JOURNAL OF INTERNET LAW

VOLUME 20
NUMBER 12

JUNE 2017

EDITED BY DLA PIPER

The Private Carriage Path to a Less Regulatory, More Market-Based Telecommunications Future

By Jonathan S. Marashlian, Jacqueline R. Hankins, and Alexander S. Schneider

President Donald Trump campaigned on a promise to reduce federal regulations by at least 70 percent.[1] Underlying this politically salient goal is the administration's view that public interest aims are best served when the regulatory atmosphere supports and does not undermine job creation, innovation, and investment incentives. In other words, the President's views are a clarion call for government to reinvent itself, following decades of excessive regulatory encroachment into private enterprise. The current administration continues to support government involvement to promote and protect public interest aims, but in a manner that defers to free market and economically sound principles.

The question before the Federal Communications Commission (FCC or Commission), and indeed the entire telecommunications industry, is how to recognize these deregulatory goals while at the same time sustaining the Commission's core mission.[2] Of course, the Commission can look critically

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JOURNAL OF INTERNET LAW

JOURNAL OF INTERNET LAW (ISSN# 1094-2904) is published monthly by Wolters Kluwer, 76 Ninth Avenue, New York, NY 10011. Telephone: 212-771-0600. One year subscription (12 issues) price: $845. Single issue price: $106. To subscribe, call 1-800-638-8437. For customer service, call 1-800-234-1660. **Purchasing reprints:** For customized article reprints, please contact *Wright's Media* at 1-877-652-5295 or go to the *Wright's Media* Web site at *www.wrightsmedia.com* Postmaster: Send address changes to JOURNAL OF INTERNET LAW, Wolters Kluwer, 7201 McKinney Circle, Frederick, MD 21704.

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Managing Wage and Hour Risks in a Digitally Connected Workforce: Who are Addicted to Technology

By Jeffrey W. Brecher and Eric Magnus

Many people are addicted to their phones. They check them constantly throughout the day (sometimes every few minutes) to determine whether a new email or text message has been sent or a new item posted on Facebook, Instagram, Snapchat, and the myriad other social media applications that exist. To ensure immediate notification of incoming mail, users can set their phone to provide an audio notification when a new email, voicemail, or text message has arrived, and select from hundreds of tones to announce the message—whether a "chime," "ding," or "swoosh."

But some of those addicts checking their phones are *employees*, and they are checking their phones for work related email and messages. Employees who have access to email on their smartphones or access to employer computer systems and servers through the Internet can work and communicate with coworkers or managers anytime.

While the ability to communicate with co-workers and managers existed before the Internet age—through home phones and pay phones (now a collector's item)—receiving a telephone call from a co-worker or manager on the weekend or after regular work hours was more an exception in most workplaces, rather than the rule. But due to the ease of communicating via email or text message, many managers and coworkers no longer feel constrained in the same way as when land-line phones ruled the world, and regularly email and text employees after the regular workday has ended. Employees (particularly those addicted to phones) may feel compelled to read and respond to these communications, whether at work or not—and their managers may expect them to respond.

Some countries have found the problem so severe that they have enacted laws regulating the sending of email after work hours. This year, for example, France enacted a "right to disconnect" law, requiring companies with more than 50 workers to negotiate with employees and unions on email use after work hours.

This article highlights the various ways in which the increased use of technology in the workforce has increased the risk of violations of wage and hour laws and outlines steps employers can take to manage those risks. Many of these risks relate to non-exempt employees, who are eligible for minimum wage and overtime, but technology also has made compliance with wage and hour laws as applied to exempt employees more challenging.

We start with an issue at the core of most questions involving the intersection of technology and wage and hour compliance—defining what constitutes "work."

WHAT IS WORK?

Must an employer compensate employees for every minute they spend outside of the regular work day reading or responding to work email, logging on to a company computer server to upload documents and information obtained during the course of the day or logging on to obtain work assignments for the following day? Maybe.

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The authors would like to thank Roberto Concepcion, an associate at Jackson Lewis P.C., who assisted in the preparation of this article.

The answer to these questions goes to the very heart of what constitutes "work." Under the Fair Labor Standards Act (FLSA),[1] employers are required to pay all covered employees the minimum wage for all hours worked and overtime at one and one-half times their regular rate of pay for hours worked over 40 in a workweek. The FLSA defines "employ" as including: "to suffer or permit to work."[2] But the FLSA does not contain any definition of "work" or "workweek."[3] The FLSA also requires employers to keep records of the hours worked by their employees.[4]

EARLY CASES

Early Supreme Court cases interpreted the term work broadly, defining work as any "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business."[5] The Supreme Court later explained that work also can include activities even where no exertion is required, and that the workweek includes all the time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed place.[6]

These broad definitions of "work," however, created substantial unexpected liability for activity that had been regarded as non-compensable (*e.g.*, walking to and from the time clock from the actual physical place of work). Following the Supreme Court's decision in *Anderson*, for example, more than 1,500 lawsuits under the FLSA were filed seeking compensation for time spent walking to and from the actual place of work, seeking nearly $6 billion in damages.[7]

In reaction to these opinions, Congress passed the Portal-to-Portal Act in 1947 to narrow and exclude certain activities from compensable work. Under the Portal-to-Portal Act, "walking, riding, or traveling to and from the actual place of performance of the principal activity" is expressly excluded from compensable work, as well as "activities which are preliminary and postliminary to said principal activity or activities."[8]

PRINCIPAL ACTIVITY

The Supreme Court has interpreted the term "principal activity" to include all activities that are an "integral and indispensable" part of the principal activities, *i.e.*, activities that are "an intrinsic element" of the principal activities and "one with which the employee cannot dispense if he is to perform his principal activities."[9] Thus, in *Busk*, the Supreme Court held that time spent by warehouse employees at an Amazon fulfillment center waiting to undergo security screenings and actually undergoing such screenings at the end of the workday to prevent theft was excluded from "work" under the Portal-to-Portal Act, because the activity was not "integral" to their principal work activity (which was to retrieve products from warehouse shelves and package those products for shipment to Amazon customers) nor was it indispensable, since the employees could perform their principal activities without undergoing the security screenings, *i.e.*, the security screenings could have been eliminated without impairing the employees' ability to complete their work.[10]

The Court rejected the Ninth Circuit's test, which included as compensable activities, those that the employer *required* the employee to perform and those that were for the "benefit of the employer," finding the test inconsistent with the Portal-to-Portal Act and overbroad.

COMPENSABLE?

Where does all this leave our weekend and after-hours email checkers? If employees are writing and responding to emails relating to substantive work they were hired to perform, the activity is unlikely to be a "preliminary or postliminary" activity, and instead a principal activity for which they were hired to perform. So it is "work." But does every second count?

THE "*DE MINIMIS*" RULE

Assuming the activity constitutes "work" and is not excluded as "preliminary" or "postliminary" activity under the Portal-to-Portal Act, the answer may depend on the application of the "*de minimis*" rule, derived from the Latin phrase *de minimis non curat lex*, Latin for "the law does not take account of trifles."

CREATED BY COURT

The *de minimis* rule is not contained in the FLSA. Rather, it is a judicial creation, established by the

Supreme Court over 60 years ago in *Anderson v. Mt. Clemens Pottery Co.*,[11] a case involving whether walking to and from the time clock to the actual place where productive work is performed is considered "work" under the FLSA. As noted above, the Court held it was "work," but Congress quickly overturned this ruling in the Portal-to-Portal Act.

But even after establishing walking time was work, the Court noted that some or all of the time spent walking still might not be compensable under "application of a *de minimis* rule." The Court explained that the workweek contemplated by FLSA must be computed "in light of the realities of the industrial world" and that "when the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded."[12] The Court explained that "split-second absurdities are not justified by the actualities of working conditions or by the policy of the Fair Labor Standards Act" and that "it is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved." And so the *de minimis* rule was born.

ADOPTED IN REGULATIONS

Following *Anderson*, the DOL incorporated the doctrine into its regulations, stating that in recording working time under the FLSA, "insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded."[13] The Supreme Court recently noted this regulation may apply a "stricter" standard than originally articulated by the Court in *Anderson*.[14] Under the regulations, for example, "[a]n employer may not arbitrarily fail to count as hours worked any part, however small, of the employee's fixed or regular working time or practically ascertainable period of time he is regularly required to spend on duties assigned to him."[15]

CIRCUIT COURTS

In applying the *de minimis* rule, courts generally have analyzed three factors in determining whether the time spent in a particular activity should be considered *de minimis*, and therefore not compensable: (1) the practical administrative difficulty of recording the additional time; (2) the size of the claim in the aggregate; and (3) whether the claimants performed the work on a regular basis.[16]

SUPREME COURT

While circuit courts of appeal have been uniform in recognizing the *de minimis* rule, the Supreme Court's decision in *Sandifer* has raised some doubts as to the scope of the *de minimis* rule. In *Sandifer*, the issue was whether steel workers were entitled to compensation for time spent changing into work gear. Under Section 3(o) of the FLSA, "time spent in changing clothes" is excluded from hours worked if such agreement is set forth in a collective bargaining agreement. But the FLSA does not define "clothes," and the issue was whether the gear employees were required to don and doff constituted "clothes." The Court held *some* of the gear was "clothes" under the FLSA (and therefore excluded under Section 3(o)), but a few items fell outside that definition.

In addressing the small amount of time necessary to put on and take off the additional non-clothes items, the Court noted that some courts would exclude such time under the *de minimis* rule, but the Supreme Court declined to do so, stating the rule did not "fit comfortably within the statute" since Section 3(o) "is all about trifles" and that "there is no more reason to *disregard* the minute or so necessary to put on classes, earplugs, and respirators, than there is to *regard* the minute or so necessary" to put on other clothes. Instead, the Court found the additional time was non-compensable so long as *most* of the time in question was "time spent in changing clothes."

