

companies to observe specified office hours in towns of over 12,000 population and required free delivery of telegrams within one mile of the office.^{146/} The same year North Dakota required that telegraph companies have sufficient equipment to give prompt service; that they deliver messages promptly; and that they transmit messages within 30 minutes barring injury to the line.^{147/}

C. State Constitutional Provisions

At about the same time, a number of states adopted constitutional provisions bearing on telecommunications. Washington's Constitution of 1889 provided that telegraph and telephone companies had the right to construct and maintain lines in the state, "and said companies shall receive and transmit each other's messages without delay or discrimination, and all such companies are hereby declared to be common carriers and subject to legislative control." Telegraph and

[Footnote continued from preceding page]

The 1904 legislation was related to creation of the State Corporation Commission in 1903, but conferred no substantive regulatory authority on the Commission. See also Act of March 6, 1900, Va. Laws, c. 898, p. 996.

^{146/} Act of Mar. 28, 1907, Me. Laws, c. 180, p. 196.

^{147/} Act of Mar. 13, 1907, N.D. Laws, c. 246, p. 385. A subsequent statute required that telegraph messages traversing different routes be transferred at the point affording the lowest combined rate. Act of Mar. 13, 1913, N.D. Laws, c. 282, p. 441.

telephone companies were accorded the right to eminent domain and the right to use railroad rights-of-way; the railroads were required to treat all such companies with impartiality.^{148/}

Wyoming's Constitution of 1890 declared telephone and telegraph corporations to be common carriers. Telegraph companies were given the right to construct and maintain lines in the state and to connect with other lines; they were directed "to extend the same equality and impartiality to all who use them."^{149/} The Mississippi Constitution of 1890 declared telegraph and telephone companies to be "common carriers in their respective lines of business, and subject to liability as such." The legislature was directed to pass laws to prevent "abuses, unjust discrimination and extortion in all charges" of telephone and telegraph companies.^{150/}

Kentucky's Constitution of 1891 provided that telegraph companies had the right to maintain lines in the state and to connect with other lines, "and said companies shall receive and transmit each other's messages without unreasonable delay or discrimination, and all such companies

^{148/} Wash. Const. Art. XII, sec. 19 (1889).

^{149/} Wyom. Const. Art. IX, sec.7; Art. X, sec. 2, 7 (1890).

^{150/} Miss. Const. Art. 7, sec. 186, 195 (1890).

are hereby declared to be common carriers and subject to legislative control." Telephone companies also were directed to "receive and transmit each other's messages without unreasonable delay or discrimination." Mergers of competing telephone and telegraph companies were prohibited.^{151/} The South Carolina Constitution of 1895 declared that "all telegraph and other corporations engaged in the business of transmitting intelligence for hire are common carriers in their respective lines of business, and are subject to liability . . . as such." Discriminations in charges or facilities for the transmission of intelligence were prohibited. Consolidations of competing lines were barred.^{152/} Louisiana's Constitution of 1898 prohibited rebates and various forms of discrimination by telephone and telegraph companies.^{153/}

The Oklahoma Constitution of 1907 provided that telephone and telegraph lines shall receive and transmit each other's messages without delay or discrimination, and make physical connections with each other's lines. Mergers of competing companies required legislative approval. Various types of discrimination were prohibited.^{154/} The Arizona

^{151/} Ky. Const. sec. 199, 201 (1891).

^{152/} S.C. Const. Art. 9, sec. 3, 5, 7 (1895).

^{153/} La. Const. Art. 284, 286, 287 (1898).

^{154/} Okla. Const. Art. IX, sec. 5, 8, 13, 30 (1907).

Constitution of 1912 declared telegraph and telephone companies "to be common carriers and subject to control by law."

Interconnection and interchange of messages were required, and discriminations of various types were prohibited.^{155/} The New Mexico Constitution of the same year prohibited certain types of discrimination,^{156/} and the California Constitution, as amended in 1911, declared telephone and telegraph to be public utilities.^{157/}

The constitutions of six additional states contained a provision authorizing telegraph companies to construct lines in the state and to connect them with other lines, while prohibiting the merger of competing lines: Pennsylvania (1874),^{158/} Nebraska (1875),^{159/} Alabama (1875),^{160/} Colorado (1876),^{161/} Montana (1889),^{162/} and South Dakota (1889).^{163/}

^{155/} Ariz. Const. Art. XV, sec. 9, 10, 12 (1912).

^{156/} N.M. Const. Art. 11, sec. 7,10 (1912).

^{157/} Cal. Const. Art. XII, sec. 23 (1911).

^{158/} Pa. Const. Art. XVI, sec. 12 (1874).

^{159/} Neb. Const. Art. XI, sec. 3 (1875) (limited to prohibition of mergers).

^{160/} Ala. Const. Art. XIV, sec. 11 (1875).

