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“The Nation’s Broadband Success Story”: The Secrecy of FCC Broadband Infrastructure Statistics

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Abstract: The Federal Communications Commission regularly promotes the competitiveness of the American broadband market and the availability of robust services to consumers. Since 2000, the Commission has reported on broadband deployment by zip code, and by late 2006 broadband was supposedly available in 99% of American zip codes, with those zip codes representing 99% of the population. However, the viability of the FCC’s zip code-based measurement methodology has long been a matter of controversy, because broadband is counted as “available” in a zip code even if as few as one household in the area has obtained service. Meanwhile, the FCC continued to use a 1999 definition of “broadband” until 2008, and industry experts suspect that the Commission’s broadband deployment statistics are exaggerated and politicized. Another issue is the viability of incoming information, supplied by private telecommunications firms, upon which the FCC bases its statistics. The Center for Public Integrity filed a Freedom of Information Act request with the FCC for the disclosure of this company information. The Commission denied the request, claiming that the information qualified as “trade secrets” under FOIA Exemption 4. The Center for Public Integrity unsuccessfully appealed this denial in Federal court, and the information has remained undisclosed.

This paper analyzes the viability of the FCC’s broadband deployment statistics, as well as the suit by Center for Public Integrity, via a government transparency and freedom of information perspective. The paper then argues that the court failed to consider important precedents in trade secrets jurisprudence that would have placed more pressure on the FCC and the telecommunications firms to justify why withholding the requested information was in the public interest. Consequently, the case leaves many unresolved issues surrounding the possible misuse of the trade secrets exemption of FOIA by the FCC, in order to withhold information that is voluntarily submitted by private companies who maintain the public telecommunications infrastructure. Ultimately, questions remain as to whether the public should believe the FCC’s pronouncements about a competitive broadband market, when such statements are based on statistics that are both exaggerated and are built upon incoming information that the Commission and private firms insist on keeping secret.
I. INTRODUCTION

“Today’s report shows the nation’s broadband success story. The President’s policies have made a significant impact on the availability and affordability of broadband in the United States. … The broadband policies put in place by the President have created a competitive environment to foster innovation and provide effective technologies, services and cost-effective solutions to revolutionize health care delivery, education, society and the economy. We look forward to continuing our progress on this issue.” - U.S. Secretary of Commerce Carlos M. Gutierrez, January 31, 2008.1

In 2007, the Center for Public Integrity (CPI) brought suit against the Federal Communications Commission (FCC) for its refusal to grant a FOIA request. CPI had sought disclosure of information that broadband providers had furnished to the FCC about their service offerings, which the FCC used when compiling controversial statistics about broadband availability by zip code across the United States. The FCC refused to disclose the requested information, citing Exemption 4 – protection of trade secrets – of the Freedom of Information Act (FOIA). The agency made this decision under the rationale that disclosing the information would cause competitive harm for the private companies from which it collects such information. The District Court of the District of Columbia ultimately denied CPI’s motion for a reconsideration of the FCC’s denial under FOIA Exemption 4.2

The accuracy and viability of the FCC’s methodologies for measuring broadband deployment, and the agency’s pronouncements about what those statistics mean for consumers, have been well covered in the peer-reviewed literature, and often in a critical light.3 Much less

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discussed has been the non-transparency of the information that the FCC compiles before announcing its broadband deployment statistics – incoming data supplied by private telecommunications companies.

This paper contributes to the literature by analyzing why this incoming data should be made transparent to the public, and argues that the court’s ruling in favor of the FCC’s use of FOIA Exemption 4 to withhold the information sought by the Center for Public Integrity was in error. The court and the FCC erred in characterizing the information in question as “trade secrets,” and in its ruling the court failed to consider important precedents in the jurisprudence of FOIA Exemption 4. Those precedents should have been applied to the unique situation of the FCC’s broadband deployment statistics, in which telecommunications companies have furnished information to the government voluntarily (in part), while that information is then used to promote the supposed success and advancement of an infrastructure that could potentially benefit all Americans.

Part II of this paper explores the controversies surrounding the FCC’s zip code-based broadband availability statistics, and the American government’s pattern of promoting statistical results that are based on heavily-criticized measurement methodologies. Part III discusses in detail the legal battle between the Center for Public Integrity and the FCC over the effort to make company-supplied broadband deployment information more transparent. Part IV covers important judicial precedents relating to FOIA Exemption 4 and why the court erred in not applying those precedents to the CPI case. The paper then concludes with a discussion of the viability and believability of the FCC’s promotion of the American broadband network, when

such pronouncements are based on incoming information that has been mischaracterized as “trade secrets” and incorrectly withheld from the public.

II. The FCC’s Broadband Deployment Statistics

The deployment of broadband\(^4\) access to American consumers became a matter of federal policy in the Clinton administration in the 1990s,\(^5\) during which Vice President Al Gore took the lead on telecommunications policy and pursued a personal interest in the development of broadband. At that time, broadband was promising vast improvements in information access and distribution over then-predominant dial-up access.\(^6\) Gore added the topic of broadband deployment to his 2000 presidential campaign, and hinted that his administration would encourage increased Federal Communications Commission (FCC) regulations and subsidies to cable and telephone firms in a national effort to make broadband-speed access to the information superhighway available to everyone.\(^7\) Gore’s opponent George W. Bush, the eventual victor in the 2000 presidential election, did not make a commitment to the issue during the election season,

\(^4\) The term “broadband” refers to the capacity to transmit signals (in the form of voice, video, or data) at higher speeds and with greater quality than the preceding technology, narrowband. In wired communications, broadband is usually enabled by coaxial or fiber-optic cables. Wireless broadband is also made possible through microwave transmissions. See Federal Communications Commission, Consumer & Governmental Affairs Bureau: Broadband or High-Speed Internet Access, available at http://www.fcc.gov/cgb/consumerfacts/highspeedinternet.html (last visited Aug. 9, 2008). From 1999 to 2008, the FCC also defined “broadband” as 200 kbps download or upload speed. See infra notes 26-28 and accompanying text.

\(^5\) The Telecommunications Act of 1996, formulated during the Clinton Administration, requires the FCC to determine if advanced telecommunications capability (under which “broadband” is typically categorized) is being deployed in a “reasonable and timely” fashion. See Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 § 706(b) (1996).

\(^6\) See Bob Davis, On Broadband Future, Gore and Bush Offer Crucial Differences, WALL ST. J., Oct. 24, 2000, at A1. Gore’s personal interest in the topic of internet access is well known, and he probably coined the term “information superhighway” in 1990, when as Senator from Tennessee he introduced a bill that would have mandated federal government involvement in the creation of educational software. Gore’s later statements on his internet policy interests gave rise to a myth that he claimed to have invented the Internet, a statement he never made but the legend of which is often used by his political opponents and detractors. See Declan McCullagh, No Credit Where It’s Due, WIRE, Mar. 11, 1999, available at http://www.wired.com/politics/law/news/1999/03/18390 (last visited Aug. 9, 2008); Robert Parry, He’s No Pinocchio: How the Press has Exaggerated Al Gore’s Exaggerations, WASH. MONTHLY, Apr. 2000, available at http://www.washingtonmonthly.com/features/2000/0004.parry.html (last visited Aug. 9, 2008).

\(^7\) See Davis, supra note 6.
though his campaign advisors and future members of his administration did study market-based and non-regulatory approaches to the issue of broadband deployment.  

