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From Bad to Worse: Assessing the Long-Term Consequences of Four Controversial FCC Decisios

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ASSESSING THE LONG-TERM CONSEQUENCES OF FOUR CONTROVERSIAL FCC DECISIONS

Rob Frieden[†]

I. INTRODUCTION

Far too many major decisions of the Federal Communications Commission (FCC) rely on flawed assumptions about the current and future telecommunications marketplaces. When the FCC incorrectly overstates the current level of competition,[1] it risks exacerbating its mistake going forward if actual competition proves unsustainable or lackluster. In many key decisions, the FCC cited robust competition in current and future markets as the basis for deregulatory decisions that relax restrictions on incumbents, abandon strategies for promoting competition, or apply statutory definitions of services that trigger limited government oversight.[2] If the FCC has confidence in the

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[1] "[T]here is substantial competition in the provision of Internet access services." *In re* AT&T Inc. & BellSouth Corp., Application for Transfer of Control, 22 FCC Rcd. 5662, 5724-25 (Mar. 26, 2007) (memorandum opinion and order). In 2008 the FCC stated that "advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion." *In re* Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, 23 FCC Rcd. 9615, 9616 (June 12, 2008) (fifth report), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-88A1.pdf. On the other hand, at about the same time the FCC stated that "[s]tudy after study demonstrates that our nation's broadband infrastructure lags dramatically behind other industrialized nations. In order to reverse this trend, we must encourage 'third pipe' technologies to provide some at least some [sic] challenge to the cable/telco broadband duopoly in our cities." *In re* Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, 21 FCC Rcd. 6703, 6727 (June 2, 2006) (order on reconsideration of the second report and order).

[2] An FCC conclusion that robust competition exists provides the basis for a reviewing court to affirm the Commission's decision that it can deregulate. For example, the FCC abandoned rules requiring incumbent carriers to make available local switching and routing services to market entrants based on the determination

viability and permanence of competition, then reviewing courts will likely refrain from second-guessing the Commission and uphold its deregulatory initiative. In its zeal to announce deregulatory decisions and to accrue political dividends, the Commission ignores secondary and tertiary consequences of decisions that deprive it of the jurisdiction and flexibility needed to respond to technological and marketplace changes.[3]

Ironically, the FCC has not promoted competition. It has exacerbated the trend toward concentration of ownership generated by technological convergence and the real (or perceived) need for incumbents to grow larger by acquiring competitors. Instead of making sure that this trend does not lead to oligopolistic behavior, which can harm consumers,[4] the

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that newcomers could survive in the marketplace by acquiring facilities from other competitors, or by paying full wholesale rates: "[T]he presence of robust competition in a market where CLECs use critical ILEC facilities by purchasing special access at wholesale rates . . . precludes a finding that the CLECs are 'impaired' by lack of access to the element under § 251(c)(3)." U.S. Telecom Ass'n v. FCC, 359 F.3d 554, 593 (D.C. Cir. 2004) (the FCC should not implement statutory requirements that incumbent carriers cooperate with market entrants when the Commission determines that adequate marketplace competition exist).

[3] For example, the FCC has expressed confidence that it can assert its ancillary jurisdiction to achieve consumer protection even if it previously opted to streamline or eliminate regulatory safeguards.

> We have a duty to ensure that consumer protection objectives in the Act are met as the industry shifts from narrowband to broadband services. Through this Notice, we thus seek to develop a framework for consumer protection in the broadband age—a framework that ensures that consumer protection needs are met by all providers of broadband Internet access service, regardless of the underlying technology. This framework necessarily will be built on our ancillary jurisdiction under Title I; as we explain in the Order, this jurisdiction is ample to accomplish the consumer protection goals we identify below, and we will not hesitate to exercise it.

In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 FCC Rcd. 14,853, 14,929-30 (Sept. 23, 2005) [hereinafter Wireline Broadband Classification Order] (report and order and notice of proposed rulemaking). "We emphasize that we will not hesitate to adopt any non-economic regulatory obligations that are necessary to ensure consumer protection and network security and reliability in this dynamically changing broadband era." *Id*. at 14,915.

[4] A duopoly controls the broadband Internet access marketplace in the United States.

> Cable and DSL providers currently control almost 98 percent of the residential and small-business broadband market. More than one quarter of consumers have only one choice between cable and DSL, and even in markets with both services available, customers usually face a duopoly, with one choice for each type of service. Under any economic standard "nearly every regional broadband market is very highly concentrated." The problem this situation generates is really very simple to grasp: in order to "reach" the logical and content layers, one has to "pass through" the physical layer; whoever controls the physical layer, unless restricted by law, becomes a gatekeeper for all other layers; and scarcity of physical layers means more control, and ability to realize that control, for fewer gatekeepers.

FCC has removed still-necessary regulatory safeguards designed to curb market power without robbing ventures of opportunities to operate efficiently. Intentionally or not, the FCC has contributed to market concentration[5] even as it abandoned lawful techniques and policies to monitor and remedy likely marketplace abuses.[6]

The FCC has embraced economic and political theory supporting reliance on marketplace forces without a complete empirical confirmation that industry self-regulation can occur. The Commission infers the existence of adequate competition and concludes that such competition will persist even though economic, technological, and future regulatory decisions might favor industry concentration and unsustainable competition. Information, communications, and entertainment markets

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Moran Yemini, *Mandated Network Neutrality and the First Amendment: Lessons from* Turner *and a New Approach*, 13 VA. J.L. & TECH. 1, 16 (2008) (citations omitted). "So long as wireline Internet access remains a closed duopoly controlled by the incumbent LEC and the incumbent cable company, the FCC will need to step in as the 'traffic cop' for ensuring nondiscriminatory Internet access." Lee L. Selwyn & Helen E. Golding, *Revisiting the Regulatory Status of Broadband Internet Access: A Policy Framework for Net Neutrality and an Open Competitive Internet*, 63 FED. COMM. L.J. 91, 120 (Dec. 2010).

[5] "Even with one less nationwide mobile telephone carrier to choose from, U.S. consumers continue to benefit from robust competition in the CMRS marketplace." *In re* Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, 21 FCC Rcd. 10,947, 11,029 (Sept. 29, 2006) (eleventh report) (dismissing any adverse impact from Sprint's merger with Nextel).

[6] It took the FCC over four years to detect and remedy over $52 million of deliberate data-service overcharges imposed by Verizon Wireless. *See In re* Verizon Wireless Data Usage Charges, 25 FCC Rcd. 15,105 (Oct. 28, 2010) (order). Because the charges refer to Internet access, Verizon arguably could have claimed the FCC lacked jurisdiction to intervene, based on the assertion that all forms of Internet access constitute information services. *See In re* Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, 17 FCC Rcd. 4798, 4802 (Mar. 15, 2002) (declaratory ruling and notice of proposed rulemaking), *aff'd*, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005). The FCC rejected the assertion by Verizon and other wireless carriers that it lacked jurisdiction to compel the carrier to provide data service to subscribers of other carriers.

> Because encouraging data roaming serves the public interest by promoting connectivity for, and ubiquitous access to, mobile broadband as well as facilitating consumer access to wireless broadband data coverage nationwide, the obligations set forth above are reasonably ancillary to the Title III provisions to manage spectrum, allocate, assign, and to establish spectrum usage conditions in the public interest as set forth above.

In re Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, 26 FCC Rcd. 5411, 5442 n.176 (Apr. 7, 2011) (second report and order); Maisie Ramsay, *Verizon Sues FCC over Data Roaming Rules*, WIRELESS WEEK (May 18, 2011), http://www.wirelessweek.com/News/2011/05/Policy-and-Industry-Verizon-Sues-FCC-Data-Roaming-Rules-Legal/.

favor large enterprises able to exploit economies of scale[7] and scope.[8] Technological and marketplace convergence supports the ability of large firms to offer bundles of services previously offered on a single, standalone basis. Additionally, the FCC's willingness to conditionally approve mergers and acquisitions also leads to industry consolidation.

The FCC's deregulatory decisions operate in one direction—the elimination of regulatory safeguards—typically without reserving any lawful and effective option to reassert safeguards should assumptions prove wrong or circumstances change. For example, the FCC's decision to classify all Internet access technologies[9] as information services[10]—consequently

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[7] *Economies of scale* refers to the ability of a single firm to offer goods and services at the lowest cost by increasing its size. "[A]n increase in inputs leads to a proportionally greater increase in outputs (for example, a doubling of inputs would lead to more than a doubling of outputs)." Kevin G. Wilson, *Deregulating Telecommunications and the Problem of Natural Monopoly: A Critique of Economics in Telecommunications Policy*, 14 MEDIA CULTURE & SOC. 343, 345 (1992). "Declining levels of average cost accompanying greater expansion of product output and optimal use of plant and equipment. Cost advantages associated with the increasing size of firms." MEDIA ECONOMICS THEORY AND PRACTICE, Glossary 286 (Alison Alexander et al. eds., 3d ed. 2004).

> Scale economies refer to lower average costs from producing a larger quantity of output. A more technical definition is that economies of scale exist at a particular range of output when the long run average total cost decreases as output expands. Scale economies can be a barrier to entry if entrants are likely to acquire fewer customers and sell less output than the incumbent, and the resulting higher average cost for the entrants makes it difficult for them to compete with the incumbent, particularly if retail prices are close to the incumbent's average cost.

Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 18 FCC Rcd. 16,978, 17,028, n.245 (2003) (report and order and order on remand and further notice of proposed rulemaking) (citations omitted).

[8]

> Economies of scope exist when one firm can produce two or more products at a lower total cost than if each product were produced separately by different firms. Scope economies can be a barrier to entry if entrants are unable to produce and sell all of the products the incumbent produces, and the resulting higher cost makes it unprofitable to enter the market.

Id. at 17,029, n.246.

[9] The FCC has determined that various broadband technologies for accessing the Internet all qualify for limited regulatory oversight. *See, e.g.*, *In re* Inquiry Concerning High-Speed Access to the Internet over Cable and their Facilities, 17 FCC Rcd. 4798, 4802 (Mar. 15, 2002) (declaratory ruling and notice of proposed rulemaking), *aff'd*, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005); Wireline Broadband Classification Order, *supra* note 3, at 14,855.

[10] An *information service* is defined as

> the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a

reducing oversight of Internet Service Providers' (ISPs) network management—now prevents the Commission from responding to complaints that some ISPs have interfered with subscribers' Internet traffic. Should an ISP, such as Comcast, deliberately disrupt subscribers' traffic,[11] which can offer a competitive alternative to the company's pay-per-view video-programming services,[12] the FCC has no direct statutory authority to sanction the company for engaging in anticompetitive conduct.[13] Worse yet, the decision to treat basic bit transmission as an information service severely restricts the Commission's ability to impose safeguards on services that combine Internet access with software to provide the functional equivalent of a regulated service (e.g., Voice over the Internet Protocol (VoIP)[14] and Internet Protocol Television (IPTV)).[15] The

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> telecommunications system or the management of a telecommunications service.

47 U.S.C. § 153(20) (2006).

[11] *In re* Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, 23 FCC Rcd. 13,028 (Aug. 20, 2008) (memorandum opinion and order) [hereinafter Comcast Sanction], *order vacated*, Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010).

[12] Peer-to-peer applications, including those relying on BitTorrent, have become a competitive threat to cable operators such as Comcast because Internet users have the opportunity to view high-quality video with BitTorrent that they might otherwise watch (and pay for) on cable television. Such video distribution poses a particular competitive threat to Comcast's video-on-demand (VOD) service. Comcast Sanction, *supra* note 11, at 13,030.

[13] *See* Kevin Werbach, *Off the Hook*, 95 CORNELL L. REV. 535, 568 (2010); Edward B. Mulligan V, Note, *Derailed by the D.C. Circuit: Getting Network Management Regulation Back on Track*, 62 FED. COMM. L.J. 633, 635 (2010); Courtney Erin Smith, Comment, *Net Neutrality, Full Throttle: Regulation of Broadband Internet Service Following the Comcast/BitTorrent Dispute*, 50 SANTA CLARA L. REV. 569, 587 (2010).

[14] VoIP is the real-time carriage and delivery of data packets that correspond to voice. VoIP services range in quality, reliability, and price and can link both computers and ordinary telephone handsets. For technical background on how VoIP works, see Susan Spradley & Alan Stoddard, *Tutorial on Technical Challenges Associated with the Evolution to VoIP*, FCC (Sept. 22, 2003), http://www.fcc.gov/events/tutorial-technical-challenges-associated-evolution-voip. *See generally* Charles J. Cooper & Brian Stuart Koukoutchos, *Federalism and the Telephone: The Case for Preemptive Federal Deregulation in the New World of Intermodal Competition*, 6 J. TELECOMM. & HIGH TECH. L. 293 (2008).

[15] IPTV offers consumers with broadband connections options to download video files or view (streaming) video content on an immediate "real time" basis. *In re* Sky Angel U.S., LLC, Emergency Petition for Temporary Standstill, DA 10-679, 25 FCC Rcd. 3879 (2010). Some of the available content duplicates what cable television subscribers receive therein triggering disputes over whether cable operators can secure exclusive distribution agreements and prevent an IPTV service provider from distributing the same content. "Sky Angel has been providing its subscribers with certain Discovery networks for approximately two and a half years, including the Discovery Channel, Animal Planet, Discovery Kids Channel, Planet Green, and the Military Channel. Sky Angel submits that these channels are a significant part of its service offering." *Id*. at 3879-80. For background on IPTV, see In-Sung Yoo, *The*

FCC's decision to apply the information-service classification to all Internet-access technologies means that the Commission has abandoned direct statutory authority to resolve problems and, in the future, must resort to questionable ancillary jurisdiction[16] to resolve legitimate complaints and impose necessary regulatory safeguards.

There are other instances of unintended consequences resulting from decisions based on the FCC's overly optimistic findings and assumptions about marketplace competition: removing caps on the total spectrum a single wireless carrier can control;[17] abandoning local loop unbundling[18] and other

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Regulatory Classification of Internet Protocol Television: How the Federal Communications Commission Should Abstain from Cable Service Regulation and Promote Broadband Deployment, 18 COMMLAW CONSPECTUS 199 (2009).

> In addition, [Local Exchange Carriers] are increasingly utilizing Internet Protocol Television ("IPTV") technologies. Verizon's FTTH [fiber to the home] network, marketed under the brand name "FiOS," allows delivery of multichannel video services, in addition to telephony and high-speed Internet access service. At the end of 2006, Verizon reported that it offered video programming via FiOS to more than 2.4 million households in 200 cities in 10 states and served 207,000 subscribers.

In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 24 FCC Rcd. 542, 548 (Jan. 16, 2009) (thirteenth annual report); *see also* In-Sung Yoo, *supra*, at 204.

[16] Ancillary jurisdiction refers to an inference of statutory authority to impose rules and regulations based on indirect statutory authority. For example, the FCC asserted jurisdiction over cable television operators because the importation of distant broadcast television signals could have had an adverse financial impact on directly regulated television broadcasters. United States v. Sw. Cable Co., 392 U.S. 157, 178 (1968); *see also* FCC v. Midwest Video Corp. (Midwest Video II), 440 U.S. 689, 696-709 (1979); United States v. Midwest Video Corp. (Midwest Video I), 406 U.S. 649, 659-70 (1972).

[17] *In re* 2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services, 16 FCC Rcd. 22,668 (Nov. 18, 2001) (report and order).

[18] Telecommunications carriers have

> [t]he duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

47 U.S.C. § 251(c)(3) (2006); *see also In re* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15,499 (Aug. 8, 1996) (first report and order), *aff'd in part, rev'd in part*, AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999); *In re* Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 15 FCC Rcd. 3696 (Nov. 5, 1999) (third report and order and fourth further notice of proposed rulemaking), *rev'd and remanded*, United States Telecom Ass'n v. FCC, 290 F.3d 415 (D.C. Cir. 2002); *In re* Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 16 FCC Rcd. 22,781 (Dec. 20, 2001); *In re* Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 18 FCC Rcd. 16,978 (Aug. 21, 2003) (report and

structural separation requirements;[19] and concluding that incumbent carriers have no duty to deal with market entrants, even when the incumbent prices the wholesale rate charged to competitors above retail rates.[20] For each of these decisions, the FCC compounded its initial mistakes by foreclosing the option to make necessary and lawful future modifications.

This article will examine the consequences of the FCC's wishful thinking about the viability of current competition and the sustainability of competition going forward. The article concludes that flawed fact finding and market projections had adverse initial consequences but have even worse future impacts. In response to aggressive incumbent advocacy, impatient lawmakers keen on deregulation, and deferential judges willing to rely on the Commission's expertise,[21] the FCC has contributed to the development of a telecommunications industry structure that is less competitive,[22] innovative, available,[23] affordable, and responsive than what exists in many

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order and order on remand and further notice of proposed rulemaking), *corrected by* Errata, 18 F.C.C.R. 19,020 (2003), *vacated and remanded in part, aff'd in part*, United States Telecom Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004).

[19] The FCC eliminated Title II and structural separation requirements applicable to wireline broadband Internet-access services offered by facilities-based providers and gave providers discretion to offer the underlying wireline broadband transmission on a common-carrier basis. Wireline Broadband Classification Order, *supra* note 3.

[20] *See* Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438, 447-57 (2009) (no supplemental antitrust relief available when the FCC determines that a carrier has no duty to deal with a competitor).

[21] To avoid "legislating from the bench" or second guessing the technical expertise of the FCC, reviewing courts typically defer to the Commission:

> 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.

