(Decision No. C83-1454)

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

* * *

IN THE MATTER OF THE INVESTIGATION OF THE SALE AND RESALE OF INTRASTATE COMMUNICATION SERVICES WITHIN THE STATE OF COLORADO.	))))	CASE NO. 6298 ORDER OF THE COMMISSION

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September 13, 1983
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I. HISTORY OF THE PROCEEDINGS

By Decision No. C83-596, the Commission, on April) 12, 1983, instituted Case No. 6298 for the purpose of entering upon an investigation pertaining to the sale and resale of intrastate telecommunications services within the State of Colorado. In that decision, the Commission stated that there could be no question that the Colorado telecommunications market is expanding and that it is in the public interest that all relevant issues concerning the sale and resale of intrastate communications services should be reviewed and examined thoroughly in order to insure that such services are provided in the manner which is consistent with applicable law and in accordance with the public interest.

By Decision No. C83-596, the Commission made the Mountain States Telephone and Telegraph Company (Mountain Bell) and all other telephone companies which are certificated by or operate under the authority and jurisdiction of this Commission, parties to Case No. 6298. In addition, all sellers or resellers, or potential sellers or resellers of telecommunications services in the State of Colorado were also made parties to Case No. 6298. The Commission also set May 13, 1983 as the date by which any person, firm or corporation who desired to intervene as a party in Case No. 6298 could file a motion to do so with the Commission.

The following persons, firms and corporations moved to intervene in Case No. 6298:

Contact Communications - Jeffrey C. Pond

*Victor J. Toth

*Comprehensive Communications Systems, Inc. of Colorado

*Rolm of Colorado, Inc.

*Combined Network, Inc.

RAM Broadcasting of Colorado - William A. Wilson

William E. Darden, III, pro se

Colorado Municipal League - Leonard M. Campbell and Dudley P. Spiller, Jr.

LDX, Inc. (limited intervention) - Tucker K. Trautman

National Econo Tel. - Tucker K. Trautman

Colorado-Wyoming Hotel & Motel Association, Inc. - Tucker K. Trautman

Radio Contact Corporation - Dudley P. Spiller, Jr.

AMCOM International, Inc., AMCOM of Colorado, Inc., and Conversation Piece, Inc. - Arthur B. Lesher

Starnet Corp. (limited appearance) - Jeffrey C. Pond and R. Norman Cramer, Jr.

Advance Mobile Phone Service, Inc. (limited appearance) - Jeffrey C. Pond

Southern Pacific Communications Co. - Michael M. McGloin

MCI Telecommunications Corp. - John E. Bryson, Robert F. Hanley, and Karen L. Chapman

Staff of the Commission - Steven H, Denman

* Became parties due to withdrawal of Application No. 35380 per Decision No. C83-705 (5-3-83).

Some of those above who moved to intervene had already been made parties to Case No. 6298 by ordering paragraph 3 of Commission Decision No. C83-596, dated April 12, 1983, which instituted the proceedings herein.

In Decision No. C83-596, the Commission set forth nine questions which it believed should be addressed by the parties. Those nine questions are as follows:

1. Is a seller and/or reseller of intrastate communication services a public utility as defined in 40-1-103(1), C.R.S. 1973?
2. If a seller and/or reseller of intrastate communications services is found to be a public utility as defined by Colorado law, is that seller and/or reseller required to obtain a certificate of public convenience and necessity prior to commencing business?
3. To what extent, if at all, does the doctrine of regulated

monopoly as enunciated in Colorado case law preclude a seller and/or reseller of intrastate telecommunications services from operating in the territory certificated to a telephone company or in the territory exclusively authorized to be served by a telephone company, such as Mountain Bell, through grandfather rights?

4. If a seller and/or reseller of intrastate telecommunications services is found to be a public utility as defined by Colorado law, is that seller and/or reseller required to conduct its operations in the manner described in the Rules and Regulations of the Commission and the laws of the State of Colorado?
5. Are sellers and/or resellers of intrastate telecommunications services subject to local franchise taxes and/or state regulatory fees?
6. Should the Commission limit or eliminate certain types of services, such as private line channels, wide area telephone services (WATS), message telephone services (MTS), foreign exchange or local exchange calls, that sellers and/or resellers may provide?
7. Should sellers and/or resellers purchase service on a measured usage basis or flat rate basis?
8. Should sellers and/or resellers sell or resell services on a measured usage basis or flat rate basis?
9. Should telephone public utilities presently certificated by the Commission be ordered to remove any and all tariff restrictions against the sale and/or resale sale of any and all intrastate telecommunications services? Does the Commission have authority under present law, without the necessity of statutory amendment, to order this removal?

