(Decision No. C87-54)

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

* * *

RE: THE APPLICATION OF THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY FOR ENTRY OF AN ORDER BY THE COMMISSION REFRAINING FROM REGULATING POINT-TO-POINT AND POINT TO MULTI-POINT DEDICATED TELECOMMUNICATIONS SERVICES; OR IN THE ALTERNATIVE, FOR A DECLARATION OF CONTINUED APPLICABILITY OF THE PUBLIC UTILITY LAW OF COLORADO TO OPERATING RIGHTS FOR THOSE SERVICES.	APPLICATION NO. 37367 COMMISSION DECISION VACATING FURTHER PROCEEDINGS PENDING FURTHER ORDER OF THE COMMISSION

- - - - - - - - - - - -

January 13, 1987

- - - - - - - - - - - -

STATEMENT AND FINDINGS OF FACT

BY THE COMMISSION:

On November 26, 1985, The Mountain States Telephone and Telegraph Company (Mountain Bell) filed Application No. 37367 seeking an order of the Commission to refrain from regulating point-to-point and point-to-multi-point dedicated telecommunications services or, in the alternative, for a declaration of continued applicability of the Public Utilities Law of Colorado to operating rights for those services.

On December 12, 1985, the Commission by Decision No. C85-1510 entered an order requiring Mountain Bell to give written notice of Application No. 37367 to each of its current customers receiving point-to-point and point-to-multi-point dedicated telecommunications services.

Various parties have intervened in Application No. 37367 and from time to time the Commission has entered a number of procedural orders relating to this application.

On September 3, 1986, Colorado Ski Country USA (CSCUSA), an Intervenor in Application No. 37367, filed a motion to dismiss or stay. In its motion, CSCUSA contended that the Commission should dismiss Application No. 37367 for lack of jurisdiction or, in the alternative, should stay the application until the Commission has completed the conclusion of possible rulemaking proceedings before the Commission to implement the provision of House Bill 1264 concerning the refraining from regulation of telecommunications services in the State of Colorado. Support of CSCUSA's motion to dismiss the application for lack of jurisdiction or to stay the application was filed by the Colorado Municipal League (League) and the Denver Burglar and Fire Alarm Company

(DBA) on September 15, 1986, and September 16, 1986, respectively. Under a request for an extension of time which it was granted, Mountain Bell filed a response in opposition to CSCUSA's motion to dismiss or stay.

On October 7, 1986, the Commission entered Decision No. C86-1334 which denied CSCUSA's motion to dismiss or stay. However, the Commission acknowledged that CSCUSA was correct in its contention that § 40-15-108(8), C.R.S., does not authorize the Commission to proceed with an application to refrain from regulation except upon the Commission's own motion. In Decision No. C86-1334, the Commission stated that it is quite clear that any provider of telecommunications service could request the Commission to institute a proceeding upon its own motion to refrain from regulation under § 40-15-108(8), C.R.S. The Commission would then have the option of either proceeding upon its own motion or declining to do so. We stated that this is the manner in which Mountain Bell should have proceeded its desire that the Commission refrain from regulation of point-to-point and point-to-multi-point dedicated telecommunications services. In Decision No. C86-1334, the Commission stated that in the future Mountain Bell should request the Commission, in advance, to institute a proceeding upon its own motion with respect to services which Mountain Bell desires to have the Commission refrain from regulating. However, the Commission stated that insofar as Application No. 37367 is concerned, we would liberally construe the application as a request by Mountain Bell for the Commission to proceed upon its own motion to refrain from regulation of point-to-point and point-to-multi-point dedicated telecommunications services, and that the Commission would accept Mountain Bell's request in that regard.

