CASE STUDIES IN ABANDONED EMPIRICISM AND THE LACK OF PEER REVIEW AT THE FEDERAL COMMUNICATIONS COMMISSION

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INTRODUCTION

Despite its legal obligation to serve the public interest[1] by using its expertise and data collection to make rational decisions,[2] the Federal

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1. For example, the Communications Act requires the FCC to reduce market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services that serve "the public interest, convenience, and necessity." 47 U.S.C. § 257(c)(1) (2008).

2. "[A regulatory] agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). Qwest Corp. v. FCC, 258 F.3d 1191, 1198-99 (10th Cir. 2001) (citing Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1575 (10th Cir. 1994) (determining that the FCC failed to provide adequate justifications to prove rational decision making in calculating subsidy mechanism for promoting universal service in high cost areas) ("If the agency has failed to provide a reasoned

Communications Commission (FCC) frequently engages in results-driven decision making.[3] Rather than collect a complete evidentiary record, including empirical evidence to support its policy prescriptions, Commission managers seemingly determine the answers to some questions before the agency solicits and analyzes filings of interested parties and stakeholders.[4] Fealty to political and economic doctrine[5] appears to drive such actions leading the FCC to reach conclusions

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explanation for its action, or if limitations in the administrative record make it impossible to conclude the action was the product of reasoned decision-making, the reviewing court may supplement the record or remand the case to the agency for further proceedings. It may not simply affirm.")).

3. *See, e.g.*, Am. Radio League, Inc. v. FCC, 524 F.3d 227 (D.C. Cir. 2008) (reversing the FCC based on the Commission's dismissal of empirical data submitted at its invitation without reason or analysis).

4. Increasingly the FCC Commissioners vote along party lines rather than reach a nonpartisan consensus. The following Joint Statement by the two Democratic Commissioners, strongly opposing media cross-ownership deregulation, expresses strong displeasure with the substance and approach of a deregulatory initiative championed by Republican Chairman Kevin Martin:

> There is still time to do this the right way. Congress and the thousands of American citizens we have talked to want a thoughtful and deliberate rulemaking, not an alarming rush to judgment characterized by insultingly short notices for public hearings, inadequate time for public comment, flawed studies and a tainted peer review process - all designed to make sure that the Chairman can deliver a generous gift to Big Media before the holidays. For the rest of us: a lump of coal.

Joint Statement by Commissioners Copps and Adelstein on Chairman Martin's Cross-Ownership Proposal, 2007 WL 3376805 (Nov. 13, 2007).

5. FCC decisions regularly recite economic doctrine:

> In economic theory generally and in its application to regulation, the relationship of price and marginal cost is of fundamental importance. Marginal cost can be simply defined as the rate of change in total cost when output changes by an infinitesimal unit. In economics, the term incremental cost refers to a discrete change in total cost when output changes by any non-infinitesimal amount, which might range from a single unit to a large increment representing a firm's entire output. The terms additional costs and avoidable costs are commonly used to refer to incremental costs resulting from an increase or a decrease in output respectively.

High-Cost Universal Service Support, *Order on Remand & Report & Order & Further Notice of Proposed Rulemaking*, 24 FCC Rcd. 6475, 6605 (2008). By assuming that a market operates competitively, the FCC can recite economic doctrine to support conclusions that consumers benefit from the Commission's regulatory or deregulatory decisions. *Id*. at 6605-06 ("In a competitive market, it is assumed that both consumers and producers independently will choose outputs to purchase or to supply on the basis of a market price. In standard economic analysis, this price is determined by the intersection of a downward sloping demand function, which represents consumer valuations for additional units of consumption, and an upward sloping supply function, which represents the marginal cost of supplying an additional unit. The competitive price is efficient in the following sense. At any other price, consumer demands would no longer be equal to producer supply, and market transactions would be limited to the smaller of the two terms. At this level of output, consumers would value an additional unit of output more than the cost of producing it as determined by the marginal cost function. Hence both consumers and producers could be made better off by increasing output by a small amount. When price is equal to the competitive price, no alternative price can be found such that both consumer and producers are better off.") (citations omitted).

without having engaged in rational decision making.[6] Additionally, the FCC often receives broadly conferred legislative authority and ambiguous mandates from Congress. When a statute makes a specific directive without factual support, the FCC similarly can pursue such a mandate without any factual corroboration and judicial second-guessing.[7] When a statute suffers from ambiguity, courts typically accord the FCC ample discretion to flesh out the meaning of the statute and establish policies and rules provided the interpretation satisfies a reasonableness standard.[8]

Remarkably, the FCC has relied upon questionable and unverifiable statistics to justify not only the wisdom in abandoning regulations, but also the need for more regulatory oversight despite its disposition toward deregulation. For example, the FCC has used statistics to support the conclusion that such ample facilities-based competition exists in broadcast,[9] broadband,[10] and wireless markets[11] that the Commission can further reduce ownership caps,[12] approve multi-billion dollar, market

6. Courts will set aside agency decisions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

7. "[A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993) (holding statutory requirement that satellite master antenna television system operators secure a franchise if they link separately owned buildings or use public rights of way constitutional even though single building service had no such franchising requirement).

8. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). "If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) (citing *Chevron*, 467 U.S. at 843–44, n.11) (upholding the FCC's determination that cable modem-provided Internet access constitutes an information service).

9. *See, e.g.*, Existing Shareholders of Citadel Broadcasting Corp. & of The Walt Disney Co., etc. for Consent to Transfers of Control, *Memorandum Opinion & Order & Notice of Apparent Liability*, 22 FCC Rcd. 7083 (2007).

10. *See* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, *Report & Order & Notice of Proposed Rulemaking*, 20 FCC Rcd. 14,853, 14,901, ¶ 90 (2005), *petition for review denied by* Time Warner Telecom, Inc. v. FCC, 507 F.3d 205 (3d Cir. 2007) (forbearing, on the Commission's own motion, from applying tariffing requirements to providers of wireline broadband Internet access service that offer the underlying transmission component of broadband Internet access service as a telecommunications service); *see also*, Rob Frieden, *Lies, Damn Lies and Statistics: Developing a Clearer Assessment of Market Penetration and Broadband Competition in the United States*, 14 VA. J.L. & TECH. (Summer 2009), *available at* http://www.vjolt.net/vol14/issue2/v14i2_100%20-%20Frieden.pdf.

11. *See* Applications of Cellco Partnership D/B/A Verizon Wireless & Atlantis Holdings LLC, for Consent to Transfer Control of Licenses, Authorizations, & Spectrum Manager & De Facto Transfer Leasing Arrangements, *Memorandum Opinion & Order & Declaratory Ruling*, 23 FCC Rcd. 17,444 (2008) (conditionally approving Verizon Wireless acquisition of Alltel wireless assets resulting in a 90 percent market share held by four firms).

12. *See, e.g.*, 2006 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules & other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Report & Order & Order on Reconsideration*, 23 FCC Rcd. 2010, 2018–19 (2007). "For the

concentrating mergers,[13] and claim that the United States continues to benefit from best-in-class access to telecommunications services.[14] The FCC regularly overstates the scope and reach of competition to justify actions that will ultimately concentrate ownership and control in the telecommunications industry.[15]

But in other rare instances, the FCC uses a worst-case scenario to justify expansion of its regulatory reach. A former Chairman of the FCC, with an eye toward broadening regulatory scrutiny of the cable television industry, insisted that data not even compiled by Commission staff proved that the market had become so concentrated as to meet a congressionally legislated trigger[16] for more regulation.[17] The FCC

better half of the existence of federal ownership regulations, which date back to the 1940s, the Commission offered and the courts required little evidence of the connection between ownership and viewpoint diversity." Daniel E. Ho & Kevin M. Quinn, *Viewpoint Diversity and Media Consolidation: An Empirical Study*, 61 STAN. L. REV. 781, 789 (Feb. 2009).

13. *See, e.g.*, Applications Filed for the Transfer of Control of Embarq Corporation to Centurytel, Inc., *Memorandum Opinion & Order*, 48 Commc'ns Reg. (P&F) 24, 2009 WL 1811057 (June 25, 2009); AT&T Inc. and BellSouth Corp. Application for Transfer of Control, *Memorandum Opinion & Order*, 22 FCC Rcd. 5662 (2007); SBC Commc'ns, Inc. & AT&T Corp. Applications for Approval of Transfer of Control, *Memorandum Opinion & Order*, 20 FCC Rcd. 18,290 (2005); Verizon Commc'ns, Inc. & MCI, Inc. Applications for Approval of Transfer of Control, *Memorandum Opinion & Order*, 20 FCC Rcd. 18,433 (2005); Applications of AT&T Wireless Services, Inc. & Cingular Wireless Corp., *Memorandum Opinion & Order*, 19 FCC Rcd. 21,522 (2004); General Motors Corp. & Hughes Electronics Corp., Transferors, & The News Corporation Limited, Transferee, *Memorandum Opinion & Order*, 19 FCC Rcd. 473 (2004).

14. John Kneuer, Former Assistant Secretary for Communications and Information and Administrator at the Commerce Department's National Telecommunications and Information Administration claimed in 2008 that the United States "has the most effective multiplatform broadband in the world." *True or False: U.S.'s Broadband Penetration Is Lower Than Even Estonia's; Answer: True*, NEWSWEEK, July 9, 2007, at 58, *available at* http://www.newsweek.com/id/33456/page/2.

15. AT&T Inc. & BellSouth Corp., Application for Transfer of Control, *Memorandum Opinion & Order*, 22 FCC Rcd. 5662, 5724-25 (2007) ("[T]here is substantial competition in the provision of Internet access services. Broadband penetration has increased rapidly over the last year with more Americans relying on high-speed connections to the Internet for access to news, entertainment, and communication. Increased penetration has been accompanied by more vigorous competition. Greater competition limits the ability of providers to engage in anticompetitive conduct since subscribers would have the option of switching to alternative providers if their access to content were blocked or degraded. In particular, cable providers collectively continue to retain the largest share of the mass market high speed, Internet access market. Additionally, consumers have gained access to more choice in broadband providers.").

16. Section 612(g) of the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779, codified at 47 U.S.C. § 532(g), states that: (1) "at such time as cable systems with 36 or more activated channels are available to 70 percent of households within the United States" and (2) "are subscribed to by 70 percent of the households to which such systems are available, the Commission may promulgate any additional rules necessary to provide diversity of information sources."

17. Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming, Statement of Chairman Kevin J. Martin, *Thirteenth Annual Report*, 24 FCC Rcd. 542, 739 (2009) [hereinafter *Thirteenth Annual Video Programming Report*] ("For the first time this year, however, the Commission received data from one of the sources the industry itself relies on, Warren Communications News, that results in finding that the test has been met. Specifically, its

persists in extensively regulating cable television, based on the perception that this industry does not support robust competition that the Commission considers widespread elsewhere in the telecommunications marketplace.

The Commission risks applying inconsistent and asymmetrical regulatory burdens in a convergent environment where firms offer a bundle of different services that include video. Because the FCC perceives the telephony business as competitive, when telephone companies offer a "triple-play" package of voice, Internet access, and video programming, the Commission has largely abandoned regulation.[18] But because the FCC still perceives the cable television business as dominated by vertically-integrated ventures, the Commission retains and possibly expands its regulatory oversight[19] despite expressing the need to ensure parity of regulatory burdens on competitors.[20]

Normal governmental checks and balances often do not detect instances where the FCC has deliberately or inadvertently failed to compile a credible record. Many reviewing courts gladly defer to the FCC's "expertise" rather than appear to second guess or to legislate from the bench in highly technical matters.[21] Courts also allow the FCC to extend its regulatory wingspan by claiming "ancillary jurisdiction"[22] to

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data shows that 71.4 percent of households passed by cable systems offering 36 or more channels subscribe to these systems.").

18. Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, *Report & Order & Notice of Proposed Rulemaking*, 20 FCC Rcd. 14,853, 14,878 (2005), *petition for review denied by* Time Warner Telecom, Inc. v. FCC, 507 F.3d 205 (3d Cir. 2007); Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, *Declaratory Ruling*, 22 FCC Rcd. 5901 (2007).

19. *See, e.g.*, Cablevision Sys. Corp. v. FCC, 570 F.3d 83 (2d Cir. 2009) (affirming FCC-ordered carriage of upstate New York broadcast station by Long Island cable system), *petition for cert. filed*, 78 USLW 3454 (Jan 27, 2010) (NO. 09-901); Comcast Corp. v. FCC, 579 F.3d 1 (D.C. Cir. 2009) (vacating FCC reimposition of a 30 percent cap on national market penetration by a single cable television venture); Nat'l Cable & Telecomms. Ass'n v. FCC, 567 F.3d 659 (D.C. Cir. 2009) (affirming FCC decision prohibiting cable television ventures from securing exclusive service agreements with owners of multiple dwelling units); Alliance for Cmty. Media v. FCC, 529 F.3d 763 (6th Cir. 2008) (affirming comprehensive FCC rules affecting the timing, scope, and nature of local franchising authority regulations).

20. Ironically, the FCC has expressed deep concern about level competitive playing fields: "[i]n an environment of increasingly competitive bundled service offerings, the importance of regulatory parity is particularly compelling in our determination to remove this impediment to fair competition." Promotion of Competitive Networks in Local Telecomms. Markets, *Report & Order*, 23 FCC Rcd. 5385, 5387 (2008).

21. *See, e.g.*, Am. Family Ass'n, Inc. v. FCC, 365 F.3d 1156, 1166 (D.C. Cir. 2004) (noting the Commission's "necessarily wide latitude to make policy based on predictive judgments deriving from [the Commission's] general expertise").

22. "Ancillary jurisdiction may be employed, in the Commission's discretion, when Title I of the Act gives the Commission subject matter jurisdiction over the service to be regulated and the assertion of jurisdiction is 'reasonably ancillary to the effective performance of [its] various responsibilities.'" IP-Enabled Services, WC Docket No. 04-36, E911 Requirements for IP-Enabled Service Providers, WC Docket No. 05-196, *First Report & Order & Notice of Proposed Rulemaking*,

oversee practices that do not trigger a direct statutory mandate, but which arguably fit within a broad conferral of jurisdiction to achieve public interest goals relating to the activities of ventures using wire and radio communications.

Additionally, the Supreme Court has ruled that, absent a legislative mandate requiring the FCC to guard against anticompetitive practices, courts lack jurisdiction to order remedies that the Commission has refused to impose.[23] One court accepted the FCC's arguments that data about commercial ventures' decisions not to provide broadband service in specific localities constituted a business trade secret thereby prohibiting the FCC from public disclosure.[24] Arguably, a carrier's decision not to serve a specific locality strongly indicates market failure, which should require heightened scrutiny in view of the legislative goal to achieve universal access to basic and advanced telecommunications services.

Too often, the FCC reaches policy conclusions based on statistical interpretations that do not make sense and do not have corroboration through peer review, a process that the Commission has a conditional obligation to use,[25] but rarely does so.[26] For example, the FCC first concluded that pay-per-channel, "à la carte" access to cable television programming, would not save consumers' money compared to a packaged bundle of channels.[27] However, the Commission quickly

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20 FCC Rcd. 10,245, 10,261 (2005) (citing United States v. Sw. Cable Co., 392 U.S. 157, 177–78 (1968); United States v. Midwest Video Corp., 406 U.S. 649, 667–68 (1972), and FCC v. Midwest Video Corp., 440 U.S. 689, 700 (1979)). *See also*, Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, *Policy Statement*, 20 FCC Rcd. 14,986 (2005) (asserting Title I authority to issue policies pertaining to Internet services not subject to Title II telecommunications service regulation); Madison River LLC and Affiliated Companies, *Order*, 20 FCC Rcd. 4295 (2005) (adopting a consent whereby a provider of DSL service agreed to a $15,000 forfeiture and to refrain from blocking subscriber access to Voice over the Internet Protocol services); *see also* Rob Frieden, *What Do Pizza Delivery and Information Services Have in Common? Lessons From Recent Judicial and Regulatory Struggles with Convergence*, 32 RUTGERS COMP. & TECH L.J. 247, 276 (2006).

23. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004); Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., No. 07-512, 2009 U.S. LEXIS 1635 (U.S. February 25, 2009).

24. Ctr. for Pub. Integrity v. FCC, 505 F. Supp. 2d 106 (D.D.C. 2007), *reconsideration denied*, 515 F. Supp. 2d 167 (D.D.C. 2007).

25. *See* Final Information Quality Bulletin for Peer Review, 70 FED. REG. 2664 (Jan. 14, 2005). For all of fiscal year 2008, the FCC Peer Review Agenda web page identified one such study. *See* FCC Peer Review Agenda, *available at* http://www.fcc.gov/omd/dataquality/peer-agenda.html.

26. The FCC appears to interpret its peer review obligation as limited to matters that involve technical or scientific determinations. "We note that if the Commission determines to rely on a scientific or technical study (or studies) as a basis for its decision-making in this proceeding, such study (or studies) may need to meet any applicable peer review requirements set forth in the Peer Review Bulletin issued by the Office of Management and Budget (OMB)." Effects of Commc'ns Towers on Migratory Birds, *Notice of Proposed Rulemaking*, 21 FCC Rcd. 13,241, 13,257 n.105 (2006).

27. FCC, REPORT ON THE PACKAGING AND SALE OF VIDEO PROGRAMMING SERVICES TO THE PUBLIC (2004), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-

reversed itself with limited explanation for its change in findings.[28] The Commission also erected a media diversity index to support relaxation of a cap on media ownership that a reviewing court rejected based on the lack of supporting evidence.[29] Only after a stinging judicial rebuke did the FCC think to subject its statistical analysis and modeling to external review from unaffiliated experts, rather than simply rely on the research and findings sponsored by stakeholders with a financial interest in the Commission's decisions.[30]

This article will identify several instances where the FCC could have used empirical research and peer review to ascertain whether a telecommunications market operates competitively. The article concludes that political sensitivity, deregulatory zeal, and wishful thinking motivate the FCC to abandon oversight, as evidenced by flawed statistical compilation and analysis, excessive reliance on advocacy documents generated by researchers sponsored by major stakeholders, and findings unsupported by evidence and not corroborated through peer review. The article will suggest ways the Commission could have avoided judicial reversal and public ridicule if it had used accepted social scientific practices and compiled an evidentiary record with an open mind.

I. A POLITICIZED AGENCY

Congress created the FCC as an expert and independent regulatory agency not only with an obligation to implement congressional intent, but also to serve the public interest.[31] In 2010, the FCC had an annual budget of approximately $335.7 million and a staff numbering 1905.[32]

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28. FCC, FURTHER REPORT ON THE PACKAGING AND SALE OF VIDEO PROGRAMMING SERVICES TO THE PUBLIC (2006), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-263740A1.pdf; *see also* Charles B. Goldfarb. Congressional Research Service, The FCC's "ala Carte" Reports (March 30, 2006).

29. Prometheus Radio Project v. FCC, 373 F.3d 372, 382 (3d Cir. 2004), *cert. denied*, 545 U.S. 1123 (2004).

30. *See* FCC, Media Bureau, Peer Review, *available at* http://www.fcc.gov/mb/peer_review/peerreview.html.

31. 47 U.S.C. §157(b) (1994) ("The Commission shall determine whether any new technology or service proposed in a petition or application is in the public interest within one year after such petition or application is filed. If the Commission initiates its own proceeding for a new technology or service, such proceeding shall be completed within 12 months after it is initiated."). 47 U.S.C. §160(b) (1996) ("If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest."). 47 U.S.C. §161(b) (1996) ("The Commission shall repeal or modify any regulation it determines to be no longer necessary in the public interest."). 47 U.S.C. §201(b) (1938) ("The Commissioner may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.").

32. FCC, FY 2011 BUDGET ESTIMATES SUBMITTED TO CONGRESS 7 (Feb. 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296111A1.pdf.

Many of the key staff, including the core group of advisors to the FCC Commissioners, are not civil service employees, but acquire employment on terms that contemplate a limited period of employment. Increasingly, FCC Commissioners select advisors with experience on Capitol Hill as Committee counsel or advisors to individual Senators and Representatives, due to the increasingly politicized nature of policy matters.[33]

Even with such a political umbrella, one would think that the Commission could use its considerable staff resources to undertake a professional and thorough analysis of public policy issues, as augmented by data collection and solicitation of comments from interested parties. Instead, the FCC relies almost exclusively on stakeholder data reporting, as well as the comments and sponsored research of these groups. The Commission does not generate much internal policy research,[34] nor does it typically sponsor such research from neutral third parties. Additionally the FCC refrains from collecting data it considers intrusive or burdensome, and the Commission takes pains to redact, or refrain from disclosing[35] data that the reporting parties consider proprietary or qualifying for trade secret protection.[36]

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33. *See, e.g.*, FCC, Commissioner Robert M. Mcdowell Announces Staff Change (Sep. 18, 2009) (2009 WL 2997593) (announcing appointment of Christine Kurth as Policy Director and Wireline Counsel) ("She was most recently Republican Staff Director and General Counsel for the U.S. Senate Committee on Commerce, Science and Transportation and joined the Committee in 2005 as Deputy Staff Director. For the last six years of her Capitol Hill career, she has led or been intimately involved in drafting and negotiating legislation to keep up with the ever-changing communications landscape.").

34. In the rare instance where Commission staff had generated studies, the FCC had to conduct an investigation into whether senior management ordered staffers to suppress or destroy data that did not support a desired outcome. REPORT OF INVESTIGATION INTO ALLEGATIONS THAT SENIOR MANAGEMENT ORDERED RESEARCH SUPPRESSED OR DESTROYED, 2007 WL 2903894 at *18 (2007). *Cf.* UNITED STATES HOUSE OF REPRESENTATIVES, COMMITTEE ON ENERGY AND COMMERCE, DECEPTION AND DISTRUST: THE FEDERAL COMMUNICATIONS COMMISSION UNDER CHAIRMAN KEVIN J. MARTIN (2008), *available at* http://energycommerce.house.gov/images/stories/Documents/PDF/Newsroom/fcc%20majority%20 staff%20report%20081209.pdf ("We have found no evidence of a pattern or practice of any commissioner or anyone in the Commission's senior management to suppress reports, facts, analysis, or any other material because it was contrary to a result desired by that person. We investigated the leads relating to possible suppressions of reports, facts, analysis or other material and did not find evidence of such suppression. Although we did not have the time or resources to examine fully the two isolated historical instances of possible suppression that were mentioned to us, we did not find even the suggestion of a pattern of practice of suppression by any commissioner or anyone in senior management, now or in the past.").

35. "Filers may submit a request that information in a Form 477 submission not be made routinely available for public inspection by so indicating in item (9) of the filer identification information for that submission." FCC Form 477, Instructions for September 1, 2009 Filing, OMB No.: 3060-0816, *available at* http://www.fcc.gov/Forms/Form477/477inst.pdf. *See also* 47 C.F.R. §§ 0.457, 0.459, 1.7001(d), 43.11(c); Examination of Current Policy Concerning the Treatment of Confidential Info. Submitted to the Comm'n, *Report & Order*, 13 FCC Rcd. 24,816 (1998).

