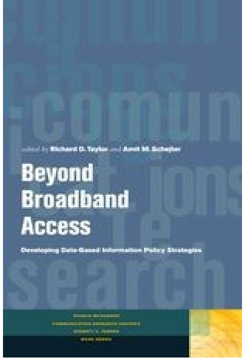

Beyond Broadband Access: Developing Data-Based Information Policy Strategies
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https://doi.org/10.5422/fordham/9780823251834.001.0001
Published: 2013 **Online ISBN:** 9780823268955 **Print ISBN:** 9780823251834

CHAPTER

9 Case Studies in Results-Driven Decision Making at the FCC

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https://doi.org/10.5422/fordham/9780823251834.003.0009 Pages 143–157
Published: June 2013

Abstract

This chapter highlights several instances in which the U.S. Federal Communications Commission (FCC) could have used empirical research and peer review to achieve an accurate measure of whether a telecommunications market operates competitively. It argues that sensitivity to politics, deregulatory zeal, and wishful thinking motivated the FCC to refrain from engaging in results-driven decision-making despite its legal obligation to serve the public interest and generate a complete evidentiary record. For example, the FCC has used statistics to support the conclusion that ample facilities-based competition exists in broadcast, broadband, and wireless markets that it can further reduce limitations on the market penetration of a single owner, approve multibillion dollar, market-concentrating mergers, and claim that the United States continues to benefit from best-in-class access to telecommunications services.

Keywords: empirical research, Federal Communications Commission, peer review, telecommunications, politics, decision-making, statistics, competition, broadcast, broadband

Subject: Museums, Libraries, and Information Sciences

Despite its legal obligation to serve the public interest[1] and generate a complete evidentiary record,[2] the Federal Communications Commission (FCC) frequently cannot resist the temptation to engage in results-driven decision making. Rather than rely on empirical evidence to support its decisions,[3] which would pass peer review by independent third parties, it appears that FCC managers sometime identify the desired policy outcome even before the agency solicits and analyzes filings of interested parties.

Too often the FCC's decision-making process has become "a morass or partisanship, pseudo-science, fuzzy math, creative interpretation of economic principles and legal concepts, selective interpretation of the facts, innovative collection of statistics, and flawed thinking."[4] The FCC has used questionable and unverifiable statistics primarily to support decisions to abandon or streamline regulations in light of sufficient and sustainable competition. For example, the FCC has used statistics to support the conclusion that such ample facilities-based competition exists in broadcast,[5] broadband,[6] and wireless markets[7] that it can further reduce limitations on the market penetration of a single owner,[8] approve multibillion dollar, market-concentrating mergers,[9] and claim that the United States continues to benefit from best-in-class access to telecommunications services.[10]

Normal governmental checks and balances have not always detected and reversed instances where the FCC has deliberately or inadvertently failed to compile a credible record. Many reviewing courts gladly defer to the FCC's "expertise" rather than appear to second-guess, or to legislate from the bench in highly technical

p. 144 matters.[11] Some courts also allow the FCC to extend its ↳ regulatory wingspan by claiming "ancillary jurisdiction"[12] to oversee practices that do not trigger a direct statutory mandate, but which arguably fit within a broad conferral of jurisdiction to achieve public interest goals relating to the activities of ventures using wire and radio communications.

Additionally, the Supreme Court has ruled that absent a legislative mandate requiring the FCC to act guard against anticompetitive practices, courts lack jurisdiction to order remedies the FCC has refused to impose.[13] One court accepted the FCC's arguments that data about commercial ventures' decisions not to provide broadband service in specific localities constituted a business trade secret, like key food and beverage recipes, thereby prohibiting the FCC from public disclosure.[14] Arguably, a carrier's decision not to serve a specific locality serves as a strong indication of market failure requiring heightened scrutiny in view of the legislative goal of achieving universal access to basic and advanced telecommunications services. Too often, the FCC reaches policy conclusions based on statistical interpretations that do not make sense, and do not have corroboration through peer review, a process that the FCC has a conditional obligation to use,[15] but rarely does so.[16]

This chapter identifies several instances where the FCC could have used empirical research and peer review to achieve a true sense of whether a telecommunications market segment operates competitively. The chapter concludes that sensitivity to politics, deregulatory zeal, and wishful thinking motivate the FCC to abandon regulatory oversight. Too many FCC decisions use flawed fact finding and analysis, excessively rely on advocacy documents generated by researchers sponsored by major stakeholders, and reach conclusions unsupported by evidence. The chapter also suggests ways the FCC could have avoided judicial reversal if it had used accepted social scientific practices, compiled a complete evidentiary record, and reviewed the facts with an open mind.

A Partisan and Politicized Agency

Congress created the FCC as an expert and independent regulatory agency with an obligation to implement congressional intent, but also to determine how to serve the public interest.[17] Many of the key staff, including the core group of advisors to the FCC commissioners, are not civil service employees, but acquire employment as appointees for a limited period. Increasingly, FCC commissioners select advisors with experience on Capitol Hill, as FCC counsel or advisors to individual senators and representatives, in light of the increasingly politicized nature of the votes commissioners cast on policy matters.[18]

Even with such a political umbrella, one would think the FCC could use its considerable staff resources to
p. 145 undertake a professional and thorough ↳ analysis of public policy issues, as augmented by data collection and solicitation of comments from interested parties. Instead, the FCC relies almost exclusively on stakeholder data reporting as well as on comments and research financed by these groups. The FCC does not generate much internal policy analysis, nor does it typically sponsor such research from neutral third parties. Additionally the FCC refrains from collecting data it considers intrusive or burdensome, and takes pains to redact or refrain from disclosing data that the reporting parties consider proprietary,[19] or qualifying for trade secret protection.[20]

The FCC's inability to collect and analyze data, without the assistance of the businesses it regulates, casts doubt on the credibility of the commission's findings. Rather than compile and disclose statistics with an open mind whether the data will support a preferred conclusion, the FCC appears to frame and interpret statistics to corroborate the view that the commission can continue on its deregulatory glide path, approve any merger application despite its market concentrating effect, and report to Congress that almost every sector in the telecommunications industry offers US consumers best-in-class services with superior accessibility and affordability. The FCC can overstate the degree of competition and achievement of its public interest service mandate largely because it relies on the comments and other filings of stakeholders who share its interest in touting what a great job it has done in serving the public interest.

