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# An Examination of the Application of Common Carrier Regulation to Entities Providing New Telecommunications Services

Kaye L. O'Riordan\*

*Federal regulation of modern telecommunications services has thus far proceeded under the judicial analyses developed to deal with communications services which existed when the Communications Act of 1934 was enacted. Economies of scale dictated that those early communications services be operated in a way that left no room for the market competition which would otherwise function to keep rates low and eliminate discrimination in rates among classes of customers; governmental regulation was thus deemed necessary as a substitute for market forces. In this article, the author points out that, with the development of new types of telecommunications entities, this presumption does not automatically carry over to the present. She examines instances where the Federal Communications Commission and the courts have attempted to apply existing analyses to new telecommunications entities and services, and finds them to be inconsistent and inadequate to fulfill the purposes intended to be achieved by governmental regulation. In light of these deficiencies, she discusses the criteria that are pertinent to a proper consideration of whether a modern telecommunications entity should be regulated and the potential effectiveness of the proposed amendments to the common carrier portions of the Communications Act.*

## INTRODUCTION

THE PORTIONS OF the Communications Act of 1934<sup>1</sup> that today regulate communications common carriage were taken largely from the Interstate Commerce Act of 1887.<sup>2</sup> The tele-

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1. Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified at 47 U.S.C. §§ 151-609 (1976)).

2. Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (codified in scattered sections of 49 U.S.C.). The Communications Act combined the regulation of rates, which had been begun by the Federal Radio Commission (FRC) pursuant to the Radio Act of 1927, ch. 169, 44 Stat. 1162 (repealed by Communications Act of 1934, ch. 652, § 602(a), 48 Stat. 1102), and the regulation of communications common carriers, which had been rather spo-

phone and telegraph industries were analogized to the railroad and trucking industries, and the same justifications made for regulation of the latter were made for regulation of communications services. They were regarded as natural monopolies since, due to economies of scale, the size at which the services were most efficient left no room for competition. Without competitors to perform the market functions of keeping rates low and eliminating discrimination in rates among classes of customers, it was felt that the government should step in to provide comprehensive regulation over market entry, rates, and terms and conditions of service. The purpose of the Act was, therefore, to ensure that communications common carriers furnish communications services to the public upon reasonable request and at just and reasonable rates.<sup>3</sup>

The Act vested this regulatory function in the Federal Communications Commission (FCC).<sup>4</sup> The FCC's powers are extensive. It supervises the imposition of charges by the carriers<sup>5</sup> and may itself prescribe just and reasonable charges.<sup>6</sup> It investigates complaints concerning acts or omissions of the carriers.<sup>7</sup> It must approve the construction or extension of new lines and approve the discontinuance of service.<sup>8</sup> It may even go so far as to make a valuation of the property owned or used by the carrier,<sup>9</sup> examine any transactions entered into by the carrier that relate to the furnishing of equipment, services, supplies, or personnel to the car-

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radically begun by the Interstate Commerce Commission (ICC) pursuant to an amendment to the Interstate Commerce Act. Mann-Elkins Act, ch. 309, § 7, 36 Stat. 539 (1910) (amending Interstate Commerce Act of 1887, ch. 104, § 1, 24 Stat. 379) (current version at 49 U.S.C. § 1 (1976)). In 1934, when the creation of a separate commission to regulate interstate communications was proposed to Congress, one suggested approach was to create the new commission by a simple pro forma statement that all functions dealing with communications then vested in both the ICC and the FRC would vest in the Federal Communications Commission. H.R. REP. NO. 1918, 73d Cong., 2d Sess. (1934); 78 CONG. REC. 10969 (1939). Although this approach was rejected in favor of drafting a new statute, it is readily apparent from an examination of the statute and the analysis provided by Congress that little more was done than amalgamate the applicable portions of the two statutes.

3. Communications Act § 201(a), 47 U.S.C. § 201(a) (1976) provides: "It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request . . . ." Subsection (b) provides: "All charges, practices, classifications, and regulations for and in connection with such communication services, shall be just and reasonable . . . ."

4. *Id.* §§ 1, 4, 5, 47 U.S.C. §§ 151, 154, 155.

5. *Id.* §§ 203, 204, 47 U.S.C. §§ 203, 204.

6. *Id.* § 205, 47 U.S.C. § 205.

7. *Id.* § 208, 47 U.S.C. § 208.

8. *Id.* § 214, 47 U.S.C. § 214.

9. *Id.* § 213, 47 U.S.C. § 213.

rier;<sup>10</sup> and inquire into the management of the carrier's business,<sup>11</sup> with the right of access to and inspection of the carrier's records and accounts.<sup>12</sup>

A major deficiency in this regulatory scheme is that it inadequately describes what is to be regulated. The Act defines a communications common carrier as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy . . . ."<sup>13</sup> The conference report which accompanied the Act fails to clarify this circular definition. It states that the definition does not include any person who is not a "common carrier in the ordinary sense of the term."<sup>14</sup> Even the FCC itself provides little guidance. Its regulations define a communications common carrier simply as "any person engaged in rendering communications services for hire to the public."<sup>15</sup>

The inefficacy of this description is highlighted in the decisional law relating to modern telecommunications services, most of which came into existence long after 1934. In attempting to determine which of these new communications services should be regulated, the courts have struggled to discover what Congress meant by subjecting to regulation only those entities that are common carriers "in the ordinary sense of the term." Courts have construed this phrase in two different ways. Under one judicial construction, Congress has referenced the sizable and growing body of law dealing with the characteristics of common carriage and has directed the FCC to this source in deciding whether to regulate new entities and services. According to the second judicial construction, Congress' simplistic definition of common carriers accords the FCC broad independent discretion in deciding whether to regulate new entities and services as they develop.

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10. *Id.* § 215, 47 U.S.C. § 215.

11. *Id.* § 218, 47 U.S.C. § 218.

12. *Id.* § 220(c), 47 U.S.C. § 220(c).

13. *Id.* § 3(h), 47 U.S.C. § 153(h).

14. H.R. REP. NO. 1918, 73d Cong., 2d Sess. 46 (1934). This language is not in itself very helpful and may exclude only press associations. The full statement reads:

It is to be noted that the definition does not include any person if not a common carrier in the ordinary sense of the term, and therefore does not include press associations or other organizations engaged in the business of collecting and distributing news services which may refuse to furnish to any person service which they are capable of furnishing, and may furnish service under varying arrangements, establishing the service to be rendered, the terms under which rendered, and the charges therefor.

*Id.*

15. 47 C.F.R. § 21.2 (1978).

These two views of the congressional mandate have been used to justify the FCC's treatment of new communications services, but no attempt has been made to reconcile them. They are in fact irreconcilable because they necessitate disparate degrees of involvement for the FCC in the decisionmaking process. Under the first view, the FCC has a passive role; under the second, it has an active role. More importantly, both views often fail to take into account the underlying purposes of regulation. If followed blindly, either may focus the FCC's inquiry only upon whether the entity is a common carrier and divert it from questioning whether the entity should be regulated. Thus, once the FCC determines under any rationale that a new entity is a common carrier, regulation automatically ensues, even if there is no need for it. More appropriately, the FCC's evaluation should encompass an economic analysis of the new entity's activities. Once the FCC determines that a particular communications service is not vulnerable to monopolistic practices, regulation need not ensue, even if the entity is a common carrier "in the ordinary sense of the term."

