Decision No. R02-988

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

DOCKET NO. 02R-278T

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IN THE MATTER OF PROPOSED AMENDMENTS TO RULES 7.2.1.2 AND 9.4 OF THE RULES CONCERNING THE COLORADO HIGH COST SUPPORT MECHANISM, 4 CCR 723-41.

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**RECOMMENDED DECISION OF**
**ADMINISTRATIVE LAW JUDGE**
**DALE E. ISLEY**
**ADOPTING AND REJECTING RULES**

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Mailed Date: September 6, 2002

## I. STATEMENT

A. This rulemaking proceeding was instituted by the Colorado Public Utilities Commission (Commission) pursuant to a Notice of Proposed Rulemaking (NOPR) adopted on May 15, 2002, in Decision No. C02-570.

B. As noted in the NOPR, this proceeding involves the proposed modification of certain of the Rules Prescribing the High Cost Support Mechanism and Prescribing the Procedures for the Colorado High Cost Administration Fund (HCSM Rules) at 4 *Code of Colorado Regulations* (CCR) 723-41. Specifically, the proposed changes relate to 4 CCR 723-41-7.1, 4 CCR 723-41-

7.2.1.2, 4 CCR 723-41-7.3, 4 CCR 723-41-7.4, and 4 CCR 723-41-9.4.[1] A copy of the proposed rules was attached to the NOPR.

C. Under the current version of 4 CCR 723-41-7.2.1.2 telecommunications providers are not required to contribute to the Colorado High Cost Administration Fund (HCSM Fund) if their calculated contribution for a given reporting period (one year) would be *de minimis* (*i.e.,* less than $10,000.00). That rule also exempts such providers from filing an High Cost Support Mechanism (HCSM) Worksheet with the Commission.

D. The proposed amendments to 4 CCR 723-41-7.2.1.2 require telecommunications providers falling within this exemption to file a portion of the HCSM Worksheet in order to certify their *de minimis* status. They also require such providers to retain documentation, including the information required by the HCSM Worksheet, and to make such documentation available to the HCSM Fund Administrator on request. The proposed amendments to 4 CCR 723-41-7.1, 4 CCR 723-41-7.3 and 4 CCR 723-41-7.4 make it clear that such providers need not apply the HCSM rate element to the Retail Revenues of each of

[1] Certain modifications to the HCSM Rules that became effective after issuance of the NOPR effectively moved the provisions of 4 CCR 723-41-9.4 to 4 CCR 723-41-9.2.3. *See,* Decision Nos. C02-319 and C02-530 in Docket No. 01R-434T, effective June 30, 2002. Therefore, the amount of High Cost Support Mechanism (HCSM) support provisions that are the subject of this NOPR will be referred to as 4 CCR 723-41-9.2.3.

their end-users, collect such contributions from their end-users, or remit the HCSM rate element to the fund.

E. The current version of 4 CCR 723-41-9.2.3 provides that each Eligible Provider (EP) shall receive support from the HCSM based on the number of Primary Residential and Single Line Business Access lines it serves in high cost support areas.[2] The proposed amendments to 4 CCR 723-41-9.2.3 would serve to provide HCSM support to all residential and business access lines in high cost support areas.

F. The NOPR was filed with the Colorado Secretary of State on May 17, 2002, and was published in the June 10, 2002, edition of *The Colorado Register*. It set the matter for hearing on July 2, 2002, at 9:00 a.m. in a Commission hearing room in Denver, Colorado. The NOPR also advised interested persons of the opportunity to submit written comments in advance of the hearing or to submit oral comments at the hearing.

G. Initial written comments were filed by the following interested entities: Qwest Corporation (Qwest); WorldCom, Inc. (WorldCom); Verizon Wireless, LLC, doing business as Verizon Wireless (Verizon); VoiceStream Wireless Corporation

[2] The terms "Eligible Provider", "Primary Residential Access Line" and "Single Line Business Access Line" are defined by 4 CCR 723-41-2.7, 4 CCR 723-41-2.1.1 and 4 CCR 723-41-2.1.2 respectively.

(VoiceStream); N.E. Colorado Cellular, Inc. (NECC); and Western Wireless Corporation (Western Wireless).