36. *See, e.g.*, Applications of Cellco P'ship d/b/a Verizon Wireless & Atlantis Holdings LLC

The Commission's inability to collect and analyze data, without the assistance of the businesses it regulates, juxtaposes with the fact that data collection constitutes an essential component in compiling a complete, factual record. If the FCC wants to confirm that the telecommunications marketplace has become so competitive that the Commission can further deregulate, then statistics could offer empirical corroboration. Rather than compile and disclose statistics with an open mind whether the data will support a preferred conclusion, the FCC appears to frame and interpret statistics with a predetermined outcome in mind, viz. the telecommunications marketplace operates so competitively that the Commission can continue on its deregulatory glide path, approve any merger application despite its market consolidating effect, and report to Congress that almost every sector in the telecommunications industry offers U.S. consumers best in class services with superior accessibility and affordability. The FCC can overstate the degree of competition and achievement of its public interest service mandate largely because the Commission relies on the comments and other filings of stakeholders who share the Commission's interest in touting what a great job it has done in serving the public interest.

II. MOST TELECOMMUNICATIONS ISSUES REQUIRE DATA COLLECTION

The FCC repeatedly makes self-serving and broad, sweeping conclusions about the state of the telecommunications marketplace without including comprehensive empirical evidence to support its conclusions. For example, despite a congressional decision in 2009 to allocate $7.2 billion to promote greater availability of broadband services in the United States,[37] the FCC has stated that "advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion."[38] In the wireless telecommunications marketplace the FCC states that "[n]o single competitor has a dominant share of the market,"[39] yet the Commission's own statistics show the four

for Consent to Transfer Control of Licenses, Authorizations, & Spectrum Manager & *de Facto* Transfer Leasing Arrangements & Petition for Declaratory Ruling that the Transaction is Consistent with Section 310(b)(4) of the Commc'ns Act, *Protective Order*, 23 FCC Rcd. 11,154 (2008) (agreeing to treat as confidential data filed to support acquisition of a competitor).

37. *See* American Recovery & Reinvestment Act of 2009, Pub. L. No. 111-005 (codified in scattered sections of U.S.C.), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h1enr.txt.pdf.

38. Inquiry Concerning the Deployment of Advanced Telecomms. Capability to All Ams. in a Reasonable & Timely Fashion, & Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecomms. Act of 1996, *Fifth Report*, 23 FCC Rcd. 9615, ¶ 1 (2008), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-88A1.pdf.

39. Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, *Thirteenth Report*, 24 FCC Rcd. 6185, 6190 (2009), *available at* http://hraunfoss.fcc.gov/

national carriers control over 87 percent of the market with Verizon controlling 30.1 percent of the national market and AT&T controlling 26.6 percent.[40] The Commission appears to interpret the statistics it compiles in the most positive light to support inferences of ample and ubiquitous competition.[41]

The FCC must engage in transparent and fair-minded data collection, because many of the issues the Commission addresses have a quantitative component that can provide evidence supporting compliance with legislative mandates. For example, Section 706 of the Telecommunications Act, as amended, requires the FCC to encourage the deployment, on a reasonable and timely basis, of advanced telecommunications capability to all Americans and to initiate a Notice of Inquiry to determine the availability of such services.[42] More generally, the FCC has congressional reporting requirements ostensibly established to keep legislators apprised of current marketplace conditions in such sectors as video programming delivery,[43] wireless telecommunications,[44] satellite services,[45] and access to advanced telecommunication

edocs_public/attachmatch/DA-09-54A1.pdf [hereinafter *Thirteenth CMRS Report*].

40. *Id.* at 138 (Table A-4: Top 20 Mobile Telephone Operators by Subscribers (with publicly-available subscriber counts, in thousands)). *See also*, Applications of Cellco Partnership d/b/a Verizon Wireless & Atlantis Holdings LLC for Consent to Transfer Control of Licenses, Authorizations, & Spectrum Manager and *de Facto* Transfer Leasing Arrangements & Petition for Declaratory Ruling that the Transaction is Consistent with Section 310(b)(4) of the Commc'ns Act, 23 FCC Rcd. 17,444 (2008) (approving Verizon's acquisition of Alltel subject to market specific divestitures). *See also infra* note 106.

41. *See* Frieden, *supra* note 10.

42. 47 U.S.C. §1302 (2008) (transferred from Telecommunications Act of 1996, Pub. L. No. 104-104, § 706 (2008)).

43. *See Thirteenth Annual Video Programming Report*, *supra* note 17, at 545 ("We find that almost all consumers are able to obtain programming through over-the-air broadcast television, a cable service, and at least two DBS providers. In some areas, consumers also may have access to video programming delivered by emerging technologies, such as digital broadcast spectrum, fiber-to-the-home facilities, or web-based Internet video. In addition, through the use of advanced set-top boxes and digital video recorders, and the introduction of new mobile video services, consumers are now able to exercise more control over what, when, and how they receive information. Further, MVPDs of all kinds are offering nonvideo services in conjunction with their traditional video services."). *See also*, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Notice of Inquiry*, 24 FCC Rcd. 750 (2009); Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Supplemental Notice of Inquiry*, 24 FCC Rcd. 4401 (2009).

44. Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, 24 FCC Rcd. at 6188 ("The metrics below indicate that there is effective competition in the CMRS market and demonstrate the increasingly significant role that wireless services play in the lives of American consumers.").

45. *See* Second Annual Report & Analysis of Competitive Market Conditions with Respect to Domestic & International Satellite Communications Services, *Second Report*, 23 FCC Rcd. 15,170, 15,201 (2008) ("We find in this Second Report, as we did in the First Report, that markets for commercial communications satellite services are subject to effective competition, notwithstanding certain structural changes in the communications satellite industry since the release of the First Report. Additionally, consumers of communications satellite services continue to realize significant

capabilities.[46]

If the FCC did not have ulterior motives in mind, the duty to promote access to advanced telecommunications capabilities, including information services like Internet access, would motivate the Commission to collect quite specific data about broadband market penetration. The more granular the data, the better the Commission can identify specific geographical locales where residents have limited access to advanced services, or carriers offering such services charge unaffordable rates. Instead, the FCC appears to have defined broadband at such a low level of performance and speed with an eye toward overstating the degree of current progress in achieving ubiquitous access. Belated efforts to narrow the geographical range of a specific locality examined, and to create multiple categories of broadband bitrates offer some confirmation of this assertion,[47] as the FCC acts on the obvious need to generate and to disclose more granular broadband penetration data.

Historically, the FCC has actively engaged in data collection and quantitative market assessment, with an eye toward establishing caps on market concentration, as well as limits on vertical and horizontal integration by individual companies due to concerns about the potential for market domination by individual firms in the absence of robust competition. Now convinced that it should relax ownership and marketplace restrictions, the Commission has changed its numerical caps or abandoned them entirely based upon non-quantifiable conclusions about the current or future onset of increased competition.[48] Some

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net benefits in terms of service choice, innovations fostered by technological change and improvements in both space and ground segment, and improvements in service quality. Observed metrics of market performance are consistent with good market performance, recognizing the constraints imposed by industry cost structure and persistent excess capacity."). *See also*, FCC Report to Congress as Required by the ORBIT Act, *Tenth Report*, 2009 WL 1674896 (June 15, 2009).

46. *See* FCC, INDUSTRY ANALYSIS & TECHNOLOGY DIVISION WIRELINE COMPETITION BUREAU, HIGH-SPEED SERVICES FOR INTERNET ACCESS: STATUS AS OF DEC. 31, 2008, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296239A1.pdf.

47. Development of Nationwide Broadband Data to Evaluate Reasonable & Timely Deployment of Advanced Services to All Ams., Improvement of Wireless Broadband Subscribership Data, & Development of Data on Interconnected Voice Over Internet Protocol (VOIP) Subscribership, *Report & Order & Further Notice of Proposed Rulemaking*, 23 FCC Rcd. 9691 (2008), *partial recon*., 23 FCC Rcd. 9800 (2008).

48. 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Report & Order & Notice of Proposed Rulemaking*, 18 FCC Rcd. 13,620, 13,623 (2003), *aff'd in part and remanded in part*, Prometheus Radio Project v. FCC, 373 F.3d 372, 395-397 (3d Cir. 2004), *cert. denied* 545 U.S. 1123 (2004) ("Nonetheless, while the march of technology has brought to our homes, schools, and places of employment unprecedented access to information and programming, our broadcast ownership rules, like a distant echo from the past, continue to restrict who may hold radio and television licenses as if broadcasters were America's information gatekeepers. Our current rules inadequately account for the competitive presence of cable, ignore the diversity-enhancing

reviewing courts have chided the FCC for insufficiently examining the marketplace consequences of initiatives to relax ownership[49] and other restrictions.[50]

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value of the Internet, and lack any sound basis for a national audience reach cap. Neither from a policy perspective nor a legal perspective can rules premised on such a flawed foundation be defended as necessary in the public interest. Not surprisingly, therefore, several of the existing rules have been questioned, reversed, and in some cases vacated by the courts. Our current rules are, in short, a patchwork of unenforceable and indefensible restrictions that, while laudable in principle, do not serve the interests they purport to serve.").

49. *Prometheus Radio Project*, 373 F.3d at 395 ("Though our standard of review analysis is lengthy, it is in the end amenable to a straightforward summing-up: In a periodic review under § 202(h), the Commission is required to determine whether its then-extant rules remain useful in the public interest; if no longer useful, they must be repealed or modified. Yet no matter what the Commission decides to do to any particular rule-retain, repeal, or modify (whether to make more or less stringent)-it must do so in the public interest and support its decision with a reasoned analysis. We shall evaluate each aspect of the Commission's Order accordingly."). *Id.* at 402-03 ("But for all of its efforts, the Commission's Cross-Media Limits employ several irrational assumptions and inconsistencies. We do not object in principle to the Commission's reliance on the Department of Justice and Federal Trade Commission's antitrust formula, the Herfindahl-Hirschmann Index ('HHI'), as its starting point for measuring diversity in local markets. In converting the HHI to a measure for diversity in local markets, however, the Commission gave too much weight to the Internet as a media outlet, irrationally assigned outlets of the same media type equal market shares, and inconsistently derived the Cross-Media Limits from its Diversity Index results. For these reasons, detailed below, we remand for the Commission to justify or modify further its Cross-Media Limits."). *Id.* at 411 ("Although the Commission is entitled to deference in deciding where to draw the line between acceptable and unacceptable increases in markets' Diversity Index scores, we do not affirm the seemingly inconsistent manner in which the line was drawn. As the chart above illustrates, the Cross-Media Limits allow some combinations where the increases in Diversity Index scores were generally higher than for other combinations that were not allowed . . . . The Commission's failure to provide any explanation for this glaring inconsistency is without doubt arbitrary and capricious, and so provides further basis for remand of the Cross-Media Limits."). *See also* 2006 Quadrennial Regulatory Review—Review of the Comm'n's Broadcast Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996, *Report & Order & Order on Reconsideration*, 23 FCC Rcd. 2010 (2008).

