

The Rights of Common Carriers and the Decision Whether to Be a Common Carrier or a Non-Regulated Communications Provider

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I. INTRODUCTION

A new communications venture can sometimes choose between (1) accepting regulation as a common carrier, or (2) avoiding regulation almost entirely by providing service as a private carrier or an enhanced service provider. Because few businesses want to be regulated, the first reaction is often to avoid common carrier status. While the common carrier option does bring with it burdens such as certification and reporting requirements, however, it also entitles the venture to benefits, including interconnection with other carriers and access to unbundled network elements (“UNEs”). Because of these benefits, some communications businesses may find that the best choice is to provide some services as a common carrier and some services on an unregulated basis—a flexible approach specifically

permitted under the Telecommunications Act of 1996 (“1996 Act”).¹

This Article principally addresses the choice between providing service (1) as a non-dominant common carrier, or (2) as an unregulated communications business, such as a private carrier or an enhanced service provider. Unless the new business is formed to acquire an existing incumbent local exchange carrier (“ILEC”), it is unlikely to face dominant common carrier regulation.

II. REGULATORY CLASSIFICATIONS AND DEFINITIONS

The definitions of “common carrier” and its new synonym “telecommunications carrier” are flexible enough to give providers discretion in structuring many communications services as either common carrier or non-common carrier services. For a service to be a common carrier service under federal law, the provider must (1) hold the service out as being available on standardized terms to the public, i.e., to all potential users of the service, and (2) transmit signals without change in form or content.² The Federal Communications Commission (“FCC” or “Commission”) applies this test in regulating interstate, international, and sometimes intrastate communications, while the states usually follow this test in determining whether an intrastate service is a common carrier service.

The first element—holding service out as being available to the public—draws the line between common carriers subject to Title II regulation under the Communications Act of 1934 (“1934 Act”) and private carriers subject only to the FCC’s rarely used “ancillary” Title I jurisdiction.³ The second element—transmission “without change in form or content,” i.e., “pure transmission”—draws the line between common carriers and providers of “enhanced services” such as Internet access. The FCC has long declined to regulate enhanced service providers, now

1. Pub. L. No. 104-104, 110 Stat. 56 (codified at scattered sections of 47 U.S.C.).

2. *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1480 (D.C. Cir. 1994). The second element has traditionally been described as requiring that the customer be permitted “to transmit intelligence of his own design and choosing.” *Id.* at 1480. Because the FCC has recognized that transmission of “telecommunications services,” as defined in the 1996 Act, requires that services be provided on a common carrier basis, *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 922 (D.C. Cir. 1999), and the 1996 Act defines “telecommunications” as transmission “without change in the form or content,” 47 U.S.C. § 153(43), (44), (46) (Supp. IV 1998), this Article instead uses the “without change in form or content” phraseology to describe the second element.

3. *Compare* 47 U.S.C. §§ 201-271 (1994) (“Title II”) *with* 47 U.S.C. §§ 151-161 (“Title I”). Section 152(a) gives the FCC ancillary jurisdiction over “interstate and foreign communication by wire or radio,” a broader field than just common carrier services. *Id.* § 152(a).

sometimes called “information service providers,” as common carriers.⁴

The 1996 Act added several new terms, including “telecommunications carrier,” equivalent to common carrier, and “information service,” which is virtually synonymous with “enhanced service.” Under the 1996 Act, a “telecommunications carrier” provides “telecommunications service.”⁵ “Telecommunications service” is “the offering of *telecommunications* for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”⁶ The reference to the public or to classes of the public incorporates the “holding oneself out” element of the traditional common carrier definition. The 1996 Act also incorporates the “pure transmission” element of the traditional common carrier definition, by defining “telecommunications” as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”⁷ Finally, the 1996 Act defines “information services” so as to cover communications in which the form or content of information changes.⁸ Consequently, “information services provider” and “enhanced service provider” mean essentially the same thing.

Telephone companies such as AT&T, MCI WorldCom, and Verizon (formerly Bell Atlantic and GTE) provide common carrier services, although they may also provide non-common carrier services. A railroad that lays a fiber-optic cable along its track and sells its capacity to a few communications providers likely is acting as a private carrier. Internet access companies such as America Online are enhanced service providers.

There is one more twist to all these definitions. Common carrier status is determined on a service-by-service basis. The same company can simultaneously be a common carrier, a private carrier, and an enhanced service provider. The D.C. Circuit recognized this concept well before passage of the 1996 Act in ruling that “it is at least logical to conclude that one can be a common carrier with regard to some activities but not others.”⁹ The 1996 Act codified the service-by-service concept by adding to the definition of “telecommunications carrier” a crucial caveat: “A telecommunications carrier shall be treated as a common carrier under this

4. Fed.-State Joint Bd. on Universal Serv., *Rep. to Cong.*, 13 F.C.C.R. 11,501, paras. 24-26, 73, 11 Comm. Reg. (P & F) 1312 (1998) [hereinafter *Universal Serv., Rep. to Cong.*].

5. 47 U.S.C. § 153(44) (Supp. IV 1998).

6. *Id.* § 153(46) (emphasis added).

7. *Id.* § 153(43); *Universal Serv., Rep. to Cong.*, *supra* note 4, paras. 24-26.

8. 47 U.S.C. § 153(20); *Universal Serv., Rep. to Cong.*, *supra* note 4, para. 45.

9. Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC, 533 F.2d 601, 608 (D.C. Cir. 1976) (“NARUC II”).

chapter only to the extent that it is engaged in providing telecommunications services.”¹⁰

For convenience, this Article uses the term “non-common carrier” service to refer to enhanced/information services, private carrier services, and any other service not offered on a common carrier basis. The term “communications provider” refers to companies providing any communications service, whether on a common carrier or non-common carrier basis. Finally, the term “common carrier” refers to any company that provides at least some common carrier service, and so must comply with common carrier regulation as to those services.

Whether a particular company is a common carrier or a non-common carrier is not always immediately apparent. One way to determine common carrier status is to see whether the company has obtained a license or certificate (sometimes just a “registration”) to provide common carrier services from the FCC or a state public utility commission. Another way is to discover whether the communications service provider has filed a tariff with the FCC or (more likely) a state commission. Both the FCC and state commissions periodically publish lists of certified carriers. Not all common carriers comply with the duty to obtain certification or file tariffs, however, and some are not required to do so in any event. Ultimately, a provider satisfies the definition of “common carrier” by providing pure transmission to the public or a substantial portion of it on standardized terms, not by obtaining certification or filing a tariff.¹¹

Finally, another key regulatory classification turns on the distinction between dominant common carriers and non-dominant common carriers.¹² The FCC regulates dominant common carriers, which have substantial market power, far more stringently than it does non-dominant carriers. With few exceptions, the only remaining dominant carriers are ILECs, the traditional monopoly phone companies, such as Verizon, against whom new entrants have begun to make some inroads. Even the largest long-distance company, AT&T, is classified as non-dominant.¹³ Most states also use the dominant/non-dominant distinction, although they may have their own terminology, such as “non-competitive services” and “competitive services.”¹⁴

10. 47 U.S.C. § 153(44).

