

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Preserving the Open Internet)	GN Docket No. 09-191
)	
Broadband Internet Practices)	WC Docket No. 07-52

COMMENTS OF PROF. BARBARA A. CHERRY

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I. INTRODUCTION

I have conducted extensive telecommunications policy and law research, which has been informed by my employment in the telecommunications industry (AT&T and Ameritech), the government (FCC), and academia (Quello Center of Telecommunications Management and Law at Michigan State University, and presently in the Department of Telecommunications at Indiana University). I am filing comments because my own body of research directly relates to important issues that have been raised in this proceeding and may be helpful to the Commission in properly framing and analyzing principles to be codified to govern broadband industry practices in order to preserve a free and open Internet.

A critical component of my research, particularly relevant to the present proceeding, has been devoted to correcting misconceptions and mischaracterizations of the law of common carriage that unfortunately misinform debates of important telecommunications policies. This research began with analysis of the limited liability practices of telecommunications carriers for my Ph.D. dissertation, which was later revised and published in my book, *The Crisis in Telecommunications Carrier Liability*.¹ During the course of this research, I discovered that many judicial and regulatory decisions (both state and federal) as well as the secondary academic literature contained factual errors related to the history of the law of common carriage. These errors had formed the basis for analytical errors in the analyses and conclusions of judicial and regulatory agency decisions concerning the liability regime of telecommunications carriers, and in the associated academic literature discussing them. My book was devoted to revealing and correcting these errors, explaining how the errors likely arose and persisted, and applying a

¹ Barbara A. Cherry, *The Crisis in Telecommunications Carrier Liability: Historical Regulatory Flaws and Recommended Reform* (Norwell, MA: Kluwer Academic Publishers) (1999) (*The Crisis in Liability*). This book has been cited in the present NPRM at footnote 157.

factually accurate understanding of the law of common carriage to an economic analysis of what liability rules should apply in a detariffed telecommunications environment.

As I expanded the scope of my research, I discovered that the factual and analytical errors related to common carriage had continued to diffuse and were now misinforming debates of other deregulatory telecommunications policies, particularly those related to broadband. In order to apply a historically accurate understanding of common carriage and its relationship to other bodies of law – such as public utilities and antitrust – to issues of broadband access, I developed an organizing principle that I refer to as “essentiality of access.”² “Essentiality of access” is a typology based on the historical alignment of different access problems – that is, access to some essential service or facility – and the legal principles that evolved to address them. This typology clarifies that different access problems led to the evolution of distinctive legal principles.³ Furthermore, the different legal principles affect different types of legal rights, such as economic rights and free speech rights, of the access recipients and access providers.⁴ Moreover, awareness of the types of rights that are affected by government intervention is necessary for determining how to address conflicts among them when simultaneously pursuing multiple access objectives, particularly when such conflicts affect constitutional rights of

² Barbara A. Cherry, *Utilizing "Essentiality of Access" Analyses to Mitigate Risky, Costly, and Untimely Government Interventions in Converging Telecommunications Technologies and Markets*, 11 COMMLAW CONSPECTUS 251 (2003) (*Utilizing "Essentiality of Access"*).

³ The problems of access to some essential service or facility differ by the following set of characteristics: the service or facility deemed to be essential; for whom, the access recipient, that the service or facility is deemed to be essential; the nature of the relationship between the access recipient and the access provider; and the circumstances impeding the accessibility of the service or facility. *Id.* at 252.

⁴ Access recipient refers to the individual or entity for whom the service or facility is deemed essential and would thereby benefit from a legal principle requiring the provider of the service or facility to provide access.

individuals as opposed to corporations.⁵

Unfortunately, different access problems and associated legal principles have become conflated in the discourse affecting broadband access services, driven in large part from mischaracterizations of common carriage, which is now misleading debate as to issues falling under the rubric of network neutrality.⁶ Applying an “essentiality of access” analysis shows that the diversity of alleged goals, problems, and remedies discussed in the context of network neutrality embody multiple types of access problems. These, in turn, lead to juxtaposition of differing legal principles – one of which is common carriage – and affect differing types of rights of access recipients and access providers. Unless the law of common carriage – as well as its relationship to other legal principles that evolved to address different types of access problems – is correctly understood in this NPRM, factual and analytical errors are likely to infiltrate and misguide the Commission’s consideration of appropriate obligations for broadband Internet access service providers.

