

Case Studies in Abandoned Empiricism and the Lack of Peer Review at the Federal Communications Commission

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Despite its legal obligation to serve the public interest,¹ using its expertise and data collection to make rational decisions,² the Federal Communications Commission (“FCC”) frequently engages in results-driven decision making. Rather than act, based on the evidentiary record it generates, Commission managers have determined that many policy questions have an answer even before the agency starts the processing of soliciting and analyzing filings of interested parties and stakeholders. Fealty to political and economic doctrine appears to drive such actions leading the FCC to violate laws that require the Commission to engage in rational

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

² “[A regulatory] agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). “If the agency has failed to provide a reasoned explanation for its action, or if limitations in the administrative record make it impossible to conclude the action was the product of reasoned decision-making, the reviewing court may supplement the record or remand the case to the agency for further proceedings. It may not simply affirm.” *Qwest Corp. v. FCC*, 258 F.3d 1191, 1198-99 (10th Cir. 2001)(determining that the FCC failed to provide adequate justifications to prove rational decision making in calculating subsidy mechanism for promoting universal service in high cost areas), *citing* *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575 (10th Cir.1994).

decision making and to refrain from acting arbitrarily.³

Remarkably, the FCC has used questionable and unverifiable statistics to confirm the wisdom in abandoning regulations, but also the need for more regulatory oversight. To support its bias toward deregulation, the FCC has used statistics to support the conclusion that such ample facilities-based competition exists in broadcast,⁴ broadband,⁵ and wireless markets⁶ that the Commission can further reduce ownership caps, approve multi-billion dollar, market concentrating mergers, and claim that the United States continues to benefit from best in class access to telecommunications services. The FCC regularly overstates the scope and reach of competition to justify actions that will result in further concentration of ownership and control in

³ Courts will set aside agency decisions found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

⁴ *See, e.g.*, Existing Shareholders of Citadel Broadcasting Corp. and of The Walt Disney Co., etc. for Consent to Transfers of Control, Memorandum Opinion and Order and Notice of Apparent Liability, 22 FCC Rcd 7083 (2007).

⁵ *See* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, CC Docket No. 02-33, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14901, para. 90 (2005), *aff’d sub nom.* Time Warner Telecom, Inc. v. FCC, 507 F.3d 205 (3d Cir. 2007) (forbearing, on the Commission's own motion, from applying tariffing requirements to providers of wireline broadband Internet access service that offer the underlying transmission component of broadband Internet access service as a telecommunications service); *see also*. Rob Frieden, *Lies, Damn Lies and Statistics: Developing a Clearer Assessment of Market Penetration and Broadband Competition in the United States*, 14 VA. J. L. & TECH., No. 100, (Summer, 2009); available at: http://www.vjolt.net/vol14/issue2/v14i2_100%20-%20Frieden.pdf.

⁶ *See* Applications of Cellco Partnership D/B/A Verizon Wireless and Atlantis Holdings LLC, for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and De Facto Transfer Leasing Arrangements, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd. 17444 (2008)(conditionally approving Verizon Wireless acquisition of Alltel wireless assets resulting in a 90% market share held by four firms).

the telecommunications industry.⁷

However, in rare instances, the FCC uses a worst case scenario to justify expansion of its regulatory reach. A former Chairman of the FCC, with an eye toward expanding regulatory scrutiny of the cable television industry, insisted that data, not even compiled by Commission staff, proved that the market had become so concentrated as to meet a congressionally legislated trigger for more regulation. The FCC persists in extensively regulating cable television, based on the perception that this industry does not support robust competition that has flourished everywhere else in the telecommunications marketplace. The Commission risks applying inconsistent and asymmetrical regulatory burdens in a convergent environment where firms offer a bundle of different services. Because the FCC perceives the telephony business as competitive, when telephone companies offer a triple-play package of voice, Internet access and video programming, the Commission has largely abandoned regulation. But because the FCC still perceives the cable television business as dominated by vertically-integrated cable television ventures, the Commission retains and possibly expands its regulatory oversight.

In far too few instances, normal governmental checks and balances do not detect and reverse instances where the FCC has deliberately or inadvertently failed to compile a credible record. Many reviewing courts gladly defer to the FCC's "expertise" rather than appear to second guess, or to legislate from the bench in highly technical matters. Additionally, the

⁷ "[T] here is substantial competition in the provision of Internet access services. Broadband penetration has increased rapidly over the last year with more Americans relying on high-speed connections to the Internet for access to news, entertainment, and communication. Increased penetration has been accompanied by more vigorous competition. Greater competition limits the ability of providers to engage in anticompetitive conduct since subscribers would have the option of switching to alternative providers if their access to content were blocked or degraded. In particular, cable providers collectively continue to retain the largest share of the mass market high speed, Internet access market. Additionally, consumers have gained access to more choice in broadband providers." AT&T Inc. and BellSouth Corp., Application for Transfer of Control, Memorandum Opinion and Order, 22 FCC Rcd. 5662, 5724-25 (2007).

Supreme Court has ruled that absent a legislative mandate authorizing the FCC to act when a market or carrier requires government oversight to guard against anticompetitive practices, courts lack jurisdiction to order remedies the Commission has refused to order.⁸ One court accepted the FCC's arguments that data about commercial ventures' decisions not to provide broadband service in specific localities constituted a business trade secret thereby prohibiting the FCC from public disclosure. Arguably, a carrier's decision not to serve a specific locality serves as a strong indication of market failure requiring heightened scrutiny in view of the legislative goal of achieving universal access to basic and advanced telecommunications services.

Too often, the FCC reaches policy conclusions based on statistical interpretations that do not make sense, and do not have corroboration through peer review, a process that the Commission has a conditional obligation to use,⁹ but rarely does so. For example, the FCC first concluded that per channel, "ala carte" access to cable television programming would not save consumers' money as an alternative to having to acquire a bundle of channels.¹⁰ However, the Commission quickly reversed itself with limited explanation for its change in findings.¹¹ The

⁸ Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004); Pacific Bell Telephone Co., v. Linkline Communications, Inc., slip op. 555 U.S. 544 (2009); available at: <http://www.supremecourtus.gov/opinions/08pdf/07-512.pdf>.

⁹ See United States, Office of Management and Budget, Final Information Quality Bulletin for Peer Review, 70 FED. REG., No. 10, 2664 (Jan. 14, 2005). For all of 2008, the FCC Peer Review Web page identified one such study. See FCC Peer Review Agenda, available at: <http://www.fcc.gov/omd/dataquality/peer-agenda.html>.