The Commission also stated that parties, at their option, could raise any and all other issues which might impact upon the relationship between the presently certificated (or otherwise grandfathered telephone public utilities) and sellers

and/or resellers of telecommunications services, including, but not limited to, the proper methods and levels of pricing services and the proper terms and conditions by such sellers and/or resellers purchase the services for resale or by which they offer such services to potential customers.

The Commission set Case No. 6298 for hearing on June 22, 23, 24, 29, 30 and July 1, 1983. However, hearings were held only on June 22 and 23, 1983. Decision No. C83-596 also provided, in ordering paragraph 6, that all parties in the case should submit on brief to the Commission no later than June 3, 1983 their views with respect to the jurisdictional issues as set forth in the statement and findings of fact therein and that parties on an optional basis would be permitted to file reply brief no later than June 17, 1983. By Decision No. C83-904, dated June 3,1983, the Commission granted an extension of time to MCI Telecommunications Corporation (MCI) to file its initial comments on or before June 10, 1983.

Opening briefs and reply briefs were filed by the parties herein as follows:

Opening Briefs:

Radio Contact Corp. - Dudley P. Spiller, Jr. - 6-3-83
Comprehensive Communications Systems, Inc. of Colorado - Arnold R. Kaplan - 6-3-83
Southern Pacific Communications Co. - Michael M. McGloin - (GTE Sprint Communications Corp. - 6-3-83
Starnet Corp., Contact Communications, Inc., and Advanced Mobile Phone Service, Inc. - Jeffrey C. Pond and R. Norman Cramer, Jr. - 6-3-83
Western Union Telegraph Co. - Lawrence P. Keller - 6-3-83
Victor J. Toth, Esq. - 6-3-83
Satellite Business Systems - J. Manning Lee - 6-3-83
Combined Network, Inc. - Steven H. Nemerovski - 6-3-83
Mountain Bell - Paul R. Wolff and Coleman M. Connolly - 6-6-83
Colorado-Wyoming Hotel & Motel Association, Inc. - Tucker K. Trautman - 6-6-83
RAM Broadcasting of Colorado, Inc. - William A. Wilson - 6-8-83
MCI Telecommunications Corp. - John E. Bryson, Robert F. Hanley, and Karen L. Chapman - 6-10-83

Reply Briefs:

Law Offices of Victor J. Toth, P.C. - 6-20-83
Southern Pacific Communications Co. - Michael M. McGloin - 6-20-83
Advanced Mobile Phone Service, Inc., Contact Communications, Inc., and Starnet Corp. - Jeffrey C. Pond - 6-20-83
Mountain Bell - Coleman M. Connolly - 6-20-83

II. BOTH SELLERS AND RESELLERS OF INTRASTATE COMMUNICATIONS SERVICES ARE PUBLIC UTILITIES

A. Public Utilities.

The threshold question posed by the Commission in its institution of Case No. 6298 is question No. 1 contained in Decision No. C83- 596. As indicated above, that first question is whether a seller and/or reseller of intrastate communications services is a public utility as defined in 40-1-103(1), CRS 1973, The Commission finds and concludes that both sellers and resellers of intrastate communications services are public utilities as defined in the Public Utilities Law.

CRS 1973, 40-1-103(1) states:

> The term "public utilities," when used in Articles 1-7 of this Article, includes every common carrier, pipeline corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, person, or municipality operating for the purposes of supplying the public for domestic, mechanical, or public uses and every corporation, or person declared by law to be affected with a public interest, in each of the preceding is hereby declared to be a public utility and to be subject to the juris- diction, control, and regulation of the Commission and to the provision of Articles 1-7 of this Title.

