

# NOTES

## REDEFINING “COMMON CARRIER”: THE FCC’s ATTEMPT AT DEREGULATION BY REDEFINITION

Title II of the Communications Act of 1934<sup>1</sup> (the Communications Act) codified a number of requirements and duties applicable to those organizations that provide communication services and created the Federal Communications Commission (FCC or Commission) to enforce those duties. Title II<sup>2</sup> has become the foundation for a vast network of regulations imposed on common carriers in the communications industry.<sup>3</sup> The definition of “common carrier” is therefore integral to the workings of the Communications Act. The language of the Communications Act itself sheds little light on the definition, as the term “common carrier” is defined at section 3(h) simply as “any person engaged as a common carrier for hire.”<sup>4</sup> From this statutory language, the Commission derives an equally unilluminating regulatory definition of a communication common carrier: “Any person engaged in rendering communication service for hire to the public.”<sup>5</sup>

The terse and somewhat circular definition of common carrier satisfied Congress. While debating how to regulate communication common carriers, Senator La Follette declared “telegraph and telephone companies . . . have a defined meaning in the law, and I do not believe it would include anything else.”<sup>6</sup> Unfortunately, Senator La Follette’s forecast has not been sustained by time: the FCC claims that the supplied definitions are no longer useful.<sup>7</sup>

Since 1979 the FCC has been seeking ways to ease or entirely remove the requirements that Title II imposes on communication common

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

2. *Id.* §§ 201-221, 48 Stat. at 1071-81 (codified at 47 U.S.C. §§ 201-221 (1982)).

3. *See* 47 C.F.R. §§ 21.0-69.611 (1986).

4. Communications Act § 3(h), 48 Stat. at 1066 (codified at 47 U.S.C. § 153(h) (1982)).

5. 47 C.F.R. § 21.2 (1986).

6. 45 CONG. REC. 6976 (1910).

7. Policy and Rules Concerning Rates for Competitive Common Carrier Servs. and Facilities Authorizations Therefor, 77 F.C.C.2d 308, 359 (1979) (Notice of Inquiry and Proposed Rulemaking) [hereinafter *Notice of Inquiry*] (this proceeding will be referred to as the Competitive Carrier proceeding).

carriers.<sup>8</sup> The FCC recently has proposed narrowing the application of Title II by redefining the term "common carrier" so as to exclude most currently regulated communication providers.<sup>9</sup> This note examines the Commission's effort to redefine the term "common carrier" and concludes that such action contradicts the expressed intent of Congress<sup>10</sup> and creates confusion and uncertainty in the industry.<sup>11</sup> The note initially examines the FCC's effort to achieve deregulation through redefinition,<sup>12</sup> and reviews the historical development of the term "common carrier"<sup>13</sup> in order to determine who Congress intended to regulate under Title II. Then, using guidelines established in recent Supreme Court decisions, the note demonstrates that the FCC's attempt to deregulate by redefinition exceeds its authority under Title II.<sup>14</sup> Finally, the note discusses the policy problems that the FCC's actions present.<sup>15</sup>

### I. TITLE II REQUIREMENTS

The regulations set forth in Title II can be divided into roughly three categories: duties of common carriers, liabilities of common carriers, and economic regulations. The Communications Act imposes the duty on a common carrier<sup>16</sup> to provide service "upon reasonable request"<sup>17</sup> at rates that are "just and reasonable,"<sup>18</sup> "without unjust or unreasonable discrimination" or "unreasonable preference or advantage" to any party.<sup>19</sup> The liabilities of common carriers are set out in section 206 of the Communications Act,<sup>20</sup> which provides a remedy for costs caused by delay in the delivery of a message,<sup>21</sup> costs associated with discrimina-

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8. *Id.* at 309-11.

9. *Id.* at 363-68. See *infra* notes 101-110 and accompanying text.

10. See *infra* notes 140-147 and accompanying text.

11. See *infra* notes 156-162 and accompanying text.

12. See *infra* notes 51-57 and accompanying text.

13. See *infra* notes 58-94 and accompanying text.

14. See *infra* notes 118-155 and accompanying text.

15. See *infra* notes 156-162 and accompanying text.

16. Cases discussing the early common law development of these duties are listed *infra* notes 66-67.

17. Communications Act of 1934, Pub. L. No. 73-416, § 201(a), 48 Stat. 1064, 1070 (codified at 47 U.S.C. § 201(a) (1982)).

18. *Id.* § 201(b), 48 Stat. at 1070 (codified at 47 U.S.C. § 201(b) (1982)).

19. *Id.* § 202(a), 48 Stat. at 1070 (codified at 47 U.S.C. § 202(a) (1982)). See *Notice of Inquiry*, 77 F.C.C.2d 308, 312 (1977) (sections 201 and 202 are standards by which the Commission determines the lawfulness of tariffs). A further duty created solely by the legislation concerns the relation of common carriers to national defense. See Act of June 25, 1940, Pub. L. No. 76-659, 54 Stat. 570 (codified as amended at 47 U.S.C. § 210(b) (1982)).

20. Communications Act § 206, 48 Stat. at 1072 (codified at 47 U.S.C. § 206 (1982)).

21. See *Jeremias v. Western Union Tel. Co.*, 78 Ga. App. 142, 144-45, 50 S.E.2d 797, 798-99 (1948).

tion in service,<sup>22</sup> attorney fees in court actions,<sup>23</sup> and punitive damages.<sup>24</sup>

Economic regulations govern the business relations of common carriers. For example, tariff regulations require common carriers to file all tariffs<sup>25</sup> with the Commission and also to make them available for public examination.<sup>26</sup> The Commission must receive ninety days notice before changes may be made to the tariff schedule.<sup>27</sup> Upon submission, the Commission may hold hearings to determine whether these new tariffs are unlawful and void.<sup>28</sup> Common carriers must also file for FCC approval of new services, routes or transmission lines.<sup>29</sup>

The national emphasis on deregulation has focused public attention on many of these economic regulations.<sup>30</sup> Those who favor deregulation posit that these regulations inhibit the development of a competitive industry by forcing carriers to disclose both tariff information and plans to expand or develop new routes to other providers, who not only benefit from advanced knowledge of competitors' plans, but can also challenge the legality of the submissions in lengthy and costly proceedings.<sup>31</sup> They also believe Title II's filing regulations impose high compliance costs on common carriers, which are passed on to the taxpayer and the consumer.<sup>32</sup> Furthermore, they argue that the lack of flexibility in pricing discourages new entrants to the industry and allows collusion between existing carriers.<sup>33</sup>

## II. THE FCC'S DRIVE TOWARDS DEREGULATION

In 1979, the FCC initiated an inquiry into the benefits and methods

22. *In re Edwards Indus., Inc.*, 74 F.C.C.2d 322, 328 (1979).

23. *See* *WSAZ, Inc. v. American Tel. & Tel.*, 31 F.C.C. 175, 194 (1961).

24. *In re Richard Johnson*, 18 F.C.C.2d 679, 681 (1969). Title II as a whole has been interpreted as placing actions for negligence by common carriers within the jurisdiction of federal courts. *Western Union Tel. Co. v. Junker*, 153 S.W.2d 210, 211 (Tex. Civ. App. 1941).

25. Tariffs are "[s]chedules of rates and [rules governing the offering of services] filed by common carriers." 47 C.F.R. § 61.23 (1986).

26. Communications Act of 1934, Pub. L. No. 73-416, § 203(a), 48 Stat. 1064, 1070-71 (codified at 47 U.S.C. § 203(a) (1982)). *See* 47 C.F.R. § 61 (1986).