¹⁰ Federal Communications Commission, Media Bureau, *Report on the Packaging and Sale of Video Programming Services to the Public*, (Nov. 18, 2004); available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-254432A1.pdf.

¹¹ Federal Communications Commission, *Further Report on the Packaging and Sale of Video Programming Services to the Public* (Feb. 9, 2006); available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-263740A1.pdf.

Commission also erected a media diversity index to support relaxation of a cap on media ownership that a reviewing court rejected based on the lack of supporting evidence.¹² Only after a stinging judicial rebuke did the FCC think to subject its statistical analysis and modeling to external review from unaffiliated experts, rather than simply rely on the research and findings sponsored by stakeholders with a financial interest in what the Commission decides.¹³

This paper will identify several instances where the FCC could have used empirical research and peer review to achieve a true sense whether a telecommunications market operates competitively. The paper concludes that deregulatory zeal and wishful thinking motivate the FCC to abandon oversight and to provide no basis for remedies should the Commission subsequently determine, on its own volition, or pursuant to a court remand, that anticipated or statistically documented competition does not exist. The paper will suggest ways the Commission could have avoided judicial reversal and public ridicule if it had used social scientific practices, including peer review.

I. A Politicized Agency

Congress created the FCC as an expert and independent regulatory agency with an obligation to implement Congressional intent, but also to serve the public interest. In 2008, the FCC had an annual budget of approximately \$313 million and a staff numbering 1900.¹⁴ With such internal resources, one would think that the Commission could undertake a professional and

¹² Prometheus Radio. Project v. FCC, 373 F.3d 372, 382 (3d Cir. 2004), *cert. denied*, 545 U.S. 1123, 125 S. Ct. 2902 (2004).

¹³ See Federal Communications Commission, Media Bureau Peer Review, Web Site, available at: http://www.fcc.gov/mb/peer_review/peerreview.html.

¹⁴ Federal Communications Commission, FY 2009 Budget Estimates Submitted to Congress, Feb., 2008 at 4; available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-279991A1.pdf.

thorough analysis of public policy issues, as augmented by data collection and solicitation of comments from interested parties. Instead the FCC relies almost exclusively on stakeholder data reporting as well as the comments and sponsored research of these groups. The Commission does not generate much internal policy research, nor does it typically sponsor such research from neutral third parties. Additionally, the FCC refrains from collecting data it considers intrusive or burdensome, and the Commission takes pains to redact, or refrain from disclosing data that the reporting parties consider proprietary, or qualifying for trade secret protection.

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

The FCC can overstate the degree of competition and achievement of its public interest service mandate largely because the Commission relies on the comments and other filings of stakeholders who share the Commission's interest in touting what a great job it has done in serving the public interest.

II. Most Telecommunications Issues Require Data Collection

Time after time the FCC makes self-serving, broadsweeping conclusions about the state of the telecommunications marketplace without including empirical evidence to support its conclusions.¹⁵ Such concrete data could prove or disprove the Commission's claims and make its findings more easily justified on judicial appeal.

The FCC should engage in transparent and fair-minded data collection, because many of the issues the Commission addresses have a quantitative component that can provide evidence supporting compliance with legislative mandates. For example, Section 706 of the Communications Act, as amended,¹⁶ requires the FCC to encourage the deployment, on a reasonable and timely basis, of advanced telecommunications capability to all Americans and to initiate a notice of inquiry to determine the availability of such services. More generally the FCC has Congressional reporting requirements ostensibly established to keep legislators apprised of current marketplace conditions in such sectors as video programming delivery,¹⁷ wireless

¹⁵ For example, the FCC has stated that “advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion.” 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, Fifth Report, ¶ 1 (2008), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-88A1.pdf.

¹⁶ 47 U.S.C. §706 (2008).

¹⁷ See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 06-189, Thirteenth Annual Report, 24 FCC Rcd 542 (2009). “We find that almost all consumers are able to obtain programming through over-the-air broadcast television, a cable service, and at least two DBS providers. In some areas, consumers also may have access to video programming delivered by emerging technologies, such as digital broadcast spectrum, fiber-to-the-home facilities, or web-based Internet video. In addition, through the use of advanced set-top boxes and digital video recorders, and the introduction of new mobile video services, consumers are now able to exercise more control over what, when, and how they receive information. Further, MVPDs of all kinds are offering nonvideo services in conjunction with their traditional video services.” *Id.* at ¶4. See also, Annual Assessment of the

telecommunications,¹⁸ satellite services¹⁹ and access to advanced telecommunication capabilities.²⁰

If the FCC did not have ulterior motives in mind, the duty to promote access to advanced telecommunications capabilities, including information services like Internet access, would motivate the Commission to collect quite specific data about broadband market penetration. The more granular the data, the better the Commission can identify specific geographical locales where residents have limited access to advanced services, or carriers offering such services charge unaffordable rates. Instead, the FCC appears to have defined broadband at such a low level of performance and speed with an eye toward overstating the degree of current progress in

Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 07-269, Notice of Inquiry, 24 FCC Rcd 750 (2009); Supplemental Notice of Inquiry, 24 FCC Rcd. 4401 (2009).

¹⁸ See Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Radio Services, WT Docket No. 08-27, Thirteenth Report, DA 09-54 (rel. Jan. 16, 2009); available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-09-54A1.pdf. “The metrics below indicate that there is effective competition in the CMRS market and demonstrate the increasingly significant role that wireless services play in the lives of American consumers.” *Id.* at ¶1.

¹⁹ See Second Annual Report and Analysis of Competitive Market Conditions with Respect to Domestic and International Satellite Communications Services, Second Report, 23 FCC Rcd 15170 (2008). “We find in this Second Report, as we did in the First Report, that markets for commercial communications satellite services are subject to effective competition, notwithstanding certain structural changes in the communications satellite industry since the release of the First Report. Additionally, consumers of communications satellite services continue to realize significant net benefits in terms of service choice, innovations fostered by technological change and improvements in both space and ground segment, and improvements in service quality. Observed metrics of market performance are consistent with good market performance, recognizing the constraints imposed by industry cost structure and persistent excess capacity.” *Id.* 23 FCC Rcd. at 15201. See also, FCC Report to Congress as Required by the ORBIT Act, Tenth Report, 2009 WL 1674896 (rel. June 15, 2009).

