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After *NARUC I*: The FCC Communicates Its Intention to Abandon the Common Carrier/ Private Carrier Distinction

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AFTER *NARUC I*: THE FCC COMMUNICATES ITS INTENTION TO ABANDON THE COMMON CARRIER/ PRIVATE CARRIER DISTINCTION

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I. INTRODUCTION

Traditionally, entities which provided communications services to the public have been labeled common carriers; in contrast, entities which provided private communications services, normally available only to a select few, have been labeled non-common carriers.[1] In recent years, the advent of fiber optic and satellite technology has caused the Federal Communications Commisssion (FCC) to circumvent this common carrier/private carrier distinction, and at the same time avoid onerous federal and state common carrier regulation, by giving communications service providers[2] the opportunity to classify their new services as private carriers. Real-

1. This Comment will refer to non-common carriers as private carriers.
2. For purposes of this Comment, a communications service provider is an entity or individual requesting a license from the FCC to provide communications services.

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izing that communications service providers now can choose to transmit simultaneously public or private transmissions through the same satellite[3] or through the same fiber optic cable system,[4] the FCC has chosen to classify many new services that look and act like common carriers as private carriers. From a regulatory perspective, regardless of whether the FCC approach is correct, few deny that the common carrier/private carrier distinction creates major regulatory problems for the telecommunications industry.

Common carriers are distinguishable from private carriers, from a regulatory standpoint, in that common carriers are subject to FCC oversight and private carriers are not.[5] Further, common carriers are subject to intrastate service regulation while, again, private carriers are not. As a result, both communications entities and the FCC would prefer to avoid the common carrier classification altogether. Unfortunately, there is no regulatory definition of private carrier. Thus, the courts and the FCC are obligated to compare and contrast private carriers to the most analogous statutorily defined service—common carrier. Since many entities which request private carrier service classification look and act like common carriers, the Communications Act of 1934 supports the belief that they are common carriers.[6] Because the distinction between common carrier and private carrier actually has become the line of demarcation between the two services, and because this regulatory definition[7] is so general in nature, common carrier status is almost

3. Satellite technology allows the operation of simultaneous public and private transmissions on different transponders or slots located on the same satellite. *See* J. ROSENBERG, DICTIONARY OF COMPUTERS, DATA PROCESSING & TELECOMMUNICATIONS 457-58 (John Wiley & Sons, ed. 1984).

4. Through one cable, fiber optic systems simultaneously can carry both public and private transmissions. *See* J. ROSENBERG, *supra* note 3, at 196.

5. In accordance with 47 U.S.C. § 303(f) (1982), once an entity is licensed to provide private carrier service, the FCC will not intervene unless a complaint alleging frequency interference is filed against a former private carrier service by a competing entity. Although such disputes do arise, the FCC rarely takes serious disciplinary action in these matters. In contrast, common carriers are stringently regulated under Title II or 47 C.F.R. § 21 (1987), which requires common carriers to file tariffs with the FCC.

6. *See* 47 U.S.C. § 153(h) (1982).

7. There is no way, technically or regulatorily, to redefine common carrier to encompass all services presently labeled as common carrier. Consequently, this Comment proposes to drop the regulatory definition altogether. In direct contrast, the FCC has attempted to circumvent the regulatory definition to avoid Title II regulation and state regulation. *See* In the Matter of Amendment of parts 2, 73, and 76 of the Commission's Rules to Authorize the Offering of Data Transmission Services on the Vertical Blanking Interval by TV Stations, 101 F.C.C.2d 973 (1985) [hereinafter Vertical Blanking Interval Decision]. In an article entitled *Redefining "Common Carrier": the FCC's Attempt at Deregulation By Redefinition*, 1987 DUKE L.J. 501, the author, Phil Nichols, alleges that the FCC is redefining common carrier. However, since the legal and the technical definition of common carrier are not the

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certain.

Recently, however, the FCC has chosen to circumvent the distinction by giving communications service providers the opportunity to classify all their new services as private carriers.[8] This Comment asserts that the FCC's action is necessary so that communications service providers can avoid Title II common carrier regulation, as well as state common carrier regulation, and also to allow the FCC to reduce its oversight function under Title II, thus reducing its expenditures.

Part II of this Comment provides an overview of the myriad definitions of common carrier. Part III summarizes the burdens of common carrier regulation under Title II. Part IV focuses on the distinction between common carrier and private carrier. Part V applies the common carrier/private carrier distinction to new communications services and notes an exception to the distinction. Part VI discusses non-dominant carrier deregulation and its effect on the regulation of new and existing common carrier services. Part VII discusses dominant carrier deregulation and its effect on the regulation of new and existing common carrier services. Part VIII criticizes the FCC's undermining of the *NARUC I* distinction for allowing communications service providers to classify their new services as private carriers to avoid common carrier regulation under Title II. Part IX assesses the potential for future problems, such as state regulation, if the courts or Congress decide that the FCC cannot undermine the distinction as applied to new common carrier services. Finally, Part X proposes that Congress resolve the federal and state common carrier regulation problems, as applied to new services, by dropping the common carrier/private carrier distinction altogether.

II. The Definition of Common Carrier

A. *The Communications Act of 1934*

The Communications Act of 1934 was enacted "to provide for the regulation of interstate and foreign communication by wire or radio and for other purposes."[9] Congress created the FCC to en-

same, his article begins from a confusing premise. In fact, since redefinition is unattainable with a regulatory or a technical approach, the FCC only can choose between applying or not applying the regulatory definition of common carrier.

8. Vertical Blanking Interval Decision, 101 F.C.C.2d at 978.

9. Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (1934) (codified as amended at 47 U.S.C. §§ 151-611 (1982 & Supp. V 1987)).

force the provisions of the Act.[10] According to section 3(h), the FCC *must classify* "any person engaged as a carrier for hire as a common carrier."[11] Section 3(h) states:

> "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this act; but a person engaged in radio broadcasting shall not, in so far as such person is so engaged, be deemed a common carrier.[12]

B. *The FCC Regulations*

The FCC regulations do not delineate clearly the distinction between common carriers and private carriers. In its regulations, a common carrier is defined as "any person engaged in rendering communication service for hire to the public."[13] The FCC specifically included the words "to the public" to distinguish a common carrier from a private carrier. In effect, if the carrier has not rendered communication service for hire to the public, it is a private carrier. Unfortunately, this FCC regulatory distinction inadequately differentiates between a common carrier and a private carrier because the FCC's definition of a common carrier would encompass practically all private carriers as well.

III. Title II Common Carrier Regulation

All providers of interstate common carrier sevice must comply with Title II of the Communications Act of 1934.[14] Title II requires common carriers to file with the Commission a schedule of all

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10. 47 U.S.C. § 151 (1982).

11. *Id.* § 153(h).

12. *Id.*

13. 47 C.F.R. § 21.2 (1987). In defining common carrier in the Communications Act, Congress borrowed the definition of common carrier found in the Interstate Commerce Act. *See* 49 U.S.C. § 1002(14) (1982).

14. 47 U.S.C. §§ 201 - 224 (1982). In the Communications Act of 1934, Congress originally enacted the regulations found in Title II to prevent AT&T from engaging in anticompetitive or monopolistic behavior. *See Regulation of Interstate and Foreign Communications by Wire or Radio and For Other Purposes: Hearings on H.R. 8301 before the Comm. on Interstate and Foreign Commerce*, 73d Cong., 2d Sess. (1934); *Regulation of Interstate and Foreign Communications by Wire or Radio: Hearings on S. 2910 before the Comm. on Interstate Commerce*, 73d Cong., 2d Sess. (1934). Congress believed that it could prevent AT&T from dominating the communications industry by granting the FCC oversite authority over all common carriers. Ironically, Title II has created more oversight problems for the FCC than any other statutorily based regulation.

charges made to residential customers and business customers, including charges for interconnection of service with connecting common carriers.[15] If a common carrier decides to increase charges, or is accused of engaging in discriminatory price-fixing, the FCC may review the charges in a hearing to determine their reasonableness.[16] If the commission concludes that the charges are unreasonable, the common carrier will be sanctioned and customer injuries will be addressed.[17]

Title II also allows the FCC to determine the value of all property owned by the common carrier or used in the transmission of services.[18] In addition, all proposals made by common carriers for the construction of new facilities are subject to FCC oversight and approval.[19] Further, the FCC can review all contracts entered into by common carriers and request an accounting of the operations of all common carrier services.[20] In short, the FCC may review anything that a common carrier does, whether questionable or not. If there are enough complaints made by the public against the common carrier, or if Congress or the courts demand action, the FCC must take appropriate action or else violate the "public interest, convenience and necessity" standard implied in the Communications Act of 1934.[21]

