Common Carrier Regulation of Telecommunications Contracts and the Private Carrier Alternative

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Introduction

The Federal Communications Commission (FCC or Commission) has traditionally regulated telephone services under Title II of the Communications Act of 1934,[(3)] requiring, among other things, that telephone companies as "common carriers" make their services available to the general public at reasonable rates.[(4)] Over the last two decades, however, the FCC has often refrained from imposing Title II or common carrier regulation when authorizing new services or in reviewing the regulatory treatment of existing services. The public interest benefits of classifying services as "private" or "noncommon" carriage are thought to be the promotion of competition, the satisfaction of customers' demand for individually tailored offerings, and the avoidance of unnecessary regulatory costs.[(5)] Notable examples of services that the FCC has moved out of common carrier regulation include enhanced telecommunications services,[(6)] customer premises equipment (CPE),[(7)] inside wiring,[(8)] and satellite transponders.[(9)] The FCC has also taken this approach in other cases, going so far as to propose that certain long-distance service contracts could be considered private carriage.[(10)]

This private carrier alternative for the long-distance market has received renewed impetus from two quarters. First, in October 1995, the FCC found that even the largest interexchange carrier, AT&T, "lacks market power in the interstate, domestic interexchange market," giving new currency to this proposal.[(11)] Second, with passage of the Telecommunications Act of 1996,[(12)] Congress has created a new legal and policy playing field based on the presumption that competition, open entry, and market forces should, when possible, "regulate" the telecommunications industry. In particular, the new law grants to the FCC the power to forbear from enforcing statutory provisions where to do so would be in the public interest.[(13)] The new law is the first broad and explicit legislative recognition that competition can provide a basis for rendering statutory requirements for telecommunications carriers obsolete. Indeed, it admonishes the FCC in exercising its forbearance authority to determine whether forbearance from enforcing a provision or regulation will promote competitive market conditions or enhance competition among providers of telecommunications services.[(14)] The private carrier alternative is consistent with and complementary to the deregulatory thrust of the Telecommunications Act of 1996. This Article reviews the judicial and FCC precedent defining the scope of common and private carriage, describes the contract segment of the long-distance market, and illustrates why at least this segment can and should be classified as private carriage.

I.The Definition of Common Carriage Under the Communications Act

A. The 1934 Communications Act and Legislative History Provide Little Guidance

Since FCC jurisdiction over telecommunications companies depends importantly on the meaning given "common carriage," it is somewhat surprising that the Communications Act of 1934 and FCC regulation provide so little guidance on how to define it. Section 3(h) of the Act provides only a circular definition:

"Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.[(15)]

While this statutory language contains some limitations on the scope of common carriage, the definition does not delineate which providers of interstate or foreign communication[(16)] for hire by wire or radio are common carriers. The legislative history is no more informative: A common carrier was not intended to include "any person if not a common carrier in the ordinary sense of the term."[17] G. Hamilton Loeb's thorough analysis of the legislative history of the 1934 Communications Act illustrates Congress's c oncern with monopoly power held by communications carriers.[18] Loeb's analysis, however, could not clarify what Congress intended by the term "common carrier."

The Telecommunications Act of 1996 neither disturbs the common carrier classification nor provides any additional guidance as to its meaning. In addition, many of the new provisions of the Act apply to "telecommunications carriers" which are defined to include, with one minor exception, any provider of "telecommunications services."[19] A "telecommunications service," in turn, is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."[20] As this Article shows, an essential element of common carriage is the holding out of a service to the public.[21] Thus, it appears from the definitions of "telecommunications service" and "telecommunications carrier" in the Telecommunications Act of 1996 that Congress has extended the common carrier classification and, therefore, the private carrier distinction, to assist in the identification of entities and services to be subject to the requirements of the new law.[22]

The definition of "telecommunications carrier" goes on to state that "[a] telecommunications carrier" shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as "common carriage."[23] As discussed, "telecommunications service" already includes the essential element of common carriage--that the carrier holds itself out as providing the services to the public.[24] The additional language in the definition appears to be restating for "telecommunications carriers" what is already true under current law for common carriers--that a single entity may be subject to common carrier regulation in providing some services but not others.[25]

The acts preceding the 1934 Communications Act do not shed much light on the subject. In 1910, the Mann-Elkins Act[26] gave the Interstate Commerce Commission (ICC) jurisdiction over the interstate rates charged by telephone and telegraph companies. The Mann-Elkins Act was an addition to an act designed to regulate railroad sleeping car companies and was not considered major legislation. Little reason was given for this limited regulatory foray since the ICC could only respond to complaints. Indeed, it was noted that telephone and telegraph, as monopolies, were the only remaining public service companies not yet subject to ICC regulation.[27] No abuses were cited.[28] The lack of regulation by the ICC during its twenty-five years of regulatory authority may, as Loeb suggests, evidence a dearth of public sentiment on the subject.[29]

Ten years later the Esch-Cummins Act[30] restated the ICC's jurisdiction to include "the transmission of intelligence by wire or wireless."[31] Loeb believes this language change was made to bring the statute into conformance with the Supreme Court's *Pensacola Telegraph Co. v. Western Union Telegraph Co*.[32] decision.[33] As Loeb points out, "[t]he Committee made it clear that no change in the regulatory scheme or the regulatory policy previously applied to communications was contemplated."[34] A year later, the Willis-Graham Act[35] exempted telephone and telegraph mergers from the antitrust acts and gave the ICC power to approve or disapprove them.[36] The debates over this Act evidence the legisla tors' view that telephony was a natural monopoly.[37]

In implementing the 1934 Communications Act, the FCC simply restated the Act's definition of a "communication common carrier" as "[a]ny person engaged in rendering communication service for hire to the public."[38] For most of the Act's history, the ambiguity over what constituted common carriage did not present any significant difficulties. As to any particular service, consumers usually had no choice; there was usually only one provider for any given service. In the long-distance market and in each local exchange there was only one telephone company, and all agreed that it was a common carrier.

The first major crack in this regulatory structure came in 1958 in the FCC's *Above 890*[39] decision, when the FCC allowed businesses to use microwave frequencies to meet some of their internal communications needs.[40] This case [41] provided a starting point for MCI to act as a common carrier by providing "private line" service to businesses. Eventually, with guidance from the D.C. Circuit Court of Appeals,[(42)] the FCC permitted MCI and others to offer switched service to the general public.[(43)] The rest is history.[(44)] By the first quarter of 1995, AT&T's share had fallen from 100 percent to 56.6 percent, MCI and Sprint had garnered 17.7 percent and 8.7 percent of the market, and scores of other carriers had constituted a significant fringe that supplied 17 percent of the total long-distance market.[(45)]

The FCC extended the concept of allowing third-party carriage of private line services in 1975, when it created a new service called specialized mobile radio service (SMRS).[(46)] SMRS licensees are third-party providers of mobile communications who, at the time the service began, were restricted to serving the internal business communications needs of eligible businesses.[(47)] In FCC parlance, they were restricted to serving those entities eligible to become private radio licensees.[(48)] This distinction, the FCC reasoned, made SMRS licensees private rather than common carriers.[(49)]

The FCC's decision to create SMRS was challenged in court by the radio common carriers on the grounds that SMRS would be engaged in common carriage and, therefore, would have to be regulated as common carriers.[(50)] Judge Wilkey's opinion in *NARUC I* filled the statutory and regulatory gap and remains the leading case regarding the definition of communications common carriers.

B. The NARUC I Test for Common Carriage

Finding the statutory and FCC definitions of common carriage unhelpful, Judge Wilkey consulted the common law.[(51)] He noted that the doctrine of common carriage developed at common law in England to "impose a greater standard of care upon carriers who held themselves out as offering to serve the public in general."[(52)] The imposition of the status of insurer on the carrier had been based on the lack of control exercised by travellers and shippers and the resulting potential for carriers to fraudulently claim losses due to theft or negligence.[(53)]

In contrast, legislation enacted in the late nineteenth and early twentieth centuries included price and service regulation as well as "insurer" obligations. Concern over the monopoly power of railroads led to regulation designed to assure reasonable pricing and access.[(54)] As discussed above, the same concern led to the imposition of common carrier regulation on telephone and telegraph companies.[(55)] Subsequently, and confusingly, legislation extended common carrier regulation to carriers without monopoly power in competitive industries such as trucking.[(56)]

Judge Wilkey attempted to harmonize these divergent theories by emphasizing an element common to all of these industries--the common carrier's practice of holding itself out to serve the public indiscriminately. He concluded that "what appears to be essential to the quasi-public character implicit in the common carrier concept is that the carrier `undertakes to carry for all people indifferently. . . .'"[(57)] A carrier is not a common carrier if its practice is to make individualized deals.[(58)]

By itself this criterion could be insufficient because carriers with substantial market power might seek to price-discriminate among consumers to maximize their profits.[(59)] Judge Wilkey added a second criterion: a carrier may not choose to make individualized deals if the FCC, or other agency or legislation, compels it to behave as a common carrier.[(60)] The FCC had concluded that SMRS providers need not act as common carriers because competition was the best means of achieving efficient use of the spectrum in question.[(61)] In applying the public interest test in *NARUC I*, Judge Wilkey found this conclusion to be rational.[(62)]

Thus, a carrier offering communications service is acting as a common carrier if it either (1) actually holds out its service indiscriminately to the public or (2) is required to hold itself out because the public interest requires it. As to the former criterion, the *NARUC I* court stated that the fact that SMRS is of practical use to only a fraction of the population was not an obstacle to common carrier status.[(63)] However, Judge Wilkey found that:

The nature of dispatch services necessarily means that SMRS will establish medium- to long-term relations with a clientele that will remain relatively stable.[(64)]

Methods of operation and time demands may be highly individualized and may be a very sound basis for a carrier to accept or reject an applicant. For example, different systems might be better suited to different users depending upon their hours of primary need.[(65)]

Nothing in the record indicates any significant likelihood that SMRS providers will hold themselves out indifferently to serve the user public.[(66)]

Because the SMRS providers did not appear likely to hold themselves out by virtue of the industry structure, and because the FCC was not required by statute or under the public interest test to force SMRS providers to hold themselves out, Judge Wilkey did not disturb the FCC's decision not to regulate SMRS providers as common carriers.

C. Three Criteria Related to Common Carriage Have Been Rejected

A number of cases clarify that various typical features of common carriage are not sufficient to make one a common carrier. First, while the holding-out test has been held to require implicitly that the carrier's service permits subscribers to transmi t intelligence of their own choosing,[(67)] lack of control over content does not by itself make one a common carrier. In *Wold Communications, Inc. v. FCC*,[(68)] the D.C. Circuit rejected the contention that domestic satellite operators' lack of control over content on the transponders they sell made them common carriers.[(69)] Instead, the court relied on the adequacy of the FCC's record that satellite operators would be unlikely to hold themselves out to the public when selling satellite transponders.[(70)]

Second, earning a profit does not make one a common carrier. *NARUC I* concluded that such a broad reading of the definition would impermissibly sweep in services that the courts have emphatically excluded.[(71)] However, the FCC is not precluded from considering profit altogether. In *American Telephone & Telegraph v. FCC,*[(72)] the Second Circuit rejected the contention that resellers of other common carriers' facilities are not common carriers because they do not communicate by wire or radio.[(73)] The court found it proper for the FCC to distinguish between not-for-profit shared telecommunications systems and for-profit resellers.[(74)] It noted that profit can be a "significant indicium" of common carriage insofar as its existence increases the likelihood that the party making the profit is indiscriminately holding itself out.[(75)] The court stated, "[t]he FCC has not altered the statutory requirements, it has merely articulated criteria to which it will look to determine whether the statutory requirements are met."[(76)] However, the court dismissed "[t]he suggestion by petitioners that the FCC has made profit a test of common carriage."[(77)]

While it is permissible for the FCC to consider whether a carrier profits from its carriage in deciding whether the carrier is a common carrier, a profit guideline is not required by the Communications Act, and the FCC has long since discarded it as an indicium of indiscriminate holding out.[(78)]

Third, it is not essential that a carrier own facilities. In rejecting IBM's contention that resellers could not be common carriers because they do not own facilities, the *AT&T* court acknowledged that it owed deference to the FCC's interpretation that a common carrier is one who holds out regardless of actual ownership of facilities.[(79)] After observing various weaknesses in IBM's argument, the court concluded that there was "no persuasive reason to depart from the FCC's long-standing interpretation of its own organic statute."[(80)] A strong presumption of validity ran with the FCC's interpretation.[(81)]

