Articulating a Modern Approach to FCC Competition Policy

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The authors wish to thank astute and generous readers Jonathan Baker, Paul De Sa, Carlos Kirjner, Eddie Lazarus, Blair Levin, Doug Melamed, David Solomon, and Scott Wallsten, as well as the careful and thoughtful team of editors from the FCLJ. We were grateful for all their advice, took some, and bear responsibility ourselves for all errors of fact and judgment.

I. INTRODUCTION

In creating the Federal Communications Commission ("FCC" or "Commission") in 1934, Congress gave the agency its fundamental mission: "regulating . . . to make available, so far as possible, to all the people . . . a rapid, efficient, Nation-wide, and world-wide . . . communication service with adequate facilities at reasonable charges."[1]

In the 1996 Telecommunications Act, Congress added this purpose: "promote competition and reduce regulation in order to secure lower prices and higher quality services . . . and encourage the rapid deployment of new . . . technologies."[2]

In these two basic documents, as well as many other supplementing statutes, Congress told the FCC to make sure the United States has the best possible information and communications technology ("ICT") platform. For the most part, private firms in many different markets build, operate, and constantly change that platform. To achieve its objective, the FCC acts, sometimes by "regulating," as empowered since 1934, and sometimes by trying "[t]o promote competition and reduce regulation," as mandated in 1996.[3] In deciding what to do with respect to competition, the FCC has taken three different approaches. It has variously chosen the following:

- the *classic* role of regulating terms and conditions of sale;
- the *modern* role of using various tools to create largely deregulated, multi-firm, competitive markets; and
- the *laissez-faire* approach of believing that unregulated markets, even if monopolized, will produce the best outcome.

In this essay, we offer a short history of each of these three quite different policies. We conclude by recommending that, as new Chairman Tom Wheeler composes a new Commission, the FCC adhere as much as possible to the *modern* approach. The FCC should use its power to promote competitive markets and therefore deregulate firms that then will drive innovation, new services, and benefit consumers. However, not all markets may be amenable to this approach. Therefore, we encourage the newly assembled FCC to explain its reasoning publicly, welcome open discussion, and then consistently follow the policy it chooses for each relevant market until the law and facts suggest a policy change would better benefit the economy and society.

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1. Communications Act of 1934, ch. 652, §1, 48 Stat. 1064 (codified as amended at 47 U.S.C. § 151 (2006)).

2. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at scattered sections of 47 U.S.C.).

3. Communications Act of 1934, ch. 652, §1, 48 Stat. 1064; Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

Transparency and consistency give guidance to stakeholders, motivate the staff, enable effective coordination with other agencies, and provide thought leadership. Coherent, cohesive, and comprehensive application of a particular competition policy to a particular market also should aid the FCC in its many inevitable experiences in judicial review and congressional oversight. In any event, clear guidance from the FCC about its competition policy in a given market will give firms the green light to pursue strategies and tactics beneficial to the economy; at the very least, it will signal a yellow caution light to firms that want to take an action that goes against FCC competition policy, harming competition or consumers.

In 2006, we called for the articulation of a competition policy by the agency to ensure the promotion of competitive markets for communications services.[4] We hold similar views today despite, or perhaps because of, significant changes in technology, business practices, and market conditions. The FCC can and should take various actions—including rulemaking, enforcement, merger review, and spectrum sales—to open closed markets to competition and encourage firms to create new markets. These multi-firm competitive markets will, by their nature, provide benefits to consumers and the economy, and thus should be lightly regulated, without the FCC setting terms and conditions of sale.

We concede that the *modern* approach may not be applicable to some markets in transition from monopoly to competition, or to some markets that show characteristics of natural monopoly. We think that instances of natural monopoly in telecommunications markets are few and far between, but they exist.[5] In addition, the *modern* policy choice calls for ingenuity and restraint in crafting pro-competition rules. Nevertheless, we believe that as to most markets most of the time, this approach will unleash the combination of capitalism and technological solutions that best creates gains in productivity, national income, and general welfare.

We prefer the FCC to adopt the *classic* approach only temporarily and as a last resort, if at all. The problems with this approach include (in the view of many others who have studied the economics and political economy of regulations) the likelihood that the regulated firms have much better information than the regulator and thus make regulation more difficult and less effective, the capability of the regulated firms to capture agency sympathy and reduce agency willpower, and the significant role that the money of incumbents plays in the elected branches of government.[6]

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4. Reed H. Hundt & Gregory L. Rosston, *Communications Policy for 2006 and Beyond*, 58 FED. COMM. L.J. 1, 2–3 (2006).

5. Curtis B. Toll, *Telecommunications Infrastructure Development in Pennsylvania: A Prescription For Effective Regulatory Reform*, 98 DICK. L. REV. 155, 160–63 (1993).

6. *See* STUART MINOR BENJAMIN ET AL., TELECOMMUNICATIONS LAW AND POLICY 197–98 (3d ed. 2011); *see generally* Howard A. Shelanski, *Adjusting Regulation to Competition: Toward a New Model for U.S. Telecommunications Policy*, 24 YALE J. ON REG. 55 (2007).

We believe the *laissez-faire* stance suits some markets on occasion. It may be ideal, for instance, in nascent or rapidly changing markets when technological roadmaps are unclear and bottlenecks are hard to create. However, the FCC ignores its ultimate mission if it allows *laissez-faire* to become *laissez-dormir*, with the Commission asleep at the wheel. Congress counts on the FCC to use its historical experience, technical skills, and good culture in constant pursuit of the ultimate objective: making sure America, and the world, has the best ICT platform imaginable.[7] As a result, in some cases where the FCC lets the market work, bottlenecks and exercises of market power may develop as technology changes.[8] In those cases, it may be beneficial for the FCC to step in with new, pro-competitive rules to ensure that consumers benefit to the extent possible. After all, competition provides both static and dynamic benefits for consumers through lower prices and increased innovation.

The purpose of this essay is to encourage all stakeholders in the FCC's mission to engage in the reasoned discussion that most benefits good decision-making at the agency. There is no shortage of important decisions in various telecommunications markets. Each decision calls for the FCC to articulate a specific competition philosophy.

As of this writing, such issues include at least the following: (1) addressing the Open Internet Order;[9] (2) ensuring a competitive broadband market that benefits consumers and includes new services and privacy provisions;[10] (3) finding a method to maximize the value of the spectrum resource (including the role of satellites);[11] (4) monitoring the transition to IP networks;[12] (5) determining the role of government in negotiations between content and multi-channel video distribution providers;[13] and (6) reviewing mergers in conjunction with the antitrust agencies. The FCC can expressly state its competition policy choice in a manner that resembles the DOJ/FTC Merger Guidelines.[14] Or it can reveal its policy choice on a case-

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7. *See* Communications Act of 1934, 47 U.S.C. § 11.

8. *See generally* George S. Ford & Lawrence J. Spiwak, *Set It and Forget It? Market Power and the Consequences of Premature Deregulation in Telecommunications Markets*, 1 N.Y.U. J.L. & BUS. 675 (2005).

9. Preserving the Open Internet, *Report and Order*, FCC 10-201, 25 FCC Rcd. 17905 (2010) [hereinafter *Open Internet Order*].

10. Inquiry Concerning the Deployment of Advanced, Telecomms. Capability to All Americans in a Reasonable & Timely Fashion, *Ninth Broadband Progress Notice of Inquiry*, GN Docket No. 12-228, FCC 12-91, 27 FCC Rcd. 10523 (2012).

11. *See, e.g.*, Expanding the Econ. & Innovation Opportunities of Spectrum Through Incentive Auctions, *Notice of Proposed Rulemaking*, WT Docket No. 12-268, FCC 12-118, 27 FCC Rcd. 12357 (2012).

12. Pleading Cycle Established on AT&T & NTCA Petitions, *Public Notice*, GN Docket No. 12-353, 27 FCC Rcd. 15766 (2012).

13. Amendment of the Comm'n's Rules Related to Retransmission Consent, *Notice of Proposed Rulemaking*, MB Docket No. 10-71, FCC 11-31, 26 FCC Rcd. 2718 (2011).

14. *See, e.g.*, U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010) [hereinafter DOJ/FTC HORIZONTAL MERGER GUIDELINES], *available at* http://ftc.gov/os/2010/08/100819hmg.pdf. We recognize that the FTC and DOJ have critical

by-case basis. We believe a combination of both methods of expression will provide the most clarity to the FCC's many stakeholders. Reasoned explanation and consistent application amount to the forward-looking guidance much prized by investors and generally beneficial to the workings of markets.[15]

Each of the topics cited above involves competition. In the context of the Open Internet Order, the FCC is addressing market access, with opposing sides arguing alternatively that content providers seeking to reach consumers through an Internet access bottleneck, or that the potential for multi-firm competition in Internet access means no enduring bottleneck exists. Regardless of the point of view about competition, either the FCC (typically through its chair) states its competition policy and explains its application, or the policy is discerned by examining FCC decisions. Either way, the Commission adopts a competition framework—the question is whether this framework will be articulated persuasively, clearly, and in a manner that permits prediction.

II. AN INDEPENDENT AGENCY NEEDS TO EXPLAIN ITS PURPOSE

The Commission is an independent regulatory agency—a creature not envisioned in the Constitution or created by any Amendment.[16] It is part of what is sometimes called the "Fourth Branch of Government."[17] As such, the FCC chair and commissioners can apply the competition policy of their choice and, for the reasons we elaborate on below, are not subject to exacting checks on their authority other than the all-important consideration of judicial review.

By contrast, for example, the Environmental Protection Agency ("EPA") is not truly independent.[18] The head of the EPA reports to the President.[19] Its proposed rules do not go into effect without the permission of the White House.[20] If these were not meaningful constraints, it is likely that the EPA would exercise more authority over environmental impacts

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roles in competition policy, and their decisions will complement the FCC's decisions and, in some cases, make FCC action redundant. We do not address that issue here. *See* Jonathan B. Baker, *Antitrust Enforcement and Sectoral Regulation: The Competition Policy Benefits of Concurrent Enforcement in the Communications Sector*, 9 COMPETITION POL'Y INT'L, Spring 2013.

