Decision No. C87-735)

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

* * *

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, Complainant,	)	CASE NO. 6443
v.	)	COMMISSION DECISION UPON EXCEPTIONS
LONGMONT COMMUNICATIONS CORPORATION, Respondent.	)	

May 27, 1987

STATEMENT

BY THE COMMISSION:

On March 23, 1987, Hearings Examiner Arthur G. Staliwe entered Recommended Decision No. R87-341 in Case No. 6443, filed on January 18, 1985, by The Mountain States Telephone and Telegraph Company (Mountain Bell) against Longmont Communications Corporation (LCC). The complaint by Mountain Bell alleged that LCC had entered into contractual arrangements with the City of Longmont obligating LCC to provide telephone and telecommunications services which are functionally equivalent to services provided by Mountain Bell, without a certificate of public convenience and necessity obtained from this Commission. For relief, Mountain Bell requested 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 was granted on March 29, 1985.

Originally scheduled for hearing on June 3 and 4, 1985, hearing in this matter ultimately began 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 had

preempted all Colorado state regulation of cable television facilities capable of originating or terminating interstate communications. The FCC 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.

As indicated above, the Hearings Examiner entered his Recommended Decision on March 23, 1987.

On April 9, 1987, the Staff of the Commission and the City of Longmont, filed exceptions to Recommended Decision No. R87-341. On April 10, 1987, LCC filed exceptions to the recommended decision, and on April 13, 1987, Mountain Bell filed exceptions to the decision. On April 23, 1987, Mountain Bell filed a response to the Staff's exceptions to Recommended Decision No. R87-341, and on April 24, 1987, Mountain Bell filed a response to LCC's exceptions to the same recommended decision.

The Commission has now considered the recommended decision of the Examiner, the exceptions filed to that decision, and the responses to the exceptions, together with the record of this case. The operative portions of the recommended decision of the Examiner dismissed Mountain Bell's complaint against LCC and denied LCC's request for attorneys' fees. Generally, the Commission agrees with the Examiner that Mountain Bell's complaint should be dismissed, but we would grant LCC's request for attorneys' fees, not in the amount requested, but in the sum of $1.00. The Commission will enter its own decision in lieu of the recommended decision of the Examiner.

FINDINGS OF FACT, DISCUSSION, AND CONCLUSIONS

1. Complainant, Mountain Bell, 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 the City of Longmont, Colorado.

2. Respondent, LCC, 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 television systems in the Colorado communities of Louisville, Lafayette, Loveland, Fort Lupton, and Parachute. It should be noted that none of the affiliated cable television systems is 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, 11 miles north of Lafayette, Colorado, and about 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; a computerized, electricity-monitoring system for Longmont's electric utility department at no cost; 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 connected with the institutional cable. And, LCC would provide a grant of $100,000 to the school district for computers, as well as donate 53 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; 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 connected 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 percent of the subscriber network is aerial installation, and 60 percent of the network is 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.

At the time of the hearing only two prospective customers had approached LCC for use of the leased access channel. And, after having approached LCC, those two customers declined to lease the channel. No other inquiries were received for leasing the video text channels 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 concerns Mountain Bell; it is fearful of LCC facing uneconomic overcapacity and turning to selling telecommunications services 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 meet future cable television growth over the 15-year franchise, economically, given the disparity between cable costs and installation costs. The economics of initially installing two cables ($19,800 per mile for labor and cable) clearly outweigh 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 remain a free service, or whether LCC will charge for the service after three years.

12. The City of Longmont plans to use part of the remaining 62 channels on the I-Loop 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 is 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 use 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 still leave numerous unused channels. Control of the use of the I-Loop rests with the city under the franchise agreement, including control of the school district's use of that network.

13. 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. As to future charges, the city and LCC disagree.

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. With regard to the issue of reliability, the City of Longmont's witnesses were 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 reflective of the opinion of the consultant. The consultant himself had not personally studied the actual situation in Longmont.

Investigation by Mountain Bell's engineers, and checked by the 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). Mismatched electronics, or failure to recognize the limitations of each medium, will result in unsatisfactory performance.

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 signalizaton 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 is likely to 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. Accordingly, it appears that cable television has many of the attributes of a natural monopoly, notwithstanding the fact that the first franchised cable company in a municipality has a non-exclusive franchise rather than an exclusive one.

