

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
GTE TELEPHONE OPERATING COMPANIES) Transmittal Nos. 873, 874,
) 893, 909, 918
Tariff F.C.C. No. 1)
)
Video Channel Service at) CC Docket No. 94-81
Cerritos, California)

To: The Commission

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SUPPLEMENTAL APPLICATION FOR REVIEW
AND
PETITION FOR EXPEDITED CONSIDERATION

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SUMMARY

The issue here is precisely the same as that already pending before the Commission: whether the unique experimental cable television facilities and services in Cerritos, California, authorized in 1989 pursuant to Commission-approval exclusive private contracts, represent private, rather than common, carriage.

Earlier, in connection with GTE Transmittal No. 873/893, the Common Carrier Bureau had refused to reject, as an unlawful tariffing of private carrier service, GTE Telephone's "conversion" of service to Apollo CableVision, Inc. -- one of two entities utilizing half of the Cerritos cable system bandwidth -- from a contract-based activity -- to a tariffed offering. GTE Telephone Operating Companies, 9 F.C.C. Rcd 3613, 3617-18 (1994). On August 14, 1995, the Bureau had reached the same result with respect to GTE Transmittal No. 909/918 -- the similar "conversion" to tariff of the carrier's relationship with its affiliate, GTE Service Corp., which occupies the other half of the Cerritos system. Supplemental Designation Order, released August 14, 1995 (DA 95-1796), ¶¶ 17-18.

As demonstrated in Apollo's August, 1994 Application for Review herein, the Cerritos facilities were constructed exclusively for the operations of Apollo and GTE Service Corp., access to the use of those facilities has always been limited to those entities, and the GTE Telephone services identified in the challenged tariffs are available only to Apollo and GTE Service

Corp. In no defensible way can the carrier's offerings be viewed as an indiscriminate holding out of service to the public -- the touchstone for any determination of common carriage.

With respect to Transmittal No. 909/918, as it had with Transmittal No. 873/893, GTE Telephone made last-minute "minor text changes" which the Bureau apparently believed adequate to make the offering appear to be common carriage. Those tariff word changes, however, which altered none of the historical or operational facts, and extended the availability of the service to no other party, were pure window-dressing. The Bureau's seeming acceptance of those changes as a basis for its rulings was both legally incorrect and an abuse of discretion.

Expedited action on this matter is needed and appropriate. Apollo's' earlier Application for Review -- which raised precisely the same issue involved here -- was unopposed, and has been pending for more than one year. Bureau efforts to further delay Commission review of its actions are both improper and fundamentally unfair.

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To: The Commission)

**SUPPLEMENTAL APPLICATION FOR REVIEW
AND
PETITION FOR EXPEDITED CONSIDERATION**

Apollo CableVision, Inc. ("Apollo"), a party to the captioned proceeding, hereby supplements its August 1, 1994 Application for Review herein, and requests immediate action on the legal issue involved -- one which has been unopposed and pending for more than one year.

INTRODUCTION

In April of 1994, Apollo requested a rejection of both Transmittal Nos. 873 and 874, arguing, among other things, that there was an unlawful attempt to tariff a private -- as distinct from a common -- carrier service. GTE Telephone duly responded to that argument in June of 1994.

In its July 14, 1994 Order herein, 9 F.C.C. Rcd 3613 ("Cerritos Tariff Order"), the Bureau, without analysis, rejected Apollo's position concerning Transmittal No. 873. Id. at

3617-18. Pursuant to Section 1.115 of the Commission's Rules, Apollo timely sought Commission review of the Bureau's ruling in an Application for Review filed August 1, 1994.

Apollo's Application for Review was unopposed by any party. Yet it has languished without any action for more than one year. For ease of reference, a copy of that pleading is appended hereto as Attachment 1.

ARGUMENT

I. The Tariff Service to GTE Service Corp. Represents Private, Not Common, Carriage

The Cerritos cable system is unique in the Commission's history, the first agency-approved joint effort at experimentation by a cable operator and a telephone company. As an operational matter, it is the only 78-channel coaxial cable system in the country on which two entities are operating. Commission authorization of the Cerritos project occurred only after extensive litigation and agency debate; the construction of the system, the configuration of the system's use by Apollo and GTE Service Corp., and the specific nature of the offerings to be provided by each, were deliberated and ultimately approved in a process unlike any other before or since. As GTE Telephone observed earlier in these proceedings:

The Cerritos project is the only one of its kind currently in operation in the nation . . .