D. The NARUC I Test Has Been Broadly Applied to New and Existing Services

1. Court Precedent

On numerous occasions, the courts and the FCC have relied on and broadly applied *NARUC I*'s two-part test. The

Supreme Court quoted the *NARUC I* test approvingly in *Midwest Video*.[(82)] In that case, the Court struck down an FCC requirement that certain cable systems hold out dedicated channels on a first-come, nondiscriminatory basis because it would have imposed common carrier regulation in contravention of Section 3(h)'s prohibition against imposing common carrier regulation on radio broadcasting.[(83)]

While the FCC does not have unfettered discretion in defining common carriage, the leading precedent[(84)] has shown substantial deference to the FCC's attempts to apply this two-part test. The tone was set in *NARUC I*. In rejecting those parts of the FCC's decision that implied "an unfettered discretion . . . to confer or not confer common carrier status on a given entity, depending on the regulatory goals it seeks to achieve,"[(85)] the court stated that "in authorizing the creation of SMRs which are not required to behave and thus be regulated as common carriers, the FCC has [not] breached the broad discretion granted it with regard to radio under the `public convenience, interest and necessity' standard."[(86)]

The D.C. Circuit upheld the FCC's *Computer II* decision,[(87)] which, in terms of economic impact, was the Commission's most significant removal of services from common carrier regulation. In *Computer II*, the D.C. Circuit upheld the FCC's decision defining enhanced services and CPE as noncommon carriage.[(88)] The court afforded the FCC considerable leeway in determining that the FCC was not required to classify enhanced services as common carrier services.[(89)] The FCC determined that its obligation to promote an efficient network could best be accomplished by regulating the rates of only those activities clearly within the scope of Title II.[(90)] The court noted the difficulties the FCC had in drawing the demarcation line in the data services area on a case-by-case basis.[(91)] The court concluded that in these circumstances the FCC was "justified in conserving its energies for more efficacious undertakings, at least when it establishes an alternative regulatory scheme under its ancillary jurisdiction."[(92)]

Importantly, having already upheld the FCC's finding that a provision of CPE is not itself a common carrier activity within Title II,[(93)] the court stated that "the Commission could regulate the rates for carrier-provided CPE only if it were necessary to ensure the availability of Title II-regulated communications service at reasonable rates."[(94)] Congress did not require the FCC to regulate carrier-provided CPE under Title II when it had "determined that an alternative regulatory scheme would more effectively further the goals of the [Communications] Act."[(95)]

Computer II concluded that an alternative regulatory scheme that relied on the "regulatory tools" of "newly unleashed market forces" provides a sufficient basis for classifying an activity as noncommon carriage.[(96)] In finding that the FCC acted reasonably in defining its jurisdiction over enhanced services and CPE, the court stated: "Because the Commission's judgement on `how the public interest is best served is entitled to substantial judicial deference,' the Commission's choice of regulatory tools in Computer II must be upheld unless arbitrary or capricious."[(97)] The economic importance of *Computer II*, however, was important to the court and arguably limits its precedential weight in other areas.[(98)]

The other leading case, *Wold Communications*, presented the D.C. Circuit with more difficult facts.[(99)] The FCC had ruled that satellite operators could sell some of the transponders on their satellites rather than lease them under a common carrier tariff.[(100)] Also, at the time of the decision allowing transponder sales, domestic satellite providers were regulated as dominant carriers.[(101)]

The *Wold Communications* court observed at the outset that it was confronting "arcane, fast-moving" technology, divergent estimates of supply and demand, and a lack of specific congressional guidance concerning satellite regulation.[(102)] These circumstances compelled the court to pay "particular deference to the expert agency's [FCC's] policy judgments [*sic*] and predictions [and] its forecasts of `the direction in which future public interest lies.'"[(103)] The court saw two questions--whether the FCC's decision was within its "broad range" of authority under the Communications Act, and whether the decision was adopted through a rational decision-making process.[(104)]

In answering the first question, the court rejected the contention that the FCC must regulate domestic satellite operators exclusively as common carriers even if the FCC has rationally found that the public interest would be advanced by allowing the marketplace to substitute for direct FCC regulation.[(105)] Given the elastic regulatory powers that Congress gave to the FCC, in "a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding," the court concluded that "beyond question the Act permits the FCC to allow the marketplace to substitute for direct FCC regulation in appropriate circumstances."[(106)] The court found that the FCC's essential public interest determinations and its measured step made its reliance on market forces appropriate.[(107)]

In answering the second question, "mindful of its limited role,"[(108)] the court found record support for the FCC's forecasts.[(109)] The court admonished the petitioners for selecting the wrong forum for complaining that the FCC's decision was "unwise."[(110)]

Reviewing courts have accorded the FCC substantial deference in determining whether a carrier is holding itself out and whether it should be required to hold itself out. The FCC must demonstrate that its decision is within its broad discretion and the product of reasoned decision making. Also, when it allows carriers to engage in noncommon carriage where previously common carriage reigned alone, the FCC has to demonstrate adequately that such increased reliance on market forces is appropriate and that it is moving in a measured manner. While there are certainly limits to the FCC's discretion in deregulating industries or industry participants,[(111)] the FCC is not without substantial breathing room to rely on deregulation and competition to serve the public interest.

2. FCC Precedent

The FCC has applied the *NARUC I* test in numerous decisions not receiving court review. When defining common carriage, the FCC has rarely strayed from *NARUC I*, except to argue for an even more narrow interpretation of the holding-out criteria. Without exception, the FCC has used the presence of competition as the primary basis for concluding that a particular service need not be held out indiscriminately to the public. FCC initiatives reclassifying services as private or noncommon carriage fall into five categories: (1) satellite transponders, (2) broadcast-related services, (3) private land mobile services, (4) private microwave services, and (5) certain communications services, such as enhanced services, CPE, and inside wiring.

a. Satellite Transponder Sales

Recognizing the significant departure from previous practice involved in authorizing transponder sales,[(112)] the FCC emphasized the public policy considerations underlying its decision.[(113)] The FCC found that allowing the sale of satellite transponders would encourage additional satellite entry and facility investment, allow for more efficient use of orbital slots and of the radio spectrum, and spur technical and marketing innovation in the provision of domestic satellite service.[(114)] The FCC also agreed with the Department of Justice and the Federal Trade Commission that domestic satellite licensees did not possess market power.[(115)]

Initially, the FCC required applicants that wanted to designate transponders for noncommon carriage to include detailed showings on such things as the percentage of noncommon carriage transponders, the nature and principal terms of these offerings when provided to other parties, the number of transponders, and the name of the purchasing parties.[(116)] In order for it to determine whether satellite operators were in fact engaging in common carriage by indiscriminately holding out the transponders available for sale, the FCC also required applicants to submit marketing plans.[(117)]

Four years after the *Transponder Sales Order*, the FCC significantly relaxed this case-by-case review.[(118)] The FCC granted Martin Marietta authority to provide domestic satellite service, but, due to its deficient provision of information, the FCC denied Martin Marietta the ability to operate on anything other than a common carrier basis.[(119)] Martin Marietta filed a Request for Modification of its authorization, and although the FCC again found the information provided by Martin Marietta to be lacking, it nonetheless approved Marietta's request to sell or lease 33 percent of its transponders.[(120)]

The FCC determined that it no longer needed the detailed showings required by *Transponder Sales Order*.[(121)] Instead, an applicant need only show that its noncommon carrier proposal would "not unduly reduce the availability of satellite transponders offered on a common carrier basis."[(122)] The FCC stated that its continued monitoring, coupled with its findings in the intervening *Competitive Carrier* proceeding[(123)] of no market power in the domestic satellite market, provide a sufficient rationale for making such authorizations more routine.[(124)]

The FCC's transponder decisions are also important for having permitted satellite operators to offer on a private carrier basis, transponders that share overhead costs with other transponders offered under tariff. Hundreds of millions of dollars are required to cover the launch costs, insurance premiums, construction expenses, and other joint and common costs incurred to provide a satellite's transponders. Nonetheless, since *Martin Marietta*, the FCC has granted numerous applications allowing operators to provide domestic fixed satellite transponders on a noncommon carrier basis while the remaining transponders on the satellite are offered under tariff.[(125)] Operators have attested that they are unaware of any instances subsequent to the *Transponder Sales Order* where a grant of noncommon carrier authority has been found to impact the public interest adversely, and that the practice has worked well in allowing them to meet customer needs in the competitive satellite market.[(126)]

b. Mass Media Services

The FCC followed this transponder sale approach in liberalizing regulation of the Microwave Multipoint Distribution Service (MMDS). Applying the *NARUC I* test, the FCC concluded that MMDS licensees could, at their election, designate some or all of their channels for noncommon carrier service, while providing common carrier service on other channels.[(127)] Relying on its favorable experience with transponder sales, the FCC predicted similar benefits in giving MMDS systems the flexibility to operate on a noncommon carriage status.[(128)]

Prior to the *MMDS Private Carriage Order*, a number of FCC decisions gave existing broadcasting licensees additional flexibility in using their frequencies for nonbroadcast purposes.[(129)] In exercising that new flexibility, the licensees were given the option of structuring their nonbroadcast operations so as to be either noncommon carriers or common carriers.[(130)] Licensees who held out their offerings to the public would then be subject to common carrier regulation.[(131)] However, the FCC did not require the licensees to offer their services indiscriminately to the public, in part because their new operations would take place in competitive markets.[(132)]

c. Private Land Mobile Services

During the same time period, the FCC considered the regulatory status of private land mobile voice and paging services and found both services to be noncommon carriage. In 1982, the FCC found that the cooperative sharing of mobile voice telecommunications systems by multiple licensees was not common carriage.[(133)] The FCC rejected the notion that either the licensees or the entities which supplied equipment to the licensees were common carriers.[(134)] Nothing in the record indicated that the proposed licensees would "carry for all people indifferently" under *NARUC I*.[(135)] The FCC could not be expected to require the licensees in this case to hold themselves out as common carriers; their licenses were limited to providing communications service to a very small number of entities. However, in the course of the proceeding, the FCC did make public interest findings that such private licensing and shared use of facilities were in the public interest.[(136)]

Since that decision, Congress has twice changed the Communications Act's test for determining whether a particular mobile service is common or private carriage.[(137)] Nonetheless, the FCC has ruled that private land mobile voice and paging services were not common carriage.[(138)]

d. Private Microwave Services

The FCC broadly defined common carriage when reviewing a number of microwave and fiber-optic cable activities in order to keep those services outside the scope of common carriage and free from the jurisdiction of state regulatory bodies. In 1985, the FCC freed private microwave licensees to offer, on a for-profit basis, telecommunications services to other businesses eligible to use these private frequencies.[(139)] This new freedom was calculated to foster additional capacity and increased usage of built capacity.[(140)] Since the services would be offered on a very selective basis, these carriers were distinguishable from common carriers.[(141)] Because private licensees would face incentives to select cautiously only users that were compatible with a licensee's own existing use, the FCC found it unlikely that a licensee would hold itself out to the public.[(142)]

The FCC has found the proposed operation of a number of microwave and fiber systems to be noncommon carriage.[(143)] These cases are quite similar in their application of *NARUC I* to the holding-out issue. Because the operators of the proposed systems were under no legal compulsion to hold their services out indiscriminately to the public,[(144)] the FCC's inquiry focused mainly on whether the system operators were likely to offer their service to everyone. The FCC found in each case that the operators were not likely to do so and emphasized the need for compatibility between the operator's own internal use and the uses of the operator's customers.[(145)] The decisions also considered the competitive nature of the market involved,[(146)] while not placing much weight on the fact that some of the operators had entered into contracts that contained similar terms,[(147)] or the relatively small use the operator itself made of its facilities.[(148)]

e. Miscellaneous Common Carrier Cases

The FCC also has addressed the definition of common carriage in its detariffing of inside wiring,[(149)] its deregulation of enhanced services and CPE,[(150)] and its declaratory ruling on FTS 2000.[(151)] In the case of CPE, the key issue was whether the equipment used to complete interstate communications was itself a communications service required to be tariffed by the Communications Act.[(152)] The FCC narrowly construed the definition of communications service to justify its finding that the provision of CPE is not a common carrier service, stating the fact that "some carriers have traditionally furnished [CPE] with their communications services does not establish that they are required to do so or warrant any universal inferences about the public interest."[(153)] The FCC went on to note, and to rely upon, the competitive benefits which were to flow from the detariffing of CPE.[(154)]