²⁰ See Federal Communications Commission, Industry Analysis and Technology Division Wireline Competition Bureau, High-Speed Services for Internet Access: Status as of June 30, 2008; available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-292191A1.pdf.

achieving ubiquitous access. Belated efforts to narrow the geographical range of a specific locality examined, and to redefine broadband at a higher rate (768 kilobits per second (“kbps”) instead of 200 kbps) offer some confirmation of this assertion.²¹

Historically, the FCC has actively engaged in data collection and quantitative market assessment, with an eye toward establishing caps on market concentration, as well as limits on vertical and horizontal integration by individual companies. With an eye toward promoting greater relaxation of ownership and marketplace restrictions, the Commission has changed its numerical caps, or abandoned them entirely, often based on non-quantifiable conclusions about the current or future onset of increased competition.²² Some reviewing courts have chided the

²¹ Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscriberhip Data, and Development of Data on Interconnected Voice Over Internet Protocol (VOIP) Subscriberhip, Report and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd. 9691(2008), *partial recon.*, 23 FCC Rcd. 9800 (2008).

²² “Nonetheless, while the march of technology has brought to our homes, schools, and places of employment unprecedented access to information and programming, our broadcast ownership rules, like a distant echo from the past, continue to restrict who may hold radio and television licenses as if broadcasters were America’s information gatekeepers. Our current rules inadequately account for the competitive presence of cable, ignore the diversity-enhancing value of the Internet, and lack any sound basis for a national audience reach cap. Neither from a policy perspective nor a legal perspective can rules premised on such a flawed foundation be defended as necessary in the public interest. Not surprisingly, therefore, several of the existing rules have been questioned, reversed, and in some cases vacated by the courts. Our current rules are, in short, a patchwork of unenforceable and indefensible restrictions that, while laudable in principle, do not serve the interests they purport to serve.” 2002 Biennial Regulatory Review -- Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Report and Order and Notice of Proposed Rulemaking, MB Docket No. 02-277, MM Docket Nos. 01-235, 01-317, 00-244, 03-130, 18 FCC Rcd 13620, 13623 (2003), *aff’d in part and remanded in part*, Prometheus Radio Project, et al. v. FCC, 373 F.3d 372, 395-397 (3d Cir. 2004), *cert. denied* 545 U.S. 1123(2004).

FCC for insufficiently examining the marketplace consequences of initiatives to relax ownership restrictions.²³

Remarkably, the FCC has qualified for similar chiding when the Commission has tried to trigger justification for more regulation based on industry concentration. Even as the FCC generally attempts to justify less restrictions on most stakeholders, a former Chairman sought to expand the scope of cable television regulation based on questionable data allegedly confirming that the cable industry had reached a market domination threshold of serving at least 70% of the population with at least 70% of those people with access to cable actually subscribing.²⁴ This so-

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

²⁴ Section 612(g) of the Communications Act of 1934, as amended, provides that when “cable systems with 36 or more activated channels are available to seventy percent of households

called 70/70 rule seems straightforward: to justify more intrusive and ostensibly public interest serving government oversight of the cable industry, the FCC need only compile market penetration statistics and report if and when market penetration triggered both 70 percent thresholds. Regrettably, the FCC either could not compile such data, or simply had not done so even though former FCC Chairman Kevin Martin insisted that a commercial venture's data collection confirmed that the cable industry had exceeded both thresholds. Apparently it did not matter that cable television market penetration statistics, even those contemporaneously compiled by the FCC, showed declining market share in the video programming distribution market, as a result of increasing market share held by two Direct Broadcast Satellite operators and recent market entry by incumbent telephone companies such as Verizon and AT&T.²⁵

Even as the FCC appeared predisposed to use market penetration data to trigger more regulation, the Commission typically does not want to burden stakeholders with data reporting obligations, or to subject such data to public scrutiny. The Commission has accepted the view that knowing whether a particular Internet Service Provider ("ISP") does or does not serve a locality constitutes a trade secret.²⁶ One would think that if a venture opts not to serve a specific locality, this decision results from a commercial determination of financial non-viability. In light

within the United States" and when seventy percent of those households subscribe to them, "the Commission may promulgate any additional rules necessary to promote diversity of information sources."

²⁵ "Data submitted in the record this year raises questions as to whether the so-called "70/70 test" has been satisfied. Accordingly, the Commission is seeking further public comment on the best methodologies and data for measuring the 70-percent thresholds and, if the thresholds have been met, what action might be warranted to achieve the statutory goals." Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 05-255, Twelfth Annual Report, 21 FCC Rcd. 2503, 2507(2006).

²⁶ Ctr. for Pub. Integrity v. FCC, 505 F. Supp. 2d 106 (D. D.C. 2007).

of the FCC's Section 706 obligation to identify areas unserved or underserved by ISPs, arguably the lack of available service options should trigger concern about whether residents in such localities need regulatory intervention, possibly including subsidized access to broadband services.

III. The FCC Generally Uses Collected or Submitted Data and Statistics to Justify a Desired Outcome

A. Regulatory Forbearance

As authorized by Section 10 of the Telecommunications Act of 1996, the FCC, on its own initiative, or based on a stakeholder's application, shall forbear from regulating when justified by marketplace conditions and the public interest.²⁷ Incumbent wireline telephone companies have aggressively sought such deregulation based on the simple premise that they face facilities-based competition. For the FCC to comply with Section 10 of the '96 Act, the Commission must compile empirical evidence that corroborates the applicants' assertions about robust and sustainable competition. Instead, the FCC has relied on the prospect of competition, or based its decision to deregulate on market entry by as few as one facilities-based carrier.

In 2005, the FCC partially granted Qwest's request to forbear from applying price cap, rate of return, tariffing, and 60-day discontinuance regulations for interstate mass market

²⁷ The Telecommunications Act of 1996 requires the FCC to forbear from any statutory provision or regulation if the Commission determines that: (1) enforcement of the regulation is not necessary to ensure that charges and practices are just and reasonable, and are not unjustly or unreasonably discriminatory; (2) enforcement of the regulation is not necessary to protect consumers; and (3) forbearance is consistent with the public interest. 47 U.S.C. § 160(a) (2008). In making such determinations, the Commission must also consider "whether forbearance from enforcing the provision or regulation will promote competitive market conditions." 47 U.S.C. § 160(b). Section 10(d) specifies, however, that "[e]xcept as provided in section 251(f), the Commission may not forbear from applying the requirements of section 251(c) or 271 . . . until it determines that those requirements have been fully implemented." 47 U.S.C. § 160(d).

exchange access services and mass market broadband Internet access services in Omaha, Nebraska. The Commission expressed its willingness to eliminate traditional regulatory safeguards when true and robust facilities-based competition²⁸ exists:

Through this Order, we show that we are ready and willing to step aside as regulators and let market forces prevail where facilities-based competition is robust.²⁹

Even as the FCC recognized that robust facilities-based competition did not really exist,³⁰ the Commission nevertheless offered some deregulatory relief.

