

**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

**REPLY COMMENTS OF PROF. BARBARA A. CHERRY**

Prof. Barbara A. Cherry  
Department of Telecommunications  
Indiana University  
1229 E. Seventh Street  
Bloomington, IN 47405-5501  
812-856-5690

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## I. INTRODUCTION

For an economic historian, time has always been something that is fundamentally disturbing, because there is no *time* in neoclassical theory. The neoclassical model is a model of an instant of time, and it does not therefore take into account what time does.... I will be blunt: Without a deep understanding of time, you will be lousy political scientists, because time is the dimension in which ideas and institutions and beliefs evolve.

— Douglass North, Nobel Laureate in Economics<sup>1</sup>

Commencing his own book with Douglass North's admonition, Paul Pierson examines the importance of *time* in conducting analyses in political contexts. He asserts that analyses underlying recommendations for policy change require "theoretical understandings of the different ways in which 'history matters.'"<sup>2</sup> "Yet an exploration of these temporal dimensions of social processes is precisely the weakest link in social science's historical [development].... Many of the key concepts needed to underpin analyses of temporal processes, such as path dependence, critical junctures, sequencing, events, duration, timing, and unintended consequences, have received only very fragmented and limited discussion."<sup>3</sup> Pierson discusses the tendency in recent years for research to distort social events or processes by ripping them from their temporal context – such as distortions endemic to neoclassical economics – and examines how to more appropriately conduct analyses involving long term processes.

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<sup>1</sup> Douglas North (1999), "In Anticipation of the Marriage of Political and Economic Theory," in James E. Alt, Margaret Levi, and Elinor Ostrom, eds., *Competition and Cooperation: Conversations with Nobelists about Economics and Political Science*, pp. 314-317, at 316 (New York, NY: Russell Sage Foundation) (emphasis in original).

<sup>2</sup> Paul Pierson (2004), *Politics in Time: History, Institutions, and Social Analysis* (Princeton, NJ: Princeton University Press), at 6.

<sup>3</sup> *Id.* at 5-7.

As explained in the Comments that I previously filed in this proceeding, a critical component of my research has been devoted to correcting misconceptions and mischaracterizations of the law of common carriage that unfortunately misinform debates of important telecommunications policies, including those related to broadband. These misconceptions and mischaracterizations are created by factual and analytical errors arising from analyses that *either totally ignore or improperly frame temporal dimensions of the evolution of the law of common carriage.*

The recent decision by the D.C. Circuit Court of Appeals in *Comcast v. FCC (2010)* significantly affects the jurisdictional basis upon which the FCC can pursue enforcement of principles such as those provided in its *Internet Policy Statement*<sup>4</sup> and the proposed revisions in this proceeding. The Court vacated the FCC's order, holding that the FCC "failed to tie its assertion of ancillary authority over Comcast's Internet service to any 'statutorily mandated responsibility.'"<sup>5</sup> As a result, options to confer jurisdictional authority to the FCC include Commission reconsideration of its classification of broadband Internet access service as an information service without a separable transmission component governed by Title II, or congressional legislation to grant jurisdiction to the FCC or even to directly establish statutory obligations on broadband Internet access service providers.

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<sup>4</sup> *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*).

<sup>5</sup> Slip opinion, p. 36.

Heated discussion related to such options – in the press, on the Internet, or in others’ replies filed with the FCC – continue to incorporate the mischaracterizations and misconceptions of the law of common carriage and thereby to misdirect inquiry. In this reply, I assert that a historically accurate, temporal analysis of the evolution of common carriage and related bodies of law is critical to evaluate options for how the FCC and/or Congress should proceed in light of *Comcast v. FCC*.