While the Supreme Court's treatment of the *de minimis* rule is likely limited to its application in the Section 3(o) context, the Court's decision not to use the *de minimis* rule has raised questions regarding the strength of the doctrine, particularly where employers are capable, through electronic timekeeping systems, of recording small increments of time.

STATE LAW

Employers must consider state law. Recently, for example, the Ninth Circuit specifically asked the

California Supreme Court to answer the certified question of whether California adopts the federal *de minimis* rule in *Troester v. Starbucks Corp.*[17] The California Supreme Court accepted the certified question, and a decision is expected in 2017.[18]

COMPENSABLE?

An employee who occasionally sends a handful of work-related email after regular work hours and spends only a few seconds or minutes reading or responding to an email, would likely not be entitled to compensation under the *de minimis* rule. Where use of email is a regularly occurring event, however, and in the aggregate amounts to more than 10 minutes, the *de minimis* rule may not apply.[19]

The employer's own computer systems often will be used as evidence to establish the regularly occurring nature of the work, as much of the email communication will be between the employees and their managers. The frequency of the email usually can be quickly determined.

THE "CONTINUOUS WORKDAY RULE"

Another area where technology can result in unforeseen wage and hour exposure is the application of the "continuous workday rule."

Under the FLSA, time spent by employees commuting to and from work is not included in determining "hours worked."[20] Thus, an employer is not required to include such time in determining whether an employee has worked overtime or in determining whether employees have received at least the minimum wage. The Portal-to-Portal Act, which amended the FLSA in 1947, sets this forth explicitly.[21] But time spent traveling *after* the workday has begun or *before* the workday has ended is treated differently. Time spent traveling from job site to job site, for example, after the workday has begun, must be counted as hours worked."[22] Similarly, the travel of an employee who is required to travel from a worksite at the end of the day to another work location (*e.g.*, main office) to drop off tools or a vehicle, or otherwise complete required paperwork, is counted as hours worked.

This rule is colloquially known as the "continuous workday rule," and under the rule, once the workday has begun, all travel that occurs between the beginning and end of the work day is part of the continuous workday, and must be included in hours worked.[23]

KUEBEL

The rule is relatively straightforward to apply to workers who begin and end their workday at the employer's place of business. Once they arrive, the workday has begun; once they finish work and punch out, the workday has ended. All time spent traveling that occurs between those two bookends is compensable. But the rule becomes more difficult to apply when the employees do not start or end their workday at the employer's place of business. The increased use of technology and employee access to and use of employer computer systems, including company intranet, email, and text messages, has made the rule more difficult to apply, and has resulted in potentially latent exposure to wage and hour violations.

Take, for example, the plaintiff in *Kuebel v. Black & Decker, Inc.*[24] The plaintiff was employed by Black & Decker (B&D) as a Retail Specialist. In that role, he was assigned six Home Depot stores and was responsible for marketing and merchandising B&D's products in those stores (*e.g.*, ensuring the products were appropriately stocked, priced, and displayed). As relevant here, the plaintiff did not report to a central office, but instead worked from his home, commuting to various Home Depot stores each day, some close by, but others up to three hours from his home. B&D paid for only a portion of his commuting time— travel time in excess of 60 miles from his home on either leg of the commute.

In order to report the time spent at each store, he was given a digital device to record the time, which then had to be plugged into his home computer and synced with the Company's server. In addition to this task, however, he also performed other administrative tasks at home, such as reading and responding to company emails, checking voicemail, printing and reviewing sales reports, organizing product tags, making display signs, taking online training courses, and loading and unloading his car.

He brought suit under the FLSA and state law, alleging B&D was required to pay him not only for the time spent performing those activities (which B&D agreed was work hours), but also for the entire time spent traveling to and from the Home Depot locations (not just the time spent commuting in excess of 60 miles). Why?—the continuous workday rule, of course! He alleged the work he performed at home in the morning and evening (*e.g.*, checking email, voicemail, and other administrative work) was the beginning and end of this workday, and thus, the continuous workday rule was triggered, making *all* the time spent commuting to and from his home compensable.

While the Second Circuit acknowledged the existence of the continuous workday rule, the Court nonetheless held the rule was not triggered even though he may have performed compensable work at home. The Court noted he was not *required* to perform the administrative work immediately when he arrived home or immediately before leaving home. Rather, he had "flexibility" in deciding when to perform those tasks. He could, for example, wake up, check his email or voicemail, then take his kids to school and go to the gym, and then drive to work. The period between the time he performed those administrative tasks and the time he began commuting, therefore, was more akin, the Court held, to periods when employees are completely relieved from duty and are long enough to enable workers to use the time effectively for their own purposes, which under DOL regulations is non-compensable "waiting time."[25]

The result may have been different if B&D had *required* the plaintiff to perform administrative work immediately before or after leaving work. Thus, permitting or requiring employees to perform work at home using electronic devices can lead to significant wage/hour exposure by converting an otherwise non-compensable commute to working hours as a result of the "continuous workday" rule.[26]

COMPENSABLE?

To limit the risk of exposure to such claims, employers should make clear to employees who work from home, whether they are reviewing and responding to email, voicemail, or performing other tasks, that this work need not be performed at any specific time, particularly immediately before or after their commute home. Of course, any time spent actually working (perhaps subject to the *de minimis* rule) must be paid. Further, employers should make clear that any instruction by a supervisor not to record hours worked should be disregarded and reported to management or human resources immediately.

HIDDEN "WORK"

Employees sometimes perform work at home or outside the regular work hours in contravention to employer policies prohibiting off-the-clock work. They may do so voluntarily, without reporting the time, and only months (or years) later seek compensation for the time after their employment has been terminated. As discussed previously, checking email may constitute "work" and may be too substantial to be excluded from hours worked under the *de minimis* rule. The central issue in this case thus becomes not whether the activity is "work," but whether it is *compensable* work, and that depends on whether the employer has knowledge that the work was performed.

KNEW OR SHOULD HAVE KNOWN

A key element of proving a claim for unpaid minimum wage or overtime is demonstrating that the employer knew or should have known that employees were working additional time for which they were not being compensated. For compensation to be awarded, an employee's activities must not only satisfy the definition of work, but also must be performed with the employer's knowledge.[27] While an employer must pay for work it suffers or permits,[28] an employer cannot suffer or permit an employee to perform services about which the employer does not know.[29]

KNOWLEDGE, ACTUAL, OR CONSTRUCTIVE

Of course, an employer need not have actual knowledge of such work; constructive knowledge will suffice.[30] But the FLSA standard for constructive knowledge in the context of overtime is whether a defendant "should have known," not whether it "could have known."[31] The duty to inquire is not unlimited, particularly when the employer has a policy against unauthorized overtime and requires its employees to submit overtime compensation claims.[32] Courts have held, for example, that mere access to information regarding the plaintiff's activities did not constitute constructive knowledge that the employee was working overtime.[33]

In *Fairchild v. All American Check Cashing, Inc.*,[34] for example, the plaintiff worked as a manager-trainee for a check cashing company and alleged she was owed overtime pay for work performed that she did not record. Although the Company had a policy requiring employees to record all hours worked and paid her overtime for work hours recorded, she failed to record the time because she believed she needed to work additional hours "to get the job done" and that it would not be paid. She claimed the employer was nonetheless responsible for paying for the overtime hours worked because her computer usage reports showed she was working after she already had clocked out, and thus established "constructive knowledge" that work was performed. The Court rejected her argument, finding that although the employer "*could have* potentially discovered that she was working overtime based on the usage reports, the question here is whether the employer *should have* known."[35] "Mere access" to information is insufficient for imputing constructive knowledge, the Court held.[36]

Similarly, in *Allen v. City of Chicago*,[37] police sergeants alleged they were owed overtime for time spent monitoring and responding to email on their BlackBerrys when they were off-duty. Although the Court found that employees did in fact respond to email and that the time spent on such activity was not *de minimis*, and thus "work," the Court found the City, nevertheless, was not liable for the uncompensated hours because the plaintiffs failed to prove the employer had actual or constructive knowledge the work had been performed, particularly where the City had established procedures for reporting time worked off-duty, and some sergeants had submitted requests for time spent responding to email off duty, negating their allegation that reporting such time was discouraged. The Seventh Circuit heard oral argument on the case in April 2017.

In several recent cases, however, courts have denied summary judgment to the employer, finding issues of material fact concerning whether the employer had actual or constructive knowledge of the plaintiff's overtime work, including evidence from an employer's own computer systems and electronic data. *Mahshie v. Infinity Ins. Co.*[38] is a good example. There, the plaintiff was employed as an insurance appraiser who was responsible for inspecting vehicles and submitting appraisals for repair. He traveled within his region to conduct the appraisals, but otherwise worked from home. He claimed the hours reported to his supervisors were inaccurate, and that he was owed hundreds of hours of overtime for time spent working from home, including time spent drafting emails. He claimed his supervisors knew he was working more hours than were reported on his timecards because the email communications he sent occurred after the time reported on his time card.[39] In denying summary judgment, the Court cited the mismatch between his time card and his email communication as evidence that work was performed beyond the reported hours and that the employer had knowledge of that work.

ON-CALL TIME AND ON-CALL SHIFTS

Employers have turned to digital technology and sophisticated scheduling software to maximize the use of labor hours, including having employees "on-call" and ready to work when needed, or requiring employees to call-in before a scheduled shift to determine whether work is available. But is an employee who is not at work but has been placed "on-call" by an employer, or who is required to call in to see if work is available, entitled to compensation for the time that she/he is on-call? The regulations defining on-call work are thin, and courts have struggled to describe when time spent on call is compensable, identifying several factors to use in making this determination, and ultimately resulting in a very fact-intensive inquiry.

REGULATIONS

DOL regulations distinguish compensable and non-compensable "on call" time depending on whether an employee has been "engaged to wait" or is "waiting to be engaged."