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 to which Mountain Bell must be free to respond. Mountain Bell argues that mere potential of competition should suffice to allow it to determine its own rates and conditions of service. The possibility of competition does not equate to competition, and we find that no competition presently exists in the Longmont area.

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 was known to have approached LCC except the city itself and the school district. And, the city does not intend to pay for the services it obtains. Whether this similarly extends to the school district is not clear.

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. For whatever reason, the threat embodied in Commline came to naught when Commline went out of business, notwithstanding a contract with MCI and an urban market in which to operate.

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 begin calling. And, apparently, this applies to other non-video services as well. As conceded by the FCC 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]
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> * * *
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> [39] For example, the affidavit of Dale Hatfield states that a number of factors may hamper the provision of service over institutional cables:
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> > 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. The record is silent regarding the impact to Mountain Bell in the Longmont area of the loss of data transmission services and other private line services,; i.e., there was no comparison of Longmont

private-line revenues to total Longmont telephone revenues. However, the Staff of the Commission pointed out that Mountain Bell, system-wide, had total Colorado 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 motion of free service.

The only known threat of telephone by-pass 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 interLATA phone carrier has approached LCC to use the LCC system along the same lines as failed Commline.

Legal Analysis

Mountain Bell's complaint sets forth three distinct claims for relief:

1. The deregulation of Mountain Bell under § 40-15-108(8) and (9), C.R.S., because of the alleged competition from LCC in Longmont;

2. The regulation of LCC as a public utility under § 40-1-103, C.R.S.; and

3. In the alternative, a declaration as to the constitutionality of § 40-15-101 et seq., C.R.S., as it applies to Mountain Bell.

We shall discuss these claims in order.

On April 29, 1987, the Commission entered Decision No. C87-567 in five complaint cases, one of which, Case No. 6290, had been brought by William C. Danks v. Mile Hi Cablevision, Inc., Mile Hi Cablevision Associate, Ltd., and Mountain Bell. The other four complaint cases, namely Case No. 6398, Case No. 6399, Case No. 6400, and Case No. 6401 (sometimes collectively referred to as the Danks case), had been brought by Mountain Bell against various entities involved in cable television services. On page 11 of Decision No. C87-567, this Commission stated that a complaint filed under § 40-6-108, C.R.S., is procedurally

ineffective as a mechanism to bring to the Commission's consideration a request for refraining from regulation (which, on occasion, incorrectly has been equated with deregulation). We pointed out that a complaint is directed to the particular respondents against whom the complaint is brought and that notice of a complaint, unlike notice of an application, is not given generally to all interested persons, firms, and corporations who may have an interest in the matter in addition to the named respondents. Thus, it is clear that a complaint proceeding is initiated and proceeds under the control of the complainant. On the other hand, a request to refrain from regulation (except for a request to provide a private telecommunication system free of regulation in response to a competitive or potentially competitive threat under § 40-15-101 through 107, C.R.S.), is a matter concerning which the Commission has exclusive authority to decide whether a proceeding will be instituted in the first instance.

If the Commission determines that a refrain-from-regulation request should be heard, it must initiate a proceeding upon its own motion, given notice to all interested persons, firms, and corporations. In other words, a refrain-from-regulation request cannot be heard under the aegis of a complaint case directed to particular named respondents because notice of the action is not given to interested persons generally, as would be the case when the Commission institutes a refrain-from-regulation proceeding upon its own motion. Accordingly, Mountain Bell cannot use the complaint procedure under Case No. 6443 to request this Commission to refrain from regulation as sought in its First Claim for Relief.

In its Second Claim for Relief Mountain Bell requests this Commission to regulate LCC as a public utility under § 40-1-103, C.R.S. In Decision No. C83-1454, dated September 13, 1983, In Re Investigation of the Sale and Resale of Intrastate Communications, 55 PUR 4th 518, the Commission stated:

> It seems clear to us that the term "telecommunications corporation" is broad enough to include any entity which renders telecommunication services and that it is not necessary that the general assembly specifically amend this statute almost on a year to year basis to include new developments in the industry. Id. 524.

