

# SCHIZOPHRENIA AMONG CARRIERS: HOW COMMON AND PRIVATE CARRIERS TRADE PLACES

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## I. INTRODUCTION

Historically, the rights and responsibilities vested in common carriers tempered their market power in exchange for reduced liability or insulation from commercial and personal damages caused by the content carried.<sup>1</sup> Providers of neutral and transparent conduits did not have to monitor the content carried, nor could they typically refuse access<sup>2</sup> to

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1. *See, e.g.*, *Western Union Tel. Co. v. Esteve Bros.*, 256 U.S. 566 (1921) (exculpatory clauses in common carrier tariff limited liability to refunding cost of carriage despite substantial financial damage resulting from non-delivery of a message transmitted only once). *See also* Christy Cornell Kunin, *Unilateral Tariff Exculpation in the Era of Competitive Telecommunications*, 41 CATH. U. L. REV. 907 (1992) (an examination of exculpation of common carrier liability).

2. *See, e.g.*, *In re Bell System Tariff Offerings of Local Distribution Facilities for Use by Other Common Carriers*, 46 F.C.C.2d 413 (1974), *aff'd sub nom.* *Bell Tel. Co. of Pa. v. FCC*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026, *reh'g denied*, 423 U.S. 886 (1975); *MCI Telecomms. Corp. v. FCC*, 580 F.2d 590, *cert. denied*, 439 U.S. 980 (1978) (access to local exchange facilities mandated); *In re Establishment of Domestic Communication-Satellite Facilities by Nongovernmental Entities*, 22 F.C.C.2d 86, 97 (1970), *pol'y reaff'd*, 34 F.C.C.2d 9, 64-5, *adopted*, 35 F.C.C.2d 844, 856 (1972), *on recon.*, 38 F.C.C.2d 665 (1972) (domestic satellite policy mandates non-discriminatory, diverse, and flexible access to domestic satellites and earth station facilities); *accord, 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*, 29 F.C.C.2d 870, 940 (1971) (AT&T required to afford local exchange facility access to competing inter-city carriers), *on recon.*, 35 F.C.C.2d 1106 (1971), *aff'd sub nom.* *Washington Util. & Transp. Comm. v. FCC*, 513 F.2d 1192 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975). *In re Use of the Carterfone Device in Message Toll Telephone Service*, 13 F.C.C.2d 420, *recon. denied*, 14 F.C.C.2d 571 (1968) (invalidating local exchange carrier tariff restrictions on interconnection of customer premises equipment with the telephone network); *In re Telerent Leasing Corp.*, 45 F.C.C.2d 204 (1974), *aff'd sub nom.* *North Carolina Util. Comm'n v. FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976); *In re Proposals for New or Revised Classes of Interstate and Foreign Message Toll*

their bottleneck<sup>3</sup> facilities on the basis of content.<sup>4</sup> Non-common carriers, on the other hand, could operate as private carriers when transporting content whether over spectrum, e.g., satellite operators,<sup>5</sup> or via closed circuit media, e.g., cable television operators.<sup>6</sup> Their regulatory status derived from the manner in which they carried content and to whom such carriage services were made available: non-common carriers did not operate essential facilities and did not serve as gatekeepers who could affect the price and availability of content. Having chosen to select and monitor content, they had to assume the greater risk of liability for the content carried, published or distributed.<sup>7</sup> The potential for civil and

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Telephone Service (MTS) and Wide Area Telephone Service (WATS), 56 F.C.C.2d 593 (1975), *recon.*, 58 F.C.C.2d 736 (1976) (second order), *aff'd sub nom.* North Carolina Util. Comm'n v. FCC, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977) (preempting the states on the matter of customer premises equipment interconnection with the telephone network).

3. "A firm controlling bottleneck facilities has the ability to impede access of its competitors to those facilities. We must be in a position to contend with this type of potential abuse. We treat control of bottleneck facilities as prima facie evidence of market power requiring detailed regulatory scrutiny. . . . Control 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. Thus bottleneck control describes the structural characteristic of a market that new entrants must either be allowed to share the bottleneck facility or fail." *In re* Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, 85 FCC 2d 1, 36 (1980). *See also* United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912) (first order) (antitrust court ordered railroads to provide competitors equivalent access to bottleneck railway terminal facilities), *appealed after remand*, 236 U.S. 194 (1915); *In re* An Inquiry Into the Use of the Bands 825–845 MHz and 870–890 MHz for Cellular Communications Systems, 86 F.C.C.2d 469, 495–96 (1981) (Commission required telephone companies to furnish interconnection to cellular systems upon terms no less favorable than those used by or offered to wireline carriers), *modified*, 89 F.C.C.2d 58 (1982), *further modified*, 90 F.C.C.2d 571 (1982); *In re* Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, 59 Rad. Reg. 2d (P & F) 1275 (1986), *clarified*, 2 F.C.C.2d 2910 (1987), *aff'd on recon.*, 4 F.C.C.R. 2369 (1989) (Commission clarified policies regarding interconnection of cellular and other radio common carrier facilities to landline network); *Lincoln Tel. & Tel. Co. v. FCC*, 659 F.2d 1092, 1103–06 (D.C. Cir. 1981) (court upheld Commission's order requiring Lincoln to provide interconnection facilities to MCI); *MCI Telecomms. Corp. v. FCC*, 580 F.2d 590 (D.C. Cir.), *cert. denied*, 439 U.S. 980 (1978); *Bell Tel. Co. of Pa. v. FCC*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975), *reh'g denied*, 423 U.S. 886 (1975).

4. *See, e.g.*, *Sable Communications, Inc. v. FCC*, 492 U.S. 115 (1989) (upholding a federal statute prohibiting obscene telephone messages, but overturning application of the statute to adult access to indecent messages via telecommunications common carriers that are entitled to First Amendment protection).

5. *See* *Wold Communications, Inc. v. FCC*, 735 F.2d 1465 (D.C. Cir. 1984) (upholding FCC decision approving non-common carrier leasing of satellite transponders).

6. *See* *Midwest Video Corp. v. FCC*, 571 F.2d 1025 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979) (cable television held not to be common carriage).

7. *See* *Stratton Oakmont, Inc. v. Prodigy Serv. Co.*, No. 31063/94, 1995 WL 323710, (N.Y. Sup. Ct. 1995).

criminal liability justified their active assessment whether to carry a particular message, or type of content.<sup>8</sup>

Recently, regulators and courts have considered the extent to which carriers can decide what content to carry, e.g., as electronic publishers whose editorial discretion includes the decision whether and how to carry particular content. The distinction between common carriers and private carriers has grown murky, because of:

- (1) legislative and regulatory tinkering with the common carrier model;<sup>9</sup>
- (2) technological innovations;
- (3) a growing body of cases articulating robust First Amendment speaker rights for common carriers; and
- (4) court cases imposing quasi-common carrier obligations on private carriers (e.g., the duty of cable television operators to carry broadcast television signals),<sup>10</sup> and quasi-publisher duties on common carriers (e.g., the duty to inquire and disclose whether content is obscene or indecent).

This article will examine court cases and actions by the Federal Communications Commission (FCC) that distort the traditional concepts of common and private carriage by establishing new rights and responsibilities previously applicable to the other category of carrier. This article will also consider the feasibility of (a) maintaining the traditional common carrier regulatory model and (b) continuing the application of that model to basic services provided by local exchange carriers (LECs). This is especially important as LECs qualify to become private carriers tapping new market opportunities, even within the same geographical region where they provide basic services. Finally, this article examines the circumstances that continue to require application of the “pure” common carrier model (e.g., the FCC currently regulates the telecommunication transport operations of Comsat Corporation, but does not regulate its non-carrier ventures).

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8. For a discussion of an information service provider’s civil liability for defamation, etc., see Anne Wells Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces*, 104 YALE L. REV. 1639 (1995).

9. See Rob Frieden, *Contamination of the Common Carrier Concept in Telecommunications*, 19 TELECOMM. POL’Y 685 (1995).

10. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994).

## II. WHITHER COMMON CARRIAGE?

Modifications to the common carrier model have made it difficult, if not impossible, to maintain conventional common carrier regulation of basic communication services. Some commentators view this development as inevitable,<sup>11</sup> or as an outcome that would eliminate a less desirable policy option.<sup>12</sup> This article argues that the difficulty in applying the common carrier model<sup>13</sup> may prevent government from creating effective incentives for carriers to provide ubiquitous access to the developing broadband digital telecommunication infrastructure.<sup>14</sup>

Common carriers have opportunities to, and legitimate business reasons for pursuing non-common carrier markets. Even if it is regulated as a common carrier for one line of business, an enterprise is not precluded from pursuing ventures outside the scope of common carrier regulation.