Justifying a Desired Outcome with Stakeholder-Submitted Data and Statistics

Regulatory Forbearance

As authorized by Section 10 of the Telecommunications Act of 1996, the FCC, on its own initiative, or based on a stakeholder's application, shall forbear from regulating when justified by marketplace conditions and the public interest.[21] Incumbent telephone companies have aggressively sought such deregulation based on the simple premise that they face facilities-based competition. For the FCC to comply with Section 10 of the 1996 Act, the FCC must compile empirical evidence that corroborates the applicants' assertions about the existence of robust and sustainable competition. Instead, the FCC has relied on the prospect of competition, or based its decision to deregulate on market entry by as few as one facilities-based carrier.

In 2005 the FCC partially granted Qwest's request to forbear from applying price cap, rate of return, tariffing, and sixty-day discontinuance regulations for interstate mass market exchange access services and mass market broadband Internet access services in Omaha, Nebraska. The FCC expressed its willingness to eliminate traditional regulatory safeguards when true and p. 146 ↳ robust facilities-based competition exists:[22] "Through this Order, we show that we are ready and willing to step aside as regulators and let market forces prevail where facilities-based competition is robust."[23] Even as it recognized that robust facilities-based competition did not really exist,[24] the FCC nevertheless offered some deregulatory relief.

The FCC later thought to consider whether facilities-based competition exists for all necessary elements, including the first and last mile links to users. Based on that consideration and new-found interest in incumbent and market-entrant market share, the FCC has recently rejected some forbearance petitions, even for major urban areas most likely to have the greatest degree of competition.[25]

Verizon appealed the FCC's rejection of forbearance petitions based on the perception that the FCC used different evaluative criteria for assessing the sufficiency of competition. The DC Circuit Court of Appeals agreed that the FCC had to explain in greater detail how and why it changed its evaluative criteria. This case highlights a remarkable paradox: in 2005 the FCC could use the prospect of facilities-based competition, based on market entry by a single cable television competitor, to justify some regulatory forbearance of the incumbent carrier's local business services in Omaha, Nebraska. Two years later, the FCC decided to consider more thoroughly whether such competition could remain sustainable, even for the largest cities in the United States. This decision to require clearer evidence of competition triggered a judicial remand.

How the FCC treats regulatory forbearance petitions shows that it has not established clear and consistent evidentiary requirements.[26] The FCC initially got away with using quite general, nonspecific indications that competition might exist, without any proof that such competition would prove longstanding and offer consumers real service alternatives. Subsequent efforts to require more granular and specific evidence of competition triggered a remand based on the FCC's failure to provide sufficient notice and explanation for its change in evidentiary requirements.[27]

The Absence of an Antitrust Remedy

In two cases, the Supreme Court has all but eliminated the possibility that a court can offer a remedy to anticompetitive practices should the FCC fail to do so. The court has concluded that because industry sector-specific legislation provides the FCC with authority to craft regulatory remedies, when the FCC refuses to act, presumably based on the existence of sufficient and sustainable competition, appellate courts have no legal basis for imposing additional antitrust safeguards, because the FCC has in effect determined that one carrier has no duty to deal with actual or prospective competitors.[28]

p. 147 The Supreme Court's deference to the FCC has gone so far as to allow an incumbent carrier to offer end users lower retail rates than the wholesale rate it charges competitors, an apparent predatory and anticompetitive practice commonly referred to as a price squeeze.[29] In 2003, several Internet service providers (ISPs) filed suit against Pacific Bell Telephone Co., contending that it attempted to monopolize the market for digital subscriber line (DSL) broadband Internet access by creating a price squeeze requiring ISP competitors to pay a higher wholesale price than what Pacific Bell offered on a retail basis to consumers. 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 *Trinko* decision that severely constrained the scope of antitrust remedies in lieu of, or in addition to FCC regulatory safeguards.

The Supreme Court assumed that Pacific Bell had no duty to deal with any ISPs based on the FCC's premise that ample facilities-based competition exists and on the FCC's refusal to order any remedy even when presented with clear evidence that Pacific Bell offered retail users rates below wholesale rates offered to competitors. But for a voluntary concession to secure the FCC's approval of AT&T's acquisition of BellSouth, the court noted that Pacific Bell would not even have a duty to provide ISPs wholesale services. The court agreed to hear the case to answer whether ISP plaintiffs can bring a price-squeeze claim under Section 2 of the Sherman Act when the defendant carrier has no mandatory 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 Supreme Court's decision upbraided the ISP plaintiffs for changing the nature of their claim from a price squeeze to one characterizing Pacific Bell's tactics as predatory pricing, a practice where one competitor charges below-cost rates with an eye toward driving out competitors after which rates can rise. 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, 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 evidenced 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, that is, to provide cost-based wholesale service that typically costs less than retail service. The court apparently can ignore the voluntary concession AT&T made that created a duty to deal, because that
p. 148 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.

The Supreme Court remanded the case to the District Court to determine whether the ISP plaintiffs have any viable predatory pricing claim. The Supreme Court expressed the need for clear antitrust rules and apparently views consumer access to low retail prices—predatory or not—as sufficient reason for courts to refrain from intervening. The Supreme Court does not seem troubled even if all ISP 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."[30]

This case evidences a strong reluctance on the part of the Supreme Court to support any sort of judicial review over the pricing strategies of carriers and analysis of the FCC's determinations about the appropriateness of such prices and the viability of competition. Judicial deference to the FCC and the FCC's failure to detect and remedy the price squeeze or predatory pricing surely will result in the near-term elimination of competition unless ISPs quickly replace expensive leased lines with their own facilities, a desirable but commercially impractical goal at least in the short term. The FCC's assumptions about competition and its viability do not jibe with what incumbent carriers can do to drive competitors out of business if market entrants do not quickly install all necessary facilities to provide a facilities-based alternative priced below the incumbent's retail rates.

