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The Nation's Broadband Success Story: The Secrecy of FCC Broadband Infrastructure Statistics

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I. Introduction

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

U.S. Secretary of Commerce Carlos M. Gutierrez, January 31, 2008.¹

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

The accuracy and viability of the FCC's methodologies for measuring broadband deployment, and the agency's pronouncements about what those statistics mean for consumers, have been well covered in the peer-reviewed literature, and often in a critical light.3 Much less discussed has been the non-transparency of the information that the FCC compiles before announcing its broadband deployment statistics—incoming data supplied by private telecommunications companies.

This paper contributes to the literature by analyzing why this incoming data should be made transparent to the public, and argues that the court's ruling in favor of the FCC's use of FOIA Exemption 4 to withhold the information sought by the Center for Public Integrity was in error. The court and the FCC erred in characterizing the information in question as "trade secrets," and in its ruling the court failed to consider important precedents in the jurisprudence of FOIA Exemption 4. Those precedents should have been applied to the unique situation of the FCC's broadband

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The National Telecommunications and Information Administration (NTIA) is an agency within the Department of Commerce that advises the Executive Branch on telecommunications policy for economic and technological development. See National Telecommunications and Information Administration, About the NTIA, http://www.ntia.doc.gov/about.html (last visited Feb. 19, 2009).


deployment statistics, in which telecommunications companies have furnished information to the government voluntarily (in part), while that information is then used to promote the supposed success and advancement of an infrastructure that could potentially benefit all Americans.

The next section of this paper explores the controversies surrounding the FCC’s zip code-based broadband availability statistics, and the American government’s pattern of promoting statistical results that are based on heavily criticized measurement methodologies. The third section discusses in detail the legal battle between the Center for Public Integrity and the FCC over the effort to make company-supplied broadband deployment information more transparent. The fourth section covers important judicial precedents relating to FOIA Exemption 4 and why the court erred in not applying those precedents to the CPI case. The paper then concludes with a discussion of the viability and believability of the FCC’s promotion of the American broadband network, when such pronouncements are based on incoming information that has been mischaracterized as “trade secrets” and incorrectly withheld from the public.

II. The FCC’s Broadband Deployment Statistics

The deployment of broadband access to American consumers became a matter of federal policy in the Clinton administration in the 1990s, during which Vice President Al Gore took the lead on telecommunications policy and pursued a personal interest in the development of broadband. At that time, broadband was promising vast improvements in information access and distribution over then-predominant dial-up access. Gore added

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4. The term “broadband” refers to the capacity to transmit signals (in the form of voice, video, or data) at higher speeds and with greater quality than the preceding technology, narrowband. In wired communications, broadband is usually enabled by coaxial or fiber-optic cables. Wireless broadband is also made possible through microwave transmissions. See Federal Communications Commission, Consumer & Governmental Affairs Bureau: Getting Broadband, http://www.fcc.gov/cgb/consumerfacts/highspeedinternet.html (last visited Feb. 19, 2009). From 1999 to 2008, the FCC also defined “broadband” as 200 kbps download or upload speed. See infra notes 27-29 and accompanying text.

5. The Telecommunications Act of 1996, formulated during the Clinton administration, requires the FCC to determine if advanced telecommunications capability (under which “broadband” is typically categorized) is being deployed in a “reasonable and timely” fashion. See Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (codified as amended at 47 U.S.C. § 706(b) (1996)).

6. See Bob Davis, On Broadband Future, Gore and Bush Offer Crucial Differences, WALL ST. J., Oct. 24, 2000, at A1 Gore’s personal interest in the topic of internet access is well known, and he probably coined the term “information superhighway” in 1990, when as senator from Tennessee he introduced a bill that would have mandated federal government involvement in the
the topic of broadband deployment to his 2000 presidential campaign, and hinted that his administration would encourage increased Federal Communications Commission ("FCC") regulations and subsidies to cable and telephone firms in a national effort to make broadband-speed access to the information superhighway available to everyone.\(^7\) Gore’s opponent George W. Bush, the eventual victor in the 2000 presidential election, did not make a commitment to the issue during the election season, though his campaign advisors and future members of his administration did study market-based and non-regulatory approaches to the issue of broadband deployment.\(^8\)

As president, by 2002 Bush had adopted broadband deployment as an economic priority, and early that year FCC Chairman Michael K. Powell began an intensive investigation into all existing regulations that affected broadband deployment.\(^9\) The catalysts for nationwide broadband deployment during the Bush administration were to be market-driven processes, not government regulations.\(^10\) As early as the summer of 2002, the administration considered formulating an enforceable national broadband deployment policy.\(^11\) However, the only true developments during this period were statements from the administration that Bush would

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creation of educational software. Gore’s later statements on his internet policy interests gave rise to a myth that he claimed to have invented the Internet, a statement he never made but the legend of which is often used by his political opponents and detractors. See Declan McCullagh, No Credit Where It’s Due, WIRED, Mar. 11, 1999, http://www.wired.com/politics/law/news/1999/03/18390 (last visited Feb. 19, 2009); Robert Parry, He’s No Pinocchio: How the Press has Exaggerated Al Gore’s Exaggerations, WASH. MONTHLY, Apr. 2000, http://www.washingtonmonthly.com/features/2000/0004.parry.html (last visited Feb. 19, 2009).

7. See Davis, supra note 6.

8. Id.


10. The acceptance of broadband deployment as a national economic priority may have been influenced by industry lobbyists who desired assistance in boosting the broadband market, as consumers in early 2002 were reluctant to take on the new technology or the increased costs of broadband service in the home. Development of the broadband infrastructure was lagging as well. See John Van, Broadband Industry Looks for Boost, CHICAGO TRIB., Jan. 31, 2002, at 3; The Right Signal on Broadband, L.A. TIMES, Feb. 10, 2002, at M4.

11. See Allen & Krim, supra note 9, at A8. The Bush administration demurred on developing a policy at this time because of sharply divided opinions from industry. Id.
promote relaxed FCC regulations toward high-speed internet service. The vagueness of these statements inspired criticism from industry lobbyists and consumer groups.

