

**MINORITY MEDIA AND
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FAX TRANSMISSION COVER SHEET

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MESSAGE OR SPECIAL INSTRUCTIONS:

Dear Nolan,

Here's a hypothetical I brought to Harvard yesterday for a presentation I was supposed to do with Larry Irving. They didn't use it, and I got to talk for 30 seconds. Why they brought me up there is a mystery -- maybe they have an endowment to burn!

Anyway, this is where I'm headed on the 14th amendment. Would enjoy your thoughts, and in particular whether this also works under the First Amendment.



DATE: 5/2/95

TIME: PM

David Honig

PLEASE CALL TO CONFIRM TRANSMISSION

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DISCUSSION PROBLEM:**SEMINAR ON INFORMATION, LAW AND TECHNOLOGY**

Harvard Law School Institute for
Information, Law and Technology
May 1, 1995

Offered by David Honig
Executive Director
Minority Media & Telecommunications
Council, Washington, D.C. */

Local and long distance telephone service in the State of East Carolina has always been supplied by Bell Telephone Company of East Carolina ("Bell-EC"). Before the MFJ, Bell-EC was an AT&T subsidiary; it is now a Southern Bell subsidiary. Intrastate tariffs are approved by the seven-member East Carolina Public Service Commission ("ECPSC").

Telephone service in the City of Rochester, East Carolina, was first authorized by a tariff approved in 1895 by the predecessor agency to ECPSC. That tariff provided that Bell-EC must provide service "to all those able to pay for it, on equal terms and conditions." That language appears in all subsequent tariffs.

Rochester's population has ranged between 80,000 and 120,000 consistently between 1890 and 1990. Throughout that time, Rochester has been approximately 40% African American.

The African American population was geographically segregated by state law until 1968 and has been de facto segregated ever since. The racial "dividing line" through the city is U.S. 1-A. Demographic data from the East Carolina Historical Society and the U.S. Census indicates that in Rochester from 1890 to 1990:

- at least 90% of the African American population has resided east of U.S. 1-A and at least 99% of the White population has resided west of U.S. 1-A;
- the housing segregation index (measuring the likelihood that one's neighbors are of the same race; 100% would reflect complete segregation) has never been lower than its current figure of 90%;
- the median adjusted gross income of African American families in Rochester has never been greater than 60% of the median adjusted gross income of White families; and
- the per-household savings of African American families has never exceeded 20% of the per-household savings of White families.

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-2-

In 1990, the mean disposable income of African American families was \$1,000, while the mean disposable income of White families was \$15,000. Disposable income and savings are the sources of funds from which families typically purchase computers and software.

The Rochester Public Schools operate under a desegregation decree dating from 1965. Rochester operates two public high schools, each having approximately 2,000 students. The racial enrollment percentages at its two public high schools in 1965, 1975, 1985 and 1995 were:

<u>Year</u>	<u>School</u>	<u>% African American</u>	<u>% White</u>
1965	Adams High	100%	0%
1975	Adams High	95%	5%
1985	Adams High	85%	15%
1995	Adams High	90%	10%
1965	Barlow High	0%	100%
1975	Barlow High	5%	95%
1985	Barlow High	15%	85%
1995	Barlow High	10%	90%

In 1995, Adams High School opened a computer lab with four computers for student use, and Barlow High began a Computer Sciences Magnet Program with 100 computers for student use.

The largest employer in Rochester, Amalgamated Textile Mills, has been largely responsible for establishing customary labor standards in the area. In 1988, it signed a \$40,000,000 consent decree to remedy 30 years of deliberate discrimination against African Americans in job placement and promotion.

By 1920, POTS was available to 90% of the population residing west of Highway U.S. 1-A. Not until 1970 did the proportion of the population residing east of Highway U.S. 1-A which had access to POTS reach 90%.

