

1997

How Have the Procedural Aspects of the Telecommunications Act of 1996 Worked?

Clinton Miller

Charles H. Carrathers III

Michael Schwarzwald

Rod Johnson

Jill Butler

Follow this and additional works at: <http://scholarship.richmond.edu/jolt>

 Part of the [Communications Law Commons](#)

Recommended Citation

Clinton Miller, Charles H. Carrathers III, Michael Schwarzwald, Rod Johnson & Jill Butler, *How Have the Procedural Aspects of the Telecommunications Act of 1996 Worked?*, 4 Rich. J.L. & Tech 1 (1997).

Available at: <http://scholarship.richmond.edu/jolt/vol4/iss1/3>

This Speech is brought to you for free and open access by UR Scholarship Repository. It has been accepted for inclusion in Richmond Journal of Law and Technology by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.



How Have the Procedural Aspects of the Telecommunications Act of 1996 Worked?

Cite as: The Honorable Clinton Miller, Charles H. Carrathers, III, Michael Schwarzwald, The Honorable Rod Johnson & Jill Butler, *How Have the Procedural Aspects of the Telecommunications Act of 1996 Worked?*, 4 RICH. J. L. & TECH. 1 (Fall 1997), <<http://www.richmond.edu/jolt/v4si/speech1.html>>. **[**]**

Table of Contents:

I. Moderator: The Honorable Clinton Miller

A. The Basic Time Frames Under the Act

B. Appellate Rights in Virginia

II. Charles H. Carrathers, III

III. Michael Schwarzwald

IV. The Honorable Rod Johnson

V. Questions and Comments

VI. Jill Butler

VII. Questions and Comments

I. The Honorable Clinton Miller[*], *Virginia State Corporation Commission*

{1} Good morning. I am Clinton Miller. I'm one of the three members of the Virginia State Corporation Commission and charged with moderating this next panel. I will give you a brief overview before they begin because there may be some people in the room who are not deeply familiar with the procedural aspects of the Telecommunication Act of 1996. **[1]**

{2} Reviewing the spring and summer of 1996, I would admonish all of you to go back and look at some of the material of that period of time to see the great hopes and the great aspirations that some of the Congressmen and some of the regulators had related to the Telecommunications Act of 1996 to see how close we have come to meeting the charge. Congress worked over a long period of time with various interests, and as I like to say, they "patched together" the Telecommunications Act of 1996.^[2]

{3} Signed into law by the President on February 8, 1996, the procedure to implement the Act was to take place within the following six months. The FCC issued its order of August 8 on interconnection; and this Federal Act, in reality, was an overlay of the various state procedures already initiated, and states had to establish rules and procedures to deal with their respective responsibilities under the Act. The short time frame for implementation forced the players to begin operating under the Act before they knew all of the rules of the game.

A. The Basic Time Frames Under the Act

{4} A party may at any time begin negotiations after they have requested interconnection with an ILEC (incumbent local exchange carrier). Any party may ask the state commission to mediate any differences. One hundred thirty-five (135) days after the negotiation request, any party may ask for arbitration by a commission. A state must complete any arbitration within nine months of the time the ILEC receives the request. It is contemplated that the parties would complete their agreement either through negotiation, arbitration, or both. The agreement would then be presented to the public utilities commission; or with a negotiated agreement, the commission must agree, or approve, or reject it within ninety (90) days. For an arbitrated agreement, the commission must approve or reject it within thirty (30) days. If it is not done in those time frames, it is deemed approved. If the state commission doesn't act, the FCC may assume jurisdiction under the Act.

{5} As to the other item, of filing by a Bell Company or any Regional Bell Operating Company (RBOC) of a statement of terms and conditions, the commission must act on the same not later than sixty (60) days after submission unless the RBOC agrees to an extension of time.

B. Appellate Rights in Virginia

{6} Virginia does have a state constitution and it provides for appeal by right to the Virginia Supreme Court. However, this Telecommunications Act^[3] provides for a different appeal mechanism, and that is through a panel of a federal district court for review of any State Corporation Commission holding, and further appellate rights from that panel to the United States Supreme Court. There are many smaller time frames relating to rural designation. No need for us to get into that because of the short time remaining.

{7} The question is, how have these procedural aspects worked? We have with us today a very distinguished panel to give us some insight in this area. I have a brief biography of each, and I will go through those instead of introducing them when they are speaking. I will present the biographies in the order in which they are to go.

{8} The first one is Chuck Carrathers. Charles Carrathers is an attorney specializing in telecommunications law and has represented various telecommunication carriers in contract negotiations and in regulatory proceedings of the state commissions and the FCC. Most recently, he represented GTE, an incumbent local exchange carrier, in mediations and arbitrations arising under the Telecommunications Act of 1996. He is a graduate from Virginia Commonwealth University and the University of Richmond, T.C. Williams School of Law.

{9} Our second panelist on our list is Michael Scharzwalder. Michael is the regional director of competition policy in the law and public policy department in Washington D.C. for MCI Communications Corporation. In this capacity, he is responsible for coordinating and implementing competition policy in the Atlantic Southern Region, comprised of twenty-one (21) states. Prior to joining MCI, he was employed in a variety of capacities at Sprint Corporation in Chicago from 1985 to 1991. Prior to beginning his career in telecommunications, he served as an Ohio State Senator from Columbus for 1977 to 1985 and he received both his undergraduate degree in political science and his J.D. degree from Ohio State University.

{10} I am very glad to have with us someone that I solicited for the panel and that is State of Nebraska Commissioner, Rod Johnson. He graduated from Harvard Nebraska High School and received his Bachelor of Science degree in History and Political Science from Nebraska West Union University. He and his wife, Lisa, have two children. He has been involved in the operation of a family farm located near Harvard. He worked as a legislative aid in 1981 to 1982, prior to his own election as a State Senator in November 1982. He was re-elected to the legislature of Nebraska in 1986 and 1990. He is a member of the National Association of Regulatory Utility Commissioners where he serves on the Committee on Water. Mr. Johnson was elected to the Public Service Commission of Nebraska in November 1992 and was elected chairman in 1996 and 1997.

