Decision No. C04-1512

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 04D-477T

IN THE MATTER OF THE PETITION FOR COMMISSION DECLARATORY ORDER TO DELCARE INVALID COMMISSION RULE 723-41.18.6.1.2 AS THE SAME IS APPLIED TO RURAL TELECOMMUNICATIONS PROVIDERS.

ORDER DENYING APPLICATION FOR REHEARING, REARGUMENT, OR RECONSIDERATION

Mailed Date: December 22, 2004
Adopted Date: December 7, 2004

I. BY THE COMMISSION

A. Statement

1. This matter comes before the Commission for consideration of an application for rehearing, reargument, or reconsideration (RRR) of Commission Decision No. C04-1292 filed by Colorado Telecommunications Association (CTA) on November 22, 2004. CTA seeks reconsideration of our decision dismissing its Petition for Declaratory Order filed on September 17, 2004.

2. Now, being duly advised in the matter, we deny CTA's application for RRR.

B. Background

3. In its Petition for Declaratory Order, CTA requested that we declare invalid Commission Rule 4 *Code of Colorado Regulations* (CCR) 723-41-18.6.1.2, asserting that the rule applies to CTA member rural independent local exchange carrier recipients (ILECs) of Colorado High Cost Support Mechanism (HCSM) support. Rule 18.6.1.2 provides as follows:

> 723-41-18.6.1.2. Once established or revised, no further qualification will be required during the six-year funding period. During the funding period, the

> amount of HCSM support per Access Line will be phased down. Funding will be fixed for first two years (any 12 month period) at 100% of the funding level established. Following the first two years, the support amount will decline and be phased out by year seven. The following is the phase out schedule: Year 1 – 100%; Year 2 – 100%; Year 3 – 82.5%; Year 4 – 65%; Year 5 – 40%; Year 6 – 20%; Year 7 – 0%.

4. CTA pointed out that Rule 41 is bifurcated between Part I, which contains no provision for phase down of HCSM support, and Part II, which does contain a phase down provision. CTA further pointed out that Part I of the rules is applicable only to Qwest Corporation (Qwest) and any wireless ETC/EP certified to provide competitive basic local service in Qwest service territories, while Part II of the rules is applicable only to rural ILECs.

5. As a result of this bifurcation, CTA asserts that, while the HCSM support received by the rural ILECs phases down under Part II, the HCSM support received by Qwest and its wireless competitors (which are also competitors of the rural ILECs) under Part I does not phase down. CTA also questions whether HCSM support for wireless competitors of rural ILECs is phased down under Part II.

6. CTA alleges that the phase down provision of Rule 4 CCR 723-41-18.6.1.2 violates § 40-15-208, C.R.S., as well as §§ 253 and 254 of the Federal Telecommunications Act of 1996. As a result, CTA contends that the phase down requirement is discriminatory, inequitable and fails the test of competitive neutrality as it is applied in practice to Colorado's rural ILECs.

7. In Commission Decision No. C04-1292, issued November 2, 2004, we determined that CTA's petition was in essence a request to repeal Rule 18.6.1.2. Consequently, we concluded that this request to repeal the rule constituted a rulemaking, which could not be conducted by issuing a declaratory order in response to a petition. We dismissed the Petition and closed the docket.

8. In its RRR filing, CTA cites several points of error in Decision No. C04-1292. First, CTA points to Rule 4 CCR 723-1-60 of the Commission's *Rules of Practice and Procedure*, which is our rule relating to declaratory orders. CTA cites subsection (a) of that rule, which provides in pertinent part : "The Commission may issue a declaratory order to terminate a controversy or remove an uncertainty as to the applicability to a petitioner of any … Commission rule, regulation or Order." CTA also points out that, pursuant to subsection (a)(3) of the rule, we may decline to issue a declaratory order when we conclude that the subject matter should be determined in another proceeding. CTA argues that we failed to indicate that the subject matter of its Petition should be decided in another proceeding and failed to cite the reasons and rule for that finding.

9. CTA maintains that we mischaracterized the relief it seeks in its Petition as a request to repeal Rule 18.6.1.2. According to CTA, it merely seeks "a declaration of the invalidity of the referenced rule only as to its Member Companies."

