

REMARKS BY PATRICIA M. WORTHY
CHAIRMAN
DISTRICT OF COLUMBIA PUBLIC SERVICE COMMISSION
"THE TIME OF CHANGE AND CHALLENGE"

BEFORE THE
NATIONAL ASSOCIATION OF STATE TELECOMMUNICATIONS DIRECTORS
13TH ANNUAL CONFERENCE
SAN FRANCISCO, CALIFORNIA
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I AM DELIGHTED TO BE WITH YOU THIS AFTERNOON. I WANT TO THANK THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS DIRECTORS FOR THE OPPORTUNITY TO DISCUSS THE ISSUES AND CHALLENGES CURRENTLY FACING STATE REGULATORY COMMISSIONS IN THE "INFORMATION AGE". ISSUES THAT I AM SURE ARE IMPORTANT TO THOSE OF YOU WHO ARE RESPONSIBLE FOR PLANNING, COORDINATING AND PROVIDING TELECOMMUNICATION SERVICES FOR YOUR RESPECTIVE STATE GOVERNMENTS.

AS SOME OF YOU MAY BE AWARE, I HAVE BEEN CHAIRMAN OF THE PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA SINCE 1984 AND A COMMISSIONER SINCE 1980. I AM HERE TODAY IN MY CAPACITY AS CHAIRMAN OF THE DISTRICT OF COLUMBIA PUBLIC SERVICE COMMISSION AND MY REMARKS ARE ATTRIBUTED SOLELY TO ME AND NOT IN MY CAPACITY AS CHAIRMAN OF THE NARUC COMMUNICATIONS COMMITTEE. AS A RESULT OF MY TEN YEARS AS A REGULATOR, I HAVE HAD THE OPPORTUNITY TO WITNESS FIRST HAND A NEW, EVOLVING TELECOMMUNICATIONS MARKET PLACE DRIVEN BY RAPID TECHNOLOGICAL ADVANCES, NEW SERVICE PROVIDERS, AND THE DEPLOYMENT OF NEW AND INNOVATIVE GOODS AND SERVICES. THOUGH, I WOULD AGREE THAT THE MARKET PLACE IS UNDERGOING TRANSITION, I AM SOMEWHAT CONCERNED WITH THE DEGREE OF COMPLEXITY, THE MYRIAD OF ISSUES, AND THE INTENSITY OF THE STRUGGLE FACING STATE REGULATORS.

IN MY OPINION, A REGULATOR'S PRIMARY OBLIGATION IS TO ENSURE THAT THE NATION'S TELECOMMUNICATIONS POLICIES CONTINUE TO FURTHER THE GOAL OF "UNIVERSAL SERVICE". SHOULD THE PACE OF TECHNOLOGICAL GROWTH CONTINUE, AND I FIRMLY BELIEVE IT WILL, I AM CONVINCED THAT

THE TIME IS RIPE TO INSTITUTE A MECHANISM THAT WILL PROVIDE THE VEHICLE FOR A SYSTEMATIC, COORDINATED OVERVIEW OF THIS NATION'S COMMUNICATIONS POLICY. I AM CONCERNED THAT OUR EXISTING POLICY HAS BECOME HIGHLY FRAGMENTED AND POLITICIZED, CREATING UNCERTAINTY AND CONFUSION AMONG THE INDUSTRY, CONSUMERS, AND REGULATORS ALIKE. MOREOVER, I AM CONVINCED THAT THE LACK OF COORDINATION MAY YIELD SHORT-TERM, INEFFICIENT AND AD-HOC RESPONSES TO NARROWLY DEFINED ISSUES AS OPPOSED TO THE DEVELOPMENT OF COMPREHENSIVE NATIONAL TELECOMMUNICATIONS GOALS.

BUT LET ME NOT STRAY TOO FAR FROM TODAY'S TOPIC OF THOSE ISSUES OF PARTICULAR IMPORTANCE TO STATE REGULATORS - WHAT I HAVE TERMED "THE TIME OF CHANGE AND CHALLENGE".

ONE OF THE MOST CHALLENGING DEVELOPMENTS AT THE STATE LEVEL IN THE 1980'S HAS BEEN THE ASSAULT ON RATE OF RETURN REGULATION AND THE CRY FOR REGULATORY REFORM. SEGMENTS OF THE INDUSTRY HAVE CALLED FOR IMPLEMENTATION OF INCENTIVE REGULATION, PRICE CAPS, AND SOCIAL CONTRACTS.