15. Warren G. Lavey, *Inconsistencies in Applications of Economics at the Federal Communications Commission*, 45 FED. COMM. L.J. 437, 440–42 (1993).

16. See 44 U.S.C. § 3502(5) (2012), which contains a list of such agencies.

17. The Supreme Court has long acknowledged the constitutional novelty, and broad practical influence, of the administrative state. *See, e.g.*, INS v. Chadha 462 U.S. 919, 984 (1983) (quoting FTC v. Ruberoid Co., 343 U.S. 470 (1952) (Jackson, J., dissenting)).

18. Angel Manuel Moreno, *Presidential Coordination of the Independent Regulatory Process*, 8 ADMIN. L. REV. AM. U. 461, 470 (1994).

19. *Id.*

20. *See, e.g.*, Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821 (2003).

than it has done.[21] The FCC chair is one of a maximum of five commissioners, each of whom is appointed by the President for a term, subject to Senate confirmation.[22] Not more than three commissioners may come from the President's political party.[23] The agency, therefore, is intentionally designed to be composed in a bipartisan way, in the hope that it will achieve consensus on most matters. Indeed, according to an internal count done by us in 1997, more than 90% of the FCC's votes were unanimous. Such is the culture. The exceptions of course draw the most public attention, but in most circumstances the FCC draws fairly little coverage from major media. However, it attracts a great deal of scrutiny from affected stakeholders, and from members of Congress that such stakeholders or self-motivation cause to take an interest.

The President, without Senate approval, selects the Chair from among the commissioners by the simple act of writing a letter of selection.[24] The President cannot order the chair to take a particular regulatory or enforcement action.[25] The agency does not have to submit its proposed rules to the White House through the Office of Information and Regulatory Affairs ("OIRA") in the Office of Management and Budget ("OMB") for approval.[26] The President, typically acting through the Department of Commerce, can express in writing a preference for certain action, but by law and norms the FCC does not report to the executive or legislative branch for approval of its actions.[27] Congress conveys to the FCC authority to issue implementing regulations, grant or deny license transfers[28] (and hence in effect approve or disapprove mergers including license transfers), engage in enforcement actions,[29] auction spectrum,[30] and take many other actions important to many companies. The legislative delegation of power is often very broad.[31] Sometimes the empowering laws require the FCC to resolve ambiguity or conflict in statutory language, or to update mandated rules as technological solutions and factual circumstances

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21. *See generally* Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260 (2006) (giving an overview of OIRA's impact on the executive agency rulemaking process).

22. *See* 47 U.S.C. § 154(a) (2006).

23. *Id.*

24. *Id.*

25. *See* 47 U.S.C. § 154(c) (2006); 44 U.S.C. § 3502(5) (2006); *see generally* Humphrey's Ex'r v. United States, 295 U.S. 602 (1935) (describing for-cause dismissal of independent agency commissioners).

26. Moreno, *supra* note 18, at 466 n.18 ("The [FCC] does not ordinarily submit legislation or reports to OMB for clearance.").

27. *See, e.g.*, Richard E. Wiley, *"Political" Influence at the FCC*, 1988 DUKE L.J. 280 (1988).

28. 47 U.S.C. §§ 301, 303 (2006).

29. 47 U.S. C. § 151 (2006).

30. *See, e.g.*, 47 U.S.C. § 1451 (2006).

31. *See, e.g.*, 47 U.S.C. § 303(r) (2006).

change.[32] As a result, the political and policy tussles over regulations and other matters are often as hard fought as the debates over the laws.[33] Members of Congress (and especially senior members, given the power of seniority in congressional actions) try to influence FCC decisions by word, appropriations, and occasionally new legislation.[34] Another way that the Senate tries to influence the agency is by placing staff members or other friendly choices as commissioners.[35] The results are shown in the table below.

Table 1: FCC Non-Chairman Commissioners

	Start Date	Hill Experience?	President's party?
O'Rielly	Nov-13	Yes	
Rosenworcel	May-12	Yes	Yes
Pai	May-12	Yes	
Clyburn	Aug-09		Yes
Baker	Jul-09		
McDowell	Jun-06		Yes
Tate	Dec-05		Yes
Adelstein	Dec-02	Yes	
Martin	Jul-01		Yes
Copps	May-01	Yes	
Abernathy	May-01		Yes
Powell	Nov-97		
Tristani	Nov-97		Yes
Furchtgott-Roth	Nov-97	Yes	
Ness	May-94		Yes
Chong	May-94		

Sources: FCC website; authors.[36]

With regard to the non-governmental influences on the FCC, stakeholders in the outcomes of an FCC action can, and usually do, appeal

32. *See* 47 U.S.C. § 161 (2006) (requiring the Commission to "review all regulations issued . . . that apply to the operations or activities of any provider of telecommunications service; and . . . determine whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service").

33. *See* CHRISTOPHER H. STERLING & JOHN MICHAEL KITTROSS, STAY TUNED: A HISTORY OF AMERICAN BROADCASTING 734–42 (3d ed. 2002).

34. Harry M. Shooshan III & Erwin G. Krasnow, *Congress and the Federal Communications Commission: The Continuing Contest for Power*, 9 COMM/ENT L.J. 619, 619–21 (1987). This is especially true of senior members of Congress.

35. *See infra* Table 1.

36. *FCC Leadership*, FCC, http://www.fcc.gov/leadership (last visited Nov. 9, 2013); *Previous FCC Commissioners*, FCC, http://www.fcc.gov/leadership/previous-fcc-commissioners (last visited Nov. 9, 2013); *Commissioners from 1934 to Present*, FCC, http://www.fcc.gov/leadership/commissioners-1934-present (last visited Nov. 9, 2013).

to the courts of appeal for reversal.[37] The U.S. Court of Appeals for the District of Columbia Circuit, a common recipient of agency rulemaking appeals, is quite willing to overturn or modify agency rulemakings.[38] In addition, stakeholders may try to influence or sidestep the FCC by urging the Federal Trade Commission ("FTC") or Department of Justice ("DOJ") to exercise their authority over a particular issue.[39] A common meme for incumbent firms is to assert that the FCC should not have what they call "duplicative jurisdiction" over competition issues.[40] However, the FCC has a unique ability to execute its competition policies in a prospective and multifaceted way. Although it can, like DOJ or the FTC, reject or conditionally approve mergers in an effort to affect a competition policy, it can go beyond the parties to a proposed merger and issue rules applying to all participants in particular markets. In addition to affecting the number of participants in many markets, it also can promote (or discourage) competition by regulating, for instance, interconnection, mandatory service, universal service subsidies, spectrum auctions, and spectrum use conditions. In large part because the breadth of its power, the FCC must fight on many fronts to preserve its authority. For the most part, it finds ways of implementing its policies. In most important respects, the FCC is its own boss. Congress would find it quite difficult to impeach a commissioner[41] or pass a law overturning an agency decision. The agency, as part of the Fourth Branch, is the most important of all the branches for the markets in its purview. In the end, timorousness is the primary check on the Commission's discretion.

The FCC's domain includes at least some part of the markets for broadcast television and radio, satellite, wireless, broadband, media content, communications equipment, the Internet, export and import of communications goods and services, and even, indirectly, newspapers.[42] Somewhere between a tenth and a sixth of the American economy is in its purview.[43] Although technological change, access to capital, and

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37. 47 U.S.C. § 402(b) (2006) (describing the rights of applicants, operators, or "any other person who is aggrieved or whose interests are adversely affected by any order of the Commission" to appeal decisions and orders of the Commission to the U.S. Court of Appeals for the District of Columbia Circuit).

38. *See* STERLING & KITTROSS, *supra* note 33, at 734.

39. *See* Cody Vitello, *Network Neutrality Generates a Contentious Debate Among Experts: Should Consumers Be Worried?*, 22 LOY. CONSUMER L. REV. 513, 520–23 (2010).

40. *See generally* Robert E. Lee, *The FCC and Regulatory Duplication: A Case of Overkill?*, 51 NOTRE DAME L. REV. 235 (1975).

41. In 1960, Eisenhower's FCC chair, John Doerfer, was forced to resign over taking what appeared to be bribes. *See* Michele Hilmes, ONLY CONNECT: A CULTURAL HISTORY OF BROADCASTING IN THE UNITED STATES 189–90 (2d ed. 2007).

42. Kevin Ryan, *Communications Regulation—Ripe for Reform*, 17 COMMLAW CONSPECTUS 771, 793 (2009).

43. The communications sector adds $1.455 trillion to the gross domestic product, making it the fifth largest industry in the United States. Press Release, Veronis Suhler Stevenson, New VSS Forecast 2012-2016: U.S. Commc'ns Indus. Spending Increased 4.4%

marketplace competition all are important to this sector, regulation enables and affects all three and so is of great concern to the sector.

III. THREE ERAS OF FCC COMPETITION POLICY

The FCC's 79-year history can be divided into three overlapping eras of regulatory philosophy, each based on a premise simplified for purposes of this essay: (1) the *classic view* (running roughly from 1934 to 1993 and occasionally appearing since then) that competition wastes resources and should be replaced by regulated monopoly; (2) the *modern view* (beginning in the 1970s and reaching its zenith in the 1990s) that multi-firm competition and ease of entry produce better outcomes; (3) and the *laissez-faire view* (flourishing in the 2000s) that regulation is a bad idea whether or not a market is competitively structured.

