4-2-2001

Colo. Office of Consumer Counsel v. PUC

SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
Appeal from the District Court, City and County of Denver, Case No. 99 CV 3732, Courtroom 18 THE COLORADO OFFICE OF CONSUMER COUNSEL, Petitioner-Appellant, v. THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO, COMMISSIONERS ROBERT J. HIX, VINCENT MAJKOWSKI, AND RAYMOND L. GIFFORD, THE COMMISSIONERS THEREOF IN THEIR OFFICIAL CAPACITY, Respondents-Appellees.	**COURT USE ONLY** ▲ Case No.: 00 SA 233
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ANSWER BRIEF OF THE COLORADO PUBLIC UTILITIES COMMISSION

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COME NOW, Respondent-Appellees the Colorado Public Utilities Commission, Commissioners Robert J. Hix, Vincent Majkowski, and Raymond L. Gifford (collectively "the Commission" or "PUC")[1], by and through counsel, the Colorado Attorney General, and hereby submit their Answer Brief.

This case is on appeal from the final judgment of the District Court of the City and County of Denver, Civil Action No. 99 CV 3732. That judgment upheld the Commission's Decision Nos. C99-310 and C99-474 in Docket No. 98S-363T. The Commission generally accepts the Statement of the Issue, Statement of the Case, and Statement of Facts as set forth in the Opening Brief of Respondent-Appellant the Colorado Office of Consumer Counsel ("OCC").[2]

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[1] After the Commission issued its Order Granting Exceptions and Decision Denying Office of Consumer Counsel's Application for Rehearing, Reargument or Reconsideration in this proceeding, in March and May 1999, respectively, Commissioner Majkowski's term expired. Polly Page was appointed to the Commission, with Raymond L. Gifford now serving as chairman.

[2] The Colorado Attorney General's Office represents both the Petitioner-Appellant and Respondents-Appellees in this case. As provided for by the legislature, pursuant to § 40-6.5-102(4), C.R.S., the OCC is represented by Assistant Attorney General Simon P. Lipstein. Pursuant to § 24-1-122(2)(a), C.R.S., the Commission is a type 1 agency of the state government, and pursuant to § 24-31-101(1)(a), C.R.S., the Commission is represented by Assistant Attorney General Anne K. Botterud. The attorneys work in different sections of the Department of Law within the Attorney General's Office and have erected a confidentiality wall between them.

SUMMARY OF ARGUMENT

Under Article XXV of the Colorado Constitution, the Commission is granted the legislative authority to do whatever it deems necessary or convenient to accomplish the legislative functions delegated to it. The proper inquiry is whether § 40-15-502(3)(b)(I), C.R.S., ("the rate cap statute") contains a specific statutory provision prohibiting the Commission's interpretation that the statutory rate cap does not apply to residential basic local exchange service when it is bundled with other services. The rate cap statute does not contain such a restriction. The Commission and the District Court properly found that the rate cap statute applies to residential basic local exchange service as a stand-alone service. The rate cap statute contemplates the Commission's and the District Court's interpretation, and through its interpretation, the Commission did not create an exception to the statute. The Commission appropriately relied on Rule 17.1.4 of the Commission's Rules Regulating Telecommunications Service Providers and Telephone Utilities, 4 CCR 723-2 ("Rule 17.1.4") in interpreting the rate cap statute.

Rate making is a legislative function delegated to the Commission, and the courts should avoid any semblance of judicial rate making. In approving NOW Communication, Inc.'s ("NOW") tariffs, and determining that the rate cap statute did not require that each component of the NOW Plan be priced separately, the Commission was performing its rate making function. Such a finding is within the Commission's sound discretion.

The OCC's analysis of Qwest Corporation's ("Qwest") tariffs and application of that analysis to NOW's tariffs is inappropriate because Qwest's tariffs are not part of the

underlying record. In addition, the results of the comparison are invalid because, while Qwest separately prices each component of its CustomChoice® offering, NOW does not separately price the component services of the NOW Plan.

The Commission and the district court correctly held that the rate cap statute does not apply to non-recurring charges for installation of residential basic local exchange service.

If this Court determines that the Commission erred in its interpretation of the rate cap statute, this Court must return the matter to the Commission to address the issue. This Court, however, may not direct the Commission to reach a particular result.

ARGUMENT

I

THE DISTRICT COURT FOR THE CITY AND COUNTY OF DENVER ("DISTRICT COURT") CORRECTLY HELD THAT THE COMMISSION ACTED REGULARLY PURSUANT TO ITS AUTHORITY IN CONCLUDING THAT BUNDLED SERVICES ARE NOT SUBJECT TO THE STATUTORY RATE CAP.

