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From Bad to Worst: Assessing the Long Term Consequences of Four Very Bad FCC Decisions

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I. Introduction

Far too many major decisions of the Federal Communications Commission (“FCC”) rely on flawed assumptions about the current and future telecommunications marketplace. If the FCC incorrectly overstates the current state of competition,¹ it risks exacerbating its mistake going forward if actual competition proves unsustainable, or lackluster. In many key decisions the FCC cited robust competition in current and future markets as the basis for decisions that relax restrictions on incumbents, abandon strategies for promoting competition, or apply statutory definitions of services that trigger limited government oversight.² In its zeal to announce a deregulatory decision and to accrue political dividends, the Commission ignores secondary and

¹ “[T]here is substantial competition in the provision of Internet access services.” AT&T Inc. and BellSouth Corp., Application for Transfer of Control, Memorandum Opinion and Order, 22 F.C.C.R. 5662, 5724-25 (2007). In 2008 the FCC stated that “advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion.” Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, Fifth Report, 23 F.C.C.R. 9615, 9616 (2008), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-88A1.pdf. On the other hand, at about the same time the FCC stated that “[s]tudy after study demonstrates that our nation’s broadband infrastructure lags dramatically behind other industrialized nations. In order to reverse this trend, we must encourage ‘third pipe’ technologies to provide some at least some challenge to the cable/telco broadband duopoly in our cities.” In the Matter of Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission’s Competitive Bidding Rules and Procedures WT Docket No. 05-211, Order on Reconsideration of the Second Report and Order, Statement of Commissioner Michael J. Copps, 21 F.C.C.R. 6703, 6727 (2006).

² An FCC conclusion that robust competition exists provides the basis for a reviewing court to direct the Commission to eliminate precompetitive requirements on incumbent carriers limited in scope and duration to instances where the absence of such requirements would impair competition. “[T]he presence of robust competition in a market where CLECs use critical ILEC facilities by purchasing special access at wholesale rates ... precludes a finding that the CLECs are ‘impaired’ by lack of access to the element under § 251(c)(3).” *United States Telecom Association v. FCC*, 359 F.3d 554, 593 (D.C. Cir. 2004).

tertiary consequences of decisions that deprive it of the jurisdiction and flexibility needed to respond to technological and marketplace changes.³

Rather than promote competition, the FCC has exacerbated the trend toward concentration of ownership generated by technological convergence and the real or perceived need for incumbents to achieve scale efficiencies by acquiring competitors. Instead of making sure that this trend does not lead to oligopolistic behavior, which can harm consumers, the FCC has removed still necessary regulatory safeguards designed to curb market power without robbing ventures of opportunities to operate efficiently. Intentionally or not the FCC contributes to market concentration⁴ even as it

³ For example, the FCC has expressed confidence that it can assert its ancillary jurisdiction to achieve consumer protection even if it previously opted to streamline or eliminate regulatory safeguards. “We have a duty to ensure that consumer protection objectives in the Act are met as the industry shifts from narrowband to broadband services. Through this Notice, we thus seek to develop a framework for consumer protection in the broadband age -- a framework that ensures that consumer protection needs are met by all providers of broadband Internet access service, regardless of the underlying technology. This framework necessarily will be built on our ancillary jurisdiction under Title I; as we explain in the Order, this jurisdiction is ample to accomplish the consumer protection goals we identify below, and we will not hesitate to exercise it.” *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, CC Docket No. 02-33, Report and Order and Notice of Proposed Rulemaking, 20 F.C.C.R. 14853, 14929-30 (2005), *pet. for rev. den.*, *Time Warner Telecom, Inc. v. F.C.C.*, 507 F.3d 205, (3rd Cir. 2007). “We emphasize that we will not hesitate to adopt any non-economic regulatory obligations that are necessary to ensure consumer protection and network security and reliability in this dynamically changing broadband era.” *Id.* 20 F.C.C.R. 14915.

⁴ “Even with one less nationwide mobile telephone carrier to choose from, U.S. consumers continue to benefit from robust competition in the CMRS marketplace.” *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*, Eleventh Report, 21 F.C.C.R. 10947, 11029 (2006)(dismissing any adverse impact from Sprint’s merger with Nextel).

abandons lawful techniques and policies to monitor and remedy marketplace abuses that invariably occur.⁵

The FCC's deregulatory decisions operate in one direction—the elimination of regulatory safeguards—typically without reserving any lawful and effective option for reasserting safeguards should assumptions prove wrong, or circumstances change in ways necessitating re-imposition of public interest safeguards. For example, the FCC's decision to classify all Internet access technologies⁶ as information services⁷ now prevents the Commission from responding to complaints that some Internet Service Providers ("ISPs") have interfered with subscribers' traffic in the absence of the need to apply legitimate network management curbs. So when Comcast

⁵ It took the FCC over four years to detect and remedy deliberate data service overcharges imposed by Verizon Wireless exceeding \$52 million. *See* Verizon Wireless Data Usage Charges, File No. EB-09-TC-458, Order, 25 F.C.C.R. 15105 (2010). Because the charges refer to Internet access, Verizon arguably could have claimed the FCC lacked jurisdiction to intervene. Verizon claims the FCC lacks jurisdiction to compel the carrier to provide data service to subscribers of other carriers. *See* Reexamination of Roaming Obligations Of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, WT Docket No. 05-265, Second Report and Order, FCC 11-52, 2011 WL 1341353 (rel. April 7, 2011); Maisie Ramsay, *Verizon Sues FCC Over Data Roaming Rules*, WIRELESS WEEK, available at: <http://www.wirelessweek.com/News/2011/05/Policy-and-Industry-Verizon-Sues-FCC-Data-Roaming-Rules-Legal/>.

⁶ The FCC has determined that various broadband technologies for accessing the Internet all qualify for limited regulatory oversight. *See, e.g.*, High-Speed Access to the Internet Over Cable and Other Facilities, GN Docket No. 00-185, Declaratory Ruling and Notice of Proposed Rulemaking, 17 F.C.C.R. 4798, 4802, (2002), *aff'd*, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 125 S.Ct. 2688, (2005); Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Report and Order and Notice of Proposed Rulemaking, 20 F.C.C.R. 14853 (2005) *petition for review denied*, Time Warner Telecom, Inc. v. FCC, 507 F.3d 205 (3d. Cir. 2007).

⁷ Information service is defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." *Id.* 47 U.S.C. § 153(20).

deliberately disrupts subscribers' traffic,⁸ which can offer a competitive alternative to the company's pay per view video programming services,⁹ the FCC has no statutory authority to sanction the company for engaging in an unreasonable trade practice.¹⁰ Worse yet, the decision to treat basic bit transmission as an information service severely restricts the Commission's ability to impose safeguards on services that combine Internet access with software, to provide the functional equivalent of a regulated service, e.g., Internet Protocol Television.¹¹ The FCC's decision to apply

⁸ Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, Broadband Industry Practices Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates The FCC's Internet Policy Statement and Does Not Meet an Exception for Reasonable Network Management, 23 F.C.C.R. 13,028 (2008)[hereinafter cited as Comcast Sanction], *order vacated*, Comcast Corp. v. F.C.C., 600 F.3d 642 (D.C. Cir. 2010).

⁹ "Peer-to-peer applications, including those relying on BitTorrent, have become a competitive threat to cable operators such as Comcast because Internet users have the opportunity to view high-quality video with BitTorrent that they might otherwise watch (and pay for) on cable television. Such video distribution poses a particular competitive threat to Comcast's video-on-demand ("VOD") service." Comcast Sanction 23 F.C.C.R. at 13030.

¹⁰ See Edward B. Mulligan, *Derailed by the D.C. Circuit: Getting Network Management Regulation Back on Track*, 62 FED. COMM. L.J. 633 (June, 2010); Kevin Werbach, *Off the Hook*, 95 CORNELL L. REV. 535 (March, 2010); Courtney Erin Smith, *Net Neutrality, Full Throttle: Regulation of Broadband Internet Service Following the Comcast/BitTorrent Dispute*, 50 SANTA CLARA L. REV. 569 (2010).

¹¹ Internet Protocol Television ("IPTV") offers consumers with a broadband connection options for downloading video files, or to view ("stream") video content on an immediate "real time" basis. Some of the available content duplicate what cable television subscribers receive. "In addition, [Local Exchange Carriers]...are increasingly utilizing Internet Protocol Television ("IPTV") technologies. Verizon's FiTH [fiber to the home] network, marketed under the brand name 'FiOS,' allows delivery of multichannel video services, in addition to telephony and high-speed Internet access service. At the end of 2006, Verizon reported that it offered video programming via FiOS to more than 2.4 million households in 200 cities in 10 states and served 207,000 subscribers." Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 24 F.C.C.R. 542, 548 (2009); see also, 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).

the information service classification to all Internet access technologies means that the Commission has abandoned direct statutory authority to resolve problems and must resort to questionable ancillary jurisdiction ¹² even to impose necessary light-handed regulatory safeguards.

Other instances of unintended consequences from overly optimistic findings and assumptions about marketplace competition include removal of caps on the total spectrum a single wireless carrier can control, ¹³ abandonment of local loop unbundling ¹⁴ and other structural

¹² Ancillary jurisdiction refers to an inference of statutory authority to impose rules and regulations based on indirect statutory authority. For example, the FCC asserted jurisdiction over cable television operators based on the potential for importation of distant broadcast television signals to have an adverse financial impact on directly regulated television broadcasters. *United States v. Sw. Cable Co.*, 392 U.S. 157 (1968). *See also* *FCC v. Midwest Video Corp.* (Midwest Video II), 440 U.S. 689 (1979); *United States v. Midwest Video Corp.* (Midwest Video I), 406 U.S. 649 (1972).

¹³ 2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services, WT Docket No. 01-14, Report and Order, 16 F.C.C.R. 22668 (2001).

¹⁴ “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). *See also*, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 F.C.C.R. 15499 (1996), *aff’d in part and rev’d in part*, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999); on remand, *Iowa Utils. Bd., v. FCC*, 219 F.3d 744 (8th Cir. 2000); *affirmed in part and rev’d in part*, *Verizon Comms., Inc. v. FCC*, 535 U.S. 467 (2002); Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 F.C.C.R. 3696, 16 F.C.C.R. 1724 (1999); *reversed and remanded*, *United States Telecom. Ass’n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002); *see also*, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket Nos. 01-338, 96-98, 98-147, Notice of Proposed Rulemaking, 16 F.C.C.R. 22781 (2001); Review of the Section 251 Unbundling

separation requirements¹⁵ and conclusions that incumbent carriers have no duty to deal with market entrants even when the incumbent engages in a price squeeze by offering retail rates below the wholesale rate charged competitors.¹⁶ For each of these decisions the FCC compounded its initial mistake by foreclosing the option of making necessary and lawful future modifications.

This paper will examine the consequences of the FCC's wishful thinking about the viability of current competition and the sustainability of competition going forward. The paper concludes

Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 F.C.C.R. 16978 (2003), *corrected by* Errata, 18 F.C.C.R. 19020 (2003), *vacated and remanded in part, affirmed in part*, United States Telecom Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004), *on remand*, Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, 20 F.C.C.R. 2533 (2005).

¹⁵ The FCC eliminated Title II and structural separation requirements applicable to wireline broadband Internet access services offered by facilities-based providers, and gave providers discretion whether to offer the underlying wireline broadband transmission on a common carrier basis. Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers, CC Docket No. 02-33; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services, CC Docket No. 01-337; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review -- Review of Computer III and ONA Safeguards and Requirements, CC Docket Nos. 95-20, 98-10; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises, WC Docket No. 04-242; Consumer Protection in the Broadband Era, WC Docket No. 05-271, Report and Order and Notice of Proposed Rulemaking, 20 F.C.C.R. 14853 (2005), *pet. for rev. den.*, Time Warner Telecom, Inc. v. F.C.C., 507 F.3d 205 (3d Cir. 2007).

¹⁶ See *Pacific Bell Telephone Co., v. Linkline Communications, Inc.*, 555 U.S. 438, 129 S.Ct. 1109 (2009)(no supplemental antitrust relief available when the FCC determines that a carrier has no duty to deal with a competitor).

that flawed fact finding and market projections have adverse initial consequences, but even worst future impacts. In response to vigorous lobbying by incumbents, impatient law makers and deferential judges willing to rely on the agency's expertise,¹⁷ the FCC has contributed to the development of a telecommunications industry structure that appears less competitive,¹⁸ innovative, available,¹⁹ affordable and responsive than what exists in many other countries.²⁰ The FCC's follies provide a clear warning to other national regulatory authorities that embracing political and economic doctrine at the expense of unbiased fact finding and empirical analysis generate bad decisions that trigger even worst long term outcomes.

¹⁷ "Our task on review is therefore limited. We review the FCC's action in this case only to ensure that it is not 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' 5 U.S.C. § 706(2)(A). That standard is particularly deferential in matters such as this, which implicate competing policy choices, technical expertise, and predictive market judgments." *Ad Hoc Telecommunications Users Comm. v. FCC*, 572 F.3d 903, 908 (D.C. Cir. 2009); *citing* *EarthLink, Inc. v. FCC*, 462 F.3d 1, 12 (D.C. Cir. 2006); *see also* *Time Warner Telecomm., Inc. v. FCC*, 507 F.3d 205, 221 (3d Cir. 2007).

¹⁸ "Unfortunately, the U.S. is lagging behind much of the rest of the world in terms of broadband service available to its citizens. As we move into a world in which 'everyone will use the Internet for everything' this country runs the risk of not being competitive." Richard Adler, Rapporteur, *News Cities: The Next Generation of Healthy Informed Communities*, A Report of the 2010 Aspen Institute Forum on Communications and Society, 27 (2011); available at: http://www.aspeninstitute.org/sites/default/files/content/docs/cands/News_Cities_The_Next_Generation_of_Healthy_Informed_Communities.pdf.