A. The Classic Approach

In the first era, the FCC's overarching policy approach was aligned with the philosophy of the first New Deal. It was thought that the nation had too much supply; markets needed to re-organize to reduce capacity and avoid inefficient production. Therefore, government needed to play a significant role in business decisions in the economy. Moreover, telephone service, like other networks, was thought to be a natural monopoly.[44] If two or three networks that served the same area could be consolidated into one, that one would produce the most efficient use of invested capital.[45] As a necessary corollary, the belief was that FCC should regulate the terms and conditions of sale of that network.[46] The owner should not be allowed to extract rents (monopoly profits) either by charging too much or by lowering the quality (and hence cost) of what was sold.[47] Moreover, under the classic regulatory approach, the regulator also should insist that the monopoly firm provide certain public goods or solve difficult problems like universal service that a multi-firm market might not address.[48] Adhering to the *classic view*, the FCC selected the number of firms for markets: monopoly (AT&T, cable), duopolies (early wireless), or three-firm oligopoly (broadcast networks). The FCC's regulations covered end user prices, prices between parties in a supply chain, the nature and quality of

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to $1.129 Trillion in 2011; Expected to Rise 5.2% in 2012 to Reach $1.189 Trillion (Sept. 26, 2012), *available at* http://www.vss.com/imgs/VSSForecast20122016PressRelease.pdf. This makes the communications industry about 8.75% of the total economy $16.62 trillion in GDP.

44. *See* Ryan, *supra* note 42, at 780.

45. *See* 47 U.S.C. § 201 (2006) (regulating rates for common carriers); BENJAMIN ET AL., *supra* note 6, at 332–41; Shelanski, *supra* note 6, at 58–59.

46. BENJAMIN ET AL., *supra* note 6, at 332–41; Shelanski, *supra* note 6, at 58–59.

47. *Id.*

48. *Id.*

service offerings, specific capital expenses, and interconnection to other networks.

B. The Modern Era

Starting in the 1970s, the FCC and others began to challenge the New Deal consensus. In the 1993 budget law ("OBRA '93"), Congress gave the FCC authority to auction spectrum.[49] In doing so, it enabled the FCC to create a multi-firm wireless market, while largely abandoning regulation of the terms and conditions of sale in that industry. The 1996 Telecommunications Act had as its central operating principle the commandment to issue rules that promoted competition and to strike from the books rules that restricted competition.[50] Congress also demanded that the FCC adopt the *laissez-faire* approach to broadcast radio; [51] this led to very rapid consolidation of the radio market.

The logical conclusion of a successful and permanent implementation of the *modern* approach would be that the FCC, like the state in Marxist theory, could wither away because competition would provide assurances that the benefits of communications technology would be bestowed upon the masses. Indeed, in aviation and trucking, Congress decided that neither the Civil Aeronautics Board ("CAB") nor the Interstate Commerce Commission ("ICC") needed to continue to exist, because transportation had become sufficiently varied and competitive to serve public interest purposes without interventions by these agencies.[52] So it is possible that the *modern* era could lead to the *laissez-faire* era. If the FCC no longer needed to open closed or new markets, its other functions could be parceled out to other agencies. If the government still needed to auction spectrum, OMB, Treasury, or GSA could do that job. If consumers occasionally needed more information, such as cell phone alerts of dangerous weather conditions, the FTC could handle that sort of regulation. The most courageous FCC chair, under this approach, would have been the one, like Fred Kahn at the CAB, who announced that the agency could shut its doors.

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49. Omnibus Reconciliation Act of 1993, Pub. L. No. 103–66, § 6002, 107 Stat. 312, 387–97 (1993).

50. Telecommunications Act of 1996, Pub. L. 104–104, 110 Stat. 56, 56 (1996) ("An Act [t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.");

51. Telecommunications Act of 1996, Pub. L. 104-104, § 202, 110 Stat 56, 110–112 (1996).

52. Thomas Gale Moore, *Moving Ahead*, REG., Summer 2002, at 6, *available at* http://www.cato.org/sites/cato.org/files/serials/files/regulation/2002/7/v25n2-3.pdf.

C. Laissez-Faire *and Beyond*

In the early 2000s, the Bush Administration's Commission moved at least toward final innings, if not to the last out. Aided by the D.C. Circuit, the agency moved to undo many Clinton era regulations prohibiting increased concentration and promoting competitors. Chairman Michael Powell expressly announced that "intermodal" competition existed.[53] Cable, broadcast, and satellite competed in video markets. Cable offered competition with the telephone network in voice communications. Telephone potentially could compete with cable in Internet access. The message was, in short, that all networks could compete with each other.

However, in reality, intermodal competition was extant in only some markets. In other markets, standard antitrust and economic analysis did not support the conclusion that actual or potential competition constrained monopoly practices. But Chairman Powell and his successor Chairman Kevin Martin seemed to adhere, for the most part, to the *laissez-faire* view.[54] Hence, they led the FCC to abandon the unbundling rules for the telephone network, approve most mergers, and remove spectrum caps.[55]

Soon after President Barack Obama was inaugurated, the American Recovery and Reinvestment Act ("ARRA" or "Recovery Act") provided over $7 billion for broadband development.[56] This astonishingly large sum—only about one percent of the total stimulus, but a very big sum for a one-time public capital expenditure on broadband—called for a competition policy choice: was the money to be spent promoting regulated monopolies or multi-firm market structures? Operating under the White House mantra of "timely, targeted, and temporary," the National Telecommunications and Information Administration ("NTIA") in the Commerce Department and Rural Utilities Service ("RUS") in the

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53. Michael K. Powell, Former Chairman, FCC, Opening Remarks at the Press Conference on Digital Broadband Migration 4 (Oct. 23, 2001), *available at* http://transition.fcc.gov/Speeches/Powell/2001/spmkp109.pdf.

54. Joe Flint, *Laissez-Faire Republican is Battling the Comcast-NBC Deal*, L.A. TIMES (Apr. 27, 2010), http://articles.latimes.com/2010/apr/27/business/la-fi-ct-martin-20100427.

55. Although Powell followed DOJ in rejecting the DirecTV/Dish merger and Martin attempted to push for à la carte cable programming, the first followed the DOJ suit to prevent the merger and the second was neither successful nor expected to be.

56. American Recovery and Reinvestment Act of 2009, Pub. L. 111–5, div. A, tit. I, 123 Stat. 115, 118, 128; *see* Cecilia Kang, *FCC Broadband Proposal May Miss Out on Stimulus*, WASH. POST (Apr. 8, 2009), http://articles.washingtonpost.com/2009-04-08/news/36777239_1_stimulus-funds-stimulus-grants-broadband; *see also* LENNARD G. KRUGER, CONG. RESEARCH SERV., R41775, BACKGROUND AND ISSUES FOR CONGRESSIONAL OVERSIGHT OF ARRA BROADBAND AWARDS 1 (2013).

Agriculture Department were supposed to make sure the money was spent quickly, with maximum job creation.[57]

The rule of "temporary" caused the NTIA and RUS to reject the idea of creating a revolving loan fund for stimulating private firm build out in rural and high cost areas.[58] Another idea rejected quickly was a race to the top auction where firms would win by providing the highest ratio of new broadband subscribers per stimulus dollar. The Department of Education had great success in its race to the top. However, in the broadband community, the idea lacked advocates, other than a group of seventy-one economists who submitted a proposal to the NTIA and RUS.[59] Instead of adopting an auction-based approach, the Obama Administration chose to conduct a "beauty contest," using a subjective multi-factor assessment of competing grant applications to determine awards.[60] The guiding principles for disbursing Broadband Technology Opportunities Program funds included disfavoring grants that created competition with existing firms, and a requirement that that the government-funded networks remain open to all content. The requirement that networks be "open" essentially operated as common carrier requirements harkening back to the FCC's 1934–1993 regulatory regime.

In fall 2009, FCC Chairman Julius Genachowski opened a proceeding about "net neutrality," which later led to the "Open Internet" Order.[61] An unstated premise of the rulemaking appeared to be that broadband Internet access was prone to becoming a monopoly (perhaps a function of cable's successful strategy and the Bush era's abandonment of unbundling the telephone network) or a duopoly (such as where Verizon had deployed FiOS to compete with cable broadband).[62] However, the FCC implied that it saw no reasonable prospect of substantial additional competition.[63] Therefore, the FCC needed a rule to ensure that wireline broadband was "open," in the sense that anyone could send or receive any content.[64] The Open Internet Order requires that Internet providers refrain from discriminating among over-the-top content providers, such as by

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57. Andrew Samwick, *A Better Approach to Stimulus Spending*, U.S. NEWS & WORLD REPORT (Nov. 30, 2012), http://www.usnews.com/opinion/blogs/economic-intelligence/2012/11/30/stimulus-better-spent-on-infrastructure-not-tax-cuts.

58. Based on personal conversations with the heads of these agencies and the National Economic Council starting during the Presidential transition period and beyond.

59. PAUL MILGROM ET AL., COMMENTS OF 71 CONCERNED ECONOMISTS: USING PROCUREMENT AUCTIONS TO ALLOCATE BROADBAND STIMULUS GRANTS 9 (2009), *available at* http://www.techpolicyinstitute.org/files/procurement_auctions_for_bbd_stimulus%20final.pdf. The plan was not well received in the broadband community.

60. Gregory L. Rosston & Scott J. Wallsten, *The Broadband Stimulus: A Rural Boondoggle and Missed Opportunity*, 74 OHIO ST. L.J. (forthcoming 2013).

61. Preserving the Open Internet, *Notice of Proposed Rulemaking*, FCC 09-93, 24 FCC Rcd. 13064 (2009).

62. *See id.* at paras. 33–34.

63. *See id.* at paras. 67–74.

64. *See id.* at para. 11

giving one company faster speeds or lower prices for transmission of content. An alternative rule might regulate end-user prices, although the FCC has said it has no intention to do so.[65]

In its Open Internet Order, the FCC seemed to be applying *classic* regulation. During the pendency of the Open Internet proceeding, in 2009, Comcast proposed merging with NBCUniversal.[66] In approving that merger, the FCC effectively inserted net neutrality as a condition for Comcast alone.[67] However, the FCC also imposed provisions important to competing content-bundling companies that seemed to partake of the *modern* era's approach by ensuring access to Comcast's content.[68]

Meanwhile, in 2010, the FCC released its National Broadband Plan.[69] The plan contained many creative ideas for delivering better access to more people, with more public goods digitally provided, as well as a number of competition ideas of the *modern* school.[70] Although the FCC did not explicitly use the Broadband Plan as a vehicle to express a preference for a certain competition policy, the very existence of planning implied a rejection of the doctrine that if network firms were left alone, they would build what people wanted and was best for society. In the end, the Commission did not use the Broadband Plan to articulate either the choice of a regulated monopoly approach to Internet access or a multi-firm market approach.