A. SCOPE OF JUDICIAL REVIEW

Section 40-6-115, C.R.S. (2000), is the **exclusive** means for judicial review of final decisions of the Commission. *Archibold v. PUC*, 933 P.2d 1323 (Colo. 1997); *Silver Eagle Services, Inc. v. PUC*, 768 P.2d 208 (Colo. 1989). Under this section, review by the courts of the decisions of the Public Utilities Commission is limited and shall not extend further than to determine: 1) whether the Commission has regularly pursued its authority, including a determination of whether an order or decision violates any constitutional right; 2) whether such order is just and reasonable; and 3) whether such order is in accordance with

the evidence. § 40-6-115(3), C.R.S. (2000); *Boulder Airporter v. Shuttlines*, 918 P.2d 1118 (Colo. 1996); *Integrated Network Services v. PUC*, 875 P.2d 1373 (Colo. 1994); *RAM Broadcasting v. PUC*, 702 P.2d 746 (Colo. 1985). The PUC's findings of fact may not be set aside if they are supported by substantial evidence in the record. *Powell v. PUC*, 956 P.2d 608, 613 (Colo. 1998). Substantial evidence means a sufficient amount of evidence to support a conclusion or to survive a directed verdict if the facts were tried to a jury. *Powell v. PUC, supra* at 613. In determining whether substantial evidence exists, courts must review the record in a light most favorable to the PUC. *Id.* Findings may not be set aside merely because the evidence before the PUC was conflicting or because more than one inference may be drawn from the evidence. *Atchison, Topeka & Santa Fe Ry. Co. v. PUC*, 763 P.2d 1037 (Colo. 1988). Furthermore, the PUC holds considerable technical expertise over utility regulation, and courts should accord deference to its decisions. *Powell v. PUC, supra* at 613; *see also Public Service Co. v. PUC*, 765 P.2d 1015, 1019 (Colo. 1988).

The fundamental issue in this case is one of statutory interpretation liberally interspersed with policy choices and decisions made by the Commission. Statutory interpretation is a question of law which the courts are required to decide. *See* § 40-6-115(3), C.R.S. ("the district court shall decide all relevant questions of law and interpret all relevant constitutional and statutory provisions"); *Phoenix Power Partners, L.P. v. PUC,* 952 P.2d 359, 364 (Colo. 1998); *Union Rural Electrical Ass'n. v. PUC,* 661 P.2d 247, 251 (Colo. 1983). However, the PUC is the agency charged with administration of the public utilities laws, and thus courts should defer to the PUC's interpretation of the statute, as well as PUC

regulations. *Powell v. PUC, supra at* 613. Policy decisions, on the other hand, are made by the Commission and courts may not substitute their judgment for that of the Commission. *Public Service Co. v. Trigen-Nations Energy Co.*, 982 P.2d 316, 322 (Colo. 1999).

B. THE RATE CAP STATUTE DOES NOT RESTRICT THE COMMISSION'S DISCRETION SO AS TO REQUIRE THE COMMISSION TO IMPOSE THE STATUTORY RATE CAP WHEN RESIDENTIAL BASIC SERVICE IS OFFERED AS PART OF A BUNDLED SERVICE.

1. The OCC's Argument that the Rate Cap Statute is a Legislative Restriction on the Commission is Mistaken.

The OCC cites *Resolution Trust Corp. v. Heiserman*, 898 P.2d 1049 (Colo. 1995), for the proposition that the rate cap statute is a legislative restriction placed on the Commission's discretion. The facts in *Heiserman* are inapposite to this case. In *Heiserman,* the United States District Court for the District of Colorado certified two issues to the Colorado Supreme Court: 1) whether joint and several liability may be imposed on two or more persons pursuant to § 13-21-111.5(4), C.R.S., where the alleged tortious act is based on negligence, gross negligence, negligence per se, breach of the fiduciary duty of due care, or breach of the fiduciary duty of loyalty, and 2) whether joint and several liability, pursuant to § 13-21-111.5(4), C.R.S., may be based upon evidence of a course of conduct from which a tacit agreement to act in concert may be implied. While *Heiserman* employs principles of statutory construction, it does not stand for the proposition for which it is cited by the OCC.

In addition, the OCC's analysis focuses on the wrong question. In the area of utility regulation, the PUC has broadly based authority to do whatever it deems necessary or

convenient to accomplish the legislative functions delegated to it. *Mountain States Tel. & Tel. Co. v. PUC*, 195 Colo. 130, 576 P.2d 544 (1978). Its power and authority stem from Article XXV of the Colorado Constitution and § 40-3-102, C.R.S., as interpreted by this Court. Article XXV was added to the state constitution by majority vote of qualified electors in November 2, 1954. *See* 1954 Colo. Sess. Laws, pp. 693-694. It provides:

> In addition to the powers now vested in the General Assembly of the State of Colorado, all power to regulate the facilities, service and rates and charges therefor, including facilities and service and rates and charges therefor within home rule cities and home rule towns, of every corporation, individual, or association of individuals, wheresoever situate or operating within the State of Colorado, whether within or without a home rule city or home rule town, as a public utility, as presently or as may hereafter be defined as a public utility by the laws of the State of Colorado, is hereby vested in such agency of the State of Colorado as the General Assembly shall by law designate.
>
> Until such time as the General Assembly may otherwise designate, said authority shall be vested in the Public Utilities Commission of the State of Colorado; provided however, nothing herein shall affect the power of municipalities to exercise reasonable police and licensing powers, nor their power to grant franchises; and provided, further, that nothing herein shall be construed to apply to municipally owned utilities.

Section 40-3-102, C.R.S., provides:

> The power and authority is hereby vested in the public utilities commission of the state of Colorado and it is hereby made its duty to adopt all necessary rates, charges, and regulations to govern and regulate all rates, charges, and tariffs of every public utility of this state to correct abuses; to prevent unjust discriminations and extortions in the rates, charges, and tariffs of such public utilities of this state; to generally supervise and regulate every public utility in this state; and to do all things,

> **whether specifically designated in articles 1 to 7 of this title or in addition thereto**, which are necessary or convenient in the exercise of such power, and to enforce the same by the penalties provided in said articles through proper courts having jurisdiction; except that nothing in this article shall apply to municipal natural gas or electric utilities for which an exemption is provided in the constitution of the state of Colorado, within the authorized service area of each such municipal utility except as specifically provided in section 40-3.5-102.

