(Decision No. R87-341)

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

* * *

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, Complainant, v. LONGMONT COMMUNICATIONS CORPORATION Respondent, and CITY OF LONGMONT, Intervenor.	CASE NO. 6443 RECOMMENDED DECISION OF EXAMINER ARTHUR G. STALIWE

March 23, 1987

Appearances: Russell P. Rowe, Esq.
David H. Stacy, Esq.,
Roy A. Adkins, Esq., Denver, Colorado, on behalf of Complainant;

Richard N. Lyons, Esq., Longmont, Colorado, on behalf of Longmont Communications Corporation;

Ralph S. Josephsohn, Esq, Longmont, Colorado, on behalf of the City of Longmont;

Mark Bender, Assistant Attorney General, on behalf of the Staff of the Commission.

STATEMENT OF THE CASE

By complaint filed January 18, 1985, Mountain Bell alleges that Longmont Communications Corporation (LCC) entered into contractual arrangements with the City of Longmont obligating LCC to provide telephone and telecommunication services which are functionally equivalent to services provided by Mountain Bell, all without a certificate of public convenience and necessity. For relief, Mountain Bell requests that it have certain of its services deregulated, or, alternatively, that LCC should be regulated as a public utility.

On February 7, 1985, the Commission sent an Order to Satisfy or Answer to LCC. On February 27, 1985, LCC answered. Additionally, on February 22,1985, the City of Longmont petitioned to intervene, which intervention was granted on March 29, 1985.

Originally scheduled for hearing on June 3 and 4, 1985, hearing in this matter ultimately commenced on September 4, 1985, and ended on September 10, 1985. Final briefs were filed on October 11, 1985. At that time the matter was taken under advisement.

Shortly after the completion of this case, four other cable companies located in Colorado petitioned the Federal Communications Commission (FCC) for expedited declaratory ruling that the FCC has preempted all Colorado state regulation of cable television facilities that are capable of originating, or terminating, interstate communications. The FCC finally released its memorandum opinion and order regarding federal preemption of this area on November 12, 1986, In Re United Cable Television of Colorado, Inc., et al., FCC 86-494. Copies of that decision were provided to all parties in this matter by Mountain Bell on December 1, 1986. In its memorandum opinion, the FCC denied the request by the various cable companies for declaratory ruling, thus clearing the way for state interpretation of the various issues contained in this complaint case, as well as other cases.

Pursuant to the provisions of § 40-6-109, C.R.S., Examiner Staliwe now transmits to the Commission the record and exhibits of said hearing, together with a written recommended decision containing findings of fact, conclusions, and order.

FINDINGS OF FACT

Based upon all the evidence of record, the following is found as fact:

1. Complainant, Mountain States Telephone and Telegraph Company, is a public utility providing telephone and other telecommunication services throughout various portions of the State of

Colorado. As pertinent to this case, Mountain Bell is a provider of telephone and other telecommunication services in and about the City of Longmont, Colorado.

2. Respondent, Longmont Communications Corporation, is a Colorado corporation whose stock is solely owned by Scripps-Howard Broadcasting Company, which in turn also owns all of the stock in Scripps-Howard Cable Company. Scripps-Howard Cable Company owns the cable televisions systems in the Colorado communities of Louisville, Lafayette, Loveland, Fort Lupton, and Parachute. It should be noted that none of these affiliated cable television systems are interconnected among themselves, nor with Longmont. Indeed, the technological and economic problems associated with interconnection of non-contiguous systems make this difficult to achieve, especially via cable. See Ex. 53.

3. The City of Longmont, Colorado, is a home-rule municipality, approximately 50,000 population, lying 38 miles due north of Denver, Colorado. As pertinent here, the City of Longmont lies 11 miles north of Lafayette, Colorado, and approximately 13 miles north of Louisville, Colorado.

HISTORICAL BACKGROUND

4. In October 1979 Longmont officials began discussing the potential award of a community antenna television franchise. Later, in August 1980, a proposed community antenna television ordinance was submitted to the city council, modeled after a similar ordinance previously adopted by Littleton, Colorado. The Longmont ordinance was passed by the city council and adopted in October 1980.