However, as to wireless, in 2011, the FCC was firmly in the *modern* era of preferring multi-firm competition when it rejected the AT&T acquisition of T-Mobile on the grounds of excess consolidation.[71] Its analysis of the wireless market in that case sounded the death knell for the

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65. *See id.*

66. *Comcast and GE to Create Leading Entertainment Company*, COMCAST, http://corporate.comcast.com/news-information/news-feed/comcast-and-ge-to-create-leading-entertainment-company (last visited Nov. 9, 2013).

67. *See* App'ns of Comcast Corp., Gen. Elec. Co. & NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees, *Memorandum Opinion and Order*, MB Docket No. 10-56, FCC 11-4, app. A (rel. Jan. 20, 2011), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-4A1.pdf.

68. *Id.*

69. FCC, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN (2010) [hereinafter CONNECTING AMERICA], *available at* http://download.broadband.gov/plan/national-broadband-plan.pdf; American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 6001(k), 123 Stat. 115, 515–16 (2009). Prior to its release, we were subject to people from around the world, including the United States criticizing the United States for "not having a broadband plan." At least since then, we have not heard this criticism.

70. CONNECTING AMERICA, *supra* note 69.

71. *See* App'ns of AT&T Inc. & Deutsche Telekom AG, *Order*, DA 11-1955, 26 FCC Rcd. 16184, para. 266 (2011), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-11-1955A2.pdf. The Commission "conclude[d] that significant harms to competition are likely to result, primarily in the form of increased prices for consumers, reduced incentives for innovation, and decreased consumer choice." *Id.*

transaction. It also demonstrated the agency's capability for analytical excellence.[72]

D. Changing Congressional Competition Policies

Not rarely, Congress provides competing or changing directives concerning competition policy. In some ways this makes the FCC's job more difficult, but in others, the conflicts provide freedom for the Commission to implement policy. For example, after the Antitrust Division of the DOJ, under the antitrust titan Bill Baxter, decided (and forced AT&T to agree in 1982) that long distance could and should be competitive, but that the local telephone networks were to be regulated as monopolies,[73] Congress did not intervene. However, the FCC carved out data in both local and national markets as a potentially competitive market (in contrast to voice).[74] In the first Bush Administration, the FCC also aspired to enable the local telephone companies to compete against cable in pay video. In sum, in the 1980s and early 1990s, the FCC tried to employ a mixture of *modern* and *classic* approaches.

Congress changed its views on its preferred competition policy (regulated monopoly vs. multi-firm market structure) as to cable several times. In the 1984 Cable Act, Congress saw cable as a competitive force against the consolidated broadcast networks and took actions to help cable, while preserving local broadcast against the power of the networks.[75] In the 1992 Cable Act, Congress believed cable had developed substantial market power for pay video services and directed the FCC to regulate cable prices to the consumers.[76] That was a *classic* move. But at the same time, Congress ordered the FCC to make much of the content owned by cable available to satellite MVPD competition through Program Access rules, in what we would regard as a *modern* move creating a multi-firm market

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72. *See* App'ns of AT&T Inc. & Deutsche Telekom AG for Consent to Assign Licenses & Authorizations, *Staff Analysis and Findings*, WT Docket No. 11-65, DA 11-1955 (submitted Nov. 30, 2011), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-11-1955A2.pdf. *See also* Patrick DeGraba & Gregory L. Rosston, *The Proposed Merger of AT&T and T-Mobile: Rethinking Possible*, *in* THE ANTITRUST REVOLUTION (John E. Kwoka & Lawrence J. White eds., 6th ed., 2013).

73. DOJ forced AT&T to agree to this in 1982 under the Modification of Final Judgment. United States v. AT&T, 552 F. Supp. 131 (D.C. Cir. 1982); *see* GERALD W. BROCK, TELECOMMUNICATION POLICY FOR THE INFORMATION AGE: FROM MONOPOLY TO COMPETITION 162 (1998).

74. BROCK, *supra* note 73, at 285.

75. Michael I. Meyerson, *The Cable Communications Act of 1984: A Balancing Act on the Coaxial Wires*, 19 GA. L. REV. 543, 546 (1985).

76. *See* Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act"), Pub. L. No. 102-385, § 9(b), 106 Stat. 1460, 1484 (1992) (amending 47 U.S.C. §§ 532 (c)(1), (4)); *see also* Henry Weissmann & Eric Tuttle, *The FCC's Stalled Attempt to Breathe Life into Commercial Leased Access of Cable Television*, ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS, Feb. 2009, at 130.

structure.[77] Then, just four years later, in 1996, Congress appeared to view the video marketplace as more competitive and ordered the FCC to curtail cable price regulation. That was rather *laissez-faire.*

Through OBRA '93, Congress gave the FCC authority to auction spectrum for the first time.[78] The auction authority was very broad in most respects—it did not tell the FCC how to auction the spectrum, and, importantly, it did not tell the FCC how to allocate the spectrum to be auctioned. OBRA '93 set forth a very aggressive timetable to conduct the auctions, but did not express a point of view on most major policy issues, except to say that minorities, women, and small businesses should be able to participate to some degree in the industry. The FCC used its discretion to introduce complex and risky simultaneous, multi-round auctions with spectrum caps in an effort to increase efficiency and competition in the provision of wireless services.[79]

From the date of the AT&T break-up, the local Bell companies insisted on being able to compete in long distance and any other adjacent market to local telephony.[80] DOJ believed that the local access monopolies should not be allowed to seek market power in adjacent markets.[81] However, in 1996, Congress passed the historic Telecommunications Act which allowed the local telephone companies the freedom to expand the scale and scope of their businesses, in return for granting rivals the opportunity to lease portions of their local access network at regulated rates.[82] The leasing provision was as radical a borrowing of a monopoly network as any legislature has ever ordered. The FCC's decisions about how that would occur, and what price was to be paid, were complex and hotly contested.[83] The regulations, known as "unbundling," jumpstarted expansion of competitive carriers, including Internet access start-ups, and eventually were rescinded by the Bush Administration's FCC chairs under the auspices of court mandates.[84] Rather than attempting to amend the rules to garner court approval or seeking Supreme Court review, the Commission in effect repealed portions of the 1996 Telecommunications Act, without

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77. Reza Dibadj, *Toward Meaningful Cable Competition: Getting Beyond The Monopoly Morass*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 245, 254–55 (2002).

78. Evan R. Kwerel & Gregory L. Rosston, *An Insiders' View of FCC Spectrum Auctions*, 17 J. REG. ECON. 253, 254 (2000).

79. *Id.* at 253–89.

80. *See generally* Jennifer L. Rand, *The AT&T Consent Decree Revisited: Setting the Stage to Free the Baby Bells*, 59 GEO. WASH. L. REV. 1103 (1991).

81. *Id.* at 1106.

82. *See generally* Daniel F. Spulber & Christopher S. Yoo, *Toward A Unified Theory of Access to Local Telephone Networks*, 61 FED. COMM. L.J. 43 (2008).

83. *Id.* at 51–57.

84. *See* Jeffrey A. Eisenach et al., *An Event Analysis Study of the Economic Implications of the FCC's UNE Decision: Backdrop for Current Network Sharing Proposals*, 17 COMMLAW CONSPECTUS 33, 33 n.1 (2008).

the approval of Congress.[85] Interestingly, the Congress and the FCC saw their unbundling policies adopted in many other countries.[86]

More recently, Congress adopted one of the recommendations of the National Broadband Plan and gave the FCC authority to conduct what has become known as the "Broadcast Incentive Auction."[87] Congress gave the FCC broad discretion about how to structure the details of the auction, but set parameters on the FCC's ability to repack broadcasters after the auction, and included several other provisions that to some extent attempt to micromanage the auction process and post-auction market structure.[88]

Through all the eras of debate about competition policy, the one continuous theme has been the clamor in the industry to understand (and endorse, dispute, or bar the application of) the FCC's choice of competition policy. Firms want to understand what actions will be allowed and what will be barred so that they can embark on business plans with some assurance that the FCC will not alter their calculations of risk and reward through regulatory intervention.

IV. THE MODERN MULTI-FIRM APPROACH HAS PRODUCED WIRELESS SUCCESS

As early as in the work of Ronald Coase, economists have been arguing against the FCC's management of industries.[89] In 1959, Coase famously made the case for privatizing spectrum in the way that ultimately led to the spectrum auctions more than thirty years later.[90] The general view among these economists was that competition, even if not the textbook model of perfect competition, could protect consumers better than a monopoly regulatory framework with its attendant weaknesses that tended to stultify innovation and favor incumbent firms.[91] The late 1970s brought the deregulation of the trucking, rail, and airline industries, and the pursuit of the AT&T monopolization case.[92] The success of deregulation and the new competition in long-distance services provided support for the

85. James B. Septa, *Deregulating Telecommunications in Internet Time*, 61 WASH. & LEE L. REV. 1063, 1096–97 (2004).

86. Jerry A. Hausman et al., *Are Regulators Forward-Looking? The Market Price of Copper Versus the Regulated Price of Mandatory Access to Unbundled Loops in Telecommunications Networks*, 61 FED. COMM. L.J. 199, 200 (2008).

87. FCC, THE BROADCAST TELEVISION SPECTRUM INCENTIVE AUCTION, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-318455A1.pdf.

88. *Id.*

89. Thomas W. Hazlett, *Assigning Property Rights to Radio Spectrum Users: Why Did FCC License Auctions Take 67 Years?* 41 J.L. & ECON. 529, 530 (1998).