This article analyzes instances where the FCC and the courts have attempted to apply the congressionally mandated standard for regulating common carriers to new telecommunications entities and services. The inconsistent results they have produced demonstrate that they have lost sight of the purposes to be achieved by regulation. Accordingly, this article discusses the criteria that are pertinent to a proper consideration of whether an entity should be regulated. Finally, this article examines the proposed revision of the Communications Act and concludes that it offers the FCC a clearer, more pragmatic mandate for regulation.

## I. THE TWO EXISTING STANDARDS

### A. *The First Application of a Standard by the FCC:* *Frontier Broadcasting Co. v. Collier*

The first major case in which the FCC determined whether a new service constituted common carriage was *Frontier Broadcasting Co. v. Collier*.<sup>16</sup> In that case, the FCC formulated what is regarded as the seminal definition of "common carrier," used by the FCC in many of its later decisions.<sup>17</sup>

In *Frontier Broadcasting*, several television broadcasters filed a

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16. 24 F.C.C. 251 (1958).

17. *E.g., In re Regulatory Policies Concerning Resale and Shared Use of Common Carrier Servs. and Facilities*, 60 F.C.C.2d 261, 304-08 (1976).

complaint requesting that the FCC declare that Community Antenna Television (CATV) system operators were common carriers and therefore subject to regulation under the Communications Act of 1934. To support their request for regulation, the broadcasters cited several similarities between CATV systems and the telephone and telegraph common carriers already regulated by the FCC. First, the broadcasters argued that CATV service was available to any member of the public willing to pay for it if the service could feasibly be provided.<sup>18</sup> Second, they pointed out that CATV operators transmitted information by wire to the subscriber.<sup>19</sup> Finally, they noted that CATV systems were analogous to several other services which the FCC had determined to be common carrier services.<sup>20</sup>

In formulating a test for determining what entities are common carriers, the FCC first looked to the definition of common carrier found in section 3(h) of the Communications Act.<sup>21</sup> In principal part, this definition states that a common carrier is any person engaged as a common carrier for hire.<sup>22</sup> Finding this definition wanting, the FCC then referenced the Communications Act's legislative history in which Congress declared that the Act's regulatory provisions should not apply to persons who are not common carriers "in the ordinary sense of the term."<sup>23</sup> The FCC construed this language as a mandate from Congress to regulate only those entities having the traditional characteristics of a common carrier.<sup>24</sup>

The FCC then examined the characteristics of CATV service. It acknowledged that CATV systems were similar to telephone and telegraph common carriers in several respects.<sup>25</sup> Neverthe-

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18. 24 F.C.C. at 252.

19. *Id.*

20. These included baseball-sports services furnished by Western Union and program reception services. *Id.* at 252-53.

21. 47 U.S.C. § 153(h) (1976).

22. The definition in its entirety reads:

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

*Id.*

23. H.R. REP. NO. 1918, 73d Cong., 2d Sess. 46 (1934).

24. 24 F.C.C. at 254.

25. The principal similarity was that both offered "to transmit, by wire, intelligence in the form of television broadcast signals, to any member of the public who desire[d] to subscribe to the service." *Id.*

less, it noted an important difference: the content of the information transmitted by the CATV system was determined by the system operator and not by the subscriber.<sup>26</sup> This observation sparked the formulation of a working definition of a communications common carrier:

Fundamental to the concept of a communications common carrier is that such a carrier holds itself out or makes a public offering to provide facilities by wire or radio whereby all members of the public who chose (*sic*) to employ such facilities and to compensate the carrier therefor may communicate or transmit intelligence of their own design and choosing between points on the system of that carrier and other carriers connecting with it.<sup>27</sup>

This definition has been applied by the FCC and the courts to other communications entities to determine if they are common carriers.<sup>28</sup> While the FCC's definition distinguished the traditional common carriers from CATV systems in the fact situation presented by *Frontier Broadcasting*, it cannot be consistently applied to other fact patterns. For example, land-mobile radio communications systems transmit intelligence formulated by the subscriber and therefore fit the *Frontier Broadcasting* definition; yet the FCC has chosen not to regulate them as common carriers.<sup>29</sup>

A principal shortcoming of the FCC's analysis in *Frontier Broadcasting* is that it only compared the attributes of the communications system at issue with the model entity it believed Congress intended to be regulated. The FCC failed to consider economic or policy arguments going to the issue of whether regulation *per se* is desirable, considerations which should underlie any decision to regulate or not to regulate.

#### B. *The Discretion Standard: Philadelphia Television Broadcasting Co. v. FCC*

A completely different formulation of the FCC's role was developed by the Court of Appeals for the District of Columbia Cir-

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26. *Id.* at 254-55.

27. *Id.* at 254 (footnote omitted). A shortcoming of this definition has been pointed out in later FCC decisions. The definition implies that the subscriber is actually transmitting the information rather than the carrier providing the means of transmission. *See, e.g., In re Regulatory Policies Concerning Resale and Shared Use of Common Carrier Servs. and Facilities*, 60 F.C.C.2d 261, 270 (1976).

28. *See* note 17 *supra*.

29. *See* text accompanying notes 62-72 *infra*.

cuit in *Philadelphia Television Broadcasting Co. v. FCC*.<sup>30</sup> This case involved an appeal from the FCC's summary dismissal of another complaint from broadcasters that also sought to regulate CATV systems as common carriers.<sup>31</sup> Instead of reviewing the FCC's determination, the court deferred to the FCC's determination of that issue. The court stated that Congress, by defining common carrier in general terms and failing to provide any helpful legislative history, had left the decision to regulate to the discretion of the FCC.<sup>32</sup>

In a statutory scheme in which Congress has given an agency various bases of jurisdiction and various tools with which to protect the public interest, the agency is entitled to some leeway in choosing which jurisdictional base and which regulatory tools will be most effective in advancing the Congressional objective.<sup>33</sup>

The court held that as long as the FCC made a rational choice, a reviewing court could not disturb the result.<sup>34</sup>

The discretionary standard was also applied by the Court of Appeals for the Ninth Circuit in response to a challenge by the American Civil Liberties Union (ACLU) to the FCC's cable television access rules.<sup>35</sup> These rules required the operators of the larger cable systems to provide nondiscriminatory access channels to the public for educational, local government, and entertainment uses.<sup>36</sup> The ACLU contended that common carrier regulation should also be imposed upon cable operators to ensure nondiscriminatory access for all persons desiring to use the access channels.<sup>37</sup> The court held that the FCC did not have to regulate access channels as a form of common carriage.<sup>38</sup> Although the court acknowledged that "from a technological point of view" ac-

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30. 359 F.2d 282 (D.C. Cir. 1966).

31. *Id.* at 283. Specifically, the complainants sought to bar Rollins Broadcasting, Inc. from constructing and operating a CATV system until it complied with the common carrier regulations.

32. *Id.* at 284.

33. *Id.*

34. *Id.* The access Channel rules were overturned as going beyond the ancillary to broadcasting test in *Midwest Video Corp. v. FCC*, 571 F.2d 1025 (8th Cir. 1978). For a discussion of this test see note 43 *infra* and accompanying text.

35. *ACLU v. FCC*, 523 F.2d 1344 (9th Cir. 1975). The access channel rules were overturned as going beyond the ancillary to broadcasting test in *Midwest Video Corp. v. FCC*, 571 F.2d 1025 (8th Cir. 1978). For a discussion of this test see note 43 *infra* and accompanying text.

36. *Id.* at 1348-49.

