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BEFORE THE
FEDERAL COMMUNICATIONS BAR ASSOCIATION
"PRIVATE CARRIAGE/Common Carriage--WHAT'S THE DIFFERENCE"

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THE TITLE OF THIS PROGRAM, "PRIVATE CARRIAGE/COMMON CARRIAGE - WHAT'S THE DIFFERENCE?" IS A QUESTION I HAVE OFTEN ASKED MYSELF. IN MY OPINION, THERE IS NO DIFFERENCE INHERENT IN THE NATURE OF THE COMMUNICATIONS SERVICES PROVIDED. PRIVATE CARRIERS AND COMMON CARRIERS PROVIDE THE SAME SERVICES OVER THE SAME TYPES OF FACILITIES. THE ONLY DIFFERENCES BETWEEN PRIVATE AND COMMON CARRIAGE ARE THOSE CREATED BY THE REGULATORY AND LEGAL COMMUNITIES. THAT IS THAT PRIVATE CARRIERS AND COMMON CARRIERS ARE REGULATED DIFFERENTLY. WHICH BRINGS US TO THE TOPIC OF THIS PANEL - THE PRESENT PARAMETERS OF REGULATIONS.

I HAVE LEFT TO THE FCC THE TASK OF DISTINGUISHING OR AS DAVID HAS INDICATED, "MUDDLE THROUGH" PRIVATE AND COMMON CARRIAGE. MY COMMENTS WILL FOCUS ON PRIVATE NETWORKS AND ADDRESS HOW THE FCC'S POLICIES HAVE AFFECTED ENTRY INTO THE TELECOMMUNICATIONS MARKET, WHICH IN TURN, COULD AFFECT THE STATES' ABILITY TO PROTECT THE FRANCHISE AND THE CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY, AND ULTIMATELY, THE PUBLIC INTEREST.

IT IS THE RESPONSIBILITY OF STATE REGULATORS TO ENSURE THAT THE BEST POSSIBLE TELEPHONE SERVICE IS AVAILABLE TO EVERYONE AT THE LOWEST PRICE. THIS HAS BEEN ACCOMPLISHED IN PART BY CONTROLLING ENTRY INTO THE TELECOMMUNICATIONS MARKET THROUGH THE CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY AND THE FRANCHISE PROCESS WHICH ARE THE LEGAL TOOLS FOR THE ORDERLY DIVISION OF SERVICE TERRITORIES. THERE ARE DIFFERENCES BETWEEN A FRANCHISE AND A CERTIFICATE, BUT MOST EXPERTS AGREE THAT THEY ACHIEVE THE SAME POLICY OBJECTIVES, AND THAT IS, THAT THESE INSTRUMENTS "NORMALLY

EVIDENCE AN INTENTION TO HAVE ONLY ONE SUCH SUPPLIER IN A GIVEN AREA."¹ THE RESULT IS THE NOTION OF THE EXCLUSIVE SERVICE PROVIDER.

INITIALLY, FRANCHISES WERE USED TO ENCOURAGE TELEPHONE COMPANIES TO PROVIDE SERVICE IN AN UNSERVED AREA AND TO PROVIDE COMPENSATION TO THE GRANTING JURISDICTION IF THE LOCAL EXCHANGE CARRIER (LEC) FAILED TO RESTORE THE STREETS TO THEIR ORIGINAL CONDITION. AS MORE PEOPLE WERE CONNECTED TO THE TELEPHONE NETWORK, THE FRANCHISE, WHICH IS THE PROVISION OF TELEPHONE SERVICE IN A SPECIFIC AREA, BY A SINGLE SYSTEM OWNED AND OPERATED BY ONE COMPANY, BECAME A MECHANISM TO ENCOURAGE MORE COMPREHENSIVE AND IMPROVED SERVICE. FOR EXAMPLE, IN CALIFORNIA IN THE EARLY 1900'S, SEVERAL LECS PROVIDED SERVICE IN THE SAME GENERAL AREA. HOWEVER, SUBSCRIBERS COULD ONLY CALL THOSE PERSONS WHO RECEIVED SERVICE FROM THE SUBSCRIBER'S COMPANY. THIS MEANT THAT THE CALLING AREA WAS EXTREMELY LIMITED OR THAT A SUBSCRIBER HAD TO PURCHASE SERVICE FROM SEVERAL COMPANIES. TO ALLEVIATE THIS PROBLEM, CALIFORNIA SOUGHT TO CONSOLIDATE ALL FRANCHISES AND PROPERTIES IN SPECIFIED AREAS INTO A SINGLE SYSTEM OWNED AND OPERATED BY ONE COMPANY.² THIS IS THE FRANCHISE SYSTEM AS IT EXISTS TODAY.

CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY AUTHORIZE A COMPANY TO PROVIDE A SPECIFIC SERVICE IN A GIVEN AREA.

¹See Porter, Burton, "Legal and Regulatory Constraints on Competition in Electric Power Supply", Public Utilities Fortnightly, at 33-34 (May 25, 1989).

²See Pacific Telephone & Telegraph v. City of Los Angeles, 282 P. 2d 36 (1955)

CERTIFICATES ARE ISSUED ONLY AFTER THE STATE COMMISSION DETERMINES THAT THE PUBLIC GOOD REQUIRES THE SERVICE. ALTHOUGH THERE IS NO ASSUMPTION THAT ONLY ONE TELCO SHOULD SERVE A PARTICULAR AREA,³ DUPLICATION OF FACILITIES IS GENERALLY DISCOURAGED.⁴ THEREFORE, THE CERTIFICATION PROCESS HAS BEEN USED TO SECURE THE ADVANTAGES OF COMPETITION WHILE PROTECTING THE PUBLIC FROM THE DISADVANTAGES.⁵

THE BODY OF LAW REGARDING CERTIFICATES AND FRANCHISES WAS COMPILED WHEN THE REGULATORY THEORY WAS TO CONTROL ENTRY INTO THE TELECOMMUNICATIONS MARKET IN ORDER TO ASSURE ADEQUATE SERVICES AT JUST AND REASONABLE RATES. THE FCC'S POLICIES CONCERNING PRIVATE NETWORKS AND CARRIERS IS CLEARLY AFFECTING WHETHER THE FRANCHISE OR CERTIFICATE CAN BE PROTECTED. THE HEART OF THE FCC'S POLICY APPEARS TO BE TO LIBERALIZE ENTRY.

THERE ARE SEVERAL FCC ACTIONS WHICH ARE ILLUSTRATIVE. IN THE MATTER OF NORLIGHT,⁶ THE FCC BARRED THE STATE OF WISCONSIN FROM REQUIRING COMMISSION APPROVAL FOR A CONSORTIUM OF ELECTRIC UTILITIES TO SELL EXCESS CAPACITY ON THEIR PRIVATE FIBER OPTIC

³ Dubois Telephone Exchange v. Mountain States Telephone & Telegraph Co., 429 P.2d 812 (1967).

⁴ See State Utilities Commission v. Southern Bell, 204 S.E.2d 27 (1974), cert denied, 205 S.E.2d 726 (1974); Mountain States Telephone & Telegraph v Suburban Telephone Co., 384 P.2d 684 (1963); cert denied, 376 U.S. 648, rehearing denied, 377 U.S. 940 (1964).

⁵ See e.g., Matter of Rule Radiophone Service, Inc., 621 P.2d 241 (1980).

⁶ In the Matter of NORLIGHT Request for Declaratory Ruling, Memorandum Opinion and Order, File No. PRB-LMMD 86-07, 2 FCC Rcd 132, recon. den., 2 FCC Rcd 5167 (1987).

