

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Review of Media Bureau Data Practice)	MB Docket No. 10-103
)	
Review of Wireless Telecommunications Bureau Data Practice)	WT Docket No. 10-131
)	
Review of Wireline Competition Bureau Data Practice)	WC Docket No. 10-132

COMMENTS OF PROFESSOR ROB FRIEDEN

SUMMARY

Practitioners and academics alike rely heavily on the FCC’s data collections and statistical compilations. When the FCC uses statistics to support a preconceived objective, the Commission fails to comply with its statutory mandate to generate a complete and unbiased evidentiary record, and it violates the Administrative Procedure Act.¹ The subsequent decisions may fail to pass muster with reviewing courts,² and the primary source of information used for both applied and academic research may offer a false or incomplete picture. It appears far too

¹ Courts will set aside agency decisions found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

² See e.g., *Verizon Tel. Cos. v. FCC*, 570 F.3d 294 (D.C. Cir. 2009)(failure to use consistent model for assessing facilities-based competition); *Comcast Corp. v. FCC*, 579 F.3d 1 (D.C. Cir. 2009)(rejecting the Commission’s rationale for imposing a 30% ownership cap on single cable television operators); *Prometheus Radio Project v. FCC*, 373 F.3d 372, 415 (3d Cir. 2004)(partially reversing the FCC based on flawed modeling of media competition) *cert. denied*, 545U.S. 1123 (2004); *Qwest Corp. v. FCC*, 258 F.3d 1191, 1198-99 (10th Cir. 2001) (determining that the FCC failed to provide adequate justifications to prove rational decision making in calculating subsidy mechanism for promoting universal service in high cost areas).

often that political expediency and philosophical commitments tempt Commission managers to shape the data collection process and subsequent interpretation in ways that support a desired outcome. If the FCC wants to conclude, for example, that a specific telecommunications market is robustly competitive, that a proposed merger will serve the public interest, or that the United States has near ubiquitous broadband access, then Commission staff bears the burden of generating definitions and benchmarks, compiling data, reporting statistics, and providing interpretations that support such conclusions.

When such results-driven data collection and statistical reporting occur, the corresponding Commission rules, policies, and regulations are flawed products that may not serve the public interest and reflect a true empirical record. Stakeholders can rely on such flawed data to corroborate preferred outcomes in ways that help legitimize, as “scientifically proven”, conclusions that would not pass peer review.

In a recently published book entitled *Winning the Silicon Sweepstakes: Can the United States Compete in Global Telecommunications?*³ I expressed dismay with many of the Commission’s key decisions that affect our national economy and global competitiveness:

The FCC has sunk into a morass of partisanship, pseudo science, fuzzy math, creative interpretation of economic principles and legal concepts, selective interpretation of the facts, innovative collection of statistics, and flawed thinking.”⁴

³ ISBN 978-0-300-15213-5 (Yale University Press, 2010).

⁴ *Id.* at 16.

Such language may come across as hyperbole, but the Commission's appellate court record, congressional investigations,⁵ and instances where the Commission has reversed, or substantially revised prior conclusions⁶ show an agency that must do better.

The FCC can generate a better work product that truly serves the public interest by committing to a series of reforms designed to make the Commission more transparent, fair minded, and committed to relying on empirical evidence. The Commission should commit to the following:

- 1) Refuse to grant blanket trade secret/confidentiality requests from stakeholders, particularly where a statutory mandate obligates the Commission to identify instances where the lack of competition or availability of even a single service provider frustrates achievement of national goals. The Commission should not redact, sanitize and obscure data, the disclosure of which would serve the public interest, help the Commission achieve statutory goals, and would not cause any financial or competitive harm to the reporting party;
- 2) Establish a rebuttable presumption that the public is entitled to understandable, credible, granular, and reproducible statistics, based on reasonable benchmarks that can help the Commission and users of the data make valid comparisons;
- 3) Place the burden on acquiring ventures to demonstrate that acquisitions will not adversely impact competition and the public interest;

⁵ See e.g., United States House of Representatives, Committee on Energy And Commerce, DECEPTION AND DISTRUST: THE FEDERAL COMMUNICATIONS COMMISSION UNDER CHAIRMAN KEVIN J. MARTIN (2008), available at <http://energycommerce.house.gov/images/stories/Documents/PDF/Newsroom/fcc%20majority%20staff%20report%20081209.pdf>.

