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

In the Matter of	)	
	)	CC Docket No. 96-98
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	
	)	
Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	CC Docket No. 95-185

PETITION FOR CLARIFICATION
OF THE ASSOCIATION OF AMERICAN RAILROADS

Thomas J. Keller
Kathy D. Smith
Verner, Liipfert, Bernhard,
McPherson & Hand, Chtd.
901 - 15th Street, N.W.
Suite 700
Washington, D.C. 20005
(202) 371-6000

Counsel for the Association of
American Railroads

September 30, 1996

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Pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, the Association of American Railroads ("AAR"), by its attorneys, hereby respectfully seeks clarification and partial reconsideration of the Federal Communications Commission's First Report and Order ("Interconnection Order") adopted August 1, 1996, in the above-captioned proceeding.[1/]

In Section 3 of the Telecommunications Act of 1996 ("1996 Act")[2/], Congress enacted a definition of the term "telecommunications carrier." Under Section 251(a) of the Communications Act of 1934, as amended by the 1996 Act, any entity deemed to be a "telecommunications carrier" by the Commission would be obligated: (1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and (2) not to install network features, functions or capabilities that do not comply with the

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1/ First Report and Order, CC Docket No. 96-98, CC Docket No. 95-185 (August 8, 1996), 61 Fed. Reg. 45,476 (1996).

2/ Telecommunications Act of 1996, Pub. L. No. 104-104, § 3, 110 Stat. 56, 60 (1996) (codified at 47 U.S.C. 153).

guidelines and standards established with regard to access to telecommunications for persons with disabilities and nondiscriminatory access to telecommunications equipment.[3/] In Paragraph 994 of the Interconnection Order, the Commission interpreted the term "telecommunications carrier" in such a way as to create some uncertainty about whether a railroad that leases or sells to others excess capacity on its private microwave facilities or fiber optic network would be deemed a "telecommunications carrier" and thus subject to the interconnection obligations of Section 251(a).

In the past, the Commission has permitted an array of "private" operators, including the railroads, to use radio spectrum to serve both their own internal communications needs and those of specific business or state or local governmental entities without being subject to the obligations of common carriers, such as interconnection. Under Commission rules, private operators in general are permitted to lease excess capacity on their microwave systems or to provide service to other entities on a for-profit basis and still not be classified as common carriers so long as they do not carry common carrier traffic.[4/] The sale or lease of excess fiber capacity is also a commonplace occurrence which the Commission to date has refrained from regulating as common carriage.[5/] The Commission's policies in this regard have been entirely consistent with the definition of

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3/ 47 U.S.C. § 251(a). These standards and guidelines have not yet been developed. Interconnection Order at ¶ 998.

4/ See e.g., 47 C.F.R. §§ 101.135, 101.603 (private operational fixed point-to-point microwave services); see also, General Telephone Company of the Southwest, Memorandum Opinion and Order on Reconsideration, 3 FCC Rcd. 6778 (1988); Public Service Company of Oklahoma, Declaratory Ruling, 3 FCC Rcd. 2327 (1988).

5/ See e.g., Lightnet and Section 214 Application to Construct Fiber Optic System in Florida as Part of Interstate Network, Memorandum Opinion and Order, 58 Rad. Reg. 2d (P & F) 182 (1985); Norlight Declaratory Ruling, 2 FCC Rcd. 132, recon. 2 FCC Rcd. 5167 (1987).

private carriage set forth by the court in National Association of Regulatory Commissioners v. FCC, 525 F.2d 630 (D.C. Cir. 1976)("NARUC I")[6].

However, ambiguous language in Paragraph 994 of the Interconnection Order creates uncertainty as to whether the Commission has departed from this precedent. Paragraph 994 provides:

> We conclude that cost-sharing for the construction and operation of private telecommunications networks is not within the definition of "telecommunications services" and thus such operators of private networks are not subject to the requirements of section 251(a). We believe that such methods of cost-sharing do not equate to a "fee directly to the public" under the definition of "telecommunications services." Conversely, to the extent an operator of a private telecommunications network is offering "telecommunications" for a fee directly to the public, **or to such classes of users as to be effectively available directly to the public** (i.e., providing a telecommunications service), the operator is a telecommunications carrier and is subject to the duties in section 251(a). **Providing to the public telecommunications (e.g., selling excess capacity on private fiber or wireless networks), constitutes a telecommunications service and thus subjects the operator of such a network to the duties of section 251(a) to that extent.**

Interconnection Order at ¶ 994, as amended by the Errata, CC Docket No. 96-98, CC Docket No. 95-185 (released August 19, 1996), (footnotes omitted)(emphasis added).