Therefore, these comments are intended to offer the Commission an analytical framework for evaluating the issues raised and comments filed in this NPRM. First, it starts with the recognition that it is necessary to establish a baseline set of obligations for broadband Internet access service providers. Second, to establish such obligations it is necessary to properly identify the relevant legal principles associated with the underlying types of access problems. In this regard, it is critical to have an accurate understanding of common carriage and its relationship to the other legal principles. Furthermore, it is essential to acknowledge the

⁵ Utilizing “Essentiality of Access”, *supra* note 2, at 252.

⁶ See Barbara A. Cherry, *Misusing Network Neutrality to Eliminate Common Carriage Threatens Free Speech and the Postal System*, 33 N. KY. L. REV. 483 (2006) (*Misusing Network Neutrality*).

multiplicity of affected rights of access recipients and access providers, both economic and free speech, and their potential conflicts. I offer my research as a resource to the Commission in embarking on the difficult and important task before it in this proceeding.

II. THIS PROCEEDING IS NECESSARY TO ESTABLISH A BASELINE OF OBLIGATIONS FOR BROADBAND INTERNET ACCESS SERVICE PROVIDERS

The accessibility of the Internet to the general public began with dial-up access to the facilities of the PSTN. The PSTN itself is common carriage based, and to which the FCC had imposed common carriage obligations under the *Computer Inquiry* proceedings for the provision of enhanced services by unaffiliated enhanced service providers (ESP's). Thus, the evolution of the Internet we experience today is dependent, in part, on its historical interconnection and interoperability with a preexisting common carriage PSTN.

The existence of an alternative network platform, the cable system – which historically has not been common carriage – to provide Internet access to the general public triggered the issue as to what obligations the cable system providers may have both to end users and to Internet service providers (ISP's). The FCC's ultimate determination that broadband access to the Internet is an information service without a separable telecommunications component is the point at which a different legal trajectory was chosen for accessibility to the Internet by both end users and ISP's.⁷

In both of their statements in this proceeding, Commissioners McDowell and Baker assert the need to be mindful of potential consequences, whether beneficial or harmful and

⁷ *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, 67 F.C.C.R. 18,848 (2002) (*Cable Declaratory Ruling*); *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Universal Service Obligations of Broadband Providers*, 20 F.C.C.R. 14,853 (2005) (*Wireline Broadband Order*).

intended or unintended, of FCC actions in this proceeding.⁸ This admonition also applies to recognizing the consequences of the FCC's change in regulatory policy through elimination of common carriage obligations under Title II to broadband access to the Internet. The need for the present inquiry in this NPRM as to what obligations should be imposed on broadband Internet access service providers is the result of the FCC's prior change in policy under the *Cable Declaratory Ruling* and its progeny.

Had common carriage obligations remained applicable to broadband access services, the cautious approach advocated by Commissioners McDowell and Baker perhaps could have been invoked without further rulemaking at this juncture. This is because there would have been existing obligations under Title II of the Communications Act of 1934 on broadband Internet access service providers against which such providers' conduct could be compared, enabling case-by-case analysis. For example, on a case-by-case basis the Commission could have considered what network management practices are consistent with reasonable discrimination by common carriers. Furthermore, to the extent that relief from some aspects of common carriage obligations under Title II was deemed desirable, the Commission could have exercised its forbearance power under 47 U.S.C. 160.

The problem is that, without the applicability of common carriage obligations under Title II – to govern access by either end users or unaffiliated ISP's – there is a lack of existing obligations on broadband Internet access service providers against which to assess their conduct. *This NPRM has become procedurally necessary to establish a framework of legally enforceable obligations imposed on broadband Internet access service providers against which their conduct*

⁸ *In the Matter of Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, Notice of Proposed Rulemaking, FCC 09-93 at 100 & 106 (2009) (Statement of Commissioner McDowell, concurring in part, dissenting in part; Statement of Commissioner Baker, concurring in part, dissenting in part).

can be assessed. Therefore, the need for this proceeding is a consequence, whether intended or unintended, of the classification of broadband Internet access services as Title I information services.