In regard to *Computer II*'s detariffing of enhanced services, the FCC reiterated its decision to refrain from requiring providers of enhanced services to offer these services indiscriminately to the public.[(155)] The FCC also found that customer services and individualized decisions were "[i]nherent in the offering of enhanced services."[(156)] In detariffing inside wiring, the FCC relied on the same legal authority it had used in the *Computer II FCC Final Decision*.[(157)]

The FCC avoided addressing the issue of whether a provision of FTS 2000 would or could be considered private carriage, in light of the fact that the parameters of FTS 2000 were yet to be determined.[(158)] The General Services Administration argued that FTS 2000 should be considered private carriage because the General Services Administration could "fend for itself" due to the existence of effective competition among potential providers. However, the FCC declined to use this as a basis for declaring FTS 2000 to be a common carrier service before the service was outlined.[(159)] The FCC made clear that it was not rejecting the possibility that a carrier is not engaged in common carriage when it offers a service that is subject to effective competition.[(160)] The FCC stated that this proposition remained an open question.[(161)]

E. The Contract Service Proposal

In the *IXC Competition NPRM*, the FCC proposed to allow AT&T and other long-distance carriers to provide contract services as private carriage.[(162)] The proposal as applied to AT&T was limited in terms of quantity and also would have required that AT&T gain Section 214 authority[(163)] prior to withdrawing specific facilities or a portion of its facilities from common carriage.[(164)] The *IXC Competition NPRM* proposal also would provide that no customer would be forced to accept private carriage in lieu of common carriage.[(165)]

The FCC noted that it had significant leeway in determining whether an offering should be subjected to common carrier regulation.[(166)] Based on *NARUC I* and its progeny, the FCC tentatively concluded that it did have authority to permit long-distance companies to offer service on a private carriage basis.[(167)]

Not surprisingly, many of AT&T's competitors opposed the proposal. Many commenters claimed that adoption of the proposal would be too dramatic a move for the FCC.[(168)] Sprint argued that cost accounting issues relating to joint and common costs precluded adoption of the proposal.[(169)] Comptel argued that private carriage would permit rate de-averaging.[(170)] Williams argued that *Maislin Industries*[(171)] and the "filed-rate doctrine" required that AT&T charge only the rate filed in its tariffs and not any privately negotiated rate.[(172)] A number of commenters also read *General Services Administration* to preclude private carriage in this instance.[(173)]

When the FCC issued the *IXC Competition Order*, it made no mention of the private carriage proposal, except to state in a footnote that "[t]he record does not support the adoption of our private carriage proposal at this time."[(174)] Commissioner Duggan applauded the FCC's decision "pointedly declin[ing] to adopt some of the more far-reaching proposals," including the private carriage proposal.[(175)]

The remainder of this Article considers the contract service segment in today's long-distance market and whether allowing carriers to enter into private carriage contracts would square with the *NARUC I* test.[(176)]

II.The Growing Importance of Customer-Specific Contracts

Many customers view specialized telecommunications services as an important part of their business operations. Individually negotiated contracts are often viewed by these customers as the best way to get these tailored services at the lowest price. Such negotiations allow large customers, at least, to leverage price and quality competition when dealing with their long-distance carrier.[(177)] This desire on the part of customers is not new. In *Above 890*, the FCC noted that private users' control over their own private microwave networks allowed for customization, better control, and greater flexibility in meeting their own communications needs.[(178)]

More often than not, customers prefer to keep their telecommunications contracts and the negotiations secret, in order to protect proprietary information. However, tariff filing requirements, by definition, make certain terms, conditions, and prices public information.[(179)]

The contract business represents an important and dynamic segment of the long-distance market. Major interexchange carriers compete with data communications companies, computer system vendors, and systems integrators in the rapidly growing market for solving customers' information needs.[(180)] These customers require individualized attention; "individual firms bring entirely different motivations and expectations to the table."[(181)]

Unfortunately, FCC regulation has stymied development of this segment, left customer demand unsatisfied, and produced regulatory anomalies and failures. The FCC has construed the Communications Act in a way that limits the usefulness of common carrier-tariffed contracts. Tariffs 12 and 15 are good examples of this, as are common carrier contracts. Although they offer greater flexibility, the requirement that they be offered to all similarly situated customers mitigates their ability to allow for truly tailored, innovative deals.

Many customers have argued in favor of customer-specific contracts, with the ability to treat the negotiations and contracts as proprietary information.[(182)] This demonstrated interest in customer-specific contracts, coupled with the presence of significant competition, at least in the high-volume interexchange market, provides support for treating these customer-specific contracts as private carriage.

III.Application of the Private Carrier Alternative to Customer Contracts

Any removal of a service from common carrier regulation must satisfy the *NARUC I* test.[(183)] Telecommunications contracts present no exception. However, nothing in the nature of these contracts or the services provided thereunder requires that they be designated as common carrier services. Furthermore, there is little reason for the FCC to require that carriers continue to hold these contract services out indiscriminately to the public.

A. Telecommunications Contracts Are the Reverse Image of the Generally Available Offerings Envisioned Under Common Carriage

Contract offerings are tailored to a customer's specific needs and offer pricing based on a customer's unique situation. While differences in calling patterns among small users may be slight, the telecommunications needs of very large users (*e.g.*, the New York Stock Exchange and General Electric) often vary greatly, in terms of services, usage, and the cost to provide service. New technologies may make these differences even larger, as each customer chooses the particular innovations which suit its needs. If allowed, a carrier could and would package service elements and price these packages on individual terms.

Another aspect of these consumer-specific contracts is that they are generally long-term arrangements. A number of cases has pointed out that longer term offerings can be a distinguishing feature of private carriage, perhaps because smaller and less sophisticated users cannot forecast and commit to a particular offering for a relatively long period of time.[(184)] Smaller customers also may present more risk in a long-term deal to a long-distance carrier and provide less of an incentive for the carrier to tailor its offering to minimize those risks.

For a number of reasons, AT&T's competitors have argued that common carrier contracts and contracts under Tariffs 12 and 15 were not generally available.[(185)] To the extent that these competitors are correct, these offerings cannot, *a fortiori*, meet the *NARUC I* test. In any case, the contract tariffs are made generally available only after they have been individually negotiated, due to regulatory compulsion. In the absence of regulatory compulsion, these individually negotiated deals constitute private offerings.

Although many common carrier contracts contain similar or identical terms, the FCC has rejected the existence of similar terms as part of the common carrier criteria.[(186)] At this stage, the private carriage proposal would include only large contracts, subject to individual negotiation. Large common carrier contracts are currently the subject of intense individualized negotiations. If the private carriage proposal is adopted, the contracts could be subject to even greater negotiation.[(187)]

Services characterized by specialized, customer-specific offerings and individual negotiations will not, at least in the absence of a legal compulsion, be held out indiscriminately to the public. There is nothing in the nature of unregulated contract carriage to cause the FCC to expect that it would be common carriage under *NARUC I*.

B. Public Interest Does Not Require Any Long-Distance Carrier to Indiscriminately Hold Out Its Contract Service Offerings to the Public

In addition to there being no evidence that telecommunications carriers would, absent regulatory compulsion, hold out their contract service offerings to the public, there is no public interest need for or advantage in imposing such a requirement on carriers.

1. Competition Minimizes the Likelihood of Anticompetitive Conduct

The long-distance market is now substantially competitive, and no long-distance carrier can unilaterally control price, as demonstrated by recent FCC analysis. The FCC analyzed the competitive conditions in the long-distance market when it ruled on AT&T's request to be classified as a nondominant carrier.[(188)] The FCC concluded that AT&T is [(189)]

nondominant because it no longer has market power in the relevant market. In so doing, the FCC freed AT&T from price cap regulation for its domestic services.[(190)] AT&T may now file tariffs with one day's notice, without cost-support data, and with a presumption of lawfulness.[(191)] AT&T is also relieved of special reporting requirements and Section 214 obligations.[(192)]

The FCC's conclusion that AT&T lacks market power in the relevant market rests on three essential findings. First, the relevant product and geographic market is the interstate, domestic interexchange telecommunications market.[(193)] The FCC defined the relevant market broadly because the interexchange facilities used to provide the various business and residential services are largely fungible.[(194)]

Second, AT&T's competitors have sufficient existing ability to supply services and ability to supply more services to constrain AT&T's unilateral pricing decisions.[(195)] For example, the FCC found uncontroverted evidence that "MCI and Sprint alone can absorb overnight as much as fifteen percent of AT&T's total 1993 switched demand at no incremental capacity cost; that within 90 days MCI, Sprint, and LDDS/WilTel, using their existing equipment, could absorb almost one-third of AT&T's total switched capacity . . . ."[(196)]

Third, the FCC found that even residential long-distance customers are willing to switch from AT&T to obtain price reductions and other desired features.[(197)] The FCC also relied on its finding in *IXC Competition Order* that business customers were highly demand elastic.[(198)] Among other things, business customers are more sophisticated than residential customers and often rely on consultants and in-house telecommunications experts. The FCC noted that in 1994 AT&T supplied only 25.6 percent of the approximately $4.4 billion resale market.[(199)] The FCC concluded that any ability AT&T had to control price is confined to *de minimis* segments of the overall market and that "most major segments of the interexchange market are subject to substantial competition today, and the vast majority of interexchange services and transactions are subject to substantial competition."[(200)]

2. Solving the Difficulty in Allocating Joint and Common Costs Does Not Require Common Carrier Regulation

The lack of rate-of-return regulation also minimizes the cost-allocation problems associated with costs incurred jointly in the provision of both common and private carriage. While the problems of allocation of joint and common costs still exist, they are no longer very important and can be left to the market. Furthermore, neither *NARUC I* nor its predecessors require the use of separate facilities when an entity provides both common and private carriage.[(201)]

The existence of discrete facilities is neither essential to the analysis of whether a carrier is in fact holding out a particular service to the public nor important in determining whether a carrier has sufficient market power to be required to offer the service indiscriminately. To the extent the FCC has found that the contract carriage segment of the long-distance market or the long-distance market itself is competitive, then it should acknowledge that carriers have an incentive to allocate joint and common costs reasonably.

Any cost-allocation problems associated with long-distance telephony are no different and possibly of a lesser degree than those presented by the issue of transponder sales.[(202)] The *Wold Communications* court was untroubled by the prospect that the same satellite could contain both common carrier and noncommon carrier transponders.[(203)]

3. Geographic Rate Averaging Law and Policy Do Not Preclude the Private Carriage Proposal

Although, presumably, private carriage would involve some amount of geographic de-averaging of rates, neither law nor policy precludes large business long-distance services such as Tariff 12 and contract services from being provided on this basis.[(204)] A properly constructed private carriage proposal should be no different. The Telecommunications Act of 1996 requires interexchange service providers to charge rates that are no higher in rural areas than in urban areas or in one state than in any other state.[(205)] The legislative history of this provision clarifies that the de-averaging that occurs under Tariff 12
evidence and prior FCC decisions support the view that customer-specific services for large customers have not

undercut geographic rate averaging. The FCC has found that allowing AT&T to offer common carrier contracts would not adversely affect residential customers or jeopardize geographic rate averaging.[(207)] As a threat to geographic averaged rates, the private carriage approach differs in no important regard from existing large customer services. In practice, like Tariff 12 and common carrier contract services, it would be limited to those relatively few customers willing to negotiate individual deals.

