PREPARED REMARKS OF
PATRICIA M. WORTHY, CHAIRMAN
PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA

FOR

TELECOMMUNICATIONS REPORTS CONFERENCE
"THE STATE PSC CHALLENGE:
BALANCING NEW SERVICES, ADVANCED TECHNOLOGY,
COMPETITIVE CONCERNS & CUSTOMER NEEDS
JUNE 5, 1990

GOOD MORNING. IT IS A PLEASURE TO BE HERE TODAY. I WANT TO THANK "TELECOMMUNICATIONS REPORTS" FOR THE OPPORTUNITY TO JOIN IN THE DEBATE OVER THE CHALLENGES CONFRONTING STATE REGULATORY COMMISSIONS. AS WE ARE ALL AWARE, THAT DEBATE HAS BEEN ON-GOING FOR QUITE SOME TIME. HOWEVER, I BELIEVE THAT THE FOCUS OF THE DEBATE CONCERNING THE ROLE OF STATE COMMISSIONS IN THE "INFORMATION AGE" IS TIMELY, AND DESERVING OF THE ATTENTION THAT THIS CONFERENCE GIVES IT.

AS A GENERAL MATTER, I AM OF THE VIEW THAT THERE CONTINUES TO BE A TECHNOLOGICAL REVOLUTION AND THAT THE FOCUS OF THAT REVOLUTION IS NOW CENTERED ON THE LOCAL LOOP. STATE COMMISSIONS, THEREFORE, HAVE AN EVEN GREATER ROLE TO PLAY IN THE EVER-CHANGING MARKETS WHICH WE ARE ASKED TO OVERSEE. THEREFORE, I BELIEVE THAT THE STATES, AND NOT THE FEDERAL COMMUNICATIONS COMMISSION (FCC), ARE IN THE BEST POSITION TO ASSURE THAT THE PUBLIC INTEREST IS PROTECTED, AS THAT CONCEPT CONTEMPLATES LOCAL CONCERNS AND CIRCUMSTANCES. THE IMPLICATIONS THAT PREEMPTION SEND ARE STAGGERING. MOREOVER, I VIEW SUCH ACTIONS AS INDICATING THE FCC'S BELIEF THAT IT HAS MORE OF A POLICY STAKE AT RISK THAN THE STATES. AND TO THIS, I RESPECTFULLY DISAGREE.

THE GOVERNING "BALANCE" BETWEEN THE FEDERAL AND STATE JURISDICTIONS IS FOUND IN THE COMMUNICATIONS ACT OF 1934, AS AMENDED. THAT IS THE FIRST PLACE ANY ANALYSIS BEGINS AND ITS DIRECTIVES ARE CLEAR.

> EXCEPT AS PROVIDED IN SECTION 224 AND SUBJECT TO THE PROVISIONS OF SECTION 301, <u>NOTHING IN THIS ACT</u> SHALL BE CONSTRUED TO APPLY TO OR GIVE THE [FCC] JURISDICTION WITH RESPECT TO (1) CHARGES, CLASSIFICATIONS, PRACTICES, SERVICES, FACILITIES, OR REGULATIONS <u>FOR OR IN CONNECTION</u>

WITH INTRASTATE COMMUNICATION SERVICE BY WIRE OR RADIO OF ANY CARRIER.... 1/

IN THE FIRST MAJOR JUDICIAL DECISION CONCERNING PREEMPTION SINCE MY TENURE AS A STATE REGULATOR, THE SUPREME COURT REAFFIRMED THE JURISDICTION OF THE STATES, AGAIN IN CLEAR TERMS, IN LOUISIANA PUBLIC SERVICE COMMISSION V. FCC.2/

> WE MIGHT BE INCLINED TO ACCEPT THIS BROAD READING OF §151 WERE IT NOT FOR THE EXPRESS JURISDICTIONAL LIMITATIONS ON FCC POWER CONTAINED IN §152(B). . . BY ITS TERMS, . . . [SECTION 152(B)] FENCES OFF FROM FCC REACH OR REGULATION INTRASTATE MATTERS -- INDEED, INCLUDING MATTERS "IN CONNECTION WITH" INTRASTATE SERVICE. MOREOVER, THE LANGUAGE WITH WHICH IT DOES SO IS CERTAINLY AS SWEEPING AS THE WORDING OF THE PROVISION DECLARING THE PURPOSE OF THE ACT AND THE ROLE OF THE FCC.3/