> An employee who is required to remain on call on the employer's premises or so close

> thereto that he cannot use the time effectively for his own purposes is working while "on call." An employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call.[40]

CASES

The Supreme Court addressed the compensability of on-call time in two early FLSA cases, *Armour & Co. v. Wontock*,[41] and *Skidmore v. Swift & Co.*[42] In both cases, the Court focused on the employees' degree of freedom during the time that they were "on-call" but were not called to work. The Court focused on whether the time on-call was spent primarily for the employee's benefit or the employer's. The Supreme Court's guidance instructs lower courts to conduct broad inquiries, taking into account all the circumstances of a given on-call arrangement: the agreements entered into by both parties; the actual conduct and work performed based on these agreements; the nature of work/service in relation to the amount of waiting time (downtime); and "all other relevant circumstances."

Lower court inquiries addressing compensability of on-call time often are determined by asking whether the employee is "engaged to wait," which is compensable, or is "waiting to be engaged," which is not compensable. Circuit courts have emphasized that the most significant factors in this "engaged" inquiry are (1) the degree to which the employee is free to engage in personal activities; and (2) the agreements between the parties.

The Fifth Circuit's decision in *Bright v. Houston Northwest Medical Center Survivor, Inc.*,[43] an oft-cited case on this subject, is instructive. It highlights how even strict geographical constraints on an employee's on-call time may not be enough to make that time compensable when the substantive constraints are relatively minimal. The Court focused on what it considered the "critical issue" of "whether the employee can use his [on-call] time effectively for his or her own purposes." Because the answer was "Yes," the Court determined the on-call time was not compensable. The Fifth Circuit in *Bright* essentially states that the being "permanently on-call," while burdensome, is irrelevant to a determination of compensability under FLSA because the amount of time says nothing about the substantive constraints.

In *Owens v. Local No. 169, Association of W. Pulp & Paper Workers*,[44] the Ninth Circuit set out a non-exhaustive list of factors courts should consider in gauging a given employee's relative freedom when determining the compensability of on-call time. The often-cited *Owens* factors are:

1. Whether there was an on-premises living requirement;
2. Whether there were excessive geographical restrictions on an employee's movements;
3. Whether the frequency of calls was unduly restrictive;
4. Whether a fixed time limit for response was unduly restrictive;
5. Whether the on-call employee could easily trade on-call responsibilities;
6. Whether the use of a pager could ease restrictions; and
7. Whether the employee actually had engaged in personal activities during call-in time.

The Ninth Circuit went on to caution, however, that since "no one factor is dispositive," a successful compensability determination demands that the factors restricting personal freedom be balanced against those promoting/facilitating it in deciding whether the employee is so restricted that he or she is effectively "engaged to wait."

SHIFT SCHEDULING

The scheduling of on-call shifts has become the most recent battleground regarding whether on-call time is compensable. An "on-call shift" requires employees in question to call in before the beginning of their scheduled shift to see if they are still needed. If employees are not required to come in to work for their shift, they are not compensated for the shift.

On-call shift scheduling is attractive to employers for several reasons. It allows employers to tailor and adjust their workforce in real-time to meet anticipated labor needs that can be analyzed by sophisticated computer modules. If the software determines for whatever reason (weather, traffic, missed delivery, product shortfall, and so on) that the employer only needs half of its employees that day or for the next several days, the employer is able to reduce its workforce at a moment's notice, saving a great deal in labor costs. These programs also conversely allow employers to ramp up labor needs when demanded.

This method of scheduling has become particularly popular in both the food and retail industries where employers are constantly attempting to avoid paying for excess labor during stagnant periods and to avoid labor shortfalls when business is active. Companies that use on-call shift scheduling often consider a variety of factors, including weather, customer traffic, major sporting events, and such, to predict whether or not they will need their entire workforce for a particular shift.

While on-call shift scheduling has become popular with employers, there are concerns about whether this type of scheduling is fair to employees under the FLSA because it may leave them with unpredictable work schedules. For that reason, there has been pushback from states and from unions. One pressing question is how much lead time is reasonable for an employer to cancel a shift. If employees are required to call in an hour before their shift to find out if they are required to come to work the employees may be effectively precluded from securing other work for this day. If the employees are not required to work the employees are not only losing the compensation they would have earned from working that shift, but also have been denied the opportunity to fully utilize the time that they would have spent working the shift. Alternatively, if an employer has given the employee several days' notice that the employee will not be required to work a particular shift, the employee would be able to schedule the time otherwise spent working effectively. The employee, however, would still lose the compensation that he/she might have otherwise earned had the scheduled shift not been canceled by the employer.

AU: Are there cases?

On-call shift scheduling has been attacked by employees in class action suits as both unfair, and illegal under the FLSA. Both California and New York have become battleground states, with courts attempting to decide whether or not employees should be compensated for "on-call" shifts even if they are not required to work. Unfortunately, current state and federal law do not directly address the lawfulness of on-call shifts, which has led to courts failing to establish bright line rules.

AU: Sould we say nothing under the FLSA prohibits it?

Recently state officials have begun investigations into the practice of on-call shift scheduling. This effort, which has been spearheaded by New York Attorney General Eric Schneiderman, led to a voluntary agreement among some retailers not to use this practice.

ROUNDING

Often employees are not compensated according to the precise number of minutes they work in a given workweek. Instead, employers utilize a process of "rounding." For example, an employer may round an employee's time punches to the nearest five minutes or nearest one-tenth or quarter of an hour. The reasoning behind allowing employers to employ such a procedure is that, over time, the amounts average out so that employees are fully compensated for all of the time they actually work. In some ways, however, rounding may be a function of a bygone era, when it was more difficult to capture time absent sophisticated timekeeping systems.

Under federal law, rounding is permissible as long as the practice is both neutral on its face and in practice. An employer's rounding policy, for example, will be found to be in compliance if it is applied consistently and, on average, it favors neither underpayment nor overpayment. On the other hand, employers will be found to be in violation of the FLSA when they systematically undercompensate employees or otherwise fail to compensate employees properly for all the time they have actually worked.

REGULATIONS

The DOL's principal regulation addressing rounding provides:

> It has been found that in some industries, particularly where time clocks are used, there has been the practice for many years of recording the employees' starting time and stopping time to the nearest 5 minutes, or to the nearest one-tenth or quarter of an hour. Presumably, this arrangement averages out so that the employees are fully compensated for

> all the time they actually work. For enforcement purposes this practice of computing working time will be accepted, ***provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.***[45]

Another relevant regulation explains that differences between clock records and actual hours worked may be disregarded in certain instances:

> Time clocks are not required. In those cases where time clocks are used, employees who voluntarily come in before their regular starting time or remain after their closing time, do not have to be paid for such periods provided, of course, that they do not engage in any work. Their early or late clock punching may be disregarded. ***Minor differences between the clock records and actual hours worked cannot ordinarily be avoided, but major discrepancies should be discouraged since they raise a doubt as to the accuracy of the records of the hours actually worked.***[46]

As the DOL Wage and Hour Fact Sheet No. 53 explains, employers may violate the FLSA minimum wage and overtime pay requirements when they always round employee time down. For example: "Employee time from 1 to 7 minutes may be rounded down, and thus not counted as hours worked, but employee time from 8 to 14 minutes must be rounded up and counted as a quarter hour of work time."

NEUTRAL AS APPLIED

The Ninth Circuit recently applied these principles and upheld a rounding practice in *Corbin v. Time Warner Entm't-Advance*.[47] The plaintiffs were call center employees who alleged they were shorted time due to rounding. The Court held, however, that the rounding practice did not violate 29 C.F.R. § 785.48(b) because it was neutral both facially and as applied as it allowed employees to gain overtime compensation just as easily as it caused them to lose it. The Court rejected the notion that an employer is required to analyze whether rounding evens out every pay period, a finding that would render the regulation useless.

MEAL BREAK CLAIMS AND AUTOMATIC MEAL BREAK DEDUCTIONS

Another area where technology and wage and hour compliance often can intersect is whether employee meal periods must be considered hours worked. While an employer is not required to compensate employees for meal periods under federal law, litigation has arisen when meal periods are interrupted.

REGULATIONS

The DOL regulation on this point is:

> (a) Bona fide meal periods are not worktime. Bona fide meal periods do not include coffee breaks or time for snacks. These are rest periods. *The employee must be completely relieved from duty for the purposes of eating regular meals*. Ordinarily 30 minutes or more is long enough for a bona fide meal period. A shorter period may be long enough under special conditions. The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating.
>
> (b) It is not necessary that an employee be permitted to leave the premises if he is otherwise completely freed from duties during the meal period.[48]

CASES

The majority of circuits have rejected the DOL's "completely relieved from duty" test and instead have adopted a "predominant benefit" test whereby the court determines whether the employer or the employees are the predominant beneficiaries of the breaks. These Circuits include the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits.[49] In these circuits, the meal period *as a whole* is examined to determine whether it is for the "predominant benefit" of the employer or the employees. The predominant benefit test denies compensability if the employees receive the predominant benefit of their meal periods.

AUTOMATIC DEDUCTIONS

Some employers do not require employees to punch in and out for lunch, but instead use an automatic deduction of 30 or 60 minutes for lunch. While automatic meal deduction systems are lawful under the FLSA, the automatic meal break deductions must accurately reflect breaks taken.

TECHNOLOGY AND THE ADMINISTRATIVE EXEMPTION

Since its inception, the administrative exemption has proved difficult for courts to apply. Even the DOL itself struggles to define the exemption and has changed its position on the applicability of the exemption to various professions over the years. The struggle to define positions that satisfy the exemption has become all the more complicated by technology, and the ability of computers and artificial intelligence to exercise the type of discretion traditionally reserved for the human mind.