11. Nat’l Ass’n of Reg. Util. Comm’rs v. FCC, 525 F.2d 630, 644 (D.C. Cir. 1976) (common carrier is common because of its functions rather than because it is declared to be so.) (“NARUC I”).

12. Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, *Order*, 11 F.C.C.R. 3271, 3280-82, 1 Comm. Reg. (P & F) 63 (1995).

13. *Id.*

14. CONN. GEN. STAT. ANN. § 16-19e, -247f, -247g (West 1998 & Supp. 2000).

The difference between dominant and non-dominant carrier regulation is striking, particularly in the area of economic regulation. Dominant carriers are subject to price cap or rate-of-return regulation at the federal level. To change rates, a dominant carrier must file its tariff and may wait up to several weeks before the new prices go into effect.¹⁵ With few exceptions, non-dominant carrier prices are not regulated, and where tariffs are still required changes can be made effective the day after the amendment is filed. The FCC rarely decides to review closely or declare unlawful a provision in a non-dominant carrier tariff; one FCC Commissioner recently noted that it has happened only twice in the many years (more than a decade) since the FCC adopted the dominant/non-dominant classification system.¹⁶

III. STRUCTURE OF COMMUNICATIONS SERVICES

The “holding oneself out” element of the definition of common carrier sets up a straightforward choice—offer service on standardized terms and accept common carrier status, or negotiate individually with each buyer (ideally over the specifications of the service as well as price) and claim private carrier status. Where the number of potential buyers is reasonably limited, so that the transaction costs of individualized negotiations are not prohibitive, the choice is very real. Many wholesale level activities, such as the building and provision of service over fiber cables, and some retail activities involving marketing to a relatively small number of large end users (e.g., the provision of high speed data networks) can be structured either way.¹⁷

If it finds a common carrier partner, a communications provider can attempt to go further and indirectly serve the retail mass market while asserting private carrier status. The common carrier partner would have the direct relationship with the customers, but it would procure the services it

15. See 1998 Biennial Regulatory Review—Pt. 61 of the Comm’n’s Rules and Related Tariffing Requirements, *Report and Order and First Order on Reconsideration*, 14 F.C.C.R. 12,293, paras. 24-26, 16 Comm. Reg. (P & F) 1103 (1999) [hereinafter 1998 Biennial Regulatory Review, *Report and Order*] (notice requirements for dominant carrier tariffs); 47 C.F.R. § 61.23(c) (1999) (one day’s notice for non-dominant carrier tariff filing); *id.* § 61.38 (supporting information to be submitted for dominant carrier tariffs); *id.* pt. 65 (rate-of-return regulation for some dominant carriers); *id.* pt. 69 (access charges regulation for dominant carriers).

16. Interexchange Carrier End-User Charges to Recover Universal Serv. Contributions, *Suspension Order*, 14 F.C.C.R. 20,032, 20,034 (1999) (Furchtgott-Roth, Comm’r, dissenting).

17. See In the Matter of AT&T Corp. MCI Int’l, Inc. SBCI-Pacific Networks, Inc. Sprint Comms. Co., L.P. Teleglobe USA, Inc., *Cable Landing License*, 13 F.C.C.R. 16,232 (1998).

offers the public from the private carrier.

Although less apparent, similar flexibility exists with respect to the second element of the traditional definition of common carrier services—transmission “without change in form or content.” At first glance, one might think this element is less subject to provider discretion. Indeed, if the end user is purchasing a service involving change in form or content (or a store-and-retrieve function such as voice mail), the end user is purchasing an enhanced service.

The retail sale to the end user is only part of the picture, however. Even if the end user is buying an enhanced service, the communications provider can still attempt to attain common carrier status if it sells to retailers the telecommunications service underlying the enhanced service. The retailer then adds an information component for the final sale to the end users. This appears to be one of the models used by a leading competitive local exchange carrier (“CLEC”) providing high-speed data transmission. This provider—Covad Communications, Inc. (“Covad”)—purchases copper loops as UNEs from ILECs (using its rights as a common carrier), transforms the ordinary loops into high-speed transmission lines using Digital Subscriber Line technology, and sells the high-speed transmission to local Internet Service Providers (“ISPs”).¹⁸ The ISPs then sell Internet access—a service considered to be enhanced because it involves computer processing of information—to end users.¹⁹

This model can be pushed further. Suppose the communications provider does make some direct sales of enhanced services, rather than limiting itself to selling the telecommunications component to retailers. As long as the communications provider makes some common carrier sales as well, the provider has certain common carrier rights as to all the sales. For instance, a Commission rule states that common carriers are entitled to send both enhanced services traffic and telecommunications traffic through interconnections with ILECs under the 1996 Act.²⁰

A communications provider may avoid common carrier status by properly claiming it provides enhanced services. The provider may be able to add an information or store-and-retrieve component to its communications services, e.g., by including computer processing functions. Especially in the area of data transmission, the provider can make the claim

18. See www.covad.com/companyinfo (high-speed Internet service is sold to consumers by ISPs); www.covad.com/companyinfo/pressreleases (announcing agreements by which Covad used its right as a competitive local service carrier to purchase underlying high-speed transmission capacity from incumbent local phone companies).

19. Universal Serv., *Rep. to Cong.*, *supra* note 4, para. 73.

20. 47 C.F.R § 51.100(b).

that its communications service actually involves a “net change” in the format of the information. A net change occurs where the format of the information at the point of origination of the transmission differs from the format at the point of reception.²¹ If the format (or “protocol”) changes along the path of transmission, but the original format is restored by the carrier prior to delivery, there is no “net change” and so the service is a common carrier service, at least if Internet Protocol [“IP”] telephony is not involved.²² Conversely, if there is a net change, but the receiving party uses its own equipment to restore the information to the original format, the service is probably enhanced. Rules such as these leave at least some room for provider discretion in structuring services as enhanced or non-enhanced.

IV. RIGHTS OF COMMON CARRIERS

Because some providers may structure their services so as to avoid common carrier status, the question arises why a communications provider would choose to submit to common carrier regulation when selling those services.

Traditionally, the duty to file a tariff (sometimes thought of as a right) provided an incentive to claim common carrier status. By filing a tariff, a carrier gains important advantages under the “Filed Rate Doctrine,” which generally makes the tariff language controlling over any alleged contrary promises by company personnel.²³ Moreover, a carrier with a large volume of customers may save administrative costs by making changes to its rates or terms and conditions solely through a tariff filing, rather than directly notifying thousands or millions of subscribers through the mail, or possibly securing amendments to any written contracts.