37. *Id.* at 1349-50.

38. *Id.* at 1351.



cess channels could function as common carriers, citing the definition of common carrier in *Frontier Broadcasting*<sup>39</sup> it decided that the FCC could exercise discretion in determining the regulatory standards to be applied to cable operations since it had the technical expertise to deal with new and experimental areas.<sup>40</sup>

Although the court in *ACLU v. FCC* based its holding on the Supreme Court decisions in *United States v. Southwestern Cable Co.*<sup>41</sup> and *United States v. Midwest Video Corp.*,<sup>42</sup> in which the Court established a basis for FCC regulation of CATV systems independent of the "common carrier" test,<sup>43</sup> it found *Frontier Broadcasting* and *Philadelphia Television* to be "historically instructive."<sup>44</sup> If by this the court simply meant that the ultimate holdings in those latter two cases—which said CATV systems were not common carriers—influenced its own similar holding, reference to them is acceptable. But if the court cited them for the analyses by which they reached their holdings, then there is cause for objection. Applying expertise and exercising discretion in deciding whether to regulate an entity are activities altogether different from matching the characteristics of CATV systems with those of a conceptual entity supposedly envisioned by Congress.

In any event, either line of analysis is an undesirable means of determining the proper scope of regulation of new communications entities. Trying to distill a congressional standard from the Communications Act and its legislative history and leaving a decision whether to regulate solely to the FCC's discretion are inappropriate coefficients of a regulatory decisionmaking process. Moreover, the availability of either line of analysis can only lead to uncertainty or, possibly, a convenient rationale for a result-oriented agency to justify a decision. The inadequacy of both of these analyses becomes apparent from a consideration of past FCC evaluations of new communications entities.

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39. *Id.* at 1350 & n.9.

40. *Id.* at 1350-51.

41. 392 U.S. 157 (1968).

42. 406 U.S. 649 (1972).

43. Under the standard developed in *Southwestern Cable* and *Midwest Video*, known as the "reasonably ancillary standard," the FCC may regulate CATV under sections 2(a) and 303(r) of the Communications Act of 1934, 47 U.S.C. §§ 152(a), 303(r) (1976), so long as the regulation is "reasonably ancillary to the Commission's various responsibilities for the regulation of television broadcasting." See *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968); *United States v. Midwest Video Corp.*, 406 U.S. 649, 659-63 (1972).

44. *ACLU v. FCC*, 523 F.2d 1344, 1351 (9th Cir. 1975).

## II. THE FCC, COMMON CARRIER REGULATION, AND NEW COMMUNICATIONS ENTITIES: A NEED FOR ONE RATIONALE

In the twenty years since the question of regulating CATV systems first arose, the FCC has had to confront similar questions with respect to other technological advances in the communications field. This section discusses how the FCC and the courts have dealt with developments in three major areas: the data processing industry, land-mobile radio services, and the resale and sharing of private line services. While in most cases the FCC and the courts have employed either a *Frontier Broadcasting* or a *Philadelphia Television* analysis, in rare instances they have also considered what should be the paramount issue in any case: whether regulation is necessary in light of its purposes.

### A. *The Data Processing Industry—A Consideration of a Need for Regulation*

During the 1960's, computer development became dependent upon communications common carrier facilities and services. Owners and manufacturers began to offer computer access to the public on a time-sharing or batch-processing basis and to maintain computer service bureaus or information services. To facilitate the availability of computers to the general public, the owners and manufacturers utilized communications channels obtained largely from communications common carriers. Furthermore, the carriers themselves began to use computers not only to perform message and circuit-switching functions, but also to store, process, and retrieve management or business data for anyone desiring to subscribe to this service. In 1966, faced with the regulatory and policy questions presented by the growing convergence and interdependence of communications and data processing technologies, the FCC initiated an inquiry into the computer industry to determine if any of its services should be subject to regulation pursuant to the Communications Act.<sup>45</sup>

In its tentative decision, issued in 1970,<sup>46</sup> the FCC set out to answer several basic regulatory and policy questions including the

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45. *In re* Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Servs. and Facilities, 7 F.C.C.2d 11 (1966) (notice of inquiry).

46. *In re* Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Servs. and Facilities, 28 F.C.C.2d 291 (1970) (tentative decision of the Commission).

two discussed herein:<sup>47</sup> (1) what the nature and extent of the regulatory jurisdiction in the data processing area should be and (2) whether and to what extent common carriers should be permitted to engage in data processing.<sup>48</sup> After noting that it possessed the power to regulate communications services which did not exist at the time of the enactment of the Communications Act,<sup>49</sup> the FCC indicated that in the instant case it would utilize the discretionary standard of *Philadelphia Television*, rather than the *Frontier Broadcasting* modeling analysis, in exercising its regulatory powers.<sup>50</sup>

The FCC then articulated certain standards which would guide its exercise of discretion. It looked to what it termed "the basic purpose of regulatory activity in the context of our general national policy."<sup>51</sup> This national policy was rooted in the free enterprise system which encouraged "individual initiative to enter into any given enterprise and compete for the available business."<sup>52</sup> The system would tolerate governmental regulation only to the extent necessary to prevent restraint of trade.<sup>53</sup>

Government intervention and regulation are limited to those areas where there is a natural monopoly, where economies of scale are of such magnitude as to dictate the need for a regulated monopoly, or where such other factors are present to require governmental intervention to protect the public interest

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47. Many other issues were considered by the FCC, such as the dividing line between data processing and communications and the establishment of maximum separation requirements. For discussion of these issues see, for example, Berman, *Computer or Communications? Allocation of Functions and the Role of the Federal Communications Commission*, 27 FED. COM. B.J. 161 (1974); Note, *The FCC Computer Inquiry: Interfaces of Competitive and Regulated Markets*, 71 MICH. L. REV. 172 (1972); Note, *Computer Services and the Federal Regulation of Communications*, 116 U. PA. L. REV. 328 (1967).

48. *In re Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Servs. and Facilities*, 28 F.C.C.2d 291, 295 (1970) (tentative decision of the Commission).

49. *Id.* at 297.

50. The agency stated that:

[W]e are not required to assert and exercise . . . jurisdiction merely because we might construe the activity as one which could be encompassed within the intent of the Communications Act of 1934. Instead, as the court in *Philadelphia [Television]* noted, as the expert agency we are "entitled to latitude in coping with new developments" in the dynamic field of communications. Consequently, we are "entitled to some leeway in choosing which jurisdictional base and which regulatory tools will be most effective in advancing the congressional objective"—the protection of the public interest.

*Id.*

51. *Id.*

52. *Id.*

53. *Id.*

because a potential for unfair practices exists.<sup>54</sup>

Applying these considerations to the data processing industry, the FCC found that competition in the field was "active and growing," with "no . . . barriers to free entry into the market."<sup>55</sup> Finding there to be an "effective competitive situation," the FCC concluded that regulation was unnecessary.<sup>56</sup>

The FCC invited and received written comments to its tentative decision from interested parties. In 1971, it released its final decision,<sup>57</sup> which adopted the tentative decision's reasoning, as well as its conclusion that the data processing industry should not be regulated.<sup>58</sup> The FCC thus began to formulate, within the context of a *Philadelphia Television* discretionary standard, an analysis which takes into account the economic realities so fundamental to a decision whether to regulate new communications entities. The limitations of this analysis, however, are obvious: it was formulated by the FCC and not by Congress, and is therefore vulnerable to modification by the courts and the FCC itself.

