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

Rob Frieden

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

by
ROB FRIEDEN*

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I. Introduction

Many ventures involved in the information, communications and entertainment industries have started 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 bitstream² make it possible for companies to offer “quadruple play” bundles of wireless and wireline telephony, video, and Internet access services.³ Financial and efficiency gains from vertical⁴ and horizontal integration,⁵ and the search for new revenues to replace declining margins from maturing and newly competitive services,⁶ combine to create robust incentives for carriers to diversify.

1. Technological convergence refers to innovations that make it possible for ventures to offer a variety of services via a single digital conduit that previously were offered on a separate, stand-alone basis via different media. For example, an incumbent telephone company, such as Verizon, offers a combination of telephone, Internet access, and video services through its fiber optic Fios network. “This ability to dynamically multiplex data packets from multiple sources contributes to packet-switched networks being more efficient and economical than circuit-switched networks. Shared network resources are the principle of network ‘convergence’ in practice. Voice, video and data applications like Internet browsing and other applications noted above are now all packetized and transmitted using the same network transmission facilities.” In the Matter of Connect Am. Fund, WC Docket No. 10–90, Notice of Inquiry and Notice of Proposed Rulemaking, 25 FCC Rcd. 6557, 6684 (2010).

2. “With the convergence of the various modes of communications networks, many broadband Internet services incorporate wireline and wireless elements.” In the Matter of Framework for Broadband Internet Service, GN Docket No. 10–127, Notice of Inquiry, 25 FCC Rcd. 7866, 7885 (2010).

3. “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, 1261–62 (2007).

4. Vertical integration refers to the combination of separate market activities by a single enterprise. Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 21 FCC Rcd. 2503, 2575 (2006).

5. 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 188 (David W. Pearce ed., 4th ed., 1992).

6. The FCC’s most current statistics (estimated for 2009) confirm a significant reduction in basic wireline service revenues, offset by an even greater increase in wireless revenues. Revenues for end user wireline local telephone service provided by all carriers amounted to \$70.142 billion, which is less than the amount these carriers generated in 1998. *Trends in Telephone Service*, FED. COMM’N COMM’N, INDUS. ANALYSIS & TECH.

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 ("FCC") desire to apply a single regulatory category to services and service providers,⁷ a process the Commission could achieve when ventures concentrated on one function and offered one readily identifiable service, such as telephony. Diversification also obscures the specific reach of the FCC's regulatory wingspan, both in terms of what regulatory classifications it can apply to which services and what regulatory safeguards it can lawfully apply.

For example, the D.C. Circuit Court of Appeals in *Comcast Corp. v. FCC*,⁸ recently reversed the Commission's attempt to subject Internet Service Providers ("ISPs") to regulatory safeguards identified in Title II of the Communications Act, as amended,⁹ but which the Commission wanted to apply through "ancillary jurisdiction"¹⁰ under Title I of the Act.¹¹ The court rejected the FCC's

DIV., WIRELINE COMPETITION BUREAU, 15-3 (Sept. 2010), http://www.fcc.gov/Daily_Releases/Daily_Business/2010/db0930/DOC-301823A1.pdf. See also *Local Telephone Competition: Status as of December 31, 2008*, FED. COMM'N COMM'N, INDUS. ANALYSIS & TECH. DIV., WIRELINE COMPETITION BUREAU (June 2010), http://www.fcc.gov/Daily_Releases/Daily_Business/2010/db0625/DOC-299052A1.pdf.

7. Fed.-State Joint Bd. on Universal Serv., 13 FCC Rcd. 11501, 11522-23 (1998) ("The language and legislative history of [the Communications Act of 1996] indicate that the drafters ... regarded telecommunications services and information services as mutually exclusive categories.").

8. *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010) (holding that the FCC could not 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).

9. Communications Act of 1934, 47 U.S.C. § 201(b) (2010).

10. The FCC attempted to assert jurisdiction over technologies and services for which the Communications Act does not provide specific authority. *Comcast Corp. v. FCC*, 600 F.3d at 644. The Commission assumed that a broad legislative mandate existed in Title I of the Communications Act that authorized the Commission to regulate wire and radio service. *Id.* at 651. "Ancillary authority" refers to the Commission's statutory discretion to adopt measures that are 'reasonably ancillary to the effective performance of the Commission's various responsibilities.'" Framework for Broadband Internet Service, 25 FCC Rcd. 7866, 7868-69 n.10 (2010) (citing *United States v. Sw. Cable Co.*, 392 U.S. 157, 178 (1962)). The D.C. Circuit rejected the FCC's jurisdictional claim based on a two-part test: "(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 effective performance of its statutorily mandated responsibilities." *Comcast Corp. v. FCC*, 600 F.3d, at 646, (citing *Am. Library Ass'n v. FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005)). The court determined that the FCC had not satisfied the second part of the test. "Because the Commission has failed to tie its assertion of ancillary authority over Comcast's Internet service to any 'statutorily mandated

attempt to apply such safeguards on ventures classified as information service providers, a largely unregulated status.¹²

Following the *Comcast* reversal, the FCC must rethink how it can best 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 Internet Protocol ("VoIP") service.¹³ Additionally, the Commission has avoided making necessary and explicit regulatory classifications as to which category new services such as VoIP and Internet Protocol Television¹⁴ fit.¹⁵

responsibility,' [citing *Am. Library*, 406 F.3d at 692], we grant the petition for review and vacate the *Order*." *Id.* at 661.

11. 47 U.S.C. §152(a) (2010).

12. "In this case, the Commission does not claim that Congress has given it express authority to regulate Comcast's Internet service. Indeed, in its still-binding 2002 *Cable Modem Order*, the Commission ruled that cable Internet service is neither a 'telecommunications service' covered by Title II of the Communications Act nor a 'cable service' covered by Title VI." *Comcast Corp. v. FCC*, 600 F.3d, at 645 (citing *In re High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd. 4798, 4802 (2002), *aff'd*, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005)).

13. Voice over Internet Protocol ("VoIP") offers voice communications capabilities, much like ordinary telephone service, using the packet-switched Internet, for all or part of the link between the call originator and the call recipient. For VoIP service providers that offer subscribers access to or from conventional wired and wireless telephone networks, the FCC Interconnected VoIP service providers must contribute to universal service funding, Universal Serv. Contribution Methodology, *Report and Order and Notice of Proposed Rulemaking*, 21 FCC Rcd. 7518, 7538 (2006) (extending section 254(d) permissive authority to require interconnected VoIP providers to contribute to the USF), *reh'g denied, vacated in part on other grounds*, *Vonage Holding Corp. v. FCC*, 489 F.3d 1232 (D.C. Cir. 2007); reconfigure their service to provide wiretapping capabilities to law enforcement authorities, Communications Assistance for Law Enforcement Act & Broadband Access & Servs., *First Report and Order and Further Notice of Proposed Rulemaking*, 20 FCC Rcd. 14989 (2005), *petition for review denied*, 451 F.3d 226 (D.C. Cir. 2006), provide caller location identification and emergency 911 access, IP-Enabled Servs., E911 Requirements for IP-Enabled Service Providers, *First Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd. 10245 (2005), *petition for review denied*, 473 F.3d 302 (D.C. Cir. 2006), and offer service to disabled users. IP-Enabled Servs., Implementation of Sections 255 and 251(A)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996: Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities Telecommunications, *Report and Order*, 22 FCC Rcd. 11275 (2007), *Order and Public Notice Seeking Comment*, 22 FCC Rcd. 18319 (2007) (granting in part and denying in part waivers of the FCC order). See generally *Vonage Holding Corp. v. The Minn. Pub. Utils. Comm'n*, 290 F. Supp. 2d 993, 994 (D. Minn. 2003)(upholding FCC preemption of state VoIP regulation).