Mergers and Acquisitions

With quite rare exceptions, the FCC has approved each and every merger application submitted to it for review in the last twenty years. The FCC can do so, despite initial opposition typically expressed by one or more commissioners, by securing "voluntary" concessions from the acquiring company.[31] In reality, ventures sweeten their offer of prospective remedies for potential anticompetitive practices, or excessive market concentration, based on their assessment of what it will take to secure a majority vote approving the merger. The final FCC order approving the merger can identify the potential for risky vertical and horizontal market concentration, but dismiss concerns about the potential for adverse impact on competition thanks to safeguards largely offered by the acquiring firm,[32] or on some general view that the merged firm will more robustly compete with other incumbent firms.[33]

Alternatively, the commission approves an acquisition based on general notions that the acquiring and acquired parties did not compete with each other,[34] or that using broad market definitions, the merged firm
p. 149
will not adversely impact the already robustly competitive marketplace. Using the ↳ former justification, the FCC approved the merger of Intelsat and PanAmSat largely on grounds that despite being two of the world's largest fixed satellite service providers, Intelsat offered international services and PanAmSat largely served North America.[35] Using the latter justification, the FCC approved the merger of the only two satellite-based, premium audio service providers XM and Sirius largely based on the premise that a satellite monopoly would not harm consumers in light of their access to alternative sources, such as portable music players, terrestrial radio broadcasting, and compact disks.[36]

The FCC allowed AT&T and BellSouth to merge largely on grounds that they did not compete with each other and based on the following beneficial outcomes that the $84.5 billion merger would accrue:

- Deployment of broadband throughout the entire AT&T-BellSouth in-region territory in 2007;
- Increased competition in the market for advanced pay television services due to AT&T's ability to deploy Internet Protocol–based video services more quickly than BellSouth could do so absent the merger;
- Improved wireless products, services and reliability due to the efficiencies gained by unified management of Cingular Wireless, which was a joint venture operated by BellSouth and AT&T;
- Enhanced national security, disaster recovery and government services through the creation of a unified, end-to-end IP-based network capable of providing efficient and secure government communications; and
- Better disaster response and preparation from the companies because of unified operations.[37]

In all but one of the above anticipated benefits of the AT&T-BellSouth merger, the FCC articulated general, not easily quantifiable public benefits. The inability to measure the benefits of this merger contrast with the FCC's allegedly steadfast commitment to require merger applicants to bear the burden of explaining with specificity how the public benefits:

> The Commission applies several criteria in deciding whether a claimed benefit is cognizable. First, the claimed benefit must be transaction or merger specific (i.e. the claimed benefit 'must be likely to be accomplished as a result of the merger but unlikely to be realized by other means that entail fewer anticompetitive effects'). [Quoting from AT&T Inc. and BellSouth Corporation Application
> p. 150
> for Transfer of Control, WC Docket No. 06-74, Memorandum Opinion and Order, ↳ 22 FCC Rcd 5662, 5672, (2007)] Second, the claimed benefit must be verifiable. Because much of the information relating to the potential benefits of a merger is in the sole possession of the Applicants, they are required to provide sufficient evidence supporting each claimed benefit to enable the Commission to verify its likelihood and magnitude. In addition, as the Commission has noted, "the magnitude of benefits must be calculated net of the cost of achieving them." [Quoting from AT&T/BellSouth Order, 22 FCC Rcd at 5761] Furthermore, the Commission will discount or dismiss speculative benefits that it cannot verify.[38]

In one of the only merger applications the FCC did not approve in the last two decades, it stated that "benefits that are to occur only in the distant future may be discounted or dismissed because, among other things, predictions about the more distant future are inherently more speculative than predictions about events that are expected to occur closer to the present."[39]

AT&T secured FCC approval of the BellSouth acquisition by offering concessions and later adding more. In a letter to the FCC on December 28, 2006, AT&T promised to make available broadband Internet access service by December 31, 2007, to 100 percent of the residential living units in the AT&T/BellSouth service regions, rollout of unregulated, fiber-based facilities reaching at least 1.5 million homes, price caps, and discounting of high-speed data transmission services and conditionally agreeing to comply with nondiscrimination principles for Internet services. Parties have disputed whether AT&T has achieved its promises, but the FCC has not investigated or sanctioned the company.

Relaxed Limits on Vertical and Horizontal Integration

The FCC has incrementally relaxed limits on market penetration by a single company. Once again the FCC rationalizes such deregulation based on expanded competitive choice, despite evidence to the contrary.[40] The Third Circuit Court of Appeals, in *Prometheus Radio Project v. FCC*,[41] held that the FCC's decision to replace its newspaper/broadcast cross-ownership rules with cross-media limits did not violate the Constitution or Communications Act of 1934, as amended, but that the FCC did not sufficiently justify its particular chosen numerical limits for cross-ownership of media within local markets. While the court affirmed the FCC's decision to retain the local television ownership rule restricting combinations of the four largest stations in any market, it held that the FCC's modification to allow triopolies in markets of eighteen stations or more and duopolies in other markets was unsupported by the evidence.

p. 151 The court also rejected the methodology used by the FCC to assess the degree of competition in broadcast markets[42] and used to justify the retention of numerical ownership restrictions: "Yet no matter what the Commission decides to do to any particular rule—retain, repeal, or modify (whether to make more or less stringent)—it must do so in the public interest and support its decision with a reasoned analysis."[43]

Abandoned Wireless Carrier Spectrum Cap

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: "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."[44]

Since the FCC's decision, the market has become even more concentrated with the top four carriers controlling over 90 percent of the market.[45] Notwithstanding such concentration and clear evidence that the carriers rarely change their rates or differ in what they charge retail customers, the FCC regularly claims that the wireless marketplace remains robustly competitive.[46]

In only one case did the FCC even seek to ensure that incumbent carriers comply with common carrier responsibilities to operate open networks, as opposed to the general practice of offering limited, "walled-garden" access to carrier- or handset manufacturer–selected content. The FCC established an "Open Platform" requirement for a 22 MHz block of highly desirable 700 MHz spectrum made available for auction in the conversion from analog to digital broadcast television. The winning bidder must allow consumers to use the handset of their choice and download and use any applications, subject to certain reasonable network management conditions that allow the licensee to protect the network from harm:

> Although we generally prefer to rely on marketplace forces as the most efficient mechanism for fostering competition, we conclude that the 700 MHz spectrum provides an important opportunity to apply requirements for open platforms for devices and applications for the benefit of consumers, without unduly burdening existing services and markets. For the reasons described below, we determine that for one commercial spectrum block in the 700 MHz Band—the Upper 700 MHz Band C Block—we will require licensees to allow customers, device manufacturers,
> p. 152 third-party application developers, ↳ and others to use or develop the devices and applications of their choice, subject to certain conditions.[47]

The unfettered ability of incumbent carriers to acquire additional spectrum forecloses market entry by additional carriers that could generate more facilities-based competition and possibly reduce the substantial percent market share held by four national carriers. However, in the most recent opportunity for market entry incumbents AT&T and Verizon spent $16 billion of the $19.6 billion collected by the US government.[48]

Appellate Courts and the FCC's Lack of Empiricism and Peer Review

Appellate courts significantly vary in the degree to which they require the FCC to demonstrate the collection and fair-minded analysis of empirical data. One cannot easily square the following two judicial statements. On the one hand, a court has declared that it has "not hesitated to vacate a rule when … the [FCC] has not responded to empirical data or to an argument inconsistent with its conclusion."[49] On the other hand, a court readily deferred to the FCC's expertise and judgment noting the Commission should have "necessarily wide latitude to make policy based on predictive judgments deriving from its general expertise."[50]

The Supreme Court appears to support significant deference to the FCC's expertise. In circumstances where one cannot predict with certainty the outcome of a decision—for example, to allow common ownership of broadcast stations by a newspaper operator in the same locality or to require divestiture—the court typically will defer to the FCC's judgment: "In such circumstances complete factual support in the record for the Commission's judgment or prediction is not possible or required; 'a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.'"[51]

In *National Cable & Telecommunications Association v. Brand X Internet Services*,[52] a majority of the Supreme Court endorsed the FCC's information service classification for cable modem service. Using the *Chevron* standard,[53] which supports deferral to administrative agency decision making that reasonably interprets and implements statutory language,[54] the court cleared the way for the FCC to create a lightly regulated information service "safe harbor" for wireline and wireless broadband access services.

A majority of the Supreme Court agreed that the FCC could reasonably have concluded that cable modems solely provide an information service, despite the use of telecommunications to link subscribers with
p. 153 content. Accordingly the Court reversed the Ninth Circuit Court of Appeal's prior ↳ determination that a separate and identifiable telecommunications service element existed on grounds that the *Chevron* precedent supports the FCC statutory construction: "A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to Chevron deference only if the prior court decision holds that its construction follows from unambiguous terms of the statue and thus leaves no room for agency discretion."[55] The court concluded that the Communications Act, as amended by the Telecommunications Act of 1996, contained ambiguities as to whether cable companies offered telecommunications in conjunction with their cable modem service.

The majority used several analogies to support the view that the FCC lawfully could ignore or subordinate the telecommunications function. The majority's analogies provided examples where a venture offers a number of services, many of which combine into a consolidated offering and others that are made available, but are not essential. In the former, the majority noted that car dealers sell cars and not a collection of integrated components, such as steel frames and carpeting. In the latter analogies, the majority noted that a pet store might offer dog leashes in addition to puppies. Because ambiguity exists as to the functional integration or separateness of telecommunications, the Supreme Court majority gladly deferred to the FCC. The nature and scope of integration between telecommunications and information processing "turns not on the language of the [Communications] Act, but on the factual particulars of how Internet technology works and how it is provided, questions Chevron leaves to the Commission to resolve in the first instance."[56] While engaging in the use of "warring analogies"[57] the majority would prefer the FCC use its technical expertise to determine congressional intent.

In a dissenting opinion, Justice Scalia did not agree that the FCC could lawfully and practically treat the telecommunications link as not separable from the predominant information processing services provided. He disputed the FCC's view that cable television companies do not provide a telecommunications service when linking subscribers physically apart from the content they access.[58] Justice Scalia used pizzerias and pizza delivery for his primary analogy and asserted that one could not ignore the fact that pizza baking and pizza delivery constitute two separate elements of the pizza business: "It is therefore inevitable that customers will regard the competing cable-modem service as giving them both computing functionality and the physical pipe by which that functionality comes to their computer—both the pizza and the delivery service."[59]

The use of simplistic, but competing analogies within Supreme Court opinions demonstrates how experts in the law struggle to conceptualize converging telecommunications and information processing technologies.
p. 154 The Supreme Court's decision has provided the legal foundation for the ↳ FCC to reclassify telephone

company provision of Internet access via Digital Subscriber Lines as an information service despite having previously identified a discrete and stand-alone telecommunications service component. Apparently the desire to achieve deregulatory parity trumps the need for consistency in interpretation of terms created by the Telecommunications Act of 1996.[60] Justice Scalia chided the majority for its undiscerning acceptance of an FCC bureaucratic sleight of hand that changes the facts to achieve an outcome not contemplated by law.

In a case involving the potential harmful effects of "fleeting expletives" on children, the Supreme Court expressed tolerance for the FCC's need to make policies and rules despite the lack of, and possible inability to generate empirical data to support the FCC's decision:

> There are some propositions for which scant empirical evidence can be marshaled, and the harmful effect of broadcast profanity on children is one of them. One cannot demand a multiyear controlled study, in which some children are intentionally exposed to indecent broadcasts (and insulated from all other indecency), and others are shielded from all indecency. It is one thing to set aside agency action under the Administrative Procedure Act because of failure to adduce empirical data that can readily be obtained.... It is something else to insist upon obtaining the unobtainable. Here it suffices to know that children mimic the behavior they observe—or at least the behavior that is presented to them as normal and appropriate. Programming replete with one-word indecent expletives will tend to produce children who use (at least) one-word indecent expletives. Congress has made the determination that indecent material is harmful to children, and has left enforcement of the ban to the Commission. If enforcement had to be supported by empirical data, the ban would effectively be a nullity.[61]

Absent clear evidence that the FCC has deliberately suppressed, dismissed, or otherwise ignored data that conflicts with its policy decision, courts appear willing to rely on the FCC's predictive judgments even if they are based on assumptions and predictions rather than empirical data. Accordingly, the FCC has to act in obvious disregard for the available evidence as it did, for example, in a matter assessing the ability of broadband service providers using the electric power grid, to operate without causing harmful interference to licensed users of radio spectrum. In *American Radio Relay League, Inc. v. FCC*,[62] the DC Circuit Court of Appeals determined that the 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 p. 155 ↳ factor for predicting how quickly broadband over powerline (BPL) emissions attenuate or weaken.