The Commission noted that if Application No. 37367 were to have been dismissed by the Commission, Mountain Bell then subsequently could request the Commission by letter or petition to enter upon a § 40-15-108(8), C.R.S., proceeding upon its own motion, and that the Commission would then accept such a request by Mountain Bell. All of this would amount to nothing more than a procedural delay. The Commission also noted that Rule 2 of the Commission's Rules of Practice and Procedure states that, consistent with due process of law, administrative proceedings should be conducted to secure just, speedy, and inexpensive determination of all issues presented to the Commission. With the foregoing in mind, the Commission denied CSCUSA's motion to dismiss Application No. 37367, construed the application as a request by Mountain Bell for the Commission, upon its own motion, to refrain from regulating point-to-point and point-to-multi-point dedicated telecommunications services, and as so construed, the Commission ordered that it would accept the request to enter upon investigation of whether or not to refrain from regulating those services and, if the answer is affirmative, upon what conditions, if any. Decision No. C86-1334 also provided that Mountain Bell would have the burden of proof, that is, the burden of going forward and the burden of persuasion in its request that the Commission refrain from regulation of the described services. Finally, Decision No. C86-1334 provided that unless otherwise ordered by the Commission, all procedural directives previously established in Application No. 37367 would remain in effect.

One of the previously established procedural directives was the setting of hearing dates for Application No. 37367 to begin on December 1, 1986. The Commission and the parties assembled on December 1, 1986, for the beginning of hearings on Mountain Bell's application. As a preliminary procedural matter and much to the surprise of the Commission and other parties, counsel for Mountain Bell orally moved that all further proceedings in Application No. 37367 be abated until at least June 1, 1987. As grounds for this oral motion to the Commission, counsel for Mountain Bell set forth several grounds: (1) House Bill 1264 arguably is unclear and uncertain in its application; (2) Mountain Bell is planning to sponsor legislation in the forthcoming Colorado General Assembly which may have an effect upon the definition of competition and the parameters and means of transition to a competitive environment; (3) it is not appropriate to proceed when the scope of Commission rules with respect to refraining from regulation under House Bill 1264 is not finalized; (4) because of statements made in public forums, speeches, articles, and in front of the National Association of Regulatory Utility Commissioners (NARUC) [inferentially by one or more Commissioners], Mountain Bell does not believe there is a substantial likelihood that much, if any, of the relief requested in Application No. 37367 will be granted; and (5) it is more important to restructure products and services that Mountain Bell offers in Investigation and Suspension Docket No. 1720 before Mountain Bell proceeds with any request to have the Commission refrain from regulation.

The Commission from the bench orally denied Mountain Bell's motion to abate proceedings in Application No. 37367, but afforded Mountain Bell the option to withdraw its application in its discretion although the Commission indicated that its preference was that Mountain Bell not withdraw. Mountain Bell next orally moved to withdraw its application. On December 1, 1986, the Commission orally indicated from the bench that Mountain Bell's motion to withdraw would be taken under advisement and that a ruling would be made on December 2, 1986.

On December 2, 1986, when Application No. 37367 was called back to order, the Commission orally announced that Mountain Bell's motion to withdraw would be denied and that the Commission would go forward with this Docket. At this point, counsel for Mountain Bell was requested by the Chairman of the Commission to call Mountain Bell's first witness. Counsel for Mountain Bell orally advised the Commission that Mountain Bell would not put on any witnesses and did not intend to put any evidence on the record. Counsel for Mountain Bell indicated that it was his opinion that the Commission had no jurisdiction to order Mountain Bell to do anything in this proceeding if Mountain Bell had determined that it did not want to seek the relief that originally had been requested in its application. Counsel further stated that Mountain Bell's presentation was concluded and again counsel indicated that Mountain Bell would decline to offer evidence. Without asking leave of the Commission, counsel for Mountain Bell then withdrew from the hearing room.

After some off-the-record informal discussions as to what procedures would be appropriate in the circumstances, the Commission recessed proceedings until December 9, 1986, for the purpose of giving the parties the opportunity to present to the Commission whatever proposals or motions they believed to be proper.