C. The Private Carrier Alternative Is Consistent with Deregulatory Approach of the Telecommunications Act of 1996

Apart from concerns about maintaining geographic averaging of long-distance rates, the Telecommunications Act of 1996 provides added support for the private carrier alternative. As discussed earlier, the definitions of "telecommunications services" and "telecommunications carriers" in the new law maintain and extend the distinction between common and private carriage.[(208)] The statute also strengthens the competition rationale relating to competition that the FCC has used in determining which markets and carriers need not be compelled to make their services available to the public generally.[(209)] Not surprisingly, the FCC's first proposed use of its Section 401(a) forbearance authority is to forbear from enforcing 47 U.S.C. §& nbsp;203, which requires common carriers to file tariffs.[(210)] In the *1996 Detariffing NPRM*, the FCC notes its previous finding that the detariffing of nondominant carriers will promote the introduction of new services and foster more robust price competition.[(211)] The FCC also restates its belief that in competitive markets, rational carriers will not engage in unreasonable price discrimination.[(212)] The elimination of tariffs would also eliminate the ability of carriers to escape contract requirements by filing tariff changes under the filed rate doctrine.[(213)]

There are important differences in rationale and likely use that make forbearance and private carriage complementary but distinct means of deregulating telecommunications services. Most fundamentally, private carriage necessarily makes a clean break with the public availability requirements of common carriage. For example, in the *1996 Detariffing NPRM*, the FCC does not propose to relieve long-distance carriers of any of their Title II obligations other than Section 203's tariffing requirements. The carriers' rates must continue to be generally available and reasonable both in amount and across similarly-situated customers.[(214)] Carriers would still be required to keep the information previously available in tariffs on hand for FCC inspection[(215)] and would be subject to complaint processes.[(216)]

While such a limited approach may be reasonable given the history of the FCC's forbearance policy and the record compiled in its earlier proceedings, the approach remains fundamentally different from the private carrier alternative that makes true customer-specific contracts possible. The terms of a private carrier contract could be proprietary and truly unique to an individual customer. Any complaints a customer or a carrier might have would be resolved not by the FCC, but through negotiation, arbitration, or court action--just as other commercial contracts are resolved. These features of private carrier contracts would permit more tailoring of service features and prices to reflect the circumstances at the time the contract is negotiated. On the other hand, the publicly available "telecommunications services" which are subject to forbearance by the FCC are in large part mass market or at least more-than-one-customer market services. Total forbearance from regulation of both types of service is not going to happen any time soon. As a theoretical matter, there is no pressing need to discard the common/private carrier distinction which has evolved over time and recognizes the fundamental difference between the types of services.

As discussed below in Part III.E., private carrier contracts could foster more robust price competition and eliminate the dampening effect that tariffs may have on competition. In addition, the proprietary and customer-specific nature of private carrier contracts would promote competition to a greater degree than mere detariffing.

The combined use of forbearance and private carriage may be optimal. Under the Communications Act and at common law, carriers use tariffs to reduce the transaction costs associated with their commercial relationships with customers. For example, carriers use tariffs to limit their liability for consequential damages arising out of the failure of their networks. In a competitive market, carriers are expected to compete on all aspects of service, including the terms of carriage as well as price and quality. Such limitations on liability, however, may achieve an efficient distribution of risks. Efficiencies can result where a limitation on consequential damages decreases a carrier's costs through reductions in liability costs[(217)] and produces price reductions that consumers find more attractive than an alternative service offering that allows customers to recover for consequential damages. In the small customer segment of the market where the costs of negotiations or even contract execution are most significant, tariffs may be the cheapest means of effecting this distribution of risks.

Coupled with permissive detariffing, the private carrier alternative would maintain most of the benefits of mandatory detariffing while still allowing for the efficiencies of tariffs. Those large customers that actually want to negotiate for customized terms could thereby avoid carriers' attempts to unilaterally alter negotiated terms. The availability of private carrier contracts would undercut the ability of carriers to use tariff filings to help enforce or signal price understandings because the private deals would be negotiated in secret and could be subject to nondisclosure agreements. Because these deals could be reached with resellers, their effects could extend beyond the very large customer market to the mass market.

D. Should the FCC Desire to Limit the Extent of Private Carriage, There Are Many Ways to Accomplish that Goal

If the FCC is concerned about making too dramatic a change, there are many options for limiting the amount and scope of services to be offered under a private carriage alternative. To begin with, the FCC could define private carriage as including only individually negotiated contracts. By requiring that all private contracts be individually negotiated, the FCC would ensure that most of the long-distance market, including those services used by residential and small business customers, would remain "protected" by common carrier regulation. Customers could still decide to take their service from a tariffed offering, but adopting a private carriage approach would give some customers the ability to gain more customer-specific services that would make services closer to actual cost.

As the FCC proposed in *IXC Competition NPRM*, the amount of private carriage service could be limited to a percentage of a carrier's revenues.[(218)] Although such a market division could be seen as anticompetitive, the FCC could relate the percentage of private carriage to the size of the contract carriage market.

As a further limitation, a private carriage proposal adopted by the FCC would almost certainly be limited to interstate long-distance service. Thus, state regulators could continue to monitor and regulate intrastate contract services as common carriage if the state commissions felt that such regulation was necessary to protect individual competitors or customers.

In order to ensure that any experiment with private carriage did not run amok, the FCC could require all long-distance carriers to report their private carrier activities. The FCC and long-distance competitors could then monitor developments to assure that *NARUC I* and any other requirements were met. These limitations and reporting requirements would allow the FCC to experiment with private carriage. If such experimentation proved successful, the FCC might consider doing away with any percentage or reporting requirements, once it was comfortable with long-distance contracts being provided on a private carriage basis.

A limited approach follows from the guidance of *Wold Communications*.[(219)] First, the FCC could find that the long-distance market is effectively competitive.[(220)] Second, continuing common carrier regulation of the noncontract portion of the market would provide an added safeguard for all customers. While the *Wold Communications* court deferred to the FCC's analysis of whether satellite operators would be able to charge monopoly prices,[(221)] it still placed a good deal of emphasis on the continuing availability of transponders under common carriage.[(222)] At the least, the measured step of a limited private carriage alternative could be taken by the FCC.

E. Public Benefits of Private Carriage

As mentioned above,[(223)] private carriage would give carriers the flexibility to customize deals. The definitional approach of limiting private carriage to individually negotiated contracts solves the FCC's putative legal problem with Tariff 15 on the grounds that it is not generally available as required by Title II.[(224)] Title II ironically requires a finding that the carrier is not holding out this particular offering indiscriminately to the public.

The FCC would encourage more robust price competition by allowing private carriage. As the FCC pointed out in the

IXC Competition NPRM, private carriage would eliminate "[o]ne of the basic prerequisites" for pricing above competitive levels or other restrictions on competition: knowledge of a competitor's prices.[(225)] Such knowledge facilitates agreements and tacit collusion among competitors.[(226)] As the Supreme Court stated, "[u]ncertainty is an oligopoly's greatest enemy."[(227)] Scherer and Ross explain:

When many sellers attempt to capture orders through sub-rosa price cuts, monopolistic price structures tend to collapse. If, on the other hand, every transaction is publicized immediately, all members of the industry will know when one has made a price cut, and each can retaliate on the next transaction. Knowledge that retaliation will be swift serves as a powerful deterrent to price cutting and therefore facilitates the maintenance of tacitly collusive prices.[(228)]

Supreme Court cases going as far back as 1921 have noted the importance of price information in facilitating collusive behavior.[(229)]

Recognizing the anticompetitive effects of tariff requirements would not involve a change of course for the FCC. At least when applied to nondominant carriers, the FCC noted that tariff regulation is "counterproductive, since it can inhibit price competition, service innovation, entry into the market, and the ability of carriers to respond quickly to market trends."[(230)] The FCC also stated that tariff filings "can impede entry, impair competitive pricing, and facilitate collusive conduct."[(231)] The FCC stated that the benefit of forbearance instead of streamlined regulation was the lack of required price and condition disclosure by carriers to their competitors, eliminating "a potential vehicle for collusive conduct and facilitat[ing] price discounting."[(232)]

While the FCC found the record evidence inconclusive as to the presence of tacit price coordination among AT&T, MCI, and Sprint with respect to basic rates, it concluded that to the extent this problem exists it would be "better addressed by removing regulatory requirements that may facilitate such conduct, such as the longer advance notice period [then] currently applicable only to AT&T" and by possible industry-wide regulatory changes.[(233)]

In addition, nontariffed private carriage can create a breeding ground for innovative communications applications. A long-distance company would be more inclined to work with a large user in developing new applications if it were not faced with the risk that a money-losing experiment might have to be repeated with any other user requesting the same arrangement. Both the long-distance company and the customer would be more likely to share and make use of proprietary information when they can be better assured of nondisclosure. Private carriage would give carriers more freedom to respond quickly to market developments without fear of disclosing information to competitors.

Additionally, the long-distance carriers would be encouraged to work with their customers to find cost-saving measures that the customer could take, and the customers would face incentives to implement them. Under common carrier regulation, the long-distance company would not fully adjust its price for the cost of serving any individual customer because it would risk having to provide that lower price to customers who did not share the same cost characteristics.

Abuse of the tariff process would be curtailed as well. Competitors could focus their energies on meeting their competition in the marketplace, rather than in tariff investigations. As *IXC Competition NPRM* pointed out, protection against anticompetitive conduct would be available in the form of antitrust remedies.[(234)] Because the FCC could limit the provision of service under private contract to those entities which can "take care of themselves" in the marketplace, the FCC could continue to protect those customers it deems unable to protect themselves.[(235)]

Lastly, the private carriage proposal would result in substantial administrative savings in terms of both FCC resources and the administrative costs visited on the carriers and customers in complying with the common carrier requirements.

Conclusion

Consistent with *NARUC I*, any common carrier offering services in the contract segment of the long-distance market and holding itself out to the public indiscriminately could be given the option to act as a private carrier. This approach would be similar to that taken by the FCC in allowing sales of transponders on satellites that were also engaged in common carriage. Initially, the FCC might place additional limits on the use of this option, such as limiting it to a fixed percentage of a carrier's business. This would allow the FCC to evaluate whether such an approach should be continued or extended.

The private carriage approach is not limited by explicit provisions of the statute and is consistent with extensive court precedent affording the FCC discretion in this area. Private carrier services need not comply with the requirements of Title II, eliminating the need for cost showings, tariff filings, showings of general availability, nondiscrimination, or justice and reasonableness. In the current competitive environment this option could do no harm and would foster more robust price competition and innovation, provide substantial cost savings, and remove unnecessary government intrusion into the private sector.

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3. 1. Communications Act of 1934, Pub. L. No. 416, 48 Stat. 562 (codified as amended in scattered sections of 47 U.S.C.).

4. 2. 47 U.S.C. §§ 201(b), 202(a) (1988).

5. 3. *See, e.g.*, *In re* Revisions to Part 21 of the Commission's Rules Regarding the Multipoint Distribution Service, *Report and Order*, 2 FCC Rcd. 4251 (1987) [hereinafter *MMDS Private Carriage Order*].

6. 4. *See In re* Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), *Final Decision*, 77 F.C.C.2d 384 [hereinafter *Computer II FCC Final Decision*], *modified by Memorandum Opinion and Order*, 84 F.C.C.2d 50 (1980), *aff'd and clarified by Memorandum Opinion and Order on Further Consideration*, 88 F.C.C.2d 512 (1981), *aff'd sub nom.* Computer & Comm. Indus. Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982) [hereinafter *Computer II*].

7. 5. *See Computer II Final FCC Decision*, 77 F.C.C.2d paras. 160-62, 168-69. The FCC has defined CPE as "any equipment provided by a common carrier and located on the premises of a customer, except that the term does not include overvoltage protection equipment, simple inside wiring, intrasystem wiring, coin-operated or other pay telephones, or multiplexing equipment used for the delivery of multiple channels to a customer." *In re* Procedures for Implementing the Detariffing of Customer Premises Equipment and En hanced Services (Second Computer Inquiry), *Report and Order*, 95 F.C.C.2d 1276, 1278 n.2 (1983).

8. 6. *See In re* Detariffing the Installation and Maintenance of Inside Wiring, *Second Report and Order*, 51 Fed. Reg. 8498, 59 Rad. Reg. 2d (P & F) 1143 [hereinafter *Inside Wiring Second Report and Order*], *modified by Memorandum Opinion and Order*, 1 FCC Rcd. 1190 (1986), *further modified by Memorandum Opinion and Order*, 3 FCC Rcd. 1719 (1988).

9. 7. *In re* Domestic Fixed-Satellite Transponder Sales, *Memorandum Opinion, Order and Authorization*, 90 F.C.C.2d 1238, para. 46 (1982) [hereinafter *Transponder Sales Order*], *aff'd sub nom.* Wold Commmunications, Inc. v. FCC, 735 F.2d 1465 (D.C. Cir. 1984).