While affirming some of the FCC's rules, the court agreed that the FCC did not provide a reasonable opportunity for public comment on unredacted staff technical studies on which it relied to promulgate certain rules. The court ordered the FCC to make the studies part of the rulemaking record, while also providing a reasoned explanation on its choice of an extrapolation factor.[63] The court rejected the FCC's rationale for not disclosing in its entirety technical studies that formed the basis for its technical rules:

> The Commission has chosen to rely on the data in those studies and to place the redacted studies in the rulemaking record. Individual pages relied upon by the Commission reveal that the unredacted portions are likely to contain evidence that could call into question the Commission's decision to promulgate the rule. Under the circumstances, the Commission can point to no authority allowing it to rely on the studies in a rulemaking but hide from the public parts of the studies that may contain contrary evidence, inconvenient qualifications, or relevant explanations of the methodology employed. The Commission has not suggested that any other confidentiality considerations would be implicated were the unredacted studies made public for notice and comment.[64]

Similarly the FCC may lose judicial support when it refuses to act in a manner supported by evidence submitted by interested parties and instead bases its decision on countervailing evidence for which it has made no explicit empirical findings. In *Qwest Corp. v. FCC*,[65] the Tenth Circuit Court of Appeals remanded to the FCC a decision to offer universal service subsidies to telephone companies serving rural or urban areas using a single benchmark for identifying areas where costs of service exceeded a national average by at least 135 percent. Because various parties in the proceeding submitted information showing differences in rural and urban costs, which the FCC appeared not to consider, the court concluded that the "FCC has not provided an adequate basis for us to review the rationality of [its benchmarking decision]. It has not explained or supported its decisions adequately and therefore has acted arbitrarily and not in accordance with [applicable law.]"[66]

Conclusion

The FCC frequently perceives political, budgetary, and public relations benefits in projecting the best-case scenario outcome of a deregulatory decision or merger approval. This motivates the FCC to overstate the
p. 156 degree of existing and prospective competition and the benefits in abandoning ↳ regulatory oversight. FCC commissioners and senior staff understand that congressional oversight hearings, including ones determining the commission's budget, have a friendlier tone when FCC representatives can deliver positive news and statistics to confirm the merit of marketplace self-regulation. When the FCC has to acknowledge market domination, market failure, or the lack of competition, it risks losing such a positive reception, even if regulation or merger disapproval would serve the public interest.

Imposing regulation, slowing down the speed of deregulation, and taking steps to remedy market failure typically anger some stakeholders, particularly incumbent firms with the resources to act on their frustration. With millions of dollars available to support deregulatory advocacy, incumbent firms have the financial wherewithal to frame the debate so that the best-case scenario appears real, not just plausible. FCC managers pragmatically realize that deviating from this party line risks congressional and major stakeholder displeasure, because stakeholders favoring deregulation frame ongoing government oversight as job killing and otherwise harmful to the public interest.

A fair-minded assessment of credible data on the telecommunications marketplace would conclude that not all sectors have become robustly competitive. Based on this evaluation of the evidence, the FCC might not have the basis for accelerating or continuing to deregulate. Indeed the FCC might have to consider remedies designed to promote competition, rather than simply reduce regulations that stakeholders do not want to abide.

Consider the consequences if the FCC reimposed a wireless carrier spectrum cap as proposed by rural carriers and other parties[67] as a means to stimulate market entry, competition, lower rates, more employment, and greater innovation. Doing so would constitute an acknowledgement that the wireless marketplace has become too concentrated and in turn less competitive. Absent a set-aside of spectrum for market entrants, or a cap on the amount incumbent carriers can control, any additional spectrum made available for wireless services will largely be acquired by incumbents. The auction of freed-up UHF television spectrum corroborates this assertion. Incumbent carriers acquired most of the newly available spectrum ostensibly to meet growing demand.[68] But an equally plausible argument casts incumbent carriers as motivated primarily to "warehouse" spectrum, that is, to control it and keep it away from market entrants who would reduce incumbents' shared domination of the marketplace and generate more facilities-based competition. Additionally, the FCC can deliver more funds to the national treasury when it auctions off spectrum free of any encumbrance, such as a duty to provide common carrier access, or limitation, such as allowing bidding only by nonincumbents.

Attributing greater competitiveness to the telecommunications marketplace will continue unless and until
p. 157 the FCC perceives greater internal benefits from ↳ serving as a fair-minded fact finder. The FCC will change its approach only through prodding. Such nudging can take place if appellate courts defer less and second guess more, if congressional oversight committees challenge the FCC's assumptions and statistics, and if the FCC, voluntarily or otherwise, subjects its work product to peer review.

With the change of administration, new FCC managers have proposed to operate in a more transparent and accessible manner. For example, the FCC has enlisted the support of two major university-affiliated research programs to determine how best to promote ubiquitous access to broadband networks at affordable rates.[69] Additionally the commission has scheduled numerous workshops to address various aspects of infrastructure development and access[70] and has begun to question whether broadband[71] and wireless markets[72] are sufficiently competitive.

The FCC's recommitment to transparency and service in the public interest will require external pressure to achieve thorough compliance. The FCC will need to encourage public participation, rather than rely on the filings of stakeholders. Such receptiveness will require more than the occasional road trip out from Washington, DC, to hear from a few people for the last hour of a prearranged and prepackaged hearing.

Additionally, the FCC will need to reshape its internal culture to encourage staff to engage in debate rather than to restate the conventional wisdom, or the party line articulated from the top down, that is, from commissioners and the chairman. Because one can hardly mandate an open mind, a commitment toward openness and getting the facts right must develop internally, as a public interest commitment of staff, or externally through embarrassing court reversals and congressional hearings.