50. In *Schurz Commc'ns, Inc. v. FCC*, 982 F.2d 1043 (7th Cir. 1992), the Seventh Circuit rejected the FCC's attempt to modify rules designed to limit broadcast networks' control of programming aired by affiliates, including a rule limiting to 40 percent how much of a network's own prime-time entertainment schedule may consist of programs produced by the network itself. The court strongly admonished the FCC:

> The Commission's articulation of its grounds is not adequately reasoned. Key concepts are left unexplained, key evidence is overlooked, arguments that formerly persuaded the Commission and that time has only strengthened are ignored, contradictions within and among Commission decisions are passed over in silence. The impression created is of unprincipled compromises of Rube Goldberg complexity among contending interest groups viewed merely as clamoring suppliants who have somehow to be conciliated. The Commission said that it had been "confronted by alternative views of the television programming world so starkly and fundamentally at odds with each other that they virtually defy reconciliation" (emphasis added). The possibility of resolving a conflict in favor of the party with the stronger case, as distinct from throwing up one's hands and splitting the difference, was overlooked. The opinion contains much talk but no demonstration of expertise, and a good deal of hand-wringing over the need for prudence and the desirability of avoiding "convulsive" regulatory reform, yet these unquestioned goods are never related to the particulars of the rules-rules that could have a substantial

In contrast, the FCC has tried to justify more regulation based on industry concentration in the cable television marketplace. Even as the FCC generally attempts to justify less restrictions on most stakeholders, a former Chairman sought to expand the scope of regulation based on questionable data allegedly confirming that the cable industry had reached a market domination threshold of serving at least 70 percent of the population with at least 70 percent of those people with access to cable actually subscribing.[51] This so-called 70/70 rule seems straightforward and easily calculated: to justify more intrusive and ostensibly public interest serving government oversight of the cable industry, the FCC need only compile market penetration statistics and report if and when market penetration triggered both 70 percent thresholds. Regrettably, the FCC either could not compile such data or simply had not done so even though former FCC Chairman Kevin Martin insisted that a commercial venture's data collection confirmed that the cable industry had exceeded both thresholds.[52] Apparently it did not matter that cable television market penetration statistics, even those contemporaneously compiled by the FCC, showed declining market share in the video programming distribution market, as a result of increasing market share held by two Direct Broadcast Satellite operators and recent market entry by incumbent telephone companies such as Verizon and AT&T.[53]

Even as the FCC uses market penetration data to tweak regulation, the Commission typically avoids burdening stakeholders with data reporting obligations or subjecting such data to public scrutiny. The Commission has accepted the view that knowing whether a particular Internet Service Provider (ISP) serves a locality constitutes a trade secret.[54] One would think that if a venture opts not to serve a specific

> impact on an industry that permeates the daily life of this nation and helps shape, for good or ill, our culture and our politics. The Commission must do better in articulating their justification.

Id. at 1050.

51. Section 612(g) of the Communications Act of 1934, as amended, provides that when "cable systems with 36 or more activated channels are available to seventy percent of households within the United States" and when seventy percent of those households subscribe to them, "the Commission may promulgate any additional rules necessary to promote diversity of information sources."

52. *See Thirteenth Annual Video Programming Report*, *supra* note 17.

53. Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Twelfth Annual Report*, 21 FCC Rcd. 2503, 2507 (2006) ("Data submitted in the record this year raises questions as to whether the so-called '70/70 test' has been satisfied. Accordingly, the Commission is seeking further public comment on the best methodologies and data for measuring the 70-percent thresholds and, if the thresholds have been met, what action might be warranted to achieve the statutory goals.").

54. Ctr. for Pub. Integrity v. FCC, 505 F. Supp. 2d 106 (D.D.C. 2007) (affirming the FCC's determination that location of service by a specific venture constitutes a trade secret).

locality, this decision results from a commercial determination that service would generate insufficient revenues. In light of the FCC's Section 706 obligation to identify areas unserved or underserved by ISPs, arguably the lack of available service options should trigger concern about whether residents in such localities need regulatory intervention, possibly including subsidized access to broadband services.

III. THE FCC GENERALLY USES COLLECTED OR SUBMITTED DATA AND STATISTICS TO JUSTIFY A DESIRED OUTCOME

A. Regulatory Forbearance

As authorized by Section 10 of the Telecommunications Act of 1996 ('96 Act), the FCC, on its own initiative or based on a stakeholder's application, shall forbear from regulating when justified by marketplace conditions and the public interest.[55] Incumbent wireline telephone companies have aggressively sought such deregulation based on the simple premise that they face facilities-based competition. For the FCC to comply with Section 10 of the '96 Act, the Commission must compile empirical evidence that corroborates the applicants' assertions about robust and sustainable competition. Instead, the FCC has relied on the prospect of competition, or based its decision to deregulate on market entry by as few as one facilities-based carrier.

In 2005, the FCC partially granted Qwest's request to forbear from applying price cap, rate of return, tariffing, and 60-day discontinuance regulations for interstate mass market exchange access services and mass market broadband Internet access services in Omaha, Nebraska. The Commission willingly eliminates traditional regulatory safeguards when true and robust facilities-based competition[56] exists: "Through this

55. The Telecommunications Act of 1996 requires the FCC to forbear from any statutory provision or regulation if the Commission determines that: (1) enforcement of the regulation is not necessary to ensure that charges and practices are just and reasonable, and are not unjustly or unreasonably discriminatory; (2) enforcement of the regulation is not necessary to protect consumers; and (3) forbearance is consistent with the public interest. 47 U.S.C. § 160(a) (2008). In making such determinations, the Commission must also consider "whether forbearance from enforcing the provision or regulation will promote competitive market conditions." 47 U.S.C. § 160(b). Section 10(d) specifies, however, that "[e]xcept as provided in section 251(f), the Commission may not forbear from applying the requirements of section 251(c) or 271 . . . until it determines that those requirements have been fully implemented." 47 U.S.C. § 160(d).

56. Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area, WC Docket No. 04-223, *Memorandum Opinion & Order*, 20 FCC Rcd. 19,415, 19,432–33 (2005), *aff'd*, Qwest Corp. v. FCC, 482 F.3d 471 (D.C. Cir. 2007) ("The record of competition compiled in this proceeding and, significantly, the other market-opening regulations that we leave in place today, support our finding that supply elasticity in this market is high for all mass market services. Cox's extensive facilities build-out in the Omaha MSA, and growing success in luring Qwest's mass market customers, indicates that . . . [ample facilitates-based competition exists] for both switched access and broadband Internet access services.").

Order, we show that we are ready and willing to step aside as regulators and let market forces prevail where facilities-based competition is robust."[57]

Even as the FCC recognized that robust, facilities-based competition does not actually exist,[58] the Commission nevertheless offered some deregulatory relief.

The Commission later thought to consider whether facilities-based competition exists for all necessary elements, including the first and last mile links to end users. Based on that consideration and new found interest in incumbent and market entrant market share, the FCC has recently rejected some forbearance petitions, even for major urban areas most likely to have the greatest degree of competition.[59]

Verizon appealed the Commission's rejection of forbearance petitions based on the perception that the FCC used different evaluative criteria for assessing the sufficiency of competition. The D.C. Circuit agreed that the Commission had to explain in greater detail how and why it changed its evaluative criteria. This case highlights a remarkable paradox: in 2005 the FCC could use the prospect of facilities-based competition, based on market entry by a single cable television competitor, to justify some regulatory forbearance of the incumbent carrier's local business services in Omaha, Nebraska. Two years later, the FCC belatedly thought to consider some aspects as to whether such competition could remain sustainable, even for the largest cities in the United States. This decision to require clearer evidence of competition triggered a judicial remand.

How the FCC treats regulatory forbearance petitions shows that the Commission has not established clear and consistent evidentiary requirements.[60] On one hand, the FCC got away with using general,

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57. *Id.* at 19,416.

58. *Id.* at 19,457 ("Even Cox, which is the competitive LEC with the most extensive facilities-based coverage in Qwest's territory in the Omaha MSA, depends on Qwest for interconnection, collocation, and reasonable notice of changes in Qwest's network in order to exchange telecommunications traffic in the Omaha MSA. Cox reports that approximately [REDACTED] percent of all the traffic that it sends and receives in the Omaha MSA depends on section 251(c)(2) interconnection and collocation—the effectiveness of which depends in part on reasonable notice of network changes.").

59. Petition of Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence & Virginia Beach Metropolitan Statistical Areas, Inc., WC Docket No. 06-172, *Memorandum Opinion & Order*, 22 FCC Rcd. 21,293 (2007), *remanded by* Verizon Tel. Cos. v. FCC, 570 F.3d 294 (D.C. Cir. 2009).

60. The Commission acknowledges this in a Report and Order establishing more specific criteria for evaluating forbearance petitions:

> We acknowledge that we have not previously required petitioners to specify in the petition how the requested relief meets each of the three forbearance criteria, and that a requirement to do so will burden applicants to the extent that they must develop their supporting arguments in advance of filing. We do not, however, consider this an

non-specific indications that competition might exist, without any proof that such competition would prove longstanding and offer consumers real service alternatives. Businesses with heavy telecommunications requirements have complained that competition has not flourished particularly for "middle mile" links between several geographically diverse facilities in a metropolitan area. However, an appellate court accepted the Commission's conclusion that incumbent carriers offered reasonable rates.[61] Remarkably, the FCC's effort to require more granular and specific evidence of competition triggered a remand based on the Commission's failure to provide sufficient notice and explanation for its decision to require more specific evidence of sufficient competition.[62]

B. The Absence of an Antitrust Remedy

In two cases, the Supreme Court has all but eliminated the possibility that a court can offer a remedy to anticompetitive practices should the FCC fail to do so. The Court has concluded that, because industry sector-specific legislation provides the FCC with authority to craft regulatory remedies when the Commission refuses to act, appellate

> unreasonable expectation, and we find that the benefit to both commenters and the Commission of clarity and precision outweighs the burden on the petitioner of explaining how forbearance from each regulation or statutory provision meets each prong.

Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Commc'ns Act of 1934, as Amended, *Report & Order*, FCC 09-56, 2009 WL 1856503, ¶ 14 (June 29, 2009) [hereinafter *Section 10 Procedural Requirements Report & Order*].

61. Ad Hoc Telecomms. Users Comm. v. FCC, 572 F.3d 903, 908 (D.C. Cir. 2009) (citing EarthLink, Inc. v. FCC, 462 F.3d 1, 12 (D.C. Cir. 2006)) ("Our task on review is therefore limited. We review the FCC's action in this case only to ensure that it is not 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' 5 U.S.C. § 706(2)(A). That standard is particularly deferential in matters such as this, which implicate competing policy choices, technical expertise, and predictive market judgments."); *see also* Time Warner Telecom, Inc. v. FCC, 507 F.3d 205, 221 (3d Cir. 2007).

62. In 2009 the FCC belatedly specified the documentation petitioners must submit:

> A petition for forbearance must include in the petition the facts, information, data, and arguments on which the petitioner intends to rely to make the prima facie case for forbearance. Specifically, the prima facie case must show in detail how each of the statutory criteria are met with regard to each statutory provision or rule from which forbearance is sought. A petition for forbearance must take into account relevant Commission precedent. If the petitioner intends to rely on data or information in the possession of third parties, the petition must identify the data or information, and the parties that possess it, and explain the relationship of the information to the prima facie case. When the petition is filed at the Commission, the petitioner must provide a copy of it to each party identified as possessing relevant data or information, and the relevant Bureau will respond to requests for third-party discovery on a case-by-case basis. Other than third-party information, a petition may not rely on data or information that is not made available, without charge, to the Commission staff and interested parties that agree to comply with any protective orders the Commission issues in the course of the proceeding. We find broad support for requiring petitioners to state a prima facie case.

Section 10 Procedural Requirements Report & Order, *supra* note 60, at ¶17.

courts have no legal basis for imposing additional antitrust safeguards.[63]

The Supreme Court's deference to the FCC has gone so far as to allow an incumbent carrier to offer end users lower rates than what it charges competitors, an apparent predatory and anticompetitive practice commonly referred to as a price squeeze.[64] In 2003, several ISPs filed suit against Pacific Bell Telephone Co., contending that this incumbent carrier attempted to monopolize the market for Digital Subscriber Line (DSL) broadband Internet access by creating a price squeeze with ISP competitors obligated to pay a higher wholesale price than what Pacific Bell offered on a retail basis. Both the District Court and the Ninth Circuit Court of Appeals agreed that the ISPs could present their price squeeze claim, despite the Supreme Court's *Trinko* decision that severely constrained the scope of antitrust remedies in lieu of, or in addition to, FCC regulatory safeguards.