27. Communications Act § 203(b), 48 Stat. at 1071 (codified as amended at 47 U.S.C. § 203(b) (1982)).

28. *Id.* § 204, 48 Stat. at 1071-72 (codified at 47 U.S.C. § 204 (1982)).

29. *Id.* § 214(a), 48 Stat. at 1075-76 (codified at 47 U.S.C. § 214(a) (1982)). *See* 47 C.F.R. § 63 (1986). Other economic regulations concern mergers, acquisitions, and other general business practices of common carriers. Communications Act §§ 211-221, 48 Stat. at 1073-81 (codified as amended at 47 U.S.C. §§ 211-221 (1982)). *See* 47 C.F.R. §§ 31-35 (1986).

30. Hillman, *Telecommunications Deregulation: The Martyrdom of the Regulated Monopolist*, 79 Nw. U.L. REV. 1183, 1183-84 (1985). *See Notice of Inquiry*, 77 F.C.C.2d 308, 312-15 (1977) (discussing economic regulation of common carriers).

31. *Notice of Inquiry*, 77 F.C.C.2d at 313 (1977).

32. *Id.* at 358.

33. *Id.*

of deregulating common carrier services.<sup>34</sup> In its Notice of Inquiry and Proposed Rulemaking, the Commission observed that the communications industry had changed greatly since passage of the Communications Act in 1934; in particular, technological innovations had led to the introduction of diverse and possibly competitive services.<sup>35</sup> The Commission feared that Title II's regulations imposed unnecessary costs and created barriers to entry, thereby diminishing both the variety of services available to the public and the possibility that a truly competitive marketplace would develop.<sup>36</sup> Two methods of deregulation were proposed. The first was forbearance, which would allow the FCC in certain situations to refrain from enforcing compliance with all but minimal Title II regulations.<sup>37</sup> The second proposal was to redefine the term common carrier, thus removing certain communication services from Title II requirements altogether.<sup>38</sup>

Although the Commission realized that the definitional approach went further towards deregulation,<sup>39</sup> the Commission initially indicated it planned to use forbearance.<sup>40</sup> In its First Report and Order, the Commission "streamlined" the regulatory requirements applicable to those the Commission considered "non-dominant common carriers."<sup>41</sup> Carriers that lack sufficient market power to raise prices artificially or to discriminate against customers were classified as non-dominant carriers, and were required to satisfy only minimal Title II requirements.<sup>42</sup> By contrast, the Commission treated "carriers that have market power (i.e. power to control price)" as dominant carriers, which continued to bear the full burden of Title II regulation.<sup>43</sup>

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34. *Id.* at 309.

35. *Id.* at 359.

36. *Id.* at 309.

37. *Id.* at 359-63.

38. *Id.* at 363-68.

39. *Id.* at 359.

40. The Commission has not explained why it chose to begin with forbearance rather than redefinition, and has noted only that it plans to deal with redefinition in future orders. Policy and Rules Concerning Rates for Competitive Common Carrier Servs. and Facilities Authorizations Therefor, 91 F.C.C.2d 59, 62 n.7 (1982) (Second Report and Order) [hereinafter *Second Report*].

41. Policy and Rules Concerning Rates for Competitive Common Carrier Servs. and Facilities Authorizations Therefor, 85 F.C.C.2d 1, 50 (1980) (First Report and Order).

42. *Id.* at 20-21. *See also* 47 C.F.R. § 61.12(e) (1986) (defining "Non-dominant carrier").

43. 85 F.C.C.2d at 20. *See also* 47 C.F.R. § 61.12(c) (1986) (defining "Dominant carrier"). The Commission commented that "[a] firm with market power is able to engage in conduct that may be anticompetitive . . . . This may entail setting price above competitive costs in order to earn supranormal profits, or setting price below competitive costs to forestall entry by new competitors or to eliminate existing competitors." 85 F.C.C.2d at 21. It is interesting to compare this market approach with the market-based definition by which the Commission posited that some services are not common carriers. *See infra* notes 51-57 and accompanying text.

In the Second Report and Order, streamlined regulations gave way to “permissive” forbearance. Resellers of basic terrestrial communication services were permitted (but not required) to cancel their tariffs and conduct their business arrangements on a private contractual basis.<sup>44</sup> The Third, Fourth, and Fifth Reports and Orders extended permissive forbearance to virtually every common carrier determined to be non-dominant.<sup>45</sup>

The Sixth Report and Order imposed mandatory forbearance. It ordered all non-dominant carriers to cancel their existing tariffs and to refrain from filing new tariff schedules.<sup>46</sup> The United States Court of Appeals for the District of Columbia Circuit, which specifically declined to examine permissive forbearance,<sup>47</sup> held the Sixth Report and Order unlawful in light of the language of the Communications Act.<sup>48</sup> The court noted that the Communications Act required *every* common carrier to “file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers.”<sup>49</sup>

The court’s literal interpretation of the statutory language has suggested to at least one commentator that judicial consideration of permissive forbearance—and possibly even streamlined regulation—would yield the same result.<sup>50</sup> Thus, although still in force, the deregulatory technique chosen by the FCC has been stalled short of what the Commission hoped to achieve.

In the meantime, the definitional approach to deregulation, which the Commission promulgated in the first Notice for the Competitive Carrier proceeding, had not been abandoned. One year after the first Notice, the Commission issued a Further Notice of Proposed Rulemaking, which

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44. See *Second Report*, 91 F.C.C.2d at 73 (1982).

45. Policy and Rules Concerning Rates for Competitive Carrier Servs. and Facilities Authorizations Therefor, 48 Fed. Reg. 46,791, 46,792 (1983) (Third Report and Order) (extending forbearance to “carriers providing service to domestic points outside the continental United States”); Policy and Rules Concerning Rates for Competitive Common Carrier Servs. and Facilities Authorizations Therefor, 95 F.C.C.2d 554, 557 (1983) (Fourth Report and Order) (extending forbearance to all resellers and specialized common carriers); Policy and Rules Concerning Rates for Competitive Common Carrier Servs. and Facilities Authorizations Therefor, 98 F.C.C.2d 1191, 1209 (1984) (Fifth Report and Order) (applying forbearance to carriers affiliated with exchange telephone companies, to domestic satellites, to miscellaneous common carriers, and to digital transmission networks).

46. Policy and Rules Concerning Rates for Competitive Common Carrier Servs. and Facilities Authorizations Therefor, 99 F.C.C.2d 1020, 1027 (1985) (Sixth Report and Order).

47. *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186, 1196 (D.C. Cir. 1985).

48. *Id.* at 1195.

49. *Id.* at 1191 (quoting 47 U.S.C. § 203(a) (1982)).

50. May, *MCI Telecommunications Corp. v. FCC: A Roadblock or Merely a Bump on the Road to Deregulation?*, 38 ADMIN. L. REV. 51, 58-59 (1986).

again solicited comments on redefining the term "common carrier."<sup>51</sup> Although adoption of the forbearance technique made it unnecessary for the Commission to issue any orders invoking the definitional theory in the Competitive Carrier proceeding itself,<sup>52</sup> the theory's structure has been fairly well articulated,<sup>53</sup> and in fact pervades several recent FCC actions.<sup>54</sup>

Specifically, the theory suggests that the definition of the term common carrier should be based on the market strength of the provider: a non-dominant provider would not be considered a common carrier under this approach.<sup>55</sup> This technique is similar to forbearance,<sup>56</sup> differing only in that it *completely* removes non-dominant carriers from Title II regulation.<sup>57</sup> To understand fully the significance of the Commission's definitional approach, it is necessary first to examine the historical development of the term "common carrier."

