

Regulating Competition in the Interexchange Telecommunications Market:

The Dominant/Nondominant Carrier Approach and the Evolution of Forbearance

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I. Introduction

With the advent of new technologies, competition has developed in many regulated industries once considered natural monopolies.⁽²⁾ The American telecommunications industry has been one of the most prominent to experience this transformation. Although the American Telephone and Telegraph Company (AT&T) virtually controlled domestic telecommunications for nearly a century,⁽³⁾ the Federal Communications Commission (Commission) began to promote competition in the interexchange segment of that industry after technological innovation made possible the offering of rival services by others. The Commission's recent efforts to account for emerging competition in the interexchange market constitute a fundamental change in its long-standing monopoly-based regulatory approach to telecommunications.

The most important of these efforts was the Commission's commencement of a formal inquiry and rulemaking to address the propriety of its proposed *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor (Competitive Carrier)*.⁽⁴⁾ In this proceeding, commonly referred to as *Competitive Carrier*, the Commission established the first comprehensive framework for regulating competition in the interexchange market. Through its *Competitive Carrier* policies, the Commission sought to address, in the context of interexchange services, an irony of the regulatory process: regulations intended to advance the public interest by restraining the exercise of market power may nevertheless have an anticompetitive effect by, among other things, creating barriers to market entry and encouraging collusion.

The Commission based *Competitive Carrier* on the notion that indiscriminately imposing on all interexchange common carriers the panoply of regulations set forth in Title II of the Communications Act of 1934 (Communications Act)⁽⁵⁾ would inhibit competition. Instead, the Commission found that Congress intended for Title II to govern only carriers possessing market power. For this reason, the Commission undertook a progressively deregulatory approach to carriers which it determined lacked market power, initially streamlining its Title II regulation of them and ultimately forbearing from the tariff and facilities regulation of them, while maintaining full Title II regulation of carriers which it concluded had such power. The Commission anticipated that this approach would benefit the public by creating an interexchange market in which all carriers could compete fairly regardless of market power.

Despite the broad mandate it received from Congress in the Communications Act to regulate telecommunications in the public interest, the Commission's approach to competition in the interexchange market has been shaped largely by the courts. The courts created the legal environment necessary for competition to thrive and compelled the Commission to nurture competitive forces during their infancy.⁽⁶⁾ Once these forces began to mature, the need for rules to ensure that they served the public interest became apparent. *Competitive Carrier* was the Commission's primary response to this need, but the courts often intervened to find that its most deregulatory provisions were inconsistent with the Communications Act. As a result, while forbearance from tariff regulation was the heart of the *Competitive Carrier* approach, only streamlined Title II regulation survived judicial review. Because sufficient statutory support existed for upholding *Competitive Carrier* in its entirety, such close judicial scrutiny suggested that the courts had their own agenda for telecommunications policy. Thus, the conflict which characterized the relationship between the Commission and the courts over the regulation of competition in the interexchange market had decisive policy implications.

Nonetheless, even without judicial interference, the viability of *Competitive Carrier* was questionable from the outset. The growth of competition in the interexchange market, and therefore the demise of that market as a natural monopoly, was inevitable once the widespread use of microwave and other technology in communications became practicable.⁽⁷⁾

A fundamental tenet of *Competitive Carrier*, however, was that the interexchange market would include, for the foreseeable future, some carriers that possessed market power and others that did not. To adhere to this principle, the Commission had to ignore the effects of the judicially supervised breakup of the mammoth Bell System and then regulate AT&T as a carrier with market power long after that power had ceased. In sum, the Commission failed to account fully for market power being largely the result of certain carriers having the ability to deny access to the interexchange network through their control of essential "bottleneck" facilities and to recognize that competition would flourish once this ability no longer existed. Until they more accurately accounted for market realities, the Commission's policies could not enjoy full legitimacy and effectiveness under any circumstances.

By the time the Commission's policies finally began to account more accurately for such realities, Congress was preparing to implement new laws to govern the telecommunications industry. Through its passage of the Telecommunications Act of 1996, which made the achievement of a deregulated, competitive telecommunications industry a national priority,⁽⁸⁾ Congress assisted both the Commission and the judiciary by providing needed legislative direction for the development of a coherent regulatory approach to interexchange competition. Most notably, the Telecommunications Act reinvigorated *Competitive Carrier* by resolving the long-debated forbearance issue in the Commission's favor. Thus, while the Commission was dilatory in acknowledging market realities throughout *Competitive Carrier*, the Telecommunications Act has confirmed that the forbearance policies it developed during that proceeding were necessary and proper to foster interexchange competition.

The Telecommunications Act's forbearance provisions, which authorize the Commission to relieve carriers of their duty to comply with statutory and regulatory requirements, facilitate the growth of interexchange competition in three significant ways. First, these provisions enhance the Commission's ability to promote service innovation, competitive pricing, and market entry through both the abolishment of regulatory disclosures that may have anticompetitive effects, such as tariff filings and applications for facilities authorizations, and the reduction of carriers' costs resulting from the easing of regulatory constraints. Second, these provisions afford the Commission the regulatory flexibility necessary to govern an industry, like telecommunications, that is continuously evolving. Third, these provisions enable the Commission to reduce its administrative costs in markets where competitive forces effectively discipline carriers' behavior and to expend its resources only where regulatory oversight is essential, such as in noncompetitive markets still dominated by one or more firms. Consequently, by expressly conferring forbearance authority on the Commission, the Telecommunications Act has given the Commission the tools required to fulfill its statutory mandate and create a competitive interexchange market that is responsive to the public's needs.

To accomplish this goal, however, the Commission must understand existing market conditions and tailor its policies to them. Consistent with its *Competitive Carrier* approach, market power should serve as the determinative factor in the Commission's inquiry into whether forbearance treatment is appropriate for some or all of the activities of a carrier or class of carriers because firms that lack such power necessarily are competitive while those that possess such power are not. In conducting this inquiry, the Commission cannot be reluctant to extend forbearance to carriers that lack market power because any such delay may impede competition as well as cause the affected carriers to suffer dire financial consequences as they, unlike their forbore competitors, must continue to endure the burdens of Title II regulation. By contrast, when evidence on the issue of market power is inconclusive and the existence of competitive forces to control the subject carrier's behavior therefore is uncertain, the Commission must exercise caution in extending forbearance because Title II regulation provides a useful mechanism to monitor market behavior and prevent abuses in the absence of competition. Hence, the effectiveness of the Telecommunications Act's forbearance provisions in advancing interexchange competition depends on the Commission's ability to evaluate accurately and objectively the extent to which carriers have the means to exert market power and to act swiftly and without hesitation when deregulation is in the public interest.

This article analyzes the Commission's recent market power approach to the regulation of competition in the interexchange market, with an emphasis on the arduous administrative, judicial, and legislative course taken to develop and implement forbearance as the primary regulatory policy. Part II introduces the regulatory scheme on which the Commission based *Competitive Carrier*. Part III surveys the Commission's initial *Competitive Carrier* policies, including the development of "streamlined" regulation for carriers that lacked market power. Part IV recounts the evolution of *Competitive Carrier* from streamlined regulation to forbearance from the tariff and facilities regulation of carriers that lacked market power. Part V analyzes the impact of forbearance on telecommunications carriers, the

Commission, and the public. Part VI evaluates the judicial rejection of forbearance. Part VII examines the Commission's regulatory policies following the judicial rejection of forbearance. Part VIII considers the impact of the Telecommunications Act on the Commission's regulatory approach to competition in the interexchange market. Part IX concludes by recommending that the Commission promote interexchange competition by adopting a forbearance policy which accurately accounts for prevailing market conditions and governing law.

II. Devising A Regulatory Approach To Interexchange Competition

A. The Commission's Authority To Regulate Competition

In the Communications Act, Congress gave the Commission a broad statutory mandate to regulate the telecommunications industry in the public interest.⁽⁹⁾ It created the Commission for the express "purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, nationwide, and worldwide wire and radio communication service."⁽¹⁰⁾ To facilitate this purpose and thereby further the public interest, Congress empowered the Commission to promulgate all "necessary" rules and regulations.⁽¹¹⁾ Included within this responsibility was the duty to enforce Title II, which imposed traditional "natural monopoly" rate and service regulation on interstate telecommunications common carriers.⁽¹²⁾

By the late 1970s, the Commission recognized that competition was developing in the domestic interexchange market and determined that regulations to advance it were "necessary."⁽¹³⁾ As a result, in September 1979, the Commission commenced *Competitive Carrier* pursuant to its Title II responsibility to regulate the rates and services of telecommunications common carriers.⁽¹⁴⁾ According to the Commission, *Competitive Carrier*, which adopted a new approach to rate, tariff, and facilities regulation in order to enhance competition, service diversity, and consumer welfare while reducing regulatory burdens, was a proper exercise of its "broad discretion in choosing how to regulate" under Title II.⁽¹⁵⁾

B. The Dominant/Nondominant Carrier Approach

In *Competitive Carrier*, the Commission adopted a bifurcated approach to regulate competition. Under this approach, the Commission oddly did not first define the relevant markets for telecommunications services or consider whether these markets were competitive and then regulate them accordingly.⁽¹⁶⁾ Rather, it examined certain characteristics of the participants in these markets and established two distinct sets of rules to regulate the firms which, based on its assessment of these characteristics, had or lacked the ability and incentive to impede competition. The Commission referred to this categorization of firms as a "dominant/nondominant carrier classification scheme."⁽¹⁷⁾

Market power, which enables a firm to control the price of goods and services without effective challenge, was the determinative factor under this classification scheme.⁽¹⁸⁾ The Commission explained its significance:

A firm with market power is able to engage in conduct that may be anticompetitive or otherwise inconsistent with the public interest. This may entail setting price above competitive costs in order to earn supranormal profits, or setting price below competitive costs to forestall entry by new competitors or to eliminate existing competitors.⁽¹⁹⁾

Such power gives a firm the ability and incentive to subsidize its competitive services with revenue generated from its monopoly or near-monopoly services.⁽²⁰⁾ Perhaps the most striking evidence of market power is a firm's control over "bottleneck facilities."⁽²¹⁾ According to the Commission, "control of bottleneck facilities [is] prima facie evidence of market power requiring detailed regulatory scrutiny" because nondiscriminatory access to such facilities is essential for competition to thrive.⁽²²⁾ Due to the potential detrimental impact of market power on competition, the Commission held that any carrier possessing such power was a "dominant carrier."⁽²³⁾

All other carriers, by contrast, were "nondominant carriers."⁽²⁴⁾ These firms lacked the ability and incentive to price

their goods and services unjustly or unreasonably because, if they overpriced, they would lose market share to their competitors who set price equal to marginal cost and, if they underpriced, they would never have the opportunity to recoup their losses.⁽²⁵⁾ These firms likewise could not unjustly or unreasonably discriminate against certain customers, terminate or reduce service, or overbuild facilities without placing themselves at a competitive disadvantage.⁽²⁶⁾ Finally, these firms could not exert anticompetitive control over any service markets because they controlled no bottleneck facilities.⁽²⁷⁾

Although some carriers had market power as to certain services and were competitive as to others, the Commission declined to create a third classification that recognized such hybrids.⁽²⁸⁾ Instead, it treated all carriers as "single output firms."⁽²⁹⁾ When a carrier had market power in at least one service market, it was a dominant carrier for all regulatory purposes.⁽³⁰⁾ The Commission described this scheme as "a conservative approach to regulation."⁽³¹⁾ In addition to being conservative, however, this approach greatly simplified the Commission's regulatory burden.

The Commission made clear in the *First Report* that, of the two classifications of firms it recognized, only nondominant carriers would benefit from *Competitive Carrier*. It determined that applying existing "regulatory procedures to non-dominant carriers impose[d] unnecessary and counterproductive regulatory constraints" because such competitive carriers "could not rationally engage in the activities proscribed by the operative provisions of Title II of the Communications Act, viz. Sections 201-205 and 214."⁽³²⁾ By contrast, the Commission regulated dominant carriers as if they were the foes of competition. It determined that substantial regulation of dominant carriers remained necessary to "insure that they did not exploit their market power to the detriment of the public."⁽³³⁾ With this predisposition, the Commission undertook the classification of the disparate carriers composing the telecommunications industry.

C. Classifying The Carriers

To implement its dominant/nondominant classification scheme, the Commission divided the telecommunications industry into six categories of carriers.⁽³⁴⁾ These categories included telephone companies, Western Union, domestic satellite carriers (Domsats), miscellaneous common carriers (MCCs), specialized common carriers (SCCs), and resale carriers.⁽³⁵⁾ The Commission concluded that the first four were dominant carriers and the latter two were not.⁽³⁶⁾

1. The Dominant Carriers

a. Telephone Companies

The telephone company category included AT&T, along with its operating companies and Long Lines Department, and the approximately fifteen hundred independent telephone companies located throughout the United States.⁽³⁷⁾ According to the Commission, all telephone companies were dominant carriers.⁽³⁸⁾

The Commission found that AT&T was the quintessential dominant carrier for five reasons.⁽³⁹⁾ First, AT&T controlled access to more than 80 percent of the domestic telephone market through its operating companies and Long Lines Department.⁽⁴⁰⁾ Second, AT&T's network constituted a bottleneck facility, at both the local exchange and interexchange levels, to which other carriers required access in order to compete successfully because of the financial and logistical impediments to constructing alternative networks.⁽⁴¹⁾ Third, AT&T had an "overwhelming share" of the long-distance telephone service market.⁽⁴²⁾ Fourth, AT&T was "dominant in virtually every private line service where other common carriers also compete[d]".⁽⁴³⁾ Finally, AT&T regularly overpriced its private line services in violation of the Commission's cost standards.⁽⁴⁴⁾ Based on these factors, the Commission concluded that AT&T indisputably had the market power necessary for classification as a dominant carrier.⁽⁴⁵⁾

Although the Commission determined that the independent telephone companies were also dominant carriers, their market power derived from the franchises they held to provide local telephone service in their assigned exchange areas⁽⁴⁶⁾

coupled with their association with AT&T to provide long-distance telephone service to their customers. The exchange facilities owned by the independent telephone companies, like AT&T's operating companies, were "essential facilities" to which competitors needed access in order to provide comparable alternative service to the same areas.⁽⁴⁷⁾ In addition, the independent telephone companies "share[d] in AT&T's market power" because their agreements with AT&T had "the effect of tying all telephone companies together in a joint venture providing basic service."⁽⁴⁸⁾ Consequently, all of these companies required similar regulatory treatment.⁽⁴⁹⁾

b. Western Union

The Commission classified Western Union as a dominant carrier on the grounds that it held a "virtual de facto monopoly" over Telex and TWX services.⁽⁵⁰⁾ In opposition, Western Union argued that these services comprised an insignificant share of the business communications market, which it claimed was the relevant market for classification purposes, and that many substitute services were available.⁽⁵¹⁾ Observing that "Telex and TWX were the only significant domestic switched networks dedicated to teletypewriter, [which was] written record service on an exchange basis,"⁽⁵²⁾ the Commission disagreed.⁽⁵³⁾ It noted that facsimile was the only comparable alternative, but pointed out that reliance on that service was unreasonable because it was in the early stages of development.⁽⁵⁴⁾ The Commission also concluded that Western Union had defined the relevant market too broadly and that the anticipated market entry of firms with competitive services was irrelevant to Western Union's existing market power.⁽⁵⁵⁾ Thus, the Commission held that there was an "[in]sufficient restraining effect on [Western Union's] pricing and marketing conduct to justify a finding of non-dominance at this time."⁽⁵⁶⁾

c. Domestic Satellite Carriers

Domsats "transmit signals between earth stations and satellites in geostationary orbit."⁽⁵⁷⁾ Some provide service over their own facilities, including earth stations and satellites, while others do so by combining their own earth stations with satellite capacity obtained from resellers.⁽⁵⁸⁾ Although the Commission speculated that regulating Domsats could disserve the public interest,⁽⁵⁹⁾ it nevertheless classified them as dominant carriers in order to maintain a consistent regulatory policy.⁽⁶⁰⁾ The limited number of operational satellites caused the demand for Domsat service to exceed the available supply and therefore gave Domsats the ability and incentive to raise their prices until demand equaled supply.⁽⁶¹⁾ As a result, Domsats had market power,⁽⁶²⁾ requiring the Commission to classify them as dominant carriers or create an exception to the principles underlying its classification scheme. The Commission chose the former option.⁽⁶³⁾

d. Miscellaneous Common Carriers

Like Domsats, the Commission classified MCCs, which relayed video and audio signals by terrestrial microwave links throughout the United States and particularly in remote areas, as dominant carriers even though it questioned the propriety of doing so.⁽⁶⁴⁾ MCCs generally competed with Domsats in providing video interconnection service except that Domsats did not relay the major broadcast networks' signals.⁽⁶⁵⁾ Consequently, in areas where over-the-air reception was poor, MCCs had market power because they had the ability to overprice their service.⁽⁶⁶⁾ The Commission recognized, however, that "terrestrial video interconnection is a technology that has been, and will continue to be, faced with declining demand."⁽⁶⁷⁾ For this reason, although MCCs were dominant carriers by definition, the Commission agreed to reconsider its regulatory approach to them in order to design regulations that "promote[d] more efficient service to the public."⁽⁶⁸⁾

2. The Nondominant Carriers

a. Specialized Common Carriers

SCCs provide terrestrial point-to-point voice communications and analog and digital data transmissions primarily over

their own facilities.⁽⁶⁹⁾ At the time *Competitive Carrier* commenced, most SCCs also offered switched services and some provided long-distance services equivalent to MTS/WATS.⁽⁷⁰⁾ Even though they offered terrestrial voice and data services like the telephone companies, however, the Commission classified SCCs as nondominant carriers.⁽⁷¹⁾ It based this determination on SCCs' small market share, AT&T's ability to set an "umbrella price" for the market which constrained the rates that SCCs could charge, the availability of AT&T's "readily substitutable service" if SCCs behaved anticompetitively, the existence of low entry barriers that encouraged new carriers to enter the market if SCCs overpriced their services, and SCCs' inability to drive AT&T out of the market through underpricing and then recouping their resultant losses through overpricing.⁽⁷²⁾ In sum, the Commission held that SCCs were nondominant carriers because "the likelihood of a predatory pricing campaign by a SCC ending up with the predator as monopolist is virtually nonexistent."⁽⁷³⁾

b. Resale Carriers

Resale carriers lease facilities from other carriers in order to provide services to their own customers.⁽⁷⁴⁾ In general, they employ these facilities "to make available through the use of their own switches and computers a special purpose network that can transmit data and facsimile with special features that are often attractive for business use."⁽⁷⁵⁾ Certain resale carriers offer, for example, long-distance service in competition with AT&T, MCI, and Sprint, while others lease satellite capacity from Domsats to resell the transmission of broadcast signals to cable television systems.⁽⁷⁶⁾ Often, when desired services are not available to the public from underlying carriers, resale carriers meet that need.⁽⁷⁷⁾

Because the Commission found that resale carriers were apparently subject to more actual and potential competition than any other carrier, it classified them as nondominant.⁽⁷⁸⁾ Like SCCs, resale carriers encountered few entry barriers, lacked the ability to overprice their services without encouraging the entry of new competition, and confronted a variety of competitive services from other carriers that were reasonably substitutable for their own.⁽⁷⁹⁾ Resale carriers therefore were nondominant because they had no market power.⁽⁸⁰⁾

III. The Regulation of Dominant and Nondominant Carriers

The retention of existing Title II regulation for dominant carriers and gradual deregulation for nondominant carriers characterized the Commission's *Competitive Carrier* approach.⁽⁸¹⁾ While the Commission continued to impose traditional Title II regulation on dominant carriers, it commenced *Competitive Carrier* with the adoption of a "streamlined" approach to the regulation of nondominant carriers.⁽⁸²⁾ Thereafter, the Commission further liberalized its regulatory approach to nondominant carriers, adopting initially a permissive forbearance policy regarding tariff and facilities regulation and later a mandatory forbearance policy regarding tariff regulation.⁽⁸³⁾ As this deregulation evolved, the Commission included new firms within the category of nondominant carriers.⁽⁸⁴⁾ By the time it concluded *Competitive Carrier*, the Commission classified as nondominant almost all interexchange carriers.⁽⁸⁵⁾

A. The Dominant Carriers

Because dominant carriers had the ability and incentive to exercise their market power contrary to the public interest, the Commission concluded in the *First Report* that retaining its existing regulatory approach to them was necessary.⁽⁸⁶⁾ This approach imposed the gamut of common carrier regulations set forth in Title II, as supplemented by the Commission's rules, on dominant carriers.⁽⁸⁷⁾

Title II placed numerous restrictions on dominant carriers' exercise of market power.⁽⁸⁸⁾ First, dominant carriers had to provide services to all creditworthy customers on reasonable request.⁽⁸⁹⁾ Second, dominant carriers could only impose just and reasonable charges, terms, and conditions for their services and could not engage in unjust or unreasonable discrimination.⁽⁹⁰⁾ Third, dominant carriers could only offer services on a tariffed basis and any changes to established services or to charges, terms, or conditions for service could only take effect after ninety-day advance notice to the
⁽⁹¹⁾

Commission and the public. Fourth, dominant carriers were vulnerable to having their tariffs suspended for as many as five months by the Commission, on its own initiative or pursuant to complaints filed by members of the public, pending an investigation into their legality.⁽⁹²⁾ Fifth, when dominant carriers committed statutory violations, the Commission had jurisdiction to prescribe just and reasonable charges, terms, and conditions for their services, to issue cease and desist orders against them, and to award damages against them.⁽⁹³⁾ Finally, dominant carriers could not construct, acquire, or operate any facilities or "discontinue, reduce, or impair" their services without Commission authorization.⁽⁹⁴⁾

Through its rules implementing Title II, the Commission sought to restrain dominant carriers' exercise of market power by burdening them with a regulatory regime designed to substitute for the competition they lacked.⁽⁹⁵⁾ This regulation eliminated dominant carriers' flexibility as the primary service providers in their markets and subjected them to substantial costs, delays, and oversight.⁽⁹⁶⁾ The premise of this approach was that the public would benefit more as a result of such intrusive regulation than if dominant carriers operated unimpeded in their own self-interest.

B. The Nondominant Carriers

In contrast to its continued traditional Title II regulation of dominant carriers, the Commission adopted a "streamlined" approach to regulate nondominant carriers in the *First Report*.⁽⁹⁷⁾ Under this approach, the Commission substantially reduced or eliminated many of the Title II regulations still governing dominant carriers.⁽⁹⁸⁾ It anticipated that, unlike traditional Title II regulation, this "streamlined regulation" would facilitate nondominant carriers' response "to the demands of the competitive marketplace with a minimum of regulatory interference."⁽⁹⁹⁾

1. Presumption of Lawfulness on Petitions to Suspend

Because section 204 challenges to tariffs burdened the filing carriers and delayed the availability of new services to the public,⁽¹⁰⁰⁾ the Commission adopted as a fundamental principle of streamlined regulation the presumption that all nondominant carrier tariffs were lawful.⁽¹⁰¹⁾ Accordingly, the Commission announced that it would forego its statutory right to suspend tariff filings "except for the most compelling reasons"⁽¹⁰²⁾ and promulgated a four-part test, analogous to the requirements for issuing a preliminary injunction, which petitioners had to satisfy in order to rebut the presumption of lawfulness and establish grounds for suspension pending an investigation.⁽¹⁰³⁾ Although the Commission stated that it might give some deference to customers bringing such petitions because they "do not usually file petitions merely as a form of competitive harassment as do competing carriers,"⁽¹⁰⁴⁾ it warned that "competitors should devote their time and energies to devising new and innovative services and pricing strategies rather than complaining about each other's tariffs."⁽¹⁰⁵⁾

Relying on the same principles it used to define the class of nondominant carriers, the Commission discounted the possibility that this presumption of lawfulness would cause nondominant carriers to shirk their continuing statutory obligations as common carriers not to impose unjust and unreasonable charges, terms, or conditions for service⁽¹⁰⁶⁾ or to discriminate unjustly or unreasonably in providing services.⁽¹⁰⁷⁾ The Commission concluded that nondominant carriers could not rationally violate these mandates because they operated in a competitive market.⁽¹⁰⁸⁾ If nondominant carriers overcharged or demanded unreasonable terms or conditions, the Commission expected the market to punish them by encouraging customers to seek services elsewhere.⁽¹⁰⁹⁾ The Commission also contended that nondominant carriers could not rationally engage in predatory pricing because they could never recover their losses or force dominant firms like AT&T out of the market.⁽¹¹⁰⁾ Under these circumstances, the Commission predicted that it would rarely have to initiate proceedings against nondominant carriers to enforce sections 201 or 202.⁽¹¹¹⁾

2. No Economic Data To Support Tariff Filings

Unlike dominant carrier tariffs, which reflected the exercise of market power tempered by regulation, nondominant carrier tariffs were primarily the products of competition.⁽¹¹²⁾ As a result, although the Commission concluded that the

filing of "extensive cost and other economic data" by dominant carriers was necessary to ensure that their tariffs comported with their statutory responsibilities, it found that the submission of such supporting information by nondominant carriers was unnecessary and potentially harmful to the public interest.⁽¹¹³⁾ The Commission elaborated:

Because the cost of developing this information is relatively great for a nondominant carrier, the rates paid by its ultimate users are likely to be higher than if all competitive carriers were free from this unnecessary regulatory burden. Further, the required submission of these data forces a carrier to reveal to its competitors in advance the fruits of its own analysis and initiative, thereby discouraging the introduction of new innovative service offerings.⁽¹¹⁴⁾

This requirement also gave competitors the opportunity to use Commission procedures to harass each other "by permitting challenges not to the merits of the [tariff] filing but to the technical details of the accompanying cost support materials."⁽¹¹⁵⁾ For these reasons, the Commission exempted nondominant carriers from its rules mandating the submission of these materials.⁽¹¹⁶⁾

3. Shortened Notice Periods for Tariff Filings

The Commission found that the traditional ninety-day notice period for tariff filings impeded competition among nondominant carriers.⁽¹¹⁷⁾ Competition demands "flexibility" and a mandatory three-month delay in the effectiveness of new services and rates substantially reduced nondominant carriers' versatility to respond quickly to changing market conditions.⁽¹¹⁸⁾ The Commission therefore eliminated nearly 85 percent of that delay, allowing nondominant carrier tariffs to become effective on fourteen-day notice.⁽¹¹⁹⁾ In doing so, it dismissed claims that such a short period would give the public inadequate time to evaluate the propriety of nondominant carrier tariffs on the grounds that "complainants do not have a statutory right to suspension or rejection."⁽¹²⁰⁾ It nevertheless did not eliminate the notice requirement because it "recognize[d] that some period of review may be justified" and wanted to study market performance before making more substantial changes.⁽¹²¹⁾

4. Facilities Authorizations

The section 214 requirement that common carriers obtain Commission approval before entering and exiting service markets fulfills several purposes. It certifies that carriers are acting in the public interest, establishes carriers' service areas, controls the number of circuits and facilities that carriers may construct or lease to provide their authorized services, and ensures that carriers do not arbitrarily discontinue, reduce, or impair their services in areas that primarily rely on them.⁽¹²²⁾ Despite the apparent applicability of section 214 to all carriers, the Commission determined that Congress intended to regulate thereunder only carriers possessing market power.⁽¹²³⁾

In support of this conclusion, the Commission argued that "non-dominant carriers are unable to sustain the kind of business practices Congress was concerned about in adopting Section 214."⁽¹²⁴⁾ It emphasized that "Congress enacted section 214 and subsequent amendments to serve primarily as a protection against excessive expenditures on plant by rate-base regulated common carriers and against service discontinuance by carriers in areas where customers had no reasonable alternative service available."⁽¹²⁵⁾ Nondominant carriers, however, had no incentive to overinvest in facilities because they were not subject to rate-base regulation.⁽¹²⁶⁾ In addition, because they were competitive and lacked market power, any termination, reduction, or impairment of service by nondominant carriers left other carriers ready and willing to fill the resulting service gap with their reasonably substitutable services.⁽¹²⁷⁾ Under these circumstances, the Commission concluded that traditional section 214 regulation of nondominant carriers was inappropriate.

Although this reasoning justified the elimination of all section 214 regulation of nondominant carriers, the Commission instead adopted streamlined section 214 regulations to govern them.⁽¹²⁸⁾ These new regulations authorized nondominant carriers to serve the entire continental United States once they received initial certification from the Commission,⁽¹²⁹⁾ required them to report circuit additions to the Commission semiannually rather than at each instance,⁽¹³⁰⁾ and relaxed the procedures they had to follow in order to terminate, reduce, or impair service.⁽¹³¹⁾ These

regulations also exempted from section 214 certification all carriers that relayed video and audio signals over terrestrial radio facilities or by satellite pursuant to authorizations previously granted in accordance with Title III of the Communications Act.⁽¹³²⁾ Streamlined section 214 regulation therefore gave nondominant carriers greater flexibility in providing services.