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)); *see also* Time Warner Telecom, Inc. v. FCC, 507 F.3d 205, 221 (3d Cir. 2007).

[22] "Unfortunately, the U.S. is lagging behind much of the rest of the world in terms of broadband service available to its citizens. As we move into a world in which 'everyone will use the Internet for everything' this country runs the risk of not being competitive." RICHARD ADLER, THE ASPEN INSTITUTE, NEWS CITIES: THE NEXT GENERATION OF HEALTHY INFORMED COMMUNITIES 27 (2011), *available at* http://www.aspeninstitute.org/sites/default/files/content/docs/cands/News_Cities_The_Next_Generation_of_Healthy_Informed_Communities.pdf.

[23] For example, even though the United States has the most broadband lines in use it only ranks 15th in terms of broadband market penetration (subscribers per 100 inhabitants) based on statistics compiled by the Organisation for Economic Co-Operation and Development on national broadband and telecommunications market penetration. *See OECD Broadband Portal*, OECD, http://www.oecd.org/document/54/0,3746,en_2649_33703_38690102_1_1_1_1,00.html (last visited Jan. 6, 2012).

other countries.[24] The FCC's follies provide a clear warning to other national regulatory authorities: embracing political and economic doctrine at the expense of unbiased fact finding and empirical analysis generates bad decisions that trigger even worse long-term outcomes.

Part II of this article will identify four FCC decisions that started a major deregulatory campaign based on unqualified conclusions about the existence and sustainability of competition. Section A examines the Commission's decision to treat Internet access as an unregulated information service. Section B tracks the Commission's deregulatory glide path for common carriers, including decisions to abandon precompetitive interconnection and access-pricing requirements as well as structural safeguards that separate carriers' telecommunications and information services. This section, emphasizing antitrust and traditional duties to deal, also considers how reviewing courts respond to FCC deregulation and the Commission's assumptions about market competitiveness. Section C examines the marketplace consequences of the FCC's decision to allow wireless carriers to acquire unlimited spectrum regardless of the impact on market entry by new competitors. Part III offers conclusions on the short- and long-term consequences of premature deregulation when the marketplace has insufficient competition and market actors do not self-regulate.

II. THE PAST AS PROLOGUE TO THE FUTURE

On numerous occasions spanning several decades, the FCC has decided to abandon or reduce regulatory oversight. Technological innovations, changed circumstances, and a host of legitimate reasons can support selective deregulation. However, a significant number of initiatives, four of which are examined in depth in this article, were wrong at the outset. When the FCC makes a bad call, the normal checks and balances in government are supposed to provide remedies (e.g., judicial review). But well-argued rationales, coupled with shared views on economic doctrine and judicial deference to FCC expertise,[25] can prevent appellate review from reversing

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[24] *See* International Comparison Requirements Pursuant to the Broadband Data Improvement Act, International Broadband Data Report, IB Docket No. 10-171, Second Report, 26 FCC Rcd. 7378 (May 20, 2011) (second report).

[25] Supreme Court Justice Scalia shows how the FCC can exploit judicial deference to engage in policymaking outside its lawful jurisdiction:

bad decisions. Once in play, these decisions can trigger secondary and tertiary consequences that the FCC might not have predicted—consequences that, over time, compound the harm caused by the initial decision.

The four decisions examined in this article show how the FCC has engaged in results-driven decision making that lacks empirical support and uses legally unsustainable rationales to bolster preordained results. Authors of these decisions have emphasized stakeholder-submitted data without much close scrutiny by Commission staff or third-party peer review.[26] In the absence of independently generated data, the FCC has had to rely largely on stakeholder-submitted materials that support a particular outcome. Such reliance prevents the Commission from generating a realistic assessment based on a thorough and critical evaluation of all submissions, coupled with in-house fact finding and analysis. The agency has a statutory obligation to compile a complete factual record[27] and to accord interested parties opportunities to participate.[28] However, the Commission

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> This is a wonderful illustration of how an experienced agency can (with some assistance from credulous courts) turn statutory constraints into bureaucratic discretions. The main source of the Commission's regulatory authority over common carriers is Title II, but the Commission has rendered that inapplicable in this instance by concluding that the definition of "telecommunications service" is ambiguous and does not (in its current view) apply to cable-modem service. It contemplates, however, altering that (unnecessary) outcome, not by changing the law (i.e., its construction of the Title II definitions), but by reserving the right to change the facts. Under its undefined and sparingly used "ancillary" powers, the Commission might conclude that it can order cable companies to "unbundle" the telecommunications component of cable-modem service. And presto, Title II will then apply to them, because they will finally be "offering" telecommunications service! Of course, the Commission will still have the statutory power to forbear from regulating them under § 160 (which it has already tentatively concluded it would do, *Declaratory Ruling* 4847–4848, ¶¶ 94–95). Such Möbius–strip reasoning mocks the principle that the statute constrains the agency in any meaningful way.

Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1013-14 (2005) (Scalia, J., dissenting) (rejecting the FCC's rationale for considering cable modem service as lacking a standalone telecommunications service and noting how some reviewing courts fail to scrutinize closely the Commission's analysis).

[26] *See generally* Rob Frieden, *Case Studies in Abandoned Empiricism and the Lack of Peer Review at the Federal Communications Commission*, 8 J. TELECOMM. & HIGH TECH. L. 277 (2010).

[27] "[A] legislative choice is not subject to courtroom factfinding 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).

[28] *See, e.g.*, Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 231 (2008) (FCC "failed to satisfy the notice and comment requirement of the Administrative Procedure Act ('APA') by redacting studies on which it relied in promulgating the rule

has primarily relied on the more comprehensive filings of the parties who have the most to gain or lose in a proceeding. It becomes easy for the FCC to rely on nonempirical data compiled by stakeholders that purport to supply data, but who in reality advocate for a desired outcome regardless of whether the facts support this objective.

A. Unconditional Conclusion that Broadband Access Constitutes an Information Service

The FCC has determined that the legislatively crafted information-service classification[29] applies to Internet access provided via cable modems,[30] digital subscriber line (DSL) service,[31] the electrical power grid,[32] and wireless networks.[33] The Commission accrued short-term political dividends from such determinations because the determinations showed regulatory restraint and endorsed marketplace self-regulation.[34] Whether the result of wishful thinking, inflexible

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and failed to provide a reasoned explanation for its choice of the extrapolation factor for" predicting how quickly broadband over powerline (BPL) emissions attenuate or weaken); *see also* Administrative Procedure Act, 5 U.S.C. § 553(b)-(c) (2006).

[29] *Information service* is defined as,

> the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

Communications Act of 1934, 47 U.S.C. § 153(20) (2006).

[30] *In re* Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, 17 FCC Rcd. 4798, 4821 (Mar. 15, 2002) (declaratory ruling and notice of proposed rulemaking), *aff'd sub nom*. Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 977-78 (2005).

[31] Wireline Broadband Classification Order, *supra* note 3, at 14,863.

[32] *In re* United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service, 21 FCC Rcd. 13,281 (Nov. 7, 2006) (memorandum opinion and order).

[33] *In re* Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks, 22 FCC Rcd. 5901 (Mar. 23, 2007) (declaratory ruling).

[34] FCC managers are keenly aware of the political consequences resulting from changes in policy.

> [I]n examining rulemaking and transitions in all three branches of government from the agency's perspective, it may be most helpful to consider how the agency analyzes the costs and benefits of rulemaking. This cost-benefit calculation is quite different than the one typically discussed in administrative law—whether a particular regulation has net benefits to society. Instead, the calculation considers the net benefits of a rulemaking, both in terms of substance and process, to an agency in light of the particular costs to the agency. On the benefit side, the agency may care about the regulatory outcome; budgetary, political, and status rewards; and judicial deference. On the cost side, the agency may worry about

adherence to libertarian economic doctrine, or fair-minded interpretation of applicable statutes, the FCC determined that it must apply a single, mutually exclusive service classification.[35] Under this either/or doctrine, the FCC opted to abandon any direct statutory foundation for mandating fair and open Internet access. Soon after these decisions, the FCC confronted instances where self-regulation did not prevent anticompetitive practices. Comcast, for example, interfered with the broadband traffic generated by some subscribers in ways that evidenced the incentive and ability to distort competition in the video-programming retail market.[36] As discussed later in this section, Comcast, lacking effective FCC oversight, unilaterally thwarted subscriber access to competitive alternatives to the company's pay-per-view video content.[37]

With an eye toward freeing the Internet of government oversight, the Commission applied the substantially less restrictive information-service classification to all types of Internet-access services based on the view that the

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> regulatory outcome; budgetary, political, and status fallout; and reversal by the courts.

Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105 NW. U. L. REV. 471, 487 (2011); *see also*, Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889 (2008).

[35] In its quest to deregulate all broadband options, the FCC opted to treat wireless Internet access as an information service even though subscribers use a single handset for making telephone calls and accessing the Internet:

> We conclude, as the Commission did in the *Universal Service Order*, that the categories of "telecommunications service" and "information service" in the 1996 Act are mutually exclusive. Reading the statute closely, with attention to the legislative history, we conclude that Congress intended these new terms to build upon frameworks established prior to the passage of the 1996 Act. Specifically, we find that Congress intended the categories of "telecommunications service" and "information service" to be mutually exclusive, like the definitions of "basic service" and "enhanced service" developed in our *Computer II* proceeding, and the definitions of "telecommunications" and "information service" developed in the Modification of Final Judgment that divested the Bell Operating Companies from AT&T.

In re Federal-State Joint Board on Universal Service, 13 FCC Rcd. 11,501, 11,507-08 (Apr. 10, 1998) (report to Congress) (citations omitted). "Although the Commission has not been entirely consistent on this point, we agree for the wireline broadband Internet access described in this Order with the past Commission pronouncements that the categories of 'information service' and 'telecommunications service' are mutually exclusive." Wireline Broadband Classification Order, *supra* note 3, at 14,862 n.32.

[36] Comcast Sanction, *supra* note 11, at 13,055-56.

[37] "Comcast's practice selectively blocks and impedes the use of particular applications, and we believe that such disparate treatment poses significant risks of anticompetitive abuse." *Id.* at 13,055.

telecommunications[38] component needed to transmit bits and packets is inseparable from the content those bits contain.[39] By treating the telecommunications component as subordinate, the Commission could rationalize a semantic distinction between a carrier providing telecommunications as a component of an information service and a carrier offering retail telecommunications services on a standalone basis.[40] By opting to treat the telecommunications function as wholly

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[38] Telecommunications is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43) (2006).

[39] To justify its decision to apply the information-service classification to services that combine telecommunications transmission and content, the FCC insisted that the telecommunications component could not be singled out:

> [W]e reject arguments that companies using their own facilities to provide wireline broadband Internet access service simultaneously provide a telecommunications service to their end user wireline broadband Internet access customers. The record demonstrates that end users of wireline broadband Internet access service receive and pay for a single, functionally integrated service, not two distinct services. This conclusion also is consistent with certain past Commission pronouncements that the categories of "information service" and "telecommunications service" are mutually exclusive. Moreover, the fact that the Commission has, up to now, required facilities-based providers of wireline broadband Internet access service to separate out a telecommunications transmission service and make that service available to competitors on a common carrier basis under the Computer Inquiry regime has no bearing on the nature of the service wireline broadband Internet access service providers offer their end user customers. We conclude now, based on the record before us, that wireline broadband Internet access service is, as discussed above, a functionally integrated, finished product, rather than both an information service and a telecommunications service.

Wireline Broadband Classification Order, *supra* note 3, at 14,911 (citations omitted).

[40] The Supreme Court accepted the FCC's determination that cable modem Internet access constituted an information service:

> Cable modem service is not itself and does not include an offering of telecommunications service to subscribers. We disagree with commenters that urge us to find a telecommunications service inherent in the provision of cable modem service. Consistent with the statutory definition of information service, cable modem service provides the capabilities described above "via telecommunications." That telecommunications component is not, however, separable from the data-processing capabilities of the service. As provided to the end user the telecommunications is part and parcel of cable modem service and is integral to its other capabilities.

In re Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, 17 FCC Rcd. 4798, 4823 (Mar. 15, 2002) (declaratory ruling and notice of proposed rulemaking), *aff'd in part and vacated in part*, Brand X Internet Servs. v. FCC, 345 F.3d 1120 (9th Cir. 2003), *rev'd and remanded*, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005). *See generally* Rob Frieden, *Neither Fish nor Fowl: New Strategies for Selective Regulation of Information Services*, 6 J. TELECOMM. & HIGH TECH. L. 373 (2008); Rob Frieden, *What Do Pizza Delivery and Information Services Have in Common? Lessons From Recent Judicial and Regulatory Struggles with Convergence*, 32 RUTGERS COMPUTER & TECH. L.J. 247 (2006).

integrated into an information-service composite, the FCC could then abandon conventional common-carrier regulation required by Title II of the Communications Act.[41]

In the short term, the Commission championed regulatory restraint, a laudable goal that arguably contributed to the Internet's speedy commercial success.[42] However, the Commission soon discovered that—having given up on a direct statutory link—it would experience great difficulty in imposing any lawful safeguards, even when it received complaints of clearly abusive, discriminatory, and anticompetitive practices like those undertaken by Comcast.[43]

The FCC appeared quite confident that it could remedy any miscalculations and improper deregulation simply by invoking ancillary jurisdiction to revisit and revise its prior deregulation if consumer protection and other compelling circumstances warranted.[44] In hindsight, the Commission acted too summarily both in its decision to deem all forms of Internet access exempt from Title II oversight and its assumption that it could readily undo, revise, or reassemble a limited regulatory regime if necessary.

When faced with instances where it had to remedy a problem (or make another information-service/telecommunications-service determination), the FCC has generated a mixed record. In some instances reviewing courts have deferred to the Commission's

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[41] 47 U.S.C. §§ 201-276.

[42] Ex Parte Submission in CS Docket No. 02-52 from Tim Wu, Assoc. Professor, Univ. of Va. Sch. of Law, and Lawrence Lessig, Professor of Law, Stanford Law Sch., to Marlene H. Dortch, Sec'y, FCC 4 (August 22, 2003), *available at* http://www.timwu.org/wu_lessig_fcc.pdf.

[43] *See* Comcast Corp. v. FCC, 600 F.3d 642, 661 (D.C. Cir. 2010) ("'[T]he allowance of wide latitude in the exercise of delegated powers is not the equivalent of untrammeled freedom to regulate activities over which the statute fails to confer . . . Commission authority.'" (quoting Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC, 533 F.2d 601, 618 (D.C. Cir. 1976))); Comcast Sanction, *supra* note 11, at 13,030-31.

[44] The FCC overestimated its ability to apply Title I ancillary jurisdiction to re-regulate information services after having previously determined that it lacked statutory authority:

> The Commission is empowered by statute to weigh these various objectives and craft regulations that specifically target the relevant features of VoIP and other IP-enabled services. Where the Act does not prescribe a particular regulatory treatment, the Commission may have authority to impose requirements under Title I of the Act. Alternatively, the Commission may forbear from applying specific provisions. Finally, of course, the Commission is entitled to amend or revoke its own rules and regulations when the underlying circumstances no longer apply.

In re IP-Enabled Services, Notice of Proposed Rulemaking, 19 FCC Rcd. 4863, 4893 (Mar. 10, 2004).

expertise and affirmed the assertion of jurisdiction[45] and rules (e.g., requiring VoIP service providers to comply with many conventional telephone company requirements[46]) despite the absence of direct statutory authority under Title II of the Communications Act. But in other cases, where equally compelling needs existed for the FCC to provide consumer safeguards, courts have deemed the Commission to lack sufficient statutory authority to act (e.g., sanctioning Comcast for deliberately preventing subscribers from transmitting and receiving video content via peer-to-peer traffic streams).[47]

Having made an unconditional determination that the information-service, deregulated "safe harbor"[48] applies to Internet access, the Commission could not subsequently reassert regulatory safeguards—no matter how necessary. When the FCC determined that only the information-service classification would apply, the Commission in effect determined that it had no direct statutory authority to impose regulatory requirements on telecommunications and other noninformation services that constitute a part of the blend of services contained in broadband Internet access. Even if the FCC could belatedly identify legitimate reasons for its

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[45] *See, e.g.*, Vonage Holding Corp. v. FCC, 489 F.3d 1232 (D.C. Cir. 2007).

[46] *See, e.g.*, *In re* IP-Enabled Services, 20 FCC Rcd. 10,245 (June 3, 2005) (first report and order and notice of proposed rulemaking), *aff'd sub nom*. Nuvio Corp. v. FCC, 473 F.3d 302 (D.C. Cir. 2006) (requiring interconnected VoIP service providers to supply 911 emergency calling capabilities); *In re* Universal Service Contribution Methodology, 21 FCC Rcd. 7518 (June 27, 2006) (report and order and notice of proposed rulemaking), *aff'd sub nom. in relevant part*, Vonage Holdings Corp. v. FCC, 489 F.3d 1232 (D.C. Cir. 2007) (establishing universal service contribution obligations for interconnected VoIP service providers); *In re* Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; IP-Enabled Services, Report and Order and Further Notice of Proposed Rulemaking 22 FCC Rcd. 6927 (2007) (extending customer proprietary network information obligations to interconnected VoIP service providers), *aff'd sub nom*. Nat'l Cable & Telecom. Assoc. v. FCC, 555 F.3d 996 (D.C. Cir. 2009).

[47] *See generally* Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010).