### III. HISTORICAL DEVELOPMENT OF THE TERM "COMMON CARRIER"

The history of section 3(h) of the Communications Act begins in the ports of Restoration England. In 1670, Lord Chief Justice Hale wrote that the ports of England were touched by three types of rights: *jus privatum* (proprietary rights), *jus publicum* (the common interest), and *jus regium* (the prerogative of the King).<sup>58</sup> Lord Hale recognized the possible conflicts among the three types of rights; in his explanation he ranked each of them. He described the King's rights, *jus regium*, which should be understood as more analogous to the interests of a centralized

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51. Policy and Rules Concerning Rates for Competitive Common Carrier Servs. and Facilities Authorizations Therefor, 84 F.C.C.2d 445, 517-19 (1981) (Further Notice of Proposed Rulemaking) [hereinafter *Further Notice of Proposed Rulemaking*].

52. Burch, *Common Carrier Communications by Wire and Radio: A Retrospective*, 37 FED. COMM. L.J. 85, 103 (1985) (Commission's "end run" use of forbearance precluded consideration of the definitional issue).

53. See *infra* notes 101-110 and accompanying text.

54. See, e.g., Cox Cable Communications, Inc., 102 F.C.C.2d 110, 121-22 (1985) (using market power analysis to determine whether carrier should be treated as a common carrier); International Competitive Carrier Policies, 102 F.C.C.2d 812, 829-30 (1985) (using market power analysis to determine whether Title II should apply to communication service).

55. *Notice of Inquiry*, 77 F.C.C.2d 308, 365 (1979).

56. See *Further Notice of Proposed Rulemaking*, 84 F.C.C.2d at 463 ("Because both the 'definitional' and forbearance approaches seek ultimately to identify the carriers and services to which Title II obligations should apply . . . the two approaches may actually be viewed as complementary sides of the same coin.").

57. *Notice of Inquiry*, 77 F.C.C.2d at 363.

58. Hale, *A Treatise in Three Parts*, in 1 COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND 1, 72 (F. Hargrave ed. 1787).

government than as a proprietary right held by the King *qua* King,<sup>59</sup> as superintendent to the other two.<sup>60</sup>

The interaction between the two remaining types of rights introduced the concept of public interest in privately held businesses. While the operator of a wharf or dock was free to profit from his proprietary interest, *jus privatum*,<sup>61</sup> Lord Hale held that the *jus privatum* was "cloathed and superinduced with a *jus publicum*."<sup>62</sup> Lord Hale argued that the public right conflicted with and superseded the private right in ports inasmuch as:

1. They ought to be free and open for subjects and foreigners, to come and go with their merchandise . . . .
2. There ought to be no new tolls or charges imposed upon them without sufficient warrant, nor the old inanced . . . .
3. They ought to be preserved from impediments and nuisances, that may hinder or annoy the access or abode or recess of ships, and vessels, and seamen, or the unlading or relading of goods.<sup>63</sup>

Lord Hale explained and developed the concept of a private business affected by a public interest in his classic work, *The Analysis of Law*.<sup>64</sup> He wrote that actions arising under a theory of implied contract could be brought against "[p]ersons that undertake a *Common Trust*," including common hosts, common "farriers," and common carriers.<sup>65</sup> Thus, Lord Hale's writings show two important aspects of a private business that serves a public interest: the infusion of *jus publicum* into an otherwise private undertaking, and a duty to perform the service in a manner that complies with public expectations.

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59. For example, when explaining why seaports could not be erected without royal permission, Lord Hale commented that "the safety of the kingdom, the commerce of the kingdom . . . are concerned in it. Merchants and seamen of all parts and quarters of the world are let into the kingdom publicly, and under the publick protection in a publick port; and consequently it is not within the extent of a jurisdiction palantine *de novo* to erect a publick port." *Id.* at 53.

60. *Id.* at 72.

61. *Id.* at 74-75.

62. *Id.* at 84.

63. *Id.* These duties are strikingly similar to those mandated for common carriers in sections 201 and 202 of the Communications Act. The Code dictates that "[i]t shall be the duty of every common carrier engaged in interstate or foreign communication . . . to furnish such communication service upon reasonable request . . . . It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services . . . ." 47 U.S.C. §§ 201-202 (1982).

64. M. HALE, *THE ANALYSIS OF LAW* (1713).

65. *Id.* at 123. The duties of hotelkeepers evolved into an elaborate body of common law. See N. COURNOYER & A. MARSHALL, *HOTEL, RESTAURANT AND TRAVEL LAW* 4-7 (2d ed. 1983) (discussing the history of hotel common law). The duties of ferrymen remained closely tied to the duties of other common carriers of goods and passengers. See T. CHITTY & L. TEMPLE, *A PRACTICAL TREATISE ON THE LAW OF CARRIERS OF GOODS AND PASSENGERS BY LAND, INLAND NAVIGATION, AND IN SHIPS* \*2, \*8 (1857) (discussing duties of carriers "by land and inland navigation").

English<sup>66</sup> and early American jurisprudence<sup>67</sup> largely defined common carriers in the context of special liabilities attached to those who were labelled as such. Although the liabilities of common carriers remained unsettled for some time,<sup>68</sup> a working definition of common carrier emerged as early as 1710.<sup>69</sup> By the mid-1800s, working definitions coalesced into a standard. Tompson Chitty and Leofric Temple wrote that:

To render a person liable as a common carrier, he must exercise the business of carrying as a "public employment," and must undertake to carry goods for *all persons indiscriminately*; and hold himself out as ready to engage in the transportation of goods for hire as a *business*, and not as a casual occupation *pro hac vice*.<sup>70</sup>

This definition was widely accepted,<sup>71</sup> and like all contemporary definitions of the term was based solely on the nature of the carrier and not on the market positions of individual common carriers.<sup>72</sup>

Because the early common law definitions of common carrier as-

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66. *Pozzi v. Shipton*, 8 Ad. & E. 963, 974-75, 112 Eng. Rep. 1106, 1110-11 (Q.B. 1838) (holding strict liability of common carriers to be the custom, and therefore the law of England); *Buddle v. Willson*, 6 Term R. 369, 373, 3 Rev. Rep. 202, 206 (K.B. 1795) (cause of action against common carriers held to be *ex contractu*); *Forward v. Pittard*, 1 Term R. 27, 33-34, 1 Rev. Rep. 142, 147-48 (K.B. 1785) (discussing common carriers' liability for acts of man, and holding common carrier liable for damage to goods caused by an accidental fire); *Aimes v. Stevens*, 1 Strange 128, 128, 93 Eng. Rep. 428, 428 (K.B. 1719) (ruling common carriers not liable for "acts of God").

67. *New Jersey Steam Navigation Co. v. Merchants' Bank*, 47 U.S. (6 How.) 344, 381-83 (1848) (discussing effect of special agreement on liabilities of common carrier); *Pomeroy v. Donaldson*, 5 Mo. 36, 38-39 (1837) (discussing liabilities of common carriers for negligence, gross negligence and negligence of the customer); *Bank of Orange v. Brown*, 3 Wend. 158, 162 (N.Y. 1829) (discussing liabilities imposed on common carrier by implied contract that it will carry goods safely); *Eagle v. White*, 6 Whart. 505, 516-17 (Pa. 1841) (discussing time at which common carriers' liabilities are discharged).

