

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 09R-845T

IN THE MATTER OF THE PROPOSED RULES REGULATING FINING OF
TELECOMMUNICATIONS PROVIDERS, 4 CODE OF COLORADO
REGULATIONS 723-2 UNDER HOUSE BILL 08-1227.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
KEN F. KIRKPATRICK
ADOPTING RULES**

Mailed Date: April 27, 2010

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I. BY THE COMMISSION**A. Statement**

1. The Colorado Public Utilities Commission (Commission) issued its Notice of Proposed Rulemaking (NOPR) regarding its Rules Regulating Telecommunications Providers, Services, and Products, 4 *Code of Colorado Regulations* 723-2 in Decision No. C09-1302.

2. The NOPR proposed changes to the Commission's rules necessitated by the passage of House Bill 08-1227 (the bill).

3. The bill adds, *inter alia*, § 40-7-113.5 and § 40-7-116.5, C.R.S. The bill became effective on July 1, 2008.

4. The bill's amendment of Article 7 of Title 40 of the *Colorado Revised Statutes* applies to telecommunications utilities. Under the bill, the Commission was granted authority to issue civil penalties to certain public utility service providers including electric, gas, water, water and sewer, and telecommunications service providers.

5. The Commission's existing rules for telecommunications utilities were established in Docket No. 03R-524T. Various sections of these rules have been amended in Dockets Nos. 05R-538T, 05R-527T, 05R-528T, 06R-316T, 05R-529T, and 06R-495T.

6. The basis and purpose of the proposed amendments is to revise the current telecommunications rules to add rules regarding fining of telecommunications utilities.

7. The statutory authority for the proposed rules is found in §§ 29-20-108, 40-1-103.5, 40-2-108, 40-2-115, 40-3-102, 40-3-103, 40-3-104.3, 40-3-111, 40-3-114, 40-3-101, 40-4-101, 40-4-106, 40-4-108, 40-4-109, 40-5-103, 40-7-117, 40-8.7-105(5), 40-7-113.5, and 40-7-116.5, C.R.S.

8. New rules have been added to establish the fining process and to list the finable rules.

9. Rule 2009 is added to define civil penalty, civil penalty assessment, civil penalty assessment notice, and intentional violation as used in the proposed fining rules.

10. Rule 2010 is added to identify regulated telecommunications utility violations, civil enforcement, and enhancement of civil penalties.

11. Rule 2895 is added to list the specific violations and fine amounts.

12. The proposed amendments were published in the December 10, 2009, edition of *The Colorado Register*.

13. The matter was set for a hearing on February 4, 2010 in a Commission Hearing Room in Denver, Colorado.¹ At the assigned time and place the undersigned Administrative Law Judge (ALJ) called the matter for hearing. At the conclusion of the hearing the ALJ extended the comment period until February 19, 2010.

14. In accordance with § 40-6-109, C.R.S., the ALJ now transmits to the Commission the record of the proceeding along with a written recommended decision.

II. DISCUSSION

A. **Intent, Safe Harbor, and Right to Cure**

15. Section 40-7-113.5, C.R.S., authorizes the Commission to assess civil penalties and is at the base of this rulemaking. Subsection (a) of that section provides that a public utility furnishing telecommunications service “that **intentionally** violates any provision of articles 1 to

¹ A joint hearing was held in Dockets Nos. 09R-847G (fining of gas utilities); 09R-846E (fining of electric utilities); 09R-848W (fining of water and combined water and sewer utilities); and 09R-845T (fining of telecommunications utilities). While the hearing record is common to all four proceedings, each docket has an individual record which includes filings unique to that docket.

7...of this title or of any rule or order of the commission pursuant to such articles, which provision is applicable to such utility, may be assessed a civil penalty of not more than two thousand dollars; except [exceptions not relevant]” [emphasis added]. Commenters noted that the proposed rules do not capture the intent element from the statute. They proposed adding such an element, and that suggestion will be adopted.

16. Some commenters proffered a definition of intent from Decision No. R07-678 and suggest that the rules incorporate a version of it. That Decision dealt with the Commission’s fining authority in the transportation area, which arises from § 40-7-113, C.R.S., some portions of which contain language very similar to that in § 40-7-113.5, C.R.S.² However, the definition suggested will not be adopted. That definition focuses too much on awareness and knowledge. It seems to suggest that a person must have actual, subjective knowledge of a rule before the person can intentionally violate the rule. This is not the case. All persons are charged with knowledge of the Commission’s Rules. It is not a defense to an allegation that someone violated a rule that the person had not read the rule and was unaware of it. Intent describes the mental state that accompanies an action. As stated in the Colorado Criminal Code, “A person acts ‘intentionally’ or ‘with intent’ when his conscious objective is to cause the specific result proscribed by the statute defining the offense.”³ This definition of intent with slight modification will be adopted in the Rules.