^{161/} Colo. Const. Art. XV, sec. 13 (1876).

^{162/} Mont. Const. Art. XV, sec. 14 (1889).

^{163/} S.D. Const. Art. XVII, sec. 11 (1889).

As will be considered hereafter, the Constitutions of Arizona, California, Louisiana, New Mexico, Oklahoma, and South Carolina established regulatory commissions with authority over telecommunications.

D. An Appraisal of the Statutory and Constitutional Developments

Beginning in the 1870's, at about the time of the introduction of the telephone, there was a shift in emphasis in state legislation. The necessary facilitating legislation -- authorizing use of roads, eminent domain, and incorporation -- was largely in place. Telephone companies generally found the legislative authorizations they needed in existing telegraph legislation, in minor modifications of that legislation, or in more general legislation on incorporation, use of public roads and eminent domain. The emphasis shifted to regulation, and the types of regulations adopted were those employed in controlling monopoly abuse: prohibitions against discrimination, requirements of access, and occasional limitations on rates and specifications of service standards. For the first time, there was extensive reference to telephone and telegraph as "common carriers" and greater emphasis on the liability of telecommunications entities to their customers.

But the franchise element was not excluded. The state constitutions on the whole were concerned with enabling

telephone and telegraph construction as well as with issues of control. And, as will be seen in the next section, the application of controls was premised largely on the monopoly-franchise theory of common carrier status first espoused by Lord Hale.

V. TELECOMMUNICATIONS IN THE COURTS IN THE PRE-COMMISSION ERA

The adjudication of telecommunications issues in the courts, prior to establishment of regulatory commissions, was strongly influenced by the monopoly-franchise theory of Lord Hale. The theory was brought to bear principally in two ways. First, many cases were decided in the context of statutory provisions that, expressly or by implication, embodied the monopoly-franchise approach. Second, the leading constitutional precedent on the scope of state regulatory authority -- Munn v. Illinois^{164/} -- relied on the writings of Lord Hale.

In Munn, the United States Supreme Court sustained as constitutional state regulation of the rates of Chicago warehouses. The Court commented on the importance of the warehouses in the shipment of grain from the Midwest to the East and quoted from Lord Hale on the common law applicable to

^{164/} 94 U.S. 113 (1877). See E. Kitch and C. Bowler, The Facts of Munn v. Illinois, 1978 Sup. Ct. Rev. 313 (1979).

businesses "affected with a public interest." It then observed that the warehouse owners jointly fixed their rates for storage of grain:

"Thus, it is apparent that all the elevating facilities through which these vast productions [of grain] must pass on the way [to market] may be a 'virtual' monopoly . . . Every bushel of grain for its passage 'pays a toll, which is a common charge,' and, therefore, according to Lord Hale, every such warehousemen 'ought to be under public regulation, viz., that he . . . take but reasonable toll.' Certainly, if any business can be clothed 'with a public interest, and cease to be juris privati only,' this has been"165/

While Munn subsequently generated significant controversy as a decision delimiting the scope of state regulatory power under the Constitution, there was no dispute, during the period under consideration, as to the soundness of Munn in its application to telecommunications. Telegraph and telephone consistently were held to be "public" businesses, subject to government regulation and subject to common law limitations in the absence of statutory controls.

165/ Id. at 131-32. That monopoly was not considered to be the sole basis for legislative regulation of rates is indicated by the Court's references to regulations affecting common carriers, millers, ferrymen, innkeepers, wharfingers, bakers, cartmen, hackney-coachmen, chimney sweeps, and auctioneers. Id. at 125, 131-32. But monopoly was the basis emphasized in the opinion and the one relevant here.

In the period prior to commission regulation of telecommunications, two classes of cases were particularly prominent: (1) those involving claims of discriminatory or exclusionary treatment, and (2) those seeking damages for failures, errors or delays in the transmission of telegraph messages. In the discrimination and exclusion cases, the courts consistently imposed a duty of impartial treatment, relying either on common law principles or statutory standards. By contrast, the results in the damage liability cases were conflicting and inconsistent, reflecting no clear consensus. Underlying these disparate patterns were the two sources of common carrier status. The franchise-monopoly theory of Lord Hale provided a firm basis for resolving the discrimination and exclusion cases. But the custodial theory of common law liability, having its roots in the law of bailments, tended to confuse rather than clarify the responsibility of telegraph companies for failures, errors and delays. Indeed, the resolution of many cases in this second category ultimately turned on abandonment of the custodial theory in favor of the franchise-monopoly theory.