As President, by 2002 Bush had adopted broadband deployment as an economic priority, and early that year FCC Chairman Michael K. Powell began an intensive investigation into all existing regulations that affected broadband deployment. The catalysts for nationwide broadband deployment during the Bush Administration were to be market-driven processes, not government regulations. As early as the summer of 2002, the administration considered formulating an enforceable national broadband deployment policy. However, the only true developments during this period were statements from the administration that Bush would promote relaxed FCC regulations toward high-speed internet service. The vagueness of these statements inspired criticism from industry lobbyists and consumer groups.  

At a March 2004 speech in New Mexico during his reelection campaign against John Kerry, Bush revived his plans for broadband deployment as a boost to the nation’s economy and pledged to deliver affordable broadband to all American homes by 2007. By that point in time,  

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8 Id.
9 See Jonathan Krim, Does Fast Internet Need a Push? High-Speed Access Seen as Catalyst, WASH. POST, Jan. 15, 2002, at A1. The push for a national policy on broadband deployment was a bipartisan endeavor, with Democratic Senate leaders Tom Daschle (D-S.D.) and Joseph Lieberman (D.-Conn.) personally encouraging President Bush to add the issue to the White House agenda. See also Mike Allen & Jonathan Krim, High-Speed Internet Access Gets White House Spotlight, WASH. POST, June 13, 2002, at A8.
10 The acceptance of broadband deployment as a national economic priority may have been influenced by industry lobbyists who desired assistance in boosting the broadband market, as consumers in early 2002 were reluctant to take on the new technology or the increased costs of broadband service in the home. Development of the broadband infrastructure was lagging as well. See John Van, Broadband Industry Looks for Boost, CHICAGO TRIB., Jan. 31, 2002, at 3; The Right Signal on Broadband, L.A. TIMES, Feb. 10, 2002, at M4.
11 See Allen & Krim, supra note 9, at A8. The Bush Administration demurred on developing a policy at this time because of sharply divided opinions from industry. Id.
13 See John Van, Bush Backs Broadband Push, CHICAGO TRIB., Mar. 27, 2004, at 1. Commentators suspected that this new announcement was merely an election year ploy, a theory bolstered by the fact that Democratic frontrunner John Kerry raised the issue shortly thereafter. More specifically, Bush’s announcement was widely criticized for its lack of detail on how the 2007 goal would be met. There was also no detail on the word “affordable” and how price
the U.S. broadband market had already fallen significantly behind other industrialized nations, particularly those in Asia, as American telecommunications companies had to embark on a laborious upgrade of the country’s wireline infrastructure. This upgrade was also slowed by the reluctance of the leading firms to roll out broadband on a wide basis without knowing beforehand how many consumers would partake of the service; while at the time, those firms were dedicating more money to wireless and video applications. The firms also claimed regulatory uncertainty due to the possible application of either telecommunications service or information service regulations.

Growth in the broadband market overall was stilted because the prohibitive costs of expanding the existing telecommunications infrastructure had given incumbent firms inordinate control over market entry, thus preventing robust competition. Meanwhile, a significant policy-related roadblock to greater broadband competition was the traditional regulatory disparity between cable and telephony, as firms in both of these industries were then entering the broadband market, and there was also controversy over the applicability of information service regulations. Experts also blamed the slow American development of broadband on the Bush
Administration’s failure to develop a viable national deployment strategy, while nations with strong state deployment policies (most notably Japan and South Korea) were able to deploy broadband at a much faster rate and with greater technological rewards for citizens.

Despite this lack of a national broadband policy, and the poor state of broadband availability and competition in America, in April 2004 the Bush Administration proclaimed that the market was developing on pace and that America was on its way to becoming the world leader in broadband deployment. In the words of the White House, “the Administration has a record of comprehensive and demonstrably effective broadband initiatives that are creating an economic and regulatory climate in which broadband can flourish.” The April 2004 White House document used the FCC’s zip code-based statistics to demonstrate the reach of broadband in America. According to the FCC’s figures, at that time approximately 90% of U.S. zip codes had access to at least one wired broadband offering, and 75% of zip codes had access to broadband via both cable modem and DSL (digital subscriber line). While these percentages appeared impressive, the FCC’s use of zip codes to measure broadband availability for American consumers was becoming a source of great controversy.


An example of a more successful national broadband deployment strategy can be found in Japan, where the government drafted a blueprint for collaboration among all stakeholders including private firms, consumer groups, and regulators. See generally Nabekura Shinichi, Broadband Deployment and Policy in Japan (May 27, 2003), available at http://www.eujapan.com/roundtable/wp3_mphpt_presentation_may03.pdf (last visited Aug. 9, 2008).

See Dan Mitchell, A Broadband Beat-Down, N.Y. TIMES, June 25, 2005, at C5. As of the date of Mitchell’s article, Japanese consumers with broadband access enjoyed download speeds 16 times greater than that available to American consumers, and at about half the price. It should be noted that Japan and other nations that have rapidly deployed broadband services have the advantage of geographic areas that are smaller and consumers that are more concentrated spatially than in the United States.


Id.
Zip Code-Based Measurements of Broadband Deployment

The FCC had been measuring broadband deployment by zip code since 2000,\(^\text{22}\) when service providers were first asked to report on FCC Form 477 whether they offered broadband service to at least one customer in any given zip code.\(^\text{23}\) Reporting broadband deployment in this fashion may give the impression that George W. Bush’s 2004 mandate for nationwide broadband access was coming to fruition. In early 2008, the National Telecommunications and Information Administration (NTIA), using statistics obtained directly from the FCC, reported that by the end of 2006, broadband had reached 99% of the nation’s zip codes, which in turn encompassed 99% of the American population. There were three or more competing providers in 91.5% of zip codes.\(^\text{24}\)

However, commentators and telecommunications experts question the true viability of these zip code-based measurements. The most common criticism is that a zip code is considered to have broadband availability for all its residents even if only one address in that zip code has been offered access, with the assumption that availability for one resident would automatically

\(^\text{24}\) See Gutierrez Hails Dramatic U.S. Broadband Growth, supra note 1. Recall that Bush had pledged inexpensive nationwide broadband deployment by 2007. See supra note 13 and accompanying text.
lead to the same options for all other residents of the zip code.\footnote{25} Also, until early 2008 the FCC counted as “broadband” any service that gave users download speeds of more than 200 kbps.\footnote{26} Despite rapid technological changes in the field, this conception of broadband speed at the FCC had remained unchanged since 1999.\footnote{27} This resulted in the measurement of certain service offerings as “broadband” even though they wouldn’t be considered so in other nations.\footnote{28} These questionable measurement methodologies had resulted in inflated broadband deployment figures ever since those methodologies were formulated.\footnote{29}

Despite the seemingly impressive statistics indicating that almost all of America’s zip codes enjoyed broadband availability, by 2006 the United States had fallen to 15th in the world for broadband deployment, with service available to only 19.6% of residents.\footnote{30} The U.S. fared even worse in a metric known as the Digital Opportunity Index, which measures broadband access via eleven different variables including price, proportion of users online, and proportion

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\footnote{26} Kilobytes per second.

\footnote{27} In 1999 the FCC defined broadband as “the capability of supporting, in both the provider-to-consumer (downstream) and the consumer-to-provider (upstream) directions, a speed… in excess of 200 kilobits [sic] per second (kbps) in the last mile.” \textit{See} Federal Communications Commission, \textit{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}, CC Docket No. 98-146 (Feb. 2, 1999), available at http://www.fcc.gov/Bureaus/Common_Carrier/Reports/fcc99005.txt at ¶ 20 (last visited Aug. 9, 2008).