⁶ Cf. Federal Communications Commission, Media Bureau, REPORT ON THE PACKAGING AND SALE OF VIDEO PROGRAMMING SERVICES TO THE PUBLIC (March 18, 2004); available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-254432A1.pdf; with FURTHER REPORT ON THE PACKAGING AND SALE OF VIDEO PROGRAMMING SERVICES TO THE PUBLIC (Feb. 9, 2006), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-263740A1.pdf; see also Charles B. Goldfarb. Congressional Research Service, The FCC's "ala Carte" Reports (March 30, 2006); available at: www.ncta.com/DocumentBinary.aspx?id=294.

- 4) Distinguish between data and sponsored research/advocacy;
- 5) Use peer review and third party research; and
- 6) Eschew reliance on ex parte presentations and brokering deals/concessions among major stakeholders; return to hearings, fact finding and creation of a comprehensive evidentiary record.

I. Lies, Damn Lies and Statistics

The FCC has undertaken an aggressive deregulatory campaign based on its assumptions and statistical compilations that support an inference of robust competition, affordable prices, and near ubiquitous access in just about every market, with the exception of broadband for specific groups of beneficiaries and plain old telephone service whose service providers tap into over \$7.3 billion in annual subsidies.⁷ Advocates for even more deregulation regularly cite the Commission's statistics as evidence that the unfettered marketplace can largely self-regulate and accommodate any market consolidation including horizontal mergers where the acquiring firm buys market share. Both the Commission and many stakeholders assume the frequently cited statistics present a true picture of the marketplace.

In a series of articles,⁸ I have challenged the Commission's conclusions about how robustly competitive the marketplace has become, the sustainability of actual competition, the

⁷ See Universal Service Fund Administrative Company, Universal Service Fund Facts, available at: <http://www.usac.org/about/universal-service/fund-facts/fund-facts.aspx>. \$4.3 billion was appropriated for carriers operating in high cost areas and \$1.0 billion for subsidizing access by low income subscribers.

⁸ See Exhibits One and Two; Rob Frieden, *Academic Research and its Limited Impact on Telecommunications Policymaking*, 2 INTERNATIONAL JOURNAL OF COMMUNICATION 421 (2008).

veracity of the Commission's statistics, the utility of the Commission's benchmarks, and whether the disclosed statistics offer sufficient granularity. I attach two of these articles as Exhibit One and Two.

The Commission repeatedly has deemed competitive the wireless marketplace that grows increasingly concentrated in light of the mergers the Commission has approved, despite proof that the market already exceeds the Herfandal Hershman Index rating for a highly concentrated market. Until recent improvements the Commission's benchmarking process generated numerous reports that attributed a number of broadband service options as though anyone within a zip code territory had access to that number of options. While it recently has identified up to 24 million Americans lacking any broadband option,⁹ the Commission previously concluded that more than 99% had such access.¹⁰ The Commission initially stated that statistics proved pay-per-channel, "à la carte" access to cable television programming would not save consumers

⁹ Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, GN Docket No. 09-137, Sixth Broadband Deployment Report, FCC 10-129 (rel. July 20, 2010); available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-129A1.doc.

¹⁰ "The presence of high-speed service subscribers was reported in all 50 states, the District of Columbia, American Samoa, Guam, Northern Mariana Islands, Puerto Rico, and the Virgin Islands, and in over 99% of the Zip Codes in the United States." Industry Analysis and Technology Division, Wireline Competition Bureau, High-Speed Services for Internet Access: Status as of June 30, 2007, at 1 (March 2008); available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-280906A1.pdf; See also Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, GN Docket No. 07-45, Fifth Broadband Deployment Report, FCC 08-88 (rel. July 20, 2010); available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-88A1.doc.

money compared to a packaged bundle of channels.¹¹ However, the Commission subsequently reversed itself with limited explanation for its change in findings. The Commission also erected a media diversity index to support relaxation of a cap on media ownership that a reviewing court rejected based on the lack of supporting evidence.¹² Only after a stinging judicial rebuke did the FCC think to subject its statistical analysis and modeling to external review from unaffiliated experts, rather than simply rely on the research and findings sponsored by stakeholders with a financial interest in the Commission's decisions.