68. See J. ANGELL, *TREATISE ON THE LAW OF CARRIERS OF GOODS AND PASSENGERS, BY LAND AND BY WATER* § 68 (1849) (special liabilities of common carriers unsettled from reign of Queen Elizabeth to reign of Queen Anne).

69. *Gisbourn v. Hurst*, 1 Salk. 249, 250, 91 Eng. Rep. 220, 220 (1710) ("[A]ny man undertaking for hire to carry the goods of all persons indifferently . . . is . . . a common carrier.").

70. T. CHITTY & L. TEMPLE, *supra* note 65, at \*14-\*15 (emphasis in original). This language is reflected in the discussion of communication common carriers in *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 640-42 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976). See *infra* notes 97-99 and accompanying text.

71. *E.g.*, R. HUTCHINSON, *TREATISE ON THE LAW OF CARRIERS* § 47 (1879); J. STORY, *LAW OF BAILMENTS* § 495 (1832); J. ANGELL, *supra* note 68, at § 68. Hutchinson noted that "[t]hese definitions are substantially the same and are adopted and used indifferently." R. HUTCHINSON, *supra* § 47 n.1. Courts also accepted the definition. *E.g.*, *Dwight v. Brewster*, 18 Mass. (1 Pick.) 50, 55 (1822); *Allen v. Sackrider*, 37 N.Y. 341, 342 (1867); *Gordon v. Hutchinson*, 1 Watts & Serg. 285, 286 (Pa. 1841).

72. The FCC argues rather elaborately that the development of the term common carrier *could* be looked at in economic terms. See *infra* notes 101-110 and accompanying text.



sumed that the entity in question actually carried something,<sup>73</sup> some commentators and courts struggled to incorporate telegraph and telephone service within the concept of common carrier.<sup>74</sup> The Illinois Supreme Court, for example, agonized over the characteristics of telegraphy, and finally concluded that although telegraph providers should not be labelled common carriers, they were so analogous as to be held to the same standards.<sup>75</sup> By contrast, the California Supreme Court had little difficulty conceptualizing telegraph and telephone service as common carriers. In language elegantly reminiscent of Lord Hale, the court concluded that:

The rules of law which govern the liability of telegraph companies are not new. They are old rules applied to new circumstances. Such companies hold themselves out to the public as engaged in a particular branch of business, in which the interests of the public are deeply concerned. They propose to do a certain service for a given price. There is no difference in the general nature of the legal obligation of the contract between carrying a message along a wire and carrying goods or packages along a route. The physical agency may be different, but the essential nature of the contract is the same.<sup>76</sup>

Although Congress did not immediately resolve the confusion concerning communication common carriers, it did enact the Interstate Commerce Act in 1887, which codified the duties and liabilities of common carriers.<sup>77</sup> Although the Interstate Commerce Act dealt exclusively with railways, it is integral to the history of communication common carrier law because it served as Congress's initial basis for regulating communications<sup>78</sup> and provided many of the definitions found in the Communications Act.<sup>79</sup>

Through the Interstate Commerce Act, Congress created the Interstate Commerce Commission (ICC), and in 1888 it gave the ICC the

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73. See I. REDFIELD, *THE LAW OF CARRIERS OF GOODS AND PASSENGERS, PRIVATE AND PUBLIC, INLAND AND FOREIGN, BY RAILWAY, STEAMBOAT, AND OTHER MODES OF TRANSPORTATION* § 20 (1869) (describing the "transport from place to place" of goods and passengers as an element of common carrier status).

74. Redfield, for example, divided his work into separate sections on carriers and telegraph. It is notable that although Redfield did not consider telegraph companies to be carriers, he found them to have almost identical duties. *Id.* at 398. See also I. BROWNE, *THE ELEMENTS OF THE LAW OF BAILMENTS AND COMMON CARRIERS* 93 (1896) (stating that telegraph and telephone companies are *not* common carriers).

75. *Tyler, Ullman & Co. v. Western Union Tel. Co.*, 60 Ill. 421, 431 (1871). See also *Leonard v. New York, Albany & Buffalo Electro Magnetic Tel. Co.*, 41 N.Y. 544, 569-70 (1870) (holding that telegraph companies are not common carriers, but are subject to similar law).

76. *Parks v. Telegraph Co.*, 13 Cal. 423, 424-25 (1859).

77. Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887) (codified as amended throughout 49 U.S.C. (1982)).

78. S. REP. NO. 781, 73d Cong., 2d Sess. 2 (1934).

79. See *infra* note 94 and accompanying text.

power to regulate telegraph companies.<sup>80</sup> Congress extended the ICC's authority, however, only to those telegraph lines that had been subsidized by the government. Congress did not discuss the status of telegraph companies as common carriers.<sup>81</sup>

The Mann-Elkins Act of 1910<sup>82</sup> resolved whether telegraphs and telephones were classified as common carriers. While working out a compromise bill completely reshaping regulation of the railroads and creating the first court that would review only agency decisions,<sup>83</sup> the House gave the ICC regulatory control of telegraph and telephone services.<sup>84</sup> The bill as enacted not only gave the ICC control over communications, it also decreed telegraph and telephone providers to be common carriers.<sup>85</sup>

Unfortunately, the bill did not define "common carrier."<sup>86</sup> The minimal floor debate concerning communications, however, helps to explain congressional intent. Representative Mann, who opposed extending regulation, argued that telegraph and telephone services were not common carriers because they did not involve the transportation of passengers or property.<sup>87</sup> Representative Underwood disagreed and argued that "the telegraph line and the telephone line are becoming rapidly as much a part of the instruments of commerce and as much a necessity in commercial life as the railroads."<sup>88</sup> Representative Bartlett, who proposed the amendment, further argued that "the messages that are transmitted are property," and went on to recite those liabilities of communication services that were identical to the liabilities of common carriers.<sup>89</sup> Representatives Underwood and Bartlett prevailed, and the

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80. Act of Aug. 7, 1888, ch. 772, § 3, 25 Stat. 382, 383.

81. Section 6 of this act required subsidized telegraph companies to file their business contracts with the ICC, foreshadowing the complex tariff requirements later promulgated by the FCC. *Id.* § 6, 25 Stat. at 384 (current version codified at 47 U.S.C. § 9 (1982)).

82. Mann-Elkins Act, Pub. L. No. 61-218, 36 Stat. 539 (1910).

83. See B. SCHWARTZ, 2 THE ECONOMIC REGULATION OF BUSINESS AND INDUSTRY 1007 (1973).

84. 45 CONG. REC. 5533 (1910) (amendment to H.R. 17536 by Rep. Bartlett). The Senate considered a wholesale adoption of the House amendment, *id.* at 6973 (statement of Sen. Dixon), but instead deferred detailed legislation to the joint conference and adopted a shorter amendment acknowledging ICC jurisdiction over telegraph and telephone, *id.* at 6976 (statement of Sen. Dixon). See also S. 6737, 61st Cong., 2d Sess. § 11, 45 CONG. REC. 7273, 7283-84 (1910) (labelling telegraph and telephone providers as common carriers).

85. Mann-Elkins Act, Pub. L. No. 61-218, § 7, 36 Stat. 539, 544 (1910).

86. The Act does list services to be included in the term common carrier, but it does not provide a general definition of the term. *Id.*

87. 45 CONG. REC. 5533 (1910). See *supra* notes 73-76 and accompanying text.

88. 45 CONG. REC. at 5534.