IT, THEREFORE, WAS WITH SOME DEGREE OF COMFORT THAT I READ LOUISIANA, OR AT LEAST UNTIL THE FCC BEGAN ITS ATTEMPT TO LIMIT THE IMPORT AND THE IMPACT OF THAT DECISION. LET ME BRIEFLY EXPLAIN MY VIEWS IN LIGHT OF THE FCC'S RECENT ACTIONS INVOLVING THE AREA OF TRADITIONAL STATE REGULATORY AUTHORITY: THE LOCAL EXCHANGE.

FIRST, IN 1987, THE FCC PREEMPTED STATE REGULATION OF PRIVATE CARRIERS. IN NORLIGHT,4/ THE FCC BARRED THE STATE OF WISCONSIN FROM REQUIRING COMMISSION APPROVAL FOR A CONSORTIUM OF ELECTRIC UTILITIES TO SELL EXCESS CAPACITY ON THEIR PRIVATE FIBER OPTIC COMMUNICATIONS SYSTEM TO THIRD PARTIES. THE FCC RELIED HEAVILY ON

1/ 47 U.S.C. §152(b)(emphasis added).

2/ 476 U.S. 355 (1986).

3/ Louisiana, 476 U.S. at 370 (emphasis added).

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

THE FACT THAT THE SYSTEM WAS PRIMARILY INTERSTATE AND THAT THE WISCONSIN COMMISSION'S REQUIREMENT FOR PRE-APPROVAL, ON ITS FACE, APPLIED TO BOTH INTERSTATE AND INTRASTATE TRAFFIC.5/ THE WISCONSIN PUBLIC SERVICE COMMISSION APPEALED THIS DECISION,6/ BUT SUBSEQUENTLY AMENDED ITS ORDER TO LIMIT THE PRE-APPROVAL REQUIREMENT TO THE PROVISION OF INTRASTATE SERVICES. THEREAFTER, THE PARTIES FILED A MOTION TO DISMISS THE APPEAL, WHICH WAS GRANTED BY THE COURT.7/

NEXT, IN EARLY 1988, THE FCC'S PRIVATE RADIO BUREAU TOOK ONE STEP FURTHER. IN PUBLIC SERVICE COMPANY OF OKLAHOMA,8/ THE BUREAU RELIED UPON NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS V. FCC,9/ WHICH, INTER ALIA, SUGGESTED CERTAIN INDICIA AS A MEANS OF DISTINGUISHING BETWEEN COMMON CARRIAGE AND PRIVATE CARRIAGE, TO FIND THAT ALL NON-COMMON CARRIER RADIO SERVICES ARE DEEMED TO BE INTERSTATE SERVICES, PURSUANT TO SECTION 301 OF THE COMMUNICATIONS ACT.10/ THUS, IF THE OWNER OF A MICROWAVE NETWORK OFFERS SERVICE BY CONTRACT ON AN INDIVIDUALIZED BASIS WITH A RELATIVELY STABLE CLIENTELE, THE BUREAU'S ORDER COULD

5/ 2 FCC Rcd at 135.

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

7/ Order, No. 87-1618 (D.C. Cir. Feb. 15, 1989).

8/ 3 FCC Rcd 2327 (1988)(petition for review pending).

9/ 525 F.2d 630, cert denied, 425 U.S. 992 (1976).

10/ 2 FCC Rcd at 2329-30.

PERMIT IT TO BE FREE OF STATE REGULATION, EVEN WITH RESPECT TO LOCAL ORIGINATION AND TERMINATION OF TELEPHONE CALLS.