5. In February 1981 a cable television consultant was retained by Longmont to advise them on issues related to the issuance of a cable television franchise. In May 1981 the consultant drafted a request for proposals which was issued to several cable television companies. In November 1981, Longmont received proposals from five cable television companies, one of whom was LCC. As part of its proposal, LCC offered to provide an interactive two-way cable system, with an additional institutional network dedicated to the municipality's use.

6. In January 1982 Longmont's consultant evaluated the various proposals, and submitted his report to the city council. As a result of advice from the municipal attorney's office, an election was held in 1982 to grant the award of a non-exclusive franchise to one of the cable television companies. Because none of the cable television companies was successful in obtaining a majority vote in the first election, a second election was held in May 1982, in which LCC received the majority vote. Accordingly, on May 24, 1982, a franchise agreement was executed between Longmont and LCC.

As part of the franchise process, LCC agreed to provide Longmont a traffic signalization service on its cable system for free; additionally, LCC also agreed to provide a computerized electricity monitoring system for Longmont's electric utility department at no cost. Longmont also agreed to provide a separate institutional cable designed to connect all municipal buildings, as well as all the St. Vrain Valley School District RE-1J schools located within Longmont municipal boundaries. As a practical matter, this meant all but one of the district's schools would be hooked up to the institutional cable. And, LCC would provide a grant of $100,000 to the school district for computers, as well as donate 53 data modems for use with the computers.

THE CABLE SYSTEM

7. By May 1983, LCC had completed construction of its cable television system in Longmont. The system is comprised of a subscriber network consisting of two separate cables, and a separate institutional network consisting of one cable. Each cable has a 64-channel capacity, with video programming requiring a full 6MHz channel for use; however, 256 data channels can fit on one video channel. Further, both the subscriber network and the institutional network are bi-directional in part, capable of some two-way interaction. This is a result of the city's requirement to be considered for a franchise. Neither of LCC's networks, the subscriber network nor the institutional network, is hooked up to any interstate communication facility.

8. As noted, the cable system is comprised of two separate networks: a 170-mile subscriber network consisting of two 64-channel (video) cables, and a single 18-mile institutional cable linking all municipal and public school facilities in Longmont. The cost per mile for the installation of aerial cable was $15,868, while burying cable underground cost $25,968 per mile. The institutional cable network, which largely piggybacks the subscriber network, cost only $5,600 per mile installed. The record establishes that approximately 40% of the subscriber network is aerial installation, with 60% of the network buried.

It is interesting to note that the cable itself only costs $1,930 per mile ($3,818 per mile for dual cable), while the labor costs are $4,000 per mile for aerial installation and $15,200 for underground installation. The remainder of the cost is taken up with the electronics associated with the cable network ($5,700 per mile of dual cable, $2,000 for single cable), various hardware, and items such as engineering costs.

9. At the time of the hearing the subscriber network had 45 operational channels. Because of its more ubiquitous nature, the subscriber network was chosen for traffic control; the institutional cable is too limited in distribution to operate all traffic signals. Two

of the 45 channels on the subscriber network are dedicated to Longmont's traffic control system, at no cost to the city.

Several of the channels are taken up with conventional broadcast stations (i.e., "free" television) from the Denver area, which stations the residents of Longmont can receive without benefit of cable.

Additionally, four of the 45 channels are allocated to video text transmission (i.e., printed messages on TV), three of which channels are controlled by Longmont and/or the school district for local broadcast of school closures, school lunch menus, etc. One of the four video text channels is available for lease.

It should be noted that up to the time of the hearing only two prospective customers approached LCC for use of the leased access channel. And, after having approached LCC those two customers declined to lease the channel. No other nibbles were received for leasing video text from system completion in May 1983 to hearing in September 1985.

10. Obviously, the initial operation of the subscriber network did not fully exhaust the capacity of one cable, much less two. It is this excess capacity that worries Mountain Bell; it is fearful of LCC facing uneconomic overcapacity and turning to telecommunications sales as a way to recoup its investment. LCC, however, points out that it constructed a dual-cable system to insure it would be able to economically meet future cable television growth over the 15-year franchise, especially given the disparity between cable costs and installation costs; i.e., it is cheaper by far to bury two $1,900-per-mile cables in a $15,000-per-mile trench once than to initially install only one and go back five years later to install the second cable. The economics of initially installing two cables ($19,800 per mile for labor and cable) clearly outweighs going back later to bury a second cable ($33,800 per mile for labor and cable).