At a March 2004 speech in New Mexico during his reelection campaign against John Kerry, Bush revived his plans for broadband deployment as a boost to the nation’s economy and pledged to deliver affordable broadband to all American homes by 2007. By that point in time, the U.S. broadband market had already fallen significantly behind other industrialized nations, particularly those in Asia, as American telecommunications companies had to embark on a laborious upgrade of the country’s wireline infrastructure. This upgrade was also slowed by the reluctance of the leading firms to roll out broadband on a wide basis without knowing beforehand how many consumers would partake of the service; while at the time, those firms were dedicating more money to wireless and video applications. The firms also claimed regulatory uncertainty due to the possible application of either telecommunications service or information service regulations.

Growth in the broadband market overall was stilted because the prohibitive costs of expanding the existing telecommunications


13. Id.

14. See John Van, Bush Backs Broadband Push – Timing of Comment Stirs Discussion, CHICAGO TRIB., Mar. 27, 2004, at 1. Commentators suspected that this new announcement was merely an election year ploy, a theory bolstered by the fact that Democratic frontrunner John Kerry raised the issue shortly thereafter. More specifically, Bush’s announcement was widely criticized for its lack of detail on how the 2007 goal would be met. There was also no detail on the word “affordable” and how price reductions or access for poor households would be achieved, be it through subsidies or other means. See also Allen, Bush Sets Internet Access Goal, WASH. POST, Mar. 27, 2004, at A4.

15. See Leslie Walker, The Promise of a Broader Superhighway, WASH. POST, Apr. 1, 2004, at E1. By mid-2003, 80 percent of American homes had at least one option available for high-speed Internet access, but only 21 percent of those homes had signed up for service. These figures in the Walker article were compiled from a then-recent estimate by the Yankee Group, an international technology research and consulting firm. See Yankee Group, About Us, http://www.yankeegroup.com/about.do (last visited Feb. 19, 2009). The disparity between availability and adoption has long been a tripping point in assessments of how well the United States is deploying broadband. As early as 2001, FCC Chairman Michael K. Powell asserted the government’s position that the availability of broadband, rather than its adoption by consumers, was the more useful measure of the nation’s progress on broadband deployment. See Chairman Michael K. Powell, Remarks at the National Summit on Broadband Deployment (Oct. 25, 2001), http://www.fcc.gov/Speeches/Powell2001/spmklp110.html (last visited Feb. 19, 2009).

infrastructure had given incumbent firms inordinate control over market entry, thus preventing robust competition.\(^\text{17}\) Meanwhile, a significant policy-related roadblock to greater broadband competition was the traditional regulatory disparity between cable and telephony, as firms in both of these industries were then entering the broadband market, and there was also controversy over the applicability of information service regulations.\(^\text{18}\) Experts also blamed the slow American development of broadband on the Bush administration's failure to develop a viable national deployment strategy,\(^\text{19}\) while nations with strong state deployment policies (most notably Japan and South Korea) were able to deploy broadband at a much faster rate and with greater technological rewards for citizens.\(^\text{20}\)

Despite this lack of a national broadband policy, and the poor state of broadband availability and competition in America, in April 2004 the Bush administration proclaimed that the market was developing on pace and that America was on its way to becoming the world leader in broadband deployment. In the words of the White House, "the Administration has a record of comprehensive and demonstrably effective broadband initiatives that are creating an economic and regulatory climate in which broadband can flourish."\(^\text{21}\) The April 2004 White House document used the FCC's zip code-based statistics to demonstrate the reach of broadband in America. According to the FCC's figures, at that time approximately 90 percent of U.S. zip codes had access to at least one wired broadband offering, and 75

\(^{17}\) See Ketter, supra note 3, at 251-58.


\(^{19}\) An example of a more successful national broadband deployment strategy can be found in Japan, where the government drafted a blueprint for collaboration among all stakeholders including private firms, consumer groups, and regulators. See generally Yasu Taniwaki, Broadband Deployment in Japan, Oct. 25, 2004, http://www.neca.org/media/taniwaki.pdf (last visited Feb. 19, 2009).

\(^{20}\) See Dan Mitchell, A Broadband Beat-Down, N.Y. TIMES, June 25, 2005, at C5. As of the date of Mitchell's article, Japanese consumers with broadband access enjoyed download speeds 16 times greater than that available to American consumers, and at about half the price. It should be noted that Japan and other nations that have rapidly deployed broadband services have the advantage of geographic areas that are smaller and consumers that are more concentrated spatially than in the United States.

percent of zip codes had access to broadband via both cable modem and DSL (digital subscriber line). While these percentages appeared impressive, the FCC’s use of zip codes to measure broadband availability for American consumers was becoming a source of great controversy.

A. Zip Code-Based Measurements of Broadband Deployment

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

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

22. Id.


automatically lead to the same options for all other residents of the zip code.26 Also, until early 2008 the FCC counted as "broadband" any service that gave users download speeds of more than 200 kbps.27 Despite rapid technological changes in the field, this conception of broadband speed at the FCC had remained unchanged since 1999.28 This resulted in the measurement of certain service offerings as "broadband" even though they wouldn't be considered so in other nations.29 These questionable measurement methodologies had resulted in inflated broadband deployment figures ever since those methodologies were formulated.30

Despite the seemingly impressive statistics indicating that almost all of America's zip codes enjoyed broadband availability, by 2006 the United States had fallen to 15th in the world for broadband deployment, with service available to only 19.6 percent of residents.31 The U.S. fared even worse in a metric known as the Digital Opportunity Index, which measures broadband access via eleven different variables including price, proportion of users online, and proportion of homes with access. Here the U.S. ranked 20th in the world for 2005-2006.32 Even in areas possessing more than one


27. Kilobytes per second.

28. In 1999 the FCC defined broadband as "the capability of supporting, in both the provider-to-consumer (downstream) and the consumer-to-provider (upstream) directions, a speed ... in excess of 200 kilobits [sic] per second (kbps) in the last mile." See Federal Communications Commission, Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, CC Docket No. 98-146 (Feb. 2, 1999), available at http://www.fcc.gov/Bureaus/Common_Carrier/Reports/fcc99005.txt at ¶ 20 (last visited Feb. 19, 2009).


30. See Hammond, supra note 3, at 542-45.

31. This ranking was made by the Organization for Economic Cooperation and Development (OECD). See Organization for Economic Cooperation and Development, Directorate for Science, Technology and Industry: OECD Broadband Statistics to December 2006, http://www.oecd.org/document/7/0,2340,en_2649_34223_38446855_1_1_1_1,00.html (last visited Feb. 19, 2009). The OECD statistics for December 2006 were the most recent available at the time of writing.

