Decision No. R21-0681

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 21R-0394T

IN THE MATTER OF PROPOSED AMENDMENTS TO RULES IN 4 CODE OF COLORADO REGULATIONS 723-2 IMPLEMENTING SB 21-154 REGARDING THE CREATION OF A STATEWIDE 9-8-8 SURCHARGE.

RECOMMENDED DECISION OF ADMINISTRATIVE LAW JUDGE STEVEN H. DENMAN ADOPTING RULES

Mailed Date: November 4, 2021

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I. BY THE COMMISSION

A. Statement

1. On August 18, 2021 by Decision No. C21-0515, the Colorado Public Utilities Commission (Commission) issued a Notice of Proposed Rulemaking (NOPR) to amend the Rules Regulating Telecommunications Services and Providers of Telecommunications Services contained in 4 *Code of Colorado Regulations* (CCR) 723-2-2800 through 2819, and 2010 (9-8-8 Rules).

2. The changes proposed were reflective of the changes to Colorado statute enacted in Senate Bill (SB) 21-154. The proposed rules were included as Attachments A and B to Decision No. C21-0515. Comments from interested parties were encouraged, with initial comments were due by September 20, 2021 and responsive comments were due by September 28, 2021.

3. Two sets of initial comments were received. They were from Bresnan Broadband of Colorado, LLC and Time Warner Cable Information Services (Colorado), LLC (collectively Charter); and CTIA – The Wireless Association (CTIA).

4. On September 28, 2021, response comments were received from the Colorado Office of the Utility Consumer Advocate (UCA). On October 1, 2021, UCA filed Supplemental Comments with proposed language for revisions to the proposed rules.

5. Pursuant to the notice in Decision No. C21-0515, a public rulemaking hearing was held on October 5, 2021. Oral comments were presented by counsel for UCA.

B. Legal Standards for Rulemaking

6. In rulemaking it is particularly important for the Commission to follow faithfully, the requirements of the State Administrative Procedure Act (APA), § 24-4-103, *et seq.*, C.R.S.

When an agency fails to comply with the requirements of the APA in adopting rules and regulations, the rules and regulations are void and not enforceable. *Home Builders Association v. Public Utilities Comm'n.*, 720 P.2d 552 (Colo. 1986); *Jefferson School District R-1 v. Division of Labor*, 791 P.2d 1217 (Colo. App. 1990); *see also, Colorado Office of Consumer Counsel v. Mountain States Tel. & Tel. Co.*, 816 P.2d 278, 284 (Colo. 1991).

7. The APA, § 24-4-103(4)(b), C.R.S., provides in part that:

> (b) . . . No rule shall be adopted unless:
>
> (I) The record of the rule-making proceeding demonstrates the need for the regulation;
>
> (II) The proper statutory authority exists for the regulation;
>
> (III) To the extent practicable, the regulation is clearly and simply stated so that its meaning will be understood by any party required to comply with the regulation;
>
> (IV) The regulation does not conflict with other provisions of law; and
>
> (V) The duplication or overlapping of regulations is explained by the agency proposing the rule.

8. Moreover, in adopting any rules, the Commission must be mindful that its regulatory powers have been restricted by the Colorado General Assembly (General Assembly), and only the General Assembly can change statutory restrictions on the Commission's regulatory authority. This principle of Colorado public utilities law is commonly known as the *Miller Brothers* Doctrine, after *Miller Brothers v. Public Utilities Comm'n.,* 185 Colo. 414, 525 P.2d 443, 451 (1974) (the Commission has as much authority as the General Assembly possessed prior to the adoption of Article 25 in 1954, until the General Assembly by statutory language restricts the legislative functions exercised by the Commission in regulating public utilities).

9. A discussion of the *Miller Brothers* Doctrine may be instructive here. While the Colorado Supreme Court (Court) has said that, under Article 25 of the Colorado Constitution,[1] the Commission has the legislative powers to regulate the facilities, service, and rates of public utilities,[2] the Court has often held that "the [Commission] does not have limitless legislative prerogative. … [B]y statute, the legislature may restrict the legislative authority delegated to the Commission."[3] Hence, the General Assembly can, and does, limit the Commission's exercise of its regulatory powers, and Commission orders entered in excess of those limitations are void.[4] Significantly, under the *Miller Brothers* Doctrine, the Commission lacks the power under Colorado law to enter orders or to enact rules that conflict with statutory restrictions upon its regulatory authority.

10. Finally, in any rulemaking proceeding, the Commission must adopt rules that provide administrative standards that are sufficient to ensure that administrative decision-making will be rational and consistent, that accomplish the necessary protections from arbitrary action,

[1] Article 25 of the Colorado Constitution states in relevant part:

> … [A]ll power to regulate the facilities, service and rates and charges therefor, including facilities and service and rates and charges therefor, … of every corporation, individual, or association of individuals, wheresoever situate or operating within the State of Colorado, … as a public utility, presently or may as hereafter be defined as a public utility by the laws of the State of Colorado, is hereby vested in … the Public Utilities Commission of the State of Colorado…."