H. The matter was called for hearing by the undersigned at the assigned time and place. Mr. Warren Wendling, Engineering Section Chief for the Commission, appeared on behalf of the Staff of the Commission (Staff). Appearances were also entered on behalf of Qwest, WorldCom, Verizon, and NECC by their respective legal counsel.

I. At the hearing, Mr. Wendling described the basis, purpose, and statutory authority underlying the proposed changes to the HCSM Rules. He also responded to questions posed by counsel for Qwest, WorldCom, Verizon, and NECC. These parties then submitted oral comments and/or arguments either supplementing or expanding on those contained in their previously filed written comments.

J. At the conclusion of the hearing interested persons were afforded an opportunity to submit supplemental written comments on or before July 16, 2002. Supplemental comments were filed by WorldCom, Verizon, and Western Wireless on that date. All written comments made prior or subsequent to the hearing, as well as all oral comments made at the hearing, have been considered in connection with this Recommended Decision.

## II. FINDINGS OF FACT AND CONCLUSIONS THEREON

A. The comments filed by Qwest, WorldCom, and Verizon raise a procedural issue concerning the sufficiency of the public notice provided by the Commission in this rulemaking proceeding. These parties contend that the Commission failed to comply with § 24-4-103(4)(a), C.R.S., since the NOPR does not contain a statement of the basis, purpose, and specific statutory authority underlying the proposed rule changes.[3] They argue that this deficiency renders the public notice of this rulemaking proceeding defective as a matter of law thereby precluding the Commission from adopting the rule changes described therein.

B. Section 24-4-103(4)(a), C.R.S., provides, in pertinent part, as follows:

> Any proposed rule or revised proposed rule by any agency which is to be considered at the public hearing, together with a proposed statement of basis, specific statutory authority, purpose, and the regulatory analysis required in subsection (4.5) of this section, shall be made available to any person at least five days prior to said hearing.

Contrary to the assertions of Qwest, WorldCom, and Verizon, this provision does not require that a statement of the basis, purpose, and statutory authority underlying the subject rule

[3] Section 40-2-108(1), C.R.S., requires the Commission to promulgate rules in compliance with the State Administrative Procedure Act at § 24-4-101, C.R.S., *et. seq.*

changes appear in the NOPR.[4] It merely obligates the Commission to make such a statement "available" to interested persons at least five days prior to the hearing. There is no indication that any interested person requested a statement of the basis, purpose, and statutory authority underlying the proposed changes to the HCSM Rules within this time frame.

C. Subsection (3)(a) of § 24-4-103, C.R.S., sets forth the required contents of public notices issued by agencies in connection with rulemaking proceedings. It provides, in pertinent part, as follows:

> Notice of proposed rule-making shall be published as provided in subsection (11) of this section and shall state the time, place, and nature of public rule-making proceedings that shall not be held less than twenty days after such publication, the authority under which the rule is proposed, and either the terms or the substance of the proposed rule or a description of the subjects and issues involved.

A review of the NOPR reveals that it complies with all the above requirements. Therefore, any argument that the rule changes proposed in this proceeding cannot be adopted due to a deficiency in the public notice provided by the Commission must be rejected.

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[4] Qwest cites *Citizens for Free Enterprise v. Department of Revenue,* 649 P.2d 1054 (Colo. 1982) in support of this proposition. However, that case is inapposite since it imposes no requirement that an agency incorporate a general statement of the basis and purpose of rule changes in the NOPR. In this case, the Court construed an earlier version of § 24-4-103(4)(a), C.R.S., that required agencies to incorporate such a statement into the rule **after** it was adopted. That requirement is now contained in subsection (4)(c) of § 24-4-103, C.R.S.

D. The parties submitting comments in this matter either support or do not oppose the proposed changes to 4 CCR 723-41-7.1, 4 CCR 723-41-7.2.1.2, 4 CCR 723-41-7.3 and 4 CCR 723-41-7.4. As explained by Mr. Wendling at the hearing, these changes are essentially administrative in nature. The current version of 4 CCR 723-41-7.2.1.2 does not require telecommunications service providers whose calculated contribution to the HCSM is less that $10,000.00 to prepare or file an HCSM Worksheet or to certify their entitlement to this exemption. Nor does it require such providers to retain documentation that would establish that they qualify for the exemption. Therefore, it is difficult for the Commission to identify those providers who qualify for the *de minimis* exemption. The lack of any current requirement that providers retain documentation establishing their *de minimis* status makes it difficult for the Commission to independently confirm a particular provider's entitlement to that status. The proposed changes will allow the Commission to do so by requiring such providers to prepare and file a portion of the HCSM Worksheet, to certify their *de minimis* status and to retain confirming documentation.