IV. The Evolution of the Competitive Carrier Approach

A. The Initial Formulation and Application of Forbearance

The Commission suggested at the outset of *Competitive Carrier* that its adoption of streamlined regulation for nondominant carriers was only an interim step in its development of a comprehensive approach to regulate competition in the interexchange market.⁽¹³³⁾ At that time, it postulated that it had "discretion to forbear from the exercise of its full regulatory authority under the [Communications] Act."⁽¹³⁴⁾ The fundamental principle underlying forbearance, like streamlined regulation, was that Title II regulations were "unnecessary and counterproductive" in a competitive market.⁽¹³⁵⁾ Although the Commission had not decided whether to adopt a forbearance policy by the time it released the *First Report*,⁽¹³⁶⁾ it had done so nearly two years later when it released the *Second Report*.⁽¹³⁷⁾

The *Second Report* set forth the Commission's initial forbearance policy, which focused on the Title II requirements that common carriers file tariffs with the Commission and receive Commission authorization before entering and exiting service markets. The Commission found that section 203's "tariff regulation of non-dominant carriers is at odds with the purposes of the Act because it inhibits price competition, service innovation and the ability of firms to respond quickly to market trends."⁽¹³⁸⁾ The Commission similarly determined that in a competitive market, section 214's "entry and exit requirements do little to serve the purposes of the Act and . . . [instead] actually deterred the introduction of innovative and useful services as well as new market entrants."⁽¹³⁹⁾ On these grounds, the Commission concluded that allowing nondominant carriers to forego compliance with these two sections was "appropriate."⁽¹⁴⁰⁾

The Commission offered its legal justification for such forbearance from tariff and facilities regulation in the *Further Notice*, which preceded the *Second Report*.⁽¹⁴¹⁾ There, the Commission asserted that section 203(b)(2) gave it discretion to "modify" any of the tariff filing requirements.⁽¹⁴²⁾ Despite the lack of similar language in section 214 and the Commission's recognition that its "authority with respect to total forbearance from 214 regulation of competitive carriers remains unanswered," the Commission found that forbearance from facilities regulation was consistent with the "overriding goals of the [Communications] Act."⁽¹⁴³⁾ It later justified forbearance from facilities regulation on the grounds that "[t]he Communications Act does not specify the amount or type of information to be obtained from applications or procedures under Section 214(a)."⁽¹⁴⁴⁾

While the rationale underlying the Commission's determination in favor of permissive forbearance seemingly applied to all nondominant carriers, the *Second Report* limited the policy to terrestrial resellers of basic communication services for three reasons.⁽¹⁴⁵⁾ First, the Commission decided to test forbearance on these carriers because of its previous favorable regulatory experience with them. It noted that it "had few, if any, occasions to reject, suspend, or even investigate tariff filings for resale services [and that] rarely, if ever, [has it] had occasion to deny or condition reseller applications for facilities certification pursuant to Section 214."⁽¹⁴⁶⁾ It found that under these circumstances traditional Title II regulation of resale carriers was "especially onerous."⁽¹⁴⁷⁾ Second, the hundreds of applications seeking permission to offer terrestrial resale services filed after the Commission's decision to authorize the unlimited resale of MTS and WATS services⁽¹⁴⁸⁾ and the low capital requirements necessary to commence providing those services confirmed the competitiveness of the resale market.⁽¹⁴⁹⁾ Third, the application of forbearance to terrestrial resale carriers had "evoked the least controversy."⁽¹⁵⁰⁾ This limited application of forbearance, however, was short-lived.

B. The Extension of Forbearance

One year after it released the *Second Report*, the Commission reevaluated its application of permissive forbearance to only terrestrial resale carriers. The Commission pointed out in the *Fourth Report*⁽¹⁵¹⁾ that, since it had adopted streamlined regulation for nondominant carriers, there had been "no evidence that it is in the public interest for [it] to continue . . . receiving tariff and Section 214 filings from certain [SCCs] to prevent them from charging unjust or unreasonable rates or making service unavailable."⁽¹⁵²⁾ Consequently, the Commission found no need to regulate SCCs and terrestrial resale carriers differently and included SCCs within its forbearance policy.⁽¹⁵³⁾

The Commission also reclassified as nondominant all remaining resale carriers, "including domsat resellers, resellers owned by or affiliated with an exchange telephone company, and domestic record-carrier resellers not covered by the interconnection requirements of the Record Carrier Competition Act [of 1981]," and applied permissive forbearance to them as well.⁽¹⁵⁴⁾ It determined that all resale carriers were particularly suited for forbearance because, unlike other nondominant carriers, they did not own their communications facilities, could not control the use of the underlying communications facilities in a manner that was inconsistent with the public interest, and by necessity could not exceed the rates charged by their underlying carriers.⁽¹⁵⁵⁾

C. The Reclassification of Carriers

Concurrent with its extension of permissive forbearance to all SCCs and resale carriers, the Commission reconsidered its classification of certain dominant carriers in the *Fourth Report* in order to make it possible to extend forbearance to some or all of them in the future.⁽¹⁵⁶⁾ To justify this reclassification, the Commission conducted an extensive market power analysis of the telecommunications industry and offered a more thorough explanation of the dangers of market power to support its regulatory approach than it had earlier in *Competitive Carrier*.⁽¹⁵⁷⁾

The Commission examined two aspects of market power. First, it noted that a firm with market power has "the ability to raise prices by restricting output" and thereby increase its profits at the expense of its customers, who have no option except to pay higher prices for the scarce goods and services they require.⁽¹⁵⁸⁾ A firm without market power, by contrast, cannot behave similarly and achieve such a self-serving result because its action would not significantly diminish the market's total output and lead to a price increase.⁽¹⁵⁹⁾ Second, the Commission observed that "market power focuses on the ability to raise and maintain price above the competitive level without driving away so many customers as to make the increase unprofitable."⁽¹⁶⁰⁾ It pointed out, however, that it considered monopoly profits and not economic rents as evidence of market power.⁽¹⁶¹⁾ Once it set forth this understanding of market power, the Commission undertook the task of defining the relevant product and geographic markets in which to apply it.⁽¹⁶²⁾

The Commission defined the relevant product market at issue in *Competitive Carrier* as "all interstate, domestic, interexchange telecommunications services" and did not recognize any relevant submarkets.⁽¹⁶³⁾ It found that voice, data, record, and video telecommunications services could be transmitted in many diverse ways, such as through the terrestrial microwave systems of MCCs, the satellite services of Domsats and Domsat resellers, the expanding high capacity facilities of SCCs, and the vast national network of AT&T.⁽¹⁶⁴⁾ It also found that consumers often substituted from "MTS/WATS to private line and public switched record services" and "that, within very broad limits, telecommunications transmission media--wire pairs, coaxial cable, terrestrial microwave, fiber optics, or satellite transponders and earth stations--can be adjusted readily to provide virtually any service efficiently."⁽¹⁶⁵⁾ Under these circumstances, the Commission held that this compelling evidence of supply and demand substitutability validated its definition of the relevant product market.⁽¹⁶⁶⁾

Consistent with its broad definition of the relevant product market, the Commission defined the relevant geographic market to include the entire United States and its territories and again did not recognize any relevant submarkets.⁽¹⁶⁷⁾ It observed that "[t]he relevant geographic market includes the locations of the suppliers (1) to which buyers in any one area practically can turn for alternative sources of supply, or (2) which otherwise check the prices charged to those buyers."⁽¹⁶⁸⁾ It pointed out that customers had substantial supply substitutability because they had the option of using, for example, the many nationwide services of AT&T, the flexible satellite offerings of Domsats and Domsat

resellers, and the developing networks of SCCs.⁽¹⁶⁹⁾ It also noted that customers had substantial demand substitutability because they had the ability to shop among numerous carriers in order to find the best price and service alternatives.⁽¹⁷⁰⁾ Because supply and demand "cannot be segmented into distinct city pairs or even regions,"⁽¹⁷¹⁾ the Commission concluded that its definition of the geographic market was appropriate.⁽¹⁷²⁾

Based on this market power analysis, the Commission determined that its original classifications, derived from technology-specific criteria,⁽¹⁷³⁾ were no longer viable.⁽¹⁷⁴⁾ It conceded that it erroneously had focused on carriers' market power, without first defining the relevant service markets, when it devised the *Competitive Carrier* classification scheme.⁽¹⁷⁵⁾ It pointed out that, because of the reasonable substitutability of their services and low barriers to entry, MCCs, Domsats, Domsat resellers, Western Union's domestic operations, record carriers, SCCs, terrestrial resellers, and interexchange carriers affiliated with exchange telephone companies each had shares of the relevant product and geographic markets that were too small to confer market power on them.⁽¹⁷⁶⁾ All of these carriers, therefore, were now, by definition, nondominant carriers.⁽¹⁷⁷⁾ As a result, only AT&T and the independent telephone companies remained dominant carriers subject to traditional Title II regulation.

While the Commission extended permissive forbearance to SCCs and resale carriers, it applied streamlined regulation to all other nondominant carriers. Like when it classified SCCs as nondominant and applied streamlined regulation to them in the First Report, the Commission took this approach because it wanted to examine these carriers' performance under streamlined regulation before extending forbearance to them.⁽¹⁷⁸⁾ The Commission intended to impose forbearance "after a carrier's petition when the costs and benefits of forbearance for that carrier are more attractive than those of streamlined regulation."⁽¹⁷⁹⁾

D. Carriers With Dominant And Nondominant Characteristics

As it developed its progressively deregulatory policy toward nondominant carriers, the Commission also evolved a more liberal approach to regulating carriers that had a mixture of dominant and nondominant characteristics.⁽¹⁸⁰⁾ Initially, the Commission adopted a "conservative approach" to regulate these carriers,⁽¹⁸¹⁾ holding that "[a] finding of dominance [requires] a continuation of [traditional Title II] treatment of all of the activities of that firm [and that] carriers are eligible for streamlined regulatory procedures only if they are not dominant in the provision of any services."⁽¹⁸²⁾ Although the Commission retained this rule for "single entities" that had some nondominant characteristics, it held that it would regulate dominant carriers' "separate affiliates" as nondominant carriers provided that they had only nondominant characteristics.⁽¹⁸³⁾ Such affiliates would then be subject to streamlined regulation or forbearance depending upon their individual characteristics.⁽¹⁸⁴⁾ As a result, some nondominant separate affiliates of the same dominant carriers could be subject to streamlined regulation while others were subject to forbearance.⁽¹⁸⁵⁾ When nondominant single entities had a mixture of streamlined regulation and forbearance characteristics, they would be subject to streamlined regulation unless they received a Commission waiver.⁽¹⁸⁶⁾ Thus, "for a single entity with mixed characteristics, all of its services would be subject to the heaviest burden of regulation applicable to any of its services."⁽¹⁸⁷⁾

E. The Further Extension Of Forbearance

It took the Commission little time to extend permissive forbearance again. In its *Fifth Report*, adopted only nine months after the *Fourth Report*, the Commission decided that permissive forbearance was appropriate for interexchange carriers affiliated with exchange telephone companies,⁽¹⁸⁸⁾ Domsats,⁽¹⁸⁹⁾ MCCs,⁽¹⁹⁰⁾ and digital electronic message service carriers (DEMS).⁽¹⁹¹⁾ As a result, all carriers, except AT&T and the independent telephone companies, had now become subject to permissive forbearance.⁽¹⁹²⁾

The Commission's explanation for taking this action was similar to its earlier rationale for extending permissive forbearance.⁽¹⁹³⁾ It observed that forbearance: (1) reduces costs and delays associated with the introduction of new services or rates, thereby enabling carriers to meet customer needs more quickly and with less expense, and (2)

facilitates and stimulates competition and innovation by reducing entry barriers, lowering carrier costs and consumer prices, and minimizing the disclosure of business strategy and technological information to rivals.⁽¹⁹⁴⁾ It also expressed satisfaction with the performance of carriers already subject to permissive forbearance, noting that only minor complaints had been filed against them, as well as with the performance of interexchange carriers affiliated with exchange telephone companies, MCCs, and Domsats during the short time they were under streamlined regulation.⁽¹⁹⁵⁾ In sum, the Commission found that, for these carriers as well as DEMS,⁽¹⁹⁶⁾ "the costs/benefits of forbearance are more in the public interest than those of streamlined regulation."⁽¹⁹⁷⁾

F. The Adoption of Mandatory Forbearance

The evolution of *Competitive Carrier* culminated with the release of the *Sixth Report* in January 1985.⁽¹⁹⁸⁾ The Commission announced therein that "the public interest and the goals of the Communications Act would best be promoted by cancellation of all forborne carrier tariffs on file at the Commission within six months of the effective date of this Order"⁽¹⁹⁹⁾ and therefore implemented this policy.⁽²⁰⁰⁾ Rebuffing allegations that it was "abdicating its oversight responsibility with regard to forborne carriers,"⁽²⁰¹⁾ the Commission asserted that this decision advanced its regulatory objectives "to assure that communications service is widely available to the public, efficiently produced and reasonably priced,"⁽²⁰²⁾ was consistent with its "broad discretion in choosing how to regulate,"⁽²⁰³⁾ and was the next logical step following the three successful years it had experienced employing permissive forbearance.⁽²⁰⁴⁾

The Commission cited three statutory grounds as support for its imposition of mandatory forbearance. First, reiterating its rationale for adopting permissive forbearance,⁽²⁰⁵⁾ the Commission stated that Title II, which Congress enacted "to control monopoly abuse or imprudent investments by the carriers which could impose increased costs on consumers," was inapplicable to nondominant carriers because they lack the market power necessary to engage in the conduct it regulates.⁽²⁰⁶⁾ Second, the Commission asserted that section 203(b)(2) grants it "express authority to exempt carriers from tariff filing requirements where appropriate" by allowing it "to modify any requirement of the section."⁽²⁰⁷⁾ Finally, the Commission cited the "broad exemptive language" of section 203(c)(1) as "authority for forborne carrier tariff cancellation."⁽²⁰⁸⁾ Thus, according to the Commission, its imposition of mandatory forbearance was a legitimate exercise of its broad statutory discretion to regulate the telecommunications industry in the public interest.

Although the Commission cited no negative impact on competition from section 214's facilities authorization requirements, it nevertheless concluded that tariff filing by nondominant carriers pursuant to section 203 needlessly encouraged anticompetitive behavior.⁽²⁰⁹⁾ Tariff filing had the potential to harm carriers and the public by "(1) taking away carriers' ability to make rapid, efficient responses to changes in demand and cost; (2) impeding and removing incentives for competitive price discounting; (3) imposing costs on carriers that attempt to make new offerings; and (4) increasing the costs of the Commission's operation."⁽²¹⁰⁾ The Commission expressed particular concern about the potential for price collusion resulting from carriers' ability to study the tariffs filed by their competitors,⁽²¹¹⁾ the likelihood that its continued supervision of competitive carriers' tariff filings would result in the wasteful spending of public funds which it could more appropriately use to monitor dominant carriers,⁽²¹²⁾ the possibility that tariff filings would discourage consumers from seeking customized service arrangements and thereby impede technological innovation,⁽²¹³⁾ and the chance that its acceptance of tariff filings would mislead other government agencies into believing that it had approved them.⁽²¹⁴⁾ Thus, the Commission held that mandatory forbearance was necessary because voluntary tariff filings would, like traditional Title II regulation, impede competition.

G. Safeguards For Abuses

Although the Commission maintained throughout *Competitive Carrier* that market forces would discipline nondominant carriers and thereby advance the goals of its streamlined regulation and forbearance policies,⁽²¹⁵⁾ it nevertheless repeatedly asserted that adequate safeguards existed to protect the public in the unlikely event it was wrong.⁽²¹⁶⁾ For example, it pointed out that it retained the section 204 right to suspend and investigate tariff filings by
⁽²¹⁷⁾

nondominant carriers subject to streamlined regulation. Likewise, it argued that it could reimpose both the section 203 tariff-filing requirements and the section 214 facilities authorization requirements on forborne carriers that went astray.⁽²¹⁸⁾ In addition, it noted that it still relied on the section 208 complaint process and its authority to require carriers to submit cost data to support their rates as well as to produce documents setting forth the terms under which they provide services.⁽²¹⁹⁾ Finally, it observed that a finding of unlawful acts still subjected nondominant carriers to damages under sections 206 and 207.⁽²²⁰⁾ The Commission therefore concluded that nondominant carriers' customers "retain[ed] regulatory protection for those few cases in which they may need it."⁽²²¹⁾

H. The Exclusion of AT&T from Forbearance Treatment

The Commission commenced *Competitive Carrier* while the federal government's antitrust action against AT&T, Western Electric, and Bell Laboratories was pending (*United States v. AT&T*).⁽²²²⁾ Although the federal government often amended its requests for relief, it consistently sought the divestiture of some or all of the BOCs from AT&T.⁽²²³⁾ That outcome would fundamentally restructure the telecommunications industry and facilitate competition by eliminating AT&T's control over critical local exchange facilities. *United States v. AT&T* therefore had important implications for the Commission's *Competitive Carrier* approach.

1. The Modification of Final Judgment

While the Commission was developing its forbearance policy in *Competitive Carrier*,⁽²²⁴⁾ *United States v. AT&T* concluded with the entry of a consent decree with certain modifications imposed by the presiding district judge, Harold H. Greene.⁽²²⁵⁾ The "key feature" of this modified decree, commonly referred to as the *Modification of Final Judgment* (*MFJ*), was AT&T's divestiture of the BOCs.⁽²²⁶⁾ Citing the Commission's historical inability to halt AT&T's allegedly anticompetitive practices through traditional regulatory policies and the Department of Justice's previous inability to accomplish that goal in the courts,⁽²²⁷⁾ Judge Greene held that divestiture was the most effective remedy then available to promote the public interest.⁽²²⁸⁾ He explained that "[t]his divestiture will sever the relationship between this local monopoly and the other, competitive segments of AT&T, and it will thus ensure--certainly better than could any other type of relief--that the practices which allegedly have lain heavy on the telecommunications industry will not recur."⁽²²⁹⁾

Judge Greene recognized two significant benefits accruing to AT&T's competitors, and consequently the public, from divestiture. First, he pointed out that, in order to preserve its market dominance, AT&T allegedly had used its control over local exchange facilities to delay, prevent, or otherwise impair the access of competing long-distance carriers and equipment manufacturers to the overwhelming majority of American telephone subscribers.⁽²³⁰⁾ By eliminating AT&T's ability to engage in such discriminatory tactics, divestiture enhanced the viability of AT&T's competitors and concomitantly expanded the public's service and equipment options.⁽²³¹⁾ Second, he observed that AT&T allegedly had subsidized its competitive long-distance and equipment enterprises with profits earned from its monopoly local telephone business.⁽²³²⁾ Without the ability to engage in this cross-subsidization, all firms gained the opportunity to compete on equal terms with AT&T, offering the public legitimate telecommunications alternatives.⁽²³³⁾

To enable AT&T to compete in this manner without creating the risk that it could successfully resume predatory behavior, Judge Greene fashioned the *MFJ* so that AT&T's monopoly power over local exchanges would be transferred to the divested BOCs. This arrangement required the imposition of substantial restrictions on the BOCs to ensure that they had neither the ability nor the incentive to engage in the same anticompetitive conduct that led to *United States v. AT&T* and necessitated the *MFJ*.⁽²³⁴⁾ These restrictions, subject to removal upon the petition of one or more BOCs,⁽²³⁵⁾ included a prohibition against the provision of interexchange services.⁽²³⁶⁾ In addition, to guarantee that AT&T and other firms competed on equal terms, the *MFJ* prohibited the BOCs from "discriminat[ing] between AT&T and its affiliates and their products and services and other persons and their products and services"⁽²³⁷⁾ and required the BOCs to "provide to all interexchange carriers and information service providers exchange access, information access, and exchange services for such access on an unbundled, tariffed basis, that is

equal in type, quality, and price to that provided to AT&T and its affiliates."⁽²³⁸⁾ Thus, these restrictions made clear that while AT&T was a "competitive" carrier under the *MFJ*, the BOCs were not.

2. The Significance of AT&T's Large Market Share

According to Judge Greene, AT&T lacked monopoly power in the interexchange market even though it had received more than three-quarters of the revenue generated in that market as late as 1981.⁽²³⁹⁾ He pointed out that while "monopoly power may be inferred from a firm's predominant share of the market, size alone is not synonymous with market power, particularly where entry barriers are not substantial."⁽²⁴⁰⁾ Because of the divestiture, which eliminated AT&T's ability to provide discriminatory interconnection and to engage in cross-subsidization, and technological developments, which allowed market entry with relatively small capital expenditures, barriers to enter the interexchange market were not substantial.⁽²⁴¹⁾ As a result, Judge Greene anticipated that market forces would drive prices down to competitive levels if AT&T attempted to engage in monopoly pricing.⁽²⁴²⁾ He therefore concluded that, despite its large market share, "AT&T should be unable to engage in monopoly pricing in any market."⁽²⁴³⁾

3. *United States v. AT&T and Competitive Carrier*

In devising its *Competitive Carrier* policies, the Commission gave little consideration to *United States v. AT&T*.⁽²⁴⁴⁾ Although that litigation had been in progress for nearly five years when *Competitive Carrier* commenced, the Commission did not even mention it until the *Fourth Report*, released more than one year after Judge Greene entered the *MFJ*.⁽²⁴⁵⁾ At that time, the Commission only noted that the regulatory policies promulgated in *Competitive Carrier* would not apply to the BOCs' interstate intraLATA services until the BOCs faced substantial competition in those services,⁽²⁴⁶⁾ that AT&T controlled approximately 77 percent of the interexchange market in 1981,⁽²⁴⁷⁾ and that AT&T received the overwhelming share of toll service revenues in 1982.⁽²⁴⁸⁾ Subsequently, in the *Fifth Report*, the Commission acknowledged that the *MFJ* limited the BOCs' ability to offer interexchange services⁽²⁴⁹⁾ and stated that it would regulate the BOCs' interstate interLATA services as dominant, whenever Judge Greene removed the *MFJ* prohibition against BOCs providing such services, until it determined whether structural separation from their monopoly local telephone businesses would qualify those services for nondominant treatment.⁽²⁵⁰⁾ Finally, in the *Sixth Report*, the Commission observed that the *MFJ* and its own decisions "drastically" changed the telecommunications industry during the half-century since Congress passed the Communications Act.⁽²⁵¹⁾ Despite these few references to *United States v. AT&T*, however, the Commission otherwise ignored that litigation for purposes of *Competitive Carrier*.

The Commission's failure to rely on *United States v. AT&T* while formulating its *Competitive Carrier* policies has two possible explanations. First, the Commission may have felt contempt for the entire proceeding. The federal government's determination that it was necessary to file such a lawsuit, Judge Greene's opinion, and the *MFJ* were all evidence of the Commission's inability over the years to restrain AT&T from engaging in anticompetitive activities. Reliance on any facet of that litigation under these circumstances would have constituted an admission by the Commission of its own shortcomings. Second, the Commission may have concluded that *United States v. AT&T* was too narrow in scope and therefore had little relevance to the regulatory goals it sought to achieve in *Competitive Carrier*. *United States v. AT&T* considered only the terms under which AT&T and the BOCs were to operate. In contrast, the Commission undertook *Competitive Carrier* to establish rules for governing the conduct of *all* telecommunications carriers.⁽²⁵²⁾ To accomplish this goal, the Commission accounted for AT&T and the BOCs through its classification and regulatory treatment of all telephone companies as dominant carriers.⁽²⁵³⁾ Because *United States v. AT&T* did not involve all carriers or establish a regulatory framework for the entire interexchange market, the Commission most likely viewed *Competitive Carrier* as a complement to the *MFJ*. In essence, *Competitive Carrier* was the Commission's "*MFJ*" for the entire telecommunications industry.

4. Assessing *Competitive Carrier's* View of *United States v. AT&T*

Even though *Competitive Carrier* was more comprehensive than the *MFJ*, the Commission's failure to account for the

MFJ's impact on AT&T made suspect the principles underlying its policies to regulate competition in the interexchange market.⁽²⁵⁴⁾ AT&T was by far the largest, and therefore the most important, telecommunications firm in the United States at the time of the *MFJ*.⁽²⁵⁵⁾ A major change in AT&T's corporate structure, such as the divestiture of the BOCs, necessarily affected the way all telecommunications firms conducted business. Nonetheless, the Commission never addressed whether such a change required it to reevaluate the criteria on which it based its *Competitive Carrier* classification scheme.

The Commission originally determined that "AT&T must be treated as dominant" because it controlled the network access of more than 80 percent of American telephone subscribers through its ownership of the most vital local exchange "bottlenecks."⁽²⁵⁶⁾ Following the divestiture, however, AT&T no longer owned these local exchanges and consequently controlled no essential bottleneck facilities.⁽²⁵⁷⁾ Although the Commission acknowledged that the *MFJ* contributed to the restructuring of the telecommunications industry,⁽²⁵⁸⁾ it never explained in *Competitive Carrier* how AT&T remained a dominant carrier when the conditions on which it based that classification had ceased to exist.⁽²⁵⁹⁾

The Commission also maintained throughout *Competitive Carrier* that AT&T had market power in long-distance telephone service because it enjoyed an "overwhelming share of the MTS and WATS market."⁽²⁶⁰⁾ Less than two years after the Commission first stated this proposition, however, Judge Greene found that AT&T lacked market power even though it had a large market share.⁽²⁶¹⁾ Despite these conflicting conclusions, the Commission never attempted to reconcile its heavy reliance on market share when assessing whether AT&T had market power with Judge Greene's rejection of market share as the decisive factor in that inquiry.

Moreover, after the *MFJ* took effect, AT&T lacked the ability to engage in cost-shifting and the incentive to engage in other anticompetitive conduct. AT&T could not shift costs from its competitive businesses to its monopoly local telephone exchanges because it no longer controlled these exchanges.⁽²⁶²⁾ AT&T also had neither the incentive to overprice its remaining competitive services because it would lose market share to other firms, nor the incentive to underprice these services because it could never recoup its losses. The Commission nevertheless still held that "concerns about cost-shifting and anticompetitive conduct lead [it] to regulate all of the common carrier services of AT&T Communications as dominant at this time."⁽²⁶³⁾ Once again, however, the Commission failed to explain the basis for this holding.

These failures to explain how AT&T remained a dominant carrier, even after the *MFJ*, constitute admissions by the Commission that *Competitive Carrier* established an inadequate framework for regulating competition in a telecommunications industry lacking a vertically integrated Bell System. For example, the Commission could have challenged Judge Greene's analysis and argued that traditional Title II regulation of AT&T was still necessary, despite the *MFJ*, on the grounds that AT&T's large share of the interexchange market gave it "the ability to raise prices by restricting output."⁽²⁶⁴⁾ By not making such a market power argument, however, the Commission gave no justification for its continued dominant classification of AT&T. Hence, the Commission's retention of that classification, with its attendant traditional Title II regulation, had no obvious legal or factual basis. Under these circumstances, the Commission's own rationale suggested that mandatory forbearance from tariff and facilities regulation was appropriate for all interexchange carriers, including AT&T.

V. The Effects of Forbearance

Forbearance was a rational, though not flawless, approach to facilitate the development of competition in the interexchange market. Its effects were far-reaching, touching nondominant and dominant carriers, the Commission, and the public.

A. The Impact of Forbearance on Nondominant Carriers

1. Cost Savings for Nondominant Carriers

One of the primary benefits offered to nondominant carriers by forbearance was the opportunity to save certain costs.

The costs related to defending tariff filings were among the most significant. The Commission noted:

The requirement that firms file tariffs, in practice, immediately subjects them to petitions from competitors for rejection or suspension and investigation of the tariffs. Should a competitor be successful in persuading the regulatory agency to order a hearing, the firm can face substantial legal costs in defending its proposed prices. As a result, it may find it less expensive to withdraw the new rate. ⁽²⁶⁵⁾

Because forbearance abolished their duty to file tariffs, nondominant carriers no longer had to endure the challenges to tariff filings that competitors made in an effort to raise their rivals' costs and delay the availability of their rivals' new rates and services. The resources saved by not having to defend tariff filings could be substantial, particularly for carriers that often filed new or revised tariffs.

Forbearance from the section 214 facilities authorization requirements also offered nondominant carriers significant cost savings. These carriers no longer had to submit to the Commission applications that satisfied the "public convenience and necessity" standard in order to obtain permission to enter or exit service areas. ⁽²⁶⁶⁾ Instead, forbearance gave them flexibility to enter lucrative markets as soon as practicable and to exit unprofitable markets whenever appropriate. Thus, forbearance allowed these carriers to forego the expense of preparing section 214 applications and to avoid unacceptable losses from having to serve unprofitable areas.