Notes

1. For example, the Communications Act requires the FCC to reduce market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services that serve "the public interest, convenience, and necessity." United States Code, 47 §257(c)(1)(2008).
2. "[A regulatory] agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company*, 463 U.S. 29, 43, 103 S.Ct. 2856 (1983). Courts will set aside agency decisions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Administrative Procedure Act, 5 U.S.C. § 706(2)(A).
3. *American Radio League, Inc. v. F.C.C.*, 524 F.3d 227 (D.C. Cir. 2008) (reversing the FCC based on the commission's dismissal of empirical data submitted at its invitation without reason or analysis).
4. Rob Frieden, *Winning The Silicon Sweepstakes: Can The United States Compete In Global Telecommunications?* (New Haven, CT: Yale University Press, 2010), 16.
5. Federal Communications Commission, *Existing Shareholders of Citadel Broadcasting Corp. and of The Walt Disney Co., etc. for Consent to Transfers of Control,* Memorandum Opinion and Order and Notice of Apparent Liability, 22 F.C.C.R. 7083 (2007).
6. Federal Communications Commission, *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, 14901 (2005), affirmed *Time Warner Telecom, Inc. v. F.C.C.*, 507 F.3d 205 (3d Cir. 2007) (forbearing, on the FCC's own motion, from applying tariffing requirements to providers of wireline broadband Internet access service that offer the underlying transmission component of broadband Internet access service as a telecommunications service). Rob Frieden, "Lies, Damn Lies and Statistics: Developing a Clearer Assessment of Market Penetration and Broadband Competition in the United States," *Virginia Journal of Law and Technology* 14 (2009): 100.
7. Federal Communications Commission, *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,* Memorandum Opinion and Order and Declaratory Ruling, 23 F.C.C.R.17444 (2008) (conditionally approving Verizon Wireless acquisition of Alltel wireless assets resulting in a 90 percent market share held by four firms).
8. Federal Communications Commission, *2006 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996,* Report and Order and Order on Reconsideration, 23 F.C.C.R. 2010, 2018–19 (2007). "For the better half of the existence of federal ownership regulations, which date back to the 1940s, the Commission offered and the courts required little evidence of the connection between ownership and viewpoint diversity." Daniel E. Ho and Kevin M. Quinn, "Viewpoint Diversity and Media Consolidation: An Empirical Study," *Stanford Law Review* 61 (2009): 789.
9. Federal Communications Commission, *AT&T Inc. and BellSouth Corporation Application for Transfer of Control,* Memorandum Opinion and Order, 22 F.C.C.R. 5662 (2007); *SBC Communications, Inc. and AT&T Corp. Applications for Approval of Transfer of Control,* Memorandum Opinion and Order, 20 F.C.C.R. 18290 (2005); *Verizon Communications, Inc. and MCI, Inc. Applications for Approval of Transfer of Control,* Memorandum Opinion and Order, 20 F.C.C.R. 18433 (2005); *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation,* Memorandum Opinion and Order, 19 F.C.C.R. 21522 (2004); *General Motors Corporation and Hughes Electronics Corporation, Transferors, and the News Corporation Limited, Transferee,* Memorandum Opinion and Order, 19 F.C.C.R. 473 (2004).
10. John Kneuer, former assistant secretary for communications and information and administrator at the Commerce Department's National Telecommunications and Information Administration claimed in 2008 that the United States "has the most effective multiplatform broadband in the world." "True or False: U.S.'s Broadband Penetration is Lower than Even Estonia's; Answer: True," *Newsweek*, July 9, 2007, 58.
11. *American Family Association, Inc. v. FCC*, 365 F.3d 1156, 1166 (D.C. Cir. 2004) (noting "necessarily wide latitude to make policy based on predictive judgments deriving from [the commission's] general expertise").
12. "Ancillary jurisdiction may be employed, in the Commission's discretion, when Title I of the Act gives the Commission subject matter jurisdiction over the service to be regulated and the assertion of jurisdiction is 'reasonably ancillary to the effective performance of [its] various responsibilities.' " Federal Communications Commission, *IP-Enabled Services, WC Docket No. 04-36, E911 Requirements for IP-Enabled Service Providers, WC Docket No. 05–196,* First Report and Order and Notice of Proposed Rulemaking, 20 F.C.C.R. 10245, 10261 (2005) citing *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177–78 (1968); *United States v. Midwest Video Corp.*, 406 U.S. 649, 667–68 (1972); *FCC v. Midwest Video Corp.*, 440 U.S. 689, 700 (1979). Rob Frieden, "What Do Pizza Delivery and Information Services Have in Common? Lessons From Recent Judicial and Regulatory Struggles with Convergence," *Rutgers Computer and Technology Law Journal* 32 (2006): 276.
13. *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*, 555 U.S. 544 (2009).