10. 8. *In re* Competition in the Interstate Interexchange Marketplace, *Notice of Proposed Rule Making*, 5 FCC Rcd. 2627, paras. 142-52 (1990) [hereinafter *IXC Competition NPRM*]. The FCC later found that the record did not support adoption of the private carriage proposal. *In re* Competition in the Interstate Interexchange Marketplace, *Report and Order*, 6 FCC Rcd. 5880, para. 91 & p. n.150 (1991) [hereinafter *IXC Competition Order*]. *See* discussion *infra* in text accompanying notes 160-73.

11. 9. *In re* Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, *Order* in FCC 95-427, para. 1 (Oct. 23, 1995) [hereinafter *AT&T Nondominance Order*].

12. 10. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (to be codified at 47 U.S.C.).

13. 11. Section 401(a) of the Telecommunications Act requires the Commission to forbear from applying any regulation or statutory provision to a telecommunications carrier, if it determines that:

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest.

§ 401, 110 Stat. at 128.

14. 12. *Id.*

15. 13. 47 U.S.C. § 153(h) (1988).

16. 14. The Communications Act applies only where the carrier is engaged in interstate or foreign commerce. Comtronics, Inc. v. Puerto Rico Tel. Co., 553 F.2d 701 (1st Cir. 1977); Ward v. Northern Ohio Tel. Co., 300 F.2d 816 (6th Cir.), *cert. denied*, 371 U.S. 820 (1962).

17. 15. H.R. Conf. Rep. No. 1918, 73d Cong., 2d Sess. 46 (1934).

18. 16. *See* G. Hamilton Loeb, *The Communications Act Policy Toward Competition: A Failure to Communicate*, 1978 Duke L.J. 1. In contrast, the Telecommunications Act of 1996 illustrates that Congress is concerned with competition among the nation's telecommunications carriers. *See* Telecommunications Act, *supra* note 10. In establishing Part II of Title II, much of the legislation is devoted to the development of competitive markets. S. 652 § 101. Where the Commission determines that regulation is not necessary to prevent unjust or unreasonably discriminatory rates or otherwise protect consumers or the public interest, it shall forbear from applying any regulation or provision of the Act to a telecommunications carrier. *Id*. § 401. "If the Commission determines that forbearance will promote competition, that determination may provide the basis for finding that forbearance will be in the public interest." *Id*.

19. 17. § 3, 110 Stat. 60. The exemption is for aggregators of telecommunications services as defined at 47 U.S.C. § 226 (1988).

20. 18. § 3, 110 Stat. 60. Telecommunications means "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent or received." *Id.*

21. 19. *See infra* notes 49-64 and accompanying text.

22. 20. The Joint Explanatory Statement of the Committee of Conference (Conference Statement) for the most part repeats these definitions, except that the report notes that the House amendment would have specifically included as "telecommunications service[s]" "those services and facilities offered on a `common carrier' basis, recognizing the distinction between common carrier offerings . . . and private services." Conference Statement, 142 Cong. Rec. H1107 (daily ed. Jan. 31, 1996). The Conference Statement does not contain any discussion of Congress's choice of words in creating the enacted definition.

23. 21. § 3, 110 Stat. 60. Again, the Conference Statement does no more than repeat the definition.

24. 22. *See supra* p. 451.

25. 23. *See infra* pp. 455-57. Also, the reference to satellite providers may give the FCC some additional discretion to refrain from imposing common carrier regulation on satellite services, even where the satellite providers are offering their service to the public.

26. 24. Commerce Court (Mann-Elkins) Act, Pub. L. No. 218, ch. 309, § 7, 36 Stat. 539, 544 (1910) (amending Interstate Commerce Act of 1887, ch. 104, § 1, 24 Stat. 379, 379 (1887)) (provisions relating to telegraph, telephone, and cable companies repealed by Communications Act of 1934, ch. 652, § 602(b), 48 Stat. 1064, 1102).

27. 25. 45 Cong. Rec. 5533 (1910) (remarks of Rep. Bartlett). *See* Loeb, *supra* note 16, at 7.

28. 26. Loeb, *supra* note 16, at 7.

29. 27. *Id.* at 9. Loeb states that only 14 formal rate investigations were begun. *Id.* at 17 & n.82. Loeb agrees with an earlier review that ICC regulation may well have "relieve[d] the wire carriers of any effective governmental control in the public interest." *Id.* at 18 (quoting Note, *The Telegraph Industry: Monopoly or Competition*, 51 Yale L.J. 629, 633 (1942)).

30. 28. Transportation (Esch-Cummins) Act of 1920, Pub. L. No. 152, ch. 91, § 400, 41 Stat. 456, 474 (amending Mann-Elkins Act, Pub. L. No. 218, ch. 309, 36 Stat. 544 (1910)), *repealed by* Communications Act of 1934, ch. 652, § 602(b), 48 Stat. 1064, 1102.

31. 29. Esch-Cummins Act § 400(b), 41 Stat. at 474.

32. 30. *Pensacola Tel. Co.*, 96 U.S. 1 (1877).

33. 31. Loeb, *supra* note 16, at 11. An earlier version of this legislation that would have subjected communications companies to full regulation, H.R. Rep. No. 456, 66th Cong., 1st Sess. 11-12 (1919), was strenuously opposed and later dropped. *See* Loeb, *supra* note 16, at 10 & n.50 (citing opposition).

34. 32. Loeb, *supra* note 16, at 10.

35. 33. Willis-Graham Act, Pub. L. No. 15, ch. 20, 42 Stat. 27 (1921) (amending Transportation (Esch-Cummins) Act of 1920, Pub. L. No. 152, ch. 91, § 407, 41 Stat. 482), *repealed by* Communications Act of 1934, ch. 652, § 602(b), 48 Stat. 1064, 1102.

36. 34. *Id*. *See* Loeb, *supra* note 16, at 12.

37. 35. *See* Loeb, *supra* note 16, at 14.

38. 36. 47 C.F.R. § 21.2 (1995).

39. 37. *In re* Allocation of Frequencies in the Bands Above 890 Mc, *Report and Order*, 27 F.C.C. 359 (1959) [hereinafter *Above 890 Order*].

40. 38. *Id*. paras. 6, 20-24.

41. 39. The FCC has defined private line service as "a service whereby facilities for communication between two or more designated points are set aside for the exclusive use or availability for use of a particular customer and authorized users during stated periods of time." 47 C.F.R. § 21.2 (1995) (relating to domestic public fixed radio services).

42. 40. MCI Telecomm. Corp. v. FCC, 561 F.2d 365 (D.C. Cir. 1977) [hereinafter *Execunet*], *cert. denied*, 434 U.S. 1040 (1978).

43. 41. *See, e.g.*, *In re* MTS and WATS Market Structure, *Report and Third Supplemental Notice of Inquiry and Proposed Rule Making*, 81 F.C.C.2d 177 (1980); *In re* MTS and WATS Market Structure, *Third Report and Order*, 93

F.C.C.2d 241, *modified by Memorandum Opinion and Order,* 97 F.C.C.2d 682 (1983), *modified by Memorandum Opinion and Order*, 97 F.C.C.2d 834 (1984), *aff'd in part and remanded in part sub nom.*, National Ass'n of Regulatory Util. Comm'rs v. FCC, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985).

44. 42. For a history of the development of competition in the long-distance market, see Michael K. Kellogg et al., Federal Telecommunications Law 585-622 (1992).

Even before the *Above 890 Order*, the FCC departed from the traditional common carrier paradigm in structuring private and common carrier mobile radio services. Because user-owned radio communications systems did not afford the same economies of scale as wire-based telephony, the FCC licensed first private licensees and then competing common carrier licensees. *See*, *e.g.*, George Calhoun, Digital Cellular Radio 35 (1988). In 1949, the FCC licensed competing mobile common carriers called radio common carriers. *In re* General Mobile Radio Serv., *Report and Order*, 13 F.C.C. 1190 (1949).

45. 43. *See* FCC, CC, Long Distance Market Share 14 (1995) (based on toll revenues).

46. 44. *In re* An Inquiry Relative to the Future Use of the Frequency Band 806-960 MHz, *Memorandum Opinion and Order*, 51 F.C.C.2d 945, paras. 36-39 (1975) [hereinafter *Land Mobile Service 1975 Order*], *aff'd sub nom.*, National Ass'n of Regulatory Util. Comm'rs v. FCC, 525 F.2d 630 (D.C. Cir.) [hereinafter *NARUC I*], *cert. denied*, 425 U.S. 992 (1976).

47. 45. *Land Mobile Service 1975 Order*, 51 F.C.C.2d 945, 993 (Appendix B).

48. 46. *Id*. para. 36.

49. 47. *See id.* para. 43. It is noteworthy that the impetus for this hybrid came, in part, from bureaucratic impulses regarding the allocation of spectrum between private radio and common carrier bureaus as well as from the desire to provide an unregulated third-party provider of mobile communications to business services. *See, e.g.*, *In re* An Inquiry Relative to the Future Use of the Frequency Band 806-960 MHz, *Second Report and Order*, 46 F.C.C.2d 752 at 762, paras. 28-30, 45-48 (1974); *In re* An Inquiry Relative to the Future Use of the Frequency Band 806-960 MHz, *Memorandum Opinion and Order*, 55 F.C.C.2d 771, para. 7 (1975) (proceeding terminated).

50. 48. If SMRS was considered common carriage, the FCC would have been required to regulate SMRS carriers under Title II of the Communications Act of 1934, including requiring tariff filings. *See* Southwestern Bell Tel. Co. v. FCC, 19 F.3d 1475, 1480 (D.C. Cir. 1994). *See also* MCI Telecomm. Corp. v. AT&T Corp., 114 S. Ct. 2223, 2231-33 (1994) (striking down the FCC's permissive detariffing rules); Southwestern Bell Corp. v. FCC, 43 F.3d 1515 (D.C. Cir. 1995) (holding that FCC rules allowing nondominant interexchange carriers to file a range of rates, rather than fixed rate tariffs, violated 47 U.S.C. § 203); American Tel. & Tel. v. FCC, 978 F.2d 272 (D.C. Cir. 1992) (striking down FCC's forbearance policy), *cert. denied*, 113 S. Ct. 3020 (1993). The FCC has amended its policies to require tariffs to illustrate a fixed rate but has continued streamlined regulation for nondominant carriers in other respects. *In re* Tariff Filing Requirements for Nondominant Common Carriers, *Order*, 10 FCC Rcd. 13,653, para. 2 (1995). The FCC is again considering reinstating something substantially similar to its previous forbearance policies in light of its authority under § 401 of the Telecommunications Act of 1996. *See In re* Policy and Rules Concerning the Interstate, Interexchange Marketplace Implementation of Section 254(g) of the Communications Act of 1934, *Notice of Proposed Rule Making*, in CC Dkt. 96-61, FCC 96-123 (Mar. 25, 1996) [hereinafter *1996 Detariffing NPRM*].

The regime established by the FCC for SMRS included an additional important competitive development--preemption of state entry regulation. *Land Mobile Service 1975 Order*, 51 F.C.C.2d para. 87. This precluded established common carriers from using state regulation to thwart start-up SMRS competitors.

51. 49. *NARUC I*, 525 F.2d 630, 640 (1976). The Supreme Court also noted the circularity of the statutory definition in FCC v. Midwest Video Corp., 440 U.S. 689, 702 n.10 (1979).

52. 50. *NARUC I*, 525 F.2d at 640.

53. 51. For a discussion of the development of common carrier duties, see Note, *Redefining "Common Carrier": The FCC's Attempt at Deregulation by Definition*, 1987 Duke L.J. 501, 506-11 (1987). This note focuses on the implied-contract aspects of common carriage. As the note points out, many early decisions were reluctant to call telephone companies common carriers, even when the courts were willing to subject them to similar duties. *See id*. at 508-09 (citing cases and commentary).

54. 52. *See NARUC I*, 525 F.2d at 640. *Cf*. *supra* notes 24-25 and accompanying text.

55. 53. *See supra* notes 24-35 and accompanying text.

56. 54. *See* Motor Carrier Act of 1935, ch. 3, 96 Stat. 2418, 2425 (codified as amended at 49 U.S.C. §§ 301, 327 (1989)).

57. 55. *NARUC I*, 525 F.2d at 641 (quoting Semon v. Royal Indem. Co., 279 F.2d 737, 739 (5th Cir. 1960)).

58. 56. *Id.*

59. 57. The effects of such price discrimination on income distribution, efficiency, and competition are complicated; under certain conditions it could increase efficiency while effecting undesirable wealth transfers. *See*, *e.g.*, F.M. Scherer & David Ross, Industrial Market Structure and Economic Performance 494-501 (1990). Of course, the purported evils associated with such price discrimination may be no worse than the anticompetitive harms caused by regulatory oversight.