Less significant were the cost savings resulting from forborne carriers not having to prepare and file tariffs. Most of the tariff costs incurred by carriers related to the preparation of their first tariffs. ⁽²⁶⁷⁾ Consequently, nondominant carriers that had not yet offered tariffed services, but had intended to do so, enjoyed the greatest savings as a result of forbearance. All nondominant carriers, however, still had to gather for their own use much of the same economic data and other information, which they previously had submitted to the Commission to support their tariff filings, in order to assess whether existing and proposed services were economically viable and to determine appropriate charges and terms for such services. Forbearance, therefore, did not offer most nondominant carriers meaningful cost benefits in this regard.

2. New Costs for Nondominant Carriers

Forbearance also created certain new costs for nondominant carriers that at least partially offset their cost savings. By abolishing their duty to set forth their services, rates, and service terms in tariffs, forbearance required nondominant carriers to negotiate service contracts with their customers. Consequently, while tariffs simplified nondominant carriers' task by specifying the kinds of services offered, the prices for them, and the terms under which they were available, forbearance complicated matters by requiring nondominant carriers to tailor their service offerings to the individual needs of their customers or risk losing business. The transaction costs for negotiating agreements on an individual basis, therefore, were potentially high. ⁽²⁶⁸⁾

B. The Impact of Forbearance on Dominant Carriers

1. Dominant Carriers at a Competitive Disadvantage

The Commission neither stated nor suggested in *Competitive Carrier* that it intended for its forbearance policies to place dominant carriers at a competitive disadvantage. Rather, the Commission implied that forbearance, coupled with the continued traditional Title II regulation of dominant carriers, would neutralize dominant carriers' market power and enable all carriers to compete on equal terms. Contrary to this goal, however, forbearance allowed nondominant carriers to exploit their exemption from Title II regulation to the detriment of dominant carriers and the public.

Forbearance inadvertently encouraged nondominant carriers to abuse the right, conferred on all members of the public by section 204, to challenge tariff filings by lodging complaints with the Commission. Nondominant carriers could file these complaints "[w]henver [other firms] filed with the Commission *any* new or revised charge, classification, regulation, or practice." ⁽²⁶⁹⁾ Nondominant carriers therefore had a statutory right to oppose all changes in the status quo proposed by dominant carriers. If nondominant carriers regularly interposed such objections, they would force dominant carriers to expend substantial resources to defend their tariff filings and could delay the availability of new

rates, services, and service terms for as much as five months.⁽²⁷⁰⁾ In the meantime, nondominant carriers could develop, offer, and promote their own alternative services and products. Thus, forbearance made the adoption of such a strategy by nondominant carriers a rational business decision.

Even though these anticompetitive tactics conflicted with the rationale and spirit underlying forbearance, the Commission had no mechanism to deter them. The Communications Act imposed no penalty on carriers that used the Section 204 complaint process to harass their competitors. Furthermore, the Commission did not adopt any rules to address that possibility.⁽²⁷¹⁾ The Commission also could not rely on the threat of retaliation by dominant carriers to serve as a deterrent. These firms lacked the ability to retaliate in kind against transgressing forborne carriers because the latter did not file tariffs. Under these circumstances, the Commission apparently did not anticipate the abuses that forbearance invited.

2. Dominant Carriers at a Cost Disadvantage

By retaining the tariff and facilities regulation of dominant carriers, the Commission placed these carriers at a cost disadvantage relative to forborne carriers. Although the Commission subjected the interexchange affiliates of exchange telephone companies to forbearance, provided that they maintained separate books of account and did not jointly own transmission and switching facilities,⁽²⁷²⁾ the interexchange and local exchange businesses still generally were under common ownership.⁽²⁷³⁾ As a result, the expenditures on behalf of the local exchange businesses for purposes of tariff filings and obtaining facilities authorizations necessarily diminished the total funds available for the interexchange businesses.⁽²⁷⁴⁾ Thus, the costs imposed by such regulation could give forborne carriers a financial advantage over certain dominant carriers, such as the small independent telephone companies, that competed in the interexchange market.⁽²⁷⁵⁾

C. The Impact of Forbearance on the Commission

Forbearance also reduced the Commission's administrative costs and thereby promoted the public interest.⁽²⁷⁶⁾ For example, under forbearance, the Commission no longer had to devote substantial resources to adjudicate disputes over the propriety of nondominant carriers' tariff filings or to consider these carriers' applications for facilities authorizations. In addition, forbearance eliminated certain incidental costs:

Maintaining [the] documents [relating to tariffs and facilities authorizations] at the Commission's offices entails certain costs such as the cost of storage space and the cost of staff time necessary to review the form of filed tariffs, to organize the materials for public inspection, to review special permission requests and to respond to questions from members of the public concerning the tariffs.⁽²⁷⁷⁾

Because it determined that the disciplining effects of competitive forces on nondominant carriers would be at least as effective as tariff and facilities regulation,⁽²⁷⁸⁾ the Commission recognized that it could more appropriately use its limited resources elsewhere.⁽²⁷⁹⁾ In particular, it found that "[t]he public interest can be better served by the Commission devoting these resources to determine the most effective regulation of carriers having market power."⁽²⁸⁰⁾

With few complaints having been filed against nondominant carriers,⁽²⁸¹⁾ most of the regulatory oversight of their activities necessarily related to tariff filings and facilities authorizations. By eliminating the administrative costs associated with these procedures, the Commission would eliminate most of the costs of regulating nondominant carriers. Forbearance therefore allowed the Commission to streamline its operations.

D. The Impact of Forbearance on the Public

1. Advantages of Forbearance for the Public

Consistent with its mandate to regulate the American telecommunications industry in the public interest,⁽²⁸²⁾ the primary beneficiary of the Commission's forbearance policies was the public. Forbearance promoted service

innovation, price competition, entry of new firms into the market, and the rapid response by firms to market trends. [\(283\)](#) All of these factors contributed to the development of a telecommunications industry that was more responsive to the public's need.

a. Service Innovation

Tariff and facilities regulation generally has inhibited innovation in telecommunications services. The Commission has observed with regard to tariffs:

A tariff may be restrictive because it fosters an image that all possible service arrangements are defined within its text. Customers may be reluctant to ask for arrangements outside of the tariff because they may think specific arrangements are unavailable or technically not feasible or are not willing to wait for the required lengthy tariff update procedures to be completed. [\(284\)](#)

Likewise, the Commission has pointed out with regard to applications for facilities authorizations:

If the application calls for new technology or a new service, the proposing firm not only is required to give its competitors an early blueprint of such technological innovations but also its exact plan for deployment. Because such early warning does not take place in markets not subject to price and entry controls, technological innovation by existing competitors or new entrants is discouraged in regulated markets compared with unregulated ones. [\(285\)](#)

By removing these artificial constraints, forbearance from tariff and facilities regulation fostered service innovation.

Forbearance made service innovation a necessity for nondominant carriers to remain competitive. Without forbearance, nondominant carriers could review the tariffs and applications for facilities authorizations filed by others and then offer comparable services. Customers would then have few alternatives. Although this approach would not distinguish these carriers from their competition, it would allow them to remain competitive without risking substantial losses. By eliminating such regulation, forbearance kept the services offered by other carriers a secret until they went into effect. All forborne carriers therefore had increased incentive to develop new services and be responsive to customer needs because: (1) they alone reaped the rewards of their ingenuity while their competitors sought to overtake them, and (2) they had to take such action in order to retain or improve their market share and remain competitive.

b. Price Competition

Likewise, the tariff system may have discouraged firms from engaging in price competition by serving as a support structure for oligopolistic pricing led by firms with market power. As with service offerings, the tariff system enabled firms to study their competitors' filings and price their services comparably. This process left the public with few pricing options. The Commission explained this phenomenon:

Tariff posting . . . provides an excellent mechanism for inducing noncompetitive pricing. Since all price reductions are public, they can be quickly matched by competitors. This reduces the incentive to engage in price cutting. In these circumstances firms may be able to charge prices higher than could be sustained in an unregulated market. Thus, regulated competition all too often becomes cartel management. [\(286\)](#)

When firms without market power deviated from the norm, firms with market power had the ability to punish them through predatory pricing. By eliminating tariff filing by nondominant carriers, however, forbearance removed the capacity of the tariff system to encourage oligopolistic pricing and instead promoted pricing determined by competitive market forces. [\(287\)](#)

c. Market Entry by New Firms

Forbearance from tariff and facilities regulation promoted the market entry of new firms for two reasons. First, tariff and facilities regulation placed new firms at a competitive disadvantage to their established rivals because it required them to disclose their business plans before they were even able to offer their initial services. This requirement

"reduc[ed] any time-related advantages that a new firm would have over existing firms by giving the latter more opportunity to react to the entrant."⁽²⁸⁸⁾ Second, as forbearance stimulated service innovation, firms were more likely to develop and specialize in services not offered by their competitors.⁽²⁸⁹⁾ Securing their own small industry niche enabled new firms to enhance their viability. Thus, forbearance motivated new firms to enter the industry by removing the most substantial obstacle to their success and, in doing so, gave the public a wider variety of service options.

d. Carrier Response to Market Trends

Forbearance from tariff and facilities regulation also advanced the public interest by enabling firms to respond rapidly to industry developments. Because tariff and facilities regulation imposed a mandatory delay in the availability of new services, rates, and service terms,⁽²⁹⁰⁾ firms could not immediately react to new market conditions or meet the changing needs of their customers. Forbearance eliminated that delay.

2. Disadvantages of Forbearance for the Public

Regardless of these benefits, forbearance posed several disadvantages for the public. For example, although forborne carriers still had a statutory obligation not to discriminate unjustly or unreasonably, monitoring their compliance with this mandate was more difficult without published tariffs. In addition, by allowing forborne carriers to discontinue, reduce, or otherwise impair their service without a prior Commission finding that such action was consistent with the public convenience and necessity, these carriers could terminate their service to areas that primarily relied on them and leave their customers without adequate alternatives. Finally, because dominant carriers did not enjoy the flexibility afforded by forbearance, such firms, which could otherwise use their more substantial resources to serve as industry leaders in service innovation, were vulnerable to losing their technological initiative and becoming relegated to a secondary role in the research and development of new services.⁽²⁹¹⁾ Forbearance therefore had certain drawbacks which diminished its benefits to the public.

VI. The Judicial Rejection of Forbearance

Despite the Commission's determination that forbearance was necessary to achieve its regulatory objectives and consistent with the Communications Act, the D.C. Circuit, and eventually the United States Supreme Court, found otherwise. Initially, in *MCI v. FCC (MCI Forbearance)*,⁽²⁹²⁾ the D.C. Circuit vacated the Commission's mandatory forbearance policy. More than seven years later, in *AT&T v. FCC (AT&T Forbearance)*,⁽²⁹³⁾ that same court invalidated the Commission's permissive forbearance policy. These two decisions substantially limited the Commission's discretion to adopt the policies it considered most appropriate to regulate competition in the telecommunications industry.

Even more significant, however, was the United States Supreme Court's decision to involve itself in this controversy. Although the Court denied certiorari in *AT&T Forbearance*,⁽²⁹⁴⁾ it agreed to resolve finally the propriety of permissive forbearance when that issue again arose in *MCI v. AT&T (AT&T Forbearance Affirmed)*.⁽²⁹⁵⁾ There, a divided Court held that this policy was contrary to the Communications Act.⁽²⁹⁶⁾ In so doing, the Court eliminated any possibility that it would ultimately validate mandatory and permissive forbearance and thereby vindicate the regulatory scheme adopted in *Competitive Carrier*.

A. The Demise of Mandatory Forbearance

One day after the Commission published the *Sixth Report*, MCI filed a petition for review with the D.C. Circuit alleging that section 203(a) of the Communications Act precludes mandatory forbearance.⁽²⁹⁷⁾ That section provides:

Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers . . . and showing the classifications, practices, and regulations affecting such charges.⁽²⁹⁸⁾

According to MCI, Congress' use of "shall" in section 203(a) mandated tariff filing and its omission of any exceptions indicated that the Commission had no discretion to abrogate that requirement.⁽²⁹⁹⁾

The D.C. Circuit adopted MCI's analysis. Like MCI, the court focused on the terms of section 203(a), observing that "the starting point for interpreting a statute is the language of the statute itself."⁽³⁰⁰⁾ The court then agreed with MCI's interpretation of that provision, noting that "[s]hall" "is the language of command" and that "[a]bsent a clearly expressed legislative intention to the contrary, courts ordinarily regard such statutory language as conclusive."⁽³⁰¹⁾

The Commission asserted that the "plain meaning" of section 203(b)(2) constituted such a "clearly expressed legislative intention to the contrary."⁽³⁰²⁾ That section states:

The Commission may, in its discretion and for good cause shown, *modify* any requirement made by or under the authority of this section either in *particular instances* or by general order applicable to *special circumstances or conditions* except that the Commission may not require the notice period . . . to be more than ninety days.⁽³⁰³⁾

The Commission therefore contended, as it had in the *Sixth Report*, that its adoption of mandatory forbearance was a permissible "modification" of section 203's tariff filing requirements in response to "particular instances" or "special circumstances or conditions"--the development of competition in the telecommunications industry.⁽³⁰⁴⁾

The D.C. Circuit, however, rejected this contention for three reasons. First, the court pointed out that the word "modify" suggests "circumscribed alterations" and not, as the Commission asserted, "wholesale abandonment or elimination of a requirement."⁽³⁰⁵⁾ Second, the court cited Second Circuit precedents that purportedly limited the Commission's discretion under section 203.⁽³⁰⁶⁾ Third, and most importantly, the court cited the Commission's statements from previous cases that all common carriers had to file tariffs in order to offer telecommunications services to the public regardless of whether market conditions no longer justified such regulation.⁽³⁰⁷⁾

The court also rejected the Commission's alternative argument that it has general authority to impose mandatory forbearance pursuant to its broad statutory power to regulate the telecommunications industry in the public interest.⁽³⁰⁸⁾ The Commission asserted that its mandatory forbearance policy was analogous to previous orders by other agencies detariffing certain airline, railroad, and trucking services which the D.C. Circuit had upheld.⁽³⁰⁹⁾ The court disagreed, concluding that these precedents were inapposite because "Congress had supplied explicit deregulatory authority."⁽³¹⁰⁾ The court further noted that, in the Record Carrier Competition Act of 1981, Congress had expressly granted the Commission forbearance authority when it provided that "[i]n order to meet the purposes of this section, the Commission *shall* forbear from exercising its authority under [Title II of the Communications Act] as the development of competition among record carriers reduces the degree of regulation necessary to protect the public."⁽³¹¹⁾ Under these circumstances, the court suggested that Congress would have specified the Commission's authority to forbear from tariff regulation if it intended to confer such authority.⁽³¹²⁾

In sum, it was irrelevant to the D.C. Circuit whether mandatory forbearance was a reasonable regulatory response to the development of competition. According to the court, the Commission simply had no authority to adopt such a policy.⁽³¹³⁾ Thus, if the Commission insisted on pursuing mandatory forbearance to achieve its regulatory objectives, its only option was to obtain the necessary authority from Congress.⁽³¹⁴⁾

B. The Demise of Permissive Forbearance

1. The D.C. Circuit's Decision

In contrast to MCI's direct challenge to mandatory forbearance through its petition for review of the *Sixth Report*,⁽³¹⁵⁾ AT&T indirectly challenged permissive forbearance through a complaint filed with the Commission seeking damages and a cease and desist order against MCI.⁽³¹⁶⁾ AT&T asserted that it was sustaining injury as a result of MCI's

continuing violations of section 203(a), which consisted of charging certain customers unfiled "special negotiated rates."⁽³¹⁷⁾ This MCI practice allegedly placed AT&T at a competitive disadvantage because *Competitive Carrier* still required AT&T to file all of its rates with the Commission, thereby impeding AT&T's ability to match MCI's rates promptly and subjecting AT&T to costly and time consuming defenses of its tariffs in response to challenges raised by competitors like MCI.⁽³¹⁸⁾ MCI conceded that it had not filed all of its rates, but asserted that as a nondominant carrier it was properly acting pursuant to the *Fourth Report*, which it claimed was a substantive rule that terminated the mandatory application of section 203(a) to nondominant carriers.⁽³¹⁹⁾ After substantial delay,⁽³²⁰⁾ the Commission adopted MCI's position, dismissed AT&T's complaint without assessing whether MCI's actions violated the Communications Act, and stated that it would only consider the validity of the *Fourth Report* in future rulemakings.⁽³²¹⁾ The Commission concurrently commenced such a rulemaking, *Tariff Filing Requirements for Interstate Common Carriers (Tariff Filing Rulemaking)*.⁽³²²⁾

On review, the D.C. Circuit reprimanded the Commission for the manner in which it had disposed of this matter. Describing the Commission's actions as an "administrative law shell game"⁽³²³⁾ and "troubling tactics,"⁽³²⁴⁾ the court pointed out:

It is rather apparent that, because the Commission fears the *Fourth Report* cannot withstand judicial scrutiny (at least in our court), it wants to avoid judicial review of the rule [in order to] allow the *Fourth Report* to continue to govern the conduct of carriers for as long as possible.⁽³²⁵⁾

The court noted that agencies like the Commission "cannot avoid their responsibilities in an adjudication properly before them by looking to a rulemaking, which operates only prospectively,"⁽³²⁶⁾ and held that "the Commission had an obligation to answer the questions raised [by AT&T's complaint] and to decide whether MCI had violated the statute."⁽³²⁷⁾ The Commission's failure to do so therefore was arbitrary and capricious and constituted a further delaying tactic to avoid formally examining the validity of its permissive forbearance policy.⁽³²⁸⁾

Rejecting as spurious the Commission's claim that judicial review of the *Fourth Report* was premature,⁽³²⁹⁾ the D.C. Circuit then invalidated that report on the same basis that it had vacated the *Sixth Report*.⁽³³⁰⁾ In addressing arguments identical to those made by the Commission in support of its mandatory forbearance policy, the court quoted extensively from, and reaffirmed its reasoning in, *MCI Forbearance*.⁽³³¹⁾ It again "concluded that the language of the statute was not susceptible to the Commission's reading"⁽³³²⁾ and, as with mandatory forbearance, held that the Commission had no statutory authority to "modify" section 203 to allow for permissive forbearance from tariff filing.⁽³³³⁾

Although the court stated that it "understood" the Commission's desire for regulatory flexibility and did not "quarrel with the Commission's policy objectives," it reiterated that Congress had neither granted such flexibility nor authorized permissive forbearance.⁽³³⁴⁾ Under these circumstances, the court vacated the *Fourth Report*⁽³³⁵⁾ and remanded the case for adjudication of AT&T's complaint on the merits.⁽³³⁶⁾

2. The United States Supreme Court's Decision

Less than two weeks after the D.C. Circuit decided *AT&T Forbearance*, the Commission reaffirmed its permissive forbearance policy in a Report and Order promulgated during the *Tariff Filing Rulemaking (Tariff Filing Report)*.⁽³³⁷⁾ In so doing, the Commission failed to acknowledge the decision against it in *AT&T Forbearance* and reiterated its determination that permissive forbearance advanced the purposes of the Communications Act by eliminating impediments to competition.⁽³³⁸⁾ It also directly attributed the growth of competition in the interexchange market to its permissive forbearance policy.⁽³³⁹⁾ Based on this "successful practical experience with permissive detariffing," the Commission concluded that "it would be unreasonable to disturb [that policy] in the absence of Congressional or judicial commands."⁽³⁴⁰⁾ Although the D.C. Circuit seemed to have issued such a "command" when it vacated the *Fourth Report* in *AT&T Forbearance*,⁽³⁴¹⁾ the United States Supreme Court made clear that the Communications Act did not authorize permissive forbearance when it invalidated the *Tariff Filing Report* in *AT&T Forbearance*

Affirmed.⁽³⁴²⁾

The majority and dissenting opinions in *AT&T Forbearance Affirmed* reveal, however, diametrically opposite views of statutory construction. The majority opinion so strictly construed the Communications Act that a forbearance policy in any form could not prevail. By contrast, the dissenting opinion so liberally construed the Communications Act that a forbearance policy in any form could not fail. Thus, the composition of the Supreme Court was crucial and made the result predictable.

a. The Majority Opinion

Like the D.C. Circuit, a majority of the Supreme Court ("Majority") first found that this dispute "turns on the meaning of the phrase 'modify any requirement' in 203(b)(2)"⁽³⁴³⁾ and then narrowly construed it.⁽³⁴⁴⁾ The Majority explained:

The word 'modify'--like a number of other English words employing the root 'mod-' (deriving from the Latin word for 'measure'), such as 'moderate,' 'modulate,' 'modest,' and 'modicum,'--has a connotation of increment or limitation.

Virtually every dictionary we are aware of says that 'to modify' means to change moderately or in minor fashion.⁽³⁴⁵⁾

In making this finding, the Majority rejected the notion that the Commission's adoption of a more expansive definition of "modify" deserved deference because certain dictionary definitions broadly state that "modify" means "to make a basic or important change in."⁽³⁴⁶⁾ The Majority reasoned that the availability of several dictionary definitions does not create "sufficient ambiguity" requiring courts to defer to an administrative agency's choice as to which one to follow.⁽³⁴⁷⁾ The Majority also noted that when the Communications Act became law in 1934, "the most relevant time for determining a statutory term's meaning,"⁽³⁴⁸⁾ "all English dictionaries provided the narrow definition of 'modify.'"⁽³⁴⁹⁾

The limitation on the Commission's authority to extend the notice period for changes to filed tariffs established by section 203(b)(2) was equally significant to the Majority.⁽³⁵⁰⁾ Section 203(b)(2) provides that the Commission cannot require this notice period to exceed 120 days.⁽³⁵¹⁾ The Majority asked whether it is "conceivable that the statute is indifferent to the Commission's power to eliminate the tariff-filing requirement entirely for all except one firm in the long-distance sector, and yet strains out the gnat of extending the waiting period for tariff revision beyond 120 days?"⁽³⁵²⁾ To the Majority, the obvious answer was "no."⁽³⁵³⁾

Under these circumstances, the Majority concluded that permissive forbearance could survive judicial scrutiny only if it did not radically or fundamentally change the Communication Act's tariff filing requirements.⁽³⁵⁴⁾ Finding that mandatory rate filing was the "heart" of the statutory scheme and "the essential characteristic of a rate-regulated industry,"⁽³⁵⁵⁾ the Majority doubted that Congress had intended for the Commission to implement a regulatory policy like permissive forbearance:

It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion--and even more unlikely that it would achieve that through such a subtle device as permission to "modify" rate-filing requirements.⁽³⁵⁶⁾

Even if Congress had granted the Commission some regulatory flexibility in this regard, the Majority could not conceive of permissive forbearance, which eliminated the tariff-filing requirements for carriers serving 40 percent of interexchange consumers and all but one interexchange carrier, as being merely a "modification."⁽³⁵⁷⁾ Rather, the Majority found that permissive forbearance was an impermissible "fundamental revision of the statute, changing it from a scheme of rate regulation in long-distance common-carrier communications to a scheme of rate regulation only where effective competition does not exist."⁽³⁵⁸⁾

According to the Majority, permissive forbearance failed for three additional reasons. First, the Majority pointed out that when the Commission seeks to make a modification under section 203(b)(2) "by general order," as it attempted

here, the order must apply "to special circumstances or conditions" and relatedly observed that "[i]t is hard to imagine that a condition shared by 40% of all long-distance customers, and by all long-distance carriers except one, qualifies as 'special' within the intent of this limitation."⁽³⁵⁹⁾ Second, the Majority found no evidence that Congress had, in effect, ratified the Commission's permissive forbearance policy through subsequent legislation.⁽³⁶⁰⁾ Third, the Majority rejected the argument that permissive forbearance was an appropriate exercise of the Commission's broad mandate to promote efficient service by eliminating a competitive barrier.⁽³⁶¹⁾ In sum, like the D.C. Circuit, the Majority believed that Congress, not the courts, was the appropriate forum in which to debate the propriety of forbearance.⁽³⁶²⁾

The Majority nevertheless did not preclude the Commission from exercising its section 203(b)(2) "modification" powers in the future. Although the Majority struck down permissive forbearance, it acknowledged that Congress had authorized the Commission to change the tariff-filing requirement on a more limited basis.⁽³⁶³⁾ The Majority failed, however, to specify the extent of this limited "modification" authority.

b. The Dissenting Opinion

Liberalizing the Commission's powers under the Communications Act, three Justices ("Dissent") vigorously disagreed with the Majority.⁽³⁶⁴⁾ The Dissent recognized that, because the "communications industry has an unusually dynamic character,"⁽³⁶⁵⁾ Congress granted the Commission "unusually broad discretion" to regulate it in the public interest.⁽³⁶⁶⁾ The Dissent also noted that, consistent with this grant, the Supreme Court previously had facilitated the Commission's exercise of discretion in fulfilling its regulatory responsibilities.⁽³⁶⁷⁾ For this reason, the Dissent sharply criticized the Majority for now "abandon[ing] that approach in favor of a rigid literalism that deprives the FCC of the flexibility Congress meant it to have in order to implement the core policies of the [Communications] Act in rapidly changing conditions."⁽³⁶⁸⁾

Contrary to the Majority, the Dissent contended that "the heart of . . . the . . . Communications Act" was the Commission's "substantive duty of [guaranteeing] reasonably priced and nondiscriminatory service," not "the mere process of filing rate schedules."⁽³⁶⁹⁾ The Dissent found support for this viewpoint in section 203(c), which requires carriers to file tariffs before offering services "unless otherwise provided by or under authority of [the Communications] Act,"⁽³⁷⁰⁾ coupled with section 203(b)(2), which "is plainly one provision that 'otherwise provides' and thereby authorizes service without a filed schedule."⁽³⁷¹⁾ Moreover, the Dissent pointed out that the sole statutory restriction on the Commission's modification authority was that it could not extend the 120-day notice period established by section 203(b)(1).⁽³⁷²⁾ Thus, according to the Dissent, "[i]t was no stretch for the FCC to draw from this single, unidirectional statutory limitation on its modification authority the inference that its authority is otherwise unlimited."⁽³⁷³⁾

The Dissent further argued that the Majority's substantial reliance on, and use of, certain narrow dictionary definitions of "modify" was disingenuous because it ignored "another, long-established meaning that fully supports the Commission's position."⁽³⁷⁴⁾ Observing that dictionaries "are no substitute for close analysis of what words mean as used in a particular statutory context,"⁽³⁷⁵⁾ the Dissent explained that the Commission's permissive forbearance policy should nevertheless survive even under the narrow definitions of "modify."⁽³⁷⁶⁾ Consistent with these definitions, the Dissent viewed the Commission's staged implementation of permissive forbearance as a "measured" regulatory approach designed to advance the statutory goal of constraining monopoly power and thereby remain "faithful" to the primary purpose of section 203's tariff-filing requirements.⁽³⁷⁷⁾ The Dissent cited the development of meaningful competition in the interexchange market since *Competitive Carrier* commenced as compelling evidence that the Commission, rather than the Majority, best understood the legislative intent underlying section 203.⁽³⁷⁸⁾

In concluding, the Dissent effectively summarized its disagreement with the Majority's decision and supporting rationale:

The filed tariff provisions of the Communications Act are not ends in themselves, but are merely one of several

procedural *means* for the Commission to ensure that carriers do not charge unreasonable or discriminatory rates. . . . Even if the 1934 Congress did not define the scope of the Commission's modification authority with perfect scholarly precision, this is surely a paradigm case for judicial deference to the agency's interpretation, particularly in a statutory regime so obviously meant to maximize administrative flexibility. Whatever the best reading of 203(b)(2), the Commission's reading cannot . . . be termed unreasonable. It is informed (as ours is not) by a practical understanding of the role (or lack thereof) that filed tariffs play in the modern regulatory climate and in the telecommunications industry.⁽³⁷⁹⁾

This rebuke of the Majority made clear that the Dissent had a different vision of the judiciary's role in construing the statutorily-defined powers of regulatory agencies. Nevertheless, while the Dissent would have sustained the Commission's "eminently sound, experience-tested, and uncommonly well explained judgment,"⁽³⁸⁰⁾ the Majority's rejection of permissive forbearance prevailed.

C. Evaluation of the Forbearance Decisions

The judicial repudiation of permissive and mandatory forbearance from tariff filing limited substantially the Commission's discretion to adopt policies which it considered most appropriate to regulate competition. Although the Commission cannot pursue policies that are contrary to law, the Supreme Court and the D.C. Circuit undertook a strict construction of section 203 to find that permissive and mandatory forbearance exceeded the Commission's statutory mandate. That interpretive approach, therefore, calls into question the legitimacy of the courts' assertions that they based their decisions on the statutory language in dispute and not on their own misgivings about the merits of the Commission's forbearance policies.⁽³⁸¹⁾ More importantly, however, the practical effect of the courts' actions was that, by denying the Commission maximum flexibility under the statutory language to adapt its policies to an ever-changing industry,⁽³⁸²⁾ the Commission could have lost its ability to enact innovative regulatory policies that addressed previously unforeseen developments in telecommunications.