The Commission later thought to consider whether facilities-based competition exists for all necessary elements, including the first and last mile links to end users. Based on that consideration and new found interest in incumbent and market entrant market share, the FCC has

²⁸ “The record of competition compiled in this proceeding and, significantly, the other market-opening regulations that we leave in place today, support our finding that supply elasticity in this market is high for all mass market services. Cox’s extensive facilities build-out in the Omaha MSA, and growing success in luring Qwest’s mass market customers, indicates that . . . [ample facilities-based competition exists] for both switched access and broadband Internet access services.” Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area, WC Docket No. 04-223, Memorandum Opinion and Order, 20 FCC Rcd 19415, 19432-33 (2005), *aff’d*, Qwest Corp. v. FCC, 482 F.3d 471 (D.C. Cir. 2007)

²⁹ *Id.* 20 FCC Rcd 19416.

³⁰ “Even Cox, which is the competitive LEC with the most extensive facilities-based coverage in Qwest's territory in the Omaha MSA, depends on Qwest for interconnection, collocation, and reasonable notice of changes in Qwest's network in order to exchange telecommunications traffic in the Omaha MSA. Cox reports that approximately [REDACTED] percent of all the traffic that it sends and receives in the Omaha MSA depends on section 251(c)(2) interconnection and collocation -- the effectiveness of which depends in part on reasonable notice of network changes.” *Id.* 20 FCC Rcd 19457.

recently rejected some forbearance petitions, even for major urban areas most likely to have the greatest degree of competition.³¹

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

How the FCC treats regulatory forbearance petitions shows that the Commission has not established clear and consistent evidentiary requirements.³² On one hand, the FCC got away with

³¹ Petition of Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas, Inc., WC Docket No. 06-172, Memorandum Opinion and Order, 22 FCC Rcd. 21293 (2007), *remanded*, Verizon Telephone Companies v. F.C.C., 570 F.3d 294, 47 Communications Reg. (P&F) 1487 (D.C. Cir. Jun 19, 2009) (NO. 08-1012).

³² The Commission acknowledges this in a Report and Order establishing more specific criteria for evaluating forbearance petitions: "We acknowledge that we have not previously required petitioners to specify in the petition how the requested relief meets each of the three forbearance criteria, and that a requirement to do so will burden applicants to the extent that they must develop their supporting arguments in advance of filing. We do not, however, consider this an unreasonable expectation, and we find that the benefit to both commenters and the Commission of clarity and precision outweighs the burden on the petitioner of explaining how forbearance from each regulation or statutory provision meets each prong." Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended, Report and Order, FCC 09-56, 2009 WL 1856503, ¶14 (rel. June 29, 2009)[hereinafter cited as Forbearance Criteria Order].

using quite general, non-specific indications that competition might exist, without any proof that such competition would prove longstanding and offer consumers real service alternatives.

Businesses with heavy telecommunications requirements have complained that competition has not flourished particularly for “middle mile” links between several geographically diverse facilities in a metropolitan area. However, an appellate court deferred to the Commission’s conclusion that incumbent carrier offered reasonable rates.³³ Remarkably, the FCC’s effort to require more granular and specific evidence of competition triggered a remand based on the Commission’s failure to provide sufficient notice and explanation for its change in evidentiary requirements.³⁴

³³ Ad Hoc Telecommunications Users Comm. v. FCC, ___ F.3d ___, 2009 WL 2081411 (D.C. Cir. 2009); available at: <http://pacer.cadc.uscourts.gov/docs/common/opinions/200907/07-1426-1196829.pdf>. “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.” *Id.* at 10, *citing* EarthLink, Inc. v. FCC, 462 F.3d 1, 12 (D.C. Cir. 2006); *see also* Time Warner Telecomm., Inc. v. FCC, 507 F.3d 205, 221 (3d Cir. 2007).

³⁴ In 2009 the FCC belatedly specified the documentation petitioners must submit: “A petition for forbearance must include in the petition the facts, information, data, and arguments on which the petitioner intends to rely to make the prima facie case for forbearance. Specifically, the prima facie case must show in detail how each of the statutory criteria are met with regard to each statutory provision or rule from which forbearance is sought. A petition for forbearance must take into account relevant Commission precedent. If the petitioner intends to rely on data or information in the possession of third parties, the petition must identify the data or information, and the parties that possess it, and explain the relationship of the information to the prima facie case. When the petition is filed at the Commission, the petitioner must provide a copy of it to each party identified as possessing relevant data or information, and the relevant Bureau will respond to requests for third-party discovery on a case-by-case basis. Other than third-party information, a petition may not rely on data or information that is not made available, without charge, to the Commission staff and interested parties that agree to comply with any protective orders the Commission issues in the course of the proceeding. We find broad support for requiring petitioners to state a prima facie case.” Forbearance Criteria Order at ¶17.

B. The Absence of an Antitrust Remedy

In two cases, the Supreme Court has all but eliminated the possibility that a court can offer a remedy to anticompetitive practices should the FCC fail to do so. The Court has concluded that because industry sector-specific legislation provides the FCC with authority to craft regulatory remedies, when the Commission refuses to act, appellate courts have no legal basis for imposing additional antitrust safeguards.³⁵

The Supreme Court's deference to the FCC has gone so far as to allow an incumbent carrier to offer end users lower rates than what it charges competitors, a predatory and anticompetitive practice commonly referred to as a price squeeze.³⁶ In 2003, several ISPs filed suit against Pacific Bell Telephone Co., contending that this incumbent carrier attempted to monopolize the market for Digital Subscriber Link ("DSL") broadband Internet access by creating a price squeeze with ISP competitors obligated to pay a higher wholesale price than what Pacific Bell offered on a retail basis. Both the District Court and the Ninth Circuit Court of Appeals agreed that the ISPs could present their price squeeze claim, despite the Supreme Court's *Trinko* decision.

The Court assumed that Pacific Bell had no antitrust duty to deal with any ISPs based on the FCC's premise that ample facilities-based competition exists and the Commission's refusal to order any remedy even when presented with clear evidence that Pacific Bell offered retail users

³⁵ Verizon Communications, Inc. v. Law Office of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

³⁶ Pacific Bell Telephone Co., v. Linkline Communications, Inc., slip op. 555 U.S. ____ (rel. Feb. 25, 1009); available at: <http://www.supremecourtus.gov/opinions/08pdf/07-512.pdf>.

rates below wholesale rates offered to competitors.³⁷ But for a voluntary concession to secure the FCC's approval of AT&T's acquisition of BellSouth, the Court noted that Pacific Bell would not even have a duty to provide ISPs wholesale services. The Court granted *certiorari* to resolve the question whether ISP plaintiffs can bring a price-squeeze claim under Section 2 of the Sherman Act when the defendant carrier has no antitrust-mandated duty to deal with the plaintiffs. The lower courts concluded that the *Trinko* precedent did not bar such a claim, but the Supreme Court reversed this holding.