IN JANUARY OF THIS YEAR, THE MISSOURI OFFICE OF THE PEOPLE'S COUNSEL RELEASED A SUMMARY REPORT CONCERNING STATE INCENTIVE REGULATION PLANS, WHICH INDICATES THAT WELL OVER TWENTY STATES HAVE EITHER INSTITUTED SUCH PLANS OR ARE CONSIDERING SOME FORM OF INCENTIVE REGULATION, WITH A SIMILAR NUMBER OF STATES ENACTING LEGISLATION WHICH HAS AT LEAST ESTABLISHED THE FRAMEWORK FOR

ALTERNATIVE REGULATION.¹

AN ANALYSIS OF THE VARIOUS STATE REGULATORY SCHEMES INDICATES THREE COMMON FACTORS:

- (1) THE PLAN PROPOSES A FREEZE ON "BASIC RESIDENTIAL RATES" IN EXCHANGE FOR RELIEF FROM TRADITIONAL RATE OF RETURN REGULATION FOR OTHER SERVICES;
- (2) THE PLAN PROVIDES FOR SOME FORM OF "SHARING" OF PROFITS ABOVE A TARGETED RETURN BETWEEN THE TELEPHONE COMPANY AND THE RATEPAYERS; AND
- (3) THE PLAN IS PROPOSED FOR A SPECIFIC TIME PERIOD AFTER WHICH A REEXAMINATION OF THE PROPOSAL PRESUMABLY WILL OCCUR.

I SHOULD NOTE THAT THE THREE FACTORS ARE NOT MUTUALLY EXCLUSIVE; SOME STATE PLANS INCLUDE MORE THAN ONE.

FOR EXAMPLE, IN FLORIDA, THE COMMISSION ESTABLISHED A PLAN WHICH CAPPED BASIC RATES UNTIL THE END OF THIS YEAR, THE TRIAL PERIOD FOR THE PLAN WAS FROM OCTOBER 1988 THROUGH DECEMBER, 1990, AND A THREE LEVEL SHARING MECHANISM WAS APPROVED. UNDER THE FLORIDA MECHANISM, THE COMPANY RETAINS ALL EARNINGS BETWEEN 13.25% TO 14.00%, THE RATEPAYERS SHARE 60% OF THE EARNINGS BETWEEN 14.00% AND 16.00%, AND THE RATEPAYERS RECEIVE 100% OF THE EARNINGS OF THE COMPANY IN EXCESS OF 16.00%.

IN NEBRASKA, WHERE REGULATORY RESTRUCTURING WAS MANDATED BY THE LEGISLATURE OVER THE OBJECTIONS OF THE NEBRASKA PSC, BASIC LOCAL SERVICE IS PRICE CAPPED UNTIL 1991. AT THAT TIME, THE PRICE

¹See Schmitz, Drainer, "Report on Telecommunications Alternative Regulation Plans by State," Missouri Office of the Public Counsel (Jan. 1990) (Missouri Report).

CAPS WILL EXPIRE AND ALL BASIC LOCAL SERVICE WILL BE DEREGULATED. PRICES AND PROFITS FOR ALL OTHER TELECOMMUNICATIONS SERVICES HAVE ALREADY BEEN DEREGULATED. THE NEBRASKA PSC REGULATORS RETAINED THEIR AUTHORITY OVER SERVICE QUALITY, MARKET ENTRY AND THE SETTLEMENT OF CONSUMER COMPLAINTS.

THE STATE OF OHIO HAS A DEREGULATION LAW WHICH GIVES THE COMMISSION AUTHORITY TO DEREGULATE ANY SERVICES IT FINDS TO BE COMPETITIVE. UNTIL 1997, THE OHIO PUC MAY RE-REGULATE A SERVICE. AFTER 1997, THE COMPANY MUST AGREE TO HAVE A SERVICE RE-REGULATED. THE COMMISSION ALSO HAS THE OPTION TO END PRICE AND PROFIT REGULATION FOR BASIC LOCAL SERVICE.

