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October 8, 1998

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FEDERAL COMMUNICATIONS COMMISSION
DEPT. OF THE INTERIOR

VIA HAND DELIVERY

Magalie Roman Salas, Esquire
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Written Ex Parte Presentation
CC Docket No. 96-45 ✓
AAD/USB File No. 98-37

Dear Ms. Salas:

On Wednesday, October 7, 1998, Leonard J. Kennedy, counsel for the Iowa Telecommunications and Technology Commission (the "ITTC"), delivered to James L. Casserly, Senior Legal Advisor to Commissioner Susan Ness, a written *ex parte* presentation regarding the above-referenced matter. A copy of the *ex parte* provided to Mr. Casserly, is attached.

Pursuant to Section 1.1206(b) of the Commission's Rules, an original and one copy of this letter are being submitted to the Secretary's office and a copy is being provided to Mr. Casserly by the close of the business day following the presentation.

Please inform me if any questions should arise in connection with this filing.

Respectfully submitted,



J.G. Harrington

JGH/lsr

cc (w/o attach.): James L. Casserly, Esq.

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IOWA COMMUNICATIONS NETWORK
REQUEST FOR DETERMINATION OF CARRIER STATUS
CC DOCKET NO. 96-45 ♦ AAD/USB FILE NO. 98-37

The following is a list of examples outlining the criteria for being a common carrier as an entity which holds itself out indifferently to all *potential* customers for its particular services on standard terms and conditions. The Iowa Communications Network fits well within this framework because it makes services, including distance learning and telemedicine, available to all potential users of those services.

I. GENERAL PRINCIPLES

- 13 AM. JUR. 2D *Carriers* § 4 (1964): *Bowles v. Weiter*, 65 F. Supp. 359 (E.D. Ill. 1946).

“A common carrier has the right to determine what particular line of business he will follow and his obligation to carry is coextensive with, and limited by, his holding out as to the subjects of carriage. Thus, it is not essential to the status of one as a common carrier that he carry all kinds of property offered to him. If he holds himself out as a carrier of a particular kind of freight generally, prepared for carriage in a particular way, he will be bound to carry only to the extent and in the manner proposed.”

- *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630 (D.C. Cir. 1976), *cert denied*, 425 U.S. 992 (1976) (*NARUT v. FCC*).

Interpreting the meaning of “common carrier,” the District of Columbia Circuit concluded that an entity may be a common carrier even though the nature of the service rendered is sufficiently specialized as to be of possible use to only a fraction of the total population, and business may be turned away either because it is not of the type normally accepted or because the carrier’s capacity has been exhausted.

II. COMMON CARRIERS AND COMMON CARRIER SERVICES LIMITED BY STATUTE AND REGULATION

- The Communications Satellite Act of 1962 --- 47 U.S.C. § 735 (1962).

Title III of the Communications Satellite Act (“Act”) authorizes the creation of a communications satellite corporation (“corporation”), subject to the provisions of the Act. The corporation was provided with limited authority to “plan, initiate, construct, own, manage, and operate itself . . . [as] a commercial *communications satellite system*.” Although only permitted by statute to provide satellite services, the corporation was deemed a common

carrier within the meaning of section 3(h) of the Communications Act of 1934. *See* 47 U.S.C. § 741 (1962).

- *In re Graphnet Systems, Inc.*, 73 F.C.C. 2d 283 (1979).

Electronic Computer Originated Mail (ECOM) service to be offered by U.S. Postal Service using Western Union services and facilities is common carrier offering where ECOM is a quasi-public offering for a for-profit service which affords the public an opportunity to transmit messages of its own design and choosing. Uncontroverted evidence that ECOM service was identical to the Western Union Mailgram offering in scope, service, operation and facilities also led the FCC to conclude that ECOM was a common carrier communications service subject to FCC jurisdiction – where Western Union had tariffed the electronic communications segment of Mailgram with the FCC in recognition that it is the type of common carrier communications service subject to the Communications Act. *See* 39 U.S.C. § 404 (1980) (Congress established the United States Postal Service pursuant to Title 39, furnishing it with the *limited* authority to provide for the collection, handling, transportation, delivery, forwarding, returning, and holding of mail, and for the disposition of undeliverable mail and to provide philatelic services.).

- The National Railroad Passenger Corporation (“Amtrak”) — 45 U.S.C. § 541 (1987).

Title III of the Rail Passenger Service Act created Amtrak for the purpose of providing intercity and commuter passenger rail service. Amtrak is defined as a *common carrier of railroad transportation*. *See* 49 U.S.C. §§ 24301(a)(1), 10102(6) (1997). Congress furnished Amtrak with the *limited authority* to operate and maintain facilities necessary for the provision of rail passenger transportation, the transportation of mail and express, and auto-ferry transportation. 49 U.S.C. § 24305 (1997).

- Applications of Telephone Common Carriers to Construct and/or Operate Cable Television Channel Facilities in Their Telephone Facilities — 47 C.F.R. §§ 63.54, 63.55 (1995)

Pursuant to 47 C.F.R. § 53.54(d)(3), the FCC authorized telephone companies to acquire cable facilities for the *limited purpose* of providing common carrier channel service to a *limited class* of users – franchised cable operators – via those facilities subject to section 214 certification. 47 C.F.R. § 63.55 provides that applications by telephone common carriers for authority to construct and/or operate distribution facilities for channel service to cable systems in their service areas shall include a showing that the applicant is unrelated and unaffiliated with the proposed cable operator.

III. COMMON CARRIERS CHOOSING TO LIMIT THE SCOPE OF THEIR SERVICES

- *In re Application of Tower Communication Systems Corporation*, 59 F.C.C. 2d 130 (1976).

Tower Communication Systems Corporation ("Tower") applied for authority to establish and operate a communication channel through a domestic satellite "receive only" earth station. The receive-only earth station would be used for the reception of video signals of Home Box Office transmitted via RCA Global Communications Corporation's domestic satellite system for distribution by Tower on a common carrier basis via terrestrial facilities. The FCC classified the facility as a common carrier, even though it was serving only its own affiliate, where the facility would not interfere with other common carriers.

- Telestra, Inc., Application for Authority Pursuant to Section 214 of the Communications Act of 1934, as amended, to Acquire Capacity in International Facilities for the Provision of Switched and Private Lines Services between the U.S. and Australia, *Memorandum Opinion, Order and Certificate*, 13 FCC Rcd 205 (1997).

Telestra, Inc. ("TI") filed a request for authorization to acquire and operate facilities for the provision of switched and private lines service between the United States and Australia. The FCC granted TI's request concluding that the grant of TI's application for facilities-based switched and private-line service on the U.S.-Australia route was in the public interest. The FCC also determined that TI should be regulated as a common carrier. *See also* Application of IDC America, Inc., Application Pursuant to Section 214 of the Communications Act of 1934, as amended, to Provide Non-interconnected International Private Line Service Between the United States and Japan, *Order, Authorization, and Certificate*, File No. I-T-C-96-685, DA 97-571 (rel. March 21, 1997) (granting IDC America, Inc.'s ("IDC") request for authority to resell non-interconnected international private lines between the United States and Japan. IDC was classified as a non-dominant carrier for that particular service.).

- Application of ITT World Communications Inc., for Temporary Authority, Pursuant to Section 214 of the Communications Act of 1934, as amended, to Provide Television Broadcasters a Television Earth Station via Early Bird Satellite, *Order and Authorization*, 3 F.C.C.2d 628 (1966).

ITT World Communications Inc. sought authority to provide television broadcasters a common carrier television transmission service via satellite through the use of the transportable earth station. *See also* IDB

Communications Group, LTD: Application to Modify its License for its Domestic Transmit/Receive Earth Station (E7754) at Culver City, California to Add the ANIK Satellite as a Point of Communication for Service between the U.S. and Canada, Order Authorization and Certificate, File No. 2805-DSE-MP/L-85 (rel. Feb. 14, 1986) (The FCC's order granted authority to several parties to permit communications with the Canadian ANIK satellites for the provision of audio and video transmission service between the U.S. and Canada).

- Consortium Communications International, Inc., Application for Authority to Acquire and Operate Facilities for the Provision of Telex Service between the U.S. and India, *Order: Authorization and Certificate*, 5 FCC Rcd 6562 (1990).

Consortium Communications International, Inc. ("CCI") filed a request for authority pursuant to Section 214 to acquire and operate facilities for direct telex service (and only telex service) between the U.S. and Japan. The FCC granted the request concluding that the "present and future public convenience and necessity require that provision of direct telex service to India by CCI." The FCC required CCI file a tariff for the proposed service in accordance with its Order.