90. *See generally* Ronald H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1 (1959); Hazlett, *supra* note 89, at 529.

91. Hazlett, *supra* note 89, at 533.

92. James Peoples, *Deregulation and the Labor Market*, 12 J. ECON. PERSP. 111, 112 (1998).

view that competition could benefit consumers. The logical result would be for regulators to set rules to promote competition, entry, and innovation rather than attempting to set retail prices for incumbent monopolists and pursue social goals within an anticompetitive framework.

The FCC thus has acted with the belief that some regulations are necessary to promote entry into markets historically closed to competition, *i.e.*, the path to deregulation ran through regulatory action. That slight paradox has flummoxed many people, especially in Congress. Nevertheless, at the core of the *modern* approach is the notion of regulating in minimal, pro-competitive ways so as to achieve policy goals without limiting competition, or setting rates to consumers and returns to investment.

The *modern* approach recognizes that, for the markets within the FCC's jurisdiction, technological change is unpredictable and rapid. Therefore, legislation should express goals and grant authority to the regulator, and regulation should be both precise and capable of adaption to changed circumstances. Sunset provisions, indices, benchmarks, and fact-based measurement are all useful tools for minimizing regulation in rapidly changing markets while maintaining a commitment to competition. At all times, the FCC should consider the possibility that adjacent market entry, divided technical leadership, or groundbreaking technological solutions will do a better job opening that market to competition than will an FCC rule. In other words, the FCC can be pro-competitive but decide on a case-by-case basis whether to be proactive in implementing rules to force markets open to more competition.

A worthwhile case to examine is the wireless marketplace, which shows the power of facilitating entry and promoting competition through rules that prevent exclusionary conduct.[93] As discussed below, in the 1980s, the FCC chose duopoly as the competition policy for wireless telephony.[94] In the 1990s, the FCC transitioned wireless to a multi-firm market structure with no price regulation—a plan still favored today.[95] In the 2000s, the FCC began to move to *laissez-faire*.[96] In 2010–2012, the FCC and DOJ moved back to promoting multi-firm market structure. For the future, the new Commission must decide which competition policy framework it will adopt.

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93. Among various other important illustrations of the *modern* approach are program access and pole attachment rules.

94. Paul Shoning, *Convergence and Competition*, 7 J. ON TELECOMM. & HIGH TECH. L. 139, 143 (2009).

95. *See id.* at 144.

96. *See, e.g.*, Spectrum Aggregation Limits for Commercial Mobile Radio Servs., *Report and Order*, FCC 01-328, 16 FCC Rcd. 22668, 22668 paras. 1–2 (2001) (relaxing spectrum caps).

In 1984, the FCC began assigning reallocated spectrum from broadcast television for mobile telephone services.[97] At the time, no one knew how important mobile communications would become. The FCC, under the *classic* approach, initially proposed to give a single firm, the incumbent wireline telephone company, a monopoly on cellular service with 40 MHz of spectrum.[98] After pressure from DOJ and others to increase the possibility of competition, the FCC split the 40 MHz into two licenses, reserving one for the incumbent local telephone company and the second for a new entrant.[99] The FCC allowed mobile phone service, but set a single analog standard and prohibited dispatch service on the cellular spectrum because it feared such use would be "inefficient."[100] Despite these restrictions, cellular use advanced much more rapidly than predicted, and by 1989 the FCC had identified microwave spectrum that it could reallocate to provide additional cellular service and, potentially, competition to the duopoly providers.

The FCC did not make the new Personal Communications Service ("PCS") spectrum available until Congress passed OBRA '93. In that Act, Congress created a new regulatory framework for Commercial Mobile Radio Services, authorized the FCC to assign licenses via auctions, and set stringent timelines for the implementation of the auctions for the PCS spectrum licenses.[101] While Congress set broad guidelines, the FCC had several decisions to make about how to move forward with the new spectrum allocation.

The FCC defined PCS very broadly—it did not prescribe services that could be offered and it did not mandate specific technology.[102] In a

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97. *See* U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-92-220, TELECOMMUNICATIONS: CONCERNS ABOUT COMPETITION IN THE CELLULAR TELEPHONE SERVICE INDUSTRY 14 (1992) [hereinafter TELECOM COMPETITION CONCERNS], *available at* http://archive.gao.gov/d33t10/147125.pdf.

98. *See* Inquiry Relative to the Future Use of the Frequency Band 806–960 MHz, *Second Report and Order*, FCC 74-470, 46 F.C.C.2d 752, para. 12 (1974), *reconsideration granted in part*, 51 F.C.C.2d 945, *clarified*, 55 F.C.C.2d 771 (1975), *aff'd sub nom.* Nat'l Ass'n of Regulatory Util. Comm'rs, 525 F.2d 630 (D.C. Cir. 1976).

99. *See* Inquiry into the Use of the Bands 825–845 MHz and 870–890 MHz for Cellular Comm'cns Sys., *Report and Order*, FCC 81-161, 86 F.C.C.2d 469, para. 15 (1981); *Competition in the Cellular Telephone Service Industry: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Commerce*, 104th Cong. 13 n.5 (1995) (statement of John H. Anderson, Jr., Director of Telecommunications Issues, GAO).

100. Reed E. Hundt & Gregory L. Rosston, *Spectrum Flexibility Will Promote Competition and the Public Interest*, IEEE COMM'CNS MAG., Dec. 1995, at 41. For a more complete discussion of the path to cellular service, see Gregory L. Rosston, An Economic Analysis of the Effects of FCC Regulation on Land Mobile Radio (Aug. 1994) (unpublished Ph.D. dissertation, Stanford University) [hereinafter Land Mobile Radio Dissertation].

101. *See generally* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, tit. VI, 107 Stat. 312, 379-401.

102. *See* 47 C.F.R. § 24.5 (2012) (defining personal communications services as "[r]adio comunications that encompass mobile and ancillary fixed communication that provide services to individuals and businesses and can be integrated with a vareity of competing networks.").

1997 paper, Rosston and Steinberg outlined the argument for the flexible allocation decisions: with competition, flexibility for operators allows them to configure their services to meet the demands of consumers and to have the incentives to offer new services.[103]

In addition to the flexible service rules, the FCC set spectrum caps in the auction that prevented the incumbent cellular carriers from buying specified large blocks of the new PCS licenses in their region.[104] These spectrum caps ensured that every region would have at least four licensees after the first broadband PCS auctions ended in 1995.[105] Without such caps, it is possible that the incumbents would have acquired the licenses in part to preclude additional competition. The auction worked well and consumers benefitted from substantial price declines and an array of new and innovative wireless products and services resulting from vigorous competition in the wireless space.

The introduction of at least two new competitors to the duopoly cellular market illustrates the potential benefits of competition. Previously, with only two providers, wireless prices were very high and usage was low.[106] In 1994, before the auction, the average bill was $56 for 119 minutes of use for about $0.47 per minute.[107] Immediately upon entry, the new entrants caused prices to drop dramatically as they fought to acquire both market share from the incumbents and new customers from those who had not yet subscribed to wireless.[108] Five years later, the average revenue per minute had been cut in half, to $0.22.[109]

Wireless has now become the primary medium of communication in the United States and the world, just as the Internet is the chief medium of information exchange.[110] Both wireless and Internet markets stand as

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103. *See* Gregory L. Rosston & Jeffrey S. Steinberg, *Using Market-Based Spectrum Policy to Promote the Public Interest*, 50 FED. COMM. L.J. 87, 99–103 (1997). We intended this paper to be a Commission Policy statement, but because we could not obtain the votes of enough commissioners, it was released as a staff working paper.

104. The FCC had PCS-specific spectrum caps limiting any provider to 40 MHz of PCS spectrum. In addition, it adopted a 45 MHz CMRS spectrum cap. Since the cellular licensees had 25 MHz of spectrum (they were each awarded an additional 5 MHz of spectrum in 1986 with little fanfare or debate), they could buy two of the 10 MHz PCS licenses, but were not allowed to buy a 30 MHz PCS license in their region. Implementation of Sections 3(n) and 332 of the Communications Act, FCC 94–212, *Third Report and Order*, 9 FCC Rcd. 7988, paras. 238, 263 (1994).

105. *Id.* at para. 264. The C block auction that began in late 1995 should have ensured a fifth provider with at least 25 MHz of spectrum in every area, but failed to do so quickly because of the bankruptcy protection for some bidders.

106. *See* TELECOM COMPETITION CONCERNS, *supra* note 97, at 22–25.

107. Annual Report & Analysis of Competitive Market Conditions with Respect to Commercial Mobile Servs., *Eleventh Report*, FCC 06-142, 21 FCC Rcd. 10947, app. A, tbl. 10 (2006).

108. *Id.*

109. *Id.*

110. *See* PEW RESEARCH CTR., GLOBAL ATTITUDES PROJECT, GLOBAL DIGITAL COMMUNICATION: TEXTING, SOCIAL NETWORKING POPULAR WORLDWIDE 2 (2011), *available*

extremely powerful evidence of the benefits of the *modern* approach that jump-started their success stories. However, in these, as in many markets, maturation gives rise to proposed consolidation attempts that threaten over-consolidation. Any *laissez-faire* policy must always be contingent; government cannot safely say that any market is guaranteed to be forever competitive.[111]

The success of the wireless market was not merely the result of increasing the amount of spectrum available for PCS licenses, ensuring a competitive number of firms, and instituting flexible use rights.[112] Competing against an entrenched incumbent provider can require regulatory intervention to ensure that a new entrant can get a foothold as well. For example, wireless would not have become a viable alternative to traditional wireline telephone service without a rule to facilitate interconnection with the wireline network dominated by large incumbents.[113] Prior to the Telecommunications Act of 1996, state regulators set local connection rates above cost for termination on the incumbent wireline network to keep monthly local telephone rates low. For example, it was typical for a cellular company to pay three cents per minute to terminate a call on the wireline network.[114] In contrast, when calls went from the wireline network and were terminated on the wireless network, a typical payment might be on the order of one cent per minute. With a typical local calling volume of 1,000 minutes per month for a household, and most of those calls going from wireless (which had comparatively few subscribers) to wireline phones (which almost everyone had), a three-cent-per-minute expense would put the monthly service cost of using a wireless phone as a landline replacement at $30 before the wireless firm could start to cover its own network costs.[115] As a result, wireless networks charged high per minute fees, and consumers did not see wireless as a replacement for landline service. That was the intention of the wireline firms.