\footnote{29} See Hammond, supra note 3, at 542-545.

\footnote{30} This ranking was made by the Organization for Economic Cooperation and Development (OECD). \textit{See} Organization for Economic Cooperation and Development, Directorate for Science, Technology and Industry: \textit{OECD Broadband Statistics to December 2006}, available at http://www.oecd.org/document/7/0,2340,en_2649_34223_38446855_1_1_1_1,00.html (last visited Aug. 9, 2008). The OECD statistics for December 2006 were the most recent available at the time of writing.
of homes with access. Here the U.S. ranked 20th in the world for 2005-2006. Even in areas possessing more than one available broadband service, “competition” was usually in the form of a duopoly consisting of the independent local exchange carrier (the local phone company) offering DSL service and the cable TV company offering cable modem service, with very little price competition and the bundling of broadband service with other options (such as premium cable channels) that consumers may not have desired.

This disconnect between the availability of broadband in entire zip codes and its adoption by actual residents was heavily criticized by FCC Commissioner Michael J. Copps. In a 2006 op-ed piece in the *Washington Post*, Copps called for an overhaul of the FCC’s methodology for measuring broadband deployment. Copps acknowledged that the threshold of “broadband” speed as measured by the Commission – 200 kbps – was an outdated definition of the term, while the zip code-based penetration statistics were too geographically diffuse to measure actual deployment of services. The lack of true competition had also stifled technological innovation in the American broadband market, with Copps decrying the fact that Americans were paying twice as much for one-twentieth the download speeds available in Asia and Europe.

The Politicization of Broadband Deployment Statistics

The zip code-based measurement methodology was also heavily criticized by industry experts, with many calling for true representative samples of a given area, rather than the FCC’s

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33 See Michael J. Copps, *America’s Internet Disconnect*, WASH. POST, Nov. 8, 2006, at A27. Copps is one of two Democratic FCC Commissioners serving under the Republican Bush Administration.

34 *Id.*
method of declaring an entire zip code to have broadband availability even if as few as one household in the area had realistic access.\textsuperscript{35} Industry experts have noted that telecommunications regulatory decisions are often shaped by political goals or desired future benefits, and such regulations are not necessarily consistent with good social policy in the present.\textsuperscript{36} The politicization of telecommunications deployment reports is a noted phenomenon, with FCC regulators tending to over-value immediate benefits while avoiding the uncertainty of future technological developments, and allowing short-term considerations to outweigh future deployment strategies.\textsuperscript{37} Consequentially, some industry experts have suspected that the FCC’s broadband statistics, and even its entire zip code-based methodology, were meant to skew deployment results upward in order to reflect favorably on telecommunications players that had built relationships with lawmakers in the Bush Administration.\textsuperscript{38}

Experts have also detected politicization in the FCC’s periodic reports to Congress on the state of American broadband deployment, with Republican commissioners typically proclaiming that deployment is progressing nicely, in line with President Bush’s mandate; while Democratic commissioners, most notably the aforementioned Copps, typically lament America’s poor performance on broadband deployment as compared to other nations.\textsuperscript{39} A telling example is the

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\textsuperscript{36} See e.g. Alfred E. Kahn, \textit{Telecommunications: The Transition from Regulation to Antitrust}, 5 J. ON TELECOMM. & HIGH TECH. L. 159, 175-186 (2004). This article deals primarily with the specific issue of network neutrality, but the section cited offers an exemplary analysis of politicized regulations at the FCC.

\textsuperscript{37} See e.g. Christopher S. Yoo, \textit{The Rise and Demise of the Technology-Specific Approach to the First Amendment}, 91 GEO. L.J. 245, 272-275 (2003). It should be noted that Yoo is generally opposed to regulatory schemes and favors market-based solutions to failures in the telecommunications sector.


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2004 FCC report, which focused on election-year political issues like economic development for rural areas and minority constituencies, while saying little about technological innovation.\textsuperscript{40}

Even other entities within the U.S. Government took the FCC to task for its statistical methods. In 2006, the Government Accountability Office (GAO) conducted its own investigation into American broadband availability and found many flaws in the FCC’s zip code-based measurement methodologies, most notably the fact that the FCC only measured large regions where particular subscribers had obtained broadband access, but not the smaller localities where telecommunications companies had actually deployed broadband infrastructure to be made available to potential subscribers. Hence, the FCC was able to report on broadband availability at a diffuse scale, but was unable to determine if broadband was actually available to the majority of residences in a given large region, especially in rural areas.\textsuperscript{41} The controversial measurement methodology also attracted the attention of Congress. In November 2007 the House of Representatives passed a bill known as the Broadband Census of America Act,\textsuperscript{42} which called for a drastic overhaul to the broadband measurement methodologies used by the FCC and the

\textsuperscript{40} See generally Federal Communications Commission, \textit{Availability of Advanced Telecommunications Capability in the United States, Fourth Report to Congress}, FCC 04-208, GN Docket No. 04-54 (Sept. 9, 2004), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-208A1.pdf (last visited Aug. 9, 2008). Such sentiments can be found in the individual commissioner statements that accompany the 2004 report. The three Republican commissioners (Chairman Michael K. Powell, Kathleen Q. Abernathy, and Kevin J. Martin) were all pleased with the progress of broadband deployment to Americans at large and to individual constituencies. The two Democratic Commissioners (Michael J. Copps and Jonathan S. Adelstein) issued dissenting opinions critical of American broadband availability, in quantitative terms and in comparison to other nations. The individual commissioner statements can be found at pages 3-7 of the report.


\textsuperscript{42} Broadband Census of America Act of 2007, H.R. 3919, 110th Cong. (2007). This bill passed the House of Representatives by voice vote only, and individual votes were not recorded.
National Telecommunications and Information Administration (NTIA). The Senate also considered a similar bill called the Broadband Data Improvement Act.  

A promise for new measurement guidelines was finally revealed on March 19, 2008. In a press release the FCC stated that it was planning to expand the scope of broadband reporting by requiring telecommunications companies to report on the quantity of subscribers by census tract (typically a geographic area more precise than an entire zip code) and improving its measurements of wireless broadband deployment. The new guidelines also reformulated the FCC definition of broadband to at least 768 kbps and required providers to report on the speeds offered in different service packages. However, the new guidelines still did not require providers to report on their prices, reducing the price-per-byte information available to consumers who may be lucky enough to have competing vendors from which to choose. 

After announcing that it sought comment on broadband pricing and availability, as well as its proposed new measurement methodologies, the Commission couldn’t resist referencing its own concurrent report showing that “broadband services are currently being deployed to all Americans in a reasonable and timely fashion.” On the day the new measurement standards

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43 Broadband Data Improvement Act, S. 1492, 110th Cong. (2007). At the time of writing, this bill had been passed by the Senate Committee on Commerce, Science, and Transportation but had not yet been debated by the full Senate.
47 See Federal Communications Commission, FCC Expands, Improves Broadband Data Collection, supra note 44, at 1. The referenced report is found at Federal Communications Commission, Federal Communications Commission Releases Data on High-Speed Services for Internet Access (FCC/DA# DOC-280909A1), available at
were announced, FCC Chairman Kevin Martin noted that 82% of the country had access to DSL service and 96% had access to cable modem service. But these percentages were still based on the zip code methodology and the old 200 kbps broadband threshold; and Martin did not mention that regardless of the accuracy of the reported percentages, only 22% of Americans had actually signed up for broadband service. Martin also did not acknowledge that of the premises receiving broadband service, 35% were businesses and institutions, and not the residential users that are the usual focus of FCC statements on broadband deployment.