- *Mobilefone of Northeastern Pennsylvania, Inc. v. The Professional Serv. Bureau of Luzerne County, Inc.*, 54 Pa. P.U.C. 161 (1980).

A group of persons offered a one-way paging service to physicians (and only physicians) in a small region of the state. The service was available to all physicians within the area that requested service. The Pennsylvania Public Utility Commission ("PA PUC") concluded that the one-way paging service offered to a limited portion of the public constituted a common carrier public utility service. Specifically, the PA PUC reasoned that "[w]hether a service is being offered 'for the public' and therefore properly classified as a public utility service, requires a determination whether or not such service is being held out, expressly or impliedly, to the general public as a class, or to any limited portion of it, as contradistinguished from being offered only to particular individuals."

- *State Bd. of R.R. Comm'rs v. Rosenstein*, 252 N.W. 251 (Iowa 1934).

An operator of a truck carrying theater films and advertising materials over a regular route to members of a film association was deemed a common carrier subject to statutory provisions. In making this determination, the Iowa Supreme Court concluded that to be classified as a common carrier, "it is not necessary . . . that he be required to carry goods for any description for every person offering the same. It is not necessary that he carry all kinds of goods, if he professes to carry only a certain kind, and, if so, this does not take from

him his status as a common carrier.” Indeed, as the court noted, “[i]f he held himself out as a common carrier of silks and laces, the common law would not compel him to be a common carrier or agricultural implements such as plows, harrows, etc.; if he held himself out as a common carrier of confectionery and spices, the common law would not compel him to be a common carrier of bacon, lard, and molasses.” (citing supporting case law from Kansas, California, Illinois, Indiana, Michigan and Oregon). Because the truck operator sought to offer his transportation service to all theaters in his territory he was a common carrier subject to the Iowa regulations.

- *In re United Parcel Serv.*, 256 A.2d 443 (Me. 1969).

The United Parcel Service (“UPS”), a corporation engaged in transportation of both interstate and intrastate items of limited size and weight, applied to the Public Utilities Commission (“PUC”) for authority to operate as a common carrier. The PUC granted the application, finding that UPS was a common carrier. The court affirmed the PUC’s holding, noting that “it is not essential to the status of one as a common carrier that he carry all kinds of property offered to him” Further, the court noted that “[w]e do not think, for example, that it is or could be seriously argued that a highway freight carrier would jeopardize its common carrier standing merely because it did not hold itself out to handle and could not in fact handle petroleum products, articles requiring refrigeration or heavy machinery.”

- *Neubauer v Disneyland, Inc.*, 875 F. Supp. 672 (C.D. Cal. 1995).

The operator of an amusement park ride was a common carrier under a California statute, which broadly defines a common carrier as those who offer to the public to carry persons, property or messages. *See also McIntyre v. Smoke Tree Stables*, 205 Cal.App.2d 489 (Cal. Dist. Ct. App. 1995) (finding common carrier status in guided tour mule ride); *Squaw Valley Ski Corp. v. Superior Court*, 2 Cal.App. 4th 1499 (Cal. Dist. Ct. App. 1992), *reh’g denied*, 1992 Cal. App. LEXIS 266, 92 (Cal. Ct. App. 1992), *review denied*, 1992 Cal. LEXIS 1810 (Cal. 1992) (imposing common carrier status on chair lift carrying skiers although carriage is limited to skiers).

525 F.2d 630 printed in ELL format

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents, American Telephone and Telegraph Company, the National Association of Business & Educational Radio, Inc., General Electric Company, the Special Industrial Radio Service Assn., Inc., the Central Committee on Telecommunications of the American Petroleum Institute, Utilities Telecommunications Council, North Carolina Utilities Commission, South Carolina Public Service Comm., the People of the State of California and the Public Utilities Commission of State of California, Intervenor. NATIONAL ASSOCIATION OF RADIOTELEPHONE SYSTEMS, Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents, The National Assn. of Business & Educational Radio, Inc., A. T. & T. Inc., General Electric Co., Special Industrial Radio Service Assn., Inc., Motorola, Inc., and Airsignal International, Inc., Intervenor. ILLINOIS ASSOCIATION OF RADIO-TELEPHONE SYSTEMS, INC., Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents, American Telephone and Telegraph Company, National Association of Business & Educational Radio, Inc., and General Electric Company, Intervenor. RAM BROADCASTING COMPANY, Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents, National Association of Business and Educational Radio, Inc. and General Electric Company, Intervenor

Nos. 74-1555, 74-1585, 74-1659, 74-1696

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

173 U.S. App. D.C. 413; 525 F.2d 630; 1976 U.S. App. LEXIS 13523; 1976-1 Trade Cas. (CCH) P60,865; 35 Rad. Reg. (2d P & B) 3484

September 12, 1975 argued

January 5, 1976

SUBSEQUENT HISTORY: [**1]

As Amended January 28, 1976

PRIOR HISTORY:

Petitions for Review of an Order of the Federal Communications Commission.

CORE TERMS: carrier, common carrier, cellular, common carriers, radio, regulation, dispatch, mobile, anticompetitive, non-common, classification, applicant, spectrum, mobile radio, competitive, wireline, licensing, station, user, eligible, public convenience, technology, license, telephone, band, interconnection, manufacture, indifferently, antitrust, allocated

COUNSEL: Kenneth E. Hardman, Washington, District of Columbia, with whom Paul Rodgers, Washington, District of Columbia, was on the brief for Petitioner in No. 74-1555.

Abe Fortas, Washington, District of Columbia, for

Petitioner in No. 74-1585.

John E. Ingle, Counsel, F.C.C., with whom Ashton R. Hardy, Gen. Counsel, Daniel M. Armstrong, Acting Associate Gen. Counsel, F.C.C. and Carl D. Lawson, Atty., Dept. of Justice, were on the brief for Respondents. Joseph Marino, Associate Gen. Counsel, F.C.C. at the time the record was filed, also entered an appearance for Respondent F.C.C. Howard E. Shapiro, and Roger B. Andewelt, Attys., Dept. of Justice, entered an appearance for Respondent, United States of America in Nos. 74-1555 and 74-1585.

John P. Bankson, Jr., Washington, District of Columbia, for Intervenor National Ass'n of Business and Educational Radio, Inc.

Thomas Schwartz, Robert A. Woods and Lawrence M. Meyer, Washington, District of Columbia, were on the brief for Petitioner in No. 74-1659.

James A. Koerner, Washington, District of Columbia, with a statement [**2] filed in lieu of a brief, for

Petitioner in No. 74-1696.

Charles A. Horsky, Charles Lister, Washington, District of Columbia, Alfred C. Patroll and F. Mark Garlinghouse, were on the brief for Intervenor American Telephone and Telegraph Co. in Nos. 74-1555 -- 74-1585 and 74-1659. Michael Boudin, Washington District of Columbia, also entered an appearance for Intervenor American Telephone and Telegraph Co.

Wayne V. Black and Larry S. Solomon, Washington, District of Columbia, were on the brief for Intervenor Special Industrial Radio Service Ass'n, Inc., in Nos. 74-1555 and 74-1585.

Joseph E. Keller, Wayne V. Black and Larry S. Solomon, Washington, District of Columbia, were on the brief for Intervenor The Central Committee on Telecommunications of the American Petroleum Institute in No. 74-1555.

Charles M. Meehan and Peter M. Nemkov, Washington, District of Columbia, were on the brief for Intervenor, Utilities Telecommunications Council.

Edward B. Hipp and Robert F. Page, Raleigh, North Carolina, were on the brief for Intervenor North Carolina Utilities Commission.

Richard D. Gravelle, J. Calvin Simpson, San Francisco, California, and Randolph W. Deutsch were on the brief [**3] for Intervenor State of California and the Public Utilities Commission of the State of California.

Frederick M. Rowe, John L. Bartlett and John B. Wyss, Washington, District of Columbia, were on the brief for Intervenor Motorola, Inc., in No. 74-1585.

Joseph M. Kittner and Edward P. Taptich, Washington, District of Columbia, entered appearances for intervenor General Electric Co.

Robert E. Conn and Thomas J. McCabe, Washington, District of Columbia, entered appearances for Intervenor Airsignal International, Inc., in No. 74-1585.

M. John Bowen, Jr., Columbia, South Carolina, entered an appearance for Intervenor South Carolina Public Service Commission in No. 74-1555.

JUDGES: Tamm, MacKinnon and Wilkey, Circuit Judges. Opinion for the Court filed by Circuit Judge Wilkey.