(Emphasis added.)

The seminal case on the Commission's power and authority under Article XXV is *Miller Bros., Inc. v. PUC*, 185 Colo. 414, 525 P.2d 443 (1974). This Court wrote:

> This is so because Colo. Const. Art. XXV has granted to the commission authority to issue certificates of public convenience and necessity...This is a legislative function (citation omitted) and, until the General Assembly restricts it, the commission has as much authority as the legislature possessed prior to the adoption of Article XXV in 1954.

This statement has been quoted, cited, explained and relied on by this Court in the long line of cases which followed *Miller Bros.*[3] As interpreted by this Court, all legislative authority possessed by the General Assembly prior to 1954 to regulate the facilities, service and rates of public utilities was vested in the Commission upon the adoption of Article XXV to the

[3] See e.g., *Haney v. PUC*, 194 Colo. 481, 574 P.2d 863 (1978); *Mountain States Tel. & Tel. Co. v. PUC*, 195 Colo. 130, 576 P.2d 544 (1978); *Aspen Airways, Inc. v. Rocky Mountain Airways, Inc.*, 196 Colo. 285, 584 P.2d 629 (1978); *Mountain States Legal Foundation v. PUC*, 197 Colo. 56, 590 P.2d 495 (1979); *Colorado Municipal League v. PUC*, 197 Colo. 106, 591 P.2d 577 (Colo. 1979); *Peoples Natural Gas Division of Northern Natural Gas. Co. v. PUC*, 626 P.2d 159 (Colo. 1981); *City of Montrose v. PUC*, 629 P.2d 619 (Colo. 1981); *Colorado Ute Electric Assoc., Inc. v. PUC*, 760 P.2d 627 (Colo. 1988); *Mountain States Tel. & Tel. Co .v. PUC*, 763 P.2d 1020 (Colo. 1988). *Accord Mountain View Electric Assoc., Inc. v. PUC*, 686 P.2d 1336 (Colo. 1984); *Public Service Co. v. PUC*, 644 P.2d 933 (Colo. 1982); *GTE Sprint Communications Corp. v. PUC*, 753 P.2d 212 (Colo. 1988).

Colorado Constitution in 1954. The power and authority of the PUC to regulate the facilities, service and rates of public utilities is subject to restriction by the General Assembly by specific statutory enactment. Unless there is a specific statutory provision restricting the Commission's power and authority in the area of public utility regulation, the Commission has as much legislative power and authority as the General Assembly possessed prior to 1954. Thus, if one is attempting to determine whether the Commission has authority to do a particular act and there is no statutory provision circumscribing the Commission's actions, the Commission would have the same authority as the legislature would have had to do the act.

In this case, the Commission's ability to determine that the rate cap statute does not apply to residential basic local exchange service when bundled with other services does not depend on whether there was a specific statutory provision permitting the Commission to do so. Rather, the Commission's ability to do so depends on whether there is a specific statutory provision prohibiting the Commission's interpretation. As the following analysis demonstrates, there is no such restriction.

2. The Rate Cap Statute Applies to Residential Basic Local Exchange Service as a Stand-Alone Service.

The rate cap statute requires, with limited exceptions, that the price for residential basic local exchange service be maintained at the levels in effect on May 24, 1995. As pertinent here, the rate cap statute states:

> Consistent with the public interest goal of maintaining affordable and just and reasonably priced basic local

> telecommunications service for all citizens of that state, **the commission shall structure telecommunications regulation to achieve a transition to a fully competitive telecommunications market with the policy the prices for residential basic local exchange service, including zone charges, if any, do not rise above the levels in effect on May 24, 1995, for comparable service; except that the price of such service may be adjusted by an amount equal to the change in the United States gross domestic product price index minus an index that represents telecommunications productivity changes as determined by the commission.** This adjustment shall be granted only to the extent the commission determines an adjustment is required to cover reasonable costs and shall not exceed five percent in any one year. The commission shall not allow prices for residential basic service plus zone charges to increase outside base rate areas by an amount greater than any price increase within base rate areas.

(Emphasis added.)

Section 40-15-102(3), C.R.S. (2000), defines basic local exchange service in the following manner:

> "Basic local exchange service" or "basic service" means the telecommunications service which provides a local dial tone and local usage necessary to place or receive a call within an exchange area and any other services or features that may be added by the commission under section 40-15-502(2).

This Court's primary task in construing a statute is to ascertain, and to give effect to, the intent of the General Assembly. *People v. District Court*, 713 P.2d 918, 921 (Colo. 1986). Constructions which defeat the obvious legislative intent should be avoided. *People v. District Court, supra* at 921. To discern that intent, a court should look first to the language of the statute. *Id.* Words and phrases should be given effect according to their plain and ordinary meaning. *Id.* If the language is clear and the intent appears with

reasonable certainty, there is no need to resort to other rules of statutory construction. *Id.* When the legislature speaks with exactitude in a statute, the Supreme Court must construe it to mean that inclusion or specification of a particular set of conditions necessarily excludes the others. *Lunsford v. Western States Life Insurance*, 908 P.2d 79, 84 (Colo. 1995); *see also Harper v. San Luis Valley Regional Medical Center*, 848 F.Supp. 911, 913 (D.Colo. 1994); *People v. Young*, 339 P.2d 672 (Colo. 1959); *People v. Campbell*, 885 P.2d 327, 329 (Colo.App. 1994); *Truck Ins. Exchange v. Home Ins. Co.*, 841 P.2d 354, 357 (Colo.App. 1992).