We have no doubt that the services provided by LCC are telecommunication services which would be subject to the jurisdictional regulation of this Commission, irrespective of when those services were instituted subsequent to the passage of the Public Utilities Law in 1913, provided that LCC is a public utility. Accordingly, based upon the record, it is necessary to determine whether LCC is a public utility, not whether it may become one. First, as we said in Danks, supra, what a particular entity does, rather that what it is capable of doing, is the determining factor as to whether or not the particular entity is acting as a public utility.

The supremacy clause of the United States Constitution also requires this Commission to recognize that the federal government has preempted this Commission as well as other state public utility regulatory agencies from asserting jurisdiction over the one-way transmission of television programs and ancillary one-way video programming such as alpha-numeric information and FM rebroadcasting to subscribers. (See the Cable Communications Policy Act of 1984, 47 U.S.C.A. Section 521, et seq.)

Although it is clear that this Commission is preempted from asserting jurisdiction over cable services, i.e., one-way video programming and other "programming services" which include one-way transmission of alpha-numeric information and FM radio rebroadcasts made available to all subscribers, any non-cable service is potentially subject to the Commission's jurisdiction if it is found to be a public utility offering.

Section 621 of the Federal Cable Act states:

> Nothing in this title shall be construed to affect the authority of any state to regulate any cable operator to the extent such operation provides any communication service other than cable services whether offered on a common carrier or private contract basis.

Some of LCC's services are non-cable services which have not been preempted by the Cable Communications Policy act of 1984, supra. These non-cable (and accordingly non-preempted) services include the bi-directional SCADA system as well as data transmission between computers on the I-Loop. Traffic signalization is presently being provided by LCC to the City of Longmont at no cost for the life of its franchise. As indicated earlier in this decision, there is significant unused capacity on LCC's I-Loop.

The Commission finds that LCC is not a public utility subject to its jurisdiction at this time, for the simple reason that LCC does not hold itself out to serve, nor is it serving the public generally. In order to analyze whether the non-cable services of LCC are public utility offerings, reference must be made to the Colorado Constitution and the Colorado Public Utility Law. Board of County Commissioners v. Denver Board of Water Commissioners, 718 P.2d 235 (Colo. 1986).

Section 40-1-103, C.R.S., defines a public utility as:

> . . . every common carrier, pipeline corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, person or municipality operating for the purpose 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, and each of the preceding is hereby declared to be a public utility and to be subject to the jurisdiction,

> control, and regulation of the Commission, and to the provisions of Articles 1 to 7 of this Title.

Article 15 of Title 40 entitled "Intrastate Telecommunications Services" sets the statutory framework for the regulation of specific telecommunications services in this State. Section 40-15-102, C.R.S., states:

> Except as otherwise provided in this Title, each provider of intrastate telecommunications service is declared to be affected with a public interest and a public utility subject to the provisions of Articles 1 to 7 of this Title, so far as applicable, including the regulation of all rates and charges pertaining to public utilities. (Emphasis added)

Section 40-15-101(9), C.R.S., defines "Telecommunications Service" as:

> . . . The transmission of signs, signals, writings, images, sounds, messages, data, or other information of 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 services.

It is true, of course, that under Article 15, the non-cable two-way services actually provided by LCC are telecommunication services. However, in order for Article 15 to be applicable at all to LCC, it first must be a public utility as defined by § 40-1-103, C.R.S. To fall into the class of being a public utility, an enterprise must be impressed with the public interest and hold itself out as serving or ready to serve all members of the public who may require it to the extent of its capacity. However, an entity does not become a public utility by a declaration to that effect, nor does it avoid becoming a public utility by disavowing such purpose. Public Utilities Commission v. Colorado Interstate Gas Company, 142, 361, 351 P.2d 241 (1960). Of course, the public does not necessarily mean everybody all of the time. Western Colorado Power Company v. Public Utilities Commission, 159 Colo. 262, 411 P.2d 785 (1966). It follows, however, that unless an entity is holding itself out to serve and, in fact, is serving more than one customer, that entity is not serving the public.

In this case, LCC has been shown to serve two customers, namely the City of Longmont, and the school district. Although an entity may be a public utility by serving more than one customer, unless it is serving or offering to serve the public generally it is not a public utility. In

this case, LCC serves two customers, namely the City of Longmont and the school district. We find that the evidence does not show that LCC has held itself out to serve the public generally. Thus, under the Colorado Interstate Gas Company case, supra, LCC does not fall within the definition of a public utility subject to the jurisdiction of this Commission, and we find that the Colorado Interstate Gas Company case is controlling in this instance.