Colorado courts have interpreted this statute in several cases in determining whether a business enterprise falls into the definition of a public utility. The courts have considered whether the enterprise is impressed with a public interest and whether the enterprise holds itself out as serving or ready to serve the public indiscriminately. The City of Englewood v. City and County of Denver, 123 Colo. 290, 229 P.2d 667 (1951); Parrish v. Public Utilities Commission, 134 Colo. 192, 301 P.2d 343 (1956); Public Utilities Commission v. Colorado Interstate Gas Company, 142 Colo. 361, 351 P.2d 241 (1960); Cady v. City of Arvada, 31 Colo. App. 85, 499 P.2d 1203 (1972). Pursuant to these cases, the court has paid particular attention to the question of whether a particular business operation has dedicated its services to the public use. Basically, the court has considered this issue on a case-by-case basis looking to see if there is evidence, supplied by the acts of the business enterprise, indicating an intent to serve the public at large. Colorado Utility Corporation v. Public Utilities Commission, 99 Colo. 189, 61 P.2d 849 (1936); Colorado-Ute Electric Association v. Western Colorado Power Company, 385 U.S. 22, 17

L.Ed.2d 21, 87 S.Ct. 230, rehearing denied 385 U.S. 984, 17 L.Ed.2d 445, 87 S.Ct. 500 (1966).

In considering the acts of sellers of intrastate communications services, if one observes the offering and supply of services to the public generally through substantial advertising efforts to attract potential customers from the public at large, it would be reasonable to conclude that such "acts" are those of a public utility. It is necessary to remember that a service offering may affect so considerably a fraction of the public that it is public in the same sense which any other service may be called so. The public does not mean everybody all the time. Western Colorado Power Company v. Public Utilities Commission, 159 Colo. 262, 411 P.2d 785, appeal dismissed, 385 U.S. 22, 87 S.Ct. 230, 17 L.Ed.2d 21, rehearing denied, 385 U.S. 984, 87 S.Ct. 500, 17 L.Ed.2d 445 (1966). Entities serving or attempting to serve the public generally are, accordingly, public utilities within the meaning of CRS 1973, 40-103(1).

We also find and conclude that resellers of telecommunications services likewise are public utilities within the definition of CRS 1973, 40-1-103(1). The fact that resellers may purchase or lease telecommunications services from another telephone company, such as Mountain Bell, which is already regulated by the Commission, is not determinative.l The fact that Mountain Bell itself may be regulated, thereby, in effect, placing a "ceiling" on the prices that resellers may charge, does not alter the status of a reseller as a public utility.

"Resale" has been defined by the Federal Communications Commission (FCC) as:

> "an activity wherein one entity subscribes to the communications services and facilities of another entity and then reoffers communications services and facilities to the public (with or without 'adding value') for profit."

Regulatory Policies Concerning Resale and Shared Use of Common Carrier Service and Facilities, 60 F.C.C.2d 261, 263, 38 R.R.2d 141, 151 (1976), aff'd sub nom. American Telephone and Telegraph Co. vs. FCC, 572 F.2d 17 (2d Cir. 1978).

In its Resale and Shared Use order, the FCC concluded that resellers of interstate communications services are, like the underlying carrier, "common carriers," and therefore subject to the jurisdiction of, and regulation by, the FCC. Central to the concept of "common carrier" is the offering of the service to the

public, not the ownership or operation of the facilities used in connection therewith, As the FCC stated:

> "[C]common carrier status under the common law depends upon the nature and extent of the undertaking rather than upon ownership or operation of the means of transportation."

Resale and Shared Use, supra, 38 R.R.2d at 190, The FCC apparently was influenced by the decision in National Association of Regulatory Utility [FN1] [It should be recognized that the economic viability of the resale industry is significantly dependent upon the rate structures of the underlying telephone suppliers. Of course, at this time, this Commission cannot predict what future rate structures will be.] Commissioners vs. FCC, 525 F,2d 630 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976), in which the Court of Appeals held as follows:

> "Whether the common carrier concept is invoked to support strict tort liability or as a justifying basis for regulation, it appears that the critical point is the quasi-public character of the activity involved.
> ". . . What appears to be essential to the quasi-public character implicit in the common carrier concept is that the carrier 'undertakes to carry for all people indifferently . . .'"

The FCC therefore concluded as follows:

> ". . . [W]ith the exception that some resellers may not own any transmission plant, we perceive no difference between resale and traditional communications common carriage. The fact that an offeror of an interstate wire and/or radio communication service leases some or all of its facilities -- rather than owning them -- ought not have any regulatory significance. The public neither cares nor inquires whether the offeror owns or leases the facilities. Resellers will be offering a communications service for hire to the public just as the traditional carriers do. The ultimate test is the nature of the offering to the public."

Resale and Shared Use, supra, 38 R.R.2d at 192 (emphasis supplied).

