Telephone

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Background

Invented by Alexander Graham Bell in 1876, the original telephone was described as a mere improvement upon the magnetic telegraph, which sent data as fast as electrons could move along wires. Unlike telegraph companies, however, telephone companies do not receive, transmit, or deliver messages in the ordinary sense of these terms. Instead, telephone companies furnish customers with networks, facilities, and devices through which conversations can take place over long distances.

The telephone-services sector began to develop in the late nineteenth century when several PATENTS registered by Bell began to expire, while independent local telephone companies began to proliferate in major cities. At first, telephone service in the United States was predominantly local because satisfactory technology for transmitting long-distance calls did not exist. However, American telephony witnessed an explosion in technological innovations during the early twentieth century, including the invention of a "vacuum tube," which allowed phone conversations to be transmitted over distances of several miles.

The Bell telephone companies—under the parentage of the American Telephone and Telegraph Company (AT&T)—patented and deployed this technology across state lines. But they typically refused to allow independent telephone companies to interconnect with their long-distance service. As a result of this handicap and the intense price competition with the Bell companies, many independent telephone service providers chose to sell their companies to AT&T. By the advent of the 1930s, AT&T controlled approximately 80% of local exchange lines in the United States. These practices placed AT&T in the cross hairs of antitrust authorities, who convinced Congress of the need for regulation in this area.

Federal Regulation of Telephone Companies and Telephone Services

The Communications Act of 1934

After conducting a series of hearings on AT&T's growing dominance over American telephoning, Congress determined that AT&T and its competitors were public service CORPORATIONS whose facilities and instruments were devoted to public use, which made them subject to two kinds of legislative control, state and federal. States may regulate the transmission of telephone communications wholly within state BOUNDARIES, Congress said, so long as such intrastate communications do not substantially affect interstate commerce. Once a telephone communication crosses state boundaries or substantially affects commerce in more than one state, Congress observed, the Commerce Clause of the U.S. Constitution gives only federal authorities the power to regulate such interstate communications. U.S.C.A.Const.Art. I, section 8,

clause 3. Congress formalized these findings in the Communications Act of 1934.

The Communications Act of 1934 establishes a dual system of state and federal regulation for telecommunications services. 47 USCA sections 151 et seq. The act grants the FCC broad authority, but also clearly delineates a strict separation between inter-state and intrastate JURISDICTION, and denies the FCC authority over most intrastate communications. The act also establishes the Federal-State Communications Joint Board to hear disputes that involve questions concerning both interstate and intrastate telephone transmissions, and any other telecommunications dispute deemed to involve a mixture of state and federal concerns.

In determining whether the FCC has jurisdiction to regulate a particular telephone service provider, the focus is on the nature of the service at issue, since the FCC may regulate telephone services only to the extent of their interstate use. However, purely intrastate telephone facilities and services that are used to complete even a single interstate call can fall under FCC jurisdiction depending on the nature of that phone call. Thus, the FCC has authority to regulate use of an intrastate call made on a Wide Area Telecommunications Service (WATS) when that service is used as part of an interstate communications network. National Association of Regulatory Utility Commissioners v. F.C.C., 746 F.2d 1492 (D.C. Cir. 1984). Similarly, where a telephone company has all of its facilities within one state and solely engages in intrastate telephone communication except for its physical connection with carriers doing business in other states, it is still subject to federal regulation under the Communications Act as a connecting carrier. At the same time, the FCC does not have authority to order connecting carriers to continue interconnection agreements with interstate telecommunication service providers. Accordingly, connecting carriers are free to remove their interconnection with any interstate carrier, and thereby remove themselves completely from jurisdiction of the FCC.