Colo. Const., Art. 25.

[2] *See Mountain States Tel. & Tel. Co. v. Public Utilities Comm'n.,* 195 Colo. 130, 576 P.2d 544 (1978).

[3] *City of Montrose v. Public Utilities. Comm'n.,* 629 P.2d 619, 622 (Colo. 1981).

[4] *See, e.g., Colorado Office of Consumer Counsel v. Mountain States Tel. & Tel. Co.*, 816 P.2d 278, 283 (Colo. 1991) [specific statutory provisions regulating public utilities act to restrict the Commission's authority]; *Peoples Natural Gas v. Public Utilities Comm'n.,* 626 P.2d 159, 162 (Colo. 1981) [once the Legislature acts, the scope of the Commission's authority and procedures is necessarily controlled by statute]; *Mountain States Legal Foundation v. Public Utilities Comm'n.,* 197 Colo. 56, 590 P.2d 495 (1979) [special gas rates for low income customers are rejected because the Commission's authority to order preferential utility rates to effect social policy has been restricted by legislative enactment].

and that will make available effective judicial review of the Commission's proceedings and decisions.[5]

C. Senate Bill 21-154

11. On October 17, 2020, the United States Congress passed the "National Suicide Hotline Designation Act of 2020," which designates 9-8-8 as the number for the National Suicide Prevention Lifeline to aid rapid access to suicide prevention and mental health support services. On June 28, 2021, Governor Jared Polis signed SB 21-154, which provides for the implementation of 9-8-8 as the number for crisis response services in Colorado, creates the 9-8-8 Crisis Hotline Enterprise (Enterprise) within the Department of Human Services, and provides for the creations, collection, and remittance of 9-8-8 surcharges through the addition of §§ 27-64-101-103 and 40-17.5-101 to 40-17.5105, C.R.S., and an amendment to § 24-75-402, C.R.S. The Enterprise is governed by a Board of Directors appointed by the Governor, pursuant to § 27-64-103(3), C.R.S. The statutes enacted in SB 21-154 became effective on September 7, 2021.

12. Effective January 1, 2022, the Enterprise shall impose a 9-8-8 surcharge on service users, "in an amount to be established annually by the enterprise, in collaboration with the public utilities commission, but not to exceed thirty cents per month per 988 access connection…."[6]

13. In addition to numerous other requirements related to the establishment, funding, and administration of the Enterprise and the 9-8-8 Crisis Hotline, SB 21-154 first directs the

[5] *Cottrell v. City & County of Denver*, 636 P.2d 703 (Colo. 1981).

[6] *See* § 27-64-103(4)(a), C.R.S.

Commission, on behalf of the Enterprise, to collect the 9-8-8 surcharge from service suppliers.[7] Second, SB 21-154 directs the Commission to promulgate rules for such remittances and for audits of service suppliers relating to the collection and remittance of 9-8-8 surcharges.[8] Many of SB 21-154's requirements relating to remittance and audit processes are similar to those contained in § 29-11-103, C.R.S., which requires remittance and audit processes for the 9-1-1 Statewide Surcharge, and which were included in the rulemaking recently concluded in Proceeding No. 21R-0099T.[9]

D. Proposed Changes to Rules

14. An overview of the changes proposed by the Commission fell into four general categories. Interested persons were invited to comment on the proposed rule additions and revisions and to provide additional suggested changes. As noted above, initial written comments were filed by Charter and CTIA, while response comments and supplemental comments were filed by UCA.

1. Rule 2801(b): Definition of 9-8-8 Access Connection

15. In its comments, Charter recommended that in these rules the Commission adopt the statutory definitions from SB 21-154 for terms, particularly for "988 access connection." The definition of "988 access connection" in proposed Rule 2801(b) is "any communications service that is enabled, configured, or capable of making 9-8-8 calls." However, in § 40-17.5-101(2), C.R.S., "988 access connection" is defined to mean:

> any communications service including wireline, wireless cellular, interconnected voice over internet protocol, or satellite in which connections are enabled, configured, or capable of making 988 Calls. '988 access connection' does not

[7] *See* § 40-17.5-102(1), C.R.S.

[8] *See* §§ 40-17.5-102(3)(a) and 40-17.5-103(5)(e), C.R.S.

[9] *See* Decision No. C21-0467 (issued on July 29, 2021) in Proceeding No. 21R-0099T. The amended 9-1-1 rules became effective on October 15, 2021.

> include facilities-based broadband services. The number of 988 access connections is determined by the configured capacity for simultaneous outbound calling. For example, for a digital signal-1 (DS-1) level service or equivalent that is channelized and split into separate channels for voice communications, the number of 988 access connections would be equal to the number of channels capable of making simultaneous calls.[10]

16. Charter asserts that the statutory definition is much more robust and that adopting it will remove any uncertainty as to whether the Commission's definition of "9-8-8 access connection" is the same as the statutory definition. In responsive comments, UCA concurred with Charter's recommendation.