² See, e.g., § 40-7-113(1)(g), C.R.S.

³ Section 18-1-501(5), C.R.S.

17. Several commenters suggested that the Commission include a “safe harbor” provision in the fining rules. One set of comments described the operation of a such a provision as follows:

As stated above, the Companies believe that the rules should clearly reflect the statutory requirement that civil penalties may only be imposed for *intentional* violations. However, the Companies believe that the rules should go even further—and prevent the imposition of significant financial penalties in instances where a good faith difference of opinion is at issue regarding the meaning of the Public Utilities Law, a Commission rule, or a Commission Order. A “safe harbor” is a provision of a statute or regulation that reduces or eliminates a party’s liability under the law, on the condition that the party performed its actions in good faith.⁴

18. At hearing, several commenters agreed with a suggestion from the ALJ that the addition of the intent element accomplishes much of what a safe harbor provision is intended to accomplish. The ALJ does not believe that an additional safeguard such as a safe harbor provision is warranted. First, there is no mention of any such provision in the statute; the Commission would be creating it out of thin air. Second, the ALJ is not convinced that there are sufficient circumstances falling into the “intentional, but in good faith” category that such a provision presupposes to warrant the defense. Finally, if such a circumstance did present itself, it would be a factor to be considered as set out in Rule 1302(b) of the Commission’s Rules of Practice and Procedure. Rule 1302(b) sets forth factors to guide the Commission in its imposition of a civil penalty, which include:

(I) The nature, circumstances, and gravity of the violation; (II) The degree of the respondent’s culpability; (III) The respondent’s history of prior offenses; (IV) The respondent’s ability to pay; (V) **Any good faith efforts by the respondent to achieve compliance and to prevent future similar violations;** (VI) The effect on the respondent’s ability to continue in business; (VII) The size of the business

⁴ Joint Initial Comments of Public Service Company of Colorado and Black Hills/Colorado Electric Utility Company LP, p. 8. Verizon Telecom filed a copy of these Comments in this Docket with its Post-Hearing Comments on February 19, 2010. Thus they are part of the record in this proceeding.

of the respondent; and (VIII) Such other factors as equity and fairness may require.

[Emphasis added.]

The combination of this Rule and the intent requirement provide sufficient protection to the utility, and no safe harbor provision is adopted.

19. In a similar vein, some commenters have requested that a right to cure be added to the proposed rules, or alternatively, that the Commission use all of the procedures outlined in Rule 1302(h) of the Rules of Practice and Procedure. This procedure would allow a utility a period of time, perhaps 30 days after receipt of a notice of a proposed formal complaint or fine, to cure the alleged violations. However, the Commission has seldom used the procedure under Rule 1302(h), and its implementation has proved to be troublesome.⁵ That may perhaps be due to the broader scope of remedies available under complaints issued under Rule 1302(h). The fining rules should provide an enforcement mechanism that is procedurally fair and more streamlined, especially given its limited range of remedies.

B. Procedural Guidance in Rules

20. Many comments noted the lack of procedural guidelines contained in the rules. For example, Proposed Rule 2010 refers generally to the requirements of § 40-7-116.5, C.R.S., but it does not explicitly mention the utility's rights to notice, hearing, and having the violations proven against it by a preponderance of the evidence, which are set forth in §§ 40-7-116.5(1)(a) and (d), C.R.S. Commenters differ in the degree to which they would like to see procedural guidelines incorporated into the Rules. This is an ongoing issue that the Commission faces in many rulemakings, namely, to what extent should statutory language be repeated in the

⁵ See Docket No. 10F-011G, a complaint under Rule 1302(h), where the Respondent filed, among other pleadings, a motion for extension of time to file for rehearing, reargument, or reconsideration of the Commission Order initiating the complaint. The fining rules are intended to avoid those types of procedural complications.

Commission's rules implementing those statutory provisions. One commenter argued that since the fining rules are totally new, rather than a modification of existing rules, more explication in the rules is warranted. The ALJ has attempted to pick a middle ground that references these rights but does not unnecessarily expand the rules.

C. Grouping of Violations by Fine Amount

21. Commenters almost unanimously disliked the aggregation of all violations into one group, with the fine amount being stated only as up to the maximum of \$2000. Some commenters suggested that this did not comport with the statutory charge to the Commission in § 40-7-113.5(2)(a), C.R.S., to adopt rules "...specifying the particular violations, and the amount of the civil penalties to be assessed for each violation..." The ALJ agrees that it is better to have a graduated schedule of fines, with the more serious violations being subject to larger penalties. The rules adopted place the finable rules in four categories, with maximum fines of \$2000, \$1000, \$500, and \$100 in each of the respective categories.