{11} Jill Butler, our last panelist, is the director for regulatory affairs for Cox Communications, stationed in Hampton Roads, Virginia. She has the responsibility for the regulatory aspects of Cox's entry and operations in telephony for Virginia, Florida, and Louisiana. Prior to working with Cox, Ms. Butler built a similar position in the Time-Warner Communications directing Time-Warner's efforts in the state of Florida. She was on the staff of the Communications Division of the Florida Public Service Commission for twelve (12) years as Bureau Chief of Rates, Policy and Planning for eight of those years. In that role, she directed or participated in every major case that came through the Florida Commission, including divestiture, depooling of toll and access charges intraLATA (Local Access and Transport Area) toll competition, local competition, rate cases, and others. Ms. Butler holds an undergraduate mathematics degree from Florida State University and has pursued graduate work in economics.

{12} So ladies and gentlemen, give a very warm welcome for our panelists. We will begin our panel with Mr. Carrathers.

II. Charles H. Carrathers, III[*]
Attorney at Law, Hunton & Williams

{13} Thank you Judge. We were asked to talk about the different procedures of the Telecommunications Act[4] (Act) and to comment on what different states had been doing to implement the Act's procedures. We were also asked to give our opinions on the good, the bad, and the ugly, and to discuss the commissions that we thought did things well and not so well.

{14} I would like to start out by saying that, without a doubt, the best state commissions working on the Act are Virginia and Nebraska.

{15} When you talk about the Act and you listen to Judge Miller's overview, you of course begin with the Act's negotiation provisions. The parties sit down, they negotiate, and if they cannot agree, they may pursue mediation. Then you go on to what we all know and love, "the arbitration process," assuming, of course, there are disputed issues. Then finally to federal court. Most lawyers who have looked at the Act's federal court provisions and who have tried to draw analogies between this Act and every other federal act see this really unique federal-state relationship, where appeals from the state commissions go straight to the federal courts. We have not seen this process in quite sometime, probably since the Johnson Act.[5]

{16} In addition to those four kinds of procedures that are set forth in the Act (i.e., negotiation, mediation, arbitration, and federal court review), I think that there are two more types of procedures -- in fact one is already in progress -- that will haunt all of us and increase our billable hours. The first type is what I would refer to as the "permanent rate proceedings."

{17} Almost every arbitration GTE was involved with and the arbitrations of many other ILECs (incumbent local exchange carriers) resulted in the setting of interim rates for unbundled network elements and resold services. Almost every commission has decided to post interim rates given the time in which decisions had to be made, and then to institute permanent proceedings.

{18} Currently, there are at least fifteen (15) or sixteen (16) permanent rate proceedings scheduled for this year for just one company. Unlike the arbitrations, there are no preset deadlines for commission decisions; as a result, I think we are going to see that the permanent rate proceedings in 1997 will be like the 1996 arbitration proceedings on steroids &SHY; they will be longer, much more detailed, and many more parties will have an opportunity to look at the issues and examine the cost studies. There will also be a lot more discovery requests. Also, these permanent proceedings will raise their own special issues. For example, what happens when someone wants to appeal those decisions? Where do you go for review when commissions establish bifurcated permanent proceedings to treat resale and unbundled elements in separate dockets?

{19} Finally, the sixth procedural prong is the "dispute resolution" prong. We expect that there will be many dispute resolution proceedings as parties begin to implement the arbitrated agreements. We are now just getting these types of proceedings, which in some cases involve four hundred (400) to six hundred (600) page contracts that have been approved by various state commissions. I think that this [dispute resolution procedure] is probably the next cottage industry for many of us in the room.

{20} In sum we have identified six procedural prongs embodied in or resulting from the Act: (1) negotiation, (2) mediation, (3) arbitration, (4) federal court review, (5) permanent, "follow-on" rate proceedings, and finally, (6) dispute resolution.

{21} Now let me go through a number of those different procedural aspects and talk about some of the major issues that have come up in most of the states.

{22} Let us begin with negotiations, which typically focus on the big money issues. Obviously, the issues presented are: What is your avoided cost discount rate? What is your unbundled network element rate? What should an ILEC be required to unbundle? What is your rate for transport and termination? Finally, the parties will attempt to negotiate a number of technical issues, such as operating systems support and interfacing between CLECs (competitive local exchange carriers) and ILECs.

{23} When the Act was first passed, you would have these tentative negotiations between parties. Indeed, just trying to figure out what the Act meant was an effort in itself. Then trying to sit down with various parties and parse through it and try to fulfill the Act's duties of negotiating all of the terms and conditions in light of rather complex issues and difficult questions. I think, however, we can break down the negotiations prong into three phases.

{24} The first phase is what I would call the "pre-FCC First Report and Order phase." [6] Again, in this phase the parties are trying to identify all these issues that need to be resolved and should be included in an interconnection agreement.

{25} The second phase I would call the "post-FCC First Report and Order negotiation phase," but before any arbitration decision has been rendered by a state public utility commission. I think what happened after the FCC came out with its First Report and Order, which was a couple of hundred pages long and purported to

establish guidelines, was that negotiations were adversely affected. The FCC's Order set forth "proxy" rates for unbundled network elements and services to be made available on resale, and also required local exchange carriers to unbundle a laundry list of network elements. It was such an all-encompassing order from the FCC that some would argue it affected or impaired negotiations.

{26} The question you often heard was, "What is there left to negotiate?" ILECs would sit down with CLECs and say, "Well, let's talk about this rate. Let's talk about access to our billing systems." And CLECs' would say, "Well, let me cite you to section whatever of the FCC's Order, and here is what I want."

{27} Some ILECs believed that the First Report and Order was at odds with the Act itself, which focused on negotiation and mediation, due to the all-encompassing nature of the Order. And as many of us know, the FCC's Order has been appealed to the U.S. Circuit Court of Appeals on a number of issues. The Eighth Circuit^[7] granted an injunction of the FCC's proxy rates and pricing methodologies set forth in the FCC's First Report and Order. We are now awaiting the court's decision on the merits.

{28} The next phase that most commissions are addressing right now is once a commission has issued an order or approved an agreement in the first arbitration for a given ILEC, what is that order's effect on that ILEC's negotiations with subsequent parties? Subsequent parties have claimed that they are entitled to "pick and choose" provisions of previously approved agreements under § 252(i)^[8] of the Act. No one really agrees on what § 252(i)^[9] means, and I am sure what it means will be fleshed out in the Eighth Circuit's opinion.