The Court of Appeals for the Second Circuit affirmed the FCC and summarized the Commission's decision as follows:

> "Thus, under the FCC's interpretation, which is entitled to great deference, . . . a common carrier is one which undertakes indifferently to provide communications service to the public for hire, regardless of the actual ownership or operation of the facilities involved.

AT&T vs. FCC, supra, 572 P.2d at 24 (emphasis supplied).

Examination of the statutory definition of "public utility" contained in the Colorado Public Utilities Law reveals an emphasis on the "nature of the offering to the public" similar to that found in the common law and the Communications Act. The critical words are:

> " . . . operating for the purpose of supplying the public . . ."

40-1-103(1), CRS 1973. As stated by the Colorado Supreme Court:

> "A public utility is a business or enterprise impressed with a public interest which holds itself out as serving, or ready to serve, all members of the public who may require its service to the extent of its capacity."

Public Utilities Commission vs. Colorado Interstate Gas Co., 142 Colo. 361, 351 P.2d 241 (1960). Accordingly, entities reselling mobile telephone services, whether such services are long distance services or mobile telephone services interconnected with longline telephone services, to the public are "public utilities" subject to the jurisdiction of this Commission.

The Commission believes it is appropriate to discuss briefly the legal arguments raised by Southern Pacific Communications Company (Southern Pacific) to the effect that the phrase "telephone corporation" as used in CRS 1973, 40-1-103 must be interpreted in the light of what was known at the time of the passage of the statute in 1913. Basically, as we understand it, what Southern Pacific is contending is that only so-called "black box" service of a traditional telephone company is what was contemplated by the General Assembly in the term "telephone corporation" as that phrase was initially used in 1913, and that an "expanded" definition of what a telephone company is would be improper. In support of that proposition, Southern Pacific refers to the case of Citizens Utilities Company v. The City of Rocky Ford, 132 Colo. 427, 289 P.2d 165, where the Colorado Supreme Court stated that the definition of the phrase "gasworks" could not be construed as broad enough to include a natural gas distribution system. The Colorado Supreme Court said at page 132 Colo. 431, "The meaning of this statute when construed in the light of subsequent events, must be discovered by giving consideration to the language of the statute as it was understood at the time of its enactment. No new meaning can be given thereto because of changed conditions." In other words, Southern Pacific argues that since the word

"gasworks" could not be expanded to include a natural gas distribution system, by the same token the same phrase "telephone corporation" cannot be expanded beyond the "black box" meaning which it must have had in 1913. Superficially, Southern Pacific`s argument may have some appeal. However, the Commission believes that the best rejoinder to its argument is to recognize that this Commission has held that it has jurisdiction to regulate the operations of radio common carriers who, quite obviously, are not "black box" telephone companies. It can also be reasonably assumed that the majority of the legislators who enacted the Public Utilities Law in 1913 did not envision a radio mobile telephone industry half a century before it came into being. See: Re Telephone Answering Service, Inc., Application No. 19001-Amended, Decision No. 58988 (July 27, 1962); Re Contact Colorado Springs, Inc., Application No. 25761, Decision No. 81729 (November 10, 1972); Re LTS Communications, Inc., Application No. 27071, Decision No. 84539 (February 20, 1974); Re Mobile Radio Telephone Service, Inc., Application No. 26466, Decision No. 84676 (March 15, 1974); Re the Application of Contact Colorado Springs, Application No. 32268, Decision No. R81-1314 (July 30, 1981); Re the Application of Radio Contact Corporation, Application No. 32355, Decision No. R81-1314 (July 30, 1981), affirmed Decision No. C82-179 (February 4, 1982).

The Commission based its jurisdiction over radio common carriers on their "interconnection" to the land line facilities of Mountain States Telephone and Telegraph Company (see Commission Decision No. 84676, dated March 15, 1974, in the Matter of the Application of Mobile Radio Telephone Service, Inc.)

The Colorado Supreme Court, through its process of judicial review of this Commission's orders involving radio common carriers, has also implied"the Commission has authority to regulate those companies providing interconnected two-way mobile radio telephone service and one-way paging service in Colorado. See: Answerphone, Inc. vs. Public Utilities Commission, 185 Colo. 175, 522 P.2d 1229 (1974) and Contact Colorado Springs, Inc. vs. Mobile Radio Telephone Service, Inc., 191 Colo. 180, 551 P.2d 203 (1976).