IV. The Distinction Between Common Carrier and Private Carrier

A. *The* NARUC I *Decision*

The distinction between common carriers and private carriers was first delineated in *National Association of Regulatory Utility Commissioners v. Federal Communications Commission.*[22] In *NARUC I*, the Court of Appeals for the District of Columbia Circuit addressed the question of whether to review the FCC's classification of the newly permitted Specialized Mobile Radio Systems (SMRS) as a private carrier. According to the FCC, the SMRS would be operated by licensees on a "commercial basis to provide

15. 47 U.S.C. § 153(h) (1982).
16. *Id.* § 204(a).
17. *Id.* § 205(a).
18. *Id.* § 213.
19. *Id.* § 214.
20. *Id.* § 215.
21. The Communications Act of 1934 requires the FCC to enforce all regulations which promote "the public interest, convenience and necessity." 47 U.S.C. § 151 (1982).
22. 525 F.2d 630 (D.C. Cir. 1976), *cert. denied*, 425 U.S. 992 (1976) [hereinafter *NARUC I*].

service to third parties."[23] Prior to this FCC decision, police departments, taxicab companies, and other dispatch services were separately licensed to use mobile radio systems.[24] Under the FCC's new proposal, specialized mobile radio operators also would be permitted to share the mobile radio system with the other dispatch services.[25] By classifying SMRS as a private carrier, the FCC hoped that entrepreneurial interest in the private land mobile radio industry would increase significantly.[26] Moreover, the classification of the SMRS as a private carrier would prevent Title II, Title III,[27] and state regulation from restricting the operation of SMRS through common carrier regulation. The court held that the FCC's classification of SMRS as a private carrier was reasonable.[28]

Neither section 3(h) of the Communications Act of 1934 nor the applicable FCC regulations clearly define the terms "common carrier" or "private carrier." Consequently, the D.C. Circuit found it necessary to rely on the common law definition of a public common carrier in distinguishing a common carrier from a private carrier for purposes of communications law.[29] The court defined a common carrier to be a type of service which holds itself out indifferently to serve the eligible user public.[30]

The court added the words "holding out indifferently" to the common law definition of a common carrier so as to make a clear distinction between common carrier and private carrier.[31] The court determined that irrespective of whether the common carrier held itself out to serve the entire public or the private carrier held itself out to serve a portion of the public, the distinction would center on whether the carrier held itself out indifferently.[32] The

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23. *NARUC I*, 525 F.2d at 634.

24. *Id.* at 639.

25. *Id.*

26. *Id.* at 640.

27. Title III, *inter alia*, subjects the applicant to a 30-day waiting period prior to which approval of the application is not possible. 47 U.S.C. § 309(d)(1) (1982). Other parties may file a petition which alleges that a particular application does not serve the public interest, convenience, and necessity. *Id.* Title II applies only to common carriers. *See* 47 U.S.C. §§ 201-224 (1982).

28. *NARUC I*, 525 F.2d at 643, 644.

29. *Id.* at 640. *Cf.* Munn v. Illinois, 94 U.S. 113 (1876) (providing an early example of price and service regulations placed on common carriers); Propeller Niagra v. Cordes, 62 U.S. 7 (1858) (imposing a greater standard of care on common carriers); American Trucking Ass'ns, Inc. v. United States, 101 F. Supp. 710 (N.D. Ala. 1951) (upholding as constitutionally valid regulations affecting motor carriers).

30. *NARUC I*, 525 F.2d at 642.

31. *Id.* at 641.

32. *Id.* at 642.

court analogized its distinction between common carrier and private carrier to the FCC's public correspondence regulation[33] and the FCC's private line service regulation,[34] noting that because the FCC uses the "holding out" distinction to distinguish between public correspondence and private line service, a similar distinction must hold true when distinguishing between common carrier and private carrier. Additionally, the court's choice of the term "indifferently" implies that a common carrier would have to hold itself out indiscriminately to the entire public. If a carrier held itself out indiscriminately to the entire public, regardless of whether *all* the public used the service, the service would still be classified common carrier.[35]

In upholding as reasonable the FCC's classification of the SMRS as a private carrier, the *NARUC I* court applied a two-part test:

> First, whether there will be any legal compulsion . . . to serve indifferently 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.[36]

The court could not find "any reasons implicit in the nature of SMRS operations to expect an indifferent holding out to the eligible user public."[37]

The court observed that private carriers, unlike common carriers, generally have stable, long-term relationships with their customers.[38] If the SMRS begins actual operations and it does not enjoy this type of relationship with its customers, the court reserved the right to "challenge . . . the Commission's classification, should the actual operation of SMRS appear to bring them within common carrier definition."[39] Thus, according to *NARUC I*, if the SMRS subsequently becomes a common carrier and holds itself

33. *Id.* at 642, n.63. Public correspondence is defined as a "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. § 21.2 (1987). An example of a public correspondence is a telegraph transmission.

34. *NARUC I*, 525 F.2d at 642. Private line service is defined as "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. § 21.2 (1987). An example of a private line service is a telephone.

35. *NARUC I*, 525 F.2d at 642.

36. *Id.*

37. *Id.*

38. *Id.* at 643.

39. *Id.* at 644.

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out to serve indifferently the eligible user public, then the SMRS will be classified as a common carrier.

The court affirmed the FCC's classification because it could not find anything in the record, or in the Communication Act's common carrier definition, to cast doubt on the FCC's conclusion that the SMRS is not a common carrier but is, instead, a private carrier. The court explicitly stated, however, that its decision did not mean the FCC "has any significant discretion in determining who is a common carrier . . . ."[40] The *NARUC I* court was telling the FCC that it cannot arbitrarily classify technologies even if its purpose is to acheive greater administrative efficiency, reduce costs to the commission, or deregulate the communications industry. In essence, the distinction would have to be maintained irrespective of the consequences to the Commission.

V. COMMON CARRIER REGULATION

A. *Application of the* NARUC I *Distinction*

In *AT&T v. FCC*,[41] the Second Circuit reviewed the Commission's use of the *NARUC I* distinction to classify as common carriers those entities that resell, to the whole public, communications services and facilities previously owned by a common carrier with or without adding value for profit.[42] The court also reviewed the FCC's decision to classify as private carrier operators those users who shared communications services and facilities owned by a carrier, where each user paid his own costs for his use of the service.[43] The court held that resellers are common carriers because "a common carrier is one which undertakes indifferently to provide communications service to the public for hire, regardless of the actual ownership or operation of the facilities involved."[44] Sharers were held to be private carriers where "a bona fide sharing arrangement exists wherein each participant has a communications need (other than a need to resell the service to others) for the services and facilities being shared."[45] Further, the court noted that sharing is by definition a non-profit arrangement and, consequently, "such activity tends to be private and is unlikely to constitute an under-

40. *Id.*
41. 572 F.2d 17 (2d Cir. 1978).
42. *Id.* at 24.
43. *Id.* at 26.
44. *Id.* at 24.
45. *Id.* at 17, 26.

taking to serve the public indiscriminately for hire."[46]

The court also reviewed the FCC's criteria for determining whether a carrier was a common carrier. In addition to the *NARUC I* distinction, the FCC had argued that the profits earned by the carrier's performance of the carriage services similarly should be an important factor in the determination.[47] Therefore, relying on the FCC's recommendation, the court held that "the use of such criteria was both advisable and proper."[48] Moreover, the court noted that "[p]rofit is a significant indicium of common carriage; it increases the likelihood that the party making the profit is also making an indiscriminate offering to the public."[49]

B. Second Computer Inquiry

In its *Second Computer Inquiry*,[50] the FCC determined that the *NARUC I* distinction was inapplicable to the field of data processing services.[51] Since data processing services[52] provide more than basic telephone service—for example, they also provide computer linkups to telephone networks—the FCC concluded that Title II regulation should not be applicable.[53] The FCC argued that the original intent of the framers of the Communications Act of 1934 was to regulate basic telephone service alone, and because computer technology is still evolving and is not yet considered a basic service, Title II regulation should not be allowed to hinder its growth.[54]

In addition, the FCC justified its decision not to apply the *NARUC I* distinction by arguing that data processing is an exception to the Title II regulation because it is not explicitly mentioned in the statute.[55] According to the FCC, no longer would the *NARUC I* distinction be applied; instead, the distinction, and therefore Title II regulation, would not apply to those technologies not in existence at the time the Communications Act of 1934 was

