Legislative and Regulatory Strategies for Providing Consumer Safeguards in a Convergent Information and Communications Marketplace

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I. Introduction

Many ventures involved in information, communications and entertainment industries have begun to expand their array of offered services. Technological convergence,\(^1\) digitization and the ability of the Internet to handle many different service types within a single bitstream make it possible for companies to offer “quadruple play” bundles of wireless and wireline telephony, video, and Internet access services.\(^2\) Financial and efficiency gains from vertical\(^3\) and horizontal integration,\(^4\) and the search for new revenues to replace declining margins from maturing and newly competitive services,\(^5\) combine to create robust incentives for carriers to diversify.

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\(^1\) Technological convergence refers to innovations that make it possible for ventures to offer a variety of services that previously were offered on a separate, standalone basis. For example, an incumbent telephone company, such as Verizon offers a combination of telephone, Internet access and video services.

\(^2\) “The major force shaping the present and future of communications policy is convergence. Digital convergence is generally understood as the elimination of distinctions between analog communications systems such as broadcast television, cable television, and telephone networks. Once encoded in digital form, all information is ultimately interchangeable. This means that networks previously in distinct markets can become direct competitors. The transformation of local telephone and cable television companies into competing providers of ‘triple-play’ bundles of voice telephony, multi-channel video programming, and high-speed internet access is a canonical example.” Keven Werbach, *Only Connect*, 22 BERKELEY TECH. L.J. 1233, 1261-61 (Fall, 2007).

\(^3\) Vertical integration refers to the combination of separate market activities by a single enterprise. In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 21 F.C.C.R. 2503, 2575 (2006) “Vertical relationships may have beneficial effects, or they may deter competitive entry in the video market-place and/or limit the diversity of programming.” *id.* at 2575 n.565 “Possible detrimental effects can include unfair methods of competition, discriminatory conduct, and exclusive contracts that are the result of coercive activity.” *id.* at 2575 n.566

\(^4\) Horizontal integration “is said to take place when two firms at the same stage of the production process merge to form a single business organization.” THE MIT DICTIONARY OF MODERN ECONOMICS, David W. Pearce, ed. 4th edition, 188 (1992).
Diversification by ventures typically results in a single company providing services that fit within more than one regulatory classification. This frustrates the Federal Communications Commission’s desire to apply a single regulatory classification to services and service providers, a process the Commission could achieve when ventures concentrated on one function, e.g., operating a conduit for content created by others, and offered one readily identifiable service, e.g., telephony. Diversification also obscures the specific reach of the FCC’s regulatory wingspan, both in terms of what regulatory classification applies to which services and what regulatory safeguards the Commission can lawfully apply.

For example, an appellate court recently reversed the FCC’s attempt to subject Internet Service Providers (“ISPs”) to regulatory safeguards identified in Title II of the Communications Act, as amended, but which the Commission wanted to apply using the concept of “ancillary

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6 In re Fed.-State Joint Bd. on Universal Serv., 13 F.C.C.R. 11501, 11522 (1998) (“[T]he language and legislative history of [the Communications Act of 1996] indicate that the drafters . . . regarded telecommunications services and information services as mutually exclusive categories.”)

7 Comcast Corp. v. FCC, 600 F.3d 642 (D.C.C. 2010) (FCC deemed unable to bar Comcast from interfering with its customers' use of peer-to-peer networking applications, because the Commission failed to show how its claim of jurisdiction was reasonably ancillary to the effective performance of its statutorily mandated responsibilities).

8 47 U.S.C. §201 et seq.
jurisdiction” ⁹ based on Title I of the Act. ¹⁰ The D.C. Circuit Court of Appeals rejected the FCC’s attempt to apply such safeguards on ventures classified as information service providers, a status that qualifies for a largely unregulated “safe harbor.” ¹¹

Having been reversed by an appellate court reversal, the FCC must rethink how it can serve the public interest and safeguard consumers, despite having broadly applied the information service classification to all Internet services and ISPs. Already the FCC has had to find ways to impose Title II-type regulatory safeguards on providers of Voice over the Internet Protocol (“VoIP”) service. ¹²

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⁹ The FCC has asserted jurisdiction over technologies and services for which the Communications Act of 1934, as amended, does not provide specific authority. The Commission has asserted such jurisdiction based on a broad mandate contained in Title I of the Communications Act that authorizes the Commission to regulate wire and radio service. “‘Ancillary authority’ refers to the Commission’s discretion under the statutory provisions that establish the agency (Title I of the Communications Act) to adopt measures that are ‘reasonably ancillary to the effective performance of the Commission’s various responsibilities.’” In the Matter of Framework For Broadband Internet Service, Notice of Inquiry, GN Docket No. 10-127 FCC 10-114, 2010 WL 2467985 n. 10 (rel June 17, 2010) citing United States v. Sw. Cable Co., 392 U.S. 157, 178 (1962).


¹¹ BLACK’S LAW DICTIONARY 1363 (8th ed. 2004) (defining a safe harbor to be “[a]n area or means of protection [or a] provision (as in a statute or regulation) that affords protection from liability or penalty.”).

¹² Voice over the Internet Protocol offers voice communications capabilities, much like ordinary telephone service, using the packet switched Internet, for all or part of the link between call originator and call recipient.
Additionally the Commission has avoided making necessary and explicit regulatory classifications as to which category new services such as VoIP and Internet Protocol Television fit. Absent a legislative remedy the FCC must calibrate its regulatory wingspan so that it passes muster with reviewing courts, but also provides necessary safeguards. FCC Chairman Julius Genachowski has proposed to reclassify Internet access as a hybrid Title II regulated service, triggering only limited regulatory safeguards. Such a re-classification, coming on the heels of a court reversal, appears as after the fact scrambling to re-arrange the wingspan of Title II jurisdiction without statutory authority.

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13 Internet Protocol Television refers to the ability of Internet access subscribers to receive and view video content through real time, immediate delivery of packets, also known as streaming, or as filed downloaded for subsequent viewing.

14 “The Communications Act, even after its 1996 rewrite, divides the world into discrete regulatory silos: Title II for telecommunications carriers, Title III for broadcasters, and Title VI for cable television. It offers definitional categories, such as ‘telecommunications service’ and ‘information service’ that are anachronistic in a world where all communications is ultimately just bits of data organized in different ways. Assignment of a service to one of these categories has tremendous consequences. Yet in a converged world, there is often no good way to map the categories to reality. Voice over Internet Protocol (VoIP), for example, is fundamentally both voice and data, straddling the line between telecommunications and information services.” Werbach, supra n. x at 1266-67.

15 See Julius Genachowski, FCC Chairman Julius Genachowski, The Third Way: A Narrowly Tailored Broadband Framework (May 6, 2010), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-297944A1.doc (proposing to apply Title II regulation only to the bit transmission portion of ISP services and rejecting a renewed attempt to find a way to extend Title I ancillary jurisdiction or reclassifying all aspects of Internet access as a telecommunications service); Austin Schlick, FCC General Counsel, A Third-Way Legal Framework for Addressing the Comcast Dilemma (May 6, 2010), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-297945A1.doc (providing legal rationale for narrow application of selected sections of Title II regulatory authority over Internet access).
This paper will explain how the FCC has backed itself into a corner in light of its predisposition to apply the information service classification indiscriminately and its perceived duty to make either/or determinations about services, i.e., to apply either the telecommunications service classification singularly, or the information service singularly to a convergent service that combines both elements. The paper also will provide recommendations on how Congress and the FCC might recognize that convergent services, such as Internet access, combine both components in much the same way as wireless cellular telephone companies offer both regulated common carrier telecommunications services, subject to forbearance, and unregulated information services via the same conduit.

The paper recommends that in light of the ascending importance of Internet access and the lack of sustainable competition that would favor self-regulation, Congress should amend the Communications Act to authorize the FCC to apply limited elements of Title II safeguards as already exists for wireless telephony. In light of the failure of Congress to reach consensus, the paper suggests that the FCC safeguard consumers when information service providers cause harm as the Commission did when a DSL service provider blocked access to competing VoIP services. 16

II. One Size No Longer Fits All

Technological innovations make it feasible for telecommunications ventures to diversify into other lines of business. Through vertical and horizontal integration, often expedited by mergers, incumbent firms, in particular, can exploit technological convergence to provide consumers a “one

16 See Madison River Commc’n, LLC, 20 F.C.C.R. 4295, 4297 (2005) (small independent telephone company agreed to a $15,000 monetary forfeiture and consent decree agreeing not to block Digital Subscriber Link customers’ access to Voice over the Internet Protocol telephone services).
stop shop” for an increasingly diverse array of information, communications and entertainment ("ICE") services. ICE firms can use the Internet as a single medium for the delivery of many services which previously they could not offer, in light of technological limitations, or which they offered only on a discrete, standalone basis. Such marketplace convergence rewards firms with gains in efficiency and productivity when they bundle many services into a “quadruple-play” of wired and wireless telephone service, Internet access and video programming.