On procedural grounds, the Court's decision 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, a practice where one competitor charges below cost rates with an eye toward driving out competitors after which rates can rise. On substantive grounds, the Court noted that a new emphasis on predatory pricing would have required determination whether the retail price was set below cost,³⁸ 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. However the decision evidences great skepticism whether the ISPs have any basis for a claim, because in the Court's reasoning the ISPs failed to make a claim that Pacific Bell's retail DSL prices were predatory, and the ISPs also failed to refute the Court's conclusion that Pacific Bell had no duty to deal with the ISPs, i.e., to provide wholesale

³⁷ "DSL now faces robust competition from cable companies and wireless and satellite services." *Id.* at 2; *see also, id.* at 8, n.2.

³⁸ The Court referenced *Brook Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) that supports the inference that a predatory pricing claim can be established only with proof of below cost pricing coupled with evidence that the defendant can subsequently recoup any lost profits. *Id.* at 4.

service.³⁹ The Court apparently can ignore the voluntary concession AT&T made that created a duty to deal, because that concession may trigger FCC oversight, but it does not change whether an antitrust duty to deal arises. The Court reads the *Trinko* case as foreclosing any antitrust claim if no antitrust duty to deal exists.⁴⁰

The Court remanded the case to the District Court to determine whether the ISP plaintiffs have any viable predatory pricing claim. The Court expressed the need for clear antitrust rules and apparently views consumer access to low retail prices—predatory or not—as sufficient reason for courts to refrain from intervening. The Court does not seem troubled even if all ISPs competitors exited the market, an event that surely would enable the surviving incumbent carrier to raise rates:

For if AT&T can bankrupt the plaintiffs by refusing to deal altogether, the plaintiffs must demonstrate why the law prevents AT&T from putting them out of business by pricing them out of the market.⁴¹

This case evidences a strong reluctance on the part of the Supreme Court to support any sort of judicial review over the pricing strategies of carriers and analysis of the FCC’s determinations about the appropriateness of such prices and the viability of competition. Judicial deference to the FCC and the Commission’s failure to detect and remedy the price squeeze or predatory pricing surely will result in the near term elimination of competition unless ISPs quickly replace expensive leased lines with their own facilities, a desirable but commercially

³⁹ “The challenge here focuses on retail prices—where there is no predatory pricing—and terms of dealing where there is no duty to deal.” *Id.* at 8. “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 12.

⁴⁰ “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 9.

⁴¹ *Id.* at 16-17.

impractical goal at least in the short term. The FCC's assumptions about competition and its viability do not jibe with what incumbent carriers can do to drive competitors out of business if they lack all necessary infrastructure.

C. Mergers and Acquisitions

With quite rare exceptions, the FCC has approved each and every merger application submitted to it for review. The Commission can do so, despite initial opposition typically expressed by one or more Commissioners, by securing "voluntary" concessions from the acquiring company. In reality, ventures sweeten their offer of prospective remedies for potential anticompetitive practices, or excessive market concentration, based on signals of distress made by individual Commissioners. The final FCC order approving the merger can identify the potential for risky vertical and horizontal market concentration, but dismiss concerns about the potential for adverse impact to the level of competition based on the safeguards largely offered by the acquiring firm.

Alternatively, the Commission approves an acquisition based on general notions that the acquiring and acquired parties did not compete with each other,⁴² or that using broad market definitions, the merged firm will not adversely impact the already robustly competitive marketplace. In the former, the FCC approved the merger of Intelsat and PanAmSat largely on grounds that despite being two of the world's largest fixed satellite service providers, Intersat

⁴² "This lack of present competition between these two incumbent LECs is hardly surprising -- both carriers largely serve rural local exchanges and the adjacent exchanges are almost all small and rural." Applications Filed for the Transfer of Control of Embarq Corporation to Centurytel, Inc. Memorandum Opinion and Order, FCC 09-54, 2009 WL 1811057, ¶18 (rel. June 25, 2009).

offered international services and PanAmSat largely served North America.⁴³ In the latter, the Commission approved the merger of the only two satellite-based, premium audio service providers largely based on the premise that a satellite monopoly would not harm consumers in light of their access to alternative sources, such as portable music players, terrestrial radio broadcasting, and compact disks.⁴⁴

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

Deployment of broadband throughout the entire AT&T-BellSouth in-region territory in 2007;

Increased competition in the market for advanced pay television services due to AT&T's ability to deploy Internet Protocol-based video services more quickly than BellSouth could do so absent the merger;

Improved wireless products, services and reliability due to the efficiencies gained by unified management of Cingular Wireless, which is now a joint venture operated by BellSouth and AT&T;

Enhanced national security, disaster recovery and government services through the creation of a unified, end-to-end IP-based network capable of providing efficient and secure government communications; and

Better disaster response and preparation from the companies because of unified operations.⁴⁵

⁴³ Constellation, LLC, Carlyle Panamsat I, LLC, Carlyle Panamsat II, LLC, Pep Pas, LLC, And Peop Pas, Llc, Transferors, and Intelsat Holdings, Ltd., Transferee, Consolidated Application For Authority to Transfer Control of Panamsat Licensee Corp. and Panamsat H-2 Licensee Corp., IB Docket No. 05-290, Memorandum Opinion and Order, 21 FCC Rcd. 7368 (2006).

⁴⁴ Applications for Consent to the Transfer of Control of Licenses XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee, MB Docket No. 07-57, Memorandum Opinion and Order and Report and Order, 23 FCC Rcd 12348 (2008).