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46. *Id.*
47. *Id.* at 26.
48. *Id.* at 27.
49. *Id.* at 26.
50. Second Computer Inquiry, Memorandum Opinion and Order, 77 F.C.C.2d 384 (1980), *reconsideration denied*, 84 F.C.C.2d 50 (1980) [hereinafter *Second Computer Inquiry*].
51. *Id.* at 431.
52. Data processing services will hereinafter be referred to as "enhanced services."
53. *Second Computer Inquiry*, 77 F.C.C.2d at 387.
54. *Id.* at 430, 431.
55. *Id.* at 430.

enacted.[56]

To prevent AT&T[57] and GTE[58] from completely monopolizing the data communications industry, the FCC required each to set up a separate subsidiary, totally divested from the parent company, which would provide the transmission facilities necessary (through resale) for others to provide enhanced services.[59] In addition, the subsidiaries themselves also would be allowed to provide enhanced services. All of these enhanced service providers would be interconnected with the basic services network which was still subject to Title II common carrier regulation. The FCC hoped that the separate subsidiary requirement for AT&T and GTE would deter anti-competitive behavior. For that reason alone the Commission believed that enhanced services should not be subject to Title II common carrier regulation.[60]

VI. The Deregulation of the Non-Dominant Carrier

A. *The Competitive Carrier Rulemaking*

Between 1980 and 1985, the FCC altered its approach to common carrier regulation in the course of six decisions.[61] These decisions involved rates for competitive common carrier services, as

56. *Id.* at 430.

57. AT&T was not divested from the Bell operating companies until four years later. *See infra* note 109.

58. GTE Sylvania Corporation had invested a great deal of money in the creation of voice/data integrated networks. *Second Computer Inquiry*, 77 F.C.C.2d at 471.

59. *Id.* at 474. Since AT&T and GTE owned most of the equipment and facilities used to transmit basic telephone services, the FCC decided to set up structural safeguards to prevent the two corporations from monopolizing the new industry. *Id.* at 474.

60. *Id.* at 463, 464.

61. In the Matter of Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, First Report and Order, 85 F.C.C.2d 1, 52 Rad. Reg.2d (P&F) 215 (1980) [hereinafter First Report]; In the Matter of Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Second Report and Order, 91 F.C.C.2d 59, 52 Rad. Reg.2d (P&F) 187 (1982) [hereinafter Second Report], *reconsideration denied*, 93 F.C.C.2d 54, 53 Rad. Reg.2d (P&F) 735 (1983); In the Matter of Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Third Report and Order, 48 Fed. Reg. 46,791 (1983) [hereinafter Third Report]; In the Matter of Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Fourth Report and Order, 95 F.C.C.2d 554, 56 Rad. Reg.2d (P&F) 1219 (1983) [hereinafter Fourth Report]; In the Matter of Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Fifth Report and Order, 98 F.C.C.2d 1191, 56 Rad. Reg.2d (P&F) 1204 (1984) [hereinafter Fifth Report]; In the Matter of Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Sixth Report and Order, 99 F.C.C.2d 1020, 57 Rad. Reg.2d (P&F) 1391 (1985), *vacated sub nom.* MCI Telecommunications Corp. v. Fed. Communications Comm'n, 58 Rad. Reg.2d (P&F) 871 (D.C. Cir. 1985) [hereinafter Sixth Report].

well as facility authorizations thereof, and permitted the FCC to regulate some common carriers under partial Title II regulation while regulating other common carriers under full Title II regulation.[62]

In its First Report, the FCC chose to reclassify all common carriers according to their overall market share.[63] The dominant carriers—most importantly AT&T, the dominant carrier in most major service markets—would continue to be subjected to full Title II regulation while the non-dominant carriers would be subjected to only partial Title II regulation. Because full Title II regulation still would be applied to the dominant carriers, the FCC was concerned with how to partially deregulate the non-dominant carriers without exceeding the statutory restrictions imposed by Title II under the Communications Act of 1934.[64] The FCC's decision to adopt a streamlined approach—specifically, ignoring sections 203 and 214 with respect to all non-dominant carriers—reflected its concern that neither the Act nor the case law interpreting the Act permitted a more expansive type of deregulation.

In the Further Notice of Proposed Rulemaking issued in 1981, the FCC presented two alternative proposals with regard to the deregulating of the non-dominant carrier.[65] The FCC either could forebear from applying certain Title II regulations to non-dominant carriers or it could choose to avoid all Title II regulation of non-dominant carriers by reclassifying them as private carriers. In effect, forebearing from applying specific Title II regulations would allow the FCC to exempt non-dominant carriers from specific Title II regulations while still compelling the non-dominant carriers to provide service to every person "upon reasonable request"[66] and to be just and reasonable with respect to charges, classifications, regulations, and practices."[67] In contrast, a private carrier approach would allow the FCC to reclassify all non-dominant carriers as private carriers thus fully exempting them from Title II regulation.[68]

62. In its First Notice of Inquiry and Proposed Rulemaking, 77 F.C.C.2d 308 (1979), the Commission suggested that a deregulatory approach should be applied to the interstate telephone industry to allow those common carriers that did not possess sufficient market power to compete with the traditional, more established common carriers, such as AT&T.

63. First Report, 85 F.C.C.2d 1 (1980).

64. Communications Act of 1934, tit. II, Pub. L. No. 73-416, 48 Stat. 1064, 1070 (1934) (codified as amended at 47 U.S.C. §§ 201-224 (1982 & Supp. V 1987)).

65. Further Notice of Proposed Rulemaking, 84 F.C.C.2d 445 (1981) [hereinafter Further Notice].

66. 47 U.S.C. § 201(a) (1982).

67. 47 U.S.C. § 201(b) (1982).

68. See Further Notice, 84 F.C.C.2d at 463 for an explanation of this definitional ap-

In its Second Report, the FCC announced that it would accept the first proposal and, in so doing, agreed to forebear from applying specific Title II regulations to all non-dominant carriers.[69] To support its position, the FCC relied primarily on section one of the Communications Act of 1934 which allows the FCC "to make available . . . to all people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . ."[70] The FCC argued that section one allows it to act "in the public interest" and, therefore, gives it broad power to choose whether or not to apply Title II common carrier regulation.[71] The Commission claimed that Congress must have intended that section one provide the FCC leeway in dealing with changing technologies and expanding markets.[72] For this reason, the FCC decided that all non-dominant carriers could refrain from complying with sections 203[73] and 214[74] if they were resellers of terrestrial common carrier services[75] or non-satellite services.[76] However, the FCC stated that it would continue to use the streamlined approach and would "analyze the appropriateness of forebearance with respect to other carriers . . . in further orders."[77]

In the Fourth Report and Order, the FCC reclassified all domestic satellite carriers (DOMSATS), miscellaneous common carriers (MCCs), and domestic satellite resellers as non-dominant carriers.[78] In a manner akin to the treatment of the non-dominant

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proach toward the non-dominant common carrier.

69. Second Report, 91 F.C.C.2d 59 (1982).

70. 47 U.S.C. § 151 (1982).

71. Second Report, 91 F.C.C.2d at 64-66.

72. Second Report, 91 F.C.C.2d at 59.

73. 47 U.S.C. § 203 (1982). Section 203 deals with the filing of tariffs.

74. 47 U.S.C. § 214 (1982). Section 214 deals with the construction of new facilities and the authorizations required from the FCC before construction, and eventually service, can begin or end.

75. Common carrier satellite services are regulated under Title II of the Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064, 1070 (1934) (codified as amended at 47 U.S.C. §§ 201-224 (1982 & Supp. V 1987)), and under the Communications Satellite Act of 1962, Pub. L. No. 87-624, 76 Stat. 419 (1962) (codified as amended at 47 U.S.C. §§ 701-757 (1982 & Supp. V 1987)).

76. Second Report, 91 F.C.C.2d at 59, 73.

77. Fifth Report, 98 F.C.C.2d 1191, n.1 (1984) (citing Second Report, 91 F.C.C.2d 59, 62 (1982), *reconsideration denied*, 93 F.C.C.2d 54 (1983)). It is important to note that the FCC determinations, in this context, are subject to judicial review. *See* 5 U.S.C. §§ 551-559 (1982).

78. Fourth Report, 92 F.C.C.2d 554 (1983). To rationalize the reclassification of all DOMSAT and DOMSAT resellers as non-dominant carriers, the FCC reiterated the market power concept with an emphasis on its relationship to economic rents. *Id.* at 554.

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terrestrial carriers, these common carriers would be deregulated using the streamlined approach. Moreover, the Fourth Report permitted carriers classified as non-dominant, the specialized common carriers, and the resellers,[79] to forebear from complying with sections 203[80] and 214[81] of title II.