Marketplace convergence presents the Federal Communications Commission ("FCC") with an acute quandary, because the Commission customarily has applied a single regulatory classification to all of the services offered by a company. With technological convergence providing the wherewithal for ventures to offer a wide variety of ICE services, the Commission cannot shoehorn everything offered by a company into one of the mutually exclusive classifications Congress has created for the Commission to apply. Telephone companies, which solely provided

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17 “The impending shift of all networks to packet-switched technologies promises to complete the collapse of any remaining attempt to base regulation on differences in the means of transmission. Once all communications are reduced to bits and bytes, all media will constitute substitutes for one another, and attempts to segment markets based on the means of conveyance will become increasingly problematic.” Christopher S. Yoo, New Models of Regulation & Interagency Governance, 2003 Mich. St. DCL L. Rev. 701, 714.

18 The three major statutory service categories established in the Communications Act are telecommunications service, telecommunications, information service and cable service. Telecommunications service is defined as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.” 47 U.S.C. §153(46). Telecommunications “means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.” Id. at §153(43). Information service is defined as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such
telecommunications services, now offer Internet access, which the FCC considers an information service, and video services that compete with cable television. Cable television companies, which solely provided video services, now offer Internet access and telephone service. Wireless cellular radiotelephone companies seamlessly combine telecommunications, information and video services all available to subscribers using “smartphones” which increasingly offer the functionality of both television sets and computers. With the compression and digitization of their signals, television broadcasters soon may offer Internet access and other wireless services.

A. An Either/Or Regulatory Dichotomy Does Not Work for Convergent Services

Nothing forecloses the FCC from applying two or more regulatory classifications to a single venture that exploits technological convergence to provide a wide array of telecommunications, information and video services. The growing number of mergers and acquisitions in the ICE industry 19 shows that companies recognize the need to diversify through vertical and horizontal integration. The FCC appears unable to adjust its regulatory regime in response to such diversification, largely because the statutory definitions the Commission must apply no longer establish clear and appropriate distinctions for which significantly different regulatory regimes apply.

capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.” Id. at §153(20). Cable service means “(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.” Id. at §522(6)(A)-(B).

19 For background on pending a recent major mergers, subject to FCC approval, see Federal Communications Commission, Office of General Counsel, Transaction Team, Worldwide Web Site, available at: http://www.fcc.gov/transaction/.
Heretofore the FCC has been able to erect such “regulatory silos” and to assign individual companies into one and only one of these classifications. The Commission increasingly finds it cannot readily assign only one such classification. Instead of admitting this and seeking legislative remedies, the Commission mightily strives to stretch the existing legislative categories so that they apply to convergent services. This strategy has not always worked as evidenced by the D.C. Circuit Court of Appeals rejection of the Commission’s attempt to apply some Title II regulatory requirements on information services providers, despite explicit language in the Communications Act of 1934, as amended, that limits such common carrier regulations to telecommunications service providers.

In other instances the FCC has been able to stretch regulatory classifications, or to apply two without explicitly acknowledging that it has done so, even when no statutory prohibition on the practice exists. For example, the Commission acknowledges that cellular telephone companies qualify for streamlined regulation of their common carrier telecommunications services and also

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20 “Under this framework, the appropriate regulation depends not on the function of the service, but on the label the FCC chooses to apply to the provider or to the network infrastructure over which service is provided. In fact, the FCC often regulates identical services differently if the providers or infrastructure have different “labels” (e.g., wireline telephone voice service falls within Title II, while wireless voice service over radio spectrum falls within Title III). As the below diagram illustrates, this traditional approach creates vertical regulatory ‘silos.’” John Blevins, Jurisdiction as Competition Promotion: A Unified Theory of the FCC’s Ancillary Jurisdiction, 36 FLA. ST. U. L. Rev. 585, 591 (Summer, 2009).

21 Comcast Corp. v. FCC, 600 F.3d 642 (D.C.C. 2010)(FCC deemed unable to bar Comcast from interfering with its customers’ use of peer-to-peer networking applications, because the Commission failed to show how its claim of jurisdiction was reasonably ancillary to the effective performance of its statutorily mandated responsibilities).

22 “In 1993, CMRS services were still nascent, and Congress specified in a new section 332(c)(1)(A) of the Communications Act that although Title II applies to CMRS, the Commission
qualify for the deregulatory “safe harbor” when such carriers offer wireless broadband access.  

Over time the information service classification appears to have predominated, in light of the Commission’s predilection for applying just one classification and the view that the wireless marketplace is so competitive that traditional Title II common carrier consumer safeguards are unnecessary.

may forbear from enforcing any provision of the title other than sections 201, 202, and 208. After Congress gave the Commission broader forbearance authority in the Telecommunications Act of 1996, the Commission considered a petition to forbear from sections 201 and 202 as applied to certain CMRS services. The Commission rejected that forbearance request, finding that even in a competitive market those provisions are critical to protecting consumers.” In Re Framework For Broadband Internet Service, Notice of Inquiry, GN Docket No. 10-127, FCC 10-114, 2010 WL 2467985, ¶25 (rel. June 17, 2010).


24  Until its most recent analysis, the FCC unconditionally concluded that the wireless radiotelephone industry was robustly competitive. “U.S. consumers continue to reap significant benefits -- including low prices, new technologies, improved service quality, and choice among providers -- from competition in the CMRS marketplace, both terrestrial and satellite CMRS. 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.” In re Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, WT Docket No. 08-27, DA 09-54, Thirteenth Report, 24 FCC Rcd. 6185, 6189 (2009). The Commission appears to have backed away from this conclusion:

“rather than reaching an overarching, industry-wide determination with respect to whether there is “effective competition,” the Report complies with the statutory requirement by providing a detailed analysis of the state of competition that seeks to identify areas where market conditions appear to be producing substantial consumer benefits and provides data that can form the basis for inquiries into whether policy levers could produce superior outcomes.” In re Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, WT Docket No. WT Docket No. 09-66, Fourteenth Report, FCC 10-81, 2010 WL 2020768, ¶2 (2009)[hereinafter cited as 14th Report on the Wireless Marketplace].

“Since the period covered by the Thirteenth Report, CMRS competition has grown stronger by some of the measures previously considered, but weaker by others.” Id. at ¶368.
Having largely ignored the fact that cellular telephone companies still provide telecommunications services, the Commission can choose to focus on the information services component by emphasizing that the hybrid and convergent nature of what these carriers offer justifies deregulation. Should the wireless marketplace become concentrated, because of the unsustainability of competition, the FCC will lack, or consider itself unable to apply essential regulatory safeguards, particularly in light of the Commission’s spectrum allocation procedures that favor deep-pocketed incumbent firms able to bid the highest sums for new spectrum, and approval of numerous mergers.


26 The FCC has approved numerous market consolidating acquisitions, including ones by AT&T and Verizon, whose share of the national market exceeds 60%. “The two largest providers, AT&T, Inc. (AT&T) and Verizon Wireless, have 60 percent of both subscribers and revenue, and continue to gain share (accounting for 12.3 million net additions in 2008 and 14.1 million during 2009). The two next-largest providers, T-Mobile USA (T-Mobile) and Sprint Nextel Corp. (Sprint Nextel), had a combined 1.7 million net loss in subscribers during 2008 and gained 827,000 subscribers during 2009. One widely-used measure of industry concentration indicates that concentration has increased 32 percent since 2003 and 6.5 percent in the most recent year for which data is available.” 14th Report on the Wireless Marketplace at ¶4. See also, 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 and Petition for Declaratory Ruling that the Transaction is Consistent with Section 310(b)(4) of the Communications Act, WT Docket No. 08-95, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd 17444 (2008) (Verizon Wireless acquisition of ALLTEL). Note that Verizon sold to AT&T the wireless properties Verizon could not retain pursuant to the FCC’s order approving the acquisition. Applications of AT&T Inc. and Cellco Partnership D/B/A Verizon Wireless, WT Docket No. 09-104, FCC 10-116, 50 Communications Reg. (P&F) 1125, 2010 WL 2526678, Memorandum Opinion And Order, (rel. June 22, 2010).
1) **Internet Access**

The single regulatory classification preference of the FCC combined with concerns about regulatory parity with other unregulated Internet access options, such as cable modem service, motivated the Commission to change its regulatory classification of Digital Subscriber Line (“DSL”) services. Despite the fact that the FCC initially classified DSL as a telecommunications service and DSL constitutes a retrofit of the copper wire initially used exclusively to provide telephone service, the Commission later applied the information service classification. The Commission typically accrues public relations and congressional benefits when it finds ways to deregulate and reduce the real or claimed burdens on commercial ventures. Should the Commission consider re-regulating or increasing regulations, stakeholders claim that such burdens become a drag on their global competitiveness and incentives to invest in vital next generation network facilities.