⁴⁵ FCC Approves Merger Of AT&T Inc. and Bellsouth Corporation, Significant Public Interest Benefits Likely to Result, Public Notice (Dec. 29, 2006); available at:

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

The Commission applies several criteria in deciding whether a claimed benefit is cognizable. First, the claimed benefit must be transaction or merger specific (*i.e.*, the claimed benefit 'must be likely to be accomplished as a result of the merger but unlikely to be realized by other means that entail fewer anticompetitive effects') [quoting from AT&T Inc. and BellSouth Corporation Application for Transfer of Control, WC Docket No. 06-74, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5672, (2007)] Second, the claimed benefit must be verifiable. Because much of the information relating to the potential benefits of a merger is in the sole possession of the Applicants, they are required to provide sufficient evidence supporting each claimed benefit to enable the Commission to verify its likelihood and magnitude. In addition, as the Commission has noted, "the magnitude of benefits must be calculated net of the cost of achieving them." [quoting from AT&T/BellSouth Order, 22 FCC Rcd at 5761]; Furthermore, the Commission will discount or dismiss speculative benefits that it cannot verify. ⁴⁶

In one of the only merger applications the FCC did not approve in the last decade, the Commission stated that "benefits that are to occur only in the distant future may be discounted or dismissed because, among other things, predictions about the more distant future are inherently

http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-269275A1.pdf. See also, AT&T Inc. and BellSouth Corporation, Application for Transfer of Control, 22 FCC Rcd. 5662 (2007), *on partial recon.*, 22 FCC Rcd. 6285(2007).

⁴⁶ Applications Filed for the Transfer of Control of Embarq Corporation to Centurytel, Inc. WC Docket No. 08-238, FCC 09-54 48 Communications Reg. (P&F) 24, 2009 WL 1811057, ¶35 (rel. June 25, 2009).

more speculative than predictions about events that are expected to occur closer to the present.”⁴⁷

AT&T secured a favorable FCC decision by offering concessions and later adding more. In a letter to the FCC on December 28, 2006 AT&T promised to make available broadband Internet access service by December 31, 2007 to 100 percent of the residential living units in the AT&T/BellSouth service regions, rollout of unregulated, fiber-based facilities reaching at least 1.5 million homes, price caps and discounting of high speed data transmission services and conditionally agreeing to comply with network neutrality principles. Parties have disputed whether AT&T has achieved its promises, but the FCC has not investigated or sanctioned the company.⁴⁸

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

⁴⁷ Application of Echostar Communications Corporation, (a Nevada Corporation), General Motors Corporation, and Hughes Electronics Corporation (Delaware Corporations) (Transferors) and Echostar Communications Corporation (a Delaware Corporation)(Transferee), Hearing Designation Order, 17 FCC Rcd. 20559, 20631 (2002)(designating a hearing to resolve issues pertaining to the public interest merits in the merger of two major Direct broadcast Satellite firms).

⁴⁸ See Federal Communications Commission, AT&T Inc. and BellSouth Corporation FCC Docket No. 06-74, Web Page; available at: <http://www.fcc.gov/transaction/att-bellsouth.html>.

tariffs, the Commission is not bound to approve these tariffs. Indeed, consistent with the Commission's prior policies and precedent, we would oppose such discriminatory practices and would encourage such tariffs to be rejected."⁴⁹

AT&T's network neutrality commitment appears generous until one considers the practical ramifications of the company's commitment. AT&T has committed to "conduct business in a manner that comports with the principles set forth"⁵⁰ in the Commission's network neutrality policy principles statement for 30 months running from the merger closing date.⁵¹ However AT&T limits its neutral network operation and routing commitment to its wireline broadband Internet access service, e.g., Digital Subscriber Link service and not to the fiber optic network that it will emphasize for video and higher speed broadband service. Additionally AT&T limits any network neutrality commitment to the pathway linking end users to the closest location where it receives and hands off Internet traffic with other carriers. These reservations provide AT&T with the means to operate next generation Internet networks with no network neutrality obligations.

D. Relaxed Limits on Vertical and Horizontal Integration

The FCC has incrementally relaxed limits on market penetration by a single company.

⁴⁹ Joint Statement of Chairman Kevin J. Martin and Commissioner Deborah Taylor Tate Re: *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, (rel. Dec. 29, 2006); available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-269275A2.doc.

⁵⁰ Letter from Robert W. Quinn, Jr. AT&T Sr. Vice President Federal Regulatory, Dec. 28, 2006 attached to the AT&T-Bell South Merger Mews release.

⁵¹ See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, Policy Statement (Sep. 23, 2005); available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-151A1.doc.

Once again the Commission rationalizes such deregulation based on expanded competitive choice, despite evidence to the contrary.⁵² The Third Circuit Court of Appeals in *Prometheus Radio Project v. FCC*,⁵³ held that the FCC's decision to replace its newspaper/broadcast cross-ownership rules with cross-media limits did not violate the Constitution or Communications Act of 1934, as amended, but that the Commission did not sufficiently justify its particular chosen numerical limits for cross-ownership of media within local markets. While the court affirmed the FCC's decision to retain the local television ownership rule restricting combinations of four largest stations in any market, it held that the Commission's modification to allow triopolies in markets of 18 stations or more and duopolies in other markets was unsupported by the evidence. The court also rejected the methodology⁵⁴ used by the FCC to assess the degree of competition in broadcast markets and used to justify the retention of numerical ownership restrictions:

⁵² The FCC has experienced several judicial reversals of the Commission's attempt to relax broadcast and MVPD ownership rules. In *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, *modified on rehearing*, 293 F.3d 537 (D.C. Cir. 2002) the D.C. Circuit Court of Appeals remanded the FCC's retention of the then congressionally-established 35% national television ownership rule. *See* 1998 Biennial Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 15 FCC Rcd 11058 (2000). In *Sinclair Broadcasting Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002) the court remanded the Commission's 1999 revision of its local television multiple ownership rule. *See* Review of the Commission's Regulations Governing Television Broadcasting, 14 FCC Rcd 12903 (1999). *See also*, *Prometheus Radio. Project v. FCC*, 373 F.3d 372, 382 (3d Cir. 2004), *cert. denied*, 545 U.S. 1123, 125 S. Ct. 2902 (2004).

⁵³ 373 F.3d 372, 382 (3d Cir. 2004), *cert. denied*, 545 U.S. 1123, 125 S. Ct. 2902 (2004).

⁵⁴ "Most importantly, the Commission has not sufficiently justified its particular chosen numerical limits for local television ownership, local radio ownership, and cross-ownership of media within local markets. Accordingly, we partially remand the Order for the Commission's additional justification or modification . . ." *Id.* 373 F.3d at 382.