A. The Discrimination and Exclusion Cases

The earliest discrimination cases concerned the refusal of telegraph companies to forward the messages of other telegraph companies. The New York statute requiring such

forwarding was intended "to enable new companies to compete with established lines, thus preventing the evils of monopolies and of combinations of companies."^{166/} The duty to transmit for all without discrimination was said to "arise from the nature of their business even if there were no statute on the subject."^{167/} Absent such a requirement, control over a monopoly line would lead to control over the business of connecting lines seeking to have their messages forwarded over the monopoly line.^{168/}

Similar considerations led to invalidation of contracts between Western Union and the railroads excluding other telegraph companies from the railroads' rights-of-way. The contracts were held to be contrary to both statutory and common law principles because they tended to create and maintain a monopoly.^{169/}

^{166/} DeRutte v. New York, Albany & Buffalo Electric Magnetic Telegraph Co., 1 Daly 547, 553 (N.Y. 1866).

^{167/} Id. at 588.

^{168/} United States Tel. Co. v. Western Union Tel. Co., 56 Barb. 46 (N.Y. 1865); Atlantic & Pacific Tel. Co. v. Western Union Tel. Co., 4 Daly 527 (N.Y. 1873). To the same effect, see Western Union Tel. Co. v. Commercial Pacific Cable Co., 177 Cal. 577, 171 P. 317 (1918).

^{169/} Western Union Tel. Co. v. American Union Tel. Co., 65 Ga. 160 (1880) (common law); Western Union Tel. Co. v. Burlington & S.R.R., 11 Fed. 1 (D. Iowa 1882) (common law and Act of July 24, 1866); Western Union Tel. Co. v. Baltimore & Ohio Tel. Co., 19 Fed. 660 (S.D.N.Y. 1884) (Act of July 24,

Perhaps the most dramatic series of cases were those in which the courts compelled telephone companies to provide impartial service to telegraph companies even though the patent licenses under which the telephone companies were operating restricted such service to Western Union. For the most part, the decisions were premised on common law principles and emphasized the importance of the telephone service, the special privileges (such as eminent domain) accorded to telephone companies, and the monopoly positions enjoyed by some telephone companies.^{170/}

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1866); Western Union Tel. Co. v. Baltimore & Ohio Tel. Co., 22 Fed. 133 (E.D. Tex. 1884) (Texas statute); Union Trust Co. v. Atchison T. & S.F.R. Co., 8 N.M. 327, 43 P. 701 (1895) (Act of July 24, 1866 and common law); St. Louis & C.R.R. v. Postal Tel. Co., 173 Ill. 508 (1898) (common law); United States v. Union Pacific Ry., 160 U.S. 1 (1895) (Act of Aug. 7, 1888 and prior legislation). See also Pensacola Tel. Co. v. Western Union Tel. Co., 96 U.S. 1 (1877) (striking down exclusionary state legislation in reliance on Act of July 24, 1866).

^{170/} State ex rel. American Union Tel. Co. v. Bell Tel. Co., 22 Alb. L.J. 363, 10 Cent. L.J. 438, 11 Cent. L.J. 359 (Mo. 1880); State ex rel. American Union Tel. Co. v. Bell Tel. Co., 36 Ohio St. 296 (1880) (Ohio statute); State ex rel. Baltimore & Ohio Tel. Co. v. Bell Tel. Co., 23 Fed. 539 (E.D. Mo. 1885), appeal dismissed, 127 U.S. 780 (1888); Bell Tel. Co. v. Commonwealth, 3 Atl. 825 (Pa. 1886) (Pennsylvania statute); Chesapeake & Potomac Tel. Co. v. Baltimore & Ohio Tel. Co., 66 Md. 399, 7 Atl. 809 (1887) (Maryland statute); Commercial Union Tel. Co. v. New England Tel. & Tel. Co., 61 Vt. 241 (1888); State ex rel. Postal Tel. Co. v. Delaware & Atlantic Tel. & Tel. Co., 47 Fed. 633 (D. Del. 1891), affirmed, 50 Fed. 677 (3d Cir. 1892). Accord, People ex rel. Postal Cable Tel. Co. v. Hudson River Tel. Co., 19 Abb. N.C. 466 (N.Y. 1887); Postal Cable Tel. Co. v. Cumberland Tel. & Tel. Co., 177 Fed. 726

[Footnote continued next page]

Discriminations also were held unlawful where the applicants or customers were not other communications companies. In some cases, enforcement of telegraph antidiscrimination statutes was involved, the courts commenting on the essentiality of the service and the special privileges granted telegraph companies.^{171/} In others, state statutes were considered to be inapplicable and decisions were based on common law principles. Particularly significant was Western Union Telegraph Co. v. Call Publishing Co.,^{172/} where the Supreme Court held that unjustified discrimination by a telegraph company, in rates charged to competing publishers, was actionable at common law. Absent such common law regulation,

"persons dealing with common carriers . . .
are absolutely at the mercy of the

[Footnote continued from preceding page]

(M.D. Tenn 1910). Contra American Rapid Tel. Co. v. Connecticut Tel. Co., 49 Conn. 352 (1881). The results in these cases were reflected in a number of telephone antidiscrimination statutes adopted in the 1880's.