14. Internet Protocol Television ("IPTV") refers to the ability of Internet access subscribers to receive and view video content through real-time, immediate delivery of

Absent a legislative remedy, the FCC has experienced great difficulty in finding ways to sanction ISP anticompetitive practices regulations within the Commission's limited statutory authority. FCC Chairman Julius Genachowski has proposed to reclassify Internet access as a hybrid Title II regulated service, triggering only a limited portion of the available regulatory safeguards.¹⁶ Such a reclassification, following a reversal, would appear as after-the-fact scrambling to rearrange the wingspan of Title II jurisdiction without statutory authority.

This article will explain how the FCC has backed itself into a corner when it sought to free the Internet of most regulatory oversight by determining that the information service classification applies to all Internet access technologies such as cable modem service. Facing complaints about ISP anticompetitive practices, the

packets, also known as streaming, or as files downloaded for subsequent viewing. Although the FCC has not explicitly classified IPTV, the Commission did determine that an IPTV provider did not qualify for the status of multichannel video programming distributor ("MVPD"), which are entitled to seek FCC resolution of a program access complaint. In the Matter of Sky Angel U.S., LLC, Emergency Petition for Temporary Standstill, DA 10-679, 25 FCC Rcd. 3879 (2010). Section 548(d) authorizes any "multichannel video programming distributor aggrieved by conduct that it alleges constitutes a violation of subsection (b) of this section, or the regulations of the Commission under subsection (c) of this section, may commence an adjudicatory proceeding at the Commission." 47 U.S.C. § 548(d) (2010).

15.

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* note 3, at 1266-67.

16. Julius Genachowski, FCC Chairman, *The Third Way: A Narrowly Tailored Broadband Framework*, BROADBAND.GOV (May 6, 2010), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-297944A1.doc (proposing to apply Title II regulation only to the bit transmission portion of ISP services and rejecting a renewed attempt to find a way to extend Title I ancillary jurisdiction or reclassifying all aspects of Internet access as a telecommunications service). See also Austin Schlick, FCC General Counsel, *A Third-Way Legal Framework for Addressing the Comcast Dilemma*, BROADBAND.GOV (May 6, 2010), 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).

FCC currently lacks explicit statutory authority to provide a needed remedy. The article also will provide recommendations on how Congress and the FCC might recognize that convergent services, such as Internet access, combine both unregulated information service and telecommunications components in much the same way as wireless cellular telephone companies, which offer both regulated common carrier telephone calling coupled with a variety of unregulated information services using the same transmission link.

The article recommends that in light of the ascending importance of Internet access and the lack of sustainable competition that would foster effective self-regulation, Congress should amend the Communications Act to authorize the FCC to apply limited Title II safeguards to ISPs the already wireless telephony. Considering the failure of Congress to reach a consensus, the article suggests that the FCC safeguard consumers when ISPs cause harm as the Commission did when a DSL service provider blocked access to competing VoIP services.¹⁷

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—firms can exploit technological convergence to provide consumers with a “one-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 that they could not previously offer due to technological limitations, or that 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 “triple” or “quadruple-play” of wired and wireless telephone service, Internet access, and video programming.¹⁸

17. See *Madison River Commc'n, LLC*, 20 FCC Rcd. 4295, 4297 (2005) (agreeing to a \$15,000 monetary forfeiture and consent decree agreeing not to block Digital Subscriber Link (“DSL”) customers’ access to Voice over the Internet Protocol telephone services).

18. “Bouygues Telecom offers its ‘Ideo’ service, which is a quadruple-play package. For the equivalent of \$54 per month, subscribers receive Internet, TV, fixed telephone and mobile phone connections.” In the Matter of International Comparison Requirements Pursuant to the Broadband Data Improvement Act, GN Docket No. 09–47 International Broadband Data Report, DA10-1348, First Report, 2010 WL 3425286, *13 (West pagination) (rel. Aug. 27, 2010).** Also available at: http://www.fcc.gov/Daily_Releases/Daily_Business/2010/db0827/DA-10-1348A1.pdf.

Marketplace convergence presents the FCC with an acute quandary because the Commission has customarily 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 everything¹⁹ offered by a company into one of the mutually exclusive classifications Congress has created for the Commission to apply.²⁰ Telephone companies, which previously only provided telecommunications services, now offer Internet access, and video services. Likewise, cable television companies, which solely provided video services, now offer Internet access and telephone services. Cellular telephone companies seamlessly combine telecommunications, information and video services, via “smartphones” that increasingly offer the functionality of both television sets and computers. With compression and digitization of their signals, television broadcasters soon may offer Internet access and other wireless services.

19.

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. L. REV. 701, 714.

20. The three major statutory service categories established in the Communications Act are telecommunications service, information service, and cable service. Telecommunications service refers to “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) (2010). 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.” 47 U.S.C. §153(43). Information service refers to “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.” 47 U.S.C. §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.” 47 U.S.C. §522(6)(A)–(B) (2010).

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 provides services in multiple categories. The growing number of mergers and acquisitions in the ICE industry²¹ shows that companies recognize the need to diversify through vertical and horizontal integration. However, 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 as to which significantly different regulatory regimes apply.

Until now, the FCC has been able to erect “regulatory silos”²² and to assign individual companies into one, and only one, of these classifications. The Commission increasingly finds that it cannot readily assign only one classification. Instead of admitting this and seeking legislative remedies, the Commission strives to stretch the existing legislative categories to apply to convergent services. This strategy has not always worked. For example, the D.C. Circuit Court of Appeals rejected the Commission’s attempt to apply some Title II regulatory requirements to ISPs, because explicit statutory language limits such common carrier regulations to telecommunications service providers.²³

In other instances, the FCC has been able to stretch regulatory classifications or apply multiple classifications without explicitly acknowledging that it has done so, even when no statutory prohibition on the practice exists. For example, the Commission

21. The FCC’s website provides more information on pending and recent major mergers subject to FCC approval. *Transaction Team*, FCC OFFICE OF GENERAL COUNSEL, <http://www.fcc.gov/transaction/> (last visited Nov. 12, 2010).

22.

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 (2009).

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

acknowledges that cellular telephone companies qualify for streamlined regulation of their common carrier telecommunications services²⁴ and also qualify for a deregulatory “safe harbor” when they offer wireless information services such as broadband access.²⁵ 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.²⁶

Having largely ignored the fact that cellular telephone companies still provide telecommunications services, the Commission has opted

24. Framework for Broadband Internet Service, 25 FCC Rcd. 7866, 7877 (2010).

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 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.

Id.

25. Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, 22 FCC Rcd. 5901, 5930 (2007).

26. 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 [wireless services] marketplace, both terrestrial and satellite CMRS. The metrics . . . indicate that there is effective competition in the [wireless services] market and demonstrate the increasingly significant role that wireless services play in the lives of American consumers.” 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, Thirteenth Report, 24 FCC Rcd. 6185, 6189 (2009).

The Commission appears to have backed away from this conclusion: “[R]ather than reaching an overarching, industry-wide determination with respect to whether there is ‘effective competition,’ the Report complies with the statutory requirement by providing a detailed analysis of the state of competition that seeks to identify areas where market conditions appear to be producing substantial consumer benefits and provides data that can form the basis for inquiries into whether policy levers could produce superior outcomes.” 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, FCC 10–81 (2009) [hereinafter *14th Report on the Wireless Marketplace*]. “Since the period covered by the Thirteenth Report, [wireless services] competition has grown stronger by some of the measures previously considered, but weaker by others.” *Id.*

to focus on the information services component by emphasizing that the hybrid and convergent nature of what these carriers offer justifies deregulation. As the wireless marketplace becomes highly concentrated²⁷, 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 to lock up new spectrums.²⁸

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.²⁹ Even though the FCC initially classified DSL as a telecommunications service³⁰ and DSL

27. The FCC has approved numerous market consolidating acquisitions, including ones by AT&T and Verizon, whose combined share of the national market exceeds sixty percent. *14th Report on the Wireless Marketplace*, *supra* note 26. See also Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings, 23 FCC Rcd. 17444 (2008) (entailing the Verizon Wireless acquisition of ALLTEL). Note that Verizon sold to AT&T the wireless properties that 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, 25 FCC Rcd. 8704 (June 22, 2010).