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11. Professor Eli Noam identifies the demise of common carriage as a predictable consequence of the evolution in telecommunications from a network of networks to a systems of systems. Questions of market access and the terms and conditions of interconnection become less important when networks, service providers and types of players proliferate. But Professor Noam does identify a number of responsibilities, historically managed by common carriers and their government overseers, e.g., universal services, interoperability and physical interconnection. If common carriers need not address these obligations, or can agree to perform some of them in exchange for further deregulation, what guarantee exists that a larger, more diverse and heterogeneous set of system operators will find it in their enlightened self interest to assume the responsibility? Professor Noam suggests the need for new policy instruments that emphasize neutral interconnection: an obligation to interconnect with and deliver the traffic of any other carrier once a carrier itself seeks interconnection with another carrier. Eli M. Noam, *Beyond Liberalization: From the Network of Networks to the System of Systems*, 18 TELECOMM. POL'Y 286 (1994); Eli M. Noam, *Beyond Liberalization II: The Impending Doom of Common Carriage*, 18 TELECOMM. POL'Y 435 (1994).

12. "Common-carriage regulation, however, should not be viewed as a panacea. Just because it can be implemented lawfully does not mean it will work well. Indeed, we suspect that, for most [mass] media, a thoughtful policy analyst will reject the common carrier model." Thomas G. Krattenmaker & L.A. Powe, Jr., *Converging First Amendment Principles for Converging Communications Media*, 104 YALE L.J. 1719,1738 (1995).

13. Ironically, while the Telecommunications Act of 1996 expressly states the intention not to modify, impair, or supersede anything in the Communications Act of 1934, unless so provided in the law, its tinkering with the common carrier concept makes it more likely that application of the pure model will not be sustained. Telecommunications Act of 1996 § 601(c) (1), Pub. L. No. 104-104, 110 Stat. 56, 143, *reprinted in* Historical and Statutory Notes, 47 U.S.C.A. § 152(1996). *See also* Telecommunications Act of 1996 § 601(a) (1), Pub. L. No. 104-104, 110 Stat. 56, 143, *reprinted in* Historical and Statutory Notes, 47 U.S.C.A. § 152(1996) (applicability of consent decrees). The Act authorizes the FCC to forbear from enforcing any regulation or provision of the Act if the Commission determines that such enforcement is not necessary to guard against discrimination, to ensure just and reasonable services, to protect consumers, and to serve the public interest. 47 U.S.C.A. § 160(a) (1996).

14. *See, e.g.*, Information Infrastructure Task Force, National Information Infrastructure Agenda For Action (1993); Andrew D. Auerbach, *Mandatory Access and the Information Infrastructure*, 3 CommLaw Conspectus 1 (1995) (discussing existing and proposed mandatory access laws); Fred H. Cate, *The First Amendment and the National Information Infrastructure*, 30 Wake Forest L. Rev. 1 (1995).

However, the option of pursuing non-common carrier markets should not impede government agencies from engaging in ongoing common carrier regulation, because such entry may require structural and other regulatory safeguards to ensure that new ventures do not adversely impact a company's ongoing common carrier obligations.<sup>15</sup> In short, the freedom to enter new markets under a different regulatory status by itself should not exempt the enterprise from ongoing common carrier regulation in previously-served markets.

Government does need to refine the common carrier model to eliminate aspects of "command and control" that create substantial barriers to market entry and impede the ability of incumbents to compete. But in refining the model to emphasize flexibility and reduced regulation where possible, government should not render the core concept unsustainable for existing and prospective services still warranting basic common carrier regulation.

### III. COMMON CARRIER PUBLISHERS AND PRIVATE CARRIERS SEEKING COMMON CARRIER PRIVILEGES AND IMMUNITIES

Courts provide a key forum for determining whether and how changed circumstances support tinkering with the common carrier model. Recent cases include determinations of:

- (1) local exchange carriers' First Amendment rights to diversify into cable television and information services;<sup>16</sup>
- (2) the extent of liability applicable to on-line information services that have distributed allegedly defamatory<sup>17</sup> or copyright infringing material;<sup>18</sup>

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15. The Telecommunications Act of 1996 imposes such structural safeguards on a Bell Operating Company's entry into inter-LATA interexchange telecommunication services and equipment manufacturing previously prohibited by the Modification of Final Judgment. 47 U.S.C. § 271 (1996).

16. *Chesapeake & Potomac Tel. Co. of Virginia v. United States*, 830 F. Supp. 909 (E.D. Va. 1993), *aff'd* 42 F.3d 181 (4th Cir. 1994), *cert. granted*, 115 S. Ct. 2608, 132 L.Ed.2d 852 (1995); *US West, Inc. v. United States*, 855 F. Supp. 1184 (W.D. Wash. 1994), *aff'd*, 48 F.3d 1092 (9th Cir. 1994); *BellSouth Corp. v. United States*, 868 F. Supp. 1335 (N. D. Ala. 1994); *Ameritech Corp. v. U.S.*, 867 F. Supp. 721 (N.D. Ill. 1994). See Laurence H. Winer, *Telephone Companies Have First Amendment Rights Too: The Constitutional Case for Entry Into Cable*, 8 CARDOZO ARTS & ENT. L.J. 257 (1990).

17. See, e.g., *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991).

18. See, e.g., *Playboy Enterprises, Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993) (finding electronic bulletin board operator liable for allowing a user to infringe on trademarks and copyrights by posting images onto its bulletin board).

- (3) cable television operators' duties to carry broadcast television signals;<sup>19</sup> and
- (4) the statutory and regulatory duties imposed on common carriers that the FCC can eliminate<sup>20</sup> as part of its deregulatory campaign to achieve a level competitive playing field among common carriers subject to different degrees of rate regulation, and between regulated common and unregulated private carriers.<sup>21</sup>

Common carriers have recently acquired some of the rights and responsibilities of private carriers, including the easily invoked option of refusing carriage, and the duty to pre-qualify certain "candidates" for carriage to determine that they will not disseminate obscenity, make indecent content readily accessible to minors, or tarnish the reputation of the carrier.<sup>22</sup> Private carriers eagerly seek the immunity from civil and criminal liability historically accorded common carriers, but wish to avoid the accompanying regulatory oversight and duties to provide universal and non-discriminatory service.<sup>23</sup> The convergence of markets and technologies encourages both incumbents and newcomers to object to

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19. *See* *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994).

20. The Telecommunications Act of 1996 § 401, Pub. L. No. 104-104, 110 Stat. 56, 128 (1996), *codified at* 47 U.S.C. § 160 (1996) authorizes the FCC to forbear from applying any provision of the Communications Act and existing Commission regulations when it determines that such oversight is not necessary to ensure just and reasonable rates, consumer protection, and service in the public interest. Soon after enactment of the Telecommunications Act of 1996 the Commission initiated a proceeding designed to eliminate the tariff filing requirement for long distance common carriers providing interstate services. *See* Policy and Rules Concerning the Interstate, Interexchange Marketplace, 11 F.C.C.R. 9564 (1996) (implementation of section 254(g) of the Communications Act of 1934, as amended).

21. *In re* Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Therefor, 77 F.C.C.2d 308 (1979) (notice of inquiry and proposed rulemaking); First Report and Order, 85 F.C.C.2d 1 (1980); Second Report and Order, 91 F.C.C.2d 59 (1982), *recon. denied*, 93 F.C.C.2d 54 (1983); Third Report and Order, 48 Fed. Reg. 46,791 (1983); Fourth Report and Order, 95 F.C.C.2d 554 (1983), *rev'd and remanded sub. nom. American Tel. & Tel. Co. v. FCC*, 978 F.2d 727 (D.C. Cir. 1992); Fifth Report and Order, 98 F.C.C.2d 1191 (1984); Sixth Report and Order, 99 F.C.C.2d 1020 (1985), *rev'd and remanded sub nom. MCI Telecomms. Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985), *aff'd sub nom. MCI Telecomms. Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218 (1994).

22. *See* *Carlin Comms., Inc. v. Mountain States Tel. & Tel. Co.*, 827 F.2d 1291, 1293 (9th Cir. 1987) (affirming right of telephone company to terminate an adult programming telephone service as a matter of business judgment), *cert. denied*, 485 U.S. 1029 (1988). *See also* Ellen L. Nagel, *First Amendment Constraints on the Regulation of Telephone Pornography*, 55 U. CIN. L. REV. 237 (1986); Cindy L. Petersen, *The Congressional Response to the Supreme Court's Treatment of Dial-a-Porn*, 78 GEO. L.J. 2025 (1990).