In light of its keen interest in concluding that successful broadband market penetration has occurred, the FCC has agreed to treat as confidential trade secrets the raw information submitted in compliance with a statutory mandate.¹³ Access to such data might provide the basis for challenging the FCC's optimistic statistical interpretations, because carriers can obscure their lack of success in providing ubiquitous broadband access. Ironically, some carriers that willingly display maps touting their wireless services argue against the FCC providing analogous information about broadband penetration to the public.

The above examples and others discussed in the Exhibits One and Two show that some of the FCC's statistical work product appears to support a preordained result, rather than reflect

¹¹ See, *supra* n. 6.

¹² *Prometheus Radio Project v. FCC*, 373 F.3d 372, 415 (3d Cir. 2004) (partially reversing the FCC based on flawed modeling of media competition) *cert. denied*, 545 U.S. 1123 (2004).

¹³ In Section 706 of the Communications Act of 1996, *codified at* 47 U.S.C. §1302(b) (2009), Congress directed the Commission and the states to encourage the deployment of advanced telecommunications capability to all Americans. In conjunction with this objective, Congress instructed the Commission to conduct regular inquiries concerning the availability of advanced telecommunications capability. Nevertheless a federal district court affirmed the Commission's trade secret designation. *Ctr. for Pub. Integrity v. FCC*, 505 F. Supp. 2d 106 (D.D.C. 2007).

an open mind keen on acquiring data to answer questions. The FCC's data does not help empirical researchers when the Commission engages in results-driven data acquisition.

Researchers want to acquire statistics to answer questions about the competitiveness of a particular market. Data framed in a way to justify merger approvals, to show Congress how competitive a market has become, to provide the basis for challenging unfavorable statistics compiled by others, and to support a political or philosophical agenda does not help empirical researchers. It provides a pseudo-scientific basis for an outcome, one that generally would not pass peer review and might not pass muster with a reviewing court unwilling to defer to agency expertise on anything complex and technical.

II. The Commission Can and Should Do a Better Job of Compiling Statistics.

The FCC frequently perceives congressional and public relations benefits in forecasting the best case scenario for a deregulatory decision, or merger approval. Congressional oversight hearings, including ones determining the Commission's budget, have a friendlier tone when FCC representatives have positive news and statistics to report. When the Commission has to acknowledge market domination, market failure, or the lack of competition, it risks losing such a positive reception, even if regulation or merger disapprovals would serve the public interest.

Imposing regulation, slowing down the speed of deregulation, and taking steps to remedy market failure may constitute the right policy outcome, but it can trigger retaliation particularly from incumbent firms with the resources to act on their frustration in ways that can punish individual Commissioners and the FCC collectively. With millions of dollars available to support deregulatory advocacy, incumbent firms have the financial wherewithal to frame the debate so that the best case scenario appears real, not just plausible. FCC managers pragmatically realize that deviating from this party line risks congressional and major stakeholder displeasure. But

that is what FCC managers and staff may have to do when the public interest necessitates an independent, open-minded review. The following concrete recommendations identify some of the macro-level reforms that FCC should embrace.

A. Refuse to grant blanket trade secret/confidentiality requests from stakeholders.

Lacking the resources to compile independently much data about the industries it regulates, the FCC relies on compulsory reports filed by specific companies. Stakeholders in the outcomes of Commission proceeding clearly do not want the reports they file to be used in ways that block, delay, or complicate deregulatory objectives. Unsurprisingly companies that bear reporting obligations want to limit the nature and scope of such duties. When obligated to file reports, these stakeholders usually seek confidentiality and trade secret protection, even though such classification can and does limit the utility of the data.