"Direct Case of GTE", August 15, 1994, p. 3; GTE "Motion for Stay", July 26, 1994, p. 4.

The facilities authorized by the Commission were implemented for the specific -- and unique -- conduct of Apollo and GTE Service Corp. Long-term lease arrangements were agreed on between GTE Telephone, on the one hand, and Apollo and GTE Service Corp. on the other.^{1/} An interrelated series of other agreements among GTE Telephone, GTE Service Corp. and Apollo concerning construction, operation and use of system facilities -- all of which were unprecedented in cable system deployment -- were reached.

At this point, there is no dispute that construction and operation of the Cerritos facilities were implemented specifically and exclusively for use by Apollo and GTE Service Corp., and that the facilities were not constructed until that exclusivity was approved by the Commission. GTE Telephone's challenged tariffs reflect those circumstances. With respect to Apollo, such matters with regard to Transmittal No. 873/893 were addressed in Apollo's earlier Application for Review.

Concerning Transmittal No. 909/918 -- the subject of the Bureau's Supplemental Designation Order -- the private carrier nature of the service represented is equally evident. Initially

^{1/} Apollo's agreement was for a 15-year period. While GTE Telephone has often asserted it had a similar 15-year base, the accuracy of that assertion has never been demonstrated (see "Supplemental Opposition by Apollo Cable Vision, Inc.", September 11, 1995, pp. 17-18).

filed in April of 1994 as Transmittal No. 874, the tariff was said to "establish[] rates and charges for Video Channel Service ... to meet the specific needs of GTE Service Corporation."^{2/} The proposed tariff provision (§ 18.4.1(B)) identified GTE Service Corp. as the specific entity to whom the service would be provided, and the accompanying "Description and Justification" repeatedly confirmed the tariff to be designed for that entity alone.^{3/}

Transmittal No. 909 -- suspended for one day and set for investigation in the Bureau's September 9, 1994 Order (DA 94-988) -- was filed to "reinstate[] rates and charges for Video Channel Service for GTE Service Corporation" (emphasis added), and the tariff content was indeed identical.^{4/} The Bureau's September 1994 Order viewed the filing to be a resubmission of GTE's earlier-rejected proposal to tariff service "to an affiliated company, GTE Service Corporation." Tariff Section 18.4.1(B)(1) established an exclusive use of Channels 40-78 for the carrier's affiliate until May 2, 2006.

Following the Bureau's September 1994 Order concerning Transmittal No. 909, GTE again described its filing as a reinstatement of "the tariff submitted for [its] provision of

^{2/} GTE transmittal letter dated April 22, 1994, p. 1 (emphasis added).

^{3/} E.g., D&J at p. 1 ("the accompanying tariff establish[es] Video Channel Service to meet the specific needs of GTE Service Corporation").

^{4/} GTE transmittal letter dated September 9, 1994, p. 1.

video channel service to Service Corp. in Transmittal No. 874." Comments of GTE, filed September 15, 1994, p. 4 (emphasis added).

In light of these facts, it cannot defensibly be claimed that GTE Telephone, in Transmittal No. 909/918, is holding itself out to provide "video channel service" on Channels 40-78 in Cerritos indifferently to all potential users -- the fundamental requirement of common carriage. The use of these facilities and services is limited to one entity -- GTE Service Corp. -- and is available to no others. The arguments at pages 6-12 of Apollo's Application for Review are directly applicable, and equally dispositive, here.

II. The Bureau's Current Disposition of the Private/Common Carrier Issue Vis-a-Vis Transmittal No. 909/918 Was Identical to -- and Equally Infirm as -- its Ruling on Transmittal No. 873/893

In light of Apollo's arguments at the time, and apparently at the Bureau's direction,^{5/} GTE Telephone made certain cosmetic changes to its Transmittal No. 873 immediately before the Cerritos Tariff Order. Apparently to buttress its claim that the services were indeed an indiscriminate holding out to the public at large, GTE Telephone changed the heading of tariff Section 18.14.(A) from "Apollo CableVision" to "Programmer for Channels 1 through 39" in its July 12, 1994 Transmittal No. 893. The

^{5/} See GTOC Application No. 316, filed July 8, 1994 ("These revisions are based upon discussion with the Commission staff...") and GTOC Transmittal No. 893 ("These revisions are made in response to directions from the Commission Staff...").

Cerritos Tariff Order, released two days later, characterized that revision as "remov[ing] language from Transmittal No. 873 limiting the offering to one customer, and mak[ing] the offering generally available". 9 F.C.C. Rcd at p. 3618.