{29} I do think that negotiations were not and are not as successful as many had hoped. We had dozens of arbitrations -- at least fifty (50) or sixty (60) or so for the company I represent -- throughout the country that raised dozens of issues, including complex pricing cost issues and complex technical issues. Given the time lines under the Act and the time within which the parties and the state commissions had to offer evidence on these issues, review that evidence and resolve the issues, it became an almost impossible task for any commission to undertake. I think that is why we see almost all, or a very high percentage, of the arbitration decisions being interim in nature, at least with respect to the cost and pricing provisions. Now we are coming into the permanent rate proceedings, where we think there will be more time to reflect on the issues.

{30} Turning to the arbitrations, let me try to give you an idea of what has happened throughout the states. It really has run the gamut from A to Z. First, let us look simply at the time that various commissions have established for reviewing these disputes. At one end of the spectrum you have a state commission giving you only one or two days to arbitrate 60 issues. At the other end of the spectrum you have commissions that conduct hearings for three weeks. You see a marked difference in the way the different states have devoted time to the arbitrations. Again, I think that is a function of the time lines that were imposed upon the state commissions by the Act itself.

{31} The second problem is who is going to preside over the arbitrations. In many states, the commission itself heard the arbitrations, but then in a significant number of states, you had either a hearing examiner or a panel involving, in some instances, the commission staff itself and commission counsel; still, other states employed outside arbitrators. I think Nebraska went that route and retained outside arbitrators.

{32} After the arbitrations that state commissions attempted to resolve the issues presented the parties had to submit an agreement for approval. Frequently what happened is that you have this six hundred (600) page agreement that will be submitted with the parties' arbitration package, but the commissions decided only a discrete set of issues, say, forty or maybe sixty (60) issues. After the commission resolved those issues, it said, "All right parties, go back and draft a contract." Well, what happened was that lawyers had different interpretations of the commission's orders. Some would argue, "Well, I think the commission really meant this when they were addressing this issue." Or they would say, "The commission did not address this issue at all." Or, "This issue was not raised and yet it is included in your proposed contract." I do not think it should

be there.

{33} In California, companies went back and forth to one arbitrator about four times. Each time, the arbitrator would attempt to clarify an issue and say, "Well, this is really what I meant. Go back and negotiate again." Then the parties would submit another "agreement" containing conflicting terms.

{34} Yet there were also situations where decisions were being made on issues that were never litigated in the arbitrations. This raises rather interesting procedural issues, which we will not address here, but I think it points to the frustration and complexity of these proceedings and particularly the time lines that Congress imposed upon state commissions.

{35} I am almost at the end of my time, but I just want to take two minutes and talk about federal court proceedings. We should think of all the questions that will be raised there, for example, what is the appropriate standard of review? Again, as I mentioned in the beginning of my comments, this review process is really unprecedented. Most appeals or review of state commission decisions typically take place in a state court, but here state commission decisions are reviewed in federal court.

{36} Well, I am at the end of our time. Let me sum up by stating that the forthcoming permanent rate proceedings are where the most of the work is going to be done. I think the first rush of initial arbitrations is over, and we probably will not see this phase again. I think that everyone who wanted to play in the first phase has played. A lot of the other follow-on companies have hooked themselves onto those initial proceedings by way of § 252(i)[10]. Over the next couple of years, the focus will instead be on the permanent rate proceedings. How those proceedings will be governed and conducted and whether the terms of § 252[11] apply to those proceedings are all issues that we will look forward to addressing. I will now turn it over to the other panelists.

III. Michael Schwarzwald[*]

Regional Executive, Competition Policy, MCI Competition Policy

{37} I am Mike Schwarzwald. The Telecommunications Act of 1996[12] is, I think, the result of the usual process of give and take in a legislature. The Act should be called the Telecommunications Act of 1993, or 1994 or 1995, because there were bills in those congressional sessions that were hotly debated, but never passed. So what passed in 1996 is, frankly, something that has a lot of problems with it, but that is extremely well intended.

{38} As a former legislator, I never wanted the word "tax" to pass my lips. However, a lot of what is going on in the universal service provisions of this Act have to do with taxes, and that is ultimately going to have to be faced. It is not one of our responsibilities here this morning to talk about universal service, but I wanted to make that comment.

{39} I think that in talking about the Telecommunications Act, Congress tried to come up with a scheme to allow people to understand how quickly they wanted competition to occur. In fact they did some crazy things as a result of the desire to create speed in the marketplace for competition. As an example, nine months from the date a request is made for negotiations on a request for interconnect, the process is supposed to be completed. As those of us who have worked in a regulatory environment know, that is a very short time period. The pressure is on the commissions as well as on the individual companies to figure out how to accomplish this task. At MCI we also felt that the idea that those negotiations were actually going to result in any serious issues being resolved was a little bit crazy. This is because people who are monopolists and have a monopoly are being asked to negotiate with people who will come in, theoretically getting good prices, and take away the customers of the monopoly. This does not make a lot of sense. Frankly I think that companies like Bell Atlantic would say they have a duty to the shareholders not to let customers be taken away by these

newcomers.

{40} The question is therefore, why do we have to negotiate with the newcomers and give them good pricing? The answer to that, of course, is that it was very difficult to negotiate with the RBOCs (Regional Bell Operating Companies) . In my responsibilities, I deal with three RBOCs Bell Atlantic, Bell South, and Southwest Bell. Each uses slightly different reasons and tactics for why it cannot negotiate. The bottom line, however, was that not a lot of negotiation actually took place. On some of the more technical issues we were able to negotiate some sort of resolution, but on the big ticket items, obviously the pricing was a particularly a big ticket, not a lot got done.

{41} Now, as soon as the window opened for arbitrations , the one hundred and thirty-five (135) day period that Judge Miller indicated, arbitrations were filed all over the place. Commissions were looking at this Act saying, "Wait a minute. We now have twenty arbitrations filed with the Commission and we have from now until the end of the nine months," which at that point was much too short, "and we are to complete all of these proceedings."