[48] A safe harbor constitutes "[a]n area or means of protection [or a] provision (as in a statute or regulation) that affords protection from liability or penalty." BLACK'S LAW DICTIONARY 1363 (8th ed. 2004). In light of the lack of a bright line distinction between regulated telecommunications services and largely unregulated information services, ventures can possibly secure a competitive advantage through regulatory arbitrage where ventures seek reduced regulatory oversight by characterizing telecommunications services as information services. The FCC defined regulatory arbitrage as "businesses making decisions based on regulatory classifications rather than on customers' preferences and innovative and sustainable business plans." *In re* Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, 17 FCC Rcd. 4798, 4846 (Mar. 15, 2002) (declaratory ruling and notice of proposed rulemaking). *See generally* Rob Frieden, *Regulatory Arbitrage Strategies and Tactics in Telecommunications*, 5 N.C. J.L. & TECH. 227 (2004).

intervention, the prior determination that cable, DSL, powerline, and wireless services qualified for deregulated safe harbors rendered them effectively off limits.[49]

The FCC wrongly concluded that the broadband Internet access marketplace was so competitive that no provider would try to engage in anticompetitive practices. In reality the broadband marketplace offers limited options to most U.S. consumers with cable modem and DSL services predominating.[50] Rather than making a proper deregulatory statutory interpretation, the FCC opined—incorrectly—that industry self-regulation would force carriers to offer low-cost

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[49] The Supreme Court rejected the FCC's attempt to impose limited regulatory safeguards on information-service providers based on an extension of ancillary jurisdiction:

> In this case we must decide whether the Federal Communications Commission has authority to regulate an Internet service provider's network management practices. Acknowledging that it has no express statutory authority over such practices, the Commission relies on section 4(i) of the Communications Act of 1934, which authorizes the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). The Commission may exercise this "ancillary" authority only if it demonstrates that its action—here barring Comcast from interfering with its customers' use of peer-to-peer networking applications—is "reasonably ancillary to the . . . effective performance of its statutorily mandated responsibilities." *Am. Library Ass'n v. FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005). The Commission has failed to make that showing. It relies principally on several Congressional statements of policy, but under Supreme Court and D.C. Circuit case law statements of policy, by themselves, do not create "statutorily mandated responsibilities."

Comcast Corp., 600 F.3d at 644.

[50] The FCC has overstated the level of broadband competition in the United States.

> Contrary to claims of those who feel the U.S. has "robust broadband competition," it is clear that half of the states have a duopoly rather than true competitive markets. The only question for these states is how much of a market share the top two providers collectively command. In states such as Ohio and Nevada, where there is a 30+ percentage gap between the top two providers, some will argue this is a monopoly. The other contention, that consumers and businesses have a wealth of options for providers (one industry executive estimated "everyone has at least four wireless carries, plus cable, satellite" etc.), also has flaws. This is perhaps true when taking in the nation as a whole, but when analyzed at the state and county levels which is where in reality the selection of possible providers actually exists, there are far fewer choices. Even in the most competitive states, the bottom five competitors have 3% market share or less. These competitors are obviously not offering services throughout their states, so clearly any remaining providers are less than a competitive force. Furthermore, if others are adding dial up service providers to their list of consumer choices, this is disingenuous distraction because consumers know dial-up is Internet access but it isn't broadband.

ADAM ELLIOTT & CRAIG SETTLES, THE STATE OF BROADBAND COMPETITION IN AMERICA—2010 (2010), *available at* http://gigaom.files.wordpress.com/2010/04/pdf-broadband-competition-research-report-4-22-10-final.pdf.

rates and refrain from engaging in anticompetitive conduct.[51] In every instance where a regulatory safeguard has appeared necessary, explicitly or implicitly, for an information service, the FCC has had to scramble to find a lawful basis to reassert jurisdiction. This process has forced the FCC to spend countless hours devising creative and not-always-successful ways to backtrack from its previously clear and unequivocal determination. One example is the FCC's attempt to sanction Comcast for deliberately interfering with its subscribers' peer-to-peer file transfers, which contained some identical content to the company's pay-per-view cable television service.[52] The Commission determined that Comcast did not have legitimate traffic-management reasons for meddling with subscriber traffic[53] and that the company lacked candor in its representation of what tactics it had used.[54] Notwithstanding the commonly shared view that Comcast's conduct justified FCC investigation and a remedy to safeguard consumers, the D.C. Circuit Court of Appeals rejected the FCC's attempt to invoke ancillary jurisdiction as the lawful basis for sanctioning Comcast. The court determined that the FCC lacked a direct statutory basis for intervening:

> In this case the Commission cites . . . [no section in the Communications Act of 1934] to shed light on any express statutory delegation of authority found in Title II, III, VI, or, for that matter, anywhere else. That is, unlike the way it successfully employed policy statements in *Southwestern Cable* and *Midwest Video I*, the Commission does not rely on section 230(b) or section 1 to argue that its regulation of an activity over which it concededly has no express statutory authority (here Comcast's Internet management practices) is necessary to further its regulation of activities over which it does have express statutory authority (here, for example, Comcast's

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[51] Wireline Broadband Classification Order, *supra* note 3, at 14,884-85 (discussing sufficiency of intermodal competition and price decline as a result of that competition).

[52] "[T]he evidence reviewed above shows that Comcast selectively targeted and terminated the upload connections of its customers' peer-to-peer applications and that this conduct significantly impeded consumers' ability to access the content and use the applications of their choice." Comcast Sanction, *supra* note 11, at 13,054.

> Peer-to-peer applications, including those relying on BitTorrent, have become a competitive threat to cable operators such as Comcast because Internet users have the opportunity to view high-quality video with BitTorrent that they might otherwise watch (and pay for) on cable television. Such video distribution poses a particular competitive threat to Comcast's video-on-demand ("VOD") service.

Id. at 13,030.

[53] *Id.* at 13,050.

[54] "Comcast's statements in its comments and response to Free Press's complaint raise troubling questions about Comcast's candor during this proceeding." *Id*. at 13,032 n.31.

> management of its Title VI cable services). In this respect, this case is just like *NARUC II*. On the record before us, we see "no relationship whatever," *NARUC II*, 533 F.2d [601,] 616, between the Order and services subject to Commission regulation.[55]

Faced with a clear rebuke, FCC Chairman Julius Genachowski attempted to fashion a rationale for subdividing broadband access so that the Commission could identify and apply limited regulation of now identifiable telecommunications service components.[56] This newfound severability of telecommunications services ran completely counter to the FCC's previous rationale used to apply the information-service classification unconditionally to broadband Internet access. The Commission previously recognized the need for a telecommunications link to provide bit-and-packet transmission across distances; however, the Commission determined that this component was not a standalone retail service because it was seamlessly integrated with a predominant information service.[57] The Supreme Court affirmed the FCC's statutory interpretation, which served as the basis to treat cable modem Internet access as an information service.[58]

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[55] *Comcast Corp.*, 600 F.3d at 654.

[56] *See* Julius Genachowski, Chairman, Fed. Commc'ns Comm'n, The Third Way: A Narrowly Tailored Broadband Framework (May 6, 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-297944A1.doc (proposing to apply Title II regulation only to the bit transmission portion of ISP services and rejecting a renewed attempt to find a way to extend Title I ancillary jurisdiction or reclassifying all aspects of Internet access as a telecommunications service); *see also* Austin Schlick, General Counsel, Fed. Commc'ns Comm'n, A Third-Way Legal Framework for Addressing the *Comcast* Dilemma (May 6, 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-297945A1.doc (providing legal rationale for narrow application of selected sections of Title II regulatory authority over Internet access).

[57] To support its finding that broadband Internet access constitutes an information service, the FCC subordinated the telecommunications transport function and emphasized the nature of what content subscribers receive:

> Thus, whether a telecommunications service is being provided turns on what the entity is "offering . . . to the public," and customers' understanding of that service. End users subscribing to wireline broadband Internet access service expect to receive (and pay for) a finished, functionally integrated service that provides access to the Internet. End users do not expect to receive (or pay for) two distinct services—both Internet access service and a distinct *transmission* service, for example. Thus, the transmission capability is part and parcel of, and integral to, the Internet access service capabilities. Accordingly, we conclude that wireline broadband Internet access service does not include the provision of a telecommunications service to the end user irrespective of how the service provider may decide to offer the transmission component to other service providers.

Wireline Broadband Classification Order, *supra* note 3, at 14,910-11.

[58] Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).

This newfound ability to segregate and identify a new telecommunications component to Internet access service is a scramble and a stretch. Previously, the Commission conveniently and expediently argued no such segregation could occur. The FCC subsequently abandoned this strategy and now asserts that it can still intervene and respond to complaints about ISP conduct based on other creative and novel interpretations of the Communications Act of 1934, as amended.[59]

Ostensibly structured to offer an acceptable compromise, the FCC issued a Report and Order that imposes basic public-interest obligations on ISPs,[60] including four principles established in a 2005 statement[61] and requirements that ISPs operate with transparency, nondiscrimination, and a commitment not to block lawful traffic.[62] The Commission identified exceptions for reasonable network management,[63] specialized services,[64] and

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[59] *In re* Preserving the Open Internet, 25 FCC Rcd. 17,905 (Dec. 23, 2010) (report and order) [hereinafter Open Internet Report and Order]; *see also In re* Preserving the Open Internet, 24 FCC Rcd. 13,064 (Oct. 22, 2009) (notice of proposed rulemaking) [hereinafter Open Internet NPRM].

[60] Specifically, the FCC imposed rules on the providers of broadband Internet access service, defined as a

> mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service. This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence, or that is used to evade the protections set forth in this Part.

Open Internet Report and Order, *supra* note 59, at 17,932.

[61] *In re* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 FCC Rcd. 14,986, 14,988 (Sept. 23, 2005) (policy statement).

[62] The FCC attempts to couch its open access initiative as consistent with prior bipartisan actions:

> [W]e adopt three basic rules that are grounded in broadly accepted Internet norms, as well as our own prior decisions: i. Transparency. Fixed and mobile broadband providers must disclose the network management practices, performance characteristics, and terms and conditions of their broadband services; ii. No blocking. Fixed broadband providers may not block lawful content, applications, services, or non-harmful devices; mobile broadband providers may not block lawful websites, or block applications that compete with their voice or video telephony services; and iii. No unreasonable discrimination. Fixed broadband providers may not unreasonably discriminate in transmitting lawful network traffic.

Open Internet Report and Order, *supra* note 59, at 17,906.

[63] "A network management practice is reasonable if it is appropriate and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service." *Id.* at 17,952 (differentiating between reasonable network management practices that could affect how subscribers access content and unreasonable discriminatory practices).

wireless access.[65] Notwithstanding its prior decision to apply the information-service classification that requires the FCC to eschew regulatory oversight, the Commission emphasized that the public-interest duty to ensure an open Internet required it to establish clear and certain rules applicable to both fixed (i.e., wire-based) and mobile (i.e., wireless) ISPs.[66]

Having faced instances where it saw the need to intervene and resolve complaints about unfair and anticompetitive practices of a major national ISP, the FCC presented compelling arguments to impose public-interest safeguards.[67] But in concluding that retail ISPs operate as information-service providers, the Commission acted on the assumption that an ISP like Comcast would never engage in such practices because robust competition would punish such self-serving conduct with substantial customer migration to alternative carriers promising not to interfere with customers' broadband traffic.

The FCC's Open Internet Report and Order would obligate all ISPs to "disclose [their] network management practices, performance characteristics, and terms and

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[64] "'[S]pecialized services,' such as some broadband providers' existing facilities-based VoIP and Internet Protocol-video offerings, differ from broadband Internet access service . . . ." *Id.* at 17,965.

> We will closely monitor the robustness and affordability of broadband Internet access services, with a particular focus on any signs that specialized services are in any way retarding the growth of or constricting capacity available for broadband Internet access service. We fully expect that broadband providers will increase capacity offered for broadband Internet access service if they expand network capacity to accommodate specialized services. We would be concerned if capacity for broadband Internet access service did not keep pace. We also expect broadband providers to disclose information about specialized services' impact, if any, on last-mile capacity available for, and the performance of, broadband Internet access service. We may consider additional disclosure requirements in this area in our related proceeding regarding consumer transparency and disclosure.

Id. at 17,966.

[65] Despite the likelihood that wireless network access will grow and perhaps become the primary way people access the Internet, the FCC established relaxed anti-blocking rules based on spectrum and operational limitations not applicable to wire-based networks.

> A person engaged in the provision of mobile broadband Internet access service, insofar as such person is so engaged, shall not block consumers from accessing lawful websites, subject to reasonable network management; nor shall such person block applications that compete with the provider's voice or video telephony services, subject to reasonable network management.

Id. at 17,959.

[66] *Id.* at 17,908.

[67] *See id.*

conditions of their broadband services."[68] The FCC adopted different requirements for fixed and broadband providers on the other two key requirements. Fixed providers may not unreasonably discriminate in transmitting lawful network traffic, nor can they block lawful content, applications, services, or nonharmful devices.[69] Mobile broadband providers may not block access to lawful websites or applications that compete with their voice or video services.[70]

The Report and Order rejects assertions that network neutrality[71] requirements would stifle innovation, reduce

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[68] *Id.* at 17,906.

> A person engaged in the provision of broadband Internet access service shall publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient for consumers to make informed choices regarding use of such services and for content, application, service, and device providers to develop, market, and maintain Internet offerings.

Id. at 17,937.

[69] "A person engaged in the provision of fixed broadband Internet access service, insofar as such person is so engaged, shall not block lawful content, applications, services, or non-harmful devices, subject to reasonable network management." *Id.* at 17,942.

[70] *Id.* at 17,959-60.

[71] Network neutrality refers to the imposition of nondiscrimination, transparency, and other requirements on ISPs. The requirements are designed to foster a level, competitive playing field among content providers and to establish consumer safeguards so that Internet users have access limited only by legitimate concerns such as ISP network management and national security. *See* Rob Frieden, *A Primer on Network Neutrality*, 43 INTERECONOMICS: REV. EUR. ECON. POL'Y 4, 5 (2008). *See generally* Marvin Ammori, *Beyond Content Neutrality: Understanding Content-Based Promotion of Democratic Speech*, 61 FED. COMM. L.J. 273 (2009); Dan G. Barry, *The Effect of Video Franchising Reform on Net Neutrality: Does the Beginning of IP Convergence Mean that It Is Time for Net Neutrality Regulation?*, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 421 (2008); Sascha D. Meinrath & Victor W. Pickard, *Transcending Net Neutrality: Ten Steps Toward an Open Internet*, 12 J. INTERNET L., No. 6, 1 (Dec. 2008); Jennifer L. Newman, *Keeping the Internet Neutral: Net Neutrality and its Role in Protecting Political Expression on the Internet*, 31 HASTINGS COMM. & ENT. L.J. 153 (2008); T. Randolph Beard et al., *Network Neutrality and Industry Structure*, 29 HASTINGS COMM. & ENT. L.J. 149 (2007); Jerry Brito & Jerry Ellig, *A Tale of Two Commissions: Net Neutrality and Regulatory Analysis*, 16 COMMLAW CONSPECTUS 1 (2007); Rob Frieden, *Internet 3.0: Identifying Problems and Solutions to the Network Neutrality Debate*, 1 INT'L J. COMM. 461 (2007); Rob Frieden, *Network Neutrality or Bias?—Handicapping the Odds for a Tiered and Branded Internet*, 29 HASTINGS COMM. & ENT. L.J. 171 (2007); Brett M. Frischmann & Barbara van Schewick, *Network Neutrality and the Economics of an Information Superhighway: A Reply to Professor Yoo*, 47 JURIMETRICS J. 383 (2007); Tim Wu & Christopher S. Yoo, *Keeping the Internet Neutral?: Tim Wu and Christopher Yoo Debate*, 59 FED. COMM. L.J. 575 (2007); Robert E. Litan & Hal J. Singer, *Unintended Consequences of Net Neutrality Regulation*, 5 J. TELECOMM. & HIGH TECH. L. 533 (2007); Randolph J. May, *Net Neutrality Mandates: Neutering the First Amendment in the Digital Age*, I/S: A J. L. & POL'Y FOR INFO. SOC'Y 197 (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 (2007); Howard A.

incentives to invest in network infrastructure, and hamper employment in the Internet economy:

> We believe these rules, applied with the complementary principle of reasonable network management, will empower and protect consumers and innovators while helping ensure that the Internet continues to flourish, with robust private investment and rapid innovation at both the core and the edge of the network. This is consistent with the National Broadband Plan goal of broadband access that is ubiquitous and fast, promoting the global competitiveness of the United States.[72]

Despite the strident dissents from the two Republican Commissioners, the Report and Order appears to emphasize that the final rules logically follow from the nonpartisan consensus reached in documents created in 2005 and 2007.[73] Further, the Report and Order claims that the requirements do

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Shelanski, *Network Neutrality: Regulating with More Questions Than Answers*, 6 J. TELECOMM. & HIGH TECH. L. 23 (2007); Barbara A. Cherry, *Misusing Network Neutrality to Eliminate Common Carriage Threatens Free Speech and the Postal System*, 33 N. KY. L. REV. 483 (2006); Christopher S. Yoo, *Network Neutrality and the Economics of Congestion*, 94 GEO. L.J. 1847 (2006); Bill D. Herman, *Opening Bottlenecks: On Behalf of Mandated Network Neutrality*, 59 FED. COMM. L.J. 103 (2006); William G. Laxton, Jr., *The End of Net Neutrality*, 2006 DUKE L. & TECH. REV. NO. 15; Lawrence Lessig, *In Support of Network Neutrality*, I/S: A J. ON L. & POL'Y FOR INFO. SOC'Y 185 (2007); J. Gregory Sidak, *A Consumer-Welfare Approach to Network Neutrality Regulation of the Internet*, 2 J. COMP. L. & ECON. 349 (2006); Adam Thierer, *Are "Dumb Pipe" Mandates Smart Public Policy? Vertical Integration, Net Neutrality, and the Network Layers Model*, 3 J. TELECOMM. & HIGH TECH. L. 275 (2005); Christopher S. Yoo, *Beyond Network Neutrality*, 19 HARVARD J. L. & TECH. 1 (2005); Christopher S. Yoo, *Would Mandating Broadband Network Neutrality Help or Hurt Competition? A Comment on the End-to-End Debate*, 3 J. ON TELECOMM. & HIGH TECH. L. 23 (2004); Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. TELECOMM. & HIGH TECH L. 141 (2003); Mark A. Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. REV. 925 (2001).