The Bureau's approach to Transmittal No. 909/918 in the Supplemental Designation Order was essentially the same. In Transmittal No. 909, GTE Telephone merely repeated the tariff wording of Transmittal No. 874, identifying GTE Service Corp. as the user of 39 of the system's channels. On October 7, 1994, however, in a filing not served on Apollo, GTE Telephone slipped in a tariff wording change similar to one in its Transmittal No. 893. (GTOC Transmittal No. 918). Characterizing it as "minor text changes in order to clarify the provision of Channels 40 through 78", the carrier changed Section 18.4.1 from:

(B) GTE Service Corporation

(1) Provision of 39 channels of the Video Channel Services coaxial network in Cerritos, California. This service will expire on May, 2006.

to:

(B) Programmer for Channels 40 through 70

(1) The existing programmer customer for channels 40 through 78 (275 MHz of bandwidth) of the Video Channel Services coaxial network in Cerritos, California is GTE service Corporation. This service will expire on May 2, 2006.

Once more, GTE Telephone's change was enough for the Bureau. In words virtually identical to those in its Cerritos Tariff Order, the Bureau's Supplemental Designation Order observed (at ¶

18) that the Transmittal No. 918 change "remove[d] language from Transmittal No. 909 which limited the offering to one customer, and . . . ma[d]e the offering generally available." Any private carriage concerns, therefore, were deemed taken care of.

Apollo's earlier Application for Review (at pp. 12-15) demonstrated the insufficiency of such verbal window-dressing to alter the real-world facts or the controlling legal principles. That pleading also made plain that the Bureau's disposition was unexplained, and did not represent reasoned agency decisionmaking. Those arguments are equally applicable here.

**III. Immediate Action by the Commission -- Not
the Bureau -- is Necessary at this Time**

Nearly 14 months ago, the Bureau denied Apollo's objection to Transmittal No. 873 as a patently unlawful effort to tariff a private carrier service. Cerritos Tariff Order, pp. 3617-18. In virtually identical terms (and equally without explanation), the Supplemental Designation Order (at ¶¶ 17-18) rejects the same arguments with respect to GTE Transmittal No. 909/918. In both instances, the legal issue involved -- whether the services to be provided by GTE Telephone are private, rather than common, carriage -- was discrete from all others. Moreover, the Bureau's rulings were final; no further Bureau action on that subject remains.

The Bureau's Supplemental Designation Order, however, suggests that Apollo's Application for Review, consideration of which has already been delayed more than one year, will continue to be withheld from Commission consideration. Notwithstanding the finality of the Cerritos Tariff Order and the Supplemental Designation Order on the subject, the latter states (at footnote 55):

[W]e will consider [the private vs. common carrier] issue with respect to Transmittal 918, as well as all other issues Apollo raises in its [August 1, 1994] application for review . . . in the Order in which we will terminate this investigation.

Having already spoken on this issue, the Bureau's decisional function is concluded, and Apollo is entitled to review of the Bureau's rulings. To further delay Commission review because of administrative convenience is both improper and fundamentally unfair.

A. As a Procedural Matter, Apollo Is Entitled to an Independent Review of The Bureau's Action

Section 1.115 of the Commission's Rules grants any party "aggrieved by any action taken pursuant to delegated authority" the right to "request[] review of that action by the Commission." In this case, Apollo's entitlement to Commission review of the Bureau's ruling on GTE Transmittal No. 873 "vested" with the filing of its Application for Review on August 1, 1994. As to GTE Transmittal No. 874/909/918, the same entitlement arises with

the release of the Supplemental Designation Order and the filing of this Supplement to Application For Review.

There is nothing further for the Bureau to do in this regard. Its disposition of the private vs. common carrier issue is complete: in its view, nether rejection nor suspension of the tariffs on that basis was warranted. While the Bureau states that it will again "consider" the matters raised in Apollo's earlier Application for Review (and its parallel ruling on GTE Transmittal Nos. 874/909/918), such a course is procedurally improper; jurisdiction over the matter has passed to the Commission.^{6/}

**B. As a Practical Matter, a Reversal of
The Bureau Would Moot The Need for
Further Proceedings**

Prompt action, should the Commission concur in Apollo's legal view, would also obviate the need for additional protracted proceedings. If, as Apollo has argued in its Application for Review, GTE Telephone's services here are not common carriage,

^{6/} An immediate referral of this appellate matter by the Bureau to another division of the Commission, such as the General Counsel's Office, for the preparation of recommendations for Commission action also seems appropriate here. Aside from the natural disinclination to find its own earlier action wrong, such a referral would obviate any ex parte concerns. See, e.g., Press Broadcasting Co. v. FCC, ___ F.3d ___ (D.C. Cir., decided July 21, 1995), slip op. at 8, 11.