23. *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135, 140 (S.D.N.Y. 1991) (on-line information services provider who assigned editing/moderating function of an electronic bulletin board to a third party not liable for allegedly defamatory material on electronic bulletin board).

any barriers to market entry.<sup>24</sup> Non-common carriers have whittled away at regulations that reserved markets to common carriers<sup>25</sup> while common carriers have pursued legislative<sup>26</sup> and judicial remedies<sup>27</sup> to eliminate any barriers to their market entry and provision of other types of telecommunication or information service even in markets where they provide common carrier services.<sup>28</sup> Market diversification by common carriers makes it difficult to sustain divergent regulatory regimes and interpretations of First

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24. See, e.g., *Chesapeake & Potomac Tel. Co. of Virginia v. United States*, 830 F. Supp. 909 (E.D. Va. 1993), *aff'd*, 42 F.3d 181 (4th Cir. 1994), *vacated and remanded*, 116 S. Ct. 1036, 134 L. Ed. 2d 46 (1996) (remanded to consider mootness).

25. See e.g., *In re Expanded Interconnection with Local Telephone Company Facilities*, 7 F.C.C.R. 7369 (1992) (order and notice of proposed rulemaking) (proposing to mandate physical co-location of private carrier facilities on Local Exchange Carrier premises to promote facilities-based competition for local switched services), *on recon.*, 8 F.C.C.R. 127 (1992), *on further recon.*, 8 F.C.C.R. 7341 (1993) (second reconsideration order), *vacated in part and remanded sub nom. Bell Atlantic, Inc. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994) (deeming physical co-location an unlawful taking of property), *on remand*, 9 F.C.C.R. 5154 (1994) (proposing virtual co-location). See also *In re Expanded Interconnection with Local Telephone Company Facilities, Transport Phase II*, 9 F.C.C.R. 2718 (1994); *In re Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Virtual Collocation for Special Access and Switched Transport, Phase II*, 10 F.C.C.R. 11116 (1995); *In re Transport Rate Structure and Pricing*, 7 F.C.C.R. 7006 (1992) (order and further notice of proposed rulemaking) (transport is a component of interstate switched access, which LECs provide to enable interexchange carriers (IXCs) and other customers to originate and terminate interstate switched telecommunications traffic and where transport constitutes the local transmission between customer points of presence (POPs) and LEC end offices, where local switching occurs), *on further recon.*, 8 F.C.C.R. 5370 (1993) (first reconsideration order), *on further recon.*, 8 F.C.C.R. 6233 (1993) (second reconsideration order), *on further recon.*, FCC 94-325 (released Dec. 22, 1994) (third reconsideration order and notice of proposed rulemaking).

26. To appreciate the extent to which Congress has considered and previously failed to enact telecommunication legislation see Telecommunications Act of 1996, S. REP. NO. 104-230, pts. 1-2, (February 1, 1996); H.R. 1555; H.R. REP. NO. 104-204, pts. 1-4 (July 24, 1996); 104-223 (August 1, 1995); S. 652; S. REP. NO. 104-23 (March 30, 1995); H.R. 3626; H.R. REP. NO. 103-559, pts. 1-2 (June 24, 1994); HR 3626; H.R. REP. NO. 103-560 (June 24, 1994); S. 1822; S. REP. NO. 103-367, pts. 1-2 (September 14, 1994).

27. See, e.g., Information Infrastructure Task Force, National Information Infrastructure Agenda For Action (1993); Andrew D. Auerbach, *Mandatory Access and the Information Infrastructure*, 3 CommLaw Conspectus 1 (1995) (discussing existing and proposed mandatory access laws); Fred H. Cate, *The First Amendment and the National Information Infrastructure*, 30 Wake Forest L. Rev. 1 (1995)

28. The Cable Communications Policy Act of 1984 § 613(b) (1) makes it unlawful for a common carrier subject to Title II of the Communications Act to provide video programming directly to subscribers in its telephone service area, either directly or indirectly through an affiliate owned by, operated by, controlled by, or under common control with the common carrier. Pub. L. No. 98-549, 98 Stat. 2780 (1984) *codified at* 47 U.S.C. A. § 533(b) (1) (1992) *implemented at* 47 C.F.R. § 63.54(b). The 1984 Cable Act prevents LECs and their affiliates to provide video programming directly to subscribers in their telephone service area. Because the cross-ownership prohibition addresses programming not ownership, a telephone company may acquire a cable television company that operates within the telephone company's service area, provided it does not provide the programming. See, e.g., *In re Chesapeake & Potomac Tel. Co.*, 57 Rad. Reg. 2d (P & F) 1003 (1985) (approving construction by a telephone company of facilities to be used for cable television by an unaffiliated programmer).

Amendment freedoms dependent on the medium involved.<sup>29</sup> Diversification also may prevent regulators from applying the common carrier model to new technologies or services that warrant such government involvement, because they involve a novel definition of basic telecommunications. Despite the clamor for deregulation and open market entry, there is little support for abandoning regulation of basic telecommunication services involving the common carrier transmission of voice, data, and video programming generated either by unaffiliated customers or corporate affiliates.

A key challenge in telecommunication regulation lies in balancing the need to retain essential common carrier regulation (whether provided by a monopolist or under competitive conditions) with the need to adjust to changing circumstances (e.g., evolving competition and technological innovations). Incumbent common carriers claim that a “level competitive playing field” can exist only if regulators abandon common carrier obligations (e.g., filing tariffs),<sup>30</sup> or reclassify some functions into private carriage (e.g., substituting private contracts for public tariffs).<sup>31</sup> These carriers have bolstered their economic and regulatory rationale with First Amendment arguments that commercial speech rights prohibit government foreclosure of market access.<sup>32</sup>

By emphasizing First Amendment concerns, these advocates want government decision-makers to view cross-ownership restrictions (e.g., the ban on the common ownership of cable and telephone companies in

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29. See Robert Corn-Revere, *New Technology and the First Amendment: Breaking the Cycle of Repression*, 17 HASTINGS COMM. & ENT. L.J. 247 (1994).

30. On two separate occasions, an appellate court has ruled that the FCC could not accord non-dominant carriers the option of refraining from filing tariffs. See *American Tel. & Tel. Co. v. FCC*, 978 F.2d 727 (D.C. Cir. 1992) and the mandatory detariffing of services; *MCI Telecomms. Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985), *aff'd sub nom.* *MCI Telecomms. Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218 (1994). However, the Telecommunications Act of 1996 makes it possible for the FCC unilaterally to forbear from applying statutory provisions even in the absence of Congressional action to repeal such provisions. See *supra* note 20.

31. A carrier cannot “vitiate its common carrier status merely by entering into private contractual relationships with its customers.” *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994). On the other hand, “it does not make sense that the filing of the terms of any contract—no matter how customer tailored—with the FCC, without more, reflects a conscious decision to offer the service to all takers on a common carrier basis.” *Id.*

32. Entry by telephone companies into cable television and other information service markets supports the “diversity principle” of the First Amendment, i.e., that a multiplicity of speakers will maximize freedom of expression. See *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (First Amendment goal is to ensure “the widest possible dissemination of information from diverse and antagonistic sources”). But speaker and publisher freedoms that permit telephone companies to deny access, which they could not do under the common carrier model, vitiates diversity unless robust competition exists and the telephone company has no bottleneck control. “[A]ssuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment.” *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994).



the same geographical area and other limits on market access) as an infringement of the right to free and diverse speech. They assume the absence of bottlenecks, essential facilities, and the lack of centralized gatekeepers with the market power to affect the price or supply of service. If these things do exist and impede competition or restrict the marketplace of ideas, then content-neutral, narrowly drawn time, place, and manner restrictions remain legitimate conditions. On the other hand, the government needs to recognize that private carriers welcome any opportunity to capitalize on an artificial competitive advantage created by the refusal of regulators, legislators, and courts to modify traditional common carrier burdens placed only on incumbent carriers.

#### IV. THE CONVENTIONAL VIEW OF LEC COMMON CARRIAGE

Much of the existing LEC infrastructure provides the functionality needed to access either basic common carrier and enhanced, private carrier services such as cable television and on-line information services. LECs provide essential “first and last mile” services that link customers (at their businesses or residences) with companies providing long distance and information services. While proliferating access options (e.g., satellite, wireless, and wireline terrestrial facilities) may abate or eliminate bottleneck control, the vast majority of business and residential subscribers to information and entertainment services currently rely on a limited set of largely one-way channels for access to the mass media,<sup>33</sup> and a single twisted wire pair (provided exclusively by an LEC) for access to two-way voice and data services.

The AT&T divestiture decree established a market demarcation between local exchange and interexchange services.<sup>34</sup> It also established a distinction between (1) permissible basic exchange access and exchange telecommunications,<sup>35</sup> and (2) other lines of business, like information

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33. “The decentralized, open-access model presents a sharp contrast to the centralized, one-way channel model that typifies most mass media today.” Jerry Berman & Daniel J. Weitzner, *Abundance and User Control: Renewing the Democratic Heart of the First Amendment in the Age of Interactive Media*, 104 *YALE L.J.* 1619, 1623 (1995).