Although one of the requirements for utility status is the intention and willingness to serve, this element, standing alone, is not sufficient to endow a company with public utility status. Public Service Company v. Public Utilities Commission, 142 Colo. 135, 350 P.2d 543 [cert. denied, 364 U.S. 820 81 S. Ct. 53, 5 L. Ed. 2d 50 (1960)]. Accordingly, although the potential to provide services which are comparable to those already provided by an existing public utility may be appropriate as a subject of inquiry in a request to refrain from regulation it does not follow that the mere ability or stated intention to provide certain utility services and products makes the potential provider a public utility until such time as those services and products are provided to the public. Stated another way, in a complaint proceeding it is insufficient to show that another entity is poised with the ability and readiness to serve. Until service is actually provided to the public (however broadly or narrowly defined, depending upon the factual circumstances of each case) there is no public utility against whom a complaint may be brought for failure to have a certificate of public convenience and necessity. When service to the public begins, a cause of action for acting as a public utility without a certificate becomes ripe, assuming, of course, that the particular services are jurisdictional to this Commission.

Further complicating the question of whether LCC is a public utility is the fact that the services are being provided to the city and the school 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), C.R.S.), the entire tenor of the Public Utilities Law is to prevent excessive charges, rates, etc., with regard to utility services. See § 40-3-101, et seq., C.R.S. Traditionally, this Commission has not regulated free utility service such as telephone networks inside hotels that never charge the customer more than the telephone utilities charge to the hotel itself, even when the costs for the "free" service were hidden or submerged in other charges for non-utility services. See Yellow Cab v. Malibu Motor Hotel, 172 Colo. 349, 473 P.2d 710 (1970). Simply put, as long as LCC does not charge for its telecommunications services, substantively speaking, there would be little or nothing for this Commission to regulate even if LCC were acting as a public utility in other respects.

In its Third Claim for Relief, Mountain Bell seeks an order from the Commission declaring that § 40-15-101, et seq., C.R.S., as applied to Mountain Bell is an unconstitutional denial of equal protection of the laws under the Constitutions of the United States and the State of Colorado. In other words, Mountain Bell desires that if the Commission

refused to relax regulation over Mountain Bell's activities while continuing to allow the so-called competitive activities of LCC, such an application of the law would deny Mountain Bell's right to equal protection as is constitutionally guaranteed. Section 40-15-101(9), C.R.S., states as follows:

> (9) "Telecommunications service" means the transmission of signs, signals, writings, images, sounds, messages, data, or other information of 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 services.

The second sentence of the definition above has been defined as the primary business exception. The Colorado Legislature determined that 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 services. Two interpretations of what that section means can be made. One interpretation is to read the statute narrowly so as to make it consistent with the Federal Cable Act of 1984. If read in that manner, the word "services" as used in § 40-15-101(9), C.R.S., would be read to mean one-way cable services as defined by the Federal Cable Act. This reading would be consistent with the Federal Cable Act which preempts state regulatory commissions from asserting jurisdiction over one-way cable activity. It has been argued that to read the statute in absolutely literal terms so as to include <u>all</u> services offered by cable operators, including non-cable services, would mean that an offering of switched line two-way local telephone service by a cable operator would be exempt from state regulation.

The other interpretation is that the second sentence of § 40-15-101(9), C.R.S., should be read precisely as it is written and, that if the primary business of an entity is the provision of one-way transmission of television signals (clearly applicable to LCC under the facts of this case), then <u>all</u> of the services offered by that entity are exempt from the definition of telecommunications service and, accordingly, unregulated by the Commission. The argument raised against the latter interpretation is that it would involve a patent denial of equal protection between two entities who provide similar services. In other words, a large diversified provider (for example, a one-way cable provider who also provides data transmission) would be exempt from regulation while a small single service provider (just providing data transmission) would be subject to regulation even though the services are similar.