The Court assumed that Pacific Bell had no antitrust duty to deal with any ISPs based on the FCC's premise that ample facilities-based competition exists and the Commission's refusal to order any remedy even when presented with clear evidence that Pacific Bell offered retail users rates below wholesale rates offered to competitors.[65] But for a voluntary concession to secure the FCC's approval of AT&T's acquisition of BellSouth, the Court noted that Pacific Bell would not even have a duty to provide ISPs wholesale services. The Court granted *certiorari* to resolve the question whether ISP plaintiffs can bring a price-squeeze claim under Section 2 of the Sherman Act when the defendant carrier has no antitrust-mandated duty to deal with the plaintiffs. The lower courts concluded that the *Trinko* precedent did not bar such a claim, but the Supreme Court reversed this holding.

On procedural grounds, the Court's decision upbraided the ISP plaintiffs for changing the nature of their claim from a price squeeze to one characterizing Pacific Bell's tactics as predatory pricing, which is a practice where one competitor charges below cost rates with an eye toward driving out competitors after which rates can rise. On substantive grounds, the Court noted that a new emphasis on predatory pricing would have required determination whether the retail price was set below cost, a claim the ISPs did not make.[66]

The Court determined that the case did not become moot, because

63. Verizon Commc'ns Inc. v. Law Office of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

64. Pac. Bell Tel. Co., v. Linkline Commc'ns, Inc., 2009 U.S. LEXIS 1635 (Feb. 25, 2009).

65. "DSL providers face stiff competition from cable companies and wireless and satellite services." *Id*. at *19 n.2.

66. The Court referenced *Brook Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), that supports the inference that a predatory pricing claim can be established only with proof of below cost pricing coupled with evidence that the defendant can subsequently recoup any lost profits.

of the change in economic and antitrust arguments. However the decision evidences great skepticism whether the ISPs have any basis for a claim, because in the Court's reasoning the ISPs failed to make a claim that Pacific Bell's retail DSL prices were predatory, and the ISPs also failed to refute the Court's conclusion that Pacific Bell had no duty to deal with the ISPs, i.e., to provide cost-based wholesale service.[67] The Court apparently can ignore the voluntary concession AT&T made that created a duty to deal. Although that concession may trigger FCC oversight, it does not change whether an antitrust duty to deal arises. The Court reads the *Trinko* case as foreclosing any antitrust claim where no antitrust duty to deal exists.[68]

The Court remanded the case to the district court to determine whether the ISP plaintiffs have any viable predatory pricing claim. The Court expressed the need for clear antitrust rules and apparently views consumer access to low retail prices—predatory or not—as sufficient reason for courts to refrain from intervening. The Court does not seem troubled even if all ISP competitors exited the market, an event that surely would enable the surviving incumbent carrier to raise rates: "For if AT&T can bankrupt the plaintiffs by refusing to deal altogether, the plaintiffs must demonstrate why the law prevents AT&T from putting them out of business by pricing them out of the market."[69]

This case evidences a strong reluctance on the part of the Supreme Court to support any sort of judicial review over the pricing strategies of carriers and analysis of the FCC's determinations about the appropriateness of such prices and the viability of competition. Judicial deference to the FCC and the Commission's failure to detect and to remedy the price squeeze or predatory pricing surely will result in the near term elimination of competition unless ISPs quickly replace expensive leased lines with their own facilities, a desirable but commercially impractical goal at least in the short term. The FCC's assumptions about competition and its viability do not jibe with what incumbent carriers can do to drive competitors out of business if market entrants do not quickly install necessary infrastructure.

67. "The challenge here focuses on retail prices—where there is no predatory pricing—and terms of dealing where there is no duty to deal." *Linkline Commc'ns, 2009 U.S. LEXIS 1635, at *20.* "If there is no duty to deal at the wholesale level and no predatory pricing at the retail level, then a firm is certainly not required to price *both* of these services in a manner that preserves its rivals' profit margins." *Id*. at *25.

68. "In this case, as in *Trinko*, the defendant has no obligation under the antitrust laws to deal with the plaintiff at wholesale; any such duty arises only from FCC regulations, not from the Sherman Act." *Id*. at *20.

69. *Id*. at *33.

C. *Mergers and Acquisitions*

With quite rare exceptions, the FCC has approved each and every merger application submitted to it for review in the last twenty years. The Commission can do so, despite initial opposition typically expressed by one or more Commissioners, by securing "voluntary" concessions from the acquiring company.[70] In reality, ventures sweeten their offer of prospective remedies for potential anticompetitive practices, or excessive market concentration, based on signals of distress made by individual Commissioners. The final FCC order approving the merger can identify the potential for risky vertical and horizontal market concentration, but dismiss concerns about the potential for adverse impact on competition thanks to safeguards largely offered by the acquiring firm,[71] or on some general view that the merged firm will robustly compete with other incumbent firms.[72]

Alternatively, the Commission approves an acquisition based on general notions that the acquiring and acquired parties did not compete with each other[73] or that, by using broad market definitions, the merged firm will not adversely impact the already robustly competitive marketplace. In the former, the FCC approved the merger of Intelsat and PanAmSat largely on grounds that, despite being two of the world's largest fixed satellite service providers, Intelsat offered international

70. *See* Sean M. Carroll, *Main Dish With a Side of Voluntary Commitments: Dish Network-DirecTV Revisited*, 61 ADMIN. L. REV. 661 (Summer 2009).

71. Applications for Consent to the Transfer of Control of Licenses XM Satellite Radio Holdings Inc., Transferor to Sirius Satellite Radio Inc., Transferee, *Memorandum Opinion & Order & Report & Order*, 23 FCC Rcd. 12,348, 12,352 (2008) ("Based on the record before us, we conclude that the proposed transfer of control would violate our rule against one licensee controlling both SDARS licenses. We also conclude that, absent Applicants' voluntary commitments and other conditions discussed below, the proposed transaction would increase the likelihood of harms to competition and diversity . . . . Applicants, however, have proposed significant voluntary commitments regarding steps the merged company would take to mitigate harms and achieve public interest benefits. We find that absent those voluntary commitments and other conditions, the harms of the transaction would outweigh the potential public interest benefits. On balance, however, we find that with Applicants' voluntary commitments and other conditions, the potential public interest benefits outweigh the harms.").

72. Sprint Nextel Corp. & Clearwire Corp. Applications for Consent to Transfer Control of Licenses, Leases, & Authorizations, *Memorandum Opinion & Order*, 23 FCC Rcd. 17,570, 17,572 (2008) (approving merger of two major wireless carriers Sprint-Nextel and Clearwire Corp.) ("We find that competitive harm is unlikely in any market, primarily because multiple other service providers in these markets would be an effective competitive constraint on the behavior of the merged entity. We also conclude that the transaction will result in major public interest benefits by facilitating the provision of a nationwide WiMAX-based network that will lead to increased competition, greater consumer choice, and new services.").

73. Applications Filed for the Transfer of Control of Embarq Corp. to Centurytel, Inc. *Memorandum Opinion & Order*, 24 FCC Rcd. 8741 (2009) ("This lack of present competition between these two incumbent LECs is hardly surprising both carriers largely serve rural local exchanges and the adjacent exchanges are almost all small and rural.").

services and PanAmSat largely served North America.[74] In the latter, the Commission approved the merger of the only two satellite-based, premium audio service providers largely based on the premise that a satellite monopoly would not harm consumers in light of their access to alternative sources of content, such as portable music players, terrestrial radio broadcasting, and compact discs.[75]

The FCC allowed two major telephone companies to merge largely on grounds that they did not compete with each other and based on the following beneficial outcomes that the $84.5 billion merger would accrue:

> Deployment of broadband throughout the entire AT&T-BellSouth in-region territory in 2007[;] Increased competition in the market for advanced pay television services due to AT&T's ability to deploy Internet Protocol-based video services more quickly than BellSouth could do so absent the merger[;] Improved wireless products, services and reliability due to the efficiencies gained by unified management of Cingular Wireless, which is now a joint venture operated by BellSouth and AT&T[;] Enhanced national security, disaster recovery and government services through the creation of a unified, end-to-end IP-based network capable of providing efficient and secure government communications[; and] Better disaster response and preparation from the companies because of unified operations. [76]

In all but one of the above anticipated benefits of the AT&T BellSouth merger, the FCC articulated general, not easily quantifiable public benefits. The inability to measure the benefits of this merger contrasts with the FCC's allegedly steadfast commitment to require merger applicants to bear the burden of explaining with specificity how the public benefits:

> The Commission applies several criteria in deciding whether a claimed benefit is cognizable. First, the claimed benefit must be transaction or merger specific (i.e., the claimed benefit "must be likely to be accomplished as a result of the merger but unlikely to be realized by other means that entail fewer anticompetitive effects").

74. Constellation, LLC, Carlyle Panamsat I, LLC, Carlyle Panamsat II, LLC, Pep Pas, LLC, & Peop Pas, LLC, Transferors, & Intelsat Holdings, Ltd., Transferee, Consolidated Application For Authority to Transfer Control of Panamsat Licensee Corp. & Panamsat H-2 Licensee Corp., *Memorandum Opinion & Order*, 21 FCC Rcd. 7,368 (2006).

75. Applications for Consent to the Transfer of Control of Licenses XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee, 23 FCC Rcd. 12,348 (2008).

76. News Release, FCC, FCC Approves Merger of AT&T Inc. & Bellsouth Corporation, Significant Public Interest Benefits Likely to Result (Dec. 29, 2006), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-269275A1.pdf. *See also* AT&T Inc. & BellSouth Corp., Application for Transfer of Control, 22 FCC Rcd. 5662, 5760–72 (2007), *on partial recon*., 22 FCC Rcd. 6285 (2007).

> Second, the claimed benefit must be verifiable. Because much of the information relating to the potential benefits of a merger is in the sole possession of the Applicants, they are required to provide sufficient evidence supporting each claimed benefit to enable the Commission to verify its likelihood and magnitude. In addition, as the Commission has noted, "the magnitude of benefits must be calculated net of the cost of achieving them." Furthermore, the Commission will discount or dismiss speculative benefits that it cannot verify.[77]

In one of the only merger applications the FCC did not approve in the last two decades, the Commission stated that "benefits that are to occur only in the distant future may be discounted or dismissed because, among other things, predictions about the more distant future are inherently more speculative than predictions about events that are expected to occur closer to the present."[78]

AT&T secured FCC approval of the BellSouth acquisition by offering concessions and by later supplementing them. In a letter to the FCC on December 28, 2006, AT&T promised to make available broadband Internet access service by December 31, 2007 to 100 percent of the residential living units in the AT&T/BellSouth service regions, rollout of unregulated, fiber-based facilities reaching at least 1.5 million homes, price caps and discounting of high speed data transmission services and conditionally agreeing to comply with nondiscrimination principles for Internet services. Parties have disputed whether AT&T has achieved its promises, but the FCC has neither investigated nor sanctioned the company.[79]

The latter two commitments warrant closer scrutiny for two reasons: (1) an unprecedented statement by the FCC's two Republican Commissioners that neither they nor the FCC should hold AT&T to its pricing commitments which former Chairman Martin and Commissioner Tate consider the reimposition of price regulation and (2) the selective nature of AT&T's Internet service commitments. On the matter of AT&T's commitment to refrain from exercising deregulatory pricing flexibility it had previously secured from the FCC, Commissioners Martin and Tate stated that "even when AT&T attempts to fulfill its merger commitments by filing tariffs, the

77. Applications Filed for the Transfer of Control of Embarq Corp. to Centurytel, Inc., *Memorandum Opinion & Order*, 24 FCC Rcd. 8741, 8756 (2009) (internal citations omitted).