The 1996 Telecommunications Act permitted the FCC to change the interconnection rules. It required that "transport and termination" of traffic be "reciprocal."[116] Incumbent wireline telephone companies made the

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at http://www.pewglobal.org/files/2011/12/Pew-Global-Attitudes-Technology-Report-FINAL-December-20-2011.pdf; *see also* Reed E. Hundt, *The Internet as "The Common Medium*," 19 MEDIA L. & POL'Y 143, 143–44, 146–48 (2010).

111. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-779, ENHANCED DATA COLLECTION COULD HELD FCC BETTER MONITOR COMPETITION IN THE WIRELESS INDUSTRY 10 (2010), *available at* http://www.gao.gov/new.items/d10779.pdf.

112. This is not to say that those aspects were not important and did not lead to immediate benefits.

113. *See* 47 U.S.C. § 251 (2006).

114. *See* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *First Report and Order*, FCC 96-325, 11 FCC Rcd. 15499, para. 1082 (1996) [hereinafter *Local Competition Order*].

115. *See id.*

116. 47 U.S.C. §§ 251, 252 (2006). The phrase "transport and termination" refers to the connection fees charged for connecting a call to an end user on a network.

argument that three cents one way and one cent the other way was "reciprocal" so that there was no need to change any rules or payments. Because this pattern of payments would insulate the wireline companies from competition, the FCC interpreted the word "reciprocal" in the legislation as synonymous with "symmetric."[117] Therefore, if the Incumbent Local Exchange Carrier ("ILEC") charged a high price for its termination, it would also have to pay a high price for its outgoing calls.[118]

The reduction in termination payments—from three cents per minute to a fraction of a penny a minute—allowed facilities-based local competitors like wireless companies and cable companies to compete with the ILECs; the sea change ushering in facilities-based competition would not have occurred had the ILECs been able to pay a low rate for their outgoing traffic and charge a much higher rate for incoming traffic. Wireless carriers were able to take advantage of the much lower and symmetric termination payments and began to offer new services like "free nights and weekends" in addition to the mobile-to-mobile calling that avoided the wireline termination payments altogether.[119] Ultimately, the reduction in termination payments contributed to AT&T's ability to offer the Digital One Rate in 1998, which started the move to big packages of minutes usable anywhere in the country and also to VoIP services that compete with the ILECs.[120]

The reciprocity rule illustrated the use of regulation to promote multi-firm competition. The ILECs apparently did not foresee the change in demand due to the Internet.[121] They focused their attention on the rules for the pricing of unbundled network elements although mandating symmetric termination charges made an enormous difference in competition for facilities-based providers. Once the ILECs, with the view that interconnection would involve voice services primarily terminating on their networks, set a high termination price, innovative Competitive Local Exchange Carriers ("CLECs") signed contracts with dial-up Internet Service Providers like AOL that received incoming calls and made

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117. *See Local Competition Order*, *supra* note 114, at paras. 1085–91, 1094–95 (1996).

118. *See id.*

119. *See* Antoinette Cook Bush, John Beahn, & Mick Tuesley, *Convergence and Competition—At Last*, 57 FED. COMM. L.J. 183, 184 (2005) ("Developments in bucket pricing plans, free nights and weekends, text messaging, ringtones, music downloads, mobile gaming, and video and Internet-capable phones all took place in the absence of intrusive regulation.").

120. *Cf. id.*

121. The Telecommunications Act of 1996 was also hailed as a grand bargain between rivals long-distance and local telephone companies. By providing the carrot of long-distance entry to the local carriers, Congress forced the local carriers to open their local networks to competition. Removal of these barriers also tore down the artificial distinction between local and long-distance telephone calls that remained in place after their foundation had evaporated due to dramatic decreases in the cost of transmitting calls over long distance.

virtually no outgoing calls.[122] As a result, the above-cost termination payments went to the CLECs and the ILECs found themselves paying out much larger amounts than they had anticipated.[123] ILECs subsequently reduced the rates for symmetric termination, while fighting for and eventually getting the FCC to change the rules to allow for different rates for dial-up internet access, but ISPs had already gotten a big leg up on the ILECs in the race to define Internet access in the first, critical, dial-up era.[124] The reduction in termination charges greatly increased and accelerated the capability of wireless and VoIP companies to provide voice telephony service in competition with the incumbent telephone companies.

The technological advances in wireless, broadband, and VoIP led to different parties with different interests vying for influence in Congress and at the FCC. Some of these newly interested parties pushed for low-cost interconnection, and the resulting changes in regulation that promoted the interests of these new competitors led to an increased diversity of competition that in turn has lessened the need for traditional monopoly regulation through its reduction of horizontal monopoly power.[125]

Wireless penetration grew rapidly from the PCS auctions in 1995 through the end of the century.[126] With the election of George W. Bush in 2000, Michael Powell moved from being a Commissioner to being Chairman of the FCC.[127] In that role, he abolished the 45 MHz CMRS spectrum cap and instituted a case-by-case approach to spectrum transactions:

> [W]e will "sunset" the spectrum cap rule effective January 1, 2003[;] . . . permit the Commission to consider, in conjunction with [DOJ], substantive and processing guidelines for the Commission's case-by-case review of transactions that would raise concerns similar to those that the spectrum cap was designed to address[;] . . . raise the spectrum cap to 55 MHz in

122. *See* Kasey A. Chappelle, *The End of the Beginning: Theories and Practical Aspects of Reciprocal Compensation for Internet Traffic*, 7 COMMLAW CONSPECTUS 393, 397–98 (1999).

123. *Id.*

124. *Id.*

125. Harris, Rosston, and Teece argued that with advances in local telephone competition, ultimately the only regulation would possibly be to ensure competitive interconnection charges. *See* Land Mobile Radio Dissertation, *supra* note 100; David J. Teece, *Telecommunications in Transition: Unbundling, Reintegration, and Competition*, 1 MICH. TELECOMM. & TECH. L. REV. 47 (1995), *available at* http://www.mttlr.org/volone/teece.pdf; Robert G. Harris, *Meddling Through: Regulating Local Telephone Competition in the United States*, J. ECON. PERSP., Fall 1997, at 93.

126. Theodore Rappaport, A. Annamalai, R.M. Buerer, & William H. Tranter, *Wireless Communications: Past Events and a Future Perspective*, 40 IEEE COMMC'NS. MAG., May 2002, at 148.

127. *Michael Powell*, NAT'L CABLE & TELECOMMS. ASS'N, http://www.ncta.com/ who-we-are/leadership/bio/169.

> all markets during the transition period[;] . . . [and] eliminate the cellular cross-interest rule in Metropolitan Statistical Areas (MSAs), while retaining it in Rural Service Areas (RSAs).[128]

It could be argued that there had been substantial change in the wireless marketplace over the previous few years—enormous growth, changes in pricing plans, and (as described above) the implementation of procompetitive termination payments that reduced the cost of wireless service tremendously. In addition, there was a move to allocate more spectrum to Commercial Mobile Radio Service.[129] Rosston and Topper document the subsequent change in wireless competition over the next several years.[130]

With additional CMRS spectrum, there is no doubt that any fixed numerical cap should be increased. But the question remains: when would caps be appropriate? One key advantage of the spectrum cap over a case-by-case review of licensing transactions surfaces in spectrum auctions. The FCC has settled on the use of a simultaneous auction framework that allows firms to compete for licenses and pursue backup strategies if other licenses become relatively too expensive.[131] Unlike a post hoc case-by-case analysis of aggregation limits, a spectrum cap provides a bright-line limit for bidders to follow in planning their acquisition strategies, thereby reducing uncertainty in expanding their spectrum holdings. Spectrum aggregation concerns would be addressed in a consistent manner, instead of trying to determine whether it makes sense to deny an auction winner the benefits of victory after the close of an auction.[132] As a result, spectrum caps make more sense in an auction context than for non-auction situations where there are fewer interrelated transactions occurring simultaneously.

The success of the wireless marketplace shows the power of competition. But it also shows that the FCC has significant power to promote efficient competition that can benefit consumers.

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128. Spectrum Aggregation Limits for Commercial Mobile Radio Servs., *Report and Order*, FCC 01-328, 16 FCC Rcd. 22668, paras. 1–2 (2001)

129. Annual Report & Analysis of Competitive Mkt. Conditions with Respect to Commercial Mobile Services, *Thirteenth Report*, DA 09-54, 24 FCC Rcd. 6185 (2009).

130. Gregory L. Rosston & Michael D. Topper, *An Antitrust Analysis of the Case for Wireless Network Neutrality* 2 (Stanford Inst. for Econ. Pol'y Research, Discussion Paper No. 08-040, 2009), *available at* http://www.stanford.edu/group/siepr/cgi-bin/siepr/?q=system/files/shared/pubs/papers/pdf/08-040.pdf

131. *See About Auctions*, FCC, http://wireless.fcc.gov/auctions/default.htm?job=about_auctions&page=2 (last visited Oct. 18, 2013).

