

DOD/FEA contends that there is no apparent correspondence between the historical FDC and the sum of fully allocated costs based upon forward-looking TSLRICs.

**3. Commission Decision**

The Commission agrees with the Staff on this issue and declines to adopt the fully allocated cost surrogate at this time.

**H. IMPUTATION - (Rules 4 CCR 723-30-2(17), 723-30-4(1)(f), 723-30-5(2)(a), and 723-30-6(2)(c)).**

1. **Issue**

Should imputation be required only for services or network elements which are bottleneck monopoly inputs?

**2. Positions of the Parties**

**a. USWC**

USWC proposes that imputation be required only for services or network elements which are bottleneck monopoly inputs, and that, if services or network elements are available either from other providers or through self-provisioning, no imputation is necessary. USWC believes that such a limitation on the concept of imputation is defensible since imputation is needed only where there is potential for creating a price squeeze on its

competitors. Finally, USWC argues that any ambiguity surrounding the notion of bottleneck monopoly inputs can be resolved in future dockets on a case-by-case basis.

**b. DOD/FEA**

DOD/FEA agrees with USWC's position on imputation.

**c. Joint Commentors**

The Joint Commentors, however, view the proposed imputation as vague and confusing. They argue, for example, that the mere availability of a network element is not sufficient to achieve a level playing field if the incumbent is still providing a non-competitive service that uses this element, because the incumbent could cross-subsidize the cost of that element.

**d. Staff**

The Staff also believes that USWC's proposed language is too vague and that its inclusion here would not resolve the major, ongoing questions concerning the appropriate imputation methodology.

**3. Commission Decision**

The Commission realizes that the concept of imputation is one which needs greater clarification but agrees with Staff and the Joint Commentors that USWC's recommended language does not contribute materially toward clarification. Therefore, the suggestion will not be adopted at this time.

## I. SHARED AND OVERHEAD COSTS - (Rules 4 CCR 723-30.6(1)(f)).

### 1. Issue

Rule 30.6(1)(f) requires that any cost study identify all shared and overhead costs and specify which costs are being included and which excluded. Should FDC studies be exempt from this rule?

### 2. Positions of the Parties

**USWC**

USWC argues that this particular rule should apply to TSLRIC, but not FDC studies, because, for example, while FDC studies include shared costs, such costs cannot be broken out and identified there.

### 3. Commission Decision

The Commission agrees that Rule 30-6(1)(f) should not apply to FDC studies.

## J. SMALL LEC RATE FLEXIBILITY- (Rule 4 CCR 723-30.7).

1. **Issue**

Should small LECs be given price flexibility within certain limits?

### 2. Positions of the Parties

**CTA**

CTA recommends that, as long as a rate is between the lowest price floor established for a LEC in Colorado and the USWC rate, a small LEC, as defined in Rule 30-7, may propose such a rate without cost support. Further, CTA recommends that such a rate

proposal will be deemed reasonable and go into effect by operation of law unless the Commission suspends the proposal within 15 days. CTA further stipulates that any increase in the residential basic exchange rate under this scheme would not exceed five percent in any given year. CTA argues that this greater price flexibility will help the small LECs, and consequently their customers, to economize on the use of consultants and attorneys since fewer rate cases will need to be filed.

**3. Commission Decision**

While we appreciate the importance of eliminating unnecessary regulation, we believe that the customers of small LECs deserve to have their rates scrutinized to the same degree as those of USWC. Small LECs remain similar to USWC, at present, in that both are virtual monopolists in their respective service territories. For this reason, the Commission rejects the CTA proposal.

## IX. RULE 4 CCR 723-1-22(H)(3) - RULES OF PRACTICE AND PROCEDURE - DISMISSAL OR WITHDRAWAL OF TARIFFS AND ADVICE LETTERS.

### A. Issue

Currently an advice letter, submitted by a utility, can be voluntarily withdrawn if it has not yet been suspended and set for hearing by the Commission. After suspension, a filing may be dismissed only upon motion and approval by the Commission. Should telecommunications providers be permitted to withdraw proposed tariffs, without Commission approval, even after suspension?

### B. Positions of the Parties

#### CTA

CTA proposed changing the language so that telecommunications providers can, without prejudice, withdraw a filing by notification to the Commission without regard to whether the advice letter has been suspended and set for hearing.