The Supreme Court in the *Brand X* case deferred to the FCC’s expertise in interpreting statutory definitions and afforded the Commission ample flexibility which in terms of Internet

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28 “We conclude that advanced services are telecommunications services. The Commission has repeatedly held that specific packet-switched services are ‘basic services,’ that is to say, pure transmission services. xDSL and packet switching are simply transmission technologies. . . . An end-user may utilize a telecommunications service together with an information service, as in the case of Internet access. In such a case, however, we treat the two services separately: the first service is a telecommunications service (e.g., the xDSL-enabled transmission path), and the second service is an information service, in this case Internet access.” Deployment of Wireline Services Offering Advanced Telecommunications Capability, Memorandum Opinion and Order, and Notice of Proposed Rulemaking 13 FCC Rcd. 24012, 24029-30 (1998).

access has resulted in expanding the reach and applicability of the information service deregulatory safe harbor. The Court majority accepted that the Commission could erect a regulatory dichotomy between ventures using telecommunications as a building block for information services and those providing telecommunications services. In the former the telecommunications component is provided as a part of an integrated package of services predominated by information services. In the latter the telecommunications component can be separated and considered a standalone service. This somewhat metaphysical distinction results in a substantial dichotomy of regulatory oversight with information services subject to quite limited FCC oversight and telecommunications services subject to substantially more, possibly reduced if the FCC determines that the public interest no longer requires such safeguards.

Because the FCC opted to extend the information service classification to all types of wireline and wireless Internet access, the Commission cannot subsequently condition its blanket determination on grounds that in certain instances information service providers have the incentive and ability to operate anticompetitively for two reasons. First, Congress determined that information services, as news and immature offerings do not require heavy handed, costly and

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investment incentive robbing regulation. Second, even if the information service industry has not evolved into a robustly competitive marketplace as it matures, the FCC has assumed it to be sufficiently competitive and able to self-regulate.

The Commission cannot surgically intervene to remedy marketplace abuses when it previously had determined that the industry qualifies for blanket deregulation. Put another way, the FCC’s decision to apply the information service classification broadly to all Internet access options implies that the Commission could not anticipate any instance where it would have to remedy abuses, or that it could backtrack and insert elements of Title II regulatory safeguards as necessary.

The telecommunications/information services distinction, added in the Telecommunications Act of 1996, codified an earlier FCC-developed division between basic and enhanced services. In its Computer Inquiry decisions between the late 1960s and the early 1990s, the FCC wrestled with the treatment of data-processing services that interacted with the telephone network. . . . The Commission created a distinction between basic services, which were traditional, regulated transmission offerings, and enhanced services, a new invention. . . . The basic/enhanced distinction became a sort of shorthand for regulated versus unregulated services. This concept largely survived in the 1996 Act.” Kevin Werbach, Off the Hook, 95 CORNELL L. REV. 535, 542-43 (March, 2010)(citations omitted).

Similarly the FCC seeks to insulate information service providers from having to pay regulatory fees borne by basic telecommunications service providers. “Much of the rationale behind treating Internet access as an “information service” has come from the Commission’s attempts to avoid burdening Internet access providers with universal service fees.” Susan Crawford, Transporting Communications, 89 B.U. L. Rev. 871, 899 (June 2009).

“Nonetheless, we articulate principles recognizing the importance of consumer choice and competition in regard to accessing and using the Internet: the Internet Policy Statement that we adopt today adopts such principles. We intend to incorporate these principles into our ongoing policymaking activities. Should we see evidence that providers of telecommunications for Internet access or IP-enabled services are violating these principles, we will not hesitate to take action to address that conduct.” Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Report and Order and Notice of Proposed Rulemaking 20 FCC Rcd. 14853, 14904 (2005)(citations omitted).
In light of instances where DSL or cable modem service providers, e.g., Madison River Telephone Company 34 and Comcast 35 respectively, have acted on their incentive and ability to operate in an anticompetitive and discriminatory manner, the Commission has attempted selectively to impose regulatory safeguards or sanctions. The FCC tried to extend the reach of ancillary jurisdiction, 36 under Title I of the Communications Act, so that the Commission could require information service providers to comply with enforceable elements of what common carriers have to accept in light of the Commission’s jurisdiction under Title II of the Communications Act. Facing a complete rejection of that strategy, Chairman Julius Genachowski has regrouped and come up with a “third way” reinterpretation of what Internet access entails. 37 The Chairman now

34 See Madison River LLC and Affiliated Companies, Order, 20 FCC Rcd. 4295 (2005) (adopting a consent whereby a provider of DSL service agreed to a $15,000 forfeiture and to refrain from blocking subscriber access to Voice over the Internet Protocol services).


36 The FCC has had significant success in convincing appellate courts that a claim of ancillary jurisdiction has a sufficient link to direct statutory authority. For example, before receiving explicit congressional authority, the Commission launched an extensive regulatory regime for cable television based on its potential for fragmenting regulated broadcast television audiences and the ability of broadcasters to offer “free” advertiser supported programming. See United States v. Sw. Cable Co., 392 U.S. 157 (1968); Midwest Video Corp., 406 U.S. 649 (1972); FCC v. Midwest Video Corp., 440 U.S. 689 (1979).

37 Federal Communications Commission, Chairman Julius Genachowski, The Third Way: A Narrowly Tailored Broadband Framework (May 6, 2010); available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-297944A1.doc (rejecting a renewed attempt to find a way to extend Title I ancillary jurisdiction or reclassifying Internet access as a telecommunications service).
identifies telecommunications components in the transmission of Internet bits and packets, even though previously the Commission was keen to ignore that function or subordinate it as an integrated component in what constitutes an information service.

In both instances the FCC collectively, or through the initiatives of individual Commissioners, wants to have near complete flexibility to apply statutory definitions, but if necessary to ignore all or part of what regulatory limitations flow from the application of specific classifications. When the FCC opted to apply the information service classification, it foreclosed the opportunity to use Title II safeguards, even if the Commission subsequently finds that the information service marketplace has not become so competitive and conscientiously self-regulating. The FCC’s attempt to sanction Comcast for interfering with subscribers’ peer-to-peer traffic absent

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38 Justice Scalia, dissenting in the Brand X case, which affirmed the FCC’s classification of cable modem service as an information service, warned that appellate courts should not defer to expert regulatory agencies that cleverly secure flexibility to make regulatory or even deregulatory decisions free of statutory authority:

[W]hat the Commission hath given, the Commission may well take away-unless it doesn’t. This is a wonderful illustration of how an experienced agency can (with some assistance from credulous courts) turn statutory constraints into bureaucratic discretions. . . . Under its undefined and sparingly used “ancillary” powers, the Commission might conclude that it can order cable companies to “unbundle” the telecommunications component of cable-modem service.FN7 And presto, Title II will then apply to them, because they will finally be “offering” telecommunications service! . . . Such Möbius-strip reasoning mocks the principle that the statute constrains the agency in any meaningful way. Nat’l Cable & Telecom. Ass’n v. Brand X Internet Serv., 545 U.S. 967, 10103-14 (2005).

39 “P2P applications allow individual computer users to transmit data directly to another user, without the use of an intermediate network service. The P2P software and services[FN523] permit individuals to search the computers of other participants for the desired content, and individual members act as hosts, distributing content from their computers. This is a highly decentralized system of content distribution.” Implementation of the Child Safe Viewing Act; Examination of
legitimate network management requirements failed to pass muster with the D.C. Circuit Court of Appeals. This decision severely sidetracks the Commission’s attempt to establish binding network neutrality policies, rules and regulations absent an explicit legislative mandate.