¹⁹ For example, statistics compiled by the Organization for Economic Co-Operation and Development on national broadband and telecommunications market penetration rank the United States at mediocre levels. *See* OECD Broadband Portal, available at: http://www.oecd.org/document/54/0,3746,en_2649_33703_38690102_1_1_1_1,00.html.

²⁰ *See, e.g.,* Akamai, *The State of the Internet* (4th Quarter, 2010); available at: <http://www.akamai.com/stateoftheinternet/>.

II. The Past as Prologue to the Future

On numerous occasions spanning several decades, the FCC has decided to abandon or reduce regulatory oversight. Technological innovations, changes circumstances and a host of legitimate reasons support such action. However, a significant number of initiatives, four of which are examined in depth in this paper, were wrong at the outset. When the FCC makes a bad call, the normal checks and balances in government are supposed to provide safeguards, e.g., judicial review. But well argued rationales, coupled with shared views on economic doctrine and judicial deference to FCC expertise²¹ can prevent appellate review from reversing a bad decision. Once in play, the decision can trigger secondary and tertiary consequences that might not have been predicted, but over time compounds the harm caused by the initial decision.

The four decisions examined in this paper show how the FCC engaged in results-driven decision making lacking support from empirical evidence and using legally unsustainable rationales

²¹ “This is a wonderful illustration of how an experienced agency can (with some assistance from credulous courts) turn statutory constraints into bureaucratic discretions. The main source of the Commission’s regulatory authority over common carriers is Title II, but the Commission has rendered that inapplicable in this instance by concluding that the definition of ‘telecommunications service’ is ambiguous and does not (in its current view) apply to cable-modem service. It contemplates, however, altering that (unnecessary) outcome, not by changing the law (i.e., its construction of the Title II definitions), but by reserving the right to change the facts. Under its undefined and sparingly used ‘ancillary’ powers, the Commission might conclude that it can order cable companies to ‘unbundle’ the telecommunications component of cable-modem service.FN7 And presto, Title II will then apply to them, because they will finally be ‘offering’ telecommunications service! Of course, the Commission will still have the statutory power to forbear from regulating them under § 160 (which it has already tentatively concluded it would do, Declaratory Ruling 4847–4848, ¶¶ 94–95). Such Möbius–strip reasoning mocks the principle that the statute constrains the agency in any meaningful way. *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. 967, 1014, 125 S.Ct. 2688, 2718 (2005) (Scalia, J., dissenting)(rejecting the FCC’s rationale for considering cable modem service as lacking a standalone telecommunications service and noting how some reviewing courts fail to scrutinize closely the Commission’s analysis).

to bolster the preordained result. Authors of these decisions emphasize stakeholder submitted data without much close scrutiny by Commission staff, or third party peer review.²² In the absence of independently generated facts, the FCC has to rely largely on stakeholder-submitted material that supports a particular outcome. In theory the Commission could generate a realistic assessment based on a thorough and critical evaluation of all submissions. The agency has a statutory obligation to compile a complete factual record²³ and to accord interested parties opportunities to participate.²⁴ However, the Commission primarily relies on the more comprehensive filings of the parties with the most to gain or lose in a proceeding. It becomes easy for the FCC to rely on non-empirical data compiled by stakeholders that purport to supply data, but which in reality constitute advocacy for a desired outcome regardless of whether the facts support this objective.

²² 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. 277-312 (2010).

²³ “[A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.” *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993) (holding statutory requirement that satellite master antenna television system operators secure a franchise if they link separately owned buildings or use public rights of way constitutional even though single building service had no such franchising requirement).

²⁴ See, e.g., *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 231 (2008) (FCC did not comply with the Administrative Procedure Act when it redacted studies on which it relied in promulgating rules and when the Commission failed to provide a reasoned explanation for its choice of an extrapolation factor for predicting how quickly broadband over powerline (BPL) emissions attenuate or weaken). See also, *Administrative Procedure Act*, 5 U.S.C. §553 *et seq.* (2010).

A. **Unconditional Determination that Broadband Access Constitutes an Information Service**

The FCC has determined that the legislatively crafted information service classification²⁵ applies to Internet access provided via cable modems,²⁶ digital subscriber line (“DSL”) service,²⁷ the electrical power grid²⁸ and wireless networks.²⁹ The Commission accrued short term political dividends from such determinations, because it could show regulatory restraint and confirm that the marketplace can self-regulate in lieu of government intervention. Whether the result of wishful thinking, inflexible adherence to libertarian economic doctrine, or a fair-minded interpretation of

²⁵ Information service is defined as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.” Communications Act of 1934, as amended, 47 U.S.C. § 153(20).

²⁶ Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, 17 F.C.C.R. 4798 (2002), *affirmed sub nom.* Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 977–78 (2005).

²⁷ Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Report and Order and Notice of Proposed Rulemaking, 20 F.C.C.R. 14853 (2005) *petition for review denied*, Time Warner Telecom, Inc. v. FCC, 507 F.3d 205 (3d Cir. 2007).

²⁸ United Power Line Council’s Petition for Declaratory Ruling Regarding the Classification of Broadband Over Power Line Internet Access Service as an Information Service, Memorandum Opinion and Order, 21 F.C.C.R. 13281 (2006).

²⁹ Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, WT Docket No. 07-53, Declaratory Ruling, 22 F.C.C.R. 5901(2007).

applicable statutes, the FCC determined that it must apply a single, mutually exclusive service classification.³⁰

The Commission applied the substantially less restrictive information service classification based on the view that the telecommunications³¹ component needed to transmit bits and packets was so integrated with the delivered information service as to be inseparable.³² By treating the

³⁰ “We conclude, as the Commission did in the *Universal Service Order*, that the categories of ‘telecommunications service’ and ‘information service’ in the 1996 Act are mutually exclusive. Reading the statute closely, with attention to the legislative history, we conclude that Congress intended these new terms to build upon frameworks established prior to the passage of the 1996 Act. Specifically, we find that Congress intended the categories of ‘telecommunications service’ and ‘information service’ to be mutually exclusive, like the definitions of ‘basic service’ and ‘enhanced service’ developed in our *Computer II* proceeding, and the definitions of ‘telecommunications’ and ‘information service’ developed in the Modification of Final Judgment that divested the Bell Operating Companies from AT&T.” Federal-State Joint Board on Universal Service, CC Docket No. 96-45 (Report to Congress), 13 F.C.C.R. 11501, 11507-08 (1998)(citations omitted).

“Although the Commission has not been entirely consistent on this point, we agree for the wireline broadband Internet access described in this Order with the past Commission pronouncements that the categories of ‘information service’ and ‘telecommunications service’ are mutually exclusive.” Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, CC Docket No. 02-33, 20 F.C.C.R. 14853, n. 32 (2005)[hereinafter cited as Wireline Broadband Classification Order, *pet. for rev. den.*, Time Warner Telecom, Inc. v. F.C.C., 507 F.3d 205 (3rd Cir. 2007).

³¹ Telecommunications is defined as “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).

³² “[W]e reject arguments that companies using their own facilities to provide wireline broadband Internet access service simultaneously provide a telecommunications service to their end user wireline broadband Internet access customers. The record demonstrates that end users of wireline broadband Internet access service receive and pay for a single, functionally integrated service, not two distinct services. This conclusion also is consistent with certain past Commission pronouncements that the categories of ‘information service’ and ‘telecommunications service’ are mutually exclusive. Moreover, the fact that the Commission has, up to now, required facilities-based providers of wireline broadband Internet access service to separate out a telecommunications transmission service and make that service available to competitors on a common carrier basis under the Computer Inquiry regime has no bearing on the nature of the service wireline broadband

telecommunications component as subordinate, the Commission could make a semantic distinction between a carrier providing telecommunications and one offering consumers retail telecommunications services.³³ By opting to treat the telecommunications function as wholly integrated into an information service composite, the FCC could abandon conventional common carrier regulation required by Title II of the Communications Act.³⁴ In the short run the Commission could champion regulatory restraint, a laudable goal that arguably contributed to the Internet's speedy commercial success. However, the Commission soon discovered that having given up on a direct statutory link, it would experience great difficulty in imposing any lawful safeguards, even when it received complaints of clearly abusive, discriminatory and anticompetitive practices.

Internet access service providers offer their end user customers. We conclude now, based on the record before us, that wireline broadband Internet access service is, as discussed above, a functionally integrated, finished product, rather than both an information service and a telecommunications service.” Wireline Broadband Classification Order, 20 F.C.C.R. at 14911 (citations omitted).

³³ “Cable modem service is not itself and does not include an offering of telecommunications service to subscribers. We disagree with commenters that urge us to find a telecommunications service inherent in the provision of cable modem service. Consistent with the statutory definition of information service, cable modem service provides the capabilities described above ‘via telecommunications.’ That telecommunications component is not, however, separable from the data-processing capabilities of the service. As provided to the end user the telecommunications is part and parcel of cable modem service and is integral to its other capabilities.” Concerning High-Speed Access to the Internet Over Cable and Other Facilities Internet Over Cable Declaratory Ruling, Declaratory Ruling and Notice of Proposed Rulemaking 17 F.C.C.R. 4798, 4823 (2002), *aff’d in part and vacated in part*, Brand X Internet Services v. F.C.C., 345 F.3d 1120 (9th Cir. 2003), *rev’d and remanded*, National Cable & Telecommunications Ass’n v. Brand X Internet Services, 545 U.S. 967, 125 S.Ct. 2688 (2005). *See also*, Rob Frieden, *Neither Fish Nor Fowl: New Strategies for Selective Regulation of Information Services*, 6 J. TELECOMM. & HIGH TECH. L. No. 2 373-423 (2008); 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., No. 2, 247-296 (2006).

³⁴ 47 U.S. C. §201 et seq.

At the outset the FCC appeared quite confident in its determination, so much so it offered almost as an afterthought the premise that it could revisit and revise its determination if consumer protection and other compelling circumstances warranted.³⁵ In hindsight, the Commission acted too summarily both in its decision to consider all forms of Internet access as exempt from Title II oversight and its assumption that it could readily undo, revise, and reassemble a limited regulatory regime if necessary.

Upon facing instances where it had to remedy a problem, or make another information service/telecommunications service determination the FCC has generated a mixed record. In some instances a reviewing court has deferred to the Commission's expertise and affirmed the assertion of jurisdiction³⁶ and rules, e.g., requiring Voice over the Internet Protocol ("VoIP")³⁷ service

³⁵ "The Commission is empowered by statute to weigh these various objectives and craft regulations that specifically target the relevant features of VoIP and other IP-enabled services. Where the Act does not prescribe a particular regulatory treatment, the Commission may have authority to impose requirements under Title I of the Act. Alternatively, the Commission may forbear from applying specific provisions. Finally, of course, the Commission is entitled to amend or revoke its own rules and regulations when the underlying circumstances no longer apply." IP-Enabled Services, Notice of Proposed Rulemaking, WC Docket No. 04-36, 19 F.C.C.R. 4863, 4893 (2004).

³⁶ Vonage Holding Corp. v. FCC, 489 F.3d 1232 (D.C. Cir. 2007).

³⁷ VoIP refers to the use of the Internet to carry and deliver on a real time, immediate basis packets of data that correspond to a voice conversation. VoIP services range in quality, reliability and price and can link both computers and ordinary telephone handsets. For technical background on how VoIP works *see* Intel, White Paper, *IP Telephony Basics*, available at http://www.intel.com/network/csp/resources/white_papers/4070web.htm; Susan Spradley and Alan Stoddard, *Tutorial on Technical Challenges Associated with the Evolution to VoIP*, Presentation to FCC Office of Engineering and Technology; *see also*, Charles J. Cooper & Brian Stuart Koukoutchos,

providers to comply with many conventional telephone company requirements,³⁸ despite the absence of direct statutory authority under Title II of the Communications' Act. But in other cases, where equally compelling need existed for the FCC to provide consumer safeguards, the Commission was deemed to lack sufficient statutory authority to act, e.g., sanctioning an ISP for deliberately disabling subscribers from transmitting and receiving video content via peer-to-peer traffic streams.³⁹

Having made an absolute determination that the information service deregulated "safe harbor"⁴⁰ applies to Internet access, the Commission could not subsequently reassert regulatory

Federalism and the Telephone: The Case for Preemptive Federal Deregulation in the New World of Intermodal Competition, 6 J. TELECOMM. & HIGH TECH. L. 293 (2008).

³⁸ See, e.g., IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers, First Report and Order and Notice of Proposed Rulemaking, 20 F.C.C.R. 10245 (2005) *aff'd sub nom.* Nuvio Corp. v. FCC, 473 F.3d 302 (D.C. Cir. 2006) (requiring interconnected VoIP service providers to supply 911 emergency calling capabilities); Universal Service Contribution Methodology, Report and Order and Notice of Proposed Rulemaking, 21 F.C.C.R. 7518 (2006), *aff'd sub nom.*, in relevant part, Vonage Holdings Corp. v. FCC, 489 F.3d 1232 (D.C. Cir. 2007) (establishing universal service contribution obligations for interconnected VoIP service providers); Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; IP-Enabled Services, Report and Order and Further Notice of Proposed Rulemaking (2007) (extending customer proprietary network information obligations to interconnected VoIP service providers).

³⁹ Comcast Corp. v. F.C.C., 600 F.3d 642 (D.C. Cir. 2010).