OPINIONBY: WILKEY

OPINION: [*633] WILKEY, Circuit Judge

Petitioners seek review of a two-part 1975 F.C.C. Memorandum Opinion and Order n1 (hereinafter 1975 Order), filed in a rulemaking proceeding of which notice was first given in 1968. n2 The Order under review adopts the basic approach, with some modification, of a Second Report and Order, n3 (hereinafter 1974 Order), [*634] which issued after two rounds [**4] of comment had been received. This Court has jurisdiction to review the Orders under 47 U.S.C. § 402 (1970) and 28 U.S.C. § 2342 (1970).

n1 *Land Mobile Service, Docket No. 18262, 51 F.C.C.2d 945 (19 March 1975)*; *Land Mobile Service, Docket No. 18262 (16 July 1975) (Proceeding terminated) (J.A. at 537-540)*.

n2 *Notice of Inquiry and Notice of Proposed Rule Making, Land Mobile Use of 806-960 MHz Band, Docket No. 18262, 14 F.C.C.2d 311 (17 July 1968)*.

n3 *Land Mobile Radio Service, Docket No. 18262, 46 F.C.C.2d 752 (1 May 1974)*.

The Orders under review deal with the allocation of frequency spectrum, in the 806-921 MHz band, to the land mobile radio service, and with the development of regulations pertaining to the future use of that spectrum. Land mobile radio services are radio communication services, based on land, where either the transmitting or receiving station is mobile. n4

n4 47 C.F.R. § 2.1 (1974).

[**5]

Such services are of two general types. Public services are operated by common carrier licensees and made available to members of the public. The most common type of public services are radio telephone services which interconnect with existing telephone systems. Private services apparently include all other mobile radio operations, i.e., those not subject to common carrier regulation. They are predominantly dispatch services such as those operated by police departments, fire departments, and taxicab companies, for their own purposes. However, they are not limited to services which an operator provides only to itself, but also extend to services provided to a limited group of users by third party operators.

The 1974 Order, as modified by the 1975 Order, embodies three distinct actions. First, it allocates a total of 40 MHz on the 900 MHz band (825-845 MHz and 870-890 MHz) to the development of a nationwide, broad-

band "cellular" mobile radio communications system. (Initially, the Commission intends to authorize use of the minimum spectrum needed for developmental systems.) n5 Through the use of expensive and sophisticated new technologies, the cellular system will make possible [**6] more traffic intensity per unit of spectrum than do present mobile communication methods. When operative, which will not be before 1978, it is expected greatly to increase capacity for mobile communications in urban areas over what is now available. The cellular system is clearly a public, common carrier system, and will serve primarily to expand the capacity of radio telephone service.

n5 46 F.C.C.2d at 761.

The 1974 Order limited the group of eligible applicants for licenses to operate on these bands, to wireline (telephone) carriers. n6 The 1975 Order removed this limitation and extended eligibility to radio common carriers as well. n7 Any applicant for a license will nonetheless be required to demonstrate that it has the resources and technology for rapid development of a cellular system. n8 As well as providing radio telephone service, cellular systems are to be allowed to engage in dispatch operations. n9

n6 *Id.* at 760.

[**7]

n7 51 F.C.C.2d at 953.

n8 *Id.* at 955.

n9 *Id.* at 952, 46 F.C.C.2d at 761.

Second, 30 MHz (806-821 MHz and 851-866 MHz) is allocated to private services, to be licensed to operators in the Public Safety, Industrial and Land Transportation areas, as authorized under 47 C.F.R. §§ 89, 91, 93. Thus, under existing regulations, this allocation makes available additional spectrum for eligible applicants who wish to obtain a license to operate a station, either for their own private purposes, or, with several other eligibles, on a non-profit, cost-sharing basis. n10 In addition, the Orders would create a new category of private mobile operators, eligible for licensing on the 30 MHz presently being allocated. This new category of operators, known as Specialized Mobile Radio Systems (SMRS), would operate on a commercial basis to provide service to third parties. Licensing is to be on a first-come, first-served basis, with SMRS applications [**635] treated no differently than those of other private

applicants. n11 Because it seeks to utilize a profit motive to speed development [**8] and refinement of mobile radio technologies, the Commission concludes that SMRS should not be subject to the common carrier regulations of Title II of the Communications Act, n12 and that state certification of SMRS should be preempted. n13

n10 47 C.F.R. § 89.604 (1974).

n11 51 F.C.C.2d at 956-57.

n12 46 F.C.C.2d at 762.

n13 51 F.C.C.2d at 974.

Third and last, the 1975 Order designates the remaining 45 MHz of the total 115 MHz allocation for reserve and future growth. n14 This aspect of the Order is not challenged in this proceeding.

n14 *Id.* at 946.

I. 40 MHz Allocation for the Creation of Cellular Systems

The power to make this allocation of spectrum for the development of sophisticated and band-efficient cellular systems arises, if at all, under 47 U.S.C. § 303(c) and (g) (1970). n15 Section [**9] 303 sets forth the Commission's power and duties in the regulation of radio, and states that the exercise of all powers should be guided by the requirements of "public convenience, interest, or necessity."

n15 47 U.S.C. § 303(c) and (g) (1970) provides:

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall --

* * *

(c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate;

* * *

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest.

The authorizations of powers under subpart (c) to assign bands of frequencies to various classes of stations, and under subpart (g) to provide for experimental uses and encourage the more effective use of [**10] radio, appear on their face to justify the allocation at issue here. However, it has been challenged on a variety of grounds, as exceeding the discretion allowed the Commission under the public convenience, interest or necessity standard.

First, the argument is made that the allocation is excessive in light of both the technological requirements for the development of cellular systems, and the extent of need which the system will ultimately satisfy. It appears there is substantial uncertainty as to how much spectrum will be necessary or desirable for the functioning of cellular systems, which are now in the developmental stage at least three years away from operation. In its tentative First Report, which preceded the 1974 and 1975 Orders now under review, the Commission proposed an allocation of 75 MHz. n16 After substantial negative comment was received, including reports by the Department of Justice n17 and the Office of Telecommunications Policy, n18 the conclusion was reached in the 1974 Order to reduce the allocation to 40 MHz. n19

n16 First Report and Order, *Spectrum Space for Land Mobile Services*, Docket No. 18262, 19 Pike & Fischer R.R.2d 1663, 1664 (1970).

[**11]

n17 Letter (undated) from the Assistant Attorney General, Antitrust Division, U.S. Department of Justice (hereinafter Justice Dept. Report). (J.A. at 345-353).

n18 Letter dated 17 August 1973, from the Director, Office of Telecommunications Policy, and enclosed comments (hereinafter OTP Report). (J.A. at 328-44).

n19 46 F.C.C.2d at 756.

AT & T, which initially proposed the cellular system and is the company now most deeply involved in its development, argued in response to that Order for an increase of the allocation to 64 MHz. It argued that the proposed reduction to 40 MHz would substantially increase the implementation cost of "attractive" design features then under development. n20 [*636] At the other extreme, the Report of the Office of Telecommunications Policy, written in 1973, concludes that 14 MHz should

be adequate for the development of a cellular system to meet projected mobile telephone needs. n21

n20 51 F.C.C.2d at 948.

n21 (J.A. at 333). Also, Motorola has argued in some detail that an allocation of 19 MHz would be sufficient. Motorola Reply Comments at 68-84. (J.A. at 245-70).

[**12]

The Orders under review reveal that the Commission has given serious consideration to the arguments raised as to the extent of the allocation. n22 They reveal also that the determination of how much band width to allocate to cellular systems is at once a highly technical and somewhat speculative undertaking. The amount of spectrum that is appropriate depends upon an estimate of the nature and capabilities of technology that is now only partially developed, and upon projected demands for radio telephone service.

n22 51 F.C.C.2d at 948; 46 F.C.C.2d at 756-57.

We conclude that such determinations are precisely the sort that Congress intended to leave to the broad discretion of the Commission, by imposing a broad public convenience, interest, or necessity standard. In cases of such broad delegations to expert agencies, the standard of review is that of the reasonableness of the conclusions reached. n23 In light of the wide ranging arguments as to appropriate spectrum width, we cannot say that the allocation [**13] of 40 MHz to this experimental mobile radio system was either unreasonably large or unreasonably small.

n23 *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 749, 92 S. Ct. 1941, 32 L. Ed. 2d 453 (1972); *S.E.C. v. New England Elec. Sys.*, 390 U.S. 207, 211, 88 S. Ct. 916, 19 L. Ed. 2d 1042 (1968); *Gray v. Powell*, 314 U.S. 402, 411, 62 S. Ct. 326, 86 L. Ed. 301 (1941).