The Federal Communications Commission and the National Telecommunications and Information Administration continue to proclaim the success of America’s broadband deployment program and the eventual realization of President Bush’s mandate of access for all citizens. But even though critics and industry watchdogs have long been aware of the problems with the FCC’s zip code-based measurement methodology and its outdated conception of broadband speed, one matter had largely escaped attention until a citizens’ group known as the

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49 See Anderson, supra note 45.

50 The FCC as a whole continues to make such claims, though these represent only the majority opinions of the commissioners. As of mid-2008, Democratic Commissioners Copps and Adelstein continue to decry the state of broadband deployment. For their statements related to the events of Mar. 19, 2008, see e.g. Statement of Commissioner Michael J. Copps, supra note 46; Statement of Commissioner Jonathan S. Adelstein, Federal Communications Commission, Re: Deployment of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscribership, Report and Order and Further Notice of Proposed Rulemaking, Mar. 19, 2008, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-280909A4.pdf (last visited Aug. 9, 2008).

51 Broadband policy occupies its own page at the NTIA web site, with several references to Bush’s 2004 mandate. See National Telecommunications and Information Administration, Broadband, available at http://www.ntia.doc.gov/opadhome/opad_brbn.htm (last visited Aug. 9, 2008).
Center for Public Integrity\textsuperscript{52} filed a Freedom of Information Act request with the FCC. The issue is whether the Commission’s broadband deployment statistics, regardless of their viability, are based on accurately-reported information from private telecommunications companies.

\textbf{III. Center for Public Integrity v. FCC}

While its outward weaknesses have been widely discussed, the FCC’s methodology for computing its broadband deployment statistics is based on incoming information that itself comes with no guarantee of accuracy or accountability. The FCC and the private companies that provide broadband service to American consumers have made use of an exemption to the Freedom of Information Act\textsuperscript{53} – the protection of trade secrets\textsuperscript{54} – to withhold this incoming statistical information from the public. This particular circumvention of the Freedom of Information Act inspired a lawsuit, \textit{Center for Public Integrity v. FCC},\textsuperscript{55} in which the public interest group was unable to improve the transparency of this fundamental building block of the FCC’s broadband deployment statistics.

Since 2003, the Center for Public Integrity (CPI) has operated a web site called “Media Tracker”\textsuperscript{56} that provides a graphics-based alternative to the zip code-based information provided by the FCC on telecommunications availability.\textsuperscript{57} In 2006, the CPI sought to improve Media

\textsuperscript{52} The Center for Public Integrity describes itself as “a nonprofit organization dedicated to producing original, responsible investigative journalism on issues of public concern. The Center is non-partisan and non-advocacy.” \textit{See} Center for Public Integrity, About Us, \textit{available at} http://www.publicintegrity.org/about/ (last visited Aug. 9, 2008).
\textsuperscript{55} 505 F.Supp.2d 106 (D.D.C. 2007).
\textsuperscript{56} \textit{See} The Center for Public Integrity, Well Connected, \textit{available at} http://www.publicintegrity.org/telecom/ (last visited Aug. 9, 2008).
\textsuperscript{57} The information on the Media Tracker site reconstitutes the zip code-based information provided at the FCC web site (usually in the form of text-based documents) on the availability of television, radio, cable, broadband, and newspapers. \textit{See} Federal Communications Commission, Media Bureau – CDBS, \textit{available at} http://www.fcc.gov/mb/cdbs.html (last visited Aug. 9, 2008). The Media Tracker information on broadband availability is reproduced from the FCC’s data on local telephone competition and broadband deployment. \textit{See}
Tracker’s level of detail by adding information on which particular companies offered broadband service within a given zip code, which types of broadband service were available to consumers, and which particular localities within a zip code were served. Finding that information of such specificity was not available in the FCC’s publicly-released broadband statistics, on August 24, 2006 the CPI filed a Freedom of Information Act (FOIA) request to obtain such information from the Commission. In particular, the CPI requested all information that had been reported on FCC Form 477 by telecommunications companies.

According to the CPI, the FCC did not respond to this request within twenty business days, which is required under FOIA. On September 25, 2006, the group promptly filed a complaint with the District Court of the District of Columbia, claiming a violation of FOIA by the FCC. The next day, the FCC sent a belated fax to the CPI disclosing its reasons for denying the initial FOIA request. The commission claimed that the records requested by the CPI

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59 See supra note 23 and accompanying text.
60 5 U.S.C. § 552(a)(6)(A)(i) (2002). When a FOIA request is denied by a government agency, the agency must provide in writing the reason for the denial along with a notification that the requester has the right to appeal the denial. No such information was provided to the Center for Public Integrity by September 25, 2006. However, the exact measurement of the 20-day response period is uncertain. See infra note 62.
62 See Letter from Kirk S. Burgee, Associate Bureau Chief, Wireline Competition Bureau, Federal Communications Commission, to Drew Clark, Senior Fellow and Project Manager, The Center for Public Integrity, Sept. 26, 2006 at 2, available at http://projects.publicintegrity.org/docs/telecom/telecomfoia/Response.pdf (last visited Aug. 9, 2008). The actual end of the 20-day response period is a matter of some confusion. The CPI filed its FOIA request on August 24, 2006, and twenty business days after that was September 22. The group then filed its claim with the court on the following business day, September 25. However, the FCC claimed that it had not violated the 20-day requirement, because according to its internal rules the 20-day period begins not when the requesting party files the request with the agency at large, but when the request reaches the FCC bureau that handles the information in question. A request made out to the FCC is first received by the Office of the Managing Director, who then sends it to the agency’s FOIA Control Office, who in turn sends it to the appropriate internal bureau. The federal regulations governing the FCC’s compliance with FOIA codify this process, but say nothing about how long this inter-office workflow should take. See 47 C.F.R. § 0.461. Consequently, the 20-day response period may begin several days after the agency receives the FOIA request. See Letter from Kirk S. Burgee, Id. at 1, n.2, referencing 47 C.F.R. §§ 0.461(e), 0.461(g). Later court documents revealed that the FOIA request from the Center for Public Integrity did
contained “commercially sensitive, competitive information and that release would cause harm
to the entities [private telecommunications firms] that submitted the requested information.”

Such concerns extended back to a data gathering order that initiated the FCC’s zip code-
based broadband deployment measurements in 2000, at which time telecommunications
companies raised concerns that their competitive interests would be damaged if the FCC made
public any information about their construction of wired infrastructure. The Commission then
resolved to report only aggregated information to the public and to refrain from disclosing
company-specific data. Hence, the Commission determined that the information requested by
the CPI fell within Exemption 4 of FOIA, which states that a government agency can choose to
withhold “trade secrets and commercial or financial information obtained from a person and
privileged or confidential.”