## II. Common Carriage Imposes Legally Enforceable, Relational Norms Under Tort Law

Tort law is first and foremost a law of responsibilities and redress. It identifies what we will call “loci of responsibility.” These loci consist of spheres of interaction that come with, and are defined (in part) by relational duties: obligations that are owed by one person to others when interacting with those others in certain contexts and in certain ways. Beneficiaries of this special class of duties enjoy a concomitant privilege or power; they are entitled to seek legal redress if injured by the breach of one of these duties.<sup>6</sup>

“The duty-imposing norms of tort law are *relational norms*: they enjoin persons from acting toward certain other persons in certain ways.”<sup>7</sup> “Torts are legal wrongs for which courts provide victims a *right of civil recourse* — a right to sue for a remedy.”<sup>8</sup>

Under the common law, the duties of common carriers are *tort obligations* to serve upon reasonable request without unreasonable discrimination at just and reasonable prices and performed with adequate care.<sup>9</sup> Common carrier obligations are legally enforceable, relational norms. Importantly, common carriers bear these obligations merely based on the existence of

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<sup>6</sup> John C. P. Goldberg & Benjamin C. Zipursky (2005), “Accidents of the Great Society,” 64 MD. L. REV. 364, 368.

<sup>7</sup> John C. P. Goldberg & Benjamin C. Zipursky (2010), “Torts as Wrongs,” Fordham Law Legal Studies Research Paper No. 1576644, available at SSRN: <http://ssrn.com/abstract=1576644>, at 45 (emphasis added).

<sup>8</sup> *Id.* at 71 (emphasis added).

<sup>9</sup> 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*”).

their economic relationship with customers, *independent of any requirement or finding of monopoly or market power*. Moreover, these duties require common carriers not to interfere with customers' interests, "notwithstanding the liberty restriction inherent in such a duty imposition."<sup>10</sup>

To argue that common carriage obligations should be imposed only upon a finding of monopoly or market failure,<sup>11</sup> both ignores and misunderstands the long-recognized "[r]elational directives ... [to] enjoin [common carriers] to treat or to refrain from treating *other persons* in a particular way."<sup>12</sup> As a general matter, the law and economics perspective fails to capture the notion of "right"<sup>13</sup> or to understand that "[t]ort law is not just a system for the selective imposition of liability in ways that will maximize wealth or other social welfare goals."<sup>14</sup>

The federal statutory regime of common carriage developed not because common carriage obligations were not needed, but because (1) the common law remedies relying on judicial litigation by customers were considered inadequate; (2) States lacked jurisdiction over interstate commerce; and (3) reliance on competition was deemed insufficient to protect customers from unreasonable discriminatory practices in interstate commerce. All of these points are explicitly stated in the Cullom Report (1886) by the Senate Select Committee on

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<sup>10</sup> Goldman & Zipursky (2010), *supra* note 7, at 21-22 (footnote omitted).

<sup>11</sup> As explained in my Comments filed in this proceeding (p. 11), public utilities historically 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.

<sup>12</sup> Benjamin C. Zipursky, (1998), 51 VAND. L. REV. 1, 59 (emphasis in original).

<sup>13</sup> *Id.* at 82.

<sup>14</sup> *Id.* at 4.

Interstate Commerce established to address the “railroad problem”.<sup>15</sup> Congress thus enacted the Interstate Commerce Act of 1887 to alter the means of enforcing the relational norms underlying common carriage obligations, which included the establishment of and oversight by a federal regulatory agency. The ICA was later 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.

The failure to understand that common carriage obligations are legally enforceable, relational norms independent of industry market structure has led to misframing of inquiry by many parties in this proceeding as to how the FCC should embark in determining what obligations should be borne by providers of broadband access.<sup>16</sup> To state that a change in regulatory policy that shifts reliance on monopoly to competition means that common carriage obligations are no longer appropriate is simply wrong. Rather, such an assertion is a radical one, particularly when viewed in light of deregulatory policies adopted for transportation common carriers. The deregulatory transportation statutes have *not* removed such carriers (e.g. railroads, airlines) from their common carriage status.<sup>17</sup> They are still common carriers, but the methods of enforcing the relational norms of common carriage obligations have changed (again) — this time to embrace policies that prefer to place greater reliance on competitive market forces.

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<sup>15</sup> U.S. Senate Report of the Senate Select Committee on Interstate Commerce, 49<sup>th</sup> Congress, 1<sup>st</sup> Session, Report 46, Part 1 (1886) (“Cullom Report”), at 175-180.