The downfall of the Commission's forbearance policies came as a result of the adoption, by both the Supreme Court and the D.C. Circuit, of a narrow definition of "modify" as used in section 203(b).⁽³⁸³⁾ In holding that "modify" "suggest[s] circumscribed alterations"⁽³⁸⁴⁾ and "means to change moderately or in minor fashion,"⁽³⁸⁵⁾ the courts were in accord with certain authorities that define "modify" as "to change in incidental or subordinate features"⁽³⁸⁶⁾ and "[t]o make minor changes in the form or structure. . . ."⁽³⁸⁷⁾ However, the courts also conflicted with other authorities that broadly define "modify" as "[t]o change in form or character,"⁽³⁸⁸⁾ "[t]o alter,"⁽³⁸⁹⁾ "[t]o make less extreme, severe, or strong,"⁽³⁹⁰⁾ "[t]o make more temperate,"⁽³⁹¹⁾ "to increase or decrease,"⁽³⁹²⁾ to "amend,"⁽³⁹³⁾ to "limit,"⁽³⁹⁴⁾ and to "reduce."⁽³⁹⁵⁾ Permissive and mandatory forbearance were consistent with the Commission's statutory power to "modify any requirement made by or under the authority of [section 203]"⁽³⁹⁶⁾ as broadly defined, because they constitute the utmost forms of altering, amending, limiting, and reducing the tariff-filing requirements.⁽³⁹⁷⁾ Under any of the narrower definitions, by contrast, these policies could not survive. The courts' selection of the governing definition therefore was outcome determinative.⁽³⁹⁸⁾

Although permissive and mandatory forbearance by definition were not "modifications" according to the Supreme Court and D.C. Circuit, the extent of the Commission's authority to implement other novel regulatory strategies without violating section 203 remained uncertain. The courts provided no guidelines to assist the Commission in evaluating whether proposals to change section 203's tariff-filing requirements pursuant to the power to "modify" constituted permissible "circumscribed alterations" or changes in "minor fashion." For example, while the D.C. Circuit "note[d]" that "the Commission could further streamline the regulation of nondominant carriers without encountering any contrary congressional prescription"⁽³⁹⁹⁾ and the Supreme Court explained that the tariff-filing requirement was not "so inviolate that the Commission's existing modification authority does not reach it at all,"⁽⁴⁰⁰⁾ both courts failed to define the parameters of such possible Commission action. That omission only invited further controversy and impaired the Commission's confidence in its ability to develop comprehensive regulatory policies that could withstand judicial scrutiny.

Moreover, the D.C. Circuit's suggestion that the Commission could further streamline its regulation of nondominant carriers without violating section 203(b) contradicted the narrow definition of "modify" it adopted to invalidate permissive and mandatory forbearance. According to the court, the streamlined regulation previously adopted by the Commission, which permitted nondominant carriers to file tariffs on fourteen-day instead of ninety-day notice, was a proper statutory "modification."⁽⁴⁰¹⁾ That "modification" constituted, however, an 85 percent reduction in the notice period, hardly a "circumscribed alteration." Rather, such a reduction was a "modification" only under a broad definition. The court's support for additional reductions in the notice period therefore compounded the inconsistency of its position. In essence, the court was advising the Commission that it would affirm the elimination of the notice period as an acceptable "modification" provided that nondominant carriers continued to file tariffs.⁽⁴⁰²⁾ This selective invocation of the broad definition of "modify" in support of streamlined regulation and the narrow definition of the word in opposition to permissive and mandatory forbearance demonstrates the tenuous rationale underlying the court's forbearance holdings.

The Supreme Court's conclusion that "[c]ertainly the Commission can modify the form, contents, and location of required filings, and can defer filing or even waive it altogether in limited circumstances"⁽⁴⁰³⁾ was similarly flawed. After adopting a narrow definition of "modify," the Majority provided no explanation as to how the Commission's occasional elimination of the tariff-filing requirement could constitute an acceptable exercise of its modification authority.⁽⁴⁰⁴⁾ In fact, the elimination of the tariff-filing requirement under any circumstances would conflict with the rationale of the Majority's opinion. The Majority's failure to specify the scope of the Commission's modification authority after a decade of litigation therefore fostered uncertainty by again leaving the Commission to define the breadth of its powers.

The adoption of a narrow definition of "modify" to invalidate permissive and mandatory forbearance also was inconsistent with the judicial interpretation of that word as used in another provision of the Communications Act.⁽⁴⁰⁵⁾ In *Transcontinent Television Corp. v. FCC*,⁽⁴⁰⁶⁾ the D.C. Circuit considered whether the Commission's *deletion* of a VHF television station after a broadcaster's license was to expire constituted a "modification" of a station license requiring a public evidentiary hearing pursuant to section 316(a) of the Communications Act.⁽⁴⁰⁷⁾ Noting that a station license does not vest a property right in the holder or confer a right to use the frequencies referenced therein beyond its term, the court held that the Commission's action was not a "modification" within the statutory language.⁽⁴⁰⁸⁾ The court instead "construe[d] section 316(a) as having reference to a modification which interferes with rights of a licensee during the term of its license."⁽⁴⁰⁹⁾ The deletion of the station under those circumstances would constitute a "modification."⁽⁴¹⁰⁾ Because deletion of a station is the "wholesale abandonment or elimination" of a station and not a "circumscribed alteration" of license terms, the definition of "modify" adopted by the court in this case was the opposite of the definition it adopted in its forbearance decisions.

In rejecting the Commission's forbearance policies, the Supreme Court and D.C. Circuit also disregarded well-settled principles governing judicial review of statutory interpretations by administrative agencies. Ordinarily, courts show "great deference" to the interpretations of statutes by the agencies charged with their administration.⁽⁴¹¹⁾ The Commission is such an agency and therefore typically receives judicial deference in its interpretations of the Communications Act, which it administers by Congressional mandate.⁽⁴¹²⁾ The D.C. Circuit explained this deference:

"To sustain the Commission's application of [a] statutory term, we need not find that 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."⁽⁴¹³⁾

It further recognized the need for deference to an agency that regulates an evolving industry like telecommunications:

Congress in passing the Communications Act in 1934 could not, of course, anticipate the variety and nature of methods of communication by wire or radio that would come into existence in the decades to come. In such a situation, the expert agency entrusted with administration of a dynamic industry is entitled to latitude in coping with new developments in that industry.⁽⁴¹⁴⁾

By failing to adhere to these principles in the forbearance cases, the Supreme Court and D.C. Circuit diminished the Commission's independence as an expert agency and placed into doubt the propriety of its policies implemented to regulate competition in the interexchange market during the nine-year period that elapsed between the release of the *Sixth Report* in 1985 and the demise of permissive forbearance in 1994.

D. Continued Viability of Forbearance from Facilities Regulation

Despite the D.C. Circuit's order in *AT&T Forbearance* vacating the entire *Fourth Report*⁽⁴¹⁵⁾ and the lack of express statutory authority for the Commission to forbear from enforcing the section 214 facilities authorization requirements,⁽⁴¹⁶⁾ the Commission nevertheless decided to retain its section 214 forbearance policy.⁽⁴¹⁷⁾ In explaining this decision, the Commission noted that it took "various actions" in the *Fourth Report*, including the adoption of the permissive detariffing policy invalidated in *AT&T Forbearance* and the granting to "forborne carriers [of] blanket section 214 authority to install new facilities or remove existing facilities from service."⁽⁴¹⁸⁾ The Commission concluded that the latter action was "unaffected by the court's decision" in *AT&T Forbearance*.⁽⁴¹⁹⁾ Because section 214 forbearance was not at issue in *AT&T Forbearance*, this conclusion was reasonable.

E. The Communications Act as an Impediment to Competition

Regardless of whether the Communications Act truly was broad enough to authorize the Commission's forbearance policies, the courts nevertheless held to the contrary. This rejection made clear that the Communications Act, as judicially interpreted, could hinder the Commission in achieving its goal of establishing a comprehensive regulatory approach to interexchange competition. Whether such a hindrance adversely affects the public, however, depends on the soundness of the Commission's policies at issue. While forbearance was an appropriate deregulatory measure to stimulate competition, the Commission poorly executed it by failing to justify the exclusion of AT&T from its coverage. Had the courts upheld forbearance, the Commission's questionable retention of AT&T's dominant classification following the *MFJ* eventually could have damaged AT&T and deprived the public of the benefits of fair competition. Under such circumstances, however, the Commission could have reclassified AT&T or otherwise changed its regulatory approach. By contrast, once the courts found that the Communications Act did not permit forbearance, they did not enjoy the same flexibility to change their position. Thus, the Commission's failure to account for market realities in *Competitive Carrier* ultimately did not present as potentially severe consequences for competition as the judicial construction of the Communications Act.

VII. Regulatory Policy After the Forbearance Decisions

Confronted with the inability to exercise meaningful regulatory flexibility under *Competitive Carrier* as a result of the forbearance decisions, the Commission had no alternative except to supplement its existing regulatory approach or devise a new one. Instead of casting aside its long-standing regulatory approach, the Commission maintained that *Competitive Carrier* still governed and adopted new policies to achieve its goals. Unlike its earlier *Competitive Carrier* policies, which focused exclusively on liberating nondominant carriers from Title II constraints, the Commission's new policies primarily focused on AT&T, which still endured the burdens of extensive Title II regulation. While the Commission sought to streamline further its regulation of nondominant carriers within the limitations imposed by the courts, its most significant new policies included the adoption of "price cap" regulation for AT&T⁽⁴²⁰⁾ followed by the commencement of a new interexchange rulemaking, entitled *In re Competition in the Interexchange Marketplace (Interexchange Rulemaking)*.⁽⁴²¹⁾ Initiating the *Interexchange Rulemaking* to adopt appropriate policies for regulating the growth of competition in long-distance business services since *Competitive Carrier*,⁽⁴²²⁾ the Commission essentially conceded that its existing *Competitive Carrier* policies were inadequate to govern a telecommunications industry that included a competitive AT&T. Despite its conclusion that the interexchange market was "not perfectly competitive," the Commission determined in the *Interexchange Rulemaking* that competition in the business services segment of that market had become "sufficiently effective" to warrant AT&T's deregulation.⁽⁴²³⁾ It would take five more years, however, for the Commission to conclude that AT&T was no longer a dominant carrier.⁽⁴²⁴⁾

A. Nondominant Carrier Regulation

Both the Supreme Court and the D.C. Circuit suggested that, as a permissible "modification" of section 203's tariff filing requirements, the Commission could further streamline the regulation of nondominant carriers adopted in the *First Report*.⁽⁴²⁵⁾ Because the Commission's original streamlined regulation policy already included a presumption that nondominant carrier tariffs were lawful on petitions to suspend, the elimination of economic data to support nondominant carrier tariff filings, a reduction in the notice period for tariff filings from ninety to fourteen days, and the granting of broad certifications for the construction and use of telecommunications facilities,⁽⁴²⁶⁾ the opportunity to further streamline the regulation of nondominant carriers left the Commission with little flexibility in developing its policies to govern an evolving telecommunications industry. Additional streamlining could at most allow for the filing of nondominant carrier tariffs without notice, rather than the minimum fourteen-day period established in the *First Report*, and changes in the kinds of information that nondominant carriers had to disclose in their tariff filings.

Three months after the D.C. Circuit decided *AT&T Forbearance*, the Commission proposed such further streamlined regulation in a new rulemaking, *In re Tariff Filing Requirements for Nondominant Common Carriers*.⁽⁴²⁷⁾ Relying on its section 203 authority to "modify" tariff filing requirements, the Commission proposed a one-day notice period for nondominant carrier tariffs.⁽⁴²⁸⁾ The Commission explained:

[T]he current fourteen-day notice period, although an improvement over long notice periods, will have, in the absence of permissive detariffing, an anticompetitive impact on nondominant carrier competition. The advance notice period allows competitors to begin, and possibly complete, development and implementation of a market response before the tariff becomes effective. As such, the notice period delays the benefits customers receive from new offerings, and discourages carriers from taking pro-consumer actions.⁽⁴²⁹⁾

The Commission justified this shortened notice period on the grounds that it never had suspended or investigated a nondominant carrier's tariff before the effective date and only once had rejected such a tariff while streamlined regulation was in effect.⁽⁴³⁰⁾ It also pointed out that adequate safeguards existed to deter nondominant carriers from abusing a one-day-notice period, citing both its own statutory authority to investigate nondominant carrier tariffs after they become effective⁽⁴³¹⁾ and the statutory right of aggrieved parties to challenge unlawful tariff filings and seek redress for damages caused by such filings.⁽⁴³²⁾

The Commission concurrently proposed to "modify" its tariff content rules for nondominant carriers.⁽⁴³³⁾ Noting that "section 203(a) of the Act requires only that carriers file 'schedules showing all charges for itself and its connecting carriers . . . and showing the classifications, practices, and regulations affecting such charges,'"⁽⁴³⁴⁾ the Commission suggested that its existing tariff filing rules required nondominant carriers to disclose more information than section 203 demanded.⁽⁴³⁵⁾ For this reason, the Commission proposed to allow nondominant carriers to set forth in their tariffs only a maximum rate or a range of rates.⁽⁴³⁶⁾ It concluded that this rule change would eliminate nondominant carriers' burden to file new tariffs whenever their new rates were below the maximum rate or within the range of rates specified in their tariffs already on file⁽⁴³⁷⁾ and "would lessen the potential for tacit collusion among carriers by withholding from competitors the exact rate being charged by competitors at any given time."⁽⁴³⁸⁾ Thus, this further streamlined regulation, which the Commission formally adopted six months later,⁽⁴³⁹⁾ would reduce nondominant carriers' costs and promote price competition, two of the primary concerns that led to the Commission's adoption of permissive and mandatory forbearance.⁽⁴⁴⁰⁾

Although this further streamlined regulation advanced some of the same goals that the Commission sought to achieve through its failed forbearance policies, the Commission could have anticipated that this approach also would not survive judicial review intact. While the shortened notice period was consistent with the forbearance decisions,⁽⁴⁴¹⁾ the rule that nondominant carriers had to publish only their maximum rates or a range of rates violated the general principle that a rate agreed upon for service must "be published in" or "readily ascertainable from" a tariff on file with the Commission.⁽⁴⁴²⁾ That rule also essentially constituted an exemption from the section 203 tariff-filing requirement in contravention of the forbearance decisions. Because of their lack of specificity, such tariff filings would provide the

public with no useful information about the rates nondominant carriers charged customers for particular services. The public could not make informed challenges to nondominant carriers' tariff filings because it could not ascertain whether these carriers were engaging in unjust or unreasonable price discrimination. It therefore is not surprising that the D.C. Circuit eventually invalidated this range tariff filing policy as an evasion of section 203.⁽⁴⁴³⁾

As a result of the narrow judicial construction of section 203, courts likely would only uphold, as consistent with section 203's rate and service disclosure requirements, a further streamlined regulatory approach that established a shortened notice period for nondominant carrier tariff filings⁽⁴⁴⁴⁾ and that limited the information which nondominant carriers had to include in these filings.⁽⁴⁴⁵⁾ The primary benefit of further streamlined regulation would be lost, however, by requiring nondominant carriers to continue publishing their specific rates.⁽⁴⁴⁶⁾ Once nondominant carriers revealed their exact rates to their rivals, they decreased the likelihood of price competition and increased the risk of oligopolistic pricing.⁽⁴⁴⁷⁾ Forbearance, by contrast, had the opposite result.⁽⁴⁴⁸⁾ Thus, further streamlined regulation was not an effective alternative to forbearance.⁽⁴⁴⁹⁾

B. AT&T Regulation

1. Price Caps

The adoption of price cap regulation for AT&T's services constituted another attempt by the Commission to control AT&T's "dominance" even though the *MFJ* had restructured the telecommunications industry and seemingly eliminated AT&T's market power.⁽⁴⁵⁰⁾ The Commission's price cap scheme created an incentive system designed "to replicate more accurately than rate of return [regulation] the dynamic, consumer-oriented process that characterizes a competitive market."⁽⁴⁵¹⁾ Under rate of return regulation, carriers have an incentive to operate inefficiently and "'pad' their costs, regardless of whether additional investment is necessary or efficient[, because] they are limited to earning a particular percentage return on investment during a fixed period."⁽⁴⁵²⁾ By contrast, under the incentive system established by the Commission's price cap regulation, carriers have a limit on the rates they may charge and therefore must increase their efficiency and engage in service innovation in order to increase their profits.⁽⁴⁵³⁾ Thus, if AT&T still had market power, price cap regulation would substantially restrain its ability to exercise that power in its pricing policies.

2. Deregulation of AT&T's Business Services

In the *First Interexchange Report*, the Commission made several findings that facilitated the deregulation of AT&T's business services. First, the Commission determined that business customers were largely demand elastic and would readily switch to other carriers in order to obtain better prices and services.⁽⁴⁵⁴⁾ Second, the Commission concluded that AT&T's competitors had enough available supply capacity to discipline AT&T's behavior.⁽⁴⁵⁵⁾ Third, the Commission observed that AT&T's rates for business services had been consistent with the price cap regulation that governed dominant carriers.⁽⁴⁵⁶⁾ Fourth, the Commission noted that AT&T's market share of business services was declining.⁽⁴⁵⁷⁾ Finally, substantially changing its *Competitive Carrier* viewpoint, the Commission held that AT&T's size, resources, financial strength, and technical capabilities were not "necessarily" indicia of market power.⁽⁴⁵⁸⁾ Rather, the Commission found that "competition in business services is thriving, that AT&T's competitors are growing, and that consumers are benefiting from these occurrences."⁽⁴⁵⁹⁾

Based on these findings, the Commission stated that it was in the public interest to proceed with the deregulation of AT&T's business services.⁽⁴⁶⁰⁾ To advance this goal, the Commission streamlined its tariff regulation of AT&T by allowing business tariff filings on fourteen-day notice without cost support and abolishing all price cap ceilings, service bands, and rate floors.⁽⁴⁶¹⁾ The Commission also allowed AT&T to offer the business services subject to further streamlined regulation on an individually negotiated contract basis.⁽⁴⁶²⁾ While it determined that competition in business services was substantial and decided that this deregulatory approach to AT&T was appropriate, the Commission still did not hold that AT&T had become a "nondominant carrier."⁽⁴⁶³⁾

3. Retention of Other AT&T Regulation

Even though it recognized that changed market conditions warranted the deregulation of AT&T's business services, the Commission determined that competition had not sufficiently developed in certain other service markets in order to justify AT&T's deregulation there. For example, the Commission concluded that there was insufficient evidence to hold that competition in operator services, residential and small business services, and international services was substantial enough to allow for further streamlined regulation.⁽⁴⁶⁴⁾ Similarly, the Commission found that 800 services would not be fully competitive until 800 numbers were "portable."⁽⁴⁶⁵⁾ Once these numbers became portable, the Commission found that 800 services were substantially competitive, eliminated price cap regulation of AT&T's 800 services, and applied further streamlined regulation to those AT&T services.⁽⁴⁶⁶⁾ Thus, the Commission took a deliberately slow approach to AT&T's deregulation.

4. Assessing The Deregulation of AT&T's Business Services

Although it retained its dominant classification of AT&T, the Commission finally acknowledged in the *Interexchange Rulemaking* that competition generated by the *MFJ* and the implementation of equal access for interstate long-distance telephone service had diminished AT&T's status in the interexchange market.⁽⁴⁶⁷⁾ However, the Commission did not have to address in this proceeding the issues raised by the judicial rejection of forbearance because the streamlined regulatory approach it adopted to govern AT&T's business services still required compliance with all Title II procedures, such as tariff filing.⁽⁴⁶⁸⁾ Consequently, the Commission reasonably could have expected its pronouncements in the *Interexchange Rulemaking* to withstand judicial scrutiny.

More importantly, the gradual deregulation of AT&T coupled with the invalidation of forbearance narrowed the substantial gap in the Commission's regulatory policies toward dominant and nondominant carriers that began with the *First Report in Competitive Carrier*. For example, following the *Interexchange Rulemaking*, the regulation of AT&T's business services was virtually identical to the regulation of nondominant carriers' business services.⁽⁴⁶⁹⁾ Nevertheless, based on the extent to which competitive forces had become entrenched in the interexchange market since the Commission commenced *Competitive Carrier*, the regulation of all interexchange carriers, including AT&T, on the same terms was long overdue.

5. The Reclassification of AT&T As A Nondominant Carrier

a. The Commission's Analysis

Despite the *MFJ* and the growth of substantial competition in the interexchange market since the early 1980s, the Commission did not respond favorably to AT&T's efforts to obtain a reclassification of its dominant status until October 1995.⁽⁴⁷⁰⁾ At that time, the Commission finally held that "the record evidence demonstrates that AT&T lacks market power in the interstate, domestic, interexchange market" and therefore warrants that AT&T "be reclassified as a non-dominant carrier with respect to that market."⁽⁴⁷¹⁾ To reach this conclusion, the Commission relied on the same market power analysis which had served as the cornerstone of its *Competitive Carrier* classification scheme.

The first step in undertaking this analysis was to define the relevant product and geographic markets for evaluating whether AT&T still possessed market power.⁽⁴⁷²⁾ Citing the *Fourth Report*, AT&T argued that "'interstate, domestic, interexchange services'" constituted the relevant product and geographic markets for determining whether an interexchange carrier has market power.⁽⁴⁷³⁾ The Commission acknowledged that it had applied this standard, treating all interexchange carriers as single output firms for classification purposes and recognizing no relevant submarkets, when it had classified AT&T's competitors as nondominant carriers years earlier.⁽⁴⁷⁴⁾ Furthermore, while the Commission conceded that demand substitutability is typically considered in making such a market definition, it observed that an examination of supply substitutability was instead appropriate here because no significant difference existed between the facilities required to provide interexchange services.⁽⁴⁷⁵⁾ Under these circumstances, the Commission agreed with AT&T.⁽⁴⁷⁶⁾

The next step was to determine the standard for assessing whether AT&T retained market power within the relevant product and geographic markets.⁽⁴⁷⁷⁾ Specifically, the issue for the Commission was whether AT&T had to lack the ability to control prices for each of its services before it became eligible for reclassification or whether AT&T only had to lack the ability to control prices in the overall interstate, domestic, interexchange market before reclassification could occur. According to the Commission, the evidence demonstrated that reclassification was in the public interest even though AT&T may have been able to control prices for a limited number of services because AT&T lacked that ability with respect to the overall interstate, domestic, interexchange market.⁽⁴⁷⁸⁾ The Commission explained:

AT&T does not have the ability unilaterally to control prices in the overall interstate, domestic, interexchange market. . . . [T]o the extent AT&T has the ability to control price at all, it is only with respect to specific service segments that are either *de minimus* to the overall . . . market, or are exposed to increasing competition so as not to materially affect the overall market. . . . [M]ost 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. Accordingly, . . . assessing AT&T's market power by an 'all-services' standard . . . would result in a situation where the economic cost of regulation outweighs its public benefits.⁽⁴⁷⁹⁾

In sum, the Commission concluded that the absence of perfect competition in the interstate, domestic, interexchange market did not require retention of AT&T's dominant classification.⁽⁴⁸⁰⁾

Consistent with its *Competitive Carrier* approach, the Commission incorporated fundamental antitrust and economic principles into its market power analysis.⁽⁴⁸¹⁾ For example, the Commission found that the supply and demand elasticity of the interstate, domestic, interexchange market supported the conclusion that AT&T lacked market power.⁽⁴⁸²⁾ Similarly, while acknowledging that AT&T still enjoyed a market share of nearly 60 percent,⁽⁴⁸³⁾ the Commission found that AT&T's 33 percent decline in market share during the preceding decade, coupled with its loss of local bottleneck facilities as a result of the divestiture and the maturity of MCI and Sprint as nationwide competitors, "suggest[ed]" that AT&T now lacked market power.⁽⁴⁸⁴⁾ Finally, the Commission rejected claims that AT&T's cost structure, size, and resources gave it market power, pointing out that these advantages alone did not establish AT&T's ability to control price.⁽⁴⁸⁵⁾ Thus, according to the Commission, a traditional market power analysis favored AT&T's reclassification.

In addition, despite arguments that AT&T still had the ability to control prices for certain services within the overall interstate, domestic, interexchange market and therefore continued to enjoy overall market dominance, the Commission found otherwise. Refuting claims that AT&T maintained market power over residential services, the Commission cited the increasing availability of discounted residential rates, the steady decrease in prices for discount plans, the growing number of consumers selecting discount plans over basic residential rates, and the leading role MCI and Sprint often played in offering discounted residential rates as evidence of AT&T's inability to raise and sustain residential rates over a competitive level.⁽⁴⁸⁶⁾ The Commission likewise determined that business, 800, operator, and calling card services were substantially competitive and that AT&T's declining portion of the resale submarket indicated its lack of dominance there.⁽⁴⁸⁷⁾ The only services over which AT&T retained the ability to control price, analog private line and 800 directory assistance services, were "so small and insignificant relative to the overall interstate, domestic, interexchange market (accounting for only .02 percent (0.0002) of AT&T's total interstate revenues) as to be *de minimus*."⁽⁴⁸⁸⁾ Consequently, the Commission held that AT&T's market position with respect to these services did not require retention of its dominant classification.⁽⁴⁸⁹⁾

Reclassification meant that AT&T no longer had to comply with the Commission's burdensome rules governing dominant carriers.⁽⁴⁹⁰⁾ The Commission observed, however, that it had been relying on the detailed information submitted by AT&T to monitor competition in the interexchange market.⁽⁴⁹¹⁾ As a result, the Commission recognized that, without such information in the future, maintaining the existing minimal reporting requirements for nondominant carriers might prove insufficient to ensure unimpeded competition.⁽⁴⁹²⁾ To avert any adverse developments in this regard, the Commission recommended the implementation of additional "limited and non-burdensome" reporting
⁽⁴⁹³⁾

requirements for nondominant carriers. Thus, in addition to its obvious impact on competition, the reclassification of AT&T imposed some real costs on nondominant carriers.⁽⁴⁹⁴⁾

b. The Propriety of AT&T's Reclassification

The reclassification of AT&T was long overdue. By its earlier failure to account for the divestiture of the "bottleneck" BOCs from AT&T in formulating its policies to promote competition in the interexchange market, the Commission made its entire regulatory approach suspect. Once AT&T also lost significant market share, however, the Commission had no legitimate excuse for not reclassifying AT&T as a nondominant carrier. Throughout the decade preceding the *Reclassification Order*, the Commission's failure to proffer meaningful evidence to support its position that AT&T remained a dominant carrier or to cite meaningful benefits accruing to the public from the imposition of more regulatory burdens on AT&T than its rivals suggested that the Commission was not adequately fulfilling its statutory mandate to serve the public interest. The *Reclassification Order*, though belated, therefore was a prerequisite to the restoration of the Commission as the authority on telecommunications policy in the wake of *United States v. AT&T* and the forbearance decisions.

Because of its past reluctance to reclassify AT&T, the Commission's real motivation to do so in October 1995 is uncertain. While the Commission's delay could have been the result of a desire to err on the side of caution and not reclassify AT&T until overwhelming evidence mandated such action, market realities had not changed that dramatically between the conclusion of *Competitive Carrier* and the adoption of the *Reclassification Order*. Moreover, contrary to its rationale for retaining AT&T's dominant classification, which implied that market conditions would prohibit a change in AT&T's status indefinitely, the Commission suggested in the *Reclassification Order* that virtually any justification for changing AT&T's status immediately was acceptable. The most rational explanation for this sudden reversal is that the Commission anticipated the passage of the Telecommunications Act, considered AT&T's reclassification necessary to advance Congress' expressed goal of further enhancing competition in the telecommunications industry, and sought to preempt congressional action. Nonetheless, regardless of the reason, AT&T's reclassification was necessary to validate the Commission's regulatory approach and promote the public interest.

VIII. The Telecommunications Act and the Rebirth of Forbearance

While the forbearance decisions placed the Commission's flexibility to regulate interexchange competition in substantial doubt for the foreseeable future, the legislative process surprisingly restored that versatility with relative swiftness as the 104th Congress sought to restructure the telecommunications industry through its passage of the Telecommunications Act. The stated purpose of these new laws was "to provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."⁽⁴⁹⁵⁾ To accomplish this lofty goal, the Telecommunications Act conferred on the Commission primary responsibility for devising appropriate regulations to make Congress' intent a reality. The Telecommunications Act therefore has expressly expanded the Commission's mandate from ensuring "a rapid, efficient, Nation-wide, and world-wide wire and radio communication service"⁽⁴⁹⁶⁾ to promoting a deregulated, competitive telecommunications industry.⁽⁴⁹⁷⁾ For the Commission to fulfill this broadened mandate, however, it needed expansive power. Congress recognized that forbearance authority constituted such power.