{42} This process really created a monster in the commissions. It also created some problems for the rest of the people, for the companies, involved. For example, we had arbitrations going on in five different states in my region at the same time. So the witnesses needed for one arbitration were also needed in four other places at the same time. We were not able to clone them fast enough so that we could have additional people - the sheep cloning had not actually occurred yet, by the way. So, it was definitely a challenge for us to figure out how to make these appointments and actually have our witnesses understand what state they were in. We did have a witness one time who said he was in one state when actually he was in another state, which did not go over very well with the commission.

{43} The point is that things were really crammed together. The timing was very difficult. The issues that needed to be resolved were big, important issues, and yet, it was very difficult to make the timing match with the proceedings. I say that only to emphasize that we were unhappy that, in a lot of cases, interim rates were set. But we were also well aware of why it happened. There really was not time, and, frankly, at the end of the game we had to appreciate that the commission said, "We are not going to do something that is premature here. We are not going to set permanent rates that are challengeable, or that are not fair." So they extended the time periods simply by saying, "We going to set interim rates now and deal with permanent rates later on." There is an argument that under the Act that you cannot do that. Frankly, we have appealed it in a couple of states, on the basis that you cannot do that. But I understand the practical necessity of what occurred and the reasons why it happened.

{44} Let me mention mediation, as well as negotiation, before I go further into arbitration. MCI tried mediation a couple of times in a couple of Ameritech states, but did not use it very much after that. Mediation was not all that helpful because the parties were pretty intractable in their opinions on the big ticket items. The other thing that happened when you moved into the arbitrations is that there really was not much guidance in the Act. This is another crazy thing that Congress did, they said, "Hey, at the end of this negotiations period, when you file for arbitration, take your resolved issues and take the positions of the parties on the unresolved issues and have the Commission arbitrate." It did not say what an arbitration was supposed to look like. It did not say whether it was a contested proceeding. It did not say anything about what form the procedure was to take.

{45} So as Chuck Carrathers pointed out, in Texas all three of the commissioners sat for three weeks and listened to all of the testimony. Frankly it turned out to be a very good way to do it. The commissioners attended the hearings; they knew exactly what the issues were; and they had an ALJ in the room to help be traffic cop and run the meetings. It went very well. Likewise in other states around my region, Virginia and Florida, an ALJ took the testimony and actually ran the proceedings. In some states, such as Nebraska and

New Jersey, they appointed arbitrators. Unfortunately in New Jersey they appointed an arbitrator who was a retired judge. The judge, frankly, was without a clue as to what was going on. You really could not blame him. He had never had an telecommunications background and had never been involved at all in the industry. Trying to learn about local telecommunications is like trying to learn the tax code and regulations from scratch. He just did not have the ability to do that. The solution was, I think, very fortunate for everyone involved. New Jersey hired a consultant and the arbitrator worked closely with the commission in making his rulings. The bottom line was they got through that proceeding. If the Act had given some more guidance, I think that all of these proceedings could have been a little more uniform.

{46} We could talk about the substance of the proceedings, but that is not really our assignment. Suffice it to say that the rulings were different in different states. From an MCI perspective, we felt some rulings were very good, some not so good. The appeals process was also interesting. As Chuck Carrathers mentioned, the thing about the appeal process is that, again, Congress did something kind of crazy. All service commission decisions in most states are appealable to the state courts. The Act explicitly states that no state court can hear an appeal of the arbitration decision. It says that the only place you can go to is federal court. So people began calling those proceedings appeals. But in a federal district court, the action is not an appeal. You do not appeal in a federal district court. That is a court of original jurisdiction, so we have started calling them challenges, just to distinguish between something that is a real appeal and a challenge which is a filing of a petition in a federal district court.

{47} These are all little niceties that the Act causes you to get into because the Act itself does these strange things with respect to how the proceedings are supposed to work. So we decide after an arbitration decision that we want to appeal some issues. Our legal thought, collectively at MCI, is that you have to have a final contract. That is, a final order that is then merged into an agreement that is approved by the parties and is then approved by the commission. There are others who do not agree with that line of thinking, but that is the way we have looked at it. So the question is, how do we get a contract out of this? As many of you know, the commissions have nine months to decide. In many cases if not all, they decided the issues that they felt were appropriate to decide in the nine months.

{48} There is a also loophole in the Act. Although the Act does say that once the contract is submitted to the Commission, they have 30 days within which to approve it, or it is deemed approved, the Act does not say how long you have to prepare the contract to be submitted to the commission. There are those who would argue that you have to do it immediately. But the Act does not say anything like that. The Act says when you want your contract approved, you submit it and the commission has 30 days to approve it.

{49} So we have been struggling with how to get these contracts finished. To be candid, it has been difficult all across the country. It has been difficult because of some of the reasons that Chuck Carrathers mentioned: parties disagreeing over what the order says, disagreeing over what the order meant, and having difficulty reaching final negotiated language on various topics. We have even initiated something called "mediation-plus," which was an attempt to involve the commission staffs of our states in the discussion and negotiations in order to resolve as many issues as possible.

{50} Actually, Virginia is one of the places where we were able to have some real commitment to that process. I think we have resolved a lot of issues as a result of having gone through that process with Virginia's staff. We had some interest in a similar process in both Maryland and Texas. The bottom line, however, is that there have been a lot of issues. For example, MCI filed 500 issues for arbitration. A number of the commissions decided that they did not want to decide 500 issues. They thought that was too many. And frankly they are right. A lot of those issues ought to be resolved through negotiation, but as I say, we have a difficult time getting the negotiations to wrap-up these issues.

{51} A lot of you have probably heard of something called Operational Support Systems (OSS) by now. This

is the myriad of issues surrounding pre-ordering provisioning maintenance repair, including such things as all the electronic interfaces necessary for billing, etc. This has been one of the more difficult areas to get resolved, because we want fast, efficient systems and, frankly, they are not in place in a lot of the BOCs. We are struggling to make sure our systems are in place so that we can have the interactive systems with the BOCs. OSS has been a subject we have been trying to resolve in all of these states. It only lasts a couple of months, and we are getting much closer than we had been. We believe that within the next several months, these contracts will be completed. We will be able to appeal if that is what we want, or we will be able to implement, and that is really the issue I want to close with.