Examiner Staliwe in his Recommended Decision No. R87-341 (on page 15) stated that he agreed with the Assistant Attorney General that the primary business exception was a patent denial of equal protection, but that it was not within the Commission's authority to ignore § 40-15-101(9), C.R.S., or to declare it unconstitutional. We must necessarily agree with the general proposition, of course, that it is beyond the authority of this Commission to ignore a statute or to declare it unconstitutional. With regard to the substantive interpretation of § 40-15-101(9), C.R.S., the Commission at this time need not decide which of the two interpretations is the correct one. Under the aegis of judicial economy, courts may decline to decide legal questions beyond those necessary in order to decide a case. The Commission likewise believes that it is unnecessary at this time to make an interpretation of § 40-15-101(9), C.R.S., since, as we have already determined above, LCC is not a public utility subject to the jurisdiction of this Commission by virtue of our finding that it is not presently holding itself out to serve the public generally.[1]

In summary, the Commission finds that: (1) a complaint case is not the appropriate procedural vehicle for the Commission to refrain from regulation under §§ 40-15-108(8) and (9), C.R.S.; (2) LCC is not acting as a public utility at the present time under § 40-1-103, C.R.S.; and (3) it is unnecessary for the Commission to reach a decision as to the proper interpretation of § 40-15-101(9), C.R.S.; and (4) in any event the Commission is without authority to make a declaration as to its alleged unconstitutionality.

Ancillary Matters Raised By Exceptions

The Staff of the Commission, the City of Longmont, and LCC have raised certain ancillary matters in their respective exceptions, some of which the Commission specifically will address.

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1 The Commission believes that it would be helpful to all concerned for the Colorado Legislature to clarify what it intended to exempt in § 40-15-101(9). It is not entirely clear whether the Legislature intended to exempt certain kinds of services, or a certain class of providers.

The Staff, in its exceptions, requests that it be allowed the opportunity to file documentation in a legal memorandum supporting its request for costs and attorneys' fees. The Staff's exceptions will be denied. The Staff alleges that § 40-15-108(10), C.R.S., precludes Mountain Bell from causing the Public Utilities Commission to incur any expense when the Staff chooses to participate in any case in which Mountain Bell alleges competition under § 40-15-108, C.R.S. Subsection 40-15-108(10), C.R.S., was clearly intended to apply to costs which Mountain Bell incurs, not costs incurred by parties. Accordingly, it is unnecessary for the Commission to specifically address Mountain Bell's further objections to the Staff's exceptions.

The City of Longmont has raised various exceptions. The City apparently believes that this Commission has lost jurisdiction in Case No. 6443 due to the long delay in achieving threshold relief. In other words, the City of Longmont has alleged that it has taken the Commission too long to decide this case and that accordingly, the Commission has lost jurisdiction. We do not agree with the City. Whether the pendency of the the declaratory judgment action before the FCC, alluded to above, justified the delay in this case is debatable. In any event, the Commission shares the overall discomfiture expressed by the parties concerning the length of time taken to reach a recommended decision in the case. It is our policy that no parties before this Commission will again be subject to delays of this magnitude. Nevertheless the City of Longmont has not cited any legal authority which stands for the proposition that delay relieves this Commission of jurisdiction. Accordingly, the City of Longmont's exception with respect to jurisdiction is overruled and denied.

Another exception raised by the City of Longmont is that LCC's activities are undertaken under a municipally granted franchise and that, therefore, the Commission has no jurisdiction to regulate its activities. The City of Longmont bolsters this argument by stating that Article XXV of the Colorado Constitution precludes Commission regulation of municipally owned utilities. The City of Longmont has misapprehended the law. First, the provision of telecommunications services is subject to the exclusive jurisdiction of this Commission by virtue of §§ 40-1-103(1) and 40-15-102, C.R.S. Further, since the provision of telephone or telecommunication services is a matter of statewide concern, the courts have consistently held that regulation of such services and facilities is a matter for state and not municipal regulation. People v. The Mountain States Telephone and Telegraph Company, 243 P.2d 397 (1952); Englewood v. The Mountain States Telephone and Telegraph Company, 431 P.2d 40 (1967). Secondly, LCC is not a municipally owned utility but is, on the contrary, a wholly-owned subsidiary of Scripps-Howard Broadcasting Company and Scripps-Howard Cable Company. Accordingly, the City of

Longmont's exceptions with regard to this Commission's lack of jurisdiction to regulate the activities of LCC on the basis of a municipally granted franchise are overruled and denied.

The remaining exceptions raised by the City of Longmont do not set forth sufficient factual or legal grounds for their granting and they are denied.