34. *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 226–234 (D.D.C. 1982), *cert. denied*, 460 U.S. 1001 (D.D.C. 1982). This consent decree, a modification of final judgment (MFJ), settled an antitrust suit brought by the federal government in 1974 alleging an unlawful combination within the Bell System resulting in the monopolization of both long distance telephone service and the manufacture of telecommunications equipment.

35. The MFJ specified that the core lines of business of the divested Bell Operating Companies (BOCs) to be exchange telecommunications and exchange access functions, i.e., local and long distance services within a geographical service region known as a Local Access and Transport Area (LATA). Section IV(G) of the MFJ defines a LATA as “one or more contiguous local exchange areas serving common social, economic, and other purposes, even where

and interexchange services.<sup>36</sup> The FCC's *Computer Inquiries* have maintained a similar regulatory distinction between basic services (which LECs provide on a common carrier basis) and enhanced services (provided by LECs and competitors alike on a private carrier basis). Both the Modification of Final Judgment (MFJ) and the FCC's *Computer Inquiries* assume that LECs will operate as common carriers, providing (a) essential building blocks for the enhancement of plain vanilla transmission lines, and (b) access to and from users who may have no other viable access option. Presumably, regulatory oversight can ensure both the continuing non-discriminatory availability of basic transmission capacity and a level competitive playing field between unaffiliated private carriers and corporate affiliates securing basic transport.

The opportunity to provide enhanced services (e.g., cable television and on-line information services) create the incentive for LECs to upgrade the telecommunication infrastructure's ability to support broadband, digital transmission streams. However, some industry observers have expressed concern that in the absence of rigorous common carrier regulatory oversight, LECs may ignore the primary task of improving ubiquitous, low-priced Plain Old Telephone Service (POTS), and instead concentrate on higher margin, Pretty Advanced New Stuff (PANS) targeted to "redlined" neighborhoods likely to generate a high subscription rate in view of ample discretionary income and prior purchases of required ancillary equipment like personal computers and modems.<sup>37</sup> When providing PANS, LECs typically do not incur the traditional common carrier duties of:

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such configuration transcends municipal or other local governmental boundaries." *Id.* at 229. The 163 LATAs created by the MFJ can be as large as a state, e.g., New Mexico, but typically represent a portion of one state. Section II(A) of the MFJ requires the BOCs to provide exchange access "on an unbundled, tariffed basis that is equal in type, quality, and price to that provided to AT&T." *Id.* at 227.

36. In *United States v. Western Elec. Co.*, 673 F. Supp. 525 (D.D.C. 1987), Judge Greene held that the RBOCs had failed to make an affirmative showing that they would lack ability to use their monopoly power anticompetitively, when providing information services, because they retained bottleneck power over the local loop. He declined to amend that decision, 690 F. Supp. 22 (D.D.C. 1987), but subsequently allowed the RBOCs to engage in transmission of information, including voice storage and retrieval, but not in the generation of content. *United States v. Western Elec. Co.*, 714 F. Supp. 1 (D.D.C. 1988). On appeal, the D.C. Circuit affirmed in part, but reversed the lower court's decision to use the more burdensome Line of Business waiver standard established in Section VII(c) of the MFJ instead of the more liberal standard established in Section VII applicable when no party to the MFJ opposes a waiver grant. *United States v. Western Elec. Co.*, 900 F.2d 283 (D.C. Cir. 1990). On remand, Judge Greene held that while the RBOCs still possessed market power information services, within the meaning of the antitrust laws, he had to apply the more liberal waiver standard as mandated by the Court of Appeals. *United States v. Western Elec. Co.*, 767 F. Supp. 308 (D.D.C. 1991).

37. In May 1994, a coalition of five consumer organizations filed two separate petitions asking the FCC to: (1) ensure that video dialtone facilities are deployed in a nondiscriminatory

- (1) providing non-discriminatory, universal access; and
- (2) operating as a quasi-public enterprise offering “transparent” capacity, i.e., carriage of content selected by the subscriber.<sup>38</sup>

## V. DIVERGING ROLES AND MISSIONS

A variety of new economic and legal rationales allow common carriers to avoid providing non-discriminatory access to some services. The FCC can simply decide that a particular activity constitutes a non-common carrier activity, even if it involves signal transport (e.g., enhanced services) or provides ancillary functions (e.g., LEC billing and collecting payment for services provided by an unaffiliated company that also may use LEC common carrier services). Or a court may consider transport services performed by a common carrier something other than common carriage. Additionally, the Telecommunications Act of 1996 provides a powerful deregulatory option allowing the FCC to “forbear from applying any regulation or any provision of this Act” if the

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manner and that services are made available universally, and (2) commence rulemaking to modify the Section 214 application process to ensure equitable introduction of video dialtone and public involvement in the application process. The coalition consists of the Center for Media Education, Consumer Federation of America, Office of Communication of the United Church of Christ, National Association for the Advancement of Colored People, and the National Council of La Raza. *See* Petition for Relief from Unjust and Unreasonable Discrimination in the Deployment of Video Dialtone Facilities (filed May 23, 1994); Petition for Rulemaking to Adapt the Section 214 Process to the Construction of Video Dialtone Facilities (filed May 23, 1994). “In the petition for relief, the Petitioners again allege that there are indications of ‘electronic redlining’ in the construction applications of several Regional Bell Operating Companies (RBOCs). The Petitioners state that the RBOCs propose to bypass many lower income and/or minority communities in their initial deployment of video dialtone service. The Petitioners argue that this is a discriminatory practice inconsistent with the goal of universal service as established in the Communications Act.” Pleading Cycle Established for Comments on Petition for Rulemaking and Petition for Relief in Section 214 Video Dialtone Application Process, 9 F.C.C.R. 3036 (June 13, 1994).

38. In *National Assoc. of Regulatory Util. Comm’r v. FCC*, 525 F.2d 630 (D.C. Cir. 1976), *cert. denied*, 425 U.S. 992 (1976), the Court of Appeals for the District of Columbia affirmed an FCC decision to refrain from applying common carrier status to a new type of terrestrial mobile radio service. The FCC chose to classify Specialized Mobile Radio Service (SMRS) as non-common carriage because the operators would enter the marketplace without a captive subscriber base, i.e., users having no option but to use SMRS, and no market power, i.e., the ability to affect the price or supply of land mobile radio services.

The court upheld the Commission’s non-common carrier determination because it could find no “substantial likelihood that SMRS will hold themselves out to serve indifferently those who seek to avail themselves of their particular services.” *Id.* at 642. A telecommunications common carrier must “offer indiscriminate service to whatever public its service may legally and practically be of use.” *Id.* The court noted that SMRS operators typically offer service on a medium-to-long term contractual basis and concluded that the FCC acted reasonably in classifying SMRS as non-common carriage.

Commission declares that (a) enforcement is unnecessary to ensure just and reasonable rates and practices, (b) enforcement of such regulation is unnecessary to protect consumers, and (c) forbearance is consistent with the public interest.<sup>39</sup>

In *Carlin Communications, Inc. v. Mountain States Telephone and Telegraph Co.*, the Ninth Circuit concluded that an LEC could refuse to carry all sexually-oriented audio programming, regardless of whether such programming constituted obscenity, or whether the carrier could provide transport services without liability.<sup>40</sup> The court drew a parallel to the adjudicated right of telephone companies operating as non-common carrier publishers of Yellow Page directories to refuse to carry a particular listing.<sup>41</sup> The court could draw such a parallel only if it equated Yellow Page advertising (a non-common carrier activity) with the transport of messages from one point to another (traditionally considered common carriage). The court made such a link by refusing to define the ability of local exchange telephone companies to deliver the same message simultaneously to thousands of subscribers as common carriage, stating:

[W]e question whether state public utility law in its traditional form makes sense as applied to Mountain Bell's 976 network. The technology of that network differs fundamentally from that of basic phone service. As pointed out above, individuals do not speak to each other on the 976 lines. Instead, "over 7,900 callers can be connected simultaneously to the same recorded message." Under these circumstances the telephone is serving as a medium by which Carlin broadcasts its messages. The phone company resembles less a common carrier than it does a small radio station.<sup>42</sup>

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39. Telecommunications Act of 1996 § 401, 47 U.S.C. 160 (1996). Soon after enactment of the Act, the FCC proposed to eliminate the tariff filing requirement for non-dominant inter-exchange carriers. See *In re Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61, Second Report and Order, FCC 96-424, 1996 WL 633345 (F.C.C.) (rel. October 31, 1996).

40. *Carlin Comms., Inc. v. Mountain States Tel. & Tel. Co.*, 827 F.2d 1291, 1293-94 (9th Cir. 1987).

41. *Id.* at 1294 (analogizing decision in *Dollar A Day Rent A Car Systems, Inc. v. Mountain States Telephone & Telegraph Co.*, 526 P.2d 1068, 1071 (1974), which found that refusal of a telephone company Yellow Pages subsidiary to publish a listing containing price information as non-discriminatory).