Because the FCC has now succeeded in abolishing domestic interstate tariffs for non-dominant carriers, this Article instead focuses on non-tariff-related benefits of common carrier status.²⁴ The tariff-related benefits (or burdens, in the cases where filing creates expense or inconvenience) will continue to exist for some time at the state level. Most states require that non-dominant carriers file tariffs for intrastate services, and there is no rush to eliminate the state tariff filing requirements, although some states have

21. Universal Serv., *Rep. to Cong.*, *supra* note 4, para. 50 n.106.

22. *Id.* paras. 50, 84, 90.

23. See 47 U.S.C. § 203 (1994) (common carrier shall adhere to tariffed rates and conditions); *AT&T v. Cent. Office Tel., Inc.*, 524 U.S. 214, 222 (1998).

24. 1998 Biennial Regulatory Review, *Report and Order*, *supra* note 15, paras. 6, 34 (reviewing FCC detariffing Orders); see also *MCI WorldCom, Inc. v. FCC*, 209 F.3d 760, 761 (D.C. Cir. 2000) (upholding detariffing policy).

done so.

The other benefits of common carrier status generally involve rights to obtain better access to the public telephone network, through interconnection, UNEs, or other means, so that the common carrier can better serve its customers. The 1996 Act created most of these “network access” rights, which are summarized below. Some of these rights are also duties, e.g., a common carrier can demand interconnection with another carrier’s network, but it must also provide another carrier interconnection with its own network.

A. Access to Competing Carriers’ Networks

1. Direct or Indirect Interconnection with any Common Carrier

Under section 251(a)(1) of the 1996 Act, every common carrier, regardless of the service it provides, must “interconnect directly or indirectly with the facilities and equipment” of other common carriers.²⁵ Interconnection is a “fundamental” requirement in a telecommunications marketplace with multiple providers.²⁶ No carrier can put in place the facilities necessary to directly reach the entire universe of persons connected to the public telephone network.²⁷ Consequently, carriers must obtain access to other carriers’ networks. Otherwise, their customers could only call a limited number of persons, severely limiting the utility of the service. In many cases, the common carrier can make voluntary arrangements for the interconnection, or order service under the terms stated in another common carrier’s tariff just as any end user could. The right to interconnection, however, serves as a backstop to prevent a carrier from simply refusing to carry another carrier’s calls.²⁸

25. 47 U.S.C. § 251(a)(1) (Supp. IV 1998).

26. Implementation of the Local Competition Provisions in the Telecomm. Act of 1996, *First Report and Order*, 11 F.C.C.R. 15,499, para. 985, 4 Comm. Reg. (P & F) 1 (1996) [hereinafter *Local Competition, First Report and Order*] (quoting 47 U.S.C. § 251(a)), *aff’d in relevant parts*, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), *rev’g in part*, *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997) and *California v. FCC*, 124 F.3d 934 (8th Cir. 1997). This citation omits the reconsideration history of the Local Competition Order.

27. Even the largest long-distance companies rely almost entirely on local phone company networks to carry calls from home and offices to central locations where the long-distance companies have a “point of presence.” Local companies all serve limited regions, albeit regions that can encompass multiple states, and generally rely on other carriers for service outside those regions. Wireless carriers depend on traditional wireline phone companies to help carry calls from wireless customers to wireline customers and vice versa.

28. The 1934 Act empowered the FCC to order interconnection but did not impose any duty on carriers to interconnect, unless and until the FCC, after thorough proceedings, exercised that power. 47 U.S.C. § 201(a) (1994) (each common carrier has a duty “to establish physical connections with other carriers” but only “in cases where the [FCC], after

The 1996 Act denies private carriers and enhanced service providers this interconnection right, as section 251(a)(1) only requires that a carrier interconnect with “other telecommunications carriers.”²⁹ The FCC has recognized that companies that provide no common carrier service are ineligible to use section 251(a)(1).³⁰

2. Interconnection with ILECs at any Technically Feasible Point

A second, more powerful type of interconnection is available when a common carrier seeks to interconnect with an ILEC—an established local phone company such as Verizon that in the past had a *de jure* or, at least, *de facto* monopoly over local phone service in its service area. Section 251(c)(2) requires ILECs to provide interconnection at any “technically feasible point” in their networks, thus allowing requesting carriers to pick where they want to transfer calls to the incumbent’s network.³¹ Section 251(c)(2) also sets pricing and quality rules for the interconnection.³²

Again, only “telecommunications carriers” are entitled to obtain such interconnection.³³ The carrier also must be requesting interconnection to provide exchange service (local phone service) or exchange access service (the origination and termination of long-distance calls)—two markets in which ILECs have traditionally held monopoly status.³⁴

3. Access to UNEs

Probably the most powerful network access right enjoyed by common carriers is the right to lease portions of the ILEC’s networks known as or UNEs at prices based on the ILEC’s incremental costs of providing the elements. The FCC has developed a list of UNEs, and by choosing from among them, a competitor can assemble its own network, mixing and matching its own facilities with those of the ILEC as desired.³⁵

A duty exists “to provide, to any requesting telecommunications

opportunity for a hearing, finds such action necessary or desirable in the public interest”).

29. 47 U.S.C. § 251(a)(1) (Supp. IV 1998).

30. Local Competition, *First Report and Order*, *supra* note 26, paras. 992, 995.

31. 47 U.S.C. § 251(c)(2) Some small ILECs are exempt from the interconnection duty of § 251(c)(2) and the other duties set forth in § 251(c), but are not exempt from the basic interconnection duty of § 251(a)(1). *See also id.* § 251(f)(1).

32. *Id.* § 251(c)(2).

33. *Id.* (interconnection provided to “any requesting telecommunications carrier”).

34. *Id.* § 251(c)(2)(A).

35. Implementation of the Local Competition Provisions of the Telecomm. Act of 1996, *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, 15 F.C.C.R. 3696, 18 Comm. Reg. (P & F) 888 (1999), *modified by* 15 F.C.C.R. 1760 (1999) (revising list of UNEs).

carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point.”³⁶ So, again, only common carriers are eligible.

The most recent addition to the list of UNEs highlights the degree of precision available to competitors in breaking ILEC networks down into component parts. A carrier purchasing the new “line-sharing” UNE leases the high-frequency capacity in the “copper wire pairs” that connect its customers’ homes and businesses to the central offices of ILECs, rather than leasing entire wire pairs.³⁷ By sending high-frequency data signals over the wire pair, while the ILEC sends ordinary low-frequency voice signals over the same wire pair, the competitor can: (1) provide high-speed data transmission services, (2) save money by leasing only part of the capacity of the wire pair, and (3) avoid having to develop a voice service to offer its customers. Although the high-speed data transmission services are commonly used for Internet access, an enhanced service, common carrier status is required to purchase the line-sharing UNE.