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54. *Id.*

55. *Id.*

56. *Id.* at 298.

We expect the competitive environment within which data processing services are now being offered to result in substantial public benefit by making available to the public, at reasonable charges, a wider range of existing and new data processing services. We believe that these expectations will continue to be realized in the free give-and-take of the market place without the need for and possible burden of rules, regulations and licensing requirements.

*Id.* The FCC indicated, however, that it would reexamine the regulatory questions and policies if there were significant changes in the data processing industry or if abuses occurred. *Id.*

57. *In re Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Servs. and Facilities*, 28 F.C.C.2d 267 (1971) (final decision and order), *aff'd in part and rev'd in part sub nom.* GTE Service Corp. v. FCC, 474 F.2d 724 (2d Cir. 1973).

58. In its final decision, the FCC repeated its finding that an analysis of the activities of the computer industry revealed that regulation would serve no purpose at the industry's current state of development:

[I]n view of our expectation that the competition afforded by carriers in the provision of computer services could and would provide benefits in such matters as new and improved services and lower prices, we cannot find the necessary social, economic or policy considerations which would require or even justify an outright prohibition against the furnishing of data processing services by common carriers.

*Id.* at 270. But the FCC also reiterated its "intention to reconsider this conclusion should future experience indicate that any of the premises underlying this conclusion have not materialized or that in spite of our prescribed safeguards carrier abuses are developing." *Id.*

B. *Land-Mobile Radio Services—A Common Law Model for Common Carrier Status*

In *National Association of Regulatory Utility Commissioners (NARUC) v. FCC*,<sup>59</sup> the District of Columbia Circuit rejected the notion that the FCC could exercise discretion in determining whether a communications entity is a common carrier. Instead, the court said that the FCC must use only the common law definition of common carrier in its deliberations.<sup>60</sup> This decision, in effect, limits the FCC to a modeling analysis similar to the one it propounded in *Frontier Broadcasting*.

*NARUC* involved developments in land-mobile radio services.<sup>61</sup> In order to meet the growing requirements of land-mobile services, the FCC in 1970 made additional spectrum space available for land-mobile systems.<sup>62</sup> At the same time, the FCC asked interested parties to submit proposals suggesting how the 30 megahertz of this space which was allocated to the dispatch-type land-mobile radio systems<sup>63</sup> could be most effectively used.

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59. 525 F.2d 630 (D.C. Cir. 1976).

60. *Id.* at 644.

61. Land-mobile radio service is radio communication between land-based transmitting stations and land-mobile transmitting stations or exclusively between land-mobile transmitting stations. A land-based station is stationary and is not intended for operation while in motion, e.g., a police dispatcher's transmitter. A land-mobile station is intended for operation during movement on the land surface, e.g., a transmitter carried in police vehicles. See 47 C.F.R. § 21.2 (1976).

62. First Report and Order and Second Notice of Inquiry, Land Mobile Radio Servs., 35 F.C.C. 644, 645 (1970).

63. Land-mobile radio technology has been utilized mainly in two areas. One is the provision of mobile telephone service for automobiles, which is interconnected with the wired telephone network. The other is the provision of dispatch services in which the radio communications services are used to control the movements of a fleet of vehicles. Different systems of governmental regulation have developed in these two areas.

Mobile telephone service is provided by several small, competitive "radio common carriers," and, increasingly, by American Telephone and Telegraph Company, which has proposed a high capacity and highly sophisticated cellular radio communications system. These public entities are regulated as common carriers under title II of the Communications Act, 47 U.S.C. §§ 201-23 (1976), and, since the service involves the use of radio, under title III, 47 U.S.C. §§ 301-99 (1976), as part of the domestic public radio service.

The dispatch systems developed as private systems built for and operated by private users. These systems were not regulated by the FCC until 1949, when the FCC established the Public Safety, Industrial, and Land Transportation Radio Services (PSILTRS) and the Domestic Public Radio Services. A portion of the radio frequency spectrum was allotted to each. General Mobile Radio Service, 13 F.C.C. 1190 (1949). In establishing the PSILTRS, the FCC *General Mobile* decision recognized that certain activities of local government, such as police and fire protection, and certain activities of industrial and transportation enterprises, such as railroad and electric utility services, had unique needs and methods of operation. Each was allowed a "block" of frequencies for the exclusive use of its constituents. Prospective users file license applications which are quickly granted if there are suffi-

After receiving and studying comments, the FCC proposed the creation of a specialized mobile radio system (SMRS) category. Under this category, the FCC would license persons in a new category of entrepreneurial mobile operators who would share access to the allocated spectrum with private operators eligible under the Public Safety, Industrial, and Land Transportation Radio Services (PSILTRS); unlike PSILTRS licensees, who provide services for themselves or members of their own private cooperatives, SMRS licensees would provide profit-motivated services for third parties.<sup>64</sup> The FCC hoped that this proposal would facilitate the development of more efficient systems to make better use of the frequencies allocated to dispatch-type mobile radio services.<sup>65</sup> The large capital investments needed to develop new forms of technology to create more efficient uses of the limited frequencies available would more feasibly be supplied by these entrepreneurs since they would be building systems to serve many individual users. Free competition among various SMRS and with shared use systems would also stimulate innovation in the development of new technology.<sup>66</sup>

By authorizing SMRS to operate like PSILTRS the FCC chose not to regulate them as common carriers. The FCC recognized that SMRS were similar to, if not technologically identical to, radio common carriers.<sup>67</sup> In its earlier order, it also stated that SMRS could be regulated as common carriers under the *Frontier*

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cient frequencies available. No hearings are necessary, so there is no "regulatory" limitation on the entry of authorized users other than the availability of frequencies.

The regulatory scheme for the PSILTRS facilitated the rapid growth of radio communications and made land-mobile communications systems indispensable in many fields. See Land Mobile Use of UHF TV Channels 14 through 20, 23 F.C.C.2d 325, 329-38 (1970). This rapid growth resulted in a greater than anticipated demand in the 30 megahertz (MHz) of radio spectrum allotted to the dispatch-type land-mobile radio systems.

In 1968, the FCC issued a Notice of Inquiry and Notice of Proposed Rulemaking, Land Mobile Use of 806-960 MHz Band, 14 F.C.C.2d 311 (1968), regarding use of certain additional frequencies in land-mobile service.

64. See *In re an Inquiry Relative to the Future Use of the Frequency Band 806-960 MHz*, and Amendment of Parts 2, 18, 21, 73, 74, 89, 91, and 93 of the Rules Relative to Operations in the Land Mobile Serv. Between 806-960 MHz, 51 F.C.C.2d 945, 947 n.9 (1975) (memorandum opinion and order); *In re an Inquiry Relative to the Future Use of the Frequency Band 806-960 MHz*, and Amendment of Parts 2, 18, 21, 73, 74, 89, 91, and 93 of the Rules Relative to Operations in the Land Mobile Serv. Between 806 and 960 MHz, 46 F.C.C.2d 752, 762-63 (1974) (second report and order). For a discussion of the establishment and early regulation of PSILTRS, see note 63, *supra*.

65. 46 F.C.C.2d at 752; 51 F.C.C.2d at 956.

66. 51 F.C.C.2d at 966-70.

67. *Id.* at 959.