E. Adoption of the changes to 4 CCR 723-41-7.1, 4 CCR 723-41-7.2.1.2, 4 CCR 723-41-7.3, or 4 CCR 723-41-7.4. described in the NOPR is warranted in order to resolve the administrative problems resulting from the Commission's current difficulty in

identifying those telecommunications providers who qualify for the *de minimis* exemption and, if necessary, to independently confirm a provider's entitlement to that exemption. Accordingly, it is found and concluded that the HCSM Rules should be amended in this manner.

F. Mr. Wendling's oral comments at the hearing pointed out the apparent inconsistency between HCSM support provided to non-rural providers in high cost areas under 4 CCR 723-41-9.2.3 (primary access line only) and HCSM support provided to rural providers under Part II, of 4 CCR 723-41 (all access lines). He indicated that one of the purposes of instituting the instant proceeding was to re-visit the issue of whether this distinction was still warranted. Staff, however, expressed no view on whether establishing a uniform method of providing HCSM support for non-rural high cost area providers and rural providers was desirable. He expressed Staff's support for the concept that the HCSM be competitively neutral, but indicated that it had not conducted an analysis of the competitive impact, if any, of the proposed changes to 4 CCR 723-41-9.2.3. He further indicated that Staff took no position in connection with the proposed changes to this rule.

G. Qwest, WorldCom, Verizon, and VoiceStream oppose the proposed changes to 4 CCR 723-41-9.2.3, the effect of which would be to provide HCSM support to all residential and business

access lines an EP serves in a high cost area.[5] These parties point out that the Commission has previously determined that HCSM support should be limited to single residential or business access lines and that there have been no relevant statutory changes that would cause the Commission to reconsider its position on this issue. *See,* Decision Nos. C98-1166 in Docket No. 98D-370T and C99-747 in Docket No. 99R-028T.

H. The arguments advanced by Qwest, WorldCom, Verizon, and VoiceStream are similar to those previously adopted by the Commission when it implemented the current version of 4 CCR 723-41-9.2.3. Essentially, they contend that adopting the proposed rule would be inconsistent with the goal of advancing basic universal telecommunications service at affordable rates. *See,* §§ 40-15-502(2), (3), and (5), C.R.S. Under their interpretation of the relevant statutes, it is the Legislature's intent to provide HCSM support only to the extent necessary to ensure "basic" service, which includes only the "minimum elements of telecommunications service." *See,* § 40-15-502(2), C.R.S.[6] They submit that providing support for one access line

[5] Although generally opposing the subject changes to 4 CCR 723-41-9.2.3, Qwest indicated at the hearing that, in the alternative, it would support a change authorizing HCSM support for the first line on any provider to a given customer at a given location.

[6] The Commission has defined basic telecommunications service as that "which provides a local dial tone, access line and local usage necessary to place or receive a call in an exchange area..." *See,* 4 CCR 723-2-2.5 and 4 CCR 723-2-17.1.

is sufficient to accomplish this purpose. Providing HCSM support to multiple access lines would, in their opinion, constitute an unwarranted departure from the concept of tying HCSM support to basic service.[7] They fear that it would also increase the cost of telecommunications service to all consumers thereby undermining the affordability standard enunciated in the applicable statutes.[8] *See,* §§ 40-15-502(2) and 40-15-208(2)(a), C.R.S.

I. Western Wireless and NECC support the proposed changes to 4 CCR 723-41-9.2.3. They contend that providing HCSM support to all access lines in high cost areas is necessary in order to further the Legislative goal of promoting competition in the telecommunications marketplace. *See,* §§ 40-15-101, 40-15-501(1), and 40-15-502(7), C.R.S. They argue that the current version of 4 CCR 723-41-9.2.3 violates the concept of "competitive neutrality" by preventing an (EP) from receiving HCSM support if the customer already receives service from an

[7] In this regard, WorldCom and Qwest recommend that, at a minimum, the Commission delay modifying 4 CCR 723-41-9.2.3 until it conducts its triennial review of the definition of basic telecommunications service. *See,* § 40-15-502(2), C.R.S.