The manner in which the Commission frames this proceeding is consistent with this conclusion of its procedural necessity. First, the Commission proposes that the rules should not apply to dial-up Internet access service, as users' telephone connections to dial-up Internet access service providers remain under Title II regulation (para. 91, fn. 209). Second, as for broadband Internet access services, the Commission intends the rulemaking process to provide greater predictability than its *Internet Policy Statement*⁹ as well as to address emerging challenges to the open Internet (para. 6). In this regard, the Commission proposes that the principles set forth in the FCC's *Internet Policy Statement* be codified as obligations of broadband Internet access service providers rather than described as what "consumers are entitled" to do with their service (para. 90):

We believe that codifying them as obligations of particular entities, rather than just as principles, would make clear precisely who must comply and in what way. Making these rules apply to particular entities will also provide certainty to all Internet participants as to what to expect and who bears responsibility for what types of actions.

Third, the Commission seeks comment on a case-by-case approach to adjudicate violations of the principles. "Under such an approach, we would evaluate the facts of particular cases against the principles codified in general form, rather than crafting detailed rules" (para. 12).

⁹ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements; Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Policy Statement, 20 FCC Rcd 14986, 14987-88, para. 4 (2005) (*Internet Policy Statement*).

Thus, through the procedural rulemaking step of establishing obligations, the Commission intends to “establish clear requirements while giving us the flexibility to consider particular circumstances case by case” (para. 89). It is *after* having established a baseline of obligations for broadband Internet access service providers that the cautious approach advocated by Commissioners McDowell and Baker can then be invoked through case-by-base analysis. “In that way, [the Commission] will be able to generate over time a body of law that develops as technology and the marketplace evolve” (para. 89).

The necessity for establishing a baseline of obligations for broadband Internet access service providers does not in and of itself, however, confer jurisdiction on the Commission to do so through a rulemaking. The enforceability of the *Internet Policy Statement* under the Commission’s Title I ancillary jurisdiction is the subject of current litigation,¹⁰ the outcome of which may affect the Commission’s authority to conduct the present rulemaking. Should the Commission ultimately lack jurisdiction to establish the baseline of obligations for broadband Internet access providers through rulemaking under Title I, then alternative legal mechanisms must be pursued. One is for the Commission to reconsider its classification of broadband Internet access service as an information service, reclassifying perhaps at least the transmission component as a Title II service. Absent Commission action in this regard, the onus then falls to Congress either to grant jurisdictional authority to the Commission or to establish obligations on broadband Internet access service providers directly in legislation. The focus of these comments is not on the matter of whether the FCC presently has jurisdictional authority, but rather on how the design of obligations on broadband Internet access service providers should be pursued whether exercised by the Commission, under current or future authority, or by Congress.

¹⁰ The enforceability of the principles in the *Internet Policy Statement* is the subject of litigation in *Comcast v. FCC*, Dkt. No. 08-1291 (D.C. Cir.).

III. IT IS NECESSARY TO PROPERLY IDENTIFY THE RELEVANT LEGAL PRINCIPLES TO ESTABLISH A BASELINE OF OBLIGATIONS FOR BROADBAND INTERNET ACCESS SERVICE PROVIDERS

To establish a set of baseline obligations for broadband Internet access service providers from which to assess their conduct, it is necessary to properly identify the relevant legal principles from which those obligations should be derived. In this regard, Commissioner McDowell asserts that, as the NPRM progresses, the public interest would be better served if the debate focused more on the dichotomy between discriminatory conduct and anticompetitive conduct.¹¹ He further asserts that “[d]uring the course of this debate, many have confused the important difference between discriminatory conduct and anticompetitive conduct.”¹²

Commissioner McDowell is right to have raised this issue. The distinction between discriminatory and anticompetitive conduct is critical to correctly identifying the relevant legal principles for purposes of establishing a baseline of obligations for broadband Internet access service providers. However, it is important to understand why there has been such confusion between these concepts. Much of the confusion arises from misconceptions and mischaracterizations of the law of common carriage that I have described in my research. It is further exacerbated, as revealed by an “essentiality of access” analysis, by the failure to adequately appreciate the different access problems, legal principles, and affected economic and free speech rights of consumers and competitors. These issues are discussed at length in my publications cited herein. The remainder of these comments highlights important aspects, but do not attempt to restate nor substitute for the full exposition provided in these publications.

¹¹ Statement of Commissioner McDowell, FCC 09-93 at 99.