78. Application of Echostar Commc'ns Corp., General Motors Corp., & Hughes Electronics Corp. (Transferors) & Echostar Commc'ns Corp. (Transferee), *Hearing Designation Order*, 17 FCC Rcd. 20,559, 20,630–31 (2002) (designating a hearing to resolve issues pertaining to the public interest merits in the merger of two major direct broadcast satellite firms).

79. *See* FCC, AT&T Inc. & BellSouth Corporation, FCC Dkt. No. 06-74, http://www.fcc.gov/transaction/att-bellsouth.html (last visited Dec. 19, 2009).

Commission is not bound to approve these tariffs. Indeed, consistent with the Commission's prior policies and precedent, we would oppose such discriminatory practices and would encourage such tariffs to be rejected."[80]

AT&T's Internet nondiscrimination commitments appear generous until one considers the practical ramifications of the company's commitment. AT&T has committed to "conduct business in a manner that comports with the principles set forth"[81] in the Commission's network neutrality policy principles statement for 30 months running from the merger closing date.[82] However, AT&T limits its neutral network operation and routing commitment to its wireline broadband Internet access service—*e.g.*, Digital Subscriber Line service—and not to the fiber optic network that it increasingly will use for video and higher speed broadband service. Additionally, AT&T limits any network neutrality commitment to the pathway linking end users to the closest location where it receives and hands off Internet traffic with other carriers. These reservations provide AT&T with the means to operate next generation Internet networks with no network neutrality obligations, unless the FCC imposes requirements on all ISPs.

D. Relaxed Limits on Vertical and Horizontal Integration

The FCC has incrementally relaxed limits on market penetration by a single company. Once again the Commission rationalizes such deregulation based on expanded competitive choice, despite evidence to the contrary in some instances.[83] The Third Circuit Court of Appeals in

80. Joint Statement of Chairman Kevin J. Martin & Commissioner Deborah Taylor Tate Re: *AT&T Inc. & BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74 (Dec. 29, 2006), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-269275A2.doc.

81. Letter from Robert W. Quinn, Jr. AT&T Sr. Vice President Federal Regulatory (Dec. 28, 2006) (attached to the AT&T-Bell South Merger News release), *available at* http://hraunfoss.fcc.gov/edocs_public/attachment/DOC-269275A1.pdf.

82. *See* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, *Policy Statement*, 20 FCC Rcd. 14,986 (2005). For background on the concept of network neutrality, see Marvin Ammori, *Beyond Content Neutrality: Understanding Content-Based Promotion of Democratic Speech*, 61 FED. COMM. L. J. 273 (March 2009); Rob Frieden, *Internet 3.0: Identifying Problems and Solutions to the Network Neutrality Debate*, 1 INT'L J. OF COMM., 461 (2007), *available at* http://ijoc.org/ojs/index.php/ijoc/article/view/160/86; Rob Frieden, *Network Neutrality or Bias?—Handicapping the Odds for a Tiered and Branded Internet*, 29 HASTINGS COMM. & ENT. L. J., 171 (Winter 2007); Barbara van Schewick, *Towards an Economic Framework for Network Neutrality Regulation*, 5 J. ON TELECOMM. & HIGH TECH. L. 329 (2007); Amit M. Schejter & Moran Yemini, *"Justice, and Only Justice, You Shall Pursue": Network Neutrality, the First Amendment and John Rawls's Theory of Justice*, 14 MICH. TELECOMM. & TECH. L. REV. 137 (Fall 2007); Tim Wu & Christopher S. Yoo, *Keeping the Internet Neutral? Tim Wu and Christopher Yoo Debate*, 59 FED. COMM. L.J. 575 (June 2007).

83. The FCC has experienced several judicial reversals of the Commission's attempt to relax broadcast and MVPD ownership rules. In *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002), *modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002), the D.C. Circuit remanded the FCC's

Prometheus Radio Project v. FCC held that the FCC's decision to replace its newspaper/broadcast cross-ownership rules with cross-media limits did not violate the Constitution or Communications Act of 1934, as amended, but that the Commission did not sufficiently justify its particular chosen numerical limits for cross-ownership of media within local markets.[84] While the court affirmed the FCC's decision to retain the local television ownership rule restricting combinations of four largest stations in any market, it held that the Commission's modification to allow triopolies in markets of 18 stations or more and duopolies in other markets was unsupported by the evidence. The court also rejected the methodology used by the FCC to assess the degree of competition in broadcast markets and to justify the retention of numerical ownership restrictions.[85] "Yet no matter what the Commission decides to do to any particular rule—retain, repeal, or modify (whether to make more or less stringent)—it must do so in the public interest and support its decision with a reasoned analysis."[86]

E. *Cable Television Ownership Restrictions*

FCC regulation of cable television operators' maximum permissible horizontal and vertical ownership provides a case study showing how the Commission, over time, can fail to justify its rationale for both deregulating and also maintaining regulations. As directed by Congress in the Cable Television Consumer Protection and Competition Act of 1992,[87] the FCC established a 30 percent horizontal ownership limit on the number of cable subscribers served by a single company and a 40 percent vertical limitation on the number of channels for which a single company has an attributable ownership interest.[88] In 1999, the

retention of the then congressionally-established 35 percent national television ownership rule. *See* 1998 Biennial Review—Review of the Comm'ns Broadcast Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996, *Biennial Review Report*, 15 FCC Rcd. 11,058 (2000). In *Sinclair Broadcasting Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002), the court remanded the Commission's 1999 revision of its local television multiple ownership rule. *See* Review of the Comm's Regulations Governing Television Broad., 14 FCC Rcd. 12,903 (1999). *See also*, Prometheus Radio Project v. FCC, 373 F.3d 372, 382 (3d Cir. 2004), *cert. denied*, 545 U.S. 1123 (2004).

84. *Prometheus*, 373 F.3d at 382.

85. *Id.* ("Most importantly, the Commission has not sufficiently justified its particular chosen numerical limits for local television ownership, local radio ownership, and cross-ownership of media within local markets. Accordingly, we partially remand the Order for the Commission's additional justification or modification . . . .").

86. *Id.* at 395.

87. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified as amended in scattered sections of chapter five, subchapter V-A of 47 U.S.C.).

88. Implementation of Sections 12 & 19 of the Cable Television Consumer Protection & Competition Act of 1992, 8 FCC Rcd. 8565 (1993), *aff'd in part, rev'd in part sub nom.* Time

Commission revised the 30 percent horizontal limit to permit a cable operator to reach 30 percent of all Multichannel Video Programming Distributor (MVPD) subscribers, rather than solely cable subscribers thereby increasing the cable subscriber limit to 36.7 percent.[89] The D.C. Circuit Court of Appeals held that the horizontal and vertical ownership limits unduly burdened cable operators' First Amendment rights and that the Commission's evidentiary basis for imposing the ownership limits and its rationales supporting the vacated attribution rules did not meet the applicable standards of review.[90] Additionally the court determined that the Commission had failed to consider sufficiently changes that have occurred in the MVPD market since passage of the 1992 Cable Act. Even as the FCC, on remand, sought comment on the nature of the MVPD industry, the Commission had no problem approving several blockbuster mergers, including Comcast's acquisition of the cable television ownership interests of AT&T[91] and News Corporation's acquisition of the direct broadcast satellite and other media business of Hughes Electronics Corporation.[92]

The D.C. Circuit Court of Appeals stated that the FCC failed to build a credible evidentiary record on which to establish relaxed ownership rules:

> [T]he statute allows the Commission to act prophylactically against the risk of 'unfair' conduct by cable operators that might unduly impede the flow of programming, either by the 'joint' actions of two or more companies or the independent action of a single company of sufficient size. But the Commission has pointed to nothing in the record supporting a non-conjectural risk of anticompetitive behavior, either by collusion or other means. Accordingly, we reverse and remand with respect to the 30 percent rule. [93]

Acting six years after the remand in *Time Warner Entertainment Co.*,

Warner Entm't Co., v. FCC, 240 F.3d 1126 (D.C.Cir. 2001), *cert. denied* Consumer Fed'n of Am. v. FCC, 534 U.S. 1054 (2001). The D.C. Circuit upheld the underlying statute in *Time Warner Entertainment Co. v. United States*, 211 F.3d 1313 (D.C. Cir. 2000).

89. Implementation of Section 11(c) of the Cable Television Consumer Protection & Competition Act of 1992, Horizontal Ownership Limits, MM Docket No. 92-264, *Third Report & Order*, 14 FCC Rcd. 19,098 (1999).

90. *Time Warner Entm't Co.*, 240 F.3d at 1126.

91. *See* Applications for Consent to the Transfer of Control of Licenses, Comcast Corporation & AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee *Memorandum Opinion & Order*, 17 FCCR 23, 246 (2002).

92. *See* General Motors Corporation & Hughes Electronics Corporation, Transferors & The News Corporation Limited, Transferee, For Authority to Transfer Control, *Memorandum Opinion & Order*, 19 FCC Rcd. 473 (2003). The programming assets involved in the transaction included 35 owned and operated (O&O) full-power television broadcast stations, a national television broadcast network, ten national cable programming networks, and 22 regional cable programming networks.

93. *Time Warner Entm't Co.*, 240 F.3d at 1136.

the FCC again proposed a cap on attributable ownership interest in cable systems serving more than 30 percent of multichannel video programming subscribers nationwide as it had initially done in 1993.[94] The Commission reiterated the need to cap ownership interest so that no single cable operator or group of operators could leverage size and market power to impede unfairly the flow of programming to consumers as mandated by Section 613(f) of the 1992 Cable Act.[95]

The Commission sought to remedy the defects in its previous order that had triggered a reversal on grounds that the Commission lacked evidence that cable operators would collude based on an assumption that cable operators would coordinate their behavior in an anticompetitive manner. The Commission had justified a 30 percent cap on the assumption that the video marketplace could function well if 40 percent of the market constituted an "open field" with 60 percent captured by the two largest multiple system operators. Additionally the FCC responded to the court's admonition that the Commission had to consider both market share and the nature and type of competition when establishing a percentage cap on attributable ownership interest.

Prior to issuing its Fourth Report & Order and Further Notice of Proposed Rulemaking, the Commission sought to shore up the record with an analysis of bargaining theory and monopsony (single buyer) behavior. The empirical and survey data identified "the contractual relationships between programmers and cable operators in order to establish the extent of cable operators' market power and the effects of market power on the quantity and quality of programming, as well as the effects of market power on the programming costs of smaller MVPDs."[96]

The FCC concluded that a modified "open field" analysis remains the best way to determine the need for an ownership cap:

> After careful consideration of the evidence before us, including the language and intent of the statute and our understanding of the

94. The Comm'n's Cable Horizontal & Vertical Ownership Limits, *Fourth Report & Order & Further Notice of Proposed Rulemaking*, 23 FCC Rcd. 2134 (2008) [hereinafter *Fourth Cable Horizontal & Vertical Ownership Cap Order*]. *See also* Implementation of Sections 11 & 13 of the Cable Television Consumer Protection & Competition Act of 1992, Horizontal & Vertical Ownership Limits, *Second Report & Order*, 8 FCC Rcd. 8565 (1993); Implementation of Section 11(c) of the Cable Television Consumer Protection & Competition Act of 1992; Horizontal Ownership Limits, *Third Report &* Order, 14 FCC Rcd. 19,098 (1999) (revising the 30 percent horizontal limit to permit a cable operator to serve 30 percent of all MVPD subscribers rather than 30 percent of all cable homes passed in light of changed marketplace conditions).

95. Section 613(f) of the Act, added by the 1992 Cable Act, codified at 47 U.S.C. § 533(f)(2)(A), directs the FCC to conduct proceedings to establish reasonable limits on the number of subscribers a cable operator may serve ("horizontal limit") and the number of channels a cable operator may devote to its affiliated programming networks ("vertical," or "channel occupancy" limit).