[72] Open Internet Report and Order, *supra* note 59, at 17,906.

[73] The FCC attempts to frame the Open Internet Report and Order as noncontroversial and a lawful exercise of statutory authority:

> The rules we proposed in the *Open Internet NPRM* and those we adopt today follow directly from the Commission's bipartisan *Internet Policy Statement*, adopted unanimously in 2005 and made temporarily enforceable for certain broadband providers in 2005 and 2007; openness protections the Commission established in 2007 for users of certain wireless spectrum; and a notice of inquiry in 2007 that asked, among other things, whether the Commission should add a principle of nondiscrimination to the *Internet Policy Statement*. Our rules build upon these actions, first and foremost by requiring broadband providers to be transparent in their network management practices, so that end users can make informed choices and innovators can develop, market, and maintain Internet-based offerings. The rules also prevent certain forms of blocking and discrimination with respect to content, applications, services, and devices that depend on or connect to the Internet.

Id. at 17,907-08 (citations omitted).

not violate the Constitution,[74] particularly First Amendment expression rights of ISPs[75] and the prohibition on government takings in the Fifth Amendment.[76]

Additionally, the Report and Order extensively attempts to demonstrate that the FCC has lawful jurisdiction to promulgate network neutrality rules, primarily because Congress, in Section 706 of the Telecommunications Act,[77] authorized the FCC to take all reasonable steps to promote widespread access to the Internet.[78] In light of the *Comcast* case, the Commission must establish clear and direct statutory authority to impose new rules.[79] The Commission heavily relied on Section 706 of the Telecommunications Act,[80] which does not explicitly authorize regulation and rule making.[81] The FCC inferred that the duty to encourage the deployment of "advanced telecommunications capability" authorizes the Commission to use whatever tools it considers necessary to achieve timely progress.[82]

The FCC's assumption of statutory authority requires two novel reinterpretations of the definition of *telecommunications* contained in the Communications Act. First, the FCC has to consider advanced telecommunications capability to include Internet access,[83] despite having

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[74] *See id*. at 17,981-87.

[75] *See* Rob Frieden, *Invoking and Avoiding the First Amendment: How Internet Service Providers Leverage Their Status as Both Content Creators and Neutral Conduits*, 12 U. PA. J. CONST. L. 1279, 1314-15 (2010).

[76] Open Internet Report and Order, *supra* note 59, at 17,985.

[77] Section 706 is reproduced in the notes to Section 157 of the Communications Act of 1934. 47 U.S.C. § 157 notes (2006).

[78] *See* Open Internet Report and Order, *supra* note 59, at 17,966-81.

[79] Comcast Corp. v. FCC, 600 F.3d 642, 661 (D.C. Cir. 2010).

[80] Open Internet Report and Order, *supra* note 59, at 17,968.

[81] *See* 47 U.S.C. § 1302.

[82] The FCC inferred that Section 706 of the 1996 Act confers broad authority to revise the scope of regulatory oversight to promote Internet access:

> As noted, Section 706 of the 1996 Act directs the Commission (along with state commissions) to take actions that encourage the deployment of "advanced telecommunications capability." . . . Under Section 706(a), the Commission must encourage the deployment of such capability by "utilizing, in a manner consistent with the public interest, convenience, and necessity," various tools including "measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."

Open Internet Report and Order, *supra* note 59, at 17,968.

[83] "'[A]dvanced telecommunications capability,' as defined in the statute, includes broadband Internet access." *Id*. at 17,968 (citing 47 U.S.C. § 1302(d)(1) (defining "advanced telecommunications capability" as "high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any

previously concluded that the technologies providing such access constitute information services that only *integrate* telecommunications (but do not constitute telecommunications services in and of themselves). The Commission previously determined that the telecommunications transmission of bits and packets in Internet access is not severable from the predominant information service offered, but instead provided as a subordinate part of an information service that an ISP offers to end users.[84] Second, the FCC now has to elevate the significance of the telecommunications bit-transmission function in Internet access[85] to trigger public-interest concerns about competition and anticompetitive practices, even though the Commission had previously qualified Internet-access technologies for an unregulated safe harbor status. Now the FCC wants to validate the telecommunications component as the driver for public-interest regulatory safeguards.

Despite having previously concluded that the broadband marketplace was robustly competitive and close to ubiquitous, the Commission cited to better-calibrated market penetration data to support its involvement:

> Section 706(b) of the 1996 Act provides additional authority to take actions such as enforcing open Internet principles. It directs the

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technology")); *In re* A National Broadband Plan for our Future, 24 FCC Rcd. 4342, 4345-46 (Apr. 8, 2009) (notice of inquiry). "The term 'advanced telecommunications capability' is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology." 47 U.S.C. § 1302(d)(1); *see also id.* at n.19. ("advanced telecommunications capability" includes broadband Internet access); *In re* Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, 14 FCC Rcd. 2398, 2400 (Jan. 28, 1999) (report) (Section 706 addresses "the deployment of broadband capability").

[84] *See* Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 977-78 (2005).

[85] Note that before the FCC deregulated Internet access, the Commission considered it possible to separate the telecommunications component:

> We conclude that advanced services are telecommunications services. The Commission has repeatedly held that specific packet-switched services are "basic services," that is to say, pure transmission services. xDSL and packet switching are simply transmission technologies. . . . An end-user may utilize a telecommunications service together with an information service, as in the case of Internet access. In such a case, however, we treat the two services separately: the first service is a telecommunications service (*e.g.*, the xDSL-enabled transmission path), and the second service is an information service, in this case Internet access.

In re Deployment of Wireline Services Offering Advanced Telecommunications Capability, 13 FCC Rcd. 24,012, 24,029-30 (Aug. 6, 1998) (memorandum and opinion and order, and notice of proposed rulemaking).

> Commission to undertake annual inquiries concerning the availability of advanced telecommunications capability to all Americans and requires that, if the Commission finds that such capability is not being deployed in a reasonable and timely fashion, it "*shall take immediate action* to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market." In July 2010, the Commission "conclude[d] that broadband deployment to *all* Americans is not reasonable and timely" and noted that "[a]s a consequence of that conclusion," Section 706(b) was triggered. Section 706(b) therefore provides express authority for the pro-investment, pro-competition rules we adopt today.[86]

Additionally, the FCC applied portions of Titles II, III, and VI of the Communications Act to ISPs despite the fact that Title II customarily applies to common carriers, Title III to broadcasters and wireless carriers, and Title VI to cable television operators.[87] Instead of stating that ISPs operate as telecommunications service carriers when they provide essential first and last-mile access to the Internet—a scenario suggested by FCC Chairman Julius Genachowski and now apparently rejected—the Report and Order states that because some Internet-based services compete with traditional telephone, broadcast, and video services, the Commission has jurisdiction to impose rules and regulations to prevent anticompetitive practices and to promote competition.[88]

The FCC justified the imposition of network neutrality rules on ISPs with the conclusion that ISPs have the incentive and ability to engage in anticompetitive practices that limit Internet openness in terms of content, applications, services, and devices accessed over, or connected to, broadband Internet access services.[89] The Commission provided three examples suggesting that ISPs may have incentives to block or degrade content that competes with what the ISP or an affiliate offers, to impose surcharges on competing content providers in addition to end user subscription fees, and to degrade competitors' traffic:

> [1] [B]roadband providers may have economic incentives to block or otherwise disadvantage specific edge providers or classes of edge providers, for example by controlling the transmission of network traffic over a broadband connection, including the price and quality of access to end users. A broadband provider might use this power to

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[86] Open Internet Report and Order, *supra* note 59, at 17,972.
[87] *Id.* at 17,972-80.
[88] *Id.*
[89] *Id.* at 17,907.

> benefit its own or affiliated offerings at the expense of unaffiliated offerings.[90]
>
> . . . .
>
> [2] [B]roadband providers may have incentives to increase revenues by charging edge providers, who already pay for their own connections to the Internet, for access or prioritized access to end users. Although broadband providers have not historically imposed such fees, they have argued they should be permitted to do so. A broadband provider could force edge providers to pay inefficiently high fees because that broadband provider is typically an edge provider's only option for reaching a particular end user. Thus broadband providers have the ability to act as gatekeepers.[91]
>
> . . . .
>
> [3] [I]f broadband providers can profitably charge edge providers for prioritized access to end users, they will have an incentive to degrade or decline to increase the quality of the service they provide to non-prioritized traffic. This would increase the gap in quality (such as latency in transmission) between prioritized access and non-prioritized access, induce more edge providers to pay for prioritized access, and allow broadband providers to charge higher prices for prioritized access. Even more damaging, broadband providers might withhold or decline to expand capacity in order to "squeeze" non-prioritized traffic, a strategy that would increase the likelihood of network congestion and confront edge providers with a choice between accepting low-quality transmission or paying fees for prioritized access to end users.[92]

The FCC considers the three examples of discrimination as more than theoretical in light of actual examples where ISPs, such as Comcast, have blocked or degraded traffic without legitimate network management concerns.[93] Similarly,

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[90] *Id.* at 17,915.

[91] *Id.* at 17,919.

[92] *Id.* at 17,922.

[93] Content providers also may have the ability and incentive to interfere with end user Internet access. For example, to bolster its negotiation leverage with Cablevision on the amount of compensation due for the right to retransmit broadcast television content, Fox briefly blocked Cablevision broadband subscribers from accessing the company's content made available via Hulu's website. Fox used packet-interrogation techniques to identify which content requests made via the Hulu web site originated from Cablevision subscribers. *See Level 3 Communications Issues Statement Concerning Comcast's Actions*, BUSINESSWIRE (Nov. 29, 2010, 4:38 PM), http://www.businesswire.com/news/home/20101129006456/en/Level-3-Communications-Issues-Statement-Comcast%E2%80%99s-Actions; Letter from Joseph W. Waz, Jr., Senior Vice President, External Affairs & Pub. Policy Counsel & Lynn R. Charytan, Vice President, Legal Regulatory Affairs, Comcast, to Sharon Gillett, Chief, Wireline Competition Bureau, FCC (Nov. 30, 2010), *available at* http://www.comcast.com/MediaLibrary/1/1/About/PressRoom/Documents/Comcastexparte1130.pdf; *see also* Joe Waz, *20 Q's—with Accurate A's—About Level 3's Peering Dispute*, COMCAST VOICES (Dec. 7, 2010), http://blog.comcast.com/2010/12/20-qs---with-accurate-as---

the Commission has stated that the benefits in guarding against such anticompetitive practices outweigh the costs.[94]

The FCC's latest attempt to circumvent its information-service classification of broadband Internet access may not pass muster with a reviewing court.[95] The Commission avoided repeating the Title I ancillary jurisdiction strategy as well as Chairman Genachowski's proposed surgical removal of telecommunications-service elements from information services. But the Commission has come up with similarly triangulating strategies: Title III confers broad authority for the FCC to impose any necessary safeguard over spectrum-using services—arguably including wireless broadband[96]—and Section 706 of the Telecommunications Act of 1996 both encourages and authorizes any well-articulated rationale for regulating information services, which promotes wider access to broadband services.[97]

Had the FCC acknowledged years ago that public access to information services might trigger conflicts not readily resolved by the marketplace, the Commission would have been able to retain limited and nonintrusive jurisdiction to respond to complaints. Telecommunications and information markets and technologies have converged, and it is now more difficult for the FCC to determine the exact scope of its lawful jurisdiction and the line between regulated telecommunications services and unregulated information services. Rather than acknowledge the

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about-level-3s-peering-dispute.html; *Level 3 Releases Statement to Clarify Issues in Comcast/Level3 Interconnection Dispute*, BUSINESSWIRE (Dec. 3, 2010, 9:13 AM), http://www.businesswire.com/news/home/20101203005375/en/Level-3-Releases-Statement-Clarify-Issues-ComcastLevel.

[94] The FCC attempted to downplay the significance of its order and the burdens it imposed:

> By comparison to the benefits of these prophylactic measures, the costs associated with the open Internet rules adopted here are likely small. Broadband providers generally endorse openness norms—including the transparency and no blocking principles—as beneficial and in line with current and planned business practices (though they do not uniformly support rules making them enforceable) Even to the extent rules require some additional disclosure of broadband providers' practices, the costs of compliance should be modest.

Open Internet Report and Order, *supra* note 59, at 17,928.

[95] Notice of Appeal, Verizon v. FCC (No. 11-1355) (D.C. Cir. 2011). A previous appeal was dismissed as premature/unripe because the final rules had not appeared in the Federal Register. Verizon v. FCC, Nos. 11–1014, 11–1016, 2011 WL 1235523 (D.C. Cir. Apr. 4, 2011).

[96] *See, e.g.*, 47 U.S.C. § 332 (2006) (applying regulations to wireless commercial mobile radio service operators using Title III that generally address broadcast spectrum use).

[97] *See id.* § 1302.

need to make ad hoc determinations and to resolve conflicts, the Commission blithely assumed that a competitive marketplace would provide solutions to consumers and remedies to any and all problems. Such reliance comes across as misguided, particularly in light of the conflicts the FCC has faced involving Internet access and how to justify its intervention.

Ironically, even as the FCC appears to have abandoned oversight of information services completely, it has devised a judicially approved model for asserting jurisdiction over a new hybrid service that combines telecommunications and information services: VoIP. The Commission has established an extensive body of decisions on what obligations VoIP service providers must undertake to serve the public interest. Bear in mind that many of these obligations impose significant costs on VoIP carriers, thereby reducing their competitiveness and ability to offer a cheaper alternative to existing wired and wireless services. Although VoIP arguably constitutes a type of information service,[98] the FCC has managed to avoid having to make that determination even as the Commission requires VoIP operators to incur the same obligations as Title II–regulated common-carrier telephone companies.[99] VoIP service providers that can receive or deliver calls to conventional wired and wireless networks must contribute to universal service funding programs designed to promote affordable dial-up telephone service;[100] make arrangements to support subscriber

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[98] VoIP customers initiate and receive calls via their broadband links, e.g., DSL and cable modem services. The FCC considers broadband access an information service. *In re* Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, 17 FCC Rcd. 4798, 4802 (Mar. 15, 2002) (declaratory ruling and notice of proposed rulemaking), *aff'd*, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005); Wireline Broadband Classification Order, *supra* note 3. It follows that software and other applications carried via information-service links similarly qualify as information services.

[99] The FCC has managed to avoid making a specific regulatory classification of VoIP, despite having imposed Title II regulatory requirements:

> To date, the Commission has not classified interconnected VoIP service as either an information service or a telecommunications service. The Commission has, however, extended certain obligations to providers of such service, including local number portability, 911 emergency calling capability, universal service contribution, CPNI protection, disability access and TRS contribution requirements, and section 214 discontinuance obligations.

In re Connect America Fund, 26 FCC Rcd. 4554, 4582 (Feb. 9, 2011) (notice of proposed rulemaking and further notice of proposed rulemaking) (citations omitted).

[100] *In re* Universal Service Contribution Methodology, 21 FCC Rcd. 7518, 7538 (June 27, 2006) (report and order and notice of proposed rulemaking) (extending section 254(d) permissive authority to require interconnected VoIP providers to

access to emergency 911 service;[101] cooperate with law enforcement authorities;[102] incorporate the technical accommodations for persons with disabilities,[103] such as deaf callers; support the ability of existing subscribers to keep their existing telephone numbers when switching services;[104] and report service outages to the Commission. [105]

The FCC can impose consumer-oriented safeguards on VoIP service providers based on a more persuasive and better-articulated assertion of ancillary jurisdiction. Because VoIP competes with conventional wired and wireless services subject to Title II regulation, the Commission can impose the very same requirements on VoIP carriers despite the lack of specific Title II authority.[106] Reviewing courts have affirmed the Commission's jurisdiction as well as its preemption of the states from imposing a different regulatory regime, or none at all.[107] But success in selectively regulating VoIP service does not extend to other information services because a less-direct impact on a regulated service exists and also because of the FCC's summary conclusion that all information services qualify for deregulation.

B. Eliminating Common Carrier Duties

The FCC has streamlined and even deregulated some telecommunications services based on criteria contained in the

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contribute to the USF), *reh'g denied, vacated in part on other grounds*, Vonage Holding Corp. v. FCC, 489 F.3d 1232 (D.C. Cir. 2007).

[101] *In re* IP-Enabled Servs., 20 FCC Rcd. 10,245 (June 3, 2005) (first report and order and notice of proposed rulemaking).