11. On the 18-mile institutional cable linking all municipal facilities and public schools in Longmont, LCC provides a supervisory control and data acquisition system (SCADA). The SCADA system is used to monitor the electric power flows to and from electric substations in Longmont's electric utility department. The data is transmitted by city owned and operated computers over the institutional network (I-Loop). Like bi-directional capability and an I-Loop, the SCADA System is an obligation required to be provided by LCC in order for it to obtain the municipal franchise. This service is provided free of charge on two of the I-Loop's channels, leaving 62 remaining channels for other use. What is in dispute is whether the SCADA service will <u>remain</u> a free service, or whether LCC will charge for the service after three years.

12. Regarding the remaining 62 channels on the I-Loop, the City of Longmont plans to use part for the transmission of data between its other computers within the city. Ultimately, Longmont expects to transfer all its data transmission needs from currently used Mountain Bell lines to LCC's I-Loop. The expected cost saving to the city lies between $30,000 and $40,000 annually, assuming no charges by LCC for the services.

In addition, the St. Vrain Valley School District also plans to utilize channels on the I-Loop for data transmission between computers, as well as for video use such as televised lectures and teacher conferences, etc. The anticipated combined use of the city and school district will not come close to exhausting the capacity of the I-Loop. There will still remain numerous unused channels. Control of the use of the I-Loop rests with the city pursuant to the franchise agreement, to include control of the school district's use of that network.

13. Regarding charges for service, it is undisputed by all parties that the City of Longmont is to receive traffic signalization at no cost for the life of the franchise. Similarly, the cost of construction for the I-Loop was not billed directly to the city. Thereafter, the city and LCC parted ways.

It is the City of Longmont's position that in every case LCC will provide at no cost the facilities and services, as well as funds, necessary to support the city's use of the I-Loop for whatever telecommunication uses the city desires. In the city's opinion, this is a part of the cost to LCC for obtaining the municipal franchise for cable television.

LCC, on the other hand, clearly states that in the future it will charge for data transmission services (and other telecommunication services) over the I-Loop. LCC's position is that while it was obliged under the franchise to construct the I-Loop and provide traffic signalization at no charge, it is free to charge the city for SCADA services after three years, and all other services such as data transmission over the I-Loop. Just how much those charges will be, and what items they will cover (i.e., capital costs and operating expenses, or just operating expenses, etc.), were not determined by LCC at the time of the hearing.

14. One bugaboo that needs to be laid to rest is the issue of reliability. The City of Longmont's witnesses were all of the opinion that the twisted wire-pair technology predominately used by Mountain Bell is inferior to the coaxial cable system offered by LCC.

Cross-examination revealed that these opinions were not based upon actual studies and observations by the witnesses, but were uncritical repetition of some consultant's sales pap. And, the consultant himself failed to study the actual situation in Longmont.

Investigation by Mountain Bell's engineers, and checked by this Commission's staff, revealed only five reports of trouble on the City of Longmont's digital data service circuits since installation in March 1985. Of those five trouble reports, only one was attributable to Mountain Bell circuits, and it was cleared up as it was being tested. The remaining four trouble reports were all attributable to the city's terminal equipment. Similarly, investigation into alleged problems with circuits provided to the school district failed to disclose any problems like those alluded to by the city's and school district's witnesses.

15. What the evidence in this matter does reveal is that Mountain Bell's wire-pair technology is somewhat slower than coaxial cable for high speed transmission. For example, wire is too slow to transmit video (motion picture), although it can transmit still pictures. In turn, coaxial cable is slower than fiber optic cable at the highest transmission speeds.

Further, by properly matching the electronics attached to each wire or cable, a user can achieve relatively error-free transmission up to the limits of each type of medium (i.e., wire, coaxial cable, fiber optic cable). Mismatch electronics, or fail to recognize the limitations of each medium, and the results will be unsatisfactory.

As pertinent to this case, the wire-pair and fiber optic cable technology of Mountain Bell is fully adequate to handle the data transmission needs of the City of Longmont, especially for the slower speed SCADA and traffic signalization services. Longmont, however, would have to pay for these services if the city used Mountain Bell.