For example, the FCC has accepted as a trade secret the decision by an Internet Service Provider (“ISP”) not to serve a particular area. The Commission dutifully obscures the identity of ISPs serving a zip code, and until this year all that researchers could glean from Commission data was a single number per zip code ostensibly representing the number of ISPs available to provide broadband competition everywhere within the zip code territory. The Commission could have challenged stakeholders’ trade secret claims, in light of a statutory mandate under Section 706 of the Telecommunications Act of 1996 to encourage the deployment, on a reasonable and timely basis, of advanced telecommunications capability to all Americans and to initiate a Notice of Inquiry to determine the availability of such services. Trade secrets typically guard against disclosure of a company’s crown jewels, e.g., food and beverage recipes, not a decision to refrain from serving a locality. Arguably an ISP’s decision not to provide service identifies an area where the Commission and other state and federal agencies may have to take

steps to remedy market failure and promote broadband development consistent with the mandate in Section 706. The FCC, NTIA, Department of Agriculture and other federal agencies, along with academic researchers should have access to the FCC's collected data, with sufficient granularity to know where market failures exist.

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

B. Resolve to compile understandable, credible, granular, and reproducible statistics based on reasonable benchmarks.

Researchers and Commission staff alike need data collection and statistical compilation that answer basic questions whether a particular market is competitive, what market share a particular venture possesses, whether ventures frequently change prices and diversify services, how ventures respond to consumers' wants, needs, and desires and what are the consequences of a Commission-initiated change in policy, or one proposed by stakeholders. Yet often the Commission's statistical reports do not answer such questions, and researchers must attempt to extrapolate from the data presented.

For example, the Commission has abandoned requiring incumbent carriers to unbundle local loop elements,¹⁴ despite a congressional mandate to promote local exchange competition.¹⁵

¹⁴ Unbundled Access To Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Order on Remand, 20 FCC Rcd. 2533 (2005).

¹⁵ Telecommunications carriers have the "duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in

The Commission appears to have abandoned requirements because the local exchange marketplace has become sufficiently competitive and market entrants have alternative sources of exchange access, i.e., cable television network infrastructure. The Commission also may have accepted arguments of stakeholders that unbundling requirements are “confiscatory,” a government “taking of property,” and a major disincentive to next generation network investment.¹⁶

Even as one has to speculate on the Commission’s rationale, a regrettable dearth of data supports any of these deregulatory justifications. Available Commission statistics count local exchange lines and attributes which type of carrier provisions, or resells these lines. But the FCC does not make a clear case that the local exchange marketplace has become sufficiently competitive, nor does the Commission provide statistical projections that assess the sustainability of competition should incumbent carriers no longer have to provide competitors with unbundled network element access. Instead the Commission, on really nothing more than a hunch, speculates that local exchange competition will thrive in all sectors including the “middle mile” links between multiple user locations.

Similarly on the issue of confiscation and taking, the Commission could have determined whether or not incumbent carrier unbundled network element pricing was sufficiently compensatory. Bear in mind that the Supreme Court, early on in the Commission’s campaign to

a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.” 47 U.S.C. §251(3).

¹⁶ See, e.g., Stuart Buck, *TELRIC vs. Universal Service: A Takings Violation?* 56 FEDERAL COMMUNICATIONS LAW JOURNAL 1 (December, 2003). J. Gregory Sidak & Daniel F. Spulber, *DEREGULATORY TAKINGS AND THE REGULATORY CONTRACT* (1998).

promote local exchange competition, noted that neither the FCC nor any local access providing carrier, had provided evidence of under-compensation.¹⁷ Some researchers have argued that next generation network plant investment skyrocketed soon after the FCC abandoned local loop unbundling and other “sharing” requirements. Has the Commission ever corroborated this assertion? Recall that local loop unbundling was not something incumbent Local Exchange Carriers (“ILECs”) gave away or shared. Resellers and repackagers of local switching and routing plant paid the incumbents, albeit at a rate below what the ILECs would like to have been paid. Deep, deep, deep in the FCC’s obscure statistics and data collection process one can find that compulsory rentals from incumbents to newcomers peaked at 12%,¹⁸ a level never close to forcing incumbents to invest in plant that they would have to make available solely to competitors.