More substantial arguments are raised pertaining to possible anticompetitive effects of the 40 MHz allocation. It is alleged, first that the allocation will prove in effect to be a grant to the Bell system of monopoly power over the urban radio telephone market. Second, it is stated that the authorization of dispatch service (in all but fleet-dispatch capacities) n24 to be performed by

cellular systems will result in a substantial impairment of competition in the now highly competitive dispatch market. Both of these results are said to put the Order in violation of the antitrust component of the public convenience, interest [**14] or necessity standard. n25

n24 *51 F.C.C.2d at 952 and n. 16; 46 F.C.C.2d at 761.*

n25 There is a good deal of authority for the proposition that competitive factors may properly be considered by the Commission under the public convenience, interest or necessity standard. See *United States v. R.C.A.*, 358 U.S. 334, 351, 79 S. Ct. 457, 3 L. Ed. 2d 354 (1959); *F.C.C. v. R.C.A. Comm., Inc.*, 346 U.S. 86, 94, 73 S. Ct. 998, 97 L. Ed. 1470 (1953); *N.B.C. v. United States*, 319 U.S. 190, 223, 63 S. Ct. 997, 87 L. Ed. 1344 (1943); *Radio Relay Corp. v. F.C.C.*, 409 F.2d 322, 326 (2d Cir. 1969). But see *Hawaiian Telephone Co. v. F.C.C.*, 162 U.S. App. D.C. 229, 235, 498 F.2d 771, 777 (1974) (F.C.C. may not "automatically equate the public interest with additional competition.").

Whether and to what extent decisions of the Commission are reversible for failure to consider particular factors is much less clear.

On the face of the record, there appears to be a significant plausibility to both of [**15] these assertions. While the Order provides for separate licensing of individual cellular systems, and no explicit grant of monopoly rights to AT & T is made, there is good reason to believe that AT & T will operate most, if not all, of the cellular systems eventually put in operation. The cellular system was initially proposed by AT & T n26 in response to the Commission's First Notice of Inquiry on this Docket, and AT & T has already made a substantial investment in its development. In spite of the 1975 Order's determination to allow other than wireline carriers to compete for the opportunity to operate cellular systems, the Commission itself still believes that only wireline carriers will be able to demonstrate that they have the resources [*637] and expertise which are a prerequisite to licensing. n27

n26 *46 F.C.C.2d at 753-54.*

n27 *51 F.C.C.2d at 953.*

If it is thus true that AT & T is the likely recipient of a virtual monopoly in the operation of cellular systems,

this will result in significant [**16] increases in its market power, where cellular systems are operative, in two fields apart from traditional wireline communications.

First, AT & T appears likely to dominate substantially the field of radio telephone service, which has heretofore been occupied in significant part by small radio common carriers operating in a highly competitive environment. n28 This threat is made more severe by the 1975 Order's elimination of a requirement that wireline operators offer to interconnect radio common carriers into their systems. n29 Such substantial domination would be undesirable both because it would weaken incentives for development of improved mobile radio systems, n30 and because it would enhance the already enormous overall economic power of the Bell System.

n28 OTP Report, supra note 18, at 8 (J.A. at 337).

n29 *51 F.C.C.2d at 946.* See OTP Report, supra note 18, at 12 (J.A. at 341); Justice Dept. Report, supra note 17, at 7 (J.A. at 351).

This part of the Commission's decision is somewhat puzzling. A substantial anticompetitive impact seems almost inevitable and the Commission has given no justification for dropping the interconnection requirement except to say that such interconnection is "unnecessary" in light of its decision not to license trunked systems. We agree with the original recommendations of the Office of Telecommunications Policy and the Justice Department that nondiscriminatory interconnections must be assured, but await the proof by the results.

[**17]

n30 Justice Dept. Report, supra note 17, at 2 (J.A. at 346).

Second, AT & T will become a significant force in the now highly competitive market for private dispatch services. n31 Whether it will be able to dominate that market presently appears difficult to determine. One significant factor is the extent to which AT & T's other communications activities may facilitate its operations in the dispatch market. n32

n31 It is unclear whether the authorization to engage in dispatch service is in violation of the 1956 Western Electric consent decree. That decree bars AT & T from engaging "in any business other than the furnishing of common carrier communications services," but excepts from the bar "services incidental to the furnishing . . . of common carrier

communications services." *United States v. Western Elec. Co., Civ. No. 17-49, 1956 Trade Cas. para. 68,246, at 71,138 (D.N.J.1956).*

Because of our general disposition of these competitive issues, see *infra*, we reserve for decision in a future case the issues of whether the dispatch services to be carried on by AT & T can be characterized as "common carrier communications services," and if not, whether the dispatch services carried on are "incidental."

[**18]

n32 See Justice Dept. Report, *supra* note 17, at 6. (J.A. at 350) (asserting that "the advantages adherent in the telephone service monopoly enjoyed by the wireline carriers vis-a-vis potential competitors in other communications services are competitively significant.").

Although the Commission has included in the 1975 Order certain actions that are designed to minimize possible anticompetitive effects of the Order, it seems likely that they will prove largely cosmetic. These actions do little or nothing to curtail the projected market power of AT & T in either cellular system or dispatch operations. In particular, the 1975 Order requires that separate companies be established for the operation of cellular systems, and that separate account books and payrolls be maintained. n33 This requirement is designed to prevent cross-subsidization of the activities of the cellular system by profits of the parent corporation, as might make possible predatory behavior against radio common carriers or private dispatch operators. However, even perceived most favorably, this action does nothing except [**19] attempt to make financially impossible with AT & T capital predatory behavior which is already illegal [*638] and subject to prosecution under the antitrust laws. n34

n33 *51 F.C.C.2d at 951.*

n34 Cutting prices below marginal cost in order to discourage competition is the most blatant form of predatory behavior and, at least where the price cutter holds significant market power, is subject to attack under Sherman Act § 2, *15 U.S.C. § 2 (1970)*. E.g., *Standard Oil Co. v. United States*, *221 U.S. 1, 43, 31 S. Ct. 502, 55 L. Ed. 619 (1910)*. See Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, *88 Harv. L. Rev. 697 (1975)*.

The 1975 Order also imposes certain restrictions on the manufacture, provision, and servicing of equipment

for cellular system operations. Were stringent regulations imposed to exclude wireline operators from these related fields, they might result in other corporations becoming involved in these manufacture and service functions. [**20] Even then, however, though they would keep AT & T out of these other fields, they would do nothing to increase competition for licensing of cellular systems, or to improve the competitive situation in the dispatch market.

Even the modest expectation of increasing competition in the manufacture, supply and maintenance of equipment is made doubtful by the narrow scope of the limits imposed by the 1975 Order. n35 First, the restrictions apply only with regard to mobile equipment, and not to the base station equipment now under development by AT & T. There appears to be no substantial expectation that any independent sources for base station equipment will be developed. Second, the 1975 Order eliminated the 1974 Order's bar on supply and maintenance (as distinguished from manufacture) of mobile equipment by wireline carriers, and stated that there would be no automatic bar to use of carrier-manufactured mobile equipment in the developmental systems. n36 The only clear restriction remaining is a general bar on manufacture of mobile equipment by wireline carriers, and that will not have unexceptioned application until the systems become generally operative, which will not be for at least [**21] several years.

n35 *51 F.C.C.2d at 951-52.*

n36 *Id. at 952.*

In spite of our conclusion that significant anticompetitive effects may well result in the form of AT & T monopolization of cellular operations and impairment of the now highly competitive dispatch market, the court holds that the 40 MHz allocation is not, at this time, a breach of the broad discretion n37 allocated to the Commission under the statute. The anticompetitive effects envisioned above are contingent upon a variety of factors surrounding the development and implementation of cellular technology. Thus far, the Commission has stated its clear intention to authorize only a developmental system in the Chicago area, which will utilize only 12.5 MHz of the 40 MHz allocation. The Commission retains a duty of continual supervision of the development of the system as a whole, and this includes being on the lookout for possible anticompetitive effects. n38 The serious anticompetitive effects, if they arise at all, will do so only after full [**22] implementation begins.

n37 The substantial discretion generally allowed the F.C.C. in determining both what and how it can properly regulate, is often attributed to the highly complex and rapidly expanding nature of communications technology. Because Congress could neither foresee nor easily comprehend the fast-moving developments in the field, it "gave the Commission not niggardly but expansive powers." *N.B.C. v. United States*, 319 U.S. 190, 219, 63 S. Ct. 997, 1010, 87 L. Ed. 1344 (1943); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 172-73, 88 S. Ct. 1994, 20 L. Ed. 2d 1001 (1968); *F.C.C. v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138, 60 S. Ct. 437, 84 L. Ed. 656 (1940); *Philadelphia Television Broadcasting Co. v. F.C.C.*, 123 U.S. App. D.C. 298, 300, 359 F.2d 282, 284 (1966).

n38 See note 25 supra.