⁴⁰ A safe harbor constitutes "[a]n area or means of protection [or a] provision (as in a statute or regulation) that affords protection from liability or penalty." Black's Law Dictionary 1363 (8th ed. 2004). In light of the lack of a bright line distinction between regulated telecommunications services and largely unregulated information services, ventures possibly can secure a competitive advantage through regulatory arbitrage where ventures seek reduced regulatory oversight by characterizing telecommunications services as information services. The FCC defined regulatory arbitrage as "businesses making decisions based on regulatory classifications rather than on customers' preferences and innovative and sustainable business plans." Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, Internet over Cable Declaratory Ruling; Appropriate

safeguards—no matter how necessary—because it previously abandoned them in their entirety going forward. When the FCC determined that the information service classification should solely apply, the Commission in effect determined that it had no direct statutory authority to impose regulatory requirements that apply to non-information services such as telecommunications services. Even if the FCC belatedly could identify legitimate reasons for its intervention, the prior determination that the services in question qualified for a deregulated safe harbor rendered them effectively off limits.⁴¹

In every instance where a regulatory safeguard appears necessary for an information service, declared or inferred, the FCC has had to scramble to find a lawful basis to assert jurisdiction. This process forces the FCC to spend countless hours devising creative and not always successful ways to backtrack from its previously clear and unequivocal determination. For example, the FCC sought to sanction Comcast for deliberately interfering with a particular type of subscriber traffic, peer-to-peer

Regulatory Treatment for Broadband Access to the Internet over Cable Facilities, Declaratory Ruling and Notice of Proposed Rulemaking, 17 F.C.C.R. 4798, 4846 (2002). *See also*, Rob Frieden, *Regulatory Arbitrage Strategies and Tactics in Telecommunications*, 5 N.C. J. L. & Tech. 227 (2004).

⁴¹ “In this case we must decide whether the Federal Communications Commission has authority to regulate an Internet service provider's network management practices. Acknowledging that it has no express statutory authority over such practices, the Commission relies on section 4(i) of the Communications Act of 1934, which authorizes the Commission to ‘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.’ [citing] 47 U.S.C. § 154(i). 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 ancillary to the ... effective performance of its statutorily mandated responsibilities.’ [quoting] *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.’” *Comcast v. F.C.C.*, 600 F.3d at 644.

file transfer, which contained content that provided an alternative to the company's pay per view cable television service.⁴² The Commission determined that Comcast did not have legitimate traffic management reasons for meddling with subscriber traffic⁴³ and that the company lacked candor in its representation of what tactics it had used.⁴⁴ Notwithstanding the commonly shared view that Comcast's conduct justified FCC investigation, the D.C. Circuit Court of Appeals rejected the FCC's attempt to invoke ancillary jurisdiction as the lawful basis for sanctioning Comcast. The court determined that the FCC lacked a direct statutory basis for intervening:

In this case the Commission cites . . . [no section in the Communications Act of 1934} to shed light on any express statutory delegation of authority found in Title II, III, VI, or, for that matter, anywhere else. That is, unlike the way it successfully employed policy statements in *Southwestern Cable* and *Midwest Video I*, the Commission does not rely on section 230(b) or section 1 to argue that its regulation of an activity over which it concededly has no express statutory authority (here Comcast's Internet management practices) is necessary to further its regulation of activities over which it does have express statutory authority (here, for example, Comcast's management of its Title VI cable services). In this respect, this case is just like *NARUC II*. On the record before us, we see "no relationship whatever," *NARUC II*, 533 F.2d at 616, between the Order and services subject to Commission regulation.⁴⁵

Faced with a clear rebuke FCC Chairman Julius Genachowski attempted to fashion a rationale for subdividing broadband access so that the Commission could identify and apply limited

⁴² Comcast Sanction, *supra*. n. 8.

⁴³ Comcast Sanction, 23 F.C.C.R. at 13050.

⁴⁴ "Comcast's statements in its comments and response to Free Press's complaint raise troubling questions about Comcast's candor during this proceeding." *Id.* 23 F.C.C.R. at n.31.

⁴⁵ Comcast v. F.C.C., 600 F.3d at 654.

regulation of now identifiable telecommunications service components.⁴⁶ This newfound severability of telecommunications services ran completely counter to the FCC's previous rationale used to apply the information service classification unconditionally to broadband Internet access. The Commission previously recognized the need for a telecommunications link to provide bit and packet transmission across distances. However the Commission determined that this component was not a standalone retail service, because it became so completely integrated with a predominant information service as to be unrecognizable.⁴⁷ The Supreme Court affirmed the FCC's statutory interpretation which served as the basis for treating cable modem Internet access as an information service.⁴⁸

⁴⁶ See FCC Chairman Julius Genachowski, *The Third Way: A Narrowly Tailored Broadband Framework* (May 6, 2010), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-297944A1.doc (proposing to apply Title II regulation only to the bit transmission portion of ISP services and rejecting a renewed attempt to find a way to extend Title I ancillary jurisdiction or reclassifying all aspects of Internet access as a telecommunications service). See also 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).

⁴⁷ "Thus, whether a telecommunications service is being provided turns on what the entity is 'offering ... to the public,' and customers' understanding of that service. End users subscribing to wireline broadband Internet access service expect to receive (and pay for) a finished, functionally integrated service that provides access to the Internet. End users do not expect to receive (or pay for) two distinct services -- both Internet access service and a distinct transmission service, for example. Thus, the transmission capability is part and parcel of, and integral to, the Internet access service capabilities. Accordingly, we conclude that wireline broadband Internet access service does not include the provision of a telecommunications service to the end user irrespective of how the service provider may decide to offer the transmission component to other service providers." Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, CC Docket No. 02-33, Report and Order and Notice of Proposed Rulemaking, 20 F.C.C.R. at 14910-11.

⁴⁸ .National Cable & Telecomm. Ass'n. v. Brand X Internet Serv., 545 U.S. 967, 125 S. Ct. 2688 (2005).

It comes across as a scramble and stretch to assert a newfound ability to segregate and identify a telecommunications service when previously it was convenient and expedient for the Commission to argue no such segregation could occur. The FCC subsequently abandoned this strategy and now asserts that it still can intervene and respond to complaints about information service provider conduct based on other creative and novel interpretations of the Communications Act of 1934, as amended.⁴⁹

Ostensibly structured to offer an acceptable compromise the FCC issued a Report and Order that imposes basic obligations on ISPs⁵⁰ that include four principles established in a 2005 statement,⁵¹ and requirements that ISPs operate with transparency, nondiscrimination and a commitment not to block lawful traffic. The Commission identified exceptions for reasonable network management,⁵² specialized services⁵³ and wireless access.⁵⁴ Notwithstanding its prior

⁴⁹ Preserving the Open Internet, GN Docket No. 09-191, Report and Order, 25 F.C.C.R. 17905 (2010) [hereinafter cited as Open Internet Report and Order]; *See also*, Preserving the Open Internet, 24 F.C.C.R. 13064 (2009) [hereinafter cited as Open Internet NPRM].

⁵⁰ Specifically the FCC imposes rules on the providers of broadband Internet access service, defined as a “mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service. This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence, or that is used to evade the protections set forth in this Part.” *Id.* 25 F.C.C.R. at 17932.

⁵¹ Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Policy Statement, 20 F.C.C.R. 14986 (2005).

⁵² “A network management practice is reasonable if it is appropriate and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service.” *Id.* 25 F.C.C.R. at 17952.

decision to apply the information service classification that requires the FCC to eschew regulatory oversight, the Commission now emphasized that the public interest duty to ensure an open Internet requires it to establish clear and certain rules applicable to both fixed. i.e., wire-based and mobile, i.e., wireless, ISPs.

The transparency requirement obligates all ISPs to disclose their network management practices, performance characteristics, and terms and conditions of their broadband services.⁵⁵

⁵³ “[S]pecialized services,’ such as some broadband providers’ existing facilities-based VoIP and Internet Protocol-video offerings, differ from broadband Internet access service . . .” *Id.* 25 F.C.C.R. at 17965. “We will closely monitor the robustness and affordability of broadband Internet access services, with a particular focus on any signs that specialized services are in any way retarding the growth of or constricting capacity available for broadband Internet access service. We fully expect that broadband providers will increase capacity offered for broadband Internet access service if they expand network capacity to accommodate specialized services. We would be concerned if capacity for broadband Internet access service did not keep pace. We also expect broadband providers to disclose information about specialized services’ impact, if any, on last-mile capacity available for, and the performance of, broadband Internet access service. We may consider additional disclosure requirements in this area in our related proceeding regarding consumer transparency and disclosure.” *Id.* 25 F.C.C.R. at 17966.

⁵⁴ Despite the likelihood that wireless network access will grow and perhaps become the primary way people access the Internet, the FCC established relaxed anti-blocking rules based on spectrum and operational limitations not applicable to wire-based networks. “A person engaged in the provision of mobile broadband Internet access service, insofar as such person is so engaged, shall not block consumers from accessing lawful websites, subject to reasonable network management; nor shall such person block applications that compete with the provider’s voice or video telephony services, subject to reasonable network management.” *Id.* 25 F.C.C.R. at 17959.

⁵⁵ *Id.* 25 F.C.C.R. at 17906. “A person engaged in the provision of broadband Internet access service shall publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient for consumers to make informed choices regarding use of such services and for content, application, service, and device providers to develop, market, and maintain Internet offerings.” *Id.* 25 F.C.C.R. at 17937.

The FCC adopted different requirements for fixed and broadband providers on the other two key requirements. Fixed providers may not unreasonably discriminate in transmitting lawful network traffic, nor can they block lawful content, applications, services, or non-harmful devices.⁵⁶ Mobile broadband providers may not block access to lawful websites, or applications that compete with their voice or video telephony services.⁵⁷

The Report and Order rejects assertions that network neutrality⁵⁸ requirements would stifle innovation, reduce incentives to invest in network infrastructure and hamper employment in the Internet economy:

⁵⁶ “A person engaged in the provision of fixed broadband Internet access service, insofar as such person is so engaged, shall not block lawful content, applications, services, or non-harmful devices, subject to reasonable network management.” 25 F.C.C.R. at 17942.

⁵⁷ *Id.* 25 F.C.C.R. at 17959-60.

⁵⁸ Network neutrality refers to the imposition of nondiscrimination, transparency and other requirements on ISPs designed to foster a level competitive playing field among content providers and to establish consumer safeguards so that Internet users have unrestricted access limited only by legitimate concerns such as ISP network management and national security. See Rob Frieden, *A Primer on Network Neutrality*, 43 INTERECONOMICS: REVIEW OF EUROPEAN ECONOMIC POLICY, NO. 1 4-15, 4,5(Jan./Feb. 2008). See also, Marvin Ammori, *Beyond Content Neutrality: Understanding Content-Based Promotion of Democratic Speech*, 61 FED. COMM. L.J. 273 (March 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 (Jan. 2008); Sascha D. Meinrath & Victor W. Pickard, *Transcending Net Neutrality: Ten Steps Toward an Open Internet*, 12 J. INTERNET L., No. 6, 1 (Dec. 2008); Jennifer L. Newman, *Keeping the Internet Neutral: Net Neutrality and Its Role in Protecting Political Expression on the Internet*, 31 HASTINGS COMM. & ENT. L.J. 153 (Fall 2008); T. Randolph Beard, *Network Neutrality and Industry Structure*, 29 HASTINGS COMM. & ENT L.J. 149 (Winter 2007); Jerry Brito, *A Tale of Two Commissions: Net Neutrality and Regulatory Analysis*, 16 COMMLAW CONSPPECTUS 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.

We believe these rules, applied with the complementary principle of reasonable network management, will empower and protect consumers and innovators while helping ensure that the Internet continues to flourish, with robust private investment and rapid innovation at both the core and the edge of the network. This is consistent with the National Broadband Plan goal of broadband access that is ubiquitous and fast, promoting the global competitiveness of the United States.⁵⁹

In light of strident dissents from the two Republican Commissioners, the Report and Order appears to emphasize that the final rules logically follow from the nonpartisan consensus reached in documents created in 2005 and 2007,⁶⁰ and do not violate the Constitution,⁶¹ particularly First

L.J. 575 (June 2007); Robert E. Litan, *Unintended Consequences of Net Neutrality Regulation*, 5 J. TELECOMM. & HIGH TECH. L. 533 (Spring 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 (Spring, 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 (Fall 2007); Howard A. Shelanski, *Network Neutrality: Regulating with More Questions Than Answers*, 6 J. TELECOMM. & HIGH TECH. L. 23 (Fall 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 (June 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 (July 18, 2006); Lawrence Lessig, *In Support of Network Neutrality*, I/S: J. L. & POL'Y FOR INFO. SOC'Y 185 (Spring 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. (Fall 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).

⁵⁹ *Id.* 25 F.C.C.R. at 17906.

⁶⁰ "The rules we proposed in the *Open Internet NPRM* and those we adopt today follow directly from the Commission's bipartisan *Internet Policy Statement*, adopted unanimously in 2005 and made temporarily enforceable for certain broadband providers in 2005 and 2007; openness protections the

Amendment expression rights of ISPs ⁶² and the prohibition on government takings in the Fifth Amendment.