### C. Commission Decision

The Commission rejects CTA's proposal for two reasons. First, proper notice of this proposed rule change was not given. Second, we conclude that utilities should not be permitted to unilaterally withdraw proposals after the Commission and interested parties may have expended substantial resources in investigating proposed tariffs. The existing rule, which permits a utility to unilaterally withdraw a proposal prior to suspension, adequately accommodates the interests of utilities, the Commission, and the public.

## X. RULE 4 CCR 723-1-25: RULES OF PRACTICE AND PROCEDURE, ANNUAL REPORTS AND UNIFORM SYSTEM OF ACCOUNTS

### A. Entities Required To File Annual Reports (4 CCR 723-1-25(a))

#### 1. Issue

Each entity operating in Colorado is required to file an annual report, unless a waiver has been granted. Should it be made explicit that LECs face such a requirement?

**2. Positions of the Parties**

**Joint Commentors**

The Joint Commentors proposed language specifically adding "local exchange carriers", as defined in 4 CCR 723-39.2.10, to those companies required to file annual reports in Colorado.

**3. Commission Decision**

The Commission rejects the Joint Commentors' proposed rule language because the current rule states that "each entity operating in Colorado, over which the Commission has jurisdiction,. . . shall file . . . an annual report." The Commission believes this wording is broad enough to include all local exchange carriers, and, therefore, the current rule requires no change.

**B. Information Required To Be Filed With the Annual Reports - (4 CCR 723-1-25(a))**

**1. Issue**

Currently the Commission receives several types of information from USWC when it files its annual report. This includes an ARMIS Report, as well as other data filed by USWC in the past. This information has been ordered by the Commission pursuant to § 40-3-110 C.R.S., which gives the Commission authority to request any report at such time and in such form as the Commission may require. Should these requirements be modified?

**2. Positions of the Parties**

**a. USWC**

In this rule, USWC proposed language that would limit data filed with the Commission with its annual report.

**b. Staff**

Staff believes that it needs the agreed upon state-specific data and that the absence of this information would hinder its exercise of its regulatory responsibilities.

**3. Commission Decision**

The Commission rejects USWC's proposed language for several reasons. First, the rule change was not properly noticed. Such a change would affect all utilities, not just USWC, and must be adequately noticed. Second, the Commission agrees with Staff that the information provided is important to the completion of its duties. Third, the wording of USWC's proposed change is inconsistent with § 40-3-110 C.R.S., which gives the Commission authority to request any report at such time and in such form as the Commission may require. The proposed rule would require another rule change any time the Commission determined changes to annual report filings are necessary. Currently clerical and/or other changes frequently are made to the annual report.

**C. Fixed Utilities -- Telephone and Telegraph Companies System of Accounts - Preservation of Records (4 CCR 723-1-25(c))**

**1. Issue**

In the past all companies were required to use the Uniform System of Accounts ("USOA"). Should CLECs be exempt from this requirement?

**2. Positions of the Parties**

The Joint Commentors propose an exception to the rule for a local exchange carrier not deemed to be an incumbent telecommunications provider.

### 3. Commission Decision

We conclude that CLECs may maintain books of accounts and records under Generally Accepted Accounting Principles ("GAAP"), in lieu of USOA.

## D. DEPRECIATION OF TELECOMMUNICATIONS PROVIDER PROPERTY - (Rule 4 CCR 723-25(c)(2)).

### 1. Issue

Currently depreciation is determined in accordance with Rule 4 CCR 723-25 (a) (2) and §40-4-112 C.R.S. Should these requirements be modified?

### 2. Positions of the Parties

USWC proposed adding rules to establish the useful life and salvage value of each class of plant within each public utility. USWC did not address the method of depreciation to use. The proposed language states that if a telecommunications provider is no longer regulated by the Commission under rate-of-return regulation, or any other form of rate base regulation, the Commission shall not regulate the depreciation rates of that provider.

### 3. Commission Decision

The Commission rejects the rule proposed by USWC. We note that the proposal is not within the scope of the proposed rulemaking here. Therefore, it would be improper to accept USWC's suggestion.