17. The Administrative Law Judge (ALJ) also concurs with Charter's assertion and recommendation. Rule 2801(b) will be modified to mirror the statutory definition of "988 access connection" found in § 40-17.5-101(2), C.R.S.

2. Setting of the Surcharge Rate and Use of 9-8-8 Fees

18. Both UCA and CTIA suggest that the Commission should take a role in ensuring that 9-8-8 funds are only expended on eligible costs. CTIA argues that "9-8-8 fees should be limited to funding those benefits and services specifically identified by SB 21-154."[11] Similarly, UCA drew a parallel between the 9-8-8 surcharge and 9-1-1 surcharges and noted that the Federal Communications Commission (FCC) has adopted a rule to address past issues related to the diversion of 9-1-1 fees. In Supplemental Comments, UCA submitted a proposed rule to restrict the use of 9-8-8 fees for specific purposes.[12] CTIA argued that, for instance, 9-8-8 funds should not be expended on mobile crisis support teams or intervention and follow-up services.[13]

[10] SB 21-154, Section 2 at p. 8.

[11] CTIA Comments at p. 3.

[12] UCA Supplemental Comments at pp. 1 and 2.

[13] CTIA Comments at pp. 3 and 4.

19. The threshold issues here are whether the Commission has the statutory authority to regulate the 9-8-8 Enterprise Board's setting of the 9-8-8 surcharge and to regulate how 9-8-8 surcharge funds are expended.

20. The ALJ disagrees with CTIA's assertion that 9-8-8 surcharge funds should not be spent on mobile crisis teams, intervention, or follow-up services, based on clear language in the statute. Section 27-64-104(3), C.R.S., states that "the enterprise may expend money from the [9-8-8 Crisis Hotline Enterprise] fund for the purposes outlined in section 27-64-103 (4)(c) and (4)(d)." Section 27-64-103(4)(c), C.R.S., states that one of the "primary powers and duties" of the Enterprise is, "*As required by Subsection (5)* of this section, [to] fund the 9-8-8 crisis hotline to provide intervention services and crisis care coordination to individuals calling the 988 crisis hotline.…" [emphasis added]. Finally, § 27-64-103(5), C.R.S., provides that, on or before July 1, 2022, the Enterprise shall fund a nonprofit organization that shall engage in several activities, including "Deploy mobile response units and co-responder programs that are part of the behavioral health crisis response system, created pursuant to section 27-60-103, and coordinate access to crisis walk-in centers, as appropriate" and "Provide follow-up services to individuals accessing the 988 crisis hotline."[14]

21. Moreover, the ALJ disagrees, and finds, that the Commission has *not* been granted statutory authority to regulate the 9-8-8 Enterprise Board's setting of the 9-8-8 surcharge or the expenditure of 9-8-8 surcharge funds. The Commission has the authority and duty to receive 9-8-8 surcharge fund remittances, as provided in § 40-17.5-102, C.R.S., and the authority and duty to audit telecommunications service providers regarding the collection and remittance of the surcharge, as provided in § 40-17.5-103, C.R.S. The statutes enacted in SB 21-154

[14] *See* §§ 27-64-103(5)(a), 27-64-103(5)(b)(IV) and 27-64-103(5)(b)(V), C.R.S.

provide no supervisory or authoritative role for this Commission in setting the 9-8-8 surcharge rate or in the monitoring of how the 9-8-8 surcharge funds are expended.

22. Both CTIA and UCA acknowledge that the statute requires that both the 9-8-8 surcharge and the prepaid wireless 9-8-8 surcharge are set annually by the 9-8-8 Enterprise Board "in collaboration with" the Commission.[15] Nevertheless, CTIA and UCA argue that the Commission should play the dominate role in setting the 9-8-8 surcharges and ensuring that the 9-8-8 surcharges are reasonably calculated to fund only the 9-8-8 services contemplated by the statutes. UCA even proposes that these rules create a process *before the Commission* to set the annual 9-8-8 surcharges, in which interested persons could participate, request information (*i.e.*, conduct discovery), and provide comments on the level of the 9-8-8 surcharges.[16]

23. The ALJ finds and concludes that the process argued by CTIA and UCA, was well as the rule proposed by UCA, would institute an adjudicatory process before the Commission to establish the annual 9-8-8 surcharges. The ALJ also finds and concludes that the rule proposed by UCA would place the Commission in the dominate role in setting the 9-8-8 surcharges and ensuring that the 9-8-8 surcharges are reasonably calculated.

24. In interpreting SB 21-154 and the statutes enacted therein, the ALJ and the Commission must apply accepted rules of statutory construction. When interpreting a statute, the Commission's goal is to give effect to the intent of the General Assembly. The ALJ and the Commission must accord words and phrases their plain and ordinary meaning.[17] The ALJ and

[15] CTIA Comments at pp. 2 and 3; and UCA Response Comments at pp. 2 and 7. *See* §§ 27-64-103(4)(a) and 27-64-103(4)(b), C.R.S. SB 21-154 does not define what the General Assembly meant by the phrase "in collaboration with," nor does it explain the nature of the Commission's collaboration with the Enterprise Board.