Yet no matter what the Commission decides to do to any particular rule--retain, repeal, or modify (whether to make more or less stringent)--it must do so in the public interest and support its decision with a reasoned analysis.⁵⁵

FCC deregulation also triggered a reversal when the Commission sought to liberalize existing cable horizontal and vertical ownership limits. The court in *Time Warner Entertainment Co. v. FCC*⁵⁶ stated that the FCC failed to build a credible evidentiary record on which to establish relaxed ownership rules:

[T]he statute allows the Commission to act prophylactically against the risk of “unfair” conduct by cable operators that might unduly impede the flow of programming, either by the “joint” actions of two or more companies or the independent action of a single company of sufficient size. But the Commission has pointed to nothing in the record supporting a non-conjectural risk of anticompetitive behavior, either by collusion or other means. Accordingly, we reverse and remand with respect to the 30% rule.⁵⁷

As directed by Congress in the Cable Television Consumer Protection and Competition Act of 1992⁵⁸ the FCC established a 30% horizontal ownership limit on the number of cable subscribers served by a single company and a 40%, vertical limitation on the number of channels for which a single company has an attributable ownership interest.⁵⁹ In 1999, the Commission

⁵⁵ *Id.* 373 F.3d at 395.

⁵⁶ 240 F.3d 1126 (D.C. Cir. 2001).

⁵⁷ *Id.* 240 F.3d at 1136.

⁵⁸ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460; *codified at* 47 U.S.C. §§ 51, *et seq.*

⁵⁹ Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, 8 FCC Rcd. 8565 (1993), *affirmed in part, reversed in part sub nom.* *Time Warner Entertainment Co., L.P. v. FCC*, 240 F.3d 1126, (D.C.Cir. 2001),. *Consumer Federation of America v. F.C.C.*, 534 U.S. 1054, 122 S.Ct. 644, 151 L.Ed.2d 562 (2001). The

revised the 30% horizontal limit to permit a cable operator to reach 30% of all Multichannel Video Programming Distributor (“MVPD”) subscribers, rather than solely cable subscribers thereby increasing the cable subscriber limit to 36.7%.⁶⁰ The District court found that the horizontal and vertical ownership limits unduly burdened cable operators’ First Amendment rights and that the Commission’s evidentiary basis for imposing the ownership limits and its rationales supporting the vacated attribution rules did not meet the applicable standards of review. Additionally the court determined that the Commission had failed to consider sufficiently changes that have occurred in the MVPD market since passage of the 1992 Cable Act. Even as the FCC, on remand, sought comment on the nature of the MVPD industry, the Commission had no problem approving several blockbuster mergers, including Comcast’s acquisition of the cable television ownership interests of AT&T⁶¹ and News Corporation’s acquisition of the direct broadcast satellite and other media business of Hughes Electronics Corporation.⁶²

D.C. Circuit upheld the underlying statute in *Time Warner Entertainment Co. v. United States*, 211 F.3d 1313 (D.C. Cir. 2000).

⁶⁰ Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal Ownership Limits, MM Docket No. 92-264, Third Report and Order, 14 FCC Rcd. 19,098 (1999).

⁶¹ See *Applications for Consent to the Transfer of Control of Licenses, Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee (Comcast-AT&T Order)*, 17 FCC Rcd 23246 (2002).

⁶² See *General Motors Corporation and Hughes Electronics Corporation, Transferors and The News Corporation Limited, Transferee, For Authority to Transfer Control (News-Hughes Order)*, 19 FCC Rcd. 473 (2003). The programming assets involved in the transaction included 35 owned and operated (O&O) full-power television broadcast stations, a national television broadcast network, ten national cable programming networks, and 22 regional cable programming networks.

Acting six years after a remand in *Time Warner Entertainment Co. v. FCC*,⁶³ the FCC again proposed a cap on attributable ownership interest in cable systems serving more than 30 percent of multichannel video programming subscribers nationwide as it had initially done in 1993.⁶⁴ The Commission reiterated the need to cap ownership interest so that no single cable operator or group of operators could leverage size and market power to impede unfairly the flow of programming to consumers as mandated by Section 613(f) of the 1992 Cable Act.⁶⁵ The Commission sought to remedy the defects in its previous order that had triggered a reversal on grounds that the Commission lacked evidence that cable operators would collude based on an assumption that cable operators would coordinate their behavior in an anticompetitive manner. The Commission had justified a 30% cap on the assumption that the video marketplace could function well if 40% of the market constituted an “open field” with 60% captured by the two

⁶³ *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001)[hereinafter cited as *Time Warner II*]. The lawfulness of having a horizontal ownership cap pass muster with a reviewing court. *See Time Warner Entertainment Co. v. United States*, 211 F.3d 1313 (D.C. Cir. 2000).

⁶⁴ The Commission’s Cable Horizontal and Vertical Ownership Limits, MM 92-264, Fourth Report & Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd. 2134 (2008) [hereinafter cited as *Fourth Cable Horizontal and Vertical Ownership Cap Order*]. *See also*, Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations, and Anti-trafficking Provisions, Second Report and Order, 8 F.C.C. Rcd (1993); Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992 Horizontal Ownership Limits, 14 F.C.C. Rcd 19098 (1999) (revising the 30 percent horizontal limit to permit a cable operator to serve 30 percent of all MVPD subscribers rather than 30 percent of all cable homes passed in light of changed marketplace conditions).

⁶⁵ Section 613(f) of the Act, added by the 1992 Cable Act, *codified at* 47 U.S.C. § 533(f)(2)(A), directs the FCC to conduct proceedings to establish reasonable limits on the number of subscribers a cable operator may serve (“horizontal limit”) and the number of channels a cable operator may devote to its affiliated programming networks (“vertical,” or “channel occupancy” limit).

largest multiple system operators. Additionally the FCC responded to the court's admonition that the Commission had to consider both market share and the nature and type of competition when establishing a percentage cap on attributable ownership interest. Prior to issuing its Fourth Report & Order and Further Notice of Proposed Rulemaking the Commission sought to shore up the record with an analysis of bargaining theory, and monopoly (single buyer) behavior as well as empirical and survey data identifying "the contractual relationships between programmers and cable operators in order to establish the extent of cable operators' market power and the effects of market power on the quantity and quality of programming, as well as the effects of market power on the programming costs of smaller MVPDs." ⁶⁶

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

After careful consideration of the evidence before us, including the language and intent of the statute and our understanding of the programming market, we determine that use of the open field approach to set a horizontal limit is the most appropriate means of ensuring that the flow of programming to consumers is not unfairly impeded. The modified open field method that we adopt in this *Order* yields a horizontal ownership cap that ensures that no cable provider is so large that it can prevent a programmer from serving "the number of viewers needed for viability – independent of concerns over anticompetitive conduct." ⁶⁷

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

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

⁶⁶ Fourth Cable Horizontal and Vertical Ownership Cap Order, 23 FCC Rcd. 2140.