28. See 2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services, *Report & Order*, 16 FCC Rcd. 22668, 22738 (2001) (eliminating a cap on the amount of radio spectrum any single cellular radiotelephone carrier can control). In 2008 the FCC auctioned off 62MHz of additional wireless spectrum made available in the conversion from analog to digital television. Verizon and AT&T acquired the lion's share of the newly available spectrum. "According to an analysis by The Associated Press, the two telecom companies [AT&T and Verizon] bid more than \$16 billion, constituting the vast majority of the overall \$19.6 billion that was bid in the FCC auction. With Verizon Wireless and AT&T dominating the auction so completely, hopes that the auction would allow for the creation of a new nationwide wireless service provider were dashed." W. David Gardner, *Verizon, AT&T Big Winners in 700 MHz Auction*, INFORMATIONWEEK, March 20, 2008, available at <http://www.informationweek.com/news/mobility/showArticle.jhtml?articleID=206905000>; see also, Saul Hansell, *Verizon and AT&T Win Big in Auction of Spectrum*, N.Y. TIMES, Mar. 21, 2008, available at <http://www.nytimes.com/2008/03/21/technology/21auction.html>; Federal Communications Commission, *Auction 73, 700 MHz Band Fact Sheet*, FEDERAL COMM'NCS COMM'N (last modified Mar. 20, 2008), http://wireless.fcc.gov/auctions/default.htm?job=auction_factsheet&id=73.

29. Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, *Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd. 14853, 14856 (2005) *petition for review denied*, Time Warner Telecom, Inc. v. FCC, 507 F.3d 205 (3d. Cir. 2007).

30. Deployment of Wireline Services Offering Advanced Telecommunications Capability, 13 FCC Rcd. 24012, 24029-30 (1998).

constitutes a retrofit of the copper wire initially used exclusively to provide telephone service, the Commission later applied the information service classification.³¹ The Commission typically accrues public relations and political 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 changes become a burden on their global competitiveness, ability to create more jobs and incentives to invest in vital next generation network facilities.

The Supreme Court in *National Cable & Telecommunication Association v. Brand X* deferred to the FCC's expertise in interpreting statutory definitions.³² The Court afforded the Commission ample flexibility, which has resulted in expanding the reach and applicability of the largely unregulated information service classification to include all types of Internet access.³³ The majority agreed that the Commission could erect a regulatory dichotomy between ventures using telecommunications as a building block for information services and those providing telecommunications services.³⁴ In the former, the telecommunications component is provided as part of an integrated package of functions predominated by information services. In the latter, the telecommunications component can be separated and considered a stand-alone service. This somewhat metaphysical distinction results in a substantial dichotomy of regulatory oversight, with information services subject to limited FCC oversight, and telecommunications services subject to substantially more—though 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,³⁵ the

31. *Id.* at 14857.

32. *Nat'l Cable & Telecomm. Ass'n. v. Brand X Internet Servs.*, 545 U.S. 967, 102–03 (2005)(affirming the FCC's classification of cable modem delivered Internet access as an information service).

33. For analysis of the case, see Rob Frieden, *What Do Pizza Delivery and Information Services Have in Common? Lessons From Recent Judicial and Regulatory Struggles with Convergence*, 32 RUTGERS COMPUTER & TECH. L.J. 247 (2006).

34. *Brand X Internet Servs.*, 545 U.S. at 990–92. See also, Frieden, *supra* note 33.

35. Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, 20 FCC Rcd. 14853 (2005) (reclassifying DSL as an information service), *petition for review denied*, *Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007); United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband Over Power Line Internet Access Service as an Information Service, 21 FCC Rcd. 13281 (2006)(classifying broadband over powerline as an information service; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless

Commission cannot subsequently condition its blanket determination on grounds that ISPs have the incentive and ability to operate anti-competitively in certain instances. This is true for two reasons. First, Congress determined that information services do not require heavy handed, costly, and possibly investment incentive-robbing regulation.³⁶ Second, even if the information service industry has not evolved into the robustly competitive marketplace that the FCC predicted, the Commission has made no explicit acknowledgement that the ISP marketplace lacks the ability to self-regulate.

The Commission cannot intervene to remedy marketplace abuses when it had previously determined that the industry qualified for blanket deregulation. In other words, 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 the Commission could lawfully backtrack and reinsert elements of Title II regulatory safeguards if necessary.³⁷

Networks, 22 FCC Rcd. 5901 (2007)(classifying wireless broadband as an information service).

36.

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 Commission limited the ability of AT&T and its successor companies to offer enhanced services, so they would not snuff out new services that depended on their underlying transmission capabilities. 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 (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 (2009).

37. "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

In light of instances where DSL or cable modem service providers, e.g., Madison River Telephone Company³⁸ and Comcast,³⁹ have acted on their incentive and ability to operate in an anticompetitive and discriminatory manner, the Commission has selectively attempted to impose regulatory safeguards or sanctions. The FCC tried to extend the reach of ancillary jurisdiction⁴⁰ 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. Facing a complete rejection of that strategy, Chairman Julius Genachowski regrouped and came up with a "third way" reinterpretation of what Internet access entails.⁴¹ The Chairman now 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.⁴²

In both instances, the FCC seems to assume that it has unconditional flexibility to ignore or reinterpret all or part of the

Framework for Broadband Access to the Internet Over Wireline Facilities, 20 FCC Rcd. 14853, 14904 (2005).

38. See Madison River Commc'n, LLC, 20 FCC Rcd. 4295 (2005) (adopting a consent decree whereby a provider of DSL service agreed to a fifteen thousand dollar forfeiture and to refrain from blocking subscriber access to Voice over the Internet Protocol services).

39. Formal Complaint of Free Press & Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications, 23 FCC Rcd. 13028 (2008), *rev'd*, Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010).

40. 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); *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972); *but see FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979).

41. Genachowski, *supra* note 15 (rejecting a renewed attempt to find a way to extend Title I ancillary jurisdiction or reclassifying Internet access as a telecommunications service).

42. Perhaps recognizing the vulnerability of this interpretation, the FCC opted to use a different primary strategy when formulating enforceable rules in a Report and Order. See *Preserving the Open Internet*, GN Docket No. 09-191, Report and Order, FCC 10-201 (rel. Dec. 23, 2010), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-201A1.doc. The Commission views Section 706 of the Communications Act as a mandate for regulatory safeguards, despite language that only authorizes the Commission to promote access to advanced telecommunications capability. 47 U.S.C. § 1302 (2010).

regulatory limitations that flow from the application of specific legislative classifications.⁴³ 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 robustly competitive and effectively self-regulating. The FCC's attempt to sanction Comcast for interfering with subscribers' peer-to-peer traffic,⁴⁴ absent legitimate network management requirements, failed to pass muster with the D.C. Circuit Court of Appeals.⁴⁵ This decision severely sidetracks the Commission's attempt to establish binding and lawful network neutrality⁴⁶ policies, rules and regulations absent an explicit legislative mandate.

43. Justice Scalia, in his dissent in *Brand X*, 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. 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 & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1013–14 (Scalia, J. dissenting)(2005).

44. The FCC describes peer-to-peer (“P2P”) traffic as:

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 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 Parental Control Technologies for Video or Audio Programming, 24 FCC Rcd. 11413, 11472 ¶ 135 (2009).