32. The Digital Opportunity Index is measured by the International Telecommunications Union (ITU). See International Telecommunications Union, The Digital Opportunity Index
available broadband service, "competition" was usually in the form of a
duopoly consisting of the independent local exchange carrier (the local
phone company) offering DSL service and the cable television company
offering cable modem service, with very little price competition and the
bundling of broadband service with other options (such as premium cable
channels) that consumers may not have desired.33

This disconnect between the availability of broadband in entire zip
codes and its adoption by actual residents was heavily criticized by FCC
Commissioner Michael J. Copps. In a 2006 op-ed piece in the Washington
Post, Copps called for an overhaul of the FCC's methodology for
measuring broadband deployment.34 Copps acknowledged that the
threshold of "broadband" speed as measured by the FCC—200 kbps—was
an outdated definition of the term, while the zip code-based penetration
statistics were too geographically diffuse to measure actual deployment of
services.35 The lack of true competition had also stifled technological
innovation in the American broadband market, with Copps decrying the
fact that Americans were paying twice as much for one-twentieth the
download speeds available in Asia and Europe.36

B. The Politicization of Broadband Deployment Statistics

The zip code-based measurement methodology was also heavily
criticized by industry experts, with many calling for true representative
samples of a given area, rather than the FCC’s method of declaring an
entire zip code to have broadband availability even if as few as one
household in the area had realistic access.37 Industry experts have noted
that telecommunications regulatory decisions are often shaped by political
goals or desired future benefits, and such regulations are not necessarily

19, 2009). The Digital Opportunity Index statistics for 2005-06 were the most recent available at
the time of writing.

33. See Phi, supra note 3, at 366-68. For commentary on the state of competitiveness in
2006, see also Nate Anderson. Broadband Competition? Not So Much, ARSTECHNICA, July 12,

34. See Michael J. Copps, America’s Internet Disconnect, WASH. POST, Nov. 8, 2006, at
A27. In 2006, Copps was one of two Democratic FCC Commissioners serving under the
Republican Bush administration.

35. Id.

36. Id.

37. See e.g. Eric Bangeman, US is a Broadband Laggard, According to FCC Commissioner,
consistent with good social policy in the present. The politicization of telecommunications deployment reports is a noted phenomenon, with FCC regulators tending to over-value immediate benefits while avoiding the uncertainty of future technological developments, and allowing short-term considerations to outweigh future deployment strategies. Consequently, some industry experts have suspected that the FCC's broadband statistics, and even its entire zip code-based methodology, were meant to skew deployment results upward in order to reflect favorably on telecommunications players that had built relationships with lawmakers in the Bush administration.

Experts have also detected politicization in the FCC's periodic reports to Congress on the state of American broadband deployment, with Republican commissioners typically proclaiming that deployment is progressing nicely, in line with President Bush's mandate; while Democratic commissioners, most notably the aforementioned Copps, typically lament America's poor performance on broadband deployment as compared to other nations. A telling example is the 2004 FCC report, which focused on election-year political issues like economic development for rural areas and minority constituencies, while saying little about technological innovation.

38. See e.g. Alfred E. Kahn, Telecommunications: The Transition from Regulation to Antitrust, 5 J. ON TELECOMM. & HIGH TECH. L. 159, 175-86 (2004). This article deals primarily with the specific issue of network neutrality, but the section cited offers an exemplary analysis of politicized regulations at the FCC.

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


42. See generally Federal Communications Commission, Availability of Advanced Telecommunications Capability in the United States, Fourth Report to Congress, FCC 04-208, GN Docket No. 04-54 (Sept. 9, 2004), available at http://hraunfoss.fcc.gov/edocs_public /attachmatch/FCC-04-208A1.pdf (last visited Feb. 19, 2009). Such sentiments can be found in the individual commissioner statements that accompany the 2004 report. The three Republican commissioners (Chairman Michael K. Powell, Kathleen Q. Abernathy, and Kevin J. Martin) were all pleased with the progress of broadband deployment to Americans at large and to individual constituencies. The two Democratic Commissioners (Michael J. Copps and Jonathan S. Adelstein) issued dissenting opinions critical of American broadband availability, in quantitative terms and in comparison to other nations. Id. at 3-7.
Even other entities within the U.S. Government took the FCC to task for its statistical methods. In 2006, the Government Accountability Office ("GAO") conducted its own investigation into American broadband availability and found many flaws in the FCC’s zip code-based measurement methodologies, most notably the fact that the FCC only measured large regions where particular subscribers had obtained broadband access, but not the smaller localities where telecommunications companies had actually deployed broadband infrastructure to be made available to potential subscribers. Hence, the FCC was able to report on broadband availability at a diffuse scale, but was unable to determine if broadband was actually available to the majority of residences in a given large region, especially in rural areas. The controversial measurement methodology also attracted the attention of Congress. In November 2007 the House of Representatives passed a bill known as the Broadband Census of America Act, which called for a drastic overhaul to the broadband measurement methodologies used by the FCC and the National Telecommunications and Information Administration ("NTIA"). In September 2008 both houses of Congress passed an updated version of the bill, known as the Broadband Data Improvement Act. This bill was signed into law by President George W. Bush on October 10, 2008, and requires the FCC to revise its definition of broadband, identify with more detail the broadband options available to consumers, and revise the information requirements to be observed by providers when they report on broadband deployment to the FCC.

The new statute, while largely avoiding technical specifications, codified into law some enhancements to measurement methodology that had been promised less formally by the FCC several months before. In a March 19, 2008, press release, the FCC stated that it was planning to expand the scope of broadband reporting by requiring telecommunications


44. Broadband Census of America Act of 2007, H.R. 3919, 110th Cong. (2007). This bill passed the House of Representatives by voice vote only, and individual votes were not recorded. This particular bill was not debated in the Senate, where discussions of a modified version of the bill were taking place. See infra note 45 and accompanying text.

companies to report on the quantity of subscribers by census tract (typically a geographic area more precise than an entire zip code) and improving its measurements of wireless broadband deployment. The new guidelines also reformulated the FCC definition of broadband to at least 768 kbps and required providers to report on the speeds offered in different service packages. However, the new guidelines still did not require providers to report on their prices, reducing the price-per-byte information available to consumers who may be lucky enough to have competing vendors from which to choose.