Recent Amendments to the Communications Act of 1934

Telephone companies that are subject to federal jurisdiction under the Communications Act are also subject to any other applicable laws, regulations, or rules enacted by Congress or promulgated by a federal agency. On three occasions during the 1990s Congress amended the Communications Act of 1934, updating its provisions in light of technological developments and market conditions. In 1991 Congress passed the Telephone CONSUMER PROTECTION Act (TCPA) to give Americans greater freedom at home from unsolicited commercial advertisements. 47 U.S.C.A. section 227. The TCPA generally imposes restrictions on unsolicited advertisements made through automatic telephone dialing systems, artificial or prerecorded voice messages, and telephone facsimile machines.

The FCC began fleshing out these restrictions when it promulgated a regulation requiring telemarketers to create do-not-call lists for consumers who ask not to receive further SOLICITATION. The FCC also limited the hours during which telemarketers may call a consumer's residence (not prior to 8 a.m. or after 9 p.m.). Additionally, the FCC issued a rule flatly prohibiting the transmission of unsolicited advertisements via telephone facsimile machines. Finally, the FCC published a regulation requiring all artificial or prerecorded messages delivered by an auto-dialer to clearly identify the caller at the beginning of the message.

In 1992 Congress again amended the Communications Act of 1934, when it passed the Telephone Disclosure and Dispute Resolution Act (TDDRA). 15 U.S.C.A. section 5701. The TDDRA regulates how telephone carriers may offer pay-per-call services (e.g., 900 numbers), and prohibits unfair and deceptive practices undertaken by telephone carriers in connection with pay-per-call services, including misleading and FRAUDULENT billing and collection practices.

Specifically, the TDDRA provides that any inter-state telephone service, other than a telephone company directory assistance service, that charges consumers for information or entertainment must be provided

through a 900 number unless it is offered under what is termed a "pre-subscription or comparable arrangement." That pre-subscription or comparable arrangement may be a preexisting contract by which the caller has "subscribed" to the information or entertainment service. The arrangement may also be made through the caller's authorization to bill an information or entertainment service call to a prepaid account or to a credit, DEBIT, charge, or calling card. Telephone companies may not disconnect local or long-distance telephone service for failure to pay 900 number charges, and must offer consumers the option of blocking access to 900 number services if technically feasible. Telephone companies that bill consumers for pay-per-call and pre-subscribed information or entertainment services must show those charges in a portion of the bill that is separate from local and long-distance charges.

Despite increased regulation at the federal level, the telephone service market in the United States remained largely monopolistic for most of the twentieth century, continuing to be dominated by a few small companies in each region of the country. Congress attempted to increase competition by passing the Telecommunications Act 1996 (the "1996 Act"), which allows multiple "local exchange carriers" (LECs) to compete for customers. 1996 Pub.L. No. 104-104. The 1996 Act amends the 1934 Act by distinguishing between incumbent LECs (ILECs) and competing LECs (CLECs). ILECs are existing telephone service providers that have established a telecommunications network in a given market. CLECs are telephone service providers that seek access to an ILEC's market.

One way in which the 1996 Act attempts to improve competition is through "interconnection agreements" and "reciprocal compensation agreements." 47 U.S.C.A. section 251. "Interconnection agreements" require ILECs to make their telecommunications networks available (via purchase or LEASE) to CLECs so that a phone call initiated by the customer of an ILEC may be connected to the customer of a CLEC, and vice versa. "Reciprocal compensation agreements" require the carrier for the customer who initiates a phone call to share some of its revenues from that call with the carrier of the customer who receives the call (the telecommunications industry describes the LEC of the customer who receives the call as the one that "terminates" the call and not the one that "receives" it). These requirements were challenged and upheld in federal court on two separate appeals, and are now under consideration by the U.S. Supreme Court. Illinois Bell Telephone Co. v. Worldcom Technologies, Inc., 179 F.3d 566 (7th Cir. 1999); Bell Atlantic Maryland, Inc. v. MCI WorldCom, Inc., 240 F.3d 279 (4th Cir. 2001). In a related case, the U.S. Supreme Court upheld FCC rules that require ILECs to lease their networks to competitors at heavily discounted rates. Verizon Communications, Inc. v. F.C.C., —-U.S.——, —-S.Ct. ——, —-L.Ed.2d ——, 2002 WL 970643 (U.S., May 13, 2002).