45. Comcast Corp. v. F.C.C., 600 F.3d 642, 661 (D.C. Cir. 2010).

46. See Marvin Ammori, *Beyond Content Neutrality: Understanding Content-Based Promotion of Democratic Speech*, 61 FED. COMM. L.J. 273 (2009); Dan G. Barry, *The Effect of Video Franchising Reform on Net Neutrality: Does the Beginning of IP Convergence Mean That It Is Time for Net Neutrality Regulation*, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 421 (2008); Sascha D. Meinrath & Victor W. Pickard, *Transcending Net Neutrality: Ten Steps Toward an Open Internet*, 12 J. INTERNET L., No. 6, 1 (2008); Jennifer L. Newman, *Keeping the Internet Neutral: Net Neutrality and Its Role*

Noting that the Commission did not invoke express statutory authority, the D.C. Circuit considered whether “barring Comcast from interfering with its customers’ use of peer-to-peer networking applications—was ‘reasonably ancillary to the . . . effective performance of its statutorily mandated responsibilities.’”⁴⁷ Notwithstanding the Supreme Court’s broad deference to the FCC’s assertion of ancillary jurisdiction in *Brand X*,⁴⁸ the D.C. Circuit

in *Protecting Political Expression on the Internet*, 31 HASTINGS COMM. & ENT. L.J. 153 (2008); T. Randolph Beard, *Network Neutrality and Industry Structure*, 29 HASTINGS COMM. & ENT. L.J. 149 (2007); Jerry Brito, *A Tale of Two Commissions: Net Neutrality and Regulatory Analysis*, 16 COMMLAW CONCEPTUS 1 (2007); Rob Frieden, *Internet 3.0: Identifying Problems and Solutions to the Network Neutrality Debate*, 1 INT’L J. OF COMM., 461 (2007); Rob Frieden, *Network Neutrality or Bias?—Handicapping the Odds for a Tiered and Branded Internet*, 29 HASTINGS COMM. & ENT. L.J., No. 2, 171 (2007); Brett Frischmann & Barbara van Schewick, *Yoo’s Frame and What It Ignores: Network Neutrality and the Economics of an Information Superhighway*, 47 JURIMETRICS J. 383 (2007); Tim Wu and Christopher S. Yoo, *Keeping the Internet Neutral? Tim Wu and Christopher Yoo Debate*, 59 FED. COMM. L.J. 575 (2007); Robert E. Litan, *Unintended Consequences of Net Neutrality Regulation*, 5 J. TELECOMM. & HIGH TECH. L. 533 (2007); Randolph J. May, *Net Neutrality Mandates: Neutering the First Amendment in the Digital Age*, I/S: J. L. & POL’Y FOR INFO. SOC’Y 197 (2007); Amit M. Schejter, “Justice, and Only Justice, You Shall Pursue”: *Network Neutrality, the First Amendment and John Rawls’s Theory of Justice*, 14 MICH. TELECOMM. & TECH. L. REV. 137 (2007); Howard A. Shelanski, *Network Neutrality: Regulating with More Questions Than Answers*, 6 J. TELECOMM. & HIGH TECH. L. 23 (2007); Barbara A. Cherry, *Misusing Network Neutrality to Eliminate Common Carriage Threatens Free Speech and the Postal System*, 33 N. KY. L. REV. 483 (2006); Christopher S. Yoo, *Network Neutrality and the Economics of Congestion*, 94 GEO. L.J. 1847 (2006); Bill D. Herman, *Opening Bottlenecks: On Behalf of Mandated Network Neutrality*, 59 FED. COMM. L.J. 103 (Dec. 2006); William G. Laxton, Jr., *The End of Net Neutrality*, 2006 DUKE L. & TECH. REV. 15 (2006); Lawrence Lessig, *In Support of Network Neutrality*, I/S: J. L. & POL’Y FOR INFO. SOC’Y 185 (2007); J. Gregory Sidak, *A Consumer-Welfare Approach to Network Neutrality Regulation of the Internet*, 2 J. COMP. L. & ECON., No. 3, 349 (2006); Adam Thierer, *Are “Dumb Pipe” Mandates Smart Public Policy? Vertical Integration, Net Neutrality, and the Network Layers Model*, 3 J. TELECOMM. & HIGH TECH. L. 275 (2005); Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. TELECOMM. & HIGH TECH. L. 141 (2005); Christopher S. Yoo, *Beyond Network Neutrality*, 19 HARVARD J. L. & TECH. (2005); Christopher S. Yoo, *Would Mandating Broadband Network Neutrality Help or Hurt Competition? A Comment on the End-to-End Debate*, 3 J. ON TELECOMM. & HIGH TECH. L. 23 (2004); Mark A. Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. REV. 925 (2001).

47. *Comcast Corp.*, 600 F.3d at 644 (quoting *Am. Library Ass’n v. FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005)).

48. The D.C. Circuit 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 afoul of *Southwestern Cable* and *Midwest Video I.*” *Comcast Corp.*, 600 F.3d at 650. “The Commission’s exercise of ancillary authority over Comcast’s network management practices must . . . ‘be independently justified.’” *Id.* at 651 (citing *Nat’l Ass’n of*

required evidence that the FCC's regulatory action had a direct link to its statutorily mandated responsibilities.⁴⁹ The court vacated the FCC's sanctioning order on Comcast based on the view that the FCC relied on congressional statements of policy that do not provide a precedent for creating such responsibilities and on 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.⁵⁰ The court referred to the three major cable television cases⁵¹ 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."⁵² As in the case rejecting the FCC's attempt to require television set manufacturers to build units capable of processing digital rights 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 or (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities."⁵³ The court determined that the FCC had not satisfied the second part of the test.⁵⁴

Regulatory Utility Comm'rs v. FCC, 533 F.2d 601, 612 (D.C. Cir. 1976))(rejecting the FCC's preemption of state and local regulation of two-way, intrastate, non-video cable transmissions).

49. *Comcast Corp.*, 600 F.3d at 648. "The Commission therefore rests its assertion of authority over Comcast'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 645 (citing 47 U.S.C. § 154(i)); Formal Complaint of Free Press & Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications, 23 FCC Rcd. 13028, 13036 (2008)).

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

51. *United States v. Sw. Cable Co.*, 392 U.S. 157 (1968); *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972); *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979).

52. *Comcast Corp.*, 600 F.3d at 646.

53. *Id.*

54. *Id.* at 644.

The Commission may exercise this 'ancillary' authority only if it demonstrates that its action—here barring Comcast from interfering with its customers' use of peer-to-peer networking applications—is 'reasonably

In a series of references to provisions of the Communications Act,⁵⁵ the Commission expansively read congressional policy as sufficient ground for enacting ISP regulations.⁵⁶ The D.C. Circuit flatly rejected the FCC's attempt to infer congressional intent in order for the Commission to extend its regulatory wingspan to include Internet access:

[T]he 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.⁵⁷

The court concluded that if it accepted the FCC's theory of ancillary authority, the Commission could invoke that theory to apply any number of regulatory requirements to cable modem provided Internet access without explicit congressional authority.⁵⁸

2. Voice Over Internet Protocol

Even though the FCC finds it legally impossible to re-regulate Internet access, either by stretching its interpretation of Title I, or by inserting selected elements of Title II onto information services, or by

ancillary to the . . . effective performance of its statutorily mandated responsibilities.'

Am. Library Ass'n v. FCC, 406 F.3d 689, 692 (D.C. Cir. 2005). The Commission has failed to make that showing. It relies principally on several Congressional statements of policy, but under Supreme Court and D.C. Circuit case law statements of policy, by themselves, do not create "statutorily mandated responsibilities." The Commission also relies on various provisions of the Communications Act that do create such responsibilities, but for a variety of substantive and procedural reasons those provisions cannot support its exercise of ancillary authority over Comcast's network management practices. We therefore grant Comcast's petition for review and vacate the challenged order. *Comcast Corp.*, 600 F.3d at 644.