Unlike the 73rd Congress which passed the Communications Act, the 104th Congress made clear its intent with respect to forbearance by specifically vesting the Commission with that authority and mandating its exercise under enumerated circumstances. Section 401 of the Telecommunications Act, in relevant part, provides:

REGULATORY FLEXIBILITY--Notwithstanding section 332(c)(1)(A) of this Act, the Commission *shall* forbear from applying any regulation or any provision of [the Communications Act of 1934, as amended] to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission 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.⁽⁴⁹⁸⁾

Regardless of whether the courts correctly or even reasonably construed the Communications Act, Congress legislatively has overturned them.⁽⁴⁹⁹⁾ Because this section requires "forbear[ance] from applying *any* regulation or *any* provision of this Act,"⁽⁵⁰⁰⁾ its coverage is much more expansive than the forbearance from tariff and facilities regulation which the Commission had attempted to implement under its section 203 modification authority.⁽⁵⁰¹⁾ Consequently, if this section had been in effect during *Competitive Carrier*, the courts would have had no basis for vacating either permissive or mandatory forbearance.

Nonetheless, the language of the Telecommunications Act's forbearance provisions suggests that, according to Congress, the courts were correct when they narrowly construed the word "modify" as used in section 203. For example, section 402 of the Telecommunications Act requires the Commission to "*repeal or modify* any regulation it determines to be no longer in the public interest" during mandatory biennial reviews⁽⁵⁰²⁾ and specifies that its provisions "shall [not] be construed to limit the authority of the Commission to *waive, modify, or forbear* from applying" any of the streamlined procedures for changes in charges, classifications, regulations, or practices set forth therein.⁽⁵⁰³⁾ This statutory language reveals Congress' perception that modifying a regulation is a less severe act than repealing, waiving, or forbearing from applying one. Otherwise, its use of "repeal," "waive," and "forbear" in addition to "modify" would have lacked purpose.

Congress' express adoption of forbearance in the Telecommunications Act vindicates the positions taken by both the Commission and the courts during the forbearance cases. Congress' action constitutes a recognition, consistent with the Commission's position, that forbearance authority is essential to regulate effectively competition among telecommunications carriers and ultimately create a deregulated telecommunications industry. The language employed in taking this action nevertheless indicates that, like the courts, Congress did not construe section 203 to confer such authority.⁽⁵⁰⁴⁾ Congress' resolution of the forbearance issue, therefore, was both diplomatic and practical.

Congress' diplomatic adroitness aside, the practical implications of its decision to codify forbearance are most significant for competition in the telecommunications industry. Unlike other portions of the Telecommunications Act, the forbearance provisions make sweeping structural changes in the interexchange market possible immediately. The Commission now has the opportunity, within the minor constraints imposed by Congress,⁽⁵⁰⁵⁾ to implement a regulatory approach that it deems most appropriate to promote competition in the interexchange market with much less risk of judicial interference. For this reason, the Telecommunications Act's forbearance provisions, with its potentially radical policy implications, are likely to have the greatest impact on interexchange competition.

IX. Conclusion

Few regulatory policies have an administrative, judicial, and legislative history like forbearance. Now that Congress has expressly conferred forbearance authority on the Commission through the Telecommunications Act, its viability is secure. Moreover, Congress' imposition of mandatory forbearance under certain circumstances coupled with the Commission's substantial reliance on forbearance policies in *Competitive Carrier* suggest that forbearance will serve a central role in the Commission's regulatory approach to competition in the interexchange market. While such a role is appropriate because of the many ways that forbearance advances the public interest, including its promotion of service innovation, competitive pricing, market entry, regulatory flexibility, and the conservation of administrative resources, the success of this approach will depend on the Commission's ability to account accurately for market realities and to adapt effectively its policies to them.

Two factors indicate that the Commission will more accurately account for existing market conditions in its regulatory approach than it has in the past. First, with its reclassification of AT&T, the Commission is finally in accord with the basic principle, which it stated at *Competitive Carrier's* inception, that the ability to control critical bottleneck facilities creates market power and thereby acts as the primary impediment to competition. Second, Congress has reinforced this principle through its limitations on the Commission's exercise of forbearance authority with respect to local exchange carriers and BOCs, the firms which retain the ability to control access to the telecommunications network. As a result, having been made apparent to the Commission, this fundamental flaw of the *Competitive Carrier* approach seemingly has been resolved.

In addition, however, the Commission's regulatory approach must have the versatility to adapt to the dynamism of the telecommunications industry. Although market power should remain the focus of the Commission's approach because it is an effective indicator of competitiveness, the Commission should not merely reinstate the dominant/nondominant carrier approach it adopted in *Competitive Carrier*. Contrary to *Competitive Carrier's* premise that the interexchange market will have dominant and nondominant carriers for the foreseeable future, the extent and pace of technological development in telecommunications require that the Commission's approach recognize that this market may soon have no dominant carriers. Congress has acknowledged this possibility, for example, by establishing conditions for lifting the restriction on BOC participation in the interexchange market.⁽⁵⁰⁶⁾ Consequently, even if the Commission continues to classify and regulate carriers according to principles of "dominance," a scheme which may still have usefulness, its approach must anticipate the eventual reclassification of all dominant carriers and endure when only firms with nondominant characteristics remain. Unlike its experience with AT&T, the Commission must demonstrate a willingness to reclassify dominant carriers, including the BOCs, whenever circumstances warrant their immediate deregulation. To facilitate this result and comply with the new regulatory regime established by the Telecommunications Act, the Commission must adopt an approach that promptly extends forbearance treatment to as many activities of interexchange carriers as appropriate and has the goal of extending such treatment to the entire interexchange market as soon as practicable.

The Commission's initial implementation of the Telecommunications Act's forbearance provisions suggests that it intends to pursue such a deregulatory approach. Determining that section 203's tariff-filing requirements are unnecessary to ensure that nondominant carriers' charges, practices, classifications, or regulations for interstate, domestic, interexchange services are just and reasonable and not unjustly or unreasonably discriminatory, the Commission recently has found that forbearing from the tariff regulation of these carriers is in the public interest and therefore required by the Telecommunications Act.⁽⁵⁰⁷⁾ When deciding which type of forbearance policy to adopt, the Commission further reasonably concluded that mandatory, rather than permissive, forbearance would most effectively achieve its goal of creating a competitive interexchange market because it understood that permitting nondominant carriers to file tariffs at their own discretion could ultimately undermine the benefits of forbearance.⁽⁵⁰⁸⁾ By taking this action less than one year after the enactment of the Telecommunications Act, the Commission has timely begun the process of deregulating the interexchange market through forbearance principles.

The Commission also recently has indicated that it is amenable to reclassifying and extending forbearance treatment to the remaining dominant carriers, including the BOCs, when they participate in the interexchange market. Although the Telecommunications Act authorized BOCs to offer out-of-region interLATA services upon its effective date without prior Commission approval,⁽⁵⁰⁹⁾ they remained subject to dominant carrier regulation pursuant to *Competitive Carrier*.⁽⁵¹⁰⁾ Until it more fully considers this matter, however, the Commission has held that the BOCs' separate affiliates may now offer such services as nondominant carriers as long as they comply with the *Fifth Report's* rules governing interexchange carriers affiliated with independent local exchange telephone companies.⁽⁵¹¹⁾ This action constitutes the Commission's essential first steps to extending forbearance treatment to the remaining dominant carriers.

Thus, the Telecommunications Act has given the Commission a valuable opportunity to restore the credibility of its regulatory approach to competition in the interexchange market. The Commission will take advantage of this opportunity as long as it has learned from its mistakes and does not repeat them. To date, the Commission's implementation of the Telecommunications Act indicates that it better understands the interexchange market and will take such advantage. By doing so, the Commission will not only enhance its own prestige, but will also fulfill its

statutory mandate to create a deregulated, competitive telecommunications industry that is responsive to the public's needs.

1. A.B., University of California at Berkeley, 1984, J.D., Vanderbilt University School of Law, 1987, LL.M., Georgetown University Law Center, 1993. The author is a member of the State Bars of California and Nevada.

2. "A natural monopoly is one resulting where one firm of efficient size can produce all or more than [the] market can take at remunerative price . . . [and] is created from circumstances over which the monopolist has no power." Black's Law Dictionary 1007 (6th ed. 1990).

3. During the first three-quarters of the twentieth century, the American telecommunications industry was essentially AT&T's vertically integrated Bell System. *See infra* notes 38-41 and accompanying text. Although more than fifteen hundred independent telephone companies operated in the United States during that period, AT&T dominated domestic telecommunications through its 22 Bell Operating Companies (BOCs) that provided telephone service to most of the nation's subscribers, its Long Lines Department that controlled most of the nation's long-distance telephone service market, its Western Electric subsidiary that manufactured the telephones and wires used by its subscribers as well as the transmission and switching equipment necessary to operate its telecommunications network, and its Bell Laboratories that served as its research and development operation and prescribed the technical standards under which its network functioned. *See infra* note 36 and accompanying text; *United States v. AT&T*, 552 F. Supp. 131, 135 n.3, 136 n.6, 139 n.19, 170-172 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). In sum, "[t]he total package was bundled together as an end-to-end service with ownership of all facilities by [AT&T]." A. Michael Noll, *Introduction to Telephones & Telephone Systems* 208 (2d ed. 1991).

4. *See In re Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Notice of Inquiry and Proposed Rulemaking*, 77 F.C.C.2d 308 (1979) [hereinafter *Competitive Carrier Notice of Inquiry*]; *First Report and Order*, 85 F.C.C.2d 1, 52 Rad. Reg. 2d (P & F) 215 (1980) [hereinafter *Competitive Carrier First Report*]; *Further Notice of Proposed Rulemaking*, 84 F.C.C.2d 445 (1981) [hereinafter *Competitive Carrier Further Notice*]; *Second Report and Order*, 91 F.C.C.2d 59, 52 Rad. Reg. 2d (P & F) 187 (1982) [hereinafter *Competitive Carrier Second Report*]; *Second Further Notice of Proposed Rulemaking*, 47 Fed. Reg. 17,308 (1982) (to be codified at 47 C.F.R. ch.1) (proposed Apr. 22, 1982) [hereinafter *Competitive Carrier Second Further Notice*]; *Order on Reconsideration*, 93 F.C.C.2d 54, 53 Rad. Reg. 2d (P & F) 735 (1983) (denying petitions to reconsider the *Second Report*) [hereinafter *Competitive Carrier Reconsideration Order*]; *Third Report and Order*, 48 Fed. Reg. 46,791 (1983) (to be codified at 47 C.F.R. pts. 61, 63) (proposed Oct. 14, 1983) [hereinafter *Competitive Carrier Third Report*]; *Third Further Notice of Proposed Rulemaking*, 48 Fed. Reg. 28,292 (1983) (to be codified at 47 C.F.R. pts. 61, 63) (proposed June 21, 1983) [hereinafter *Competitive Carrier Third Further Notice*]; *Fourth Report and Order*, 95 F.C.C.2d 554, 56 Rad. Reg. 2d (P & F) 1219 (1983) [hereinafter *Competitive Carrier Fourth Report*]; *Fourth Further Notice of Proposed Rulemaking*, 96 F.C.C.2d 922 (1984) [hereinafter *Competitive Carrier Fourth Further Notice*]; *Fifth Report and Order*, 98 F.C.C.2d 1191, 56 Rad. Reg. 2d (P & F) 1204 (1984) [hereinafter *Competitive Carrier Fifth Report*]; *Sixth Report and Order*, 99 F.C.C.2d 1020, 57 Rad. Reg. 2d (P & F) 1391 (1985) [hereinafter *Competitive Carrier Sixth Report*].

5. Communications Act of 1934, Title II, 47 U.S.C. 201-229.

6. AT&T's virtual monopoly first eroded in the market for customer premises telephone equipment (CPE). *See Hush-A-Phone Corp. v. United States*, 238 F.2d 266 (D.C. Cir. 1956) (invalidating AT&T tariffs that created "unwarranted interference with the telephone subscriber's right reasonably to use his telephone in ways which are privately beneficial without being publicly detrimental"); *Hush-A-Phone v. AT&T*, 22 F.C.C. 112, 114 (1957) (prohibiting AT&T tariffs that infringed on a customer's use of any "device which does not injure [AT&T] employees, [AT&T] facilities, [or] the public in its use of [AT&T's] services, or impair the operation of the telephone system"); *In re Use of the Carterfone Device in Message Toll Telephone Service, Decision*, 13 F.C.C.2d 420, 423-426 (1968), *recon. denied*, 14 F.C.C.2d 571, para. 8, 14 Rad. Reg. 2d (P & F) 185 (1968) (invalidating AT&T tariffs that permitted network interconnection only via AT&T equipment); *In re Proposals for New or Revised Classes of Interstate and Foreign Message Toll Telephone Service (MTS) and Wide Area Telephone Service (WATS), First Report and Order*, 56 F.C.C.2d 593, paras. 17-59 (1975) (establishing registration program that allowed interconnection of all CPE complying with certain

technical standards). Spurred by the development of a competitive CPE market, competition began to evolve in the interexchange market. *See In Re Allocation of Frequencies in the Bands Above 890 Mc., Report and Order*, 27 F.C.C. 359 (1959) (allocating spectrum for, and authorizing the use of, private point-to-point microwave systems that operated outside AT&T's network); *In Re Microwave Communications, Inc., Decision*, 18 F.C.C.2d 953, 16 Rad. Reg. 2d (P & F) 1037 (1969) (granting request to offer small businesses interoffice and interplant communications on a limited common carrier microwave basis); *In re Establishment of Policies and Procedures for Consideration of Application to Provide Specialized Common Carrier Services in the Domestic Public Point-to-Point Microwave Radio Service and Proposed Amendments to Parts 21, 43, and 61 of the Commission's Rules, First Report and Order*, 29 F.C.C.2d 87, 22 Rad. Reg. (P & F) 1501 (1971) (approving provision of specialized common carrier services to various parts of United States via microwave and stating policy in favor of equal exchange access), *aff'd*, 31 F.C.C.2d 1106, 23 Rad. Reg. (P & F) (1971), *aff'd sub nom. Washington Utils. & Transp. Comm'n v. FCC*, 513 F.2d 1142 (9th Cir. 1975); *Bell Tel. Co. v. FCC*, 503 F.2d 1250 (3rd Cir. 1974) (affirming Commission order directing AT&T to permit specialized common carriers to interconnect with its network on a nondiscriminatory basis to provide certain services); *MCI v. FCC*, 561 F.2d 365 (D.C. Cir. 1977) (authorizing the offering of a metered telephone service that competed with AT&T's long-distance telephone services).

7. For example, the introduction of satellite systems, the advancement of computer science and methods of data transmission, and the expansion of resale and shared use of common carrier services and facilities.

8. *See Telecommunications Act of 1996*, Pub. L. No. 104-104, 110 Stat. 56 (to be codified in scattered sections at 47 U.S.C.); H.R. Conf. Rep. No. 104-458, at 113 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124.

9. 47 U.S.C. 151 (1994); *see also United States v. Southwestern Cable Co.*, 392 U.S. 157, 168 (1967) (recognizing that the Commission received "broad authority" to "serve as the 'single Government agency' with 'unified jurisdiction' and 'regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio'").

10. *See* 47 U.S.C. 151.

11. *See id.* 154(i), 201(b).

12. *See infra* notes 87-93 and accompanying text (discussing Title II regulation); *supra* note 1 (defining "natural monopoly").

13. *Competitive Carrier Notice of Inquiry*, 77 F.C.C.2d 308, para. 6; *see also United States v. AT&T*, 552 F. Supp. 131, 161-62 (D.D.C. 1982) (observing that, "at least by the mid-1970s, the FCC had clearly begun to promote competition in telecommunications").

14. *See Competitive Carrier Notice of Inquiry*, 77 F.C.C.2d 308, para. 6 (1979); *see also Geller v. FCC*, 610 F.2d 973, 979 (D.C. Cir. 1979) (pointing out that "an agency normally possesses a generous measure of discretion respecting the launching of rulemaking proceedings").

15. *AT&T v. FCC*, 572 F.2d 17, 26 (2d Cir. 1978).

16. The Commission later concluded that it had to define the relevant markets for telecommunications services in order for its *Competitive Carrier* classification scheme to remain viable. *See infra* notes 155-174 and accompanying text.

17. *Competitive Carrier First Report*, 85 F.C.C.2d 1, para. 54, 52 Rad. Reg. 2d (P & F) 215 (1980). Except for AT&T and the United States Independent Telephone Association, which raised legal, economic, and policy objections, most parties "enthusiastically endorse[d]" this two-tiered classification scheme. *Id.* para. 22. Some parties, such as Western Union, opposed the Commission's classification of them. *Id.* para. 23; *see also infra* notes 49-55 and accompanying text.

18. *See Competitive Carrier First Report*, 85 F.C.C.2d 1, para. 54, 52 Rad. Reg. 2d (P & F) 215.

19. *Id.* para. 56.

20. *Id.* para. 15.

21. *Id.* The Commission stated that "[c]ontrol of bottleneck facilities is present when a firm or group of firms has sufficient command over some essential commodity or facility in its industry or trade to be able to impede new entrants." *Id.* para. 59 (footnote omitted). The existence of only a few minor competitors, barriers inhibiting market entry, and few reasonably substitutable goods and services are evidence that a firm controls bottleneck facilities. *Id.* para. 57.

22. *Id.* paras. 58-59.

23. *Id.* paras. 54-55.

24. *Id.*

25. *Id.* para. 55.

26. *Id.* para. 56.

27. *Id.* paras. 58-59.

28. *Id.* at 22 n.55, 52 Rad. Reg. 2d (P & F) at 230 n.55.

29. *Id.*

30. *Id.* The Commission modified this position as its *Competitive Carrier* policies evolved. *See infra* notes 179-86 and accompanying text.

31. The Commission stated that it would address "the much more complex issue of the regulation of multi-output carriers" in subsequent rulemakings. *See id.*

32. *Id.* para. 54.

33. *Id.* para. 15 (footnote omitted).

34. *Id.* para. 61. The Commission retained this classification scheme with six categories of carriers throughout *Competitive Carrier*. As the Commission developed its policies, however, it reclassified certain categories of carriers from dominant to nondominant. *See infra* notes 155-176 and accompanying text.

35. *Id.* para. 15. The Commission initially excluded radio common carriers, which competed with telephone companies in the mobile radio telephone service market, and multipoint distribution service carriers, which provided mostly local distribution of closed circuit video signals, from *Competitive Carrier*. *See Competitive Carrier Notice of Inquiry*, 77 F.C.C.2d 308, 319 n.15 (1979).

36. *Competitive Carrier First Report*, 85 F.C.C.2d 1, paras. 62-84, 52 Rad. Reg. 2d 115.

37. *Id.* paras. 62-65.

38. *Id.*

39. *Id.*

40. *Id.* para. 62.

41. *Id.*

42. *Id.* para. 63.

43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* para. 65.
47. *Id.*
48. *Id.*
49. *Id.* The Commission noted, however, that certain independent telephone companies could enter new service or geographic markets in which they were not dominant. *See id.* at 24 n.61, 52 Rad. Reg. 2d (P & F) at 232 n.61.
50. *Id.* para. 66. For an explanation of Telex and TWX services, *see infra* note 51 and accompanying text.
51. *Id.* para. 68.
52. *Id.* para. 66.
53. *Id.* para. 69
54. *Id.*
55. *Id.* paras. 70-71.
56. *Id.* para. 71.
57. *Competitive Carrier Notice of Inquiry*, 77 F.C.C.2d 308, para. 23 (1979).
58. *Id.* para. 22.
59. *Competitive Carrier First Report*, 85 F.C.C.2d 1, para. 75, 52 Rad. Reg. 2d (P & F) 215. The Commission hypothesized that if it regulated the price for transponder space, then Domsats' market power would shift to Domsat resellers. *Id.* It pointed out, however, that if it similarly regulated the prices of Domsat resellers, then cable systems and program suppliers, not the public, would enjoy the economic rewards. *Id.* Thus, "[u]nder such conditions, the benefits of regulation are questionable." *Id.*
60. *Id.* para. 76. The Commission noted that, to regulate Domsats properly, it would have to reassess its cost-based approach to evaluating whether charges, terms, and conditions for service were "just and reasonable" as required by section 201(b). *Id.* para. 75.
61. *Id.* para. 76.
62. *Id.*
63. *See id.*
64. *Id.* paras. 77-78. Although MCCs were dominant carriers under *Competitive Carrier*, the Commission decided to continue regulating them under the principles set forth in *In Re American Television Relay, Inc. (ATR)*, *Decision and Order*, 63 F.C.C.2d 911, *Memorandum Opinion and Order*, 65 F.C.C.2d 792 (1977), *modified sub nom.* *Las Cruces TV Cable v. FCC*, 645 F.2d 1041 (D.C. Cir. 1981).
65. *Competitive Carrier First Report*, 85 F.C.C.2d 1, para. 77, 52 Rad. Reg. 2d (P & F) 215.

66. *Id.* The Commission acknowledged that potential competition from Cable Television Relay Stations (CARS) could limit the ability of MCCs to overprice, but noted that CARS were not yet operational in areas served by MCCs. *Id.*
67. *Id.*
68. *Id.*
69. *Competitive Carrier Notice of Inquiry*, 77 F.C.C.2d 308, para. 20 (1979). SCCs included national firms, such as MCI and Southern Pacific Communications Corporation (Sprint), and regional firms. *Id.* In 1979, SCCs still delivered most of their transmissions over microwave facilities. *See id.*
70. *Id.* MTS (Message Telecommunications Service) and WATS (Wide Area Telecommunications Service) were the switched interstate long distance telephone services offered by AT&T. *See In re Matter of Investigation of Access and Divestiture Related Tariffs: AT&T Communications, Memorandum Opinion and Order*, 98 F.C.C.2d 989, para. 1 (1984).
71. *See Competitive Carrier First Report*, 85 F.C.C.2d 1, para. 79, 52 Rad. Reg. 2d (P & F) 215.
72. *Id.* paras. 79-81. Comparing the capacity of AT&T with SCCs' as a group, the Commission found that "[i]n 1979 the SCCs owned approximately 30,000 voice-grade circuits in the top 100 markets . . . [while] AT&T alone owned 2.3 million individual interexchange circuits and more than 80 million exchange loops." *Id.* para. 79.
73. *Id.* para. 81.
74. *Id.* para. 82. Resale carriers leased most of their circuits from AT&T. *Competitive Carrier Notice of Inquiry*, 77 F.C.C.2d 308, para. 24.
75. *Competitive Carrier Notice of Inquiry*, 77 F.C.C.2d 308, para. 24. The Second Circuit upheld the Commission's treatment of resale carriers as common carriers under Title II. *See AT&T v. FCC*, 572 F.2d 17, 24-27 (2d Cir. 1978).
76. *Competitive Carrier Notice of Inquiry*, 77 F.C.C.2d 308, para. 24.
77. *Competitive Carrier First Report*, 85 F.C.C.2d 1, para. 82, 52 Rad. Reg. 2d (P & F) 215.
78. *See id.* The Commission determined that only Domsat resellers were dominant carriers for the same reasons that Domsats themselves were dominant. *Id.* para. 83; *see also supra* notes 56-62 and accompanying text.
79. *Id.* para. 80-81. The Commission pointed out that resale carriers had the lowest investment requirements and the fewest construction delays. *Competitive Carrier Notice of Inquiry*, 77 F.C.C.2d 308, para. 24. Resale carriers also had the ability to engage in arbitrage and defeat dominant carriers' efforts to discriminate when pricing services. *Competitive Carrier First Report*, 85 F.C.C.2d 1, para. 82, 52 Rad. Reg. 2d (P & F) 215.
80. *Competitive Carrier First Report*, 85 F.C.C.2d 1, para. 82.
81. *See infra* notes 85-178 and 187-213 and accompanying text.
82. *See infra* notes 85-131 and accompanying text.
83. *See infra* notes 132-78 and 187-213 and accompanying text.
84. *See infra* notes 155-76 and accompanying text.
85. *See id.*
86. *See Competitive Carrier First Report*, 85 F.C.C.2d 1, paras. 54-58, 52 Rad. Reg. 2d (P & F) 215.

87. *See id.* The Commission referred to such regulation as "'traditional Title II regulation,'" meaning "control over price, publication of terms and conditions of service, control over investments and the obligation to serve all." *Competitive Carrier Second Report*, 91 F.C.C.2d 59, 60 n.3, 52 Rad. Reg. 2d (P & F) 187 (1982) (citing 47 U.S.C. 201-203, 214).
88. The following list is not exclusive, but rather identifies the Title II regulations that are most onerous for dominant carriers.
89. *See* 47 U.S.C. 201(a) (1994).
90. *See* 47 U.S.C. 201(b), 202(a).
91. *See* 47 U.S.C. 203(a), (b)(1); *see also* *MCI v. FCC*, 627 F.2d 322, 333-334 (D.C. Cir. 1980) (discussing Commission's section 204 authority). A tariff "is not a mere contract," but rather "is the law." *Carter v. AT&T*, 365 F.2d 486, 496 (5th Cir. 1966); *see also* *AT&T v. Florida-Texas Freight, Inc.*, 357 F. Supp. 977, 979 (S.D. Fla.) (stating that "tariffs validly filed in accordance with 47 U.S.C. 203 operate to conclusively and exclusively control the rights and liabilities between the parties"), *aff'd*, 485 F.2d 1390 (5th Cir. 1973).
92. *See* 47 U.S.C. 204(a)(1), 208(a).
93. *See* 47 U.S.C. 205(a), 206, 207, 209.
94. *See* 47 U.S.C. 214(a).
95. *See, e.g.*, 47 C.F.R. 61 (1995).
96. *See id.*
97. *Competitive Carrier First Report*, 85 F.C.C.2d 1, paras. 85-147, 52 Rad. Reg. 2d (P & F) 215 (1980). Although the Commission initially limited the application of this streamlined regulation to nondominant carriers serving the continental United States, it subsequently extended this policy to such carriers serving "Hawaii, Puerto Rico, the U.S. Virgin Islands, and other domestic offshore points" in the *Third Report* released nearly three years later. *See Competitive Carrier Third Report*, 48 Fed. Reg. 46,791, para. 5 (1983).
98. *Competitive Carrier First Report*, 85 F.C.C.2d 1, paras. 85-147, 52 Rad. Reg. 2d (P & F) 215.
99. *Id.* para. 85; *see also* *Wold Comm., Inc. v. FCC*, 735 F.2d 1465, 1475 (D.C. Cir. 1984) (stating that "the public interest touchstone of the Communications Act, beyond question, permits the FCC to allow the marketplace to substitute for direct Commission regulation in appropriate circumstances").
100. *See supra* note 91 and accompanying text.
101. *See Competitive Carrier First Report*, 85 F.C.C.2d 1, paras. 88-96, 52 Rad. Reg. 2d (P & F) 215. This presumption only applied, however, to petitions to suspend tariffs and not to challenges made through the Commission's formal complaint and investigation process. *See id.* para. 94; *Competitive Carrier Notice of Inquiry*, 77 F.C.C.2d 308, para. 59.
102. *See Competitive Carrier Notice of Inquiry*, 77 F.C.C.2d 308, para. 59; *see also* 47 U.S.C. 204(a)(1) (1994).
103. *See Competitive Carrier First Report*, 85 F.C.C.2d 1, para. 107, 52 Rad. Reg. 2d (P & F) 215; *Competitive Carrier Notice of Inquiry*, 77 F.C.C.2d 308, para. 59. Under this test, the petitioner must show: "(1) that there is a high probability that the tariff would be found to be unlawful after an investigation (likelihood of success on the merits); (2) that any harm alleged to competition (which [the Commission] believe[s] accomplishes public interest benefits) would be more substantial than that to the public arising from unavailability of the service pursuant to the rates and conditions proposed in the tariff filing (*e.g.*, that the proposed rate is predatory); (5) [sic] that irreparable injury would

be suffered if suspension does not issue; and (4) that the suspension would not otherwise be contrary to the public interest." *Competitive Carrier First Report*, 85 F.C.C.2d 1, para. 107, 52 Rad. Reg. 2d (P & F) 215 (footnote omitted); *Competitive Carrier Notice of Inquiry*, 77 F.C.C.2d para. 59.

104. *See Competitive Carrier Notice of Inquiry*, 77 F.C.C.2d 308, para. 60. The Commission subsequently acknowledged that customers have an interest in maintaining low rates and therefore may file petitions challenging new tariffs. *See Competitive Carrier First Report*, 85 F.C.C.2d 1, para. 110, 52 Rad. Reg. 2d (P & F) 215. It is unclear how much deference the Commission intended to grant to customers during this process. *See id.*

105. *See Competitive Carrier First Report*, 85 F.C.C.2d 1, para. 110, 52 Rad. Reg. 2d (P & F) 215.

106. *See* 47 U.S.C. 201(b) (1994).

107. *See* 47 U.S.C. 202(b). Nondominant carriers also continued to have the common carrier obligation to provide service to all creditworthy customers on reasonable request. *See* 47 U.S.C. 201(a).