Additionally the Report and Order extensively attempts to demonstrate that the FCC has lawful jurisdiction to promulgate network neutrality rules, primarily because Congress, in Section 706 of the Telecommunications Act, ⁶³ authorized the Commission to take all reasonable steps to promote widespread access to the Internet. ⁶⁴ In light of Comcast case, the Commission must establish clear and direct statutory authority to impose new rules. The Commission heavily relies on Section 706 of the Telecommunications Act which does not explicitly authorize regulation and rule making. The FCC infers that the duty to encourage the deployment of “advanced

Commission established in 2007 for users of certain wireless spectrum; and a notice of inquiry in 2007 that asked, among other things, whether the Commission should add a principle of nondiscrimination to the *Internet Policy Statement*. Our rules build upon these actions, first and foremost by requiring broadband providers to be transparent in their network management practices, so that end users can make informed choices and innovators can develop, market, and maintain Internet-based offerings. The rules also prevent certain forms of blocking and discrimination with respect to content, applications, services, and devices that depend on or connect to the Internet.” *Id.* 25 F.C.C.R. at 17907-08(citations omitted).

⁶¹ See *Id.* 25 F.C.C.R. at 17981-87.

⁶² See Rob Frieden, *Invoking and Avoiding the First Amendment: How Internet Service Providers Leverage Their Status as Both Content Creators and Neutral Conduits*, 12 U. PA. J. CONST. L., No. 5, 1279-1323 (June, 2010).

⁶³ Section 706 is reproduced in the notes to Section 157 of the Communications Act of 1934, 47 U.S.C. § 157 nt.

⁶⁴ See *Id.* 25 F.C.C.R. at 17966-81.

telecommunications capability” authorizes the Commission to use whatever tools it considers necessary to achieve timely progress.⁶⁵

The assumption of statutory authority requires two novel reinterpretations of the definition for telecommunications contained in the Communications Act, as amended. First, the FCC has to consider advanced telecommunications capability to include Internet access,⁶⁶ despite having previously concluded that the technologies providing such access constitute telecommunications and not telecommunications service. The Commission previously applied the former so that it could treat the transmission of bits and packets in Internet access as an insignificant factor that is not severable, but instead provided as part of an information that the ISP offers to end users.⁶⁷ Second, the FCC now has to elevate the significance of the telecommunications bit transmission function in

⁶⁵ “As noted, Section 706 of the 1996 Act directs the Commission (along with state commissions) to take actions that encourage the deployment of ‘advanced telecommunications capability.’ . . . Under Section 706(a), the Commission must encourage the deployment of such capability by ‘utilizing, in a manner consistent with the public interest, convenience, and necessity,’ various tools including “measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.” *Id.* 25 F.C.C.R. at 17968.

⁶⁶ “[A]dvanced telecommunications capability,” as defined in the statute, includes broadband Internet access.” *Id.* 25 F.C.C.R. at 17968, *citing* 47 U.S.C. § 1302(d)(1) (defining “advanced telecommunications capability” as “high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology”); National Broadband Plan for our Future, Notice of Inquiry, 24 F.C.C.R. 4342, 4309, App. para. 13 (2009) (“advanced telecommunications capability” includes broadband Internet access); Inquiry Concerning the Deployment of Advanced Telecomms. Capability to All Americans in a Reasonable and Timely Fashion, 14 F.C.C.R. 2398, 2400, (Section 706 addresses “the deployment of broadband capability”).

⁶⁷ *See Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 977–78 (2005).

Internet access ⁶⁸ to trigger public interest concerns about competition and anticompetitive practices having previously subordinated it so that the Commission could deem Internet access technologies as qualifying for unregulated safe harbor status. Now the FCC wants to validate the telecommunications component as the driver for public interest regulatory safeguards.

Despite having previously concluded that the broadband marketplace was robustly competitive and close to ubiquitous, the Commission now cites to better calibrated market penetration data to support its involvement:

Section 706(b) of the 1996 Act provides additional authority to take actions such as enforcing open Internet principles. It directs the Commission to undertake annual inquiries concerning the availability of advanced telecommunications capability to all Americans and requires that, if the Commission finds that such capability is not being deployed in a reasonable and timely fashion, it “*shall take immediate action* to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.” In July 2010, the Commission “conclude[d] that broadband deployment to *all* Americans is not reasonable and timely” and noted that “[a]s a consequence of that conclusion,” Section 706(b) was triggered. Section 706(b) therefore provides express authority for the pro-investment, pro-competition rules we adopt today. ⁶⁹

⁶⁸ Note that before the FCC deregulated Internet access, the Commission considered it possible to separate the telecommunications component: “We conclude that advanced services are telecommunications services. The Commission has repeatedly held that specific packet-switched services are ‘basic services,’ that is to say, pure transmission services. xDSL and packet switching are simply transmission technologies. . . . An enduser may utilize a telecommunications service together with an information service, as in the case of Internet access. In such a case, however, we treat the two services separately: the first service is a telecommunications service (e.g., the xDSL-enabled transmission path), and the second service is an information service, in this case Internet access.” Deployment of Wireline Services Offering Advanced Telecommunications Capability, Memorandum Opinion and Order, and Notice of Proposed Rulemaking 13 F.C.C.R. 24012, 24029-30 (1998).

⁶⁹ Open Internet Report and Order, 25 F.C.C.R. at 17972.

Additionally the FCC applies portions of Title II, III and Title VI of the Communications Act to ISPs despite the fact that Title II customarily applies to common carriers, Title III to broadcasters and wireless carriers and Title VI to cable television operators. Instead of stating that ISPs operate as telecommunications service providers when they provide essential first and last mile access to the Internet—a scenario suggested by FCC Chairman Julius Genachowski and now apparently rejected—the Report and Order states that because some Internet-based services compete with traditional telephone, broadcast and video services, the Commission has jurisdiction to impose rules and regulations to prevent anticompetitive practices and to promote competition.

The FCC justifies imposing network neutrality rules on ISPs based on the Commission’s conclusion that ISPs have the incentive and ability to engage in anticompetitive practices that limit Internet openness in terms of content, applications, services, and devices accessed over or connected to broadband Internet access service. The Commission provides three examples suggesting that ISPs may have incentives to block or degrade content that competes with what the ISP or an affiliate offers, to impose surcharges on competing content providers in addition to end user subscription fees, and to degrade competitors’ traffic:

1) “[B]roadband providers may have economic incentives to block or otherwise disadvantage specific edge providers or classes of edge providers, for example by controlling the transmission of network traffic over a broadband connection, including the price and quality of access to end users. A broadband provider might use this power to benefit its own or affiliated offerings at the expense of unaffiliated offerings.”⁷⁰

2) “[B]roadband providers may have incentives to increase revenues by charging edge providers, who already pay for their own

⁷⁰ *Id.* 25 F.C.C.R. at 17915.

connections to the Internet, for access or prioritized access to end users. Although broadband providers have not historically imposed such fees, they have argued they should be permitted to do so. A broadband provider could force edge providers to pay inefficiently high fees because that broadband provider is typically an edge provider's only option for reaching a particular end user. Thus broadband providers have the ability to act as gatekeepers.”⁷¹

3) “[I]f broadband providers can profitably charge edge providers for prioritized access to end users, they will have an incentive to degrade or decline to increase the quality of the service they provide to non-prioritized traffic. This would increase the gap in quality (such as latency in transmission) between prioritized access and non-prioritized access, induce more edge providers to pay for prioritized access, and allow broadband providers to charge higher prices for prioritized access. Even more damaging, broadband providers might withhold or decline to expand capacity in order to ‘squeeze’ non-prioritized traffic, a strategy that would increase the likelihood of network congestion and confront edge providers with a choice between accepting low-quality transmission or paying fees for prioritized access to end users.”⁷²

The FCC considers the three examples of discrimination as more than theoretical in light of actual examples where ISPs, such as Comcast, blocked or degraded traffic without legitimate network management concerns. Similarly the Commission states that the benefits in guarding against such anticompetitive practices outweighs the costs.⁷³

⁷¹ *Id.* 25 F.C.C.R. at 17919.

⁷² *Id.* at 25 F.C.C.R. at 17922.

⁷³ “By comparison to the benefits of these prophylactic measures, the costs associated with the open Internet rules adopted here are likely small. Broadband providers generally endorse openness norms—including the transparency and no blocking principles—as beneficial and in line with current and planned business practices (though they do not uniformly support rules making them enforceable) Even to the extent rules require some additional disclosure of broadband providers’ practices, the costs of compliance should be modest.” *Id.* 25 F.C.C.R. at 17928.

The FCC's latest attempt to circumvent its information service classification of broadband Internet access may not pass muster with a reviewing court. The Commission avoids repeating the Title I ancillary jurisdiction strategy as well as Chairman Genachowski's proposed surgical removal of telecommunications service elements from information services. However the Commission comes up with similarly triangulating strategies: Title III confers broad authority to impose any necessary safeguard over spectrum using services, including wireless broadband, and Sec. 706 of the Telecommunications Act of 1996, both encourages and authorizes any well articulated rationale for regulating information services that also promotes wider access to broadband services.

Had the FCC acknowledged years ago that public access to information services might trigger conflicts, not readily resolved by the marketplace, the Commission would have been able to position itself to respond to complaints. Surely telecommunications and information markets and technologies have converged making it difficult for the FCC to determine the exact scope of its lawful jurisdiction. Rather than acknowledge the need to make ad hoc determinations and to resolve conflicts, the Commission blithely assumed that a competitive marketplace would provide solutions to consumers and remedies to any and all problems. Such reliance comes across as misguided particularly in light of the numerous instances where the FCC has faced a conflict involving Internet access and wrestled with how to justify its intervention.

For example, the FCC has now established an extensive body of decisions on what obligations VoIP service providers must undertake to serve the public interest. Bear in mind that

many of these obligations impose significant costs on VoIP carriers thereby reducing their competitiveness and ability to offer a cheaper alternative to existing wired and wireless services. While VoIP arguably constitutes a type of information service,⁷⁴ the FCC has managed to avoid having to make that determination even as the Commission requires VoIP operators to incur the same obligations of Title II regulated common carrier telephone companies.⁷⁵ VoIP service providers that can receive or deliver calls to conventional wired and wireless networks must contribute to universal service funding programs designed to promote affordable dial up telephone service,⁷⁶ make arrangements to support subscriber access to emergency 911 service,⁷⁷ cooperate

⁷⁴ VoIP customers initiate and receive calls via their broadband links, e.g., DSL and cable modem services. The FCC considers broadband access an information service. High-Speed Access to the Internet Over Cable and Other Facilities, GN Docket No. 00-185, Declaratory Ruling and Notice of Proposed Rulemaking, 17 F.C.C.R. 4798, 4802, (2002), *aff'd*, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 125 S.Ct. 2688, (2005); Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Report and Order and Notice of Proposed Rulemaking, 20 F.C.C.R. 14853 (2005) *petition for review denied*, Time Warner Telecom, Inc. v. FCC, 507 F.3d 205 (3d. Cir. 2007). It follows that software and other applications carried via information service links similarly qualify as information services.

⁷⁵ “To date, the Commission has not classified interconnected VoIP service as either an information service or a telecommunications service. The Commission has, however, extended certain obligations to providers of such service, including local number portability, 911 emergency calling capability, universal service contribution, CPNI protection, disability access and TRS contribution requirements, and section 214 discontinuance obligations.” Connect America Fund, WC Docket No. 10-90, A National Broadband Plan for Our Future, GN Docket No. 09-51, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, FCC 11-13, 2011 WL 466775, ¶73 (rel. Feb. 9, 2011)(citations omitted).

⁷⁶ Universal Serv. Contribution Methodology, *Report and Order and Notice of Proposed Rulemaking*, 21 F.C.C.R. 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).

with law enforcement authorities,⁷⁸ incorporate the technical accommodations telephone companies provide persons with disabilities,⁷⁹ such as deaf callers, and support the ability of existing subscribers to keep their existing telephone numbers when switching service.⁸⁰

The FCC can impose possibly competition reducing regulatory requirements on VoIP service providers based on ancillary jurisdiction. Because VoIP competes with conventional wired and wireless services, subject to Title II regulation, the Commission can impose the very same requirements on VoIP carriers despite the lack of specific Title II authority.⁸¹ Reviewing courts have

⁷⁷ IP-Enabled Servs., E911 Requirements for IP-Enabled Service Providers, *First Report and Order and Notice of Proposed Rulemaking*, 20 F.C.C.R. 10245 (2005), *petition for review denied*, 473 F.3d 302 (D.C. Cir. 2006).

⁷⁸ Communications Assistance for Law Enforcement Act & Broadband Access & Servs., *First Report and Order and Further Notice of Proposed Rulemaking*, 20 F.C.C.R. 14989 (2005), *petition for review denied*, 451 F.3d 226 (D.C. Cir. 2006).

⁷⁹ 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 F.C.C.R. 11275 (2007), *Order and Public Notice Seeking Comment*, 22 F.C.C.R. 18319 (2007) (granting in part and denying in part waivers of the FCC order). *See also*, In The Matter of Contributions to the Telecommunications Relay Services Fund, CG Docket No. 11-47, Notice of Proposed Rulemaking, FCC 11-38, 2011 WL 742268 (rel. March 3, 2011).

⁸⁰ Telephone Number Requirements for IP Enabled Services Providers; Local Number Portability Porting Interval and Validation Requirements; IP-Enabled Services; Telephone Number Portability; CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues; Final Regulatory Flexibility Analysis; Number Resource Optimization, WC Docket Nos. 07-243, 07-244, 04-36; CC Docket Nos. 95-116, 99-200, Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking, 22 F.C.C.R. 19531 (2007); Matters of Local Number Portability Porting Interval and Validation, WC Docket No. 07-244, Report and Order, 25 F.C.C.R. 6953 (May 20, 2010)(establishing short deadlines for conversions).

⁸¹ “To date, the Commission has not classified interconnected VoIP service as either an information service or a telecommunications service. The Commission has, however, extended

affirmed the Commission's jurisdiction as well as its preemption of the states from imposing a different regulatory regime, or none at all.⁸² But success in selectively regulating VoIP service does not extend to information services that have a less direct impact on a regulated service.