After announcing that it sought comment on broadband pricing and availability, as well as its proposed new measurement methodologies, the FCC couldn't resist referencing its own concurrent report showing that "broadband services are currently being deployed to all Americans in a reasonable and timely fashion." On the day the new measurement standards were announced, FCC Chairman Kevin Martin noted that 82 percent of the country had access to DSL service and 96 percent had access to cable modem service. But these percentages were still based on the zip code methodology and the old 200 kbps broadband threshold; Martin did not mention that regardless of the accuracy of the reported percentages, only 22 percent of Americans had actually signed up for broadband service. Martin also did not acknowledge that of the premises receiving


broadband service, 35 percent were businesses and institutions, and not the residential users that are the usual focus of FCC statements on broadband deployment.\textsuperscript{51}

The Federal Communications Commission\textsuperscript{52} and the National Telecommunications and Information Administration\textsuperscript{53} continue to proclaim the success of America’s broadband deployment program and the eventual realization of President Bush’s mandate of access for all citizens. But even though critics and industry watchdogs have long been aware of the problems with the FCC’s zip code-based measurement methodology and its outdated conception of broadband speed, one matter had largely escaped attention until a citizens’ group known as the Center for Public Integrity\textsuperscript{54} filed a Freedom of Information Act request with the FCC. The issue is whether the Commission’s broadband deployment statistics, regardless of their viability, are based on accurately reported information from private telecommunications companies.

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

While its outward weaknesses have been widely discussed, the FCC’s methodology for computing its broadband deployment statistics is based on incoming information that itself comes with no guarantee of accuracy or accountability. The FCC and the private companies that provide broadband service to American consumers have made use of an exemption to the Freedom of Information Act\textsuperscript{55}—the protection of trade secrets\textsuperscript{56}—to withhold this incoming statistical information from the public. This

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particular circumvention of the Freedom of Information Act inspired a lawsuit, *Center for Public Integrity v. FCC*\(^5\) in which the public interest group was unable to improve the transparency of this fundamental building block of the FCC’s broadband deployment statistics.

Since 2003, the Center for Public Integrity ("CPI") has operated a web site called "Media Tracker"\(^5\) that provides a graphics-based alternative to the zip code-based information provided by the FCC on telecommunications availability.\(^5\) In 2006, the CPI sought to improve Media Tracker’s level of detail by adding information on which particular companies offered broadband service within a given zip code, which types of broadband service were available to consumers, and which particular localities within a zip code were served. Finding that information of such specificity was not available in the FCC's publicly-released broadband statistics, on August 24, 2006, the CPI filed a FOIA request to obtain such information from the FCC.\(^6\) In particular, the CPI requested all information that had been reported on FCC Form 477 by telecommunications companies.\(^6\)

According to the CPI, the FCC did not respond to this request within twenty business days, which is required under FOIA.\(^6\) On September 25, 2006, the group promptly filed a complaint with the District Court of the District of Columbia, claiming a violation of FOIA by the FCC.\(^6\) The next

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61. See supra note 24 and accompanying text.
62. 5 U.S.C. § 552(a)(6)(A)(i) (2002). When a FOIA request is denied by a government agency, the agency must provide in writing the reason for the denial along with a notification that the requester has the right to appeal the denial. No such information was provided to the Center for Public Integrity by September 25, 2006. However, the exact measurement of the 20-day response period is uncertain. See infra note 64.
day, the FCC sent a belated fax to the CPI disclosing its reasons for denying the initial FOIA request.\textsuperscript{64} The FCC claimed that the records requested by the CPI contained "commercially sensitive, competitive information" and that release would cause harm to the private telecommunications firms that submitted the requested information.\textsuperscript{65}

Such concerns extended back to a data gathering order that initiated the FCC's zip code-based broadband deployment measurements in 2000, at which time telecommunications companies raised concerns that their competitive interests would be damaged if the FCC made public any information about their construction of wired infrastructure.\textsuperscript{66} The FCC then resolved to report only aggregated information to the public and to refrain from disclosing company-specific data.\textsuperscript{67} Hence, the FCC determined that the information requested by the CPI fell within Exemption 4 of FOIA,\textsuperscript{68} which states that a government agency can choose to withhold "trade secrets and commercial or financial information obtained from a person and privileged or confidential."\textsuperscript{69}

\textsuperscript{64} See Letter from Kirk S. Burgee, Associate Bureau Chief, Wireline Competition Bureau, Federal Communications Commission, to Drew Clark, Senior Fellow and Project Manager, The Center for Public Integrity, Sept. 26, 2006 at 2, http://projects.publicintegrity.org/docs/telecom/telecomfoia/Response.pdf (last visited Feb. 19, 2009). The actual end of the 20-day response period is a matter of some confusion. The CPI filed its FOIA request on August 24, 2006, and twenty business days after that was September 22. The group then filed its claim with the court on the following business day, September 25. However, the FCC claimed that it had not violated the 20-day requirement, because according to its internal rules the 20-day period begins not when the requesting party files the request with the agency at large, but when the request reaches the FCC bureau that handles the information in question. A request made out to the FCC is first received by the Office of the Managing Director, who then sends it to the agency's FOIA Control Office, who in turn sends it to the appropriate internal bureau. The federal regulations governing the FCC's compliance with FOIA codify this process, but say nothing about how long this inter-office workflow should take. See 47 C.F.R. § 0.461. Consequently, the 20-day response period may begin several days after the agency receives the FOIA request. See Letter from Kirk S. Burgee at 1, n.2, referencing 47 C.F.R. §§ 0.461(e), 0.461(g). Later court documents revealed that the FOIA request from the Center for Public Integrity did not reach the appropriate FCC custodian of records until August 29. The September 26 response from the FCC to the CPI actually fell within twenty business days after August 29, but not August 24. Ctr. for Pub. Integrity v. Fed. Communications Comm'n., 505 F.Supp.2d 106, 110 (D.D.C. 2007).

\textsuperscript{65} See Letter from Kirk S. Burgee, supra note 64, at 2-3.


\textsuperscript{67} Id. at ¶ 91.

\textsuperscript{68} See Letter from Kirk S. Burgee, supra note 64, at 3.