[16] CTIA Comments at pp. 4 through 6; UCA Response Comments at pp. 6 through 8; and UCA Supplemental Comments at pp. 1 and 2.

[17] *People v. Padilla-Lopez*, 279 P.3d 651, 653 (Colo. 2012).

the Commission must examine the actual language the General Assembly has employed and reconcile any conflicts if possible.[18] The ALJ and the Commission cannot add words to a statute.[19] The ALJ and the Commission must avoid constructions that would render a part of a statute meaningless.[20]

25. Sections 27-64-103(4)(a) and 27-64-103(4)(b), C.R.S., require the Enterprise to establish both the 9-8-8 surcharge and the prepaid wireless 9-8-8 surcharge annually "in collaboration with the pPublic utilities commission." The *Oxford English Dictionary* defines collaboration as, "The action of working with someone to produce or create something." The plain and ordinary meaning of this phrase in these statutes clearly contemplates that the Enterprise Board will establish the annual 9-8-8 surcharges, while working with the Commission. The plain and ordinary meaning of the statutory language gives the Enterprise Board the dominant role of establishing the annual 9-8-8 surcharges and gives the Commission the secondary role of assisting the Enterprise Board in that task.

26. For the ALJ to interpret SB 21-154 as argued by CTIA and UCA would not only conflict with §§ 27-64-103(4)(a) and 27-64-103(4)(b), C.R.S., but would render those statutes meaningless by placing the Commission in a dominant role over the Enterprise Board in establishing the annual 9-8-8 surcharges.

27. It is also clear that SB 21-154 assigns limited duties to the Commission. First, §§ 27-64-103(4)(a) and 27-64-103(4)(b), C.R.S., require the Commission to collaborate with the Enterprise Board when the Enterprise establishes the 9-8-8 surcharge and the prepaid wireless 9-8-8 surcharge annually. Second, § 40-17.5-102(1), C.R.S., directs the Commission, on

[18] *Colorado Mining Assoc. v. Bd. of County Comm'rs of Summit County*, 199 P.3d 718, 733 (Colo. 2009).
[19] *Boulder County Bd. Of Comm'rs v. HealthSouth Corp.*, 246 P.3d 948, 951 (Colo. 2011).
[20] *Colorado Real Estate Comm'n v. Bartlett*, 272 P.3d 1099, 1102 (Colo. App. 2011).

behalf of the Enterprise, to collect the 9-8-8 surcharges from service suppliers. Third, § 40-17.5-102(3)(a), C.R.S., directs the Commission to promulgate rules to establish remittance procedures. Fourth, § 40-17.5-103(5)(e), C.R.S., directs the Commission to promulgate rules for audits of books and records of service suppliers relating to the collection and remittance of 9-8-8 surcharges and for appeal procedures.

28. Moreover, § 40-17.5-101(4), C.R.S., defines the "9-8-8 surcharge" or "surcharge" as "the 988 surcharge imposed by the 988 crisis hotline enterprise pursuant to section 27-64-103 (4)(a)," and § 40-17.5-101(9), C.R.S. uses similar language in defining the prepaid wireless 9-8-8 surcharge. Further, § 27-64-102(2), C.R.S., defines "charge" as "the 988 surcharge imposed by the enterprise pursuant to section 27-64-103 (4)(a) and the prepaid wireless 988 charge imposed by the enterprise pursuant to section 27-64-103 (4)(b)." None of these statutory definitions say the Commission's role is to impose or to establish the 988 surcharges. These statutory definitions are additional indications of legislative intent that the Enterprise is the primary actor in setting 9-8-8 surcharges.

29. When interpreting a statute, the ALJ and the Commission must presume that, when it enacted SB 21-154, the General Assembly knew the common law and the Court's judicial precedents related to the powers and regulatory authority of the Commission.[21] In interpreting SB 21-154, we must presume the General Assembly was aware of the *Miller Brothers* Doctrine and the Court's judicial precedents involving that Doctrine. The ALJ finds and concludes that, in enacting SB 21-154, the General Assembly limited the Commission's exercise of its regulatory powers and authority regarding the setting and imposition of the

[21] *Cooper v. People*, 973 P.2d 1234, 1239 (Colo. 1999) ("We presume that the General Assembly was familiar with our previous interpretations of statutes and with the common law when it enacted the statute in question."); *Vaughan v. McMinn*, 945 P.2d 404, 409 (Colo. 1997) ("The legislature is presumed to be aware of the judicial precedent in an area of law when it legislates in that area.").