60. 58. *See NARUC I*, 525 F.2d at 642-43.

61. 59. *See Land Mobile Service 1975 Order*, 51 F.C.C.2d 945, paras. 70-78 (1975).

62. 60. *NARUC I*, 525 F.2d at 646.

63. 61. *Id.* at 642.

64. 62. *Id.* at 643.

65. 63. *Id.* at 643 n.73.

66. 64. *Id.* at 644.

67. 65. Frontier Brdcst. Co. v. Collier, *Memorandum Opinion and Order*, 24 F.C.C. 251 (1958).

68. 66. *Wold Communications, Inc.*, 735 F.2d 1465 (D.C. Cir. 1984).

69. 67. *Id.* at 1471 n.10.

70. 68. *Id*. The *Wold Communications* court also observed that *NARUC I* determined that the operators of SMRS, who exercised no control over the content of the messages conveyed, were not common carriers. *Id.* (citing *NARUC I*, 525 F.2d at 642-45).

71. 69. *NARUC I*, 525 F.2d at 641 (citing Home Ins. Co. v. Riddell, 252 F.2d 1 (5th Cir. 1958); Ciaccio v. New Orleans Public Belt R.R., 285 F. Supp. 373 (E.D. La. 1968)).

72. 70. American Tel. & Tel. Co. v. FCC, 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978).

73. 71. *Id.* at 25.

74. 72. *Id*. at 26.

75. 73. *Id*.

76. 74. *Id*. at 27.

77. 75. *Id*. While not requiring a "profit" test, the definition of telecommunications service under the Telecommunications Act of 1996 is limited to carriers offering service for a fee. § 3, 110 Stat. 60. Telecommunications carriers would not be subject to common carrier regulation to the extent that they did not provide a service for a fee. *See Id.*

78. 76. *See*, *e.g.*, *MMDS Private Carriage Order*, 2 FCC Rcd. 4251, para. 8 (1987); *In re* Norlight Request for Declaratory Ruling, *Declaratory Ruling*, 2 FCC Rcd. 132, *reconsidered*, 2 FCC Rcd. 5167 (1987) [hereinafter *Norlight Declaratory Ruling*].

79. 77. *American Tel. & Tel. Co.*, 572 F.2d at 25.

80. 78. *Id.*

81. 79. *Id*. The court also deferred to the FCC, affirming its finding that shared users were not common carriers. In this instance, the court found that the FCC did not "manipulate the definition of common carrier in such a way to achieve pre-determined regulatory goals." *Id*. at 26. The court found no error in the FCC's conclusion that sharing among participants, each of whom had a communications need, other than a need to resell the service to others, was unlikely to constitute an undertaking to serve the public indiscriminately for hire. *Id*. As already noted, the court found the FCC's use of criteria such as profit to assist in its determination to be proper. *See supra* notes 69-76 and accompanying text. Also, the court rejected an intervenor's contention that the FCC erred in failing to limit sharing to entities in the same line of business. The court stated that the decision to impose such limitations is left to the FCC's discretion. *Id.* at 27. While the proposed limitation might have been fair and reasonable, the Second Circuit found that the FCC is free to select other fair and reasonable alternatives. *Id*.

82. 80. FCC v. Midwest Video Corp., 440 U.S. 689, 701 (1979). The Supreme Court also quoted a 1966 FCC decision, *In re* Amendment of Parts 2, 91 and 99 of the Commission's Rules Insofar as They Relate to the Industrial Radiolocation Service, *Report and Order*, 5 F.C.C.2d 197 (1966) [hereinafter *Indus. Radiolocation Serv. Order*], which employed essentially the same test. The Court noted that a common carrier service in the communications context is one that "makes a public offering to provide [communications facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing . . . ." *Midwest Video*, 440 U.S. at 701 (quoting *Indus. Radiolocation Serv Order*., 5 F.C.C.2d para. 19).

83. 81. *Midwest Video*, 440 U.S. at 701. In a cable TV classification case that predates *NARUC I*, Philadelphia TV Brdcst. Co. v. FCC, 359 F.2d 282 (D.C. Cir. 1966), the D.C. Circuit upheld the FCC's decision, at that time, not to regulate cable systems as common carriers. In agreeing with the FCC's position that the regulation of cable systems as adjuncts to broadcasting was more appropriate than imposing common carriage obligations, the court stated, it showed:

great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the Commission's application of this statutory term, we need not find its construction is the only reasonable one or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings."

Id. at 283-84 (citations omitted) (quoting Udall v. Tallman, 380 U.S. 1, 16 (1965)). This is especially true where the statute and legislative history are, at best, unhelpful on the question involved, and Congress could not have reasonably anticipated the nature and variety of methods of communication by wire and radio that would have come into existence since 1934. *Id*.

84. 82. The leading precedent in this area is *NARUC I*, 525 F.2d 630 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976), discussed at *supra* notes 48-64 and accompanying text. Two other D.C. Circuit cases, *Computer II* and *Wold Communications, Inc. v. FCC* also established precedent. *Computer II*, 693 F.2d 198 (D.C. Cir. 1982), discussion *infra* notes 86-96 and accompanying text, and *Wold* , 735 F.2d 1465 (D.C. Cir. 1984), discussion *infra* notes 97-108 and

accompanying text.

85. 83. *NARUC I*, 525 F.2d at 644. ("A particular system is a common carrier by virtue of its functions, rather than because it is declared to be so.") The court also applied a deferential standard in judging the Commission's conclusion that a competitive environment will best achieve its goals: "The 1975 Order reveals an in-depth consideration of the effects of such a competitive approach so that we cannot say that the FCC may not have `given reasoned consideration to each of the pertinent factors.'" *Id*. at 645 (footnotes omitted).

86. 84. *Id.* at 645.

87. 85. *Computer II FCC Final Decision*, 77 F.C.C.2d 384 (1980); *In re* Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), *Memorandum Opinion and Order*, 84 F.C. C.2d 50 (1980); *In re* Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), *Memorandum Opinion and Order on Further Reconsideration*, 88 F.C.C.2d 512 (1981), *aff'd sub nom*, Computer & Comm. Indus. Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982).

88. 86. *Computer II*, 693 F.2d 198, 203 (D.C. Cir. 1982).

89. 87. *Id*. at 206-14.

90. 88. *See, e.g.*, *Computer II FCC Final Decision*, 77 F.C.C.2d, paras. 119, 129-132.

91. 89. *Computer II*, 693 F.2d at 211.

92. 90. *Id*.

93. 91. *Id*.

94. 92. *Id.*

95. 93. *Id*. at 211-12. The court upheld the requirement that AT&T provide CPE only through a separate subsidiary.

96. 94. *Id*. at 212 (citing Western Union Tel. Co. v. FCC, 674 F.2d 160, 166-67 (2d Cir. 1982)). In winding up its analysis, the court quoted earlier cases that described Congress's intent to endow the Commission with sufficiently elastic powers such that it could readily accommodate dynamic new developments in the field of communications. *See id*. at 213 (citing General Tel. Co. v. United States, 449 F.2d 846, 853 (5th Cir. 1971); National Ass'n of Theatre Owners v. FCC, 420 F.2d 194, 199 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970); General Tel. Co. v. FCC, 413 F.2d 290, 298 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969)).

97. 95. *Id.* at 214 (quoting FCC v. WNCN Listeners Guild, 450 U.S. 582, 596 (1981)) (citations omitted).

98. 96. *Computer II* may be regarded as somewhat of an "outlier" in terms of the amount of discretion allowed the FCC. For example, it is difficult to imagine that the provision of voice mail by the telephone company to residential customers would be consistently done on an individually negotiated basis.

99. 97. Because transponders require significant overhead in satellite construction and launch costs, this case raises difficult questions regarding, *inter alia*, the allocation of those joint and common costs. *See infra* pp. 463-464.

100. 98. *Transponder Sales Order*, 90 F.C.C.2d 1238 (1982), *aff'd sub nom.*, Wold Communications, Inc. v. FCC, 735 F.2d 1465 (D.C. Cir. 1984).

101. 99. *See* Wold Communications, Inc. v. FCC, 735 F.2d 1465, 1470 (D.C. Cir. 1984). The FCC eventually relaxed rate regulation for domestic satellites. *See In re* Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorized Therefor, *Fourth Report and Order*, 95 F.C.C.2d 554, 568 n.48 (1983).

102. 100. *Wold Communications, Inc.*, 735 F.2d at 1468.

103. 101. *Id*. (quoting FCC v. WNCN Listeners Guild, 450 U.S. 582, 595 (1981) (quoting FCC v. National Citizens Comm. for Brdcst., 436 U.S. 775, 814 (1978))).

104. 102. *Id.* at 1474.

105. 103. *Id*.

106. 104. *Id.* at 1475 (citations omitted).

107. 105. *Id*.

108. 106. *Id*. at 1478. *See also id*. at 1477 (citing National Brdcst. Co., Inc. v. United States, 319 U.S. 190, 224 (1943)).

109. 107. *Id*. at 1477-79.

110. 108. *Id*. at 1479 (quoting National Brdcst. Co., 319 U.S. at 224).

111. 109. *See supra* note 48 (discussing constraints on the FCC's ability to relax regulation of nondominant carriers). Section 401(a) of the Telecommunications Act of 1996 substantially expands the Commission's authority to exempt carriers from stautory requirements upon specific findings. *See supra* note 11.

112. 110. *Transponder Sales Order*, 90 F.C.C.2d 1238, para. 23 (1982).

113. 111. *Id*. paras. 28-45.

114. 112. *Id*. para. 34.

115. 113. *Id*. para. 39. The FCC limited its finding of no market power solely to the purpose of determining whether noncommon carrier regulation was permissible under *NARUC I*, as the FCC still considered domestic satellite carriers dominant, at least insofar as their common carriage offerings were concerned. *Id.* at 1254 n.38.

116. 114. *See id.* para. 55.

117. 115. *Id*.

118. 116. *See In re* Martin Marietta Comm. System, Inc., *Memorandum Opinion and Order*, 60 Rad. Reg. 2d (P & F) 779 (1986).

119. 117. *See id*. para. 1. Martin Marietta had addressed each of the information requirements required by *Transponder Sales Order*, but its filing was "vague." *See id.* para. 6.

120. 118. *Id.* para. 12.

121. 119. *Id*. para. 6.

122. 120. *Id*.

123. 121. *Id*. paras. 8-9.

124. 122. *Id*. para. 11.

125. 123. *See*, *e.g.*, Letter from Cecily C. Holiday, FCC, to Leslie A. Taylor, GTE Spacenet Corp. (Mar. 31, 1987) (granting "systemwide" transponder sales authority for up to 80 of its 136 then-authorized transponders); Letter from Chief, Domestic Facilities Division, FCC, to Carl J. Cangelosi, GE American Communication, Inc. (Nov. 21, 1989) (authorizing transponder sales authority for 12 of 24 transponders on Satcom IIR); Letter from James R. Keegan, FCC,

to Joan M. Griffin, Contel Corp. (Aug. 2, 1990) (granting noncommon carrier authority for an additional 8 transponders on each of the ASC-1 and ASC-2 satellites and 30 of the 40 transponders on each of the Contelsat-1 and Contelsat-2 satellites); Letter from Chief, CC, FCC, to Ernest G. DeNigris, AT&T (Jan. 31, 1994) (authorizing noncommon carrier service on an additional 25% of the available transponders on TELSTAR 401 and 402).

126. 124. *See* Application of Comsat General Corp. in File No. 42/43-DSS-ML/MISC-93, at 6-7 (Mar. 11, 1993); Application of GTE Spacenet Corp. in File No. 33-DSS-ML-93 (Jan. 13, 1993); Application of AT&T Corp. in File No. 1-DSS-ML-94, at 6-7 (Nov. 9, 1993).

127. 125. *MMDS Private Carriage Order*, 2 FCC Rcd. 4251, para. 10 (1987).

128. 126. *Id*. paras. 6-7.