THIS WIDE VARIANCE OF PLANS IS INDICATIVE OF THE FACT THAT EACH STATE COMMISSION IS GRAPPLING WITH THE VERY SPECIAL CIRCUMSTANCES OF THEIR RESPECTIVE JURISDICTIONS. I BELIEVE, HOWEVER, THAT THESE NEW REGULATORY APPROACHES RAISE THEIR OWN CHALLENGING CONCERNS WHICH I WOULD LIKE TO QUICKLY DISCUSS WITH YOU.

FIRST, I AM CONCERNED THAT RATEPAYERS MAY BE BEARING TOO MUCH OF THE RISK. MY CONCERN FOCUSES ON THE ABILITY OF THE LEC TO SEEK FLEXIBILITY BUT RETAINING THE RIGHT TO RETURN TO TRADITIONAL RATE OF RETURN REGULATION SHOULD THE PROJECTIONS FOR FINANCIAL SUCCESS FALTER.

SECOND, I DO NOT BELIEVE THAT FREEZING BASIC RATES FOR SOME PERIOD OF TIME NECESSARILY PROTECTS RATEPAYERS. WHILE THE CONCEPT OF "FREEZING RATES" OR RATE STABILIZATION MAY BE POLITICALLY ADVANTAGEOUS -- DURING A PERIOD OF COST DECLINE, SUCH AS NOW, THE

OBLIGATION WE FACE AS REGULATORS IS TO INSURE THAT RATES ARE "JUST AND REASONABLE" AND, TO THE EXTENT FEASIBLE, REFLECTIVE OF COST.

THIRD, I AM CONCERNED THAT THE USE OF A "SHARING MECHANISM", WHILE AN INTERESTING THEORY MAY NOT BE A REALITY. FIRST, I AM AWARE OF ONLY ONE JURISDICTION WHICH HAS INCLUDED A SHARING MECHANISM IN ITS NEW REGULATORY REGIME, WHERE THE CONSUMERS HAVE, IN FACT, SHARED IN ANY ACTUAL EARNINGS.

LAST, BUT NOT LEAST, I AM CONCERNED THAT SERVICE QUALITY IS AT RISK. IN MY OPINION, ALTERNATIVE REGULATORY MECHANISM MAY CREATE THE INCENTIVE TO REALIZE SHORT TERM PROFITS AT THE EXPENSE OF SERVICE QUALITY. LET US NOT FORGET THE BELL SYSTEM SERVICE QUALITY CRISIS IN THE LATE 1960'S WHICH RESULTED FROM AT&T'S EFFORTS TO INCREASE NET EARNINGS.

I AM NOT OPPOSED TO REGULATORY REFORM. I AM COGNIZANT OF THE ECONOMIC AND TECHNOLOGICAL CHANGES OCCURRING IN THE INDUSTRY. I DO BELIEVE, HOWEVER, THAT CHANGE FOR CHANGE'S SAKE IS NOT PROGRESS. IT IS MERELY THE REPLACEMENT OF ONE FORM OF REGULATION FOR ANOTHER. BEFORE ANY PARTICULAR ALTERNATIVE APPROACH IS USED IT SHOULD BE PROVEN THAT THE CHOSEN METHOD OF RE-REGULATION WILL IMPROVE THE OVERALL STATE OF TELECOMMUNICATIONS, THAT IT WILL INCREASE EFFICIENCIES, YIELD TECHNOLOGICAL INNOVATIONS, CREATE, WHERE APPROPRIATE, SUSTAINED PRICE REDUCTIONS, AND THAT THE BENEFITS WILL APPRECIABLY EXCEED RISKS.

THERE ARE THOSE WHO VIEW STATE REGULATORS, SUCH AS MYSELF, AS OBSTRUCTIONISTS AND WHO ASSERT THAT WE ARE RESPONSIBLE FOR THIS NATION'S TECHNOLOGICAL DECLINE, SOME HAVE EVEN ARGUED, I HOPE, NOT

SERIOUSLY, THAT WE ARE DIRECTLY RESPONSIBLE FOR THE INTERNATIONAL TRADE DEFICIT. THE OBLIGATION OF REGULATORS IS TO ENSURE UNIVERSAL SERVICE AND TO BALANCE THE INTERESTS OF COMPANIES AND RATEPAYERS. WHICH BRINGS ME TO ANOTHER MAJOR CHALLENGE WHICH STATE COMMISSIONS FACE AND THAT IS BALANCING THE PROVISION OF NEW TELECOMMUNICATIONS SERVICES AND THE COST OF THESE SERVICES.