Had Southern Pacific's argument had a legal vitality with respect to the developing telecommunications industry, obviously the Court would not have upheld Commission jurisdiction over radio common carriers in the absence of specific legislative amendment to include them in the definition of the "telephone corporation." It seems clear to us that the term "telephone corporation" is broad

enough to include any entity which renders telecommunications services, and that it is not necessary that the General Assembly specifically amend the statute, almost on a year to year basis, to include new developments in the industry.

B. Certification.

The second question posed by the Commission in its Decision No. C83-596 was, "If a seller and/or reseller of intrastate communications services is found to be a public utility as defined by Colorado law, is that seller and/or reseller required to obtain a certificate of public convenience and necessity prior to commencing business?"

> CRS 1973, 40-5-102 states:
> Certificate of public convenience and necessity. No public utility shall exercise any right or privilege under any franchise, permit, ordinance, vote, or other authority granted after April 12, 1913, or under any franchise, permit, ordinance, vote, or other authority granted before April 12, 1913, but not actually exercised before said date or the exercise of which has been suspended for more than one year without first having obtained from the commission a certificate that public convenience and necessity require the exercise of such right or privilege. When the commission finds, after hearing, that a public utility has, before April 12, 1913, begun actual construction work and is prosecuting such work, in good faith, uninterruptedly, and with reasonable diligence in proportion to the magnitude of the undertaking, under any franchise, permit, ordinance, vote, or other authority granted before April 12, 1913, but not actual exercised before said date, such public utility may proceed, under such rules and regulations as the commission may prescribe, to the completion of such work and after such completion, may exercise such right or Privilege. Sections 40-5-101 to 40-5-104 shall not be construed to validate any right or privilege invalid on April 12, 1913, or becoming invalid after said date under any law of this state.

Further, CRS 1973, 40-5-101 provides that a utility, before it constructs any new facility, plant or system, must obtain a certificate of public convenience and necessity. Accordingly, since we have already found and concluded that sellers and resellers of intrastate communications services are public utilities, they lawfully may not commence operations unless and until they have obtained a certificate of public convenience and necessity from this Commission.

It should be made clear that the American Telephone and Telegraph divestiture case in the United States District Court for the District of Columbia

does not derogate from the foregoing findings and conclusions as to the status of sellers and resellers.

On May 31, 1983, this Commission, by Decision No. C83-869, instituted Case No. 6307 for the purpose of entering upon an investigation into the various methodologies regarding access charges for intrastate interLATA long distance telephone communications. Decision No. C83-869 contains a history of the AT&T antitrust litigation referred to above. As a result of an August 24, 1982 modification of final judgment (MFJ) entered by United States District Court Judge Harold H. Greene in the AT&T case, AT&T, on January 1, 1984, will be divested of its Bell operating companies (BOCs). Two of the terms used by Judge Greene in the MFJ are the terms "exchange area" and "interexchange telecommunications." According to the MFJ, an exchange area or exchange means a geographic area established by a BOC in accordance with the following criteria:

1. Any such area shall encompass one or more contiguous local exchange areas serving common social, economic, and other purposes, even where such configuration transcends municipal or other local governmental boundaries;
2. Every point served by a BOC within a state shall be included within an exchange area;
3. No such area which includes part or all of one standard metropolitan statistical area (or a consolidated statistical area, in the case of densely populated states) shall include a substantial part of any other standard metropolitan [FN2 United States of America v. Western Electric Company, Inc. and American Telephone & Telegraph Company, Civil Action No.

82-0192; United States of America v. American Telephone & Telegraph Company, et al., Misc. No. 82-0025 (PI).] statistical area (or a consolidated statistical area, in the case of densely populated states), unless the court shall otherwise allow; and

4. Except with approval of the court, no exchange area located in one state shall include any point located within another state.

The term "interexchange telecommunications" means telecommunications between a point or points located in one exchange telecommunications area and a point or points located in one or more other exchange areas or a point outside the exchange area.