We are strongly influenced by the position of the Justice Department in full [*639] support of the proposed F.C.C. Orders. n39 It is true that the Justice Department [**23] has expressed reservations about several elements of the 1974 Order, and that the 1975 Order does not fully ameliorate several of Justice's concerns. n40 Nonetheless, the Department is apparently satisfied that the Order as a whole poses no immediate and substantial competitive problems. Their action, like ours, would appear to be based in part on the view that there will be ample opportunity to challenge anticompetitive effects as the time approaches when they will be felt, and the extent of the impact on competition becomes more readily assessable. The Justice Department no doubt will make a continuing assessment.

n39 Respondent's Brief is filed jointly by the F.C.C. and the Justice Department.

n40 In particular, the Order authorizes entry of wireline carriers into the dispatch market, and eliminates any requirement that wireline carriers extend non-discriminatory interconnection rights to all providers of land mobile services. See Justice Dept. Report, supra note 17, at 6, 7 (J.A. at 350-51).

[**24]

Our affirmance of the 40 MHz allocation for the development of a cellular common carrier system is with the implicit recognition that it may be subject to successful challenge at some future date. It is the broad statutory power of the Commission to experiment and encourage new uses of radio, n41 coupled with the lack of urgency

surrounding the projected anticompetitive effects, which leads us to our conclusion. We do not hold that the projected effects considered above would not constitute a breach of the antitrust component of the public convenience, interest and necessity standard, n42 were they more immediate in time or more susceptible of precise assessment. Nor do we make any comment with regard to the particular applicability of antitrust statutes, which issue is not presently before us. n43

n41 47 U.S.C. 303(g) (1970).

n42 See note 7-3 supra.

n43 Under 47 U.S.C. § 313(a) (1970), the antitrust laws are fully applicable to the manufacture, sale and trade in radio apparatus, and to interstate or foreign radio communications.

[**25]

II. 30 MHz Allocation for Use by Private Mobile Service, Including a New Class of Entrepreneurial Operators Known as Specialized Mobile Radio Systems (SMRS)

The aspect of the 30 MHz allocation which is challenged is the authorization of a new category of entrepreneurial mobile operators who will share access to the allocated spectrum with private operators eligible under the Public Safety, Industrial and Land Transportation Radio Services. n44 Private operations involve primarily dispatch services which the operator provides to himself, such as those provided by police departments and taxicab companies. Prior to the present Order, they have also included systems operated on a cooperative basis for the benefit of several affiliated users. n45 The significant action taken under the present Order is the assimilation, with the above operations, of profit-motivated systems by an entrepreneur solely for the use of third party clients.

n44 See 47 C.F.R. §§ 89, 91, and 93 (1974).

n45 Under 47 C.F.R. § 89.604(a) and (b)(1974), several operators may be separately licensed to use a single system. Such systems, known as "community repeaters," were explicitly approved by the Commission in 1970. Memorandum Opinion and Order, *Multiple Licensing -- Safety and Special Radio Services*, Docket No. 18921, 24 F.C.C.2d 510 (15 July 1970).

[**26]

In authorizing the creation of these entrepreneurial Specialized Mobile Radio Systems (SMRS), the Commission seeks to deal with them precisely as it deals with the more traditionally private mobile operators. n46 Applications of all private [*640] operators including SMRS, are to be processed, up to spectrum capacity, on a first-come, first-served basis. n47 Believing that competition between many operators is the best way to hasten the development of improved technologies, the Commission seeks to treat SMRS, like all other private operators, as non-common carriers, and to pre-empt state regulation of entry.

n46 *51 F.C.C.2d at 956-57*. In processing applications for use of the 30 MHz allocated by this Order, the Commission intends to consider those of commercial enterprises "on the same basis" as those of applicants for "private or shared communication facilities." 47 C.F.R. § 89.803(b) (as amended per 1975 Order, 51 F.C.C.2d at 999).

n47 *51 F.C.C.2d at 957*.

The non-common carrier classification [**27] is the pivot upon which the Commission's scheme for regulating SMRS turns. It makes clearly inapplicable the stringent rate and service regulations of the Title II Common Carrier provisions. n48 Also, it renders inapplicable certain provisions of Title III (Radio Licensing), which require a 30-day waiting period prior to the granting of any application n49 and which guarantee the right to petition for denial of the application. n50 Finally the classification as non-common carriers appears to have certain effects on the power of federal pre-emption, which power the Commission has sought to exercise here by barring state entry regulation.

n48 *47 U.S.C. §§ 201-05 (1970)*. We do not here hold that the Commission is required to exercise its affirmative Title II powers wherever a common carrier within its jurisdiction is found to exist. We only hold that the language of that Title becomes applicable, and leave to a case presenting that issue the problem of whether Title II powers are mandatory or discretionary.

n49 *47 U.S.C. § 309(b) (1970)*.

n50 *47 U.S.C. § 309(d) (1970)*. Section (d) applies to the categories set forth in section (b).

[**28]

A. Classification of SMRS as Non-Common Carriers

1. Statutory Definition of Common Carrier

For purposes of the Communications Act, a common carrier is "any person engaged as a common carrier for hire . . ." n51 The Commission's regulations offer a slightly more enlightening definition: "any person engaged in rendering communication service for hire to the public." n52 However, the concept of "the public" is sufficiently indefinite as to invite recourse to the common law of carriers to construe the Act.

n51 *47 U.S.C. § 153(h) (1970)*.

n52 *47 C.F.R. § 21.1 (1974)*.

In seeking an applicable common law definition of common carrier, a good deal of confusion results from the long and complicated history of that concept. Originally, the doctrine was used to impose a greater standard of care upon carriers who held themselves out as offering to serve the public in general. The rationale was that by holding themselves out to the public at large, otherwise private carriers took on a quasi-public [**29] character. This character, coupled with the lack of control exercised by shippers or travellers over the safety of their carriage, was seen to justify imposing upon the carrier the status of an insurer. n53

n53 This insurance obligation has never been un-exceptioned, and has not extended to acts of God, damages resulting from warfare, or causes beyond the control of the carrier which are expressly excepted in the bill of lading. *Propeller Niagara v. Cordes*, 62 U.S. (21 How) 7, 23, 16 L. Ed. 41 (1858).

The late nineteenth century saw the advent of common carriers being subjected to price and service regulations as well. At first challenged as deprivations of property without due process, these early regulations were upheld on the basis of the near monopoly power exercised by the railroads, coupled with the fact that they "exercise a sort of public office" in the duties which they perform. n54 [*641] Subsequently, legislation has been upheld imposing stringent regulations of various types on entities [**30] found to be affected with a public character, even where nothing approaching monopoly power exists. In such cases as the Motor Carrier Act of 1935, n55 relatively competitive carrying industries have been subjected to entry, rate and equipment regulations on the basis of the quasi-public character of the activities

involved. n56

n54 *Munn v. Illinois*, 94 U.S. (4 Otto) 113, 130, 24 L. Ed. 77 (1876). For an historical discussion of the idea that businesses affected with a public interest are subject, on that account, to governmental regulation, see McAllister, Lord Hale and Business Affected with a Public Interest, 43 *Harv. L. Rev.* 759 (1930).

n55 49 U.S.C. §§ 301-27 (1970).

n56 See *American Trucking Ass'ns, Inc. v. United States*, 101 F. Supp. 710 (N.D. Ala. 1951) (upholding the Act against Constitutional challenge.).

Whether the common carrier concept is invoked to support strict tort liability or as a justifying basis for regulation, it appears that the critical point is the quasi-public [**31] character of the activity involved. To create this quasi-public character, it is not enough that a carrier offer his services for a profit, since this would bring within the definition private contract carriers which the courts have emphatically excluded from it. n57 What appears to be essential to the quasi-public character implicit in the common carrier concept is that the carrier "undertakes to carry for all people indifferently" n58

n57 *Home Ins. Co. v. Riddell*, 252 F.2d 1 (5th Cir. 1958); *Ciaccio v. New Orleans Public Belt R.R.*, 285 F. Supp. 373 (E.D. La. 1968).

n58 *Semon v. Royal Indemnity Co.*, 279 F.2d 737, 739 (5th Cir. 1960); *Home Ins. Co. v. Riddell*, 252 F.2d 1, 3 (5th Cir. 1958); *Ciaccio v. New Orleans Public Belt R.R.*, 285 F. Supp. 373, 375 (E.D. La. 1968); *State v. Sinclair Pipe Line Co.*, 180 Kan. 425, 304 P.2d 930, 941 (1957); *Utilities Comm. v. Gulf Atlantic Towing Corp.*, 251 N.C. 105, 110 S.E.2d 886, 889 (1959).