\textsuperscript{69} 5 U.S.C. § 552(b)(4) (2002). The FCC also claimed that some of the requested information included personal data for company officers and employees who have submitted
The CPI filed a FOIA administrative appeal on October 19, 2006, asking the FCC to reconsider its denial of the original request. This appeal received no response from the FCC. The lawsuit *Center for Public Integrity v. Federal Communications Commission* was now underway, as the CPI concluded that it had exhausted its administrative remedies for disclosure of the requested information under FOIA. On January 8, 2007, the FCC filed a motion for summary judgment, believing that there was no general issue of material fact that justified the CPI's dispute with the FCC's FOIA refusal. Verizon, AT&T, and the United States Telecom Association intervened in the lawsuit on the FCC's behalf, supporting the FCC's motion for summary judgment with their own arguments on the need to keep the requested information confidential.

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70. See The Center for Public Integrity, Re: Review of Freedom of Information Action, FOIA Control No. 2006-493, October 19, 2006, available at http://projects.publicintegrity.org/docs/telecom/telecomfoia/admin_appeal.pdf (last visited Feb. 19, 2009). In this appeal the CPI offered to reduce the scope of its request to only data that can be segregated from that which legitimately falls under FOIA Exemptions 4 and 6.

71. The Freedom of Information Act requires that an appeal be acted upon within twenty business days, with requirements nearly identical to those for a denial of an original request. 5 U.S.C. § 552(a)(6)(A)(ii) (2002). The lack of response to the CPI's appeal by the FCC was technically a violation of FOIA, leading the CPI to conclude that it had exhausted its administrative remedies under that statute.


74. Verizon Communications, Inc. is one of the predominant carriers in the U.S. broadband market. See Verizon, Corporate Responsibility: Network, http://responsibility.verizon.com/lhome/results/network/ (last visited Feb. 19, 2009). As can be seen at the cited Web page and other pages linked to it, Verizon has been known to promote the competitiveness of its broadband offerings while refusing to disclose the information on which such claims have been made. Similar behavior by the FCC inspired the lawsuit by the Center for Public Integrity.


76. The United States Telecom Association is a trade group representing American companies that are involved in the development of the broadband market. See USTelecom, About USTelecom, http://www.ustelecom.org/WhoWeAre/ (last visited Feb. 19, 2009).

77. Center for Public Integrity v. Federal Communications Commission, 505 F.Supp.2d 106, 108 (D.D.C. 2007). The court found that the intervenors had no standing in the motion for summary judgment, though their arguments would be considered as relevant to the facts of the case in later phases of the suit. See Id. at 110.
The suit came before the District Court of the District of Columbia on August 27, 2007.\textsuperscript{78}

By this point the FCC had agreed to disclose some non-private information from the cover page of Form 477.\textsuperscript{79} This was required by D.C. Circuit Court precedent. In a case involving U.S. Army records, the court ruled that even if a request includes some information that can be claimed as exempt under FOIA, the agency must still disclose any "reasonably segregable portion" of the information after the deletion of nondisclosable portions.\textsuperscript{80} However, this information did not significantly add to what the Center for Public Integrity already knew about broadband deployment, consisting mostly of what the group was already presenting graphically on its Media Tracker web site and resembling the FCC's regular broadband deployment reports.\textsuperscript{81}

Given the agreement by the FCC to disclose some of the requested information (regardless of its usefulness), the court determined that the only matter left to consider was whether the requested information was indeed "confidential" and eligible for the trade secrets exemption under FOIA.\textsuperscript{82} Applying a test for the confidentiality of trade secrets established in National Parks & Conservation Ass'n v. Morton,\textsuperscript{83} the court decided to award summary judgment to the FCC if disclosure of the requested information was likely "to cause substantial harm to the competitive position of the person from whom the information was obtained."\textsuperscript{84}

The CPI argued that the requested information would not damage the competitive interests of the broadband companies because such information could already be inferred indirectly by interested persons. In effect, deployment data for localities defined more sharply than zip codes would simply reflect where the companies offer broadband service, which makes the data analogous to that available in a local phone book.\textsuperscript{85} The FCC and the intervenor companies (Verizon and AT&T) did not believe the matter

\textsuperscript{78} Id. at 106.

\textsuperscript{79} The cover page of Form 477 contains the contact information for the person who files the form. This data can be withheld under the personal privacy provisions of FOIA Exemption 6. 5 U.S.C. \$ 552(b)(6) (2002). For more on the process for the completion of Form 477 by telecommunications firms, see supra note 24 and accompanying text.

\textsuperscript{80} Oglesby v. U.S. Dep't of Army, 79 F.3d 1172, 1176 (D.C. Cir. 1996). Non-private information on the cover page, such as company names and high-level zip code data, was ruled to be segregable and eligible for disclosure. Center for Public Integrity, 505 F. Supp. 2d at 113.

\textsuperscript{81} See supra note 24 and accompanying text.

\textsuperscript{82} 505 F. Supp. 2d at 112.

\textsuperscript{83} 498 F.2d 765, 770 (D.C. Cir. 1974).

\textsuperscript{84} 505 F. Supp. 2d at 112.

\textsuperscript{85} Id. at 115.
was so simple, as localized broadband deployment information would reveal where customers had been gained or lost, and would identify areas where an incumbent company was having trouble penetrating a market, thus allowing a competitor to free-ride on the incumbent’s prior efforts to upgrade that locality’s broadband infrastructure. Consequently, data at this level of detail would “improve [a] competitor’s ability to draw inferences about a filer’s overall financial and competitive position” and assist competitors in “designing specific competing offers to target [an identified] customer.” The key point made by the FCC and the intervenor companies was that the CPI was incorrect in characterizing the requested data as merely a snapshot in time, showing which companies were providing broadband in a given area on which date. Instead, the data could be used by competitors to find trends in broadband penetration over extended periods, illustrating the incumbent company’s long-term deployment strategies and perhaps even its financial health.