[102] *In re* Communications Assistance for Law Enforcement Act & Broadband Access & Services, 20 FCC Rcd. 14,989 (Sept. 23, 2005) (first report and order and further notice of proposed rulemaking).

[103] *In re* IP-Enabled Services, 22 FCC Rcd. 11,275 (June 15, 2007) (report and order); *In re* IP-Enabled Services, 22 FCC Rcd. 18,319 (Oct. 9, 2007) (order and public notice seeking comment) (granting in part and denying in part waivers of the FCC order); *see also In re* Contributions to the Telecommunications Relay Services Fund, 26 FCC Rcd. 3285 (Mar. 3, 2011).

[104] *In re* Telephone Number Requirements for IP Enabled Services Providers, 22 FCC Rcd. 19,531 (Nov. 8, 2007) (report and order, declaratory ruling, order on remand, and notice of proposed rulemaking); *In re* Matters of Local Number Portability Porting Interval and Validation, 25 FCC Rcd. 6953 (May 20, 2010) (report and order) (establishing short deadlines for conversions).

[105] The Proposed Extension of Part 4 of the Commission's Rules Regarding Outage Reporting to Interconnected Voice Over Internet Protocol Service Providers and Broadband Internet Service Providers, PS Docket No. 11-82, FCC 12-22 (Feb. 21, 2012) (report and order), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-12-22A1.doc.

[106] *In re* Connect America Fund, 26 FCC Rcd. 4554, 4582 (Feb. 9, 2011) (notice of proposed rulemaking and further notice of proposed rulemaking) (citations omitted).

[107] Vonage Holding Corp. v. Minn. Pub. Utils. Comm'n, 290 F. Supp. 2d 993, 994 (D. Minn. 2003) (upholding FCC preemption of state VoIP regulation).

Telecommunications Act[108] and, more broadly, in light of expanded competition. In many instances the Commission wisely has forborne from applying conventional "command and control," "heavy-handed" regulation in light of carriers' ability to self-regulate and consumers' ability to pursue service options.[109] However, the Commission has accelerated the deregulatory glide path in some market segments based on wishful thinking and flawed assessments of the robustness and sustainability of competition.[110] The markets for equipment,[111]

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[108] Section 10 of the Telecommunications Act of 1996, codified at 47 U.S.C. § 160 (2006), requires the FCC to forbear from any statutory provision or regulation if the Commission determines that:

> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest.

47 U.S.C. § 160(a) (2006). In making such determinations, the Commission must also consider "whether forbearance from enforcing the provision or regulation will promote competitive market conditions." *Id.* § 160(b). Section 160(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." *Id.* § 160(d). Section 332(c) of the Communications Act, 47 U.S.C. § 332(c), authorizes the Commission to refrain or forbear from enforcing any provision other than the core requirements of sections 201, 202, and 208, which respectively require just and reasonable charges, practices, classifications, and regulations, prohibit unreasonable discrimination and carrier practices, and require the FCC to investigate complaints.

[109] *See* Earthlink, Inc. v. FCC, 462 F.3d 1 (D.C. Cir. 2006) (affirming the FCC's decision to forbear from imposing most local loop unbundling requirements on incumbent carriers); U.S. Telecom Ass'n v. FCC, 359 F.3d 554, 588 (D.C. Cir. 2004) (upholding the FCC's nationwide decision to refrain from requiring § 251 unbundling fiber broadband elements and reversing the Commission's decision not to eliminate other unbundling requirements in light if the adverse impact on carrier investment incentives).

[110] The FCC previously did not even require applicants for regulatory forbearance to demonstrate how marketplace conditions specifically supported less government oversight:

> 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 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.

In re Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended, 24 FCC Rcd. 9543, 9551 (June 29, 2009) (report and order) [hereinafter Forbearance Criteria Order].

[111] *In re* Use of the Carterfone Device in Message Toll Telephone Service, 13 F.C.C.2d 420 (June 26, 1968) (decision); *In re* Telerent Leasing Corp., 45 F.C.C.2d 204

wiring located on customers' premises,[112] and long-distance telephone services[113] provide clear examples of prudent regulatory streamlining. But similar initiatives for the first-, last-, and middle-mile services[114] that link end users with major

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(Feb. 5, 1974), *aff'd sub nom*. N.C. Util. Comm'n v. FCC, 537 F.2d 787 (4th Cir. 1976); *In re* Mebane Home Telephone Co., 53 F.C.C.2d 473, 474 (June 4, 1975), *aff'd sub nom*. Mebane Home Tel. Co. v. FCC, 535 F.2d 1324 (D.C. Cir. 1976); *see also* Pub. Util. Comm'n of Tex. v. FCC, 886 F.2d 1325 (D.C. Cir. 1989) (noting long established FCC policy that carriers and non-carriers alike have a federal right to interconnect to the public telephone network in ways that are privately beneficial if they are not publicly detrimental). Previous FCC opposition to this principle failed to pass muster with a reviewing court that interpreted the Communications Act as mandating the right of consumers to attach equipment to the network in ways that were privately beneficial but not publicly harmful. Hush-A-Phone Corp. v. United States, 238 F.2d 266 (D.C. Cir. 1956). "The intervenors' tariffs [prohibiting the use of a plastic device to enhance privacy and low volume conversations], under the Commission's decision, are in [sic] unwarranted interference with the telephone subscriber's right reasonably to use his telephone in ways which are privately beneficial without being publicly detrimental." *Id.* at 269.

[112] *In re* Detariffing the Installation and Maintenance of Inside Wiring, Second Report and Order, 51 Fed. Reg. 8498 (Mar. 12, 1986).

[113] "In recent years, the FCC has sought to facilitate greater competition in the provision of both long-distance and local telephone service." WorldCom, Inc. v. FCC, 238 F.3d 449, 452 (D.C. Cir. 2001) (citing AT&T v. FCC, 220 F.3d 607 (D.C. Cir. 2000); Bell Atl. Tel. Cos. v. FCC, 79 F.3d 1195 (D.C. Cir. 1996); Nat'l Rural Telecom Ass'n v. FCC, 988 F.2d 174 (D.C. Cir. 1993)); *see also In re* Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, 85 F.C.C.2d 1 (Nov. 28, 1980) (first report and order); *In re* MTS and WATS Market Structure, 93 F.C.C.2d 241 (Feb. 28, 1983) (report and order); *In re* Access Charge Reform, 15 FCC Rcd. 12,962 (May 31, 2000), *aff'd in part, rev'd in part, and remanded in part sub nom.* Tex. Office of Pub. Util. Counsel v. FCC, 265 F.3d 313 (5th Cir. 2001); *In re* Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, 84 F.C.C.2d 445 (Jan. 16, 1981).

[114] The FCC categorizes Internet access into three types based on geographical location and function:

> Today, the Internet has evolved from its early stages and is comprised of three types of interconnected networks. The first category, Backbone Providers, supply long-distance high-speed "connections between a small number of interconnection points." Second, there are Middle-Mile Providers who supply regional distributive functions; for example, a connection from a Backbone Provider to a distant city's central office maintained by an ISP. Finally, there are Last-Mile Providers who connect Middle-Mile Providers to end users (consumers). Although ISPs were historically considered Last-Mile Providers, it is often the case for broadband capable networks that the ISP is both the Last-Mile Provider and the Middle-Mile Provider. This system of connected networks is most analogous to a road system: Backbones represent interstate highways; Middle-Mile networks are the intrastate highways; and Last-Mile networks are the local roads that ultimately reach consumers.

Cody Vitello, *Network Neutrality Generates Contentious Debate Among Experts: Should Consumers Be Worried?*, 22 LOY. CONSUMER L. REV. 513, 518 (2010) (citations omitted).

> Middle-mile facilities are shared assets for all types of last-mile access. As such, the cost analysis is very similar regardless of last-mile infrastructure. The local aggregation point can vary based on technology (e.g., a cable headend, LEC central office or a wireless mobile switching center (MSC)) while the Internet gateway is a common asset. Middle-mile facilities are widely deployed but can be

broadband long-haul networks exemplify premature abandonment of regulatory safeguards in light of the onset of little competition, particularly in rural areas.[115]

> expensive in rural areas because of the difficulties of achieving local scale, thereby increasing the investment gap. On a per-unit basis, middle-mile costs are high in rural areas due to long distances and low aggregate demand when compared to middle-mile cost economics in urban areas. While there may be a significant affordability problem with regard to middle-mile access, it is not clear that there is a middle-mile fiber deployment gap.

In re Connect America Fund, 25 FCC Rcd. 6657, 6842 (Apr. 21, 2010) (notice of inquiry and notice of proposed rulemaking).

[115] The FCC's conclusions about broadband competitiveness has generated substantial opposition:

> The course the Commission has followed over the past eight years has turned out to be spectacularly wrong in all of those aspects. There is little to no competition for broadband services in the residential and "middle mile" markets. As a result, U.S. consumers pay higher rates for services with slower speeds than do consumers in other industrialized nations. Our record of online innovation has slowed to a crawl. The U.S.'s standing in the world ranking of broadband adoption falls continually. (One can look at various rankings and dispute any given position, but the trend in all of them is clear. America is clearly falling behind.)

Public Knowledge, Media Access Project, The New America Foundation & U.S. PIRG, *Comments In re A National Broadband Plan for our Future*, *in* Practising Law Inst., Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series 993 PLI/Pat 149, 176-77 (2010).

> The reason the U.S. is falling behind can be traced directly to the decisions the Commission made over the past 10 years to reclassify broadband service, taking it out of the environment of Title II while moving it into the more legally murky area of Title I by classifying broadband as an "information service" instead of as a "telecommunications service." Now is the time to recognize that this deliberate decision to deregulate by redefinition failed to produce the promised land of "intermodal competition" and reverse that decision.

Id. at 177.

> Rural broadband networks are fundamentally similar to broadband networks in other areas in that, in order to have broadband access to the Internet, they must include local access, or last-mile, broadband access to the end user and backhaul, or middle-mile, capabilities to an available Internet peering point. The last-mile network connects residential and business end users to a local ISP. In this configuration, the middle-mile or backhaul component connects the local ISP to an Internet peering point or node. In rural settings, either or both of these components may not support robust broadband connectivity.

Rural Broadband Report, 24 FCC Rcd. 12,791, 12,828 (Oct. 19, 2009) (public notice) (citations omitted); *cf.* Ad Hoc Telecomms. Users Comm. v. FCC, 572 F.3d 903, 908 (D.C. Cir. 2009) (deferring to the FCC's expertise in deeming middle mile markets sufficiently competition). *But see also* Data Requested in Special Access NPRM, 25 FCC Rcd. 15,146 (Oct. 28, 2010) (public notice) (seeking more data about the nature and scope of middle mile competition); *In re* Special Access Rates for Price Cap Local Exchange Carriers, 20 FCC Rcd. 1994, 1995 (Jan. 31, 2005) (order and notice of proposed rulemaking); Parties Asked to Refresh Record in the Special Access Notice of Proposed Rulemaking, 22 FCC Rcd. 13,352 (July 9, 2007); Parties Asked to Comment on Analytical Framework Necessary to Resolve Issues in the Special Access NPRM, 24 FCC Rcd. 13,638, 13,639 (Nov. 5, 2009) (public notice).

In three instances of streamlined regulatory oversight discussed below, the FCC eliminated statutory duties to deal, which, in turn, short-circuited both the prospect for true facilities-based competition and effective judicial review.[116] In its zeal to eliminate common-carrier regulations, based on a questionable finding of robust and sustainable competition, the FCC has abandoned requirements that local exchange carriers: (1) provide market entrants interconnection with their switching and routing facilities on congressionally mandated favorable terms and conditions;[117] (2) separate their basic transmission facilities from services that provide enhancements to these basic transmission links;[118] and (3) refrain from offering end-user retail services at rates below the wholesale rate offered other carriers.[119]

In all three instances the FCC eliminated regulatory requirements based on the view that they were not needed to ensure that consumers could acquire diverse services at competitive rates. After failing to convince the FCC that such streamlining did not serve the public interest, consumer advocates and recent market entrants were similarly unsuccessful at convincing appellate courts that the Commission erred in its fact finding.[120] On two separate occasions the Supreme Court has stated clearly that if the FCC determines that no regulatory safeguards are necessary, then reviewing courts

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[116] *See infra* Part II.B.3.

[117] *In re* Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 18 FCC Rcd. 16,978, 16,983 (Aug. 21, 2003), *vacated and remanded in part, aff'd in part*, U.S. Telecomm. Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004); *In re* Unbundled Access to Network Elements, 20 FCC Rcd. 2533, 2534 (Feb. 4, 2005) (order on remand).

[118] *In re* Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 F.C.C.2d 384, 385-86 (May 2, 1980) (final decision), *aff'd sub nom.* Computer & Commc'ns Indus. Ass'n. v. FCC, 693 F.2d 198 (D.C. Cir. 1982); *In re* Amendment of Sections 64.702 of the Commission's Rules & Regulations (Third Computer Inquiry), 104 F.C.C.2d 958, 962 (June 16, 1986) (report and order), *vacated sub nom.* California v. FCC, 905 F.2d 1217 (9th Cir. 1990), *on remand*, *In re* Computer III Remand Proceedings: Bell Operating Company Safeguards, 6 FCC Rcd. 174 (Dec. 17, 1990) (notice of proposed rulemaking and order), *rule modification*, 6 FCC Rcd. 7571 (1991), *vacated in part and remanded*, California v. FCC, 39 F.3d 919 (9th Cir. 1994), *on remand*, *In re* Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, 10 FCC Rcd. 5692 (Apr. 25, 1995) (order).

[119] Wireline Broadband Classification Order, *supra* note 3, at 14,868; Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438, 439-40 (2009) (inferring no duty to deal based on FCC determination of sufficient broadband competition).

[120] For example, a reviewing court did not question the FCC's conclusion that a sufficiently competitive market existed for telecommunications services linking end users with ISPs and other service providers. Ad Hoc Telecomm. Users Comm. v. FCC, 572 F.3d 903, 904 (D.C. Cir. 2009).

should not second guess the Commission and therefore should not apply a more rigorous antitrust standard or duty to deal.[121] Thus, if the FCC overstates the competitiveness and regulatory capability of telecommunications-service markets, recent case precedent states that appellate courts will not correct the Commission's mistakes but instead summarily validate the Commission's determination that such carriers have no duty to deal with other carriers.

1. Abandonment of Local Loop Unbundling

The Telecommunications Act of 1996[122] sought to stimulate local exchange service competition by creating a combination of specific common-carrier responsibilities on telecommunications carriers[123] with additional requirements on the Bell Telephone companies that were spun off from AT&T in 1984.[124] In exchange for satisfying a fourteen-point competitive checklist,[125] the spun-off Bell Telephone companies could seek FCC authorization to provide long-distance telephone services, a line of business prohibited since AT&T's divestiture.[126] Included in that list was a requirement that they provide network access on an *à la carte* or combined basis at rates well below what the incumbent carriers would seek to charge even at wholesale.[127] Congress hoped that the Bell companies' entry

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[121] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 410 (2004); *Linkline*, 555 U.S. at 450.

[122] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (Feb. 8, 1996).

[123] 47 U.S.C. § 251 (2006) (duties applicable to all telecommunications carriers). 47 U.S.C. § 252(c)(3) requires all telecommunications to

> provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

[124] 47 U.S.C. § 271 (duties that the Bell telephone companies must satisfy to qualify for the opportunity to pursue prohibited lines of business such as most long distance telephone services).

[125] *See Telecommunications Act of 1996 Section 271 Long Distance Application Summary of 14 Point Competitive Checklist*, FCC, http://transition.fcc.gov/Bureaus/Common_Carrier/News_Releases/1999/nrc9101b.html (last visited Jan. 24, 2012).

[126] Bellsouth Corp. v. FCC, 162 F.3d 678, 680-81 (D.C. Cir. 1998).

[127] The Supreme Court did not dispute the right of Congress to require the FCC to create new rate-setting methods with an eye toward expediting market entry in the local exchange marketplace:

into long-distance services would further stimulate competition in that market. Congress also believed that the interconnection requirements imposed on these carriers would jump-start local service competition.[128] But over time, the Bell companies faced a robustly competitive long-distance telephone service market with low margins and less-than-desired upside business opportunities.[129] The mandated promotional pricing of local exchange facilities stimulated market entry by new competitive local exchange carriers (CLECs), but sustainable, long-term competition by facilities-based carriers did not result.[130]

> The Act thus appears to be an explicit disavowal of the familiar public-utility model of rate regulation (whether in its fair-value or cost-of-service incarnations) presumably still being applied by many States for retail sales, *see In re* Implementation of Local Competition in Telecommunications Act of 1996, 11 F.C.C.R. 15,499, 15,857, ¶ 704 (1996) (First Report and Order), in favor of novel ratesetting designed to give aspiring competitors every possible incentive to enter local retail telephone markets, short of confiscating the incumbents' property.

Verizon Commc'ns Inc. v. FCC, 535 U.S. 467, 489 (2002).

[128] The Telecommunications Act of 1996 required incumbent local exchange carriers to cooperate with market entrants.