96. *Fourth Cable Horizontal & Vertical Ownership Cap Order*, 23 FCC Rcd. at 2140.

> programming market, we determine that use of the open field approach to set a horizontal limit is the most appropriate means of ensuring that the flow of programming to consumers is not unfairly impeded. The modified open field method that we adopt in this *Order* yields a horizontal ownership cap that ensures that no cable provider is so large that it can prevent a programmer from serving "the number of viewers needed for viability—independent of concerns over anticompetitive conduct."[97]

The Commission concluded that even one powerful MSO could have sufficient market power to thwart the successful debut of a new programming network:

> Most importantly, we do not believe that a single new programming network, having failed to gain carriage on the largest cable operator's system, would have a good chance of both gaining carriage on other MVPDs and then induce enough of the large cable operator's subscribers to switch to the other MVPDs either to allow the network to gain sufficient subscribership to be financially viable, or to place substantial pressure on the large cable operator to carry the network within a reasonable period of time.[98]

The Commission noted that "without an open field that is large enough, many new programming networks might not even attempt to enter the market without a contract from the largest cable operator."[99]

In August, 2009, the D.C. Circuit Court of Appeals again rejected the FCC's decision to cap the national market penetration of a single cable operator at 30 percent.[100] In what it considered an egregious disregard of changed circumstances, such as the onset of substantial competition from DBS operators and fiber optic video providers, the court vacated the rule, rather than remanding to the FCC with a requirement that it reconsider the rationale and evidentiary support for the rule.

The court determined that the FCC did not have evidentiary support for the Commission's assumption that the two largest, vertically integrated cable operators, each having up to 30 percent national market share, would collude and both refuse to carry programming from new programmers. The Commission's "open field" analysis assumes that for a competitive video programming marketplace to function, new programmers need to have access to the 40 percent of the market not controlled by the top two cable operators.

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97. *Id.* at 2166 (citing *Time Warner Entm't Co.*, 240 F.3d at 1131–32).
98. *Id.* at 2168.
99. *Id.* at 2169.
100. Comcast Corp. v. FCC, 579 F.3d 1 (D.C. Cir. 2009).

The court also rejected as "feeble" the four "non-empirical" reasons that the FCC relied upon to largely ignore the competitive alternative provided by DBS: (1) high consumer costs in switching to DBS; (2) attractiveness of non-video services, such as broadband Internet access, provided by cable operators; (3) the inability of consumers to know the attractiveness of alternative video programming packages before consuming them; and (4) the inability of DBS to support new programming networks lacking financing.[101] The court noted that 50 percent of all DBS subscribers previously subscribed to cable television service, and that the Commission did not provide evidence to support the conclusion that offering non-video services confers a competitive advantage to cable operators, particularly in light of the fact that the two DBS operators have partnered with telephone companies to provide bundled services. The court also refused to agree that consumers do not know the nature of the content offered by new networks delivered via DBS.

The court noted the significant increase in the number of cable networks and the fact that the percentage of networks affiliated with, or owned by a vertically integrated cable operator has declined since 1992 when Congress enacted the Cable Television Consumer Protection and Competition Act that authorized FCC-prescribed market penetration caps.[102] The court concluded:

> [T]he Commission has failed to demonstrate that allowing a cable operator to serve more than 30 percent of all cable subscribers would threaten to reduce either competition or diversity in programming. First, the record is replete with evidence of ever increasing competition among video providers: Satellite and fiber optic video providers have entered the market and grown in market share since the Congress passed the 1992 Act, and particularly in recent years. Cable operators, therefore, no longer have the bottleneck power over programming that concerned the Congress in 1992. Second, over the same period there has been a dramatic increase both in the number of cable networks and in the programming available to subscribers.[103]

F. Abandoned Wireless Carrier Spectrum Cap

In 2003, the FCC eliminated a cap on the amount of spectrum a

101. *See id.* at 6–7.

102. 47 U.S.C. § 533(f)(1)–(f)(2)(A) ("The Cable Television Consumer Protection and Competition Act of 1992 directed the FCC, '[i]n order to enhance effective competition,' to prescrib[e] rules and regulations . . . [to] ensure that no cable operator or group of cable operators can unfairly impede, either because of the size of any individual operator or because of joint actions by a group of operators of sufficient size, the flow of video programming from the video programmer to the consumer.").

103. *Comcast Corp.*, 579 F.3d at 7.

single wireless telecommunications carrier can control, based on a current determination of ample competition:

> Measures of market concentration in the record show a substantial continuing decline in concentration in most local [commercial mobile radio service] CMRS markets. We find that considerable entry has occurred and that meaningful competition is present, particularly given the presence of such earmarks of competition as falling prices, increasing output, and improving service quality and options. Specifically, concentration in CMRS markets, as measured by subscriber share, is falling.[104]

Since the Commission's decision, the market has become even more concentrated with the top four carriers controlling over 87 percent of the market.[105] Notwithstanding such concentration and clear evidence that the carriers rarely change their rates or differ in what they charge retail customers, the Commission regularly claims that the wireless marketplace remains robustly competitive.[106]

In only one case did the FCC even seek to ensure that incumbent carriers comply with common carrier responsibilities to operate open networks, as opposed to the general practice of offering limited, "walled-garden" access to carrier- or handset manufacturer-selected content.

The FCC established an "Open Platform" requirement for a 22 MHz block of choice "beachfront" 700 MHz spectrum made available for auction in the conversion from analog to digital broadcast television. The winning bidder must allow consumers to use the handset of their choice and download and use any applications, subject to certain reasonable network management conditions that allow the licensee to

104. 2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services, *Report & Order*, 16 FCC Rcd. 22,668, 22,682 (2001). The FCC rejected as a significant barrier to market entry the need to acquire spectrum, in light of the Commission's view that resale opportunities would suffice. *Id*. at 22,690 ("Nonetheless, there are factors that moderate concern regarding the spectrum access barrier to entry. In particular, the need for direct access to spectrum is not absolute because carriers can compete in the provision of CMRS without direct access to spectrum through resale, or a mobile virtual network operator ('MVNO') arrangement.")

105. Using statistics compiled by a wireless trade association, the FCC reports that there were 255,395,599 cellular radio subscribers in the U.S. *Thirteenth CMRS Report*, *supra* note 39, at 6314 app. A, tbl.A-1, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-09-54A1.pdf. The top four carriers serve approximate 223,173,000 subscribers, amounting to approximately 87.4 percent. *Id*. at 6321 app. A, tbl.A-4. The FCC calculated the top four carrier market share at approximately 85 percent. *Id*. at 6200, chart 1.

106. Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993, Annual Report & Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, *Twelfth Report*, 23 FCC Rcd. 2241, 2354 (2008) ("Using the various data sources and metrics discussed above, we have met our statutory requirement to analyze the competitive market conditions with respect to commercial mobile services, and conclude that the CMRS marketplace is effectively competitive.").

protect the network from harm:

> Although we generally prefer to rely on marketplace forces as the most efficient mechanism for fostering competition, we conclude that the 700 MHz spectrum provides an important opportunity to apply requirements for open platforms for devices and applications for the benefit of consumers, without unduly burdening existing services and markets. For the reasons described below, we determine that for one commercial spectrum block in the 700 MHz Band—the Upper 700 MHz Band C Block—we will require licensees to allow customers, device manufacturers, third-party application developers, and others to use or develop the devices and applications of their choice, subject to certain conditions . . . .[107]

The unfettered ability of incumbent carriers to acquire additional spectrum forecloses market entry by additional carriers, an outcome about which the FCC apparently has no concern. In the 700 MHz spectrum auction AT&T and Verizon spent $16 billion of the $19.6 billion collected by the U.S. government.[108]

IV. APPELLATE COURTS OFTEN DO NOT QUESTION THE FCC'S LACK OF EMPIRICISM AND PEER REVIEW

Appellate courts significantly vary in the degree to which they require the FCC to demonstrate that it has collected empirical data and analyzed it in a transparent and professional manner. One cannot easily square the following judicial statements. On one hand, a court has declared that it has "not hesitated to vacate a rule when the . . . [FCC] has not responded to empirical data or to an argument inconsistent with its conclusion.[109] On the other hand, a court readily defers to the FCC's

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107. Service Rules for the 698-746, 747-762 & 777-792 MHz Bands, *Second Report & Order*, 22 FCC Rcd. 15,289, 15,361 (2007), *on recon*., 22 FCC Rcd. 17,935, *partially modified*, 23 FCC Rcd. 5319 (2008), 24 FCC Rcd. 4782 (2009). Wireless carriers remain subject to conventional common carrier regulation of their telecommunications services, a status the FCC has generally ignored except for the matter of compulsory interconnection to provide subscribers with access to other carriers when "roaming" outside their home territory. *See* Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, *Report & Order & Further Notice of Proposed Rulemaking*, 22 FCC Rcd. 15,817 (2007) (specifying that cellular operators must provide their subscribers automatic access to other carriers for making and receiving telephone calls when traveling outside the subscribers' home service regions).

108. W. David Gardner, *Verizon, AT&T Big Winners in 700 MHz Auction*, INFO. WK., Mar. 20, 2008, http://www.informationweek.com/news/mobility/showArticle.jhtml?articleID=206905000 ("According to an analysis by The Associated Press, the two telecom companies bid more than $16 billion, constituting the vast majority of the overall $19.6 billion that was bid in the FCC auction. With Verizon Wireless and AT&T dominating the auction so completely, hopes that the auction would allow for the creation of a new nationwide wireless service provider were dashed."); *see also*, Saul Hansell, *Verizon and AT&T Win Big in Auction of Spectrum*, N.Y. TIMES (March 21, 2008), *available at* http://www.nytimes.com/2008/03/21/technology/21auction.html; FCC, Auction 73, 700 MHz Band Fact Sheet, http://wireless.fcc.gov/auctions/default.htm?job=auction_factsheet&id=73.

109. Comcast Corp. v. FCC, 579 F.3d 1, 8 (D.C. Cir. 2009) (citing Ill. Pub. Telecomms. Ass'n v. FCC, 117 F.3d 555, 564 (D.C. Cir. 1997)) (rejecting the FCC's determination that local and toll

expertise and judgment noting the Commission should have "necessarily wide latitude to make policy based on predictive judgments deriving from its general expertise."[110]

The Supreme Court appears to support significant deference to the FCC's expertise.

In circumstances where one cannot predict with certainty the outcome of a decision, *e.g.*, to allow common ownership of broadcast stations by a newspaper operator in the same locality or to require divestiture, the Court typically will defer to the FCC's judgment:

> In such circumstances complete factual support in the record for the Commission's judgment or prediction is not possible or required; "a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency."[111]

In *National Cable & Telecommunications Association v. Brand X Internet Services*,[112] a majority of the Supreme Court endorsed the FCC's information service classification for cable modem service used to provide broadband Internet access. Using the *Chevron* standard,[113] which supports deferral to administrative agency decision making that reasonably interprets and implements ambiguous statutory language,[114] the Court cleared the way for the FCC to create a lightly regulated information service "safe harbor" for all wireline and wireless broadband access services.

A majority of the Court agreed that the FCC could reasonably have concluded that cable modems solely provide an information service, despite the use of telecommunications to link subscribers with content. Accordingly, the Court reversed the Ninth Circuit Court of Appeals'

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free calls from pay telephone have similar costs, because the record compiled by the FCC showed significantly different costs). *Ill. Pub. Telecomms. Ass'n*, 117 F.3d at 564 (citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 46–57 (1983)) ("The FCC's *ipse dixit* conclusion, coupled with its failure to respond to contrary arguments resting on solid data, epitomizes arbitrary and capricious decisionmaking.").