REGULATIONS

Section 213(a) of the FLSA states that the FLSA's wage and overtime requirements will not apply to "any employee employed in a bona fide executive, administrative, or professional capacity." 29 C.F.R. § 541.200 provides the general rule for employees exempt from minimum wage and overtime under the "administrative" exemption, and provides:

> (a) The term "employee employed in a bona fide administrative capacity" in section 13(a)(1) of the Act shall mean any employee:
>
> (2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
>
> (3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

With respect to the "exercise of discretion and independent judgment with respect to matters of significance" component of the administrative exemption, the DOL's fact sheet provides:

> In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The term must be applied in the light of all the facts involved in the employee's particular employment situation, and implies that the employee has authority to make an independent choice, free from immediate direction or supervision. Factors to consider include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval, and other factors set forth in the regulation. The fact that an employee's decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment. The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or

specific standards described in manuals or other sources.

EXERCISE OF JUDGMENT

In the age of technology, many jobs that traditionally met the "exercise of discretion and independent judgment with respect to matters of significance" test may no longer satisfy the exemption because *computers* now exercise the judgment that used to be exercised by humans. Today, computers can engage in the "comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered." Indeed, computers can engage in this kind of analysis far more efficiently and objectively than humans can.

One example cited is the position of a loan originator. Before sophisticated computers that were capable of synthesizing big data, individuals were called on to make determinations of whether an individual, family, or business qualified for a loan. These types of decisions satisfied the administrative exemption requirements, including the "exercise of discretion and independent judgment" element. Now, some argue these types of decisions are made by computers based on information inputted by humans that are instructed as to what information they need to gather and enter into the computer so that the computer can make the determination objectively based on the data provided.

In short, because of technology, the number of jobs exercising true discretion and independent judgment as to matters of significance has shrunk.

REDUCING EXPOSURE TO WAGE AND HOUR RISKS RESULTING FROM USE OF TECHNOLOGY

As discussed above, employees can perform substantive work at their homes, at a coffee shop, on a plane, or anywhere else. For purposes of the FLSA, the work performed remotely is no different from work performed at the office. Many employers, however, provide their employees with the ability, means, and ease of working away from the office without sufficiently considering how to capture non-exempt employees' work time performed away from the "workplace." The following are suggestions for employers.

HAVE CLEAR POLICIES REQUIRING EMPLOYEES TO RECORD ALL HOURS WORKED, WHEREVER PERFORMED

Non-exempt employees that work outside the office on a laptop or smartphone should be provided with instruction on recording this time. Employers should also document that employees have reviewed and understood the instructions regarding how to record such time. Employers can use any means to capture the time—paper and pen, an e-mail reporting the time, or a time-keeping "app" on employees' smartphones, but the time must be recorded.

HAVE EMPLOYEES VERIFY EACH WEEK IN WRITING THAT ALL TIME SPENT WORKING IN AND OUT OF THE OFFICE HAS BEEN RECORDED

While no system is fail-proof, requiring employees to verify each week in writing that they have recorded all time worked, both inside and outside the office, will further reduce the risk of failing to pay for uncompensated time. Employees can, of course, still later argue they were instructed by their manager *not* to record all hours worked despite their verification that all hours were recorded. But if this does occur the employer will be able to demonstrate the the employee and the manager were acting in violation of Company policy.. The verification also could include an additional affirmation that no manager has instructed the employees not to record their time, and include an 800 number to call to report any abuses.

PROHIBIT NON-EXEMPT EMPLOYEES FROM PERFORMING WORK OUT OF THE OFFICE AND DISCIPLINE EMPLOYEES WHO VIOLATE THE POLICY

If employers want to avoid additional payroll costs incurred from employees working outside the office, they may, of course prohibit employees from performing such work. But employers should also discipline employees who fail to follow the policy.

CONSIDER PROVIDING SMARTPHONES ONLY TO EXEMPT EMPLOYEES AND CONFIGURE COMPUTER SYSTEMS TO PROHIBIT NON-EXEMPT EMPLOYEES FROM ACCESSING COMPANY SERVERS OR EMAIL

One means of reducing exposure to off-the-clock work performed by non-exempt employees is simply limiting company provided smartphones to only exempt employees. But this may not be enough. Employees often use their own personal smartphones or computers to access company servers and send and receive email. Technology here can help as well. Employers can configure their computer systems so that non-exempt employees cannot access company computer systems outside their regular work hours, *i.e.*, they may not log-in to the company's servers or use company email after work hours. Of course, nothing can stop them from sending or receiving emails using their own personal email addresses, but managers should be trained only to communicate with non-exempt employees using company provided email accounts (not through personal email or texts) and if they become aware of non-exempt employees using personal email addresses or using text messages, the managers should determine what work is being performed, why it is being performed outside of regular work hours, and either authorize it (and pay it) or instruct the employee not to perform the work (but pay for the work that already has been completed).

TRAIN EMPLOYEES AND MANAGERS REGARDING THE NEED FOR AN UNINTERRUPTED MEAL PERIOD

Managers and employees should be instructed that employees must receive an uninterrupted meal period and managers should not email, call, or assign tasks to employees while they are on their meal break. Employers also should consider prohibiting employees from eating at their desks so that they are not tempted to respond to emails or phone calls. Employees can later point to emails that were sent or phone calls that were made during their meal period as evidence that they did not receive an uninterrupted meal period. For example, if an employee clocks out for lunch at 12:30, but the phone logs show she made business related calls for 20 minutes between 12:30 and 1:30, the meal period may become compensable.

LIMIT RESTRICTIONS FOR EMPLOYEES WHO ARE ON-CALL OR CONSIDER PROVIDING COMPENSATION FOR ON-CALL TIME, BUT AT LOWER HOURLY RATE

As noted above, placing too many restrictions on employees who are on-call may convert the on-call time to compensable work time. Consider also providing employees who are on-call with hourly compensation at a lower rate, thereby ensuring the time has been compensated. But remember that paying for such time results in the hours becoming compensable work hours, which must be added to their total hours worked, which may result in additional overtime.

CONCLUSION

Technology has allowed employees to easily perform work anywhere and at any time and communicate with each other instantly. The new "addiction" is technology and many employees are hooked. Employees now busily read and respond to e-mails and text messages long after they have left the workplace. This new workforce of tech-addicts, however, has created challenges in ensuring compliance with wage and hour laws. But as long as employers continue to "upgrade" their policies to the next version, they should be fine, and may even find that technology is the key to managing such risks.

NOTES

1. 29 U.S.C. § 201 et seq.
2. 29 U.S.C. § 203(g).
3. Integrity Staffing v. Busk, 135 S. Ct. 513 (2014); IBP, Inc. v. Alvarez, 546 U.S. 21, 26 (2005); *see also* Reich v. New York City Transit Auth., 45 F.3d 646, 649 (2d Cir. 1995) ("While Congress made clear that employers are required to compensate employees for 'work' … it did not define the contours of … 'work'"); 29 C.F.R. § 785.6.
4. 29 C.F.R. § 516.