Another term, which is new, is "local access and transport area" which has been given the acronym LATA. The LATA acronym apparently was coined by AT&T. On April 20, 1983, Judge Greene entered a 162 page order in which he approved, with some modifications, the LATAs that had been Proposed by the Department of Justice and AT&T. On page 140 of that opinion, Judge Greene approved the two LATAs proposed by Mountain Bell for Colorado. Roughly speaking, the Colorado Springs LATA includes Pueblo and the southeastern portion of Colorado, stretching over into portions of western Colorado in the southern part of the LATA to just east of Durango. The Denver LATA includes everything else in Colorado which is basically the Denver metropolitan area and most of western and northern Colorado. The Court agreed that it was not necessary to make a third LATA centered in the Fort Collins and Greeley areas and, accordingly, these areas are consolidated with the Denver LATA.

Although the overall purpose of Judge Greene's MFJ is to foster

competition in the telecommunications industry, it should be made clear that the MFJ does not pre-empt state regulatory jurisdiction over intrastate as well as intraLATA regulation. [FN3 See page 32-33 of Judge Greene's April 20, 1983 order, and 552 F.Supp. at 159, n.117 (States may continue to require a regulated monopoly in local telephone service and intrastate toll service).]

Presumably as the result of comments filed by the Commonwealth of Virginia, Judge Greene was of the mistaken impression that only the Commonwealth of Virginia prohibits competition for intrastate phone calls. As will be discussed below, Colorado also, under the doctrine of regulated monopoly, prohibits competition in intrastate telecommunications, which, of course, will cover both interLATA and intraLATA telecommunications within the state.

C. Regulated Monopoly.

"To what extent, if at all, does a doctrine of regulated monopoly as enunciated in Colorado case law preclude a seller and/or reseller of intrastate telecommunications services from operating in the territories certificated to a telephone company or in the territory exclusively authorized to be served by a telephone company, such as Mountain Bell, through grandfather rights?"

The policy or principle of regulated monopoly in the regulation of public utilities has been the law since the year 1913 when the Public Utilities Act of the State of Colorado was first adopted. Western Colorado Power Company v. Public Utilities Commission, 159 Colo. 262, 411 p.2d 785 (1966). In Archibald v. Public Utilities Commission, 115 Colo. 190, 71 P.2d 421 (1946), the court stated:

> The theory of regulated monopoly is based upon the fact that, except as shown, it is better to have fewer utilities who can make a reasonable return upon their investments and thus give the public better and more expeditious service, than to throw the doors open so that, although the number of operators may be increased, service to the public may become disorganized. 171 P.2d at 423.

These Supreme Court holdings are an articulation of the legislative Policy embodied in CRS 1973, 40-5-101. This statute represents the foundation of the regulated monopoly principle in that it prohibits a public utility from beginning construction of any new facilities, or extension of any of its facilities, without having first obtained from the Commission a certificate that the present or future public convenience and necessity will require such construction. Clearly this statute was designed to prevent duplication of facilities and competition between utilities and to authorize new utilities in the field only when existing ones are found to be inadequate. Ephraim Freightways, Inc. v. Public Utilities Commission, 151 Colo. 596, 380 P.2d 228 (1963); Donahue v. Public Utilities Commission, 145 Colo. 499, 359 P.2d 1024 (1961); Public Service Company v. Public Utilities Commission, 1452 Colo. 135, 350 P.2d 543 (1960); Public Utilities Commission of Colorado v. Donahue, 138 Colo. 492, 335 P.2d 285 (1959); Public Utilities Commission v. City of Love land, 87 Colo. 556, 289 P. 1090 (1930).

In order for a new company lawfully to provide service in an authorized area of an existing public utility, there must be a showing that the existing public utility, for the area, is presently providing service which is shown to be substantially inadequate to satisfy the needs of the public. Ephraim Freightways, Inc. v. Commission, supra; Mellow Yellow Taxi v. Public Utilities Commission, 644 P.2d 18 (1982).

Colorado courts have carefully examined instances in which certificated utilities have had their franchise invaded by would-be competitors. In Public Utilities Commission v. Verl Harvey, Inc., 150 Colo. 158, 371 P.2d 452 (1962), review was sought from a Commission decision granting a motor carrier certain requests of authority. The carrier had unlawfully hauled cement without authority for seven years. In reversing the Commission reaffirmed previous case law by quoting a portion of its decision in Donahue v. Public Utility Commission, 359 P.2d at 1024 (1961) as follows:

> In our opinion, there is no competent evidence in the record before us to show need for the additional service by the applicant. Nor can there be until protestant has had a reasonable time to demonstrate what may be done by him free and unfettered by the unauthorized competition to which he has been subjected at all times pertinent to this action.