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

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

86.  *Id.* at 115-16.
87.  *Id.* at 116.
88.  *Id.* at 115.
89.  See supra notes 83-84 and accompanying text.
90.  505 F. Supp. 2d at 117.
91.  FED. R. CIV. P. 59(a)(2). For a nonjury trial, this procedural rule allows a court to hear a motion for a new trial and to take additional testimony, amend findings of fact and conclusions of law, and consider a new judgment.
93.  *Id.* at 168. Here the court was quoting Nat’l Ctr. for Mfg. Sci. v. Dep’t of Def., 199 F.3d 507, 511 (D.C. Cir. 2000).
reinforcing the group's position that the requested information is analogous to that which could be found in other sources by enterprising consumers.\textsuperscript{94}

The court found that this new evidence merely supported, in a slightly different form, the same unsuccessful argument from the prior proceeding, and by precedent this tactic had already been rejected.\textsuperscript{95} In effect, the CPI could not explain why its new evidence was not presented in the original proceeding, or why the new evidence was likely to alter the court's position.\textsuperscript{96} In a previous case, the D.C. District Court had also ruled that simple disagreement with a prior judgment does not satisfy the criteria described in the federal rules of procedure for altering or amending that previous decision.\textsuperscript{97} For these reasons, the Center for Public Integrity's motion for reconsideration was denied.\textsuperscript{98}

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

\section*{IV. Trade Secrets Jurisprudence and Public Infrastructure}

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

\textsuperscript{94} Ctr. For Pub. Integrity, 515 F.Supp.2d at 169. \textit{See also supra} note 85 and accompanying text.


\textsuperscript{96} Ctr. For Pub. Integrity, 515 F. Supp. 2d at 169.

\textsuperscript{97} Rann v. Chao, 209 F. Supp. 2d 75, 83 (D.D.C. 2002). \textit{See also FED. R. CIV. P. 59.}

\textsuperscript{98} Ctr. For Pub. Integrity, 515 F. Supp. 2d at 170.
These distinctions are imperative for understanding whether potential competitive harm to broadband providers is truly a sound rationale for the FCC’s non-disclosure of the type of information sought by the Center for Public Integrity. In particular, how can the FCC claim that the broadband market is competitive and beneficial for American consumers when it refuses to disclose information that corroborates such conclusions? Meanwhile, the 1996 Telecommunications Act requires the FCC to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans,” and to regularly inquire on whether such deployment is taking place.\textsuperscript{99} Do such inquiries by the FCC require statistics from telecommunications firms that can be independently reviewed and corroborated by citizens?

The U.S. Supreme Court has not yet heard a case in which the definitions or parameters of FOIA Exemption 4 were in dispute. Therefore, the District of Columbia Circuit has formed the precedents for determining whether the trade secrets exemption has been used properly or improperly by a government agency.\textsuperscript{100} Three precedents are relevant to the present discussion on the secrecy of broadband statistics—the aforementioned \textit{National Parks} decision of 1974,\textsuperscript{101} the \textit{Critical Mass} decision of 1992,\textsuperscript{102} and an obscure 1983 case involving the Food and Drug Administration.\textsuperscript{103} Only the first of these was considered as precedent in \textit{Center for Public Integrity v. FCC}. The court erred in not considering the other two precedents, because the secrecy of broadband deployment statistics raises important issues of voluntarily vs. involuntarily submitted information, and the public’s understanding of infrastructure that is deployed for its benefit.

In the text of the Freedom of Information Act, the trade secrets exemption is the fourth of nine codified exemptions that can be used by government agencies to withhold requested information.\textsuperscript{104} The original rationale for protecting trade secrets was pro-business, as companies should be encouraged to innovate without worrying that a competitor could make


\textsuperscript{101} \textit{Nat’l Parks & Conservation Ass’n v. Morton}, 498 F.2d 765 (D.C. Cir. 1974).


\textsuperscript{103} \textit{Public Citizen Health Research Group v. Food & Drug Admin.}, 704 F.2d. 1280 (C.A.D.C. 1983).

use of FOIA to usurp the information that they are required to report to the government. Starting in the late 1960s, several cases were brought to court involving disputes around agency use of FOIA Exemption 4, though at first the basic meaning of the exemption was rarely a matter under consideration.

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

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

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


108. Id.

109. Id. at 770.

110. See Moser, supra note 100, at 7.
Meanwhile, the court in *National Parks* added an important distinction to the meaning of "trade secret" by quoting the original senate debates during the passage of FOIA: "This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained." In other words, when a party submits information voluntarily to a government agency, it is not automatically assumed that the same agency should disclose that information to the public just because it was originally submitted without compulsion from the government. This distinction effectively reinforced the rights of parties that are compelled (though not necessarily required) to provide information to government agencies—and this focus on voluntary information would later cause a schism in Exemption 4 jurisprudence.

The difference between voluntarily and involuntarily submitted information became a matter of dispute in the *Critical Mass* case of 1992, in which the D.C. Circuit Court abruptly formulated a new test to distinguish between these two categories of government-held information. In this proceeding, a citizen’s group known as the Critical Mass Energy Project contested an Exemption 4 non-disclosure by the Nuclear Regulatory Commission ("NRC"). The information in question was provided voluntarily by the Institute for Nuclear Power Operations, a consortium representing companies regulated by the NRC. The NRC denied Critical Mass’s FOIA request, and then requested summary judgment in the resulting appeal. This motion was granted by the district court.

111. S. Res. 813, 89th Cong., 1st Sess. 9 (1965). Here the court was quoting earlier cases that in turn used this quotation from the Senate debates. See Grumman Aircraft Engineering Corp. v. Renegotiation Bd., 425 F.2d 578 (C.A.D.C. 1970); Sterling Drug, Inc. v. Fed. Trade Comm’n, 450 F.2d 698 (C.A.D.C. 1971). Those cases involved agency withholding of information under FOIA Exemption 4, though the text of the exemption was not a matter under consideration.


113. Id. at 769. See also Moser, *supra* note 100, at 6-7.


court under the *National Parks* test for confidentiality.\textsuperscript{116} After multiple appeals and remands,\textsuperscript{117} the D.C. Circuit Court resolved to rehear the facts of the case and reconsider whether the *National Parks* test was appropriate for voluntarily submitted information, choosing to "correct some misunderstandings as to [the] scope and application" of the test.\textsuperscript{118}