42. *Carlin Comms. v. Mountain States*, 827 F.2d at 1294 (citation omitted). See also *Carlin Comm., Inc. v. Southern Bell Tel. & Tel. Co.*, 802 F.2d 1352, 1357-61 (11th Cir. 1986) (permitting tariff with content restrictions on material qualifying for First Amendment protection as legitimate business judgment); *Network Comms. v. Michigan Bell Tel. Co.*, 703 F. Supp. 1267, 1274 (E.D. Mich. 1989) (affirming telephone company decision to cut off billing and collection services for a dial-a-porn operator).

In an increasing number of scenarios, common carriers select where to provide service and whom to serve on variable, market-based terms and conditions.<sup>43</sup> Government officials have not fully come to grips with the consequences of having a business enterprise that has historically been regulated as a common carrier also operating in some market segments under a significantly different regulatory and legal regime. Where content involves obscenity, indecency, libel, defamation, or otherwise might render the carrier liable for damages or fines, common carriers can assume the role of electronic publishers free to determine the worthiness of material for carriage. Some courts have extended the non-carrier, publisher status to carriers who refuse to provide tariffed transport services to certain types of service providers, based on the nature of the content. If the carrier can characterize the service as public, even though content originates at one point and disseminates to many in a closed network environment, then it can refuse carriage on the grounds that providing service would adversely affect its business.

In *Carlin Communications*, the Ninth Circuit endorsed the view that a common carrier can avoid traditional common carrier responsibilities, even for tariffed services, if it can characterize the service as public, rather than private communications:

Once the telephone company becomes a medium for public rather than private communication, the fit of traditional common carrier law becomes much less snug. Arizona may, of course, decide to make the phone company operate the 976 network as a content-neutral public forum open to any and all speakers. We are very reluctant, however, to infer such a principle from traditional public utility law.<sup>44</sup>

Professor Jerome A. Barron argues that “[b]usiness judgment in these cases sounds suspiciously like editorial judgment,”<sup>45</sup> a common right of broadcasters and newspaper publishers, but one that does not accord with the traditional non-discrimination, neutral conduit definition

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43. See *In re Competition in the Interstate Interexchange Marketplace*, 6 F.C.C.R. 5880, 5906–08 (1991), *on recon.*, 6 F.C.C.R. 7569 (1991), *further recon.*, 7 F.C.C.R. 2677 (1992), *further recon.*, 8 F.C.C.R. 2659 (1993), *further recon.*, 10 F.C.C.R. 4562 (1995). “Contract carriage would further benefit consumers by unleashing competitive forces for business services to the maximum extent possible. By permitting customers to seek competitive bids from all carriers in the long-distance market—and allowing AT&T to offer customers the same types of contract deals that its competitors are already offering—contract carriage will expand customers’ choices.” *Id.* at ¶ 105.

44. *Carlin Comms. v. Mountain States*, 827 F.2d at 1294–95 (citation omitted).

45. Jerome A. Barron, *The Telco, the Common Carrier Model and the First Amendment—The “Dial-A-Porn” Precedent*, 19 RUTGERS COMPUTER & TECH. L.J. 371, 386 (1993).

of common carriage.<sup>46</sup> Professor Barron perceives “a disturbing willingness to grant exemptions from the common carrier principle when that principle proves troublesome to the carrier”—particularly in light of carriers’ direct involvement in information and video services.”<sup>47</sup>

Can LECs operate under different regulatory regimes without abusing their increasingly ample discretion whether to accept common carrier responsibilities? Will those common carriers qualified to also operate as private carriers refrain from commingling costs or misallocating investments for anticompetitive and predatory purposes, particularly in view of the reluctance of the FCC to impose structural separation between basic and enhanced corporate affiliates?<sup>48</sup> The risk and

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46. The court in *Carlin Comms. v. Mountain States* “is really saying here that the telco can censor an information service even though a state statute could not. The reason the state could not effect such censorship is that it would violate the First Amendment. But if one views the telco as a private actor, then a telco’s decision to prohibit the transmission of a certain category of messages—in this case, Carlin’s ‘adult entertainment service’—is simply an editorial decision such as broadcasters and newspapers make all the time.” *Id.* at 385, n.44. Professor Barron rejects this analysis on the view that it might be possible for the telephone company “to become the dominant information provider—overtaking broadcasting, cable broadcasting and newspapers it would have more power than government” to affect speech, yet freely able to do so. *Id.* Most courts have rejected the view that telephone company decision making on carriage represents state action. *See, e.g.,* *Dial Info. Serv. Corp. v. Thornburgh*, 938 F.2d 1535, 1543 (2d Cir. 1991), *cert. denied*, 502 U.S. 972 (1992) (finding no government compulsion whether to bill or not bill for dial-a-porn services). Such a finding would make the refusal to carry or bill for such material more difficult, since the First Amendment analysis would be undertaken with closer scrutiny. *See* *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974) (attributing action of a private company to the state when the company exercises powers traditionally and exclusively reserved to the state). Censorship, as opposed to editing and business decision making, would constitute state action. *See* *Carlin Comms., Inc. v. South Cent. Bell Tel. Co.*, 461 So.2d 1208, 1214 (La. Ct. App. 1984) (finding dial-a-porn messages deemed obscene may be censored by the telco to serve the traditional state concern about minors’ exposure to obscenity).

47. Barron, *supra* note 46, at 390. “If the telcos as information providers are too quickly suited with First Amendment armor and labelled [sic] speakers or editors, they can too easily shed the non-discriminatory access obligations of the common carrier. The end result could be that the regional telco will not only control who enters the conduit but also what can be said on it.” *Id.* at 403.

48. The FCC first attempted to create a bright line separation between enhanced service functions, which are unregulated and subject to robust competition, and basic transport capacity, which is regulated and not robustly competitive. *See In re* Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry), 77 F.C.C.2d 384 (final decision), *mod. on recon.* 84 F.C.C.2d 50 (1980), *further mod.*, 88 F.C.C.2d 512 (1981), *aff’d sub nom.*, *Computer & Comms. Ind. Ass’n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983). However, the FCC subsequently decided that structural separation imposed unnecessary costs and burdens. It opted for non-structural safeguards like account auditing and the complaint process. *See* Third Computer Inquiry, Report and Order, 104 F.C.C.2d 958 (1986), *mod. on recon.*, 2 F.C.C.R. 3035 (1987), *further recon.*, 3 F.C.C.R. 1135 (1988); Phase II, CC Docket No. 85-229, Report and Order, 2 F.C.C.R. 3072 (1987), *recon. denied*, 3 F.C.C.R. 1150 (1988), *rev’d in part and remanded sub nom.*, *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990), *on remand*, 6 F.C.C.R. 7571 (1991), *rev’d in part and*

consequences of anticompetitive or even well-intentioned, but erroneous cost allocation grows more acute as LECs aggressively diversify. In the quest for new profit centers and market access opportunities, the LECs have successfully invoked a First Amendment publishers' right to access markets and to use editorial discretion in determining how to serve them profitably.

#### VI. REJECTING THE SELF-FULFILLING PROPHECY OF MARKET CONTESTABILITY AND VANISHING BOTTLENECKS

Implicit in the willingness of courts and legislators to endorse non-common carriage in lieu of common carriage is the assumption that competition and low barriers to market entry will ensure ample capacity and a variety of speakers. Yet in the case of cable television, a non-common carrier function,<sup>49</sup> the Supreme Court rejected the view that cable television operators lack bottleneck or gatekeeper control. The Court held that quasi-common carrier, economic regulation was essential to safeguard the ongoing viability of broadcast television.<sup>50</sup> Even as it acknowledged that cable television operators have legitimate First Amendment rights, including editorial discretion in program selection and channel assignment, the Court endorsed the mandatory carriage of broadcast television signals to ensure a degree of program diversity and the opportunity for television broadcasters to reach audiences increasingly reliant on cable television bottleneck delivery:

When an individual subscribes to cable, the physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home. Hence, simply by virtue of its ownership of the essential pathway for cable speech, a cable operator can prevent its subscribers from obtaining access to programming it chooses to exclude. A cable operator, unlike speakers

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*remanded sub nom.*, California v. FCC, 39 F.3d 919 (9th Cir. 1994). See also Robert M. Frieden, *The Third Computer Inquiry: A Deregulatory Dilemma*, 38 FED. COMMS. L.J. 383 (1987); Robert M. Frieden, *The Computer Inquiries: Mapping the Communications/Information Processing Terrain*, 33 FED. COMMS. L.J. 55 (1981).

49. *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1051 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979).

50. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994).

in other media, can thus silence the voice of competing speakers with a mere flick of the switch.<sup>51</sup>

## VII. PROVIDING SOME ASPECTS OF COMMON CARRIER INSULATION FROM LIABILITY TO PRIVATE CARRIERS

The Turner case emphasized a functional analysis of market access, rather than simply concluding that once having qualified for non-common carrier status, cable television operators cannot be required to perform any function analogous to common carriage. By extension, such an analysis might confer some of the liability exculpation benefits of common carriage in instances where private carriers operate in a manner analogous to common carriage. Such flexible and incremental responses to changed circumstances, like inchoate competition and technological innovations, maintain the viability of the core models.

For example, an incremental approach respecting the common/private carrier dichotomy could support the ability of electronic bulletin boards to provide a quasi-public forum for the expression of views on a two-way interactive basis, with greater diversity and lower cost than what is currently available.<sup>52</sup> Electronic bulletin board systems operators and commercial information service providers like CompuServe, Prodigy and America On-Line have a keen interest in limiting or eliminating liability for what they carry. By serving as an electronic forum, library, newsstand, or distributor,<sup>53</sup> these companies can avoid having to monitor and censor the content of messages carried over their networks, thereby creating an environment more conducive to robust debate and generous contributions to the marketplace of ideas.<sup>54</sup> They need not be reclassified as common carriers or vested with the rights and

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51. 114 S. Ct. at 2466.

52. See Edward J. Naughton, *Is Cyberspace a Public Forum? Computer Bulletin Boards, Free Speech and State Action*, 81 GEO. L.J. 409 (1992); Patrick O'Neill, *Optimizing and Restricting the Flow of Information: Remodeling the First Amendment for a Convergent World*, 55 U. PITT. L. REV. 1057 (1994); Eric Schlachter, *Cyberspace, the Free Market and the Free Marketplace of Ideas: Recognizing Legal Differences in Computer Bulletin Board Functions*, 16 HASTINGS COMM. & ENT. L.J. 87 (1993); Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805 (1995).

53. While analogizing an on-line, bulletin board to an electronic publisher, a New York court also characterized such a service as "the electronic equivalent of a talk show . . ." *Stern v. Delphi Internet Serv. Corp.*, 626 N.Y.S.2d 694, 790 (Sup. Ct. 1995) (considering liability for use of radio personality's photograph on an electronic bulletin board).

54. For a thoughtful comparison of the Madisonian view, i.e., promoting public deliberation, and marketplace of ideas free speech traditions as applied to new information technologies, see Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 YALE L.J. 1757, 1759-60 (1995).



responsibilities properly conferred on only bona fide common carriers to avoid the risk of liability for defamation or serving as unintentional conduits for the transmission of obscenity, indecency, or copyrighted material.<sup>55</sup>

In *Cubby, Inc. v. CompuServe, Inc.*, a court gladly exempted an on-line information services provider from liability by choosing a “hands-off” approach to content:

CompuServe has no more editorial control over such a publication than does a public library, book store, or newsstand, and it would be no more feasible for CompuServe to examine every publication it carries for potentially defamatory statements than it would be for any distributor to do so . . . .

Technology is rapidly transforming the information industry. A computerized database is the functional equivalent of a more traditional news vendor . . . .<sup>56</sup>

Such immunity did not accrue to a bulletin-board operator who chose to monitor the content of messages, thereby moving him closer to the private carrier role of editor. In *Stratton Oakmont, Inc. v. Prodigy Services Co.*, a New York court held that the Prodigy commercial on-line information services company rendered itself liable for defamatory statements carried over one of its electronic bulletin boards, because it actively assumed the task of monitoring the messages and held itself out as exercising editorial control:

By actively utilizing technology and manpower to delete notes from its computer bulletin boards on the basis of offensiveness and “bad taste,” for example, Prodigy is clearly making decisions as to content and such decisions constitute editorial control. . . . Based on the foregoing, this Court is compelled to conclude that for the purposes of Plaintiffs’ claims in this action, Prodigy is a publisher rather than a distributor. . . . Prodigy’s conscious choice, to gain the benefits of editorial control, has opened it up to a greater liability than CompuServe and other computer networks that make no such choice.<sup>57</sup>

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55. See Edward V. Di Lello, *Functional Equivalency and Its Application to Freedom of Speech on Computer Bulletin Boards*, 26 COLOM. J.L. & SOC. PROBS. 199 (1993).

56. *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 140 (S.D.N.Y. 1991) (finding no liability for allegedly defamatory material where on-line information services provider assigned editing/moderating control of an electronic bulletin board to a third party).

57. *Stratton Oakmont, Inc. v. Prodigy Serv. Co.*, 1995 WL 323710 at \*4 (N.Y. Sup. Ct. 1995) (citations omitted).

### VIII. THE TELECOMMUNICATIONS ACT OF 1996

Congress has come to the rescue of private carriers in search of quasi-common carrier insulation from liability while at the same time retaining its private carrier/publisher status. The Telecommunications Act of 1996 provides legal protection for "Good Samaritan" blocking and screening of offensive material, defined as "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."<sup>58</sup>

Congressional legislation has the ironic impact of providing the same kind of insulation from liability for modern day private carriers who monitor, censor, and restrict the flow of messages that was available when common carriers of prior years operated as neutral, transparent conduits. Prior legislation designed to protect minors from indecent programming requires both modern day common carriers and their private carrier competitors to exercise a degree of editorial control and content review.<sup>59</sup>

### IX. A NEW QUASI-COMMON CARRIER OPTION FOR CABLE TELEVISION

The Telecommunications Act of 1996 provides local exchange carriers with three options when distributing video programming: the local carrier can be (1) a cable television franchisee; 2) a common carrier; or

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58. Telecommunications Act of 1996 § 509(c), 47 U.S.C. § 230(c) (1996). In *Shea on Behalf of American Report v. Reno*, 930 F.Supp. 916, 65 U.S.L.W. 2095 (S.D.N.Y. 1996) the publisher of an electronic newspaper raised First Amendment challenges to the Communications Decency Act section that criminalizes use of interactive computer service to send or display patently offensive materials. The court granted a preliminary injunction holding that the section would be given strict scrutiny on a challenge that it was overbroad and that a complete ban on constitutionally protected indecent communications between adults was unconstitutional. *See also* *American Civil Liberties Union v. Reno*, 929 F.Supp. 824, 64 U.S.L.W. 2794 (E.D.Pa. 1996) (Granting preliminary injunction on enforcement of Communications Decency Act provisions, 47 U.S.C. §§ 223(a), 223(d) (1996), prohibiting transmission of obscene or indecent material by means of a telecommunications device).

59. *See* 47 U.S.C. § 223 (1994) (prohibiting the use of a telephone to transmit obscene communications, and indecent communications to persons under the age of 18 or to persons over 18 without that person's consent); *implemented in* Regulations Concerning Indecent Communication By Telephone, 5 F.C.C.R. 4926 (1990), *on partial recon.*, 10 F.C.C.R. 665 (1994) (clarifying that Section 223 applies to LECs who may not have a contractual relationship with a provider of indecent programming and that intermediary interexchange carriers have a duty to inform LECs providing billing and collection services of the nature of such calls).

3) a quasi-common carrier provider of an “Open Video System.”<sup>60</sup> When providing an Open Video System (“OVS”), the LEC must operate somewhat like a common carrier: it must not discriminate unjustly or unreasonably, and it must endeavor to make two-thirds of its capacity available to third parties when demand outstrips capacity. However, it can avoid many non-common carrier cable television regulations, including the need to obtain local franchises or comply with rate regulation.

## X. FLAWS IN HYBRID MODELS

Government tinkering with the common carrier model has made it all but impossible to apply core principles. This presents two significant problems:

- (1) the telecommunication marketplace is not so competitive that the common carrier model should no longer apply to basic services like local and long distance services for residences and small businesses; and
- (2) the FCC and reviewing courts are obligated to apply the common carrier model, absent liberalization of the responsibilities of common carriers set out in Title II of the Communications Act of 1934 (which the Congress did not undertake in its massive rewrite in 1996).<sup>61</sup>

Common carriers do have First Amendment rights<sup>62</sup> and opportunities to operate in non-common carrier markets. However, such market

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60. Telecommunications Act of 1996 § 653, 47 U.S.C. § 573 (1996).

61. This statement results from an assumption that Congress must expressly repeal a provision of the Communications Act of 1934, as amended, to render such provision unenforceable. Section 401 of the Telecommunications Act of 1996 appears to authorize the FCC to refrain from enforcing a statutory provision, even in the absence of Congressional action to repeal the specific provision. Telecommunications Act of 1996 § 401, 47 U.S.C. § 160 (1996). Such latitude would afford the Commission the option of unilaterally eliminating, completely or partially, the fundamental common carrier requirements imposed by Title II of the Communications Act. Such carte blanche deregulatory opportunities typically require legislative action. Indeed, much of what Congress did affecting common carriers in the Telecommunications Act of 1996 specifies the rights and responsibilities of common carriers, e.g., what constitutes full and fair interconnection. *See, e.g.*, Communications Act of 1934 § 251, 47 U.S.C. § 251 (1996).