¹² *Id.*

A. Origins of Common Carriage as Status-Based Regulation, Independent of Market Structure, to Address Discriminatory Conduct

With its origins under the English common law, “[c]ommon carriers, merely by virtue of their *status* as public employments, or public callings, bore unique obligations under *tort law* to serve upon reasonable request without discrimination, to charge just and reasonable prices, and to exercise their calling with adequate care, skill and honesty.”¹³ *A common carrier bore its obligations merely on the basis of its status as a public employment, independent of any requirement or finding of monopoly or market power.* When both competition and enforcement of common law remedies were deemed inadequate to prevent myriad forms of discrimination by railroads – and States lacked jurisdiction to regulate interstate commerce – Congress enacted the Interstate Commerce Act of 1887 (ICA).¹⁴ The statutory version of common carriage under the ICA codified the common law principles of common carriage, but substantially changed the means for their enforcement. A federal agency, the Interstate Commerce Commission (ICC), was created with regulatory oversight. Tariffs were also required as a means of providing greater uniformity of rates, terms and conditions of service to mitigate the scope of permissible discrimination.

The ICA created the template for the federal statutory form of common carriage. The ICA was amended in 1910 to apply to telegraph and telephone companies, and provided the basis for the statutory framework of Title II of the Communications Act of 1934 when federal jurisdiction over telegraph and telephone companies was transferred to the newly created FCC.

¹³ Barbara A. Cherry, *Maintaining Critical Legal Rules to Enable Sustainable Communications Infrastructures*, 24 GEORGIA ST. U. LAW. REV. 947, 962 (2006) (*Maintaining Critical Legal Rules*) (emphasis in original).

¹⁴ See U.S. Senate Report of the Senate Select Committee on Interstate Commerce, 49th Congress, 1st Session, Report 46, Part 1 (1886) (“Cullom Report”) (discusses reasons for the need for federal legislation).

Some confuse common carriers with public utilities.¹⁵ They are not synonymous, although some entities – such as telecommunications carriers – are both common carriers and public utilities.

The common law of public utilities subsequently evolved in the United States during the nineteenth century, incorporating the tort obligations of common carriers to which was added an affirmative duty to extend facilities to provide service with a corresponding barrier to exit. To enable public utilities to remain financially viable while satisfying these additional obligations, they were protected from competitive entry typically through monopoly franchises.¹⁶

Historically, public utilities received certain privileges pursuant to a contractual relationship with government in exchange for which they bore certain obligations. These privileges included protection from market entry, usually through monopoly franchises. It is at this juncture that the existence of monopoly became relevant to the regulatory obligations imposed on public utilities, some of which were also common carriers.

Unfortunately, the dual classification of telephone companies, now telecommunications carriers, as both common carriers and public utilities has led to factually inaccurate and inappropriate association between common carriage obligations and monopoly or market power. This analytical error has resulted in policy recommendations, such as the assertion that common carriage obligations are no longer necessary in a competitive market, which have infiltrated the network neutrality debate.

B. Relationship of Common Carriage to Anticompetitive Conduct

The first federal antitrust statute, the Sherman Act, was enacted in 1890, after the enactment of the ICA. The essential facilities doctrine, prohibiting a monopolist to refuse to deal with competitors with regard to an essential facility, evolved through judicial interpretation of

¹⁵ See, e.g., *The Crisis in Liability*, *supra* note 1, at 55-57.

¹⁶ *Maintaining Critical Legal Rules*, *supra* note 13, at 962 (footnote omitted).

the Sherman Act. The purpose of the essential facilities doctrine is to address the problem of access to an essential facility among competitors, which is different from the purpose of common carriage to address the economic relationship between a carrier and end user customer in the retail market.

Using “essentiality of access” to analyze the network neutrality debate “shows how the lineage of legal principles that evolved to address differing forms of access problems is being misrepresented in the *network neutrality* debate.”¹⁷ In particular, “[t]he law of common carriage has and continues to be mischaracterized, leading to a conflation of the legal bases for addressing access problems for end user customers and competitors.”¹⁸

The origin of common carriage as status-based regulation in the retail market with end user customers (not competitors of the carriers) has been ignored. Furthermore, the tests of market power and the (non-)existence of essential facilities associated with antitrust analysis have been improperly imputed to common carriage regulation. As a result, the interrelationship of common carriage to antitrust principles has been either misunderstood or intentionally obfuscated,¹⁹ ultimately giving rise to serious analytical errors upon which policy recommendations are being based.