The CPI filed a FOIA administrative appeal on October 19, 2006, asking the FCC to
reconsider its denial of the original request. This appeal received no response from the
Commission. The lawsuit Center for Public Integrity v. FCC was now underway, as the CPI
concluded that it had exhausted its administrative remedies for the disclosure of information

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64 See Federal Communications Commission, Local Competition and Broadband Reporting, Report and Order, CC
65 Id. at ¶ 91.
66 See Letter from Kirk S. Burgee, supra note 62, at 3.
67 5 U.S.C. § 552(b)(4) (2002). The FCC also claimed that some of the requested information included personal data
   for company officers and employees who have submitted Form 477, which is protected under FOIA Exemption 6.
68 See The Center for Public Integrity, Re: Review of Freedom of Information Action, FOIA Control No. 2006-493,
   visited Aug. 9, 2008). In this appeal the CPI offered to reduce the scope of its request to only data that can be
   segregated from that which legitimately falls under FOIA Exemptions 4 and 6.
69 The Freedom of Information Act requires that an appeal be acted upon within twenty business days, with
   requirements nearly identical to those for a denial of an original request. 5 U.S.C. § 552(a)(6) (A)(ii) (2002). The
   lack of response to the CPI’s appeal by the FCC was technically a violation of FOIA, leading the CPI to conclude
   that it had exhausted its administrative remedies under FOIA.
under FOIA. On January 8, 2007 the FCC filed a motion for summary judgment, believing that there was no general issue of material fact that justified the CPI’s dispute with the Commission’s FOIA refusal. Verizon, AT&T, and the United States Telecom Association intervened in the lawsuit on the FCC’s behalf, supporting the Commission’s motion for summary judgment with their own arguments on the need to keep the requested information confidential. The suit came before the District Court on August 27, 2007.

By this point the FCC had agreed to disclose some non-private information on the cover page of Form 477. This was required by D.C. Circuit Court precedent. In a case involving U.S. Army records the court ruled that even if a request includes some information that can be claimed as exempt under FOIA, the agency must still disclose any “reasonably segregable portion” of the information after the deletion of nondisclosable portions. However, this information did not significantly add to what the Center for Public Integrity already knew about

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70 5 U.S.C. § 552(a)(6) (C) (2002). The court agreed that the CPI had exhausted its statutory remedies. This in turn provided the court with jurisdiction to hear the case. 505 F.Supp.2d 106, 110 (D.D.C. 2007).
72 Verizon Communications, Inc. is one of the predominant carriers in the U.S. broadband market. See Verizon, Corporate Responsibility: Service and Innovation, available at http://responsibility.verizon.com/our-principles/innovation.htm (last visited Aug. 9, 2008). As can be seen at the cited Web page and other pages linked to it, Verizon has been known to promote the competitiveness of its broadband offerings while refusing to disclose the information on which such claims have been made. Similar behavior by the FCC inspired the lawsuit by the Center for Public Integrity.
73 AT&T Inc. is also a predominant provider of broadband service in the U.S. market. See AT&T, Corporate Profile, available at http://www.att.com/gen/investor-relations?pid=5711 (last visited Aug. 9, 2008).
74 The United States Telecom Association is a trade group representing American companies that are involved in the development of the broadband market. See USTelecom, About USTElecom, available at http://www.ustelecom.org/WhoWeAre/ (last visited Aug. 9, 2008).
75 505 F.Supp.2d 106, 108 (D.D.C. 2007). The court found that the intervenors had no standing in the motion for summary judgment, though their arguments would be considered as relevant to the facts of the case in later phases of the suit. See Id. at 110.
76 Id. at 106.
77 The cover page of Form 477 contains the contact information for the person who files the form. This data can be withheld under the personal privacy provisions of FOIA Exemption 6. 5 U.S.C. § 552(b)(6) (2002). For more on the process for the completion of Form 477 by telecommunications firms, see supra note 23 and accompanying text.
78 Oglesby v. U.S. Dep’t. of Army, 79 F.3d 1172, 1176 (D.C.Cir.,1996). Non-private information on the cover page, such as company names and high-level zip code data, was ruled to be segregable and eligible for disclosure. 505 F.Supp.2d at 113.
broadband deployment, and consisted mostly of what the group was already presenting graphically on its Media Tracker web site, upon obtaining such data from the FCC’s regular broadband deployment reports.\textsuperscript{79}

Given the agreement by the FCC to disclose some of the requested information (regardless of its usefulness), the court determined that the only matter left to consider was whether the requested information was indeed “confidential” and eligible for the trade secrets exemption under FOIA.\textsuperscript{80} Applying a test for the confidentiality of trade secrets established in \textit{National Parks & Conservation Association v. Morton},\textsuperscript{81} the court decided to award summary judgment to the FCC if disclosure of the requested information was likely “to cause substantial harm to the competitive position of the person from whom the information was obtained.”\textsuperscript{82}

The CPI argued that the requested information would not damage the competitive interests of the broadband companies because such information could already be inferred indirectly by interested persons. In effect, deployment data for localities defined more sharply than zip codes would simply reflect where the companies offer broadband service, which makes the data analogous to that available in a local phone book.\textsuperscript{83} The FCC and the intervenor companies (Verizon and AT&T) did not believe the matter was so simple, as localized broadband deployment information would reveal where customers had been gained or lost, and would identify areas where an incumbent company was having trouble penetrating a market, thus allowing a competitor to free-ride on the incumbent’s prior efforts to upgrade that locality’s broadband infrastructure.\textsuperscript{84} Consequently, data at this level of detail would “improve [a]
competitor's ability to draw inferences about a filer's overall financial and competitive position” and assist competitors in “designing specific competing offers to target [an identified] customer.”

The key point made by the FCC and the intervenor companies was that the CPI was incorrect in characterizing the requested data as merely a snapshot in time, showing which companies were providing broadband in a given area on which date. Instead, the data could be used by competitors to find trends in broadband penetration over extended periods, illustrating the incumbent company’s long-term deployment strategies and perhaps even its financial health.

The court accepted the FCC’s line of argument, and ruled that the more specific information requested by the Center for Public Integrity would indeed cause harm to each telecommunications company’s competitive interests. Thus, under the National Parks standard the FCC’s refusal to disclose this information under FOIA Exemption 4 was justified. The court finally granted summary judgment in favor of the FCC and the intervenor companies.

Less than two months later, on October 18, 2007 the Center for Public Integrity moved, pursuant to a federal procedural rule, for an alteration or amendment to the court’s original ruling in favor of the FCC. The court noted that motions for reconsideration should only be entertained when “the moving party shows new facts or clear errors of law which compel the court to change its prior position.” The CPI attempted to introduce new evidence in the form of a statistical report by one of its own employees, reinforcing the group’s position that the

85 Id. at 116.
86 Id. at 115.
87 See supra notes 81-82 and accompanying text.
88 505 F.Supp.2d at 117.
89 FED. R. CIV. P. 59. For a nonjury trial, this procedural rule allows a court to hear a motion for a new trial and to take additional testimony, amend findings of fact and conclusions of law, and consider a new judgment. See FED. R. CIV. P. 59(a)(2).
91 Id. at 168. Here the court was quoting Nat’l Ctr. for Mfg. Sci. v. Dep’t of Def., 199 F.3d 507, 511 (D.C.Cir. 2000).
requested information is analogous to that which could be found in other sources by enterprising consumers.\textsuperscript{92}

The court found that this new evidence merely supported, in a slightly different form, the same unsuccessful argument from the prior proceeding, and by precedent this tactic had already been rejected.\textsuperscript{93} In effect, the CPI could not explain why its new evidence was not presented in the original proceeding, or why the new evidence was likely to alter the court’s position.\textsuperscript{94} In a previous case, the D.C. District Court had also ruled that simple disagreement with a prior judgment does not satisfy the criteria described in the federal rules of procedure for altering or amending that previous decision.\textsuperscript{95} For these reasons, the Center for Public Integrity’s motion for reconsideration was denied.\textsuperscript{96}

Thus, on October 18, 2007, the CPI’s efforts to pry more specific broadband deployment information out of the FCC came to an unceremonious end. The inability to learn whether or not telecommunications companies were providing realistic information to the FCC, via Form 477, continued to give consumers reason to doubt the viability or accuracy of the Commission’s broadband availability statistics. There is also reason to question whether such data should truly be considered “trade secrets” when it is used by the FCC to compile reports that it then releases to the public. Most importantly, one must question whether the commercial benefits of keeping such information secret outweigh the costs for citizens who use public infrastructure that is developed and managed by private companies.