> Until the 1990's, local phone service was thought to be a natural monopoly. States typically granted an exclusive franchise in each local service area to a local exchange carrier (LEC), which owned, among other things, the local loops (wires connecting telephones to switches), the switches (equipment directing calls to their destinations), and the transport trunks (wires carrying calls between switches) that constitute a local exchange network. Technological advances, however, have made competition among multiple providers of local service seem possible, and Congress recently ended the longstanding regime of state-sanctioned monopolies. The Telecommunications Act of 1996 (1996 Act or Act), Pub. L. 104-104, 110 Stat. 56, fundamentally restructures local telephone markets. States may no longer enforce laws that impede competition, and incumbent LECs are subject to a host of duties intended to facilitate market entry.

AT&T Corp. v. Iowa Pub. Util. Bd., 525 U.S. 366, 371 (1999).

[129] The long distance toll service marketplace has become robustly competitive with low profit margins.

> Until the 1970s, AT&T had a virtual monopoly on long distance service in the United States. In the 1970s, competitors such as MCI and Sprint began also to offer long distance service. With the gradual emergence of competition, basic rates dropped, calling surged, and AT&T's dominance declined. More than 1,900 toll companies now offer long distance service of which more than 1,400 are wireline carriers. These carriers remain subject to the Commission's jurisdiction. The Commission, however, has chosen to rely on competition, rather than regulation, as much as possible. Thus, the Commission forbears from regulating most aspects of long distance service.

FED. COMMC'NS COMM., INDUSTRY ANALYSIS & TECH. DIV. WIRELINE COMPETITION BUREAU, TRENDS IN TELEPHONE SERVICE, 2010 WL 3806371 (2010) (tracking declining revenues and increased competition for inter-LATA toll service).

[130] Legislative and FCC attempts to promote local exchange competition failed:

> It was both the intent of Congress and the target of intense and sustained FCC efforts to open up the incumbent local exchange carriers' (ILECs) local access lines

Frustrated by the combination of low long-distance margins and the ongoing duty to bolster the market share of newcomers, incumbent carriers sought judicial relief. Initially, even the Supreme Court favored the FCC's interpretation of the '96 Act's requirements. The Court determined that the FCC could lawfully require promotional pricing that used a costing model which justified access prices well below existing wholesale rates[131] instead of actual, current, and already-incurred costs. Similarly, the Court held that such mandatorily low interconnection rates did not constitute an unconstitutional taking of incumbent-carrier property because the carriers never proved that any undertaking resulted in a financial loss, only less-than-desired financial gains.[132] However, the Court and other lower appellate tribunals later agreed that the FCC's interconnection pricing mandate lacked sufficient calibration to ensure that the promotional pricing only occurred where absolutely necessary to jump-start competition.[133] As time

> to competitive local exchange carriers (CLECs) who could then compete against the ILECs for "last mile" services without having to build their own access lines. Seldom have the forces of public policy in telecommunications been as powerfully aligned as they were on the issue of local-loop unbundling. And yet, the effort was a failure-the evidence for which is the demise of the CLECs. The reasons for this failure are clear: (i) the interface between the regulated monopoly owning the local-access line and the CLECs who wished to use it was highly complex; and (ii) the ILECs not only owned the local loops, they also competed in the retail market for access services with the very CLECs who had to use their facilities. The result was that ILECs had every incentive to make life miserable for the CLECs in any way they could, and the complexity of the interface gave them plenty of opportunity.

Gerald R. Faulhaber, *Will Access Regulation Work?*, 61 FED. COMM. L.J. 37, 40-41 (2008).

[131] *Verizon Commc'ns Inc.*, 535 U.S. at 468-69.

[132] In *Verizon Communications, Inc. v. FCC*, the Supreme Court rejected ILECs' arguments that using a theoretical, most-efficient-cost model, instead of actual historical costs, constituted a taking that violated the Fifth Amendment. *Id.* The Court noted that no party had disputed any specific rate established by the FCC's forward-looking, long-run incremental cost-pricing methodology, and concluded that "[r]egulatory bodies required to set [just and reasonable] rates . . . have ample discretion to choose methodology." *Id.* at 499. Additionally the Court stated that the Telecommunications Act of 1996 did not specifically require historical costs, particularly in light of its explicit prohibition on the use of conventional "'rate-of-return or other rate-based proceeding' . . . which has been identified with historical cost ever since *Hope Natural Gas* was decided." *Id.* at 499-500; *see also* AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999) (largely upholding the FCC's implementation of the Congressional mandate contained in Section 251 of the Telecommunications Act of 1996 as a reasonable exercise of its rulemaking authority, including its requirement that ILECs unbundle network elements and offer CLECs the opportunity to pick and choose from an à la carte menu or platform of elements).

[133] *See, e.g.*, United States Telecom Association v. FCC, 290 F.3d 415 (D.C. Cir. 2002) (rejecting the FCC's local exchange network unbundling requirements as insufficiently calibrated); U.S. Telecom Ass'n v. FCC, 359 F.3d 554, 578-85 (D.C. Cir. 2004) (again reversing the FCC for failing to create local requirements based on the specific level of local competition).

passed, and as many market entrants did not fully migrate from reselling incumbent carrier services to operating their own networks, reviewing courts became less deferential to the FCC's precompetitive initiatives. Several appellate courts eventually rejected the FCC's national pricing mandates based on the conclusions that Congress only required incumbent carriers to offer such rates in localities where the absence of such a financial catalyst would impair the onset and sustainability of competition.[134]

Reviewing courts grew weary with the ongoing role of the FCC, not only in the matter of whether and how a carrier must interconnect with a competitor but also the terms, conditions, and rates of such interconnection. The courts were persuaded that the FCC's pricing methodology might bolster artificial competition, sustainable only because the FCC was all but guaranteeing a margin between the low rates incumbent carriers had to charge and the higher retail rates CLECs could charge customers.[135] The courts also became persuaded that the FCC's pricing methodology removed incentives for CLECs to

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[134] Appellate courts required the FCC to limit precompetitive initiatives to that perceived as minimally necessary to achieve success:

> [T]he purpose of the [1996 Telecommunications] Act is not to provide the widest possible unbundling, or to guarantee competitors access to ILEC network elements at the lowest price that government may lawfully mandate. Rather, its purpose is to stimulate competition-preferably genuine, facilities-based competition. Where competitors have access to necessary inputs at rates that allow competition not only to survive but to flourish, it is hard to see any need for the Commission to impose the costs of mandatory unbundling.

U.S. Telecom Ass'n, 359 F.3d at 576 (ordering elimination of all unbundling requirements for access to long distance and CMRS carriers).

[135] Reviewing courts determined that the Telecommunications Act of 1996 sought to promote competition by allowing market entrants the temporary option of profitably reselling incumbent carrier services.

> We also made clear that the Commission's broad and analytically insubstantial concept of impairment failed to pursue the "balance" between the advantages of unbundling (in terms of fostering competition by different firms, even if they use the very same facilities) and its costs (in terms both of "spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities") . . . .

Id. at 563 (identifying flaws in the FCC's unbundling requirements and why the court previously required more nuanced and granular precompetition requirements); *see also* Jerry A. Hausman & J. Gregory Sidak, *A Consumer-Welfare Approach to the Mandatory Unbundling of Telecommunications Networks*, 109 YALE L.J. 417 (1999); Thomas M. Jorde, J. Gregory Sidak, & David J. Teece, *Innovation, Investment, and Unbundling*, 17 YALE J. ON REG. 1 (2000); Daniel F. Spulber & Christopher S. Yoo, *Access to Networks: Economic and Constitutional Connections*, 88 CORNELL L. REV. 885 (2003); Richard A. Epstein, *Takings, Commons, and Associations: Why the Telecommunications Act of 1996 Misfired*, 22 YALE J. ON REG. 315, 315 (2005).

migrate from the resale of incumbent carrier facilities to making their own investments in new infrastructure.[136] In response, the FCC exempted new technologies from any unbundling requirement and established dates for the elimination of interconnection and preferential access pricing for CLECs.[137]

2. Elimination of Structural Safeguards

The FCC also eliminated structural separation rules. These rules required incumbent carriers with market power to create one or more separate subsidiaries to pursue markets that add value to and enhance basic leased lines.[138] These requirements, articulated in the FCC's *First* and *Second Computer Inquires*,[139] sought to establish a bright line between basic telecommunications services and the array of enhancements that evolved into what are now called information services. The Commission sought to create a level, competitive playing field between ventures unaffiliated with a carrier providing basic network access and an information-service affiliate of the basic network-providing carrier.[140]

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[136] Reviewing courts determined that the FCC correctly refused to mandate sharing of competitively used facilities:

> We therefore uphold the Commission's rules concerning hybrid loops, FTTH, and line sharing on the grounds that the decision not to unbundle these elements was reasonable, even in the face of some CLEC impairment, in light of evidence that unbundling would skew investment incentives in undesirable ways and that intermodal competition from cable ensures the persistence of substantial competition in broadband.

U.S. Telecom Ass'n, 359 F.3d at 585.

[137] *In re* Unbundled Access to Network Elements, 20 FCC Rcd. 2533, 2535-36 (Feb. 4, 2005) (order on remand). *Cf. In re* Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area, 25 FCC Rcd. 8622 (June 22, 2010) (memorandum opinion and order) (finding insufficient competition to justify further regulatory streamlining).

[138] Wireline Broadband Classification Order, *supra* note 3, at 14,855; *see also* Amendment of Sections 64.702 of the Commission's Rules & Regulations (Third Computer Inquiry), 104 F.C.C. 2d 958 (1986) (report and order), *vacated sub nom*. California v. FCC, 905 F.2d 1217 (9th Cir. 1990), *on remand*, Computer III Remand Proceedings: Bell Operating Co. Safeguards, 6 FCC Rcd. 174 (1990) (notice of proposed rulemaking and order), rule modification, 6 F.C.C.R. 7571 (1991), v*acated in part and remanded*, California v. FCC, 39 F.3d 919 (9th Cir. 1994), *on remand*, Computer III Further Remand Proceedings: Bell Operating Co. Provision of Enhanced Servs., Order, 10 FCC Rcd. 5692 (1995).

[139] *In re* Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 F.C.C. 2d 384 (May 2, 1980) (final decision), *aff'd sub nom.* Computer & Commc'ns Indus. Ass'n. v. FCC, 693 F.2d 198 (D.C. Cir. 1982).

[140] For background on the FCC's Computer Inquiries, see Robert Cannon, *The Legacy of the Federal Communications Commission's Computer Inquiries*, 55 FED.

Structural separation prevented facilities-based incumbent carriers from offering preferential interconnection terms and conditions to corporate affiliates.[141]

Carriers subject to the separate-subsidiary requirement and other safeguards that mandated functional separation between basic and enhanced services bristled at these requirements. They believed that the requirements were both unnecessary and costly.[142] Over time, these carriers succeeded in persuading the FCC to abandon these safeguards despite never proving how such requirements resulted in lost efficiency and synergy.[143] Bear in mind that the complaining carriers

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COMM. L.J. 167 (2003); Rob Frieden, *Adjusting the Horizontal and Vertical in Telecommunications Regulation: A Comparison of the Traditional and a New Layered Approach*, 55 FED. COMM. L.J. 207 (2003).

[141] *See* Robert M. Frieden, *The Computer Inquiries: Mapping the Communications/Information Processing Terrain*, 33 FED. COMM. L.J. 55, 70-71 (1981); Robert M. Frieden, *The Third Computer Inquiry: A Deregulatory Dilemma*, 38 FED. COMM. L.J. 383, 389 (1987).

[142] Incumbent carriers framed the separate subsidiary requirement as unnecessary and inefficient.

> Parties supporting the removal of the structural separation requirements for the provision of enhanced services by AT & T and BOCs argue that, in the current telecommunications environment, the costs of those requirements outweigh their benefits. On the cost side of the equation, they contend that structural separation has imposed substantially greater burdens on the affected carriers, and ultimately on the public, than anticipated when we established those requirements in Computer II. In particular, a large number of parties assert that structural separation has deprived the public of innovative services that could be provided efficiently through AT & T's and the BOCs' extensive communications networks and thus made available to a large number of potential customers.

Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry); and Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Thereof, 104 F.C.C.2d 958, 978-88 (1986); *on reconsideration*, 2 F.C.C.R. 3035 (1987); 2 F.C.C.R. 3072 (1987); Memorandum Opinion and Order on Further Reconsideration, *In re* Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), 3 F.C.C.R. 1135 (1988); Memorandum Opinion and Order on Reconsideration, *In re* Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), 3 F.C.C.R. 1150 (1988*), rev'd and remanded sub nom.* California v. FCC, 905 F.2d 1217 (9th Cir. 1990), *on remand*, *In re* Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, CC Docket 90–623, 6 F.C.C.R. 7571 (1991), *partially aff'd and partially rev'd sub nom.* California v. FCC, 4 F.3d 1505 (9th Cir. 1993), 39 F.3d 919 (9th Cir. 1994).

[143] The FCC abandoned structural separation requirements based on carrier assertions of lost operational synergy and efficiency:

> The following factors guide us toward replacing the Computer Inquiry obligations for wireline broadband Internet access service providers with a less regulatory framework: the increasing integration of innovative broadband technology into the existing wireline platform; the growth and development of entirely new broadband platforms; the flexibility to respond more rapidly and effectively to new consumer demands; and our expectation of the availability of alternative competitive

willingly created separate subsidiaries to provide "yellow page" directory advertising and wireless services,[144] perhaps because such separateness accrued tax benefits and some degree of insulation from having to compensate the parent carrier for access to existing billing and database-management systems.

Even as the FCC eliminated local loop unbundling (LLU) and structural safeguards, national regulatory authorities (NRAs) in other nations have embraced them.[145] Carriers facing such obligations have not experienced financial distress and the competitive environment has shown measureable

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> broadband transmission to the currently required wireline broadband common carrier offerings. We believe our actions today will enhance each of these factors.

Wireline Broadband Classification Order, *supra* note 3, at 14,895.

> Deployment to consumers of these technologies then, at best, is delayed and, in many cases, may be avoided altogether. Broadband Internet access services are also not developing in ways that neatly fall within existing regulatory classifications or the current *Computer Inquiry* requirements (i.e., they cannot be easily separated into discrete information service and telecommunications service components). As a result, unlike cable modem providers or other broadband Internet access service competitors, wireline carriers must make either of two less-than-optimal choices when they seek to deploy advanced network equipment: either they must decide not to use all the equipment's capabilities, thereby reducing their operational efficiency; or they must defer deployment while the manufacturer re-engineers it to facilitate compliance with the *Computer Inquiry* rules, thereby creating unnecessary costs and service delays.

Id. at 14,887-88.

[144] For example AT&T divides itself into four subsidiaries, two of which provide wireless and directory publishing service:

> AT&T has four main operating segments: wireless, wireline, advertising solutions, and other. The wireless segment consists of AT&T's subsidiary, AT&T Mobility, which provides wireless services to both business and consumer customers. This segment represents approximately 43 percent of 2009 total segment operating revenues. . . . The advertising solutions segment includes AT&T's directory operations, which publish Yellow and White Pages directories and sell directory advertising and Internet-based advertising and search.

In re Applications of AT&T Inc. and Cellco Partnership D/B/A Verizon Wireless for Consent to Assign or Transfer Control of Licenses and Authorizations and Modify a Spectrum Leasing Arrangement, WT Docket No. 09-104, Memorandum Opinion and Order, 25 FCC Rcd. 8704, 8706 (2010).

[145] "[E]xperience both in the United Kingdom and elsewhere has indicated that, where access to the incumbents' networks has been allowed, it has provided a sound platform for the successful deployment of new services. Many of these new services-VoIP is an example-provide a significant source of competition." Michael H Ryan, *Promoting Network-Based Competition in UK Fixed-Line Markets: A Failed Policy*, 5 CONVERGENCE 63, 72 (2009); Bob Bell, *Broadband Deregulation—Similar Legislation, Different Results: A Comparative Look at the United States and the European Union*, 10 TUL. J. TECH. & INTELL. PROP. 77, 94-98 (2007); ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, DEVELOPMENTS IN LOCAL LOOP UNBUNDLING 5 (2003), *available at* http://www.oecd.org/dataoecd/25/24/6869228.pdf.

improvement.[146] For example, Britain's dominant carrier, British Telecom, split itself into two firms in 2006, one providing first- and last-kilometer access to telecommunications infrastructure[147] and the other offering competitive services. The United Kingdom marketplace has become robustly competitive without harming incumbent British Telecom's financial viability and stock attractiveness.[148] The nations of the European Union continue to embrace structural separation and LLU. Other nations with LLU requirements include Japan, Korea, New Zealand, Switzerland, South Africa, Australia, and Hong Kong.[149]

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[146] Many national regulatory authorities endorse local loop unbundling as a vehicle for stimulating competition and expediting development of next generation broadband networks:

> Korea has acquired world-class broadband internet services through a successful combination of industrial and competition policy. From the start, the Ministry of Information and Communication aggressively pursued industrial policy in the sector, but without stifling competition. It fostered competition in the market by lowering entry barriers and intervening to prevent KT from gaining too much of a competitive edge. It also adopted a local loop unbundling strategy to address concerns about unfair competition. The success of the government's broadband internet strategy is apparent in the penetration ratio . . . . What can we learn from this Korean example? At an early stage of development, the government recognized the need for fundamental infrastructure. As an industrial policy measure, it required market entrants to install their own facilities while helping to create the market conditions that would make this affordable. Later, after sufficient facilities had been set up throughout Korea, the government changed tack and began to enforce an "essential facilities" doctrine that rested on local loop unbundling. This enabled new entrants to secure a foothold in an established market on a competitive basis. This demonstrates that under certain circumstances industrial policy can function alongside competition policy to achieve an ultimate economic policy goal, without producing undesirable side effects from a competition policy perspective.