^{171/} Friedman v. Gold & Stock Tel. Co., 32 Hun. 4 (N.Y. 1884). Accord, Smith v. Gold & Stock Tel. Co., 42 Hun. 454 (N.Y. 1886).

^{172/} 181 U.S. 92 (1901), aff'g 58 Neb. 192 (1899) (the state court opinion rested on statutory grounds). Accord, Dunn v. Western Union Tel. Co., 2 Ga. App. 845 (1907) (duty inferred from special franchises); Sterrett v. Philadelphia Local Telegraph Co., 18 Weekly Notes of Cases 77 (Pa. 1886) (duty inferred from corporate franchise).

carriers . . . [I]f there be no law to restrain, the necessary result is that there is no limit to the charges they may make and enforce . . . 173/

" . . . Common carriers . . . are performing a public service. They are endowed by the State with some of its sovereign powers, such as the right of eminent domain, and so endowed by reason of the public service they render" 174/

The leading case prohibiting discrimination by telephone companies was State ex rel. Webster v. Nebraska Telephone Co., 175/ The telephone company was required to provide service to Webster notwithstanding a dispute as to prior indebtedness:

"While there is no law giving [the company] a monopoly of the business in the territory covered by its wires, yet it must be apparent to all that the mere fact of this territory being covered by the 'plant' of respondent, from the very nature and character of its business, gives it a monopoly of the business which it transacts . . . The demands of the commerce of the present day make the telephone a necessity The relator [Webster] never can be supplied with this new element of commerce so necessary in the prosecution of all kinds of business, unless supplied by the respondent." 176/

The court cited the English decision in Allnut v. Inglis 177/ for the proposition that "where private property is, by consent

173/ 181 U.S. at 94-95.

174/ Id. at 99-100.

175/ 17 Neb. 126 (1885).

176/ Id. at 133.

177/ 12 East 527, 104 Eng. Rep. 206 (1810), discussed supra at note 19.

of the owner, invested with a public interest or privilege for the benefit of the public, the owner can no longer deal with it as private property only, but must hold it subject to the rights of the public, in the exercise of that public interest conferred for their benefit."^{178/}

The franchise-monopoly theory of Lord Hale received further recognition in the later decision in Gardner v. Providence Telephone Co.,^{179/} where the court upheld a company ban on customer attachments to the telephone system, but required that the company's regulations be reasonable:

"By municipal action . . . the complainant is forced to deal with the defendant if he desires telephone service. [Defendant was the only telephone company authorized to operate in Providence.] Undoubtedly, it is a condition of such a grant that the grantee shall furnish to such of the public as desire it complete service of the kind in which it deals [and to provide reasonable service at reasonable rates.]"^{180/}

Similar decisions were reached under both the common law^{181/} and statutory prohibitions against discriminations.^{182/}

^{178/} 17 Neb. at 136.

^{179/} 23 R.I. 262, 312, (1901).

^{180/} Id. at 267.

^{181/} Louisville Transfer Co. v. American Dist. Tel. Co., 24 Alb.L.J. 283 (Ky. 1881); State ex rel. Payne v. Kinloch Tel. Co., 93 Mo. App. 349, 67 S.W. 687 (1902); cf., Central New York Tel. & Tel. Co. v. Averill, 199 N.Y. 128 (1910) (emphasis on franchise). See also Williams v. Maysville Tel. Co., 119 Ky.

Apart from prohibitions against discrimination, government regulations of telecommunications charges were infrequent in the pre-commission era. But where such regulation was attempted, it was sustained because of the public character of the business and its importance and indispensability.^{183/} It was held in one case that the thrust

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33, 82 S.W. 995 (1904); Huffman v. Marcy Mut. Tel. Co., 143 Iowa 590, 121 N.W. 1033 (1909); New York Tel. Co. v. Siegel-Cooper Co., 202 N.Y. 502, 96 N.E. 109 (1911); Southern Bell Tel & Tel. Co. v. Beach, 8 Ga. App. 720 (1911).

182/ Central Union Tel. Co. v. Fehring, 45 N.E. 64 (Ind. 1896); State ex rel. Gwynn v. Citizens Tel. Co., 61 S.C. 83, 39 S.E. 257 (1901); Gwynn v. Citizens Tel. Co., 69 S.C. 434, 48 S.E. 460 (1904); Yancey v. Batesville Tel. Co., 81 Ark. 486 (1907); Bradford v. Citizens' Tel. Co., 161 Mich. 385, 126 N.W. 444 (1910); Mooreland Rural Tel. Co. v. Mouch, 48 Ind. App. 521, 96 N.E. 193 (1911).