4. Collocation

To aid carriers in exercising their rights to interconnect and obtain access to UNEs under section 251(c)(2)-(3), ILECs must permit competing carriers to physically locate their equipment (“collocate”) on ILEC premises. Because only common carriers can invoke section 251(c)(2)-(3), only common carriers can collocate.³⁸

5. Discount Resale

Carriers desiring to compete with ILECs on a non-facilities basis also have a network access right—the right to purchase ILEC services at “wholesale rates” in order to resell them to end users. Because only “telecommunications services” must be sold by the ILEC at this wholesale discount, only common carriers are eligible to purchase them.³⁹

6. Numbers, Dialing Parity, and Other Ancillary Services

Common carriers also have a right under section 251(b)(3) to obtain (from both CLECs and ILECs) ancillary services and functions, such as

36. 47 U.S.C. § 251(c)(3).

37. In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability, *Third Report and Order in CC Dkt. No. 98-147, Fourth Report and Order in CC Dkt. No. 96-98*, 14 F.C.C.R. 20,912, paras. 4, 5 (1999).

38. 47 U.S.C. § 251(c)(6) (requiring “physical collocation of equipment necessary for interconnection or access to unbundled network elements”).

39. *Id.* § 251(c)(4).

dialing parity, access to telephone numbers, and sometimes directory assistance and operator services.⁴⁰ Section 251(b)(3) thus provides access to resources that ILECs have traditionally controlled and may be helpful to a competing carrier. As discussed below, the FCC is considering ways to create rights in favor of non-common carriers that mirror some of the rights set forth in section 251(b)(3).

7. Arbitration

Common carriers requesting interconnection, UNEs, discounted resale, and collocation from ILECs pursuant to section 251(c) are entitled to seek arbitration by state commissions to settle disputes over the rates, terms, and conditions for these services.⁴¹ The state commission must issue a decision promptly or forfeit its jurisdiction to the FCC.⁴² Thus, arbitration is an efficient procedural vehicle for dispute resolution, a vehicle available only to common carriers.

B. Rights of Way and Pole Attachments

Common carriers have another tool useful for building networks—they may require that telephone, electric, water, and other utilities provide access to their rights-of-way, poles, ducts, and conduits (collectively “pole attachments”) so that the common carrier can run cable. Section 224(f)(1) of the 1996 Act states that “[a] utility shall provide a cable television system or *any telecommunications carrier* with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.”⁴³ The FCC has developed rules governing compensation to the utilities.⁴⁴ All common carriers except ILECs are eligible to demand access.⁴⁵ Such access can be very helpful, for example, to a new business seeking to lay a fiber-optic cable along the right-of-way of a nearby power company.

Along with collocation, access to pole attachments is probably the most physically intrusive of all the common carrier rights. Access to pole attachments involves placing the requesting carrier’s property on the utility’s property. The Eleventh Circuit held that forced access results in a “taking” of the utility’s private property, even though the requesting

40. *Id.* § 251(b)(3) (requiring that requesting company provide telephone toll service, i.e., long-distance, or telephone exchange service, both common carrier services).

41. *Id.* § 252(a)-(b).

42. *Id.* § 252(b)(3), (e)(5).

43. *Id.* § 224(f) (emphasis added).

44. *See id.* § 224(e)(1). States can displace the federal requirements by adopting their own requirements meeting the criteria specified in 47 U.S.C. § 224(f).

45. *Id.* § 224(a)(5); *see also id.* § 224(a)(1) (defining “utilities” required to provide access).

carrier, and not the government, demands the access.⁴⁶ Because the FCC issued rules requiring that the requesting carrier compensate the utility, the “taking” was facially constitutional.

Some states go further than section 224 and explicitly grant the power of eminent domain to common carriers.⁴⁷ Under some of these statutes, a new common carrier may “take” private property from any individual, not just utilities—leverage in any negotiation for an easement or other concession.

C. Other Common Carrier Rights

1. Preemption of State and Local Barriers to Entry

Yet another advantage of common carrier status is protection from state or local government regulation that is burdensome enough to effectively bar provision of a common carrier service. Section 253 of the 1996 Act outlaws state or local legal requirements that “may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”⁴⁸ If a company believes a state or local requirement violates section 253, it may petition the FCC to issue a preemption order.⁴⁹

By using the term “telecommunications service,” the statute grants a remedy only where the service, for which entry is effectively barred, is a common carrier service.⁵⁰ The preemption remedy is important because section 152(b) of the 1934 Act bars the FCC from regulating intrastate services (section 251 being an exception).⁵¹ This prohibition leaves the states substantial autonomy over such services, subject to section 253.

2. Access to Universal Service Subsidies

In the 1996 Act, Congress created the “schools and libraries” universal service program, which subsidizes telecommunications services

46. *Gulf Power Co. v. United States*, 187 F.3d 1324, 1328 (11th Cir. 1999).

47. *E.g.*, COLO. REV. STAT. ANN. §§ 38-2-101, 38-5.5-101 to -108 (West 1990 and Supp. 2000) (granting eminent domain authority to “telecommunications providers”).

48. 47 U.S.C. § 253(a).

49. *Id.* § 253(d). Section 253(b) sets forth several defenses available to the state or local government.

50. It is unclear whether a provider of non-common carrier services could seek preemption on the theory that the state or local legal requirement is a barrier to entry as to both common and non-common carrier services. Additionally, pre-1996 FCC Orders deregulating enhanced services may have some preemptive impact on state regulation of enhanced services.

51. *Id.* § 152(b) (1994).

to schools and libraries in urban and rural areas.⁵² Any common carrier is eligible to participate in the program and receive subsidies, either in the form of cash or a credit against the carrier's obligation to contribute to universal service programs.⁵³

Exactly why Congress restricted eligibility to common carriers is unclear, for the schools and libraries can receive the same service whether the provider is a common carrier or a non-common carrier, e.g., a cable company. Whatever Congress's reasoning, the FCC has enforced the statutory language by refusing to allow non-common carriers to receive subsidies. Thus, the FCC refused to authorize subsidies to the Iowa Communications Network ("ICN"), a state-owned, not-for-profit organization dedicated to serving public agencies in the state of Iowa, including schools and libraries. The FCC explained that because the ICN did not make its services available to the public, but rather restricted availability to public agencies, the ICN was a private carrier and so was ineligible for funding.⁵⁴ The FCC cited no policy rationale for the decision, relying solely on its duty to implement the statute as written.⁵⁵

Persisting in its desire to be treated as a common carrier (and, thus, be eligible for universal service money), ICN sought judicial review of the FCC's ruling by the D.C. Circuit. The Court of Appeals reversed, directing the FCC to consider on remand whether by holding itself out to serve all eligible government agencies desiring ICN's service (the potential customer class), ICN is providing service to the public (albeit a very small public), and so is entitled to common carrier status.⁵⁶ The result in the D.C. Circuit demonstrates the substantial—if not complete—flexibility a new communications venture has in attempting to classify itself a common or non-common carrier.