{52} It is hard to believe that the first year of the Telecommunications Act has passed, although the frenzy of activity was nothing short of amazing to everybody. Now, we have come to the point where it looks like the contract is going to get finished. It looks like we are going to have some appealable contracts and then the question of implementation and enforcement comes up. We have everything written down in six to seven hundred pages of contract, and now we have to make those things be implemented. Implementing those provisions is going to be a major problem, not necessarily because of good faith, but really because of misunderstandings about how to do it and what the words actually mean. Since we do not have the systems to do these things (i.e., implementation and enforcement of contract terms), the commissions will have to see our smiling faces back in front of them. On a number of occasions they will see both parties to these agreements trying to figure out how to get them enforced and what they really mean. So I think the Lawyers' Full Employment Act of 1996 will continue into 1997, 1998, or 1999, as we try to figure out what exactly what these provisions and these contracts mean, and whether they comply with the Act. Really, these agreements are what Congress intended. You hear a lot of Congressional people, Senators and so forth, saying, "This is not what we intended." Well, if you intended something else, you should have written something else, because the Telecommunications Act has been difficult, at best, to decipher.

{53} The Act gave us a road map, but the road map was not complete with all the side roads and all the other pieces that help make the map. Those pieces are being filled in, and I think we will have competition in the local loop for the local exchange businesses. Ultimately the country will be better for that. MCI has been through monopoly break-up before, as you all know. We believe that we will be one of the companies still standing at the end of all of this.

IV. The Honorable Rod Johnson[*] ***Chairman, Nebraska Public Service Commission***

{54} I agree with the statements that Chuck and Mike have made here today as they relate to the timelines. They have been very strenuous on us. Especially, for commissions like Nebraska which are very small. What I would like to do is digress for moment to give you a perspective of what Nebraska is like.

{55} We are a state of about 1.6 million people and approximately 77 thousand square miles of territory. We have a commission staff made up of nine individuals and one attorney. This flood of arbitrations, certificates of public convenience, and necessity have really taxed our staff to the limit. Quite frankly, we have been trying to meet the demands that the CLECs have been bringing in, wanting to get into the competition. We can start competing and winning the interconnection agreements approved by the commission, and therefore, we have been scrambling as best we can to deal with that. As it has been mentioned, there have been essentially four phases in this process.

{56} In the negotiation phase, we have reached two voluntary agreements. Although neither have been approved by the commission, they are relatively new and minor in the scheme of things. We have had no mediation *per se* in Nebraska. Everything has essentially gone to arbitration which brings me to why I am here: to discuss the reasons Nebraska chose to use outside arbitrators as opposed to commissioners or our present staff. Early in the process, we decided that it was important to understand what we are doing and we

felt we did not have the resources or technical expertise on staff to really understand some of these technical issues. We also felt that it might be better to look at an outside third party to serve as an arbitrator in these issues.

{57} It is interesting that Mike brought up the fact that there was a retired judge at one of the arbitrations. We felt that the same problem happened in Nebraska where we used a retired judge and got the same result. He was simply overwhelmed by the technicalities of the matters and really struggled. We are still struggling with that arbitration, although he did the best he could do under the circumstances. But, that is the pitfall of using arbitrators. On the other hand, we have used some very good arbitrators for some of our cases. Two examples that I can think of are deals with US West-West Wireless and USWest-AT&T.

{58} We have had some interesting results. What we generally do is allow both parties to come forward, bring their concerns or their arguments about why they support the arbitration agreement, and raise the points that they want the commission to review. Then we ask the arbitrator to come forward if he or she wishes to make comments on the decision. We have had complaints in Nebraska in at least two cases.

{59} One such complaint occurs when the arbitrator has gone beyond the issues that were raised on the record. In those cases, we have had to remand the issues back to the arbitrators and essentially say, "Look, you base your decision on these interconnection rules based on the record before you. We are not going to go into these areas, particularly pricing, at this time." We have a cost docket pending.

{60} Their concern (particularly the ILEC who said the arbitrators went beyond what we agreed) was that due process had not been served. This is an area where we have struggled. But, we have also had arbitrators who have said, when we have asked them why they did not look into that matter, "I did not feel like I had the authority to go into that area." So, as a commission, we sit down when we get the results from the arbitrator and go through them piece by piece, looking at the arguments that, for example, AT&T will present. We look at what the arbitrator has written on that matter. At that time we either agree or disagree based upon that and what we feel is right for the consumers of Nebraska.

{61} Is it the right way to go? To be honest with you, I am not sure. As we work our way through the very technical issues that Chuck presented in the manual, I think that the commissioners are becoming more comfortable. Maybe to a point where we will follow the example that the Virginia Commission is following which is where we will be actively either serving as the overseers of the arbitration or at least as participants sitting in the room. We were not actually present at the arbitration hearings. We took a hands-off approach. I guess at this point, we have come to find out that maybe there was a need for us to be more involved. Particularly in understanding some of the more technical issues that were brought forward by the companies.

{62} We have certificated a number of companies in Nebraska. AT&T has state-wide authority. I think the six remaining companies that we have certificated in Nebraska have restricted their applications down to essentially the USWest, GTE, and Sprint territories in Nebraska primarily for ease of access into Nebraska. AT&T's application took several days to process. You have to remember, Nebraska is predominantly dominated by USWest and Alliance which is our second largest company. GTE, Sprint and Great Plains cover about 95% of all the access lines in Nebraska. There are essentially five companies that serve the entire state. There are another 37 smaller companies that are out there, but obviously competition in those areas does not seem to be coming any time soon.

{63} An issue that has not come up yet which is one I hear almost every week, particularly from the smaller companies is, "How is my rural exemption standing today?" They are always worried that in some way or another the rural exemption is magically going to disappear.

V. Questions and Comments:

{64} **Audience Question:** I wanted to ask, does the Act contain any provision to fund this mandate for increased cost of state regulatory affairs? This is certainly an increase in the state regulatory function. Is there anything to pay for that?

{65} **Johnson:** We are not a cash funded agency. Agencies receive our funds from the appropriation of our state legislature. What the state legislature does not understand, they do not fund. Having been a state senator for 10 years, I know this to be true. We have been before the appropriations committee on a number of occasions and asked for additional staff. At this point, they are allowing us one additional staff person: essentially an administrative assistant position. Because of the technical nature of the issue and its breadth, you may have about 49 state senators in the room for the debate on some of these bills. Two or three will talk about the bill, because nobody else understands what it means. I am unaware of any federal funds that we will receive. Since our state, like most states, is trying to pull the line on spending, we are not seeing any rapid relief from our state legislature.