COMPETITION

16. The evidence in this matter indicates that in any given municipality it is likely there will only be one cable television company. This will be true regardless of the absence of legal constraints (i.e., non-exclusive franchises). Whichever cable company is first into a municipality is also likely to be the only one because of the capital-intensive nature of the business. As noted by LCC's witness, Mr. Michael Adamchak:

Q. Suppose there was no franchising requirement, it was come one, come all, it could be one cable company or 50 cable companies. Would Longmont Communications have entered that market on that basis without the protection of a franchise?

A. In effect that market is open for cable television. More than one cable company can serve the City of Longmont. Highly unlikely but theoretically it's possible. Franchise agreement just spells out our obligations and the city's obligations. So we need that type of document before we would service a city.

Q. Why did you say it would be unlikely that one would do so without franchise?

A. It's just not profitable to have more than one cable operator serve a city, in most instances. It is being done. I think here in Colorado, Colorado Springs, they're having some activity like that where two operators are serving the same area. But it does cut down on our potential customers and therefore your profitability is decreased.

Q. Are cable services what we would normally call capital intensive? It takes a lot of up-front money to get something like that going?

A. Yes. That's the other limitation factor in that only so many facilities can be strung on some of the poles for safety purposes and such. So in some ways a second operator comes in, he has to redesign his system, redesign it so it's a little more costly to build which could be a determining factor.

Q. So am I correct that the first cable company into a given area would have a distinct advantage over the second, third or fourth companies?

A. Yes.

Q. Would I then be correct in saying that in any given area, any municipality that would have both telephone and cable service, there is likely to be nothing more than a duopoly, two providers?

A. Yes.

Transcript, September 9, 1985, pp. 73-75. The economic constraints of having to build a totally buried cable system at $26,000 per mile, while your predecessor took up all the pole space and has a 40 percent mix of aerial installation at only $16,000 per mile, only to then wind up fighting over portions of the cable television market, virtually guarantees one cable company in a market. It appears that cable television has many of the attributes of a natural monopoly.

If it is Mountain Bell's fear that non-exclusive franchises will lead to proliferation of cable companies in a municipality, the evidence is to the contrary.

17. The gravamen of Mountain Bell's position, as articulated by witnesses Dozoretz and Blankenship, is that since LCC has a "network" in place, and someday might offer data transmission services to the public, there is today, ipso facto, competition that Mountain Bell must be free to respond to. The mere possibility of competition, however speculative, should suffice to allow Mountain Bell to charge whatever it can get for the "competitive" services, Mountain Bell argues.

What is undisputed is that LCC executives have expressed an interest in talking to potential data transmission customers; however, up to the time of the hearing none were known to have approached LCC except the city itself and the school district. And, the city doesn't intend to pay for the services it gets. Whether this similarly extends to the school district is not clear; the implication the examiner gets from the record is that the school district believes it will get services on the same basis as the city.

Additionally, Mountain Bell is fearful of the cable television network being used to connect a large telephone user directly to his interstate long-distance carrier (i.e., AT&T, MCI, Sprint, etc.), thus bypassing the Mountain Bell network and avoiding Mountain Bell's access charges to the interstate carrier. The example pointed to by Mr. Blankenship was Cox Cable's subsidiary, Commline, in Omaha, Nebraska, which had a contract with MCI to connect MCI's customers to it and bypass the local phone company.

The record, however, as supplemented by Mountain Bell on December 1, 1986, In Re United Cable Television of Colorado, Inc., FCC 86-494, reveals that Commline ceased operations several months after the FCC allowed it to operate as the connection between MCI and MCI's customers. The implication the Examiner gets from the FCC decision is that Commline's service either wasn't needed and/or Commline had technical problems adapting its cable system to slow-speed voice circuits. Whatever the reason, the feared threat that was Commline went out of business, despite a contract with MCI and an urban market to operate in.