COMMUNICATIONS SYSTEM TO THIRD PARTIES. THE FCC RELIED HEAVILY ON THE FACT THAT THE SYSTEM WAS PRIMARILY INTERSTATE AND THAT THE WISCONSIN COMMISSION'S REQUIREMENT FOR PRE-APPROVAL, ON ITS FACE, APPLIED TO BOTH INTERSTATE AND INTRASTATE TRAFFIC.⁷

THE WISCONSIN PUBLIC SERVICE COMMISSION APPEALED THIS DECISION.⁸ THE D.C. COMMISSION, ALONG WITH A NUMBER OF OTHER STATE COMMISSIONS, INTERVENED IN THE APPEAL. THE STATE INTERVENORS ARGUED THAT THE FCC'S RULING FAILED TO CORRECTLY APPLY THE COURT'S PRECEDENTS GOVERNING CLASSIFICATION OF COMPANIES AS PRIVATE OR COMMON CARRIERS. FOR EXAMPLE, THE FCC FAILED TO CONSIDER IMPORTANT INDICIA OF COMMON CARRIAGE INDICATED BY NORLIGHT'S OPERATIONS SUCH AS 1) NORLIGHT WOULD ALLOW CUSTOMERS TO TRANSMIT DATA OF THEIR OWN DESIGN; 2) NORLIGHT WOULD OPERATE ITS SYSTEM ON A FOR-PROFIT BASIS; AND 3) NORLIGHT WOULD OFFER TRADITIONAL COMMON CARRIER SERVICES. IN ADDITION, THE STATE INTERVENORS ARGUED THAT THE FCC'S PREEMPTION OF THE WISCONSIN ORDER VIOLATED §2(B) OF THE COMMUNICATIONS ACT AND VIOLATED THE STATES' LEGITIMATE INTERESTS IN PROMOTING HEALTH, SAFETY AND WELFARE.

WISCONSIN SUBSEQUENTLY AMENDED ITS ORDER TO LIMIT THE PRE-APPROVAL REQUIREMENT TO THE PROVISION OF INTRASTATE SERVICES. SUBSEQUENTLY, THE PARTIES FILED A MOTION TO DISMISS THE APPEAL, WHICH WAS GRANTED BY THE COURT.⁹

⁷ 2 FCC Rcd at 135.

⁸ Public Service Commission of Wisconsin v. Federal Communications Commission, No. 87-1618 (D.C. Cir. 1987).

⁹ Order, No. 87-1818 (D.C. Cir. Feb. 15, 1989).

IN PUBLIC SERVICE COMPANY OF OKLAHOMA,¹⁰ THE FCC'S PRIVATE RADIO BUREAU DETERMINED THAT ALL NON-COMMON CARRIER RADIO SERVICES ARE DEEMED TO BE INTERSTATE SERVICES, PURSUANT TO §301 OF THE COMMUNICATIONS ACT.¹¹ THE BUREAU RELIED UPON THE 1976 DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT IN NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS V. FCC.¹² IN NARUC I, IN WHICH THE COURT DEFINED COMMON CARRIER SERVICES AS THOSE WHICH INVOLVE A HOLDING OUT TO THE PUBLIC IN CONTRAST TO PRIVATE CARRIAGE WHICH INVOLVES INDIVIDUALIZED DECISIONS REGARDING THE TERMS AND CONDITIONS OF SERVICE OFFERINGS, GENERALLY BASED ON CONTRACTS WITH A GENERALLY STABLE CLIENTELE. THUS, IF THE OWNER OF A MICROWAVE NETWORK OFFERS SERVICE BY CONTRACT ON AN INDIVIDUALIZED BASIS WITH A RELATIVELY STABLE CLIENTELE, THE BUREAU'S ORDER WOULD PERMIT IT TO BE FREE OF STATE REGULATION, EVEN WITH RESPECT TO LOCAL ORIGINATION AND TERMINATION OF TELEPHONE CALLS.

THIS DECISION IS PENDING REVIEW AND THERE IS REASON TO DOUBT THAT THIS RULING WILL BE UPHELD. IN THE RECENT INSIDE WIRE DECISION, THE D.C. CIRCUIT REJECTED THE FCC'S ARGUMENT THAT INTRASTATE PRIVATE CARRIER SERVICE WAS NOT RESERVED TO THE STATES' JURISDICTION BY §2(B) OF THE COMMUNICATIONS ACT. RATHER, THE COURT STATED THAT §2(B) OF THE COMMUNICATIONS ACT, 47 U.S.C., §152(B),

¹⁰ 3 FCC Rcd 2327 (1988) (petition for review pending).