Noting that the Commission invoked no express statutory authority, the court considered whether “barring Comcast from interfering with its customers’ use of peer-to-peer networking applications is ‘reasonably ancillary to the . . . effective performance of its statutorily mandated responsibilities.’” Notwithstanding the Supreme Court’s broad deference to the FCC’s assertion of ancillary jurisdiction in the Brand X case, where the Court affirmed the FCC’s determination that cable modem provided Internet access constitutes a largely unregulated information service, the D.C. Circuit required evidence that the FCC’s regulatory action had a direct link to its statutorily mandated responsibilities. The court vacated the FCC’s sanctioning order of Comcast based on Parental Control Technologies for Video or Audio Programming, Report, 24 FCC Rcd. 11413, 11472 (2009).

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40 Comcast Corp. v. F.C.C., 600 F.3d 642 (D.C. Cir. 2010).

41 Id. at 3 citing Am.Library Ass’n v. F.C.C., 406 F.3d 689, 692 (D.C. Cir. 2005).

42 The court does not interpret the Brand X case as precedent for the imposition of plenary authority over any matter involving cable television company provided Internet access. “By leaping from Brand X’s observation that the Commission’s ancillary authority may allow it to impose some kinds of obligations on cable Internet providers to a claim of plenary authority over such providers, the Commission runs afoot of Southwestern Cable and Midwest Video I.” Id. at 14. “The Commission’s exercise of ancillary authority over Comcast’s network management practices must, to repeat, be independently justified.” Id. at 16, citing National Ass’n of Regulatory Utility Commissioners v. FCC, 533 F.2d 601, 613 (D.C. Cir. 1976)(rejecting the FCC’s preemption of state and local regulation of two-way, intrastate, non-video cable transmissions).

43 “The Commission therefore rests its assertion of authority over Comcast’s
the view that the FCC had relied on congressional statements of policy which do not provide a precedent for creating such responsibilities and to various section of the Communications Act that the court deemed inapplicable for substantive and procedural reasons.

The D.C. Circuit vacated the Commission’s reprimand of Comcast based on the court’s refusal to accept the Commission’s claim of ancillary jurisdiction. The court referred to the three major cable television cases 44 where the Supreme Court had affirmed the FCC’s ancillary jurisdictional claim “at a time when, as with the Internet today, the Communications Act gave the Commission no express authority to regulate such systems.” 45 As it had done in the case rejecting the FCC’s attempt to require television set manufacturers to build units capable of processing digital right management, “broadcast flags,” the court distilled the precedent for ancillary jurisdiction established by these cases into a two part test whether: “(1) the Commission’s general jurisdictional grant under Title I [of the Communications Act] covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission’s network management practices on the broad language of section 4(i) of the Act: “The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions,” Id. at 6, citing 47 U.S.C. § 154(i) and In re Formal Compl. of Free Press & Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications, 23 F.C.C.R. 13,028, 13,036, (2008).


45 Id. at 6.
effective performance of its statutorily mandated responsibilities.” The court determined that the FCC had not satisfied the second part of the test.

The court flatly rejected the FCC’s attempt to infer congressional intent for the Commission to extend its regulatory wingspan to include Internet access. In a series of references to provisions of the Communications Act, the Commission expansively read congressional policy as sufficient ground for undertaking regulatory policy:

Instead, the Commission maintains that congressional policy by itself creates “statutorily mandated responsibilities” sufficient to support the exercise of section 4(i) ancillary authority. Not only is this argument flatly inconsistent with *Southwestern Cable*, *Midwest Video I*, *Midwest Video II*, and *NARUC II*, but if accepted it would virtually free the Commission from its congressional tether.

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46 *Id.* at 7.

47 The court noted that Comcast had conceded “that the Commission’s action here satisfies the first requirement because the company’s Internet service qualifies as “interstate and foreign communication by wire” within the meaning of Title I of the Communications Act.” *Id.* at 7-8 citing 47 U.S.C. § 152(a). The court also rejected the Commission’s claim that because Comcast had used the existence of FCC jurisdiction in another case the company should be judicially stopped from challenging the Commission’s jurisdiction now. The court interpreted Comcast’s position in the other case as simply acknowledging the FCC’s jurisdiction over wire and radio services, which includes what Comcast offers. “Because Comcast never clearly argued in the California litigation that the Commission’s assertion of authority over the company’s network management practices would be ‘reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities’ (*American Library’s* second requirement), 406 F.3d at 692, that question remains for us to answer.” *Id.* at 12.

48 The Commission cited to Secs. 1, 230(b), 706, 257, 201 and 623 of the Communications Act.

49 *Id.* at 23.
The court concluded that the FCC could invoke ancillary jurisdiction to apply any number of regulatory requirements to cable modem provided Internet access without explicit congressional authority to do so. 50

2) **Voice over the Internet Protocol**

Even as the FCC finds it legally impossible to re-regulate Internet access, either by stretching the Commission’s interpretation of Title I, or inserting selected elements of Title II onto information services, the Commission has found ways to re-regulate Voice Over the Internet Protocol (“VoIP”). Notwithstanding the commonly shared view that VoIP services should qualify as information services, the Commission has managed to apply Title II safeguards without having to specify into which category commercial VoIP service fits. 51 The Commission has specified that

50 “Were we to accept that theory of ancillary authority, we see no reason why the Commission would have to stop . . . [at imposing regulation of Internet Service Providers’ rates] for we can think of few examples of regulations that apply to Title II common carrier services, Title III broadcast services, or Title VI cable services that the Commission, relying on the broad policies articulated in section 230(b) and section 1, would be unable to impose upon Internet service providers.” *Id.* at 23-24.

personal computer-to-personal computer VoIP clearly falls into the information service category. In a report to the Senate, the Commission also tentatively concluded that VoIP calls, which have access to and from the conventional Public Switched Network (“PSTN”), constitute a telecommunications service. However, the FCC never made an on the record determination for these interconnected services, possibly because having to do so would result in the anomalous outcome of the Commission determining that basic bit transmission services provided by ISPs qualify for the information service safe harbor, but software configured services that ride on top of the bit transmission stream do not.

Nevertheless courts have validated the FCC’s preemption of state regulatory jurisdiction and have not rejected as unlawful the Commission’s selective application of Title II safeguards on


52 Petition For Declaratory Ruling that pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service, WC Docket No. 03-45, Memorandum Opinion and Order, 19 FCC Rcd 3307 (2004).


VoIP ventures based on the view that such services have a sufficiently close statutory link to common carriage telephony. Because VoIP constitutes the functional equivalent of Title II telephone service, provided by powerful incumbent firms, the Commission can impose regulatory safeguards that may protect consumers, but also has a direct and negative monetary impact on VoIP providers, including thinly capitalized market entrants. Remarkably when confronted with a similar instance of functional equivalence—Internet Protocol Television—\textsuperscript{55} the Commission so far has refrained from making a regulatory call. In the absence of such decision making, the FCC de facto treats IPTV as an information service despite the fact that it offers identical or similar video programming as offered by cable television operators.

B. The FCC Has Abandoned the Most Effective and Straightforward Safeguards

The FCC would not have to finesse its interpretation of statutory service definitions if the Commission had continued to require structural or functional separation of telecommunications services from everything else offered by ICE ventures.\textsuperscript{56} At the onset of data communications the Commission’s first regulatory strategy explicitly limited oversight to core, basic telecommunications services by requiring carriers to form separate corporate subsidiaries when pursuing new information

\textsuperscript{55} For background on IPTV see In-Sung Yoo, \textit{The Regulatory Classification of Internet Protocol Television: How the Federal Communications Commission Should Abstain From Cable Service Regulation and Promote Broadband Deployment}, 18 COMMLAW CONSPECTUS 199 (2009).

\textsuperscript{56} “[R]egulators may force full structural separation, or complete divestiture, of the bottleneck facilities into a separate firm. In between, there is a potentially infinite range of “operational” or “functional” separation alternatives which impose various requirements for “arms-length” dealing, while stopping short of complete divestiture.” Robert W. Crandall, Jeffrey A. Eisenach & Robert E. Litan, \textit{Vertical Separation of Telecommunications Networks: Evidence From Five Countries}, 62 FED. COMM. L.J. 493, 495 (June 2010).
markets. 57 Telephone companies have ample experience in creating separate subsidiaries and gladly pursue this option when doing so possibly insulates revenues, e.g. wireline telephone companies created separate and unregulated telephone directory publishing companies.

Incumbent telephone companies objected to the structural separation requirement on grounds that it triggered inefficiency, lost synergies and higher costs. These companies never provided empirical evidence that such adverse outcomes were occurring, but the FCC accepted such assertions without question and abandoned structural safeguards. 58 The Commission adopted some accounting safeguards, but subsequently abandoned most of these requirements. 59 Ironically, just as carriers in the United States succeeded at persuading the FCC to abandon structural safeguards, national regulatory authorities in other nations, including the European Union led by the

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United Kingdom, Australia, and New Zealand implemented either structural or functional separation requirements. These nations have identified no significant loss of synergies, or the inability of carriers to decouple telecommunications elements of convergence services.