On December 5, 1986, CSCUSA, the League, the Colorado Association of Radio Common Carriers (Radio Carriers), and DBA filed a joint motion for reconsideration of the Commission's previous oral denial of Mountain Bell's motion to withdraw. The joint motion for reconsideration filed by these intervenors requested that (1) the Commission treat Mountain Bell's motion to withdraw as a motion to dismiss the proceeding under Rule 41(a)(2), of the Colorado Rules of Civil Procedure, (2) the Commission grant the motion to dismiss without prejudice subject to the condition that Mountain Bell be ordered to pay intervenors, the Staff, and the Office of Consumer Counsel (OCC) their respective attorneys' fees and expert witness fees and costs expended in this proceeding, (3) that in order to protect the confidentiality of proprietary information revealed in discovery, all parties be directed to file with the Commission all copies of all depositions taken in this docket for destruction or maintenance under seal, as determined appropriate by the Commission, and (4) the Commission order that other proprietary information should be returned to the party or nonparty producing it.

On December 9, 1986, OCC filed a motion supporting the motion for reconsideration that had been filed on December 5, 1986, jointly by several of the intervenors, named above.

On December 5, 1986, the City and County of Denver (Denver) filed a motion for decision and order on the record of the Commission. In its motion, Denver requested the Commission to (1) declare that Mountain Bell had abused its management discretion in abandoning its position and responsibility to proceed and to exercise its right to be heard in this matter, (2) accept the waiver of the other parties of their rights to be heard further in this Docket, (3) adjourn the formal hearing, (4) close the record of the Commission in this Docket, (5) decide and declare that, based upon the record of the Commission, there is presently no competitive need to refrain from regulating point-to-point and point-to-multi-point dedicated telecommunications services, and (6) order the continued regulation of these telecommunications services.

Denver subsequently on December 19, 1986, withdrew its motion for decision and order on the record of the Commission which it had filed on December 5, 1986.

On December 15, 1986, Mountain Bell filed a response to the motions to reconsider that had been filed jointly by several of the intervenors and the motion for decision and order that had been filed by Denver. In its pleading, Mountain Bell requested the Commission to reconsider its previous oral denial of Mountain Bell's request for a continuance of the hearings in this Docket until some date subsequent to June 1, 1987. Mountain Bell contends that a six-month continuance is far more desirable than closing this Docket and starting all over with a new proceeding addressing the same or similar issues. By letter of December 15, 1986, Mountain Bell indicated it would not seek a further continuance so long as telecommunications legislation has been finally acted upon by June 1, 1987.

As indicated above, Denver has withdrawn its motion for decision and order, and it is also clear from the various pleadings filed by the parties in this Docket that none of the parties except Denver has stated affirmatively a willingness to waive cross-examination of the witnesses who have prefiled direct testimony, in written form, with the Commission. The Commission, of course, is well aware of the statutory provision set forth in § 40-6-114(6) which states, in essence, that the record of the Commission in a proceeding before it consists not only of testimony or affidavits or other evidence under the shortened or informal procedure, together with all exhibits or copies thereof introduced, but can also include information secured by the Commission on its own initiative and considered by it in rendering its order or decision, together with pleadings, the record, and proceedings in the case. Nevertheless, the Commission is compelled to consider the statutory definition of the record as contained in § 40-6-113(6) together with § 40-6-109(1) which provides that parties in a proceeding shall be entitled to be heard, to examine and cross-examine witnesses, and introduce evidence. Without a waiver of cross-examination of witnesses who prefiled testimony, or a stipulation that designated prefiled testimony would be introduced into evidence by stipulation, the Commission does not believe that § 40-6-113(6) would empower it to use the prefiled testimony in this Docket as a basis for making a decision upon the merits at this time.

As already indicated in this Decision, Mountain Bell originally filed Application No. 37367 as its own application requesting the Commission refrain from regulation of point-to-point and point-to-multi-point telecommunications services. When CSCUSA filed its motion to dismiss the application upon the proper legal ground that Mountain Bell was without statutory authority to initiate this kind of a refrain-from-regulation application on its own, but that such a refraining from regulation proceeding must be initiated by the Commission upon its own motion, the Commission, in order to accommodate Mountain Bell as well as to conserve the technical and legal resources already expended in this Docket by the various parties, liberally construed Mountain Bell's initial application as a request by Mountain Bell to this Commission for the Commission to proceed on its own motion under § 40-15-108(8) for a consideration on the merits whether to refrain from regulation of point-to-point and point-to-multi-point telecommunications services of Mountain Bell. To further accommodate Mountain Bell and the parties, the Commission maintained the scheduled hearing dates for Application No. 37367 to commence on December 1, 1986. When Mountain Bell waited literally until the first scheduled day of hearing to request orally that the hearings in this matter be postponed until at least June 1, 1987, needless to say, not only the Commission but all other parties in this proceeding were taken by surprise. The Commission can only characterize such conduct as bordering upon the boundaries of, if not actually entering into, the precincts of unconscionability.