9-8-8 surcharges. In SB 21-154, the General Assembly has restricted the Commission's powers and regulatory authority to the activities specified in § 40-17.5-102(1), C.R.S. (on behalf of the Enterprise, to collect the 9-8-8 surcharges from service suppliers), § 40-17.5-102(3)(a), C.R.S. (to promulgate rules to establish remittance procedures for 9-8-8 surcharges); and § 40-17.5-103(5)(e), C.R.S. (to promulgate rules for audits of books and records of service suppliers relating to the collection and remittance of 9-8-8 surcharges and for appeal procedures). By properly applying the *Miller Brothers* Doctrine, the ALJ finds and concludes that the Commission lacks the power and authority under Colorado law to enact rules that conflict with these statutory restrictions upon the Commission's regulatory authority. If the ALJ or the Commission were to adopt rules in excess of, or in conflict with, the statutory restrictions on the Commission's power and authority regarding setting 9-8-8 surcharges, such as the rule proposed by UCA, those rules would be void as a matter of law.[22]

30. The ALJ also notes that SB 21-154 allows the Commission to retain up to 4 percent of the 9-8-8 surcharges received by the Commission "for its direct and indirect costs of administering the collection and remittance of surcharges for the 988 crisis hotline, including costs related to conducting audits of service suppliers in accordance with section 40-17.5-103."[23] This provision is the only funding that SB 21-154 provides to the Commission related to the 9-8-8 surcharge, and it is limited to recovering actual costs for collecting the surcharge remittances from the service suppliers and conducting audits of those same service suppliers.

[22] *See, e.g., Colorado Office of Consumer Counsel v. Mountain States Tel. & Tel. Co.*, 816 P.2d 278, 283 (Colo. 1991) [specific statutory provisions regulating public utilities act to restrict the Commission's authority]; *Peoples Natural Gas v. Public Utilities Comm'n.,* 626 P.2d 159, 162 (Colo. 1981) [once the Legislature acts, the scope of the Commission's authority and procedures is necessarily controlled by statute]; *Mountain States Legal Foundation v. Public Utilities Comm'n.,* 197 Colo. 56, 590 P.2d 495 (1979) [special gas rates for low income customers are rejected because the Commission's authority to order preferential utility rates to effect social policy has been restricted by legislative enactment].

[23] *See* § 40-17.5-102(3)(c)(II), C.R.S.

The ALJ takes administrative notice of the facts that the Commission does not have staff qualified to analyze the proper use of funds for operating mental health crisis hotlines or any of the other purposes listed in § 27-64-103(5)(b), C.R.S.[24] Moreover, in SB 21-154 the General Assembly did not appropriate funds for additional personnel to take on this task. It is reasonable to conclude that the General Assembly would have appropriated funds for additional personnel to take on this task if it was its intent for the Commission to do so.

31. Finally, UCA makes a comparison between 9-8-8 surcharges and 9-1-1 surcharges, and notes that the topic of 9-1-1 fee diversion (the expending of 9-1-1 surcharge funds on purposes unrelated to 9-1-1) has been a topic of concern for the FCC. The ALJ notes that it has also been a topic of concern for the U.S. Congress (Congress), as Congress specifically directed the FCC to issue rules regarding 9-1-1 fee diversion in Section 902 of the Consolidated Appropriations Act of 2021.[25] However, the ALJ notes that this Commission was specifically tasked by statute to set the state 9-1-1 surcharge rate by § 29-11-102.3, C.R.S. No such explicit recognition of the Commission's authority is provided by SB 21-154 regarding setting the 9-8-8 surcharges.

32. For these reasons, the ALJ denies the requests from CTIA and UCA to include amendments to the proposed rules that would require the Commission to establish, approve, deny, or regulate the 9-8-8 surcharge rates set by the 9-8-8 Enterprise Board, which is solely the duty of the Enterprise Board pursuant to statutes enacted in SB 21-154. While the ALJ agrees that 9-8-8 surcharge funds should only be expended on eligible costs as enumerated by statute, the ALJ finds and concludes that the statutes enacted in SB 21-154 do not grant to the

[24] Rule 1501(c) of the Rules of Practice and Procedure, 4 CCR 723-1 (2020).

[25] *See* Public Law 116–260, Section 902 at H.R. 133-2025 through H.R. 133-2029 (December 27, 2020); *see also* 47 U.S.C. § 615a–1.

Commission, and in fact restrict, the power and authority to define eligible costs for which 9-8-8 surcharge funds can be spent.

3. Reporting Requirements for the 9-8-8 Enterprise Board

33. In its comments, the UCA notes that the 9-8-8 Enterprise Board is required by both federal code and Colorado statute to file reports with the FCC.[26] UCA suggests that the 9-8-8 Enterprise Board should be required to file reports annually with this Commission, as well. UCA fails to cite any Colorado statute that requires the Enterprise Board to file any reports with this Commission. Moreover, the ALJ is unaware of any Colorado statute, for example as enacted in SB 21-154, that grants the Commission the authority to impose such a reporting requirement on the 9-8-8 Enterprise Board. Indeed, no statute in SB 21-154 (or elsewhere) declares the 9-8-8 Enterprise Board to be a public utility subject to this Commission's regulatory jurisdiction.[27]

34. As UCA notes, § 27-64-105, C.R.S., imposes reporting requirements on the Department of Human Services (Department), which houses the 9-8-8 Enterprise Board, requiring the Department to provide reports to the Federal Substance Abuse and Mental Health Services Administration, the FCC, and to the General Assembly itself. If the General Assembly had intended that the Department or the 9-8-8 Enterprise Board itself should provide reports to the Commission, it likely would have stated so in § 27-64-105, C.R.S., or elsewhere in SB 21-154.