Ideally the Congress should reinstate the structural separation requirement for carriers possessing market power in telecommunications services markets. By mandating separation, Congress would obligate carriers offering telecommunications transmission services, whether for voice or data, to offer such basic capacity to former affiliates and competitors alike on fair terms and conditions. In the absence of proof that separation causes the reduction of synergistic benefits, Congress should act to capture public welfare gains such as certainty that facilities-based carriers will

60 See Press Release, Ofcom, A New Regulatory Approach for Fixed Telecommunications (June 26, 2005), available at http://www.ofcom.org.uk/media/news/2005/06/nr_20050623; Press Release, Ofcom Accepts Undertakings from Board of BT Group Plc on Operational Separation, 1 (Sept. 22, 2005), available at http://www.ofcom.org.uk/media/news/2005/09/nr_20050922 (announcing the structural whereby the dominant incumbent carrier British Telecom agrees to only offer wholesale services through a structurally separate entity called Openreach). “[O]perational separation within BT that would ensure that those responsible for overseeing BT’s bottleneck assets had real incentives to wish to serve other operators in practice and on the ground with the same zeal, efficiency and enthusiasm as they served the remainder of BT’s downstream activities.” United Kingdom Office of Communications, Telecommunications Statement, at 234 available at: http://www.ofcom.org.uk/consult/condocs/telecoms_p2/statement/.


operate in a transparent and non-discriminatory manner when they offer bit transmission services to other ventures that add value to such links.

II. Causes of the FCC’s Inability to Calibrate its Regulatory Mission

Absent a revised statutory mandate to require structural or functional separation of basic telecommunication from enhanced information services, the FCC will continue to muddle through with ad hoc determinations into which single category convergent services must fit. The Commission likely will continue to prefer use of the information service classification, because announcing a deregulatory outcome typically confers more political and budgetary benefits than one calling for regulation.

A. The FCC’s Deregulatory Bias

The FCC’s appellate court record, instances of substantial shifts in policy, the failure to subject findings to third party peer review, obvious defects in data collection and statistical reporting and other flaws evidence an administrative agency inclined to engage in results-driven decision making. 64 Rather than have an open mind shaped by the evidence it acquires the FCC may seek to shape the record so that it supports a preordained outcome, typically one that reduces regulations based on a finding of ample and sustainable competition.

Practitioners and academics alike rely heavily on the FCC’s data collections and statistical compilations. When the FCC uses statistics to support a preconceived objective, the Commission fails to comply with its statutory mandate to generate a complete and unbiased evidentiary record,

and it violates the Administrative Procedure Act. It is possible that the subsequent decisions may fail to pass muster with reviewing courts, and the primary source of information used for both applied and academic research may offer a false or incomplete picture. It appears far too often that political expediency and philosophical commitments tempt Commission managers to shape the data collection process and subsequent interpretation in ways that support a desired outcome. If the FCC wants to conclude, for example, that a specific telecommunications market is robustly competitive, that a proposed merger will serve the public interest, or that the United States has near ubiquitous broadband access, then Commission staff bears the burden of generating definitions and benchmarks, compiling data, reporting statistics, and providing interpretations that support such conclusions.

When such results-driven data collection and statistical reporting occur, the corresponding Commission rules, policies, and regulations are flawed products that may not serve the public interest and reflect a true empirical record. Stakeholders can rely on such flawed data to corroborate preferred outcomes in ways that help legitimize, as “scientifically proven”, conclusions that would not pass peer review.

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

66 See e.g., Verizon Tel. Cos. v. FCC, 570 F.3d 294 (D.C. Cir. 2009)(failure to use consistent model for assessing facilities-based competition); Comcast Corp. v. FCC, 579 F.3d 1 (D.C. Cir. 2009)(rejecting the Commission’s rationale for imposing a 30% ownership cap on single cable television operators); Prometheus Radio Project v. FCC, 373 F.3d 372, 415 (3d Cir. 2004)(partially reversing the FCC based on flawed modeling of media competition) cert. denied, 545U.S. 1123 (2004); 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).
The statutory prohibition of arbitrary and capricious decision making, which shows an abuse of discretion and should not qualify for deference typically accorded administrative agencies, has not always forced the FCC to compile a complete evidentiary record. The FCC appears to have acquired data selectively with an eye toward generating statistics that support pre-determined outcomes. Such results-driven decision making occurs when the FCC too willingly accepts stakeholders’ requests that the Commission treat data reports as trade secrets and to redact, sanitize and obscure them.

1) Lies, Damn Lies and Statistics

The FCC has undertaken an aggressive deregulatory campaign based on its assumptions and statistical compilations that support an inference of robust competition, affordable prices, and near ubiquitous access in just about every market, with the exception of broadband for specific groups of beneficiaries and plain old telephone service whose service providers tap into over $7.3 billion in annual subsidies. Advocates for even more deregulation regularly cite the Commission’s statistics as evidence that the unfettered marketplace can largely self-regulate and accommodate any market consolidation including horizontal mergers where the acquiring firm buys market share. Both the Commission and many stakeholders assume the frequently cited statistics present a true picture of the marketplace.


68 See Universal Service Fund Administrative Company, Universal Service Fund Facts, available at: http://www.usac.org/about/universal-service/fund-facts/fund-facts.aspx. $4.3 billion was appropriated for carriers operating in high cost areas and $1.0 billion for subsidizing access by low income subscribers.
The FCC repeatedly has deemed competitive the wireless marketplace that grows increasingly concentrated in light of the mergers the Commission has approved, despite proof that the market already exceeds the Herfandal Hershman Index rating for a highly concentrated market. Until recent improvements, the Commission’s benchmarking process generated numerous reports that attributed a number of broadband service options as though anyone within a zip code territory had access to that number of options. While it recently has identified up to 24 million Americans lacking any broadband option, the Commission previously concluded that more than 99% had such access. The Commission initially stated that statistics proved pay-per-channel, “à la carte” access to cable television programming would not save consumers money compared to a packaged

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

In light of its keen interest in concluding that successful broadband market penetration has occurred, the FCC has agreed to treat as confidential trade secrets the raw information submitted in compliance with a statutory mandate. Access to such data might provide the basis for challenging


75 In Section 706 of the Communications Act of 1996, codified at 47 U.S.C. §1302(b) (2009), Congress directed the Commission and the states to encourage the deployment of advanced telecommunications capability to all Americans. In conjunction with this objective, Congress instructed the Commission to conduct regular inquiries concerning the availability of advanced telecommunications capability. Nevertheless a federal district court affirmed the Commission’s trade secret designation. Ctr. for Pub. Integrity v. FCC, 505 F. Supp. 2d 106 (D.D.C. 2007).
the FCC’s optimistic statistical interpretations, because carriers can obscure their lack of success in providing ubiquitous broadband access. Ironically, some carriers that willingly display maps touting their wireless services argue against the FCC providing the same information about broadband penetration to the public.

The above examples show that some of the FCC’s statistical work product appears to support a preordained result, rather than reflect an open mind keen on acquiring data to answer questions. The FCC’s data does not help empirical researchers when the Commission engages in results-driven data acquisition. Researchers want to acquire statistics to answer questions about the competitiveness of a particular market. Data framed in a way to justify merger approvals, to show Congress how competitive a market has become, to provide the basis for challenging unfavorable statistics compiled by others, and to support a political or philosophical agenda does not help empirical researchers. It provides a pseudo-scientific basis for an outcome, one that generally would not pass peer review and might not pass muster with a reviewing court unwilling to defer to agency expertise on anything complex and technical.

B. The Commission Can and Should Do a Better Job of Compiling Statistics

The FCC frequently perceives congressional and public relations benefits in forecasting the best case scenario for a deregulatory decision, or merger approval. Congressional oversight hearings, including ones determining the Commission’s budget, have a friendlier tone when FCC representatives have positive news and statistics to report. When the Commission has to acknowledge market domination, market failure, or the lack of competition, it risks losing such a positive reception, even if regulation or merger disapprovals would serve the public interest.
Imposing regulation, slowing down the speed of deregulation, and taking steps to remedy market failure may constitute the right policy outcome, but it can trigger retaliation particularly from incumbent firms with the resources to act on their frustration in ways that can punish individual Commissioners and the FCC collectively. 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. But that is what FCC managers and staff may have to do when the public interest necessitates an independent, open-minded review. The following concrete recommendations identify some of the macro-level reforms that FCC should embrace.