B. Eliminating Common Carrier Duties

The FCC has streamlined and even deregulated some telecommunications services based on criteria contained in the Telecommunications Act⁸³ and more broadly in light of expanded competition. In many instances the Commission wisely has forborne from applying conventional "command and control," "heavy-handed" regulation in light of the ability of carriers to self-regulate

certain obligations to providers of such service, including local number portability, 911 emergency calling capability, universal service contribution, CPNI protection, disability access and TRS contribution requirements, and section 214 discontinuance obligations." Connect America Fund, WC Docket No. 10-90, A National Broadband Plan for Our Future, GN Docket No. 09-51, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, FCC 11-13, 2011 WL 466775, ¶73 (rel. Feb. 9, 2011)(citations omitted).

⁸² Vonage Holding Corp. v. The Minnesota Public Utilities Comm'n, 290 F. Supp. 2d 993, 994 (D. Minn. 2003)(upholding FCC preemption of state VoIP regulation).

⁸³ Section 10 of the Telecommunications Act of 1996, *codified at* 47 U.S.C. §160 (2010) requires the FCC to forbear from any statutory provision or regulation if the Commission determines that: (1) enforcement of the regulation is not necessary to ensure that charges and practices are just and reasonable, and are not unjustly or unreasonably discriminatory; (2) enforcement of the regulation is not necessary to protect consumers; and (3) forbearance is consistent with the public interest. 47 U.S.C. § 160(a) (2008). In making such determinations, the Commission must also consider "whether forbearance from enforcing the provision or regulation will promote competitive market conditions." 47 U.S.C. § 160(b). Section 10(d) specifies, however, that "[e]xcept as provided in section 251(f), the Commission may not forbear from applying the requirements of section 251(c) or 271 . . . until it determines that those requirements have been fully implemented." 47 U.S.C. § 160(d). Section 332(c) of the Communications Act, 47 U.S.C. §332(c)(2010) authorizes the Commission to refrain or forbear from enforcing any provision other than the core requirements of sections 201, 202, and 208 that respectively require just and reasonable charges, practices, classifications, and regulations, prohibit unreasonable discrimination and carrier practices and require the FCC to investigate complaints

and consumers to pursue service options.⁸⁴ However the Commission has accelerated the deregulatory glide path in some market segments based on wishful thinking and flawed assessments of the robustness and sustainability of competition.⁸⁵ While the markets for equipment,⁸⁶

⁸⁴ See *Earthlink, Inc. v. F.C.C.*, 462 F.3d 1 (D.C. Cir. 2006) (affirming the FCC's decision to forbear from imposing most local loop unbundling requirements on incumbent carriers); *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 588 (D.C. Cir. 2004) (upholding the FCC's nationwide decision to refrain from requiring § 251 unbundling fiber broadband elements and reversing the Commission's decision not to eliminate other unbundling requirements in light of the adverse impact on carrier investment incentives).

⁸⁵ “We acknowledge that we have not previously required petitioners to specify in the petition how the requested relief meets each of the three forbearance criteria, and that a requirement to do so will burden applicants to the extent that they must develop their supporting arguments in advance of filing. We do not, however, consider this an unreasonable expectation, and we find that the benefit to both commenters and the Commission of clarity and precision outweighs the burden on the petitioner of explaining how forbearance from each regulation or statutory provision meets each prong.” *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, Report and Order, FCC 09-56, 2009 WL 1856503, ¶14 (rel. June 29, 2009) [hereinafter cited as *Forbearance Criteria Order*].

⁸⁶ *Use of the Carterfone Device in Message Toll Telephone Service*, Decision, 13 FCC 2d 420 (1968), *recon. denied*, 14 FCC 2d 571 (1968); *Telerent Leasing Corp. et al.*, 45 FCC 2d 204 (1974), *aff'd sub nom.* *North Carolina Utilities Commission v. FCC*, 537 F.2d 787 (4th Cir. 1976), cert. denied, 429 U.S. 1027 (1976); *Mebane Home Telephone Co.*, 53 FCC 2d 473 (1975), *aff'd sub nom.* *Mebane Home Telephone Co. v. FCC*, 535 F.2d 1324 (D.C. Cir. 1976). See also, *Public Utility Comm'n of Texas v. FCC*, 886 F. 2d 1325 (D.C. Cir. 1989) (noting long established FCC policy that carriers and non-carriers alike have a federal right to interconnect to the public telephone network in ways that are privately beneficial if they are not publicly detrimental).

Previous FCC opposition to this principle failed to pass muster with a reviewing court that interpreted the Communications Act as mandating the right of consumers to attach equipment to the network in ways that were privately beneficial but not publicly harmful. *Hush-A-Phone Corp. v. U.S.*, 238 F. 2d 266 (D.C. Cir. 1956). “The intervenors’ tariffs [prohibiting the use of plastic device to enhance privacy and low volume conversations], under the Commission’s decision, are in unwarranted interference with the telephone subscriber’s right reasonably to use his telephone in ways which are privately beneficial without being publicly detrimental.” 238 F.2d 266, 269 (D.C. Cir. 1956).

wiring⁸⁷ located on customers' premises and long distance telephone services⁸⁸ provide clear examples of prudent regulatory streamlining, similar initiatives for the first, last and middle mile services,⁸⁹ linking end users with major broadband, long haul networks, exemplify premature

⁸⁷ Detariffing the Installation and Maintenance of Inside Wiring, Second Report and Order, 51 Fed.Reg. 8498 (Mar. 12, 1986), *recon.*, 1 F.C.C.R. 1190 (1986), *further recon.*, 3 F.C.C.R. 1719 (1988), *partially remanded sub nom.* National Association of Regulatory Utility Commissioners v. FCC, 880 F.2d 422 (D.C.Cir.1989); *on remand*, Detariffing the Installation and Maintenance of Inside Wiring, Second Further Notice of Proposed Rulemaking, 5 F.C.C.R. 3407 (1990), *partially modified*, 7 F.C.C.R. 1334 (1992).

⁸⁸ "In recent years, the FCC has sought to facilitate greater competition in the provision of both long-distance and local telephone service." WorldCom, Inc. v. F.C.C., 238 F.3d 449 (D.C. Cir. 2001) *citing* AT&T v. FCC, 220 F.3d 607 (D.C.Cir.2000); Bell Atl. Tel. Cos. v. FCC, 79 F.3d 1195 (D.C.Cir.1996); Nat'l Rural Telecom Ass'n v. FCC, 988 F.2d 174 (D.C.Cir.1993). *See also*, Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, First Report and Order, 85 F.C.C.2d 1, (1980); MTS and WATS Market Structure, Report and Order, 93 F.C.C.2d 241 (1983); Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Report and Order, 15 F.C.C.R. 12962 (2002), *aff'd in part, rev'd in part, and remanded in part sub nom.*, Tex. Office of Pub. Util. Counsel v. FCC, 265 F.3d 313 (5th Cir. 2001), cert. denied, Nat'l Ass'n of State Util. Consumer Advocates v. FCC, 535 U.S. 986 (2002); Competitive Carrier First Report and Order, CC Docket No. 79-252, Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981); Second Further Notice of Proposed Rulemaking, CC Docket No. 79-252, 47 Fed. Reg. 17308 (1982); Second Report and Order, 91 FCC 2d 59 (1982); Order on Reconsideration, 93 FCC 2d 54 (1983); Third Further Notice of Proposed Rulemaking, 48 Fed. Reg. 28292 (1983); Third Report and Order, 48 Fed. Reg. 46791 (1983); Fourth Report and Order, 95 FCC 2d 554 (1983), *vacated*, AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992) (AT&T v. FCC), *cert. denied*, MCI Telecomms. Corp. v. AT&T, 509 U.S. 913 (1993); Fifth Report and Order, 98 FCC 2d 1191 (1984); Sixth Report and Order, 99 FCC 2d 1020 (1985), *vacated*, MCI Telecomms. Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985), *aff'd*, MCI v. AT&T, 512 U.S. 218 (1994).

⁸⁹ "Today, the Internet has evolved from its early stages and is comprised of three types of interconnected networks. The first category, Backbone Providers, supply long-distance high-speed 'connections between a small number of interconnection points.' Second, there are Middle-Mile Providers who supply regional distributive functions; for example, a connection from a Backbone Provider to a distant city's central office maintained by an ISP. Finally, there are Last-Mile Providers who connect Middle-Mile Providers to end users (consumers). Although ISPs were historically considered Last-Mile Providers, it is often the case for broadband capable networks that the ISP is both the Last-Mile Provider and the Middle-Mile Provider. This system of connected networks is most analogous to a road system: Backbones represent interstate highways; Middle-Mile networks are the

abandonment of regulatory safeguards in light of the onset of little competition, particularly in rural areas.⁹⁰

intrastate highways; and Last-Mile networks are the local roads that ultimately reach consumers.” Cody Vitello, *Network Neutrality Generates Contentious Debate Among Experts: Should Consumers Be Worried?*, 22 LOY. CONSUMER L. REV. 513, 518 (2010) (citations omitted).

“Middle-mile facilities are shared assets for all types of last-mile access. As such, the cost analysis is very similar regardless of last-mile infrastructure. The local aggregation point can vary based on technology (e.g., a cable headend, LEC central office or a wireless mobile switching center (MSC)) while the Internet gateway is a common asset. Middle-mile facilities are widely deployed but can be expensive in rural areas because of the difficulties of achieving local scale, thereby increasing the investment gap. On a per-unit basis, middle-mile costs are high in rural areas due to long distances and low aggregate demand when compared to middle-mile cost economics in urban areas.

While there may be a significant affordability problem with regard to middle-mile access, it is not clear that there is a middle-mile fiber deployment gap.” Connect America Fund, WC Docket No. 10-90, Notice of Inquiry and Notice of Proposed Rulemaking, 25 F.C.C.R. 6657, 6842 (2010).

⁹⁰ “The course the Commission has followed over the past eight years has turned out to be spectacularly wrong in all of those aspects. There is little to no competition for broadband services in the residential and “middle mile” markets. As a result, U.S. consumers pay higher rates for services with slower speeds than do consumers in other industrialized nations. Our record of online innovation has slowed to a crawl. The U.S.’s standing in the world ranking of broadband adoption falls continually. (One can look at various rankings and dispute any given position, but the trend in all of them is clear. America is clearly falling behind.)

The reason the U.S. is falling behind can be traced directly to the decisions the Commission made over the past 10 years to reclassify broadband service, taking it out of the environment of Title II while moving it into the more legally murky area of Title I by classifying broadband as an ‘information service’ instead of as a ‘telecommunications service.’” Comments of Public Knowledge, Media Access Project, The New America Foundation, and U.S. PIRG, In the Matter of a National Broadband Plan For Our Future, No. 09-51 (June 8, 2009), in Practising Law Institute, Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series, Broadband and Cable Industry Law 2010, 993 PLI/Pat 149, 176-77 (January--March, 2010). “Rural broadband networks are fundamentally similar to broadband networks in other areas in that, in order to have broadband access to the Internet, they must include local access, or last-mile, broadband access to the end user and backhaul, or middle-mile, capabilities to an available Internet peering point. The last-mile network connects residential and business end users to a local ISP. In this configuration, the middle-mile or backhaul component connects the local ISP to an Internet peering point or node. In rural settings, either or both of these components may not support robust broadband connectivity. Bringing Broadband to Rural America: Report on a Rural Broadband Strategy, 24 F.C.C.R. 12,791, 12,828 (2009)(citations omitted). Cf. *Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903, 908 (D.C. Cir. 2009) (citing deferring to the FCC’s expertise in deeming middle mile

In three instances of streamlined regulatory oversight discussed below the FCC eliminated a statutory duty to deal which in turn short-circuited both the prospect for true facilities-based competition and effective judicial review. In its zeal to eliminate common carrier regulations, based on a questionable finding of robust and sustainable competition, the FCC has abandoned requirements that local exchange carriers: 1) provide market entrants interconnection with their switching and routing facilities on congressionally mandated favorable terms and conditions;⁹¹ 2) separate their basic transmission facilities from offerings that provide enhancements to these basic transmission links;⁹² and 3) refrain from offering end user retail services at rates below the wholesale rate offered other carriers.⁹³

markets sufficiently competition). *But see also*, FCC, Public Notice, Data Requested in Special Access NPRM, WC Docket No. 05-25, RM-10593, DA 10-2073 (rel. Oct. 28, 2010)(seeking more data about the nature and scope of middle mile competition); Special Access Rates for Price Cap Local Exchange Carriers, WC Docket No. 05-25, AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, RM-10593, Order and Notice of Proposed Rulemaking, 20 F.C.C.R. 1994 (2005); Parties Asked to Refresh Record in the Special Access Notice of Proposed Rulemaking, WC Docket No. 05-25, Public Notice, 22 F.C.C.R. 13352 (2007); Parties Asked to Comment on Analytical Framework Necessary to Resolve Issues in the Special Access NPRM, WC Docket No. 05-25, Public Notice, 24 F.C.C.R. 13639 (2009).

⁹¹ Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 F.C.C.R. 16978 (2003), *vacated and remanded in part, affirmed in part*, United States Telecomm. Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004), *cert. denied*, 543 U.S. 925 (2004); Unbundled Access to Network Elements, Order on Remand, 20 F.C.C.R. 2533 (2005), *pet for rev. den.*, Covad Communications Co. v. F.C.C., 450 F.3d 528 (D.C. Cir. 2006).