The following cases state the test in similar wording, while not finding that a given carrier was a non-common carrier: *Washington ex rel. Stimson Lumber Co. v. Kuykendall*, 275 U.S. 207, 211, 48 S. Ct. 41, 72 L. Ed. 241 (1927); *Terminal Taxicab Co. v. Kutz*, 241 U.S. 252, 255, 36 S. Ct. 583, 60 L. Ed. 984 (1916); *Grace Line, Inc. v. F.M.B.*, 280 F.2d 790, 792 (2d Cir. 1960); *Arrow Aviation, Inc. v. Moore*, 266 F.2d 488, 490 (8th Cir. 1959); *Circle Express Co. v. Commerce Comm.*, 249 Iowa 651, 86 N.W.2d 888, 893 (1957); *State ex rel. Anderson v. Witthaus*, 340 Mo. 1004, 102 S.W.2d 99, 102

(1937); *Ferguson Trucking Co. v. Rogers Truck Line*, 164 Neb. 85, 81 N.W.2d 915, 922 (1957).

The F.C.C. has expressed a similar view of the common carrier concept as applied to communications. "The fundamental concept of a communications common carrier is that such a carrier makes a public offering to provide, for hire, facilities by wire or radio whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing" Report and Order, *Industrial Radiolocation Service*, Docket No. 16106, 5 F.C.C.2d 197, 202 (5 October 1966).

[**32]

This does not mean a given carrier's services must practically be available to the entire public. One may be a common carrier though the nature of the service rendered is sufficiently specialized as to be of possible use to only a fraction of the total population. And business may be turned away either because it is not of the type normally accepted or because the carrier's capacity has been exhausted. But a carrier will not be a common carrier where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal. n59 It is not necessary that a carrier be required to serve all indiscriminately; it is enough that its practice is, in fact, to do so. n60

n59 *Semon v. Royal Indemnity Co.*, 279 F.2d 737, 739-40 (5th Cir. 1960).

n60 *Washington ex rel. Stimson Lumber Co. v. Kuykendall*, 275 U.S. 207, 211-12, 48 S. Ct. 41, 42, 72 L. Ed. 241 (1927), ("a common carrier is such by virtue of his occupation, not by virtue of the responsibilities under which he rests."); See *Lone Star Steel Co. v. McGee*, 380 F.2d 640, 647-48 (5th Cir. 1967).

[**33]

This requirement, that to be a common carrier one must hold oneself out indiscriminately to the clientele one is suited to serve, is supported by common sense as well as case law. The original rationale for imposing a stricter duty of care on common carriers was that they had implicitly accepted a sort of public trust by availing themselves of the business of the public at large. The common carrier [*642] concept appears to have developed as a sort of quid pro quo whereby a carrier was made to bear a special burden of care, in exchange for the privilege of soliciting the public's business.

Moreover, the characteristic of holding oneself out to serve indiscriminately appears to be an essential element, if one is to draw a coherent line between common and private carriers. The cases make clear both that common carriers need not serve the whole public, n61 and that private carriers may serve a significant clientele, apart from the carrier himself. n62 Since given private and common carriers may therefore be indistinguishable in terms of the clientele actually served, it is difficult to envision a sensible line between them which does not turn on the manner and terms by which [**34] they approach and deal with their customers. The common law requirement of holding oneself out to serve the public indiscriminately draws such a logical and sensible line between the two types of carriers.

n61 *Terminal Taxicab Co. v. Kutz*, 241 U.S. 252, 255, 36 S. Ct. 583, 60 L. Ed. 984 (1927).

n62 *Home Ins. Co. v. Riddell*, 252 F.2d 1, 4 (5th Cir. 1958).

Finally, the holding out prerequisite to common carrier status is not without implicit support in the F.C.C. Regulations themselves. In defining "public correspondence," the Regulations focus upon the element of being at the disposal of the public. n63 Unlike "public correspondence," "private line service" is distinguished by its being set aside for the use of particular customers, so as not to be generally available to the public. n64 This public-private dichotomy is generally regarded as synonymous with the distinction between common carrier and non-common carrier operators.

n63 "Public correspondence. Any telecommunication which the offices and stations, by reason of their being at the disposal of the public, must accept for transmission." 47 C.F.R. § 21.1 (1974).

[**35]

n64 "Private line service. A service whereby facilities for communication between two or more designated points are set aside for the exclusive use or availability for use of a particular customer and authorized users during stated periods of time." 47 C.F.R. § 21.1 (1974).

2. Application of Common Carrier Definition to SMRS

In order to overturn the Commission's classification of SMRS as non-common carriers, the Court must find a substantial likelihood that SMRS will hold themselves

out to serve indifferently those who seek to avail themselves of their particular services. It is not an obstacle to common carrier status that SMRS offer a service that may be of practical use to only a fraction of the population, nor that the Order limits possible subscribers to SMRS services to eligibles under Sections 89, 91 and 93 of the Regulations. n65 The key factor is that the operator offer indiscriminate service to whatever public its service may legally and practically be of use. In making this determination, we must inquire, first, whether there will be any legal compulsion thus to serve indifferently, [**36] and if not, second, whether there are reasons implicit in the nature of SMRS operations to expect an indifferent holding out to the eligible user public.

n65 47 C.F.R. § 89.604(c) (as amended per 1975 Order, 51 F.C.C.2d at 993).

As to possible regulatory compulsion, there is no indication in the proposed regulations that SMRS are to be in any way compelled to serve any particular applicant, or that their discretion in determining whom, and on what terms, to serve, is to be in any way limited. The application provisions require that SMRS applicants certify that they will not provide service to ineligibles, but say nothing about any obligation to provide services to eligibles who seek them. n66 Nor does the section setting [**643] forth limitations on mode of operation contain any such provision. n67

n66 47 C.F.R. § 89.702(a)(2) (as amended per 1975 Order, 51 F.C.C.2d at 996-97).

n67 47 C.F.R. § 89.655 (as amended per 1975 Order, 51 F.C.C.2d at 995-96).

[**37]

Nor is there evidence in the administrative scheme of an implicit intent so to require. The Order evidences a clear intent not to discriminate between any of the types of "private" operators, including SMRS, in the granting of license applications. n68 It would appear that the FCC might have made special provision assuring adequate allocation to SMRS particularly, if SMRS were regarded as performing some public access function not performed by the other types of "private" systems.

n68 47 C.F.R. § 89.803(b) (as amended per 1975 Order, 51 F.C.C.2d at 999).

Finally, the fact that the same Order provides for per-

formance of dispatch services by cellular common carriers n69 suggests that any Commission concern about free public access to dispatch services may have been dealt with by authorizing dispatch services by common carrier who, due to their general status as common carriers, arguably cannot discriminate against particular users.

n69 51 F.C.C.2d at 952.

[**38]

Since one may be a common carrier by holding oneself out as such, we must inquire further whether there is good reason to believe that SMRS will in fact serve the user public more or less indifferently, even absent any regulatory compulsion to do so. At the outset it appears that this inquiry must be highly speculative, both because no operating SMRS are now in existence, and because the parties have not addressed in any detail the issue of the prospective SMRS business operations.

The nature of the dispatch services which SMRS will primarily offer appear necessarily to involve the establishment of medium-to-long-term contractual relations, whereby the SMRS supply the needs of users for dispatch facilities for a period of time. n70 In such a situation, it is not unreasonable to expect that the clientele might remain relatively stable, with terminations and new clients the exception rather than the rule. It might even be that the turnover will be sufficiently minor that, except for the commercial mode of operation, SMRS will be much like non-profit community repeaters. n71 "Repeaters" are required on application to submit the names and addresses of all cost-sharing participants, [**39] n72 which would seem to indicate a high level of stability among those employing the service.

n70 See 47 C.F.R. § 89.702(a)(2)(iii) (as amended per 1975 Order, 51 F.C.C.2d at 997) (making clear that SMRS business will be done under written contract).

n71 See note 45 supra.

n72 47 C.F.R. § 89.702(a)(2)(iii) (1974).

If the SMRS business is as hypothesized above, and nothing in the briefs or argument indicates otherwise, there would appear to be little reason to expect any sort of holding out to the public at all. Moreover, even as openings arise, there may be many reasons that the operator would desire and expect to negotiate with and select future clients on a highly individualized basis. The

operator may be concerned about the personal and operational compatibility of a given applicant vis-a-vis the SMR system as a whole and the other clients already using it. Methods of operation and time demands may be highly individualized and may be a very sound basis for accepting or rejecting [**40] an applicant, when considered in light of the methods already being employed and the particular time demands already being put on the system. n73

n73 For example, an operator might be in a position to accept an applicant whose primary needs are between certain hours, but to reject one whose needs are different. See 51 F.C.C.2d at 965-66, for further discussion of the way that different systems may be suited to different users and different user needs.