Further, the evidence in this case reveals that a cable system is not readily adaptable to voice communication, at least not without extensive and expensive modification, to include modems designed to adapt high-speed cable to slow-speed voice communications. One cannot simply plug a phone jack into one's cable outlet and commence calling. And, apparently, this applies to other non-video services as well. As conceded by the Federal Communications Commission, the bastion of deregulation, regarding non-video services:

> ...Both the technical ease with which such services might be made possible by cable companies and the potential market have, in our view, been greatly exaggerated.

The FCC went on to remark in footnote 43 of its decision:

> The Commission's own missteps in this regard are perhaps instructive. Notwithstanding a requirement adopted in 1972 that larger cable systems have the capacity for two-way communications installed (Cable Television Report and Order, 36 FCC 2d 143 (1972), little practical use was made of this capacity. The requirement was subsequently eliminated.

Emphasis supplied, F.C.C. 86-494, at pp. 4, 6.

The above remarks were preceded by these observations:

> There are statements to the effect that the Colorado proceedings have influenced the companies' decisions not to provide institutional-type services but even those statements are tempered considerably by admissions that there are technical and economic reasons why cable systems across the country are not providing these types of services.[39]
>
> * * *
>
> [39] For example, the affidavit of Dale Hatfield states that a number of factors may hamper the provision of service over institutional cables:

> Often...the institutional cable serves only a limited number of locations....[Another] major impediment is the cable systems have been franchised on a community by community basis such that a metropolitan area is seriously fragmented with independently operated cable systems. It is very difficult to offer geographically widespread services in such an environment. Also cable operators are typically entertainment oriented [and] are often preoccupied with establishing the viability of their basic cable interests.
>
> Mr. Hatfield also states that the technical problems associated with residential cables are "reduced" with institutional cables, but the implication is that they are not eliminated. We note that several months after we preempted the Nebraska prior certification requirement, Commline ceased operations.

F.C.C. 86-494, at pp. 4, 5, 6.

19. Regarding the loss of data transmission services and other private line services, the record is silent regarding the impact to Mountain Bell in the Longmont area; i.e., there was no comparison of Longmont private line revenues to total Longmont telephone revenues, etc. Colorado system-wide, however, the staff of the Commission pointed out that Mountain Bell had total intrastate revenues in 1984 (last full year before hearing) of $650,739,000, with private line services of all kinds totaling $25,828,000, or 4.0 percent of the total. Further, some of these services are currently profitable (i.e., priced above cost) yet there is no evidence of record indicating any attempts by Mountain Bell to lower its prices for these services.

20. In summation, the record in this case reflects that the only provision of non-video services are those being provided free (or the assumption that they will be free), with no actual requests from paying customers seeking to leave Mountain Bell and use the local facilities of LCC. While LCC executives express an interest in commercially transporting data, no one else has expressed an interest in commercially using them in the Longmont area. The use of the system by the City of Longmont is clearly predicated upon the notion of "free" service; how long the honeymoon between city and cable company will last is anyone's guess.

Regarding telephone by-pass, the only known threat referred to in the record, Commline of Omaha, went out of business in a larger, and potentially more lucrative, market than Longmont. There is no evidence that any inter-LATA phone carrier has approached LCC to use the LCC system along the same lines as failed Commline.

LEGAL HISTORY

21. In 1913 the Colorado legislature passed then - S.B.1, creating the Public Utilities Commission, and pertinently designating a public utility as:

> The term "public utility", ... includes every ... telephone corporation, telegraph corporation, ...

At the time (and up to the present), the legislature provided no definitions for the terms "telephone" and "telegraph".

Traditionally, "telephone" referred not only to the apparatus but also to the transmission of live two-way voice communication to a distance, while "telegraph" referred to the transmission of written messages to a distance. Davis v. Pacific Telephone and Telegraph Co., 127 Cal. 312, 59 P.698 (1899); Television Transmission, Inc. v. Public Utilities Commission, 47 Cal. 2d 82, 301 P.2d 862 (1956); Commercial Communications, Inc. v. Public Utilities Commission, 50 Cal. 2d 512, 327 P.2d 513 (1958). The use of the separate terms by the Colorado legislature in 1913 clearly connotes a distinction, which distinction remains unchanged to the present.