129. 127. *See In re* Amendment of Part 74, Subpart F of the Comm'n's Rules to Permit Shared Use of Brdcst. Auxiliary Facil's with Other Brdcst. and Nonbrdcst. Entities, *Report and Order*, 93 F.C.C.2d 570 (1983) [hereinafter *Broadcast Auxiliary Facility Sharing Order*]; *In re* Amendment of Parts 2 and 73 of the Comm'n's Rules Concerning Use of Subsidiary Comm. Authorizations, *First Report and Order*, 48 Fed. Reg. 28,445 , 53 Rad. Reg. 2d (P & F) 1519 (1983) [hereinafter *FM SCAs Order*]; *In re* Amendment of Parts 2, 73 and 76 of the Comm'n's Rules to Authorize the Transmission of Teletext by TV Stations, *Report and Order*, 48 Fed. Reg. 27,054, 53 Rad. Reg. 2d (P & F) 1309 (1983) (proceeding terminated) [hereinafter *Teletext Order*], *reconsidered*, 101 F.C.C.2d 827 (1985) [hereinafter *Teletext Reconsideration*]; *In re* Amendment of Parts 2, 21, 74 and 94 of the Comm'n's Rules and Regs. in Regard to Frequency Allocation to the Instructional TV Fixed Service, *Report and Order*, 94 F.C.C.2d 1203 (1983) [hereinafter *IFTS-MDS Reallocation Order*], *reconsidered*, 98 F.C.C.2d 129 (1984).

130. 128. *See Broadcast Auxiliary Facility Sharing Order*, 93 F.C.C.2d paras. 25-26; *FM SCAs Order*, 53 Rad. Reg. 2d 1526. 27 n.13; *Teletext Order*, 53 Rad. Reg. paras. 45, 61, 69; *Teletext Reconsideration*, 101 F.C.C.2d paras. 22-25; *IFTS-MDS Reallocation Order*, 94 F.C.C.2d paras. 123-29.

131. 129. *See Broadcast Auxiliary Facility Sharing Order*, 93 F.C.C.2d para. 26; *FM SCAs Order*, 53 Rad. Reg. para. 47; *Teletext Order*, 53 Rad. Reg. paras. 25-26; *Teletext Reconsideration*, 101 F.C.C.2d paras. 22-25; *IFTS-MDS Reallocation Order*, 94 F.C.C.2d paras. 123-130.

132. 130. *See, e.g.*, *Broadcast Auxiliary Facility Sharing Order*, 93 F.C.C.2d paras. 25-26. *See FM SCAs Order*, 53 Rad. Reg. para. 27 (stating that it would evaluate each service offered on an FM SCA in accordance with the relevant *NARUC I* or statutory test to determine whether the service is common carriage).

133. 131. *In re* Amendment of Parts 89, 91, 93 and 95 of the Comm'n's Rules and Regs. to Adopt New Practices and Procedures for Cooperative Use and Multiple Licensing of Stations in the Private Land Mobile Radio Services, *Report and Order*, 89 F.C.C.2d 766, paras. 24-25 (1982) [hereinafter *Shared Facilities Order*].

134. 132. *Id*. As the FCC pointed out, equipment suppliers in this context are not even providing communications services. *Id*. para. 24.

135. 133. *Id*. para. 25. The FCC further found that neither the advertising of these shared systems nor their interconnection with the public switched telephone network (PSTN) altered the FCC's finding that the shared systems were not being used in a common carrier fashion. *Id*. paras. 7, 26.

136. 134. *Id*. paras. 26-50. The public interest determination included a discussion of whether the third-party equipment suppliers would be allowed by this decision to engage in unfair competition against the radio common carriers. *Id*. paras. 26-40.

137. 135. The current provision enacted in response to pressure from cellular licensees' concerns over their disparate treatment vis-à-vis SMRS carriers (NEXTEL, in particular) is codified at 47 U.S.C. § 332(c)(1)-(2). Under 47 U.S.C. § 331(c), all Commercial Mobile Radio Service providers are to be subject to common carrier regulation, except that the FCC may designate certain Title II provisions as inapplicable to particular services or providers. In order to specify

a provision of Title II as inapplicable, the FCC must find that: (1) enforcement is not necessary in order to ensure just, reasonable, and nondiscriminatory rates and practices; (2) enforcement is not necessary to protect consumers; and (3) specifying such provision is in the public interest. 47 U.S.C. § 331(c)(1)(A) (1988). The FCC may not exempt carriers from complying with 47 U.S.C. § 201, 202, or 208. *Id.*

138. 136. *See In re* Amendment of Parts 89, 91 and 93 of the Comm'n's Rules and Regs. to Adopt New Practices and Procedures for Cooperative Use and Multiple Licensing of Stations in the Private Land Mobile Radio Services, *Memorandum Opinion and Order on Reconsideration*, 93 F.C.C. 2d 1127, paras. 11-17 (1983); Amendments of Parts 2 and 22 of the Comm'n's Rules to Allocate Spectrum in the 928-941 MHz Band and to Establish Other Rules, Policies, and Procedures for One-way Paging Stations in the Domestic Public Land Mobile Radio Service, *Memorandum Opinion and Order on Reconsideration*, 93 F.C.C.2d 908 (1983).

139. 137. *In re* Amendment of Part 94 of the Comm'n's Rules and Regs. to Authorize Private Carrier Systems in the Private Operational-Fixed Microwave Radio Service, *First Report and Order*, 57 Rad. Reg. 2d (P & F) 1486, para. 51 (1985) [hereinafter *Private Microwave Carrier Operations Order*].

140. 138. *Id.* paras. 50, 53-54, 68-70.

141. 139. *Id*. paras. 53-57.

142. 140. *Id*.

143. 141. *See In re* Lightnet and Section 214 Application to Construct Fiber Optic System in Florida as Part of an Interstate Network, *Memorandum Opinion and Order*, 58 Rad. Reg. 2d (P & F) 182 (1985) [hereinafter *Lightnet Order*]; *Norlight Declaratory Ruling*, 2 FCC Rcd. 132, *reconsidered* 2 FCC Rcd. 5167 (1987); *In re* Public Serv. Co. of Oklahoma Request for Declaratory Ruling, *Declaratory Ruling*, 3 FCC Rcd. 2327 (1988) [hereinafter *Public Serv. Co. Declaratory Ruling*]; *In re* General Tel. Co. of the Southwest; Request for Declaratory Ruling, *Memorandum Opinion and Order on Reconsideration*, 3 FCC Rcd. 6778 (1988) [hereinafter *General Tel. Co. Reconsideration*].

144. 142. *See Lightnet Order*, 58 Rad. Reg. 2d (P & F) paras. 4, 8-10; *Norlight Declaratory Ruling*, 2 FCC Rcd. para. 19.

145. 143. *See Lightnet Order*, 58 Rad. Reg. 2d (P & F) paras. 8-10; *Norlight Declaratory Ruling*, 2 FCC. Rcd. para. 19; *reconsidered*, 2 FCC Rcd. para. 14; *Public Serv. Co. Declaratory Ruling*, 3 FCC Rcd. para. 18; *General Tel. Co. Reconsideration*, 3 FCC Rcd. para. 9.

146. 144. *See Lightnet Declaratory Ruling*, 58 Rad. Reg. 2d (P & F) paras. 6-7; *Norlight Declaratory Ruling*, 2 FCC Rcd. paras. 22-23.

147. 145. *See Norlight Declaratory Ruling*, 2 FCC Rcd. paras. 22-23; *General Tel. Co. Declaratory Ruling*, 3 FCC Rcd. para. 10.

148. 146. *See Norlight Declaratory Ruling*, 2 FCC Rcd. paras. 22-23.

149. 147. *Inside Wiring Second Report and Order*, 51 Fed. Reg. 8498, 59 Rad. Reg. 2d (P & F) 1143 (1986).

150. 148. *Computer II FCC Final Decision*, 77 F.C.C.2d 384 (1980); *In re* Amendment of Section 64.702 of the Commn's Rules and Regs. (Second Computer Inquiry), *Memorandum Opinion and Order*, 84 F.C.C.2d 50 (1980).

151. 149. *In re* General Services Administration; Petition for Declaratory Ruling Regarding FTS 2000 Service, *Memorandum Opinion and Order*, 2 FCC Rcd. 5072 (1987) [hereinafter *General Services Administration Order*]. FTS 2000 is the custom-designed integrated intercity service telecommunications network for the federal government.

152. 150. *Computer II FCC Final Decision*, 77 F.C.C.2d paras. 168-179.

153. 151. *Id.* para. 171.

154. 152. *Id*. para. 183.

155. 153. *Id*. paras. 122-23. The FCC stated that such a requirement "would negate the dynamics of computer technology" and preclude vendors from tailoring services to fit a customer's needs. In contrast, the FCC recently required AT&T to offer its InterSpar frame relay service--a data transmission service--indiscriminately to the public. This was done to strengthen the competing enhanced service providers and, probably, was due to bureaucratic impulses regarding the FCC's definitions of basic and enhanced services. *See In re* Indep. Data Comm. Mfrs. Ass'n, Inc. Petition for Declaratory Ruling that AT&T's Interspan Frame Relay Serv. Is a Basic Serv., *Memorandum Opinion and Order*, 10 FCC Rcd. 13,717 (1995).

156. 154. *Computer II FCC Final Decision*, 77 F.C.C.2d para. 123.

157. 155. *Inside Wiring Second Report and Order*, 51 Rad. Reg. 1143, para. 2 (1986).

158. 156. *See General Services Administration Order*, 2 FCC Rcd. 5072, para. 30 (1987).

159. 157. *Id.* para. 32.

160. 158. *Id.* at 5077 n.24.

161. 159. *Id*.

162. 160. *IXC Competition NPRM*, 5 FCC Rcd. 2644, para. 142 (1990).

163. 161. 47 U.S.C. § 214 requires that the FCC determine that an interstate common carrier's extension or withdrawal from service is in the public convenience and necessity. This section purports to protect the public from "goldplating"--a carrier's padding of the rate base through provision of unnecessary facilities--and from loss of necessary service in the event of a withdrawal from service. As the *IXC Competition NPRM* points out, AT&T was the only long-distance carrier subject to Section 214 approval. *Id.* a t 2657 n.184.

164. 162. *Id.* para. 142.

165. 163. *Id*. at 2657 n.186. It is unclear how the FCC would have enforced useful price restrictions to protect against the possibility that AT&T could "force" large customers into private carriage by raising its common carrier rates vis-à-vis its private carriage rates. If private carriage were to be more efficient, it is likely, or at least proper, that private carriage contracts would be lower priced (adjusted for quality) than common carriage tariffed offerings.

166. 164. *Id.* para. 149.

167. 165. *Id.* As in many cases, the driving force behind the FCC's desires to explore such an option was the existence of competition in the market at issue. *See id.* para. 151.

168. 166. *See* Williams Telecommunications' Comments at 10, 21; Sprint's Comments at 180; IDCMA's Comments at 102; Comptel's Comments at Appendix, page 39. In addition, the Department of Justice and the National Telecommunications Infrastructure Administration (NTIA) argued that the proposal required further study. *See* Department of Justice's Comments at 48; NTIA's Comments at 25. In this footnote and throughout this Article, comments filed in response to the *IXC Competition NPRM* will be cited simply as "[party's name]'s Comments".

169. 167. *See* Sprint's Comments at 171.

170. 168. *See* Comptel's Comments at 150.

171. 169. Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116 (1990). In *Maislin Industries*, the Supreme Court affirmed the "filed-rate doctrine" which precludes a carrier that has filed tariffs from charging any rate other

than the one specified in the tariffs. *Id*. at 119.

172. 170. *See* Williams Telecommunications' Comments at 24. *Cf.* NATA's Comments at 35 (arguing that private carriage is not permitted where the same class of service is regulated under common carriage).

173. 171. *See* Williams Telecommunications' Comments at 17; Sprint's Comments at 145; Comptel's Comments at Appendix, 36.

174. 172. *IXC Competition Order*, 6 FCC Rcd. 5880, 5897 n.150 (1990).

175. 173. *Id.* at 5917 (Separate Statement of E. Duggan, Comm'r) (noting that throughout its history, the FCC has scrupulously avoided moving too quickly on any given matter).