{66} **Audience Question:** Seeing this as kind of a new legislation, where the federal government tends to take its administrative costs and give them away with this unfunded mandate, I would suppose that in the future the state regulatory agencies would want to get together on that. Perhaps they will raise the concerns that they do not want to go to their taxpayers and to their constituents seeking more funds.

{67} **Johnson:** I would like to say on the arbitration side, as in the USWest-AT&T arbitrations going on in Nebraska, I know the last cost estimate I received or heard of relating to the arbitrator's fees, is going to be close to \$500,000 when that arbitration is finished. It is a costly process to go through and I think Mike was talking about companies considering picking and choosing from other arbitrations that have already been resolved. I think that is going to happen very often in Nebraska. Just based upon what some of you have seen on the AT&T-USWest arbitration. The timelines are very tight for the commissions. In Nebraska, for example, we are stressed to the limit in trying to meet some of these timelines, process peoples' applications, get the interconnection agreements back from the arbitrators, do our review as commissions, potentially remand those back to the arbiter if we need to, and hopefully get them approved by the commission. So, timelines are tight and we talk to the arbitrators, who always would like to have more time. Talking to the CLECs, they always like to have it done yesterday.

{68} We do have, interestingly enough, a group of the very small telephone companies in Nebraska that formed a new company called NTT which is going to be a competitive exchange carrier. They have basically set up a corporation which will start competing with the idea that they are going to invest in the company but that they are not actually competing out of their own local exchange. Thus, I think, preserving their rural exemptions so that they do not jeopardize them and cause a great division within the Nebraska Telephone Association and the Nebraska Independent Telephone Association. These two organizations are dissolving because there is great disagreement over whether or not they should be pursuing this particular application. There is some wide debate within the Nebraska Telephone Association between USWest and some of the smaller companies that this is war between the companies that have, in the past, worked somewhat harmoniously together and now they find themselves to be competitors.

{69} Nebraska also has a unique rate setting structure. In 1985, the state legislature approved an incentive based rate regulation process, where companies can raise their rates (the larger companies up to 10% every twelve months and the smaller companies up to 30%), without rate review by the state commission. That has been in effect for eleven years now and has never been used, primarily because there was not the need to change rates.

{70} We hear the term "re-balancing" a lot at the Commission. There are more rate cases being filed in Nebraska than a Texas tornado right now because people are coming in saying we have got to re-balance our rates to get ready for competition. We all know that our present residential rates are below cost. We have got to get those up, but everybody seems to about the 10% or 30% level, which the only way then that the public

can contest the rates is by petition. A petition forces the public to go forward and the Commissions to look at those, and if there is a percentage level of a number of customers that have filled out that petition, it gets reviewed. We have had three companies out in '42 that have actually bumped over those barriers and we have been going through in fact we have two others pending to look at those rates, but rates in Nebraska are as low as \$4 a month local rates to \$5.35, so it depends.

{71} I would also like to talk about another barrier to entry issue. We are a publicly owned utility company in a state where the companies are publicly owned. There is no investor owned electric company in Nebraska. The electric companies in Nebraska, at least one, NPPD, have built a shield wire on top of the transmission lines a shield wire protect them from lightening. Fiber optics are also in that shield wire: 200% more capacity than they need. They have told us that they are not planning to use that capacity for only their own public use. They have just started initiating pilot projects with community colleges and libraries to provide transmission of information. The telephone association is pulling its hair out to get the legislature and the Commission to stop this process. Here, we have the issue of a public entity getting into the private business, as well as the issues of barriers to entry. Should they be allowed to do this? We have said, "You could come and compete but we feel that it is important for you to get a certificate at least." They respond by saying that we are a public entity so we do not need a public certificate. So goes the ongoing battle. Our Attorney General's office is involved in this, as well as the state legislature, so there is a lot going on in this particular area.

{72} The final point I would like to make is, "What does all this mean to the Nebraska consumer?" Initially, it looks like we are seeing higher residential rates as rate balancing takes place. As opposition comes in, particularly in the Omaha metro area, you may see those rates go back down, or at least stabilize. In the short term, it looks like our competition is not going to come very quickly. I think there are going to be a lot of appeals from the decisions we make. GTE has already appealed in Nebraska. We anticipate that as hard and as fast as we work, there is still the appellate process so we are not sure how quickly competition will actually take place. But at least we will try to get the job done as quickly as we can with the personnel and the expertise we have. Eventually, we hope to carry out the wish of Congress, which is to provide people with competitor choice, competitive pricing, and competitive services that they do not have now. Thank you.

VI. Jill Butler[*]

Director of Regulatory Affairs, Cox Communications, Inc.

{73} Cox is rolling out telephony in nine states. Those are our plans right now and if we want to continue to do business in these states, any of my remarks today are going to be anonymous as to states, especially if they are negative. So, if you can figure out what I am talking about, that is your conclusion, but it did not come from me.

{74} Some of the process issues that I have seen roll out have really been indicative of the general way that commissions do business. The requirements that the state commission took on or had imposed upon them as a result of the Act really did not leave the commissions a lot of time to set up a separate set of rules for dealing with arbitration. It was almost like the requirements were coming as fast as the commissions could deal with them, and the commissions had to quickly figure out a way to handle those requirements. I think, in general, state commissions adopted whatever procedures they already had in place for handling petitions on an accelerated basis because of time frames. Cox is committed to being a premiere provider of telecommunications service for businesses and residents, and it is a simple fact that the company is rolling out in nine states and all nine states are working from the same pool of dollars to fund that effort. So there is a bit of competition inside the company for those dollars, and the company is going to use the pool that it has strategically because there is just not enough to do everything that you want to do all at the same time. We are making our investments in states in which, quite frankly, we think we can do business. The regulatory arena has a great impact on that.

{75} I want to remark on the funding question that was asked from the state commission's perspective. I worked in Florida for quite a while. In 1995, the Florida legislature made some steps toward having local competition before the Federal Act. Part of the legislature's reasoning was that with competition you would need less regulation. The result was that the legislature, over the next several years, funded fewer positions for dealing with telephony. It is now a real challenge for the commission to figure out how to get everything done. In addition, the work load has obviously increased incredibly.