\textsuperscript{92} 515 F.Supp.2d at 169. \textit{See also supra} note 83 and accompanying text.


\textsuperscript{94} 515 F.Supp.2d at 169.


\textsuperscript{96} 515 F.Supp.2d at 170.
IV. TRADE SECRETS JURISPRUDENCE AND PUBLIC INFRASTRUCTURE

Litigation concerning the trade secrets exemption to the Freedom of Information Act typically raises two important questions. First, is a government agency justified in withholding information that has been submitted voluntarily by the parties it regulates, especially when that information is then used to create reports for public consumption? Second, can citizens effectively understand infrastructure that has been deployed for their use and benefit, but by companies that keep information about that deployment secret?

These distinctions are imperative for understanding whether potential competitive harm to broadband providers is truly a sound rationale for the FCC’s non-disclosure of the type of information sought by the Center for Public Integrity. In particular, how can the FCC claim that the broadband market is competitive and beneficial for American consumers when it refuses to disclose information that corroborates such conclusions? Meanwhile, the 1996 Telecommunications Act requires the FCC to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans,” and to regularly inquire on whether such deployment is taking place.97 Do such inquiries by the Commission require statistics from telecommunications firms that can be independently reviewed and corroborated by citizens?

The U.S. Supreme Court has not yet heard a case in which the definitions or parameters of FOIA Exemption 4 were in dispute. Therefore, the District of Columbia Circuit has formed the precedents for determining whether the trade secrets exemption has been used properly or improperly by a government agency.98 Three precedents are relevant to the present discussion on

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the secrecy of broadband statistics – the aforementioned *National Parks* decision of 1974,99 the *Critical Mass* decision of 1992,100 and an obscure 1983 case involving the Food and Drug Administration.101 Only the first of these was considered as precedent in *Center for Public Integrity v. FCC*. The court erred in not considering the other two precedents, because the secrecy of broadband deployment statistics raises important issues of voluntarily- vs. involuntarily-submitted information, and the public’s knowledge of infrastructure that is deployed for its benefit.

In the text of the Freedom of Information Act, the trade secrets exemption is the fourth of nine codified exemptions that can be used by government agencies to withhold requested information.102 The original rationale for protecting trade secrets was pro-business, as companies should be encouraged to innovate without worrying that a competitor could make use of FOIA to usurp the information that they are required to report to the government.103 Starting in the late 1960s, several cases were brought to court involving disputes around agency use of FOIA Exemption 4, though at first the basic meaning of the exemption was rarely a matter under consideration.104

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The first noteworthy case in which the true meaning and ramifications of the trade secrets exemption were contested was the *National Parks* case of 1974. In this proceeding, an environmental advocacy group disagreed with a refusal by the Department of the Interior, via FOIA Exemption 4, to disclose licensing documents related to concession stands at national parks.\(^\text{105}\) The court lamented the lack of definition for the word “confidential” in Exemption 4,\(^\text{106}\) and thus formulated what became known as the *National Parks* test for the applicability of that term:

“[A] commercial or financial matter is ‘confidential’ for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.”\(^\text{107}\)

This test became the norm for Exemption 4 cases throughout the federal court system, and was applied regularly (and without significant controversy) for nearly two decades.\(^\text{108}\)

Meanwhile, the court in *National Parks* added an important distinction to the meaning of “trade secret” by quoting the original senate debates during the passage of FOIA: “This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained.”\(^\text{109}\) In other words, when a party submits information voluntarily to a government agency, it is not automatically assumed that the same agency should disclose that information to the public just because it was originally

\(^{105}\) 498 F.2d at 766.
\(^{106}\) Id.
\(^{107}\) Id. at 770.
\(^{109}\) S. Res. 813, 89th Cong., 1st Sess. 9 (1965). Here the court was quoting earlier cases that in turn used this quotation from the Senate debates. *See Grumman Aircraft Engineering Corp. v. Renegotiation Bd.*, 425 F.2d 578 (C.A.D.C. 1970); *Sterling Drug, Inc. v. Fed. Trade Comm’n.*, 450 F.2d 698 (C.A.D.C. 1971). Those cases involved agency withholding of information under FOIA Exemption 4, though the text of the exemption was not a matter under consideration.
submitted without compulsion from the government.\textsuperscript{110} This distinction effectively reinforced the rights of parties that are compelled (though not necessarily required) to provide information to government agencies\textsuperscript{111} – and this focus on voluntary information would later cause a schism in Exemption 4 jurisprudence.

The difference between voluntarily- and involuntarily-submitted information became a matter of dispute in the \textit{Critical Mass} case of 1992, in which the D.C. Circuit Court abruptly formulated a new test to distinguish between these two categories of government-held information.\textsuperscript{112} In this proceeding, a citizen’s group known as the Critical Mass Energy Project contested an Exemption 4 non-disclosure by the Nuclear Regulatory Commission (NRC). The information in question was provided voluntarily by the Institute for Nuclear Power Operations, a consortium representing companies regulated by the NRC.\textsuperscript{113} The NRC denied Critical Mass’s FOIA request, and then requested summary judgment in the resulting appeal. This motion was granted by the district court under the \textit{National Parks} test for confidentiality.\textsuperscript{114} After multiple appeals and remands,\textsuperscript{115} the D.C. Circuit Court resolved to rehear the facts of the case and

\textsuperscript{110} 498 F.2d at 766-767.
\textsuperscript{111} \textit{Id.} at 769. \textit{See also} Moser, \textit{supra} note 98, at 6-7.
\textsuperscript{112} Critical Mass Energy Project v. Nuclear Regulatory Comm’n., 975 F.2d 871 (D.C. Cir. 1992), \textit{cert. denied}, 507 U.S. 984 (1993). This case is known informally as “Critical Mass III” due to multiple appeals, remands, and summary judgments all related to same FOIA denial by the NRC. The Critical Mass Energy Project was a now-defunct effort undertaken by Public Citizen, the consumer rights group founded by Ralph Nader. The project sought to increase the transparency of government licensing of nuclear power plants. Public Citizen still opposes unfettered construction of nuclear power plants, but now does so under an endeavor to promote sustainable energy. \textit{See} Public Citizen, Energy Program, \textit{available at} http://www.citizen.org/cmep/index.cfm (last visited Aug. 9, 2008).
\textsuperscript{113} 975 F.2d at 874.
\textsuperscript{115} Critical Mass’s refusal to accept the FOIA denial by the NRC resulted in an extended cycle of litigation. In the first appeal, the D.C. Circuit Court ruled that the district court’s judgment was a proper application of the \textit{National Parks} test. However, the court also ruled that the NRC had not fully proven that the information in question was submitted voluntarily, and remanded the case for further findings on that matter. Critical Mass Energy Project v. Nuclear Regulatory Comm’n., 830 F.2d 278, 281-282 (D.C.Cir. 1987). After remand, the defendants filed a motion for summary judgment, which the district court granted because the defendants had shown sufficiently that disclosing the requested information would harm the government’s interest in efficiently licensing nuclear power facilities. Critical Mass Energy Project v. Nuclear Regulatory Comm’n., 731 F.Supp. 554, 557 (D.D.C. 1990). This ruling was then appealed by Critical Mass, at which time the appeals court remanded the case again for further findings on the effects of disclosure on the quality of the NRC’s licensing operations. Critical Mass Energy Project v.
reconsider whether the *National Parks* test was appropriate for voluntarily-submitted information, choosing to “correct some misunderstandings as to [the] scope and application” of the test.\(^{116}\)