89. *Id.* at 5536. Representative Hobson said:

a telegraph message or a telephone message is property. But even if it were not the transportation of property, there is no reason why a measure that regulates intercommunication,

House voted to include telegraph and telephone providers under the rubric of "common carrier."<sup>90</sup> Once again, it is important to note, debate focused only upon the nature of the carriers, and did not examine the market dominance of individual providers.

The Interstate Commerce Act, as amended by the Mann-Elkins Act, directly preceded the Communications Act of 1934.<sup>91</sup> Although the legislative history of section 3(h) of the Communications Act is brief and does not expressly define common carrier, the Conference Report noted that "the definition does not include any person if not a common carrier *in the ordinary sense of the term*."<sup>92</sup> The facial circularity of contemporary definitions of common carrier suggests that there was indeed an "ordinary sense" of the phrase,<sup>93</sup> so that Congress did not believe it needed to provide a precise definition. Indeed, comments of various legislators during floor debate uniformly suggest that Congress transferred the meaning of the term common carrier intact from its use in the amended Interstate Commerce Act.<sup>94</sup>

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that regulates commerce, should not embrace these messages. . . . Messages are classified, and are more easily classified than freight. The same underlying principle of reasonableness of rates apply [sic] to the regulation of both.

*Id.*

The analysis of Bartlett and Hobson mirrored the scholarly thinking of that period. *See* J. ALLDREDGE, RATE-MAKING FOR COMMON CARRIERS § 69 (1929) ("Telegraph companies belong to a special class of common carriers. . . . They transmit rather than transport."); *id.* at § 73 (telephones also special class of common carriers).

90. 45 CONG. REC. 5537 (1910).

91. The Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162, which created the Federal Radio Commission and mandated regulation of radio, was also incorporated into the Communications Act. However, the Radio Act did not address communication common carriers.

As previously mentioned, the Interstate Commerce Act did not provide a definition of a common carrier but instead merely described services that would be considered as common carriage. Interstate Commerce Act, ch. 104, § 1, 24 Stat. 379, 379 (1887) (current version at 49 U.S.C. § 10102 (1982)). Workable definitions of the term common carrier were later provided by amendment and case law. *See* Regulatory Policies Concerning Resale and Shared Use of Common Carrier Servs. and Facilities, 60 F.C.C.2d 261, 304-08 (1976) (Report and Order) (discussing use of the term common carrier by the ICC and stating that ICC use was precedential for FCC purposes).

92. H.R. CONF. REP. NO. 1918, 73d Cong., 2d Sess. 46 (1934) (emphasis added), *reprinted in* [Current Service] Rad. Reg. (P & F) ¶10:1011.

93. Legal treatises of the period continued to use the definition of common carrier that had emerged in the mid-1800s: one who holds himself out indiscriminately as a carrier for hire. *See, e.g.,* W. ELLIOT, LAW OF BAILMENTS AND CARRIERS § 122 (W. Hemingway 2d ed. 1929); E. GODDARD, LAW OF BAILMENTS AND CARRIERS §§ 191-192 (C. Cullen 2d ed. 1928). Congress took a similar approach with the word "railroad" in the Interstate Commerce Act. *See* 45 CONG. REC. 5892 (1910) (statement of Rep. Mann) ("[A] railroad corporation is not defined in the act to regulate commerce.").

94. *See, e.g.,* 78 CONG. REC. 8823 (1934) (statements of Sen. Dill); *id.* at 10,313 (statement of Rep. Rayburn). *See* S. REP. NO. 781, 73d Cong., 2d Sess. 3 (1934) (definitions in section 3 taken from Radio Act, Interstate Commerce Act, and international broadcasting conventions).

#### IV. MODERN APPROACHES TO THE DEFINITION OF COMMUNICATION COMMON CARRIER

The legal definition of a *communication* common carrier has not engendered a large body of case law.<sup>95</sup> The few modern court decisions adhere to the common law elements of common carrier. The Supreme Court, for example, in determining that cable television systems could *not* be forced into the role of common carrier, commented that "[a] common carrier service in the communications context is one that 'makes a public offering to provide [communications facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing.'"<sup>96</sup>

Over ten years ago, in *National Association of Regulatory Utility Commissioners v. FCC*<sup>97</sup> (*NARUC*), the United States Court of Appeals for the District of Columbia Circuit grappled with the issue of common carrier status under the Communications Act. The court relied on common law notions of a common carrier's quasi-public nature in concluding that a common carrier was one who both holds itself out indiscriminately for hire by the public and transmits information exactly as it is given by the client.<sup>98</sup> A carrier need not, according to the *NARUC* court, actually serve the entire public, or even be of possible use to more than a small segment in order to satisfy the definition. Thus, in defining common carrier under the Communications Act, the court distinguished between those that offer to serve all comers and those that "make individualized decisions, in particular cases, whether and on what terms to deal."<sup>99</sup>

Although the Commission has used the *NARUC* definition to determine common carrier status in some proceedings,<sup>100</sup> the Commission has not embraced *NARUC* so wholeheartedly as to abandon its search for a definition that might better suit its goals. The Notice which opened the

95. See Burch, *supra* note 52, at 102 (legal definition of common carrier a novel issue raised by Commission's procompetitive policy).

96. FCC v. Midwest Video Corp., 440 U.S. 689, 701 (1979).

97. 525 F.2d 630, 640 (D.C. Cir. 1976), *cert. denied*, 425 U.S. 992 (1976).

98. *Id.* at 640-42. This definition has been well followed in later decisions. See, e.g., Computer and Communications Indus. Ass'n v. FCC, 693 F.2d 198, 210 (D.C. Cir. 1982); American Tel. & Tel. Co. v. FCC, 572 F.2d 17, 24 (2d Cir. 1978).

99. *NARUC*, 525 F.2d at 641. See Wold Communications, Inc. v. FCC, 735 F.2d 1465, 1471 n.10 (D.C. Cir. 1984) (pointing to this distinction as central to the common carrier concept).

100. Regulatory Policies Concerning Resale and Shared Use of Common Carrier Servs. and Facilities, 60 F.C.C.2d 261, 308 (1976) (Report and Order), issued shortly after the *NARUC* decision, used the *NARUC* definition as determinative of common carrier status. The Commission's reluctance to adopt *NARUC* as the standard, however, can be seen in such proceedings as Detariffing of Billing and Collection Serv., 102 F.C.C.2d 1150, 1155 & n.15 (1986) (Report and Order), in which the Commission mentions *NARUC* in a footnote as one standard proposed by commentators to the proceeding, and expresses neither approval nor disapproval.

Competitive Carrier proceeding took issue with the emphasis in *NARUC* on “holding oneself out indiscriminately” to the public.<sup>101</sup> The Commission focused instead on the possible element of monopoly in the definition. Relying on English common law, the Commission noted that ports and other places “affected with public interest” had been essential to commerce, and were scarce enough to be potential sources of monopoly income.<sup>102</sup> The Commission therefore proposed that a new definition should focus on the situation of the provider within the market, and not on the nature of the service itself.<sup>103</sup>

The Further Notice of Proposed Rulemaking continued the Commission’s disagreement with *NARUC*<sup>104</sup> and sharpened the economic theory set out in the first Notice.<sup>105</sup> The Commission first observed that much commercial regulation is economic in nature;<sup>106</sup> second, that the regulations in Title II can be viewed as economic;<sup>107</sup> and finally, that at the time the Communications Act was enacted, telegraph and telephone services essentially were monopolistic and thus ripe for statutory control.<sup>108</sup> The Commission deduced from these observations that Congress must have promulgated Title II as a means of checking monopolistic powers, and that entities subject to the regulations should therefore be defined in terms of market power.<sup>109</sup> Thus, the FCC concluded that a common carrier under the Communications Act is an entity that is dominant in its market.<sup>110</sup>

The Commission’s definition of common carrier is wrong for three reasons. First, the definition contrasts markedly with the definition developed and used through two centuries of common law. This definition looked solely at the nature of the service offered.<sup>111</sup> Second, it contravenes Congress’s mandate that common carrier be interpreted in an ordinary sense.<sup>112</sup> Third, the Commission’s redefinition of common carrier is

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101. *Notice of Inquiry*, 77 F.C.C.2d 308, 365-66 & n.86 (1977).