35. Furthermore, while the ALJ agrees that while transparency regarding the use of 9-8-8 surcharge funds is important, he concludes that sufficient transparency requirements have

[26] UCA Response Comments at pp. 5 and 6. *See* 47 U.S.C. § 251a(b); § 27-64-105, C.R.S.

[27] *See e.g.*, § 40-1-103, C.R.S., for the definition of "public utility" in the Colorado Public Utilities Law.

been set forth in SB 21-154 without the Commission promulgating rules, for which it has no legal authority, to impose further requirements. Apart from the reporting required to federal agencies and the General Assembly in § 27-64-105, C.R.S., SB 21-154 specifies that, "The enterprise is subject to the open meetings provisions of the 'Colorado Sunshine Act of 1972,' contained in part 4 of article 6 of title 24, and the 'Colorado Open Records Act,' part 2 of article 72 of title 24."[28] The members of the 9-8-8 Enterprise Board are appointed by the Governor, and the Enterprise Board is a public entity for purposes of the Public Securities Act.[29] The ALJ also notes that the 9-8-8 Enterprise Board posts online, its meeting announcements, minutes, and recordings of its meetings.[30]

36. For these reasons, the ALJ denies UCA's recommendation that the Commission require additional reporting from the 9-8-8 Enterprise Board.

II. CONCLUSIONS

37. Both CTIA and UCA acknowledged the importance of the 9-8-8 surcharges and 9-8-8 services to the State of Colorado and its residents. The ALJ agrees that the 9-8-8 surcharges and 9-8-8 services are critically important to the State of Colorado and its residents. CTIA stated that it "understands the vital importance of 9-8-8 as the number established by Congress for the National Suicide Prevention Lifeline to aid rapid access to suicide prevention and other crisis/mental health support services."[31] Likewise, UCA referred to 9-8-8 as a "vital resource to fight against suicide in our community and to provide critical mental

[28] *See* § 27-64-103(8), C.R.S.; § 27-64-103(9), C.R.S., also declares that the records of the Enterprise are public records as defined in § 24-72-202(6), C.R.S., of the Colorado Open Records Act.

[29] *See* §§ 27-64-103(3) and 27-64-103(10), C.R.S., respectively.

[30] *See* https://cdhs.colorado.gov/988-crisis-hotline-enterprise-board-of-directors

[31] CTIA Comments at p. 2.

health assistance."[32] The ALJ concurs, and concludes that it is for this reason, as well as to fulfill the Commission's statutory obligation to collect 9-8-8 surcharge funds beginning on January 1, 2022, that these rules should be implemented in as timely a manner as possible.

38. The ALJ finds and concludes that:

(I) The record of this rulemaking proceeding demonstrates the need for the Rules Regulating Telecommunications Services and Providers of Telecommunications Services adopted by and attached to this Recommended Decision (Adopted Rules).

(II) The proper statutory authority exists for the Adopted Rules.

(III) The Adopted Rules are clearly and simply stated so that their meaning will be understood by any party required to comply with the Adopted Rules.

(IV) The Adopted Rules do not conflict with other provisions of law, and the Adopted Rules are consistent with Colorado law.

(V) The Adopted Rules do not duplicate or overlap any existing Commission regulations.

39. The Adopted Rules also correct a few minor typographical errors that appeared in the proposed rules attached to the NOPR.

III. ORDER

A. The Commission Orders That:

1. The Rules Regulating Telecommunications Services and Providers of Telecommunications Services, 4 *Code of Colorado Regulations* 723-2, are adopted, consistent with the discussion, findings, and conclusions in this Recommended Decision.

[32] UCA Response Comments at p. 9.

2. The adopted rules are attached to this Recommended Decision in legislative/strikeout format as Attachment A, and in final format attached as Attachment B. The adopted Rules are available through the Commission's Electronic Filing system at:

https://www.dora.state.co.us/pls/efi/EFI.Show_Docket?p_session_id=&p_docket_id=21R-0394T

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

4. If this Recommended Decision becomes a Commission Decision, the relevant rules are adopted on the date the Recommended Decision becomes a final Commission Decision.

5. Consistent with § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the participants and their counsel, if any, who may file exceptions to it.