State Regulation of Telephone Companies and Services

State law regulates intrastate telephone services that do not substantially affect interstate commerce. It is the policy of each state to protect the PUBLIC INTEREST in having adequate and efficient telecommunications services available to every state resident at a just, fair, and reasonable rate. To carry out this policy and to regulate rates, operations, and services, state public utility commissions (PUCs) have the general power to regulate and supervise the business of each public utility within its jurisdiction and to do anything that is necessary and convenient in the exercise of its power. For example, state PUCs are typically given exclusive jurisdiction to determine whether a telephone utility should be permitted to close a business office in a given community.

PUCs are also commonly charged with the exclusive responsibility to enhance competition by adjusting regulation to match the degree of competition in the marketplace so that costs associated with running a utility do not deter new telephone service providers from entering the market. State PUCs must ensure that telephone rates are not unreasonably preferential, prejudicial, predatory, or discriminatory and are applied equitably and

consistently throughout its jurisdiction. Additionally, PUCs may supplement federal law by enacting their own rules and regulations governing pay-per-call services, unsolicited advertisements, automatic dial announcing devices, or any other feature of local telephone service that might adversely affect consumers.

An individual, partnership, or corporation may not normally offer local telephone service without complying with PUC rules and regulations. In most states, the PUC requires that before a telephone company may provide local service each company must obtain (1) a certificate of convenience and necessity; (2) a certificate of operating authority; or (3) a service provider certificate of operating authority. PUCs may revoke or amend a certificate of convenience and necessity, a certificate of operating authority, or a service provider certificate of operating authority after notice and HEARING if it finds that the certificate holder has never provided or is no longer providing service in all or any part of the certificated area. PUCs may also require one or more public utilities to provide service in an area affected by the revocation or amendment of a certificate held by a public utility.

Organized for public purposes to more efficiently serve its customers, telephone companies are usually granted special privileges and powers in addition to those that they possess as private corporations. For example, telephone corporations, telephone cooperatives, and foreign telephone companies are often given the power of eminent domain, which gives these entities a right-of-way to erect, construct, and maintain necessary stations, plants, equipment, or lines upon, through, or over private land. The delegation of the state's power of eminent domain has been held valid because of the public good derived from installing telecommunications systems on private property.

On the other hand, local telephone companies have no absolute right to use city streets to erect telephone poles or configure their facilities and networks. Instead, telephone companies must first obtain consent from the municipal authorities of the city in which they are seeking to provide telephone service. This consent is commonly manifested by the grant of a franchise from the governing municipal authority, and PUCs should not unreasonably restrict the rights and powers of municipalities in granting or refusing a telephone company the right to use city streets. However, cities, towns, and villages have no right to deny telephone companies all use of their streets, and when a municipal corporation unlawfully rejects a telephone company's application to erect poles and string wires along certain public streets, it abandons the right to prescribe the streets on which the line will be constructed.

Additional Resources

American Jurisprudence. St. Paul: West Group, 1998

West's Encyclopedia of American Law. St. Paul: West Group, 1998

Organizations

Federal Communications Commission

445 12th Street S.W.
Washington, DC 20554 USA
Phone: (888) 225-5322
Fax: (202) 835-5322
E-Mail: fccinfo@fcc.gov
URL: http://www.fcc.gov

Primary Contact: Michael K. Powell, Chairman

Public Utility Commission of Texas

1701 N. Congress Avenue
Austin, TX 78711-3326 USA
Phone: (512) 936-7000
E-Mail: customer@puc.state.tx.us
URL: http://www.puc.state.tx.us/about/index.cfm
Primary Contact: Lane Lanford, Executive Director

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