In the Fifth Report and Order,[82] the FCC replaced its streamlined approach with a permissive forebearance approach which would allow all non-dominant carriers to choose whether or not to file tariffs.[83] Specifically, the DOMSAT carriers, MCCs, "all domestic, interstate, inter-exchange services of carriers affiliated with exchange telephone companies,"[84] and carriers providing domestic interstate and inter-exchange digital transmission networks could forebear from filing tariffs.[85]

In the Sixth Report and Order, the FCC imposed a mandatory forebearance on all non-dominant carriers.[86] The ruling provided that all non-dominant carriers would have to forebear from filing tariffs. In effect, this was a radical departure from previous FCC policy. Before the FCC issued the Sixth Report, the permissive forebearance approach permitted non-dominant carriers either to continue or discontinue to file tariffs or, alternatively, to enter into private contracts with their customers as the carriers wished. Under the mandatory forebearance approach, the non-dominant carriers could not file tariffs under any circumstance. Consequently, since many non-dominant carriers wanted to continue filing tariffs, there were a great number of challenges to this decision.[87]

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79. In the Fourth Report, 95 F.C.C.2d at 554, specialized common carriers and resellers were classified as non-dominant.

80. 47 U.S.C. § 203 (1982).

81. 47 U.S.C. § 214 (1982).

82. Fifth Report, 98 F.C.C.2d 1191, n.1 (1984).

83. "The tariff is [simply] a contract between the customer and the telecommunications facility." J. ROSENBERG, *supra* note 3, at 530. Most non-dominant carriers, such as MCI and Sprint, would rather continue to file tariffs to prevent AT&T from one day challenging their own filing of tariffs. The non-dominant carriers believe that competition will be maintained as long as AT&T is subject to full Title II regulation.

84. MCI Telecommunications Corp. v. Fed. Communications Comm'n, 58 Rad. Reg.2d (P&F) 871, 874 (D.C. Cir. 1985) (citing Fifth Report, 98 F.C.C.2d at 1209-10). [hereinafter MCI v. FCC].

85. *See id.*

86. Sixth Report, 57 Rad. Reg.2d (P&F) 1391 (1985). This approach originally was suggested in the Fourth Further Notice of Proposed Rulemaking. *Id.* at 1393 (citing Fourth Further Notice of Proposed Rulemaking, 49 Fed. Reg. 11,856 (1984) [hereinafter Fourth Further Notice]).

87. Sixth Report, 57 Rad. Reg.2d (P&F) at 1393 (citing Fourth Further Notice, 49 Fed. Reg. 11,856, 11,857 (1984)). MCI Telecommunications Corporation (MCI), as well as

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B. MCI v. FCC

In *MCI v. FCC*,[88] the D.C. Circuit overruled the FCC's decision to apply mandatory forebearance to all non-dominant carriers. Although the court reviewed all comments made by all parties involved in the Sixth Report,[89] the principal issue before the court was the narrow question of whether the FCC had the authority under section 203(a) of the Communications Act of 1934 to make forebearance mandatory for all non-dominant carriers.[90] No court ever had reviewed the FCC's competitive carrier rulemaking; consequently, this decision sent a message to the FCC that section 203(a) of the Communications Act of 1934 allows only a permissive forebearance approach toward non-dominant carriers.

In the court's opinion, the mandatory forebearance approach was a direct violation of section 203(a) of the Communications Act of 1934 which provides:

> Every common carrier, except connecting carriers, shall, within such reasonable time as the FCC shall designate, file with the FCC and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers . . . and showing the classifications, practices and regulations affecting such charges.[91]

The court interpreted the phrase "every common carrier except connecting carriers" as commanding all common carriers to abide by this statutory language.[92] Citing Supreme Court precedent, the court held that no leeway would be given to the FCC on the issue of mandatory forebearance.[93]

The court rejected the FCC's argument that section 203(b)(2) of the Communications Act of 1934 granted the Commission broad discretion to modify the Title II regulations.[94] Section 203(b)(2) states:

> The Commission may, in its discretion and for good cause

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other non-dominant interstate telephone carriers, wanted to continue filing tariffs. Consequently, they demanded judicial review of the Sixth Report which also had required that they cancel existing tariffs within six months of the Report's effective date. MCI v. FCC, 58 Rad. Reg.2d (P&F) 871 (D.C. Cir. 1985).

88. *MCI*, 58 Rad. Reg.2d (P&F) 871 (D.C. Cir. 1985).

89. For a detailed discussion of these arguments, see *MCI*, 58 Rad.Reg.2d at 874.

90. *MCI*, 58 Rad. Reg.2d at 871.

91. 47 U.S.C. § 203(a) (1982).

92. *MCI*, 58 Rad. Reg.2d at 876 (interpreting 47 U.S.C. § 203(a) (1982)).

93. *MCI*, 58 Rad. Reg.2d at 876 (citing Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980); Escoe v. Zerbst, 295 U.S. 490, 493 (1935)).

94. *Id.* at 876.

> shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the FCC may not require the notice period . . . to be more than ninety days.[95]

Relying on the broad language in section 203(b)(2), the FCC argued that mandatory forebearance should be considered "a special circumstance" because the proposal would eliminate costs to the FCC and the non-dominant carriers, thereby reducing administrative burdens imposed by tariff filings.[96]

The court stated that the term "modify" means "to alter, to change an incidental or subordinate feature; enlarge, extend, limit or reduce but not to eliminate," as the Commission argued.[97] However, the court rejected the Commission's argument that the phrase "to modify in particular circumstances or special circumstances or conditions"[98] gave the Commission the statutory right to force non-dominant carriers to forebear from filing tariffs.[99] Moreover, the court found that the Commission's position was not supported by Title II, prior FCC decisions, or precedent.[100]

Next, the court addressed the FCC's alternative argument that the Commission can prevent non-dominant carriers from filing tariffs if it is in the public interest to do so. Relying on four decisions, each referring to private carrier offerings,[101] the Commission argued that since the Communications Act of 1934 allowed the FCC to avoid Title II common carrier regulation by classifying services as private carriers, the Act also should allow the FCC to prohibit tariff filings by non-dominant carriers.[102] The court found the issue not to be whether to classify a carrier as a common carrier or a

95. 47 U.S.C. § 203(b)(2) (1982).

96. *MCI*, 58 Rad. Reg.2d at 876.

97. *Id.* at 877.

98. *Id.* (quoting 47 U.S.C. § 203(b)(2) (1982)).

99. *Id.* at 877.

100. *Id.* at 877 (citing AT&T v. Fed. Communications Comm'n, 487 F.2d 865 (2d Cir. 1973)). The court reemphasized that modification of tariff filing requirements for adminsistrative purposes is acceptable. *Id.* at 878. However, the FCC simply cannot stop tariff filings by non-dominant carriers through an agency order. In short, section 203(a) of the Communications Act of 1934 supports permissive forebearance but not mandatory forebearance.

101. *MCI*, 58 Rad. Reg.2d (P&F) at 878 (citing Wold Communications, Inc. v. Fed. Communications Comm'n, 735 F.2d 1465 (D.C. Cir. 1984); Computer and Communications Industry Ass'n v. Fed. Communications Comm'n, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 462 U.S. 938 (1983); Western Union Telegraph v. Fed. Communications Comm'n, 674 F.2d 160 (D.C. Cir. 1982); and Philadelphia Television Broadcasting Co. v. FCC, 359 F.2d 282 (D.C. Cir. 1961)).

102. *MCI*, 58 Rad. Reg.2d at 878.

private carrier but, instead, whether non-dominant carriers must file tariffs.[103] The court noted that "to protect the public interest, the agency is entitled to *some leeway* in choosing which jurisdictional base and which regulatory tools will be most effective in advancing the Congressional objective."[104] Nonetheless, the court warned that the FCC will not be allowed to totally deregulate common carrier service provided by non-dominant carriers regardless of their reasons.

In its final argument, the FCC attacked Title II as an outdated method of common carrier regulation. Essentially, the FCC asserted that "marketplace forces" would force common carriers to charge "just and reasonable rates."[105] However, citing as an example its transportation industry decisions where the court refused to rule on tariff exemptions for all transportation carriers,[106] the court concluded that the fate of Title II common carrier regulation will have to lie with Congress.[107]

VII. The Deregulation of the Dominant Carrier

A. *Third Computer Inquiry*

In recent years, the courts have expressed a great deal of interest in the dominant common carriers, particularly AT&T.[108] In addition, the 1984 divestiture of AT&T's long distance operations from its local operating companies,[109] coupled with the increase in suppliers of communications services, has allowed the FCC to begin its divestiture of the dominant common carriers, specifically AT&T and the Bell Operating Companies (B.O.C.). To achieve this deregulatory goal, the FCC decided to proceed more cautiously

103. *Id.* at 879.