102. *Id.* at 364-65.

103. *Id.* at 365.

104. *Further Notice of Proposed Rulemaking*, 84 F.C.C.2d 445, 467 (1981).

105. The Commission did note that many elements of the definition of common carrier had been derived from the liabilities inherent in that status; however, it dismissed them as irrelevant to the purposes of the Communications Act. *Id.* at 468.

106. *Id.* at 448-50.

107. *Id.* at 451-52.

108. *Id.* at 459-60.

109. *Id.* at 465-69.

110. *Id.* at 465. The Commission acknowledged that this approach yielded the same result as forbearance towards non-dominant carriers. *Id.* at 463.

111. See *supra* notes 64-76, 87-90 and accompanying text.

112. *Supra* note 92 and accompanying text.

not supported by any legislative history.<sup>113</sup>

When passing both the Mann-Elkins Act and the Communications Act, Congress was concerned over the monopolistic powers of communication providers.<sup>114</sup> The Commission's assertion, however, that "[n]owhere in the legislative history did Congress demonstrate an actual intention to extend this form of regulation to communications companies without market powers"<sup>115</sup> is untrue. The legislative histories of both the Mann-Elkins Act and the Communications Act discuss telephone services not connected to monopolies.<sup>116</sup> Congress knew of these carriers and easily could have excluded them. Instead, Congress chose to mandate that "every common carrier *shall*" comply with the regulations of Title II.<sup>117</sup>

## V. JUDICIAL REVIEW OF REDEFINITION BY THE FCC

If the Commission issues an order that formally adopts its market power definition of common carrier, someone will surely challenge the order. The federal court that reviews the order should reject any argument by the FCC that the court should defer to the Commission's reasonable construction of the Communications Act.

The starting point<sup>118</sup> for judicial review of agency interpretation of statutory language is *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*<sup>119</sup> In *Chevron*, the Supreme Court considered the legality of a definition promulgated by the Environmental Protection Agency.<sup>120</sup>

113. See *infra* notes 114-117 and accompanying text. Cf. *American Fed'n of Govt. Employees v. FLRA*, 798 F.2d 1525, 1528 (D.C. Cir. 1986) ("Where an agency's interpretation would deprive a statutory provision of virtually all affect, a court should not affirm the agency's interpretation absent 'legislative history of exceptional clarity,'" (quoting *American Fed'n of Govt. Employees v. FLRA*, 702 F.2d 1183, 1187 (D.C. Cir. 1983))).

114. See 78 CONG. REC. 8822 (1934) (statement of Sen. Dill) (detailing size of telephone monopoly); 45 CONG. REC. 5534 (1910) (statement of Rep. Underwood) (comparing telegraph and telephone monopolies to railroad monopolies).

115. *Further Notice of Proposed Rulemaking*, 84 F.C.C.2d 445, 462 (1981).

116. See 78 CONG. REC. 10,315 (1934) (statement of Sen. Rayburn) (reciting percentages of telephone and telegraph industry independent of monopolies); 45 CONG. REC. 6974 (1910) (letter from J. Ware to Sen. Smith) ("there are as many independent as Bell telephones in the United States").

117. *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186, 1193 (D.C. Cir. 1985) (quoting 47 U.S.C. § 203(a) (1982)) (emphasis supplied by the court). The FCC itself supported this position in its brief in *American Tel. & Tel. v. FCC*: "The agency has no authority to ignore these commands, even if market forces arguably are present which undercut the 'natural monopoly' justification for regulation." Brief of Federal Communications Commission at 49-50, *American Tel. & Tel. v. FCC*, 572 F.2d 17 (2d Cir.) (No. 77-4057), *cert. denied*, 439 U.S. 875 (1978) (quoted in *MCI Telecommunications*, 765 F.2d at 1193).

118. See *Kuehner v. Heckler*, 778 F.2d 152, 159 (3d Cir. 1985).

119. 467 U.S. 837 (1984).

120. *Id.* at 840.

In the course of its analysis, the Court set out a two-step procedure for "review[ing] an agency's construction of the statute which it administers."<sup>121</sup> First, a court, using "traditional tools of statutory construction,"<sup>122</sup> must ascertain whether "Congress has directly spoken to the precise issue at question. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."<sup>123</sup> Second, if the reviewing court determines that "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."<sup>124</sup>

*Chevron* arguably "mark[s] a retreat from the close judicial scrutiny of agency decisions that had characterized the hard look doctrine prevailing until *Chevron*."<sup>125</sup> However, the deference accorded agencies in the second step of *Chevron* has not reduced judicial review of agency interpretation "to a hollow formality."<sup>126</sup> The second step is reached only if the first is not satisfied,<sup>127</sup> and in determining whether Congress addressed a precise issue the courts are "not required to grant any particular deference to the agency's parsing of statutory language or its interpretation of legislative history."<sup>128</sup>

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121. *Id.* at 842.

122. *Id.* at 843 n.9.

123. *Id.* at 842.

124. *Id.* at 843.

125. *Kuehner v. Heckler*, 778 F.2d 152, 159 (3d Cir. 1985). *But see* *Garland, Deregulation and Judicial Review*, 98 HARV. L. REV. 507, 552-53 (1985) (*Chevron* and *State Farm* can be harmonized; "*Chevron* need not be read as a retreat from the commitment to hard look review expressed by the Court in *State Farm*.").

In *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto Ins. Corp.*, 463 U.S. 29 (1983), the Supreme Court considered the National Highway Traffic and Safety Administration's rescission of its passive restraint standard. *Id.* at 39-40. The Court held that:

the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." . . . [The reviewing court] must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." . . . Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

*Id.* at 43. As *Garland* points out, such a review is quite substantive in nature. *Garland, supra*, at 548-49.

126. Note, *Bursting the Bubble of Environmental Protection: Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 34 DE PAUL L. REV. 757, 758, 800 (1985). *See* *American Fin. Servs. v. FTC*, 767 F.2d 957, 998 (D.C. Cir. 1985) (Tamm, J., dissenting) (depicting majority as "anesthetized by misplaced deference to agency authority"), *cert. denied*, 106 S. Ct. 1185 (1986).

127. *Coalition to Preserve the Integrity of Am. Trademarks v. United States*, 790 F.2d 903, 908 (D.C. Cir. 1986).