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

56. *Comcast Corp.*, 600 F.3d at 655.

57. *Id.*

58. *Id.* ("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.").

inferring congressional authorization where no explicit language exists, the Commission has found ways to regulate VoIP. Notwithstanding the fact that VoIP services apply software to Internet access links, such as DSL that are already classified as information services,⁵⁹ the Commission has managed to apply Title II safeguards without having to specify into which category commercial VoIP service fits.⁶⁰ The Commission only specified that personal computer-to-personal computer VoIP clearly falls into the information service category.⁶¹ In a report to the Senate, the Commission also tentatively concluded that VoIP calls, which have access to and from the conventional Public Switched Telephone Network (“PSTN”), constitute a telecommunications service.⁶² 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 as

59. A VoIP service uses software to configure voice bits into a telephone service. Because the FCC has determined that bit transmission service constitutes an information service, the Commission could not credibly determine that the software configuration of bits also constitute an information service. See Rob Frieden, *Assessing the Merits of Network Neutrality Obligations at Low, Medium and High Network Layers*, 115 PENN. ST. L. REV. (forthcoming 2010).

60. VoIP service providers accessible to and from conventional wired or wireless networks must contribute to universal service funding. Universal Serv. Contribution Methodology, 21 FCC Rcd. 7518, 7538 (2006) (extending section 254(d) permissive authority to require interconnected VoIP providers to contribute to the USF), *petition for review denied, vacated in part on other grounds*, Vonage Holding Corp. v. FCC, 489 F.3d 1232 (D.C. Cir. 2007). VoIP providers must reconfigure their services to provide wiretapping capabilities to law enforcement authorities. Communications Assistance for Law Enforcement Act & Broadband Access & Servs., 20 FCC Rcd. 14989, 14989 (2005), *petition for review denied*, Am. Council on Educ. v. FCC, 451 F.3d 226 (D.C. Cir. 2006). They must provide caller location identification and emergency 911 access. IP-Enabled Servs., E911 Requirements for IP-Enabled Service Providers, 20 FCC Rcd. 10245, 10246 (2005), *petition for review denied*, Nuvio Corp. v. FCC, 473 F.3d 302 (D.C. Cir. 2006). They must offer subscribers the option of transferring the telephone number they previously used. Telephone Number Requirements for IP-Enabled Services Providers, 22 FCC Rcd. 19531, 19532 (2007). They also must offer service to disabled users. IP-Enabled Servs., Implementation of Sections 255 and 251(A)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996: Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities Telecommunications, 22 FCC Rcd. 11275, 11276 (2007), *Order and Public Notice Seeking Comment*, 22 FCC Rcd. 18319, 18319 (2007)(granting in part and denying in part waivers of the FCC order).

61. *Petition for Declaratory Ruling that pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, 19 FCC Rcd. 3307, 3324 (2004).

62. *Fed.-State Joint Board on Universal Service*, 13 FCC Rcd. 11501, 11528 (1998).

information services, 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,⁶³ and have not rejected as unlawful the Commission's selective application of Title II safeguards on VoIP ventures based on the view that such services have a sufficiently close statutory link to common carriage telephony.⁶⁴ 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 have 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 (“IPTV”)⁶⁵—the Commission has so far refrained from making a regulatory call. In the absence of such decision making, the FCC de facto treats IPTV as an information service, even though 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 it had continued to require structural or functional separation of telecommunications services from everything else offered by ICE ventures.⁶⁶ At the onset of data communications, the Commission's first regulatory strategy explicitly limited oversight

63. Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, 19 FCC Rcd. 22404, 22413 (2004) (classifying Vonage's VoIP offering as a “jurisdictionally mixed service” and expressly preempting the Minnesota Commission's regulation of that service), *aff'd on other grounds*, Minn. Pub. Utils. Comm'n v. FCC, 483 F.3d 570 (8th Cir. 2007).

64. See, e.g., Vonage Holding Corp. v. FCC, 489 F.3d 1232 (D.C. Cir. 2007) (FCC could lawfully require VoIP service providers, which receive or deliver calls to conventional wired and wireless networks, to contribute to a universal service fund).

65. For background on IPTV, see In-Sung Yoo, *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).

66. Robert W. Crandall, Jeffrey A. Eisenach & Robert E. Litan, *Vertical Separation of Telecommunications Networks: Evidence From Five Countries*, 62 FED. COMM. L.J. 493, 495 (2010) (“[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.”).

to core, basic telecommunications services by requiring carriers to form separate corporate subsidiaries when pursuing new information markets.⁶⁷ Telephone companies have ample experience in creating separate subsidiaries, and gladly pursue this option when doing so possibly insulates revenues. For example, wireline telephone companies created separate and unregulated telephone directory publishing companies with an eye toward insulating revenues from state and federal telecommunications regulation of rates.

Incumbent telephone companies objected to the structural separation requirement on grounds that it triggered inefficiency, lost synergies, and higher costs. Although these companies never provided empirical evidence that such adverse outcomes were occurring, the FCC accepted their assertions without question and abandoned structural safeguards.⁶⁸ The Commission adopted some accounting safeguards, but subsequently abandoned most of these requirements as well.⁶⁹ 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 United Kingdom,⁷⁰ Australia,⁷¹ and New

67. Amendment of Section 64.702 of the Commission's Rules and Regulations, Final Decision, 77 F.C.C. 2d 384, 385 (1980). See also Amendment of Section 64.702 of the Commission's Rules and Regulations, Memorandum Opinion and Order, 84 F.C.C. 2d 50, 55-56 (1980); Amendment of Section 64.702 of the Commission's Rules and Regulations, *Memorandum Opinion and Order on Further Reconsideration*, 88 F.C.C. 2d 512, 513 (1981), *aff'd*, Computer & Comm'n's Indus. Ass'n, 693 F.2d 198 (D.C. Cir. 1982); Robert M. Frieden, *The Computer Inquiries: Mapping the Communications/Information Processing Terrain*, 33 FED. COMM. L.J. 55 (1981).

68. See Robert M. Frieden, *The Third Computer Inquiry: A Deregulatory Dilemma*, 38 FED. COMM. L.J. 383, 384 (1987).

69. See Michael H. Ryan, *Structural Separation: A Prerequisite for Effective Telecoms Competition*, 24(6) EUR. COMPETITION L. REV. 241 (2003); David Gabel, *Why is There So Little Competition in the Provision of Local Telecommunications Services?: An Examination of Alternative Approaches to End-User Access*, 2002 MICH. ST. L. REV. 651; T. Randolph Beard, George S. Ford & Lawrence J. Spiwak, *Why ADCo? Why Now? An Economic Exploration into the Future of Industry Structure for the "Last Mile" in Local Telecommunications Markets*, 54 FED. COMM. L.J. 421 (2002).

70. See *A New Regulatory Approach for Fixed Telecommunications*, OFCOM (June 26, 2005), <http://media.ofcom.org.uk/2005/06/23/a-new-regulatory-approach-for-fixed-telecommunications/>; *Ofcom Accepts Undertakings from Board of BT Group Plc on Operational Separation*, OFCOM (Sept. 22, 2005), <http://media.ofcom.org.uk/2005/09/22/ofcom-accepts-undertakings-from-board-of-bt-group-plc-on-operational-separation/> (announcing the structural changes 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 . . . 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." *Telecommunications Statement*,

Zealand⁷² implemented either structural or functional separation requirements.⁷³ These nations have identified no significant loss of synergies, or the inability of carriers to decouple telecommunications elements of convergence services.

Ideally, 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 operate in a transparent and nondiscriminatory manner when they offer bit transmission services to other ventures that add value to such links.

III. 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 of which single category convergent services must fit. The Commission will likely continue to prefer use of the information service classification, because announcing a deregulatory outcome typically confers more political 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, statistical reporting, and other flaws demonstrate an administrative agency inclined to engage in

OFCOM 3 (Sept. 8, 2005), http://stakeholders.ofcom.org.uk/binaries/consultations/telecoms_p2/statement/main.pdf.