WHILE I DO NOT OBJECT TO THE CONCEPT OF A NATIONWIDE NETWORK WITH ITS TECHNOLOGICAL ADVANCEMENTS, THE REAL ISSUE FOR STATE REGULATORS IS THE ASSESSMENT OF ACTUAL DEMAND FOR THESE SERVICES AND THE ALLOCATION OF THE CONCOMITANT COST OF THE NEW INFRASTRUCTURE.

I NOTE THAT THE FCC HAS ISSUED A NUMBER OF DECISIONS WHICH SHIFT THE BURDEN OF COST RECOVERY TO THE STATE JURISDICTIONS. AS THE COSTS RISE, SO DOES THE DEMAND ON A STATE COMMISSION'S COMMITMENT TO ASSURE THAT SPECIAL CIRCUMSTANCES PRESENTED IN THEIR RESPECTIVE JURISDICTIONS ARE ACCOMMODATED TO THE EXTENT POSSIBLE WHILE ENSURING THAT THE LOCAL RATEPAYERS ARE NOT BURDENED WITH THE EXPENSE OF NETWORK SERVICES THAT THEY HAVE NEITHER THE DESIRE TO USE NOR THE MONEY TO PAY FOR. THIS BALANCE WILL BECOME EVEN MORE DIFFICULT TO MAINTAIN WITH THE RAPID ESCALATION OF TECHNOLOGICAL ADVANCEMENT.

I BELIEVE THAT ADVANCEMENTS IN THE NETWORK SHOULD BE "DEMAND-DRIVEN", WITH THE COSTS ASSOCIATED WITH THOSE ADVANCEMENTS AND SERVICES SHARED AMONG THE INTENDED BENEFICIARIES. I DO NOT BELIEVE THAT LOCAL RATEPAYERS SHOULD BEAR THE BURDEN OF CONSTRUCTING A "CADILLAC" NETWORK, WHEN LOCAL RATEPAYERS ONLY DEMAND SIMPLE

TRANSPORTATION.

I AM SURE THAT NO ONE WANTS TO BE LEFT BEHIND AS THIS NATION SURGES FORWARD INTO THE INFORMATION AGE. THOSE OF YOU WHO PLAN AND DIRECT STATE/GOVERNMENT TELECOMMUNICATIONS SYSTEMS WANT TO ASSURE THAT YOUR CLIENTS TO THE EXTENT FEASIBLE, HAVE ACCESS TO THOSE SERVICES THAT WILL HELP THEM TO BE MOST EFFICIENT AND PRODUCTIVE. HOWEVER, I AM CONCERNED THAT MANY STATE GOVERNMENTS HAVE USED MASSIVE AMOUNTS OF TAXPAYER DOLLARS TO CONSTRUCT PRIVATE TELECOMMUNICATIONS NETWORKS WITH EXCESSIVE CAPACITY THAT IN FACT BY-PASS THE LOCAL EXCHANGE AND, THEREFORE, INCREASE THE COST OF TELEPHONE SERVICE OF THE VERY TAXPAYERS WHOSE MONEY HAS ALREADY BEEN USED TO CONSTRUCT THE NEW, UNDER-UTILIZED GOVERNMENT SYSTEMS.

AS GOVERNMENT EMPLOYEES AND KEEPERS OF THE PUBLIC TRUST YOU, TOO, HAVE THE RESPONSIBILITY AND OBLIGATION TO ENSURE THAT THE DEMAND FOR THE SERVICE IS REAL AND THAT THE ASSOCIATED COSTS ARE JUSTIFIED AND REASONABLE.

THE RAPID DEPLOYMENT OF NEW TECHNOLOGIES AND SERVICES HAS PRESENTED STATE REGULATORS WITH ANOTHER MAJOR CHALLENGE AND THAT IS TO DETERMINE THE EXTENT OF PRIVACY PROTECTION THAT SHOULD BE AFFORDED USERS OF TELECOMMUNICATIONS SERVICE AND WHO, IF ANYONE, SHOULD PAY FOR PRIVACY.