¹¹ 2 FCC Rcd at 2329-30.

¹² 525 F.2D 630, cert denied, 425 U.S. 992 (1976) (NARUC I).

GIVES STATES JURISDICTION OVER ALL INTRASTATE COMMUNICATIONS SERVICES, WHETHER OR NOT COMMON CARRIER IN NATURE.¹³

IN ANOTHER DECISION, PUBLIC UTILITY COMMISSION OF TEXAS V. FEDERAL COMMUNICATIONS COMMISSION, (ARCO)¹⁴ THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT UPHELD A DECISION WHICH PERMITTED A CUSTOMER TO USE ITS OWN FACILITIES TO AVOID THE AUTHORIZED LOCAL EXCHANGE CARRIER AND PREEMPTED THE EFFORTS OF THE PUBLIC UTILITY COMMISSION OF TEXAS (TEXAS COMMISSION) TO PROHIBIT IT.

THE CASE CONCERNED THE ATLANTIC RICHFIELD COMPANY'S (ARCO'S) USE OF A PRIVATE MICROWAVE NETWORK CONNECTING ITS OFFICES AT DALLAS AND PLANO, TEXAS. IN AN EFFORT TO LESSEN ITS USE OF GTE SOUTHWEST (GTE), WHICH HAD AN EXCLUSIVE STATE CERTIFICATE AT PLANO, ARCO ORDERED TRUNKS FROM SOUTHWESTERN BELL AT DALLAS, CANCELLED MANY GTE TRUNKS AT PLANO, AND USED ITS PRIVATE MICROWAVE NETWORK TO ACCESS THE TELEPHONE NETWORK THROUGH SOUTHWESTERN BELL AT DALLAS FOR CALLS ORIGINATING AT PLANO. GTE ASKED THE TEXAS COMMISSION TO ORDER SOUTHWESTERN BELL TO CEASE AND DESIST FROM PROVIDING THE "ADDITIONAL INTERCONNECTIONS" AT DALLAS. THE TEXAS COMMISSION FOUND THAT THE TEXAS STATUTE, PROHIBITING NON-CERTIFICATED PUBLIC UTILITIES FROM SERVING, DIRECTLY OR INDIRECTLY, A CONSUMING FACILITY WITHIN AN AREA BEING SERVED LAWFULLY BY ANOTHER PUBLIC

¹³National Association of Regulatory Utility Commissioners v. Federal Communications Commission, No. 86-1678 (D.C. Cir. July 7, 1989) at 12-13.

¹⁴ No. 88-1274, et al. (D.C. Cir. September 22, 1989) (Opinion).

UTILITY, PRECLUDED THE ARRANGEMENT. THE TEXAS COMMISSION ALSO FOUND THAT THERE WAS SIGNIFICANT PUBLIC DETRIMENT AS A RESULT OF THE PROSPECT OF STRANDED INVESTMENT, DIFFICULTIES IN SYSTEM PLANNING, AND DISRUPTION OF THE NETWORK DESIGN PROCESS.¹⁵

ARCO THEN PETITIONED THE FCC, WHICH SUBSEQUENTLY FOUND THAT A USER HAS A FEDERAL RIGHT TO INTERCONNECT ITS FACILITIES WITH THE PUBLIC TELEPHONE NETWORK IN WAYS THAT ARE "PRIVATELY BENEFICIAL AND NOT PUBLICLY DETRIMENTAL". ON THIS BASIS, IT PREEMPTED THE TEXAS COMMISSION DECISION.¹⁶

THE TEXAS COMMISSION, NARUC AND GTE APPEALED THE FCC'S DECISION. AGAIN, THE D.C. COMMISSION, AND THE OTHER STATE COMMISSIONS, INTERVENED IN THE APPEAL. THE STATE INTERVENORS AGAIN ARGUED THAT THE FCC UNLAWFULLY INTRUDED UPON THE JURISDICTION OF THE STATES, PROTECTED BY §2(B) OF THE COMMUNICATIONS ACT, TO ESTABLISH LOCAL CERTIFICATED TELEPHONE SERVICE AREAS.