The plain language of the rate cap statute is clear: the rate cap applies only to prices for residential basic local exchange service, including zone charges, if any. § 40-15-502(3)(b)(I), C.R.S. There is nothing in the statute that mandates application of the rate cap when residential basic local exchange service is offered in a package which includes other services. As the OCC acknowledges on page 5 of its Opening Brief, the NOW Plan is a bundled service.

The Commission found the rate cap statute was silent on this issue of bundling. R. 000888. The district court found the statutory language unambiguous but silent on the issues of bundled services and non-recurring charges. Opening Brief, Appendix B, p. 3. What the OCC is asking this Court to do is to read into the plain language of the rate cap statute the requirement that the rate cap applies to residential basic local exchange service when it is offered in conjunction with (bundled with) other services. The rate cap statute does not

contain that requirement. In order to give the statute the interpretation urged by the OCC, this Court would have to rewrite the statute. This Court should decline to do so.

3. The Rate Cap Statute Contemplates the Commission's Interpretation.

In imposing the rate cap, the General Assembly employed the term "*residential basic local exchange service.*" The NOW Plan offers a service of which residential basic local exchange service is a component part and not the entire offering. The NOW Plan includes residential basic local exchange service, plus toll blocking, initiation of service, prepayment, change and termination of service at payment centers. R. 000883. The non-NOW Plan is an offering for bald residential basic local exchange service. R. 000883. An examination of NOW's tariffs, R. 000038, establishes that, if the NOW Plan is purchased, a customer may not simply select residential basic local exchange service and choose not to pay for the toll blocking and other non-telephone services. Rather, a customer may purchase either the entire bundle of services offered as the NOW Plan or the non-NOW Plan, which is a separate offering. The statutory rate cap applies to one service: residential basic local exchange service or, in this case, the non-NOW Plan. The rate cap does *not* apply to other methods by which customers may obtain access to residential basic local exchange service as part of a bundle of other services.

The Commission and the district court correctly interpreted the rate cap statute, and the district court's order should be affirmed.

4. The Commission Did Cot Create an Exception to the Rate Cap Statute.

The OCC next argues that the Commission's interpretation of the rate cap statute results in an exception to the statute that the Commission is not authorized to create. The OCC asserts that, since the rate cap statute already contains certain exceptions to the mandatory rate cap,[4] the General Assembly did not authorize the Commission to create an additional exception by interpreting the statute so as not to apply when residential basic local exchange service is offered as part of a package of services. Opening Brief, pp. 12-13.

The OCC misconstrues the effect of the Commission's interpretation. The rate cap identifies the only kind of telephone service which is subject to the rate cap: residential basic local exchange service. As the OCC acknowledges on page 13 of its Opening Brief, the statute is silent concerning the bundling of residential basic local exchange service with other services. Since the statute does not expressly require application of the rate cap to residential basic local exchange service when it is bundled with other services, the Commission's interpretation does not create an exception. Rather, it is the OCC's interpretation – that the mandatory rate cape applies whether residential basic local exchange service is offered either as a stand-alone service or as part of a package of services – that creates an exception where

[4] As identified by the OCC, the exceptions created by the General Assembly allow the prices of basic service to rise up to five percent (5%) in any one year if the Commission determines that the increase is necessary to cover reasonable costs, § 40-15-502(3)(b)(I), C.R.S.; to recover a provider's Commission-approved cost of investment in network upgrades made for the purpose of provisioning residential basic service, § 40-15-502(3)(b)(III), C.R.S.; and to cover the cost and account for the inclusion of additional elements in the definition of basic

none exists. When a statute specifies particular situations in which it is to apply, it should generally be construed as excluding from its operation all other situations not specified. *People v. Campbell,* 885 P.2d at 329.

5. The Commission Appropriately Relied on Rule 17.1.14.

In Decision No. C99-310, the Commission stated:

> The issue becomes whether the rate cap has any meaning left if we do not apply it to bundled services. The question cannot be answered in isolation. We look first to the Rules Regulating Telecommunications Service Providers and Telephone Utilities, specifically, 4 *Code of Colorado Regulations* ("CCR") 723-2-17.1.14:
>
> > At a minimum, all telecommunications service providers shall offer Basic Local Exchange Service (as defined in this Rule) by itself as a separate tariff offering. This provision does not preclude the telecommunications provider from also offering Basic Local Exchange Service packaged with other services.
>
> Through this rule we require that all providers, including NOW, provide basic local exchange service, and that simple basic local exchange service is subject to the rate cape set out in Section 40-15-502 (3)(b)(I), C.R.S. The offering of a bundled service in addition does not affect the offering of basic service or the applicable rate cap. What NOW proposes to offer is an alternative, a choice to the consumer who cannot meet the legitimate credit requirements of the basic offering. That choice is the NOW Plan, a grouping of services to meet a specialized need.

R. 000888-889.

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service as a result of the triennial review of this definition by the Commission pursuant to § 40-15-502(2), C.R.S.