Youngjin Jung & Seung Wha Chang, *Korea's Competition Law and Policies in Perspective*, 26 NW. J. INT'L L. & BUS. 687, 719-20 (2006); *see also* CHRISTINE ZHEN-WEI QIANG, BROADBAND INFRASTRUCTURE INVESTMENT IN STIMULUS PACKAGES: RELEVANCE FOR DEVELOPING COUNTRIES (2009), *available at* http://siteresources.worldbank.org/EXTINFORMATIONANDCOMMUNICATIONANDTECHNOLOGIES/Resources/282822-1208273252769/Broadband_Investment_in_Stimulus_Packages.pdf; *What Is Local Loop Unbundling?*, OFCOM, http://www.ofcom.org.uk/static/archive/oftel/publications/broadband/dsl_facts/LLUbackground.htm (last visited Apr. 1, 2012); EWAN SUTHERLAND, LINK CENTRE, UNIVERSITY OF THE WITWATERSRAND, UNBUNDLING LOCAL LOOPS: GLOBAL EXPERIENCES (2007), *available at* http://link.wits.ac.za/papers/LINK.pdf; Paul W.J. de Bijl & Martin Peitz, *Local Loop Unbundling in Europe: Experience, Prospects and Policy Challenges*, COMM. & STRATEGIES, 1st Qtr. 2005, at 33, 35-50, *available at* http://www.idate.fr/fic/revue_telech/414/CS57_BIJL_PEITZ.pdf.

[147] *See* OPENREACH, KEEPING THE UK CONNECTED 4-6 (2008), *available at* http://www.openreach.co.uk/orpg/home/aboutus/downloads/web_corp_brochure.pdf.

[148] Liz Tay, *BT: Functional Separation Was a Success*, IT NEWS (Nov. 4, 2009, 12:17 AM), http://www.itnews.com.au/News/159659,bt-functional-separation-was-a-success.aspx; *see also* OFCOM, COMMUNICATIONS MARKET REPORT 15-16 (Aug. 19, 2010), *available at* http://stakeholders.ofcom.org.uk/binaries/research/cmr/753567/CMR_2010_FINAL.pdf.

[149] *See Network Unbundling*, INFODEV, ICT REGULATION TOOLKIT 4.5.5 (Dec. 28, 2011), http://www.ictregulationtoolkit.org/en/Section.3426.html; Robert W. Crandall,

3. Courts Infer the Absence of a Common Carrier Duty to Deal

Appellate courts have determined that there is no antitrust remedy if the FCC has relaxed its oversight of carrier interconnection terms and conditions based on its expert assessment of marketplace competition. Put another way, if the FCC determines that the scope of competition is sufficient to trigger abandonment of regulatory safeguards, reviewing courts have no basis to second guess the Commission. In application, this means that reviewing courts have great reluctance to impose more burdensome safeguards than what the FCC, in its expert judgment, has deemed unnecessary.

Verizon v. Law Offices of Curtis V. Trinko[150] resolved uncertainty about whether antitrust claims can exist based on the obligations imposed on ILECs by the Telecommunications Act of 1996 and, if so, whether individual customers have standing to assert such claims. The Supreme Court granted certiorari, limited to the question of whether the court of appeals erred in reversing the district court's dismissal of the respondent's antitrust claims.[151]

The Court held that the "savings clause" contained in the '96 Act[152] does not foreclose application of antitrust laws to ILEC behavior. However, the Court noted that such inclusion in the text of the Communications Act does not provide significantly greater scrutiny of or safeguards against anticompetitive practices. The relaxation of existing regulatory oversight performed by the FCC and state regulatory agencies does not create a mandate for new antitrust safeguards for courts to enforce:

> But just as the 1996 Act preserves claims that satisfy existing antitrust standards, it does not create new claims that go beyond existing antitrust standards; that would be equally inconsistent with

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Jeffrey A. Eisenach & Robert E. Litan, *Vertical Separation of Telecommunications Networks: Evidence from Five Countries*, 62 FED. COMM. L.J. 493 (2010).

[150] 540 U.S. 398 (2004).

[151] *See* Law Offices of Curtis V. Trinko, L.L.P. v. Bell Atl. Corp., 123 F. Supp. 2d 738 (S.D.N.Y. 2000) (dismissing antitrust claims), *aff'd in part, vacated in part and remanded*, 294 F.3d 307 (2d Cir. 2002) (No. 01-7746), *as superseded*, 305 F.3d 89 (2002), *cert. granted in part sub nom*. Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 538 U.S. 905 (2003).

[152] "Section 601(b)(1) of the 1996 Act is an antitrust-specific saving clause providing that 'nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.'" *Trinko*, 540 U.S. at 406 (citing 110 Stat. 143, 47 U.S.C. § 152).

> the saving clause's mandate that nothing in the Act "modify, impair, or supersede the applicability" of the antitrust laws.[153]

Having concluded that the '96 Act does not foreclose antitrust cases, the Court easily rejected the applicability of the Sherman Act to a claim that Verizon discriminated against competitors when they sought access to individual, unbundled network services provided by Verizon:

> We conclude that Verizon's alleged insufficient assistance in the provision of service to rivals is not a recognized antitrust claim under this Court's existing refusal-to-deal precedents. This conclusion would be unchanged even if we considered to be established law the "essential facilities" doctrine crafted by some lower courts, under which the Court of Appeals concluded respondent's allegations might state a claim.[154]

The Court concluded that both the FCC and state regulatory agencies can investigate claims that an ILEC had failed to comply with '96 Act requirements and, in turn, can impose financial penalties, remediation measures, and additional reporting requirements for noncompliance:

> Finally, we do not believe that traditional antitrust principles justify adding the present case to the few existing exceptions from the proposition that there is no duty to aid competitors. Antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue. Part of that attention to economic context is an awareness of the significance of regulation.[155]

The Supreme Court's deference to the FCC's deregulatory campaign has gone so far as to allow an incumbent carrier to engage in predatory price squeezing, or to offer end users lower rates than what it charges competitors.[156] In 2003, several ISPs filed suit against Pacific Bell Telephone Co. contending that the company attempted to monopolize the market for DSL broadband Internet access by creating a price squeeze where ISP competitors were obligated to pay a higher wholesale price than what Pacific Bell offered on a retail basis.[157] 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 ruling in *Trinko*.

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[153] *Id.* at 407.
[154] *Id.* at 419.
[155] *Id.* at 411.
[156] Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438, 449-55 (2009).
[157] *Id.* at 443-44.

The Supreme 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 existed.[158] Curiously, the Court did not mention that Pacific Bell could have avoided a unilateral duty to deal with ISPs based on the FCC's conclusion that DSL, and presumably its component parts, constituted information services and not common-carrier-provided telecommunications services. But for a voluntary concession to secure the FCC's approval of AT&T's acquisition of another ILEC, the Court noted that Pacific Bell would not have a duty even to provide ISPs with wholesale service.[159] The Court granted certiorari to resolve the narrow question of 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.[160] The lower courts concluded that the *Trinko* precedent did not bar such a claim, but the Supreme Court reversed this holding.[161]

On procedural grounds, the Court's decision chided the ISP plaintiffs for changing the nature of their claim from a price squeeze to one characterizing Pacific Bell's tactics as predatory pricing.[162] On substantive grounds, the Court noted

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[158] "DSL now faces robust competition from cable companies and wireless and satellite services." *Id.* at 443.

[159] "As a condition for a recent merger, however, AT & T remains bound by the mandatory interconnection requirements, and is obligated to provide wholesale 'DSL transport' service to independent firms at a price no greater than the retail price of AT & T's DSL service." *Id.*

[160] "We granted certiorari, 554 U.S. 916, . . . to resolve a conflict over whether a plaintiff can bring price-squeeze claims under § 2 of the Sherman Act when the defendant has no antitrust duty to deal with the plaintiff." *Id.* at 435-46.

[161] The Court supported the theoretical possibility that an antitrust claim could survive in a deregulated environment.

> Our grant of certiorari was limited to the question whether price-squeeze claims are cognizable in the absence of an antitrust duty to deal. The Court of Appeals addressed only AT & T's motion for judgment on the pleadings on the plaintiffs' original complaint. For the reasons stated we hold that the price-squeeze claims set forth in that complaint are not cognizable under the Sherman Act.

Id. at 455-56.

[162] The Court noted that the plaintiffs appeared to have shifted their claim from Pacific Bell engaging in a price squeeze to one alleging predatory pricing.

> This case has assumed an unusual posture. The plaintiffs now assert that they agree with Judge Gould's dissenting position that price-squeeze claims must meet the *Brooke Group* requirements for predatory pricing. They ask us to vacate the decision below in their favor and remand with instructions that they be given leave to amend their complaint to allege a *Brooke Group* claim. In other words, plaintiffs are no longer pleased with their initial theory of the case, and ask for a mulligan to try again under a different theory.

that a new emphasis on predatory pricing would have required determination of whether the retail price was set below cost,[163] a claim the ISPs did not make. The Court determined that the case did not become moot because of the change in economic and antitrust arguments.[164] But the decision evidences great skepticism as to whether the ISPs had any basis for a claim. 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 wholesale service).[165] The Court could apparently ignore the voluntary concession AT&T made that created a duty to deal because that concession may have triggered FCC oversight, but the concession could not change whether an antitrust duty to deal arose. The Court read the *Trinko* case as foreclosing any antitrust claim if no antitrust duty to deal exists.[166]

The Court remanded the case to the district court to determine whether the ISP plaintiffs had a viable predatory pricing claim.[167] The Court expressed the need for clear

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Id. at 446.

[163] The Court referenced *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), which 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. *Linkline*, 555 U.S. at 446-47.

[164] The Court determined that a shift in framing what anticompetitive practice occurred did not by itself render the claim moot.

> We do not think this case is moot. First, the parties continue to seek different relief. AT & T asks us to reverse the judgment of the Court of Appeals and remand with instructions to dismiss the complaint at issue. The plaintiffs ask that we vacate the judgment and remand with instructions that they be given leave to amend their complaint. The parties thus continue to be adverse not only in the litigation as a whole, but in the specific proceedings before this Court.

Linkline, 555 U.S. at 446.

[165] "The challenge here focuses on retail prices—where there is no predatory pricing—and the terms of dealing—where there is no duty to deal." *Id.* at 449. "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' margins." *Id*. at 452.

[166] "In this case, as in *Trinko*, the defendant has no antitrust duty to deal with its rivals at wholesale; any such duty arises only from FCC regulations, not from the Sherman Act." *Id.* at 450.

[167] The Court remanded the case for lower court determination whether a viable antitrust claim existed.

> It is for the District Court on remand to consider whether the amended complaint states a claim upon which relief may be granted in light of the new pleading standard we articulated in *Twombly*, whether plaintiffs should be given leave to amend their complaint to bring a claim under *Brooke Group*, and such other matters properly before it.

antitrust rules and apparently viewed consumer access to low retail prices—predatory or not—as sufficient reason for courts to refrain from intervening. Remarkably, the Court did not seem troubled by the threat of all ISPs' competitors exiting 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."[168]

This case evidences a strong reluctance on the part of the Supreme Court to support any review over the pricing strategies of carriers. Presumably the plaintiffs could have petitioned the FCC to review the broadband wholesale prices, but the Commission could have claimed that it had no jurisdiction to investigate because the DSL service at issue constituted an information service not subject to Title II pricing and nondiscrimination requirements.[169] In light of the regulatory objectives contained in the '96 Act, which the Court deemed "much more ambitious than the antitrust laws,"[170] more powerful safeguards against anticompetitive practices already exist. The Court opted not to second guess why the FCC refrained from using its lawful authority to remedy an obvious price squeeze.

C. Eliminating Cellular Radio Spectrum Caps

In 2003, the FCC eliminated a cap on the amount of spectrum a single wireless telecommunications carrier can acquire based on a determination of ample competition.[171]

Id. at 456.

[168] *Id.* at 456-57.

[169] The holding in *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), and the reversal of the FCC's attempt to sanction Comcast for meddling with subscribers' use of cable modem broadband links, *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010), confirm that the FCC has no direct statutory mandate to regulate the terms and conditions by which a carrier offers information services including DSL.

[170] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 415 (2004).

[171] Despite evidence to the contrary, the FCC concluded that a robustly competitive wireless telecommunication market existed:

> Measures of market concentration in the record show a substantial continuing decline in concentration in most local CMRS [commercial mobile radio service] 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.

Coupled with the Commission's approval of each and every merger application it had received,[172] the Commission all but guaranteed a concentrated marketplace for wireless services.[173] In light of increasing reliance on wireless services to serve all consumers' information, communications, and entertainment requirements, the FCC should have concluded that such consolidation would adversely affect the level of competition and the public interest. Advocates for merger approval have heralded efficiency gains from scale, the possibility of increased employment, spectrum scarcity, and extraordinary growth in demand for services.[174] To these advocates, a spectrum cap would prevent a single carrier from satisfying demand and a proliferation of carriers presumably would not be able collectively to achieve such goals.

When it removed the spectrum cap, the FCC made summary assertions without using any serious or rigorous analysis about the consequences. The Commission never considered that removing a spectrum cap would eliminate an

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In re 2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services, 16 FCC Rcd. 22,668, 22,682 (Dec. 18, 2001) (report and order). 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.

> 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.

Id. at 22,690.

[172] *See, e.g.*, *In re* Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC, 23 FCC Rcd. 17,444, 17,546-47 (Nov. 10, 2008); *In re* Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation for Consent to Transfer Control of Licenses and Authorizations, 19 FCC Rcd. 21,522, 21,626 (Oct. 26, 2004); *see also Archive of Major Transactions*, FCC, http://www.fcc.gov/encyclopedia/major-transactions-archive (last visited Jan. 13, 2012).

[173] The FCC's most recent statistics show that in 2009 the top four wireless carriers in the United States served 90.42 percent of all subscribers and generated 93.25 percent of all revenues. Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, 26 FCC Rcd. 9664, 9697, tbl.4, Service Provider Share of Subscribers and Revenues (Year-End 2009) (June 27, 2011) (fifteenth report).

[174] *See, e.g*., Acquisition of T-Mobile USA, Inc. by AT&T Inc. Description of Transaction, Public Interest Showing and Related Demonstrations, Comment from AT&T, Inc. to the FCC (Apr. 21, 2011), *available at* http://fjallfoss.fcc.gov/ecfs/document/view?id=7021240421; *In re* Applications of AT&T Inc. and Deutsche Telekom AG, Comments of Communications Workers of America to the FCC (May 31, 2011), *available at* http://fjallfoss.fcc.gov/ecfs/document/view?id=7021681259; *In re* Applications of AT&T Inc. and Deutsche Telekom AG, Joint Opposition of AT&T Inc., Deutsche Telekom AG, and T-Mobile USA, Inc. to Petitions to Deny and Reply to Comments to the FCC (June 10, 2011), *available at* http://fjallfoss.fcc.gov/ecfs/document/view?id=7021686831.

ex ante safeguard that helps prevent anticompetitive consequences before harm has occurred. Arguably, ex ante safeguards are more essential in light of the Commission's elimination of common-carrier duties to deal and case law that all but eliminates antitrust remedies.[175] As a basis for comparison, other nations, including the United Kingdom, support spectrum caps in the mobile wireless marketplace. The UK's telecommunications regulator has acknowledged that high barriers to entry and the potential for excessive concentration[176] justify spectrum caps:

> We also propose to put in place safeguard caps to guard against longer term[] risks to competition from very asymmetric holdings of spectrum. While we do not think that spectrum needs to be held equally for there to be effective competition or equality of opportunity to compete, we do think that there could be a risk if some national wholesalers held a very large share of mobile spectrum. While it is difficult to speculate about future possible developments, we consider it is possible that in the longer term there could be technological (e.g. beyond LTE) or market developments that meant that very asymmetric holdings of spectrum represented a risk to competition, especially for sub-1 GHz spectrum.[177]

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[175] In light of the substantial deregulation that has occurred, the remaining regulatory oversight provides essential safeguards.

> [A] sector regulator can introduce ex ante means, of which spectrum caps are one example, to help ensure that markets remain truly competitive. To the extent that policy makers believe they should have a portfolio of ex post and ex ante measures at their disposal to facilitate and ensure effective competition in markets for the sake of users, consumers, and overall welfare, then both a sector regulator in telecommunications and a Competition Authority have valuable roles to play.

Martyn F. Roetter, *Mobile Broadband, Competition and Spectrum Caps*, ARTHUR D. LITTLE 21 (Jan. 2009), http://hspa-titian.profissionhosting.com/upload/news/files/05032009134807.pdf.

[176] The United Kingdom telecommunications regulatory authority considered it essential to impose spectrum caps on wireless carriers:

> We consider that if we put in place no measures in the combined award to promote competition, there is a material risk of an outcome that would lead to lower competitive intensity in the provision of higher quality data services compared to competition in the wholesale market today, and compared to what might be possible. This is because we consider there is a material risk of only two or three national wholesalers emerging from the auction capable of providing higher quality data services in a profitable way. This is especially the case given that there are high barriers to entry to the national wholesale market, including the difficulty of obtaining access to suitable spectrum.