The court went on to quote with approval from Tidewater Express Lines, Inc. v.

Chesapeake Motorlines, Inc., 11 PUR3d 182, 184-185 as follows:

> To grant this application would in effect be permitting Chesapeake to use the evidence of its wrongdoing in its own behalf. Obviously this cannot be done. If this were not so every freight hauler in the state could, and perhaps would, begin infringement upon the rights of others in an effort to build up a case to support an application for the broadening of its authority. The rights and protections of a permit would be a nullity. Public convenience and necessity involves more than simple showing that another's business can be taken away from him by one means or another. And it is more than rendering better service.

This same issue was addressed in Colorado Transportation Company v. Public Utilities Commission, 158 Colo. 136, 405 P.2d 682 (1965). In setting aside the award of a certificate to a taxi corporation, the Court held that the taxi corporation had failed to show an inadequacy in the service offered by the other carriers engaged in the sightseeing business. Absent such showing of public convenience and necessity, the Commission's grant of authority was unlawful. The Court stated as follows:

> It would seem to us that probably the real reason for the commission's falling into error in the instant case is the fact even at this comparatively late date ft professes to be uncertain as to whether utility regulation of motor carriers in Colorado was based upon the theory of "regulated competition" or "regulated monopoly" . . . .
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> * * *
>
> It is too late to debate the merits of the competing Principals of "regulated competition" and of "regulated monopoly" in the field of utility regulation. Despite the claimed uncertainty of the Commission, the State of Colorado has long been wedded to the concept of regulated monopoly in the field of public utility regulation. 405 P.2d at 685. (Emphasis supplied.)

The courts have further stated that when a common carrier is serving a particular area, it is entitled to protection against competition so long as the offered service is adequate to satisfy the needs of the area and that no finding of public convenience and necessity for another carrier service is justified unless that present service offering is found to be clearly inadequate. Ephraim Freightways, Inc. v. Public Utilities Commission, supra; Public Utilities Commission of Colorado v. Donohue, supra; Denver and Rio Grande Western Railroad v. Public Utili ties Commission, 142 Colo. 400, 351 P.2d 278 (1960).

Therefore, it is clear that Colorado law precludes an uncertified seller from providing intrastate telecommunications services within the State of Colorado.

In exchange for being regulated, Mountain Bell and certificated telephone companies within the State of Colorado are entitled to protection from the entry of would-be competitors in profit able markets unless these entities can demonstrate that Mountain Bell, or a certificated telephone company, is providing substantially inadequate service. If these principles were not embodied in the law, there would be no reason for regulation. The Commission is bound to follow the law as enacted by the General Assembly as enunciated by the Colorado Supreme Court. This is not to say, however, that we believe that intrastate interLATA service and resale communications services may not be appropriate candidates for legislative inclusion under the doctrine of regulated competition. [FN4][The General Assembly, in 1967, placed the transportation of property under the doctrine of regulated competition. See CRS 1973, 40-10-105(2).]

D. Conduct of Operations.

"If a seller and/or a reseller of intrastate telecommunications services is found to be a public utility as defined by Colorado law, is that seller and/or reseller required to conduct its operations in the manner described in the rules and regulations of the Commission in the laws of the State of Colorado?"

It is clear from CRS 1973, 40-1-103 that any public utility **is** subject to the jurisdiction, control and regulation of the Public Utili ties Commission. Article XXV of the Colorado Constitution vests powers in the General Assembly of the State of Colorado to:

> regulate the facilities, service and rates and **charges** therefore, including facilities and service and rates and charges therefore within home rule cities and home rule towns, of every corporation, individual, or association of individuals, wheresoever situated or operating within the State of Colorado, whether within or without a home rule city or home rule town, as a public utility, as presently or may hereafter be defined as a public utility by the laws of the State of Colorado, is hereby vested in such agency of the State of Colorado as the General Assembly shall by law designate.

Thus, inasmuch as a seller or reseller of intrastate telecommunications services is a public utility as defined by Colorado law, such an entity is required to conduct its operations in the manner described in the rules and regulations of the Commission in the laws of the State of Colorado.

E. Franchise Taxes and Regulatory Fees.

"Are sellers and/or resellers of intrastate telecommunications services

subject to local franchise taxes and/or state regulatory fees?"