14. *Center for Public Integrity v. FCC*, 505 F.Supp.2d 106 (D.D.C. 2007), reconsideration denied, 515 F.Supp.2d 167 (D.D.C. 2007).
15. United States, Office of Management and Budget, *Final Information Quality Bulletin for Peer Review*, Federal Register 70 Fed. Reg. 2664 (January 14, 2005).
16. The FCC appears to interpret its peer review obligation as limited to matters that involve technical or scientific determinations. “We note that if the Commission determines to rely on a scientific or technical study (or studies) as a basis for its decision-making in this proceeding, such study (or studies) may need to meet any applicable peer review requirements set forth in the Peer Review Bulletin issued by the Office of Management and Budget (OMB).” Federal Communications Commission, *Effects of Communications Towers on Migratory Birds,* Notice of Proposed Rulemaking, 21 F.C.C.R. 13241, n. 105 (2006).
17. “The Commission shall determine whether any new technology or service proposed in a petition or application is in the public interest within one year after such petition or application is filed. If the Commission initiates its own proceeding for a new technology or service, such proceeding shall be completed within 12 months after it is initiated.” 47 U.S.C. §157(b). “The Commissioner may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.” 47 U.S.C. §201(b).
18. Federal Communications Commission, *Commissioner Robert M. McDowell Announces Staff Change*, Public Notice (rel. September 18, 2009) (announcing appointment of Christine Kurth as Policy Director and Wireline Counsel).
19. 47 C.F.R. §§ 0.457, 0.459, 1.7001(d), 43.11(c); Federal Communications Commission, *Examination of the Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission,* Report and Order, 13 F.C.C.R. 24816 (1998).
20. Federal Communications Commission, *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, Protective Order, 23 F.C.C.R. 11154 (WTB 2008) (agreeing to treat as confidential data filed to support acquisition of a competitor).
21. The Telecommunications Act of 1996 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 FCC must also consider “whether forbearance from enforcing the provision or regulation will promote competitive market conditions.” 47 U.S.C. § 160(b).
22. “The record of competition compiled in this proceeding and, significantly, the other market-opening regulations that we leave in place today, support our finding that supply elasticity in this market is high for all mass market services. Cox’s extensive facilities build-out in the Omaha MSA, and growing success in luring Qwest’s mass market customers, indicates that … [ample facilitates-based competition exists] for both switched access and broadband Internet access services.” Federal Communications Commission, *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, 20 F.C.C.R. 19415, 19432–33 (2005), affirmed, *Qwest Corp. v. F.C.C.*, 482 F.3d 471 (D.C. Cir. 2007).
23. Ibid., 19416.
24. “Even Cox, which is the competitive LEC with the most extensive facilities-based coverage in Qwest’s territory in the Omaha MSA, depends on Qwest for interconnection, collocation, and reasonable notice of changes in Qwest’s network in order to exchange telecommunications traffic in the Omaha MSA.” Ibid., 19457.
25. Federal Communications Commission, *Petition of Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas, Inc.*, WC Docket No. 06-172, Memorandum Opinion and Order, 22 F.C.C.R.21293 (2007), remanded, *Verizon Telephone Companies v. F.C.C.*, 570 F.3d 294, 47 Communications Reg. (P&F) 1487 (D.C. Cir. Jun 19, 2009) (No. 08-1012); *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).
26. The FCC acknowledges this in a report and order establishing more specific criteria for evaluating forbearance petitions: “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.” Federal Communications Commission, *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended,* Report and Order, 24 F.C.C.R 9543, 9551 (2009) [hereafter cited as *Forbearance Criteria Order*].
27. In 2009 the FCC belatedly specified the documentation petitioners must submit: “A petition for forbearance must include in the petition the facts, information, data, and arguments on which the petitioner intends to rely to make the prima facie case for forbearance. Specifically, the prima facie case must show in detail how each of the statutory criteria are met with regard to each statutory provision or rule from which forbearance is sought.” *Forbearance Criteria Order*, 9553.
28. *Verizon Communications, Inc. v. Law Office of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).
29. *Pacific Bell Telephone Co., v. Linkline Communications, Inc.*, 555 U.S. 438 (2009).
30. Ibid., 1123.
31. Sean M. Carroll, “Main Dish with a Side of Voluntary Commitments: Dish Network-DirecTV Revisited,” *Administrative Law Review* 61 (2009): 661.

32. “Based on the record before us, we conclude that the proposed transfer of control would violate our rule against one licensee controlling both SDARS licenses. We also conclude that, absent Applicants’ voluntary commitments and other conditions discussed below, the proposed transaction would increase the likelihood of harms to competition and diversity. Applicants, however, have proposed significant voluntary commitments regarding steps the merged company would take to mitigate harms and achieve public interest benefits. We find that absent those voluntary commitments and other conditions, the harms of the transaction would outweigh the potential public interest benefits. On balance, however, we find that with Applicants’ voluntary commitments and other conditions, the potential public interest benefits outweigh the harms.” Federal Communications Commission, *Applications for Consent to the Transfer of Control of Licenses XM Satellite Radio Holdings Inc., Transferor to Sirius Satellite Radio Inc., Transferee,* Memorandum Opinion and Order and Report and Order, 23 F.C.C.R. 12348, 12352 (2008). See also Federal Communications Commission, *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, MB Docket No. 10–56, Memorandum Opinion and Order, 26 F.C.C.R. 4238 (2011).

33. “We find that competitive harm is unlikely in any market, primarily because multiple other service providers in these markets would be an effective competitive constraint on the behavior of the merged entity. We also conclude that the transaction will result in major public interest benefits by facilitating the provision of a nationwide WiMAX-based network that will lead to increased competition, greater consumer choice, and new services.” Federal Communications Commission, *Sprint Nextel Corporation and Clearwire Corporation Applications for Consent to Transfer Control of Licenses, Leases, and Authorizations,* Memorandum Opinion and Order, 23 F.C.C.R. 17570, 17572 (2008) (approving merger of two major wireless carriers, Sprint-Nextel and Clearwire Corp.).

34. “This lack of present competition between these two incumbent LECs is hardly surprising—both carriers largely serve rural local exchanges and the adjacent exchanges are almost all small and rural.” Federal Communications Commission, *Applications Filed for the Transfer of Control of Embarq Corporation to Centurytel, Inc.* Memorandum Opinion and Order, 24 F.C.C.R. 8741, 8750 (2009).

35. Federal Communications Commission, *Constellation, LLC, Carlyle Panamsat I, LLC, Carlyle Panamsat II, LLC, Pep Pas, LLC, And Peop Pas, LLC, Transferors, and Intelsat Holdings, Ltd., Transferee, Consolidated Application For Authority to Transfer Control of Panamsat Licensee Corp. and Panamsat H-2 Licensee Corp.*, IB Docket No. 05-290, Memorandum Opinion and Order, 21 F.C.C.R.7368 (2006).

36. Federal Communications Commission, *Applications for Consent to the Transfer of Control of Licenses XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee,* Memorandum Opinion and Order and Report and Order, 23 F.C.C.R. 12348 (2008).

37. Federal Communications Commission, *AT&T Inc. and BellSouth Corporation, Application for Transfer of Control*, 22 F.C.C.R. 5662 (2007), on partial reconsideration, 22 F.C.C.R. 6285 (2007).

38. Federal Communications Commission, *Applications Filed for the Transfer of Control of Embarq Corporation to Centurytel, Inc.,* Memorandum Opinion and Order, 24 F.C.C.R. 8741, 8756 (2009).

39. Federal Communications Commission, *Application of Echostar Communications Corporation, (a Nevada Corporation), General Motors Corporation, and Hughes Electronics Corporation (Delaware Corporations) (Transferors) and Echostar Communications Corporation (a Delaware Corporation) (Transferee),* Hearing Designation Order, 17 F.C.C.R. 20559, 20631 (2002) (designating a hearing to resolve issues pertaining to the public interest merits in the merger of two major direct broadcast satellite firms).