108. *See Competitive Carrier First Report*, 85 F.C.C.2d 1, para. 88, 52 Rad. Reg. 2d (P & F) 215.

109. *See id.*

110. *Id.*

111. *Id.*

112. *See id.* para. 99.

113. *See id.* paras. 97-102.

114. *Id.* para. 99.

115. *Id.* (footnote omitted.)

116. *See id.* para. 101.

117. *See id.* paras. 102-06.

118. *See id.* para. 102.

119. *See id.* The Commission proffered no evidence suggesting how 14 days, rather than any other period shorter than 90 days, would address the problems it sought to solve.

120. *See id.* para. 104.

121. *See id.* para. 102. Although the Commission stated that a one-day notice period had "some appeal," it postponed serious consideration of that option. *See id.* para. 105.

122. *Competitive Carrier Notice of Inquiry*, 77 F.C.C.2d 308, para. 64 (1979).

123. *See Competitive Carrier First Report*, 85 F.C.C.2d 1, paras. 114-16, 52 Rad. Reg. 2d (P & F) 215.

124. *See id.* para. 114.

125. *Id.*

126. *Competitive Carrier Notice of Inquiry*, 77 F.C.C.2d 308, para. 66. Even if they were subject to such regulation, the Commission pointed out that these "carriers do not possess sufficient control over price to recognize any reward

from overbuilding." *Id.*

127. *Id.* para. 67. Even when a carrier possessed a monopoly in a small geographic region or over a specific service route, it could still be classified as a nondominant carrier because of low barriers to market entry. *See id.*

128. *See Competitive Carrier First Report*, 85 F.C.C.2d 1, paras. 117-47, 52 Rad. Reg. 2d (P & F) 215.

129. *Id.* para. 133. The Commission adopted this rule to eliminate carriers' filing burdens as they expanded their service areas following their initial certification. *Id.* It pointed out that it limited this rule to the continental United States because it had not yet considered whether domestic offshore points raised unique concerns. *Id.* If it found that they did not, it intended to extend this policy to include them. *Id.* In the meantime, the Commission required nondominant carriers to apply for additional certification to serve such areas as well as to construct interstate nonradio transmission media in excess of 10 miles. *Id.* Eventually, in the *Third Report*, the Commission extended this rule's coverage to domestic offshore points. *See Competitive Carrier Third Report*, 48 Fed. Reg. 46,791, 46,792-93 (1983); *see also supra* note 95.

130. *Competitive Carrier First Report*, 85 F.C.C.2d 1, paras. 138-42, 52 Rad. Reg. 2d (P & F) 215. The Commission retained the right to demand supplemental information, but stated that this limited reporting requirement would ease carriers' as well as its own burdens. *Id.*

131. *See id.* paras. 143-47. Under these new rules, the Commission would "ordinarily automatically grant" nondominant carriers' requests to terminate, reduce, or impair service 30 days after it received them. *Id.* In their requests, carriers had to describe their proposed changes in service, identify when and where those changes would take effect, and set forth the dates and methods of notice to affected customers. *Id.* The Commission reserved the right to delay the discontinuation of service when "an unreasonable degree of customer hardship would result." *Id.* para. 147. Although these procedures imposed some burden on nondominant carriers, it was less severe than the burden imposed on dominant carriers through traditional section 214 regulation. *See supra* note 93 and accompanying text.

132. *Id.* paras. 133-37. The Commission believed that including satellite transmissions within this streamlined section 214 regulation was consistent with its classification of Domsats as dominant carriers. *See id.* para. 137. It pointed out that "[g]iven [the] inherent flexibility in satellite communications, a requirement for prior circuit-by-circuit section 214 authorizations would only delay or inhibit satellite service to customers without any countervailing regulatory benefits." *Id.* Consequently, it "concluded that a separate section 214 certification requirement applicable only to video and on a transponder by transponder or circuit-by-circuit basis can also be removed for domestic satellite carriers where present procedures result in duplicative regulation." *Id.*

133. *See Competitive Carrier Notice of Inquiry*, 77 F.C.C.2d 308, para. 97.

134. *Id.* para. 99.

135. *See id.* para. 97; *Competitive Carrier Second Report*, 91 F.C.C.2d 59, para. 15, 52 Rad. Reg. 2d (P & F) 187 (1982). The Commission subsequently noted that "[f]orbearance involves less disclosure to competitors of carriers' rates and tariff conditions than streamlined regulation [and,] [c]onsequently, forbearance eliminates a potential vehicle for collusive conduct and facilitates price discounting." *Competitive Carrier Fourth Report*, 95 F.C.C.2d 554, 556 n.3, 56 Rad. Reg. 2d (P & F) 1219 (1983).

136. *See Competitive Carrier First Report*, 85 F.C.C.2d 1, para. 4, 52 Rad. Reg. 2d (P & F) 215.

137. *See Competitive Carrier Second Report*, 91 F.C.C.2d 59, para. 1, 52 Rad. Reg. 2d (P & F) 187.

138. *Id.* para. 12.

139. *Id.* In *Further Notice*, the Commission suggested that its forbearance policy might exempt nondominant carriers from the traditional common carrier obligation to provide service to any creditworthy customer on reasonable request. *See Competitive Carrier Further Notice*, 84 F.C.C.2d 445, para. 70 (1981).

140. *See Competitive Carrier Second Report*, 91 F.C.C.2d 59, paras. 12, 30, 52 Rad. Reg. 2d (P & F) 187.

141. *See Competitive Carrier Further Notice*, 84 F.C.C.2d 445, paras. 87-119.

142. *Id.* para. 88. For the text of section 203(b)(2), *see infra* note 302 and accompanying text.

143. *See id.* para. 117.

144. *See Competitive Carrier Fourth Report*, 95 F.C.C.2d 554, para. 38 & 580 n.84, 56 Rad. Reg. 2d (P & F) 1219 (1983) (citing *ITT World Comm. v. FCC*, 595 F.2d 897, 900 (2d Cir. 1979)).

145. Some comments submitted to the Commission suggested that resale carriers were not common carriers, but rather were "private carriers" exempt from Title II regulation. *See Competitive Carrier Second Report*, 91 F.C.C.2d 59, para. 10, 52 Rad. Reg. 2d (P & F) 187.

146. *Id.* para. 5.

147. *Id.*

148. *Id.* para. 6; *see also In re Regulatory Policies Concerning Resale and Shared Use of Common Carrier Domestic Public Switched Network Services, Report and Order*, 83 F.C.C.2d 167 (1980).

149. *See Competitive Carrier Second Report*, 91 F.C.C.2d 59, paras. 6, 16, 52 Rad. Reg. 2d (P & F) 187.

150. *Id.* para. 7. For example, rather than oppose forbearance for resale carriers, AT&T requested permission to offer its own unregulated resale services through a separate subsidiary. *See id.* at 63 n.13, 52 Rad. Reg. 2d (P & F) at 220 n.13. AT&T nevertheless argued that, while reducing unnecessary regulation for all carriers was appropriate, the Commission was exceeding its discretion because Congress intended the regulation of all carriers regardless of their market power. *Id.* para. 9 (Southern Pacific Communications Corporation (Sprint) and others agreed). Some carriers "agree[d] in principle" with the Commission's deregulatory efforts, but favored retention of certain Title II regulations. *See id.* at 63 n.13.

151. For a discussion of the *Third Report*, released less than one month before the *Fourth Report*, *see supra* notes 96 and 128.

152. *Competitive Carrier Fourth Report*, 95 F.C.C.2d 554, para. 36, 56 Rad. Reg. 2d (P & F) 1219 (1983) (footnote omitted). The Commission noted that it only had received five challenges to SCC tariff filings and a "couple" of baseless oppositions to SCC service terminations. *Id.* at 578 n.79, 56 Rad. Reg. 2d at 1237 n.79. Although it stated that continued tariff and facilities regulation of "certain" SCCs was no longer necessary, the Commission apparently erroneously used the word "certain" because it extended permissive forbearance to all SCCs in the *Fourth Report*.

153. *See id.* para. 36. The Commission included GTE Sprint with the other SCCs subject to forbearance because it was a structurally separate affiliate of GTE, a dominant telephone carrier, under the GTE consent decree. *Id.* at 579 n.80, 56 Rad. Reg. 2d (P & F) at 1237 n.80.; *see also United States v. GTE Corp.*, 603 F. Supp. 730 (D.D.C. 1984) (approving consent decree permitting GTE to acquire the Sprint long distance telephone service from Southern Pacific Communications Corporation).

154. *Competitive Carrier Fourth Report*, 95 F.C.C.2d 554, para. 35, 56 Rad. Reg. 2d (P & F) 1219. In the Record Carrier Competition Act of 1981, Congress ordered the Commission to "promote the development of fully competitive domestic and international markets in the provision of record communications service, so that the public may obtain record communications service and facilities (including terminal equipment) the variety and price of which are governed by competition." *See* 47 U.S.C. 222(b)(1) (1994). "The term 'record communications service' means those services traditionally offered by telegraph companies, such as telegraph, telegram, telegram exchange, and similar services involving an interconnected network of teletypewriters." 47 U.S.C. 222(a)(3) (repealed 1994).

155. *See Competitive Carrier Fourth Report*, 95 F.C.C.2d 554, para. 35, 56 Rad. Reg. 2d (P & F) 1219.

156. *See infra* notes 175-76 and accompanying text.

157. *See Competitive Carrier Fourth Report*, 95 F.C.C.2d 554, paras. 6-30, 56 Rad. Reg. 2d (P & F) 1219.

158. *Id.* para. 7 (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979)).

159. *Id.*

160. *Id.* para. 8.

161. *See id.* paras. 8-12. The Commission distinguished between monopoly profits, which generally result from a firm's ability to limit market output artificially, and economic rents, which generally result from a firm's acquisition of a scarce resource at a cost below its current market value. *See id.* para. 8. It concluded that "regulation of firms that can earn economic rents does not promote the public interest in efficient allocation of resources as may regulation of firms able to earn monopoly profits by restricting output [because it] does not increase output; does not decrease prices to consumers when unregulated intermediate suppliers are present; and can create difficult allocation problems and resulting inefficiencies." *Id.* para. 12.

162. *See id.* paras. 13-30.

163. *Id.* para. 14.

164. *See id.* para. 17.

165. *Id.* paras. 15-16 (footnote omitted).

166. *Id.*

167. *See id.* paras. 25-30.

168. *Id.* para. 25. The Commission stated that "[l]ocations are included in a relevant market because either buyers in one area practicably can go there to purchase from a supplier as an alternative to purchasing from a given firm (demand substitutability), or a supplier there readily could sell to these buyers by employing existing capacity or developing new plant (supply substitutability)." *Id.* (footnote omitted).

169. *Id.* paras. 26-28.

170. *Id.* para. 29.

171. *Id.* para. 26.

172. *See id.* para. 30.

173. *See supra* notes 33-79 and accompanying text.

174. *See Competitive Carrier Fourth Report*, 95 F.C.C.2d 554, para. 31, 56 Rad. Reg. 2d (P & F) 1219.

175. *See supra* notes 33-79 and accompanying text.

176. *Competitive Carrier Fourth Report*, 95 F.C.C.2d para. 31, 56 Rad. Reg. 2d (P & F) 1219. The Commission recognized that exchange telephone companies had the ability to acquire market power in the interstate service market by providing their affiliated interexchange carriers with more favorable interconnections than their competitors. *Id.* para. 32. As a result, it vowed to "scrutinize" such arrangements as well as to maintain Title II regulation of local exchange companies and exchange access tariffs. *Id.*

177. In the *First Report*, the Commission had rejected this broad definition of the relevant product and geographic markets in response to Western Union's opposition to its classification as a dominant carrier. *See supra* notes 50 and 54 and accompanying text. If the Commission had adopted this market definition then, Western Union would have been classified initially as a nondominant carrier. *See id.*

178. *See id.* para. 37. The Commission expected to review the performance of these new nondominant carriers within 18 months in order to assess whether continuing streamlined regulation was appropriate. *See id.*

179. *Id.*

180. For example, "a carrier providing international services (subject to full regulation), domestic record carrier services with international interconnections (subject to streamlined regulation), and domestic resale services (subject to forbearance)." *See Competitive Carrier Fifth Report*, 98 F.C.C.2d 1191, para. 17, 56 Rad. Reg. 2d (P & F) 1204 (1984) (footnote omitted).

181. *Competitive Carrier First Report*, 85 F.C.C.2d 1, 22 n.55, 52 Rad. Reg. 2d (P & F) 215, at 230 n.55 (1980); *see also supra* notes 27-30 and accompanying text.

182. *Id.* at 22 n.55, 52 Rad. Reg. 2d (P & F) at 230 n.55.

183. *Competitive Carrier Fourth Report*, 95 F.C.C.2d 554, para. 37, 56 Rad. Reg. 2d (P & F) 1219. The Commission did not define "separate affiliate" at this time. It later explained that, by referring to "separate affiliates," it did not intend to require carriers to establish the kind of structurally separate subsidiaries ordered in the *Second Computer Inquiry*. *See Competitive Carrier Fifth Report*, 98 F.C.C.2d 1191, para. 18, 56 Rad. Reg. 2d (P & F) 1204; *see also infra* note 187. The Commission decided, however, to subject GTE Sprint to forbearance because it was a "structurally separated affiliate" of GTE. *See supra* note 152.

184. *See Competitive Carrier Fourth Report*, 95 F.C.C.2d 554, para. 37, 56 Rad. Reg. 2d (P & F) 1219.

185. *See id.*

186. *See id.*

187. *Competitive Carrier Fifth Report*, 98 F.C.C.2d 1191, para. 17, 56 Rad. Reg. 2d (P & F) 1204 (1984). AT&T was the leading example of a carrier with mixed characteristics. *See Competitive Carrier Fourth Report*, 95 F.C.C.2d 554, para. 40, 56 Rad. Reg. 2d (P & F) 1219.

188. The Commission defined "'affiliate' of an exchange telephone company" as "a carrier that is owned (in whole or part) or controlled by, or under common ownership (in whole or part) or control with, an exchange telephone company." *Competitive Carrier Fifth Report*, 98 F.C.C.2d 1191, para. 9, 56 Rad. Reg. 2d 1204. Although it acknowledged that exchange telephone companies with affiliated interexchange carriers had the ability and incentive to engage in anticompetitive conduct, such as cross-subsidization and discriminatory interconnection, the Commission did not find that the total structural separation ordered in the *Second Computer Inquiry* was necessary here. *See id.* Rather, it provided that "an exchange telephone company's affiliate qualifying for nondominant treatment must have separate books of account, and must not jointly own transmission or switching facilities with that exchange telephone company." *Id.* While it recognized that structural separation had been imposed successfully on "large exchange telephone companies," it concluded that the costs could outweigh the benefits if the same requirement applied to "smaller exchange telephone companies." *See id.* at 1198 n.23; *see also* *Illinois Bell Tel. Co. v. FCC*, 740 F.2d 465, 476 (7th Cir. 1984) (stating that "most of the independent companies, apart from GTE, are quite small firms that might find it very costly to establish separate subsidiaries"). By contrast, any exchange telephone company that offered its own "interstate services" was subject to regulation as a dominant carrier. *See Competitive Carrier Fifth Report*, 98 F.C.C.2d 1191, para. 9, 56 Rad. Reg. 2d 1204.

189. A Domsat petition for forbearance by waiver filed pursuant to the *Fourth Report* led the Commission to consider

extending permissive forbearance to all Domsats. *See Competitive Carrier Fifth Report*, 98 F.C.C.2d 1191, para. 12, 56 Rad. Reg. 2d (P & F) 1204.

190. As with the Domsats, an MCC petition for forbearance by waiver filed pursuant to the *Fourth Report* led the Commission to consider extending permissive forbearance to all MCCs. *See id.* para. 14.

191. DEMS provide high-speed, two-way radio transmissions. *See id.* para. 19; *see also Competitive Carrier Fourth Report*, 95 F.C.C.2d 554, para. 40, 56 Rad. Reg. 2d (P & F) 1219 (1983). In the *Fourth Report*, the Commission noted that *Competitive Carrier* had not considered certain carriers, including DEMS, domestic public land mobile radio services, public coast maritime mobile radio services, multipoint distribution services, and cellular mobile radio services, for classification as nondominant carriers. *See id.* para. 40 & 1240 n.92 ("[p]ursuant to the *First Report*, resellers of these services are treated by forbearance") (emphasis removed). The Commission provided, however, that these carriers could petition for such consideration and thereby become subject to streamlined regulation or forbearance as long as they satisfactorily "address[ed] the relevant product and geographic markets, supported by factual evidence of demand and supply substitutability, and market power, supported by factual evidence of the level and change in market shares and entry." *See id.* para. 40. It is by this method that the Commission considered DEMS for forbearance treatment. *See Competitive Carrier Fifth Report*, 98 F.C.C.2d 1191, para. 19, 56 Rad. Reg. 2d (P & F) 1204.

192. The Commission rejected a request by AT&T for regulation as a nondominant carrier. *Competitive Carrier Fifth Report*, 98 F.C.C.2d at 1193 n.4, 56 Rad. Reg. 2d (P & F) at 1206 n.4. MCI and others had opposed AT&T's petition for reclassification. *See id.*

193. *See supra* notes 137-43 and accompanying text.

194. *Competitive Carrier Fifth Report*, 98 F.C.C.2d 1191, para. 10, 56 Rad. Reg. 2d (P & F) 1204.

195. *Id.*

196. In extending permissive forbearance to DEMS, the Commission noted that DEMS would have close substitutes from the other carriers offering domestic, interstate, interexchange data, voice, record, and video services, that DEMS were a novelty and would have only a "minuscule" market share, that DEMS faced competition from established carriers and other methods of transmission, and that no oppositions to any DEMS tariffs or formal complaints regarding any DEMS service had been filed. *Id.* paras. 19-26. The Commission also found that forbearance particularly benefits new carriers, like DEMS, because often "it is more costly for a new carrier to prepare and file its first tariff than any subsequent tariff." *Id.* para. 23. Despite the apparent applicability of forbearance to all DEMS services, however, the Commission determined that it would regulate the DEMS services of exchange telephone companies as services of dominant carriers unless those companies offered such services through affiliated carriers. *Id.* para. 18.

197. *Id.* para. 14; *see also id.* paras. 13-14, 23. The Commission noted, however, that it was "[un]able to quantify the benefits and costs discussed" in the *Fifth Report*, but "believe[d] that they are substantial." *Id.* at 1199 n.24, 56 Rad. Reg. 2d (P & F) at 1210 n.24. These carriers still had to file semi-annual reports on circuits in order to provide the Commission with information necessary to adopt regulations which ensured that the telecommunications industry was serving the public interest, and to comply with Title III of the Communications Act. *See id.* paras. 11, 14, 23.

198. The *Sixth Report* only addressed section 203's tariff-filing requirements and did not pertain to section 214's facilities authorization requirements. *Competitive Carrier Sixth Report*, 99 F.C.C.2d 1020, paras. 1-26, 57 Rad. Reg. 2d (P & F) 1391 (1985).

199. *Id.* para. 2 (footnote omitted).

200. *Id.* paras. 23-27. The Commission ordered all forborne carriers to file supplements canceling their tariffs within six months and all carriers with mixed tariffs either to cancel their tariffs and file new ones only relating to services covered by traditional Title II or streamlined regulation or to issue revisions canceling the provisions relating to services subject to forbearance. *Id.* para. 23. The Commission would not accept new tariffs from forborne carriers, but would allow revisions to tariffs that had not yet been canceled. *Id.* para. 24. In place of tariffs, the Commission

required all forbore carriers to "maintain at their premises price and service information" and "copies of service contract and documentation of agreements and arrangements with all customers" in order to ensure that all carrier actions were consistent with the Communications Act and to facilitate the investigation of complaints. *Id.* para. 25.

201. *Id.* para. 11. The opponents of mandatory forbearance included MCI and GTE Sprint. *Id.* at 1023 n.9, 57 Rad. Reg. 2d (P & F) at 1394 n.9 (citing MCI's position that "a tariff rate is the only legal rate").

202. *Id.* para. 12.

203. *Id.* (footnote omitted).

204. *Id.* para. 16. AT&T supported mandatory forbearance on the grounds that nondominant carriers "cannot have 'the trappings of regulatory approval without the regulatory supervision.'" *Id.* para. 10 (quoting AT&T's comments at page 1); *cf.* *Phonetele, Inc. v. AT&T*, 664 F.2d 716, 733 (9th Cir. 1981) (noting that the Commission does not approve or adopt a tariff by allowing it to go into effect). In sum, AT&T argued that nondominant carriers cannot enjoy the benefits of competition without bearing the attendant responsibilities and costs. *Competitive Carrier Sixth Report*, 99 F.C.C.2d 1020, para. 10, 57 Rad. Reg. 2d (P & F) 1391 (1985).

205. *See supra* notes 136-43 and accompanying text.

206. *Competitive Carrier Sixth Report*, 99 F.C.C.2d 1020, at 1028-29 n.29, 57 Rad. Reg. 2d (P & F) at 1398 n.29.

207. *Id.* para. 12.

208. *Id.*

209. *Id.* paras. 12-27.

210. *Id.* para. 13 (quoting *Competitive Carrier Fifth Report*, 98 F.C.C.2d 1191, 1199 n.24, 56 Rad. Reg. 2d (P & F) 1204, 1210 n.24 (1984)).

211. *Id.* para. 13 (concluding that "[s]ince carriers can ascertain their competitors' existing rates and keep track of any changes in those rates by reviewing the filed tariffs, carriers may be encouraged to maintain rates at an artificially high level [while] [w]ithout forbore carrier tariffs on file, carriers may initiate price cutting or generally institute rates at a lower level to meet directly customer demand").

212. *Id.* para. 14 (pointing out that "[m]ere streamlined regulation of nondominant carriers does not remove any of the harmful effects and offers the consumers less benefit, and imposes unnecessary costs on such carriers, their subscribers, and society generally").

213. *Id.* para. 18 (noting that "[a] tariff may be restrictive because it fosters an image that all possible service arrangements are defined within its text"). The Commission also stated that "maintenance of tariffs is likely to inhibit the development of the 'informed consumer' who diligently studies industry trends," a result that is antithetical to a competitive market. *Id.* para. 20.

214. *Id.* para. 20 (arguing that "[t]he presence of effective tariffs on Commission premises may suggest that the Commission has, in fact, substantively evaluated them and found no objection"). *But see Competitive Carrier Second Report*, 91 F.C.C.2d 59, para. 19, 52 Rad. Reg. 2d (P & F) 187 (1982) (rejecting the notion that Commission regulation or certification is a "stamp of approval").

215. *Competitive Carrier Fourth Report*, 95 F.C.C.2d 554, para. 37, 56 Rad. Reg. 2d (P & F) 1219 (1983).

216. *Id.* paras. 33-35, 37.

217. *Id.* para. 33.

218. *Id.* paras. 33, 36.

219. *Id.* para. 33.

220. *Id.*

221. *Id.*

222. *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982) (filed November 20, 1974, the complaint alleged the monopolization of "telecommunications services and equipment in violation of 2 of the Sherman Act"), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

223. *Id.* at 139 n.20.

224. *Competitive Carrier Second Report*, 91 F.C.C.2d 59, 52 Rad. Reg. 2d (P & F) 187 (1982).

225. *United States v. AT&T*, 552 F. Supp. at 222-34. Upon the enactment of the Telecommunications Act, this consent decree and the consent decree governing GTE and its operating companies were no longer in effect. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, sec. 601(a)(1)-(2), 110 Stat. 56, 143.

226. *United States v. AT&T*, 552 F. Supp. at 160. The AT&T reorganization resulted in the assignment of the 22 BOCs to seven regional holding companies. *Id.* at 142 n.41.

227. On January 14, 1949, the federal government filed an antitrust action against Western Electric and AT&T. *Id.* at 135. That litigation, which focused on the defendants' alleged domination of the telecommunications equipment market, ended on January 24, 1956, with the entry of a consent decree that enjoined AT&T from engaging in businesses other than common carrier communications services, restricted Western Electric to manufacturing telecommunications equipment only for the Bell System, and required the defendants to license their patents to all applicants. *Id.* at 136, 138.

228. *Id.* at 223.

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.* AT&T also allegedly shifted costs from its competitive businesses to its monopoly local telephone service, thereby enabling it to underprice its competition and recoup the shifted costs through its rate-based regulation. *Id.* at 172.

233. *Id.* at 223.

234. *Id.* at 224. BOCs could provide service only in "Local Access and Transport Areas" (LATAs), defined as "one or more contiguous local exchange areas serving common social, economic, and other purposes, even where such configuration transcends municipal or other local governmental boundaries." *Id.* at 229. BOCs therefore could provide service that was traditionally "long distance" as long as it was within their assigned LATA. *Id.*

235. To obtain the removal of a restriction, a BOC had to show "that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter." *Id.* at 225; *see also* *United States v. Western Elec. Co.*, 890 F. Supp. 1 (D.D.C. 1995) (granting BOCs' motion to modify section II(D) of the *MFJ*, subject to certain conditions, in order to allow them to provide cellular and other wireless services across LATA boundaries).

236. *United States v. AT&T*, 552 F. Supp. at 227. The Telecommunications Act expressly provides for BOC entry into the interexchange market. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, sec. 151, 271-76, 110 Stat. 56,

86-107. It departs from the *MFJ* by allowing BOCs to offer "out-of-region" and "incidental" interLATA services immediately, but retains the spirit of the *MFJ* by imposing numerous restrictions that BOCs must satisfy before they can offer "in-region" interLATA services. *Id.* sec. 151, 271(b)-(c), (j), 110 Stat. at 86-89.

237. *United States v. AT&T*, 552 F. Supp. at 227.

238. *Id.*

239. *Id.* at 171. AT&T admitted that its share of interexchange revenues at that time was approximately 77 percent while others asserted that its market share actually exceeded 90 percent. *Id.* at 171 n.170.

240. *Id.* at 171. Judge Greene noted that "monopoly power" is "'the power to control prices or exclude competition.'" *Id.* (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966)).

241. *Id.* at 171-72. Examples of technological innovation that facilitated competition cited by Judge Greene included the development of satellites and microwave transmission. *Id.* at 172 n.173. Judge Greene noted that the growing resale and sharing of AT&T's services also promoted competition. *Id.*

242. *Id.* at 172. Judge Greene acknowledged that AT&T was the only interexchange carrier on certain routes, some of which were less profitable rural routes. *Id.* He did not believe, however, that AT&T would monopolize prices in those instances, even if some of those routes became lucrative, because such action would encourage other firms to enter those markets. *Id.*

243. *Id.*

244. *See generally infra* note 253.

245. *See Competitive Carrier Fourth Report*, 95 F.C.C.2d 554, 557 n.6, 56 Rad. Reg. 2d (P & F) 1219, 1221 n.6 (1983).

246. *Id.*

247. *Id.* at 575 n.69, 56 Rad. Reg. 2d (P & F) at 1235 n.69.

248. *Id.*

249. *Competitive Carrier Fifth Report*, 98 F.C.C.2d 1191, 1197 n.20, 56 Rad. Reg. 2d (P & F) 1204, 1209 n.20 (1984).

250. *Id.* at 1198-99 n.23, 56 Rad. Reg. 2d at 1210 n.23.

251. *Competitive Carrier Sixth Report*, 99 F.C.C.2d 1020, 1029 n.33, 57 Rad. Reg. 2d (P & F) 1391, 1398 n.33 (1985).

252. *But see Competitive Carrier Fourth Report*, 95 F.C.C.2d 554, para. 40, 56 Rad. Reg. 2d (P & F) 1219 (1983) (pointing out that *Competitive Carrier* did not originally involve "providers of domestic public land mobile radio services, public coast maritime mobile radio services, multipoint distribution services, digital electronic message services, and cellular mobile radio services"); *see also supra* note 34.

253. *See supra* notes 35-47 and accompanying text.

254. In October 1983, the Commission sought comments on "the appropriate long-run regulation of AT&T's basic interstate services under the policies of the Communications Act of 1934 and the statutory obligation of th[e] Commission." *In re Long-Run Regulation of AT&T's Basic Domestic Interstate Services, Notice of Inquiry*, 95 F.C.C.2d 510 (1983) [hereinafter *AT&T Notice of Inquiry*]. The Commission commenced the *AT&T Notice of Inquiry* in order to, among other things, address "fundamental changes in the telecommunications marketplace," such as the AT&T divestiture. *Id.* para. 2. The Commission intended "to look into the future and begin the public policy discussion" regarding the course it should take to regulate AT&T in the public interest, but did not seek to adopt any

deregulatory policies immediately. *Id.* para. 1. Nevertheless, nearly seven years later, the Commission terminated this proceeding without adopting a new regulatory approach to AT&T. *See In re Long-Run Regulation of AT&T's Basic Domestic Interstate Services, Order*, 5 FCC Rcd. 5411 (1990). Ironically, the Commission took this action for the same reason it commenced the *AT&T Notice of Inquiry*, the "fundamental changes that have taken place in the telecommunications industry since the proceeding was initiated." *Id.* para. 1. The Commission cited the *MFJ* as evidence of these changes. *Id.* para. 3.