CRS 1973, 40-5-103(1) states as follows:

> Before any certificate may issue under 40-5-101 to 40-5-104, a certified copy of all its Articles of Incorporation or Charter, if the applicant is a corporation, shall be filed in the office of the Commission. Every applicant for a certificate shall file in the office of the Commission such evidence as shall be required by the Commission to show that such applicant has received the required consent, franchise, permit, ordinance, vote, or other authority of the proper county, city and county, municipal or other public authority.

However, the Supreme Court has stated in City of Englewood v. Mountain States Telephone and Telegraph Company, 163 Colo. 400, 431 P.2d 40 (1967) that Mountain Bell had received, by virtue of statute, a valid state franchise or right which permitted it not only to maintain facilities within the city public ways, but also the right to construct and operate additional ones without obtaining a city franchise. Consequently, Mountain Bell may lawfully operate without a local government franchise.

The State of Colorado has not granted a statewide franchise to any other telephone concern. Therefore, it would appear that other sellers or resellers or potential sellers or resellers of intrastate telephone services must obtain such franchises or permits as local governmental entities may require.

Presently, Mountain Bell is taxed by municipalities either by a license fee or by an occupation tax. Whether sellers or resellers of intrastate telecommunications services would be subject to these taxes will be governed by the provisions of each local ordinance. However, a seller or a reseller is clearly subject to state regulatory fees as outlined in CRS 1973, 40-2-110 through 40-2-114. It should be pointed out that this generic case cannot and does not determine that specific tele communications entities are, or are not, intrastate telephone carriers subject to this Commission's jurisdiction.

The Commission has determined that it would not be appropriate, at this time, to generically answer questions 6, 7 and 8 as initially proposed by Decision No. C83-596.

F. Removal of Restrictions.

Question No. 9, as set forth in Decision No. C83-596 is "Should telephone public utilities presently certificated by the Commission be ordered to remove any

and all tariff restrictions against the sale and/or resale of any and all intrastate telecommunications services? Does the Commission have authority under present law, without the necessity of statutory amendment, to order this removal?" In view of the fact that the Commission has determined above that both sellers and resellers of telecommunications services within the State of Colorado are public utilities subject to the doctrine of regulated monopoly, the answer to both questions under No. 9 is negative.

III. CONCLUSION

In essence, the Commission has found and concluded that both sellers and resellers of telecommunications services within the State of Colorado are public utilities and, as such, subject to the doctrine of regulated monopoly which precludes a second telecommunications carrier from offering telecommunications services to subscribers where an incumbent telecommunications utility has been certificated or grandfathered to serve a certain geographical area, and that this Commission is without authority to authorize a second telecommunications carrier from offering telecommunications services in a certificated or grandfathered area absent a finding that the incumbent telecommunications carrier is unwilling or unable to provide the particular telecommunications service proposed by a second and subsequent telecommunications carrier. The antitrust litigation with respect to the Bell system which will eventuate in the divestiture of the Bell operating companies from AT&T on January 1, 1984, as a result of Judge Greene's MFJ of August, 1982, does not, at this time, impinge upon the doctrine of regulated monopoly as far as Colorado intrastate telecommunications are concerned. Any change which would permit intrastate competition in the telecommunications industry (whether interLATA or intraLATA) necessarily must result from appropriate legislative action which would delimit the doctrine of regulated monopoly as heretofore enunciated by the Colorado Supreme Court.

Furthermore, inasmuch as the MFJ of Judge Greene will preclude Mountain Bell from offering interLATA telecommunications services from and after January 1, 1984, and inasmuch as the doctrine of regulated monopoly will permit only one telecommunications carrier for a specified geographical area, it would behoove the various telecommunications carriers who may be interested in providing interLATA telecommunications services for specified geographical areas within the State of Colorado to apply to this Commission for appropriate certification in accordance with

the Public Utilities Law.

An appropriate Order will be entered.

O R D E R

THE COMMISSION ORDERS THAT:

1. Questions 1 through 5 and Question 9, as set forth in Decision No. C83-596, be, and hereby are, answered in accordance with the findings of fact and conclusions set forth above.

2. Questions 6 through 8, as set forth in Decision No. C83-596, be, and hereby are, indefinitely deferred.

3. Case No. 6298 be, and hereby is, closed.

This Order shall be effective forthwith.

DONE IN OPEN MEETING the l3th day of September, 1983.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

EDYTHE S. MILLER

DANIEL E. MUSE

ANDRE SCHMIDT

COMMISSIONERS

jm:0223Z