LCC takes exception to the denial of attorneys' fees and costs by the Examiner. LCC contends that Mountain Bell's real objective was its own deregulation and not the regulation of LCC and that Mountain Bell could have filed either an application for refraining from regulation for competitive purposes under § 40-15-108(8), C.R.S., or a complaint for declaratory relief under § 24-4-105(11), C.R.S. LCC further contends that since other and more appropriate means existed for Mountain Bell to pursue its deregulation, because it failed to offer any evidence on its claim against LCC, and because it actually admitted it did not seek the regulation of LCC, Mountain Bell should pay reasonable attorneys' fees and costs incurred by LCC.

Mountain Bell responded to the exception filed by LCC with the contention that the Commission does not have legal authority to award attorneys' fees in complaint-type cases. Mountain Bell, in that contention, is incorrect. It is quite clear that the Commission has authority to award attorneys' fees and costs in its own proceedings as has been pointed out in The Mountain States Telephone and Telegraph Company v. Public Utilities Commission, 502 P.2d 945 (Colo. 1972), The Mountain States Telephone and Telegraph Company v. Public Utilities Commission, 576 P.2d 544 (Colo. 1978), and Colorado-Ute Electric Association v. Public Utilities Commission, 602 P.2d 861 (Colo. 1979).

The Examiner correctly pointed out that the Commission has never before ruled on whether a losing party in a complaint case is, ipso facto, required to pay attorneys' fees, especially where there is no request for monetary damages. The Examiner denied LCC's request for attorney's fees and costs and suggested that LCC take the issue to the full Commission by way of exceptions. The Colorado Supreme Court has declared that the Commission does have broad constitutional discretion to determine when attorneys' fees should be awarded in its own proceedings. This is, however, an authority entrusted to the Commission which should be exercised with care and sound judgment.

LCC has set forth a persuasive argument to the effect that Mountain Bell could have, and should have, pursued other legal remedies in order to effectuate its own regulatory (or deregulatory) strategy rather than dragging LCC through expensive and protracted litigation. On the other hand, the Commission recognizes the general American rule of law that litigants are responsible for their own attorneys' fees and costs regardless of the outcome of litigation. Additionally, the Commission is cognizant of the strong argument that requiring Mountain Bell to pay attorneys' fees and costs of LCC would be imposing a new

obligation after the fact. We find that Mountain Bell should be ordered to reimburse LCC in the sum of $1.00. Obviously, this is more a symbolic award than a reimbursement but it does give recognition to the legitimate concerns properly raised by LCC (which this Commission shares) while at the same time not unduly imposing a financial burden on Mountain Bell for consequences of conduct which Mountain Bell might claim it could not foresee.

THEREFORE THE COMMISSION ORDERS THAT:

1. The complaint of The Mountain States Telephone and Telegraph Company against Longmont Communications Corporation is dismissed.

2. The Mountain States Telephone and Telegraph Company shall remit to Longmont Communications Corporation, within 60 days of the effective date of this Decision and Order, the sum of $1.00 in partial reimbursement of attorneys' fees and costs incurred by Longmont Communications Corporation.

3. The exceptions filed by the Staff of the Commission on April 9, 1987, directed to Decision No. R87-341 are denied.

4. The exceptions filed by the City of Longmont on April 9, 1987, directed to Recommended Decision No. R87-341 are denied.

5. The exceptions filed by Longmont Communications Corporation on April 10, 1987, directed to Recommended Decision No. R87-341 are granted to the extent those exceptions are consistent with this Decision and Order and otherwise they are denied.

6. The exceptions filed on April 13, 1987, by the Mountain States Telephone and Telegraph Company directed to Recommended Decision No. R87-341 are denied.

7. Recommended Decision No. R87-341, dated March 23, 1987, is not adopted by this Commission, and in lieu of that Decision, this Decision and Order is substituted.

8. The 20-day time period provided by § 40-6-114(1), C.R.S., to file an application for rehearing, reargument, or reconsideration begins on the first day after the mailing or serving of this Decision and Order.

9. Unless otherwise ordered by the Commission this Decision and Order shall be effective 30 days from this date.

DONE IN OPEN MEETING the 27th day of May 1987.

(S E A L)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

ARNOLD H. COOK

ANDRA SCHMIDT

RONALD L. LEHR

Commissioners

ATTEST: A TRUE COPY

James P. Spiers
Executive Secretary

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