## E. Method of Maintaining Books of Accounts and Records (Rule 723-1-25(C)(4))

### 1. Issue

Current rules in 4 CCR 723-1-25(c)(4) address the manner in which telephone and telegraph companies, including radio common carriers, shall maintain books of accounts and records.

### 2. Positions of the Parties

#### a. USWC

USWC proposed elimination of the rule.

#### b. Joint Commentors

The Joint Commentors proposed that CLECs and providers of emerging telecommunications services that have been granted a specific form of relaxed regulation under rule 24 be exempt from using USOA.

#### c. Staff

Staff proposed to refer to Rule 4 CCR 723-38-3.2.2 to indicate how CLECs should maintain their books of accounts.

### 3. Commission Decision

We accept USWC's proposal because radio common carriers are no longer regulated, making the current rule out of date. Also, the manner in which companies should maintain books of accounts and records is addressed in Rule 4 CCR 723 1-25(c)(4).

## XI. RULE 4 CCR 723-39 - RULES ON INTERCONNECTION AND UNBUNDLING.

### A. Recovery of Terminating Fees (Rule 4 CCR 723-39-4.2)

#### 1. Issue

Rule 4 CCR 723-39-4.8 sets timetables for a terminating provider to recover its costs for terminating local traffic from an originating provider. Should Rule 723-39-4.8 be deleted, including the reference to it in Rule 723-39-4.2?

#### 2. Positions of the Parties

##### a. USWC

USWC recommended removing the current Rule 723-39-4.8, and all references to it. USWC suggested that a terminating provider be allowed to charge the originating provider a termination fee for all local calls which originate on the originating provider's network and terminate on the terminating provider's network.

##### b. Staff

Staff argued that the current timelines in Rule 4 CCR 723-39-4.8 are prudent, consistent with the Telecommunications Act of 1996 and should be retained.

#### 3. Commission Decision

The Commission agrees with Staff's position and orders that Rule 4 CCR 723-39-4.8 be retained, including the reference to it in Rule 4 CCR 723-39-4.2.

**B. Imputation Requirements (Rule 723-39-7.6)**

**1. Issue**

Should the language in Rule 723-39-7.6 be changed as recommended by USWC?

**2. Positions of the Parties**

**a. USWC**

USWC suggested changing the language in Rule 723-39-7.6 as follows:

> "Imputation is only required for those services or network elements which are bottleneck monopoly inputs (e.g. terminating access to a provider's network). Services that are available from other providers, or that can reasonably be provisioned by a provider for itself, are exempt from the imputation requirements of these rules. As applicable, each telecommunications provider shall impute its ~~**rates**~~ **costs** for ~~**interconnection**~~ the termination of local traffic~~**, unbundled network elements, and "White Pages" directory listings**~~ into the rates of its own services in accordance with 4 CCR 723-30 (Rules Prescribing Principles for Costing and Pricing of Regulated Services of Telecommunications Service Providers).

**b. Staff**

Staff argued that the proposed language changes not be adopted for the following reasons:

(1) The change from "rates" to "costs" significantly changes the meaning of the rule in a manner that is inconsistent with the Commission's original intent.

(2) The change in wording from "interconnection, the termination of local traffic, unbundled network elements, and 'White Pages' directory listings"

to simply the "termination of local traffic" significantly changes the application of the rule in a manner that is significantly different from the Commission's original intent.

(3) The proposed language changes would limit the imputation of either rates or costs to only services or network elements which are bottleneck monopoly inputs as discussed in Rule 30 above.

(4) USWC's suggestions are overly broad and change the meaning of the imputation requirement. Therefore, the original language should be retained.

**3. Commission Decision**

We agree with Staff that USWC's proposed language changes for Rule 723-39-7.6 are overly broad and change the meaning of both the rule and the imputation requirement. Therefore, we order that the original language be retained.

**C. Interconnection Agreements Supersede Tariffs For Specific Services - (Rule 723-39-8.1)**

**1. Issue**

Should the language in Rule 723-39-8.1 be modified, as recommended by USWC, to clarify its consistency with current Colorado law?