I AM SURE YOU ALL KNOW THIS ISSUE IN THE CONTEXT OF AUTOMATIC NUMBER IDENTIFICATIONS (ANI) SERVICE OFFERINGS SUCH AS CALLER-ID OR AUTOMATIC CALLBACK, WHICH HAS GENERATED A SIGNIFICANT DEBATE WITHIN THE VARIOUS STATES WHERE THE BOCS HAVE OR ARE ATTEMPTING TO INTRODUCE THE SERVICES. WHILE SOME STATES SUCH AS NEW JERSEY,

MARYLAND, AND VIRGINIA HAVE PERMITTED THE INTRODUCTION OF THE CALLER-ID SERVICES, THE PENNSYLVANIA COMMONWEALTH COURT RULED THAT CALLER-ID WITH OR WITHOUT BLOCKING VIOLATED THE STATE OF PENNSYLVANIA'S WIRETAP STATUTE AS WELL AS CONSTITUTIONAL PRIVACY RIGHTS. IN THE DISTRICT OF COLUMBIA, WE RECENTLY PERMITTED CALLER-ID WITH PER CALL BLOCKING. WE UNDERSTAND THAT WE ARE THE FIRST STATE COMMISSION TO ORDER PER CALL BLOCKING.

I WOULD, HOWEVER, SUBMIT THAT THE PRIVACY ISSUES THAT WE FACE ARE FAR BROADER, AND THAT CALLER-ID IS JUST A SMALL PART OF THE MORE GENERIC ISSUES INHERENT IN PROTECTING INFORMATION IN AN INCREASINGLY OPEN NETWORK SYSTEM. NEARLY EVERY NEW SERVICE HAS RAISED NEW TYPES OF PRIVACY ISSUES AND CONCERNS. CELLULAR TELEPHONES, SATELLITE AND MICROWAVE TRANSMISSION, VOICE MAIL, FACSIMILE MACHINES, AUTOMATIC DIALERS, VIDEOTEX, AUDIOTEX, REMOTE ACCESSORY TO DIRECTORY INFORMATION, JUST TO NAME A FEW, ALL PRESENT RELATED PRIVACY PROBLEMS IN SOME FORM.

HERE AGAIN STATE REGULATORS MUST EXAMINE THESE ISSUES BALANCING PRIVACY WITH SOCIETAL INTERESTS. AND THERE ARE LEGITIMATE SOCIETAL INTERESTS THAT MUST BE CONSIDERED. FOR EXAMPLE, PRIVACY PROTECTION MAY INCREASE THE COST OF INFORMATION SEARCH, STORAGE, AND TRANSMISSION. THE COST OF PROVIDING PRIVACY PROTECTION MAY BE A BARRIER TO THE ENTRY OF NEW TECHNOLOGIES AND MAKE THEM MORE EXPENSIVE.

STATE COMMISSIONERS AS WELL AS THE INDUSTRY MUST EXAMINE AND DEVELOP STANDARDS OR GUIDELINES FOR THE FUTURE. STANDARDS DEVELOPMENT IS CRITICAL IN HELPING TO STRUCTURE CONSISTENT

POLICIES. MOREOVER, THESE STANDARDS MUST REFLECT CONSUMER EXPECTATIONS OF PRIVACY. THE U.S. SUPREME COURT HAS CONSISTENTLY RULED THAT PRIVACY PROTECTION IS GOVERNED BY THE STANDARD OF REASONABLE EXPECTATIONS.

AND FINALLY, I WANT TO DISCUSS TODAY THE GREATEST CHALLENGE OF THEM ALL - THE CONTINUAL STRUGGLE WITH OUR FEDERAL COUNTERPART, THE FCC, TO RETAIN AND MAINTAIN CONTROL OF OUR STATE STATUTORY RESPONSIBILITY. NOTWITHSTANDING OUR RECENT VICTORY IN THE NINTH CIRCUIT, THE COMPUTER III DECISION, WHICH I WILL DISCUSS, THE GREATEST RISK TO "AFFORDABLE TELEPHONE SERVICE", IN MY OPINION, IS THAT OF FEDERAL PREEMPTION.

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 30A, NOTHING IN THIS ACT SHALL BE CONSTRUED TO APPLY TO OR GIVE THE [FCC] JURISDICTION WITH RESPECT TO (1) CHARGES, CLASSIFICATIONS, PRACTICES, SERVICES, FACILITIES, OR REGULATIONS FOR OR IN CONNECTION WITH INTRASTATE COMMUNICATION SERVICE BY WIRE OR RADIO OF ANY CARRIER...²

IN ONE OF THE FIRST MAJOR JUDICIAL DECISION CONCERNING PREEMPTION THE SUPREME COURT REAFFIRMED THE JURISDICTION OF THE STATES, AGAIN IN CLEAR TERMS, OR SO WE THOUGHT, IN LOUISIANA PUBLIC SERVICE COMMISSION V FCC.³ THE COURT STATED:

WE MIGHT BE INCLINED TO ACCEPT THIS BROAD READING OF SEC. 151

²47 U.S.C. Section 152(b) (Emphasis added).