*Broadcasting* test, but that it found application of that standard irrelevant.<sup>68</sup> The FCC stated:

[W]e have concluded that we do have the necessary statutory authority to choose one regulatory process which is preferable, on demonstrable grounds, over another which is not at all suited to the objectives of the action we propose to take. . . . [W]e do not think we are restricted or limited . . . in carrying out our duties and responsibilities under the Act of assuring the most effective and efficient use of the radio spectrum under whatever controlling circumstances exist. We believe, rather, that the Communications Act, read as a whole, directs us to regulate the use of radio frequencies that are available in the way that affords maximum benefits to the public . . . .

Further, we are convinced that we . . . must not carry forward to the 900 MHz band the burdens and delays inherent in present procedures, used in regulating common carriers . . . . It is our view that it is very much in the public interest to shed this heavy cloak and exchange it for one with far greater flexibility and far greater promise for maximizing the potential of utilization of the radio spectrum at 900 MHz.<sup>69</sup>

By regulating SMRS like PSILTRS instead of as common carriers, the FCC hoped to create a simplified regulatory process with as little burden on the applicants and cost to the public as possible. It felt that competition could accomplish the objectives of regulation. An open marketplace would foster the development of SMRS to meet the needs and requirements of users and stimulate the improvement of service quality and the development of new techniques.<sup>70</sup> It would also result in lower systems costs since active production would discourage standardization of systems, and a user would be able to negotiate and avoid paying for unneeded equipment.<sup>71</sup> Competition would provide flexibility for shaping the use of the new spectrum the FCC had allocated. In short, the FCC believed that the spur of competitive forces was necessary and was more feasible and appropriate than the restraint of regulation.<sup>72</sup>

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68. 46 F.C.C.2d at 763.

69. *Id.* at 764, 766. In its later order, the FCC attempted to qualify this broad assertion of authority by acknowledging that if SMRS were clearly common carriers in the ordinary sense of the term within the meaning of section 3(h) of the Communications Act, the FCC would have to regulate them as common carriers. 51 F.C.C.2d at 959.

70. *Id.* at 969-70.

71. *Id.* at 970.

72. The FCC did note that "in major respects, our plan is not entirely new or untried; rather, it arises out of and amplifies and builds on what we have found to be an effective and efficient method of management of the radio spectrum." 46 F.C.C.2d at 762.

The Court of Appeals for the District of Columbia Circuit affirmed the FCC's decision that SMRS should not be regulated as common carriers.<sup>73</sup> But the court rejected the argument that the FCC had discretion to decide how to regulate entities providing telecommunications services. Instead, it developed a standard which it felt Congress had mandated. *NARUC* thus limits the broad authority that *Philadelphia Television* gave the FCC and represents a return to the narrow role that the FCC imposed upon itself in *Frontier Broadcasting*.

As the FCC had done in *Frontier Broadcasting*, the court attempted to develop a definition of a common carrier that could be matched against SMRS. This time, however, the court looked to common law definitions of common carrier as a guide. Critical to the definition of a common carrier under the common law was a finding of the "quasi-public character of the activity involved."<sup>74</sup> A private entity can acquire this quasi-public character by holding itself out as offering a service to the public. The court observed that it was not enough that the entity offer its services for a profit since this would include within the concept private contract carriers, which traditionally had been excluded.<sup>75</sup> Nor was it necessary that the entity offer its services to the entire public.<sup>76</sup> What was essential to the quasi-public character of the common law concept was that the carrier "undertakes to carry for all people indifferently."<sup>77</sup>

In determining whether SMRS would serve the public indiscriminately, the court made two inquiries. First, it looked to see if there were any "legal compulsion" for SMRS to serve indifferently.<sup>78</sup> The court examined the proposed regulations and the administrative scheme for SMRS and could not find any such compulsion.<sup>79</sup> Second, it considered whether there were "reasons

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73. National Ass'n of Regulatory Util. Comm'rs. v. FCC, 525 F.2d 630 (D.C. Cir. 1976).

74. *Id.* at 641.

75. *Id.*

76. *Id.*

One may be a common carrier though the nature of the service rendered is sufficiently specialized as to be of possible use only to a fraction of the total population. And business may be turned away either because it is not of the type normally accepted or because the carrier's capacity has been exhausted.

*Id.*

77. *Id.* "But a carrier will not be a common carrier where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal." *Id.*

78. 525 F.2d at 642.

79. *Id.* at 642-43. The weakness of this test is obvious since it puts the decision squarely within the control of the agency. See National Ass'n of Regulatory Util. Comm'rs



implicit in the nature of SMRS operations to expect an indifferent holding out to the eligible user public," even in the absence of a regulatory compulsion to do so.<sup>80</sup> Stressing that the inquiry was speculative, since there were no SMRS in existence, the court hypothesized how they would operate. It envisioned SMRS serving a stable clientele, with only a minor turnover of customers, and providing highly individualized operations.<sup>81</sup> This led the court to conclude that SMRS probably would not offer their services to the public at all, and consequently, it was not necessary to regulate them as common carriers.<sup>82</sup>

Thus, the court affirmed the FCC's decision not to impose common carrier regulation. But the court made it clear that it disapproved of the rationale for the FCC's decision:

[W]e reject those parts of the Orders which imply an unfettered discretion in the Commission to confer or not confer common carrier status on a given entity, depending upon the regulatory goals it seeks to achieve. *The common law definition of common carrier is sufficiently definite as not to admit of agency discretion in the classification of operating communications entities . . . .* Thus, we affirm the Commission's clarification not because it has any significant discretion in determining who is a common carrier, but because we find nothing in the record or the common carrier definition to cast doubt on its conclusions that SMRS are not common carriers.<sup>83</sup>

The use of the common law standard for imposing common carrier regulation has several drawbacks. First, it allows no deference to the special expertise of the FCC in an extremely technical area. It precludes the FCC from considering attributes of new telecommunications services or changes in the telecommunications services market. The *NARUC* court refused to examine the validity of any of the pragmatic considerations developed by the FCC to justify its decision not to regulate SMRS.<sup>84</sup> Most importantly, this common law standard forecloses consideration of the role played by competition. The court did not examine the allegations of parties, such as the radio common carriers, that the approach taken by the FCC generated unequal competition between

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v. FCC, 533 F.2d 601 (D.C. Cir. 1976) (where the lower court's application of this test to two-way applications of cable television is rejected).

80. 525 F.2d at 642.

81. *Id.* at 643.

82. *Id.*

83. *Id.* at 644 (emphasis added and footnotes omitted).

84. See notes 64-72 *supra* and accompanying text.

regulated and unregulated entities.<sup>85</sup> Any decision to impose or stay common carrier regulation should include these considerations; mere reference to a common law analogue makes little use of the FCC's expertise.

A second problem is presented by the court's analogy from FCC treatment of "public correspondence"<sup>86</sup> and "private line service"<sup>87</sup> in the telecommunications field to those of common carrier and non-common carrier operators in the transportation field to support the requirement that a common carrier hold out its services indifferently. An essential element of public correspondence, the court said, was that it was at the disposal of the public, while a private line service was set aside only for particular customers and was not generally available to the public.<sup>88</sup> The court observed that "[t]his public-private dichotomy is generally regarded as synonymous with the distinction between common carrier and non-common carrier operators."<sup>89</sup> The FCC, however, has actually regulated both public correspondence and private line service as common carrier activities.<sup>90</sup>

Another problem with the decision is that the court stated that it is free to challenge the present characterization of SMRS should their operations actually involve an indiscriminate offering of service to the public.<sup>91</sup> This statement interjects uncertainty into the new SMRS marketplace which could inhibit the interest of potential entrants.