Ofcom, Consultation on Assessment of Future Mobile Competition and Proposals for the Award of 800 MHz and 2.6 GHz Spectrum and Related Issues 45 ¶ 5.58 (Mar. 22, 2011), *available at* http://stakeholders.ofcom.org.uk/binaries/consultations/combined-award/summary/combined-award.pdf [hereinafter Ofcom Future Mobile Consultation].

[177] *Id.* at 49, ¶ 5.83.

Only recently, with 91.2 percent of the wireless market controlled by four national carriers, has the Commission begun to express doubts about whether concentration in the wireless marketplace generates sufficient competition.[178] Previously the Commission expressed no concern that incumbent carriers would acquire the lion's share of any newly available spectrum. For example, in the auctions for choice 700 MHz spectrum, which were made available when television broadcasters converted to digital transmissions, the two largest incumbent carriers, AT&T and Verizon, spent $16 billion of the $19.6 billion collected by the U.S. government.[179]

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[178] With an eye toward providing better fact-based assessments of industry competitiveness, the FCC's recent reports on the wireless marketplace use a more sophisticated and granular assessment:

> [R]ather than reaching an overarching, industry-wide determination with respect to whether there is "effective competition," the *Report* complies with the statutory requirement by providing a detailed analysis of the state of competition that seeks to identify areas where market conditions appear to be producing substantial consumer benefits and provides data that can form the basis for inquiries into whether policy levers could produce superior outcomes.

In re Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, 25 FCC Rcd. 11,407, 11,411, 11,407 (May 20, 2010) (fourteenth report) [hereinafter 14th Wireless Competition Report]. The Commission largely disputes its previous determinations of robust competition. For example, in 2006 the FCC reported that despite having approved a major merger, "[e]ven with one less nationwide mobile telephone carrier to choose from, U.S. consumers continue to benefit from robust competition in the CMRS marketplace." *In re* Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, 21 FCC Rcd. 10,947, 11,029 (Sep. 29, 2006) (eleventh report). More recent Commission reports are less confident about the sufficiency of competition: "Over the past five years, concentration has increased in the provision of mobile wireless services. The two largest providers, AT&T and Verizon Wireless, have 60 percent of both subscribers and revenue, and continue to gain share (accounting for 12.3 million net additions in 2008 and 14.1 million during 2009)." *Id.* at 11,412. The Commission uses the Herfindahl-Hirschman Index to measure wireless industry concentration and reports that the current figure of 2848 exceeds the 1800 figure used by the Department of Justice to identify "highly concentrated" industries. *See id*. at 11,451-55; *see also* Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, 26 FCC Rcd. 9664, 9697, Table 4, Service Provider Share of Subscribers and Revenues (Year-End 2009) (June 27, 2011) (fifteenth report).

[179] AT&T and Verizon acquired the most spectrum and bid the most money in the FCC's auction of 700 MHz wireless spectrum:

> 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.

W. David Gardner, *Verizon, AT&T Big Winners in 700 MHz Auction*, INFO. WEEK (Mar. 20, 2008), http://www.informationweek.com/news/mobility/showArticle.jhtml?articleID=206905000; *see also* Saul Hansell, *Verizon and AT&T Win Big in Auction of Spectrum*,

In light of the Commission's favorable treatment of merger requests, AT&T Wireless applied to acquire T-Mobile.[180] AT&T claimed the merger would help it abate a severe spectrum shortage and promote the company's ability to provide wireless broadband services to rural locales on an accelerated basis.[181] The company had sought to shift attention from the market-concentrating impact of the merger because acquiring T-Mobile's 14 percent market share would boost AT&T's share to over 40 percent, which, combined with Verizon's share, would result in two companies controlling almost 80 percent of the market.[182] AT&T sought to frame the merger as a means for the company to improve customer service and to compensate for delays in FCC regulatory reform, especially the Commission's inability to make more spectrum available for wireless services.[183]

AT&T's now failed merger with T-Mobile[184] constitutes an exception to a long list of approved mergers made possible by the FCC's removal of a spectrum cap. Had the Commission retained the cap, the wireless marketplace may today have had more competition, innovation, and consumer choice. The four major carriers do not deviate significantly from a business model that offers subscribers a subsidized handset in exchange for a two-year service commitment and a hefty financial penalty for early termination of service.[185] Wireless carriers charge rates that contribute to the recoupment of the handset subsidy and subscribers have few options for cheaper service if they activate

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N.Y. TIMES (Mar. 21, 2008), http://www.nytimes.com/2008/03/21/technology/21auction.html; *Factsheet for Auction 73*, FCC (Mar. 20, 2008), http://wireless.fcc.gov/auctions/default.htm?job=auction_factsheet&id=73.

[180] *See* Acquisition of T-Mobile USA, Inc. by AT&T Inc. Description of Transaction, Public Interest Showing and Related Demonstrations, *supra* note 174.

[181] "As we have shown, AT&T is facing severe capacity constraints in markets throughout the United States, and this merger is the surest and most efficient solution to those constraints." *Id*. at 5.

[182] *See In re* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, 26 FCC Rcd. 9664, 9697 tbl.4 (June 27, 2011) (fifteenth report), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-103A1.doc [hereinafter 15th CMRS Competition Record].

[183] *See* Response of AT&T Inc. to Information and Discovery Request Dated May 27, 2011 to the FCC (June 10, 2011), *available at* http://fjallfoss.fcc.gov/ecfs/document/view?id=7021687006.

[184] *See* Applications of AT&T Inc. and Deutsche Telekom Ag for Consent to Assign or Transfer Control of Licenses and Authorizations, DA 11-1955 (order) (Nov. 29, 2011).

[185] For example, compare AT&T Wireless service plans, AT&T: PLANS, http://www.wireless.att.com/businesscenter/plans/index.jsp?wtLinkName=Plans&wtLinkLoc=MNB&WT.svl=2 (last visited Apr. 1, 2012), with the nearly identical terms and conditions available from Verizon Wireless, VERIZON WIRELESS: CELL PHONE PLANS, http://www.verizonwireless.com/plans.shtml (last visited Apr. 1, 2012).

a used and unsubsidized handset. Had the spectrum cap remained in force, perhaps one or more carriers would have pursued a different business plan, maybe concentrating on data services and offering an open interface to content and software instead of the tightly controlled access erected by the four major carriers and handset manufacturers such as Apple.

U.S. wireless carriers claim they must aggressively compete by offering consumers world-class service in terms of monthly minutes of use, price, and innovation.[186] On the positive side, the carriers correctly report that their rate plans offer large baskets of voice minutes and—at least until recently—unlimited data access plans.[187] Additionally, carriers typically offer services that do not debit the monthly usage allotment when a subscriber calls another subscriber of the same carrier.[188] On the other hand, U.S. wireless carriers offer services with nearly identical price points. Service terms do not stimulate competition and innovation even as these carriers generate some of the world's highest margins and average revenue per user (ARPU).[189] Provided subscribers do not deviate from relatively narrow, carrier-defined usage parameters, both carriers and customers can benefit. However, one can only speculate how much more robust, innovative, and dynamic the industry could have become had the FCC retained the spectrum cap.

Instead, the FCC overstates the positive benefits accruing from an increasingly concentrated industry. By using carrier-provided estimates of ARPU, average minutes of use,

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[186] U.S. wireless carriers claim they operate in a robustly competitive and innovative marketplace:

> American consumers are the world's wireless winners because today's wireless ecosystem has evolved into a virtuous cycle of innovation and fierce competition. The U.S. regulatory approach has enabled American consumers to benefit from better value and more cutting-edge wireless products and services than consumers in other countries. Due to flexible, market-driven policies, the U.S. wireless industry is the most innovative and competitive. We are the example that other countries try to emulate.

Innovation and Competition, CTIA—THE WIRELESS ASS'N, http://www.ctia.org/advocacy/policy_topics/topic.cfm/TID/64 (last visited Jan. 10, 2012).

[187] *See, e.g.*, *Wireless Industry Innovation: We're #1*, CTIA—THE WIRELESS ASS'N BLOG (June 14, 2011), http://blog.ctia.org/2011/06/14/wireless-industry-innovation-were-1/ (compiling a list of industry leading accomplishments by U.S. wireless carriers).

[188] "One of the main benefits of choosing an AT&T Mobile Phone Plan is unlimited calls to other AT&T wireless mobile users." *AT&T Wireless Phone Service*, AT&T, http://www.att-services.net/att-wireless.html (last visited Jan. 8, 2012).

[189] "The average monthly subscriber bill (ARPU) in the United States, at $51.54, is much higher than the Western European average of $33.45." 14th Wireless Competition Report, *supra* note 178, at 11,619.

and cost-per-minute of service, the FCC has reported a mostly happy story about the U.S. wireless marketplace. Only recently has the Commission started to acknowledge the highly concentrated nature of the wireless marketplace.[190] The Commission has generally dismissed any problems drawn from credible and frequently used measures of severe industry concentration. Factoring in Verizon's $28 billion acquisition of Alltel, a company with a 5.2 percent market share, the Herfindahl-Hirschman Index (HHI) generated a concentration score of 2848, well above the 1800/2500 figure that triggers a Justice Department and Federal Trade Commission "highly concentrated" market finding.[191] Apparently for wireless markets, other factors support a decision not to worry about the HHI score, including the availability of many subsidized handsets, non-price rivalry, and the $3.4 billion the four major wireless carriers spent on advertising in 2009.[192] Additionally, the FCC has reported to Congress that CMRS carriers have at least 586 MHz of spectrum available.[193] However, a close examination of the frequency bands identified by the Commission generates questions whether carriers can offer a

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[190] The FCC belatedly has begun to acknowledge how concentrated the U.S. wireless marketplace has become:

> In the mobile wireless services industry, the weighted average of HHIs (weighted by population across the 172 Economic Areas in the United States) was 2811 at the end of 2009, compared to 2842 at the end of 2008. Both the lowest HHI values and the highest HHI values by Economic Area decreased in 2009 relative to 2008. From 2003 (the first year the Commission calculated HHIs) to 2009, the average HHI has increased from 2151 to 2811, an increase of 660 points. As of mid-2010, the weighted average of the HHIs has increased to 2848, slightly higher than the year-end 2008 level.

15th CMRS Competition Record, *supra* note 182, at 9679.

> The Herfindahl-Hirschman Index (HHI), which is calculated by summing the squared market shares of all firms in any given market, is a commonly used measure of industry concentration. Antitrust authorities in the United States generally classify markets into three types: Unconcentrated (HHI < 1500), Moderately Concentrated (1500 < HHI < 2500), and Highly Concentrated (HHI > 2500).

Id. (citing U.S. DEP'T OF JUSTICE & THE FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf).

[191] *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 1.5 (1997), *available at* http://www.justice.gov/atr/public/guidelines/horiz_book/15.html. In April 2010, the Justice Department and the FTC raised the concentrated industry floor to a 2500 HHI level. 14th Wireless Competition Report, *supra* note 178, at 11,451.

[192] *In re* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, 26 FCC Rcd. 9664, 9748 (June 27, 2011) (fifteenth report); *see also* 14th Wireless Competition Report, *supra* note 178, at 11,491-92.

[193] 14th Wireless Competition Report, *supra* note 178, at 11,566.

functionally equivalent service option based on propagational characteristics of the available spectrum and company business plans. For example, Clearwire, a company identified as providing a competitive alternative to CMRS, concentrates on data services to users and only offers VoIP service to users with wireless-modem-equipped, portable computers. The company does not provide a functional and competitive alternative to mobile services accessible via small handsets like those used by CMRS subscribers.[194]

III. CONCLUSION

National regulatory authorities such as the FCC typically have a statutory duty to serve the public interest and to recalibrate the nature and scope of their oversight when circumstances change. Technological innovations surely promote the possibility of more competition, but the countervailing trends of convergence create incentives for incumbents to diversify and serve new markets while expanding in size and scale. The cross-currents of potentially greater competition, but also consolidation of control by incumbents, should motivate NRAs to streamline regulations with caution and on an incremental basis. The FCC did not embrace this course of action and opted instead to make expansive deregulatory pronouncements based largely on nonempirical, overly optimistic assessments about the future sustainability of existing and future competition.

In the four case studies examined in this article, the FCC has identified problems necessitating its intervention or reassessment, but the Commission's prior acts now prevent it from crafting quick and lawful solutions.[195] When it opted to

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[194] Clearwire's web site specifies that the carrier provides service to laptop computers, not handsets: "The CLEAR 4G modem plugs into your laptop for the ultimate high-speed connection. Stream movies and videos across your city, video chat at the park, download files on-the-go and much, much more." CLEAR INTERNET, http://internet.clear.com/mobile-broadband.html (last visited Apr. 1, 2012).

[195] The Commission rarely has the inclination or authority to undo a streamlined regulation in light of changed circumstances. A rare exception occurred when the Commission approved the merger of Sirius and XM satellite digital audio radio services (SDARS).

> At that time, the Commission agreed that market forces produced by the robust competition between two SDARS competitors would ensure that listeners would receive noncommercial educational and public interest programming on the SDARS service. In the absence of such competitive forces post-merger, we find the potential harm to programming diversity greater than was the case in 1997.

apply unconditionally the information-services classification to all types of broadband Internet access, the FCC abdicated its authority even to resolve legitimate complaints of discriminatory and anticompetitive conduct. When it freed Title II–regulated common carriers of many core responsibilities—such as the duty to cooperate with competitors on fair terms, conditions, and prices—the Commission made it possible for reviewing courts to conclude that these carriers no longer had a duty to deal with each other subject to FCC oversight. Even a blatantly anticompetitive practice, such as offering retail rates below the wholesale rate offered to a competitor, does not trigger a judicial remedy because reviewing courts can defer to the FCC's expert conclusion that marketplace competition would discipline carriers and offer readily available and cheaper alternatives to carriers' engaging in price squeezes. When the FCC eliminated spectrum caps, it allowed incumbent carriers to achieve necessary scale, but also to benefit from extraordinarily high barriers to market entry all but guaranteeing a concentrated market, which is compounded by lax merger review.

The FCC has executed a strategy that favors incumbents best equipped to exploit streamlined or eliminated regulation for private gain. The competition identified or predicted by the Commission has failed to reach effective and sustainable levels. Rather than imposing so-called heavy-handed regulations, the FCC has removed regulatory safeguards that would require scrutiny of incumbents' efforts to achieve market dominance, including tactics that might constitute unfair trade practices and violations of competition policies.

Only recently has the FCC changed its approach and recognized anticompetitive conduct and market concentration. The FCC has determined that it should resolve complaints regarding the allegedly anticompetitive practices of certain ISPs. The Commission no longer reports to Congress that the mobile wireless marketplace unconditionally operates with effective competition,[196] or that Americans enjoy ubiquitous access to

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In re Applications for Consent to the Transfer of Control of Licenses, 23 FCC Rcd. 12,348, 12,413 (Aug. 5, 2008) (memorandum opinion and order and report and order).

[196] The FCC no longer unconditionally concludes that the U.S. wireless marketplace evidences effective competition:

> [W]e find that the mobile wireless ecosystem is sufficiently complex and multi-faceted that it would not be meaningful to try to make a single, all-inclusive finding regarding effective competition that adequately encompasses the level of

competitive broadband services.[197] Additionally, the Commission has launched a reassessment of whether middle-mile telecommunications links between end users and carriers are priced at competitive levels.[198] The Commission apparently now sees the need to impose duties to deal fairly and on reasonable terms and conditions even for carriers who claim regulatory streamlining exempts them from government oversight.

It remains to be seen whether and how the FCC can maneuver around all the consumer-protection tools it has abandoned. Already courts have rejected the Commission's creative and novel invocations of ancillary jurisdiction in lieu of direct statutory authority. Had the Commission acted cautiously it would have lost the ability to make a big deregulatory pronouncement, but years later it would be in a position to act when needed.

Sadly, remedies for the FCC and the nation cannot arrive anytime soon, because Congress appears unable to reach consensus on necessary amendments to the Communications Act of 1934. Whether and how the FCC should regulate has become a contentious issue based largely on economic and political philosophy and not empirical evidence.[199] The FCC needs a clear statutory basis to provide public-interest safeguards for consumers of information services and to make sensible and limited retreats from several deregulatory initiatives. Such reassessments would not signal a resumption of intrusive and potentially harmful regulation. Instead the FCC would have clear legislative authority to assess the current state of telecommunications and information-service markets and to make midcourse corrections in the scope of deregulation.

Absent new statutory authority the FCC will continue to struggle with no certainty whether an assertion of ancillary

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> competition in the various interrelated segments, types of services, and vast geographic areas of the mobile wireless industry.

15th CMRS Competition Report, *supra* note 182, at 9691.

[197] The FCC states that "that broadband is not being deployed in a reasonable and timely fashion to all Americans." Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, GN Docket No. 10-159, FCC 11-78, ¶ 1 (May 20, 2011) (seventh broadband progress report and order on reconsideration).

[198] *In re* Connect America Fund, 26 FCC Rcd. 4554, 4676 (Feb. 9, 2011) (notice of proposed rulemaking and further notice of proposed rulemaking) (seeking comment on reasons for high middle mile costs and whether to use universal funding support to expand capacity and reduce price).

[199] *See generally* Frieden, *supra* note 26, at 277-312.

jurisdiction will pass muster with a reviewing court. The Commission has achieved success in applying what it considers necessary consumer safeguards for VoIP, but similar efforts to curb ISP anticompetitive practices have failed. The Commission lacks clear guidance on the reach of its jurisdiction at the very time it needs to provide guidance to stakeholders, particularly ones that use the Internet to serve as a medium for a combination of voice, data, and video services.