By its action, Mountain Bell has placed the Commission and the parties in this Docket in a most awkward, uncomfortable, and economically wasteful position. Without identifying a specific dollar figure at this point, it obviously is clear that many thousands of hours of effort have been expended by the parties in this Docket, as well as by the Commission itself. To close down Application No. 37367, at this time, would not be

in the public interest. In reaching this conclusion, however, the Commission does not agree with or accept the reasons set forth by Mountain Bell, above described, as the justification for postponing further proceedings in Application No. 37367 until sometime after June 1, 1987. The principle reason for granting Mountain Bell's request to postpone further proceedings in this application until sometime after June 1, 1987, is the regrettable, but undeniable, fact that Mountain Bell refuses to proceed at this time, although the Commission and the parties were ready and willing to proceed. We have already in this Decision indicated our disappointment and displeasure at this course of conduct.

The Commission has given its utmost consideration to the proposal by several intervenors that Application No. 37367 be dismissed without prejudice upon the condition that intervening parties be made whole with respect to expenditures for attorneys' and expert witness fees and costs in accordance with Rule 41(a)(2) of the Colorado Rules of Civil Procedure. The first sentence of Rule 41(a)(2) states, "Except as provided in subsection (a)(1) of this subdivision of this Rule an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper." As a result of Mountain Bell's response to motions to reconsider and motion for decision and order, which it filed on December 15, 1986, Mountain Bell has requested the Commission to reconsider and reverse its oral order of December 1, 1986, denying Mountain Bell's motion to continue this application until a date subsequent to June 1, 1987. Accordingly, it reasonably can be stated that Mountain Bell has not requested to dismiss Application No. 37367, but merely to postpone it. Another potential difficulty in applying Rule 41(a)(2) is the legal fact that intervening parties in Application No. 37367 are not involuntary defendants who have been brought before a tribunal upon the filing of a civil action, but rather parties who, for whatever reason, requested to intervene and were granted intervenor status by the Commission. Thus, the argument could be made that whatever expenditures were undertaken by the intervenors were undertaken by the intervenors by virtue of their voluntary determination to be parties in Application No. 37367 rather than by Mountain Bell bringing them in as involuntary defendants which would be the situation in a civil court action.

The Commission at the same time recognizes that countervailing arguments could be made to the effect that Mountain Bell, by its actions, is in fact attempting to dismiss Application No. 37367 and that by its initial filing of Application No. 37367, intervenors necessarily were compelled to become intervenors in order to protect their economic interests. Thus, with regard to this latter point, intervenors could make the strong argument that although in legal fiction they may be "voluntary" intervenors, in economic fact they are involuntary defendants against the proposals set forth by Mountain Bell. The Commission, of course, is in no position to speculate which arguments might be found more persuasive by a reviewing court in the event the Commission were to use Rule 41(a)2 in dismissing Application No. 37367 provided intervenors were made whole with respect to attorneys' and expert witness fees and costs. We make no final determination whether or not the Commission possesses the legal authority to use Rule 41(a)(2). We believe on balance that the appropriate course of action is to grant, however reluctantly, Mountain Bell's request for a continuance. We do so in an

attempt to preserve the materials that have been produced to date at a considerable expenditure of time and effort. In this connection, Mountain Bell and all parties in this application should be advised that the Commission will not permit any party to turn Application No. 37367 into a de facto new proceeding. Absent is a strong showing of changed circumstances justifying another approach to refraining from private line and special access markets, changes in the thrust or the scope of the proceedings will be denied. In accommodating Mountain Bell in its request for a continuance, the Commission has no intention of permitting Mountain Bell to use Application No. 37367 as the vehicle for a new and different attempt to persuade the Commission to refrain from regulation absent in such changes. The prefiled testimony and exhibits of the parties are in, and all that remains is for the opportunity of the parties to cross-examine the testimony and exhibits which have been prefiled. The Commission, of course, will not foreclose reasonable supplementations and corrections of testimony and exhibits, but any requests to do so should be upon motion by the requesting party which shall be subject to the normal opportunity to respond.