10. CTA asserts that, if taken out of the context of its Petition, our Order suggests that any future Declaratory Order Petition challenging a Commission rule would be denied and would not be subject to the exercise of Commission discretion.

11. In addition, CTA argues that the general assumption of our Order is that a challenge claiming the invalidity of a Commission rule necessarily implies that what is sought is the adoption of a new rule. CTA characterizes this assumption as a "breathtaking leap." CTA finds that our Order in effect "insulates any Commission rule, no matter how discriminatory in application."

C. Analysis

12. We find CTA's arguments unavailing. In determining whether this matter constitutes a rule-making or adjudicatory proceeding, we must look to the substance of what is asked, rather than the label attached to the action. *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407, 417, 62 S.Ct. 1194, 1200, 86 L.Ed. 1563 (1942).

13. An adjudication is defined as "the procedure used by an agency for the formulation, amendment, or repeal of an order and includes licensing." § 24-4-102(2), C.R.S. (2004). Rule-making is defined as the "agency process for the formulation, amendment, or repeal of a rule." § 24-4-102(16), C.R.S. (2004). A "rule" is defined as the "whole or any part of every agency statement of general applicability and future effect implementing, interpreting, or declaring law or policy or setting forth the procedure or practice requirements of any agency. 'Rule' includes 'regulation'." § 24-4-102(15), C.R.S. (2004).

14. In general, agency proceedings that primarily seek to, or in effect, determine policies or standards of general applicability are deemed rulemaking proceedings, while agency proceedings that affect a specific party and resolve particular issues of disputed fact by applying previously determined rules or polices to the circumstances of the case are deemed adjudicatory proceedings. *Home Builders Association of Metropolitan Denver v. Public Util. Comm'n.*, 720 P.2d 552 (Colo. 1986). The determination of whether a particular proceeding constitutes rulemaking requires an analysis of the character and effect of the proceedings, in addition to a determination of the purposes for which it was initially instituted. *Avicomm, Inc. v. Public Util. Comm'n.*, 955 P.2d 1023 (Colo. 1998); *Landmark Land Co. v. City and County of Denver*, 728 P.2d 1281 (Colo. 1986).

15. In *Home Builders*, the Colorado Supreme Court determined that a Commission action which adopted an embedded investment method for calculating a free construction allowance for line extensions constructed by Public Service Company of Colorado (Public Service) was *de facto* rulemaking. The Court determined that the Commission's action was rulemaking rather than adjudicatory because the Commission clearly intended its decision to be of general applicability to all future Public Service customers. Since these customers were not parties to the proceeding, they had no ability to participate in the formulation of the new Commission policy. *Id*. at 561. The Court further found the adoption of a new construction allowance represented an agency statement of regulatory policy that affected a large number of people in the state. *Id*. Finally, the Commission recognized that the construction allowance was adopted pending a more comprehensive revision of the construction allowance rule, and therefore the Court found that the Commission had in effect amended an existing rule by its action, which could only be characterized as *de facto* rulemaking. *Id.*

16. It is only when there is a truly special circumstance, peculiar to the particular case and clearly supported by the evidence, that the Commission may alter, modify, or amend its own rules in the course of an adjudicatory proceeding. *Id*. at 562. Even then the Commission may only modify a rule to the extent necessary under the facts of the case. *Id*. "The State Administrative Procedure Act … does not countenance an agency's utilization of an adjudicatory proceeding for the issuance of a policy declaration … under the semblance of a 'special circumstance.'" *Id*.

17. In *Avicomm, Inc. supra*, the Court reiterated that in order to determine the character of a Commission proceeding (*i.e.*, whether it constitutes a rulemaking), one must look to the actual conduct and effect of the particular proceeding, as well as to the purposes for which

the proceeding was brought. *Id*. at 1030. Consequently, where the Commission determined that call transfer providers provided interexchange telecommunications services and were required to purchase services from local exchange carriers' access service tariff, the court held that this was properly conducted as an adjudicatory proceeding because there was no on-going rulemaking proceeding involving the topic, and the Commission merely applied existing statutory standards rather than amend an existing rule. *Id*.