D. Finable Rules

22. Commenters complained that the list of finable rules was faulty in that it listed too many rules that did not appear to impose mandatory duties on utilities, or it included inappropriate portions of rules, such as those listing the content of applications. The ALJ agrees that finable rules should contain a mandatory duty.⁶ He has generally attempted to go one level down in the numbering system of the rules in determining which of the proposed rules would

⁶ This includes conditional, mandatory duties where a utility may not have to act, but once it chooses to act it must comply with the mandate.

stay in and which would be deleted. In narrowing down the list of finable rules, the undersigned has utilized the following principles (not without some exceptions):

- There should be no fines for incomplete applications. That can be addressed through other means, such as deeming the application incomplete or denying the application.
- Rules that are definitions have been eliminated.
- Rules that are essentially affirmative defenses have been eliminated.
- Rules that do not impose a mandatory duty have been eliminated. This includes several rules that were written in the passive voice.
- Rules that were addressed to jurisdictional entities that are not public utilities were eliminated.⁷ Some rules that cover both utilities and non-utilities remain, but only the utility is subject to fines.

E. Staff Manual

23. Commission Staff (Staff) testified at the hearing that it was in the process of preparing a document that it would use for internal guidance in issuing civil penalty assessment notices. The document may contain ministerial business rules, such as what the civil penalty assessment notice actually looks like, how long it is, where the signature blocks are located, and similar details. No commenters expressed serious interest in these types of business rules. However, the manual may also contain guidelines such as whether a warning violation will be issued before an actual civil penalty assessment notice is served on a utility. Several commenters expressed strong interest in these types of provisions. Some suggested that such a Staff manual constituted rulemaking.⁸

⁷ The Colorado Telecommunications Association (CTA) proposed that the rules explicitly cover a much broader class of entities. *See* CTA's Initial Comments, pp. 4-7. However, the Commission's authority under § 40-7-113.5, C.R.S., is initially limited to assessing penalties against public utilities; the statute then provides for additional exemptions from the imposition of civil penalties. Other statutory provisions provide for additional exemptions, but they are not enumerated in the Rules.

⁸ *See, e.g.,* Supplemental Comments of Cbeyond Communications, LLC, Level 3 Communications, LLC, and tw telecom of Colorado, llc, p.2.

24. The ALJ disagrees with the suggestion that such a manual constitutes rulemaking. The rules as adopted in this proceeding clearly state to whom they apply, what conduct is subject to fines, and what the maximum fines can be. The factors to be evaluated when determining the amount of a fine are also set out in Commission Rules.⁹ This is not a situation where a decision by the Commission to assess a penalty would be based on any criteria outside of the rules. The manual may help Staff determine when and if to initiate a proceeding by serving a civil penalty assessment notice. But the manual would not, indeed, could not, be used in making the ultimate determination of whether there had been a rule violation subject to a civil penalty and what such a penalty should be.

F. Repeat Violations

25. Section 40-7-113.5(3), C.R.S., states, “If any public utility receives a second civil penalty assessment for a violation of the same statute, rule, or order within one year after the first violation, the civil penalty assessed for the second violation shall be no greater than twice the amount specified by rule for such violation.” Similarly, § 40-7-113.5(4), C.R.S., states, “If any public utility receives more than two civil penalty assessments for violation of the same statute, rule, or order within one year, the civil penalty assessed for each such subsequent violation shall be no greater than three times the amount specified by rule for such violation.”

26. The proposed rules as noticed were somewhat unclear as to how these provisions would be implemented. The ALJ has adopted suggested language from one of the commenters to clarify how these provisions will be utilized.

⁹ See the discussion above of Rule 1302(b) of the Commission’s Rules of Practice and Procedure.

G. Assessment Notice vs. Assessment

27. Some comments appeared to confuse the roles of the Staff¹⁰ in issuing a civil penalty assessment notice, and the role of the Commission in assessing a civil penalty. When Staff issues a civil penalty assessment notice under the proposed rules, it is simply a notice that Staff is seeking a penalty because it reasonably believes that it can prove by a preponderance of the evidence that the respondent utility violated the stated rule or requirement. If the utility does nothing, the civil penalty assessment notice (CPAN) “constitutes a complaint to appear before the commission.”¹¹ The CPAN is merely an allegation or group of allegations that the utility did not comply with certain Commission Rules or requirements. At hearing, if Staff proves its case by a preponderance of the evidence, the Commission would make a finding to that effect and could then assess the utility a civil penalty, in accordance with the factors mentioned above.