132. This might require re-running the entire auction to get the efficient outcome.

V. UPCOMING COMPETITION POLICY CHOICES

A. The Open Internet Order

The wireless story leads to the present. The FCC seems committed to a proactive competition policy in wireless,[133] with the corollary that it sees no need for rate regulation or behavioral regulation in that sector.[134]

The Commission's relatively consistent approach to a competition policy for wireless can be most readily contrasted with the policy for wireline broadband service.[135] Many questions about the FCC's approach to broadband internet access remain, chief among them: Does the FCC prefer, or can it in fact promote, multi-firm competition in broadband Internet access, or should it instead choose for that market either a *classic* or *laissez-faire* competition policy? When the D.C. Circuit issues a decision on Verizon's challenge to the FCC's Open Internet Order, the court will be asking the new FCC, composed of four commissioners who did not vote on those rules, whether they will choose to fight for, change, or abandon the rules.[136] The FCC response to the Court's decision will be tantamount to selecting a competition policy for wireline broadband.

The Open Internet Order itself did not articulate a competition policy or even a framework for assessing competition issues. Indeed, the rules allowed carriers to impose data caps and usage-based pricing.[137] Both practices in some circumstances might enhance welfare gains. They might, in other situations, amount to inappropriate monopolistic practices. The rule did not discuss the metrics the FCC would use to decide if caps and usage-based pricing should be barred. In any event, the D.C. Circuit may or may not permit the FCC to consider such rate regulation under the auspices of an Open Internet. The FCC may have to decide that broadband Internet access is to be treated as a regulated monopoly and declare it to be a "telecommunications service" under Title II, suitable for "common carrier" classification. Or it may elect, instead, to seek ways to create more robust multi-firm competition in wireline broadband Internet access. It also might find ways to help wireless provide more effective competition in broadband Internet access.

In any case, the FCC will need to decide what problem of competition it is trying to solve. In our view, the FCC's competition

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133. *E.g.*, Annual Report & Analysis of Competitive Mkt. Conditions with Respect to Mobile Wireless, Including Commercial Mobile Servs., *Fourteenth Report*, FCC 10-81, para. 1 (2010), *available at* www.fcc.gov/14report.pdf.

134. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-34, TELECOMMUNICATIONS: FCC NEEDS TO IMPROVE OVERSIGHT OF WIRELESS PHONE SERVICE 23 (2009); 42 U.S.C. § 203 (2006).

135. We do not think that at this point in time the FCC will declare that wireless is a competitive substitute for wireline broadband.

136. *See* Verizon v. FCC, No. 11-1355 (D.C. Cir. argued Sept. 9, 2013).

137. *Open Internet Order*, *supra* note 9, at para. 72.

analysis should start with recognizing that broadband networks have two sides: sender and receiver. There is a rich economic literature on "two-sided markets."[138] A network owner can charge either or both sides. The credit card business provides a useful analogy: a credit card company can charge the cardholder and/or the restaurant that takes the card. A two-sided network owner determines its charges based on the relative elasticity of demand (which can also be a function of network size).[139] Typically a credit card company gives away cards to get a user base, then charges restaurants a commission when cardholders pay for meals with their cards.[140] Similarly, a broadband network operator might charge a low price to users and a high price to content sellers until it had a large user base. Conversely, a network might be able to provide such good access that it could charge high prices to end users, say for example, if it had very high-speed mobile service relative to all of its competitors.

Yet not all content is of equal value to the network owner. ESPN is said to be considering paying wireless carriers to allocate more bandwidth to carry ESPN's content.[141] The carriers might well garner new revenue from the upstream, content side of their networks by ensuring quality just as FedEx and the USPS provide priority delivery of packages. Nor are all broadband customers of equal value to access network owners. Access providers are seeking to price discriminate among customers through usage caps, time of day pricing, and other marketing programs. While such arrangements may treat customers differently depending on their elasticities, it is not clear whether such arrangements harm or help efficiency overall.

The FCC needs to put in place a framework for all of its decisions so that companies will understand how such arrangements will be evaluated. Without clear guidance, like that provided by the DOJ/FTC merger guidelines,[142] firms will not know how the FCC will judge their actions. Uncertainty about the framework might lead some firms to eschew certain practices that would be beneficial and cause other firms to adopt harmful practices with the view that they might be allowed to proceed, or that their actions will set a precedent that will make it harder for the FCC to condemn their actions.

Without deciding all issues in advance, and with attention to the actual facts of any dispute, the FCC has many reasons to retain jurisdiction over arrangements on both sides of the network. For example, if wireless carriers treated PBS worse than ESPN, many would argue that the FCC

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138. *See, e.g.*, Marc Rysman, *The Economics of Two-Sided Markets*, 23 J. ECON. PERSP. 125 (2009).

139. *Id.* at 129.

140. *Id.* at 128.

141. *See* Karl Taro Greenfield, *ESPN: Everywhere Sports Profit Network*, BLOOMBERG BUSINESSWEEK (Aug. 30, 2012), http://www.businessweek.com/articles/2012-08-30/espn-everywhere-sports-profit-network.

142. *See* DOJ/FTC HORIZONTAL MERGER GUIDELINES, *supra* note 14, at 2–3.

should intervene to ensure that at least some non-profit educational content can reach consumers as quickly, with as high a quality level as sports.[143] On the other hand, if the FCC used regulation to require networks to unbundle and separately offer ESPN and PBS, either as pay video or as over-the-top content, consumers might well be worse off.[144]

None of these questions about two-sided networks are easy. Nor are they unusual. Applying their 1993 experience of regulating the cable pay video industry to the issue of regulating the cable broadband network in 2009, the FCC can draw three lessons:

- Regulating price or content in broadband will produce the same firestorm of lobbying against the FCC that it had experienced in 1993, with probably the same result that obtained in 1996 when cable companies persuaded Congress to undo almost all regulation of its business.
- Creating opportunities for adjacent market entry against any dominant broadband network is a productive avenue. In the case of cable broadband, that means using regulations to promote new entry and expanded offerings from competitive providers, such as wireless access. In this connection, special access reform and spectrum licensing and availability are vital.
- It is important to limit efforts by any access monopolist to entrench its position by gaining exclusive access to content. This is reflected in conditions imposed on the Comcast acquisition of NBCUniversal, and historically in the program access rules that allowed satellite MVPDs to gain a foothold in competition with cable television systems.

The history of the last four years for the FCC could have been much different had it been guided from the beginning of the Obama Administration by a clear regulatory philosophy coupled with a detailed analysis of the competitive structure of the markets in its broad jurisdiction.

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143. For another example of a potentially problematic practice within a vertically integrated firm, see Kevin J. Obrien, *Speed Limits on Data Downloads*, INT'L HERALD TRIB., May 13, 2013, at 14 ("The Deutsche Telekom [data caps] proposal is controversial not only because it would impose the nation's first comprehensive download limits on landline broadband service; Deutsche Telekom also plans to exempt from the limits the traffic generated by its own Internet television service, Entertain. At the same time, the operator does not plan to exempt the traffic of rival services, like YouTube, from Google; iTunes, from Apple; or Facebook.").

144. For a good discussion of these issues, see generally *Economics of Media*, MRUNIVERSITY, http://mruniversity.com/courses/economics-media (last visited Nov. 16, 2013). Another scenario where the FCC may someday be asked to intervene would be where a content provider blocks access to its websites from broadband customers of an MVPD with which it is having a dispute over payment for video programming, but allows access from other broadband providers with competing video services.

If the FCC had stated in 2009 that network neutrality applied only to dominant firms, for example only to cable where it was the dominant Internet access provider, then the rules would not have seemed so intrusive and retrograde. Moreover, because it wanted to clear the way toward closing its acquisition of NBCUniversal, Comcast might have led the cable industry in stipulating to the rules.[145] With a clear definition of how it would determine "dominance," the FCC then would have been able to link market power with network neutrality.

As individual disputes arise in this domain and in other areas of its authority, the FCC could study the specific facts and develop a body of case-by-case decisions that amount to competition doctrine. Of course, the case-by-case decisions should be governed by an overall competition framework, much as Associate Attorney General Baxter's revisions to the Merger Guidelines in the 1980s have influenced the case law governing antitrust enforcement.[146]

B. Maintaining the Success of Wireless

The other big battleground where the FCC must clarify its competition policy is the wireless marketplace. The National Broadband Plan endorsed the idea of an incentive auction, where the Commission would use market forces to transition spectrum from broadcast television to wireless mobile use.

In 2012, Congress authorized the FCC to implement this spectrum repurposing through a reverse incentive auction. Subparagraph (A) of section 6404 of the incentive auction legislation states that "the Commission may not prevent a person from participating in a system of competitive bidding" under proper procedures and conditions.[147] But it also empowers the FCC to set a generally applicable rule for ownership of spectrum by adding that "[n]othing in subparagraph (A) affects any authority the Commission has to adopt and enforce rules of general applicability, including rules concerning spectrum aggregation that promote competition."[148] The latter clause once again reaffirms the FCC's role as a competition agency. At the least it must be read as calling on the FCC to consider a general rule, screen, or aggregation principle. The FCC's

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145. Ultimately, Comcast agreed to myriad conditions on its ability to prioritize carriage of different content to gain approval of its acquisition. *See generally* App'ns of Comcast Corp., Gen. Elec. Co. & NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees, *Memorandum Opinion and Order*, MB Docket No. 10-56, FCC 11-4 (rel. Jan. 20 , 2011).

146. *See* William E. Kovacic*, The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 435 (2003) (arguing that the 1982 Guidelines "changed the way the U.S. courts and enforcement agencies examine mergers").

147. Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6404(17)(A), 126 Stat. 155, 230 (2012).

148. *Id.* § 6404(17)(B).

inevitable decision on this issue will reveal an antitrust philosophy. But should that rule come before or after the next spectrum auction?

As discussed above, it would introduce unacceptable inefficiencies to hold an auction and then afterwards determine if the winner can be permitted to buy the spectrum licenses. Surely bidders ought to know going into an auction whether they can or cannot close on the volume of spectrum they try to buy. Resurrecting spectrum caps would increase certainty about the ability to acquire spectrum in an auction.

Another problem is that, in the incentive auction legislation, the House put more constraints on the FCC's auction authority than Congress has ever done. Further, Congress required the agency to use auction proceeds for specific purposes, such as funding a public safety network.[149] But the legislation does not tell the FCC what competition policy to follow. Once again, the agency has the challenging role of being, in all important respects, on its own.