Statutory violations were rejected in some cases, but not because of any disagreement in principle. See Cumberland Tel. & Tel. Co. v. Kelly, 160 Fed. 316 (6th Cir. 1908); Vaught v. East Tenn. Tel. Co., 123 Tenn. 318, 130 S.W. 1050 (1910); Younts v. Southwestern Tel. & Tel. Co., 192 Fed. 200 (E.D. Ark. 1911); Montgomery v. Southwestern Ark. Tel. Co., 110 Ark. 480, 161 S.W. 1060 (1913).

183/ Hockett v. State, 105 Ind. 250, 5 N.E. 178 (1886), appeal dismissed, 131 U.S. 438 (1889); Central Union Tel. Co. v. Bradbury, 106 Ind. 1, 5 N.E. 721 (1886); Central Union Tel. Co. v. State, 118 Ind. 194 (1889); Central Union Tel. Co. v. State, 123 Ind. 113 (1889); Chicago Tel. Co. v. Illinois Manufacturers Ass'n, 106 Ill. App. 54 (1902); People ex rel. City of Chicago v. Chicago Tel. Co., 220 Ill. 238, 77 N.E. 245 (1906); Charles Simons Sons Co. v. Maryland Tel. & Tel. Co., 99 Md. 141, 57 Atl. 193 (1904). See also Chesapeake & Potomac Tel. Co. v. Manning, 186 U.S. 238 (1902); Nebraska Tel. Co. v. State, 55 Neb. 627, 76 N.W. 171 (1898).

of such legislation could not be avoided by a company's refusal to "hold out" to serve the public generally and its adoption of a program to convert its telephone system to one providing public toll booths exclusively. The legislature had limited telephone rental charges to three dollars and the intention was

"that where a telephone company was doing a general telephone business in this State, any person within the local limits of its business in a town or city should have the right to demand and receive a telephone and telephonic connections, facilities and service, the best in use by such company and should only be liable to be charged and to pay three dollars per month therefore."^{184/}

That the company sought to withdraw from any such offering was held to be without effect.

B. The Telegraph Liability Cases

The status of telegraph companies as common carriers also was litigated in cases in which the companies sought to avoid liability for errors, delays, and omissions by relying on contractual limitations on liability. An early California case rejected the defense on the ground that the telegraph company, as a common carrier, could not limit its liability, at least where there was a finding of gross neglect. "There is no difference in the general nature of the legal obligation of the

^{184/}
(1889). Central Union Tel. Co. v. State, 118 Ind. 194, 208

contract between carrying a message along a wire and carrying goods or a package along a route."^{185/}

To other courts, however, the difference was obvious. A carrier in physical possession of merchandise was held to high standards because control accompanied possession and the shipper, having parted with possession, was in no position to protect his interests. By contrast, the transmission of a telegraph message conferred no custody over property and was subject to interference by forces beyond the control of the telegraph company. To these courts a limitation on liability appeared to be appropriate. In Primrose v. Western Union Telegraph Co.,^{186/} the Supreme Court upheld a limitation on liability with these observations:

"Telegraph companies resemble railroad companies and other common carriers, in that they are instruments of commerce; and in that they exercise a public employment, and are therefore bound to serve all customers alike, without discrimination. They have, doubtless, a duty to the public, to receive, to the extent of their capacity, all messages clearly and intelligibly written, and to transmit them upon reasonable terms. But they are not

^{185/} Parks v. Alta California Tel. Co., 13 Cal. 422, 424 (1859).

^{186/} 154 U.S. 1, 14-15 (1894). See also Birney v. New York & W. P. Tel. Co., 18 Md. 341 (1862); Ellis v. American Tel. Co., 95 Mass. 226 (1866); Schwartz v. Atlantic & Pacific Tel. Co., 18 Hun. 157 (N.Y. 1879).

common carriers; their duties are different, and are performed in different ways; and they are not subject to the same liabilities. . . .

"The rule of the common law, by which common carriers of goods are held liable for loss or injury by any cause whatever, except the act of God, or of public enemies. . . [extends to those who] have peculiar opportunities for embezzling the goods or for collusion with thieves. . . .

"But telegraph companies are not bailees, in any sense. They are entrusted with nothing but an order or message, which . . . is to be translated and transmitted through different symbols by means of electricity, and is peculiarly liable to mistakes. The message cannot be the subject of embezzlement; it is of no intrinsic value; its importance cannot be estimated, except by the sender . . . and the measure of damages, for failure to transmit or deliver it, has no relation to any value of the message itself, except as such value may be disclosed by the message, or be agreed between the sender and the company."