104. *Id.* at 878 (citing *Philadelphia Television Broadcasting Co.*, 359 F.2d at 284).

105. *MCI*, 58 Rad. Reg.2d at 879.

106. Central & Southern Motor Freight Tariff Ass'n v. United States, 757 F.2d 301 (D.C. Cir. 1985)(per curiam); National Small Shipments Traffic Conference, Inc. v. Civil Aeronautics Bd., 618 F.2d 819 (D.C. Cir. 1980); Brae Corp. v. United States, 740 F.2d 1023 (D.C. Cir. 1984).

107. *MCI*, 58 Rad. Reg.2d at 880.

108. In the Matter of Policy and Rules Concerning Rates for Dominant Carriers, Notice of Proposed Rulemaking, 2 FCC Rcd 5208, 5224 n.38 (citing United States v. AT&T, 552 F. Supp. 131 (D.C. Cir. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983)) [hereinafter Notice of Proposed Rulemaking].

109. In 1984, the Bell Operating Companies (B.O.C.s) were divested from AT&T. This brought to a close the antitrust suit brought by the Department of Justice against AT&T. *See* Notice of Proposed Rulemaking, 2 FCC Rcd at 5210. *See also* Illinois Bell Telephone Co. v. Fed. Comunications Comm'n, 56 Rad. Reg.2d (P&F) 69 (7th Cir. 1984) (affirming the FCC's order requiring the divested B.O.C.s to form separate subsidiaries to engage in the marketing of customer premises equipment).

than it had in the competitive carrier rulemaking.[110]

In the *Third Computer Inquiry*,[111] the FCC reviewed the structural safeguards that had been set up between basic services and enhanced services in the *Second Computer Inquiry*.[112] Originally, these safeguards were set up to prevent AT&T from engaging in anti-competitive activities.[113] However, the FCC soon began to feel that the safeguards were hurting the consumer because they were less efficient and lacked creativity.

After the divestiture of AT&T, there were more companies that could offer enhanced services, creating a more complicated system of procedural safeguards. For example, there were many non-dominant carriers leasing AT&T phone lines and leasing and interconnecting with local exchange carriers—*viz.*, the B.O.C.s—to provide data communications.[114] Consequently, the FCC proposed an alternative deregulatory approach.[115] In its new approach, the FCC proposed to maintain the distinction between basic and enhanced services but to drop the separate subsidiary requirement as applied to AT&T and the B.O.C.s.[116] In its place, AT&T and the B.O.C.s would be allowed to offer specific enhanced services if they could demonstrate: (1) that all other enhanced service providers were allowed equal access to the facilities owned by AT&T and the B.O.C.s; (2) that prices charged for interconnection to facilities would be the same for all enhanced service providers; and (3) that all equipment and transmission quality was equal to that used by AT&T and the B.O.C.s.[117] Next, AT&T and the B.O.C.s would at-

110. Notice of Proposed Rulemaking, 2 FCC Rcd at 5210 (citing MCI v. FCC, 58 Rad. Reg.2d (P&F) at 877).

111. Amendment of section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), Report and Order, 104 F.C.C.2d 958, 60 Rad. Reg.2d (P&F) 603, (1986), *clarified on reconsideration*, 2 FCC Rcd 3035 (1987) [hereinafter *Third Computer Inquiry*].

112. *See Second Computer Inquiry*, 77 F.C.C.2d 384 (1980).

113. *Second Computer Inquiry*, 77 F.C.C.2d at 469, 485. The structural separation between enhanced services and basic services prevented common carriers from taking over data processing markets by utilizing profits from their basic services. Moreover, the distinction allowed the Commission to scrutinize the cost of service, accounting methods, and the actual providing of the service separate from the parent company and any Title II regulation.

114. MCI, Sprint, and Contel are all examples of non-dominant carriers. Fourth Report, 95 F.C.C.2d 554, 557 (1983).

115. For a more detailed discussion of the Commission's alternative deregulatory approach and the rationale behind it, see *Third Computer Inquiry*, 60 Rad. Reg.2d at 667-679; Frieden, *A Deregulatory Dilemma*, 38 FED. COMM. L.J. 383 (1987).

116. *See Second Computer Inquiry*, 77 F.C.C.2d 430, 431 (1980).

117. *Third Computer Inquiry*, 60 Rad. Reg.2d (P&F) at 647. This plan, otherwise known as Comparably Efficient Interconnection or CEI, will remain in effect until AT&T and the B.O.C.s submit acceptable open network architecture plans.

tempt to devise a plan whereby all carriers not only could offer enhanced services on an "equal access basis" but could achieve total interconnection with basic service networks as well.[118]

However, even assuming AT&T and the Bell Operating Companies create an acceptable plan, there are still a number of problems with implementing this deregulatory approach in the data processing communications industry. First, the FCC is unwilling to allow a permissive forebearance approach toward the filing of tariffs by the dominant carriers, that is, to permit dominant carriers the choice of filing tariffs or not filing tariffs.[119] The courts also are unwilling to require non-dominant carriers to forebear from filing tariffs.[120] Moreover, the Department of Justice has prohibited the offering of information services by the B.O.C.s unless the cross-ownership ban is lifted.[121] Additionally, there is uncertainty as to how much the data processing communications market has changed. Arguably, the structural separation between the basic service and the enhanced service market did serve a useful purpose and should have been maintained.

The deregulation of the dominant carrier is the next step toward the FCC's deregulation of the common carrier; still, it is questionable whether the FCC has chosen the correct approach in deregulating the data processing communications industry.[122]

B. The AT&T Price Cap Appoach

In a 1987 notice of proposed rulemaking, the FCC proposed to replace its cost of service regulatory approach toward the domi-

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118. AT&T and the B.O.C.s also will have to allocate joint and common costs, disclose network information, and access customer propriety network information. *Third Computer Inquiry*, 60 Rad. Reg.2d (P&F) 603, 676 (1986).

119. First Report, 85 F.C.C.2d 1, 6 (1980).

120. The Commission argued in its competitive carrier rulemaking that Congress created Title II to apply to the traditional common carriers. Therefore, in order to maintain its argument to allow non-dominant common carriers to permissively forebear, the traditional common carriers must continue to be subjected to full Title II regulation.

121. Judge Harold Greene, the U.S. district judge presiding over the AT&T divestiture, refuses to grant a line of business waiver to allow the B.O.C.s to provide information services to their customers. One minor problem with the implementation of Open Network Architecture is that AT&T, the Bell operating companies, and the FCC are having difficulty distinguishing between information services and enhanced services as defined in Judge Greene's Modification of Final Judgment Order. *See* Harper, *F.C.C. Unveils Computer III; Telcos Cautiously Optimistic*, TELEPHONY, May 26, 1986, at 12.

122. The FCC already has rejected the possibility of replacing the basic/enhanced services dichotomy with an economic analysis approach. *See Third Computer Inquiry*, 60 Rad. Reg.2d at 603, 642 (1986), *clarified on reconsideration*, 2 FCC Rcd 3035 (1987).

nant carrier, AT&T, with a price cap approach.[123] In effect, this price cap approach would set a ceiling on the prices that a dominant carrier such as AT&T could charge its customers. As a result, both consumers and the dominant carrier would benefit from the price cap approach.[124] The dominant carrier would benefit by keeping the difference between his cost of providing the service and the industry price cap level.[125] Consumers, on the other hand, no longer would have to worry about dominant carriers shifting to the less competitive markets the high costs associated with providing business in the more competitive commercial markets, solely to increase their profit margins.[126] Furthermore, according to the FCC, the price cap approach would alleviate the substantial administrative burdens in employing the cost-of-service approach.[127]

Although there are clear advantages to employing the price cap approach, implementing it would create five major problems. First, it is questionable whether the FCC would have the statutory authority to implement such an approach.[128] Second, assuming the FCC did have the authority under Title II, it is not clear what method of implementation the Commission should use.[129] Third, it is debatable whether the price cap approach would solve the problem of anti-competitive behavior.[130] Fourth, it is unclear how the FCC would adjust price cap levels to reflect changes in the commu-

123. In the Matter of Policy and Rules Concerning Rates for Dominant Carriers, 2 FCC Rcd 5208 (1987) [hereinafter Rates for Dominant Carriers].

124. *See id.* at 5213.

125. *See id.*

126. *Id.* at 5213.