⁹² Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Final Decision, 77 F.C.C.2d 384 (1980), *aff'd sub nom.* Computer and Communications Indus. Ass'n. v. FCC, 693 F.2d 198 (D.C. Cir. 1982). Amendment of Sections 64.702 of the Commission's Rules & Regulations (Third Computer Inquiry), Report and Order, 104 F.C.C.2d 958 (1986), *vacated sub nom.* California v. FCC, 905 F.2d 1217 (9th Cir. 1990), *on remand*, Computer III Remand Proceedings: Bell Operating Co. Safeguards, Notice of Proposed Rulemaking & Order, 6

In all three instances the FCC eliminated regulatory requirements based on the view that they were not needed to ensure that consumers could acquire diverse services at competitive rates. After failing to convince the FCC that such streamlining did not serve the public interest, consumer advocates and recent market entrants were similarly unsuccessful at convincing appellate courts that the Commission erred in its fact finding. On two separate occasions the Supreme Court has stated clearly that if the FCC determines that no regulatory safeguards are necessary, then reviewing courts should not second guess the Commission and apply a more rigorous antitrust standard or duty to deal.⁹⁴ If the FCC has overstated the competitiveness and regulatory capability of telecommunications service markets, in light of recent case precedent appellate courts will not correct Commission's mistakes, but instead will summarily validate the Commission's determination that such carriers have no duty to deal with other carriers.

1. Abandonment of Local Loop Unbundling

The Telecommunications Act of 1996⁹⁵ sought to stimulate local exchange service competition by creating a combination of specific common carrier responsibilities on

F.C.C.R. 174 (1990), rule modification, 6 F.C.C.R. 7571 (1991), vacated in part and remanded, *California v. F.C.C.*, 39 F.3d 919 (9th Cir. 1994), on remand, *Computer III Further Remand Proceedings: Bell Operating Co. Provision of Enhanced Servs.*, Order, 10 F.C.C.R., 5692 (1995).

⁹³ Appropriate Framework for Broadband Access to Internet over Wireline Facilities, 20 F.C.C.R. 14853, 14868 (2005). *Pacific Bell Telephone Co. v. Linkline Communications, Inc.* 555 U.S. 438, 129 S.Ct. 1109 (2009)(inferring no duty to deal based on FCC determination of sufficient broadband competition)[hereinafter cited as *Linkline*].

⁹⁴ *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 410, 124 S.Ct. 872, 157 L.Ed.2d 823 (2004); *Linkline*, *supra* n.93.

⁹⁵ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (Feb. 8, 1996).

telecommunications carriers⁹⁶ with additional requirements on the Bell telephone companies that were spun off from AT&T in 1984.⁹⁷ In exchange for satisfying a 14 point competitive check list,⁹⁸ including a requirement that they providing network access on an ala carte or combined basis at rates well below what the incumbent carriers would seek to charge even at wholesale,⁹⁹ the spun off Bell Telephone companies could seek FCC authorization to provide long distance telephone services, a line of business prohibited since AT&T's divestiture. Congress hoped that the Bell companies entry into long distance services would further stimulate competition in that market and the interconnection requirements imposed on these carriers also would jump start local service competition. Over time the Bell companies faced a robustly competitive long distance telephone

⁹⁶ 47 U.S.C. § 251 (duties applicable to all telecommunications carriers). 47 U.S.C. § 252 (3) requires all telecommunications carriers "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. 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."

⁹⁷ 47 U.S.C. §271(duties that the Bell telephone companies must satisfied to qualify for the opportunity to pursue prohibited lines of business such as most long distance telephone services).

⁹⁸ See FCC, Telecommunications Act of 1996 Section 271 Long Distance Application Summary of 14 Point Competitive Checklist, available at:
http://transition.fcc.gov/Bureaus/Common_Carrier/News_Releases/1999/nrc9101b.html.

⁹⁹ "The Act thus appears to be an explicit disavowal of the familiar public-utility model of rate regulation (whether in its fair-value or cost-of-service incarnations) presumably still being applied by many States for retail sales, see *In re Implementation of Local Competition in Telecommunications Act of 1996*, 11 F.C.C.R. 15499, 15857, ¶ 704 (1996) (First Report and Order), in favor of novel ratesetting designed to give aspiring competitors every possible incentive to enter local retail telephone markets, short of confiscating the incumbents' property." *Verizon v. F.C.C.*, 535 U.S. 467, 489 122 S.Ct. 1646, 1661 (2002).

service market with low margins and less than desired upside business opportunities. The mandated promotional pricing of local exchange facilities stimulated market entry by new competitive local exchange carriers (“CLECs”), but sustainable, long term competition by facilities-based carriers did not result.¹⁰⁰

Frustrated by the combination of low long distance margins and the ongoing duty to bolster the market share of newcomers incumbent carriers sought judicial relief of the FCC’s interpretation of what the ’96 Act required. The Supreme Court determined that the FCC lawfully could require promotional pricing, using a costing model purporting to identify carriers’ Total Element Long Run Costs¹⁰¹ instead of actual current and already incurred costs. Similarly the Court held that mandatory low interconnection rates did not constitute an unconstitutional taking of incumbent carrier property largely because the carriers never proved that any undertaking resulted in a financial

¹⁰⁰ “It was both the intent of Congress and the target of intense and sustained FCC efforts to open up the incumbent local exchange carriers’ (ILECs) local access lines to competitive local exchange carriers (CLECs) who could then compete against the ILECs for ‘last mile’ services without having to build their own access lines. Seldom have the forces of public policy in telecommunications been as powerfully aligned as they were on the issue of local-loop unbundling. And yet, the effort was a failure—the evidence for which is the demise of the CLECs. The reasons for this failure are clear: (i) the interface between the regulated monopoly owning the local-access line and the CLECs who wished to use it was highly complex; and (ii) the ILECs not only owned the local loops, they also competed in the retail market for access services with the very CLECs who had to use their facilities. The result was that ILECs had every incentive to make life miserable for the CLECs in any way they could, and the complexity of the interface gave them plenty of opportunity.” Gerald R. Faulhaber, *Will Access Regulation Work?*, 61 FED. COMM. L.J. 37, 40-1 (2007). Cable television operators now offer a competitive alternative to incumbent carriers, largely without the legislative support provided the CLECs.

¹⁰¹ *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 122 S.Ct. 1646 (2002).

loss as opposed to less than desired financial gains.¹⁰² However the Court and other lower appellate tribunals agreed that the FCC's interconnection pricing mandate lacked sufficient calibration to ensure that promotional pricing to jump start competition only occurred where absolutely necessary. Courts rejected the FCC's national pricing mandates, because congress only required incumbent carriers to offer such rates where the absence of such a financial catalyst would impair the onset of competition.¹⁰³

Over time reviewing courts grew weary with the ongoing role of a regulatory agency involved not only in the matter of whether and how a carrier must interconnect with a competitor, but also the terms, conditions and rates of such interconnection. The courts became persuaded that the FCC's pricing methodology might bolster artificial competition, sustainable only because the

¹⁰² In *Verizon Comm.'s Inc. v. FCC*, 531 U.S. 1124 (2001), the Supreme Court rejected incumbent local exchange carriers' arguments that using a theoretical, most efficient cost model, instead of actual historical costs, constituted a taking that violated the Fifth Amendment. The Court noted that no party had disputed any specific rate established by the FCC's forward-looking, long-run incremental cost pricing methodology, and concluded that "[r]egulatory bodies required to set [just and reasonable] rates....have ample discretion to choose methodology." Additionally the Court stated that the Telecommunications Act of 1996 did not specifically require historical costs, particularly in light of its explicit prohibition on the use of conventional "rate-of-return or other rate-based proceeding" . . . which has been identified with historical cost ever since *Hope Natural Gas* was decided." See also, *AT&T Corp. v. Iowa Util.'s Board*, 525 U.S. 366 (1999) (largely upholding the FCC's implementation of the Congressional mandate contained in Section 251 of the Telecommunications Act of 1996 as a reasonable exercise of its rulemaking authority, including its requirement that ILECs unbundle network elements and offer CLECs the opportunity to pick and choose from an a la carte menu or platform of elements).

¹⁰³ "[T]he purpose of the [1996 Telecommunications] Act is not to provide the widest possible unbundling, or to guarantee competitors access to ILEC network elements at the lowest price that government may lawfully mandate. Rather, its purpose is to stimulate competition-preferably genuine, facilities-based competition. Where competitors have access to necessary inputs at rates that allow competition not only to survive but to flourish, it is hard to see any need for the Commission to impose the costs of mandatory unbundling." *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 576 (D.C. Cir. 2004) *cert. denied*, 125 S.Ct. 313, 316, 345 (2004)(ordering elimination of all unbundling requirements for access to long distance and CMRS carriers).

FCC was all but guaranteeing a margin between the low rates incumbent carriers had to charge and the higher retail rates CLECs could charge customers. The courts also became persuaded that the FCC's pricing methodology removed incentives for CLECs to migrate from and the resale of incumbent carrier facilities to making investments in new infrastructure.¹⁰⁴ In response the FCC exempted new technologies from any unbundling requirement and established dates for the elimination of existing requirements.¹⁰⁵

2. Elimination of Structural Safeguards

The FCC also eliminated rules that required incumbent carriers with market power to create one or more separate subsidiaries to pursue markets that add value to an enhance basic leased lines.¹⁰⁶ These requirements articulated in the FCC's *First* and *Second Computer Inquiries*¹⁰⁷ sought to

¹⁰⁴ "We therefore uphold the Commission's rules concerning hybrid loops, FTTH, and line sharing on the grounds that the decision not to unbundle these elements was reasonable, even in the face of some CLEC impairment, in light of evidence that unbundling would skew investment incentives in undesirable ways and that intermodal competition from cable ensures the persistence of substantial competition in broadband." USTA-II, 359 F.3d at 585.

¹⁰⁵ Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, 20 F.C.C.R. 2533, 2534, para. 1 (2005) (Triennial Review Remand Order), *aff'd*, Covad Commc'ns Co. v. FCC, 450 F.3d 528 (D.C. Cir. 2006). Cf. Petition of Qwest Corporation for Forbearance Pursuant To 47 U.S.C. § 160(C) in the Phoenix, Arizona Metropolitan Statistical Area, WC Docket No. 09-135, Memorandum Opinion and Order, 25 F.C.C.R. 8622 (2010)(finding insufficient competition to justify further regulatory streamlining).

¹⁰⁶ Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, CC Docket No. 02-33, Report and Order and Notice of Proposed Rulemaking, 20 F.C.C.R. 14853, 14929-30 (2005), *pet. for rev. den.*, Time Warner Telecom, Inc. v. F.C.C., 507 F.3d 205, (3rd Cir. 2007).

¹⁰⁷ Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Final Decision, 77 F.C.C.2d 384 (1980), *aff'd sub nom.* Computer and Communications Indus. Ass'n. v. FCC, 693 F.2d 198 (D.C. Cir. 1982). Amendment of Sections 64.702 of the Commission's Rules & Regulations (Third Computer Inquiry), Report and Order, 104 F.C.C.2d 958 (1986), *vacated sub*

establish a bright line between basic telecommunications services and the array of enhancements that evolved into what are now called information services. The Commission sought to create a level competitive playing field between ventures unaffiliated with a carrier providing basic network access and an information service affiliate of the basic network providing carrier.

Carriers subject to the separate subsidiary requirement and other safeguards that mandated functional separation between basic and enhanced services bristled at these requirements. They believed that the requirements were both unnecessary and costly. Over time these carriers succeeded in persuading the FCC to abandon these safeguards despite never proving how such requirements resulted in lost efficiency and synergy.¹⁰⁸ Bear in mind that the complaining carriers

nom. California v. FCC, 905 F.2d 1217 (9th Cir. 1990), *on remand*, Computer III Remand Proceedings: Bell Operating Co. Safeguards, Notice of Proposed Rulemaking & Order, 6 F.C.C.R. 174 (1990), rule modification, 6 F.C.C.R. 7571 (1991), *vacated in part and remanded*, California v. F.C.C., 39 F.3d 919 (9th Cir. 1994), *on remand*, Computer III Further Remand Proceedings: Bell Operating Co. Provision of Enhanced Servs., Order, 10 F.C.C.R., 5692 (1995).

¹⁰⁸ “The following factors guide us toward replacing the Computer Inquiry obligations for wireline broadband Internet access service providers with a less regulatory framework: the increasing integration of innovative broadband technology into the existing wireline platform; the growth and development of entirely new broadband platforms; the flexibility to respond more rapidly and effectively to new consumer demands; and our expectation of the availability of alternative competitive broadband transmission to the currently required wireline broadband common carrier offerings. We believe our actions today will enhance each of these factors.” Wireline Broadband Order, 20 F.C.C.R. at 14896. “Deployment to consumers of these technologies then, at best, is delayed and, in many cases, may be avoided altogether. Broadband Internet access services are also not developing in ways that neatly fall within existing regulatory classifications or the current Computer Inquiry requirements (i.e., they cannot be easily separated into discrete information service and telecommunications service components). As a result, unlike cable modem providers or other broadband Internet access service competitors, wireline carriers must make either of two less-than-optimal choices when they seek to deploy advanced network equipment: either they must decide not to use all the equipment's capabilities, thereby reducing their operational efficiency; or they must defer deployment while the manufacturer re-engineers it to facilitate compliance with the Computer Inquiry rules, thereby creating unnecessary costs and service delays. *Id.* at 14887-88.

willingly created separate subsidiaries to provide “yellow page” directory advertising and wireless services, perhaps because such separateness accrued tax benefits and some degree of insulation from having to compensate the parent carrier for access to existing billing and data base management systems.