FINALLY, AND ALSO IN 1988, THE FCC, IN PERHAPS THE CLEAREST INTRUSION TO DATE ON THE STATE'S AUTHORITY ISSUED THE ARCO DECISION. THE CASE CONCERNED THE ATLANTIC RICHFIELD COMPANY'S (ARCO'S) USE OF ITS PRIVATE MICROWAVE NETWORK FACILITIES LOCATED BETWEEN PLANO AND DALLAS, TEXAS, AS A MEANS OF LESSENING ITS USE OF GTE SOUTHWEST (GTE) FACILITIES IN PLANO. IT IS IMPORTANT TO NOTE THAT GTE HAD AN EXCLUSIVE STATE CERTIFICATE AT PLANO. GTE ASKED THE TEXAS COMMISSION TO ORDER SOUTHWESTERN BELL TO CEASE AND DESIST FROM PROVIDING THE "ADDITIONAL INTERCONNECTIONS" AT DALLAS. THE TEXAS COMMISSION FOUND THAT THE TEXAS STATUTE, PROHIBITING NON-CERTIFICATED PUBLIC UTILITIES FROM SERVING, DIRECTLY OR INDIRECTLY, A FACILITY WITHIN AN AREA BEING SERVED LAWFULLY BY ANOTHER PUBLIC UTILITY, PRECLUDED THE ARRANGEMENT ARCO HAD ESTABLISHED. MOREOVER, THE TEXAS COMMISSION FOUND THAT THERE WAS A SIGNIFICANT PUBLIC DETRIMENT AS A RESULT OF THE PROSPECT OF STRANDED INVESTMENT, DIFFICULTIES IN SYSTEM PLANNING, AND DISRUPTION OF THE NETWORK DESIGN PROCESS.11/

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

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

COMMISSION DECISION.12/ ON APPEAL BY THE TEXAS COMMISSION, NARUC AND GTE, ALONG WITH A NUMBER OF STATES, THE COURT AGREED WITH THE FCC. THE COURT STATED THAT THE FCC MAY PREEMPT STATE REGULATION TO VINDICATE A FEDERAL RIGHT WHERE THE EQUIPMENT WHICH THE FCC WISHES TO REGULATE IS USED INSEPARABLY FOR INTERSTATE AND INTRASTATE CALLING AND THE FCC IS UNABLE TO LIMIT ITS REGULATION TO THE INTERSTATE ASPECTS.13/

THUS, A PRIVATE MICROWAVE SYSTEM CAN BE USED TO BYPASS A LEC UNLESS THE STATE OR THE LEC CAN SHOW THAT (1) THE STATE CAN LIMIT ITS ORDER TO INTRASTATE TRAFFIC OR (2) THE PRIVATE USE WOULD CAUSE TECHNICAL HARM TO THE NETWORK OR ECONOMIC LOSS SEVERE ENOUGH TO SERIOUSLY JEOPARDIZE THE LEC'S CAPABILITY OF SERVING THE PUBLIC. SIMPLY STATED, THIS DECISION IMPAIRS THE STATES' AUTHORITY AND POLICY PREROGATIVES OVER HOW AND WHEN THE LOCAL EXCHANGE SHOULD BE USED. I BELIEVE THAT, IN THIS AREA, THE STATES HAVE THE GREATER ROLE TO PLAY, AND THE GREATER RISKS AT STAKE.

I GIVE THIS BACKGROUND ONLY TO SAY THAT THE STATES HAVE EVERY INCENTIVE TO ASSURE THAT THE UNIQUE AND SPECIAL INTERESTS OF THEIR RESPECTIVE JURISDICTIONS ARE NOT CIRCUMVENTED BY FCC PREEMPTIVE ACTIONS. THIS ESPECIALLY IS TRUE WHEN SUCH DECISIONS DIRECTLY IMPACT THE OVERSIGHT OF THE LOCAL LOOP.

12/ In the Matter of Atlantic Richfield Company Petition for Emergency Relief and Declaratory Ruling with Respect to Registered Terminal Equipment and Private Microwave Interconnection to Telephone Service of Southwestern Bell Telephone Company, Memorandum Opinion and Order, 3 FCC Rcd 3089 (1988).

13/ 886 F.2d at 1334.

WHAT IS MOST TROUBLING TO ME IS THAT THERE IS NO RECOGNIZABLE PATTERN AS TO WHEN THE FCC WILL PREEMPT; I AM AWARE OF NO GUIDELINES WHICH PROVIDE NOTICE AS TO WHEN THE FCC WILL OR WILL NOT DISPLACE STATE REGULATORY OVERSIGHT. AS A RESULT THE STATES ARE HINDERED IN MAKING AND PURSUING POLICY OBJECTIVES.