62. *See, e.g.*, *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm.*, 447 U.S. 557 (1980) (holding that monopoly common carrier status does not bar public utility from exercising its First Amendment protected commercial speech rights to advertise); *Pacific Gas & Elec. Co. v. Public Serv. Comm.*, 475 U.S. 1 (1986) (holding that public utility not obligated to provide space in its billing envelope for a citizen’s group newsletter). *See also* Angela J. Campbell,

diversification cannot diminish their ability to perform common carrier duties, or of regulatory agencies to perform legislatively mandated duties. For example, Comsat Corporation, the sole United States investor in the world's primary satellite cooperative, the International Telecommunications Satellite Organization (Intelsat), can pursue non-common carrier business ventures only to the extent that they do not impede its ability to meet responsibilities<sup>63</sup> established by the Communications Satellite Act of 1962.<sup>64</sup>

We believe that Comsat should not be foreclosed as a matter of policy from applying its corporate technology and expertise to the development of new lines of business which will result in public benefit. . . . However, notwithstanding prospective public benefits, Comsat's involvement in diversified lines of business raises significant public policy problems involving Comsat's continued ability to carry out its original statutory mission and fulfill the obligations and responsibilities associated with this mission. These problems are reflected within the four areas of concern which we have discussed in detail: (1) the scope of Comsat's authority as it relates to non-INTELSAT/INMARSAT lines of business; (2) conflict of interest and other related problems resulting from involvement in such activities; (3) competitive advantages in non-INTELSAT/INMARSAT markets, flowing from Comsat's unique status as the U.S. Signatory in INTELSAT and INMARSAT; and, (4) cross-

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*Publish or Carriage: Approaches to Analyzing the First Amendment Rights of Telephone Companies*, 70 N.C. L. REV. 1071 (1992).

63. See *In re Comsat Study—Implementation of Section 505 of the International Maritime Satellite Telecommunications Act*, 77 F.C.C.2d 564 (1980) [hereinafter *Comsat Study*]. "We concluded in the *Comsat Study* that the Communications Satellite Act of 1962 permits Comsat to engage in activities which are not inconsistent with its statutory mission. We stated that Comsat should not be foreclosed from applying its corporate technology and expertise to the development of new lines of business which would likely contribute to the overall development of satellite technology and which would be in the public interest. However, we found that Comsat's involvement in diversified lines of business raised significant public policy problems. These problems included conflicts of interest resulting from Comsat's involvement in both jurisdictional and nonjurisdictional activities, competitive advantages in nonjurisdictional markets flowing from Comsat's unique status as the U.S. Signatory to INTELSAT and INMARSAT, and potential cross-subsidization resulting from the misallocation of jurisdictional and nonjurisdictional costs." *Changes in the Corporate Structure and Operations of the Communications Satellite Corporation*, CC Docket 80-634, Second Mem. Op. & Ord., 97 F.C.C.2d 145 (1984) (requiring formation of separate subsidiaries when pursuing nonjurisdictional markets), *on recon.*, 99 F.C.C.2d 1040 (1984); see also First Mem. Op. & Ord., 90 F.C.C.2d 1159 (1982).

64. 47 U.S.C. §§ 701-744 (1995).

subsidization and related problems resulting from the misallocation of common costs.<sup>65</sup>

Comsat can pursue such diverse non common carrier businesses as professional sports, hotel room video programming, and satellite equipment manufacturing, provided the government agency with regulatory authority can maintain effective oversight of Comsat's core, common carrier business lines.

Regulatory agencies and Congress typically resort to structural separation between corporate subsidiaries involved in core common carrier and non-common carrier ventures.<sup>66</sup> Such segregation establishes a "bright line" of demarcation between common carrier and non-common carrier activities. However, the FCC has grown reluctant to use structural safeguards because of the real or perceived loss of benefits from economies of scale provided by a single, consolidated company.<sup>67</sup>

The FCC has proceeded with aggressive deregulation of common carriers without regard to maintaining the common/private carrier distinction. On several occasions, courts have rejected these FCC initiatives as unilaterally abrogating statutorily mandated common carrier duties. In a series of *Competitive Carrier* proceedings commencing in 1979<sup>68</sup> the Commission sought to forbear from regulating an increasingly large category of non-dominant carriers (i.e., carriers "not possessing the market power necessary to sustain prices either unreasonably above or below costs").<sup>69</sup> The Commission's rationale for substantial deregulation was that a strict interpretation of Section 203(a) of the Communications Act

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65. Comsat Study, 77 F.C.C.2d at & 511; *see also* National Ass'n of Broadcasters v. FCC, 740 F.2d 1190 (D.C. Cir. 1984) (affirming conditional right of Comsat to enter non-common carrier direct broadcast satellite service market through a separate corporate entity).

66. *See, e.g.*, United States v. Western Elec. Co., 1995-1 Trade Cases & 70,973, 890 F.Supp. 1 (D.D.C. 1995) (allowing Bell Operating Companies to resell inter-LATA long distance telephone service via cellular radio and other wireless ventures subject to several conditions including the formation of a separate resale subsidiary).

67. The Telecommunications Act of 1996 requires Bell Operating Companies to form separate subsidiaries when engaging in the business lines previously prohibited by the MFJ, viz., providing interexchange, long distance services across Local Access and Transport ("LATA") boundaries and manufacturing telecommunication equipment. Telecommunications Act of 1996 § 272, 47 U.S.C. § 272 (1996).

68. Sixth Report and Order, 99 F.C.C.2d 1020 (1985), *rev'd and remanded sub nom.*, MCI Telecomms. Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985), *aff'd sub nom.* MCI Telecomms. Corp. v. American Tel. & Tel. Co., 512 U.S. 218 (1994); Fifth Report and Order, 98 F.C.C.2d 1191 (1984); Fourth Report and Order, 95 F.C.C.2d 554 (1983), *rev'd and remanded sub nom.*, American Tel. & Tel. Co. v. FCC, 978 F.2d 727 (D.C. Cir. 1992); Third Report and Order, 48 Fed. Reg. 46,791 (1983); Second Report and Order, 91 F.C.C.2d 59 (1982), *recon. denied*, 93 F.C.C.2d 54 (1983); *In re* Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, 77 F.C.C.2d 308 (1979) (notice of inquiry and proposed rulemaking); First Report and Order, 85 F.C.C.2d 1 (1980).

69. Competitive Carrier, First Report and Order, 85 F.C.C.2d 1, 6 (1980).

would impose unnecessary expense and burden on non-dominant carriers that could retard service innovation, inhibit price competition, and facilitate collusion among carriers.<sup>70</sup>

Two portions of the FCC's forbearance policy generated major appellate court reversals. In *MCI Telecomms. Corp. v. FCC*, the D.C. Circuit found that the FCC acted arbitrarily and in violation of its statutory authority when (in its Sixth Report and Order in the *Competitive Carrier* proceeding) it required all carriers subject to regulatory forbearance to cancel their filed tariffs within six months.<sup>71</sup> The court ruled that the FCC's shift from permissive forbearance of the tariff filing requirement for non-dominant carriers, to a prohibition on tariff filing, violated the clear language of Section 203 requiring every common carrier (except connecting carriers) to file tariffs. The court stated that the FCC could use its discretion only to modify tariff filing requirements and that a modification could not result in the "wholesale abandonment or elimination of a requirement."<sup>72</sup>

In 1992 the D.C. Court of Appeals considered the legality of the FCC's Fourth Report and Order in the *Competitive Carrier* proceeding in the context of whether the FCC could accord some carriers the option not to file tariffs at all. On the substantive issue of whether the FCC had properly interpreted Section 203 to grant such tariff filing flexibility, the court held that it "is simply not defensible in this court" to modify the clear requirements imposed by the Communications Act.<sup>73</sup> The court held that the FCC lacked authority to eliminate the tariff filing requirement for a class of carriers, on either a permissive or mandatory basis:

Whether detariffing is made mandatory, as in the Sixth Report, or simply permissive, as in the Fourth Report, carriers are, in either event, relieved of the obligation to file tariffs under section 203(a). That step exceeds the limited authority granted the Commission in Section 203(b) to "modify" requirements of the Act.<sup>74</sup>

While "understand[ing] fully why the FCC wants the flexibility to apply the tariff provisions . . . differently"<sup>75</sup> based on market power, the court had to apply the clear language in Section 203 of the Communica-

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70. *Competitive Carrier*, Fourth Report and Order, 95 F.C.C.2d 554, 555 n.1 (1983).

71. *MCI Telecomms. Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985).

72. *Id.* at 1191-92.

73. *American Tel. & Tel. Corp. v. FCC*, 978 F.2d at 735-36.

74. *Id.* at 736.