Even as the FCC eliminated local loop unbundling and structural safeguards national regulatory authorities (“NRAs”) in other nations have embraced them.¹⁰⁹ Carriers facing such obligations have not experienced financial distress and the competitive environment has evidenced measureable improvement.¹¹⁰ For example, the Britain’s dominant carrier British Telecom split

¹⁰⁹ “[E]xperience both in the United Kingdom and elsewhere has indicated that, where access to the incumbents’ networks has been allowed, it has provided a sound platform for the successful deployment of new services. Many of these new services--VoIP is an example--provide a significant source of competition.” Michael H Ryan, *Promoting Network-Based Competition in UK Fixed-Line Markets: A Failed Policy*, IBA CONVERGENCE, 63; (April, 2009); Bob Bell, *Broadband Deregulation--Similar Legislation, Different Results: A Comparative Look at the United States and the European Union*, 10 TUL. J. TECH. & INTELL. PROP. 77 (Fall, 2007); Organization for Economic-Co-Operation and Development, Directorate For Science, Technology and Industry, Committee For Information, Computer and Communications Policy, *Developments in local loop unbundling*, DSTI/ICCP/TISP(2002)5 (Sep. 10, 2003); available at: <http://www.oecd.org/dataoecd/25/24/6869228.pdf>. See also, Marta Ienco, *A Review of Functional/ Structural Separation Models around the World*, Presented at ITU Centres of Excellence Training Workshop on “Infrastructure Sharing Potential- Consideration of Separation Models,” Athens (2009); available at: <http://about.ovum.com/consulting/telecomsregulation/thoughtleadership/thoughtleadership1.pdf>.

¹¹⁰ “Local loop unbundling (LLU) is a potentially important option that could allow competitors to use unbundled elements or unbundled services of . . . [the incumbent’s] access network to provide alternative telephone or broadband access services to end-users. Most OECD countries require unbundling . . . Unbundling can create incentives for new investment in broadband access and drive faster deployment of broadband services because it allows less costly access to consumers for alternative broadband service providers. Vigorous competition can be expected to drive prices down towards cost.” New Zealand Ministry of Economic Development, *Report on Commerce Commission’s Local Loop and fixed PDN Unbundling Investigation*, File BTP/1/TCOMP/11 (May 5, 2004), available at <http://www.med.govt.nz/pbt/telecom/llu-investigation/ministry-report/ministry-report.pdf>.

itself into two firms in 2006, one for providing first and last kilometer access to telecommunications infrastructure,¹¹¹ and the other offering competitive services. The United Kingdom marketplace has become robustly competitive without harming incumbent British Telecom's financial viability and stock attractiveness.¹¹² The nations of the European Union continue to embrace structural separation and LLU. Other nations having LLU requirements include Japan, Korea, New Zealand, Switzerland, South Africa, Australia and Hong Kong.¹¹³

3. Courts Infer the Absence of a Common Carrier Duty to Deal

Appellate courts have determined that if the FCC has relaxed its oversight of carrier interconnection terms and conditions, based on its expert assessment, then no judicial antitrust remedy need apply. Put another way if the FCC determines that the scope of competition is sufficient to trigger abandonment of regulatory safeguards, reviewing courts have no basis to second guess the Commission. In application this means that reviewing courts have great reluctance to

¹¹¹ See Openreach, *Keeping the UK Connected*; available at: http://www.openreach.co.uk/orpg/aboutus/Downloads/web_corp_brochure.pdf.

¹¹² Liz Tay, *British regulator and BT boast of the benefits of separation*, IT News (Nov. 4, 2009); available at: <http://www.itnews.com.au/News/159659,bt-functional-separation-was-a-success.aspx>. See also, Ofcom, *The Communications Market 2010, Telecoms and Networks*; available at: <http://stakeholders.ofcom.org.uk/market-data-research/market-data/communications-market-reports/cmr10/>.

¹¹³ See The World Bank, InfoDev, *ICT Regulation Toolkit Module 7, New Technologies and Impacts on Regulation 4 Hot Topics 4.5 IPTV 4.5.5 Network unbundling*; available at: <http://www.ictregulationtoolkit.org/en/Section.3426.html>; Robert W. Crandall, Jeffrey A. Eisenach and Robert E. Litan, *Vertical Separation of Telecommunications Networks: Evidence From Five Countries*, 62 FED. COMM. L.J. 493 (June, 2010).

impose more burdensome safeguards that what the FCC, in its expert judgment, has deemed unnecessary.

Verizon v. Law Offices of Curtis V. Trinko,¹¹⁴ resolves a dispute among the circuits concerning whether antitrust claims can exist based on the obligations imposed on incumbent local exchange carriers (“ILECs”) by the Telecommunications Act of 1996 and, if so, whether individual customers have standing to assert such claims. The Supreme Court granted certiorari, limited to the question whether the Court of Appeals erred in reversing the District Court’s dismissal of the respondent’s antitrust claims.¹¹⁵

The Court held that the “savings clause” contained in the ’96 Act¹¹⁶ does not foreclose application of antitrust laws to ILEC behavior. However the Court noted that such inclusion does not provide significantly greater scrutiny or safeguards against anticompetitive practices in light of existing regulatory oversight performed by the FCC and state regulatory agencies:

But just as the 1996 Act preserves claims that satisfy existing antitrust standards, it does not create new claims that go beyond existing antitrust standards; that would be equally inconsistent with the saving clause's

¹¹⁴ 540 U.S. 398, 124 S.Ct. 872 (2004)[hereinafter cited as Trinko].

¹¹⁵ See Law Offices of Curtis V. Trinko, L.L.P. v. Bell Atlantic Corp., 123 F.Supp.2d 738 (S.D.N.Y.,2000)(dismissing antitrust claims), *affirmed in part, vacated in part and remanded*, 294 F.3d 307, (2nd Cir. Jun 20, 2002) (NO. 01-7746), *as superseded*, 305 F.3d 89 (Aug 30, 2002), *cert. granted in part sub nom.*, Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP, 538 U.S. 905, 123 S.Ct. 1480(2003).

¹¹⁶ “Section 601(b)(1) of the 1996 Act is an antitrust-specific saving clause providing that ‘nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.’” Trinko, 124 S.Ct. at 878, *citing*, 110 Stat. 143, 47 U.S.C. § 152.

mandate that nothing in the Act ‘modify, impair, or supersede the applicability’ of the antitrust laws.¹¹⁷

Having concluded that the ‘96 Act does not foreclose antitrust cases, the Court easily rejected the applicability of the Sherman Act to a claim that Verizon discriminated against competitors when they sought access to Verizon unbundled network services:

We conclude that Verizon’s alleged insufficient assistance in the provision of service to rivals is not a recognized antitrust claim under this Court’s existing refusal-to-deal precedents. This conclusion would be unchanged even if we considered to be established law the ‘essential facilities’ doctrine crafted by some lower courts, under which the Court of Appeals concluded respondent’s allegations might state a claim.¹¹⁸

The Court concluded that both the FCC and state regulatory agencies can investigate claims that an ILEC had failed to comply with ‘96 Act requirements and in turn can impose financial penalties, remediation measures, and additional reporting requirements for noncompliance:

Finally, we do not believe that traditional antitrust principles justify adding the present case to the few existing exceptions from the proposition that there is no duty to aid competitors. Antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue. Part of that attention to economic context is an awareness of the significance of regulation.¹¹⁹

The Supreme Court’s deference to the FCC has gone so far as to allow an incumbent carrier to offer end users lower rates than what it charges competitors, a predatory and anticompetitive

¹¹⁷ *Id.* 124 S.Ct. at 878.

¹¹⁸ *Id.* 124 S.Ct at 880.

¹¹⁹ *Id.* 124 S.Ct. at 881.

practice commonly referred to as a price squeeze.¹²⁰ In 2003 several ISPs filed suit against Pacific Bell Telephone Co., contending that this incumbent carrier attempted to monopolize the market for Digital Subscriber Line (“DSL”) broadband Internet access by creating a price squeeze with ISP competitors obligated to pay a higher wholesale price than what Pacific Bell offered on a retail basis. Both the District Court and the Ninth Circuit Court of Appeals agreed that the ISPs could present their price squeeze claim, despite the Supreme Court’s ruling in *Trinko*.

The Supreme Court assumed that Pacific Bell had no antitrust duty to deal with any ISPs based on the FCC’s premise that ample facilities-based competition exists.¹²¹ Curiously, the Court does not mention that Pacific Bell could avoid a unilateral duty to deal with ISPs based on the FCC’s classification that DSL and presumably its component parts constitute information services and not common carrier-provided telecommunications services. But for a voluntary concession to secure the FCC’s approval of AT&T’s acquisition of another ILEC the Court noted that Pacific Bell would not even have a duty to provide ISPs with wholesale service. The Court granted certiorari to resolve the narrow question whether ISP plaintiffs can bring a price-squeeze claim under Section 2 of the Sherman Act when the defendant carrier has no antitrust-mandated duty to deal with the plaintiffs. The lower courts concluded that the *Trinko* precedent did not bar such a claim, but the Supreme Court reversed this holding.

On procedural grounds, the Court’s decision chided the ISP plaintiffs for changing the nature of their claim from a price squeeze to one characterizing Pacific Bell’s tactics as predatory

¹²⁰ Linkline, *supra*. n. 93.

¹²¹ “DSL now faces robust competition from cable companies and wireless and satellite services.” Linkline, 129 S.Ct. at 1115.

pricing. On substantive grounds, the Court noted that a new emphasis on predatory pricing would have required determination whether the retail price was set below cost,¹²² a claim the ISPs did not make.

The Court determined that the case did not become moot, because of the change in economic and antitrust arguments. However the decision evidences great skepticism whether the ISPs have any basis for a claim, because in the Court's reasoning the ISPs failed to make a claim that Pacific Bell's retail DSL prices were predatory, and the ISPs also failed to refute the Court's conclusion that Pacific Bell had no duty to deal with the ISPs, i.e., to provide wholesale service.¹²³ The Court apparently can ignore the voluntary concession AT&T made that created a duty to deal, because that concession may trigger FCC oversight, but it does not change whether an antitrust duty to deal arises. The Court reads the *Trinko* case as foreclosing any antitrust claim if no antitrust duty to deal exists.¹²⁴

The Court remanded the case to the District Court to determine whether the ISP plaintiffs have a viable predatory pricing claim. The Court expressed the need for clear antitrust rules and apparently views consumer access to low retail prices—predatory or not—as sufficient reason for

¹²² The Court referenced *Brook Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) that supports the inference that a predatory pricing claim can be established only with proof of below cost pricing coupled with evidence that the defendant can subsequently recoup any lost profits. *Id.* 129 S.Ct. at 1112.

¹²³ “The challenge here focuses on retail prices—where there is no predatory pricing—and terms of dealing where there is no duty to deal.” *Id.* 129 S.Ct. at 1118. “If there is no duty to deal at the wholesale level and no predatory pricing at the retail level, then a firm is certainly not required to price both of these services in a manner that preserves its rivals’ margins.” *Id.* at 1120.

¹²⁴ “In this case, as in *Trinko*, the defendant has no antitrust duty to deal with its rivals at wholesale; any such duty arises only from FCC regulations, not from the Sherman Act.” *Id.* 129 S.Ct. at 1119.

courts to refrain from intervening. Remarkably, the Court does not seem troubled even if all ISPs competitors exited the market, an event that surely would enable the surviving incumbent carrier to raise rates:

For if AT&T can bankrupt the plaintiffs by refusing to deal altogether, the plaintiffs must demonstrate why the law prevents AT&T from putting them out of business by pricing them out of the market.¹²⁵

This case evidences a strong reluctance on the part of the Supreme Court to support any review over the pricing strategies of carriers. Presumably the plaintiffs could have petitioned the FCC to review the wholesale prices, but the Commission might just as well have claimed that even the sub-elements of DSL service constitute information services not subject to Title II pricing and nondiscrimination requirements. In light of the regulatory objectives contained in the '96 Act, which the Court deemed “much more ambitious than the antitrust laws,”¹²⁶ more powerful safeguards against anticompetitive practices already exist.

C. Eliminating Cellular Radio Spectrum Caps

In 2003, the FCC eliminated a cap on the amount of spectrum a single wireless telecommunications carrier can control, based on a current determination of ample competition.¹²⁷ Coupled with the Commission’s approval of each and every merger application it has received,¹²⁸

¹²⁵ Linkline, 129 S.Ct. at 1123.

¹²⁶ Trinko, 124 S.Ct. at 883.

¹²⁷ “Measures of market concentration in the record show a substantial continuing decline in concentration in most local [commercial mobile radio service] CMRS markets. We find that considerable entry has occurred and that meaningful competition is present, particularly given the presence of such earmarks of competition as falling prices, increasing output, and improving service quality and options. Specifically, concentration in CMRS markets, as measured by subscriber share, is falling.” 2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile

the Commission all but guaranteed a concentrated marketplace for wireless services.¹²⁹ In light of increasing reliance on wireless services to serve all consumers' information, communications and entertainment requirements, the FCC should have analyzed extensively the consequences of such consolidation. Advocates for merger approval herald efficiency gains from scale, spectrum scarcity, and extraordinary growth in demand for services. To these advocates a spectrum cap would prevent a single carrier from satisfying demand and a proliferation of carriers presumably would not be able collectively to achieve such goals either.

Radio Services, WT Docket No. 01-14, Report and Order, 16 F.C.C.R. 22668, 22682 (2001). The FCC rejected as a significant barrier to market entry the need to acquire spectrum, in light the Commission's view that resale opportunities would suffice. "Nonetheless, there are factors that moderate concern regarding the spectrum access barrier to entry. In particular, the need for direct access to spectrum is not absolute because carriers can compete in the provision of CMRS without direct access to spectrum through resale, or a mobile virtual network operator ("MVNO") arrangement." *Id.* 16 F.C.C.R. 22690.