[8] Mr. Wendling estimated that the proposed changes to 4 CCR 723-41-9.2.3 would increase the HCSM surcharge from 2.8 percent to 3.3 percent and, in the absence of Commission approval of a stipulation in pending Docket No. 98M-147T, increase the HCSM Fund by $10 to $12 million.

Incumbent Local Exchange Carrier (ILEC).[9] They believe that the lack of such support precludes EPs from fairly competing with ILECs. They submit that the Commission adopted the current version of 4 CCR 723-41-9.2.3 at a time when ILECs had no meaningful competition in high cost areas. Therefore, it had no reason to seriously consider the "competitive neutrality" issue in adopting the rule. They contend that circumstances have changed and that the competition now afforded to ILECs in high cost areas by EPs requires the Commission to rethink its earlier policy to limit HCSM to single access lines. They believe that the competitive balance resulting from providing HCSM support to all access lines would ultimately lower costs to consumers.

J. NECC also supports the proposed changes to 4 CCR 723-41-9.2.3 on the basis of its belief that the HCSM Rules should be consistent with federal rules governing comparable subjects. In this regard, NECC points out that the rule adopted by the Federal Communications Commission governing support to ETCs provides that such providers who serve loops in the service areas of rural ILECs receive support for each line they serve based on the support the ILEC would receive for each such line. *See,* 47 *Code of Federal Regulations* § 54.307(a)(1). NECC cites

[9] Western Wireless and NECC provide cellular telecommunications services within high cost areas in Colorado. Both have been designated by the Commission as EPs eligible to receive HCSM support.

the recent case of *Qwest Corporation v. FCC,* 258 F.3d 1191 (10th Cir. 2001) in support of its contention that consistency between comparable federal and state rules is desirable in order to further the partnership between federal and state governments designed to support universal service.

K. Based on the comments submitted and after considering the record as a whole, it is found and concluded that the changes to 4 CCR 723-41-9.2.3 set forth in the NOPR should not be adopted. The Commission considered modifying 4 CCR 723-41-9.2.3 so as to provide HCSM support for all access lines in high cost areas as recently as 1999. *See,* Docket No. 99R-028T. It also dealt with this issue in a 1998 declaratory order proceeding involving the applicability of the rate cap contained in § 40-15-502(3)(b)(I), C.R.S., to second and additional residential access lines. *See,* Docket No. 98D-370T. After evaluating virtually the same arguments that have been advanced in this proceeding, it came to the conclusion that "the Legislature has not indicated an intent that the HCSM support all access lines" in high cost areas. *See,* Decision No. C99-747 at page 3.

L. The Commission's holding in these earlier proceedings was based on its understanding of the Legislature's intent concerning the scope of HCSM support. Such intent was gleaned from the Commission's analysis of the statutory provisions

implementing the HCSM.[10] Based on these provisions, the Commission concluded that the essential purpose of the HCSM was universal access to the public switched network and that such access could be accomplished by supporting a single access line to that network. It specifically found that expanding HCSM support to multiple lines would be inconsistent with the goal of universal service by increasing the expenses of the HCSM Fund and the amounts paid by telephone ratepayers.

M. The Commission has also previously addressed the "competitive neutrality" arguments raised by NECC and Western Wireless. *See,* Decision Nos. C01-476 and C01-629 in Docket Nos. 00A-174T and 00A-171T. In this regard, the Commission has held that it is appropriate for ILECs to receive HCSM support in all cases where it provides service to a customer in light of the legal "obligation to serve" imposed on them as providers of last resort (POLR). *See,* 4 CCR 723-42. The Commission has found that the differing obligations imposed on the ILECs as POLRs and EPs such as NECC and Western Wireless justifies the ILEC's receipt of HCSM support for the first residential or business access line.

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[10] *See, for example,* § 40-15-208(a), C.R.S. (Commission to establish a high cost support mechanism to provide financial assistance to local exchange providers "to help" make basic local exchange service affordable); and § 40-15-502(5) C.R.S. (to accomplish goals of universal basic service and universal access to advanced services, Commission shall create a system of support mechanisms "to assist" in the provision of such services in high cost areas).