The OCC argues that the Commission's reliance on Rule 17.1.14, 4 CCR 723-2,[5] is misplaced because the language of the rule addresses only how basic service must be offered, not the prices of the service, and that the rule does not provide a basis for excepting residential basic local exchange service in a package form. Opening Brief, p. 14. The Commission disagrees.

The OCC is correct in that Rule 17.1.14 does not address *prices* of packaged services; however, on its face, it contemplates the *packaging* of services. And, as noted above, the rate cap statute is silent as to packaged services. The Commission's reliance on Rule 17.1.14 in reaching its decision that the statutory rate cap does not apply to bundled services was appropriate.

6. In Approving the NOW Plan, the Commission Did Not Price Each Component Separately.

The OCC next argues that the Commission's interpretation of the rate cap statute is in error because the rate cap statute restricts the price of residential basic local exchange service, not the price of a package containing that service. Opening Brief, pp. 14-15. The OCC asserts that if residential basic local exchange service is a component of any package, then the price for that service within the package are subject to the rate cap.[6] Opening Brief, p. 15.

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[5] A copy of Rule 17.1 is attached hereto.

[6] The OCC cites *Re Basic Telephone Service*, 202 PUR 4th 74 (Oregon Public Utilities Commission, May 19, 2000) in support of this argument. However, this case is not controlling in Colorado.

In essence, what the OCC is arguing is that each component of a package must be priced separately. The Commission addressed and rejected the OCC's argument in Decision No. C99-474, finding:

> The OCC and dissent urge an alternate construction of the rate cap statute, where the Commission would break out each component of a bundle of services and allocate a price to each. The rate cap statute can plausibly be construed both ways. Nevertheless, for the policy and statutory construction reasons stated in the Order Granting Exceptions, the majority ruled that the NOW Plan did not violate the rate cap.

R. 000948.

The Commission addressed the policy and statutory construction principles in support of its interpretation in its Order Granting Exceptions, Decision No. C99-310, as follows:

> 4. This is a matter of statutory interpretation. The rate cap is found in the statutory section setting forth the "Expression of State Policy" for telecommunications. The legislature's expression of state policy includes, among other things, that this Commission shall: "structure telecommunications regulation to achieve a transition to a fully competitive telecommunications market." § 40-15-503(3)(B)(I). In addition, the legislature directs the Commission to: "require the furtherance of universal basic service;" § 40-15-502(3)(a), and remove barriers to entry in the provision of telecommunications service, § 40-15-502(7). Thus, the Commission's charge is to advance three principles: affordable service, universal service and competition.
>
> 5. In this instance, the three principles are in conflict: competition and universal service are forwarded by allowing NOW into the market with its proposed tariffs; affordability is hindered because of the risk-premium that NOW demands to service this niche market. The OCC and the ALJ elected to elevate the value of affordability; the staff and NOW ask us to forward the equally laudable goals of universal service and competitive entry.

> 6. The legislature did not give us clear textual guidance about which goal takes precedence. As the OCC notes, "the rate cap statute is silent on the issue of bundling." OCC Consolidated Response at 4. Nevertheless, we can discern the respective consequences of the various interpretations put forward.
>
> 7. If we construe the rate cap to apply to "bundled" service, then we would be hindered from creating a regulatory structure to promote competition and universal service. Whenever a statute presents such, seemingly, contradictory mandates it must be construed, if possible, to give meaning to all facets of the legislative directives. If we accept the construction urged by NOW and staff that the rate cap does not apply to bundled services, we are able to meet the goals of service and competition demanded by the statute.

R. 000887-888.

In reaching its decision, the Commission was balancing the legislatively declared but competing state policy goals of removing barriers to entry in the provision of telecommunications service, promoting competition, and furthering universal service. In this case, the Commission found the goals in conflict, and the Commission was faced with weighing the goals. The Commission's decision to promote the goals of universal service and competition above affordable service is logical, consistent with legislative intent, and within the Commission's sound discretion. This is precisely the type of *policy* decision (*i.e.*, balancing and deciding among and between available choices and courses of action) which is the province of the Commission. *Public Service Co. v. Trigen-Nations Energy Co.*, 982 P.2d at 322. So long as the Commission's decision and interpretation are reasonable, the Court may not substitute its judgment for that of the Commission. *Public Service Co. v. PUC*, 765

P.2d at 1019. The OCC's position in this case is untenable because, as shown, the Commission reasonably interpreted the statute and applied its judgment to weigh and to accomplish the legislatively-mandated goals.

In addition, the Commission employed price allocation as a rate making function. R. 000948. Adoption of the OCC's argument would require this Court to order the Commission to employ a specific kind of rate making, different from the one the Commission adopted in this case. Ratemaking is a legislative function delegated to the Commission. Colo. Const. art. XXV; *Silverado Communication Corp. v PUC*, 893 P.2d 1316, 1319 (Colo. 1995); *Integrated Network Services, Inc. v. PUC, supra at* 1377. Any semblance of judicial ratemaking must be avoided. *PUC v. District* Court, 527 P.2d 233, 243 (Colo. 1974); *Mountain States Tel. & Tel. Co. v. PUC*, 491 P.2d 582, 586 (Colo. 1971). This Court must decline to direct the PUC in its rate making function.