127. *Id.* at 5214. For a detailed discussion of cost-of- service regulation, see *id.* at 5209-11.

128. The Commission claims that it is under "no legal obligation to continue to use cost-of-service regulation, particularly if another method of regulation will lead to just and reasonable rates at a lower cost to society." *Id.* at 5208 (citing 47 U.S.C. §§ 151, 201(b), and 202(a)).

129. Before implementing a price cap approach, the Commission must decide to which services it will apply the price cap approach. *See* Rates for Dominant Common Carriers, 2 FCC Rcd 5208, 5214 (1987). The Commission concedes that, regardless of the price cap approach implemented, the dominant carriers must continue to file tariffs and, in accordance with Title II regulation, their rates must be "just, reasonable and not discriminatory." *Id.* at 5214. However, the Commission does leave open the possibility of a streamlined approach toward those dominant common carriers that want to set rates *below* the price cap. *Id.* Nonetheless, if rates were set *above* the price cap, those dominant common carriers would be subject to full Title II regulation. *Id.*

130. The Commission is concerned that the price cap approach would allow AT&T, in a market in which it has an 80% share, to purposely lower its prices for service below the price cap to destroy the other service providers. *Id.* at 5216. The Commission's solution to combat predatory pricing is price floors. *Id.* These price floors would prevent AT&T from setting prices below a certain level. *Id.*

nications market.[131] Finally, it is far from unequivocal whether the price cap approach would affect present FCC policies, rules, and regulations.[132]

On March 1, 1989, with the assistance of Congress,[133] the public,[134] and the Common Carrier Bureau, FCC Chairman Dennis R. Patrick was able to respond to all of these concerns. Testifying before the Communications Subcommittee of the Senate Committee on Commerce, Science, and Transportation, Chairman Patrick outlined his final price cap proposal for AT&T.[135] This proposal includes, first, replacing rate of return regulation "with incentive regulation for all dominant carriers," and secondly, adopting a four year plan to "cap AT&T's prices to require 3% reductions in real terms each year, after adjustment for exogenous cost changes outside of AT&T's control."[136]

Chairman Patrick's approach should solve the problem of anti-competitive behavior with which the FCC was so concerned in its 1987 Notice of Proposed Rulemaking.[137] In effect, each separate AT&T service would have its own price cap which would prevent AT&T from overcharging consumers or small businesses for discounts given to big business, as has been done in the past.[138] Since Chairman Patrick has proposed a four year plan, the AT&T price cap level can be adjusted as the communications market further evolves.[139] Moreover, Patrick cleverly avoided having to assess whether price caps would violate Title II when he proposed that his price cap plan be implemented through "the Title II tariffing process."[140]

As expected, on March 16, 1989, the FCC voted to approve

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131. *Id.* at 5218.

132. The Commission cited as one example the lowering of the structural separation between basic and enhanced services. *See Id.* at 5220, 5221.

133. Congress sent the Commission a memorandum seeking information about the price cap proposal and also conducted five hearings on the issue. *See F.C.C. Price Cap Proceeding: Hearing Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 101st Cong., 1st Sess. 5 (March 1, 1989) (Statement of Dennis R. Patrick, Chairman, FCC) [hereinafter Statement of Dennis R. Patrick].

134. The Commission received more than 11,000 comments and reply comments to its price cap proposal. *Id.* at 6.

135. Chairman Patrick's proposal also recommends the eventual implementation of a price cap plan for the Bell Operating Companies. *Id.* at 5-6.

136. *Id.* at 7.

137. *See* Rates for Dominant Carriers, 2 FCC Rcd 5208 (1987).

138. In other words, the Chairman's approach will prevent predatory pricing.

139. Statement of Dennis R. Patrick, *supra* note 133, at 1.

140. *Id.*

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Chairman Patrick's price cap plan.[141] The AT&T price cap plan was slated to go into effect on July 1, 1989.[142] However, the extent to which price caps will affect the constantly changing telecommunications market remains to be seen.

C. *The Broadcasting/Telco Controversy*

1. Public Interest

Currently, cable television only offers the viewer the choice of news, sporting events, and movies. However, suppose that the viewer could pick any movie or watch any sporting event as it was happening from around the world simply by pushing a button on a touchtone telephone. This could become reality by the year 2000, as every channel on the standard television set may be in use.[143] Through switched fiber optic cable, the viewer might be able to watch live news televised abroad, request delivery of any newspaper in the world via the television screen, participate directly in game shows, or play video games without the extra equipment presently needed. Further, fiber optic cable may allow the sports fan to instantly replay the sporting event, or protest a referee's call; the fan's input would be fed through a central computer directly to the sportscaster. Eventually, with the installation of dual telephone/television switched fiber optic cable service, the viewer will be able to receive all of these services and more.

2. The Commission's Interest

If the FCC continues its deregulatory approach toward the telephone companies,[144] the telcos could gain control of the broadcast industry by the year 2000. In a recent interview, outgoing National Cable Television Association President James Mooney[145] asserted that telco entry into the broadcast industry would have serious repercussions for the broadcast industry as a whole. Although Mooney quickly acknowledged that he believed telco entry

141. On March 16, 1989 the FCC voted unanimously to approve the price cap plan. Telephone interview with Mary Brown, FCC attorney (Sept. 21, 1989).

142. Statement of Dennis R. Patrick, *supra* note 133, at 8.

143. According to the National Cable Television Association, "telcos could become giant TV stations capable of using their monopoly revenues to finance their entry into the business and crush competition." Common Carrier Week, Jan. 9, 1989, at 7.

144. "Telephone companies" and "telcos" refer to the Bell Operating Companies.

145. *See The Grace Under Pressure of Jim Mooney*, BROADCASTING, May 22, 1989, at 35 [hereinafter *Jim Mooney*].

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would not occur in the near future,[146] he did offer his views on the effect of price caps on the entry of the telcos into the broadcast industry, on FCC support for telco entry, and on potential consumer backlash due to the increase in cost for providing dual broadcast/telco service.[147] Mooney contends that with the implementation of price caps, the telcos might not be so enthusiastic to enter the broadcast industry.[148] Moreover, he asserts that the cost of building fiber optic plants simply would be too expensive.[149] In addition, he claims that since the consumer already has both telephone and television service, he would probably be very reluctant to pay the additional costs associated with the dual service.[150]

Although Mooney may be correct in his assertions, he fails to emphasize the serious consequences that FCC support for telco entry would have on broadcast itself.[151] Mooney points out that many at the FCC believe that switched fiber optic cable made available to every household in America would take away the need for broadcast towers.[152] As a result, there would be more spectrum available for other uses.[153] Arguably, this assertion could be correct. However, if the Commission is promoting telco entry into the broadcast market, it might be more important to ask why the merger of broadcast and common carrier is even in the public interest? Since the Communications Act of 1934 specifically excludes broadcast from its definition of common carrier, why should common carriers be allowed to take over and destroy the broadcast industry? In essence, we must determine whether the advances of technology will be allowed to ruin a whole medium of communication? When the FCC allows the telcos entry into the broadcast industry, the FCC will realize that common carrier deregulation may have gone too far.[154]

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146. Telcos presently cannot enter into the broadcast market because telco/broadcast violates the Communications Act of 1934, and cable/telco crossownership violates the Cable Communications Policy Act of 1984, the FCC regulations, and Judge Harold Greene's AT&T modification of final judgment order. *See* 47 U.S.C. § 613 (1982); 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

147. *Jim Mooney*, *supra* note 145, at 36.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. If Congress would propose to reorganize the Bureau of Mass Media to allow the Common Carrier Bureau to handle complaints and investigations for broadcast television, the Commission would realize that common carrier deregulation had gone too far.

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VIII. The Undermining of the *NARUC I* Distinction

To avoid Title II Common Carrier regulation, and thereby achieve its deregulatory goals, the FCC must find an alternative approach to the dominant/non-dominant classification and, more importantly, to the *NARUC I* distinction.[155] Because the FCC could not avoid the *NARUC I* distinction, it chose to incorporate the distinction into criteria that would classify a carrier as a private carrier.[156] The FCC knew it could not disregard *NARUC I* and give itself "an unfettered . . . discretion . . . to confer or not confer common carrier status on a given entity, depending upon the regulatory goals it seeks to achieve."[157] Therefore, the FCC's solution was to utilize the *NARUC I* distinction as part of the criteria necessary to classify a carrier as a private carrier.[158]

In the transponder sales decision,[159] the domestic satellite corporations wanted to sell transponders as private carriers. Since a transponder is a slot on a satellite which operates on a frequency licensed for use by an individual for his own private transmissions, or for public transmissions from the satellite to his subscribers below, technically, transponder service could be operated on a private carrier basis. Indeed, the FCC held that "the transponders could be sold as private carriers because the nature of transponder service is not such that it would be expected to be provided uniformly and indiscriminately to all potential customers on a common carrier basis."[160] Although this is true, the facts in this case suggest that the domestic satellite corporations probably would sell their transponder service indiscriminately to *all* private companies wishing to use satellites for business purposes.[161] Since DOMSATs could make an enormous profit on the sale of the transponder service, these transponders should have been classified as common carriers and therefore subject to Title II regulation. The FCC's decision to go beyond the *NARUC I* distinction was done more to promote administrative efficiency than anything else. Utilizing

155. *NARUC I*, 525 F.2d at 642, held that if a carrier holds itself out indifferently to the public, it is classified as a common carrier.