I RECOGNIZE THAT THE ARGUMENT WILL ALWAYS BE THAT THE FCC'S ACTION WAS TAILORED TO THE FEDERAL GOALS IT SOUGHT TO PURSUE, THAT THE DECISION GOES ONLY SO FAR AS THE CASE BEFORE IT, AND, THEREFORE, THAT CONCERNS REGARDING THE CUMULATIVE EFFECT OF THOSE DECISIONS ARE MERE SPECULATION. THE FCC HAS ARGUED A SIMILAR SYLLOGISM IN ITS DECISION LEADING UP TO ARCO.14/ I SUGGEST TO YOU, HOWEVER, MY CONCERN IS NOT SPECULATIVE.

FOR EXAMPLE, IN A RECENT PETITION FOR RULEMAKING FILED BY METROPOLITAN FIBER SYSTEMS, INC. (MFS), RM 7249, MFS SEEKS TO COMPEL THE BELL OPERATING COMPANIES (BOCs) TO INTERCONNECT WITH COMPETING LOCAL EXCHANGE CARRIERS AT THE BOCs' CENTRAL OFFICES. MFS CLAIMS THAT THE RIGHT TO PHYSICAL COLLOCATION AT WIRE CENTERS IS NECESSARY AS A NEGOTIATING TOOL SO THAT THE BOCs WILL AGREE TO REASONABLE RATES FOR ACCESS TO THOSE FACILITIES. WHILE MFS DISCLAIMS THE INTENTION TO HAVE THE FCC PREEMPT STATE REGULATION OF INTRASTATE SERVICE, IT RELIES ON ARCO AND SIMILAR CASES TO SUPPORT ITS VIEW THAT THE FCC SHOULD ORDER PHYSICAL CONNECTIONS BETWEEN FACILITIES WHICH ARE USED TO CARRY ANY INTERSTATE TRAFFIC, EVEN IF THOSE FACILITIES ARE GEOGRAPHICALLY INTRASTATE, AND THAT

14/ Memorandum Opinion and Order, 3 FCC Rcd at 3092, paras. 17, 21, 24-26.

THE STATE COMMISSION'S AUTHORITY WOULD BE LIMITED TO DETERMINING HOW THE COSTS ALLOCATED TO THE INTRASTATE JURISDICTION SHOULD BE RECOVERED. IT APPEARS THAT THIS PROCEEDING MAY INVOLVE AN EXPANSION OF THE HOLDING OF ARCO.

NARUC AND SEVERAL STATE COMMISSIONS FILED COMMENTS IN THE DOCKET WHICH GENERALLY INDICATED THEIR VIEW THAT THE ISSUE RAISED BY MFS INVOLVES STATE POLICIES, NOT SIMPLY FCC POLICIES. I DO NOT KNOW HOW THIS PROCEEDING WILL BE RESOLVED BY THE FCC, BUT I CAN STATE WITHOUT RESERVATION THAT THE STATES WILL BE WATCHING THE OUTCOME CLOSELY.

SO WHERE DOES THIS LEAVE THE "BALANCE"? I BELIEVE THAT AS TECHNOLOGY ADVANCES, THE TENSION BETWEEN FEDERAL AND STATE POLICIES WILL CONTINUE TO BE PRESENT, POSSIBLY INCREASING AS PRIVATE INTERESTS, SUCH AS IN THE ARCO AND NORLIGHT CASES, SHOP FOR THE "BEST" FORUM IN WHICH TO ARGUE AND PLEAD THEIR CASES.

THEREFORE, WHERE DOES THIS LEAVE US? I SUGGEST THAT A RETHINKING OF THE RELATIONSHIP BETWEEN THE STATES AND THE FCC MAY BE IN ORDER. THIS APPROACH MAY BE THE MOST EFFICIENT WAY OF ASSURING THE CORRECT "BALANCE" OF INTERESTS BETWEEN THE STATES AND THE FCC. PERMIT ME, THEREFORE, TO MAKE TWO PROPOSALS TO YOU.