7. The OCC's Analyses of Qwest's and NOW's Tariffs are Flawed.

In further support of its decision, the Commission stated:

> c. "Basic service" is the "availability of high quality, minimum elements of telecommunications services, as defined by the commission, at just and reasonable rates." Section 40-15-502(2), C.R.S. (1998). This includes local dial tone and local usage necessary to place calls within the local exchange area. Section 40-15-102(3), C.R.S. (1998). Additional elements of basic local exchange service, added by the Commission, are set forth at 4 *Code of Colorado Regulations* ("CCR") 723-2-17. This is the package of minimum elements to which the rate cap applies.

> d. For services above and beyond this basic service package, the rate cap does not apply. This construction of the statute is consistent with the way the Commission treats pricing of advanced services when added to basic service. Advanced services--such as call forwarding, caller ID, and call waiting--are all priced at levels far-exceeding their actual cost. Yet the Commission does not find that a bundle of basic service plus advanced services violate the rate cap, or demand that the advanced services be priced closer to cost. Tacitly, then, the Commission has always interpreted the rate cap statute to preserve only the default right to basic service at the rate cap price. Beyond that, for bundled service exceeding the rate cap, the Commission relies on competitive pressure to induce competitive local exchange market and to restrain prices for "bundled services."

R. 000948-949.

The OCC argues that the Commission's rationale that it has tacitly approved offerings that include residential basic local exchange service as part of a bundled service at prices above the rate cap has no basis in fact in the record. To support its argument, the OCC presents an analysis of Qwest's tariffs relating to its CustomChoice® offering, and then applies the analysis to NOW's tariffs. Based on this analysis, the OCC reaches the conclusion that the NOW Plan exceeds the statutory rate cap. Opening Brief, pp. 15-19.

As part of its argument, the OCC requests that this Court take judicial notice of Qwest's tariffs pursuant to C.R.E. 201(f). While it may be appropriate for this Court to take judicial notice of Qwest's tariffs in some instances, the OCC's application of Qwest's tariffs in its argument is not appropriate. The tariffs are not part of the underlying record in this case and are those of a company which is not a party to this case. If this Court accepts the

OCC's analysis of Qwest's tariffs as a basis for finding that the NOW Plan exceeds the statutory rate cap, it would be required to conduct fact finding that is inappropriate on appeal.

For example, and without limitation, the OCC asserts:

> 1. "Since a customer must pay the prepaid surcharge[7] to obtain residential basic service in the NOW Plan, **the prepaid surcharge must be considered part of the price of the residential service within the NOW Plan and that price, approximately $34.71 per month, illegally exceeds the rate cape.**" Opening Brief, p. 17. (emphasis added).
>
> 2. "Alternatively, starting with the NOW Plan package price of $36.50 and **subtracting the separate service price of toll restriction, $2.00, the remaining $34.50 covers the price of residential basic service and the prepaid surcharge. Again, since a customer cannot purchase the services covered by the prepaid surcharge separately, the prepaid surcharge must be considered part of the price for residential basic service under the Plan. This price, $34.50, illegally exceeds the rate cap.**"

Opening Brief, pp. 17-18. (emphasis added).

Adopting the OCC's analysis of Qwest's tariffs as applied to the NOW Plan would require this Court to make the following factual findings, among others: a) the prepaid surcharge is part of basic residential local exchange service and that the price exceeds the rate cap; b) the component pieces of the NOW Plan are separately priced; c) the separate service price of toll restriction is $2.00; and d) the remaining amount of the NOW Plan's

[7] The term "prepaid administrative surcharge" is used to identify the price for the non-telephone services, bundled in the NOW Plan, which include marketing, advertising, and payment center costs. *See* R. 000945.

price is part of the price of residential basic local exchange service, and that price exceeds the rate cap.

In reaching its decision, the Commission made none of the above findings. Rather, as previously set forth, the Commission determined that the rate cap statute did *not* require separate pricing of the component pieces of the NOW Plan. Further, the Commission viewed the prepaid surcharge as a service *in addition* to residential basic local exchange service, and that both components compromise the NOW Plan package. The Commission's findings of fact are binding on judicial review. § 40-6-115(2), C.R.S. Courts are not permitted to find facts on judicial review. This Court must accept the Commission's findings.

While this Court's review of the Commission's decisions is this case is *de novo*, the Commission's interpretation of its own statutes and rules are entitled to deference. *Powell v. PUC, supra* at 613 (Colo. 1998); *Integrated Network Services v. PUC, supra.* Further, as set forth in Section I.B.7 above, the Commission applied price allocation as a ratemaking function, well within the sound discretion given to the Commission by the legislature. As with the OCC's argument in Section I.B.7, if the Court accepts the OCC's argument here, the result would be this Court directing the Commission's rate making function and substituting its judgment for that of the Commission. Consistent with the authorities cited in Section I.B.7, this Court must avoid any semblance of judicial rate making. Furthermore, the substantial weight of case law weighs against this Court substituting its judgment for the Commission's. *See e.g. CF&I Steel, L.P. v. PUC,* 949 P.2d 577, 585 (Colo. 1997);

Colorado-Ute Elec. v. PUC, 760 P.2d at 641; *Public Service Co. v. PUC,* 765 P.2d at 1019. This Court should decline to adopt the OCC's argument.

The OCC's analysis of Qwest's and NOW's tariffs is also facially flawed. As noted in Section I.B.6 above, a review of NOW's tariffs indicate that the components of the NOW Plan are in fact inseparably bundled. In contrast, a review of Qwest's tariffs reveal that the components of its CustomChoice ® offering are separately priced. Given this fundamental difference in the pricing of the service offerings of Qwest and NOW, a comparison between the two is comparing apples to oranges and any conclusions reached by the comparison are invalid.