176. 174. It also should be noted that the FCC proposed to make so-called local exchange carrier's (LEC) special construction activities, currently under tariff, noncommon carriage. *In re* Special Constr. of Lines and Special Serv. Arrangements Provided by Common Carriers, *Notice of Proposed Rule Making*, 97 F.C.C.2d 978 (1984). The NPRM argued that LECs might not be compelled to offer special construction services on a common carrier basis due to competition in the market and due to efficiencies of individualized offerings. The NPRM also argued that the special construction services were not necessarily indiscriminate offerings, again due to individualized dealings. *See id. See also* Southwestern Bell Tel. Co. v. FCC, 19 F.3d 1475, 1481-82 (D.C. Cir. 1994) (noting a contradiction between FCC's arguments in the NPRM and the FCC's policies regarding provision of dark fiber by common carriers).

This proposal, insofar as it antedated price cap regulation and covered dominant carriers, raised difficult questions of potential cross-subsidy as well as definitional problems. In addition, the local market is usually considered less competitive than the interexchange market. Because of the potential for cross-subsidy, the Commission sought to limit the scope of the change to services involving discrete facilities. The NPRM was never decided; it was dismissed six years later because the record had become "stale." *See In re* Special Constr. of Lines and Special Serv. Arrangements Provided by Common Carriers, *Order*, 5 FCC Rcd. 5410 (1990).

177. 175. Some customers use more than one long-distance carrier and have individually negotiated contracts with each of them.

178. 176. *Above 890 Order*, 27 F.C.C. 359, paras. 24-27 (1959). By tightly negotiating contract carriage, a large user can often gain the same benefits it would receive from operating its own private network. By doing so, a large user can avoid being forced to provide that carriage service for itself.

179. 177. *See* 47 C.F.R. § 61.55 (1995); *IXC Competition Order*, 6 FCC Rcd. para. 122.

180. 178. *See, e.g.*, Jeffrey M. Kaplan, *Evaluating Network Outsourcing Vendors*, Bus. Com. Rev., Aug. 1995, at 48-50.

181. 179. F. Warren McFarlan & Richard L. Nolan, *How to Manage an Outsourcing Alliance*, Sloan Mgmt. Rev., Winter 1995, at 9, 20. MCI's award from the Smithsonian Institution was as a result of its "use of advanced technology in delivering *customized* solutions for customers." *Outsourcing: How Industry Leaders Are Reshaping the American Corporation*, at 7, *in* Fortune (special advertising section), Oct. 16, 1995 (emphasis added). Tom Richardson, a system integrator, counsels firms and network outsourcing partners to spend "plenty of upfront time together" working out the details of their network solutions. Tom Richardson, *Project Management Pitfalls*, Bus. Com. Rev., Aug. 1995, at 49.

182. 180. *See IXC Competition Order*, 6 FCC Rcd. para. 118. Many customers objected to an FCC proposal that entire contracts be filed. *Id.*

183. 181. *See* discussion of *NARUC I supra* notes 48-64 and accompanying text.

184. 182. Larger users usually negotiate flexibility into their contracts.

185. 183. *See*, *e.g.*, *In re* AT&T Comm. Apparent Liability for Forfeiture and Order to Show Cause, *Notice of Apparent Liability for Forfeiture and Order to Show Cause*, 10 FCC Rcd. 1664 (1995) (AT&T apparently violated the Communications Act by failing to provide requested service under Contract Tariff F.C.C. No. 383.); Competitive Telecomm. Ass'n v. FCC, 998 F.2d 1058 (D.C. Cir. 1993) (upholding FCC determination that certain Tariff 12 offerings were not unreasonably discriminatory); MCI Telecomm. Corp. v. FCC, 917 F.2d 30 (D.C. Cir. 1990) (remanding FCC approval of AT&T Tariff 12 offerings after FCC committed "legal seppuku" in finding services unlike when considering pricing differences).

186. 184. *See*, *e.g.*, *Norlight Declaratory Ruling*, 2 FCC Rcd. 132, para. 23 (1987); *General Tel. Co. Reconsideration*, 3 FCC Rcd. 6778, paras. 10-11 (1988). In most industries, contracts have a substantial amount of similar terms, sometimes involving identical agreements and often involving preprinted forms.

187. 185. Because an interexchange carrier knows that it must make any individually-negotiated contract available to the public generally, it is less likely to negotiate a deal that takes into account specific attributes of the customer, for fear that it will have to provide the same price and terms to a customer without those special attributes.

188. 186. *AT&T Nondominance Order*, FCC 95-427, paras. 19-34 (Oct. 23, 1995).

189. 187. *Id*. para. 35.

190. 188. *Id*. para. 12.

191. 189. *Id*.

192. 190. *Id*.

193. 191. *Id*. para. 21.

194. 192. *Id*. para. 23.

195. 193. *Id.* para. 58.

196. 194. *Id*. para. 59.

197. 195. *Id*. para. 63.

198. 196. *Id*. para. 65 (noting that the FCC had previously found that long-distance business services, except analog private line, and 800 services, except 800 directory assistance, had become substantially competitive). *See IXC Competition Order*, 6 FCC Rcd. 5880, para. 37 (1991).

199. 197. *AT&T Nondominance Order*, FCC 95-427, para. 65 (Oct. 23, 1995).

200. 198. *Id*. para. 26.

201. 199. For example, resellers can be classified as common carriers even though they do not own any facilities. *See* American Tel. & Tel. Co. v. FCC, 572 F.2d 17, 25 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978).

202. 200. *See supra* notes 119-124 and accompanying text.

203. 201. *See* discussion of Wold Communications, Inc. v. FCC *supra* notes 97-108 and accompanying text.

204. 202. *See IXC Competition Order*, 6 FCC Rcd. 5880, paras. 52-59 (1991) (stating that allowing AT&T to offer common carrier contracts will not adversely affect residential customers).

205. 203. 142 Cong. Rec. H1112 (daily ed. Jan. 31, 1996).

206. 204. *Id.*

207. 205. *IXC Competition Order*, 6 FCC Rcd. 5880, paras. 114, 116 (1991).

208. 206. *See* discussion *supra* notes 17-23 and accompanying text.

209. 207. *See, e.g.*, Telecommunications Act of 1996, § 401, 100 Stat. 128.

210. 208. *See 1996 Detariffing NPRM* in CC Dkt. 96-61, FCC 96-123 (Mar. 25, 1996).

211. 209. *Id.* para. 21.

212. 210. *Id.* para. 28.

213. 211. *Id.* paras. 92-101. The *1996 Detariffing NPRM* provides a more in-depth examination of the filed rate doctrine. Briefly, the filed rate doctrine requires and, thus, allows carriers to charge the rate specified in their tariffs, even if they conflict with negotiated contract rates.

214. 212. *See* 47 U.S.C. §§ 201, 202 (1988).

215. 213. *1996 Detariffing NPRM* in CC Dkt. 96-61, FCC 96-123 para. 36.

216. 214. *Id.* para. 28.

217. 215. Greater liability exposure also could cause inefficiently high levels of quality as carriers seek to minimize losses from such liability.

218. 216. *See IXC Competition NPRM*, 5 FCC Rcd. 2627, para. 142 (1990).

219. 217. The court's analysis in *Wold Communications* consisted of three key factors. First, the FCC continued to exercise Title II authority with respect to the large majority of transponders. Wold Communications, Inc. v. FCC, 735 F.2d 1465, 1474 (D.C. Cir. 1984). Second, the authorization was not blanket. The FCC stated that it would, in reviewing an application required under Title III, determine whether sufficient common carrier transponder capacity would remain if an application was granted. *Id*. In so doing, the court found that the FCC's reluctance to establish a bright line test for the appropriate percentage to be reasonable because a simple comparison of percentages of transponders in and outside of common carriage might not be appropriate in every case. *Id*. at 1476. Third, the FCC committed to monitor the situation and to revise its course if changing circumstances warranted. The court emphasized that "[the FCC] has not forsworn regulation or slighted its obligation to forecast where the public interest lies; and it stands ready to alter its course if future developments indicate that the public interest is not advanced by its decision." *Id*. at 1475. The FCC could make the same declarations in adopting a private carriage alternative.

220. 218. As noted *supra* note 113, domestic satellite carriers still were regulated as dominant carriers at the time of the *Transponder Sales Order*.

221. 219. *Wold Communications, Inc.*, 735 F.2d at 1477-79.

222. 220. *Id*. at 1468.

223. 221. *See supra* Part III.A.

224. 222. *See supra* note 183 and accompanying text.

225. 223. *IXC Competition NPRM*, 5 FCC Rcd. 2627, para. 143 (1990).

226. 224. *See id*.

227. 225. Brook Group v. Brown & Williamson Tobacco, 113 S. Ct. 2578, 2596, *reh'g denied*, 114 S. Ct. 13 (1993). Prof. Phillip Areeda concurs:

Tacit coordination is obstructed by any characteristics of the product, the sellers, the buyers, or the transactions that reduce each seller's confidence in predicting or monitoring rivals' present or future behavior. Such uncertainty stands in the way of oligopolists' achieving cartel-like results through recognized interdependence.

Phillip Areeda, 6 Antitrust Law ¶ 1435 (1986).

228. 226. Scherer & Ross, *supra* note 57, at 348. Scherer and Ross point out that, in 1912, corporate attorney Arthur Jerome Eddy promoted open pricing in order to facilitate price collusion and prevent "ruinous competition." *See id*. (quoting Arthur Jerome Eddy, The New Competition 126 (4th ed. 1917)).

229. 227. *See* American Column & Lumber Co. v. United States, 257 U.S. 377, 410 (1921) (manufacturer's association's requirement that members submit price lists and sales reports to the association, which the association reported, reflected agreement to follow a common purpose); United States v. American Linseed Oil Co., 262 U.S. 371 (1923) (manufacturer's association requirements that members report details of business for dissemination to other members); Sugar Institute v. United States, 287 U.S. 553, 598 (1936) (violation found where 15 sugar refining companies explicitly agreed to charge quoted prices without deviation until publicly announced changes were made); United States v. Container Corp. of Am., 393 U.S. 333 (1969) (the provision of prices quoted to particular customers to competitors tended to stabilize prices illegally). Where general price and factor cost information was reported without other evidence of implied agreement on prices or a requirement to charge such prices, the Supreme Court has not found violations. *See* Maple Flooring Mfrs.' Ass'n v. United States, 268 U.S. 563, 586 (1925) (no violation where association gathered and disseminated information without evidence of agreement with respect to prices or other concerted behavior); Cement Mfrs.' Protective Ass'n v. United States, 268 U.S. 588 (1925) (no violation where association gathered and disseminated information without evidence of agreement with respect to prices or other concerted behavior).

230. 228. *In re* Tariff Filing Requirements for Nondominant Common Carriers, *Memorandum Opinion and Order*, 8 FCC Rcd. 6752, para. 2 (1993).

231. 229. *In re* Policies and Rules Concerning Rates for Competitive Carrier Services and Facilities Authorizations Therefor, *Fourth Report and Order*, 95 F.C.C. 2d 554, 554 n.1 (1983) (citing United States v. United States Gypsum Co., 438 U.S. 422, 457 (1978). "[T]he exchange of price information among competitors carries with it the added potential for the development of concerted price-fixing arrangements which lie at the core of the Sherman Act's prohibitions.").

232. 230. *Id*. at 556 n.3.

233. 231. *AT&T Nondominance Order*, FCC 95-427, para. 83 (Oct. 23, 1995). The *AT&T Nondominance Order* abolished the advance notice requirement. *Id*. para. 83. AT&T did commit for one year to give 5 days advance notice to customers in existing term plans and to give 14 days notice if service is to be discontinued. *Id*. para. 135. The advance notice requirement can aid in cooperative price understandings among competitors, making "price leadership" less risky, because the "leader" can retract its price increase if it does not get enough "followers." *See* Areeda, *supra* note 225, at 222. In the absence of price leadership, advance notice requirements still undermine the incentive for a firm to offer innovative pricing or marketing packages because its competitors have ample time to respond by constructing similar offerings. The would-be innovator, thus, loses any first-mover advantage it might have otherwise had. *See IXC Competition Order*, 6 FCC Rcd. 5880, para. 80 (1991) (recognizing that notice requirements can discourage AT&T from being the first mover in the mar ket and encourage AT&T's competitors to be reactors).

234. 232. *See IXC Competition NPRM*, 5 FCC Rcd. 2627, 2658 n.187 (1990).

235. 233. Customer sophistication is not determinative of whether a service must be classified as private or common carriage. *See General Services Administration Order*, 2 FCC Rcd. 5072, para. 29 (1987). However, the public interest determination is certainly affected by whether the regulatory restraints actually protect a customer better than the

customer could protect itself.