The FCC is moving forward to implement this complex two-sided auction, which may occur in 2014 or 2015.[150] In the first part of this auction, known as the "reverse auction," broadcasters will bid the amount of money they would accept to cease broadcasting or to move to a different spectrum band (e.g., from UHF to upper or lower VHF channels, or from upper VHF to lower VHF).[151] Once the FCC determines the amount of money required to pay off the broadcasters for vacating a certain amount of spectrum, it will then hold a "forward auction," in which blocks of wide-area, flexible-use licenses are put up for sale.[152] When this auction concludes, the FCC will compare the revenue generated by the forward auction to the revenue requirement from the reverse auction—potentially including money for public safety, relocation, and other costs[153]—to see if the auction will "clear."[154] That is, if net revenue is sufficient, the auction will close, and the participants will transfer money and spectrum.

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149. The funding for public safety is not limited to the broadcast incentive auction—proceeds from other auctions, such as the H Block (1915–1920 MHz and 1995–2000 MHz) auction that the FCC has proposed to hold in 2014, possibly in advance of the broadcast incentive auction, would also count toward the revenues to fund public safety.

150. Expanding the Econ. & Innovation Opportunities of Spectrum Through Incentive Auctions, *Notice of Proposed Rulemaking*, FCC 12-11827, FCC Rcd. 12357, para. 10 (2012) [hereinafter *Incentive Auction NPRM*].

151. *Id.* at para. 84.

152. *Id.* at para. 5

153. *Id.* at paras. 26–31.

154. *See* Michael Selkirk, *Voluntary Incentive Auctions and the Benefits of Full Relinquishment*, 91 TEX. L. REV. 1561, 1576 (2013) (citing Middle Class Tax Relief and Job Creation Act Pub. L. No. 112-96, § 6403(c), 126 Stat. 227-28), *available at* http://www.texaslrev.com/wp-content/uploads/Selkirk.pdf ("[I]f the total amount of the proceeds from the forward auction are not greater than the sum of (1) the total amount of compensation to be awarded to successful reverse auction bidders, (2) the costs of conducting the forward auction, including repacking costs, and (3) the relocation costs associated with relocated

If not, the FCC will reduce the spectrum target and continue the reverse auction to clear fewer broadcasters in each area, leading to a lower revenue target. Then, the FCC will resume the forward auction with a smaller amount of spectrum available. Presumably, the price per MHz-pop[155] will increase, but because of the smaller amount of spectrum available, the total revenue may increase or decrease. The revenues will again be compared to the revenue requirement, and the process will continue until the clearing rule is met or until there is little or no spectrum left to auction.[156]

The incentive auction is an example of an attempt to use market forces to move spectrum from one constrained use to a more highly valued use.[157] Television has created large consumer surplus, but with over-the-air television watched by a very small minority of households, the consumer welfare benefits of the marginal over-the-air television station are likely to be small relative to the benefits from additional spectrum for flexible use.[158] Congress may have intervened if the FCC had used regulation to mandate a transition. Rather than exercising its regulatory power, the FCC (and the Administration) chose instead to seek legislation that permits the FCC to create a market for, in effect, the sale of broadcast licenses to wireless carriers on a voluntary basis.

The Commission's choices about the Open Internet Order and competition in the Incentive Auction will provide an indication of its overall competition policy framework. However, other decisions as well would benefit from a consistent competition policy framework. The Commission should proactively think through as many of the issues in advance rather than making reactive decisions about the issues solely when proposed mergers cause them to arise.

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broadcasters, then no spectrum will be relinquished or reallocated, and the FCC will assign no new flexible licenses.").

155. An MHz-pop, or a megahertz pop, "refers to one megahertz of bandwidth passing one person in the coverage area in a spectrum license." Saul Hansell, *Verizon Licks Its Cheap Megahertz Pops*, N.Y. TIMES (Mar. 21, 2008, 6:49 PM), http://bits.blogs.nytimes.com/2008/03/21/verizon-licks-its-cheap-megahertz-pops.

156. *See Incentive Auction NPRM*, *supra* note 150, at para. 5.

157. *See* Julius Genachowski, Chairman, FCC, Remarks at the Georgetown Ctr. for Bus. & Pub. Policy, (Nov. 7, 2011), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-310876A1.pdf ("In November 2010, the Commission initiated a rulemaking focused on . . . pav[ing] the way for incentive auctions–a market-based approach to reallocate spectrum to its most valued use.").

158. *See* FCC OMNIBUS BROADBAND INITIATIVE, SPECTRUM ANALYSIS: OPTIONS FOR BROADCAST SPECTRUM 15–19 (2010), *available at* http://download.broadband.gov/plan/fcc-omnibus-broadband-initiative-%28obi%29-technical-paper-spectrum-analysis-options-for-broadband-spectrum.pdf (charting decline of broadcast television and discussing economic importance of repurposing spectrum for mobile broadband).

VI. CONCLUSION: CONSISTENT CLEAR APPLICATION OF A COMPETITION POLICY WILL STRENGTHEN THE COMMUNICATIONS SECTOR

Michael Porter states that the only right economic goal for a government is a high and rising standard of living for *all* citizens.[159] Broadband, by itself, is not a goal. It is a means to an end; similarly, policies promoting increasing broadband access are strategic only if they represent a commitment of political and economic capital to achieve a particular goal.

As set forth by Hundt and Levin in 2012, expansion of broadband penetration and bandwidth could be the means to achieve a high and rising standard of living.[160] That could follow, for example, if broadband efficiently conveyed faster, better, and cheaper public goods (like education and health care) to everyone in the country. Broadband might also affect the economy in other ways: it could accelerate the velocity of money and trade, or the volume of entrepreneurship, and it could enhance productivity gains. The FCC must know the goals it seeks. It must then choose the means to achieve those goals. Our recommendation is to explore the full potential of the *modern* approach to competition policy as a means to achieve the chosen goals.

For example, some might believe that the FCC should increase welfare by increasing the scope and scale of public goods broadband can digitally deliver.[161] Another view could be that the private goods and services, such as those that Netflix or Amazon video offer, more than suffice to increase the penetration, bandwidth and the value of broadband access.[162] To implement either of these views, the FCC needs to develop and articulate a point of view on competition in not only access markets, but also markets for digital goods and services.

We know many of the current FCC employees. We know and respect former chairs Genachowski, Clyburn, and current Chairman Wheeler and other commissioners. This is a very able, upstanding, honest, well-informed group, based on our personal knowledge of their skills and reputation in the community. If we had their jobs, we would not know exactly what to do. We are sufficiently officious, however, to suggest that there are better and worse ways to decide what to do.

Historically, the FCC has made several moves to encourage competition by setting the rules of the road and then letting the marketplace work. Increasing the amount of spectrum with caps to prevent excessive concentration, ensuring that new entrants are able to connect with

159. MICHAEL E. PORTER, THE COMPETITIVE ADVANTAGE OF NATIONS 6 (1990).
160. *See generally* REED HUNDT & BLAIR LEVIN, THE POLITICS OF ABUNDANCE (2012).
161. *Id.*
162. *Id.*

incumbent networks, and assuring new entrants access to content are three historical examples of FCC action that facilitated entry and competition.

Here are some reasonably workable ways to come to a decision. First, as Chairman Genachowski often said, decisions should be driven by data.[163] In a town where global warming is not the subject of consensus, one might suspect that all data is regarded as dubious or politicized. But this is not typically the case on the eighth floor; the FCC has usually made decisions based on a widely accepted understanding of facts. A competition policy depends first on facts, not law. In fact, markets can be dangerously consolidated, robustly competitive, or fall somewhere in between.[164] Learning the facts about where a market stands, and is likely to move, is an essential first step. Each market is its own story. All markets deserve the same sort of analysis, but in each market, that analysis should lead to a coherent and predictable set of competition policy decisions.

Second, it is important to have a perspective on consolidation. Market forces and appropriate rules can enable firms to enter and exit, but the FCC can and should protect against anticompetitive mergers. In 1994, Michael Porter told us in a meeting in the Chairman's office at the FCC to make sure we auctioned at least enough licenses to let at least one fail in every market because only then would we know we had auctioned enough to achieve maximum competition. That actually is more or less what we did, although by accident and by dint of some strange doings in bankruptcy court.[165] His axiom is worth remembering, even if it should not necessarily be applied exactly as he put it.

Third, standing up for competition usually turns out to be the same as standing up for entrepreneurship, innovation, the little guy who wants to get big, the spirit of rivalry, and the right of people to make what they can of themselves rather than be told by the government what they can or cannot accomplish. In most businesses, government does not limit the number of entrants. The FCC should remember that.

It should also remember that it does not have a crystal ball that works better than the forecasting done, for instance, by financial analysts or technology firms in the United States. Everyone can miss product and market shifts. The genius and devil of technology is its unpredictability. Therefore, assuring a robustly competitive structure is the alpha and omega of policy for every market. As long as the FCC makes certain that multiple firms can compete in old markets or can try to create new ones, then the agency will have provided effective guidelines and fulfilled its statutory role in "promot[ing] competition and reduc[ing] regulation in order to secure lower prices and higher quality services . . . and encourag[ing] the

163. *See* FCC Process Reform: Hearing Before the Subcomm. on Comm'ns and Technology of the H. Comm. on Energy and Commerce, 112th Congress 15–16 (2011) (statement of Julius Genachowski, Chairman, FCC).

164. *See* Rosston & Steinberg, *supra* note 103, at 88.

165. *See* FCC v. NextWave Pers. Commc'ns Inc., 537 U.S. 293 (2003).

rapid deployment of new . . . technologies."[166] As long as the FCC makes certain that anyone can come in and do something insanely great in any market, then the agency will have been a fine umpire, rules-maker, guideline-drawer, and contributor to the wellbeing of these United States.

166. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.