71. See AUSTRALIAN GOVERNMENT, NATIONAL BROADBAND NETWORK: REGULATORY REFORM FOR 21ST CENTURY BROADBAND 20-23 (April 2009), http://www.dbcde.gov.au/_data/assets/pdf_file/0006/110013/NBN_Regulatory_Reform_for_the_21st_Century_Broadband_low_res_web.pdf.

72. See Telecommunications Amendment Act 2006, No. 83 (N.Z.).

73. See Ricardo Goncalves and Alvaro Nascimento, *The Momentum for Network Separation: A Guide for Regulators*, 34 TELECOM. POL'Y 355 (2010).

results-driven decision making.⁷⁴ Rather than have an open mind shaped by the evidence it acquires, the FCC may seek to shape the record to support 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.⁷⁵ The subsequent decisions may fail to pass muster with reviewing courts,⁷⁶ and the primary source of information used for both applied and academic research may offer a false or incomplete picture. Far too often, it appears 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. For example, if the FCC wants to conclude 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, the 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 become flawed products that may not serve the public interest or may not reflect a true empirical record. Stakeholders can rely on such

74. See Rob Frieden, *Case Studies in Abandoned Empiricism and the Lack of Peer Review at the Federal Communications Commission*, 8 J. TELECOMM. & HIGH TECH. L. 277 (2010)(providing examples of FCC decisions overturned by appellate courts or subsequently abandoned by the Commission).

75. See, e.g., *Prometheus Radio Project v. FCC*, 373 F.3d 372, 434–35 (3d Cir. 2004) (rejecting the FCC's simple count of media outlets without consideration of market penetration), *cert. denied*, 545 U.S. 1123, 125 S. Ct. 2902 (2004).

5 U.S.C. § 706(2)(A) (2002)(mandating reviewing courts to set aside agency conclusions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

76. See, e.g., *Verizon Tel. Cos. v. FCC*, 570 F.3d 294 (D.C. Cir. 2009) (finding 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 thirty percent 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*, 545 U.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).

flawed data to corroborate preferred outcomes in ways that help legitimize, as “empirically-based,” conclusions that would not pass peer review.

The statutory prohibition of arbitrary and capricious decision making⁷⁷ obligates the FCC to compile a complete evidentiary record. Nonetheless, reviewing courts have admonished the Commission for acquiring and interpreting data selectively with an eye toward generating statistics that support pre-determined outcomes.⁷⁸ This results-driven decision making also 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.⁷⁹

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.⁸⁰ Even advocates for 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 that the frequently cited statistics present a true picture of the marketplace.

The FCC has repeatedly deemed competitive the wireless marketplace that grows increasingly concentrated in light of the mergers approved by the Commission, despite proof that the market already exceeds the Herfandal Hershman Index rating for a highly

77. 5 U.S.C. § 706(2)(A).

78. See e.g., *Verizon Tel. Cos. v. FCC*, 570 F.3d at 304–305; *Comcast Corp. v. FCC*, 579 F.3d at 8; *Prometheus Radio Project v. FCC*, 373 F.3d at 415; *Qwest Corp. v. FCC*, 258 F.3d at 1198–99.

79. See 47 C.F.R. §§ 0.457, 0.459, 1.7001(d), 43.11(c); Report and Order, Examination of the Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, 13 FCC Rcd. 24816, 24883, ¶ 23 (1998).

80. The Commission readily acknowledges the absence of ubiquitous telephone service perhaps because a \$7.4 billion annual subsidy program exists to subsidize access. See *Universal Service Fund Facts*, UNIVERSAL SERVICE FUND ADMINISTRATIVE COMPANY, (last modified June 16, 2010), <http://www.usac.org/about/universal-service/fund-facts/fund-facts.aspx> (showing that \$4.3 billion was appropriated for carriers operating in high cost areas and one billion dollars for subsidizing access by low-income subscribers).

concentrated market.⁸¹ 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.⁸² Although it recently identified that up to twenty-four million Americans lacked any broadband option,⁸³ the Commission previously concluded that more than ninety-five percent of all U.S. residents had such access.⁸⁴ The Commission initially stated that statistics proved pay-per-channel, *à la carte* access to cable television programming, would not save consumers money when compared to a packaged bundle of channels.⁸⁵ However, the Commission subsequently reversed itself with relatively limited explanation for its change in findings.⁸⁶ The Commission also erected a media diversity index that made no distinction between media outlets based on market penetration to support relaxation of a cap on media ownership that a reviewing

81. See *14th Report on the Wireless Marketplace*, *supra* note 24, at 31, Table 3, Chart 1.

82. See *Number of Holding Companies Reporting High-Speed Subscribers by ZIP Code as of June 30, 2007*, FED. COMM'NS COMM'N, (March 24, 2008), available at http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/hzip060.pdf.

83. Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, Sixth Broadband Deployment Report, FCC 10-129 (July 20, 2010), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-129A1.doc.

84. "The presence of high-speed service subscribers was reported in all 50 states, the District of Columbia, American Samoa, Guam, Northern Mariana Islands, Puerto Rico, and the Virgin Islands, and in over 99% of the Zip Codes in the United States." INDUSTRY ANALYSIS AND TECHNOLOGY DIVISION, WIRELINE COMPETITION BUREAU, HIGH-SPEED SERVICES FOR INTERNET ACCESS: STATUS AS OF JUNE 30, 2007, 1 (March 2008), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-280906A1.pdf. See also Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, Fifth Broadband Deployment Report, FCC 08-88 (June 12, 2008), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-88A1.doc.

85. *Report on the Packaging and Sale of Video Programming Services to the Public*, FED. COMM'NS COMM'N (2004), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-254432A1.pdf.

86. *Further Report on the Packaging and Sale of Video Programming Services to the Public*, FED. COMM'NS COMM'NS (2006), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-263740A1.pdf. See also Charles B. Goldfarb, Congressional Research Service, THE FCC'S "A LA CARTE" REPORTS (March 30, 2006), <http://www.ncta.com/DocumentBinary.aspx?id=294>.

court rejected based on the lack of supporting evidence.⁸⁷ Only after a stinging judicial rebuke did the FCC consider subjecting 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.

Until the FCC in 2009 sought to use better calibrated measures of broadband access in the U.S., the Commission reported statistics that confirmed a "mission accomplished" view that an unregulated marketplace operated without failure even for the nation's large rural hinterland.⁸⁸ Skeptical analysts of the FCC's conclusions could not subject the statistics to comprehensive review because the Commission agreed to treat as confidential trade secrets the raw information submitted to the FCC in compliance with a congressional mandate for accurate tracking of broadband market penetration by the Commission.⁸⁹ Access to such data might provide the basis for challenging 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 the geographical reach of their wireless services argue against the FCC providing the same information about broadband penetration to the public.

87. *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*, 545 U.S. 1123 (2004).

88. "[W]e find, pursuant to the analytical framework established in prior section 706 reports, that advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion." In the Matter of 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, GN Docket No. 07-45, Fifth Report, 23 FCC Rcd. 9615, 9616 (2008). The Commission reported that as of 2009, nearly one hundred million Americans lack broadband at home and between fourteen million and twenty-four million Americans do not have access to broadband even if they want it. In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, GN Docket No. 09-137, Sixth Broadband Deployment Report, 25 FCC Rcd. 9556, 9557 (2010).

89. 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 regarding 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, 117 (D.D.C. 2007).

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 do not assist empirical researchers. Rather, 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 those that determine the Commission's budget, have a friendlier tone when FCC representatives report positive news and statistics. 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. Such retaliation may arise particularly from incumbent firms that have 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, most competitive 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 the FCC should embrace.