3. Ability to Directly Sell Mass Market/Pure Transmission Services

While this Article stresses that some services can be offered either on a common carrier or non-common carrier basis, there are services, such as ordinary residential long-distance and residential local phone service over the traditional circuit voice network, that are difficult to offer except on a common carrier basis. By accepting common carrier status and obtaining any necessary federal and state certificates, a communications provider gains the right to offer these services directly in its own name, without

52. *Id.* § 254(h)(1)(B) (Supp. IV 1998).

53. *Id.*

54. Universal Serv., *Declaratory Ruling*, *supra* note 2, para. 23.

55. *Id.* para. 27.

56. *Iowa v. FCC*, 218 F.3d 756, 757-58 (D.C. Cir. 2000).

having to attempt potentially expensive efforts to structure the service on a non-common carrier basis.

V. LIMITED NETWORK ACCESS RIGHTS OF NON-COMMON CARRIERS

The provisions in the 1996 Act granting only common carriers standing to invoke network access and other rights are the work of Congress, not the FCC. In rulemaking proceedings both before and after passage of the 1996 Act, the FCC has granted network access rights to non-common carriers as well as common carriers. These rights mitigate somewhat the advantages of accepting common carrier status, but they are not as powerful as the rights enjoyed by common carriers.

A. Non-Common Carrier Network Access Rights

1. Interconnection for Interstate Access Services

Prior to passage of the 1996 Act, the FCC granted limited interconnection rights to end users and non-common carriers in the “expanded interconnection” docket,⁵⁷ relying on its general powers under sections 201 and 202 of the 1934 Act. In this docket, the FCC attempted to encourage competition for interstate access services, which are purchased by long-distance carriers and sometimes purchased directly by end users for the origination and termination of interstate long-distance calls.

The FCC ordered large, “Tier 1” ILECs to (1) file tariffs for interconnection services useful in providing alternative interstate access services, and (2) permit collocation of competitors’ equipment on ILEC premises.⁵⁸ In the absence of the 1996 Act, the FCC could not readily require interconnection with respect to local exchange service—an intrastate service—thus it focused solely on interstate access.⁵⁹ A successful appeal by the ILECs forced the FCC to narrow the collocation duty requiring only “virtual collocation” (the connection of off-premises competitor equipment by wires to ILEC equipment).⁶⁰

During one phase of this extended proceeding, the FCC asked for

57. This docket had a long history including many FCC Orders and more than one judicial remand. *See, e.g.*, Expanded Interconnection with Local Tel. Co. Facilities, *Report and Order and Notice of Proposed Rulemaking*, 7 F.C.C.R. 7369, para. 1, 71 Rad. Reg.2d (P & F) 510 (1992) [hereinafter Expanded Interconnection, *Report and Order*], *vacated in part*, 24 F.3d 1441 (D.C. Cir. 1994), *policy re-confirmed on remand*, 9 F.C.C.R. 5154, 5185, para. 111 (1994).

58. Expanded Interconnection, *Report and Order*, *supra* note 57, para. 1.

59. 47 U.S.C. § 152(b) (1994); *id.* § 251 (Supp. IV 1998).

60. *See* Expanded Interconnection, *Report and Order*, *supra* note 57, para. 61.

comment on whether only common carriers should be entitled to exercise expanded interconnection rights.⁶¹ A new entrant, Teleport Denver, argued that limiting standing to common carriers would encourage entry of such common carriers, known then as “competitive access providers,” into the market.⁶² The argument appears to have been that the prospect of competing not only with the ILECs, but also with a host of private carriers and end users might discourage common carrier entry.⁶³

The FCC rejected Teleport Denver’s argument, and granted non-common carriers and end users standing to demand expanded interconnection.⁶⁴ The FCC reasoned that granting standing to a broader group would encourage use of expanded interconnection to compete with ILEC access services in rural areas that might not be attractive to common carriers.⁶⁵ Essentially, the FCC wanted to encourage any possible source of competition. The FCC also noted that historically it had treated long-distance carriers and end users equally in regulation of LEC access services.⁶⁶

Over time, however, the right to expanded interconnection has been of limited practical value. The ILECs filed tariffs for expanded interconnection in 1994, their adversaries filed petitions challenging the reasonableness of the tariffs, and the FCC opened investigations that it is at least nominally still conducting.⁶⁷ However, the passage of the 1996 Act appears to have reduced the FCC’s interest in completing the expanded interconnection tariff investigations. The FCC’s focus has been almost entirely on section 251, which overshadows the Expanded Interconnection Orders in many respects. For example, section 251 applies to local phone service generally and not just interstate access services, and section 251(c)(6) authorizes the FCC to order ILECs to provide physical collocation rather than just virtual collocation.⁶⁸ The FCC did decide in its *First Report and Order* implementing section 251, however, that the Expanded Interconnection Orders should remain in effect.⁶⁹ The FCC

61. *Id.*

62. *Id.* paras. 61-64.

63. *Id.*

64. *Id.* para. 65.

65. *Id.*

66. *Id.*

67. See Local Exchange Carriers’ Rates, Terms and Conditions for Expanded Interconnection Through Virtual Collocation for Special Access and Switched Transport, *Report and Order* 10 F.C.C.R. 6375, 77 Rad. Reg.2d (P & F) 1238 (1994); Ameritech Operating Cos. Revisions to Tariff F.C.C. No. 2, *Order*, 10 F.C.C.R. 1960, 76 Rad. Reg.2d (P & F) 1410 (1994).

68. 47 U.S.C. § 251(c)(6) (Supp. IV 1998).

69. Local Competition, *First Report and Order*, *supra* note 26, paras. 611-12.

reasoned that the Expanded Interconnection Orders were by no means superfluous because they gave standing to a class of entities—non-common carriers and end users—who lacked standing to use section 251.⁷⁰

2. Computer II and Unbundled Access for Enhanced Service Providers

Also using its general rulemaking powers under sections 201 and 202, the FCC in the early 1980s granted enhanced service providers a limited network access right.⁷¹ The FCC wanted to permit ILECs, AT&T, and other common carriers to provide enhanced services subject to minimal regulation. The FCC feared, however, that common carriers would favor their own enhanced service affiliates by discriminating against independent enhanced service providers who needed to purchase the telecommunications component from them. For instance, a phone company that provided voice mail service (an enhanced service) through the forwarding of unanswered calls might refuse to forward calls for a competing independent voice mail provider.