22. In 1984 by then - H.B. 1264, the Colorado legislature added Article 15 to the public utilities law, which pertinently provides:

§ 40-15-101(6):

> "Private telecommunications network" means a system, including the construction, maintenance, or operation thereof, for the provision of telecommunications service, or any portion of such service, by a person or entity for the sole and exclusive use of a person or entity and not for resale, directly or indirectly. In addition, any telecommunications service, the operation, facilities, or premises of which are or may be shared by energy utilities, used solely and exclusively by and for such utilities and not for resale, directly or indirectly, shall be considered a private telecommunications network under this article. Construction, maintenance, or operations of a private telecommunications

network shall not constitute the provision of public utility service, and such network shall not be subject to any of the provisions of articles 1 to 7 of this title.

§ 40-15-101(9)

"Telecommunications service" means the transmission of signs, signals, writings, images, sounds, messages, data, or other information on any nature by wire, radio, lightwaves, or other electromagnetic means. "Telecommunications service" does not include the services offered by persons whose primary business is the one-way transmission of television signals, surveying, cellular communications, or the provision of radio paging or mobile radio service.

§ 40-15-103(2):

No provider of intrastate telecommunications service shall operate within this state without first having obtained from the commission a certificate declaring that the present or future public convenience and necessity requires or will require such operation, unless such operation is authorized by § 40-5-102.

Emphasis supplied. Pursuant to § 40-15-109, willful violations of the various provisions of Article 15 are declared to be crimes, class 1 misdemeanors, and punished accordingly.

From this Examiner's limited research it appears that the bill was signed and became effective on April 2, 1984. The timing is important when compared to the creation of the LCC cable systems. The City of Longmont's discussion of a cable television franchise (1979), the enactment of a cable television ordinance (1980), the request for proposal (1981), the municipal elections (1982), the award of the franchise (1982), and the completion of the cable systems (1983) all precede the enactment of Article 15 by about a year or more.

Put in other terms, at the time LCC went through the franchising process and constructed its systems there were no legal restraints to constructing a data transmission (i.e., telemetry) system. Only the electronic transmission of two-way voice (telephone) and written messages (telegraph) were then statutorily designated as utility services. This Commission cannot interpret the 1984 additions as mere semantics rather than substantial changes in the law. Miller Brothers v. PUC, 185 Colo. 414, 525 P.2d 443 (1974).

23. At the federal level, Congress in 1984 passed the Cable Communications Policy Act, P.L. 98-549, 47 U.S.C. §521, et seq., which pertinently provides:

> 47 U.S.C. 541 (d)(1) and (2):
> (1) A State or the Commission may require the filing of informational tariffs for any interstate communications service provided by a cable system, other than cable service, that would be subject to regulation by the Commission or any State if offered by a common carrier subject, in whole or in part, to subchapter II of this chapter. Such informational tariffs shall specify the rates, terms, and conditions for the provision of such service, including whether it is made available to all subscribers generally, and shall take effect on the date specified therein.
>
> (2) Nothing in this subchapter shall be construed to affect the authority of any State to regulate any cable operator to the extent that such operator provides any communication service other than cable service, whether offered on a common carrier or private contract basis.
>
> 47 U.S.C. 522(5) defines cable service thusly:
>
> The term "cable service" means --
>
> (A) The one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and
>
> (B) Subscriber interaction, if any, which is required for the selection of such video programming or other programming service;

Emphasis supplied.

From the above it appears that this Commission does have subject matter jurisdiction over non-video telecommunication services offered in intrastate commerce.

DISCUSSION

To begin, this examiner cannot ignore the fact that LCC contracted and built its cable systems before any change in the law expanding utility service from telephony and telegraphy to include all other forms of telecommunication. Assuming a determination that LCC is a utility, I fail to see how this Commission can do anything but grant a certificate to LCC to service as a telecommunication provider to the area encompassed within the City of Longmont as it existed on April 2, 1984. Further, if a utility, LCC would be compelled to be a common carrier or provider under Colorado law, and serve up to the limits of its capacity. In effect, we would drive LCC into competition with Mountain Bell. Needless to say, since LCC would be "grandfathered" in, there is no legal way this Commission could compel it to eliminate existing facilities that duplicate those of Mountain Bell, as Bell requests.