Finally, the OCC's argument impliedly requires all telecommunications providers to offer their service in the same manner as Qwest and requires the Commission to measure all services provided by all other telecommunications providers by Qwest's yardstick. This approach is antithetical to the basic premise of introduction of competition: customer choice. The Commission properly looked only at services offered by NOW without regard to what other providers were or were not doing. The Commission's approach encourages competition, development of different service offerings, and customer choice. This Court should reject the OCC's approach.

8. The NOW Plan is a New Bundled Service.

The OCC also argues that considering the prepaid surcharge part of residential basic local exchange service is supported by statute. In making this argument, the OCC relies on

the language of §§ 40-15-102(19) and 40-15-401(e), C.R.S. (2000). Opening Brief, p. 18.

Section 40-15-102(19), C.R.S., states:

> "New products and services" means any new product or service introduced separately or in combination with other products and services after January 1, 1998, which is not functionally required to provide basic local exchange service and any new product or service which is introduced after January 1, 1988, which is not a repackaged current product or service or a direct replacement for a regulated product or service. Repackaging any product or service deregulated under part 4 of this article with any service regulated under part 2 or 3 of this article shall not be considered a new product or service.

Section 40-15-401(1)(e), C.R.S., states:

> (1) The following products, services, and providers are exempt from regulation under this article or under the "Public Utilities Law" of the State of Colorado"
>
> * * * * *
>
> (e) New products and services other than those included in the definition of basic local exchange service...

The OCC does not contend that the services included in the prepaid surcharge are included in the definition of "basic local exchange service" found in § 40-15-102(3), C.R.S., or added by the Commission pursuant to § 40-15-502(2), C.R.S. Nor are the services included in the prepaid surcharge found in Rule 17.1, 4 CCR 723-2, which identifies the minimum services and capabilities which a local exchange provider is required to include in its provision of basic local exchange service. Furthermore, the OCC does not contend that the services included in the prepaid surcharge are functionally required to provide basic local

exchange service. Thus, the prepaid surcharge represents a new bundled service, which is not subject to the statutory rate cap. However, the NOW Plan remains subject to the Commission's jurisdiction because it is comprised of residential basic local exchange service inseparably bundled with a new service.

9. The Commission and the District Court Correctly Found that the Rate Cap Statute Does Not Apply to Non-Recurring Charges for Installation of Residential Basic Local Exchange Service.

The OCC argues that both the Commission and the district court erred because inclusion of installation charges in the prices capped by the rate cap statute derive from the definition of basic service. Opening Brief, p. 20. The OCC is incorrect.

The plain language of the rate cap statute applies the rate cap only to residential basic local exchange service. *See* § 40-15-502(3)(b)(I), C.R.S. Pursuant to § 40-15-102(3), C.R.S., basic service is defined as "a local dial tone line and local usage necessary to place or receive a call." Pursuant to Rule 17.1, 4 CCR 723-2, line connection/installation is not identified as a minimum element of the services or facilities required to provide basic local exchange service. Therefore, it is erroneous to conclude, as the OCC did, that charges for installation can be derived from the prices capped in the rate cap statute.

The OCC also urges that because the legislature used the term "prices" in the rate cap statute, the term should be construed as encompassing more than just the recurring charge for residential basic service. Opening Brief, p. 20. It argues that an installation charge is a component of residential basic local exchange service that *should* be subject to the rate cap.

Through its own argument, the OCC concedes that the rate cap statute does not expressly identify installation charges as being subject to the rate cap. Once again, the OCC inappropriately urges this Court to rewrite the rate cap statute to add language that does not currently appear.

The Commission held that the non-recurring charges for a bundled service are not subject to the rate cap any more than bundled services are. R. 000892. The district court upheld the Commission, holding that that the Commission's "interpretation of governing statutes is entitled to considerable deference because of their 'unique expertise' in regulating public utilities." Opening Brief, Appendix B, p. 4. For the same reasons, this Court should affirm the district court's holding on this issue as well.

II

THIS COURT LACKS AUTHORITY TO ORDER THE REMEDY SOUGHT BY THE OCC.

The OCC requests that this Court set aside the Commission's decisions and remand the case to the Commission with instructions to order the Commission to require NOW to make refunds of all overcharges paid by its customers. Opening Brief, pp. 21-22. As fully set forth in Section I.A above, pursuant to § 40-6-115(3), C.R.S., a court's authority on judicial review is limited to affirming, setting aside, or modifying the Commission's decision. Consistent with the authorities set forth in Section I.A, if this Court determines that the Commission erred in its interpretation of the rate cap statute, this Court must return the

matter to the Commission with directions to address the issue. The Court, however, may not itself make a determination on the issue and may not direct the Commission to reach a particular result with respect to the issue. These functions are exclusively within the Commission's domain.

CONCLUSION

The Commission and the district court correctly interpreted § 40-15-502(3)(b)(I), C.R.S., by holding that the statutory rate cap did not apply to residential basic local exchange service when it is part of bundled service. When the OCC asks this Court to set aside the district court's order and to order the Commission to require NOW to make refunds of all overcharges paid by its customers, the OCC is asking this Court to make a determination on the issues and direct the Commission to reach a specific result. For the reasons fully set forth above, this Court may not do so. The Commission respectfully requests that this Court affirm the district court's order.

Respectfully submitted this 2nd day of April, 2001.