5. *Busk*, 135 S. Ct. at 516 (*quoting* Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, 321 U.S. 590 (1944)).
6. Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946); 29 C.F.R. § 785.7.
7. *Busk*, 135 S. Ct. at 516.
8. 29 U.S.C. § 254.
9. *Busk*, 135 S. Ct. at 517.
10. *Id.*
11. Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946).
12. *Id.* at 692.
13. 29 C.F.R. § 785.47.
14. Sandifer v. United States Steel Corp., 134 S. Ct. 870, 880 (2014) n. 8.
15. *Id.*
16. *See* Corbin v. Time Warner Entertainment-Advance/Newhouse, 821 F.3d 1069 (9th Cir. 2016) (applying *de minimis* rule to employee who alleged he was denied compensation for one minute spent loading computer program prior to logging into time system); Singh v. City of New York, 524 F.3d 361, 371-372 (2d Cir. 2008) (finding additional commuting time resulting from carrying inspection material *de minimis* as a matter of law where the time amounted to 10 minutes, "give or take," was administratively difficult to record, and occurred sporadically); Lindow v. United States, 738 F.2d 1057 (9th Cir. 1984) (finding time spent by employees who arrived prior to their shift to review a shift log from the prior shift, averaging, seven to eight minutes, to be *de minimis*); Von Friewalde v. Boeing Aerospace Operations, Inc., 2009 U.S. App. LEXIS 17346 (5th Cir. Aug. 4, 2009) (noting that most courts have found daily periods of approximately 10 minutes *de minimis*); Kellar v. Summit Seating, Inc., 664 F.3d 169 (7th Cir. 2011) (recognizing the *de minimis* rule, but refusing to apply it where the employee regularly worked 10-45 minutes each day prior to her scheduled shift).
17. *See* Troester v. Starbucks Corp., 2016 U.S. App. LEXIS 23587 (9th Cir. June 2, 2016).
18. *See* Troester v. Starbucks Corp., 2016 Cal. LEXIS 6801 (Cal. Aug. 17, 2016).
19. *See* Allen v. City of Chicago, 2015 U.S. Dist. LEXIS 165906, at *16 (N.D. Ill. Dec. 10, 2015) ("While not every response to a phone call, or review of follow up on an email, constituted compensable work activity, we find that plaintiffs have proven that at least some of their off-duty BlackBerry activity qualifies as such."); Gomley v. Crossmark, Inc., 2015 U.S. Dist. LEXIS 54037 (D. Id. Apr. 22, 2015) (finding employee who was required to check email prior to leaving for work, sync a handheld device, organize folders, and load a car before appointments, was engaged in non-*de minimis* work activity); Mahshie v. Infinity Ins. Co., 2012 U.S. Dist. LEXIS 163569 (S.D. Fla. Nov. 15, 2012) (denying summary judgment where employee alleged he performed work at home, including checking email, because fact issue existed as to whether the time was *de minimis*).
20. 29 C.F.R. § 785.35.
21. *See* 29 U.S.C. § 254(a) (excluding from hours worked, time spent "walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform").
22. 29 U.S.C. § 785.38.
23. *See* IBP, Inc. v. Alvarez, 546 U.S. 21, 37 (2005) ("[D]uring a continuous workday, any walking time that occurs after the beginning of the employee's first principal activity and before the end of the employee's last principal activity is…covered by the FLSA."); 29 C.F.R. § 790.6(b).
24. Kuebel v. Black & Decker, 643 F.3d 352 (2d Cir. 2011).
25. *See* Rutti v. Lojack Corp., 596 F.3d 1046, 1060 (9th Cir. 2010) (technician's evening commute was not rendered compensable merely because he performed the arguably principal activity of uploading data to his employer after returning home because he was free to make the transmission any time between 7:00 p.m. and 7:00 a.m.).
26. *See*, *e.g.*, Harris v. Reliable Reports, Inc., 2014 U.S. Dist. LEXIS 31223 (N.D. Ind. Mar. 10, 2014) (finding employee who worked as a field inspector from his home and alleged he was required to log into the employer's computer network and complete administrative tasks prior to leaving home and after returning home after the last customer visit stated a claim under the continuous workday rule for time spent traveling to his first appointment and from his last appointment); Bowman v. Crossmark, Inc., 2012 U.S. Dist. LEXIS 93345 (E.D. Tenn. July 5, 2012) (denying summary judgment to employer where employees sought compensation for commuting time under the continuous workday rule and alleged they were required to perform job-related activities in their homes immediately before traveling to their first retail location and immediately after returning home from their last retail location, such as checking email, confirming work schedules, and reporting to a company computer system); Gomley v. Crossmark, Inc., 2015 U.S. Dist. LEXIS 54037 (D. Id. April 22, 2015) (same). *But see* Bettger v. Crossmark, 2014 U.S. Dist. LEXIS 82031 (M.D. Pa. June 17, 2014) (granting summary judgment to employer in action seeking compensation for commuting time under the continuous workday rule due to the absence of evidence that the employee was required to check email or perform administrative tasks immediately prior to driving to the first work location).
27. Holzapfel v. Town of Newburgh, 145 F.3d 516, 524 (2d Cir. 1998); Forrester v. Roth's I.G.A. Foodliner, Inc., 646 F.2d 413, 414 (9th Cir. 1981) ("An employer who knows or should have known that an employee is or was working overtime must comply with the provisions of [29 U.S.C.] § 207 [mandating overtime pay]"); Kellar v. Summit Seating, Inc., 664 F.3d 169 (7th Cir. 2011) ("To state a claim under the FLSA, [plaintiff] must show that [employer] had actual or constructive knowledge of her overtime work"
28. *See* 29 C.F.R. § 785.11.
29. *Holzapfel*, 145 F.3d at 524.
30. *See* Reich v. Dept. of Conservation and Natural Resources, 28 F.3d 1076, 1082 (11th Cir. 1994).
31. Hertz v. Woodbury County, 566 F.3d 775, 781 (8th Cir. 2009).
32. Hellmers v. Town of Vestal, 969 F. Supp. 837, 845-846 (N.D.N.Y 1997).
33. Newton v. City of Henderson, 47 F.3d 746, 749 (5th Cir. 1995).
34. Fairchild v. All Am. Check Cashing, Inc., 815 F.3d 959 (5th Cir. 2016).
35. *Id.* at 965 (internal quotations omitted) (emphasis added).
36. *See also* Hertz v. Woodbury County, 566 F.3d 775, 781 (8th Cir. 2009) (finding employer had no obligation to check computer dispatch records to determine whether police officers were working overtime because records were not used for payroll purposes, but instead to determine whether officers were available to respond to emergencies).
37. Allen v. City of Chicago, 2015 U.S. Dist. LEXIS 165906, *16 (N.D. Ill. Dec. 10, 2015).
38. Mahshie v. Infinity Ins. Co., 2012 U.S. Dist. LEXIS 163569 (S.D. Fla. Nov. 12, 2012).
39. *Id.* at *13 ("[Plaintiff] produced an email sent to his supervisor… at 7:09 PM on June 2, 2010; however [Plaintiff's] timecard…shows that he clocked out at 5:30 PM").

40. 29 C.F.R. § 785.17.

41. Armour & Co. v. Wontock, 323 U.S. 126 (1944).

42. Skidmore v. Swift & Co., 323 U.S. 134 (1944).

43. Bright v. Houston Northwest Med. Ctr. Survivor, Inc., 888 F.2d 1059 (5th Cir. 1989).

44. Owens v. Local No. 169, Ass'n of W. Pulp & Paper Workers, 971 F.2d 347 (9th Cir. 1992).

45. 29 C.F.R. § 785.48(b) (emphasis added).

46. 29 C.F.R. § 785.48(a) (emphasis added).

47. Corbin v. Time Warner Entm't-Advance, 821 F.3d 1069 (9th Cir. 2016).

48. 29 C.F.R. § 785.19 (emphasis added).

49. *See* Reich v. S. New Eng. Telecomms. Corp., 121 F.3d 58, 64 (2d Cir. 1997); Roy v. Cnty. of Lexington, S.C., 141 F.3d 533 (4th Cir. 1998); Bright v. Houston N.W. Med. Ctr. Survivor, Inc., 934 F.2d 671, 677 (5th Cir. 1991); Hill v. United States, 751 F.2d 810, 814 (6th Cir. 1984); Alexander v. City of Chicago, 994 F.2d 333, 337 (7th Cir. 1993); Henson v. Pulaski Co. Sheriff Dep't, 6 F.3d 531 (8th Cir. 1993); Lamon v. City of Shawnee, Kan., 972 F.2d 1145, 1155 (10th Cir. 1992); Birdwell v. City of Gadsden, Ala., 970 F.2d 802, 808 (11th Cir. 1992).

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at its existing rules and walk back those it concludes are imposing unreasonable burdens without clear, corresponding benefits. Conversely, Congress could take the lead by re-calibrating the regulatory structures instituted in the 1996 revision of the Communications Act. These solutions promise to be effective, if pursued, but will take time and require expenditure of political capital.

This article proposes an alternate opportunity for the Commission to realize the deregulatory aims of the Trump administration and Republican-led Congress by using tools that the FCC already has at its disposal.[3] This is the private carriage path to a less regulatory, more market-based telecommunications future, a path that reaffirms limited regulation of business-to-business relationships in the telecommunications marketplace, consistent with congressional intent and in alignment with other regulatory regimes, including the broadband Internet marketplace.

The private carriage legal classification is a game-changer for many businesses. Private carriers negotiate deals on an individualized basis with other companies. This allows private carriers to customize contract terms and offerings to meet the unique needs of their customers. Because private carriers are subject to limited regulatory oversight, the market—and not the regulatory agency—is the final arbiter of the private carrier's actions and business opportunities.

But private carriers do not enjoy an unencumbered regulatory landscape. Although the law is on the side of private carriage, there is still a significant level of guess work and associated uncertainty involved when invoking the private carriage legal classification. And for those companies taking advantage of private carrier exemptions, complications arise at every turn that hamper the benefits of private carriage status while unnecessarily exposing businesses to risks of financial and reputational harm at the hands of the Commission and administrators of various FCC programs. This uncertainty is counterproductive, and the Commission should seize this opportunity to correct course.

With private carriage, the Commission is faced with a stark deregulatory opportunity available now, without procedural or political hoops. This article describes the opportunity in detail. By following the steps outlined, the FCC can unleash the deregulatory potential of the private carriage classification.

HISTORICAL PURPOSE OF PRIVATE CARRIAGE AND REASONS FOR ITS ADVANCEMENT IN THE 21ST CENTURY DIGITAL ECONOMY

The law on private carriage, while well-settled, is neither well known by the telecommunications industry at large, nor was it well respected by the Commission or its universal service program administrators of the two prior administrations. The private-common carriage distinction arose out of the Communications Act of 1934, which adopted requirements applicable to common carriers.[4] Private carriers "make individualized decisions…whether and on what terms to deal."[5] Common carriers, on the other hand, "serve all potential customers indifferently."[6] Carriers may operate as private carriers with respect to some services and common carriers with respect to others.[7]

In determining a company's classification, FCC precedent and case law requires analyzing the following factors relating to the company's offerings to distinguish between services offered on a private and a common carriage basis:[8]

1. *Contract Negotiations*. Private carriers individually negotiate contract terms with customers. Common carriers, by contrast, offer services for set prices and terms.[9]
2. *Length of Contracts*. Private carriers are more likely to enter into contracts with a medium-to-long range term.[10]
3. *Customers Involved*. Private carriers enter into contracts with sophisticated business entities and stable clientele.[11] Customers of private carriers have unique communications requirements.
4. *Tailoring*. Private carriers tailor contracts and services to the special requirements of their customers.[12]

Congress preserved the distinction between common carriage and private carriage in the Telecommunications Act of 1996 (1996 Act).[13] The 1996 Act aimed to promote competition dictated by market forces in place of heavy-handed government regulation,[14] and the private carriage classification was "consistent with and complementary to the deregulatory thrust of the" new 1996 Act.[15]

Specifically, private carriers are exposed to fewer regulations and less regulatory scrutiny than common carriers. Title II of the 1996 Act includes comprehensive regulatory requirements applicable exclusively to common carriers. With limited exceptions, these Title II common carrier regulations generally do not apply to private carriers. For example, private carriers contribute to the Universal Service Fund (USF), but are legally exempt from contributing to other universal service mechanisms established under Title II. Private carriers also enjoy less regulatory scrutiny at the state level by public utilities commissions.

Congress did not apply private carriage to all competitors in the communications marketplace. Instead, Congress endorsed a hybrid system where common carriage and private carriage would co-exist. A provider of telecommunications services is classified as a common carrier only to the extent that the company provides common carriage services.[16] Otherwise, to the extent that a company provides private carriage services, the company is able to take advantage of the private carrier classification. This hybrid system promotes two equally important aims:

1. *Public interest aims*. The hybrid system maintains a public interest driven emphasis on essential services, interconnectivity, spread of basic infrastructure, and accessibility.
2. *Deregulatory aims*. In the hybrid system, industry retains the freedom to design and implement tailored services. These services do not have the same nexus to the public interest and thus are not subject to as heavy a regulatory burden.