28. 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 attached to this Order as Appendix A are adopted.
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.

¹⁰ Section 40-7-116.5, C.R.S., authorizes “The director of the commission or his or her designee..” to issue the notices.

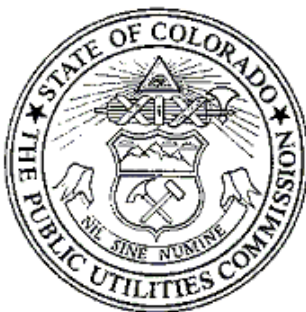
¹¹ Section 40-7-116.5(1)(d), C.R.S.

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)



ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

KEN F. KIRKPATRICK

Administrative Law Judge

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 09R-845T

IN THE MATTER OF THE PROPOSED RULES REGULATING FINING OF
TELECOMMUNICATIONS PROVIDERS, 4 CODE OF COLORADO REGULATIONS 723-2
UNDER HOUSE BILL 08-1227.

**ORDER LIFTING STAY, DENYING EXCEPTIONS,
AND ADOPTING RULES**

Mailed Date: July 9, 2010

Adopted Date: June 23, 2010

I. BY THE COMMISSION

A. Statement

1. The Commission initiated this proceeding on November 23, 2009 by issuing a Notice of Proposed Rulemaking (NOPR) regarding its Rules Regulating Telecommunications Providers, Services, and Products, 4 *Code of Colorado Regulations* (CCR) 723-2. By Decision No. C09-1302, we stated that the basis and purpose of the rulemaking proceeding was to make changes to the Commission's rules necessitated by the passage of House Bill 08-1227 (the bill). The bill adds, *inter alia*, § 40-7-113.5 and § 40-7-116.5, C.R.S., giving the Commission the statutory authority for the proposed rules.

2. We assigned this proceeding to an Administrative Law Judge (ALJ) and scheduled a hearing by Decision No. C09-1302. The hearing took place on February 4, 2010.

3. Comments in this proceeding were filed by: NE Colorado Cellular, Inc. d/b/a Viaero Wireless; the Colorado Telecommunications Association; Verizon Telecom and Verizon Wireless, collectively; Qwest Corporation; Cbeyond Communications, LLC, Level 3 Communications, LLC, and TW Telecom of Colorado, LLC, collectively; AT&T

Communications of the Mountain States, Inc., TCG Colorado and AT&T Mobility, LLC, collectively; and the Office of Consumer Counsel. The hearing in this matter was held simultaneously with the hearings for the proposed fining rules in the electric, gas, and water and combined water and sewer industries, Docket Nos. 09R-846E, 09R-847G, and 09R-848W respectively. Oral comments were provided during this hearing by the telecommunications, electric, and gas industries.

4. ALJ Ken F. Kirkpatrick issued his Recommended Decision Adopting Rules on April 27, 2010 (Decision No. R10-0386 or Recommended Decision).

5. We stayed the Recommended Decision and set a deadline for the filing of exceptions by Decision No. C10-0436, mailed on May 6, 2010.

6. On May 20, 2010, MCImetro Access Transmission Services LLC d/b/a Verizon Access Transmission Services and MCI Communications Services, Inc. d/b/a Verizon Business Services (collectively, Verizon) filed exceptions to the Recommended Decision. Verizon raises a number of arguments in its exceptions, which will be addressed in turn.

7. First, Verizon argues the rules, as approved by ALJ Kirkpatrick, provide no meaningful criteria or guidance regarding the nature of a violation of a rule or the amount of the civil penalty that should be assessed. Verizon contends fining rules must contain additional specificity regarding what conduct constitutes a violation of a rule and the amount of the civil penalty for each violation. In the absence of such detail, Verizon states the Commission will have unlawfully delegated its authority to the Director. The Commission disagrees. The rules set forth how regulated utilities shall act. The Commission need not identify every possible way in which those rules could be violated in order to utilize its authority to issue fines. The Commission therefore rejects this argument presented in Verizon's exceptions.