The validity of telegraph limitations on liability remained a subject of continuing uncertainty as long as the courts attempted to resolve the issue by reference to the common law of bailments.^{187/} A more satisfactory basis for decision was reached when the courts shifted the focus of inquiry to the

^{187/} Breese v. U.S. Tel. Co., 48 N.Y. 132 (1871) (compare majority and concurring opinions); Dorgan v. Telegraph Co., 7 Fed. Cas. No. 4004 (S.D. Ala. 1874); Western Union Tel. Co. v. Fontaine, 58 Ga. 433 (1877); (compare multiple opinions); Birkett v. Western Union Tel. Co., 103 Mich. 361, 61 N.W. 645 (1894). See also Central Union Tel. Co. v. Swoveland, 14 Ind. App. 1035 42 N.E. 1035 (1896) (telephone company liability).

question of whether the telegraph company was misusing its power as a firm enjoying the advantages of special franchises and a monopoly position.^{188/} Implicit in this shift in emphasis was a recognition that the proper basis for telegraph company regulation was not the law governing common carrier custody of goods, but rather the law governing business enterprises in possession of franchised monopolies. In one such case, the court reasoned:

"Telegraph companies are public agents, and exercise a public employment. They are vested with the power of eminent domain, which they cannot lawfully exercise if they are not public agents. By virtue of their public employment, it is their duty, for a reasonable consideration, to receive and transmit all messages over their wires with the integrity, skill, and diligence which appertain to their business. They are a commercial necessity. Business [can] be transacted without them only at a great disadvantage. In most places there is no choice as to lines, and, where there is, it is so limited that a virtual monopoly exists. On the other hand, the occasion for sending a message often comes suddenly, or with so short a notice, as to compel the sending of the message by telegraph without delay, or the sufference of pecuniary loss by the failure to do so. Often the customer cannot afford to wait, and must

^{188/} Western Union Tel. Co. v. Graham, 1 Colo. 230 (1871); Western Union Tel. Co. v. Reynolds Bros., 77 Va. 173 (1883); Reed v. Western Union Tel. Co., 135 Mo. 661, 37 S.W. 904 (1896); Cogdell v. Western Union Tel. Co., 135 N.C. 431, 47 S.E. 490 (1904); Western Union Tel. Co. v. Short, 14 S.W. 649 (Ark. 1890); Western Union Tel. Co. v. Crall, 38 Kan. 679 (1888).

submit to the terms of the telegraph company. They do not stand upon an equality. The public is compelled to accept the services of the telegraph company, and to rely upon it discharging its duty."^{189/}

After the passage of the Mann-Elkins Act in 1910,^{190/} the validity of limitations on liability ceased to be governed by state law. Such limitations were included in federal tariffs and these were held to be binding on the states.^{191/}

VI. THE RISE OF THE REGULATORY COMMISSION

Statutory and judicial remedies proved to be inadequate in dealing with the burgeoning telegraph and telephone industries. Near the end of the nineteenth century the states began to turn to specialized regulatory commissions to control telecommunications enterprises exercising monopoly power. The transition began in the South. Near the end of the nineteenth century several railroad commissions were vested with authority over telecommunications.

^{189/} Western Union Tel. Co. v. Short, 14 S.W. 649, 650 (Ark. 1890).

^{190/} See discussion infra in Part VII.

^{191/} Postal Telegraph Cable Co. v. Warren-Godwin Lumber Co., 251 U.S. 27 (1919); Western Union Tel. Co. v. Esteve Bros. & Co., 256 U.S. 566 (1921); Western Union Tel. Co. v. Czizek, 264 U.S. 281 (1924); Western Union Tel. Co. v. Priester, 276 U.S. 252 (1928).

Georgia in 1891 subjected telegraph companies to railroad commission control, at least with respect to rates and discriminatory practices.^{192/} Subsequent legislation extended the commission's jurisdiction to telephone companies and broadened the scope of its powers.^{193/} North Carolina subjected telegraph operations to railroad commission control in 1891 and telephone operations to like control in 1893.^{194/} In 1892, Mississippi provided for commission regulation of telephone and telegraph, requiring filed tariffs and applying provisions against extortion and discrimination.^{195/} South Carolina placed telegraph operations under commission control in 1898, and extended commission authority to telephone operations in 1904.^{196/} The Louisiana Constitution of 1898 created a commission with authority over all public utilities, including telephone and telegraph.^{197/}

^{192/} Act of Oct. 21, 1891, Ga. Laws, 1890-91, No. 748, p. 151.

^{193/} Act of Oct. 22, 1905, Ga. Laws, No. 76, p. 79; Act of Aug. 23, 1907, Ga. Laws, No. 223, p. 72.

^{194/} Act of Mar. 5, 1891, N.C. Laws, c. 320, p. 275; Act of Mar. 6, 1893, N.C. Laws, c. 512, p. 468. See also Act of Mar. 6, 1899, N.C. Laws, c. 164, p. 291; Act of Mar. 11, 1907, N.C. Laws, c. 469, p. 675, and c. 966, p. 1372.

^{195/} Miss. Anno. Code §§ 4291, 4324-25 (1892), reenacted. Miss. Code §§ 4843, 4878-79 (1906), supplemented by Miss. Laws, 1908, c. 76, 78 and 80, pp. 65-67.