255. *See supra* note 2 and accompanying text; *see also Competitive Carrier Fourth Report*, 95 F.C.C.2d 554, para. 17, 56 Rad. Reg. 2d (P & F) 1219.

256. *Competitive Carrier First Report*, 85 F.C.C.2d 1, para. 62, 52 Rad. Reg. 2d (P & F) 215 (1980); *see also supra* notes 2, 38-44 and accompanying text.

257. *United States v. AT&T*, 552 F. Supp. at 223, *supra* notes 229-32 and accompanying text.

258. *Competitive Carrier Sixth Report*, 99 F.C.C.2d 1020, 1029 n.33, 57 Rad. Reg. 2d (P & F) 1391, 1398 n.33 (1985).

259. The Commission later conceded that, due to the *MFJ*, "AT&T lost any ability to discriminate against its long-distance competitors through its control of bottleneck local interconnection facilities." *In re Competition in the Interstate Interexchange Marketplace, Notice of Proposed Rulemaking*, 5 FCC Rcd. 2627, para. 39, 67 Rad. Reg. 2d (P & F) 1010 (1990) (footnote omitted) [hereinafter *Interexchange Notice*]. The Commission further admitted that "this control had been a principal basis for [its] classification of AT&T as a dominant carrier in the *Competitive Carrier* proceeding." *Id.*

260. *Competitive Carrier First Report*, 85 F.C.C.2d 1, para. 1, 52 Rad. Reg. 2d (P & F) 215. For an explanation of MTS and WATS services, *see supra* note 69 and accompanying text.

261. *United States v. AT&T*, 552 F. Supp. at 171-72; *see supra* notes 237-41 and accompanying text.

262. *United States v. AT&T*, 552 F. Supp. at 223; *see supra* notes 229-32 and accompanying text.

263. *Competitive Carrier Fifth Report*, 98 F.C.C.2d 1191, para. 18, 56 Rad. Reg. 2d (P & F) 1204 (footnote omitted). The Commission noted that the basic services of AT&T Information Systems, which was structurally separate from AT&T Communications, were subject to forbearance. *Id.* para. 18 n.40.

264. *Competitive Carrier Fourth Report*, 95 F.C.C.2d 554, para. 7, 56 Rad. Reg. 2d (P & F) 1219 (1983) (citing 2 P. Areeda & D. Turner, *Antitrust Law* 322 (1978)); *see also Competitive Carrier First Report*, 85 F.C.C.2d 1, paras. 15, 54, 56, 52 Rad. Reg. 2d (P & F) 1980 and *supra* notes 17-19 and accompanying text.

265. *Competitive Carrier Further Notice*, 84 F.C.C.2d 445, para. 25 (1981). Although the Commission has no statutory authority to prohibit carriers from challenging rivals' tariffs or to require that carriers demonstrate harm to consumers through the filing of joint carrier-consumer petitions, the Commission could lobby Congress for such power on the grounds that these challenges ordinarily have anticompetitive motives and effects. To date, the Commission apparently has not done so.

266. 47 U.S.C. 214(a) (1994).

267. *Competitive Carrier Fifth Report*, 98 F.C.C.2d 1191, para. 23, 56 Rad. Reg. 2d (P & F) 1204.

268. Some carriers argued that they "would sustain increased administrative costs to negotiate contracts with individual customers and to replace certain protections that they believe the tariff filing process . . . affords them." *Competitive Carrier Sixth Report*, 99 F.C.C.2d 1020, para. 6, 56 Rad. Reg. 2d (P & F) 1391 (1985); *see also id.* para. 17 (pointing out that "[w]ith the tariff mechanism no longer available, carriers accustomed to dealing with their customers by tariff rather than by other methods traditionally used by non-regulated businesses might perceive some increased administrative burdens, at least initially"). In addition, forbearance may have cost nondominant carriers the opportunity

to obtain artificially high prices for their services as a result of tacit price collusion with dominant firms. *See Competitive Carrier Further Notice*, 84 F.C.C.2d 445, and *infra* notes 285-286 and accompanying text.

269. 47 U.S.C. 204(a)(1) (1994) (emphasis added).

270. *Id.* The Commission has discretion to suspend tariff filings "in whole or in part but not for a longer period than five months beyond the time when it would otherwise go into effect." *Id.*

271. *Competitive Carrier Further Notice*, 84 F.C.C.2d 445, para. 25.

272. *Competitive Carrier Fifth Report*, 98 F.C.C.2d 1191, para. 9, 56 Rad. Reg. 2d (P & F) 1204; *see also supra* note 187.

273. *Id.* para. 9.

274. This outcome was inconsistent, however, with the concern expressed by the Commission in the *Fifth Report* that imposing substantial regulatory burdens on the "smaller exchange telephone companies" could outweigh the benefits. *Id.* para. 9; *see also supra* note 187. To prevent costs from outweighing the benefits, the Commission had decided not to require complete structural separation of the exchange telephone companies from their interexchange affiliates. *See supra* note 187.

275. A dominant carrier like AT&T, by contrast, still maintained a substantial revenue advantage over nondominant carriers despite the discrepancy in regulatory costs created by forbearance. *Competitive Carrier First Report*, 85 F.C.C.2d 59, 52 Rad. Reg. 2d (P & F) 215 (1980); *see supra* note 71. Consequently, the additional regulatory costs imposed on AT&T served only to achieve greater balance between the funds available to AT&T and nondominant carriers in the conduct of their businesses.

276. *See, e.g., Competitive Carrier Further Notice*, 84 F.C.C.2d 445; *Competitive Carrier Fifth Report*, 98 F.C.C.2d at 1199 n.24, 56 Rad. Reg. 2d (P & F) at 1210 n.24; *Competitive Carrier Sixth Report*, 99 F.C.C.2d 1020, para. 14, 57 Rad. Reg. 2d (P & F) 1391 (1985).

277. *Competitive Carrier Fourth Further Notice*, 96 F.C.C.2d 922, para. 2 (1984); *see also Competitive Carrier Sixth Report*, 99 F.C.C.2d 1020, 1030 n.37, 57 Rad. Reg. 2d (P & F) 1391, 1399 n.37.

278. *See supra* notes 23-26, 31, 205, 214 and accompanying text.

279. *See Competitive Carrier Further Notice*, 84 F.C.C.2d 445, para. 28; *Competitive Carrier Sixth Report*, 99 F.C.C.2d 1020, para. 14, 57 Rad. Reg. 2d (P & F) 1391.

280. *Competitive Carrier Sixth Report*, 99 F.C.C.2d 1020, para. 14, 57 Rad. Reg. 2d (P & F) 1391. The Commission disagreed with certain carriers, including MCI and GTE Sprint, that claimed forbearance would not significantly reduce its costs. *Id.* at 1025 (pointing out that these carriers "argued that any cost savings would be offset by additional costs incurred as a result of increased investigations of complaints, increased staff time spent responding to individual customer inquiries and increased time required to review petitions for rulings on discriminatory practices").

281. *Competitive Carrier Fifth Report*, 98 F.C.C.2d 1191, 56 Rad. Reg. 2d (P & F) 1204; *see supra* note 194 and accompanying text.

282. *See* 47 U.S.C. 151 (1994); *see also supra* notes 8-11 and accompanying text.

283. *Competitive Carrier Second Report*, 91 F.C.C.2d 59, para.12, 52 Rad. Reg. 2d (P & F) 187 (1982).

284. *Competitive Carrier Sixth Report*, 99 F.C.C.2d 1020, para. 18, 57 Rad. Reg. 2d (P & F) 1391.

285. *Competitive Carrier Further Notice*, 84 F.C.C.2d 445, para. 27 (1981); *see also Competitive Carrier Fifth Report*, 98 F.C.C.2d 1191, para. 10, 56 Rad. Reg. 2d (P & F) 1204 (stating "[f]orbearance can stimulate competition by . . .

decreasing the disclosure of competitively-sensitive information to rival carriers").

286. *Competitive Carrier Further Notice*, 84 F.C.C.2d 445, para. 26.

287. Competitive pricing enabled firms to structure their prices according to their customers' needs and market conditions. For example, firms could offer volume discounts to their large customers or lower prices to the general public in the attempt to improve their business. *Id.* para. 24.

288. *Id.* para. 30.

289. Before it adopted forbearance, the Commission observed that "firms typically face a series of rival firms offering similar service to the same location." *Id.*

290. 47 U.S.C. 203(b)(1), 214 (1994).

291. Forbearance had the potential to discourage dominant carriers from innovating. Because traditional Title II regulation required these carriers to file their business plans with the Commission before their effective date, forbore carriers could review these filings and, if feasible, beat the dominant carriers to the market with their own comparable new services.

292. *MCI v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985). Although it apparently approved of permissive forbearance because it could forbear from filing tariffs and applying for facilities authorizations at its pleasure, MCI apparently disapproved of mandatory forbearance because that policy denied it certain advantages offered by the regulatory process. *See, e.g., Competitive Carrier Sixth Report*, 99 F.C.C.2d 1020, 1024 n.13, 57 Rad. Reg. 2d (P & F) 1391, 1395 n.13 (1985) (discussing administrative costs incurred to negotiate service contracts on individual bases).

293. *AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992).

294. *Id.*

295. *MCI v. AT&T*, 114 S. Ct. 2223 (1994). For an explanation of how the issue of permissive forbearance arose again, *see infra* notes 336-339 and accompanying text.

296. The Court split five to three, with Justice O'Connor taking no part in the consideration or decision of the matter. *Id.* at 2226. The rationale of the majority opinion was equally applicable to mandatory forbearance. *See infra* notes 342-62 and accompanying text.

297. *See MCI v. FCC*, 765 F.2d at 1189. The court also granted MCI's motion for a stay of the *Sixth Report* and ordered expedited briefing and oral argument on the petition for review. *Id.* at 1188. Although MCI filed its petition for review one day after the Commission published the *Sixth Report*, well within the 60-day period for such petitions, the Commission claimed that the petition nevertheless was untimely on the grounds that MCI could not challenge this report when it previously had not challenged either the *Second Report* or the *Fourth Report*. *Id.* at 1189-90. The court, however, disagreed. *Id.* at 1190. It first dismissed the Commission's reliance on the *Second Report* as inapposite because that report only had applied to resellers of basic communications services. *Id.* It then rejected the Commission's reliance on the *Fourth Report*, holding that "[o]nly when the Commission turned permission into command did MCI's aggrievement become evident and plainly adequate to support a challenge to the Commission's forbearance authority." *Id.* (footnote omitted.)

298. *Id.* at 1191 (quoting 47 U.S.C. 203(a) (1982) (emphasis and deletions in original)).

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*
303. *Id.* (quoting 47 U.S.C. 203(a) (1982) (emphasis and deletions in original)).
304. *Competitive Carrier Sixth Report*, 99 F.C.C.2d 1020, 57 Rad. Reg. 2d (P & F) 1391 (1985); *see supra* notes 197-213 and accompanying text.
305. *MCI v. FCC*, 765 F.2d 1186, 1192 (D.C. Cir. 1985).
306. *Id.* The court quoted *AT&T v. FCC*, 572 F.2d 17, 25 (2d Cir. 1978), which stated that "[t]he Communications Act requires . . . that carriers file their tariffs with the FCC . . ." and *AT&T v. FCC*, 487 F.2d 865, 879 (2d Cir. 1973), which stated that "under Section 203(b) the Commission may only modify requirements as to the form of, and information contained in, tariffs and the thirty days notice provision." *MCI v. FCC*, 765 F.2d at 1192 (emphasis and ellipses in original).
307. *MCI v. FCC*, 765 F.2d at 1192-93. The court quoted the Commission's comments in *Western Union Tel. Co., Memorandum Opinion and Order*, 75 F.C.C.2d 461, para. 47 (1980), that "[t]here can be no question that tariffs are essential to the entire administrative scheme of the Act" and that "[t]he importance of tariffs and the requirement that common carriers--all common carriers--must offer all of their communications services to the public through published tariffs is well established." *MCI v. FCC*, 765 F.2d at 1192-93 (emphasis removed). The court also quoted the Commission's brief in *AT&T v. FCC*, 572 F.2d at 49-50, which stated that "[t]he Commission has affirmative commands from Congress to ensure . . . that rates and practices are set forth in tariffs filed with the FCC" and that "[t]he agency has no authority to ignore these commands, even if market forces arguably are present which undercut the 'natural monopoly' justification for regulation." *MCI v. FCC*, 765 F.2d at 1193 (emphasis removed).
308. *MCI v. FCC*, 765 F.2d at 1193.
309. *Id.* at 1194. The Commission relied on *Central & S. Motor Freight Tariff Ass'n v. United States*, 757 F.2d 301 (D.C. Cir. 1985) (motor carriers); *Brae Corp. v. United States*, 740 F.2d 1023 (D.C. Cir. 1984) (rail carriers); and *National Small Shipments Traffic Conference, Inc. v. Civil Aeronautics Bd.*, 618 F.2d 819 (D.C. Cir. 1980) (air carriers). *MCI v. FCC*, 765 F.2d at 1194-1195; *see also* *Western Union Tel. Co. v. FCC*, 674 F.2d 160 (2d Cir. 1982) (affirming Commission order permitting international record carriers to detariff their terminal equipment offerings).
310. *MCI v. FCC*, 765 F.2d at 1194. The D.C. Circuit asserted that the applicable statutes in those cases were distinguishable from section 203 of the Communications Act because, rather than authorizing modifications, they permitted the governing agencies to exempt carriers from the tariff filing requirements. *Id.* at 1194-95; *see also* *Central & S. Motor Freight Tariff Ass'n*, 757 F.2d at 306 (relevant statute states that the Interstate Commerce Commission "may grant relief from" its terms to motor contract carriers "when relief is consistent with the public interest and the transportation policy of section 10101 of [Title 49]"); *Brae Corp.*, 740 F.2d at 1034-35 (citing 44 U.S.C. 10505(a) which authorizes Interstate Commerce Commission to "exempt" rail carriers from certain regulations); *National Small Shipments Conf.*, 618 F.2d at 827 (citing 44 U.S.C. 1388(c) which allows the Civil Aeronautics Board to "exempt" all air cargo carriers from "any" statutory provisions that it deems appropriate).
311. *MCI v. FCC*, 765 F.2d at 1195 (quoting 47 U.S.C. 222(b)(1) (emphasis supplied by court)). For a discussion of the Record Carrier Competition Act of 1981, *see supra* note 153.
312. *Id.* at 1195.
313. *Id.*
314. *Id.*
315. *See id.* and *supra* note 296 and accompanying text.
316. *AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992); *see also* *In re AT&T v. MCI, Memorandum Opinion and Order*, 7

FCC Rcd. 807, para. 13, 70 Rad. Reg. 2d (P & F) 404 (1992). AT&T brought this action pursuant to section 208, which required the Commission to investigate the matter and issue an order within 12 to 15 months. *AT&T v. FCC*, 978 F.2d at 730 (citing 47 U.S.C. 208(a)-(b)); *AT&T v. MCI, Memorandum Opinion and Order*, 7 FCC Rcd. 807, para. 13, 70 Rad. Reg. 2d (P & F) 404.

317. *AT&T v. FCC*, 978 F.2d at 730. This lawsuit addressed the Commission's permissive forbearance policy regarding tariff filings under section 203 and did not consider the validity of the Commission's decision to forbear from enforcing the facilities authorization requirements of section 214.

318. *Id.*

319. *Id.*

320. *Id.* The Commission took more than twice the statutory time to act. *Id.* at 731.

321. *Id.*; see also *In re AT&T v. MCI, Memorandum Opinion and Order*, 7 FCC Rcd. 807, para. 13, 70 Rad. Reg. 2d (P & F) 404. For the first time, the Commission stated that the *Fourth Report* was a substantive rule. See *AT&T v. FCC*, 978 F.2d at 731.

322. *In re Tariff Filing Requirements for Interstate Common Carriers, Notice of Proposed Rulemaking*, 7 FCC Rcd. 804 (1992).

323. *AT&T v. FCC*, 978 F.2d at 732.

324. *Id.* at 734.

325. *Id.* at 731. The Commission apparently believed that its dismissal of AT&T's complaint without expressly relying on or affirming the validity of the *Fourth Report* would avoid judicial review of permissive forbearance. *Id.* at 733.

326. *Id.* at 732. The court detailed the differences between the Commission's quasi-legislative and quasi-judicial roles and concluded that "[t]o the extent that the Commission thought it had discretion to postpone decision to a rulemaking, it misunderstood its role as an adjudicator." *Id.* at 733.

327. *Id.* at 732.

328. *Id.* at 733.

329. The Commission argued that, because it had not assessed the *Fourth Report's* validity or decided the merits of AT&T's claim against MCI, the court should remand the matter. *Id.* The court disagreed, citing its earlier opinion invalidating the *Sixth Report*, the Commission's previous delays, and judicial authority to review agency rules after they have been applied in adjudicatory proceedings. *Id.* at 734 (stating that by its dismissal, the Commission "necessarily" had denied the relief sought and sanctioned MCI's conduct pursuant to the *Fourth Report*).

330. *Id.* at 735-37.

331. *Id.* at 735-36; see also *supra* notes 299-313 and accompanying text.

332. *Id.* at 735.

333. *Id.* at 736 (finding that statute "is not open to the Commission's construction").

334. *Id.*

335. *Id.* at 737.

336. *Id.* The Commission considered AT&T's complaint on the merits in *In re AT&T v. MCI, Memorandum Opinion*

and Order, 8 FCC Rcd. 3202, 72 Rad. Reg. 2d (P & F) 1169 (1993), and ordered MCI "to file tariffs including the information required by section 203 for all of its interstate common carrier services." *Id.* para. 4.

337. *In re* Tariff Filing Requirements for Interstate Common Carriers, *Report and Order*, 7 FCC Rcd. 8072, 71 Rad. Reg. 2d (P & F) 898 (1992) [hereinafter *Tariff Filing Report*]. The Commission adopted this *Report and Order* pursuant to its claimed "modification" authority on November 5, 1992, eight days before the D.C. Circuit decided *AT&T Forbearance*, and released it on November 25, 1992. *Id.* para. 17.

338. *Id.* para. 36. The Commission again relied on its findings in *Competitive Carrier* that "mandatory tariff regulation of nondominant carriers was in fact at odds with the fundamental statutory purpose set forth in Section 1 of the [Communications] Act because it inhibits price competition, service innovation, entry into the market, and the ability of firms to respond quickly to market trends." *Id.* (footnote omitted). The Commission also noted that mandatory tariff filing was unnecessary to protect the public because (1) customers could change carriers when their own charged seemingly unjust or unreasonable rates, (2) the section 208 complaint process remained available to address allegations relating to the charging of unjust or unreasonable rates, and (3) the Commission retained power to reimpose tariff filing requirements when necessary. *Id.* paras. 36-37.

339. *Id.* para. 39. The Commission pointed out that while "approximately a dozen long distance carriers operated within the United States" in 1982, "there were an estimated 482 such carriers purchasing switched access from local exchange carriers" by 1992. *Id.* In addition, AT&T's growth rate was significantly less than that of nondominant carriers; AT&T's share of minutes of the interstate market and rates for directly dialed interstate calls declined substantially; and nondominant carriers had engaged in intensive capital investment programs which led them to own more than half of the long-distance industry's fiber optic route miles. *Id.* para. 40.

340. *Id.* para. 40.

341. *See supra* notes 322-35 and accompanying text.

342. *MCI v. AT&T*, 114 S. Ct. 2223 (Scalia, J.) (1994). The Supreme Court granted the petitions of MCI and the United States for certiorari after the D.C. Circuit summarily reversed the *Tariff Filing Report* upon AT&T's motion. *Id.* at 2228. There, in an unpublished *per curiam* order, the D.C. Circuit held that "[t]he decision of this court in [*AT&T Forbearance*] conclusively determined that the FCC's authorization of permissive detariffing violates Section 203(a) of the Communications Act." *Id.*

343. *Id.* at 2229.

344. *Id.* at 2229-30.

345. *Id.* at 2229 (citing Random House Dictionary of the English Language 1236 (2d ed. 1987) ("to change somewhat the form or qualities of; alter partially; amend"); Webster's Third New International Dictionary 1452 (1976) ("to make minor changes in the form or structure of: alter without transforming"); 9 Oxford English Dictionary 952 (2d ed. 1989) ("[t]o make partial changes in; to change (an object) in respect of some of its qualities; to alter or vary without radical transformation"); Black's Law Dictionary 1004 (6th ed. 1990) ("[t]o alter; to change in incidental or subordinate features; enlarge; extend; amend; limit; reduce")).

346. *Id.*, 114 S.Ct at 2229 (quoting Webster's Third New International Dictionary 1452 (1976)). The Majority noted that petitioners also cited Webster's Ninth New Collegiate Dictionary 763 (1991), "which includes among its definitions of 'modify,' 'to make basic or fundamental changes in often to give a new orientation to or serve a new end,'" and could have cited Webster's Eighth New Collegiate Dictionary 739 (1973) and Webster's Seventh New Collegiate Dictionary 544 (1963), which contain comparable definitions. *MCI v. AT&T*, 114 S. Ct. at 2229 n.2. By contrast, the Majority pointed out that "[t]he last *New Collegiate* to be based upon *Webster's Second New International*, rather than Webster's Third, does not include 'basic or fundamental change' among the accepted meanings of 'modify.'" *Id.* (citing Webster's New Collegiate Dictionary 541 (6th ed. 1949)).

347. *MCI v. AT&T*, 114 S. Ct. at 2229 (observing that the dictionary definitions relied on by petitioners derived

exclusively from Webster's Third New International Dictionary 1452 (1976)); *cf.*, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (discussing the principle of judicial deference). Petitioners unsuccessfully contended that *National Railroad Passenger Corp. v. Boston and Maine Corp.*, 503 U.S. 407 (1992), required such deference. *MCI v. AT&T*, 114 S. Ct. at 2229-30. Disagreeing with petitioners, the Majority explained that *Boston and Maine* involved "a selection between accepted alternative meanings shown as such by many dictionaries" as well as "contextual indications" favorable to a finding of deference. *Id.* at 2230. Here, by contrast, the Majority found that: (1) contextual indications contradict the petitioners' position and (2) the broad definitions of "modify" derive from a single source, *Webster's*, and are coupled with the narrow definitions. *Id.* at 2229. The Majority expressed confusion as to how "modify" can "connote *both* (specifically) major change *and* (specifically) minor change." *Id.* at 2230 (emphasis in original).

348. *MCI v. AT&T*, 114 S. Ct. at 2230.

349. *Id.* (emphasis in original). The Majority further pointed out that all "Webster's" dictionaries published then provided only the narrow meaning. *Id.*

350. *Id.* at 2230-31.

351. *Id.* at 2230.

352. *Id.* at 2230-31.

353. *Id.* at 2231.

354. *Id.*

355. *Id.* at 2231-32.

356. *Id.* at 2232.

357. *Id.* The Majority questioned the Commission's argument that the inquiry should focus on the percentage of consumers affected by permissive forbearance (40% of the market) rather than the proportion of carriers affected (all except AT&T). *Id.* Under both alternatives, however, permissive forbearance failed to survive the Majority's analysis. *Id.*

358. *Id.*

359. *Id.* (footnote omitted).

360. *Id.* at 2232-33. The Majority acknowledged that both sides of the permissive forbearance issue could cite at least one example of recent legislation which suggested that Congress supported their position, but explained that this conflict "indicate[d] [only] that Congress was aware of the decade-long tug of war between the Commission and the D.C. Circuit over the authority to relax filing requirements, and at different times proceeded on different assumptions as to who would win." *Id.* at 2233.

361. *Id.*

362. *Id.*

363. *Id.*

364. *Id.* (Stevens, J., dissenting).

365. *Id.*

366. *Id.* at 2234.

367. *Id.*

368. *Id.*

369. *Id.* at 2235.

370. *Id.* at 2236 (emphasis removed).

371. *Id.* The Dissent construed the statutory language authorizing the Commission to "modify" the tariff-filing requirements in "particular instances" or by "general order applicable to special circumstances or conditions" as conferring broad discretion on the Commission to adjust those requirements either narrowly or expansively according to existing conditions. *Id.* The Dissent considered the development of competition in the telecommunications industry a "special circumstance or condition" warranting the Commission to exercise its modification authority. *Id.*

372. *Id.*

373. *Id.*

374. *Id.* at 2237. In support of this proposition, the Dissent quoted Webster's Collegiate Dictionary 628 (4th ed. 1934), which defines "modify" as "to limit or reduce in extent or degree." *MCI v. AT&T*, 114 S. Ct. at 2237 (footnote omitted).

375. *Id.* at 2237.

376. *Id.* at 2236-37.

377. *Id.* The Dissent noted that "[w]hether the current policy should count as a cataclysmic or merely an incremental departure from the Section 203(a) baseline depends on whether one focuses on particular carriers' obligations to file (in which case the commission's policy arguably works a major shift) or on the statutory policies behind the tariff-filing requirement (which remain satisfied because market constraints on nondominant carriers obviate the need for rate-filing)." *Id.* (footnote omitted). The Dissent focused on the latter. *Id.* at 2237 (citing Black's Law Dictionary 1198 (3d ed. 1933), which defined "modification" as "[a] change; an alteration which introduces new elements into the details, or cancels some of them, but leaves *the general purpose and effect of the subject-matter* intact") (emphasis in original)).

378. *Id.* at 2237-38. The Dissent contended that the Robinson-Patman Price Discrimination Act of 1936, codified at 15 U.S.C. 13, constitutes additional evidence that the Majority's statutory analysis was wrong because it "contains a much broader prohibition against price discrimination than does the Communications Act [and] has performed its mission for almost sixty years without any counterpart to the filed rate doctrine." *Id.* at 2238.

379. *Id.* (emphasis in original).

380. *Id.* at 2239.

381. In *AT&T Forbearance Affirmed*, the Majority suggested that permissive forbearance was the wrong approach to the regulation of competition in the interexchange market by expressing "doubt [that] it makes sense, if one is concerned about the use of filed tariffs to communicate pricing information, to require filing by the dominant carrier, the firm most likely to be a price leader." *Id.* at 2233.

382. *See* *NBC v. United States*, 319 U.S. 190, 219 (1942) (noting that "Congress was acting in a field of regulation which was both new and dynamic" when it passed the Communications Act).

383. *See supra* notes 299-313 and 342-57 and accompanying text.

384. *MCI v. FCC*, 765 F.2d 1186, 1192 (D.C. Cir. 1985).

385. MCI v. AT&T, 114 S. Ct. at 2223.

386. Metropolitan Life Ins. Co. v. Promenade Towers Mut. Hous. Corp., 84 Md. App. 702, 718, 581 A.2d 846, 854 (1990), *aff'd*, 324 Md. 588, 597 A.2d 1377 (1991); Black's Law Dictionary 1004 (6th ed. 1990).

387. Webster's Third New International Dictionary 1452 (1986).

388. The American Heritage Dictionary 1161 (3d ed. 1992).

389. *Id.*; AT&T v. FCC, 503 F.2d 612, 614 (2d Cir. 1974). In *AT&T Forbearance Affirmed*, MCI v. AT&T, 114 S. Ct. at 2223, the Majority suggested that "to alter" supports its narrow construction of "modify". As the authorities relied on by the Majority indicate, however, "to alter" supports a broad construction of "modify" when qualifying or limiting adjectives are absent. For example, the Majority cites the Random House Dictionary of the English Language 1236 (2d ed. 1987), Webster's Third New International Dictionary 1452 (1976), and 9 Oxford English Dictionary 952 (2d ed. 1989), which respectively include to "alter partially," "alter without transforming," and "alter or vary without radical transformation" among their definitions of "modify." *See* MCI v. AT&T, 114 S. Ct. at 2229. If "to alter" alone had the narrow meaning suggested by the Majority, the use of such qualifying or limiting adjectives with "alter" would have lacked purpose.

390. The American Heritage Dictionary 1161 (3d ed. 1992).

391. Webster's Third New International Dictionary 1452 (1976).

392. Freese v. County of Douglas, 315 N.W.2d 638, 641 (1982).

393. Lee Enter., Inc. v. Iowa State Tax Comm'n, 162 N.W.2d 730, 737 (Iowa 1968); Black's Law Dictionary 1004 (6th ed. 1990).

394. Anderson v. Civil Serv. Comm'n, 176 Cal. Rptr. 66, 67 (1981); Black's Law Dictionary 905 (6th ed. 1990).

395. Black's Law Dictionary 905 (6th ed. 1990). As with "to alter," the Majority in *AT&T Forbearance Affirmed* suggested that, as definitions, "amend," "limit," and "reduce" support its narrow construction of "modify." MCI v. AT&T, 114 S. Ct. at 2229. That conclusion is suspect for the same reasons discussed *supra* at note 388.