The Bureau's handling of the tariff issues is not a restricted proceeding, and it appears that the carrier's last-minute tariff modifications, on which the Bureau appeared immediately to rely in denying Apollo's arguments, were made at the Bureau's suggestion. The application for review process, however, is a restricted procedure, and it is impossible to know to what extent earlier ex parte communications between the Bureau and GTE Telephone -- which Apollo is unable to respond to -- will influence the Bureau's recommendations to the Commission.

GTE Telephone tariffs should have been rejected for that reason alone.

From the parties' standpoint, all of the varied presentations to date could have been eliminated if the Bureau's actions were wrong. And looking forward, all of the future Staff and Commission time and energy being devoted to other legal and rate-making analyses in these proceedings could be avoided. A prompt Commission review is plainly desirable.

C. As an Equitable Matter, Further Delay in Commission Action Will Continue to Injure Apollo

In prior pleadings, Apollo has demonstrated that GTE Telephone's efforts to abrogate its contracts with Apollo, concurrent with its seizure of control of system operations in July of 1994, has worked serious and substantial economic injury on Apollo. That injury continues today, and litigation costs simply to resist GTE's deep-pockets effort to drive Apollo out of business continue to mount.

Without some relief from the carrier's arrogant conduct, Apollo's future is entirely uncertain. And delaying even a consideration of potentially pivotal legal issues in these proceedings unfairly favors GTE. While Apollo is but a small cable operator in a small community, while GTE is a large and prominent carrier, and although the Commission is confronted with

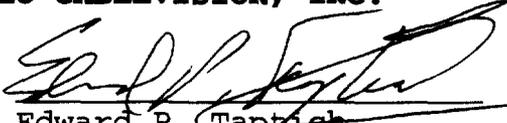
other, major policy issues, there comes a point when even the lesser players are entitled to have their grievances heard on prompt basis. Immediate action on Apollo's August 1, 1994 Application for Review, as supplemented herein, is fully warranted.

CONCLUSION

Apollo's earlier Application for Review demonstrated that, as to Apollo, Transmittal No. 873/893 was an impermissible tariffing of a private carrier service. In this supplement, it is shown that Transmittal No. 909/918 is equally infirm. On an expedited basis, the Commission should review and reverse the Bureau's rulings to the contrary.

Respectfully submitted,

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September 12, 1995

COPY

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

GTE TELEPHONE OPERATING COMPANIES
Tariff F.C.C. No. 1

Video Channel Service at
Cerritos, California

To: The Commission

) Transmittal Nos. 873, 874, 893

) CC Docket No. 94-81

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APPLICATION FOR REVIEW

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GTE TELEPHONE OPERATING COMPANIES)
Tariff F.C.C. No. 1) Transmittal Nos. 873, 874, 893
)
Video Channel Service at) CC Docket No. 94-81
Cerritos, California)

To: The Commission

APPLICATION FOR REVIEW

Apollo CableVision, Inc. ("Apollo"), by its attorneys and pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, respectfully requests review of an Order of the Common Carrier Bureau ("Bureau") released July 14, 1994 (DA 94-784). As set forth below, the Bureau's failure to reject GTOC Transmittal Nos. 873 and 893 was in direct conflict both with statute and with Commission and court precedent, and must be reversed.

In addition, Apollo requests that consideration of the matters herein be combined with any accelerated Commission decision on the Application for Review filed herein July 26, 1994, by GTE California Incorporated ("GTE Telephone").

SUMMARY

The Bureau's Order is the latest decisional event in the unique history of the 78-channel coaxial cable television system serving Cerritos, California since 1989.^{1/} Having been granted a

^{1/} General Telephone Company of California, 3 F.C.C. Rcd. 2317 (Chief, Common Carrier Bureau, 1988); General Telephone Company of California, 4 F.C.C. Rcd. 5693 (1989); National Cable Television Association v. FCC, 914 F.2d

(continued...)

5-year waiver of the Commission's cable/telephone cross-ownership limitation in 1989 to permit certain programming experiments on half of the Cerritos system channels, and facing an imminent expiration of that authority before a Ninth Circuit ruling on the constitutionality of the cross-ownership ban. GTE Telephone filed the captioned tariffs in an effort to "regularize" its ownership of, and experimental programming over, the Cerritos cable system.