Here the court formulated a distinction between voluntary and involuntary submissions of data to government agencies. In situations in which information is furnished voluntarily, the government interest is the continued availability of data. On the other hand, for involuntary submissions the government interest is the continued reliability of the data. This distinction between availability and reliability is not found in the *National Parks* test.\textsuperscript{119} In turn, that test of the meaning of "confidential" under FOIA Exemption 4 was found to be workable only for data furnished to the government involuntarily.\textsuperscript{120} The court then determined that voluntarily submitted information was "confidential" for purposes of the trade secrets exemption "if it is of a kind that would customarily not be released to the public by the person from whom it was obtained."\textsuperscript{121}

\begin{footnotes}
\item 117. Critical Mass's refusal to accept the FOIA denial by the NRC resulted in an extended and complicated cycle of litigation. In the first appeal, the D.C. Circuit Court ruled that the district court's judgment was a proper application of the *National Parks* test. However, the court also ruled that the NRC had not fully proven that the information in question was submitted voluntarily, and remanded the case for further findings on that matter. Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 830 F.2d 278, 281-82 (D.C. Cir. 1987). After remand, the defendants filed a motion for summary judgment, which the district court granted because the defendants had shown sufficiently that disclosing the requested information would harm the government's interest in efficiently licensing nuclear power facilities. Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 731 F. Supp. 554, 557 (D.D.C. 1990). This ruling was then appealed by Critical Mass, at which time the appeals court remanded the case again for further findings on the effects of disclosure on the quality of the NRC's licensing operations. Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 931 F.2d 939, 943-947 (D.C. Cir. 1991). This ruling inspired petitions from the defendants to vacate, which were granted by the circuit court. Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 942 F.2d 799 (D.C. Cir. 1991). After this ruling, the court resolved to reexamine all the previous decisions and reconsider the definition of "confidential" under the *National Parks* test. This was the impetus for the 1992 proceeding under discussion in the present section of this article.
\item 119. *Id.* at 878.
\item 120. *Id.* at 879.
\item 121. *Id.* at 878-79. Note that this language was borrowed from the *National Parks* ruling, but in that ruling the requirement was not applied only to voluntarily submitted information. See *supra* note 111 and accompanying text.
\end{footnotes}
The court finally ruled 7-4 (en banc) not to overturn the National Parks test because of its longstanding precedent.\textsuperscript{122} However, that test was now confined to involuntary information only. And while the court did not state that it was forming a new test for voluntary information, this was effectively the outcome of the ruling, as courts in future disputes surrounding FOIA Exemption 4 would have to differentiate voluntary information from that which is required by government agencies.\textsuperscript{123} This new test was heavily criticized in a rash of unfavorable articles by legal experts and government transparency advocates.\textsuperscript{124} The most telling criticism of the Critical Mass decision concerns its impact on consumer advocates and public interest groups, who would find major categories of previously attainable information falling under the trade secrets exemption, if the providers or the government agency could claim plausibly that voluntarily submitted data was not to be released to the public by "custom."\textsuperscript{125}

While not all the federal circuits have accepted the Critical Mass test uniformly, it has become the norm in Exemption 4 litigation in the circuit in which the test was formulated—the D.C. Circuit. That circuit is also the venue for a majority of FOIA related litigation, including the Center for Public Integrity's suit over broadband statistics, so Critical Mass is effectively operating as a precedent.\textsuperscript{126} Therefore, that test's distinction between voluntary and involuntary information is crucial to the FOIA dispute between the CPI and the FCC.

A. Voluntary and Involuntary Information on FCC Form 477

After the Critical Mass decision, it became easier for government agencies to treat voluntary and involuntary information differently, with

\textsuperscript{122} Critical Mass, 975 F.2d at 880.

\textsuperscript{123} See Moser, supra note 100, at 9.


\textsuperscript{125} See Rena Steinzor, "Democracies Die Behind Closed Doors": The Homeland Security Act and Corporate Accountability, 12 KAN. J.L. & PUB. POL'Y 641, 653 (2003). Similar concerns were voiced in the dissent to the Critical Mass III decision, supplied by future Supreme Court Justice Ruth Bader Ginsburg, who called the new test "slackened" and likely to inspire agency and business abuse of the phrase "customarily not be released to the public." See Critical Mass, 975 F.2d at 883.

\textsuperscript{126} See Moser, supra note 100, at 15-17. Moser calculates that 60 percent of cases concerning FOIA Exemption 4 are heard in the D.C. Circuit. Id. at 15.
involuntary information more likely to be disclosed to FOIA requesters and voluntary information more likely to be withheld. This phenomenon appears to have manifested itself with the FCC's broadband statistics, if those statistics were formulated with information that was submitted voluntarily by private telecommunications companies. But the court in the CPI case did not consider this distinction fully, perhaps because the CPI itself did not consider the possibility that some of the information provided by telecommunications companies to the FCC was submitted voluntarily.

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

Despite mentioning this possibility, the WCA stated in its brief that all the information at issue should be treated as confidential regardless, which the court proceeded to do via the National Parks test.

But the possibility of voluntarily—submitted information on FCC Form 477 should have inspired the court to consider the Critical Mass precedent. Recall that in addition to its distinction between voluntary and involuntary information, the Critical Mass court also drew a distinction between availability (voluntary) and reliability (involuntary).

128. 505 F. Supp. 2d at 112.
131. Center for Public Integrity, 505 F. Supp. 2d at 112.
132. See supra note 123 and accompanying text.
voluntary information, "the presumption is that [the government’s] interest will be threatened by disclosure as the persons whose confidences have been betrayed will, in all likelihood, refuse further cooperation."\textsuperscript{133} This distinction is worth noting when the government-held information at issue is used in reports tailored for the public. When promoting the possibilities of broadband availability to the American people, the FCC is dependent upon the cooperation of telecommunications companies. Therefore the government’s interest, under the above statement by the \textit{Critical Mass} court, is to keep incoming information available, not to protect the competitive sensibilities of the companies supplying it. For the FCC’s broadband statistics, withholding the incoming information is more likely to threaten the government’s interests, not those of the companies, because the information is being used to further the FCC’s goal of educating the public. This distinct governmental interest was not considered by the court in the CPI case.