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RULE (4 CCR) 723-2-17. BASIC TELEPHONE SERVICE STANDARD.

723-2-17.1 Basic Service Standard. As part of its obligation to provide adequate Basic Local Exchange Service, each LEC shall construct and maintain its telecommunications network so that the instrumentalities, equipment and facilities within the network shall be adequate, efficient, just and reasonable in all respects in order to provide to each of its customers within its jurisdictional service area with the following services or capabilities:

723-2-17.1.1 Individual Line Service or its functional equivalent constructed and maintained to meet the general parameters and characteristics of Rule 2-18;

723-2-17.1.2 Voice Grade Access (as that term is defined in Rule 2-2.51) to the public switched network;

723-2-17.1.3 Dual tone multifrequency signaling capability or its functional equivalent on the local access line;

723-2-17.1.4 Facsimile and data transmission capability with the public switched network when the customer uses modulation/demodulation devices rated for such capability, in particular, the capability to transmit two-way communications between a person using a telecommunications device or other nonvoice terminal device and a person using other customer premise equipment within the bandwidth of Voice Grade Access (as that term is defined in Rule 2-2.51);

723-2-17.1.5 Local Usage. Each LEC shall construct and maintain sufficient message path capacity to meet the requirements of Rule 2-21.1.1;

723-2-17.1.6 Access to Emergency Services;

723-2-17.1.7 Access to Toll Services: Any telecommunications service provider granted authority to serve in an area in which the incumbent telecommunications service provider has provided the capability for a customer to presubscribe to different MTS providers for the use of 1+ dialing capability shall also provide that capability to all customers served in such area;

723-2-17.1.8 Customer Billing; to the extent described in Rule 10;

723-2-17.1.9 Public Information Assistance to the extent described in Rule 11;

723-2-17.1.10 Access to Operator Services;

723-2-17.1.11 White page directory listing as described in Rules 12.1 and 12.2;

723-2-17.1.12 Access to directory assistance and intercept to the extent described in Rule 12.3;

723-2-17.1.13 In the event of a commercial power failure, the telecommunications service provider shall provide a minimum of four hours of backup power (or battery reserve) rated for peak traffic load requirements from the telecommunications service provider's power source to the network interface in landline (coaxial, fiber, or copper) applications in order to support existing basic service to lines that utilize a traditional ringer. A mobile power source shall be available which can be delivered and connected within four hours. Additional battery reserve capacity beyond the four hour minimum shall be provided based on the consideration of the following local conditions:

(a) reasonable travel time (the time from personnel call-out through arrival at the facility);

(b) time for procuring and transporting the portable engine to the site, placing it in position, and connecting it to the load;

(c) number of sites serviced by one engine (commercial power failures may simultaneously affect more than one facility); and

(d) frequency and duration of past commercial power failures; and

723-2-17.1.14 At a minimum, all telecommunications service providers shall offer Basic Local Exchange Service (as defined in this Rule) by itself as a separate tariff offering. This provision does not preclude the telecommunications service provider from also offering Basic Local Exchange Service packaged with other services.

723-2-17.2 Universal Service Availability Standard. In order to maintain a reasonable uniformity between all localities in the state for adequate Basic Local Exchange Service in the ordinary course of its business pursuant to its certificate of public convenience and necessity, each LEC shall construct and maintain its telecommunications network so as to provide for universal (*i.e.* ubiquitous) availability of the following services or capabilities when requested by a customer within its jurisdictional serving area:

723-2-17.2.1 The basic service standard defined in Rule 17.1;

723-2-17.2.2 E911 service, either by providing the necessary facilities and identification (name/number, etc.) information to a basic emergency service provider or as

provided by the LEC under Rules Prescribing the Provisions of Emergency Reporting Services for Emergency Telecommunications Service Providers and Telephone Utilities, 4 CCR 723-29 shall be available to any governing body upon request; and

723-2-17.2.3 Services to which the customer may voluntarily subscribe:

723-2-17.2.3.1 Services that deny access to MTS;

723-2-17.2.3.2 Services that deny access to other information service providers; and

723-2-17.2.3.3 Services that are defined as "Toll Limitation" services (see Rule 2-2.49.1).

723-2-17.3 Local Calling Area Standards.

Local calling areas as established by the Commission shall meet the community of interest or incremental extended service standards. Any telecommunications service provider that is granted authority to offer basic local exchange service in an exchange, or for any portion thereof, for which the Commission has previously established a Local Calling Area meeting the standards of Rule 17.3 shall provide at least one option to its customers that includes that same local calling area, unless modified by order of the Commission.

723-2-17.3.1 Principles. In general, and to the extent possible, each local calling area or an incremental extended service area should:

723-2-17.3.1.1 allow customers to place and receive calls without payment of a toll charge to 9-1-1, their county seat, municipal government, elementary and secondary school districts, libraries, primary centers of business

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within ANSWER BRIEF OF THE COLORADO PUBLIC UTILITIES COMMISSION upon all parties herein by depositing copies of same in the United States mail, postage prepaid, at Denver, Colorado, this 2nd day of April, 2001, addressed as follows:

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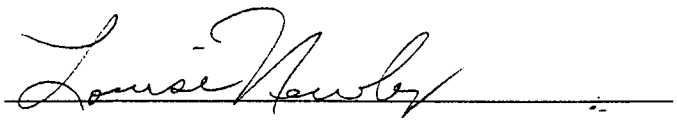

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