1. *Refuse to Grant Blanket Trade Secret/Confidentiality Requests From Stakeholders*

Lacking the resources to independently compile much data about the industries it regulates, the FCC relies on compulsory reports filed by specific companies. Stakeholders in the outcome of Commission proceedings 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 ISP not to serve a particular area.⁹⁰ The Commission dutifully obscures the identity of ISPs serving a ZIP code. For many years, researchers could only glean from the Commission's data 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 the 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.⁹¹ 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 of the Communications Act. The FCC, National Telecommunications and Information Administration, 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 whether and where market failures exist.

90. *Ctr. for Pub. Integrity*, 505 F. Supp. 2d at 117 (upholding the FCC's trade secret classification of broadband market penetration data).

91. 47 U.S.C. § 157 (2008).

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

2. *Resolve to Compile Understandable, Credible, Granular, and Reproducible Statistics Based on Reasonable Benchmarks*

Researchers and Commission staff need data collection and statistical compilations that answer basic questions, such as 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 separate and offer for lease to competitors the facilities that switch and route telecommunications traffic,⁹² despite a congressional mandate to promote local exchange competition.⁹³ The Commission appears to have abandoned these 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 stakeholders' arguments that unbundling requirements are "confiscatory," a government "taking of property," and a major disincentive to next generation network investment.⁹⁴

92. Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 20 FCC Rcd. 2533 (2005).

93. 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) (2004).

94. See, e.g., Stuart Buck, *TELRIC vs. Universal Service: A Takings Violation?*, 56 FED. COMM. L.J. 1 (2003). See also J. Gregory Sidak & Daniel F. Spulber, *DEREGULATORY TAKINGS AND THE REGULATORY CONTRACT* (1998).

Even though 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 owns or resells these lines. However, 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 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 incumbent carrier unbundled network element pricing was sufficiently compensatory. It is imperative to keep in mind that early in the Commission's campaign to promote local exchange competition, the Supreme Court noted that neither the FCC nor any local access-providing carrier had produced evidence of under-compensation.⁹⁵ 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.⁹⁶ 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 in the FCC's obscure statistics and data collection process, one can find that compulsory rentals from incumbents to newcomers peaked at twelve percent of available line capacity,⁹⁷ a level that is not close to forcing incumbents to invest in additional plant that they would have to make available solely to competitors.

95. *Verizon Commc'n, Inc. v. FCC*, 535 U.S. 467 (2002)(affirming the FCC's unbundling requirements and pricing methodology for access).

96. See George S. Ford, *Competition After Unbundling: Entry, Industry Structure, and Convergence*, 59 FED. COMM. L.J. 331 (2007), Thomas W. Hazlett, *Rivalrous Telecommunications Networks With and Without Mandatory Sharing*, 58 FED. COMM. L.J. 477, 492-94 (2006); Jerry A. Hausman & J. Gregory Sidak, *Did Mandatory Unbundling Achieve Its Purpose? Empirical Evidence from Five Countries*, 1 J. COMPETITION L. & ECON. 173 (2005).

97. See *Industry Analysis and Technology Division, WIRELINE COMPETITION BUREAU*, FCC (Aug. 2008), at 8-8, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-284932A1.pdf.

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, resulting in a price squeeze. However, this price squeeze is one for which the FCC and the Supreme Court in *Linkline*⁹⁸ have no concerns, presumably in light of ample local exchange service competition.

Assuming that ILECs actually increased 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. 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 in light of competitive pressure from VoIP and declining margins in long distance telephone service. Giving the ILECs due credit, they have invested in next generation networks, mostly wireless plant for which no unbundling requirement ever applied. As to newfound zeal in investing in DSL, 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 an extraordinary amount of research 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 imperative the ability to answer these basic questions, such as whether specific telecommunications markets operate competitively.

3. Seriously Consider the Consequences of Mergers on Consumers

With rare exception, the FCC finds a way to approve any and all mergers, including those where the acquiring company increases its market share and further concentrates the market. The Commission typically asserts that a merger will “promote competition,” but supports this conclusion with a variety of qualitative forecasts about

98. *Pac. Bell Tel. Co. v. Linkline Commc’ns, Inc.*, 129 S. Ct. 1109 (2009) (holding that antitrust remedies are not available to offer greater competitive safeguards when the FCC determines that a carrier has no common carrier obligation to provide access to a competitor).

how the acquiring firm will become a better and more efficient competitor, or that the acquired firm never competed with the acquiring firm. The Commission's analysis of most mergers emphasizes the concessions the acquiring firm has "voluntarily" submitted, rather than assessing the true nature of the competitiveness of the market in question pre- and post-merger. The Commission does not conscientiously determine post-merger whether the acquiring company complies with its offered concessions and fulfills measureable service commitments.

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 acquisitions, including ones by AT&T and Verizon that now control over sixty percent of the total market with four national carriers controlling over ninety-one percent of the market.⁹⁹ A researcher must painstakingly examine almost three hundred 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.¹⁰⁰

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, which is well in excess of Department of Justice antitrust guidelines that considers a market to be "highly concentrated" if the post-merger HHI exceeds 1800.¹⁰¹ Nowhere in its comprehensive examination of the wireless marketplace does the

99. *14th Report on the Wireless Marketplace*, *supra* note 24, at 31, Table 3, Chart 1.

100.

[T]he mobile wireless ecosystem is sufficiently complex that any review or analysis of competitive market conditions must take into consideration a multitude of factors. As a result, 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.

14th Report on the Wireless Marketplace, *supra* note 24, at ¶ 3.

101. *Id.* ¶ 49.

Commission directly consider the potential consumer harms. 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.

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 analyses 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 documents predominate, because, with rare exception, only parties with direct financial stakes 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. If that should fail, the Commission should fund third party research as it has done in preparation of the National Broadband Plan.¹⁰² The Commission typically relies solely on the filings of interested parties, which by definition have a biased point of view and policy agenda. To separate advocacy from empirical data, the FCC must commit to practices that can distinguish the two. Peer review can achieve that goal. However, the Commission rarely uses this process even with the statutory mandate to do so.¹⁰³

The Commission's website showcases very few instances where it uses peer review, including a 2008 investigation of the Maritime

102. See, e.g., *Next Generation Connectivity: A Review of Broadband Internet Transitions and Policy from Around the World*, BERKMAN CENTER FOR INTERNET & SOC. (2009), available at http://www.fcc.gov/stage/pdf/Berkman_Center_Broadband_Study_13Oct09.pdf.

103. See Final Information Quality Bulletin for Peer Review, 70 FED. REG. 2664 (Jan. 14, 2005).

Automatic Identification Systems.¹⁰⁴ In other instances the Commission relies on third party research but refuses to subject the research to scrutiny by the general public.¹⁰⁵

Too much is at stake for the FCC not to use the best practices in its acquisition of data, compilation of statistics, and establishment of rules, policies, and regulations based on its analysis of statistics. The Commission should 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. Despite the gains that the FCC has accrued for itself and its 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 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 of generating a complete evidentiary record.

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 they may be. Congress should not have to enact reminders of this core regulatory duty.

IV. Limited But Essential Statutory and Regulatory Remedies

A. Congress Should Act

Although the FCC does not need a 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

104. See FED COMMC'NS COMM'N, PEER REVIEW AGENDA, (2010).

105. See, e.g., *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 231 (2008)(holding that the FCC did not comply with the Administrative Procedure Act by redacting 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 emissions attenuate).

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 from telecommunications offered as a stand-alone 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 Congress 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.

In 2005, the FCC, as augmented by recent efforts, has identified what minimum requirements ISPs should satisfy.¹⁰⁶ 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 is in 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.”¹⁰⁷

The Commission articulated its support in terms of four principles “to encourage broadband deployment and preserve and promote the

106. Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Policy Statement, 20 FCC Rcd. 14986 (2005).