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

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

6. 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

STEVEN H. DENMAN

Administrative Law Judge

COLORADO DEPARTMENT OF REGULATORY AGENCIES

Public Utilities Commission

4 *CODE OF COLORADO REGULATIONS* (CCR) 723-2

PART 2

RULES REGULATING TELECOMMUNICATIONS SERVICES AND PROVIDERS OF TELECOMMUNICATIONS SERVICES

* * * *

[indicates omission of unaffected rules]

PROGRAMS

~~**2800. – 2819. [Reserved[.**~~

9-8-8 Surcharge

Basis, Purpose, and Statutory Authority

The basis and purpose of these rules is to prescribe the process for the collection and remittance of 9-8-8 surcharge funds and to establish the procedures for the conducting of audits of service providers' practices regarding the collection, payment, and remittance of 9-8-8 surcharges.

The statutory authority for the promulgation of these rules is found at §§ 40-17.5-102 and 103, C.R.S.

2800. Applicability.

Rules 2801 through 2803 apply to 9-8-8 originating service providers.

2801. Definitions.

(a) "9-8-8" means the three-digit abbreviated dialing code used to report a behavioral health crisis.

(b) "9-8-8 access connection" means any communications service including wireline, wireless cellular, interconnected voice over internet protocol, or satellite in which connections are enabled, configured, or capable of making 988 calls. "988 access connection" does not include facilities-based broadband services. The number of 988 access connections is determined by the configured capacity for simultaneous outbound calling. for example, for a digital signal-1 (ds-1) level service or equivalent that is channelized and split into separate channels for voice communications, the number of 988 access connections would be equal to the number of channels capable of making simultaneous.

(c) "9-8-8 crisis hotline enterprise" or "enterprise" means the enterprise created in § 27-64-103, C.R.S., created to provide intervention services and crisis care coordination to individuals calling the 9-8-8 crisis hotline, and other purposes.

(d) "9-8-8 originating service provider" (9-8-8 OSP) means a local exchange carrier, wireless carrier, Voice-over-Internet-Protocol service provider, or other provider of functionally equivalent services to any customer in the state that includes the ability to place 9-8-8 calls.

(e) "9-8-8 surcharge" means the charge established by § 40-17.5-102, C.R.S. and imposed by the enterprise on originating service providers that provide 9-8-8 access connections.

(f) "Enterprise" means the 9-8-8 Crisis Hotline Enterprise created by § 27-64-103.

(g) "Prepaid wireless 9-8-8 charge" means the charge established by § 40-17.5-104, C.R.S. and imposed by the enterprise on sellers of prepaid wireless telecommunications service.

2802. Administration of the 9-8-8 Crisis Hotline Cash Fund.

(a) This rule does not apply to 9-8-8 access connections provided via prepaid wireless telecommunications services. The 9-8-8 surcharge is a statewide surcharge applied to all 9-8-8 access connections in the state of Colorado, and is separate from the wireless prepaid 9-8-8 charge pursuant to § 27-64-103(4)(b), C.R.S.

(b) Annually prior to October 1, the Commission shall collaborate with the Enterprise to assist the Enterprise in its establishment of the 9-8-8 surcharge rate and prepaid wireless 9-8-8 charge rate, including but not limited to providing the Enterprise with relevant information regarding number of statewide 9-8-8 access connections and prepaid wireless transactions. After the Enterprise's annual establishment of the 9-8-8 surcharge rate to take effect on the following January 1, the Commission will publish the 9-8-8 surcharge rate on its website and notify 9-8-8 originating service providers at least 60 days prior to the effective date of the surcharge.

(c) 9-8-8 surcharge.

(I) Effective January 1, 2022, all 9-8-8 originating service providers shall collect and remit the 9-8-8 surcharge assessed upon each service user whose primary service address, if known, or billing address, if service address is unknown, is within the state of Colorado. The surcharge shall be assessed on each 9-8-8 access connection provided to that service user. Such charges shall be collected monthly and remitted as directed by the Commission using the combined surcharge remittance form.

(II) With respect to multi-line telephone systems, the number of 9-8-8 access connections is determined by the configured capacity for simultaneous outbound calling.

(III) The 9-8-8 surcharge must be listed separately or on the same line as the 9-1-1 surcharge established in § 29-11-102.3, C.R.S. If combined, the line item must be listed as "state 911 and 988 surcharges".

(IV) The 9-8-8 surcharge is the liability of the service user and not the 9-8-8 originating service provider, except that the 9-8-8 originating service provider is liable to remit all

9-8-8 surcharges that the originating service provider collects from service users. An originating service provider is liable only for the portion of the 9-8-8 surcharge collected until it is remitted to the Commission. The amount remitted by the 9-8-8 originating service provider must reflect the sate 9-8-8 surcharges actually collected on the number of 9-8-8 access connections provided in Colorado by the 9-8-8 originating service provider.

(V) Each 9-8-8 originating service provider may retain from the total 9-8-8 surcharges collected and timely remitted, a vendor fee in the amount of one percent of the total monthly charges collected by such provider.