There are two aspects of the foregoing paragraph that generate uncertainty. First, the examples set forth in the parenthetical clause in the last sentence of Paragraph 994 could be read to suggest that the mere act of selling excess capacity on a private network triggers an interconnection obligation. On the other hand, the last sentence of Paragraph 994 could also be read in a light entirely consistent with the long history of

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6/ In NARUC I, the court held that a common carrier is either required to hold out its service to all people indifferently or in fact chooses to do so. NARUC I, 525 F.2d at 641. On the other hand, private operators enter into individually negotiated medium-to-long term contracts with a relatively stable customer base having compatible service needs with that of the operator and its other customers. Id. at 641-643.

private operation if the phrase "to the public" is considered to be the operative clause and the term "public" is interpreted to mean a potentially unlimited universe of customers to whom service or capacity is sold indiscriminately. In that light, the transactions would not trigger an interconnection obligation because the sale of such capacity by the operator of a private microwave system or fiber network is not "to the public," but rather to one or a limited number of entities.

Second, the Commission failed to explain what it meant by the phrase "or to such classes of users as to be effectively available directly to the public" in the penultimate sentence of Paragraph 994. On the one hand, the Commission could conclude that an operator of a private fiber network is a "telecommunications carrier" if it sells or leases capacity on its fiber network to a telecommunications carrier, e.g., an interexchange carrier that in turn uses it for providing long distance services to the public.[7/] In other words, the Commission could determine that the phrase "such classes of users" includes telecommunications carriers and that such a transaction makes the operator's facilities "effectively available directly to the public" by virtue of the interexchange carrier using it to provide long distance services to the public. On the other hand, the Commission could interpret the phrase "to such classes of users as to be effectively available directly to the public" to mean that the actual customers of the operator of the private fiber network must

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7/ Commission rules already prohibit operators of private microwave systems from leasing capacity to common carriers, including interexchange carriers, for common carrier traffic. See 47 C.F.R. §101.603. However, the Commission has waived this prohibition under certain circumstances and permitted an operator of a private microwave system to carry common carrier traffic and still retain its status as a private operator. See e.g., Mobile Oil Telecom, Ltd., 5 FCC Rcd. 5812 (1990); Northwest Pipeline Corporation, 3 FCC Rcd. 6690 (1988).

be sufficiently numerous that they represent a "virtual" public before that operator would be deemed a "telecommunications carrier" subject to interconnection obligations.

AAR presumes that the Commission does not intend Paragraph 994 to be construed in a manner that would impose an interconnection obligation on railroads that operate private microwave systems or fiber networks. To reach any other conclusion would seriously disrupt existing relationships including railroad use of these communications systems and would be a marked departure from well-settled judicial precedent and the Commission's of long history of permitting private operation.

Conclusion

For the foregoing reasons, AAR respectfully requests that the Commission clarify and reconsider the meaning of "telecommunications carrier" adopted in the Interconnection Order to provide guidance to AAR and its member railroads as to whether the Commission intended Paragraph 994 to be read in a manner consistent with judicial and Commission precedent on private carriage.

Respectfully submitted,

ASSOCIATION OF AMERICAN RAILROADS

By: Kathy D. Smith

Thomas J. Keller
Kathy D. Smith

Verner, Liipfert, Bernhard,
McPherson & Hand, Chtd.
901 - 15th Street, N.W.
Suite 700
Washington, D.C. 20005
(202) 371-6000

Its Attorneys

Dated: September 30, 1996

CERTIFICATE OF SERVICE

I, Renee K. Kernan, a secretary with the law firm of Verner, Liipfert, Bernhard, McPherson and Hand, hereby certify that on this 30th day of September, 1996, a copy of the Petition for Clarification of the Association of American Railroads was mailed, first-class, postage prepaid to:

Chairman Reed E. Hundt
Federal Communications Commission
1919 M Street, NW -- Room 814
Washington, D.C. 20554

Commissioner James H. Quello
Federal Communications Commission
1919 M Street, NW -- Room 802
Washington, D.C. 20554

Commissioner Rachelle B. Chong
Federal Communications Commission
1919 M Street, NW -- Room 844
Washington, D.C. 20554

Commissioner Susan Ness
Federal Communications Commission
1919 M Street, NW -- Room 832
Washington, D.C. 20554

William E. Kennard, Esq.
General Counsel
Federal Communications Commission
1919 M Street, NW -- Room 614
Washington, D.C. 20554

A. Richard Metzger, Jr.
Deputy Bureau Chief
Common Carrier Bureau
Federal Communications Commission
1919 M Street, NW -- Room 500
Washington, D.C. 20554

Suzanne Tetrault, Esq.
Office of the General Counsel
Federal Communications Commission
1919 M Street NW
Washington, D.C. 20554

Kalpak Gude
Common Carrier Bureau
Federal Communications Commission
1919 M Street, NW
Washington, D.C. 20554

Renee K. Kernan

Renee K. Kernan