**2. Positions of the Parties**

**a. USWC**

USWC suggested that Rule 723-39-8.1 is inconsistent with § 40-15-503(2)(g)(III), C.R.S. (1996 Supp.) and proposed the following change:

"Rule 723-39.8.1: Nothing in Rule 7 shall be construed to limit a telecommunications provider's ability to reach a negotiated, mediated, or arbitrated agreement with respect to the rates, terms, and conditions associated with interconnection, the termination of local traffic, the purchase of an unbundled network element, or publication of a "White Pages" directory. ~~**Such agreements shall not be inconsistent with the rates, terms, or conditions contained in a telecommunications provider's currently effective tariff."**~~

**b. Staff/OCC**

Staff and the OCC did not agree that an inconsistency exists, but recommended the following clarifying language to remove any uncertainty about consistency with the statute:

"Rule 723-39.8.1: Nothing in Rule 7 shall be construed to limit a telecommunications provider's ability to reach a negotiated, mediated, or arbitrated agreement with respect to the rates, terms, and conditions associated with interconnection, the termination of local traffic, the purchase of an unbundled network element, or publication of a "White Pages" directory. Such agreements, **EXCEPT THOSE RELATED TO INTERCONNECTION**, shall not be inconsistent with the rates, terms, or conditions contained in a telecommunications provider's currently effective tariff. **AN INTERCONNECTION AGREEMENT ADOPTED BY NEGOTIATION OR ARBITRATION AND APPROVED BY THE COMMISSION SUPERSEDES A TELECOMMUNICATIONS PROVIDER'S CURRENTLY EFFECTIVE TARIFF, BUT ONLY WITH REGARD TO THE SPECIFIC SERVICE(S) COVERED BY THE AGREEMENT AND ONLY TO THE EXTENT THAT THE COMMISSION DETERMINES THAT THE TERMS OF SUCH AN AGREEMENT SHOULD BE APPLICABLE TO PERSONS OTHER THAN THE PARTIES TO THE AGREEMENT."**

**3. Commission Decision**

The Commission recognizes that the Staff's proposal, to a large extent, recites the Colorado statute. However, we find it unnecessary to repeat the statute in this rule. The Commission, therefore, will adopt USWC's proposed clarifying language.

## XII. RULE 4 CCR 723-40 - RULES FOR THE RESALE OF TELECOMMUNICATIONS EXCHANGE SERVICES.

**Interconnection Agreements Supersede Tariffs For Specific Services - (Rule 723-40-7.1).**

**1. Issue**

Should the language in Rule 723-40-7.1 be modified, as recommended by USWC, to clarify its consistency with current Colorado law?

**2. Positions of the Parties**

**USWC**

USWC also suggested that Rule 723-40-7.1 is inconsistent with § 40-15-503(2)(g)(III), C.R.S. and proposed the following changes:

> 723-40-7.1 Nothing in Rule 6 shall be construed to limit a telecommunications provider's ability to reach a negotiated, mediated, or arbitrated agreement with respect to the rates, terms, and conditions associated with the resale of telecommunications services. ~~**Such agreements shall not be inconsistent with the rates, terms, or conditions contained in a telecommunications provider's currently effective tariff.**~~

**3. Commission Decision**

For the same reasons stated in the above discussion regarding Rule 723-39-8.1, we will adopt USWC's suggestion.

## XIII. RULE 4 CCR 723-2 - RULES REGULATING TELECOMMUNICATIONS SERVICE PROVIDERS AND TELEPHONE UTILITIES.

**VARIOUS PROPOSED CHANGES - (4 CCR 723-2)**

**1. Issue**

Should the Commission consider changes to Rule 723-2 suggested by CTA and the Joint Commentors? The suggested changes affect standards for the adequate level and timely provisioning of regulated telecommunications services throughout Colorado, including basic telephone service.