The FCC stopped preparing this helpful source of information, but the percentage of resold ILEC lines has declined below the 8% reported in 2007 in light of the fact that interconnection charges for Competitive Local Exchange Carriers (“CLECs”) can exceed retail rates ILECs charge end users, a price squeeze, but one for which the FCC and the Supreme Court in the *Linkline* case¹⁹ have no concerns.

Let’s assume that ILECs actually did increase their aggregate plant investment after the FCC abandoned local loop unbundling, bearing in mind that the Commission never required

¹⁷ Verizon Communications, Inc. v. F.C.C., 535 U.S. 467, 122 S.Ct. 1646 (2002).

¹⁸ See Industry Analysis and Technology Division, Wireline Competition Bureau Trends in Telephone Service (Aug. 2008), at p. 8-8; available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-284932A1.pdf.

¹⁹ Pacific Bell Tel. Co. v. Linkline Communications, Inc., 129 S.Ct. 1109 (2009).

leasing of next generation plant such as dark or even lit fiber. Did deregulation cause all of the new investment? Might the business cycle have had something to do with it? Might the cost of capital have had something to do with it? Might competitive necessity have had something to do with it? Might declining market share and revenues in core business lines such as Plain Old Telephone Service have had something to do with it? Whatever disincentive local loop unbundling imposed paled in comparison to incumbents' need to find new revenues. Giving the ILECs due credit they have invested in next generation networks, mostly wireless plant for which no unbundling requirement ever applied. As to new found zeal in investing in Digital Subscriber Line services, might the ILECs want to make relatively small additional investment in already amortized copper plant, to acquire some share of the growing broadband market? The Commission could have helped researchers answer these and other questions.

It should not take extraordinary sleuthing for researchers to find answers to basic questions such as whether incumbent carriers had to make investments in plant solely to satisfy the demands of reseller competitors. Similarly the Commission should consider as a challenge worth answering any assertion by a stakeholder that Commission's rules, regulations, and policies are unlawful and harmful to the economy.

C. Seriously Consider the Consequences of Mergers to Consumers.

With rare exception the FCC finds a way to approve any and all mergers and acquisitions including ones where the acquiring company acquires market share and further concentrates the market. The Commission typically asserts that a merger will "promote competition," but it supports this conclusion with a variety of qualitative forecasts about how the acquiring firm will become a better and more efficient competitor. The Commission's analysis of most mergers emphasizes what the concessions the acquiring firm has "voluntarily" submitted rather than

assess the true nature about the competitiveness of the market in question pre- and post-merger. The Commission does not conscientiously follow up post-merger to determine whether and how concessions involving measureable service commitments actually were undertaken.

Consider the wireless marketplace where FCC-approved mergers and acquisitions have so concentrated the market that even the Commission recently has expressed some reservations. Notwithstanding such concerns, the FCC has approved all albeit acquisitions, including ones by AT&T and Verizon who now control over 60% of the total market with four national carriers controlling over 91% of the market.²⁰ A researcher must painstakingly examine almost 300 pages in the Commission's most recent Annual Report and Analysis of Competitive Market Conditions to find the few empirical nuggets showing that even the Commission now has to conclude that all is not well in the wireless marketplace.

In previous years, the FCC breathlessly endorsed an inference of robust competition and enhanced consumer welfare, but after numerous approved mergers, the Commission had to make a passing reference that the wireless market now has a Herfindahl-Hirschman Index ("HHI") score of 2848 well in excess of Department of Justice antitrust guidelines that considers a market to be "highly concentrated" if the post-merger HHI exceeds 1800.²¹ Nowhere in its comprehensive examination of the wireless marketplace does the Commission directly consider the potential consumer harms when the market becomes as concentrated as it is. The Commission did not examine wireless carrier pricing to determine if consciously parallel conduct

²⁰ Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, Fourteenth Report, WT Docket No. 09-66, FCC 10-81, Table 3, Chart 1 at p. 31 (2010).