A final problem with the common law standard is that the FCC might only apply it obligatorily to support a desired result. The actual result could well be based on the economic conditions in the given market, the nature of the new services, or other factors that the FCC considered to be controlling. But as long as the FCC could justify a decision to regulate or not to regulate by showing that it had applied the common law standard, it would not need to discuss these controlling factors.

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85. 51 F.C.C.2d at 922.

86. See 47 C.F.R. § 21.2 (1978).

87. See *id.*

88. 525 F.2d at 642.

89. *Id.*

90. Specialized Common Carrier Decision, 29 F.C.C.2d 870, *reh. denied*, 31 F.C.C.2d 1106, *aff'd sub nom.*, Washington Util. & Transp. Comm. v. FCC, 513 F.2d 1142 (9th Cir. 1975), *cert. denied*, 423 U.S. 836 (1976); *In re Applications of Microwave Comms., Inc.*, 15 F.C.C.2d 953 (1969), *recon. denied*, 21 F.C.C.2d 90, *mod. granted*, 27 F.C.C.2d 380 (1971).

91. 525 F.2d at 644.

C. *Resale and Sharing Activities: Shortcomings of the Common Law Model*

A new service for which the FCC considered common carrier regulation was the resale and sharing of private line services.<sup>92</sup> Resale and sharing of private line services<sup>93</sup> had been controlled (and in large part prohibited) by the common carriers themselves.<sup>94</sup> But the FCC declared such restrictions unlawful and discriminatory, thereby ratifying the creation of a new class of entities which would lease facilities from the underlying common carriers and sell services to the public.<sup>95</sup> The FCC decided to regulate only resellers, not those engaged in sharing arrangements, as common carriers.<sup>96</sup>

In reaching its decision to regulate only resellers as common carriers, the FCC began with the definition of communications

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92. *In re Regulatory Policies Concerning Resale and Shared Use of Common Carrier Servs. and Facilities*, 60 F.C.C.2d 261 (1976), *modified* 60 F.C.C.2d 588, 61 F.C.C.2d 70, *amended upon reconsideration*, 62 F.C.C.2d 588 (1977), *aff'd sub nom.* American Tel. and Tel. Co. v. FCC, 572 F.2d 17 (2d Cir. 1978) (the *Resale* decision). For discussion of the issues raised before the FCC, see Note, *Resale and Sharing of Private Line Communications Services: A.T.&T. Restriction and FCC Regulation*, 61 U. VA. L. REV. 679 (1975).

93. Private line service is an alternative to long distance telephone service. It makes telecommunications facilities between two points available to large volume users on a full-time basis and for a flat rate. Substantial discounts have been given to customers purchasing private line services in bulk. Because the services are often underutilized, there is a desire among small users to share the services and among middlemen to buy the discounted bulk services and then sell them to small customers at less than long distance rates.

The FCC defined sharing as "a non-profit arrangement in which several users collectively use communications services and facilities provided by a carrier, with each user paying the communications related costs associated therewith according to its pro rata usage . . ." 60 F.C.C.2d at 263. Resale was defined as "an activity wherein one entity subscribes to the communications services and facilities of another entity and then reoffers communications service and facilities to the public . . . for profit." *Id.* at 271.

94. With limited exceptions, the tariffs of most telecommunications common carriers prohibited the customers of private line services, Message Toll Services (MTS), and Wide Area Telecommunications Services (WATS), from receiving any payment for use of the services in transmitting any communications for others. *Id.* at 264. The restrictions on the resale and sharing of MTS and WATS were upheld since there was no support in the record for overturning them. *Id.* at 264-65.

95. *Id.* at 280-85. Several types of entities are encompassed. The so-called value-added carriers had been previously regulated as common carriers. These included Packet Communications, Telenet, and Graphnet. Packet Communications, Inc., 43 F.C.C.2d 922 (1973); Graphnet Systems, Inc., 44 F.C.C.2d 800 (1974). The FCC rejected the value-added distinction because a service is only "value-added" to the extent that the underlying carrier does not offer that service and this changes over time. The FCC spoke instead of the resale entities offering brokerage or processing services. 60 F.C.C. 2d at 271-72. Entities involved in sharing are, of course, primarily involved in businesses other than communications, such as airlines or stock exchanges.

96. See notes 116-25 and accompanying text *infra*.

common carrier found in the Communications Act. As it had done in *Frontier Broadcasting*, it discounted the statutory definition as well as the legislative history as circular and unhelpful.<sup>97</sup> The FCC then analyzed the case law to determine the "legal characteristics" of a communications common carrier, as *NARUC* required.<sup>98</sup>

Both *Frontier Broadcasting* and *NARUC* involved a public offering to provide communications facilities.<sup>99</sup> Since resellers made offerings of facilities to the public, they were likely candidates for common carrier regulation. That the resellers did not necessarily own the facilities they provided was considered insignificant: "The public neither cares nor inquires whether the offeror owns or leases the facilities. Resellers will be offering a communications service for hire to the public just as the traditional carriers do."<sup>100</sup>

The contrast between the portion of the *Resale* decision discussing whether resale and sharing should be allowed and the portion concerning the regulation of resellers as common carriers is striking. For instance, in determining whether to allow resale and sharing, the FCC embarked upon a detailed analysis of the public benefits that would accrue from those activities.<sup>101</sup> It expected

a further trend toward cost-related pricing by underlying carriers; a reduction in the public resources devoted to enforcement . . . ; more efficient utilization of existing communication capacity; better management of communications networks; improved marketing of communications services and facilities; a wider variety of communications offerings; and increased re-

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97. 60 F.C.C.2d at 304.

98. *Id.*

99. *Id.* at 308.

100. *Id.* The FCC supported this conclusion with an analogy to a more traditional transportation carrier, a freight forwarder. *Id.* at 305-07. Freight forwarders are the middlemen of the transportation industry. They consolidate shipments which would, by themselves, fill less than a railroad car, charge their customers less than the railroad's rate for small shipments, and pay the railroad the lower, carload rate. The FCC noted that at common law freight forwarders were considered common carriers. *Id.* at 306. In using this analogy, however, the FCC chose to disregard the history of Interstate Commerce Commission regulation of freight forwarders. In 1887, the Interstate Commerce Act had not included freight forwarders as common carriers. Only in 1950 was the Act amended to include them, even though they did not control the motor vehicles performing the transportation. Act of Dec. 20, 1950, ch. 1140, § 1, 64 Stat. 1113. The FCC used the analogy nonetheless since initially "freight carriers apparently were exempt from ICC regulation not because they were not common carriers but because the services they provided did not constitute 'transportation service' . . . within the meaning of . . . the Act." 60 F.C.C.2d at 306.

101. *Id.* at 298-303.

search, development, and implementation of communications technology.<sup>102</sup>

Yet the Commission limited itself to analysis of general common law precedents in reaching its decision to regulate resale.<sup>103</sup> The FCC should have continued its consideration of policy and economics into these areas as well. It is submitted that an economic analysis of a particular communications entity is more appropriate for effectuating the purpose of the Communications Act and is more likely to result in the correct application of common carrier regulation.