1. **Refuse to grant blanket trade secret/confidentiality requests from stakeholders**

   Lacking the resources to compile independently much data about the industries it regulates, the FCC relies on compulsory reports filed by specific companies. Stakeholders in the outcome of Commission proceedings clearly do not want the reports they file to be used in ways that block, delay, or complicate deregulatory objectives. Unsurprisingly companies that bear reporting obligations want to limit the nature and scope of such duties. When obligated to file reports, these stakeholders usually seek confidentiality and trade secret protection, even though such classification can and does limit the utility of the data.
For example, the FCC has accepted as a trade secret the decision by an Internet Service Provider ("ISP") not to serve a particular area. The Commission dutifully obscures the identity of ISPs serving a zip code, and until this year all that researchers could glean from Commission data was a single number per zip code ostensibly representing the number of ISPs available to provide broadband competition everywhere within the zip code territory. The Commission could have challenged stakeholders’ trade secret claims, in light of a statutory mandate under Section 706 of the Telecommunications Act of 1996 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. Trade secrets typically guard against disclosure of a company’s crown jewels, e.g., food and beverage recipes, not a decision to refrain from serving a locality. Arguably an ISP’s decision not to provide service identifies an area where the Commission and other state and federal agencies may have to take steps to remedy market failure and promote broadband development consistent with the mandate in Section 706. The FCC, NTIA, Department of Agriculture and other federal agencies, along with academic researchers should have access to the FCC’s collected data, with sufficient granularity to know where market failures exist.

Accordingly, the Commission should not automatically grant confidentiality and other requests that obscure, sanitize, and reduce the utility of the data the Commission collects.

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2) Resolve to compile understandable, credible, granular, and reproducible statistics based on reasonable benchmarks

Researchers and Commission staff alike need data collection and statistical compilation that answer basic questions whether a particular market is competitive, what market share a particular venture possesses, whether ventures frequently change prices and diversify services, how ventures respond to consumers’ wants, needs, and desires and what are the consequences of a Commission-initiated change in policy, or one proposed by stakeholders. The Commission’s statistical reports typically do not answer such questions, and researchers must attempt to extrapolate from the data presented.

For example, the Commission has abandoned requiring incumbent carriers to unbundle local loop elements, despite a congressional mandate to promote local exchange competition. The Commission appears to have abandoned requirements because the local exchange marketplace has become sufficiently competitive and market entrants have alternative sources of exchange access, i.e., cable television network infrastructure. The Commission also may have accepted arguments of

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78 Telecommunications carriers have the “duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.” 47 U.S.C. §251(3).
stakeholders that unbundling requirements are “confiscatory,” a government “taking of property,” and a major disincentive to next generation network investment. 79

Even as one has to speculate on the Commission’s rationale, a regrettable dearth of data supports any of these deregulatory justifications. Available Commission statistics count local exchange lines and attributes which type of carrier provisions, or resells these lines. But the FCC does not make a clear case that the local exchange marketplace has become sufficiently competitive, nor does the Commission provide statistical projections that assess the sustainability of competition should incumbent carriers no longer have to provide competitors with unbundled network element access. Instead the Commission, on really nothing more than a hunch, speculates that local exchange competition will thrive in all sectors including the “middle mile” links between multiple user locations.

Similarly on the issue of confiscation and taking, the Commission could have determined whether or not incumbent carrier unbundled network element pricing was sufficiently compensatory. Bear in mind that the Supreme Court, early on in the Commission’s campaign to promote local exchange competition, noted that neither the FCC nor any local access providing carrier, had produced evidence of under-compensation. 80 Some researchers have argued that FCC regulations remove incentives for carriers to invest in next generation network plant, particularly


local loop unbundling and other “sharing” requirements. Has the Commission ever corroborated this assertion? Recall that local loop unbundling was not something incumbent Local Exchange Carriers (“ILECs”) gave away or shared. Resellers and repackagers of local switching and routing plant paid the incumbents, albeit at a rate below what the ILECs would like to have been paid.

Deep, deep, deep in the FCC’s obscure statistics and data collection process one can find that compulsory rentals from incumbents to newcomers peaked at 12%, a level never close to forcing incumbents to invest in plant that they would have to make available solely to competitors.

The FCC stopped preparing this helpful source of information, but the percentage of resold ILEC lines has declined below the 8% reported in 2007 in light of the fact that interconnection charges for Competitive Local Exchange Carriers (“CLECs”) can exceed retail rates ILECs charge end users, a price squeeze, but one for which the FCC and the Supreme Court in the Linkline case have no concerns.

Assuming that that ILECs actually did increase their aggregate plant investment after the FCC abandoned local loop unbundling, did deregulation cause all of the new investment? Surely the business cycle has a substantial impact on carriers’ investment decisions and the cost of capital.

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Declining market share and revenues in core business lines such as Plain Old Telephone Service forced incumbent telephone companies to diversify and find new revenue generating lines of business. Whatever disincentive local loop unbundling imposed paled in comparison to incumbents’ need to find new revenues. Giving the ILECs due credit they have invested in next generation networks, mostly wireless plant for which no unbundling requirement ever applied. As to new found zeal in investing in Digital Subscriber Line, ILECs could make relatively small additional investments in already amortized copper plant to acquire a share in the growing broadband market.

It should not take extraordinary sleuthing for researchers to find answers to basic questions such as whether incumbent carriers had to make investments in plant solely to satisfy the demands of reseller competitors. Similarly the Commission should consider as a challenge worth answering any assertion by a stakeholder that Commission’s rules, regulations, and policies are unlawful and harmful to the economy.

3) **Seriously Consider the Consequences of Mergers to Consumers**

With rare exception the FCC finds a way to approve any and all mergers including ones where the acquiring company acquires market share and further concentrates the market. The Commission typically asserts that a merger will “promote competition,” but it supports this conclusion with a variety of qualitative forecasts about how the acquiring firm will become a better and more efficient competitor. The Commission’s analysis of most mergers emphasizes what the concessions the acquiring firm has “voluntarily” submitted rather than assess the true nature about the competitiveness of the market in question pre- and post-merger. The Commission does not conscientiously follow up post-merger to determine whether and how concessions involving measureable service commitments actually were undertaken.
Consider the wireless marketplace where FCC-approved mergers and acquisitions have so
concentrated the market that even the Commission recently has expressed some reservations.
Notwithstanding such concerns, the FCC has approved all albeit acquisitions, including ones by
AT&T and Verizon that now control over 60% of the total market with four national carriers
controlling over 91% of the market. A researcher must painstakingly examine almost 300 pages in
the Commission’s most recent Annual Report and Analysis of Competitive Market Conditions to
find the few empirical nuggets showing that even the Commission now has to conclude that all is
not well in the wireless marketplace.

In previous years, the FCC breathlessly endorsed an inference of robust competition and
enhanced consumer welfare, but after numerous approved mergers, the Commission had to make a
passing reference that the wireless market now has a Herfindahl-Hirschman Index (“HHI”) score of
2848 well in excess of Department of Justice antitrust guidelines that considers a market to be
“highly concentrated” if the post-merger HHI exceeds 1800. Nowhere in its comprehensive
examination of the wireless marketplace does the Commission directly consider the potential
consumer harms when the market becomes as concentrated as it is. The Commission did not
examine wireless carrier pricing to determine if consciously parallel conduct has occurred, nor did
the Commission consider the question whether robust competition might not exist even when four
or five carriers serve many localities.

84 Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993,
Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless,
Including Commercial Mobile Services, Fourteenth Report, WT Docket No. 09-66, FCC 10-81, Table 3,
Chart 1 at p. 31 (2010).

85 Id. at ¶49, p. 40.
4) Commit to Best Practices That Would Survive Peer Review

When an academic researcher seeks to publish work in a credible journal, external and unaffiliated third party experts examine the work without knowing the author’s identity. This peer review process subjects the research to close scrutiny to ensure that the work complies with baseline standards to assure that the findings are credible and reproducible by others. Peer review identifies and legitimizes true research and differentiates it from documents that simply make assertions, conclusions, and analysis of unproven facts, statistics, and assumptions.

The Commission’s notice and comment process, which solicits filings from interested parties, provides a forum for both legitimate research and advocacy documents masquerading as research. Sponsored researchers submit white papers, affidavits, expert reports and other forms of advocacy documents that have a pre-established agenda and outcome. These type documents predominate, because with rare exception only parties with much directly at stake will commit the resources needed to participate in Commission proceedings.