As a remedy to this potential problem, the FCC in its “Computer II” proceeding ordered that common carriers owning their own transmission facilities “unbundle” the telecommunications component from the information component of their enhanced services.⁷² These common carriers had to file a tariff for the telecommunications component. The common carrier’s enhanced service operations had to “purchase” the telecommunications component at the tariffed rates, and the common carrier had to sell the telecommunications component at the same tariffed rate to unaffiliated providers of enhanced services.⁷³

FCC actions to enforce the unbundling requirements have been rare; the most recent major affirmation of the rule came in 1995.⁷⁴ The resulting practical difficulty in enforcing the rule is increased by the fact that the FCC asked for comment in October 1998 on whether it should eliminate the “Computer II” unbundling rule as to long-distance carriers as part of its efforts to deregulate the long-distance market.⁷⁵ While the FCC has yet to

70. *Id.*

71. Amendment of Section 64.702 of the Comm’n’s Rules and Regulations, *Final Decision*, 77 F.C.C.2d 384, 47 Rad. Reg.2d (P & F) 669 (1980), *aff’d sub nom.*, *Computer and Comm. Indus. Ass’n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982) (“Computer II”).

72. *Id.* para. 231.

73. *Id.*

74. *Indep. Data Comm. Mfg. Ass’n, Inc., Memorandum Opinion and Order*, 10 F.C.C.R. 13,717, para. 59, 1 Comm. Reg. (P & F) 409 (1995).

75. *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Further Notice of Proposed Rulemaking*, 13 F.C.C.R. 21,531, paras. 33-35 (1998).

act, and did not forecast its ultimate decision in calling for comments, enforcing a rule that may soon be repealed in part is not an easy task. In any event, the "Computer II" requirements do not go nearly as far as the interconnection, UNE, and collocation provisions of section 251(c) in granting physical access to ILEC networks. The "Computer II" unbundling rule permits the common carrier to set the price, terms, and conditions for access by competing with enhanced service providers. It imposes an accounting safeguard requiring that the common carrier's enhanced service operations live by the same price and terms.

3. Carrier Identification Codes

The FCC and the industry groups that regulate telephone numbers have taken steps to permit non-common carriers access to a scarce number resource, Carrier Identification Codes ("CICs"). LECs use CICs to determine which of the many long-distance carriers purchasing interstate and intrastate access services from them should be routed particular calls. CICs have a variety of other uses in identifying the carriers that will be handling (and be paid for carrying) traffic.⁷⁶ Having a CIC is thus very helpful in providing multiple communications services. Some "dial-around" long-distance companies advertise their CICs, as the public can often include the CIC as the last four digits of a seven-digit dialing sequence starting with "101", e.g., "101XXXX," that will direct the LEC to send long-distance calls to that "dial-around" carrier.

Pursuant to the FCC's policy of permitting end users and non-common carriers to order LEC interstate access services (for which CICs were originally created), CICs are available to non-common carriers and end users as well as common carriers.⁷⁷ This is so, even though CICs are a scarce resource. CICs are four-digit numbers, so there are only 10,000 possible combinations. Stringent rationing measures have been necessary to postpone exhaustion of the four-digit resource as long as possible.⁷⁸

B. Future for Non-Common Carrier Network Access Rights

The provisions in section 251 granting only common carriers standing to invoke various rights are the work of Congress, not the FCC. Consistent with its Expanded Interconnection Orders, the FCC is still demonstrating interest in providing network access rights to common carriers to increase

76. Admin. of the N. Am. Numbering Plan Carrier Identification Codes (CICs), *Second Report and Order*, 12 F.C.C.R. 8024, paras. 1-4, 7 Comm. Reg. (P & F) 709 (1997) [hereinafter CIC, *Second Report and Order*].

77. *Id.* para. 1 n.1.

78. *Id.* para 2.

competition in communications service markets.

A pending Rulemaking provides an example of FCC sympathy toward the positions of non-common carriers. In September 1999, the FCC asked for comment as to whether it should grant non-common carriers the same access to LEC directory assistance and numbering resources provided to common carriers under section 251(b)(3).⁷⁹ If it expanded non-common carrier rights, the FCC would rely on its general powers under sections 201 and 202. In seeking comment, the FCC reasoned that if an entity wants to provide a competing directory assistance service, it should not have to become a common carrier (i.e., a telephone company) just to do so: “[W]e tentatively conclude that non-carrier directory assistance providers cannot compete without access to directory assistance equal to that provided to . . . [LEC and long-distance common carriers] pursuant to section 251(b)(3).”⁸⁰ Although the FCC questioned its legal authority to expand non-common carrier rights, it clearly indicated such expansion would be good policy.

The FCC’s legal authority to provide rights to non-common carriers equivalent to those granted common carriers is subject to question. At a certain point, the FCC arguably evades the intent of Congress if it uses sections 201 and 202 to create a shadow version of section 251, differing from the real section 251 in that the common carrier standing limitations are removed. The FCC can respond, however, by citing section 251(i), which states “[n]othing in this section shall be construed to limit or otherwise affect the Commission’s authority under section 201” of the 1934 Act.⁸¹

Policy arguments against the use of sections 201 and 202 to give standing to non-common carriers also exist. There is a certain symmetry in granting special regulatory rights only to those providers that are subject to regulatory burdens. Additionally, complying with interconnection and other duties under the 1996 Act imposes administrative burdens on ILECs—burdens reduced by limiting the class entitled to invoke those duties to those businesses required as common carriers to serve the public or a substantial segment of it. These arguments must be weighed against the basic argument that competition is good and should be encouraged from every source, whether common carrier or non-common carrier.

The bottom line is that while the FCC is reasonably sympathetic to

79. In the Matters of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information, *Third Report and Order in CC Docket No. 96-115, Second Order on Reconsideration of the Second Report and Order in CC Docket No. 96-98, and Notice of Proposed Rulemaking in CC Docket No. 99-273*, 17 Comm. Reg. (P & F) 643 (1999).

80. *Id.* para. 190.

81. 47 U.S.C § 251(i) (Supp. IV 1998).

claims of non-common carriers for increased network access rights, these rights are currently nowhere near as powerful as those enjoyed by common carriers. The incentive to accept the burdens of non-dominant common carrier regulation to obtain the common carrier rights still exists.

VI. BURDENS OF COMMON CARRIER STATUS

The rights of common carriers come with burdens. Because of the heavy regulatory burdens imposed on dominant carriers, this Article focuses on businesses that would be subject only to non-dominant carrier regulation if they choose to provide common carrier services. This includes virtually all new common carriers except for ILECs and, in some situations, their affiliates. The relative laxness of non-dominant carrier regulation makes it tempting to accept the burdens of common carrier regulation to obtain the benefits of common carrier status.

Nevertheless, while non-dominant carriers are not subject to economic regulation (with the one exception being the geographic averaging/rate integration rules for long-distance carriers discussed below), they still face significant regulatory burdens. A brief review of these burdens follows. A few of the burdens apply to private carriers and enhanced service providers as well as common carriers.