107. *Id.*

open and interconnected nature of public Internet.”¹⁰⁸ 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.¹⁰⁹

Prior to the reversal of the FCC’s sanctioning of Comcast for meddling with subscriber traffic, the FCC issued a Notice of Inquiry (“NOI”) with an eye towards codifying the four so-called Internet freedoms, plus an explicit requirement of nondiscrimination and transparency.¹¹⁰ 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.”¹¹¹ The FCC posed three primary questions, the answers of which would steer the Commission to do one of the following: (1) to maintain the limited, if any, regulatory foundation available from Title I; (2) to reclassify wired Internet access—e.g., DSL and Cable Modem service—as telecommunications services, subject to Title II, common carrier regulation; or (3) 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.¹¹²

108. *Id.* at 14988.

109. *Id.*

110. Framework for Broadband Internet Service, Notice of Inquiry, 25 FCC Rcd. 7866, 7877 (June 17, 2010).

111. *Id.* at ¶ 1.

112. *Id.* at ¶ 2. “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

The FCC's NOI strongly implied that the Commission's 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."¹¹³ The NOI stated that until the *Comcast* decision, few observers doubted whether the Commission had lawful authority to regulate broadband Internet services.¹¹⁴

The FCC devoted substantial space in the NOI reasserting why it has a direct statutory authority to regulate Internet access. The Commission persists in making possible inferences to statutory language containing no specific regulatory mandate:

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."¹¹⁵

The FCC did acknowledge that the *Comcast* decision "causes [it] to reexamine [its] ability to rely on Title I as the legal basis for

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." *Id.*

113. *Id.* at ¶ 10. *See also*, Framework for Broadband Internet Service, Notice of Inquiry Powerpoint, FED. COMM'C'N COMM'N (June 17, 2010), *available at* http://reboot.fcc.gov/c/document_library/get_file?uuid=366e0dc4-c4ef-4525-bc36-d6a8dd75da4e&groupId=19001.

114. *Id.* at ¶ 8. "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."

115. *Id.* at ¶ 30 (citations omitted).

implementing broadband policies.”¹¹⁶ In the wake of that decision, the Commission accordingly asked what overall scope of authority remains available if the Commission should retain the information service classification for Internet access.

The FCC’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.”¹¹⁷ ISPs universally oppose this option, claiming that it would impose unnecessary regulatory burdens and create disincentives for investment in infrastructure and expanded hiring.

The FCC offered a third alternative which proposes to fine-tune 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.”¹¹⁸ The Commission has applied this streamlined common carrier model to wireless cellular telephone carriers, under an explicit statutory mandate.

Chairman Genachowski and his staff have expressed a clear preference for this Third Way option.¹¹⁹ However, even with the immediate and extensive forbearance from regulation, this option

116. *Id.*

117. *Id.* at ¶ 52.

118. *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.

119. Julius Genachowski, FCC Chairman, *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); 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).

entails a re-classification of statutory service definitions. Shifting from information service to telecommunication service, which is subject to regulatory forbearance, vests greater regulatory authority in the FCC. Stakeholders and reviewing courts welcome reclassifications that result in less regulatory authority and commensurately less regulation. In effect, the Third Way option 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 as an information service.

Should the FCC adopt and apply the Third Way option, or rely on Section 706 and other portions of the Communications Act, 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. Nevertheless carriers subject to even the prospect of triggering a potentially more expansive regulatory regime have launched a costly campaign to convince Congress to prohibit 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 authority to sanction the Madison River Telephone Company when the company blocked DSL subscriber access to VoIP services.¹²⁰ The matter resulted in a voluntary forfeiture of fifteen thousand by the company instead of litigation, without a complete examination of which obligations the company had in its capacity as both an ISP and common carrier vis a vis information services provided by a competitor.¹²¹

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

120. Madison River Commc'n, LLC, 20 FCC Rcd. 4295 (2005).

121. *Id.* at 4297.

Sec. 208 (Title II) of the Communications Act.¹²² *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. However, 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 authorizing the Commission to deviate from applying the complete array of Title II statutory requirements on wireless Commercial Mobile Radio Service (“CMRS”) providers.¹²³ 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 and the degree of competition the carrier faces.

The Commission has deemed the wireless market sufficiently competitive to justify abandonment of 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”

122. *Id.* at 4298.

123. *See supra* note 24.

subscribers of other carriers,¹²⁴ ensure free 911 emergency access,¹²⁵ and maintain number portability.¹²⁶ 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*

Although 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 telecom-munications 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 to apply two different regulatory regimes. Over time, reviewing courts might accept an FCC initiative to reclassify

124. Order on Reconsideration and Second Further Notice of Proposed Rulemaking, 25 FCC Rcd. 4181(2010); Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 15817 (2007); Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, WT Docket No. 05-265, Memorandum Opinion & Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 15047 (2005); Interconnection and Resale Obligations of Commercial Mobile Radio Service Providers, CC Docket No. 94-54, *Second Report and Order and Third Notice of Proposed Rulemaking*, 11 FCC Rcd. 9462, 9468-69 ¶ 10 (1996)(rules codified at 47 C.F.R. § 20.12(c)).

125. Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102, RM-8143, Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 18676 (1996) (adopting amendments to Section 20.3 and new Section 20.18 in the Commission's Rules, 47 C.F.R. §§ 20.3, 20.18, *on recon.*, Memorandum Opinion and Order, 12 FCC Rcd. 22665 (1997) Second Report and Order, 14 FCC Rcd. 10954 (*E911 Second Report and Order*) (adopting 47 C.F.R. § 22.921 of the Commission's Rules). Third Report and Order, 14 FCC Rcd. 17388 (1999); *see also* In the Matter of Implementation of the Net 911 Improvement Act of 2008, WC Docket No. 08-171, Report and Order, 23 FCC Rcd. 15884 (2008).

126. In the Matter of Telephone Number Portability, CC Docket No. 95-116, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 8352 (1996) (establishing deadlines for wired and wireless telephone companies to enable new subscribers to use preexisting telephone numbers when changing carriers); Cellular Telecommunications Industry Association's Petition for Forbearance From Commercial Mobile Radio Services Number Portability Obligations, et al., WT Docket No. 98-229, CC Docket No. 95-116, Memorandum Opinion and Order, 14 FCC Rcd. 3092 (1999) (wireless compliance deadline extended); Verizon Wireless's Petition for Partial Forbearance From Commercial Mobile Radio Services Number Portability Obligation and Telephone Number Portability, *Memorandum Opinion and Order*, 17 FCC Rcd. 14972, 14986, ¶ 31 (2002)(discussing further extension of compliance deadline).

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 unconditional deregulation. 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 the invalid rationale for justifying a false regulatory dichotomy between identical technologies used to provide both telecommunications and information services.

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 a telephone company provider of DSL Internet access should not exploit its 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 integrated telephone company or ISP to refrain from abusing its position as gateway to the Internet.

V. 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 summary determination that such services require no regulatory oversight. The Commission attempted to corroborate this conclusion with questionable statistics showing the robust competitiveness of broadband markets and the ubiquity of access to such services by all Americans wherever located.

The FCC has subsequently recanted such summary conclusions and belatedly come to recognize the need to impose some consumer safeguards in the information services marketplace. But making a case for the essentialness of broadband access, and generating statistics that show less than ideal 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 give the FCC such authority.

It is 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 have aggressively lobbied Congress to maintain the deregulatory status quo. Accordingly, the FCC will have to determine 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 again risks overstepping its authority, but 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 article has identified a number of ways in which the Commission can generate a more complete evidentiary record that identifies the true current environment instead of the one Commission's managers want to see. With greater clarity in its mission to serve the public interest, rather than achieve a preordained, deregulatory outcome, the Commission may once again convince reviewing courts that it is worthy of deference to its lawfully recognized expertise and statutory analysis.