<sup>16</sup> See, e.g., filing of 22 economists on April 12, 2010; Letter dated February 22, 2010 to FCC Chairman Genachowski, by Kyle McSlarrow (NCTA), Steve Largent (CTIA), Walter McCormick (USTA), Grant Seiffert (TIA), Curt Stamp (ITTA), Thomas Tauke (Verizon), James Cicconi (AT&T), Gail MacKinnon (Time Warner Cable), and Steve Davis (Qwest) (“Letter”).

<sup>17</sup> See Barbara A. Cherry, (2008), “Back to the Future: How Transportation Deregulatory Policies Foreshadow Evolution of Communications Policies,” 24 *The Information Society* 273-291.

### **III. The Application of Common Carriage to Information Services**

Information, or enhanced, services to customers require provision via telecommunications, as the FCC has long recognized. Pursuant to the *Computer Inquiry* proceedings, the FCC determined that such services provided via narrowband telecommunications had a separable telecommunications service component. In this context, the Commission imposed Title II common carriage obligations on the telecommunications service component to address potential anticompetitive conduct by telecommunications carriers with regard to competitors in an ancillary market, unaffiliated information or enhanced service providers (ISPs or ESPs), for whom access to the carrier's underlying telecommunications facilities was deemed essential. 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 relational norms on telecommunications carriers in serving unaffiliated ISP's arose from a different economic relationship than that between carriers and (enduser) customers under the common law. *Thus, for the provision of information (or enhanced) services via narrowband telecommunications, both the enduser customer and unaffiliated information service providers (ISPs) obtained the telecommunications service component through a common carriage relationship with the underlying common carrier.*

This framework was subsequently applied to carriers' provision of DSL (broadband) services. DSL service was classified as a Title II common carriage service available to endusers, and the telecommunications component was available on a common carriage basis to

unaffiliated ISPs per FCC rule to prevent anticompetitive conduct by the carrier.<sup>18</sup>

#### **IV. The Creation of “Shadow Common Carriers”**

Beginning with cable modem access in its *Cable Declaratory Ruling (2002)*<sup>19</sup> and then following with DSL access in its *Wireline Broadband Order (2005)*,<sup>20</sup> the FCC reversed course and classified broadband Internet access service as an information service *without a separable telecommunications component*. In so doing, *the FCC placed broadband access service on a different legal trajectory by eliminating provision of telecommunications on a common carriage basis to both enduser customers and ISPs*. With regard to enduser customers, the entity providing the underlying telecommunications is no longer subject to the longstanding legally enforceable norms of common law common carriage, later codified in the Communications Act of 1934. To the extent that the FCC had extended these norms to unaffiliated ISPs under the *Computer Inquiry* cases, it also now permits the providers to violate those norms to competitors. This is why norms are being raised under the rubric of network neutrality, as exemplified by the FCC’s *Internet Policy Statement* and further revisions proposed in this proceeding. To reinstate the recognition of information service as containing a separable telecommunications component provided under common carriage is at the core of assertions by advocates that the FCC should reclassify broadband Internet access services as Title II common carriage in light of the court’s decision in *Comcast v. FCC*.

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<sup>18</sup> *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).

<sup>19</sup> *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*).

<sup>20</sup> *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*).

In the context of the recent financial crisis, Paul Krugman, a Nobel Laureate in Economics, asserts that the era of U.S. stability ended with “the rise of ‘shadow banking’: institutions that carried out banking functions but operated without a safety net and with minimal regulation.”<sup>21</sup> Due in part to banking deregulation since 1980, “institutions and practices [of shadow banks] ... recreated the risks of old-fashioned banking but weren’t covered either by guarantees or by regulation. The result, by 2007, was a financial system as vulnerable to severe crisis as the system of 1930. And the crisis came.”<sup>22</sup>

The FCC’s elimination of common carriage access to telecommunications for both enduser customers and unaffiliated ISPs has created broadband “*shadow common carriers*”. The entities (telecommunications carriers and cable companies) providing the underlying telecommunications by which information services are conveyed are performing the common carrier functions but with minimal regulation. They do not bear responsibility for violating the longstanding relational norms of common carriers.