ON APPEAL, THE COURT AGREED WITH THE FCC. IT STATED THAT THE FCC MAY PREEMPT STATE REGULATION TO VINDICATE A FEDERAL RIGHT WHERE THE EQUIPMENT WHICH THE FCC WISHES TO REGULATE IS USED INSEPARABLY FOR INTERSTATE AND INTRASTATE CALLING AND THE FCC IS UNABLE TO

¹⁵Application of General Telephone Company of the Southwest for a Cease and Desist Order Against Southwestern Bell Telephone Company, Order, Docket No. 5264, at pp. 1 -2 (Tx. PUC July 8, 1985).

¹⁶In the Matter of the Atlantic Richfield Company Petition for Emergency Relief and Declaratory Ruling with Respect to Registered Terminal Equipment and Private Microwave Interconnection to Telephone Service of Southwestern Bell Telephone Company, Memorandum Opinion and Order, 3 FCC Rcd 3909 (1988).

LIMIT ITS REGULATION TO THE INTERSTATE ASPECTS.¹⁷

IN UPHOLDING THE FCC'S PREEMPTION, THE COURT EMPHASIZED THAT THE TEXAS COMMISSION ORDER WAS "EXTRAORDINARILY BROAD" IN THAT IT COVERED BOTH INTERSTATE AND INTRASTATE SERVICES.¹⁸ CONSEQUENTLY, THE COURT FOUND IT UNNECESSARY TO DECIDE WHETHER "A PRIVATE MICROWAVE OPERATOR HAS AN ABSOLUTE FEDERAL RIGHT OF ACCESS TO THE PUBLIC SWITCHED NETWORK AT LOCATIONS OF ITS CHOICE, WHOLLY UNIMPAIRED BY STATE REGULATORY INTERESTS."¹⁹ FURTHER, THE COURT FOUND THAT GTE HAD NOT DEMONSTRATED AN ECONOMIC LOSS SEVERE ENOUGH TO JEOPARDIZE ITS ABILITY ADEQUATELY TO SERVE THE PUBLIC.²⁰ THE TEXAS COMMISSION HAS NOT APPEALED THE COURT'S DECISION.

THUS, A PRIVATE MICROWAVE SYSTEM CAN BE USED TO BYPASS AN LEC UNLESS THE STATE OR THE LEC CAN SHOW THAT (1) THE STATE CAN LIMIT THE EFFECT OF ITS ORDER TO INTRASTATE TRAFFIC OR (2) THE PRIVATE USE WOULD CAUSE TECHNICAL HARM TO THE NETWORK OR ECONOMIC LOSS SEVERE ENOUGH TO SERIOUSLY JEOPARDIZE THE LEC'S CAPABILITY OF SERVING THE PUBLIC. THIS DECISION SERIOUSLY THREATENS THE ABILITY OF STATES TO PRESERVE EXCLUSIVE FRANCHISES.

IN MY OPINION, THE FCC'S PRIVATE NETWORK POLICIES ENCOURAGE BYPASS AT THE LOCAL LEVEL. THIS CREATES SIGNIFICANT PROBLEMS SUCH AS STRANDED INVESTMENT. THE EXAMPLES THAT WE HAVE OF PRIVATE

¹⁷Opinion at 17.

¹⁸Id. at 19.

¹⁹Id. at 21.

²⁰Id. at 25.