²¹ *Id.* at ¶49, p. 40.

has occurred, nor did the Commission consider the question whether robust competition might not exist even when four or five carriers serve many localities.

D. Commit to Best Practices That Would Survive Peer Review.

When an academic researcher seeks to publish work in a credible journal, external and unaffiliated third party experts examine the work without knowing the author's identity. This peer review process subjects the research to close scrutiny to ensure that the work complies with baseline standards to assure that the findings are credible and reproducible by others. Peer review identifies and legitimizes true research and differentiates it from documents that simply make assertions, conclusions, and analysis of unproven facts, statistics, and assumptions.

The Commission's notice and comment process, which solicits filings from interested parties, provides a forum for both legitimate research and advocacy documents masquerading as research. Sponsored researchers submit white papers, affidavits, expert reports and other forms of advocacy documents that have a pre-established agenda and outcome. These type documents predominate, because with rare exception only parties with much directly at stake will commit the resources needed to participate in Commission proceedings.

Ideally the FCC should have the resources and incentive to compile its own evidence, using empirical research tools and best practices. Failing that the Commission should commission third party research as it has done in preparation of the National Broadband Plan.²² Typically the Commission solely relies on the filings of interested parties, which by definition have a biased point of view and policy agenda. In order to separate advocacy from empirical

²² See, e.g., Harvard University, Berkman Center for Internet and Society, NEXT GENERATION CONNECTIVITY: A REVIEW OF BROADBAND INTERNET TRANSITIONS AND POLICY FROM AROUND THE WORLD (Oct. 2009); available at: http://www.fcc.gov/stage/pdf/Berkman_Center_Broadband_Study_13Oct09.pdf.

data, the FCC must commit to practices that can distinguish the two. Peer review can achieve that goal, yet for some inexplicable reason the Commission rarely uses this process even though it has a statutory mandate to do so.²³ The Commission showcases on its web site very few instances where it uses peer review, the most recent a 2008 investigation of the Maritime Automatic Identification Systems.²⁴ In other instances the Commission relies on third party research, but for some unexplained reason it refuses to subject the research to scrutiny by the general public.²⁵

Too much is at stake for the FCC not to use best practices in its acquisition of data, its compilation of statistics and its establishment of rules, policies, and regulations based on its analysis of the statistics. The Commission must operate under the premise that any rulemaking must comply with best practices where data is used to justify a policy initiative.

E. Return to Open Hearings and Compilation of a Complete Evidentiary Record.

Over the last thirty years the FCC has all but abandoned use of hearings before Administrative Law Judges, or the Commissioners themselves. Whatever gains the FCC has accrued for itself and stakeholders in administrative convenience and reduced costs, the Commission risks losing in terms of the quality of the evidence it reviews. The final perfunctory

²³ See Final Information Quality Bulletin for Peer Review, 70 FED. REG. 2664 (Jan. 14, 2005).

²⁴ See FCC Peer Review Agenda, available at <http://www.fcc.gov/omd/dataquality/peer-agenda.html>.

²⁵ *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 231 (2008) (FCC did not comply with the Administrative Procedure Act when it redacted studies on which it relied in promulgating rules and when the Commission failed to provide a reasoned explanation for its choice of an extrapolation factor for predicting how quickly broadband over powerline (BPL) emissions attenuate).

hearing and vote by the Commissioners culminates much behind the scenes maneuvering often involving ex parte presentations and the brokering of concessions among major stakeholders. This scenario emphasizes process over substance with no guarantee that a complete evidentiary record will get generated.

The public interest requires the Commission to have an open mind in its proceedings and to accept rational inferences from the data collected no matter how politically unpopular.

III. Conclusion

The FCC has undertaken belated, but laudable steps to improve its fact finding by appointing a Chief Data Officer and by soliciting comments on the data practices of three Bureaus. My comments offer mostly macro-level suggestions on how the Commission can improve its work product, its record with appellate courts, and its public interest contributions. The Commission should refrain from prejudging an outcome and instead commit to using best practices research that would survive peer review.

Respectfully submitted,

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