110. Am. Family Ass'n, Inc. v. FCC, 365 F.3d 1156, 1166 (D.C. Cir. 2004). "We must defer to the Commission's expert judgment in the absence of record evidence indicating that the Commission's assumption is a clear error of judgment, or a showing that the empirical assumption is facially implausible or inconsistent." *Id.* at 1165 (FCC's method for assigning noncommercial educational broadcast licenses among competing applicants deemed valid).

111. FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 814 (1978) (quoting FPC v. Transcon. Gas Pipe Line Corp., 365 U.S. 1, 29 (1961); Indus. Union Dept., AFL-CIO v. Hodgson, 499 F.2d 467, 474–475 (D.C. Cir. 1974)).

112. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).

113. Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837 (1984).

114. *Brand X Internet Servs.*, 545 U.S. at 980 (citing *Chevron*, 467 U.S. at 843–844 & n.11) ("If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation.").

prior determination that a separate and identifiable telecommunications service element existed on grounds that the *Chevron* precedent supports the FCC statutory construction:

> A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from unambiguous terms of the statue and thus leaves no room for agency discretion.[115]

The Court concluded that the Communications Act, as amended by the Telecommunications Act of 1996, contained ambiguities as to whether cable companies offered telecommunications service in conjunction with their cable modem service.

The majority used several analogies to support the view that the FCC lawfully could ignore or subordinate the telecommunications function. The majority's analogies provided examples where a venture offers a number of services, many of which combine to form a consolidated offering, and others that are made available, but are not essential. In the former, the majority noted that car dealers sell cars and not a collection of integrated components, such as steel frames and carpeting. In the latter analogies, the majority noted that a pet store might offer dog leashes in addition to puppies. Because ambiguity exists as to the functional integration or separateness of telecommunications, the Court majority gladly deferred to the FCC. The nature and scope of integration between telecommunications and information processing "turns not on the language of the [Communications] Act, but on the factual particulars of how Internet technology works and how it is provided, questions *Chevron* leaves to the Commission to resolve in the first instance."[116] While engaging in the use of "warring analogies,"[117] the majority would prefer the FCC use its technical expertise to determine congressional intent.

In a dissenting opinion, Justice Scalia did not agree that the FCC could lawfully and practically treat the telecommunications link as not separable from the predominate information processing services provided. He disputed the FCC's view that cable television companies do not provide a telecommunications service when linking subscribers physically apart from the content they access.[118] Justice Scalia used pizzerias and pizza delivery for his primary analogy and asserted that one

115. *Id.* at 982.
116. *Id.* at 991.
117. *Id.* at 992.
118. *Id.* at 1005 (Scalia, J., dissenting) ("The important fact, however, is that the Commission has chosen to achieve this [result] through an implausible reading of the statue, and thus exceeded the authority given it by Congress.").

could not ignore the fact that pizza baking and pizza delivery constitute two separate elements of the pizza business:

> It is therefore inevitable that customers will regard the competing cable-modem service as giving them *both* computing functionality *and* the physical pipe by which that functionality comes to their computer—both the pizza and the delivery service . . . .[119]

The use of simplistic but competing analogies within Supreme Court opinions demonstrates how experts in the law struggle to conceptualize converging telecommunications and information processing technologies. The Court's decision has provided the legal foundation for the FCC to reclassify as an information service telephone company provision of Internet access via Digital Subscriber Lines despite having previously identified a discrete and stand alone telecommunications service component. Apparently the desire to achieve deregulatory parity trumps the need for consistency in interpretation of terms created by the Telecommunications Act of 1996.[120] Justice Scalia chided the majority for its undiscerning acceptance of an FCC bureaucratic sleight of hand that changes the facts to achieve an outcome not contemplated by law.

In a case involving the potential harmful effects of "fleeting expletives" on children, the Court expressed tolerance for the FCC's need to make policies and rules despite the lack of, and possible inability to generate empirical data to support the Commission's decision:

> There are some propositions for which scant empirical evidence can be marshaled, and the harmful effect of broadcast profanity on children is one of them. One cannot demand a multiyear controlled study, in which some children are intentionally exposed to indecent broadcasts (and insulated from all other indecency), and others are shielded from all indecency. It is one thing to set aside agency action under the Administrative Procedure Act because of failure to adduce empirical data that can readily be obtained . . . . It is something else to insist upon obtaining the unobtainable. Here it suffices to know that children mimic the behavior they observe-or at least the behavior that is presented to them as normal and appropriate. Programming replete with one-word indecent expletives will tend to produce children who use (at least) one-word indecent expletives. Congress has made the determination that indecent material is harmful to children, and has left enforcement of the ban to the Commission. If enforcement had to be supported by empirical data, the ban would

119. *Id.* at 1009.

120. *See* Rob Frieden, *The FCC's Name Game: How Shifting Regulatory Classifications Affect Competition*, 19 BERKELEY TECH. L.J. 1275 (Fall 2004).

effectively be a nullity.[121]

Absent clear evidence that the FCC has deliberately suppressed, dismissed, or otherwise ignored data that conflicts with its policy decision, courts appear willing to rely on the Commission's predictive judgments even if they are based on assumptions rather than empirical data. Accordingly, the FCC has to act in obvious disregard for the available evidence as it did, for example, in a matter assessing the ability of broadband service providers using the electric power grid, to operate without causing harmful interference to licensed users of radio spectrum. In *American Radio Relay League, Inc. v. FCC*,[122] the D.C. Circuit Court of Appeals determined that the FCC did not comply with the Administrative Procedure Act when it redacted studies on which it relied in promulgating rules and when the Commission failed to provide a reasoned explanation for its choice of an extrapolation factor for predicting how quickly broadband over powerline (BPL) emissions attenuate or weaken.

While affirming some of the FCC's rules, the court agreed that the Commission did not provide a reasonable opportunity for public comment on unredacted staff technical studies on which it relied in establishing binding rules. The court ordered the FCC to make the studies part of the rulemaking record, while also providing a reasoned explanation on its choice of an extrapolation factor. [123] The court rejected the FCC's rationale for not disclosing in its entirety technical studies that formed the basis for its technical rules:

> The Commission has chosen to rely on the data in those studies and to place the redacted studies in the rulemaking record. Individual pages relied upon by the Commission reveal that the unredacted portions are likely to contain evidence that could call into question the Commission's decision to promulgate the rule. Under the circumstances, the Commission can point to no authority allowing it to rely on the studies in a rulemaking but hide from the public parts of the studies that may contain contrary evidence, inconvenient qualifications, or relevant explanations of the methodology employed. The Commission has not suggested that any other confidentiality considerations would be implicated were the unredacted studies made public for notice and comment.[124]

Similarly the FCC may lose judicial support when the Commission

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121. FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1813 (2009).
122. Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 231 (2008).
123. *Id.* at 242.
124. *Id.* at 239.

refuses to act in a manner supported by evidence submitted by interested parties and instead bases its decision on countervailing evidence for which it has made no explicit empirical findings. In *Qwest Corp. v. FCC*,[125] the Tenth Circuit remanded to the FCC a decision to offer universal service subsidies to telephone companies servicing rural or urban areas using a single benchmark for identifying areas where costs of service exceeded a national average by at least 135 percent. Because various parties in the proceeding submitted information showing differences in rural and urban costs, which the FCC appeared not to consider, the court concluded that the "FCC has not provided an adequate basis for us to review the rationality of [its benchmarking decision]. It has not explained or supported its decisions adequately and therefore has acted arbitrarily and not in accordance with [applicable law.]"[126]

V. CONCLUSIONS AND RECOMMENDATIONS

The FCC frequently perceives congressional and public relations benefits in forecasting the best case scenario outcome of a deregulatory decision or merger approval. Congressional oversight hearings, including ones determining the Commission's budget, have a friendlier tone when FCC representatives have positive news and statistics to report. When the Commission has to acknowledge market domination, market failure, or the lack of competition, it risks losing such a positive reception, even if regulation or merger disapproval would serve the public interest.

Imposing regulation, slowing down the speed of deregulation, and taking steps to remedy market failure typically anger stakeholders, particularly incumbent firms with the resources to act on their frustration. With millions of dollars available to support deregulatory advocacy, incumbent firms have the financial wherewithal to frame the debate so that the best case scenario appears real, not just plausible. FCC managers pragmatically realize that deviating from this party line risks congressional and major stakeholder displeasure.

Consider the consequences if the FCC reimposed a wireless carrier spectrum cap as proposed by rural carriers and other parties.[127] Doing so would constitute an acknowledgement that the wireless marketplace has become too concentrated and in turn less competitive. Absent a set-aside of spectrum for market entrants, or a cap on the amount incumbent carriers can control, any additional spectrum largely will flow to

125. Qwest Corp. v. FCC, 258 F.3d 1191 (10th Cir. 2001).

126. *Id.* at 1205.

127. Wireless Telecomms. Bureau Seeks Comment on Petition for Rulemaking of Rural Telecomms. Group, Inc. to Impose a Spectrum Aggregation Limit on all Commercial Terrestrial Wireless Spectrum Below 2.3 GHz, *Public Notice*, 23 FCC Rcd. 14,875 (2008).

incumbents. The auction of freed-up UHF television spectrum corroborates this assertion. Incumbent carriers acquired most of the newly available spectrum ostensibly to meet growing demand.[128] But an equally plausible argument casts incumbent carriers as motivated primarily to erect higher market entry barriers and to "warehouse" spectrum, *i.e.*, to control it and keep it away from market entrants who would reduce incumbents' shared domination of the marketplace and generate more facilities-based competition. Additionally, the Commission can deliver more funds to the treasury when it auctions off spectrum free of any encumbrance, such as a duty to provide common carrier access, or limitation, such as allowing bidding only by non-incumbents.

Attributing greater competitiveness to the telecommunications marketplace will continue unless and until the FCC perceives greater internal benefits from serving as a fair-minded fact finder. The Commission will change its approach only through prodding. Such nudging can take place if appellate courts defer less and second guess more, if congressional oversight committees challenge the FCC's assumptions and statistics, and if the FCC, voluntarily or otherwise, subjects its work product to peer review.

With the change of administration, new FCC managers have proposed to operate in a more transparent and accessible manner. For example, the Commission has enlisted the support of major university-affiliated research programs to determine how best to promote ubiquitous access to broadband networks at affordable rates.[129] Additionally the Commission has scheduled numerous workshops to address various aspects of infrastructure development and access.[130]

The FCC's recommitment to transparency and service in the public interest will require external pressure to achieve thorough compliance. The Commission will need to encourage public participation, rather than rely on the filings of stakeholders. Such receptiveness will require more than the occasional road trip out from Washington, D.C. to hear from a few people for the last hour of a pre-arranged and pre-packaged hearing. Additionally, the Commission will need to reshape its internal culture to

128. For example, Verizon Wireless bid $9,363,160,000 of the net bidding total amounting to $18,957,582,150. AT&T bid $6,636,658,000. *See* FCC, Auction 73, 700 MHz Band Fact Sheet, http://wireless.fcc.gov/auctions/default.htm?job=auction_summary&id=73.

129. *See, e.g.,* FCC, Harvard's Berkman Center to Conduct Independent Review of Broadband Studies to Assist FCC (2009), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-291986A1.pdf; Columbia Inst. for Tele-Info. to Conduct Indep. Review of Telecom Capital Expenditures to Assist FCC (2009), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-292598A1.pdf.

130. *See* FCC, Broadband.gov, http://www.broadband.gov/ (last visited December 21, 2009).

encourage staff to engage in debate rather than to restate the conventional wisdom, or the party line articulated from the top down, *i.e.*, from Commissioners and the Chairman. Because one can hardly mandate an open mind, a commitment toward openness and getting the facts right must develop internally, as a public interest commitment of staff, or externally through embarrassing court reversals and congressional hearings.