Well, is LCC a public utility under either § 40-1-103 or § 40-15-101, C.R.S.? It clearly is not a provider of telephone service, at least based upon the record, nor is it translating and transmitting written messages. The electricity monitoring system (SCADA) and the traffic signalization system fit into neither category. Accordingly, I must conclude it is not a utility under § 40-1-103, C.R.S.

How about the broader definition of telecommunications service found in 40-15-101(9)? Especially with its curious exception for those, "...whose primary business is the one-way transmission of television signals...?" While I am in complete agreement with the assistant attorney general that the primary business exception is a patent denial of equal protection[1], I do not believe it is within the ambit of this Commission's authority (statutory and/or constitutional) to either ignore the law or declare it unconstitutional. The power to declare that part of the statute unconstitutional lies with the judicial branch, and it is there relief must be sought. In any event, since LCC was only providing service one or two customers, and then at no extra charge, it clearly falls within the ambit of the exception. I should add that with multiple customers on the I-Loop, that system does not appear to be a private telecommunications network as defined in § 40-15-101(b).

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1. In effect, what the primary business exception says is that a large, diversified provider (i.e., cable plus data transmission) of telecommunications services is exempt from criminal prosecution, while a small, single-service provider (i.e, just data transmission) has exposure to criminal liability, all for the same acts.

Further complicating this situation is the fact that the services being provided to the city are done so at no cost. While there is no specific exemption for free utility services in § 40-1-103 and § 40-15-101, C.R.S., as there is in the transportation utility area [see § 40-10-101(4)], the entire tenor of the public utility law is to prevent excessive charges, rates, etc., with regard to utility services. See § 40-3-101, et. seq. However, if the service is free, what is there to effectively regulate? After all, no matter how atrocious, inadequate, unsafe, etc., a free service may be, it's still worth more than is being paid for it.

Traditionally, this Commission has never regulated free utility service (e.g., telephone networks inside hotels that never charged the customer more than Mountain Bell's charges to the hotel itself), even when the costs for the "free" service were hidden or submerged in other charges for non-utility services. Yellow Cab v. Malibu Motor Hotel, 172 Colo. 349, 473 P.2d 710 (1970). Simply put, as long as LCC doesn't charge for its telecommunications services, there is nothing for this Commission to regulate. Let LCC send a bill for telecommunications services, even if only to the city, and its status changes. Similarly, if it purports to hold itself out to provide such services, then its conduct may bring it within the ambit of § 40-15-101((), but for the primary business exemption. However, under the existing law the only telecommunications utility in Longmont that we know about is Mountain Bell.

Well, regardless of whether the Commission regulates LCC, should Mountain bell be deregulated because of "competition" from LCC? At this point, I must ask "What competition?" Does Mountain bell desire to provide free service to Longmont? Worse yet, pay the city to take traffic signalization, etc.? How do you profitably compete with someone giving the service away? It must be remembered that but for the city and school district, who expect free service, there is no evidence of anyone else seeking telecommunications services from LCC. It is not clear that there is a market beyond the city and school district in Longmont solely for intra-city data communication. Indeed, it is not clear that the city and school district will remain customers of LCC if they ultimately have to pay for the services they request.

Regarding the largely theoretical dispute between the economic experts in this case on perfect competition versus workable competition, etc., the examiner merely notes that that area is the subject of Case No. 5323, heard by the Commissioners themselves, in which a decision is expected shortly.

In this case it should be noted that Mountain Bell's Dr. Dozoretz defined his notion of workable competition to include the following:

A. Absence of legal and/or technological barriers to entry;
B. Sufficiently dense market to support alternative providers of service;
C. An opportunity for alternative providers to market products and services in competition with one another;
D. A need for alternative providers in the market place to price on the basis of marginal price.

The staff's economist, Mr. Langland, defined his notion of competition thusly:

1. A market with reasonably free entry;
2. A reasonable number of firms in the market, each without disproportionate;
3. Reasonably free exit from the market;
4. Reasonable flexibility in price
5. Goods and services substitutable for one another for choice.

As pertinent here, the record discloses that in any municipality there will likely only be two telecommunications providers: Mountain BEll and the cable TV company (maybe). That is a duopoly (maybe), not a reasonable number of firms.