We therefore conclude that nothing in the record indicates any significant likelihood that SMRS will hold [**644] themselves out indifferently to serve the user public. While it is undisputed that they would be permitted so to hold themselves out if they desired, that is not sufficient basis for imposing the burdens that go with common carrier status. In so holding, we do not foreclose the possibility of future challenge to the Commission's classification, should the actual operations of SMRS appear to bring them within the common carrier definition. [**41]

Further, we reject those parts of the Orders which imply an unfettered discretion in the Commission to confer or not confer common carrier status on a given entity, depending upon the regulatory goals it seeks to achieve. n74 The common law definition of common carrier is sufficiently definite as not to admit of agency discretion in the classification of operating communications entities. A particular system is a common carrier by virtue of its functions, rather than because it is declared to be so. n75 Thus, we affirm the Commission's classification not because it has any significant discretion in determining who is a common carrier, but because we find nothing in the record or the common carrier definition to cast doubt on its conclusions that SMRS are not common carriers. n76 If practice and experience show the SMRS to be common carriers, then the Commission must determine its responsibilities from the language of the Title II common carrier provisions.

n74 The strongest statement of this sort is in the 1974 Order:

We are fully aware . . . that some of the entities

we propose to license, i.e., entrepreneur-operated, common-user systems, could be licensed as common carriers and regulated under Title II of the Communications Act. However, our basic goal in this proceeding is . . . to make available to the land mobile service additional spectrum and to do this in a way that would promote the larger and more effective use of this spectrum. . . . In accomplishing this goal, we are free, we believe, to adopt whatever comprehensive regulatory scheme is best suited for the purpose." 46 F.C.C.2d at 763-64. See also 51 F.C.C.2d at 957-59.

[**42]

n75 *United States v. California*, 297 U.S. 175, 181, 56 S. Ct. 421, 80 L. Ed. 567 (1936); *Lone Star Steel Co. v. McGee*, 380 F.2d 640, 648 (5th Cir. 1967).

But see *Philadelphia Television Broadcasting v. F.C.C.*, 123 U.S. App. D.C. 298, 300, 359 F.2d 282, 284 (1966) (upholding F.C.C. classification of cable T.V. as a non-common carrier: "Deference to the agency's interpretation of its governing statute is reinforced where, as here, the legislative history is silent, or at best unhelpful, with respect to the point in question.")

n76 The statements of the Order can be made to square with the view of this court, if they are read to mean that the Commission could have treated SMRS as common carriers by imposing on them requirements which would have made them common carriers. Without asserting that this was the Commission's meaning, it is clear that the Commission had discretion to require SMRS to serve all potential customers indifferently, thus making them common carriers within the meaning of the statute.

Finally, we reject any implications in the Orders n77 and argument of [**43] the Commission that there is any mutual exclusivity of application of the Title II Common Carrier provisions and the Title III provisions pertaining to Radio. It may be true that when enacted, the two titles were seen as applying to two largely discrete realms of activity. n78 Certainly radio technology had not, by 1934, achieved large scale application in the common carriage area, and was largely limited to the broadcast activities which were originally the primary target of Title III. Nonetheless, the language of Title II, from time of first enactment, extended its coverage to common carriage "by wire or radio". n79

n77 See 46 F.C.C.2d at 763.

n78 See IV B. Schwartz, *The Economic Regulation of Business and Industry* 2374 (1973).

n79 47 U.S.C. § 201 (1970).

Moreover, the result of a radio operator being held subject to Title II is not to create any conflict with the already applicable provisions of Title III, which basically allow for licensing of transmitting stations in the public [**44] interest. n80 It is rather to make additionally applicable [**45] certain provisions including those dealing with non-discriminatory service and charges, n81 liability for damages, n82 special corporate obligations and duties of common carriers, n83 and right to petition for denial of an application. n84 Therefore, if it is at some time demonstrated that SMRS are actually common carriers, there is nothing in the statute to prevent their regulation under both Titles II and III.

n80 47 U.S.C. § 303 (1970).

n81 47 U.S.C. §§ 201-05 (1970).

n82 47 U.S.C. §§ 206-09 (1970).

n83 47 U.S.C. §§ 210-12 (1970).

n84 47 U.S.C. § 309(b) and (d) (1970).

B. Impact of Non-Common Carrier Status on Federal Regulation

Our decision to uphold the Commission's classification of SMRS as non-common carriers leads directly to the affirmance of the Orders, insofar as they create a scheme of Federal regulation. In essence, the Commission seeks to license SMRS on a first-come, first-served basis, out [**45] of a pool which includes, as well, all individual and system-sharing eligibles under 47 C.F.R. §§ 89, 91 and 93. While the Commission expects to pass upon the legal and technical qualifications of applicants, it does not plan to examine their financial qualifications. n85 Most importantly, the Commission intends to leave SMRS free of all federal regulation which would follow as a result of common carrier status.

n85 51 F.C.C.2d at 957.

There is no facial violation of the statute resulting from any of these actions, once the conclusion is reached that SMRS are not common carriers. Obviously, the Title II common carrier provisions are inapplicable, as are cer-

tain provisions of Title III which apply only to common carriers. n86

n86 Sections 309(b), (d), dealing with delay before granting an application and right to petition for denial of an application, apply to several classes of stations, but only the common carrier classification is potentially relevant to SMRS. 47 U.S.C. § 309(b), (d) (1970).

[**46]

Also, the provision of 47 U.S.C. § 308(b) authorizing consideration of factors of "citizenship, character, and financial, technical and other qualifications . . ." is not violated because it does not require scrutiny of an applicant's financial fitness. That section leaves it within the discretion of the Commission to decide which facts relating to such factors it wishes to have set forth in applications. Since this leaves the Commission free to have no facts set forth on any of these matters, if it finds such action appropriate, it follows necessarily that the Commission is not required to consider financial fitness if it deems it irrelevant to its regulatory scheme. n87

n87 47 U.S.C. § 308(b)(1970). See also 51 F.C.C.2d at 960.

Nor, going beyond the words of the statute, can we conclude that in authorizing the creation of SMRS which are not required to behave and thus be regulated, as common carriers, that the F.C.C. has breached the broad discretion granted it with regard to radio under the "public [**47] convenience, interest and necessity" standard. The Commission has concluded that a competitive environment is the best and most feasible way to achieve its goal of most efficient development and use of the 900 MHz band. The 1975 Order reveals an in-depth consideration of the effects of such a competitive approach n88 so that we cannot say that the F.C.C. may not have "given reasoned consideration to each of the pertinent factors." n89

n88 51 F.C.C.2d at 967-71.

n89 *Permian Basin Area Rate Cases*, 390 U.S. 747, 792, 88 S. Ct. 1344, 1373, 20 L. Ed. 2d 312 (1968). See *Hawaiian Telephone Co. v. F.C.C.*, 162 U.S. App. D.C. 229, 234-35, 498 F.2d 771, 776-77 (1974).

The allegation of a breach of discretion in failing to give adequate consideration to possible anticompetitive effects is likewise without merit. While it is true that Motorola enjoys substantial domination of the sales market for mobile radio systems, that fact does not confer upon any aspect of the Order a [*646] clear anticompetitive [**48] character. Motorola is to be allowed to apply for licensing to operate SMRS. Although the company's longstanding expertise in the field of mobile radio certainly will not impair its efforts to operate such systems, no reason has been made known to us why it should be of any substantial competitive advantage either. n90

n90 See OTP Report, supra note 18, at 11 (J.A. at 340): "We see no justification for excluding mobile radio equipment manufacturers and suppliers from the operation of mobile communications systems, whether multi-user systems for hire or otherwise."

Motorola's substantial size and financial power is, of course, a factor which could discourage competition, especially if most SMRS (and private dispatch) operators are relatively small. However that potential threat arises from economic power alone and not from any of Motorola's mobile radio-related activities. It is a factor which the Commission must keep under scrutiny, and it may give cause at some point for adoption of more exclusive [**49] licensing policies. Also, it may provide cause for independent antitrust actions. However, on the present record, no such anticompetitive effects have been shown as would constitute a colorable violation of the antitrust component of the public convenience, interest or necessity standard. n91

n91 See note 25 supra.