^{196/} Act of Feb. 21, 1898, S.C. Laws, No. 486, p. 780; Act of Feb. 25, 1904, S.C. Laws, No. 281, p. 496. See S.C. Const. Art. 9, §14 (1895).

^{197/} La. Const. art. 283-89 (1898). See also Act of July 17, 1904, La. Laws, No. 24, p. 28; Act of July 8, 1908, La. Laws, No. 199, p. 293.

In the Midwest, Nebraska provided for commission control of telephone and telegraph in 1897.^{198/} Thereafter, between 1900 and 1920, commission control over telecommunications was vested in regulatory commissions in every remaining state except Delaware, Iowa, and Texas.^{199/}

^{198/} Neb. Laws, 1897, c. 56, p. 303. See also Act of Mar. 27, 1907, Neb. Laws, c. 90, p. 311.

^{199/} Alabama: Act of Sept. 15, 1915, Ala. Laws, No. 501, p. 567; Act of Sept. 25, 1915, Ala. Laws, No. 746, p. 865. Limited authority was conferred by the Act of Aug. 9, 1907, Ala. Laws, No. 741, p. 716.

Arizona: Ariz. Const., Art. XV (1912); Act of May 28, 1912, Ariz. Laws, c. 90, p. 495.

Arkansas: Ark. Laws, No. 571, p. 411. See also Act of Feb. 15, 1921, Ark. Laws, No. 124, p. 177.

California: Cal. Const. Art. XII, § 23; Act of Dec. 23, 1911, Cal. Laws, c. 14, p. 18 (extra session). See also Act of Jan. 2, 1912, Cal. Laws, c. 40, p. 168; Act of June 14, 1913, Cal. Laws, c. 553, p. 934.

Colorado: Act of Apr. 12, 1913, Colo. Laws, c. 127, p. 464.

Connecticut: Act of July 11, 1911, Conn. Laws, c. 128, p. 1387.

Florida: Acts of May 26, 1911, Fla. Laws, c. 6186, p. 127, and c. 6187, p. 128. See also Act of June 6, 1913, Fla. Laws, c. 6525, p. 389.

Idaho: Act of Mar. 13, 1913, Idaho Laws, c. 61, p. 247.

Illinois: Act of June 30, 1913, Ill. Laws, p. 459.

Indiana: Act of Mar. 4, 1913, Ind. Laws, c. 76, p. 167.

[Footnote continued next page]

This deluge reflected a widely held consensus that competition was impracticable in the rendition of telephone and

[Footnote continued from preceding page]

Kansas: Act of Mar. 14, 1911, Kans. Laws, c. 238, p. 417.

Kentucky: Act of Mar. 15, 1916, Ky. Laws, c. 18, p. 84. Limited authority was conferred by Ky. Laws, 1912, c. 99, p. 285 and c. 143, p. 649.

Maine: Act of Mar. 23, 1913, Me. Laws, c. 129, p. 133.

Maryland: Act of Apr. 5, 1910, Md. Laws, c. 180, p. 338.

Massachusetts: Act of June 13, 1913, Mass. Laws, c. 784, p. 815. Limited regulatory authority was exercised earlier by the highway commission under the Act of May 31, 1906, Mass. Laws, c. 433, p. 448, and by the Commissioner of corporations under the Act of June 18, 1894, Mass. Laws, c. 452, p. 514.

Michigan: Act of Apr. 24, 1911, Mich. Laws, No. 138, p. 199 (telephone only). See also Act of May 26, 1909, Mich. Laws, No. 144, p. 307.

Minnesota: Act of Apr. 16, 1915, Minn. Laws, c. 152, p. 208 (telephone only).

Missouri: Missouri Laws, 1913, p. 556.

Montana: Act of Mar. 4, 1913, Mont. Laws, c. 52, p. 88.

Nevada: Act of Mar. 5, 1907, Nev. Laws, c. 44, p. 73. See also Act of Mar. 28, 1919, Nev. Laws, c. 109, p. 198.

New Hampshire: Act of Apr. 15, 1911, N.H. Laws, c. 164, p. 187.

New Jersey: Act of Mar. 24, 1910, N.J. Laws, c. 41, p. 56. See also Act of Apr. 21, 1911, N.J. Laws, c. 195, p. 374.

New Mexico: N.M. Const. art. 11 (1912); Act of June 12, 1912, N.M. Laws, c. 78, p. 137.

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telegraph service, and that the interests of firms and users would best be served by a regime of regulated monopoly. This

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New York: N.Y. Laws, 1910, c. 673, p. 1929.

North Dakota: Act of Feb. 27, 1911, N.D. Laws, c. 255, p. 374. See also Act of Mar. 1, 1915, c. 209, p. 314.

Ohio: Act of May 31, 1911, 102 Ohio Laws 549.