8. Second, Verizon states the Commission should reject ALJ Kirkpatrick's definition of "intentional violation." The definition utilized by ALJ Kirkpatrick states, "A person acts 'intentionally' or 'with intent' when his conscious objective is to cause the specific result proscribed by the statute, rule or order defining the violation." In contrast, Verizon argues a violation is intentional "when a person is fully aware of a requirement or restriction and nonetheless commits an act, or fails to act, and that act or omission violates the requirement or restriction." Verizon's preferred definition comes from Decision No. R07-0678, in Docket No. 07G-207EC, in which an ALJ adopted this language as the standard for an intentional violation. In support of this definition, the ALJ cited to paragraph 24 of Decision No. C00-1075, Docket No. 99K-590CP, where the Commission stated,

Therefore, it is clear that Dashabout had notice since December 19, 1997 that its interpretation of its CPCN was not reasonable, and was fully aware that the subject transportation service encompassed by the CPANs was not authorized under its CPCN. Yet, fully cognizant of this information, Dashabout nonetheless offered the service it knew was not authorized under its CPCN. As such intent exists for its violation of § 40-10-104, C.R.S.

The Commission does not believe it adopted a definition of intentional violation in Decision No. C00-1075. Nor would it be bound to any such previously adopted definition. *See Public Service Co. of Colo. v. Public Util. Comm'n*, 26 P.3d 1198, 1205 (Colo. 2001) ("The Commission's decision making power is not limited by *stare decisis* when a reasonable basis exists to depart from a previous decision."). The Commission finds the definition utilized by ALJ Kirkpatrick is preferable to Verizon's proffered alternative, as it is more in line with the traditional legal understanding of intent. As such, this portion of Verizon's exceptions is rejected.

9. Third, Verizon proposes the following "clarifying" change to rule 2000, 4 CCR 723-2:

All rules in this Part 2, the “2000” series, shall apply to all telecommunications service providers, and to all Commission proceedings and operations concerning providers, unless a specific statute or rule provides otherwise. *RULES 2009, 2010 AND 2895 APPLY ONLY TO PUBLIC UTILITY PROVIDERS OF “REGULATED TELECOMMUNICATIONS SERVICES” AS DEFINED IN C.R.S. § 40-15-102(24) AND DO NOT APPLY TO PROVIDERS OF “DEREGULATED TELECOMMUNICATIONS SERVICES” AS DEFINED IN C.R.S. § 40-15-102(6).* Other applicability provisions are found in various subchapters of this Part 2.

The Commission finds this proposed change does little to clarify but would seemingly exempt Verizon from any fine. The Commission finds such an exemption would be inappropriate, and therefore rejects this proposed change.

10. Finally, Verizon argues the rules, as approved by ALJ Kirkpatrick, will encourage costly litigation rather than expedited compliance with the rules. In support of this argument, Verizon states the proposed fines are too large, and that warning notices should be included in any adopted fining rules. Currently, the rules identify maximum fines for various violations, and do not include a mandatory notice provision. The Commission is not persuaded by Verizon’s characterization of these portions of the proposed fining rules, and will reject this argument. Therefore, Verizon’s exceptions are denied in whole.

11. However, we do make some changes to the rules on our own motion. Rule 2009 adds the definitions for civil penalty, civil penalty assessment, civil penalty assessment notice, and intentional violation. We have revised the definitions for civil penalty, civil penalty assessment, and civil penalty assessment notice to match the definitions in the rules adopted by the recommended decision in Docket 09R-847G regarding the fining rules for gas utilities.

12. We have also reformatted the tables of finable offenses to make them consistent with the tables adopted by the recommended decision in Docket No. 09R-846E regarding the fining rules for electric industry.

II. ORDER

A. The Commission Orders That:

1. The stay of Decision No. C10-0436 is hereby vacated.
2. The Exceptions filed by MCImetro Access Transmission Services LLC d/b/a Verizon Access Transmission Services and MCI Communications Services, Inc. d/b/a Verizon Business Services are denied.
3. The Commission adopts a modification to the rules attached to Recommended Decision R10-0356 consistent with the above discussion. The Commission adopts the rules attached to this Order as Attachment A.
4. The rules shall be effective 20 days after the publication in the Colorado Register by the Office of the Secretary of State. (The rules shall be effective August 30, 2010 if published in the August 10, 2010 edition of the *Colorado Register* by the Office of the Secretary of State.)
5. The opinion of the Attorney General of the State of Colorado shall be obtained regarding the constitutionality and legality of the rules.
6. A copy of the rules adopted by the Order shall be filed with the Office of the Secretary of State for publication in the Colorado Register. The rules shall be submitted to the appropriate committee of the Colorado General Assembly if the General Assembly is in session at the time this Order becomes effective, or for an opinion as to whether the adopted rules conform with § 24-4-103, C.R.S.

7. The 20-day time period provided by § 40-6-114(1), C.R.S. to file an application for rehearing, reargument, or reconsideration shall begin on the first day after the effective date of this Order.

8. This Order is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
June 23, 2010.**

(S E A L)



ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

RONALD J. BINZ

JAMES K. TARPEY

MATT BAKER

Commissioners