A. *Certification and Transaction Approval*

Most states require that any company desiring to provide intrastate common carrier services first obtain a certificate of public convenience and necessity from their state public utility commission.⁸² Additionally, a company desiring to provide international service (rather than just interstate service) must first obtain a certificate from the FCC.⁸³ Because most customers will want the ability to place intrastate and/or international calls, a new business desiring to provide common carrier services will, in all likelihood, need to file certification applications.

Moreover, company mergers, acquisitions, and assets transfers involving common carriers often require state commission approval.⁸⁴ If a transaction includes a change of control of a carrier or a license transfer, FCC approval may also be necessary.

The FCC and the states have generally streamlined the certification process and transaction approval process for non-dominant carriers, particularly long-distance carriers. Nevertheless, several states still conduct

82. See, e.g., CONN. GEN. STAT. ANN. § 16-247g (West Supp. 2000); GA. CODE ANN. § 46-5-182 (Supp. 2000).

83. See 47 C.F.R. §§ 63.01 (interstate), 63.18 (international) (1999).

84. See, e.g., MO. ANN. STAT. § 392.300 (West 1994).

hearings (often telephonically) on certification applications and require written testimony in support of applications. Many examine financial statements for proof of financial responsibility, and some require that the company show a minimum net worth. Each state, even those with very streamlined procedures, seems to demand at least one unusual item of information in certification applications. Taken as a whole, obtaining certification in multiple states is an expensive and time-consuming undertaking. A corporate transaction such as a merger requiring state-by-state approval is similarly expensive and time-consuming if operations are conducted in multiple states.

Finally, at least one state requires that some private carriers obtain certification. Alaska considers any company that provides communications service directly or indirectly to ten or more customers to be a public utility that must seek certification.⁸⁵ There is no apparent exception for providers that negotiate individually with each customer. A company desiring to avoid the burdens of common carrier regulation needs to consider whether the states in which they will do business have similar unusual rules.

B. Tariffs

The duty to file tariffs is both a burden and a benefit. The benefit, discussed above, comes from the Filed Rate Doctrine and the ability to change rates or terms and conditions without (in most states) directly notifying each customer. The burden comes in preparing and filing the tariffs, and perhaps more importantly, in being theoretically obligated to file the complete terms, conditions, and rates for every service in advance of enlisting customers. Several states require as much as 30 days' notice before a change in rates becomes effective—a real handicap in a competitive market.⁸⁶

C. Sections 201 and 202 of the 1934 Act

The most basic obligations of all common carriers, including non-dominant carriers, are set forth in sections 201 and 202 of the 1934 Act (which are applicable to interstate service) and their analogs in various state public utility acts (which are applicable to intrastate service). Section 201 requires that carriers offer service on just and reasonable terms, and that they provide service upon reasonable request to all persons eligible for service.⁸⁷ Section 202 requires that carriers refrain from unreasonable

85. See ALASKA STAT. § 42.05.990(3)(A), (4)(B) (Michie Supp. 1999).

86. See, e.g., MO. CODE REGS. ANN. tit. 4, § 240-30.010(11)(G) (2000).

87. 47 U.S.C. § 201 (1994).

discrimination among similarly situated customers.⁸⁸ Carriers can offer different service packages at difference prices, however, without violating section 202.⁸⁹

Probably the most important aspect of section 202 is the FCC's decision to use it to forbid long-distance carriers and certain other carriers from prohibiting resale of their services—a restriction on resale being viewed as discriminatory toward customers who are also competitors.⁹⁰ If a communications provider needs to favor certain customers over others, e.g., by refusing to sell to those customers who will resell their services or by giving special discounts to their own investors, it may have to consider non-common carrier status to comply with section 202.

D. Universal Service Contributions

Every common carrier must now contribute a significant percentage of their revenues (projected to be 5.6% in the fourth quarter of 2000) from interstate telecommunications services to the various federal universal service funds.⁹¹ Many states have funds requiring additional contributions calculated on the basis of intrastate revenues.⁹²

Although the universal service contribution requirements would create an incentive to provide non-common carrier service, Congress and the FCC eliminated that incentive, in part by subjecting private carriers, but not enhanced service providers, to the contribution requirement.⁹³ This is a rare example of federal regulation of private carriers.

88. *Id.* § 202.

89. *Amer. Broad. Cos., Inc. v. FCC*, 663 F.2d 133, 138-39 (D.C. Cir. 1980).

90. *See Reg. Policies Concerning Resale and Shared Use of Common Carrier Domestic Pub. Switched Network Serv., Report and Order*, 84 F.C.C.2d 130, 48 Rad. Reg.2d (P & F) 1027 (1980).

91. Proposed Fourth Quarter 2000 Universal Serv. Contribution Factors, *Public Notice*, DA 00-2065 (Sept. 9, 2000), 2000 WL 1269840 (F.C.C.).

92. *See, e.g.*, KAN. STAT. ANN. 66-2008(b) (Supp. 1999) (all carriers to contribute to Kansas Universal Fund); Application of SeTel, LLC for a Certificate of Public Convenience and Necessity to Operate as a Reseller of Telecommunications Services Within the State of California, Decision No. 97-08-032, 1997 CAL PUC LEXIS 622 (Aug. 1, 1997) (listing various California Commission assessments on revenue from intrastate services).

93. Congress directed the FCC to impose the contribution requirement on every provider of interstate telecommunications services (i.e., common carriers) and on “[a]ny other provider of interstate telecommunications . . . if the public interest so requires.” 47 U.S.C. § 254(d) (Supp. IV 1998). The FCC required contributions from “every provider of interstate telecommunications that offers telecommunications for a fee on a non-common carrier basis.” 47 C.F.R. § 54.706(b) (1999). Because § 254(d) authorizes imposing the contribution obligation only on providers of “telecommunications,” enhanced service providers may be beyond the FCC’s reach.

E. Miscellaneous Common Carrier Obligations

Rules applicable to non-dominant as well as dominant carriers still pepper the 1934 Act and the FCC's regulations. A sampling provides an idea of the variety of these provisions:

Geographic Averaging/Rate Integration: Common carriers providing long-distance service must ensure that rates "charged . . . to subscribers in rural and high cost areas shall be no higher than the rates charged by each such provider to its subscribers in urban areas," and that rates charged to subscribers in one state are "no higher than the rates charged to its subscribers in any other State."⁹⁴ While long-distance companies may still vary their rates by the distance called and other factors, these rules are an exception to the policy against regulating the prices charged by non-dominant common carriers.