Some recommendations assert that antitrust principles are sufficient to substitute for the functions that common carriage and public utility obligations have served in providing access to (end user) customers. These include claims that network neutrality rules are not necessary because competition is sufficient to protect against abuses of discrimination and that any

¹⁷ *Misusing Network Neutrality*, *supra* note 6 at 500 (emphasis in original).

¹⁸ *Id.*

¹⁹ Barbara A. Cherry, *Analyzing the Network Neutrality Debate Through Awareness of Agenda Denial*, 1 INTERNATIONAL J. OF COMMUNICATION 580 (2007) (describes agenda denial strategies of opponents of network neutrality).

remaining problems should be addressed under antitrust law. In addition to the different purposes for which common carriage and antitrust law evolved, a fundamental error embedded in such claims and recommendations is a failure to appreciate that the industry-specific legal regimes of common carriage and public utilities largely *predate* the legal regime for general businesses, consisting of antitrust and consumer protection laws.

Recognition of this temporal sequence is critical, as the statutory general business regime evolved as an adjunct to the industry-specific statutory regimes. As a result, in numerous cases and circumstances the general business regime has been preempted or superseded by the industry-specific regimes, and, for such situations, further evolution of the general business regime thereby addressed issues *not* covered by the traditional industry-specific regimes... [U]nder deregulatory policies ... it is unclear whether the general business regime will adequately address the situations or circumstances that had previously been addressed by the traditional industry-specific regimes.²⁰

It is for this reason that “deregulatory policies may generate a ‘legal gap’ for which some issues may no longer be adequately addressed by either the general business or the deregulatorily adjusted industry-specific regimes.”²¹ Such a legal gap has been created by the Commission’s classification of broadband Internet access services as information services, and thereby the necessity for this NPRM.

Perhaps some of the confusion between discriminatory conduct and anticompetitive conduct to which Commissioner McDowell refers also arises from the Commission’s imposition of common carriage obligations on telecommunications carriers to unaffiliated enhanced service providers (ESP’s) pursuant to the *Computer Inquiry* proceedings. In this context, the Commission imposed Title II obligations to address potential anticompetitive conduct by carriers with regard to competitors in an ancillary market, enhanced services, the provision of which access to the carrier’s underlying telecommunications facilities is an essential component. This

²⁰ *Maintaining Critical Legal Rules*, *supra* note 13, at 961 (emphasis in original).

²¹ *Id.*

framework was subsequently applied, prior to the *Cable Declaratory Ruling*, to carriers' provision of DSL services with regard to unaffiliated information service providers (ISP's).²² In this way, there was a convergence of concerns with discriminatory and anticompetitive conduct, to which application of common carrier obligations by Commission rule was deemed a solution. However, the application of common carriage obligations on telecommunications carriers to unaffiliated ESP's (and initially to unaffiliated ISP's) arises from a different type of access problem (under the "essentiality of access" typology) than that associated with end users; rather, the Commission's intervention in this context arises from concerns similar to those underlying the essential facilities doctrine under antitrust law.²³

C. Different Legal Principles Apply to Consumers and Competitors

The Commission's classification of broadband Internet access services as information services eliminated the applicability of common carriage obligations to end users (consumers) as well as to unaffiliated ISP's. In this way, the economic rights of both consumers and certain competitors have been affected. However, as previously discussed, the underlying "essentiality of access" problems for originally applying common carriage differed in the context of consumers as opposed to ISP's. The differing types of access problems and associated legal principles for end users and competitors must be identified and analyzed in establishing baseline obligations for broadband Internet access service providers in this proceeding.

²² *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011, 24030-24031, paras. 36-37 (1998) (classifying DSL as a telecommunications service).

²³ Yet, reliance on the essential facilities doctrine under antitrust law to fill the legal gap for unaffiliated ISP's is misplaced. The validity of the essential facilities doctrine is now uncertain given that the U.S. Supreme Court recently declined to either recognize or repudiate it. *Verizon v. Trinko*, 540 U.S. 398, 410-411 (2004).