³476 U.S. 355 (1986).

WERE IT NOT FOR THE EXPRESS JURISDICTIONAL LIMITATIONS ON FCC POWER CONTAINED IN SEC. 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.⁴

IMMEDIATELY FOLLOWING THE LOUISIANA DECISION THE FCC BEGAN AND HAS CONTINUED TO THIS DAY ITS ATTEMPT TO LIMIT THE IMPORT AND THE IMPACT OF THAT DECISION. THE EVIDENCE OF FCC PREEMPTION IS WELL DOCUMENTED. THE EFFECTS OF PREEMPTION HAVE BEEN DEVASTATING. 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 THE NORLIGHT DECISION,⁵ 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.

IN EARLY 1988, THE FCC'S PRIVATE RADIO BUREAU TOOK ONE STEP FURTHER. IN PUBLIC SERVICE COMPANY OF OKLAHOMA,⁶ IN WHICH THE APPLICATION FOR REVIEW IS CURRENTLY PENDING BEFORE THE FCC, THE BUREAU FOUND THAT ALL NON-COMMON CARRIER RADIO SERVICES ARE DEEMED TO BE INTERSTATE SERVICES, PURSUANT TO SECTION 301 OF THE

⁴Louisiana, 476 U.S. at 370 (emphasis added).

⁵In 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).

⁶3 FCC Rcd 2327 (1988) (petition for review pending).

COMMUNICATIONS ACT.⁷ THUS, IF THE OWNER OF A MICROWAVE NETWORK OFFERS SERVICES BY CONTRACT ON AN INDIVIDUALIZED BASIS WITH A RELATIVELY STABLE CLIENTELE, THE BUREAU'S ORDER COULD PERMIT IT TO BE FREE OF STATE REGULATION, EVEN WITH RESPECT TO LOCAL ORIGINATION AND TERMINATION OF TELEPHONE CALLS.

ALSO IN 1988, THE FCC, IN PERHAPS THE CLEAREST INTRUSION TO DATE ON THE STATE'S AUTHORITY ISSUED ITS 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 FRANCHISE 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 HAS 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.⁸

⁷2 FCC Rcd at 2329-30.

⁸Application 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).

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." AND EFFECTIVELY PREEMPTED THE TEXAS COMMISSION'S DECISION.⁹

I AM CONVINCED THAT THE MAJOR TECHNOLOGY CHANGES ARE FOCUSED ON THE LOCAL LOOP AND THEREFORE, I BELIEVE THAT THE STATES, AND NOT THE FEDERAL COMMUNICATIONS COMMISSION (FCC), HAS THE STATUTORY AUTHORITY AND OBLIGATION TO MAKE ALL RELEVANT PUBLIC INTEREST DETERMINATIONS. THE RECENT DECISIONS AND ACTIONS I'VE MENTIONED IMPAIR THE STATE'S AUTHORITY AND POLICY PREROGATIVES OVER HOW AND WHEN THE LOCAL EXCHANGE SHOULD BE USED. STATE COMMISSIONS HAVE EVERY INCENTIVE AND RIGHT TO ENSURE THAT THE UNIQUE AND SPECIAL INTEREST OF THEIR RESPECTIVE JURISDICTIONS ARE NOT CIRCUMVENTED BY FCC POLICY.

GIVEN STATE COMMISSIONS CONCERN WITH PREEMPTION, ONE CAN FULLY UNDERSTAND HOW ELATED WE WERE WITH THE RECENT NINTH CIRCUIT DECISION IN CALIFORNIA V FCC, 905 F.2D 1217 (9TH CIRCUIT) (1990), IN WHICH THE COURT VACATED THE FCC'S PREEMPTIVE ORDER IN ITS THIRD COMPUTER INQUIRY DECISION. THE NINTH CIRCUIT'S DECISION REAFFIRMED THE STATES AUTHORITY TO REGULATE INTRASTATE ENHANCED SERVICES AND TO ORDER STRUCTURAL SEPARATION OR OTHER NON-STRUCTURAL SAFEGUARDS

⁹In 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).