Transmittal No. 873 was avowedly intended to abrogate and supplant long-term agreements negotiated between Apollo, on the one hand, and GTE Telephone and GTE Service Corporation ("GTE Service"), on the other. (Based on those contracts, Apollo had joined with GTE Telephone as early as 1987 in the Cerritos experiment, and had operated the system since the inception of service in 1989.)

Transmittal No. 874 sought to make permanent what all parties -- GTE Telephone, GTE Service, Apollo, the City of Cerritos and this Commission -- had initially intended would be a 5-year experiment with "near-pay-per-view" program offerings. In response to vigorous objections by Apollo and others, the Bureau rejected Transmittal No. 874, but refused to reject Transmittal No. 873, opting instead for a one-day suspension and further investigation of certain legal and factual issues.

In its Order (¶¶ 31-33), the Bureau dismissed without any analysis Apollo's argument that Transmittal No. 873 was a patently unlawful effort to tariff a private carriage offering. The sole basis expressed for that action was a July 12, 1994 further tariff

^ (...continued)

285 (D.C. Cir. 1990); General Telephone Company of California, 8 F.C.C. Rcd. 8178, 8753 (1993); GTE California Incorporated, No. 93-70924 (9th Cir.).

revision (Transmittal No. 893), as to which Apollo had not had an opportunity to comment, characterized by the Bureau (but not GTE Telephone) as "remov[ing] language from Transmittal No. 873 limiting the offering to one customer, and [making] the offering generally available." (Order, ¶ 32.)

The Order's treatment of this issue is plainly wrong, and raises significant precedential and policy issues requiring immediate Commission attention. First, the Order is factually in error that three cosmetic word changes in Transmittal No. 893 converted a concededly one-customer tariff into a general public offering. Second, both the Commission and the courts have consistently held that private carriage offerings are not lawfully tariffable, and the circumstances here fit squarely within precedents defining the characteristics of private, as distinct from common, carriage. The Bureau's action is further inconsistent with the Court of Appeal's recent decision in Southwestern Bell Telephone Company v. FCC, No. 91-1416 (D.C. Cir. April 5, 1994).

BACKGROUND

The captioned tariff filings were an outgrowth of an unique Commission-authorized 5-year cable television experiment in Cerritos, California. Since 1989, Apollo, the cable television franchisee in Cerritos, has operated a 78-channel coaxial system pursuant to certain long-term agreements negotiated with GTE Telephone, approved by the City of Cerritos, and long known to the Commission. Pursuant to those agreements, Apollo has provided -- both for itself and GTE Service -- all system operational mainte-

nance and repair functions, as well as installation, removal, billing and collection activities vis-a-vis system subscribers.

Transmittal Nos. 873 and 874 were specifically stated by GTE Telephone to be intended to abrogate and supersede the Apollo/GTE Telephone agreements. (See "Descriptions and Justifications" ("D&J"), p. 1, attached to Transmittal Nos. 873, 874.) Transmittal No. 874 would have transformed GTE Service into a new and potentially permanent competitor of Apollo; Transmittal No. 873 established a financial and operating structure for the system totally at odds with the Apollo/GTE Telephone contracts, and severely injurious to Apollo.

In its Order, the Bureau rejected Transmittal No. 874 and essentially ordered the termination of GTE's programming operations, within 60 days. However, the Bureau refused to reject Transmittal Nos. 873 and 893; instead, the Bureau suspended the tariffs for one day, and instituted an investigation to resolve certain legal and factual issues, on the basis of which it would determine the lawfulness of the tariffs.

Apollo does not here seek review of those portions of the Order which seek further information or legal presentations. While Apollo believes the factual data and legal analyses submitted to the Bureau required rejection in those respects, at least those issues are continuing to be pursued.

In one important respect, however, the Bureau improperly refused to either reject or further investigate the tariffs. And it is in that regard Apollo seeks immediate Commission review herein.