In this regard, the existence of competition does not obviate the need for baseline obligations to protect consumers from the conduct of broadband Internet access service providers. Demand-side market failures occur even in markets that are structurally sound on the supply side – a reality that is apparently more readily recognized and accepted outside the U.S for its implications for consumer policy.²⁴ Furthermore, consumers are particularly vulnerable to economic exploitation where there is substantial disparity in bargaining power between the provider and the consumer. Such disparity is manifest, for example, in contracts of adhesion for which the courts have long provided the remedy of unenforceability of unconscionable terms and conditions.²⁵ Furthermore, it is well established that, even in competitive markets, competition among sellers does not necessarily occur on all terms and conditions; consequently, seller-protective terms can persist without meaningful alternatives for consumers.²⁶

Moreover, consumers of broadband Internet access service are economically vulnerable in the same manner as consumers of traditional common carriers. The vulnerability arises from the nature of a bailment relationship, in which – regardless of the number of carriers available to the customer – once chosen the carrier has exclusive control of the property or electronic

²⁴ See OECD, Summary Report, Directorate for Science, Technology and Industry, Committee on Consumer Policy, Roundtable on Economics for Consumer Policy, DIST/CP(2007)1FINAL (July 26, 2007). I further discuss the relevance of the OECD Summary Report to telecommunications and broadband access policies in Barbara A. Cherry, *Consumer Sovereignty: New Boundaries for Telecommunications and Broadband Access*, 34 TELECOMMUNICATIONS POLICY __ (forthcoming in 2010).

²⁵ See, e.g., W. D. Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971); T. D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173 (1983).

²⁶ For discussion of seller-protection terms in standardized contracts, see Rakoff, note 15 *supra*; R. Korbkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003); M. Meyerson, *The Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 GA. L. REV. 583 (1990).

transmission in its possession.²⁷

On the other hand, concerns of anticompetitive conduct are relevant to establishing baseline obligations of broadband Internet access service providers in their relationship with potential competitors for which such broadband access is an important component. Perhaps similar obligations can be imposed to address the concerns of both consumers and competitors, as was done when common carriage obligations were imposed in both contexts under the FCC's Title II jurisdiction, but the reasons for doing so will differ.

D. Relationship of Common Carriage to Free Speech

In addition to the economic rights of consumers and competitors, “essentiality of access” analysis recognizes additional access problems for which the relevant legal principles relate to free speech concerns. Historically, free speech concerns were rarely relevant to the law of common carriage. As providers of only transmission facilities, telecommunications carriers generally possessed no First Amendment rights (other than as to tangential operations, such as billing practices). However, mass media, as providers of information content of their choosing over their own facilities, did possess free speech rights. “With the elimination of technological entry barriers and mass media, the interrelationship of common carriage and free speech principles is becoming more complex.”²⁸

Consideration of free speech rights form yet another legal basis for establishing baseline obligations on broadband Internet access service providers. Yet again, the circumstances governing the free speech rights of consumers as well as among differently-situated competitors – network providers, application and service providers, and content providers – may differ.

²⁷ The bailment relationship between the common carrier and customer was an important factor affecting the evolution of the liability rules applied to common carriers. *See The Crisis of Liability*, *supra* note 1, at 12-13.

²⁸ *Misusing Network Neutrality*, *supra* note 6, at 505.

Different obligations may be necessary to address the differing circumstances. In this regard, it is also important to recognize that constitutional rights, including free speech rights, of corporations are not co-extensive with those of human individuals.²⁹ Establishing baseline obligations on broadband Internet access service providers may give rise to conflicting constitutional claims, pitting the economic and free speech rights of individuals against those of corporate interests. Resolution of such conflicts further complicates the task before the Commission in this NPRM, and raises the importance of correctly identifying the relevant legal principles upon which such resolution relies.

²⁹ For a discussion of the constitutional rights of individuals versus corporations and the relevance of the distinction to broadband access issues, see *Utilizing “Essentiality of Access”*, *supra* note 2, at 268-274; *Misusing Network Neutrality*, *supra* note 6, at 506-507.

IV. CONCLUSION

This NPRM has become procedurally necessary to establish a framework of legally enforceable obligations imposed on broadband Internet access service providers against which their conduct can be assessed. The need for this proceeding is a consequence of the Commission's prior classification of broadband Internet access services as Title I information services. To establish a baseline of obligations for broadband Internet access service providers, it is necessary to properly identify the relevant legal principles. In this regard, some longstanding misconceptions and mischaracterizations of the law of common carriage need to be corrected, as they unfortunately have given rise to analytical errors that have infiltrated the network neutrality debate. My research is offered as a resource to the Commission in embarking on the difficult and important task before it in this proceeding.

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