By 1974, custom calling services (three-way calling, call waiting, call transfer and speed dial) were available to 90% of the population residing west of Highway U.S. 1-A. Not until 1984 did the proportion of the population residing east of Highway U.S. 1-A which had access to custom calling services reach 90%.

Bell-EC began offering custom calling services in Rochester in 1970. In order to offer custom calling services in Rochester, Bell-EC needed a capital infusion of \$10,000,000 to expand its physical plant. This money was raised through a rate increase amounting to \$100 per line, spread over 1971 and 1972, applicable equally to all Rochester lines served by Bell-EC.

Dwellings located east of U.S. 1-A are typically very close together and have short driveways, or are situated in multi-unit buildings. The cost of providing a line from the street to a home east of U.S. 1-A averages \$50; west of U.S. 1-A, that cost averages \$150. All customers are charged the same amount per month for basic service, which includes the cost attributable to providing wires from the streets to the homes. That cost is approximately 50¢ per month per line.

In 1976, Sturdley Trunch, a Professor at Rochester State University, published a study entitled "Race and Telephone Service in Rochester, East Carolina." Professor Trunch's study analyzed the number of days taken by Bell-EC to respond to "611" service calls. He found that calls placed from west of U.S. 1-A were answered in a mean time of four hours, but calls placed from east of U.S. 1-A were answered in a mean time of 72 hours. He discovered a Bell-EC memorandum directing that when a "611" call was received in the evening, it was to be answered in the evening only if it was placed from west of U.S. 1-A. Professor Trunch's study also showed that 99.8% of intrastate calls placed from west of U.S. 1-A were placed successfully, while 96.0% of intrastate calls placed from east of U.S. 1-A were placed successfully.

In 1994, Professor Trunch conducted a review of the minutes of all meetings of the ECPSC, newspaper accounts of its tariff proceedings, oral histories of retired members of ECPSC and its staff, and the recollections of current commissioners and staff. He did not uncover any challenge to Bell-EC's tariffs by any party at any time for any purpose. Nor did he uncover evidence that racial issues were ever discussed publicly or privately by any official of ECPSC in connection with tariffs or service practices.

The only newspaper account regarding racial and economic factors and telephone service in Rochester was a June 1, 1977 story in the African American owned Rochester Advocate. A reporter at the newspaper had interviewed E. Presley, Manager of Bell-EC's Rochester office, inquiring of Mr. Presley why custom calling service was generally unavailable east of U.S. 1-A. Mr. Presley's answer was "most Black people don't earn enough money to buy a push button telephone. When our market studies show they can afford push button telephones, we'll offer custom calling on that side of town."

In 1995, the ECPSC's Chief Economist issued a report concluding that the Rochester African Americans had subsidized the service received by Whites. First, she found that African Americans had received inferior service and had received basic and custom calling services later than Whites. Second, she found that African Americans paid the same as Whites for access to the loop despite the lower cost of wiring in African American neighborhoods. She estimated this subsidy, in 1995 dollars, to have averaged \$50 per African American household per year for the past 100 years.

QUESTION 1:

Does the Equal Protection Clause of the 14th Amendment require the ECPSC to take any affirmative steps to remedy the subsidization identified by the ECPSC's Chief Economist? If remedies are appropriate, what should they be, and to whom should they flow?

QUESTION 2:

Bell-EC has proposed a rate increase to cover the cost of installing fiber optics throughout its Rochester plant. This service upgrade will make possible higher quality telephone service, as well as an interactive video dialtone ("VDT") service for which Bell-EC has filed an application with the FCC. On the question of a timetable for offering service, Bell-EC's FCC VDT application states only that Bell-EC will "commence test service within six months after a grant, and will have its service passing every home in ten years." Knowing that Bell-EC has this proposal pending at the FCC, and knowing that VDT is not presently regulated under Title II of the Communications Act, how should ECPSC respond to Bell-EC's proposed rate increase?

QUESTION 3:

What definition of "universal service" would establish the parameters for an answer to Questions 1 and 2?

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