Customer Privacy: Every common carrier "has a duty to protect the confidentiality of proprietary information of, and relating to" customers and other carriers and equipment manufacturers.⁹⁵

Payphone Compensation: Every long-distance company or other common carrier carrying a call originating from a payphone must compensate the payphone owner, thus permitting the payphone owner to receive compensation even when the payphone user dials a 1-800 number or an access code and deposits no coins into the payphone.⁹⁶

Reporting: Non-dominant carriers must still file periodic reports on revenues (for purposes of calculating universal service and other regulatory assessments) with the FCC and many state commissions. There are various other reporting requirements, for example, the requirement that facilities-based carriers report major service outages.⁹⁷ Many states also require annual reports.

Discontinuance of Service: Non-dominant carriers must notify customers, state governors, the Department of Defense, and the FCC at least thirty days prior to discontinuing service.⁹⁸ The FCC reserves the right to deny the requested discontinuance, although the request is automatically granted if no action is taken.

CLEC Obligations: All LECs, including new entrants (who are necessarily non-dominant) are subject to the obligations of section 251(b), which include the duty to provide number portability, dialing parity, and

94. 47 U.S.C. § 254(g) (imposing these requirements on "providers of interexchange telecommunications services").

95. 47 U.S.C. § 222(a).

96. 47 C.F.R. § 64.1300.

97. *Id.* § 43.61; *Id.* § 63.100(b).

98. *Id.* § 63.71.

access to directory assistance, and the duty to transport and terminate local traffic originating on the networks of other carriers.⁹⁹

General Regulatory Jurisdiction: As a common carrier, a provider must defend complaint proceedings filed at the FCC pursuant to section 208 of the 1934 Act,¹⁰⁰ and will in most cases be required to defend any complaints filed with state public utility commissions as well. A common carrier will need to devote at least some resources to monitoring FCC and state commission activity that may impact its operations.

In short, non-dominant carriers are by no means free from regulation, although they are free from the stringent regulation imposed on dominant carriers.

VII. BENEFITS, BURDENS, AND OPTIONS IN PROVIDING A MIX OF COMMON AND NON-COMMON CARRIER SERVICES

A. *Weighing the Benefits and Burdens*

Deciding whether to accept non-dominant common carrier regulation to obtain the benefits of common carrier status can be difficult. A number of factors should be considered.

First, the number of states in which the provider will operate is a factor. The burden of obtaining certification depends greatly on the number of states in which certification is needed. Long-term regulatory compliance will also be more expensive if many state regulators and the FCC assert jurisdiction over the provider.

Second, peculiarities in state laws are also important. If one provides service in Alaska, or another state that regulates private carriers and/or enhanced services to any significant degree, trying to avoid regulation may be difficult or impossible. In such a case, a provider may decide that it might as well be a common carrier and obtain common carrier rights.

Third, the availability of business partners who have common carrier status is an important factor. If a communications business has a close working relationship with a common carrier, the business may not need to have its own common carrier rights. The common carrier partner can presumably make any necessary requests for interconnection, UNEs, or other needs.

A fourth factor is timing. Obtaining certifications to provide common carrier service from the FCC (for international calls) and numerous states (for intrastate services) takes months. Even if the long-term burdens of

99. 47 U.S.C. § 251(b)(2)-(5).

100. 47 U.S.C. § 208 (1994).

non-dominant carrier regulation are acceptable, choosing non-common carrier status, and structuring all services so that no common carrier services are provided, may be the only option to quickly start providing service and earning revenue. This situation can arise both in the case of a completely new business and in the case of a new entity that emerges from a merger-and-acquisition transaction.

A fifth factor is whether the communications service will relate to local phone service or long-distance service. The most powerful common carrier network access rights created by section 251 of the 1996 Act (for example, collocation at local company central offices under 47 U.S.C. § 251(c)(6)) are designed to provide access to the networks of local phone companies. Thus, these rights are probably more important to ventures relating to the local telephone service market (such as a business that helps a few nearby ISPs connect to the local phone company) than they are to ventures relating to the more competitive long-distance market (such as a long-distance fiber-optic cable network, capacity in which will be sold to a few major long-distance carriers). However, if the venture's contemplated service does not just relate to but actually is mass market local or long-distance voice service, common carrier status would be difficult to avoid, at least if transmission over the Internet Protocol technology is not involved.¹⁰¹ These are only a few of the many factors that may play a part in the decision whether to take common carrier status.

B. Option to Provide Some Services on a Common Carrier Basis

One solution may be to provide common carrier service only to the extent necessary to take advantage of the benefits of common carrier status. As discussed above, the 1996 Act specifically permits common carriers to provide other services, stating that a telecommunications carrier shall be regulated as a common carrier only to the extent it provides telecommunications services.¹⁰²

The FCC, in implementing the 1996 Act, made the option of providing both common carrier and non-common carrier services somewhat more attractive. The FCC adopted a rule stating that as long as the carrier requesting access provides some telecommunications services through the point of interconnection or UNEs, the carrier can also provide enhanced services through the same arrangements.¹⁰³ The FCC reasoned it would be wasteful to increase transaction costs by effectively requiring new entrants to make separate arrangements with ILECs for carrying

101. See Section IV(c)(3) of this Article.

102. 47 U.S.C. § 153(44) (Supp. IV 1998).

103. 47 C.F.R. § 51.100(b).

enhanced services traffic.¹⁰⁴ The enhanced services portion of the traffic is not subject to assessment to raise money for the FCC's universal service programs.¹⁰⁵

It should be noted, however, that a competitive carrier's ability to carry a substantial amount of unregulated traffic using facilities obtained through exercising its rights as a common carrier is not unlimited. In March 1999, the FCC attempted to extend the concept of section 51.100 to collocation of the equipment of competitive carriers on ILECs' premises through authorizing the placement of equipment used for both common carrier and enhanced services.¹⁰⁶ On review, the D.C. Circuit vacated this portion of the *Order*, stating that the FCC has not yet sufficiently justified extending collocation rights to such dual-purpose equipment, as the statutory provision authorizing collocation applied only to equipment "necessary" for accomplishing interconnection or obtaining access to UNES.¹⁰⁷

VIII. CONCLUSION

Congress, in the 1996 Act, granted to common carriers network access and other rights that it did not make available to other communications providers. Limiting these rights to common carriers ran counter to a consistent FCC policy of granting network access rights to non-common carriers and end users as well as common carriers. These limitations impact the decision each new communications provider must make as to whether it should become a common carrier or an unregulated communications services provider. A new communications business should closely examine whether it will need to invoke any of the common carrier rights as it makes this decision.

104. Local Competition, *First Report and Order*, *supra* note 26, para. 995.

105. Universal Serv., *Rep. to Cong.*, *supra* note 4, para. 26.

106. In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, *First Report and Order and Further Notice of Proposed Rulemaking*, 14 F.C.C.R. 4761, para. 28, 15 Comm. Reg. (P&F) 553 (1999), vacated in part, *GTE Serv. Corp. v. FCC*, 205 F.3d 416 (D.C. Cir. 2000).

107. *GTE Serv. Corp.*, 205 F.3d at 422.