⁶⁷ *Id.* 23 FCC Rcd. 2166, citing *Time Warner II*, 240 F.3d at 1131-32.

pressure on the large cable operator to carry the network within a reasonable period of time.⁶⁸

The Commission noted that “without an open field that is large enough, many new programming networks might not even attempt to enter the market without a contract from the largest cable operator.”⁶⁹

E. Abandoned Wireless Carrier Spectrum Cap

In 2003, the FCC eliminated a cap on the amount of spectrum a single wireless telecommunications carrier can control, based on a current determination of ample competition:

Measures of market concentration in the record show a substantial continuing decline in concentration in most local [commercial mobile radio service] CMRS markets. We find that considerable entry has occurred and that meaningful competition is present, particularly given the presence of such earmarks of competition as falling prices, increasing output, and improving service quality and options. Specifically, concentration in CMRS markets, as measured by subscriber share, is falling.⁷⁰

Since the Commission’s decision, the market has become even more concentrated with the top four carriers controlling over 87% of the market.⁷¹

⁶⁸ *Id.* 23 FCC Rcd. 2168.

⁶⁹ *Id.* 23 FCC Rcd. 2169.

⁷⁰ 2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services, WT Docket No. 01-14, Report and Order, 16 FCC Rcd. 22668, 22682 (2001). The FCC rejected as a significant barrier to market entry the need to acquire spectrum, in light 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.* 16 FCC Rcd. 22690.

⁷¹ Using statistics compiled by a wireless trade association, the FCC reports that there were 255,395,599 cellular radio subscribers in the U.S. Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Thirteenth Report, Appendix A, Table A-1: CTIA’s Semi-Annual Mobile Telephone Industry Survey (2009); available at:

Notwithstanding such concentration and clear evidence that the carriers rarely differ in the rates they charge, the Commission regularly claims that the wireless marketplace remains robustly competitive.

In only one case, did the FCC even seek to ensure that incumbent carriers comply with common carrier responsibilities to operate open networks, as opposed to the general practice of offering limited, “walled-garden” access to carrier- or handset manufacturer-selected content. The FCC established an “Open Platform” requirement for a 22 MHz block of choice “beachfront” 700 MHz spectrum made available for auction in the conversion from analog to digital broadcast television. The winning bidder must allow consumers to use the handset of their choice and download and use any applications, subject to certain reasonable network management conditions that allow the licensee to protect the network from harm:

Although we generally prefer to rely on marketplace forces as the most efficient mechanism for fostering competition, we conclude that the 700 MHz spectrum provides an important opportunity to apply requirements for open platforms for devices and applications for the benefit of consumers, without unduly burdening existing services and markets. For the reasons described below, we determine that for one commercial spectrum block in the 700 MHz Band -- the Upper 700 MHz Band C Block -- we will require licensees to allow customers, device manufacturers, third-party application developers, and others to use or develop the devices and applications of their choice, subject to certain conditions . . .⁷²

http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-09-54A1.pdf. The top four carriers serve approximate 223,173,000 subscribers, amounting to approximately 87.4%. *Id.* Table A-4: Top 20 Mobile Telephone Operators by Subscribers, 138. The FCC calculated the top four carrier market share at approximately 85%. *Id.* Chart 1: YE2007 Mobile Telephone Subscribers by Company at 16.

⁷² Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, Second Report and Order, 22 FCC Rcd. 15289, 15361(2007), *on recon.*, 22 FCC Rcd. 17,935, *partially modified*, 23 FCC Rcd. 5319 (2008), 24 FCC Rcd 4782 (2009).

IV. Conclusions and Recommendations

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

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

Consider the consequences if the FCC reimposed a wireless carrier spectrum cap as proposed by rural carriers and other parties.⁷³ Doing so would constitute an acknowledgement that the wireless marketplace has become too concentrated and in turn less competitive. Absent a set-aside of spectrum for market entrants, or a cap on the amount incumbent carriers can control, any additional spectrum largely will flow to incumbents. The auction of freed-up UHF

⁷³ Public Notice, Wireless Telecommunications Bureau Seeks Comment on Petition for Rulemaking of Rural Telecommunications Group, Inc. to Impose a Spectrum Aggregation Limit on all Commercial Terrestrial Wireless Spectrum Below 2.3 GHz, RM No. 11498, DA 08-2279 (rel. October 10, 2008); available at: <http://wireless.fcc.gov/index.htm?job=headlines&y=2008#10>.

television spectrum corroborates this assertion. Incumbent carriers acquired most of the newly available spectrum ostensibly to meet growing demand.⁷⁴ But an equally plausible argument casts incumbent carriers as motivated primarily to “warehouse” spectrum, i.e. to control it and keep it away from market entrants who would reduce incumbents’ shared domination of the marketplace and generate more facilities-based competition. Additionally, the Commission can deliver more funds to the treasury when it auctions off spectrum free of any encumbrance, such as a duty to provide common carrier access, or limitation, such as allowing bidding only by non-incumbents.⁷⁵

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

With the change of administration, new FCC managers have proposed to operate in a more transparent and accessible manner. For example, the Commission has enlisted the support of two major university-affiliated research programs to determine how best to promote ubiquitous access to broadband networks at affordable rates.⁷⁶ Additionally the Commission has

⁷⁴ For example Verizon Wireless bid \$9,363,160,000 of the net bidding total amounting to total \$18,957,582,150. AT&T bid \$6,636,658,000. *See* FCC, Auction 73, 700 MHz Band available at: http://wireless.fcc.gov/auctions/default.htm?job=auction_summary&id=73.

⁷⁵ *See* FCC, Broadband.gov web Site; available at: <http://www.broadband.gov/>.

⁷⁶ FCC, Public Notice, Harvard’s Berkman Center to Conduct Independent Review of Broadband Studies to Assist FCC, (rel. July 14, 2009); available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-291986A1.pdf; Public Notice,

scheduled eighteen workshops to address various aspects of infrastructure development and access.

The FCC's recommitment to transparency and service in the public interest will require external pressure to achieve thorough compliance. The Commission will need to encourage public participation, rather than rely on the filings of stakeholders. Such receptiveness will require more than the occasional road trip out from Washington, D.C. to hear from a few people for the last hour of a pre-arranged and pre-packaged hearing. Additionally, the Commission will need to reshape its internal culture to encourage staff to engaged in debate rather than to restate the conventional wisdom, or the party line articulated from the top down, i.e., from Commissioners and the Chairman. Because one can hardly mandate an open mind, a commitment toward openness and getting the facts right must develop internally, as a public interest commitment of staff, or externally through embarrassing court reversals and congressional hearings.