Here the court formulated a distinction between voluntary and involuntary submissions of data to government agencies. In situations in which information is furnished voluntarily, the government interest is the continued *availability* of data. On the other hand, for involuntary submissions the government interest is the continued *reliability* of the data. This distinction between availability and reliability is not found in the *National Parks* test.\(^{117}\) In turn, that test of the meaning of “confidential” under FOIA Exemption 4 was found to be workable only for data furnished to the government involuntarily.\(^{118}\) The court then determined that voluntarily-submitted information was “confidential” for purposes of the trade secrets exemption “if it is of a kind that would customarily not be released to the public by the person from whom it was obtained.”\(^{119}\)

The court finally ruled 7-4 (*en banc*) not to overturn the *National Parks* test because of its longstanding precedent.\(^{120}\) However, that test was now confined to *involuntary* information only. And while the court did not state that it was forming a new test for *voluntary* information, this was effectively the outcome of the ruling, as courts in future disputes surrounding FOIA Exemption 4 would have to differentiate voluntary information from that which is required by


\(^{117}\) *Id.* at 878. Emphasis added.

\(^{118}\) *Id.* at 879.

\(^{119}\) *Id.* at 878-879. Note that this language was borrowed from the *National Parks* ruling, but in that ruling the requirement was not applied only to voluntarily-submitted information. *See supra* note 109 and accompanying text.

\(^{120}\) *Id.* at 880.
government agencies.\textsuperscript{121} This new test was heavily criticized in a rash of unfavorable articles by legal experts and government transparency advocates.\textsuperscript{122} The most telling criticism of the \textit{Critical Mass} decision concerns its impact on consumer advocates and public interest groups, who would find major categories of previously attainable information falling under the trade secrets exemption, if the providers or the government agency could claim plausibly that voluntarily-submitted data was not to be released to the public by “custom.”\textsuperscript{123}

While not all the federal circuits have accepted the \textit{Critical Mass} test uniformly, it has become the norm in Exemption 4 litigation in the circuit in which the test was formulated – the D.C. Circuit. That circuit is also the venue for a majority of FOIA-related litigation, including the Center for Public Integrity’s suit over broadband statistics, so \textit{Critical Mass} is effectively operating as a precedent.\textsuperscript{124} Therefore, that test’s distinction between voluntary and involuntary information is crucial to the FOIA dispute between the CPI and the FCC.

\textit{Voluntary and Involuntary Information on FCC Form 477}

After the \textit{Critical Mass} decision, it became easier for government agencies to treat voluntary and involuntary information differently, with involuntary information more likely to be

\textsuperscript{121} See Moser, supra note 98, at 9. Emphasis added.
\textsuperscript{123} See Rena Steinzor, “\textit{Democracies Die Behind Closed Doors}”: The Homeland Security Act and Corporate Accountability, 12 KAN. J.L. & PUB. POL’Y 641, 653 (2003). Similar concerns were voiced in the dissent to the \textit{Critical Mass} decision, supplied by future Supreme Court Justice Ruth Bader Ginsburg, who called the new test “slackened” and likely to inspire agency and business abuse of the phrase “customarily not be released to the public.” See 975 F.2d at 883.
\textsuperscript{124} See Moser, supra note 98, at 15-17. Moser calculates that 60 percent of cases concerning FOIA Exemption 4 are heard in the D.C. Circuit. Id. at 15.
disclosed to FOIA requesters and voluntary information more likely to be withheld. This phenomenon appears to have manifested itself with the FCC’s broadband statistics, if those statistics were formulated with information that was submitted voluntarily by private telecommunications companies. But the court in the CPI case did not consider this distinction fully, perhaps because the CPI itself did not consider the possibility that some of the information provided by telecommunications companies to the FCC was submitted voluntarily.

During the proceedings, all parties in the case (including the CPI) agreed that the information submitted on FCC Form 477 was involuntary. Therefore, the National Parks test for confidentiality, now the norm for involuntary information in the wake of the Critical Mass decision, was applied by the court. The requested information was henceforth found to be confidential and eligible for withholding under Exemption 4. The court did not even mention Critical Mass in the ruling, as that test applies to voluntary information. However, the court did briefly mention – but then overlook – a potentially crucial amicus curiae brief filed by the Wireless Communications Association (WCA). In its brief, the WCA noted that “most Form 477 filings are mandatory” but suggested that “there may also be some voluntarily filers.” Despite mentioning this possibility, the WCA stated in its brief that all the information at issue should be treated as confidential regardless, which the court proceeded to do via the National Parks test.

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126 505 F.Supp.2d at 112.
129 505 F.Supp.2d at 112.
But the possibility of voluntarily-submitted information on FCC Form 477 should have inspired the court to consider the *Critical Mass* precedent. Recall that in addition to its distinction between voluntary and involuntary information, the *Critical Mass* court also drew a distinction between availability (voluntary) and reliability (involuntary).\(^{130}\) For voluntary information, “the presumption is that [the government’s] interest will be threatened by disclosure as the persons whose confidences have been betrayed will, in all likelihood, refuse further cooperation.”\(^{131}\) This distinction is worth noting when the government-held information at issue is used in reports tailored for the public. When promoting the possibilities of broadband availability to the American people, the FCC is dependent upon the cooperation of telecommunications companies. Therefore the government’s interest, under the above statement by the *Critical Mass* court, is to keep incoming information available, not to protect the competitive sensibilities of the companies supplying it. For the FCC’s broadband statistics, withholding the incoming information is more likely to threaten the government’s interests, not those of the companies, because the information is being used to further the FCC’s goal of educating the public. This distinct governmental interest was not considered by the court in the CPI case.

As for the interests of the telecommunications companies, also recall that the *Critical Mass* court ruled that voluntarily-submitted information can be deemed confidential “if it is of a kind that would customarily not be released to the public by the person from whom it was obtained.”\(^{132}\) Notwithstanding the difficulties surrounding the term “customarily,”\(^{133}\) the court added that “the agency invoking Exemption 4 must meet the burden of proving the provider's

\(^{130}\) See *supra* note 121 and accompanying text.

\(^{131}\) 975 F.2d at 878.

\(^{132}\) See *supra* note 119 and accompanying text.