Pragmatic reasons for imposing common carrier regulation were suggested to the FCC in the comments of various parties to the *Resale* decision. The Office of Telecommunications Policy (OTP) argued that only the existence of a natural monopoly justified regulation of common carriers.<sup>104</sup> Absent technological restraints, competition, together with enforcement of the antitrust laws, would provide the needed impetus to achieve the regulatory goals of fairness and nondiscriminatory service without imposing the costs of regulation. Another party, Telenet Communications Corporation, argued that a third goal of regulation is to ensure that essential communications services are not adversely affected by the new services. The OTP noted that this could be accomplished by less intrusive regulatory devices, such as maximum sep-

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102. *Id.* at 302.

103. In most of the comments filed with the FCC, it was argued that the agency's decision in *In re Mackay Radio and Tel. Co.*, 6 F.C.C. 562 (1938), mandated the regulation of resellers. *Mackay* involved the question of whether the leasing of a telegraph circuit by one common carrier from another which enables the first carrier to provide service to a new area without first obtaining a certificate of convenience and necessity violated section 214 of the Communications Act, 47 U.S.C. § 214 (1976). But the Office of Telecommunications Policy (OTP) in its comments pointed out that the entities involved in *Mackay* were themselves common carriers already subject to full title II regulation. 60 F.C.C.2d at 307. Thus, the FCC's holding in *Mackay* that the leasing activity necessitated a certificate under title II did not determine the initial question of whether the communications entity would have been considered a common carrier solely as a result of the lease.

The FCC could have used *Mackay* to formulate a structural analysis of the resale area. Its decision in *Mackay* was not prompted by the public's perception of the service involved and did not result from an application of communications or transportation common law precedents. Rather, it was based upon a need for regulation. One rationale of *Mackay* was that if the leasing activity were left unregulated, facilities would be needlessly duplicated. 6 F.C.C. at 573-77. This policy justification for regulation is not present in the resale area where competition will be encouraged. But in the *Resale* decision the FCC noted merely that *Mackay* did not technically control. 60 F.C.C.2d at 307.

104. OTP's Reply Comments at 13-16, Regulatory Policies Concerning Resale and Shared Use of Common Carrier Servs. and Facilities, 60 F.C.C.2d 70 (1976). OTP has become part of the National Telecommunications and Information Administration in the Commerce Department.

aration or the creation of separate subsidiaries to engage in the nonregulated functions.<sup>105</sup> The OTP also pointed out that regulating new services in order to protect already regulated services would lead to a completely regulated marketplace, since all activities impact to a certain extent upon each other.<sup>106</sup>

In dissenting from the FCC's decision to regulate resellers, then-Commissioner Glen O. Robinson similarly argued that the only justification for regulation was to control monopolistic tendencies.<sup>107</sup> Since the new industry was to be competitive, there was no need for regulation, and it would be nothing more than "pointless interference" to engage in such regulation. As Commissioner Robinson stated, "[R]egulation is not only a tool by which regulatory commissions protect the public against regulated carriers; it is also a tool by which regulated carriers protect themselves against competition."<sup>108</sup> The issues raised by the OTP and Commissioner Robinson are those that should have been addressed by the FCC when deciding whether to regulate the newly created resale industry.

More importantly, the various benefits to the public from resale, which were exhaustively catalogued by the FCC, will be lessened or even frustrated by the FCC's decision to regulate. The FCC stated that a major benefit of allowing resale was that it would force carriers to provide their bulk services at prices related to costs.<sup>109</sup> The reseller could underprice the nonbulk rate service of the carrier by subscribing to the bulk rate service as it is now priced and then offering service to the public at a price above the bulk rate but below the nonbulk rate. If there is no actual cost savings in selling in bulk, the resellers providing straight brokerage of bulk facilities would be in existence only long enough to force the carrier's bulk rates in line with costs. But if the rate charged for resale brokerage is determined through regulation and not through competition, resale brokerage would not accomplish this benefit.<sup>110</sup>

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105. *Id.* at 16.

106. *Id.* at 11-12.

107. 60 F.C.C.2d at 339 (Robinson, Commissioner, dissenting).

108. *Id.* Commissioner Robinson also stated:

When I was in the Army, there used to be a saying, "If it moves, salute it; if it doesn't move, paint it." In this branch of the government, we proceed according to a slightly different maxim: "If it moves, regulate it; if it doesn't move, kick it—and when it moves, regulate it."

*Id.*

109. *Id.* at 298.

110. *Id.* at 299.

Other benefits set forth by the FCC included better management of specialized communications networks and the development of innovative and flexible services.<sup>111</sup> The extent to which these benefits arise will depend upon the competitive forces in the resale market. The stimulus to develop new management techniques and services comes from a desire to stay ahead of other firms which market the same product.<sup>112</sup> If such a stimulus is not present, these benefits will not materialize.

It is clear that the important questions of the impact of common carrier regulation upon the new resale market were not fully analyzed by the FCC. The Court of Appeals for the Second Circuit, in affirming the *Resale* decision, agreed in all respects with the analysis undertaken by the FCC;<sup>113</sup> the court even carried it one step further. Citing *FPC v. Texaco, Inc.*,<sup>114</sup> the court rejected the discretion argument and stated that the FCC must regulate all entities which are common carriers.<sup>115</sup> This argument begs the issue since the Communications Act is, as discussed above, not clear as to how this initial determination is to be made.

A major problem with the FCC's decision is that it distinguished between resale, which would be subject to common carrier regulation, and sharing, which would not. Because a sharing arrangement would not involve the offering of communications services to the public, the FCC felt that it did not come within the common law definition of common carrier.<sup>116</sup> Sharing involves a long-term arrangement between parties wishing to communicate between two or more geographic points who collectively use communications services and facilities obtained from an underlying carrier.<sup>117</sup> Each user pays the communications-related costs according to its pro rata usage.<sup>118</sup> Sharers enter such an arrangement hoping to achieve gains in economy and efficiency instead of purchasing their communications needs separately from the underlying carrier. The parties to the arrangement might even de-

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111. *Id.* at 299-303.

112. Regulation of resale entities will, according to Commissioner Robinson, force them to compete through their lawyers before the FCC rather than through their salespeople before the consumer. *Id.* at 339 (Robinson, Commissioner, dissenting).

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

114. 417 U.S. 380 (1974).

115. 572 F.2d at 25-26.

116. 60 F.C.C.2d at 316-21.

117. *Id.* at 316.

118. *Id.* The FCC noted that it did not "rule out any other manner of allocation of the costs of the sharing arrangement, so long as one user does not realize a profit from such allocation (other than the reduction of its own communications costs)." *Id.* at n.96.

cide that they can make more efficient use of the leased communications facilities if they hire a network control manager. The costs of this service are also apportioned among the parties. So long as users make no profit from the arrangement and, more importantly, no indiscriminate offering is made to the public, the FCC states that it will not regard sharing activity as common carriage.<sup>119</sup>

The effect of distinguishing resale and sharing activities is to create an incentive to characterize a service as a sharing arrangement rather than as resale, thus freeing it from the burdens of regulation.<sup>120</sup> Suppose several sharers pay a management fee to a nonuser third-party.<sup>121</sup> The network manager would, in that case, make a profit on the arrangement just as a reseller would. The only difference is that the manager's profit cannot include an increase in the cost of the bulk service provided by the underlying carrier. But this difference will not be significant. The carriers will surely raise their bulk rates for private line service to reflect the actual costs of providing them.<sup>122</sup> The major component of the reseller's profit will then be management compensation—just as is the user-manager's.