NETWORKS CONFIRM THAT THEY ARE BUILT TO SERVE LARGE BUSINESS CUSTOMERS. THE "DOMINO THEORY" OF TELECOMMUNICATIONS FOLLOWS - AS LARGE USERS WITH PRIVATE NETWORKS LEAVE THE LOCAL NETWORK, THE REGULATED OPERATING COMPANIES WILL BE LEFT WITH STRANDED INVESTMENT, OR UNDERUTILIZED INVESTMENT, AND UNDER EXISTING LEGAL PRINCIPALS, REMAINING CUSTOMERS, THE RESIDENTIAL AND SMALL BUSINESS CUSTOMERS, WILL HAVE TO COVER THESE COSTS AND THEIR RATES MUST THEREFORE BE INCREASED.

MOREOVER, EVEN IF A STATE COULD LIMIT BYPASS OF THE LOCAL NETWORK, A QUESTION ARISES CONCERNING THE EFFICIENCY OF THE TOTAL TELECOMMUNICATIONS NETWORK. AS I STATED, THE FCC'S POLICY ENCOURAGES THE CONSTRUCTION OF NEW TELECOMMUNICATIONS FACILITIES. IT ONLY MAKES ECONOMIC SENSE THAT THE OWNERS OF THESE FACILITIES WILL WANT TO MAXIMIZE USAGE. IF THERE IS NOT ENOUGH INTERSTATE TRAFFIC, SAID ANOTHER WAY, IF THEY HAVE ACCESS CAPACITY, THEY WILL SEEK INTRASTATE TRAFFIC, AND PRESSURE LOCAL REGULATORS AND LEGISLATORS TO ALLOW THEM TO PROVIDE THAT SERVICE. ULTIMATELY, THE EFFICIENCY OF THE TOTAL TELECOMMUNICATIONS NETWORK IS AFFECTED BY INDISCRIMINATELY ALLOWING PRIVATE NETWORKS TO BE BUILT.

THE D.C. COMMISSION CURRENTLY IS FACING THE ISSUE OF WHETHER IT SHOULD LIBERALIZE ENTRY. THREE COMPANIES, INSTITUTIONAL COMMUNICATIONS COMPANY, METROPOLITAN FIBER SYSTEMS OF WASHINGTON, D.C., INC., AND TELEPORT COMMUNICATIONS OF WASHINGTON, D.C., INC., HAVE APPLIED FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO OFFER PRIVATE LINE SERVICE IN THE DISTRICT OF COLUMBIA. THE COMMISSION WILL HOLD HEARINGS TO CONSIDER THESE APPLICATIONS AND

THE SERIOUS ISSUES THAT THEY RAISE. FOR EXAMPLE:

- SHOULD OR CAN NEW ENTRANTS BE LIMITED SO THAT THEIR OPERATIONS DO NOT NEGATIVELY IMPACT ON THE LOCAL EXCHANGE CARRIERS' ABILITY TO PROVIDE UNIVERSAL SERVICE AT REASONABLE RATES?
- IF ENTRY RULES ARE LIBERAL, SHOULD EXIT RULES ALSO BE LIBERAL?
- SHOULD THERE BE A CARRIER OF LAST RESORT AND HOW WILL THAT CARRIER BE SELECTED AND/OR COMPENSATED?
- WHAT REGULATORY DEVICES, IF ANY, SHOULD THE STATE COMMISSION IMPOSE UPON NEW ENTRANTS TO ASSURE THAT THE INTERESTS OF RATEPAYERS ARE PROTECTED?
- SHOULD STATES CREATE ECONOMIC MEASURES, SUCH AS LIFELINE MECHANISMS, OR SHOULD STATES REQUIRE RATE CONTRIBUTION BY NEW ENTRANTS IF THE THREAT OF HARM TO THE CONSUMER IS PRESENT?

THESE QUESTIONS ARE NOT EASILY ANSWERED AND REGULATORS WILL NEED TO DECIDE THEM BASED ON THE PARTICULAR NEEDS OF THEIR JURISDICTION. HOWEVER, I BELIEVE THAT THE NEED FOR STATE REGULATORS TO TACKLE THESE ISSUES HAS BEEN DRIVEN, MOST UNFORTUNATELY, BY THE FCC'S PRIVATE CARRIER POLICIES.