Oklahoma: Okla. Const. art. IX, §§15-35 (1907).

Oregon: Act of Feb. 24, 1911, Ore. Laws, c. 279, p. 483. See also Act of Feb. 16, 1917, Ore. Laws, c. 164, p. 209.

Pennsylvania: Act of July 26, 1913, Pa. Laws, No. 854, p. 1374. Limited authority was conferred by Act of May 31, 1907, Pa. Laws, No. 250, p. 337.

Rhode Island: Act of Apr. 17, 1912, R.I. Laws, c. 795, p. 84.

South Dakota: Act of Mar. 11, 1907, S.D. Laws, c. 239, p. 474. See also Act of Mar. 9, 1909, S.D. Laws, c. 289, p. 435; Act of Mar. 10, 1911, S.D. Laws, c. 207, p. 296.

Tennessee: Act of Apr. 9, 1913, Tenn. Laws, c. 32, p. 81. See also Tenn. Laws, 1919, c. 49, p. 143.

Utah: Act of Mar. 8, 1917, Utah Laws, c. 47, p. 128.

Vermont: Act of Jan. 20, 1909, Vt. Laws, 1908, No. 116, p. 101. See also Act of Apr. 2, 1915, Vt. Laws, No. 163, p. 271.

Virginia: Act of Mar. 13, 1914, Va. Laws, c. 95, p. 174; Act of Mar. 27, 1914 Va. Laws, c. 340, p. 673. See also Va. Code §§ 4064-73 (1919).

Washington: Act of Mar. 11, 1909, Wash. Laws, c. 93, p. 191. See also Act of Mar. 18, 1911, Wash. Laws, c. 117, p. 538.

West Virginia: Act of Feb. 22, 1913, W. Va. Laws, c. 9, p. 53.

Wisconsin: Act of July 9, 1907, Wis. Laws, c. 499, p. 1130 (telephone only).

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was the view of Governor Hughes of New York and Governor La Follette of Wisconsin, two of the leaders in advocating state commission regulation of the public utility industries.^{200/} Similar sentiments were expressed by the National Civic Federation, an organization of business, civic and labor leaders that was active and influential in the movement toward regulation of public utilities by state commissions.^{201/}

VII. TELECOMMUNICATIONS IN THE CONGRESS, 1910 - 1934

In three major enactments in the twentieth century, Congress pursued the same policies -- prompted by the same

[Footnote continued from preceding page]

Wyoming: Act of Mar. 4, 1915, *Wyom. Laws*, c. 146, p. 210.

District of Columbia: 37 U.S. Stat. 974 (Mar. 4, 1913).

^{200/} Addresses and Papers of Charles Evans Hughes, 1906-1916, at 135, 146, 179 (2d ed. 1916); I M. Pusey, Charles Evans Hughes 200-09 (1951); R. Wesser, Charles Evans Hughes: Politics and Reform in New York, 1905-1910, at 153-71 (1967); J. Commons, Myself, 111-12, 120, 125-26 (1964); Robert M. LaFollette's Autobiography 152-54 (1960); C. McCarthy, The Wisconsin Idea 58-65 (1912); F. Holmes, Regulation of Railroads and Public Utilities in Wisconsin 193-205 (1915).

^{201/} 1 National Civic Federation, Municipal and Private Operation of Public Utilities, Part I, at 23, 26 (1907); National Civic Federation, Dept. of Public Utilities, Proposed Sections for a Model Public Utility Law (1912); National Civic Federation, Draft Bill for the Regulation of Public Utilities (1914); J. Weinstein, The Corporate Ideal in the Liberal State: 1900-1918, at 24-25 (1968).

considerations -- as were being implemented contemporaneously in the states. In each case, the primary emphasis was on the monopoly characteristics of the telecommunications industries.

In the Mann-Elkins Act of 1910, Congress classified interstate telephone and telegraph operations as common carrier activities and empowered the ICC to regulate their rates.^{202/} The basis for the legislation, clearly reflected in the legislative history, was Congressional concern about the monopoly characteristics of these telecommunications industries.^{203/} The advocates of the legislation stated:

"Now, the telegraph line and the telephone line are becoming rapidly as much a part of the instruments of commerce and as much a necessity in commercial life as the railroads. One of the greatest monopolies in this country today is a system of telegraph and telephone lines; and if it is right and proper to regulate the great railroad systems of this country in the interest of commerce, it is equally right to limit the telephone and telegraph companies.^{204/}

"Why should not these necessary instrumentalities which the citizens have to use, which are monopolies in their particular lines of business, be required to make reasonable charges; and if they are

^{202/} Act of June 18, 1910, 36 Stat. 539.

^{203/} 45 Cong. Rec. 5533-37, 6972-74 (1910). See also the discussion of competition at pp. 7129-30.

^{204/} Id. at 5534 (1910).