156. *See* Vertical Blanking Interval Decision, 101 F.C.C.2d 973 (1985).

157. *NARUC I*, 525 F.2d at 644.

158. *See* Vertical Blanking Interval Decision, 101 F.C.C.2d 973 (1985).

159. Domestic Fixed Satellite Transponder Sales, 90 F.C.C.2d 1238 (1982) (FCC failed to apply the *NARUC I* distinction in a proper manner for the first time.).

160. *Id.* at 1256.

161. Since satellites do not have a long life span—orbit begins to decay after 7 years—DOMSAT owners will sell the service to anyone that wants it. The most important goal is to fill up all transponders while the satellite is operational. *Satellites: Flying Towards the Future*, Broadcasting, July 17, 1989, at 35, 37.

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dicta in the *NARUC I* decision, the FCC cleverly managed to ignore the distinction between common carrier and private carrier.[162] In its interpretation of the facts, the FCC concluded that "[s]table, long term contractual offerings to individual customers of technically and operationally distinct portions of a satellite system fall far short of the indiscriminate holding out contemplated in the *NARUC I* decision."[163]

If the FCC properly had applied the *NARUC I* distinction, the domestic satellite corporations would have been subjected to Title II common carrier regulation in the sale of their transponders. This decision suggests, however, that transponders sold by domestic satellite corporations to public corporations using the transponders for private company business, no longer will be subject to common carrier regulation.[164]

In the Vertical Blanking Interval decision,[165] the FCC decided that it would allow paging and other data transmission services, in addition to teletext,[166] to utilize the television video signal on a secondary basis to broadcast television signals. More importantly, the FCC concluded that it would no longer apply the *NARUC I* distinction to classify services allowed to use the vertical blanking interval on a secondary basis.[167] Instead, the FCC made it very difficult to classify a service as a common carrier. The Commission held that "specific services are not to be classified as either common carrier or private carrier offerings."[168] "Instead, services are to be classified according to the criteria established by the court in the *NARUC I* decision."[169] The FCC, in the Vertical Blanking Interval Decision, concluded that the *NARUC I* court found the following factors to be evidence of non-common carriage: "1) [t]he establishment of medium-to-long term contractual relationships with customers, 2) [a] relatively stable clientele base, 3) [n]ot holding out facilities indifferently, and 4) [t]he selection of clients on a

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162. Domestic Fixed-Satellite Transponder Sales, 90 F.C.C.2d at 1255-57.

163. *Id.* at 1257.

164. *Id.* at 1244-45. Clearly, this decision worried those corporations that wanted to buy or lease transponders on the domestic satellites in order to serve the eligible user public. They were worried because they believed that the corporations which wanted to utilize the service for private interests would buy up all of the transponders as they would not have to worry about common carrier regulation.

165. Vertical Blanking Interval Decision, 101 F.C.C.2d 973 (1985).

166. "Teletext is . . . . a data system for the transmission of textual and graphic information intended for display on viewing screens." *Id.* at 973.

167. *Id.* at 976.

168. *Id.* at 978.

169. *Id.*

highly individualized basis."[170]

Clearly, the FCC does not want to utilize the *NARUC I* distinction to classify a service as common carrier or private carrier. Instead, it will look to the criteria enumerated in *NARUC I* to decide whether the service is private carrier. The FCC is suggesting that the new service will be automatically labeled private carrier so long as one of the four criteria mentioned in *NARUC I* is satisfied. Under this approach, the communications service provider will have little difficulty having his service classified private carrier.

In effect, the FCC is giving the carrier the opportunity to classify its services private carrier. If the carrier satisfies one of the four criteria, its services will be labeled private carrier. Before, if a carrier held himself out indifferently to serve the eligible user public, its services would have been classified common carrier. Thus, the carrier now can hold himself out to serve the eligible user public and still avoid Title II common carrier regulation by satisfying any of the *NARUC I* criteria. As a result, the carrier need only restructure his service offering in order to be labeled a private carrier.[171]

IX. State Regulation

Although the FCC has achieved its goal of partially deregulating the non-dominant carriers, and despite its continued deregulation of the dominant carriers, state common carrier regulation should not be ignored. The FCC imposition of less restrictive federal regulatory burdens on common carriers is wholly irrelevant to the issue of state common carrier regulation. State public utility commissions place heavy burdens on common carriers providing intrastate service reasoning that common carriers can afford these

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170. *Id.* In two recent decisions, the Commission has utilized the *NARUC I* criteria to allow the Multipoint Distribution Service (a transmitter located on a fixed site that can transmit communications services to many subscribers) and the Fiber Optic Service (a cable with the capacity of sending enormous amounts of data to the home or business presently through the telephone system) to be classified as private carriers. *See* In the Matter of Division to Part 21 of the Commissions Rules Regarding Multipoint Distribution Service, Report and Order, 2 F.C.C.2d 4251 (1987) (allowing MDS licensees to define themselves as private carriers); In the Matter of Norlight, Declaratory Ruling, 2 F.C.C.2d 132 (1987) (providing Fiber Optic Service licensees the option of defining themselves as private carriers).

171. Simply stated, a carrier now can enter into long term contracts or maintain stable relationships with a few selected customers. Nonetheless, in *NARUC I*, the court had distinguished between common carriers and private carriers by defining a common carrier using the holding out distinction enumerated in the Communications Act of 1934. *NARUC I*, 525 F.2d at 642. Here, the FCC had done the exact opposite by emphasizing the Vertical Blanking Interval criteria, originally only dicta mentioned in *NARUC I*, which defines the carrier from a private carrier standpoint. Vertical Blanking Interval Decision, 101 F.C.C.2d at 976.

burdens and that public utility charges help to insure the growth and maintenance of the state.[172] For this reason alone, state common carrier regulation is much more severe than Title II common carrier regulation.[173]

By giving the communications service providers the opportunity to classify practically all their new services as private carrier, the FCC temporarily has avoided the more severe burden of state regulation.[174] However, if the FCC's promotion of the private carrier classification is ever challenged in court, the FCC may be forced to apply the *NARUC I* distinction in its proper manner.[175] Therefore, a discussion of court decisions regarding the preemption of less burdensome federal regulation in favor of more onerous state regulations is necessary.

In *Louisiana Public Service Commission v. F.C.C.*,[176] the United Stated Supreme Court countenanced state regulation of common carriers which provide interstate service when it allowed Louisiana "to depreciate telephone plant and equipment to preserve the state's ratemaking authority over intrastate service."[177] In this decision, the Supreme Court examined Congress' intent in adopting section 220(b)[178] and section 152(b)[179] of the Communica-

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172. "A state is free to adopt whatever economic policy may reasonably be deemed to promote the public welfare." Nebbia v. New York, 291 U.S. 502 (1934).

173. State common carrier regulation effects all common carriers which interconnect with intrastate service providers.

174. Vertical Blanking Interval Decision, 101 F.C.C.2d 973 (1985).

175. *See* 5 U.S.C. §§ 551-559 (1982).

176. 106 S. Ct. 1890 (1986).

177. *Id.* at 1893.

178. 47 U.S.C. § 220(b) (1982). Section 220(b) states:

> The Commission shall, as soon as practicable, prescribe for such carriers the classes of property for which depreciation charges may be properly included under operating expenses, and the percentages of depreciation which shall be charged with respect to each of such classes of property, classifying the carriers as it may deem proper for this purpose. The Commission may, when it deems necessary, modify the classes and percentages so prescribed. Such carriers shall not, after the Commission has prescribed the classes of property for which depreciation charges may be included, charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission, or after the Commission has prescribed percentages of depreciation, charge with respect to any class of property a percentage of depreciation other than that prescribed therefor by the Commission. No such carrier shall in any case include in any form under its operating or other expenses any depreciation or other charge or expenditure included elsewhere as a depreciation charge or otherwise under its operating or other expenses.