Regarding entry, and ignoring legal questions for the moment, the record reveals that the high initial fixed costs (aerial and buried cable), most of which appear to be unrecoverable labor rather than salvageable hardware, dictate that only large operators reasonably assured of a profit will enter a given market. This whittles down the field considerably.

Once in place, a custom designed telecommunications network cannot be economically abandoned, i.e., you can't sell the "inventory" to other users at close to cost. That clearly limits free exit - thus inhibiting entry by compelling potential entrants to carefully weigh their options before literally burying millions of dollars of stockholder money. Simply put, the economics of starting a telecommunications network are vastly different from those of opening a small retail store.

As noted earlier, there has been no showing that the Longmont intra-city telecommunications market is sufficiently dense to support two or more providers. It must be remembered that the City of Longmont didn't become actively interested in cable telecommunication services until it smelled a free lunch. Similarly, the school district hadn't discovered its great need for classroom computers and inter-school hookups until it was given $100,000 cash and free modems. And, the record fails to reveal any other request by anyone else for such services over two years after the building of the cable systems.

It certainly appears that the FCC's statement that the demand for such services is greatly exaggerated is true in Longmont.

With that, the examiner does not see how the Longmont situation meets even the relaxed definitions of "workable competition", much less the higher definitions of "perfect competition." This is not to say the situation might not change at some time in the future. Currently, however, the record indicates that Mountain Bell is the only commercial (versus free) telecommunications provider in Longmont. Any refraining from regulation based on the facts in this case is premature.

In summation, the existing law does not permit this Commission to order the dismantling of LCC's cable network built before the 1984 changes in the public utility law. And, this Commission has no authority to declare statutes, or portions thereof, unconstitutional regardless of our own legal opinions in the matter. Further, the record does not support the notion that there is competition in the Longmont market, but for the loss of customers to the free service provided by LCC.

Regarding LCC's request for attorney's fees, the examiner notes that if what Mountain Bell really wanted was declaratory relief, that could have been obtained under § 24-4-105(11), rather than suing LCC directly and thus compelling it to defend for the entire length of the case (5 days of hearing). Rather than being an unwilling party, LCC could merely have been a witness at far less attorney time and expense than that required for a party defendant.

Further, it should have been clear that an unregulated business activity undertaken before a change in the law would not later be subject to dismantling. And, of course, the clear exemption in § 40-15-101(9), whatever its constitutional validity, is beyond this Commission's authority to ignore. With that, the examiner must wonder why the fuss, at least in this forum.

However, the Commission has never before ruled on whether a losing party in a complaint case is, ipso facto, required to pay attorney's fees, especially where there isn't a request for monetary damages. Accordingly, the examiner will deny LCC's request and permit it to take the issue to the full Commission by way of exceptions.

CONCLUSIONS

1. Pursuant to § 40-101-3 and § 40-15-101, C.R.S., et seq., this Commission has jurisdiction over at least one of the parties.

2. Pursuant to § 40-15-101(9), C.R.S., Longmont Communications Corporation is exempt from the Commission's oversight as long as its "primary business" is that of a cable television provider. In view of the fact that it currently derives no income at all from its telecommunications services, only from the provision of television programming, it is a foregone conclusion that LCC is exempt.

3. The record in this matter does not support the notion that there is a competitive need for relaxed regulation of Mountain Bell in the Longmont market at this time. The only alternative provider, Longmont Communications Corporation, is doing so at no charge to only two governmental entities per contract and franchise. Whether LCC will ultimately charge for its municipal services, and also expand to the commercial market, is uncertain based on the record in this case.

4. Pursuant to § 40-6-109, C.R.S., the examiner recommends that the following order be entered.

O R D E R

THE EXAMINER ORDERS THAT:

1. The complaint of Mountain Bell against Longmont Communications Corporation is dismissed.

2. The request by Longmont Communications Corporation for attorney's fees is denied.

3. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if such be the case, and is entered as of the date hereinabove set out.

4. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions thereto; but if no exceptions are filed within 20 days after service upon the parties or within such extended period of time as the Commission may authorize in writing (copies of any such extension to be served upon the parties), or unless such Decision is stayed within such time by the Commission upon its own motion, such Recommended Decision shall become the Decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

5. 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)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

ARTHUR G. STALIWE

Examiner

lc:2699d