FOR THE PROVISION OF SUCH SERVICE SO LONG AS THE STATES REGULATION DOES NOT NEGATE LEGITIMATE FEDERAL REGULATION OF INTERSTATE SERVICES. EVEN IN VICTORY "LEGITIMATE FEDERAL REGULATION" SEEMS TO SUGGEST SOME PREEMPTION BY THE FCC MAY BE PERMISSIBLE. HOWEVER, THIS NINTH CIRCUIT DECISION IS AN EXTREMELY IMPORTANT ONE FOR STATE REGULATORS. AS A RESULT OF THE THIRD COMPUTER INQUIRY MOST STATES CONCLUDED THAT THEY WERE WITHOUT THE AUTHORITY TO REGULATE INTRASTATE ENHANCED SERVICES TO CRAFT STATE-SPECIFIC SAFEGUARDS AGAINST CROSS-SUBSIDY OR OTHER ANTI-COMPETITIVE CONDUCT. AS A RESULT OF THE NINTH CIRCUIT DECISION INDIVIDUAL STATES ARE CURRENTLY TAKING ACTION TO ESTABLISH AN INTERIM REGULATORY FRAMEWORK FOR THE PROVISION OF INTRASTATE ENHANCED SERVICES. THE FRAMEWORK WILL VARY AMONG THE INDIVIDUAL STATES. FOR EXAMPLE, IN SOME STATES, THE PROVISION OF THESE SERVICES BY BELL OPERATING COMPANIES MAY REQUIRE STATE AUTHORIZATION AND SUCH AUTHORITY MAY NOT HAVE BEEN PREVIOUSLY GRANTED IN WHICH CASE THE STATES MAY GRANT THE LOCAL BOC A WAIVER OR PROVIDE OTHER INTERIM APPROVAL.

THE FCC HAS GRANTED THE REGIONAL BELL OPERATING COMPANIES AN INTERIM WAIVER OF ITS SECOND COMPUTER INQUIRY RULES TO ALLOW THE COMPANIES TO CONTINUE TO PROVIDE INTERSTATE ENHANCED SERVICES.

ALTHOUGH THE FCC HAS DECIDED NOT TO PETITION FOR REHEARING OF THE COURT'S DECISION I DO NOT EXPECT IT TO CEASE ITS PURSUIT OF THIS ISSUE. THE FCC HAS ALREADY ANNOUNCED THAT IT WILL BE INSTITUTING RULEMAKING PROCEEDING TO ADDRESS THE STRUCTURAL SEPARATIONS REQUIREMENTS FOR THE PROVISION OF INTERSTATE ENHANCED SERVICES AND TO ADDRESS THE CONTINUING DEVELOPMENT OF OPEN NETWORK

ARCHITECTURE. THEREFORE THE STATE COMMISSIONS MUST BE READY TO CONTINUE THE STRUGGLE.

I AM HOPING THAT INSTEAD OF THROWING DOWN THE GAUNTLET, SIGNALLING THE COMMENCEMENT OF A NEW ROUND OF SENSELESS LEGAL AND POLITICAL DEBATES, THAT THE FCC WILL JOIN THE STATES IN AN COOPERATIVE, MEANINGFUL DIALOGUE THAT WILL AFFORD ALL REGULATORS THE OPPORTUNITY TO DEVELOP INTELLIGENT, PROGRESSIVE, YET APPROPRIATE TELECOMMUNICATIONS POLICY.

WELL, I HOPE MY TALK HAS PROVIDED YOU WITH AN ADEQUATE OVERVIEW OF STATE ISSUES AND CONCERNS; I KNOW THAT PREPARING THESE REMARKS HELPED ME TO IDENTIFY AND FOCUS CLEARLY ON THE MANY TASKS AHEAD - THAT EXERCISE SERVED TO PRIORITIZE AND EMPHASIZE THAT THIS IS, IN FACT, THE TIME OF CHANGE AND CHALLENGE. THANK YOU AGAIN FOR THE OPPORTUNITY TO BE WITH YOU THIS AFTERNOON. IF TIME PERMITS I WOULD BE DELIGHTED TO ANSWER ANY QUESTIONS YOU MAY HAVE.