\(^{133}\) See *supra* notes 122-123 and accompanying text.
custom.” 134 Thus, given the possibility of voluntary information on Form 477, if the court had invoked the Critical Mass precedent the FCC would have had to prove that withholding the information from the public was the “custom” of the broadband companies – a burden of proof that would have to be weighed against the disclosure requirements of the Freedom Information Act. 135

The Public Broadband Infrastructure

In addition to the distinction between voluntary and involuntary data, the court in Center for Public Integrity v. FCC should have also considered the impact of trade secrets on public infrastructure (or more precisely, infrastructure that is used by the public but deployed by private firms) and the accountability of the government agencies that maintain and promote it. For the FCC and its promotion of the supposed competitiveness and availability of the American broadband market, such promotion requires deployment statistics that corroborate the Commission’s conclusions and which can be reviewed and validated by consumers and their representatives. 136 Private businesses now conduct much of the development and management of public infrastructure, particularly in telecommunications, and such companies are increasingly using trade secrets jurisprudence to obfuscate activities that were traditionally performed by government. 137 This reduces the accountability of the telecommunications firms that are

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134 975 F.2d at 879. According to the court, this burden corresponds to that placed on the government in all other types of FOIA disputes. Id.
136 Recall that the FCC is required to encourage the deployment of advanced telecommunications services in a reasonable and timely fashion, and to report periodically to Congress on the status of such deployment efforts. See Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 §§ 706(a)-706(b) (1996).
developing the broadband network, as the commercial profit motive conflicts with American
traditions of government transparency.\textsuperscript{138}

Public infrastructure, including the American broadband network, is a resource that all
Americans use or could possibly use. The benefits of broadband have been heavily promoted as
an economic and political boon for the nation’s citizens, as heard in campaign rhetoric dating
back to the 2000 presidential election,\textsuperscript{139} and George W. Bush’s 2004 mandate to provide access
to all Americans.\textsuperscript{140} But a fundamental conflict arises when infrastructure is promoted as
beneficial for the citizenry by one segment of the American government, while another segment
keeps information about the development of that infrastructure secret.\textsuperscript{141} The commercial
benefits that secrecy delivers to private telecommunications companies do not outweigh the
potential benefits for consumers who may be able to partake of broadband offerings.\textsuperscript{142} Public
use of public infrastructure requires public knowledge, but allowing company information to be
exempted from disclosure prohibits full understanding of that infrastructure among citizens.\textsuperscript{143}
This raises the important question of who is most affected by the disclosure of the trade secrets
in question. Would the disclosure of those secrets be truly harmful to the private company, or is
withholding the information \textit{more} harmful to the public citizen attempting to make use of the
company’s product – or in this case, the infrastructure?

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\footnote{138}{See Philip M. Napoli & Michelle Seaton, \textit{Necessary Knowledge for Communications Policy: Information
(2006).}
\footnote{139}{See supra note 7 and accompanying text.}
\footnote{140}{See supra note 13 and accompanying text.}
\footnote{141}{Government secrecy surrounding the development of public infrastructure is a relatively recent phenomenon. Historically, other areas of infrastructure development like road construction have not been especially afflicted by non-transparency. However, the highly technical nature of telecommunications infrastructure, featuring many patents and heavily guarded research and development programs, is prone to much more secrecy. The non-transparency of the highly competitive private firms involved has spilled over into the government agencies that compile infrastructure information, most notably the FCC. See Levine, \textit{supra} note 137, at 170-171, 174-175.}
\footnote{142}{Id. at 151.}
\footnote{143}{Id. at 152, 154.}
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In a 1983 FOIA dispute involving the Food and Drug Administration’s testing of intraocular lenses, a district court in the D.C. Circuit added an important refinement to the definition of “trade secret” as covered by FOIA Exemption 4: “[a] commercially viable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.”

This refinement to the definition of “trade secret,” if it had been considered by the court in the CPI dispute, would have also placed additional burdens on the FCC and the intervenor companies to show that withholding the requested information was not just in the companies’ interests, but the public’s.

The “trade commodities” distinction in that definition would allow the withholding of information that applies only to devices and technologies developed by the telecommunications companies (or in other words, their “commodities”). However, the information sought by the CPI extended beyond the internal research and development of those companies and into the public infrastructure. By definition, an infrastructure consists of patterns of public use and participation that are beyond the mere commodities that it is built upon. Hence, the public’s interest must be taken into account.

The FDA definition of a “trade secret” was not utilized as precedent in Center for Public Integrity v. FCC. This was an oversight by the court because the expanded FDA conception of a trade secret provides crucial distinctions that are relevant to broadband infrastructure. When something created by private companies – in this case, America’s broadband network – is utilized by the public at large, the conception of trade secrets should be narrowed to apply only

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144 Public Citizen Health Research Group v. Food & Drug Admin., 704 F.2d. 1280, 1281 (C.A.D.C. 1983). Intraocular lenses are implanted in the eye during cataract surgery. This case involved a FOIA denial by the FDA toward information requested by Public Citizen concerning the testing of these lenses. Id. at 1282.

145 See Levine, supra note 137, at 141-145.
to inter-firm commerce. In other words, the withholding of trade secrets under FOIA Exemption 4 should be confined to situations in which the only parties that could possibly be harmed are one or more private companies. But when public infrastructure is at issue, relevant information should not be defined only as “trade secrets” unless disclosure would fundamentally harm the infrastructure itself. Such considerations would bring the needs of the public into discussions of whether such information should be disclosed by the government.

Therefore, the court in Center for Public Integrity v. FCC erred in using only the National Parks standard to determine whether the requested information qualified as “trade secrets” under FOIA Exemption 4. It should be noted that the Center for Public Integrity did not consider the Critical Mass or FDA precedents in any of its motions, filings, or arguments, which would have been in its best interests. Regardless, the court should have taken these precedents into account due to the possibility of voluntarily-submitted information and the peculiarities of the public infrastructure. When the information sought by the CPI was withheld by the FCC, the only beneficiaries were the telecommunications companies that provide that information, while the needs of public users of America’s broadband infrastructure were not even considered. The public interest that is at the heart of the Freedom of Information Act, not to mention the FCC’s promotion of the broadband infrastructure, was incorrectly disregarded by the court, the telecommunications companies, and most importantly the FCC.

V. CONCLUSION

On March 19, 2008 the FCC finally announced a plan to overhaul its methods of measuring the deployment of the American broadband network and the availability of service to

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146 Id. at 191-192.  
147 Id. at 192.
consumers. The commission’s technical definition of “broadband” would be modernized and the pronouncements of availability would be based on geographic areas more sharply defined than zip codes. At the time of writing, whether or not such plans will come to fruition remains to be seen, but perhaps the new measurement methodology will make the FCC’s broadband deployment statistics more believable to commentators and industry experts. But the knowledge level of the typical American consumer should be a matter of much more concern to all the parties involved.

Regardless of the strength of the methodology used to create statistics that are then used for public promotion, there is still the crucial matter of the incoming information that is used to create those statistics. That information, as supplied by private telecommunications companies, must be made transparent if American citizens are to believe what the FCC tells them about the growth and availability of the broadband network. As this paper has argued, it is nonsensical for the government to withhold information that is supplied voluntarily (in part) by private companies, and then use that same data to create promotional reports that potentially could be crucial to citizens as they try to understand the state of their public infrastructure.

When the American citizenry at large is intended as the ultimate beneficiary of private company information, the interests of the public should outweigh the fears of competitive harm to the companies providing the data. When the development of public infrastructure is conducted by private companies, those firms should realize that they have an incentive, if not a duty, to accurately inform the public users of that infrastructure. When they incorrectly contend that the information needed by the public should be withheld as trade secrets, the private telecommunications companies risk alienating huge numbers of potential customers. This is a

148 See supra notes 44-45 and accompanying text
poor business practice that could be ameliorated by a greater commitment to public accountability.  

If private telecommunications companies, and the FCC, want Americans to believe that broadband is widely available and competitively priced throughout the land, they should reveal their justifications for making such pronouncements. When they succeed in keeping such information under wraps, via an incorrect use of the Freedom of Information Act, the public has been given little reason to believe that the American broadband network is the success story that the government and telecommunications companies claim it to be.

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149 See Levine, supra note 137, at 191-192.