In conclusion, the Commission will grant Mountain Bell's motion to reconsider its previous denial of its request to continue hearings in Application No. 37367 until a date subsequent to June 1, 1987. It should be pointed out to Mountain Bell and all the parties that the Commission will issue a subsequent order, in its normal course of business, resetting the hearing dates in this application subsequent to June 1, 1987. At this time, the Commission will advise the parties that it is very unlikely that hearing dates can be reset before August or September of 1987. To the extent, if any, that Mountain Bell has incurred an erosion of revenues due to its decision to request a postponement of further proceedings in this application, Mountain Bell should be on notice that the Commission may well consider such an erosion of revenues as one to be borne by Mountain Bell shareholders rather than ratepayers in a subsequent general rate proceeding. In the interim, the Commission will require Mountain Bell to submit a monthly report, beginning with data from the month of December 1986, and continuing each month thereafter, on the lost revenues, if any, and associated expenses incurred by Mountain Bell with respect to each of its discrete services for which it has requested this Commission to refrain from regulation in this application.

THEREFORE THE COMMISSION ORDERS THAT:

1. Hearings previously set in Application No. 37367 are vacated and shall be reset to commence on a date subsequent to June 1, 1987, by further order of the Commission.

2. No party in Application No. 37367 shall supplement or amend its prefiled testimony and exhibits except upon motion to do so granted by the Commission. Any motion requesting to supplement or amend testimony and exhibits shall set forth with particularity the justification for doing so together with a proposed amended or supplemented testimony or exhibit.

3. The following motions, and responses to motions, are held in abeyance pending further order of the Commission:

(a) Motion for the Commission to take judicial notice filed on November 28, 1986, by The Mountain States Telephone and Telegraph Company;

(b) Renewed verified motion to cause discovery and for protective orders filed on December 1, 1986, by Steven Jessen, Management Information Services Director of the City of Longmont, Colorado; and

(c) Motion to quash subpoena duces tecum issued to Doug Loflan, Mountain Top Communications, Inc., filed on December 2, 1986, by Mountain Top Communications, Inc.

4. A request by the Mountain States Telephone and Telegraph Company that the Commission reconsider and reverse its oral order of December 1, 1986, denying its motion to continue until a date subsequent to June 1, 1987, is granted in accordance with this Decision and Order and otherwise, is denied.

5. Except as otherwise provided by this Decision and Order, all pending motions, are denied.

6. No party in Application No. 37367 shall supplement or amend its testimony or exhibits previously prefiled in this application, except upon motion granted by the Commission. Any motion seeking permission to amend or supplement testimony and exhibits shall set forth with particularity the grounds therefor together with the proposed amendment or supplementation of testimony or exhibits.

7. The Mountain States Telephone and Telegraph Company shall submit a monthly report, commencing as of the date of December 1, 1986, and monthly thereafter, setting forth for each discrete service which it seeks to have the Commission refrain from regulation in this application the revenues, if any, which it has lost for each discrete service and the associated expenses for that service for that month. The report for December 1986 and the report for January 1987 shall be filed on or before April 2, 1987. The report for February 1987 shall be filed on the first working day of May 1987, and each monthly report thereafter shall be filed on the first working day of the third month after the month for which the report is made.

8. This Decision and Order shall be construed as an interim order of the Commission subject to the provisions of Rule 14.R of the Commission's Rules of Practice and Procedure.

This Decision and Order shall be effective forthwith.

DONE IN OPEN MEETING the 13th day of January 1987.

(S E A L)

ATTEST: A TRUE COPY

Harry A. Galligan, Jr.
Executive Secretary

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

RONALD L. LEHR

EDYTHE S. MILLER

ANDRA SCHMIDT

Commissioners

JEA:lm:ym:1686P