C. Impact of Non-Common Carrier Status on Aspects of the Order Relating to State Regulation

The 1975 Order pre-empts possible assertion of state entry certification over SMRS. n92 This action appears reasonably necessary in order to create the atmosphere of free entry and competition which the Commission has determined is desirable as a means of maximizing the development of mobile radio technology. n93 Because we have held above that the Commission's treatment of SMRS, from the standpoint of federal law, is within its broad discretion under Title III, it follows that any state regulation inconsistent with the policy adopted may be pre-empted, unless such pre-emption is explicitly [**50] prohibited by statute. Petitioners point to two sections of the Communications Act which they say bar federal pre-

emption by denying any Commission jurisdiction over certain areas regulated by the states.

n92 *51 F.C.C.2d at 974*. The 1974 Order had pre-empted all state regulation of SMRS operations. In limiting the pre-emption to entry certification, the 1975 Order expresses the hope "that states will follow our lead towards a free, competitive environment for SMR systems . . ." but "defer[s] judgment as to any action by the states relating to regulation of other aspects of SMR operations." *Id.*

n93 See *Florida Lime & Avocado Growers, Inc., et al v. Paul*, 373 U.S. 132, 142, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1963).

Section 221(b) of Title 47, U.S.C., denies Commission jurisdiction except as provided by § 301, over "telephone exchange service" which is subject to state regulation. While it appears to us that SMRS are not likely to be significantly engaged in "telephone exchange service," and [**51] further appears highly arguable that the § 301 licensing power includes the power to draw up comprehensive schemes providing the conditions under which licenses will be granted, we do not dispose of this challenge on these grounds. Rather the context of § 221 within the Title dealing with common carriers, and the section's own reference to "telephone companies" and "telephone exchange service," makes clear that its only application is to common carriers. Since we have upheld the Commission's non-common carrier classification of SMRS, § 221(b) has no application here.

Section 152(b) of Title 47, U.S.C., expresses a similar denial of Commission jurisdiction, except as provided by § 301, over radio or wire carriers whose operations are either intrastate, or interstate or foreign only by interconnection with another carrier with whom it has no interlocking control relationship. Reserving the same question set forth above as to the breadth of the § 301 licensing power, and not conceding that SMRS fit [*647]

within the categories of intrastate and interconnection interstate operations to which the section applies, we again rest our holding on other grounds. Under 47 U.S.C. § [**52] 153(h), the term "carrier," as used in § 152(b), is equated with "common carrier." Thus, § 152(b) only has application to common carriers, and our affirmance of the Commission's non-common carrier classification of SMRS vitiates any objection which might rest upon it.

III. Conclusion

The 1974 Order, as modified by the 1975 Order, is upheld.

In affirming the allocation of 40 MHz for development of a cellular system, we are not unaware of substantial anticompetitive effects which may become more apparent as the date for general implementation of the systems draws nearer. In light of the Commission's broad discretion in experimentation and encouragement of the broader use of radio, we conclude that those effects are at present too speculative and distant in time to constitute this part of the Order a breach of discretion. We make no comment upon the possible success of any antitrust actions which may in the future be brought, nor upon possible challenges to Commission actions taken when anticompetitive effects, if any, have become more immediate and predictable.

In affirming the 30 MHz allocation and authorization of SMRS, to be treated in the same way as private operators, [**53] our holding is subject to future challenge should SMRS in practice behave as common carriers. This part of the Order, save the bare allocation of 30 MHz to the private services, which the Commission itself has stated to be severable, n94 will be open to renewed attack if it is later concluded that SMRS are in fact common carriers.

n94 *51 F.C.C.2d at 976*.

So ordered.

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Federal-State Joint Board on)	CC Docket No. 96-45
Universal Service)	
)	
Access Charge Reform,)	
Price Cap Performance Review)	
for Local Exchange Carriers,)	CC Docket Nos. 96-262, 94-1,
Transport Rate Structure)	91-213, 95-72
and Pricing, End User Common)	
Line Charge)	

**FOURTH ORDER ON RECONSIDERATION IN CC DOCKET NO. 96-45,
REPORT AND ORDER IN CC DOCKET NOS. 96-45, 96-262, 94-1, 91-213, 95-72**

Adopted: December 30, 1997

Released: December 30, 1997

By the Commission (Commissioners Ness and Powell issuing separate statements;
Commissioner Furchtgott-Roth dissenting and issuing a statement):

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Telecommunications and Technology Commission also contends that states that have existing subsidy programs may be able to redirect some of their funding to costs that the federal program does not support, such as computers, modems and software, if federal universal service discounts are applied before the deduction of any state subsidy.⁵⁹¹ In its opposition to the Iowa Telecommunications and Technology Commission petition, USTA contends that this request "would appear to suggest that all telecommunications providers subsidize Iowa's state-wide network."⁵⁹²

3. Discussion

196. We conclude that, for services provided to eligible schools and libraries, federal universal service discounts should be based on the price of the service to regular commercial customers or, if lower than the price of the service to regular commercial customers, the competitively bid price offered by the service provider to the school or library that is purchasing eligible services, prior to the application of any state-provided support for schools or libraries. To find otherwise would penalize states that have implemented support programs for schools and libraries by reducing the level of federal support that those schools and libraries would receive. We anticipate that our conclusion will encourage states to implement or expand their own universal service support programs for schools and libraries.

197. Our determination to calculate discounts on the price of a service to eligible schools and libraries prior to the reduction of any state support will not require an adjustment in the \$2.25 billion in annual support that the Commission estimated was necessary to fulfill the statutory obligation to create sufficient universal service support mechanisms for schools and libraries.⁵⁹³ In estimating the level of universal service support needed to serve schools and libraries, the Commission purposefully did not take into consideration state universal service support to schools and libraries.⁵⁹⁴ Thus, our determination to calculate federal universal service support levels on the price of service to schools and libraries prior to the application of any state-provided support should not threaten the sufficiency of the federal support mechanisms for schools and libraries.

198. Finally, we do not agree with USTA that allowing federal support levels to be based upon the price of service to schools and libraries prior to the application of any state-provided support for schools or libraries will force all telecommunications carriers to subsidize

⁵⁹¹ Iowa Telecommunications and Technology Commission petition at 6.

⁵⁹² USTA opposition at 6-7.

⁵⁹³ Order, 12 FCC Rcd at 9054.

⁵⁹⁴ Order, 12 FCC Rcd at 9054-9056.

**Schools and Libraries Corporation
Clients' Commonly Asked Questions
Fourth Order on Reconsideration CC Docket No. 96-45**

Lowest Corresponding Price

Q. 1) How does the FCC define the lowest corresponding price that service providers must offer in response to FCC Form 470 Requests for Services?

A. Service providers must offer eligible schools and libraries prices no higher than the lowest price available to similarly situated non-residential customers for similar services in the same area. Similar services include both contract and tariff prices and services. The FCC affirmed that there is a rebuttable presumption that rates offered by service providers within the last three years are compensatory for purposes of calculating the lowest corresponding price.

Special regulatory subsidies need not be considered by service providers when determining the lowest corresponding price. Providers are not required to match a price offered to a customer under a special regulatory subsidy or that appeared in a contract negotiated under very different conditions. Each situation will be examined on a case-by-case basis to determine whether a particular rate is a special regulatory subsidy or is generally available to the public. [Para. 139-142].

Promotional rates offered for 90 days or less do not have to be included in the determination of the lowest corresponding price. [Para. 143].

If schools, libraries or service providers believe that a particular lowest corresponding price is unfair (schools and libraries believe that the bid price is too high and/or the service provider believes that the price is not compensatory), there is a dispute resolution process. The FCC will review lowest corresponding price issues relating to interstate services and the state regulatory commissions will review such issues with respect to intrastate services. The FCC plans to monitor parties' use of the dispute process and will take corrective action if a pattern of frivolous challenges to the lowest corresponding price is detected. [Para.144].

Wide Area Networks

Q. 13) Are wide area networks eligible for discounts?

A. It depends on whether the network is purchased and constructed by an eligible entity. If so, the costs of the wide area network are not eligible for discounts because they do not meet the definition of services eligible for discount. [Para. 193]. A wide area network leased from a telecommunications carrier, however, may be eligible for discounts as part of telecommunications service. [Footnote 585].

Reflection of State Price Reductions in Calculating the Discounts

Q. 14) If a state provides universal service discounts or other subsidies to schools and libraries for eligible services, how will those funds be reflected in the calculation of discounts to be funded from the federal program?

A. The federal discount will be based on the price of services to regular commercial customers, or if lower than the price of service for regular commercial customers, then the price is computed as though there were no state discount or subsidy. [Para. 196].

Aggregation of Discounts

Q. 15) When multiple entities apply for discounts as a consortium, how will the level of support be determined?

A. Because the overall discount is based on discounts for each entity weighted by the average of the amount for which each individual school or library agrees to