128. *Transbrasil S.A. Linhas Aereas v. Department of Transp.*, 791 F.2d 202, 205 (D.C. Cir. 1986) (quoting *Rettig v. Pension Benefit Guar. Corp.*, 744 F.2d 133, 141 (D.C. Cir. 1984)). *See*

In *Securities Industry Association v. Board of Governors*,<sup>129</sup> the Supreme Court noted that "deference is not to be a device that emasculates the significance of judicial review."<sup>130</sup> Indeed, lower courts<sup>131</sup> applying *Chevron's* first step have followed the Court's earlier admonition that "the 'deference owed to an expert tribunal cannot be allowed to slip into judicial inertia'. . . . [Reviewing courts] must not 'rubber stamp . . . administrative decisions that they deem inconsistent with a statutory mandate.'"<sup>132</sup>

Determining the "precise issue" is the threshold inquiry in applying the first step of *Chevron*. Because the FCC wishes to redefine the term common carrier, the precise issue should be "*how* is a common carrier defined?"<sup>133</sup> The Commission, however, would rather phrase the precise issue as "*whether* certain companies offering communication services in markets where they lack dominance or market power should be defined as common carriers and become subject to Title II regulation."<sup>134</sup> The Commission could then argue that, because Congress did not address this exact point, the courts should defer to the Commission's construction of the statute.

The Commission's phraseology should be rejected for two reasons. First, in applying the first step of *Chevron*, the Court has limited its consideration to whether Congress expressed an intent on the definition of the specific term at issue.<sup>135</sup> If Congress *has* expressed an intent on the definition of common carrier, "that is the end of the matter."<sup>136</sup> Second,

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Natural Resources Defense Council, Inc. v. EPA, 790 F.2d 289, 297 (3d Cir. 1986) (agency interpretation not given presumption of correctness accorded to congressional legislation).

129. 468 U.S. 137 (1984).

130. *Id.* at 142-43.

131. *E.g.*, American Fed'n of Govt. Employees v. FLRA, 798 F.2d 1525, 1528 (D.C. Cir. 1986); Natural Resources Defense Council, Inc. v. EPA, 790 F.2d 289, 297 (3d Cir. 1986); Missouri v. Andrews, 787 F.2d 270, 286-87 (8th Cir. 1986); Army Eng'r Center v. FLRA, 762 F.2d 409, 414 (4th Cir. 1985).

132. Bureau of Alcohol, Tobacco and Firearms v. FLRA, 464 U.S. 89, 97 (1983) (quoting American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 318 (1965), and NLRB v. Brown, 380 U.S. 278, 291-92 (1965)).

133. Similarly, in *Chevron*, the Court focused its step one examination on whether Congress expressed an intent as to the definition of a "stationary source," 467 U.S. at 851-59, and in *Securities Industry*, the Court focused its examination on whether Congress expressed an intent as to the definition of the terms "note" or "other securities," 468 U.S. at 149-54.

134. FEDERAL COMMUNICATIONS COMMISSION, MAJOR MATTERS REPORT 40 (1982) (emphasis added).

135. See *supra* note 123 and accompanying text. Indeed, much of the criticism of *Chevron* stems from the claim that by narrowing its scrutiny to one discrete section of the legislation, the Court ignores congressional intentions expressed by the enactment as a whole. Stukane, *EPA's Bubble Concept After Chevron v. NRDC: Who Is to Guard the Guards Themselves?*, 17 NAT. RESOURCES LAW. 647, 650-52 (1985).

136. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984).



the FCC should not be allowed to bootstrap itself past the first step of *Chevron* by creating an illusory confusion of policies, thereby accruing the deference accorded agencies in the *second* step.<sup>137</sup>

The statute provides the first source for determining congressional intent as to the definition of common carrier.<sup>138</sup> The Communications Act's sparse definition of common carrier probably will not satisfy *Chevron*'s requirement for a clear expression of intent; thus a reviewing court should turn to the legislative history.<sup>139</sup> The legislative history of section 3(h) shows that Congress directly addressed the meaning of common carrier and stated that it should be interpreted in the "ordinary sense of the term."<sup>140</sup> An ordinary sense of the term common carrier had existed for almost three hundred years, from the courts of Queen Anne's England<sup>141</sup> to the treatises in circulation when the Communications Act was passed.<sup>142</sup> Throughout those three centuries the "ordinary meaning" of common carrier looked at the nature of the service offered and *not* at an individual provider's position in the marketplace.

It is a basic principle of statutory interpretation that the statutory language be interpreted according to its use at the time the legislation was passed.<sup>143</sup> The legislators who enacted the Communications Act

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137. See *Southern Pac. Pipe Lines, Inc. v. Department of Transp.*, 796 F.2d 539, 542 (D.C. Cir. 1986) (plaintiff not allowed to bootstrap by creating confusing meaning to avoid plain legislative meaning); *Texas v. United States*, 761 F.2d 211, 215 (5th Cir. 1985) (declining respondent's invitation to relax judicial review of agency interpretation merely because it was reasonable, and instead applying first step of *Chevron*); see also *Duquesne Light Co. v. EPA*, 791 F.2d 959, 963 (D.C. Cir. 1986) ("That the Congress' use of [a term] clashes somewhat with its allegedly primary goal . . . is not a fatal flaw in the legislative scheme.").

138. *Abourezk v. Reagan*, 785 F.2d 1043, 1053 (D.C. Cir.) (general principle of statutory construction is to look first at the statutory language, citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)), *cert. granted*, 107 S. Ct. 666 (1986).

139. See *Washington Hosp. Center v. Bowen*, 795 F.2d 139, 143 (D.C. Cir. 1986) ("[I]nquiry into congressional intent [for first step of *Chevron*] encompasses both statutory language and legislative history."); *Donovan v. Rose Law Firm*, 768 F.2d 964, 970 (8th Cir. 1985) (noting that reading of statutory provision did not plainly indicate intent and turning to legislative history to satisfy first step of *Chevron*).

140. H.R. CONF. REP. NO. 1918, 73d Cong., 2d Sess. 46 (1934), *reprinted in* [Current Service] Rad. Reg. (P & F) ¶ 10:1017. See *supra* note 92 and accompanying text. See also *Securities Indus. Ass'n v. Board of Governors*, 468 U.S. 137, 149 (1984) (Statutory silence on definition of term compels Court to "start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used.")

141. *Gisbourn v. Hurst*, 1 Salk. 249, 250, 91 Eng. Rep. 220, 220 (1710). See *supra* note 69 and accompanying text.

142. W. ELLIOT, *supra* note 93; E. GODDARD, *supra* note 93. See *supra* note 93 and accompanying text.

143. See *Securities Indus.*, 468 U.S. at 150 (analyzing "ordinary meaning" of term as used by the Congress that passed legislation being scrutinized); *Livermore v. Heckler*, 743 F.2d 1396, 1401-03 (9th Cir. 1984) (analyzing term according to usage at time legislation was passed); see also Proceedings of the Forty-Fifth Judicial Conference of the Dist. of Columbia Circuit, 105 F.R.D. 251,

specifically pointed to the Interstate Commerce Act as the source of legal definitions for section 3.<sup>144</sup> When Congress debated whether communications providers could be characterized as common carriers, they debated the nature of the service provided, not the market dominance of individual entities.<sup>145</sup> This debate illustrates Congress's understanding of what was and what was not a common carrier.

Even today there is an "ordinary," if not exclusive meaning of the term common carrier. The Supreme Court<sup>146</sup> and lower federal courts<sup>147</sup> have continued to define "common carrier" by the nature of the service. No one, other than the Commission, focuses on the market dominance of individual providers.

The Commission may try to avoid the first step and proceed directly to the deferential second step by arguing that Congress did not expressly *forbid* defining common carrier by relative market power.<sup>148</sup> This disingenuous reasoning ignores the tenet that it would be "absurd" to believe "that Congress delegated authority to vitiate . . . its intent."<sup>149</sup> This reasoning also ignores the rationale for deferring to agency created definitions: that Congress has implicitly delegated responsibility to the agency by leaving a "gap" in the legislation.<sup>150</sup> There is no gap in the history of section 3(h)—Congress has defined common carrier and the Commission cannot redefine it.