¹²⁸ See, e.g., Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and *De Facto* Transfer Leasing Arrangements and Petition for Declaratory Ruling that the Transaction is Consistent with Section 310(b)(4) of the Communications Act, WT Docket No. 08-95, Memorandum Opinion and Order, 23 F.C.C.R. 17444, 17546-47 ¶ 233 (2008) ; Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation For Consent to Transfer Control of Licenses and Authorizations, File Nos. 0001656065, et al., Memorandum Opinion & Order, 19 F.C.C.R. 21522, 21568 ¶ 108 (2004). See also, FCC, Archive of Major Transactions, available at: <http://www.fcc.gov/encyclopedia/major-transactions-archive>.

¹²⁹ "The four facilities-based providers that analyst reports typically describe as nationwide all have mobile wireless networks that cover in excess of 86 percent of the U.S. population in large proportions of the western, mid-western, and eastern United States." FCC, Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, Fourteenth Report, FCC 10-81, at 29 (rel. May, 20, 2010). The FCC did not account for Verizon's acquisition of Alltel's 5.2% national market share. See *Id.* at 31, Chart 1.

When it removed the spectrum cap the FCC made summary assertions without using any serious and rigorous analysis about the consequences. The Commission never considered that removing a spectrum cap eliminates an ex ante safeguard that helps prevent anticompetitive consequences rather than rely on ex post remedies after the harm has occurred. Arguably ex ante safeguards are more essential in light of the Commission's elimination of carrier duties to deal and case law that all but eliminates antitrust remedies.¹³⁰ Other nations support spectrum caps in the mobile wireless marketplace including the United Kingdom whose telecommunications regulator acknowledged that high barriers to entry and the potential for excessive concentration¹³¹ justify spectrum caps:

We also propose to put in place safeguard caps to guard against longer terms risks to competition from very asymmetric holdings of spectrum. While we do not think that spectrum needs to be held equally for there to be effective competition or equality of opportunity to compete, we do think that there could be a risk if some national wholesalers held a very large share of mobile

¹³⁰ “[A] sector regulator can introduce ex ante means, of which spectrum caps are one example, to help ensure that markets remain truly competitive. To the extent that policy makers believe they should have a portfolio of ex post and ex ante measures at their disposal to facilitate and ensure effective competition in markets for the sake of users, consumers, and overall welfare, then both a sector regulator in telecommunications and a Competition Authority have valuable roles to play.” Dr. Martyn F. Roetter, *Mobile Broadband, Competition and Spectrum Caps*, 21 (Jan. 2009); available at: http://www.asocel.org.co/pdf/Spectrum_Caps_Report.pdf.

¹³¹ “We consider that if we put in place no measures in the combined award to promote competition, there is a material risk of an outcome that would lead to lower competitive intensity in the provision of higher quality data services compared to competition in the wholesale market today, and compared to what might be possible. This is because we consider there is a material risk of only two or three national wholesalers emerging from the auction capable of providing higher quality data services in a profitable way. This is especially the case given that there are high barriers to entry to the national wholesale market, including the difficulty of obtaining access to suitable spectrum.” Ofcom, *Consultation on assessment of future mobile competition and proposals for the award of 800 MHz and 2.6 GHz spectrum and related issues*, Sec. 5.58 p. 45 (published March 22, 2011); available at: <http://stakeholders.ofcom.org.uk/binaries/consultations/combined-award/summary/combined-award.pdf> [hereinafter cited as Ofcom Future Mobile Consultation].

spectrum. While it is difficult to speculate about future possible developments, we consider it is possible that in the longer term there could be technological (e.g. beyond LTE) or market developments that meant that very asymmetric holdings of spectrum represented a risk to competition, especially for sub-1 GHz spectrum.¹³²

Only recently, with the 91.2% of the wireless market controlled by four national carriers, has the Commission begun to express doubts whether concentration in the wireless marketplace generates sufficient competition.¹³³ Previously the Commission expressed no concern that incumbent carriers would acquire the lion's share of any newly available spectrum. For example, in the auctions for choice 700 MHz spectrum made available when television broadcasters converted

¹³² *Id.* Sec. 5.83, p. 49.

¹³³ With an eye toward providing better fact-based assessments of industry competitiveness, the FCC's most recent report on the wireless marketplace uses a more sophisticated and granular assessment. "[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 Mobile Wireless, Including Commercial Mobile Services, Fourteenth Report, WT Docket No. 09-66, FCC 10-81, ¶ 3 (May 20, 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-81A1.pdf. The Commission largely disputes previous determinations of robust competition and reports significant concentration of ownership that well exceeds a standard measurement for a highly concentrated industry. "Over the past five years, concentration has increased in the provision of mobile wireless services. The two largest providers, AT&T, Inc. (AT&T) and Verizon Wireless, have 60 percent of both subscribers and revenue, and continue to gain share (accounting for 12.3 million net additions in 2008 and 14.1 million during 2009)." *Id.* at ¶ 4. The Commission uses the Herfindahl-Hirschman Index to measure wireless industry concentration and reports that the current figure of 2848 exceeds the 1800 figure used by the Department of Justice to identify "highly concentrated" industries. *See id.* at ¶¶ 48-55.

to digital transmissions, the two largest incumbent carriers AT&T and Verizon spent \$16 billion of the \$19.6 billion collected by the U.S. government.¹³⁴

In light of the Commission's favorable treatment of merger requests AT&T Wireless has applied to acquire T-Mobile.¹³⁵ AT&T claims the merger will help it abate a severe spectrum shortage, and promote the company's ability to provide wireless broadband services to rural locales on an accelerated basis. The company has sought to shift attention from the market concentrating impact of the merger, because acquiring T-Mobile 14% market share will boost AT&T's share to over 40% which combined with Verizon's share would result in two companies controlling over 80% of the market. AT&T seeks to frame the merger as a means for the company to improve customer service and to compensate for delays in FCC regulatory reform, especially the Commission's inability to make more spectrum available for CMRS.

The AT&T proposed merger with T-Mobile follows a long line of approved mergers made possible by the FCC's removal of a spectrum cap. Had the Commission retained the cap, the

¹³⁴ "According to an analysis by The Associated Press, the two telecom companies 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, INFORMATION WEEK (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, THE NEW YORK TIMES (March 21, 2008), available at: <http://www.nytimes.com/2008/03/21/technology/21auction.html>; FCC, Auction 73, 700 MHz Band, Fact Sheet, available at http://wireless.fcc.gov/auctions/default.htm?job=auction_factsheet&id=73.

¹³⁵ See AT&T, Acquisition of T-Mobile USA, Inc. Description of Transaction Public Interest Showing and Related Demonstrations, Filed with the Federal Communications Commission April 21, 2011; available at: <http://fjallfoss.fcc.gov/ecfs/document/view?id=7021240421>.

possibility exists that the wireless marketplace would have more competition, innovation and consumer choice. The four major carriers do not deviate significantly from a single business model that offers subscribers a subsidized handset in exchange for a two year service commitment and a hefty financial penalty for early termination of service. Wireless carriers charge higher rates to recoup the handset subsidy and no company offers a lower rate for subscribers who eschew the subsidy by activating an existing handset. Had the spectrum cap remained in force the possibility exists that one or more carriers would pursue a different business plan, perhaps concentrating on data services and offering an open interface to content and software, instead of the tightly controlled access erected by the four major carriers.

U.S. wireless carriers claim they must aggressively compete thereby offering consumers world class service in terms of monthly minutes of use, price and innovation. On the positive side the carriers correctly report that their rate plans offer large baskets of voice minutes and at least until recently unlimited data access plans. Additionally carriers typically offer services that do not debit the monthly usage allotment when a subscriber calls another subscriber of the same carrier. On the other hand identical price points and service terms do not stimulate competition and innovation even as these carriers generate some of the world's highest margins and average revenue per user ("ARPU").¹³⁶ Provided subscribers do not deviate from relatively narrow, carrier-defined usage parameters both carriers and customers can benefit. However, one can only speculate how much more robust and dynamic the industry could have become had the FCC retained the spectrum cap.

¹³⁶ "The average monthly subscriber bill (ARPU) in the United States, at \$51.54, is much higher than the Western European average of \$33.45." 14th CMRS Competition Report at 195.

Instead the FCC overstates the positive benefits accruing from an increasingly concentrated industry. By using carrier provided estimates of ARPU, average minutes of use and cost per minute of service, the FCC reports a mostly happy story about the U.S. wireless marketplace. The Commission largely dismisses any problem with the fact that a credible and frequently used measure of industry concentration points to severe concentration. Factoring in Verizon's \$28 billion acquisition of Alltel, a company with a 5.2% market share, the Hirschman Herfindal Index generates a score of 3000 well above the 1800 figure that triggers a Justice Department and Federal Trade Commission finding of a "highly concentrated" market.¹³⁷ Apparently for wireless markets other factors support a decision not to worry about the HHI score. The apparent rationale for discounting market concentration is non-price rivalry, e.g., a plethora of different subsidized handsets and the more than \$3.4 billion the four major wireless carriers spent on advertising in 2008.¹³⁸ Additionally the FCC reports to Congress that CMRS carriers have at least 586 MHz of spectrum available.¹³⁹ However a close examination of the frequency bands identified by the Commission generates questions whether many offer a functionally equivalent service option based on propagational characteristics of the available spectrum and company business plans. For example, Clearwire, a company identified as providing a competitive alternative to CMRS,

¹³⁷ See U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines*, Sec. 1.5 Concentration and Market Shares (1997); available at: http://www.justice.gov/atr/public/guidelines/horiz_book/toc.html. In April, 2010 the FTC proposed to raise the concentrated industry floor to a 2500 HHI level. ¹⁴th CMRS Competition Report at 40, n. 107.

¹³⁸ *Id.* at 76.

¹³⁹ *Id.* at 145.

concentrates on data services to users and only offer VoIP service to users with wireless modem equipped portable computers. The company does not provide a functional and competitive alternative to mobile services accessible via small handsets like that used by CMRS subscribers.

III. Conclusion

NRAs such as the FCC, typically have a statutory duty to serve the public interest and to recalibrate the nature and scope of their oversight when circumstances change. Technological innovations surely promote the possibility of more competition, but the countervailing trends of convergence creates incentives for incumbents to diversify and serve new markets while expanding in size and scale. The cross currents of potentially greater competition, but also consolidation of control by incumbents, should motivate NRAs to streamline regulations cautiously and incrementally. The FCC did not embrace this course of action and opted instead to make expansive deregulatory pronouncements based largely on non-empirical, overly optimistic assessments about the future sustainability of existing or future competition.

In the four case studies examined in this paper the FCC subsequently has identified problems necessitating its intervention, but the Commission's prior acts now prevent it from crafting a solution.¹⁴⁰ When it opted to apply unconditionally the information services classification

¹⁴⁰ The Commission rarely has the inclination or authority to undo a streamlined regulation in light of changed circumstances. A rare instance occurred when the Commission approved the merger of Sirius and XM satellite digital audio radio services ("SDARS"). "At that time, the Commission agreed that market forces produced by the robust competition between two SDARS competitors would ensure that listeners would receive noncommercial educational and public interest programming on the SDARS service. In the absence of such competitive forces post-merger, we find the potential harm to programming diversity greater than was the case in 1997." Applications for Consent to the Transfer of Control of Licenses XM Satellite Radio Holdings Inc., Transferor to Sirius Satellite Radio Inc., Transferee, MB Docket No. 07-57, Memorandum Opinion and Order and Report and Order, 23 F.C.C.R. 12,348, 12413 (2008).

to all types of broadband Internet access the FCC abdicated its authority even to resolve legitimate complaints of discriminatory and anticompetitive conduct. When it freed Title II regulated common carriers of many core responsibilities, such as the duty to cooperate with competitors on fair terms, conditions and prices, the Commission made it possible for reviewing courts to conclude that these carriers no longer had a duty to deal with each other subject to FCC oversight. Even a blatantly anticompetitive practice, such as offering retail rates below the wholesale rate offered a competitor, does not trigger a judicial remedy, because reviewing courts can defer to the FCC's expert conclusion that marketplace competition would discipline carriers and offer readily available and cheaper alternatives to carriers engaging in price squeezes. When the FCC eliminated spectrum caps it allowed incumbent carriers to achieve necessary scale, but also to benefit from extraordinarily high barriers to market entry all but guaranteeing a concentrated market made more so by lax merger review.

The FCC has executed a strategy that favors incumbents best equipped to exploit streamlined or eliminated regulation for private gain. The competition identified or predicted by the Commission has failed to reach effective and sustainable levels. Rather than imposing so-called heavy handed regulations, the FCC has removed regulatory safeguards that would require scrutiny of efforts by incumbents to achieve market dominance, including tactics that might constitute unfair trade practices, and violations of competition policies.

Belatedly the FCC has identified that it should resolve complaints regarding the allegedly anticompetitive practices of certain information service providers. The Commission no longer reports to Congress that the mobile wireless marketplace unconditionally operates with effective competition. The Commission sees the need to impose duties to deal fairly and on reasonable

terms and conditions even for carriers who claim regulatory streamlining exempts them from government oversight.

It remains to be seen whether and how the FCC can maneuver around all the consumer protection tools it has abandoned. Already courts have rejected the Commission's creative and novel invocations of ancillary jurisdiction in lieu of direct statutory authority. Had the Commission acted cautiously it would have lost the ability to make a big deregulatory pronouncement, but years later it would be in a position to act when needed.