75. *Id.*

tions Act that makes no distinction between carrier types for purposes of the tariff filing requirement.<sup>76</sup>

Even though the FCC can argue that tariff filing by some common carriers is unnecessary and counterproductive, the Commission cannot unilaterally ignore Congressional directives:<sup>77</sup>

[O]ur estimations, and the Commission's estimations, of desirable policy cannot alter the meaning of the Federal Communications Act of 1934. For better or worse, the Act establishes a rate-regulation, filed-tariff system for common-carrier communications, and the Commission's desire "to 'increase competition' cannot provide [it] authority to alter the well-established statutory filed rate requirements." . . . "[S]uch considerations address themselves to Congress, not to the courts."<sup>78</sup>

In *Southwestern Bell Corp. v. FCC*, the D.C. Circuit vacated the FCC's order proposing to allow nondominant carriers the option of filing a range of rates, instead of specific rates.<sup>79</sup> In undertaking a statutory analysis, the court also deemed irrelevant whether the law supports currently predominant economic policy. The court held that Section 203(a), which requires every common carrier to file schedules showing all charges, does not permit the FCC to allow some common carriers to file

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76. *Id.* The court stated that "[w]hether detariffing is made mandatory, as in the *Sixth Report* [of the *Competitive Carrier* proceeding], or simply permissive, as in the *Fourth Report*, carriers are, in either event, relieved of the obligation to file tariffs under section 203(a). That step exceeds the limited authority granted the Commission in section 203(b) to 'modify' requirements of the Act." *Id.* (footnote omitted).

77. In *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986), the Supreme Court rejected the FCC's attempt to preempt the states on plant depreciation, because Section 152(b) of the Communications Act expressly denied FCC "jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service . . ." 47 U.S.C. § 152(b) (Supp. 1996). The Court reversed an FCC ruling that Section 220 of the Communications Act authorized the Commission to preempt inconsistent state depreciation regulations for intrastate ratemaking purposes. *Louisiana Pub. Serv.*, 476 U.S. at 377. The Commission sought to stimulate innovation and modernization of the telecommunications infrastructure by prescribing faster depreciation schedules that would allow telephone companies to recoup investment over a shorter period of time. *Id.* at 362. Faster depreciation schedules would result in an unpopular and politically undesirable upward pressure on local rates. Fearing the potential for higher rates resulting from FCC regulatory initiatives, state public utility commissions challenged the assertion of jurisdiction as an illegal attempt to regulate intrastate "charges" under Section 152(b) of the Communications Act. *Id.* at 366. No matter how reasonable, given changed circumstances and the need to provide a way for telephone companies to accelerate depreciation and speed deployment of new technologies, the clear language of the Communications Act "fences off from FCC reach or regulation intrastate matters—indeed, including matters 'in connection with' intrastate service." *Id.* at 370.

78. *MCI Telecomms. Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218, 114 S. Ct. 2223, 2233, 129 L. Ed. 2d 182 (1994) (citations omitted).

79. *Southwestern Bell Corp. v. FCC*, 43 F.3d 1515 (D.C. Cir. 1995).

a range of charges. The court referred to the clear language of the Act and cases interpreting parallel provisions in the Interstate Commerce Act, which served as the template for the Communications Act.

The Telecommunications Act of 1996 now affords the FCC the option of abandoning common carrier tariff filing requirements. The Commission can accelerate its abandonment of regulations that maintain a common carrier/private carrier dichotomy. Ironically, such abandonment will make it harder for the FCC and state public utility commissions to promote universal access to a broader array of services considered an essential part of the national information infrastructure. The Act accords the FCC discretion to abandon common carrier regulation at the same time that it expands the definition of universal service and the obligations of all carriers to promote or provide such access.<sup>80</sup>

## XI. CONCLUSION

Congress, courts, and the FCC have worked aggressively to revise, revamp, and rewrite the definition of common carriage. In deregulating and liberalizing incumbent common carriers, they have created a variety of new and fact-specific privileges, immunities, and options. The straightforward model of common carriage has evaporated.

Technological innovations and First Amendment interpretations do not require abandonment of the common carrier model. Rather than starting where the last reformation of common carriage left off, policy makers and courts should return to the core concept of common carriage.<sup>81</sup> Proceeding from this core concept, they can respond to changed circumstances and need, just as government frequently applies different time, place, and manner restrictions to First Amendment rights as conditions change.

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80. See FEDERAL STATE JOINT BOARD ON UNIVERSAL SERVICE, NOTICE OF PROPOSED RULEMAKING AND ORDER ESTABLISHING JOINT BOARD, CC Docket No. 96-45, FCC 96-93 (rel. March 8, 1996); Recommended Decision, FCC No. 965-3, 1996 WL 656113 (F.C.C.) (rel. November 8, 1996).

81. At least one court rejects the view that the FCC can assume unlimited discretion in determining the regulatory classification of a new service: "We recognize the Commission's authority to approve services on an experimental basis in an effort to gather important market data to be used in the completion of a regulatory framework. Moreover, . . . that discretion is particularly capacious when the Commission is dealing with new technologies unforeseen at the time the Communications Act was passed. But that discretion is not boundless: the Commission has no authority to experiment with its statutory obligations." *National Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1200-1201 (D.C. Cir. 1984) (citation omitted) (concluding that the Commission engaged in forbidden statutory experimentation in exempting from Title III broadcasting regulation lessees of DBS transponder provided by common carriers).



Common carrier duties should continue to dominate the corporate culture and practices of companies providing basic local exchange telecommunication services. Government should permit non-common carrier market entry only if such ventures are subordinate to the primary common carrier mission, do not adversely affect the ability to perform this mission, and are provided by separate subsidiaries. Likewise, government should not accept bold assertions that infrastructure development can only occur if the common carrier is allowed to load the expanded bandwidth with content it created or acquired.

The manner in which the FCC regulates Comsat Corporation provides a blueprint for ensuring that a monopoly common carrier serves the public interest even as it pursues a variety of private carrier and non-communication markets. Comsat files tariffs, follows government instructions on matters relating to INTELSAT and INMARSAT and does not examine content generated by its customers. On those occasions the FCC has considered it necessary to scrutinize the allocation of costs between Comsat's common carriage and other activities, and the task has been made easier by the structural separation between jurisdictional activities and other ventures. Like most common carriers, Comsat does not desire these structural safeguards or the burdens of common carriage. These restrictions on its corporate flexibility, however, are a small price to pay for a preferential position in the telecommunication marketplace, in Comsat's case, the opportunity to serve as the exclusive wholesaler of INTELSAT and INMARSAT satellite capacity.<sup>82</sup>

Separating content and carriage may somewhat impede the economic benefits of convergence and vertical integration. But such separation ensures that the transporter of content will concentrate on carriage without regard to content and without preoccupation with finding ways to target and serve new profit centers in programming markets. The United States needs such dedication to improving the telecommunication infrastructure and building networks as a function of demand. Where a business enterprise pursues both content and carriage markets without structural safeguards, it may shape network expansion plans to capture current demand for certain types of content, rather than build to meet the nation's diverse, future telecommunication requirements.

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82. The Communications Satellite Act of 1962 § 101 *et seq.*, 47 U.S.C. §§ 701-744 establishes Comsat as the sole United States investor in the two major global satellite cooperatives. Comsat operates as a "carrier's carrier" by leasing capacity at wholesale rates to other international carriers who then retail it to end users. *See* Authorized User Policy, 97 F.C.C.2d 296 (1984), *reaff'd*, 99 F.C.C.2d 177 (1985), *aff'd sub nom.*, *Western Union Int'l v. FCC*, 804 F.2d 1280 (D.C. Cir. 1986).

Visions of a National Information Infrastructure contemplate universal access<sup>83</sup> to a network capable of handling large digital bitstreams supporting countless applications. Providers of the underlying facilities providing bit transport need to concentrate on upgrading networks rather than determining how network deployment can favor their non-common carrier market forays. The NII completes the migration from a narrow-band, primarily point-to-point telecommunication network, to a diverse system capable of providing services that some consider broadcasting, or at least outside the realm of conventional common carriage. Yet the very common carrier functions that have promoted universal service and cost averaging may be necessary to secure universal access to an even more robust and expensive array of common carrier services and facilities.

At the very least, the carriers responsible for building the first and last mile access to the NII should not have the opportunity to pursue programming interests in derogation of the traditional view that such operators not discriminate, engage in unreasonable practices, or favor corporate affiliates. The common carrier model creates these requirements, and it remains incumbent on regulatory agencies to enforce them.

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83. One of the key "principles and goals" of the National Information Infrastructure initiative will be to "[e]xtend the 'universal service' concept to ensure that information resources are available to all at affordable prices." INFORMATION INFRASTRUCTURE TASK FORCE, NATIONAL INFORMATION INFRASTRUCTURE PROGRESS REPORT 2 (1994).