The FCC stated that it will make specific findings in individual cases in which the status of an offering as resale or sharing is challenged.<sup>123</sup> The criteria to be used in making this factual determination will include the duration of the arrangement, the

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119. *Id.* at 317. The FCC summarized the three forms of sharing that it anticipated:

- (a) sharing through a non-profit intermediary;
- (b) "pure" sharing wherein two or more users combine their needs to share *only* the costs of communications line service; and
- (c) sharing, either through a for-profit intermediary or in an arrangement wherein one user is the primary user, in which line costs and charges associated with "augmented" services are shared according to usage. In this case no management fee may be charged unless the payment is made to an entity other than a sharing participant.

*Id.* at 321 (emphasis added). The Commission specifically declined to limit sharing to the "pure" form. *Id.* at 318. No user may charge a management fee since it is "compensated for its efforts simply by sharing the cost of its communications requirements." *Id.* at 319. If a user does charge a management fee, it would then be subject to certification as a common carrier. *Id.* at 318.

120. *Id.* at 317.

121. The FCC has implied that it will allow this. *See* text accompanying note 116 *supra*.

122. *See* note 109 *supra* and accompanying text.

123. 60 F.C.C.2d at 320-21. The FCC emphasized that it reserved the opportunity to correct abuses: "In the future, if we find that resolution of individual cases regarding improper sharing could be alleviated by reporting, we reserve the right to again consider this matter." *Id.* at 320.



advertising used to recruit additional members, and the profit received by the sharing entities.<sup>124</sup> It is not clear how closely the FCC will examine a given sharing arrangement.<sup>125</sup> If detailed examinations are to be made, they will add tremendously to the FCC's regulatory burden. Undoubtedly, a network manager will be careful to have the sharing participants sign separate contracts for service for a specified duration, will not advertise extensively, and will not be a user of the shared services. If this sort of compliance is all that is required, it will not be difficult to have most resale relationships characterized as sharing arrangements and thus avoid regulation.

### III. THE COMMUNICATIONS COMMON CARRIER AMENDMENTS OF 1979: REGULATION WHERE NECESSARY

In June of 1978, legislation was proposed to Congress which would have totally rewritten the Communications Act of 1934.<sup>126</sup> This legislation was in turn substantially modified in March, 1979, and designated as the Communications Act of 1979.<sup>127</sup> Although the House Subcommittee on Communications decided not to proceed to the markup stage with the bill, plans are underway to reintroduce the common carrier portions of the legislation later in the 96th Congress.<sup>128</sup>

This legislation proposes to allow competition to replace much of the existing federal regulation of communications common carriers.<sup>129</sup> It would eliminate the term "common carrier," and re-

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124. *Id.* at 319.

125. The FCC thought a strict delineation between resale and sharing unrealistic "in view of the difficulty in maintaining a clear distinction between these activities." *Id.* at 321. It stressed that the indicia noted in the text were to be factual questions in every case.

We are not holding that it is impermissible for a sharing arrangement to advertise for additional members, nor do we set a minimum time commitment that each user must respect. We simply set forth our view that there *are* criteria which have traditionally been looked to in defining common carriage [citing *National Ass'n of Regulatory Util. Comm'rs. v. FCC*, 525 F.2d 630 (D.C. Cir. 1976)] . . . [and] we will not hesitate to make a factual finding regarding whether the offering is being made indiscriminately.

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

126. H.R. 13015, 95th Cong., 2d Sess., 124 CONG. REC. H 5128 (daily ed. June 7, 1978).

127. H.R. 3333, 96th Cong., 1st Sess., 125 CONG. REC. H 1853 (daily ed. March 29, 1979).

128. The common carrier provisions of H.R. 3333 are section 101, portions of section 102, and sections 311 through 353. Bills have also been introduced in the Senate to modify the common carrier provisions of the Communications Act along lines similar to those proposed in the House. See S. 611 and S. 622, 96th Cong., 1st Sess., 125 CONG. REC. S 2501 (daily ed. March 12, 1979).

129. Section 101 provides:

place it with the term "carrier,"<sup>130</sup> and provide for regulation only of "dominant carriers" as defined in the legislation.<sup>131</sup> The FCC would be required to reexamine its classification of dominant carriers and report its findings to Congress at least once every three years.<sup>132</sup> At the end of ten years, federal regulation of telecommunications would be reduced to a minimum.<sup>133</sup>

This proposed legislation, if enacted into law, will radically change the climate in which telecommunications services are offered. The clear hope of the drafters is that the telecommunica-

- (a) The Congress hereby finds that the regulation of interstate and foreign telecommunications is necessary, *to the extent marketplace forces are deficient*, in order to—

- (1) make available to the people of the United States nationwide and worldwide telecommunications services which are diverse, reliable, and efficient, and which are universally available at affordable rates; and
- (2) meet the needs of United States foreign policy, the national defense and the safety of life and property.

- (b) It is the purpose of this Act to establish certain requirements relating to the regulation of interstate and foreign telecommunications, which shall apply *to the extent that marketplace forces fail to protect the public interest*.

H.R. 3333, 96th Cong., 1st Sess. § 101, 125 CONG. REC. H 1853-54 (daily ed. March 29, 1979) (emphasis added).

Section 311(a) provides:

The Congress hereby declares that it is the purpose of this title to assure that the people of the United States have available, at reasonable rates, domestic and international telecommunications services which are reliable, efficient, and diverse, and to assure that the economy, general welfare, and security of the Nation will benefit from the continuing improvements in telecommunications technology. In achieving such purpose, *competition and the private sector shall be relied upon to the maximum extent possible* to determine the variety, quality, and cost of telecommunications services and facilities.

*Id.* § 311(a) (emphasis added).

130. The reason for this change is "to displace the various common law attributes of common carriage, as well as the historical notions derived under the 1934 Act." STAFF OF SUBCOMM. ON COMMUNICATIONS OF THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 96TH CONG., 1ST SESS., H.R. 3333, "THE COMMUNICATIONS ACT OF 1979" SECTION-BY-SECTION ANALYSIS 17 (Comm. Print. 1979) [hereinafter cited as STAFF ANALYSIS].

131. A dominant carrier is an interexchange carrier which "(A) furnishes telecommunications service in a substantial percentage of the total number of markets for interexchange telecommunications services; and (B) has the ability, in a substantial percentage of those markets . . . to either raise or lower prices without significantly affecting the amount of service demanded by its customers. . . ." H.R. 3333, 96th Cong., 1st Sess. § 332(b)(1). Only AT&T would meet this definition today. STAFF ANALYSIS, *supra* note 130, at 19.

132. *Id.* § 322(c)(1).

133. After ten years, the FCC's authority to regulate telecommunications carriers would be limited to certain carriers, to the extent they provide international transmissions or international telecommunications facilities, which are classified as dominant carriers because they have "a monopoly over the ownership, control or provision of any category of international telecommunications facilities" or have "the ability to either raise or lower prices in a market for a particular type of international transmission without significantly affecting the amount of service demanded by its customers." *Id.* §§ 332(d), 332(b)(2).

tions market will develop during the next ten years so that there will be no dominant carriers and the market forces of competition will be activated such that the industry can be completely deregulated.

The Communications Act of 1934 was drafted with a view toward regulating communications in a way which would ensure that communications services are provided to the public upon reasonable request and at just and reasonable rates. These goals remain unchanged today. The proposed amendments would eliminate regulation which operates to inhibit those goals by neglecting to take into account the steadying forces of market competition. They represent Congress' belief that the marketplace not only is sufficient to ensure fair rates and reasonable profits, but also is the best source for the promotion of efficient service and rapid innovation.