(VI) Each 9-8-8 originating service provider shall remit the 9-8-8 surcharge amount the provider collected for the previous month, less the applicable vendor fee, no later than the last day of the following month. If the last day of the month is a legal holiday, then the remittance shall be due the next business day.

(VII) Remittances mailed through the United States Postal Service shall be deemed to be filed on the date of the postmark stamped on the envelope in which the remittance was mailed.

(d) Combined Colorado telecommunications surcharge remittance form.

(I) Each remittance of 9-8-8 surcharges shall be accompanied by a completed combined Colorado telecommunications surcharge remittance form, also referred to as the combined Colorado telecommunications relay service and 9-1-1 surcharge remittance form, that includes information for each month remitted. This form is available from the Commission or on its website.

(A) The combined Colorado telecommunications surcharge remittance form must be signed and dated by a company representative authorized to do so. The name and telephone number of the most appropriate company representative to whom questions may be directed must also be included on the form.

(B) Regardless of the method of payment, the combined Colorado telecommunications surcharge remittance form shall be filed with the Commission through its E-Filings System into the proceeding opened for that purpose. The Commission, for good cause shown, may grant a waiver of the E-Filings requirement.

(C) 9-8-8 originating service providers shall submit all 9-8-8 surcharge remittances to the custodial receiver directly.

(D) If payments are made by physical check, the completed combined Colorado telecommunications surcharge remittance form shall also be enclosed with the check.

(E) All remittances of the 9-8-8 surcharges received by the Commission pursuant to this rule shall be deposited in an 9-8-8 receipt account established for that purpose.

(e) The Commission may withdraw from the 9-8-8 receipt account an amount up to four percent of the total amount of the fund necessary for the direct and indirect costs of administering the collection and remittance of the 9-8-8 surcharge, including costs related to conducting audits of 9-8-8 originating service providers. Funds deducted for this purpose will be kept in a 9-8-8 administrative retention account created by the Commission until expended. Any funds withdrawn by the Commission for this purpose will be returned to the 9-8-8 trust cash fund if the Commission determines that the funds are not necessary to pay administrative costs.

(f) On a monthly basis, the Commission shall transfer the amount of funds received into the 9-8-8 receipt account to the 9-8-8 surcharge trust cash fund, less the administrative retention fee authorized in paragraph (e). This transfer shall be made via ACH bank transfer.

2803. Audit of 9-8-8 Originating Service Providers Regarding 9-8-8 Surcharge Practices.

(a) The Commission may conduct an audit of a 9-8-8 originating service provider's books and records regarding the collection and remittance of the 9-8-8 surcharge.

(I) All expenses related to audits initiated by the Commission shall be paid for by the Commission from the administrative retention fund as authorized by § 40-17.5-102(3)(c)(II), C.R.S.

(II) 9-8-8 originating service providers shall make relevant records available to auditors at no charge.

(III) Audits shall be limited to the collection and remittance of the 9-8-8 surcharge. However, audits regarding the collection and remittance of 9-8-8 surcharges may be conducted concurrently with audits regarding the collection and remittance of 9-1-1 surcharges, emergency telephone charges, and telecommunications relay service surcharges.

(IV) Any delinquent remittance of 9-8-8 surcharges received by the Commission, including penalties and interest, shall be deposited into the 9-8-8 receipt account and transferred to the 9-8-8 surcharge trust cash fund, less allowable administrative expenses, as prescribed in rule 2802.

(b) 9-8-8 originating service providers shall maintain a record of the amount of each 9-8-8 surcharge collected and remitted by service user address for three years after the time that it was remitted.

(c) If a 9-8-8 originating service provider fails to file a combined Colorado telecommunications surcharge remittance form and remit 9-8-8 surcharges in a timely manner, the Commission may assess the 9-8-8 originating service provider for the delinquent remittance in the following manner.

(I) The Commission shall estimate delinquent remittance based on available information.

(II) The Commission shall issue a notice of assessment to the 9-8-8 originating service provider within three years of the original due date of the remittance, unless the three-year period is extended, in writing, in accordance with this rule.

(III) Before the expiration of the three-year period, the Commission and the 9-8-8 originating service provider may extend the period for assessment by agreement, in writing. The period agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon. Any party seeking extension from the Commission shall do so by filing a petition.

(IV) The Commission shall impose an additional 15 percent penalty in addition to the estimated amount of the delinquent remittance.

(V) The Commission shall assess an additional one percent interest monthly, assessed against the original principal owed, from the original due date until the delinquent remittance has been paid by the 9-8-8 originating service provider.

(VI) If the assessment was properly noticed within three years of the original due date of the remittance, or prior to the expiration of the period of time agreed to by the Commission and 9-8-8 originating service provider in writing, the Commission may file a lien, issue a distraint warrant, institute a suit for collection, or take other action to collect the amount up to one year after the expiration of said time period.

2804. – 2819. [Reserved].

COLORADO DEPARTMENT OF REGULATORY AGENCIES

Public Utilities Commission

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