40. The FCC has experienced several judicial reversals of the commission’s attempt to relax broadcast and MVPD ownership rules. In *Fox Television Stations, Inc. v. F.C.C.*, 280 F.3d 1027, modified on rehearing, 293 F.3d 537 (D.C. Cir. 2002) the D.C. Circuit Court of Appeals remanded the FCC’s retention of the then congressionally established 35 percent national television ownership rule. In *Sinclair Broadcasting Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002) the court remanded the commission’s 1999 revision of its local television multiple ownership rule.

41. 373 F.3d 372, 382 (3d Cir. 2004), cert. denied, 545 U.S. 1123 (2004). The Third Circuit Court of Appeals rejected the FCC’s decision to count media outlets with no differentiation on market penetration and significance.

42. “Most importantly, the Commission has not sufficiently justified its particular chosen numerical limits for local television ownership, local radio ownership, and cross-ownership of media within local markets. Accordingly, we partially remand the Order for the Commission’s additional justification or modification” (Ibid., 382).

43. Ibid., 395.

44. Federal Communications Commission, *2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services,* 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 of 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.” Ibid., 16 F.C.C.R. 22690.

45. Federal Communications Commission, *Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services,* 14th Report, 25 F.C.C.R. 11407 (2010).

46. “Using the various data sources and metrics discussed above, we have met our statutory requirement to analyze the competitive market conditions with respect to commercial mobile services, and conclude that the CMRS marketplace is effectively competitive.” Federal Communications Commission, *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,* Twelfth Report, 23 F.C.C.R. 2241, 2354 (2008).

47. Federal Communications Commission, *Service Rules for the 698–746, 747–762 and 777–792 MHz Bands,* Second Report and Order, 22 F.C.C.R.15289, 15361(2007), on reconsideration, 22 F.C.C.R.17,935, partially modified, 23 F.C.C.R.5319 (2008), 24

F.C.C.R. 4782 (2009). Wireless carriers remain subject to conventional common carrier regulation of their telecommunications services, a status the FCC has generally ignored except for the matter of compulsory interconnection to provide subscribers with access to other carriers when "roaming" outside their home territory. Federal Communications Commission, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers,* Report and Order and Further Notice of Proposed Rulemaking, 22 F.C.C.R. 15817 (2007) (specifying that cellular operators must provide their subscribers automatic access to other carriers for making and receiving telephone calls when traveling outside subscribers' home service regions).

48. "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," *InformationWeek*, March 20, 2008, http://www.informationweek.com/news/206905000.
49. *Illinois Public Telecommunications Association v. FCC*, 117 F.3d 555 (1997) (court rejects FCC's determination that local and toll free calls from pay telephone have similar costs, because the record compiled by the FCC showed significantly different costs).
50. "We must defer to the Commission's expert judgment in the absence of record evidence indicating that the Commission's assumption is a clear error of judgment, or a showing that the empirical assumption is facially implausible or inconsistent." *American Family Association, Inc. v. FCC*, 365 F.3d 1156, 1165 (D.C. Cir.2004) (FCC's method for assigning noncommercial educational broadcast licenses among competing applicants deemed valid).
51. *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 814 (1978) quoting *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29; *Industrial Union Dept., AFL-CIO v. Hodgson*, 499 F.2d 467, 474–475 (1974).
52. 545 U.S. 967 (2005).
53. *Chevron U.S.A. v. Natural Resources Defense Council, Inc*. 467 U.S. 837 (1984).
54. "If a statute is ambiguous, and if the implementing agency's construction is reasonable, Chevron requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." Brand X, 545 U.S. at 980, citing Chevron at 843–844 and n. 11.
55. Ibid., 982.
56. Ibid., 991.
57. Ibid., 992.
58. "The important fact, however, is that the Commission has chosen to achieve this [result] through an implausible reading of the statue, and thus exceeded the authority given it by Congress." Brand X, Scalia Dissenting Opinion, Ibid., 1005.
59. Scalia Dissenting Opinion, Brand X, Ibid., 1009.
60. Rob Frieden, "The FCC's Name Game: How Shifting Regulatory Classifications Affect Competition," *Berkeley Technology Law Journal* 19 (2004): 1275.
61. *FCC. v. Fox Television Stations, Inc.*, 129 S.Ct. 1800, 1813 (2009), on remand, 613 F.3d 317 (2d Cir. 2010).
62. 524 F.3d 227 (D.C. Cir. 2008).
63. *American Radio Relay League, Inc. v. FCC*, 524 F.3d 227 (D.C. Cir. 2008).
64. Ibid., 239.
65. 258 F.3d 1191 (10th Cir. 2001).
66. Ibid., 1205.
67. Federal Communications Commission, *Wireless Telecommunications Bureau Seeks Comment on Petition for Rulemaking of Rural Telecommunications Group, Inc. to Impose a Spectrum Aggregation Limit on all Commercial Terrestrial Wireless Spectrum Below 2.3 GHz,* Public Notice, DA 08–2279 (rel. October 10, 2008), http://wireless.fcc.gov/index.htm?job=headlines&y=2008#10.
68. For example Verizon Wireless bid $9,363,160,000 of the net bidding total amounting to total $18,957,582,150. AT&T bid $6,636,658,000. See Federal Communications Commission, Auction 73, 700 MHz Band, available at http://wireless.fcc.gov/auctions/default.htm?job=auction_summary&id=73.
69. Federal Communications Commission, *Harvard's Berkman Center to Conduct Independent Review of Broadband Studies to Assist FCC*, Public Notice (rel. July 14, 2009), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-291986A1.pdf.
70. See Federal Communications Commission, Broadband.gov website, http://www.broadband.gov/.
71. The FCC has acknowledged "that broadband is not yet 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, as Amended by the Broadband Data Improvement Act, GN Docket No. 11-121, Eighth Broadband Progress Report, FCC 12-90, ¶1, 27 F.C.C.R. 10342 (rel. Aug. 21, 2012); http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-12-90A1.doc.
72. Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services, Fifteenth Report, FCC 11-103, 26 F.C.C.R. 9664 (rel. June 27, 2011); http://www.fcc.gov/reports/mobile-wireless-competition-report-15th-annual.