This dichotomy between private and common carriage honors the 1996 Act's emphasis on competition and market-based discipline as drivers of growth and innovation. In particular, the private carriage classification promotes the following competitive effects:

- *Flexibility*. Private carriage affords companies the flexibility and freedom to customize deals, including pricing, conditions of service, and choice of customers. In a free-market economy, flexibility to contract with other companies translates into mutually beneficial commercial arrangements.[17]
- *Experimentation*. Private carriage options empower market participants to develop and test compensation and service arrangements that may better accommodate individual market circumstances.[18]
- *Modification*. "Non-common carriage ... enables parties to a contract to modify their arrangement over time as their respective needs and requirements change."[19]
- *Leverage*. Savvy customers can leverage competition among private carriers to obtain optimal quality and price for services purchased.[20]
- *Risk Taking*. Private carriers can work with customers to develop new products or applications despite risks involved, because the private carrier is not required to offer similar services or terms to other companies.[21]
- *Competitive Pricing*. Private carriage fosters competition, which generally leads to lower prices. Private carriers also are not required to list their service offerings or prices, because they instead negotiate contracts on a case-by-case basis. As a result, the private carriage marketplace is less likely to sustain price fixing that has been associated with knowledge of competitor prices.[22]

BARRIERS TO WIDESPREAD ADOPTION OF THE PRIVATE CARRIAGE TELECOMMUNICATIONS MODEL

Specific barriers prevent full realization of the deregulatory benefits of private carriage. This section highlights a confluence of factors that have, in the experience of the authors, led many in the industry to avoid taking advantage of the private carriage classification.

UNCERTAINTY AND FEAR

The first barriers standing in the way of widespread adoption of the private carriage model are uncertainty and fear. While FCC law and decades-old judicial precedent provide a high-level framework for identifying common carriage services (whether the carrier "holds himself out to serve indifferently all potential users"),[23] the result is somewhat of a patchwork that requires businesses to weigh and balance the facts that support adopting private carrier status against potentially serious financial and reputational risks of guessing wrong. The way the law on private carriage is presented to the industry simply does not provide the necessary degree of clarity and confidence needed to ensure the benefits of private carriage are realized to their full potential. For the risk-averse, the bottom line is that private carriage is not a feasible business model.

Currently, whether a provider has made a common carriage offering "must be determined on a case-by-case basis."[24] A variety of often unclear factors contribute to the regulatory classification analysis a business must conduct before reaching a decision whether to treat a particular offering as private or common carriage. Absent a bright-line test, the final arbiter of classification too often is an FCC enforcement official or an auditor working for the Universal Service Administrative Company (USAC), the administrator of the FCC's USF program. Meanwhile, the consequences of an incorrect decision are material in nature: exposure to years of unrecoverable contributions to Title II programs, enforcement actions, fines and penalties, and the reputational harm associated with becoming the target of a government investigation.

Compare this dynamic to the FCC's regulation of the broadband industry. Since 2010, the FCC has differentiated between "mass market" and "enterprise" broadband services for purposes of regulating Internet access.[25] Whereas "mass market" services are "marketed and sold on a standardized basis" and provided to "residential, small business, and other end-user customers," the term does not include "enterprise" service offerings, "which are typically offered to larger organizations through customized or individually negotiated arrangements."[26]

In its 2010 and 2015 Open Internet Orders, the FCC only subjected "mass market" services to regulation. To accomplish this goal, the FCC wrote a clear definition of broadband Internet access service (BIAS) that defined BIAS as consisting of "mass market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints…"[27] Then, the FCC only subjected BIAS to regulation under Title II. In this way, because BIAS clearly does not include "enterprise" offerings, the FCC freed companies offering business-to-business services from regulation.

The FCC's approach to regulation of BIAS serves as an example of the level of specificity the FCC should emulate to provide clarity to the industry. That said, the FCC does not even have to re-write its rules to clarify the difference between regulation of common and private carriers. Instead, it could simply publish definitive guidance that eliminates confusion as to the differences.

Without certainty in the form of definitive FCC guidance, companies will continue to view the private/common carrier classification as a somewhat futile exercise in risk management. It is no coincidence, then, that relatively few industry participants pursue broad private carrier business models. Some businesses taking advantage of private carriage options hedge their bets by simultaneously, and unnecessarily, subjecting themselves to Title II common carrier regulatory burdens—passing through the ultimate compliance costs to their sophisticated consumers—simply to mitigate risks. This current state of affairs hampers the effectiveness of the private carriage deregulatory solution. The Commission can act swiftly and definitively to offer certainty and clarity to businesses, while concurrently taking well-deserved recognition for reducing unnecessary and harmful regulatory burdens.

UNEVEN APPLICATION

A second barrier arises from the uneven application of the private/common carriage precedent at the FCC, as applied to companies providing services with Voice over Internet Protocol (VoIP) components. Broadly speaking, interconnected VoIP services are not eligible for the private carriage classification.[28] The result is that interconnected VoIP providers offering services with identifiable private carriage qualities are at a regulatory disadvantage as compared with traditional telecommunications competitors who enjoy private carrier status.

This uneven treatment actually originates from a generally favorable public policy for the VoIP industry.[29] Over a decade ago, the FCC chose not to apply full common carriage regulatory responsibilities to interconnected VoIP services, but to instead selectively extend specific regulations to interconnected VoIP.[30] As a result, interconnected VoIP services received relaxed regulatory treatment as compared with services provided on a common carriage basis. The drawback to this approach has been that an interconnected VoIP service with private carriage qualities is treated no differently from any other interconnected VoIP service. Simply put, whereas private carrier telecommunications companies enjoy benefits of lesser regulation over their common carrier telecommunications services competitors, all interconnected VoIP is created equal.

This regulatory framework disadvantages systems integrators in particular.[31] Systems integrators package together component subsystems, ensure these subsystems function well together, and sell the entire package as a bundled solution, usually to enterprise customers. As an example, a systems integrator may package a communications service with a larger data, IT, or technical support solution and sell the package to a customer.

The FCC has recognized for two decades that regulatory barriers have no place in the systems integrator industry, but the rules are unevenly applied in the interconnected VoIP context. Currently, if a systems integrator bundles a traditional telecommunications service with non-telecommunications offerings, the entire bundle can be treated as a private carriage service, thus usually eliminating any Title II regulatory obligations. Additionally, another traditional systems integrator exemption frees many systems integrators from contributing to the USF.[32] But if the same systems integrator bundles a newer technological solution with an interconnected VoIP component with its systems integrator offerings, the entire bundle will be regulated as an interconnected VoIP service, and the exemptions may not apply.

USAC POLICIES PREVENT COMMON-PRIVATE CARRIAGE REVENUE SEGREGATION

A third barrier to reliance on the private carriage model stems from the lack of enforcement of the private carriage exemption at USAC. Longstanding precedent exempts private carriers from contributing to non-USF Title II programs, which include the Telecommunications Relay Services (TRS) Fund, Local Number Portability (LNP) administration, and the North American Numbering Plan (NANPA) program.[33] In contrast, common carriers are required to contribute to these support mechanisms.[34] But USAC has not provided a sure mechanism for separating common carriage and private carriage revenues earned by companies providing both types of services, to enable them to take advantage of the exemption with respect to private carriage revenues.

Specifically, carriers report revenue for purposes of contributing to the universal service programs on the Form 499. USAC collects the Forms 499 and administers the USF, whereas each of the other Title II funds (NANP, LNP and TRS) is administered by a separate non-governmental agency. USAC passes along FCC Form 499 revenue data to the administrators of the other Title II program funds to calculate and invoice provider contribution obligations based only on the provider's self-reported primary service category (from Line 105 on Form 499-A).[35] The primary service category in turn is reported based on the service that generates the most revenue for the company. Thus, the result is that a company with more common carriage service revenues than private carriage service revenues is treated as if *all* revenues are subject to the non-USF Title II fees and ineligible for the private carriage exemption. Common carriers with some private carriage revenues have been over-billed as a result. The same is true in the other direction: private carriers with some common carriage revenues could be under-billed.

This revenue reporting structure is inconsistent with the history of the private/common carriage distinction, which always has held that companies may operate as private carriers with respect to some services and as common carriers with respect to others.[36] To change this precedent inevitably would require companies to separate operations by classification to avoid payment of common carrier fees on private carriage revenues.

BARRIERS TO PRIVATE CARRIAGE ADOPTION HAVE DIMINISHED AVAILABILITY OF BENEFITS ENVISIONED BY CONGRESS

To the extent that uncertainty and risk aversion have watered down the benefits to the industry of the private carriage classification, these realities have hampered true implementation of Congress's deregulatory aims defined in the 1996 Act.

UNLEASH GROWTH THROUGH CERTAINTY FOR PRIVATE CARRIERS

At this time of new energy around deregulatory opportunities, the FCC has an opportunity to effect positive, lasting change. By clarifying and supporting private carriage, the Commission can promote new business opportunities while relieving itself and its Title II program administrators of regulatory oversight and administrative burdens associated with business-to-business transactions that are beyond the agency's public interest mission. The aim is not to roll back the important progress the FCC has made to expand universal access to communications technologies and to promote public interest aims in the provision of telecommunications service. Instead, the FCC should yield to boundaries already drawn by Congress, the courts and earlier Commissions, but which have become hazy by lack of enforcement under the past two administrations. The FCC can restore clarity to the classification distinction between a common carriage service and a private carriage service quickly and without risk of judicial delay by taking the actions detailed below. This section offers specific, tangible solutions immediately available to the Commission to tear down the barriers earlier described and unleash the full potential of the private carrier exemption from Title II regulations.