FIRST, NOW IS THE TIME TO CALL FOR A "NATIONAL POLICY FORUM" IN ORDER TO ASSURE THAT STATE AND FEDERAL POLICY MAKERS HAVE ARTICULATED POLICY GOALS. SECOND, THE TIME IS RIPE FOR A RESTRUCTURING OF THE "JOINT BOARD" PROVISION OF THE COMMUNICATIONS ACT.

I SUGGEST TO YOU, THEREFORE, THAT THE TIME MAY BE RIPE FOR THE DEVELOPMENT OF A NATIONAL POLICY FORUM MADE UP OF FEDERAL AND STATE REGULATORS, MEMBERS OF CONGRESS, AND OTHER EXECUTIVE AGENCY REPRESENTATIVES, E.G., REPRESENTATIVES FROM NTIA AND DOJ, TO HELP FORMULATE NATIONAL TELECOMMUNICATIONS POLICY DIRECTIVES AND DISCRETE OBJECTIVES, INCLUDING RECOMMENDATIONS FOR THE AMENDMENT OF THE COMMUNICATIONS ACT, IF NECESSARY. I BELIEVE THAT THIS COORDINATED EFFORT, A LOGICAL OUT-GROWTH OF CHAIRMAN SIKES' EFFORTS TO COORDINATE ACTIVITIES WITH THE STATES, IS NECESSARY TO ASSUAGE CONCERNS THAT THIS NATION IS FALLING BEHIND IN THE DEVELOPMENT OF A REGULATORY FRAMEWORK CONDUCIVE TO THE INFORMATION CHALLENGES CONFRONTING IT TODAY AND TOMORROW.

ONE ALTERNATIVE TO ASSIST IN THE DEVELOPMENT OF COORDINATED FEDERAL/STATE POLICY MAKING IS A REFORMATION OF THE JOINT BOARD PROCESS UNDER SECTION 410(c) OF THE COMMUNICATIONS ACT. TO THIS END, THE JOINT BOARD PROCESS COULD BE REFORMED TO REQUIRE ALL FCC COMMISSIONERS, WITH AN EQUAL NUMBER OF STATE COMMISSIONERS APPOINTED BY THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, TO BE PARTICIPANTS. SUBJECT MATTERS BEFORE THE JOINT BOARD WOULD REQUIRE A SIMPLE MAJORITY VOTE FOR APPROVAL. IN THE EVENT OF A TIE VOTE, THE SUBJECT MATTER OF THAT VOTE WOULD BE NULL AND VOID. FURTHER, TO ASSURE TIMELY JUDICIAL REVIEW, ANY JOINT BOARD DECISION WOULD BE APPEALABLE DIRECTLY TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT. IF COMPROMISE IS THE WAY TO ACHIEVE OBJECTIVES IN LIGHT OF COMPETING

INTERESTS AND CONCERNS, THE REFORMED JOINT BOARD THAT I HAVE OUTLINED SHOULD DO JUST THAT.

I OFFER THESE SUGGESTIONS AS A VEHICLE FOR FURTHER DISCUSSIONS AND CONSTRUCTIVE DEBATE AMONG ALL INTERESTED PARTIES. I BELIEVE THAT THESE ALTERNATIVES MAY VERY WELL ESTABLISH THE FORUM REQUIRED TO ASSURE THE "APPROPRIATE BALANCE OF FEDERAL/STATE COOPERATION" FOR THE FUTURE.

IN CLOSING, I AGAIN WANT TO THANK TELECOMMUNICATIONS REPORTS FOR THIS OPPORTUNITY TO BE BEFORE YOU TODAY. THERE ARE CHALLENGES CONFRONTING ALL OF US. AS THIS CONFERENCE IS TESTIMONY TO, THE BALANCING OF THE LEGITIMATE GOALS AND CONCERNS OF THE FEDERAL AND STATE JURISDICTIONS IS, IN MY OPINION, ONE OF THE MOST PRESSING ISSUES FOR TODAY AND FOR THE FUTURE. THANK YOU. I LOOK FORWARD TO ANY QUESTIONS YOU MAY HAVE.