Finally, the argument ignores what Congress did and what Congress continues to do.<sup>151</sup> In 1934 Congress drafted the Communications Act

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330-31 (1984) (statement of James Fitzpatrick) (intent of the Congress that enacted legislation is controlling).

144. *E.g.*, 78 CONG. REC. 8823 (1934) (statement of Sen. Dill); *id.* at 10,313 (statement of Rep. Rayburn). *Cf.* *Drummond Coal Co. v. Hodel*, 796 F.2d 503, 506 n.6 (D.C. Cir. 1986) (using legislative history of prior enactments to clarify congressional intent, as directed by Congress), *cert. denied*, 107 S. Ct. 1593 (1987).

145. 45 CONG. REC. 5533-37 (1910). *See supra* notes 87-90 and accompanying text.

146. *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979). *See supra* note 96 and accompanying text; *see also* *Production Workers Union v. NLRB*, 793 F.2d 323, 328 (D.C. Cir. 1986) (using Supreme Court precedent to determine intent of Congress).

147. *E.g.*, *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 640-42 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976). *See supra* notes 97-99 and accompanying text.

148. *See, e.g.*, *Further Notice of Proposed Rulemaking*, 84 F.C.C.2d 445, 462 (1981). The *Chevron* Court did comment that Congress did not foreclose the possibility of the agency-promulgated definition. 467 U.S. 837, 851 (1984). The Court, however, had already found that Congress had expressed no intent on the specific issue and was analyzing, as part of the second step, whether or not the agency definition was reasonable within the confines of what Congress legislated. *Id.* at 845.

149. *Washington Hosp. Center v. Bowen*, 795 F.2d 139, 143 (D.C. Cir. 1986); *Montana v. Clark*, 749 F.2d 740, 745 (D.C. Cir. 1984), *cert. denied*, 106 S. Ct. 246 (1985).

150. *American Cetacean Soc'y v. Baldrige*, 768 F.2d 426, 433 (D.C. Cir. 1985), *rev'd on other grounds*, 106 S. Ct. 2860 (1986).

151. *Cf. Securities Indus. Ass'n v. Board of Governors*, 468 U.S. 137, 153-54 (1984) (noting that

in absolute terms: “*any* person,”<sup>152</sup> and “*every* common carrier.”<sup>153</sup> The Commission has, in turn, pointed out the effect of this legislation to Congress and asked it to modify the language.<sup>154</sup> In spite of these requests, as the District of Columbia Circuit noted in its consideration of the FCC’s actions, Congress has not modified the Commission’s mandate in this field.<sup>155</sup>

## VI. PRACTICAL PROBLEMS CREATED THROUGH DEREGULATION BY REDEFINITION

The Commission’s attempt at deregulation by redefinition not only contravenes congressional intent, it is also unwise policy and may prevent implementation of discrete congressional goals. For example, section 310(a) of the Communications Act prohibits foreign ownership of common carrier fixed radio services,<sup>156</sup> including both the earth stations<sup>157</sup> used to communicate with domestic satellites and the domestic satellites themselves.<sup>158</sup> The stated congressional purpose of this prohibition was to preserve independent communications that would not be susceptible to foreign influence, and Congress placed a “heavy burden” on the FCC to carry out this goal.<sup>159</sup> Under the Commission’s new market-oriented definition, however, neither earth stations nor domestic satellites are considered common carriers; therefore, the Commission has allowed the sale of U.S. satellite facilities to a foreign entity.<sup>160</sup>

On another level, the FCC’s new approach to defining common car-

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Congress did not originally adopt the approach promulgated by the agency, “and it has adhered to that rejection ever since”).

152. Communications Act of 1934, Pub. L. No. 73-416, § 3(h), 48 Stat. 1064, 1066 (codified as amended at 47 U.S.C. § 153(h) (1982)) (emphasis added).

153. *Id.* § 203, 48 Stat. at 1070-71 (codified at 47 U.S.C. § 203 (1982)) (emphasis added).

154. *E.g.*, Federal Communications Commission, FCC Legislative Proposals 5-8 (1986).

155. MCI Telecommunications Corp. v. FCC, 765 F.2d 1186, 1195 (D.C. Cir. 1985).

156. Communications Act of 1934, Pub. L. No. 73-416, § 310, 48 Stat. 1064, 1086 (codified as amended at 47 U.S.C. § 310(b) (1982)).

157. 47 C.F.R. § 25.103(d) (1986).

158. “Domestic satellites” refers to satellites serving only points located inside the United States and its territories. *Cf.* Establishment of Domestic Communications-Satellite Facilities by Non-governmental Entities, 35 F.C.C.2d 844, 845 (1972). Service between points located in more than one country is coordinated by the intergovernmental organization INTELSAT, although the United States does favor allowing some privately owned service in the North Atlantic. Rein, McDonald, Adams, Frank & Nielsen, *Implementation of a U.S. “Free Entry” Initiative for Transatlantic Satellite Facilities: Problems, Pitfalls, and Possibilities*, 18 GEO. WASH. J. INT’L L. & ECON. 459, 464 (1985) [hereinafter Rein].

159. *Heitmeyer v. FCC*, 95 F.2d 91, 99 (D.C. Cir. 1937) (Congress has imposed heavy obligations upon FCC to discover and prevent alien or improper control of radio broadcasting stations.). *See generally* Rein, *supra* note 158, at 473-74.

160. Letter from James R. Keegan to Kenneth E. Hardman, Application File No. 1302-DSC-P/

riers is confusing to those who are regulated. Market power is difficult to predict.<sup>161</sup> An entity wishing either to enter a new market or to expand its position in an existing market may not be able to determine in advance whether it will be subject to FCC regulations. Further uncertainty is added by fluctuations in market power that may render an entity a common carrier only at certain times. Such uncertainty is a significant flaw in any regulatory system.

### CONCLUSION

The FCC faces an everbroadening array of new communications services that fall within Congress's definition of common carrier. The FCC also faces pressure from an economic theory that suggests that the regulatory system applicable to common carriers will only inhibit these new services. Heeding the cry of deregulation, the FCC has proposed to achieve deregulation by redefining the term common carrier in terms of market dominance. Only those carriers that can dominate the market would be regulated as common carriers.

This note has demonstrated that the FCC's attempts should be rejected. When Congress enacted the Communications Act of 1934, it had a specific definition of common carrier in mind. That definition, relating to the nature of the service rather than the position of the provider in the market, was based on the ordinary meaning of the term as it had developed over three centuries. It is possible that a new definition would better serve an agency facing current economic and technological developments.<sup>162</sup> However, if the policies of Congress have become outdated or obsolete, Congress, not the FCC, is responsible for replacing them.

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L-82 (Sept. 23, 1982). *See also In re Application of Satellite Business Sys.*, No. 1091-DSS-MP/ML-83 (Nov. 2, 1982) (authorizing sale of satellite capacity to foreign entities).

161. *Further Notice of Proposed Rulemaking*, 84 F.C.C.2d 445, 465 n.43 (1981). *See Baxter, The Definition and Measurement of Market Power in Industries Characterized by Rapidly Developing and Changing Technologies*, 53 ANTITRUST L.J. 717, 720-21 (1984) (measurable market share of high-tech industries may not reflect important research and development share of industry).

162. *Cf. Geller, Communications Law—A Half Century Later*, 37 FED. COMM. L.J. 73, 83 (1985) (faulting Congress for failing to provide guidance in new fields of communication services).