N. The record in this proceeding does not persuade the undersigned that the policy previously adopted by the Commission with regard to HCSM support of Primary Residential and Single Line Business Access should be modified. There has been no material change in the statutory scheme underlying the HCSM since the Commission's earlier pronouncements in this area. In the absence of such changes, it must be presumed that the Legislature's goal of providing universal support to the public switched network in the manner previously prescribed by the Commission (*i.e.,* by providing HCSM support for only a single access line to that network) remains intact.

O. In addition, the policy previously adopted by the Commission of supporting only primary access lines has historically been closely tied to its definition of basic telecommunications service. The Commission is currently examining possible changes to that definition in Docket No. 02I-251T. It would be most prudent for the Commission to first determine whether that definition will change before it considers adopting the modifications to 4 CCR 723-41-9.2.3 proposed by the NOPR. The Commission may wish to revisit the issue of providing HCSM support for multiple access lines when or if it modifies the definition of basic telecommunications service in a manner that would make such support consistent with any new definition.

P. In accordance with § 40-6-109, C.R.S., it is recommended that the Commission enter the following order.

## III. ORDER

A. **The Commission Orders That:**

1. The Rules Prescribing the High Cost Support Mechanism and Prescribing the Procedures for the Colorado High Cost Administration Fund at 4 *Code of Colorado Regulations* 723-41 are amended and adopted as set forth in Appendix I to this Recommended Decision.

2. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

3. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

a. If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission upon its own motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

b. If a party seeks to amend, modify, annul, or reverse basic findings of fact in its exceptions, that party

must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

4. If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

( S E A L )

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

DALE E. ISLEY

Administrative Law Judge

ATTEST: A TRUE COPY

Bruce N. Smith
Director

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**BASIS, PURPOSE AND STATUTORY AUTHORITY.**

. . . . .

Adoption of the changes to 4 CCR 723-41-7.1, 4 CCR 723-41-7.2.1.2, 4 CCR 723-41-7.3 or 4 CCR 723-41-7.4 described herein are necessary to assist the Commission in identifying those telecommunications providers who are not required to contribute to the Colorado High Cost Administration Fund and, if necessary, to independently confirm a provider's entitlement to that exemption.

. . . . .

723-41-7.1 Contributors. Every provider of intrastate telecommunications service to the public, or to such classes of users as to be effectively available to the public, every provider of intrastate telecommunications that offers telecommunications for a fee on a non-common carrier basis, and payphone providers that are aggregators not falling within the *de minimis* exemption of Rule 7.2.1.2 must contribute to the HCSM.

. . . . . .

723-41-7.2.1.2 *De Minimis* Exemption. If a ~~contributor's~~ telecommunication service provider's contribution to the HCSM in any given year is calculated to be less than $10,000, that contributor will not be required to submit a contribution. Telecommunications service providers falling within this *de minimis* exemption are required to file with the Administrator ~~or the~~ only that portion of HCSM Worksheet for that period that certifyies their *de minimis* status. Such *de minimis* certification shall be accompanied by an affidavit of an officer of the telecommunication service provider attesting to the veracity of its self-certification. However, each telecommunications service provider exempt from contributing because of its *de minimis* revenues shall retain complete documentation (including, but not limited to the information required in the HCSM Worksheet) and shall make such documentation available to the Administrator upon request. Notwithstanding the *de minimis* exemption of this Rule 7.2.1.2, all Eligible Providers are required to remit contributions and to file the entire HCSM Worksheet.

. . . . .

723-41-7.3 Application of the Rate Element to Customer Billings. The HCSM rate element shall be applied to the Retail Revenues of each telecommunications service provider's end-user and shall appear as a line item on the monthly bill of each such end-user except that telecommunications service providers falling within the *de minimis* exemption of Rule 7.2.1.2 shall not apply the HCSM rate element nor collect such contribution from its end-users. Where an end-user service location receiving the bill and an end-user service location receiving the service differ, the location of the telecommunication service delivery shall be used to determine whether the HCSM rate element applies.

723-41-7.4 Remittance of Contributions. All telecommunications service providers not falling within the *de minimis* exemption of Rule 7.2.1.2 shall be responsible for collecting and remitting quarterly the HCSM rate element receipts according to the following procedure:

. . . . . .