With the knowledge of all parties, including the City of Cerritos and this Commission, the Cerritos system has been operated since 1989 pursuant to special Section 214 authority, and on a non-tariff basis. In its pleadings to the Bureau, Apollo explained in detail that GTE Telephone's proposed offering was not common carriage in nature, but instead involved private carriage as to which tariffs were impermissible. As summarized at one point in Apollo's May 17, 1994 Petition to Reject or Suspend Tariffs (pp. 15-16):

The Cerritos facilities are presently being used only by two parties -- Apollo and GTE Service -- pursuant to contract negotiations intended from the outset to yield a commercially acceptable arrangement specific to the parties' needs, not one designed for general availability. GTE Telephone acknowledges that even the terms of the proposed tariffs are tailored "to meet the specific needs of" Apollo and GTE Service. (D&J (873) p. 1; D&J (874) p. 1.) Ultimately, of course, the fact that a single coaxial system is involved, coupled with the proposed tariff structure, precludes any third party's ability to employ the facilities being tariffed. In fact, if Apollo accedes to GTE Service's 275 MHz even under the Transmittal No. 873 proposal (§ 18.4(A)(4)), the use of the system facilities would be exclusively Apollo's.

In seeking Section 214 authority for the Cerritos system, GTE Telephone itself contended that the service involved was a private offering for which tariffing was not required. GTE Telephone Company of California, supra, 3 F.C.C. Rcd. at 2317. While motivations may have changed since 1988, the operational facts have not. Any claim that the service here involved is being held out generally to the public -- the sine qua non of any common carrier offering -- is patently indefensible. [Footnotes omitted.]

Two days before the Bureau ruling below, GTE filed Transmittal No. 893 -- what the Order (but not GTE Telephone) described as revisions "to remove language from Transmittal No. 873 limiting the offering to one customer, and to make the offering generally

available." (Order, ¶ 32.) In the Order, the Bureau concluded that, as revised, the tariff was "not so patently unlawful as to warrant rejection," and that further consideration of the private carriage issue was "not warranted at this time." (Order, ¶ 33.)

The Bureau was plainly wrong. The offering in Transmittal Nos. 873 and 874 were tailored exclusively for the two entities involved, the offerings were plainly private carriage, and the superficial cosmetics of Transmittal No. 893 worked no substantive change in that respect. Without regard to any other of the objections raised, the tariffs were required to be rejected on this basis alone.

ARGUMENT

A. The GTE/Apollo Arrangement is Not Common Carriage Subject to the Tariff Requirements of Title II.

The U.S. Court of Appeals has long made clear that the same entity may be a common carrier with respect to some service offerings -- holding itself out to serve indifferently all potential users -- but not as to others. National Ass'n of Regulatory Util. Comm'rs v. FCC, 533 F.2d 601, 608-09 (D.C. Cir. 1976) ("NARUC II");

If the carrier chooses its clients on an individual basis and determines in each particular case "whether and on what terms to serve" and there is no specific regulatory compulsion to serve all indifferently, the entity is a private carrier for that particular service

Id. Accord, National Ass'n of Regulatory Util. Comm'rs v. FCC, 525 F.2d 630, 643 (D.C. Cir.) ("NARUC I"), cert. denied, 425 U.S. 992 (1976).

The issue whether a service is common carriage must therefore be resolved, not by reference to the party offering the

service, but in light of the nature of the service itself. Southwestern Bell Telephone Co. v. FCC, 19 F.3d 1475, 1481 (D.C. Cir. 1994) ("Southwestern Bell"); cf. General Telephone of California, 13 F.C.C.2d at 461 ("The decisive factor in determining the applicability of section 214 is the character of the communication for which the construction is undertaken, rather than the classification of the carrier . . ."). If the service is a private, rather than common carriage, offering, imposition of the full panoply of regulatory requirements contained in Title II of the Communications Act is unwarranted.^{2/} As the U.S. Court of Appeals recently stated, "we cannot permit the Commission to augment its regulatory domain . . . by redefining the elements of common carriage to include any service arrangement that is recorded with the FCC." Southwestern Bell, supra, 19 F.3d at 1484.

The Commission itself has recognized that imposing common carrier obligations on private arrangements between a carrier and its customer could impair the carrier's ability to fulfill its contractual obligations to the customer. Radiodetermination Satellite Service (Second Report and Order), 104 F.C.C.2d 650, 665-66 (1986); Special Construction of Lines and Special Service Arrangements Provided by Common Carriers, (Notice of Proposed Rulemaking) 97 F.C.C.2d 978, 987 (1984). The circumstances at hand illustrate the Commission's concern perfectly:

Involved is the use of a standard 78-channel coaxial cable television system which has been in operation since 1989. The

^{2/} See Domestic Fixed-Satellite Transponder Sales, 90 F.C.C.2d 1238, 1257 (1982), aff'd sub nom. World Communications, Inc. v. FCC, 735 F.2d 1465 (D.C. Cir. 1984).