18. CTA argues that we should have exercised our authority under Rule 60(a)(3) to hear its Petition for Declaratory Order regarding the applicability of Rule 41-18.6.1.2. However, our authority to make such a determination is not unfettered. The Court has been clear that, because of the broad authority reposed in this Commission by the legislature, procedural requirements must shape the exercise of that authority in various contexts. *Colorado Office of Consumer Counsel v. Mountain States Telephone and Telegraph Company*, 816 P.2d 278, 283 (Colo. 1991). Therefore, despite the benefits of declaratory orders, our authority to initiate various types of proceedings is "expressly restricted by procedural requirements pertaining to proceedings that are in effect rulemaking proceedings." *Id*. at 285. We are guided by the Court's admonition that:

> [t]o adopt the view that the Commission may in its discretion develop any procedural rule designed to aid its regulation of public utilities would for all practical purposes nullify the General Assembly's express determination that the exercise of the Commission's broad rule-making authority must be tempered by adherence to procedural requirements designed to protect the public as a whole as well as to ensure fundamental fairness to all utilities subject to such authority. *Id*.

19. CTA takes the position that it merely seeks a ruling from the Commission challenging the validity of Rule 18.6.1.2 as it applies to its member rural ILECs. Consequently, CTA argues that it did not seek adoption of a rule. However, a review of its Petition and the

attached testimony prove otherwise. CTA clearly indicates at page 8 of its Petition that Rule 4 CCR 723-41-18.6.1.2 "should be stricken." Further, the testimony attached to the Petition of Russell P. Rowe at page 6, line 22, to page 7, lines 1 through 3 provides: "I conclude that the rule is unlawful and recommend that this Commission *strike in its entirety* Rule 723-41.18.6.1.2 [sic] of 4 CCR 723-41-17 *et seq*., the phase-down Rule, from the High Cost Support Mechanism rules." (emphasis added) The attached testimony of Chad A. Duval at page 5, lines 4 through 7, states that, "[t]he ultimate purpose of my testimony is to support the recommendations of Mr. Rowe that this Commission strike the so-called 'phase down' rule in its entirety from the HCSM rules because of its discriminatory impact and effect and because of the rule's lack of competitive neutrality."

20. The import of CTA's Petition is clear. It seeks to strike, in its entirety, Rule 18.6.1.2. No other interpretation is plausible. The character and effect of such a proceeding is primarily to seek to determine polices or standards of general applicability to rural ILECs. As such, we exercise our discretion pursuant to Rule 60(a)(3) and determine that this matter is more appropriately addressed in a rulemaking proceeding.

21. What CTA asks of this Commission is to issue a policy declaration under the semblance of a special circumstance applicable only to CTA members. We decline to do so. CTA does not present a truly special circumstance peculiar only to its members here. Rather, it requests a policy declaration applicable to rural telecommunications providers beyond its membership without their participation, or the participation of other affected parties. We find such a request inappropriate. We will not prejudice the due process rights of those non-CTA member rural providers by excluding them from what can only be characterized as a rulemaking process that substantively affects their interests.

22. As the Colorado Supreme Court has instructed, we must look to the actual conduct and effect of the particular proceeding, as well as to the purposes for which the proceeding was brought in order to determine the correct procedural course of the matter. We determine that the relief CTA seeks must be addressed in a rulemaking proceeding. We therefore find we are required to follow the procedures outlined in § 24-4-103, C.R.S., for rulemaking and repeal of rules.

23. We further point out that the repeal and reenactment of our telecommunications rules is currently underway in Docket No. 03R-524T. We note that CTA is participating in these hearings and has in fact addressed the very matters at issue here in those proceedings. We see no necessity for the duplication of effort that would result by addressing CTA's petition in an adjudicatory proceeding. Therefore, we deny CTA's application for RRR.

II. ORDER

A. The Commission Orders That:

1. The Application for Rehearing, Reargument, or Reconsideration of Commission Decision No. C04-1292, filed by Colorado Telecommunications Association is denied.

2. This docket is closed.

3. This Order is effective upon its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING December 7, 2004.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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Commissioners

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