{76} Let me discuss good faith negotiation. Mike talked about how perverse this whole process is - a process where you could expect an incumbent who has 100% of the market to negotiate on terms that would allow someone else to come and take away that market. It just does not make any sense. We found that the carrot of authority for the RBOCs has had a pretty important impact on their willingness to actually sit down and do a deal with us. Companies that do not have such incentive have been a little more difficult to deal with, and with all due respect to Mr. Carrathers here, GTE has been a good example of a bad apple.

{77} Here in Virginia, Cox was surprised and a bit appalled at the post script that GTE added to the signature page of our interconnection agreement which we crafted after going through arbitration at the Commission. I am going to read you the language. What happened was that we signed the deal, sent it over to GTE for them to sign it and they sent it back with a little footnote:

{78} GTE South, Inc. does not consent to this purported agreement which does not comply with Federal Telecommunication Act of 1996 and has not authorized any of its representatives to consent to it. The signature of a GTE representative has been placed on this document only under the duress of an order of the State Corporation Commission of Virginia requiring the filing of this purported agreement.[\[13\]](#)

{79} Although mediation is an option available in the Act, Cox has not requested mediation in any state. The time tables that are mandated by the Act tend to preclude mediation at this stage of the game. I think as we get further along, very specific incidents of implementing the provisions of the interconnection agreement will lend themselves to mediation. The breadth of the issues and the technical nature of the issues have, I think, precluded, mediation up to now. I do not know whether MCI has mediated in any states.

{80} We just do not see mediation as vital to this phase of the game. I think as we get down the road, it will make more sense. So where we end up is in arbitration, and what we have found to work well is to have the commissioners themselves sit in on the arbitration process. This has worked in Virginia. Even if there is an ALJ who is writing a recommendation to the commissioners, having the commissioners themselves there helps for a few reasons. One, it eliminates the filter. You are talking about a lot of information -- very technical information. The commissioners need to be able to have the opportunity to ask questions so they are sure that they understand the information. By cooperating in this manner, the parties have a chance to clarify any misconceptions.

{81} When you get into cases, a lot of state commissions, in order to handle the workload, have combined arbitration requests like MCI-AT&T and Cox in one case with Bell Atlantic. This has happened here in Virginia. In such situations, you get each new entrant coming in with a little bit of different slant on what they are requesting because their business plans are different. We have found it to be very helpful to have the commissioners to be able to hear and weigh those differences.

{82} I wanted to make one comment on a process that I have seen a couple of commissions use: the use of panels of witnesses. This is my opinion, not Cox's opinion. In order to get the cases accomplished quickly, commissions put witnesses on a panel of what appear to be people with a like point of view. I think the idea behind this method is that you do not have to listen to the same thing five times, which is crazy, and also you may have a freer exchange of ideas. My experience has been that when people are trying to get a point across *and* fill in a record, it is really hard to get a free exchange of ideas. What people are actually doing is standing

by what their positions are and not freely exchanging ideas.

{83} When I was on the staff of the Florida Commission, we would do workshops to try not only to educate ourselves but also to see whether parties might be able to work things out. I can not tell you how many times I came away from those workshops feeling very frustrated because everyone got up and said what their company's position was and that was the end of it. There was just not a free exchange of ideas, so panels have not been as successful as they might appear that they would be when you start them up. The other part of it is that new entrants like MCI may have a different strategy for entering the market than say Cox does and so different parts of interconnection are more important to one new entrant than to another. For example, to a facilities-based provider such as Cox, publication is a really big deal while resale is not. Because of this difference, it is important to hear from each one.

{84} Everyone has talked about the stresses and timetables. I do not think that there is any reason for me to go beyond that. One thing that we as a new entrant can ask from a commission is the speedy resolution of these issues. This means that the commissioners have I guess about four and half months under the table that was laid out by the Act. From one hundred sixty days from when someone files an arbitration request to about nine months and we really like it if it is less than that. We like to get this thing finished as quickly as possible and the Virginia commission has been great about having a very short turnaround from the point of hearing to making a decision.

{85} The timeliness of the decisions is going to continue to be a big issue. I expect that what is going to happen as we roll on in implementing these interconnection agreements is that we are going to run into situations where there will be a dispute as to what the agreement says. What will happen is that we are going to come to the commissions and say, "Hey we need your help on this," or one of the parties may do some things that look they are in bad faith to another party and a complaint will be filed. At least from a new entrant's perspective, we are out there trying to convince our customers that we are worthy of their business, and we need to do an excellent job. Anything that occurs to make the service that we provide to our customers less than excellent has a very bad effect on our future ability to get new customer. A speedy resolution of complaints is going to be really important for us in the future, even more so than it is with arbitrations now.

{86} My experience in some of our states is that it has taken over a year to get certified even though our arbitration goes through quickly. That has been a strange thing. In addition, in one of the states where the public service commission does not regulate cable, certificates have gotten held up because a commissioner was unhappy with our cable. There are all kinds of ways to make things slow down.

{87} The next step beyond arbitration is the permanent pricing docket. We have that going on in Virginia right now. This docket is almost more important, in the long term, than the arbitration cases because it results in the prices that we are going to be paying for a long time to come. We want to have an opportunity to participate in that process. You would think that it would be a very reasonable thing in a permanent pricing case to have anyone join who was affected by that case, but that is not what happens. In one of the states in which we are doing business, the commission put into its rules the results of one arbitration decision in which nobody but the two parties involved were allowed to participate. We are in the process right now of filing an appeal for those rules.

{88} The RBOC entry into the long distance business from a competitor perspective is not a big issue for a company like Cox which is largely a local company. How it is a big deal to us is that I looked at the 271 proceeding as our last chance to make sure that the incumbent local exchange company is behaving itself - is creating an atmosphere in which competition can occur. I look at the companies that already have the authority to do long distance business and their behavior in interconnection negotiations. I see that after the RBOCs have long distance authorities, we are going to have a lot less ability to affect how congenial they are

in dealing with us.