Id.

179. 47 U.S.C. § 152(b) (1982). Section 152(b) states, in pertinent part, that "nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations, for or in

tions Act of 1934.[180] The Court held that "section 220(b), which deals specifically and expressly with depreciation, does not require automatic preemption of all state regulation respecting depreciation."[181] Moreover, the Court concluded that Section 152(b) constitutes a congressional denial of power to the FCC to require state Commissions to follow FCC depreciation practices for intrastate rate making purposes."[182]

In *People of the State of California v. FCC*,[183] the U.S. Court of Appeals for the D.C. Circuit held that title III of the Communications Act of 1934,[184] which enumerates the special provisions relating to radio, "does not authorize the Commission to preempt state regulation of intrastate radio common carriage merely because these regulations may frustrate the entry of FCC licensees."[185] Here, the Court of Appeals had to address the conflicting

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connection with intra-state communication service by wire or radio of any carrier." *Id.*

180. Louisiana Public Service Comm'n v. Fed. Communications Comm'n, 106 S. Ct. at 1897.

181. 106 S. Ct. at 1903.

182. *Id.* at 1903.

183. 798 F.2d 1515 (D.C. Cir. 1986).

184. Communications Act of 1934, title III, Pub. L. No. 73-416, 48 Stat. 1064, 1081 (1934) (codified as amended at 47 U.S.C. §§ 301-399 (1982 & Supp. V 1987)).

185. 798 F.2d at 1520. Certain state statutes demonstrate that state public utility commissions are unwilling to ease regulatory burdens on common carriers. For example, a California statute states:

> Every common carrier shall file with the commission and shall print and keep open to the public inspection schedules showing the rates, fares, charges, and classifications for the transportation between termini within this state of persons and property from each point upon its route to all other points thereon; and from each point upon its route to all points upon every other route leased, operated, or controlled by it; and from each point on its route or upon any route leased, operated, or controlled by it to all points upon the route of any other common carrier, whenever a through route and a joint rate has been established or ordered between any two such points. If no joint rate over a through route has been established, the schedules of the several carriers in such through route shall show the separately established rates, fares, charges, and classifications applicable to the through transportation.

CAL. PUB. UTIL. CODE § 486 (West 1975).

A Massachusetts statute states:

> All charges made, demanded or received by any common carrier for any service rendered or performed, or to be rendered or performed by it or in connection therewith in the conduct of its common carrier business, or made, demanded or received by any two or more common carriers joining in rendering or performing any service shall be just and reasonable, and every such common carrier and any two or more such common carriers joining in rendering or performing any service shall be entitled to make, demand and receive just and reasonble charges for any such service, and every unjust or unreasonable charge is hereby prohibited and declared unlawful; but charges heretofore established and set out in any schedule filed as provided in section nineteen shall be deemed prima facie lawful until changed or modified by the department under the powers conferred upon it by

language between sections 152(b)[186] and 301[187] of the Communications Act. Section 152(b) "reserves to the states jurisdiction over charges, classifications, practices, services, facilities, or regulations for, or in connection with, intrastate communication service by wire or radio of any carrier."[188] Section 301, on the other hand, "directs the FCC to maintain the control of the United States over all channels of radio transmission."[189] Further, section 301 states that "no person shall use or operate any apparatus for the [intrastate, interstate, or foreign] transmission of energy or communications or signals by radio except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter."[190]

The Court of Appeals held that section 301 is a general jurisdiction statute and section 152(b) is a limited jurisdiction statute.[191] Consequently, the court found that section 152(b) cannot be implemented unless there is an implied authority under section 301. Therefore, in interpreting section 152(b), courts must rely on Congress' intent when it incorporated section 301 into section 152(b).[192] As noted above, the Court of Appeals held that "the structure and legislative history of the Act is such that Section 301 does not authorize the FCC to preempt state regulation of intrastate radio common carriage merely because these regulations may frustrate the entry of FCC licensees."[193] Despite its holding, the court nonetheless opined that "[p]ublic interest considerations may well favor changing the present rules and allowing more complete FCC control over intrastate radio common carriage."[194] However, the court concluded that any change must come from Congress, not from the courts, and not from the FCC.[195] Thus, for now,

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> this chapter, but this provision shall not give to such rates any greater weight as evidence of the reasonableness of other rates than they would otherwise have.

MASS. GEN. LAWS ANN. ch. 159, § 17 (West Supp. 1989).

186. 47 U.S.C. § 152(b) (1982 & Supp. V 1987).

187. 47 U.S.C. § 301 (1982).

188. People of the State of California v. Fed. Communications Comm'n, 798 F.2d 1515, 1517 (D.C. Cir. 1986).

189. *Id.*

190. *Id.*

191. *Id.* A general jurisdiction statute gives the FCC broad power to regulate all radio transmission. A limited jurisdiction statute acts as an exception to this power by granting the states power over intrastate radio transmission.

192. *People of the State of California*, 798 F.2d at 1520; H.R. REP. No. 910, 83d Cong., 1st Sess. 1953, *reprinted in* 1954 U.S. CODE CONG. & ADMIN. NEWS, at 1233.

193. *People of the State of California*, 798 F.2d at 1520.

194. *Id.*

195. *Id.*

the courts will prevent federal regulation of interstate common carriers providing intrastate service and will allow states to regulate these common carriers in accordance with their own statutes.

X. The Future

Congress must amend the Communications Act of 1934 to drop the *NARUC I* distinction. Such Congressional action could prevent a court from ruling that the FCC had to apply the *NARUC I* distinction as it is written in the Communications Act of 1934. Undoubtedly, a ruling of this nature would have an adverse effect on the deregulatory goals of the FCC, as well as communications service providers.

Although the FCC recently has set price caps on rates charged by AT&T, and although it soon may implement the *Third Computer Inquiry* proposal to allow a competitive and open enhanced services market for all dominant carriers, the dominant carrier will still have to file tariffs under Title II. Moreover, although the competitive carrier rulemaking allowed the non-dominant carriers to forebear from filing tariffs, the FCC will never be able to impose mandatory forebearance on the non-dominant carriers and, as a result, they will continue to file tariffs so long as AT&T has a dominant market share.

Obviously, Title II will affect the common carrier regardless of which approach the FCC takes. For this reason, the FCC should label a carrier's services private carrier so that Title II regulation can be avoided by the FCC for administrative purposes and by the communications service providers for regulatory purposes.[196]

XI. Conclusion

The *NARUC I* distinction will continue to create problems for the FCC, the courts, and the communications service providers. If Congress would drop the distinction between common carrier and private carrier, the definition of common carrier would remain only technical in nature. For this reason alone, the classification of an entity as a private carrier would become simpler because of the clear technical distinction between common carriers and private carriers.

Until Congress amends the Communications Act of 1934, and

196. However, it must be remembered that, although some states have eased the burden imposed on intrastate common carrier activity, state regulation of intrastate common carrier regulation remains quite onerous.

absent judicial intervention, the FCC will continue to undermine the *NARUC I* distinction. Furthermore, FCC decisions have actually created more problems relating to the definition of private carrier. In fact, there is a growing resentment by many (pre-FCC circumvention) providers of common carrier service towards private carriers.[197] Because of the plethora of problems it has created, Congress must act soon and *correct* the *NARUC I* distinction between common carrier and private carrier.

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197. In markets where they actually compete with private carriers, common carriers have demanded reclassification of private carriers. In fact, in 1982, Congress amended section 331 of the Communications Act of 1934 to resolve the private carrier classification problem anticipated by the *NARUC I* decision. Pub. L. No. 97-259, 96 Stat. 1087 (1982). Unfortunately, Congress continued to define private carrier according to its similarities and dissimilarities to common carriers. In fact, in a recent decision, the FCC rejected the notion that a carrier already classified as a private carrier in the private land mobile radio service could be reclassified as a common carrier because it provided service to ineligibles under Part 90 of the Commission's Rules. In the Matter of Paul Kelley d/b/a American Teletronix, Licensee of Station WNHM 552, Memorandum Opinion and Order, 3 FCC Rcd 5347 (1988). In this case, a private carrier licensee had asked the Commission for a declaratory ruling urging that his private carrier paging system should be allowed to maintain its private carrier status and thus avoid common carrier regulation. *Id.* at 5347. A competing radio common carrier opposed the petition arguing that the licensee was advertising himself as a common carrier and also serviced many ineligibles. *Id.* The FCC concluded that once the carrier has been classified as a private carrier, the only event allowing reclassification of the carrier as a common carrier would be the carrier's reselling the services of a common carrier for profit. *Id.*

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