396. 47 U.S.C. 203(b)(2) (1994) (emphasis added); *see also Competitive Carrier Further Notice*, 84 F.C.C.2d 445, paras. 87-88.

397. Some dictionaries do not even include the narrow definitions, while others only include them on a secondary basis. *See* The American Heritage Dictionary 1161 (3d ed. 1992); Black's Law Dictionary 1004 (6th ed. 1990); Webster's Third New International Dictionary 1452 (1986). *But see* 58 C.J.S. *Modify* 840 (1948) (stating that "[t]he power to modify anything does not imply a power to substitute a thing entirely different, and it does not confer the power to destroy") (footnotes omitted).

398. The Communications Act's legislative history offers no guidance on this issue. Congress based the Communications Act on the Interstate Commerce Act passed nearly 50 years earlier and substantially relied on the legislative history of that earlier legislation. *See, e.g.,* S. Rep. No. 73-781 (1934); H.R. Rep. No. 73-1850 (1934); *see also* ABC v. FCC, 643 F.2d 818, 820-821 (D.C. Cir. 1980) (observing that "[t]o understand the purposes of the Communications Act, [a court] must look to the legislative history of the Interstate Commerce Act of 1887, for the Communications Act borrowed its language and purpose from the Interstate Commerce Act").

399. MCI v. FCC, 765 F.2d 1186, 1196 (D.C. Cir. 1985).

400. MCI v. AT&T, 114 S. Ct. at 2233.

401. MCI v. FCC, 765 F.2d at 1196.

402. Such a result would be consistent with the Second Circuit's statement that the Commission may waive the notice requirements of section 203(b). *See* AT&T v. FCC, 487 F.2d 865, 871 n.10 (2d Cir. 1973); *see also* ABC v. FCC, 682 F.2d 25, 30 (2d Cir. 1982) (stating that the Commission may forego pre-effectiveness review of a tariff). However, in both *MCI Forbearance* and *AT&T Forbearance*, the D.C. Circuit ignored the Second Circuit's opinion in *AT&T v. FCC*, 503 F.2d 612 (2d Cir. 1974), the one case in which a court addressed the meaning of "modify" as used in section 203(b). There, the Second Circuit evaluated the validity of a Commission rule extending the existing 30-day notice period for tariff filings to 60 days under the power to "modify" the tariff filing requirements conferred by section 203(b). AT&T v. FCC, 503 F.2d at 612. AT&T argued, to no avail, that this power authorized only a reduction in the notice period. AT&T v. FCC, 503 F.2d at 615. Noting that the "language of the statute is not ambiguous," the court expansively held that "the word 'modify' used in the statute plainly gives the FCC the power to alter or change the notice period whether it results in an increase or decrease of time involved." AT&T v. FCC, 503 F.2d at 614. Although the Second Circuit did not consider whether "modify" included authority to adopt a forbearance policy, it suggested that the Commission had broad discretion either to decrease or increase substantially the notice period. AT&T v. FCC, 503 F.2d at 614-15.

403. *MCI v. AT&T*, 114 S.Ct. at 2233.

404. *See id.* at 2232-33; *see supra* note 362 and accompanying text.

405. *See, e.g.*, *Transcontinent TV Corp. v. FCC*, 308 F.2d 339, 341-344 (D.C. Cir. 1962) (considering the meaning of the phrase "modified by Commission" as used in section 316(a) of the Communications Act).

406. *Id.* at 339.

407. *Id.* at 340-41. Section 316(a) of the Communications Act stated in pertinent part: "Any station license * * * may be modified by the Commission either for a limited time or for the duration of the term thereof * * * No such order of modification shall become final until the holder of the license * * * shall be given reasonable opportunity * * * to show cause by public hearing, if requested, why such order of modification should not issue." *Id.* at 341 (omissions in original; footnote omitted).

408. *Id.* at 342-44.

409. *Id.* at 343.

410. *Id.* at 344.

411. *See Philadelphia TV Brdcast. Co. v. FCC*, 359 F.2d 282, 283 (D.C. Cir. 1966). The Supreme Court avoided having to show such deference by holding that the Commission's interpretation of "modify" was unreasonable and therefore not entitled to deference. *See MCI v. AT&T*, 114 S. Ct. at 2231.

412. *See Philadelphia TV Brdcast. Co. v. FCC*, 359 F.2d at 283.

413. *Id.* at 283-84 (quoting *Udall v. Tallman*, 380 U.S. 1, 16 (1965)).

414. *Id.* at 284; *see also* *Wold Comm., Inc. v. FCC*, 735 F.2d 1465, 1468 (D.C. Cir. 1984) (stating that "a reviewing court owes particular deference to the expert administrative agency's policy judgments and predictions, its forecasts of 'the direction in which future public interest lies,' when "it confront[s] on review an arcane, fast-moving field of technology" and Congress has not enunciated its own policy on the matter); *supra* notes 364-79 and accompanying text, discussing the dissent's concurrence with these principles in *AT&T Forbearance Affirmed*. The Commission noted in the *Sixth Report* that "as a result of [its own] decisions and the [MFJ] . . . the telecommunications industry structure today is drastically different from the one that existed in 1934 when the Communications Act was enacted." *Competitive Carrier Sixth Report*, 99 F.C.C.2d 1020, 1029 n.33, 57 Rad. Reg. 2d (P & F) 1391, 1398 n.33 (1985).

415. *AT&T v. FCC*, 978 F.2d 727, 737 (D.C. Cir. 1992); *see supra* notes 334-335 and accompanying text.

416. *Competitive Carrier Second Report*, 91 F.C.C.2d 59, paras. 25-27, 52 Rad. Reg. 2d (P & F) 187 (1982).
417. *See In re Tariff Filing Requirements for Nondominant Carriers, Notice of Proposed Rulemaking*, 8 FCC Rcd. 1395, para. 6, 73 Rad. Reg. 2d (P & F) 861 (1993) [hereinafter *Tariff Filing Notice*]; *see also* AT&T v. FCC, 978 F.2d 727, 737 (D.C. Cir. 1985).
418. *Tariff Filing Notice*, 8 FCC Rcd. 1395, para. 6, 73 Rad. Reg. 2d (P & F) 861.
419. *Id.*; *see also supra* notes 315-35 and accompanying text.
420. *In re Policy and Rules Concerning Rates for Dominant Carriers, Report and Order and Second Further Notice*, 4 FCC Rcd. 2873, 66 Rad. Reg. 372 (1989) [hereinafter *AT&T Price Cap Order*].
421. *In re Competition in the Interstate Interexchange Marketplace, Notice and Proposed Rulemaking*, 5 FCC Rcd. 2627 (1990); *In re Competition in the Interstate Interexchange Marketplace, Report and Order*, 6 FCC Rcd. 5880, 69 Rad. Reg. 2d (P & F) 1135 (1991) [hereinafter *First Interexchange Report*].
422. *First Interexchange Report*, 6 FCC Rcd. 5880, para. 3, 69 Rad. Reg. 2d (P & F) 1135.
423. *Id.*
424. *See infra* notes 469-93 and accompanying text.
425. *See supra* notes 398-399 and accompanying text. With the demise of permissive and mandatory forbearance, the Commission's streamlined regulation policies governed nondominant carriers. *See Tariff Filing Requirements Notice*, 8 FCC Rcd. 1395, 1396 n.9, 73 Rad. Reg. 2d (P & F) 861, 862 n.9 (1993).
426. *See supra* Part III.B.
427. *Tariff Filing Notice*, 8 FCC Rcd. 1395, 73 Rad. Reg. 2d (P & F) 861.
428. *Id.* para. 15.
429. *Id.* The Commission proffered no evidence to support this conclusion and seemingly overstated the benefits that would accrue to the public by eliminating 13 days from the notice period for tariff filings.
430. *Id.* para. 14.
431. *Id.* para. 16 (citing Communications Act of 1934, ch. 652, 4(i), 204-205, 403, 48 Stat. 1064, 1068, 1071-72, 1094 (as amended)).
432. *Id.* (citing Communications Act, 208, Stat. at 1073.)
433. *Id.*
434. *Id.* (quoting 47 U.S.C. 203(a); omissions in original).
435. *Id.*
436. *Id.* The Commission contended that this proposal was consistent with section 203.
437. *Id.*
438. *Id.*
439. *In re Tariff Filing Requirements for Nondominant Common Carriers, Memorandum Opinion and Order*, 8 FCC

Rcd. 6752, 73 Rad. Reg. 2d (P & F) 849 (1993) [hereinafter *Nondominant Filing Order*].

440. *See supra* notes 264-66, 285-86 and accompanying text.

441. *See supra* notes 398-99 and accompanying text.

442. *See AT&T v. MCI, Order*, No. Civ. A. 93-1147 SSH, 1993 WL 268394, at *2 (D.D.C. July 7, 1993) (stating that "rates must be 'published in,' or 'readily ascertainable from,' the filed schedules" (quoting *Regular Common Carrier Conference v. United States*, 793 F.2d 376, 380 (D.C. Cir. 1986) (invalidating Interstate Commerce Commission's tariff rule which permitted freight forwarders to "agree to provide services to shippers at unpublished rates determined by averaging prior charges to those shippers"))).

443. *See Southwestern Bell Corp. v. FCC*, 43 F.3d 1515 (D.C. Cir. 1995). Relying on its earlier forbearance decisions as well as on the majority opinion in *AT&T Forbearance Affirmed*, the D.C. Circuit concluded: "Congress is free to select the remedial tools it deems appropriate; Congress decided to require common carriers to file 'schedules showing all charges' not ranges of rates [and] [t]he FCC cannot abandon the legislative scheme because it thinks it has a better idea." *Id.* at 1525. In sum, the D.C. Circuit held that "the Commission does not have the authority under section 203(b) to modify the requirements of section 203(a), allowing nondominant common carriers to file ranges of rates." *Id.* at 1526. While this decision vacated the entire *Nondominant Filing Order*, the Commission subsequently reinstated that order, except for its range of rates provision, on the grounds that the D.C. Circuit did not object to its other terms. *See In re Tariff Filing Requirements for Nondominant Common Carriers, Order*, 10 FCC Rcd. 13,653, 78 Rad. Reg. 2d (P & F) 1722 (1995).

444. *See supra* notes 398-400 and accompanying text.

445. The Commission's original streamlined regulation already substantially reduced the amount of information that nondominant carriers had to submit to support their tariffs. *See supra* notes 111-15 and accompanying text.

446. The only other benefits of this further streamlined regulation are questionable. For

example, despite the Commission's assertion to the contrary, it is unclear whether thirteen fewer days notice of nondominant carrier tariff filings would appreciably benefit competition. *See supra* note 428 and accompanying text. Likewise, given the substantial reduction in data required to support nondominant carrier tariff filings established by the Commission's original streamlined regulation approach, it is unclear whether any additional reductions in such supporting information would have a meaningful impact on competition. *See supra* notes 111-15 and accompanying text.

447. *See supra* notes 285-86 and accompanying text.

448. *Id.*

449. Following the forbearance decisions, the Commission had two other options to regulate interexchange competition under the surviving portions of *Competitive Carrier*. First, the Commission could have redefined "common carrier" to exclude firms with little or no market power, an approach it previously rejected. *See Competitive Carrier Second Report*, 91 F.C.C.2d 59, para. 5, 52 Rad. Reg. 2d (P & F) 187 (1982). Only firms possessing market power would be "common carriers" subject to traditional Title II regulation. *See Competitive Carrier Further Notice*, 84 F.C.C.2d 465, para. 54 (1980). However, because a firm is a common carrier "by virtue of its functions" and not as a result of being "declared to be so," such a redefinition likely would have no legal effect. *See National Ass'n of Reg. Comm'rs v. FCC*, 525 F.2d 630, 644 (D.C. Cir. 1976). Second, the Commission could have lobbied Congress to authorize forbearance. However, because the legislative process is slow and uncertain, it did not offer the Commission much hope for immediately acquiring forbearance authority. Thus, like further streamlined regulation, these two alternatives were unsatisfactory when compared to the Commission simply asserting forbearance authority under the existing Communications Act provisions.

450. 449. *See In re Policy and Rules Concerning Rates for Dominant Carriers, Report and Order and Second Further*

Notice of Proposed Rulemaking, 4 FCC Rcd. 2873, 66 Rad. Reg. 2d (P & F) 372 (1989); *see also supra* notes 225-32 and accompanying text.

451. 450. *AT&T Price Cap Order*, 4 FCC Rcd. 2873, para. 36, 66 Rad. Reg. 2d (P & F) 372 (1989). Under this scheme, the Commission divided AT&T's services into three "baskets": (1) residential and small business services; (2) 800 toll-free services; and (3) all other business services. *Id.* paras. 359-87. The Commission placed residential and small business services in their own basket "so that AT&T will not be able to raise prices for these services in order to lower prices for services that larger business customers use." *Id.* para. 361. The Commission also protected residential customers by, among other things, forbidding AT&T from raising the average residential rate per minute by greater than one percent per year above a price cap index. *Id.* paras. 364 & 377.

452. *Id.* para. 30 (emphasis removed).

453. *Id.* para. 37.

454. *First Interexchange Report*, 6 FCC Rcd. 5880, para. 36, 69 Rad. Reg. 2d (P & F) 1135 (1991).

455. *Id.* para. 47.

456. *Id.* para. 49; *see also supra* notes 449-52.

457. *Competitive Carrier First Report*, 6 FCC Rcd. 5880, paras. 50-51, 69 Rad. Reg. 2d (P & F) 1135. The Commission pointed out that "AT&T's market share in business services appears to be about fifty percent, a level that is not incompatible with a highly competitive market." *Id.* para. 51.

458. *Id.* para. 60. The Commission further found that "while AT&T may have certain first-in advantages, no one has shown that these advantages preclude the effective functioning of the . . . market." *Id.*

459. *Id.*

460. *Id.* para. 9. Like its earlier decisions to adopt streamlined regulation and forbearance for nondominant carriers, the Commission found that the costs of maintaining full regulation of AT&T's business services outweighed the benefits to the public. *See id.* paras. 8-12.

461. *See id.* para. 74. The Commission referred to this approach as "further streamlined regulation." *Id.* para. 72. When challenged, these tariffs would enjoy a presumption of validity. *Id.* para. 74. However, the Commission would still engage in a limited review of all AT&T tariff filings before they became effective. *Id.* paras. 73-79.

462. *Id.* para. 91. Fourteen days before such a contract became effective, AT&T had to file a tariff that summarizes the contract and specifies: "(1) the term of the contract, including any renewal options; (2) a brief description of each of the services provided under the contract; (3) minimum volume commitments for each service; (4) the contract price for each service or services at the volume levels committed to by the customers; (5) a general description of any volume discounts built into the contract rate structure; and (6) a general description of other classifications, practices, and regulations affecting the contract." *Id.* para. 121. The Commission asserted that "the provision of this information will satisfy the requirements of section 203(a) of the Act, while avoiding disclosure of customer proprietary information or information that might increase the risk of tacit collusion in the marketplace." *Id.*

463. *See id.* para. 130.

464. *Id.* paras. 153-61. In taking this position, the Commission demonstrated excessive caution. It suggested that it would soon find that effective competition existed with regard to these services. *See Interexchange Notice*, 5 FCC Rcd. 2627, para. 156 (1990).

465. *First Interexchange Report*, 6 FCC Rcd. 5880, para. 138, 69 Rad. Reg. (P & F) 1135 (1991).

466. *In re Competition in the Interstate Interexchange Marketplace, Second Report and Order*, 8 FCC Rcd. 3668, 72 Rad. Reg. (P & F) 1114 (1993).

467. *Interexchange Notice*, 5 FCC Rcd. 2627, para. 257. The Commission again failed to explain why it retained AT&T's dominant classification.

468. This approach therefore constituted an acceptable "modification" of the statutory requirements under the analysis of the Supreme Court and D.C. Circuit. *See supra* notes 291-362, 398-99 and accompanying text.

469. Because of the judicial repudiation of permissive and mandatory forbearance, streamlined regulation then governed nondominant carriers. *See Competitive Carrier Tariff Filing Notice*, 8 FCC Rcd. 1395, 1396 n.9, 73 Rad. Reg. 2d (P & F) 861, 862 n.9 (1993); *see also supra* note 424 and accompanying text.

470. *See In re Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, Order*, 11 FCC Rcd. 3271, para. 1, 1 Comm. Reg. (P & F) 63 (1995) [hereinafter *Reclassification Order*]. AT&T had opposed its classification as a dominant carrier since *Competitive Carrier* commenced. *See Competitive Carrier First Report*, 85 F.C.C.2d 1, para. 22, 52 Rad. Reg. 2d (P & F) 215. In September 1993, AT&T filed a motion with the Commission requesting reclassification as a nondominant carrier and, in April 1995, filed *ex parte* papers supplementing and updating its motion. *See Reclassification Order*, 11 FCC Rcd. 3271, para. 1, 1 Comm. Reg. (P & F) 63.

471. *Reclassification Order*, 11 FCC Rcd. 3271, para. 1, 1 Comm. Reg. (P & F) 63. To facilitate "an orderly transition," reclassification became effective 30 days after the *Reclassification Order's* October 23, 1995 release date. *Id.* paras. 167, 172. The Commission "defer[red] consideration of AT&T's request to be reclassified as non-dominant in its provision of all international services because that category of services requires a different market analysis." *Id.* para. 2.

472. *Id.* para. 19.

473. *Id.* para. 20.

474. *Id.* paras. 21-22.

475. *Id.* para. 23.

476. *Id.* paras. 21-23.

477. *Id.* para. 24.

478. *Id.* paras. 26-27. Although it admitted that several of its pronouncements during *Competitive Carrier* and other proceedings suggested that AT&T had to lack the ability to control prices for all services before reclassification could occur, the Commission argued that these statements did not constitute a rule. *Id.* paras. 28-30; *see also supra* notes 27-30, 179-86 and accompanying text (suggesting the existence of such a rule). Even if these statements nevertheless did establish such a rule, the Commission contended that circumstances required "either a departure from that policy or a waiver of that rule." *Reclassification Order*, 11 FCC Rcd. 3271, para. 31, 1 Comm. Reg. (P & F) 63 (1995).

479. *Id.* para. 26. The Commission cited the same consequences of dominant carrier regulation which it had identified during *Competitive Carrier*, such as carriers' inability to offer new services immediately and to respond quickly to competitors' new services because of the tariff filing requirements. *Id.* para. 27; *see also supra* notes 80-131 and accompanying text.

480. *Id.* para. 35.

481. *Id.* paras. 38, 139.

482. *Id.* paras. 57-66. With respect to supply elasticity, the Commission observed that AT&T's competitors have

sufficient excess capacity or could readily acquire such capacity in order to respond to the public's needs in the event AT&T overprices. *Id.* para. 58. With respect to demand elasticity, the Commission concluded that residential and business customers believe that the services offered by AT&T and its competitors are comparable and therefore are not reluctant to switch regularly between carriers. *Id.* paras. 63-65. Although it conceded that AT&T had acquired valuable goodwill over the years, the Commission explained that goodwill is not evidence of market power or demand inelasticity. *Id.* para. 66.

483. *Id.* para. 67. The Commission pointed out that AT&T's market share declined from approximately 90 percent to 55.2 and 58.6 percent in terms of revenues and minutes respectively during the preceding 10 years. *Id.*

484. *Id.* paras. 67-72. Responding to claims that AT&T's large market share mandated the conclusion that AT&T retained market power, the Commission noted that "[i]t is well-established that market share, by itself, is not the sole determining factor of whether a firm possesses market power," but rather "[o]ther factors, such as demand and supply elasticities, conditions of entry and other market conditions, must be examined to determine whether a particular firm exercises market power in the relevant market." *Id.* para. 68 (footnote omitted).

485. *Id.* para. 73. The Commission reiterated its comment in the *First Interexchange Report* that the "competitive process itself is largely about trying to develop one's own advantages, and all firms need not be equal in all respects for this process to work." *Id.* (quoting *First Interexchange Report*, 6 FCC Rcd. 5880, para. 60, 69 Rad. Reg. 2d (P & F) 1130 (1991)).

486. *Id.* paras. 78-80. Although the Commission admitted that certain evidence suggested the existence of tacit price coordination among AT&T, MCI, and Sprint with AT&T as the price leader, it concluded that such collusion was an industry problem unrelated to whether AT&T had the unilateral ability to raise and maintain residential rates above competitive levels. *Id.* paras. 81-83. The Commission also pointed out that, while not relevant to resolving this market power debate, AT&T had voluntarily committed to offering two optional calling plans designed to offset the effects of its inevitable increases in basic residential rates. *Id.* paras. 84-87.

487. *Id.* paras. 88-99, 116-37. By 1994, AT&T had only 25.6 percent of the resale market segment and anticipated a decline to 20.3 percent within two years. *Id.* para. 129.

488. *Id.* para. 105. Moreover, the Commission anticipated that AT&T's three-year voluntary agreement to limit any price increases for its interstate analog private line and 800 directory assistance services to the increase in the consumer price index and to file clearly identified tariff changes increasing prices for these services on not less than five business days' notice would address any concerns regarding AT&T's continued ability to control pricing for these services. *Id.* para. 106.

489. The Commission believed that AT&T's reclassification would not adversely affect long-standing policies in favor of rate integration, geographic rate averaging, and universal service. *Id.* paras. 107-15.

490. *Id.* para. 164. The Commission removed all of AT&T's domestic residential services from Basket 1, 800 directory assistance services from Basket 2, and analog private line service from Basket 3. Only AT&T's international services remained in Basket 1. *Id.*

491. *Id.* para. 165.

492. *Id.*

493. *Id.* The Commission ordered the Chief of the Common Carrier Bureau to determine which additional disclosures were necessary. *Id.*

494. *Id.*

495. H.R. Conf. Rep. No. 104-458, at 113 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124 (March 1996).

496. 47 U.S.C. 151; *see supra* note 9 and accompanying text.

497. 47 U.S.C. 154(i) and 201(b); *see supra* note 10 and accompanying text.

498. . Telecommunications Act of 1996, Pub. L. No. 104-104, sec. 401(a), 110 Stat. 56, 128 (emphasis added). Section 332(c)(1)(A) authorizes the Commission to hold that certain Title II regulations are inapplicable to commercial mobile services. 47 U.S.C. 332(c)(1)(A) (1994).

499. The Telecommunications Act allows any carrier or class of carriers to petition for forbearance treatment and authorizes the Commission to forbear from enforcing statutory or regulatory provisions if it determines, in its complete discretion, that such action will promote competition among service providers. Telecommunications Act of 1996, sec. 401(b)-(c), 110 Stat. 128 (such petitions "shall be deemed granted" if the Commission does not deny them within one year (or 15 months if the Commission exercises its authority to extend the initial one-year period for 90 days)). The only exceptions to this forbearance authority are that the Commission may not forbear from applying the interconnection obligations imposed on incumbent local exchange carriers by new section 251(c) or the prerequisites to BOC entry into in-region interLATA services set forth in new section 271 until "it determines that those requirements have been fully implemented." *Id.* Commentators have observed that, "[p]resumably, 'full implementation' arrives when a BOC secures interLATA relief on a region-wide, or perhaps even state-wide, basis." *See* Peter W. Huber et al., *The Telecommunications Act of 1996: Special Report* 61 (1996).

500. Telecommunications Act, sec. 401(a), 110 Stat. at 128 (emphasis added).

501. *See supra* notes 132-220 and accompanying text. Section 402(b)(2) of the Telecommunications Act also specifically provides that the Commission shall exempt any common carrier from the requirements of Section 214 of the Communications Act for the extension of any line. Telecommunications Act, sec. 402(b)(2)(A), 110 Stat. at 129.

502. *Id.* sec. 402(b), 110 Stat. at 129 (emphasis added).

503. *Id.* sec. 402(b)(3), 110 Stat. at 129 (emphasis added).

504. Of course, the 104th Congress' construction may not comply with the 73rd Congress' intent in enacting section 203.

505. *See supra* note 498.

506. *See* Telecommunications Act, sec. 151, 271-276, 110 Stat. at 86-107; *see also supra* note 249 and accompanying text (discussing Commission's expected regulatory treatment of BOCs after they obtain permission to offer interexchange services).

507. *See In re* Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as Amended, *Notice of Proposed Rulemaking*, 61 Fed. Reg. 14,717, paras. 23-29 (1996); *Second Report and Order*, 61 Fed. Reg. 59,340, paras. 14-66 (1996) (to be codified at 47 C.F.R. pts. 42, 61, and 64; effective December 23, 1996) (this proceeding's *First Report and Order*, 61 Fed. Reg. 42,558 (1996) (effective September 16, 1996), issued rules relating to the Telecommunications Act's geographic rate averaging and integration requirements) [hereinafter *Interexchange Forbearance Report*]. To support this finding, the Commission relied on the same factors which it had cited in favor of forbearance for nondominant carriers in earlier proceedings. For example, the Commission again concluded that: (1) the services provided by interexchange carriers are close substitutes; (2) consumers of interexchange services are "highly demand-elastic" and will readily switch carriers in order to obtain better prices if their carriers attempt to impose unjust or unreasonable rates, terms, or conditions for service; (3) detariffing will deter tacit price coordination, promote price competition and service innovation, enable carriers to respond quickly to market demands, and encourage carriers to tailor their service offerings to the specific needs of their customers; (4) carriers will likely make the rate and service information set forth in tariffs "available to the public in a more user-friendly form in order to preserve their competitive position in the market, and as part of their contractual relationship with customers"; (5) the absence of tariffs will not impede the public's ability to challenge the lawfulness of carriers' rates, terms, and conditions for service on the rare occasion it is necessary to do

so; and (6) the reimposition of tariff regulation always remains an option in the unlikely event that forbearance fails. *Interexchange Forbearance Report*, 61 Fed. Reg. 59,340, paras. 16-66. Although forbearance applied to all nondominant carriers, including AT&T, the Commission found that the "detriffing of [AT&T's] analog private line and 800 directory assistance services at this time is not in the public interest, and would not meet the statutory forbearance criteria" and therefore "require[d] AT&T to continue to file tariffs for these services in accordance with, and for the specified term of, its commitments" as set forth in the *Reclassification Order*. *Id.* para. 106; *supra* note 487. Within nine months of the end of its three-year commitments regarding these services, AT&T must cancel its tariffs relating to these services because they will become subject to forbearance treatment at that time. *Interexchange Forbearance Report*, 61 Fed. Reg. 59,340, para. 106.

508. *Id.* paras. 44-66. The Commission explained that "not permitting nondominant interexchange carriers to file tariffs with respect to interstate, domestic, interexchange services will enhance competition among providers of such services, promote competitive market conditions, and achieve other objectives that are in the public interest, including eliminating the possible invocation of the filed rate doctrine by nondominant interexchange carriers, and establishing market conditions that more closely resemble an unregulated environment." *Id.* para. 52. Consistent with its findings in the *Sixth Report*, the Commission further observed that "[e]ven under existing streamlined tariff filing procedures, requiring nondominant interexchange carriers to file tariffs for interstate, domestic, interexchange services impedes vigorous competition in the market for such services by: (1) Removing incentives for competitive price discounting; (2) reducing or taking away carriers' ability to make rapid, efficient responses to changes in demand and cost; (3) imposing costs on carriers that attempt to make new offerings; and (4) preventing consumers from seeking out or obtaining service arrangements specifically tailored to their needs." *Id.* para. 53.

509. Telecommunications Act, sec. 151, 271(b)(2), 110 Stat. at 86.

510. *In re Bell Operating Company Provision of Out-of-Region Interstate, Interexchange Services, Notice of Proposed Rulemaking*, 61 Fed. Reg. 6607, paras. 9, 11 (1996); *First Report and Order*, 61 Fed. Reg. 35,964, paras. 10, 12 (1996) (to be codified at 47 C.F.R. ch. 1) (establishing August 8, 1996 effective date) [hereinafter *Interim BOC Out-of-Region Order*]; *Order on Reconsideration*, 61 Fed. Reg. 39,359 (1996) (advancing effective date of interim order to July 29, 1996).

511. *Interim BOC Out-of-Region Order*, 61 Fed. Reg. 35,964, paras. 19-25; *see supra* notes 181 and 186 and accompanying text. The Commission noted that "these minimal requirements should be in place" until it completes the proceedings necessary to "adopt a comprehensive and cohesive framework that addresses the myriad issues involving BOC provision of services that the BOCs previously have been barred from offering." *Interim BOC Out-of-Region Order*, 61 Fed. Reg. 35,964, para. 20. It decided to adopt this temporary policy, "pending a future proceeding to consider more fully the long-term issues raised by BOC entry into out-of-region, interstate, interexchange services," because it "sought to balance the goal of the [Telecommunications] Act to allow swift BOC entry into the interexchange market, subject to interim safeguards, with the need for a comprehensive review of [its] rules." *Id.* para. 21.

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