{89} So the issues that are most important to a company like Cox are speedy resolution of issues that we need help with at the commission and also the ability to participate in the process that sets the long term rates.

VII. Questions and Comments:

{90} **Audience Question:** Fifteen-year sunset agreements. These agreements are going to be around for a long time. On the other hand some seem to be pushing for the the creation of new entry fees, employment, facilities, and technologies, and they seem to be saying that the interconnection part is just some means to jump start competition. From what I have heard this morning, it sounds like the panel would agree with Dean Krattenmaker that interconnection agreements are very important and will be around a while. Any comments from the panel as to who may be right, or was Congress completely misled?

{91} **Schwarzwalder:** Actually one of the ironies of this whole situation is that it took about eleven years for the long distance industries to be declared competitive by Judge Green. After the modified final judgment, enough market shares were gained by the competitors that AT&T had to turn loose and the industry was basically deregulated. The thing that is really interesting about this local exchange business is that you have a business where you have to build infrastructure, more to have the technology through PCS or Cellular which is just coming but not quite here yet, in order to provide service. And a much heavier investment in infrastructure is a difficult thing to do. Yet it is assumed that all of this is going to be competitive in a year, two years, or three years. Frankly I think Congress and the general public has been misled on that point. I do not think you can have fully competitive local exchange industry in anything short of five, six, seven, or eight years.

{92} **Audience Question:** Has anyone told Congress that?

{93} **Johnson:** Congress is banging the drum of lower prices, and understandably so. As a former politician I understand that there are constituents who do not know diddily about all this arbitration stuff that is going on. What they are really looking for is a result of lower prices. So that is what is driving the political train that we are on. The problem is it is a difficult challenge to try to create a competitive market place in the local exchange environment. So I think it is going to take years.

{94} **Carathers:** I have a different take on it. I think this idea of facilities-based competition goes hand in hand with the rates that established unbundled elements and facilities. The CLEC can purchase unbundled elements from ILECs at prices that are "forward looking" - less than the actual cost. If this is less than the cost for the CLEC to build, then any reasonable businessman or businesswoman is not going to go out and invest; they are going to purchase. There is one example that comes to life. Companies were building a conduit to extend a conduit line to the university. It is expensive to get in there and dig and do the trench work. It is not that expensive to lay the line, but the labor is expensive. They did a write-up on the project and it worked out to be a couple of hundred dollars a foot. The CLEC sits and says, "Wait a minute. I can either pay a couple of hundred dollars a foot or give them what I think is going to happen in the interconnection world. I can let you, the ILEC, go ahead and lay it, and I would come and require you to put my facilities in there at a fraction of the cost." So that is the ILEC propaganda spin on it. I think there are some facts that support that viewpoint.

{95} **Schwartzwalder:** Briefly let me say that we have been somewhat disappointed with the loop rates that we have been getting around the countryside. Doing a cost analysis of our own, it is obvious to see that if we cannot make any money in the business, and if we cannot, it is a challenge with the loop rates that we have in many states.

{96} **Audience Question:** Does the Act spell out the standard of review in federal court in reviewing an approved state agreement or is it silent? Have any of these actions gone up the food chain enough for there to be any district court to say what its review standard is?

{97} **Schwarzwalder:** As a matter of fact, to my knowledge, we have filed four appeals and we have had absolutely no action on any of those. So the answer is no.

{98} **Carathers:** It is interesting that the access that the federal court has to look into the agreement depends upon whether is it an arbitrated decision or if it is a negotiated one. Certain standards apply under the Act, but it does not tell you how the court gets there. This is the tricky part.

{99} Well, thank you very much.

[*] The Honorable Clinton Miller of the Virginia State Corporation Commission was a member of the Virginia House of Delegates from 1972 until 1995. Prior to practicing law and serving as Commonwealth's Attorney for Shenandoah County, he was involved in productions for WTOP Television and WMAL Television in Washington. Mr. Miller has served on the board of directors for communications companies located in Virginia. He is a graduate of the American University and Washington and Lee University Law School.

[*] Charles H. Carrathers, III is an partner with Hunton & Williams whose practice specializes in Telecommunications Law. He has represented various telecommunications carriers in contract negotiations and in regulatory proceedings before state commissions and the Federal Communications Commission. Most recently, Mr. Carrathers represented the GTE-affiliated incumbent local exchange carriers in negotiations, mediations and arbitrations arising under the Telecommunications Act of 1996. Mr. Carrathers is a graduate of Virginia Commonwealth University and the T.C. Williams School of Law, University of Richmond.

[*] Michael Schwarzwalder is the regional director of competition policy in the law and public policy department in Washington D.C. for MCI Communications Corporation. He received his undergraduate degree and his law degree from Ohio State University.

[*] The Honorable Rod Johnson is Chairman of the Nebraska Public Service Commission.

[*] Jill Butler is the director for regulatory affairs for Cox Communications, stationed in Hampton Roads, Virginia.

[**] **NOTE:** All endnote citations in this article follow the conventions appropriate to the edition of THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION that was in effect at the time of publication. When citing to this article, please use the format required by the Seventeenth Edition of THE BLUEBOOK, provided below for your convenience.

The Honorable Clinton Miller, Charles H. Carrathers, III, Michael Schwarzwalder, The Honorable Rod Johnson & Jill Butler, *How Have the Procedural Aspects of the Telecommunications Act of 1996 Worked?*, 4 RICH. J. L. & TECH. 1 (Fall 1997), at <http://www.richmond.edu/jolt/v4si/speech1.html>.

[1] Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 86 (codified as amended in scattered sections of 47 U.S.C.).

[2] *Id.*

[3] *Id.*

[4] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

[5] Johnson Act (Injunctions Affecting Utility Rates), ch. 283, 48 Stat. 775 (1934) (codified as amended at 28 U.S.C. §§ 1331-32, 1341-42, 1345, 1354 (1994)).

[6] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996).

[7] Iowa Utilities Bd. v. FCC, 109 F.3d 418 (8th Cir. 1996).

[8] 47 U.S.C.A. § 252(i) (West Supp. 1997).

[9] *Id.*

[10] *Id.*

[11] 47 U.S.C.A. § 252 (West Supp. 1997).

[12] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

[13] Roanoke, Va., Telecommunications Regulatory Ordinance (August 26, 1996).