Ideally the FCC should have the resources and incentive to compile its own evidence, using empirical research tools and best practices. Failing that the Commission should fund third party research as it has done in preparation of the National Broadband Plan. Typically the Commission solely relies on the filings of interested parties, which by definition have a biased point of view and policy agenda. In order to separate advocacy from empirical data, the FCC must commit to

See, e.g., Harvard University, Berkman Center for Internet and Society, NEXT GENERATION CONNECTIVITY: A REVIEW OF BROADBAND INTERNET TRANSITIONS AND POLICY FROM AROUND THE WORLD (Oct. 2009); available at: http://www.fcc.gov/stage/pdf/Berkman_Center_Broadband_Study_13Oct09.pdf.
practices that can distinguish the two. Peer review can achieve that goal, yet for some inexplicable reason the Commission rarely uses this process even though it has a statutory mandate to do so. 87

The Commission showcases on its web site very few instances where it uses peer review, the most recent a 2008 investigation of the Maritime Automatic Identification Systems. 88 In other instances the Commission relies on third party research, but for some unexplained reason it refuses to subject the research to scrutiny by the general public. 89

Too much is at stake for the FCC not to use best practices in its acquisition of data, its compilation of statistics and its establishment of rules, policies, and regulations based on its analysis of the statistics. The Commission must operate under the premise that any rulemaking must comply with best practices where data is used to justify a policy initiative.

5) Use Open Hearings and Compile a Complete Evidentiary Record

Over the last thirty years the FCC has all but abandoned use of hearings before Administrative Law Judges, or the Commissioners themselves. Whatever gains the FCC has accrued for itself and stakeholders in administrative convenience and reduced costs, the Commission risks losing in terms of the quality of the evidence it reviews. The final perfunctory hearing and vote by


89 Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 231 (2008)(FCC did not comply with the Administrative Procedure Act when it redacted studies on which it relied in promulgating rules and when the Commission failed to provide a reasoned explanation for its choice of an extrapolation factor for predicting how quickly broadband over powerline (BPL) emissions attenuate).
the Commissioners culminates much behind the scenes maneuvering often involving ex parte presentations and the brokering of concessions among major stakeholders. This scenario emphasizes process over substance with no guarantee that a complete evidentiary record will get generated.

The public interest requires the Commission to have an open mind in its proceedings and to accept rational inferences from the data collected no matter how politically unpopular. Congress should not have to enact reminders of this core regulatory duty.

III. Limited But Essential Statutory and Regulatory Remedies

A. Congress Should Act

While the FCC needs no new congressional mandate to specify its duty to compile data and disclose statistics about the current state of the telecommunications and information marketplace, the Commission does need statutory guidance elsewhere. In light of the reversal of the FCC’s attempt to stretch its jurisdiction to impose nondiscrimination and other responsibilities on ISPs, Congress should amend the Communications Act to add a new Title that creates a limited and specific set of regulatory requirements applicable to Internet access providers. An explicit statutory mandate would eliminate the false dichotomy created by the FCC to differentiate telecommunications used to provide an information service and telecommunications offered as a standalone service. In both instances the telecommunications facilities used are identical. The FCC has rationalized a difference by choosing to apply the telecommunications service classification when telecommunications is offered, while applying the information service when telecommunications is provided as an integral, but apparently unseverable part of an information service.
Only the legislature can amend the organic law specifying the scope of FCC jurisdiction and identifying what services and providers of these services are subject to Commission jurisdiction. Congress should identify the telecommunications components that provide Internet access to end users, among ISPs, and from content providers. Such specificity would eliminate any question that the FCC has a lawful duty to ensure that access to the Internet complies with the traditional Title II obligations of nondiscrimination and transparency even though ISPs, as information service providers, do not bear the duty of providing universal service. A specific Title on Internet Access would eliminate confusion about whether ISPs will be reclassified as common carriers and subject to all the Title II requirements.

The FCC in 2005, as augmented by recent efforts, has identified what minimum requirements ISPs should satisfy. These requirements collectively do not convert ISPs into telecommunications service providers, but show that because nondiscriminatory and open Internet access has become essential to national welfare and the public interest, the FCC should have explicit statutory authority to safeguard consumers. In 2005 a unanimous FCC, led by a Republican Chairman, identified four Internet freedoms:

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The Commission articulated its support in terms of four principles “to encourage broadband deployment and preserve and promote the open and interconnected nature of public Internet.” 91 The four principles are:

(1) consumers are entitled to access the lawful Internet content of their choice;

(2) consumers are entitled to run applications and services of their choice, subject to the needs of law enforcement;

(3) consumers are entitled to connect their choice of legal devices that do not harm the network; and

(4) consumers are entitled to competition among network providers, application and service providers, and content providers.

Prior to the court reversal of the FCC’s sanctioning of Comcast for meddling with subscriber traffic, the FCC issued a Notice of Inquiry (“NOI”) with an eye toward codifying the four so-called Internet freedoms, plus an explicit requirement of nondiscrimination and transparency. 92 The NOI sought to begin “an open, public process to consider the adequacy of the current legal framework within which the Commission promotes investment and innovation in, and protects consumers of, broadband Internet service.” 93 The FCC posed three primary questions the answers of which would steer the Commission to maintain the limited, if any, regulatory foundation available from Title I, to reclassify wired Internet access, e.g., Digital Subscriber Line and Cable


93 Id. at ¶1.
Modem service, as telecommunications services, subject to Title II, common carrier regulation, or to pursue a “Third Way” where the Commission would target selective portions of Title II regulation solely to the portions of Internet access that involves the actual connection using telecommunications lines. \footnote{94}

The FCC’s NOI strongly implied that Commission management objects to the D.C. Circuit Court’s analysis and still believes that Internet access “networks are within the Commission’s subject-matter jurisdiction over communications by wire and radio and historically have been supervised by the Commission.” \footnote{95} The NOI stated that until the Comcast decision few observers doubted whether the Commission had lawful authority to regulate broadband Internet services. \footnote{96}

\footnote{94} “First addressing the wired service offered by telephone and cable companies and other providers, we seek comment on whether our “information service” classification of broadband Internet service remains adequate to support effective performance of the Commission’s responsibilities. We then ask for comment on the legal and practical consequences of classifying Internet connectivity service as a “telecommunications service” to which all the requirements of Title II of the Communications Act would apply. Finally, we identify and invite comment on a third way under which the Commission would: (i) reaffirm that Internet information services should remain generally unregulated; (ii) identify the Internet connectivity service that is offered as part of wired broadband Internet service (and only this connectivity service) as a telecommunications service; and (iii) forbear under section 10 of the Communications Act from applying all provisions of Title II other than the small number that are needed to implement the fundamental universal service, competition and small business opportunity, and consumer protection policies that have received broad support.” \textit{Id.} at \textsection{2}.

\footnote{95} \textit{Id.} at \textsection{10}. \textit{See also}, Framework for Broadband Internet Service, Notice of Inquiry Powerpoint summary available at: \url{http://reboot.fcc.gov/c/document_library/get_file?uuid=366e0dc4-c4ef-4525-bc36-d6a8dd75da4e&groupId=19001}.

\footnote{96} “Before the Comcast case, most stakeholders—including major communications service providers—shared the Commission’s view that the information service classification allowed the Commission to exercise jurisdiction over broadband Internet services when required.” \textit{Id.} at \textsection{8}.  

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The FCC devoted substantial space in the NOI reasserting why it does have a direct statutory authority to regulate Internet access. Even as the FCC persists in making possibly reasonable inferences to statutory language containing no specific regulatory mandate, the Commission stated that:

“[i] Throughout the last decade, the Commission has stated its consistent understanding that Title I provided the Commission adequate authority to support effective performance of its core responsibilities. Commissioners, including the two former Chairmen who urged the information service approach, as well as cable and telephone companies and other interested parties, individually expressed this understanding. In Brand X, the Supreme Court appeared to confirm this widely held view, stating that “the Commission remains free to impose special regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction.” 97

The FCC did acknowledge that the Comcast decision “causes us to reexamine our ability to rely on Title I as the legal basis for implementing broadband policies.” 98 Accordingly the Commission asked whether in the wake of that decision what overall scope of authority remains available should the Commission retain the information service classification for Internet access.