**2. Positions of the Parties**

**a. CTA**

**(1) Held Order Reports.**

CTA recommended five changes to the requirements for Held Order Reports specified in Rule 723-2 as they affect small LECs. First, CTA proposed that a small LEC not be required to comply with Rules 2-6.2 through 2-6.5 unless at least one percent of its customers have filed complaints within the previous calendar year. Second, CTA recommended that a small LEC provide held service order information only if it had fifty or more such orders. Third, CTA suggested that a small LEC should not be required to file reports concerning time delays in answering calls to the business office, for repair service, or responding to trouble reports unless a related complaint has been filed within the last year. Fourth, CTA stated that a small LEC should not be required to comply with the temporary alternative for basic customer service notification and reporting provisions in Rule 2-24. Fifth, CTA proposed that a small LEC should be able to request a blanket waiver from Rule 2-24. CTA argued that it is not requesting these five changes in order to offer inferior service to its

customers, but rather that the tracking and reporting requirements in Rule 2 are quite costly and unnecessarily burdensome for small LECs. CTA pointed out that held service orders have not been a problem for small, rural LECs, yet the held service order process has become increasingly complex, costly and impersonal with little value to the small LECs' customers.

**(2) Toll Bridging**

CTA further proposed three changes to the rules concerning toll bridging. First, CTA argued that toll bridging be prohibited. Second, CTA suggested that, if toll bridging occurs, a LEC should be able to terminate service without notice. Third, CTA recommended that if a service is discontinued because of toll bridging, the bond posted should be equal to at least six months of the lost revenue for the LEC. In support of these three proposals, CTA observed that it is very difficult for small LECs to detect or measure toll bridging activity and, when it occurs, it reduces access revenue and increases local traffic for these LECs. They cannot unilaterally stop toll bridging because no services are being purchased directly from them. The small LECs propose these changes to avoid having to initiate repeated complaint proceedings including the corresponding costs of doing so.

**(3) Termination of Service.**

Additionally CTA suggested two changes concerning a LEC's termination of service. First, CTA proposed that a LECs daily liability should equal 1/30 of the monthly charge for the service terminated. Second, CTA argued that Rule 2-9.4.1 should contain an exception for termination without notice.

**(4) Small LEC Exemptions - (Rule 4 CCR 723-2-17)**

Concerning Rule 2-17, CTA proposed that small LECs should be exempt from the possibly expensive requirement of providing backup power, and that small LECs should receive high cost fund support in order to comply with the basic telephone service standards required.

**b. Joint Commentors**

**(1) Location of Utility Records**

The Joint Commentors argued that a utility's records need not necessarily be kept in Colorado or available at all times.

**(2) CLEC's Deposit Requirement Policy**

They also recommend that a CLEC's deposit requirement policy should be included in its price list.

**(3) Obligation to Serve**

They further contend that CLECs should not have a ubiquitous obligation to serve since such an obligation is a barrier to entry and a deterrent to competition.

**(4) Line Extension Policies**

They also argue that CLECs should not be subject to line extension policies.

**(5) Rules Applicable Only to Providers of Last Resort (POLRs)**

As a consequence of the above issues, the Joint Commentors proposed that the basic service standard, the universal service availability

standard, and the availability of service/adequacy of facilities standard be applicable only to providers of last resort.

**c. Staff/OCC**

The Staff/OCC recommend that no action be taken on Rule 2 in this docket. They acknowledge that many important questions were raised but believe that they would be better addressed in a future docket devoted exclusively to this rule.

**3. Commission Decision**

The Commission agrees with the Staff/OCC that these issues should not be dealt with in this docket. We find that the issues raised by the parties concerning Rule 723-2 are easily separated from the main issues in this docket and thus there is no necessity to address them here. Moreover, substantial question exists as to whether the issues raised by CTA are within the scope of this rulemaking proceeding. Consequently, the Commission orders that no changes will be made to Rule 2 at this time.

## XIV. ORDER

### A. The Commission Orders That:

1. The revised rules attached hereto as Attachment A: Rule 38; Attachment B: Rule 24; Attachment C: Rule 1-40; Attachment D: Rule 1-41; Attachment E: Rule 27; Attachment F: Rule 30; Attachment G: Rule 1-25; Attachment H: Rule 39; and Attachment I: Rule 40; are hereby adopted.

2. The previous versions of these Rules are hereby repealed.

3. This order adopting the rules attached hereto as Attachments A through I 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.

4. Within 20 days after final action of the Commission adopting the rules attached hereto as Attachments A through I, the adopted 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.

5. 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 through I, the adopted and repealed rules shall be filed with the Office of Legislative Legal Services.

6. 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.

7. This Order is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS DELIBERATIONS MEETING SEPTEMBER 18, 1997.**

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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