As for the interests of the telecommunications companies, also recall that the \textit{Critical Mass} court ruled that voluntarily—submitted information can be deemed confidential "if it is of a kind that would customarily not be released to the public by the person from whom it was obtained."\textsuperscript{134} Notwithstanding the difficulties surrounding the term "customarily,"\textsuperscript{135} the court added that "the agency invoking Exemption 4 must meet the burden of proving the provider’s custom."\textsuperscript{136} Thus, given the possibility of voluntary information on Form 477, if the court had invoked the \textit{Critical Mass} precedent the FCC would have had to prove that withholding the information from the public was the "custom" of the broadband companies—a burden of proof that would have to be weighed against the disclosure requirements of the Freedom Information Act.\textsuperscript{137}

B. The Public Broadband Infrastructure

In addition to the distinction between voluntary and involuntary data, the court in \textit{Center for Public Integrity v. Federal Communications Commission} should have also considered the impact of trade secrets on public infrastructure (or more precisely, infrastructure that is used by the public but deployed by private firms) and the accountability of the government agencies that maintain and promote it. For the FCC and its

\begin{itemize}
  \item[133.] Critical Mass, 975 F.2d at 878.
  \item[134.] See supra note 121 and accompanying text.
  \item[135.] See supra notes 124-25 and accompanying text.
  \item[136.] Critical Mass, 975 F.2d at 879. According to the court, this burden corresponds to that placed on the government in all other types of FOIA disputes. \textit{Id}.
\end{itemize}
promotion of the supposed competitiveness and availability of the American broadband market, such promotion requires deployment statistics that corroborate the FCC's conclusions and which can be reviewed and validated by consumers and their representatives.138 Private businesses now conduct much of the development and management of public infrastructure, particularly in telecommunications, and such companies are increasingly using trade secrets jurisprudence to obfuscate activities that were traditionally performed by government.139 This reduces the accountability of the telecommunications firms that are developing the broadband network, as the commercial profit motive conflicts with American traditions of government transparency.140

Public infrastructure, including the American broadband network, is a resource that all Americans use or could possibly use. The benefits of broadband have been heavily promoted as an economic and political boon for the nation's citizens, as heard in campaign rhetoric dating back to the 2000 presidential election,141 and George W. Bush's 2004 mandate to provide access to all Americans.142 But a fundamental conflict arises when infrastructure is promoted as beneficial for the citizenry by one segment of the American government, while another segment keeps information about the development of that infrastructure secret.143 The commercial benefits that secrecy delivers to private telecommunications companies do not outweigh the potential benefits for consumers who may be able to partake of broadband offerings.144 Public use of public infrastructure requires public knowledge, but allowing company information to be exempted from disclosure prohibits full understanding of that infrastructure among

138. Recall that the FCC is required to encourage the deployment of advanced telecommunications services in a reasonable and timely fashion, and to report periodically to Congress on the status of such deployment efforts. See Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 §§ 706(a)-(b) (1996).
141. See supra note 7 and accompanying text.
142. See supra note 14 and accompanying text.
143. Government secrecy surrounding the development of public infrastructure is a relatively recent phenomenon. Historically, other areas of infrastructure development like road construction have not been especially afflicted by non-transparency. However, the highly technical nature of telecommunications infrastructure, featuring many patents and heavily guarded research and development programs, is prone to much more secrecy. The non-transparency of the highly competitive private firms involved has spilled over into the government agencies that compile infrastructure information, most notably the FCC. See Levine, supra note139, at 170-71, 174-75.
144. Id. at 151.
citizens. This raises the important question of who is most affected by the disclosure of the trade secrets in question. Would the disclosure of those secrets be truly harmful to the private company, or is withholding the information more harmful to the American citizen attempting to make use of the company’s product—or in this case, the infrastructure?

In a 1983 FOIA dispute involving the Food and Drug Administration’s testing of intraocular lenses, a district court in the D.C. Circuit added an important refinement to the definition of “trade secret” as covered by FOIA Exemption 4: “[a] commercially viable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.” This refinement to the definition of “trade secret,” if it had been considered by the court in the CPI dispute, would have also placed additional burdens on the FCC and the intervenor companies to show that withholding the requested information was not just in the companies’ interests, but the public’s.

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

The FDA definition of a “trade secret” was not utilized as precedent in Center for Public Integrity v. Federal Communications Commission. This was an oversight by the court because the expanded FDA conception of a trade secret provides crucial distinctions that are relevant to broadband infrastructure. When something created by private companies—in this case, America’s broadband network—is utilized by the public at large, the conception of trade secrets should be narrowed to apply only to inter-firm commerce. In other words, the withholding of trade secrets under FOIA Exemption 4 should be confined to situations in which the only parties that

145. Id. at 152, 154.
146. Public Citizen Health Research Group v. Food & Drug Admin., 704 F.2d. 1280-81 (C.A.D.C. 1983). Intraocular lenses are implanted in the eye during cataract surgery. This case involved a FOIA denial by the FDA toward information requested by Public Citizen concerning the testing of these lenses. Id. at 1282.
147. See Levine, supra note139, at 141-45.
could possibly be harmed are one or more private companies.\textsuperscript{148} But when public infrastructure is at issue, relevant information should not be defined only as "trade secrets" unless disclosure would fundamentally harm the infrastructure itself. Such considerations would bring the needs of the public into discussions of whether such information should be disclosed by the government.\textsuperscript{149}

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

\textbf{V. Conclusion}

On March 19, 2008, the FCC finally announced a plan to overhaul its methods of measuring the deployment of the American broadband network and the availability of service to consumers—an overhaul that became required by law later that year in the Broadband Data Improvement Act. The commission's technical definition of "broadband" would be modernized and the pronouncements of availability would be based on geographic areas more sharply defined than zip codes.\textsuperscript{150} At the time of writing, whether or not such plans will come to fruition remains to be seen, but perhaps the new measurement methodology will make the FCC's broadband deployment statistics more believable to commentators and industry experts. Meanwhile, the knowledge level of the typical American consumer should be a matter of much more concern to all the parties involved.

\textsuperscript{148} \textit{Id.} at 191-92.
\textsuperscript{149} \textit{Id.} at 192.
\textsuperscript{150} \textit{See supra} notes 46-47 and accompanying text.
Regardless of the strength of the methodology used to create statistics that are then used for public promotion, there is still the crucial matter of the incoming information that is used to create those statistics. That information, as supplied by private telecommunications companies, must be made transparent if American citizens are to believe what the FCC tells them about the growth and availability of the broadband network. As this paper has argued, it is nonsensical for the government to withhold information that is supplied voluntarily (in part) by private companies, and then use that same data to create promotional reports that potentially could be crucial to citizens as they try to understand the state of their public infrastructure.

When the American citizenry at large is intended as the ultimate beneficiary of private company information, the interests of the public should outweigh the fears of competitive harm to the companies providing the data. When the development of public infrastructure is conducted by private companies, those firms should realize that they have an incentive, if not a duty, to accurately inform the public users of that infrastructure. When they incorrectly contend that the information needed by the public should be withheld as trade secrets, the private telecommunications companies risk alienating huge numbers of potential customers. This is a poor business practice that could be ameliorated by a greater commitment to public accountability.151

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

151. See Levine, supra note 139, at 191-92.