The significance of eliminating these relational norms of common carriage to telecommunications provided over broadband networks, and thereby creating shadow common carriers, requires understanding “the importance of common law principles of common carriage and public utility law — which include imposition of ex ante requirements on providers in the retail market — in generating the desired emergent properties of widely available, affordable and reliable transportation and telecommunications infrastructures.”<sup>23</sup> It also requires understanding

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<sup>21</sup> Paul Krugman (April 2, 2010), “Financial Reform 101,” *The New York Times*.

<sup>22</sup> Paul Krugman (March 29, 2010), “Krugman: Punks and Plutocrats,” *The New York Times DealBook Blog*, available at <http://dealbook.blogs.nytimes.com/2010/03/29/krugman-punks-and-plutocrats>.

<sup>23</sup> *Maintaining Critical Legal Rules*, *supra* note 9, at 950.

the temporal sequencing of the industry-specific, common carriage regime and the general business regime of antitrust and consumer protection law to appreciate the inadequacy of relying solely on the latter to develop and sustain the desired emergent properties of widely available, affordable, and reliable broadband infrastructures.<sup>24</sup>

Two of my recent publications are dedicated to these tasks, *Maintaining Critical Legal Rules*<sup>25</sup> and *Consumer Sovereignty*.<sup>26</sup> Some parties assert that network neutrality rules are not necessary because competition is sufficient to protect against abuses of discrimination and that any remaining problems should be addressed under antitrust law. As explained in both of these publications, a fundamental error embedded in such claims 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.<sup>27</sup>

Moreover, these claims directly contradict the deregulatory policies adopted for transportation carriers.<sup>28</sup>

Common carriage obligations are based on legal norms that constitute an early form of consumer protection to enduser customers. Due to the existence of such obligations prior to

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<sup>24</sup> *Id.* at 956-967.

<sup>25</sup> Cherry, *supra* note 9.

<sup>26</sup> Barbara A. Cherry (2010), “Consumer Sovereignty: New Boundaries for Telecommunications and Broadband Access,” 34 *Telecommunications Policy* 11-22 (“*Consumer Sovereignty*”).

<sup>27</sup> *Maintaining Critical Legal Rules*, *supra* note 9, at 961 (emphasis in original).

<sup>28</sup> *See* page 6, *supra*.

development of general business laws, the elimination of these obligations by the Commission's classification of broadband Internet access services as information services without a separable telecommunications component has left enduser customers without civil recourse for violation of the underlying relational norms.<sup>29</sup> Furthermore, given the uncertain validity of the essential facilities doctrine under antitrust law under *Verizon v. Trinko*,<sup>30</sup> the elimination of the common carriage provision of the underlying telecommunications to unaffiliated ISPs has also jeopardized the availability of a legal remedy to such ISPs. It is these legal gaps that have created the necessity for this NPRM.

#### **IV. CONCLUSION**

Misconceptions and mischaracterizations of the law of common carriage have unfortunately misinformed debates of important telecommunications policies, including those related to broadband raised in this NRPM. These misconceptions and mischaracterizations have been created by factual and analytical errors arising from analyses that either totally ignore or improperly frame temporal dimensions of the evolution of the law of common carriage. A historically accurate, temporal analysis of the evolution of common carriage and its relationship to the general business regime of antitrust and consumer protection is critical to evaluate options for how the FCC and/or Congress should proceed in light of *Comcast v. FCC*. In this regard, it needs to be recognized that common carriage duties originated as legally enforceable, relational norms under tort law and were imposed independent of market structure. These duties were retained under the Communications Act of 1934, and their elimination in the *Cable Declaratory Ruling* and *Wireline Broadband Order* for the telecommunications component of information services provided over broadband is a radical legal development that created shadow common

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<sup>29</sup> *Id.*

<sup>30</sup> 540 U.S. 398, 410-411 (2004).

carriers. The likely adverse consequences of maintaining a legal framework of shadow common carriers need to be evaluated in the context of a historically accurate understanding of common carrier law, its relationship to the later development of a general business legal regime, and its important role in enabling the sustainable development of transportation and communications infrastructures that are widely available, affordable, and reliable.

Respectfully submitted,

Prof. Barbara A. Cherry

Department of Telecommunications  
Indiana University  
1229 E. Seventh Street  
Bloomington, IN 47405-5501  
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