ISSUE A PRIVATE CARRIAGE POLICY STATEMENT

To combat uncertainty regarding the private carriage classification, the FCC should first and foremost set the record straight by issuing a policy statement that clarifies and lists the elements of private carriage. By endorsing these factors and listing them in one place, the FCC will send signals to the market that the agency is enforcing the laws on the books. This simple approach will have immediate consequences in the industry. Armed with a clear understanding of the rules, businesses will be better equipped to classify their own services and to reduce risk from unintended classification errors. In turn, a private carriage policy statement will lower costs and barriers to entry for service providers serving enterprise customers, resulting in more vibrant competition and a more level playing field.

RESOLVE OUTSTANDING PETITIONS IN FAVOR OF CLARITY FOR PRIVATE CARRIERS

The FCC should take steps to resolve outstanding petitions for regulatory parity in matters relating to private carriage. By addressing petitions relating to the systems integrator exemption[37] and USAC's handling of the private carrier Title II fee exemption,[38] the FCC will make significant progress towards eliminating doubt and confusion faced by private carriers.

The first pending petition asks the FCC to clarify that the systems integrator exemption applies to interconnected VoIP services, not just to legacy telecommunications services. The underlying rationale for this petition is regulatory parity. Systems integrators incorporating traditional telecommunications today largely are unregulated as a result of both the systems integrator exemption and the private carriage classification. Neither option is available to a systems integrator incorporating interconnected VoIP. From a regulatory standpoint, the optimal approach for systems integrators has been to avoid integrating new interconnected VoIP technologies to avoid heavy regulatory burdens that the FCC recognized two decades ago had no place in the systems integration arena. Clarity on this regulatory issue would give the industry an incentive to upgrade to VoIP technologies, inevitably driving growth in the industry.

More broadly, the systems integrator situation highlights the need for the FCC to consider affording interconnected VoIP companies the option to take advantage of the private carriage classification. Clearly, if interconnected VoIP companies are to lead the next generation of telecommunications innovation, these companies should have access to the same deregulatory opportunities as traditional telecommunications players. Ultimately, a final determination on this issue would require a rulemaking garnering input from stakeholders.

A second pending petition relates to confusion around USAC's handling of the private carrier Title II fee exemption. USAC has not offered service providers a method for separating private and common carriage revenues via the Form 499. In so doing, USAC has impermissibly charged non-USF, Title II fees based on private carriage revenues, effectively ignoring the private carrier Title II fee exemption. Companies with both common and private carriage revenues have therefore either over or under paid Title II fees as a result.

This financial hardship on companies is not the only effect of USAC's policy, however. More importantly, USAC's handling of the private carrier Title II fee exemption violates precedent dictating that a carrier can freely decide to offer either or both common carriage services and private carriage services. Companies should not have to choose one or the other—they should be free to offer services to the public indifferently and to innovate and experiment by offering private services on their own terms. USAC's policy disrupts the entire premise of the private carriage classification: that the marketplace should govern private deals, and that companies must be free to contract on a private basis. Resolving this second petition will thus restore the original intention of the private carriage classification.

COMMIT TO PRINCIPLES OF BUSINESS FREEDOM IN THE PRIVATE CARRIAGE MARKETPLACE

The incoming FCC has an opportunity to rededicate the agency to the deregulatory principles of the 1996 Act. In this spirit, the FCC must not merely clarify and reinforce the existence of the private carriage classification, but commit to the market-based framework upon which private carriage is premised. Otherwise, private carriers face unending uncertainty. Should they negotiate business deals and draft contractual terms in anticipation of FCC or USAC scrutiny? Should they model their service distribution methods to avoid unanticipated regulatory exposure, including for their business partners? Will the FCC and USAC accept the terms of contracts or the outcome of litigation, or do regulators reserve the right to investigate on their own terms? Clearly, common carriers operating in the highly-scrutinized telecommunications industry know that they face exposure from the FCC for their business decisions at all times. In contrast, the answer to these questions is not readily available for private carriers. FCC law and precedent proclaim these private carriers as largely deregulated, but in reality, private carriers too often remain exposed to regulatory uncertainty and risk.

To tackle this uncertainty in the interests of protecting and promoting the private carriage classification, the FCC should publicly and categorically recognize the role of two key principles of business freedom in the private carriage marketplace.

First, the FCC must commit to full deregulation as envisioned in the private carriage precedent. Regulating a fully de-regulated industry is messy and complicated, and hampers the effect of underlying deregulatory policy aims. Regulated industries by definition require continuous monitoring by the regulatory agency. But deregulated industries cannot sustain irregular interventions where government effectively picks winners and losers. The FCC and even USAC must defer to the greatest extent possible to decisions made by private carriers with other sophisticated businesses. The FCC should instead expend its limited resources focusing on issues impacting the mass market of consumers, putting limited federal monetary resources where most needed to protect the most vulnerable.

Second, the FCC must set a clear policy of recognizing negotiation, contracts, and litigated remediation as the foundations of the private carriage ecosystem. Across the economy, sophisticated businesses use these three tools when implementing, structuring, maintaining, and enforcing business deals. Private carriage in the telecommunications industry should be no different. Accordingly, the FCC and USAC should at all times respect negotiated business decisions. In evaluating business arrangements, these agencies should look to the terms of binding contracts to understand business deals rather than engage in independent analyses or evaluate independent factors. Auditors should assess responsibility and agency in business arrangements based on the intent of governing contracts. As to disputes, these agencies should defer to courts or private dispute resolution rather than open enforcement or market disputes proceedings.

By committing to these principles of business freedom in the private carriage marketplace, the FCC will provide private carriers ever more incentive to rapidly develop new commercial arrangements with a growing list of business partners. Unhampered by regulatory uncertainty, private carriers will be better able to focus on investment in new partnerships and distribution channels, strengthening competition in the market and increasing the speed of deployment of services.

CONCLUSION

The FCC has the tools at its disposal to promote the deregulatory aims of the 1996 Act by clarifying the regulatory landscape encountered by private communications carriers. But should it? Clearly, as with any public policy decision, the FCC has a number of interests to weigh:

- **Private Carriage Industry.** For companies that knowingly or unknowingly provide their services on a private carriage basis, any action by the FCC to clarify their responsibilities and to remove regulatory doubt is a worthy investment of time and resources. Regulatory clarity promises to remove guesswork that hampers investment and discourages ambition. Companies should not fear economic reprisal for guessing wrong on how the private carriage system works. Quite to the contrary, private carriers must be able to take advantage of the deregulatory law and precedent on the books that favors their legal and economic interests.
- **Public Interest Mission of the FCC.** This deregulatory approach does not deter the public interest mission of the FCC. Right now, the FCC's law and precedent exempts private carriers from many regulations. Broadly, the FCC imposes a hybrid regulatory system, where common carriers providing services that impact the public interest are regulated whereas private carriers largely are unregulated. Maintaining and clarifying this system is consistent with the directives of Congress and does not disturb regulation on the common carrier side of the equation.

  Critics may argue that reinforcing the common/private carrier dichotomy would decrease funding needed to support critical FCC programs. Admittedly, if the FCC goes down the road of allowing all interconnected VoIP carriers to take advantage of private carriage classification, the FCC will need to address the impact on funding in a rulemaking. Otherwise, any funding currently collected from private carriers incorrectly contributing to regulatory funds are undeserved and unfair. The FCC may choose to balance its books in a number of ways, but first should ensure that its current rules are closely enforced and clearly defined.

  As an aside, if the FCC follows through with the recommendations in this article, it will not be required to expend as many resources on the private carriage industry. The FCC may consider analyzing whether potential savings from reduced regulatory oversight may offset any reductions in collected funding.
- **Business Customers of Private Carriage Services.** Buyers of private carriage services stand to gain from a more competitive marketplace for individualized telecommunications solutions. With fewer regulatory barriers, private carriers will be incentivized to expand business relationships, offer more competitive options, and take more risks. Sophisticated business customers would benefit from the availability of new, tailored options that open in the marketplace.
- **Regulatory Parity.** The proposals in this article are targeted at improving regulatory parity, both with regard to the private carrier Title II fee exemption and the interconnected VoIP exception to private carriage exemplified by treatment of systems integrators. Regulatory parity promotes clarity and consistency in the industry, helping regulated entities better understand and carry out their regulatory obligations.

By providing certainty to private carriers using the proposals in this article, the FCC has an opportunity to improve the position of a number of market participants while furthering its public policy goals. These economic benefits are achievable by means of the deregulatory approach to competition already codified in law.

This is what deregulation should be about: Promoting market discipline in areas where regulation is unnecessary and where competition already promotes innovation, investment, and job creation. Today, private carriage has not been given a chance with so much uncertainty surrounding its meaning and rules. The FCC has the tools at its disposal right now to correct course and free private carriers to grow within the confines of the free market. The only question that remains is whether the FCC will accept this unique invitation to reimagine the potential of the private carriage industry.