The Commission’s second regulatory alternative considered a reclassification of Internet access so that all aspects of Title II common carrier regulatory could apply and enable the Commission to establish “rules furthering universal service, privacy, access for persons with disabilities, and basic consumer protection, among other federal policies.” 99 ISPs universally oppose

97  Id. at ¶30 (citation omitted).
98  Id.
99  Id. at ¶52.
this option claiming that it would impose unnecessary regulatory burdens and create disincentives for investment in infrastructure and expanded staff hiring.

The FCC offered a third alternative that proposes to finetune the scope of Title II coverage, limiting it to the telecommunications links used to provide Internet access, while also having the Commission forbear from applying all elements of common carrier regulation. “This third way would involve classifying wired broadband Internet connectivity as a telecommunications service . . . , but simultaneously forbearing from applying most requirements of Title II to that connectivity service, save for a small number of provisions.” 100 The Commission has applied this streamlined common carrier model to wireless cellular radiotelephone carriers, under an explicit statutory mandate.

Chairman Genachowski and his staff have expressed a clear preference for this Third Way option. 101 However even with the immediate and extensive forbearance from regulation, this option

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100 Id. at ¶67. “Specifically, if the Commission decided, after appropriate analysis, to classify wired broadband Internet connectivity (and no other component of wired broadband Internet service) as a telecommunications service, it could simultaneously forbear from applying all but a handful of core statutory provisions—sections 201, 202, 208, and 254—to the service. Two other provisions that have attracted longstanding and broad support in the broadband context—sections 222 and 255—might also be implemented for the connectivity service, perhaps after the Commission provides guidance in subsequent proceedings as to how they will apply in this context.” Id. at ¶68.

does entail a re-classification of statutory service definitions. Shifting from information service to telecommunication service, subject to regulatory forbearance nominally vests greater regulatory authority in the FCC. Stakeholders and reviewing courts welcome reclassifications that result in less regulatory authority and commensurately less regulation. The Third Way option in effect re-regulates a service that either never qualified for regulation, e.g., cable modem information service, or had previously qualified for deregulation, e.g., DSL service, that the FCC initially classified as a telecommunications service, but later reclassified it as an information service.

Should the FCC adopt and apply the Third Way option, the Commission will have explicitly stated that ISPs, like cellular telephone companies, trigger two or more regulatory classifications when offering a retail service. The Commission has evidenced a preference for applying a single, least regulatory classification to convergent services. When obligated to apply two or more classifications, as currently applies to wireless telephone calls, Title II common carriage, and wireless Internet access, Title I information service, jointly provided by cellular telephone companies, the Commission largely defaults to the less regulatory classification, which perhaps should provide some indication that the Commission will seeks to regulate aggressively. Nevertheless carriers subject to even the prospect of triggering a potentially more expansive regulatory regime have launched a costly campaign to convince Congress to preempt the FCC from undertaking a Third Way reclassification of Internet access.

Even as DSL and cable modem service providers act to prevent the Commission from considering a reclassification of service, curiously no one disputed the FCC’s jurisdiction and rationale for narrow application of selected sections of Title II regulatory authority over Internet access).
authority, to sanction the Madison River telephone company when the company blocked DSL subscriber access to VoIP services. The matter resulted in a voluntary forfeiture of $15,000 by the company instead of litigation without a complete examination of the jurisdictional basis for claiming jurisdiction over a DSL information service. However the Commission did expressly state that it reserved the option of reviewing any complaints against the company—presumably retroactively and prospectively—under its authority in Sec. 208 (Title II) of the Communications Act. Madison River provides some basis for FCC intervention to safeguard the public interest and assert jurisdiction over the telecommunications links used to provide DSL Internet access. But a far better option would be to have Congress explicitly identify the scope of FCC jurisdiction over the telecommunications links used to provide Internet access.

B. Regulatory Remedies in the Absence of New Legislation

In the absence of receiving explicit statutory authority for limited regulation of Internet access, the FCC will attempt to fashion a remedy, albeit one subject to litigation and delay. If the FCC has to seek reform without legislative guidance the Commission has to develop the capability for subjecting convergent ICE ventures to multiple regulatory classifications and to use structural safeguards as needed.

1) CMRS Hybrid Regulation

Congress has provided the FCC with one hybrid regulatory model, one that authorizes the FCC to deviate from applying the complete array of Title II statutory requirements on wireless

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Commercial Mobile Radio Service ("CMRS") providers. While this model only allows modification of a single regulatory model, telecommunications service and Title II common carriage requirements, the model does provide the basis for the FCC to undertake empirical research with an eye toward determining what regulatory reform appears necessary. The CMRS model authorizes the FCC to streamline Title II requirements based on a current assessment of the competitive posture of the wireless marketplace. More broadly the CMRS model provides some basis for the FCC to consider what to do when changed circumstances alter the array of services provided by a regulated carrier.

The Commission has considered the wireless market sufficiently competitive to abandon many Title II requirements, while also acknowledging that CMRS carriers provide information services not at all subject to Title II. Wireless carriers do not have to file tariffs and comply with other regulatory burdens, even as they still must interconnect with other carriers, provide access to “roaming” subscribers of other carriers, free 911 emergency access and number portability. While the FCC appears to overemphasize CMRS carriers’ unregulated information service capabilities, at least the Commission is able to identify a carrier triggering two separate regulatory regimes, and to some extent calibrate the scope of its regulatory oversight based on whether the CMRS carrier provides a telecommunications or information service.

2) **Eliminate the provide/offer distinction**

Even though the FCC cannot subject information service providers to Title II regulation, the Commission should eliminate one of the false rationales used by the Supreme Court to justify a vast information service safe harbor for Internet access services. The Commission should explicitly recognize that the telecommunications technologies and facilities used to provide end user
telecommunications and to provide the links needed for Internet access are identical. If such facilities are functional equivalents, then it makes no sense for two quite different regulatory regimes to apply. Over time reviewing courts might accept an FCC initiative to reclassify Internet access, not as an after the fact rationale, but in light of changed circumstances.

If the Commission were to eliminate the technological basis it used to support divergent regulatory treatment, then perhaps a reviewing court would accept the Commission’s premise that Internet access has become such an essential service as to no longer qualify for a deregulated safe harbor. Bear in mind that the FCC converted DSL service from a regulated classification to an unregulated one based on changed circumstances. As politically difficult as it may be to re-regulate, the FCC should eliminate a invalid rationale for justifying a false regulatory dichotomy between identical technologies used to provide both telecommunications and information services.

Note that despite having reclassified DSL as an information service, without challenge the FCC sanctioned a DSL service provider that deliberately blocked subscriber access to an Internet-mediated service. No party objected to the Commission’s view that even information service provider cannot exploit their largely unregulated status to engage in an unreasonable and anticompetitive practice. No one sought to invoke the information service classification as foreclosing the FCC from securing a commitment from an ISP not to abuse its position as gateway to the Internet.
IV. Conclusions

The D.C. Circuit Court of Appeals reversal of the FCC’s attempt to sanction Comcast’s unwarranted meddling of subscriber traffic is the latest of several instances where the FCC has to face the consequences of abdicating regulatory oversight. Having applied the information services deregulatory safe harbor to every form of broadband Internet access, the FCC made a one-way, irreversible determination that such services require no regulatory oversight. The Commission attempted to corroborate this conclusion with questionable statistics showing the robustly competitiveness of broadband markets and the ubiquity of access to such services by all Americans wherever located.

The FCC has recanted such summary conclusions and belatedly has come to recognize the need to impose some consumer safeguards in the information services marketplace. But now making a case for the essentialness of broadband access, and now generating statistics that show less than idea marketplace conditions cannot undo the careless decision to stretch the information service classification far and wide. The Commission cannot now “find” a direct or even permissibly indirect statutory mandate to impose minimal Title II safeguards to services providers not offering Title II telecommunications services. Only Congress can provide the FCC with such authority.

It is quite likely that Congress will not pass curative legislation providing the FCC with direct statutory authority to establish binding rules promoting nondiscriminatory Internet access on fair terms and conditions. Once freed of pesky common carrier regulations, ISPs will lobby Congress to maintain the deregulatory status quo. Accordingly the FCC will have to find whether and how it can impose any structural separation of telecommunications and information services and other forms of regulatory oversight based on existing and indirect statutory authority.
The Commission risks again overstepping its authority, but it can make its best case for acting under changed circumstances if it resolves to do a better job of collecting, disseminating and analyzing data. This paper has identified a number of ways the FCC can generate a more complete evidentiary record that identifies the true current environment instead of one FCC managers want to see. With greater clarity in its mission to serve the public interest, rather than achieve a preordained, deregulatory outcome, the FCC may once again convince reviewing courts that the Commission is worthy of deference to its lawfully recognized expertise and statutory analysis.