NOTES

1. Chris Kaufman, "Republican Trump says 70 percent of federal regulations 'can go'," *Reuters* (Oct. 7, 2016), *http://www.reuters.com/article/us-usa-election-trump-regulations-idUSKCN12629R*.
2. *See* 47 U.S.C. § 151.
3. This approach is consistent with recent views expressed by Chairman Ajit Pai: "Going forward, I hope that the commission will do a much better job of respecting the rule of law. If we have a good idea that we don't have the power to put into practice, then we should ask Congress to give us that power." Ajit Pai, Remarks of FCC Commissioner Ajit Pai Before the Free State Foundation's Tenth Anniversary Gala Luncheon (Dec. 7, 2016); *see also* Jenna Ebersole, "FCC Republicans Want Course Correction, Process Fix," *Law360* (Dec. 7, 2016), *https://www.law360.com/articles/870242/fcc-republicans-want-course-correction-process-fix*.
4. *See* 47 U.S.C. § 153(h) (1988) (defining "common carrier").
5. Nat'l Ass'n. of Regulatory Util. Comm'rs v. Fed. Commc'ns Com., 525 F.2d 630, 641 (1976) (NARUC I).
6. NARUC I, 525 F.2d at 644 n.76.
7. *See* Nat'l Ass'n of Regulatory Util. Comm'rs v. Fed. Commc'ns Com., 533 F.2d 601, 608 (1976) (NARUC II); *see also* In re Audio Comm'cns, Inc., 8 FCC Rcd 8697, 8698-8699 (1993) ("[A] single firm that is a common carrier in some roles need not be a common carrier in other roles.").
8. *See, e.g.*, In the Matter of Philippine Long Distance Tel. Co., 12 FCC Rcd 15001 (1997); Cellco P'ship v. F.C.C., 700 F.3d 534, 546-547 (D.C. Cir. 2012).
9. *See* In the Matter of Norlight, Declaratory Ruling, 2 FCC Rcd 132, 133-134 (1987).
10. *Id.*
11. *Id.*
12. *Id.*
13. Specifically, the 1996 Act defined three service categories corresponding with differing regulatory treatment and classification. An "Information Service" is "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . ." 47 U.S.C. § 153 (24). Information services are largely unregulated. Classification as an information service generally exempts a service and a service provider from direct FCC regulation. "Telecommunications" is "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." 47 U.S.C. § 153 (50). "Telecommunications" offerings are subject to some regulatory oversight. Providers that merely offer "telecommunications" (not "telecommunications services") are considered private carriers. "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." 47 U.S.C. § 153 (53). "Telecommunications service" offerings are subject to full Title II regulatory oversight. Providers of "telecommunications service" are considered common carriers. The Act also refers to "telecommunications carriers," defined as "any provider of telecommunications services." 47 U.S.C. § 153 (51). Telecommunications carriers are common carriers, but only to the extent that they are engaged in providing telecommunications services.
14. *See generally* Peter Pitsch & Arthur Bresnahan, "Common Carrier Regulation of Telecommunications Contracts and the Private Carriage Alternative," 48 *Fed. Comm. L. J.* 447, 450 (June 1996), available at *http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1108&context=fclj* ("The new law is the first broad and explicit legislative recognition that competition can provide a basis for rendering statutory requirements for telecommunications carriers obsolete."). One example of this deregulatory approach was the grant to the FCC of forbearance authority, allowing the agency to reduce regulation when competitive forces allowed and the public interest would be served. *See* 47 U.S.C. § 160; Pitsch, *supra* at 450, 479-481. The FCC used forbearance to order detariffing in the early 2000s, and more recently, to reduce regulations imposed on broadband internet access service (BIAS) service providers. *See* Charles Helein, Jonathan Marashlian & Loubna Haddad, "Detariffing and the Death of the Filed Tariff Doctrine: Deregulating in the 'Self' Interest," 54 *Fed. Comm. L. J.* 281 (March 2002), available at *http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1296&context=fclj*; In the Matter of Protecting and Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, 5804 et seq. (2015) (Open Internet Order).
15. Pitsch, *supra* n.14 at 450.
16. *See* 47 U.S.C. § 153 (51).
17. *See* Pitsch, *supra* n.14, at 473, 483-485; *see also* Wireline Broadband Order, 20 FCC Rcd 14853, 14899-14900 (Sept. 23, 2005), at ¶¶ 87-88.
18. *See* Wireline Broadband Order, 20 FCC Rcd at 14899-14900.
19. *Id.* at 14900.
20. *See* Pitsch, *supra* n.14 at 473.
21. *Id.* at 484-485.
22. Competitors in a common carriage market have access to each other's price details. *See* Pitsch, *supra* n.14 at 483; In the Matter of Competition in the Interstate Interexchange Marketplace, Notice of Proposed Rulemaking, 5 FCC Rcd 2627, 2644 (April 13, 1990), at ¶ 143 (IXC Competition NPRM). Detariffing did not change this dynamic in the telecommunications marketplace, because many previously tariffed common carriers must still maintain price and service offering details on their Web sites. *See* Helein, *supra* n.14 at 283. As Peter Pitsch explains, such knowledge facilitates collusive agreements, tacit collusion, detection of price cutting, and retaliation. *See* Pitsch, *supra* n.14 at 483.
23. *NARUC II*, 533 F.2d at 608; *see also* U.S. Telecom Ass'n v. FCC, 295 F.3d 1326, 1329 (D.C. Cir. 2002) ("[C]ommon carrier status turns on: (1) whether the carrier 'holds himself out to serve indifferently all potential users'; and (2) whether the carrier allows 'customers to transmit intelligence of their own design and choosing.'" (citation omitted)).
24. Bright House Networks, LLC, et al. v. Verizon California, Inc., et al., Memorandum Opinion and Order, 23 FCC Rcd 10704, 10717-19 (June 23, 2008), at ¶¶ 37-40.
25. *See* Open Internet Order, 30 FCC Rcd at 5683, ¶ 189.
26. *Id.*; *see* In the Matter of Preserving the Open Internet, 25 FCC Rcd 17905, 17932, ¶ 45 n. 147 (2010) (*citing* AT&T and BellSouth Corp., Memorandum Opinion and Order, 22 FCC Rcd 5662, 5709-5710, ¶ 85 (2007) ("[E]nterprise customers tend to be sophisticated and knowledgeable (often with the assistance of consultants), . . . contracts are typically the result of RFPs and are individually-negotiated (and frequently subject to non-disclosure clauses), . . . contracts are generally for customized service packages, and that the contracts usually remain in effect for a number of years.")).

27. Open Internet Order, 30 FCC Rcd at 5682, ¶ 187.
28. Interconnected VoIP is defined as a service that: (1) Enables real-time, two-way voice communications; (2) Requires a broadband connection from the user's location; (3) Requires Internet protocol-compatible Customer Premises Equipment (CPE); and (4) Permits users generally to receive calls that originate on and to terminate calls to the PSTN. 47 C.F.R. § 9.3.
29. Interconnected VoIP services were not, and have never been, classified as common carrier services or subjected to the full range of Title II requirements. *See*, *e.g.*, In the Matter of IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245, FCC 05-116 (May 19, 2005); In the Matter of Universal Service Contribution Methodology, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, FCC 06-94 (June 21, 2006).
30. *See*, *e.g.*, *id*.
31. *See* Jonathan Marashlian & Seth Williams, "Principles of Neutrality Missing from FCC Systems Integrator Exemption Rules," *TechZone360* (March 24, 2015), *http://www.techzone360.com/topics/techzone/articles/ 2015/03/24/400207-principles-neutrality-missing-from-fcc-systems-integrator-exemption.htm*; In the Matter of Petition of The Commpliance Group, Inc. for a Declaratory Ruling that the Systems Integrator Exemption Applies to the Resale of Provision of Interconnected VoIP by Systems Integrators, Docket No. 06-122 (Mar. 17, 2015), available at *https://prodnet.www.neca.org/publicationsdocs/wwpdf/31815compliance.pdf*.
32. In 1997, the FCC created an exemption for systems integrators by freeing "non-common carriers that obtain a *de minimis* amount of their revenues from the resale of telecommunications" from filing Form 499 and contributing directly to the Universal Service Fund. In re Federal-State Joint Board on Universal Service; Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge, Fourth Order on Reconsideration, 13 FCC Rcd 5318, 5471-75 (1997). For purposes of the exemption, "*de minimis*" is 5 percent of revenue. *Id*.
33. *See* 47 C.F.R. §§ 52.17, 52.32, 54.706, 64.604.
34. *See* 47 C.F.R. § 64.604(c)(5)(iii)(A) (requiring providers of "interstate telecommunications services" to contribute to TRS); 47 C.F.R. § 52.32(a) (requiring LNP contributions "from all telecommunications carriers providing telecommunications service …"); 47 C.F.R. § 52.17 ("All telecommunications carriers in the United States shall contribute on a competitively neutral basis to meet the costs of establishing numbering administration."). The Commission has ruled that the terms "common carrier" and "carrier" are synonymous with the term "telecommunications carrier" for the purposes of the 1996 Act and the FCC's rules. In re AT&T Submarine Sys. Inc., File No. S-C-L.94-006, Mem. Opinion & Order, 13 FCC Rcd 21585, 21587-88 (1998), at ¶ 6 ("As the Commission has previously held, the term 'telecommunications carrier' means essentially the same as common carrier."); *see also* Virgin Islands Telephone Corp. v. FCC, 198 F.3d 921, 922, 926 (D.C. Cir. 1999) (affirming the FCC's conclusion that the terms "telecommunications carrier" and "common carrier" are synonymous for the purposes of the 1996 Act and the FCC's rules). The Commission has nonetheless required both common carriers and private service providers to contribute to USF. *See* Federal-State Joint Board on Universal Service, CC Docket No. 96-45, 12 FCC Rcd 8776, 9183-84 (1997), at ¶ 795; In the Matter of Federal-State Joint Board on Universal Service, Report to Congress, CC Docket No. 96-45, 13 FCC Rcd 11501, 11548-11549 (1998), at ¶ 98.
35. *See* In the Matter of Locus Telecommunications, LLC, Petition for Declaratory Rulings Relative to the Treatment of Private Carriage Revenues, Docket No. 06-122 (Nov. 22, 2016) (petitioning the FCC to clarify how carriers with private carriage and common carriage revenues can separate their revenue reporting on FCC Form 499 to avoid payment of Title II fees on private carriage revenues), *available at https://ecfsapi.fcc.gov/file/112276489876/FINAL%20Petition%20for%20Declaratory%20Ruling%20Locus%20USAC%20Policy%20Revised.pdf*.
36. *NARUC II*, 533 F.2d at 608.
37. *See supra* n.31.
38. *See supra* n.35.

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June/9900502691